

The Supreme Court of South Carolina

Ex Parte: TLC Laser Eye Centers (Piedmont/Atlanta)
LLC; TLC The Laser Center (Institute), Inc., Appellants,

In Re: John Hollman, Respondent,

v.

Dr. Jonathan Woolfson, individually; Dr. Michael A.
Campbell, individually, Optical Solutions, Inc.; and
Optical Solutions of Bluffton, LLC, Defendants,

Danielle Hollman, Respondent,

v.

Dr. Jonathan Woolfson, individually; Dr. Michael A.
Campbell, individually, Optical Solutions, Inc.; and
Optical Solutions of Bluffton, LLC, Defendants.

Appellate Case No. 2012-210888

ORDER

Pursuant to Rule 204(b) of the South Carolina Appellate Court Rules, this
appeal is hereby certified for review by the South Carolina Supreme Court.

Upon receipt of this order, the Court of Appeals is hereby directed to forward the case file, all records and briefs and any exhibits on file to this Court.



C.J.
FOR THE COURT

Columbia, South Carolina

December 28, 2012

cc:

Steven Edward Buckingham

W. Howard Boyd, Jr.

Stephen R.H. Lewis

Douglas F. Patrick

The Honorable Jenny Kitchings

COVINGTON, PATRICK, HAGINS, STERN & LEWIS, P.A.

Eugene C. Covington, Jr.
Douglas F. Patrick
John A. Hagins, Jr.*
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November 16, 2012

W. Howard Boyd, Jr., Esq.
Steven Edward Buckingham, Esq.
Gallivan, White & Boyd, P.A.
55 Beattie Place, Suite 1200
Greenville, SC 29601

RECEIVED

NOV 27 2012

SC Court of Appeals

RE: Ex Parte: TLC Laser Eye Centers (Piedmont / Atlanta) LLC; TLC The Laser Center (Institute), Inc. - IN RE: John Hollman vs. Dr. Jonathan Woolfson, individually; Dr. Michael A. Campbell, individually; Optical Solutions, Inc.; and Optical Solutions of Bluffton, LLC

Danielle Hollman v. Dr. Jonathan Woolfson, individually; Dr. Michael A. Campbell, individually; Optical Solutions, Inc.; and Optical Solutions of Bluffton, LLC

Appellate Case No. 2012-210888

Gentlemen:

As we discussed on the telephone today, it is my understanding that you have no objection to our submitting supplemental materials to be included in the Record on Appeal in the above-referenced matter. It is further my understanding that your consent is conditioned on the supplemental materials being materials we have cited and argued in our brief and that no new additional materials would be supplemented which would require additional argument by TLC.

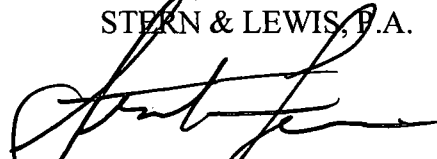
Since Rule 212(b) of the *S.C. Appellate Court Rules* requires written consent of all attorneys of record, I would ask that if this letter conforms to your understanding of our agreement, you sign below where indicated so I can submit the same to the Court of Appeals with the supplemental materials.

November 16, 2012
Page Two

I appreciate your cooperation in this regard, and, should you have any questions or concerns, please do not hesitate to contact me.

Sincerely,

COVINGTON, PATRICK, HAGINS,
STERN & LEWIS, P.A.

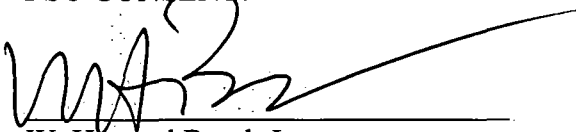


Stephen R.H. Lewis

SRHL:dcs

cc: Douglas F. Patrick
James W. Fayssoux, Jr.
Paul Landis

I SO CONSENT:



W. Howard Boyd, Jr.
Steven Edward Buckingham
***Counsel for Appellants**

COVINGTON, PATRICK, HAGINS, STERN & LEWIS, P.A.

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November 26, 2012

The Honorable Jenny Abbott Kitchings
Clerk of Court, S.C. Court of Appeals
1205 Pendleton Street
Columbia, SC 29201

**RE: *Ex Parte TLC Laser Eye Centers (Piedmont/Atlanta) LLC; and
TLC The Laser Center (Institute), Inc., Intervenor***

In re: John Hollman v. Dr. Jonathan Woolfson, et al.

- AND -

***In re: Danielle Hollman v. Dr. Jonathan Woolfson, et al.
Appellate Case No. 2012-210888***

Dear Ms. Kitchings:

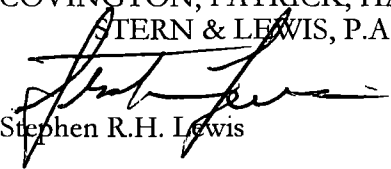
Please find enclosed the original and fourteen (14) copies of the Supplemental Record on Appeal and Proof of Delivery on opposing counsel which we hereby submit to your office. By copy of this letter, we also serve a copy of the same upon opposing counsel.

Also enclosed is an original letter dated November 16, 2012, which has been signed by Howard Boyd on behalf of the Appellants consenting to the submission of the supplemental materials.

Should you have any questions or concerns or need anything further, please do not hesitate to contact me or Deborah Scott in my office.

Sincerely,

COVINGTON, PATRICK, HAGINS,
STERN & LEWIS, P.A.


Stephen R.H. Lewis

SRHL:dcs
Enclosures

cc: W. Howard Boyd, Jr.
Steven E. Buckingham
Douglas F. Patrick

RECEIVED
NOV 27 2012

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Appellate Case No. 2012-210888

RECEIVED

NOV 19 2012

SC Court of Appeals

Ex parte TLC Laser Eye Centers (Piedmont/Atlanta) LLC; and
TLC The Laser Center (Institute), Inc., Intervenor Appellants,

In re: John Hollman Respondent

v.

Dr. Jonathan Woolfson, Individually; Dr. Michael A. Campbell,
Individually; Optical Solutions, Inc.; and Optical Solutions of
Bluffton, LLC Defendants.

In re: Danielle Hollman Respondent,

v.

Dr. Jonathan Woolfson, Individually; Dr. Michael A. Campbell,
Individually; Optical Solutions, Inc.; and Optical Solutions of
Bluffton, LLC Defendants.

**RESPONDENTS' RETURN TO APPELLANTS' MOTION FOR THE
APPELLATE COURT TO ADOPT THE PROTECTIVE ORDER OF
NOVEMBER 14, 2008**

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ATTORNEYS FOR THE RESPONDENTS

November 16, 2012

Greenville, South Carolina

**TO: THE HONORABLE JUDGES OF THE SOUTH CAROLINA
COURT OF APPEALS**

Seldom in the course of litigation---trial or appellate---is there a defining moment where a litigant's entire case is destroyed by its own conduct. Appellants' Motion for Appellate Court adoption of the trial court's November 14, 2008 Protective Order is that rare case.¹

At first glance, the motion makes no sense. At the heart of Appellants' appeal is their desire to have this Court overturn the lower court's interpretation of its own Protective Order. So what order do they seek to have adopted - the lower court's interpretation, their own interpretation or another interpretation to be determined in the future if this Court remands the case to enter an order on Appellants' reconsideration motion? Not surprisingly, the motion is silent on this issue. Other issues exist. For example: How, why, or could this court adopt a Protective Order when the Appellants are seeking to have the lower court's interpretation overturned? While this court most likely will not get to these issues in light of its preliminary issues relating to the timeliness of the appeal, isn't this proposal putting the horse before the cart? Should not this court interpret the order, if necessary, before it endorses the same?

Not only does the current motion make no sense but its timing is suspect but for reasons that disclose further TLC's quandary in trying to hoist an illogical position on this court. If the Appellants really believed that the protective order protected all things and all discovery then they should have filed a motion prior to the

¹ At the outset, it should be noted that although Appellants' motion is inappropriate no matter when filed, it is remarkable and telling that Appellants did not file this Motion in April 2012 when they initiated this appeal.

designation of the record seeking to seal the record. Why did they choose not to do this? The answer is simple. To do that would have required Appellants to specify with particularity all items they sought to protect under their definition of the protective order. Since their real motive is to insulate themselves from their wrongful conduct, this would have required them to try to protect items were produced voluntarily before the protective and items post protective order that they never sought to seal in the lower court proceeding. This would have exposed the absurdity of their position. Appellants have been careful in their briefs to never really say what its interpretation of the protective order would specifically cover, because they hope to get from this court a ruling that insulates wrongful conduct. The procedural highjinx of filing this motion is conduct speaking louder than words.

The answers to the questions raised herein lie in the fundamental truth behind the well-known proverb: "Actions speak louder than words." In their briefs, Appellants appear to be asking this Court to adopt an interpretation of the Protective Order that would provide a cloak of secrecy to their wrongful conduct by making off limits all of Plaintiff's/Respondent's discovery in the Hollman case. But, incredibly, Appellants have litigated two state court cases, one federal court case, made arguments in open court, and filed a Transcript of Record that is a matter of public record, and is replete with documents violative of their proposed interpretation. Either Appellants don't believe their own position or, by their conduct, have engaged in more egregious/intentional violations of the Protective Order than they have claimed to have occurred at the hands of the Plaintiffs/Respondents.

A brief history will shed light on Appellants' "Catch 22" self-imposed predicament. In the Hollman case, the Plaintiff was a TLC LASIK surgery patient who had pre-existing eye conditions (keratoconus) that made surgery an act of malpractice. Unknown to the patient, but known to the Appellants, the surgery caused an eye condition that was incurable and unstoppable (ectasia).

When Hollman filed suit, initial discovery revealed that Hollman was not an isolated case and that TLC had engaged in widespread LASIK surgeries on patients with identical pre-surgery contraindications. Discovery also disclosed that Appellants' response to their wholesale malpractice was the creation of a complex system to avoid responsibility where these injured patients were identified, diagnosed, and carefully monitored without disclosing to the patients their condition or cause. The result was the formation of a secret database which contained crucial medical information/diagnosis that was different from the patient's actual medical records. When Hollman discovered the existence of this database, the court required its production and allowed discovery into its creation, purpose, existence and use. Recognizing that the database and its discovery would involve disclosure of sensitive medical information of other patients, the court (and the parties) put in place a Protective Order whose sole purpose was to protect third party patients' identity while permitting complete examination of Appellants' flagrant and egregious conduct. (TR 334-335)

After the Protective Order, all parties, Appellants included, conformed their conduct in discovery to insure the privacy of third-party patients. In depositions, database materials were redacted to exclude patient identity and witnesses were

advised to refer to patients by numerical designation. (Exhibit “A”, Deposition of Dr. Potter, p. 222). In addition, in his initial discovery Order, Judge Few discussed in detail why the database and other patient medical records were discoverable. In ordering production of patient medical records, the Court identified by name those patients but placed their names under seal. (TR 23-24). Under Appellants’ interpretation of the Protective Order, Judge Few’s entire Order should have been sealed, but, clearly, the Court’s only concern was patient identity, and the rest of the discovery was not subject to confidentiality. As discussed, from that point forward, all parties and the Court conducted the litigation under the same interpretation of the Protective Order---keeping confidential only patient identity.

In all court filed documents where database information was discussed and revealed, the only documents placed under seal were those in which patient names were revealed. All of these actions conformed to paragraph 10 of the Protective Order (TR 32-33) and to the original purpose of the Protective Order which was specifically discussed on the record by parties counsel and Judge Few (TR 334-335). Patient identity has always been the focus of protection by the Court.

After the Protective Order was in place, additional discovery revealed that Appellants violated internal operating procedures to create their database/scheme¹, systematically hid crucial medical information from patients to their harm², and to

¹See SOP’s for Complex Case System (TR 862-866) and undisputed evidence of its violation (TR 595-596)

²See Hollman’s medical records (Exhibit “B”) which do not contain any diagnosis of ectasia or causation versus TLC’s internal Complex Case document (TR 859) wherein diagnosis and cause are documented. Also, see Affidavit of Dr. Randleman addressing similar issues as to patients Dickerson, and Luce (Exhibit “C”) and Affidavit of Dr. Williams confirming injury to potentially 40 other patients (names withheld per Protective Order) (Exhibit “D”).

avoid the consequence of their actions after the Hollman court permitted discovery into its conduct, Appellants engaged in wholesale attempts to destroy the evidence.³

Late in the Hollman litigation things began to spiral out of control for Appellants. They were forced into bankruptcy and settled the Hollman case. Litigation was filed in Federal Court seeking to provide to TLC database patients their own medical information.⁴ Lawsuits from other TLC patients facing devastating visual problems and corneal transplantation were brought.⁵

As a result, Appellants decided that their best defense was to go on the offense. After they settled the Hollman litigation, which involved the dismissal of Hollman's spoliation motion and Appellants' Sanction Motion, Appellants filed another sanctions motion which was based upon a new interpretation of the Protective Order. This interpretation was designed to prevent any disclosure of their wrongful conduct by having all evidence returned to them so it could be destroyed. To accomplish this, Appellants proposed a new definition of confidential health information that would expand the Protective Order to include any discovery, pre or post Protective Order that in any way touched on issues relating to the database or Appellants' conduct. In essence, Appellants attempted to engage the lower court as a co-conspirator in their wrongful conduct. Fortunately, the lower court refused. It reviewed the purpose and intent of creating the Protective Order, looked at the clear

³See Plaintiff/Respondent's Spoliation Brief (Exhibit "E"). Appellant has never filed any evidence to refute these allegations.

⁴Charles Benjamin "Ben" Dickerson, on behalf of himself and all others similarly situated vs. TLC The Laser Eye Center (Institute), Inc., et al. (U.S. District Court Case #: 6:10-CV-00685-JMC)

⁵Charles Benjamin "Ben" Dickerson and Gale M. Dickerson vs. TLC The Laser Center (Institute), Inc., et al. (SC Court of Common Pleas C.A. No.: 2010-CP-23-9954) AND Michael "Chad" Luce vs. TLC The Laser Center (Institute), Inc., et al. (SC Court of Common Pleas C.A. No.: 2010-CP-23-9956)

conduct of the parties during discovery where confidentiality was limited to patient identity and interpreted its own Protective Order appropriately.

The matter appeared to be ended. Appellants chose not to appeal and decided to fight their battles in other pending cases (see Footnote 5) where disclosure and use of the database was being pursued. However, serious setbacks in those cases caused Appellants to rethink their strategy.⁶ It needed to find a way to prevent discovery of their conduct by building a wall around its wrong doing. The Hollman Protective Order was their only avenue. They tried to resurrect the issues and, when those attempts were denied, filed this appeal.

In their initial brief (App Brief 33-36), Appellants attempt to vaguely define confidential health information to include all discovery. This definition is so vague as to lose all meaning. When Hollman, in its initial brief, correctly pointed out that Appellants' lower court conduct in both discovery and court filings supported a more narrow interpretation of the definition of confidential health information and was in one accord with the lower court ruling, Appellants, in their reply brief, offered the confusing explanation that they did all they could do (reply brief 21-22). Of course, the explanation completely ignored the provisions of the Protective Order which established a procedure for placing confidential health information under seal (Protective Order ¶10 / TR 32-33), a procedure that Appellants, Hollman, and the court had used to protect patient identity only.

⁶In the Dickerson and Luce cases, TLC lost its initial Motion to Dismiss (TR 102-153). It was only after this Order was filed that TLC began demanding that the Hollman court issue an Order denying TLC Reconsideration Motion - a motion which ended with the dismissal of Hollman over 4 months earlier.

Then, after all briefs were filed and its transcript of record completed, Appellants suddenly realized the inconsistency of its appellate position. In essence, Appellants are faced with their appellate conduct disproving its appellate words. Appellants' designation of the record is a filing in this Court which is a public record. The documents filed violate their own interpretation of the Protective Order. Appellants have filed lower court transcripts (TR 312-532), lower court briefs (TR 558-691), depositions (TR 886-889), and documents (TR 862-873) that, by their proposed definition of confidential health information, would constitute intentional violations of the Protective Order. If Appellants truly believed their constrained definition of confidential health information, all of these documents should have been filed under seal with the Appellate Court in accord with Protective Order provisions. But consistent with their course of conduct during the litigation, Appellants were adhering to the interpretation of the Protective Order intended by Judge Few and, specifically, discussed on the record, and only sealing documents disclosing patient identity. Appellants never took issue with this interpretation until they needed a broader interpretation to protect their interests in subsequent litigation. In truth, Appellants care nothing for the rights of their patients except to use them as a convenient shield for their conduct that harmed the very patients they claim to protect. The current motion is a true OMG ("oh my gosh") moment reflecting Appellants' recognition that its conduct and words are not consistent.

While the current motion may be a belated attempt by Appellants to get this court's help in extricating the Appellants from their inconsistent positions, there are other and perhaps more illegitimate motives. Contrary to Hollman which is an ended,

inactive case, there are two active cases pending in the lower court, Charles Benjamin “Ben” Dickerson and Gale M. Dickerson vs. TLC The Laser Center (Institute), Inc., et al. (SC Court of Common Pleas C.A. No.: 2010-CP-23-9954) and Michael “Chad” Luce vs. TLC The Laser Center (Institute), Inc., et al. (SC Court of Common Pleas C.A. No.: 2010-CP-23-9956). In these cases, the lower court, when faced with Appellants’ refusal to answer discovery requests concerning their internal conduct in harming their patient and creating the now infamous database has issued a Discovery Order requiring production of the same material produced in Hollman.⁷ In addition, the lower court, perhaps recognizing Appellants’ attempts to expand the Hollman Protective Order interpretation, has issued a Protective Order in Dickerson and Luce which leaves no doubt over its narrow protection for patient identity only.⁸

This motion seeking Appellate adoption of a disputed Protective Order may very well be an attempt by Appellants to control other litigation and litigants by seeking to super impose an Appellate adoption of the Hollman Protective Order over the new Protective Order issued in Dickerson and Luce. The filing of this motion suggests this as a possibility. Of course, the effect, if successful, would be to deny to Dickerson and Luce their due process rights and opportunity for a fair trial.⁹ If, in fact, this is Appellants’ intent, it should, at the very least, have the honesty to tell this

⁷Discovery Order as Exhibit “F”

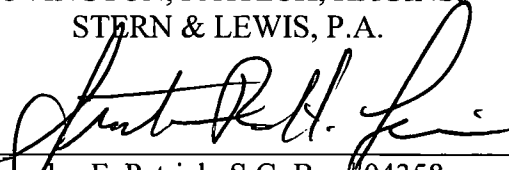
⁸Dickerson/Luce Protective Order dated 11/15/12 as Exhibit “G”

⁹TLC has demonstrated a rather confusing concept of due process in this litigation. In its critical sanction motion, it attempted to sanction lawyers not involved in the Hollman case. In fact, it attempted these sanctions without even serving these lawyers with the sanction motion. When confronted with the due process issue, TLC responded that it just wanted to present its sanction evidence and then the Court could rule the lawyers in the punishment. (TR 365-373)

Court of their intentions rather than trying to make it an unwitting ally in their scheme of perpetual cover up.

Appellants' motion is, at the very least, confusing. Appellants are asking this Court to adopt a Protective Order when, in this appeal, they take issue with its interpretation. Perhaps the confusion is explained by understanding that Appellants find themselves in a self-imposed quandary saying one thing and doing another. Fortunately, "Actions do speak louder than words."

COVINGTON, PATRICK, HAGINS,
STERN & LEWIS, P.A.



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ATTORNEYS FOR THE RESPONDENTS

November 16, 2012

Greenville, South Carolina

EXHIBIT "A"

1 put it in my hand, went back in and specifically
2 modified the notes field to make sure that I
3 included the operating surgeon's name in that
4 record, because there's no drop-down box in ARMS for
5 the surgeon, only the facility.

6 And in particular, like as an example -- And
7 I left Mr. Martin's on top because --

8 Q What I'd -- Yeah.

9 A I -- I'm sorry.

10 Q Well --

11 A I -- I didn't mean to say -- I left ID 34 on
12 top.

13 Q There you go. That would --

14 A Sorry.

15 Q -- be better.

16 A My -- My fault. I left --

17 Q That's okay. We can -- We can -- We'll --
18 We'll delete that if --

19 A Yeah.

20 Q -- we need to.

21 A Thank you. I left ID 34 on top because he
22 had actually had his original surgery in another
23 facility with another TLC doctor.

24 Q Mm-mm.

25 A So I was trying to build the narrative here

EXHIBIT "B"

Patient's Name: Joh Hollman : 6-26-03 PG.

DPA: 2 gtt OD OS OU Paremyd 0.5% T 1.0% T 2.5% P 1.0% C TIME AM/PM
1 gt Fluress OU Reveyes Used Reveyes Refused

Fundus Examination:

Dilated Funduscopy: <input checked="" type="checkbox"/> BIO <input type="checkbox"/> DIRECT <input type="checkbox"/> VOLK-SLE	Undilated Funduscopy: <input type="checkbox"/> DIRECT <input type="checkbox"/> VOLK-SLE
PVD FLOATERS <u>CLEAR</u> 0.1/0.2	CLEAR PVD FLOATERS 0.2/0.2
PINK PALE <u>CLEAR</u>	CLEAR PINK PALE
<u>DISTINCT</u> INDISTINCT	DISTINCT INDISTINCT
< 1/2 1/2 <u>2/3</u> > 2/3	< 1/2 1/2 2/3 > 2/3
<u>RPE Disp</u> <u>DRUSEN</u> <u>CLEAR</u>	CLEAR <u>RPE Disp</u> <u>DRUSEN</u>
L/B S/B <u>+</u> DOV REFLEX	L/B S/B
<u>FLAT/INTACT</u> <u>LATTICE</u>	<u>FLAT/INTACT</u> <u>LATTICE</u>

Physical Examination: Prob. focused (1-5): Expanded Prob. focused (6-8): Detailed (>9): Comp. (all):

Manifest Refraction:

OD: +1.75 - 3.50 x 071 20/25+ Add:
OS: +0.75 - 1.50 x 101 20/25+ Add: PT 4+

Medical Decision Making: A-Assessment of Data and Plan

Final RX: SPH CYL AXIS PRISM ADD
OD: RX=EM
OS: RX=EM
C +1.75 - 3.50 x 071 20/25+
+0.75 - 1.50 x 103 20/25+

Contact Lens Lens Order: <u> </u> Boxes <u> </u> Trials <u> </u>
Contact Type: <u> </u>
Contact RX: OD: <u> </u>
OS: <u> </u>

Diagnoses:
1. CHA ↑ Axial (K-conus?)
2. ocular health good
3. Enhancement, Needed - Custom Lentic?

Management Options:
1. RX=EM
2. PT to go to TLC - Rxedment
3. etc in 1 yr for CER

Other Notes/Drawings/Follow-up/CL Check:
Dr. end time: am pm Total Dr./Pt. face to face time minutes.
Time spent in counseling/coordination of care minutes

Patient Education: Told side effects of dilation Patient/Parent told of plan Given MydSpecs Letter sent to MD

Other Instructions:

Dr. Michael A. Campbell

Dr. Michael A. Campbell

841

Print Doctor's Full Name

Doctor's Signature

HOLL-WOOLFSON
0022

License #

EXHIBIT “C”

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS
C.A. No. 2010-CP-23-_____

Charles Benjamin "Ben" Dickerson)
and Gale M. Dickerson,)
)
Plaintiffs,)

vs.)

AFFIDAVIT OF
J. BRADLEY RANDLEMAN, MD

TLC Corporate)

TLC The Laser Center (Institute), Inc.,)
a/k/a TLC The Laser Center (Piedmont))
Inc., TLC and TLC Vision Corp.,)

TLC Physicians)

Jonathan Woolfson, MD, Jeffery)
Machat, MD, Derek P. Van Veen, OD,)
and Cynthia Wike Yeager, OD, David)
Kohler, OD, and David C. Eldridge, OD,)

TLC Management)

Brian Andrew, Esq., Stacey Anne)
Lerum, Bob May, Esq., and John Potter,)
MD,)

Defendants.)
_____)

I, J. BRADLEY RANDLEMAN, MD, being duly sworn deposes and says:

1. I am a physician engaged in the specialty of ophthalmology. My curriculum vitae is attached as Exhibit A. Ophthalmology involves the study and treatment of the human eye and includes surgical interventions for injuries and diseases of the eye.

2. I am licensed by the State of Georgia (1999). I am Board Certified by the American

Board of Ophthalmology (2005). My board certification requires written and/or oral examinations for certification in the area of practice and specialty (ophthalmology) about which this opinion on standard of care is offered.

3. I have actual professional knowledge and experience in the specialty and area of practice (ophthalmology) in which this opinion is given, as a result of my having been regularly and continuously engaged in the active practice of ophthalmology from 2002 through present. I have additional training and experience beyond Residency training in corneal surgery, including LASIK surgery, and the treatment of corneal disorders and injury including the condition known as ectasia. Specifically, my training and experience in these areas include: 1) Residency in Ophthalmology; 2) Fellowship in Cornea, External Disease, and Refractive Surgery; 3) Clinical Practice consisting of refractive surgery, referral practice for refractive surgery complications, and corneal transplantation, among other things; 4) Investigator in the US FDA Collagen Cross Linking Trial; and, 5) Specific Research focusing on refractive surgery patient screening, diagnosis and management of refractive surgery complications, with special emphasis on corneal ectasia after LASIK. A significant portion of my practice involves the treatment of patients with post LASIK problems and, in particular, the treatment of patients diagnosed with keratectasia which, by definition, is ectasia induced or caused by LASIK surgery.

4. I have professional knowledge and experience in the specialty and area of practice (ophthalmology) in which this opinion is given, as a result of my having been regularly engaged in the teaching of the specialty and area of practice in question as an employed member of the faculty of Emory University School of Medicine from 2002 through present.

5. As it relates to the opinions offered in this affidavit, I was the principal author of a

study published in 2003 that has been widely regarded as the definitive scientific treatise on the risk factors involving ectasia caused by LASIK surgery. Subsequent to this published article, I have periodically, through articles and publications, updated and addressed the issue of LASIK surgery and the development and treatment of surgically induced ectasia.

6. I have been asked by counsel for Ben Dickerson to provide an affidavit which specifies at least one negligent act or omission of Mr. Dickerson's treating physicians named as defendants in the above-captioned action. This affidavit is limited to such purpose, is subject to further discovery being conducted in this matter, and is not intended to be exhaustive of all opinions I may have or develop in this matter.

7. I have been advised by counsel for Ben Dickerson that TLC maintains an internal database which may contain additional medical information relevant to this patient. To the extent this information exists, I have not had access to it or reviewed it, and therefore, the opinions contained herein are independent of any information which might exist in TLC's internal files.

8. This affidavit is made pursuant to *§15-36-100 of the 1976 SC Code of Laws*, which requires that this affidavit must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit.

9. The evidence made available to me, for my review, prior to the making of this affidavit, includes the following:

- a) Medical records of Charles Benjamin Dickerson, inclusive of relevant diagnostic tests and studies;
- b) My examination and treatment of Mr. Dickerson as a patient from 2008 through present.

10. I have reviewed the evidence submitted to me and, based upon my expertise, as set forth above, it is my opinion to reasonable degree of medical certainty that the defendant physicians in the above-captioned action committed the following negligent acts and/or omissions which constituted a failure to comply with the appropriate standard of care:

- 1) **Violations of standard of care involving the 1998 LASIK surgery.** This surgery was approved by the TLC screening optometrist and performed by Dr. Jonathan Woolfson at the TLC Surgery Center in Greenville, SC:
 - a) Performance of LASIK surgery when the patient had abnormal topographies and documented thin corneas. These conditions were contraindications for the LASIK surgery performed;
 - b) The failure to inform the patient of the specific risk factors for elective LASIK surgery posed by his abnormal pre-surgery topographies and thin corneas.
- 2) **Violations of standard of care post 1998 LASIK surgery and prior to 1999 LASIK surgery.** Treatment performed by TLC optometrist at the local surgery centers and approved by TLC optometrists at TLC Vision (USA) Corp.:
 - a) The failure to diagnose and/or document the patient's surgically induced injuries (ectasia);
 - b) The recommendation to the patient to have LASIK enhancement surgery when he was not a candidate for surgery due to his ectasia.
- 3) **Violations of standard of care involving the 1999 LASIK Surgery.** The surgery was approved by TLC screening optometrist and performed by Dr. Machat at the TLC facility in Windsor Canada:
 - a) The performance of LASIK surgery. The patient's original topographic studies pre-original LASIK combined with his post LASIK topographical studies and his reduced corneal thickness, all were contraindications for LASIK enhancement surgery;
 - b) The misinterpretation of pre-enhancement diagnostic studies (Orbscan) as normal when these studies were abnormal and, therefore, served as an additional contraindications to performing LASIK enhancement surgery;

- 4) **Violations of standard of care post 1999 LASIK enhancement surgery:**
- A) The follow-up care through 2000 was performed by TLC optometrist at the local TLC surgery center:
- (1) The failure to diagnose the patient's condition of LASIK induced ectasia when the patient was examined on October 12, 2000;
 - (2) The failure to inform the patient of his medical condition of ectasia and its cause;
 - (3) The failure to recommend to the patient appropriate treatment for his surgically induced condition of ectasia;
- B) The medical review of Dickerson's medical information from 2005 forward was conducted by Drs. Van Veen and Potter:
- (1) The failure to diagnose the patient's condition of LASIK induced ectasia when the patient's chart was reviewed in 2005;
 - (2) The failure to inform the patient of his medical condition of ectasia and its cause;
 - (3) The failure to recommend to the patient appropriate treatment for the condition of ectasia;

11. The factual basis for my opinion based upon the available evidence is:

- a) Review of 1998 pre-surgery topographical maps revealed abnormalities that substantially increased the risk of serious post surgery complications inclusive of the development of keratectasia (surgically caused ectasia). Specifically, central keratometry values above 47.2 D and inferior steepening of greater than 3 diopters were both contraindications for surgery. The findings in these topographies were recognized in 1998 as contraindications for surgery;
- b) Review of the patient's pre-surgery central corneal thickness (pachymetry readings of 507 microns right eye and 506 microns left eye. These corneal thickness represent significantly below normal measurements which, when coupled with the abnormal topographies, were in 1998 as contraindication for surgery;
- c) A review of the informed consent documents and the surgeon/optometrist pre-surgery consultations fails to reveal any

documented discussion and/or acknowledgment of the risk factors recited above. Therefore, the patient was not provided sufficient information from which to make an informed decision about having LASIK surgery;

- d) Review of the medical records from the 1998 LASIK surgery until the 1999 LASIK enhancement surgery revealed that the patient was developing keratectasia (surgically caused ectasia);
- e) A review of the topographies and orbiscans taken prior to the 1999 LASIK enhancement surgery demonstrate worsening abnormalities that, in conjunction with the pre-1998 surgery topographies, made the patient a non-candidate for enhancement surgery;
- f) In addition, the documented pachymetry reading pre-1999 LASIK enhancement confirms an abnormal thinning of the cornea as compared with the pre-1998 cornea condition. This further thinning of the cornea caused by the ablation and removal of corneal tissue in the original surgery was an additional reason for the patient's non-candidacy for the 1999 enhancement surgery;
- g) A review of the pre and post 1999 surgery records reveals that the surgeon (Machat) documented significant diagnostic abnormalities which were known contraindication for LASIK but failed to appreciate the condition of the patient's right cornea and, in fact, provided to the patient inaccurate and misleading information. This information falsely relayed to the patient that his cornea was appropriate for LASIK enhancement and, specifically, ruled out conditions which the diagnostic testing confirmed the patient had (ectasia). As a result, the patient was not capable of making an informed decision about surgery;
- h) A review of the patient's medical records for follow-up care by TLC optometrists in 2000 confirms the patient progressive ectasia injuries but the records do not reflect an accurate diagnosis of this condition nor any treatment recommendations. Therefore, there is no evidence that the patient was informed of the severity of his condition or its cause;
- i) The review of the patient's medical records shows that these records were retrieved by Dr. Van Veen and sent to Dr. John Potter. A review of the patient's medical records would have confirmed the above violations of appropriate care and the lack of notification by TLC to the patient of his true condition and cause. This is

particularly true given the significant scientific studies done from 2000-2005 concerning LASIK ectasia. The physicians' duty upon review of the medical records would have included prompt notification and disclosure to the patient. If this had been done, the documented evidence of the patient's corneas establishes that the patient had viable treatment options, including cross linking both eyes which would have, most likely, arrested the progression of the patient's ectasia and prevented the need for corneal transplantation.

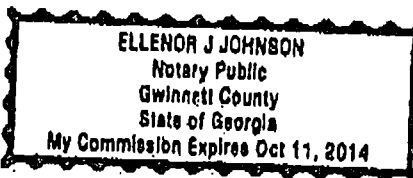
12. These violations of the standard of care have proximately caused injuries and damages to the Plaintiff which may be summarized as:

- a) Ectasia both eyes - caused by LASIK surgeries of 1998 and 1999;
- b) Appropriate diagnosis and treatment options being withheld from the patient well beyond 2005, precluding collagen cross linking treatment for his right eye, resulting in corneal transplant surgery for the right eye and reduced probability of success of cross linking in the left eye arresting the progression of ectasia. Therefore, patient is at an increased risk that his ectasia in the left eye will require corneal transplantation surgery. As of October 2005, the patient's topographical studies confirm he remained a viable candidate for treatment of and stabilization of his ectasia which, to a reasonable degree of medical certainty, would have prevented the need for corneal transplant surgery in both the right and left eye.

J. Bradley Randleman MD
J. Bradley Randleman, MD

SWORN to before me this 17 day of November, 2010

[Signature]
Notary Public for Atlanta, Georgia
My Commission Expires: October 11, 2014



STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE)

C.A. No. 2010-CP-23-_____

Michael (Chad) Luce,)

Plaintiffs,)

vs.)

TLC Corporate)

AFFIDAVIT OF
J. BRADLEY RANDLEMAN, MD

TLC The Laser Center (Institute), Inc.,)
a/k/a TLC The Laser Center (Piedmont))
Inc., TLC and TLC Vision Corp.,)

TLC Physicians)

Jonathan Woolfson, MD, Derek P.)
Van Veen, OD, and Cynthia Wike)
Yeager, OD,)

TLC Management)

Brian Andrew, Esq., Stacey Anne)
Lerum, Bob May, Esq., and John Potter,)
MD,)

Defendants.)

_____)

I, J. BRADLEY RANDLEMAN, MD, being duly sworn deposes and says:

1. I am a physician engaged in the specialty of ophthalmology. My curriculum vitae is attached as Exhibit A. Ophthalmology involves the study and treatment of the human eye and includes surgical interventions for injuries and diseases of the eye.

2. I am licensed by the State of Georgia (1999). I am Board Certified by the American Board of Ophthalmology (2005). My board certification requires written and/or oral examinations

for certification in the area of practice and specialty (ophthalmology) about which this opinion on standard of care is offered.

3. I have actual professional knowledge and experience in the specialty and area of practice (ophthalmology) in which this opinion is given, as a result of my having been regularly and continuously engaged in the active practice of ophthalmology from 2002 through present. I have additional training and experience beyond Residency training in corneal surgery, including LASIK surgery, and the treatment of corneal disorders and injury including the condition known as ectasia. Specifically, my training and experience in these areas include: 1) Residency on Ophthalmology; 2) Fellowship in Cornea, External Disease, and Refractive Surgery; 3) Clinical Practice consisting of refractive surgery, referral practice for refractive surgery complications, and corneal transplantation, among other things; 4) Investigator in the US FDA Collagen Cross Linking Trial; and, 5) Specific Research focusing on refractive surgery patient screening, diagnosis and management of refractive surgery complications, with special emphasis on corneal ectasia after LASIK. A significant portion of my practice involves the treatment of patients with post LASIK problems and, in particular, the treatment of patients diagnosed with keratectasia which, by definition, is ectasia induced or caused by LASIK surgery.

4. I have professional knowledge and experience in the specialty and area of practice (ophthalmology) in which this opinion is given, as a result of my having been regularly engaged in the teaching of the specialty and area of practice in question as an employed member of the faculty of Emory University School of Medicine from 2002 through present.

5. As it relates to the opinions offered in this affidavit, I was the principal author of a study published in 2003 that has been widely regarded as the definitive scientific treatise on the risk

factors involving ectasia caused by LASIK surgery. Subsequent to this published article, I have periodically, through articles and publications, updated and addressed the issue of LASIK surgery and the development and treatment of surgically induced ectasia.

6. I have been asked by counsel for Chad Luce to provide an affidavit which specifies at least one negligent act or omission of Mr. Luce's treating physicians named as defendants in the above-captioned action. This affidavit is limited to such purpose, is subject to further discovery being conducted in this matter, and is not intended to be exhaustive of all opinions I may have or develop in this matter.

7. I have been advised by counsel for Chad Luce that TLC maintains an internal database which may contain additional medical information relevant to this patient. To the extent this information exists, I have not had access to it or reviewed it, and therefore, the opinions contained herein are independent of any information which might exist in TLC's internal files.

8. This affidavit is made pursuant to *§15-36-100 of the 1976 SC Code of Laws*, which requires that this affidavit must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit.

9. The evidence made available to me, for my review, prior to the making of this affidavit, includes the following:

- a) Medical records of Michael (Chad) Luce, inclusive of relevant diagnostic tests and studies;
- b) My examination and treatment of Mr. Luce as a patient;
- c) Affidavit of Chad Luce dated July 14, 2010.

10. I have reviewed the evidence submitted to me and, based upon my expertise, as set forth above, it is my opinion to reasonable degree of medical certainty that the defendant physicians in the above-captioned action committed the following negligent acts and/or omissions which constituted a failure to comply with the appropriate standard of care:

- 1) **Violations of standard of care involving the May 27, 1999 LASIK surgery.** This surgery was approved by the TLC screening optometrist and performed by Dr. Jonathan Woolfson at the TLC Surgery Center in Greenville, SC:
 - a) Performance of LASIK surgery when the patient had abnormal topographies and documented thin corneas. These conditions were contraindications for the LASIK surgery performed;
 - b) Performance of LASIK when the patient had a demonstrable worsening of his topographic findings from 1998 to 1999, which is evidence of keratoconus and a contraindication for LASIK;
 - c) The failure to inform the patient of the specific risk factors for elective LASIK surgery posed by his abnormal pre-surgery topographies and thin corneas.
- 2) **Violations of standard of care after 1999 LASIK surgery:**
 - A) The follow-up care through 2005 was performed by TLC optometrists at the local TLC surgery center:
 - (1) The failure to inform the patient of his medical condition of ectasia and its cause when the patient was examined 12/2003 despite the fact that the diagnosis of "ectasia" was written in the medical record;
 - (2) The failure to recommend to the patient appropriate treatment for his surgically induced condition of ectasia;
 - B) The medical review of Mr. Luce's medical information from 2005 forward was conducted by Drs. Van Veen and Potter:
 - (1) The failure to diagnose the patient's condition of LASIK induced ectasia when the patient's chart was reviewed in 2005;

- (2) The failure to inform the patient of his medical condition of ectasia and its cause;
- (3) The failure to recommend to the patient appropriate treatment for his surgically induced condition of ectasia.

