STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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

Appellate Case No. 2016-002326

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

v.

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

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RECORD ON APPEAL – VOLUME II of III

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Ex. January 5, 2016 Supplemental Affidavit of Robert B. Ransom (omitted because reproduced elsewhere in Record on Appeal)

Ex. May 2, 2016 Second Supplemental Affidavit of Robert B. Ransom (omitted because reproduced elsewhere in Record on Appeal)

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EXHIBIT A

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

Case Times

Anest Start: 10/01 07:20	Surg Start: 10/01 07:35	Proc Start: 10/01 07:42	PACU Start: 10/01 08:45	Stepdown Start:
Anest End: 10/01 09:12	Surg End: 10/01 08:37	Proc End: 10/01 07:56	PACU End: 10/01 13:40	Stepdown End:
Anest Total: 01:52	Surg Total: 01:02	Proc Total: 00:14	PACU Total: 04:55	Stepdown Total:

Surgical Procedure

DIAGNOSTIC COLONOSCOPY

Pre-op Diagnosis

Post-op Diagnosis

Allergies

No known medication allergies

Anesthesia Type

General Anesthesia

ASA

III

Staff and Electronic Signature Legend (Initials)

Role: Scheduled Surgeon - Payne, Mark (MAP)
Role: Primary Surgeon - Payne, Mark (MAP)
Role: Pre/Postoperative Registered Nurse - Toohey, Jeffrey (JGT)
Role: Anesthesia Attending - Nelson, Eric (EWN)
Role: CRNA - Embrey, Donna (DBE)

Anesthesia Attending Documentation Electronically Signed By:

10/01 7:48 EWN Anesthesiologist assessed patient, reviewed chart and formulated anesthesia pla
10/01 7:48 EWN Anesthesiologist medically directing case and present for all critical portions.
10/01 7:48 EWN Anesthesiologist present for induction
10/01 7:48 EWN I (or another attending anesthesiologist) was immediately available throughout a
10/01 8:31 EWN Anesthesiologist present for airway device placement

Anesthesia Events

10/01 7:25 DBE Airway equipment available and functioning
10/01 7:25 DBE Surgical consent verified and appropriate
10/01 7:25 DBE Pre-op vital signs reviewed
10/01 7:25 DBE Risks, benefits, and complications of anesthetic plan discussed and understood
10/01 7:25 DBE Procedural site marking(s) verified where appropriate
10/01 7:25 DBE Anesthesia machine checked, alarms on and functioning
10/01 7:25 DBE Integrity of Anesthesia circuit confirmed
10/01 7:25 DBE Standard monitors available, alarms on and functioning
10/01 7:25 DBE Suction available and functioning
10/01 7:25 DBE Anesthesia and resuscitation drugs available
10/01 7:25 DBE Patient identified by 2 methods
10/01 7:25 DBE Patient chart and preoperative assessment reviewed
10/01 7:25 DBE NPO status verified
10/01 7:25 DBE Peripheral IV placed preoperatively
10/01 7:25 DBE Right hand
10/01 7:25 DBE 22 gauge peripheral IV catheter in situ in HA.
10/01 7:35 DBE Transfer to:
10/01 7:42 DBE Patient evaluated immediately prior to induction
10/01 7:42 DBE Standard monitors applied
10/01 7:42 DBE Respiratory rate monitored
10/01 7:42 DBE ETCO2 wave form present
10/01 7:42 DBE Plan spontaneous ventilation throughout case
10/01 7:48 EWN Anesthesiologist medically directing case and present for all critical portions.
10/01 7:48 EWN I (or another attending anesthesiologist) was immediately available throughout and present for all key/critical portions of case
10/01 7:48 DBE Memo Nelson,MDA in .Nasal airway in. O2 sat up to 94%. Pt remains lateral.
10/01 7:48 EWN Anesthesiologist assessed patient, reviewed chart and formulated anesthesia plan
10/01 7:48 EWN Anesthesiologist present for induction
10/01 7:51 DBE Memo Nelson out.
10/01 7:55 DBE Memo Pt turned supine from Lateral to establish better assisdted Bag-Mask ventilation. Nasal airway out. Oral airway in.
10/01 7:56 DBE Memo Came into room. Pt hypoxic with junctional rhythm and no palpable pulse. ACLS protocol initiated, Mayday team called.
10/01 7:57 DBE Non-palpable pulse
10/01 7:57 DBE Chest compressions initiated and continuous until noted.
10/01 7:57 DBE Patient Oxygenated w/100% 02 per Bag-mask
10/01 8:01 DBE Atraumatic laryngoscopy DVL x 1 per Embrey,CRNA.
10/01 8:01 DBE Intubation - Tube size: #8.0 fr ETT @ 23 cm @ lips.
10/01 8:01 DBE Cuff inflated with minimum volume to create seal
10/01 8:01 DBE Breath sound equal and bilateral
10/01 8:01 DBE ETCO2 confirmed via CO2 Monitor
10/01 8:01 DBE Memo Eyes taped.
10/01 8:11 DBE Arrhythmia identified: v fib noted when compressions halted.
10/01 8:11 DBE Defibrillation - Joules: 200
10/01 8:12 DBE CPR stopped Palpable pulse present.
10/01 8:16 DBE Skin prep with chlorhexadine
10/01 8:16 DBE Sterile technique
10/01 8:16 DBE Arterial line placed by CRNA
10/01 8:16 DBE Arterial catheter taped and sterile dressing applied
10/01 8:16 DBE Left radial artery
10/01 8:16 DBE 20 ga arterial catheter over wire
10/01 8:16 DBE Attempts: 1 per Dushanko,CRNA.
10/01 8:16 DBE Good arterial waveform
10/01 8:23 DBE Peripheral IV placed after induction
10/01 8:23 DBE Aseptic technique used
10/01 8:23 DBE 16 gauge peripheral IV catheter
10/01 8:23 DBE Left anticubital x1 per Dushanko,CRNA.
10/01 8:25 DBE Skin preparation with chlorhexidine
10/01 8:25 DBE Landmarks indentified
10/01 8:25 DBE Introducer needle inserted into vessel, free blood flow
10/01 8:25 DBE Triple lumen catheter RL femoral vein.
10/01 8:25 DBE Sterile transparent dressing placed over insertion site
10/01 8:25 DBE Maximum barrier precautions utilized for strict sterile technique including sterile body drape, hat, mask, and sterile gloves.
10/01 8:25 DBE Hand hygiene prior to donning gloves
10/01 8:25 DBE Blood return through all lumens. Lumens flushed.
10/01 8:25 DBE Central line placed by Attending Anesthesiologist
10/01 8:31 DBE Post resuscitation rhythm: SR.
10/01 8:31 DBE Patient Oxygenated w/100% 02 and remains on vent.
10/01 8:31 DBE ETT in place as per above.
10/01 8:31 EWN Anesthesiologist present for airway device placement
10/01 8:31 EWN Patient stabilized
10/01 8:37 DBE Patient transported with O2
10/01 8:37 DBE To recovery area in stable condition

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

Case Times

Anest Start: 10/01 07:20	Surg Start: 10/01 07:35	Proc Start: 10/01 07:42	PACU Start: 10/01 08:45	Stepdown Start:
Anest End: 10/01 09:12	Surg End: 10/01 08:37	Proc End: 10/01 07:56	PACU End: 10/01 13:40	Stepdown End:
Anest Total: 01:52	Surg Total: 01:02	Proc Total: 00:14	PACU Total: 04:55	Stepdown Total:

Surgical Procedure

Staff and Electronic Signature Legend (Initials)

Pre-op Diagnosis

Anesthesia Attending Documentation Electronically Signed By:

Post-op Diagnosis

Allergies

Anesthesia Type	ASA
General Anesthesia	III

Anesthesia Events

10/01	8:37	DBE	Transported via stretcher/bed
10/01	8:45	JGT	Phase I PACU admission
10/01	8:45	JGT	Report received from: Donna Embry CRNA
10/01	8:45	JGT	Side rails up
10/01	8:45	JGT	Wheels locked
10/01	8:45	JGT	Connected to monitors
10/01	8:45	DBE	To PACU in stable condition with O2/ambu/MDA/RT/monitors for transport. VSS. Pt to vent in PACU on arrival per RT. SBAR report to PACU RN.
10/01	9:15	DBE	Postoperative Location:PACU
10/01	9:15	DBE	Cardiac arrest: during procedure.
10/01	9:15	DBE	Requiring vasoactive/inotropic drips
10/01	9:15	DBE	Mechanical ventilatory support
10/01	9:15	DBE	Pain managed by primary care service
10/01	9:46	JGT	Family at Bedside mother
10/01	10:54	JGT	Family at Bedside mother
10/01	12:16	JGT	Memo Dr. Guidan at bedside, Propofol off at this time to evaluate patients Neuro status.
10/01	12:17	JGT	Family at Bedside pastor
10/01	13:40	JGT	Discharge criteria not met
10/01	13:40	JGT	Transfer to ICU:
10/01	13:40	JGT	Transported via stretcher/bed stretcher
10/01	13:40	JGT	With monitors
10/01	13:40	JGT	With Oxygen
10/01	13:42	JGT	Memo Ice packs applied to pulse points. Dr. Guidan at bedside to evaulate patients neuro status. No response to verbal or noxious stimuli. Placed back on sedation for transfer to MSICU

MUSC Health

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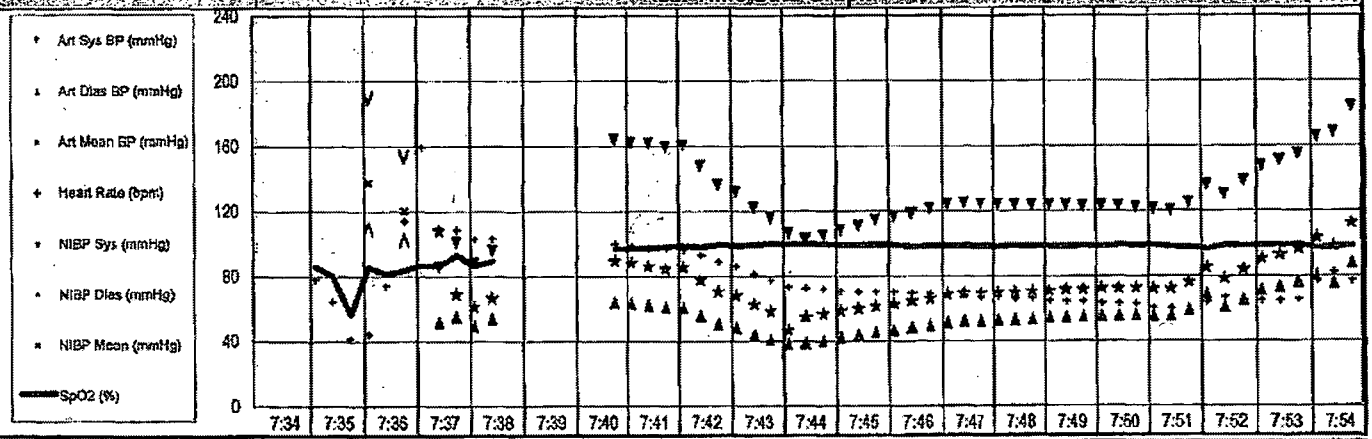
DOB: 01/25/1951	BMI: 44.7
PatCom: 270428782	Sex: M
Surgeon: Payne , Mark	Age: 49 years

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	10.55	10.55	0.754
Des out (%)																					
Exp. Tidal volume (mL)																			41	32	
PIP (cmH2O)															0	0	0	0	0	1	0

Real Time Data Graph



Laboratory Results

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
PH ARTERIAL																					
PH ARTERIAL																					
PCO2 ARTERIAL																					
PCO2 ARTERIAL																					
PO2 ARTERIAL																					
PO2 ARTERIAL																					
BICARB ARTERIAL																					
BICARB ARTERIAL																					
TOTAL CO2 ARTERIAL																					
O2 SAT ARTERIAL																					
O2 SAT ARTERIAL																					
HCT WHL BLD ARTERIAL																					
HGB WHL BLD ARTERIAL																					
NA WHL BLD ARTERIAL																					
K WHL BLD ARTERIAL																					
IONIZED CA ARTERIAL																					

MUSC Health

ANESTHESIANT

Anesthesia/PACU Record

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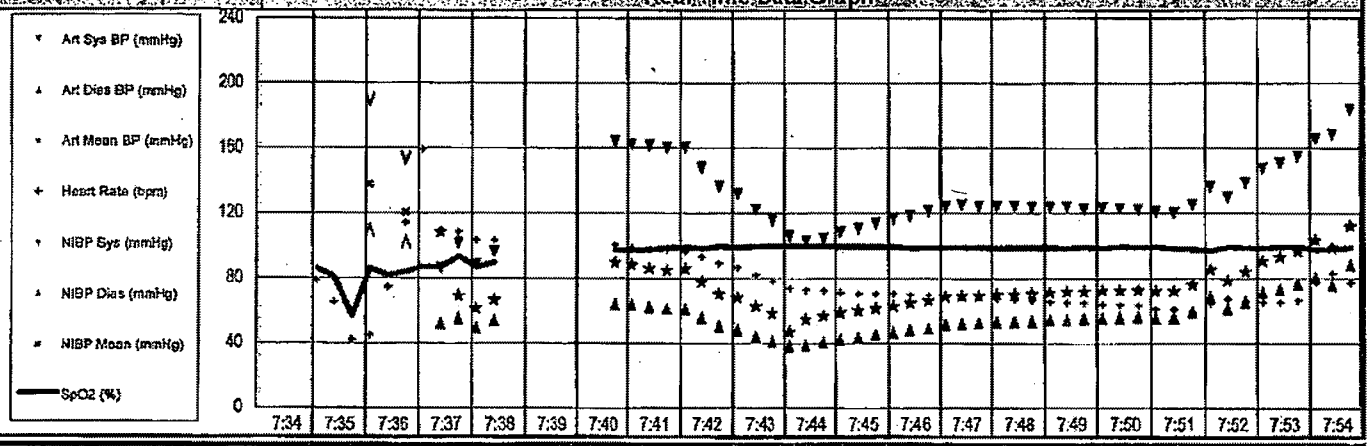
DOB: 01/25/1951	BMI: 44.7
PatCom: 270428782	Sex: M
Surgeon: Payne , Mark	Age: 49 years
	Surgery Date: 10/01/2010

Real Time Variables

TIME																						

Real Time Data Graph



Laboratory Results

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
GLU WHL BLD ARTERIAL																					
CL WHL BLOOD ARTERIAL																					
HEMOGLOBIN																					
GLUCOSE																					

MUSC Health

ANESTHESIANT

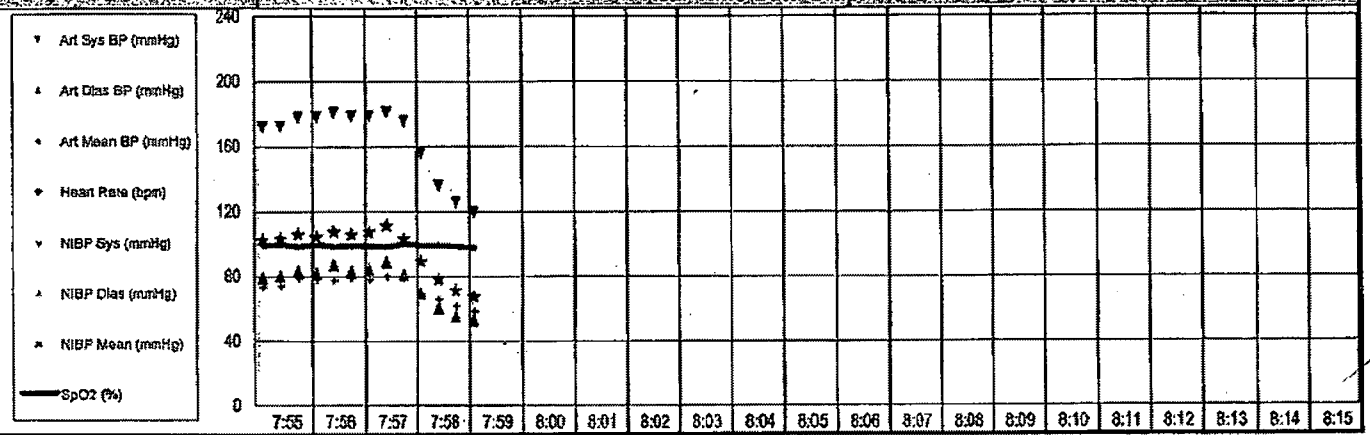
Anesthesia/PACU Record

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	7:55	7:56	7:57	7:58	7:59	8:00	8:01	8:02	8:03	8:04	8:05	8:06	8:07	8:08	8:09	8:10	8:11	8:12	8:13	8:14	8:15
SpO2 (%)	62.1	75	41.2	47.5		67.6	88.1	88.4	96.4	88.3	79.9	77.6		86.3		83.5					79.7
Temperature (°C)																					
EKG Rhythm	SR	JUNCT	JUNCT	PEA*	PEA*	PEA*	PEA*	PEA*	PEA*	PEA*	PEA*	PEA*	PEA*	PEA*	PEA*	PEA*	V-FIB*	SR*	SR*	SR*	SR*
SpO2 Heart Rate bpm	90	64	30	29		29	102	95	87	108	94	79		35		39					89
Spontaneous Resp Rate	3	12	14	18	15	15	13	7	2	1	0	0	0	0	1	1	22	9	28	24	15
Resp Rate from pCO2 cart	0	17	0	0	0	0	0	20	9	10	10	10	10	0	0	0	17	15	17	11	15
Vent Resp Rate/min	4	12	14	18	15	15	13	8	17	13	10	10	10	10	11	10	25	15	28	24	15
FIO2 (%)	95	95	99	98	99	100	100	96	79	94	96	97	98	98	98	98	97	99	98	98	98
EtCO2 (mmHg)	1.508	24.88	0	0	0	7.54	0	16.59	9.802	20.36	13.57	10.56	7.54	2.262	4.524	5.278	23.37	16.59	25.64	62.58	52.03
Des out (%)										0	0	0	0	0	0	0	0	0	0	0	0
Exp. Tidal volume (mL)	17	50	121	72	72	314	93	454	107	549	546	557	553	559	726	559	1128	781	10	904	1061
PIP (cmH2O)	3	27	28	28	30	32	31	38	26	29	27	27	27	27	35	27	57	63	10	55	47

Real Time Data Graph



Laboratory Results

TIME	7:55	7:56	7:57	7:58	7:59	8:00	8:01	8:02	8:03	8:04	8:05	8:06	8:07	8:08	8:09	8:10	8:11	8:12	8:13	8:14	8:15
PH ARTERIAL																					
PH ARTERIAL																					
PCO2 ARTERIAL																					
PCO2 ARTERIAL																					
PO2 ARTERIAL																					
PO2 ARTERIAL																					
BICARB ARTERIAL																					
BICARB ARTERIAL																					
TOTAL CO2 ARTERIAL																					
O2 SAT ARTERIAL																					
O2 SAT ARTERIAL																					
HCT WHL BLD ARTERIAL																					
HGB WHL BLD ARTERIAL																					
NA WHL BLD ARTERIAL																					
K WHL BLD ARTERIAL																					
IONIZED CA ARTERIAL																					

MUSC Health

ANESTHESIANT

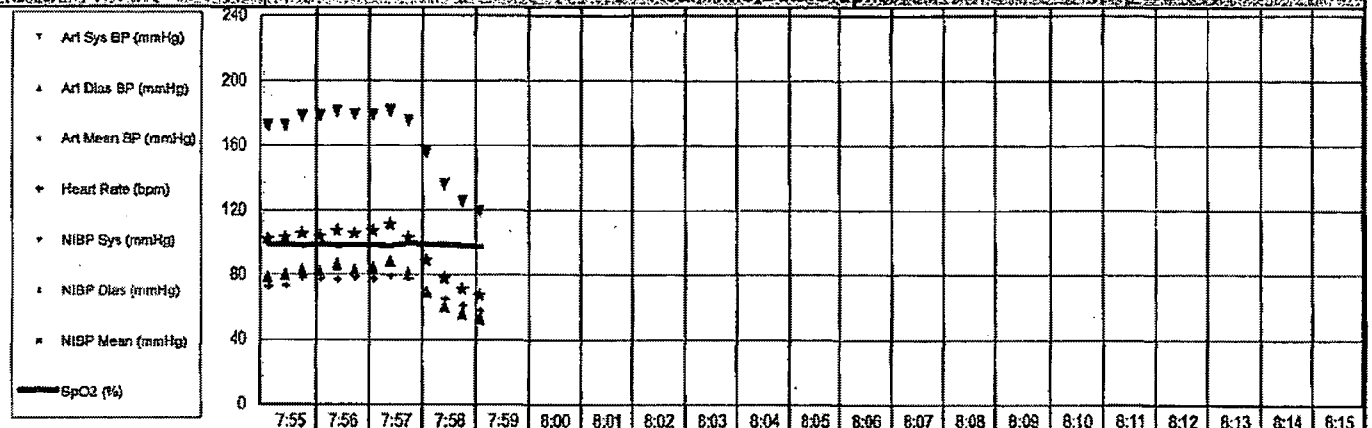
Anesthesia/PACU Record

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	7:55	7:56	7:57	7:58	7:59	8:00	8:01	8:02	8:03	8:04	8:05	8:06	8:07	8:08	8:09	8:10	8:11	8:12	8:13	8:14	8:15

Real Time Data Graph



Laboratory Results

TIME	7:55	7:56	7:57	7:58	7:59	8:00	8:01	8:02	8:03	8:04	8:05	8:06	8:07	8:08	8:09	8:10	8:11	8:12	8:13	8:14	8:15
GLU WHL BLD ARTERIAL																					
CL WHL BLOOD ARTERIAL																					
HEMOGLOBIN																					
GLUCOSE																					

EXHIBIT F

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF CHARLESTON

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

Plaintiff,

vs. CASE NO. 2012-CP-10-7275

MEDICAL UNIVERSITY OF SOUTH CAROLINA,

Defendant.

DEPOSITION OF:	GEORGE JOSEPH GULDAN, III, M.D.
DATE:	November 4, 2014
TIME:	3:34 p.m.
LOCATION:	Medical University of South Carolina 274 Calhoun Street Charleston, SC
TAKEN BY:	Counsel for the Plaintiff
REPORTED BY:	Janice N. Shepherd, Registered Professional Reporter

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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(INDEX AT REAR OF TRANSCRIPT)

GEORGE JOSEPH GULDAN, III, M.D.,
being first duly sworn, was examined and testified as follows:

MS. FLEMING: I want to stipulate on the record, just to clarify that he's been designated as a Rule 30(b)(6) witness on the issue of the Mayday Policy, and that the documents that you just produced today -- provided today, not produced, are outside the scope of the Mayday Policy.

MR. RANSOM: Well, let's talk about that. It was my understanding that he was going to talk about the manner in which the anesthesia machine records, collects, displays, prints out information. Am I wrong about that?

MS. FLEMING: You're wrong about that. You asked about the Mayday Policy, and we designated him on that issue. I'd like to take a minute then with the witness. I don't know that he's the appropriate designee to address the issue that you just mentioned. So can we go ahead and take a break for a minute?

MR. RANSOM: Sure.

MS. FLEMING: Just so the record is clear, the formal policy is called the Emergency

Medical Response Policy.

(A recess transpired.)

EXAMINATION

BY MR. RANSOM:

Q. Can I get you to state your full name for the record, please?

A. Sure. It's George Joseph Guldan, III.

Q. And how do you spell your last name?

A. It's G-U-L-D-A-N.

Q. But you pronounce it Guldan?

A. Guldan.

Q. All right. What's your current residential address?

A. It's 645 Cloudbreak Court, and that's Charleston, South Carolina 29412.

Q. And who, if anyone, lives with you at that address?

A. Melissa Pearce, my fiance.

Q. Does she work?

A. She does. She's an obstetric and gynecologist physician.

Q. Where is she employed?

A. She works with women -- she works in Summerville mostly and sometimes Trident. She's in the OB hospitalist group.

Q. Is she employed by MUSC?

A. No, she is not.

Q. And where are you currently employed?

A. MUSC. I'm a board certified cardiac anesthesiologist. I'm the residency program director and the Joanne Conroy endowed chair of leadership and education development in the department of anesthesia and perioperative medicine.

Q. Can you give me a brief sketch of your educational background and professional training?

A. Sure. I attended medical school at the University of South Carolina School of Medicine. I graduated in 2003. Then I did my residency training here at the Medical University of South Carolina in the department of anesthesia, graduated in 2007, and then went on to do a cardiac anesthesia fellowship here at MUSC from 2007 to July of 2008.

Q. Where did you go to college?

A. I went to University of South Carolina for college.

Q. What was your major?

A. Biology and chemistry.

Q. And what year did you graduate?

A. I graduated from college in 2001.
Q. Did you go straight into medical school?
A. I had -- I think I had about six months off.
Q. What did you do?
A. I played, actually, in a competitive basketball league and traveled.
Q. What was the name of the league?
A. It was a local league in Columbia. It was an intramural league associated with USC.
Q. Where are you originally from?
A. Sumter.
Q. Did you go to Sumter High School?
A. No, I went to Wilson Hall.
Q. And what year did you graduate there?
A. 1994.
Q. And did you take some time off between high school and college?
A. No, I went straight --
Q. I'm not good at math, but it looks like seven years between high school diploma and college degree?
A. I'm sorry. I said '94. Should be -- I graduated in '98. Sorry. I don't know where I got

'94.

Q. Okay. How old a man are you here today?

A. I'm 38 years old.

Q. How long have you lived in Charleston?

A. Since I came down for residency.

Q. What part of town is Cloudbreak Court?

A. James Island.

Q. Are you a member of a church or any civic organizations or clubs here in town?

A. I'm not a member of a church, no.

Q. Any clubs, organizations, sports leagues, anything like that in Charleston?

A. No, I've got a bad knee now, so...

Q. What happened to your knee?

A. I hurt it playing intramural basketball, actually as a resident here at MUSC.

Q. I got my left knee wiped out skiing earlier this year. It's been quite an experience.

A. It's unfortunate.

Q. Yeah. My understanding is that you were actually one of the people who responded to the Mayday code for Mr. Mikell's case. Is that true?

A. Correct.

Q. You've been produced by the Medical University here today as someone who can testify about their Mayday code policy?

A. Emergency Medical Response Policy, yeah, um-hum.

Q. Emergency Medical Response. And what we'll do is we'll mark as Exhibit 1 to your deposition a document that's entitled MUSC Medical Center Policy Manual, Emergency Medical Response. Is that what we're talking about?

A. That is correct.

(PLF. EXH. 1, Nine-page MUSC Policy, Emergency Medical Response, Mayday Committee, Bates Stamp BWPH 004948 Through 004956, was marked for identification.)

BY MR. RANSOM:

Q. Okay. Bear with me.

A. Certainly.

Q. Does this policy, Exhibit 1, apply to the Mayday that was called in Mr. Mikell's case?

A. It does not fully apply. If you look at -- let me find the -- if you look at page 4, for Maydays in any area other than the OR or ICUs or ED, a full Mayday team will be called for. In this instance, we were actually in an OR site. So

whenever we have an anesthesia site, whether it be in heart and vascular, Digestive Disease Center, or in the OR upstairs at the ART building, a higher standard of preparation and staffing must be present for it to be an OR site.

So in this case, we had an ACLS-certified nurse anesthetist taking primary care of the patient being supervised by an ACLS-trained cardiac anesthesiologist. In addition, because it's an OR site, there must be a code drug box immediately available that's present in the anesthesia cart that's in the room directly next to the ventilator. So that has all the drugs necessary in a code situation that would come with the pharmacy team normally in a Mayday situation that would happen on the floor.

Obviously being in the OR, you have all the airway equipment necessary to intubate and secure an airway, even a difficult airway, already must be present in an OR situation. You also have to have a defibrillator present in an OR situation that's not the case in a normal procedure room, as well as the additional trained personnel who can provide above and beyond even ACLS training in situations that happen in the OR.

So that is why it is not necessary from a patient care standpoint to call a Mayday in the OR. Whenever you need help, it is always beneficial to have extra hands. So the nurses being -- erring on the side of caution, called the Mayday because part of that response team is another anesthesiologist, in this case, it was myself with another nurse anesthetist. I think it was Annette Cooper in this case was carrying the pager with me. So we responded.

By the time we arrived, the patient was already -- the airway was secured and resuscitation was underway. And I believe when I arrived, the patient had ROSC, return of spontaneous circulation, at that point.

Q. All right. So what you're telling me is, based on, I think, paragraph 11 on page 4, that the composition of the Mayday team is not necessarily the same in an OR setting as it is in other designated areas of the hospital?

A. There is no Mayday team necessary in the OR because of the composition of the staff of the OR. It becomes superfluous.

Q. I wanted to ask you about the documentation aspects of the Mayday Policy, if you

can permit me to call that, as opposed to Emergency Medical Response Policy. An economy of words is helpful. Turn to page 3 of 8, and you'll see at the top left, it says Policy. And paragraph number 4, it says: Each Mayday is documented under Cardiopulmonary Resuscitation Event Form, open parens, Mayday records, closed parens.

Am I reading that correctly?

A. You are reading that correctly. But I do need to state that in the OR, when a patient has a cardiopulmonary event, it is a code, not a Mayday. We do not call Maydays in the OR.

Q. Well, what I wanted to ask you was, where in Exhibit 1 do we see some exception language that tells us that the documentation requirement there, paragraph 4 on page 3 of 8, doesn't apply to an OR setting? Where does it say that?

A. So the legal documentation in an OR code situation is the anesthesia or medical record.

Q. Where does it say that in the policy?

A. It does not say that. It says the Mayday record is the legal documentation of the Mayday. There is no Mayday in the OR. It's a code. And it is documented on the anesthesia

record is the reality of the medical practice.

Q. So what you're telling me is, as regards Maydays that are called in the OR, Exhibit 1 does not apply?

A. Correct.

Q. But it doesn't say that it doesn't apply?

A. It actually states that a Mayday -- if we go to page -- page 3 of 8 -- no, that's not what I was referring to. Hold on one second. Oh, it's -- it's kind of going on to page 4. So the emergency departments, EDs, and ORs do not have on to call a full Mayday. That is what I'm referring to in the policy, that the ORs do not have to call a Mayday, but staff may call a Mayday if they determine a need for a full team, or in this case, Annette or I, help.

Q. You're reading paragraph 10 at the bottom of page 3 that carries over to page 4?

A. Correct.

Q. And that relates to the members of the Mayday team who respond to the call?

A. It's in regards to that you do not have to call a Mayday in the OR, period. It's actually harmful to call a Mayday, because you have people

who are not trained often to be in a sterile environment and actually accessory people coming in that actually clutter the situation and make it harder to take care of the patient.

Q. But they did call a Mayday in Mr. Mikell's case; right?

A. Yes, the nursing staff that works in the DDC. They also work in non-OR sites. So right next door to the OR site, they're working in an endoscopy suite that's getting moderate sedation. It does not have an anesthesiologist. It does not have a nurse anesthetist who is ACLS-trained. So they, in an over abundance of caution to take care of the patient -- this is not a common event, having a code situation in the DDC. So in the best interest of the patient, they called a Mayday just in case they needed to be extra help.

Q. What's a DDC, what's that stand for?

A. That's the Digestive Disease Center. So that's the designation of those OR sites that we're covering. We have three digestive disease sites. Now we have up to four that are covered by anesthesiologists, residents, and nurse anesthetists.

Q. Is a DDC the same as an OR suite?

A. Yes. So we have the same equipment, the same medications, same staffing as an OR suite.

Q. So, again, back to page 3, paragraph 4, it doesn't say that a Mayday record is not needed for things to take place in a DDC, does it?

A. It does not say a Mayday record -- it says a Mayday record is legal documentation of the Mayday.

Q. Right.

A. The word play in this case is Mayday, as is 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, as, again, the code was documented fully, including all medications and the timing of medications and staff procedures and resuscitation events were documented in the OR medical record.

Q. The OR medical record?

A. Correct.

Q. Was it signed by all the designated participants?

A. Correct, it was electronically signed by all the designated participants.

Q. What does that record look like? Have you seen it?

A. I have.

Q. Can you describe it for me?

A. So the OR medical record, as it is presented out for the chart, is a culmination. The PICIS records were a culmination of all the keyed-in, typed-in events for a case, along with printouts of the actual vital signs and multiple categories, end tidal CO2, blood pressure, et cetera, for the case. It can be quite an extensive array of information. You can print out based on time intervals, so it can be more or less data depending on the interval that was picked out for the printout.

(PLF. EXH. 3, Three-page Anesthesia/PACU Record, was marked for identification.)

(PLF. EXH. 4, Seven-page MUSC

Anesthesia Record, was marked for identification.)
BY MR. RANSOM:
Q. I'm going to show you a printout that's been marked as Exhibit 3 and ask you if that's an example of the record you're referring to.
A. This is an example of the record I'm referring to.
Q. Is that signed by everybody who participated in the event?
A. Correct.
Q. Can you tell me who all the people are that signed it? I'm sorry, strike that. A better question is, where did you sign it?
A. I did not participate in the resuscitative event.
Q. Did Annette Cooper sign it?
A. As I believe Annette was not participating in the event as well, because the patient was already airway-secured, and they were in the process of resuscitating when we arrived, so they did not need our assistance. So she should not be on here either, but I'm looking to see if she did document doing anything on the particular patient. I think it was Donna Embry, Eric Nelson, and, I believe, Mike Dushanko I saw on here.

Q. Can you show me where Mr. Dushanko's signature is?

A. So whenever you sign in to chart that you did a procedure, the initials of the individual show up to the left. I believe I saw him on here at one point when I looked at one of these records -- let's see. Was it a different --

MS. FLEMING: Is this the whole --

THE WITNESS: This is not the whole record, no. There are additional pages of the record that are not here.

(PLF. EXH. 5, 21-page MUSC Anesthesia Record, Bates Stamp MUSC PAGE 494 OF 2115 Through 505 of 2115 and 604 of 2115 Through 612 of 2115, was marked for identification.)

BY MR. RANSOM:

Q. All right. Let me show you what I've marked as Exhibit 5. And -- okay, Exhibit 5, you'll notice down in the lower right-hand corner, these pages have what we call document control numbers. So I've turned to page 604 of 2115, and you'll see that there are some names listed.

A. Um-hum.

Q. Annette Thompson, Donna Embry, Eric Nelson, and Jeffrey Toohey. Am I reading those

correctly?

A. Yep, that appears to be the case.

Q. But it doesn't list Annette Cooper, Mike Dushanko, or yourself; correct?

MS. FLEMING: Objection to the form. Go ahead and answer.

THE WITNESS: I do not see my name, no.

BY MR. RANSOM:

Q. You don't see Mr. Dushanko's name?

A. I do not.

Q. Do you see Ms. Cooper's name?

A. I do -- I do not see Ms. Cooper's name.

Q. You're telling me that the reason that those three names are not on the record is because those three people, including yourself, did not actually participate in the Mayday?

A. Correct.

Q. Even though you responded to the call?

A. Correct, because, as I aforementioned, the patient had ROSC upon our arrival. They were already being resuscitated. That's return of spontaneous circulation. I apologize for the abbreviation.

Q. Sure. Had he returned to spontaneous respiration when you came in?

A. He was being mechanically ventilated.

Q. But his heart rate had returned to normal?

A. I believe it was -- I'd have to look to see the precise heart rate. I know he was being supported on multiple medications at that point, but had a pulse and perfusing rhythm.

Q. Were you present when they actually hit him with the paddles?

A. I was not. I came in after that. He obviously did not have an effective perfusing rhythm the whole time.

Q. Is there any way in looking at this document, Exhibit 5, for us to tell when it was that you came into the room?

A. I don't believe so. Exhibit 5 is this one right here. Let me review it real quick.

Q. Sure.

A. I mean, it's -- so it does not have any documentation of when we responded to the code. It's just documentation of the code and the post-resuscitative efforts.

Q. All right. And to try to make a clear record on this, Dr. Guldan, I want to ask you a couple of questions.

A. Certainly.

Q. Again, focusing our attention on page 3 of Exhibit 1, paragraph 4, it discusses and describes the Mayday record. Is it your testimony here today under oath that that paragraph does not apply to Mr. Mikell's code?

A. Because he was in an OR setting, yes, sir, that is my testimony today.

Q. And, again, I'm not trying to beat a dead horse --

A. No, I understand.

Q. -- but can you point me to any specific paragraph in Exhibit 1 that exempts Mr. Mikell's situation from the requirement for a Mayday record to be kept pursuant to paragraph 4 on page 3?

A. The fact that the ED and ORs do not have to call a Mayday, and if there is not a Mayday, there cannot thus be a Mayday record.

Q. And this is where you're losing me, because there was a Mayday. Right? I mean, several witnesses have testified that they called a Mayday. So what was it? If they weren't actually calling a Mayday, why do they think they actually did?

A. It's just -- it's terminology. The

nurses were trying to call what their normal procedure -- when they're covering non-anesthesia sites, they were trying to call for help to better the care of the patient. They were not as familiar working with an OR setting, because they are digestive disease nurses. It was a time when we were just recently providing care at that site, and they just did what they thought was best to better the care of that patient. It was unnecessary, but certainly we never can fault someone for calling for additional help in those situations.

Fortunately, when I arrived, as I aforementioned, the patient's resuscitation was already well underway appropriately, and they had defibrillated and had a return of spontaneous circulation and a perfusing rhythm.

Q. Okay. Turn to page 4 of Exhibit 1, and you'll see down near the bottom of the page under Procedure, it says: Mayday teams, composition and roles.

Paragraph A says: Adult team.

Do you follow me on this?

A. Yes, I've got you now.

Q. So the Mayday team leader there is supposed to, amongst other things, complete and

sign the Cardiopulmonary Resuscitation Form, reviewing it for accuracy and completeness, and entering a record of the event in the progress note for the patient. Am I getting this right?

A. I am reading that.

Q. Is that what it says?

A. It says: Directs administration of advanced cardiac life support according to ACLS protocols. If an attending physician present chooses to assume control of the code, he/she must clearly state they're in charge and will then be referred to as team leader;

They discuss resuscitation efforts with the attending physician or designee;

Orders the discontinuation of resuscitation efforts in the absence of the attending physician;

Talks to the family in the absence of the attending physician;

And completes and signs Cardiopulmonary Resuscitation Event Form, reviewing for accuracy and completeness, enters record of the event in progress note.

Q. Right. So was somebody in charge during Mr. Mikell's code?

A. Dr. Nelson was in charge.

Q. Okay. So he was supposed to complete and sign a Cardiopulmonary Resuscitation Event Form, review it for accuracy and completeness, and enter it into the record?

MS. FLEMING: Objection to the form.

THE WITNESS: I believe I've already answered that it was not a Mayday, and that does not apply in this instance because we are in an OR. He did complete the medical record form of the event.

BY MR. RANSOM:

Q. Okay. And where did he do that?

A. Donna Embry and Dr. Nelson documented the drugs and the ACLS administration on the OR medical record.

Q. The OR medical record?

A. The OR medical record.

Q. Is that different than this Exhibit 3?

A. That is the OR medical record for this case.

Q. I'm sorry. You said it was Dr. Nelson who was in charge?

A. The attending cardiac anesthesiologist in this case was in charge of the site. So he was

in charge. In the OR, the attending physician for the case is in charge of the resuscitation of an individual patient in his room. That is -- you know, that is the standard.

Q. And I'm sorry. I should have written this down. When I asked you who it was that was the team leader that was in charge of the code, you said it was Dr. Nelson?

A. Correct.

Q. Okay. So since no Mayday was called, Exhibit 1 doesn't apply. Is that right?

A. Correct.

Q. Okay. Is there any other procedure that applies to Mr. Mikell's circumstance?

A. We do not have a written formal procedure that I'm aware of for OR codes. The -- again, as I said, the expectation, the standards of an OR resuscitation go above and beyond ACLS. You know, you want to have an ACLS-trained anesthesiologist present, an ACLS -- all the nurse anesthetists are ACLS-trained, all our residents are ACLS-trained, so that whoever is taking care of our patients in an OR setting can immediately respond and provide, at minimum, ACLS training -- usually ACLS treatment usually above that

immediately so the patients have the best chance of having a good outcome.

Q. What documentation requirements are there for a code that gets called in an OR setting like this?

A. So you always want to chart the start of ACLS, chest compressions, et cetera, drugs given, and the electronic medical record is -- it will show the drugs given, epinephrine, atropine, et cetera, when ACLS is initiated, when chest compressions are initiated. The nice thing about the electronic medical record is you have additional data coming in about the patient's vital signs, end tidal CO2, et cetera, that are beneficial in helping you manage that patient aggressively in the OR. So you can see adequacy of your chest compressions with an arterial line. That's why we usually place that after the initial resuscitation. Those kinds of things go above the standard of care.

Q. Is any of that reduced to some written policy at MUSC?

A. I'm not aware of a written policy of that at MUSC. It's considered standard of care for the -- by our Society of -- American Society of

Anesthesiology to provide that level of care in the OR. That's a national standard for anesthesia.

Q. Looking at page 1 of Exhibit 1, you'll see under the definition section, there are a variety of different terms that are defined, and several of them relate to specific locations within the MUSC facility. Which, if any, one of those describes the location where Mr. Mikell's procedure took place? Was it in the main hospital? Was it in the Ashley River Tower? Do you follow me?

A. The DDC is in Ashley River Tower.

Q. I mean, would you agree with me, Dr. Guldan, that as you read this policy that's been marked in Exhibit 1, there isn't anything in the language of the document itself that would draw your attention to the fact that it didn't apply to Mr. Mikell's situation?

A. Again, I think number 10 on page 3 and number 11 do -- does imply that in the OR, in the ICU and the ED, a full Mayday does not have to be called for. Especially in the ED and OR it says specifically, do not have to call for Mayday. It says very specifically.

Q. Right. And, again, I'm not being argumentative. I'm just trying to understand. It

says they don't have to. But in Mr. Mikell's case, they did.

A. Again, the nurses were not familiar with working in the OR setting, and they were trying to help. It was not detrimental, but it certainly was not beneficial either.

Q. Have you reviewed any of the testimony of any of the other participants in the code?

A. I have not.

Q. So you said that you and Ms. Cooper received a page; is that correct?

A. Correct.

Q. How does that work?

A. So there is a code pager that an attending carries. Currently it's a senior anesthesia resident, but at that time it was a nurse anesthetist. So that's the rapid response intubation, slash, code response team. So when that pager goes off, you respond to the site and assess what needs to be done next.

Q. So you're carrying, I mean, we're talking 20th century pager?

A. Circa 1980 pager, correct.

Q. And you've got that on your belt or in your pocket?

A. It's on your belt, yes.

Q. Because you know you're the designated guy for that day?

A. Correct.

Q. What about Ms. Cooper? Does she have a pager too?

A. She has a physical pager as well, but we have a separate pager. They usually go off relatively simultaneously. There can be seconds delay between the two.

Q. And this is somebody who is picking up a phone and dialing a number?

A. Correct. There is not a lot of information put in at that point. So you get a location -- you get that there is a code. You get a location, usually a room number. In this case they actually put a descriptor because the room number was not a common location. So they said Digestive Disease Center, Room 2012.

Q. How long did it take you to get there?

A. I do not recall specifically.

Q. Do you remember what you were doing at the time that the page came through?

A. I was taking care of a patient in the OR, I believe.

Q. So you were managing someone else's anesthesia while they were undergoing surgery?

A. Correct, correct.

Q. And you said that that was in an operating room as opposed to a Digestive Disease Center?

A. It was in one of the operating rooms on the fourth floor versus an operating room in the Digestive Disease Center.

Q. Which is on what floor?

A. It's on the second floor.

Q. So you had to come down two floors?

A. Correct.

Q. Were you delayed in any way in responding?

A. I don't believe so.

Q. Can you recall who was present in the room when you came in?

A. Other than I recall Dr. Nelson and Dr. Embry being present. Other than that, I cannot recall.

Q. Were you ever interviewed as part of the peer review investigation?

A. I was not.

Q. Did you give any kind of a written

statement?

A. I did not.

Q. Was there -- after Mr. Mikell was taken out of the DDC room, was there any discussion about what had happened to cause his crisis?

A. Not that I recall, just his poor cardiac function.

Q. Was there any discussion about his obstructive sleep apnea?

A. No.

MR. RANSOM: All right. Okay. I think that's it.

MS. FLEMING: Thanks, Rob.

(The witness, after having been advised of his right to read and sign this transcript, does not waive that right.)

(The deposition was concluded at 4:17 p.m.)

SIGNATURE OF DEPONENT

DEPONENT: GEORGE JOSEPH GULDAN, III, M.D.
DEPOSITION DATE: NOVEMBER 4, 2014
REPORTER: JANICE N. SHEPHERD
CASE CAPTION: SHON TURNER vs. MEDICAL UNIVERSITY OF SOUTH CAROLINA

(Please return both Signature of Deponent pages)

I, the undersigned, GEORGE JOSEPH GULDAN, III, M.D., do hereby certify that I have read the foregoing deposition and find it to be a true and accurate transcription of my testimony, with the following corrections, if any:

PAGE	LINE	CHANGE	REASON

SIGNATURE OF DEPONENT (CONTINUED)

DEPOSITION DATE: DATE
REPORTER: JANICE N. SHEPHERD
CASE CAPTION: SHON TURNER vs. MEDICAL UNIVERSITY OF SOUTH CAROLINA

PAGE	LINE	CHANGE	REASON

_____

GEORGE JOSEPH GULDAN, III, M.D. Date

I, Janice N. Shepherd, Notary Public for the State of South Carolina at Large, do hereby certify that the deponent was advised of his or her right to read and sign said deposition both verbally and in writing. If the deponent fails to execute and return foregoing Signature of Deponent pages within the thirty (30) days allowed pursuant to the Rules of Civil Procedure, the original transcript may be filed with the court.

_____

Janice N. Shepherd, RPR, CSR
My Commission expires
October 11, 2014

CERTIFICATE OF REPORTER

I, Janice N. Shepherd, Registered Professional Reporter and Notary Public for the State of South Carolina at Large, do hereby certify that the foregoing transcript is a true, accurate, and complete record.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 12th day of November, 2014, at Charleston, Charleston County, South Carolina.

Janice N. Shepherd, RPR, CSR
My Commission expires
October 10, 2024

I N D E X

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(No Information Requested)

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(No PLF. EXH. 2 was proffered)

EXHIBIT H

BARNWELL WHALEY
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Alissa D. Fleming
afleming@barnwell-whaley.com

July 23, 2015

1.554
Robert B. Ransom, Esquire
Leventis & Ransom
Post Office Box 11067
Columbia, SC 29211

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

Dear Rob,

Thank you for your letter dated July 9th. We signed the Amended Scheduling Order that you sent and will submit it to the court this week for approval.

With regard to your request to take the depositions of Pat Aysse, RN, Danielle Scheurer, M.D., Scott Reeves, M.D., Eric Nelson, M.D., Donna Embrey, CRNA, and the 30(b)(6) designee pursuant to Judge Stillwell's Order filed March 6, 2015, we are working on obtaining dates from the witnesses which has been somewhat challenging because it is summer. I am not sure that we will be able to coordinate scheduling all of the depositions before the mediation on August 28th. Thus far, it seems that Pat Aysse, RN and MUSC's Rule 30(b)(6) designee can be available before mediation. I do not have exact dates from them and am not sure that we will be able to schedule those depositions on the same day, but will try to make that possible for you. With regard to the other witnesses, if we are unable to coordinate dates or the witnesses are unavailable prior to mediation, are you comfortable deposing them after mediation, but before the deadline in the Amended Scheduling Order?

Accordingly, we will designate Sheila Scarborough, RN as the Rule 30(b)(6) designee pursuant to Judge Stillwell's Order. Ms. Scarborough currently holds the position of MUHA Director of Risk Management. Ms. Scarborough has some information regarding the code sheet/Mayday form that is different from the information previously presented and that might lead one to infer that there was a code sheet at one time.

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

William C. Helms, III*

* Registered patent attorney
* Retired

Ernest B. Lipscomb, III*
J. Gail Rahn
John A. Jones
Lucinda D. Gardner
John W. Fletcher

Alissa D. Fleming
Barbara J. Wagner, Ph.D.
Jeremy E. Bowers
D. Summers Clarke, II
Jeffrey M. Bogdan
Bradley B. Banias

In addition, although the audit trail was not requested by you until after Dr. Nelson and Ms. Embrey were deposed, we are inclined to allow you to ask them about the information in the audit trail.

My paralegal, Kevin Borkowski, will be in touch with your staff to schedule the depositions. Should you have any questions or wish to discuss any of these issues further, please do not hesitate to call me.

Sincerely,

M. Dawes Cooke, Jr.
Alissa D. Fleming

MDCjr/ADF/jgc
Enclosure

cc: Alex Apostolou, Esquire

EXHIBIT I

In the Matter Of:

Turner, Shon v

MUSC

Sheila Hall Scarborough 30B6

August 24, 2015

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STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF CHARLESTON

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

Plaintiff,

vs. CASE NO. 2012-CP-10-7275

MEDICAL UNIVERSITY OF SOUTH CAROLINA,

Defendant.

VIDEOTAPED 30(b)(6) DEPOSITION OF:	MEDICAL UNIVERSITY OF SOUTH CAROLINA, through its designated representative, SHEILA HALL SCARBROUGH
DATE:	August 24, 2015
TIME:	3:23 PM
LOCATION:	Medical University of South Carolina 171 Ashley Avenue Charleston, SC
TAKEN BY:	Counsel for the Plaintiff
REPORTED BY:	MARIE H. BRUEGGER, Registered Professional Reporter, CRR

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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Charlotte, NC (704) 573-3919

APPEARANCES OF COUNSEL:

ATTORNEYS FOR THE PLAINTIFF
SHON TURNER, as Personal
Representative of the ESTATE OF
CHARLES MIKELL:

LEVENTIS & RANSOM
BY: ROBERT B. RANSOM
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Columbia, SC 29201
(803) 765-2382
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ATTORNEYS FOR THE DEFENDANT
MEDICAL UNIVERSITY OF SOUTH CAROLINA:

BARNWELL, WHALEY, PATTERSON & HELMS
BY: ALISSA D. FLEMING
288 Meeting Street, Suite 200
Charleston, SC 29401
(843) 577-7700
afleming@barnwell-whaley.com

ALSO PRESENT:

Douglas Browne, Legal Videographer

Donna Cool

(INDEX AT REAR OF TRANSCRIPT)

THE VIDEOGRAPHER: Good afternoon. We are now on the record. Today's date is August 24th, 2015. The time is approximately 3:23 PM.

This is the video deposition of Sheila Scarbrough, taken by counsel for the plaintiff. The location today is 171 Ashley Avenue, in Charleston, South Carolina.

My name is Douglas Browne, legal videographer, representing A. William Roberts, Jr. & Associates.

This deposition is taken in the matter of Shon Turner, et al., versus the Medical University of South Carolina, Case No. 2012-CP-10-7275.

Counsel present, please introduce yourselves for the record.

MR. RANSOM: My name is Rob Ransom. I represent Shon Turner.

MS. FLEMING: My name is Alissa Fleming. I represent the Medical University of South Carolina.

THE VIDEOGRAPHER: Would the court reporter please swear in the witness, and we may begin.

SHEILA HALL SCARBROUGH

being first duly sworn, testified as follows:

EXAMINATION

BY MR. RANSOM:

Q. Good morning, Ms. Scarbrough. My name is Rob Ransom. I'm a lawyer from Columbia. My client is Shon Turner, and he's the personal representative of the estate of his stepfather -- personal representative of his stepfather's estate, Chuck Mikell. Mr. Mikell was a patient here at the Medical University back in the fall of 2010, and his estate has a lawsuit against the Medical University. I'm here to take your deposition in that lawsuit, okay.

A. All right.

Q. Can I get you to state your full name for the record?

A. Sheila Hall Scarbrough.

Q. And what is your current residence address?

A. 1160 Tidal View Lane, in Charleston, 29412.

Q. And who, if anyone, lives with you at that address?

A. Just myself and my dog.

Q. Where are you currently employed?

A. Medical University of South Carolina.

Q. And what is it that you do at the Medical University?

A. I'm the director of risk management and patient safety.

Q. How long have you held that position?

A. I've held this position for -- since January, so this is '15, '14, '13, January '13.

Q. Now, Ms. Cool is here with us. Is she your supervisor, or what relationship are you in the organizational chart to her?

A. She's a colleague.

Q. Have you given a deposition or testified under oath before?

A. I have.

Q. A couple of quick rules that I'm required to go over with you here as we get started. First and most importantly, the young lady seated to your left, the court reporter, is taking down everything that's being said. In order to assist her in doing that, I need your answers to my questions to be verbal in nature, meaning yes or no, as opposed to a nod or a shake of the head or saying uh-huh or huh-uh, because even though I'll understand you, she has a hard time getting that down accurately in the

transcript, okay.

A. Okay.

Q. It's also beneficial for the court reporter when only one person is speaking at a time, so I'm going to do the best that I can to let you finish answering each question before I ask the next one. I just need you to let me finish asking the question before you start to answer, okay.

A. I understand.

Q. If at any time I ask a question you don't understand, please just let me know, and I'll try to reask it or rephrase it, but if you go ahead and answer my question, I'm going to assume you understood it. Is that fair?

A. Yes.

Q. Finally, if you need to take a break at any time, please just let us know, but now that we've begun your testimony, you aren't allowed to discuss the substance of this case with anyone in the room except for me, okay.

A. Okay.

Q. So you have been presented by the Medical University as a person with knowledge about certain issues. Are you aware of that?

A. Yes.

Q. Okay. So that you're not here testifying just as Sheila Scarbrough individually, but you are testifying on behalf of the Medical University?

A. That's correct.

Q. Okay. And what is the issue that you understand you've been designated to testify about?

A. About the policy of the emergency response policy, otherwise known as the Mayday Policy.

Q. Mayday policy, okay.

(PLF. EXH. 1, Policy Manual Excerpt Re: Emergency Medical Response, was marked for identification.)

BY MR. RANSOM:

Q. Let me show you what I'm going to mark as Exhibit 1 to your deposition, and this was previously marked as Exhibit 1 to the deposition that we took from Dr. Gulden.

And the question that I have for you is -- and you may need to review that document in order to be able to answer it, if so, please take your time -- whether or not that policy applies to

the events surrounding Mr. Mikell's colonoscopy in October of 2010?

A. I'm sorry. You're saying does the policy apply?

Q. Yes. Does that policy apply to his procedure?

A. Yes, it does.

Q. Are there any other policies that apply?

A. Policies that apply to his procedure or -- I mean, there's many policies that apply to --

Q. Any policies that apply to the documentation of the event that took place during his colonoscopy?

A. Not that I'm aware of.

Q. Because I'll represent to you that when I asked Dr. Gulden whether or not Exhibit 1 applied, I think he told me that it doesn't and that there was, instead, a code policy that applied.

A. There is no code policy that I'm aware of.

Q. So that Exhibit 1 is the only written policy that applies to the documentation of code

events?

A. That's correct.

Q. Okay. And that includes procedures that take place in the Digestive Disease Center?

A. That's correct.

Q. And it would include things like the colonoscopy that Mr. Mikell was undergoing at the time?

A. That's correct.

Q. Okay. Let me look at this. One of the things that it says here on Page 3 of 8, and this is paragraph numbered four, it says: Each mayday is documented on the cardiopulmonary resuscitation event form, and that's referred to in parentheses as the mayday record, and it says: The mayday record is the legal documentation of the mayday. It accounts for physicians' orders and medication administration during the mayday. It must be signed by the designated participants.

Am I reading all that correctly?

A. Yes.

Q. Okay. So I would expect, then, that there would be a mayday -- a mayday card, a mayday record, or, alternatively, a cardiopulmonary resuscitation event form for Mr. Mikell's

procedure?

A. That's correct.

Q. Is there such a record?

A. I don't know.

Q. Should there be such a record?

A. There should be.

Q. What would it look like?

A. It's a piece of paper. It's an eight-by-11 piece of paper that's got records of vital signs and activities during the event.

Q. During the code itself?

A. Uh-huh.

Q. Is it something that's different than the anesthesia record?

A. Yes.

Q. And so that there will be no misunderstanding about this, I'm going to show you two exhibits from a previous witness's deposition, Exhibits 1 and 2 to Ms. Aysse's deposition. That's what I would call an anesthesia record. Would you agree?

A. I would.

Q. Okay. And you're saying that that is something different than the mayday record?

A. Yes.

Q. Okay. So there should be a mayday record for Mr. Mikell's event, and Exhibits 1 and 2 from Ms. Aysse's deposition are not that record, correct?

A. That's correct.

Q. Let me look at the policy again. It also indicates here at various places in Exhibit 1 that certain individual members of the mayday team are supposed to complete and sign this cardiopulmonary resuscitation event form and then enter it into the progress notes. Am I understanding that that's what that requires? And please take a look at the highlighted sections on Pages 4 and 5.

A. All team members have a responsibility for making sure that the record is accurate, so there's usually a recorder, and so the team member's -- what this is -- this is referring to it is the team member's responsibility to make sure that that is accurate on that form.

Q. Okay. And I appreciate you saying that there's a recorder, meaning when the mayday team comes into the room, one person's job is to do nothing other than write down what's taking place?

A. That's correct.

Q. I would call that the scribe. Is that another word for it?

A. You can use that term.

Q. Okay. And then that mayday card is completed by the scribe, and then at the end of the event, those who have participated in the patient's care are supposed to make sure that that record is accurate, and they make that determination and sign it?

A. There's usually only one other signature on the form. It's the physician who ran the code. So not everyone signs it. They look at, make sure that it's accurate, but they don't actually sign it all the time, because usually at the end of the code, people are off.

Q. And the purpose of the mayday card is to have an accurate record of what's taken place?

A. That's correct.

Q. Okay. Now, are there any other records of Mr. Mikell's event other than the mayday record?

MS. FLEMING: Object to the form. Go ahead. You may answer.

THE WITNESS: I'm sorry. I don't

understand the question.
BY MR. RANSOM:
Q. Yeah, poorly-worded question. Let me do this. Let me mark Exhibit 2.
(PLF. EXH. 2, 7/23/15 Letter to Robert Ransom from Dawes Cooke, was marked for identification.)
BY MR. RANSOM:
Q. And this is a letter that Ms. Fleming sent to me, and it's telling me something about what I might expect your testimony to be, and it says in the highlighted portion at the bottom: Ms. Scarbrough has some information regarding the code sheet mayday form that is different from the information previously presented and that might lead one to infer that there was a code sheet at one time.
Am I reading that correctly?
A. Yes.
Q. Okay. Can you explain to me what she's referring to?
A. My job at that time was to review these code sheets to see if there was any problems with the code and also to put the data into a database called the -- at the time it was the

CPR -- NRCPR database, the National something of the CPR, but now it's Get With The Guidelines database. It's a national database that the American Heart Association has that we enter data on all resuscitative events, whether they're maydays or codes, and we collate that data and use that for quality purposes.

Q. Okay. So if I'm understanding you, what you're saying is that you would receive the actual mayday record itself?

A. Yes.

Q. And, from the information that it contains, create a second record?

A. I would enter data into a database. I don't know if that's a record.

Q. Yeah. You would enter data into a database. And I think we're going to mark as Exhibit 3 some information that's been provided to me in that regard, but I got to let the court reporter do it.

(PLF. EXH. 3, Database Printout [BWPH 4962-4987], was marked for identification.)

BY MR. RANSOM:

Q. Let me show you what's been marked as Exhibit 3, and this is a multipage document.

You'll see in the lower left-hand corner, it's got your name, and then in the lower right-hand corner, it's got what we refer to as document control numbers, and this particular exhibit is -- the document control number is BWPH 4962 through 4987. So tell me what Exhibit 2 is.

A. Exhibit 2?

Q. Did I mark it as Exhibit 2? I'm sorry, Exhibit 3, yes. What's Exhibit 3?

A. This, what I'm looking at here, is a printout from the database from -- for this particular patient and this particular event, and it's all the different pieces of data that go into the database.

Q. Okay. And that would be information that you derived from the mayday record itself?

A. That's correct.

Q. Okay. So once you have completed entering certain data that you're pulling off of the mayday record, what happens to the mayday record?

A. I never get the mayday record. I get the code sheet copy. They fax it to me.

Q. Okay. You're confusing me. Code sheet copy, what's that?

A. The mayday record copy. What they do is my office is here in the main hospital, and so, of course, events happen everywhere, and so when they happen, they fax it to a particular number, which is a machine in my office, and so it ends up on that machine. So I have that copy of a fax, and when I finish with my data abstraction, I throw it away.

Q. Okay. Now, this copy that you referred to, is this described anywhere in Exhibit 1, which is the actual policy and procedure itself?

