THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas
Honorable Paul M. Burch, Fourth Judicial Circuit

Court of Appeals Case No. 2016-002064
Case No. 12-CP-16-0872

Elizabeth McCants and Greg McCants .....
Respondents,

v.

Hartsville Medical Group, LLC .....
Appellant.

INITIAL BRIEF OF APPELLANTS

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TABLE OF CONTENTS

Table of Authorities iii

Statement of Issues on Appeal 1

Statement of the Case 2

Arguments 6

1. BECAUSE THE TRIAL COURT'S DECISION TO STRIKE THE APPELLANT'S ANSWER WAS WITHOUT REASONABLE FACTUAL SUPPORT AND RESULTED IN PREJUDICE TO THE APPELLANT'S RIGHTS, THE TRIAL COURT'S DECISION TO STRIKE THE APPELLANT'S ANSWER SHOULD BE REVERSED BECAUSE IT AMOUNTED TO AN ERROR OF LAW AND AN ABUSE OF DISCRETION. 6

A. THE TRIAL COURT'S FINDINGS THAT THE APPELLANT WILLFULLY VIOLATED THE TRIAL COURT'S ORDERS AND WILLFULLY FAILED TO RESPOND TO RESPONDENT'S SIXTH AND SEVENTH REQUESTS FOR PRODUCTION ARE WITHOUT REASONABLE FACTUAL SUPPORT 8

B. THE TRIAL COURT'S FINDING THAT THE APPELLANT ENGAGED IN A PATTERN AND PRACTICE OF OBSTRUCTION IN DISCOVERY DESIGNED TO PREJUDICE THE RESPONDENT IS WITHOUT REASONABLE FACTUAL SUPPORT 30

C. THE TRIAL COURT'S FINDING THAT THE APPELLANT'S CONDUCT PREJUDICED THE RESPONDENT IS WITHOUT REASONABLE FACTUAL SUPPORT 34

D. THE TRIAL COURT'S FINDING THAT THE NATURE OF DISCOVERY WEIGHS IN FAVOR OF SANCTIONS, AND PARTICULARLY THE STRIKING OF THE APPELLANT'S ANSWER, IS WITHOUT REASONABLE FACTUAL SUPPORT 36

E. THE TRIAL COURT'S FINDING THAT THE POSTURE OF THE CASE WEIGHS IN FAVOR OF SANCTIONS, AND PARTICULARLY THE STRIKING OF THE APPELLANT'S ANSWER, IS WITHOUT REASONABLE FACTUAL SUPPORT 39

Conclusion 40

TABLE OF AUTHORITIES

CASES

Balloon Plantation, Inc. v. Head Balloons, Inc., 303 S.C. 152, 154, 399 S.E.2d 439, 440 (Ct.App.1990) 7, 32

Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 109, 410 S.E.2d 537, 542 (1991).....7

Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co., 334 S.C. 193, 198 (Ct. App. 1999) 6, 7

Jamison v. Ford Motor Co., 373 S.C. 248, 270, 644 S.E.2d 755, 767 (Ct. App. 2007) 7

Laney v. Hefley, 262 S.C. 54, 202 S.E.2d 12 (1974) 7

QZO, Inc. v. Moyer, 358 S.C. 246, 256, 594 S.E.2d 541, 548 (Ct. App. 2005).....7

Rickerson v. Karl, 412 S.C. 215, 221, 770 S.E.2d 767, 770 (Ct. App. 2015) 7, 32

Samples v. Mitchell, 329 S.C. 105, 111, 495 S.E.2d 213, 216 (Ct.App.1997).....7

42 CFR § 482.23 .....20, 23-26, 31, 36-37

STATEMENT OF ISSUES ON APPEAL

1. WAS IT AN ERROR OF FACT FOR THE TRIAL COURT TO FIND THAT THE APPELLANT VIOLATED THE COURT'S ORDERS?

2. WAS IT AN ERROR OF FACT FOR THE TRIAL COURT TO FIND THAT THE APPELLANT WILLFULLY VIOLATED THE COURT'S ORDERS?

3. WAS IT AN ERROR OF FACT FOR THE TRIAL COURT TO FIND THAT THE APPELLANT WILLFULY FAILED TO RESPOND TO THE RESPONDENT'S SIXTH AND SEVENTH SETS OF REQUESTS FOR PRODUCTION TO THE APPELLANT?

4. WAS IT AN ERROR OF FACT FOR THE TRIAL COURT TO FIND THAT THE APPELLANT ENGAGED IN A PATTERN AND PRACTICE OF OBSTRUCTION IN DISCOVERY DESIGNED TO PREJUDICE THE RESPONDENT?

5. WAS IT AN ERROR OF FACT FOR THE TRIAL COURT TO FIND THAT THE APPELLANT'S CONDUCT PREJUDICED THE RESPONDENT?

6. WAS IT AN ERROR OF LAW FOR THE TRIAL COURT TO FIND THAT THE NATURE OF DISCOVERY WEIGHS IN FAVOR OF SANCTIONS, AND IN PARTICULAR, THE STRIKING OF THE APPELLANT'S ANSWER?

7. WAS IT AN ERROR OF LAW FOR THE TRIAL COURT TO FIND THAT THE POSTURE OF THE CASE WEIGHS IN FAVOR OF SANCTIONS, AND IN PARTICULAR, THE STRIKING OF THE APPELLANT'S ANSWER?

8. WAS IT AN ERROR OF LAW FOR THE TRIAL COURT TO FIND THAT THE APPELLANT WILLFULLY FAILED TO ABIDE BY THE TRIAL COURT'S WRITTEN AND VERBAL ORDERS?

9. WAS IT AN ERROR OF LAW FOR THE TRIAL COURT TO FIND THAT THE PLAINTIFF HAS BEEN PREJUDICED BY THE APPELLANT'S CONDUCT?

STATEMENT OF THE CASE

I. HISTORY OF THE PRESENT CASE

On October 9, 2012, Respondents filed their Complaint alleging medical malpractice against Appellant and Melvin B. Nickles, MD for the administration of a Hepatitis B vaccination that Respondents allege caused a catastrophic injury to Plaintiff Greg McCants ("Greg"). On January 30, 2013, this case was stayed pending the outcome of this action before the U.S. Court of Claims. On March 17, 2014, the stay on this action was lifted. (Exhibit A.)

On April 1, 2014, Respondents sent their First Interrogatories and Requests for Production to Appellant. (See Defendant's Responses to Plaintiff's First Interrogatories and Requests to produce, attached as Exhibit B, C.). Among other things, Respondents requested information related to policies, procedures, protocols, and guidelines, relating to the job descriptions, requirements, and scopes of practice of all Appellant's employees during 2010. (Exhibit C.)

On May 30, 2014, Appellant reasonably objected to these requests on the grounds that they were overly broad, unduly burdensome, vague and ambiguous, and requested documents prepared in anticipation of litigation and that may be protected by the doctrine of work product. Appellant then provided Respondents with the table of contents of its protocols in effect in 2010. (See Exhibit B; Exhibit C.) On June 13, 2014, Respondents sent Appellant Plaintiffs' Second Requests for Production to Defendant Hartsville Medical Group LLC, requesting Dr. Nickles' personnel file. On August 1, 2014, counsel for Dr. Nickles filed a Motion for Protective Order. The Court entered an order dated October 27, 2014, noting that the motion had been resolved. (See Exhibit D.)

On July 30, 2014, Respondents sent Appellant Plaintiffs' Requests to Admit to Defendant Hartsville Medical Group, LLC, which Appellant responded to on August 29, 2014. On July 31, 2015, Respondents filed a Motion to Compel responses to Plaintiff's First Interrogatories and Request for Production relating to the Interrogatories and Requests for Production relating to assets, liabilities, net worth, and guidelines, relating to the job descriptions, requirements, and scopes of practice of all Appellant employees during 2010 referenced *supra*. On July 31, 2015, Respondents sent Appellant Plaintiffs' Third Requests for Production to Defendant Hartsville Medical Group, LLC (Exhibit E.), which Appellant answered on October 20, 2015.