11. The factual basis for my opinion based upon the available evidence is:

- a) Review of 1998 and 1999 pre-surgery topographical maps revealed abnormalities that substantially increased the risk of serious post surgery complications inclusive of the development of keratectasia (surgically caused ectasia). Furthermore, there is a notable progression (worsening) in the topographic abnormalities from 1998 to 1999; the findings in these topographies were independently recognized in 1999 as contraindications for surgery and progression of topographic abnormality was an additional recognized contraindication;
- b) A review of the informed consent documents and the surgeon/optometrist pre-surgery consultations fails to reveal any documented discussion and/or acknowledgment of the risk factors recited above. Therefore, the patient was not provided sufficient information from which to make an informed decision about having LASIK surgery;
- c) A review of the patient's medical records for follow-up care by TLC optometrists in 2003 confirms the patient progressive ectasia injuries but the records do not reflect an accurate diagnosis of this condition nor any treatment recommendations. Therefore, there is no evidence that the patient was informed of the severity of his condition or its cause;


A review of the patient's medical records from 2/3/05 confirms that the patient sought an enhancement and was denied due to "corneal instability" but that the term ectasia was not used in this note, suggesting that the true reason for the patient's problems were being withheld from him;

- d) The review of the patient's medical records shows that these records were retrieved by Dr. Van Veen and sent to Dr. John Potter. A review of the patient's medical records would have confirmed the above violations of appropriate care and the lack of notification by TLC to the patient of his true condition and cause. This is particularly true given the significant scientific studies done from 2000-2005 concerning LASIK ectasia. The physicians' duty upon

review of the medical records would have included prompt notification and disclosure to the patient. If this had been done, the documented evidence of the patient's corneas establishes that the patient had viable treatment options, including cross linking both eyes which would have, most likely, arrested the progression of the patient's ectasia.

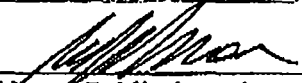
12. These violations of the standard of care have proximately caused injuries and damages to the Plaintiff which may be summarized as:

- a) Ectasia both eyes - caused by LASIK surgery of 1999;
- b) Appropriate diagnosis and treatment options being withheld from the patient well beyond 2005, precluding collagen cross linking treatment for his right eye, resulting in corneal transplant surgery for the right eye and reduced probability of success of cross linking in the left eye arresting the progression of ectasia. Therefore, patient is at an increased risk that his ectasia in the left eye will require corneal transplantation surgery. As of October 2005, the patient's topographical studies confirm he remained a viable candidate for treatment of and stabilization of his ectasia which, to a reasonable degree of medical certainty, would have improved the outcome of corneal collagen cross linking



 J. Bradley Randleman, MD

SWORN to before me this 17 day of November, 2010



 Notary Public for Atlanta, Georgia
 My Commission Expires: October 11, 2014

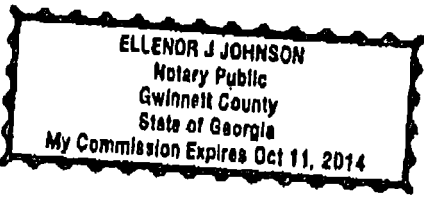


EXHIBIT “D”

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS

AFFIDAVIT OF EXPERT WITNESS

John Hollman,)
)
Plaintiff,)
)
vs.)
)
Dr. Jonathan Woolfson, et al.,)
)
Defendants.)

C.A. No.: 2007-CP-23-2347

Danielle Hollman,)
)
Plaintiff,)
)
vs.)
)
Dr. Jonathan Woolfson, et al.,)
)
Defendants.)

C.A. No.: 2007-CP-23-8364

George E. Carter, Jr. and Jean)
Carter,)
)
Plaintiffs,)
)
vs.)
)
Nimmons, et al)
)
Defendants.)

C.A. No.: 2007-CP-23-7587

Bradley B. Williams, MD, being duly sworn deposes and says:

I am a board certified ophthalmologist currently practicing at Southern Eye Associates in Greenville, South Carolina. Ophthalmology is the medical specialty which involves the care and treatment of diseases of the eye.

I graduated from Medical University of South Carolina, College of Medicine in 1981 and completed the required specialty training in ophthalmology at Medical College of Georgia Hospitals in 1986. I have been actively engaged in the practice of ophthalmology since that time.

As an integral part of my practice, I began photo therapeutic refractive surgery in 1997 and progressed to LASIK surgery and continued until 2002. I am knowledgeable concerning the standard of care in the performance of LASIK surgery, including the standard of care in determining a patient's candidacy or suitability for LASIK procedures. I brought the first corneal topography to Greenville, South Carolina in 1997.

I have been retained as an expert in the medical specialty of ophthalmology by Douglas F. Patrick on behalf of John Hollman and Wally Fayssoux on behalf of George Carter. I have reviewed the medical records of John Hollman and George Carter. Included in these medical records were pre-surgery color topographies of Hollman's and Carter's corneas. These topographical maps demonstrated that both patients had inferior steepening of the corneas consistent with a diagnosis of forme fruste keratoconus. In summary, both patients had substantially similar medical conditions. At the time of their respective LASIK surgeries, forme fruste keratoconus was a known contraindication of LASIK surgery and, therefore, performing LASIK on Mr. Carter on May 14, 1998 and Mr. Hollman on July 10, 1999, November 22, 1999 and June 26, 2001 was a breach of the standard of care.

By 1998, it was known that performing LASIK surgery on forme fruste keratoconus patients would substantially increase the risk of the patient developing loss of vision, corneal instability and/or ectasia. Following the LASIK surgeries performed on Carter and

Hollman, both patients developed ectasia which was caused by the surgery.

At the request of the Plaintiffs and subject to court imposed confidentiality requirements, I have reviewed a substantial number of medical records of patients who, like the Plaintiffs, had LASIK surgery performed through the Defendant TLC. Although the medical records, both pre and post surgery, were incomplete, a significant number of patients had color pre-surgery topographies and clinical exams upon which a standard of care opinion could be made with a reasonable degree of medical certainty.

It is my opinion that the LASIK surgery performed on the patients listed in **Exhibit A** constituted a breach of the standard of care because each patient had pre-surgery topographical findings of inferior corneal steepening consistent with forme fruste keratoconus. Again, while the post surgery medical records are incomplete, each patient listed in **Exhibit A** developed post surgery loss of vision, corneal instability or ectasia caused by the LASIK surgery. It is my opinion that the patients listed in **Exhibit A** had substantially similar pre-surgery conditions as that of Hollman and Carter, suffered substantially similar breaches of the standard of care, namely contraindicated LASIK surgery, and incurred injury as a result of the surgery as did Hollman and Carter.

I have reviewed a significant number of medical records that were incomplete and/or did not contain pre-surgery color topographies. Some of these medical charts had black and white topographies which would prove that color topographies were performed and should be a part of the patient's medical record consistent with standard medical practice. The patients listed in **Exhibit B** all had black and white topographies in their medical records and all patients had post LASIK surgery injury consistent with the patients having

pre-surgery inferior corneal steepening and forme fruste keratoconus. In these patients, the color topographies would be the best evidence to confirm the existence of pre-surgery inferior steepening and forme fruste keratoconus and thus a breach of the standard of care. These records may exist with the patient. In the absence of their existence a complete history from the patient and more complete medical records, including post surgery topographies, could permit relevant opinions on breach of standard of care, injury and injury causation.

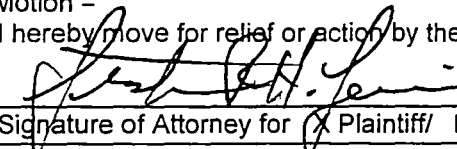
Finally, listed on **Exhibit C** are patients whose medical records are either non-existent or so significantly incomplete that opinions could not be rendered on issues of breach of standard of care. As in those patients listed in **Exhibit B**, obtaining additional medical records and patient interviews could provide sufficient information from which opinions as to breach of standard of care, injury and causation could be made.

Bradley Williams MD
Bradley Williams, MD

SWORN to before me this 13 day of February, 2009.

Sheri A. Garrett
Notary Public for South Carolina
My Commission Expires: 10/30/2013

EXHIBIT "E"

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	)	IN THE COURT OF COMMON PLEAS Case No. 2007-CP-23-2347
John Hollman, X Plaintiff	)	MOTION INFORMATION AND CIVIL COVER SHEET
v.)	
Dr. Jonathan Woolfson, et al. <input type="checkbox"/> Defendant.)	
Plaintiff's Attorney: Douglas F. Patrick and Stephen R.H. Lewis SC Bar No: 04359 (Patrick) / 12947 (Lewis) Address: 211 Pettigru Street, Greenville, SC 29603 Phone: (864) 242-9000 Fax: (864) 233-9777 Email: dpatrick@covpatlaw.com slewis@covpatlaw.com	Defendants' Attorneys: Ronald G. Tate, Jr. Howard Boyd SC Bar No: Address: P.O. Box 10589, Greenville, SC 29603 Phone: (864) 271-9580; FAX: (864) 271-7502 Email: rtate@gwblawfirm.com Attorneys for Defendants TLC The Laser Center (Institute) Inc. and TLC The Laser Eye Centers (Piedmont/Atlanta) LL	
<input checked="" type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I AND III) <input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II AND III)		
SECTION I: Hearing Information		
Nature of Motion: Motion for Protective Order Due to Spoliation of Evidence Estimated Time Needed: _____ Court Reporter Needed: <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO		
SECTION II: Motion Type		
<input checked="" type="checkbox"/> Written motion attached <input type="checkbox"/> Form Motion - I hereby move for relief or action by the court as set forth in the attached proposed order.		
 _____ Signature of Attorney for <input checked="" type="checkbox"/> Plaintiff/ <input type="checkbox"/> Defendant	<u>7/21/10</u> Date Submitted	
SECTION III: Motion Fee		
<input checked="" type="checkbox"/> PAID - AMOUNT - \$25.00 <input type="checkbox"/> EXEMPT: (check reason)		
<input type="checkbox"/> Rule to Show Cause in Child or Spousal Support <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input type="checkbox"/> Post - Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRPC) <input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ <input type="checkbox"/> Other: Consent Order		
JUDGE'S SECTION		
<input type="checkbox"/> Motion fee to be paid upon filing of the attached order. <input type="checkbox"/> Other: _____	JUDGE CODE: _____ Date: _____	
CLERK'S VERIFICATION		
Date Filed: _____ Collected by: _____		
<input type="checkbox"/> MOTION FEE COLLECTED: _____ <input type="checkbox"/> CONTESTED - AMOUNT DUE: _____		

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF GREENVILLE JUL 2) PM 3:34

FILED - COURT OF COMMON PLEAS
GREENVILLE)
Civil Action No. 2007-CP-23-2347
John Hollman,)
Plaintiff,)
)
vs.)
)
Dr. Jonathan Woolfson, et al,)
)
Defendants.)

**MOTION FOR A PROTECTIVE ORDER
DUE TO SPOILIATION OF EVIDENCE
AND MEMORANDUM IN SUPPORT**

_____)
)
Danielle Hollman,)
)
Plaintiff,) Civil Action No. 2007-CP-23-8364
)
vs.)
)
)
Dr. Jonathan Woolfson, et al,)
)
)
Defendants.)
_____)

PLEASE TAKE NOTICE that the Plaintiffs, by and through their undersigned counsel, do hereby move this Court for an immediate Order to prevent further spoliation of evidence relevant to the litigation in this matter by TLC Laser Centers, Piedmont/Atlanta LLC and TLC The Laser Center (Institute), Inc. (hereinafter collectively referred to as "TLC") and for sanctions against TLC for spoliation and destruction of critical evidence to this litigation. This Motion is based on the pleadings filed and memorandum of law incorporated herein. TLC is now a party back in front of this Court seeking sanctions against the Plaintiffs (the merit of TLC's Motions for Order and Rule to Show Cause and For Sanctions is addressed in Plaintiffs' Motion to

Enforce Settlement and For Sanctions). Since TLC has voluntarily appeared as a party before this Court, Plaintiffs believe that due to TLC's past undisputed conduct of intentionally destroying evidence crucial to Plaintiffs' case, this Court has the authority to impose sanctions for such conduct and requests it do so based on the following grounds.

SPOILIATION OF EVIDENCE

TLC provided LASIK eye surgery to its patients. From 1998 - 2003 TLC surgeons performed numerous LASIK surgeries on patients who had known contraindications for surgery, namely pre-surgery keratoconus, subclinical keratoconus or forme fruste keratoconus. The complications arising from these improper surgeries were severe. Many patients developed, as a consequence of surgery, a condition known as ectasia. Ectasia is a progressively worsening vision instability leading to profound vision loss which cannot be cured. To restore vision, many patients must undergo corneal transplants.

As increasing numbers of ectasia cases were discovered, TLC embarked on a risk management plan grounded in deceit and fraud. Essentially, (1) TLC withheld medical information from the patient; (2) promised future medical treatment it knew not to be appropriate; (3) delayed treatment; (4) created a separate file on its patients without their knowledge and/or consent; (5) used the patients' medical information against them and their interests; and/or (6) paid for ancillary costs (glasses, contacts, examinations) under a representation that those payments would continue for life when in fact, TLC planned to discontinue payments when the risk posed by that patient ended. The goal of this institutional scheme was to prevent malpractice claims from being filed within a patient's statute of

limitation. When delay was successful, TLC would withdraw payments, abandon the patient and/or offer nominal settlements.

In order to accomplish the goal of risk avoidance via fraud, TLC created an intricate system to monitor and control patients. TLC used an existing Complex Case System to compile data without the patient's consent and/or knowledge. In principle, the Complex Case System was designed to assist patients with surgery complications but its SOP required patient notification and consent.

"...The referring doctor must obtain and provide a current signed Release of Information.." [Excerpts of Complex Case SOP - Full Text - EXHIBIT A]

However, when TLC corrupted the Complex Case System to further its fraudulent scheme, patient consents were not obtained and the records developed were considered non-patient records and not for patient review.

A: No. Complex Case forms are not for patients --

A: - to see.

Q: So if John Hollman said, I want to see my complex case form, to the extent he might even know that there was one, but if he said, I want to see the complex case information being submitted to the company; would TLC allow him to see that?

A: No.

[Potter Deposition: P 120, L 2-11]

In addition, TLC created a separate "Advocacy Program" for management and control of "high risk patients". A management level employee, Dr. John Potter, was put in charge. None of the records created under this system were part of the patient's medical records.

Q: - in there. But if I understand correctly, none of these e-mails sent from one physician to the other, or from one employee - or from one person affiliated with TLC to the other, is - is part of his medical record, they are internal correspondence of TLC.

A: Yes.

[Potter Deposition: P 136, L 22 - P 137, L3]

These two processes contained vital information highly relevant to TLC's scheme of fraudulent and improper risk avoidance. For example, the diagnosis and treatment options found in the "private files" differed from the medical information and treatment recommendations in the patient's medical records. Incredibly, TLC has acknowledged that from 2003 forward, the Complex Case system and the Advocacy Program were used in anticipation of litigation - litigation it anticipated and planned for while withholding the medical basis for claims from its own patients.

Answer 2: TLC would clarify that the "advocacy group" to which this request refers, operates under TLC's in-house general counsel, and its purpose is to facilitate the dissemination of legal counsel and advice in anticipation of litigation.

Answer 4e: Plaintiff's case was never designated as a "complex case," either as part of the complex case process or in accordance with the Complex Case SOP...The use of this form was for convenience purposes to report to TLC general counsel...This document is work product created in anticipation of litigation.

[Excerpts of Discovery Responses filed in Hollman vs. TLC, et al., CA# 2007-CP-23-2347 - Full Text - EXHIBIT B]

While discovery of documents were vigorously opposed by TLC when production was forced by the court, those documents were literally "smoking gun" admissions.

Complex Case Form: "John Hollman...7/28/03...ectasia OU...likely keratoconus pre-operatively. Progression of corneal irregularity - may have been increased post operatively." [Excerpt of Complex Case Form on John Hollman produced over objections of TLC in Hollman v. TLC et al, CA# 2007-CP-23-2347 - Full Text EXHIBIT C]

Obviously, evidence of this nature is crucial to the prosecution of the Plaintiff's cause of action for fraud in the present litigation. However, as has been discovered in the companion litigation filed in South Carolina Circuit Court, TLC has embarked on a "shred and delete" campaign designed to cover its tracks.

Dr. John Potter, Vice President of Clinical Services, was assigned the task of damage control.

A: *..And we have a medical malpractice insurance provider that, you know, we have to deal with.*

A: *We have premiums that we pay, and so general counsel in his wisdom said, Let's learn more about ectasia, I want to know more. And he assigned me to do it, and I was happy to do it. And I learned a great deal and I still use what I learned from that project today.*

[Potter Deposition: P 167, L 12-21]

According to TLC General Counsel, his function related exclusively to preparing for litigation or avoiding litigation.

Affidavit of Brian L. Andrew:

#5. *The "advocacy group" is organized and operates under the direction and control of the General Counsel's office.*

#6. *The "advocacy group's" activities are carried out in anticipation of litigation...*

[Excerpt of Affidavit of Brian L. Andrew in Hollman v. TLC, et al., CA# 2007-CP-23-2347 - Full Text - EXHIBIT D]

Dr. Potter has acknowledged that from the outset he has systematically destroyed evidence.

A: *What I do, and have done for years, is begin a day with a folded piece of paper like this. I'll make notes of my conversations with patients or whatever. At the end of the day I shred this and I start over with the next day.*

Q: *Why would you do that?*

A: *Well, it's private information. It's about patients and I don't want it to be just lying around. So I get rid of it.*

Q: *Okay. And – And so by shredding it, whatever those conversations may have been, the documentation of those is – any documentation of that, then, is destroyed.*

A: *Yeah.*

[Potter Deposition: P 78, L15 - P. 79, L3]

[Relating to his pattern of conduct from 2003 - 2008]

A: *Well, yeah, I shredded them.*

Q: *Shredded what?*

A: *All the records that I had.*

[Potter Deposition: P 224, L 4-8]

*[Relating to his conduct in January 2008]*¹

The Complex Case and Advocacy data collected from patient files (medical records) and the interaction and handling of this information by TLC representatives was kept in central databases which were then merged into a single database.

A: ...Certainly consolidate the – certainly consolidate the – the ability to get the data into one place...we – we still need the separation of advocacy and in complex case.

[Webb Deposition: P 31, L 22-23; P 32, L 1-2]

This database had crucial information relevant to TLC's improper activities.

In addition to shredding documents, Dr. Potter has engaged in a systematic corruption of this data by deleting and/or modifying the information when its potential for production in litigation appeared likely.

The creator of this computer data system, Alan Webb, has acknowledged that it can be modified effectively destroying prior information without recourse, meaning that once changed, no one could determine what those changes were. The old data could not be retrieved. In that instance, the only evidence of modification would be a computer entry showing the last date modified.

A: And those fields are always at the bottom of any screen of information. So they know, or any user knows that's looking at that information when it was created and – and who made the last modification to it.

A: – just wouldn't know exactly what had been modified.

Q: And does it narrow down to the particular field that was modified?

A: No, it does not.

Q: Just the record has been modified and you don't know exactly where in the record it's been modified.

A: That's correct.

¹ This action was filed by John Hollman in October 2006. Therefore, a substantial amount of Dr. Potter's "shredding" activity occurred when litigation was pending.

[Webb Deposition: P 157, L 9-13; P 159, L 3-7 and 10-13]

Hollman filed this suit on **October 12, 2006**. The database collecting all existing data in Complex Case and Advocacy as it relates to John Hollman was **modified by Dr. John Potter on December 2, 2006**. **There is no way to tell what was done.**

<i>Advocacy Table rmModified By</i>	<i>Advocacy Table rmDateModified</i>
<i>jpotter arms</i>	<i>12/2/2006</i>

From October 2007 through December 2007, the scope of Hollman's State Court case changed dramatically. TLC had inadvertently produced emails alerting Hollman's attorneys to the existence of numerous similar cases and a concerted effort to manipulate patients and patient records. This culminated in December 2007 when Hollman filed a Motion To Amend his complaint to allege fraud and contemporaneously sought expanded discovery of other patients, together with Complex Case and Advocacy Data.

TLC's response was immediate. During late January 2008 through February 2008, Dr. Potter entered the individual database on 230 patients in Advocacy and modified each in ways impossible to trace!

Later, from June 2008 until early October 2008, this Court held hearings and orally confirmed to all parties that the Advocacy and Complex Case Databases were discoverable. A formal Order was entered on November 14, 2008.

Again, TLC's response was immediate. Between the time of the first hearing and the entry of the Order, Dr. Potter entered the individual databases on 344 additional patients in Advocacy and modified each in ways impossible to trace! Over 95% of these changes were done over a two day period!

In total 574 databases on individual patients were spoliated and cannot be recovered!

The Plaintiff in the present litigation seeks an Order preventing further spoliation of evidence and severe sanctions for spoliation which has already occurred and substantially prejudiced the Plaintiff's ability to prosecute his case.

LEGAL ANALYSIS

Spoliation is the "destruction or material alteration of evidence or...the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation". *Nucor Corp. v. Bell*, 251 FRD 191 (DCSC 2008). Citing *Silvestri v. General Motors Corp.*, 271 F.3rd 583, 590 (4th Cir., 2001).

Sanctionable spoliation of evidence occurs only when three prerequisites are met. First, the altered or destroyed evidence must have been relevant to the litigation. (Citation omitted). Second, the party must have been under a duty to preserve the evidence at the time it was altered or destroyed. (Citation omitted). ...Finally, the spoliating party must have acted with the requisite level of intent, which varies depending on the sanction imposed.

Silvestri v. General Motors Corp., 271 F.3rd 583, 590 (4th Cir., 2001)

1. Evidence destroyed was relevant to the litigation

Dr. Potter deleted and/or modified information contained in the Complex Case and Advocacy databases in such a way that the modifications could not be tracked. The databases contained important information regarding the diagnosis and treatment of the TLC patients. More importantly, the databases contained notes and comments reflecting internal information exchanged by the patients' doctors and TLC corporate personnel. The Plaintiffs have alleged that the Defendants used these databases to further their deceptive and fraudulent activity. The data and information contained in the databases is evidence relevant to TLC's improper conduct. In addition, Dr. Potter admitted to shredding any and all documents containing his notes of

conversations with patients who were included in the Complex Case and Advocacy databases. The Plaintiffs have alleged that the Defendants made representations to them that were untrue, deceitful, and fraudulent. Dr. Potter's notes regarding conversations with these patients is clearly relevant to the litigation.

The non-spoliator does not have to show that the evidence would have been favorable to his case; it is enough to show that the evidence naturally would have elucidated a fact at issue.

Vodusek v. Bayliner Marine Corp., 71 F.3d 148 (4th Cir., 1995).

There is no question that information contained in a database designed to gather critical data on each patient would elucidate a fact at issue in this litigation. Similarly, Dr. Potter's notes regarding his discussions with patients who were included in the Complex Case and Advocacy databases would shed light on a number of issues in this case, not the least of which is whether Dr. Potter made misrepresentations to these patients. Therefore, the Plaintiffs have easily made the requisite showing that the altered or destroyed evidence was relevant to the litigation.

2. **Dr. Potter had a duty to preserve the evidence**

A party has a duty to preserve evidence during litigation and at any time "before the litigation when a party should reasonably know that the evidence may be relevant to anticipated litigation".

Nucor, Id., 194 (citing, *Kronisch v. United States*, 150 F.3d 112, 126 (2^d Cir., 1998)).

TLC has acknowledged that from 2003 forward, the Complex Case system and Advocacy program were used in anticipation of litigation. This evidence clearly demonstrates that Dr. Potter, as an employee of TLC, anticipated litigation prior to the time he modified the databases and destroyed his handwritten notes of conversations with patients.

3. **Dr. Potter acted with the requisite intent to destroy the evidence**

Dr. Potter's testimony clearly shows an intention to destroy the evidence by both shredding his notes regarding any conversations he had with patients who were in the database, as well as the systematic deletion and modification of information contained in the database. Dr. Potter's own testimony demonstrates he intended to shred his conversation notes and, in fact, made it a daily practice. In addition, the databases themselves clearly show that modifications and deletions were made following Plaintiffs' counsel's allegations of fraud and expanded discovery to obtain the Complex Case and Advocacy data. Such conduct is *prima facie* evidence of his intent to destroy critical data and information relevant to the litigation he anticipated.

CONCLUSION

The court's ability to impose sanctions for spoliation stems from its "inherent power to control the judicial process and litigation". Citing, *Silvestri v. General Motors Corp.*, 271 F.3d 583 (4th Cir., 2001).

The power "is limited to that necessary to redress conduct 'which abuses the judicial process.'" Citing, *Silvestri v. General Motors Corp.*, 271 F.3d 583 (4th Cir., 2001). Accordingly, "the applicable sanction should be molded to serve the prophylactic, punitive, and remedial rationales underlying the spoliation doctrine". Citing, *Silvestri v. General Motors Corp.*, 271 F.3d 583 (4th Cir., 2001).

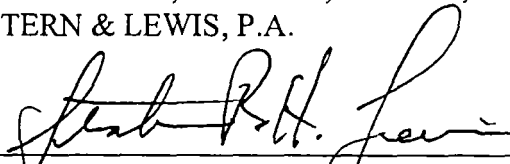
Nucor Corp. v. Bell, 251 FRD 191 (DCSC, 2008).

TLC's past conduct clearly warrants immediate action by this Court. Plaintiffs seek an immediate Order to prevent further spoliation of evidence. The Plaintiffs further request that TLC be sanctioned severely for the intentional spoliation of critical evidence that has already

occurred. Only the enunciation of significant sanctions will deter future spoliation. Finally, the Plaintiffs request further relief as this Court may deem appropriate.

Respectfully Submitted,

COVINGTON, PATRICK, HAGINS,
STERN & LEWIS, P.A.



Douglas F. Patrick, S.C. Bar #04358
Stephen R.H. Lewis, S.C. Bar #012947
P.O. Box 2343
Greenville, SC 29602
(864) 242-9000

ATTORNEYS FOR PLAINTIFFS

July _____, 2010

Greenville, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS

2010 JUL 21 PM 3:34

John Hollman,)
)
Plaintiff,)

Civil Action No. 2007-CP-23-2347

vs.)

CERTIFICATE OF SERVICE

Dr. Jonathan Woolfson, et al,)
)
Defendants.)

_____)
Danielle Hollman,)
)
Plaintiff,)

Civil Action No. 2007-CP-23-8364

vs.)

Dr. Jonathan Woolfson, et al,)
)
Defendants.)

I did this date serve a copy of Plaintiffs' Motion For a Protective Order Due to Spoliation of Evidence and Memorandum in Support upon counsel for Defendants TLC, by hand-delivering a copy of the same in the U.S. mail, with proper postage affixed thereto, and addressed as follows:

Ronald G. Tate, Jr., Esquire
W. Howard Boyd, Jr., Esquire
Gallivan, White & Boyd, P.A.
55 Beattie Place, Suite 1200
Greenville, SC 29601

COVINGTON, PATRICK, HAGINS,
STERN & LEWIS, P.A.



Deborah C. Brooks, Paralegal to
Stephen R.H. Lewis, S.C. Bar #12947
P.O. Box 2343
Greenville, SC 29602
(864) 242-9000

July 21, 2010
Greenville, South Carolina

EXHIBIT "F"

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

2017 SEP 25 AM 8:38

COUNTY OF GREENVILLE

FILED - CLERK
GREENVILLE CO

Charles Benjamin "Ben" Dickerson and Gale M. Dickerson

ORDER

Plaintiffs,

vs.

TLC Corporate

C.A. No. 2010-CP-23-9954

TLC The Laser Center (Institute), Inc., f/k/a TLC The Laser Center (Piedmont), Inc.,

TLC Physicians

Jonathan Woolfson, M.D., Jeffery Machat, M.D., Derek P. Van Veen, O.D., Cynthia Wike Yeager, O.D., John Potter, M.D., and David Kohler, O.D.

Defendants.

- AND -

Michael "Chad" Luce,

Plaintiff,

vs.

TLC Corporate

C.A. No. 2010-CP-23-9956

orig w/10-9954

TLC The Laser Center (Institute), Inc., f/k/a TLC The Laser Center (Piedmont), Inc.

TLC Physicians

Jonathan Woolfson, MD; Derek P. Van Veen, OD; Cynthia Wike Yeager, OD; and John Potter, MD,

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Defendants.

This matter comes before the Court on the combined Motions to Compel filed by the Plaintiffs Michael "Chad" Luce and Charles Benjamin "Ben" Dickerson. The Plaintiffs are seeking to compel responses to Discovery Requests filed on May 9, 2011. According to Plaintiffs, the information sought contains Plaintiffs' own medical information which has been deliberately hidden from them by Defendants and further contains information related to a scheme designed and implemented by Defendants for the specific purpose of preventing their patients from discovering and bringing claims. Plaintiffs further allege that the information sought has been subjected to extensive spoliation. The cases have been combined because the discovery issues are virtually identical.

The Defendants (and in particular, TLC Corporate Defendants) submitted responses and objections to the Discovery Request on April 10, 2012. The objections related to Discovery Requests seeking both production of and information about an internal database created by TLC relating to both the named Plaintiffs as well as other TLC patients. In addition, the Plaintiffs sought production of the medical records of TLC patients similar to the Plaintiffs who were treated at the TLC Laser (Institute) Surgery Center located in Greenville, South Carolina and who were also placed in this database. These Medical records and the database/information was previously produced under a Protective Order in the case of John Hollman vs. Dr. Jonathan Woolfson, et al (2007-CP-23-2347) and has been the subject of considerable contention both in this prior litigation as well as in the currently files cases. Finally, the Plaintiffs sought a current version of the database from which comparison could be made to the originally produced database. In support of this production request, the Plaintiffs claimed relevance due to acts of spoliation and submitted evidence in support of these contentions.



A hearing was held on July 2, 2012. Both in the motion and at the hearing the Plaintiffs acknowledged that production of this information/documents involved confidential health information of TLC patients other than the Plaintiffs and, as a consequence proposed a tiered approach to discovery designed to assist this court in determining the proper scope and application of the discovery sought in light of the privacy rights of patients who are not parties in the litigation.

The Plaintiffs suggested the Court permit production of the database, medical records and information concerning those issues sought by discovery under an appropriate protective order which would permit discovery but would protect the confidentiality of the identity of the other patients. In addition to the production, Plaintiff proposed a period of permitted discovery wherein the parties could examine all issues relating to the database. In this first tier period of discovery, the parties would not be permitted to use the information of the database for the purpose of contacting or deposing patients whose identities are revealed therein. In support of this initial request, the Plaintiffs submitted evidence on the issue of relevance under the discovery rules/standards. The Plaintiffs also noted that the identical issue was previously ruled upon in the prior litigation of Hollman v. Woolfson, and provided to this Court the prior rulings of Judge Few in this litigation.

The second tier would follow an appropriate but limited period of discovery and the Plaintiffs proposed that the parties be allowed to address uses concerning specific relevance and necessity of this information given a more complete record created by the discovery. This would allow the parties or, if necessary, the court to determine the appropriate parameter, if any, for its use in this litigation.

The Defendants argued in their objections to Discovery Requests of the Plaintiffs, in briefs and at the hearing, that the database discovery: 1) had been barred by the Supreme Court ruling in Hollman¹; 2) was not relevant or likely to lead to the discovery of relevant evidence; 3) was prepared in anticipation of litigation; 4) is protected under the work product doctrine; 5) concerns advice of counsel; 6) is protected under the attorney/client privilege; 7) is protected under the doctrine of self-critical analysis; 8) contains trade secrets and/or

¹ Hollman v. Woolfson, 384 SC 571, 683 SE2d 495 (2009).

In addition to relevance, the Defendants proffered numerous objections under doctrines of attorney/client privilege, work product, anticipation of litigation, and self-critical analysis. However, the Defendants failed to offer any evidence in support of any of these positions and, as such, has failed to meet their burden of proof. Specifically, as to the Defendants' claim of privilege, the Court finds the Defendants have not submitted any evidence to substantiate this claim². The Court has reviewed the hearing transcripts and orders of Judge Few in the Hollman litigation and concurs that claims of privilege under the doctrine of work product, anticipation of litigation or peer review do not prohibit discovery of the database or medical records. Furthermore, as mentioned above, Plaintiffs have presented evidence that, in response to a court order in the Hollman case and subsequent to the Hollman decision, the database information has been frequently altered and subjected to extensive spoliation by TLC employees.

Next, the Defendants argue that the information sought by Plaintiffs is not relevant or necessary. Pursuant to Laffitte v. Bridgestone Corp., 381 S.C. 460, 674 S.E.2d 154 (2009), Defendants have the first burden of proof. In order for this Court to impose a burden on Plaintiffs to show that the information sought has particular relevance and is necessary, Defendants must show a basis for confidentiality, such as trade secrets and that a particularized harm that will be caused by allowing the discovery. The Defendants have offered no evidence as to either issue and, as such, have failed to meet their burden of proof.

Even if a need of confidentiality and a particularized harm had been shown by Defendants, Plaintiffs have shown that the information sought is relevant and necessary so as to be discoverable in the first tier of this process. In both cases, Defendants have raised defenses pursuant to applicable statutes of limitation and repose. In response, Plaintiffs argue that South Carolina should follow the majority of jurisdictions that have recognized an exception to the same due to fraudulent conduct specifically designed to prevent potential

²Defendants interposed seven objections to the production of the database but argued only two - work product and peer review. Although the Defendants in this case offered no evidence, the Court is aware of an affidavit of TLC's general counsel produced in the Hollman case. However, that affidavit was contradicted by the testimony of numerous TLC witnesses.

plaintiffs from bringing claims. According to Plaintiffs, the database information is necessary to establish the scheme alleged by Plaintiffs to intentionally mislead patients including Plaintiffs and prevent them from bringing claims. In order for our courts in this State to decide this novel issue of whether such an exception will be recognized, a full factual record must be developed. In that regard, Plaintiffs have shown that the information sought from the database is different than the information contained in the patients' medical records and, in fact, directly contradicts the same. Plaintiffs have presented evidence to support their allegations and have shown that the information they believe is contained within the database does not exist elsewhere.

In this case, the only reason for confidentiality would be privacy concerns of the individual patients. With regard to Plaintiffs' own medical information sought by Plaintiffs, there can be no harm. With regard to the remaining information contained in the database, Plaintiffs have proposed both a tiered approach and in the first tier that the discovery be conducted under seal and subject to a protective order.³ Accordingly, under the tiered approach proposed by Plaintiffs, there will be no discussion of database information or dissemination of the same outside the instant cases.

The information submitted by the Plaintiffs establishes that the information sought is discoverable under the appropriate standards for discovery as are enunciated in the SC Rules of Civil Procedures and case law, and Plaintiffs have proposed a reasonable procedure for the discovery to be performed in a manner that protects the interests of the litigants and any third parties whose information may be revealed through the discovery.

Accordingly, Plaintiffs are entitled to further develop the factual record in this case to obtain the information contained in the database under parameters that ensure any privacy interests are appropriately protected.

³Defendants argue HIPAA bars disclosure. However, HIPAA specifically permits disclosure of confidential health information if controlled by the judicial process. See Judge Few's analysis in the Order in of John Hollman vs. Dr. Jonathan Woolfson, et al (2007-CP-23-2347) dated August 17, 2010.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED THAT:

The Defendants are to fully respond to Discovery Request numbers 8, 9, 24, 29, 30, 2, 25, 26, 27, 28, 31, 32, 33 and 34 in the Dickerson case and numbers 8, 9, 24, 29, 30, 2, 25, 26, 27, 28, 31, 32, 33 and 34 in the Luce case.

In connection with those discovery requests that seek information specific to either Dickerson or Luce, whether within the database or elsewhere, this information is to be produced without limitation or subject to any protective order. In this regard, the Court finds as persuasive the analysis employed by Judge Few in the prior litigation wherein he concluded the litigants' own medical information cannot be withheld on the basis of work product/privilege.⁴

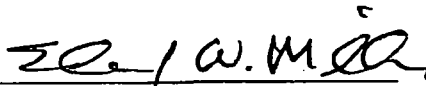
⁴ In this litigation, TLC alleges both work product privilege and peer review. In the Hollman litigation, TLC withdrew its peer review objections which were unsupported by the records. Judge Few's analysis on work product privilege is equally applicable here.

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As to the production of discovery relating to other patients and their medical information, the Court approves the tiered approach to the discovery sought and finds that this discovery shall include production of the database and selected medical records which were previously produced in the Hollman litigation as well as a current version of the "ARMS" database containing all corrections, additions, and deletions that might exist since the database was originally produced in the Hollman matter. The Court further orders that production occur under an appropriate Protective Order which will preserve the confidentiality of the information produced, while permitting discovery for a period of ninety (90) days.⁵ The Protective Order should be jointly prepared by the parties consistent with this Court's ruling. If the parties fail to agree, each side should submit its version to the Court so the Court can enter its Protective Order. The period of discovery shall run from the date of the filing of the Protective Order and production of the required information/documents.

Following the period of discovery, the parties should submit to the Court either a mutual agreeable prepared order on the issues of the necessity and use of this discovery in the current litigation or, failing agreement, the parties should brief their respective position so this Court can decide issues on the specific relevance and necessity of this discovery as it relates to the current litigation.

AND IT IS SO ORDERED.



Honorable Edward W. Miller

Dated: 9-24, 2012

Greenville, South Carolina

⁵ This period of discovery can be extended by mutual consent of the parties if scheduling issues arise.

EXHIBIT "G"

STATE OF SOUTH CAROLINA

FILED CLERK OF COURT
GREENVILLE, S.C.
CASE NO. 2010-CP-23-9954

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE

2012 NOV 15 P 1:30

Charles Benjamin "Ben" Dickerson and
Gale M. Dickerson,

Plaintiffs,

vs.

