THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
The Court of Common Pleas for the Ninth Judicial Circuit

Hon. J. C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2016-002326

Shon Turner, as Personal Representative
of the Estate of Charles Mikell, deceased, ... Respondent/Appellant

v.

The Medical University of South Carolina . . . . . Appellant/Respondent

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STATEMENT OF ISSUES ON APPEAL

Did the lower court abuse its discretion in imposing costs and attorneys fees pursuant to Rule 37, SCRCP, when there was substantial evidence that the Medical University gave evasive and incomplete answers to discovery; and that it denied Requests for Admission which were proven true.

STATEMENT OF THE CASE

This medical malpractice case began when the Plaintiff filed a Summons and Complaint on November 6, 2012. An Amended Complaint was filed on January 31, 2013 and served on February 12, 2013. MUSC served its Answer on March 14, 2013. A Second Amended Complaint was filed on February 22, 2016, to which MUSC served an Answer on March 9, 2016.

A series of five Consent Scheduling Orders were submitted, the last of which was entered by the lower court on August 5, 2015, setting deadlines for mediation (September 1, 2015) and the completion of discovery (October 2, 2015). The mediation was conducted on August 28, 2015 and resulted in an impasse. The case was set for date certain trial commencing on April 18, 2016.

The Plaintiff's Motion for Discovery Sanctions was filed on September 9, 2015. The Plaintiff filed a Supplemental Memorandum in Support; and MUSC served a Memorandum in Opposition, both on October 14, 2015. The lower court conducted hearings on October 21, 2015 and December 11, 2015. The lower court also instructed the parties to make several additional submissions, including attorneys fee affidavits; and allowed the parties to make other submissions as well.

By email dated March 17, 2016, the lower court granted partial relief by permitting the Plaintiff to take four depositions to be conducted at MUSC's expense. These depositions were taken on April 7 and 8, 2016. The case then proceeded to a jury trial on April 18, 2016, with a defense verdict being returned on April 26, 2016.[1]

Post trial, the lower court instructed Plaintiff's counsel to submit supplemental affidavits setting forth their attorneys fees. A hearing was then held on July 18, 2016 for the purpose of allowing MUSC to examine Plaintiff's counsel under oath concerning the attorneys fee affidavits. The lower court then issued an Order for Sanctions, which was filed on September 28, 2016.

[1] The verdict is the subject of a separate appeal, Appellate Case No. 2016-001986

MUSC filed a Rule 59, SCRCP Motion to Reconsider on October 10, 2016, which the lower court denied in a Form 4 order filed on October 13, 2016. MUSC served its Notice of Appeal on October 28, 2016. The Plaintiff served his Notice of Cross Appeal on November 16, 2016.

FACTS

Charles Mikell suffered a life-altering cardiac arrest while undergoing a colonoscopy at MUSC on October 1, 2010. Mr. Mikell was hospitalized for six weeks. After being released at Thanksgiving, Mr. Mikell received home health care through the end of the year. Mr. Mikell was found dead on his living room couch on January 2, 2011.

Donna Embry was the nurse anesthetist who provided anesthesia for the colonoscopy, under the direction and supervision of Eric Nelson, DO, an anesthesiologist. The colonoscopy was performed by Kenneth Payne, MD, a gastroenterologist, who was assisted by a nurse, Martha Zwermer, RN. When Mr. Mikell went into cardiac arrest, a "Mayday team" was called and a number of other medical personnel responded, including George Guldan, MD, an anesthesiologist.

Beginning in March 2013, the Plaintiff sought, *inter alia*, answers to two very straight forward questions raised by the anesthesia record for Mr. Mikell's colonoscopy:

MUSC Health

ANESTHESIANT

Anesthesia/PACU Record

MRN: 001400764	Height(cm): 175.20002
Name: MIKELL, CHARLES L.	Weight(kg): 137.29966
DOB: 01/25/1961	BMI: 44.7
PatCom: 270428782	Sex: M
Surgeon: Payne , Mark	Age: 49 years
	Surgery Date: 10/01/2010

Real Time Variables

TIME	7:34	7:35	7:36	7:37	7:38	7:39	7:40	7:41	7:42	7:43	7:44	7:45	7:46	7:47	7:48	7:49	7:50	7:51	7:52	7:53	7:54
SpO2 (%)															96.7	75	69.2	90.1	80.7	88	73.3
Temperature (°C)																					
EKG Rhythm		SR	SR	SR	SR	SR	SR	SR	SR	SR	SR	SR	SR	SR	SR	SR	SR	SR	SR	SR	SR
SpO2 Heart Rate bpm															74	72	101	83	62	75	85
Spontaneous Resp Rate																			0	1	1
Resp Rate from pCO2 cart															0	0	0	11	14	17	0
Vent Resp Rate/min																			1	1	1
FiO2 (%)															99	35	26	29	24	26	29
EtCO2 (mmHg)															0	0.754	52.78	45.24	10.56	10.56	0.754
Des out (%)																					
Exp. Tidal volume (mL)																			41	32	
PIP (cmH2O)															0	0	0	0	0	1	0

Vital Signs Data

1. Why is vital signs data missing from this record? Although the colonoscope was advanced beginning at 7:42 a.m., the vital signs portion of the anesthesia record contains nothing but blank boxes until 7:48 a.m. The explanation for these blank boxes was not provided

by MUSC until September 22, 2015: a software "linkage" "connection" "didn't work,"[2] requiring Nurse Embry to engage in a series of text messages and telephone calls with technician Annette Thompson to correct the problem — all while Mr. Mikell was under anesthesia.

Anesthesia Narrative

10/01/2010 08:00 EWN	**Memo Came into room. Pt. hypoxic with junctional rhythm and no palpable pulse. ACLS protocol initiated, Mayday team called.**

Procedure note

FINDINGS: The colon appeared to be normal. However, about the time the endoscope reached the cecum the patient began getting hypoxic. This did not respond to routing measures and the pateint then became bradycardic with a juntional rythym. The scope was immediately withdrawn without viewing so the Anesthsia attending could resusciatate the patient. Please see Code documentation.

2. Why is there no Mayday record for Mr. Mikell's cardiac arrest? Dr. Payne's procedure note for the colonoscopy explicitly refers to "code documentation."[3] The Plaintiff asked for the code documentation or "Mayday record" to be produced. For 27 months, MUSC denied there was ever any Mayday record. In August 2015, that position was recanted; the creation of a Mayday record was admitted; and its subsequent loss was explained: sometimes papers fall out of a chart or get left sitting in a fax machine.[4] It was not until six months later, in February 2016, that Plaintiff learned the Mayday record had been used to alter critical entries in the anesthesia narrative before the Mayday record was lost.[5]

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[2] September 22, 2015 Deposition of Scott Reeves, MD at page 22, line 23 to page 23, line 25.

[3] Plaintiff's Exhibit 14.

[4] August 24, 2015 Deposition of Sheila Scarborough at page 17, line 17 to page 18, line 25.

[5] February 22, 2016 Deposition of Donna Embry at page 105, line 20 to page 111, line 4.

Original Anesthesia Narrative

Dt/Tm Initials	EVENTS	Dt/Tm Initials	EVENTS
10/01/2010 07:35 DBE	Transfer to:	10/01/2010 08:31 EWN	Patient Oxygenated w/100% 02
10/01/2010 07:35 DBE	Patient in Room (PIR)	10/01/2010 08:31 EWN	ETT in place
10/01/2010 07:46 ALT	Transfer # (EVTROUT-)	10/01/2010 08:31 EWN	Defibrillation - Joules: 200
10/01/2010 07:47 DBE	Transfer to SCsNO	10/01/2010 08:31 EWN	CPR stopped
10/01/2010 07:48 EWN	Anesthesiologist assessed patient, reviewed chart and formulated anesthesia plan	10/01/2010 08:31 EWN	Patient stabilized
		10/01/2010 08:31 EWN	Post resuscitation rhythm:
10/01/2010 07:48 EWN	Anesthesiologist medically directing case and present for all critical portions.	10/01/2010 08:37 DBE	To recovery area in stable condition
		10/01/2010 08:37 DBE	Patient transported with O2
10/01/2010 07:48 EWN	Anesthesiologist present for induction	10/01/2010 08:37 DBE	Transported via stretcher/bed
10/01/2010 07:48 EWN	I (or another attending anesthesiologist) was immediately available throughout and present for all key/critical portions of case	10/01/2010 08:37 DBE	Patient Out of Room (POR)
		10/01/2010 08:37 DBE	Transfer from SCsNO
		10/01/2010 08:45 JGT	Phase I PACU admission
10/01/2010 08:00 EWN	Memo Came into room. Pt. hypoxic with junctional rhythm and no palpable pulse. ACLS protocol initiated, Mayday team called.	10/01/2010 08:45 JGT	Report received from: Donna Embry CRNA
		10/01/2010 08:45 JGT	Side rails up
		10/01/2010 08:45 JGT	Wheels locked
10/01/2010 08:27 DBE	Central line placed by Attending Anesthesiologist	10/01/2010 08:45 JGT	Connected to monitors
10/01/2010 08:27 DBE	Hand hygiene prior to donning gloves	10/01/2010 08:45 JGT	Arrival in PACU/ICU (APACU)
10/01/2010 08:27 DBE	Maximum barrier precautions utilized for strict sterile technique including sterile body drape, hat, mask, and sterile gloves.	10/01/2010 08:54 DBE	Transfer to LCsAn
		10/01/2010 08:58 DBE	Anesthesia machine checked, alarms on and functioning
		10/01/2010 08:58 DBE	Integrity of Anesthesia circuit confirmed
10/01/2010 08:27 DBE	Skin preparation with chlorohexadine	10/01/2010 08:58 DBE	Standard monitors available, alarms on and functioning
10/01/2010 08:27 DBE	Landmarks indentified	10/01/2010 08:58 DBE	Suction available and functioning
10/01/2010 08:27 DBE	Introducer needle inserted into vessel, free blood flow	10/01/2010 08:58 DBE	Airway equipment available and functioning
10/01/2010 08:27 DBE	Triple lumen catheter Rt. femoral vein.	10/01/2010 08:58 DBE	Anesthesia and resuscitation drugs available
10/01/2010 08:27 DBE	Blood return through all lumens. Lumens flushed.	10/01/2010 08:58 DBE	NPO status verified
10/01/2010 08:27 DBE	Sterile transparent dressing placed over insertion site	10/01/2010 08:58 DBE	Patient chart and preoperative assessment reviewed
10/01/2010 08:31 EWN	Anesthesiologist present for airway device placement	10/01/2010 08:58 DBE	Patient identified by 2 methods
10/01/2010 08:31 EWN	Arrhythmia identified: v fib	10/01/2010 08:58 DBE	Pre-op vital signs reviewed
10/01/2010 08:31 EWN	Non-palpable pulse	10/01/2010 08:58 DBE	Surgical consent verified and appropriate
10/01/2010 08:31 EWN	Chest compressions initiated	10/01/2010 08:58 DBE	Risks, benefits, and complications of anesthetic plan

Printed on: 10/01/2010 13:48 Post Anesthesia Care Unit Flowsheet Page 8 of 9

Confidential

From the very outset, MUSC steadfastly denied there was any "missing" vital signs data or any Mayday record.[6] Both of those positions are, of course, completely false. But MUSC made no effort whatsoever to disclose the truth until July 23, 2015 — about a month before mediation[7] and after virtually all of the discovery in this case had been completed[8] — when defense counsel disclosed the existence of "information regarding the code sheet/Mayday form that is different from the information previously presented . . . ."[9] The Plaintiff filed a Motion for Discovery Sanctions; attended multiple hearings; obtained preliminary relief from the lower court;[10] and completed a second round of limited discovery.[11] But by the time this process played out, the case was literally a week away from jury selection.[12]

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[6] MUSC continues to maintain this discredited position on appeal. *See*, MUSC Brief at page 16.