On September 23, 2015, Respondents sent Appellant Plaintiffs' Second Requests to admit to Hartsville Medical Group, LLC. On November 10, 2015, Respondents attorney filed an affidavit of no response. On October 8, 2015, Respondents noticed Appellant's 30(b)(6) deposition which listed various topics Respondents wished to ask Appellant's 30(b)(6) witness including topics Appellant had previously objected to. On October 9, 2015, Respondents filed an Amended Motion to Compel, adding to the July

31, 2015 Motion to Compel requests for information regarding the current ownership of Appellant and Appellant's insurance information. On October 21, 2015, Appellant served Respondents with objections to various topics included in the 30(b)(6) deposition notice, all of which related to the financial interests, ownership interests, and insurance information. Appellant reasonably objected to these same topics as no ruling had been made on Respondents' July 31, 2015 Motion to Compel. Respondents filed a Motion to Compel that same day regarding Appellant's objections to the topics included in the 30(b)(6) notice.

On October 23, 2015, Respondents served Plaintiffs' Second Interrogatories to Defendant Hartsville Medical Group, LLC and Plaintiffs' Fifth Requests for Production to Defendant Hartsville Medical Group, LLC. (Exhibit F; Exhibit G.) On October 28, 2015, during a status conference, Judge Burch ordered counsel for Appellant to provide Respondents with insurance information/documents and ownership and control information/documents. Judge Burch further ordered that the motion to compel regarding the financial information and documents would be heard in the normal course. On November 18, 2015, Respondents served Appellant with Plaintiffs' Third Interrogatories to Defendant Hartsville Medical Group, LLC and Plaintiffs' Sixth Requests for Production to Defendant Hartsville Medical Group, LLC. (Exhibit H; Exhibit I.)

On November 18, 2015, Respondents filed yet another amendment to their July 31, 2015 Motion to Compel. This time, Respondents demanded the entire personnel files for former employees Angie Gainey and Stephanie Watford, and the entire personnel file for Dr. Nickles. On December 7, 2015, Respondents served Appellant with Plaintiffs' Seventh Requests for Production to Defendant Hartsville Medical Group, LLC. (Exhibit J.)

Appellant's counsel working in good faith with Respondents' counsel resolved some, but not all, of the outstanding issues remaining in Respondents' three Motions to Compel. On December 15, 2015, the parties asked Judge Burch to rule on the contested issues. On February 2, 2016, Judge Burch filed an Order requiring Appellant to produce the following:

> 1. A copy of the following items mentioned in the job descriptions that were produced to me (received October 22, 2015):
>
> i. HMA ethical program;
> ii. HMA Compliance Program;
> iii. HMA Operations Manual;
> iv. HMA Recordkeeping standards;
>
> 2. Complete and up to date answer to Interrogatory number ten (10) regarding ownership, control and financial interest in Hartsville Medical Group, LLC, and any documents responsive to Requests for Production numbers one (1) and thirty-eight (38) relating thereto.

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

4. Within thirty (30) days documents and information responsive to Plaintiffs' First Requests for Production seventeen (17) and thirty-nine (39) through forty-two (42), AS WELL AS First Interrogatories thirty-three (33) through thirty-six (36), all regarding Defendant's financials, and, in particular, Defendant's CEO's gross compensation for the past three years, Defendant's net profit for the past three years, and Defendant's assets, liability and net worth, as well as Defendant's tax returns for the past five years; and

5. 30(b)(6) testimony regarding the information and documents sought in Response to the Requests referenced [above] (topic four (4) of the Amended 30(b)(6) Notice), and regarding the identity of any accountants for the Defendant (topic number sixteen (16) of the Amended 30(b)(6) notice).

(February 2, 2016 Order, Exhibit K.) The February 2, 2016 Order further ordered Appellant to "attempt to provide" the following documents:

1. From 2010, policies and procedures required under 42 CFR § 482.23(c)(2) (for Defendant and Hartsville HMA, LLC);
2. From 2010, written definitions required under JCAHO requirement MM.01.01.01 (for Defendant and Hartsville HMA, LLC)

(February 2, 2016 Order, Exhibit K.) The February 2, 2016 Order required Appellant to provide the documents within thirty days, which was March 4, 2016.

On March 24, 2016, Respondents filed yet another motion to compel and for sanctions, this time alleging that Appellant failed to comply with portions of the February 2, 2016 Order. Following a hearing on this motion to compel, the court entered an order on August 8, 2016, granting Plaintiff's Motion for Sanctions and striking Appellant's Answer. (August 8, 2016 Order, Exhibit L.) The following items were listed as being outstanding as of the date of the hearing:

A. Responses to the Sixth and Seventh Requests for Production
B. Complete and up to date answer to Interrogatory number ten (10) regarding ownership, control and financial interest in Hartsville Medical Group, LLC, and any documents responsive to Requests

for Production numbers one (1) and thirty-eight (38) relating thereto.

C. Copies of responsive insurance policies;

D. Identify of the Accountant for Defendant;

E. 2010 Policies and procedures required under 42 CFR § 482.23(c)(2) and written definitions required under JCAHO requirement MM.06.01.01;

F. Copies of Tax Returns actually filed for the Defendant

(August 8, 2016 Order, Exhibit L.)

Appellant received written notice of the Order on August 8, 2016, and filed a Motion to Reconsider on August 17, 2016. On September 12, 2016, Appellant received written notice of the court's Order Denying Defendant's Motion to Reconsider Pursuant to Rule 56(e), SCRCP and Denying Plaintiff's Prayer for Attorney's Fees.

On October 5, 2016, Appellants served the notice of appeal on Plaintiff.

II. OWNERSHIP HISTORY OF APPELLANT, HMG

In addition to the above, the ownership history of the Appellant HMG is of particular relevance to the discovery issues in this matter. Appellant is a limited liability company created in May of 2009 that was originally owned by Health Management Associates. On July 29, 2013, Community Health Systems, Inc. ("CHS") agreed to acquire Health Management Associates, Inc. ("HMA") through merger; the transaction was consummated on January 27, 2014. In re Community Healthcare Systems, Inc., 2014 WL 5474621 (F.T.C) (Oct. 21, 2014). Appellant was one of the assets purchased by CHS from HMA in this merger. In re Community Health Systems, Inc., 2014 WL 333627 (F.T.C.) (Jan. 21, 2014). As part of its purchase of HMA, CHS assumed various liabilities and potential liabilities of HMA, including the potential liability of the present action. (Affidavit of Terri Yates, Exhibit M.)

On January 21, 2014, the Federal Trade Commission ("FTC") entered an order essentially blocking the transfer of assets related to Carolina Pines Regional Medical Center ("Carolina Pines"), including Appellant, and requiring CHS to divest itself of Appellant within six months of that order. Id. The January 21, 2014 Order further empowered the FTC to appoint a Trustee to oversee Appellant while CHS sought a purchaser. Id. A Trustee was appointed, and assumed control of Appellant. (See Affidavit of Charlotte Adams, Exhibit N.)

On October 11, 2014, the FTC approved the sale of Carolina Pines, including Appellant to Capella Healthcare, Inc. ("Capella"). In re Community Healthcare Systems, Inc., 2014 WL 5474621 (F.T.C) (Oct. 21, 2014). Capella purchased Appellant, but it did

not purchase certain liabilities from CHS, including the present lawsuit. (See Affidavit of Terri Yates, Exhibit M.) On January 1, 2015, CHS sold Appellant to Capella. Id. CHS, therefore, remained the party responsible for the present litigation even though it never fully had control of Appellant and no longer had any ownership interest in Appellant.

In March of 2016, Capella announced it was merging with RegionalCare Hospital Partners ("RegionalCare"). The entity created out of this merger is called RCCH Health Partners. This merger created the third owner and fourth controlling interest in Appellant since 2013.

ARGUMENTS

1. BECAUSE THE TRIAL COURT'S DECISION TO STRIKE THE APPELLANT'S ANSWER WAS WITHOUT REASONABLE FACTUAL SUPPORT AND RESULTED IN PREJUDICE TO THE APPELLANT, THE TRIAL COURT'S DECISION TO STRIKE THE APPELLANT'S ANSWER AMOUNTED TO AN ERROR OF LAW AND SHOULD BE REVERSED.

While the selection of a sanction for discovery violations is within the trial court's discretion, an abuse of discretion may be found where the appellant shows that the conclusion reached by the trial court was without reasonable factual support and resulted in prejudice to the rights of appellant, thereby amounting to an error of law. Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co., 334 S.C. 193, 198 (Ct. App. 1999). When the court orders default or dismissal, or the sanction itself results in default or dismissal, the end result is harsh medicine that should not be administered lightly. Id. Furthermore, the sanction should be aimed at the specific conduct and not go beyond the necessities of the situation to foreclose a decision on the merits of a case. Id. Where the sanction would be tantamount to granting a judgment by default, the moving party must show bad faith, willful disobedience or gross indifference to its rights to justify the sanction. Id. at 198-99.