TLC Corporate

TLC The Laser Center (Institute), Inc.,
f/k/a TLC The Laser Center (Piedmont),
Inc.,

TLC Physicians

Jonathan Woolfson, M.D., Jeffery Machat,
M.D., Derek P. Van Veen, O.D., Cynthia
Wike Yeager, O.D., John Potter, M.D., and
David Kohler, O.D.

Defendants.

- AND -

Michael "Chad" Luce,

Plaintiff,

vs.

TLC Corporate

TLC The Laser Center (Institute), Inc.,
f/k/a TLC The Laser Center (Piedmont),
Inc.

TLC Physicians

Jonathan Woolfson, MD; Derek P. Van
Veen, OD; Cynthia Wike Yeager, OD; and
John Potter, MD,

Defendants.

PROTECTIVE ORDER

C.A. No. 2010-CP-23-9954

C.A. No. 2010-CP-23-9956

Pursuant to Rule 26 (c) of the South Carolina Rules of Civil Procedure and with the consent of the parties, IT IS HEREBY ORDERED that:

WHEREAS, by separate Order the Court has ordered the production of documents that may contain health information of non-parties that may be deemed confidential under applicable law.

WHEREAS, the parties acknowledge and agree that it is appropriate for the Court to provide proper safeguards to protect Confidential Health Information (as defined in paragraph 2 below), which may be disclosed and used for purposes of this action;

WHEREAS, the Court recognizes that requests for the disclosure of documents or other information containing Confidential Health Information necessarily implicate the privacy rights of individuals not parties to this litigation;

WHEREAS, such privacy interests must be protected under applicable federal statutes, rules, regulations, and common law principles (collectively "Governmental Regulations"), including, but not limited to, the privacy regulations promulgated pursuant to the Administrative Simplification provisions of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and privacy statutes, rules, regulations, and common law principles promulgated under South Carolina law (collectively "State Laws");

WHEREAS, the Court finds that the disclosure and use of certain information and documents containing such Confidential Health Information is essential to the litigation of the claims being asserted. The Court further finds that it is not practicable, given the scope of this action, either to give notice of the discovery requests (or an opportunity to consent or object to disclosure) to each and every patient or individual whose health information may be the subject



of the discovery requests or to conduct an in camera review of the requested Confidential Health Information. The Court further finds that it would be unduly burdensome and would further deprive the parties of meaningful access to information if the parties were to attempt to redact all medically related and payment related information that could potentially be used to identify an individual;

WHEREAS, this Order requires that any use or disclosure of Confidential Health Information be made consistent with the terms of this Order and the Order of the Court dated September 24, 2012 and filed September 25, 2012 and the requirements of the South Carolina Rules of Civil Procedure;

WHEREAS, certain limited categories of Confidential Health Information that pertain to certain types of medical conditions or treatment (including, without limitation, records of diagnosis or treatment of alcohol or substance abuse, certain sexually transmitted diseases such as HIV/AIDS, mental health and certain information pertaining to genetic testing) are afforded heightened protection under applicable Governmental Regulations or State Laws, and generally may not be produced under such applicable Governmental Regulations or State Laws even with a qualified protective order absent consent of the parties involved, a good cause determination by a court of competent jurisdiction, and/or other procedural safeguards set forth under the applicable Governmental Regulations or State Laws. The Court finds that the procedures set forth herein for the disclosure and use of Confidential Health Information are reasonable and appropriate to protect against the improper disclosure or unauthorized use of such sensitive Confidential Health Information;

WHEREAS, the public interest outweighs any minimal risk attendant to the disclosure and use of Confidential Health Information in the manner set forth herein; **WHEREAS**, the Court further finds that the procedures set forth herein are adequate to safeguard against the unauthorized use, disclosure, or subsequent dissemination of Confidential Health Information. The Court hereby prohibits the dissemination of Confidential Health Information beyond the parameters established by this Order or use of Confidential Health Information for any purpose other than the prosecution or defense of this litigation;

PROTECTIVE ORDER

1. This Stipulation and Protective Order shall apply to all information or discovery materials produced pursuant to the Court's Order dated September 24, 2012 and filed September 25, 2012, by any party or their agents during the course of discovery in this action, all information derived therefrom, and extracts, copies, excerpts, or summaries thereof, including, without limitation, documents produced pursuant to Rule 33(c) or Rule 34 of the South Carolina Rules of Civil Procedure, answers to requests for admissions, answers to interrogatories, documents subpoenaed in connection with depositions and deposition transcripts (hereinafter referred to collectively as "discovery materials"). The term "documents" as used herein is intended to be comprehensive and includes any and all materials in the broadest sense contemplated by Rule 34 of the South Carolina Rules of Civil Procedure, and shall include all written, oral, recorded, or graphic material, however produced or reproduced, including, but not limited to: all written or printed mater of any kind, including the originals and all nonidentical copies thereof; computer data, all graphic or manual records or representations of any kind; electronic, mechanical, or electric records or representations of any kind.



2. The term “Confidential Health Information,” means, without regard to whether the material has been designated confidential generally or “Confidential Health Information” specifically, any document or information supplied that identifies by name, Social Security number, or address, a patient, and relates to the past, present, or future payment for the provision of health care to such patient, or any document or information supplied that includes medical information and contains the identity of the patient by name, Social Security number or address. The term “Confidential Health Information” specifically includes “protected health information” as such term is defined by the Standards for Privacy of Individually Identifiable Health Information, 45 CFR parts 160 and 164, promulgated pursuant to the Health Insurance Portability and Accountability Act of 1996. 45 CFR sections 164.501 (“protected health information”) and 160.103 (“individually identifiable health Information”). “Confidential Health Information” includes all notes, summaries, compilations, extracts, abstracts, or oral communications that contain, Confidential Health Information as defined herein. All documents and all transcripts, exhibits, and videotapes of any deposition or testimony containing Confidential Health Information as defined herein shall be treated in accordance with this Order without regard to any designation.

3. Confidential Health Information may be disclosed only to the following, and pursuant to the terms and conditions set forth in this Order:

- a. the Court and all persons assisting the Court in this action, including court reporters and necessary stenographic and clerical personnel thereof;
- b. the parties, the parties’ counsel and their partners, associates, paralegals, and clerical and support personnel.

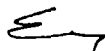


- c. persons retained as consultants or experts for any party and principals and employees of the firms with which consultants or experts are associated;
- d. persons other than consultants or experts who are retained to provide purely administrative assistance to counsel for any party for the purpose of this action, including litigation support services and outside copying services;
- e. the persons listed on the document as authors or recipients (including persons copied on or forwarded the document);
- f. any person who may testify as a witness at a deposition, hearing, mediation, trial, or other proceeding in this action, and for the purpose of assisting in the preparation or examination of the witness; and,
- g. any other person hereafter designated by written stipulation of the parties or by further order of the Court.



4. No Confidential Health Information may be disclosed to any person pursuant to the provisions of paragraph 4 of this Order unless counsel first informs such person that pursuant to this Order the material to be disclosed may only be used for purposes of preparing and presenting evidence in this litigation and must be kept confidential. No Confidential Health Information may be disclosed to any person identified in subparagraphs 4 (c) through (g) of this Order unless such person first is given a copy of this Order and advised that the information contained in the document is Confidential Health Information and informed that an unauthorized disclosure of their information may constitute a contempt of this Court. Each person to whom Confidential Health Information is disclosed pursuant to Paragraph 4 (c), (d), (f) and (g) of this Order shall execute an Acknowledgment in the form attached hereto as "Exhibit A" and shall agree to be bound by this Order prior to receiving any Confidential Health Information. Copies of the executed Acknowledgments, and a log of the materials disclosed to each person executing an Acknowledgment shall be retained by counsel for the party or parties who disclosed the Confidential Health Information to such persons. Copies of all Acknowledgments executed pursuant to this paragraph shall be disclosed to the party who produced or supplied the Confidential Health Information (a) within 30 days after the final resolution of this action (including resolution of all appellate proceedings); (b) within 30 days after settlement with the producing party, or (c) on good cause shown,

5. Counsel for a party may show documents containing Confidential Health Information to a witness during a deposition, hearing, trial or other proceeding without providing prior notice to the party producing the Confidential Health Information. Before doing so, however, the witness shall be shown a copy of this Order and advised that the information contained in the document is Confidential Health Information and informed that an unauthorized



disclosure of such information may constitute a contempt of this Court. The only exception to this requirement is if the witness has previously been authorized to receive Confidential Health Information as specified in paragraph 3. Persons present at a deposition or mediation who are not entitled to receive Confidential Health Information pursuant to the provisions of this Order may be excluded from the room while such deposition or mediation is occurring.

6. Notwithstanding any other provision of this Order, nothing in this Order shall limit: (a) the ability of any party to disclose to any person Confidential Health Information that is a business record of that party; (1,) any defendant's ability to disclose Confidential Health Information that is a business record of that defendant to other defendants or their counsel or to others as the defendant may mutually agree so long as such disclosure complies with the laws of this State and the HIPAA statutes, rules and regulations; (c) any named plaintiff's ability to disclose Confidential Health Information of that plaintiff to other third parties not involved in this litigation.

7. No person, firm, corporation, or other entity subject to this Order shall give, show, disclosures, make available, or communicate Information to any person, firm, corporation, or other entity not expressly authorized by this Order to receive such Confidential Health Information. A party's use for any purpose of its own documents and information which it produces or discloses in this litigation shall not be considered a violation of this Order.

8. Except as may be provided by subsequent Order of this Court: 1) Confidential Health Information shall be used for no purpose other than this litigation; 2) No person who receives, pursuant to this or other Orders of this Court, Confidential Health Information concerning persons who are not parties to the captioned lawsuits (hereinafter "Third Parties") shall directly or indirectly contact or attempt contact with Third Parties or their medical



providers (except those who are parties to these actions); and, 3) No discovery shall be directed to such Third Parties or their medical providers (except those who are parties to these actions) by means of subpoena, request for production, deposition or otherwise.

9. A party shall not be obligated to challenge the classification or propriety of a designation of material as Confidential Health Information or other action under the terms of this Order at the time made, and any failure to do so shall not preclude or act as a waiver of a subsequent challenge thereto. In the event that any party to this lawsuit disagrees at any point in these proceedings with the designation by the producing party of any information as Confidential Health Information or other action under the terms of this Order, the parties shall try first to resolve such dispute in good faith on an informal basis, If the dispute cannot be resolved in this manner, the objecting party may seek appropriate relief from the Court and the producing party asserting confidentiality or defending an action under this Order shall have the burden of proving same to the Court.

10. All documents of any nature, including briefs, motions, appendices, etc., which are filed with the Court for any purpose and which contain information which have been designated Confidential Health Information, shall be filed in sealed envelopes or containers marked with the title of the action and bearing a statement substantially in the following form:

CONFIDENTIAL HEALTH INFORMATION

Filed under seal pursuant to Protective Order governing the confidentiality of documents and information obtained during the course of this litigation. This envelope is not to be opened nor the contents thereof displayed or revealed except by or to qualified persons or by Court order.

11. This Order shall not prevent any discovery materials designated as Confidential Health Information from being used by the Court or counsel of record in any bearing in this



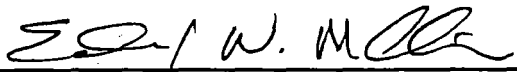
action, or from being received into evidence at trial, subject to such confidentiality measures as the Court may then prescribe.

12. Within sixty (60) days after the conclusion of trial and all appeals or any other termination of this action, all discovery materials designated as Confidential Health Information, including copies, extracts, and summaries thereof, shall be returned to the producing party or destroyed. If such materials are destroyed, the party destroying such materials shall execute a certificate in the form attached hereto as "Exhibit B" certifying such destruction. Additionally, each party shall destroy all work product materials, as such are defined at law, containing or referring to Confidential Health Information, in whatever form, stored or reproduced.

13. Nothing in this Order shall bar or otherwise restrict any attorney representing any of the parties to this lawsuit from rendering advice to his or her client with respect to this lawsuit and in the course thereof relying upon his or her examination of Confidential Health Information.

14. The provisions of this Order are without prejudice to any application by any party to seek future modification of this Order.

AND IT IS SO ORDERED.



Circuit Judge

Dated at Greenville, SC
this ___ day of ~~October~~, 2012.

11/15/12

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Appellate Case No. 2012-210888

Ex parte TLC Laser Eye Centers (Piedmont/Atlanta) LLC; and
TLC The Laser Center (Institute), Inc., Intervenor Appellants,

In re: John Hollman Respondent

v.

Dr. Jonathan Woolfson, Individually; Dr. Michael A. Campbell,
Individually; Optical Solutions, Inc.; and Optical Solutions of
Bluffton, LLC Defendants.

In re: Danielle Hollman Respondent,

v.

Dr. Jonathan Woolfson, Individually; Dr. Michael A. Campbell,
Individually; Optical Solutions, Inc.; and Optical Solutions of
Bluffton, LLC Defendants.

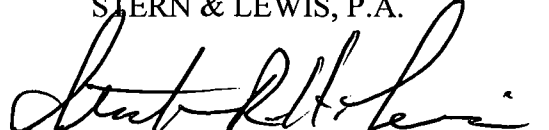
PROOF OF DELIVERY

I hereby certify that I have served a copy of the Respondents' Return to Appellants' Motion for the Appellate Court to Adopt the Protective order of November 14, 2008 on counsel of record for the Appellants as specified below, by

placing a copy of the same in the mail, proper postage affixed thereto, on the 16th day of November, 2012, addressed as follows:

W. Howard Boyd, Jr.
Steven Edward Buckingham
55 Beattie Place / Suite 1200
Greenville, SC 29603

COVINGTON, PATRICK, HAGINS,
STERN & LEWIS, P.A.



Douglas F. Patrick, S.C. Bar #04358
Stephen R.H. Lewis, S.C. Bar #12947
P.O. Box 2343

Greenville, SC 29602

(864) 242-9000 Phone

(864) 233-9777 Fax

dpatrick@covpatlaw.com

slewis@covpatlaw.com

ATTORNEYS FOR THE RESPONDENTS

November 16, 2012

Greenville, South Carolina

COVINGTON, PATRICK, HAGINS, STERN & LEWIS, P.A.

Eugene C. Covington, Jr.
Douglas F. Patrick
John A. Hagins, Jr.*
T. S. Stern, Jr.
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Writer's Direct E-Mail: Slewis@covpatlaw.com
Direct Dial: (864) 240-5518

November 16, 2012

VIA FEDERAL EXPRESS

The Honorable Jenny Abbott Kitchings
Clerk of Court, S.C. Court of Appeals
1205 Pendleton Street
Columbia, SC 29201

**RE: *Ex Parte TLC Laser Eye Centers (Piedmont/Atlanta) LLC; and
TLC The Laser Center (Institute), Inc., Intervenor***

In re: John Hollman v. Dr. Jonathan Woolfson, et al.

- AND -

***In re: Danielle Hollman v. Dr. Jonathan Woolfson, et al.
Appellate Case No. 2012-210888***

Dear Ms. Kitchings:

Please find enclosed the original and one (1) copy of the Respondents' Return to Appellants' Motion for the Appellate Court to Adopt the Protective Order of November 4, 2008, and Proof of Delivery on opposing counsel which we hereby submit to your office.

Should you have any questions or concerns or need anything further, please do not hesitate to contact me or Deborah Scott in my office.

Sincerely,

COVINGTON, PATRICK, HAGINS,
STERN & LEWIS, P.A.


Stephen R.H. Lewis

SRHL:dcs
Enclosures
cc: W. Howard Boyd, Jr.
Steven E. Buckingham
Douglas F. Patrick

RECEIVED

NOV 19 2012

SC Court of Appeals

66145

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

RECEIVED
NOV 06 2012
SC Court of Appeals

Case No. 2007-CP-23-2347

Ex parte TLC Laser Eye Centers (Piedmont/Atlanta) LLC; and
TLC The Laser Center (Institute), Inc. Appellants,

In re:

John Hollman Respondent,

v.

Dr. Jonathan Woolfson, Individually;
Dr. Michael A. Campbell, Individually;
Optical Solutions, Inc.; and Optical
Solutions of Bluffton, LLC Defendants.

Case No. 2007-CP-23-8364

Ex parte TLC Laser Eye Centers (Piedmont/Atlanta) LLC; and
TLC The Laser Center (Institute), Inc. Appellants,

In re:

Danielle Hollman Respondent,

v.

Dr. Jonathan Woolfson, Individually;
Dr. Michael A. Campbell, Individually;
Optical Solutions, Inc.; and Optical
Solutions of Bluffton, LLC Defendants.

MOTION FOR THE APPELLATE COURT TO
ADOPT THE PROTECTIVE ORDER OF NOVEMBER 14, 2008

W. Howard Boyd, Jr. (SC Bar No. 826)
Steven E. Buckingham (SC Bar No. 75089)
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hboyd@gwblawfirm.com
sbuckingham@gwblawfirm.com

*Counsel for Appellants
TLC Laser Eye Centers (Piedmont/Atlanta),
LLC and TLC The Laser Center (Institute), Inc.*

**TO: THE HONORABLE JUDGES OF THE SOUTH CAROLINA COURT
OF APPEALS**

COME NOW the Appellants, TLC Laser Eye Centers (Piedmont/Atlanta) LLC and TLC The Laser Center (Institute), Inc., by and through their undersigned counsel, and pursuant to Rule 240, SCACR, respectfully submit this Motion for the Appellate Court to Adopt the Protective Order of November 14, 2008 (hereinafter referred to as “the Protective Order”). A copy of the Protective Order is attached to this Motion as **Exhibit A.**

During the course of the underlying litigation, Respondents sought discovery of information that pertained to the health and care of individuals who had received medical services at Appellants’ facilities. Despite vigorous opposition from Appellants, the circuit court entered the Protective Order and ordered Appellants to produce the confidential information at issue, which Appellants did, though subject to the Protective Order. Now that the underlying proceedings are on appeal, and in furtherance of a complete record, both Appellants and Respondents have designated materials which are subject to the Protective Order. However, absent an order of protection, the record on appeal is open to the public. Because the interests of protecting confidential information are just as compelling on appeal as they were in the court below, the Protective Order should be extended to these appellate proceedings.

The terms and conditions of the Protective Order speak for themselves. The touchstone for protection under the Protective Order is “Confidential Health Information.” At a minimum, both parties agree that “Confidential Health

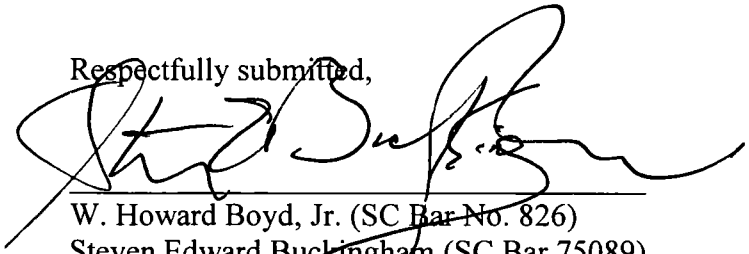
Information” consists of any information that identifies a patient (or provides a basis through which a patient’s identity would be ascertainable through reasonable diligence), coupled with statements about that patient’s health or care.¹ “Confidential Health Information” may not be used for any purpose other than the Hollman litigation, (Protective Order ¶ 8), and it may not be disclosed to any unauthorized person, (Protective Order ¶ 7).

If this motion to adopt the Protective Order is granted, it is Appellants’ understanding that the Order would be enforced by the appellate court to the same extent as the Order is subject to enforcement by the circuit court; that is, any and all documents containing “Confidential Health Information” which are a part of the record on appeal may not be used for any purpose other than this appeal, nor disclosed to any person not authorized to receive the Information.

WHEREFORE, Appellants respectfully request that the Protective Order be adopted by the appellate court. There is good cause for extending protection for Confidential Health Information filed in furtherance of the record on appeal. This motion is supported by the pleadings submitted in connection with the appeal and the applicable rules of law and appellate procedure.

¹ The definition of “Confidential Health Information” is one of the most hotly contested issues in this appeal. Respondents contend that “Confidential Health Information” consists only of health information coupled with patient identity, while Appellants believe that “Confidential Health Information” also includes “all notes, summaries, compilations, extracts, abstracts, or oral communications that contain, are based on, or are derived from Confidential Health Information.” (Protective Order ¶ 2).

Respectfully submitted,



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Greenville, SC

November 5, 2012

Counsel for Appellants
TLC The Laser Center (Institute), Inc. and
TLC Laser Eye Centers (Piedmont/Atlanta)
LLC

EXHIBIT A

2008 NOV 14 P 12:00
FILED CLERK OF COURT
GREENVILLE CO. S.C.
W. WICKENSHER

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS

John Hollman,

Plaintiff,

PROTECTIVE ORDER

vs.

Dr. Jonathan Woolfson, individually, et al,

Defendants.

C.A. No. 2007-CP-23-2347

AND

Danielle Hollman,

Plaintiff,

vs.

Dr. Jonathan Woolfson, individually, et al,

Defendants.

C.A. No.: 2007-CP-23-8364

AND

George E. Carter, Jr. and Jean Carter,

Plaintiffs,

vs.

William T. Nimmons, OD, et al

Defendants.

C.A. No. 2007-CP-23-7587

Pursuant to Rule 26 (c) of the South Carolina Rules of Civil Procedure and with the consent of the parties, IT IS HEREBY ORDERED that:

WHEREAS, discovery materials or information otherwise provided or disclosed by any party to this action may contain confidential, trade secret and/or sensitive proprietary information.

WHEREAS, by separate Order the Court has ordered the production of documents containing health information that may be deemed confidential under applicable law.

WHEREAS, the parties acknowledge and agree that it is appropriate for the Court to provide proper safeguards to protect confidential, trade secret and/or sensitive proprietary information, Confidential Health Information (as defined in paragraph 2 below), which may be disclosed and used for purposes of this action;

WHEREAS, the Court recognizes that requests for the disclosure of documents or other information containing Confidential Health Information necessarily implicate the privacy rights of individuals not parties to this litigation;

WHEREAS, such privacy interests must be protected under applicable federal statutes, rules, regulations, and common law principles (collectively "Governmental Regulations"), including, but not limited to, the privacy regulations promulgated pursuant to the Administrative Simplification provisions of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and privacy statutes, rules, regulations, and common law principles promulgated under South Carolina law (collectively "State Laws");

WHEREAS, the Court finds that the disclosure and use of certain information and documents containing such Confidential Health Information is essential to the litigation of the claims being asserted. The Court further finds that it is not practicable, given the scope of this action, either to give notice of the discovery requests (or an opportunity to consent or object to disclosure) to each and every patient or individual whose health information may be the subject



of the discovery requests or to conduct an in camera review of the requested Confidential Health Information. The Court further finds that it would be unduly burdensome and would further deprive the parties of meaningful access to information if the parties were to attempt to redact all medically related and payment related information that could potentially be used to identify an individual;

WHEREAS, this Order requires that any use or disclosure of Confidential Health Information be made consistent with the terms of this Order and the requirements of the South Carolina Rules of Civil Procedure;

WHEREAS, certain limited categories of Confidential Health Information that pertain to certain types of medical conditions or treatment (including, without limitation, records of diagnosis or treatment of alcohol or substance abuse, certain sexually transmitted diseases such as HIV/AIDS, mental health and certain information pertaining to genetic testing) are afforded heightened protection under applicable Governmental Regulations or State Laws, and generally may not be produced under such applicable Governmental Regulations or State Laws even with a qualified protective order absent consent of the parties involved, a good cause determination by a court of competent jurisdiction, and/or other procedural safeguards set forth under the applicable Governmental Regulations or State Laws. The Court finds that the procedures set forth herein for the disclosure and use of Confidential Health Information are reasonable and appropriate to protect against the improper disclosure or unauthorized use of such sensitive Confidential Health Information;

WHEREAS, the public interest outweighs any minimal risk attendant to the disclosure and use of Confidential Health Information in the manner set forth herein;

WHEREAS, the Court further finds that the procedures set forth herein are adequate to safeguard against the unauthorized use, disclosure, or subsequent dissemination of Confidential Health Information. The Court hereby prohibits the dissemination of Confidential Health Information beyond the parameters established by this Order or use of Confidential Health Information for any purpose other than the prosecution or defense of this litigation;

PROTECTIVE ORDER

1. This Stipulation and Protective Order shall apply to all information or discovery materials produced by any party or their agents during the course of discovery in this action, all information derived therefrom, and extracts, copies, excerpts, or summaries thereof, including, without limitation, documents produced pursuant to Rule 33(c) or Rule 34 of the South Carolina Rules of Civil Procedure, answers to requests for admissions, answers to interrogatories, documents subpoenaed in connection with depositions and deposition transcripts (hereinafter referred to collectively as "discovery materials"). The term "documents" as used herein is intended to be comprehensive and includes any and all materials in the broadest sense contemplated by Rule 34 of the South Carolina Rules of Civil Procedure, and shall include all written, oral, recorded, or graphic material, however produced or reproduced, including, but not limited to: all written or printed matter of any kind, including the originals and all nonidentical copies thereof; computer data, all graphic or manual records or representations of any kind; electronic, mechanical, or electric records or representations of any kind.

2. The term "Confidential Health Information," means, without regard to whether the material has been designated confidential generally or "Confidential Health Information" specifically, any document or information supplied that identifies an individual or subscriber in any manner and relates to the past, present, or future payment for the provision of health care to



such individual or subscriber. The term "Confidential Health Information" specifically includes "protected health information" as such term is defined by the Standards for Privacy of Individually Identifiable Health Information, 45 CFR parts 160 and 164, promulgated pursuant to the Health Insurance Portability and Accountability Act of 1996. See 45 C.F.R. sections 164.501 ("protected health information") and 160.103 ("individually identifiable health information"). "Confidential Health Information" includes all notes, summaries, compilations, extracts, abstracts, or oral communications that contain, are based on, or are derived from Confidential Health Information. All documents and all transcripts, exhibits, and videotapes of any deposition or testimony containing Confidential Health Information shall be treated in accordance with this Order without regard to any designation.

3. Confidential Health Information may be disclosed only to the following, and pursuant to the terms and conditions set forth in this Order:

- a. the Court and all persons assisting the Court in this action, including court reporters and necessary stenographic and clerical personnel thereof;
- b. the parties, the parties' counsel and their partners, associates, paralegals, and clerical and support personnel.
- c. persons retained as consultants or experts for any party and principals and employees of the firms with which consultants or experts are associated;
- d. persons other than consultants or experts who are retained to provide purely administrative assistance to counsel for any party for the purpose of this action, including litigation support services and outside copying services;
- e. the persons listed on the document as authors or recipients (including persons copied on or forwarded the document);

- f. any person who may testify as a witness at a deposition, hearing, mediation, trial, or other proceeding in this action, and for the purpose of assisting in the preparation or examination of the witness; and
- g. any other person hereafter designated by written stipulation of the parties or by further order of the Court.

4. No Confidential Health Information may be disclosed to any person pursuant to the provisions of paragraph 4 of this Order unless counsel first informs such person that pursuant to this Order the material to be disclosed may only be used for purposes of preparing and presenting evidence in this litigation and must be kept confidential. No Confidential Health Information may be disclosed to any person identified in subparagraphs 4 (c) through (g) of this Order unless such person first is given a copy of this Order and advised that the information contained in the document is Confidential Health Information and informed that an unauthorized disclosure of their information may constitute a contempt of this Court. Each person to whom Confidential Health Information is disclosed pursuant to Paragraph 4 (c), (d), (f) and (g) of this Order shall execute an Acknowledgement in the form attached hereto as "Exhibit A" and shall agree to be bound by this Order prior to receiving any Confidential Health Information. Copies of the executed Acknowledgements, and a current log of the materials disclosed to each person executing an Acknowledgement shall be retained by counsel for the party or parties who disclosed the Confidential Health Information to such persons. Copies of all Acknowledgements executed pursuant to this paragraph shall be disclosed to the party who produced or supplied the Confidential Health Information (a) within 30 days after the final resolution of this action (including resolution of all appellate proceedings); (b) within 30 days after settlement with the producing party, or (c) on good cause shown.

5. Counsel for a party may show documents containing Confidential Health Information to a witness during a deposition, hearing, trial or other proceeding without providing prior notice to the party producing the Confidential Health Information. Before doing so, however, the witness shall be shown a copy of this Order and advised that the information contained in the document is Confidential Health Information and informed that an unauthorized disclosure of such information may constitute a contempt of this Court. The only exception to this requirement is if the witness has previously been authorized to receive Confidential Health Information as specified in paragraph 3. Persons present at a deposition or mediation who are not entitled to receive Confidential Health Information pursuant to the provisions of this Order may be excluded from the room while such deposition or mediation is occurring.

6. Notwithstanding any other provision of this Order, nothing in this Order shall limit: (a) the ability of any party to disclose to any person Confidential Health Information that is a business record of that party; (b) any defendant's ability to disclose Confidential Health Information that is a business record of that defendant to other defendants or their counsel or to others as the defendant may mutually agree; (c) any named plaintiff's ability to disclose Confidential Health Information of that plaintiff to other named plaintiffs in this action or their counsel or to others.

7. No person, firm, corporation, or other entity subject to this Order shall give, show, disclosures, make available, or communicate Information to any person, firm, corporation, or other entity not expressly authorized by this Order to receive such Confidential Health Information. A party's use for any purpose of its own documents and information which it produces or discloses in this litigation shall not be considered a violation of this Order.



8. Except as may be provided by subsequent Order of this Court: 1) Confidential Health Information shall be used for no purpose other than this litigation; 2) No person who receives, pursuant to this or other Orders of this Court, Confidential Health Information concerning persons who are not parties to the captioned lawsuits (hereinafter "Third Parties") shall directly or indirectly contact or attempt contact with Third Parties or their medical providers (except those who are parties to these actions); and, 3) No discovery shall be directed to such Third Parties or their medical providers (except those who are parties to these actions) by means of subpoena, request for production, deposition or otherwise.

9. A party shall not be obligated to challenge the classification or propriety of a designation of material as Confidential Health Information or other action under the terms of this Order at the time made, and any failure to do so shall not preclude or act as a waiver of a subsequent challenge thereto. In the event that any party to this lawsuit disagrees at any point in these proceedings with the designation by the producing party of any information as Confidential Health Information or other action under the terms of this Order, the parties shall try first to resolve such dispute in good faith on an informal basis. If the dispute cannot be resolved in this manner, the objecting party may seek appropriate relief from the Court and the producing party asserting confidentiality or defending an action under this Order shall have the burden of proving same to the Court.

10. All documents of any nature, including briefs, motions, appendices, etc., which are filed with the Court for any purpose and which contain information which have been designated Confidential Health Information, shall be filed in sealed envelopes or containers marked with the title of the action and bearing a statement substantially in the following form:

CONFIDENTIAL HEALTH INFORMATION



Filed under seal pursuant to Protective Order governing the confidentiality of documents and information obtained during the course of this litigation. This envelope is not to be opened nor the contents thereof displayed or revealed except by or to qualified persons or by Court order.

11. This Order shall not prevent any discovery materials designated as Confidential Health Information from being used by the Court or counsel of record in any hearing in this action, or from being received into evidence at trial, subject to such confidentiality measures as the Court may then prescribe.

12. Within sixty (60) days after the conclusion of trial and all appeals or any other termination of this action, all discovery materials designated as Confidential Health Information, including copies, extracts, and summaries thereof, shall be returned to the producing party or destroyed. If such materials are destroyed, the party destroying such materials shall execute a certificate in the form attached hereto as "Exhibit B" certifying such destruction. Additionally, each party shall destroy all work product materials, as such are defined at law, containing or referring to Confidential Health Information, in whatever form, stored or reproduced.

13. Nothing in this Order shall bar or otherwise restrict any attorney representing any of the parties to this lawsuit from rendering advice to his or her client with respect to this lawsuit and in the course thereof relying upon his or her examination of Confidential Health Information.

14. The provisions of this Order are without prejudice to any application by any party at any time, upon notice, to seek a modification to or release from any provisions of this Order.

AND IT IS SO ORDERED.

Dated at Greenville, SC
this 14 day of November 2008.


Circuit Judge

9/12

EXHIBIT A

STATE OF SOUTH CAROLINA)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE)	
)	
John Hollman,)	
	)	AGREEMENT TO ABIDE BY
	)	PROTECTIVE ORDER
Plaintiff,	)	GOVERNING CONFIDENTIAL
vs.	)	HEALTH INFORMATION
)	
Dr. Jonathan Woolfson, et al,)	
	)	C.A. No. 2007-CP-23-2347
Defendants.)	
)	
AND)	
)	
Danielle Hollman,)	
)	
Plaintiff,)	
vs.)	
)	
Dr. Jonathan Woolfson, et al,	)	C.A. No. 2007-CP-23-8364
)	
Defendants)	
)	
AND)	
)	
George E. Carter, Jr. and Jean Carter,)	
)	
Plaintiffs,)	
vs.)	
)	
William T. Nimmons, OD, et al,	)	C.A. No. 2007-CP-23-7587
)	
Defendants.)	

I hereby acknowledge that I have read the stipulation and protective order entered in this action, that I have had the terms thereof explained to me by counsel, that I fully understand such terms and that compliance with these procedures is a condition of receipt of confidential health information, that I agree to be bound by such terms and that I voluntarily hereby submit to the

jurisdiction of this court for purposes of this order, which court may impose civil and criminal sanctions against me if I violate this protective order in any way.

Dated: _____

A handwritten signature or set of initials, possibly "AS", written in black ink at the bottom center of the page.

EXHIBIT B

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

)
) IN THE COURT OF COMMON PLEAS

John Hollman,

)
)
) Plaintiff,

)
)
) **CERTIFICATE OF COMPLIANCE**

vs.

Dr. Jonathan Woolfson, et al,

)
)
) Defendants.

)
)
) C.A. No. 2007-CP-23-2347

AND

Danielle Hollman,

)
)
) Plaintiff,

vs.

Dr. Jonathan Woolfson, et al,

)
)
) Defendants

)
)
) C.A. No. 2007-CP-23-8364

AND

George E. Carter, Jr. and Jean Carter,

)
)
) Plaintiffs,

vs.

William T. Nimmons, OD, et al,

)
)
) Defendants.

)
)
) C.A. No. 2007-CP-23-7587

I, _____, counsel for Plaintiff(s), pursuant to the stipulation and protective order entered in this action by the Greenville County Court of Common Pleas, hereby certify that all Confidential Health Information produced by the Defendants have been destroyed.

Dated: _____

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

666145

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2007-CP-23-2347

Ex parte TLC Laser Eye Centers (Piedmont/Atlanta) LLC; and
TLC The Laser Center (Institute), Inc. Appellants,

In re:

John Hollman Respondent,

v.

Dr. Jonathan Woolfson, Individually;
Dr. Michael A. Campbell, Individually;
Optical Solutions, Inc.; and Optical
Solutions of Bluffton, LLC Defendants.

Case No. 2007-CP-23-8364

Ex parte TLC Laser Eye Centers (Piedmont/Atlanta) LLC; and
TLC The Laser Center (Institute), Inc. Appellants,

RECEIVED
NOV 06 2012
SC Court of Appeals

In re:

Danielle Hollman Respondent,

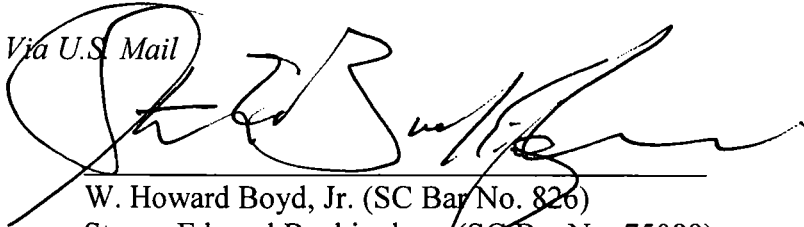
v.

Dr. Jonathan Woolfson, Individually;
Dr. Michael A. Campbell, Individually;
Optical Solutions, Inc.; and Optical
Solutions of Bluffton, LLC Defendants.

PROOF OF SERVICE

I certify that on the 5th day of November, 2012, I served a copy of the Motion for the Appellate Court to Adopt the Protective Order of November 14, 2008 on counsel of record in the above-entitled matters by sending a copy of same by the methods of delivery specified below:

Douglas F. Patrick, Esq.
Stephen R.H. Lewis, Esq.
Covington, Patrick, Hagins, Stern & Lewis, P.A.
211 Pettigru Street
Greenville, SC 29601
Counsel for Respondents – Via U.S. Mail



W. Howard Boyd, Jr. (SC Bar No. 826)
Steven Edward Buckingham (SC Bar No. 75089)
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hboyd@gwblawfirm.com
sbuckingham@gwblawfirm.com

Greenville, SC
November 5, 2012

Counsel for Appellants
TLC Laser Eye Centers (Piedmont/Atlanta) LLC
and TLC The Laser Center (Institute), Inc.

RECEIVED

NOV 06 2012

SC Court of Appeals

Steven Edward Buckingham
A member of the South Carolina Bar
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November 5, 2012

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
Calhoun State Office Building
1015 Sumter Street
Columbia, SC 29201

Ex parte TLC Laser Eye Centers (Piedmont/Atlanta) LLC; and
TLC The Laser Center (Institute), Inc., Intervenor

In re: John Hollman v. Dr. Jonathan Woolfson, et al.
C.A. No.: 2007-CP-23-2347

And

Ex parte TLC Laser Eye Centers (Piedmont/Atlanta) LLC; and
TLC The Laser Center (Institute), Inc., Intervenor

In re: Danielle Hollman v. Dr. Jonathan Woolfson, et al.
C.A. No.: 2007-CP-23-8364

Dear Ms. Kitchings:

Enclosed please find the original and seven copies of the Motion for the Appellate Court to Adopt the Protective Order of November 14, 2008 along with a Proof of Service showing that the Motion has been served on all Respondents. Also enclosed is our check for \$25.00 to cover the filing fee. Please return one copy of the Motion and Proof of Service, stamped as filed, in the enclosed self-addressed stamped envelope. Thank you for your assistance in this matter. Should you have any questions or concerns, please do not hesitate to contact me.

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SC Court of Appeals

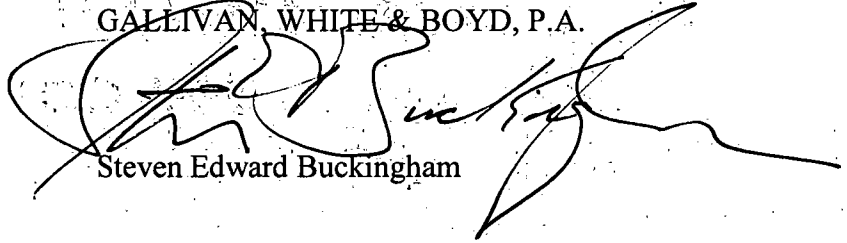
The Honorable Jenny Abbott Kitchings

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November 5, 2012

Respectfully,

GALLIVAN, WHITE & BOYD, P.A.

