THE 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.....Respondent

v.

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

APPELLANT THE MEDICAL UNIVERSITY OF SOUTH CAROLINA'S FINAL APPELLANT'S REPLY BRIEF

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I. The Proper Standard of Review of the Decision to Impose Sanctions Is *De Novo*

In his Respondent's Brief, Plaintiff first disagrees with MUSC and urges that the standard of review of all issues in this appeal should be abuse of discretion. However, for the reasons that follow, Plaintiff's argument misses the mark; the proper standard is *de novo*, since an action seeking to recover attorneys' fees is plainly one in equity.

MUSC does not dispute that the trial court has broad discretion in making the decision — in the context of established facts — as to whether conduct warrants sanctions. In other words, the trial judge has broad discretion to make the value judgment of whether undisputed conduct is sufficiently blameworthy to justify the imposition of sanctions. However, where the trial judge imposes sanctions in the form of attorneys' fees, this Court may review the *factual underpinnings of that* exercise of discretion under a *de novo* standard. Plaintiff has not cited any legal authority to the contrary.

In support of his argument that an abuse of discretion standard should control, Plaintiff cites *Creighton v. Coligny Plaza Ltd. Partnership*, 334 S.C. 96, 512 S.E.2d 510 (Ct. App. 1998). However, *Creighton* is factually distinguishable. In that case, the aggrieved party was not appealing the trial court's factual determinations supporting the imposition of Rule 37 sanctions. To the contrary, in *Creighton*, the appeal argued that "the trial court erred in failing to rule on their motions for discovery abuse and dismissing the motions as moot at the conclusion of the liability trial." *See id.*, 334 S.C. at 121, 512 S.E.2d at 523. In other words, the appeal in that case concerned the trial judge's discretionary decision as to whether to even consider the merits of a discovery motion. In this case, on the other hand, MUSC argues, *inter alia*, that the trial judge's factual underpinnings of his imposition of sanctions was not founded in the evidence.

Moreover, the additional cases that Plaintiff cites in favor of his contention that an abuse of discretion standard of review applies involve dissimilar circumstances where either: (a) there

is not an appeal from a grant of attorneys' fees; or (b) the underlying factual issues were settled and not in dispute on appeal:

- *Davis v. Parkview Apartments*, 409 S.C. 266, 281, 762 S.E.2d 535, 543 (2014) ("[T]he merits of the underlying discovery orders are not before this Court on appeal. Thus, despite Appellants' vehement objections to the Privilege Order and Discovery Order, the only reviewable question before this Court is whether the sanctions were properly awarded.") (review of attorneys' fees under undisputed facts).

- *Dunn v. Dunn*, 298 S.C. 499, 503, 381 S.E.2d 734, 736 (1989) ("There is *no evidence* in the record to reasonably support Judge Arrants' conclusion that Wife's refusal to continue was unjustified. Therefore, we hold the Family Court's award of sanctions was an abuse of discretion.") (emphasis added).

- *Wallace v. Timmons*, 237 S.C. 411, 415, 117 S.E.2d 567, 569 (1960) (pre-Rule 37 case) (appeal not from order on request for attorneys' fees as sanction, but rather from "order 'requiring the defendant to produce for inspection by plaintiff's attorneys and plaintiff's accountant such books, records and other papers of the William R. Timmons Agency'").

- *Wilson v. Willis*, 416 S.C. 395, 424, 786 S.E.2d 571, 586 (Ct. App. 2016), *reh'g denied* (June 24, 2016) ("As an additional sustaining ground, the Insureds and Agents first argue the circuit court could have denied the Insurers' motions [to compel arbitration] on the ground that the agreements containing the arbitration clauses were intentionally withheld during discovery to prevent the Insureds and Agents from challenging them. We disagree.").

- *McNair v. Fairfield Cty.*, 379 S.C. 462, 466, 665 S.E.2d 830, 832 (Ct. App. 2008) (under undisputed facts the Court of Appeals considered order striking answer).