In determining the appropriateness of a sanction, the court should consider such factors as: 1) the precise nature of the discovery and the discovery posture of the case; 2) willfulness; and 3) the degree of prejudice. Rickerson v. Karl, 412 S.C. 215, 221, 770 S.E.2d 767, 770 (Ct. App. 2015) (citing Laney v. Hefley, 262 S.C. 54, 202 S.E.2d 12 (1974)). The sanction should be aimed at the specific misconduct of the party sanctioned and should not be used improvidently to prevent a decision on the merits. QZO, Inc. v. Moyer, 358 S.C. 246, 256, 594 S.E.2d 541, 548 (Ct. App. 2005) (citations omitted). "[T]he sanction imposed should be reasonable, and the [c]ourt should not go beyond the necessities of the situation to foreclose a decision on the merits of a case." Rickerson, at 221, 770 S.E.2d at 770 (citing Balloon Plantation, Inc. v. Head Balloons, Inc., 303 S.C. 152, 154, 399 S.E.2d 439, 440 (Ct.App.1990)).

A sanction that results in a default or dismissal is a severe punishment that should be imposed **only** if there is some showing of bad faith, willful disobedience, or gross indifference to the rights of the adverse party. Griffin, at 198–99, 511 S.E.2d at 719 (citing Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 109, 410 S.E.2d 537, 542 (1991)) (emphasis added). "A failure to weigh the required factors demonstrates a failure to exercise discretion and amounts to an abuse of discretion." Jamison v. Ford Motor Co., 373 S.C. 248, 270, 644 S.E.2d 755, 767 (Ct. App. 2007) (citing Samples v. Mitchell, 329 S.C. 105, 111, 495 S.E.2d 213, 216 (Ct.App.1997)).

As noted above, the appellant must establish only two prongs to show an abuse of discretion in a trial court's issuance of discovery sanctions: first, the appellant must show that the trial court's decision was reached without reasonable factual support, and second,

the appellant must show that it was prejudiced. In this matter, the prejudice to the Appellant is immediately apparent in that the trial court struck the Appellant's answer in the underlying action, amounting to a grant of summary judgment for the Respondent. The remaining factor—a showing that the trial court's conclusion was reached without factual support—is discussed below.

A. THE TRIAL COURT'S FINDINGS THAT THE APPELLANT WILLFULLY VIOLATED THE TRIAL COURT'S ORDERS AND WILLFULLY FAILED TO RESPOND TO RESPONDENT'S SIXTH AND SEVENTH REQUESTS FOR PRODUCTION ARE WITHOUT REASONABLE FACTUAL SUPPORT.

The trial court's order striking Appellant's Answer found the following discovery matters still outstanding at the time of its hearing on the Respondent's March 24, 2016 Motion to Compel:

A. Responses to the Sixth and Seventh Requests for Production
B. Complete and up to date answer to Interrogatory number ten (10) regarding ownership, control and financial interest in Hartsville Medical Group, LLC, and any documents responsive to Requests for Production numbers one (1) and thirty-eight (38) relating thereto.
C. Copies of responsive insurance policies;
D. Identity of the Accountant for Defendant;
E. 2010 Policies and procedures required under 42 CFR § 482.23(c)(2) and written definitions required under JCAHO requirement MM.06.01.01;
F. Copies of Tax Returns actually filed for the Defendant

(August 8, 2016 Order, Exhibit L.) As to each of the above discovery matters, Appellant has responded or has diligently made all reasonable efforts to obtain and provide responses to Respondent's requests. The scope of these efforts is outlined generally below, with details regarding each discovery matter individually to follow.

Regarding Appellant's general efforts to obtain and provide responses to Respondent's requests, in early February, 2016, counsel for Appellant contacted Charlotte Adams ("Adams") at Carolina Pines and the 30(b)(6) designee for Appellant about compiling the requested documents and information from the February 2, 2016 Order. (Affidavit of Charlotte Adams, Exhibit N.) From early February 2016 to February 23, 2016, Adams searched the computer systems and physical files she had access to in an attempt to locate the documents. (Id.)

Unsuccessful, Adams contacted Rodney Van Donkelaar ("Van Donkelaar"), the Chief Financial Officer ("CFO") of Carolina Pines Regional Medical Center for assistance with locating financial and ownership documents for Appellant. Upon receipt of the request from Adams, Van Donkelaar contacted Andrew Slusser ("Slusser") who was the Executive Vice President and Chief Development Officer for Capella. (Affidavit of Rodney Van Donkelaar, Exhibit O.) Slusser placed Van Donkelaar in touch with Davis Turner, Vice President and Associate General Counsel for Capella. (Id.) After several privileged discussions with Turner, Van Donkelaar searched computer systems and local physical files for the documents. (Id.) After several days of searching, Van Donkelaar was able to locate some remaining internal profit/loss statements for Appellant. (Id.) He was unable, however, to locate filed tax returns or documents reflecting net profit, assets, liability and net worth. He was also unable to locate tax filings, internal audits, and profit/loss statements. (Id.) On March 11, 2016, Van Donkelaar informed counsel for Appellant he had searched all he could and had only been able to locate the internal profit/loss statement. (Id.)

Counsel for Appellant subsequently contacted Terri Yates ("Yates"), senior claims manager for CHSPSC, LLC about attempting to locate the documents that Van Donkleaar and Adams had been unable to locate locally. Yates then contacted CHS's Corporate Tax Department to start the process of looking for the documents requested, including ownership documents and tax information. (Affidavit of Terri Yates, Exhibit M.) The Tax Department was able to locate what are known as "pro forma" 1120 tax returns for Appellant. These documents were provided to Respondents' counsel.

As can be seen through the affidavits of Adams, Van Donkelaar and Yates, Capella and CHS exerted great effort to locate the documents that have been produced to Respondent. In addition, counsel for Appellant have invested over sixty hours in conferences, reviewing documents, identifying responsive materials, and otherwise engaging in efforts to provide responses to Respondent's discovery. In no way has Appellant willfully violated the court's orders, acted in bad faith, or conducted its actions with gross indifference to the Respondent's rights.

In addition to its general efforts described above, Appellant's efforts as to each specific discovery order are outlined below. Again, as will be shown, the Appellant has not willfully violated the court's specific discovery orders nor has it failed to respond to Plaintiff's Sixth and Seventh Sets of Discovery Requests.

I. Appellant Has Already Substantially Answered Respondent's Sixth and Seventh Requests for Production

1. Responses to Sixth Requests for Protection

Respondents' Sixth Requests for Production of Documents have already been answered to the extent responsive materials are available. However, Respondent

continues to seek additional materials. Because the Appellant cannot produce documents that do not exist, and perhaps never existed, is both unjust and inequitable for Appellant's answer to be struck, in part, for failing to produce those documents.

Specifically, Plaintiff's Sixth Requests for Production of Documents read as follows:

> 1. Please provide a complete copy of the HMA Compliance Manual, 3rd Edition, as referenced in the contract between Hartsville Medical Group, LLC and Melvin B. Nickles, Jr., MD, which was marked as Exhibit 4 to your 30(b)(6) Deposition.
>
> 2. Please provide the HMA Ethics Manual, HMA Operations Manual, and HMA Recordkeeping Standards as referenced throughout the Hartsville Medical Group, LLC job descriptions that are marked as Exhibit #3 to your 30(b)(6) Deposition.
>
> 3. Please produce all documents relating to the purchase of the assets of Melvin Nickles, Jr., MD's medical practice as referred to in his contract with you that was marked as Exhibit #4 to your 30(b)(6) Deposition. This would include, but not be limited to, any and all records of due diligence regarding the adequacy of the clinical staff, clinical protocols, recordkeeping, and patient safety precautions in Dr. Nickles' practice prior to or at the time it was purchased by Hartsville Medical Group, LLC.

(Plaintiff's Sixth Requests for Production of Documents, Exhibit I).

The first two of these requests seek (1) the HMA Compliance Manual, 3rd Edition; (2) the HMA Ethics manual; (3) the HMA Operations Manual, and (4) the HMA Recordkeeping Standards. Thus, these first two requests are substantially similar to Respondents' Fifth Requests for Production of Documents, which, among other things, requested the following:

> 1. A copy of the following items mentioned in the job descriptions that were produced to me (received October 22, 2015):
>
> i. HMA Ethical program;
>
> ii. HMA Compliance Program;

iii. HMA Recordkeeping standards

Regarding the first item on the list, the Compliance Manual, the trial court found in its August 8, 2016 Order that "[o]n June 16, 2016, counsel for Defendant delivered Plaintiffs' counsel . . . two copies of Health Management Associates, Inc. Corporate Compliance Manual and Code of Conduct, Third Edition (2007)." (August 8, 2016 Order, Exhibit L.) Regarding the remaining items on the list, as Appellant indicated in its written responses dated August 9, 2016, Appellant provided any responsive documents available at the time it responded to Respondent's Fifth Requests for Production of documents. Regarding the Recordkeeping Standards specifically, Adams has testified through her affidavit that she went back and looked for the Standards as requested by Respondents counsel in her deposition and was unable to locate any recordkeeping standards. (See Affidavit of Adams, Exhibit N.)