A large, stylized handwritten signature in black ink, appearing to read 'SEB', is written over the name 'Steven Edward Buckingham'.

Steven Edward Buckingham

SEB/jws

Enclosures

cc: Douglas F. Patrick, Esquire (w/encl.)
Stephen R.H. Lewis, Esquire (w/encl.)

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NOV 06 2012

SC Court of Appeals



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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November 13, 2012

Mr. Steven Edward Buckingham
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Mr. W. Howard Boyd, Jr.
PO Box 10589
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Mr. Stephen R.H. Lewis
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Mr. Douglas F. Patrick
PO Box 2343
Greenville SC 29602

Re: Ex Parte: TLC Laser In Re: John Hollman
Appellate Case No. 2012-210888

Dear Counsel:

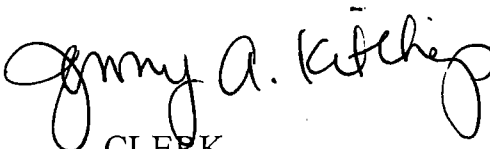
All parties are advised that the originals of all records on appeal and final briefs filed with the appellate courts are scanned. Therefore, in accordance with the May 1, 2008 Amendments to the South Carolina Appellate Court Rules, DO NOT staple, spiral bind, velobind, or otherwise permanently bind the ORIGINALS of these documents. The original brief(s) and record on appeal should still have front

and back covers in compliance with Rule 267(e) of the South Carolina Appellate Court Rules, but should not be bound. You may secure the originals with paper clips, binder clips, rubber bands, by placing them in large envelopes, or by any other similar means that will keep the pages together without binding or hole-punching. All COPIES of the record on appeal and final briefs should be bound as specified in the South Carolina Appellate Court Rules.

We suggest that large parcels such as copies of final briefs and the Record On Appeal be sent directly to the Court via the street address: 1205 Pendleton Street, Columbia, S.C. 29201. Thank you for your attention to this.

If you have any questions, please do not hesitate to contact this office.

Very truly yours,


CLERK



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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November 13, 2012

[DesignatedParty]

Re: Ex Parte: TLC Laser In Re: John Hollman
Appellate Case No. 2012-210888

Dear Counsel:

Upon reviewing your appellant's initial brief, the following deficiency has been noted under the South Carolina Appellate Court Rules (SCACR):

- Any future filings by any party to this appeal must feature the caption below:

Ex Parte: TLC Laser Eye Centers (Piedmont/Atlanta) LLC; TLC The Laser Center (Institute), Inc., Appellants,

In Re: John Hollman, Respondent,

v.

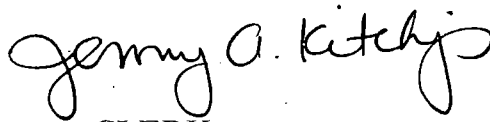
Dr. Jonathan Woolfson, individually; Dr. Michael A. Campbell, individually, Optical Solutions, Inc.; and Optical Solutions of Bluffton, LLC, Defendants.

Danielle Hollman, Respondent,

v.

Dr. Jonathan Woolfson, individually; Dr. Michael A. Campbell, individually,
Optical Solutions, Inc.; and Optical Solutions of Bluffton, LLC, Defendants.

Very truly yours,


CLERK

cc: Steven Edward Buckingham
W. Howard Boyd, Jr.
Stephen R.H. Lewis
Douglas F. Patrick

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2007-CP-23-2347

R
SC COURT OF APPEALS

Ex parte TLC Laser Eye Centers (Piedmont/Atlanta) LLC; and
TLC The Laser Center (Institute), Inc. Appellants,

In re:

John Hollman Respondent,

v.

Dr. Jonathan Woolfson, Individually;
Dr. Michael A. Campbell, Individually;
Optical Solutions, Inc.; and Optical
Solutions of Bluffton, LLC Defendants.

Case No. 2007-CP-23-8364

Ex parte TLC Laser Eye Centers (Piedmont/Atlanta) LLC; and
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In re:

Danielle Hollman Respondent,

v.

Dr. Jonathan Woolfson, Individually;
Dr. Michael A. Campbell, Individually;
Optical Solutions, Inc.; and Optical
Solutions of Bluffton, LLC Defendants.

APPELLANTS' SUPPLEMENTAL DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

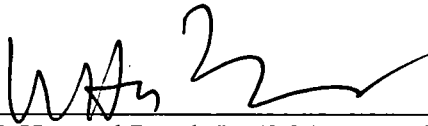
In addition to designated previously made, Appellants propose the following to be included in the Record on Appeal:

1. Order & Opinion of the United States Court of Appeals for the Fourth Circuit of August 15, 2012, Affirming the Dismissal of the Federal Class Action;
2. Order of September 18, 2012, Allowing Respondents' Counsel to File Work Product from Hollman under Seal in Dickerson v. TLC The Laser Center (Institute), Inc. et al., 2010-CP-23-9954, and Luce v. TLC The Laser Center (Institute), Inc. et al., 2010-CP-23-9956;
3. Order of September 25, 2012, Granting Plaintiffs' Motion to Compel in Dickerson v. TLC The Laser Center (Institute), Inc. et al., 2010-CP-23-9954, and Luce v. TLC The Laser Center (Institute), Inc. et al., 2010-CP-23-9956;
4. Transcript of Proceedings of July 2, 2012, pp. 5-15;
5. Motion to Strike of September 28, 2011, in Dickerson v. TLC The Laser Center (Institute), Inc. et al., 2010-CP-23-9954;
6. Motion to Strike of September 28, 2011, in Luce v. TLC The Laser Center (Institute), Inc. et al., 2010-CP-23-9956;

7. Plaintiffs' Motion to Compel of April 25, 2012, in Dickerson v. TLC The Laser Center (Institute), Inc. et al., 2010-CP-23-9954, and Luce v. TLC The Laser Center (Institute), Inc. et al., 2010-CP-23-9956;
8. Plaintiffs' Memorandum of June 27 2012, in Support of the Motion to Compel in Dickerson v. TLC The Laser Center (Institute), Inc. et al., 2010-CP-23-9954, and Luce v. TLC The Laser Center (Institute), Inc. et al., 2010-CP-23-9956 (with selected attachments).

I, the undersigned counsel for Appellants, certify that this designation contains no matter which is irrelevant to this appeal.

Respectfully submitted,



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October 4, 2012

Counsel for Appellants
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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Court of Common Pleas

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Case No. 2007-CP-23-2347

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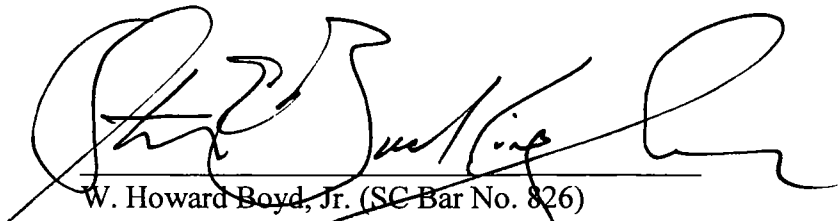
PROOF OF SERVICE

I certify that on the 4th day of October, 2012, I served a copy of the Reply Brief of Appellants and Supplemental Designation of Matter to Be Included in the Record on Appeal on counsel of record in the above-entitled matters by sending a copy of same by the methods of delivery specified below:

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*Counsel for Defendants Michael A. Campbell,
Optical Solutions, Inc. and Optical Solutions of
Bluffton, LLC – Via U.S. Mail*



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October 4, 2012

Counsel for Appellants
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October 4, 2012

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Ex parte TLC Laser Eye Centers (Piedmont/Atlanta) LLC; and
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C.A. No.: 2007-CP-23-2347

And

Ex parte TLC Laser Eye Centers (Piedmont/Atlanta) LLC; and
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In re: Danielle Hollman v. Dr. Jonathan Woolfson, et al.
C.A. No.: 2007-CP-23-8364

Dear Ms. Kitchings:

Enclosed please find the original and one copy of the Reply Brief of Appellants and Supplemental Designation of Matter to Be Included in the Record on Appeal along with a Proof of Service showing that the Reply Brief and Supplemental Designation of Matter have been served on all Respondents. Please return one copy of the Reply Brief and Supplemental Designation of Matter, stamped as filed, in the enclosed self-addressed stamped envelope. Thank you for your assistance in this matter. Should you have any questions or concerns, please do not hesitate to contact me.

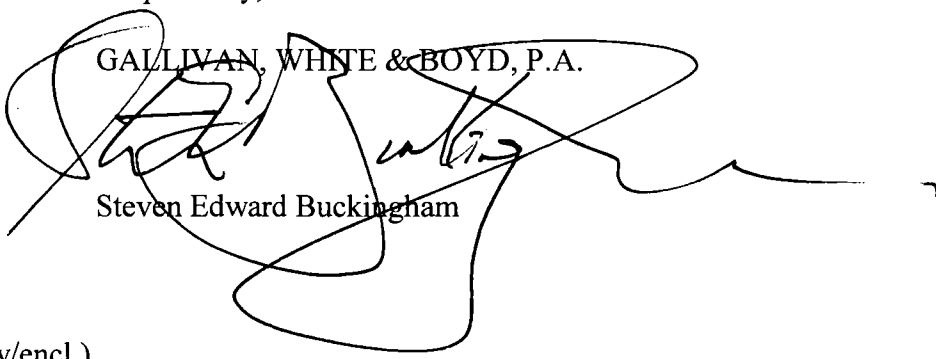
The Honorable Jenny Abbott Kitchings

Page 2

October 4, 2012

Respectfully,

GALLIVAN, WHITE & BOYD, P.A.



Steven Edward Buckingham

SEB/jws

Enclosures

cc: Douglas F. Patrick, Esquire (w/encl.)
Stephen R.H. Lewis, Esquire (w/encl.)
George C. Beighley, Esquire (w/encl.)
Jack G. Gresh, Esquire (w/encl.)

THE STATE OF SOUTH CAROLINA
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APPEAL FROM GREENVILLE COUNTY
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Edward W. Miller, Circuit Court Judge

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REPLY BRIEF OF APPELLANTS

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and TLC The Laser Center (Institute), Inc.*

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ARGUMENT

As explained in TLC's opening brief,¹ the information in dispute consists of the medical charts of approximately sixty individuals who had undergone surgery at TLC, as well as a proprietary database that contained not only information taken from the medical charts, but also information collected for TLC's internal purposes under the administration of its general counsel. There is no dispute that, as they were produced to Respondents' counsel, the charts and database constitute "Confidential Health Information."

Critically, Respondents' counsel does not deny that they have used information based on or derived from the charts and database in furtherance of other litigation. Instead, their argument is that the Protective Order protects only individually identifiable health information; by de-identifying Confidential Health Information, Respondents' counsel claims, they can use information derived from the charts and database in furtherance of other litigation. This is fundamentally irreconcilable with the provision of the Protective Order that states "'Confidential Health Information' includes all notes, summaries, compilations, extracts, abstracts, or oral communications that contain, are based on, or are derived from Confidential Health Information."²

Ultimately, the Supreme Court's decision in Hollman v. Woolfson is dispositive of these issues. 384 S.C. 571, 683 S.E.2d 495 (2008). In Hollman, the Supreme Court held that "[the] Protective Order was issued to prohibit the use of

¹ Appellants' Opening Br. Statement of Facts 5-7.

² Prot. Order ¶ 2.

confidential information obtained through the medical records.” 384 S.C. at 576, 683 S.E.2d at 497. Despite the Court’s holding that this information is not relevant or necessary to any of Respondents’ claims, Respondents’ counsel is attempting to use this very information in furtherance of other plaintiffs’ claims, which are the same claims brought by John Hollman.³ The Hollman decision expressly prohibits the positions taken by Respondents’ counsel, which explains why Respondents’ brief does not address Hollman at all.

I. The truth of “Protected Information.”

TLC is disappointed, though not surprised, that Respondents would refer to “Protected Information” as a myth.⁴ The term Protected Information originated in the 2010 Settlement Agreement between TLC and Respondents, specifically Paragraph 15, which explicitly defines “Protected Information” as Confidential Health Information, “including all records of patients other than John Hollman and the Complex Case and Advocacy databases,” as well as “data, any hard copies, or any work-product containing names of patients and private healthcare information.”⁵ At a

³ TLC thought the Supreme Court’s decision in Hollman was crystal clear. The Supreme Court held that third-party Confidential Health Information was not relevant to Respondents’ claims for fraud and medical malpractice; such information was not necessary to Respondents’ unfair trade practices claim. Hollman v. Woolfson, 384 S.C. 571, 683 S.E.2d 495 (2009). Yet Respondents’ counsel persists in trying to use the very same information in furtherance of the medical negligence, fraud, and unfair trade practices claims in Dickerson & Luce. TLC believes this is a deliberate breach of the holding in Hollman, which the appellate courts will vindicate.

⁴ Resp’ts’ Br. § V.A, 30.

⁵ (2010 Settlement Agreement ¶ 15.) Notably, through the settlement agreement, Respondents and their counsel made a covenant to TLC not to disseminate any Protected Information to any third party, and not to use Protected Information for any purpose. Those promises have been wholly disregarded.

minimum, the term Protected Information embraces the same scope of materials as contemplated by the term Confidential Health Information.

As explained in the opening brief,⁶ TLC intermittently uses the term Protected Information as a point of reference for Confidential Health Information. Under the Protective Order, Confidential Health Information describes individually identifiable health information, as well as information derived therefrom; that is, information based on, containing, or derived from Confidential Health Information.⁷ TLC used the term Protected Information to highlight the analytically distinct relationship between individually identifiable health information and information derived therefrom, and to illustrate that both types of information are subject to protection under the Protective Order.

In any event, the term Protected Information is not mythical, but is real and substantial, and describes affirmative limitations on the ability of Respondents' counsel to use information from Hollman in furtherance of any other litigation. Protected Information is not converted into a myth simply because Respondents' counsel has chosen to deny that it should be protected.

⁶ See Appellants' Opening Br. Statement of the Case 1 fn. 2 (“[T]he term ‘protected information’ describes any ‘Confidential Health Information’ that was disclosed under the Protective Order of November 14, 2008, as well as any information based on, containing, or derived therefrom.”).

⁷ Prot. Order ¶ 2.

II. Respondents concede the existence of continuing subject matter jurisdiction to enforce the Protective Order, yet incorrectly and for the first time argue that TLC failed to intervene in *Hollman*.

Respondents' brief does not contest the proposition that the court had continuing jurisdiction to enforce the Protective Order after the 2010 settlement⁸ and the 2011 settlement.⁹ Furthermore, Respondents agree that intervention is an appropriate procedure for enforcing a protective order,¹⁰ and do not offer any argument to support the "special release" requirement imposed by the circuit court.¹¹ Having conceded these issues, Respondents have instead argued a new position, that even though subject matter jurisdiction existed, TLC did not intervene in Hollman.¹²

As the Court is well aware, "an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial [court] to be preserved for appellate review." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). In this case, Respondents have never previously taken the position that TLC failed to intervene in Hollman, though they have had ample opportunity to do so. At the hearing on July 26, 2010 regarding TLC's motion to enforce the Protective Order, the first issue argued—which was brought up by Respondents' counsel—was that the case caption should be amended to reflect TLC's post-

⁸ Appellants' Opening Br. § VII, 48.

⁹ Appellants' Opening Br. § II.C, 22.

¹⁰ Resp'ts' Br. § III.B, 28.

¹¹ Appellants' Opening Br. § II.F, 30.

¹² Resp'ts' Br. § III.A, 17.

settlement status as a third party.¹³ TLC agreed with Respondents' counsel, and the parties' agreement was acknowledged by the court on the record.¹⁴ The August 17 Order contains the amended case caption and states that the caption was amended according to the parties' agreement.

At all relevant times since July 2010, TLC has participated in Hollman explicitly in its capacity as a third-party intervenor who is interested only in the administration of the Protective Order. In September 2010,¹⁵ September 2011,¹⁶ and February 2012,¹⁷ TLC filed motions in its capacity as intervenor. The court's orders of January 12, 2012 and September 18, 2012 explicitly refer to TLC as "intervenor." Not once did Respondents challenge this designation. The first time that Respondents objected to TLC's status as a third-party intervenor was in their brief on appeal. Accordingly, this issue is not before the Court.¹⁸

Importantly, TLC did not intervene in Hollman to enjoin violations of the Protective Order that were occurring in that case. Instead, TLC intervened in

¹³ July 2010 State Tr. 4–6, 14.

¹⁴ July 2010 State Tr. 4–6, 14.

¹⁵ TLC's Mot. for Reconsideration, Sept. 2, 2010.

¹⁶ Intervenor TLC's Mot. Compel Pltfs.' Counsel to Prepare an Order for the Court as Directed by the Court, or Alternatively, to Request the Court to Issue an Order on TLC's Prior Mot. for Reconsideration, Sept. 28, 2011; Intervenor TLC's Mot. Compel Pltfs.' Counsel to Observe the Protective Order, Sept. 28, 2011.

¹⁷ Intervenor TLC's Mot. for Reconsideration, Feb. 2, 2012.

¹⁸ In fact, TLC's status as an intervenor is the law of the case. Respondents did not appeal the August 17 Order, which established TLC as a third-party intervenor, nor did Respondents appeal the January 12 Order, which explicitly identifies TLC as an "intervenor." An unappealed ruling becomes the law of the case and precludes further consideration of the issue. See, e.g., In re Morrison, 321 S.C. 370, 372, 468 S.E.2d 651, 652 n.2 (1996).

Hollman to enjoin violations of the Protective Order that were occurring in the Federal Class Action, and which were later repeated in Dickerson and Luce.¹⁹ Because the Protective Order was issued under the auspices of Hollman, procedurally, TLC would necessarily have had to bring an enforcement action in Hollman.²⁰ This is true regardless of whether Respondents still had claims pending against Dr. Woolfson, or whether those claims had been settled long before. See, e.g., Ex parte Bland, 380 S.C. 1, 667 S.E.2d 540 (2008).

In any event, the circuit court was capable of hearing and deciding matters affecting the integrity of the Protective Order regardless of any merits-based settlement that occurred in Hollman. TLC sought to enforce the Protective Order as a third-party intervenor, and that status has been recognized by the circuit court for the past few years in several orders that have never been challenged.

III. TLC did not waive its right to the entry of an order denying the motion for reconsideration.

Respondents continue to argue that TLC had an “affirmative duty” to request the entry of an order on its motion for reconsideration.²¹ However, the court never made TLC’s right to an order contingent on TLC’s asking for an order to be entered, and there is no such affirmative duty implied by law. To the contrary, the rules of civil procedure expressly require the entry of a written order any time there is a judgment. Rule 58, SCRPC. TLC is not divested of that right by the fact that

¹⁹ This is discussed in more detail in §§ III–IV, infra.

²⁰ In fact, TLC has sought from relief against Respondents’ counsel’s violations of the Protective Order from every court it could. (Appellants’ Opening Br. Statement of Facts 11–17, and § IV.D, 38–40.)

²¹ Resp’ts’ Br. § III.B, 18.

Respondents entered into a settlement agreement with Dr. Woolfson and Dr. Campbell, and Respondents have not cited any authority in support of such a proposition.

Respondents' argument that TLC lost its procedural right to the entry of an order denying its motion for reconsideration by some action taken by TLC or failure to take action is essentially a waiver and estoppel argument. Consistent with the following discussion, that argument is without merit.

A. TLC did not release Respondents from the obligation to prepare an order denying the motion for reconsideration.

Respondents argue that a letter from Mr. Lewis dated April 20, 2011 confirms an agreement with TLC that an order disposing of TLC's motion for reconsideration is not needed. To the contrary, the letter expressly contradicts Respondents' assertion. The first paragraph states:

I [Mr. Lewis] am writing to confirm our telephone conversation of last week in which I advised you [TLC counsel Ron Tate] that we have settled Mr. Hollman's case against Dr. Woolfson and Dr. Campbell. In light of the settlement, I had called to discuss with you whether we needed to submit a proposed [o]rder to Judge Miller regarding the Motion to Reconsider you filed several months ago.

This paragraph states in no uncertain terms that Respondents had settled—past tense—their claims with Dr. Woolfson and Dr. Campbell. TLC was not a part of those settlement discussions, nor should it have been. TLC was involved in Hollman only for the limited, collateral purpose of enforcing the Protective Order. TLC was learning about Respondents' settlement after the fact. Furthermore, Respondents' counsel is not confirming an agreement that he claims to have reached with TLC about there no longer being a need to prepare an order. He is confirming a

conversation with counsel for TLC in which he has asked to be relieved of his obligation to prepare an order.

Regarding the second paragraph of the letter:

I have now received copies of the transcripts from the previous hearings and am prepared to draft a proposed [o]rder should your client feel it to be necessary considering the fact that this case will be dismissed soon.

This sentence again demonstrates that Respondents' counsel is asking for TLC's permission to not prepare an order, and demonstrates counsel's understanding that the settlement did not relieve him of that responsibility. The second paragraph continues:

We also discussed our intention to comply with the Judge's Order regarding the return of the database, however, as you know, we have filed two additional lawsuits against Dr. Woolfson and TLC employees and will soon be submitting discovery requests seeking discovery of the database. My suggestion was to file the database we currently have under seal with the Court until any discovery issues involving the production of the database can be addressed by the Court.

These sentences indicate that Respondents' counsel would prefer to not comply with the Protective Order, given the fact that they had filed other lawsuits against TLC involving Confidential Health Information. This is troubling, as the Protective Order states explicitly that "Confidential Health Information shall be used for no purpose other than this litigation [meaning Hollman]."²² The Order also requires that Respondents return or certify the destruction of all Confidential Health Information in their possession within sixty days after the termination of Hollman.²³ Yet in the April 20 letter, Respondents' counsel states it is their intention to do the opposite of what

²² Prot. Order ¶ 8.

²³ Prot. Order ¶ 12.

the Protective Order requires; they do not want to return the database and other Confidential Health Information, and they want to seek to use such information in other litigation, all of which would occur after the termination of Hollman.

This, of course, is exactly how events unfolded. Respondents filed the stipulations of dismissal against Dr. Woolfson and Dr. Campbell on May 3, 2011. Sixty days after May 3 occurred on July 2. Respondents' counsel did not return the Confidential Health Information disclosed under the Protective Order by this date and did not certify its destruction. In September 2011, TLC filed a motion to compel Respondents to observe the Protective Order.²⁴ At a hearing on the motion in November 2011, the court ordered Respondents' counsel to comply with the Protective Order, but allowed counsel to file their work product under seal with the court.²⁵

Meanwhile, in Dickerson and Luce, Respondents' counsel filed motions to compel against TLC that sought discovery of the same Confidential Health Information that had been at issue in Hollman.²⁶ In fact, Respondents' counsel explicitly used Confidential Health Information from Hollman in furtherance of the Dickerson and Luce motions.²⁷ Over TLC's strenuous objections, in September

²⁴ Intervenor TLC's Mot. Compel Resp'ts' Counsel to Observe the Prot. Order of Nov. 14, 2008 and Return or Destroy Materials Produced Thereunder, Sept. 28, 2011.

²⁵ (Nov. 2011 Tr. 56–59; see also Order Allowing Resp'ts' Counsel to File Work Product under Seal, Dickerson & Luce, Sept. 18, 2012.) Respondents' counsel did not carry this order out until September 2012.

²⁶ Plfts.' Mot. Compel, Dickerson & Luce, Apr. 25, 2012.

²⁷ Plfts.' Memo. Supp. Mot. Compel, Dickerson & Luce, June 27, 2012 (including selected attachments); Hr'g Tr. 5–15, July 2, 2012.

2012, the motion to compel was granted.²⁸ In that regard, the April 20 letter was not so much an offer to compromise as it was a statement of what Respondents' counsel was going to do regardless of any agreement.

The last paragraph of the April 20 letter states that, "As [Mr. Lewis] understands it, [counsel for TLC] was going to talk with [its] client about the[] two issues" of whether an order was still necessary and whether the database could be used in other litigation "and get back to [him]." This statement conclusively establishes that there was no understanding or agreement, and that Respondents' counsel had not been released of their obligation to prepare an order.²⁹

Respondents complain that TLC was too slow in responding to their letter, and that therefore, this somehow amounts to a waiver of TLC's right to an order denying the motion for reconsideration. This is a specious argument. For each issue addressed by the April 20 letter, the circuit court had already instructed Respondents' counsel how to proceed. When Respondents' counsel asked whether an order was needed to dispose of TLC's motion for reconsideration, the court had answered that question five months earlier when it instructed counsel to prepare an order. When Respondents' counsel asked whether Confidential Health Information could be used in other litigation, the court had answered that question three years earlier with an express prohibition in the Protective Order. TLC never advised Respondents' counsel that an order was unnecessary, or that Confidential Health Information could be used

²⁸ Order Granting Pltfs.' Mot. Compel, Dickerson & Luce, Sept. 25, 2012.

²⁹ If the April 20 letter represented the agreement that Respondents' counsel claims it does, it would have looked completely different. For starters, the letter would have indicated that it had been sent to confirm the parties' agreement that no order was necessary, instead of expressly disavowing the existence of an agreement.

in furtherance of other litigation. To the extent it is argued that TLC expressly waived or released any procedural rights, those arguments are meritless.

B. TLC's silence did not release Respondents' counsel from their obligation to prepare an order.

Respondents suggest that TLC's silence in response to the April 20 letter amounts to a waiver of their procedural right to an order. First of all, TLC was not silent. Although TLC did not respond immediately to the April 20 letter, TLC was aggressively litigating ongoing violations of the Protective Order in the Federal Class Action, Dickerson, and Luce.³⁰ The Federal Class Action has now been dismissed as a matter of law, and that disposition has been upheld on appeal.³¹ In Dickerson and Luce, TLC filed motions to dismiss based on the statute of repose and the violation of the Protective Order, among many other grounds, and filed motions to strike the allegations of the amended complaints based on or derived from Confidential Health Information.³² Had those motions been granted, most of the outstanding issues in Hollman would have been resolved.³³ Instead, since TLC's motions to dismiss were

³⁰ Admittedly, TLC's slowness in responding to Respondents' April 20 letter was a consequence of having become preoccupied with the litigation in the Federal Class Action, Dickerson, and Luce, which was all very contentious. However, TLC doubts that any response would have prompted Respondents' counsel to prepare an order as instructed, as evidence by the fact that TLC's subsequent requests for Respondents' counsel to prepare an order were ignored. As explained in the following sections, TLC is reasonably concerned that Respondents' counsel never had any intention of preparing an order.

³¹ Order Granting TLC's Mot. Dismiss, Fed. Class Action, Feb. 3, 2011; Order Den. Pltfs.' Mot. for Reconsideration, Fed. Class Action, Dec. 21, 2011; Order & Opinion of the United States Court of Appeals for the Fourth Circuit, Aug. 15, 2012 (affirming the district court's disposition of the Federal Class Action).

³² TLC's Mot. Strike, Dickerson, Sept. 28, 2011; TLC's Mot. Strike, Luce, Sept. 28, 2011.

³³ After all, the ongoing Hollman litigation is focused only on enforcing the Protective Order against the use and disclosure of Confidential Health Information in furtherance of any other litigation.

denied,³⁴ TLC was forced to continue litigating in Hollman to restrain violations of the Protective Order in Dickerson and Luce. As Respondents aptly point out, the day after counsel in Dickerson and Luce submitted proposed orders denying TLC's motions to dismiss,³⁵ TLC sent a letter to Respondents' counsel asking that they submit a proposed order denying the motion for reconsideration.³⁶ In any event, TLC has not slept on its rights, but has acted diligently in protecting its interests.

Furthermore, "[s]ilence ordinarily does not constitute acceptance" of an offer. H.A. Sack Co. v. Forest Beach Pub. Serv. Dist., 272 S.C. 235, 237, 250 S.E.2d 340, 341 (1978) (citations omitted). Instead, the silence must occur in circumstances which objectively convey agreement, and the offering party must have detrimentally relied upon their perception of agreement by silence. Rushing v. McKinney, 370 S.C. 280, 294, 633 S.E.2d 917, 924 (Ct. App. 2006). In this case, TLC's silence cannot possibly be interpreted as agreement. The April 20 letter shows that there is no agreement, that Respondents' counsel knew there was no agreement, and that if TLC would consent to an order not being prepared, TLC's counsel would let Respondents know.

³⁴ As explained in TLC's opening brief, (Appellants' Opening Br. Statement of Facts 14), Dickerson's LASIK eye surgeries occurred in 1998 and 1999; Luce's occurred in 1999. Under the applicable statute of repose for actions involving medical malpractice, Dickerson's and Luce's claims should have been time-barred in 2005. S.C. Code § 15-3-545. Despite the fact that Dickerson and Luce were not filed until 2010, TLC's motions to dismiss were denied. (Order Den. TLC's Mot. Dismiss, Dickerson, Sept. 1, 2011; Order Den. TLC's Mot. Dismiss, Luce, Sept. 1, 2011.)

³⁵ Email of Mr. Landis to the Circuit Court, Aug. 18, 2011.

³⁶ Letter of Mr. Boyd to Mr. Lewis, Aug. 19, 2011.

As for detrimental reliance, Respondents have suffered absolutely no prejudice by their failure to prepare an order.³⁷ If anything, Respondents have received an unjust benefit through their delay, which has allowed them to use Confidential Health Information in furtherance of other litigation without any danger of appellate review. By contrast, TLC has suffered a substantial amount of prejudice due to Respondents' failure to prepare an order, specifically by incurring a significant amount of time and expense just to overcome artificial barriers to the exercise of their appellate rights.

C. Did Respondents' counsel deliberately delay the preparation of an order?

On November 23, 2010, the court directed Respondents' counsel to prepare an order denying TLC's motion for reconsideration.³⁸ The court stated explicitly: "It doesn't have to be very long."³⁹ On December 17, 2010, Respondents' counsel contacted the court via email asking for additional time to prepare an order, citing the need to obtain transcripts of relevant hearings.⁴⁰ Strangely, despite the fact that Respondents were the prevailing party, by April 20, 2011, counsel had still not

³⁷ Respondents' counsel had no right to use or disclose Confidential Health Information for any purpose other than in furtherance of Hollman, (see Prot. Order ¶ 8), and upon settling with TLC, frankly, Respondents had no good reason to remain in possession of Confidential Health Information. Such information was not relevant to any claims or defenses that were pending in the ongoing merits-based litigation with Dr. Woolfson and Dr. Campbell.

³⁸ Nov. 2010 Tr. 59–62.

³⁹ Nov. 2010 Tr. 62.

⁴⁰ Email from Mr. Lewis to the Circuit Court, Dec. 17, 2010.

prepared an order formalizing their victory,⁴¹ and they have not prepared an order to date.⁴²

Respondents have prepared many other, more complex orders for Hollman, Dickerson, and Luce without taking nearly as long. For example, TLC filed several motions in Hollman on September 28, 2011. A hearing upon these motions occurred on November 21, 2011. As a consequence of this hearing, the court denied subject matter jurisdiction and instructed Respondents to prepare an order.⁴³ Respondents did so, and a proposed order was submitted on December 9, 2011—three weeks later.⁴⁴ As another example, on July 11, 2011, the court denied TLC’s motions to dismiss Dickerson and Luce and instructed counsel to prepare an order.⁴⁵ Counsel submitted the proposed order on August 18, 2011—five weeks later.⁴⁶ It is perplexing that Respondents could prepare orders arising from the November 21 hearing and the July 11 disposition so swiftly, when for some reason, Respondents could not prepare a simple order denying TLC’s motion for reconsideration at all.

This has caused TLC to become concerned that the delay in preparing an order was a deliberate attempt to frustrate TLC’s ability to appeal the August 17

⁴¹ Although Respondents’ counsel claimed that they had finally received copies of the transcripts and were prepared to draft a proposed order, as instructed five months previously. (Letter from Mr. Lewis to Mr. Tate, Apr. 20, 2011.)

⁴² It would have been easy for Respondents to prepare an order, perhaps as simple as: “Upon due consideration, TLC’s motion to reconsider the order denying the motion for an order and rule to show cause of August 17, 2010 is denied.”

⁴³ Nov. 2011 Tr. 104–06.

⁴⁴ Email from Mr. Lewis to the Circuit Court, Dec. 9, 2011.

⁴⁵ Email from the Circuit Court to Counsel of Record in Dickerson and Luce, July 11, 2011.

⁴⁶ Email from Mr. Landis to the Circuit Court, Aug. 18, 2011.

Order. After all, without a final written order disposing of the motion for reconsideration, TLC was forced into a position where it technically could not file a notice of appeal. See Rules 58(a)(2) & 72, SCRCP; Rule 203(b)(1), SCACR. There is also a strong incentive to frustrate TLC's appellate rights. As TLC's opening brief makes clear, the critical issue involved in the August 17 Order is the definition of "Confidential Health Information." It has been a major battleground between TLC and Respondents' counsel, and it carries significant ramifications for Hollman, Dickerson, and Luce. In fact, the disposition of the term "Confidential Health Information" in this appeal could very well determine whether Dickerson and Luce survive dismissal.⁴⁷ Without the use of Confidential Health Information from Hollman, Respondents' counsel cannot maintain their actions against TLC in Dickerson and Luce.⁴⁸ It is therefore absolutely critical, from the perspective of Respondents' counsel, that the favorable definition of Confidential Health Information set out in the August 17 Order not be disturbed. Obviously, the prospect of an adverse decision by the appellate court represents a threat to that interest. For these reasons, TLC has become reasonably concerned that the delay in the preparation of an order was a deliberate attempt to frustrate the exercise of its

⁴⁷ In derogation of the law of the State of South Carolina, the circuit court held that allegations of fraud may equitably estop the operation of a statute of repose. (Order Den. TLC's Mot. Dismiss, Dickerson, Sept. 1, 2012, 13–17; Order Den. TLC's Mot. Dismiss, Luce, Sept. 1, 2012, 12–16.) This ruling represents manifest legal error. See, e.g., Langley v. Pierce, 313 S.C. 401, 438 S.E.2d 242 (1993) (holding that there are no exceptions to the medical malpractice statute of repose). Therefore, if neither Dickerson nor Luce can use Confidential Health Information from Hollman in furtherance of their claims, then Dickerson's and Luce's claims are time-barred by the statute of repose, and as a matter of law, Dickerson and Luce should be subject to summary dismissal.

⁴⁸ See, infra, § IV.

appellate rights. If so, Respondents' counsel should not be rewarded for their unjust conduct under theories of waiver and estoppel.

D. Respondents' counsel is still actively seeking to avoid appellate review of the August 17 Order, even though the Order is ripe for decision.

In their brief, Respondents claim that the Court should not take jurisdiction over any issues involved in the August 17 Order.⁴⁹ They claim that to do so would be “novel.”⁵⁰ Yet TLC has cited many cases where, in the interests of judicial economy, the appellate courts have taken jurisdiction over issues that are certain to be presented in subsequent appeals.⁵¹ Respondents' counsel also claims that a remand is necessary to settle “unfinished business.”⁵² However, the only issue arising from the August 17 Order that is properly before the Court is the definition of Confidential Health Information, which TLC believes is erroneous as a matter of law and allows Respondents' counsel to use Confidential Health Information in furtherance of other litigation.

On that point, Respondents claim it is “mere speculation” that the court will deny TLC's motion for reconsideration.⁵³ This is simply preposterous. In no uncertain terms, Judge Miller stated that he wanted Respondents' counsel “to prepare a brief order, it doesn't have to be terribly long, to submit to the [c]ourt which would

⁴⁹ Resp'ts' Br. § IV, 28–30.

⁵⁰ Resp'ts' Br. § IV, 29.

⁵¹ Appellants' Opening Br. § III, 32 fn. 78.

⁵² Resp'ts' Br. § VI, 37.

⁵³ Resp'ts' Br. § IV, 30.

include the denial of [TLC's] [Rule] 59(e) motion.”⁵⁴ In other words, the circuit court has effectively denied TLC's motion; the entry of a written order is nothing more than a mere administrative formality. There are no further facts to develop, and no “unfinished business” to settle. There is nothing left for the circuit court to do except enter a perfunctory order denying TLC's motion for reconsideration. Consistent with the authority cited by TLC in its opening brief,⁵⁵ in the interests of judicial economy, the Court should consider the final written order as having been constructively entered and proceed to a disposition of the August 17 Order on its merits, which are ripe for review.

IV. Respondents' counsel has been violating the Protective Order for years, and continues to violate the Protective Order.

As explained in TLC's opening brief, Respondents' counsel has engaged in numerous, substantial violations of the Protective Order's prohibitions against using or disclosing Confidential Health Information in any litigation other than Hollman. For example, the following allegations are taken from the Federal Class Action complaint:

36. From 1998 through 2003 TLC LASIK Centers, TLC Clinical Directors, and TLC LASIK surgeons performed surgery on a substantial number of patients who had clinical evidence of the known contraindications for LASIK surgery as previously described.

The only way that Respondents' counsel could make this allegation in good faith would be in reliance on the Confidential Health Information produced in Hollman;

⁵⁴ Nov. 2010 Tr. 62.

