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 BRIEF

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STATEMENT OF ISSUES ON APPEAL

I. **Did the trial judge err in imposing sanctions upon MUSC where there is no evidence that MUSC violated a clear discovery order from the trial judge?**

Suggested Answer: *Yes.*

II. **Did the trial judge err in imposing sanctions upon MUSC where there is no evidence showing willful or abusive conduct on the part of MUSC or of prejudice to Plaintiff?**

Suggested Answer: *Yes.*

III. **Was the nearly $90,000 attorneys' fee award in this case excessive under the circumstances of this case?**

Suggested Answer: *Yes.*

STATEMENT OF THE CASE

I. BACKGROUND

This lawsuit involves claims by Plaintiff Shon Turner ("Plaintiff"), as Personal Representative of the Estate of Charles Mikell, asserting survival and wrongful death claims against Defendant The Medical University of South Carolina ("MUSC"). The case was tried to a jury from April 18, 2016 to April 26, 2016, resulting in a verdict in favor of MUSC. The instant appeal does not involve the trial of the merits of this matter, which are the subject of a separate appeal.

MUSC appeals from sanctions that the trial court imposed upon it for alleged failures to produce information in discovery and for perceived discovery abuses. Specifically, the trial court concluded that MUSC engaged in improper discovery conduct regarding: "(1) the Mayday record; (2) the AHA database; (3) the PICIS "glitch" and the text messages and phone calls made to correct it; (4) the audit trails; (5) the backup anesthesia data; and (6) other generally nebulous discovery responses." (*See* R. p. 29). MUSC believes that Plaintiff's litigation strategy from the beginning of this case was to inundate MUSC with discovery demands and exploit the difficulty that a large institution inevitably has in curating and retrieving massive data. Plaintiff sought to augment a weak malpractice case by accusing MUSC of destroying or altering records and covering up facts. Indeed, Plaintiff's principal argument at trial was that MUSC falsified records and lied to cover up its malpractice. To be sure, MUSC's witnesses' memories of the details of events and record of years past and MUSC's command of its massive databases and records were not perfect. However, Plaintiff fell far short of showing that MUSC deliberately obstructed discovery or that MUSC's witnesses lied, falsified records, or tried to cover up their actions. The jury heard the Plaintiff's evidence on this and were given a spoliation charge, but still rejected Plaintiff's claims and returned a verdict for MUSC.

It is difficult to encapsulate months of intensive discovery into a concise statement of facts. Nevertheless, Defendant MUSC will attempt to summarize the pertinent history of the various discovery issues in this case. Despite Plaintiff's allegations, MUSC was extremely

forthcoming and cooperative in discovery. It produced well over 5,000 pages of documents. It permitted hours of depositions of numerous employees and agents. It committed dozens of hours of work by information technology staff to retrieve archived data for Plaintiff. Plaintiff produces no evidence that MUSC intentionally withheld information or willfully prevented Plaintiff from full and complete discovery. MUSC asks this Court, as it scrutinizes the Record in this case, to be mindful of the difficulty of curating the practically infinite volume of data that is generated in a modern hospital, and of the danger in allowing a litigant to build his litigation strategy around the exploitation of that data.

The discovery issues in this case date back to March 19, 2013, when Plaintiff served his First Discovery Request upon Defendant MUSC seeking documents that MUSC might possess relating to Plaintiff's claims. On or about May 17, 2013, Defendant MUSC served its Answers to Plaintiff's First Discovery Requests. (*See* R. pp. 240-51 ¶¶ 7 & 16). MUSC's July 11, 2013 Supplemental Answers to Plaintiff's First Discovery Requests stated:

> 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 proceedings, information, records, data, and/or documents acquired by a committee of a medical staff of a licensed hospital that operates pursuant to the written bylaws that have been approved by the governing board of the hospital and are therefore confidential pursuant to S.C. Code Ann.§ 40-71-20(A); *McGee v. Bruce Hosp. Syst.*, 312 S.C. 58, 439 S.E.2d 257 (1993), *Durham v. Vinson*, 360 S.C. 639, 602 S.E.2d 760 (2004). 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. Please refer to the Privilege Log produced herewith referencing privileged documents bates labeled BWPH 1.554 (Mikell) MUSC 1-34 Privileged and Confidential. Without waiving and subject to the foregoing objections, no root cause analysis with regard to Mr. Mikell was performed. Peer review was conducted by members of an appointed committee of a medical staff of MUSC that operates pursuant to written bylaws. Specifically,**

a committee of the medical staff of the Department of Anesthesia and Perioperative Medicine of MUSC through the Department Chairperson performed the peer review. The outcome of the peer review was that no issues were found. Furthermore, without waiving and subject to the foregoing, see documents Bates labeled 1.554 (Mikell) MUSC 1-2556 which have been previously produced.

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.

(*See* R. pp. 123-26).

A. The "Mayday Form"

The first issue discussed in the Court's Order for Sanctions relates to Plaintiff's request for a Cardiopulmonary Resuscitation Event Form ("Mayday Form") for Mr. Mikell. Throughout this litigation, this Mayday Form has sometimes been referred to as the "Mayday record" or "Mayday card". MUSC was never able to find or produce a Mayday Form for Mr. Mikell's resuscitation following his cardiac arrest.[1] Nobody knows what happened to it. As will be seen below, Nurse Donna Embrey, the CRNA who was cared for Mr. Mikell during his colonoscopy, did not at first remember whether there had been a Form. This is understandable, since she was being asked in her deposition about events that had occurred and records that had been created almost four years earlier. Only later did she remember that the Mayday Form must have existed because she had used it to complete the anesthesia record of Mr. Mikell's resuscitation. It is hardly surprising that her memory about this might be revived after her first deposition; she had had no occasion to think about this matter, let alone study the records, for almost four years, and

[1] It is undisputed that, if a Mayday Form existed, it would have been started when the Mayday was called, *after* the allegedly negligent acts or omissions occurred. It is exceedingly unlikely that the record would have included any information relevant to Plaintiff's claim. For this reason alone, MUSC was highly motivated to determine whether the Mayday Form existed and to find it if it did exist. The jury was given a spoliation charge pursuant to, *inter alia*, *Stokes v. Spartanburg Reg. Med. Ctr.*, 368 S.C. 515, 629 S.E.2d 675 (2006), because MUSC could not produce the record. The Mayday Form was a red herring. Plaintiff knew very well that the Form could shed no light on the cause of Mr. Mikell's cardiac arrest, but he built his case – both to the jury and to the trial judge -- around inferences that might be drawn from the Form's disappearance.

then she was forced to become immersed in the case as discovery progressed. MUSC's 30(b)(6) deponent, Dr. George J. Guldan, III, who participated in the resuscitation, was confident that a Mayday Form would not even have been created. He believed that since the event occurred in an operating room setting, staffed with anesthesia personnel, the anesthesia record would have served as the record for the Mayday resuscitation. Dr. Guldan was deposed more than four years after the event. His reasoning was logical, but incorrect, based on evidence that MUSC would later discover. Both parties were misled about the existence of the Mayday Form, but this was the result of human error, not sanctionable misconduct.

On August 24, 2014, Plaintiff deposed Donna Embrey, CRNA ("Nurse Embrey"), a Certified Registered Nurse Anesthetist employed by MUSC who provided services to Plaintiff's Mr. Mikell during his procedure. (*See* R. pp. 242 & 428-65). During her deposition, Nurse Embrey testified concerning the potential existence of a Mayday Form documenting Mr. Mikell's arrest:

> Q: What are they writing in?
>
> A: They're writing on a Mayday – their own RN Mayday record.
>
> Q: What does that look like?
>
> A: I think every facility has its own.
>
> Q: What about at MUSC; where this procedure-
>
> A: I believe they're kept on the Mayday cards. When the nurses bring the Mayday cards in with a, you know, defibrillator, etcetera, they grab the clipboard and they literally start writing. This is a separate document for them. . . . It is a handwritten document

(*See* R. pp. 433-34 (20:15-21:3)). Nurse Embrey testified that she did not know whether a Mayday Form existed for Plaintiff's Mr. Mikell. (*See* R. p. 434 (22:9-14)). She further testified that a Mayday Form (or "card") *might* be part of the record for Plaintiff. (*See* R. p. 449 (84:8-12) ("I mean, that is up to the nursing staff; I guess, to fill that out appropriately and chart who is in there, what they're doing. That's kind of a nursing record, not so much anesthesia record.")).

On October 27, 2014, MUSC responded to Plaintiff's Second Request for Admission and produced the MUSC Medical Center Policy Manual, Section PC-19, No. C-14 (entitled "Emergency Medical Response") (the "Policy"):

> 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.**

(*See* R. pp. 272; *see also* R. pp. 252-60). That Policy sets set forth responsibilities in the event of a "Mayday," 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." (*See* R. pp. 252-60). Under that Policy, "[e]ach Mayday is documented on the Cardiopulmonary Resuscitation Event Form (Mayday record). The Mayday record is the legal documentation of the Mayday. It accounts for physician orders and medication administration during the Mayday. It must be signed by the designated participants." (*See* R. p. 255). Additionally, that policy states that "[f]ollowing the MAYDAY, the Cardiopulmonary Resuscitation Event Form is faxed to Risk Management and then entered into the patient's medical record." (*See* R. p. 259). The Policy would have governed the Mayday Form at issue in this case, if it existed. As reflected by MUSC's response to this request to admit, it believed that a Mayday Form would not have been required for Mr. Mikell. Plaintiff presented no evidence to suggest that, when MUSC produced the Policy, it believed a Mayday Form existed.

After MUSC produced the Policy, Plaintiff sought to depose an MUSC witness regarding that Policy. Pursuant to S.C.R. Civ. P. 30(b)(6), MUSC designated Dr. George Guldan, an Assistant Professor of Anesthesiology and Perioperative Medicine at MUSC and member of the team that helped to resuscitate Mr. Mikell. (*See* R. p. 855:17-21). On November 4, 2014, Dr.

Guldan testified that he believed that the Policy did not require a Mayday Form because of Mr. Mikell's procedure:

> 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 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. . . . [I]t is not necessary from a patient care standpoint to call a Mayday in the OR. . . .
>
> There is no Mayday team necessary in the OR because of the composition of the staff in the OR. It becomes superfluous.