As to number 3 of Plaintiffs' Sixth Requests for Production to Hartsville Medical Group, LLC, the contract between Dr. Nickles and Appellant dated August 4, 2009, does not reference any documents relating to "due diligence regarding the adequacy of the clinical staff, clinical protocols, recordkeeping, and patient safety precautions." (See Exhibit P.) In fact, the only time the words "record" or "document" are mentioned in the Contract are in the context of patient records. (Id.) As a result, Appellants have fully responded to the Respondents' request as it was provided to Appellants. B

Because Respondents' Sixth Requests for Production of Documents have already been answered or request documents that do not exist, and perhaps never existed, it is

both unjust and inequitable for Appellant's answer to be struck, in part, for failing to produce those documents.

2. Responses to Seventh Requests for Production

Respondents are in possession of documents responsive to their seventh requests for production; to the extent any documents have not been provided, it is Respondents have requested that Appellant produce documents in the possession of a non-party. As a result, to the extent the trial court granted the motion for sanctions based on Appellant's alleged failure to respond to the Seventh Requests for Production, the trial court's decision is not based on reasonable factual support.

In Respondents' Seventh Requests for Production of Documents, Respondents requested the following:

> 1. A copy of the Practice Administrator job description in use at the Hartsville Medical Group, LLC in 2010.
>
> 2. Please provide the standing order and clinical protocol for the administration of the Hepatitis B Vaccine that was in use at Carolina Pines Regional Medical Center during 2010.

(Plaintiffs' Seventh Requests for Production of Documents, Exhibit J.)

Regarding the first portion of this request, the trial court itself found in its August 8, 2016 Order that "[t]he morning of this hearing defense counsel provided Respondents' counsel with the job description for Practice Administrator." (August 6, 2016 Order, p. 11, Exhibit L.) Therefore, the August 8, 2016 order is incorrect when it states that Appellant has provided "no response of any sort to the . . . Seventh Requests for Production." Id.

As to the second request in Plaintiff's Seventh Requests for Production of Documents to Hartsville Medical Group, Respondents have requested documents relating to Carolina Pines. Carolina Pines is not a party to this action. Appellant is the sole remaining defendant. There has been no finding by this court that the corporate veil is to be pierced and Carolina Pines is to be amalgamated with its corporate parent, HMA, Capella, or CHS, or any subsidiary of its corporate parent like Appellant. Without a finding that Appellant is amalgamated with Carolina Pines and its corporate parent, Appellant has no right to documents from Carolina Pines that are not being kept specifically for Appellant.

Thus, because the Respondents already possess the Practice Administrator job description (the first part of their discovery request), and because the remainder of the request seeks documents in the possession of an entity that is not a party to this litigation, Appellant has already substantively responded Respondent's Seventh Request for Production. As a result, to the extent the trial court granted the motion for sanctions based on Appellant's alleged failure to respond to the Seventh Requests for Production, the trial court's decision is not based on reasonable factual support.

II. To the Extent it Possessed Responsive Information, Appellant Provided Updated Responses to Interrogatory Number 10 and Requests to Produce Number 1 and Number 38 Within a Reasonable Time.

Next, the February 2, 2016 Order addressed Interrogatory Number 10 and Requests to Produce Number 1 and Number 38. Specifically, Paragraph 5(b) of the February 2, 2016 Order states "Defendant will provide Plaintiff a complete and up to date answer to Interrogatory number ten (10) regarding ownership, control and financial

interest in Hartsville Medical Group LLC, and any documents responsive to Requests for Production numbers one (1) and thirty-eight (38) relating thereto . . . ." (February 2, 2016 Order, Exhibit K.) While other paragraphs in the Order requiring document production mandate the number of days in which the documents were to be produce, Paragraph 5(b) does not. Appellant thus presumed the Order granted a reasonable period of time to search its records and locate the documents. These documents were provided within that reasonable period by providing responsive documents on June 16, 2016.

On June 16, 2016, counsel for Appellant provided Respondents' counsel with the document entitled "Amended and Restated Limited Liability Agreement of Hartsville Medical Group, LLC, dated January 27, 2014." This document reflects the ownership of Appellant by CHS, who is the party defending this litigation. It would not be relevant for Respondents to reference any information relating to Capella's ownership of Appellant for a punitive damages argument or ability to pay analysis in this case as Capella would neither be punished through this lawsuit and would not pay anything as a result of this lawsuit. Because Appellant has produced documents reflecting CHS's ownership interest in Appellant within a reasonable period of time after the February 2, 2016, Appellant, therefore, has fully complied with the February 2, 2016 Order and there is nothing else owed to the Respondents regarding Interrogatory number 10 and Requests for Production Number 1 and 38.

Notwithstanding the responses provided by the Appellant to the Respondent, it is also notable that these discovery requests seek information and material that belong to a non-party. Specifically, in the August 8, 2016 Order, the court agreed with the

Respondents that the document showing CHS owning Appellant did not show "the identity of any . . . hospital or healthcare system, which has a financial interest, controlling interest or ownership interest of the medical entity, including the business address of all offices which are owned, managed or used by this Defendant or any company having a financial interest in this Defendant." (August 8, 2016 Order, p. 11, Exhibit L.) The August 8, 2016 Order states that the document provided by Appellant's counsel to Respondents' counsel "identifies a Delaware limited partnership as the sole member, and another LLC as the limited partnership's general partner." (Id.)

As a result, by considering Appellant's responses to Interrogatory 10 and Requests for Production Number 1 and 38 as part of its basis for striking Appellant's answer, the trial court has essentially sanctioned Appellant for failing to identify the members of Delaware limited partnerships and LLC's in which Appellant has no ownership interest. Appellant has produced the documents showing the name of its immediate owner; however, it is unreasonable to expect subsidiary corporations to maintain documents of its corporate parents. If Respondents want to know the corporate structure of entities that are not parties to this action, their access to those records through subpoena is equal to Appellant's access. Furthermore, Respondents could have easily added HMA, CHS, and/or Capella as defendants in order to subject them to discovery.

Thus, the trial court's decision to strike Appellant's Answer based in part on Appellant's alleged failure to more fully answer these discovery requests—which seek material belonging to a non-party—is without reasonable factual support.

III. Appellant's Failure to Produce the Insurance Documents was Not Willful.

The trial court next listed insurance documents as still outstanding from Respondent's discovery requests. However, Appellant's failure to produce the insurance documents was not willful. After the February 2, 2016 Order, Appellant, Capella, and CHSPSC, LLC personnel began searching for the documents requested from the Order. (See Affidavit of Yates, Exhibit M; Affidavit of Adams, Exhibit N; Affidavit of Van Donkelaar, Exhibit O.) CHS purchased 71 hospitals when it purchased HMA. (Affidavit of Yates.) This meant a great deal of information was moved from HMA's headquarters into CHS's headquarters. Electronic data stored by HMA was not always compatible with the systems used by CHS.

There was, and remains, a great deal of confusion about the location of various documents, including the insurance documents requested by Respondents. Appellant's failure to produce the insurance documents is not willful but rather the result of information from three different owners being stored across three different states in three different computer systems owned by three different companies. As can be seen through the affidavits of Adams, Yates, and Van Donkleaar, Appellant used all the contacts at its disposal in an attempt to locate these documents. This included involving two large hospital organizations and their personnel located across three states. (See Affidavit of Adams, Exhibit N; Affidavit of Yates, Exhibit M; Affidavit of Van Donkleaar, Exhibit O.) Furthermore, Appellant is still attempting to locate these documents. Because Appellant's failure to produce the insurance documents is not willful, the trial court's

consideration of this factor to strike Appellant's Answer is not reasonably supported by the facts.

IV. Appellant has not violated the Court's Order Requiring 30(b)(6) Deposition Testimony Regarding Identification of Appellant's Accountant.