⁵⁵ Appellants' Opening Br. § III, 32 fn. 78.

that is, the database and the third-party medical records. The same is true of the following allegations, also taken from the Federal Class Action complaint:

39. As a consequence of the surgeries, Ben Dickerson and all others similarly situated began developing vision problems directly caused by the LASIK surgery.
40. The most prevalent complications experienced by this group of surgical patients occurred remotely from the time of surgery and the resulting visual instability progressively deteriorated over time.
41. By 2002 TLC LASIK Centers, TLC Clinical Directors and TLC LASIK Surgeons recognized that a substantial number of patients were affected with surgery induced vision injuries emanating from the breach of standard of care in the performance of LASIK surgery on those with substantially similar LASIK surgical conditions.
42. TLC Management, TLC LASIK Centers, TLC Clinical Directors, and TLC LASIK Surgeons recognized the significant risk these patients posed to their respective financial assets and in response developed a plan to avoid responsibility for respective acts of malpractice.
43. This plan of institutional fraud and deception included the following:
 - a. Creation of a system to identify these patients subjected to the substandard LASIK surgeries without informing the patient of his/her condition or cause;
 - b. Use of that system to monitor the patients' condition without the knowledge and/or consent of the patient;
 - c. Maintenance of a separate file per patient outside of the medical records of the patients for purposes of identification, monitoring and/or control of these patients and risk posed to the Defendants['] assets;
 - d. Delay both in treatment of and discovery by the patient of his/her medical conditions;
 - e. Communication of false representations to the patients concerning the use of new LASIK equipment and surgeries to enhance or correct vision in the patients when the Defendants knew the patients were not candidates for LASIK surgery;

- f. The periodic scheduling, canceling and rescheduling of the LASIK surgery described above in order to create delay and buy time until the expiration of the patients' rights;
- g. Misrepresentation of the patient[s'] true medical condition and cause;
- h. Withholding of the information and diagnosis of known surgery induced eye condition from the patient;
- i. Use of the Lifetime Commitment Contract to cover costs of treatments, examinations, glasses, contact lenses and medicines as a method to keep patients at TLC facilities and physicians, along with representations that such conduct would continue for the life of the patient;
- j. Predetermined decision by Defendants that the LTC contract benefits described above would be withdrawn or discontinued when patients' risk to the Defendants expired;
- k. Creating and perpetuating a separate file on the patients which included medical diagnosis, treatment options and risk information not contained in the patients' medical records;
- l. Ongoing efforts by the Defendants to keep patients at TLC facilities and physicians by discouraging outside consultations or physician intervention;
- m. Obtaining releases for nominal consideration from patients after the expiration of the patients' rights said expiration caused by the actions of the Defendants;
- n. Intentional misrepresentation of the patients' true medical conditions through misleading diagnosis and dissemination of medical information and advice and/or the omission of necessary medical information, advice and/or diagnosis.

TLC vigorously disputes these allegations. But more importantly for the purposes of this appeal, there is absolutely no way that Respondents' counsel could make these allegations without the benefit of Confidential Health Information. It should come as no surprise that the day the Federal Class Action complaint was filed, Respondents' counsel also attempted to file—and were ultimately successful in filing—the database under seal in federal court. This is because Respondents' counsel had no way of

maintaining their case against TLC unless they used Confidential Health Information from Hollman, despite the fact that doing so was absolutely prohibited.⁵⁶ Critically, these same allegations were repeated almost verbatim in Dickerson and Luce.⁵⁷

Recently, in Dickerson and Luce, Respondents' counsel has used and disclosed Confidential Health Information from Hollman in furtherance of motions to compel discovery.⁵⁸ The discovery that Respondents' counsel is seeking in Dickerson and Luce is largely the same Confidential Health Information that was produced in Hollman.⁵⁹ In other words, Respondents' counsel is using Confidential Health Information from one case to bootstrap their way into discovery in other cases. This is a clear violation of the Protective Order. Respondents' counsel cannot use Confidential Health Information from Hollman for any purpose whatsoever in Dickerson and Luce,⁶⁰ and certainly not for the purpose of gaining an advantage in discovery. Ex parte Bland, 380 S.C. 1, 667 S.E.2d 540 (2008). Respondents' counsel has shown time and again that they are simply not interested in observing the limitations of the Protective Order; with the one exception of the Supreme Court's

⁵⁶ See, supra, fn. 3.

⁵⁷ Am. Compl., Fed. Class Action, ¶¶ 36, 39–48; Am. Compl., Dickerson, ¶¶ 51–58; Am. Compl., Luce, ¶¶ 46–53.

⁵⁸ Plfts.' Mot. Compel, Dickerson & Luce, Apr. 25, 2012; Plfts.' Memo. Supp. Mot. Compel, Dickerson & Luce, June 27, 2012 (including selected attachments); Hr'g Tr. 5–15, July 2, 2012.

⁵⁹ The only difference is that Respondents' counsel is also seeking a current copy of the proprietary database, as well as a copy of the database that was produced in Hollman.

⁶⁰ Prot. Order ¶ 8.

decision in Hollman, they are living under the assumption that no court will ever hold them accountable for complying with the Protective Order.⁶¹

V. **Respondents' counsel unfairly accuses TLC of acting inconsistently regarding the scope of information protected by the Protective Order.**

Respondents' counsel has taken the position that if TLC wanted to make any information produced during Hollman subject to the Protective Order, then TLC should have designated that information as "Confidential Health Information" during Hollman.⁶² According to Respondents' counsel, the Protective Order does not apply unless information has been specifically designated as "Confidential Health Information." Since TLC did not designate any information as "Confidential Health Information" during Hollman, Respondents argue that TLC has waived its right to complain about the way that Respondents' counsel is using Confidential Health Information in furtherance of Dickerson and Luce.

This is not the way the Protective Order works. Under the Protective Order, protection for information attaches automatically if information comes within the definition of "Confidential Health Information." As explained in TLC's brief, "Confidential Health Information" is individually identifiable health information, or information containing, based on, or derived therefrom.⁶³ There is no additional requirement that, as a condition precedent to protection, "Confidential Health Information" must be expressly designated as such. Instead, the Protective Order sets out the definition of Confidential Health Information, then prohibits Confidential

⁶¹ See, *supra*, fn. 3.

⁶² Resp'ts' Br. § V.B–C, 35–37.

⁶³ Prot. Order ¶ 2.

Health Information from being used or disclosed for any purpose other than Hollman. To claim otherwise is to burden the Protective Order with requirements that simply do not exist.

Respondents' counsel also makes the argument that, by engaging in discovery with regard to Confidential Health Information during the course of Hollman, TLC has somehow waived the right to enforce the Protective Order against any use or disclosure that may occur in Dickerson and Luce. This is baffling on several levels. First of all, TLC vigorously opposed discovery of the database and third-party medical information from the very beginning in 2008. TLC objected to Respondents' discovery requests on the basis of relevance, necessity, over-breadth, undue burden, attorney/client privilege, work product doctrine, and HIPAA protection. These objections were presented to the court and overruled.⁶⁴ At that point, it was apparent that Judge Few would grant Respondents' motion to compel discovery of the database and third-party medical records. Rather than continue fighting, TLC made the strategic decision to participate in discovery, relying on the expectations of confidentiality established by the Protective Order. If TLC knew then what it knows now about the impunity with which Respondents' counsel would violate the Protective Order, TLC would have appealed the initial order granting Respondents' motion to compel and the Protective Order.

As explained in TLC's brief,⁶⁵ it was not long after the entry of the Protective Order that Respondents' counsel began to seek ways to avoid the prohibitions on the

⁶⁴ June 2008 Tr. 4–9, 18–23, 39–42; Oct. 2008 Tr. 6–14; Order Granting Resp'ts' Mot. Compel, Nov. 14, 2008.

⁶⁵ Appellants' Opening Br. Statement of Facts 9–17.

use and disclosure of Confidential Health Information. Since that time, TLC has been battling non-stop to enforce the Protective Order against Respondents' counsel's improper uses of the database and third-party medical records. After the Supreme Court's decision in Hollman, TLC believed that the attempted violations of the Protective Order would cease. This was based on the Supreme Court's observation that "[TLC's] treatment of other patients is not necessary to establish any element of [R]espondents' causes of action." Hollman v. Woolfson, 384 S.C. 571, 581, 683 S.E.2d 495, 500 (2009). Yet six months later, Respondents' counsel filed the class action in federal court, which was based on Confidential Health Information, ostensibly to evade any further review by the state appellate courts. By the point TLC realized that Respondents' counsel would be so relentless in using and disclosing Confidential Health Information in violation of the Protective Order, the smoke had escaped the chimney. TLC could not claw back the discovery regarding Confidential Health Information that had been done, which TLC believes could have been enjoined on the basis of the decision in Hollman. Yet now, Respondents' counsel seems to argue that because TLC allowed some discovery of Confidential Health Information in Hollman, TLC has somehow waived the ability to enforce the Protective Order against the way such information is used in furtherance of Dickerson and Luce. This argument is legally indefensible. Notably, there is no authority cited in support of this position anywhere in Respondents' brief.

In any event, TLC has fought consistently, though largely unsuccessfully, to hold Respondents' counsel to the parameters of the Protective Order. TLC has waived nothing, has conceded nothing, has acquiesced in nothing when it comes to

the battle for obedience to the Protective Order and the integrity of Confidential Health Information. For evidence of this, TLC stands on the voluminous record it has built over the past four years.

VI. The Findings and Conclusions in the August 17 and January 12 Orders were not adjudicated and must be stricken.

TLC was amused by Respondents' footnote 47, which addressed the argument that unadjudicated findings and conclusions have no place in proposed orders: "Appellant[s'] definition of 'adjudication' appears to be unreasonably narrow." Contrary to Respondents' counsel's perspective on drafting proposed orders, the rule is not "To the victors go the spoils." It is simply not proper for a party to load a proposed order, which was drafted for the court at its instruction, with every fact, finding, and conclusion the drafting party wants, as if it were their Christmas wish-list.

Respondents' counsel offers a weak excuse for their conduct by claiming that the information contained in the proposed orders (which were eventually signed) was at least presented to the court through exhibits and oral argument. At best, this means that the court could have made findings and conclusions based on the information presented. But there is a critical difference between what the court could have done and what the court actually did. For example, with regard to TLC's motion for an order and rule to show cause, the court could have ordered Respondents' counsel to prepare an order that gave a new interpretation to the term Confidential Health Information. Instead, the court instructed Respondents' counsel to prepare an order which denied all issues as being premature; there was no instruction whatsoever

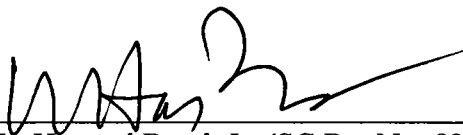
regarding Confidential Health Information.⁶⁶ There is no excuse for such material inventions to be included in proposed orders, and it is regrettable that such apparent offenses to traditional notions of due process have been tolerated for so long in Hollman without any recourse.

CONCLUSION

For the reasons stated herein, for the reasons set out in TLC's opening brief, or for any reason that may appear in the record, TLC respectfully requests that this Court reverse the circuit court's orders of January 12, 2012 and March 2, 2012, and thereby hold that the court has subject matter jurisdiction to issue an order on TLC's Motion for Reconsideration of the order of August 17, 2010, by which the court denied TLC's Motion for an Order and Rule to Show Cause. Furthermore, in the interests of judicial economy, this Court should reverse, vacate, or otherwise modify the circuit court's order of August 17, 2010 to hold that the Protective Order prohibits the use and disclosure of "Confidential Health Information," which includes information "based on, containing, or derived from" Confidential Health Information, and that Respondents' counsel's use and disclosure of protected information for purposes other than Hollman is a violation of the Protective Order. Finally, the Court is requested to vacate the findings of fact and conclusions of law set out in the Orders of August 17, 2010 and January 12, 2012 which were not adjudicated by the court.

⁶⁶ Email from the Circuit Court to Respondents' Counsel, Aug. 4, 2010.

Respectfully submitted,



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Greenville, SC
October 4, 2012

Counsel for Appellants
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The South Carolina Court of Appeals

2007-CP-23-02347,
Ex Parte: TLC Laser Eye Centers (Piedmont/Atlanta)
LLC; TLC The Laser Center (Institute), Inc., Appellants,

In Re: John Hollman, Respondent,

v.

Dr. Jonathan Woolfson, individually; Dr. Michael A.
Campbell, individually, Optical Solutions, Inc.; and
Optical Solutions of Bluffton, LLC, Defendants,

2007-CP-23-08364,
Danielle Hollman, Respondent,

v.

Dr. Jonathan Woolfson, individually; Dr. Michael A.
Campbell, individually, Optical Solutions, Inc.; and
Optical Solutions of Bluffton, LLC, Defendants.

Appellate Case No. 2012-210888

The Honorable Edward W. Miller, Edward W. Miller
Greenville County
Trial Court Case No. 2007CP2302347, 2007CP2308364

ORDER

The time for serving and filing the appellants' initial reply brief is hereby extended until October 18, 2012.

FOR THE COURT

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina
cc:
Steven Edward Buckingham
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Stephen R.H. Lewis
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FILED

10-9-12 LET

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September 24, 2012

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SEP 24 2012

SC Court of Appeals

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
Calhoun State Office Building
1015 Sumter Street
Columbia, SC 29201

Ex parte TLC Laser Eye Centers (Piedmont/Atlanta) LLC; and
TLC The Laser Center (Institute), Inc., Intervenors, Appellants,

In re: John Hollman, Respondent vs. Dr. Jonathan Woolfson *et al.*,
C.A. No.: 2007-CP-23-2347

And

Ex parte TLC Laser Eye Centers (Piedmont/Atlanta) LLC; and
TLC The Laser Center (Institute), Inc., Intervenors, Appellants,

In re: Danielle Hollman, Respondent vs. Dr. Jonathan Woolfson *et al.*,
C.A. No.: 2007-CP-23-8364

Appellate Case No.: 2012-210888

Re: Appellants' Request for Extension of Time to File Reply Brief

Dear Ms. Kitchings:

I represent Appellants in the case whose caption is set out above. Appellants respectfully request an extension of time to file the brief in reply to Respondents' opening brief. Following are the facts in support of this request:

1. On Thursday, September 13, 2012, Appellants received a copy of Respondents' opening brief. Consistent with the Appellate Court Rules, Appellants' Reply Brief is currently due on Monday, September 24.
2. This is Appellants' first request for an extension of time to file the Reply Brief.
3. Appellants have enclosed a check for \$25.00.

The Honorable Jenny Abbott Kitchings

Page 2

September 21, 2012

4. Appellants respectfully request an additional ten (10) days to file the Reply Brief. Ten days from the original deadline occurs on Thursday, October 4.

A copy of this letter is being sent to each counsel of record. Thank you for your consideration of this request.

Sincerely yours,

GALLIVAN, WHITE & BOYD, P.A.



Steven Edward Buckingham

SEB/jws

Enclosure

cc: Douglas F. Patrick, Esquire
Stephen R.H. Lewis, Esquire
George C. Beighley, Esquire
Jack G. Gresh, Esquire

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2007-CP-23-2347

Ex parte TLC Laser Eye Centers (Piedmont/Atlanta) LLC; and
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In re:

John Hollman Respondent

v.

Dr. Jonathan Woolfson, Individually;
Dr. Michael A. Campbell, Individually;
Optical Solutions, Inc.; and Optical
Solutions of Bluffton, LLC Defendants.

Case No. 2007-CP-23-8364

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Dr. Jonathan Woolfson, Individually;
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Optical Solutions, Inc.; and Optical
Solutions of Bluffton, LLC Defendants.

**DESIGNATION OF MATTER TO BE INCLUDED
IN THE RECORD ON APPEAL**

In addition to the Appellant's proposed Designation of Matter, the Respondent proposes the following be included in the Record on Appeal:

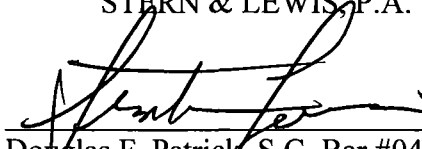
1. Electronic correspondence dated 11/10/03 at 2:19 p.m. from Van Veen to Owen
2. Electronic correspondence dated 11/10/03 at 6:35 p.m. from Owen to Van Veen
3. Electronic correspondence dated 11/11/03 from Van Veen to Owen
4. Hollman Complex Case form dated 07/28/03
5. Hollman Complex Case form dated 06/01/05
6. Complex Case Standard Operating Procedure
7. Advocacy Standard Operating Procedure
8. Standard Operating Procedure Flowchart
9. TLC Authorization for Release of Information
10. Transcript of Proceedings of June 30, 2008, p. 6, p. 19-20, 27-29, and 33-34
11. Deposition Transcript of Alan Webb, pp. 157-159
12. Redacted Settlement Agreement between Appellant and Respondent of June 16, 2010

13. Correspondence of July 1, 2011 from The Honorable Edward W. Miller to all parties
14. Electronic correspondence of 08/18/11 from Paul Landis, Esq. to The Honorable Edward W. Miller and Appellant's counsel

CERTIFICATE

I, the undersigned counsel for Respondent, certify that this designation contains no matter which is irrelevant to this appeal.

COVINGTON, PATRICK, HAGINS,
STERN & LEWIS, P.A.



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ATTORNEYS FOR THE RESPONDENTS

September 12, 2012

Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

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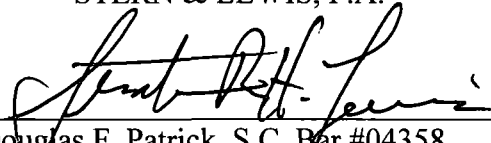
Dr. Jonathan Woolfson, Individually;
Dr. Michael A. Campbell, Individually;
Optical Solutions, Inc.; and Optical
Solutions of Bluffton, LLC Defendants.

PROOF OF DELIVERY

I hereby certify that I have served a copy of the Initial Brief of Respondent and Designation of Record to be Included in the Record on Appeal on counsel of record for the Appellant as specified below, via E-Mail on the 12th day of September, 2012, and by hand-delivery on the 13th day of September, 2012, addressed as follows:

W. Howard Boyd, Jr.
Steven Edward Buckingham
55 Beattie Place / Suite 1200
Greenville, SC 29603

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September 12, 2012

The Honorable Jenny Abbott Kitchings
Clerk of Court, S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

**RE: *Ex Parte TLC Laser Eye Centers (Piedmont/Atlanta) LLC; and
TLC The Laser Center (Institute), Inc., Intervenor***

***In re: John Hollman v. Dr. Jonathan Woolfson, et al.
C.A. No. 2007-CP-23-2347***

- AND -

***Ex Parte TLC Laser Eye Centers (Piedmont/Atlanta) LLC; and
TLC The Laser Center (Institute), Inc., Intervenor***

***In re: Danielle Hollman v. Dr. Jonathan Woolfson, et al.
C.A. No. 2007-CP-23-8364***

Dear Ms. Kitchings:

Please find enclosed the original and one (1) copy of the Initial Brief of Respondents, Designation of Matter, and Proof of Delivery on opposing counsel which we hereby submit to your office. I would appreciate your returning a clocked in copy of the same for our records.

Should you have any questions or concerns or need anything further, please do not hesitate to contact me or Deborah Scott in my office.

Sincerely,

COVINGTON, PATRICK, HAGINS,
STERN & LEWIS, P.A.


Stephen R. H. Lewis

SRHL:dcs
Enclosures

cc: W. Howard Boyd, Jr.
Steven E. Buckingham
Douglas F. Patrick

RECEIVED

SEP 13 2012

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2007-CP-23-2347

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SEP 13 2012

SC Court of Appeals

In re:

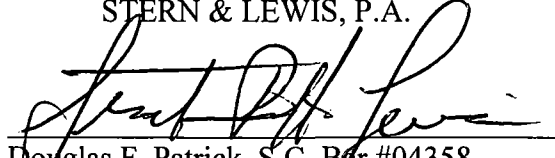
Danielle Hollman Respondent,

v.

Dr. Jonathan Woolfson, Individually;
Dr. Michael A. Campbell, Individually;
Optical Solutions, Inc.; and Optical
Solutions of Bluffton, LLC Defendants.

INITIAL BRIEF OF RESPONDENTS

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September 12, 2012

Greenville, South Carolina

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STATEMENT OF ISSUES ON APPEAL

1. Whether the Appellant properly intervened in the *Hollman* litigation which had been dismissed with prejudice.
2. Whether the Appellant's own conduct result in a failure to preserve its rights.
3. If the Appellant did properly intervene to preserve its rights, whether the appropriate mechanism for full adjudication is remand to the circuit court.
4. Whether the circuit court misinterpreted the plain and unambiguous terms of its own Protective Order.
5. Whether the circuit court should be allowed to conduct unfinished business even if this Court interprets the Protective Order.
6. Whether the findings of fact and conclusions of law contained in the August 17th and January 12th Orders were proper.

STATEMENT OF THE CASE

In October of 2006, John Hollman (hereinafter referred to as "Respondent") filed a medical malpractice case against the Appellants (hereinafter referred to collectively as "Appellant". The lawsuit initially alleged only medical malpractice relating to LASIK eye surgeries performed between 1999 and 2001.¹ Hollman further alleged that the three surgeries performed by Appellant caused an unstoppable and incurable deteriorating corneal condition known as "ectasia." During the initial discovery phase, Appellant voluntarily produced documents providing evidence of a database containing critical health information which was being withheld from its patients. Respondent requested production of the database and other

¹ The lawsuit alleged Hollman had a pre-existing condition known as kerataconus for which LASIK surgery was contraindicated.

documents and, by Order dated November 14, 2008, the circuit court compelled the production of the database and also issued a Protective Order.²

In May of 2010, Appellant and Respondent entered into a settlement agreement, dismissing Appellant as a party to the litigation. As part of the settlement agreement, both parties agreed to withdraw motions each had filed for sanctions. Appellant's motion for sanctions alleged Respondent's had violated the Protective Order. Despite the parties' agreement, the Appellant, as a non-party, re-filed its motion for sanctions against the Respondent only two weeks after the agreement to withdraw its identical motion. The re-filed motion did not allege one single act in violation of the Protective Order that occurred after the settlement agreement with Appellant.³

A hearing was held on the re-filed motion for sanctions, and the circuit court granted the Appellant's request to interpret the Protective Order but, much to the Appellant's disliking, disagreed with the Appellant's interpretation of the language of the Order, and interpreted its own Order in a reasonable manner thereby denying Appellant's motion.

Appellant filed a motion for reconsideration, and at the motion hearing, the Court indicated the motion would be denied and instructed Respondent's counsel to prepare an Order consistent with its ruling. A delay in preparing the Order occurred when Respondent's counsel requested transcripts of the numerous hearings held by the circuit court, and the transcripts were not immediately forthcoming. In the interim, Respondent entered into a settlement agreement

² Disagree significantly on the scope of the Protective Order as it relates to the database and other documents produced by the Appellant. To this point in the litigation, no Court has agreed with Appellant's interpretation of the Protective Order and any statement contained in the Appellant's brief asserting Respondent's counsel has failed to comply with the Protective Order is a mischaracterization of this case and the evidence submitted to any Court.

³ Respondent disputes that any act violating the Protective Order ever occurred, with the exception of an inadvertent filing with the circuit court which was immediately remedied.

with the remaining defendants. Prior to filing the Order of Dismissal, Appellant's and Respondent's counsel discussed how to handle the pending preparation of the Order denying Appellant's motion for reconsideration. This conversation was memorialized in a letter from Respondent's counsel dated April 20, 2011, in which Respondent's counsel requested Appellant's counsel to advise him whether the Order needed to be prepared in light of the pending dismissal of the case as well as the opportunity to have the discovery issues adjudicated in the other LASIK medical malpractice cases filed by Respondent's counsel earlier that year. Respondent's counsel did not receive a response from Appellant, and on May 2, 2011, the Order of Dismissal with Prejudice was filed. Four months later, on August 19, 2011, one day after Defendant's motions to dismiss in the other malpractice cases had been denied, Appellant advised Respondent that it now wanted the Order prepared and filed in the *Hollman* case which had been ended and dismissed with prejudice. Respondent refused, and five weeks later, on September 28, 2011, Appellant filed a Motion to Compel the filing of the Order denying its Motion for Reconsideration. By Order dated January 12, 2012, Appellant's Motion was denied. Appellant's Motion for Reconsideration was also denied, and this appeal followed.

Respondent respectfully requests that this appeal be dismissed because Appellant failed to properly preserve its right to have this issue heard on appeal. Secondly, if this Court decides Appellant's rights were properly preserved, Respondent respectfully requests that this matter be remanded to the circuit court for a determination of pending issues which will require an evidentiary hearing creating a full record. Lastly, the Respondent respectfully requests this Court deny Appellant's unprecedented request to "adjudicate" the issues arising from the August 17th Order, as doing so would deprive the circuit court of making findings consistent with the

evidence before it as well as prevent this Court from adjudicating issues based on an incomplete lower court record.

STATEMENT OF FACTS

Litigation against TLC in South Carolina began in 2006. The initial lawsuit, *John Hollman v. Woolfson, Campbell, and TLC* was filed in October of 2006, and alleged medical negligence involving LASIK procedures performed on John Hollman in 1999 and 2001. Following initial discovery, the *Hollman* complaint was amended to include a cause of action for fraud based on information produced by Appellant prior to the execution of a protective order⁴. The voluntarily produced documents presented evidence of the existence of databases in which critical medical information was kept by Appellant but withheld from its patients. The documents referred to the databases as “Complex Case” and “Advocacy” databases. Upon learning of the existence of the complex case and advocacy databases, Respondents requested the production of the databases themselves.⁵

Appellant initially presented several objections, including work product prepared in anticipation of litigation, attorney-client privilege, and peer review.⁶ However, at the hearings before the circuit court on the discoverability of the databases and other related documents, two

⁴ TLC produced e-mails between TLC doctors which made reference to the databases and John Hollman’s inclusion therein (1) e-mail from Van Veen to Owen – 11/10/03 @ 2:19 p.m.; 2) e-mail from Owen to Van Veen – 11/10/03 @ 6:35 p.m.; 3) e-mail from Van Veen to Owen – 11/11/03). In addition, TLC produced complex case forms containing John Hollman’s medical information, including diagnoses and statements pertaining to the causation of his eye problems (complex case form dated 7/28/03 and complex case form dated 6/01/05). Lastly, TLC produced complex case and advocacy standard operating procedures (complex case process SOP, advocacy SOP, authorization for release of information, and SOP flowchart).

⁵ June 30, 2008, Hearing Transcript, p. 6, l. 5-10.

⁶ At no time during the initial discovery phase did Appellant object to the production of the databases on the basis of trade secret or proprietary information.

facts became abundantly clear. First, Appellant's position on its objections to the production of the databases and other materials had diminished to asserting only two objections: Attorney/client privilege and work product prepared in anticipation of litigation. Second, the scope of any protective order was intended to be very narrow.

As for the objections to the production of the database, the following exchange between the Court and Appellant's counsel took place:

The Court: Okay. Alright. There is no---this (sic) not a situation where there's any type of Peer Review privilege available to the Defendant, is it?

Mr. Tate: I don't believe so, Your Honor.

June 30, 2008, Hearing Transcript, P. 17.

Mr. Tate: ... We were taking the position this complex case workup was some sort of Peer Review thing, potentially other ectasia cases. We wanted to try to gather some information about those and put them in this format. Well, Mr. Patrick took some depositions in St. Louis. Some of the questions and the answers that he got---just simply reconsider that, and so we did and we've produced that now.

June 30, 2008, Hearing Transcript, p. 33.

The Court: Uh, anything within the Advocacy Group that relates to Mr. Hollman is relevant under the discovery rules. Is that true?

Mr. Tate: It could be relevant, but it's privileged.

The Court: Well, I was trying to---I want to go through it step by step.

Mr. Tate: Yes, sir.

The Court: Is there any argument that any of that (sic) relates to Mr. Hollman is not relevant?

Mr. Tate: That's correct.

The Court: Okay. It is relevant.

Mr. Tate: We are not arguing relevance.

The Court: Okay.

Mr. Tate: **We are only arguing privilege and work product nature.**

The Court: And so it would have---is it work product or is it attorney-client or could it be both?

Mr. Tate: It could be both.

June 30, 2008, Hearing Transcript, p. 19-20.

The Court: For discovery purposes, I'm hearing that you think you are about to be sued because you think Mr. Hollman has a cause of action against your client.

Mr. Tate: I think that's---

The Court: Okay.

Mr. Tate: ---That's fair enough for now.

The Court: No doubt about the fact that if Mr. Hollman has been injured or if---if your client has information about his medical condition, there is a duty to disclose it. No doubt about that.

Mr. Tate: Okay.

The Court: This issue frames itself as your having failed to disclose to him what you knew which throws us right into this Advocacy Group thing. At a minimum, I'm going to have to look at all the documents. You contend they are privileged. I'm going to have to look at all the documents to see whether or not there's anything in there that is contrary to what you are telling your patient because if your client knows something about his medical condition, they clearly can consult a lawyer about it and ask for advice about it. Those communications are privileged so long as you are not coming in here to Court or your client's not coming in here to Court and misrepresenting what happened.

Mr. Tate: Yes, sir.

The Court: **So I would have to look at those documents to see whether or not there's anything within---that's said about Mr. Hollman in the Advocacy Group that's different from what he was being told or at least arguably different from what he's being told by his doctors?**

Mr. Tate: Yes, sir.

The Court: **If it is different, then the privilege is going to be shot.**⁷

June 30, 2008, Hearing Transcript, P. 27-29.

The Court: It seems to me that everything that relates to Hollman is relevant. The only basis on which you could refuse to produce it would either be that there was some attorney-client privilege communication or that it is a communication or document that was created in anticipation of litigation and is work product privilege under 26(b)(3). **Other than that, it's got to be produced. Right?**

Mr. Tate: **Yes, sir.**

June 30, 2008, Hearing Transcript, P. 33-34.

Judge Few ultimately ordered an *in camera* review of the databases and Hollman documents to determine which, if any, of the Appellant's objections applied. Another hearing was held on October 14, 2008, in which Judge Few ordered the production of the databases and other relevant documents. In addition, Judge Few took up the issue of a protective order and the scope thereof. The following exchanges between the Court and Mr. Tate clearly show the intended scope of the protective order at issue in this appeal.

⁷ Based on the documents voluntarily produced (see Footnote #1), including Mr. Hollman's medical records, the medical information contained in the databases was drastically different from the medical information contained in Hollman medical records. For example, Hollman's medical record dated 06/26/03 states, "ocular health good" while the Complex Case form dated 07/28/03 which Appellant claims is not part of his medical record but, instead, is for Appellant's eyes only, presents a diagnosis of "ectasia" (a deteriorating condition of the cornea) and states "Progression of corneal irregularity may have been increase (sic) post operatively. In layman's terms, the internal, secret documents show Mr. Hollman has an unstoppable, incurable deteriorating corneal condition that could have been caused by the LASIK surgery, while his medical records (in Judge Few's words, "What he's being told by his doctors") reflect his ocular health to be "good".

The Court: ...the major concern from the defense standpoint, in my mind, is the identity of these other people and how do we handle that. That is, in the long run, that's relatively easy to handle through the use of some type of protective order.

October 14, 2008, Hearing Transcript, P. 6.

The Court: ... now that I've gone back through all this and I recall everything that we discussed in the hearing, almost everything that we are talking about here is discoverable. And **the question is, uh, pretty simple. How do I handle the, uh, privacy issues?** And then, if any, how do I handle issues regarding the burdensomeness of the production...I'd looked---the notebook that you've sent me, I've looked through it as carefully as I am capable of doing given the understanding that I have of the documents themselves. And many of the communications, and, again, I probably need to be updated on exactly what has been...many of the communications in there are privileged but **very little of the facts and information that is in there is not discoverable...**and my opinion is that it really, the identity question set aside for a moment, **I'm inclined to believe that pretty much everything that's been asked for is discoverable**, so with that, I will let the Defendants respond first and then I will let Mr. Patrick.

Mr. Tate: Yes, Your Honor. **On the third parties, and that, that is the crux of the matter as far as we are concerned.**

The Court: **The third party?**

Mr. Tate: **The third party.**

The Court: Well, let me---and I want to hear you on that.

Mr. Tate: Yes, sir.

The Court: **But I'm not worried about that. I'll just issue a protective order---**

Mr. Tate: Right.

The Court: **---that says that the identities of these people can't go beyond the lawyers in the first place and then that matter is done. That's very simple.**

Mr. Tate: **Yes, sir, and it is.** Once the Court decides that these third parties are discoverable, it really becomes a question of drawing an appropriate protective order that protects everybody in the case. And so, you know, **what protective order could be issued to adequately protect these folks from---for example---**

The Court: Alright. And I apologize. I told you I was going to let you argue, and I will.

Mr. Tate: Okay.

The Court: **If you are already wanting to talk about the protective order, then I will dictate the protective order now, and we can all go home because that's a simple matter.**

October 14, 2008, Hearing Transcript, P. 7-9.

Mr. Tate: And I'm worried about, again, **this goes to scope and not the necessity of discovery but the scope of the protective order. How do we assure these patients whose identities will be disclosed that they won't be bothered, that they won't be worried about being contacted by other people that they don't want to be contacted by?**

October 14, 2008, Hearing Transcript, P. 11-12.

The Court: ...Then there's going to be a prohibition against any contact with anybody connected with any of these people without prior Court approval.

It's possible, conceivable, that you could get to the point where you could call one of them as a witness, but that's not going to happen until I or some other judge has said I understand why you are doing this, give the Defendant an opportunity to be heard, and say yes or no. Now, is there any way to sew a tighter protective order than that.

Mr. Tate: Your Honor, I'm sure we can agree on something.

The Court: Okay.

Mr. Tate: **As long as those contacts are in place so these other third parties won't be bothered by unwanted contact.**

The Court: They won't be. Everybody gets what they want. If there ever arises a legitimate reason why some **further inquiry into an individual patient** needs to be made, then the Court can say yes or no to that.

Mr. Tate: Yes, sir.

The Court: But the lawyer will not do it without Court approval.

Mr. Tate: And for our purposes right now, what we are talking about are the documents, basically the documents that are in this notebook, the database documents.

The Court: No, what we are talking about are the documents that have been requested...At this point, I've looked at this, and I believe this information that has been requested is discoverable. **The protective order is in place to handle the privacy issues.**

October 14, 2008, Hearing Transcript, P. 13-15.

These hearing transcripts clearly show the intent of the Court and the parties to draft and execute a protective order designed to protect the identities of the third parties listed in the databases. The Court issued its Protective Order on November 14, 2008. Numerous depositions were taken subsequent to the entry of the protective order and, at no time, did the Appellant request these depositions be sealed, redacted, or otherwise designated as materials to be protected under the Order. For over a year and a half, the parties conducted discovery under a narrow interpretation of the Protective Order in which each side understood the intent of the Order was to protect the identities of the patients. However, a significant event occurred which forced Appellant to take an extreme position inconsistent with its prior statements and conduct.”⁸

⁸ Appellant's extreme position is addressed in detail in Section V of Respondent's Brief.

On March 17, 2010, Hollman filed a Federal Court Class Action in which the Appellant was named as a Defendant.⁹ The class action complaint alleged the database was a fraudulent scheme designed to hide and withhold crucial medical information from its patients through the use of the complex case and advocacy databases. Although the *Hollman* federal court complaint did not identify a single individual by name who was included in the database nor did it recite any identifying information, Appellant swiftly filed in the *Hollman* state court litigation a Motion for Order and Rule to Show Cause, Motion to Modify Protective Order, and Motion for Sanctions.¹⁰

In this motion, Appellant, for the first time, took the position that use and/or disclosure of *any and all* information and/or documents *relating in any way* to the complex case and advocacy databases constituted a violation of the Protective Order.¹¹ On April 20, 2010, Respondent filed a Motion for a Protective Order Due to Spoliation of Evidence by Appellant. The motion alleged the Appellant had intentionally and systematically modified the databases in a manner which could not be traced nor could the information be recovered.¹² Prior to a hearing

⁹ *Hollman v. TLC The Laser Eye Center (Institute), Inc., et al.*, C.A. No. 6:10-685 (U.S.D.C., D.S.C.).

¹⁰ This motion was filed on April 13, 2010.

¹¹ It is interesting to note that Appellant did not take this position in its opposition to Respondent's motion in the *Hollman* state court case to contact and interview the non-party patients listed in the database. Appellant's opposition included a Petition for Writ of Certiorari to the South Carolina Supreme Court.

¹² The *Hollman* lawsuit was filed on October 12, 2006. The databases as they relate to John Hollman were modified by Dr. John Potter, Vice President of Clinical Services and the Director of the Advocacy Program, on December 2, 2006. According to Alan Webb, the TLC employee responsible for the creation of the databases, the databases could be modified so that the modifications could not be traced, and the old data could not be retrieved (Webb Deposition, p. 157, l. 9-13; p. 159, l. 3-7 and 10-13). According to Mr. Webb, if the database was modified, the only evidence of the modification would be a computer entry showing the last date modified.

From October 2007-December 2007, the scope of *Hollman's* state court case changed dramatically. TLC had produced e-mails alerting *Hollman's* attorneys to the existence of numerous similar cases contained in the complex case and advocacy log databases. In addition, the e-mails and other documents produced showed a concerted effort to manipulate patients and patients' records (see description of the e-mails and other documents in

being held on Appellant's and Respondent's cross-motions for sanctions, Appellant and Respondent reached a settlement agreement on June 16, 2010.¹³ On June 24, 2010, a Stipulation of Dismissal with Prejudice as to Appellant was filed with the circuit court. The settlement agreement provided Appellant the right to file a motion or petition with the circuit court to modify or vacate the applicable orders to seek return of protected information at an earlier date (Settlement Agreement, paragraph 15). In addition, as part of the settlement, both Appellant and Respondent agreed to withdraw their motions for sanctions. However, despite this agreement, and only two weeks later on July 8, 2010, Appellant, now a non-party to the Hollman litigation, filed an identical Motion for Order and Rule to Show Cause, Motion to Modify Protective Order, and Motion for Sanctions.¹⁴ Appellant's motion did not allege any conduct by the Respondent which was different from the allegations in the original motion or any conduct which had occurred subsequent to the original motion, the settlement agreement, or the dismissal with prejudice of Appellant from the case. Shortly thereafter, and in response to Appellant's re-filing, Respondent re-filed their Motion for a Protective Order Due to Spoliation of Evidence by

Footnote #4 on p. 4 of Respondent's brief). Based on this information, in December of 2007, Hollman filed a Motion to Amend his complaint to allege fraud and contemporaneously sought expanded discovery of other patients, together with complex case and advocacy databases.

TLC's response was immediate. During late January 2008 through February 2008, Dr. Potter entered the individual database on 230 patients in advocacy, modifying each patient's information in ways which, according to Alan Webb, were impossible to trace.

The circuit court hearings in June 2008 and October 2008, orally confirmed to all parties that the advocacy and complex case databases were discoverable. Again, Appellant's response was immediate. Between the time of the first hearing (June 30, 2008) and the entry of the discovery order, Dr. Potter entered the individual databases of 344 additional patients in the advocacy database and modified each in ways impossible to trace. Over 95 percent of these changes were done over a two-day period. In total, 574 databases on individual patients were modified in a way that cannot be traced nor can the information be recovered. These facts constituted the basis for Respondent's Motion regarding spoliation of evidence.

¹³ See June 16, 2010, Settlement Agreement between Hollman and TLC.

¹⁴ This identical motion contained an identical case caption and identical civil action numbers and again sought sanctions of costs and attorneys' fees, not from Respondent's attorneys, but from the prior Plaintiffs, John and Danielle Hollman.

