

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF DARLINGTON

) FOURTH JUDICIAL CIRCUIT

Elizabeth McCants and Greg McCants,

) C/A No. 12-CP-16-0872

Plaintiffs,

ORDER

v.

Hartwell Medical Group, LLC,

Defendant.

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SC Court of Appeals

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DARLINGTON COUNTY, SC

I. INTRODUCTION

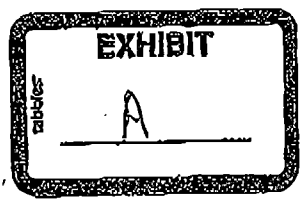
This is a serious matter. It has come before the Court on June 21, 2016 on Plaintiffs' Motion to Compel and for Sanctions filed March 10, 2016 (hereinafter, Motion for Sanctions) and their Motion to Compel filed March 24, 2016 (hereinafter, Motion to Compel) (collectively, "the motions"). In connection with the motions, Plaintiffs contend that the Defendant has willfully disobeyed the discovery Orders of this Court and engaged in conduct that violates South Carolina's discovery rules. After considering the arguments and submissions of Counsel, the Clerk's file in this matter, and the law, I agree and find that sanctions are warranted.

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DARLINGTON COUNTY, SC

II. THE LAWSUIT

This is medical malpractice case involving a catastrophic injury to Plaintiff Greg McCants, including but not limited to the partial physical loss, deformation, scarring and disability of his penis, as well as other parts of his integumentary (skin) system. Complaint #13-17-21. Mr. McCants has not been able to have sexual relations with his wife.

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Plaintiff Elizabeth McCants, since before the incident which occurred in August of 2010. Amended Complaint, ¶21.

Plaintiffs have alleged that this is a case of gross negligence on the part of the Defendant who had a radiology tech administering vaccinations (a medication or drug) to members of the public, including Mr. McCants, without adequate training or supervision. Amended Complaint, ¶¶20-21. The Plaintiffs allege that a vaccination for Hepatitis B improperly administered by the radiology tech to Mr. McCants without his informed consent, and *after* he informed her of a reaction to a prior Hepatitis B vaccination, caused his catastrophic injuries. Amended Complaint, ¶¶7-21.

III. PROCEDURAL/DISCOVERY HISTORY

This case has been pending in this Court since 2012. The Notice of Intent to file Suit was filed April 27, 2012. Pre-suit mediation was held August 13, 2012, and ended with the parties at an impasse. The Summons and Complaint were initially filed on October 9, 2012. This matter was stayed by consent by my Order of January 30, 2013. The stay was lifted and the complaint amended by consent by my Order of March 17, 2014.

Plaintiff began serving Interrogatories and Requests for Production on Defendant Hartsville Medical Group, LLC (HMG) on April 1, 2014. Motion to Compel filed July 31, 2015, ¶1.

On March 10, 2015 I signed an Amended Consent Scheduling Order with a mediation deadline of September 18, 2015 and a trial not before date of February 15, 2016.

On July 31, 2015 Plaintiffs' filed a Motion to Compel Responses to Plaintiffs' First Interrogatories and Requests for Production that had been served April 1, 2014.

Mediation was had in this matter on September 15, 2015, and ended with the parties at an impasse. Proof of ADR. The Defendant did not appear at the mediation. Proof of ADR.

On September 29, 2015 Plaintiffs filed a Motion to Compel seeking responses from Defendant to Plaintiffs' Third Requests for Production alleging that they needed the responses so they could: (a) get Defendant's 30(b)(6) deposition in a timely manner; (b) have their experts finalize their opinions before their trial depositions; and (c) get ready for trial. Motion to Compel filed September 29, 2015 at 2-3.

On October 9, 2015 Plaintiffs' filed an Amended Motion to Compel Responses to Plaintiffs' First Interrogatories and Requests for Production that had been served April 1, 2014 (amending the July 31, 2015 motion to add additional deficiencies).

On October 9, 2015 Plaintiffs filed a Motion to Compel Defendant's Expert Barry Weissglass's Subpoena Response.¹

On October 9, 2015 Plaintiffs filed a Motion to Compel Defendant's 30(b)(6) deposition. On October 21, 2015, before the October 9, 2015 Motion to Compel Defendant's 30(b)(6) deposition could be heard, and before a firm date was given, defense counsel served on Plaintiffs' objections to the 30(b)(6) necessitating an amendment to the initial motion on October 21, 2015.²

¹ In this motion, at 3, Plaintiffs contended that:

14. That the undersigned must re-take Barry Weissglass's deposition on October 16, 2015 in Charleston because, among other things, Dr. Weissglass did not have the subpoenaed documents with him on July 28, 2015, and the undersigned now is afraid that he will have to travel to Charleston a *third time* to depose him because Dr. Weissglass *still has not produced the documents* that have been subpoenaed from him *twice*.
15. That in order to finalize his opinions for trial, Plaintiff's expert, Dr. Herold, who is scheduled to be deposed for trial in Tampa, FL on December 18, 2015, and has been paid, needs the deposition transcript of Barry Weissglass, M.D. *with* the subpoenaed documents.
16. That the undersigned has discussed this with opposing counsel and has asked if the subpoena needs to be sent directly to Barry Weissglass, MD, which was answered in the negative.

² In this motion, at 2, Plaintiffs state that:

10. That Plaintiffs' family medicine expert, Arthur Herold, has been paid many thousands of dollars to give his trial deposition in Tampa, FL on December 18, 2015, within the time allotted for *de bene esse* depositions in the scheduling order.

On October 28, 2015, at the request of Plaintiffs' counsel, there was status conference in this matter with me regarding outstanding discovery, related motions to compel and a trial date. During that status conference, which was held in chambers, I ordered that counsel for Defendant provide to Plaintiffs the requested insurance information/documents and the requested ownership and control information/documents³, and that counsel otherwise try to resolve any outstanding discovery disputes (interim, the verbal Order). It was decided that the motion to compel regarding Defendants' financial information and documents would have to be heard in the normal course along with any other motion that was not resolved.

11. In order to finalize his opinions for trial Dr. Herold needs the deposition transcript of the Defendant.
12. That Defendant today served the objections attached hereto as Exhibit "A" to the 30(b)(6) notice.
13. That Plaintiffs are informed and believed that they are entitled to take the Defendant's deposition on everything noticed before December 8, 2015.

³ The pertinent Interrogatories and Requests for Production are identified in the Amended Motion to Compel Responses to Plaintiffs' First Interrogatories and Requests for Production filed October 9, 2016, at ¶¶(d)-(e), and are as follows:

First Interrogatories

5. Identify all insurance companies which provide any type of liability insurance coverage to you, including but not limited to first party liability policies, self-insured retention policies, and/or policies of excess and/or umbrella coverage, and set forth the numbers of policies involved, the policy period dates, and the amounts of liability insurance coverage provided and available for coverage of insurance in this matter in these policies, including any deductibles.
10. Set forth in detail the business structure of Hartsville Medical Group. This would include the identity of any corporation, hospital or healthcare system, which has a financial interest, controlling interest or ownership interest of the medical entity, including the business address of all offices which are owned, managed or used by this Defendant or any company having a financial interest in this Defendant. Additionally, please note whether the entity is a wholly owned subsidiary or partially owned subsidiary of another entity.