[7] This case underwent mediation on August 28, 2015.

[8] The defense medical expert, James Berry, MD, was deposed on June 15, 2015.

[9] July 23, 2015 Letter, Exhibit J to Supplemental Memorandum in Support.

[10] The lower court issued a preliminary email ruling on March 17, 2016.

[11] Four depositions were taken on April 7 and 8, 2016.

[12] The jury was selected on April 18, 2016.

The Plaintiff's two initial questions were not concocted by counsel as part of a diabolical litigation strategy to vexatiously exploit the unwieldy vastness of MUSC's information technology systems. Instead, these questions were posed by the Plaintiff's anesthesia consultant following his initial review of the 229 page medical chart that MUSC produced to Shon Turner on March 22, 2012.[13] The Plaintiff's consultant asked, "Where is the rest of the chart?" and "Where is the Mayday record?"[14] The Plaintiff's consultant further urged counsel to, "Get the one-minute anesthesia record" and, "Get the backup data."[15]

It is important to understand that the information responsive to these questions was vital to reconstructing what happened in order to effectively depose the key medical care providers who were present in the colonoscopy procedure room when Mr. Mikell suffered his cardiac arrest.[16] Having the information at that juncture would have allowed the Plaintiff to develop a coherent theory of the case taking all of the pertinent facts into account. For example, it would have been extremely useful to be able to ask those present how Mr. Mikell was doing while the nurse anesthetist was sending text messages and making telephone calls; and whether the initial chronology of events in the anesthesia narrative was more or less accurate than the altered version. But because the audit trails, software glitch, text messages, phone calls, and use of the Mayday record to alter the narrative were not disclosed until months after these depositions were completed, the Plaintiff was denied his legitimate right to fully examine these witnesses and prepare for trial in an orderly fashion.

MUSC did not timely produce the information needed to answer discovery asking for

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[13] *See*, Plaintiff's Exhibit 16.

[14] *See*, October 21, 2015 Hearing Transcript at page 24, lines 1 - 9.

[15] *See*, October 21, 2015 Hearing Transcript at pages 38 - 39.

[16] Eric Nelson, DO; Kenneth Payne, MD; Donna Embry, CRNA; Martha Zwermer, RN.

details about what happened,[17] but instead prevaricated for months while the Plaintiff completed the depositions of over 25 witnesses, including both of the parties' standard of care medical experts.[18] At that point, once defense counsel had gleaned how the Plaintiff's case was being developed, MUSC began selectively disclosing the disputed information, much of which was nevertheless withheld until after the Motion for Discovery Sanctions was filed. The defense-oriented timing of MUSC's disclosures[19] substantially undermined some of the Plaintiff's main theories of the case. Combined with uncertainty about what, if any, relief the lower court might grant, this greatly interfered with the Plaintiff's ability to both mediate the case and prepare for trial.

In considering MUSC's appeal, the Court should perhaps be cognizant that this case arises out of the death of a 49-year old father of three who suffered a cardiac arrest during a routine colonoscopy performed to see why he was suffering from constipation. If the Plaintiff "inundated MUSC with discovery demands,"[20] it was only because Plaintiff's counsel had a significant professional responsibility to Mr. Mikell's survivors that prohibited the unquestioning acceptance of MUSC's defense narrative, which as it turned out rested upon false testimony and materially altered medical records. Very few, if any, of MUSC's important disclosures came about voluntarily. Yet MUSC would have this Court see it as the victim of too diligent a search for the truth, as though abuse somehow lies in not being able to maintain a fiction.

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[17] *See, e.g.*, Plaintiff's First Discovery Request; September 2, 2014 letter to defense counsel; September 24, 2014 letter to defense counsel; October 31, 2014 letter to defense counsel; November 19, 2014 letter to defense counsel; December 5, 2014 letter to defense counsel; January 6, 2015 letter to defense counsel.

[18] Andrew Kofke, MD, the Plaintiff's medical expert, was deposed on March 4, 2015. James Berry, MD, the defense medical expert, was deposed on June 15, 2015.

[19] Plaintiff's Motion for Discovery Sanctions was filed September 9, 2015. The software glitch was first disclosed on September 22, 2015. The text message and phone call log and legible AHA database were produced on December 2, 2015. The backup anesthesia data CD was produced on December 11, 2015. The use of the Mayday record to alter the anesthesia narrative was first disclosed on February 22, 2016.

[20] MUSC Brief at page 2.

To be sure, two MUSC witnesses[21] provided false testimony about the Mayday record. MUSC also provided false information about the existence of backup computer data; false information about the burden of producing that backup data; and false and misleading information about the missing vitals signs data.[22] MUSC contends this was done unwittingly, if at all, without any intention to withhold or deceive. But based upon an almost overwhelming record — including the chance to observe the demeanor of MUSC's witnesses at trial — the lower court flatly rejected MUSC's claims of innocence.

In it's brief, MUSC seeks sympathy for the complexity of its own information technology systems along with the feigned poor memories and confusion of its highly trained professional staff. Yet tellingly, when confronted with her testimony about the missing vital signs data and the Mayday record, Nurse Embry did not claim she had "forgotten" important events that had occurred so many, many years ago — a clever alibi devised for the jury.

Rather, Nurse Embry admitted she remembered those issues, but first she tried to claim she had not been asked about them.[23] Then she claimed she thought Plaintiff's counsel already knew about the anesthesia software problem, making it unnecessary for her to "volunteer" information about it:

> Q When I took your deposition last fall, you didn't ever mention anything about making phone calls to Annette Thompson, did you?
> A Do you mean paging her for —
> Q Paging her, talking to her on the phone, trying to communicate with her about this problem we've been discussing today.
> A I think I probably, at our first deposition, was just answering your

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[21] Donna Embry, CRNA and George Guldan, MD.

[22] Even on appeal MUSC persists in its discredited position that there was never any vital signs data missing from the anesthesia record — "No data was 'missing' from the record . . . because no data was ever recorded . . . ." MUSC Brief at page 16. For the first time on appeal, MUSC adopts the phrase "Unrecorded Data" — in contradistinction to "missing data" — in order to obfuscate why data boxes in the anesthesia record are empty: the data isn't missing, it's unrecorded — as though that shift in nomenclature explains the software glitch that took text massages and phone calls to correct.

[23] February 22, 2016 Deposition of Donna Embry at page 214, line 13 to page 218, line 8.

questions as honestly and accurately as I could.

Q **I mean, did you know back then that you had had conversations and emails and phone calls with Annette Thompson, or were you forgetting it then?**

A **No, sir. I knew. I knew back then that I had —**

Q Would you agree with me that you never mentioned anything about it?
MS. FLEMING: Objection to the form.
THE WITNESS: Again, I don't recall. If you did not ask me, then **I don't recall volunteering the information to you.**

Q You don't remember me putting the real time graph in front of you and asking you who could explain why it wasn't accurate?

A I remember you giving me the graph, yes.

Q And do you remember me giving you the anesthesia record and asking you if you could explain why it was so unusual?
MS. FLEMING: Objection to the form.
THE WITNESS: **I guess I assumed that you knew that PICIS had been paged because there was a problem with the record.** I'm not sure, Rob. I think I was just answering your questions that you were putting in front of me. **I don't think I was volunteering a lot.**[24]

Likewise, even after it had been conclusively established that MUSC's Emergency Response Policy does apply to Mr. Mikell's event;[25] and that a Mayday record was created, used to alter the anesthesia record,[26] and then lost and/or destroyed,[27] MUSC's Rule 30(b)(6) designee, Dr. Guldan, continued his stubborn refusal to admit the Mayday record even existed.[28]

The lower court thus found that MUSC "engaged in a pattern of discovery abuse."[29] Although MUSC contends it "was extremely forthcoming and cooperative in discovery," the lower court held to the contrary, finding the Plaintiff experienced "extraordinary difficulties . . . in obtaining truthful, accurate and complete information at appropriate times during the discovery

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[24] February 22, 2016 Deposition of Donna Embry at page 215, line 4 to page 217, line 1 (emphasis added). *See also*, Trial Transcript at page 519, line 10 to page 520, line 24.

[25] August 24, 2015 Deposition of Sheila Scarborough at page 8, lines 5 - 7.

[26] February 22, 2016 Deposition of Donna Embry at page 105, line 20 to page 111, line 4.

[27] August 24, 2015 Deposition of Sheila Scarborough at page 13, line 9 to page 18, line 25.

[28] Trial Transcript at page 220, lines 23 - 24.

[29] Order on Appeal at page 1.

process."[30] The lower court's rulings are well supported by substantial evidence in the record.

ARGUMENT

1. Standard of review

A trial judge's ruling on discovery matters will not be disturbed on appeal absent an abuse of discretion. Creighton v. Coligny Plaza Ltd Partnership, 334 S.C. 96, 121, 512 S.E.2d 510, 523 (Ct. App. 1998). The burden is on the appealing party to demonstrate that the trial court abused its discretion. *Ibid.* A reviewing court may only find abuse of discretion when an appellant shows that the lower court's conclusions are based upon an error of law or have no evidentiary support. *Id.*

In its Brief, MUSC contends a different standard of review applies, citing to In re: Beard, 359 S.C. 351, 357, 597 S.E.2d 835, 838 (Ct. App. 2004) and Ex Parte Gregory, 378 S.C. 430, 663 S.E.2d 46 (2008) for the proposition that "an action for attorneys fees" is one in equity, so that this Court is entitled to make a *de novo* review of the lower court's factual findings.[31] In this regard, MUSC is misapprehending the law.

This medical malpractice case is not an action for attorneys fees. Beard, Gregory, and similar cases involve appellate review of causes of action brought pursuant to the Frivolous Civil Proceedings and Sanctions Act, S.C. Code Ann. §15-36-10 *et seq.* (Code 1976, as amended). Such cases, sounding in equity, are thus quite different in nature from a Rule 37, SCRCP motion for discovery abuse arising in an action at law.