Appellant and for Sanctions. A hearing on cross motions was held on July 26, 2010. On August 17, 2010, the circuit court issued its Order containing the following rulings:

1. The Protective Order filed November 14, 2008, is clear and unambiguous in its definition of the information to be protected and does not need to be modified;
2. The Settlement Agreement permits TLC to request modification of the Protective Order following settlement but no post-settlement events exist which would permit or require the modifications sought by TLC and, therefore, the request is premature; and,
3. The parties' motions for sanctions need not be decided at this time and should be deferred until the conclusion of this case.¹⁵

In addition, the Order found the definition of "Confidential Health Information" contained in the Protective Order was unambiguous in that for information to be "Confidential Health Information", it must include both the health information and the identity of the patient.¹⁶

Appellant filed a Motion for Reconsideration on September 15, 2010. On November 23, 2010, the circuit court held a hearing regarding Appellant's Motion for Reconsideration. After a lengthy hearing and extensive oral arguments, the circuit court denied the motion and instructed Respondents to prepare an Order denying Appellant's motion.

On December 17, 2010, Respondent's counsel gave notice to the Court and opposing counsel that the submission of the proposed Order would be delayed pending receipt of transcripts of the three hearings related to the issues involved.¹⁷ In January 2011, a mediation between Hollman and the remaining parties was held, and on March 25, 2011, Hollman and the

¹⁵ August 17th Order, p. 2

¹⁶ August 17th Order, p. 3.

¹⁷ December 17, 2010, E-mail from Mr. Lewis to the Circuit Court.

remaining parties (Woolfson and Campbell) reached a settlement agreement. At some point during the week of April 11, 2011, Respondent's counsel had a telephone conversation with Appellant's counsel and advised him a settlement with the remaining parties had been reached, and the case would soon be dismissed with prejudice. Counsel for both parties discussed several issues, including whether the proposed Order regarding the Motion for Reconsideration needed to be filed in light of the settlement and pending dismissal with prejudice. By letter dated April 20, 2011, Respondent's counsel followed up with Appellant's counsel and confirmed that he had received transcripts from the previous hearings and was prepared to draft the proposed Order "should your client feel it to be necessary considering the fact that this case will be dismissed soon".¹⁸ Respondent's counsel also confirmed the previous discussion regarding the return of the database pursuant to the Protective Order in light of the fact that Respondent's counsel had filed additional lawsuits against Dr. Woolfson and Appellant (the *Dickerson* and *Luce* cases) and would be seeking discovery of the database in the new cases.¹⁹ Respondent's counsel suggested the database be filed "under seal with the Court until any discovery issues involving the production of the database can be addressed by the Court" in the newly filed cases. Respondent's counsel represented to the Court at the subsequent hearing that it was his understanding Appellant's counsel agreed with the suggested proposal but was going to seek consent from his client and respond to Respondent's counsel.²⁰ Respondent's counsel's letter made it clear that the checks and releases to settle the *Hollman* cases would be received within

¹⁸ April 20, 2011 Letter from Mr. Lewis to Mr. Tate.

¹⁹ April 20, 2011 Letter from Mr. Lewis to Mr. Tate.

²⁰ January 12, 2011, Order, p. 5.

the next week, and the Stipulation of Dismissal with Prejudice would be filed shortly thereafter. Indeed, the Order of Dismissal with Prejudice in the *Hollman* case was filed on May 2, 2011. Appellant's counsel made no effort to contact Respondent's counsel within the timeframes discussed, and, in fact, Appellant's first communication to Respondent's counsel regarding its desire to have an Order prepared and submitted occurred on August 19, 2011, some four months after Respondent's counsel's letter. More than five weeks later, on September 28, 2011, Appellant filed its Motion to Compel Respondent to file a proposed Order. In the hearing on the matter, the Court denied the motion and issued its Order of January 12, 2012. The circuit court also denied Appellant's Motion to Reconsider, and this appeal followed.

ARGUMENT

I. Introduction

Appellant contends the critical issue in this appeal involves "Respondents' counsel's compliance with the Protective Order."²¹ Nothing could be more incorrect. The critical issue in this appeal is Appellant's disagreement with the circuit court's interpretation of its own Protective Order and its failure to timely preserve the issue on appeal. Appellant now seeks a ruling from this Court which would be unprecedented. Essentially, Appellant vehemently argues that the circuit court retained subject matter jurisdiction to issue an Order denying Appellant's Motion for Reconsideration, yet then asks this Court to divest the circuit court of the very same jurisdiction. In addition to such a paradoxical request, Appellant seeks a ruling from this Court that would eliminate the circuit court's findings of fact and conclusions of law upon which the Order is based.

²¹ Appellant's Initial Brief, p. 1.

Appellant has crafted an argument to convince this Court that the sole basis for the circuit court's finding that it lacked subject matter jurisdiction over Appellant's request to issue an Order denying Appellant's Motion for Reconsideration of the August 17, 2010 Order, is the dismissal of the *Hollman* case in May of 2011. However, the circuit court's August 17th Order, read in its entirety, clearly takes into account additional and compelling reasons for its ruling. The circuit court's findings of fact show an appreciation for the totality of the circumstances, including Appellant's own conduct which ultimately resulted in the Appellant's failure to preserve the issue for the Court's consideration. The Court's conclusion is not only consistent with South Carolina law but reflects an accurate view of the underlying facts resulting in its denial of Appellant's motion.

II. Standard of Review

The Respondent concedes this appeal involves questions of law which are to be evaluated under the *de novo* standard of review. However, despite Appellant's desire that this Court decide this case without any particular deference to the decisions of the lower court, the Supreme Court recently discussed at length the *de novo* standard of review in a family court matter and held:

De novo review neither relieves an appellant of demonstrating error nor requires us to ignore the findings of the family court. The presence of *de novo* review and a willingness, after review, to defer to the fact finder should not be viewed as contradictory positions.

Lewis v. Lewis, 392 S.C. 381, 709 S.E.2d 650 (2011).

Appellant next argues that this appeal involves equitable questions and cites *Ex parte Boddie*, 200 S.C. 379, 21 S.E.2d 4 (1942), as standing for the proposition that a motion for an

Order and Rule to Show Cause is a question arising in the Court's equitable jurisdiction.²² However, nowhere in the *Boddie* decision does the Court state this proposition. Neither does the *Boddie* Court pass on the applicable standard of review. *Boddie* involved a mortgage foreclosure action during which one of the parties filed a Rule to Show Cause. Simply because the underlying suit was one in equity does not translate into a legal principle that Motion and Order and Rule to Show Cause is an equitable issue. The Motion and Rule to Show Cause in this case does not require this Court to apply a *de novo* standard of review. Any review of the circuit court's ruling on Appellant's Motion and Rule to Show Cause should be considered as an action at law with an abuse of discretion standard.

In an action at law, when a case is tried without a jury, the trial court's findings of fact will be upheld on appeal when they are reasonably supported by the evidence. Stated another way, the trial court's findings of fact will not be disturbed on appeal unless wholly supported by the evidence or unless it clearly appears the findings were influenced or controlled by an error of law. The trial court's findings in such a case are equivalent to a jury's findings in a law action. *Butler Contracting, Inc. v. Court Street, LLC*, 369 S.C. 121, 631 S.E.2d 252 (2006).

III. Subject Matter Jurisdiction

A. Appellant's Status As Intervenor is in Dispute

Appellant argues its second filing of the Motion for Sanctions in July 2010 constituted an intervention and was, therefore, the proper mechanism for enforcing its rights.²³ The Appellant makes a conclusory statement that "TLC subsequently *intervened* in *Hollman* for the limited purpose of enforcing the Protective Order". In a footnote purportedly supporting this statement,

²² Appellant's Initial Brief, p. 18.

²³ Nowhere in the Appellant's motion does it refer to itself as an intervenor nor does it refer to Rule 24. In fact, despite its admission that it was not a party when the motion was filed, its motion repeatedly refers to itself as "defendant".

Appellant references the July 2010 hearing transcript asserting the transcript reflects the circuit court allowing “TLC’s intervention and noting Respondents’ counsel’s consent.”²⁴ In addition, the footnote cites the August 17th Order as “confirming TLC’s intervention”²⁵ and makes another conclusory statement: “Accordingly, the Court recognized TLC’s separate interest in enforcement of the Protective Order.” Appellant’s conclusions are inaccurate. Appellant first mischaracterizes the actions of the Court at the hearing as well as Respondents’ counsel’s “consent”. The transcript is clear that at the beginning of the hearing Respondent’s counsel immediately raised issues relating to Appellant’s status in the case and, on several occasions---including the page cited by Appellant in support of its proposition---that the Appellant has no standing to file the motion since it was a non-party.²⁶ In addition, the mere fact that the circuit court allowed Appellant to proceed with oral argument does not constitute allowing or “confirming” its intervention. Lastly, the Court’s Order makes it clear that Appellant’s request for modification of the Protective Order was premature and its motion for sanctions was deferred until the conclusion of the case. Contrary to the Appellant’s position, the Court never confirmed Appellant’s attempt to intervene, and, in fact, the Court’s ruling effectively denies Appellant’s intervenor status.

B. The Appellant’s Own Conduct Resulted in a Failure to Preserve its Rights.

The June 16, 2010, settlement agreement between Appellant and Respondent ended a long and protracted litigation battle involving numerous discovery and procedural issues. At the

²⁴ Appellant’s Initial Brief, p. 20, footnote 60.

²⁵ Appellant’s Initial Brief, p. 20, footnote 60.

²⁶ See July 2010 State Court transcript, p. 4, 5, 12, and 14.

time the settlement agreement was reached and the case was dismissed with prejudice as to the Appellant, both parties had outstanding motions alleging improper conduct on the part of the other.²⁷ As part of the settlement agreement, both parties agreed to withdraw their motions for sanctions. Despite this agreement, only two weeks later, Appellant, as a non-party, filed the identical motion for sanctions against the Respondent without citing one single act or event which had occurred subsequent to the first filing of the motion for sanctions. Had Respondent known Appellant intended to re-file an identical motion for sanctions only days after dismissal of the case against Respondent, Respondent would have refused to settle the case. In response to Appellant's questionable conduct in re-filing the identical motion, Respondent re-filed its Motion for a Protective Order Due to Spoliation of Evidence and, in addition, filed a Motion to Enforce the Settlement Agreement, and to Dismiss Appellant's Motion for Sanctions. The circuit court, upon ruling on the cross-motions, found: 1) Respondent had not violated the unambiguous language of the Protective Order²⁸; 2) Appellant's request to modify the Protective Order was premature; and, 3) the ruling on the cross-motions for sanctions would be deferred until the conclusion of the *Hollman* case.

Appellant filed a Motion for Reconsideration which was denied by the circuit court. At that time, the circuit court instructed Respondent to prepare an appropriate Order. Shortly thereafter, Respondent sought permission from the Court to delay the drafting of the proposed Order until receipt of the lengthy hearing transcripts. Appellant did not object, and the Court

²⁷ Appellant's motion alleged violations of the Protective Order, and Respondent's motion alleged spoliation of evidence by the Appellant.

²⁸ The circuit court found that, pursuant to the clear and unambiguous language of the Protective Order, protected "Confidential Health Information" must include both the health information and the identity of the patient (August 17, 2010, Order, p. 3). The Court's finding is addressed in detail in Section V of Respondent's brief.

granted Respondent's request. In the meantime, Respondent and the remaining parties reached a settlement agreement. Until this point, the facts are largely undisputed. However, Appellant and Respondent have very different views on what occurred next. Since the Hollman case was to be ended and dismissed with prejudice, Respondent's counsel contacted Appellant's counsel to notify him of the pending dismissal and discussed several issues, including whether the Order regarding the Motion for Reconsideration needed to be filed since the case would soon end. Respondent's counsel, by letter dated April 20, 2011, confirmed the conversation and advised Appellant's counsel that if Appellant still wanted the Order to be prepared in light of the pending dismissal with prejudice, Respondent's counsel would be willing to do so. However, the letter clearly questions the necessity of filing an Order since the same issues would be taken up in the Dickerson and Luce litigation. In addition, it was Respondent's counsel's understanding that Appellant's counsel agreed with the proposal to handle the discovery issues in the recently filed Dickerson and Luce cases²⁹ thereby filing the databases under seal with the Court pending resolution of the discovery issues. Again, it was Respondent's counsel's understanding that Appellant's counsel agreed with the proposal but would seek consent from his client and get back to Respondent's counsel prior to the consummation of the settlement which would occur within the next week or so.³⁰ The purpose of seeking Appellant's response prior to the dismissal of the case was to ensure that upon such request by Appellant, Respondent could retain the ability to craft a release which would protect the released parties from having to participate in

²⁹ Dickerson and Luce were filed on December 7, 2010.

³⁰ April 20, 2011, Lewis letter to Tate.

any ongoing dispute between Appellant and Respondent.³¹ Appellant did not respond, and the Stipulation of Dismissal with Prejudice was filed on May 2, 2011. At no time prior to the filing of the Stipulation of Dismissal with Prejudice did Appellant contact Respondent's counsel and, in fact, Appellant waited four months until August 19, 2011, to advise Respondent it, indeed, wanted an Order denying its Motion for Reconsideration.^{32 33}

In its January 12th Order following Appellant's Motion to Compel Respondent to prepare and file an Order, the circuit court essentially ruled that the dismissal with prejudice of the Hollman case on May 2, 2011, ended with finality all pending matters and, therefore, the Court lacked subject matter jurisdiction over TLC's request to issue an Order in a case which had ended. The Order further held that based on Respondent's counsel's letter of April 20, 2011, Appellant had notice that the dismissal with prejudice was imminent, and its failure to advise Respondent's counsel it wanted the Order to be prepared prior to the dismissal of the case resulted in a failure to preserve the issue. Despite Appellant's arguments to the contrary, the April 20th letter clearly advises Appellant's counsel that based on the previous conversation, the attorneys had agreed that the best course of action was to have the discovery issues relating to the database resolved by the circuit court in the Dickerson and Luce cases.

In light of the settlement, I had called to discuss with you whether we needed to submit a proposed Order to Judge Miller regarding the motion to reconsider you filed several months ago.

³¹ Again, Appellant's re-filing of the Motions for Sanctions contained the same captions and civil action numbers of the cases which were dismissed with prejudice.

³² During this four month period, Appellant's Motions to Dismiss in the Dickerson and Luce cases were denied.

³³ The hearing on Respondent's Motions to Dismiss in the Dickerson and Luce cases were heard on June 9, 2011. The Order denying the motions was filed on September 12, 2011. Appellant filed its Motion to Compel on September 28, 2011.

I have now received copies of the transcripts from the previous hearings and am prepared to draft a proposed Order **should your client feel it to be necessary considering the fact that this case will be dismissed soon...**As I understand it, you were going to talk with your client about these two issues and **get back to me**. It appears we will receive checks and releases within the next week, and after the execution of the releases and the filing of the Stipulation of Dismissal, we have 60 days in which to return the database.

April 20, 2011, Lewis Letter to Tate.

It is clear that the letter memorializes a conversation in which Respondent's counsel asks Appellant's counsel if the Order needs to be prepared in light of the pending dismissal of the *Hollman* case and the discovery issues involved in the *Dickerson* and *Luce* cases. Despite Appellant's argument that it had no affirmative duty to request that the Order be prepared, Appellant has never offered any evidence or explanation as to why it never responded to Respondent's counsel's simple request until 4 months later. The circuit court found, after a lengthy hearing³⁴, Appellant was aware, based on the prior discussion between counsel, that it had an affirmative duty to request the Order be prepared prior to dismissal or the matter would be ended.³⁵ Further, the Court found there was "no evidence to support defendant's position that it intended the Order to be filed."³⁶ Again, despite Appellant's arguments to the contrary, the evidence begs the question: Why did Appellant wait four months to request the Order be filed?

A reasonable inference to answer that question can be drawn from the events which occurred during the four-month period of silence by Appellant. On April 28, 2011, Appellant

³⁴ Mr. Lewis, as an officer of the Court, explained in detail to the Court his understanding of the conversation with Appellant's counsel, Mr. Tate, which preceded the April 20, 2011, letter. It is interesting to note that Mr. Tate was not present at the hearing to give the Court the benefit of his understanding of the conversation and no affidavit was filed to provide the Court with any evidence to contradict Mr. Lewis' statements.

³⁵ January 12, 2012, Order, p. 5.

³⁶ January 12, 2012, Order, p. 6.

filed its motions to dismiss in the *Dickerson* and *Luce* cases. The motions were primarily based on statute of limitation and statute of repose defenses. A hearing was held on the motions to dismiss on June 9, 2011. By e-mail dated July 1, 2011, Judge Miller advised the parties he was denying all motions and asked the *Dickerson* and *Luce* attorneys to prepare a proposed Order.³⁷ On August 18, 2011, Paul Landis, one of the attorneys for *Dickerson* and *Luce*, submitted proposed Orders to the Court and copied Appellant's counsel.³⁸ **One day later**, on August 19, 2011, after waiting 4 months, Appellant's counsel requested Respondent's counsel file the proposed *Hollman* Order denying its motion for reconsideration. At least one reasonable inference to be drawn from this sequence of events is that Appellant believed it would prevail on the *Dickerson* and *Luce* motions to dismiss, and when those motions were denied, it faced the reality that the databases would be produced in *Dickerson* and *Luce* and was left with the ended *Hollman* case as its only potential avenue to prevent production of the databases. Unfortunately for the Appellant, its gamble on the *Dickerson* and *Luce* motions to dismiss backfired, resulting in its desperate attempt to have the circuit court issue an Order in a case that has ended and been dismissed with prejudice.

An action will be held to be ended when the parties agree upon a compromise and settlement of the cause of action and the terms of the agreement are complied with. *W.T. Ferguson Lumbar Co. v. Elliott*, 171 S.C. 455, 172 S.E. 616 (1934). In *Pryor v. Newbold*, 69 S.C. 426, 48 S.E. 275, the S.C. Supreme Court addressed whether a defendant could file a counterclaim against the Plaintiff after a case had been settled. The Court stated:

³⁷ July 1, 2011, E-Mail from Judge Miller to all parties.

³⁸ August 18, 2011, E-Mail from Paul Landis to Judge Miller, copying all parties.

We consider the first defense of settlement, because, if it is found the parties themselves by contract ended the case, it would manifestly be not only unnecessary, but improper, for this Court to revive and discuss issues which the parties themselves had set at rest.

W.T. Ferguson Lumbar Co. v. Elliott, 172 S.E. 618, citing Pryor v. Newbold, *id.*

In addition to entering into the Settlement Agreement, the parties also dismissed the Hollman case with prejudice. It is generally recognized that a dismissal with prejudice indicates an adjudication on the merits and precludes subsequent litigation to the same extent as if the action had been tried to a final adjudication. Jones v. City of Folly Beach, 326 S.C. 360, 483 S.E.2d 770 (1997).

Appellant cites *Ex parte Bland*, 380 S.C. 1, 667 S.E.2d 540 (2008) in support of its argument that its rights to challenge the circuit court's denial of its Motion for Reconsideration were preserved. However, its reliance on Bland is misplaced. Bland involved a Protective Order issued in a legal malpractice action which required all documents marked by the parties as "Confidential" be returned upon written demand at the conclusion of the litigation. Two years following the settlement of the underlying litigation, the original plaintiffs' attorneys filed another legal malpractice case against the original defendant law firm. During the course of discovery, defendant law firm discovered the plaintiffs' attorneys had retained a "policy manual" which had been marked by the parties as "Confidential" in the original lawsuit. Defendant law firm filed a motion under the previous lawsuit caption to enforce the settlement agreement alleging the plaintiffs' attorneys had violated the terms of the protective order as well as the settlement agreement. All of the acts that allegedly constituted the breach of the settlement agreement and protective order occurred after the termination of the underlying litigation. The

Supreme Court held the acts constituted a material breach of the settlement agreement and a violation of the protective order. *Bland* does not support Appellant's position.

The conduct which allegedly violated the protective order in *Bland* occurred after the settlement of the underlying litigation. In this case, Appellant, in its re-filed Motion for Sanctions, has alleged no conduct which occurred following the settlement and dismissal with prejudice. Following notice by Mr. Lewis to Mr. Tate of the pending settlement in the case and the clear request by Mr. Lewis to advise him if Appellant wanted the Order Denying Reconsideration prepared, Appellant's inaction was rightly interpreted as a decision made by Appellant that it did not want the Order to be issued. Notably, the Court in *Bland* recognized with approval the defendant law firm's communicated response to the plaintiffs' attorney's notice of their continued possession of the policy manual. In this case, the Appellant's silence over a 4-5 month period is strong evidence cutting against its argument.

Despite its arguments to the contrary, Appellant had a number of appropriate vehicles at its disposal following the settlement between Respondent and the remaining parties to have the order issued. First, Appellant could simply have responded to Respondent's counsel's letter, prior to dismissal of the suit, accepting counsel's offer to prepare the proposed Order. Having been so advised, Respondent's counsel would have prepared the appropriate release and Order of Dismissal ensuring the other defendants would not be forced to engage in litigation involving the Protective Order issues. Yet, for no apparent reason³⁹, Appellant chose not to respond to Mr. Lewis' letter. Had it chosen to do so, Appellant could have appealed the circuit court's Order denying the Motion for Reconsideration. Presumably, Appellant will argue that it did request

³⁹ As stated earlier, Appellant has never provided Respondent or any Court with a reason why there was not a response to Mr. Lewis' letter until four months after it was received.

Respondent's counsel to prepare the Order on August 19, 2011, and such request was timely. However, this issue begs the question: How long after notice of the Respondent's intention to dismiss the underlying action can the Appellant wait to request an Order in a dismissed case be prepared and filed? Although not directly on point, the South Carolina Supreme Court has addressed a similar situation with regard to timeliness. The Appellant cites *Davis v. Jennings*, 304 S.C. 502, 405 S.E.2d 601 (1991) in support of its proposition that its "intervention" was procedurally necessary and appropriate. However, the *Davis* Court, in recognizing a non-party's right to intervene for the limited purpose of challenging a protective order, applied a 4-part test for determining the timeliness of a motion to intervene. The 4-part test is a useful vehicle for determining in this case whether the Appellant's request that the Order be prepared was timely. The 4-part test takes into consideration the following factors:

- (1) the time that has passed since the applicant knew or should have known of his or her interest in the suit;
- (2) the reason for the delay;
- (3) the stage to which the litigation has progressed; and,
- (4) the prejudice the original parties would suffer from granting intervention and the applicant would suffer from denial.

Davis v. Jennings, 405 S.E.2d 504, citing *Mokhiber v. Davis*, 537 A.2d 1100 (D.C. App. 1988).

Applying the timeliness test to the Appellant's request, clearly shows Appellant's request was untimely:

1. The time that has passed since the applicant knew or should have known of his or her interest in the suit

By virtue of Respondent's counsel's letter, 4 months passed until Appellant requested the Order be prepared and 5 ½ months passed until Appellant filed its Motion to Compel the Order

to be issued. In Davis, the Court held the intervenor's motion was timely when filed within one month of its knowledge of its interest in the case.

2. The reason for the delay

As stated previously, Appellant has never given the Respondent or the circuit court any reason for the 4-5 ½ month delay following Respondent's counsel's letter.

3. The stage to which the litigation has progressed

The Hollman litigation ended on May 2, 2011, when the Stipulation of Dismissal was filed.

4. The prejudice the original parties would suffer from granting intervention and the applicant would suffer from denial

The Appellant's original motions for sanctions requested the Court sanction the Plaintiffs John and Danielle Hollman for costs and attorneys' fees. Clearly, the Hollmans would be prejudiced should the circuit court grant Appellant's motion for sanctions. It would be extremely prejudicial to Mr. and Mrs. Hollman to be assessed what most likely would be significant costs and attorneys' fees in a case which they believed had been fully and finally settled pursuant to the settlement agreement and dismissal. As for any prejudice the Appellant would suffer from denial, Respondent has never contested that the Appellant has the right to raise these same discovery issues in the Dickerson and Luce cases. In fact, the letter from Mr. Lewis to Mr. Tate suggests that discovery issues be taken up in the Dickerson and Luce cases. Therefore, the Appellant will have its day in court with regard to these issues, and the circuit court can make the appropriate ruling in ongoing litigation with a full record before it. Appellant's attempt to "intervene" in the ended Hollman litigation appears to simply be a vehicle to obtain a favorable

ruling before an appellate Court with an incomplete record which it will attempt to use to affect the rights of the litigants in two totally separate and viable cases.

Although not factually or procedurally identical, *Davis* is useful in determining when a request in the nature of the Appellant's request in this case is timely.

Appellant's second option to preserve its rights was to have simply appealed the *Hollman* Order of Dismissal after it was filed. Thirdly, Appellant could have filed a Rule 60 motion to reopen the case following the dismissal. Fourthly, Appellant could have chosen to bring a new action to enforce the portions of the Protective Order which it alleges have been violated. This option is clearly available to them under the terms of the settlement agreement with Respondent. Lastly, Appellant could have filed a Motion to Intervene pursuant to Rule 24 of the *S.C. Rules of Civil Procedure*.

With each of these procedural maneuvers, the Appellant would have properly preserved its rights. Instead, it chose to be silent for four months and then file a motion in a case that didn't exist. Appellant simply failed to preserve its rights through its own motion.

IV. If the Appellant Did Properly Intervene to Preserve the Issue, the Proper Mechanism For Full Adjudication is Remand to the Circuit Court

Should this Court determine the Appellant properly preserved its right to challenge the circuit court's denial of its Motion to Reconsider the Court's January 12th Order, the proper mechanism for full adjudication, and in Appellant's wording, "complete relief", is a remand to the circuit court. Appellant's request for this Court to adjudicate "the issues arising under the August 17th Order" would not only divest the circuit court of its essential fact finding function but would deprive this Court of a full record upon which to base its ruling. In its brief, Appellant devotes 22 of its 31 pages of argument to convincing this Court that it was unfairly and

inappropriately prevented from exercising its right to receive and, ultimately, appeal the circuit court's denial of its Motion for Reconsideration of the August 17th Order. Yet, in a single paragraph makes what can only be characterized as an unprecedented and novel request that this Court divest the circuit court of the very thing the Appellant argues for so strenuously. Amazingly, the Appellant requests that this Court deprive the circuit court of the opportunity to hear Appellant's arguments and make findings based on the evidence presented to it.

In its August 17th Order, the circuit court adjudicated only one of the several issues before it: its interpretation of the language of the Protective Order. In addition to its finding with regard to the clear and unambiguous language of the Protective Order, the circuit court made two other critical findings. The first involved Appellant's rights under the settlement agreement to request modifications of the Protective Order where no post-settlement conduct violative of the Protective Order existed. The Court held this request to be premature. If Appellant has properly preserved its rights to challenge the circuit court's Order, Appellant's request for modification has now matured and specific findings of fact need to be made based on an evidentiary hearing.

In addition, and more importantly, the circuit court deferred a decision on the parties' cross-motions for sanctions until the conclusion of the case. Any ruling by this Court on the deferred motions for sanctions would be made based upon an utterly incomplete record. Both parties' Motions for Sanctions deserve serious consideration by the circuit court only after all of the evidence has been presented to it. Appellant's request appears to be an attempt to take its best shot with an appellate court which does not have the benefit of a full record. Granting such

a request would do injustice, not only to the Respondent, but to the circuit court, as it would completely undermine the fact finding duty and responsibility of the lower court.

The Appellant has attempted to convince this Court that submission of a proposed Order “is a purely administrative act that could be accomplished with a Form 4...since the circuit court will almost certainly...deny TLC’s motion for reconsideration...”⁴⁰ Such an assertion is certainly mere speculation and more likely an attempt by the Appellant to bypass the circuit court’s consideration of and ruling upon the other issues before it. The Appellant shouldn’t be allowed to “cherry pick” the issues for which it wants a ruling by a court which has an incomplete record before it.

V. The Circuit Court Did Not Misconstrue the Protective Order But, Instead, Rightly Construed the Plain and Unambiguous Terms of the Order

Appellant consistently and continually mischaracterizes information produces in discovery, including information contained in the databases as “Protected Information.” In addition, it engages frequently in revisionist history, completely disregarding and contradicting the positions it has taken in the past. Lastly, it disregards its prior conduct which completely contradicts the position it is now taking.

A. The “Protected Information” Myth

Throughout its brief, Appellant consistently refers to information that is protected pursuant to the terms of the Protective Order, as “Protected Information”. For example, in its Statement of Facts, Appellant uses the term “Protected Information” to refer to documents and information which has never been determined by any judge or court to be “protected” by the

⁴⁰ Appellant’s Brief, p. 32.

Protective Order.⁴¹ The Appellant completely misconstrues and misuses the term “Protected Information” to its benefit.

In the late stages of this litigation, the Appellant has taken the position that **any and all** information and/or documents **relating in any way** to the complex case and advocacy databases is “Protected Information” subject to the Protective Order. Appellant asserts that the Protective Order is so all encompassing that it prohibits the disclosure of information such as the mere existence of the Complex Case System, the protocol for that system, the violations of that protocol, the mere existence of the Advocacy Log System, its set-up, the uses of it by Appellant, and, most importantly, the mere existence of the complex case and advocacy databases as well as any and all information contained in those databases. In support of its argument, Appellant cites the first numbered paragraph of the Protective Order which states:

1. This Stipulation and Protective Order shall apply to all information or discovery materials produced by any party or their agents during the course of discovery in this action, all information derived therefrom and extracts, copies, excerpts, or summaries thereof, including, without limitation, documents produced pursuant to Rule 33(c) or Rule 34 of the *S.C. Rules of Civil Procedure*, answers to requests for admissions, answers to interrogatories, documents subpoenaed in connection with depositions, and deposition transcripts (hereinafter referred to collectively as “discovery materials”).

Protective Order, p. 4.

Despite Appellant’s attempt to include the term “Confidential Health Information” as part of paragraph 1, that term does not appear in paragraph 1. Clearly, paragraph 1 is a general statement giving the Court the authority to protect information that needs protection. However,

⁴¹ In fact the only place where the phrase “Protected Information” appears outside of arguments made by the Appellant is in ¶ 15 of the Settlement Agreement between Appellant and Respondent which requires the return of certain discovery materials “containing names of patients and private healthcare information” (see 06/16/10 Settlement Agreement, ¶ 15).

the Court's *intent* with regard to the scope of the Protective Order is clearly demonstrated by the Order's opening paragraphs.

WHEREAS, discovery materials or information otherwise provided or disclosed by any party to this action **may contain** confidential, trade secret, and/or sensitive proprietary information;

WHEREAS, by separate Order, the Court has ordered the production of documents containing health information that **may be deemed** confidential under applicable law;

WHEREAS, the parties acknowledge and agree that it is appropriate for the Court to provide proper safeguards to protect confidential, trade secret, and/or sensitive proprietary information, Confidential Health Information (as defined in paragraph 2 below) **which may be disclosed and used** for purposes of this action;

WHEREAS, the Court recognizes that requests for the disclosure of documents or other information containing Confidential Health Information necessarily implicate the **privacy rights of individuals** not parties to this litigation;

WHEREAS, such privacy interests must be protected under applicable federal statutes...including, but not limited to... "HIPAA"...

WHEREAS, the Court finds that the disclosure and use of **certain information and documents containing such Confidential Health Information** is essential to the litigation of the claims being asserted...the Court further finds that it would be unduly burdensome and would further deprive the parties of meaningful access to information if the parties were to attempt to redact all medically-related and payment-related information that **could potentially be used to identify an individual**.⁴²

Clearly, the terms of the Order itself envision documents and materials produced in the litigation that are not subject to the Protective Order. Nevertheless, the Appellant has taken the extreme position that the Protective Order "protects" any information produced by the parties.

The Appellant's position is also inconsistent with the definition of "Confidential Health Information". The terms of the Protective Order are clear as to the scope of the information

⁴² Protective Order, p. 2-3.

subject to it. The Protective Order clearly contemplates the protection of “Confidential Health Information”. The Order defines Confidential Health Information as follows:

The term “Confidential Health Information” means...any document or information supplied that *identifies an individual* or subscriber in any manner and relates to the past, present or future payment for the provision of healthcare to such individual or subscriber. The term “Confidential Health Information” specifically includes “protected health information” as such term is defined by the Standards for Privacy of Individually Identifiable Health Information. 45 CFR Parts 160 and 164, promulgated pursuant to the Health Insurance Portability and Accountability Act of 1996. See 45 CFR §§164.501 (“protected health information”) and 160.103 (“individually identifiable health information”). “Confidential Health Information” includes all notes, summaries, compilations, extracts, abstracts, or oral communications that contain, are based on, or are derived from Confidential Health Information. [emphasis added]⁴³

“Protected Health Information” is defined as follows:

Protected Health Information means individually identifiable health information:

- (1) Except as provided in paragraph (2) of this definition, that is:
 - (i) transmitted by electronic media;
 - (ii) maintained in electronic media;
 - (iii) transmitted or maintained in any other form or medium.

45 CFR §160.103

“Individually identifiable health information” is defined as follows:

“Individually identifiable health information” is information that is a sub-set of health information, including demographic information collected from an individual, and:

⁴³ Protective Order, p. 4, ¶2

(1) Is created or received by a healthcare provider, health plan, employer or healthcare clearing house; **and**

(2) Relates to the past, present or future physical or mental health or condition of an *individual*; the provision of healthcare to an *individual*; or the past, present or future payment for the provision of healthcare to an *individual*; **and**

(i) That *identifies the individual*; or

(ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual.

45 CFR §160.103

“Health information” is defined as follows:

“Health information” is any information, whether oral or recorded in any form or medium; that:

(1) Is created or received by a healthcare provider, health plan, public health authority, employer, life insurer, school or university, or healthcare clearing house; and

(2) Relates to the past, present or future physical or mental health or condition of an *individual*; the provision of healthcare to an *individual*; or the past, present or future payment for the provision of healthcare to an *individual*.

45 CFR §160.103

Clearly, TLC's interpretation of the scope of the Protective Order is unreasonably broad, bordering on absurd. The definition of “Confidential Health Information” and the terms of the Order itself prohibit the disclosure and public use of information which identifies the individual patient. The circuit court found and so ruled that TLC's objection to the production of the documents and information—that they were prepared in anticipation of litigation—was not valid

and overruled the objection, thereby ordering the production of the information⁴⁴. It would defy both logic and reason to issue a Protective Order, and for both parties to agree to a Protective Order, of such broad scope that it prohibited *any* disclosure or use of *any* information produced in the absence of revealing the identity of the patient. Mere information about a patient isn't "confidential" if the identity of the patient is not disclosed. Further, the mere existence of a database that contains information about patients is not confidential if the identity of the patients is not disclosed. Instead, the purpose and terms of the Protective Order clearly establish the Court sought protection of the identity of the patients. TLC has never argued the information produced constituted a trade secret or proprietary information. Instead, the argument used time and time again in both open court and in briefs addressing the issue was "the protection of the privacy rights of the individual patients". An interpretation of the Protective Order which prohibits the Plaintiffs from using information contained in the database which does not specifically identify an individual patient is nothing more than an attempt by TLC to continue its longstanding pattern of withholding crucial information from its patients.

B. Appellant's Revisionist History

The position Appellant now takes with regard to the Protective Order is entirely inconsistent with positions it has taken in the past. The hearing transcripts from the first two hearings before the circuit court clearly show Appellant's initial positions were different from what it now argues. During the two hearings at which the production of the databases and other documents were at issue, Appellant's counsel conceded that Appellant had only two objections to the production of the databases: attorney-client privilege and work product prepared in

⁴⁴ November 14, 2008, Discovery Order, p. 4.

anticipation of litigation.⁴⁵ Despite its assertions to the contrary and its statement of facts, until very recently, the Appellant never objected to the production of the database information on the basis of trade secret or proprietary information. In addition, Appellant did not hold its extreme position with regard to the scope of the Protective Order until Hollman filed a federal court class action on March 17, 2010. Appellant should not now be allowed to revise the procedural and substantive history of this case merely to present its position in a better light on appeal.

C. Appellant's Current Position Disregards Its Prior Conduct

Lastly, Appellant's current position is inconsistent with its conduct during the first 3 ½ years of this litigation. In the later stages of this litigation, Appellant has consistently accused the Respondent of the improper use of database information which was "protected" by the Protective Order. However, documents containing information about the databases were voluntarily produced to the Respondent in the initial stages of discovery. Appellant produced e-mails between TLC doctors which made reference to the databases, complex case forms, and complex case and advocacy log standard operating procedures.⁴⁶ This information alone contained details as to the existence of the database as well as raised reasonable inferences that the database was being used to hide critical medical information from its patients. Despite the voluntary production of what the Appellant now calls proprietary, sensitive, confidential health information, Appellant seeks a ruling from this Court that this information is "Protected Information" and any use thereof is improper.

In addition, and even more compelling, is the Appellant's conduct following the issuance of the Protective Order. From November 14, 2008 (the date the Order was issued) until April 13,

⁴⁵ See Respondent's Statement of Facts, pp. 5-7. June 30, 2008 Hearing Transcript, p. 19-20, 27-29, and 33-34.

⁴⁶ See Footnote #4, p. 4 of Respondent's Brief

2010 (the date of Appellant's Motion for Order and Rule to Show Cause and for Sanctions), numerous depositions were taken and discovery conducted under a narrow interpretation of the Protective Order in which each side understood the intent of the Order was to protect the identities of the patients. At no time during this year and a half did the Appellant request that any depositions be sealed, redacted, or otherwise designated as materials to be protected under the Order. In fact, Respondent's counsel was diligent in instructing Appellant's witnesses that, pursuant to the Protective Order, the witnesses should not identify any patients contained in the database. Appellant's counsel in attendance at the deposition never voiced an objection to Respondent's counsel soliciting information contained in the database and never moved to have the depositions sealed or redacted to reflect its "concern" over the use of database information. For the Appellant to now take an extreme position with regard to the scope of the database because it suits its current agenda is disingenuous at best and should not be condoned by this Court.

VI. If This Court Chooses to Interpret the Protective Order, It Must Still Remand to the Circuit Court to Conduct Unfinished Business

Should this Court take on the Appellant's requested task of interpreting the Protective Order, and should it interpret the Order consistent with the Appellant's position, remand to the lower court is still appropriate. In the face of such a ruling, the circuit court must still determine the issue of the parties' cross-motions for sanctions. These matters were deferred by the circuit court and can only be determined based on a full evidentiary record before the Court. Based on the agreement between Appellant and Respondent upon settlement, Respondent withdrew its Motion for Sanctions Due to Spoliation of Evidence and only re-filed it after the Appellant re-filed its Motion for Sanctions. The Respondent has never had the opportunity to present a full

record of spoliation of evidence to the circuit court. To divest the circuit court of its responsibility to make additional findings with regard to spoliation would allow the Appellant to obtain a ruling based on an incomplete record.

