



STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 SHON TURNER as Personal)
 Representative of the Estate of)
 CHARLES MIKELL, Deceased,)
)
 Plaintiff,)
)
 vs.)
)
 THE MEDICAL UNIVERSITY OF)
 SOUTH CAROLINA,)
)
 Defendant.)

IN THE COURT OF COMMON PLEAS
 FOR THE NINTH JUDICIAL CIRCUIT
 CIVIL ACTION NO.: 2012-CP-10-7275

ORDER FOR SANCTIONS

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This matter came before the Court on Plaintiff's Motion for Sanctions filed on September 9, 2015 and was argued before the Court on October 21, 2015. After oral arguments, the matter was taken under advisement. A rehearing was held on December 11, 2015. The Court posed sets of questions to the parties after each hearing and the parties responded. The Court has received voluminous briefings on this motion, including the submission of multiple legal memoranda from counsel for both parties; lengthy discovery materials; sworn declarations and affidavits from the attorneys; and additional submissions made both by letter and by e-mail. Communications which have not been filed and other relevant documents are attached as Court's Exhibits. The Court also presided over the presentation of evidence during a seven (7) day jury trial which resulted in a verdict in favor of the Medical University on April 26, 2016. A final hearing on the Motion for Sanctions and a Motion for a New Trial was heard on July 18, 2016. Based upon all of the materials and information submitted, the Court finds that the Medical University engaged in a pattern of discovery abuse in this case and grants Plaintiff's Motion for

Sanctions pursuant to Rule 37 of the South Carolina Rules of Civil Procedure.

Prior to trial, the Plaintiff sought permission to depose nine (9) fact witnesses outside scheduling order deadlines, at the Medical University's expense. The Court limited this request by ordering the Medical University to pay the cost of deposing four (4) witnesses. These depositions were intended to allow the Plaintiff to examine witnesses with the benefit of information the Medical University had not disclosed in a timely fashion. As an additional sanction, the Court now orders the Medical University to pay attorneys fees and costs to the Plaintiff, as more fully set forth herein. The rationale for the Court's decision follows.

Background

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This medical malpractice case arises out of a routine colonoscopy procedure which 49-year-old patient Charles Mikell underwent at the Medical University on October 1, 2010. Mr. Mikell received intravenous anesthesia during the colonoscopy. At various points, Mr. Mikell's blood oxygen saturation dropped to dangerous levels, placing him in distress, and he ultimately experienced a cardiac arrest. Although he was rescued from the cardiac arrest, Mr. Mikell spent the next six weeks hospitalized at the Medical University. Thereafter he remained under continuous medical care until his death on January 2, 2011.

When the Plaintiff obtained Mr. Mikell's medical chart from the Medical University, several discrepancies were noted. First, multiple printouts of the written anesthesia record were obtained, no two of which were identical. Second, eight (8) minutes of blood oxygen saturation data was missing from all of the anesthesia record printouts, which included multiple blank boxes where the data should have been contained. Third, although a procedure note for the colonoscopy specifically referred to "code documentation," no "code

sheet," "Mayday record" or other "code documentation" was included anywhere in Mr. Mikell's medical chart.

During discovery, the Plaintiff sought to investigate these discrepancies. In furtherance of that effort, the Plaintiff served a series of written discovery requests including interrogatories, requests for production, and requests for admission. When the first of these requests were served, the Plaintiff was unfamiliar with the records keeping processes at the Medical University and likewise unfamiliar with the Medical University's information technology nomenclature. However, the goal of these discovery requests was clear and consistent: to discover why there were discrepancies, including blank boxes, in the anesthesia record; and why there was no Mayday record. The Plaintiff also took the depositions of several of Mr. Mikell's medical care providers and the Medical University was asked to produce a designee to address specific topics of interest pursuant to Rule 30(b)(6), SCRCP.

The Motion for Sanctions arises out of extraordinary difficulties the Plaintiff experienced in obtaining truthful, accurate and complete information at appropriate times during the discovery process. The Medical University has acknowledged to the Court that it provided information which later turned out to be false. The Medical University cannot deny that many times it produced information, records and data months, and in some instances even years, outside the deadlines established by the Rules of Civil Procedure. In regard to certain issues, the Medical University initially said responsive information, records or data did not exist, then later claimed it could not be produced because of undue burden, only to end up producing it once the Court began holding hearings on the Motion for Sanctions. The Medical University's conduct resulted in the Plaintiff expending

enormous time and resources overcoming a variety of unfair roadblocks to the timely receipt of properly discoverable information.

This case was commenced on November 6, 2012. The Plaintiff's First Discovery Request, consisting of both interrogatories and requests for production, was served on March 19, 2013. The Medical University asserted a peer review privilege as to certain responsive documents, resulting in a motion being filed by the Plaintiff on September 3, 2013. A hearing was held on December 16, 2013 and an order upholding the privilege was filed on May 15, 2014. Depositions of key fact witnesses then began to be taken in August and September of 2014.

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Yet several important delinquent disclosures were made by the Medical University beginning in August of 2015, after a protracted and contested discovery process had neared its final conclusion under a series of five different Scheduling Orders. By the time these disclosures were made, over thirty (30) witnesses had been deposed, including both of the parties' standard of care experts. Additional delinquent disclosures came in December of 2015, only after the Motion for Sanctions had been filed and the first hearing held. One significant disclosure — concerning the Mayday record — did not come until February 22, 2016, when the Plaintiff re-deposed one of the key witnesses in the case.

The following description of the electronic patient health information systems at the Medical University helps to put the discovery abuse issues in this case into proper perspective.

Electronic Record Keeping System

At the time of Mr. Mikell's colonoscopy, the Medical University used an electronic anesthesia software system called PICIS. The PICIS system is supposed to automatically

generate an electronic record of vital signs data obtained via biometric sensors attached to the patient during the colonoscopy procedure. This data includes the patient's blood oxygen saturation levels, an important metric for monitoring the safety of anesthesia. The vital signs data can be displayed in increments varying from every second to every 15 minutes, and the electronic record can be printed in hard copy. As with all computerized systems, the PICIS software system was not without its vulnerabilities, which were known to Medical University personnel in both the Anesthesia and Information Technology Departments prior to Mr. Mikell's colonoscopy.

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Mr. Mikell was first connected to the PICIS anesthesia system while in a pre-procedure area of the hospital. At the point where he was moved from the pre-procedure area to the colonoscopy procedure room itself, the nurse anesthetist was supposed to electronically "transfer" his case from one PICIS computer workstation to another by clicking an icon with a computer mouse.

However, when Mr. Mikell arrived in the colonoscopy procedure room, his electronic chart did not open on the PICIS workstation in the procedure room. The consequence was that the PICIS software did not record some of Mr. Mikell's vital signs data during the first eight (8) minutes of the colonoscopy procedure. The absence of this data made it difficult to accurately recreate the events leading to the cardiac arrest.

The nurse anesthetist became aware of this PICIS transfer "glitch" sometime before the anesthetic agent had been administered to Mr. Mikell, rendering him insensate and unconscious. In order to complete the PICIS transfer, the nurse anesthetist engaged in a series of text messages and telephone calls with an information technologist who was located elsewhere in the hospital. Those text messages and phone calls were themselves

memorialized in an electronic log. Whether Mr. Mikell's condition remained stable while these texts and phone calls were being exchanged was one of the most hotly contested issues in the case.

At various times during the colonoscopy procedure, the nurse anesthetist and the anesthesiologist typed "narrative" entries into the electronic anesthesia record, using a keyboard connected to the PICIS workstation in the procedure room. These entries described what was being done to manage Mr. Mikell's anesthesia care. Each of the narrative entries was electronically memorialized in an audit trail which recorded the username of the person making the entry and the precise time when it was made. This case involved information contained in two separate electronic audit trails for the PICIS system. One shows the time when each narrative entry was created, modified or deleted; and by whom. Another shows the date and time when the anesthesia record was printed; and by whom.

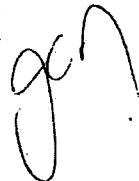
In Mr. Mikell's case, narrative entries were made in his electronic anesthesia record by both the nurse anesthetist and the anesthesiologist. These entries set out a detailed chronology of the events occurring during his colonoscopy, including the responses of the anesthesiologist and the nurse anesthetist to changes in Mr. Mikell's vital signs. The accuracy of the chronology in this narrative was another contested issue in the case.

Pursuant to written hospital policy, whenever a patient at the Medical University experiences a cardiac arrest, the responding medical care providers are required to complete a "cardiopulmonary resuscitation event form," commonly known as a "Mayday record" or "code documentation." The original Mayday record is to be maintained as part of the patient's medical chart after being faxed to the hospital's Risk Management office. Upon

receipt in the Risk Management office, information from the faxed Mayday record is entered into a computerized database maintained for research purposes by the American Heart Association.

The Medical University maintains a centralized data storage server known as an Enterprise Data Warehouse ("EDW"), which is connected to a variety of computer systems on its campus, including the PICIS anesthesia software system. Data from the PICIS software is automatically "swept" off the PICIS system and onto the EDW server, where it is stored for research purposes. In order to protect patient confidentiality, certain patient identifying information is disassociated from this stored data.

Discovery Abuse

The Medical University's discovery abuse includes its failure to forthrightly produce records and information in a timely fashion, categorized according to the following issues: (1) the Mayday record; (2) the AHA database; (3) the PICIS "glitch" and the text messages and phone calls to correct it; (4) the audit trails; (5) the backup anesthesia data; (6) other generally nebulous discovery responses. These issues are discussed in turn.

1. The Mayday record

The October 1, 2010 colonoscopy was performed by a gastroenterologist who dictated a typewritten note for the procedure. That procedure note explicitly refers to "code documentation." At their depositions in late August of 2014, both the gastroenterologist and the nurse anesthetist were asked about the "code documentation," or "Mayday record," for Mr. Mikell's cardiac arrest. Neither of them could specifically recall a Mayday record for Mr. Mikell's cardiac arrest, but since the procedure note specifically

refers to "code documentation," and the anesthesia record itself says a "Mayday" was called, they could not articulate any reason why a Mayday record would not have been created.

Following these depositions, Plaintiff's counsel wrote to defense counsel twice in September of 2014 specifically asking about the Mayday record. The Medical University took the position that there was no Mayday record. Plaintiff's counsel asked to see the Medical University's written documentation policy for cardiac arrests. A written policy was produced, which clearly required the creation of a "cardiopulmonary resuscitation event form" or Mayday record. The Medical University nevertheless tried to explain this away by contending no Mayday record was created for Mr. Mikell's cardiac arrest because it had occurred in the "digestive disease center" area of the hospital. The Medical University claimed the anesthesia record just was the Mayday record for Mr. Mikell's cardiac arrest.

The Plaintiff served a Rule 30(b)(6) deposition notice requiring the Medical University to designate a witness to testify about its written documentation policy. That witness, a physician member of the anesthesia faculty, testified on November 4, 2014 that there was no Mayday record for Mr. Mikell's cardiac arrest because the policy requiring cardiopulmonary resuscitation event forms did not apply to a cardiac arrest in the digestive disease center. However, the witness was unable to identify any language in the documentation policy exempting the digestive disease center from the requirement for a cardiopulmonary resuscitation event form.

Consequently, following unsuccessful efforts to resolve the issue with defense counsel, the Plaintiff filed a Motion to Compel on January 29, 2015. The motion was heard by Judge Stilwell on March 3, 2015. Judge Stilwell filed an order on March 5, 2015,

requiring the Medical University to designate another witness "regarding the applicable policies, if any, that govern the circumstances of Mr. Mikell's colonoscopy and cardiac arrest/ code..."

The Medical University did not produce a new designee until August 24, 2015. This new witness testified that the Medical University's documentation policy does apply to Mr. Mikell's cardiac arrest; that a cardiopulmonary resuscitation event form or Mayday record was created for his case; that the Mayday record had been faxed to the hospital Risk Management office, where it was used to make entries in the American Heart Association ("AHA") database in late December 2010; and that the fax was then shredded. In short, the new designee repudiated virtually everything the first designee had said.

Six months after this second designee's testimony, the issue of the missing Mayday record took yet another improbable turn.

The nurse anesthetist had originally been deposed on August 26, 2014. During that deposition, she was instructed not to answer certain questions about a peer review investigation of Mr. Mikell's cardiac arrest. The Medical University subsequently filed a Motion for Protective Order, which was heard by The Honorable Judge Markley Dennis on October 27, 2014. In an order filed on December 15, 2014, Judge Dennis ruled that the instruction not to answer some of the questions was improper, so that the Plaintiff was entitled to re-depose the nurse anesthetist.

The nurse anesthetist was re-deposed on February 22, 2016. Whereas she had previously testified she could not recall a Mayday record, this time she testified that following Mr. Mikell's cardiac arrest, she had gone to his hospital bed; obtained his paper medical chart; removed the original Mayday record from the chart; and used the Mayday

record as a reference to "complete" the anesthesia narrative. She did this using a computer terminal in the intensive care unit to access the PICIS system. As part of that process, she altered one of the anesthesiologist's entries in the narrative; and created and modified a series of other entries in the narrative.

Upon completing this process, the nurse anesthetist testified she replaced the original Mayday record in Mr. Mikell's chart and left it next to his bed. The original Mayday record has never been seen again. This testimony substantially contradicted what the nurse anesthetist had said about the Mayday record and the narrative entries in the anesthesia record when she was first deposed on August 26, 2014. Therefore, two of the Medical University's witnesses provided testimony about the Mayday record, which later turned out to be completely false. Notably, although both of these witnesses exercised their right to read and sign their depositions, neither of them made any effort to correct their testimony.

The Plaintiff was entitled to be informed of the creation, destruction and loss of the Mayday record. The Plaintiff was also entitled to be informed that the Mayday record had been used as a reference to "complete" the narrative portion of the anesthesia record and to change one of the anesthesiologist's entries. Importantly, the Plaintiff was entitled to be informed of these things in response to written discovery requests first served on March 19, 2013; and followed upon by multiple additional written discovery requests and depositions taken in the fall of 2014 and continuing into the summer of 2015.

The Court rejects the Medical University's contention that it somehow did not know a Mayday record had been created and faxed to its Risk Management office just as its own documentation policy required. Quite simply, the Mayday record could not have been

created, used to complete the anesthesia narrative, faxed to the Risk Management office, and used to create the AHA database without anyone at the Medical University knowing of its existence.

The Court also rejects the Medical University's contention that it did not know its own documentation policy required the creation of a Mayday record for Mr. Mikell's cardiac arrest. The language of that policy is clear and unmistakable. The procedure note explicitly refers to the "code documentation."

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The Court further rejects the contention that the Medical University's initial Rule 30(b)(6) designee should be excused for providing testimony about the Mayday record and the documentation policy which later proved to be completely false. As a Rule 30(b)(6) corporate designee, the witness was obliged to investigate the issue to determine the truth. A reasonable investigation would have led to the realization that the AHA database entries had been made in the Risk Management office using the faxed Mayday record. No explanation has been offered as to why such an investigation was not conducted until August of 2015.


Finally, having evaluated the nurse anesthetist's demeanor at trial, the Court rejects the Medical University's suggestion that when she was deposed on August 26, 2014, she simply forgot she had used the Mayday record to "complete" the anesthesia narrative and to change one of the anesthesiologist's entries.

Rather, the Court finds that information concerning the Mayday record was wrongfully withheld by the Medical University throughout the discovery process, with the result that the Plaintiff was put to considerable effort and expense in forcing the ultimate disclosure of all this information, which was not made available until after multiple

witnesses were deposed, including the Medical University's standard of care expert, who was deposed on June 15, 2015.

2. The American Heart Association database

Just two business days prior to the August 24, 2015 deposition of the Medical University's second Rule 30(b)(6) designee, the Plaintiff was sent an electronic file containing the AHA database entries which had been made using the Mayday record faxed to the Risk Manager's office. Plaintiff's counsel was informed that the new Rule 30(b)(6) designee would be able to explain this file, but at the deposition the witness could not do so.

The AHA database file was produced to the Plaintiff in a format which prevented it from being intelligibly viewed or printed using a standard office computer. When Plaintiff's counsel asked to have the file printed or otherwise produced in usable format, the Medical University simply refused, claiming to do so would reveal protected patient information. It was not until the first hearing on the Plaintiff's Motion for Sanctions, when the Court demanded an explanation for this inexcusable recalcitrance, that the AHA database file was finally printed in readable format and produced to Plaintiff's counsel on December 2, 2015.

The Court finds there is no justification for the twenty-nine (29) months it took to produce the electronic AHA database file, which was responsive to discovery requests served by the Plaintiff on March 19, 2013. The Court further finds there is no justification for the Medical University's failure to produce the database file in readable format until December 2, 2015.

3. The PICIS "glitch" and the text messages and phone calls to correct it.

At her first deposition on August 26, 2014, the nurse anesthetist was asked whether

the anesthesia machine accurately recorded Mr. Mikell's blood oxygen saturation levels during the colonoscopy. She testified that she was not aware of any problems. Whether this testimony constituted perjury or not, it was certainly false in the sense that the recording of the blood oxygen saturation data was indisputably affected by the PICIS software "glitch," which the nurse anesthetist corrected through several text messages and phone calls with a technician.

Had the nurse anesthetist testified accurately, the Plaintiff would have learned about the "glitch," text messages and phone calls no later than August 26, 2014. Instead, the "glitch" was not disclosed until the Chairman of the Anesthesia Department mentioned it during his September 22, 2015 deposition. The log showing the text messages and phone calls was not produced by the Medical University until December 2, 2015.

The Court rejects the Medical University's contention that the Plaintiff missed earlier opportunities to discover this information by not deposing several witnesses named by the Medical University in January of 2015. The naming of those witnesses in no way disclosed to the Plaintiff that any of them would testify about a PICIS software "glitch," texts messages, or phone calls. The Medical University seems to suggest that by simply providing the bare names of these witnesses, it fully met its obligation to disclose the important facts known to or observed by them.

The existence of the log showing the text messages and the phone calls was responsive to written discovery requests served by the Plaintiff on March 19, 2013. The log was not produced until thirty (30) months later. Additionally, there is neither justification nor excuse for the Medical University's failure to disclose the PICIS "glitch" until September 22, 2015, more than a year after Plaintiff's counsel's September 4, 2014 letter to defense

counsel specifically asking for an explanation as to why important vital signs data was missing from the anesthesia record. The Medical University's conduct is unjustifiable and inexcusable.

4. The electronic audit trails

The Plaintiff's First Discovery Request was served on the Medical University on March 19, 2013. Coming at the initial phase of discovery, these Requests were purposely broad in nature, intended to capture a wealth of information to be sifted through and refined as the discovery process proceeded. These Requests required the Medical University to produce:

“materials in any way memorializing the events involved in this litigation,” [Request No. 7];

“any and all medical records relating to Charles Mikell . . . in whatever form they may exist,” [Request No. 13]; and

“all electronic data captured or recorded by the anesthesia machine,” [Request No. 16].

In addition, the Medical University was asked to:

“state the date upon which [any] data was deleted or erased and describe the circumstances under which this occurred” [Request No. 17]; and

“describe any and all data management systems . . . for the purpose of backing up or storing data captured or recorded by the anesthesia machine.” [Request No. 17].

Although electronic audit trails existed which contained information arguably responsive to these Requests, no electronic audit trail of any kind was either identified or produced by the Medical University within thirty (30) days of service of these Requests.

In an effort to focus the scope of these Requests as depositions provided more information about the course of events, Plaintiff's counsel wrote to defense counsel on

September 4, 2014 requesting information about several unresolved discovery issues. The Medical University did not inform the Plaintiff that information contained in one of its electronic audit trails would directly answer several of the issues raised. Nor did it answer the Plaintiff's questions. Instead, the Medical University largely ignored this letter and the information it did provide (about the Mayday record) turned out to be false.