(*See* R. pp. 500:21 to 502:23). He also testified that the relevant clinical information regarding Mr. Mikell's code was fully and properly documented in the anesthesia record:

> 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.

(*See* R. pp. 503:13-504:5). Plaintiff has presented no evidence that, at the time of Dr. Guldan's deposition, anyone at MUSC knew a Mayday Form existed for Mr. Mikell. Plaintiff presents no evidence that Dr. Guldan had any reason to believe his testimony was inaccurate.

Following Dr. Guldan's deposition, Plaintiff continued to inquire about the policies applicable to Mr. Mikell's arrest during his procedure and whether a Form existed for Mr. Mikell. Plaintiff filed a Motion to Compel on or about January 30, 2015 requesting, *inter*

alia, "OR Code documentation policy consonant with MUSC employee George Guldan, MD's November 4, 2014 deposition testimony." (*See* R. p. 137). MUSC had responded, consistent with Dr. Guldan's testimony, that the only policy applicable was the Policy, which did not require a Form in this instance. The Court conducted a hearing on this Motion to Compel and ordered MUSC "to produce for deposition, pursuant to Rule 30(B)(6), SCRCP, a designee(s) to testify regarding the applicable policies, if any, that govern the circumstances of Mr. Mikell's colonoscopy and cardiac arrest/code that occurred on October 1, 2010." (*See* R. p. 15).

In conformity with this Order, MUSC designated Sheila Scarborough, RN, MSN, who (at the time of the incidents alleged in the Complaint) was its Director of Risk Management, to testify on its behalf. Only considerable diligence and luck enabled MUSC to learn that Nurse Scarborough had information about Mr. Mikell's Mayday Form. During its continuing search for the missing record, MUSC discovered that at the time of the incident it was Nurse Scarborough's practice to receive faxed copies of Mayday Forms, extract certain data from them, and send that data to the American Heart Association ("AHA") for purposes of statistical analysis. By searching her records, Nurse Scarborough could ascertain that she had in fact may have received a copy of Mr. Mikell's Mayday Form, sent the required data to the AHA, and then discarded her copy of the Mayday Form as was her routine practice. From her records, she could reconstruct the information that would have been in the Mayday Form. MUSC designated Nurse Scarborough on July 23, 2015 (more than a month before her deposition), and promptly disclosed to Plaintiff's counsel that, after further investigation, MUSC had discovered new information about the Mayday Form: "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." (*See* R. pp. 528-30). Plaintiff has not proffered any evidence that MUSC could have known about that information previously.

Plaintiff deposed Ms. Scarborough on August 24, 2015. She testified that "there should be a mayday record for Mr. Mikell's event." (*See* R. p. 543:1-5). She further testified that part of her job at the time of Mr. Mikell's procedure was to review code sheets and enter data into a

database for the American Heart Association on all resuscitative events ("AHA Database"), including Maydays and codes. (*See* R. pp. 545-46). Following a code or Mayday, Ms. Scarborough would receive the Mayday Form by fax. (*See* R. p. 548). The information that she input into the AHA Database would generally be derived from a Mayday Form. (*See* R. pp. 546-48). She also testified:

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 22 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.

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 again, this [Policy] 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.

(*See* R. pp. 557:7-560:7).

On February 22, 2016, Plaintiff re-deposed Nurse Embrey, MUSC's anesthesia nurse for Mr. Mikell's procedure — for reasons unrelated to the Mayday Form. Judge Nicholson wrote extensively about her deposition:

> The nurse anesthetist was re-deposed on February 22, 2016. Whereas she had previously testified she could not recall a Mayday record, this time she testified that following Mr. Mikell's cardiac arrest, she had gone to his hospital bed; obtained his paper medical chart; removed the original Mayday record from the chart; and used the Mayday record as a reference to "complete" the anesthesia narrative. She did this using a computer terminal in the intensive care unit to access the PICIS system. As part of that process, she altered one of the anesthesiologist's entries in the narrative; and created and modified a series of other entries in the narrative.

(*See* R. pp. 31-32). Specifically, in her second deposition, Nurse Embrey testified in relevant part that she could now recall having the Mayday Form with her to make certain entries into computer records concerning Mr. Mikell's procedure:

> Q: So you had the mayday card with you there in the room at the terminal, correct?
>
> A: Yes. It was in the -- it was in the chart in the MSICU that evening, right, Friday evening.
>
> Q: So when you were finished with this process of completing the electronic record --
>
> A: Yes.
>
> Q: -- what did you do with the mayday card?
>
> A: Put it back in the -- I never actually -- you know, the chart is one of these, the chart, you know, and it's like -- . . . an oblong binder, where you flip it open, and it's this way, right. And to the best of my recollection, I don't think I ever actually took it out. I just turned to that page, you know, and looking at time stamps of defibrillation, CPR started, blah, blah, blah.

(*See* R. pp. 1223:18-1224:12). She testified that the last time she saw the Mayday Form was in this binder in the chart. (*See* R. pp. 1224:25-1225:21). Nurse Embrey testified she was aware that MUSC had been unable to locate the Mayday Form, but she did not know where the Mayday Form was. (*See* R. pp. 1231:17-1232:19).

In any event, Plaintiff presents no evidence MUSC possessed a Mayday Form or knowingly withheld that form from Plaintiff. MUSC (reasonably, though mistakenly) originally believed that no Mayday Form ever existed for Plaintiff. However, as discovery proceeded,

MUSC came to learn that it appeared that it was mistaken and that a Mayday Form had existed at some point in time. MUSC promptly disclosed this information to Plaintiff's counsel and the Court. Unfortunately, despite its best efforts, MUSC has never been able to find the Mayday Form. There is no evidence of abusive discovery conduct regarding the Mayday Form.

B. The AHA Database

The trial judge concluded that MUSC engaged in discovery abuse regarding electronic files containing AHA Database entries Nurse Scarborough made using the Mayday Form:

> The AHA database file was produced to the Plaintiff in a format which prevented it from being intelligibly viewed or printed using a standard office computer. When Plaintiff's counsel asked to have the file printed or otherwise produced in usable format, the Medical University simply refused, claiming to do so would reveal protected patient information. It was not until the first hearing on the Plaintiffs Motion for Sanctions, when the Court demanded an explanation for this inexcusable recalcitrance, that the AHA database file was finally printed in readable format and produced to Plaintiff's counsel on December 2, 2015.
>
> The Court finds there is no justification for the twenty-nine (29) months it took to produce the electronic AHA database file, which was responsive to discovery requests served by the Plaintiff on March 19, 2013. The Court further finds there is no justification for the Medical University's failure to produce the database file in readable format until December 2, 2015.

(*See* R. pp. 34).

Plaintiff does not dispute that, on August 20, 2015, after it learned of the possible use of the Mayday Form to input data into the AHA Database, MUSC produced information that Nurse Scarborough input into the AHA Database. (*See* R. pp. 217-18, 294-320). This information was not producible at that time in a human readable format, so Nurse Scarborough was unable to testify about those AHA Database entries. Plaintiff presented no evidence that, at the time, MUSC knew of a way to produce the AHA Database information in a human viewable format.

Ultimately, MUSC learned to convert the AHA Database information into a human-readable format, and produced the same to Plaintiff:

> The data in the database maintained by MUSC for submission to the AHA [Database] is not encrypted. MUSC produced the information in a legible format on December 2, 2015. This was done by cutting and pasting the data into another

format and converting it into PDF. A copy of the document is being provided to the Court and is numbered BWPH File No. 1.554 (Mikell v. MUSC) 004991-005011.

(*See* R. p. 51). This letter further pointed out that MUSC had offered to allow Plaintiff's counsel to view a computer containing the AHA Database information but that it was not available to view online. (*See* R. p. 52).

As with the Mayday Form, any delay in producing a readable copy of AHA Database information was not the product of any malfeasance by MUSC. It is a testament to the durability of electronic data and the persistence of MUSC's investigation that the AHA Database information was discovered, retrieved, and produced when it was.[2] At every step along the way, when MUSC obtained or learned new information, it promptly advised Plaintiff of same. Plaintiff presents no evidence that MUSC did not exercise reasonable diligence. Instead, Plaintiff and the trial court unfairly inferred improper intent from the mere fact of a delay.

C. Mr. Mikell's PACU Record

The trial court's third and fifth areas of concern ("(3) the PICIS 'glitch' and the text messages and phone calls to correct it [and] . . . (5) the backup anesthesia data") involve real-time recordation of Mr. Mikell's vitals and the treatment rendered to him during his colonoscopy. The trial court overlooked an important facet of modern information technology, to wit, that any large institution, and particularly an institution like a hospital, collects and stores almost infinite amounts of data. Monitors and other medical equipment automatically, endlessly stream data, which is recorded and then stored forever. Only a fraction of the data is ever displayed or used in taking care of the patient. The amount and variety of information available today bears little resemblance to the handwritten medical charts of the past. The paradox of the information technology revolution is that, while vastly more information is available to healthcare providers (and to lawyers) than ever before, it creates the unrealistic expectation that *all* of that information should be recorded and easily retrievable.

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[2] Notably, the AHA Database information provided no evidence to support Plaintiff's malpractice claims. The missing Mayday Form was very much a "red herring" in this case.

In response to Plaintiff's discovery requests, on May 17, 2013, MUSC produced a nearly 400-page document (Bates Range MUSC 2116-2556) entitled "Anesthesia/PACU [Post Anesthesia Care Unit] Record" ("PACU Record") for Mr. Mikell's colonoscopy. (*See* R. pp. 485-91; *accord* 675-79 (including pages of the PACU Record)). Among other things, the PACU Record included data recorded at various intervals (fifteen minutes, one minute, and ten seconds). The PACU Record is the complete documentation of all the medical care that the anesthesia providers provided to Mr. Mikell during his October 1, 2010 colonoscopy. Importantly, the PACU Record contains relevant clinical data regarding Mr. Mikell's arrest and resuscitation. It includes information that MUSC personnel input into that record and information that various computerized measurement devices automatically recorded.