Cases reviewing Rule 37, SCRCP discovery sanctions uniformly apply an abuse of discretion standard of review rather than a *de novo* standard of review. *See, e.g.*, Davis v. Parkview Apartments, 409 S.C. 266, 762 S.E.2d 535 (2014)(appellate court will not interfere with trial court's imposition of discovery sanctions unless it abuses its discretion); Dunn v. Dunn,

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[30] Order on Appeal at page 3.

[31] MUSC Brief at page 35.

298 S.C. 499, 381 S.E.2d 734 (1989)(same); Wallace v. Timmons, 237 S.C. 411, 117 S.E.2d 567 (1960)(reviewing court will not substitute its judgment for that of the trial court); Wilson v. Willis, 416 S.C. 395, 786 S.E.2d 571 (Ct. App. 2016)(applying abuse of discretion standard); McNair v. Fairfield County, 379 S.C. 462, 665 S.E.2d 830 (Ct. App. 2008)(absent abuse of discretion, discovery sanctions will not be reversed on appeal); Griffin Grading and Clearing, Inc. v. Tire Service Equipment Mfg. Co., Inc., 334 S.C. 193, 511 S.E.2d 716 (Ct. App. 1999) (same); Karppi v. Greenville Terrazo Co., Inc., 327 S.C. 538, 489 S.E.2d 679 (Ct. App. 1997) (same).

Accordingly, this Court's review is circumscribed to a determination of whether the lower court's conclusions were without reasonable factual support. Dunn, *supra*; Wilson, *supra.* The record shows that the lower court's rulings were supported by abundant evidence of sanctionable misconduct.

2. The Mayday record

"At every step along the way, when MUSC obtained or learned of new information, it promptly advised Plaintiff of same."[32]

The Plaintiff's First Discovery Request was served on March 23, 2013. It took 28 months before MUSC finally conceded a Mayday record required by its Emergency Medical Response Policy "might" have been created.[33] It was another month before the Plaintiff learned a Mayday record had in fact been created, faxed to the Risk Management office, and used to create entries in an American Heart Association ("AHA") database.[34] It was another six months later before the Plaintiff finally learned the Mayday record had also been used to alter entries in the

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[32] MUSC Brief at page 13.

[33] July 23, 2015 letter from defense counsel, Exhibit J to Plaintiff's Memorandum in Support.

[34] August 24, 2015 Deposition of Sheila Scarborough.

anesthesia narrative.[35] Which means it took MUSC the better part of three years to "promptly advise Plaintiff" of the truth about the Mayday record. Even after MUSC begrudgingly acknowledged a Mayday record "might" have been created, it was still another seven months before the full truth about the Mayday record was revealed.

MUSC now tries to excuse this incredible delay by claiming its personnel "did not at first remember" a Mayday record being created and were themselves "misled" about its existence.[36] MUSC claims that it required "considerable diligence and luck"[37] in order for it to stumble upon the truth. In defense of its feckless efforts to answer discovery, MUSC repeatedly claims there is "no evidence" in the record to show that it had "any reason" to believe its position about the Mayday record was wrong or false.[38]

There is a very simple answer to MUSC's position: First, look at the procedure note that says, "see code documentation." Next, read the anesthesia narrative that says, "Mayday team called." Then, read your own Emergency Medical Response Policy, which explicitly requires a Mayday Form to be created and faxed to your own Risk Management Office. Fourth, check with someone in your Risk Management Office, where the Mayday record was used to input data into an AHA database. Fifth, ask your nurse anesthetist about her changes to the anesthesia narrative. Finally, disclose the results of this investigation to the Plaintiff. All of these things should have been accomplished within 30 days of the Plaintiff's First Discovery Request, much less three years afterward. If MUSC had done these things, it would have had ample reason to believe its position about the Mayday record was false.

Indeed, even though Dr. Nelson's procedure note refers to "code documentation;" and even though Nurse Embry and Sheila Scarborough testified they both used the Mayday record

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[35] February 22, 2016 Deposition of Donna Embry.

[36] MUSC Brief at pages 4 and 5.

[37] MUSC Brief at page 8.

[38] MUSC Brief at page 8.

— to alter the anesthesia narrative and to create the AHA database entries, respectively — MUSC still takes the amazing position before this Court, that "[t]here is no specific evidence establishing to a certainty that a Mayday form existed."[39] Will MUSC's subterfuge about the Mayday record never cease?

"My testimony was not false. You can be wrong and not be false."[40]

Doublespeak is language that deliberately obscures, disguises, distorts, or reverses the meaning of words. As described by Edward S. Herman in his book, *Beyond Hypocrisy*:[41]

> "What is really important in the world of doublespeak is the ability to lie, whether knowingly or unconsciously, and to get away with it; and the ability to use lies and choose and shape facts selectively, blocking out those that don't fit an agenda or program."

Perhaps no single statement better captures MUSC's use of doublespeak in this case than the above-quoted trial testimony of Dr. Guldan, who was seeking to excuse the sworn deposition testimony he had previously given as MUSC's Rule 30(b)(6) designee:

A The **word play** in this case is Mayday, as a Mayday does not occur in the OR.
Q Even though they called one?
A Correct. So it's a code, and it was documented in the OR medical record.
Q All right. So Paragraph 4 calls for a Cardiopulmonary Resuscitation Event Form. Am I reading that correctly?
A Correct.
Q **Is there such a form for Mr. Mikell's case?**
A **There is not . . . .**[42]

Even after acknowledging at trial that he was "wrong," Dr. Gulden refused to concede that his deposition testimony was "false."[43] His own use of the phrase "word play" is highly illuminating. But "word play" has no place in sworn testimony, or in responses to requests for

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[39] MUSC Brief at pace 46.

[40] Trial Transcript at page 222, line 10.

[41] Edward S. Herman, *Beyond Hypocrisy: Decoding the News in An Age of Propaganda including the Doublespeak Dictionary*, Boston: South End Press, 1992.

[42] November 4, 2014 Deposition of Dr. Guldan at page 14, lines 10 - 21 (emphasis added).

[43] Trial Transcript at page 189, line 20.

admission signed pursuant to Rule 11, SCRCP.[44]

MUSC contends Dr. Guldan's false deposition testimony and its false response to the Plaintiff's Second Request for Admissions were merely innocent mistakes, which must be forgiven as a matter of law. This contention ignores the requirements of Rule 30(b)(6), SCRCP, which impose an obligation on MUSC to adequately prepare its designee so that he can give "complete, knowledgeable and binding answers" on its behalf. *See*, Marker v. Union Fidelity Life Ins. Co., 125 F.R.D. 121, 126 (M.D.N.C. 1989). Such preparation includes inquiring of those people who might reasonably be expected to have knowledge of the matters in issue. *See*, In re: Independent Service Organizations Antitrust Litigation, 168 F.R.D. 651, 653 (D. Kan 1996). A designee is not permitted to simply "stick his head in the sand." *Ibid.* Nor is a designee allowed to give answers limited to his own personal knowledge, as opposed to what is known to the entity on whose behalf he is being designated to testify. *See*, Alexander v. Federal Bureau of Investigation, 186 F.R.D. 148, 152 (D.D.C. 1999); Poole ex rel Elliot v. Textron, Inc., 192 F.R.D. 494, 504 (D. Md. 2000).

The anesthesia narrative explicitly states, "Mayday team called."[45] The procedure note prepared by Dr. Payne explicitly states, "Please see code documentation."[46] So at trial, where the presence of a jury limited equivocation, Dr. Guldan was compelled to concede that a Mayday was, in fact, called.[47] Mayday procedures are governed by MUSC's written Emergency Medical Response Policy,[48] which explicitly states as follows:

> 4. Each Mayday is documented on the Cardiopulmonary Resuscitation Event Form (Mayday record). The Mayday record is the legal

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[44] When asked to admit that there should be a Mayday record for Mr. Mikell's cardiac arrest, MUSC responded, "denied." *See*, Response to Plaintiff's Second Request for Admissions No. 1.

[45] Plaintiff's Exhibit 2 at page 611 of 2115; Plaintiff's Exhibit 3 at page 494 of 2115; Plaintiff's Exhibit 5 at page 2116; Plaintiff's Exhibit 6 at page 2215.

[46] Plaintiff's Exhibit 14.

[47] Trial Transcript at page 179 line 22 to page 181, line 11.

[48] Plaintiff's Exhibit 9.

documentation of the Mayday. . . . It must be signed by the designated participants.[49]

* * *

A. Following the MAYDAY, the Cardiopulmonary Resuscitation Event Form is faxed to Risk Management and then entered into the patient's medical record.[50]

At trial, Dr. Guldan was asked about his Rule 30(b)(6) deposition testimony, in which he tried to deny that a Mayday had been called, as is clearly evident from the anesthesia record itself:

Q [The Emergency Medical Response Policy] doesn't say that no Mayday record was necessary for Mr. Mikell's event?
A It does not.
Q When you testified back in 2014, you said that this Mayday policy does not apply to Mr. Mikell's situation; right?
A That is correct.
Q And you said that his situation was not a Mayday, and that was why there was no Mayday record?
A It was — it was an inter-operative (ph) code as far as an anesthesiologist is concerned.
Q Right. But I mean as a representative and a designee of the Medical University, you testified that there was no Mayday?
A That is correct.
Q And that is why there was no Mayday record?
A That is correct.[51]

Of course, there was a Mayday — Dr. Guldan himself responded to it — and there was a Mayday record. So at trial, Dr. Guldan was further questioned about what he did, as MUSC's Rule 30(b)(6) designee, to investigate the existence of a Mayday record for this case.[52] He conceded that he did not contact any of the Mayday participants to inquire about a Mayday record.[53] He also conceded he did not make any effort to contact anyone in the Risk Management Office to inquire about a Mayday record.[54] Instead, he seemed to believe such inquiries were unnecessary because, in his view, the Emergency Medical Response Policy does

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[49] Plaintiff's Exhibit 9 at Page 3 of 8, ¶4.

[50] Plaintiff's Exhibit 9 at Page 7 or 8, ¶A.

[51] Trial Transcript at page 186, lines 3 - 19.

[52] *See generally*, Trial Transcript at pages 218 to 222.

[53] Trial Transcript at page 219, lines 6 - 14.

[54] Trial Transcript at page 220, lines 2 - 6.

not apply to cardiac arrests in an operating room setting:

> Q All right. So you can't tell us if the Mayday policy was complied with in this case, can you?
> A I can actually. It was complied with because it does not apply to the OR or NORA sites. I've said it once, I'll say it a thousand times.[55]

This circularity is not an example of simply being mistaken. At best, this is willful ignorance recklessly brought about by an intransigent refusal to make even the most basic investigation necessary to comply with Rule 30(b)(6), SCRCP. Instead of making an investigation, Dr. Guldan based his testimony solely on the limited knowledge he gained when he personally responded to the Mayday call: he did not witness a nurse completing a Mayday form;[56] he did not sign a Mayday form;[57] and he did not see a Mayday record when he looked in the patient chart.[58] Dr. Guldan thus concluded, without any inquiry of others, that there was no Mayday record — because contrary to its own express terms, Dr. Guldan "reasonably, though mistakenly"[59] believed the Emergency Medical Response Policy does not require one.