First Requests for Production

1. All writings and recordings in the possession, custody or control of this Defendant or this Defendant's attorney, or other person or entity, listed in, referred to, or used in the preparation of this Defendant's answers or responses to Plaintiff's First Set of Interrogatories to Defendant Hartsville Medical Group.
21. A copy of the declaration sheet and complete policy of liability insurance of Hartsville Medical Group. This would include any primary policy of insurance, any self insured retention coverage and any excess or umbrella coverage and all endorsements or attachments thereto, including copies of any letters or assessment of additional premiums or monies for a period of five years prior to the date of this request. Additionally, this would include all insurance agreements and/or policies, in their entirety, which afford protection to this Defendant for note and omissions set forth by Plaintiffs in the above entitled and numbered case including, but not limited to, primary, umbrella and excess policies which may obligate any respective insurance company to satisfy part of all the judgment which may be rendered in an action against this Defendant arising out of the acts or omissions of any such member or employee of any Defendant.
38. Any and all documents utilized in answering, or referred to, or used to answer Plaintiff's Interrogatories to Defendant Hartsville Medical Group.

On November 17, 2015 Defendant identified as a 30(b)(6) designee to speak on its behalf the head of Human Resources for Carolina Pines Regional Medical Center who testified that she had responsibilities regarding the staffing of the practice. Memorandum in Support of Motion for Sanctions, Ex. "B" (Dep. Charlotte Adams, 10:18-24, 12:18-23, 16:25-17:12, and Ex. 1).

On December 15, 2015 there was a hearing before me on Plaintiffs' outstanding motions to compel. At the call of the case the lawyers for the parties announced to the Court an agreement on some, but not all, of the outstanding issues and asked the Court to rule on the balance. The agreement and the Court's rulings on the contested issues were memorialized in an Order signed by me on January 21, 2016, and filed with the Clerk on February 2, 2016 (hereinafter, "my written Order").

My written Order required certain information and documents to be produced by Defendant to Plaintiff's counsel within thirty (30) days of the date of the Order (by March 4, 2016)(hereinafter, the Ordered Information and documents).

On March 8, 2016, counsel for the Defendants mailed Plaintiff's counsel a letter producing some of the Ordered Information and documents, and explaining why Defendant did not produce some of the Ordered Information and documents (hereinafter, "the letter"; which is attached to the Motion for Sanctions).

On March 10, 2016 Plaintiffs' counsel filed the Motion for Sanctions (and later a memorandum in support thereof), identifying deficiencies in Defendant's compliance with my written Order as of that date, as follows:

1. As to ¶1.1 of the Order, the Order requires the Defendant to produce the job description for Practice Administrator, and the letter states that it is enclosed, but it was not. The job description for Group Practice Manager was enclosed, and had already been produced.

2. As to ¶1.4 of the Order, which provides:

As to Plaintiffs' Fifth-Requests for Production to Defendant⁴, dated October 23, 2015, responses to which are outstanding, Defendant shall provide to Plaintiff documents responsive to number one (1), and shall attempt to provide documents responsive to numbers two (2) and three (3) as such documents are available, all within thirty (30) days. To the extent that this does not resolve all outstanding issues as to numbers two (2) and three (3), Plaintiff can make another motion. (emphasis added).

Defendant stated in the letter:

Regarding the policies and procedures required under 42CFR Section 482.23 from 2010, Defendant is not JCAHO accredited, therefore has nothing in response,

Regarding the written definition required under JCAHO requirement MM.06.01.01, Defendant is not JCAHO accredited, therefore has nothing in response.

3. As to ¶1.5(b) of the Order, which provides:

Defendant will provide to Plaintiff a complete and up to date answer to Interrogatory number ten (10) regarding ownership, control and financial interest in Hartsville Medical Group LLC, and any documents responsive to Requests for Production numbers one (1) and thirty-eight (38) relating thereto (emphasis added),

Defendant responded in the letter:

⁴ Plaintiffs' Fifth Requests for Production requested:

1. A copy of the following items mentioned in the job descriptions that were produced to me (received October 22, 2015):
 - i. HMA Ethical program;
 - ii. HMA Compliance Program;
 - iii. HMA Operations Manual;
 - iv. HMA Recordkeeping standards.
2. From 2010, policies and procedures required under 42 CFR §482.23(c)(2) (for Defendant and Hartsville HMA, LLC).
3. From 2010, written definitions required under JCAHO requirement MM.06.01.01 (for Defendant and Hartsville HMA, LLC).

We are diligently searching for this information. Ownership of the Hartsville Medical Group has changed several times during the time frame in question. Therefore the location of this information has been very difficult to determine. These efforts will continue and response updated as soon as possible.

4. As to ¶I.5(e) of the Order, which provides:

Defendant will provide to Plaintiff within thirty (30) days a complete and up to date answer to Interrogatory number five (5) regarding insurance potentially responsive to this claim, whether self insurance or not, as well as all documents requested by Request to Produce number twenty-one (21) regarding same (e. g., the actual insurance policy or policies).

Defendant responded to the letter:

We are diligently searching for this information. Ownership of the Hartsville Medical Group has changed several times during the time frame in question. Therefore the location of this information has been very difficult to determine. These efforts will continue and response updated as soon as possible. Upon information and belief Hartsville Medical Group is self-insured for the first \$10 million on malpractice claims. Zurich Insurance provides insurance coverage for the next \$25 million above that \$10 million.

5. As to Section IV. of the Order (regarding the information/documents sought at III.1 and II.2 of the Order), which provides:

this Court finds that the challenged Interrogatories and Requests for Production are reasonably calculated to lead to the discovery of admissible evidence, and the requested financial information and documents shall be produced by counsel for the Defendant or counsel for Plaintiff within thirty (30) days of the date of this Order (emphasis added)

The information and documents sought at III.1 and II. 2. of the Order that were to be produced by the Defendant within 30 days are:

1. Documents and information responsive to Plaintiffs' First Requests for Production seven (7) and thirty-

nine (39) through forty-two (42), as well as First Interrogatories thirty-three (33) through thirty-six (36), all regarding Defendant's financials, and, in particular, Defendant's CEO's gross compensation for the past three years, Defendant's gross revenue for the past three years, Defendant's net profit for the past three years, and Defendant assets, liability and net worth, as well as Defendant's tax returns for the past five years; and

- 2. 30(b)(6) testimony regarding the information and documents sought in Response to the Requests referenced in subparagraph L1, above (topic four (4) of the Amended 30(b)(6) Notice), and regarding the identity of any accountants for the Defendant (topic number sixteen (16) of the Amended 30 (b)(6) Notice)

Defendant wrote in the letter:

We are diligently searching for this information. Ownership of the Hartsville Medical Group has changed several times during the timeframe in question. Therefore the location of this information has been very difficult to determine. These efforts will continue and response updated as soon as possible.