- *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 198, 511 S.E.2d 716, 718 (Ct. App. 1999) (reviewing order striking sanctions).

- *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 489 S.E.2d 679 (Ct. App. 1997) (reviewing order striking pleading).

Plaintiff has not cited a single case applying the abuse of discretion standard in a case such as that at bar: a case involving hotly contested facts with an order granting attorneys' fees as a Rule 37 sanction.

As a result, despite his protestations to the contrary, Plaintiff has not refuted the well-settled law that "[a]n action for attorneys' fees is one in equity." *See In re Beard*, 359 S.C. 351, 357, 597 S.E.2d 835, 838 (Ct. App. 2004). As MUSC has previously observed, this Court has

previously applied the *de novo* standard to the question of findings of fact underlying an attorneys' fee award as sanction in the similar context of Rule 11 and the South Carolina Frivolous Civil Proceedings Sanctions Act:

> The determination of whether attorney's fees should be awarded under Rule 11 or under the Act is treated as one in equity. *In re Beard,* 359 S.C. 351, 357, 597 S.E.2d 835, 838 (Ct. App. 2004) (applying an equitable standard of review of factual findings in action for sanctions under Rule 11 and the Act). In an action in equity tried by the judge alone, the appellate court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. *Id.* "However, the abuse of discretion standard plays a role in the appellate review of a sanctions award." *Ex parte Gregory,* 378 S.C. 430, 437, 663 S.E.2d 46, 50 (2008). Where the appellate court agrees with the trial court's findings of fact, it reviews the decision to award sanctions under an abuse of discretion standard. *Id.* Under the abuse of discretion standard, the imposition of sanctions will not be disturbed on appeal unless the decision is controlled by an error of law or is based on unsupported factual conclusions. *Id.*

See Southeastern Site Prep, LLC v. Atlantic Coast Bldrs. and Contractors, LLC, 394 S.C. 97, 104, 713 S.E.2d 650, 653-54 (Ct. App. 2011).

For the foregoing reasons, MUSC respectfully asserts that, at least with regard to the factual determinations underlying the decision to impose sanctions, this Court should apply a *de novo* standard of review.

II. Plaintiff's Factual Statements Are Inaccurate

Plaintiff devotes most of his Respondent's Brief to setting forth his version of the facts of this case. For the most part, this consists of emotionally-charged accusations based on innuendo, with no real substance. Without evidentiary support, Plaintiff ascribes to MUSC the absolute worst motivation for every action, while ignoring the reasonable and logical explanations that MUSC has provided in its own detailed statement of the facts.

In the interest of brevity, MUSC will not address Plaintiff's many factual misstatements or unwarranted implications. MUSC simply directs the Court to its previous recitation of the facts. Contrary to Plaintiff's accusations, which find their support in the *ipse dixit* of his attorney,

MUSC's statement of the facts of this case is a reasonable construction of the evidence in light of circumstances of this case.

For the foregoing reasons, because the evidence does not support Plaintiff's version of the facts, this Court should reverse the trial judge's imposition of attorneys' fees on MUSC.

III. Plaintiff Erroneously Relies on Rule 37(a)

Plaintiff devotes much of the legal analysis of his Brief to the argument that the trial court properly imposed sanctions on MUSC pursuant to South Carolina Rule of Civil Procedure 37(*a*), rather than 37(b).

> Relying upon cases applying Rule 37(b), SCRCP, MUSC contends that no discovery sanction can ever be imposed by a trial court unless the offending party first violates a prior court order. That untenable position simply ignores the language of Rule 37(a), SCRCP, which allows the circuit court, when hearing a motion involving "evasive or incomplete" discovery responses, to impose "reasonable expenses ... including attorneys fees."

(*See* Pl.'s Br., at 43-44). In making this argument, Plaintiff urges that the trial judge properly sanctioned MUSC by imposing sanctions upon it under Rule 37(a)(4), which states that:

> If the motion [to compel] is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

See id. (emphasis added).