From 2007 through June 30, 2014, MUSC used "PICIS" as its electronic medical record software to document anesthesia and post-anesthesia care, including the PACU Record. (*See* R. p. 1087:10-13 ("PICIS went dormant on July -- July 1, 2014, when the University switched over to Epic."). The trial judge described the PICIS system and PACU Record:

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

(*See* R. pp. 26-27). MUSC's PICIS database houses approximately 244,475 distinct patient medical record numbers and contains protected health information for those patients, within the scope of the Health Insurance Portability and Accountability Act of 1996 (HIPAA). Regarding the PACU Record, Plaintiff sought, and the trial court granted, sanctions because there are certain vital sign measurements, including blood oxygen saturation levels, that were not recorded on the PACU Record for certain time intervals ("Unrecorded Data"). Based upon this missing

data, on October 27, 2014, MUSC served its Response to Plaintiff's Second Request for Admissions regarding the Unrecorded Data as follows:

> 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 a.m.
> b. 7:43 a.m.
> c. 7:44 a.m.
> d. 7:45 a.m.
> e. 7:46 a.m.
> f. 7:47 a.m.
> g. 7:59 a.m.
> h. 8:08 a.m.
> i. 8:09 a.m.
> j. 8:11 a.m.
> k. 8:12 a.m.
> *l.* 8:13 a.m.
> m. 8:14 a.m.
>
> 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 the data has not 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 requested in Request No. 4. However, the data was continuously viewed during the colonoscopy procedure on October 10, 2010.**

(*See* R. pp. 273-74). This discovery response further indicates, when asked for the explanation of why the Missing Data was not included in the PACU Record, that explanations "were provided in the deposition testimony to date." (*See* R. pp. 274-75). MUSC's response was accurate. No data was "missing" from the record for the times specified, because no data was ever recorded for those times. As will be shown below -- and as was explained to Plaintiff's counsel, the trial court, and the jury -- the oxygen saturation levels were being continually

measured and monitored, but for approximately half an hour the readings were not being electronically recorded.

1. Data Not Recorded in the PACU Record and the "Glitch"

The trial court first concluded that MUSC had engaged in wrongful conduct regarding its disclosure of the circumstances surrounding the Unrecorded Data.

In her August 26, 2014 deposition, Nurse Embrey testified that she had no reason to question the *accuracy* of the blood saturation levels in Mr. Mikell's PACU Record (*though she did not testify about* the existence of the Unrecorded Data):

Q: How was Mr. Mikell's oxygen saturation being monitored?

A: By a finger probe, I believe, which is the normal modality that we use.

Q: Finger probe pulse oximeter?

A: That is correct.

Q: Was it working correctly in his case?

A: As far as I can recall, yes, sir. I do not recall any issues with that.

Q: And was the machine accurately recording his oxygen saturation levels?

A: I mean, I don't recall any overt problems with it at the moment.

Q: And as you reviewed the record in preparation for your testimony this morning did you see any values that you thought were inaccurate? . . . I'm asking did you see any values that you thought that were inaccurate when you looked at it?

A: I would have to look at it again.

Q; Do you have any recollection of thinking: Wait a minute. That can't be right?

A: No. I don't recall questioning that anything was incorrect as far as data coming across. I do not recall that right now.

(*See* R. p. 435 (27:8-28:9)). At that time (August 26, 2014), Plaintiff's counsel did not ask Nurse Embrey why the PACU Record did not reflect blood oxygen saturation levels at certain times,

even though MUSC had produced a complete copy of the PACU Record to him with the omission of the Unrecorded Data evident.

On September 4, 2014, Plaintiff's counsel wrote to MUSC's attorneys and, *inter alia*, asked "[w]hy is there no oxygen saturation data recorded" at certain times. (*See* R. p. 265). Shortly thereafter, MUSC served its October 24, 2014 its Response to Plaintiff's Second Request for Admissions regarding the Unrecorded Data, discussed *supra*. (*See* R. pp. 271-76).

The trial court, in his Order for Sanctions, inaccurately stated that the Unrecorded Data was the result of an undisclosed software "glitch." The explanation for the Unrecorded Data is much simpler. In his September 22, 2015 deposition, Dr. Scott Reeves, Chairman of MUSC's Department of Anesthesia, explained that certain measurements were not recorded because Mr. Mikell's data stream was not effectively transferred from the system that was recording his vital signs in the holding area to the system that would record them in the operating room:

> Q: And I wanted to ask you a simple question. If you'll look at the second page, you'll see I've got some portions of that spreadsheet highlighted? . . . And my question to you is can you explain why those boxes don't have any data or information in them? Why are those boxes empty?
>
> A: So, you know, I've -- I've had the opportunity to review this record some and so there's a process. This is PICIS, this is our electronic medical record system and it was a new system to us and it requires a linkage. So when you -- when you transfer out of one location, you have to reconnect in the new location.
>
> So, for example, this gentleman was transferred from the recovery area -- the holding area, excuse me, to the operating room and so there's a gap in there then when you get to the operating room, the -- you make the connection and then the machine starts collecting data, okay? . . .
>
> And so Donna Embrey attempted to make that connection and it didn't work and so what we see is we see a gap where part of the system is not talking to the electronic record. And so she recognized that and she called I -- for IT support and we have an audit trail associated with that. That's one of the nice things about the electronic record. And the audit trail shows the IT person logging in and correcting that deficiency and that's why we start getting data later in the -- in the record.

(*See* R. p. 414 (22:16-23:25)). Dr. Reeves further testified:

Q: Okay. You would agree with me that if there was some technical problem with the monitoring equipment, that should have been resolved before the procedure was begun? . . .

A: No, there's no technical problem with the monitor. So the monitors are functional so the -- the pulse oximeter sitting there beeping at her, the EKG's running, any end tidal CO2 or any of that kind of stuff is functional. That's independent of the electronic record system. The -- what's not occurring is the background filling out of these squares that the electronic record system is doing and we're not -- we don't see that.

You know we're seeing the monitors in front of us and to us everything looks fine, it's not until we turn around and start doing some documentation or something like that that we -- you know, that requires us to do a manual entry of some form that we would -- may notice that things aren't flowing across into the electronic record.

(*See* R. p. 414 (24:10-25:6)). He explained further:

Q. Well, and I'm curious with the anesthesia providers, meaning the anesthesiologist and the nurse anesthetist -- . . . in October of 2010 have known beforehand that, hey, there's a problem with the communication of our systems there in the Digestive Disease Center, be on the lookout for that?

A: I -- I think you're -- I don't exactly know how to explain this better. The -- the monitors were functioning fine, okay? So the monitors are doing what they're supposed to be doing. The person is looking at the monitor, seeing the beeps, hearing the beeps, seeing the monitors. That's not what I'm talking about. What's -- what didn't occur was the link which is, you know, she -- there's -- she talks about it, she goes, transfer to, okay?

That sounds like a very generic term that you're moving -- oh, sorry. You're moving from one place to the another and from -- and that's what it means. But from a -- from a record -- from an electronic record perspective, that's a button we push, boom, transfer to, and so I'm not transferring from recover -- from holding to the OR, okay?

And then when you get to the OR, you hit another button that -- that links what the record saw of this individual in holding to the operating room record and that link didn't occur in this particular case for a period of time, five, six minutes, whenever this distance here. . . . And as soon as it was recognized, it was corrected.

Q: When was it recognized?

A: As soon as she recognized it in the -- in the audit trail.

(*See* R. pp. 415-16 (29:21-31:10)).

In a December 7, 2015 Affidavit, Annette Thompson, R.N., a Clinical Analyst at MUSC with experience working with PICIS who responded to Nurse Embrey's service request, confirmed Dr. Reeves' explanation:

> 7. In response to the service request, I accessed the PICIS electronic medical record system at approximately 7:46a.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.

(*See* R. pp. 568-70 ¶¶ 7-11).

The trial judge criticized MUSC for its perceived delay in producing a log showing, *inter alia*, text messages and phone calls relating to this issue: "The log showing the text messages and phone calls was not produced by the Medical University until December 2, 2015." (*See* R. p. 35). As can be seen from the discussion above, the parties' understanding of the data available grew through the process of discovery. By the time this lawsuit was commenced, MUSC was no longer using the PICIS data management system into which Mr. Mikell's data was recorded.

Retrieving data from the PICIS system and understanding how to interpret it was not an easy matter, and MUSC's counsel were forced to learn along with Plaintiff's counsel how to use the PICIS system. Far from abusing the discovery process, MUSC worked hard to timely and fully answer the questions concerning the medical record that Plaintiff's counsel posed. Certainly, the fact that the equipment did not create a record of oxygen saturation levels for approximately one half hour does not equate to MUSC concealing data. There is no evidence that MUSC delayed in producing that information once it was located.

2. "Backup" of the PACU Record

The trial judge and Plaintiff also accuse MUSC of misconduct regarding the backup of the PACU Record, suggesting that the Unrecorded Data might be found in that backup or archived information. This conclusion is based entirely upon the speculation of Plaintiff's counsel and his belief or expectation as to what might be included on any backup of Mr. Mikell's PACU Record, and whether it might include the Unrecorded Data. Plaintiff has proffered no evidence that MUSC's archives contain, or ever contained, the Unrecorded Data. To the contrary, MUSC's IT staff spent hundreds of hours examining archived data — from a "dormant" information management system that MUSC no longer uses — to confirm that the Unrecorded Data never existed and was not deleted.

On December 5, 2014, Plaintiff's counsel wrote to MUSC's counsel and asked whether computerized backup of the PACU Record on PICIS might disclose the Unrecorded Data. (*See* R. pp. 341-43). Plaintiff's counsel stated:

> I understand MUSC has an Office of the Chief Information Officer which, among other things, is charged with managing a Clinical Data Repository, an Enterprise Data Warehouse and a Health Data Exchange. I also understand that the Enterprise Data Warehouse "originates from dozens of computer systems across the MUSC enterprise. In some cases, data is extracted directly from an application's database (an example would be Picis anesthesia)." I am quoting from an on-line document created by Mark Daniels, MUSC's Director of Enterprise IT Architecture, who has been at MUSC since 1992.
>
> MUSC definitely knows what I am talking about when I ask where the data from Mr. Mikell's October 1, 2010 procedure is archived and I am confident MUSC has

an IT person who can answer my questions about the anesthesia records that have been produced in this case.