VII. The Findings of Fact and Conclusions of Law Contained in the August 17th Order and January 12th Order Were Adjudicated By the Court and Proper Findings and Conclusions

Appellant concedes that Rule 52 of the *S.C. Rules of Civil Procedure* authorizes the Court to make findings of fact and conclusions of law in connection with the disposition of motions. Respondent also agrees that the Court's findings and conclusions should be supported by evidence in the record.⁴⁷ Despite Appellant's arguments to the contrary, there is evidence in the record to support each finding of fact and conclusion of law made by this circuit court. Appellant's criticism of the circuit court's conclusions of law and findings of fact is itself inaccurate since the "Accurate Statements of Fact" contained in its brief are, for the most part, mere self-serving, conclusory statements which do not recite one single piece of evidence in support of its statement with the exception of the April 20, 2011 letter written by Mr. Lewis. Appellant's brief, in this regard, is consistent with its pattern in the lower court. In support of its arguments in the circuit court with regard to the issues involved in this appeal, the Appellant routinely failed to present any evidence to the Court other than counsel's argument.

Nevertheless, Respondent will attempt, in summary fashion, to present this Court with a more clear picture of the evidence supporting what the Appellant calls improper findings of fact and/or conclusions of law. However, at the outset, several matters should be addressed:

⁴⁷ Appellant cites *Abernathy v. Latham*, 345 S.C. 106, 545 S.E.2d 848 (Ct. App. 2001) as supporting its conclusory statement that "the record should demonstrate that the facts and conclusions were actually adjudicated". Neither this language nor anything similar to this language appears in the *Abernathy* decision. While the Respondent doesn't disagree that the findings of fact and conclusions of law should not include matters which were not before the Court, Appellant's definition of "adjudication" appears to be unreasonably narrow.

1. Appellant appears to argue that e-mails sent from the circuit court to the parties in which a proposed Order was requested should constitute the entire substance of the proposed Order. This position defies both reason and logic. In this case in particular, there were typically multiple hearings from which an Order needed to be entered. The fact that an e-mail from the circuit court failed to set forth every detail of the Court's thought process defeats the purpose of asking for the preparation of a proposed Order.

2. Appellant implies that the circuit court was merely a puppet, doing the bidding of Respondent's counsel by adopting the proposed Order as its own. The fact that the Appellant doesn't agree with the decision of the Court does not compel a reversal of the Order.

3. Appellant's definition of "adjudication" is unreasonably narrow. In its brief, Appellant states the August 17th Order concludes that the Protective Order "does not protect information 'based on, containing, or derived from' protected information." Although it appears Appellant is quoting language from the Order, such language does not appear in the Order. Apparently, Appellant is arguing that because the circuit court interpreted the phrase "Confidential Health Information" as meaning information which includes both the health information and the identity of the patient,⁴⁸ it necessarily excludes information "based on, containing, or derived from" Confidential Health Information. Appellant asserts this issue was not addressed at the hearing and was not set out in the Court's e-mail.⁴⁹ Appellant then concludes this matter was "manufactured out of thin air" by Appellant's counsel.⁵⁰

⁴⁸ August 17th Order, p. 3.

⁴⁹ Appellant's Initial Brief, p. 41.

⁵⁰ Appellant's Initial Brief, p. 41.

Appellant again mischaracterizes the facts. In its Motion for Sanctions, the Appellant asks the circuit court to interpret the Protective Order to determine whether or not Respondent and its counsel had violated the Protective Order. The Appellant got what it asked for---an interpretation of the language of the Protective Order. The fact that Appellant disagrees with the Court's interpretation does not mean the language cited in the August 17th Order was "manufactured out of thin air". The issue of interpretation of the Order was briefed and presented to the circuit court at oral argument, and the Court interpreted the Order and made findings of fact and conclusions of law consistent therewith.

Findings of Facts and Conclusions of Law

Appellant asserts several findings of fact and/or conclusions of law were improper and/or inaccurate. For example, Appellant takes issue with the August 17th Order's statement that Appellant did not make any objections to discovery of the database other than in anticipation of litigation. However, Respondent craves reference to its Statement of Facts in this brief in which it provides exchanges between the circuit court and Appellant's counsel which clearly show Appellant's counsel abandoning the Peer Review objection following depositions taken of the TLC employees.⁵¹ The Order may be technically incorrect in that, initially, TLC did make several objections other than anticipation of litigation, but it did not, until later in the litigation, voice any objections regarding "interest of internal risk management practices and necessity". Nevertheless, the Court overruled any and all objections after an *in camera* review of the documents, therefore, the technical inaccuracy of this finding of fact is harmless.

⁵¹ Respondent's Statement of Facts, p. 5-7, June 30, 2008 Hearing Transcript, pp. 17 and 33.

Appellant next disputes the circuit court's finding regarding the conduct of the parties following imposition of the Protective Order. Appellant craves reference to its Statement of Facts in its Initial Brief, which describes the pattern of conduct of both parties following the imposition of the Protective Order.⁵² As stated earlier, not until the Appellant's first Motion for Sanctions did it contend the Protective Order protected information other than the identity of the parties.

Finally, Appellant, unbelievably, disputes the finding in the August 17th Order which states all of the violations claimed to have occurred pre-dated the Settlement Agreement.⁵³ Appellant contends the post-settlement agreement conduct which violated the Protective Order was the amendment to include Charles Benjamin Dickerson as the class representative of the federal class action. However, the settlement agreement between the Appellant and the Respondent, in ¶4, clearly contemplates the substitution of another person for Hollman as class representative.⁵⁴ For Appellant to attempt to convince this Court that a substitution of the class representative, which the Appellant's agreed to, was a violation of the Protective Order is absurd and disingenuous and should be disregarded by this Court.

CONCLUSION

For the reasons stated herein, Respondent respectfully requests this Court dismiss Appellant's appeal or, in the alternative, remand to the circuit court for a determination of pending issues requiring a full evidentiary hearing. Respondent also respectfully requests this

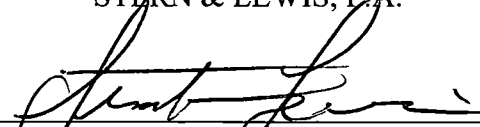
⁵² Respondent's Statement of Facts, p. 10-11.

⁵³ Appellant's Brief, p. 43.

⁵⁴ Settlement Agreement, ¶4, p. 5-6. This fact was also discussed extensively in the settlement negotiations between Appellant and Respondent.

Court deny Appellant's request to "adjudicate" the issues arising from the August 17th Order since such an "adjudication" would deprive the circuit court of conducting an evidentiary hearing to make findings on unresolved issues other than the interpretation of the Protective Order.

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ATTORNEYS FOR THE RESPONDENTS

September 12, 2012

Greenville, South Carolina

The South Carolina Court of Appeals

2007-CP-23-02347,

Ex Parte: TLC Laser Eye Centers (Piedmont/Atlanta) LLC;
TLC The Laser Center (Institute), Inc., Appellants,

In Re: John Hollman, Respondent,

v.

Dr. Jonathan Woolfson, individually; Dr. Michael A.
Campbell, individually, Optical Solutions, Inc.; and Optical
Solutions of Bluffton, LLC, Defendants,

2007-CP-23-08364,

Danielle Hollman, Respondent,

v.

Dr. Jonathan Woolfson, individually; Dr. Michael A.
Campbell, individually, Optical Solutions, Inc.; and Optical
Solutions of Bluffton, LLC, Defendants.

Appellate Case No. 2012-210888

The Honorable Edward W. Miller
Greenville County
Trial Court Case No. 2007CP2302347, 2007CP2308364

ORDER

The time for serving and filing the respondents' initial brief and designation of mater is hereby extended until September 12, 2012.

FOR THE COURT

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina
cc: Steven Edward Buckingham
W. Howard Boyd, Jr.
Stephen R.H. Lewis
Douglas F. Patrick

FILED

8-15-12 JDF

6/16/12
25/12

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*Of Counsel

August 8, 2012

The Honorable Jenny Abbott Kitchings
Clerk of Court, S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

**RE: Ex Parte TLC Laser Eye Centers (Piedmont/Atlanta) LLC; and
TLC The Laser Center (Institute), Inc., Intervenor**

**In re: John Hollman v. Dr. Jonathan Woolfson, et al.
C.A. No. 2007-CP-23-2347**

- AND -

**Ex Parte TLC Laser Eye Centers (Piedmont/Atlanta) LLC; and
TLC The Laser Center (Institute), Inc., Intervenor**

**In re: Danielle Hollman v. Dr. Jonathan Woolfson, et al.
C.A. No. 2007-CP-23-8364**

Dear Ms. Kitchings:

I would respectfully request an extension of time of thirty (30) days to file Respondents' Initial Brief in the above-referenced matter and enclose our firm's check in the amount of \$25.00 for the necessary filing fee.

Should you have any questions or concerns or need anything further, please do not hesitate to contact me or Deborah Scott in my office.

Sincerely,

COVINGTON, PATRICK, HAGINS,
STERN & LEWIS, P.A.

Stephen R.H. Lewis

SRHL:dcs

Enclosures

cc: W. Howard Boyd, Jr.
Steven E. Buckingham
Douglas F. Patrick

RECEIVED
AUG 13 2012

SC Court of Appeals

8/13

9/12

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2007-CP-23-2347

Ex parte TLC Laser Eye Centers (Piedmont/Atlanta) LLC; and
TLC The Laser Center (Institute), Inc. Appellants,

In re:

John Hollman Respondent,

v.

Dr. Jonathan Woolfson, Individually;
Dr. Michael A. Campbell, Individually;
Optical Solutions, Inc.; and Optical
Solutions of Bluffton, LLC Defendants.

Case No. 2007-CP-23-8364

Ex parte TLC Laser Eye Centers (Piedmont/Atlanta) LLC; and
TLC The Laser Center (Institute), Inc. Appellants,

RECEIVED
JUL 16 2012
SC Court of Appeals

In re:

Danielle Hollman Respondent,

v.

Dr. Jonathan Woolfson, Individually;
Dr. Michael A. Campbell, Individually;
Optical Solutions, Inc.; and Optical
Solutions of Bluffton, LLC Defendants.

DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

Appellants propose the following to be included in the Record on Appeal:

1. Order of November 14, 2008, Granting Respondents' Motion to Compel;
2. Protective Order of November 14, 2008;
3. Order of April 21, 2009, Granting Respondents' Motion to Modify the Protective Order of November 14, 2008;
4. Order of May 4, 2009, Denying Appellants' Motion for Reconsideration of the Order of April 21, 2009;
5. Order of the Supreme Court of May 28, 2009, Remanding for Further Proceedings;
6. Supplemental Order of July 7, 2009, Finding Relevance & Necessity;
7. Order & Opinion of the Supreme Court of September 21, 2009, Vacating the Orders of April 21, 2009 & July 7, 2009 and Remanding for Further Proceedings;
8. Order of August 17, 2010, Denying Appellants' Motion for an Order & Rule to Show Cause;

9. Order of September 1, 2010, Granting Respondents' Motion to File a Redacted Form of the Database under Seal in Dickerson v. TLC The Laser Eye Center (Institute), Inc. et al., C.A. No. 6:10-685 (U.S.D.C., D.S.C.);
10. Order of February 3, 2011, Granting Appellants' Motion to Dismiss in Dickerson v. TLC The Laser Eye Center (Institute), Inc. et al., C.A. No. 6:10-685 (U.S.D.C., D.S.C.);
11. Order of September 1, 2011, Denying Appellants' Motion to Dismiss in Dickerson v. TLC The Laser Center (Institute), Inc. et al., 2010-CP-23-9954;
12. Order of September 1, 2011, Denying Appellants' Motion to Dismiss in Luce v. TLC The Laser Center (Institute), Inc. et al., 2010-CP-23-9956;
13. Order of December 21, 2011, Denying Respondents' Motion for Reconsideration in Dickerson v. TLC The Laser Eye Center (Institute), Inc. et al., C.A. No. 6:10-685 (U.S.D.C., D.S.C.);
14. Order of January 12, 2012, Denying Appellants' Motion to Compel Respondents' Counsel to Prepare an Order for the Court as Directed, or Alternatively, to Request the Court to Issue an Order on Appellants' Prior Motion for Reconsideration;
15. Order of March 2, 2012, Denying Appellants' Motion for Reconsideration of the Order of January 12, 2012;
16. Order of March 9, 2012, Denying Appellants' Motion to Stay / Strike in Dickerson v. TLC The Laser Center (Institute), Inc. et al., 2010-CP-23-9954 and Luce v. TLC The Laser Center (Institute), Inc. et al., 2010-CP-23-9956;
17. Complaint, Hollman v. TLC The Laser Eye Center (Institute), Inc. et al., C.A. No. 6:10-685 (U.S.D.C., D.S.C.);
18. Amended Complaint, Dickerson v. TLC The Laser Eye Center (Institute), Inc. et al., C.A. No. 6:10-685 (U.S.D.C., D.S.C.);
19. Amended Complaint, Dickerson v. TLC The Laser Center (Institute), Inc. et al., 2010-CP-23-9954;
20. Amended Complaint, Luce v. TLC The Laser Center (Institute), Inc. et al., 2010-CP-23-9956;
21. Complaint, Holley v. TLC The Laser Center (Institute), Inc. et al., 2012-CP-23-1377;
22. Transcript of Proceedings of June 30, 2008, pp.6-8, 39-42;

23. Transcript of Proceedings of October 14, 2008, pp. 6–20;
24. Transcript of Proceedings of May 14, 2009, pp. 21–25, 47–54;
25. Transcript of Proceedings of July 26, 2010, pp. 4–15, 22–67;
26. Transcript of Proceedings of July 28, 2010, in Dickerson v. TLC The Laser Eye Center (Institute), Inc. et al., C.A. No. 6:10–685 (U.S.D.C., D.S.C.), pp. 15–36;
27. Transcript of Proceedings of August 31, 2010, in Dickerson v. TLC The Laser Eye Center (Institute), Inc. et al., C.A. No. 6:10–685 (U.S.D.C., D.S.C.), pp. 5–17;
28. Transcript of Proceedings of November 23, 2010, pp. 27–33, 59–62;
29. Transcript of Proceedings of December 29, 2010, in Dickerson v. TLC The Laser Eye Center (Institute), Inc. et al., C.A. No. 6:10–685 (U.S.D.C., D.S.C.), pp. 73–74, 82–83, 88, 97–101, 116–18;
30. Transcript of Proceedings of June 9, 2011, in Dickerson v. TLC The Laser Center (Institute), Inc. et al., 2010–CP–23–9954 and Luce v. TLC The Laser Center (Institute), Inc. et al., 2010–CP–23–9956, pp. 17–18, 34–38;
31. Transcript of Proceedings of November 21, 2011, pp. 15–25, 56–69, 104–06;
32. Stipulation of Dismissal as to Appellants of June 21, 2010, in Hollman v. Woolfson, 2007–CP–23–2347;
33. Stipulation of Dismissal as to Appellants of June 21, 2010, in Hollman v. Woolfson, 2007–CP–23–8364;
34. Stipulation of Dismissal as to Dr. Woolfson & Dr. Campbell of May 3, 2011, in Hollman v. Woolfson, 2007–CP–23–2347;
35. Stipulation of Dismissal as to Dr. Woolfson & Dr. Campbell of May 3, 2011, in Hollman v. Woolfson, 2007–CP–23–8364;
36. Redacted Settlement Agreement between Appellants and Respondents of June 16, 2010, pp. 1, 5–6, 9;
37. Redacted Settlement Agreement between Respondents and Dr. Woolfson of April ___, 2011, pp. ____;

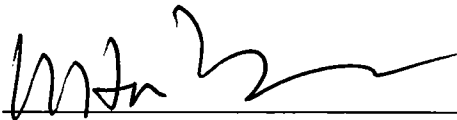
38. Redacted Settlement Agreement between Respondents and Dr. Campbell of April ___, 2011, pp. ____;
39. Respondents' Motion of March 17, 2010, to Seal Documents in Dickerson v. TLC The Laser Eye Center (Institute), Inc. et al., C.A. No. 6:10-685 (U.S.D.C., D.S.C.), pp. 1-9;
40. Respondents' Memorandum of April 26, 2010, in Opposition to Appellants' Motion to Bar Extrajudicial Statements, in Dickerson v. TLC The Laser Eye Center (Institute), Inc. et al., C.A. No. 6:10-685 (U.S.D.C., D.S.C.), pp. 1-13;
41. Respondents' Motion of June 25, 2010, for Discovery, in Dickerson v. TLC The Laser Eye Center (Institute), Inc. et al., C.A. No. 6:10-685 (U.S.D.C., D.S.C.), pp. 1-29;
42. Appellants' Motion of July 8, 2010, for an Order & Rule to Show Cause, pp. 1-14;
43. Appellants' Memorandum of July 9, 2010, in Opposition to Respondents' Motion for Discovery, and Appellants' Motion to Strike in Dickerson v. TLC The Laser Eye Center (Institute), Inc. et al., C.A. No. 6:10-685 (U.S.D.C., D.S.C.), pp. 1-15;
44. Appellants' Motion of September 2, 2010, for Reconsideration of the Order of August 17, 2010, pp. 1-12;
45. Appellants' Motion of September 28, 2011, to Compel Respondents' Counsel to Prepare an Order for the Court as Directed, or Alternatively, to Request the Court to Issue an Order on Appellants' Prior Motion for Reconsideration, pp. 1-6;
46. Appellants' Motion of September 28, 2011, to Compel Respondents' Counsel to Observe the Protective Order of November 14, 2008 & Return or Destroy Materials Produced Thereunder, pp. 1-4;
47. Appellants' Motion of February 10, 2012, for Reconsideration of the Order of January 12, 2012, pp. 1-12;
48. First Set of Discovery Requests to Appellants, September 3, 2010, in Dickerson v. TLC The Laser Eye Center (Institute), Inc. et al., C.A. No. 6:10-685 (U.S.D.C., D.S.C.), pp. 1, 6-9;
49. First Set of Discovery Requests to Appellants, May 9, 2011, in Dickerson v. TLC The Laser Center (Institute), Inc. et al., 2010-CP-23-9954, pp. 1, 6, 9-13;

50. First Set of Discovery Requests to Appellants, May 9, 2011, in Luce v. TLC The Laser Center (Institute), Inc. et al., 2010–CP–23–9956, pp. 1, 6, 9–13;
51. Electronic Correspondence of August 4, 2010, from the Honorable Edward W. Miller to Counsel for Appellants and Respondents;
52. Correspondence of August 10, 2010, from W. Howard Boyd, Jr., Esq., to the Honorable Edward W. Miller;
53. Electronic Correspondence of December 17, 2010, from Stephen R.H. Lewis, Esq., to the Honorable Edward W. Miller and Appellants' Counsel;
54. Correspondence of April 20, 2011, from Stephen R.H. Lewis, Esq., to Appellants' Counsel;
55. Correspondence of August 19, 2011, from W. Howard Boyd, Jr., Esq., to Respondents' Counsel;
56. Correspondence of August 22, 2011, from Stephen R.H. Lewis, Esq., to Appellants' Counsel;
57. Correspondence of August 25, 2011, from W. Howard Boyd, Jr., Esq., to Respondents' Counsel;
58. Correspondence of August 25, 2011, from W. Howard Boyd, Jr., Esq., to James W. Fayssoux, Jr., Esq.,
59. Correspondence of September 6, 2011, from Stephen R.H. Lewis, Esq., to Appellants' Counsel;
60. Correspondence of September 14, 2011, from W. Howard Boyd, Jr., Esq., to Respondents' Counsel;
61. Correspondence of September 16, 2011, from Stephen R.H. Lewis, Esq., to Appellants' Counsel;
62. Correspondence of December 6, 2011, from W. Howard Boyd, Jr., Esq., to the Honorable Edward W. Miller;
63. Correspondence of February 6, 2012, from W. Howard Boyd, Jr., Esq., to the Office of the Clerk of Court, Greenville County, South Carolina
64. Correspondence of February 10, 2012, from W. Howard Boyd, Jr., Esq., to the Office of the Clerk of Court, Greenville County, South Carolina;

65. Correspondence of May 14, 2012, from the Office of the Clerk of Court, Greenville County, South Carolina, to Appellants' Counsel;
66. Affidavit of Brian Andrew, Appellants' General Counsel, of May 7, 2008;
67. Affidavit of Douglas F. Patrick, Esq., of May 6, 2009;
68. Affidavit of Stephen R.H. Lewis, Esq., of May 6, 2009;
69. Affidavit of James W. Fayssoux, Jr., Esq., May 6, 2009;
70. Certificate of Service of February 10, 2012, Accompanying Appellants' Motion for Reconsideration of the Same Date;
71. Miscellaneous Media Reports Arising from March 2010.

I, the undersigned counsel for Appellants, certify that this designation contains no matter which is irrelevant to this appeal.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2007-CP-23-2347

Ex parte TLC Laser Eye Centers (Piedmont/Atlanta) LLC; and
TLC The Laser Center (Institute), Inc. Appellants,

In re:

John Hollman Respondent,

v.

Dr. Jonathan Woolfson, Individually;
Dr. Michael A. Campbell, Individually;
Optical Solutions, Inc.; and Optical
Solutions of Bluffton, LLC Defendants.

Case No. 2007-CP-23-8364

Ex parte TLC Laser Eye Centers (Piedmont/Atlanta) LLC; and
TLC The Laser Center (Institute), Inc. Appellants,

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SC Court of Appeals

In re:

Danielle Hollman Respondent,

v.

Dr. Jonathan Woolfson, Individually;
Dr. Michael A. Campbell, Individually;
Optical Solutions, Inc.; and Optical
Solutions of Bluffton, LLC Defendants.

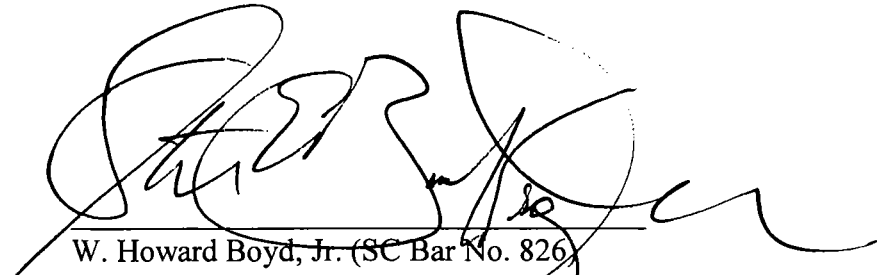
PROOF OF SERVICE

I certify that on the 13th day of July, 2012, I served a copy of the Initial Brief of Appellants and Designation of Matter to Be Included in the Record on Appeal on counsel of record in the above-entitled matters by sending a copy of same by the methods of delivery specified below:

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SC Court of Appeals

Ex parte TLC Laser Eye Centers (Piedmont/Atlanta) LLC; and
TLC The Laser Center (Institute), Inc., Intervenor

In re: John Hollman v. Dr. Jonathan Woolfson, et al.
C.A. No.: 2007-CP-23-2347

And

Ex parte TLC Laser Eye Centers (Piedmont/Atlanta) LLC; and
TLC The Laser Center (Institute), Inc., Intervenor

In re: Danielle Hollman v. Dr. Jonathan Woolfson, et al.
C.A. No.: 2007-CP-23-8364

Dear Ms. Kitchings:

Enclosed please find the original and one copy of the Initial Brief of Appellants and Designation of Matter to Be Included in the Record on Appeal along with a Proof of Service showing that the Initial Brief and Designation of Matter have been served on all Respondents. Please return one copy of the Initial Brief and Designation of Matter, stamped as filed, in the enclosed self-addressed stamped envelope. Thank you for your assistance in this matter. Should you have any questions or concerns, please do not hesitate to contact me.

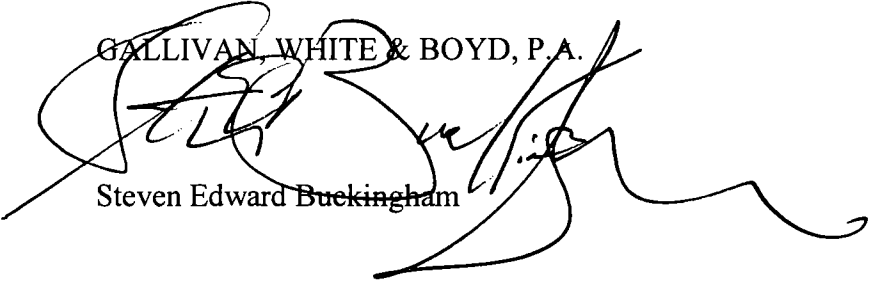
The Honorable Jenny Abbott Kitchings

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July 13, 2012

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THE STATE OF SOUTH CAROLINA
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STATEMENT OF ISSUES ON APPEAL

1. Whether the circuit court erred in determining that it had been divested of subject matter jurisdiction to enforce one of its own protective orders by the settlement and dismissal of the underlying litigation, where the need to protect confidential information was continuing, the party seeking to enforce the protective order was a third-party intervenor, and the intervenor was not involved in the settlement or dismissal.
2. Whether the circuit court erred in failing to interpret the protective order of November 14, 2008 according to its plain, unambiguous meaning and/or in failing to give effect to every relevant provision, including but not necessarily limited to the following:
 - a. By failing to conclude that the protective order applies to “Confidential Health Information,” as that term is defined, as well as to information based on, containing, or derived therefrom; and/or,
 - b. By failing to conclude that Respondents’ counsel has violated the prohibitions of the protective order against using and/or disclosing protected information for any purpose other than the case in which the order was issued, by using protected information to bring a federal class action lawsuit against Appellants (as well as other subsequent litigation), and/or by disclosing protected information to unauthorized recipients.
3. Whether the circuit court erred in issuing orders prepared by Respondents’ counsel that contained material, prejudicial “findings of fact” and/or “conclusions of law” which are not supported by the record and were never adjudicated by the court.
4. Whether the circuit court erred in concluding that there were no violations of the protective order of November 14, 2008 which could have supported Appellants’ motion for an order and rule to show cause filed in July 2010.
5. Whether the circuit court erred in concluding that the 2010 settlement agreement between Appellants and Respondents limited in any way Appellants’ ability to seek enforcement of the protective order of November 14, 2008.

STATEMENT OF THE CASE

In 2007, Respondents filed a medical malpractice action against Appellants (hereinafter referred to as “TLC”) arising out of three LASIK eye surgeries performed on John Hollman during 1999 and 2001.¹ It was alleged that these surgeries caused Hollman to develop “ectasia.” During the litigation, TLC was required to produce certain confidential, sensitive, and proprietary information to Respondents, consisting of treatment records of non-party patients, as well as a database of patient information that was intended for TLC’s internal uses only under the administration of its general counsel. The non-party patient treatment records and database were produced to Respondents under a protective order, which prohibits the use and disclosure of protected information for any purpose other than Hollman.² The critical issue in this appeal involves Respondents’ counsel’s compliance with the protective order.

In May 2010, TLC entered into a settlement agreement with Respondents and was subsequently dismissed from the litigation. However, in July 2010, TLC became a third-party intervenor in Hollman for the limited, collateral purpose of enforcing the protective order. This was necessary because Respondents’ counsel had used, and was continuing to use, protected information in furtherance of a separate class action against TLC, and had disclosed protected information to unauthorized recipients.

¹ More precisely, there were two lawsuits. One was filed by Respondent John Hollman, C.A. 2007–CP–23–2347; the other, by Respondent Danielle Hollman, C.A. 2007–CP–23–8364. Respondent John Hollman’s claim consisted of actions for negligence, battery, breach of contract, and fraud. Mrs. Hollman’s claim was for loss of consortium. These actions were never formally consolidated in the circuit court; however, discovery was pursued on a consolidated basis, and the orders at issue in this appeal feature a consolidated caption.

² As it is used herein, the term “protected information” describes any “Confidential Health Information” that was disclosed under the Protective Order of November 14, 2008, as well as any information based on, containing, or derived therefrom.

Since then, Respondents' counsel has filed two additional medical negligence lawsuits on behalf of two new plaintiffs against TLC, both of which are based on protected information. Respondents' counsel is actively using protected information obtained in the course of Hollman in furtherance of these new cases, specifically to attain an advantage in discovery and dispositive motions.

To enforce the protective order against Respondents' counsel's unauthorized use and disclosure of protected information, on July 8, 2010, TLC intervened in Hollman and filed a motion for an order and rule to show cause. However, by order dated August 17, 2010, the circuit court held that protected information consisted only of health information coupled with patient identity. This was a novel construction of the protective order which was not only contrary to its plain language, but which resulted in substantially diminished protection for TLC and its patients. Consequently, the court held that Respondents' counsel had not violated the protective order, and TLC's motion for an order and rule to show cause was denied.

On September 2, 2010, TLC filed a motion for reconsideration. A hearing on the motion was held on November 23, 2010, at which time the court indicated that the motion would be denied and instructed Respondents' counsel to prepare an order. In May 2011, Respondents and the remaining Defendants (not including TLC as third-party intervenor) entered into a settlement agreement which resolved all remaining merits-based claims. In late September 2011, TLC filed a motion requesting the preparation of an order on the motion for reconsideration, which had still not been done. On January 12, 2012, TLC's motion was denied on the basis of lack of subject matter jurisdiction. TLC promptly filed a motion for reconsideration, which was

denied by order dated March 2, 2012. TLC's notice of appeal, pertaining to the orders of August 17, 2010, January 12, 2012, and March 2, 2012, was filed on April 2, 2012.

Critically, this appeal does not involve any issues pertaining to the merits of the underlying Hollman litigation. Instead, the fundamental questions are whether the court had continuing jurisdiction to enforce the protective order after the 2011 settlement and dismissal, whether the court misconstrued the protective order, and whether the court erred in concluding that Respondents' counsel had not violated the protective order. These issues are collateral to the merits of the Hollman litigation.³

For the reasons set out below, TLC respectfully requests that the circuit court's order denying the existence of subject matter jurisdiction to enforce the protective order be reversed. TLC also requests that the court's order regarding the construction of the protective order, which holds that there was no violation by the unauthorized use and disclosure of protected information, be modified to conclude that Respondents' counsel's use and disclosure of protected information was a material breach of the order. Finally, TLC requests that certain material "findings of fact" and "conclusions of law" set out in the orders of August 17, 2010 and January 12, 2012, which are material, improper, and prejudicial to TLC, be vacated.

³ This appeal also involves the propriety of including material "findings of fact" and "conclusions of law" in an order where no such findings and conclusions were made or are supported by the record.

STATEMENT OF FACTS

This case arises out of three LASIK eye surgeries performed on Respondent John Hollman in 1999 and 2001.⁴ The first two surgeries were performed on July 8, 1999 and November 22, 1999 at Appellants' facility in Greenville, South Carolina. A third procedure was performed on June 26, 2001 in Atlanta, Georgia. In 2007, Hollman brought a medical negligence action against TLC, Dr. Woolfson (the ophthalmologist who performed Hollman's LASIK eye surgery), and Dr. Campbell (the independent optometrist who treated Hollman)⁵ in which it was alleged that, as a result of the surgeries, Hollman had developed a condition known as "ectasia."⁶ Hollman also brought a cause of action against TLC for fraud. His theory was that TLC knew or should have known that LASIK eye surgeries were contraindicated for patients with ocular topographies like his, specifically because of the risk associated with developing post-surgical complications, but that TLC was motivated by financial interests to disregard those risks. Furthermore, it was alleged that after the appearance of post-surgical complications, TLC deliberately misled Hollman into believing his condition was or would become treatable, specifically so that he would not pursue litigation.

⁴ The term "LASIK" is an acronym for the medical procedure known as "laser-assisted in situ keratomileusis," a form of refractive eye surgery which uses an excimer laser to reshape the structure of a patient's cornea. LASIK eye surgery can be an effective treatment for myopia and astigmatism, and presents a practical alternative to traditional forms of vision correction, such as eyeglasses and contact lenses.

⁵ Because these proceedings involve issues which are collateral to the merits of the underlying litigation, Dr. Woolfson and Dr. Campbell are not involved in this appeal.

⁶ As it is used in the Complaint, the term "ectasia" describes the condition where an individual's cornea experiences progressive destabilization, which results in diminishing visual acuity.

In 2008, Respondents served discovery requests seeking the production of Hollman's medical chart and the charts of other patients who were not parties to the action, but who had ocular topographies like Hollman's or who had reported complaints following their surgeries. Respondents also sought the production of a proprietary database, which contained not only information taken from TLC's patient charts, but also information collected for TLC's internal purposes under the administration of its general counsel.⁷ TLC did not believe that third-party confidential health information was discoverable since such information was neither relevant nor necessary to Respondents' claims.⁸ Furthermore, TLC did not believe that the database or its contents was discoverable pursuant to the work product doctrine, the privilege for attorney/client communications, the protection for self-critical analysis, and the legitimate purposes of TLC's risk management and legal interests, as well as other similar uses. TLC was also concerned that Respondents or their counsel would use this information to contact third-party patients. Accordingly, for all these reasons, TLC objected to the production of the database and third-party medical charts, which caused Respondents to file a motion to compel.

A hearing on Respondents' motion was held on June 30, 2008, at which time the court ordered TLC to produce all responsive information, including the database, for in camera inspection.⁹ Before the circuit court had ruled on the first motion to

⁷ Affidavit of Brian Andrew, TLC's General Counsel, May 7, 2008.

⁸ Hr'g Tr. 6-8, 39-42, June 30, 2008 (hereinafter referred to as "June 2008 Tr."); Hr'g Tr. 6-20, Oct. 14, 2008 (hereinafter referred to as "Oct. 2008 Tr."); Hr'g Tr. 21-25, 47-54, May 14, 2009 (hereinafter referred to as "May 2009 Tr.").

⁹ June 2008 Tr. 39-42.

compel, a second motion to compel was filed which sought the production of additional “medical records of all other ectasia patients of the Piedmont TLC facility.”¹⁰ A hearing on the second motion was held on October 14, 2008, at which time the court took the matter under advisement. On November 14, 2008, both motions to compel were granted.¹¹ However, in conjunction with the order granting the motions to compel, the court also issued a Protective Order, which provides in relevant part:

The Court hereby prohibits the dissemination of Confidential Health Information beyond the parameters established by this Order or use of Confidential Health Information for any purpose other than the prosecution or defense of this litigation.

1. This Stipulation and Protective Order shall apply to all information or discovery materials produced by any party or their agents during the course of discovery in this action, all information derived therefrom, and extracts, copies, excerpts, or summaries thereof

2. The term “Confidential Health Information,” means . . . any document or information supplied that identifies an individual or subscriber in any manner and relates to the past, present, or future payment for the provision of health care to such individual or subscriber. The term “Confidential Health Information” specifically includes “protected health information” as such term is defined by the Standards for Privacy of Individually Identifiable Health Information, 45 CFR parts 160 and 164, promulgated pursuant to the Health Insurance Portability and Accountability Act of 1996. See 45 C.F.R.

¹⁰ Order Granting Resp’ts Mot. Compel, Nov. 14, 2008.

¹¹ Although Respondents’ counsel has repeatedly claimed that TLC waived all objections to producing database information other than work product, this assertion is simply not supported by the record. TLC’s objections were made to the court, given due consideration, and overruled. (June 2008 Tr. 6–8, 39–42; Oct. 2008 Tr. 6–20; see also May 2009 Tr. 21–25, 47–54.) Accordingly, while the court was concerned only with protecting patient privacy rights, at all relevant times, TLC has been concerned with protecting not only patient privacy, but also its own rights and privileges against disclosing information that is sensitive, proprietary, and confidential. Those objections are based on the privilege for attorney/client communications, the protections of the work product doctrine, the privileges for self-critical analysis, and the protection for confidential business information and third-party medical records.

sections 164.501 (“protected health information”) and 160.103 (“individually identifiable health information”). **“Confidential Health Information” includes all notes, summaries, compilations, extracts, abstracts, or oral communications that contain, are based on, or are derived from Confidential Health Information. . . .**

....

8. Except as may be provided by subsequent Order of this Court: 1) **Confidential Health Information shall be used for no purpose other than this litigation;** 2) No person who receives, pursuant to this or other Orders of this Court, Confidential Health Information concerning persons who are not parties to the captioned lawsuits (hereinafter “Third Parties”) shall directly or indirectly contact or attempt contact with Third Parties or their medical providers¹²

Soon after the entry of the Protective Order on November 14, 2008, TLC produced the information required by the order granting Respondents’ motion to compel, including third-party treatment records and the patient database.

On February 17, 2009, Respondents filed a motion to modify the Protective Order to allow their counsel to contact and interview patients who were identified by the protected information that TLC had been forced to disclose. Specifically, Respondents’ counsel sought permission to discuss the Hollmans’ lawsuit against TLC, “as well as the patient’s own experience if they so choose.” By order dated April 17, 2009, Respondents’ motion was granted.¹³

On May 6, 2009, TLC filed a petition for writ of certiorari with the Supreme Court asking the Court to exercise its original jurisdiction on the basis of exceptional

¹² Protective Order, Nov. 14, 2008, 4–5, 8 (hereinafter referred to as “Prot. Order”) (emphasis added).

¹³ (Order Granting Resp’ts Mot. Mod. Prot. Order, Apr. 21, 2009.) Respondents’ counsel immediately began contacting third-party patients, and in fact, successfully contacted fifteen. (See Affidavits of Douglas F. Patrick, Esq., Stephen R.H. Lewis, Esq., and James W. Fayssoux, Jr., Esq., May 6, 2009.) TLC has no information whether Charles Benjamin Dickerson and/or Michael “Chad” Luce were among those fifteen initial contacts.

circumstances and review the circuit court's decision of April 17. The petition was granted, and by decision dated May 28, 2009, the Supreme Court reversed the April 17 order and remanded the case for further proceedings to determine if the information to be gained from interviewing third-party patients was relevant and necessary to Respondents' claims.¹⁴

By supplemental order dated July 7, 2009, the circuit court found that the information to be gained from such interviews was "highly relevant" and necessary to Respondents' claims,¹⁵ prompting TLC to file a second petition for writ of certiorari on July 16, 2009. The petition was granted, and by decision dated September 21, 2009, the circuit court's orders of April 21 and July 7 were vacated. Hollman v. Woolfson, 384 S.C. 571, 683 S.E.2d 495 (2009). In no uncertain terms, the Supreme Court held that neither Respondents nor their counsel could contact third-party patients, specifically because the treatment received by third-parties was not relevant or necessary to establish any element of Respondents' actions for medical negligence or fraud,¹⁶ nor were patient interviews necessary to establish any element of an action for violation of the Unfair Trade Practices Act. Id., 384 S.C. at 579–80, 683 S.E.2d at 499–500.¹⁷

¹⁴ Hollman v. Woolfson, Op. No. 2009-MO-025 (S.C. S. Ct. filed May 28, 2009).