On March 15, 2016 Court Administration set this matter for a two week trial with me as the trial Judge for November 7, 2016 to November 18, 2016.

On April 9, 2016, defense counsel produced to Plaintiffs' counsel some pages printed off of a book-keeping program. Memorandum In Support of Motion for Sanctions at 5. Plaintiffs' accountant has indicated that for the purposes of preparing an ability to pay punitive damages report they are worthless without the annual accountant's statements with notes and explanations. Id. I specifically found in my written Order that Plaintiffs were entitled to Defendant's financial information so their economist could prepare such a report for the jury, and Ordered that it be produced by March 4, 2016.

This matter came for the Court during the usual course for a hearing on May 25, 2016. On that day, before the hearing, counsel for the Defendant sent Plaintiffs' counsel a letter outlining the insurance policies applicable to Plaintiffs' claims. Id. This was required to be

produced by my verbal Order and written Order, and was produced over seven months after my verbal Order and almost three months late under the written Order; it was produced over two years after it was initially requested as part of a standard Interrogatory. At the hearing, counsel for Defendant asked that Judge Roger Henderson defer ruling to me as I was familiar with this case, it is my Order that is alleged to have been violated, and I am the trial Judge. Judge Henderson granted the request.

That day, May 25, 2016, Plaintiffs' counsel sent counsel for Defendant a letter listing the ten (10) items still outstanding (the first eight (8) still due under my verbal and/or written Order and the other two (2) due under the Sixth and Seventh Requests for Production to which Plaintiffs have never received a response and which are the subject of the Motion to Compel) (hereinafter, the list letter⁵). Id. at 6, Ex. B.

⁵ The list letter stated as follows:

Just so there is no mistake in this matter, I have compiled a list of what I believe to be outstanding. It is below. Please note that I believe that Items 1-8 were required to have been produced to the Plaintiff by the Defendant under Judge Burch's order filed February 2, 2016, and Items 9 and 10 are Items that are currently outstanding in the Sixth and Seventh Request for Production to which I have never received an answer.

1. the job description for Practice Administrator from 2010;
2. the policies and procedures required under 42CFR Section 482.23 from 2010 (from the practice or the hospital);
3. the written definition required under JCAHO requirement MM.06.01.01 from 2010 (from the practice or the hospital);
4. a complete and up to date answer to Interrogatory number ten (10) regarding ownership, control and financial interest in Hartsville Medical Group LLC, and any documents responsive to Requests for Production numbers one (1) and thirty-eight (38) relating thereto (emphases added);
5. all documents requested by Request for Production No. 21 (e.g., the actual policy or policies insurance potentially responsive to this claim);
6. Defendant's CEO's gross compensation for the past three years;
7. Defendant's tax returns for the past five years;
8. the identity of any accountants for the Defendant;
9. Please provide the standing order and clinical protocol for the administration of the Hepatitis B Vaccine that was in use at Carolina Pines Regional Medical Center during 2010 (7th RTP).
10. Please produce all documents relating to the purchase of the assets of Molyh Nicklos, Jr., MD's medical practice as referred to in his contract with you that was marked as Exhibit #4 to your 30(b)(6) Deposition. This would include, but not be limited to, any and all records of due diligence regarding the adequacy of the clinical staff, clinical protocols, recordkeeping, and patient safety precautions in Dr. Nicklos' practice prior to or at the time it was purchased by Hartsville Medical Group, LLC (6th RTP).

On June 16, 2016, counsel for Defendant delivered Plaintiffs' counsel a letter listing the gross pay of the CEO of Carolina Plus Regional Medical center for 2012 through 2014; enclosing unsigned, undated, apparently incomplete, "for review only" (written on one of them) U.S. Corporation Income Tax Return Form 1120s for Hartsville Medical Group, LLC⁶; enclosing two copies of a Health Management Associates, Inc. Corporate Compliance Manual and Code of Conduct, Third edition (2007); and enclosing an Amended and Restated Limited Liability Company Agreement of Hartsville Medical Group, LLC dated January 27, 2014⁷. Id at 6. To the extent these were required to be produced by my written Order, they were produced over three months late.

The morning of this hearing defense counsel provided Plaintiffs' counsel with the job description for Practice Administrator. To the extent this was required to be produced by my written Order, it was produced over three months late.

As to the outstanding items on the list letter on the date of hearing, June 21, 2016 (hereinafter, the date of the hearing), Plaintiffs had not received a response to Item Nos.: 2; 3; 4 to the extent it requires a complete and up to date answer to Interrogatory No. 10 and related documents under Requests for Production No. 1 and No. 38; 5; 7 to the extent it requires the actual returns that were filed by or for the Defendant for the past five (5) years; 8; 9; and 10.

This includes, as of the date of the hearing:

⁶ Plaintiffs contend that to the extent these convey no more information than the pages of the bookkeeping program produced by defendant on April 9, 2016, Plaintiffs' accountant has indicated that for the purposes of preparing an ability to pay punitive damages report they are worthless without the annual accountant's statements with notes and explanations. Id. at 6.

⁷ Plaintiffs contend this does not provide the information requested in Interrogatory No. 10, does not identify "the identity of any ... hospital or healthcare system, which has a financial interest, controlling interest or ownership interest of the medical entity, including the business address of all offices which are owned, managed or used by this Defendant or any company having a financial interest in this Defendant," and argued at the hearing that it actually more thoroughly convolutes the issue of who actually has a financial, ownership or control interest in the Defendant as it identifies a Delaware limited partnership as the sole member, and another LLC as the limited partnership's general partner. Id. at 6.

- No response of any sort to the Sixth and Seventh Requests for Production (Item Nos. 9 and 10 in the list letter)
- No complete and up to date answer to Interrogatory No. 10 (or *any* attempted updated answer) with associated documents under Requests for Production Nos. 1 and 38 (ordered verbally on October 28, 2015 and in my written Order filed February 2, 2016) (Item No. 4 on the list letter).
- No copies of any responsive insurance policies (ordered verbally on October 28, 2015 and in my written Order filed February 2, 2016) (Item No. 5 on the list letter).
- No identity of any accountant for Defendant (ordered in my written Order filed February 2, 2016) (Item No. 8 on the list letter).
- No 2010 policies and procedures required under 42 CFR §482.23(c)(2) (for Defendant and Hartsville, HMA, LLC) and written definitions required under JCAHO requirement MM.06.01.01 (for Defendant and Hartsville, HMA, LLC) (ordered in my written Order filed February 2, 2016) (Item Nos. 2 and 3 on the list letter).
- No copies of tax returns actually filed for the Defendant (ordered in my written Order filed February 2, 2016) (Item No. 7 on the list letter).