MUSC simplistically glosses over Dr. Guldan's complete lack of investigation by saying, "Plaintiff has presented no evidence that Dr. Guldan had any reason to believe his testimony was inaccurate."[60] But if Dr. Guldan simply "stuck his head in the sand," did nothing to learn the truth about what he was saying, and ignored the terms of the written policy to justify the absence of his own investigation, that amounts to an evasive and incomplete answer. Because MUSC denied there was a Mayday record and the Plaintiff proved that there was, an award of costs and attorneys fees was appropriate under both Rule 36, SCRCP and Rule 37, SCRCP.

The imposition of sanctions was especially appropriate when this misconduct allowed

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[55] Trial Transcript at page 220, lines 7 - 11.

[56] Trial Transcript at page 184, lines 16 - 17; and at page 188, lines 4 - 7.

[57] Trial Transcript at page 188, lines 4 - 7.

[58] Trial Transcript at page 187, lines 12 - 14.

[59] MUSC Brief at page 16.

[60] MUSC Initial Brief at page 8.

MUSC to maintain its fictitious position about the Mayday record — which it turned out did exist and was used to materially alter a critical record of what happened to Mr. Mikell. Compare the original anesthesia narrative (Mayday called at 8:00 a.m.) with the altered version (Mayday called at 7:56 a.m.):

Original Anesthesia Narrative

10/01/2010 08:00 EWN	**Memo Came into room. Pt. hypoxic with junctional rhythm and no palpable pulse. ACLS protocol initiated, Mayday team called.**

Altered Anesthesia Narrative

10/01 07:56	DBE	**Memo Came into room. Pt. hypoxic with junctional rhythm and no palpable pulse. ACLS protocol initiated, Mayday team called.**

It is fascinating to note that MUSC's initial July 23, 2015 disclosure of "information regarding the code sheet/Mayday form that is different from the information previously presented"[61] came only after MUSC's standard of care expert, Dr. Berry, had been caught flat-footed at his June 15, 2015 deposition by the alteration of the anesthesia narrative, whereby Nurse Embry changed the time when the Mayday was called from 8:00 a.m.[62] to 7:56 a.m.:[63]

Q And this indicates on one of the lines that I've highlighted that the code was called at 8:00 a.m.? Am I reading that correctly?
A Yes.
Q Okay. Do you have any basis for disputing the accuracy of that data point?
A No. . . .[64]

* * *

Q Okay. So Exhibit 7 indicates that the code was called at 8:00?
A Yes, it does.
Q Okay. And again, my question is, do you have any basis for disputing the accuracy of that data point?

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[61] July 23, 2015 Letter, Exhibit J to Supplemental Memorandum in Support.

[62] Plaintiff's Exhibit 2 at page 611 of 2115.

[63] Plaintiff's Exhibit 3 at page 494 of 2115.

[64] June 15, 2015 Deposition of James Berry, MD at page 66, lines 6 - 12.

A No. Asked and answered. . . .[65]

This testimony was a problem for MUSC because Dr. Berry also testified that "something bad happened" at 7:52 a.m.,[66] so that the standard of care required Nurse Embry to call for help "somewhere around 7:55, 7:56,"[67] instead of waiting another four or five minutes until 8:00 a.m.[68]

Significantly, when it was pointed out to Dr. Berry that Nurse Embry had altered the anesthesia narrative to change the time when Dr. Nelson came back into the room from 8:00 a.m. to 7:56 a.m., he was left gaping at the records in disbelief:

Q So she thought that the four-minute difference made — was — was important enough to go back and actually change Dr. Nelson's entry?
MR. BOGAN: Object to the form.
THE WITNESS: I'm still amazed that that is even possible. I don't know.
Q There it is, right there.
A (No response)
Q Right?
A There it is.[69]

This state of affairs meant MUSC had to come up with a benign explanation for Nurse Embry's alteration of the anesthesia narrative, leading to MUSC's curiously timed disclosure, approximately a month after Dr. Berry's deposition, of "information regarding the code sheet/ Mayday form that is different from the information previously presented." In other words, the Mayday record was the only answer to the dilemma created by Dr. Berry's deposition testimony. At this point, the sands began shifting underneath the Plaintiff's feet.

Once the Mayday record became indispensable to MUSC's defense of the case, so that its existence could no longer be denied, MUSC simultaneously launched a full-scale assault on

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[65] June 15, 2015 Deposition of James Berry, MD at page 67, lines 2 - 8. A lawyer has to love it when the witness starts objecting to the questions.

[66] June 15, 2015 Deposition of James Berry, MD at page 88, line 8 to page 89, line 1.

[67] June 15, 2015 Deposition of James Berry, MD at page 99, lines 12 - 15.

[68] June 15, 2015 Deposition of James Berry, MD at page 94, lines 2 - 16.

[69] June 15, 2015 Deposition of James Berry, MD at page 144, line 19 to page 145, line 5.

the best evidence rule[70] to try to overcome the adverse inference[71] that arose from its loss/ destruction of the Mayday record. An almost comedic tension was thus created as MUSC was constrained in its effort to explain how Nurse Embry had used a "red herring"[72] Mayday record to alter the detailed chronology of events in the anesthesia narrative, thereby making it "more accurate." The way this all played out was fascinating.

In order to soften the blow from the loss/destruction of the Mayday record, Dr. Guldan testified at trial that the Mayday record would not reflect any of the events that transpired prior to the cardiac arrest:

> Q So is there — based on your understanding of the Mayday record, is there any information documented in the Mayday record before an actual Mayday is called?
> A There is — there is — there is no documentation from before a code is called in those records [referring to the Cardiopulmonary Resuscitation Event Form], as far as I understand.[73]

When it was pointed out to Dr. Guldan that the anesthesia narrative shows a Mayday being called at 8:00 a.m.,[74] he agreed that a Mayday record would not provide the times for any events that occurred prior to 8:00 a.m. but would instead only show what happened after the Mayday team arrived.[75] In argument to the court, defense counsel tried to corroborate Dr. Guldan's claim: "[T]he only thing [Nurse Embry] could have gotten off [the Mayday record] was when did the code begin. That's the first piece of data on there."[76]

Nevertheless, Nurse Embry testified that when altering the anesthesia narrative she

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[70] South Carolina Rule of Evidence 1004.

[71] *See*, Stokes v. Spartanburg Regional Medical Center, 368 S.C. 515, 692 S.E.2d 675 (Ct. App. 2006)

[72] *See, e.g.*, MUSC Brief at page 4, footnote 1.

[73] Trial Transcript at page 212, line 23 to page 213, line 3.

[74] Plaintiff's Exhibit 2 at page 611 of 2115.

[75] Trial Testimony of Dr. Guldan at page 215, line 11 to page 216, line18.

[76] Trial Transcript at page 784, lines 6 - 12; *see also*, July 18, 2016 Hearing Transcript at page 13, lines 1 - 10.

Altered Anesthesia Narrative

Anesthesia Events											
10/01	07:25	DBE	Anesthesia machine checked, alarms on and functioning	10/01	07:42	DBE	Plan spontaneous ventilation throughout case				23 cm @ 6ps.
10/01	07:25	DBE	Integrity of Anesthesia circuit confirmed	10/01	07:48	EWN	Anesthesiologist assessed patient, reviewed chart and formulated anesthesia plan	10/01	08:01	DBE	Cuff inflated with minimum volume to create seal
10/01	07:25	DBE	Standard monitors available, alarms on and functioning					10/01	08:01	DBE	Breath sound equal and bilateral
				10/01	07:48	EWN	Anesthesiologist medically directing case and present for all critical portions.	10/01	08:01	DBE	ETCO2 confirmed via CO2 Monitor
10/01	07:25	DBE	Suction available and functioning					10/01	08:01	DBE	Memo Eyes taped.
10/01	07:25	DBE	Airway equipment available and functioning					10/01	08:11	DBE	Arrhythmia identified: v fib noted when compressions halted.
				10/01	07:48	EWN	Anesthesiologist present for induction	10/01	08:11	DBE	Defibrillation - Joules: 200
10/01	07:25	DBE	Anesthesia and resuscitation drugs available	10/01	07:48	EWN	I (or another attending anesthesiologist) was immediately available throughout and present for all key/critical portions of case	10/01	08:12	DBE	CPR stopped Palpable pulse present.
								10/01	08:15	DBE	Arterial line placed by CRNA
10/01	07:25	DBE	NPO status verified					10/01	08:16	DBE	Left radial artery
10/01	07:25	DBE	Patient chart and preoperative assessment reviewed	10/01	07:48	DBE	Memo Nelson,MDA in .Nasal airway in. O2 sat up to 94%. Pt remains lateral.	10/01	08:16	DBE	Sterile technique
								10/01	08:16	DBE	Skin prep with chlorohexadine
10/01	07:25	DBE	Patient identified by 2 methods					10/01	08:16	DBE	20 ga arterial catheter over wire
10/01	07:25	DBE	Pre-op vital signs reviewed					10/01	08:16	DBE	Attempts: 1 per Dushanko,CRNA.
10/01	07:25	DBE	Surgical consent verified and appropriate	10/01	07:51	DBE	Memo Nelson out.	10/01	08:16	DBE	Good arterial waveform
				10/01	07:55	DBE	Memo Pt turned supine from Lateral to establish better assisted Bag-Mask ventilation. Nasal airway out. Oral airway in.	10/01	08:16	DBE	Arterial catheter taped and sterile dressing applied
10/01	07:25	DBE	Risks, benefits, and complications of anesthetic plan discussed and understood					10/01	08:23	DBE	Peripheral IV placed after induction
								10/01	08:23	DBE	16 gauge peripheral IV catheter
10/01	07:25	DBE	Procedural site marking(s) verified where appropriate	10/01	07:56	DBE	Memo Came into room. Pt. hypoxic with junctional rhythm and no palpable pulse. ACLS protocol initiated, Mayday team called.	10/01	08:23	DBE	Left antiocubital x1 per Dushanko,CRNA.
10/01	07:25	DBE	Peripheral IV placed preoperatively					10/01	08:23	DBE	Aseptic technique used
10/01	07:25	DBE	22 gauge peripheral IV catheter in situ in HA.	10/01	07:57	DBE	Non-palpable pulse	10/01	08:25	DBE	Central line placed by Attending Anesthesiologist
10/01	07:25	DBE	Right hand	10/01	07:57	DBE	Chest compressions initiated and continuous until noted. .	10/01	08:25	DBE	Hand hygiene prior to donning gloves
10/01	07:35	DBE	. Transfer to:					10/01	08:25	DBE	Maximum barrier precautions utilized for strict sterile technique including sterile body drape, hat, mask, and sterile gloves.
10/01	07:42	DBE	Patient evaluated immediately prior to induction	10/01	07:57	DBE	Patient Oxygenated w/100% 02 per Bag-mask				
10/01	07:42	DBE	Standard monitors applied	10/01	08:01	DBE	Atraumatic laryngoscopy DVL x 1 per Embrey,CRNA.	10/01	08:25	DBE	Skin preparation with chlorohexadine
10/01	07:42	DBE	Respiratory rate monitored					10/01	08:25	DBE	Landmarks indentified
10/01	07:42	DBE	ETCO2 wave form present	10/01	08:01	DBE	Intubation - Tube size: #8.0 fr ETT @				

used the Mayday record to correlate the times for a variety of events which, according to her own altered chronology,[77] took place prior to the Mayday being called:

> Q And you filled quite a number of entries at 7:51, Dr. Nelson's left the room?
>
> A Yes.
>
> Q 7:55, you've turned the patient. 7:56, Dr. Nelson's back in the room. That's the entry that you changed. 7:57, 7:57, then 8:01. My point being that there's a number of entries in there that are timed earlier than 8:00; correct?
>
> A Yes.
>
> Q Okay. And it's your testimony that you were relying upon the Mayday record in order to be able to accurately recount what had taken place during those times?
>
> A Yes. That's the — that's the only other thing I would be able to look at, . . .[78]

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[77] *See*, Plaintiff's Exhibit 3 at page 494 of 2115.