A. It is not.

Q. Okay. Because I see, for example, at someplace in here, and this is Page 6 of 8, there's a paragraph that reads someone's supposed to record the mayday event on the cardiopulmonary resuscitation event form, place the white copy in the patient's medical record, and forward the yellow copy to risk management.

A. Yeah. So that was a previous -- we used to have -- you know those carbon things, you pull them apart, we stopped using those sometime in the mid-2000s. So that policy was a little out of date. Actually, that should have been caught

when that policy was updated.

Q. Okay. I get it.

A. But it's the same idea. Instead of doing a little yellow thing, they fax it.

Q. Right. Meaning it's 21st Century technology, right?

A. Well, it's a fax.

Q. Well, that's true. All right. So the document, then, that you receive on the fax, what is done with it when you're finished?

A. I put it in the confidential documents and throw it away.

Q. Confidential documents?

A. It's got HPI on it, so those things are shredded. You just don't throw them in a trash can.

Q. Well, Exhibit 1 indicates to me, at least, that a copy of this record is supposed to be placed in the patient chart. Is that correct?

A. That is the policy.

Q. So we should have a copy of it in Mr. Mikell's hospital chart?

A. It should be there.

Q. Can you explain to me why there isn't one?

A. I do not know.

Q. Have you ever faced a circumstance before where there isn't one?

A. Yes, sir, frequently.

Q. All right, frequently, all right. How does that come about?

A. It's a piece of paper that -- during the code or times afterwards when the patient is resuscitated, the patient's ill, and there's a lot of activity. The piece of paper is stuck into a folder, sometimes with a rubber band, sometimes not, and if the patient moves one place or another, sometimes that piece of paper falls out, or somebody leaves it on the fax machine. When they fax it to me, they forget to pull it up and stick it in the chart. I've known that to happen before as well.

Q. Paperwork gets misshuffled and blunders happen, right?

A. That's correct.

Q. Okay. And what you're saying is that that happens frequently?

A. At least when I did this -- I haven't done this particular job in a couple years, but at that time, yes, it happened quite a bit.

Q. All right. So -- and as a result of those types of blunders, important information about the code is lost?

MS. FLEMING: Object to the form.

THE WITNESS: Object to the form. It could be.

BY MR. RANSOM:

Q. So what I wanted to ask you, then, is with respect to the information that you've entered in Exhibit 3 -- if I could have that. There may be some questions that I want to ask you about this. As I look at what's been printed out here, Ms. Scarbrough, it's not formatted in a way that lends itself to easy reading. Would you agree?

A. I would agree.

Q. Okay. Can it be formatted some other way?

A. I'm not aware of that. I just copied and pasted out of the database.

Q. So let me ask you this: When you're sitting looking at the computer screen, is it readable when you're looking at it on the screen?

A. Yes. You can scroll. You can't scroll on paper.

Q. Well, and that's what I say. This is very -- what's been printed out is, let's just say, quite difficult to read. Is it difficult like that when you're looking at it on the screen?

A. I don't think it's difficult.

Q. Okay, all right. So the first thing that I wanted to ask you, and I'm going to go by individual pages here, Document Control No. 4965, you see I've highlighted a little part right there? It seems to be saying something about a pulse oximeter. Would you agree?

A. Uh-huh, yes.

Q. Tell me what that means.

A. That means the patient had a pulse oximeter on.

Q. Okay. Does it tell us when?

A. No.

Q. Does it tell us whether it was working?

A. No.

Q. Does it tell us whether it was sending data to the system where it was then recorded?

A. No.

Q. So what, if anything, do we know from the fact that the word pulse oximeter is there on

that page?

A. That the patient had a pulse oximeter hooked up to them.

Q. All right. And nothing more than that?

A. No.

Q. That's very basic, bare bones, not of a whole lot of use, is it?

MS. FLEMING: Object to the form. You can answer.

BY MR. RANSOM:

Q. Would you agree?

A. Not necessarily, because if a patient codes on the floor, we want to know if a pulse ox was hooked up or not, so that can be important.

Q. Well, let me ask you this, then, and this is a record that you created, what is the significance of that information to you?

A. If the patient was monitored.

Q. Okay. Was he monitored?

A. Yes. He had a pulse ox on.

Q. Okay. And was it working properly?

A. Again, I don't know that from this, from this data.

Q. Okay. Do you know that independent of

that data?

A. No. All I had was the code sheet, and now I do not know.

Q. Okay. The next page is 4968, and you'll see that I've highlighted a little bit of information. Can you read for me what that says?

A. Respiratory insufficiency was a potential cause of the arrest, and it's checked.

Q. Okay. Very good. Respiratory insufficiency.

And then Page 4969, there's two pieces of information highlighted. What do those say?

A. It says: Cause tox -- basically, it's checkmarks that you do, like what thing could potential cause, toxicity or propofol, mean the patient was on drugs, including propofol.

Q. Okay. And that that was the cause of something?

A. No, no. It doesn't say it was definitely a cause. It was saying that it was something that occurred before.

Q. Okay. Well, tell me what exactly it says.

A. On the piece of paper in front of me, it says: Cause tox prob underline aid spec

propofol.

Q. So to me that suggests that propofol is being identified as the cause of some problem?

MS. FLEMING: Object to the form.

THE WITNESS: Not necessarily.

BY MR. RANSOM:

Q. Well, let's figure out, then. You're saying not necessarily, which to me suggests that yes, that could be the meaning of that information.

A. When you put -- when you do the abstraction, everything that's going on you put in there, so some things are relevant, some things aren't, and so propofol could have been relevant or not. I don't know what the dose was or anything. It's just that the patient was on propofol.

Q. But again, the document indicates that propofol is checked as being the cause of something?

MS. FLEMING: Object to the form.

THE WITNESS: And again, that's just how it comes out on the printout. When you put -- when you abstract it, if it's asking -- like if you have a peripheral IV, it asks that. That doesn't

mean that that caused anything.
BY MR. RANSOM:
Q. Right. Well, but it says: Cause tox probable, something or other, propofol, right?
A. That's what the form says.
Q. And it looks different when you're looking on the screen?
A. Yes.
Q. Next page is 4975, and the highlighted information, what does that say?
A. Confirm method, expired CO2, end tidal CO2.
Q. Okay. What does that refer to?
A. That's a methodology for determining if the endotracheal tube is in the appropriate location, which is the trachea.
Q. The next page I wanted to ask you about is 4986. Can you tell me what that highlighted language means?
A. I'm not sure.
Q. If you can't tell us, who can?
A. Let's see. That's in -- I'm trying to remember what section that's in. I can't answer the question. I don't know.
Q. What does it appear to say, though?

A. Something about -- maybe chromographic. Probably that's what it is. It's a chromographic. There's different ways of doing end tidal CO2 detection, there's different detectors, so maybe that's what it was asking, what type of detector.

Q. And then lastly, Page 4987, it seems to indicate that you created this document in -- what is it?

A. 12/29/2010.

Q. December 29th of 2010, correct?

A. That's correct.

Q. Which means that this mayday record would have existed as of that date, correct?

A. Correct.

Q. All right. And you're aware of the date of the procedure itself or of the event itself?

A. Not precisely. I think it was October.

Q. Yeah, October 1st. So this mayday record managed to survive here at the Medical University from October 1st until December 29th?

MS. FLEMING: Object to the form.

THE WITNESS: The copy, the copy that I

had.

BY MR. RANSOM:

Q. Right. Is there -- is there a currently-existing copy of the mayday record?

A. I do not have one.

Q. Have you checked to see?

A. Yes. I don't -- I don't keep those files anymore.

Q. Now, you say that it's marked confidential. Is that what you testified?

A. It's the confidential bin, as in the trash, the confidential shredder trash, so you just don't throw it in like that kind of trash can.

Q. Right. Meaning it's not the waste bucket that the janitor comes and empties?

A. Correct.

Q. It's the one that the shredder company comes and shreds?

A. Yes.

Q. Okay. I understand. Is there a copy of that mayday record that's kept anywhere else?

A. A copy of the copy that I had?

Q. Yeah.

A. No.

Q. And again, I say that because the policy gives me the impression that a copy of it is supposed to be placed in the patient chart.

A. My copy does not exist. I got rid of it.

Q. And Exhibit 1, which is the policy document, can you take a look at that for me and tell me is that the earlier one or the later one? You know, again, with Mr. Mikell, his event occurred on October 1st of 2010, and I'm trying to make sure that that is or isn't the policy that applies to his situation.

A. That would have been the policy that applied to his situation because the review date was 6/09.

Q. And again, this says that on Page 6 of 8 that the mayday record, a copy is supposed to be placed in the patient chart, right?

A. That's correct.

Q. And it also says that the form is faxed to risk management and then entered into the patient's medical record. Am I reading that correctly?

A. Yes. A copy is faxed to risk management.

Q. Well, but again, my point is there's two places there in Exhibit 1 where it says that the mayday record is supposed to be placed in the patient chart, correct?

A. Correct.

Q. And we don't have one for Mr. Mikell?

A. I don't have one.

MR. RANSOM: Let's take a quick break.

THE VIDEOGRAPHER: We will now go off the record. The time is approximately 3:49 PM.

(A recess transpired.)

THE VIDEOGRAPHER: We are now back on the record. The time is approximately 3:51 PM.

BY MR. RANSOM:

Q. Ms. Scarbrough, we're back from a short break. Are you ready to continue?

A. Yes.

Q. So with respect to Exhibit 3, which is the printout of the information that you had tabulated based upon your review of the mayday record, as we were pointing out earlier in your testimony, the printout's a little choppy, a little hard to read, and what you're saying is that when you're looking at it on the computer screen, it's not chopped up like that, and it's

easier to read, and so the question that I have for you is where would we need to go in order for me to be able to look at it on the screen so that it's not chopped up?

MS. FLEMING: Object to the form.

THE WITNESS: Have to get into the database.

BY MR. RANSOM:

Q. And what database are you referring to?

A. Get With The Guidelines, the Get With The Guidelines database.

Q. This American Heart database?

A. Uh-huh.

Q. Now, is that a confidential database?

A. Yes. It's got privileged -- health information, patient information, et cetera, et cetera, so it's --

Q. Covered by the Privacy Act, right?

A. Yes, HIPAA.

Q. Is it part of the peer review process here at the Medical University?

A. No.

Q. So if we went to your office, for example, you would be able to access it from the

computer on your desk?

A. I could.

Q. Would it be accessible from other computer terminals in other places here at the Medical University?

A. Web-based.

Q. It's Web-based?

A. (Witness moves head up and down.)

Q. Do you have to have like a password and security code?

A. Yes.

Q. Okay. So if I had a password and a security code, I could look at it on my laptop?

A. Yes.

Q. Okay. Good. Thank you. I don't have any other questions.

MS. FLEMING: I just have one question.

EXAMINATION

BY MS. FLEMING:

Q. Is there other PHI particular to other patients in that same database?

A. Yes.

Q. That's all I have.

MR. RANSOM: Nothing further.

THE VIDEOGRAPHER: This concludes the video

deposition of Sheila Scarbrough. The time is approximately 3:53 PM. We are now off the record.

(The witness, after having been advised of her right to read and sign this transcript, does not waive that right.)

(The deposition was concluded at 3:53 p.m.)

SIGNATURE OF DEPONENT

DEPONENT: SHEILA HALL SCARBROUGH
DEPOSITION DATE: AUGUST 24, 2015
REPORTER: MARIE H. BRUEGGER
CASE CAPTION: SHON TURNER vs. MUSC

(Please return both Signature of Deponent pages)

I, the undersigned, SHEILA HALL SCARBROUGH, do hereby certify that I have read the foregoing deposition and find it to be a true and accurate transcription of my testimony, with the following corrections, if any:

PAGE	LINE	CHANGE	REASON

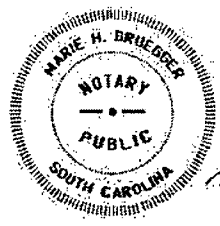
SIGNATURE OF DEPONENT (CONTINUED)
DEPOSITION DATE: AUGUST 24, 2015
REPORTER: MARIE H. BRUEGGER
CASE CAPTION: SHON TURNER vs. MUSC

PAGE	LINE	CHANGE	REASON

_____

SHEILA HALL SCARBROUGH Date

I, Marie H. Bruegger, Notary Public for the State of South Carolina at Large, do hereby certify that the deponent was advised of his or her right to read and sign said deposition both verbally and in writing. If the deponent fails to execute and return foregoing Signature of Deponent pages within the thirty (30) days allowed pursuant to the Rules of Civil Procedure, the original transcript may be filed with the court.



_____

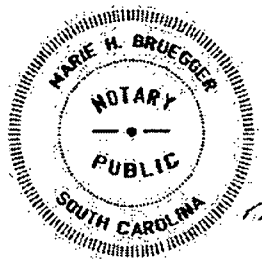
Marie H. Bruegger, RPR, CRR
My commission expires
April 18, 2021

CERTIFICATE OF REPORTER

I, Marie H. Bruegger, Registered Professional Reporter, Certified Realtime Reporter, and Notary Public for the State of South Carolina at Large, do hereby certify that the foregoing transcript is a true, accurate, and complete record.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 31st day of August, 2015, at Charleston, Charleston County, South Carolina.



Marie H. Bruegger
Registered Professional
Reporter, CCR
My commission expires
April 18, 2021

I N D E X

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REQUESTED INFORMATION INDEX

(No Information Requested)

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	CIVIL ACTION NO.: 2012-CP-10-7275
SHON TURNER, as Personal Representative of the ESTATE OF CHARLES MIKELL, deceased,	)	**AFFIDAVIT OF ANNETTE THOMPSON, R.N.**
Plaintiff,	)	
vs.	)	
MEDICAL UNIVERSITY OF SOUTH CAROLINA,	)	
Defendant.	)	

FILED
2015 DEC -7 AM 11:26
JULIE J. ARMSTRONG
CLERK OF COURT
BY

THE AFFIANT, AFTER BEING DULY SWORN, DEPOSES AND SAYS AS FOLLOWS:

1. My name is Annette Thompson, R.N. and the facts in this Affidavit are based upon personal knowledge.

2. I am a Registered Nurse and am employed by The Medical University of South Carolina (hereinafter referred to as "MUSC") and hold the position of Clinical Analyst in the Department of OCIO.

3. I have been employed by MUSC for nineteen years and have held the position of Clinical Analyst for the past six years.

4. In my role as Clinical Analyst, I was a member of the team assigned to support the PICIS electronic medical record and fulfilled that position in October of 2010.

5. In addition, I have experience working with the user application of the PICIS system.

6. On the morning of October 1, 2010, I responded to a service request made by Donna Embrey, CRNA. Upon information and belief, Nurse Embrey was one of the anesthesia

providers assigned to provide anesthesia care to Mr. Mikell during his colonoscopy on October 1, 2010.

7. In response to the service request, I accessed the PICIS electronic medical record system at approximately 7:46 a.m. and used the admission, discharge, transfer (ADT) function to transfer Mr. Mikell in the electronic record. This allowed Nurse Embrey to open the PICIS Anesthesia/PACU Record for Charles Mikell on the computer workstation located in the procedure room and continue the session in the electronic medical record system.

8. The ADT function was a built-in safety function that prohibited two users from documenting in the PICIS electronic medical record at the same time.

9. Thus, for a provider to document in PICIS using the computer workstation located in the procedure room, the patient had to be closed out of the PICIS system after leaving one location or computer workstation so that the record could be unlocked at another computer workstation.

10. When I accessed the record, I noticed that Mr. Mikell had not been closed out of the PICIS system prior to being transported to the procedure room. This is evidenced, in part, by the notation at 7:35 a.m. by Nurse Embrey in the Anesthesia/PACU Record stating "Transfer to:."

11. I have reviewed the Anesthesia/PACU Record for the procedure date of October 1, 2010 concerning Charles Mikell. Based upon my review of the record and understanding of the PICIS system, certain clinical data was not recorded in the Real Time Variables section of the Anesthesia/PACU Record for the times of 7:35 a.m. through 7:47 a.m. because Mr. Mikell's record was not open in the PICIS system during that time.

FURTHER AFFIANT SAYETH NOT.

Annette Thompson RN
ANNETTE THOMPSON, R.N.

SWORN to before me this
4th day of December, 2015
Margaret M. Goss
Notary Public for South Carolina
My Commission Expires: June 18th, 2019

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	CIVIL ACTION NO.: 2012-CP-10-7275
SHON TURNER, as Personal Representative of the ESTATE OF CHARLES MIKELL, deceased,	)	**AFFIDAVIT OF JOHN L. FISHER**
Plaintiff,	)	
vs.	)	
MEDICAL UNIVERSITY OF SOUTH CAROLINA,	)	
Defendant.	)	

FILED
2015 DEC -7 AM 11:26
JULIE J. ARMSTRONG
CLERK OF COURT
BY E

THE AFFIANT, AFTER BEING DULY SWORN, DEPOSES AND SAYS AS FOLLOWS:

1. My name is John L. Fisher and the facts in this Affidavit are based upon personal knowledge.

2. I am employed by The Medical University of South Carolina (hereinafter referred to as "MUSC") and hold the position of Program Manager, Enterprise Architecture Development, Office of the Chief Information Officer (OCIO).

3. I have been employed by MUSC since October 8, 2012.

4. In addition to my capacity as Program Manager of the Enterprise Architecture Development team I am also responsible for supporting the Anesthesia and Perioperative Department's special Information Technology (IT) projects.

5. In my capacity as a Software Engineer, and later Program Manager, working on the Anesthesia and Perioperative Department's special IT projects, I am familiar with the PICIS database that was in use by the Anesthesia department at the time of Mr. Mikell's colonoscopy on October 1, 2010.

6. I have a Bachelor of Science in Computer Science from Clemson University and a Master of Science in Computer Science from Clemson University.

7. All knowledge I have regarding the PICIS database is through personal experience and reading documentation from PICIS.

8. I do not currently have, nor have I ever had, operational responsibility to the PICIS program and its proper function.

9. I am the only person employed by MUSC who currently has access to the PICIS database.

10. Based upon my personal experience accessing and working with the PICIS database, I have concluded that data cannot be deleted from the PICIS database by any MUSC employee and no data regarding Charles Mikell could be deleted from the PICIS database. Furthermore, I have concluded that none of the data regarding the oxygen saturation in the PICIS Anesthesia/PACU record was deleted for the times of approximately 7:35 a.m. through 7:47 a.m.

11. In addition, I have prepared an estimate of the temporal and monetary cost of extracting all of the data regarding Charles Mikell from the PICIS database.

12. I estimate that it will take approximately 534 hours and 19 minutes to extract the raw data regarding Charles Mikell from the PICIS database. I further estimate that it will take up to an additional 400 hours and 45 minutes to format the data into a human readable format.

13. The total cost of extracting the data from the PICIS database will be approximately $96,000.00 in man hours and will result in a total cost shifting of various projects that I am directly responsible for in the amount of approximately $2.8 million.

14. The estimates of cost and time described herein are based upon the following:

a. The PICIS database is a Microsoft Structured Query Language (SQL) server. It is composed of four (4) major database schemas which contain 1,603 tables, collectively, and is made up of 669,650,431 rows of data.

b. The full PICIS database takes approximately 300 Gigabytes of data in disk space.

c. The data stored in each row is referenced by the use of Primary Keys, often in the form of identification numbers that are automatically generated by the database itself. To determine if a row contains information for a specific patient and a specific surgery, the identification numbers for that specific row and for all other associated rows across several tables must be determined and cross referenced.

d. Through my experience working with this database, I estimate that it would take approximately twenty (20) minutes, on average, per table, for an extractor to retrieve the data from the database. The estimated time to retrieve the data is influenced by the following factors: (1) time to write Structured Query Language (SQL) queries against the table, (2) time to ensure that the data being queried is specific to Mr. Mikell, (3) time to ensure that the data being queried is specific to the October 1, 2010 colonoscopy, (4) time to verify that the data being queried is valid, (5) time to move data from the database connection interface to Microsoft Excel, and (6) time to format the data in Microsoft Excel and save the file.

e. It is estimated that it will take another ten to fifteen minutes per table to perform the factors identified in paragraph 14(d) including making additions to the SQL query to make the data more human readable and formatting the data in Microsoft Excel to make the data more human readable.

15. Of the 1,603 tables in the PICIS database, I estimate that approximately 150 of those tables do not contain data regarding Charles Mikell or the October 1, 2010 colonoscopy.

16. The PICIS database contains information on approximately 145,007 distinct patient medical record numbers in the PICIS Surgery Module and 99,468 distinct medical record numbers in the PICIS Anesthesia Module.

17. Thus far, I have performed a search of two tables which has yielded all of the Real Time data available for Charles Mikell from the October 1, 2010 colonoscopy.

18. To date, I have spent a total of approximately 100 hours of time extracting the Real Time Data from the database and determining whether data was deleted and whether it can be deleted from the database.

19. The estimate of costs associated with shifting my responsibilities to extract the data from the PICIS database is based upon my estimate of the projects that would be neglected or put on hold in order for me to extract the data from the PICIS database.

20. I am the Program Manager of the Enterprise Architecture Development Team at MUSC and head the Anesthesia and Perioperative Department's IT special projects. I currently have four employees who report directly to me. In addition, I am directly responsible for the following projects:

- Operating Room Traffic Tracking Research
- University HealthSystem Consortium Quarterly Submission Tool
- Anesthesia After Hours Reporting Utility
- Practice Partner Research Network Submission and Processing System
- Admit Transfer Center Database Redesign
- Society of Thoracic Surgeons Anesthesia Module Upload Interface

- National Surgical Quality Improvement Program Data Upload Interface
- 3M Core Grouping Software Diagnosis Related Group Updater Utility
- Anesthesia iVital
- MUSC Office of the Chief Analytics Officer Intake Interface
- Patient Readmission Assessment Utility

21. As a Manager, I have management responsibilities over the following projects:

- MUSC Directory Mobile Phone Application
- MUSC Historical Walking Tour Application
- Mobile Catalyst Application
- Hand Hygiene Tracker
- Leader on Call Support Application
- Accountability of Disclosure Processor
- Office of the Chief Information Officer Downtime Logger
- Alumni Association Mobile Application
- Heparin Calculator Update
- Master Site Charge Tool

FURTHER AFFIANT SAYETH NOT.

JOHN L. FISHER

SWORN to before me this
04 day of December, 2015

Notary Public for South Carolina
My Commission Expires: 11/16/2024

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

FILED
2016 JAN -6 PM 12:26
JULIE J. ARMSTRONG
CLERK OF COURT

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

1. I am over the age of eight (18) years, am legally competent to make this affidavit, and have personal knowledge of the matters set forth herein.

2. I am lead counsel for the Plaintiff in the above-captioned action.

3. I was admitted to the South Carolina Bar in November 1988 and have been a member in good standing, engaged in the private practice of law, for over 27 years. Among other positions, I have served on the South Carolina Bar's Ethics Advisory Committee; been a member of the South Carolina Trial Lawyers Association (Legislative Steering and Amicus Curae Committees); a member of the South Carolina Association for Justice; a member of the American Trial Lawyers Association (President's Club); a member of the American Association for Justice; a member of the Southern Trial Lawyers Association; a member of

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

4. Over the last ten years, my practice has focused primarily on representing patients injured by medical malpractice. I have been recognized in that area of practice as a South Carolina Super Lawyer each year since 2009. I have also been recognized by the American Trial Lawyers Association as a Top 100 Trial Lawyer each year since 2009.

5. My current billing rate for hourly work is $450.00 per hour.

6. The time entries set forth below document the effort undertaken by me to address and respond to the various discovery issues which are the subject of the Plaintiff's Motion for Discovery Sanctions, filed in the within-captioned action.

FURTHER AFFIANT SAYETH NAUGHT.

BY: Robert B Ransom
Robert B. Ransom

SWORN TO BEFORE ME this
4 day of January, 2016
Kristen Cuza
Notary Public for the State of South Carolina

My commission expires:
JULY 13, 2025

TIME RECORD FOR Estate of Charles Mikell

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

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

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

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

TOTAL TIME: 129.8 hours

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

FILED
2016 JAN -7 PM 3:35
JULIE J. ARMSTRONG
CLERK OF COURT

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

1. I am over the age of eight (18) years, am legally competent to make this affidavit, and have personal knowledge of the matters set forth herein.

2. I am lead counsel for the Plaintiff in the above-captioned action.

3. This Affidavit is submitted in order to supplement my previous Affidavit, dated January 4, 2016.

4. At the point in this case where it became apparent to me that MUSC was not being forthcoming about its computer data backup systems, I consulted with Online Security, an information technology firm in Los Angeles, California which specializes in electronic discovery.

5. From May 2015 through October 2015, I collaborated with Charlie Batch and Richard

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

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

FURTHER AFFIANT SAYETH NAUGHT.

BY: Robert B Ransom
Robert B. Ransom

SWORN TO BEFORE ME this

5th day of January, 2016.

Notary Public for the State of South Carolina

My commission expires:

Aug. 01, 2021

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

INVOICE

DATE	INVOICE #
1/4/2016	24048

BILL TO	SHIP TO
Leventis & Ransom 1913 Bull Street P.O. Box 11067 Columbia, SC 29201 Attn: Robert B. Ransom	

Matter No.	TERMS	REP	PROJECT
R. Ransom	Upon Receipt	MJM	

QUANTITY	ITEM CODE	DESCRIPTION	RATE	AMOUNT
		Billing Period - 05/15/15 - 10/25/15 - "Mikell v. MUSC" Matter - Electronic Discovery Technical & Consulting Services		
0.5	CBF	05/13/15 - (C. Balot - Sr. Case Manager) - Review case documents from R. Ransom re: the MUSC information technology backup environment.	300.00	150.00
1	RGF	06/10/15 - (R. Gralnik - Sr. Forensic Tech) - Review MUSC information technology profile documents & teleconference with R. Ransom & C. Balot re: case issues.	300.00	300.00
0.5	CBF	06/10/15 - (C. Balot - Sr. Case Manager) - Teleconference with R. Ransom & R. Gralnik re: case issues.	300.00	150.00
0.5	RGF	09/16/15 - (R. Gralnik - Sr. Forensic Tech) - Reivew opposing counsel case document re: database restore costs & protocols & internal meeting with C. Balot re: same.	300.00	150.00
0.25	CBF	09/16/15 - (C. Balot - Sr. Case Manager) - Internal meeting with R. Gralnik re: opposing counsels database restore costs & protocols.	300.00	75.00
2.75	RGF	10/13/15 - (R. Gralnik - Sr. Forensic Tech) - Teleconference with R. Ransom re: opposing counsel Fleming's letter, research PCIS system, teleconference with R. Ransom re: specific data from the PCIS system to be retrieved, teleconference with T. Elmer at Optum on restoring PCIS data, correspondence with T. Elmer re: restore of PCIS data & teleconference with R. Ransom re: MUSC in-house ability to read PCIS backed up data.	300.00	825.00
			Total	

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R. Ransom	Upon Receipt	MJM	

QUANTITY	ITEM CODE	DESCRIPTION	RATE	AMOUNT
3.5	RGF	10/15/15 - (R. Gralnik - Sr. Forensic Tech) - Review correspondence from B. Marrazino of PCIS re: server setup for database restore, continued research of the PCIS MUSC configuration, follow up teleconference with B. Marrazino re: additional technical questions, start draft of declaration requested by R. Ransom.	300.00	1,050.00
2.75	RGF	10/16/15 - (R. Gralnik - Sr. Forensic Tech) - Continued drafting of requested declaration, internal meeting with C. Balot re: edits to the declaration, teleconferences with R. Ransom re: declaration issues, teleconferences with T. Elmer & B. Marrazino at PCIS re: technical issues, complete draft of declaration, have declaration notarized & forward same to R. Ransom via FedEx.	300.00	825.00
0.5	CBF	10/16/15 - (C. Balot - Sr. Case Manager) - Review & edits to the R. Gralnik PCIS draft declaration & internal meeting with R. Gralnik re: same.	300.00	150.00
1	CBF	FedEx shipping reimbursement.	28.50	28.50
1	CBF	Notary reimbursement.	15.00	15.00
1	CBF	*DEDUCT RETAINER DEPOSIT*	-3,000.00	-3,000.00

Total $718.50

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF CHARLESTON)	CIVIL ACTION NO.: 2012-CP-10-7275
SHON TURNER, as Personal Representative of the ESTATE OF CHARLES MIKELL, deceased,)	**SECOND AMENDED COMPLAINT**
Plaintiff,)	
vs.)	
MEDICAL UNIVERSITY OF SOUTH CAROLINA,)	
Defendant.)	

FILED
2016 FEB 22 PM 4:23
JULIE J. ARMSTRONG
CLERK OF COURT

The Plaintiff, complaining of the Defendant, alleges and states as follows:

1. The Plaintiff is a citizen and resident of Charleston County and is the duly appointed personal representative of the Estate of Charles Mikell, who died in Charleston County on January 2, 2011.

2. The Defendant is, upon information and belief, an agency of the State of South Carolina with its principal place of business located in Charleston County, South Carolina. The Defendant is regularly engaged in the provision of healthcare services to members of the public and does so through the actions and conduct of its actual and apparent agents, servants and employees, for whom it is legally responsible. The Plaintiffs are prevented by law from naming the Defendant's agents, servants or employees as individual parties to this action.

3. On or about October 1, 2010, Charles Mikell presented to MUSC to undergo a routine colonoscopy performed by the actual and apparent agents, servants and employees of the

Defendant. A physician/patient relationship was created and continuously existed between Mr. Mikell and the Defendant's actual and apparent agents, servants and employees.

4. During the colonoscopy procedure, Mr. Mikell suffered an intra-operative event during which he desaturated, became hypoxic, experienced bradycardia and then cardiac arrest, resulting in an hypoxic brain injury and other serious injuries all of which substantially contributed to his death on January 2, 2011.

FOR A FIRST CAUSE OF ACTION
(Medical Malpractice)

5. The allegations in Paragraphs 1 through 4 above are realleged as fully as if restated herein.

6. Mr. Mikell's intra-operative event and subsequent injuries and death were all preventable and due to and caused by the negligent, grossly negligent, willful, wanton and reckless actions and conduct of the Defendant and its actual and apparent agents, servants and employees, in the following particulars:

a. in failing to adequately and appropriately monitor Mr. Mikell's vital signs while he was under anesthesia;

b. in administering anesthetic agents to Mr. Mikell at a time when his vital signs were not being properly or adequately monitored;

c. in failing to check that the medical monitoring systems were operational and properly functioning before giving anesthesia to Mr. Mikell;

d. in failing to take reasonable steps to fully activate the medical monitoring systems before administering anesthesia to Mr. Mikell;

e. in administering anesthesia to Mr. Mikell when there was an unresolved issue with

the medical monitoring systems;

f. in failing to properly manage, supervise and direct the provision of anesthesia care to Mr. Mikell;

g. in diverting attention from Mr. Mikell's care to the correction of issues with the medical monitoring systems;

h. in failing to correct issues with the medical monitoring system prior to the administration of anesthesia;

i. in leaving the colonoscopy procedure room to attend to other patients at a time when Mr. Mikell's condition was unstable;

j. in failing to timely note that Mr. Mikell was desaturating during the colonoscopy procedure;

k. in failing to timely respond to Mr. Mikell's desaturation during the colonoscopy procedure;

l. in failing to properly react and respond to Mr. Mikell's desaturation during the colonoscopy procedure;

m. in failing to properly manage Mr. Mikell's airway so that he did not suffer a preventable cardiac arrest;

n. in failing to make and preserve a truthful, accurate and complete record of Mr. Mikell's care and treatment;

o. in such other particulars as the evidence through discovery and trial may otherwise tend to prove or suggest.

7. Mr. Mikell suffered actual harms and losses as a result of the actions and conduct of the

Defendant and its actual and apparent agents, servants and employees.

8. The Plaintiff is entitled to recover actual damages from the Defendant in an amount to be determined by the trier of fact.

FOR A SECOND CAUSE OF ACTION
(Survival Action)

9. The allegations in Paragraphs 1 through 8 above are realleged as fully as if restated herein.

10. Mr. Mikell endured conscious pain and suffering prior to his death as a direct and proximate result of the negligent, grossly negligent, willful, wanton and reckless actions and conduct of the Defendant's actual and apparent agents, servants, employees.

11. Pursuant to S.C. Code. Ann. §15-5-90 (Code 1976, as amended), the Plaintiff is entitled to recover damages from the Defendant for Mr. Mikell's conscious pain and suffering prior to his death.

12. The Plaintiff is entitled to a verdict actual damages against the Defendant in an amount to be determined by the trier of fact.

FOR A THIRD CAUSE OF ACTION
(Wrongful Death)

13. The allegations in Paragraphs 1 through 12 above are realleged as fully as if restated herein.

14. Mr. Mikell's death was the direct and proximate result of the negligent, grossly negligent, willful, wanton and reckless actions and conduct of the Defendant's actual and apparent agents, servants, employees.

15. Pursuant to S.C. Code Ann. §15-51-10 (Code 1976, as amended), the Plaintiff is entitled to recover damages from the Defendant for the wrongful death of Mr. Mikell.

16. The Plaintiff is entitled to a verdict for actual damages against the Defendant in an amount

to be determined by the trier of fact.

FOR A FOURTH CAUSE OF ACTION
(Unfair Trade Practice)

17. The allegations in Paragraph 1 through 16 above are realleged as fully as if restated herein.

18. The Defendant failed to make and keep a truthful, accurate and complete record of what happened to Mr. Mikell.

19. The Defendant has engaged in unfair and deceptive actions and conduct the intent and effect of which has been to conceal and withhold from the Plaintiff the truth of what actually happened to Mr. Mikell. These unfair and deceptive actions and conduct include, but are not limited to:

a. improperly altering records of Mr. Mikell's treatment;

b. improperly destroying and failing to retain records of Mr. Mikell's treatment;

c. failing to disclose and/or produce all data, information, and records about Mr. Mikell's treatment;

d. producing records which have been altered without disclosing the existence or nature of the alterations;

e. failing to disclose that records of Mr. Mikell's treatment have been lost or destroyed;

f. providing false and inaccurate information about its record creation and record retention policies;

g. failing to provide records, information and data concerning Mr. Mikell which are accurate and complete, intending that various parties rely upon inaccurate and incomplete information;

h. encouraging medical care providers to omit material information from patient records;

i. encouraging medical care providers to record important patient-related information only in a form and in a fashion where it cannot later be obtained by patients;

i. discouraging medical care providers from being forthright and straightforward in documenting medical mistakes and medical errors;

j. such other unfair and deceptive acts and conduct as the evidence through discovery and trial may otherwise tend to prove or suggest.

20. This unfair and deceptive conduct is capable of repetition and has in fact been repeated to the injury of the Plaintiff and other members of the public.

21. The Plaintiff has personally been harmed as a result of these unfair and deceptive tactics.

22. The Plaintiff is entitled to recover actual damages, treble damages and attorneys fees from the Defendant in an amount to be determined by the trier of fact.

FOR A FIFTH CAUSE OF ACTION
(Constructive Fraud)

23. The allegations in Paragraph 1 through 22 above are realleged as fully as if restated herein.

24. At various times, the Defendant has represented to the Plaintiff that it was providing him with records, data and information about Mr. Mikell's care, treatment, injuries and death which were truthful, accurate and complete.

25. These representations have been false.

26. The Defendant should have know that these representations were false.

27. These false representations were material to the Defendant's dealings with Mr. Mikell and

the Plaintiff.

28. The Defendant intended that the Plaintiff rely upon its representations.

29. The Plaintiff was unaware that the Defendant's representations were false.

30. The Plaintiff was entitled to rely upon the truth of the Defendant's false representations.

31. The Plaintiff has been harmed by his reasonable reliance upon the Defendant's false representations.

32. The Plaintiff is entitled to recover actual damages from the Defendant in an amount to be determined by the trier of fact.

FOR A SIXTH CAUSE OF ACTION
(Negligent Misrepresentation)

33. The allegations in Paragraph 1 through 32 above are realleged as fully as if restated herein.

34. The Defendant has had a direct financial interest in and motivation for making misrepresentations about records, information and data concerning Mr. Mikell.

35. The Defendant has at all times been under a duty to provide truthful, accurate and complete records, information and data concerning Mr. Mikell.

36. The Defendant has provided records, information and data about Mr. Mikell which are incomplete, inaccurate, false and/or misleading.

37. The Plaintiff has justifiably relied upon the completeness, truthfulness and accuracy of the records, information and data provided by the Defendant concerning Mr. Mikell.

38. The Plaintiff has suffered pecuniary losses as a result of his reasonable reliance upon the completeness, truthfulness and accuracy of the records, information and data provided by the Defendant concerning Mr. Mikell.

39. The Plaintiff is entitled to recover actual damages from the Defendant in an amount to be determined by the trier of fact.

FOR A SEVENTH CAUSE OF ACTION
(Abuse of Process)

40. The allegations in Paragraph 1 through 39 above are realleged as fully as if restated herein.

41. The Defendant has used the legal process of this Court to perpetrate a fraud upon the Plaintiff by presenting to him records, information and data about Mr. Mikell which are incomplete, inaccurate, false and/or misleading.

42. Through its abuse of process, the Defendant has sought to secure for itself certain benefits and advantages which are wrongful and improper.

43. The Plaintiff has been harmed by the Defendant's abuse of process.

44. The Plaintiff is entitled to recover actual damages from the Defendant in an amount to be determined by the trier of fact.

FOR AN EIGHTH CAUSE OF ACTION
(Civil Conspiracy)

45. The allegations in Paragraph 1 through 44 above are realleged as fully as if restated herein.

46. The actual and apparent agents, servants and employees of the Defendant have combined together for the purpose of injuring the Plaintiff.

47. By the combination of its agents', servants' and employees' acts, the Defendant has injured the Plaintiff by withholding from him records, information and data about Mr. Mikell which are truthful accurate, and complete.

48. The purpose and intent of the combined conduct of the Defendant's actual and apparent agents, servants and employees has been to deprive the Plaintiff of access to information

about Mr. Mikell which is truthful, accurate and complete, thereby frustrating the Plaintiff's ability to discharge the duties and obligations imposed on him by virtue of his position as Personal Representative.

FOR A NINTH CAUSE OF ACTION
(Conversion)

49. The allegations in Paragraph 1 through 48 above are realleged as fully as if restated herein.

50. Prior to his death, Mr. Mikell had a legally recognized and protectible interest in the contents of various records which were in the exclusive care, custody and control of the Defendant.

51. The Defendant wrongfully altered, lost, destroyed or withheld Mr. Mikell's records and the information and data contained therein.

52. The Defendant altered and destroyed Mr. Mikell's records and the information and data contained therein without Mr. Mikell's knowledge, permission or approval.

53. Mr. Mikell suffered harm as a result of the Defendant's wrongful alteration and destruction of his records and the information contained therein and a claim for compensation as a result of that harm accrues to the benefit of his estate and its heirs.

WHEREFORE, the Plaintiff prays for judgment against the Defendant in an amount of actual damages to be determined by the trier of fact, along with treble damages, attorneys fees and the costs of this action; and for such further legal and equitable relief as the Court deems just and proper.

BY: Robert B Ransom

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ATTORNEYS FOR THE PLAINTIFF

CERTIFICATE OF MAILING

The undersigned hereby certifies that a true copy of the Second Amended Complaint has been served upon opposing counsel by depositing in the United States mail a copy of same properly addressed with sufficient postage affixed thereto this 22 day of February 2016

Robert B Pearson

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

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

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

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

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

1. <u>The "glitch" and the emails</u>

Presently, the most critical information in this case is the recent disclosure that Mr. Mikell was given the anesthetic agent even though the medical care providers knew the vital signs monitoring equipment was not fully operational, so that at a point where Mr. Mikell was in trouble, Donna Embry was sending emails and talking on the phone with Annette Thompson trying to fix what MUSC likes to refer to as a software "glitch."

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

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

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

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

The real time graphs show Mr. Mikell's blood oxygen saturation levels dropping precipitously and then recovering over a ten (10) minute period of time corresponding to when the Propofol anesthetic agent was first administered at 7:42 a.m. The newly disclosed emails show that during this critical time – when the patient's life was in jeopardy – Donna Embry was sending emails and talking on the phone with Annette Thompson, saying at 7:39 am, "hey- call me" and again at 7:46 a.m., "hey- can u call me abck" [sic].

Significantly, Plaintiff's expert Dr. Kofke testified that he could not understand why the medical care providers were unable to stabilize Mr. Mikell's condition using standard, routine airway management maneuvers. The short answer is that these maneuvers require two hands and cannot be performed while typing or holding a telephone. What's more, the anesthesia narrative was altered after-the-fact to change the time at which Dr. Nelson entered the room in response to Mr. Mikell's crisis.

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

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

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

2. The Mayday card / NRCPR Database

Without the August 24, 2015 testimony of Sheila Scarborough – which followed Dr. Gulden's testimony and required a Motion to Compel, a hearing, an Order, and a six (6) month delay to obtain – Plaintiff would never have learned that the Mayday card was created, then transposed into the NRCPR database, then lost/destroyed. These damaging facts entitle Plaintiff to an important jury instruction and adverse evidentiary inference; and also have significant value as impeachment evidence because witness Martha Zwermer testified she could not recall creating a Mayday card, a task which MUSC now admits was part of her responsibility.

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

3. The first audit trail

The first audit trail was not produced until February 27, 2015. It is the only evidence showing how and when Donna Embry changed Dr. Nelson's narrative entries in the anesthesia record. Without the first audit trail, Plaintiff could not have discovered these alterations, which have very significant value as impeachment evidence. The first audit trail was not produced until six months after Donna Embry and Dr. Nelson had already been deposed.

4. The second audit trail

The second audit trail was not produced until September 21, 2015. It shows that the electronic anesthesia record was accessed by Annette Cooper, CRNA, who although mentioned during Donna Embry's deposition, was not identified by MUSC as a witness until December 2, 2015. MUSC is unable to explain why Nurse Cooper accessed the anesthesia record.

The second audit trail also shows that Donna Embry accessed the anesthesia record in order to print it on three (3) separate occasions. On December 2, 2015, MUSC admitted it cannot produce two of those printouts and it does not know what happened to them. This in a case where several of the anesthesia printouts produced by MUSC have missing pages.

5. The backup anesthesia data

The backup anesthesia data helps to determine which permutation of the real time graph is most likely accurate.

The real time graphs help to pinpoint what was happening with Mr. Mikell's vital signs as the emails and phone calls to fix the "glitch" were taking place.

In other words, the backup anesthesia data correlates what Mr. Mikell's condition was at the times reflected by the emails. The picture is not a favorable one for MUSC.

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

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

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

If the anesthesia chart and the Mayday record had been created and preserved in the normal course of events, without alteration, loss or destruction, Plaintiff's expert could use them to recreate a reliable time-line of events. Instead, Plaintiff's expert is forced to rely heavily on the vague recollections of hostile witnesses whose memories have potentially been corrupted by malpractice claims against them.

The vital signs portion of the anesthesia record, if not filled with empty boxes, would show what was taking place with Mr. Mikell's blood oxygen and exhaled carbon dioxide levels at time intervals as precise as every (10) ten seconds. Without this information, Plaintiff's expert must rely upon the real time graphs, which are inconsistent for reasons the witnesses have been unable to explain.

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

The real time graphs, if not somehow inexplicably corrupted, would give a continuous graphic representation of Mr. Mikell's blood oxygen saturation levels during every second of the procedure.

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

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

point is contained in multiple records, the time-line of events can be cross-checked for accuracy. This is impossible when records and data are missing, destroyed, altered or unavailable.

Especially in the case of a peer reviewed event (where MUSC has withheld certain documents described only by document controls numbers in a privilege log), the Plaintiff must have access to a complete, accurate and reliable record of exactly what happened. Unfortunately, that is not the case in this instance. The harder it is to show a jury what actually happened, the harder it is to prove that the Defendant did something wrong.

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

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

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

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

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

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

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

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

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

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

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

The examples are myriad.

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

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

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

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

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

The second audit trail was not produced until September 21, 2015 – the afternoon before Dr. Reeves' deposition. Dr. Reeves did not know anything about it. Plaintiff had to serve another written discovery request to find out that Annette Cooper had accessed the anesthesia record for reasons MUSC cannot explain; and that MUSC cannot produce two copies of the anesthesia record printed out by Donna Embry.

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

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

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

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

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

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

This testimony placed MUSC in a very compromised position. It had to come up with an explanation for all of those empty boxes, a need which informs Plaintiff's perspective of what happened next.

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

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

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

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

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

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

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

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

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

From Plaintiff's perspective, MUSC attempted to obtain resolution of this case based upon a false narrative which omitted disclosure of several very significant adverse facts. Throughout discovery, MUSC presented a skewed version of what actually happened during the colonoscopy. The defense narrative, as articulated by Dr. Berry, was that Mr. Mikell suffered a reaction to the anesthetic agent which, while unfortunate, was wholly unpreventable.

It turns out that there is another explanation, one in which the outcome was completely within MUSC's control: MUSC gave the anesthetic agent to Mr. Mikell knowing its vital signs monitoring equipment was not fully operational, with the consequence that its medical care providers were addressing a software "glitch" when Mr. Mikell went into respiratory and cardiac arrest.

Through various tactics deployed at various times, MUSC suppressed discovery and/or obscured disclosure of several highly damaging facts: (1) the colonoscopy was started despite a known software "glitch;" (2) parts of the anesthesia record were altered after-the-fact by a nurse who did not have the doctor's permission to change his entries; (3) vital signs data is missing from the anesthesia chart; (4) printed copies of the anesthesia record are either missing pages or are missing altogether; (5) code documentation for the event has been lost/destroyed; (6) backup data for the real time graphs correlates emails and phone calls to the time of the patient's crisis.

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

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

In fairness, the Plaintiff is entitled to ask all of the eyewitnesses to the cardiac arrest what effect the software "glitch," emails and phone calls had on their response to Mr. Mikell's respiratory and cardiac arrest. The Plaintiff is entitled to ask Dr. Berry whether it is reasonable to administer the anesthetic agent to a patient knowing there is an unresolved issue with the vital signs monitoring equipment. The Plaintiff is entitled to depose someone who can explain the NRCPR database printout and the second audit trail.

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

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

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

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

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

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

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

Plaintiff has already spent approximately $3,718.50 consulting with experts in the retrieval of electronically stored information. A protracted pretrial process (29 depositions; 30 separate trips to Charleston) has eroded Plaintiff's financial resources. Significant additional discovery costs loom in order to prepare for trial. While Plaintiff is willing to contribute a reasonable additional amount to verify that electronic data and information have not been deleted, Plaintiff is not currently in a position to commit significant additional resources to such an effort.

BY: Robert B Ransom
Robert B. Ransom

SWORN TO BEFORE ME this
19 day of February, 2016.

Grace F Woody
Notary Public for the State of South Carolina

My commission expires:

12-18-2022

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	CIVIL ACTION NO.: 2012-CP-10-7275
SHON TURNER, as Personal Representative of the ESTATE OF CHARLES MIKELL, deceased,	)	**AFFIDAVIT OF ALISSA FLEMING, ESQ.**
Plaintiff,	)	
vs.	)	
MEDICAL UNIVERSITY OF SOUTH CAROLINA,	)	
Defendant.	)	

FILED
2016 MAR -2 PM 1:35
JULIE J. ARMSTRONG
CLERK OF COURT
BY

THE AFFIANT, AFTER BEING DULY SWORN, DEPOSES AND SAYS AS FOLLOWS:

My name is Alissa Fleming. I am an attorney with the law firm of Barnwell Whaley Patterson & Helms, LLC. I, along with M. Dawes Cooke, Jr., Esq., represent the Defendant, Medical University of South Carolina (MUSC), in the above-referenced case. This Affidavit was prepared at the request of the Honorable J.C. Nicholson in the form of ten (10) questions to counsel dated January 26, 2016. The facts in this Affidavit are based on diligent inquiries and all prior discovery and correspondence in this case.

The questions presented for the Defendant are below with responses in bold.

1. The timeline you provided on Dec. 30th ends in August. Will you please complete the timeline through the date of the Dec. 11th hearing?

August 24, 2015, Sheila Scarbrough, RN, MSN was deposed. She testified that at the time of Mr. Mikell's code, one of her responsibilities was to review the code sheets/Mayday cards and enter the data from the Mayday card into a database for the American Heart Association. The formal name of the database is "Get with the Guidelines" but was named the "National Registry for CPR" at the time of Mr. Mikell's arrest. The database is supported by and for the American Heart Association (AHA).

Ms. Scarbrough was questioned about the 26 page document that was produced pursuant to Plaintiff's request. She admitted that the document was not formatted in a way that lent itself to easy reading, but she was able to explain most of the entries in the document. She testified that to explain certain entries in the document,

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

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

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

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

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

Mr. Ransom to view the 26-page document of information specific to Mr. Mikell on the computer, with Ms. Scarbrough so that she could explain anything that she was unable to explain at the time of her deposition.

September 21, 2015: MUSC amended certain discovery responses and responses to Requests for Admission so that they were consistent with the deposition testimony of Sheila Scarbrough, RN, MSN.

October 21, 2015: The Court heard Plaintiff's Motion for Discovery Sanctions.

December 2, 2015: MUSC answered Plaintiff's Second Set of Discovery Requests that were served on September 23, 2015. MUSC received a thirty-day extension to respond to the Requests. Interrogatory Number 17 requested a "properly formatted useable form of the database entries by Ms. Scarbrough." A PDF document of the information in the database for the AHA was produced at that time.

2. Please explain what facilitated the information being produced subsequently to Judge Nicholson's list of questions and suggestions. Please explain how it was produced shortly before the hearing on Dec. 11th in contrast to the high estimated cost and time you said it would take.

The high estimated cost is the cost of producing all of the information that Mr. Ransom requested, which was vastly more than he needed and that MUSC produced prior to the December 11 hearing. MUSC estimated the cost of producing all the data that was derived from the monitors or machines that were connected to Mr. Mikell during his colonoscopy and stored in PICIS. It was determined that it would require a substantial amount of time and resources, but that only 2 out of 1,604 tables in the PICIS database would need to be searched in order to show that no data had been deleted from the Real Time Variables and Real Time Data Graph in the PICIS database. The data reflected in the sections entitled "Real Time Variables" and "Real Time Data Graph" is the vital sign data. The data provided represents the raw data from the Real Time Variables and Real Time Data Graph that was communicated by the machines that were connected to Mr. Mikell to the PICIS software during the colonoscopy. The data from the PICIS database that was produced before the December 11th hearing does not account for the data contained in the other 1,602 tables also stored in the PICIS database and encompassed in Mr. Ransom's broad request. The other 1,602 tables in the PICIS database contain information such as the narrative entries, procedure start and end time, and various other types of information. The time estimate to extract the data from the total 1,604 tables that comprise the PICIS database is based on Plaintiff's request to produce "all electronic data recorded or captured by the anesthesia machine used for the colonoscopy procedure performed on Charles Mikell on October 1, 2010." This was Interrogatory Number 16 of Plaintiff's First Discovery Requests to MUSC. Whereas, the information provided shortly before the December 11th hearing was the raw vital sign data that was sent to the database by the monitoring equipment that was connected to the patient during the colonoscopy.

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

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

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

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

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

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

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

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

Spreadsheet for all patients who had codes in October, November and December of 2010 in order to try to locate the information specific to Charles Mikell. Ms. Scarbrough found the information for Mr. Mikell, once it was downloaded into the Excel Spreadsheet, and deleted the information for the other patients. She clarified that she never manipulated or cut and pasted the information specific to Mr. Mikell once it was in the Microsoft Excel Spreadsheet. Rather, she downloaded the information specific to Mr. Mikell directly from the Quintiles website.

According to Ms. Scarbrough, information regarding a code is entered into the user application for the Quintiles site by logging into the user application. The application presents a number of forms, with questions, that the user completes or fills out. The application then puts the information into the database.

Prior to this case, Ms. Scarbrough had never been asked to locate or obtain information for a specific patient from the database. Therefore, she was not familiar with the exact formats available to obtain and isolate data for a specific patient from the Quintiles website.

Again, the document was never converted by Ms. Scarbrough from any format. As previously explained, the information contained in the 26-page printout was downloaded directly from the Quintiles website into a Microsoft Excel document by Ms. Scarbrough.

The PDF version of the information from the database for the AHA was likewise downloaded directly from the Quintiles website by Ms. Scarbrough.

4. In your answer to number 1 of Judge Nicholson's initial set of questions, you say you produced the information by "cutting and pasting the data into another format and converting it to PDF." What was the original format? Ms. Fleming mentioned it was an Excel document at the hearing. If that is the case, why wasn't it legible to begin with?

We discussed Ms. Scarbrough's process of obtaining the information from the database for the AHA with her in more detail. She has clarified the process of producing both the 26-page Excel document and the PDF. Ms. Scarbrough confirmed that she did not convert the data in the 26-page Excel format into PDF. Rather, she downloaded the PDF directly from the Quintiles website in a PDF format. Following the first hearing before Your Honor in October of 2015, we asked Ms. Scarbrough if there was another way to display the information so that it was easier for someone not familiar with the database to read. She took Mr. Mikell's patient identification number and searched the database by entering that number. She was then able to view the information specific to Mr. Mikell in the database. She had never thought of searching the database by using a patient specific identification number because she had never before had to obtain data on a specific patient from the database. She did not know, prior to this past November when she went back into the database, that she could search the database for a specific patient. Instead of choosing the "download" function in Quintiles, she used

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

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

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

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

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

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

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

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

We did not know about the database for the AHA until late July of 2015. The reason is that there was not a Mayday Card in Mr. Mikell's medical record. Furthermore, Donna Embrey, CRNA, the nurse anesthetist involved in Mr. Mikell's colonoscopy was deposed on August 26, 2014. She testified that the Digestive Disease Center (DDC) nurse assigned by the colonoscopy room usually writes on the Mayday Card. The nurse anesthetist does not write on the Mayday Card. Ms. Embrey also testified that she was not sure if a Mayday Card was done for Mr. Mikell. She said that she would have to ask the nurse who was in the room.

Martha Zwemer, RN, was the DDC nurse who took care of Mr. Mikell during his colonoscopy. At her deposition on September 5, 2014, she testified that she had no recollection of whether a Mayday Card was completed and did not remember documenting on the Card.

Because there was no Card in Mr. Mikell's medical record and the nurse taking care of Mr. Mikell did not recall documenting in the Card, we believed that a Mayday Card was never done for Mr. Mikell.

We did not know to investigate other non-clinical departments within MUSC for the Mayday Card or the information in the Card. Ms. Scarbrough was not and is not involved with patient care and her reasons for receiving a copy of the Mayday Card were for the purpose of collecting data for the NR CPR/Get with the Guidelines database that is supported by the AHA.

In late July of 2015, the issue of the Mayday Card arose during a meeting with Donna Embrey, CRNA. During that meeting, we were trying to understand why she made some changes to the Anesthesia/PACU Record and how she arrived at certain times for certain entries in the record. When we questioned her in more detail about the record, Ms. Embrey further analyzed certain entries in the record and then recalled that she thought she had seen a Mayday Card even though she did not create or participate in documenting on the Card. When she had been asked about the Mayday Card in her deposition, she did not recall it. It was not until we questioned her more closely in July of 2015 that she remembered possibly obtaining some information from the Card.

Based on our conversation with Donna Embrey, CRNA, we started to investigate the issue with Ms. Scarbrough. Ms. Scarbrough did not have a copy of the Mayday Card that was faxed to her. It was at that time that she investigated whether there was any information in the NR CPR/Get with the Guidelines database for the AHA that was specific to Mr. Mikell. It was at that time that she was able to find information specific to Mr. Mikell's code in the database for the AHA.

8. Why are some of the times out of order on the audit trail and anesthesia records?

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

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

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

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

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

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

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

FURTHER AFFIANT SAYETH NOT.

Alissa Fleming, Esq.

SWORN to before me this
1st day of March, 2016

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

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	CIVIL ACTION NO.: 2012-CP-10-7275
SHON TURNER, as Personal Representative of the ESTATE OF CHARLES MIKELL, deceased,	)	
Plaintiff,	)	**NOTICE OF MOTION AND MOTION TO DISMISS**
vs.	)	
MEDICAL UNIVERSITY OF SOUTH CAROLINA,	)	
Defendant.	)	

FILED
2016 MAR 10 PM 3:50
JULIE J. ARMSTRONG
CLERK OF COURT
BY

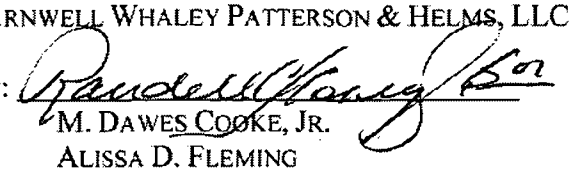
TO: ROBERT B. RANSOM, ESQUIRE AND ALEX APOSTOLOU, ESQUIRE, ATTORNEYS FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that Defendant, Medical University of South Carolina ("MUSC"), by and through its undersigned counsel, will move before this Court on the tenth (10^{th}) day after the service hereof or as soon thereafter as counsel may be heard, pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, for an Order that dismisses the Plaintiff's causes of action for violation of the South Carolina Unfair Trade Practice Act, Abuse of Process, Civil Conspiracy, and Conversion, with prejudice.

This Motion is supported by the pleadings and any memoranda of law that may be provided to the Court prior to the hearing on this Motion.

[SIGNATURE ON FOLLOWING PAGE]

BARNWELL WHALEY PATTERSON & HELMS, LLC

By: 

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ATTORNEYS FOR DEFENDANT MEDICAL UNIVERSITY OF SOUTH CAROLINA

Charleston, South Carolina
March 9, 2016

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	CIVIL ACTION NO.: 2012-CP-10-7275
SHON TURNER, as Personal Representative of the ESTATE OF CHARLES MIKELL, deceased,	)	**ANSWER ON BEHALF OF THE MEDICAL UNIVERSITY OF SOUTH CAROLINA TO PLAINTIFF'S SECOND AMENDED COMPLAINT**
Plaintiff,	)	
vs.	)	
MEDICAL UNIVERSITY OF SOUTH CAROLINA,	)	
Defendant.	)	

FILED
2016 MAR 10 PM 3:19
JULIE J. ARMSTRONG
CLERK OF COURT

TO: ROBERT B. RANSOM, ESQUIRE, ESQUIRE, FOR THE PLAINTIFF:

The Defendant The Medical University of South Carolina ("MUSC"), by and through its undersigned attorneys, denying all allegations not specifically or expressly admitted, reserving all rights to amend this pleading pursuant to the South Carolina Rules of Civil Procedure, Rule 15, and subject to its Motion to Dismiss Plaintiff's causes of action for violation of the South Carolina Unfair Trade Practice Act, civil conspiracy, abuse of process and conversion filed herewith, hereby answers the Plaintiff's Second Amended Complaint by alleging as follows:

FOR A FIRST DEFENSE

1. Defendant MUSC has insufficient information and knowledge to form a belief as to the truth of the allegations in Paragraph 1 of Plaintiff's Second Amended Compliant and therefore denies the allegations.

2. In answering the allegations in Paragraph 2 of Plaintiff's Second Amended Complaint, Defendant MUSC admits that it is an entity organized and existing under the laws of the State of South Carolina and that it is an agency of the State of South Carolina as defined in

the South Carolina Tort Claims Act, S.C. Code Ann. §15-78-10, et. seq. The remaining allegations in Paragraph 2 of Plaintiff's Second Amended Complaint constitute conclusions of law to which Defendant MUSC is required neither to admit nor deny.

3. In answering the allegations in Paragraph 3 of Plaintiff's Second Amended Complaint, Defendant MUSC admits that Charles Mikell presented to MUSC on October 1, 2010 to undergo a colonoscopy. The remaining allegations in Paragraph 3 of Plaintiff's Second Amended Complaint constitute conclusions of law to which Defendant MUSC is required neither to admit nor deny.

4. Defendant MUSC craves reference to the medical records of Charles Mikell and denies any allegations in Paragraph 4 of Plaintiff's Second Amended Complaint that are inconsistent therewith and demands strict proof thereof. In further answering the allegations in Paragraph 4 of Plaintiff's Second Amended Complaint, Defendant MUSC lacks sufficient information and knowledge to form a belief as to the truth of any cause or contributing cause of Mr. Mikell's death or the date of his death and therefore denies these allegations and demands strict proof thereof.

FOR A FIRST CAUSE OF ACTION
(Medical Malpractice)

5. In answering the allegations in Paragraph 5 of Plaintiff's Second Amended Complaint, Defendant MUSC incorporates its responses to the paragraphs referenced and incorporated in Paragraph 5 of Plaintiff's Complaint as if fully stated herein verbatim.

6. Defendant MUSC denies the allegations in Paragraph 6 of Plaintiff's Second Amended Complaint, including subparts a, b, c, d, e, f, g, h, i, j, k, l, m, n, and o of Plaintiff's Second Amended Complaint and demands strict proof thereof.