At the hearing, defense counsel stated that the Defendant could not find the identity of its accountant, could not find its insurance policies, could not find the CMS regulation and JCAHO policies and procedures required by federal law at Hartsville HMA, LLC, could not find copies of the tax returns that had actually been filed for the Defendant, did not have records relating to the purchase of the assets of the Defendant practice (Sixth Request for Production) and did not

have a clinical protocol for the administration of Hepatitis B vaccine at Carolina Pines Regional Medical Center (Seventh Requests for Production). Defense counsel argued that the Amended and Restated Limited Liability Company Agreement of Hartsville Medical Group, LLC dated January 27, 2014 produced June 16, 2016 should suffice as a complete and up to date Answer to First Interrogatory No. 10 and all relative documents under First Requests for Production No. 1 and No. 38. Defense counsel argued that ownership of the Hartsville Medical Group has changed several times during the timeframe in question and the location of this information has been very difficult to determine.

IV. FINDINGS OF FACT

1. Defendant violated this Court's Orders, and such violations were willful

This Defendant still has *never* provided Plaintiffs a complete and up to date answer to First Interrogatory No. 10, or indeed *any answer whatsoever* since being ordered to do so on two (2) separate occasions, and has *no explanation* for the failure. The claim in the letter that Defendant, a sophisticated medical practice, does not know and cannot figure out the identity of any hospital or healthcare system, which has a financial interest, controlling interest or ownership interest in it, including the business address of all offices which are owned, managed or used by it or any company having a financial interest in it, after being ordered by the Court to provide this information, *not once but twice*, is not credible. I find that the Defendant made a willful decision to disobey the Court's Orders so it would not have to provide this information to Plaintiffs.

The Defendant has also never produced to Plaintiffs its responsive insurance policies. I do not find it credible that a sophisticated medical practice can list policy numbers and amounts of responsive insurance in a letter but has been unable to either find or obtain copies of those

declarations pages and policies and to produce them after being ordered to do so by the Court, *not once but twice*. I find that the Defendant made a willful decision to disobey the Court's Orders so it would not have to provide this information to Plaintiffs.

Although it produced via letter a listing of insurance responsive to Plaintiff's claims on May 25, 2016, right before the hearing, I find that the Defendant made a willful decision to disobey the Court's Orders from the time this information was due until the date this matter first came on for a hearing, May 25, 2016, so it would not have to provide this insurance information to Plaintiffs. This is information required in response to the standard Interrogatory at Rule 33(b)(4), SCRCP, and should have been produced to Plaintiffs *years ago*, without the Court having to repeatedly get involved.

Furthermore, although it produced (*almost eight months after being Ordered to*) an LLC agreement, without Defendant first providing a complete and up to date answer to First Interrogatory No. 10, Defendant cannot produce any and all documents utilized in answering, or referred to, or used to answer the question of the identity of any hospital or healthcare system, which has a financial interest; controlling interest or ownership interest in it, including the business address of all offices which are owned, managed or used by it. I find that the LLC agreement that was not provided until June 16, 2016 does not suffice as some type of answer to Interrogatory No. 10 or a response to Requests for Production Nos. 1 and 38.

Regarding the CMS and JCAHO policies and procedures, in the letter on March 8, 2016 this Defendant willfully refused to comply with the Order and to produce them when its defense counsel stated:

Regarding the policies and procedures required under 42CFR Section 482.23 from 2010, Defendant is not JCAHO accredited, therefore has nothing in response.

Regarding the written definition required under JCAHO requirement MM.06.01.01, Defendant is not JCAHO accredited, therefore has nothing in response.

This Court did not ask whether or not the Defendant was JCAHO accredited, it ordered:

Defendant ... shall attempt to provide documents responsive to numbers two (2) and three (3) as such documents are available, all within thirty (30) days

Numbers two (2) and three (3) of the Fifth Requests for Production request the policies and procedures and written definitions from Defendant *of* Hartsville HMA, LLC (also known as Carolina Pines Regional Medical Center). If Defendant identified the head of Human Resources for Carolina Pines Regional Medical Center (the affiliated hospital) as a 30(b)(6) designee, it could have gotten its policies and procedures and written definitions required under JCAHO and federal regulations. While Defendant may contend that it is not JCAHO accredited, it cannot argue that the affiliated hospital is not.

Furthermore, it was not until the hearing on June 21, 2016 that defense counsel stated that "they" do not have these requested documents, and while he may be referring only to Defendant, I do not find it credible that a hospital does not have these documents required by federal law available, although, *most importantly*, I do find that there is *no evidence* that *any* attempt was made by Defendant to obtain and produce these documents to Plaintiffs' counsel as required under my written Order. Rather, the only evidence is that Defendant stated in the letter that "Defendant is not JCAHO accredited, therefore has nothing in response." I find, based upon that language in the letter, that Defendant made a conscious decision to willfully disobey the Court's Order.

By the time I signed my written Order it was too late for the Defendant to argue that the Fifth Requests for Production are not reasonably calculated to lead to the discovery of admissible

evidence under Rule 26(b)(1), SCRCP, but even if it had not been too late, I find that these requests were reasonably calculated to lead to the discovery of admissible evidence as Plaintiffs' hospital administration and nursing expert testified on April 27, 2015 that the policies and procedures and written definition under the federal CMS regulation and JCAHO section are applicable in this case (are at least evidence of the standard of care) and the Defendant violated them. Memorandum In Support of Motion for Sanctions, Ex. "C" (Dep. Beverly Bessick, 73:9-74:10, 85:23-86:6).

The Defendant has also never produced to Plaintiffs the identities of its accountants. Again, while at the hearing defense counsel argued that "they" do not know who their accountant is, I do not find it credible that a sophisticated medical practice cannot find and produce the identity of its own accountants after being ordered to do so by the Court. I find that the Defendant made a willful decision to disobey the Court's Orders so it would not have to provide this information to Plaintiffs.

Regarding the job description for Practice Administrator, while defense counsel produced it the morning of the June 21, 2016 hearing, evidencing the fact that it was clearly available and could be found, the Defendant was in violation of this Court's Order from March 4, 2016 until then.

Regarding the CEO's gross compensation for the past three (3) years, while defense counsel produced that via letter on June 16, 2016, evidencing the fact that it was clearly available and could be found, the Defendant was in violation of this Court's Order from March 4, 2016 until then. I find that the Defendant made a willful decision to disobey the Court's Orders so it would not have to provide this information to Plaintiffs from March 4, 2016 until June 16, 2016.