This distinction is vitally important because, if Plaintiff's Motion for Sanctions was, as MUSC contends, a motion for sanctions under Rule 37(b), such a motion would have been improper because there was no *prior* discovery order that MUSC violated or disregarded:

> If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party *fails to obey an order to provide or permit discovery*, including an order made under subdivision (a) of this rule or Rule 35, or if a party *fails to obey an order* entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following: [listing potential sanctions] . . .

> In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

See S.C.R.C.P. 37(b)(2). On the other hand, Rule 37(a) does not require a violation of a prior order.[1]

For the reasons that follow, Plaintiff's reliance upon Rule 37(a) is misplaced. The record reflects that Rule 37(a) could not be a proper basis for the imposition of the requested sanctions.

A. Plaintiff Filed a Motion for Sanctions, Not a Rule 37(a) Motion to Compel

Initially, the Rule 37(a) does not govern because the Motion for Sanctions was, as its name suggests, a motion for sanctions under Rule 37(b), not a Rule 37(a) motion to compel. Therefore, Plaintiff's reliance on Rule 37(a) is misplaced.

By its terms, Rule 37(a) applies to motions to compel discovery responses where a party fails to respond to a proper request:

> If a deponent fails to answer a question propounded or submitted under Rule 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request.

See S.C.R.C.P., Rule 37(a)(2). With regard to depositions and interrogatories, "an evasive or incomplete answer is to be treated as a failure to answer." *See* S.C.R.C.P., Rule 37(a)(3). Plaintiff's Motion for Discovery Sanctions was not a Rule 37(a) motion to compel and the Order for Sanctions was not an order compelling discovery.

Plaintiff's Respondent's Brief is the very first time he has formally relied upon the motion to compel rule, Rule 37(a), as a basis for his Motion for Discovery Sanctions. At no time below

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[1] MUSC notes that Plaintiff does not dispute that, if the Motion for Discovery Sanctions is governed under Rule 37(b), the trial court erred in granting such motion.

did any party or the trial judge specifically cite to Rule 37(a)(4) as a claimed basis for Plaintiff's Motion for Discovery Sanctions.

On September 9, 2015, Plaintiff filed his Motion for Discovery Sanctions in the trial court. (*See generally* R. pp. 141-49). In its opening paragraph, the Motion for Discovery Sanctions requests "an Order imposing discovery sanctions on the Medical University." (*See id.*, R. p. 142). This Motion for Discovery Sanctions does not cite to Rule 37(a) specifically, and casts itself only as a Motion for *Discovery Sanctions.* Moreover, the relief that Plaintiff requested further supports that he was not seeking to compel discovery, but to sanction MUSC for general perceived discovery abuses. In particular, Plaintiff's Motion for Discovery Sanctions sought the following relief from the trial court:

1. That within ten (10) days the Medical University shall certify in writing and under oath that (a) all backup data systems have been searched; and (b) all records, data and information about Mr. Mikell have been recovered and produced to the Plaintiff in properly formatted, useable form;

2. That the process leading to this certification be described in detail so that its veracity can be verified by the Plaintiff's information technology consultants;

3. That an *in camera* review be conducted of the Medical University's Privilege Log to result in the production of any records, data or information found therein which have been lost, altered, destroyed, secreted or withheld to the extent the same are not otherwise available to the Plaintiff from another source;

4. That the Plaintiff be permitted to re-depose the Medical University's employees and experts concerning any records, data or information produced pursuant to Paragraphs (1) or (3) above with all associated costs and attorneys fees to be paid for by the Medical University;

5. That the Medical University fully compensate the Plaintiff for all attorneys fees and costs associated with discovery responses found to be false, misleading or made in bad faith;

6. That an adverse inference instruction be given to the jury relative to all records, data or information which have been altered, lost, destroyed or withheld by the Medical University; *see, Stokes v. Spartanburg Regional Medical Center*, 386 S.C. 515, 629 S.E.2d 675 (Ct. App. 2006);

7. For-all-further legal and equitable relief which the Court deems just and proper.

(*See generally* R. p. 148).