7. MUSC denies the allegations in Paragraphs 7 and 8 of Plaintiff's Amended Complaint and demands strict proof thereof.

FOR A SECOND CAUSE OF ACTION
(Survival Action)

8. In answering the allegations of Paragraph 9 of Plaintiff's Second Amended Complaint, Defendant MUSC incorporates its response to the paragraphs referenced and incorporated in Paragraph 9 of Plaintiff's Second Amended Complaint as if fully stated herein verbatim.

9. Defendant MUSC denies the allegations in Paragraph 10 of Plaintiff's Second Amended Complaint and demands strict proof thereof.

10. The allegations in Paragraph 11 of Plaintiff's Second Amended Complaint constitute conclusions of law to which Defendant MUSC is required neither to admit nor deny.

11. Defendant MUSC denies the allegations in Paragraph 12 of Plaintiff's Second Amended Complaint and demands strict proof thereof.

FOR A THIRD CAUSE OF ACTION
(Wrongful Death)

12. In answering the allegations in Paragraph 13 of Plaintiff's Second Amended Complaint, Defendant MUSC incorporates its responses to the paragraphs referenced and incorporated in Paragraphs 13 of Plaintiff's Second Amended Complaint as if fully stated herein verbatim.

13. Defendant MUSC denies the allegations in Paragraph 14 of Plaintiff's Second Amended Complaint and demands strict proof thereof.

14. The allegations in Paragraph 15 of Plaintiff's Second Amended Complaint constitute conclusions of law to which Defendant MUSC is required to neither admit nor deny.

15. Defendant MUSC denies the allegations in Paragraph 16 of Plaintiff's Second Amended Complaint and demands strict proof thereof.

FOR A FOURTH CAUSE OF ACTION
(Unfair Trade Practices)

16. In answering the allegations in Paragraph 17 of Plaintiff's Second Amended Complaint, Defendant MUSC incorporates its responses to the paragraphs referenced and incorporated in Paragraph 17 of Plaintiff's Second Amended Complaint as if fully stated herein verbatim.

17. Defendant MUSC denies the allegations in Paragraphs 18, 19, including subparts a, b, c, d, e, f, g, h, i, and j of Plaintiff's Second Amended Complaint and demands strict proof thereof.

18. Defendant MUSC denies the allegations in Paragraphs 20, 21, and 22 of Plaintiff's Second Amended Complaint and demands strict proof thereof.

FOR A FIFTH CAUSE OF ACTION
(Constructive Fraud)

19. In answering the allegations in Paragraph 23 of Plaintiff's Second Amended Complaint, Defendant MUSC incorporates its responses to the paragraphs referenced and incorporated in Paragraph 23 of Plaintiff's Second Amended Complaint as if fully stated herein verbatim.

20. Defendant MUSC denies the allegations in Paragraphs 24, 25, 26, 27, 28, 29, 30, 31, and 32 of Plaintiff's Second Amended Complaint and demands strict proof thereof.

FOR A SIXTH CAUSE OF ACTION
(Negligent Misrepresentation)

21. In answering the allegations in Paragraph 33 of Plaintiff's Second Amended Complaint, Defendant MUSC incorporates its responses to the paragraphs referenced and

incorporated in Paragraph 33 of Plaintiff's Second Amended Complaint as if fully stated herein verbatim.

22. Defendant MUSC denies the allegations in Paragraph 34 of Plaintiff's Second Amended Complaint and demands strict proof thereof.

23. The allegations in Paragraph 35 of Plaintiff's Second Amended Complaint constitute conclusions of law to which no response is required.

24. Defendant MUSC denies the allegations in Paragraphs 36, 37, 38, and 39 of Plaintiff's Second Amended Complaint and demands strict proof thereof.

FOR A SEVENTH CAUSE OF ACTION
(Abuse of Process)

25. In answering the allegations in Paragraph 40 of Plaintiff's Second Amended Complaint, Defendant MUSC incorporates its responses to the paragraphs referenced and incorporated in Paragraph 40 of Plaintiff's Second Amended Complaint as if fully stated herein verbatim.

26. Defendant MUSC denies the allegations in Paragraphs 41, 42, 43, and 44 of Plaintiff's Second Amended Complaint and demands strict proof thereof.

FOR AN EIGHTH CAUSE OF ACTION
(Civil Conspiracy)

27. In answering the allegations in Paragraph 45 of Plaintiff's Second Amended Complaint, Defendant MUSC incorporates its responses to the paragraphs referenced and incorporated in Paragraph 45 of Plaintiff's Second Amended Complaint as if fully stated herein verbatim.

28. Defendant MUSC denies the allegations in Paragraphs 46, 47, and 48 of Plaintiff's Second Amended Complaint and demands strict proof thereof.

FOR A NINTH CAUSE OF ACTION
(Conversion)

29. In answering the allegations in Paragraph 49 of Plaintiff's Second Amended Complaint, Defendant MUSC incorporates its responses to the paragraphs referenced and incorporated in Paragraph 49 of Plaintiff's Second Amended Complaint as if fully stated herein verbatim.

30. The allegations in Paragraph 50 of Plaintiff's Second Amended Complaint constitute conclusions of law to which no response is required.

31. Defendant MUSC denies the allegations in Paragraphs 51, 52, 53 and the WHEREFORE clause of Plaintiff's Second Amended Complaint and demands strict proof thereof.

FOR A SECOND DEFENSE
AND BY WAY OF AFFIRMATIVE DEFENSE

32. Plaintiff's Second Amended Complaint is barred and otherwise limited by the applicable provisions of the South Carolina Tort Claims Act, S.C. Code Ann. §15-78-10, et. seq. (1976), specifically, S.C. Code Ann. §15-78-60(5) and (25). Furthermore, Defendant MUSC is not subject to a claim for punitive damages under the South Carolina Tort Claims Act, S.C. Code Ann. §15-78-120(b).

FOR A THIRD DEFENSE
AND BY WAY OF AFFIRMATIVE DEFENSE

33. Any damages suffered by Plaintiff are the direct and proximate result of the contributory and or comparative negligence of Plaintiff and/or Charles Mikell and Plaintiff's recovery should be barred or alternatively, reduced proportionally to Plaintiff's and/or Charles Mikell's comparative negligence.

FOR A FOURTH DEFENSE
AND BY WAY OF AFFIRMATIVE DEFENSE

34. Plaintiff's Second Amended Complaint and any damages recoverable are limited by the South Carolina Wrongful Death Act, S.C. Code Ann. §15-51-10, et. seq. (1976)(supp. 2005).

FOR A FIFTH DEFENSE
AND BY WAY OF AFFIRMATIVE DEFENSE

35. Plaintiff's Second Amended Complaint and any damages recoverable are limited by the South Carolina Survival Act, S.C. Code Ann. §15-5-90(1976)(supp. 2005).

FOR A SIXTH DEFENSE
AND BY WAY OF AFFIRMATIVE DEFENSE

36. Plaintiff's Unfair Trade Practice claim is barred because the UTPA prohibits a representative claim.

FOR A SEVENTH DEFENSE
AND BY WAY OF AFFIRMATIVE DEFENSE

37. Plaintiff has failed to adequately plead a cause of action for fraud with particularity in accordance with Rule 9, SCRCP, and therefore, the Plaintiff is barred from recovery.

FOR AN EIGHTH DEFENSE
AND BY WAY OF AFFIRMATIVE DEFENSE

38. Plaintiff's claims are barred in whole or in part by the applicable statute of limitations.

FOR A NINTH DEFENSE
AND BY WAY OF AFFIRMATIVE DEFENSE

39. Plaintiff's cause of action for fraud and negligent misrepresentation are barred by the doctrines of waiver, estoppel and laches.

FOR A TENTH DEFENSE
AND BY WAY OF AFFIRMATIVE DEFENSE

40. Defendant MUSC has taken no action with a view to lessen or which tends to lessen competition.

FOR AN ELEVENTH DEFENSE
AND BY WAY OF AFFIRMATIVE DEFENSE

41. The activities alleged in Plaintiff's Second Amended Complaint do not fall within the contemplation of S.C. Code § 39-5-10, etc.

FOR A TWELFTH DEFENSE
AND BY WAY OF AFFIRMATIVE DEFENSE

42. Any alleged unfair or deceptive method, act or practice engaged in by MUSC was not a willful or knowing violation of S.C. Code § 39-5-20.

FOR A THIRTEENTH DEFENSE
AND BY WAY OF AFFIRMATIVE DEFENSE

43. Plaintiff's cause of action for civil conspiracy is barred because he can obtain relief through other causes of action.

FOR A FOURTEENTH DEFENSE
AND BY WAY OF AFFIRMATIVE DEFENSE

44. Plaintiff's cause of action for civil conspiracy is barred because South Carolina law does not recognize intra-corporate conspiracies.

FOR A FIFTEENTH DEFENSE
AND BY WAY OF AFFIRMATIVE DEFENSE

45. Plaintiff's cause of action for civil conspiracy is barred because there was no purpose of injuring the Plaintiff, and no special damages to the Plaintiff.

FOR A SIXTEENTH DEFENSE
AND BY WAY OF AFFIRMATIVE DEFENSE

46. Plaintiff's cause of action for abuse of process is barred because no cause of action for abuse of process exists where the defendant did not cause process to issue against plaintiff.

FOR A SEVENTENTH DEFENSE
AND BY WAY OF AFFIRMATIVE DEFENSE

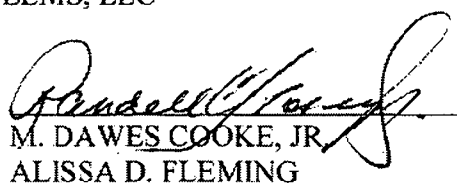
47. Plaintiff fails to state a claim for conversion because there is no evidence that MUSC improperly exercised its legal rights.

FOR A EIGHTEENTH DEFENSE
AND BY WAY OF AFFIRMATIVE DEFENSE

48. Plaintiff has failed to state facts sufficient to constitute a cause of action pursuant to Rule 12(b)(6), SCRCP.

WHEREFORE, having fully answered the Plaintiff's Amended Complaint, the Defendant Medical University of South Carolina, prays that the same be dismissed with costs and for such other relief as this Court may deem to be just and proper.

BARNWELL WHALEY PATTERSON
& HELMS, LLC

By: 

M. DAWES COOKE, JR.
ALISSA D. FLEMING
288 Meeting Street, Suite 200 (29401)
Post Office Drawer H
Charleston, SC 29402
Tel: (843) 577-7700
Fax: (843) 577-7708
Email: mdc@barnwell-whaley.com
afleming@barnwell-whaley.com
ATTORNEYS FOR DEFENDANT THE
MEDICAL UNIVERSITY OF SOUTH CAROLINA

March 9, 2016
Charleston, South Carolina

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

FILED
2016 MAY -4 PM 1:54
JULIE J. ARMSTRONG
CLERK OF COURT
BY BS

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

1. I am over the age of eight (18) years, am legally competent to make this affidavit, and have personal knowledge of the matters set forth herein.

2. I am lead counsel for the Plaintiff in the above-captioned action.

3. This Affidavit is submitted in order to further supplemental my previous Affidavits, dated January 4, 2016 and January 5, 2016.

6. The time entries set forth below document the effort undertaken by me to address and respond to the various discovery issues which are the subject of the Plaintiff's Motion for Discovery Sanctions, filed in the within-captioned action.

7. The expenses set forth below were incurred by my office in regard to these same discovery issues.

FURTHER AFFIANT SAYETH NAUGHT.

BY: Robert B Ransom
Robert B. Ransom

SWORN TO BEFORE ME this

2nd day of May 2016

Notary Public for the State of South Carolina

My commission expires:

Aug. 01, 2021

TIME RECORD FOR Estate of Charles Mikell

Date:	Time:	Description:
01/05/16	0.5	prepare Supplemental Affidavit and cover letter to Judge Nicholson
01/07/16	0.1	email to Dawes and Alissa about scheduling Donna Embry's deposition
01/11/16	0.1	email from Debbie Tolle about scheduling Donna Embry's deposition
01/11/16	0.2	email to Debbie Tolle about scheduling Donna Embry's deposition
01/22/16	0.2	emails with Debbie Tolle confirming Donna Embry's deposition
01/26/16	0.3	email from Brook Burroughs with questions posed by Judge Nicholson
01/27/16	0.2	emails with court reporter confirming Donna Embry deposition
02/04/16	0.2	emails with Brook Burroughs about submitting answers to Judge Nicholson's questions
02/10/16	2.5	draft declaration responding to Judge Nicholson's questions
02/11/16	3.0	draft declaration responding to Judge Nicholson's questions
02/16/16	0.1	email draft declaration to Alex Apostolou for comment
02/16/16	3.0	revise declaration
02/17/16	0.3	emails from Alex Apostolou about draft declaration
02/17/16	0.3	emails with Brook Burroughs about work-product contained in declaration
02/17/16	4.0	prepare for deposition of Donna Embry
02/18/16	0.1	email from Dawes about answers to Judge Nicholson's questions
02/18/16	0.7	draft motion to seal
02/19/16	0.1	emails with Alissa to confirm Donna Embry's deposition
02/19/16	2.0	finalize motion to seal
02/22/16	2.0	travel to Charleston from Columbia
02/22/16	5.0	appear at deposition of Donna Embry
02/22/16	0.6	travel to court house to file motion to seal and declaration
02/23/16	0.3	emails with Alex Apostolou about Donna Embry's deposition
02/24/16	1.8	travel to Columbia from Charleston
02/24/16	3.5	prepare letter to Judge Nicholson about Donna Embry's deposition
03/01/16	1.2	review and analyze letter from Alissa to Judge Nicholson
03/02/16	0.6	emails to Alex Apostolou about Alissa's letter to Judge Nicholson
03/02/16	4.5	review transcript of Donna Embry's deposition
03/03/16	0.6	email to Brook Burroughs about Donna Embry's deposition testimony
03/08/16	0.1	email from Alissa about MUSC's forthcoming supplemental submission
03/0816	0.2	email from Brook Burroughs about additional depositions needed
03/08/16	0.4	email to Brook Burroughs about additional depositions
03/17/16	0.2	email from Brook Burroughs advising motion for sanctions granted in part
03/17/16	0.1	email from Alissa about request for supplemental submission prior to ruling
03/17/16	0.2	email from Dawes about request for supplemental submission
03/17/16	0.2	email to Brook Burroughs advising I am in India
03/18/16	0.2	emails from Brook Burroughs about status of ruling
03/18/16	0.2	email from dawes about final submission by MUSC

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

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

TOTAL TIME: 75.3 hours

Expenses

01/11/16	Online Security (PICIS backup data issue)	$ 375.00
02/22/16	Charleston County Clerk of Court (motion to seal)	$ 25.00
03/10/16	A. Wm. Roberts, Jr. & Assoc. (Embry transcript)	$1,114.70
03/20/16	Dr. Kofke: review of Donna Embry deposition	$ 875.00
03/29/16	Dr. Kofke: review of Donna Embry deposition	$ 750.00
04/04/16	Dr. Kofke: review of Donna Embry deposition	$3,166.54
04/07/16	Quality Inn & Suites: room for Apr 7-8 depositions	$ 181.23
04/09/16	Dr. Kofke: attorney phone call	$ 166.66
Total Expense:		**$6,654.13**

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

INVOICE

DATE	INVOICE #
1/5/2016	24050

BILL TO	SHIP TO
Leventis & Ransom 1913 Bull Street P.O. Box 11067 Columbia, SC 29201 Attn: Robert B. Ransom	

Matter No.	TERMS	REP	PROJECT
R. Ransom	Upon Receipt	MJM	

QUANTITY	ITEM CODE	DESCRIPTION	RATE	AMOUNT
		Billing Period - 05/14/15 - 05/15/15 - "Mikell v. MUSC" Matter - Electronic Discovery Technical & Consulting Services		
0.75	RGF	05/14/15 - (R. Gralnik - Sr. Forensic Tech) - Review/analysis of MUSC data warehouse information architecture document, review Optum white papers on anesthesia management information system	300.00	225.00
0.5	RGF	05/15/15 - (R. Gralnik - Sr. Forensic Tech) -	300.00	

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01/11/16

$ **375.00

PAY TO THE ORDER OF OnlineSecurity

Three Hundred Seventy-Five and 00/100 DOLLARS

OnlineSecurity
3000 S. Robertson Blvd, Suite 228
Los Angeles, CA 90034

Robert B Ransom

MEMO Charles Mikell

⑈002097⑈ ⑆053200983⑆ 200 1200 10138⑈

	Total	$375.00

Common Pleas

Clerk : Julie Armstrong
Charleston County Judicial Center
Charleston, SC 29401
(843) 958-5000

Received From:	Ransom, Robert B.		Date:	2/22/2016
	PO Box 11067		Receipt #:	556089
	Columbia, SC 29211		Clerk:	coceba
Paying for:	Turner, Shon			
Transaction Type:	Payment		Reference #:	
Payment Type:	Credit Card	$25.00	Comment:	motion to seal
	Convenience Fee	$0.43	Non-Refundable	
	SC.gov Portal Fee	$1.00		
Total Paid:		$26.43		

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

Total Cases:	**1**	**$25.00**	**$25.00**	**$0.00**
		Convenience Fee:	**$0.43**	
		SC.gov Portal Fee:	**$1.00**	
		Total Paid:	**$26.43**	

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

Job #: 160222MHB
Job Date: 02/22/16
Order Date: 02/22/16
DB Ref.#:
Date of Loss: / /
Your File #:
Your Client: Turner, Shon

Invoice

Invoice #: 229808
Inv.Date: 03/03/16
Balance: $1,114.70

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

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

Item	Proceeding/Witness	Description	Disc. Amt	Amount
1	Donna Benton Embrey CRNA	Original and e-transcript copy	$0.00	$940.10
2	Donna Benton Embrey CRNA	PDF Scanned Exhibits	$0.00	$9.60
3	Donna Benton Embrey CRNA	Reporting Time	$0.00	$150.00
4		Shipping & Handling	$0.00	$15.00

Comments:

Sub Total	$1,114.70
Shipping	$0.00
Tax	N/A
Total Invoice	$1,114.70
Payment	$0.00
Balance Due	$1,114.70

Federal Tax I.D.: 57-0762990
Terms: Net 30 Days Finance Charge @ 1.5%

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(803) 765-2383

BB&T, N.A.
PO BOX 1466
COLUMBIA, SC 29202
67-109/652

2122

03/10/16

PAY TO THE ORDER OF A. William Roberts, Jr. & Assoc. $ **1,114.70

One Thousand One Hundred Fourteen and 70/100********** DOLLARS

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

Robert B Ransom

MEMO Charles Mikell

⑈002122⑈ ⑆053200983⑆ 2001200106138⑈

Details on Back.
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From: Kofke, Andrew <William.Kofke@uphs.upenn.edu>
To: 'Rob Ransom' <bertcone@aol.com>
Cc: Kofke, Andrew <William.Kofke@uphs.upenn.edu>
Subject: Mikell invoice 042016
Date: Wed, Apr 20, 2016 9:11 am

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

date time work
1/17/2016 30 review notes
3/20/2016 105 embry 2 dep
3/29/2016 90 embry 2 dep
4/4/2016 55 embry 2 dep
4/4/2016 180 embry 2 dep
4/4/2016.145 embry 2 dep
4/4/2016 30 research and reserve travel
4/9/2016 20 atty phone call
19-Apr 1680 TRIAL
min= 2335
hr= 38.91667
fee= 19458.33
trial retain -3000
16458.33

expenses 1700.2 plane ticket
456.38 hotel
35.79 parking
4.82 food
5.46 food
20.39 food
3.57 food
6.09 food
2.54 food
12.5 food
20 taxi
50 taxi
2317.74
Prof fee expenses total
total 16458.33 2317.74 18776.07

Please remit to me $18,776.07 at the address below.
For tax purposes it will be easier all around to have two separate checks, one for fee and one for expense rei

Thanks for involving me in this case

W Andrew Kofke MD MBA FCCM FNCS
Professor, Director Neuroscience in Anesthesiology and Critical Care Program

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

Account: 453217545
Date: 4/8/16
Room: 133 SGM
Arrival Date: 4/7/16
Departure Date: 4/8/16
Check In Time: 4/7/16 3:48 PM
Check Out Time:
Rewards Program ID:
You were checked out by:
You were checked in by: jandre
Total Balance Due: 0.00

Ransom, Robert
70 Foot Point Rd
Columbia, SC 29209

Post Date	Description	Reference	Amount
4/7/16	Room Charge	#133 Ransom, Robert	161.10
4/7/16	Occupancy Tax		3.22
4/7/16	State Tax		10.47
4/7/16	City / County Tax		6.44
4/8/16	Master Card		(181.23)
		XXXXXXXXXXXX1926	

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

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

x_____

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	CIVIL ACTION NO.: 2012-CP-10-7275
SHON TURNER, as Personal Representative of the ESTATE OF CHARLES MIKELL, deceased,	)	**SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR DISCOVERY SANCTIONS**
Plaintiff,	)	
vs.	)	
MEDICAL UNIVERSITY OF SOUTH CAROLINA,	)	
Defendant.	)	

FILED
2016 MAY 11 AM 11:52
JULIE J. ARMSTRONG
CLERK OF COURT
BY

AND NOW COMES Defendant Medical University of South Carolina ("MUSC"), by and through its undersigned counsel, and respectfully files this Supplemental Memorandum in Opposition to Plaintiff's Motion for Discovery Sanctions. MUSC expressly asserts its right to cross-examine Plaintiff's counsel regarding all attorneys' fees and costs asserted in their Affidavits in Support of Plaintiff's Motion for Sanctions.

INTRODUCTION

Plaintiff filed a Motion for Discovery Sanctions against MUSC on September 4, 2015 alleging failure to disclose certain information including the Mayday Record, PICIS Audit Trail, and the "Backup Anesthesia Record." In support of his Motion, Plaintiff's counsel submitted affidavits for attorney's fees and costs requesting fees and costs beginning in September of 2014 related to the discovery on the foregoing issues.

Although the Court has not yet issued an Order or announced its specific findings, it has informed the parties that it intends to award sanctions against the Defendant for discovery abuse. The Defendant respectfully asks the Court to reconsider in light of having had the opportunity to hear and observe the witnesses and to hear the details of the allegedly lost, destroyed, or "altered" records. The Defendant asks the Court to find that, while witnesses may have been mistaken about the existence of records, specifically the Mayday sheet, they nor MUSC attempted to mislead the Plaintiff. Alternatively, if the Court does find willful discovery abuse, the Defendant asks the Court to carefully scrutinize Plaintiff's claim for attorneys' fees and to inquire into whether and to what extent the Plaintiff's counsel had to spend extra time on account of having been misled in discovery. The Defendant respectfully submits that, contrary to being required to spend extra time on discovery, Plaintiff strategically built his case around the missing Mayday sheet, changes that Donna Embrey made to the narrative record, and the missing PICIS data.

Because there is simply no evidence of discovery abuse by MUSC, any sanctions against MUSC and the fees and costs claimed by Plaintiff's counsel should be denied. In the alternative, the fees and costs awarded should be reduced to those actually necessitated by discovery abuse.

The Defendant requests an opportunity to examine Plaintiff's counsel under oath as to these matters.

A. Discovery at Issue

1. The Cardiopulmonary Resuscitation Form/Mayday Record

Plaintiff seeks sanctions against MUSC because of alleged discovery abuses related to the Mayday Record. Plaintiff contends that the "truth" about the Mayday Record would never have been disclosed had he not vigorously pursued discovery on MUSC's untruths regarding the

record. Plaintiff claims that certain witnesses, specifically Donna Embrey, CRNA and Dr. G.J. Guldan lied about the existence of the Mayday Record and about whether MUSC's Emergency Medical Response Policy required a Mayday Record.

The evidence in this case, including the testimony of Sheila Scarbrough, RN, MSN, established that any information documented in the Mayday Record pertained to resuscitation. The Record would have been completely void of any information leading up to the arrest or the cause of the arrest. Through trial the Plaintiff has offered not a single piece of evidence to the contrary. Plaintiff relies upon the testimony of Donna Embrey that she used the Mayday Record to reconstruct the times surrounding the resuscitation. Yet, it is clear that she used the record mostly to reconstruct the times of events that occurred during the resuscitation itself. The only information that she could possibly have gotten from the Mayday Record that was relevant to this case was when the Code began, which could have corroborated – but not shown – when the resuscitation began. It is undisputed that the resuscitation began before the Code team arrived, and – as Dr. Guldan testified – the Anesthesia record reflects the times of the resuscitation efforts.

Plaintiff exploited the absence of the actual Mayday Record and MUSC's confusion over its existence and aggressively argued that its absence prevented him from discovering the cause of Mr. Mikell's arrest. Plaintiff's feigned frustration was intended to convince the Court and the jury that MUSC had deliberately destroyed the document to conceal its negligence and to obtain a spoliation charge.

A close analysis of the discovery, testimony and evidence in this case demonstrates that MUSC was nothing but honest, thorough and forthcoming regarding the Mayday Record. Plaintiff began deposing witnesses in August of 2014. Three of the first witnesses deposed by

Plaintiff were Donna Embrey, CRNA on August 26, 2014, Dr. Mark Payne on August 27, 2014, and Martha Zwemer, RN, on September 5, 2014. Plaintiff questioned Nurse Embrey about a Cardiopulmonary Resuscitation Form ("Mayday Record") during her first deposition. At that time, she could not recall whether a Mayday Record had been completed (almost four years earlier), and there was not a copy of the Mayday Record in Mr. Mikell's medical record. Nurse Embrey was not the person responsible for completing the Mayday Record. Rather, her documentation was in the Anesthesia/PACU Record. Neither Martha Zwemer, RN – the nurse assigned to Mr. Mikell's colonoscopy and person who would have completed the Mayday Record - nor Mark Payne, M.D., the Gastroenterologist who performed the colonoscopy - recalled a Mayday Record.

Following the initial depositions, in a letter dated September 4, 2014, Plaintiff requested the Mayday Record. At that time, MUSC honestly believed that the Mayday Record did not exist because one had never been completed.

On October 27, 2014, MUSC responded to Plaintiff's Second Request for Admission and produced the Emergency Medical Response Policy Section PC-19 No. C-14 (the "Policy"). MUSC designated Dr. G.J. Guldan, an Assistant Professor of Anesthesiology and Perioperative Medicine, to testify on that subject pursuant to Rule 30(b)(6), SCRCP. Plaintiff deposed Dr. Guldan on November 4, 2014. Dr. Guldan was the person most likely to be able to answer questions about the Mayday record. Dr. Guldan testified that the Policy did not require the completion of a Cardiopulmonary Resuscitation Form.[1] He also testified, as he did at trial, that

[1] The Emergency Medical Response Policy defines a "Mayday" as "a respiratory and or cardiac emergency or any other situation perceived by the care giver to be a life threatening situation including both conscious and unconscious individuals." It further provides that "[e]ach Mayday is documented on the Cardiopulmonary Resuscitation Event Form (Mayday record)...". (*See* the Policy, previously submitted as Exhibit E to Memorandum in Opposition).

the relevant clinical information regarding Mr. Mikell's code was fully and properly documented in the Anesthesia/PACU Record. (*See* Dep. Dr. Guldan previously submitted as Exhibit F to Memorandum in Opposition, at pp. 11-12).[2] The Anesthesia/PACU Record is the only record used by Anesthesia providers at MUSC to document their care before, during and after an arrest.

Dr. Guldan truly believes that a Mayday Record was not required. The code occurred in a Non-Operating Room Anesthesia (NORA) site which is akin to an Operating Room. The procedure was staffed by a Board Certified Cardiac Anesthesiologist and CRNA – both of whom are certified in Advanced Cardiac Life Support (ACLS) – and all emergency drugs and equipment for resuscitation were already present. And, the Policy distinguishes between an OR and non-OR setting and states that it is unnecessary to call a Mayday in the OR.

Unsatisfied with Dr. Guldan's testimony, Plaintiff continued to inquire about the policies applicable to Mr. Mikell's code on October 1, 2010. In this regard, Plaintiff filed a Motion to Compel on January 29, 2015 requesting the policies applicable to Mr. Mikell's arrest and the Cardiopulmonary Resuscitation Form. MUSC truthfully responded, consistent with Dr. Guldan's testimony, that the only policy applicable was the Policy, which did not require a Cardiopulmonary Resuscitation Form.

Upon further investigation, MUSC discovered that Ms. Scarbrough had new information about the Mayday Record and promptly disclosed this to Plaintiff and designated her to discuss the Policy. (*See* Corresp. dated July 23, 2015 previously submitted as Ex. H to Memorandum in Opposition). At the same time, MUSC was investigating additional issues regarding the PICIS record and asked Donna Embrey, CRNA to more closely scrutinize certain information in the

[2] Specifically, Dr. Guldan likened the setting in the DDC to an OR and testified that from an anesthesia perspective, "[t]here is no Mayday in the OR. It's a code. And it is documented on the anesthesia record is the reality of the medical practice." (*See* deposition testimony of Dr. Guldan).

Anesthesia/PACU Record. It was at that time that Ms. Embrey recalled seeing the Mayday Record on the evening of October 1, 2010 when she went to the MSICU to complete the Anesthesia Record in PICIS for Mr. Mikell. This information was promptly disclosed to Plaintiff's counsel prior to his re-opening of her deposition on the peer review issue. Plaintiff's counsel wrongly asserts that MUSC would not have disclosed this information but for his request for a second Rule 30(b)(6) deposition to discuss the Emergency Medical Response Policy.

Plaintiff deposed Ms. Scarbrough on August 24, 2015. She testified, as she did at trial, that "there should be a mayday record for Mr. Mikell's event." [Dep. S. Scarbrough, p. 11]. (*See* Dep. S. Scarbrough previously submitted as Ex. I to Memorandum in Opposition). She also acknowledged that Anesthesia is a different animal, particularly in NORA sites and documents in the Anesthesia/PACU Record, not the Mayday Record. Ms. Scarbrough further testified that her job at the time was to review code sheets and enter the data into a database for the American Heart Association on all resuscitative events, including Maydays and codes. (*See* Dep. S. Scarbrough, at pp. 13-14). Following a code or Mayday, Ms. Scarbrough would receive the Cardiopulmonary Resuscitation Form by fax. (*See* Dep. S. Scarbrough, at p. 16). The information that she entered into the database was generally derived from the Cardiopulmonary Resuscitation Form. (*See* Dep. S. Scarbrough, at pp. 14-16). After entering the information into the database, Ms. Scarborough would destroy the faxed copy of the Cardiopulmonary Resuscitation Form. (*See* Dep. S. Scarbrough, at pp. 25-28). The fax copy of the form provided to Ms. Scarbrough would <u>never</u> be made a part of the patient's medical record. [Dep. S. Scarbrough, pp. 25-28](emphasis added). Finally, Ms. Scarbrough adamantly explained that the Mayday Record documented resuscitative events that occurred after a Mayday was called.

The discovery regarding the Mayday Record fails to establish that MUSC refused to timely produce or disclose information or that its responses were false. To be sure, Ms. Embrey did not at first remember there being a Mayday Record, and Dr. Guldan adamantly believes that there should not have been one. Yet, these honest errors on their part fall short of the type of deliberate misdirection that would warrant imposition of sanctions. In fact, the Plaintiff took full advantage of the missing record and of MUSC's conflicting information as to its very existence, wrongly arguing to the Court and to the jury that MUSC had deliberately destroyed it to cover up evidence of its negligence.

2. PICIS Anesthesia Record

Plaintiff was not misled at all about the data missing from the PICIS Anesthesia/PACU record. Plaintiff's counsel learned all about this right alongside Defense counsel and, indeed, MUSC itself.

As previously discussed in MUSC's Memorandum in Opposition to Plaintiff's Motion for Sanctions, MUSC produced the information and data in the PICIS Anesthesia/PACU Record, including all of the data in the database for Mr. Mikell's October 1, 2010 colonoscopy in printed format spanning more than four hundred pages — entitled *Anesthesia/PACU Record* — on May 17, 2013 (Bates Range MUSC 2116-2556). The Anesthesia/PACU record is the complete documentation of the medical care that the anesthesia providers provided Mr. Mikell during his October 1, 2010 colonoscopy. MUSC, through extensive work, devoted nearly 500 hours confirming that the information in the actual PICIS database is exactly the same as the information in the printed version of the Anesthesia/PACU Record and that no data had been deleted. This was confirmed by the undisputed testimony of John Fisher, the Program Manager, Enterprise Architecture Development, Office of the Chief Information Officer (OCIO).

Plaintiff argues that MUSC failed to timely produce all data concerning Mr. Mikell in response to his First Discovery Requests in May of 2013. MUSC maintained that the May 2013 production contained all data concerning Mr. Mikell. Subsequently and because of Plaintiff's failure to question witnesses about material information in the PICIS Anesthesia/PACU Record, including the reason for the blank boxes in the Real Time Variables section of the record from 7:35 a.m. to 7:48 a.m., he accused MUSC of deleting and/or failing to produce all data regarding Mr. Mikell.

When Plaintiff deposed Donna Embrey, CRNA and Eric Nelson, M.D. in August of 2014, he never inquired about the blank boxes from 7:35 a.m. to 7:48 a.m. He only asked them about the graph contained in the Real Time Graph section of the record. In response, Donna Embrey, CRNA and Dr. Nelson testified that the printout of the graph on the different versions of the Anesthesia/PACU Record, i.e. fifteen minute, one minute, and ten second, versions of the record was printer artifact. They consistently referred to the numerical values in the one minute version of the record as the most accurate vital sign data for the colonoscopy.

Following their depositions, Plaintiff's counsel sent a letter dated September 4, 2014 to counsel for MUSC asking about the blanks in the record. Before MUSC could respond, he served MUSC with Plaintiff's Second Request for Admissions on September 25, 2014. (Attached as Exhibit A). In the Requests, he asked:

> 4. Admit that blood oxygen saturation data is missing from the anesthesia record for Mr. Mikell's colonoscopy for each of the following times:
>
> a. 7:42 am
> b. 7:43 am
> c. 7:44 am
> d. 7:45 am
> e. 7:46 am
> f. 7:47 am

g. 7:59 am
h. 8:07 am
i. 8:09 am
j. 8:11 am
k. 8:12 am
l. 8:13 am
m. 8:14 am

If this Request is denied, then pursuant to Rule 34, SCRCP, produce the blood oxygen saturation data for each of the referenced times and pursuant to Rule 33, SCRCP, explain why that data has not previously been produced.

RESPONSE: Objection. Defendant MUSC objects to Request No. 4 on the grounds that the total number of requests for admission served on this defendant, including subparts, exceeds the number permitted by Rule 36(b), SCRCP. Without waiving and subject to the foregoing objection, denied. Defendant MUSC cannot produce the data requested because it was not recorded in the record at the intervals indicated in Request No. 4. However, the data was continuously viewed during the colonoscopy procedure on October 1, 2010.

5. Admit that MUSC has no explanation for why blood oxygen saturation data is missing from the anesthesia record for Mr. Mikell's colonoscopy (*see*, Request No. 4, above). If this Request is denied, then pursuant to Rule 33, SCRCP, then provide MUSC's explanation for the missing blood oxygen saturation data.

RESPONSE: Objection. Defendant MUSC objects to Request No. 5 on the grounds that the total number of requests for admission served on this defendant, including subparts, exceeds the number permitted by Rule 36(b), SCRCP. Defendant MUSC further objects to Request No. 5 on the grounds that the use of the word "missing" is inaccurate. Without waiving and subject to the foregoing objection, denied. The data was continuously viewed during the colonoscopy procedure on October 1, 2010, but was not recorded in the record at the intervals indicated in Request No. 4. In further answering Request No. 5 and without waiving the foregoing objections, Defendant MUSC states that explanations responsive to this request were provided in the deposition testimony, to date.

MUSC correctly responded that the data was continuously viewed during the colonoscopy, but had not been recorded at the time intervals specified. On November 19, 2014, Plaintiff's counsel asked MUSC to designate corporate representatives pursuant to Rule 30(b)(6),

SCRCP, to testify about how the PICIS software functioned and how data was stored, recorded, and printed by PICIS. On January 22, 2015, MUSC identified the witnesses in response to Plaintiff's November 19, 2014 request for a witness to explain (1) how the anesthesia machine displays, captures, records, stores, and prints out data, and (2) to explain various spreadsheets and graphs that constitute the anesthesia record, and (3) who accessed the record to print parts out on October 1 and 2, 2010. *See* Corresp. from Pltf's Counsel dated November 19, 2014. One of the witnesses designated was Pat Aysse, RN, MSN. Rather than depose the witnesses, Plaintiff's counsel served his Thirst Requests for Admission on January 29, 2015. In response to the Requests, MUSC produced the first audit trail. This was on February 27, 2015. The Audit Trail and the alleged alteration of the records will be addressed in more detail below.

In his Motion for Discovery Sanctions, Plaintiff falsely asserts that MUSC did not request access to the data until August 21, 2015, that it had not authorized anyone to access the archive to look at the data, and that it made no effort to produce the archived data for Mr. Mikell from the PICIS database. Again, MUSC produced all data to Plaintiff in May of 2013, fully informed Plaintiff that no data had been recorded between 7:35 a.m. and 7:48 a.m. and identified three witnesses in January of 2015, including Pat Aysse, RN, MSN, to explain the reason for the blanks in the record.

It was Plaintiff's strategic decision not to depose Ms. Aysse or the other witnesses. Plaintiff finally decided to depose Ms. Aysse on August 24, 2015 even though Ms. Aysse was a known witness since January 22, 2015 and had the same information in January that she did in August.

Plaintiff cannot now blame MUSC for his lack of material questioning of witnesses and for his strategic decisions by accusing MUSC of neglecting to timely produce the data. As

reinforced by John Fisher, all data regarding Mr. Mikell was in the PICIS Anesthesia/PACU Record that was produced in May of 2013 and no data was deleted from any record or the database. (*See* previously filed Affidavit of John Fisher and deposition of John Fisher attached as Exhibit B). Furthermore, and as shown by MUSC's direct responses to inquiries about the blanks in the records, once asked MUSC correctly stated that the data had not been recorded and furnished witnesses to testify about that issue.

3. Changes to the Entries in the Narrative Portion of the PICIS Anesthesia Record/Audit Trail

Plaintiff asserts the changes that Donna Embrey, CRNA made to the Anesthesia/PACU Record were not readily apparent to him until the Audit Trail for the record was produced on February 27, 2015. He also claims that MUSC failed to timely produce the Audit Trail. This is simply not correct.

The Anesthesia/PACU record shows an original entry by Dr. Nelson indicating that he came back into the procedure room at approximately 0800. (*See* Anesthesia/PACU Record attached as Exhibit C). Donna Embrey, CRNA changed the time of Dr. Nelson's entry from 0800 to 0756. Plaintiff maintains that she changed the time on the entry to conceal her own malfeasance during the colonoscopy. He points to the Audit Trail for the Anesthesia/PACU Record in support of his position and further argues that the one material change to the record would not have been apparent to him, but for the Audit Trail. Plaintiff's representations are incorrect. The change made by Donna Embrey, CRNA was readily apparent in the original records produced in May of 2013, as seen in the PACU Record and the narrative portion of the Anesthesia/PACU Record. (Attached as Exhibit D). There was simply no way for Ms. Embrey to conceal the changes that she made to the narrative portion of the record nor is there any

evidence that she did so. In her first deposition, she was never asked to compare the specific narrative portions of the record that showed the initial note that was made by Dr. Nelson and timed for 8:00 a.m. Rather, she was asked only to explain the entry timed at 7:56 which was documented under her initials. Her August 2014 deposition was almost four years after the colonoscopy. As she explained at trial, the entry that she was shown during her deposition appeared to be Dr. Nelson charting under her name, since the entry described what Dr. Nelson did but had her initials on it. Ms. Embry did not recall the specific details of the record, nor had she studied the various entries to compare the notes. The substance of the note was identical and the changes were readily apparent to Plaintiff's counsel from the very moment the records were produced to him in May of 2013.

On December 5, 2014, Plaintiff requested the audit trail from the PICIS database, seeking the identity of "everyone who logged onto the anesthesia system to access Mr. Mikell's anesthesia record at any time during or after the October 1, 2010 event." MUSC produced the PICIS audit trail showing the identities of all persons who made entries, modifications, and/or deletions to Mr. Mikell's electronic Anesthesia/PACU Record.

The audit trail clearly identified all of the changes, modifications, deletions that were made to the narrative portion of the Anesthesia/PACU Record, including the time change that Donna Embrey made to Dr. Nelson's 0800 note. It also clearly showed that a PICIS IT Clinical Analyst, Annette Thompson, RN, accessed the PICIS electronic medical record system at approximately 7:46 a.m. and transfer (ADT) function to transfer Mr. Mikell in the electronic record. This allowed Nurse Embrey to open the PICIS Anesthesia/PACU Record for Charles Mikell on the computer workstation located in the procedure room and continue the session in the electronic medical record system.

Plaintiff's counsel had the Audit trail prior to deposing MUSC's expert witness, Dr. Berry, in June of 2015. Furthermore, he had the full Anesthesia/PACU Record showing the changes to the record in May of 2013 before he ever deposed any witnesses in the case and before his expert was deposed in March of 2015.

ARGUMENTS

1. Sanctions

Sanctions are appropriate under Rule 37(b)(2)(C), SCRCP, in limited circumstances and only when a party fails to comply with a discovery order. *See McNair v. Fairfield Cty.*, 379 S.C. 462, 665 S.E.2d 830 (2008)(citing Rule 37(b)(2)(C)). As the facts clearly demonstrate, MUSC never failed to comply with a discovery order or to timely produce information. MUSC meaningfully answered every interrogatory, requests for production, and request for admission served by Plaintiff and timely supplemented those responses with truthful information. In addition, MUSC never withheld or falsified discovery responses. *See e.g. Griffin Grading and Clearing, Inc. v. Tire Services Equipment*, 334 S.C. 193, 511 S.E 2d 716 (1999). The discovery demonstrates the lack of meaningful questioning of several key witnesses by Plaintiff's counsel regarding the blank boxes in the PICIS record and the modifications made to the record by Donna Embrey, CRNA.

Simply stated, there is no evidence of non-compliance with a discovery order or discovery abuse giving rise to an inference of bad faith or willful, intentional disobedience by MUSC that justifies and award of sanctions. *Karppi v. Greenville Terrazzo Co., Inc.*, 327 S.C. 538, 543, 489 S.E.2d 679, 682 (Ct. App. 1997)(citing *Orlando v. Boyd*, 320 S.C. 509, 466 S.E.2d 353 (1996); *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991)). The four depositions taken by Plaintiff's counsel in late February and early April 2016 of Dr. Berry,

John Fisher, and Annette Thompson, RN were completely unnecessary and did not lead to the discovery of any information not already known to Plaintiff's counsel. None of Dr. Berry's opinions regarding liability or causation had changed. The information known to John Fisher and Annette Thompson, RN had been provided by way of Affidavit and informal discovery meetings in December 2015 which merely reinforced prior disclosures. The only information not known to Plaintiff prior to his Motion for Sanctions was Donna Embrey's recollection of the Mayday Record and the fact that she used it to obtain certain information about Mr. Mikell's resuscitation when she went to the MSICU on the evening of October 1, 2010 to complete her charting for the procedure. Importantly, there was no evidence that Ms. Embrey destroyed the Mayday Record or that she obtained any information from the Record that was relevant to MUSC's alleged negligence or the cause of Mr. Mikell's arrest. (*See* Dep. of Donna Embrey dated Feb. 22, 2016 previously submitted).

Importantly, the deposition of Ms. Embrey on February 22, 2016 was not a result of this Court's preliminary order on Plaintiff's Motion for Sanctions. Rather, the deposition was taken in the normal course of discovery and as a result of the Order of Judge Dennis' December 5, 2014 Order pertaining to questions asked in her first deposition related to peer review.

The transparent audit trail clarifies any entries in the Anesthesia/PACU Record and identifies each individual who accessed the record and the action taken. There is absolutely no evidence in the audit trails that MUSC destroyed or deleted any data from Mr. Mikell's Anesthesia/PACU Record. The audit trail clearly disclosed any and all modifications or deletions and their substance.

2. **Spoliation Charge**

The Court granted Plaintiff a spoliation charge, though Defendant contended that one was not warranted. None of the evidence or testimony from any of the depositions taken established any clinical data from Mr. Mikell's arrest or the cause of his arrest. The information in the Mayday Record pertains to the resuscitation, not the events leading up to it. An adverse inference charge is appropriate only upon a showing that "the document or evidence might reasonably have supported whatever presumption is being requested of the fact finder. *See Pringle v. SLR, Inc. of Summerton*, 382 S.E. 397, 675 S.E.2d 783 (Ct. App. 2009)(*citing and quoting* Kevin Eberle, *Spoliation in South Carolina*, 19-SEP S.C. Law, Sept. 2007, 26, 32 (holding that any inference a jury could make from the absence of the evidence at issue – a chair - would not change the fact that there was no indication that the chair was dangerous or unfit for use)).

Nothing in the Mayday Record would have helped to determine the cause of Mr. Mikell's arrest or his subsequent death. *See Stokes v. Spartanburg Regional Med. Ctr.*, 386 S.C. 515, 629 S.E.2d 675 (Ct. App. 2006). Therefore, an adverse inference or spoliation charge was improper.

3. **Reasonableness of Attorney's Fees and Costs**

Plaintiff's counsel submitted their attorneys' fees and costs in the total amount of $104,624.13. That sum includes $97,970.00 of attorneys' fees spread among two attorney timekeepers with the majority attributed to Mr. Ransom's time at a rate of $450.00 per hour and $6,654.13 of costs, primarily consultation between Plaintiff's counsel and his expert regarding Plaintiff's expert's new theories of liability.

Plaintiff's counsels' fees are unreasonable and Mr. Ransom's requested hourly rates are too high for this legal community and this type of litigation. Moreover, MUSC should not be

responsible for funding Plaintiff's case in the event of a verdict in its favor. In order to properly calculate an award of attorneys' fees, the court should "determine a lodestar figure by multiplying the number of reasonable hours expended times a reasonable rate." *Potter v. Mosteller*, 199 F.R.D. 181, 187 (D.S.C.), aff'd, 238 F.3d 414 (4th Cir. 2000)(*citing Brodziak v. Runyon,* 145 F.3d 194, 196). The court must consider the following twelve factors as set out in *Barber v. Kimbrell's Inc.,* 577 F.2d 216 (4th Cir.1978):

1. *Time and Labor Expended.* The legal work was conducted primarily by Mr. Ransom. The majority of the time claimed dates back to September of 2014 through the summer of 2015 and pertains to routine discovery – not as a result of misleading or false discovery responses by MUSC. Plaintiff's counsel failed to heed the expense of prolonged litigation by not engaging in meaningful settlement negotiations at mediation or thereafter and declined offers of settlement that were within the limits of liability in the South Carolina Tort Claims Act.

2. *Novelty and Difficulty of questions raised.* The issues in this case are not novel and, in fact, this case is a straightforward medical malpractice case. Plaintiff's counsel attempted to make it more complex by delving into the electronic medical record and conducting unnecessary discovery on issues that were simply not supported in fact, such as the alleged deletion of data from the PICIS database and concealment of time entries by Ms. Embrey.

3. *Skill required to properly perform the legal services rendered.* The skill required to litigate a medical malpractice case is not unique and this case did not require any unique matters that an experienced attorney in this field is not capable of managing.

4. *Attorney's opportunity costs.* There is no showing by Plaintiff's counsel that had they not been working on this case, they could have been engaged in other work being compensated at the same, or higher rates.

5. *The customary fee for like work.* The Declaration submitted by Mr. Ransom is based on an hourly rate of $450/hour. Plaintiff's counsel has made no showing that his hourly rate is consistent with the prevailing hourly rates in the community for the same or similar work. This rate is simply too high when compared to reasonable hourly rates in the community on both the defense and plaintiff side of the bar. For instance, for the same work, Defense counsel are compensated at a rate of $150/hour for this case. Plaintiff's rate is three times greater than Defense counsel's rate for the same work. Therefore, a downward adjustment of fees and costs is necessary.

6. *Attorney's expectations at the outset of litigation.* Plaintiff's counsel has not indicated his expectations at the outset of the litigation. However, he was most likely retained on a contingency fee basis which is one of the hazards of litigation.

7. *Time limitations imposed by client or circumstances.* Plaintiff's counsel has not indicated whether his client mandated any time limitations, but it is unlikely.

8. *Amount in controversy and results obtained.* Plaintiff's damages were limited to the $300,000.00/$600,000.00 limitations on liability set forth in the South Carolina Tort Claims Act. The result obtained, a defense verdict for MUSC, precludes Plaintiff from recovering anything. Had Plaintiff prevailed, the most he would have been able to recover in attorneys' fees and costs is $120,000.00 per claim plus costs.

9. *Experience, reputation and ability of counsel.* Plaintiff's counsel enjoys a good reputation in the legal community. However, his lack of understanding of the medical records, particularly the electronic medical record and ability to meaningfully question witnesses on issues relating to the medical records created unnecessary discovery on issues that could have been meaningfully explored at the outset.

10. *Undesirability of case within the legal community.* There is nothing to suggest that this kind of case is undesirable in the legal community.

11. *Nature and length or professional relationship between attorney and client.* Unknown.

12. *Attorney's fees awards in similar cases.* Again, Plaintiff has presented no evidence of attorney's fees in the community in similar cases. *See Potter v. Mosteller*, 199 F.R.D. 181, 188-89 (D.S.C.), aff'd, 238 F.3d 414 (4th Cir. 2000)).

Most importantly, if the Court finds that sanctions are warranted, the Plaintiff bears the burden of demonstrating to what extent, if any, he incurred additional attorneys' fees or costs because of the sanctionable conduct. Defendant respectfully submits that most, if not all, of the Plaintiff's counsel's extraordinary efforts in discovery were devoted to developing a case based on adverse inferences from spoliation of evidence, not on discovering the facts of the case.

CONCLUSION

This Court should deny Plaintiff's Motion for Sanctions and should find that the attorneys' fees and costs claimed are unreasonable. If the Court remains inclined to award sanctions, the Defendant requests an opportunity to examine Plaintiff's counsel under oath as to the reasonability of the fees requested and as to how, if at all, the fees claimed were necessitated by discovery abuse on the part of the Defendant.

[SIGNATURE ON FOLLOWING PAGE]

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ATTORNEYS FOR DEFENDANT MEDICAL UNIVERSITY OF SOUTH CAROLINA

Charleston, South Carolina

May 9, 2016

Exhibit A

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF CHARLESTON)	CIVIL ACTION NO.:2012-CP-10-7275
SHON TURNER, as Personal Representative of the ESTATE OF CHARLES MIKELL, deceased,)	
Plaintiff,)	**PLAINTIFF'S SECOND REQUEST FOR ADMISSIONS**
vs.)	
MEDICAL UNIVERSITY OF SOUTH CAROLINA,)	
Defendant.)	

TO: ALISSA D. FLEMMING, ESQ. ATTORNEY FOR THE DEFENDANT

PURSUANT TO SOUTH CAROLINA RULES OF CIVIL PROCEDURE 26, 33, 34 and 36, the Defendant is hereby required to admit or deny the truth of the following matters; to answer the following interrogatories; and to produce the requested materials for inspection and copying (as the case may be) within thirty (30) days from the service hereof. Each of these Requests relate to the October 1, 2010 colonoscopy and cardiac arrest alleged in the Complaint:

1. Admit that pursuant to MUSC policies and procedures, there should be a code sheet, code documentation and/or "May Day card" for Mr. Mikell's cardiac arrest.

   If this Request is denied, then pursuant to Rule 34, SCRCP, produce all MUSC policies, procedures and guidelines in effect on October 1, 2010 relating to documentation of May Day codes.

2. Admit that there is no code sheet, code documentation and/or "May Day card" for Mr.

Mikell's cardiac arrest.

If this Request is denied, then pursuant to Rule 34, SCRCP, produce the code sheet, code documentation and/or "May Day card" and pursuant to Rule 33, SCRCP, explain why the code sheet, code documentation and/or "May Day card"have not previously been produced.

3. Admit that MUSC has no explanation for why there is no code sheet, code documentation and/or "May Day card" for Mr. Mikell's cardiac arrest.

If this Request is denied, then pursuant to Rule 33, SCRCP, provide MUSC's explanation for the missing code sheet, code documentation and/or "May Day card."

4. Admit that blood oxygen saturation data is missing from the anesthesia record for Mr. Mikell's colonoscopy for each of the following times:

a. 7:42 am

b. 7:43 am

c. 7:44 am

d. 7:45 am

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g. 7:59 am

h. 8:07 am

i. 8:09 am

j. 8:11 am

k. 8:12 am

l. 8:13 am

m. 8:14 am

If this Request is denied, then pursuant to Rule 34, SCRCP, produce the blood oxygen saturation data for each of the referenced times and pursuant to Rule 33, SCRCP, explain why that data has not previously been produced.

5. Admit that MUSC has no explanation for why blood oxygen saturation data is missing from the anesthesia record for Mr. Mikell's colonoscopy (*see*, Request No. 4, above).

If this Request is denied, then pursuant to Rule 33, SCRCP, then provide MUSC's explanation for the missing blood oxygen saturation data.

6. Admit that data and information relating to Mr. Mikell's October 1, 2010 colonoscopy were captured and recorded by a computerized Endoworks system used in connection with the colonoscopy.

7. Admit that images, data and information captured and/or recorded by the Endoworks system during Mr. Mikell's colonoscopy are missing.

If this Request is denied then pursuant to Rule 34, SCRCP, produce all images, data and information captured and recorded by the Endoworks system and pursuant to Rule 33, SCRCP, explain why the images, data or information have not previously been produced .

8. Admit that there is no documentation in the MUSC chart of any medical decision about Mr. Mikell's suitability or need for an ICD (Implantable Cardioverter Defibrillator).

If this Request is denied, then pursuant to Rule 34, SCRCP, produce all such documentation and pursuant to Rule 33, SCRCP, explain why that documentation has not previously been produced.

BY: Robert B Ransom

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ATTORNEYS FOR THE PLAINTIFF

CERTIFICATE OF MAILING

The undersigned hereby certifies that a true copy of the Plaintiff's Second Request for Admissions has been served upon opposing counsel by depositing in the United States mail a copy of same properly addressed with sufficient postage affixed thereto this 25 day of Sept 2014.

Robert B Ransom

Exhibit C

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS

COUNTY OF CHARLESTON

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

Plaintiff,

vs. CASE NO. 2012-CP-10-7275

MEDICAL UNIVERSITY OF SOUTH CAROLINA,

Defendant.

DEPOSITION OF: JOHN L. FISHER

DATE: April 7, 2016

TIME: 12:47 PM

LOCATION: MUSC-STORM EYE INSTITUTE
167 Ashley Avenue
Charleston, SC

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: Laura J. Bash, RMR

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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(INDEX AT REAR OF TRANSCRIPT)

JOHN L. FISHER,
being first duly sworn, testified as follows:
EXAMINATION
BY MR. RANSOM:

Q. Good morning, Mr. Fisher. We've met once before. I'm Rob Ransom. I represent Shon Turner and the estate of Charles Mikell. They've got a lawsuit pending against the Medical University.

I'm here to take your deposition, to find out some things that you maybe know about the case.

Can I get you to state your full name for the record?

A. John Lawrence Fisher.

Q. What is your current residence address?

A. 2427 Shiraz, S-H-I-R-A-Z, Lane, Charleston, South Carolina.

Q. Where is that?

A. It's in West Ashley.

Q. And who, if anybody, lives there with you?

A. My wife Tai, T-A-I.

Q. Does she work outside the home?

A. Yes, sir.

Q. What does she do?

A. She's a school psychologist for the Charleston County School Board.

Q. Does she rotate amongst different schools or is located in one place?

A. Yes. No, she rotates.

Q. Well, have you ever given a deposition or testified under oath before?

A. Testified under oath, but not given a deposition.

Q. Okay. Well, let me tell you that there are a couple of fairly simple rules, as we get started here. First and most importantly, the court reporter is seated immediately to your left. She's taking down everything that's being said. In order to assist her in doing so accurately, I need your answers to my questions being verbal in nature, meaning yes or no, as opposed to a nod or a shake of the head. Okay?

Also to assist the court reporter in making an accurate record, it's best if two people are not speaking at the same time. This is the hardest rule to follow. So I'm going to do the best that I can to let you finish your answer before I ask the next question, and please do your

best to let me finish asking the question before you start to answer, so we're not talking over one another. Okay?

A. Yes, sir.

Q. If at any time I ask you a question that you don't understand, please just let me know and I'll try to re-ask it or rephrase it. But if you go ahead and answer my question, I'm going to assume that you understood it.

Is that fair?

A. Yes, sir.

Q. And finally, at any time during the deposition you need to take a break, just let me know, we'll be happy to let you go to the bathroom, get a drink, use the phone. But now that we're on the record, you're not permitted to discuss the substance of your testimony in this case with anybody in the room, except for me.

A. Yes, sir.

Q. Where are you currently employed?

A. At the Medical University of South Carolina.

Q. And what is your job there?

A. I am currently the manager of enterprise application development.

Q. What does that mean?
A. That means I manage the team that develops applications specifically for the university.
Q. Now, I understand that that position involves information technology?
A. Yes, sir.
Q. Or IT?
A. It is a part of the office of the chief information officer. Yes, sir.
Q. Tell me a little bit about yourself. Where you originally from?
A. Born and raised in Charleston, South Carolina. I have been here my whole life, outside of when I went to college, in Clemson.
Q. Clemson. What years were you up in Clemson?
A. I was there from 2001, till December of 2008.
Q. What is your degree?
A. I have both a Master's and Bachelor's in computer science.
Q. Where did you go to high school, down here?
A. The Charleston County School of the

Arts.
Q. What year did you graduate?
A. 2001.
Q. Do your parents still live here?
A. Yes, sir.
Q. What does your father do for a living?
A. My father is vice president of development at the Medical University of South Carolina.
Q. And did your mother work?
A. No, she does not.
Q. Do you have any brothers or sisters?
A. I have two sisters.
Q. Did they grow up here, as well?
A. Yes, sir.
Q. Where did they go to school?
A. They both went to James Island High School, before it was a charter school.
Q. Are they older or younger?
A. Both are older.
Q. How old a man are you today?
A. I am 33.
Q. Okay. What are your sisters' names?
A. Rebecca and Jennifer.
Q. Are they married?

A. Yes. Rebecca is not. She is Rebecca Fisher.
Q. What is Jennifer's last name?
A. Jennifer Fisher Bowman.
Q. B-O-W --
A. B-O-W-M-A-N.
Q. Now, do they work here in the Charleston area?
A. Rebecca does.
Q. What does she do?
A. To be honest with you, she just recently got a new job and I'm not aware of where it is. But she has been a nurse, so I suspect it's a nursing job.
Q. So she's got a nursing degree?
A. Yes, sir.
Q. Has worked in the local medical community?
A. Yes, sir.
Q. Has she ever worked for MUSC?
A. Yes, sir.
Q. Any other hospitals or healthcare facilities that she's worked at?
A. Not that I know.
Q. What does Jennifer do?