Regarding the tax returns, the claim in the letter that a sophisticated medical practice cannot find or obtain its own tax returns after being ordered by the Court to produce them is not credible. I also find that not only was the Defendant in violation of this Court's Order from March 4, 2016 until June 16, 2016 when it produced unsigned, undated, incomplete, "for review only" copies of tax return forms that do not even list the preparer or accountant, but I find that the Defendant continues to be in violation of my written Order as I do not find it credible that it cannot obtain copies of the tax returns that were actually filed on its behalf. I find that the Defendant made a willful decision to disobey the Court's Orders so it would not have to provide any information to Plaintiffs from March 4, 2016 until June 16, 2016, and continue in willful disobedience as I find that if Defendant wanted to comply with my written Order it could obtain and produce actual copies of its filed tax returns.

2. Defendant's failure to make any effort to respond in any way to Plaintiff's Sixth and Seventh Requests for Production for seven and eight months, respectively, is willful

Defendant was served with Plaintiffs' Sixth and Seventh Requests for Production on November 18, 2015 and December 7, 2015, respectively. Plaintiffs' filed a Motion to Compel responses thereto on March 24, 2016. As of the date of the hearing, even though the motion to compel had been pending for three (3) months, and even though Plaintiffs' counsel had sent the letter list as a reminder, Plaintiffs had received no response to either - *absolutely nothing*.

At the hearing defense counsel gave Defendant's first response to the Sixth Request for Production when he argued that "they" do not have any responsive records regarding the purchase of the medical practice of Melvin Nickles, Jr., MD (which is now the Defendant). I do not find this credible. At the hearing defense counsel also gave Defendant's first response to the Seventh Request for Production when he argued that "they" do not have a clinical protocol for the administration of the Hepatitis B vaccine. Regardless of whether or not I find that credible,

Plaintiffs' were entitled to a written answer to their Request, and their counsel should not have had to file a motion to compel and attend two hearings to get a verbal answer to the Sixth or Seventh Requests for Production.

3. Defendant has engaged in a pattern and practice of obstruction in discovery designed to prejudice Plaintiffs

From its failure to provide its insurance information until the day of a hearing on a Motion for Sanctions for its failure to comply with a Court Order, to its failure – to this very day – to identify what hospital or healthcare systems have an ownership, financial or controlling interest in it, to its failing to facilitate its experts' complying with subpoenas *duces tecum*, to its failure to give dates for its 30(b)(6) deposition whilst simultaneously filing objections, to its failure – to this very day – to identify its accountants or to produce its insurance policies, to its failure to give any response whatsoever to discovery requests, this Defendant has engaged in a willful pattern of obstruction and delay that has violated not only this Court's Orders, but also the spirit and letter of the South Carolina Rules of Civil Procedure.

Taken one at a time, the Court may accept that this or that may be an isolated incident, but taken all together the only possible conclusion that this is a willful pattern and practice of obstruction directed at prejudicing the Plaintiffs ability to prosecute their claims.

This pattern and practice of obstruction has necessitated otherwise needless hours, indeed probably days, spent filing motions and briefs (six or more motions to compel), preparing for and attending a status conference and three hearings by Plaintiffs' counsel, travelling to Charleston twice to get an expert's deposition, etc. These issues have needlessly distracted Plaintiffs' counsel from otherwise being able to prosecute the case for his clients, and the delays have prejudiced Plaintiffs in being able to prepare for trial.

As another example of obstruction and delay, Plaintiffs' liability expert in Florida gave a trial deposition without the benefit of the withheld information and documents, and Plaintiffs assert that to go back to Florida to retake the expert's trial deposition to get a fully informed opinion for trial would cost in excess of \$10,000.00. Memorandum in Support of Motion for Sanctions at 15.

Yet another example of obstruction and delay is Plaintiffs' economist wasting time looking at pages of a book-keeping program produced by Defendant on April 9, 2016 only to discover that they are worthless to prepare an ability to pay punitive damages report that I ordered the Jury was entitled to be shown at trial. Memorandum in Support of Motion for Sanctions at 5.

As another example, but for this Order, Plaintiffs' counsel would have to take the Defendant's 30(b)(6) deposition for the third time to question it about the outstanding financial information and documents. Memorandum in Support of Motion for Sanctions at 15.

4. Defendant's willful conduct has prejudiced Plaintiffs

The Plaintiffs are and will be prejudiced by Defendant's obstruction in preparing for trial, in trying their case and in collecting upon a judgment.

In particular, keeping in mind that Defendant identified as a 30(b)(6) designee the head of Human Resources for Carolina Plines Regional Medical Center, without the identity of any hospital or healthcare system which has a financial interest, controlling interest or ownership interest in Defendant, including the business address of all offices which are owned, managed or used by it or any company having a financial interest in it, Plaintiffs will be prejudiced, and challenged, factually at trial, in connection with the following claims and issues:

- a) whether or not the Carolina Pines Regional Medical Center and the Defendant practice should be considered one entity for purposes of the application of federal CMS regulations and JCAHO standards;
- b) the relationship between the Defendant and a controlling hospital or healthcare system (e.g., Carolina Pines Regional Medical Center) relative to negligent supervision of the Defendant's employees;
- c) the relationship between the Defendant and a controlling hospital or healthcare system (e.g., Carolina Pines Regional Medical Center) relative to negligent administration and staffing of the Defendant practice;
- d) the relationship between the Defendant and a controlling hospital or healthcare system (e.g., Carolina Pines Regional Medical Center) relative to negligent training and supervision of Defendant's employees;
- e) collection of a judgment (e.g., to the extent that Defendant practice has no assets and may be an alter ego of another entity who will be liable for a judgment, or part of a judgment such as one for punitive damages that is not covered by insurance);

As well, keeping in mind that Plaintiff's expert said that these requirements were applicable to this case, and that Defendant was in violation of these requirements, without the 2010 policies and procedures required under 42 CFR §482.23(e)(2) (for Defendant and Hartsville HMA), and the written definitions required under JCAHO requirement MM.06.01.01 (for Defendant and Hartsville HMA, LLC)⁸, Plaintiff has already been prejudiced, and will be prejudiced and challenged, factually, at trial in connection with the following claims and issues:

⁸ The pertinent portions of these sections that Plaintiff's expert Beverly Essick determined applied in this case, and were violated, are as follows from her list marked as Exhibit 2 to her deposition which is located at Exhibit "C" to Plaintiff's Memorandum in Support of Motion for Sanctions:

- a) Whether or not the Defendant and/or Hartsville HMA, LLC had and complied with its own medical staff policies and procedures, and its own written federal and state law (including licensure) requirements for the administration of drugs and biologicals, as required under 42 CFR §482.23(c)(2), in this case;
- b) Whether or not Defendant's and/or Hartsville HMA, LLC's policies and procedures required under 42 CFR §482.23(c)(2) identified licensed personnel and the types of medication they are permitted to administer, in accordance with state laws, as required, and whether or not it followed them in this case;
- c) Whether or not Defendant's and/or Hartsville HMA, LLC's policies and procedures required under 42 CFR §482.23(c)(2) identified education and training for all personnel administering drugs and biologicals, as required, and whether or not it followed them in this case;

42 CFR §482.23(c)(2) Personnel authorized to administer medication. Requires that all drugs and biologicals are administered by, or under the supervision of nursing or other personnel, in accordance with Federal or State law and approved medical staff policies and procedures. State law requirements include licensure requirements. Policies and procedures must identify categories of licensed personnel and the types of medications they are permitted to administer, in accordance with state laws. The policies and procedures must also address education and training for all personnel administering drugs and biologicals. Medication administration education and training is typically included in hospital orientation or other continuing education for nursing staff and other authorized healthcare personnel....