On December 5, 2014, Plaintiff's counsel wrote to defense counsel again, this time specifically asking about an "audit trail" for the electronic anesthesia record. Once again, the Medical University did not respond within the thirty (30) day time frame set forth in the Rules. Faced with the Medical University's lack of response, the Plaintiff contacted the manufacturer of the PICIS software system in Boston, learned of its audit trail functions, and served a request to admit.

It was not until February 27, 2015 that the Medical University finally produced an electronic audit trail for the narrative entries in the anesthesia record. A second audit trail, containing information directly responsive to several of the issues raised in counsel's September 4, 2014 letter, was not produced by the Medical University until September 21, 2015.


These audit trails certainly appear to be "materials . . . memorializing the events involved in this litigation" and "electronic data captured or recorded by the anesthesia machine . . ." within the meaning of the Plaintiff's First Discovery Request Nos. 7 and 16. By the time these audit trails were produced — twenty-three (23) and thirty (30) months after service of the Plaintiff's First Discovery Request, respectively — virtually every witness who might be questioned using the information they contain had already been deposed. Even assuming the audit trails were not properly responsive to the Plaintiff's First

Discovery Request, there is no excuse for not promptly producing them in response to the letters of September 4, 2014 and December 5, 2014.

The Medical University has provided no credible explanation for its extraordinarily dilatory production of the audit trails, which the Court finds to be inexcusable.

5. Backup anesthesia data

According to Plaintiff's counsel, at the earliest stage of this case, one of his consultants advised that vital signs data which appeared to be missing from the blank boxes in the anesthesia record could be recovered by obtaining backup data stored on a computer data server, as is customary for a research university to maintain. A request for backup data was included in the Plaintiff's First Discovery Request No. 16, served on March 19, 2013. No backup anesthesia data was produced.

 Counsel for the parties engaged in several discussions about backup anesthesia data, ultimately leading to a letter Plaintiff's counsel wrote to defense counsel on December 5, 2014. In that letter, Plaintiff's counsel enclosed a copy of a document about the Medical University's Enterprise Data Warehouse ("EDW"), describing how data from the PICIS anesthesia software was extracted directly into the EDW for backup storage.

The Medical University nevertheless maintained its position that there was no backup anesthesia data. Faced with this intransigence, the Plaintiff made contact with the PICIS software manufacturer in Boston and later retained an electronic discovery firm in Los Angeles. According to Plaintiff's counsel, these consultants disputed the Medical University's claim that there was no backup data, so the Plaintiff persisted in seeking its production.

On August 23, 2015, the Plaintiff deposed a Medical University employee who

testified that all of the anesthesia data from Mr. Mikell's colonoscopy procedure had in fact been preserved on a storage server. The witness further testified that no effort had been made by the Medical University to extract Mr. Mikell's data from the server.

When confronted with this testimony, which directly contradicted its prior position, the Medical University shifted to a new position: that it would be prohibitively expensive to extract Mr. Mikell's data from the backup server. The Medical University contended, both to the Plaintiff and to this Court, that it would take an extensive and burdensome amount of time and would cost an estimated \$2.8 million to extract Mr. Mikell's data.

Both the Plaintiff and the Court reacted to this position with incredulity. The Court posed questions addressing the time and cost estimates and even suggested ways the data could be quickly and cheaply produced. The Medical University conceded in its response that the data could be produced in manners suggested by the Court in its questions. Ultimately, on the eve of the second hearing on the Motion for Sanctions set for December 11, 2015, the Medical University produced a computer disc containing several hundred pages of data. This CD was provided to the Plaintiff more than thirty-two (32) months after the Plaintiff's First Discovery Request had been served. During that period of extraordinary delay, the Plaintiff expended considerable time and money disputing the Medical University's shifting positions. The Medical University has provided no credible explanation for its conduct, which the Court finds to be inexcusable.

6. Nebulous discovery responses

The Court has other concerns about the manner in which the Medical University answered written discovery in ways which appear calculated to obfuscate or obscure important disclosures. In at least one instance, the Medical University was forced to amend

its responses to requests for admission by admitting matters which had previously been denied. But in all things, the Medical University seems to have crafted the language of its discovery responses so as to create ambiguity and plausible deniability. In other words, taking pains to ensure that no written discovery response could be effectively used before the jury to establish a point the Medical University was seeking to deny.

For example, rather than simply admitting a Mayday record had been created and then destroyed, the Medical University informed the Plaintiff it had "information regarding the code sheet/Mayday form that is different from the information previously presented and that might lead one to infer there was a code sheet at one time." That is an incredible way to say the nurse anesthetist and the first Rule 30(b)(6) designee provided false testimony.

In another instance, two witnesses testified that the PICIS software "glitch" was a well-known "problem," terms they used repeatedly to explain the empty boxes in the anesthesia record. Yet when the Plaintiff served written discovery seeking to learn more about the scope of this problem, the Medical University objected, claiming there was no "problem" with the PICIS software system; that it had functioned just as intended. This is also an incredible way to characterize the system's failure to record vital signs data over an eight (8) minute period of time.

In all, the Medical University steadfastly refused to concede anything unfavorable to its defense of the case, forcing the Plaintiff to turn to the Court for relief over and over again.

Prejudice to the Plaintiff

Rule 37 governs failure to make or cooperate in discovery and provides possible

sanctions for such failure. *Pioneer Electronics (USA) Inc. v. Cook*, 294 S.C. 135, 137 363 S.E.2d 112, 113 (Ct. App. 1987). "In deciding what sanction to impose for failure to disclose evidence during the discovery process, the trial court should weigh the nature of the interrogatories, the discovery posture of the case, willfulness, and the degree of prejudice." *Teseniar v. Professional Plastering & Stucco, Inc.* 407 S.C. 83, 754 S.E.2d 267, 273 (Ct. App. 2014). "A failure to weigh the required factors demonstrates a failure to exercise discretion and amounts to an abuse of discretion." *Id.* "[D]iscovery abuse motions do not become moot when a case is terminated. . . . 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.' *Creighton v. Coligny Plaza Ltd. Partnership*, 334 S.C. 96, 211, 512 S.E.2d 510, 524 (Ct. App. 1998). Where a party's right to discovery is abused, prejudice must be presumed unless the party failing to submit to discovery can show a lack of prejudice. *Downey v. Dixon*, 294 S.C. 42, 46, 362 S.E.2d 317, 319 (Ct. App. 1987). The Court has no difficulty concluding the Plaintiff was prejudiced by the manner in which the Medical University subverted the discovery process in this case.

If the Plaintiff's discovery rights had been fully accorded by the Medical University, by the close of 2014 (at the very latest), the Plaintiff would have been fully informed that blood oxygen saturation data missing from Mr. Mikell's anesthesia chart was explained by a PICIS software "glitch" which the nurse anesthetist had spent some number of minutes sending text messages and talking on the phone to correct. The Plaintiff would also have been informed of the existence, loss and destruction of a Mayday record which was used by the nurse anesthetist to "complete" the narrative entries in the anesthesia record. The

Plaintiff would further have learned that during this "completion" process, the nurse anesthetist changed one of the anesthesiologist's entries to materially alter the timeline of events. The Plaintiff also would have had in his counsel's possession the audit trails, AHA database printout, and the log of text messages and phone calls.

Knowledge of these facts, and possession of these records, would have permitted the Plaintiff to fully question fact witnesses and also the defense standard of care expert, whose explanation for the missing blood oxygen saturation data — that the anesthesia monitors were not turned on, in breach of the standard of care — was ultimately undermined by disclosure of the PICIS software "glitch" three (3) months after the expert was deposed on June 15, 2015.

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A party is entitled to conduct an orderly discovery process developed in reliance upon accurate information being timely supplied by his or her opponent. This right is defeated when information is produced in haphazard, delinquent fashion — such as the audit trails; the AHA database file; and the log of text messages and phone calls; and when false information is provided (whether knowingly or not) — such as the Medical University's position about the Mayday record and the nurse anesthetist's initial deposition testimony about whether the anesthesia machine had accurately recorded the blood oxygen saturation data.

One prejudicial effect of this uneven development of the factual record was that Plaintiff's counsel was unable to complete discovery and finalize a trial strategy until just ten (10) days prior to jury selection, despite a discovery process that lasted for over three (3) years. Another prejudicial effect was that information which was clearly both relevant and discoverable was not produced in an efficient manner, but rather had to be doggedly

pursued through multiple discovery requests, letters, motions, hearings, and orders. The most obvious example is the effort required before the Plaintiff learned the full truth about the Mayday record.

The Court is aware of and has considered Rule 37(f) SCRCP, which states, "[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as result of the routine, good-faith operation of an electronic information system." The Court does not seek to impose sanctions for information lost in a "glitch." Rather, the Court is concerned with the discovery responses concerning the missing and conflicting information.

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A large portion of the Plaintiff's burden in gathering truthful, accurate and complete information could have been avoided had the Medical University simply been forthcoming in its written discovery responses. For example, the Medical University could have simply responded to the two pointed letters written by Plaintiff's counsel in September of 2014 by disclosing all of the material facts about the PICIS software "glitch"; the text messages and phone calls; the Mayday record; the AHA database; and the backup anesthesia data. Those disclosures certainly were responsive to the questions being asked. The Medical University's failure to act forthrightly is both inexplicable and inexcusable.

Relief

The Court is guided in this matter by the fundamental principle that 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." Creighton v. Coligny Plaza Ltd. Partnership, 334 S.C. 96, 124, 512 S.E.2d 510, 524 (Ct. App. 1998).


In his Motion for Sanctions, the Plaintiff asked the Court for a variety of relief under Rule 37, including striking the Medical University's Answer and turning over peer review documents previously determined to be privileged. The Court declined to impose either sanction. Instead, on March 17, 2016 the Court issued an interim ruling, that the Plaintiff would be entitled to depose four (4) additional witnesses at the Medical University's expense. These depositions occurred and that relief has been afforded.

The Court also determined to award attorneys fees and costs to Plaintiff's counsel in connection with the efforts necessary to overcome the Medical University's misconduct. At the Court's request, Plaintiff's counsel, Mr. Ransom and Mr. Apostolou, submitted several affidavits detailing their efforts. Mr. Ransom sought reimbursement of his time at the rate of \$450.00 per hour. Mr. Apostolou sought reimbursement of his time at the rate of \$250.00 per hour.

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The Court held a hearing on July 18, 2016 to allow the Medical University to cross-examine Plaintiff's counsel about their attorneys fees affidavits. Mr. Ransom was examined under oath at length, but the Medical University did not challenge the time and billing records attached to his affidavits. The Medical University did challenge the hourly rate requested by Mr. Ransom. No challenge was made to the time and billing records set forth in Mr. Apostolou's affidavits. No challenge was made to the costs being sought or Mr. Apostolou's requested hourly rate. The Court therefore accepts the information contained in the affidavits and finds they provide appropriate support for an award of attorneys fees and costs.

The factors used to determine a reasonable attorney's fee are: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional

standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services. *EFCO Corp. v. Renaissance on Charleston Harbor, LLC*, 370 S.C. 612, 621, 635 S.E.2d 922, 926 (Ct. App. 2006). The Court notes that the discussion of these factors set forth in the Plaintiff's June 15, 2016 Reply Memorandum on Issue of Attorneys Fees went virtually unchallenged by the Medical University at the July 18, 2016 hearing, which was held specifically for the purpose of determining an appropriate attorneys fee award. With the exception of Mr. Ransom's requested hourly rate, the Court is persuaded by the arguments presented in the Plaintiff's Reply Memorandum.

 The disputed issues were complex and pervasive, fundamentally effecting the trial of this case, which focused extensively on the accuracy of the anesthesia record and its timeline of events. The Plaintiff experienced unnecessary difficulty in obtaining discovery necessary to learn and understand everything that occurred during the colonoscopy. The time and labor necessary to overcome the Medical University's intransigence was significant, as reflected by the attorneys fee affidavits.

The Plaintiff's efforts included, but were not limited to, the preparation of multiple written discovery requests, multiple motions and supporting legal memoranda, and attendance at multiple hearings. On virtually every challenged issue, the Plaintiff's position was upheld. Plaintiff's counsel are both able trial lawyers who enjoy excellent reputations in the legal community. Advocates with their years of experience are able to charge significant hourly rates in the Charleston legal community.

Order

In consideration of the foregoing, the Court rules that Mr. Ransom is entitled to be compensated for the time set forth in his affidavits, but only at a rate of \$300.00 per hour.

The Court further rules that Mr. Apostolou is entitled to be compensated for the time set forth in his affidavit, at the requested rate of \$250.00 per hour.

The Court also rules that the Plaintiff is entitled to be compensated for all of the costs set forth in the attorneys fee affidavits. None of those costs were challenged by the Medical University at the July 18, 2016 hearing.

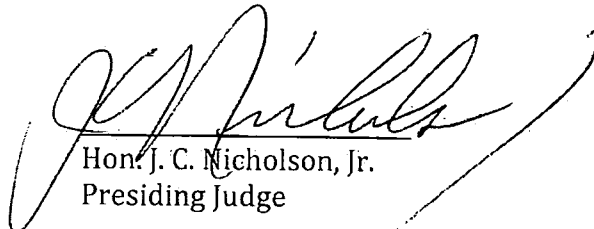
Accordingly, the Court awards \$71,730.00 in attorneys fees to Mr. Ransom; \$5,675.00 in attorneys fees to Mr. Apostolou; and \$10,372.63 in costs.

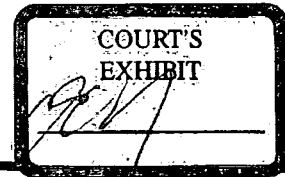
The total amount of sanctions payable by the Medical University is \$87,777.63.

Payment of this sum shall be delivered by the Medical University to the Plaintiff's attorneys within thirty (30) days of this Order.

IT IS SO ORDERED.

September ²⁸ 2016
Charleston, South Carolina


Hon. J. C. Nicholson, Jr.
Presiding Judge



Nicholson, J. C. Law Clerk (Brooklyn A. Burroughs)

From: BertCone@aol.com
Sent: Thursday, December 10, 2015 2:00 PM
To: Nicholson, J. C. Law Clerk (Brooklyn A. Burroughs); Nicholson, J. C.
Cc: alex@apostoloulaw.net; afleming@barnwell-whaley.com; mdc@barnwell-whaley.com; bertcone@aol.com
Subject: Re: Mikell v MUSC; C/A No.: 2012-CP-10-7275

Follow Up Flag: Follow up
Flag Status: Completed

Dear Brook,

I want to let you and Judge Nicholson know that MUSC recently produced a legibly formatted version of the American Heart Association database entries which were made using the information contained in the handwritten Mayday card (which was then discarded).

I do not, however, believe this resolves all of the discovery issues pending before the court. I therefore look forward to seeing you at the hearing tomorrow morning.

Lastly, I have obtained the Form 4 order denying MUSC's motion for partial summary judgment from the Clerk of Court's website.

Best regards,

Rob Ransom
803-765-2383
bertcone@aol.com

In a message dated 12/7/2015 5:47:24 P.M. Eastern Standard Time, JNicholsonLC@sccourts.org writes:

All,

Good afternoon. Judge Nicholson asks that counsel for both parties and any IT experts be prepared to address the following questions in reference to the Motion for Discovery Sanctions at Friday's hearing:

1. Why encrypt or store the information from "Mayday cards" or "code sheets" if it cannot be retrieved in a legible format?
2. Can the information requested be converted to a legible format?
3. Can Plaintiff's counsel view the monitor in person?
4. If the information is available online with a password, can it be produced that way, either printed or by providing a password to Plaintiff's counsel?
5. Why can't the legible information be screenshotted, photographed, or filmed if it is accessible on a computer monitor at MUSC. Could the document be retrieved with the lawyers and a notary present to produce an affidavit to verify that it is a true, unaltered copy?
6. Can the information on the monitor be retyped by a court reporter or neutral source and validated with an affidavit?
7. If one of the above is possible, where did the extreme estimate for hours and cost come from?
8. In detail, explain how the electronic record(s) are created? Is a third party application used or is it a custom in house application?

9. Was the original primary source data from a Mayday card provided to anyone outside of the hospital?
10. How was the information originally provided to Plaintiff's counsel?
11. Are the records encrypted or stored in a proprietary format? If encrypted, what type of encryption is used? If proprietary, what is the name of the program?
12. If the information is viewable by hospital staff, are they able to view the Mayday card data or the original source data?
13. What level of security is required to view the data on the monitor?

I apologize for the lengthy list. Keep in mind any information that would violate HIPAA can be redacted or dealt with through a protective order as Judge Nicholson addressed at the last hearing. Feel free to e-mail me any documents you would like reviewed before the hearing. Let me know if you have any questions.

Kind regards,

Brook

Brooklyn A. Burroughs

Law Clerk to The Honorable J.C. Nicholson, Jr.

Circuit Court Judge

100 Broad Street

Charleston, South Carolina 29401

Tel: (843) 958-5047

jnicholsonlc@sccourts.org

From: Julia Childers [mailto:jchilders@barnwell-whaley.com]
Sent: Monday, December 07, 2015 11:33 AM
To: Nicholson, J. C. Law Clerk (Brooklyn A. Burroughs)
Cc: bertcone@aol.com; alex@apostoloulaw.net; Alissa Fleming; Deborah Tolle; M. Dawes Cooke
Subject: (1.554) Mikell v MUSC; C/A No.: 2012-CP-10-7275

Attached please find the Affidavits of Annette Thompson and John Fisher in the above-referenced matter. These Affidavits will be filed with the Clerk of Court today.

By copy of this email to them, we are notifying counsel for the Plaintiff of this communication with the Court.

Sincerely,

Julia Childers

for Alissa Fleming, Esquire

Julia G. Childers

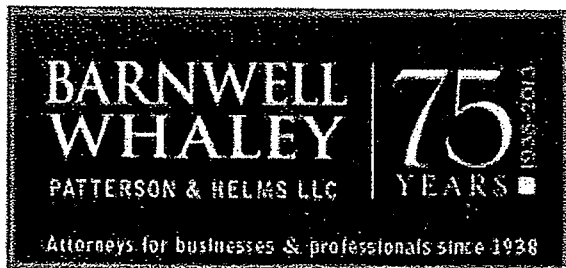
Legal Assistant to Alissa D. Fleming

and John W. Fletcher

843.577.7700

843.577.7708 (fax)

jchilders@barnwell-whaley.com



We have moved to Downtown Charleston!

Please make a note of our new address.

288 Meeting Street, Suite 200

P.O. Drawer H

Charleston, SC 29402



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Nicholson, J. C. Law Clerk (Brooklyn A. Burroughs)

From: Alissa Fleming <afleming@barnwell-whaley.com>
Sent: Thursday, December 10, 2015 2:14 PM
To: Nicholson, J. C. Law Clerk (Brooklyn A. Burroughs); BertCone@aol.com;
alex@apostoloulaw.net
Cc: M. Dawes Cooke; Deborah Tolle
Subject: Mikell v MUSC/C.A. No. 2012-CP-10-7275
Attachments: Mikell Anesthesia (Bates 91-106).pdf; MUSC Anesthesia (Bates 2116-2214).pdf; MUSC Response to Pltf's 2nd Discovery Request 12.2.15 (00578754xA18B7).PDF; MUSC AHA (Bates 4991 - 5011) (00580308xA18B7).pdf

Follow Up Flag: Follow up
Flag Status: Flagged

Brook,

We are getting ready to email you a final version of the responses to the thirteen questions posed by Judge Nicholson the other day. In addition, it might be helpful for the Court to see the documents and information that are being discussed. Due to the graphics on some of the documents, it might take a while for the documents to upload. If you have any difficulty accessing anything, please let us know and we can try to find a better way to get them to you. These are documents that have been produced in this case. We will have our copy tomorrow. Unless you advise otherwise, we will not bring another copy since this amounts to thousands of pages.