Importantly, the cases cited in Plaintiff's Motion for Discovery Sanctions all involved sanctions under Rule 37(b), not 37(a). *See McNair v. Fairfield Cty.*, 379 S.C. 462, 466, 665 S.E.2d 830, 832 (Ct. App. 2008) (reviewing sanctions imposed under Rule 37(b)(2)(C)); *QZO, Inc. v. Moyer*, 358 S.C. 246, 256, 594 S.E.2d 541, 547 (Ct. App. 2004) ("When a party *fails to obey an order* relating to discovery, the trial court may strike that party's pleadings and enter a default judgment.") (emphasis added); *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 198, 511 S.E.2d 716, 718 (Ct. App. 1999) ("*If a party fails to obey an order* to provide or permit discovery, the trial court may impose sanctions such as striking pleadings, dismissing the action, or rendering a default judgment.") (emphasis added).

Likewise, Plaintiff's October 14, 2015 Supplemental Memorandum in Support of Plaintiff's Motion for Discovery Sanctions did not cite or specifically discuss Rule 37(a) or any case citing that rule. (*See* R. pp. 212-39 (*citing In re Anonymous Member of S.C. Bar*, 346 S.C. 177, 194, 552 S.E.2d 10, 18 (2001) (mentioning potential for additional remedy of discovery sanctions against attorney in opinion addressing violations of Rules of Professional Conduct); *Samples v. Mitchell*, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997) (reviewing sanction of refusing to allow defendant's investigator to comment on videotape)). That Supplemental Memorandum made clear that Plaintiff was seeking *sanctions*, which fall within subsection (b) of Rule 37.

Similarly, MUSC's October 15, 2015 Memorandum in Opposition to Plaintiff's Motion for Discovery Sanctions argued, first and foremost (as it does in this appeal), that Plaintiff could not seek relief under Rule 37(b) because there was no prior order that MUSC had violated. (*See* R. pp. 222-23). That memorandum did *not* mention or discuss Rule 37(a)(4), since Plaintiff had never specifically cited that Rule or suggested that the Motion for Discovery Sanctions was really a motion to compel.

On June 15, 2016, Plaintiff filed his Reply Memorandum on Issue of Attorneys Fees. Once again, that Reply does not reference Rule 37(a) and does not cite any case applying Rule 37(a). (*See generally* R. pp. 680-97).

Thus, none of the filings leading up to the imposition of sanctions relied upon Rule 37(a). Plaintiff never indicated his belief that Rule 37(a) governed rather than 37(b). Notably, Plaintiff's Motion for Discovery Sanctions never actually uses the word "compel." (*See generally* R. pp. 141-49). Plaintiffs' Supplemental Memorandum in Support of Motion for Discovery Sanctions only uses the word once, and then to describe Plaintiff's *prior* Motion to Compel (which has no bearing on the discovery issues in this appeal). (*See generally* R. pp. 141-49). At no time did Plaintiff suggest that he was seeking an order compelling discovery under Rule 37(a).

Consistent with the parties' filings, the trial judge's Order for Sanctions *never* cited to or relied upon Rule 37(a)(4). To the contrary, none of the cases cited in the trial judge's Order for Sanctions directly authorize the award of attorneys' fees under 37(a). To the contrary, the authority cited by the trial judge: (a) does not involve attorneys' fees; and/or (b) involves "sanctions" imposed under a rule besides Rule 37(a)(4):

- *Pioneer Elecs. (USA) Inc. v. Cook*, 294 S.C. 135, 137, 363 S.E.2d 112, 113 (Ct. App. 1987) ("[T]his court will not reverse our lower court's decision as to an imposition of sanctions under Rule 37(d) . . . .").

- *Teseniar v. Professional Plastering & Stucco, Inc.*, 407 S.C. 83, 94, 754 S.E.2d 267, 273 (Ct. App. 2014) (reviewing whether exclusion of witness was "an appropriate discovery sanction in response to Professional's failure to produce Dawkins' files, which included field notes.").