A. Jennifer is, more or less, a database administrator. I have forgotten -- I believe it is athenahealth, in Boston, Massachusetts.
Q. She lives in Boston?
A. Yes, sir.
Q. Are you a member of a church or any civic organizations here locally?
A. No, sir.
Q. You don't have any children?
A. No, sir.
Q. All right. I'm going to mark as Exhibit 1 an affidavit that you've provided in this case. And I've only got the one copy of it, so we'll have to share.
A. Sure.
(PLF. EXH. 1, Affidavit of John L. Fisher, was marked for identification.)
MS. FLEMING: I probably have a copy so you guys don't have to go back and forth. Just one second.
BY MR. RANSOM:
Q. Okay. So Exhibit 1 is an affidavit which you provided in this case and it was executed on December 4th of 2015. Is that correct?
Last page will show when it was signed

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and notarized.
A. Yes, sir.
Q. Okay. Is everything in the affidavit true and correct?
A. Yes, sir.
Q. Turn to Page 2, Paragraph 10, if you will.
A. Yes, sir.
Q. You'll see that's -- paragraph, it has two sentences, the second one begins with the word "furthermore"?
A. Yes, sir.
Q. Okay. So that second sentence reads: Furthermore, I concluded that none of the data regarding the oxygen saturation in the Picis anesthesia/PACU record was deleted for the times of approximately 7:35 a.m. through 7:47 a.m. Am I reading that correctly?
A. Yes, sir.
Q. Explain to me how you were able to reach that conclusion.
A. So all information stored in Picis is stored in the application database. That's how the application works. There are only two people that have the highest rights to that database, employed

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at the Medical University, myself and someone who is no longer employed here.
And we, in doing the work for the discovery for this case, created a test patient, created test data in the realtime data log, which is where all the machine data is, and verified that I am not able to delete any data out of that table in the database. Which means the only way data could be deleted out of that database would have been a Picis program developer, of which there are none in employment in the Medical University.
Q. Can data in the Picis database be changed?
A. In some cases. But we tried that, as well, on the realtime data graph and the audit table, and we were not able to do such.
Q. And this was done in, sort of, the ghost patient that you created in order to run this test?
A. Correct, sir.
Q. Okay. Which data stream were you hooked up to for this ghost patient?
A. We were not. It was -- we used the application to write data into that realtime graph, which is -- which is a function of the Picis

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application.
Q. Is that something different than actually having the biometric sensors on a patient, hooked up to the system?
A. Different, exactly, how?
Q. In terms of the input coming into the system?
A. Outside of the source, it's no different. It all goes to the same place.
Q. Where, exactly, is the Picis database located?
A. I have -- I don't know. In the sense, that I know it's at the Medical University, but whether -- what physical computer it is, I don't know. We have many data centers that we use.
Q. So it's on a computer server somewhere?
A. Yes, sir.
Q. In order for you to perform your work, it wasn't necessary for you to know the physical location of the server?
A. Correct.
Q. So you were able to input data into the system to see how it was captured and recorded?
A. Yes, sir.
Q. And then you attempted to delete that

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data?
A. And to modify it. Yes, sir.
Q. And to modify it. So you're saying, you're not able to modify it?
A. No, sir.
Q. All right. But you can modify the data that goes into the system from the patient. Correct?
A. Correct.
Q. So how do you explain that difference?
A. The program, when it's interacting -- the application, the Picis application, when it's interacting with the database, it may have certain permissions that I, myself, can't have when I'm accessing the database correctly. So any modification that would be done through the Picis application, can be done, but is then also recorded in the audit log, so that, later, we can go back and see, employee X made this change on this chart.
Q. Okay. So is there an audit log that shows any changes to the actual values, you know, the biometric data?
A. If it's modified through the

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application.
Q. Okay. Because I have been provided an audit trail that shows changes to the narrative portion of the record, and I've been provided an audit trail that shows when the record is printed. Is there an audit trail that shows whether or not data has been modified?
A. Yes, sir. I believe it was produced when we were in the Court, in December.
MS. FLEMING: I just want to put on the record, it was produced, and that's Bates label Pages 5,223 through 57-something. So you have that.
MR. RANSOM: Got it right here.
MS. FLEMING: No, you don't.
THE WITNESS: That's not the audit log.
MS. FLEMING: No, no. This is my work product.
Furthermore, I produced this to you on CD. I'm just saying.
MR. RANSOM: I'm not saying I didn't get it on the CD.
MS. FLEMING: Okay. I just wanted you to know.
MR. RANSOM: It's 700 pages of paper I

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didn't print out.
BY MR. RANSOM:
Q. So that record Ms. Fleming has identified for us, actually shows whether or not any of the vital signs data has been changed?
A. Yes, sir.
Q. Okay. And it's your testimony that, based on your review of that document, it has not been changed.
A. You would have to be more specific.
Q. Well, has any of the data been changed?
A. The way that the Picis program is written, if you make one change, it will pull the data for that specific column -- in this case, machine data -- all of it, over into the audit log.
One value was changed when, I believe, Ms. Thompson, Ms. Annette Thompson, showed Ms. Donna Embrey how to go back and fill the data in. That is the only value I saw changed.
Q. What value was that?
A. You would have to ask Ms. Thompson.
Q. Well, can you tell me, looking at that stack of paper right there, what it was?
A. Not without my computer, I could not.
Q. Okay. Do you know whether or not any

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of the blood oxygen saturation values were changed?
A. They were not.
Q. Did you specifically check for that?
A. Yes, sir.
Q. What about any of the heart rate values, were they changed?
A. Not that I'm aware of.
Q. End Tidal CO2 values, changed?
A. Not that I'm aware of.
Q. And again, you specifically checked those parts of the table?
A. Yes, sir.
Q. Okay. So I've got this record, this document that you were kind enough to provide me when you and I had a chance to talk back in December.
A. Yes, sir.
Q. And I have gone through it, and I think I actually understand what it is, but I want to make sure that I do.
So it consists of, sort of, two separate records. The first is Document Control Number 5763, which is sort of a summary page. And then the rest of it is Document Control Numbers 5025 through 5222. So it's -- if my math is

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correct, just about 197 pages [sic].
Is that a fair description?
A. Yes, sir.
Q. So let's look at this top page, 5763. And the first line that I see is SPO2, open parens, 120, close parens.
A. Yes, sir.
Q. So that's reference to the blood oxygen saturation?
A. If that is what SPO2 means. I'm not a doctor.
Q. Ill just tell you that's what that means.
And then over here on this side, if I follow that line across, it puts me into the light green that you've got reflecting Philips monitor?
A. Philips machine. Yes, sir.
Q. Philips machine. All right. Is that what that is intended to indicate --
A. Yes, sir.
Q. -- that that particular data stream is being captured by the Philips machine?
A. That is what I have been led to believe. Yes, sir.
Q. How have you come to draw that

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conclusion?
A. By talking with the Picis support team.
Q. Then you've got a dark green – a darker green block that says "anesthesia ventilation machine?"
A. Yes, sir.
Q. Is that word "ventilation" misspelled?
A. It's possible. I'm not a great speller.
Q. Okay. We'll go with that.
Do you know whether there is any blood oxygen saturation data that's captured by the anesthesia machine?
A. What is reflected is what I was told, but I could not say definitely that that's true.
Q. Okay. Look down near the bottom of the page, I think the very last line is SPO2 open parens, 120, close parens, blue line graph.
Do you see that?
A. Yes, sir.
Q. Okay. And that's being captured by the Philips machine?
A. Yes, sir. And it is the same data as stated at the very top.
Q. So what I want to do now, is I've got

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two pages of the very voluminous anesthesia record in this case, and I'm going to mark one as Exhibit 2 and the other as Exhibit 3.
(PLF. EXH. 2, MUSC Health Anesthesia Record, MUSC Page 499 of 2115, was marked for identification.)
(PLF. EXH. 3, MUSC Health Anesthesia Record, BWPH 1554/MUSC 2151, was marked for identification.)
BY MR. RANSOM:
Q. And Exhibit 2, you'll see, has got a Document Control Number of 499, down in the lower left.
Do you see that?
A. Yes, sir.
Q. And Exhibit 3 has got the Document Control Number cut off, in the lower left. But in the center of the page, it says Page 36 of 99.
MS. FLEMING: I can get you the right number. Just let me see that one.
MR. RANSOM: Off the record.
MS. FLEMING: So it's BWPH 1554, MUSC 2151.
MR. RANSOM: 2151. Okay. I'm going to write 2151, right there (marking).

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BY MR. RANSOM:
Q. So Exhibit 2 is Document Control Number 499, and Exhibit 3 is Document Control Number 2151. So we'll see if we can figure this out.
So you'll see up here at the top of Exhibit 3, there's this line "SPO2 percentage."
A. Yes, sir.
Q. And it runs across -- is that the x-axis or the y-axis? What do we call that?
A. I believe that is the x-axis.
Q. X-axis, running left to right -- right to left, rather. And we see it's a bunch of empty boxes, up until the time of 7:48. And then beginning at 7:48 and every minute thereafter, there is actually data being displayed in those boxes.
A. Yes, sir.
Q. Where is that data coming from? Is that coming from the Philips machine or from the anesthesia machine?
A. I have no way of knowing, looking just at these documents.
Q. All right. And then on Exhibit 2, you look down here, you see I have highlighted this

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graph -- graphic line?
A. Yes, sir.
Q. It's called the realtime data graph?
A. Yes, sir.
Q. Where is the data that's being plotted in that graph coming from?
A. Again, if you mean specifically at the time that it was captured, I couldn't tell you. But I know where it is in the database.
Q. So you don't know whether that's being plotted off of the Philips machine or the anesthesia machine?
A. Based off what I was told, which is on that top page, right there, it would be – I believe if you're talking about this – what should be a blue line, it's not in color, would be SPO2, from the Philips machine.
Q. From the Philips machine. Okay.
A. But that is the same SPO2 value up here, as well. They're both from the Philips machine.
Q. Okay. So that's what I really was coming to, was -- it's the same data –
A. Yes, sir.
Q. -- it's just being recorded in

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different ways in different parts of this record?
A. The data is only being recorded to that one table in the database. How it's represented on this printout is different.
Q. All right.
A. But it's the same data.
Q. Okay. So do you know if we -- if we took, from Exhibit 3, the data that's in the realtime variables part, if we plotted that in a graph, should it look like this graph here, in Exhibit 2?
A. It should. However, looking at this graph right now, I believe these times are marked incorrectly.
Q. Right.
MS. FLEMING: Just make sure you refer to --
THE WITNESS: The time on Exhibit 3, I believe the times running along the x-axis, which is generated by Picis, is incorrect.
BY MR. RANSOM:
Q. Okay. Setting aside for a moment the times themselves, the configuration of the graph should be the same.
MS. FLEMING: Objection to the form.

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THE WITNESS: It depends on the interval in which the graph is intended to show. The data at the top of Exhibit 3 is by minute. And if the graph on Exhibit 3 is also by minute, which again, I don't believe it is, then I would expect it to match up exactly. Now, however, if the graph were in, say, 15-minute variables, I believe that Picis will average the numbers for those 15-minute intervals.
BY MR. RANSOM:
Q. Got it. So it's not actually plotting every data point, it's running them through an algorithm and displaying them as an average.
A. It will plot every data point if the time values are the same.
Q. Okay. So shouldn't the realtime graph just be -- I hear what you're saying. Depending upon the time interval, it should just be a more-or-less, detailed display of the data that's in the table in the realtime variables.
A. The graph should be a display of what is in the realtime variables. Yes, sir.
Q. Okay. And if that weren't true, could you offer any explanation?
A. If the graph shown on these printouts,

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Exhibit 3 and Exhibit 2, if the graph does not match the realtime variables, then the only explanation I can give is that is a bug in Picis' programming. And that is beyond MUSC's ability to control.
Q. Okay. I mean, are you aware of there being that kind of a bug in the program?
A. I am not familiar enough with Picis to know.
Q. I mean, has anybody -- you ever overheard that? Anybody tell you that, during your conversations with them about this case?
A. No, sir.
Q. All right. So between this printout that I have here and the other printout that Ms. Fleming has, where do we find the data that is actually being plotted there in the realtime graph on Exhibits 2 and 3?
A. That will be with the printout that you have.
Q. This right here (indicating)?
A. Yes, sir.
Q. Got it.
You sure about that?
A. Yes, sir.

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Q. All right. Let's -- I just want -- this is going to be tough on the record, but I just want to make sure that I'm putting all this together correctly.
So we start out -- this is the time sequence, John?
A. Yes, sir.
Q. Running at one-minute intervals, beginning at the top, at 7:48, and on the bottom of that first page, it gets us to 8:19.
Am I understanding this correctly?
A. Yes, sir.
Q. And across the x-axis, you know, we got C001, C002, C003, and those correspond to some of the numbers that we see here on this front page, 5763?
A. They should. Yes, sir.
Q. Okay. And so as we go through, I notice that there's a page break. We get here --
A. Yes, sir.
Q. -- and what we've done is we have come to the end of these first four -- do you call these tables?
A. Those are columns.
Q. Columns. Okay. So we got 1, 2, 3, 4,

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5, 6, 7, 8, 9, 10, 11, 12 columns. And then it breaks at Page 5035. And it starts, and it goes like this (indicating).

Am I getting this right?

And that's how you put these together. So it goes from -- this column is 12, here, and then 13, 14, 15, and on down the line (indicating)?

A. May I look at this?

Q. Sure.

A. That appears to be how it's laid out.

Q. So the way I was looking at this, I take them and lay them across a big table -- you have to have a big table, because there are a lot of these -- and they go across, like this?

A. Yes, sir.

Q. And when you lay them all out, they fit together like that. Right?

A. Yes, sir.

Q. And when you find the column on the x-axis that corresponds with the blood oxygen saturation data, the time should line up -- because you'll notice, like, on this page, you don't have the times listed. Right?

A. Correct.

Q. But they correspond with what is

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provided here.

A. As long as the pages are still in order.

Q. I got it. That's why we're careful not to shuffle the deck on these things. Okay. Got it.

And what we find when we go through this process, is that the values in these various columns basically correspond with the x-axis, up here at the top on Exhibit 3.

A. Say that, again.

Q. That as we spread these out and we go through these -- all these pages, all right, that what we find, is, I think, C120, right -- when we look at the first page, 120 is the blood oxygen saturation. So when I go to Column 120 and I start reading down, and it begins over here at 7:48 a.m., it says 96.7, and I come on Exhibit 3, up at the top of the x-axis, I go across to 7:48, and I see 96.3, 75, 69.2, and that's how this fills in.

A. Yes, sir.

Q. Am I getting this right?

A. Yes, sir.

Q. Okay. I'm about to shuffle the deck. And you weren't going to stop me, were you?

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All right. So the other larger printout that Ms. Fleming has, how does that interplay with Exhibits 2 and 3?

What part of the data that's contained in 2 and 3 are in that other 500 pages? Can you explain that?

A. It does not. This audit trail only reflects changes to what you're holding in your hand.

Q. Okay. Reflects changes.

A. So what you are holding in your hand is the values at those times -- at the time in which that table was queried.

Q. That it was queried, meaning somebody got on the system and printed it out or looked at it?

A. Looked at it.

Q. And then this other -- what's the -- Alissa, if you will, what's the first document control number?

MS. FLEMING: 005223.

BY MR. RANSOM:

Q. 5223. Okay. Let's just call that 5223.

That would show you when each of the

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data points in this other record was -- were created, altered, deleted, in some way?

A. Only altered. There really are no deletions. If a value is quote/unquote "deleted," it just becomes -- if it's a numerical value, it becomes zero. There is no true delete.

Q. Got it. So these -- you know, we notice the word "null" in here for a lot of these. What does that mean?

A. Yes, sir. That means there is no data.

Q. So when we look, for example, at Column 120, and this is Document Control Number 5058, and I was just pointing out it starts 96.7, 75, 69.2, and on down the way, okay, we get to a couple places where it's null, null, null -- several nulls.

A. Yes, sir.

Q. What's going on there, do you know?

A. I do not know.

Q. So do you know anything about this process of capturing and repopulating dropped data into these charts?

A. Only very little.

Q. Okay. Tell me what you do know.

A. You would have to be specific.

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Q. Well, does -- is it possible when data gets dropped, to capture it somehow and repopulate the chart?

A. I'm not sure what you mean by "when data is dropped."

Q. So we've heard some testimony from some other witnesses about a circumstance where the digital stream is coming into the system off of the patient and it's being displayed on the display monitors, but it's not being recorded by the software system recording.

Is that making sense to you?

A. Yes, sir.

Q. And we've heard some testimony that when that happens, it's possible to go into the system and, somehow or other, capture that digital data and repopulate it into the chart.

A. What system are you talking about?

Q. Picis.

A. By definition of the situation you're explaining, Picis doesn't have the data.

Q. Okay. So it wouldn't be possible to repopulate the chart?

A. Not from Picis. If Picis has the data, there would be no need to repopulate.

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Q. So where might the data come from in order for it to be repopulated?

A. From the machines themselves.

Q. All right. And what do you mean by that?

A. I believe -- and again, I was never a part of the Picis team, nor do I know how the OR is situated. But from what I have been told, that the machines, themselves, might hold on to data for a few minutes, maybe until the next case has started. You would have to get the data from there. The data -- if the data is not flowing into Picis, Picis doesn't have the data.

Q. Can the Picis monitor display data that's not going into the system -- flowing into the system?

A. At the time that data is flowing into the system, it cannot.

Q. Let me see if I can word this question a little better.

So if I'm looking at a monitor that is hooked up to Picis, is it possible for that monitor to be displaying biometric information, you know, like a wave form, if, in fact, the data is not being captured by Picis?

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A. I'm not sure I understand what you're trying to ask.

Q. Well, so again, the fundamental question that we have had in this case, is why are these boxes empty? All right. And the answer that I have been provided, is, well, that it was a linkage or communication problem between the Picis system and the sensors on the patient's body.

MS. FLEMING: Object to the form.

You may answer.

THE WITNESS: Well, I don't believe that's a problem. I understand that the patient's chart could not be opened in the procedure room, but that's a proper function of the Picis system.

BY MR. RANSOM:

Q. Right. I get it. Right. I don't want to argue with you about that, because plenty of witnesses have called it a problem. This issue that prevents --

MS. FLEMING: Object to the form.

BY MR. RANSOM:

Q. -- that prevents the data from being recorded in the table. So if the data is not being recorded in this record, how is it possible to be able to see it being displayed on the monitor?

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A. Well, you're talking about two different systems. I mean, for example, we're talking right now. If we had a tape recorder and there's no tape, you know, we hit record on the tape recorder, but there is actually no tape in there, the fact that we are conversing is still true. It may not be recorded, but we're still conversing.

You're talking about data going from the machines to their monitors, and then data going from the machine to Picis.

Q. Okay. So does the Philips monitor record the data?

A. Yes, sir.

Q. Okay. And what happens to that data?

A. The data is supplied on its monitor and then a feed from that machine also goes to Picis.

Q. Okay. But where is that data -- when you say "it's on the Philips monitor," are we talking about on a little hard drive on the Philips monitor, and there is a bunch of 1s and 0s on there?

A. I have no knowledge of those machines.

Q. Okay. So is it possible, for example, for this graph to be plotted if the data that's

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being shown on the graph isn't being recorded?
A. What -- the data shown on the graph on Exhibit 2 and 3 is not reflective of what they may have seen on the machine --
Q. No.
A. -- during the procedure.
Q. My question is -- I mean, can this graph be plotted without the data being captured and recorded?
A. I'm not sure I understand what you're getting at. To me, these are just representations of what's in the database.
Q. What's the database?
A. The database is the brain of the application. The database stores all information that the application uses. The application is merely a user interface to the database. And we have shown that the database -- that there is no data prior to 7:48. And there have been no -- and no one can delete data from the database.
Q. Okay. And why are these boxes empty, then --
A. Because --
Q. -- on Exhibit 3?
A. Because the patient's chart could not

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be opened in the procedure room, so data could not flow into Picis; therefore, could not flow into Picis' database.
Q. But it could flow into the Philips monitor?
A. I don't really understand what you're trying to get at.
Q. I'm asking you a question.
A. No, I understand that, sir.
Q. If the Philips monitor is displaying wave form --
MS. FLEMING: Rob, one second. If he doesn't understand your question, you have to let him tell you that.
MR. RANSOM: That's why I'm re-asking the question.
MS. FLEMING: Let him finish telling you why.
BY MR. RANSOM:
Q. So if the Philips monitor is supplying a wave form, that means it's got data coming into the system. Right?
A. Yes, sir. Well, it has data coming into its system.
Q. Right. And that's why I'm asking you,

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and is that data captured and recorded by the Philips monitor system?
A. I have no -- I don't know anything about the Philips monitor system. But what I have been told is that those machines, at that time, do not maintain the data for very long, if -- maybe minutes.
Q. Who told you that?
A. The people who work for the Picis support.
Q. Whose names are?
A. Brett Seyfried. Annette Thompson.
Q. Okay. So Annette should be able to explain this?
A. Yes, sir.
Q. Okay. Now, that's the Philips monitor. What about the anesthesia machine?
A. Same thing.
Q. So you've been told certain things, but you don't know, one way or another?
A. It's not my job to be in the operating room or to understand those machines.
Q. Okay. All right. Have you talked with Annette Thompson about this case?
A. Yes, sir.

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Q. Tell me what you-all talked about.
A. Mostly, we talked about what we needed to do to provide all the discovery documentation that you've asked for.
Q. Okay. And again, the information that's contained in these printouts, this is the actual data that's pulled off of what?
A. That's the data stored on the database.
Q. What database?
A. The Picis database.
Q. So the Picis database, if I'm looking at this first page, 5763, it looks like it's storing data that's originated through the Philips monitor and the anesthesia machine.
A. Yes, sir.
Q. Okay. So could you check the anesthesia machine to see if that data is still there?
A. Not now.
Q. Okay. Could you at any time? I mean, tell me what you understand.
A. I don't know. I don't know. I don't know the capability of those machines.
MR. RANSOM: All right. That's cool. I don't have any other questions.

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EXAMINATION
BY MS. FLEMING:
Q. I have a few follow-up questions for you, John.
Mr. Ransom showed you two documents, Exhibit 2 and Exhibit 3, which are -- Exhibit 2 is representative of the 15-minute version of the anesthesia record. It's indicated, at the top, where it starts at 7:45. And Exhibit 3 is indicative of the one-minute version of the record.
I think you testified earlier that your work has confirmed there is no data for any of the vital sign values prior to 7:48 a.m., for either the information that's reflected in the realtime variable section on the heart rhythm, and the realtime data graph section.
Is that correct?
A. Yes, ma'am.
Q. Okay. So if Exhibit 3, if the realtime data graph, as we see on Exhibit 3, shows a value starting at 7:35 a.m., based on the work that you do, and your understanding of the Picis system, is this graph on Exhibit 3 accurate?
A. No. I don't believe that the times labeled on the graph on Exhibit 3 are correct.

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Q. Okay.
A. And in fact, looking at both of these, the times on Exhibit 2 correlate to the data better than on Exhibit 3.
Q. And the times on exhibit -- the graph on Exhibit 2 correlate to the data reflected in the realtime variable section of the record?
A. Of Exhibit 2, right. They're both -- as I said, they're both 15-minute intervals.
Q. Okay. And I think you said that you've confirmed that no data has been deleted by anyone at MUSC?
A. Yes, ma'am.
Q. At any time, including the times 7:35 to 7:48 a.m.?
A. Yes, ma'am.
Q. Okay. And now, with regard to the interface between the Philips monitor and the Picis software system, what -- in having that interface between the monitoring system and the Picis software, what's the purpose of that -- let me re-ask that question. I can see it's a bad one.
Does the -- is the purpose of having -- at the time, having the Picis software

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system, is the purpose to create an electronic record reflective of what was going on in the case?
A. Yes, ma'am.
Q. And in terms of using the actual monitor's data, that was -- that was conveyed by the monitors to the software, a provider, if the monitors were working correctly, could still see the data and vital signs on the monitors.
Is that your understanding?
A. I'm a little confused.
Q. Sure. Just because the data is not reflected in the record, didn't record or populate in the Picis system, doesn't necessarily mean that the monitors were not either on or not working.
A. Correct.
Q. Okay. I wanted to ask you, you were asked about querying the database. Has anyone at MUSC, other than you, queried the database?
A. I don't believe anyone else at the Medical University knows how to connect to the database or to run queries on it.
Q. Okay.
MS. FLEMING: I think that's all I have.
You have any other questions?

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MR. RANSOM: I do.
FURTHER EXAMINATION
BY MR. RANSOM:
Q. This is just to try to make sure that I understand what we're talking about.
So when we talk about storing data, we're talking about, like, on a computer hard drive. Right?
A. Yes, sir.
Q. Okay. Like, the computer hard drive that I have on my desktop PC. Right?
A. Yes, sir.
Q. And some computer hard drives are a little disk that is spinning. Right? Some are solid state?
A. Yes, sir.
Q. Like the thumb drive that I have, stick into my USB port, that's solid state. Right?
This is what we're talking about, data storage?
A. Yes, sir.
Q. So there's a hard drive on the Philips machine?
A. I don't know.
Q. Is there a hard drive on the anesthesia

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machine?
A. I don't know.
Q. Is there a hard drive that the Pixis [sic] system is running off of?
A. Do you mean Picis?
Q. I'm sorry. Picis.
A. Picis is an application that runs on a computer, so the computer would have a hard drive.
Q. Right. Picis is just a software application --
A. Correct.
Q. -- and it's running on a computer --
A. Correct.
Q. -- and that computer has a hard drive.
A. Correct.
Q. Okay. But what you're saying is you don't know whether or not the Philips machine has a hard drive, and you don't know whether the anesthesia machine has a hard drive.
A. I do not.
Q. And so you don't know whether the Philips machine would have stored any data after Mr. Mikell's procedure.
A. I don't.
Q. And you don't know whether the

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anesthesia machine would have stored any data after his procedure.
A. I do not.
Q. And you wouldn't know what, if anything, might be necessary to recover that data.
A. Correct.
Q. If I'm understanding the configuration, the Philips machine and the anesthesia machine are both hooked up to the Picis application?
A. Define what you mean by "hooked up."
Q. Well, the data that's streaming in off of the Philips machine is going to the Picis application. Right?
A. That's one of the places it goes.
Q. Okay. And data that is streaming in off of the anesthesia machine is going to the Picis application?
A. That's one of the places, yes.
Q. What other places does it go?
A. Their monitors.
Q. Okay. To the monitors. Right. I got it.
So what you're saying, is what we've discovered in this case, is that for, you know, whatever you want to call it, the Picis application

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is not causing that data to be recorded on its -- on the computer hard drive that it's hooked up to, but the information is still coming into the Philips machine, it's still coming into the anesthesia machine, and those two separate devices are still displaying that information on their separate displays.
A. That's correct. But I don't know what you mean by Picis is causing something to not happen.
Q. Well, the data is not being recorded, because the chart's not open.
A. That's -- yes, that's true. But your implication is that it was a problem, and it was no problem.
Q. Right. So for example, it wasn't necessary to call anybody on the phone and ask them to open --
A. I'm saying, it is. But I'm saying that that's the proper function of the Picis application.
Q. Well, let's be clear about this. When the boxes, here on Exhibit 3, are empty, is that a proper function -- is that the system functioning properly, for those boxes to be empty?

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A. Yes, sir. If the patient was not transferred correctly.
Q. Okay. But he was transferred and the procedure was started, so is that the way that it's supposed to work?
MS. FLEMING: Object to the form.
You may answer.
THE WITNESS: If they're not able to open the patient in the procedure room, then the patient was not transferred correctly. Picis is a computer program, Mr. Ransom. Computer programs are not intelligent. They are dumb, and they do exactly what they are told. And I understand that you may believe it to be a bug or a problem, but the Picis application worked as intended.
BY MR. RANSOM:
Q. Well, are you familiar with Nurse Embrey's testimony that when Mr. Mikell came into the procedure room, she clicked on an icon to open his chart in the procedure room?
A. I am.
Q. Is that what she's supposed to do?
A. It is.
Q. Did it work?
A. It did not.

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Q. Is that a problem? Or is that the proper functioning of a safety feature?

A. Define -- it depends on what you mean by a problem. Is it a problem that she couldn't open the chart? Of course it is.

But is it a problem, as in the computer software had a bug or glitch? No.

Q. Why didn't the chart open?

A. Maybe she didn't transfer the patient as she thought.

Q. Is there any other explanation?

A. That's the way the program is designed. If she could not open the patient in the procedure room, then the transfer did not occur.

Q. Okay.

A. And that is a safety feature of the Picis application.

Q. Okay.

A. I just want to be clear, that it is not a bug, it was not a glitch.

Q. If she clicked on the icon and what she expects to happen and what is supposed to happen doesn't happen, what adjective do we attach to that?

A. It's not a bug or glitch, sir.

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Q. What is it?

A. Well, it's unfortunate, is what it is. She could click on "transfer the patient," and maybe before she hit the button, the mouse jitters off the button, she clicks, thinks it's done and walks off. The fact is, the patient's not transferred, so she can't open in the procedure room.

It's not a bug.

Q. So if that happened, the patient doesn't transfer and the file doesn't open in the procedure room, that's because she made a mistake?

A. I don't know. I wasn't there.

Q. How else could it happen?

You just said it's not explainable by a malfunction with the computer or the software. So the only explanation is user error. Right?

A. (Witness shrugs.)

Q. You're shrugging your shoulders. I need a verbal answer, please.

A. You are trying to put words in my mouth. I'm only telling you the facts. I'm telling you the truth. I don't know why the patient wasn't transferred. But what I'm telling you, is the patient wasn't transferred, and that's

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why they couldn't open the procedure. It is a safety feature of the application. It was not a bug or glitch.

Q. Okay. So she didn't click on the icon --

A. I can't make that assumption.

Q. -- correctly.

What I'm asking you to do is explain to me what all the possible things that could account for what happened might be.

A. I don't have enough time in the day to explain to you all the possible things. All you need -- all I know is the patient wasn't transferred.

Q. You don't have enough time in the day? I do.

MS. FLEMING: Objection to the form.

You can answer the question.

THE WITNESS: I don't know what you're trying to get, sir.

BY MR. RANSOM:

Q. I'm trying to find out what explanation there is to account for the fact that the patient did not properly transfer, other than Donna Embrey doing something wrong?

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A. I wasn't there. I don't know what happened.

Q. Okay. But you're sure that it wasn't a computer error?

A. I'm positive.

Q. Okay. Couldn't be a computer error --

A. I am positive.

Q. -- right?

I mean, you're positive it could not have been some problem with the computer system?

A. Positive.

Q. Okay. So what else does that leave?

A. Whatever you wish to believe. I'm not there, I can't tell you what happened. I can only tell you how the program is designed to operate.

Q. Okay. Is human error one of the possibilities?

A. I'm not at liberty to say. I don't know. I don't know enough about the human psychology to say that.

Yeah, I suppose it could be. But so could many other things.

Q. Well, it's either a computer malfunction or a human error. Right?

MS. FLEMING: Objection to the form.

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THE WITNESS: I don't know.
BY MR. RANSOM:
Q. Okay. That's fine. That's your sworn testimony under oath. We'll let the jury evaluate that.
I don't have any other questions.
MS. FLEMING: No questions.
MR. RANSOM: I would like to get the witness to read and sign that, though.
MS. FLEMING: I think he has the right to read and sign. I think we have done that with every witness.
MR. RANSOM: Right.
MS. FLEMING: Yeah.
MR. RANSOM: Yeah. So please, read and sign.
MS. FLEMING: Well, he can't do it right now.
MR. RANSOM: I know. Once the transcript is ready, he can.
FURTHER EXAMINATION
BY MS. FLEMING:
Q. Mr. Fisher, at the time of this incident -- or in general, does MUSC have -- you were talking about the Picis support team. What is

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the Picis support team, or what was the Picis support team?
A. They were the IT employees -- they were Medical University employees hired to support Picis whenever there were issues or whenever a user was having trouble with the system.
MS. FLEMING: Okay. That's all I have. Thank you.
(Signature not waived.)
(The deposition concluded at 1:43 p.m.)

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SIGNATURE OF DEPONENT
DEPONENT: JOHN L. FISHER
DEPOSITION DATE: APRIL 7, 2016
REPORTER: LAURA J. BASH
CASE CAPTION: TURNER vs. MUSC

(Please return both Signature of Deponent pages)
I, the undersigned, JOHN L. FISHER, do hereby certify that I have read the foregoing deposition and find it to be a true and accurate transcription of my testimony, with the following corrections, if any:

PAGE	LINE	CHANGE	REASON

Page 53

SIGNATURE OF DEPONENT (CONTINUED)
DEPONENT: JOHN L. FISHER
DEPOSITION DATE: APRIL 7, 2016
REPORTER: LAURA J. BASH
CASE CAPTION: TURNER vs. MUSC

PAGE	LINE	CHANGE	REASON

JOHN L. FISHER Date

I, Laura J. Bash, Notary Public for the State of South Carolina at Large, do hereby certify that the deponent was advised of his or her right to read and sign said deposition both verbally and in writing. If the deponent fails to execute and return foregoing Signature of Deponent pages within the thirty (30) days allowed pursuant to the Rules of Civil Procedure, the original transcript may be filed with the court.

Laura J. Bash, RMR
My Commission expires
July 7, 2025

CERTIFICATE OF REPORTER

I, Laura J. Bash, Registered Merit Reporter and Notary Public for the State of South Carolina at Large, do hereby certify that the foregoing transcript, is a true, accurate, and complete record.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 7th day of April, 2016, at Charleston, Charleston County, South Carolina.

Laura J. Bash, RMR
My Commission expires
July 7, 2025

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REQUESTED INFORMATION INDEX
(No Information Requested)

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Exhibit D

MUSC Health
SURGICAL SERVICES

POST ANESTHESIA CARE UNIT RECORD
Nursing Documentation Sheet

PACU

Account #: 270428782
Patient Name: MIKELL, CHARLES
DOB: 1/25/1951 Age: 49 years
CPI: 001400764 Sex: M
Physician:

Height (cm): 175 BMI: 44.73
Weight (Kg): 137.29883 Admission Date: 10/1/2010

Dt /Tm Initials	NURSING CARE	Dt /Tm Initials	NURSING CARE
10/01/2010 10:08 JGT	Foley Catheter: Placed *** Done		
10/01/2010 10:15 JGT	Suctioned *** Done		
10/01/2010 11:00 JGT	Suctioned *** Done		
10/01/2010 12:00 JGT	Suctioned *** Done		
10/01/2010 12:37 JGT	Suctioned *** Done		

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 07:48 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 09:00 EWN	Memo Came into room. PL 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 RL 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 09:31 EWN	Anesthesiologist present for airway device placement	10/01/2010 08:58 DBE	Patient identified by 2 methods
10/01/2010 09:31 EWN	Arrhythmia identified: v fib	10/01/2010 08:58 DBE	Pre-op vital signs reviewed
10/01/2010 09:31 EWN	Non-palpable pulse	10/01/2010 08:58 DBE	Surgical consent verified and appropriate
10/01/2010 09:31 EWN	Chest compressions initiated	10/01/2010 08:58 DBE	Risks, benefits, and complications of anesthetic plan

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MUSC Health
SURGICAL SERVICES

POST ANESTHESIA CARE UNIT RECORD
Nursing Documentation Sheet

Account #: 270428782
Patient Name: MIKELL, CHARLES
DOB: 1/25/1961 Age: 49 years
CPI: 001400764 Sex: M
Physician:

Height (cm): 175 BMI: 44.73
Weight (Kg): 137.28983 Admission Date: 10/1/2010

Dt /Tm Initials	NURSING CARE	Dt /Tm Initials	NURSING CARE

Dt /Tm Initials	EVENTS	Dt /Tm Initials	EVENTS
	discussed and understood		
10/01/2010 08:58 DBE	Procedural site marking(s) verified where appropriate		
10/01/2010 09:04 DBE	Transfer from LCsAn		
10/01/2010 09:12 JGT	Transfer to PACU		
10/01/2010 09:46 JGT	Family at Bedside mother		
10/01/2010 10:54 JGT	Family at Bedside mother		
10/01/2010 12:16 JGT	Memo Dr. Guidan at bedside. Propofol off at this time to evaluate patients Neuro status.		
10/01/2010 12:17 JGT	Family at Bedside pastor		
10/01/2010 13:40 JGT	Discharge criteria not met		
10/01/2010 13:40 JGT	Transfer to ICU:		
10/01/2010 13:40 JGT	Transported via stretcher/bed stretcher		
10/01/2010 13:40 JGT	With Oxygen		
10/01/2010 13:40 JGT	With monitors		
10/01/2010 13:40 JGT	Ready for Discharge from PACU (RDPACU)		
10/01/2010 13:42 JGT	Memo Ice packs applied to pulse points. Dr. Guidan at bedside to evaluate patients neuro status. No response to verbal or noxious stimuli. Placed back on sedation for transfer to MSICU		

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MUSC Health

ANESTHESIANT

Anesthesia/PACU Record

MRN: 001400764	Height(cm): 175.20002
Name: MIKELL, CHARLES L.	Weight(kg): 137.29366
DOB: 01/25/1961	BMI: 44.7
PatCom: 270428782	Sex: M
Surgeon: Payne , Mark	Age: 49 years

Surgery Date: 10/01/2010

Case Times

Anest Start: 10/01 07:20	Surg Start: 10/01 07:35	Proc Start: 10/01 07:42	PACU Start: 10/01 08:45	Stepdown Start:
Anest End: 10/01 09:12	Surg End: 10/01 08:37	Proc End: 10/01 07:56	PACU End: 10/01 13:40	Stepdown End:
Anest Total: 01:52	Surg Total: 01:02	Proc Total: 00:14	PACU Total: 04:55	Stepdown Total:

Surgical Procedure

DIAGNOSTIC COLONOSCOPY

Pre-op Diagnosis

Post-op Diagnosis

Allergies

No known medication allergies

Anesthesia Type

General Anesthesia

ASA

III

Staff and Electronic Signature Legend (Initials)

Role: Scheduled Surgeon - Payne, Mark (MAP)
Role: Primary Surgeon - Payne, Mark (MAP)
Role: Pre/Postoperative Registered Nurse - Toohey, Jeffrey (JGT)
Role: Anesthesia Attending - Nelson, Eric (EWN)
Role: CRNA - Embrey, Donna (DBE)

Anesthesia Attending Documentation Electronically Signed By:

10/01 7:48 EWN Anesthesiologist assessed patient, reviewed chart and formulated anesthesia pla
10/01 7:48 EWN Anesthesiologist medically directing case and present for all critical portions.
10/01 7:48 EWN Anesthesiologist present for induction
10/01 7:48 EWN I (or another attending anesthesiologist) was immediately available throughout a
10/01 8:31 EWN Anesthesiologist present for airway device placement

Anesthesia Events

10/01 7:25 DBE Airway equipment available and functioning	10/01 7:48 DBE Memo Nelson,MDA in .Nasal airway in. O2 sat up to 94%. Pt remains lateral.		applied
10/01 7:25 DBE Surgical consent verified and appropriate	10/01 7:48 EWN Anesthesiologist assessed patient, reviewed chart and formulated anesthesia plan	10/01 8:16 DBE Left radial artery	
10/01 7:25 DBE Pre-op vital signs reviewed	10/01 7:48 EWN Anesthesiologist present for induction	10/01 8:16 DBE 20 ga arterial catheter over wire	
10/01 7:25 DBE Risks, benefits, and complications of anesthetic plan discussed and understood	10/01 7:51 DBE Memo Nelson out.	10/01 8:16 DBE Attempts: 1 per Dushanko,CRNA.	
10/01 7:25 DBE Procedural site marking(s) verified where appropriate	10/01 7:55 DBE Memo Pt turned supine from Lateral to establish better assisdted Bag-Mask ventilation. Nasal airway out. Oral airway in.	10/01 8:16 DBE Good arterial waveform	
10/01 7:25 DBE Anesthesia machine checked, alarms on and functioning		10/01 8:23 DBE Peripheral IV placed after induction	
10/01 7:25 DBE Integrity of Anesthesia circuit confirmed	10/01 7:56 DBE Memo Came into room. Pt. hypoxic with junctional rhythm and no palpable pulse. ACLS protocol initiated, Mayday team called.	10/01 8:23 DBE Aseptic technique used	
10/01 7:25 DBE Standard monitors available, alarms on and functioning		10/01 8:23 DBE 16 gauge peripheral IV catheter	
10/01 7:25 DBE Suction available and functioning	10/01 7:57 DBE Non-palpable pulse	10/01 8:23 DBE Left anticubital x1 per Dushanko,CRNA.	
10/01 7:25 DBE Anesthesia and resuscitation drugs available	10/01 7:57 DBE Chest compressions initiated and continuous until noted.	10/01 8:25 DBE Skin preparation with chlorhexidine	
10/01 7:25 DBE Patient identified by 2 methods	10/01 7:57 DBE Patient Oxygenated w/100% 02 per Bag-mask	10/01 8:25 DBE Landmarks indentified	
10/01 7:25 DBE Patient chart and preoperative assessment reviewed	10/01 8:01 DBE Atraumatic laryngoscopy DVL x 1 per Embrey,CRNA.	10/01 8:25 DBE Introducer needle inserted into vessel, free blood flow	
10/01 7:25 DBE NPO status verified		10/01 8:25 DBE Triple lumen catheter RL femoral vein.	
10/01 7:25 DBE Peripheral IV placed preoperatively	10/01 8:01 DBE Intubation - Tube size: #8.0 fr ETT @ 23 cm @ lips.	10/01 8:25 DBE Sterile transparent dressing placed over insertion site	
10/01 7:25 DBE Right hand		10/01 8:25 DBE Maximum barrier precautions utilized for strict sterile technique including sterile body drape, hat, mask, and sterile gloves.	
10/01 7:25 DBE 22 gauge peripheral IV catheter in situ in HA.	10/01 8:01 DBE Cuff inflated with minimum volume to create seal	10/01 8:25 DBE Hand hygiene prior to donning gloves	
10/01 7:35 DBE Transfer to:		10/01 8:25 DBE Blood return through all lumens. Lumens flushed.	
10/01 7:42 DBE Patient evaluated immediately prior to Induction	10/01 8:01 DBE Breath sound equal and bilateral	10/01 8:25 DBE Central line placed by Attending Anesthesiologist	
10/01 7:42 DBE Standard monitors applied	10/01 8:01 DBE ETCO2 confirmed via CO2 Monitor	10/01 8:31 DBE Post resuscitation rhythm: SR.	
10/01 7:42 DBE Respiratory rate monitored	10/01 8:01 DBE Memo Eyes taped.	10/01 8:31 DBE Patient Oxygenated w/100% 02 and remains on vent.	
10/01 7:42 DBE ETCO2 wave form present	10/01 8:11 DBE Arrhythmia identified: v fib noted when compressions halted.	10/01 8:31 DBE ETT in place as per above.	
10/01 7:42 DBE Plan spontaneous ventilation throughout case	10/01 8:11 DBE Defibrillation - Joules: 200	10/01 8:31 EWN Anesthesiologist present for airway device placement	
10/01 7:48 EWN Anesthesiologist medically directing case and present for all critical portions.	10/01 8:12 DBE CPR stopped Palpable pulse present.	10/01 8:31 EWN Patient stabilized	
10/01 7:48 EWN I (or another attending anesthesiologist) was immediately available throughout and present for all key/critical portions of case	10/01 8:16 DBE Skin prep with chlorhexadine	10/01 8:37 DBE Patient transported with O2	
	10/01 8:16 DBE Sterile technique	10/01 8:37 DBE To recovery area in stable condition	
	10/01 8:16 DBE Arterial line placed by CRNA		
	10/01 8:16 DBE Arterial catheter taped and sterile dressing		

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

Case Times

Anest Start: 10/01 07:20	Surg Start: 10/01 07:35	Proc Start: 10/01 07:42	PACU Start: 10/01 08:45	Stepdown Start:
Anest End: 10/01 09:12	Surg End: 10/01 08:37	Proc End: 10/01 07:56	PACU End: 10/01 13:40	Stepdown End:
Anest Total: 01:52	Surg Total: 01:02	Proc Total: 00:14	PACU Total: 04:55	Stepdown Total:

Surgical Procedure

Staff and Electronic Signature Legend (Initials)

Pre-op Diagnosis

Anesthesia Attending Documentation Electronically Signed By:

Post-op Diagnosis

Allergies

Anesthesia Type	ASA
General Anesthesia	III

Anesthesia Events

10/01	8:37	DBE	Transported via stretcher/bed
10/01	8:45	JGT	Phase I PACU admission
10/01	8:45	JGT	Report received from: Donna Embry CRNA
10/01	8:45	JGT	Side rails up
10/01	8:45	JGT	Wheels locked
10/01	8:45	JGT	Connected to monitors
10/01	8:45	DBE	To PACU in stable condition with O2/ambu/MDA/RT/monitors for transport. VSS. Pt to vent in PACU on arrival per RT. SBAR report to PACU RN.
10/01	9:15	DBE	Postoperative Location:PACU
10/01	9:15	DBE	Cardiac arrest: during procedure.
10/01	9:15	DBE	Requiring vasoactive/inotropic drips
10/01	9:15	DBE	Mechanical ventilatory support
10/01	9:15	DBE	Pain managed by primary care service
10/01	9:46	JGT	Family at Bedside mother
10/01	10:54	JGT	Family at Bedside mother
10/01	12:16	JGT	Memo Dr. Guidan at bedside, Propofol off at this time to evaluate patients Neuro status.
10/01	12:17	JGT	Family at Bedside pastor
10/01	13:40	JGT	Discharge criteria not met
10/01	13:40	JGT	Transfer to ICU:
10/01	13:40	JGT	Transported via stretcher/bed stretcher
10/01	13:40	JGT	With monitors
10/01	13:40	JGT	With Oxygen
10/01	13:42	JGT	Memo ice packs applied to pulse points. Dr. Guidan at bedside to evaulate patients neuro status. No response to verbal or noxious stimuli. Placed back on sedation for transfer to MSICU

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF CHARLESTON)	CIVIL ACTION NO.:2012-CP-10-7275
SHON TURNER, as Personal Representative of the ESTATE OF CHARLES MIKELL, deceased,)	
Plaintiff,)	**PLAINTIFF'S REPLY MEMORANDUM ON ISSUE OF ATTORNEYS FEES**
vs.)	
MEDICAL UNIVERSITY OF SOUTH CAROLINA,)	
Defendant.)	

FILED
2016 JUN 15 PM 3:3
JULIE J. ARMSTRONG
CLERK OF COURT
BY

On several occasions, the Court has announced its decision to grant the Plaintiff's September 9, 2015 Motion for Sanctions and impose attorneys fees and costs for discovery abuse. For example, at a hearing held on December 11, 2015, the Court said the Plaintiff had made a *prima facie* case of discovery abuse. Then in an email sent to counsel on March 17, 2016, the Court said the Plaintiff's motion was being "partially granted." More recently, during the trial of this case, the Court repeatedly said the motion had been granted and defense counsel was given an opportunity to respond to the attorneys fee Affidavits submitted by Plaintiff's counsel.

Abusing that opportunity, on May 9, 2016 the Medical University filed a sixty (60) page Supplemental Memorandum in Opposition to Plaintiff's Motion for Discovery Sanctions. Only three (3) pages of this Supplemental Memorandum address the attorneys fee Affidavits submitted by Plaintiff's counsel; and those three pages discuss the attorneys fees in the context of non-controlling North Carolina law. The remainder of the Supplemental Memorandum asks the Court to once again reconsider its decision to grant the Motion for Sanctions.

DISCOVERY ABUSE

It bears mentioning that at the time of the events in question, Mr. Mikell was unconscious. Consequently, in preparing this case for trial, the Plaintiff had no choice but to rely exclusively on the Medical University's records and the hostile recollections of its employees as the sole sources of information about what happened. Through its alteration, falsification and selective release of information, the Medical University distorted the truth. Plaintiff's counsel was able to recognize this subterfuge and repeatedly challenged the false defense narrative. The Medical University nevertheless succeeded in withholding material facts, records, data and opinions until the very end of a three (3) year discovery process. Some information came to light only when defense witnesses took the stand at trial.[1]

The Medical University nevertheless continues to insist that it did not withhold any information during discovery, contending that although "witnesses may have been mistaken about the existence of records,"[2] the Medical University "was nothing but honest, thorough and forthcoming."[3] It asks the Court for sympathy because things which it "honestly believed"[4] to be true nevertheless turned out to be completely false. The Medical University further asks the Court to excuse its "honest errors"[5] because of its "confusion"[6] about its own records. It points to the "feigned

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[1] For example, the Medical University never disclosed its intention to elicit expert opinion testimony about Mr. Mikell's life expectancy from Dr. Zile.

[2] Supplemental Memorandum at page 2.

[3] *Ibid* at page 3.

[4] *Ibid* at page 4.

[5] *Ibid* at page 7.

[6] *Ibid* at page 3.

frustration"[7] of Plaintiff's counsel, whose case it contends was "strategically built"[8] to take advantage of the Medical University's inability to get certain important details right. As though in building his case, the Plaintiff had any choice but to play the cards as they were being dealt.

Central to the discovery abuse issue is the Medical University's acknowledgment that "upon further investigation,"[9] and while it was "investigating additional issues,"[10] it asked its witnesses to "more closely scrutinize certain information,"[11] which lead defense counsel to concede false information had been provided to the Plaintiff. Interestingly, however, the Medical University nowhere offers any explanation for what triggered this "further investigation;" nor why its information was being "more closely scrutinized" when the "honest errors" were discovered. And therein lies the whole rub.

One imminently reasonable conclusion is that the triggering event for the Medical University's "further investigation" and "closer scrutiny" was the June 15, 2015 deposition of defense expert, Dr. James Berry, who testified to the following:

1) the empty boxes in the anesthesia chart were most probably explained by the medical care providers beginning Mr. Mikell's colonoscopy before the vital signs monitoring equipment had been turned on and warmed up, which was a breach of the standard of care;[12] and

2) the anesthesia narrative had been changed by Donna Embry in a way Dr.

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[7] *Ibid.*

[8] *Ibid* at page 2.

[9] *Ibid* at page 5.

[10] *Ibid.*

[11] *Ibid.*

[12] For a detailed discussion of Dr. Berry's testimony, please see pages 4 and 5 of the Plaintiff's Response to Defendant's Motion for Partial Summary Judgment, filed on October 14, 2015.

Berry could not even believe was possible.[13]

Dr. Berry's extremely damaging testimony apparently resulted in defense counsel's "further investigation" of the vital signs data and "closer scrutiny" of the anesthesia narrative. Why such investigation and scrutiny did not take place in response to the Plaintiff's many discovery requests, served more than two (2) years before Dr. Berry's deposition, remains unanswered.

The Medical University suddenly faced the Hobson's choice of either living with Dr. Berry's testimony or disclosing what up until that point had long been obfuscated: (1) the missing vital signs data was explained by a software glitch with the PICIS system which had required text messages and phone calls to correct; and (2) Donna Embry had altered Dr. Nelson's entries in the anesthesia narrative using a time-line derived from the Mayday record.

So just three weeks after the transcript of Dr. Berry's deposition became available, the Medical University began rolling out a series of new disclosures, including: (1) the August 20, 2015 production of the illegible American Heart Association database (made using the Mayday record); (2) the August 24, 2015 testimony of Sheila Scarbrough (who admitted receiving and then destroying a fax of the Mayday record); (3) the September 21, 2015 amendments to the Plaintiff's Second and Third Requests for Admissions (admitting a Mayday record was created and producing the second audit trail); (4) the September 22, 2015 testimony of Dr. Reeves (who first disclosed the software glitch); and (5) the December 2, 2015 document production (including the text message and telephone call log and the backup anesthesia data).

While defense counsel would have this Court believe all of these late-breaking disclosures were the result of its tireless effort at full and forthright disclosure, the truth is that the deposition

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[13] June 15, 2015 deposition of James M. Berry, MD at pages 127 and 144-145.

testimony of its own expert threatened to hoist the Medical University by its own petard and that was most likely the motivation for the "further investigation" and "closer scrutiny" which lead to all of these disclosures. The Plaintiff had no choice but to adjust his theory of the case to account for this new information, the dilatory disclosure of which allowed the Medical University to regain the initiative[14] and ultimately obtain a favorable outcome at trial.

ATTORNEYS FEES

Turning now to the issue of attorneys fees, it is important to note at the outset that medical malpractice is a specialized area of personal injury practice. Most attorneys do not take these cases, which involve significantly greater investment of time and money than do other, less technical areas of personal injury practice. In order to succeed with medical malpractice cases, counsel must have access to qualified medical experts and sufficient financial resources to carry a case from initial record gathering and expert review through appeal, if necessary. Each case also requires insight into the scientific aspects of the specific medical conditions and treatments at issue.

As a personal injury attorney, Mr. Ransom typically handles cases on a contingent fee basis. He does not routinely do hourly fee work, although there are exceptions. Mr. Ransom last did insurance defense work – where he was paid an hourly rate by an insurance company to defend one of its insured in litigation – in the early 2000s. The last insurance defense case Mr. Ransom handled was a multi-state trademark infringement dispute filed by Microsoft Corporation against Mr. Ransom's client in federal courts in both North Carolina and Oklahoma. Mr. Ransom's representation required him to be admitted to practice *pro haec vice* in both of those States. His hourly rate was $200.00, a 50% reduced rate because there was a coverage dispute with his client's

[14] In the game of chess, "maintaining the initiative" refers to the ability to force your opponent to move pieces in response to your moves, instead of in execution of your opponent's own strategy.

insurance carrier.

Mr. Ransom began his career in the legal profession in 1983 in the context of mass tort litigation against chemical companies which had manufactured the Agent Orange defoliant used during the Vietnam War. During this time, when his business was almost exclusively defense oriented, Mr. Ransom's work was billed at hourly rates which varied according to client. In the 1980s, the standard pyramidal business model for insurance defense firms involved young associates gaining experience by handling routine disputes at billable rates ranging from $75.00 to $150.00 per hour. Beginning in the early 1990s, Mr. Ransom began to focus on asbestos personal injury litigation, with his clients including several companies with national-level exposure to asbestos liability. Mr. Ransom's work for these non-insurance company clients was often billed at rates of $200.00 per hour or more.

After co-founding his own firm in 1996, Mr. Ransom occasionally did business litigation on an hourly fee basis. In one such matter, involving distraint of equipment under a commercial lease, his hourly rate was $275.00. More recently, Mr. Ransom has charged an hourly rate to serve as an expert witness in legal malpractice claims. His current rate in such cases is $450.00 per hour and his services at that rate have been engaged as recently as May 2016. That rate is based on Mr. Ransom's 30-plus years of experience in complex civil litigation including toxic torts, admiralty, construction, Uniform Commercial Code, personal injury, administrative law, and appellate work. At this point, Mr. Ransom has tried more than 100 civil cases to a jury verdict. In an era of mandatory alternative dispute resolution, that is a fairly rare level of civil trial experience.

Bookkeeping records for the time period during which the discovery abuse in Mr. Mikell's case took place (2014- 2015) allow Mr. Ransom's effective hourly rate to be calculated by dividing gross revenue from attorneys fees ($1,433,097.00) by the number of hours worked (3,440). Using

that methodology, Mr. Ransom's effective billing rate for the years 2014-2015 is approximately $416.00 per hour.

Despite the Medical University's argument, Plaintiff's counsel declines to violate the parties' written agreement to keep the mediation process confidential. The Plaintiff will neither disclose nor discuss the details of the parties' pre-trial settlement negotiations.

Regarding the amount of an attorneys fee award, the South Carolina Supreme Court has identified six factors for a trial court's consideration: (1) the nature, extent and difficulty of the services; (2) the time and labor necessarily devoted; (3) the professional standing of counsel; (4) the contingency of compensation; (5) the fee customarily charged in the locality for similar services; and (6) the beneficial results obtained. Collins v. Collins, 239 S.C. 170, 122 S.E.2d 1 (1961); Burgess v. Burgess, 407 S.C. 98, 753 S.E.2d 566 (Ct. App. 2014). These factors apply regardless of whether the fees are awarded pursuant to a statute or private contract.

1. Nature, Extent and Difficulty of Services

The issue *sub judice* involves the Medical University's failure to meet its discovery obligations in a medical malpractice case involving thousands of pages of medical records and uncounted gigabytes of electronic medical record data. Prior to this case, Plaintiff's counsel had handled several anesthesia cases, including those involving airway management issues. However, counsel had never before encountered a PICIS electronic anesthesia record and was unfamiliar with the detailed audit trails and technical aspects of such a system. Counsel had successfully handled other medical malpractice cases against the Medical University but those cases did not involve the Mayday policy, the documentation of cardiac arrests, backup data systems, or systems for sending text messages amongst care providers. Thus, this case necessarily required a significant time investment to learn and understand these issues and systems in order to effectively challenge the

Medical University's discovery responses. Such an effort would not have been required had the Medical University not wrongfully obstructed the discovery process by, *inter alia*, failing to provide truthful answers to simple, straight-forward questions.

2. **Time and Labor Necessarily Devoted**

In order to determine whether the Medical University was being forthcoming about multiple discovery issues – the Mayday record; the missing vital signs data; the software glitch; the text messages and phone calls; the American Heart Association database; the audit trails; the altered anesthesia narrative; the backup anesthesia data – Plaintiff's counsel had to serve multiple discovery requests, file multiple motions, and appear at multiple court hearings.

As examples, in August 2014 defense counsel improperly instructed Donna Embry and Dr. Nelson not to answer certain questions at their depositions. This resulted in a disputed Motion for Protective Order followed by a ruling allowing the Plaintiff to re-depose these two witnesses. In November 2014, Dr. Guldan gave inscrutable testimony as the Medical University's Rule 30(b)(6) designee on the Mayday policy. This resulted in a Motion to Compel followed by a ruling that the Medical University produce another designee.

In August 2015, the Medical University claimed it was unable to produce a legible printout of the American Heart Association database and that it would cost over $3,200,000.00 to produce backup data underlying the anesthesia record. It was only after the Plaintiff obtained a document describing the Medical University's Enterprise Data Warehouse system; retained a firm with expertise in the recovery of electronically stored information; filed the Plaintiff's Motion for Sanctions; and attended two hearings, that both the database printout and the backup data were produced.

The point is that the Medical University never once conceded a single disputed issue. Nor

was the Medical University's position upheld a single time. This result came about only because of the time and effort spent by Plaintiff's counsel, as detailed in the Affidavits submitted for the purpose of recovering attorneys fees. Contrary to the Medical University's baseless assertion, the time set forth in the Affidavits was not directed at routine discovery issues but rather was necessitated by the Medical University's consistent refusal to give straight answers to direct questions and its persistent strategy to "not volunteer" any information if there was any way to withhold it.

3. **Professional Standing of Counsel**

Mr. Ransom is a well-respected member of the South Carolina Bar with 32 years of civil litigation experience. He receives medical malpractice referrals from a wide variety of sources, including former clients; other trial lawyers; defense lawyers; hospital administrators; insurance adjusters; mediators; and even medical care providers whom he has sued. Mr. Ransom has consistently been selected as a South Carolina Super Lawyer in the area of medical malpractice since 2009. He is recognized as one of the top medical malpractice plaintiff's lawyers in the Midlands of South Carolina, having obtained a number of multi-million dollar verdicts and settlements in medical malpractice cases over the last 15 years. Other members of the plaintiffs' trial bar regularly solicit Mr. Ransom's advice on matters of procedure, strategy and trial advocacy. On occasion, Mr. Ransom is asked to speak at CLE seminars and to serve as an expert witness in legal malpractice cases.

Mr. Apostolou has been a member of the South Carolina Bar since 2003, spending two years with the Ninth Circuit Solicitor's Office before opening his own solo practice in 2005. Like Mr. Ransom, he has successfully handled medical malpractice cases against the Medical University and handles a variety of other personal injury matters.

4. The Contingency of Compensation

Sanctions for discovery abuse are rare. Compensation for the efforts of Plaintiffs' counsel has at all times been contingent upon the exercise of the Court's discretion with respect to the Plaintiff's Motion for Sanctions. Plaintiff's counsels' challenges to the Medical University's discovery responses have thus been without any assurance that compensation for their efforts would ultimately be forthcoming in any form or amount. The Court has ruled that beyond deposing four (4) additional witnesses, no sanction will be imposed other than attorneys fees and costs. In the absence of such sanctions, the Medical University and other litigants will have no disincentive to repeat similar misconduct in the future.

The issue is not the contingent nature of the Plaintiff's substantive medical malpractice claims against the Medical University. Were it otherwise, a party could obtain a favorable outcome in a case by abusing the discovery process without recourse. The South Carolina Court of Appeals has held that sanctions for discovery abuse do not become moot by, but rather survive, a verdict in favor of the abusing party. Creighton v. Coligny Plaza Ltd. Partnership, 334 S.C. 96, 122, 512 S.E.2d 510 524 (Ct. App. 1998).

5. The Fee Customarily Charged for Similar Services

This is an elusive factor because, as a practical matter, virtually all medical malpractice cases in South Carolina are handled on a contingency fee basis, with the customary fee being set at forty percent (40%) of any recovery or even higher. Trial lawyers do not undertake plaintiff's medical malpractice cases on an hourly fee basis. The undersigned has never handled such a case on an hourly fee basis.

The task before the Court is to impose an award of attorneys fees and costs which will both fairly compensate Plaintiff's counsel for the efforts detailed in their attorneys fee Affidavits; and

adequately "penalize those whose conduct may be deemed to warrant such a sanction, and to deter those who might be tempted to such conduct in the absence of such a deterrent." Karppi v. Greenville Terrazo Co., 327 S.C. 538, 545, 489 S.E.2d 679, 683 (Ct. App. 1997).

Plaintiff's counsel respectfully suggests that the Medical University, its witnesses and counsel need to understand that important materials and information cannot be withheld unless and until opposing counsel asks perfect questions. An answering party, witness or counsel cannot simply decide not to "volunteer" information which is clearly relevant, material and being actively sought through various discovery devices. Parties must provide truthful, accurate and complete discovery responses, whether doing so creates a litigation advantage for them or not. Anything less results in the sort of paradigmatic "game of blind man's bluff" eschewed by the South Carolina Supreme Court in In Re: Anonymous Member of South Carolina Bar, 346 S.C. 177, 193, 552 S.E.2d 10, 18 (2001).