- American Heart Association (AHA) database, Bates Stamped: BWPH File No. 1.554 (Mikell v. MUSC) 004991-005011;
- Anesthesia/PACU record, Bates Stamped:
 - BWPH File No. 1.554 (Mikell v. MUSC) 00091-106 (15 min interval);
 - BWPH File No. 1.554 (Mikell v. MUSC) 2116-2214 (1 min interval); and
- MUSC Response to Plaintiff's 2nd Discovery Request
- Affidavit of John L. Fisher
- Affidavit of Anette Thompson, RN

The following is a Drop Box link to access the below listed documents:

<https://www.dropbox.com/s/sd0xc5uee3of6w6/RTData%20Output%20%28Bates%205025-5222%29%20%2800578786xA18B7%29.PDF?dl=0>

- PICIS database, Bates Stamped: BWPH File No. 1.554 (Mikell v. MUSC) 005025-005222;
- PICIS database, Bates Stamped: BWPH File No. 1.554 (Mikell v MUSC) 005223-005762;
- MUSC Anesthesia/PACU records, Bates Stamped: BWPH File No. 1.554 (Mikell v MUSC) 2215-2556 (10 sec interval)

The documents that are identified as 005025-005762 contain the Real Time Data from the PICIS database regarding Charles Mikell from two boxes within the database. The document identified as 005763 represents the data points that correspond with the various C grid numbers. This is an example of data that was extracted directly from the database and formatted into a human readable format.

Thank you again,
Alissa Fleming
Barnwell Whaley



Alissa D. Fleming, Esquire
afleming@barnwell-whaley.com

December 10, 2015

VIA E-MAIL ONLY

The Honorable J.C. Nicholson, Jr.
Circuit Court Judge
100 Broad Street
Charleston, South Carolina 29401
jnicholsonlc@sccourts.org

RE: Shon Turner, as Personal Representative of the Estate of Charles Mikell, deceased,
vs. Medical University of South Carolina
C/A No.: 2012-CP-10-7275
BWPH File No.: 1.554

Dear Judge Nicholson,

1. Why encrypt or store the information from "Mayday cards" or "code sheets" if it cannot be retrieved in a legible format?

The Cardiopulmonary Resuscitation Form which has been referred to as the Mayday card or code sheet is a piece of paper. The form, itself, is not part of a database. A copy of the form was faxed to Sheila Scarbrough, RN, MSN. At the time of this case, Ms. Scarbrough was the Director of Risk Management and Patient Safety. In her role as Director of Risk Management and Patient Safety, she had the responsibility for reviewing code sheets and entering de-identified patient information regarding codes into a national database for the American Heart Association (AHA) called "Get with the Guidelines."

The data in the database maintained by MUSC for submission to the AHA is not encrypted. MUSC produced the information in a legible format on December 2, 2015. This was done by cutting and pasting the data into another format and converting it to PDF. A copy of the document is being provided to the Court and is numbered BWPH File No. 1.554 (Mikell v. MUSC) 004991-005011.

2. Can the information requested be converted to a legible format?

Yes. It has been converted to a legible format per above.

M. Dawes Cooke, Jr.
B.C. Killough*
Randell C. Stoney, Jr.
Phillip S. Ferderigos
K. Michael Barfield
David S. Cox

William C. Helms, III*

* Registered patent attorney
* Retired

Ernest B. Lipscomb, III*
J. Gail Rahn
John A. Jones
Alissa D. Fleming

Lucinda D. Gardner
John W. Fletcher
Barbara J. Wagner, Ph.D.
Jeremy E. Bowers
D. Summers Clarke, II
Jeffrey M. Bogdan
Bradley B. Banias

3. Can Plaintiff's counsel view the monitor in person?

MUSC made an offer to Plaintiff's counsel to view the monitor to review the information concerning Charles Mikell in the AHA database as well as the PICIS database. That offer was made on September 14, 2015. PICIS is not an acronym and does not stand for anything. The PICIS database is the collection of all clinical care documentation regarding Surgical Services and the Anesthesia Preoperative services that was used at the time of this case.

4. If the information is available online with a password, can it be produced that way, either printed or by providing a password to Plaintiff's counsel?

The information for the AHA database is not available online. The PICIS database is what stored the clinical care documentation from the Anesthesia and Surgical Services at the time of this case. The PICIS database is not available online. The PICIS user application is available online in a view only format.

5. Why can't the legible information be screenshotted, photographed, or filmed if it is accessible on a computer monitor at MUSC? Could the document be retrieved with the lawyers and a notary present to produce an affidavit to verify that it is a true, unaltered copy?

The information from the AHA database and the PICIS user application can be screenshotted. A screenshot of the PICIS database would be useless. Yes, a copy of the information in the AHA database and PICIS database can be retrieved with the lawyers and a notary present to produce an affidavit to verify that it is a true, unaltered copy.

6. Can the information on the monitor be retyped by a court reporter or neutral source and validated with an affidavit?

Yes. However, doing such would be repetitive of the raw data from the PICIS database that has already been produced in the documents numbered BWPH File No. 1.554 (Mikell v. MUSC) 005025-005762.

With regard to the information in the AHA database, MUSC has converted the information from the AHA database into a human legible or readable format. As stated in answer number 1, the document is BWPH File No. 1.554 (Mikell v. MUSC) 004991-005011 and has been produced.

The information from the PICIS database was produced to Plaintiff's counsel in a human readable format on May 17, 2013 in response to Plaintiff's First Discovery Requests. The information that was produced was in a printed format in the Anesthesia/PACU record and identified as BWPH 1.554 (Mikell) 91-106 (15 minute interval record) 2116-2214 (1 minute interval record) and 2215-2556 (10 second interval record).

Both documents, the one from the AHA database and the Anesthesia/PACU Record from the PICIS database have been retrieved and produced to Plaintiff. Additional raw data

extracted directly from the PICIS database for the Real Time data in the Record has also been produced.

7. If one of the above is possible, where did the extreme estimate for hours and cost come from?

The estimated hours provided did not pertain to the extraction of data from the AHA database. Rather, it was an estimate of hours for extracting *all* data concerning Charles Mikell from the PICIS database. MUSC has extracted the raw data for the Real Time data which is all of the numerical values in the PICIS database for Mr. Mikell's colonoscopy on October 1, 2010. This includes numerical values for data points such as oxygen saturation, blood pressure, heart rate, etc. The extraction of only the raw data for RealTime variables took approximately 100 hours.

The PICIS database is not what the end user of the PICIS application sees or interacts with when he/she documented in the medical record. The PICIS software was used by MUSC from approximately March 27, 2007 until July 1, 2014 to collect all clinical care documentation for Anesthesia and Surgical Services. On July 1, 2014, MUSC implemented a different medical record system which replaced several pieces of software used to provide patient care. PICIS was one of the pieces of software replaced by the new system. The data from the PICIS database for Mr. Mikell is accessible. MUSC maintains the PICIS database today so that it may retrieve clinical care documentation on procedures that took place prior to July 1, 2014. The clinical care documentation of the procedures done on Mr. Mikell is displayed in the Anesthesia/PACU Record and identified as BWPH 1.554 (Mikell) 91-106 (15 minute interval record) 2116-2214 (1 minute interval record) and 2215-2556 (10 second interval record). The Anesthesia/PACU Record was easily accessible, printed, and produced on May 17, 2013. It should be noted that the 15 minute interval record is the version that was placed in a patient's official medical record.

However, the PICIS database, consistent with databases in general, is designed and organized for rapid search and retrieval by a computer, it is not presented in a user-friendly manner that it easy to understand by someone who does not have a technical background. For a non-technical person to view the data stored in the PICIS database, he would use the PICIS user application. Thus, when the user accesses or uses the application, it pulls the information from the database to display it. A user application is any software on a computer that a computer user can utilize. Examples include Microsoft Word, Internet Explorer, and Microsoft Excel.

The request that was made to MUSC regarding Mr. Mikell was for "all electronic data recorded or captured by the anesthesia machine used for the colonoscopy procedure performed on Charles Mikell on October 1, 2010." The number of hours to extract the data from the actual PICIS database, not the user application, arises from the fact that the database is approximately 300 Gigabytes, containing 1,603 tables comprised of 669,650,431 rows of data. To extract data directly from the database, a computer scientist must write queries or code to locate and find the data specific to the patient at issue. The data in the PICIS database is not separated by patient or procedure. Thus, all tables and rows must be queried and then the data retrieved must be formatted so that it may be understood.

As previously mentioned, the raw data for the Real Time Variables and Data section of the Anesthesia/PACU Record was extracted. This search of the Real Time Variables and Data was located in two tables of the PICIS database. A copy of the raw data that was extracted and formatted into a Microsoft Excel spreadsheet was produced to Plaintiff and identified as BWPH File No. 1.554 (Mikell v. MUSC) 005025-005762. Again, the raw data is the same as the data contained in the Anesthesia/PACU record (MUSC 91-106, 2216-2214, 2215-2556) which is the print-out from the user application.

The remaining data in the other 1,603 tables in the PICIS database represents every other possible field contained in the Anesthesia/PACU Record (version that the user sees and that was printed and produced) and includes information such as the procedure start and end time, name of the care providers, room number, etc.

8. In detail, explain how the electronic record(s) are created? Is a third party application used or is it a custom in house application?

There are multiple software applications within the MUSC hospital system that are used to comprise the electronic medical record. The PICIS application or software was one of those applications.

PICIS is a third party application furnished by PICIS Clinical Solutions which is owned by Optum. The PICIS software was built, configured, tested, and supplied to MUSC by the PICIS company. MUSC installed the software for use by Anesthesia and Surgical Services so that healthcare providers within the Anesthesia and Surgical Services Departments could document clinical care.

9. Was the original primary source data from a Mayday card provided to anyone outside of the hospital?

No. The original primary source data from the Cardiopulmonary Resuscitation Form/Mayday card was a piece of paper. MUSC has not been able to locate the actual form.

De-identified patient information contained in the AHA database was most likely provided to the AHA.

10. How was the information originally provided to Plaintiff's counsel?

For the AHA database: The information was cut and pasted from the full AHA database into a Microsoft Excel Spreadsheet. It has since been converted to a more legible format in document number 004991-005011.

For the PICIS database: A printout of the Anesthesia/PACU Record was printed from the PICIS user application of all of the data in the database in a human readable format in the Anesthesia/PACU Record (BWPH 1.554 (Mikell) 91-106, 2216-2214, 2215-2556), and provided to Plaintiff's counsel on May 17, 2013.

The Honorable J.C. Nicholson, Jr.
December 10, 2015
Page 5 of 5

11. Are the records encrypted or stored in a proprietary format? If encrypted, what type of encryption is used? If proprietary, what is the name of the program?

No.

12. If the information is viewable by hospital staff, are they able to view the Mayday card data or the original source data?

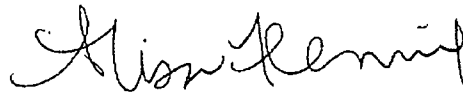
For the Cardiopulmonary Resuscitation Form/Mayday Card: The original primary source data which is a piece of paper cannot be found. The information in the AHA database can be viewed by Sheila Scarbrough, RN, MSN. As stated in answer to question number 1, this was produced to Plaintiff on December 2, 2015.

For the PICIS database: The original source data can be viewed by anyone within the Anesthesia and Surgical Services Departments with a PICIS account. John Fisher is the only person at MUSC who currently has access to the PICIS database and who can view the raw unformatted data in the database.

13. What level of security is required to view the data on the monitor?

There is no specific level of security required to view the data. All persons who view the data are expected to fully adhere to all requirements upholding patient confidentiality and privacy, including HIPAA on a "need to know" basis. The databases contain protected health information for any patient whose information is in the database and is not separated by individual patient. The PICIS Database is no longer used for clinical care at MUSC and has not been used for clinical care since July 1, 2014.

Sincerely,



M. Dawes Cooke, Jr.
Alissa D. Fleming

MDCjr/ADF/jgc

cc: **VIA E-MAIL ONLY**
Robert B. Ransom, Esquire (bertcone@aol.com)
Alex Apostolou, Esquire (alex@apostolou.net)

Brook,

I've been out of the office a good bit the last couple of weeks but have just about completed my response, which I should be able to provide next week. Please forgive the delay.

Best regards,

Rob Ransom

803-765-2383

bertcone@aol.com

In a message dated 1/26/2016 12:36:11 P.M. Eastern Standard Time, JNicholsonLC@sccourts.org writes:

2012-CP-10-7275

Motion for Discovery Sanctions

All,

Judge Nicholson would like answers to the questions below. Please respond to all questions via affidavit.

Questions for Plaintiff:

1. Specifically, how critical is the information you have struggled to receive, but eventually received, to your causes of action?
2. Specifically, how critical is the missing information, either unpreserved or destroyed, to your causes of action?
3. In what format(s) was the information last produced to you prior to the Dec. 11th hearing?
4. Explain how the discovery process has or has not been proportionate to the issues at hand.
5. Aside from your request for attorney's fees, which Judge Nicholson finds reasonable thus far, why do you believe the severe sanctions you requested are proportionate to the defendant's actions or the harm, if any, caused in the discovery process?

6. If your claims focus on the breach of the standard of care *before* the arrest, how is your case harmed by the discovery delays and missing information after that time?
7. In order to prove or rule out the argument that MUSC deleted data, research would be needed. Is it important enough to your case that you would be willing to split the cost for such research?

Questions for Defendant:

1. The timeline you provided on Dec. 30th ends in August. Will you please complete the timeline through the date of the Dec. 11th hearing?
2. Please explain what facilitated the information being produced subsequently to Judge Nicholson's list of questions and suggestions. Please explain how it was produced shortly before the hearing on Dec. 11th in contrast to the high estimated cost and time you said it would take.
3. In reference to the 26 page illegible document originally produced-- In what format was the document displayed from the computer at MUSC? Was it Microsoft Excel or some type of PICIS chart? If you copy and paste a large group of cells from such a chart into a word processor such as Microsoft Word keeping the text only, is that not what the document you produced resembles? Specifically, the court would like to know if it was originally formatted in a chart, converted to an illegible format, and then converted back to a chart shortly before the hearing.
4. In your answer to number 1 of Judge Nicholson's initial set of questions, you say you produced the information by "cutting and pasting the data into another format and converting it to PDF." What was the original format? Ms. Fleming mentioned it was an Excel document at the hearing. If that is the case, why wasn't it legible to begin with?
5. If mass amounts of information got copied and pasted cell by cell, how can you be sure there are no alterations, mistakes, or missing information, either intentionally or as a result of human error?
6. Who did the conversion to a legible format? In detail, how was it done?
7. According to the timeline you submitted, you were aware the information from the Mayday card was sent to the American Heart Association's database by July of 2015. Why didn't you provide the information from their records sooner?
8. Why are some of the times out of order on the audit trail and anesthesia records?
9. Please provide the court with electronic versions, including all metadata, of the original illegible document and the later legible document in their original formats rather than PDF, which eliminates tracked changes.
10. Can the Court have the login information to the PICIS database for in camera review?

Let me know if you have any questions or if I can be of assistance. Have a great week!

Kind regards,

Brook

Brooklyn A. Burroughs

Law Clerk to The Honorable J.C. Nicholson, Jr.

Circuit Court Judge

100 Broad Street

Charleston, South Carolina 29401

Tel: (843) 958-5047

jnicholsonlc@sccourts.org

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# LEVENTIS & RANSOM

## ATTORNEYS AT LAW

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**James J. Leventis**  
jjleventis@aol.com

**Robert B. Ransom**  
bertcone@aol.com

February 24, 2016

Hon. J.C. Nicholson, Jr.  
100 Broad Street, Suite 106  
Charleston, SC 29401

Re: Shon Turner v. MUSC  
2012-CP-10-7275

Dear Judge Nicholson:

In the above-referenced matter, please find an unfiled copy of the Declaration of Robert B. Ransom, which answers the questions posed in Ms. Burrough's January 26, 2016 email. Also enclosed is a copy of the Plaintiff's Motion to Seal relating to what I believe is protectable attorney work-product contained in the Declaration.

I have provided a copy of the Motion to Seal and a redacted copy of the Declaration to opposing counsel. I have not provided the unredacted Declaration to opposing counsel. The original unredacted Declaration has been filed by the Clerk's office in a sealed envelope marked, "Confidential Information to Be Submitted to Court in Connection with Plaintiff's Motion to Seal."

Besides the Declaration, there is another matter which needs to be brought to your attention as you consider the Plaintiff's Motion for Sanctions.

When I originally took Donna Embry's deposition on August 24, 2014, defense counsel objected to certain questions and instructed Nurse Embry not to answer. On December 15, 2014, Judge Dennis issued an Order overruling some of those objections and allowing me to re-depose Nurse Embry.

Subsequent to that Order, MUSC produced the two audit trails, one of which showed that Nurse Embry changed some of Dr. Nelson's entries in the narrative portion of the anesthesia record. MUSC also disclosed the "glitch" and produced the email communications relating to it, all as discussed in detail in my Declaration.

I re-deposed Nurse Embry on February 22, 2016. She testified that late in the afternoon following Mr. Mikell's colonoscopy, she went to check on him in the Intensive Care Unit. Mr. Mikell's hard copy medical chart was in a binder next to his bedside. Nurse Embry said she wanted to finish the narrative entries in the electronic anesthesia record so she took Mr. Mikell's medical chart and went to a computer work station where she could access the electronic record.

February 24, 2016

Page Two

Nurse Embry testified that the code documentation sheet, or Mayday card, was in the binder and she used the information it contained to “complete” the “correct” timing and sequence of events, which had been misstated in the narrative portion of the electronic anesthesia record during the procedure. Nurse Embry said that after doing this, she printed the anesthesia record, reviewed it to make sure all of her modifications had been recorded in the electronic record, and then put the printed record into a shredder bin. Nurse Embry then returned the hard copy medical chart – including the Mayday card – to Mr. Mikell’s bedside. The last time Nurse Embry saw the hard copy medical chart, the Mayday card was affixed to the binder with a multi-hole fastener.

Of course, the Mayday card has never been produced and no explanation has ever been given for why it is missing from the binder containing Mr. Mikell’s hard copy medical chart.

I find Nurse Embry’s testimony remarkable because you will recall that for quite a while MUSC’s position was that there was never any Mayday card because the anesthesia record just is the code documentation for Mr. Mikell’s cardiac arrest. That is the lie which Dr. Guldán swore to under oath when he testified as MUSC’s Rule 30(b)(6) designee on November 4, 2014.

Of further note in this regard is the testimony Nurse Embry gave about the Mayday card at her first deposition on August 26, 2014. I attach two pages from the transcript of that testimony in which she swears under oath, “I’m not sure” and “I don’t recall” when directly asked whether there was a Mayday card for Mr. Mikell’s case. Nurse Embry apparently forgot using the Mayday card to alter the electronic anesthesia record. She also apparently forgot the “glitch,” the email communications, and her alterations when asked to explain the missing data and other discrepancies in the anesthesia record.

I think it is outrageous that Nurse Embry failed to correct her false testimony about the Mayday card when she exercised her right to read and sign the transcript of her August 26, 2014 deposition. I think it is also outrageous that her false testimony was never addressed by defense counsel even after my September 24, 2014 letter to Mr. Cook directly asking him about the Mayday card.

Moreover, Dr. Guldán was subsequently produced as a Rule 30(b)(6) designee to testify that there was no Mayday card for Mr. Mikell’s procedure. Two pages of his testimony are also attached. Dr. Guldán also read and signed his deposition, which neither he nor defense counsel ever lifted a finger to correct until Ms. Fleming’s July 23, 2015 letter obliquely referring to “information . . . different from the information previously presented and that might lead one to infer that there was a code sheet at one time.”