(*See* R. p. 343). In support of his statements in this letter, Plaintiff's counsel cited an October 15, 2013 working draft of a six-page document entitled "MUSC's Enterprise Warehouse Data at a Glance" that he had obtained from the internet. (*See* R. pp. 334-40). In response, in a January 22, 2015 letter, MUSC's counsel identified several witnesses who might have knowledge about the storing of data in the PACU Record:

> — "a witness who can testify about how the anesthesia machine works and how its data is displayed, captured, recorded, stored, and printed out." In response to this subject matter, MUSC defers to the manufacturer of the anesthesia machine regarding how it works. MUSC designates the following witnesses to testify regarding how the information on the anesthesia machine is displayed, captured, recorded, stored, and printed: Pat Aysee, Desiree Tillman, and Lucinda Banks.

(*See* R. pp. 347-49). MUSC formally identified Pat Aysse, RN, MSN as a potential witness on July 2, 2015. (*See* R. p. 355). However, MUSC never made any representation that such a witness would be able to testify concerning the backup or archive of the Unrecorded Data.

On October 24, 2015, Plaintiff deposed Nurse Aysse, who testified that, *in general*, the information in Mr. Mikell's PACU record would likely have been archived:

Q: Okay. So that brings me to my next series of questions I want to ask you, which sounds to me as though the data from this procedure is preserved somewhere?

A: That is correct.

Q: Okay. And, where is it preserved?

A: I assume it's preserved on the servers that they have that they save all the data from.

Q: Okay. And where are those servers located?

A: I can't speak to that. I don't know.

Q: Who would have the answer to that?

A: I'm not -- I'm not sure who would be the appropriate contact.

Q: Who do you think it might be?

A: At this point in time, with the changes that have occurred in our electronic medical record and the structure of the IT department, I don't know. I don't work closely with them anymore, so I don't specifically know who that might be.

Q: Do you know whether or not any effort has been made to retrieve the data in this case?

A: I don't know.

(*See* R. p. 364 (22:8-23:6)). However, Nurse Aysse never testified that the unrecorded data was archived at MUSC.

Plaintiff then attempted to obtain a copy of a backup of the PACU Record. In response to a letter from Plaintiff's counsel, on September 14, 2015, MUSC's counsel catalogued the burden on MUSC from obtaining backup of all of Mr. Mikell's PACU Record data and the fact that such information would be *identical* to the PACU Record that MUSC had previously produced:

> In our letter dated August 31, 2015, we represented that the process of extracting data from the PICIS database specific to Mr. Mikell would be onerous and likely require close to 1,000 hours to accomplish *while yielding the exact same data that has already been produced in this case*. This means that the data available from the database *is exactly the same as the data that was produced to Plaintiff on May 17, 2013* in the printed version of the Anesthesia Record contained in the document production bates labeled 1.554 (Mikell) MUSC 1-2556. . . .
>
> Based on the foregoing, MUSC estimates that it would take the following amount of time to extract PICIS information from the database for Mr. Mikell:
>
> - Raw Data (not human readable): 524 hours and 19 minutes at 20 minutes per table;
> - Human Readable Data: 801 hours and 30 minutes at 30 minutes per table.
>
> The PICIS database was implemented by MUSC in approximately 2007 and was used until June 30, 2014. The database houses 145,007 distinct patient medical record numbers in the PICIS Surgery module and 99,468 distinct patient medical record numbers in the PlCIS Anesthesia module. This is not reflective of the total number of procedures housed in the database since any one patient could have more than one procedure.
>
> Because the PICIS database contains protected health information (PHI) for approximately 244,475 patients, MUSC cannot give your technical consultants

direct access to the database. To do so would cause MUSC to violate the Health Portability and Accountability Act of 1996 (HIPAA).

Furthermore, MUSC estimates that the total cost to extract the data from the database would be approximately $96,000.00 and that the total cost of shifting various project responsibilities of personnel to accomplish the extraction would be approximately $2.8 million.

(*See* R. pp. 375-77). After the initial hearing on Plaintiff's Motion for Sanctions, the trial court addressed several questions to MUSC's counsel, which MUSC answered in a December 10, 2015 letter to Judge Nicholson. (*See* R. pp. 51-55). This included questions about producing backup data for Mr. Mikell's PICIS PACU Record and the anticipated expenses associated with same. (*See id.*).

On or about December 2, 2015, MUSC produced some additional information to Plaintiff that it obtained from the PICIS database, explaining:

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.

[RESPONSE:] 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.

(*See* R. pp. 608-09).

In any event, two facts remain constant. First, Plaintiff can cite no evidence that MUSC's backup of Mr. Mikell's PACU Record has the Unrecorded Data or is different from the PACU Record that MUSC produced years ago. Second, there is no evidence that MUSC did anything to hide, destroy or otherwise prevent Plaintiff from obtaining the Unrecorded Data. To the contrary, John Fisher testified that, after spending almost five hundred hours, he confirmed that no data that had been recorded was missing from Mr. Mikell's PACU Record:

> Q: Now, how many hours, during the discovery process in this case, how many hours have you spent trying to determine whether Mr. Mikell's anesthesia record was unchanged?
>
> A: I spent approximately about 500 hours in the last six months.
>
> Q. Why did you do that?
>
> A. I believe when the legal printout documentation from PICIS was presented to Mr. Ransom, he had proposed that the values were modified. And so knowing that the database was unmodifiable, we wanted to see if that was, in fact, true or not.
>
> Q: And what was your final conclusion?
>
> A: That the data was not modified in any manner.

(*See* R. pp. 1090:20-1091:8; *accord* R. pp. 1088-1100).

D. <u>The Audit Trails</u>

Additionally, the trial court and Plaintiff found fault with MUSC's discovery conduct relating to electronic audit trails for the PACU Record on PICIS. These audit trails would reflect

who logged into and made changes to Mr. Mikell's PICIS PACU Record. Plaintiff apparently believes that someone at MUSC changed Mr. Mikell's PACU Record to conceal evidence showing MUSC's culpability. MUSC notes at the outset that Plaintiff's claims regarding the audit trails (and the Unrecorded Data in general) were red herrings. The testimony at trial confirmed that there had been no improper manipulation, alteration or deletion of data from the PACU Record:

> So the only way that data can be modified in any manner in PICIS is through the user application. PICIS has what's called an audit trail. It tracks everything that is done in the system. I know that it's been mentioned a few times in prior testimonies, and there is literally audit trails for everything in PICIS.
>
> And so what I did is I looked at all the real time variables for Mr. Mikell's case, and then crossed it with this audit trail, and found absolutely no modifications whatsoever between the two.

(*See* R. p. 1088:9-19).

Though Plaintiff's initial discovery requests did not request the audit trails for the PACU Record, in a December 5, 2014 letter, Plaintiff requested the audit trail:

> I want to know 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; when they logged on; what they did while logged on; and why. There should be an audit trail in the electronic medical record system that provides this information.

(*See* R. p. 343). MUSC produced the PICIS audit trail showing the identities of everyone who made entries, modifications, and/or deletions to Mr. Mikell's electronic PACU Record. Specifically, on February 27, 2015, MUSC served its Response to Plaintiff's Third Request for Admissions, denying the accusation that an audit trail did not exist and produced an audit trail to Plaintiff (BWPH 4948-4950). (*See* R. pp. 351-52 ¶¶ 2-3 and 378-82).

Several months later MUSC discovered a second audit trail identifying individuals who logged on to the PICIS system from October 1-2, 2010. On September 21, 2015, MUSC served its Amended Responses to Plaintiff's Second Request for Admissions and Amended Response to Plaintiff's Third Request for Admissions and produced (subject to some objections) a second

audit trail (BWPH004988-90). (*See* R. pp. 392-406). This second audit trail clearly identifies "persons who logged onto the system and the routine undertaken for the dates of October 1, 2010 through October 2, 2010." (*See id.*). These audit trails disclosed any entries in the PACU Record and identified each individual who accessed the PACU Record and any action taken. There is absolutely no evidence in the audit trails that MUSC destroyed or deleted any data from Mr. Mikell's PACU Record. Moreover, there is no evidence that MUSC did anything to try to conceal or intentionally withhold any of the audit trails from production. Furthermore, Plaintiff had the full Anesthesia/PACU Record, which showed all changes to that record, since May of 2013, long before he ever deposed any witnesses and before his expert was deposed in March of 2015.

E. <u>Other Generally Nebulous Discovery Responses</u>

Finally, the trial court expressed concern with its perception of MUSC's overall discovery conduct:

> The Court has other concerns about the manner in which the Medical University answered written discovery in ways which appear calculated to obfuscate or obscure important disclosures. In at least one instance, the Medical University was forced to amend its responses to requests for admission by admitting matters which had previously been denied. But in all things, the Medical University seems to have crafted the language of its discovery responses so as to create ambiguity and plausible deniability. In other words, taking pains to ensure that no written discovery response could be effectively used before the jury to establish a point the Medical University was seeking to deny.

(*See* R. pp. 39-40). The trial court identified two examples of this alleged conduct, which MUSC will discuss. First, the trial court critiqued the way MUSC disclosed that it had discovered information suggesting that, contrary to its initial belief, a Mayday Form might have existed for Mr. Mikell:

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

(*See* R. p. 40). However, there is no evidence to suggest that MUSC's description in its counsel's July 23, 2015 letter to Plaintiff's counsel was misleading or inaccurate in any way. As discussed previously, it is hardly surprising that Nurse Embrey did not readily remember, four years after the event, whether a Mayday Form existed. Dr. Guldan was most earnest in his belief that a Mayday Form was not created in an operating room staffed with anesthesia personnel. In fact, he would reiterate that belief at trial. (*See* R. p. 860:7-9 ("There is not a -- there is not a Mayday sheet in the OR and NORA sites in any situation that I can remember."). MUSC's counsel correctly informed Plaintiff's counsel that — although Dr. Guldan believed that a Mayday Form never existed for Mr. Mikell — MUSC had located circumstantial evidence that a Mayday Form might in fact have existed. MUSC had not actually located a copy of the Mayday Form. Moreover, MUSC had no reason to believe that its witnesses had given "false testimony" just because their testimony was mistaken. MUSC certainly had no evidence that Mr. Mikell's Form had "been created and then destroyed."