If there is a legitimate dispute about the time and effort expended by Plaintiff's counsel, then the Court is respectfully asked to permit a subpoena to be served on the Barnwell, Whaley law firm to obtain the billing records for defense counsel, to compare their time spent with that of Plaintiff's counsel. If the issue of hourly rates requires additional elucidation, Plaintiff's counsel likewise requests leave of Court to seek and submit declarations from other South Carolina trial lawyers with 30 years of experience to compare their hourly billing rates with those of Plaintiff's counsel here.

6. Beneficial Results Obtained

At every turn, the Plaintiff's challenges to the Medical University's discovery tactics have been affirmed. When defense counsel instructed Nurse Embry and Dr. Nelson not to answer certain questions during their August 2014 depositions, the Motion for Protective Order was denied and the objections overruled. When Dr. Guldan was presented as a Rule 30(b)(6) designee to testify about the Mayday policy, the Plaintiff's resulting Motion to Compel was granted. When Sheila Scarbrough

testified that a Mayday record had been created and used to enter data into an American Heart Association database, the Medical University was compelled to produce the database in legible format. When Plaintiff's counsel asked Nurse Embry whether there had been any problem with the anesthesia machine accurately recording the oxygen saturation levels in the chart, she denied knowing of any problems but the Medical University was later forced to admit and produce evidence of a software glitch. Plaintiff's Motion for Sanctions succeeded in finally shaking lose the backup anesthesia data.

In short, the Plaintiff obtained favorable rulings and forced important disclosures on virtually every disputed discovery issue in this case. Those successes, however, came at significant cost in terms of effort, time and money.

7. **Factors Addressed by Federal Law**

The Medical University cites Potter v. Mosteller, 199 F.R.D. 181 (D.S.C.), aff'd. 238 F.3d 414 (4th Cir. 2000) and Barber v. Kimbrell's, Inc., 577 F. 2d 216 (4th Cir. 1978) for the factors the Court must consider in determining a reasonable amount of attorneys fees. These federal cases do not decide the issue by application of South Carolina law[15] and so are not controlling here. In its discussion of these non-controlling factors, the Medical University nevertheless makes several rather striking statements which merit a response.

The Medical University contends that "this is a straightforward medical malpractice case" and that "the skill required to litigate a medical malpractice case is not unique."[16] Yet this case involves complicated medical issues including obstructive sleep apnea, heart failure, acute and

[15] The Potter case cites the Barber case, which applied North Carolina law.

[16] Interestingly, this assertion is made by a lawyer who holds a four (4) year degree in nursing.

chronic kidney failure, medication interactions, airway management, Propofol titration, nursing supervision, and vital signs data such as forced inspiratory effort and end tidal carbon dioxide. Expert testimony was developed in the areas of cardiology, anesthesiology, nephrology, pharmacology, and critical care. These already complex issues were immeasurably confounded by empty data boxes, missing and altered records, and the Medical University's seeming inability to truthfully answer such basic questions as, "Was the machine accurately recording his oxygen saturation levels?" and "Was a code sheet filled out for Mr. Mikell's case?" Consequently, there was nothing straightforward about the progress of discovery in this case.

Further to the contrary of the Medical University's position, only a small number of personal injury lawyers do medical malpractice work and the skills necessary to litigate an anesthesia/airway management case are hardly common amongst the plaintiffs' bar. Likewise, electronic audit trails and computer data warehouses are not issues one typically encounters in car wreck or workers compensation cases.

The Medical University also makes the bald claim that $450.00 per hour is not "consistent with the prevailing hourly rates in the community for the same or similar work." The undersigned would challenge the Medical University to submit an affidavit from even one South Carolina trial lawyer who handles plaintiff's medical malpractice cases on an hourly fee basis. The truth of the matter is that trial lawyers in South Carolina do not handle this type of case on an hourly fee basis. So any reference to the "prevailing rates in the community" for such work is misleading in and of itself. There is no "prevailing" hourly rate for plaintiffs' medical malpractice work in Charleston County, South Carolina.

That the South Carolina Insurance Reserve Fund only pays attorneys with ten (10) years of experience the rate of $150.00 an hour to defend cases is largely irrelevant to the determination of

the hourly fee that would need to be offered to entice a veteran trial lawyer to undertake the representation of Mr. Mikell's estate in the Charleston legal marketplace. That this case was handled by lead counsel from Columbia should give some indication of the attitude of the Charleston legal community towards anesthesia malpractice cases against the Medical University.

The Medical University makes the argument that the discovery issues in this case were the result of Plaintiff's counsel's "lack of understanding of the medical records"[17] and his inability to "meaningfully question witnesses."[18] Indeed, the Medical University goes so far as to claim Plaintiff's counsel "failed to question witnesses about material information" and "never inquired about the blank boxes"[19] in the anesthesia record.

What part of, "Was the machine accurately recording his oxygen saturation levels?"[20] "Was there a Mayday card kept in Mr. Mikell's case?"[21] and "Was a code sheet filled out for Mr. Mikell's case?"[22] did the Medical University's witnesses and defense counsel fail to understand? Were those not meaningful questions in the quest to learn why the boxes in the anesthesia record were empty and whether there was a Mayday record? Did Plaintiff's counsel inartfully articulate his desire to learn, "Why is there no data recorded for the first six minutes . . . " of the colonoscopy?[23] Did the

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[17] Supplemental Memorandum at page 17. On this point, it should be noted that over the course of the litigation, the Medical University produced almost 6,000 pages of records on CDs some of which were password encrypted so that the documents they contained could neither be copied nor extracted.

[18] *Ibid.*

[19] *Ibid* at page 8.

[20] August 26, 2014 deposition of Donna Embry at page 27, lines 17 - 18.

[21] Supplemental Memorandum at page 22, lines 9 - 10.

[22] *Ibid* at page 83, lines 11 - 12.

[23] September 4, 2014 letter to Ms. Fleming.

direct question, "Why don't these printed anesthesia records accurately graph the timing of events?"[24] somehow confuse defense counsel, so that this information could not be disclosed until more than a year later? Perhaps the defense expert, Dr. Berry, did not understand the question when asked, "Your conclusion from this data is that the monitors – that these values are explained by the fact that the monitors were not hooked up until 7:48?"[25]

It was not the failure of Plaintiff's counsel to understand the records or to ask meaningful questions that lead to the Medical University's serial non-disclosures and provision of false information. Rather, it was the attitude that certain things were not going to be "volunteered"[26] except under threat of sanctions by the Court.

It is incongruous for the Medical University to on the one hand admit, "Ms. Embry did not at first remember there being a Mayday record, and Dr. Guldan adamantly believes there should not have been one,"[27] and on the other hand, try to blame these witnesses' "honest errors,"[28] on the failure of Plaintiff's counsel to ask "meaningful questions." It is likewise disingenuous for the Medical University to claim that "Plaintiff's counsel learned about" the missing PICIS data "right alongside Defense counsel and, indeed, MUSC itself,"[29] and then turn around and criticize Plaintiff's counsel for "lack of understanding of the medical records." As though Plaintiff's counsel somehow

---

[24] *Ibid.*

[25] June 15, 2015 deposition James Berry, MD at page 86, lines 4 - 7.

[26] For example, "If you did not ask me, then I don't recall volunteering the information to you." February 22, 2016 deposition of Donna Embry at page 216.

[27] Supplemental Memorandum at page 7.

[28] *Ibid.*

[29] *Ibid.*

caused witnesses to provide false information by asking poorly worded questions and was obliged to know more about the Medical University's medical records than the Medical University claims to know itself.

The Medical University would have the Court believe that Nurse Embry innocently lost all recollection of the software glitch, text messages, phone calls, Mayday record and altered anesthesia narrative, coincidently regaining her memory immediately following Dr. Berry's deposition. Likewise, the Medical University would have the Court believe it was shear coincidence that the existence of a Mayday record was first discovered when defense counsel started puzzling over Nurse Embry's alterations to the anesthesia narrative, shown by an audit trail it had produced six months earlier. The only conclusion one can reach is that the Medical University, its witnesses and counsel were sitting mute with fingers crossed behind their backs, hoping to conclude this case without any of these facts being revealed.

Lastly, in its Supplemental Memorandum the Medical University makes the statement that when Nurse Embry finally "recalled seeing the Mayday record . . .[t]his information was promptly disclosed to Plaintiff's counsel prior to his re-opening of her deposition."[30] That statement is quite simply false and pursuant to Rule 11, the Plaintiff challenges the Medical University to produce proof of this disclosure. The truth of the matter is that Nurse Embry's use of the Mayday record to alter the anesthesia narrative was never disclosed to Plaintiff's counsel at any time prior to her second deposition on February 22, 2016.[31]

---

[30] It is at least gratifying to see defense counsel acknowledge Nurse Embry's use of the Mayday record should have been disclosed to the Plaintiff prior to her February 22, 2016 deposition.

[31] *See*, February 26, 2016 deposition of Donna Embry at page 105, line 20 to page 112, line 3.

CONCLUSION

The Medical University treated the discovery process in this case like a game of seven card stud, where important information was kept hidden in the "down cards" which it did not turn up until the very end of the game. If, as it now claims, the Medical University and its witnesses had truly been "honest, thorough and forthcoming"[32] during discovery, multiple motions and hearings could have been avoided and important information would have been disclosed to the Plaintiff within thirty (30) days of written discovery requests being served (some 29 months prior to mediation and 37 months prior to trial).

This important information would have included the following facts:

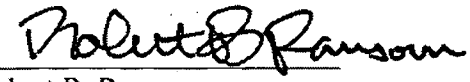
1) a Mayday record was:

   (a) created;
   (b) used to alter the anesthesia narrative;
   (c) faxed to Risk Management;
   (d) used to enter data into an American Heart Association database;
   (e) shredded; and
   (f) lost from the patient chart.

2) the anesthesia machine was not accurately recording Mr. Mikell's oxygen saturation levels for the first six minutes of the procedure because there was a software glitch which required several text messages and phone calls to fix.

3) certain entries in the anesthesia narrative were not "Dr. Nelson charting under my name" but rather Donna Embry changing Dr. Nelson's entries, without his knowledge or approval.

If Plaintiff's counsel had been timely informed of these things, this case would have developed much differently.

BY: 

Robert B. Ransom
LEVENTIS & RANSOM

[32] Supplemental Memorandum at page 3.

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Bertcone@aol.com

Alex Apostolou
3443 Rivers Avenue
North Charleston, SC 29405
(843) 853-3637
Alexapostolou@bellsouth.net

ATTORNEYS FOR THE PLAINTIFF

CERTIFICATE OF MAILING

The undersigned hereby certifies that a true copy of the foregoing pleading has been served upon opposing counsel by depositing in the United States mail a copy of same properly addressed with sufficient postage affixed thereto this 15 day of June, 2016.

Robert B Ransom

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

FILED
2016 SEP -8 PM 12:33
JULIE J. ARMSTRONG
CLERK OF COURT
BY

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

1. I am over the age of eight (18) years, am legally competent to make this affidavit, and have personal knowledge of the matters set forth herein.

2. I am lead counsel for the Plaintiff in the above-captioned action.

3. This Affidavit is submitted in order to further supplemental my previous Affidavits, dated January 4, 2016, January 5, 2016, and May 2, 2016.

6. The time entries set forth below document the effort undertaken by me to address and respond to the various discovery issues which are the subject of the Plaintiff's Motion for Discovery Sanctions, filed in the within-captioned action.

FURTHER AFFIANT SAYETH NAUGHT.

BY: Robert B Ransom
Robert B. Ransom

SWORN TO BEFORE ME this

2nd day of September, 2016.

Notary Public for the State of South Carolina

My commission expires:

February 14, 2022

TIME RECORD FOR Estate of Charles Mikell

Date:	Time:	Description:
05/11/16	2.1	review MUSC Supplemental Memo in Opposition to Motion for Discovery Sanctions
05/11/16	0.1	email to court concerning MUSC Supplemental Memo
05/12/016	0.4	begin preparing Reply Memorandum on Issue of Attorneys Fees
05/18/16	2.3	continue drafting Reply Memorandum
05/26/16	4.0	continue work on Reply Memorandum
06/03/16	6.0	continue work on Reply Memorandum
06/14/16	3.5	complete work on Reply Memorandum
06/15/16	0.2	letter to Judge Nicholson transmitting Reply Memorandum
06/29/16	0.1	email from Clerk of Court setting July 18 hearing date
07/07/16	0.6	meet with George Kefalos about representation at hearing
07/18/16	0.8	testify at hearing about attorneys fees
08/12/16	0.2	email from court asking for proposed order
08/17/16	3.0	begin preparing proposed order for attorneys fees
08/22/26	6.0	continue work on proposed order
08/29/16	3.5	continue work on proposed order
09/01/16	1.2	complete work on proposed order

TOTAL TIME: 34.0 hours

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	CIVIL ACTION NO.: 2012-CP-10-7275
SHON TURNER, as Personal Representative of the ESTATE OF CHARLES MIKELL, deceased,	)	**MOTION FOR RECONSIDERATION**
Plaintiff,	)	
vs.	)	
MEDICAL UNIVERSITY OF SOUTH CAROLINA,	)	
Defendant.	)	

FILED
2016 OCT 11 PM 2:37
JULIE J. ARMSTRONG
CLERK OF COURT

NOW COMES the Defendant, the Medical University of South Carolina (MUSC), pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure and hereby moves for an Order altering or amending this Court's September 28, 2016 Order for Sanctions. MUSC moves for reconsideration of several inaccuracies contained in the Order. The inaccuracies pertain to the timing of MUSC's efforts to disclose information and respond to Plaintiff's discovery requests. The specific inaccuracies that MUSC requests this Court to reconsider are as follows:

1. Page 2 of 24 of the Order in Paragraph 3 contains the following statement: "The Medical University cannot deny that "First, multiple printouts of the written anesthesia record were obtained, no two of which were identical." MUSC would request that this Court correct this statement to reflect that several different versions of the Anesthesia/PACU Record were produced in response to Plaintiff's First Discovery Requests on May 17, 2013. (*See* Ex. A page 7, Answer 9 and page 8 Answer 16). The documents produced included a copy of the 15 minute version of the record, 1 minute version of the record, and 10 second version of the record. A

copy of the PACU record was also produced. This is the reason that no two versions were "identical" in format. MUSC also requests that this Court acknowledge that the foregoing records were timely produced in response to Plaintiff's First Discovery Requests.

2. Page 3 of 24 of the Order in Paragraph 2 contains the following statement: "The Medical University cannot deny that many times it produced information, records, and data months, and in some instances even years, outside the deadlines established by the Rules of Civil Procedure. In this regards, the Medical University initially said responsive information, records or data did not exist, then later claimed it could not be produced because of undue burden..." First, MUSC requests that this Court amend the foregoing statement to indicate that MUSC continually supplemented its responses to Plaintiff's Discovery Requests as required by the Rules of Civil Procedure and that in some instances, it took longer to learn about and produce certain information that was responsive to Plaintiff's Discovery Requests. Furthermore, the only document MUSC claimed did not exist was the Code Sheet/Mayday Record. MUSC never claimed that the back-up data, i.e. the data contained in the PICIS database did not exist.

3. Page 9 of 24 of the Order in Paragraph 1 contains the following statement: "Judge Stilwell filed an Order on March 5, 2015 requiring the Medical University to designate another witness 'regarding the applicable policies, if any, that govern the circumstances of Mr. Mikell's colonoscopy and cardiac arrest/code." The Order implies that despite the Order being filed on March 5, 2015, MUSC was delinquent in producing a witness. The Order should reflect that Plaintiff's counsel never requested dates for the deposition of a new witness until July 9, 2015. This is the reason that MUSC did not produce a new designee until August 24, 2015. (*See* Ex. B).

4. On Page 11 of 24 of the Order in Paragraph 2 refers to the testimony of MUSC's Initial 30(b)(6) designee regarding the Mayday Policy as false. MUSC requests that the Court remove characterizations of testimony by the initial 30(b)(6) witness as false. Rather, the witness testified about his understanding and interpretation of the policy. A later witness, Sheila Scarbrough, RN, MSN, testified regarding her interpretation of the policy and her testimony was different from that of the initial 30(b)(6) designee regarding whether the policy required the completion of a Mayday Card/Code Sheet in the Digestive Disease Center (DDC).

5. Page 12 of 24 of the Order in Paragraph 2 refers to the new Rule 30(b)(6) designee to explain the Mayday policy and states: "The AHA database file was produced to Plaintiff in a format which prevented it from being intelligibly viewed or printed using a standard office computer. When Plaintiff's counsel asked to have the file printed or otherwise produced in usable format, the Medical University simply refused, claiming it would reveal protected patient information." This statement is inaccurate. First, the witness tried to print the section in the AHA database pertaining to Charles Mikell because the database, as a whole, contained protected health information of other patients. In her deposition on August 24, 2015, the witness, Ms. Scarbrough, testified regarding many of the sections in the printout from the AHA database. (*See* Ex. C). When asked regarding certain sections, she explained that she would need to refer to the actual computer version of the database. Thereafter, MUSC wrote to Plaintiff's counsel and offered for him to view the Database with Ms. Scarbrough. The letter was dated August 31, 2015. (*See* Ex. D).

6. Page 13 of 24 of the Order in the Paragraph continued from Page 12 discusses the issues with the PICIS software capturing data, i.e., the "glitch" and states: "At her first deposition on August 26, 2014, the nurse anesthetist was asked whether the anesthesia machine accurately

recorded Mr. Mikell's blood oxygen saturation levels during the colonoscopy. She testified that she was not aware of any problems." MUSC requests that the characterization of Nurse Embrey's testimony as "false" be eliminated.

7. Page 13 of 24 of the Order in Paragraphs 1 and 2 states: "Had the nurse anesthetist testified accurately, the Plaintiff would have learned about the "glitch", text messages and phone calls no later than August 26, 2014. Instead, the "glitch" was not disclosed until the Chairman of the Anesthesia Department mentioned it during his September 22, 2015 deposition." It continues, "[a]dditionally, there is neither justification nor excuse for the Medical University's failure to disclose the PICIS "glitch" until September 22, 2015, more than a year after Plaintiff's counsel's September 4, 2014 letter to defense counsel specifically asking for an explanation as to why important vital signs data was missing from the anesthesia record." These statements about the timing of the disclosure of the "glitch" and whether certain data was recorded in PICIS are inaccurate. MUSC was served with Requests for Admission on September 25, 2014. The Requests asked whether data was available or recorded during the 8 minutes at issue. MUSC answered the Requests for Admission on October 24, 2014 and stated that the data for the 8 minutes of intervals requested was not available because the data was not recorded at those intervals. September 22, 2015, was not the first time that this information was disclosed. (*See* Ex. E Page 2-3, Answer 4).

8. Page 15 of 24 of the Order discusses the production of the audit trails by MUSC. It states that MUSC did not respond to Plaintiff's letters asking for the audit trails and supplemental information within 30 days as required by the rules. Again, this is inaccurate because those requests were not served as formal discovery requests. Rather, they were requests made by letter(s) inquiring about that information.

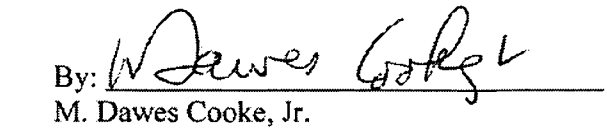
9. Page 16 of 24 in Paragraph 4, the Order states: "The Medical University nevertheless maintained its position that there was no backup anesthesia data." This statement is incorrect. MUSC never took the position that back-up anesthesia data for the PICIS database did not exist. Rather, MUSC acknowledged that the PICIS database existed, but that producing the data requested would be costly and burdensome. This was conveyed by letter dated August 31, 2015 and in Defendant's Amended Responses to Plaintiff's Third Requests for Admission dated September 21, 2015. (*See* Ex. D and F).

10. Page 17 of 24 in Paragraph 2, the Order states: "The Medical University conceded in its response that the data could be produced in manners suggested by the Court in its questions." This statement is likewise, inaccurate. MUSC never conceded that the data in the database could be produced in simple formats suggested by the Court. MUSC defers to its responses to the Court's inquires including the Affidavit requested by the Court dated March 1, 2016 wherein MUSC explained why certain things could not be produced in certain formats and why it would be so costly to produce the data directly for the PICIS database. (*See* Ex. G).

Based on the foregoing, MUSC respectfully requests that this Court alter or amend its Order for Sanctions filed on September 28, 2016 to correct the above-referenced inaccuracies contained in the Order regarding the timing and sequence of certain discovery responses and disclosures.

[SIGNATURE ON FOLLOWING PAGE]

BARNWELL WHALEY PATTERSON & HELMS, LLC

By: 

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afleming@barnwell-whaley.com

Counsel for Defendant Medical University of South Carolina

Charleston, South Carolina
October 10, 2016

Exhibit A

BARNWELL WHALEY
PATTERSON & HELMS LLC

Attorneys for businesses & professionals since 1938

Alissa D. Fleming
afleming@barnwell-whaley.com

May 17, 2013

Robert B. Ransom, Esquire
Leventis & Ransom
Post Office Box 11067
Columbia, SC 29211

Alex Apostolou
215 East Bay Street, Suite 505F
Charleston, SC 29401

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

Dear Robert and Alex,

Enclosed please find Defendant Medical University of South Carolina's Answers to Plaintiff's First Discovery Requests and CD of documents in the above-referenced matter.

Should you have any questions, feel free to contact Dawes, me, or our paralegal, Amanda Taylor, directly at 843.329.5306.

Sincerely,

Alissa Fleming

M. Dawes Cooke, Jr.
Alissa Fleming

MDCjr/AF/jgc
Enclosures

William C. Helms, III
M. Dawes Cooke, Jr.
B.C. Killough*
Randell C. Stoney, Jr.
Phillip S. Ferderigos
K. Michael Barfield
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* Registered patent attorney

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	CIVIL ACTION NO.: 2012-CP-10-7275
SHON TURNER, as Personal Representative of the ESTATE OF CHARLES MIKELL, deceased, Plaintiff, vs. MEDICAL UNIVERSITY OF SOUTH CAROLINA, Defendant.	)	**DEFENDANT MEDICAL UNIVERSITY OF SOUTH CAROLINA'S ANSWERS TO PLAINTIFF'S FIRST DISCOVERY REQUESTS**

TO: ROBERT B. RANSOM, ESQUIRE, COUNSEL FOR THE PLAINTIFF:

Defendant Medical University of South Carolina (hereinafter "MUSC"), by and through its undersigned counsel, hereby answers the Plaintiff's First Discovery Request as follows:

RESPONSES TO DISCOVERY REQUESTS

1. Give the names and addresses of persons known to the parties or counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

ANSWER:

Jeffrey Akhtar, MD
Carolina Family Care
30 Bee Street
Suite 2100
Charleston, SC 29403

Dr. Akhtar is a family care physician at Carolina Family Care. He is expected to testify regarding the medical care and treatment that he provided to Charles Mikell. The Defendant is not in possession of any written or recorded statement.

Luann Arthur
14415 Lusby Ridge Road
Accokeek, MD 20607

Ms. Arthur is the ex-wife of Charles Mikell. She is expected to testify regarding her knowledge of the allegations in the Complaint and medical history of Mr. Mikell. The Defendant is not in possession of any written or recorded statement.

Sofia Barbosa, M.D.
Kindred Hospital
326 Calhoun Street
Charleston, SC 29401

Dr. Barbosa is a physician at Kindred Hospital. She is expected to testify regarding her knowledge of the allegations in the Complaint and the medical care and treatment that she provided to Mr. Mikell. The Defendant is not in possession of any written or recorded statement.

Donna Embrey,CRNA
MUSC
171 Ashley Avenue
Charleston, SC 29425

Ms. Embrey is a Certified Registered Nurse Anesthetist employed by MUSC. She provided medical care to Charles Mikell on October 1, 2010 during the colonoscopy procedure. She is expected to testify regarding the allegations in the Complaint as well as the care and treatment that she provided to Mr. Mikell on October 1, 2010. The Defendant is not in possession of any written or recorded statement.

Dawn P. Heyward, R.N., B.S.N., A.R.N.P.
MUSC
171 Ashley Avenue
Charleston, SC 29424

Ms. Heyward is a nurse practitioner employed by MUSC. She provided medical care to Mr. Mikell in the Heart Failure Clinic at MUSC. She is expected to testify regarding her evaluation of Mr. Mikell and the care that she provided to him.

John Terrill Huggins, M.D.
MUSC
171 Ashley Avenue
Charleston, SC 29424

Dr. Huggins is a physician employed by MUSC. He is Board Certified in Internal Medicine, Critical Care Medicine, and Pulmonary Disease. He provided medical care and treatment to Charles Mikell following the colonoscopy that was performed on October 1,

2010 and through the time of his discharge on October 26, 2010. He is expected to testify regarding the medical care and treatment that he provided to Mr. Mikell. The Defendant is not in possession of any written or recorded statement.

Pamela Mazyck, Pharm. D.
MUSC
171 Ashley Avenue
Charleston, SC 29424

Dr. Mazyck is a pharmacologist at MUSC. She is expected to testify regarding her knowledge of the allegations in the Complaint. The Defendant is not in possession of any written or recorded statement.

Jennifer R. Matos, M.D.
MUSC
171 Ashley Avenue
Charleston, SC 29424

Dr. Matos is an attending physician at MUSC. She is expected to testify regarding her knowledge of the allegations in the Complaint and the medical care and treatment that she provided to Mr. Mikell. The Defendant is not in possession of any written or recorded statement.

Dadrian Michael
14415 Lusby Ridge Road
Accokeek, MD 20607

Mr. Michael is the son of Charles Mikell. He is expected to testify regarding his knowledge of the allegations in the Complaint and medical history of Mr. Mikell. The Defendant is not in possession of any written or recorded statement.

Madison Michael
14415 Lusby Ridge Road
Accokeek, MD 20607

Ms. Michael is the daughter of Charles Mikell. She is expected to testify regarding her knowledge of the allegations in the Complaint and medical history of Mr. Mikell. The Defendant is not in possession of any written or recorded statement.

Jewel Mikell
1325 5th Avenue
Charleston, SC 29407

Ms. Mikell is the mother of Charles Mikell. Upon information and belief, Ms. Mikell was present at MUSC and/or communicated with MUSC during Mr. Mikell's admission in

October of 2010. She is expected to testify regarding her knowledge of the allegations in the Complaint. The Defendant is not in possession of any written or recorded statement.

Eric Nelson, M.D.
MUSC
171 Ashley Avenue
Charleston, SC 29425

Dr. Nelson is a physician employed by MUSC. He is Board Certified in Anesthesiology. He provided medical care and treatment to Charles Mikell during the colonoscopy that was performed on October 1, 2010 at MUSC. He is expected to testify regarding his knowledge of the allegations in the Complaint and the medical care and treatment that he provided to Mr. Mikell. The Defendant is not in possession of any written or recorded statement.

Kenneth Mark Payne, M.D.
MUSC 171 Ashley Avenue
Charleston, SC 29425

Dr. Payne is a physician employed by MUSC. He is Board Certified in Gastroenterology and Hepatology. He performed the colonoscopy on Charles Mikell at MUSC on October 1, 2010. He is expected to testify regarding his knowledge of the allegations in the Complaint and the medical care and treatment that he provided to Mr. Mikell. The Defendant is not in possession of any written or recorded statement.

Shon Turner
c/o Robert B. Ransom
Leventis and Ransom

Shon Turner is the Plaintiff in this case. Mr. Turner is expected to testify regarding the allegations in the Complaint. The Defendant is not in possession of any written or recorded statement.

Adrian B. Van Bakel, M.D.
MUSC 171 Ashley Avenue
Charleston, SC 29425

Dr. Van Bakel is a physician employed by MUSC. He is Board Certified in Internal Medicine and Cardiovascular Disease. He is an Associate Professor of Medicine/Cardiology and Medical Director of the Cardiac Transplant Program at MUSC. He provided medical care and treatment to Charles Mikell following his admission to MUSC in October of 2010. He is expected to testify regarding the medical care and treatment he provided to Mr. Mikell as well as his knowledge of the allegations in the Complaint. The Defendant is not in possession of any written or recorded statement.

Defendant MUSC identifies each and every person whose name appears in the medical records of Charles Mikell from MUSC, any other healthcare providers who provided care

to Charles Mikell, and any other witnesses identified by Plaintiff. Defendant MUSC reserves the right to supplement this answer as discovery progresses, up to and including the time of trial.

2. Set forth a list of photographs, plats, sketches or other prepared documents in possession of the party that relate to the claim or defense in this case.

ANSWER: **Objection. Defendant MUSC objects to this request to the extent that it seeks the discovery of information and/or documents that are protected from disclosure by the attorney-client privilege or that seeks the mental impressions, conclusions, opinions, or legal theories of counsel or other representative of MUSC. Without waiving and subject to the foregoing objection, see documents bates labeled 1.554 (Mikell) MUSC 1-2556.**

3. Set forth the names and addresses of all insurance companies which have liability insurance coverage relating to the claim and set forth the number or numbers of the policies involved and the amount or amounts of liability coverage provided in each policy. If there is any dispute as to coverage under any liability insurance policy, please describe the nature and basis for the dispute.

ANSWER:

Insurance Reserve Fund
P.O. Box 11066
Columbia, SC 29211
Policy No.: P12012001H
Limits: Tort liability coverage is limited in accordance with the South Carolina Tort Claims Act, S.C. Code Ann § 15-78-10, et. seq.

4. List the names and addresses of any expert witnesses whom the party proposes to use as a witness at the trial of the case and for each such expert set forth: (a) a complete statement of all opinions to be expressed and the basis and reasons therefore; (b) the data and other information considered by the expert in forming the opinions; (c) any exhibits to be used as a summary of or support for the opinions; (d) citations of any treatise, text or other authority upon which the expert has especially relied; and (e) the nature of any financial arrangements between the expert and the party or counsel relating to the expert's fees for consulting or

testifying in connection with this case; (f) state the date upon which the expert was first contacted regarding this case; (g) produce any and all communications with the expert relating to his services in this case, including but not limited to retainers and materials provided for review; and (h) produce a current copy of the experts' *curriculum vitae*.

ANSWER: Objection. Defendant MUSC objects to Interrogatory No. 4 to the extent that it seeks the discovery of the mental impressions, conclusions, opinions, or legal theories of counsel or other representatives of MUSC. Without waiving and subject to the foregoing objection, MUSC has not yet determined which expert witnesses it will call at the trial of this case and expressly reserves the right to supplement this response.

5. For each person known to the parties or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

ANSWER: See Answer to Request No. 1.

6. If you contend that some other person or legal entity is, in whole or in part, liable to you or the party asserting a claim against you in this matter, identify such person or entity and describe the basis of said liability.

ANSWER: Objection. Defendant MUSC objects to Interrogatory No. 6 to the extent that it seeks the discovery of the mental impressions, conclusions, opinions or legal theories of counsel or other representative of Defendant MUSC concerning this litigation and is protected from discovery pursuant to the work-product doctrine. Without waiving and subject to the foregoing objection, discovery is ongoing, and therefore, Defendant MUSC reserves the right to supplement this response up to and including the time of trial.

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). This request includes but is not limited to any incident report from the events of October 1, 2010, and the results of any root cause analysis of the events of October 1, 2010.

ANSWER: Objection. Defendant MUSC objects to Request No. 7 on the grounds that it requests information of proceedings of, and data, documents, records, and information prepared or acquired, reviewed, investigated by a hospital relating to root cause analysis and/or incident reports that are confidential and not subject to discovery, subpoena, or introduction into evidence in any civil action pursuant to S.C. Code Ann. § 44-7-392 (2012). Defendant MUSC further objects to Request No. 7 to the extent that it seeks discovery of the mental impressions, conclusions, opinions or legal theories of counsel or other representative of Defendant MUSC concerning this litigation and is protected from discovery pursuant to the work-product doctrine.

8. Produce any and all photographs, plats, sketches, diagrams, drawings, video tapes, visual representations, audio tapes, recordings, items of physical evidence, or other tangible materials, objects or items which relate in any way to the current litigation.

ANSWER: Objection. Defendant MUSC objects to Request No. 8 on the grounds that it seeks the discovery of information that is protected by the attorney-client privilege or that seeks the discovery of the mental impressions, conclusions, opinions, or legal theories of counsel or other representative of Defendant MUSC concerning this litigation and is protected from discovery pursuant to the work product doctrine. Without waiving and subject to the foregoing objections, see BWPH 1.554 (Mikell) MUSC 1-2556.

9. Produce any and all documents or other written or tangible materials used or relied upon in answering any of the Plaintiff's interrogatories.

ANSWER: Objection. Defendant MUSC objects to Request No. 9 on the grounds that it seeks the discovery of information that is protected by the attorney-client privilege or that seeks the discovery of the mental impressions, conclusions, opinions, or legal theories of counsel or other representative of Defendant MUSC concerning this litigation and is protected from discovery pursuant to the work product doctrine. Without waiving and subject to the foregoing objections, please find the documents of Charles Mikell bates labeled BWPH 1.554 (Mikell) MUSC 1-2556.

10. Produce any and all visual or audio surveillance conducted on the Plaintiff or any witnesses in this case.

ANSWER: None.

11. Produce any and all documents, items, materials, or things obtained through the issuance of a Rule 45 subpoena in this case.

ANSWER: To be supplemented.

12. Produce any and all documents, items, materials or things which will be offered into evidence at the trial of this case.

ANSWER: Defendant MUSC has not yet determined which documents, items, materials or other things it will offer into evidence at the trial of this case and, therefore, reserves the right to supplement this response up to and including the time of trial.

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).

ANSWER: See documents bates labeled BWPH 1.554 (Mikell) MUSC 1-2115.

14. Produce any and all written protocols, policies, procedures or guidelines which apply to any of the medical diagnoses, medical treatment or medical procedures provided to Charles Mikell on October 1, 1010 *(sic)*.

ANSWER: Objection. Defendant MUSC objects to Request No. 14 on the grounds that it is overly broad and unduly burdensome. Should Plaintiff narrow the scope of his request to define for which diagnoses, treatment, or procedures he seeks the protocols, policies, procedures, and/or guidelines, Defendant MUSC will attempt to identify any documents responsive to the request, should such documents exist.

15. Produce a complete itemized billing detail showing all charges for services provided to Charles Mikell at or by MUSC at any time on or after October 1, 2010.

ANSWER: See documents bates labeled BWPH 1.554 (Mikell) MUSC 1528-1561.

16. Produce all electronic data recorded or captured by the anesthesia machine used for the colonoscopy procedure performed on Charles Mikell on October 1, 2010. If no such data exists or is currently available, state the date upon which the data was deleted or erased and describe the circumstances under which this occurred.

ANSWER: See documents bates labeled BWPH 1.554 (Mikell) MUSC 2116-2556.

17. Identify the manufacturer, make, model, year, serial number and any and all other identifying information for the anesthesia machine used for the colonoscopy procedure performed on Charles Mikell on October 1, 2010. Describe any and all data management systems in place on October 1, 2010 for the purpose of backing up or storing data captured or recorded by the anesthesia machine.

ANSWER: Defendant MUSC does not maintain a record of the specific anesthesia machine(s) used for each patient during each procedure; therefore, it is unable to identify the exact machine(s) used during the colonoscopy performed on Charles Mikell on October 1, 2010. However, Defendant MUSC used the following type of equipment during the colonoscopy performed on Mr. Mikell on October 1, 2010:

GE Datex Ohmeda Avance Anesthesia Machine
Philips Intellivue MP 70 Physiological Monitor

18. Identify and describe all acts of contributory or comparative negligence which serve as the basis for the Third Defense plead in the Answer and as to each such act state the duty of care owed by Charles Mikell which said act violated.

ANSWER: Objection. Defendant MUSC objects to Request No. 18 on the grounds that it seeks the discovery of the mental impressions, conclusions, opinions, or legal theories of counsel or other representative of Defendant MUSC concerning this litigation and is protected from discovery pursuant to the work product doctrine. Without waiving and subject to the foregoing objection, Defendant MUSC reserves the right to supplement this response up to and including the time of trial as discovery is ongoing.

19. Identify and describe all discretionary acts which serve as the basis for the Second Defense plead in the Answer and as to each such discretionary act, state (a) who was acting with discretion; (b) at what specific time the discretionary act took place; and (c) describe the discretionary act itself in detail.

ANSWER: Objection. Defendant MUSC objects to Request No. 6 to the extent that it seeks the discovery of the mental impressions, conclusions, opinions or legal theories of counsel or other representative of Defendant MUSC concerning this litigation and is protected from discovery pursuant to the work-product doctrine. Without waiving and subject to the foregoing objection, Defendant MUSC states that the physicians and other healthcare providers involved in Mr. Mikell's care on October 1, 2010 exercised their

clinical judgment in providing medical care and treatment to him which qualifies as a discretionary act under S.C. Code Ann. § 15-78-60(5). Furthermore, Defendant MUSC craves reference to the medical records of Charles Mikell with regard to each discretionary actor, act, and time that each act occurred. Defendant MUSC also states that the establishment of policies and procedures is a discretionary function under S.C. Code Ann. § 15-78-60(5).

20. Identify by name, address, telephone number and any and all other available identifying information, all persons who both (a) participated in providing care to Charles Mikell on October 1, 2010 and (b) were not at that time working as employees of the Defendant.

ANSWER: **Objection. Defendant MUSC objects to Request No. 20 on the grounds that it is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving and subject to the foregoing object, please refer to the medical record of Charles Mikell from MUSC dated October 1, 2010. Upon information and belief, all individuals who provided medical care to Mr. Mikell on October 1, 2010, as identified in the medical records from MUSC dated October 1, 2010, were employees of MUSC.**

19.*(sic)* Identify by name, address, telephone number and any and all other available identifying information, all persons who both (a) participated in providing care to Charles Mikell on October 1, 2010 and (b) were at that time "students" within the meaning of S.C. Code Ann §15-78-60(25). For each person:

i. explain and describe how such persons' status as a "student" has been determined;

ii. explain and describe when and how Charles Mikell was notified of such persons' status as a "student" and the role they would play in providing his care;

iii. state the specific role such persons played in providing care to Charles Mikell;

iv. state such persons' training and qualifications for providing such care;

v. identify all personnel responsible for supervising the care provided by such persons; and

vi. explain how MUSC distinguished such persons from its other agents, servants and employees of MUSC.

ANSWER: Objection. Defendant MUSC objects to Request No. 19 on the grounds that it is overly broad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence. Defendant MUSC further objects to Request No. 19 on the grounds that it is vague and misleading. Without waiving and subject to the foregoing objection, upon information and belief, no students provided medical care to Mr. Mikell on October 1, 2010.

BARNWELL WHALEY PATTERSON & HELMS, LLC

BY: _____

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ATTORNEYS FOR DEFENDANT MEDICAL UNIVERSITY OF SOUTH CAROLINA

Charleston, South Carolina

May 17, 2013

Exhibit B

LEVENTIS & RANSOM

ATTORNEYS AT LAW

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Robert B. Ransom
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July 9, 2015

Alissa D. Fleming, Esq.
Post Office Drawer H
Charleston, SC 29402

Re: Estate of Charles Mikell v. MUSC
2012-CP-10-7275

Dear Alissa:

I had sent you an email on July 1, 2015 concerning an amendment to the Scheduling Order. Then, on July 2, 2015, you disclosed a new witness to testify about the audit trail for the PICIS system.

In response, I am writing to let you know that we need to set the following depositions:

Pat Aysse, RN	Dr. Nelson
Danielle Scheurer, MD	Donna Embry
Scott Reeves, MD	30(b)(6) witness on code/may day policy

You will recall the Court ordered that I be permitted to re-depose Dr. Nelson and Donna Embry. Subsequent to that Order, your client produced the audit trail for the anesthesia record. I intend to question both Dr. Nelson and Donna Embry about the information in the audit trail. If you are unwilling to permit this, please let me know so I can file the appropriate motion.

I must respectfully ask that all these depositions be set on one or two consecutive days in order to minimize my travel from Columbia. My staff will be in contact with your office to arrange dates within the deadlines set forth in the latest proposed scheduling order.

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: Alex Apostolou, Esq.

Exhibit C

site_os_id	patient_os_id	study_id	procstep_id	formdata_seq	eventcompressions	compressdatetime	compressdatetime_precision	compressdatetimemd	icuwi24hrdc	prior24icudischdt	prior24icudischdt_precision	prior24pacudischarge	prior24eddischarge
35287	270428782	2020	2203	1	Yes	10/1/2010 7:56	MM/DD/YYYY HH24:MI					No	No

R_0723

EXHIBIT P-3
WIT: Scarbrough
DATE: 8-24-15
Marie Brueggar, CRR, RPR

Exhibit D

BARNWELL WHALEY | 75 YEARS 1938-2013
PATTERSON & HELMS LLC
Attorneys for businesses & professionals since 1938

Alissa D. Fleming
afleming@barnwell-whaley.com

August 31, 2015

VIA E-MAIL AND U.S. MAIL
Robert B. Ransom, Esquire
Leventis & Ransom
Post Office Box 11067
Columbia, SC 29211

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

Dear Rob,

We are in receipt of your letter dated August 25, 2015. With regard to the PICIS database, we would like to give you the opportunity to have your forensic IT personnel meet with the appropriate IT personnel from MUSC to discuss what it would require to review and extract data regarding Mr. Mikell from the database. It is our understanding that the process is onerous and would require close to 1,000 hours to accomplish and would yield the exact same data that has already been produced in this case. However, we would defer to the appropriate representative from MUSC on that issue.

We would also like to give your forensic IT personnel the same opportunity with regard to the database maintained by Sheila Scarbrough, RN, MSN. Please let me know if you are interested in pursuing these meetings.

Should you wish to discuss this further, please do not hesitate to contact us. Thank you again,

Sincerely,

Alissa D. Fleming

Alissa D. Fleming

ADF/lgc

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

William C. Helms, III'

* Registered patent attorney
' Retired

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

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

Exhibit E

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	CIVIL ACTION NO.: 2012-CP-10-7275
SHON TURNER, as Personal Representative of the ESTATE OF CHARLES MIKELL, deceased,	)	
Plaintiff,	)	**DEFENDANT'S RESPONSE TO PLAINTIFF'S SECOND REQUEST FOR ADMISSIONS**
vs.	)	
MEDICAL UNIVERSITY OF SOUTH CAROLINA,	)	
Defendant.	)	

TO: ROBERT B. RANSOM, ESQUIRE, COUNSEL FOR THE PLAINTIFF:

Defendant Medical University of South Carolina (hereinafter "MUSC"), by and through its undersigned counsel, hereby responds to the Plaintiff's Second Request for Admissions as follows:

RESPONSES TO SECOND REQUEST FOR ADMISSIONS

1. Admit that pursuant to MUSC policies and procedures, there should be a code sheet, code documentation and/or "May Day card" for Mr. Mikell's cardiac arrest. If this Request is denied, then pursuant to Rule 34, SCRCP, produce all MUSC policies, procedures and guidelines in effect on October 1, 2010 relating to documentation of May Day codes.

RESPONSE: Objection. Defendant MUSC objects to Request No. 1 on the grounds that the total number of requests for admission served on this defendant, including subparts, exceeds the number permitted by Rule 36(b), SCRCP. Without waiving and subject to the foregoing objection, denied. In addition, see documents bates labeled BWPH 004948 – 004956.

2. Admit that there is no code sheet, code documentation and/or "May Day card" for Mr. Mikell's cardiac arrest. If this Request is denied, then pursuant to Rule 34, SCRCP, explain why the code sheet, code documentation and/or "May Day card" have not previously been produced.

RESPONSE: Objection. Defendant MUSC objects to Request No. 2 on the grounds that the total number of requests for admission served on this defendant, including subparts, exceeds the number permitted by Rule 36(b), SCRCP. Without waiving and subject to the foregoing objection, denied. The code documentation is contained in the Anesthesia Record which has been previously produced in this case.

3. Admit that MUSC has no explanation for why there is no code sheet, code documentation and/or "May Day card" for Mr. Mikell's cardiac arrest.

RESPONSE: Objection. Defendant MUSC objects to Request No. 3 on the grounds that the total number of requests for admission served on this defendant, including subparts, exceeds the number permitted by Rule 36(b), SCRCP. Without waiving and subject to the foregoing objection, denied.

4. Admit that blood oxygen saturation data is missing from the anesthesia record for Mr. Mikell's colonoscopy for each of the following times:

a. 7:42 am

b. 7:43 am

c. 7:44 am

d. 7:45 am

e. 7:46 am

f. 7:47 am

g. 7:59 am

h. 8:07 am

i. 8:09 am

j. 8:11 am

k. 8:12 am

l. 8:13 am

m. 8:14 am

If this Request is denied, then pursuant to Rule 34, SCRCP, produce the blood oxygen saturation data for each of the referenced times and pursuant to Rule 33, SCRCP, explain why that data has not previously been produced.

RESPONSE: Objection. Defendant MUSC objects to Request No. 4 on the grounds that the total number of requests for admission served on this defendant, including subparts, exceeds the number permitted by Rule 36(b), SCRCP. Without waiving and subject to the foregoing objection, denied. Defendant MUSC cannot produce the data requested because it was not recorded in the record at the intervals indicated in Request No. 4. However, the data was continuously viewed during the colonoscopy procedure on October 1, 2010.

5. Admit that MUSC has no explanation for why blood oxygen saturation data is missing from the anesthesia record for Mr. Mikell's colonoscopy (*see*, Request No. 4, above). If this Request is denied, then pursuant to Rule 33, SCRCP, then provide MUSC's explanation for the missing blood oxygen saturation data.

RESPONSE: Objection. Defendant MUSC objects to Request No. 5 on the grounds that the total number of requests for admission served on this defendant, including subparts, exceeds the number permitted by Rule 36(b), SCRCP. Defendant MUSC further objects to

Request No. 5 on the grounds that the use of the word "missing" is inaccurate. Without waiving and subject to the foregoing objection, denied. The data was continuously viewed during the colonoscopy procedure on October 1, 2010, but was not recorded in the record at the intervals indicated in Request No. 4. In further answering Request No. 5 and without waiving the foregoing objections, Defendant MUSC states that explanations responsive to this request were provided in the deposition testimony, to date.

6. Admit that data and information relating to Mr. Mikell's October 1, 2010 colonoscopy were captured and recorded by a computerized Endoworks system used in connection with the colonoscopy.

RESPONSE: Objection. Defendant MUSC objects to Request No. 6 on the grounds that the total number of requests for admission served on this defendant, including subparts, exceeds the number permitted by Rule 36(b), SCRCP. Without waiving and subject to the foregoing objections, admit.

7. Admit that images, data and information captured and/or recorded by Endoworks system during Mr. Mikell's colonoscopy are missing. If this Request is denied, then pursuant to Rule 34, SCRCP, produce all images, data and information captured and recorded by the Endoworks system and pursuant to Rule 33, SCRCP, explain why the images, data or information have not previously been produced.

RESPONSE: Objection. Defendant MUSC objects to Request No. 7 on the grounds that the total number of requests for admission served on this defendant, including subparts, exceeds the number permitted by Rule 36(b), SCRCP. Without waiving and subject to the foregoing objection, denied. Please see documents bates labeled 3599.

8. Admit that there is no documentation in the MUSC chart of any medical decision about Mr. Mikell's suitability or need for an ICD (Implantable Cardioverter Defibrillator). If this Request is denied, then pursuant to Rule 34, SCRCP, produce all such documentation and pursuant to Rule 33, SCRCP, explain why the documentation has not previously been produced.

RESPONSE: Objection. Defendant MUSC objects to Request No. 8 on the grounds that the total number of requests for admission served on this defendant, including subparts, exceeds the number permitted by Rule 36(b), SCRCP. Without waiving and subject to the foregoing objection, denied.

BARNWELL WHALEY PATTERSON
& HELMS, LLC

By: _____

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ATTORNEYS FOR DEFENDANT THE
MEDICAL UNIVERSITY OF SOUTH CAROLINA

October 24, 2014
Charleston, South Carolina

Exhibit F

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	CIVIL ACTION NO.: 2012-CP-10-7275
SHON TURNER, as Personal Representative of the ESTATE OF CHARLES MIKELL, deceased,	)	
Plaintiff,	)	**DEFENDANT'S AMENDED RESPONSE TO PLAINTIFF'S THIRD REQUEST FOR ADMISSIONS**
vs.	)	
MEDICAL UNIVERSITY OF SOUTH CAROLINA,	)	
Defendant.	)	

TO: ROBERT B. RANSOM, ESQUIRE, COUNSEL FOR THE PLAINTIFF:

Defendant Medical University of South Carolina (hereinafter "MUSC"), by and through its undersigned counsel, hereby amends its responses to the Plaintiff's Third Request for Admissions as follows:

AMENDED RESPONSES TO THIRD REQUEST FOR ADMISSIONS

1. Admit there is no archived data from the PICIS anesthesia system

RESPONSE: Objection. Defendant MUSC objects to Request No. 1 on the grounds that the total number of requests for admission served on this defendant, including subparts, exceeds the number permitted by Rule 36(b), SCRCP. Without waiving and subject to the foregoing objection, denied.

2. Admit there is no electronic audit trail from the PICIS anesthesia system.

RESPONSE: Objection. Defendant MUSC objects to Request No. 2 on the grounds that the total number of requests for admission served on this defendant, including subparts, exceeds the number permitted by Rule 36(b), SCRCP. Without waiving and subject to the foregoing objection, denied

3. If Request No. 1 is denied, then produce all of the archived data.

RESPONSE: See documents bates labeled BWPH 4948 – 4951. The Anesthesia Record was previously produced on May 17, 2013. In addition, see documents bates labeled BWPH 4988 – 4990.

4. If Request No. 2 is denied, then (a) identify all persons who logged onto the PICIS anesthesia system; (b) state the date and time when they did so; and (c) describe in detail any and all additions, deletions, alterations, changes or other entries made to the anesthesia record.

RESPONSE: Objection. MUSC objects to the production of information and/or data identifying all individuals who logged on to the PICIS anesthesia system on the grounds that it is overly broad and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving and subject to the foregoing objections, see documents bates labeled BWPH 4948 – 4950. The documents previously produced and bates labeled BWPH 4948-4950 indicate the identity of the persons who logged onto the PICIS system for the purpose of making modifications, and/or deletions to the information. The documents reflect the date and time that such information was modified or deleted. The documents also reflect the additions, deletions, and modifications made. Upon continued investigation, MUSC produces herewith the documents bates labeled BWPH 4988 – 4990. The documents bates labeled BWPH 4988 – 4990 identify persons who logged on to the system and the routine undertaken for the dates of October 1, 2010 through October 2, 2010.

[SIGNATURE ON FOLLOWING PAGE]

BARNWELL WHALEY PATTERSON
& HELMS, LLC

By: _____

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ATTORNEYS FOR DEFENDANT THE
MEDICAL UNIVERSITY OF SOUTH CAROLINA

Charleston, South Carolina
September 21, 2015

Exhibit G

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	CIVIL ACTION NO.: 2012-CP-10-7275
SHON TURNER, as Personal Representative of the ESTATE OF CHARLES MIKELL, deceased,	)	**AFFIDAVIT OF ALISSA FLEMING, ESQ.**
Plaintiff,	)	
vs.	)	
MEDICAL UNIVERSITY OF SOUTH CAROLINA,	)	
Defendant.	)	

THE AFFIANT, AFTER BEING DULY SWORN, DEPOSES AND SAYS AS FOLLOWS:

My name is Alissa Fleming. I am an attorney with the law firm of Barnwell Whaley Patterson & Helms, LLC. I, along with M. Dawes Cooke, Jr., Esq., represent the Defendant, Medical University of South Carolina (MUSC), in the above-referenced case. This Affidavit was prepared at the request of the Honorable J.C. Nicholson in the form of ten (10) questions to counsel dated January 26, 2016. The facts in this Affidavit are based on diligent inquiries and all prior discovery and correspondence in this case.

The questions presented for the Defendant are below with responses in bold.

1. The timeline you provided on Dec. 30th ends in August. Will you please complete the timeline through the date of the Dec. 11th hearing?

August 24, 2015, Sheila Scarbrough, RN, MSN was deposed. She testified that at the time of Mr. Mikell's code, one of her responsibilities was to review the code sheets/Mayday cards and enter the data from the Mayday card into a database for the American Heart Association. The formal name of the database is "Get with the Guidelines" but was named the "National Registry for CPR" at the time of Mr. Mikell's arrest. The database is supported by and for the American Heart Association (AHA).

Ms. Scarbrough was questioned about the 26 page document that was produced pursuant to Plaintiff's request. She admitted that the document was not formatted in a way that lent itself to easy reading, but she was able to explain most of the entries in the document. She testified that to explain certain entries in the document,

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

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

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

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

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

Mr. Ransom to view the 26-page document of information specific to Mr. Mikell on the computer, with Ms. Scarbrough so that she could explain anything that she was unable to explain at the time of her deposition.

September 21, 2015: MUSC amended certain discovery responses and responses to Requests for Admission so that they were consistent with the deposition testimony of Sheila Scarbrough, RN, MSN.

October 21, 2015: The Court heard Plaintiff's Motion for Discovery Sanctions.

December 2, 2015: MUSC answered Plaintiff's Second Set of Discovery Requests that were served on September 23, 2015. MUSC received a thirty-day extension to respond to the Requests. Interrogatory Number 17 requested a "properly formatted useable form of the database entries by Ms. Scarbrough." A PDF document of the information in the database for the AHA was produced at that time.

2. Please explain what facilitated the information being produced subsequently to Judge Nicholson's list of questions and suggestions. Please explain how it was produced shortly before the hearing on Dec. 11th in contrast to the high estimated cost and time you said it would take.

The high estimated cost is the cost of producing all of the information that Mr. Ransom requested, which was vastly more than he needed and that MUSC produced prior to the December 11 hearing. MUSC estimated the cost of producing all the data that was derived from the monitors or machines that were connected to Mr. Mikell during his colonoscopy and stored in PICIS. It was determined that it would require a substantial amount of time and resources, but that only 2 out of 1,604 tables in the PICIS database would need to be searched in order to show that no data had been deleted from the Real Time Variables and Real Time Data Graph in the PICIS database. The data reflected in the sections entitled "Real Time Variables" and "Real Time Data Graph" is the vital sign data. The data provided represents the raw data from the Real Time Variables and Real Time Data Graph that was communicated by the machines that were connected to Mr. Mikell to the PICIS software during the colonoscopy. The data from the PICIS database that was produced before the December 11th hearing does not account for the data contained in the other 1,602 tables also stored in the PICIS database and encompassed in Mr. Ransom's broad request. The other 1,602 tables in the PICIS database contain information such as the narrative entries, procedure start and end time, and various other types of information. The time estimate to extract the data from the total 1,604 tables that comprise the PICIS database is based on Plaintiff's request to produce "all electronic data recorded or captured by the anesthesia machine used for the colonoscopy procedure performed on Charles Mikell on October 1, 2010." This was Interrogatory Number 16 of Plaintiff's First Discovery Requests to MUSC. Whereas, the information provided shortly before the December 11th hearing was the raw vital sign data that was sent to the database by the monitoring equipment that was connected to the patient during the colonoscopy.

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

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

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

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

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

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

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

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

Spreadsheet for all patients who had codes in October, November and December of 2010 in order to try to locate the information specific to Charles Mikell. Ms. Scarbrough found the information for Mr. Mikell, once it was downloaded into the Excel Spreadsheet, and deleted the information for the other patients. She clarified that she never manipulated or cut and pasted the information specific to Mr. Mikell once it was in the Microsoft Excel Spreadsheet. Rather, she downloaded the information specific to Mr. Mikell directly from the Quintiles website.

According to Ms. Scarbrough, information regarding a code is entered into the user application for the Quintiles site by logging into the user application. The application presents a number of forms, with questions, that the user completes or fills out. The application then puts the information into the database.

Prior to this case, Ms. Scarbrough had never been asked to locate or obtain information for a specific patient from the database. Therefore, she was not familiar with the exact formats available to obtain and isolate data for a specific patient from the Quintiles website.

Again, the document was never converted by Ms. Scarbrough from any format. As previously explained, the information contained in the 26-page printout was downloaded directly from the Quintiles website into a Microsoft Excel document by Ms. Scarbrough.

The PDF version of the information from the database for the AHA was likewise downloaded directly from the Quintiles website by Ms. Scarbrough.

4. In your answer to number 1 of Judge Nicholson's initial set of questions, you say you produced the information by "cutting and pasting the data into another format and converting it to PDF." What was the original format? Ms. Fleming mentioned it was an Excel document at the hearing. If that is the case, why wasn't it legible to begin with?

We discussed Ms. Scarbrough's process of obtaining the information from the database for the AHA with her in more detail. She has clarified the process of producing both the 26-page Excel document and the PDF. Ms. Scarbrough confirmed that she did not convert the data in the 26-page Excel format into PDF. Rather, she downloaded the PDF directly from the Quintiles website in a PDF format. Following the first hearing before Your Honor in October of 2015, we asked Ms. Scarbrough if there was another way to display the information so that it was easier for someone not familiar with the database to read. She took Mr. Mikell's patient identification number and searched the database by entering that number. She was then able to view the information specific to Mr. Mikell in the database. She had never thought of searching the database by using a patient specific identification number because she had never before had to obtain data on a specific patient from the database. She did not know, prior to this past November when she went back into the database, that she could search the database for a specific patient. Instead of choosing the "download" function in Quintiles, she used

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

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

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

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

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

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

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

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

We did not know about the database for the AHA until late July of 2015. The reason is that there was not a Mayday Card in Mr. Mikell's medical record. Furthermore, Donna Embrey, CRNA, the nurse anesthetist involved in Mr. Mikell's colonoscopy was deposed on August 26, 2014. She testified that the Digestive Disease Center (DDC) nurse assigned by the colonoscopy room usually writes on the Mayday Card. The nurse anesthetist does not write on the Mayday Card. Ms. Embrey also testified that she was not sure if a Mayday Card was done for Mr. Mikell. She said that she would have to ask the nurse who was in the room.

Martha Zwemer, RN, was the DDC nurse who took care of Mr. Mikell during his colonoscopy. At her deposition on September 5, 2014, she testified that she had no recollection of whether a Mayday Card was completed and did not remember documenting on the Card.

Because there was no Card in Mr. Mikell's medical record and the nurse taking care of Mr. Mikell did not recall documenting in the Card, we believed that a Mayday Card was never done for Mr. Mikell.

We did not know to investigate other non-clinical departments within MUSC for the Mayday Card or the information in the Card. Ms. Scarbrough was not and is not involved with patient care and her reasons for receiving a copy of the Mayday Card were for the purpose of collecting data for the NR CPR/Get with the Guidelines database that is supported by the AHA.

In late July of 2015, the issue of the Mayday Card arose during a meeting with Donna Embrey, CRNA. During that meeting, we were trying to understand why she made some changes to the Anesthesia/PACU Record and how she arrived at certain times for certain entries in the record. When we questioned her in more detail about the record, Ms. Embrey further analyzed certain entries in the record and then recalled that she thought she had seen a Mayday Card even though she did not create or participate in documenting on the Card. When she had been asked about the Mayday Card in her deposition, she did not recall it. It was not until we questioned her more closely in July of 2015 that she remembered possibly obtaining some information from the Card.

Based on our conversation with Donna Embrey, CRNA, we started to investigate the issue with Ms. Scarbrough. Ms. Scarbrough did not have a copy of the Mayday Card that was faxed to her. It was at that time that she investigated whether there was any information in the NR CPR/Get with the Guidelines database for the AHA that was specific to Mr. Mikell. It was at that time that she was able to find information specific to Mr. Mikell's code in the database for the AHA.

8. Why are some of the times out of order on the audit trail and anesthesia records?

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

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

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

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

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

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

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

FURTHER AFFIANT SAYETH NOT.

Alissa Fleming, Esq.

SWORN to before me this
1st day of March, 2016

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

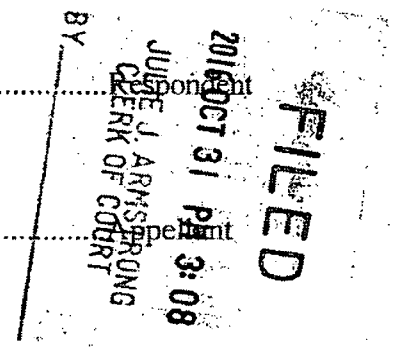
J. C. Nicholson, Circuit Court Judge

Case No. 2012-CP-10-7275

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

v.

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



NOTICE OF APPEAL

The Medical University of South Carolina hereby appeals (a) the Order for Sanctions of the Honorable J.C. Nicholson dated September 28, 2016 (attached hereto as Exhibit A) and (b) the Order denying Defendant's Motion for Reconsideration of the Honorable J. C. Nicholson dated October 12, 2016 (attached hereto as Exhibit B). Appellant received written notice of entry of the Order for Sanctions on September 29, 2016 and the Order denying Motion for Reconsideration on October 14, 2016.