When I asked Nurse Embry at her second deposition why she did not tell me at her first deposition about using the Mayday card to alter the anesthesia record, she said she had not wanted to “volunteer” any information. As though providing truthful answers to direct questions about the Mayday card was considered some sort of inappropriate “volunteering.”

February 24, 2016

Page Three

At her second deposition, I also asked Nurse Embry about the data missing from the spreadsheet portion of the anesthesia record. She testified that the anesthesia software “glitch” was a well-known problem with the PICIS anesthesia software; that she had personally experienced this “glitch” on as many as ten (10) other occasions; that MUSC had held meetings and provided training sessions about what to do when the “glitch” occurred; and that a procedure had been devised to call a technician for help using a pager system.

Most importantly, Nurse Embry testified that in past instances where the “glitch” had occurred, MUSC’s information technology people had been able to “recover” vital signs data saved in the system memory and use it to “repopulate” the chart so that no information was missing or lost. Nurse Embry further testified that a part of the anesthesia equipment she referred to as the “Phillips monitor” captured and stored the patient’s vital signs data (missing in this case) until someone deleted it, so that the anesthesia record could be “repopulated” whenever a “glitch” occurred.

I find this testimony extremely troubling because of the position MUSC has taken throughout this case about the nonexistence of backup anesthesia data. Certainly, the anesthesia record produced by MUSC in this case has never been repopulated with stored vital signs data. What remains unknown is who deleted that stored data, when and why.

Additionally, after Dr. Reeves first disclosed the “glitch” at his September 22, 2015 deposition, I served the Plaintiff’s Second Discovery Request No. 8 (attached) specifically asking, “How many other times has this problem [the “glitch”] resulted in anesthesia data not being recorded in a patient’s anesthesia record?”

MUSC’s answer – signed by Ms. Fleming pursuant to Rule 11 – is this: “MUSC . . . is unable to provide a response to this question.” Unable to provide a response.

Apparently, Nurse Embry was never asked for her response to this question, because her sworn testimony was that the problem occurred “all the time” and happened to her at least ten (10) times.

Please also note that while Nurse Embry described the “glitch” as a well-known problem that happened all the time and received a great deal of attention from MUSC’s technical people, in her answer to Request No. 8, Ms. Fleming describes the “glitch” as follows:

MUSC further objects to Interrogatory No. 8 to the extent that it implies that there was a problem with the electronic medical record, software or hard drive because there was not. The function encountered by Donna Embry, CRNA with regard to being unable to open the patient record in PICIS was a built in safety function . . . .

February 24, 2016

Page Four

To suggest that what Nurse Embry described was not a "problem" but rather the proper operation of "a built in safety function" is disingenuous to the point of double-speak. Are we to understand that MUSC specifically designed its anesthesia software to malfunction, so that patient data had to be repopulated into charts by technicians working from memory storage? Yet this nonsense is representative of the way Ms. Fleming has answered discovery throughout this case. The true nature and scale of this "glitch" was completely obfuscated by Ms. Fleming's blatantly misleading discovery response, which she signed subject to Rule 11.

In summary, Nurse Embry's second deposition shed significant additional light on the false testimony and duplicitous discovery responses which MUSC has persistently advanced without correction throughout this case in an effort to corrupt the pretrial process and perpetrate a fraud upon the court.

When was Plaintiff going to be informed that: (1) Nurse Embry had used the now-missing Mayday card to "correct" the electronic anesthesia narrative; (2) this software "glitch" was happening all the time; but (3) MUSC had a process in place to recover missing data and repopulate the patient record?

If Plaintiff had not obtained a court order and reconvened Nurse Embry's deposition on February 22, 2016, none of this information was ever going to be disclosed because apparently MUSC's legal strategy is to not "volunteer" information.

This outrageous misconduct is especially egregious when the Mayday card appears to be the only accurate, contemporaneous record of what happened to Mr. Mikell, without which even Nurse Embry was unable to reconstruct what happened on the very day of the event itself. Is it any wonder MUSC has no explanation for where the Mayday card is and has repeatedly lied about its existence?

I am happy to provide the court with the transcript of Nurse Embry's February 22, 2016 deposition testimony just as soon as it is available from the court reporter. I ask that you please take this and the Declaration into consideration in deciding the Plaintiff's Motion for Sanctions.

Thank you for your attention to this matter. Please call me if you have any questions or comments.

Very truly yours,



Robert B. Ransom

Enclosures

c: Alissa Fleming, Esq.  
Alex Apostolou, Esq.

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF CHARLESTON )

IN THE COURT OF COMMON PLEAS  
FOR THE NINTH JUDICIAL CIRCUIT  
CIVIL ACTION NO.: 2012-CP-10-7275

SHON TURNER as Personal )  
Representative of the Estate of )  
CHARLES MIKELL, Deceased, )

Plaintiff, )

vs. )

THE MEDICAL UNIVERSITY OF )  
SOUTH CAROLINA, )

Defendant. )

**PLAINTIFF'S MOTION TO SEAL**

FILED  
2016 FEB 22 PM 4: 29  
JULIE J. WILSON  
CLERK OF COURT

TO: ALISSA FLEMING, ESQ., ATTORNEY FOR THE DEFENDANT

YOU WILL PLEASE TAKE NOTICE that the Plaintiff herein, through his undersigned attorneys, will move before the Hon. J.C. Nicholson, Jr., presiding judge for the Charleston County Court of Common Pleas, at such date and time as the Court may hereafter appoint, for an Order sealing the unredacted portions of the Declaration of Robert B. Ransom, on the grounds that: (1) the Declaration contains the mental impressions, conclusions, opinions and legal theories of counsel for the Plaintiff, prepared in anticipation of trial; (2) the Declaration has been prepared at the request of the Court in order to describe in detail the perspective of Plaintiff's counsel on the manner in which discovery abuse in this case has adversely effected trial preparation; and (3) in order to fully respond to the Court's request, counsel must necessarily provide a frank discussion of factual issues and legal strategies to which the Defendant would not normally have access, thereby placing the Plaintiff at a potentially significant disadvantage at the trial of this case.

This Motion is made pursuant to South Carolina Rules of Civil Procedure 26(b)(3) and (5); and 41.1(b). A redacted version of the Declaration is attached hereto. An unredacted version of the Declaration is contained in a sealed envelope marked "Confidential Information to be submitted to Court in Connection with Motion to Seal."

Please be present to defend this Motion if you are so minded.

By: Robert B Ransom

Robert B. Ransom  
Leventis & Ransom  
Post Office Box 11067  
Columbia, SC 29211  
803-765-2383

Alex Apostolou  
3433 Rivers Avenue, North  
Charleston, SC 29405  
803-853-3637

ATTORNEYS FOR THE PLAINTIFF

#### Certificate of Mailing

The undersigned certifies that a true and correct copy of the Plaintiff's Motion to Seal has been served upon opposing counsel by depositing the same in the United States Mail, properly addressed and with sufficient postage affixed, this 22 day of February, 2016.

Robert B Ransom

STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON )

CIVIL ACTION NO.:2012-CP-10-7275

SHON TURNER, as Personal )  
Representative of the )  
ESTATE OF CHARLES MIKELL, )  
deceased, )

Plaintiff, )

**DECLARATION  
OF ROBERT B. RANSOM**

vs. )

MEDICAL UNIVERSITY OF )  
SOUTH CAROLINA, )

Defendant. )

The following detailed information is provided in response to a January 26, 2016 request from the Court. I have personal knowledge of all the facts set forth herein and swear the same to be true and accurate to the best of my knowledge, information and belief.

**Q Specifically, how critical is the information you have struggled to receive, but eventually received, to your causes of action?**

The information is critically important because it goes to the very heart of what transpired during Mr. Mikell's colonoscopy procedure. Simply stated, nothing is more important than the truth.

In order to prove medical malpractice, the Plaintiff must prove the medical care providers acted unreasonably in response to the specific circumstances they faced during Mr. Mikell's colonoscopy. Missing records, altered records, and undisclosed data and information all seriously undermine Plaintiff's ability to recreate the circumstances of what happened and thus evaluate the reasonableness of what the medical care providers did in response.

1. The "glitch" and the emails



The occurrence of a software “glitch” during Mr. Mikell’s colonoscopy was not disclosed to Plaintiff until the September 22, 2015 deposition of Dr. Reeves.

The e-mail communications between Donna Embry and Annette Thompson were not produced to Plaintiff until December 2, 2015.

A detailed factual description of the “glitch” was not provided to Plaintiff until the Affidavit of Annette Thompson, RN was e-mailed to Plaintiff’s counsel on December 7, 2015.

The Thompson Affidavit explains the situation as follows: “Mr. Mikell had not been closed out of the PICIS system prior to being transported to the procedure room” with the result that “certain clinical data was not recorded in the Real Time Variables section of the Anesthesia/PACU Record for the times of 7:35 a.m. through 7:47 a.m. because Mr. Mikell’s record was not open in the PICIS system during that time.”



At her August 24, 2014 deposition, Donna Embry was specifically asked to explain the discrepancies in the real time graphs. She repeatedly said she had “no explanation.” Despite all of Plaintiff’s efforts to find out why the anesthesia record contained empty boxes including a September 4, 2014 letter from Plaintiff’s counsel specifically asking, “Why is there no data recorded for the first six minutes . . . ?” it was not until September 24, 2015 that MUSC identified Annette Thompson as a witness; not until December 2, 2015 that it produced the emails; and not until December 7, 2015 that it provided the Thompson Affidavit. This cannot, under any view of this case, be considered timely disclosure.

By the time this extremely important information was disclosed, all four (4) of the medical care providers in the procedure room during Mr. Mikell’s colonoscopy (Donna Embry, Martha Zwerner, Dr. Payne, Dr. Nelson) had already been deposed along with both of the parties’ retained medical experts (Dr. Kofke and Dr. Berry).

In short, the extraordinarily dilatory disclosure of the software "glitch," the e-mails, and identification of Annette Thompson as a witness, served to deny the Plaintiff *any* opportunity to conduct discovery or to obtain expert review of these critically important issues. None of these disclosures pre-dated the Plaintiff's September 9, 2015 Motion for Sanctions.

2. The Mayday card / NRCPR Database

Without the August 24, 2015 testimony of Sheila Scarborough which followed Dr. Gulden's testimony and required a Motion to Compel, a hearing, an Order, and a six (6) month delay to obtain

Plaintiff would never have learned that the Mayday card was created, then transposed into the NRCPR database, then lost/destroyed. These damaging facts entitle Plaintiff to an important jury instruction and adverse evidentiary inference; and also have significant value as impeachment evidenc

Additionally, the NRCPR database records the specific times at which specific events occurred, so it can be used to either confirm or undermine the veracity of data and information from other sources.

3. The first audit trail

The first audit trail was not produced until February 27, 2015. It is the only evidence showing how and when Donna Embry changed Dr. Nelson's narrative entries in the anesthesia record. Without the first audit trail, Plaintiff could not have discovered these alterations,

The first audit trail was not produced until six months after Donna Embry and Dr. Nelson had already been deposed.

4. The second audit trail

The second audit trail was not produced until September 21, 2015.

5. The backup anesthesia data

The backup anesthesia data

The real time graphs help to [REDACTED]

In other words, [REDACTED]

**Q** Specifically, how critical is the missing information, either unpreserved or destroyed, to your causes of action?

In order to prove his medical malpractice claim, Plaintiff must rely on the testimony of medical experts who must in turn rely upon the medical record to determine what happened. The medical record is literally the foundation upon which Plaintiff's case is built. Any cracks or weaknesses in that foundation necessarily effect Plaintiff's ability to build a strong case.

Critical to the expert review process is the ability to accurately correlate: (1) what's happening with the patient (e.g., heart rate, oxygen saturation, expired carbon dioxide, respirations) with (2) how the medical care providers are reacting (e.g., who is in the room, what they are doing). The reliability of the medical record is dependent upon the data being recorded accurately without any after-the-fact tampering.

If the anesthesia chart and the Mayday record had been created and preserved in the normal course of events, without alteration, loss or destruction, [REDACTED]

The vital signs portion of the anesthesia record, if not filled with empty boxes, would show what was taking place with Mr. Mikell's blood oxygen and exhaled carbon dioxide levels at time intervals as precise as every (10) ten seconds. Without this information, [REDACTED]

The narrative portion of the anesthesia record, if not altered, would show who was present and what they were doing in response to what was happening with the patient.

The real time graphs, [REDACTED], would give a continuous graphic representation of Mr. Mikell's blood oxygen saturation levels during every second of the procedure.

The backup anesthesia data would allow one to associate specific vital signs data with specific times, thereby creating a very detailed and accurate time-line of events.

It is critically important to be able to piece together an accurate picture of what happened to be able to discern the truth of the matter. Each record and each data point are like puzzle pieces. Until each piece is put in its proper place, the full and complete picture cannot be seen. [REDACTED]

[REDACTED]

Especially in the case of a peer reviewed event (where MUSC has withheld certain documents described only by document controls numbers in a privilege log), the Plaintiff must have access to a complete, accurate and reliable record of exactly what happened. Unfortunately, that is not the case in this instance. [REDACTED]

**Q In what format(s) was the information last produced to you prior to the Dec. 11th hearing?**

The first audit trail was produced in electronic format on February 27, 2015.

The second audit trail was produced in hard copy format on September 21, 2015.

The NRCPR database printout was produced in readable hard copy on December 2, 2015.

The backup anesthesia data for the real time graphs was produced in electronic format on December 2, 2015.

The e-mails discussing the software glitch were produced in hard copy on December 2, 2015.

The Affidavit of Amette Thompson, RN was produced in electronic format on December 7, 2015.

**Q Explain how the discovery process has or has not been proportionate to the issues at hand.**

Typically, I serve a general discovery request at the beginning of a case (Plaintiff's First Discovery Request) and receive responsive information sufficient to enable me to identify and begin deposing witnesses within 60 to 90 days. In virtually every case, when counsel realize responsive documents or information have been overlooked e.g., a witness mentions something and counsel realizes it has not been produced; or new issues are identified implicating new record sets the matter is quickly resolved with little disruption to the overall discovery process.

In this case, early on Plaintiff's medical consultant was saying something was amiss with the anesthesia record. I have seen enough anesthesia charts to know they do not usually have a bunch of empty boxes. I tried to be pro-active at the earliest stage of the case, seeking to learn why this particular record was "unique" in its appearance.

Nothing but argument, denial and obfuscation ensued. While discussions were pleasant enough, meaningful disclosure was virtually nonexistent, leading to frustration and consternation. This ultimately lead to multiple written discovery requests, lengthy letters, emails, motions and hearings.

The examples are myriad.

Both Donna Embry and Dr. Nelson were instructed not to answer certain questions at their depositions. The Court ultimately ruled those questions were proper. Dr. Guldan provided false testimony about the code documentation policy. The court ultimately granted relief. But the court had to be involved in both of these issues because MUSC would agree to nothing.

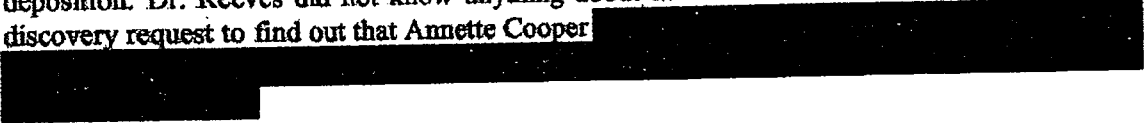
MUSC could not simply admit the Mayday card had been lost/destroyed. Instead, Plaintiff had to write letters that were ignored; ask for the code documentation policy; explain what a code documentation policy is; ask for a 30(b)(6) witness; take his deposition; file a motion; attend a hearing; draft an order; argue about the language of the order; wait for a new designee; schedule two more depositions; receive illegible new records at the last minute; argue about their illegibility; file another motion; attend multiple hearings all to get an admission that there really was a Mayday card after all. Why not just respond to the letter written by Plaintiff's counsel on September 24, 2014 specifically asking about the Mayday card? Mr. Cooke never responded to that letter *no response*. Not even an acknowledgment of receiving it.

MUSC could not simply produce the backup anesthesia data at the beginning of the case. Instead, Plaintiff had to repeatedly ask for it; explain what it is; contend with MUSC's insistence it does not exist; find a description of MUSC's Enterprise Data Warehouse and send it to defense counsel; identify MUSC's Information Technology personnel and send that to defense counsel; consult with the anesthesia software manufacturer in Boston; hire an e-discovery firm; and insist on deposing a witness who could testify about how the PICIS anesthesia system captured, recorded and stored data.

In its July 2, 2015 witness disclosure, MUSC finally identified Patricia Aysse to "testify regarding the PICIS system." When Plaintiff took her deposition on August 24, 2015, she could not explain the empty boxes in the anesthesia chart but she did admit MUSC has a backup data server. Even then, Plaintiff had to file a motion, attend a hearing and dispute a \$2.8M cost estimate before the backup anesthesia data was finally produced on December 2, 2015.

Plaintiff only asked to depose Dr. Reeves when Ms. Aysse could not explain the empty boxes in the anesthesia record. Dr. Reeves was never identified as a witness by MUSC. If Plaintiff had not thought to depose the Department Chairman who ordered the peer review investigation to ask why all the boxes were empty in the anesthesia record, the emails, phone calls and software "glitch" would never have been disclosed by MUSC.

The second audit trail was not produced until September 21, 2015 the afternoon before Dr. Reeves' deposition. Dr. Reeves did not know anything about it. Plaintiff had to serve another written discovery request to find out that Annette Cooper



When Donna Embry was asked on August 24, 2014 what explanation she had for all the empty boxes and the mis-matched real time graphs, why wasn't the software "glitch" identified *right then*, without any of defense counsel's objections? Why weren't the emails between Donna Embry and Annette Thompson disclosed *right then* and produced in response to counsel's September 4, 2014 letter? Why wasn't Annette Thompson identified as a witness *right then*? Why did the disclosure of the software "glitch" have to await the fortuity that Plaintiff deposed Dr. Reeves on September 22, 2015? Why weren't the emails and Thompson Affidavit produced until just before the second hearing on the Plaintiff's Motion for Sanctions?

When Plaintiff's counsel called Ms. Fleming asking for some explanation of the misformatted NPCPR database printout, she responded that counsel would have to ask Ms. Scarborough, who when asked could not explain any of it. When Plaintiff's counsel asked to have the NRCPR database printout produced in legible format, MUSC argued about whether this could be done. Although a readable version of the printout was finally produced on December 2, 2015, Plaintiff has never had any opportunity to depose a witness about what it says or means.

Sorting through all of these problems required the dedication of enormous resources and lead to lengthy delays.

In addition to all the gamesmanship, MUSC seems to have manipulated the timing of every disclosure to suit an ulterior purpose.

The first audit trail was produced on February 27, 2015, just two business days before Plaintiff's expert, Dr. Kofke, was deposed on March 4, 2015. He could not comment on the "glitch," the phone calls or the emails because those things had not yet been disclosed.

At his June 15, 2015 deposition, the defense expert, Dr. Berry, was confronted with the empty boxes in the anesthesia chart and testified they most likely represented a breach of the standard of care. When confronted with Donna Embry's changes to Dr. Nelson's narrative entries in the anesthesia record, Dr. Berry testified he couldn't even believe that was possible.

First, on July 2, 2015, MUSC identified Patricia Aysse as a witness "to testify regarding the PICIS system." No other detail was provided.

Then, on July 23, 2015, MUSC identified Sheila Scarborough as the new Rule 30(b)(6) designee to testify about "information regarding the code sheet/Mayday card that is different from the information previously presented." No further detail was provided.

Finally, on August 12, 2014, MUSC filed a Motion for Partial Summary Judgment.