[78] Trial Transcript at page 554, line 20 to page 555, line 9.

All of this simply demonstrates the manner in which MUSC systematically used the Mayday record to utterly confound the Plaintiff's efforts to cogently reconstruct for the jury what really took place during Mr. Mikell's colonoscopy. Following Dr. Berry's damaging deposition testimony, the factual predicate for the Plaintiff's case went into flux with one bomb-shell disclosure after another: the Mayday record; the software glitch; the text messages and phone calls; the AHA database; the backup anesthesia data — the dust never settled at any time prior to jury deliberations.

All of this late-breaking confusion — which highly favors MUSC because the Plaintiff has the burden of proof — was enabled by the almost three year delay in disclosing the truth of what was known to MUSC's own personnel all along. Ms. Scarborough always knew the Mayday record had been faxed to her in the Risk Management office; and Nurse Embry always knew there was a software glitch and that she used the Mayday record to "complete" the anesthesia narrative. Neither of those two witnesses have ever claimed to have forgotten any of those important facts.

To summarize, the first doublespeak narrative advanced by MUSC was that no Mayday record ever existed. The second doublespeak narrative was that loss of the Mayday record was meaningless because it contained no information about the critical events occurring prior to Mr. Mikell's cardiac arrest. The third doublespeak narrative was that the Mayday record included a time-line of events that allowed Nurse Embry to "accurately" "complete" the anesthesia narrative, including reverse-engineering the time at which Dr. Nelson left the procedure room before the Mayday was called.

The lower court was a witness to this whole circus of lies and correctly concluded that it was not the innocent result of failed memories or honest mistakes but rather sanctionable evasiveness in responding to interrogatories, requests for production, and requests for admission. There was no abuse of discretion in the lower court's decision to take action to

redress this misconduct.

3. The software glitch, text messages, and phone calls

The deposition of Dr. Berry created other problems for MUSC because his testimony strongly supported one of the Plaintiff's other theories of the case: that the empty vital signs boxes in the anesthesia chart were most likely explained by a failure to ensure that all of the monitoring equipment was hooked up, checked out, and fully operational before Mr. Mikell was rendered unconscious with the anesthetic agent.[79] Dr. Berry admitted this would be a breach of the standard of care.[80] He further testified that this was the most likely explanation for some of the missing vital signs data.[81]

Just as Dr. Berry's deposition testimony forced MUSC to disclose the existence of the Mayday record in order to explain the altered anesthesia narrative, so too his testimony about the empty data boxes forced MUSC to disclose the existence of the software glitch, text messages, and phone calls in order to show the equipment had been working but was not recording the data. In other words, following Dr. Berry's testimony, MUSC had to explain how those empty boxes did not equal malpractice and the only way to do it was by finally disclosing an inconvenient truth.

The Plaintiff's First Discovery Request was served on March 19, 2013. It included three separate requests for records and materials memorializing or recording the events at issue in the case:

> 7. Produce any and all writings, recorded statements, or other **materials in any way memorializing the events involved in this litigation**, whether made by the party, a witness, or some other person (not including counsel). . . .
>
> * * *
>
> 8. Produce any and all photographs, plats, sketches, diagrams, drawings, video tapes, visual representations, audio tapes, recordings, items of physical

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[79] *See*, October 21, 2015 Hearing Transcript at pages 24 and 25.

[80] June 15, 2015 Deposition of James Berry, MD at page 85, line 9 to page 86, line 19.

[81] June 15, 2015 Deposition of James Berry, MD at page 79, line 16 to page 80, line 2.

evidence, or other tangible materials, objects or items which relate in any way to the current litigation.

* * *

13. Produce a complete copy of any and all medical records relating to Charles Mikell, including but not limited to office notes, consultations, telephone message slips, prescriptions, test results, reports, hospital records, faxes, **e-mails, and any and all other items in whatever form they may exist (written or electronic).**

In addition to these discovery requests, Plaintiff's counsel sent a September 4, 2014 letter to defense counsel asking, *inter alia*:

> You will note there is no data recorded for respirations or ETCO2 — or oxygen saturation — at any time prior to 7:48 a.m. **Why is there no data recorded for the first six minutes** after the narrative states Mr. Mikell was hooked up to standard monitors with a ETCO2 wave form present?[82]

MUSC never made any response to this letter — it completely ignored it then, and tries to completely ignore it now.[83]

Beyond these efforts to get an explanation, the Plaintiff also served his Second Request for Admissions seeking, *inter alia*, "MUSC's explanation for the missing blood oxygen saturation data." On October 24, 2014, MUSC responded by claiming no data was "missing," but rather it simply "was not recorded at the intervals indicated,"[84] *viz*, every minute. But anyone who is not blind can look at the anesthesia record and see that the vital signs data was being recorded in one-minute intervals. MUSC's evasively worded response simply made no sense without the further (omitted) explanation that the data "was not recorded" because of a software glitch.

MUSC also made the remarkably disingenuous response that the missing data had already been explained "in the deposition testimony to date."[85] In other words, MUSC claimed

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[82] Exhibit D to Supplemental Memorandum in Support (emphasis added).

[83] *See*, MUSC Brief at page 40, wherein MUSC contends the Plaintiff never asked for the information in dispute.

[84] Exhibit F to Supplemental Memorandum at Request No. 5.

[85] This claim is remarkable because MUSC later claimed the software glitch had not been disclosed because witnesses had not been asked about the empty data boxes at their depositions.

the Plaintiff already knew the answer.

It was not until the September 22, 2015 deposition of Scott Reeves, MD[86] that the Plaintiff first learned there were text messages and phone calls between Nurse Embry and Ms. Thompson to overcome a software glitch during Mr. Mikell's colonoscopy — and that this glitch was the explanation for the empty data boxes.[87] A log showing the text messages and phone calls was not produced to the Plaintiff until December 2, 2015.[88]

Obviously, this timing prevented any of this information from being used during the August 2014 depositions of the medical care providers who were present in the colonoscopy procedure room when the software glitch occurred. Indeed, Dr. Nelson was deposed not once but twice[89] — and this information was not available for use during either of his depositions. It was also unavailable for use in deposing the parties' standard of care experts.[90] In short, this critical information — which was responsive to repeated requests — was not disclosed or produced until it was virtually useless for anything but resurrecting MUSC's defense after the problems created by Dr. Berry's deposition testimony.

Bear in mind, both Nurse Embry and Ms. Thompson knew about the software glitch.[91] They both knew that they had used text messages and phone calls to fix it. By Nurse Embry's own admission, this was not something she had simply forgotten. Instead, it was something Nurse Embry "assumed" Plaintiff's counsel already knew about so she decided it was not

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[86] Dr. Reeves was the Chairman of the Anesthesia Department who had arranged a peer review investigation into Mr. Mikell's cardiac arrest.

[87] MUSC contends that as soon as it figured out why the data boxes were empty, it "promptly and correctly disclosed that information to Plaintiff." MUSC Brief at page 28. This is ridiculous. Nurse Embry and Annette Thompson knew why those data boxes were empty on October 1, 2010. The Plaintiff was not informed of the reason until September 22, 2015.

[88] *See*, Plaintiff's Exhibit 12.

[89] Dr. Nelson was deposed on August 24, 2014 and again on August 17, 2015.

[90] Dr. Kofke was deposed on March 4, 2015. Dr. Berry was deposed on June 15, 2015.

[91] Dr. Nelson, Dr. Payne, and Nurse Zwermer may have known about it, too, but the Plaintiff never had an opportunity to ask them prior to trial.

necessary for her to "volunteer" anything about it at her August 24, 2014 deposition. It was also something MUSC never mentioned when it identified Ms. Thompson as a witness on January 22, 2015, or when it responded to the Plaintiff's Second Request for Admissions on February 27, 2015.

It is also useful in understanding this issue to know that in the fall of 2010, Dr. Reeves had organized a peer review investigation of Mr. Mikell's cardiac arrest. That investigation generated 34 pages of privileged material which the lower court reviewed *in camera* but ruled were not discoverable.[92]

So consider all of this very carefully for just a moment.

How likely is it that Nurse Embry would decide — all on her own — that she should not "volunteer" information during a deposition? Why would Nurse Embry assume Plaintiff's counsel already knew about the anesthesia software "glitch" if she had never discussed it with anyone? How likely is it that Nurse Embry and Ms. Thompson never mentioned the text messages and phone calls to anyone? Dr. Reeves organized a peer review investigation of Mr. Mikell's cardiac arrest in October 2010.[93] How likely is it that Dr. Reeves was not thereby made aware of the empty data boxes, software glitch, text messages, and phone calls? How likely is it that Dr. Reeves never mentioned anything about any of this to anyone? Were none of these witnesses interviewed when answers to the Plaintiff's First Discovery Request were being prepared in May 2013? Or when MUSC's Privilege Log was being prepared in July 2013? Yet none of these facts were disclosed to the Plaintiff for another two-plus years.

Is it mere coincidence that the software glitch, text messages, and phone calls were never once mentioned to Plaintiff's counsel by anyone until Dr. Berry testified the empty data boxes were evidence that MUSC had breached the standard of care? What could possibly have

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[92] July 11, 2013 Privilege Log and May 15, 2014 Order Denying Plaintiff's Motion to Determine Applicability of Privileges Asserted.