As an initial matter, the Appellant notes that it erroneously stated, in its Memorandum in Support of Defendant's motion to Reconsider, that the trial court's Order did not contain the words "accountant" or "account." In reviewing the trial court's Order, the Appellant had reviewed the record for the term "accountant" in the context of an interrogatory or request to produce from the Respondent, and in fact, the words "accountant" and "account" do not appear in reference to interrogatories or requests to produce. Nor did the trial court order the Appellant to respond to any interrogatory or request to produce with the identity of an appellant. However, the Appellant inadvertently overlooked the term as it appears in the context of 30(b)(6) testimony. Specifically, the court granted the Respondent's motion to compel to require 30(b)(6) deposition testimony regarding the identify of an accountant. Importantly, however, this error does not impact the Appellant's position that it has not violated the trial court's order on this point, as is explained further below.

The trial court's February 2, 2016 Order found that the Appellant's objections regarding 30(b)(6) testimony as to the identity of an accountant were not appropriate, and as a result, it granted the Respondent's motion to compel 30(b)(6) deposition testimony

as to the identity of an accountant.[1] However, the Order did not require that the 30(b)(6) deposition be set by any specific time, and to date the Respondents have not noticed or even discussed scheduling a 30(b)(6) deposition on this topic, nor has any deposition taken place at which the Respondents requested 30(b)(6) testimony regarding the identification of Appellant's accountant. Thus, the Appellant has not violated the trial court's order regarding the identity of an accountant because no 30(b)(6) deposition regarding this topic has been sought.

In addition to the above, and as explained to the trial court in the hearing on the Respondent's motion to compel, the Appellant has been unable to determine the identity of any accountant. As a result, even had the Appellant failed to provide the identity of an accountant, such failure would not have been committed willfully or in bad faith. Appellant has made all reasonable efforts in its attempt to identify this information, and as a result, the trial court's consideration of this factor in its decision to strike the Appellant's Answer is unjust.

In summary, the Appellant has not declined to abide by the trial court's Order regarding providing 30(b)(6) testimony regarding identification of an accountant because no 30(b)(6) deposition has been scheduled or even discussed since the Order was issued. As a result, they have not violated the Order. Moreover, even had the Appellant been unable to identify any accountant, any failure in this respect would not have been willful or in bad faith. As a result, to strike the Appellants' Answer based on any alleged failure

[1] To reiterate the Appellant's position raised to the Court below in its Motion for Reconsideration, the Respondents did not request the identity of an accountant in any interrogatory or request to produce. As a result, the Appellants have violated no order in regards to providing the name of an accountant in response to a discovery request. Rather, the only instruction regarding an accountant was in relation to 30(b)(6) deposition testimony.

to provide 30(b)(6) testimony, when a deposition regarding such testimony has not been noticed, is unjust and not reasonably supported by the facts.

V. Appellant is Not a Hospital as the Term is Used in 42 CFR § 482.23(c)(2) and is Not JCAHO Accredited; Thus, it Neither Has Nor is it Required to Have Any Records or Documents Related to 42 CFR § 482.23(c)(2) or JCAHO Requirement MM.06.01.01.

Appellant is not JCAHO accredited and is thus not required to maintain any records relating to JCAHO requirement MM.06.01.01, nor does Appellant possess any records relating to this requirement. Likewise, Appellant is not a hospital as defined in 42 U.S.C. § 1395x (e), which sets the definition for the term "hospital" as used in 42 CFR § 482.23, and as a result, it does not have any documents relating to this regulation. Furthermore, Appellant was not ordered to produce records relating to MM.06.01.01 or 42 CFR § 482.23(c)(2), but only to look for such documents, which it has done. Finally, no entity that is a party to this lawsuit would maintain records related to MM.06.01.01 or 42 CFR § 482.23(c)(2). As a result, as is more fully explained below, the trial court's consideration of Appellant's failure to produce these documents in striking Appellant's answer is not reasonably supported by the facts.

1. Appellant is Not JCAHO Accredited and Thus Has No Documents Related to JCAHO Requirement MM.06.01.01.

As noted *supra*, Appellant was, at one point, owned by Hartsville HMA, LLC. Hartsville HMA, LLC changed its name to Hartsville, LLC on December 31, 2014. (See Exhibit Q.) Hartsville, LLC also owns and does business as Carolina Pines. Hartsville HMA, LLC a/k/a Hartsville, LLC d/b/a Carolina Pines is JCAHO accredited in hospital and laboratory services, and has only ever been accredited in hospital and laboratory

services. (See Exhibit R.) In fact, the only entity accredited by JCAHO with Hartsville in its name is Hartsville, LLC. (See Exhibit S.) Hospital accreditation is defined on the JCAHO website as "General medical/surgical, psychiatric, long term care acute, rehabilitation and surgical specialty, children's." (Exhibit T, p. 2-3.) Pathological and Clinical Laboratory services are defined as "Hospital-based main laboratories or testing facilities, free-standing laboratories, embryology laboratories, reference laboratories, blood banks and donor centers." (Id. at 3.)

Appellant never performed surgery, psychiatric, long term acute care, rehabilitation, or surgery, and never ran a laboratory. In fact, Angie Gainey, one of the Appellant's employees in 2010 stated that ninety percent (90%) of Dr. Nickles's practice is treating patients for work-related injuries, pre-employment physicals, random drug screens, and breath alcohol tests. (Deposition of Angie Gainey, p. 11:6-15, Exhibit U.) Appellant was an occupational healthcare facility (Id.; Deposition of Charlotte Adams, p. 74:16, Exhibit V.) Hartsville, LLC's JCAHO certification does not include a certification for occupational healthcare. Respondents are essentially insisting that Appellant produce records relating to a certification that it never had. Further, Respondents are insisting that Appellant has the ability to obtain documents from an entity with which it has no controlling interest and that is not a party to the present litigation.

Respondents knew that Appellant was not JCAHO accredited. In her 30(b)(6) deposition for Appellant on December 1, 2015, Charlotte Adams ("Adams") provided the following testimony:

> Q: Sure. The requirements of the Joint Commission would certainly be evidence of what the standard of care is in relation to the deliver of healthcare to patients in a safe manner, is that right?
>
> A: Yes, but only in the Medical Gr—I mean only in the hospital facility. **We are not Joint Commission accredited at the practice.**

(Deposition of Charlotte Adams, p. 38:2-9, Exhibit V (emphasis added).) She repeated this statement several times in her deposition, stating in response to the question is Appellant JCAHO accredited: "No, they are not Joint Commission accredited" and "We've always kept them completely separate, because the hospital is Joint Commission accredited, but the group is not (See Dep. of Adams, pp. 77:6, 78:16-18, Exhibit V.)

In fact, Respondents' own expert has testified that she did not know whether Appellant was JCAHO accredited or licensed. (See Deposition of Beverly Ann Tedder Essick, p. 51:2-9, Exhibit W.) Additionally, the fact that Respondents apparently need expert testimony on whether JCAHO standards applied in the first place means that this is an issue for a jury to decide. Instead, the court is sanctioning Appellant for failing to have documents that a jury must determine whether it is supposed to have in the first place. It is clear that there is a material factual dispute as to whether JCAHO standards applied to Appellant. There has been no court ruling or jury finding that JCAHO standards applied to Appellant. There has been no evidence heard by either a judge or a jury as to whether JCAHO standards apply to Appellant. To the extent Respondents seek JCAHO standards for Carolina Pines, they were free to add Hartsville, LLC as a party or subpoena those records from Hartsville, LLC directly. To sanction Appellant for failing to produce records which it did not maintain and which it is not required to maintain is unjust and inequitable and rises to the level of a miscarriage of justice.

2. Appellant is Not a Hospital as Defined in 42 C.F.R. § 482.23 and Thus Has No Documents Related This Regulation.

The opening to 42 C.F.R. § 482.23 states "[t]he hospital must have an organized nursing service that provides 24-hour nursing services. The nursing services must be furnished or supervised by a registered nurse." Other sections of 42 C.F.R. § 482.23 contain other regulations relating to hospitals. For example, 42 C.F.R. § 482.23(b)(1) states that "[t]he hospital must provide 24-hour nursing services furnished or supervised by a registered nurse, and have a licensed practical nurse or registered nurse on duty at all times, except for rural hospitals that have in effect a 23-hour nursing waiver granted under § 488.54(c) of this chapter."