The Plaintiff deposed Ms. Scarborough and Ms. Aysse on August 24, 2015 thereby learning for the first time about the Mayday card, the NRCPR database and the backup data server. Then the parties participated in mediation on August 28, 2015. But instead of settling the case at mediation, Plaintiff filed a Motion for Sanctions on September 9, 2015 and took the deposition of Dr. Reeves on September 22, 2015, thereby learning for the first time about the second audit trail, the "glitch," and the phone calls.

It was only after the Court held an October 21, 2015 hearing on the Plaintiff's Motion for Sanctions, denied MUSC's Motion for Partial Summary Judgment, and set a second hearing for December 11, 2015 that MUSC finally produced the emails, the readable NRCPR database entries, the backup anesthesia data and the Thompson Affidavit.

In sum, virtually every bit of important information came only at the end of a lengthy fight and even then only when MUSC perceived advantage for itself from the disclosure.

The discovery effort in this case has been *enormously disproportionate* to anything Plaintiff's counsel has ever encountered outside of asbestos litigation or national MDL proceedings against major pharmaceutical companies. Nothing of value has been produced or disclosed by MUSC without a costly, time consuming fight.

**Q** Aside from your request for attorneys fees, which Judge Nicholson finds reasonable thus far, why do you believe the severe sanctions you requested are proportionate to the defendants actions or the harm, if any, caused in the discovery process?

Rule 37 and its interpretive case law say an Order taking certain facts as being established; refusing to allow a party to support or oppose certain claims; prohibiting certain evidence; or striking defenses is justified when there is evidence of "bad faith" or where the record shows "multiple egregious abuses" which have "blocked" a party's efforts to obtain "meaningful discovery." That conduct is present here.

From Plaintiff's perspective, MUSC attempted to obtain resolution of this case based upon a false narrative which omitted disclosure of several very significant adverse facts. Throughout discovery, MUSC presented a skewed version of what actually happened during the colonoscopy.

[REDACTED]

[REDACTED]

Through various tactics deployed at various times, MUSC suppressed discovery and/or obscured disclosure of several highly damaging facts: [REDACTED]

Plaintiff would certainly be interested to know whether any of this information is contained in or revealed by any of the documents described in MUSC's privilege log.

All of this important incriminating information, strongly tending to show MUSC's culpability, has been wrongfully withheld throughout the discovery process. Witnesses with knowledge of bad facts were not timely identified. Designated witnesses testified falsely.

In fairness, the Plaintiff is entitled to ask all of the eyewitnesses to the cardiac arrest [REDACTED]

The Plaintiff is entitled to ask Dr. Berry [REDACTED]

The Plaintiff is entitled to depose someone who can explain the NRCPR database printout and the second audit trail.

These very important issues could have been explored months if not years ago had MUSC truthfully responded to discovery about an adverse event which was the subject of Dr. Reeve's peer review investigation in October 2010. Instead of drilling into the truth, significant time and resources have been wasted investigating a deliberately distorted set of facts. Neither Plaintiff's counsel nor Mr. Mikell's survivors should have to start over again so MUSC can secure further advantage from the virtual fraud it has perpetrated on the discovery process.

The Plaintiff is entitled to full, unimpeded discovery and expert review of all the issues if there is to be a fair trial on liability. But discovery need not be re-opened if the liability issues are determined against MUSC as a sanction for its misconduct. An Order imposing such a sanction will have a salutary deterrent effect on similar behavior by others.

At this point, the Plaintiff and the beneficiaries of Mr. Mikell's estate have been involved in litigation for three (3) years, incurring tens of thousands of dollars in costs. As the old saying goes, "Justice delayed is justice denied." There is no closure for Mr. Mikell's family. His two children were youngsters when he died in January 2011; they are now young adults with litigation still pending. Mr. Mikell's elderly mother was alive when he died; she passed away last fall with this case still pending.

**Q If your claims focus on the breach of the standard of care before the arrest, how is your case harmed by the discovery delays and missing information after that time?**

The missing information memorializes what happened during the period of time from the administration of the anesthetic agent up until and including the cardiac arrest. The vital signs data, anesthesia narrative, email communications, Mayday card, and backup data all bear upon this critical time period.

As explained above, missing and/or unreliable information makes it difficult to create an accurate time-line of events for the retained experts to review. The undeniable fact that critically important incriminating information was not provided by MUSC until December 2015 means the Plaintiff's ability to prepare for trial in timely fashion has simply been obliterated.

**Q In order to prove or rule out the argument that MUSC deleted data, research would be needed. Is it important enough to your case that you would be willing to split the cost for such research?**

Plaintiff has already spent approximately \$3,718.50 consulting with experts in the retrieval of electronically stored information. [REDACTED]

[REDACTED] Significant additional discovery costs loom in order to prepare for trial. While Plaintiff is willing to contribute a reasonable additional amount to verify that electronic data and information have not been deleted, Plaintiff is not currently in a position to commit significant additional resources to such an effort.

BY: \_\_\_\_\_  
Robert B. Ransom

SWORN TO BEFORE ME this  
\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
Notary Public for the State of South Carolina

My commission expires:  
\_\_\_\_\_



Alissa D. Fleming, Esquire  
afleming@barnwell-whaley.com

March 1, 2016

**VIA EMAIL AND U.S. MAIL**

The Honorable J.C. Nicholson, Jr.  
Circuit Court Judge  
100 Broad Street  
Charleston, South Carolina 29401  
[jnicholsonlc@sccourts.org](mailto:jnicholsonlc@sccourts.org)  
[jnicholsonj@sccourts.org](mailto:jnicholsonj@sccourts.org)

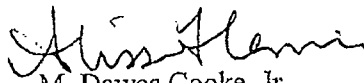
RE: Shon Turner, as Personal Representative of the Estate of Charles Mikell, deceased,  
vs. Medical University of South Carolina  
C/A No.: 2012-CP-10-7275  
BWPB File No.: 1.554

Dear Judge Nicholson:

Please find attached the answers to the ten questions posed by Your Honor on January 26, 2016 in the form of an Affidavit. In addition, we are in receipt of Mr. Ransom's responses, as well as a letter from him to you dated February 24, 2016. Based on the information provided by him, we feel the need to provide Your Honor with a supplemental response to those two documents. In addition, due to the seriousness of the assertions made by Mr. Ransom regarding our alleged abuse of discovery, we respectfully request a hearing on this matter.

Thank you for your consideration.

Sincerely,

  
M. Dawes Cooke, Jr.  
Alissa D. Fleming

MDCjr/ADF/jgc  
Enclosure

cc: **VIA EMAIL AND U.S. MAIL**  
Robert B. Ransom, Esquire  
Alex Apostolou, Esquire

M. Dawes Cooke, Jr.  
B.C. Killough\*  
Randell C. Stoney, Jr.  
Phillip S. Ferderigos  
K. Michael Barfield  
David S. Cox

William C. Helms, III\*  
\* Registered patent attorney  
\* Retired

Ernest B. Lipscomb, III\*  
J. Gail Rahn  
John A. Jones  
Alissa D. Fleming  
Barbara J. Wagner, Ph.D.

John W. Fletcher  
Jeremy E. Bowers  
D. Summers Clarke, II  
Jeffrey M. Bogdan  
Bradley B. Baniias  
Guy M. Dabbs, IV

she would have to view the actual database on the computer and was willing to do so. We could not do that on the day of the deposition because a determination needed to be made about how to view the information in a way that would not compromise or disclose confidential, protected health information of other patients. This was complicated because the database for the AHA is not a database that is supported by MUSC. Rather it is a database that is supported by the AHA and operated through a company called Quintiles, through a website that is hosted by Quintiles.

August 25, 2015: Counsel for MUSC wrote a letter to Mr. Ransom offering to have his forensic IT personnel meet with the appropriate IT personnel from MUSC to discuss what it would require to review and extract data specific to Mr. Mikell from both the PICIS database and the database maintained for the AHA, since the database contained health information of other patients and was not one that was directly supported by MUSC.

September 1, 2015: Mr. Ransom sent a letter to counsel for MUSC stating that his IT personnel are located in Los Angeles. He asked MUSC to provide a username and password for his IT personnel to access the database maintained for the AHA remotely and extract its contents.

September 4, 2015: Plaintiff filed his Motion for Discovery Sanctions against MUSC. The Motion for Discovery Sanctions was filed prior to any response by us to Mr. Ransom's September 1, 2015 letter. We view the issues pertaining to the database for the AHA as complex to solve and had made offers for Mr. Ransom's IT personnel to meet with MUSC's IT personnel to discuss how to accomplish his request to directly view the information/data specific to Mr. Mikell on the computer. We did not feel that Mr. Ransom had consulted with us in good faith before he filed his Motion for Discovery Sanctions against MUSC. We felt – and still feel – that he has unfairly portrayed MUSC and its attorneys as trying to obstruct discovery. In fact we and our clients have gone to extraordinary lengths to satisfy Mr. Ransom's requests, vastly disproportionate to the potential relevance of the data that he has requested.

September 14, 2015: Counsel for MUSC sent a letter to Mr. Ransom explaining that MUSC was in the process of identifying whether the database maintained for the AHA contained protected health information for other patients, which it did, and stating that if it did not, Mr. Ransom could arrange a time to view the data on a computer at MUSC. Incidentally, the database does contain protected health information of other patients. We were not sure that the separate 26-page document that contained only Mr. Mikell's information could be accessed remotely and were trying to determine whether that was possible. We were willing to allow

There is other data in the PICIS database that is specific to Mr. Mikell. Examples of the other data include, but are not limited to, the substantive charting that was done by the nurse anesthetist and anesthesiologist during the colonoscopy. This data is located somewhere in the other 1,602 tables in the PICIS database and has not yet been extracted.

3. In reference to the 26-page illegible document originally produced-- In what format was the document displayed from the computer at MUSC? Was it Microsoft Excel or some type of PICIS chart? If you copy and paste a large group of cells from such a chart into a word processor such as Microsoft Word keeping the text only, is that not what the document you produced resembles? Specifically, the court would like to know if it was originally formatted in a chart, converted to an illegible format, and then converted back to a chart shortly before the hearing.

The 26-page document that was originally produced contained some abbreviations. Ms. Scarbrough could read and explain the document. Ms. Scarbrough was able to answer a number of questions about the information in the document during her deposition. She could not remember what certain language in several of the columns meant, during her deposition, and she said that she would have to refer to the actual database to answer those questions.

The document that was produced was displayed on the computer in Microsoft Excel. The information in that document is not from the PICIS database.

Microsoft Word was not used and was not attempted. Therefore, we do not know what format the information would be displayed if Microsoft Word were used.

The information that was produced in the 26-page document is from the "Get with the Guidelines" database. At the time of Mr. Mikell's event in October of 2010, it was called the "National Registry of CPR (NRCPR)" database. It is a database that is supported by the American Heart Association (AHA). The AHA uses a company named Quintiles to administer the database. The database is not supported by MUSC nor is the username or password to the database administered by MUSC. It is supported and administered by Quintiles.

At the time of Mr. Mikell's event, the database contained information from over 100 hospitals and approximately 1,903 codes that had occurred nationwide. MUSC was one hospital that participated in the registry. The purpose of the database is quality improvement. It evaluates when chest compressions were initiated and tracks various metrics.

When Ms. Scarbrough was asked to try and locate information about Mr. Mikell's code for this lawsuit, she searched the database on the Quintiles website for codes that occurred during the last quarter (October, November and December) of 2010. She then downloaded data directly from the Quintiles website into a Microsoft Excel

the "look-up" function, went to the patient tab and searched using Mr. Mikell's patient identification number. That is how she found the information in the database, specific to Mr. Mikell, in isolation. After Ms. Scarbrough found the information for Mr. Mikell, she selected the "exit" function and selected the "print" function. The information printed, directly from the Quintiles website, in the PDF format that was produced.

As previously stated, Ms. Scarbrough did not know that she could print the information in the database specific to Mr. Mikell from the Quintiles website in PDF format. She figured this out through trial and error after we asked her to determine if it was possible for the information to be produced in a format that was easier for someone who is not familiar with the database to read. This is the reason that the information from the NR CPR/Get with the Guidelines database for the AHA was not produced in the PDF format originally.

5. If mass amounts of information got copied and pasted cell by cell, how can you be sure there are no alterations, mistakes, or missing information, either intentionally or as a result of human error?

Ms. Scarbrough says that she did not cut and paste information cell by cell. Rather, she downloaded the information directly from the Quintiles website using the "download" function.

We could verify that there are no alterations, mistakes, or missing information by viewing the data directly in the database instead of on the 26-page Excel document or the PDF.

6. Who did the conversion to a legible format? In detail, how was it done?

Ms. Scarbrough printed the information in the PDF format. She said that she did not actually convert it. As outlined in response to question number 4, Ms. Scarbrough entered Mr. Mikell's patient identification number into the Quintiles website and searched the database by entering that number. She was then able to view the information specific to Mr. Mikell in the database. Instead of choosing the "download" function in Quintiles, she used the "look-up" function, went to the "patient" tab and searched using Mr. Mikell's patient identification number. That is how she found the information in the database, specific to Mr. Mikell, separate from information for other patients. After Ms. Scarbrough found the information for Mr. Mikell, she selected the "exit" function and then selected the "print" function. The information from the database, specific to Mr. Mikell, was printed directly from the Quintiles website, in the PDF format and produced.

7. According to the timeline you submitted, you were aware the information from the Mayday card was sent to the American Heart Association's database by July of 2015. Why didn't you provide the information from their records sooner?

The order in which the records generated by the database are presented are based on whatever sorting algorithm the database chooses to use at the time of extraction. The information can be re-run to force the sorting to be by date.

9. Please provide the court with electronic versions, including all metadata, of the original illegible document and the later legible document in their original formats rather than PDF, which eliminates tracked changes.

We are not entirely sure what Your Honor means by "metadata." The PDF version of the document was the original format for that document as it was directly downloaded in that format from the Quintiles website.

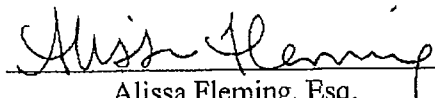
Upon information and belief, if data is downloaded directly from a database, there may not be metadata for that data.

10. Can the Court have the login information to the PICIS database for in camera review?

The PICIS database can be accessed remotely or on-site at MUSC.

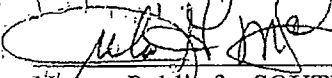
The data in the PICIS database would not be intelligible to a non-computer science trained person. Also, the user application would not be understandable to someone unfamiliar with it. We will make MUSC's computer science personnel available to review the information in the PICIS database and the PICIS user application with the Court. The two individuals who may assist the Court with this are John Fisher and Annette Thompson.

FURTHER AFFIANT SAYETH NOT.

  
Alissa Fleming, Esq.

SWORN to before me this

1<sup>st</sup> day of March, 2016

  
Notary Public for SOUTH CAROLINA  
My Commission Expires: 5/23/2016

## **Nicholson, J. C. Law Clerk (Brooklyn A. Burroughs)**

---

**From:** BertCone@aol.com  
**Sent:** Thursday, March 03, 2016 10:49 AM  
**To:** Nicholson, J. C. Law Clerk (Brooklyn A. Burroughs); Nicholson, J. C.  
**Cc:** alex@apostoloulaw.net; afleming@barnwell-whaley.com; bertcone@aol.com  
**Subject:** Re: Mikell v MUSC; C/A No.: 2012-CP-10-7275  
**Attachments:** Donna Embry Depo - 2.zip

**Follow Up Flag:** Follow up  
**Flag Status:** Flagged

Dear Brook,

I apologize for having to make one last submission on the Plaintiff's Motion for Sanctions, but in order to complete the record, I need to provide the attached transcript of the deposition I obtained from Donna Embry, CRNA on February 22, 2016.

Among other things, Nurse Embry testified:

1. that the empty boxes in the anesthesia record were caused by a problem with the monitors and the anesthesia machine not communicating with the PICIS software. See, pages 26 - 31.
2. this was a well-know problem with the PICIS software which had happened to Nurse Embry as many as ten (10) other times and which had been discussed by MUSC at various department meetings. See, pages 28, 38 - 39, 48, 166 - 167 and 208.
3. it was Nurse Embry's understanding, based on prior instances when the problem occurred, that a technician would fix the problem, recapture missing data from a storage memory, and use that data to repopulate the patient's chart so that no data would be missing. See, pages 34 - 37 and 95 - 108.
4. in the late afternoon following Mr. Mikell's procedure, Nurse Embry used the Mayday card or code sheet, which she found in his hard copy hospital chart, to complete the electronic anesthesia record. See, pages 98 - 111.
5. Nurse Embry explained why she had not mentioned the software problem or her use of the Mayday card at her first deposition at pages 214 - 218.

If any of this information had been supplied at or near the time of Nurse Embry's first deposition (Aug 26, 2014), my client and I would have had almost 19 months to develop these issues with any number of other witnesses prior to trial. Instead, this information was not revealed until February 22, 2016, less than two months prior to the April 18, 2016 date certain trial date and long after important witnesses were already deposed.

Again, thank you for the court's patient consideration of this information.

Best regards,

Rob Ransom  
803-765-2383  
[bertcone@aol.com](mailto:bertcone@aol.com)

In a message dated 3/2/2016 10:31:41 A.M. Eastern Standard Time, JNicholsonLC@sccourts.org writes:

That will not be a problem since Judge Nicholson is not hearing motions during that time anyway. If he decides he does want to have a hearing I will let you all know and I'll make sure it does not interfere with your trip.

## **Nicholson, J. C. Law Clerk (Brooklyn A. Burroughs)**

---

**From:** M. Dawes Cooke <mdc@barnwell-whaley.com>  
**Sent:** Thursday, March 17, 2016 7:00 PM  
**To:** Nicholson, J. C. Law Clerk (Brooklyn A. Burroughs)  
**Cc:** alex@apostoloulaw.net; Deborah Tolle; Alissa Fleming; BertCone@aol.com  
**Subject:** Re: Mikell v MUSC; C/A No.: 2012-CP-10-7275  
**Attachments:** image001.jpg

Brook, Alissa forwarded this to me. Mr. Ransom submitted a Declaration on February 22 and a letter on February 24. These were ostensibly in response to Judge Nicholson's questions of January 26, but they made some very disturbing claims that MUSC, Ms. Fleming, and I have deliberately obstructed discovery and falsified discovery responses. We requested a hearing and an opportunity to respond to these claims. We have worked very hard to prepare a detailed and accurate written response. We would have submitted it by now, but I have been immersed in preparing for a trial that is set to begin on Monday. We still very urgently request an opportunity to respond to these horrific allegations, because they are simply not true.

We appreciate the need for this case to move forward to trial. I would respectfully ask that Judge Nicholson consider allowing us to proceed with the depositions of the four people that Mr. Ransom selects and allow Mr. Ransom to submit his fee petition, but to hold in abeyance the imposition of sanctions until you have our response. We requested a hearing due to the gravity of Mr. Ransom's accusations, but if Judge Nicholson will not hear us we would ask that he at least receive our written response.

I regret that you and Judge Nicholson have had to spend the time on this that you have on this matter. It is unlike anything I can recall having experienced in almost thirty-five years of practice.