The trial court next challenged MUSC's disclosures regarding the Unrecorded Data from Mr. Mikell's PACU Record:

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

(*See* R. p. 40). Again, the trial court's conclusions in this regard miss the mark. First, as discussed in detail *supra*, the Unrecorded Data was not the product of a "problem" with the PICIS software itself. Rather, it was the result of a minor user error. Once MUSC determined the cause of the Unrecorded Data, it promptly and correctly disclosed that information to Plaintiff. Second, the trial court mischaracterizes "the system's failure to record vital signs data over an eight (8) minute period of time." The anesthesia equipment did monitor and display accurate data for Mr. Mikell, including blood oxygen saturation levels, at all times during the

procedure. The so-called "glitch" (a simple user error) simply resulted in a few points of Unrecorded Data being excluded from the PACU Record.

The trial court stated that MUSC "steadfastly refused to concede anything unfavorable to its defense of the case, forcing the Plaintiff to turn to the Court for relief over and over again." (*See* R. p. 40). This again is inaccurate. Plaintiff only sought the intervention of the Court on a motion to compel once prior to its Motion for Sanctions, in which it sought MUSC's policies regarding Mayday Forms (which had already been produced to Plaintiff). Plaintiff did not have to file a series of motions seeking the information that formed the basis for the trial court's imposition of sanctions. To the contrary, MUSC exercised diligent efforts to ensure complete production.

As noted above, it is difficult to summarize many months of intense discovery in a concise and understandable way, without omitting important details. Nevertheless, the record unequivocally reflects that MUSC did not obstruct discovery, but worked hard to navigate the obsolete PICIS system and answer all Plaintiff's questions. MUSC had nothing to hide. In fact, the deeper the Plaintiff required MUSC to dig into its data archives, the more it was confirmed that no data was ever deleted or lost that would in any way support Plaintiff's malpractice claim.

II. PROCEDURAL HISTORY

A. Plaintiff's Complaints

Plaintiff commenced this action asserting survival and wrongful death claims against Defendant MUSC by Summons and Complaint filed on November 6, 2012. (*See generally* R. pp. 94-98). Plaintiff alleged that on October 1, 2010, Mr. Mikell presented to MUSC to undergo a routine colonoscopy. (*See* R. pp. 94-95 ¶ 3). Plaintiff further alleged that Mr. Mikell suffered an intra-operative event during which he desaturated, became hypoxic, experienced bradycardia and then cardiac arrest, resulting in a hypoxic brain injury that caused his death on January 2, 2011. (*See id.*). Plaintiff's initial Complaint asserted three counts against MUSC: (a) medical

malpractice; (b) survival action; and (c) wrongful death.[3] (*See generally* R. pp. 94-98). On January 31, 2013, Plaintiff filed an Amended Complaint, with an Affidavit of W. Andrew Kofke, M.D. (*See* R. pp. 99-105). Defendant MUSC Answered the Amended Complaint on March 15, 2013. (*See generally* R. pp. 106-10).

On February 22, 2016, Plaintiff filed his Second Amended Complaint adding claims for unfair trade practices, constructive fraud, negligent misrepresentation, abuse of process, civil conspiracy and conversion. (*See generally* R. pp. 586-95). Plaintiff's new claims related to allegations that MUSC had engaged in improper destruction of Mr. Mikell's medical records or had provided false information in discovery in this lawsuit. (*See id.*).

On March 10, 2016, MUSC filed a Notice of Motion and Motion to Dismiss, seeking to dismiss several counts of the Second Amended Complaint. (*See* R. pp. 614-15). On the same day, Defendant MUSC also filed its Answer to Second Amended Complaint. (*See generally* R. pp. 616-27). By Order on Defendant's Motion to Dismiss filed on April 7, 2016, the Court (by the parties' agreement) dismissed Plaintiff's unfair trade practices, constructive fraud, abuse of process and civil conspiracy claims without prejudice. (*See* R. p. 21).

B. Plaintiff's Motion for Discovery Sanctions

1. Plaintiff's Discovery Motions Other Than the Motion for Sanctions

To provide this Court with a complete understanding of the discovery proceedings below, MUSC will briefly discuss all discovery motions that Plaintiff filed in this matter prior to the time he sought sanctions against MUSC.

On September 13, 2013, Plaintiff filed his Motion to Determine Applicability of Privileges Asserted by Defendant, regarding documents set forth in MUSC's privilege log on the bases of attorney work product protection and the "peer review" privilege pursuant to S.C. Code § 40-71-20. (*See generally* R. pp. 111-21). The trial judge denied this Motion by Order filed on

[3] The initial Complaint was never served on MUSC.

May 15, 2014 and agreed with MUSC's assertions of privilege as to certain documents not at issue in this appeal. (*See* R. pp. 1-11).

On June 30, 2014, Plaintiff filed a Motion to Compel seeking to compel MUSC to produce "any and all emails or other electronic communications in its care, custody or control, which relate in any way to the decedent Charles Mikell." (*See* R. pp. 127-35). That Motion (which was never ruled upon) sought the production of a specific email, which was not the subject of the sanctions imposed in this case and has no bearing on this appeal:

> This motion is made pursuant to Rules 26, 34 and 37, SCRCP, on the grounds that on January 4, 2014, witness Jewell Mikell testified at her deposition about a "letter" which she believed to have been written to Dr. Jeffrey Akhtar complaining about the medical care which had been provided to the decedent, Charles Mikell, whose death from medical malpractice is the subject of this action. Subsequent witness interviews disclosed that the "letter" was in fact an e-mail which was believed to have been sent to Dr. Akhtar from an e-mail account in the decedent's name, which is no longer accessible following his death.

(*See id.*).

On January 30, 2015, Plaintiff filed a Motion to Compel seeking an order requiring MUSC to produce "(1) an OR Code documentation policy consonant with MUSC employee George Guldan, MD's November 4, 2014 deposition testimony; and (2) any and all information or data recorded by an EndoWorks system as described by MUSC employee Martha Zwermer, RN during her September 5, 2014 deposition testimony." (*See* R. pp. 136-40). On March 6, 2015, the Honorable Robin B. Stilwell filed an Order granting, in part, Plaintiff's Motion to Compel:

> Based upon the argument and materials presented for decision, the Court rules that the Plaintiff's motion should be granted in part. By way of relief, the Defendant is ordered to produce for deposition, pursuant to Rule 30(B)(6), SCRCP, a designee(s) to testify regarding the applicable policies, if any, that govern the circumstances of Mr. Mikell's colonoscopy and cardiac arrest/code that occurred on October 1, 2010.

(*See* R. p. 15). Such a witness was, in fact, designated and produced for examination: Sheila Scarborough, RN, MSN.

2. Evidence of Plaintiff's Counsel's Fees

On January 6, 2016, Plaintiff filed the Affidavit of Robert B. Ransom, Esq. detailing attorneys' fees that Plaintiff sought in connection with his Motion for Sanctions. (*See* R. pp. 576-81). In that Affidavit, Attorney Ransom recited a current hourly billing rate of $450. (*See* R. p. 577 ¶ 5). Attached as an Exhibit to that Affidavit were timesheets for Attorney Ransom including time beginning as early as February 4, 2014, with a total of 129.8 hours. (*See* R. pp. 578-81). On January 7, 2016, Plaintiff filed a Supplemental Affidavit of Robert B. Ransom, which included documentation of expenses incurred to Online Security:

> 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. . . . The total amount due and payable to Online Security is $3,718.50.

(*See* R. pp. 582-83 ¶¶ 5-6).

On May 4, 2016, Plaintiff filed a Second Supplemental Affidavit of Robert B. Ransom. Attached to this Second Supplemental Affidavit were timesheets for work that Attorney Ransom performed between January 5, 2016 and May 2, 2016 — in the amount of 75.3 hours — "to address and respond to the various discovery issues which are the subject of the Plaintiffs Motion for Discovery Sanctions." (*See* R. p. 625 ¶ 6 and 625-34). This Second Supplemental Affidavit also included charges for work by Online Security, for deposition transcripts of Donna Embrey, for travel and for Plaintiff's expert's review of Donna Embrey's deposition transcript, 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 he performed from July 9, 2015 through April 29, 2016, at an hourly rate of $250.00. (*See* R. pp. 91-92). On September 8, 2016, Plaintiff filed the Third Supplemental Affidavit of Robert B. Ransom, including time entries for his work from May 11, 2016 through September 1, 2016, totaling 34.0 hours. (*See* R. pp. 698-700).

3. Plaintiff's Motion for Sanctions

On September 9, 2015, Plaintiff filed his Motion for Discovery Sanctions, claiming that he was entitled to sanctions pursuant to S.C.R. Civ. P. 37:

> One can only conclude that the Medical University has not made a good faith effort to fully respond to the Plaintiff's discovery requests. Its dilatory conduct supports the reasonable inference that the Medical University withheld disclosure and production of information it simply did not want the Plaintiff to know: (1) the printed anesthesia record has been altered; (2) the Medical University lost and destroyed the Mayday card; (3) information from the Mayday card is preserved in an NRCPR database; and (3) backup anesthesia data is archived on the Medical University's computer servers. Clearly, the Medical University's discovery (non)responses have been false, misleading and submitted in complete disregard of the Plaintiffs right to receive critically important information memorializing the events at the very heart of this case.

(*See* R. p. 147).

On October 14, 2015, Plaintiff filed his Supplemental Memorandum in Support of Plaintiff's Motion for Discovery Sanctions, with hundreds of pages of exhibits. (*See generally* R. pp. 150-470). On October 15, 2015, MUSC filed its Memorandum in Opposition to Plaintiff's Motion for Discovery Sanctions, with exhibits. (*See generally* R. pp. 471-567).