Furthermore, 42 U.S.C. § 1395x, the federal law out of which 42 C.F.R. 482.23 was created, defines "hospital" as an institution which meets the following criteria:

> (1) is primarily engaged in providing, by or under the supervision of physicians, to inpatients (A) diagnostic services and therapeutic services for medical diagnosis, treatment, and care of injured, disabled, or sick persons, or (B) rehabilitation services for the rehabilitation of injured, disabled, or sick persons;
> (2) maintains clinical records on all patients;
> (3) has bylaws in effect with respect to its staff of physicians;
> (4) has a requirement that every patient with respect to whom payment may be made under this subchapter must be under the care of a physician, except that a patient receiving qualified psychologist services (as defined in subsection (ii) of this section) may be under the care of a clinical psychologist with respect to such services to the extent permitted under State law;
> (5) provides 24-hour nursing service rendered or supervised by a registered professional nurse, and has a licensed practical nurse or registered professional nurse on duty at all times; . . .
> (6)(A) has in effect a hospital utilization review plan which meets the requirements of subsection (k) of this section and (B) has in place a discharge planning process that meets the requirements of subsection (ee) of this section;

> (7) in the case of an institution in any State in which State or applicable local law provides for the licensing of hospitals, (A) is licensed pursuant to such law or (B) is approved, by the agency of such State or locality responsible for licensing hospitals, as meeting the standards established for such licensing;
> (8) has in effect an overall plan and budget that meets the requirements of subsection (z) of this section; and
> (9) meets such other requirements as the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services in the institution.

42 U.S.C. § 1395x(e). As this text states, to be considered a hospital under federal law and federal regulations, an entity must meet each and every one of these nine criteria.

Appellant does not and never has met all these standards. Among the standards that Appellant does not meet are that (a) it does not have in effect a hospital utilization review plan; (b) it does not have a hospital license from the State of South Carolina; (c) it does not have an overall plan and budget reflecting the requirements of subsection (z); and (d) Appellant does not provide 24-hour nursing service. In fact, the Respondents entire position in this case is that Appellant had **NO** nurses employed by Appellant at all. Each the three of Appellant's employees that were deposed testified they did not have nursing degrees. (See Deposition of Rachel Hoffman, p. 18:3-4, Exhibit X; Deposition of Stephanie Waford, p. 8:12-21, Exhibit Y; Deposition of Angie Gainey, p. 15:24-16:4, Exhibit Z.) In fact, Angie Gainey, one of the Appellant employees deposed by counsel for Respondents, specifically told Respondents that there were no nurses working for Appellant. (Dep. of Gainey, p. 16:5-7, Exhibit Z.)

As a result, Appellant is not, and never has been, a hospital under federal law, and thus the standards of 42 CFR § 482.23 do not apply. Appellant, therefore, was never required to maintain any records relating to 42 C.F.R. § 482.23. It would be inequitable,

unjust, and a miscarriage of justice to strike Appellant's answer, in part, for failing to again produce records that it does not possess and that it was not required to maintain.

3. Hartsville, LLC d/b/a Carolina Pines Regional Medical Center Is Not a Party to this Litigation, and, Therefore, it is Inequitable to Punish Appellant for Failing to Produce Records For Entities that are Not Parties to this Litigation Over which Appellant Has No Control.

Respondents, and the court appear to have concluded that Hartsville, LLC d/b/a Carolina Pines Regional Medical Center is the same entity as Appellant. This is not, and has never been true. Appellant is a separate entity from Hartsville, LLC and Carolina Pines. Appellant does not have an ownership interest in Hartsville, LLC or Carolina Pines. To the extent the court found that Appellant should have maintained records under 42 C.F.R. § 482.23 and JCAHO, those records would have been and are maintained by Hartsville, LLC d/b/a Carolina Pines Regional Medical Center – an entity which Appellant has no ownership interest in, and, therefore, no control over. It is thus inequitable for Appellant's answer to be struck for failing to obtain documents from an entity which it has no ownership in and which the Respondents can directly subpoena for the same records.[2]

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[2] Respondents have suggested in their Memorandum in Opposition to Appellant's Motion for Reconsideration that because Charlotte Adams is an agent of Carolina Pines who has also served as a 30(b)(6) designee on Appellant's behalf, Appellant should produce documents available to Carolina Pines. Respondents appear to be suggesting that because Ms. Adams has access to the documents of a non-party, Appellant should recruit her to take the materials from the non-party and provide them on behalf of Appellant. Obviously, without a finding that the Appellant and Carolina Pines are amalgamated, Appellant cannot ask Ms. Adams to use her agency with Carolina Pines to take their internal documents to provide on Appellant's behalf.

4. Even Were the Factfinder to Find that Appellant is Required to Keep Records Pursuant to 42 CFR § 482.23 or JCAHO, Appellant Does Not Have Such Records, and Striking Appellant's Answer for Failure to Keep Such Records Amounts to Punishing Appellant for Failing to Comply with 42 CFR § 482.23 and JCAHO Without a Trial in Violation of Appellant's Constitutional Rights.

Respondents insist, despite a lack of any case law, statute, or administrative decision in support, that Appellant was required by federal law to comply with 42 C.F.R. § 482.23 and JCAHO Requirement MM.06.01.01. Even if this were the case, which Appellant denies, Appellant has stated repeatedly that it does not have such documents and that it never maintained these documents. If Appellant failed to maintain records as required by 42 C.F.R. § 482.23, which Appellant again denies, then Appellant violated a federal law and JCAHO standards. Yet there has been no finding in this case that Appellant violated a federal law or JCAHO standards. Such a finding would have to be made by a jury.

Additionally, Appellant is being punished for violating a federal law and JCAHO standard without a jury decision through a punishment that Respondents have provided no basis in state or federal law. Specifically, there are no provisions in either South Carolina or Federal law that support an automatic penalty of striking a defendant's answer for failing to comply with 42 C.F.R. § 482.23 and JCAHO Standard MM.06.01.01. However, to the extent the trial court's Order strikes the Appellant's Answer based on Appellant's failure to produce JCAHO and 24 C.F.R. § 48.23 records which it does not have, the trial court has essentially deemed, without a jury trial, that Appellant is required to keep these records and that the appropriate punishment for

failing to keep them is to strike the Appellant's Answer. Such a result is inequitable, unjust, and a miscarriage of justice along with a violation of Appellant's constitutional right to a jury trial on issues of fact.

VI. Respondents Never Requested and Appellant Was Never Ordered to Produce Copies of Tax Returns "Actually Filed."

In its decision to strike Appellant's Answer, the trial court improperly considered Appellant's failure to provide *filed* copies of its tax returns because the Appellant fully complied with the Respondents' discovery requests and the trial court's order by providing pro forma copies of the tax returns. Moreover, Appellant is unable to provide filed copies of the tax returns because it is a disregarded entity for IRS purposes and, as a result, the Appellant is not in possession of the filed copies. As a result, the trial court's consideration of the tax returns as part of its basis for striking the Appellant's answer is unjust and inequitable, and the trial court's decision should be reversed.

To provide the necessary background, Request 17 of Respondent's First Requests for Production to Hartsville Medical Group, LLC, sought "[a]ll tax returns of Hartsville Medical Group and/or its clinics (or any related entity) for the previous five (5) year period." Appellant reasonably objected to this request on the grounds that it requested information not relevant to the present litigation, a position that Appellant still maintains. Thereafter, the trial court discussed the tax return dispute in it February 2, 2016 Order, and concluded that the tax returns were calculated to lead to the discovery of admissible evidence. (February 2, 2016 Order, Exhibit K.) The trial court then ordered that the tax returns be produced within thirty days of the date of the order on the grounds that these documents could be used by Respondents to "analyze said documents and information

and to explain the same to the jury at trial." Importantly, however, neither the Respondents' discovery request nor the trial court's order required production of "actually filed" tax returns.

On June 16, 2016, following a search that uncovered only pro forma copies of the tax returns, Appellant produced the pro forma copies of U.S. Corporation Income Tax Return Form 1120s to Respondent. (See Exhibit AA.) These tax returns reflect the exact information Respondents requested, and counsel for Appellant explained that copies of the filed tax returns could not be located because Appellant was a disregarded entity for tax purposes, and, therefore, there are no filed tax returns for Appellant. However, Appellant offered to stipulate to the accuracy of the pro forma 1120s, which Respondents rejected.[3] Thus, Respondents had the information necessary for their experts to provide an evaluation as to Appellant's ability to pay, but rejected them for allegedly being in the wrong form.