[93] September 22, 2015 Deposition of Dr. Reeves at page 18, line 3 to page 20, line 25.

triggered MUSC's decision to disclose this critically important information — which was responsive to multiple written requests from Plaintiff's counsel — in late September 2015, after the case had already been mediated and less than two weeks before the close of discovery?

In its May 9, 2016 Supplemental Memorandum in Opposition, MUSC provides some insight and context about this when it superficially explains that, at the same time defense counsel was preparing to send the July 23, 2015 "different information" letter, Donna Embry was being asked "to more closely scrutinize certain information in the Anesthesia/PACU record. It was at that time that Ms. Embry recalled seeing the Mayday Record on the evening of October 1, 2010 . . . ."[94] In other words, when MUSC realized the problems created by Dr. Berry's June 15, 2015 deposition testimony, it concluded that "different information" was going to be the key to the empty boxes and altered narrative. Yet MUSC's employees had known about that "different information" all along.

In its Brief, MUSC now adopts the catchy phrase "Unrecorded Data"[95] to refer to the missing vital signs data, as though this doublespeak excuses its failure to respond to multiple requests for an explanation of why the data boxes are empty. It also tries to parse the use of the word "glitch" by saying, "Mr. Mikell's data stream was not effectively transferred from the system that was recording his vital signs in the holding area to the system that would record them in the operating room."[96]

This all makes evident that MUSC's primary goal was to redefine discovery requests in order to avoid disclosing information the Plaintiff was clearly seeking and clearly entitled to receive. MUSC obfuscates its obligation to explain the empty data boxes by contending the Plaintiff asked about "missing" data while the data was not "missing" but was really just

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[94] May 9, 2016 Supplemental Memorandum in Opposition at pages 5 - 6.

[95] MUSC Brief at pages 16 and 17.

[96] MUSC Brief at page 17.

"unrecorded" — for reasons MUSC falsely said had already been described in prior deposition testimony. Likewise, MUSC obfuscates its obligation to explain the software glitch by contending it was not a "glitch" or "problem," but rather an "ineffectively transferred data stream" about which the Plaintiff never inquired. The lower court was not impressed by this "word play" and correctly decided this evasiveness and non-responsiveness merited the imposition of sanctions.

4. The audit trails

MUSC produced multiple versions of the anesthesia record, including printouts showing the data displayed in 15-minute, 10-minute, and 1-minute increments. Although a wide variety of discrepancies in the various versions of these records were indeed apparent upon close scrutiny, the explanation for these discrepancies was not. It was for this reason that Nurse Embry was asked at her August 26, 2014 deposition, "Do you have any explanation for why none of these things add up?"[97] It was her lack of any explanation — "I don't have an explanation . . . I have no answer for that . . . ."[98] — which lead to the September 4, 2014 and September 24, 2014 letters being sent to defense counsel. MUSC simply ignored these letters.

It is important to note, as the lower court did, that many of the discovery issues in the case would have been easily solved had MUSC simply responded to these letters by, *inter alia*, producing the audit trails and disclosing the software glitch, thereby answering many of the questions being posed.

In its Brief, MUSC claims the audit trails were "promptly produced" and it says there is "no evidence MUSC unreasonably delayed in producing those documents."[99] Yet even after Plaintiff's counsel wrote on December 5, 2014 to specifically request the audit trail by name, it was not until February 27, 2015 — 84 days later — that the first audit trail[100] was actually

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[97] August 26, 2014 Deposition of Donna Embry at page 94, lines 5 - 6.

[98] August 26, 2014 Deposition of Donna Embry at page 94, lines 7 and 11.

[99] MUSC Brief at pages 45 - 46.

[100] Plaintiff's Exhibit 10.

produced. MUSC did not produce the second audit trail[101] until September 21, 2015 — 207 days later. Even then, the second audit trail is limited to access to the electronic record on October 1 and 2, 2010, even though several of the anesthesia records contain time stamps showing they were printed in April 2013 and May 2013.[102] Producing incomplete documents 290 days after they are requested cannot be considered "prompt" under any view of the evidence.

The audit trails allowed the Plaintiff to finally understand that Nurse Embry had logged onto the PICIS system the afternoon following the cardiac arrest and changed Dr. Nelson's entries showing when he left the room; then spent hours creating a series of other entries to show when other important events occurred. MUSC claims the "testimony at trial confirmed that there had been no improper manipulation, alteration or deletion of data"[103] from the anesthesia narrative but there is no way to know what conclusions the jury may have reached about this issue. There was certainly an abundance of bitterly disputed evidence presented during the trial.

5. Backup anesthesia data and the American Heart Association database entries

The backup anesthesia data and the America Heart Association ("AHA") database entries presented technical issues the resolution of which was greatly confounded by the divergent positions taken by MUSC. On appeal, MUSC seems to contend that it was sanctioned because certain data was not recorded,[104] but that is an inaccurate portrayal of the lower court's ruling,[105] which primarily arose out of the inordinate delay in producing information the very existence of which MUSC had tried to deny.[106]

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[101] Plaintiff's Exhibit 11.

[102] Plaintiff's Exhibits 5 and 6.

[103] MUSC Brief at page 25.

[104] MUSC Brief at page 15.

[105] The lower court specifically noted that it was not sanctioning MUSC for failing to record data. *See,* Order for Sanctions at page 21: "The Court does not seek to impose sanctions for information lost in a 'glitch.'"

[106] December 11, 2015 Hearing Transcript at page 41, lines 1 - 14 and page 42, lines 8 - 12.

a. Backup anesthesia data

At the beginning of the case, the Plaintiff's anesthesia consultant asked Plaintiff's counsel to obtain the "backup data" from the PICIS anesthesia software system in order to try to fill vital signs data into the empty boxes on the printed anesthesia records. The consultant explained that in each of the university-affiliated healthcare facilities where he had practiced anesthesiology (University of Pennsylvania; University of Pittsburgh; West Virginia University; Harvard University), the biometric data streaming into the anesthesia software system was "swept" onto a backup data storage server where it was accessible for research purposes. His description of this process made perfect sense. So on March 19, 2013, MUSC was asked to identify its anesthesia data management system[107] and to produce all data captured or recorded by the anesthesia machine.[108]

MUSC's initial response was to produce the anesthesia record printouts displaying the vital signs data in 10-minute, 1-minute, and 1-second increments. In regard to the backup data, however, MUSC simply said, with condescension, that Plaintiff's consultant did not understand how MUSC's information technology systems worked. A great deal of discussion and argument between counsel ensued about backup data. None of it involved the revelation that the vital signs data had not been recorded because of a software glitch.

As this argument festered, Plaintiff's counsel reviewed certain technical information available on MUSC's public website;[109] consulted with the manufacturer of the PICIS software system; and retained a firm specializing in the discovery of electronically stored data. All of this effort informed the conclusion that MUSC did in fact have an archival data storage system containing backup data from Mr. Mikell's colonoscopy procedure. So Plaintiff's counsel persisted

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[107] Plaintiff's First Discovery Request No. 17.

[108] Plaintiff's First Discovery Request No. 16.

[109] *See*, Exhibit N to Supplemental Memorandum in Support.

in his requests for the backup data to be produced;[110] and MUSC persisted in its position that there was no backup data. It continued to withhold any disclosure of the software glitch.

The dispute came to a head when the Plaintiff took the deposition of MUSC employee Patricia Aysse on August 24, 2015.[111] Ms. Aysse confirmed the Plaintiff's suspicion about Mr. Mikell's anesthesia data being swept off onto a storage server for archival purposes:

> Q Okay. And that's — so that the record is clear, you don't know why those boxes are blank for the end tidal CO2 and for the blood oxygenation?
> MS. FLEMING: Object to the form.
> THE WITNESS: I cannot give you a specific reason. I was not present.
> BY MR. RANSOM:
> Q **Have you done anything to investigate that?**
> A On this record?
> Q Yes.
> A **I have not. I did specifically ask to get back into the electronic system that has been retired to take a look at it, and that access has not been given back to me.**[112]
>
> * * *
>
> Q Okay. So that brings me to my next series of questions I want to ask you, which **sounds to me as though the data from this procedure is preserved somewhere?**
> A **That is correct.**
> Q Okay. Where is it preserved?
> A **I assume it's preserved on the servers that they have that they save all the data from.**[113]
>
> * * *
>
> Q **Do you know whether or not any effort has been made to retrieve that data in this case?**
> A **I don't know.**
> Q **So the data from Mr. Mikell's case is stored on a server somewhere?**
> A **That's correct.**
> Q And it should be accessible?
> A That's correct. . . .[114]

So according to Ms. Aysse, there was a storage server containing Mr. Mikell's anesthesia data,

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[110] *See*, Exhibit O to Supplemental Memorandum in Support.

[111] MUSC contends it promptly responded to the December 5, 2014 letter by identifying Ms. Aysse. But "MUSC never made any representation that [Ms. Aysse] would be able to testify concerning the backup or archive of the Unrecorded Data." MUSC Brief at pages 21 and 22.

[112] August 24, 2015 Deposition of Patricia Aysse at page 20, line 16 to page 21, line 7 (emphasis added).

[113] August 24, 2015 Deposition of Patricia Aysse at page 22, lines 8 - 15 (emphasis added).

[114] August 24, 2015 Deposition of Patricia Aysse at page 23, lines 4 - 11 (emphasis added).

but as of August 24, 2015 no one at MUSC had checked the server to see if it contained the missing vital signs data.[115] This was a far cry from MUSC's previous position that there was no backup data. Even at this point, MUSC did not disclose any software glitch.

MUSC subsequently took the position that the cost of checking its server was prohibitive. It contended, both to the Plaintiff and the lower court, that it would require $3,000,000.00 worth of manpower to do so.[116] At the October 21, 2015 hearing on the Plaintiff's Motion for Discovery Sanctions, the lower court was incredulous about this cost estimate, calling it "poppycock,"[117] demanding to have an MUSC information technology person come to court to confirm it under oath,[118] and saying the court was going to engage its own IT expert to extract the backup data.[119] The lower court then adjourned the October 21, 2015 hearing until the court's own expert could be arranged.[120]

Another hearing was held on December 11, 2015. At that hearing, MUSC produced a computer disc ("CD") which defense counsel represented to the lower court contained the backup data.[121] MUSC then indicated its information technology employee, John Fischer, could explain the information on the CD. The lower court then asked, "Why is it so difficult for y'all to have attained [sic] this; why has it taken two and three years?" to which MUSC's counsel very tellingly answered, "Well, it really didn't."[122]

Consequently, the lower court asked defense counsel to explain in writing why MUSC

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[115] This sort of willful blindness was harshly condemned in Malautea v. Suzuki Motor Corp., 148 F.R.D. 362, 373 (S.D.Ga. 1991).

[116] October 21, 2015 Hearing Transcript at pages 44 - 45.

[117] October 21, 2015 Hearing Transcript at page 46, lie 17.

[118] October 21, 2015 Hearing Transcript at page 46, lines 15 - 16,

[119] October 21, 2015 Hearing Transcript at page 45, lines 20 - 22.