October 28, 2016

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON) 2012-CP-10-7275

Shon Turner, as Personal Representative of the Estate of Charles Mikell, Deceased,	)	
Plaintiff,	)	Transcript of Record
vs.	)	October 21, 2015
Medical University of South Carolina,	)	
Defendant.	)	

B E F O R E:

Honorable J. C. Nicholson, Jr.
Charleston County Courthouse
Charleston, South Carolina

A P P E A R A N C E S:

Robert B. Ransom, Esquire
Attorney for Plaintiff

Alissa D. Fleming, Esquire
Attorney for Defendant

Grace L. Hurley, CVR-CM-M
Circuit Court Reporter

(There were no exhibits marked during the hearing.)

(On the record, October 21, 2015.)

THE COURT: All right. Let me see. We've got Turner versus Medical University of South Carolina. Who's here on that one?

MR. RANSOM: Rob Ransom from Columbia for the Plaintiff, Your Honor.

MS. FLEMING: Alissa Fleming from Barnwell, Whaley, Patterson and Helms for the Medical University.

THE COURT: Okay. Let me see. What we got, three motions?

MR. RANSOM: Yes, sir.

THE COURT: Let me see. We got what, one for the Plaintiff and two for the -- two by the Plaintiff and one by the Defendant?

MS. FLEMING: That's correct.

MR. RANSOM: That's correct.

THE COURT: Which one you want to hear first?

MS. FLEMING: Well, we have a, we have a motion for partial summary judgment on the wrongful death claim.

THE COURT: On the what?

MS. FLEMING: Wrongful death claim.

THE COURT: Okay. You want to hear yours first?

MS. FLEMING: If you'd like to hear it first.

THE COURT: It doesn't matter to me.

MS. FLEMING: Okay.

THE COURT: It's you all's -- your motion. I don't care which one we hear. I got to hear all three of them sooner or later.

MS. FLEMING: Okay.

THE COURT: Which one you want to hear?

MS. FLEMING: The summary judgment is fine.

THE COURT: Okay. Be glad to hear you.

MS. FLEMING: Okay. Judge, just to give you some background about this case, I don't want to belabor it too much since we submitted briefs prior to the hearing, but this is a medical malpractice case brought under both the wrongful death and survival statutes. The decedent, Charles Mikell, had a colonoscopy at MUSC on October 1st of 2010. He died three months later on January 2nd of 2011, which was three months after, after the procedure.

THE COURT: Died how long after?

MS. FLEMING: Three months.

THE COURT: Three months?

MS. FLEMING: Uh-huh.

THE COURT: What did he die from?

MS. FLEMING: A good question. There is no autopsy and no one has -- no one knows the cause of death.

THE COURT: What is -- what does the death certificate say?

MS. FLEMING: The death certificate says acute coronary

syndrome.

THE COURT: Had what?

MS. FLEMING: Acute coronary syndrome.

THE COURT: Okay.

MS. FLEMING: But the, the coroner who completed the death certificate basically said that was her best guess based on a review of the medical records. She, she just --

THE COURT: Is the person that signed that a MD or just a --

MS. FLEMING: She's an RN, a registered nurse.

THE COURT: RN. Okay.

MS. FLEMING: Right. Yeah. She didn't consult with any of the physicians or any of the --

THE COURT: So she says it was a coronary?

MS. FLEMING: She says -- I'll read you exactly --

THE COURT: All right. Well, go ahead with your argument. Okay. So three months later he died.

MS. FLEMING: Okay. Right. So anyway, the, the summary judgment motion is with regard to the wrongful death claim, not the survival claim, and as I said there's -- there was no autopsy, so no cause of death has ever been established other than the best guess that was in the, the death certificate.

The Plaintiff alleges that medical -- that MUSC was negligent in the provision of anesthesia care that was provided to Mr. Mikell during the colonoscopy. He was a -- he

was a 49 year old man. He had a lot of comorbid conditions. He was obese. He had obstructive sleep apnea, hypertension, stage -- New York Heart Association's level three heart failure, chronic kidney disease, just a lot of different complex medical issues going on, and actually he had been placed on the heart, heart failure transplant list many, many years before but, but never underwent a transplant because the doctors were able to manage his, his heart with medical, medical management.

So needless to say, he -- the reason for his colonoscopy was, was constipation. His primary care physician, who's also affiliated with MUSC, referred him for the colonoscopy, and the colonoscopy was staffed by a cardiac anesthesiologist, so a fellowship trained anesthesiologist who specialized in --

THE COURT: Why was he having it?

MS. FLEMING: Constipation.

THE COURT: Okay.

MS. FLEMING: I'm sorry. Right. And, and a CRNA, so a certified registered nurse anesthetist, so two anesthesia providers were involved in the care.

During the procedure he suffered a cardiac arrest and was resuscitated, placed on a ventilator and admitted to MUSC for I want to say until about October 26th, so about a month after that. He did develop some complications. He -- they had trouble getting him off the ventilator. So he required a

tracheostomy. He had, like I said before, he had underlying chronic kidney disease but he developed an acute kidney injury that required some hemodialysis on top of that.

He was transferred at the end of October to Kindred Hospital, which is the long-term acute care facility here in Charleston.

THE COURT: What's the name of it?

MS. FLEMING: Kindred.

THE COURT: Okay.

MS. FLEMING: Where he remained until November 19th of 2010 and was discharged home, and incidentally, his hemodialysis was completely stopped in early November about, I want to say, 13 days before his discharge. He --

THE COURT: You said he was released when, November what?

MS. FLEMING: November 19th.

THE COURT: Okay.

MS. FLEMING: And discharged home. His -- he was taken off the, taken off the ventilator and his tracheostomy was removed also during that time period. So after he was released from Kindred he continued to follow up with his cardiologist at MUSC, and he followed up with a nephrologist with Charleston Nephrology named Richard Browder.

The, the cardiologist involved in his care both in the hospital and subsequent to his hospitalization had said that he did not sustain any acute injury to his heart during or

because of the arrest. His nephrologist said that his acute kidney injury resolved and his kidney function had actually returned to its baseline by early November.

So on January 2nd of 2011 his mother, who's elderly, found him. He lived alone. She found him at his home on his couch deceased, and, and that was it.

So the Plaintiff is alleging that, like I said before, that MUSC was negligent with regard to the anesthesia care and what their expert says is that MUSC failed to put Mr. Mikell on certain cardiac or physiological monitors before anesthesia was given, and that, and that the CRNA failed to adequately bag mask ventilate him during, during the procedure which caused the arrest to occur from which he was resuscitated that day.

Their -- in support of, of their claims they've named an expert, Dr. Andrew Kofke, and he is a -- he's an anesthesiologist who specializes in neurocritical --

THE COURT: Andrew who?

MS. FLEMING: Kofke. He's at the University of Pennsylvania --

THE COURT: Uh-huh.

MS. FLEMING: -- and he specializes in neuroanesthesia.

THE COURT: Okay.

MS. FLEMING: And nonetheless, he -- like -- he testified to deviations from the standard of care, which we obviously

don't agree with, but for the purpose of this motion we're not really addressing standard of care at the moment, but he was asked extensively during his deposition regarding causation, and he was specifically asked whether he had opinions about the cause of death and whether the failure -- the two deviations from the standard of care, failure to adequately ventilate this patient during the procedure and the failure to place the patient on monitors before anesthesia was provided caused Mr. Mikell's death three months later.

He, like I -- he testified extensively on this, and he essentially said -- they asked him if he had any opinions about the cause of Mr. Mikell's death. He said, "No. I didn't review his chart carefully for damages," and things like that. He, he goes on to say that he, he had no idea whether the patient, whether the decedent, sorry, had recovered from the acute kidney injury or whether he had suffered any kind of acute injury to his heart as a result of the arrest. He had no idea when he died. He could not give an opinion about the cause of death. He had no opinion about that. He did not know the circumstances surrounding the death. Yet he went on to say that he thought that -- he said, "I can't say" -- I'll read you exactly what he says. He says -- the question was, "And so is it your opinion that because Mr. Mikell suffered an arrest that it must have in some way contributed to his death?" He said, "Yes. That's why I use

the word contributed. I'm not sure about cause." "And but you're not able to provide any information regarding what factors about his condition or what sequelae the arrest may have caused that contributed to his death; is that correct?" He says, "That's correct."

He said numerous times that he could not -- he had no idea what factors about the condition contributed or caused the death. All he says is that because he had this arrest he -- Ms. -- Mr. Mikell was hospitalized for a long period of time and that it must have caused or contributed to the death, and, and the -- viewing, viewing the facts in the light most favorable to the Plaintiff that's not sufficient to establish causation in fact but for the, the deviations from the standard of care Mr. Mikell would not have died.

THE COURT: Well, did he say the, the anesthesia process during the colonoscopy was improper?

MS. FLEMING: He, he did, which we contest.

THE COURT: So that -- is that what precipitated sort of his downfall so to speak or his --

MS. FLEMING: That's what he --

THE COURT: -- medical problems?

MS. FLEMING: That's what -- that's his opinion, yes, about the arrest and the --

THE COURT: So he was just basically saying if it hadn't been but for the faulty anesthesia problem or whatever he says

your client did he wouldn't have died?

MS. FLEMING: Three months later. Right. Right. And during that time, as I mentioned, he had recovered from his acute kidney injury, he was weaned from the ventilator, he went home, he had no acute injuries to his heart muscle.

THE COURT: And you're asking for a partial summary judgment as to wrongful death?

MS. FLEMING: That's correct.

THE COURT: Why wrongful death and not the survival?

MS. FLEMING: Well, I mean --

THE COURT: I mean, the survival is about death, also.

MS. FLEMING: The survival claim is really based on the acute injuries during that hospital period. So whether, for instance, whether the provision of anesthesia care --

THE COURT: Well, don't they both ultimately go to the cause of death at the time of death?

MS. FLEMING: I don't -- I think the survival action has to do more with whether, whether he would have had -- whether the decedent would have had a cause of action for malpractice during his life had he lived, and it's our position that -- I mean, although, you know, we would contest that as well, I think that if you're, if you're looking at acute injuries as a result of maybe physiological complications due to profusion during the acute period then perhaps his, perhaps his expert gets him there but not farther, not three months out of. I

have no idea what the cause of death was. There is no, no cause that's been forwarded other than a speculatory guess by, by a coroner, no autopsy, so.

THE COURT: Okay. Anything else?

MS. FLEMING: I don't think so. I just I, I wanted to add that and what his expert is basically saying is that he thinks the, the, the improper provision of anesthesia care increased the likelihood of injuries or death occurring, and that's, that's been rejected, that standard has been rejected with regard to but for causation and causation in fact.

THE COURT: I guess excuse me for my ignorance --

MS. FLEMING: Uh-huh.

THE COURT: -- I don't see how that would apply to the wrongful death and not also apply to the survival action.

MS. FLEMING: Well, perhaps it, it could. I think we're just saying, you know, viewing -- he's asked -- I guess maybe the way to distinguish it is he's asked about whether -- so, so whether this patient or this man suffered acute injuries as a result of some physiological issue that occurred because of the anesthesia care. Right? And so that has to do with immediately after this incident.

THE COURT: Okay.

MS. FLEMING: And he recovered from those. He went home. He lived another three months after that event, and that's where, you know, he could have -- who knows what could have

happened during that time that was totally unrelated to this, and so for his expert to say, "I have no idea. I can't give you any opinion about what caused this man's death," I don't know. No one knows, and, and I should say no one in this case has been ever -- been able to give an opinion to a reasonable degree of medical certainty, most probably not even the coroner about cause of death. That's, that's the difference.

THE COURT: I mean, the elements of the damage on the wrongful is at the time of death. The survival action is pain and suffering during the time period he's conscious from the medical mal till the time of death. Maybe, maybe the cause of death on the survival action is not appropriate. I, I don't know.

MS. FLEMING: Well, I --

THE COURT: All right. Anything else?

MS. FLEMING: Well, maybe one other way to distinguish it is that, you know, there are cases where a decedent is alive when he brings his malpractice claim and subsequently dies. That doesn't mean the death was caused by a negligent act. Perhaps that's one way to distinguish this.

THE COURT: Okay. Thank you very, thank you very much, Ms. Fleming.

MS. FLEMING: Thank you.

THE COURT: Mr. Ransom.

MR. RANSOM: Thank you, Your Honor. May it please the

Court? Very briefly. It's true that Mr. Mikell had some medical problems, but the reason he was undergoing this colonoscopy was simply because he was suffering from constipation and his gastroenterologist said, "You're at that age where we would like to have you screened." What took place was during the colonoscopy, for reasons that aren't particularly important at this moment, he suffered a cardiac arrest, and what's important to keep in mind is this is a procedure where he's expecting to go home at the end of the day, take maybe two or three hours at the hospital and then he'll be back at home enjoying his life, and instead he ends up getting admitted to the hospital in a coma -- all right -- that he remains in for two weeks. They have to put him on a ventilator which means he needs a tracheostomy.

THE COURT: Well, yeah, I mean, that would go towards the medical malpractice.

MR. RANSOM: Well, but what I'm, what I'm trying to explain to the Court is the malpractice during the anesthesia for the colonoscopy set into action a whole cascading series of events --

THE COURT: Right.

MR. RANSOM: -- that included hospitalization, coma, tracheostomy, he's in the hospital, I think, for six weeks when he's released.

THE COURT: Well, I, I thought she said after he got out

of the Hendricks Hospital, he was -- he, he was okay.

MR. RANSOM: Well, I think that's, that's inaccurate.

THE COURT: I mean, I -- I'm no -- I don't know if it is or not, but I mean, that's what she said.

MR. RANSOM: Perhaps the best way to answer --

THE COURT: I won't say okay because apparently he had a lot of major medical problems before he even had a colonoscopy.

MR. RANSOM: Perhaps the best way to answer this, Judge, is he had a -- several physicians at the Medical University. A Jeffrey Akhtar was his general practice physician. A Dr. Van Bakel was his cardiologist, and as a consequence of what happened during the colonoscopy he ended up having a Dr. Browder as a kidney doctor. We took each of those three fellows' depositions, and I asked them directly, "Can you tell me here under oath that these events did not have some impact on his subsequent death," and they all said, "No. I can't tell you that it didn't contribute to his death." Dr. Kofke is not only an anesthesiologist up in Philadelphia, he's also got additional qualifications in critical care, and you know, being from Philadelphia he has a certain vernacular that perhaps we're not accustomed to down here, but he was asked what his view of this was. His testimony, and we've recited a lot of this in the motion papers at length, but his explanation was, he says, "The only way that I would think

that it didn't -- that the cardiac arrest didn't contribute to it, meaning death, is if he went on to totally recover and get by -- hit by a car or something." Okay. So he's perhaps being a little bit glib, but his testimony is that, "Look, when" --

THE COURT: Well, but wouldn't he, wouldn't he have to pretty well say by the -- the death was most probably caused with a medical -- degree of medical certainty by the anesthesiologist administered at the time of the colonoscopy?

MR. RANSOM: I'm sorry, Your Honor?

THE COURT: Wouldn't he have to attribute the death itself to the error made in the -- during the colonoscopy, whatever that may be, may have been?

MR. RANSOM: Well, and as I say, I think his testimony establishes that at least in his view he's confident in his own words that these events that followed from the colonoscopy did, in fact, relate to the subsequent death.

THE COURT: I, I know he didn't use the words that the most, most probably caused to a reasonable degree of medical certain his death, he didn't use those words, but you think what he used is sufficient?

MR. RANSOM: Yeah. I mean, in essence what he says is if all that other stuff doesn't happen he doesn't die, and, and again, the way he then describes it is the only way that the cardiac arrest wouldn't have contributed to his death is if he

get fully recovered and got hit by a car, and of course, as I was trying to explain, he goes from being in a coma to being in the hospital to going home and being seen by home healthcare people and his doctors describe him as fatigued and debilitated and unable to do his usual pre-colonoscopy activities, and so what we have is this entire sequence of consequences for this guy's health where then he's found dead on the couch at home, and Dr. Kofke says his -- if it wasn't for all that other stuff it wouldn't have happened, and that's what's in the record, and he says the only way that the cardiac arrest wouldn't contribute to the death is if he had gotten hit by a car. So again, that's a little bit Philadelphia style, if you will.

THE COURT: Okay.

MR. RANSOM: But we've set all that out at length in the motion papers, and so our position is that on one hand when the Medical University's own witnesses can't say that the cardiac arrest didn't contribute to his death, and then on the other hand Dr. Kofke says is the only way it didn't contribute is if he got hit by a car, we think that that's sufficient at this stage of the proceeding.

THE COURT: Okay. Yes, ma'am. Very briefly in reply.

MS. FLEMING: Sure. Two things. One is I would like to just say that the Plaintiff has the burden of proof to prove by a preponderance of the evidence or more probably than not

that the death would not have occurred but for the deviations from the standard of care. MUSC does not have that burden. So Mr. Ransom representing --

THE COURT: Well, all the Plaintiffs have got to show is a scintilla of evidence of a material fact in dispute --

MS. FLEMING: Right. And there is --

THE COURT: -- at this point in time, not -- that standard you just quoted may be at trial, but not now.

MS. FLEMING: Right. But I think in terms of what the scintilla means is that he can -- that there is some shred of evidence establishing that the death was a result of the --

THE COURT: Well, why, why isn't that true with the -- what the statement Dr. Kofke made?

MS. FLEMING: Because he has no idea what caused the death. So how can he say --

THE COURT: Well, he -- but he said -- he said it caused it.

MS. FLEMING: He did not actually. He's just --

THE COURT: Well, I hadn't, I hadn't read the memos, which I'll have to do and see the exact language. Maybe I misunderstood. I thought you said there's no way he could say it didn't contribute to it unless he had gotten, well, hit by a car. Is that right?

MR. RANSOM: He, he -- that's right.

THE COURT: Okay.

MS. FLEMING: But contribute is not but for causation. It is not --

THE COURT: Well, but, but for is a medical -- legal term not a medical term.

MS. FLEMING: I, I understand that, but it's -- he, he can't say what factors caused the death. He has just, I mean --

THE COURT: Well, can't --

MS. FLEMING: -- speculating.

THE COURT: -- can't you one interpretation that would be that it caused his death at this point in the proceedings? I'll agree with you at trial in the directed verdict I think it's going to have to be something much stronger than that, but we're not at a directed verdict stage.

MS. FLEMING: Thank you, but --

THE COURT: I mean, isn't one interpretation of what he said that, hey, the faulty anesthesiologist or the error in anesthesiologist, whatever the error was, caused his death?

MS. FLEMING: Basically what he's saying is that it increased the likelihood of the death occurring, which is not the standard. That was, that was rejected --

THE COURT: Well, it's almost like making a res ipsa type argument is what he's doing.

MS. FLEMING: Right. Right.

THE COURT: I mean, he's basically making a res ipsa

argument.

MS. FLEMING: Right. Or like a loss --

THE COURT: Even though we don't recognize res ipsa in this state.

MS. FLEMING: Right.

THE COURT: But that's basically what he's saying.

MS. FLEMING: Right.

THE COURT: Okay. Thank you very much. Let me read your memos and the statements --

MR. RANSOM: Yes, sir.

THE COURT: -- and I'll, I'll have to take it under advisement and have the opportunity to read it since I have not read those. Okay?

MR. RANSOM: Yes, sir.

THE COURT: All right. Now, we've got a motion for discovery and motion for leave to file something?

MR. RANSOM: Correct, Your Honor.

THE COURT: What's your -- what's the Plaintiff's motions?

MR. RANSOM: The Plaintiff's got a motion for discovery sanctions and also a motion for leave to file a supplemental complaint, and it would probably work best to hear the motion for discovery sanctions first.

THE COURT: Well, I mean, if you're going to amend, it doesn't matter. I'll hear either one, whichever one you want

to hear first.

MR. RANSOM: Let's, let's start with the discovery motion, please, Your Honor.

THE COURT: Okay.

MR. RANSOM: And in that context I'd like to real quickly hand up just three separate documents that may help me to walk you through some of these issues because regrettably it is a little bit complicated, and both parties have filed fairly extensive briefs with a lot of exhibits, and so I'm going to try to hit the highlights, Judge, in a fashion that will allow you to understand the general nature of the problem.

So the first thing that I'd like the Court to understand is that when this colonoscopy went south back in October of 2010 the Medical University conducted a peer review investigation, presumably a full and thorough investigation in order to find out what happened, and so we begin the case with the assumption really, I guess, if not the presumption that the Medical University by the time the lawyers get involved they've already done an investigation and they know what happened. All right. And one of the documents that I've handed up is the anesthesia record or part of the anesthesia record because it's actually hundreds of pages, and if you'll look at it you'll see, Judge, the first page that I show you is it kind of -- it, it consists of two parts. The top is what I refer to as a spreadsheet, and the bottom is what I

refer to as a real-time graph. All right. And as you flip through those four first pages what you're going to see is that a lot of the boxes in the spreadsheet are empty, and if you'll look at those four pages at the real-time graph you'll see that the line at the very beginning makes a sort of a v-shaped dip. Okay. That line represents the patient's blood oxygen saturation level, which is simply a measure of how much oxygen is in the blood, and of course, it's elementary that you've got to have oxygen in your blood in order to stay alive. Typically a person's blood oxygen levels are going to be 95 to a hundred percent, and by the time you get down to a 40 percent O2 sat level you're in a serious crisis. So what we see with these couple of pages are that that v-shaped dip on the first page you see it occurring in a block that's timed at 7:34, and if you'll turn to the second page you see that v-shaped dip is occurring in a block that's timed at 7:35, and if you'll turn to the third page you'll see that that v-shaped dip --

THE COURT: Wait a minute. Hold on. The first one that I'm looking at shows it at 7, 7:35, between 7:35 and 7 -- yeah, 7:35, and then the next I'm looking at shows it at 7:43. Am I looking at the wrong?

MR. RANSOM: Okay. Well, I, I may have -- forgive me, Judge. I may have shuffled the papers, but if you look at each of those four pages what you're going to see is that v-

shaped dip occurs at a different time on each page. All right, and, and one of those pages shows that the v-shaped dip occurs closer to 8:00 o'clock and the other pages show it's sometime around 7:34, 7:35, 7:36, and again, the spreadsheet, if you'll turn -- what we've got, Judge, some page numbers in the center of the pages, and if I could direct your attention to the one that says page 36 of 99, and I apologize if I've got the deck shuffled on you.

THE COURT: Page 6 --

MR. RANSOM: Page 36 of 99 in the center, down at the center bottom.

THE COURT: Okay. I'm with you.

MR. RANSOM: Okay. So if you look on that page up at the top where the spreadsheet is you'll see that one of the axis identifies so SPO2 that's oxygen saturation, temperature, EKG and other biometric data. Okay. And the boxes for a number of those metrics are empty. All right. So you can see that, and it's obvious, and let me just say that it's not supposed to be that way. So from --

THE COURT: The EKG rhythm is -- says SR.

MR. RANSOM: Yeah. That means sinus rhythm.

THE COURT: Okay. All right. But from there on down it's empty until you get to 7:48.

MR. RANSOM: That's correct, Your Honor.

THE COURT: Okay.

MR. RANSOM: All right. So again, as I say, it -- the way these cases progress obviously we get the records and I send them to Dr. Kofke in Philadelphia and he reviews them and the first thing he tells me is, "Mr. Ransom, well, where's the rest of this man's chart?" Okay. "Why are these boxes empty? Where is the data that's supposed to go in those boxes?" All right. So that sort of sets the tone for the discovery process in this case, and the Plaintiff throughout the course of the case has asked a number of different witnesses what their explanation is for why those boxes are empty, and we started out with the deposition of a woman by the name of Donna Embry and she was the CRNA who was actually responsible for managing the anesthesia process and we took her deposition in August of 2014 and asked her why are those boxes empty and she says, in essence, "I can't really explain it. I've never seen anything like that," and then we took the deposition of the Plaintiff's expert Dr. Kofke in June or rather in March of this year, and he said, "Well, I think those boxes are empty because they hadn't hooked up the monitors to this man before they started with the anesthetic which would be a breach of the standard of care," and then when we took the Defense expert's deposition in June of this year, asked him the same question, "Why are the boxes empty," and he says, "Well, I think it's probably because they started the anesthetic before the monitors were turned on. That's a breach of the standard

of care." All right. So that's sort of been the explanation that the witnesses have given us up through this summer about why those boxes are empty. Well, once the Defendant's own expert testifies that they've breached the standard of care, now the Medical University suddenly has a problem. All right. And so two weeks after their expert's testimony, we start getting a series of new discovery responses, and this all culminates with new records being produced, new witnesses being identified, and ultimately, I took the deposition of a Dr. Reeves who's the chairman of the anesthesia department at the Medical University, took his deposition I think it was September 22nd of this year, which importantly was about a week to ten days before the close of discovery under the agreed-upon scheduling order, and Dr. Reeves for the first time when he was asked, "How do you explain those empty boxes," he says, "Oh, there was some sort of a glitch with the equipment that was recording the biometric information," and I asked him, "Well, how do you know that?" And he says, "Well, there was a document that's called an audit trail that was produced and if you'll look there's an entry in the audit trail that shows that in the middle of this man's procedure somebody is communicating with the information technology department at the Medical University to fix" --

THE COURT: Have you --

MR. RANSOM: That's correct.

THE COURT: Is that in here?

MR. RANSOM: Pardon me?

THE COURT: The audit trail's in here?

MR. RANSOM: Yeah. It's one of the documents that's been attached to the one in the memorandum.

THE COURT: Okay. The audit trail, I've got it. Okay.

MR. RANSOM: Okay. And actually there's two audit trails but we'll come to that.

So the point is, Judge, we went through this entire case, this discovery process with the medical care providers and the Plaintiff's expert and the Defendant's expert, and then we finally get a week before the close of discovery to a guy who's not even identified as a witness by the Medical University, this is just somebody that I wanted to get his testimony, and he says, "Oh, there's this technical malfunction with the equipment and that explains why all these boxes are empty and why these graphs don't line up properly," and so I asked him, "Well, how did you find out?" And he says, "Well, I looked at this audit trial," and he says, "The audit trail shows that the -- someone from they call it the IT department, information technology," he said, "Somebody from the IT department had to log into the system in the middle of the procedure and fix this glitch," and I asked him, "Well, how would the IT department have known that there was a malfunction that needs to be corrected," and he says, "Well,

the CRNA would have alerted them," and I asked him, "Well, how would the CRNA have known that there was a malfunction," and he said, "You'll have to ask her." Well, of course, I had taken her deposition more than a year before, and as we've set forth in some of our motion papers, I showed these records and similar parts of the anesthesia chart to her and asked her, "What is your explanation for these empty boxes and for why none of this data seems to line up on these graphs," and she says, "I don't really have any explanation," and my point being I would have thought that that would have been, you know, during that line of questioning, that would have been the point in time when the CRNA would have said, "Well, there was a malfunction with the equipment." All right. So the first point that I want the Court to understand is that the Medical University's defense to this case now after their own expert sort of gave away the farm earlier this summer is now they've got the chairman of the department is saying, "We had a technical malfunction and that explains the discrepancies with the chart." Well, we sure would have liked to have known about that technical malfunction at the beginning of the case instead of at the very end of the case. All right. So that's point number one.

Point number two relates to a document that from a semantics standpoint it can be described with a number of different technical terms if you will, cardiopulmonary

resuscitation form, code documentation, code sheet, mayday record, mayday card. What it basically is, Judge, anytime somebody over at the Medical University suffers an unexpected cardiac arrest, all right, they call a mayday or a code, might be familiar with this from television, and when the code gets called a bunch of people come running in the room to assist with the patient, and one of those people that comes in is what they call the recorder or the scribe, and the recorder or the scribe's only job is to sit with a clipboard and write down everything that's happening and the record that's made is called the mayday record. Okay.

When we first got the anesthesia chart from Mr. Mikell we saw that in one part of the chart it indicates that at 7:56 a mayday is called, and so we started asking the witnesses about that we were told that there should be a mayday card, and in fact, the gastroenterologist who was involved in the procedure in his own note he actually says at one point in time, "Please see code documentation," for further details of what had happened. All right. So this is depositions that were taking --

THE COURT: Please see what now? I'm sorry?

MR. RANSOM: Pardon me, sir?

THE COURT: Please see what?

MR. RANSOM: Code documentation.

THE COURT: Okay.

MR. RANSOM: Okay. So these are depositions that were taken I think August 24th of last year. So we've got a reference to a mayday that's called, and we've got two of the medical care providers who are in the room saying that, "We believe that a mayday card was completed." Well, that's obviously a fairly important piece of the record for my expert to have especially since we have all these empty boxes. So I specifically started asking counsel for the Medical University, "Where's the mayday card," and I wrote him a letter on September 4th and that's part of the exhibits. I wrote him a letter on September 24th, and I wrote him some additional letters and I sent some requests to admit and did everything that I could think of to try to get at this mayday card, and the Medical University's original response to all that was to say, "There is no mayday card," and so I asked him, "Well, do you have a policy that governs the way these types of events are supposed to be documented?" And they said, "Yes. We do," and I said, "Please produce the policy," and they did, and when I looked at the policy, and it's what I refer to as the mayday policy, the mayday policy as I read it certainly required that a mayday card be created and kept in the patient's chart, and so then I said -- I mean, I almost got into an argument with counsel. "Your policy says there should be a mayday card. Why isn't there?" Well, they ultimately produced a witness, a 30(B)(6) witness on this

issue. The guy's name is Dr. Guldan.

THE COURT: Doctor what?

MR. RANSOM: G-U-L-D-A-N.

THE COURT: How you spell it?

MR. RANSOM: G-U-L-D-A-N, and he's a member of the anesthesia faculty there, and we took Dr. Guldan's deposition November 4th of last year and I handed him the policy that requires this cardiopulmonary resuscitation event form or mayday card, whatever you want to call it, and I asked him, I said, "Well, does this apply?" And he says, "No. It doesn't apply," and I said, "Well, was there a mayday card?" He says, "No. There's no mayday card." All right. And I said, "Well, wait a minute. Show me in the policy where it exempts Mr. Mikell's situation so that there isn't a mayday card." Well, he couldn't do it. So I filed a motion to compel, and we came down here and had a hearing in March, and Judge Stilwell heard the motion, and he said, "You know what, Mr. Ransom, you're right. Something's not right here. I'm going to order that they produce another witness on the issue of whatever record was created here and what their record-keeping requirements are."

So finally late this summer they produce a new witness. Her name is Sheila Scarborough, and I handed Ms. Scarborough the mayday policy, and I asked her, "Does this apply to Mr. Mikell's circumstance?" She said, "Yes. It does," and I

said, "Was a mayday card created for Mr. Mikell?" She said, "Yes. There was," and I said, "Well, where is it," and she says, "Well, Mr. Ransom, the mayday card got faxed to my office. I work in the risk management office. The mayday card got faxed to my office," and I asked her, "Well, when you got it what'd you do with it?" She says, "Well, I take that mayday card with all the information that it contains and I enter that information into this American Heart Association database," and I said, "Great. What'd you do with the mayday card once you had finished with the database?" She says, "I shredded it," and I said, "Well, where's the database?" They produced a couple of days before her deposition a printout of the database and that's one of the couple of pages that I've handed you. Her deposition, I think, was on August 24th. They produced this printout on August 20th. It's multiple pages. The entire database printout is included in the exhibits with our motion papers. I just rather than print -- hand you 26 pages I just took two pages that are sort of representative, and as you look at that, Judge, you realize that's sort of unintelligible, and I asked her, I said, and keep in mind this is a witness that they were ordered to produce by the Court, and I asked her, I said, "Ms. Scarborough, can you explain to me what any of that means?" She says, "No." So it turns out that for the better part of two years the Medical University position was, "There is no mayday card. There wasn't ever one

made," and then all of a sudden about five weeks before the close of discovery now all of a sudden they're saying, "Well, there was a mayday card, but we've destroyed it, but we didn't destroy it before we created this database, and we're going to print out the database and give it to you in a way that you can't even understand what it means."

So I asked Ms. Scarborough, I said, "When you're looking at your computer screen there at your desk at this database could you make sense of it then?" She says, "Sure." I said, "Well, is there a computer in the room next door we can go over there and take a look at it so I can see this?" "Objection." All right.

So my point on this mayday card is, you know, if we had not refused to accept Dr. Guldan's testimony and did not file the motion to compel and had not come down here and gotten an order and had not patiently waited until they produced Ms. Scarborough as a witness, all right, the record would be that there never was a mayday card, and it turns out that there was, turns out it was destroyed and it turns out that the information in the mayday card exists in their computer system. They just don't really want to give it to us in a way that's usable because, again, the important point here is Dr. Kofke wants to have this information. All right. So that's point two, this mayday card.

The second or the next issue that we've struggled with in

this case, Judge.

THE COURT: Well, let's -- let me hear -- you want them -- what do you want them to produce, a copy that's legible as to what was put into the computer before the mayday card was transcribed?

MR. RANSOM: I mean, we, we think we're --

THE COURT: I mean, excuse me, destroyed.

MR. RANSOM: -- at a minimum we're entitled to have this information provided in a usable.

THE COURT: This went into the American Heart Association?

MR. RANSOM: Yeah. They said -- I gather that the Heart Association has some interest in cardiac arrests.

THE COURT: Why can't you produce it?

MS. FLEMING: She can. I mean, we can --

THE COURT: Pardon?

MS. FLEMING: We're trying to figure out a way to do that.

THE COURT: Well, the lady said she could understand it on her computer. All you have to do is punch print.

MS. FLEMING: That's, that's what she did and that's --

THE COURT: Pardon?

MS. FLEMING: That's what she did and that's how it came out. I want to clarify something with regard to -- I want to address these issues but when you're ready for me to do that.

THE COURT: All right. You want to what?

MS. FLEMING: Address some of these issues but when you're ready for, for me to do that.

THE COURT: I, I want to know why you can't produce the mayday card. He says you all have shredded it, and you all have entered it into a website.

MS. FLEMING: That's incorrect.

THE COURT: All right. If it hasn't been shredded where is it?

MS. FLEMING: The copy -- no one knows, Judge. The, the, the copy of the record -- so this woman was the director of risk management at the time that this happened, the director of risk management.

THE COURT: Was what now?

MS. FLEMING: The director of risk management. She -- we were asked to produce the cardiopulmonary resuscitation form and MUSC has never been able to find the form. If it --

THE COURT: Right now I'm talking about the mayday card. Don't --

MS. FLEMING: It's -- that's the same thing. It's the same thing.

THE COURT: All right. So it's the same thing.

MS. FLEMING: Yeah. Uh-huh.

THE COURT: Why can't you produce it?

MS. FLEMING: It, it doesn't exist. If, if she -- she

never keeps a copy. She receives a --

THE COURT: I thought your witness said that it had been produced and she entered into a website and then shredded it.

MS. FLEMING: Let me clarify that.

THE COURT: Is she lying?

MS. FLEMING: No. Let me clarify that if you will. So after the code the person recording the information according to the policy is supposed to fax a copy of the form to risk management, which came to our attention later this year that that actually happened. We had no idea that that happened.

THE COURT: I'm not concerned about that.

MS. FLEMING: Okay.

THE COURT: I'm concerned about how you're going to produce it and where you're going to get it from. If it's been entered into the American Heart Association why can't you get it?

MS. FLEMING: So all of the data that's in that database is actually in the anesthesia record, and that's what Dr. Guldan said.

THE COURT: Is what?

MS. FLEMING: In, in the anesthesia record, the, the 400-page record of this man's procedure contains every piece of information that was in that cardiopulmonary resuscitation form, in the mayday card. It, it says when he went into --

THE COURT: You still haven't answered my question.

MS. FLEMING: Right.

THE COURT: Why can't you retrieve the mayday card off of where you put -- where your employee put it on the American Heart Association website?

MS. FLEMING: It was never put on the website. The data was transcribed into her database -- right -- where --

THE COURT: Well, I thought she testified she put it on the database?

MS. FLEMING: She, she testified that she received a copy, a faxed copy. That faxed copy is shredded because it contains protected health information.

THE COURT: Well, did she shred it before she put it on the website?

MS. FLEMING: No. It never went on the website, Judge. She entered the information --

THE COURT: Well, what did she testify to?

MS. FLEMING: She testified that she entered the information from the form into a database that she maintains on every patient over there who has an arrest.

THE COURT: All right. Where's that database where she entered the card to?

MS. FLEMING: It's, it's on her -- it's on a server over here.

THE COURT: Well, then why can't you produce that?

MS. FLEMING: Because it contains protected health

information of numerous other patients at the Medical University. So we're trying to figure out a way to give him some type of access to actually --

THE COURT: You won't produce it because it produces some other names?

MS. FLEMING: We can't under HIPAA.

THE COURT: Why can't you just -- well, you're going to get a court order to produce it.

MS. FLEMING: I'm afraid that it's more complicated than that. It's not -- it's, it's --

THE COURT: Why can't you screenshot the image on the server and redact the rest of it?

MS. FLEMING: We were, we were trying -- this --

THE COURT: All right. Let's do this. Okay. I'm not going to play anymore silly games. Tomorrow morning 9:00 o'clock bring the lady here that testified about the card, bring your IT people and we're going to find out how to get -- retrieve this, period. You understand? See you in the morning at 9:00 o'clock. Have a good day. Is there anything else that we can deal with this afternoon?

MR. RANSOM: Your Honor, there are a number of other issues.

THE COURT: All right. Let's hear them. Can we deal with them without bringing somebody in here tomorrow? I mean, I want this lady in here. I want to hear what she has to say

and what she did with the, the mayday card, and I want an IT person to tell me why they can't screenshot the image on the server, redact the rest of it, and run -- hit print and give it to him. I want to know that tomorrow morning. You understand? What's next?

MR. RANSOM: All right. Judge, now we come to the issue of what I call a backup data from the anesthesia process. All right, and again, to give you some background, and this is coming to me from a variety of different sources, Dr. Kofke and others. So when Mr. Mikell goes in to have this colonoscopy he's hooked up to a variety of different biometric sensors that record his oxygen saturation, heart rate, respirations, etcetera. Okay. And those sensors then feed that data into a software system that then runs it through an algorithm and then that creates a visual display on a monitor that the doctors are looking at during the procedure that shows heart rate, respiration, oxygen saturation, etcetera. It's also got some audible alarms. All right. And according to my consultants, once it goes through that algorithm, that data is then swept off into a server where it is stored for some period of time. All right. So when Dr. Kofke looked at all these empty boxes he says, "Mr. Ransom, you've got to get the data. Where's the data? They should have that data." All right. So from the very beginning of this case we began this process of asking where's -- the boxes are empty, where's

the data? All right. And part of this becomes even more important because we later find out that the CRNA has gone back into part of the anesthesia record and changed some entries after the fact.

THE COURT: Who did what now?

MR. RANSOM: The CRNA went back -- and I'm sorry. That stands for certified nurse anesthetist. Her name's Donna Embry.

THE COURT: Who? What? What's her name?

MR. RANSOM: Donna Embry, E-M-B-R-Y.

THE COURT: Okay. She's changed some records?

MR. RANSOM: That's right. She goes back into the record, into the anesthesia record a day and a half later and changes some of the anesthesiologist's entries. All right.

THE COURT: I mean, how does she change? What -- I mean, what kind of -- do you know what kind of changes she made?

MR. RANSOM: Yeah. Yeah. A number of changes, but the most important of which changing the time at which the anesthesiologist is indicated as coming into the room during the midst of the crisis.

THE COURT: Well, is all this after your -- their experts have said it was medical malpractice to not turn it on or after the fact or before the fact?

MR. RANSOM: No. This is all being done in the afternoon of October 1st.

THE COURT: Okay. Okay.

MR. RANSOM: And in the afternoon of October 2nd.

THE COURT: Okay. All right.

MR. RANSOM: Okay. But my point is, is we found out some of the anesthesia record that has been produced has been in my words tampered with. They don't agree with that, but I say tampered with, and so that makes it all the more important to get what Dr. Kofke keeps saying is get the backup tape. All right. So we began by sending a request to admit in September of last year, followed that up with letters in November, December and January. All right. Had a meeting with some of the folks at the Medical University, and last fall their position was, they were telling me, "Listen, your consultants don't understand how our system is set up. It doesn't work that way here at the Medical University. We don't sweep that data off onto a server and keep it. We don't have it."

All right. So ultimately Dr. Kofke's deposition is taken. He describes this data sweeping process. We take the Defense expert's deposition. He describes the same data sweeping process. We actually go to -- the Medical University has a public website, and on that website they've got a document that's created by one of their own information technology people, and it's been made an exhibit, and that document describes what they call MUSC's enterprise data warehouse, and in that enterprise data warehouse document they

say that all sorts of information from the computer systems at the Medical University get swept off into our data server, and specifically identified as part of that process is the anesthesia software system. So I write to defense counsel in January, December and January and say, "You all are telling me you don't have any backup data. Your own website's got a document that describes the system for preserving it." So finally they relent, and again, this is after their own expert has testified, after my expert has testified, after all the medical care providers have been deposed. I get a letter from Ms. Fleming, and they've got a witness, and her name is Pat Aysse.

THE COURT: Pat who?

MR. RANSOM: Pat Aysse, and it's spelled A-Y-S-S-E.

THE COURT: Okay.

MR. RANSOM: So I take Ms. Aysse's deposition and, and large portions of that are included in our papers.

THE COURT: What's her specialty?

MR. RANSOM: I think she's some sort of a technology person.

THE COURT: She's IT?

MS. FLEMING: No. She's a registered nurse.

THE COURT: Okay.

MS. FLEMING: Who worked with -- she was the clinical interface between IT and the clinical people at MUSC with

regard to the Department of --

THE COURT: All right. Do you have the backup tape or not?

MS. FLEMING: It's, it's -- that's not even an issue.

THE COURT: Pardon?

MS. FLEMING: We have never represented that there was no backup data to him.

THE COURT: Well, do you have it?

MS. FLEMING: They're --

THE COURT: Yes or no?

MS. FLEMING: It, it, it exists on a server that is huge, that is huge.

THE COURT: I understand that. Do you have it? The answer is yes; correct?

MS. FLEMING: There -- it, it does exist.

THE COURT: All right. What's it going to take to produce it?

MS. FLEMING: Yeah. And that's the thing, Judge. We've had so many conversations about this.

THE COURT: Well, we haven't -- you and I are having a conversation right now.

MS. FLEMING: Right. Right.

THE COURT: What's it going to take to produce it?

MS. FLEMING: It will take approximately -- let me, let me tell you exactly what our IT people have said about that.

It will take -- it will take over a thousand hours to actually try to retrieve the, the data in the database which would cost in, in human hours just to pay someone to do that $96,000.

THE COURT: What's, what's the name of those programs where they put word searches?

MS. FLEMING: So the database is, is 300 gigabytes of data. It's made up of 669,600 --

THE COURT: I, I understand all that.

MS. FLEMING: Yeah.

THE COURT: But isn't there a program where you can insert and put in keywords to retrieve this information?

MS. FLEMING: It's not. It actually takes a master's level --

THE COURT: Takes a what?

MS. FLEMING: It takes a master's level engineer to do -- for each, for each box or query the -- of this database which contains beyond -- I think over, over 300,000 different procedures, it would take him 20 minutes per box, and that's what I'm trying to say, it's 669,000,000 boxes. Nonetheless all of the data that he wants, that he's asked for has been produced in the anesthesia record. Our IT people are saying that it would essentially be -- everything that he's asking for is essentially what was already produced.

THE COURT: Well, in other words when -- but you're saying these blanks on these forms, on these anesthesia forms,

the anesthesia PACU record is blank. Initially you were saying they didn't turn it on. Then I think you said it was a glitch in the, in the equipment. Are you all still saying it's available?

MS. FLEMING: We, we never said that it -- what, what --

THE COURT: Are you now saying it's not even on the backup?

MS. FLEMING: There's -- it -- so what happened -- may I explain?

THE COURT: Yes, ma'am.

MS. FLEMING: Okay. Because I don't agree with his representation of what happened. So on the form that you have the top part of the form is -- there are monitors in the procedure room that sit on a, on a rack, on a shelf. The bottom of the, of the form that has the graph, the real-time data graph is actually derived from a set of monitors.

THE COURT: All right.

MS. FLEMING: And the top part is from the anesthesia.

THE COURT: All right. What's it going -- you say it's going to take a thousand man-hours to produce this backup tape for this one individual --

MS. FLEMING: It's not a backup.

THE COURT: -- for this one day? Is that what it's going to take?

MS. FLEMING: Plus the cost of it is, is almost $3

million.

THE COURT: It's how much?

MS. FLEMING: Three million, 2.3 million plus 96,000 in actual man-hours.

THE COURT: Oh, okay.

MS. FLEMING: Uh-huh.

THE COURT: Well, let me ask you this. Why do you have backup tapes if it takes that much? Why don't you all just ignore the backups?

MS. FLEMING: Well --

THE COURT: I mean, that's absurd.

MS. FLEMING: I don't think it's that simple to just ignore.

THE COURT: Okay. All right.

MS. FLEMING: Because let me explain why actually, Judge, because when we go to print so the anesthesia record which was printed in this case and provided in numerous different intervals, almost 500 pages of records, you actually -- that prints from that database.

THE COURT: Well, now, let, let me, let me, let me do this. Okay? I'm going to bring in a court's expert, and you all are going to pay for it.

MS. FLEMING: I'm sorry? What expert?

THE COURT: And we're going to reschedule this hearing.

MS. FLEMING: Okay.

THE COURT: And he's going to sit right here and advise me on what it's going to take to get that information. Okay?

MS. FLEMING: And may we bring our IT people to help?

THE COURT: Pardon?

MS. FLEMING: May we bring our IT people to help with that process?

THE COURT: Whenever I set it up and I get my expert here.

MS. FLEMING: Okay. Okay.

THE COURT: It's going to be a court expert.

MS. FLEMING: Okay.

THE COURT: I will reschedule this hearing and the two of you all are going to split the cost of this expert. Okay?

MS. FLEMING: Okay.

THE COURT: Now, you're welcome to bring your -- I want you to bring your IT people to that hearing because I think this is poppycock. I think there's a, there's a program that you can install and do keyword searches and find this relatively simple. Now, you all may not want to do that and you all come up with all, all this other IT information that's probably correct, but there's a program you could install using keywords to find it --

MS. FLEMING: And --

THE COURT: -- a lot quicker than a thousand man-hours. Okay. So I'm going to continue this. I will reschedule it

when I have a chance for Mr. Abrams to be here, and he's going to be my expert.

MS. FLEMING: And I, I appreciate that because I think it's a very complicated --

THE COURT: Okay.

MS. FLEMING: -- issue, and, and I think that our position all along has been that what the rule requires, and as you know, is that we produce the data and we did. There's nothing else to produce. We've given him the audit trails, everything.

THE COURT: Well, in other words, either, either you -- but you're running around the mulberry bush. You're saying, hey, you didn't do anything wrong --

MS. FLEMING: Right. Okay.

THE COURT: -- because they're blank and then his expert's saying there's a backup tape to that but you don't want to produce that backup tape to see what the readings were.

MS. FLEMING: There isn't. There aren't any readings. That's the point, Judge, and our concern --

THE COURT: Well, and if the backup tape shows blanks then let's get the backup tape. Okay? The backup tape's going to be the proof in the pudding.

MS. FLEMING: So --

THE COURT: Okay.

MS. FLEMING: -- just --

THE COURT: Thank you all very much. I'll reschedule it whenever I can make arrangements for Mr. Abrams to be here. He's a retired FBI expert. He can find anything you want to find on a computer. Okay. And it won't take a thousand man-hours. I promise you. Thank you all very much.

MS. FLEMING: May I ask one --

THE COURT: Yes, ma'am.

MS. FLEMING: -- point for clarification? The issue that you -- with regards to the other form you still want us here tomorrow at nine a.m. or can we address that at another hearing as well?

THE COURT: Do what now?

MS. FLEMING: Do you still want us here with the other witness?

THE COURT: Yeah. We'll listen to those when we reconvene.

MS. FLEMING: When we reconvene. Okay. Thank you.

THE COURT: Based upon what you're telling me --

MS. FLEMING: Okay.

THE COURT: -- I need Mr. Abrams here. Okay?

MS. FLEMING: Okay. That's fine. That's great. Thank you, Judge.

MR. RANSOM: Yes, sir. Judge, there were some other issues, but we'll wait to get --

THE COURT: We'll take those up at the time.

MR. RANSOM: Thank you, sir.

THE COURT: Thank you all very much, and, and how about asking your tech person, your tech person why they can't do what I ask as far as finding that one, take that screenshot on the computer screen, then print it and delete, why they can't do that where you said it would show other, other patients, why they can't do that?

MS. FLEMING: I don't know.

THE COURT: That's a simple process.

MS. FLEMING: I, I --

THE COURT: My law clerk can do it. You want me to send her over there to do it?

MS. FLEMING: The databases aren't -- I believe she can do it, but I don't know that it's --

THE COURT: Pardon?

MS. FLEMING: I don't know that it's doable from this system, and that's one of the issues that we were trying --

THE COURT: Well, you want me to send my law clerk over to do it for you?

MS. FLEMING: Can't because of HIPAA.

THE COURT: Okay. How about asking them that question, okay, please, ma'am?

MS. FLEMING: Yeah. I will ask that. I will. Absolutely.

THE COURT: All right. Thank you very much.

MS. FLEMING: Uh-huh.

MR. RANSOM: Thank you, Your Honor.

(Adjourned.)

C E R T I F I C A T E

I, the undersigned, Grace L. Hurley, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the Hearing held in the case of Shon Turner, as Personal Representative of the Estate of Charles Mikell, deceased versus Medical University of South Carolina, held in the Court of Common Pleas for Charleston County, Charleston County Courthouse, Charleston, South Carolina, on October 21, 2015.

I do hereby certify that I am neither of kin, counsel, nor interest to any party hereto.

_____

Grace L. Hurley, CVR-CM-M
Official Reporter

January 16, 2017.

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	
Shon Turner, as Personal Representative of the Estate of Charles Mikell, deceased,	)	CASE NO. 2012-CP-10-7275
	)	
PLAINTIFF,	)	TRANSCRIPT OF RECORD
	)	
VS.	)	
	)	
Medical University of South Carolina,	)	
	)	
DEFENDANT.	)	
	)	

December 11, 2015

Charleston, South Carolina

B E F O R E:

The Honorable J. C. Nicholson

A P P E A R A N C E S:

Robert B. Ransom, Esquire
For the Plaintiff

Alex Apostolou, Esquire
For the Plaintiff

Alissa D. Fleming, Esquire
For the Defense

Jeffrey Michael Bogdan, Esquire
For the Defense

I N D E X

HEARING -- 03

EXHIBITS - None Proffered

CERTIFICATION OF TRANSCRIPT -- 51

If you need an additional copy of this transcript or a sealed transcript or if opposing counsel requires a copy of the transcript, you should contact the court reporter.

Certification will satisfy Rule 80, Stenographic Report of Transcript as Evidence.

THE COURT: Turner versus Medical University of South Carolina.

All right. All right. First of all, Ms. Fleming, thank you very much for responding to those questions that my law clerk sent out on my behalf. I appreciate you doing that.

Let me -- let me say this to the parties involved. I want to say up front no way from anything I say or do is indicated that any attorneys in this case have done anything that the court feels like is inappropriate or not appropriate.

But I have got -- I have read some of this case. I got into it briefly. I am not comfortable today until I read some depositions and do some studying to delve into this and even listen to your arguments.

Let me say this. Just with a brief looking at what I have looked at very briefly - I haven't delved into it in detail - I think the plaintiff has probably made a prima facie case for possibly discovery abuse. And whether that discovery abuse is intentional or not intentional or was just lack of communication between parties of what's transpired, I don't know.

But I want to read some depositions. I want to read the doctor's deposition that testified that this particular procedure was not recorded from an anesthesia

standpoint; and then the nurse's decision that came in later that said, yes, she recorded it, she placed it in the medical records and then destroyed it.

And then there has been something recently from the American Health Association that you produced January 2nd. I still haven't -- I haven't seen a copy of that. I don't know what that is.

But my point is I am not comfortable understanding what has transpired from a time sequence. I have read the memos. But the memos show you a relative position. But I am going to sit down and read -- I want to -- where is the doctor's deposition and the nurse's deposition; are they in your possession or are they in the court records or what?

MS. FLEMING: Your Honor, I think we both cite to them. But they are both marked as exhibits to our memorandum in opposition.

THE COURT: The entire deposition?

MS. FLEMING: The entire ---

THE COURT: See, I haven't read those; and I want to read those, okay. I just haven't had an opportunity to read them. Okay.

Now I am not -- just because I say it is a prima facie case, I am not saying there has been any abuse. I'm not trying to take that position one way or the

other.

And I use the term prima facie case. Some of my judge colleagues refer to it it just doesn't smell right at this point in time. Now it may wind up having a better smell after I get into it. I am not trying to prejudge anything.

Now I have got a few questions I want to ask y'all today. And I will probably email some questions to both of you to respond electronically to help me get into this and figure out what -- what has been going on, what has been transpired, and why it transpired.

I am just I am not comfortable today listening to you. Okay. I can't put it any more simply than that. And I know y'all are here ready to go to war. And I appreciate that. Both of you are good lawyers. But I am just not comfortable.

I want to get an understanding in my mind of what transpired. I want to do some reading before I think your oral arguments will appear to be appropriate.

Now we have got two motions, I understand; a motion to amend and a motion for sanctions; right?

MR. RANSOM: That is correct, Your Honor.

THE COURT: And both of those are under advisement from previously. And I asked y'all to come today. And y'all have brought some IT people I assume. And ya'll

have responded to my questions.

And Ms. Fleming, I want to thank you very much for doing that, okay.

MS. FLEMING: Absolutely. And we appreciate you asking the questions.

THE COURT: And I am probably going to do some more of that once I got into it. Okay. The first thing I want to do is read these depositions. Now I want to ask -- ask a couple of questions.

Ms. Fleming, the affidavit concerning the tech that says it is going to cost $1.3 million to produce, what is he -- what is he producing and -- what is being produced? Is that the anesthesia records, the patient records, or what?

MR. BOGDAN: Can I try respond to that, Your Honor?

THE COURT: Yeah, I mean what -- what is -- when he gives me that figure and going -- and his explanation in the affidavit as to what he was trying to do, what is he trying to retrieve is my question.

MR. BOGDAN: Actually, John Fischer would probably be the best person to explain it. But if I could paraphrase. What we are talking about now is the search of the Pixus database which is no longer in active use. And that may not be the technical term. But as of July of 2014 they have switched to a new system.

So he has already spent in excess of 100 hours retrieving the very basic data. And he is able to establish that not only did that data -- was that data not deleted or altered but it couldn't have been.

So what has been asked is I think that he -- that he continue that type of search for all of the data fields that would have existed for Mr. Mikell, which have we contend nothing to do with this case. We would -- we would contend if the court ---

THE COURT: Well, was this anesthesia records he's searching for?

MR. BOGDAN: It is every -- it is every -- it is every records from this treatment. It is the data that -- it is the raw data.

THE COURT: Okay. All right. So it is every record for treatment from the time he walked in the hospital until the time he left; is that what you are trying to retrieve?

MR. BOGDAN: Can I let Ms. Fleming explain? She ---

THE COURT: Yeah, she has been involved in it. And I appreciate you -- I will listen to both of you. I am not going to cut you off. I mean what is he trying to retrieve at this 1.6 or whatever the price was?

MS. FLEMING: Yeah, and I -- the only reason -- I think I am hearing it a different way. It is not the

actual anesthesia record. It is the -- it is the data behind the record. That is what they are asking for. So we produced all of the records ---

THE COURT: Well, help me understand. Help me a little bit to understand the process. I assume when he comes in for the colonoscopy he is prepped and he is taken into the OR and anesthesia of some sort is administered and he is not put completely under like you would for a three-hour surgery; and this whole process takes probably what, 20 minutes, 30 minutes?

MS. FLEMING: It should.

THE COURT: How long was he under anesthesia?

MS. FLEMING: He -- his procedure was never completed because within about -- I would say it started -- he received his first dose of anesthesia at 7:41 a.m., and around 7:56 he started to go down. He started to develop ---

THE COURT: Okay.

MS. FLEMING: --- a heart rhythm issue and trouble breathing.

THE COURT: And obviously they switched over to that ailment, not the colonoscopy. Was any ---

MS. FLEMING: They took ---

THE COURT: --- part of the colonoscopy performed?

MS. FLEMING: They had put the probe in, and they

took it right out.

THE COURT: Okay. All right. Now on this documentation that somebody sent that talks about from, oh, 7:24 to 7:47, about 12 minutes, is blank.

MS. FLEMING: That is right.

THE COURT: At what timeframe when he was taken into that OR did that occur?

MS. FLEMING: May I ---

THE COURT: Was that when he first went in, or was that during the process; or why is it blank?

MS. FLEMING: May I approach just to see that?

THE COURT: Yes, sir. Yes, ma'am.

MS. FLEMING: So from this time frame, 7:35 a.m. to 7:45, at 7:35 he was in a pre-holding area like a pre-op area. He was transferred from ---

THE COURT: You can come up here if you want to see. Or you probably already know about it (referring to other counselors).

MS. FLEMING: He was transferred from the pre- -- the holding area, the pre-op area, into the room at about 7:35.

THE COURT: Okay.

MS. FLEMING: And from 7:37 this whole timeframe he is in the procedure room. At 7:41 he gets the dose of Propofol which is the anesthetic. It is recorded

elsewhere in the chart.

And then from this point forward at about 7:39 the CRNA who is the nurse anesthetist who was giving him the drugs realized that she -- although her testimony is she had him hooked up to the monitors but she realized when she went to document in the computer that his chart wasn't open in the computer. So she called the IT helpdesk. Which our IT person is here. And we have a record of that saying, hey, I need help opening his record in the computer.

It is not the monitors aren't talking to the computer. She called two times ---

THE COURT: So it was never turned on in the OR is what you are telling me?

MS. FLEMING: It was turned on. It is like a safety feature that they have with the system where when he is in the holding area since all of the documentation is now on the computer it is kind of like when you used to have a paper chart you would have a paper chart that was with the patient and as soon as they finished documenting it goes with the patient into the OR.

This is analogous to that in that the computer that he was -- that they were documenting on in the pre-area doesn't stay open. They have to close him out in that system. He was not closed out properly. So when she got

him into the OR room she couldn't look him back up in the computer.

THE COURT: Because it wasn't closed out in the prep area?

MS. FLEMING: That is right. And so that ---

MR. BOGDAN: But the monitors were working.

MS. FLEMING: The monitors were working.

MR. BOGDAN: They just weren't recording on that chart.

MS. FLEMING: That's right.

THE COURT: All right. So that is your explanation for the blank.

MS. FLEMING: That is correct.

THE COURT: So at what time did he have the heart difficulty?

MS. FLEMING: Right. So right about two pages over you see that where it says his sinus rhythm -- normal sinus and sinus rhythm. That is what a normal person's heart rhythm would be. At 7:56 a.m. he went into a junctional rhythm which is a -- which is a bad rhythm.

THE COURT: Let me get the right page. Is this the right page?

MS. FLEMING: I will find it for you.

THE COURT: Please do.

MS. FLEMING: Sure.

THE COURT: Because I am not familiar with what I'm looking at. I apologize. And this is part of my problem; listening to y'all, I have got to get some education on myself. Okay.

MR. RANSOM: It is not simple.

THE COURT: It is not simple.

MS. FLEMING: It is missing a page. But you are welcome to have this copy.

THE COURT: It is missing a page?

MS. FLEMING: Yeah, it is. That's okay.

THE COURT: We are going to call this the missing case.

MS. FLEMING: No. No, it is not though. I promise.

THE COURT: Well, how about getting me a copy of it.

MS. FLEMING: This is for you. Actually I have a copy.

(WHEREUPON, document provided to the court.)

THE COURT: Okay.

MS. FLEMING: So he actually went junctional at 7:56.

THE COURT: So the machine was functioning properly before he had the heart problem?

MS. FLEMING: Oh, yeah.

THE COURT: Okay.

MS. FLEMING: Yeah. And you have that -- you have

evidence of that by virtue of it recording. As soon as Ms. Thompson who is the clinical analyst who got the -- opened him up in the computer it is all recording starting at 7:48 a.m. It is all there. And so at 7:56 which is, you know, what, eight minutes later, that is when he -- his rhythm started to change.

THE COURT: Okay.

MS. FLEMING: His heart rhythm. And PEA means pulseless electrical activity. It is like your heart is beating but there is no profusion.

THE COURT: Okay.

MS. FLEMING: So that is what he is coding.

THE COURT: All right. All right. Well, that -- all right. That explains that and answers that.

MS. FLEMING: Okay.