- *Creighton v. Coligny Plaza Ltd. P'ship*, 334 S.C. 96, 512 S.E.2d 510 (Ct. App. 1998) (analyzing whether trial court erred in not considering requests for costs asserted under Rules 26 and 30, which expressly incorporate Rule 37(a)(4)).

- *Downey v. Dixon*, 294 S.C. 42, 44, 362 S.E.2d 317, 318 (Ct. App. 1987) ("Ms. Downey moved for the sanctions against Mr. Dixon pursuant to S.C.R. Civ. P. 37. The sanctions which she sought to have imposed against him are provided under both subdivision (b) and subdivision (d) of the Rule.").

(*See* R. pp. 41-46). In other words, the Order for Sanctions is inconsistent with Plaintiff's claim now that the trial judge imposed sanctions under Rule 37(a).

For the foregoing reasons, since Rule 37(a) does not apply, this Court should reverse the trial court's imposition of sanctions, because Plaintiff's Motion for Discovery Sanctions does not comport with Rule 37(b).

B. Rule 37(a) Cannot Apply Because Plaintiff Has Not Shown That MUSC Provided "Evasive or Incomplete Answer[s]" in Discovery

Plaintiff argues that his Motion for Discovery Sanctions was really a Rule 37(a) motion to compel because he was complaining about "evasive or incomplete" discovery responses. Plaintiff's reliance on this argument is misplaced.

For purposes of a Rule 37(a) motion to compel, "an evasive or incomplete *answer* is to be treated as a failure to answer." *See* S.C.R.C.P., Rule 37(a)(3) (emphasis added). In the context of Rule 37, "answer" is used to refer to: (a) answers to questions in depositions and (b) answers to interrogatories:

- Rule 37(a)(2): This subsection permits a motion to compel "[i]f a deponent fails to *answer* a question . . . or a party fails to *answer* an interrogatory." In such an event, "the discovering party may move for an order compelling an answer." *See id.*
- Rule 37(b)(1): "If a deponent fails to be sworn or to *answer* a question after being directed to do so by the court the failure may be considered a contempt of that court."
- Rule 37(d): This subsection permits remedies where a party fails "to serve answers or objections to interrogatories submitted under Rule 33."

On the other hand, Rule 37 describes responses to requests for production as "responses." *See generally* S.C.R.C.P., Rule 37. On the other hand, Rule 37(b) does not include such language; instead, that rule only permits sanctions where a party "fails to obey an order to provide or permit discovery."

Contrary to Plaintiff's arguments, Rule 37(a) would not apply here, because the trial judge did not base its Order for Sanctions on particular "evasive or incomplete" deposition or interrogatory answers. Instead, the Motion for Discovery Sanctions and Order for Sanctions are

premised more on MUSC's claimed general discovery conduct. Notably, none of Plaintiff's filings relating to his Motion for Discovery Sanctions identified any specific interrogatory or deposition answer that was "evasive or incomplete." In its Order for Sanctions, the trial court did not specifically identify any deposition answer or interrogatory answer that was "evasive or incomplete."

To the contrary, this appeal boils down to MUSC's progressive identification and location of documents. There is simply no evidence whatsoever that the Court's Order on Sanctions is premised upon any representative of MUSC giving an evasive or incomplete answer to a specific deposition question or to specific interrogatory. As a result, Plaintiff's reliance on Rule 37(a) is misplaced.

Therefore, for the foregoing reasons, this Court should reverse the trial court's imposition of sanctions and vacate the Order for Sanctions.