[120] October 21, 2015 Hearing Transcript at page 48, lines 2 - 6.

[121] December 11, 2015 Hearing Transcript at page 19, lines 20 - 25.

[122] December 11, 2015 Hearing Transcript at page 32, lines 15 - 18.

had been able to produce the backup data CD with far less burden than it had initially claimed was required. In so doing, defense counsel essentially conceded that the backup data had been responsive to the Plaintiff's First Discovery Request No. 16 all along.[123]

Although Plaintiff's counsel was able to meet briefly with defense counsel and Mr. Fischer at the court house immediately following the December 11, 2015 hearing, this only enabled counsel to see that the information on the CD consisted of approximately 735 pages of data tables which were organized in multiple columns and rows. There was no court reporter present and this was not a deposition. Plaintiff's counsel had no opportunity to prepare for this meeting and was unable to understand exactly what the data tables represented.

The lower court did not grant any relief until March 17, 2016, at which point it allowed the Plaintiff to take only four more depositions (even though eight had been requested.) The Plaintiff then faced a Hobson's choice about whom to depose. There was only a month to go before trial.

Pursuant to a separate order issued by Judge Dennis,[124] Nurse Embry had been re-deposed on February 22, 2016. She testified that the software glitch had occurred on numerous previous occasions and that MUSC information technology personnel had successfully extracted missing data from memory drives on the vital signs monitors themselves and then used that recovered data to "repopulate" empty boxes on the anesthesia chart.[125] Ms. Thompson testified on April 8, 2016 that she was unfamiliar with this process and said someone from biomedical engineering would need to be asked about it.[126]

John Fischer was deposed on April 7, 2016. Based upon his testimony, it appeared as though the data tables on the backup data CD represented some sort of audit trail for the vital signs portion of PICIS anesthesia system — according to Mr. Fischer, these data tables allowed

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[123] Affidavit of Ms. Fleming at pages 3 - 4.

[124] December 15, 2014 Order on Motion for Protective Order.

[125] February 22, 2016 Deposition of Donna Embry at page 34, line 5 to page 38, line 8.

[126] April 8, 2016 Deposition of Annette Thompson at pages 66 - 71.

him to determine there had been no effort to tamper with any of the extant vital signs shown in the hard copy anesthesia records.

In the end, the Plaintiff simply ran out of time and resources to probe these issues any further and had to accept what Mr. Fischer said as being true; and forgo any further investigation of the issues Ms. Thompson deferred to a biomedical engineer. There was never any opportunity to ask Dr. Nelson, Dr. Payne, or Nurse Zwermer about a software glitch, text messages, or phone calls. There was no opportunity to submit the CD to the PICIS software manufacturer once Mr. Fischer explained its contents. There was no opportunity to depose a biomedical engineer. The case was up for trial.

MUSC contends there is "no evidence that MUSC engaged in any blameworthy conduct" concerning the backup data.[127] Yet MUSC acknowledges the Plaintiff made a specific request for the backup data in his First Discovery Request (served on March 19, 2013) and again in the December 5, 2014 letter to defense counsel.[128] In response to the letter, MUSC merely said Patricia Aysse (among others) could explain how MUSC's anesthesia software system works.

Of course, it was Ms. Aysse who testified on August 24, 2015 that there was indeed a storage server containing Mr. Mikell's anesthesia data. So presumably, MUSC was aware of this at least by the time it knew enough about Ms. Aysse to provide her name, seven (7) months earlier. But MUSC did not disclose the backup server or produce the data tables at that time.

When Ms. Aysse gave her deposition, MUSC's computer server still had <u>not</u> been checked for missing vital signs data. The software glitch still had not been disclosed. The Plaintiff had to wait until John Fischer's April 7, 2016 deposition before learning MUSC's final word about what was on the computer server. The April 2016 depositions of Mr. Fischer and Ms. Thompson were the proverbial end of the road. This dilatory timing — sixteen (16) months from

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[127] MUSC Brief at page 45.

[128] MUSC Brief at page 21.

request to final answer — is certainly evidence of "blameworthy conduct" by MUSC.

b. AHA database entries

Close scrutiny of the AHA database entries reveals helpful information about the timing of certain events during Mr. Mikell's colonoscopy — just not the time when Dr. Nelson left and came back into the room. But those entries were of little use in preparing for trial because they were not produced in legible form until long after Mr. Mikell's medical care providers had been deposed.

The data base printout was not produced to Plaintiff in any form until August 20, 2015. At that point, it was almost completely indecipherable. It was not produced in readable form until December 2, 2015 — after the Motion for Discovery Sanctions had been filed; after the lower court had blasted defense counsel about it; and on the eve of the second sanctions hearing. More than anything, it was the inexcusable 3 1/2 month delay in producing a legible copy of the document that lead the lower court to impose sanctions.

Of course, if Dr. Guldan had conducted anything more than a cursory investigation into the existence of the Mayday record, he would have determined that Ms. Scarborough had received it via fax and used it to create the AHA database entries in late December 2010. That information would then have been available no later than Dr. Guldan's Rule 30(b)(6) deposition on November 4, 2014. So in reality MUSC's, dilatory conduct resulted in the AHA database entries not being produced in legible form for 13 months after their existence was first reasonably discoverable. Regardless, the only real value to these entries was in questioning the medical care providers present during the colonoscopy, who were deposed a year before MUSC disclosed the existence of the AHA database entries.

6. Other nebulous discovery responses

As described above, throughout this case MUSC has attempted to evade questions by engaging in "word play" to redefine terms. There is no Mayday record because "Maydays" are

not called in operating rooms, even though the anesthesia narrative explicitly says, "Mayday team called." "Missing" data need not be explained by a software glitch because the data is not "missing," it is "unrecorded at the intervals requested." "Problems" with the PICIS software require no explanation because there are no "problems," the software functioned exactly as intended. MUSC's position about the Mayday record is not "false" even though there is "different information" which "might lead one to infer" that.

This doublespeak campaign continues even on appeal, as MUSC will only concede Ms. Scarborough "may have received a copy of Mr. Mikell's Mayday Form"[129] — even though she testified both at her deposition and at trial that she used the Mayday record to create the AHA database entries.[130] How could she do so if she never received it? The lower court was absolutely correct in its assessment that MUSC would not give straight answers to simple questions. This is the essence of evasiveness and is prohibited by Rule 37(a)(3), SCRCP. *See*, Malautea v. Suzuki Motor Corp., 148 F.R.D. 362 (S.D.Ga. 1991), aff'd 987 F.2d 1536 (11th Cir. 1993)(wherein the court condemned misleading discovery tactics designed to obfuscate the truth).

7. Non-specific nature of the Plaintiff's discovery requests

MUSC's argument that the Plaintiff "did not specifically request the information at issue"[131] simply ignores the multiple discovery requests and several very detailed letters sent to defense counsel describing the specifics of what the Plaintiff was seeking to learn.[132] Beyond this, MUSC's "lack of particularity" argument was never presented to the lower court. It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised

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[129] MUSC Brief at page 8.

[130] August 24, 2014 Deposition of Sheila Scarborough at page 25, lines 7 - 15; Trial Transcript at page 226, lines 23 - 24.

[131] MUSC Brief at page 40.

[132] *See*, Footnote 14, above.

to and ruled upon by the trial judge to be preserved for appellate review. Wilder Corp. v. Wilke, 330, S.C. 71, 497 S.E.2d 731 (1998).

8. Prejudice to the Plaintiff

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). Turning this presumption on its head, MUSC contends the burden is on the Plaintiff to show prejudice by making the remarkable claim that there is "no evidence whatsoever of any prejudice" caused by MUSC's evasive and incomplete discovery responses.[133]

Twenty years ago, the late Justice Conner made the prescient observation that "the entire thrust of the discovery rules involves full and fair disclosure 'to prevent a trial from becoming a guessing game or one of surprise for either party.'" Samples v. Mitchell, 329 S.C. 105, 113, 495 S.E.2d 213, 217 (Ct. App. 1997). In this case, MUSC's evasive and incomplete answers had the ultimate effect of pulling the rug out from underneath a case the Plaintiff had built believing requested information had not been produced or disclosed because it did not exist. And then it did exist, and had to be accounted for.

For the better part of two and a half years, the Plaintiff developed the theory that the empty boxes in the anesthesia chart were due to a negligent failure to connect, turn on, and warm up the vital signs monitors before administering the anesthetic agent; and that the discrepancies in the various anesthesia printouts were due to a ham-handed effort to fabricate the entries. Those theories were certainly supported by the information available at the time.

The Plaintiff largely succeeded in trapping the defense expert with the evidence supporting these theories, obtaining testimony that was tantamount to an admission of malpractice. All of that changed as one late disclosure after another short-circuited the Plaintiff's

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[133] MUSC Brief at page 47.

theories. Following Nurse Embry's February 22, 2016 testimony about repopulating charts using local storage memory, the Plaintiff was simply left guessing what would come next. But there was no time to regroup or to re-examine critical witnesses.

The discovery process in this case proceeded such that the Plaintiff could never organize and analyze the facts for cogent presentation to the jury. New surprises and new information kept coming beginning the month after Dr. Berry's deposition and continuing right up until a week before trial.

MUSC contends that "it was forced to learn along with Plaintiff,"[134] but that position should be rejected as untenable. MUSC's own employees knew what happened during the colonoscopy as it happened. Ms. Scarborough knew there was a Mayday record when she used it to create the AHA database entries. Nurse Embry and Ms. Thompson both knew there was a software glitch and that they solved it by text messages and telephone calls. Nurse Embry knew she changed the entries in the anesthesia narrative using the Mayday record. MUSC's employees did not learn all of these things only as discovery progressed. So there is no excuse for this information being disclosed only after the incredible effort the Plaintiff expended to overcome the many doublespeak obfuscations that continue even to this day, e.g., MUSC still tries to claim there might not have been a Mayday record.[135]

9. Availability of Rule 37 sanctions

Relying upon cases applying Rule 37(b), SCRCP, MUSC contends that no discovery sanction can ever be imposed by a trial court unless the offending party first violates a prior court order.[136] That untenable position simply ignores the language of Rule 37(a), SCRCP,

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[134] MUSC Brief at page 20: "[T]he parties understanding of the data grew through the process of discovery. . . . MUSC's counsel was forced to learn along with Plaintiff's counsel how to use the PICIS system."

[135] MUSC Brief at page 46.