MM.06.01.01 The hospital safely administers medications
 #1 The hospital defines, in writing, licensed independent practitioners and the clinical staff disciplines that are authorized to administer medication, with or without supervision, in accordance with law and regulation. (See also MM.06.01.03, BP 1)

#2 Only authorized licensed independent practitioners and clinical staff administer medications.

Note: This does not prohibit self-administration of medications by patients, when indicated. (See also MM.06.01.03, BP 1)

#6 Before administration, the individual administering the medication does the following: Verifies that no contraindications exist.

#8 Before administration, the individual administering the medication does the following: Discusses any unresolved concerns about the medication with the patient's licensed independent practitioner, prescriber (if different from the licensed independent practitioner), and/or staff involved with the patient's care, treatment, or services.

#9 Before administering a new medication, the patient or family is informed about any potential clinically significant adverse drug reactions or other concerns regarding administration of a new medication. (See also MM.06.01.03, BPs 3-6; PC.02.03.01, BP 10)

- d) Whether or not the Defendant and/or Hartsville HMA, LLC had and complied with its own written definition of licensed independent practitioners and the clinical staff disciplines that are authorized to administer medications, with or without supervision, in accordance with law and regulation, as required under JCAHO requirement MM.06.01.01 in this case;
- e) Whether or not Defendant violated its own policies and procedures;
- f) Whether or not there is evidence of a violation of a regulation or standard that is evidence of gross negligence;
- g) Plaintiff's physician liability expert's testimony at trial relative to the lack of and/or failure to follow these policies, procedures and definitions as he has already been deposed for trial;
- h) Plaintiff's use of Defendant's 30(b)(6) deposition testimony at trial relative to the lack of and/or failure to follow these policies, procedures and definitions, as it has already been taken twice;
- i) Plaintiff's use of defense physician liability expert's transcript at trial relative to the lack of and/or failure to follow these policies, procedures and definitions as it has already been taken twice.

As well, without the insurance policies, Plaintiff will be challenged at trial in how to frame the issues and arguments so a verdict falls within the coverage provided, and therefore also may be prejudiced in collecting a judgment (e.g., Plaintiffs would like to know whether the policies cover punitive damages); as well, to the extent that the named insured is an entity other than the named Defendant, that may be evidence of alter ego.

In addition, without complete filed tax returns and annual accountant's statements with notes and explanations, Plaintiffs will be prejudiced at trial as their economist will be unable to prepare an ability to pay punitive damages report and will therefore be prejudiced in obtaining a punitive damages verdict at trial.

Also, without the information requested in the Sixth request for Production,⁹ Plaintiffs will be prejudiced at trial in proving whether or not the Defendant exercised due care in connection with its purchase, and subsequent administration and staffing of Melvin Nickles' medical practice, to include ensuring that it had a clinical protocol for the administration of Hepatitis "B." There will also be a lack of liability expert testimony at trial relative to this issue and these documents, whether Defendant has them or not as either is probative on issues of liability.

In addition, without the information requested in the Seventh Request for Production,¹⁰ Plaintiffs will be prejudiced at trial in proving whether or not the Defendant exercised due care in connection with its administration of Hepatitis "B" to Plaintiff. There will also be a lack of liability expert testimony at trial relative to this issue and these documents, whether Defendant has them or not as either is probative on issues of liability.

Furthermore, as mentioned in section IV. 3. above, Plaintiffs have been prejudiced in other particulars as well.

As well, Defendant's delay and willful failure has also prejudiced Plaintiffs insofar as the practice has been sold twice since the incident complained of (at least once since April 1, 2014

⁹ Sixth Request for Production No. 3: Please produce all documents relating to the purchase of the assets of Melvin Nickles, Jr., MD's medical practice as referred to in his contract with you that was marked as Exhibit #4 to your 30(b)(6) Deposition. This would include, but not be limited to, any and all records of due diligence regarding the adequacy of the clinical staff, clinical protocols, recordkeeping, and patient safety precautions in Dr. Nickles' practice prior to or at the time it was purchased by Hartsville Medical Group, LLC.

¹⁰ Seventh Request for Production No. 2: Please provide the standing order and clinical protocol for the administration of the Hepatitis B Vaccine that was in use at Carolina Pines Regional Medical Center during 2010.

when Plaintiff's propounded their first discovery requests that Defendant now says it can't answer because it's been sold), and the previously named physician Defendant has died and cannot testify live at trial.

V. LEGAL STANDARD FOR SANCTIONS

Generally, discovery sanctions are imposed to penalize those whose conduct may be deemed to warrant such a sanction, and to deter those who might be tempted to such conduct in the absence of such a deterrent. Rule 37(b)(2)(C), SCRCP. *Creighton v. Colling Plaza Ltd. Partnership*, 334 S.C. 96, 512 S.E.2d 510 (Ct. App. 1998). The imposition of sanctions is left to the sound discretion of the trial judge. *Halverson v. Yawn*, 328 S.C. 6189, 493 S.E.2d 883 (Ct. App. 1997); *Barnette v. Adams Bros. Logging*, 355 S.C. 588, 593, 586 S.E.2d 572, 575 (2003).

Pursuant to Rule 37 of the *South Carolina Rules of Civil Procedure*, when a party fails to obey an order to provide or permit discovery, the court may "make such orders in regard to the failure as are just." See also *In re Anonymous Member of South Carolina Bar*, 346 S.C. 177, 194, 552 S.E.2d 10, 18(2001) (noting that "judges must use their authority to make sure that abusive deposition tactics and other forms of discovery abuse do not succeed in their ultimate goal; achieving success through abuse of the discovery rules rather than by the rule of law."). More specifically, "[i]f a party fails to obey an order to provide or permit discovery, the trial court may impose sanctions such as striking pleadings, dismissing the action, or rendering a default judgment." *Id.*

Rule 37(b)(2) of the *South Carolina Rules of Civil Procedure* (SCRCP) states that:

"... [i]f...a party...fails to obey an Order to provide or permit discovery, including an Order made under subdivision (a) of this rule [(e.g., Judge Burch's Order)] the court in which the action is pending may make such orders in regard to failure as are just, and among others the following: (A) an order that the matters

regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order; (B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters into evidence; (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."