C. Even If Rule 37(a) Could Apply, Plaintiff Was Not Entitled to Attorneys' Fees Under Rule 37(a) Because MUSC Had Substantial Justification for Its Actions

Even if Rule 37(a)(4) could apply in this matter, the undisputed evidence does not support the imposition of attorneys' fees thereunder. As set forth above, Rule 37(a)(4) permits the award of attorneys' fees for a motion to compel, "unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust." Under the similar federal counterpart[2] to South Carolina's Rule 37(a), substantial justification is defined as follows:

> Substantial justification for refusing discovery is determined according to "an objective standard of reasonableness and does not require that the party have acted in good faith." *Bowne of New York City, Inc. v. AmBase Corp.*, 161 F.R.D. 258, 262 (S.D.N.Y. 1995) (*citing Pierce v. Underwood*, 487 U.S. 552, 565, 108 S. Ct. 2541, 101 L.Ed.2d 490 (1988)).

[2] Federal Rule of Civil Procedure 37(a)(5)(A) provides that attorneys' fees may be awarded on a motion to compel, unless "(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action; (ii) the opposing party's nondisclosure, response, or objection was substantially justified; or (iii) other circumstances make an award of expenses unjust."

> "Conduct is substantially justified if there was a genuine dispute or if reasonable people could differ as to the appropriateness of the contested action." *Underdog Trucking, L.L.C. v. Verizon Servs. Corp.*, 273 F.R.D. 372, 377 (S.D.N.Y.2011) (internal quotation marks omitted). A responding party's refusal to produce documents on the basis that they are irrelevant can provide substantial justification unless such a position "involves an unreasonable, frivolous or completely unsupportable reading of the law." *Comprehensive Habilitation Servs., Inc. v. Commerce Funding Corp.*, 240 F.R.D. 78, 87 (S.D.N.Y.2006) (*quoting Bowne,* 161 F.R.D. at 265). Though Defendant's relevancy argument has proved unavailing, it was not without substance

See Klein v. Torrey Point Grp., LLC, 979 F. Supp. 2d 417, 442 (S.D.N.Y. 2013) (construing Federal Rule 37).

As set forth in detail in MUSC's Appellant's Brief in this appeal, it is indisputable that it acted in an objectively reasonable fashion at all times. It conducted reasonable efforts to locate responsive documents. It continued attempting to locate responsive information. When it learned that the information it had previously produced was no longer accurate, it took immediately produced correct information. MUSC did this even knowing that Plaintiff would attempt to use the supplementation of discovery as a sign of some malevolent intention. However, there is simply no evidence whatsoever that anyone from MUSC took any position or did anything that was unreasonable, frivolous or completely unsupportable under the law. To the contrary, MUSC went above and beyond the call of duty in an effort to provide Plaintiff with the requested information.

For example, with regard to the "Mayday Form," on November 4, 2014, Dr. George Guldan, Assistant Professor of Anesthesiology and Perioperative Medicine at MUSC and member of the team that resuscitated Mr. Mikell, testified that there would not be a Mayday Form because Mr. Mikell's arrest occurred in an operating room. (*See* R. pp. 500:21 to 502:23, 855:17-21). There is no evidence that Dr. Guldan testimony was knowingly false or that anyone at MUSC intended to mislead Plaintiff. Subsequently, on August 24, 2015, Sheila Scarborough, RN, MSN testified — after further investigation was conducted — that "there should be a mayday record for Mr. Mikell's event." (*See* 543:1-5). To date, MUSC has, unfortunately, not been able to locate the Mayday Form. Throughout this process, however, it is undisputed that

MUSC provided up-to-date information as soon as it learned it. It even disclosed that a Mayday Form should have existed, contrary to its initial belief and notwithstanding its inability to actually locate that form. In other words, it is beyond dispute that MUSC acted at all times in a reasonable and proper manner.

Similarly, with regard to the other claimed discovery deficiencies, the record is devoid of any evidence that MUSC did anything to hinder Plaintiff's discovery or to knowingly conceal information. To the contrary, MUSC engaged in ongoing efforts — at great expense to itself — to address all of the issues that Plaintiff raised during discovery. Technology and the nature of the requested information often made Plaintiff's numerous demands impracticable or impossible to satisfy. However, Plaintiff cannot reasonably dispute that MUSC undertook reasonable efforts to provide information. In any event, it is clear that MUSC's conduct was substantially justified, and it was unfair for the trial judge to impose sanctions on MUSC.