**M. DAWES COOKE, JR.**  
**BARNWELL WHALEY PATTERSON & HELMS, LLC**  
288 Meeting Street | Charleston SC 29401 | 843.577.7700  
[mdc@barnwell-whaley.com](mailto:mdc@barnwell-whaley.com) | [Firm Website](#) | [Bio](#) | [vCard](#)



### **CONFIDENTIAL**

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**From:** Nicholson, J. C. Law Clerk (Brooklyn A. Burroughs) [<mailto:JNicholsonLC@sccourts.org>]  
**Sent:** Thursday, March 17, 2016 3:37 PM  
**To:** [BertCone@aol.com](mailto:BertCone@aol.com); Nicholson, J. C.  
**Cc:** [alex@apostoloulaw.net](mailto:alex@apostoloulaw.net); Alissa Fleming  
**Subject:** RE: Mikell v MUSC; C/A No.: 2012-CP-10-7275



M. Dawes Cooke, Jr., Esquire  
Alissa D. Fleming, Esquire

March 18, 2016

**VIA EMAIL ONLY**

The Honorable J.C. Nicholson, Jr.  
Circuit Court Judge  
100 Broad Street  
Charleston, South Carolina 29401  
[jnicholsonlc@sccourts.org](mailto:jnicholsonlc@sccourts.org)  
[jnicholsonj@sccourts.org](mailto:jnicholsonj@sccourts.org)

RE: Shon Turner, as Personal Representative of the Estate of Charles Mikell, deceased,  
vs. Medical University of South Carolina  
C/A No.: 2012-CP-10-7275  
BWPB File No.: 1.554

Dear Judge Nicholson:

Please allow this letter to provide you with a supplemental response to Mr. Ransom's correspondence dated February 22, 2016 and February 24, 2016. We are deeply troubled by the serious allegations that he makes against both our client and us with regard to falsification of information. We feel that this response is necessary to correct important factual inaccuracies in the information conveyed by Mr. Ransom and to help provide further clarification regarding the issues before Your Honor in the Motions for Sanctions. These allegations are serious enough that we very respectfully request a hearing before Your Honor takes any action on them.

Mr. Ransom's statements and our responses follow:

1. Your Honor's first question to Mr. Ransom was: "Specifically, how critical is the information you have struggled to receive, but eventually received, to your causes of action?" Mr. Ransom stated: "The occurrence of a software 'glitch' during Mr. Mikell's colonoscopy was not disclosed to Plaintiff until the September 22, 2015 deposition of Dr. Reeves."

M. Dawes Cooke, Jr.  
B.C. Killough\*  
Randell C. Stoney, Jr.  
Phillip S. Ferderigos  
K. Michael Barfield  
David S. Cox

William C. Helms, III\*  
\* Registered patent attorney  
\* Retired

Ernest B. Lipscomb, III\*  
J. Gail Rahn  
John A. Jones  
Alissa D. Fleming  
Barbara J. Wagner, Ph.D.

John W. Fletcher  
Jeremy E. Bowers  
D. Summers Clarke, II  
Jeffrey M. Bogdan  
Bradley B. Bantias  
Guy M. Dabbs, IV

Regardless of the appearance of the graph, John Fisher, the Program Manager, Enterprise Architecture Development, Office of the Chief Information Officer (OCIO), and Brett Seyfried, Director, Clinical Systems at MUSC, told Mr. Ransom that there is no vital sign data in the PICIS database for any times prior to 7:48 a.m. This includes the graph.

Plaintiff did not specifically request information about who logged on to the anesthesia record until November 19, 2014. In response, MUSC produced what Mr. Ransom refers to as the "first audit trail." With regard to the "second audit trail" that was produced on September 21, 2015, MUSC produced this after digging deeper into the PICIS software and discovering that it existed.

It is thus very misleading to claim that MUSC failed to disclose a computer "glitch" until September, 2015. Mr. Ransom frequently misunderstands or misinterprets information provided to him and then says that we or MUSC have misled him.

Finally, it should be noted that Mr. Ransom did not answer the Court's very pertinent question as to how critical this information is to his case. He claims emphatically that the information is "critically important" because he has to prove medical malpractice, but he does not explain how the missing information in this inquiry could possibly help him prove his case. No previously missing data that has been recovered helps to establish any part of Plaintiff's malpractice claims.

2. Your Honor's second question to Mr. Ransom was: "[s]pecifically, how critical is the missing information, either unpreserved or destroyed, to your causes of action?" In response, Mr. Ransom stated: "[t]he vital signs portion of the anesthesia record, if not filled with empty boxes, would show what was taking place with Mr. Mikell's blood oxygen and exhaled carbon dioxide levels at time intervals as precise as every (10) ten seconds."

MUSC responds to this as follows: Importantly, blood oxygen saturation levels (SpO2%) and end tidal carbon dioxide (EtCO2) or what Mr. Ransom refers to as "exhaled carbon dioxide", are recorded for approximately 8 minutes before Mr. Mikell developed a junctional heart rhythm at 7:56 a.m. It was the junctional heart rhythm at 7:56 a.m. that precipitated the code or Mayday being called. The oxygen saturation levels and carbon dioxide levels were recorded in the "Real Time Variables" section of the Anesthesia Record beginning at 7:48 a.m. and were recorded every minute thereafter up to and through the time of the Mayday. This was confirmed by John Fisher following the hearing before Your Honor on December 11, 2015.

As previously explained to Mr. Ransom, the "Real Time Data Graph" is distorted in the one minute version of the Anesthesia Record (which is not the standard version). The most accurate version of the graph is contained in the fifteen minute version of the record. The data displayed in "graph" format for each time, for example 7:45 a.m. and 8:00 a.m., represents an average of the oxygen saturation levels over that fifteen minute period of time. The actual numeric value for the oxygen saturation level is recorded every minute in the "Real Time Variables" section beginning at 7:48 a.m. Mr. Ransom's statement about how the data is recorded in the "Real Time Graph" section of the record is not correct. Pat Aysse, RN explained this to him in her deposition on August 24, 2015. In her deposition, Ms. Aysse explained, "The SpO2 information is also down below in the graph, which is the same information or can be the same information as what's captured at the top. Without seeing it in the electronic version, I cannot

The Honorable J.C. Nicholson, Jr.  
March 18, 2016  
Page 5

In his letter dated February 24, 2016, Mr. Ransom, again, states that Donna Embrey was instructed not to answer certain questions during her August 24, 2014 deposition and that Judge Dennis overruled some of the objections. Ms. Embrey was instructed not to answer certain questions because the questions concerned the peer review process, which is protected from discovery by statute, specifically, S.C. Code Ann § 40-71-10 and 20(A), et seq. and 42 U.S.C. § 299(B)(21). Judge Dennis did not categorically overrule the objections. Rather, his December 9, 2014 Order specifically stated that Plaintiff was permitted to “reconvene the depositions of Dr. Nelson, Dr. Payne and Nurse Embrey for the limited purpose of discovering whether any of them were involved in a medical staff committee investigation into Mr. Mikell’s care, including whether the witnesses provided oral or written statements to the committee; *See*, SCRCF 30(j)(3). It is further ORDERED that none of the three witnesses shall be required to disclose the substance or content of any of the information they may have provided to the medical staff committee.”

In her deposition dated February 22, 2016, Ms. Embrey did explain that she went back into Mr. Mikell’s Anesthesia record on the evening of October 1, 2010 while Mr. Mikell was in the MSICU. She testified that she looked at the code sheet and does not believe that she ever actually took it out of his record – the paper copy of his record. This is discussed on page 110 of her deposition dated February 22, 2016. Ms. Embrey testified that she was not concerned with anything that happened prior to 7:55 a.m., which was when Mr. Mikell became unstable. Ms. Embrey explained that looking at the code sheet enabled her to sync the time that CPR was started. She specifically stated, “That’s how I synced when CPR started, et cetera.” Ms. Embrey also used the code sheet to “make sure of the time stamps on when we started CPR and when we defibrillated and that kind of stuff.” She explained that after she reviewed the code sheet, she put the chart back where she obtained it in the MSICU. She testified that she never physically removed the Mayday Card from Mr. Mikell’s medical record binder.

With regard to the Real Time Graph section of the Anesthesia Record, Ms. Embrey testified that she does not know why the graph appears to be compressed. She testified that the Graph contained in the fifteen minute record of the chart appeared to be most accurate because it indicated a decrease in Mr. Mikell’s oxygen saturation sometime between 7:45 a.m. and 8:00 a.m.

In his letter to Your Honor, Mr. Ransom completely neglects to mention that after the December 11, 2015 hearing before Your Honor, MUSC’s IT personnel met with him and explained both sections of the Anesthesia Record. During this meeting, John Fisher and Brett Seyfried explained and reviewed the vital sign data that was extracted from the PICIS database. They confirmed that no vital sign data exists in PICIS prior to 7:47 a.m. for either the Real Time Variables or Real Time Data Graph sections of the Anesthesia Record. Yet, Mr. Ransom continues to distort this information and refuses to accept the explanations provided.

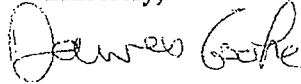
Mr. Ransom spent an inordinate amount of time questioning Donna Embrey about the graphic portion of the record. She repeatedly told him that he needed to ask IT about the data graph and the information in the graph.

Mr. Ransom’s portrayal of the PICIS software and what he calls a “glitch” is, likewise, disingenuous. What occurred in this case was nothing more than a computer software issue that required

The Honorable J.C. Nicholson, Jr.  
March 18, 2016  
Page 7

We understand and appreciate that Your Honor does not want yet another hearing in this matter. We believe, however, that the Court would discover the truth of this matter by closely questioning the attorneys and key MUSC personnel.

Sincerely,



M. Dawes Cooke, Jr.  
Alissa D. Fleming

MDCjr/ADF/jgc  
Enclosures

cc: VIA EMAIL AND U.S. MAIL  
Robert B. Ransom, Esquire  
Alex Apostolou, Esquire

## **Nicholson, J. C. Law Clerk (Brooklyn A. Burroughs)**

---

**From:** Alissa Fleming <afleming@barnwell-whaley.com>  
**Sent:** Friday, September 09, 2016 9:21 AM  
**To:** Nicholson, J. C. Law Clerk (Brooklyn A. Burroughs); Robert Ransom  
**Cc:** alex@apostoloulaw.net; Deborah Tolle; metzekk@gmail.com; M. Dawes Cooke; Julia Childers  
**Subject:** RE: Mikell v MUSC - 2012-CP-10-7275

**Follow Up Flag:** Follow up  
**Flag Status:** Completed

Hi Brook:

I apologize for not replying sooner. However, I've now had the opportunity to fully review Mr. Ransom's proposed Order. We have several objections to his characterization of the facts, evidence, and findings and would like to preserve our objections for the record. One characterization that is particularly concerning is his characterization that witnesses provided false testimony and discovery responses were deliberately withheld to conceal bad facts. If Judge Nicholson prefers not to have a detailed commentary on our objections, then please allow this correspondence to notify the court that we have objections to the proposed Order and want to preserve them for the record.

Thank you again,  
Alissa

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STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF CHARLESTON )  
  
SHON TURNER, as Personal )  
Representative of the )  
ESTATE OF CHARLES MIKELL, )  
deceased, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
MEDICAL UNIVERSITY OF )  
SOUTH CAROLINA, )  
 )  
Defendant. )

IN THE COURT OF COMMON PLEAS  
CIVIL ACTION NO.: 2012-CP-10-7275

**AFFIDAVIT OF ROBERT B. RANSOM**

PERSONALLY APPEARED BEFORE ME the undersigned who, being duly sworn, deposes and states as follows:

1. I am over the age of eight (18) years, am legally competent to make this affidavit, and have personal knowledge of the matters set forth herein.
2. I am lead counsel for the Plaintiff in the above-captioned action.
3. I was admitted to the South Carolina Bar in November 1988 and have been a member in good standing, engaged in the private practice of law, for over 27 years. Among other positions, I have served on the South Carolina Bar's Ethics Advisory Committee; been a member of the South Carolina Trial Lawyers Association (Legislative Steering and Amicus Curae Committees); a member of the South Carolina Association for Justice; a member of the American Trial Lawyers Association (President's Club); a member of the American Association for Justice; a member of the Southern Trial Lawyers Association; a member of

the South Eastern Admiralty Law Institute (Charleston Harbor Master); a member of the National Trial Lawyers; a member of the American Judicature Society; and served as a Special Judge for the City of Goose Creek, South Carolina.

4. Over the last ten years, my practice has focused primarily on representing patients injured by medical malpractice. I have been recognized in that area of practice as a South Carolina Super Lawyer each year since 2009. I have also been recognized by the American Trial Lawyers Association as a Top 100 Trial Lawyer each year since 2009.
5. My current billing rate for hourly work is \$450.00 per hour.
6. The time entries set forth below document the effort undertaken by me to address and respond to the various discovery issues which are the subject of the Plaintiff's Motion for Discovery Sanctions, filed in the within-captioned action.

FURTHER AFFIANT SAYETH NAUGHT.

BY:

Robert B. Ransom  
Robert B. Ransom

SWORN TO BEFORE ME this

4 day of January, 2010

Kristen Arza

Notary Public for the State of South Carolina

My commission expires:

JULY 13, 2025

**TIME RECORD FOR Estate of Charles Mikell**

| <u>Date:</u> | <u>Time:</u> | <u>Description:</u>                                                                                                                                                         |
|--------------|--------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 09/04/14     | 3.7          | letter to Alissa Fleming about Mayday card and anesthesia chart discrepancies                                                                                               |
| 09/18/14     | 0.2          | letter to Alissa Fleming asking to depose witnesses who can answer the issues identified in the letter dated Sep 4, 2014                                                    |
| 09/24/14     | 1.2          | prepare Second Request for Admission                                                                                                                                        |
| 09/24/14     | 0.6          | letter to Dawes Cooke concerning code documentation / Mayday card and testimony of Dr. Payne                                                                                |
| 10/07/14     | 0.7          | meet with Alissa Fleming and Lisa Kindy to discuss the issues outlined in the letter dated Sep 4, 2014                                                                      |
| 10/15/14     | 0.2          | letter to Alissa Fleming about producing Dr. Guldan to testify about code documentation policies                                                                            |
| 10/30/14     | 0.8          | review MUSC's Response to Second Request for Admission, including Emergency Medical Response Policy (Mayday Policy)                                                         |
| 10/31/14     | 0.4          | letter to Alissa Fleming regarding Mayday Policy and Mayday card                                                                                                            |
| 11/03/14     | 0.7          | prepare for deposition of Dr. Guldan - 30(b)(6) designee                                                                                                                    |
| 11/04/14     | 4.8          | travel to Charleston and appear at the deposition of George Guldan, MD                                                                                                      |
| 11/15/14     | 0.2          | letter from Alissa Fleming about Emergency medical response Policy and deposition of Dr. Guldan                                                                             |
| 11/19/14     | 0.3          | letter to Alissa Fleming about discrepancy between "code policy" and "Mayday policy" and remaining issues about the anesthesia record                                       |
| 12/05/14     | 1.3          | search MUSC public web page and retrieve information and materials relating to Enterprise Data Warehouse                                                                    |
| 12/05/14     | 0.6          | letter to Alissa Fleming about EndoWorks records, Mayday policy, and Enterprise Data Warehouse                                                                              |
| 12/10/14     | 0.3          | emails with Adam Bridge at Optum to see if he can provide technical assistance with recovering any backup anesthesia data                                                   |
| 01/06/15     | 0.2          | email from Eileen Sullivan at Optum concerning inquiry about PICIS data at MUSC                                                                                             |
| 01/06/15     | 0.4          | letter to Alissa Fleming regarding anesthesia records and how the anaesthesia system displays, captures, records, stores, and prints information                            |
| 01/07/15     | 0.4          | telephone call with Eileen Sullivan at Optum to discuss what would be necessary to search MUSC server for backup anesthesia data                                            |
| 01/07/15     | 0.3          | letter to Eileen Sullivan at Optum providing portions of the MUSC anesthesia record for her review                                                                          |
| 01/07/15     | 0.2          | letter to Alissa Fleming asking for product identification information on PICIS system (requested by Eileen Sullivan)                                                       |
| 01/14/15     | 0.4          | telephone conference with Eric Bolden, Jeff Whitney and Eileen Sullivan at Optum to discuss how backup anesthesia data might be extracted from MUSC's data warehouse server |

|          |     |                                                                                                                                                            |
|----------|-----|------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 01/23/15 | 0.2 | review letter from Alissa Fleming concerning issues with the anesthesia data and the PICIS software system                                                 |
| 01/27/15 | 1.3 | prepare Motion to Compel regarding Guldan testimony                                                                                                        |
| 01/29/15 | 1.1 | prepare Third Request for Admissions                                                                                                                       |
| 01/29/15 | 0.2 | letter to Alissa Fleming about anesthesia record issues and Third Request for Admission                                                                    |
| 01/30/15 | 0.2 | letter to Alissa Fleming with filed Motion to Compel                                                                                                       |
| 02/15/15 | 0.2 | letter from Alissa Fleming concerning OR code documentation policy                                                                                         |
| 03/02/15 | 0.6 | review Response to Third Request for Admissions                                                                                                            |
| 03/03/15 | 5.4 | travel to Charleston for hearing on motion to compel regarding Dr. Guldan testimony                                                                        |
| 03/04/14 | 0.8 | prepare proposed order for Judge Stilwell and forward to court via email.                                                                                  |
| 03/04/15 | 0.2 | review email from Alissa Fleming noting her objections to the proposed order for Judge Stilwell                                                            |
| 03/04/15 | 0.2 | review and respond to emails from Judge Stilwell's law clerk and Alissa Fleming concerning proposed order                                                  |
| 03/05/15 | 0.2 | letter to Alissa Fleming again asking for product identification information on PICIS system                                                               |
| 03/07/15 | 4.2 | review Audit Trail for anesthesia record and reconstruct modifications, alterations and deletions                                                          |
| 03/23/15 | 0.2 | review letter from Alissa Fleming concerning PICIS software version being used at the time in question                                                     |
| 03/26/15 | 0.2 | exchange email with Charlie Batch at Online Security concerning consulting on backup anesthesia data issue                                                 |
| 05/13/15 | 0.3 | telephone conversation with Charlie Batch at Online Security to discuss retaining his firm to consult on backup anesthesia data problem                    |
| 05/14/15 | 0.4 | review retainer agreement from Online Security and arrange for payment                                                                                     |
| 06/02/15 | 0.2 | email from Charlie Balot with executed retainer agreement for Online Security consultation                                                                 |
| 07/09/15 | 0.2 | letter to Alissa Fleming asking to schedule depositions of 30(b)(6) designee and Pat Aysse, among others                                                   |
| 07/28/15 | 0.3 | review letter from Alissa Fleming about different information to be supplied by Sheila Scarborough                                                         |
| 06/09/15 | 0.2 | email from Charlie Balot at Online Security seeking to schedule teleconference                                                                             |
| 07/03/15 | 0.2 | review discovery response identifying Pat Aysse as witness about PICIS system                                                                              |
| 07/28/15 | 0.2 | letter from Alissa Fleming advising Sheila Scarbrough has information about the Mayday card which is "different than previously provided"                  |
| 08/17/15 | 4.5 | travel to Charleston and appear at reconvening of Dr. Nelson's deposition to inquire about audit trail and changes to his entries in the anesthesia record |
| 08/20/15 | 0.2 | email from Kevin Borkowski with NRCPR document for Sheila Scarbrough's deposition                                                                          |