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 (or striking an answer). *Barnette v. Adams Bros. Logging, Inc.*, 355 S.C. 588, 593, 586 S.E.2d 572, 575 (2003).

Rule 37(d), SCRCP, also makes sanctions under Rule 37(b)(2)(C), SCRCP, available to the Court in cases of a failure to serve a written response to a request under Rule 34, SCRCP:

"(d)...[I]f a party...fails...(3)to serve a written response to a request for inspection submitted under Rule 34 [e.g., Plaintiffs' Sixth and Seventh Requests for Production] ... the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B) and (C) of subdivision (b)(2) of this rule."¹¹

Absent a clear 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 County*, 379 S.C. 462, 465-466, 665 S.E.2d 830, 832(Ct. App. 2008); *Halverson v. Fawn*, 328 S.C. 6189, 493 S.E.2d 883 (Ct. App. 1997)

¹¹ There is an exception under the Rule if the party has moved for a protective order, which Defendant never did in this case as to the relative discovery requests.

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. *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 199, 511 S.E.2d 716, 719 (Ct. App. 1999).

Severe sanctions, such as the dismissal of an action (or the striking of an answer), should only be imposed in cases involving bad faith, willful disobedience, or gross indifference to the opposing party's rights. See *Orlando v. Boyd*, 320 S.C. 509, 511, 466 S.E.2d 353, 355 (1996); *Daughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 108-09, 410 S.E.2d 537, 541-42 (1991); *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 198-99, 511 S.E.2d 716, 719 (Ct. App. 1999).

A defendant's answer has been stricken as a sanction when it fails to meaningfully comply with all or part of a discovery Order. *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 199, 511 S.E.2d 716, 719 (Ct. App. 1999). Dismissal of an action as a sanction has been based upon a Plaintiff's persistent refusal to comply with Court orders (including oral) regarding the release of her records. *Barnette v. Adams Bros. Logging, Inc.*, 355 S.C. 588, 586 S.E.2d 577 (2003).

VI. CONCLUSIONS OF LAW

Discovery abuse has taken place in this case. The abuse was purposeful, willful, and in an effort to delay, obstruct or mislead the Plaintiffs and this Court. The Defendant has persistently and willfully failed to comply with this Court's orders.

Defendant's emphasis on its current efforts to locate or produce documents over two years after they were requested, and many months after it was Ordered to do so, is misplaced. The Defendant's duty is to comply with the discovery requests at the time they are served, and

then to comply with the Court's Order in a timely matter. It would be both imprudent and ineffectual for this Court to now trust a litigant who has deliberately withheld discoverable information, documents, and evidence. Further, the record before me suggests that any attempt to locate and produce such documents at such a late date was not a crisis of conscience or willingness to be thorough in discovery -- the Defendant was merely caught withholding discoverable information, documents, and evidence, both before and after this Court issued an Order requiring it to produce that information and those documents to Plaintiffs.

This Court has made factual findings that the Defendant violated discovery Orders in this case willfully, intentionally, and with the gross indifference to the rights of Plaintiffs. The Court also finds that this Defendant willfully ignored and failed to serve any kind of a written response to Plaintiffs Sixth and Seventh Requests for Production, even months after a Motion to Compel was filed.

Moreover, the Court has considered factors for awarding Sanctions, and each weighs in favor the Plaintiffs.

L. Nature of Discovery

First, the discovery requests were straightforward, and requested basic information, documents, and evidence relevant to this particular case, and to medical malpractice cases in general.

Specifically, the request for insurance information -- that was entirely ignored for over two years until the morning of a hearing on Plaintiffs' Motion for Sanctions for Defendant's failure to abide by my Order -- was a basic request memorialized as a standard interrogatory in Rule 33(b)(4), SCRCP. Furthermore, a simple request for hospitals or healthcare systems with a financial, ownership or controlling interest in the Defendant, is a basic, standard request in

medical malpractice cases, as is the request for the medical practice's relevant insurance policies and for policies, procedures and protocols required by the standard of care or otherwise required under the law.

This Defendant is a sophisticated medical practice that has been sued numerous times, and it, as well as its representatives, know that these are basic requests for information, documents, and evidence that are to be responded to within the usual course of any medical malpractice litigation. However, this Defendant failed to complete the simplest of tasks in searching its own records, for years, for such items as its own insurance information, insurance policies, evidence of hospitals or healthcare systems with a financial, ownership or controlling interest in it, tax returns and accountants' identities. Yet, Defendant now wants to come into the Court and argue that because of its unjustifiable and wrongful delay, during which it has been sold, it cannot now locate those things. I find this argument ironic rather than persuasive. Furthermore, I do not find it credible that the Defendant was unable to locate or obtain these items for years, or even for a few weeks or months so as to comply with the Court's Order.

As well, this pattern of obstruction was not limited to just the aforementioned, but to willful refusals to attempt to locate and to produce policies, procedures and protocols that Plaintiffs' expert testified are applicable to this case and that were violated, willful refusals to serve written responses to discovery requests, defense expert's failure or refusal to comply with subpoenas and even to failures or refusals to timely cooperate in providing deposition dates for a 30(b)(6) deposition. The Court finds that the nature of discovery weighs in the favor of sanctions.

2. Discovery Posture of the Case

Next, the Court has carefully considered the posture of the case. This case has been pending for over four years. Plaintiff Greg McCants was catastrophically injured almost six (6) years ago. There has been obstruction during the discovery process that has hampered Plaintiffs' counsel in prosecuting this case, and that has caused great inconvenience, time lost, and frustration. This Court has met with the parties about this matter at a status conference on October 28, 2015, during which it Ordered the Defendant to produce some basic information (that has still not been entirely produced), had a hearing on this matter on December, 15, 2016, convened another hearing on May 25, 2016, and then had this hearing on June 21, 2016. The Plaintiff has had to file at least six (6) motions to compel, and *even sent a reminder letter to defense counsel outlining the outstanding items before the June 21, 2016 hearing.* The Defendant had years to comply with many of the discovery requests, and almost eight (8) months before the most recent hearing to comply with the verbal Order (which was reiterated in my written Order), but Defendant has still not complied. Furthermore, the initial scheduling order had a trial date of February 13, 2016, and but for the inability to find an appropriate two week term in which to try this case, the Defendant very well may have withheld this information and these documents from Plaintiffs up until the time of trial. It is only because the Plaintiffs were unable to obtain a two week trial period until November 2016 that the Court is even able to address these matters.