On October 21, 2015, the trial judge conducted a hearing on several motions, including Plaintiff's Motion for Sanctions. On December 7, 2015, MUSC filed the Affidavit of Annette Thompson, RN and Affidavit of John L. Fisher further opposing Plaintiff's Motion for Sanctions. (*See generally* R. pp. 568-75). On December 11, 2015, the trial judge held a second hearing on Plaintiff's Motion to Compel.

On March 2, 2016, MUSC filed an 8-page Affidavit of Alissa Fleming, Esq., its counsel. (*See* R. pp. 606-13). In that Affidavit, MUSC's counsel answered "based on diligent inquiry," in detail, ten (10) questions that the trial judge had posed regarding MUSC's alleged discovery abuses. (*See id.*).

Trial on the merits of Plaintiff's claims occurred over seven days, from April 18, 2016 to April 26, 2016. The jury returned a verdict in favor of MUSC on the merits of Plaintiff's claim.

On May 11, 2016, MUSC filed its Supplemental Memorandum in Opposition to Plaintiff's Motion for Discovery Sanctions (*See generally* R. pp. 635-79). On June 15, 2015, Plaintiff filed his Reply Memorandum on the Issue of Attorneys Fees, supporting his Motion for Sanctions. (*See generally* R. pp. 680-97).

On July 18, 2016, the trial judge conducted a final hearing on Plaintiff's Motion for Sanctions. At that hearing, Plaintiff's counsel testified in support of Plaintiff's request for attorneys' fees in his Motion for Sanctions. On September 28, 2016, the trial court granted Plaintiff's Motion for Sanctions and entered an Order for Sanctions, imposing sanctions on MUSC. (*See* R. pp. 22-92). In its Order for Sanctions, the trial court awarded Plaintiff's attorneys' fees:

$71,7300.00	Attorneys' Fees to Robert Ransom
$5,675.00	Attorneys' Fees to Alex Apostolou
$10,372.63	Costs
$87,777.63	**TOTAL**

(*See* R. p. 46). On October 11, 2016, MUSC filed a Motion for Reconsideration of the court's imposition of sanctions upon it, seeking to have the trial court correct numerous factual inaccuracies. (*See* R. pp. 701-744). On October 13, 2016, the Court denied MUSC's Motion for Reconsideration. (*See* R. p. 93). On or about October 31, 2016, MUSC filed the instant appeal from both the Order for Sanctions and the Order denying its Motion for Reconsideration. (*See* R. pp. 745-46).

ARGUMENT

I. STANDARD OF REVIEW

"An 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). In appeals in the similar context of Rule 11 sanctions and sanctions under the South Carolina Frivolous Civil Proceedings Sanctions Act, this Court has applied an equitable standard of review to factual findings:

> 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). Thus, while the trial court has broad discretion in awarding sanctions, this Court can and should review *de novo* the factual findings upon which it based that imposition of sanctions.

II. THE TRIAL COURT ERRED IN IMPOSING SANCTIONS BECAUSE THERE IS NO EVIDENCE MUSC VIOLATED A COURT ORDER

The trial judge erred in imposing sanctions on MUSC pursuant to Rule 37(b) because there is not a scintilla of evidence that MUSC violated the terms of a Court order, which is a mandatory prerequisite to sanctions under Rule 37(b). Plaintiff cannot present any evidence that MUSC's conduct vis-a-vis "(1) the Mayday record; (2) the AHA database; (3) the PICIS 'glitch' and the text messages and phone calls to correct it; (4) the audit trails; (5) the backup anesthesia data; (6) other generally nebulous discovery responses." (*See* R. pp. 29). In fact, the trial judge

never entered any orders on those subjects. Thus, Plaintiff cannot show a necessary predicate of a claim for entitlement to sanctions under Rule 37(b).

This Court and the Supreme Court have repeatedly held that a violation of a court order is a prerequisite to relief under Rule 37(b) (as opposed to relief under another subsection of Rule 37):

> Rule 37(b) provides sanctions for the violation of an order of the Court to provide or permit discovery. Rule 37(d), on the other hand, provides for sanctions against a party who fails to answer interrogatories or attend his own deposition. The distinction between the two subdivisions is that there must be an order of the Court before sanctions are imposed under subdivision (b), while under subdivision (d) a party may move directly for the imposition of sanctions. *See* H. Lightsey & J. Flanagan, South Carolina Civil Procedure 316 (1985) ("[Under Rule 37(d)] sanctions may be imposed without obtaining an order compelling discovery...."); 4A J. Moore, J. Lucas & D. Epstein, Moore's Federal Practice § 37.05 at 37-100 (2d ed. 1984) (addressing the comparable Federal Rule: "In short, if the party from whom discovery is sought complies with the rule in question by making the initial response, he has a right to refuse discovery until compelled by court order, subject to the expenses of determining the justification of his refusal; but if he does not comply with the rule, he is subject to the sanctions set forth in Rule 37(d)."); 8 C. Wright & A. Miller, Federal Practice and Procedure § 2291 at 807 (1970) (addressing the comparable Federal Rule: "No court order is required to bring Rule 37(d) into play.").

See Downey v. Dixon, 294 S.C. 42, 44 n.1, 362 S.E.2d 317, 318 n.1 (Ct. App. 1987); *accord McNair v. Fairfield Cty.*, 379 S.C. 462, 465, 665 S.E.2d 830, 832 (Ct. App. 2008) ("Under Rule 37(b)(2)(C), SCRCP, *when a party fails to comply with a discovery order*, the trial court has the discretion to impose a sanction . . . ."") (emphasis added); *Enriquez v. S.C. Dep't of Corr.*, 374 S.C. 165, 167, 648 S.E.2d 582, 583 (2007) ("Because SCDOC failed to fully comply with discovery *as ordered*, sanctions were authorized under Rule 37.") (emphasis added); *Kershaw Cty. Bd. of Educ. v. U.S. Gypsum Co.*, 302 S.C. 390, 395, 396 S.E.2d 369, 372 (1990) ("Although the order itself contains no provision regarding sanctions, *as a discovery order*, it is subject to those measures contained in SCRCP Rule 37.") (emphasis added). In fact, there is no South Carolina law permitting sanctions under Rule 37(b) in the absence of a predicate discovery

order requiring that a specific action be taken by the sanctioned party (*i.e.*, a Rule 37(a) order on a motion to compel). This rule has been reiterated in South Carolina Jurisprudence:

> Under Rule 37(b), the court noted, a court may impose sanctions against a party for a violation of a court order compelling discovery. Under Rule 37(d), by contrast, a court may impose sanctions for a party's failure to attend a deposition or answer interrogatories, regardless of whether a court has previously issued an order compelling such action. Thus, "[t]he distinction between the two subdivisions is that *there must be an order of the court before sanctions are imposed under subdivision (b)*, while under subdivision (d) a party may move directly for the imposition of sanctions."

See 25 S.C. Jur., Rules of Civil Procedure § 37.2 (emphasis added).

As the Note to S.C.R. Civ. P. 37 observes, "[t]his Rule 37 is the language of the Federal Rule with minor changes." Importantly, the prerequisite of a violated court order has long been adhered to in federal court. As one district court noted:

> "The predicate for imposition of sanctions pursuant to Rule 37(b) is failure to obey a lawful order from this court." *Call Center Technologies v. Grand Adventures Tour & Travel Publishing Corp.*, No. 3:03 CV1036(DJS), 2007 WL 2439401, at *4 (D. Conn. Aug. 24, 2007). "*Provided that there is a clearly articulated order of the court requiring specified discovery*, the district court has the authority to impose Rule 37(b) sanctions for noncompliance with that order." *Daval Steel Products, a Div. of Francosteel Corp. v. M/V Fakredine*, 951 F.2d 1357, 1363 (2d Cir.1991).

See Tucker v. Am. Int'l Grp., Inc., 936 F. Supp. 2d 1, 26 (D. Conn. 2013) (emphasis added). In federal court, the requirement of a prior order is intended to allow parties to know what is expected of them before they are sanctioned: "'The litigants would then be on notice by court order of what was expected, and failure to comply would be sufficient basis for imposition of a sanction under [Rule] 37.'" *See Genentech, Inc. v. U.S. Int'l Trade Comm'n*, 122 F.3d 1409, 1422 (Fed. Cir. 1997) (citations omitted).

Courts from all over the country predicate the imposition of sanctions upon the prior violation of a court order. *See, e.g., In re Williams (Williams v. United States)*, 156 F.3d 86, 89 (1st Cir. 1998) ("Sanctions under Rule 37(b)(2) *may not be levied without the issuance*, and subsequent violation, *of a formal order* under Rule 37(a).") (emphasis added); *Brandt v. Vulcan,*

Inc., 30 F.3d 752, 756 (7th Cir. 1994) ("Rule 37(b)(2) has been invoked only against parties who have disobeyed a discovery ruling of some sort."); *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208, 1213 (8th Cir. 1981) ("We recognize that a Rule 37(b) sanction should not be imposed by the trial court unless a Rule 37(a) order is in effect."); *accord* Wright & Miller, *8B Fed. Prac. & Proc. Civ.* § 2289 (3d ed.) ("Rule 37(b) usually has no application if there has not been a court order."); *accord Bell v. Le-Ge, Inc.*, 20 Ohio App. 3d 127, 131, 485 N.E.2d 282, 286 (1985) ("The buyers failed to move for an order to compel discovery under Civ. R. 37(A) as a predicate for their motion for sanctions under Civ. R. 37(B).").

Plaintiff never obtained an order from the trial court requiring that MUSC produce the Mayday Form, the Unrecorded Data, the audit trails, backup information for Mr. Mikell's PACU Record or any of the other items forming the basis for Judge Nicholson's imposition of sanctions. This is not a case where the trial judge sanctioned a party for a willful violation of the specific terms of an existing order. Rather, Plaintiff and the trial judge believed that sanctions were appropriate because, in their subjective view, MUSC's actions were abusive or inappropriate. Plaintiff never satisfied the mandatory prerequisite to the trial judge's Order for Sanctions.