|          |     |                                                                                                                                         |
|----------|-----|-----------------------------------------------------------------------------------------------------------------------------------------|
| 08/20/15 | 0.2 | review NRCPR document (incomprehensible format)                                                                                         |
| 08/21/15 | 0.2 | telephone call to Alissa Fleming about the formatting of the NRCPR document                                                             |
| 08/24/15 | 7.0 | travel to Charleston and appear at the depositions of Sheila Scarborough and Patricia Aysse                                             |
| 08/25/15 | 2.0 | prepare motion for discovery sanctions                                                                                                  |
| 08/25/15 | 0.3 | letter to Alissa Fleming about Aysse/Scarborough testimony concerning Mayday card and backup anesthesia data                            |
| 08/26/15 | 5.0 | review discovery materials and correspondence to support motion for discovery sanctions                                                 |
| 08/27/15 | 2.0 | travel to Charleston for mediation                                                                                                      |
| 08/27/15 | 1.5 | meet with client and Mr. Apostolou to discuss mediation prospects and strategy                                                          |
| 08/28/15 | 4.8 | attend failed mediation and travel to Columbia                                                                                          |
| 08/31/15 | 4.3 | conduct legal research and revise motion for discovery sanctions                                                                        |
| 09/01/15 | 0.4 | telephone conversation with Charlie Batch and Richard Gralnik at Online Security to discuss assistance with electronic discovery issues |
| 09/02/15 | 0.7 | discuss motion for discovery sanctions with Alex Apostolou                                                                              |
| 09/04/15 | 3.2 | finalize motion for discovery sanctions                                                                                                 |
| 09/04/15 | 0.2 | letter to Clerk of Court with Motion for Discovery Sanctions                                                                            |
| 09/04/14 | 0.2 | letter to Alissa Fleming concerning Motion for Discovery Sanctions                                                                      |
| 09/14/15 | 0.2 | email from Charlie Balot seeking to set up telephone conference with Online Security                                                    |
| 09/15/15 | 0.2 | review letter from Alissa Fleming describing effort needed to recover backup anesthesia data                                            |
| 09/15/15 | 2.0 | research on rules concerning electronic discovery                                                                                       |
| 09/15/15 | 0.2 | review discovery response identifying Annette Thompson, Desiree Tillman and Lucinda Banks as witnesses on the PICIS system              |
| 09/21/15 | 0.7 | review MUSC's Amended Responses to Second and Third Requests for Admission                                                              |
| 09/22/15 | 5.2 | travel to Charleston and appear at deposition of Dr. Reeves to inquire about empty boxes in anesthesia record                           |
| 09/29/15 | 3.0 | draft supplemental memorandum on motion for discovery sanctions                                                                         |
| 09/30/15 | 2.6 | draft supplemental memorandum on motion for discovery sanctions                                                                         |
| 10/02/15 | 6.5 | draft supplemental memorandum on motion for discovery sanctions                                                                         |
| 10/08/15 | 9.0 | draft supplemental memorandum on motion for discovery sanctions                                                                         |
| 10/11/15 | 2.3 | revise supplemental memorandum on motion for discovery sanctions and begin to organize exhibits                                         |
| 10/12/15 | 5.8 | finalize supplemental memorandum on motion for discovery sanctions along with exhibits and prepare for filing                           |
| 10/13/15 | 0.2 | email from Charlie Balot seeking to set up telephone conference with Online Security                                                    |
| 10/14/15 | 0.6 | telephone call with Charlie Batch of Online Security concerning backup                                                                  |

|          |     |                                                                                                                                                                 |
|----------|-----|-----------------------------------------------------------------------------------------------------------------------------------------------------------------|
|          |     | anesthesia data                                                                                                                                                 |
| 10/14/15 | 2.3 | travel to Charleston to file supplemental memorandum on motion for discovery sanctions                                                                          |
| 10/14/15 | 0.2 | review email communications between Richard Gralnik at Online Security and Tom at Optum concerning creation of a working PICIS environment at MUSC              |
| 10/15/15 | 0.2 | review email from Bobby Mazzarino at Optum to Richard Gralnik at Online Security concerning fees for extracting backup anesthesia data from MUSC data warehouse |
| 10/15/15 | 0.2 | discuss motion for discovery sanctions with Alex Apostolou                                                                                                      |
| 10/16/15 | 2.3 | review MUSC memorandum in opposition to motion for discovery sanctions                                                                                          |
| 10/20/15 | 0.4 | review draft affidavit from Richard Gralnik at Online Security                                                                                                  |
| 10/20/15 | 0.2 | review email communications between Bobby Mazzarino and Richard Gralnik concerning technical requirements for database restoration                              |
| 10/21/15 | 5.0 | travel to Charleston and appear at hearing on motion for sanctions and motion for partial summary judgment                                                      |
| 12/11/15 | 5.5 | travel to Charleston and appear at hearing on motion for sanctions                                                                                              |
| 12/20/15 | 0.4 | review letter from Alissa Fleming to Judge Nicholson concerning Mayday card and sanctions                                                                       |
| 12/31/15 | 1.5 | draft letter to Judge Nicholson responding to Alissa Fleming's letter                                                                                           |
| 01/04/16 | 1.3 | finalize letter to Judge Nicholson along with attorneys fee affidavit                                                                                           |

**TOTAL TIME: 129.8 hours**

# LEVENTIS & RANSOM

ATTORNEYS AT LAW

Post Office Box 11067  
Columbia, South Carolina 29211

1913 Bull Street  
Columbia, South Carolina 29201

Telephone (803) 765-2383  
Facsimile (803) 799-1612 (fax)

**James J. Leventis**  
jileventis@aol.com

**Robert B. Ransom**  
bertcone@aol.com

January 5, 2016

Hon. J.C. Nicholson, Jr.  
100 Broad Street, Suite 106  
Charleston, SC 29401

VIA EMAIL: [jnicholsonlc@sccourts.org](mailto:jnicholsonlc@sccourts.org)

Re: Shon Turner v. MUSC  
2012-CP-10-7275

Dear Judge Nicholson:

At your request, yesterday I submitted an Affidavit in support of an award of attorneys fees and costs on the Plaintiff's Motion for Discovery Sanctions.

Not soon after doing so, I received an Invoice from Online Security, a California-based information technology company I consulted with regarding MUSC's position on the backup anesthesia data issue. Online Security was retained to help counter MUSC's initial claim that there was no backup data and its subsequent claim that it would cost \$2.8 million to retrieve the backup data.

I am attaching a Supplemental Affidavit to include the amount of the Online Security invoice (\$3,718.00) in the request for attorneys fees and costs. I will have the Supplemental Affidavit filed with the Clerk of Court later this week.

Thank you for your attention to this matter. Please call me if you have any questions or comments.

Very truly yours,



Robert B. Ransom

Attachment

c: M. Dawes Cooke, Jr.  
Alissa Fleming  
Alex Apostolou

Gralnik at Online Security in order to try to verify the claims MUSC was making about its backup data systems and the effort required to locate and extract backup anesthesia data for Charles Mikell. In turn, Mr. Batch, Mr. Gralnik at others at Online Security communicated with representatives of Optum, the manufacturer of the PICIS anesthesia software system used by MUSC, in order to learn the technical capabilities of the PICIS software system.

6. Attached to this Affidavit is the Invoice my office received from Online Security for its consulting services. The total amount due and payable to Online Security is \$3,718.50.

FURTHER AFFIANT SAYETH NAUGHT.

BY: Robert B Ransom  
Robert B. Ransom

SWORN TO BEFORE ME this

5<sup>th</sup> day of January, 2016.

Kevin A. Deegan - III

Notary Public for the State of South Carolina

My commission expires:

Aug. 01, 2021

**ONLINESECURITY**  
 3000 S. Robertson Blvd., Suite 288  
 Los Angeles, CA 90034  
 310-815-8855

# INVOICE

|          |           |
|----------|-----------|
| DATE     | INVOICE # |
| 1/4/2016 | 24048     |

|                                                                                                         |
|---------------------------------------------------------------------------------------------------------|
| <b>BILL TO</b>                                                                                          |
| Leventis & Ransom<br>1913 Bull Street<br>P.O. Box 11067<br>Columbia, SC 29201<br>Attn: Robert B. Ransom |

|                |
|----------------|
| <b>SHIP TO</b> |
|                |

| Matter No.   | TERMS        | REP                                                                                                                                                                                                                                                                                                                                                                                        | PROJECT   |           |
|--------------|--------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------|-----------|
| R. Ransom    | Upon Receipt | MJM                                                                                                                                                                                                                                                                                                                                                                                        |           |           |
| QUANTITY     | ITEM CODE    | DESCRIPTION                                                                                                                                                                                                                                                                                                                                                                                | RATE      | AMOUNT    |
| 3.5          | RGF          | 10/15/15 - (R. Gralnik - Sr. Forensic Tech) - Review correspondence from B. Marrazino of PCIS re: server setup for database restore, continued research of the PCIS MUSC configuration, follow up teleconference with B. Marrazino re: additional technical questions, start draft of declaration requested by R. Ransom.                                                                  | 300.00    | 1,050.00  |
| 2.75         | RGF          | 10/16/15 - (R. Gralnik - Sr. Forensic Tech) - Continued drafting of requested declaration, internal meeting with C. Balot re: edits to the declaration, teleconferences with R. Ransom re: declaration issues, teleconferences with T. Elmer & B. Marrazino at PCIS re: technical issues, complete draft of declaration, have declaration notarized & forward same to R. Ransom via FedEx. | 300.00    | 825.00    |
| 0.5          | CBF          | 10/16/15 - (C. Balot - Sr. Case Manager) - Review & edits to the R. Gralnik PCIS draft declaration & internal meeting with R. Gralnik re: same.                                                                                                                                                                                                                                            | 300.00    | 150.00    |
| 1            | CBF          | FedEx shipping reimbursement.                                                                                                                                                                                                                                                                                                                                                              | 28.50     | 28.50     |
| 1            | CBF          | Notary reimbursement.                                                                                                                                                                                                                                                                                                                                                                      | 15.00     | 15.00     |
| 1            | CBF          | *DEDUCT RETAINER DEPOSIT*                                                                                                                                                                                                                                                                                                                                                                  | -3,000.00 | -3,000.00 |
| <b>Total</b> |              |                                                                                                                                                                                                                                                                                                                                                                                            |           | \$718.50  |

|                           |   |                                      |
|---------------------------|---|--------------------------------------|
| STATE OF SOUTH CAROLINA   | ) | IN THE COURT OF COMMON PLEAS         |
|                           | ) |                                      |
| COUNTY OF CHARLESTON      | ) | CIVIL ACTION NO.:2012-CP-10-7275     |
|                           | ) |                                      |
| SHON TURNER, as Personal  | ) |                                      |
| Representative of the     | ) |                                      |
| ESTATE OF CHARLES MIKELL, | ) |                                      |
| deceased,                 | ) |                                      |
|                           | ) |                                      |
|                           | ) | <b>SECOND SUPPLEMENTAL</b>           |
|                           | ) | <b>AFFIDAVIT OF ROBERT B. RANSOM</b> |
| Plaintiff,                | ) |                                      |
|                           | ) |                                      |
| vs.                       | ) |                                      |
|                           | ) |                                      |
| MEDICAL UNIVERSITY OF     | ) |                                      |
| SOUTH CAROLINA,           | ) |                                      |
|                           | ) |                                      |
| Defendant.                | ) |                                      |
|                           | ) |                                      |

PERSONALLY APPEARED BEFORE ME the undersigned who, being duly sworn, deposes and states as follows:

1. I am over the age of eight (18) years, am legally competent to make this affidavit, and have personal knowledge of the matters set forth herein.
2. I am lead counsel for the Plaintiff in the above-captioned action.
3. This Affidavit is submitted in order to further supplemental my previous Affidavits, dated January 4, 2016 and January 5, 2016.
6. The time entries set forth below document the effort undertaken by me to address and respond to the various discovery issues which are the subject of the Plaintiff's Motion for Discovery Sanctions, filed in the within-captioned action.
7. The expenses set forth below were incurred by my office in regard to these same discovery issues.

FURTHER AFFIANT SAYETH NAUGHT.

BY: Robert B. Ransom  
Robert B. Ransom

SWORN TO BEFORE ME this

2<sup>nd</sup> day of May 2016

Deborah A. Ransom, Esq.

Notary Public for the State of South Carolina

My commission expires:

Aug. 01, 2021

**TIME RECORD FOR Estate of Charles Mikell**

| <u>Date:</u> | <u>Time:</u> | <u>Description:</u>                                                                 |
|--------------|--------------|-------------------------------------------------------------------------------------|
| 01/05/16     | 0.5          | prepare Supplemental Affidavit and cover letter to Judge Nicholson                  |
| 01/07/16     | 0.1          | email to Dawes and Alissa about scheduling Donna Embry's deposition                 |
| 01/11/16     | 0.1          | email from Debbie Tolle about scheduling Donna Embry's deposition                   |
| 01/11/16     | 0.2          | email to Debbie Tolle about scheduling Donna Embry's deposition                     |
| 01/22/16     | 0.2          | emails with Debbie Tolle confirming Donna Embry's deposition                        |
| 01/26/16     | 0.3          | email from Brook Burroughs with questions posed by Judge Nicholson                  |
| 01/27/16     | 0.2          | emails with court reporter confirming Donna Embry deposition                        |
| 02/04/16     | 0.2          | emails with Brook Burroughs about submitting answers to Judge Nicholson's questions |
| 02/10/16     | 2.5          | draft declaration responding to Judge Nicholson's questions                         |
| 02/11/16     | 3.0          | draft declaration responding to Judge Nicholson's questions                         |
| 02/16/16     | 0.1          | email draft declaration to Alex Apostolou for comment                               |
| 02/16/16     | 3.0          | revise declaration                                                                  |
| 02/17/16     | 0.3          | emails from Alex Apostolou about draft declaration                                  |
| 02/17/16     | 0.3          | emails with Brook Burroughs about work-product contained in declaration             |
| 02/17/16     | 4.0          | prepare for deposition of Donna Embry                                               |
| 02/18/16     | 0.1          | email from Dawes about answers to Judge Nicholson's questions                       |
| 02/18/16     | 0.7          | draft motion to seal                                                                |
| 02/19/16     | 0.1          | emails with Alissa to confirm Donna Embry's deposition                              |
| 02/19/16     | 2.0          | finalize motion to seal                                                             |
| 02/22/16     | 2.0          | travel to Charleston from Columbia                                                  |
| 02/22/16     | 5.0          | appear at deposition of Donna Embry                                                 |
| 02/22/16     | 0.6          | travel to court house to file motion to seal and declaration                        |
| 02/23/16     | 0.3          | emails with Alex Apostolou about Donna Embry's deposition                           |
| 02/24/16     | 1.8          | travel to Columbia from Charleston                                                  |
| 02/24/16     | 3.5          | prepare letter to Judge Nicholson about Donna Embry's deposition                    |
| 03/01/16     | 1.2          | review and analyze letter from Alissa to Judge Nicholson                            |
| 03/02/16     | 0.6          | emails to Alex Apostolou about Alissa's letter to Judge Nicholson                   |
| 03/02/16     | 4.5          | review transcript of Donna Embry's deposition                                       |
| 03/03/16     | 0.6          | email to Brook Burroughs about Donna Embry's deposition testimony                   |
| 03/08/16     | 0.1          | email from Alissa about MUSC's forthcoming supplemental submission                  |
| 03/08/16     | 0.2          | email from Brook Burroughs about additional depositions needed                      |
| 03/08/16     | 0.4          | email to Brook Burroughs about additional depositions                               |
| 03/17/16     | 0.2          | email from Brook Burroughs advising motion for sanctions granted in part            |
| 03/17/16     | 0.1          | email from Alissa about request for supplemental submission prior to ruling         |
| 03/17/16     | 0.2          | email from Dawes about request for supplemental submission                          |
| 03/17/16     | 0.2          | email to Brook Burroughs advising I am in India                                     |
| 03/18/16     | 0.2          | emails from Brook Burroughs about status of ruling                                  |
| 03/18/16     | 0.2          | email from dawes about final submission by MUSC                                     |

|          |     |                                                                                                                       |
|----------|-----|-----------------------------------------------------------------------------------------------------------------------|
| 03/21/16 | 0.1 | email from Alissa about MUSC's final submission                                                                       |
| 03/22/16 | 0.2 | emails with Alissa about scheduling depositions of Dr. Berry and Dr. Reeves                                           |
| 03/22/16 | 0.1 | email from Debbie Tolle about scheduling motion hearing                                                               |
| 03/22/16 | 0.1 | emails with Brook Burroughs about scheduling motion hearing                                                           |
| 03/22/16 | 0.4 | emails with Alissa about depositions of Dr. Berry and Dr. Reeves                                                      |
| 03/25/16 | 0.2 | email from Alex Apostolou about status of motion and hearing                                                          |
| 03/25/16 | 0.2 | email to Brook Burroughs about motion hearing                                                                         |
| 03/25/16 | 0.2 | emails from Clerk of Court about Apr 1, 2016 motion hearing                                                           |
| 03/26/15 | 0.3 | emails with Alex Apostolou with draft letter to Judge Nicholson                                                       |
| 03/27/16 | 0.7 | investigate flights to Nashville for Dr. Berry's deposition                                                           |
| 03/28/16 | 0.3 | emails with Brook Burroughs about rescheduling motion hearing                                                         |
| 03/28/16 | 0.1 | email to Brook Burroughs with response to Dawes' Mar 18, 2016 letter                                                  |
| 03/28/16 | 0.2 | emails with Alissa about travel to Nashville for Dr. Berry's deposition                                               |
| 03/26/16 | 1.0 | review Dawes' Mar 18, 2016 letter to Judge Nicholson                                                                  |
| 03/26/18 | 5.0 | draft response to Dawes' Mar 18, 2016 letter                                                                          |
| 03/28/16 | 3.0 | final Mar 28, 2016 response to Dawes' Mar 18, 2016 letter                                                             |
| 03/29/16 | 0.1 | email from Brook Burroughs canceling motion hearing                                                                   |
| 03/29/16 | 0.1 | email to Alissa asking to depose John Fisher                                                                          |
| 03/29/16 | 0.2 | emails with Alissa about Dr. Berry's deposition                                                                       |
| 03/30/16 | 0.1 | email from Debbie Tolle setting John Fisher's deposition                                                              |
| 03/31/16 | 0.2 | emails with Alissa about travel to Nashville                                                                          |
| 03/31/16 | 0.3 | email to Alissa confirming depositions of Dr. Reeves, John Fisher and Dr. Berry and asking to depose Annette Thompson |
| 03/31/16 | 0.3 | emails with Alissa agreeing to do Dr. Berry's deposition by video conference                                          |
| 03/31/16 | 0.2 | emails with Alissa setting Annette Thompson's deposition                                                              |
| 04/01/16 | 0.2 | email from Brook Burroughs about ruling on motion for sanctions and additional depositions                            |
| 04/01/16 | 0.3 | emails with Brook Burroughs and Dawes about additional deposition that have been set                                  |
| 04/04/16 | 0.2 | emails with Alissa to confirm locations for depositions                                                               |
| 04/05/16 | 0.3 | review index of materials sent to Dr. Berry by MUSC                                                                   |
| 04/05/16 | 1.5 | review database audit trail documents produced by John Fisher                                                         |
| 04/06/16 | 5.0 | prepare for depositions of Dr. Reeves, Dr. Berry, John Fisher and Annette Thompson                                    |
| 04/07/16 | 1.8 | travel to Charleston from Columbia                                                                                    |
| 04/07/16 | 1.0 | appear at deposition of John Fisher                                                                                   |
| 04/07/16 | 1.5 | appear at deposition of Dr. Reeves                                                                                    |
| 04/08/16 | 2.3 | appear at deposition of Annette Thompson                                                                              |
| 04/08/16 | 0.8 | appear at deposition of Dr. Berry                                                                                     |
| 04/08/16 | 2.0 | travel to Columbia from Charleston                                                                                    |
| 04/09/16 | 0.3 | telephone call with Dr. Kofke to discuss Embry deposition                                                             |
| 04/10/11 | 0.7 | prepare letter to Dawes about Dr. Kofke's updated opinions                                                            |
| 04/11/16 | 0.1 | email to Dawes and Alissa with letter about Dr. Kofke's opinions                                                      |

04/29/16 0.4 draft final affidavit for attorneys fees  
05/02/16 3.5 finalize affidavit for attorneys fees