At no time has Appellant been asked to produce or ordered to produce tax returns that have "actually been filed." This additional language appears to have been added by the Respondents in attempt to penalize Appellant for form over substance. While Appellant has been unable to locate and produce filed copies of the returns, it has acted in good to comply with the discovery requests and the February 2, 2016 Order by providing

[3] Respondent has asserted, without any explanation, that the Respondents are not "able to utilize" the pro forma tax returns. Respondent's Memorandum in Opposition to Appellant's Motion to Reconsider and Prayer for Attorney's Fees, Exhibit BB, at 21-22. Not only is the Respondent's assertion made without any explanation, but it is furthermore inaccurate, particularly given Appellant's offer to stipulate to the pro form tax returns' accuracy. Respondent also asserted that "Defendant produced what it represented were Defendant's tax returns. Now it admits that they are not...." Id. This statement is patently untrue, and Appellant has never stated that the pro forma tax returns are not its tax returns. Again, Appellant has even offered to stipulate to their accuracy.

the pro forma tax returns with a stipulation that they are accurate. As a result, there has been no prejudice to the Respondents.

By nonetheless ordering the Appellant's Answer to be struck, the trial court improperly penalized the Appellants despite the fact that they complied with the discovery requests and the trial court's order by providing the pro forma tax returns and the offer of a stipulation as to their accuracy. By striking Appellant's answer based in part on Appellant's failure to produce information to Respondents in a form they never requested and in a form which was never ordered is unjust and a miscarriage of justice.

2. Appellant Does Not Have Tax Filings for the Last Five Years Because It Was a Disregarded Entity for Tax Purposes.

Unfortunately, the pro forma copies of the tax returns are the only form of the returns Appellant could produce. This is because the Appellant is a "disregarded entity" for tax purposes, which is permitted for LLCs under the federal regulations. See 26 C.F.R. § 3011.7701-3(a). As a disregarded entity, Appellant's tax filings were made as part of the tax filings of its corporate parent. (See Affidavit of Van Donkelaar, Exhibit O.) This is also true for profit and loss statements. Appellant does not and never did maintain individual profit/loss statements for Appellant itself. Rather, that information would have been created by and maintained at a corporate level by the parent company. (Id.) The parent company would then file taxes on behalf of all the entities combined and report profit/losses as a whole.

Nonetheless, while it was unable to provide filed copies of the tax returns, the Appellant has complied with the Respondent's request by providing pro forma tax returns. A Pro Forma tax return is normally used to determine how a decision could

change the way investors view the business. They are for internal use only and are not filed with the IRS. However, the Appellant has offered to stipulate to the accuracy of these returns, an offer which the Respondents has rejected.

In addition, in a good faith attempt to comply with the February 2, 2016 Order, on March 16, 2016, Appellant produced internal documents showing profit/loss for Appellant, that included information on gross revenue, deductions, net operating revenue, net revenue, bad debt, operating expenses, operating profit, fixed expenses, profit/loss, management fees, among other information for 2012, 2013, 2014, and 2016. (See Exhibit CC). Like the pro forma tax returns, these documents contain the information requested by the Respondents, and so any objection from the Respondent is to form, not substance. Again, to the extent the trial court considered Appellant's failure to provide filed copies of these documents, the trial court's order should be reversed.

B. THE TRIAL COURT'S FINDING THAT THE NATURE OF DISCOVERY WEIGHS IN FAVOR OF SANCTIONS, AND PARTICULARLY THE STRIKING OF THE APPELLANT'S ANSWER, IS WITHOUT REASONABLE FACTUAL SUPPORT.

The nature of the discovery sought in this case does not weigh in favor of the trial court's harsh and extreme sanction of striking the Appellant's Answer for two reasons. First, the trial court's decision to strike the Appellant's Answer in response to Appellant's failure to respond to discovery related to its ability to pay punitive damages is not reasonable related to the discovery sought, nor is it proportionate to the alleged conduct. Second, the facts of this case, including the multiple sales of the Appellant's company, the entrusting of the company to a Trustee since suit was filed, and the Appellant's sincere and good faith efforts to obtain responsive information, show that sanctions of

any kind—and especially of striking the Appellant's Answer—are without reasonable factual support.

1. The Trial Court's Decision to Strike the Appellant's Answer is Not Rationally Related or Proportionate to the Nature of the Discovery.

The trial court's order striking Appellant's Answer found the following discovery matters still outstanding at the time of its hearing on the Respondent's March 24, 2016 Motion to Compel:

A. Responses to the Sixth and Seventh Requests for Production
B. Complete and up to date answer to Interrogatory number ten (10) regarding ownership, control and financial interest in Hartsville Medical Group, LLC, and any documents responsive to Requests for Production numbers one (1) and thirty-eight (38) relating thereto.
C. Copies of responsive insurance policies;
D. Identity of the Accountant for Defendant;
E. 2010 Policies and procedures required under 42 CFR § 482.23(c)(2) and written definitions required under JCAHO requirement MM.06.01.01;
F. Copies of Tax Returns actually filed for the Defendant

(August 8, 2016 Order, Exhibit L.) With the exception of the Respondent's request for records maintained pursuant to 42 C.F.R. § 482.23 and JCAHO (item E. in the list above), the allegedly outstanding discovery sought by the Respondents (items A. through D., and item F.) relate only to the Respondent's ability to pay punitive damages. Moreover, as the Respondent has shown at length in Section V. above, Respondent is not required to keep and does not have records pursuant to 42 C.F.R. § 482.23 and JCAHO. Thus, the trial court's decision to issue sanctions in this matter could only have derived from the Respondent's allegations that Appellant failed to respond to discovery related to the Appellant's ability to pay punitive damages.

Nonetheless, while the documents sought by the Respondents and considered by the trial court in striking the Appellant's answer do not affect the underlying merits of the case, the trial court's sanction of striking the Appellant's answer relates solely to the merits of the case. Striking Appellant's Answer and ordering there to be a damages hearing because Appellant has failed to produce information necessary for a damages hearing does not meet the requirement that the sanction imposed should be reasonable, and the **[c]ourt should not go beyond the necessities of the situation to foreclose a decision on the merits of a case**." Rickerson, at 221, 770 S.E.2d at 770 (emphasis added) (citing Balloon Plantation, Inc. v. Head Balloons, Inc., 303 S.C. 152, 154, 399 S.E.2d 439, 440 (Ct.App.1990)).

Because the documents and information requested that Appellant did not produce and/or produced late only had to do with ability to pay, the nature of the discovery does not support striking Appellant's answer and ordering a damages hearing.

2. Given the Immense Difficulty of Obtaining the Discovery Requested by the Appellants in this Case and the Diligent and Good Faith Efforts by the Appellant to Obtain Responsive Information, The Nature of the Discovery Does Not Weigh in Favor of Striking the Appellant's Answer.

While the trial court below stated in its August 8, 2016 Order stated that the Respondent's "discovery requests were straightforward, and requested basic information, documents, and evidence relevant to this particular case and to medical malpractice cases in general," (Aug. 8, 2016 Order, Exhibit L), given the circumstances of the ownership of Appellant from 2013 to present, obtaining materials responsive to the Respondents' requests has been painstaking and has required immense and diligent efforts.

As noted in Section 2. of the Statement of the Case, *supra*, HMA owned Appellant until January 27, 2014, when CHS purchased both HMA and Appellant. In doing so, CHS purchased Appellant's liabilities. Six days before the sale was to be finalized, the FTC blocked the sale of Appellant to CHS. The FTC then proceeded to place Appellant under the direction of a Trustee, who limited CHS's access to Appellant's records and data, and ordered CHS to find a buyer for Appellant in the next six months. While under the direction of the FTC and with its future in limbo, most of the administration of HMA, LLC left. It was in this period of receivership and lack of administration personnel familiar with the ownership of Appellant that Respondents sent their first discovery requests.

On October 11, 2014, the FTC approved the sale of Appellant to Capella. The completion of the sale was not finalized until January 1, 2015. When Capella finally gained control of Appellant, it did not gain control of the existing liabilities of Appellant including this particular lawsuit. (Affidavit of Yates, Exhibit M.) Since CHS owns the liability of the present litigation and not Capella, every time counsel for Appellant requested information for Appellant from Capella, it was as if it was being requested by an outside party altogether. Allowing an outside entity access to ownership information, financial information, required extensive review from Capella's new personnel – both locally and nationally – creating a long lag time between the request for documents and the time it was received. (See Affidavit of Adams, Exhibit N; Affidavit of Von Donkelaar, Exhibit O.)