THE COURT: Y'all can stand up here if you want to. I mean she can take it down.

MR. RANSOM: If I can get something real quick.

THE COURT: It doesn't matter to me because I am just going to ask you some questions and then I are going to adjourn this hearing. I am going to go I guess do some reading and we will reconvene this. I am not going to make a decision without oral arguments. Okay.

MR. BOGDAN: And we do have witnesses ---

THE COURT: I am not equipped ---

MR. BOGDAN: --- whenever the court is ready, Your Honor.

THE COURT: I'm not equipped myself to even ---

MR. BOGDAN: We will come back.

THE COURT: --- listen to you did today, okay. I'm sorry. I am not.

MR. BOGDAN: We will come back ---

THE COURT: And I apologize for that. But I just haven't had time to learn. I didn't realize the complications until last night when I was sitting there reading some of this stuff. Okay.

MR. RANSOM: It is complicated.

MR. BOGDAN: We did a dry run. I played your role. And believe me it is hard to understand. So we get you.

MS. FLEMING: And we spent -- I mean ---

THE COURT: Now my question to you is so what.

MR. RANSOM: So what.

THE COURT: So what ---

MR. RANSOM: Right.

THE COURT: --- this is missing and you don't have it and it can't be retrieved, how does that affect your overall theory of liability? And that -- because I think that is important when you start talking about sanctions and if you are going to sanction or what you are going to sanction. Okay.

MR. RANSOM: And I have got a little page that I would like to give the court.

THE COURT: That is fine.

MR. RANSOM: And that can help you understand the dilemma that I face.

THE COURT: I mean I couldn't understand just because it began the procedure how is that going to affect your theory of liability.

MR. RANSOM: Right.

THE COURT: What is your theory of liability?

MR. RANSOM: Well, what we -- and understand it has been sort of a moving target as additional information has become available and, you know, stuff to come in the last three months. But our theory of liability is at this point in time that once this procedure got started and once the anesthetic had been administered the nurse anesthetist and the other providers' attention were diverted from the patient because of these technical issues that they were being called upon to deal with.

THE COURT: All right. So you because of that difficulty they had you feel like that interfered with -- that precipitated not his heart attack but taking care of his heart attack?

MR. RANSOM: Well ---

THE COURT: I assume he had a heart attack.

MR. RANSOM: Not -- his heart stopped.
THE COURT: Oh, his heart stopped; okay.
MR. RANSOM: Yeah. And our view at this point in time is that the reason that occurred is because at the point where they had administered the anesthetic - and this man, understand, has some underlying medical conditions that make him particularly sensitive to this anesthetic agent; and at the point ---
THE COURT: This particular anesthesia or ---
MR. RANSOM: Yeah.
THE COURT: --- all anesthesia?
MR. RANSOM: Well, you know, they are using it fairly standard. It is called Propofol.
THE COURT: Right.
MR. RANSOM: But because of his heart condition and sleep apnea we contend that this is a patient they can very quickly get into trouble when he is giving Propofol.
THE COURT: Well, is there -- is your theory another anesthesia would have been appropriate, another type?
MR. RANSOM: That is not our main theory.
THE COURT: Okay. All right. Okay.
MR. RANSOM: There are other drugs. And that is one of the issues.
MR. BOGDAN: And other location.
THE COURT: I'm trying to get a grasp on what your

theory is so I can understand it.

MR. RANSOM: So originally, Judge, when -- and if I can -- this will -- this is just a couple of pages. This will help everybody perhaps. As you have already perceived yourself, the boxes up here are empty (pointing).

THE COURT: Right.

MR. RANSOM: And what we have learned is that he is apparently hooked up to two different systems. One is a system they call a Phillips monitor. And the second is a system that is the anesthesia.

THE COURT: Is that the monitor that she was referring that wasn't properly on or turned on ---

MR. RANSOM: Well, I can explain that.

THE COURT: Or not functioning properly. I don't know the right ---

MR. BOGDAN: Not recording. Not recording.

THE COURT: Not recording ---

MS. FLEMING: No ---

THE COURT: --- at the time.

MS. FLEMING: No, it is not. The monitors -- I can show you a picture if that would ---

THE COURT: Just tell me.

MS. FLEMING: Okay. Good. The monitors were working. It was the computer where they documented the

care ---

THE COURT: Okay.

MS. FLEMING: --- that wasn't ---

THE COURT: That is not what -- is that the Phillip's ---

MS. FLEMING: It was ---

THE COURT: --- system he is talking about?

MS. FLEMING: No.

MR. RANSOM: Well, let me if I can, Judge.

THE COURT: All right, go ahead and finish.

MR. RANSOM: So what you see is -- and this is my understanding of this. And part of the problem is we are here three years into this case ---

THE COURT: I understand.

MR. RANSOM: --- and I am just figuring this out. But we have got these boxes up here are blank because of the issue that they have described. When they move him from one room to another the computer doesn't pick up the monitors and so the data is not being recorded and displayed in these boxes up here (pointing).

Down here (pointing) we have got what is called the real-time graph. All right. Which I have come to find out apparently is a different system; because even though these boxes up here (pointing) are blank you will see we do in fact have data being plotted on this graph right

here (pointing). Okay.

So one of the initial questions in the case was, well, wait a minute now, the computer can't be plotting data that it is not receiving and recording, where is that data.

Well, we think we are now starting to get an explanation for that, that there are two systems going here.

THE COURT: I mean is that the system that they no longer use? I forget what they call it.

MR. RANSOM: The Pyxis system is what they are no longer using.

THE COURT: Is that the system that was recording it as a backup?

MS. FLEMING: Pyxis is the computer software that was used ---

THE COURT: And that is the one you are no longer using; ---

MS. FLEMING: No longer ---

THE COURT: --- that is the one that he is saying is going to cost so many million dollars to retrieve this information?

MS. FLEMING: No, we have got that.

MR. BOGDAN: We have retrieved that. We have got that.

THE COURT: That has been retrieved. Did you get that from him or did you get that from the American Heart Association?

MS. FLEMING: No, no, we got it ---

THE COURT: What did you get from the American Heart Association?

MS. FLEMING: American -- I ---

MR. RANSOM: That is a separate record called the Mayday card.

THE COURT: Right, the Mayday card. That is the one she destroyed after she put it on?

MR. RANSOM: Right. And we have now gotten -- we have gotten the printout of that database.

THE COURT: You have been trying to get the Mayday card for two years, right?

MR. BOGDAN: Somebody else destroyed it. Somebody who he had a temporary copy destroyed it. The original is just missing. We don't know why. But I think they are satisfied with that issue.

Right?

THE COURT: Are you satisfied with that issue?

MR. RANSOM: Well, I'm not satisfied; but we at least now know what happened.

THE COURT: Okay. They routinely send it to the American Heart Association is what I gleaned from reading

last night.

MR. BOGDAN: They sent data from it.

THE COURT: Data.

MR. BOGDAN: And so ---

THE COURT: So they have got a database so other doctors can look and see about this abnormality?

MR. BOGDAN: So we were able to retrieve the data that was on it even though we don't have the piece of paper anymore.

THE COURT: Right.

MR. BOGDAN: Because the person who once had the piece of paper entered that data. So we went to where she entered that data and got the data even though we still don't have the piece of paper.

THE COURT: I guess my question is why did it take so long to get it?

MS. FLEMING: The issue is ---

THE COURT: I mean they took -- when was this nurse's deposition taken, how long ago?

MS. FLEMING: The nurse who testified about the American Heart database ---

THE COURT: Yeah.

MS. FLEMING: --- was in I believe late August.

THE COURT: Okay.

MS. FLEMING: It is not ---

THE COURT: Of this year?
MS. FLEMING: Of this year, yes.
THE COURT: Okay. All right. That is not too bad then.
MS. FLEMING: Yeah.
THE COUR: I was thinking it was a couple of years ago.
MS. FLEMING: Well, and it is not -- her database is never -- is never anything that is -- if you requested a patient's medical record from MUSC you are not going to get her American -- the data that she enters into the American Heart database. It is not part of the medical record.
MR. BOGDAN: This was a very backdoor way of finding that data.
THE COURT: Okay.
MR. BOGDAN: It took a lot of detective work to find. Normally we wouldn't have ---
MR. RANSOM: Well, and the issue there are, Judge, to digress for a moment, is that for the better part of two years they took the position that there never was a Mayday card.
THE COURT: Yeah, I know.
MR. RANSOM: Okay.
THE COURT: I gleaned that from ---

MR. RANSOM: So if I can get back ---

THE COURT: --- from the affidavits. I mean that's why I said my concern is is that because certain people weren't talking to certain people or certain people weren't doing their jobs, or was it intentional.

Okay, now I can't judge -- I'm just saying but that is the question I have in my mind.

MR. RANSOM: Right.

THE COURT: I mean I know I had a Bank of America case one time and it was just absolutely astounding how one section of the bank over here never talked to this section. One section was doing one thing and the other section was doing something else and they never communicated.

And that happens when you get so big that -- like in MUSC. I mean that happens. And I am not saying that is not what happened. That is my concern before I start taking sanctions, if you understand where I'm coming from.

MR. RANSOM: I do. I do.

MR. BOGDAN: Judge, different people really did think different things. Because somebody who was deposed -- and Alyssa will correct me on this -- actually thought that because of where this procedure was done there wouldn't have been a Mayday sheet and that was the

explanation why there wasn't one. And it took a lot of detective work to figure out that there probably -- that there was one.

MS. FLEMING: And interestingly enough, the nurse in the room who was assigned to care for him, just regular nurse, didn't ever remember documenting on a Mayday form. And so only ---

MR. RANSOM: Even though everyone else in the room remembered that she did.

MS. FLEMING: No, no, that wasn't the testimony.

THE COURT: Well, let's don't argue about the testimony.

MS. FLEMING: I know.

THE COURT: I know y'all are advocates and sometimes you lose communication when you start being advocates. And that is fine. That is your job. And I am not saying there's anything wrong with that. Okay. Please don't misinterpret what I'm trying to do. I am just trying to figure it all out and make a decision.

Now what else -- are you satisfied about the May card -- Mayday card?

MR. RANSOM: Yes, as I say, I am satisfied that they have now explained to us.

THE COURT: That doesn't mean you are still not asking for attorney fees. And I understand that, okay.

MR. RANSOM: We now have been provided the printout of the database that was created from the Mayday card, and that printout is legible and it is usable. And that is great. We finally have gotten that.

THE COURT: Okay. All right. Now -- now we are talking about this data.

MR. RANSOM: Right, so ---

THE COURT: Back up, so to speak.

MR. RANSOM: So if I could get back to you real quickly. What you will see is setting aside for a moment the issue that all of these boxes up here (pointing) on the top part are empty, all right, when you start looking at this real-time graph -- all right, and understand we have from provided a number of different copies of this anesthesia record.

You will see that for example on this first page what we have got -- this little dip right here (pointing), that is the patient's blood oxygen saturation decline. That is trouble. Okay. We see that that dip here starts or occurs at 7:34. When we turn to this chart (pointing) we see that that dip occurs at 7:35. When we turn to this page (pointing) we see it happens at 7:36. When we turn to this page (pointing) we see it happens at 7:45. Okay?

THE COURT: Okay.

MR. RANSOM: So this creates the question since we now know that during some part of this procedure the nurse anesthetist is engaged in the process of trying to correct a technical malfunction -- they don't call it a malfunction. Whatever it is. She can't get the record to change.

Okay. So we see that at some point in time this process is taking place. And what we then find is apparently it has affected the accuracy of that real-time graph.

So one of the real questions in the case that remains yet unanswered is what exactly what time is it when Mr. Mikell gets into trouble and what are people doing when that happens. And that is a question that we don't yet know the answer to because this information ---

THE COURT: Well, what information is it going to take for you to look at that issue?

MR. RANSOM: Well, so what we have asked is -- and again you have got to understand I have been being educated about this to; and, you know, and as I have learned more about their system ---

THE COURT: I think they probably are too.

MR. RANSOM: Yeah, well, that is right.

THE COURT: I mean I think everybody is, okay.

MR. RANSOM: Right. As I have learned more about

the way this is put together I have begun -- I have become able to ask better questions.

So at this point in time we want to know, well, okay, we get what you are saying that the boxes up here are empty, that data may be not be retrievable or if it is it may be at great expense, but what about this data that is being plotted on this graph. Because, again, fundamentally the computer cannot plot data that it is not capturing.

And so we are curious to find out, well, what is it that is causing this down here (pointing) to be inconsistent throughout these records.

And we don't yet really -- I don't know the answer to that.

MR. BOGDAN: Can I speak to that for just a second?

THE COURT: Yes, sir.

MR. BOGDAN: This (pointing), he is right. This is inconsistent. And when you -- the normal -- the normal chart charts it every 15 minutes. But for discovery purposes we produced it up to, what, one second, I think. One second.

And so every time we expand that, this thing (pointing) comes out differently. And it is what we call a glitch.

So to figure out what the real data is, that is why

Mr. Fischer spent 100 hours digging down to the raw data. And the last thing or one of the last things ---

THE COURT: On just this?

MR. BOGDAN: On this.

THE COURT: Just this.

MR. BOGDAN: To take the data that actually is behind this part of the chart. And he has gone down -- and we now have produced the actual data matched with the actual time that it was recorded.

THE COURT: Recorded.

MS. FLEMING: And this ---

THE COURT: And do you have that?

MR. RANSOM: Do I have that?

MS. FLEMING: That is this (pointing).

MR. RANSOM: That is this?

MS. FLEMING: Yes, we produced it. It is this.

THE COURT: Have you seen it?

MR. RANSOM: They produced a disk. And all that I really noticed was that it was hundreds of pages ---

THE COURT: Okay.

MR. RANSOM: --- that was Greek to me.

MS. FLEMING: Exactly.

MR. BOGDAN: Right. Exactly.

MS. FLEMING: Exactly.

MR. BOGDAN: And that's -- that's the ---

MS. FLEMING: However ---

MR. BOGDAN: --- the tip of the iceberg of what he might want. But we believe it is everything that he needs to answer the questions.

MR. RANSOM: It may well be.

THE COURT: Well, I mean is it illegible?

MR. RANSOM: Yes. Well, in the sense that ---

THE COURT: You don't necessarily understand it?

MR. RANSOM: Yeah, it is not -- we don't have words that the letters are just --- like we did with that database printout.

THE COURT: Okay.

MR. RANSOM: I mean this is legible, in tables. I have no idea how we might extract the answer to the question, what was the actual time where this data point came in. But presumably this gives us a starter.

MS. FLEMING: And Mr. Fischer actually can explain. He can explain all of the work. He can explain when the data started flowing and can explain exactly what numbers are there and ---

THE COURT: All right. Do you want him to sit down in a -- and explain it to you while we are here?

MR. RANSOM: Well, what might be better is if he just gives us the data in a table.

MS. FLEMING: Yes, this is ---

MR. RANSOM: I mean if this can be condensed. Well, again, I mean, Judge, I can't believe that what, you know, takes place in three minutes is, you know, a thousand pages.

MR. BOGDAN: It is true.

MS. FLEMING: It is true.

MR. BOGDAN: Because it is continuous data. And you can focus in as far as you want to focus in ---

THE COURT: Well, how do you want to try to get it in a more useful form? Mr. Fischer is here.

MR. RANSOM: Well, I mean with all due respect to the court I mean I will sit down with Mr. Cooke and we will discuss. Because again this was just made available I think in the first part of this week.

THE COURT: I understand. I understand.

MR. RANSOM: Yeah.

THE COURT: I am just asking you ---

MR. RANSOM: But I mean I'm happy to work ---

THE COURT: While you are here what will help ---

MR. RANSOM: --- with them to try to figure out how that can be done.

THE COURT: What will help for you to try to understand what you have got? Because I am trying to understood what I have got, okay. I know your problem and theirs too.

MR. BOGDAN: And, Judge, I do want to say this. I mean what this is really is it is a Rule 26(b)(6) analysis where the court is supposed to weigh the potential benefit with the cost of doing ---

THE COURT: I understand.

MR. BOGDAN: And I do ---

THE COURT: And I am not ready to do that yet.

MR. BOGDAN: No, I know I know; but ---

THE COURT: I am not ready to do that. I am trying to gather information to do that, okay.

MR. BOGDAN: Right. Right. But I do want to ---

THE COURT: Help the to do. But that is lack of a better word, I guess.

MR. BOGDAN: And we will come back whenever and however you want us to do. But I do want to say that in the hundreds of hours and many hundreds for Alissa - it is a hundred for him - I will cite to this court there has been no evidence developed that anything was ever changed or intentionally deleted from this record; that everything that is in this is consistent with the chart.

THE COURT: Well, I think the affidavit says from somebody - I can't - that it was impossible to delete it. I don't know ---

MS. FLEMING: That's right.

THE COURT: I've always said if you can tap into --

these hackers can tap into some of the stuff they are tapping into somebody could delete it if they so chose.

MR. BOGDAN: Well, I mean they could; but there would be a record of ---

THE COURT: I understand. But I just I don't buy it can't be deleted.

MR. BOGDAN: Well, there is probably somebody in China that can figure that out.

THE COURT: I understand. But it means -- would that help?

MR. RANSOM: Yes.

THE COURT: All right. But I guess you have explained the question of why you think it is important, okay, the theory of your case.

I guess my question to you, why is it so difficult for y'all to have attained this; why has it taken two and three years?

MR. BOGDAN: Well, it really didn't.

THE COURT: Is it lack of communication between ---

MR. BOGDAN: No.

THE COURT: --- the two of y'all?

MR. BOGDAN: No.

THE COURT: Why has it taken so long?

MR. BOGDAN: I mean part of it is just what Rob says, that his learning curve has led him to ask more

probing questions as more questions have arisen.

But we produced over two -- two-and-a-half years ago not only the entire record, the expanded record. And then we produced the audit trail for that record.

And it really wasn't until Rob says, well, I don't believe essentially, I don't believe what is here, now I want you to go to the very source data, that we started having to dig into things that are not part of the medical record, would never ---

THE COURT: But why -- why is MUSC's storage -- retrieval storage ability so poor?

MR. BOGDAN: Because they don't ---

THE COURT: Because they are not using this system anymore; is that the problem?

MR. BOGDAN: And because the data that the doctor -- and I asked that very question. I said suppose Mr. Mikell were alive and he came in for a procedure and I am his doctor and I want his old records. The old records are there. The old records that the doctor would need are there. This is the raw data behind what is behind the records. Sometimes you call it metadata.

THE COURT: Okay.

MR. BOGDAN: It is like when you take -- and I tried to use this example. You take pictures with your phone or with your digital camera and you edit it and you get

nice JPEG images. Well, there is raw data way back there that you will never see. You have never seen before and you will never see it again. You will never use it. But it is there somewhere. And in the modern age nothing ever gets discarded.

THE COURT: Right.

MR. BOGDAN: It sits on a server.

THE COURT: I know storage is a big issue.

MR. BOGDAN: Right. But it is not ---

THE COURT: In the whole country. You know, where do you store all of this stuff.

MR. BOGDAN: That's right and how long.

THE COURT: And how long you store it and how do you retrieve it if you need it.

MR. BOGDAN: Right. Right. So we did. And actually I will say this. I am glad we did for this part because if we didn't Rob would be saying, well, somebody deleted it. And so now we can show unequivocally nobody deleted anything. The record is what the record is.

I mean I would still like to be able to find the Mayday sheet. We all would. Because I know I am going to hear that from Rob at the trial about where is the Mayday sheet. Well, thankfully he has forced us to get a lot of information, including the text messages from the nurse to the IT Department where she is trying to get

help to open this record. So we have got that. That is not part of the record, but we found it as a result of all of this.

THE COURT: Okay.

MR. RANSOM: And what I would say is I don't know whether or not any of the Medical University's technical people have been in contact with the people in Boston who design, manufacture, and sell this system.

THE COURT: They say -- in the affidavit they say it would be easy to get.

MR. RANSOM: Right.

THE COURT: Or at least in your memorandum.

MR. RANSOM: Yeah, I mean my people say that, look, all you have got to do is called Pyxis and they will come down and help you get it. I mean I don't want to say it is nothing.

THE COURT: I understand.

MR. RANSOM: But it is less.

THE COURT: Yeah, I read that in your memo. As a matter of fact -- but, you know, as a matter of fact, it is not going to say anything else because they probably want to sell it to somebody else.

MR. BOGDAN: It can be gotten. I mean we -- he did get it. And it is easy for him. It just took a long time. He knows how to do it.

But it is just because there are so many data fields; and the computer just keeps all of these ones and zeros all in a big pot, so he has got to pull out the ones for this patient and the ones for this data field and get them in the right place.

THE COURT: That is almost as bad as where are you going to store nuclear waste.

MR. BOGDAN: Well, it was easy enough when you had just paper. You know, a lot of times you would have to go back and look several times. But at some point you could finally say I have looked everywhere I can look and that is it.

But with computers there is never an end to how far you can look when you are talking about billions of pieces of data that are in this big pot.

THE COURT: All right. Will it help y'all to sit down and talk? Now I am going to read these depositions. I am going to make a decision and once I have read it.

And I may do what I did before, I may send you some email questions without dragging you in here for the questions to get you to respond. I may send you some. I may send you some once I get into it, okay.

MR. RANSOM: Uh-huh.

THE COURT: And then we will schedule oral arguments. I will listen to you on the sanctions. In

the meantime I want you to give me attorney's affidavit fees. Because if I am going to award anything I am going to award some attorney's fees.

And I am not saying I am going to give you what you want, but at least I don't -- I think they are entitled to look at that data before we have a hearing.

Because I think under the law y'all are entitled to even cross-examine about that data if you want his affidavit if you so choose if I decide to award any. I am not saying I am. I am just trying ---

MR. BOGDAN: I think we will respond to it ---

THE COURT: I am just trying to get that beforehand, okay.

MR. RANSOM: All right. Yeah.

THE COURT: And we will set up oral arguments. Now I don't have any problem today if y'all want to argue about this amendment. I mean that is just basic law. That is not ....

MR. BOGDAN: I mean we don't consent to it, but it is an amendment. I think the court can -- I mean it is going to interject a whole rash ---

THE COURT: It is ---

MR. BOGDAN: --- of new issues in the case.

THE COURT: Well, you have almost done that now.

MR. BOGDAN: Yeah.

THE COURT: You know, I mean you have almost got a whole new concept of trial now.

MR. BOGDAN: Right.

THE COURT: I mean I don't know why it is going to prolong it; because it is already prolonged. Okay.

MR. BOGDAN: I am going to save you ---

THE COURT: I am not saying he has got valid cause of action or not. Because she raised those issues also very eloquently.

MR. BOGDAN: I will spare you my speech on why we are going down these trails now instead of looking at the merits of the case. But, you know, you have heard the summary judgment and so forth.

So you are right it is what it is. I mean if you grant the amendment we will probably need some time to respond to that part of the case.

THE COURT: I mean, you know, the law says you liberally grant it unless basically there is some prejudice since the other side -- so whether it was inherently prejudiced, so granted, you know.

MR. BOGDAN: If we were up for trial next week I would really be screaming about it but.

THE COURT: Well, I don't think you are going to be up with all of this going on anytime next week; okay.

MR. BOGDAN: Right. Right.

THE COURT: I mean my inclination -- unless y'all -- I know you submitted your memorandum and you are supposed to look at the cause of action. But you can bet those that are 12(b) or in a summary judgment ---

MS. FLEMING: Okay.

THE COURT: --- I think are more appropriately than now.

MS. FLEMING: Okay.

THE COURT: My inclination is to let him grant it, whether it is valid or not. Whether it is cause of action or valid or not is a different story.

MR. BOGDAN: We will address it in an appropriate motion if we think it is not.

THE COURT: Now as far as the sanctions are concerned I'm going to have to get into it a little bit.

MR. RANSOM: Yes, sir.

THE COURT: Anything else y'all want to tell me about that before we adjourn?

MR. RANSOM: The only thing that may be pertinent to Your Honor's work is we do have an April 18th trial date.

THE COURT: A what?

MR. RANSOM: An April 18th trial date.

THE COURT: Well, I -- I mean -- okay.

(WHEREUPON, confers with law clerk regarding scheduling.)

THE COURT: I mean I am not planning on dragging

this out. I'm going to get some reading and get a handle on it and make a decision.

MR. BOGDAN: What I would appreciate is -- there have been a lot of issues and other -- but if the court is seriously considering sanctions I would -- I would appreciate knowing what the basis may be and give us an opportunity to respond. Because I mean ---

THE COURT: I said I am going -- I am going to vet the questions to you. I am not going to blindside you.

MR. BOGDAN: Okay.

THE COURT: I will send out some information to you, okay.

And I don't know what I am going to do. That is why I don't want to hear it today. I don't know. As I said, at this point in time it doesn't smell good. Okay, it may get to be smelling better. I don't know. Whether you want to call it prima facie or not, I don't know. But right now in my opinion it hasn't passed the smell test.

MR. BOGDAN: Can I -- are you talking about the Mayday sheet part of it, or are you talking about the ---

THE COURT: I am talking about the delay in getting information to him.

MR. BOGDAN: Okay. Well, we will get you a chronology on that.

THE COURT: Okay. That is what I'm talking about, why did it take two years. And why did you also say it never existed, it never existed, it never existed; and all of a sudden it does exist. Those are my concerns from a sanctions ---

MR. BODGAN: We will address all ---

THE COURT: From a sanction's standpoint to be -- from what I have read so far. I mean all of a sudden you are talking, well, hey, it doesn't exist, nobody did, nobody did; and then all of a sudden this lady did; it shows up. After the court has already -- get another expert ---

MR. BOGDAN: Right.

THE COURT: --- under 32.

And you have got this other guy saying, hey, this procedure we don't do this with this procedure. And he sticks it in front of him and says, well, this is your written procedure; well, I'm sorry but this is a procedure we don't do. And then you come in with a second designee and she says, well, yeah, I did it. Now all of a sudden it shows up. That is my concern.

Now whether that is lack of communication or it is something intentional, I don't know. And that is what I have got to vet in my mind.

MR. BOGDAN: It was a combination of circumstances

starting with the fact ---

THE COURT: And I am just telling you what I am thinking right now.

MR. BOGDAN: No, that's helpful. And we will -- I think we should give you a complete chronology of how these things unfolded. And I think it would be helpful to you.

THE COURT: And from your perspective, at the same time -- at the same time he spent a lot of time and effort getting to this point where y'all could have done this two years ago if somebody had done their job either over at there, at the MUSC.

MR. BOGDAN: I do have to say this ---

THE COURT: Do you understand where I am coming from?

MR. BOGDAN: I do. But as it relates to the merits of the case it is almost irrelevant.

THE COURT: I know. And to me that -- to me that is what controls what I do if that -- if I am making myself clear. In other words, you know, when you start talking about sanctions, you are talking about attorney's fees, you are talking about striking an answer and putting you in default and having a damage hearing and everything in between.

And it is, you know, from sitting in court one day I

put two guys in jail from Florida. You said you had never seen that happen before. But it took them three years and they finally produced what they were supposed to. Sat in ---

MR. RANSOM: I was present that day ---

THE COURT: --- jail for three years.

MR. RANSOM: --- as well.

THE COURT: After sitting downstairs for three years.

And maybe I'm wrong, but the abuses -- I have got -- that is my job. And I don't like it. It is very unpleasant.

MR. BOGDAN: I think you're going to find ---

THE COURT: But if I don't -- if I don't try to enforce that, who is going to do it?

MR. BOGDAN: Right. But I will say it has been ---

THE COURT: I mean who is going to do it?

MR. BOGDAN: It has been a mammoth effort to, frankly, chase red herrings. Okay. And we will put -- we will put all of that out for you. But this -- and I don't want to try to argue the whole case.

But Rob has done a masterful job of digging and digging and digging on something that we think at the end of the day it really has nothing to do with the case.

But, you know, discovery is broad. You are allowed

to do it. It is very hard to ---

THE COURT: Well, and that is why I was asking how does that affect -- so what; you don't have it; ---

MR. BOGDAN: Right.

THE COURT: --- how does that affect this case.

MR. BOGDAN: Right.

THE COURT: And I think that is a valid argument. And that goes in the issue of sanctions in my opinion.

MR. BOGDAN: But you are entitled to an explanation. Rob is entitled to one. But I think -- I think you are going to be impressed at how far beyond the call of duty Alissa has gone and the IT folks have gone and everybody that is here has gone.

And it is true by doing very good detective work they have been able to fill in some holes in the records. Not that it changes anything in the merits of the case, ---

THE COURT: Right.

MR. BOGDAN: --- but they have done it. And a lot of it is because Rob is very persistent. He starts with basic discovery and then he finds a thread and he keeps digging and he keeps digging and deeps digging. And it has taken two years to do that.

THE COURT: Well, but, see, I sort of view discovery differently; okay. I guess I came from a school where we

didn't have discovery. And I think -- I don't know if you remember that or not. You know, but there was no discovery. We didn't have interrogatories. We didn't have -- we didn't have depositions.

MR. BOGDAN: I don't go quite that far back.

THE COURT: Well, I mean our discovery was sitting down with you and saying here is my file, what do you want copies of.

MR. BOGDAN: Right.

THE COURT: Here is your file and you show me what you want a copy of. Go take the -- when they did -- go take a deposition it lasted 30 minutes. Have you got any relatives in Anderson County, tell me what happened. Thirty minutes.

MR. BOGDAN: I remember having to file an answer the week before trial ---

THE COURT: Right. That's right. And so we tried basically everything by ambush. You know, so I go back to those days.

And then they come with discovery. And my view of discovery is the parties cooperate with each other and exchange information so parties can analyze their case, decide on the case, not play hide and seek. And there is too much hide and seek going on.

He is very diligent to get this. So my question to

you is real simple, why didn't you give it two years ago. And that is where -- I want you to understand my thinking ---

MR. BOGDAN: Right.

THE COURT: --- of where I am coming from.

MR. BOGDAN: That is a fair question.

THE COURT: If you are trying to be fair in discovery and produce it so both sides know what they have.

But that is not happening on today's market. Everybody is keeping it back, keeping it back. Everybody is playing games. I don't say everybody. But I see a lot of that. And I just see too much of that.

MR. BOGDAN: We think ---

THE COURT: From my prospective, okay.

MR. BOGDAN: We think we gave everything. And part of it is that Rob didn't necessarily always understand what he had when we gave it to him.

And part of it is that we all learned as the case goes on and he asked more and more focused questions as the time went.

But we will give you a timeline to explain that.

THE COURT: Okay.

Do you understand what I am trying to say?

MR. RANSOM: I do.

THE COURT: Right or wrong I am just trying to give you my version and how I sort of look at it so you will know how to phrase your argument.

And I probably -- other judges could look at it entirely differently. But I can just frame what my experience has been, you know.

MR. RANSOM: And once you get up to speed, Judge, I will be happy to answer any questions that remain and present my client's position. And that is fine with us.

MR. BOGDAN: Do you want to go out and talk to John for a few minutes?

THE COURT: Do you want to go talk and see if you can resolve some issues with this while you are here?

MR. RANSOM: I am happy to do that. Yeah. I mean I don't know whether we can resolve them in that informal fashion, but if you are offering to make it ---

MR. BOGDAN: Since he is here. Start and, you know.

THE COURT: I mean at least he might help you understand it.

MR. RANSOM: Right.

THE COURT: And you say y'all come up for trial in April?

MR. RANSOM: Yeah, we are down for a date certain April 18th.

THE COURT: Are you going to be able to handle an

amendment between now and April?
MR. BOGDAN: I think we will -- we will just do it.
THE COURT: How much time have you got scheduled; two weeks, three weeks?
MR. BOGDAN: For trial?
THE COURT: For trial.
MR. BOGDAN: It is a week I guess.
THE COURT: A week?
MS. FLEMING: At least a week.
THE COURT: Okay.
MR. BOGDAN: So we have got some work to do. But if we can't get it done then we'll come back and say we can't get it done.
THE COURT: Well, whatever. I mean, you know. Do you really think all of those causes of actions are going to stick or are you just trying to throw out ---
MR. RANSOM: I am trying -- I am trying to cover the bases.
THE COURT: You are trying to cover the bases ---
MR. RANSOM: That's right.
THE COURT: --- and see what sticks. Because some of them are sort of right ---
MR. RANSOM: That's right.
THE COURT: --- questionable.
MR. RANSOM: We will trying to be crea- ---

THE COURT: Especially if you read her memo.

MR. RANSOM: That's right. We are trying to be creative just to make sure that there is some remedy for what we perceive to be improper conduct.

THE COURT: Well, your remedy is the sanctions in my opinion; not some of these causes of action. Well, I won't be here and somebody else will hopefully will hear all of that. I have probably heard enough of all of this.

I want to thank y'all for coming. And I appreciate you answering those questions, Melissa.

MS. FLEMING: Absolutely.

THE COURT: And I am probably going to be sending you some more ---

Alissa. I'm sorry.

MS. FLEMING: That's okay.

THE COURT: Alissa. Ms. Fleming. Okay.

MS. FLEMING: I know who you are talking about.

THE COURT: Okay. Excuse me. It has been a long week.

MS. FLEMING: I understand.

(WHEREUPON, discussions regarding other cases was had.)

MS. FLEMING: Your Honor, may I give you and Ms. Burrows just hard copies of the things that we think are ---

THE COURT: You can give me anything you want.

MS. FLEMING: Okay. And then a copy of the American Heart database information?

THE COURT: Yeah, if you will give me anything you want to help me read and understand what has transpired. But thank y'all for explaining all of these.

MR. RANSOM: Thank you for having us down here, Judge.

THE COURT: Okay.

MR. RANSOM: Always a pleasure.

THE COURT: Thank you very much. I appreciate it. Thank you so very much.

MR. BOGDAN: Good to see you.

THE COURT: All right. Y'all have a good Christmas.

(WHEREUPON, the hearing concluded.)

(NOTE: Please contact the court reporter for additional copies or certified transcripts.*)*

CERTIFICATE

I, the undersigned Phyllis Norton, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the captioned case, relative to appeal, in the court for South Carolina, on December 11, 2015.

I do further certify that I am neither of kin, Counsel, nor interest to any party hereto.

PHYLLIS NORTON, CVR

Date: December 21, 2015

Certified Transcript Provided For: Cooke, Fleming

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	)	IN THE COURT OF
COUNTY OF CHARLESTON	)	COMMON PLEAS
	)	2012-CP-10-7275
SHON TURNER, as Personal Representative of the Estate of CHARLES MIKELL, Deceased, Plaintiff vs. THE MEDICAL UNIVERSITY OF SOUTH CAROLINA, Defendant	)	TRANSCRIPT OF RECORD

APRIL 18, 19, 20, 21, 22, 25, 26, 2016
CHARLESTON, SOUTH CAROLINA

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questions.

THE COURT: Any recross?

MS. FLEMING: No. Thank you.

THE COURT: All right. Any reason Dr. Payne can't be excused?

MR. RANSOM: I'm sorry, Your Honor?

THE COURT: Any reason he cannot be excused?

MR. RANSOM: He can be excused, Your Honor.

THE COURT: Doctor, you may step down and you may be excused. Let me see the attorneys up here just a second please.

(WHEREUPON, a bench conference was had.)

THE COURT: All right. If you would call your next witness, please.

MR. RANSOM: The next witness is Dr. George Guldan.

DR. GEORGE GULDAN, after having been duly sworn, testified as follows:

THE CLERK: Please state your first and last name, and spell your last name loudly and clearly into the microphone.

THE WITNESS: It's George Guldan, G-u-l-d-a-n.

DIRECT EXAMINATION BY MR. RANSOM:

Q. I'm sorry, Dr. Guldan?

A. Guldan.

Q. Yes, I'm sorry. I've been mispronouncing your name. Forgive me.

A. That's okay.

Q. All right. Dr. Guldan, you're a member of the faculty there at the Medical University?

A. I am, that's correct.

Q. And I believe you actually hold an endowed chair in the Department of Anesthesia?

A. That's correct. I'm the --

COURT REPORTER: I'm sorry?

A. It's the Joanne Conroy Endowed Chair for Education and Leadership.

BY MR. RANSOM:

Q. All right. You graduated from medical school in 2003?

A. That is correct.

Q. And you were actually one of the medical personnel who responded to Mr. Mikell's Mayday on October 1, 2010?

A. That is correct. I was assigned as part of the code team for that afternoon.

Q. And you have testified previously that it was Dr. Nelson, the anesthesiologist, who was in charge of the Mayday that day?

A. Dr. -- Dr. Nelson was in charge of the

resuscitation. There is a very important distinction about what happens in the OR and what happens elsewhere in the hospital in the situation where patients need resuscitation.

Q. Okay. Well, I had asked you at your deposition some time ago was somebody in charge during Mr. Mikell's code; and your answer had been that Dr. Nelson was in charge; is that correct?

A. He is in charge, correct, of the code.

Q. Now, the code situation or a Mayday situation in the Digestive Disease Center -- and that's where this colonoscopy was taking place; right?

A. The colonoscopy was taking place in one of our periphery anesthesia sites. That is very different than the rest of the Digestive Disease Center because of our preparation and our equipment, the medications available. We hold -- in the anesthesia site, we hold a different level of preparation, a different level of staffing than any other sites in the hospital.

So you always have two ACLS trained providers taking care of a patient. You always have emergency drugs for -- for in -- in the event of a code. You always have a mechanical ventilation device, the ventilator. Our monitoring is ASA standard monitoring, so EKG, pulse ox, entitle capnography, temperature, all

of these things have to be present that aren't necessarily present in other sedation sites, that allow us to provide care for sicker patients than would be in a typical moderate sedation site.

And because of that, the response when patients do have adverse events is very different in an OR and the anesthesia -- non -- a NORA site is what we call those sites. It is still set up exactly like our other OR sites, our response is very different.

When we call a code on a patient, we are asking for another anesthesiologist, a skilled provider, to come help. When a Mayday is called on the floor in a sedation room, a team of -- it consists of residents, usually one of the cardiology residents responds, along with a pharmacist, a respiratory therapist and an anesthesia provider. It can be either a resident, a CMA and/or an attendant depending on the time of day. So it's not necessarily an attending anesthesiologist that is responding.

So -- and that -- that's the situation where it's a all-hands-on-deck situation where you have -- usually an unmonitored and un -- or -- unknown reason for someone to get into trouble, and you don't know why that -- why it happened. You are kind of walking to a situation blind. You don't know why the person

arrested, you just know they have arrested. You assess the situation the best you can, and you apply your skills to help that patient.

In the OR, it's a very different situation. In the OR -- the NORA site, we know the patient's medical history as the provider -- like Dr. Nelson did -- very well. We know their physiology very well. In Dr. Nelson's case, and my case for -- as cardiac anesthesiologist, so we know that physiology and we take care of patients with heart failure, pulmonary hypertension, sleep apnea --

COURT REPORTER: Your Honor, I'm sorry. If he could slow down just a little bit.

THE WITNESS: My apologies. I'm sorry, this is what I do.

MR. RANSOM: That's all right.

THE WITNESS: I apologize for speaking fast.

BY MR. RANSOM:

Q. We know you're out of your element here at the courthouse.

A. I don't -- I take care of patients. I don't speak in the courthouse often, so I'll slow down. But we -- we are providing, you know, care for those patients in those situations with a lot more understanding of what's actually happening so we can

get focus treatment.

That goes above and beyond what ACLS, Advance Cardiac Life Support, which is what is provided to people in Maydays. It goes above and beyond that.

In Mr. Mikell's case, the patient received an arterial line. He was intubated very quickly, which is not part of ACLS because we understood a big part of -- you know, once he's in trouble, a big part of helping somebody with pulmonary hypertension and sleep apnea is making sure their oxygen levels get totally returned to normal. And you can do that very effectively with the airway.

The reason it's not part of ACLS is most people are not -- I'm slowing down again -- most people are not proficient at placing those devices, especially in someone with a difficult airway like he had, with sleep apnea and a large neck, it's more challenging to place an airway device.

We happen to have skilled anesthesia providers there, so they were able to do that without interfering with the CPR, the cardiac pulmonary resuscitation, the regular stuff with doing chest compressions, giving meds, et cetera, so they did that early in the situation. That would not have happened if it -- it was a Mayday on the floor, for instance.

So -- and the other big differentiation factor between the Mayday on the floor or a Mayday in another endoscopy suite where there are not anesthesia providers, is the onerous and the expectation is for us to document everything that happens in a code situation on our electronic medical record, on the anesthesia record. There is not a -- there is not a Mayday sheet in the OR and NORA sites in any situation that I can remember.

Everything that we do, all the drugs given, the times given, all those things need to be documented in our record. It is not -- there's -- it is our responsibility to do that as an anesthesiologist and a nurse anesthetist in the case to do that. And we do not rely on a nurse to do that for us.

So it needs to be -- we can use nursing documents to help make sure we have the times right. Because in those situations, our total focus is on the patient having the best outcome possible. But a lot of times, we have to supplement our -- our recollection. Because we're so focused on taking care of the patient, we can't chart everything we did at -- in real time. Obviously, we have to go back after the fact and do that. That's very common in these situations.

Q. Now, you were called -- or rather you got a

page and went to the procedure room where Mr. Mikell was; correct?

A. That is correct.

Q. And when you got there, he had already been returned to -- I think your phrase was -- returned to spontaneous circulation?

A. Yes, sir.

Q. Meaning he was breathing again?

A. He -- at that point, he was being ventilated by us. His -- his heart was creating a profusing rhythm. During -- during the point where he was in -- as you refer to arrest -- it was what we call pulseless electrical activity, PA arrest, so that's different than the heart stopping totally. It's beating, it's just not producing blood pressure. So the heart is beating ineffectively.

Q. Right. By the time you got into the room, the crisis had largely passed?

A. That is correct. At that point, I proceeded to coordinate his continued care with the PACU, and the upstairs, and I helped arrange to induce the hypothermia treatment to -- to help stabilize him and to prevent organ damage.

Q. And so obviously you didn't witness any of the things that took place prior to the time that you

arrived in the room?

A. Correct. I just witnessed -- I arrived when they were just finishing up doing the initial chest compressions. They had been secured, and the patient had -- shortly after I arrived, had retuned to spontaneous circulations --

Q. And so you don't know at what point in time the procedure, before your arrival, Dr. Nelson had been coming in and going out?

A. I'm not -- I'm not aware of those times other than looking at the record.

Q. And you don't know of your own personal knowledge what may have been going on with Mr. Mikell during the times that the nurse anesthetist, Ms. Embrey, may have been texting and making phone calls?

A. I cannot -- I cannot know what happened before I was there.

Q. Okay. You didn't, yourself, actually make any entries in the anesthesia record?

A. I believe I made an entry in the PACU record later.

Q. But the anesthesia record itself --

A. No --

Q. -- to the point --

A. Correct --

Q. -- to the point where he's first given the Propofol to the point where the --

A. He was transferred.

Q. Yeah. Until he's transferred, you didn't make any of those entries?

A. That is -- that is correct because my assistance was not needed.

Q. Okay. Now, a code situation in a procedure room where a patient is undergoing a colonoscopy is a fairly rare event; isn't it?

A. It is -- it is rare, but it does happen on a regular basis due to the number.

Q. This is the only time that you've ever been called to respond to a cardiac arrest during a colonoscopy?

A. As I do not cover the code pager during the day, it -- it was.

Q. Okay. Now, you were designated at one point in time to speak on behalf of the Medical University about its emergency medical response policy; correct?

A. That is correct.

Q. Okay. And you would agree with me, there's no question but that in Mr. Mikell's case, a Mayday was actually called?

A. I believe someone from the room called a

Mayday, which is fine.

Q. Okay. I mean, the record reflects that a Mayday was called; you don't dispute that?

A. If -- if somebody thinks they need help in the room, that's -- that's their prerogative as the attending anesthesiologist in the room or the nursing staff in the room. We're a team.

Q. That's right. But -- well, we can do this. If you'll look -- I've got this board here -- and if you'll look down at the bottom, it's got a document control number 611 -- right there? Do you see that?

A. I do.

Q. Let me just carry this over here where you can see it, and I hope these folks can see it. But right here, it says -- there's an entry under Dr. Nelson's initials, time at 8:00 a.m; do you see that?

A. Uh-huh.

Q. And one of the things that it says is "Mayday team called"; correct?

A. Uh-huh.

THE COURT: Doctor, instead of saying "uh-huh, " say yes or no, please.

A. Yes. Yes.

THE COURT: It's hard to understand what uh-huh means.

A. I apologize.

THE COURT: Please proceed.

BY MR. RANSOM:

Q. And that's why I say, there is no question but that a Mayday was actually called?

A. Dr. Nelson was calling for help.

Q. And that's the -- the term "Mayday" is actually in this record; right?

A. The term "Mayday" is used to -- whenever we call for help, and that was used to get me there.

Q. Right.

A. And the additional CRNA -- not the rest of the team, which actually gets in the way in an OR situation.

Q. Okay.

A. So the rest of the team was immediately sent away. Does that make sense?

Q. Dr. Guldan, let me hand you what we had marked as Plaintiff's Exhibit 2. And this is a printout of the Post Anesthesia Care Unit record. You'll see it's multiple pages. The first one is document control number 604, and it runs through page 612.

A. Yes.

Q. Okay. And that Exhibit 2 is the record that contains this page 611 that we were just pointing to on

the board?

A. Yes.

MR. RANSOM: All right. Your Honor, I'd offer Exhibit 2 into evidence at this time.

THE COURT: Any objection?

MS. FLEMING: No objection.

THE COURT: All right. Plaintiff's No. 2 admitted without objection.

(WHEREUPON, Plaintiff's Exhibit No. 2 admitted into evidence.)

BY MR. RANSOM:

Q. Now, again, Dr. Guldan, you were designated in November of 2014 to testify on behalf of Medical University concerning its emergency medical response policy; correct?

A. Correct.

Q. And I've got marked as Plaintiff's Exhibit 9, a document that's entitled MUSC Medical Center Policy Manual, titled Emergency Medical Response; am I reading that correctly?

A. That is -- is correct.

Q. Okay. And that is, in fact, the emergency medical response policy that you were designated to testify on behalf of the Medical University in November of 2014?

A. I believe it is.

Q. Okay. And that policy actually requires that a cardiopulmonary resuscitation event form, or quote/unquote Mayday record be created whenever a patient at the Medical University suffers a cardiac arrest?

A. That -- that is correct, which does include our electronic medical record.

Q. If I could see the exhibit. Thank you. Let's go over part of this, Dr. Guldan. You'll see the part that I've highlighted.

THE COURT: Is it on this screen in front of him?

THE CLERK: Yes, it is.

THE COURT: Doctor, you've got it right in front of you there.

THE WITNESS: Yes, sir.

(Pause.)

BY MR. RANSOM:

Q. So the highlighted portion there -- and this is on page 3 of 8, paragraph 4, it reads "Each Mayday is documented under cardiopulmonary resuscitation event form or Mayday record"; correct? The Mayday record is the legal documentation of the Mayday; correct?

A. Correct.

Q. It accounts for the physician's orders and medication administration during the Mayday; correct?

A. That's what it says.

Q. And it says it must be signed by the designated participants; correct?

A. Correct.

Q. So that this policy envisions a sheet of paper or sheets of paper; correct?

A. What happens is on the -- when a Mayday is called on the floor, a nurse is holding a clipboard, and she is helping run the timing of the drugs and the events with the -- usually medicine resident performing the -- running the code in those situations because there is not an attending anesthesiologist there.

Q. Right.

A. And she's documenting as they go. I did not witness that happening during this event. I did not find that unusual because it is an OR situation, which on page 4 number 11, it does says that a Mayday is not required in the OR.

Q. Page 4?

A. Number 11 -- item 11, I believe it was, sir.

Q. Okay. Item 11. It says what?

A. I believe -- I don't want to quote it verbatim, but I believe the -- the -- the wording is a

Mayday in any area, other than the OR's ICU and ED, a full Mayday team will be called for. And that's from the -- that's the documentation part of that, is with the full Mayday team, which we were in an OR site.

Q. Well --

A. So that is why it was not unusual to me for there not to be a nurse documenting on a Mayday form. The OR record in those situations should be the record of the code or a Mayday, whatever you would like to term it.

Q. So this is page 4, paragraph 11, it doesn't say that you don't need a cardiopulmonary resuscitation event form for events that occur in the area of the hospital where Mr. Mikell was, does it?

A. I mean, there's lots of things we do, we don't have verbatim telling us --

THE COURT: Doctor, let me interrupt you for a second. Please be responsive to the question; okay?

THE WITNESS: Yes, sir.

THE COURT: He asked you a question -- otherwise, I'm going to get him to repeat it. But please be responsive. Listen to the question, and answer it. And then you can give whatever explanation you want to give. Okay?

THE WITNESS: Yes, sir.

THE COURT: Ask the question, please.

BY MR. RANSOM:

Q. Paragraph 4, page 11 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 was why there was no Mayday record?

A. That is correct.

Q. You said that instead of there being a Mayday record, Mr. Mikell's code was documented in the anesthesia record?

A. That is correct. All the drugs given, all the times of defibrillation, the times of CPR, all of that was documented -- would be documented on a code sheet,

was documented in the medical record, which is appropriate for an OR situation.

Q. Okay. Did you ever see all of that documented in Mr. Mikell's medical record?

A. I did see the drugs, the times, the defibrillation note, yes.

Q. And when did you see that?

A. When I -- when I was asked to look at the case for the deposition.

Q. And that's why you testified that there was no Mayday record?

A. Correct. Because at that time, there was no Mayday record in any of our electronic files of the case. And I -- because of -- again, because of our policy, the OR is not to have a Mayday record, but to document in the electronic medical record. Unless they're an active practice in anesthesiology, I did not find that unusual at all.

Q. Okay. One of the other things that it says here in Exhibit 9, and this is on page 7 of 8, it says "Following the Mayday, the cardiopulmonary resuscitation event form" -- and that's the Mayday record -- "is faxed to Risk Management and then entered into the patient's medical record" -- am I reading that correctly?

A. That is what it says, yes, sir.

Q. Okay. But, again, you testified that there was no Mayday record from Mr. Mikell?

A. I did not witness a record being written on during my time in the room, and I was not asked to sign it which I would in any other Mayday event in a non-anesthesia site.

Q. Well, now, you weren't testifying just as Dr. Guldan, you were testifying as the Medical University with respect to all knowledge known to it; correct?

A. I was -- I was testifying in regards to what we do in the OR as anesthesiologists in a code situation.

Q. Okay. And you testified that there was no Mayday record?

A. I did not witness one, and it is not our practice to do them. It's a nursing function that happens in the non-OR sites.

Q. Well, can I get you to agree with me that when I asked you at your deposition in November of 2014 if that policy applied, you told me that it didn't?

A. I said that then, and I would agree now, yes, sir.

Q. And you would agree with me that when I asked you at your deposition back in November of 2014 whether

or not there was a Mayday record made from Mr. Mikell's case, you said that there was not?

A. To the best of my understanding at the time, there was not.

Q. Okay. And you were wrong; right?

A. Apparently there was a Mayday sheet filled out at some point.

Q. Okay. You had the opportunity to obtain a preliminary copy of the transcript of your testimony back in November of 2014?

A. I believe so, yes.

Q. That's what we call it when the witness reads and signs their testimony?

A. Yes.

Q. Okay. You actually exercised the right to read and sign your testimony?

A. I did.

Q. And even though your testimony was false, you didn't make any changes?

A. It was not false, sir.

Q. Well, you testified that there was no Mayday record; that's false?

A. There was not a Mayday record when I was in the room. The Mayday record not being charted on, I was not asked to sign a Mayday record. And there was

no Mayday record known when I gave that deposition, so there was no reason for me to believe there ever was.

Q. So I asked you back in November of 2014, when you were designated to speak on behalf of the Medical University, is there such a form for Mr. Mikell's case; and you said, "There is not"; do you remember that?

A. I do remember that.

Q. Okay.

A. There was none in any of the electronic records for the case.

Q. Okay. And you've reviewed and read and signed that testimony, and didn't change it; did you?

A. That is correct because it was correct at the time.

MR. RANSOM: Thank you, Dr. Guldan.

THE COURT: Cross-examination.

CROSS EXAMINATION BY MS. FLEMING:

Q. Dr. Guldan, I just want to clarify, you made some references to what you call a NORA site, what does that stand for?

A. It's what we refer to as a non OR anesthesia site.

Q. Okay. And we know that Mr. Mikell's colonoscopy took place in the Digestive Disease Center. Are there rooms within that center that are designated

as NORA or non-operating room anesthesia sites?

A. That is correct. At the time of his procedure, we had three separate NORA anesthesia sites in DDC.

Q. And the rooms that are designated as NORA sites, are those the rooms that the anesthesia providers are assigned to?

A. That is correct. We only provide anesthesia in those rooms because of the specialized equipment and drugs available in those rooms that allow us to take care of patients.

Q. And so --

A. In those situations.

Q. I'm sorry. The rooms that are non NORA sites, are those staffed by regular nurses who work in endoscopy?

A. They're staffed by endoscopy nurses and the G.I. doctors and fellows, yes.

Q. I think you were asked some about the -- the emergency medical response policy?

A. Yes.

Q. And it's your understanding that for -- you're analogizing the OR and the NORA site as similar, the same?

A. As far as our staffing and our procedures,

they are treated exactly the same. A NORA site is treated just like an OR site from the anesthesia perspective, patient safety wise.

Q. And that's from an anesthesia position perspective?

A. That's correct.

Q. And I believe you were trying to reference a portion of the policy that says something to the effect that a full Mayday does not need to be called in an OR site?

A. That is correct. In fact, a full Mayday team showing up to an OR site can actually impede our care of the patient. Because you have people who are less skilled providers showing up, who do not have full knowledge of the patient.

Q. Okay. And I think that's actually -- I think you referenced page 4, paragraph 11, but could you take a look at the -- at the sentence above that, where it says "The emergency departments and ORs do not have to call a full Mayday. Staff may call for a full Mayday any time they determine a need for a full team"; is that what you --

A. Yes, that is correct.

Q. Is that what you were referring to?

A. That is correct, yes.

Q. And I think, just to clarify, you testified that you reasonably believed that there was no code sheet or Mayday sheet prepared for Mr. Mikell in this case?

A. That is correct. As the anesthesia provider responding to a code in the OR, I would not expect there to be a code sheet filled out on that patient. And if there were, I would be, you know, on the floor -- in the floor situation where we're called to a code, and there's a full Mayday team. There's -- one of the members of that team is a nurse from ICU, and her job is to actually fill out that form. And she actually writes down everyone's names that's in attendance and all the drugs, and she requires us to sign them. And that was not occurring in this case as she was not needed.

Q. And just to clarify, have you -- have you seen a code sheet before?

A. I have, many times.

MS. FLEMING: I'd like to go ahead and mark the cardiopulmonary resuscitation event form as Defendant's Exhibit's 2 for identification please.

(WHEREUPON, Defendant's Exhibit No. 2 was marked for identification.)

BY MS. FLEMING:

Q. Dr. Guldan, I would like to show you what's been marked for identification at Defendant's Exhibit 2.

THE COURT: Defendant's what?

MS. FLEMING: Exhibit 2.

MR. RANSOM: Your Honor, we object to the use of this document with this witness, or with any other witness.

THE COURT: All right. Ladies and gentlemen of the jury panel, I'm going to have to take up this objection out of your presence. The reason I do that is I'm not permitted to comment on the facts of this case during the trial. And in order to rule on certain questions as to whether it's admissible under the Rules of Evidence or not, I want to be free to comment on the facts with the lawyers before I make a decision whether it's admissible under the Rules of Evidence or not admissible under the Rules of Evidence. So I generally ask you to leave the courtroom.

And let me correct something I said to you earlier -- well, not correct, but let me add to it. Madam Forelady, ladies and gentlemen of the jury, on direct examination the plaintiff's attorney has been asking -- been asking -- excuse me -- been asking

meantime, the clerk will maintain control of them.

I believe we were at cross-examination. If you'll please proceed.

MR. COOKE: Yes, Your Honor. Thank you.

MS. FLEMING: Thank you.

CROSS EXAMINATION BY MS. FLEMING:

Q. Dr. Guldan, good morning.

A. Good morning.

Q. Yesterday we were talking about the code sheet, the Mayday record?

A. Yes.

THE COURT: Let me interrupt you just a second. Ladies and gentlemen, I forget, Plaintiff's Exhibit No. 9, which is the Emergency Medical Response Policy has been admitted into evidence without objection. Please proceed.

BY MS. FLEMING:

Q. Thank you. Okay. At what point -- you mentioned that the Mayday record is a -- is a document that the nurse in the room would ordinarily document once a Mayday is called; is that correct?

A. In situations that are not in the OR or NORA site, which we were in a NORA site for this case.

Q. Now, is the record physically kept in the room, or is that something that has to be brought into

the room with a crash cart or a defibrillator?

A. So in -- in -- when a -- when a Mayday is called on the floor, for instance, the -- the nurse who does the documentation is the charge nurse from the ICU, who is part of the Mayday team. And she's the one who does the documentation, gets the doctors who participated in the code to sign it.

The difference in the OR's is the documentation is in the electronic medical record. We document, you know, the -- the attending -- instead of an internal medicine resident running the code, the attending anesthesiologist for the case runs the code for instance. And that's the -- that is documented in the medical record.

Q. When -- when does that nurse start documenting in the Mayday record? Is that after the Mayday is called?

A. That is correct. When -- when -- whenever the response team arrives in the room, which is usually -- depending on where it is in the hospital, can be two minutes, five minutes even, it depends how -- how remote a location is.

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, as far as I understand.

Q. And so would it be fair to say that the Mayday record reflects efforts taken to resuscitate a patient?

A. It is -- it is a narrative of the actual resuscitation event, who participated and what is given at what times, correct.

Q. Now, I think you testified yesterday that when you arrived in response to the Mayday that was called, Mr. Mikell had already returned to spontaneous circulation?

A. That is correct. A large part of the resuscitation had been completed, which you know -- again, I just really wanted to emphasize the difference between a code in the OR and a code or a Mayday -- whatever you would like to call it -- on the floor of a nonanesthesia site. The resuscitation would not begin until a Mayday team arrived, so it would be delayed two minutes, five minutes, however long it takes for the Mayday team to arrive.

In this case, because it was in an anesthesia NORA site or an OR, the resuscitation began immediately when the patient was identified to have a problem. And thus, the patient was already well -- well resuscitated

when I, and the rest of the team, arrived.

Q. And I think you mentioned that you then went to the PACU, which is the Post Anesthesia Care Unit, and instituted or got things ready to start the hypothermia protocol?

A. That -- that is correct. The -- the guidelines show that when you have a cardiac arrest, and you're within the first hour of that arrest, if you induce moderate hypothermia, you can reduce organ damage and specifically damage to the brain after the anoxia that happens during any cardiopulmonary arrest, and that can improve the chances of a patient's function returning to baseline.

There's always going to be an insult immediately after a cardiac arrest, but you can, you know, improve the likelihood of somebody's function returning to baseline, which happened in this case.

Q. Okay. And was the hypothermia protocol a state of the art treatment in 2010?

A. That is correct. It was not part of any guidelines as evidenced -- evidence based medicine, excellent standard of care.

Q. Were any other hospitals in the Charleston area using the hypothermia protocol in 2010 that you're aware of?

A. It was -- it was -- it was pretty new in the literature at that time, so I would seriously doubt it.

Q. I don't have any further questions. Thank you very much.

A. You're welcome.

THE COURT: Any redirect?

MR. RANSOM: Yes, sir, Your Honor.

REDIRECT EXAMINATION BY MR. RANSOM:

Q. Good morning, Dr. Guldan.

A. Good morning.

Q. You -- you testified that the Mayday record, to your understanding, wouldn't contain any documentation of events that occurred before the Mayday took place?

A. That -- that is correct.

Q. Okay. And let me show you this board here. This is -- you see down in the lower left, it's document control number 611?

A. That is correct.

Q. Let me see if I can set this up.

(Pause.)

Q. And this is a part of the anesthesia record from Mr. Mikell's case; correct?

A. That is correct.

Q. Okay. And I just wanted to point your

attention to the entry there -- can you see where it's timed 8:00 a.m, and it's under the initials of a Dr. Nelson EWN; do you see that?

A. That is correct.

Q. Okay. I'll circle it. I apologize. I don't have my marker handy. This entry right here, and it says "Mayday team called at 8 a.m;" correct?

A. That is correct.

Q. So according to your testimony, the Mayday record would not contain the times or the record of any events that occurred before 8:00 a.m, would it?

A. It would not -- it would not have occurred in the events that occurred before the Mayday team arrived on a Mayday sheet.

Q. All right. So we wouldn't expect a Mayday record then to provide the times of events that occurred before the Mayday team arrived?