Whatever Plaintiff or the trial judge might have thought about MUSC's candor or discovery behavior, there is no evidence that MUSC did anything in violation of a court order that would support the imposition of sanctions. To the contrary, the *only* Rule 37(a) order granting a motion to compel in this case was limited in scope and required only that MUSC "produce for deposition, pursuant to Rule 30(B)(6), SCRCP, a designee(s) to testify regarding the applicable policies, if any, that govern the circumstances of Mr. Mikell's colonoscopy and cardiac arrest/code that occurred on October 1, 2010." (*See* R. p. 15). MUSC complied with that order, and the trial judge did not base his imposition of sanctions upon that order.

Therefore, for the foregoing reasons, this Court should reverse the trial court's imposition of sanctions on MUSC for its alleged discovery misconduct.

III. THE TRIAL COURT ERRED BECAUSE THERE IS NO EVIDENCE OF DISCOVERY ABUSE OR PREJUDICE

The trial court imposed sanctions upon MUSC pursuant to Rule 37, which authorizes courts to sanction parties for violations of discovery orders:

> (b) . . . 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:
>
> (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
>
> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
>
> (D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination; . . .
>
> 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. Civ. P. 37(b). Additionally (though not at issue in this case), Rule 37 authorizes a Court to impose these sanctions on a party who: (a) fails to appear for deposition; or (b) fails to serve *any* response to interrogatories or to a request for inspection. *See* S.C.R. Civ. P. 37(d).

Pursuant to Rule 26(e), SCRCP, "requests for discovery under Rules 31, 33, 34, and 36 shall be deemed to continue from the time of service until the time of trial of the action so that information sought, which comes to the knowledge of a party, or his representative attorney,

after original answers have been submitted, shall be promptly transmitted to the other party." "In determining the sufficiency of responses to interrogatories, each answer must be read in light of the question asked." *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991) (*citing* 8 Wright & Miller, *Federal Practice and Procedure* § 2177, at 560 (1970)). Absent a specification, an interrogatory should be construed as seeking current information as of the time the question is asked and answered. *Id.* (*citing Young Spring & Wire Corp. v. American Guarantee & Liability Ins. Co.*, 32 F.R.D. 345 (W.D. Mo. 1963)).

With regard to electronic discovery, Rule 26(b)(6), SCRCP, makes clear that "a party need not provide discovery of electronically stored information from sources that the party identifies to the requesting party as not reasonably accessible because of undue burden or cost."

A. Plaintiff Did Not Request Information with Reasonable Particularity

As an initial matter, contrary to the trial judge's statement in the Order for Sanctions, Plaintiff's original discovery requests were not sufficiently broad to cover all the items forming the basis for the imposition of sanctions. Thus, the trial court's imposition of sanctions is premised upon a faulty premise: that — regarding the Mayday Form, the AHA Database information, the Unrecorded Data from the PACU Record (including information regarding the "glitch" and backup data) and the PACU Record's PICIS audit trail — MUSC has failed to timely comply with discovery. Plaintiff's discovery requests did not specifically request the information at issue. The trial judge recited and discussed Plaintiff's initial broadest discovery requests:

> Coming at the initial phase of discovery, these Requests were purposely broad in nature, intended to capture a wealth of information to be sifted through and refined as the discovery process proceeded. These Requests required the Medical University to produce:
>
> > "materials in any way memorializing the events involved in this litigation," [Request No.7];
> >
> > "any and all medical records relating to Charles Mikell ... in whatever form they may exist," [Request No, 13]; and

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

In addition, the Medical University was asked to:

> "state the date upon which [any] data was deleted or erased and describe the circumstances under which this occurred" [Request No. 17]; and
>
> "describe any and all data management systems ... for the purpose of backing up or storing data captured or recorded by the anesthesia machine." [Request No. 17].

(*See* R. p. 36).

The South Carolina Rules of Civil Procedure require that, rather than broadly request all relevant documents, a document request must describe the requested information "reasonable particularity." *See* S.C.R.C.P., Rule 34(b) ("The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity."). In this regard, document requests should be made with some level of specificity:

> Document requests must be drafted with "reasonable particularity," meaning that although a broad request may be desirable to obtain all documents regarding the claim, an overly broad fishing expedition is not allowed. Therefore, be specific in Requests (such as "Plaintiff's articles of incorporation" instead of "corporate documents"), and request by category (such as a request for "corporate operating procedures"). *See Richland Wholesale Liquors, Inc. v. Joseph E. Seagram & Sons, Inc.*, 40 F.R.D. 480, 481 (D.S.C. 1966) (holding that items designated by category or subject matter are reasonable in most circumstances, but requests for "any and all documents" are generally too broad and vague).

See Scott Moïse, Requests for Production, S.C. Law., July/August 2006, at 43-44.

"The 'reasonable particularity' requirement is not susceptible to exact definition. What is reasonably particular is dependent upon the facts and circumstances in each case." *Mallinckrodt Chem. Works v. Goldman, Sachs & Co.*, 58 F.R.D. 348, 353 (S.D.N.Y. 1973). "The test for reasonable particularity is whether the request places the party upon 'reasonable notice of what is called for and what is not.'" *St. Paul Reinsurance Co. v. Commercial Fin. Corp.*, 198 F.R.D. 508, 514 (N.D. Iowa 2000) (*quoting Parsons v. Jefferson-Pilot Corp.*, 141 F.R.D. 408, 412 (M.D.N.C. 1992)).

In response to Plaintiff's initial 2013 discovery requests, MUSC produced hundreds of pages of documents, including the entire PACU Record for Mr. Mikell. Notably, Plaintiffs' discovery did not specifically request documents relating to the Mayday Form, Unrecorded Data, AHA Database or audit trail. To read those requests to cover those documents would be to permit plaintiffs to use vague discovery requests to unduly burden defendants and require them to produce any document that could conceivably have any potential relevance to a case. Far from being abusive, MUSC gave the original requests a reasonable construction and produced all the information it had in Mr. Mikell's medical record. The *additional* information sought by Plaintiff should not be read as being within his overly broad requests and interrogatories. MUSC did exactly what it was obligated to do. It produced documents reasonably within the scope of Plaintiff's discovery and supplemented discovery when Plaintiff sought more information in follow up. Contrary to the trial judge's reading of Plaintiff's initial discovery, MUSC was not under an initial obligation to produce every document that Plaintiff might eventually want in the case.

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

B. <u>There Is No Evidence Supporting a Finding of Conduct Warranting Sanction</u>

"In determining the appropriateness of a sanction, the court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice." *Griffin Grading & Clearing, Inc. v. Tire Service Equip. Mfg. Co.*, 334 S.C. 193, 199, 511 S.E.2d 716, 719 (Ct. App. 1999). "Discovery sanctions are imposed 'to penalize those whose conduct may be deemed to warrant such a sanction, and to deter those who might be tempted to such conduct in the absence of such a deterrent.'" *Creighton v. Coligny Plaza Ltd. P'ship*, 334 S.C. 96, 123, 512 S.E.2d 510, 524 (Ct. App. 1998) (citation omitted).

As detailed below, Plaintiff proffers no evidence that MUSC engaged in culpable conduct warranting sanction. To the contrary, MUSC has undertaken herculean efforts to obtain and

produce all relevant documents; Plaintiff's main complaint is that none of these efforts disclosed evidence that would help his baseless claims. One MUSC witness testified at trial about the efforts he undertook:

> Q: Now, how many hours, during the discovery process in this case, how many hours have you spent trying to determine whether Mr. Mikell's anesthesia record was unchanged?
>
> A: I spent approximately about 500 hours in the last six months.
>
> Q: Why did you do that?
>
> A: I believe when the legal printout documentation from PICIS was presented to Mr. Ransom, he had proposed that the values were modified. And so knowing that the database was unmodifiable, we wanted to see if that was, in fact, true or not.
>
> Q. And what was your final conclusion?
>
> A. That the data was not modified in any manner.

(*See* R. pp. 1090:20-1091:8). In other words, far from engaging in a cover-up, MUSC expended significant resources to fully disclose all potential evidence to Plaintiff.

1. <u>Mayday Form</u>

As discussed in detail above, the record is clear that MUSC initially believed that no Mayday Form had been created for Mr. Mikell's arrest, since Mr. Mikell was in an operating room with anesthesia staffing at the time. Dr. Guldan testified to that interpretation of the Policy, which was a logical interpretation. There is no evidence that, at the time of Dr. Guldan's deposition, MUSC had any reason to doubt his testimony in that regard.

Following Dr. Guldan's deposition, in response to Judge Stilwell's Order, MUSC designated Sheila Scarborough, RN, MSN, Director of Risk Management, to testify about the Mayday Form and the policies governing same. On July 23, 2015 (more than a month before her deposition), MUSC disclosed to Plaintiff's counsel that, after further investigation, "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." (*See* R. pp. 528-30). Specifically, Nurse Scarborough testified that she would normally use Mayday Forms entered data into the AHA Database and that a Mayday Form might have been used to enter Mr. Mikell's information, though she would no longer have the document if she used it. (*See* R. pp. 557-60).

The record simply does not disclose any sanctionable misconduct regarding the Mayday Form.

2. AHA Database Information

On August 20, 2015, after it learned of the possible use of the Mayday Form to input data into the AHA Database, MUSC produced pages reflecting the information that Nurse Scarborough input into the AHA Database. (*See* R. pp. 217-18 and 294-320). Unfortunately, this information was not then in a readable format, so Nurse Scarborough could not testify about it. MUSC was later able to convert the AHA Database information into a human-readable format, and promptly produced the same to Plaintiff's counsel on or about December 2, 2015, not long after it had produced the original AHA Database information. (*See* R. p. 51).

Plaintiff presents no evidence to show that any delay in producing an easily readable copy of AHA Database information was the product of any culpable conduct. To the contrary, when MUSC obtained or learned new information, it promptly disclosed same to Plaintiff.