The discovery requested that was not received by Respondents mostly involved financial data. Financial data is normally kept secret by most businesses so as not to provide any advantage to its competition. When Capella purchased Carolina Pines, and Appellant, it did not obtain internal financial data. (Affidavit of Von Donkelaar, Exhibit O.) This was only realized after a diligent search of the data that Capella did have from the sale. It should be noted that CHS, Capella, and HMA, LLC are not parties to this lawsuit. As a result, the discovery sought in this matter includes information which Appellant itself does not have and which relates to entities that are not parties to this litigation. The nature of the discovery in this matter—both that which has been produced and that which is allegedly outstanding—has not been in any way "straightforward" to produce. As a result, the trial court's order sanctioning the Appellant related to its discovery responses in this matter, and especially the particular decision to strike the Appellant's Answer, are without reasonable factual support and should be overruled.

C. THE TRIAL COURT'S FINDING THAT THE POSTURE OF THE CASE WEIGHS IN FAVOR OF SANCTIONS, AND PARTICULARLY THE STRIKING OF THE APPELLANT'S ANSWER, IS WITHOUT REASONABLE FACTUAL SUPPORT.

The posture of discovery in this matter does not weigh in favor of the extreme sanction of striking the Appellant's Answer. In particular, this case is not of excessive age, particularly for a complex medical malpractice case, and discovery has progressed rabidly and in significant volume. In addition, during the pendency of this case, the parties have engaged in extensive discovery in developing the case for trial. Finally, at the time the trial court struck the Appellant's answer, there was still sufficient time remaining prior to trial for additional discovery responses and production.

Regarding the age of the case, the trial court's August 8, 2016 order stated that "[t]his case has been pending for over four years." (Aug. 28, 2016 Order, p. 28. Exhibit L) While technically true, this statement does not reflect the true age of the case, as it was stayed for a significant period of time. Specifically, this case was filed on October 9, 2012, and it was then stayed until March 17, 2014 while Respondents brought an action as required by Federal law in the United States Federal Court of Claims. Therefore, this case had been active only for approximately two years when the trial court struck the Appellant's answer. As any seasoned medical malpractice attorney can testify, two years is a short period of time given the volume of discovery conducted in this matter. As a result, the age of this matter did not weigh in favor of the extreme sanction issued below.

Nor did the discovery posture of the case weigh in favor of striking the Appellant's answer, as both parties had engage in extensive cost and time in conducting discovery. The Respondents have filed three causes of action arising out of Greg's injuries. Respondents unsuccessfully attempted to combine two of the cases together on two separate occasions. The Respondents in this case alone have issued two Requests to Admit, three sets of Interrogatories, seven sets of Requests for Production, and there had been at least twenty-four depositions in this case alone. Motions to Compel have been filed and litigated on both sides. All of this discovery and expense will have been for naught if the trial court's decision to strike the Appellant's answer is not reversed.

Furthermore, when the trial court struck the Appellant's answer on August 8, 2016, ample time still remained for production of additional documents and information, as the case was not scheduled to be tried until November 7 through November 18, 2016.

This is especially true given that the allegedly outstanding discovery related to ability to pay punitive damages.

Again, this is not a case involving a defendant that was entirely disconnected from discovery and willfully refusing to produce documents. On the contrary, Appellant has spent a great deal of time, effort, and expense engaging in discovery. For these reasons, the discovery posture of this case does not support the trial court's decision to strike the Appellant's Answer.

D. THE TRIAL COURT'S FINDING THAT THE APPELLANT'S CONDUCT PREJUDICED THE RESPONDENT IS WITHOUT REASONABLE FACTUAL SUPPORT.

The trial court's finding that the Appellant's conduct prejudiced the Respondents is without reasonable factual support. As already noted, the trial court found the following discovery outstanding at the time of its August 8, 2016 Order: responses to the Sixth and Seventh Requests for Production; complete and up to date answer to Interrogatory number ten regarding ownership, control and financial interest in Hartsville Medical Group, LLC, and any documents responsive to Requests for Production numbers one (1) and thirty-eight (38) relating thereto; Copies of responsive insurance policies; 30(b)(6) testimony of the identity of the Appellant's accountant; 2010 Policies and procedures required under 42 CFR § 482.23(c)(2) and written definitions required under JCAHO requirement MM.06.01.01; and copies of tax returns actually filed for the Appellant. Each of these is addressed individually below.

As noted above, Appellant does not have and has never had any documents relating to 42 C.F.R. 482.23(c)(2) and JCAHO requirement MM.06.01.01. As a result, Appellant's conduct has not prejudiced the Respondent with regard to these documents.

Regarding the accountant, the Appellant has been ordered to provide 30(b)(6) testimony regarding the identity of the accountant. However, following the court's order, the Respondent has never scheduled, nor even discussed scheduling a 30(b)(6) deposition on this topic. As a result, it is not the Appellant's conduct, but the Plaintiff's conduct that has caused any prejudice as to this matter.

Regarding the Appellant's late responses to Respondent's Sixth and Seventh Requests for Production, no harm has resulted to the Respondents because those requests were substantially similar to earlier discovery requests by the Respondents or sought information that is not within the Appellant's possession, as referenced *supra* Section1(A)(I). To find that Respondents have been prejudiced when Respondents had all of the requested data in Appellant's possession well before the trial in this case would put form over substance.

Regarding Respondent's late production of the Appellant's owners did not cause any prejudice to the Respondents. Respondents, presumably, intend to use this information to show the gross profit and overall financial capacity of the current owner of the Appellant in the damages phase of trial. Because this information was produced nearly three months prior to the scheduled trial in this case, the information was produced with ample time for the Respondents to have investigated and prepared the information for use at trial.

Moreover, data regarding the current owner of Appellant is irrelevant as the current owner is not responsible for paying damages. The identity of the previous owner, CHS, was communicated to the Respondents in Appellant's May 30, 2014 Responses to Plaintiffs' First Interrogatories to Defendant Hartsville Medical Group, LLC. Respondents, therefore, knew the identity of CHS two years and five months, or 892 days, before trial. Because Respondents knew this information with more than ample time before trial, and because they have also been informed that Capella purchased Appellant from CHS, the Respondents have not been prejudiced by the failure to produce data regarding the current owner of Appellant until recently.

Next, Appellant's failure to produce insurance policies has not prejudiced Respondents. Again, at the time of the court's order striking the Respondent's answer, the trial of this matter was nearly three months away. At that time, the Respondents knew the names of the insurance companies, the policy periods, the policy numbers, and the coverage limits. This is more than sufficient for Respondents to subpoena the policies from the insurance companies directly. Additionally, Appellant is self insured up to $10 million dollars, which is more than a potential verdict is likely to be. Furthermore, the insurance policies only become relevant in the event that Appellant is unwilling or unable to pay, and so this information could not have prejudiced the Respondents as no judgment had yet been entered and the Appellant had shown know unwillingness or inability to pay. Nor have there been any allegation that Appellant would be unwilling or unable to pay a verdict. Because there is no evidence that Respondents have been

prejudiced by the failure to produce insurance policies, it is inappropriate to strike Appellant's Answer on this basis.

Finally, the failure to produce the tax returns "actually filed" has caused no prejudice to the Respondents. Appellant has produced pro forma tax returns and internal profit and loss documents to Respondents, and these were the only documents Appellants were able to locate. Because Respondents have had more than enough time to evaluate Appellant's ability to pay through other means and through the documents Appellant was able to locate, there can be no prejudice to Respondents.

E. THE TRIAL COURT'S FINDING THAT THE APPELLANT ENGAGED IN A PATTERN AND PRACTICE OF OBSTRUCTION IN DISCOVERY DESIGNED TO PREJUDICE THE RESPONDENTS IS WITHOUT REASONABLE FACTUAL SUPPORT

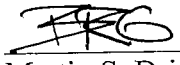
The trial court erred in finding that the Appellant engaged in a pattern and practice of obstruction in discovery designed to prejudice the respondent is without reasonable factual support. As shown *supra* Section 1(A) , the Appellant has made diligent and reasonable efforts to provide responses and documents where available. Moreover, even where the Appellant has ultimately been unable to locate documents, it has diligently and at significant cost searched for responsive documents. Again, as noted above, Appellant's counsel alone have spent over 60 hours in conferences and document review in efforts to respond to Respondents' discovery. In no way has the Appellant's practice been designed to prejudice the Respondents, and as shown *supra* Section 1(D), Appellant's conduct has not prejudiced the Respondents. As a result, the trial court's finding that the Appellant engage in a pattern and practice of obstruction designed to

prejudice the Respondents is without reasonable factual support. For this reason, the trial court's order striking the Appellant's Answer should be reversed.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court.

Respectfully submitted,



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