Therefore, for the foregoing reasons, this Court should reverse the trial judge's imposition of sanctions in this case.

D. Even if Plaintiff Was Entitled Filed to Attorneys' Fees Under Rule 37(a), a Motion for Sanctions, the Trial Judge Did Not Limit Him to Recovery of Only "Reasonable Expenses Incurred in Obtaining the Order" for Sanctions

Even if Plaintiff is correct that the trial court could grant him attorneys' fees under Rule 37(a), the trial court erred in that it failed to limit its Order for Sanctions to only the reasonable attorneys' fees and expenses incurred in obtaining that Order for Sanctions. South Carolina Rule of Civil Procedure 37(a)(4) provides that, if a court orders that a motion to compel should be granted, it can only "require the party or deponent whose conduct necessitated the motion . . . to pay to the moving party the reasonable expenses *incurred in obtaining the order*, including attorney's fees." *See id.* (emphasis added). Notably, Rule 37(b) does not contain such a limitation. *See* S.C.R.C.P., Rule 37(b) (allowing the award of "the reasonable expenses, including attorney's fees, caused by the failure" of the sanctioned party to obey a court order).

Even if the trial court did not err in imposing sanctions on MUSC, the attorneys' fees awarded in the Order for Sanctions *greatly* exceeded what Rule 37(a)(4) permits.

In connection with his Motion for Discovery Sanctions, Plaintiff sought a very substantial amount of attorneys' fees, the bulk of which was not incurred in obtaining the Order for Sanctions. Over the course of several months, Plaintiff submitted numerous affidavits from his attorneys quantifying the requested attorneys' fees and expenses. On January 6, 2016, Plaintiff filed the first Affidavit of Robert B. Ransom, Esq., including 129.8 hours of time for Attorney Ransom dating back as far as September 4, 2014. (*See* R. pp. 576-81). On January 7, 2016, Plaintiff filed a Supplemental Affidavit of Robert B. Ransom, which included documentation of expenses incurred to Online Security to analyze MUSC's computers. (*See* R. pp. 582-85 ¶¶ 5-6). On May 4, 2016, Plaintiff filed a Second Supplemental Affidavit of Robert B. Ransom, attaching timesheets for 75.3 hours of work between January 5, 2016 and May 2, 2016 "to address and respond to the various discovery issues which are the subject of the Plaintiffs Motion for Discovery Sanctions." (*See* R. pp. 625 ¶ 6 and 625-634). This Second Supplemental Affidavit included additional for work by Online Security, deposition transcripts of Donna Embrey, travel and Plaintiff's expert's review of Donna Embrey's deposition, totaling $6,654.13. (*See id.*). Plaintiff submitted a May 4, 2016 Affidavit of Alex Apostolou, his other attorney, setting forth 22.7 hours of work from July 9, 2015 through April 29, 2016. (*See* R. pp. 91-92). On September 8, 2016, Plaintiff filed the Third Supplemental Affidavit of Robert B. Ransom, including 34 hours of work from May 11, 2016 through September 1, 2016. (*See* R. pp. 698-700).

The Affidavits that Plaintiff submitted in support of his Motion for Discovery Sanctions are replete with expenses and fees that were not "incurred in obtaining" the Order for Sanctions. By way of illustration, Plaintiff includes billing for work performed more than a year before the Motion for Discovery Sanctions was even filed. He includes fees and expenses for the drafting of Requests to Admit to MUSC. He includes fees and expenses relating to a Motion to Compel, which had no bearing on the issues raised in the Motion for Discovery Sanctions. He includes fees and expenses relating to the retention of a computer consultant. He includes fees and

expenses for depositions of fact witnesses. He even includes fees and expenses relating to the mediation of this case. Plainly, Plaintiff's affidavits reflect a substantial quantity of fees and expenses for matters beyond "obtaining" the Order for Sanctions. The trial court made **no** determination as to which claimed attorneys' fees were incurred in obtaining the Order for Sanctions. The trial court did not conduct a line-by-line analysis of Plaintiff's affidavits to ensure that Plaintiff was only granted attorneys' fees and expenses "incurred in obtaining" the Order for Sanctions.