[136] MUSC Brief at page 35 - 38.

which allows the circuit court, when hearing a motion involving "evasive or incomplete" discovery responses, to impose "reasonable expenses . . . including attorneys fees." Creighton v. Coligny Plaza Ltd. Partnership, 334 S.C. 96, 122 n. 9, 512 S.E.2d 510 (1998). *See also*, Thornton v. Thornton, 294 S.C. 512, 517, 366 S.E.2d 37, 39 (1988)(noting that attorneys fees are available under Rule 37(a).) Even the authorities cited by MUSC recognize that "sanctions may be imposed without obtaining an order compelling discovery."[137] Simply stated, Rule 37, SCRCP has never been construed as narrowly as MUSC suggests. *See also*, Malautea v. Suzuki Motor Corp., 148 F.R.D. 362 (S.D.Ga. 1991), aff'd 987 F.2d 1536, 1546 (11th Cir. 1993), in which the court made reference to its "inherent power" to "manage its affairs," which "necessarily includes the authority to impose reasonable and appropriate sanctions" on a party for discovery misconduct.

The whole tenor of the Plaintiff's position before the lower court was that MUSC had given evasive and incomplete discovery responses. The lower court wholeheartedly agreed, finding "the Medical University engaged in a pattern of discovery abuse"[138] including the "failure to forthrightly produce records and information in a timely fashion."[139] The lower court found that through its false, evasive, and delinquent discovery responses[140] MUSC created "unfair roadblocks to the timely receipt of properly discoverable information,"[141] thereby imposing "extraordinary difficulties" on the Plaintiff. If such conduct cannot be sanctioned by the circuit court as a matter of law, then it is open season on the discovery process.

The lower court declined to impose any of the harshest sanctions available under Rule 37(b)(2) SCRCP, instead opting to allow four depositions to be taken at MUSC's expense and

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[137] MUSC Brief at page 36, citing Downey v. Dixon, 294 S.C. 42, 44 n.1, 362 S.E.2d 317, 318 n. 1 (Ct. App. 1987).

[138] Order for Sanctions at page 1.

[139] Order for Sanctions at page 7.

[140] Order for Sanctions at page 3.

[141] Order for Sanctions at page 4.

imposing costs and attorneys fees to compensate the Plaintiff for the time and effort undertaken in challenging MUSC's false, evasive, and incomplete discovery responses. This exercise of discretion is authorized by Rule 37, SCRCP. If MUSC's view were to obtain, a party could simply ignore discovery entirely and the circuit court would be powerless to award any costs or attorneys fees for the effort in bringing a motion to compel.

It is also important to bear in mind that the software glitch, backup data, second audit trail, text messages and phone calls, and use of the Mayday record to alter the anesthesia narrative were all disclosed after the September 9, 2015 Motion for Discovery Sanctions was filed. The AHA database was ultimately disclosed as a result of Judge Stilwell's March 3, 2015 order for a second Rule 30(b)(6) deposition. Disclosure of the Mayday record's use in altering the anesthesia narrative was a further result of Judge Dennis' December 15, 2014 order for a second deposition from Nurse Embry. In other words, the efforts to obtain all of these disclosures were properly compensable under Rule 37, SCRCP.

Moreover, in some instances the lower court's rulings impacted matters which were the subject of MUSC's responses to the Plaintiff's Requests for Admission.[142] Rule 36(a), SCRCP specifically authorizes the trial court to impose sanctions pursuant to either Rule 37(a), SCRCP or Rule 37(c), SCRCP, when a party's responses to requests for admission are challenged, as was the case here.

10. Sanctions imposed

MUSC's argument on appeal is the same as it made before the lower court. But the attorneys fees imposed were not excessive. Each time entry in the Plaintiff's attorneys' fee affidavits correlates to some effort to deal with MUSC's false, evasive, and incomplete discovery responses. When the lower court held a hearing for the purpose of allowing MUSC to challenge

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[142] MUSC's responses to Plaintiff's Second Request for Admissions and to Plaintiff's Third Request for Admissions.

the contents of these affidavits, MUSC instead sought to re-argue the propriety of any sanctions award.[143]

In fact, at the July 18, 2016 hearing defense counsel did not ask a single question about any time entry or cost[144] reflected in the attorneys fees affidavits. MUSC's only attack has been to generally claim that the efforts of Plaintiffs' counsel were not directed towards discovery abuse, but not one single specific time entry or cost item has ever been challenged. None.

MUSC claims the hourly rates for Plaintiff's counsel are too high — because its defense counsel are being compensated for their time at the rate of $150.00 per hour,[145] a "lowest common denominator" which has never been properly placed into evidence. Regardless, defense counsel conceded at the July 18, 2016 hearing that, "Mr. Ransom is worth more than that."[146]

In his sworn Affidavits, Mr. Ransom set forth his $450.00 hourly billable rate. At the hearing on July 18, 2016, Mr. Ransom confirmed under oath that this is what he charges and is paid for hourly billable work.[147] The Plaintiff's Reply Memorandum on Issue of Attorneys Fees sets forth a fact-based explanation for how that hourly rate is derived.[148] That pyramidal law firms will work for stingy high-volume clients who pay below-market rates is not determinative of the customary fees charged for services similar to those provided by Plaintiff's counsel in this case. For example, there is no evidence that defense counsel personally advanced so much as a penny in litigation costs while defending this case.

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[143] *See*, July 18, 2016 Hearing Transcript at page 25, line 14 to page 30 line 23.

[144] These costs were all supported by invoices submitted to the lower court.

[145] The South Carolina Insurance Reserve Fund does not set the market hourly rates for private attorneys. There are hundreds if not thousands of South Carolina lawyers who will not work for the IRF because of the artificially low hourly rates it pays..

[146] July 18, 2016 Hearing Transcript at page 32, line 25.

[147] July 18, 2016 Hearing Transcript at page 31.

[148] Plaintiff's Reply Memorandum on Issue of Attorneys Fees at pages 6 - 7.

The lower court considered all of the information submitted by both parties bearing upon the six factors to be considered in making an award of attorney fees. The issue on appeal is not whether a more perfect record could have been made but rather whether there is competent evidence to support the lower court's decision. Given the paucity of MUSC's evidentiary showing as to any of the six factors at the July 18, 2016 hearing, the lower court properly determined the Plaintiff had the better part of the argument, as it was entitled to do, but nevertheless found that $300.00 an hour was a customary rate for Mr. Ransom's services.

In its Brief, MUSC invites this Court to substitute its own view of the facts by making a *de novo* review of the evidence. But the lower court had vastly greater exposure to the issues, evidence, and efforts by Plaintiff's counsel. The lower court's findings are supported by substantial evidence; are not controlled by any error of law; and the discretionary award of costs and attorneys fees should not be disturbed on appeal.

CONCLUSION

In its Brief, MUSC contends the Plaintiff's malpractice case "lacked merit"[149] and was simply "baseless."[150] MUSC postures itself as the sympathetic victim of the Plaintiff's "inability to meaningfully question witnesses"[151] and counsel's unfair effort to deliberately obstruct the weaknesses in the Plaintiff's case by exploiting MUSC's massive data systems,[152] abusing MUSC with unnecessary discovery,[153] purposely complicating the issues,[154] and manipulating minor discovery issues to gin up outage.[155]

Yet MUSC never sought a Rule 26(c), SCRCP protective order or any other relief from

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[149] MUSC Brief at page 47.
[150] MUSC Brief at page 43.
[151] MUSC Brief at page 49.
[152] MUSC Brief at page 2.
[153] MUSC Brief at page 48.
[154] MUSC Brief at page 48.
[155] MUSC Brief at page 47.

what it now contends was unnecessary, abusive discovery. Nor did the alleged meritless and baseless nature of the Plaintiff's medical malpractice claims result in the granting of MUSC's pre-trial motion for summary judgment; or its directed verdict motion at the close of the Plaintiff's case. The jury deliberated for more than 5 hours over two days before returning its verdict.

Contrary to MUSC's characterizations, the Plaintiff contended at trial that Nurse Embry and Dr. Nelson were in a hurry to begin their first of many colonoscopy procedures scheduled for October 1, 2010; neglected to check whether the PICIS software system was fully and properly functioning before Mr. Mikell was rendered unconscious; and were then caught distracted by a software glitch and shorthanded when Dr. Nelson left the room while Mr. Mikell was unstable, causing Mr. Mikell to desaturate and descend into cardiac arrest.

None of that was made any less likely by the credibility issues created by Nurse Embry's unquestionable use of a lost Mayday record to alter the time when Dr. Nelson left and came back into the room. The defense verdict is hardly a validation of MUSC's conduct in answering discovery and can as easily be explained by the difficulty of managing ever-changing facts as by the Plaintiff's case "lacking merit" or being "baseless."

MUSC repeatedly claims there is "no evidence" it engaged in any "deliberate," "willful," "blameworthy," "intentional," or "abusive" discovery conduct. It asserts benign explanations for all of its many evasions, claiming these were nothing more than "honest mistakes and misunderstandings."[156] Yet Rule 37, SCRCP requires neither *scienter* nor *mens rea* as a prerequisite to an order for "reasonable expenses . . . including attorneys fees." All that Rule 37, SCRCP requires is "an evasive or incomplete answer" which is not "substantially justified" under the circumstances; or proof that a denied request for admissions has been proven true.

The lower court did not abuse its discretion in finding that MUSC engaged in a pattern of discovery abuse by failing to timely and forthrightly respond to discovery served pursuant to

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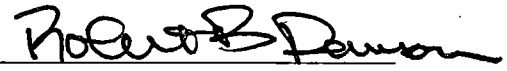
[156] MUSC Brief at page 47.

Rules 33, 34, and 36, SCRCP. Nor did the lower court err in imposing attorneys fees and costs as a sanction for that abusive conduct. The Order for Sanctions should be affirmed and this case remanded to the lower court for the entry of final judgment in the amount awarded plus interest.

Respectfully submitted

By: 

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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J. C. Nicholson, Circuit Court Judge

Appellate Case No. 2016-002326

Shon Turner as Personal Representative
of the Estate of Charles Mikell, deceased,. . . . . Respondent/Appellant

v.

The Medical University of South Carolina . . . . . Appellant/Respondent

PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondent/Appellant Shon Turner on The Medical University of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on April 21, 2017, addressed to its attorney of record, M. Dawes Cooke, Jr.,

April 21, 2017

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April 21, 2017

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Re: Shon Turner v. MUSC
Appellate Case No. 2016-002326

Dear Ms. Kitchings:

Enclosed please find one copy of the Initial Brief of Respondent/Appellant Shon Turner along with a Proof of Service.

Also enclosed please find one copy of the Respondent/Appellant Shon Turner's Designation of Matter to Be Included in the Record on Appeal along with a Proof of Service.

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

Very truly yours,

Robert

Robert B. Ransom

c: M. Dawes Cooke, Jr., Esq.
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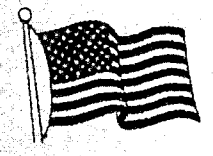

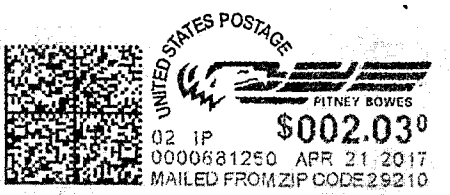

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