3. PACU Record Unrecorded Data ("Glitch" and Backup Data)

In response to Plaintiff's original discovery requests, on May 17, 2013, MUSC produced almost 400 pages of Mr. Mikell's complete PACU Record. (*See* R. pp. 485-91, 675-79 (including pages of the PACU Record)). From day one, Plaintiff was on notice that this record did not contain certain blood oxygen saturation recordings for several time periods, *i.e.,* the Unrecorded Data. Plaintiff did not examine Nurse Embrey specifically about the Unrecorded Data at her first deposition on August 26, 2014. By September of 2015, MUSC discovered why the Unrecorded Data was missing and informed Plaintiff: because of human error, PICIS was not connected to the proper computer for a short period. (*See* R. pp. 414-16 and 569 ¶¶ 7-11). By

December 2, 2015, MUSC was able locate a log of, *inter alia*, text messages relating to the problem using the PICIS system on the date of Mr. Mikell's procedure. (*See* R. p. 35). Plaintiff presents no evidence that MUSC delayed in disclosing any information regarding the Unrecorded Data.

Moreover, regarding the backup of Mr. Mikell's PACU Record (which Plaintiff believed would disclose the Unrecorded Data), there is no evidence of any misconduct by MUSC or prejudice to Plaintiff. MUSC has consistently stated that: (a) it would be prohibitively expensive to pull all the backup data from PICIS, a system that is no longer in use at MUSC, for Mr. Mikell's procedure; and (b) that data would be **identical** to what MUSC has already produced. (*See* R. pp. 51-55, 376-77, and 608-09). By chance, MUSC could ultimately produce *some* of the backup data, which (as predicted) was identical to the PACU Record already produced for Mr. Mikell.

Plaintiff had produced no evidence that MUSC engaged in any blameworthy conduct concerning the Unrecorded Data from the PACU Record.

4. Audit Trail

Regarding the two audit trails that MUSC produced to Plaintiff (on February 27, 2015 and September 21, 2015), there is no evidence that MUSC engaged in any wrongdoing. Plaintiff did not initially specifically request an audit trail. When he did so, MUSC promptly produced that trail. MUSC subsequently produced another audit trail when it located that document. Plaintiff presents no evidence MUSC unreasonably delayed in producing those documents.

5. Other Alleged Discovery Abuses

Plaintiff has not produced a scintilla of any other claimed "discovery abuses" by MUSC. To the contrary, Plaintiff's and the trial judge's perception of abuses was based on speculation and innuendo. The mere fact that MUSC did not initially discover information does not mean it acted with a blameworthy intention. Moreover, the fact that there were some delays in

producing certain information — which often did not exist and had to be derived from MUSC's computer systems — does not suggest any malicious intention.

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

C. There Is No Prejudice to Plaintiff

Additionally, the trial judge erred in imposing almost $90,000 in attorneys' fees on MUSC because there is no evidence that MUSC did anything to prejudice Plaintiff. Plaintiff has not shown that MUSC hid (or attempted to conceal) a "smoking gun" from him or that any of the evidence underlying the Motion for Sanctions was even relevant to this case. Plaintiff obtained every item of evidence he requested (to the extent they existed and could be reasonably obtained and produced):

- There is no specific evidence establishing to a certainty that a Mayday Form existed. The only suggestion that a Form existed comes from the possible use of that card to input data into the AHA Database. That AHA Database information has been provided to Plaintiff.
- Plaintiff has been provided with the AHA Database information in human readable format.
- Plaintiff can present no evidence to contest that, for entirely innocent reasons, there is Unrecorded Data from the PACU Record. That information was omitted because of a user error, and is not available on any backup.
- Plaintiff has been produced with two copies of an audit trail for the PICIS system. That information is accurate and complete.

Because Plaintiff produced no evidence whatsoever of any prejudice from MUSC's alleged conduct, this Court should reverse the trial court's imposition of sanctions.

D. The Sanctions Imposed Are Not Commensurate With MUSC's Fault

Even if the trial judge did not err in imposing sanctions in this case, it is apparent that those sanctions — totaling almost $90,000.00 — were wholly disproportionate to any culpability attributable to MUSC. A court's imposition of sanctions must be commensurate with the punished party's culpability. *See Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 544–45, 489

S.E.2d 679, 683 (Ct. App. 1997) ("[A]ny number of lesser, more narrowly tailored sanctions would have sufficed to protect Karppi's rights while adequately punishing the wrongdoing of Ogden Teck."); *accord Downey v. Dixon*, 294 S.C. 42, 45, 362 S.E.2d 317, 318 (Ct. App. 1987) (sanction should "protect the rights of discovery provided by the Rules").

As set forth herein, any delays in producing information or any unavailable information was not the result of any intentional, willful or abusive conduct by MUSC. To the contrary, the *only* evidence is that MUSC produced documents as soon as it could do so. MUSC initially responded to very broad discovery requests — which did not expressly ask for any of the information underlying the Order for Sanctions to the best of its ability. It supplemented those disclosures when it learned of additional information. There is no evidence that anyone at MUSC ever willfully, intentionally or maliciously withheld any information from Plaintiff or attempted to conceal anything from him. To the contrary, there is no evidence to dispute that any discovery issues were the result of honest mistakes and misunderstandings. Correctly concluding that the substance of his case lacked merit, Plaintiff attempted to manipulate perceived minor discovery issues to gin up outrage against MUSC. There is not a shred of evidence that MUSC engaged in any sanctionable conduct. At most, MUSC made mistakes and was unable to initially locate all the information that Plaintiff would eventually want.

IV. THE TRIAL COURT IMPOSED EXCESSIVE ATTORNEYS' FEES

In addition to the foregoing, even if the trial court properly imposed sanctions on MUSC in the form of attorneys' fees, this Court should substantially reduce the trial judge's award of attorneys' fees, or reverse and remand with instructions to the trial judge to reduce the amount of the award. "There are six factors to consider in determining an award of attorney's fees: 1) nature, extent, and difficulty of the legal services rendered; 2) time and labor devoted to the case; 3) professional standing of counsel; 4) contingency of compensation; 5) fee customarily charged in the locality for similar services; and 6) beneficial results obtained." *Seabrook Island Prop. Owners' Ass'n v. Berger*, 365 S.C. 234, 240, 616 S.E.2d 431, 434–35 (Ct. App. 2005);

accord EFCO Corp. v. Renaissance on Charleston Harbor, LLC, 370 S.C. 612, 621, 635 S.E.2d 922, 926 (Ct. App. 2006). Under these standards, $90,000 was excessive and wholly out of proportion to nature of the actual discovery issues and the work related to same.

1) nature, extent, and difficulty of the legal services rendered: The issues Plaintiff addressed in this straightforward medical malpractice case are not novel. Plaintiff's counsel attempted complicate this case by 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. Despite Plaintiff's best efforts to complicate issues, even the discovery matters were relatively straightforward. Plaintiff obtained most of the information at issue in the Order for Sanctions simply by writing letters to counsel for MUSC. There is no evidence of serial motions required to obtain this information. The skill required to litigate a medical malpractice case is not unique, and this case did not involve any complex legal issues beyond the ken of an experienced attorney in this field.

2) time and labor devoted to the case: The legal work was conducted primarily by Mr. Ransom. Most the time claimed dates back to September of 2014 through the summer of 2015 and pertains to routine discovery that would have been conducted in this case in any event – not because of misleading or false discovery responses by MUSC. Plaintiff has made no showing that he was required to engage in discovery proceedings or depositions beyond those that would have been necessary in this case in any event.

3) professional standing of counsel: MUSC does not dispute that Plaintiff's attorneys are competent counsel of good professional standing. However, those attorneys' lack of understanding of the medical records, particularly electronic medical records, and inability to meaningfully question witnesses on issues relating to medical records created unnecessary discovery on issues that could have been quickly and efficiently explored at the outset.

4) contingency of compensation: In this malpractice case, Plaintiff's counsel's fees were contingent upon his successful settlement or trial of this matter. After a full trial on the merits, a jury returned a verdict for MUSC. Therefore, irrespective of anything that MUSC did or did not

do, Plaintiff's counsel would not receive a fee in this case in accordance with his fee arrangement. Plaintiff has not shown that his counsel, had they not been working on this case, would have been engaged in other work being compensated at the same or higher rates.

5) fee customarily charged in the locality for similar services: The Declaration submitted by Mr. Ransom requested an hourly rate of $450/hour, which the Court reduced to $300/hour. Plaintiff has made no showing that either hourly rate is consistent with the prevailing hourly rates in the community for the same or similar work. MUSC's counsel are compensated at a rate of only $150/hour for this case. MUSC respectfully submits that $150/hour is a more reasonable rate. 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)).

6) beneficial results obtained: Despite all the claimed effort of his attorneys to obtain it, the information at issue (Mayday Form, Unrecorded Data, AHA Card, audit trail) was of limited ultimate value to Plaintiff. Plaintiff cannot show that his ongoing efforts to obtain this information resulted in a discovery that materially changed the case in his favor. Despite making these perceived "cover-ups" the centerpiece of his trial strategy, the jury rightly rejected his claims. In other words, Plaintiff presents no evidence that his attorneys obtained a result in discovery that would warrant a $90,000 attorneys' fee award.

CONCLUSION

Plaintiff's litigation strategy – before both the jury and the trial judge – was to attack MUSC's recordkeeping, rather than the actual quality of care that MUSC provided to Mr. Mikell. The trial judge tried hard to analyze the discovery issues in the case, but in the end the sheer volume of information involved was too overwhelming. Plaintiff succeeded in having the judge focus on the few pieces of mostly irrelevant information that MUSC could not produce, rather than the many thousands of pieces, and multiple layers, of data that it did produce. Through multiple printout formats, audit trails, and exhaustive searches of archived data, Plaintiff received far more information than would ever have been available in a traditional hospital chart. With all due respect to the trial judge, he failed to account, as we ask this Court to do, for the exponentially heightened complexity of the modern electronic medical record and of a litigant's ability to exploit that complexity for strategic advantage.

For the foregoing reasons, this Court should reverse and vacate the trial court's September 28, 2016 Order for Sanctions and October 13, 2016 Order denying Motion to Reconsider. In the alternative, the Court should reduce the amount of attorneys' fees awarded in the above-referenced Orders or remand for a determination of the proper amount of attorneys' fees that should be awarded, with instructions to the trial court.

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July 7, 2017

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 Brief complies with Rule 211(b), S.C.A.C.R.

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