A. That is correct, sir.

Q. Thank you. Now, you're not really a fact witness in this case, are you?

A. No, sir.

Q. Right. You don't really know very much of anything about what actually happened during the Mayday?

A. Actually I -- I -- I arrived during the

resuscitation -- the end of the resuscitation, so I am aware of what happened -- the quality and the -- during the duration of the resuscitation. Before that, I was not present.

Q. Well, that's what I mean. I mean, you don't really know what happened during the resuscitation because it was basically over by the time you got there?

A. The initial portion of it. The resuscitation doesn't end until the patient is stable. And he was not stable for some time.

Q. Instead, your role in this case was you were designated to be the Medical University -- from amongst all the hundreds, if not thousands, of people they've got over there that they selected you -- designated you to talk about -- to explain the Mayday policy; right?

A. In -- in -- insofar as it involves the OR's and NORA sites, yes, because I'm an anesthesiologist.

Q. Right. But, I mean, your role in this case was to explain to me what this Exhibit 9 means, and how it relates to the events in Mr. Mikell's case; correct?

A. Correct.

Q. Okay. And I'm curious, I mean did you look over this Mayday policy before you testified in November of 2014?

A. I did.

Q. And I wanted to ask you, did you do anything to investigate whether or not there, in fact, was a Mayday record for Mr. Mikell's cardiac arrest?

A. I did look through the electronic medical record. When we transition to the PICIS medical record system, that we've mentioned several times now, all paper entries into a chart are scanned into the electronic record. And that process is a manual process. So I looked for all scanned documents and did not find anything in regards to -- to a Mayday issue.

Q. Well, you see one of the things that the Mayday policy requires -- says it must be signed by the designated participants; correct?

A. Correct. And that would be -- that would be myself, as well, since I responded. Again, I did not witness a sheet being filled out. I was not asked to sign a sheet. And, again, it is not unusual for there not to be a sheet in the OR, NORA site.

Q. Right.

A. As the electronic medical record is our official code document for that event.

Q. So I wanted to ask you, since the policy requires the record be signed by all the participants, did you do anything to identify who the participants

were and then go ask them if they had seen a Mayday record?

A. The -- again, the participants are listed in the electronic medical record, and that -- they sign it when they signed into the record.

Q. So when you were designated to explain this policy on behalf of the Medical University, you didn't do anything to identify who the people in the record were that had been participating and ask them whether there was a Mayday record, did you?

A. Did I speak to the individual -- individual nurses in the room?

Q. Right.

A. No, I did not. Because I did not expect there to be a medical record. Again in the NORA site or an OR site, there is not.

Q. Right. So you didn't ask anything of the participants in the code if there was a Mayday record, you didn't ask any of the nurses in the room whether there was a Mayday record -- let me ask you this: We also know that the policy requires that a copy of the Mayday -- or that rather the Mayday record be faxed to the Risk Management Office; do you see that?

A. Again, it does not -- it does not require -- there is no form required for an OR or NORA site. So

there's -- so the form would not need to be faxed.

Q. Did you contact anybody in the Risk Management Office to see if they had received a Mayday record for Mr. Mikell's case?

A. I -- I do not recall contacting anybody in Risk Management Office, no, sir.

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.

Q. All right. You can't tell us whether there was a Mayday record that was signed by everybody who participated?

A. I can tell you there was not a Mayday record signed by everybody that participated, because I would have signed it, as well as Dr. Nelson and Donna Embrey.

Q. You can't tell us what the Mayday record contained because you never saw it?

A. That's -- that's correct.

Q. You don't have any explanation for why the Mayday record isn't in Mr. Mikell's chart?

A. Because the Mayday record is the Anesthesia Electronic Medical Record.

Q. Did you ever go and look at the paper record

for Mr. Mikell to see if it was in his chart?

A. Again, the paper record is scanned. This -- this -- my involvement was four years after. The paper record no longer exists. All the paper documents, again, are scanned into the electronic system. And that is the complete record for the patients, especially after -- you're two years out, the paper chart doesn't exist anymore. So it's impossible to go back and look at a remote chart.

You have to look at the electronic copy and I did. And there was no evidence of a Mayday record, thus my testimony that -- and me not witnessing it, I -- I think reasonably inferred that there was never a Mayday record, especially when it does not apply to an OR or NORA site.

Q. And as we sit here today, you don't have any explanation for why there is no Mayday record in this case?

A. Again, there -- it did not need to be, so it never struck my mind as being unusual at all.

Q. But you did find out at one point in time that there was, in fact, a Mayday record created; right?

A. Very recently.

Q. And that that Mayday record was faxed to the Risk Management Office?

A. I found that out actually in court.

Q. And when you found those things out, did you do anything to notify either my office or my client or anybody in this case that it turned out that what you had testified to was false?

A. Again, my -- the -- my testimony was not false. I spoke truly to what I and everyone believed was the case.

Q. And it turned out you were wrong?

A. You can be wrong and not be false.

Q. Thank you. I don't have any other questions.

THE COURT: Any recross?

MS. FLEMING: No, thank you.

THE COURT: Okay. Doctor, you may step down. Any reason the doctor can't be excused?

MR. RANSOM: Yes, Your Honor.

THE COURT: Yes, he can be, or you have a reason not to excuse him?

MR. RANSOM: Yes, he can be excused.

THE COURT: All right. Doctor, you may be excused. Thank you very much. Call your next witness, please.

MR. RANSOM: The next witness is Sheila Scarborough.

(Pause.)

MR. RANSOM: Thank you. The plaintiff calls Sheila Scarbrough.

SHEILA SCARBROUGH, after having been duly sworn, testified as follows:

THE CLERK: Thank you. Please be seated. Please state your first and last name, and spell your last name loudly and clearly into the microphone.

THE WITNESS: Sheila Scarbrough, S-c-a-r-b-r-o-u-g-h.

DIRECT EXAMINATION BY MR. RANSOM:

Q. Good morning, Ms. Scarbrough.

A. Good morning.

Q. You're employed by the Medical University?

A. I am.

Q. And I believe that back in October -- well, the late part of 2010, you worked at the Risk Management Office?

A. That's incorrect. I worked in the quality department. I was a Critical Interventions Manager.

Q. Okay. And what is your position now?

A. My position now is the Director of Risk Management and Patient Safety.

Q. Okay. But you were in the Risk Management Office in December of 2010?

A. No. I was not working in Risk Management at

that time. Again, I was working in the quality department. I was a Critical Interventions Manager. I was overseeing our emergency teams, as in code teams, et cetera, and working on patient safety.

Q. Now, you were identified by the Medical University to testify on its behalf about its Emergency Medical Response Policy?

A. Yes, sir.

Q. Okay. We've had that marked as Exhibit 9; are you familiar with that policy?

A. Yes, sir. I helped to write it.

Q. You testified back in August of 2015?

A. Yes, sir.

Q. That was about nine months after Dr. Guldan had testified about the same policy?

A. I don't know the date he testified, but I remember that I testified in August.

Q. Now, you would agree with me that the Mayday Policy, Exhibit 9 there, that does in fact apply to the cardiac arrest that Mr. Mikell suffered on October 1, 2010?

A. Yes, sir.

Q. Okay. And pursuant to that policy, there should be a Mayday record for Mr. Mikell's cardiac arrest?

A. That's what's written in the policy.

Q. Okay. The Mayday record should be in Mr. Mikell's hospital chart pursuant to the policy?

A. That's what's in the policy, yes, sir.

Q. Okay. And according to the policy, the Mayday record is something different from the anesthesia record?

A. In the policy.

Q. Yes, ma'am.

A. I don't know that it says that exactly in the policy, but there are -- I don't recall that being in the policy, that it's different.

Q. Yeah. You would agree with me that Mayday record is something different than the anesthesia record?

A. It's a -- two different things, yes, sir.

Q. And something different from the general medical record, too, right?

A. The CPR form will be part of the medical record once it's in the medical record, but it is a part of the medical record.

Q. And you would agree with me that there -- a Mayday record for Mr. Mikell was, in fact, created?

A. I think so, yes, sir.

Q. Okay. And it was faxed to the Risk Management

Office some time in late December of 2010?

A. No. It probably was faxed right after the code, or sometime around the code is generally when the forms are faxed.

Q. Okay. Well, you -- you had the fax in the Risk Management Office?

A. It went to the Risk Management fax machine because I couldn't afford a fax machine in my office, and it was the closest fax machine to my office. So I had to walk across the hall to get it. But yeah, it went into that -- that fax machine.

Q. Okay. And if you'll look at the policy -- well, let me point this out to you -- the policy actually requires that the Mayday record be faxed to Risk Management?

A. Yes.

Q. You see that -- okay. And so it was -- because that's what the policy requires, that's why it was faxed to the fax machine where you picked it up?

A. Yes, sir?

Q. Do you remember about when it was that -- that you got that fax?

A. No, sir. I don't remember that directly.

Q. Okay. All right. And what did you do with the Mayday record when you got it off the fax?

A. I don't remember this particular record itself. But what my general practice was -- is during that time when I had that job, is to get the records, to review it, to look to see if there were quality issues that needed to be addressed. That's one of the primary functions of that record, is to look to see if, you know, Epinephrine was given in five minutes. If, you know, the patient was defibrillated appropriately, if we were following ACLS protocols.

Because that was my primary job, to look to see if there was quality issues that needed to be addressed. So I would look at the -- at the record, and I would do a quick abstraction, to have all the data that I needed to put in the database later. I didn't always put everything in the database immediately. It depended on how busy I was or whatever.

But I would want to make sure at the time, when I first got the record, if there was anything that needed addressing, like equipment was missing, or code team members didn't show up or things like that, that's the sort of thing that I would look at on the sheet is to say, okay, did everything seem to go okay.

And if something didn't go okay, then I would step it up and go back to the committee and say, you

know, we have a problem with -- the code team didn't respond, or whatever it was that happened on the code, that wasn't a quality piece that we needed to learn from. Because that's we try to do is learn from our quality indicators.

Q. And so that's the general process that you would follow?

A. Yes, sir.

Q. Okay. But you say you don't have any recollection of this --

A. Of this particular one, no. We had two or three a day. And so for several years, I did this, so I can't remember this particular date.

Q. Okay. And once you were done with your review of the Mayday record from Mr. Mikell's case, what did you do with it?

A. Once I finished with the document -- the copy that came off the fax, when I didn't need it any more, then I would put it in the shredder per law. It's a HIPAA violation to leave something like that laying around.

Q. Right now, just to be clear, the policy that's on the screen, it doesn't say anything about shredding or destroying the Mayday record?

A. No. I wouldn't destroy the record, the one

that goes in the chart. No, no one does that. The copy that I get off the fax, that's what's destroyed. And, no, it's not in here, but we do have a policy at the Medical University about HIPAA violations, and how you deal with health information. And so that would be in a policy from that. And I don't remember the actual name of that policy, sorry.

Q. Do you have any explanation for why the Mayday record isn't in Mr. Mikell's chart?

A. I don't personally know. This particular record, in my experience, sometimes records -- there are pieces of papers. And, of course, during an event, you know, after the event occurs, you know, you resuscitate. And then after the patient is resuscitated and goes to the ICU, or whenever they're going, there's a fair amount of chaos.

Sometimes when the nurses fax me the -- the record, they forget to pull it off the fax, and so it stays on the fax. I've seen that happen. I've seen the piece of paper get stuffed into this little folder, that's the medical record. And a piece of paper sometimes can just fall out. But, again, in this particular case, I don't know in this particular case.

Q. And you didn't do anything to look for the Mayday record, and try to find out what may have

happened to it?

A. No, I did not.

Q. Okay. So you don't know?

A. I do not.

Q. Okay. Thank you. I don't have any other questions.

THE COURT: Cross-examination.

CROSS EXAMINATION BY MS. FLEMING:

Q. Good morning, Ms. Scarbrough.

A. Good morning.

Q. Could you tell the jury how long you've been employed by MUSC and a little bit about your educational background?

A. Okay. I graduated from nursing school with a Bachelors in Nursing from Radford University back in 1986. I did travel nursing for some years, and then came to the Medical University -- first as a traveler, about six months after Hugo. And then traveled a little bit longer, then came back in 1992 permanently. And I've been at the Medical University since then.

My background is critical care nursing. And I joined the quality department in two -- about 2005-ish to develop our medical emergency team, which we didn't have before at that time, which was kind of like a code team, but it's for patients who are not coding. The

patients are sick on the floor that need critical care, so I developed that team.

Q. Okay. Now, you said in 2010, at the time of Mr. Mikell's code, you were in the quality department?

A. Yes, ma'am.

Q. And you actually developed the policy that we are talking about today?

A. Yes. That was actually started back in the '90s, but I did most of the -- I was the chair of the committee, starting in the late -- in the early 2000s, like 2002, 2003, I started being chair. So it was my responsibility to keep that policy up-to-date.

Q. Okay. And you said that you -- you actually tracked codes that occurred at the Medical University. And why did you -- why did the Medical University track codes?

A. So we could improve. Codes, themselves, you know can be chaotic and difficult, and so we want to make sure that every one of the team members are working appropriately, that we gave the medications that we're supposed to so we can improve. In the last -- since 2005, since I started in the quality department, our return to spontaneous circulation rates, which have gone -- gotten a lot better -- and better than the national average, and so that's what we

want to do. We want to save lives.

Q. And did -- at the time that this happened, I heard you mention a database?

A. Uh-huh.

Q. What was the purpose of -- or why did you receive a copy or why was -- why did you receive a copy of -- of the Mayday record or the code sheet?

A. As I said before, to look at immediately to see if there was any problems that I needed to be addressing with the code team or equipment, et cetera. The other piece is to put this data in this database so it can be reviewed on the aggregate.

As you know, if you're just looking at one event, you may not be able to learn lessons from that. But if you look at 10 or 100, 200, you could see trends. If we have trends of problems with medications or personnel -- or whatever, that would point the quality department in the direction of what we need to do to fix things, and so that's the purpose of the database.

Also, to benchmark ourselves with other hospitals in the country. So, you know, how fast can they start CPR, and how fast they do this -- are we in the same -- we're doing the same thing. That's -- that's the purpose of that database.

Q. And then from a quality standpoint, did you find any issues with regard to quality as it pertains to Mr. Mikell's arrest or the resuscitation?

A. I don't recall the actual abstraction, but my normal practice was if I did find any issues, I would have took that back to the committee. And, also, we did learnings, we did meetings. We called M&Ms.

So, basically, we went back to the code team and said, hey, this particular thing happened, so let's learn from it. And, you know, we would discuss it.

And there's -- I looked at all of those records, you know, in preparation for this deposition -- I mean this witness, and I didn't see that we did that. So I have no evidence that there was anything that was wrong. But, again, I can't actually remember what was in the record.

Q. Now, the database that you referenced, what is -- what is the name of that database?

A. It used to be called the National Registry of CPR at the time that we were doing this. They changed their name to get with the guidelines, resuscitation. I think they did that about two or three years ago, so that's what it's currently called.

Q. And when you say "they", what --

A. It's --

Q. Is that a database that's maintained by MUSC or is that an independent database --

A. That's independent. That's -- I forget the name of the company, I think Hortiles (ph), but it's -- it's a vendor of the American Heart Association. So the American Heart Association is the group that hires this -- this -- this database people to keep up with all this data. It's not ours.

Q. So the database, is it a -- is it a National Registry of Codes that occur throughout the country?

A. Yes, ma'am.

Q. And so as part of a participant in that data, MUSC enters data into the database for the purpose of the American Heart?

A. That's correct.

Q. And did you, in your role as quality coordinator, did you enter data regarding codes into the American Heart Association database?

A. Yes, I did.

Q. Do you recall whether you entered any data into the database concerning Mr. Mikell?

A. I don't recall that. I did look later to see and I did. But I don't technically recall doing it. I did -- like I said, I did many entries.

MS. FLEMING: I'd like to mark for

identification Defendant's Exhibit 3.

(WHEREUPON, Defendant's Exhibit No. 3 marked for identification.)

BY MS. FLEMING:

Q. Now, Ms. Scarbrough, when you -- did you -- did you at any point go back into the database and look to see if you entered information on Mr. Mikell?

A. Yes. At a request for my deposition -- for the deposition, I did look at that, yes.

Q. Okay. And I'd like to go ahead and show you what's been marked for identification as Defendant's Exhibit 3.

A. Okay.

Q. Can you identify that document?

A. This is a PDF that I pulled off -- I think this last Fall -- about what was entered into the database for Mr. Mikell.

Q. And when you it's say a PDF, can you explain -- so did you go back into the database and look for information concerning Mr. Mikell's --

A. So, when I was originally asked back in August to look to see if anything had gone into the database -- and, again, you have to -- the way I see the data is in the aggregate, so I have an Excel -- so I don't look at -- I never go back and look at individual patients.

I look at aggregate data, like a bunch of data.

And so when I was asked to look for it, I looked in the big Excel database. And I did find the medical record that was associated with Mr. Mikell in that database. And so I pulled that to start off with, which was very unwieldy to be able to read, because it was an Excel -- a long thing, and it turned out to be like 20 something pages -- and it was hard to read, so.

I went back to get with the guidelines and looked on their website for help to see if there was a better way to pull individual patients, because I've never done it before. And I found that the best way to pull it is a PDF, which actually shows it in a more organized fashion to be able to read.

Q. Okay. And so the document that's been handed to you, that we were talking about, is that a printout of the information from the database that you entered concerning Mr. Mikell?

A. Yes, it is.

Q. And when did you create this -- the entry in the database for Mr. Mikell?

A. When did I create the entry in the database -- it was the last week of -- of December -- December 29, 2010 at 5:00 in the afternoon.

MS. FLEMING: I'd like to move to enter

Defendant's Exhibit 3 into evidence at this time.

THE COURT: Any objection?

MR. RANSOM: Yes, Your Honor, we object.

THE COURT: Let me see what -- what we're talking about, please, ma'am.

(Pause. Document handed to Court.)

THE COURT: All right. What is your legal objection?

MR. RANSOM: Two objections, Your Honor. The first is relevance of the information contained in the document. And the second is the best evidence rule objection.

THE COURT: All right. Madam Forelady, and ladies and gentlemen of the jury, I'm going to ask you to go to the jury room. Please don't discuss the case amongst yourselves. Please leave your note pads in your chairs.

(WHEREUPON, the jury leaves the courtroom at 11:00 a.m.)

THE COURT: All right. Ms. Fleming, tell me exactly what this is.

MS. FLEMING: Yes. Your Honor, it is --

THE COURT: I -- wait a minute -- I assume it's what she put into the database, based upon a copy of the Mayday card; is that correct?

BY MS. FLEMING:

Q. Ms. Scarbrough, I'd like to show you what's been identified as Defendant's Exhibit 2 for identification; could you please identify that document?

A. This is a Cardiopulmonary Resuscitation Event Form, as it has been called, quote, really the Mayday form or the code form.

Q. And have you seen this document before?

A. Yes, I have.

Q. And under -- under what circumstances have you seen this document?

A. Again, I created it to start off with. And then I looked at many, many, many filled out cardiac forms, and I actually -- we still use this form, so I still see it.

Q. And when you say you still see it, is this -- is what's been marked as Defendant's Exhibit 2 representative of the form or the version that was being used in 2010?

A. Yes, it was.

Q. Okay. And does it -- when you said that you developed it, did you make a determination of what information should be or would be documented in an actual Mayday record code sheet?

A. Part of that came from American Heart Association, part of the purpose of this tool is to get quality data to put into the database. And so that's what this form was based on, what they asked for the database information. We wanted to make sure that that was being collected at the time of the code. So that's one of the reasons that we developed this sheet.

And, of course, the other reason is because generally during codes, nurses give medications not doctors, anesthesia is the only people that give meds. And so this had to be a physician's order as well.

Q. And so was this form designed to be completed by a nurse or a physician? Because you just mentioned something about --

A. Generally nurses fill this out.

Q. And you'll notice that -- obviously you drafted this, so did the labels on the document and each of the various sections describe accurately the data that is recorded during a Mayday or a code?

A. I'm sorry. I didn't understand the question.

Q. Sure. You'll notice that there are different sections where data is entered on the code sheet?

A. Yes.

Q. Okay. Do those sections represent the information that is supposed to be recorded in the form

during a code or a Mayday resuscitation?

A. Yes.

MS. FLEMING: Nothing further.

THE COURT: Do you have any cross-examination you would like -- let me see the form you're actually trying to put in for a second, please. I know I've got a copy of it. I want to make sure it's --

MS. FLEMING: The same. Okay.

THE COURT: All right. Before I even would consider it, down where it says PWPA, file number, Mikell vs. MUSC, that's going to be redacted if I let in; do you understand?

MS. FLEMING: Uh-huh.

THE COURT: All right. Cross-examination concerning this witness, if you so desire before I rule.

MR. RANSOM: Yes, Your Honor. I would like to ask a couple of questions.

THE COURT: Now, my understanding is they are offering this simply to show that this is what we've been referring to as the Mayday card. It's really a Cardiopulmonary Resuscitation Event form, which we've been referring to as the Mayday form which MUSC uses --

MR. RANSOM: Correct.

THE COURT: -- is my understanding -- is that

correct? Ms. Fleming, is that correct?

MS. FLEMING: I'm sorry. I didn't hear what you said.

THE COURT: I'm sorry.

MS. FLEMING: I didn't hear --

THE COURT: I said you're offering this for the purpose of showing this is what MUSC uses, and this is what a blank Mayday card is; is that correct?

MS. FLEMING: That is correct.

THE COURT: Okay. All right.

BY MR. RANSOM:

Q. Ms. Scarbrough, with respect to this blank form, which is marked as Defendant's Exhibit 2, in your experience, have you ever seen these forms when they aren't fully completed?

A. Yes.

Q. And have you ever seen a circumstance where information is written on the form other than just the -- to fill out the form itself?

A. I'm sorry? What other information?

Q. So have you ever seen -- you know, there are boxes to check and places to write in medications and so forth. I mean, have you ever seen information written in one of these forms that isn't according to the template, that somebody wrote in something in the

margin or up here at the top?

A. I can't recall, sir.

Q. So you can't tell us that that hasn't happened?

A. That's accurate. I don't recall 100 percent. I can't remember every single form right now, so yes.

Q. And you don't have any specific recollection of Mr. Mikell's Mayday record to be able to tell us that it didn't have stray marks, added notes, extra information?

A. I don't remember that. And I don't remember ever seeing it, so I think I probably would remember it if it was something that strange.

Q. But when you say you don't remember --

A. But I don't. I don't.

MR. RANSOM: Thank you, Your Honor. That's all I have on the form.

THE COURT: Okay. All right. Let me hear your argument on why -- why it shouldn't be admitted primarily just to show this is the form that MUSC uses? And I will so instruct the jury.

MR. RANSOM: Judge, the blank form doesn't prove or disprove anything in the case.

THE COURT: Well, I understand that. But my arguments -- why shouldn't I allow it?

MR. RANSOM: Because I think it's, again, it's a back door to beat the best evidence rule and provide secondary evidence of what was in Mr. Mikell's form. The argument is going to be --

THE COURT: Well, we haven't gotten to Mr. Mikell yet, because she says she doesn't remember. Now, if it is somehow fill in the blanks, that's a different story; okay?

MR. RANSOM: Well, and again, I think the filling in of the blanks is going to come in the argument of counsel at the close of the case.

THE COURT: Well, I don't know. But I -- I think it's -- I'm going to overrule your objection. I'm going to allow it in simply based upon the fact that this is a -- what the parties have been referring to as a Mayday card, used by MUSC when this occurred -- when did it occur -- October 1, 2010. And it's referred to as a Cardiopulmonary Resuscitation Event Form. I'm going to allow it in for that purpose and that purpose only.

Now, assuming the part down here, this Mikell vs. MUSC is redacted --

MS. FLEMING: May we use a black marker to redact that?

THE COURT: I don't have a black marker.

MS. FLEMING: We do. We do.

THE COURT: Okay. Do you have one?

MS. FLEMING: Yes. Yes.

THE COURT: Then mark it. Redact it.

MS. FLEMING: Okay. I wanted to make sure that that was acceptable.

THE COURT: Okay. Get it marked. It's not going in unless you get it marked.

MS. FLEMING: Thank you.

THE COURT: Thank you very much.

(WHEREUPON, Defendant's Exhibit No. 2 admitted into evidence.)

THE COURT: All right. Ms. Fleming, you understand you're going to have to go -- jump through this hoop again when we bring the jury in.

MS. FLEMING: Okay.

THE COURT: Okay. Bring us the jury. Any other forms you're going to try to get in with this witness that we need to discuss now?

MS. FLEMING: No, I don't think so.

THE COURT: Okay. Thank you very much. Bring us the jury.

(WHEREUPON, the jury enters the courtroom at approximately 11:15 a.m.)

THE BAILIFF: All jurors are present.

BY MS. FLEMING:

Q. Ms. Scarbrough, could you please identify this document for the jury?

A. This is the Cardiopulmonary Resuscitation Event form, which is also known as the Mayday form.

Q. And I'm sorry -- is it -- how -- are you familiar with this form?

A. Yes. I helped to create it.

Q. Okay. And is the -- is this the version of the form that MUSC was using in 2010?

A. Yes, it was.

Q. And the information on the form -- there are various places to record information; is that correct?

A. That's correct.

Q. Okay. Is this representative of the information that was documented in the form during resuscitation after a Mayday was called?

A. Yes. This is the type of information that is documented for Maydays.

Q. And you said that you helped to create this form; why did -- why did MUSC create this form that's called the Cardiopulmonary Resuscitation Event --

A. There's a couple of reasons. First and foremost, from the quality standpoint, we wanted to make sure that at the time of resuscitation, when

people are busy saving lives, they don't think a lot of the data points that we want to capture to put in the database, so this helps to remind them to write these things down.

The other piece is that -- unlike anesthesia, who those doctors give their own medicines, most doctors don't give medications. They order nurses to do it. And in a code situation, you know, there's not time to write something down, like a normal physician's order, so we made this a physician's order so that nurses would be covered for giving medications. Because nurses can't give medications without a physician's order, so that's what this is.

MS. FLEMING: I would like to move Defendant's Exhibit 2 into evidence at this time.

THE COURT: I'm sorry?

MS. FLEMING: I said, I would like to move Defendant's Exhibit 2 into evidence at this time.

THE COURT: All right. The defendant (sic) has an objection, is that correct -- what's your legal objection?

MR. RANSOM: The same objection that we discussed when the jury was out, Your Honor.

THE COURT: All right. That objection is overruled. I'm going allow the Defendant's Exhibit --

is it number 2 or number 3?

MS. FLEMING: It's number 2.

THE COURT: Number 2. Defendant's Exhibit No. 2 admitted to show that this is the form that the parties have been referring to as a Mayday card.

(WHEREUPON, Defendant's Exhibit No. 2 was admitted into evidence.)

BY MS. FLEMING:

Q. Ms. Scarbrough, I'm going to put a copy of this form up so the jury can see it. Now, Ms. Scarbrough, what information is -- is documented in the resuscitation form? And when I say that, I'm really referring to -- is it information that's -- that occurs after a Mayday is called?

A. After the Mayday is called, yes. After it's determined that the patient is in cardiopulmonary arrest.

Q. Does -- is anything that occurs, generally speaking, prior to the time of the Mayday, recorded in this document?

MR. RANSOM: Your Honor, I'm going to object.

THE COURT: What's the legal objection?

MR. RANSOM: Well, on relevance grounds. This doesn't have anything to do with Mr. Mikell's care.

THE COURT: Overruled. Go ahead.

BY MS. FLEMING:

A. No. It's actually about the resuscitation, but it's what the patient's condition was at the time that he went into cardiac arrest. Like there's a question about was it witnessed or not. So when he went into cardiac arrest, was someone there. Because sometimes we have patients that we find, you know, in the bed that has cardiac arrest that we didn't know about. Those sort of things.

Yeah, it's all about at the time of cardiac pulmonary arrest on -- until the patient is resuscitated or not, that's what the information is in the form is all about.

Q. And I think you mentioned that the nurse actually -- the nurses actually document in this form, not physicians?

A. That's correct.

Q. So the anesthesiologists might be asked to sign the form at the completion of a Mayday, but they generally don't fill out the boxes and the information that's contained on this?

A. They do not. They usually -- they don't even sign it. It's a doctor -- it's not -- unless the anesthesiologist is running the code, it's the other doctors that sign it, so anesthesia very rarely ever

see this form.

Q. Okay. Now, the copy of the code -- I'll refer to it as a code sheet, but we would call it the Cardiopulmonary Resuscitation Event form, or the Mayday form, the copy that you receive in your office, is that copy ever placed in the patient's medical record?

A. No. It's a fax. So that doesn't go back into it. It's a fax.

Q. And after you -- what do you do with -- with the form that you -- the copy that you receive after you enter the data in the database?

A. After I enter the data in the database, I throw the form away into the confidential bend. Because it is confidential information. You just don't leave health information laying around.

Q. And you said that -- that to leave it lying around would be a violation of HIPAA?

A. HIPAA, it's against the law.

Q. And HIPAA was -- could you explain just generally speaking what HIPAA is?

A. HIPAA, actually it's the Health Affordability Act, but basically it's about health information, so that your medical records are not found by people that don't need them. So in the quality department, we do look at patient's medical records. We're not actually

taking care of them, but we use the medical records for quality purposes. No one should be looking at your medical records except for your doctor, or for quality insurance or insurance purposes. It's protection of information.

Q. And so do you ever maintain a copy of the form that you receive in the ordinary course of business?

A. After I -- after I finish the abstraction, no.

Q. Now, Mr. Ransom asked you some questions about why a code sheet or a -- one of these forms might go missing. Could you -- could you explain -- have you had circumstances where the actual form that is supposed to be placed in the medical record cannot be found?

A. Yes.

Q. Is that something that has happened?

A. It happens -- it happens several times a month at least that, you know, there's -- I try to find the code sheet, and nobody can find the code sheet. Because, again, it may have gotten destroyed about the time of the code when there was chaos, or it fell out, or it fell into medical records, and we lost the medical records. So it's not unheard of at all for the code sheet to -- to be missing.

Q. Now, I think you said that you entered the

data concerning Mr. Mikell's code into American Heart -- or the database maintained by the American Heart Association at the end of the year of 2010?

A. That's correct.

Q. Okay. Did you know that Mr. Mikell had passed away -- did you know any circumstances related to his health at the time that you entered the data into the database?

A. So, for the database, you put in all the resuscitative data, but you also put in when a patient is admitted and discharged. And so I would have waited until after he was discharged, and then put in the date of discharge. After someone is discharged, I don't know what happens to them after that.

Q. Okay. And so when you entered this data into the database, would it be fair to say that you didn't know whether he had died or not?

A. That's correct.

Q. And did you -- do you know whether a lawsuit had been filed?

A. That's correct -- I didn't know anything about it.

Q. And when did you come to learn that he actually passed away?

A. I guess when I was asked about this form last

summer. I didn't know anything about it. I had nothing to do with it.

Q. Ms. Scarbrough, did you know when you discarded the copy that you received, that the original Mayday form had been lost?

A. I did not.

MS. FLEMING: That's all I have. Thank you.

THE COURT: Redirect.

MR. RANSOM: Yes, Your Honor.

REDIRECT EXAMINATION BY MR. RANSOM:

Q. Ms. Scarbrough, you said that once it's in the file, the Mayday record is generally pretty safe?

A. In the file?

Q. In the patient's record, in the patient's chart?

A. It should be. They punch the holes and stick it in the chart.

Q. All right. Did Dr. Guldan ever come and ask you if you knew anything about the Mayday record?

A. No.

Q. Can you think of any reason why if Dr. Guldan was part of the resuscitation effort, he wouldn't have signed the Mayday record as the policy requires?

A. He -- I don't think he was the leader of the code team. I think it was another physician that was

actually leading the resuscitative effort. So the policy doesn't say that everyone signs it. The policy says that it's reviewed, but it's not signed by all.

The only people that sign the code sheet are the person -- the nurse that fills it out, and the code team leader that -- the doctor who orders medications. But, again, if the doctors aren't ordering medications, then they don't necessarily need to sign it because they're not -- because the signature is for a physician's order.

Q. They are all supposed to review it though?

A. They are supposed to make sure that what's in the sheet is accurate.

Q. So --

A. The team.

Q. So Dr. Guldan was supposed to review this record?

A. Either Dr. Guldan or the other anesthesiologist that was there.

Q. Now, you testified that the Mayday records themselves, they might actually reflect whether everyone was doing what they were supposed to do?

A. That's correct.

Q. You don't have any specific knowledge of what was on the Mayday record for Mr. Mikell's cardiac

arrest that you shredded; right?

A. All I know is what's in the database.

Q. And it's no longer in the medical record for Mr. Mikell, is it, the Mayday record?

A. It's -- from what -- that's my understanding.

Q. Even though the MUSC policy requires that it be in his medical record?

A. That's correct.

MR. RANSOM: I don't have any other questions.

THE COURT: Any recross?

MS. FLEMING: No, Your Honor. Thank you very much.

THE COURT: All right. Ms. Scarbrough, you may step down. Thank you very much. Any reason she can't be excused?

MR. RANSOM: No, Your Honor. She can be excused.

THE COURT: Ms. Scarbrough, you may be excused. Thank you so very much. Call your next witness, please.

MR. RANSOM: The plaintiff calls Dr. Terrill Huggins.

DR. JOHN HUGGINS, after having been duly sworn, testified as follows:

THE CLERK: Please state your first and last

MR. COOKE: Yes.

THE COURT: All right. Bring us the jury, please.

(WHEREUPON, the jury enters the courtroom at approximately 9:57 a.m.)

THE BAILIFF: All jurors are present, Your Honor.

THE COURT: All right. Thank very much. Call your next witness, please.

MR. RANSOM: Your Honor, the plaintiff calls Donna Embrey.

DONNA EMBREY, after having been duly sworn, testified as follows:

THE CLERK: Please state your first and last name, and spell your last name loudly and clearly into the microphone.

THE WITNESS: Donna Embrey, E-m-b-r-e-y.

DIRECT EXAMINATION BY MR. RANSOM:

Q. Good morning, Ms. Embrey. How are you today?

A. Good morning, Mr. Ransom.

Q. You were the nurse anesthetist who was responsible for Mr. Mikell's anesthesia care on October 1, 2010; correct?

A. Yes, sir.

Q. Okay. I want to show you on this board, part of his anesthesia record -- for the record, what I'm showing you is page 36 of 99, and that's part of the --

I think -- one minute anesthesia record; are you familiar with this?

A. Yes, sir. I have seen it before, yes.

Q. So up here in this top row with oxygen saturation values, we see that there are a number of boxes that are empty, including the time period with 7:41 through 7:48; correct?

A. Yes, sir.

Q. The reason those boxes are empty is because there was a problem -- a glitch, a malfunction, whatever you want to call it, with the anesthesia software that was supposed to be recording that data in the chart; correct?

A. Correct.

Q. Okay. And I want there to be no question, as we begin your testimony today, that you made some phone calls and sent some text messages to a technician to try to fix that computer problem; correct?

A. Correct. If I may explain, I sent two Simon page text messages. And to the best of my recollection, received one phone call.

Q. All right.

A. From Annette.

Q. One phone call.

A. Before she fixed it and got the data to convey

correctly.

Q. Well, we've marked the -- the text messages here as Plaintiff's Exhibit 12. And what you'll notice there at the bottom is your first text message was sent at 7:39. And it said, "hey, call me, R-E N-O-R-A" -- that means Non Operating Room Anesthesia -- "patient not in transfer bucket, thanks, Donna" -- correct?

A. Yes.

Q. Okay. And in response to that, you got a phone call? And the --

A. No, sir --

Q. -- next --

A. No, sir.

Q. -- the next text message that you sent --

A. Mr. Ransom, I'm sorry, I did not get a phone call. That's why I repaged her.

Q. Okay. Well, at 7:46, you sent the second text message and it didn't say, hey call me -- it said, "hey, call me back"?

A. Correct. Just meaning -- I meant call me -- call me at this number.

Q. Okay. And we can agree that after that first phone call, but before you got the problem fixed, you administered the Propofol to Mr. Mikell?

A. Say that again.

Q. We can agree that after the first phone call, but before the problem was fixed, you administered the Propofol to Mr. Mikell?

A. Correct.

Q. No question about that?

A. No question about it.

Q. Okay. So at a time where you are trying to correct a problem with the computer system, you are putting your patient to sleep?

A. Yes, sir. I initiated Propofol, yes --

Q. Okay.

A. I did.

Q. Now, there are a number of different printouts of the anesthesia record in this case; correct?

A. Yes, I have seen many.

Q. And I want to just take a second with the jury here now to go through these, so that they can have some understanding. The first one that we have is what I've marked as Plaintiff's Exhibit 1. And if you'll look down at the bottom, you'll see it's got MUSC page 502; do you see that?

A. I do.

Q. Okay. And you'll notice that this record has been printed on October 1, 2010, at 1346?

A. Yes, I see that.

Q. About 1:46 in the afternoon; right?
A. Yes, sir.
Q. And you'll see that there are page numbers down in the middle of the bottom; right?
A. Yes, sir.
Q. Okay. And it indicates that there are five pages; correct?
A. Yes.
Q. So, we see page two, page three, page four, page five; correct?
A. Yes.
Q. There is no page one, is there?
A. Not that you are showing me.
Q. Well, if there is a page one, perhaps Mr. Cooke or Ms. Fleming will present it to you. The next one that we have is what's been marked as Plaintiff's Exhibit 2. And you'll notice that down in the lower left, this one is dated October 1, 2010, and it's timed at 1347; do you see that?
A. Yes, sir.
Q. Okay. And that's really just about a minute after the first one, after Exhibit 1; correct?
A. Yes, sir.
Q. All right. And you'll notice that this one is nine pages. And on the last of -- or rather on page

eight of nine, we see what we refer to as the narrative; do you see that?

A. I do.

Q. Okay. And I've highlighted this part up here and that's an entry under the initials EWN; do you see that?

A. I do.

Q. Whose initials are those?

A. Eric Nelson.

Q. Okay. And you'll see that it says, "Memo, came into room, patient hypoxic, with junctional rhythm and no palpable pulse, ACLS Protocol initiated. Mayday team called", correct?

A. I do.

Q. And what is the time of that entry?

A. Eight o'clock.

Q. Eight o'clock. Thank you. Now, the next record that we have is what's been marked as Plaintiff's Exhibit 3. And you'll see that this one was printed out on October 2, 2010, at 1815?

A. Yes, sir.

Q. So that's at about 6:15 in the evening, the day after Mr. Mikell's procedure?

A. Yes, sir.

Q. And you'll notice when we look at the entry,

where it says -- it's right here, "memo, patient came into room" -- "or came into room, patient hypoxic with junctional rhythm and no palpable pulse. ACLS protocol. And Mayday team called" -- whose initials is that entry under?

A. Mine.

Q. All right. And what's the time?

A. At 7:56. I had corrected it the day before -- the afternoon before to make sure times were accurate.

Q. Right. So you went into the electronic record and changed Dr. Nelson's entry?

A. Yes, sir. I changed the time of it, uh-huh.

Q. And you changed it from being his entry at 8:00 to being your entry at 7:56?

A. Correct.

Q. Now, how many years have you worked as a nurse anesthetist at MUSC?

A. At MUSC, I have been there since July of 2007.

Q. Okay. And this entry that you changed here on this chart here, that we see there on Plaintiff's Exhibit 3, that's the only time that you can ever remember going back into an anesthesia record and changing a doctor's entry?

A. I'm not certain about that because sometimes with -- if you have several personnel involved in a

critical situation in the OR, you all might be doing and caring for the patient, and not contemporaneously charting necessarily all the time. So I can't say I have, you know, collaborated with docs and anesthesiologists and other CRNAs after the fact to make sure that our record is reflected accurately as far as meds given. Sometimes somebody is just scribbling it down as best they can, and just making sure that everything is accurate. Because you're not necessarily charting contemporaneously when there's something very critical going on.

Q. Well, I had asked you about that in a deposition that you gave me back in February of this year. Do you need me to remind you of what your answer was then?

A. Yes, sir, you can.

Q. All right. Bear with me and I'll see if I can get it. All right. So we're looking at pages 154 and 155 of your testimony from February of this year. And you'll see up there, beginning at line 24 on page 154, I asked you the question, "Well, what was the rule there at the Medical University in October of 2010 about a nurse changing a doctor's entries in the medical record?" And you said, "I'm not sure". And I asked you, "Have you ever done that before?" And you

said, "Not that I recall. Not that I recall." And then I asked you, "Have you ever done it since?" And you said, "Not that I can recall". All right.

A. All right, sir.

Q. And then the next question that I asked you was, "In terms of a patient that's in respiratory arrest, is four minutes an important period of time?" And you said, "Sure, yes."

Then I asked you, "What about a patient that's in cardiac arrest?" And you said, "Yes." Then I asked you, "What about a doctor's time to respond to a Mayday call, is a four minute period an important time period?" And, again, your answer was, "Yes".

A. Yes, sir.

Q. So, you had gone back into the anesthesia record the day after Mr. Mikell's event, and changed Dr. Nelson's entries so that it looked as though he had come into the room four minutes earlier than what he himself had charted?

A. No, sir. I believe I made all of my edits on the narrative that afternoon, that evening before I left. Because -- because it was a Friday, and I wanted the record to reflect accurately. That's when I edited and finished editing --

Q. Okay.

A. -- on my narrative to reflect everything accurately.

Q. Well, you don't disagree, though, that on October 2nd, the day after Mr. Mikell's cardiac arrest, you went back into his electronic record and rearranged some of the entries?

A. I don't recall editing on the 2nd. I recall printing and looking at it, and making sure that everything was accurate from any anesthesia standpoint, that I had entered everything accurately.

Q. You wanted to make sure that everything was the way you wanted it to be. And one of the ways that you made sure that the changes you had made to the record were completed in the computer system was you printed out the anesthesia record?

A. Say that again.

Q. You wanted to make sure that the changes you had made to the anesthesia record were finalized in the computer system, and one of the ways that you confirmed that they had been finalized, was you printed out the anesthesia record?

A. Yes, sir. Yes, sir.

Q. And then with the anesthesia record that you printed out, you shredded it?

A. Yes, sir. Yes.

Q. Okay. And I had asked you at a deposition that I took from you back in March -- I'm sorry -- August of 2014, if you had any explanation for why these various anesthesia records were printed on these different dates. And do you remember what you told me?

A. No, sir, I don't recall.

Q. All right. Well, let's go ahead and take a look then. Now, this is from page 99 of your August 2014 deposition.

(A portion of a video deposition was played in open court.)

BY MR. RANSOM:

Q. So, that was your answer when I took your deposition at a time before I had the audit trail; do you remember that?

A. Do I remember that answer -- not specifically.

Q. Well, do you remember that at your first deposition, I hadn't been provided any of the audit trails for the anesthesia record, so I couldn't really ask you anything about what those records show?

A. All right, sir.

Q. Do you remember that?

A. Vaguely.

Q. But I was ultimately provided a couple of audit trails, and I've got one of them that's marked

here as Plaintiff's Exhibit 11; let's take a look at that. So you see up at the top, it says "audit trail by patient", and it gives the dates from October 1st to October 2nd. All right. And, importantly, the audit trail doesn't tell us anything that's been done with this record after October 2nd. All right. Now, I want to point your attention down here to the bottom of the first page.

A. Yes, sir.

Q. And you'll see the document control number is 4988; do you see that?

A. I do.

Q. And it indicates under your name in the left hand column, that somebody has hit the print command in order to print the anesthesia record, and that's being done on October 1st, 2010, at 1815?

A. That afternoon, yes, uh-huh.

Q. So that's about 6:25 in the evening?

A. Correct.

Q. That is not the date of the printout on Plaintiff's Exhibit 1, and it's not the date of the printout on Plaintiff's Exhibit 2, and it's not the date of the printout on Plaintiff's Exhibit 3. So, what did you do with the anesthesia record that you printed there at 6:25 in the evening on October 1st?

A. To the best of my recollection, after I was done editing, after I was done with cases in the DDC that day, I went back and made sure that the time narrative was appropriate and accurate as far as timing and everything of the events that occurred in my narrative.

And so after I printed it out, I believe to the best of my recollection, I put it in the DDC chart, which had gone up to I believe the MSICU.

Q. All right. So the record that this audit trail shows that you printed at 6:25 in the evening on October 1st, it's your testimony that you put it in Mr. Mikell's chart?

A. Yes, sir.

Q. Have you ever seen that record again?

A. The thing is, if different people edit and they print it out, they can replace their edited and narrated record as well. So I'm not certain if that one is the one that -- do you follow what I'm saying -- actually ended up in a chart. I'm not sure if anyone else went in and did any -- any type of editing non contemporaneously on this case. So I -- I can't be sure it was the one that I believe that I put in the chart after I was done editing my narrative that evening.

Q. Is that the one that you took out the next day, on October 2nd, and shredded after you made other changes in the record?

A. No, sir. I just believe that I looked at the record the next day.

Q. Well, okay, so --

A. I was just looking at it visually.

Q. Do you have any explanation for us why this version of the record, that was clearly printed out that date and that time, it just sort of magically disappeared?

A. Say that again now.

Q. Where is it?

A. Where is what?

Q. The anesthesia record that you printed out on October 1, 2010, at 6:25 p.m.?

A. I'm not sure. I'm fairly certain that I put that copy in the chart, because I felt like that correctly reflected everything that anesthesia did.

Q. Can we at least agree that you were the only one that did anything with it?

A. Did anything with what? I'm sorry.

Q. You didn't give to it a nurse; you didn't give it to a doctor. Whatever happened to it, is what you did with it?

A. No, sir. There's a lot of hands on a chart. Even if I put it there, I don't know if it got, you know, if it was manipulated or pages missing. I'm not certain of that. I can't speak to that.

Q. All right. Now, in terms of the missing day -- the empty boxes here on page 36 of 99, that's explained by the PICIS anesthesia software not properly recording the data; correct?

A. Yes, sir.

Q. And I had asked you about that at your deposition back in August of 2014; do you remember what you told me at that time?

A. I do not.

Q. All right. Let's take a look at that.

(A portion of a video deposition was played in open court.)

BY MR. RANSOM:

Q. So when I asked you if you had any comment about whether or not Mr. Mikell's oxygen saturation levels were being accurately recorded --

A. Recorded or on the monitor?

Q. Well, I said -- I asked "recorded". Do you want me to play it back?

A. Oh, okay. No, sir.

Q. Okay.

A. That's fine.

Q. And this is the problem that we have up here, isn't it?

A. It is.

Q. All right. So when I asked you if you had any comment about whether there was a problem with the values being accurately recorded, you said you couldn't recall?

A. Correct. I'm not sure if I had seen the exhibit or not, or if the variables had populated.

Q. Well, and the reason you didn't say anything about it when I took your deposition in August of 2014, was because you didn't really want me to know that there had been a malfunction with the software, and that you had been on the phone and sending text messages?

A. No, sir. No, sir.

Q. Did you say anything about the phone calls and text messages when I took your deposition in August of 2014?

A. I don't recall.

Q. And when I asked you, as we just saw, was there any problem with the machine accurately recording the values -- don't you think maybe that would have been the time to say, yes, there was a computer system

malfunction, and I was sending text messages and making phone calls to correct it?

A. I don't -- I don't recall that I necessarily was -- was being evasive. I knew that I saw an appropriate oxygen saturation number on the monitor when I hooked him up, put monitors on, oxygen initiated Propofol, I would not have done any of those things or proceeded with the case if there was a problem.

Q. I wasn't asking you about that. I was asking you to help me to understand why these boxes are empty. And the question I asked was, "Was there any problem with the machine accurately recording those values?" And you didn't tell me that there had been a software malfunction. You didn't tell me that you had been on the phone with a technician. You told me you couldn't recall any problem.

A. Yes, sir. I think it was my belief that if I saw -- if I saw values on the screen, that there would be no problems repopulating those. And I, you know, I was not familiar with -- with the one minute variables and exactly what numbers were -- were missing on the chart. I was -- I wasn't that familiar with it.

Q. And when I asked you -- I had a chance to take your deposition a second time in February of this year, and you remember I asked you the same questions I'm

asking you right now, Ms. Embrey, why did you not play straight with me when I asked you about this at your first deposition -- do you remember what you told me?

A. No, sir, I don't.

Q. You said that you didn't want to volunteer any information if you didn't have to?

A. No, sir. At my first deposition, Mr. Ransom, it was -- what I wanted to do was answer your questions accurately and honestly, like I always have.

Q. All right. See, I asked you at your second deposition, this is at pages 215 and 216, "When I took your deposition last Fall, you didn't never tell me anything about making phone calls to Annette Thompson, did you?" And your answer was, "Do you mean paging her for?" And I said, "Paging her, talking to her on the phone, trying to communicate with her about this problem that we've been discussing today?" And you said, "I think I probably at our first deposition, was just answering your questions as honestly and accurately as I could."

A. Yes, sir.

Q. And I said, "I mean, did you know back then, meaning in August of 2014, that you had conversations and emails and phone calls with Annette Thompson, or were you forgetting it then?" And you answered, "No,

sir. I knew. I knew back then that I had." And I said, "Would you agree with me that you never mentioned anything about it?" And your answer was, "Again, I don't recall. If you did not ask me, then I don't recall volunteering the information to you."

And then we continued this discussion. "All right. 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?" You said, "I remember you giving me the graph."

"And you remember me giving you the anesthesia record and asking you if you could explain why it was so unusual?" And you said, "I guess I assumed that you knew that PICIS been paged, because there was a problem with the record." And a little bit later you said, "I don't think I was volunteering a lot."

Now, you would agree with me that nobody informed either myself or my client until last Fall about this communcation problem, this software glitch, that resulted in all of these boxes being empty? You didn't tell me in your deposition in August of 2014, and your lawyers didn't tell me until the Fall of 2015; right?

A. All right, sir. Yes, sir.

Q. So, why were you withholding that information?

A. Oh, I wasn't withholding information. I didn't necessarily recall how many times I paged Annette. A lot of this was -- was many years later. You know, after looking at documents and refreshing my memory, I recalled them better. But I could not recall every detail.

Q. All right. Let's talk a little more about the entries that you changed in the anesthesia record.

A. Yes, sir.

Q. Now, this board that I'm going to put up here -- and I'll see if I can get this on the overhead as well.

This is from Plaintiff's Exhibit 2 and it's page 611. So, again, we see that Dr. Nelson has entered under his initials at the time of 8:00, this information that begins "memo, came into room, patient hypoxic". All right. And we can agree that you went back and changed that entry?

A. Yes. Yes, I did.

Q. And I had asked you about that change in entry in your deposition -- do you remember what you told me?

A. No, sir.

Q. All right. Well, let's take a look at that. And I believe this is from pages 24, 69 and 70 of your testimony in August of 2014.

(A portion of a video deposition was played in open court.)

BY MR. RANSOM:

Q. So you were pretty insistent, you told me three different times when you were sworn under oath to tell the truth?

A. Yes, sir.

Q. That this 7:56 entry, that we see here, was Dr. Nelson charting under your name right here. And I'm referring right now on this board to MUSC page 494?

A. Okay. Initially when Eric charted at 8:00, he was charting after the fact obviously. He was kind of going over the -- the recent and previous few minutes events. He charted. But when I went back in and edited the time that the Mayday was called, and he entered the room, we turned the patient supine, et cetera, then it was under my name. My initials were the last ones on the record as -- as charting that.

Q. Ms. Embrey, again, looking back here on the overhead at page 611, that entry, "memo, came into room, patient hypoxic" -- that's not Dr. Nelson charting under your name, is it? That's Dr. Nelson charting under his own name and --

A. Yes, sir.

Q. And you went back and changed it?

A. Yes, sir.

Q. And when I was asking you about it at your deposition in August of 2014 --

A. Yes.

Q. -- you just lied to me, didn't you?

A. In what way? I'm sorry, Mr. Ransom.

Q. You kept telling me over and over again that that was Eric charting under your name. The truth of the matter was, that was you changing his entry. Why did you keep telling me that he was charting under your name when what really happened was you went back and changed his entry? You didn't tell me that. You said, "he's charting under my name". That's not what happened?

A. No, sir. He was charting under his own name when he made the 8:00 non contemporaneously. When I edited it, I changed the time, but I did not say "memo, Nelson came into room" -- do you follow what I'm saying? When I edited it, I was the last one to edit that afternoon. It comes up under my initials. And that is -- that is actually what is meant by that narrative.

Q. Because you kept telling me that this was the accurate sequence of events right here on this page, 494, that this was the accurate sequence. All right.

We weren't talking about page 611. And you kept telling me that's Eric charting under my name, meaning the system is open under my initials. Let's explain that to the jury. So when you open up this PICIS anesthesia software, it requires a user name and a password; correct?

A. Yes.

Q. And then once the system is open under Donna Embrey's user name and password, any entries that are made come in under your initials?

A. Yes.

Q. And end up under your name on the audit trail unless somebody else comes in and logs in under their own user name and password. And what happened was, that at 8:00, Dr. Nelson came in and logged into the system. And his entry was that at 8:00, he had come into the room, the patient was hypoxic with a junctional rhythm, which means by the way -- Mr. Mikell is in big trouble, right? And so what Eric says is, it's at 8:00 that he comes back into the room.

And you realize, of course, that if your patient is hypoxic and in a junctional rhythm, and you haven't gotten Dr. Nelson back in the room, and you fiddled around and fooled around with text messages and phone calls, and four minutes have gone by, while Mr. Mikell

is over there holding his breath, you got a big problem?

A. No, sir.

Q. And so you go back, and you get in the system, and you change Dr. Nelson's entries to shave four minutes off the time that he came back into the room; that's what you did?

A. No, sir. I changed it to accurately reflect when he entered the room, and helped us turn the patient, and initiated the Mayday, and did all those things. Yep. He's -- he's charting that all of these things went on just previously to when he was charting.

Q. And you didn't tell Dr. Nelson that you were going to change his entry? And you didn't get his permission, and he didn't know anything about that? He found out about it -- Dr. Nelson found out that you had changed his entry in his chart when I asked him about it at his deposition in this case; right?

A. All right, sir. If you're telling me that.

Q. Well, because you never went to Eric and said, can we take a look at this record and make sure that it's accurate; did you?

A. I did not. I do not recall going to him. No, I do not.

Q. And you never went to him and said, I think

that the times that you entered in the chart are inaccurate, is it okay with you if I change them? You never did that?

A. I never -- I do not recall doing that, no.

Q. And you never went to him and said, by the way, Eric, I know that the anesthesia department is going to be conducting an investigation into what happened to Mr. Mikell, and so you may wish to know that I have changed your entries in the record?

A. I do not recall doing that.

Q. But you did know that there was going to be an investigation, didn't you?

A. At what point?

Q. At some point because any time a patient at the Medical University --

A. Of course.

Q. -- suffers an unexpected cardiac arrest, the hospital requires that there be an investigation, and you knew that?

A. Yes, sir.

Q. And that's why it was so important to you to go back after the fact, and rearrange these entries in this chart to make it look as though everything had been done with textbook perfect accuracy?

A. No, sir. I wanted the record to accurately

reflect the times and what was going on, including the Mayday initiation, defibrillation, intubation, and everything else that the five or six of us who were in the room --

Q. Well, that's right. You wanted it -- to make it look as though nobody had done anything wrong?

A. No, sir. I wanted it to accurately reflect the time of everything that went on, that we did for Mr. Mikell.

Q. Now, one of things that you told me when I took your deposition the second time in February of this year, was that out of this desire to try to make the record as accurate as possible, you had gone to Mr. Mikell's room in the Intensive Care Unit and had gotten his chart?

A. Yes.

Q. Right?

A. Yes.

Q. And you took his chart, and you went to a computer terminal where you could access this narrative record?

A. In the MSICU, yes, sir.

Q. And you told me that, again, because you wanted the entries in the chart to be accurate, that you took a document that was in his medical chart, and

used it for you to rely upon so that you wouldn't have to rely on your memory for this process of making the chart more accurate; right?

A. Yes, sir, uh-huh.

Q. And I asked you what was the document that you were relying on?

A. Yes, sir.

Q. Do you remember what you told me?

A. Not exactly, but it was -- it was the code record.

Q. It was the Mayday record?

A. Yes, sir.

Q. Okay. Now, do you remember me asking you at your deposition in August of 2014 about this Mayday record that you had in his chart to rely upon to complete the narrative?

A. Do I remember you asking me? Not specifically. Not specifically.

Q. Let's take a look at that.

(A portion of a video deposition was played in open court.)

BY MR. RANSOM:

Q. So this record that was in Mr. Mikell's chart, and that nobody can find now that we're in this lawsuit, that you say that you used in order to

accurately complete this narrative?

A. Yes, sir.

Q. I asked you about it three times in August of 2014; you didn't remember anything about it?

A. I did. The only thing that I could probably add to that, to shed light on my testimony, I do not -- I did not refresh myself with that case as far as the documentation, the different edits, the different edits on the narrative. The record itself. The timing, et cetera, prior to that deposition. So -- but in looking at it, and looking at the time that the Mayday was called and then the defibrillation specifically, the intubation specifically, it helped supplement and helped me edit my narrative.

There would be no other way that I would know specifically what times, you know, the -- when CPR was initiated, et cetera, all of that good stuff. None of that was actually contem -- very little -- very, very, very few of those events were contemporaneously charted in the narrative. So that's where I -- I would have gotten it. So at the time, I must not have -- I must not have recalled it.

Q. And you -- you'll remember back in August of 2014, when you came to your deposition, you had Ms. Fleming and Mr. Cooke there on behalf of the Medical

University, they were providing counsel for you; right?

A. Yes, sir.

Q. And you had your own lawyer there, Mr. Early?

A. Yes, sir.

Q. All right. And we had given you plenty of notice that the deposition was coming up?

A. Yes.

Q. So are you telling the jury that the reason that you gave these answers that we are seeing on these video clips, is because you were somehow or another caught off guard, and didn't understand the facts of what had happened?

A. No, sir. I wouldn't say that -- I just did not readily recall --

Q. Well --

A. -- how -- how I came up with editing my narrative.

Q. And then one of the things that a witness is allowed to do when they give a deposition, is what we call read and sign; where the court reporter, much like our court reporter here is taking down everything that's said, they prepare a preliminary transcript. And then this is made available to the witness to review, to make sure that it's truthful, accurate, and complete. You can make any changes that are necessary

if you misremembered, misspoke, or got something wrong?

A. Yes. Yes.

Q. All right. You actually exercised your right to read and sign the transcript of your testimony in August of 2014?

A. Yes, sir.

Q. You didn't make any changes, did you?

A. I do not recall making any changes, no.

Q. In fact, you actually signed a document that I've got marked here as Plaintiff's Exhibit 51, making no changes. And you signed it on October 5th -- well, it looks like October 7th of 2015. It's actually notarized October 19, 2015; is that your signature right there?

A. Yes, sir, it is.

Q. Okay.

MR. RANSOM: Your Honor, we'd offer Plaintiff's Exhibit 51 into evidence.

THE COURT: Any objection?

MR. COOKE: No objection.

(WHEREUPON, Plaintiff's Exhibit 51 was admitted into evidence.)

BY MR. RANSOM:

Q. Now, August of 2015 would be 14 months after your testimony in this case, in August of 2014, 14

months later?

A. Yes, sir.

Q. You, once again, swore in front of a notary that there wasn't any change that needed to be made to your testimony in order for it to be truthful, accurate, and complete?

A. Yes, sir.

Q. Thank you. So that would be a second time that you swore falsely?

A. May I explain, please?

Q. Sure.

A. May I explain -- I may not have read my sworn testimony from the deposition in its entirety, and I'm not certain that I was familiar with my edits and the timing of my edits as accurately as I am now.

So I would not have -- I would not have given false testimony. Everything I tell you, Mr. Ransom, is accurate and honest to the best of my recollection. So at the time, it just didn't -- it did not raise a red flag. It did not raise a red flag that I had, you know, I had said anything that I knew not to be honest, so.

Q. Now, Ms. Embrey, please, you're digging yourself in a hole here. Do you not remember last summer -- and I can't recall if it was July or

August -- you sat there and exercised your memory once again, and remembered, oh, I saw the Mayday record. It was in Mr. Mikell's chart and I used it to complete this narrative. And that was three or four months before you signed Exhibit 51?

A. Case in point, I do not believe I read the 2014 deposition as accurately as I should have, so that is -- that is my fault.

Q. And you didn't testify as accurately as you should have in 2014 either; did you?

A. I testified as accurately and honestly as I recalled.

Q. Now, in terms of this software malfunction, the policies and procedures for anesthesia services of the Medical University have been marked as Plaintiff's Exhibit 8. As the certified nurse anesthetist, you are a part of the anesthesia department there at the Medical University?

A. Yes, sir.

Q. Okay. And the anesthesia department's policies and guidelines would apply to your activities?

A. Yes, sir.

Q. Have you ever seen the document that's entitled, Policies and Basic Standards of Anesthesia Care?