To the contrary, the attorneys' fees and expenses that the trial judge imposed in his Order for Sanctions seem more designed to punish MUSC and/or compensate Plaintiff for general perceived discovery abuses in the case. In this respect, the Order for Sanctions is more akin to a Rule 37(b) order (which, of course, it is). However, Rule 37(a), which Plaintiff argues for the first time on appeal does not provide for such broad "sanctions." Instead, Rule 37(a) provides simply for a party to be compensated for the expense of preparing and filing a motion to compel. The Order for Sanctions goes *far* beyond that limited purpose. If, as Plaintiff now suggests, Rule 37(a) governs, the trial judge far exceeded the remedies allowable under that Rule.

Plaintiff is plainly aware that the Order for Sanctions has imposed substantial attorneys' fees that are not "incurred in obtaining the order," as he intentionally *omits* those words from his quotations of Rule 37(a)(4). (*See* Pl.'s Br., at 44 & 48 (quoting Rule 37(a)(4), but deleting the "incurred in obtaining the order" language)). Plaintiff's Brief in this appeal does not address or discuss how all the fees that the trial judge awarded were incurred to obtain the Order for Sanctions. He has never explained how all the fees and expenses claimed are recoverable under the limited terms of Rule 37(a).

For the foregoing reasons, this Court should vacate the Order for Sanctions and either: (a) determine the amount of claimed fees and expenses that was reasonably incurred in obtaining the Order for Sanctions; or (b) remand this matter for the trial court with instructions for it to make such a determination.

CONCLUSION

This is an important case, as it is one where the discovery and trial on the merits was overwhelmed by electronic discovery. It has been observed that "E-discovery, or the process that compels litigants to share electronically stored information and documents, has become the most prominent form of information sharing in modern-day litigation. It is also the most expensive. Data is produced at rates never thought possible. Documents are backed up many times over and replicated many times more. The information is then stored indefinitely, accruing to vast volumes which make traditional paper discovery file-box storerooms pale in comparison. Producing this electronically stored information during discovery becomes incredibly expensive."[3]

This case perfectly proves the commentator's criticism of electronic discovery. The trial court failed to appreciate the enormity of the electronic discovery burden that Plaintiff placed upon Defendant MUSC. Plaintiff – and the trial court -- required Defendant to dig ever deeper into virtually limitless databases to produce irrelevant or nonexistent data. Plaintiff wrongly accused Defendant of discovery abuse, when Plaintiff abused discovery by feigning confusion and frustration despite Defendant's desperate efforts to comply. The trial court erred in finding that Defendant MUSC had deliberately misled the Plaintiff or failed to timely and completely respond to discovery requests.

[3] "Capping E-Discovery Costs: A Hybrid Solution to E-Discovery Abuse", 56 WILLIAM & MARY LAW REVIEW 631 (2014) (*citing Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558-59 (2007)).

For the foregoing reasons and for the reasons set forth in MUSC's Appellant's Brief in this appeal, this Court should reverse and vacate the trial court's September 28, 2016 Order for Sanctions and October 13, 2016 Order denying its Motion to Reconsider. In the alternative, the Court should reduce the attorneys' fees awarded to Plaintiff or remand for a determination of the proper amount of attorneys' fees to be awarded.

July 7, 2017

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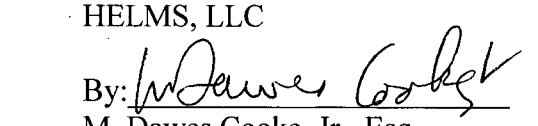
By: 

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THE 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.....Respondent

v.

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

RULE 211 CERTIFICATE

I hereby certify that this Final Appellant's Reply Brief complies with Rule 211(b), S.C.A.C.R.

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