**TOTAL TIME: 75.3 hours**

Expenses

|          |                                                    |                  |
|----------|----------------------------------------------------|------------------|
| 01/11/16 | Online Security (PICIS backup data issue)          | \$ 375.00        |
| 02/22/16 | Charleston County Clerk of Court (motion to seal)  | \$ 25.00         |
| 03/10/16 | A. Wm. Roberts, Jr. & Assoc. (Embry transcript)    | \$1,114.70       |
| 03/20/16 | Dr. Kofke: review of Donna Embry deposition        | \$ 875.00        |
| 03/29/16 | Dr. Kofke: review of Donna Embry deposition        | \$ 750.00        |
| 04/04/16 | Dr. Kofke: review of Donna Embry deposition        | \$3,166.54       |
| 04/07/16 | Quality Inn & Suites: room for Apr 7-8 depositions | \$ 181.23        |
| 04/09/16 | Dr. Kofke: attorney phone call                     | <u>\$ 166.66</u> |

**Total Expense: \$6,654.13**

**ONLINESECURITY**  
 3000 S. Robertson Blvd., Suite 288  
 Los Angeles, CA 90034  
 310-815-8855

# INVOICE

| DATE     | INVOICE # |
|----------|-----------|
| 1/5/2016 | 24050     |

|                                                                                                         |
|---------------------------------------------------------------------------------------------------------|
| <b>BILL TO</b>                                                                                          |
| Leventis & Ransom<br>1913 Bull Street<br>P.O. Box 11067<br>Columbia, SC 29201<br>Attn: Robert B. Ransom |

|                |
|----------------|
| <b>SHIP TO</b> |
|                |

| Matter No. | TERMS        | REP                                                                                                                                                                                            | PROJECT |        |
|------------|--------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------|--------|
| R. Ransom  | Upon Receipt | MJM                                                                                                                                                                                            |         |        |
| QUANTITY   | ITEM CODE    | DESCRIPTION                                                                                                                                                                                    | RATE    | AMOUNT |
| 0.75       | RGF          | Billing Period - 05/14/15 - 05/15/15 - "Mikell v. MUSC" Matter - Electronic Discovery Technical & Consulting Services                                                                          | 300.00  | 225.00 |
| 0.5        | RGF          | 05/14/15 - (R. Gralnik - Sr. Forensic Tech) - Review/analysis of MUSC data warehouse information architecture document, review Optum white papers on anesthesia management information system. | 300.00  | 150.00 |
|            |              | 05/15/15 - (R. Gralnik - Sr. Forensic Tech) -                                                                                                                                                  |         |        |

**CASH ONLY IF ALL Check.ock™ SECURITY FEATURES LISTED ON BACK INDICATE NO TAMPERING OR COPYING**

**LEVENTIS & RANSOM**  
 POST ACCOUNT  
 P.O. BOX 11067  
 COLUMBIA, SC 29201  
 310-815-8855

01/05/2016

**\*\*375.00**

PAY TO THE ORDER OF OnlineSecurity

Three Hundred Seventy Five and 00/100

OnlineSecurity  
 3000 S. Robertson Blvd., Suite 288  
 Los Angeles, CA 90034

MEMO: Charles Mikell

*Robert B. Ransom*

|              |                 |
|--------------|-----------------|
| <b>Total</b> | <b>\$375.00</b> |
|--------------|-----------------|

**Coram Pleas**  
**Clerk : Julie Armstrong**  
**Charleston County Judicial Center**  
**Charleston, SC 29401**  
**(843) 958-8000**

Received From: Ransom, Robert B.  
 PO Box 11067  
 Columbia, SC 29211

Date: 2/22/2016  
 Receipt #: 556089  
 Clerk: coceba

Paying for: Turner, Shon

Transaction Type: Payment

Reference #:

Payment Type: Credit Card \$25.00

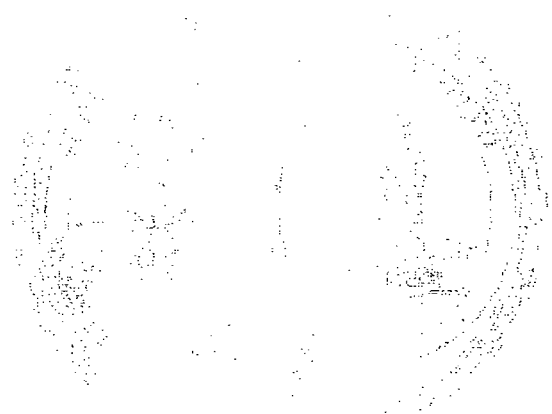
Comment: motion to seal  
 Non-Refundable

Convenience Fee \$0.43

SC.gov Portal Fee \$1.00

Total Paid: \$26.43

| Case #        | Caption                                             | Previous Balance | Amount Paid | Balance Due |
|---------------|-----------------------------------------------------|------------------|-------------|-------------|
| 2012CP1007275 | Shon Turner VS Medical University of South Carolina | \$25.00          | \$25.00     | \$0.00      |



|                       |                           |                |               |
|-----------------------|---------------------------|----------------|---------------|
| <b>Total Cases:</b> 1 | <b>\$25.00</b>            | <b>\$25.00</b> | <b>\$0.00</b> |
|                       | <b>Convenience Fee:</b>   | <b>\$0.43</b>  |               |
|                       | <b>SC.gov Portal Fee:</b> | <b>\$1.00</b>  |               |
|                       | <b>Total Paid:</b>        | <b>\$26.43</b> |               |



**A. William Roberts, Jr. & Associates**  
 Court Reporting | Videography | Trial Presentation  
 234 Seven Farms Drive, Suite 210  
 Charleston, SC 29492  
 phone: (843) 722-8414 fax: (843) 722-8451  
 www.scheduladopo.com

Job #: 160222MHB

Job Date: 02/22/16

Order Date: 02/22/16

DB Ref. #:

Date of Loss: / /

Your File #:

Your Client: Turner, Shon

# Invoice

Invoice #: 229808

Inv. Date: 03/03/16

Balance: \$1,114.70

**Bill To:**  
 Robert B. Ransom, Esq.  
 Leventis & Ransom  
 1913 Bull Street  
 Columbia, SC 29201

**Action:** Turner, Shon, et al  
 VS  
 Medical University of SC  
**Action #:** 2012-CP-10-7275  
**Rep:** MHB  
**Cert:**

| Item | Proceeding/Witness       | Description                    | Dis. Amt. | Amount   |
|------|--------------------------|--------------------------------|-----------|----------|
| 1    | Donna Benton Embrey CRNA | Original and e-transcript copy | \$0.00    | \$940.10 |
| 2    | Donna Benton Embrey CRNA | PDF Scanned Exhibits           | \$0.00    | \$9.60   |
| 3    | Donna Benton Embrey CRNA | Reporting Time                 | \$0.00    | \$160.00 |
| 4    |                          | Shipping & Handling            | \$0.00    | \$15.00  |

|                    |                      |            |
|--------------------|----------------------|------------|
| <b>Comments:</b>   | <b>Sub Total</b>     | \$1,114.70 |
|                    | <b>Shipping</b>      | \$0.00     |
|                    | <b>Tax</b>           | N/A        |
|                    | <b>Total Invoice</b> | \$1,114.70 |
|                    | <b>Payment</b>       | \$0.00     |
| <b>Balance Due</b> |                      | \$1,114.70 |

Federal Tax I.D.: 67-0782980

Terms: Net 30 Days Finance Charge @ 1.5%

Please KEEP THIS PART for YOUR RECORDS.  
 Please FOLD then TEAR HERE and RETURN THIS PART with PAYMENT.

2122

**LEVENTIS & RANSOM**  
 COURT REPORTING  
 PO BOX 1105  
 COLUMBIA, SC 29211-1105  
 (803) 765-2883

03/18/16

\$ 1,114.70

PAY TO THE ORDER OF: A. William Roberts, Jr. & Assoc.

One Thousand One Hundred Fourteen and 70/100 DOLLARS

A. William Roberts, Jr. & Assoc.  
 234 Seven Farms Drive, Suite 210  
 Charleston, SC 29492

*Robert B. Ransom*

MEMO Charles Mikell

Details on Back  
 © CheckLinx™ Secure Check

From: Kofke, Andrew <William.Kofke@uphs.upenn.edu>

To: 'Rob Ransom' <bertcone@aol.com>

Cc: Kofke, Andrew <William.Kofke@uphs.upenn.edu>

Subject: Mikell invoice 042016

Date: Wed, Apr 20, 2016 9:11 am

Hi rob,

Hope things work out. Below is a summary of fees and expenses for the mikell case.

date time work

1/17/2016 30 review notes

3/20/2016 105 embryo 2 dep

3/29/2016 90 embryo 2 dep

4/4/2016 55 embryo 2 dep

4/4/2016 180 embryo 2 dep

4/4/2016.145 embryo 2 dep

4/4/2016 30 research and reserve travel

4/9/2016 20 atty phone call

19-Apr 1680 TRIAL

min= 2335

hr= 38.91667

fee= 19458.33

trial retain -3000

16458.33

expenses 1700.2 plane ticket

456.38 hotel

35.79 parking

4.82 food

5.46 food

20.39 food

3.57 food

6.09 food

2.54 food

12.5 food

20 taxi

50 taxi

2317.74

Prof fee expenses total

total 16458.33 2317.74 18776.07

Please remit to me \$18,776.07 at the address below.

For tax purposes it will be easier all around to have two separate checks, one for fee and one for expense rei

Thanks for involving me in this case

W Andrew Kofke MD MBA FCCM FNCS

Professor, Director Neuroscience in Anesthesiology and Critical Care Program



**Quality Inn & Suites Patriots Point  
(SC064)**

196 Patriots Point Rd  
Mount Pleasant, SC 29464  
(843) 856-8817  
GM.SC064@choicehotels.com

Account: 453217545

Date: 4/8/16

Room: 133 SEM

Arrival Date: 4/7/16

Departure Date: 4/8/16

Check In Time: 4/7/16 3:46 PM

Check Out Time:

Rewards Program ID:

You were checked out by:

You were checked in by: Jandre

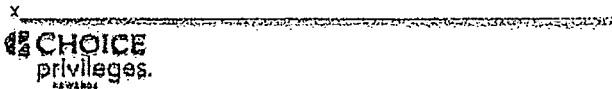
**Total Balance Due: 0.00**

Ransom, Robert  
70 Foot Point Rd  
Columbia, SC 29209

|                  |                   |                     |          |
|------------------|-------------------|---------------------|----------|
| 4/7/16           | Room Charge       | #133 Ransom, Robert | 161.10   |
| 4/7/16           | Occupancy Tax     |                     | 3.22     |
| 4/7/16           | State Tax         |                     | 10.47    |
| 4/7/16           | City / County Tax |                     | 6.44     |
| 4/8/16           | Master Card       |                     | (181.23) |
| XXXXXXXXXXXX1926 |                   |                     |          |

|  |                     |  |             |
|--|---------------------|--|-------------|
|  | Room Charge         |  | 161.10      |
|  | State Tax           |  | 10.47       |
|  | City / County Tax   |  | 6.44        |
|  | Occupancy Tax       |  | 3.22        |
|  | Master Card         |  | (181.23)    |
|  | <b>Balance Due:</b> |  | <b>0.00</b> |

This rate is eligible for partner rewards. If this rate is changed, you may no longer be entitled to partner rewards.



You could be earning free nights and other great rewards. Join Choice Privileges today at [www.choiceprivileges.com](http://www.choiceprivileges.com).

Thank you for your stay. Visit [ChoiceHotels.com/VerifiedReviews](http://ChoiceHotels.com/VerifiedReviews) to post your comments about your recent experience (Click the 'Write a Review' button)

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF CHARLESTON )

IN THE COURT OF COMMON PLEAS  
CIVIL ACTION NO.:2012-CP-10-7275

SHON TURNER, as Personal )  
Representative of the )  
ESTATE OF CHARLES MIKELL, )  
deceased. )

**THIRD SUPPLEMENTAL  
AFFIDAVIT OF ROBERT B. RANSOM**

Plaintiff. )

vs. )

MEDICAL UNIVERSITY OF )  
SOUTH CAROLINA, )

Defendant. )

PERSONALLY APPEARED BEFORE ME the undersigned who, being duly sworn, deposes and states as follows:

1. I am over the age of eight (18) years, am legally competent to make this affidavit, and have personal knowledge of the matters set forth herein.
2. I am lead counsel for the Plaintiff in the above-captioned action.
3. This Affidavit is submitted in order to further supplemental my previous Affidavits, dated January 4, 2016, January 5, 2016, and May 2, 2016.
6. The time entries set forth below document the effort undertaken by me to address and respond to the various discovery issues which are the subject of the Plaintiff's Motion for Discovery Sanctions, filed in the within-captioned action.

FURTHER AFFIANT SAYETH NAUGHT.

BY: Robert B. Ransom  
Robert B. Ransom

SWORN TO BEFORE ME this

2<sup>nd</sup> day of September, 2016.

Katherine [Signature]

Notary Public for the State of South Carolina

My commission expires:

February 14, 2022

**TIME RECORD FOR Estate of Charles Mikell**

| <u>Date:</u> | <u>Time:</u> | <u>Description:</u>                                                           |
|--------------|--------------|-------------------------------------------------------------------------------|
| 05/11/16     | 2.1          | review MUSC Supplemental Memo in Opposition to Motion for Discovery Sanctions |
| 05/11/16     | 0.1          | email to court concerning MUSC Supplemental Memo                              |
| 05/12/16     | 0.4          | begin preparing Reply Memorandum on Issue of Attorneys Fees                   |
| 05/18/16     | 2.3          | continue drafting Reply Memorandum                                            |
| 05/26/16     | 4.0          | continue work on Reply Memorandum                                             |
| 06/03/16     | 6.0          | continue work on Reply Memorandum                                             |
| 06/14/16     | 3.5          | complete work on Reply Memorandum                                             |
| 06/15/16     | 0.2          | letter to Judge Nicholson transmitting Reply Memorandum                       |
| 06/29/16     | 0.1          | email from Clerk of Court setting July 18 hearing date                        |
| 07/07/16     | 0.6          | meet with George Kefalos about representation at hearing                      |
| 07/18/16     | 0.8          | testify at hearing about attorneys fees                                       |
| 08/12/16     | 0.2          | email from court asking for proposed order                                    |
| 08/17/16     | 3.0          | begin preparing proposed order for attorneys fees                             |
| 08/22/16     | 6.0          | continue work on proposed order                                               |
| 08/29/16     | 3.5          | continue work on proposed order                                               |
| 09/01/16     | 1.2          | complete work on proposed order                                               |

**TOTAL TIME: 34.0 hours**

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF CHARLESTON )  
 )  
 SHON TURNER, as Personal )  
 Representative of the ESTATE OF )  
 CHARLES MIKELL, deceased )  
 )  
 Plaintiff, )  
 )  
 )  
 vs. )  
 )  
 MEDICAL UNIVERSITY OF )  
 SOUTH CAROLINA, )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
 FOR THE NINTH JUDICIAL CIRCUIT  
 CIVIL ACTION NO.: 2012-CP-10-7275

**AFFIDAVIT OF  
 ALEX APOSTOLOU**

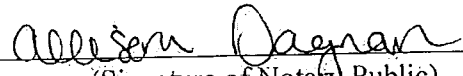
PERSONALLY APPEARED before me, Alex Apostolou, who after being  
 duly sworn, deposes and says:

- 1) I am over the age of eighteen (18) years old, and am legally competent to make this affidavit.
- 2) I am one of the attorney's handling the above captioned case.
- 3) I submit this affidavit to list for the Court the time I spent handling portions of the above case dealing Discovery issues.
- 4) I bill at an hourly rate of \$250 dollars an hour.

FURTHER THE AFFIANT SAYETH NOT!

  
 Affiant

SWORN TO AND SUBSCRIBED BEFORE ME  
 This 4 day of May, 2016

  
 (Signature of Notary Public)

My commission expires 2 19, 2024

TIME RECORDED FOR ESTATE OF CHARLES MIKELL:

| <u>Date:</u> | <u>Time:</u> | <u>Description:</u>                                           |
|--------------|--------------|---------------------------------------------------------------|
| 7.9.15       | 0.2          | emails with Mr. Ransom about blanks in records                |
| 8.27.15      | 1.5          | met with Mr. Ransom and client to discuss upcoming Mediation  |
| 8.28.15      | 4.8          | attended failed Mediation                                     |
| 9.02.15      | 0.7          | conversation about Discovery Sanctions - Mr. Ransom, emails   |
| 9.04.15      | 0.4          | review amended complaint - emails to Mr. Ransom               |
| 9.23.15      | 0.3          | email discussion about Dr. Reeves and Donna Embry's testimony |
| 10.15.15     | 0.2          | discussion about MUSC's response to sanctions - Mr. Ransom    |
| 10.16.15     | 1.0          | review MUSC Memorandum                                        |
| 10.21.15     | 1.2          | attend hearing on Sanctions                                   |
| 12.8.15      | 0.1          | email ahead of sanctions hearing                              |
| 12.10.15     | 0.2          | emails ahead of sanctions hearing                             |
| 12.11.15     | 1.0          | attend hearing on Sanctions                                   |
| 1.3.16       | 0.2          | email revising letter to Judge Nicholson                      |
| 1.8.16       | 0.4          | review amended complaint, emails                              |
| 1.26.16      | 0.2          | review questions from Judge                                   |
| 2.16.16      | 0.1          | emails with Mr. Ransom - declarations                         |
| 2.17.16      | 0.3          | emails with Mr. Ransom - declarations                         |
| 2.22.16      | 5.0          | attend deposition 2 - Donna Embry                             |
| 2.23.16      | 0.3          | email with Mr. Ransom about Deposition                        |
| 3.2.16       | 0.5          | email discussions with Mr. Ransom - Defense Letter            |
| 3.2.16       | 2.0          | review deposition transcript - Embry                          |
| 3.4.16       | 0.1          | email about discovery responses of MUSC - Mr. Ransom          |
| 3.17.16      | 0.1          | email to Court about potential Order being drafted            |
| 3.25.16      | 0.2          | emails with Mr. Ransom about motions hearings                 |
| 3.26.16      | 0.3          | emails with Mr. Ransom about Plaintiff's letter to Judge      |
| 4.8.16       | 0.8          | appear at deposition 2 of Dr. Berry                           |
| 4.29.16      | 0.4          | draft up Affidavit of time                                    |

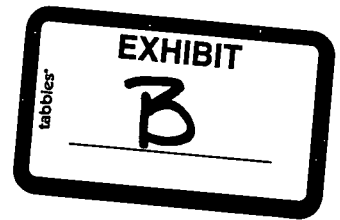
TOTAL HOURS: 22.7 hours

STATE OF SOUTH CAROLINA  
 COUNTY OF CHARLESTON  
 IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2012-CP-10-7275



Shon Turner

The Medical University of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for :  Plaintiff  Defendant  
 or  
 Self-Represented Litigant

**DISPOSITION TYPE (CHECK ONE)**

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41 SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  Other
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j), SCRPC;  Bankruptcy;  Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX)**  
 Affirmed;  Reversed;  Remanded;  Other

FILED  
 2016 OCT 13 AM 11:15  
 CLERK OF COURT  
 JULEE ANN STRONG

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:**  See attached order (formal order to follow)  Statement of Judgment by the Court: Defendant's Motion to Reconsider is respectfully denied without a rehearing.

**ORDER INFORMATION**

This order  ends  does not end the case.

Additional Information for the Clerk :

**INFORMATION FOR THE PUBLIC INDEX**

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

| Judgment in Favor of<br>(List name(s) below) | Judgment Against<br>(List name(s) below) | Judgment Amount To be Enrolled<br>(List amount(s) below) |
|----------------------------------------------|------------------------------------------|----------------------------------------------------------|
|                                              |                                          |                                                          |

If applicable, describe the property, including tax map information and address, referenced in the order:  
 N/A

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

*[Signature]*  
 Circuit Court Judge

2117  
 Judge Code

10/12/16  
 Date

**RECEIVED**

OCT 31 2016

SC Court of Appeals