Indeed, even at this late juncture, over four months after the initial trial not before date, Plaintiffs still await information and documents necessary to re-depose the Defendant for the third time, necessary for their physician liability expert to give a fully informed opinion at trial (which would require him to be re-deposed for trial), and necessary for their economist to do an ability to pay punitive damages report for the jury at trial.

3. Willfulness

Third, as addressed in §IV above, Defendant's failures to abide by my written Order, as well as my verbal order of October 28, 2015, were willful, its pattern and practice of obstruction in discovery in this case was willful, and its failure to give any response at all, much less serve any type of written response, to Plaintiff's Sixth and Seventh Requests for Production was willful. Furthermore, in connection with these failures and refusals, Defendant was willfully disobedient and grossly indifferent to the Plaintiffs' rights. Finally, given the fact that Defendant failed to answer a standard interrogatory with its insurance information for over two (2) years, and for almost four months after the Court Ordered it to, and waited until right before a hearing on a Motion for Sanctions, the Court can come no conclusion other than Defendant acted in bad faith. This is further evidenced by the fact that as of the date of this hearing, it still has not even attempted to give an updated and complete answer to Interrogatory No. 10, still has never given a written answer to the Sixth and Seventh Requests for Production, and still has never produced its insurance policies. Indeed, this Defendant has thumbed its nose at this Court and has been willfully disobedient to its Orders.

4. Degree of Prejudice

Fourth, this Court has determined that Defendant's discovery abuse was designed to, and has prejudiced the ability of Plaintiffs to receive a fair trial both in terms of their ability to prove liability and punitive damages.

Plaintiffs have already taken the trial deposition of their physician liability expert, the 30(b)(6) deposition of the Defendant, and the deposition of the defense experts, without the benefit of the requested policies and procedures and written definition under the federal CMS regulation and JCAHO section, without the benefit of the documents relating to the purchase of

Melvin Nicklos medical practice by Defendant, and without any clinical protocol for the administration of Hepatitis B that may have been at Hartsville HMA, LLC (Carolina Pines Regional Medical Center) in 2010, and these documents are not available for trial. Indeed, Defendant has never denied in writing that these documents exist or existed but just refused to produce the policies and procedures and written definition under the federal CMS regulation and JCAHO section despite being required to under the Order (see the letter), and just ignored Plaintiffs' Sixth and Seventh Requests for Production.

After such willful disobedience and bad faith, the Defendant's attorney cannot now come into Court at the second scheduled hearing on a Motion for Sanctions and get any type of credit for asserting that it does not have these documents. Even if that was a creditable argument, Plaintiff was still entitled to that very information when due, in writing, as that failure itself, admitted in writing, could have been followed up by Plaintiff at a 30(b)(6) deposition or otherwise, and such failure may be evidence of either gross negligence (a failure to have policies, procedures protocols and definitions required by the standard of care or federal law, or a failure to have done any due diligence before purchasing a medical practice), or spoliation. The Defendant, who is a sophisticated medical practice that has been sued many times, knows this, and the Court finds it persuasive that this willful disobedience by Defendant in connection with these matters was to gain an upper hand in this litigation at the prejudice of Plaintiffs.

Plaintiffs would be prejudiced without the admissions of Defendant at trial, without the fully informed opinion of their liability experts at trial, without a full 30(b)(6) deposition of the Defendant to use in their case-in-chief, and without a full transcript of the defense liability expert to be able to use at trial during cross examination.

Furthermore, Defendant does not contend that it cannot give a complete and up to date answer to Interrogatory No. 10, but has simply refused. Without that information, Plaintiff will be prejudiced relative to proof of liability at trial as it cannot be determined if Carolina Pines Regional Medical Center and the Defendant practice should be considered one entity for purposes of the application of federal and JCAHO standards, and the relationship between the two cannot be defined for purposes of negligent supervision, training, staffing and administration claims (as Defendant identified a human resources employee of Carolina Pines Regional Medical Center as its 30(b)(6) designee, etc.). This information is also material to Plaintiffs' ability to collect on a judgment for which there is no insurance coverage under an alter ego theory.

Furthermore, Plaintiffs' economist will be unable to prepare an ability to pay punitive damages report without the filed tax returns, ownership, financial and controlling interest information, as well as the identity of the accountants so any accountant's statements, including notes and explanations, can be obtained. This will prejudice Plaintiffs' ability to obtain a punitive damages verdict at trial.

In addition, Plaintiff has been, or may be prejudiced in its ability to tailor its trial presentation to available coverage, and to collect a verdict in this matter due to Defendants failures to produce the requested insurance policies.

I also address in detail the specific ways that Plaintiffs will be prejudiced in section IV.4.

VII CONCLUSION

Considering that all of the relevant discretionary factors weigh strongly in favor of sanctions, the Court is ever mindful that any sanction imposed should be tailored. Since the pattern and practice of obstruction in discovery in this case has been so pervasive, so willful and has touched virtually every aspect of the case, and because of all of the reasons this Court has

determined that it has and will prejudice Plaintiffs before, at, and after trial in this matter, the Court finds that the necessities of this situation require the most extreme sanction that is needed both to remedy the prejudice to Plaintiffs in this case, and to deter this Defendant or anyone else from perpetrating such willful and repeated obstruction in the future.

Presently, the harshest of sanctions is needed because the Defendant repeatedly intentionally disobeyed Court Orders, made incredible excuses that it was not able to locate and produce its own tax returns, accountants' identities, insurance policies, insurance information, and information about who owns it and controls it, and because the Defendant created needless delays and inconveniences for the Plaintiffs and its counsel and prejudiced Plaintiffs' rights to a full and fair trial, and to information necessary to collect a verdict after trial.

In summary, the Court finds that Defendant's violations of the Court's previous discovery Orders was intentional, willful and with gross indifference to the rights of Plaintiffs. The Court finds that the nature of the discovery requests, the discovery posture of the case, the willful disobedience of Defendant and the degree of prejudice to Plaintiffs call for an extreme sanction. The Court finds that any need to tailor the sanction does not prevent the sanction imposed, even though it forecloses decision on the merits of the case, as the sanction imposed is designed to deal directly, and specifically, with the Defendant's willful, repeated and pervasive disobedience of Court Orders and discovery abuse.

The Court Orders that the Defendant's Answer shall be and is hereby stricken.

At trial the jury shall be instructed to accept the allegations of Plaintiffs' Amended Complaint as true and to render a verdict for each Plaintiff against the Defendant in amounts it shall determine pursuant to the instructions of this Court and based upon the evidence of

damages presented by Plaintiffs at trial.

AND IT IS SO ORDERED!

August 8, 2016

[Signature]
Honorable Paul M. Burch
Trial Judge, Fourth Judicial Circuit

TRUE CERTIFIED COPY,
Scott B. Suggs
CLERK OF COURT/RMG
DARLINGTON COUNTY, SC

SCOTT B. SUGGS
CLERK OF COURT/RMG
DARLINGTON COUNTY, S.C.

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