¹⁵ Supp. Order, July 7, 2009.

¹⁶ "Whether [TLC] breached the standard of care with any patients other than [R]espondents is irrelevant to whether [TLC was] negligent in [its] treatment of [R]espondents. . . . Whether other patients were similarly treated does not prove any of the elements required to show fraudulent conduct by [TLC] toward [R]espondents." Hollman, 384 S.C. at 579–80, 683 S.E.2d at 499.

¹⁷ The Supreme Court's decision was also based on equitable grounds: "[I]t would [have been] inequitable to allow [R]espondents to obtain non-party patient information from [TLC]

Six months later, on March 17, 2010, Respondents' counsel filed a complaint on behalf of John Hollman and "all others similarly situated" in the United States District Court for the District of South Carolina, Greenville Division, naming as defendants dozens of TLC Centers, Clinical Directors, affiliated Surgeons, and Management personnel.¹⁸ The complaint was purportedly brought under the federal civil RICO statute,¹⁹ and it was alleged that each defendant participated personally in a massive conspiracy to conceal unsuccessful LASIK surgeries from patients, who had also allegedly been deprived of certain indeterminable property rights. The allegations of the complaint were based almost exclusively on protected information. Some of the information pertained only to John Hollman; other information pertained to patients who were alleged to be members of the putative class, which was comprised of individuals whose confidential health information was contained in the database.²⁰

with the understanding the patients would not be contacted, only to subsequently permit [R]espondents to contact the patients." Hollman, 384 S.C. at 581, 683 S.E.2d at 500.

¹⁸ Complaint, Hollman v. TLC LASIK Centers et al., C.A. No. 6:10-CV-685 (U.S.D.C., D.S.C.) (hereinafter referred to as "the Federal Class Action"). Ultimately, on February 3, 2011, the Federal Class Action was dismissed for failure to state a claim for which relief could be granted, Fed. R. Civ. P. 12(b)(6), (Order Granting Mots. Dismiss, Feb. 3, 2011), though the case is still pending on appeal.

¹⁹ 18 U.S.C. § 1962(c).

²⁰ There is little doubt that the Federal Class Action was an attempt to circumvent the Supreme Court's decision in Hollman, as these were the same individuals who the Supreme Court had expressly prohibited Respondents' counsel from contacting just six months earlier. In fact, to quote Mr. Patrick: "[T]he federal court case is **designed to notify** these [database] patients so that they no longer suffer the irreparable harm that they are suffering. . . ." (Hr'g Tr. 61, July 26, 2010 (hereinafter referred to "July 2010 State Tr.") (emphasis added); see also July 2010 State Tr. 4–15, 22–67.)

Based on the filing of the Federal Class Action and other conduct which violated the Protective Order,²¹ on April 9, 2010 TLC filed a motion in circuit court for an order and rule to show cause against Respondents and their counsel. However, on May 5, 2010, before a hearing on the motion had been held, TLC entered into an oral settlement agreement of the Hollman state court case with Respondents. The agreement was eventually reduced to writing and formally executed on June 16, 2010.²² In relevant part, the 2010 Settlement Agreement provides as follows:

Pursuant to the terms of the Protective Order entered in the State Action on November 14, 2008, each party to the State Action receiving Confidential Health Information shall return or destroy all copies of such Confidential Health Information to the producing party in accordance with the Protective Order. At the conclusion of the State action, counsel for the Hollmans shall comply with the terms of the Protective Order as it exists or as modified by subsequent Court Order by returning all such discovery materials including all records of patients other than John Hollman and the Complex Case and Advocacy databases, and certifying the data, any hard copies, or any work-product containing names of patients and private healthcare information (hereinafter “Protected Information”): **(1) Has not been disseminated to any third parties, including clients, consultants, co-counsel, or experts; and, if it has, identifying all third parties, in what form the information was disseminated and what measures were taken to assure destruction; . . . (3) Will not be used for any purpose, except those as permitted by Court Order.**²³

²¹ Specifically, Respondents’ counsel admittedly used and disclosed protected information in furtherance of other judicial proceedings, (see Order Den. TLC’s Mot. Order & Rule to Show Cause, Aug. 17, 2010 (hereinafter referred to as “the August 17 Order”)), and disclosed protected information through popular media outlets, (see Miscellaneous Media Reports; Re Mem. in Opp. to TLC’s Mot. Barring Extrajudicial Statements, Fed. Class Action, Apr. 26, 2010).

²² (Redacted Settlement Agreement between John and Danielle Hollman and TLC, June 16, 2010 (hereinafter referred to as “2010 Settlement Agreement”).)

²³ (2010 Settlement Agreement 9 (emphasis added).) To date, Respondents’ counsel has not made the certifications required by this paragraph, nor can they.

The Settlement Agreement did not modify or abrogate any of the terms of the Protective Order, but expressly confirms that the Protective Order was intended to continue in full force and effect. Furthermore, the Settlement Agreement terminated only Respondents' claims against TLC; Respondents' claims against Dr. Woolfson and Dr. Campbell were not affected by the 2010 settlement and dismissal. Consequently, on June 24, 2010, TLC was voluntarily dismissed from the case.²⁴

Following the 2010 settlement and dismissal, Hollman withdrew as the class representative in the federal case. However, Respondents' counsel did not withdraw the complaint itself. Instead, on May 14, 2010 Respondents' counsel substituted a stranger to the Protective Order—Charles Benjamin Dickerson—as the class representative and continued the litigation.²⁵ The allegations based on protected information were not withdrawn, despite the fact that neither Dickerson nor Respondents' counsel, who were now acting as Dickerson's counsel, had any right to use or possess protected information in furtherance of the Federal Class Action.²⁶

On July 8, 2010, TLC intervened in the ongoing Hollman litigation between Respondents and Dr. Woolfson and Dr. Campbell to enforce the Protective Order's

²⁴ Stipulation of Dismissal as to TLC, June 21, 2010, John Hollman v. Woolfson, C.A. No. 2007–CP–23–2347; Stipulation of Dismissal as to TLC, June 21, 2010, Danielle Hollman v. Woolfson, C.A. No. 2007–CP–23–8364.

²⁵ The Settlement Agreement provided that “[t]he Hollmans further agree that they shall withdraw their claims and John Hollman shall forever withdraw as class representative and member of the putative class action currently pending in [federal court]. John Hollman shall either dismiss the putative class action or cause an amended complaint to be filed to substitute another person for him as class representative within twenty-one (21) days.” (See 2010 Settlement Agreement 5–6.) Neither the Settlement Agreement nor the Protective Order authorized Hollman, Dickerson, or Respondents' counsel to use or disclose protected information for the purposes of litigation in federal court.

²⁶ See Amended Complaint, Fed. Class Action.

prohibition against unauthorized use and disclosure of protected information by filing a motion for an order and rule to show cause.²⁷ A hearing on the motion was held on July 26, 2010, at which time the court allowed TLC's intervention and took the matter of the rule to show cause under advisement.²⁸

TLC also sought enforcement of the Protective Order in federal court. On June 25, 2010, Respondents' counsel filed a motion for precertification discovery for the purpose of contacting TLC's patients.²⁹ TLC filed a memorandum in opposition on July 9, 2010, requesting that Respondents' counsel's motion be stricken on the basis of the Protective Order, which prohibits the use and disclosure of protected information in furtherance of the Federal Class Action.³⁰ A hearing was held on July 28, 2010, at which time United States Magistrate Judge Hendricks held that she would defer to the state court as to matters of interpretation and enforcement.³¹

On August 17, 2010, the circuit court issued an order on TLC's motion for an order and rule to show cause holding that the Protective Order prohibited the use and disclosure of protected information only if such information was coupled with the patient's identity.³² Under this standard, the court concluded, it was not a violation of

²⁷ TLC's Mot. Order & Rule to Show Cause, July 8, 2010.

²⁸ (July 2010 State Tr. 5–6.) The ongoing database litigation in state court from which this appeal is taken is identified as TLC Laser Eye Centers (Piedmont/Atlanta) LLC; TLC The Laser Center (Insitute), Inc. In re: Hollman v. Woolfson, or simply, In re Hollman.

²⁹ Resp'ts Mot. Disc., June 25, 2010, Fed. Class Action.

³⁰ TLC's Memo. Opp., July 9, 2010, Fed. Class Action.

³¹ Hr'g Tr. 15–17, July 28, 2010 (hereinafter referred to as "July 2010 Fed. Tr."). See generally July 2010 Fed. Tr. 15–36.

³² Aug. 17 Order 3–4.

the Protective Order for Respondents' counsel to bring the Federal Class Action using information based on, containing, or derived from protected information.³³ The circuit court also ostensibly held that the TLC's ability to enforce the Protective Order was limited by the 2010 Settlement Agreement, and that in any event, all of the allegedly wrongful acts complained of by TLC pre-dated the 2010 Settlement Agreement and were therefore incapable of judicial scrutiny.³⁴ TLC subsequently filed a motion pursuant to Rule 59, SCRCP, requesting that the circuit court alter or amend its judgment.³⁵ A hearing on the motion for reconsideration was held on November 23, 2010, at which time the court indicated orally that the motion would be denied and instructed Respondents' counsel to prepare an order.³⁶

On December 7, 2010, Respondents' counsel filed two new actions against TLC in the Circuit Court of Greenville County on behalf of Charles Benjamin Dickerson and Michael "Chad" Luce. Initially, Dickerson's and Luce's complaints were filed as ordinary medical negligence actions. However, on February 3, 2011, the Federal Class Action was dismissed with prejudice. Then, on March 22, 2011,

³³ Specifically, the acts prompting TLC's motion for an order and rule to show cause were: (1) on several occasions, Respondents' counsel disclosed protected information on the record in other judicial proceedings (such as TLC's bankruptcy proceedings in Delaware); (2) Respondents' counsel brought the Federal Class Action based explicitly on protected information; and (3) Respondents' counsel had admittedly disclosed significant amounts of protected information to the media. (See Miscellaneous Media Reports; see also Respondents' Mem. in Opp. to TLC's Mot. Barring Extrajudicial Statements, Fed. Class Action, Apr. 26, 2010.) Item No. 1 was ostensibly excused as a violation on the basis that the disclosures were inadvertent and promptly corrected. (Aug. 17 Order 4.) Item No. 2 was found not to be a violation. (Id. 3–4.) Item No. 3 was not addressed.

³⁴ Id. 4–6.

³⁵ TLC's Mot. for Reconsideration, Sept. 2, 2010.

³⁶ Hr'g Tr. 27–33, 59–62, Nov. 23, 2010 (hereinafter referred to as "Nov. 2010 Tr.").

Respondents' counsel amended Dickerson's and Luce's complaints to include allegations that are substantially identical to the allegations that had been set out in the Federal Class Action, including, in particular, the allegations that had been based on protected information.³⁷

On April 28, 2011, TLC filed motions to dismiss the amended Dickerson and Luce complaints.³⁸ Among other grounds, the motions to dismiss were based on the fact that Dickerson and Luce were both filed long after the expiration of the applicable statute of limitation and repose, which is three years and six years, respectively.³⁹ It is undisputed that Dickerson underwent LASIK eye surgery in 1998 and 1999; Luce's surgery also occurred in 1999. Therefore, as a matter of law, Dickerson's and Luce's claims should have expired in 2004 and 2005, respectively, fully five years before their complaints were filed.⁴⁰ However, by orders dated September 1, 2011, the court denied TLC's motions to dismiss.⁴¹ Soon thereafter

³⁷ Compare Amended Complaint, Federal Class Action with Amended Complaint, Charles Benjamin "Ben" Dickerson et ux. v. TLC The Laser Center (Institute), Inc. et al., 2010-CP-23-9954 (hereinafter referred to as "Dickerson"), and Amended Complaint, Michael "Chad" Luce v. TLC The Laser Center (Institute), Inc. et al., 2010-CP-23-9956 (hereinafter referred to as "Luce").

³⁸ The original Dickerson and Luce complaints were filed but never served.

³⁹ It is undisputed that the allegations of the Dickerson and Luce claims sound in medical negligence. Therefore, the periods of limitation and repose set out at South Carolina Code § 15-3-545 apply.

⁴⁰ Langley v. Pierce, 313 S.C. 401, 403, 438 S.E.2d 242, 243 (1993) ("A statute of repose creates a substantive right in those protected to be free from liability after a legislatively-determined period of time. . . . [T]he six-year repose provision in § 15-3-545 constitutes an outer limit beyond which a medical malpractice claim is barred, regardless of whether it has or should have been discovered." (citation omitted)); see also Kerr v. Richland Mem'l Hosp., 383 S.C. 146, 678 S.E.2d 809 (2009) (citation omitted).

⁴¹ (Order Den. TLC's Mot. Dismiss, Dickerson, Sept. 1, 2011; Order Den. TLC's Mot. Dismiss, Luce, Sept. 1, 2011.) At the hearing on TLC's Motions to Dismiss, Respondents'

Respondents' counsel sought to file protected information under seal in both Dickerson and Luce.⁴² Respondents' counsel had also served discovery that requested the disclosure of protected information.⁴³ TLC filed motions in Dickerson and Luce to strike the allegations based impermissibly on protected information, but these motions were denied.⁴⁴

Meanwhile, no order had been prepared by Respondents' counsel following the November 23, 2010 hearing on TLC's motion for reconsideration. Respondents' counsel initially stated there would be some delay in preparing an order because of the need to obtain a transcript of the hearing.⁴⁵ By spring 2011, an order had still not been prepared, but a letter from Respondents' counsel dated April 20, 2011 acknowledged that an order was needed.⁴⁶ On May 2, 2011, Respondents entered

counsel argued that the statute of repose should be disregarded due to the evidence of alleged fraud which the contents of the database as to other patients would conclusively establish and the statute of limitations was subject to equitable tolling. (Hr'g Tr., TLC's Mots. Dismiss, Dickerson and Luce, June 9, 2011, 17–18, 34–38.) Although TLC objected at the hearing to the introduction of argumentation based impermissibly on database information, the court considered the information and denied TLC's motion. Respondents' counsel also relied upon protected information in arguing against TLC's motion to dismiss the Federal Class Action. (Hr'g Tr. 73–74, 82–83, 88, 97–101, 116–18, Dec. 29, 2010, Fed. Class Action.)

⁴² Respondents' counsel had already successfully sought to file redacted versions of protected information under seal in the Federal Class Action. (Order Granting Resp'ts Mot. to Seal, Sept. 1, 2010, Fed. Class Action; see also Resp'ts Mot. to Seal, Fed. Class Action, Mar. 17, 2010; Hr'g Tr. 5–17, Aug. 31, 2010, Fed. Class Action.)

⁴³ (First Set Disc. Req. to TLC, Dickerson, 1, 6, 9–13; First Set Disc. Req. to TLC, Luce, 1, 6, 9–13.) Respondents' counsel had also sought discovery of protected information in the Federal Class Action. (First Set Disc. Req. to TLC, Fed. Class Action, 1, 6–9.)

⁴⁴ Order Denying TLC's Mots. Stay / Strike, Dickerson & Luce, Mar. 9, 2012.

⁴⁵ Email from Mr. Lewis to the Circuit Court, Dec. 17, 2010.

⁴⁶ (Letter from Mr. Lewis to Mr. Tate, Apr. 20, 2011.) By its own terms, the April 20 letter was sent to confirm a prior telephone conversation among counsel. Respondents' counsel has taken the position that during this phone conversation, an agreement was reached that an

into a settlement agreement with Dr. Woolfson and Dr. Campbell and dismissed all remaining claims in Hollman.⁴⁷ Appellants were not a party to these settlement negotiations. By August 2011, Respondents' counsel had still not prepared an order denying TLC's motion for reconsideration as instructed at the November 23, 2010 hearing. After an exchange of correspondence, on September 16, 2011 Respondents' counsel made the unilateral decision that, due to the intervening settlement of Hollman, an order was unnecessary and would not be prepared.⁴⁸ Accordingly, on September 28, 2011, TLC filed a motion to compel Respondents' counsel to prepare an order as directed by the court, or in the alternative, requesting the court to prepare its own order.⁴⁹ A hearing on TLC's motion was held on November 21, 2011, and by order dated January 12, 2012, the motion was denied on the basis of lack of subject

order arising from the November 23, 2010 hearing was unnecessary. This is unambiguously contradicted by the April 20 letter, which was authored by Respondents' counsel.

⁴⁷ Redacted Settlement Agreement between Respondents and Dr. Woolfson, April ___, 2011; Redacted Settlement Agreement between Respondents and Dr. Campbell, April ___, 2011 (together, these agreements are hereinafter referred to as "the 2011 Settlement Agreement"); see also Stipulation of Dismissal as to Dr. Woolfson and Dr. Campbell, May 3, 2011, John Hollman v. Woolfson, C.A. No. 2007-CP-23-2347; Stipulation of Dismissal as to Dr. Woolfson and Dr. Campbell, May 3, 2011, Danielle Hollman v. Woolfson, C.A. No. 2007-CP-23-8364.

⁴⁸ Letter from Mr. Boyd to Mr. Lewis, Aug. 19, 2011; Letter from Mr. Lewis to Mr. Boyd, Aug. 22, 2011; Letter from Mr. Boyd to Mr. Lewis, Aug. 25, 2011; Letter from Mr. Boyd to Mr. Fayssoux, Aug. 25, 2011; Letter from Mr. Lewis to Mr. Boyd, Sept. 6, 2011; Letter from Mr. Boyd to Mr. Lewis, Sept. 14, 2011; Letter from Mr. Lewis to Mr. Boyd, Sept. 16, 2011.

⁴⁹ TLC's Mot. Compel Resp'ts Counsel to Prepare an Order for the Court as Directed by the Court, or Alternatively, to Request the Court to Issue an Order on TLC's Prior Mot. for Reconsideration, Sept. 28, 2011; see also TLC's Mot. Compel Resp'ts Counsel to Observe the Protective Order of Nov. 14, 2008 and Return or Destroy Materials Produced Thereunder, Sept. 28, 2011.

matter jurisdiction.⁵⁰ On February 10, 2012, TLC filed a motion for reconsideration pursuant to Rule 59, SCRPC,^{51,52} which was denied by order dated March 2, 2012.⁵³ This appeal followed.

ARGUMENT

I. The standard of review for each question presented in this appeal is *de novo*.

This appeal involves both legal and equitable questions. When questions of law are presented on appeal, they are evaluated under the *de novo* standard of review. See, e.g., Crystal Pines Homeowners Ass'n v. Phillips, 394 S.C. 527, 533, 716 S.E.2d 682, 685 (Ct. App. 2011) (citation omitted). The existence of subject matter jurisdiction is a question of law, see, e.g., Linda Mc Co. v. Shore, 390 S.C. 543, 550, 703 S.E.2d 499, 503 (2010) (citations omitted), as are issues involving the construction of orders, see, e.g., J.C. Lynch & Son v. Cusaac, 104 S.C. 507, ___, 89 S.E. 392, 393 (1916).

Likewise, when an appeal involves equitable questions, the Court may find the facts in accordance with its own view of the preponderance of the evidence. See, e.g., Lewis v. Lewis, 392 S.C. 381, 384, 709 S.E.2d 650, 651 (2011). This is also

⁵⁰ Order Den. TLC's Mot. Compel, Jan. 12, 2012 (hereinafter referred to as "the January 12 Order").

⁵¹ TLC's Mot. for Reconsideration, Feb. 10, 2012.

⁵² Due to a clerical error of the Greenville County Clerk of Court's Office, TLC did not receive notice that the January 12 Order had been entered until February 3, 2012. (See Letter from Mr. Boyd to Greenville County Clerk's Office, Feb. 6, 2012; Letter from Greenville County Clerk of Court's Office to Mr. Boyd, May 14, 2012.) However, after receiving the January 12 Order, TLC promptly moved for reconsideration, (see Letter from Mr. Boyd to Greenville County Clerk's Office accompanying TLC's Motion for Reconsideration, Feb. 10, 2012; Cert. of Service for TLC's Mot. for Reconsideration, Feb. 10, 2012), which was denied on its merits, not on procedural grounds.

⁵³ Order Den. TLC's Mot. for Reconsideration, Mar. 2, 2012.

described as *de novo* review. *Id.*, 392 S.C. at 386, 709 S.E.2d at 652. An appeal regarding the disposition of a motion for an order and rule to show cause is a question arising in the court’s equitable jurisdiction. *See, e.g., Ex parte Boddie*, 200 S.C. 379, ___, 21 S.E.2d 4, 9 (1942).

Therefore, because the appropriate standard of review is *de novo* for each of the questions presented, the Court may decide this case without any particular deference to the decisions of the courts below. *See, e.g., Wiegand v. U.S. Auto. Ass’n*, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011) (citations omitted).

II. The circuit court was not divested of subject matter jurisdiction to enforce the Protective Order by the 2011 settlement and dismissal of Respondents’ claims against Dr. Woolfson and Dr. Campbell.

According to the January 12 Order, “[a] dismissal with prejudice creates finality with respect to pending matters,” and therefore, “[t]he dismissal of the Hollman case in May[] 2011 terminated the [c]ourt’s jurisdiction to issue an [o]rder on TLC’s Motion for Reconsideration. . . . [H]ad TLC wanted to reserve its right to appeal the [c]ourt’s denial of its Motion for Reconsideration, a *special release* would have been required”⁵⁴ The circuit court also held that TLC had an “affirmative duty” to request that an order disposing of its motion be prepared prior to Hollman’s dismissal. “Since no request [for an order] was made by TLC, the case was dismissed.”⁵⁵ Accordingly, the court held it was divested of its subject matter jurisdiction with regard to Hollman, and “TLC’s Motion to Compel [Respondents’]

⁵⁴ Jan. 12 Order 6 (emphasis added to the term “special release”).

⁵⁵ *Id.* 5.

counsel to prepare an [o]rder on the Motion for Reconsideration [was] denied[,] as [was] TLC’s request for the [c]ourt to prepare and enter its own [o]rder.”⁵⁶

The ultimate legal conclusion reached by the January 12 Order—that the 2011 settlement and dismissal divested the court of jurisdiction to enforce its own Protective Order—is contrary not only to South Carolina law, but also the overwhelming weight of legal authority from other jurisdictions, as is the proposition that the court was powerless to enforce the Protective Order against continuing violations. Indeed, the need for protection is just as strong now as it has ever been. It was also error to conclude that TLC had an “affirmative duty” to request the preparation of an order on the motion for reconsideration. There is no such duty at law; and even if there were, TLC requested an order and was denied. Finally, there is no such thing as a “special release” capable of affecting the court’s jurisdiction. The court has not only the authority, but the obligation, to exercise its jurisdiction to enforce the Protective Order. The Orders of January 12 and March 2 represent an abdication of that responsibility, and therefore, must be reversed.

A. TLC was not involved in the 2011 settlement and dismissal of Respondents’ claims against Dr. Woolfson and Dr. Campbell.

The January 12 Order holds that “a dismissal with prejudice indicates an adjudication on the merits and precludes subsequent litigation to the same extent as if the action had been tried to a final adjudication.”⁵⁷ The court found that not only had

⁵⁶ Id. 6.

⁵⁷ Id. 5 (citing in support of this proposition Jones v. City of Folly Beach, 326 S.C. 360, 366, 483 S.E.2d 770, 772 (Ct. App. 1997); W.T. Ferguson Lumber Co. v. Elliott, 171 S.C. 455, ___, 172 S.E.2d 616, 617–18 (1934); Pryor v. Newbold, 69 S.C. 426, ___, 48 S.E. 275, 276 (1904)). The authority cited in furtherance of the court’s jurisdictional analysis is inapplicable. These cases deal with the circumstance where the parties to a lawsuit enter into

“the parties” entered into a settlement agreement, they had also dismissed Hollman with prejudice. Consequently, the court held it had been divested of jurisdiction.

In arriving at this conclusion, the court overlooked a critical issue: Which parties were actually involved in the 2011 settlement and dismissal? The implication of the January 12 Order is that “the parties” to the underlying motion—TLC and Respondents—were the settling parties.⁵⁸ But this was not the case. TLC had entered into a settlement agreement with Respondents one year earlier, in June 2010.⁵⁹ At that point, Hollman was not over. Respondents’ merits-based claims were still pending against Dr. Woolfson and Dr. Campbell. TLC subsequently intervened in Hollman for the limited purpose of enforcing the Protective Order.⁶⁰ This was collateral to the ongoing merits-based litigation between Respondents and Dr. Woolfson and Dr. Campbell, which was resolved by the 2011 settlement and dismissal among those parties.⁶¹ TLC was not a party to the 2011 agreement, and the agreement did not pertain to TLC’s collateral litigation with Respondents to enforce the Protective Order.

a settlement agreement which releases all claims, and later, one of the settling parties tries to renew merits-based claims that had been released. These were not the circumstances before the court.

⁵⁸ Jan. 12 Order 5.

⁵⁹ 2010 Settlement Agreement; Stipulations of Dismissal as to TLC, June 21, 2010.

⁶⁰ (See July 2010 State Tr. 14 (reflecting that the court allowed TLC’s intervention and noting Respondents’ counsel’s consent); Aug. 17 Order 2 (confirming TLC’s intervention).) Accordingly, the court recognized TLC’s separate interest in enforcement of the Protective Order.

⁶¹ 2011 Settlement Agreement; Stipulations of Dismissal as to Dr. Woolfson and Dr. Campbell, May 3, 2011.

B. Intervention was the only procedural mechanism available for TLC, as a third party, to seek enforcement of the Protective Order.

Although TLC was dismissed from Hollman in June 2010, almost immediately thereafter it became necessary for TLC to seek the court's enforcement of the Protective Order. However, because of the 2010 settlement and dismissal, TLC was no longer a party to the litigation. This put TLC in the unusual position of needing to enforce an order issued for its protection in a case to which it was no longer a party. Consequently, in July 2010, TLC intervened in Hollman for the limited, collateral purpose of seeking enforcement of the Protective Order, which was procedurally necessary and appropriate. Davis v. Jennings, 304 S.C. 502, 405 S.E.2d 601 (1991); see also Rule 24, SCRPC.

In Davis, the circuit court granted a motion to seal the judicial record permanently in conjunction with a voluntary dismissal among the parties. The Charlotte Observer, a third-party to the litigation, wanted to obtain records of the proceeding, which required a challenge to the protective order by which the records were sealed. The Observer's motion to intervene was denied. The Observer then appealed, and the decision was reversed. Id., 304 S.C. at 503, 405 S.E.2d at 602. The Supreme Court recognized that intervention is ordinarily relied upon by individuals seeking status as a party to the merits-based litigation. Id., 304 S.C. at 504, 405 S.E.2d at 602–03. Rule 24, SCRPC, does not expressly contemplate the circumstance where third-parties seek to intervene for collateral issues, such as the administration of protective orders. Id., 304 S.C. at 503–04, 405 S.E.2d at 602 (citations omitted). “[H]owever, many courts [have held] that challenges to protective orders are appropriately raised through motions to intervene.” Id., 304 S.C. at 503–04, 405

S.E.2d at 602 (citations omitted). This type of intervention “is provisional in nature and for the limited purpose of permitting the intervenor to file a motion, to be considered separately, requesting that access to proceedings or other matters be granted.” Id., 304 S.C. at 504, 405 S.E.2d at 603 (alterations and citations omitted). Accordingly, the Supreme Court held that Rule 24 is the appropriate mechanism for third-parties to intervene in litigation for the limited purpose of addressing the administration of protective orders. 304 S.C. at 504, 405 S.E.2d at 603.

Davis is therefore controlling on this appeal. After the 2010 settlement and dismissal, the only appropriate way for TLC to seek enforcement of the Protective Order was to intervene for that limited purpose, which is exactly what TLC did.

C. The court’s jurisdiction to enforce the Protective Order was not affected by the 2011 settlement and dismissal of Respondents’ merits-based claims against Dr. Woolfson and Dr. Campbell.

The January 12 Order holds that the 2011 settlement and dismissal of Respondents’ claims against Dr. Woolfson and Dr. Campbell caused the court to lose its jurisdiction with respect to Hollman, including the authority to issue an order on TLC’s motion for reconsideration.⁶² However, it is well-established that an intervenor’s action survives dismissal of the underlying litigation as long as there are independent grounds of jurisdiction.⁶³ See, e.g., 7C Charles Alan Wright et al.,

⁶² Jan. 12 Order 5–6.

⁶³ Subject matter jurisdiction describes the court’s authority, constitutional or statutory, to hear and determine cases of the general class to which the proceedings in question belong. See, e.g., Theisen v. Theisen, 394 S.C. 434, 440–41, 716 S.E.2d 271, 274 (2011); Johnson v. South Carolina Dep’t of Probation, Parole & Pardon Servs., 372 S.C. 279, 284, 641 S.E.2d 895, 897 (2007) (citations omitted). Since South Carolina courts are courts of general jurisdiction, S.C. Const. art. V, § 11, the need for independent jurisdictional grounds is not nearly as important as it may very well be in federal court.

Federal Practice & Procedure: Civil § 1920 (3d ed. 2012) (discussing intervention).⁶⁴

Furthermore, there is a wealth of authority—from this appellate court, no less—for the proposition that the court which issues a protective order has the authority to modify, enforce, or vacate the order, regardless of the dismissal or termination of the underlying litigation. See Ex parte Bland, 380 S.C. 1, 667 S.E.2d 540 (2008); Davis v. Jennings, 304 S.C. 502, 405 S.E.2d 601 (1991); see also 8A Charles Alan Wright et al., Federal Practice & Procedure: Civil § 2044.1 (3d ed. 2012) (discussing protective orders).

In Davis v. Jennings, which was discussed in the preceding section, the Charlotte Observer filed a motion to intervene as a third party for the purpose of accessing sealed litigation records in a case which had already been dismissed. 304 S.C. 502, 405 S.E.2d 601 (1991). The order dismissing the case and sealing the records had been entered on December 29, 1989. Id., 304 S.C. at 503, 405 S.E.2d at 602. The Observer's motion was denied on January 25, 1990, one month after dismissal. Id. On appeal, the circuit court's order was reversed and remanded for a disposition of the Observer's intervention on the merits. In providing this relief, the Supreme Court necessarily determined that the circuit court had continuing jurisdiction over the protective order even after dismissal. Otherwise, the Court would not have remanded the case for further proceedings. The only conclusion that may be reasonably inferred from Davis is that the circuit court—as the court which

⁶⁴ See also Rockwell Int'l Corp. v. United States, 549 U.S. 457, 478 (2007) (citation omitted); U.S. Steel v. EPA, 614 F.2d 843 (3d Cir. 1979); Magdoff v. Saphin Television & Appliance, Inc., 228 F.2d 214, 215 (5th Cir. 1955); Hunt Tool Co. v. Moore, Inc., 212 F.2d 685, 688 (5th Cir. 1954).

issued the protective order—had continuing jurisdiction to administer the order, which was not impaired by the termination of the underlying litigation.

The same conclusion was reached in Ex parte Bland, 380 S.C. 1, 667 S.E.2d 540 (2008). Bland started out as an action for legal malpractice between a law firm—Nexsen Pruet—and a set of former clients. In the course of litigation, plaintiffs’ counsel sought confidential information from Nexsen Pruet, which was ultimately disclosed pursuant to a protective order. The protective order stated that all information disclosed under the order must be returned or destroyed upon the conclusion of litigation, and that no protected information could be used for any purpose other than the legal malpractice action. Id., 380 S.C. at 3, 667 S.E.2d at 541. Eventually, the legal malpractice case settled. However, two years after the case had been dismissed, plaintiffs’ counsel filed another legal malpractice action against Nexsen Pruet. Id., 380 S.C. at 5–6, 667 S.E.2d at 542. Soon thereafter, it was discovered that plaintiffs’ counsel had retained substantial amounts of protected information, which prompted Nexsen Pruet’s counsel to file a motion under the caption of the first legal malpractice action to enforce the protective order. Id., 380 S.C. at 6, 667 S.E.2d at 542. The motion was heard and decided against Nexsen Pruet. Id., 380 S.C. at 7, 667 S.E.2d at 543. Nexsen Pruet appealed and the Supreme Court reversed, ultimately concluding that plaintiffs’ counsel had committed a material breach of the protective order. Id., 380 S.C. at 12, 667 S.E.2d at 545. Notably, all of the acts that constituted the breach had occurred after the termination of the underlying litigation. Despite the fact that Bland had been over for two years prior to the filing of the motion for enforcement, the Supreme Court remanded the

case to the circuit court for further proceedings to determine the amount of sanctions to be imposed. Id., 380 S.C. at 14, 667 S.E.2d at 547. As with Davis, it was necessarily implied in the Supreme Court's decision that the court which issues a protective order has continuing jurisdiction to enforce the order, even if years have passed since the case through which the order was issued was resolved.⁶⁵

The jurisdictional holdings in Davis and Bland are consistent with the conclusions reached by other jurisdictions. For example, in Public Citizen v. Liggett Group, Inc., the First Circuit held that “[d]uring the pendency of the protective order, including times after judgment, the order act[s] as an injunction, setting forth strict limitations on the parties’ use of discovery materials. In support of this ‘injunction,’ the district court necessarily [has] the power to enforce the order, at any point while the order [is] in effect, including periods after judgment.” 858 F.2d 775, 782–83 (1st Cir. 1988) (“We note that courts and commentators seem unanimous in finding such an inherent power to modify discovery-related protective orders, even after judgment, when circumstances justify.” (numerous citations omitted)). Likewise, in United Nuclear Corp. v. Cranford Insurance Co., the Tenth Circuit held that “[a]s long as a protective order remains in effect, the court that entered the order retains the power to modify it, even if the underlying suit has been dismissed.” 905 F.2d 1424, 1427 (10th

⁶⁵ Cf. Brady v. Anders, 294 S.C. 342, 364 S.E.2d 467 (1988) (upholding the enforcement of an injunction issued in 1981, and noting that “the court which rendered the permanent injunction has the inherent power or authority to vacate or modify the injunction”); Rogers v. Citizens & S. Nat’l Bank, 220 S.C. 264, 268, 66 S.E.2d 873, 874 (1951) (“[A] court has the inherent power, necessarily an adjunct to the effectiveness of its rulings, to enforce such findings and judgments issued by it.”); State v. Miller, 122 S.C. 468, ___, 115 S.E. 742, 744 (1923) (“[A] court having jurisdiction to render a judgment has inherent authority to carry such judgment into effect.”); see also Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 9–10, 630 S.E.2d 464, 469 (2006) (observing that “[e]very court has supervisory power over its own records and files”).

Cir. 1990). A similar decision was reached in Marshall v. Plantz, in which the court held that its jurisdiction to administer a protective order was not disturbed by an underlying settlement, since the order was outstanding and there was still information in the hands of other parties subject to protection. 347 F. Supp. 2d 1198, 1201 (M.D. Ala. 2004) (holding “that it [the court] has the power to modify, and even vacate, its protective orders, even after final judgment[,] as long as the orders are outstanding and thus enforceable”) (citations omitted). Thus, as a Maryland district judge observed, “[t]here seems to be little doubt that a protective order issued by a court, either state or federal, which on its face survives the underlying litigation, continues to have full force and effect on the parties subject to it even after final resolution of the underlying case, and the issuing court retains jurisdiction and authority to modify or revoke it.” Tucker v. Ohtsu Tire & Rubber Co., 191 F.R.D. 495, 499 (D. Md. 2000) (citations omitted).⁶⁶

⁶⁶ See, e.g., Eli Lilly & Co. v. Gottstein, 617 F.3d 186, 195 (2d Cir. 2010); United States v. Pollard, 416 F.3d 48, 59 (D.C. Cir. 2005); Gambale v. Deutsche Bank AG, 377 F.3d 133, 140–41 (2d Cir. 2004) (observing that “every court has supervisory power over its own records and files,” and that this power “does not disappear because jurisdiction over the relevant controversy has been lost. . . . So long as [the record and files of a case] remain under the aegis of the court, they are superintended by the judges who have dominion over the court.” (citing Nixon v. Warner Commc’ns, Inc., 435 U.S. 589, 598 (1978)) (alterations omitted); Poliquin v. Garden Way, Inc., 989 F.2d 527, 535 (1st Cir. 1993); Al Wady v. Obama, 623 F. Supp. 2d 20, 22 (D.D.C. 2009); In re Cessna 208 Series Aircraft Prods. Liab. Litig., 2009 WL 951532, *3 (D. Kan. Apr. 7, 2009) (unpublished opinion); Pac. Gas & Elec. Co. v. United States, 79 Fed. Cl. 744, 746 (2007); Adem v. Bush, 425 F. Supp. 2d 7, 20 (D.D.C. 2006); Zurich Am. Ins. Co. v. Rite Aid Corp., 345 F. Supp. 2d 497, 501 (E.D. Pa. 2004); Colaprico v. Sun Microsystems, Inc., 1994 WL 514029 (N.D. Cal. Aug. 22, 1994) (“A voluntary dismissal divests [the court] of jurisdiction over the underlying claims in the action and the settlement thereof, unless it is expressly retained in the final order. However, [the court] may consider collateral matters after an action has been terminated, and may assert ancillary jurisdiction ‘to manage its proceedings, vindicate its authority, and effectuate its decrees.’” Id. (citing Kikkonen

Therefore, under the precedents of our appellate courts and consistent with the decisions of our sister jurisdictions, the circuit court erred when it concluded that the 2011 settlement and dismissal divested the court of its subject matter jurisdiction to enforce the Protective Order.

D. Because the court is vested with continuing jurisdiction to enforce the Protective Order, the court has an obligation to do so.

The existence of subject matter jurisdiction is fundamental to judicial authority. In the absence of jurisdiction, the court has no authority to act, and any judgments made under the auspices of its jurisdiction are void. See, e.g., Coon v. Coon, 364 S.C. 563, 566, 614 S.E.2d 616, 617 (2005) (citations omitted). However, in circumstances where subject matter jurisdiction exists, then not only does the court have the authority to exercise its jurisdiction, it has the “virtually unflagging obligation” to do so. Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817–18 (1976); see also Segars v. Parrott, 54 S.C. 1, ___, 31 S.E. 677 696 (1898) (Buchanan, Cir. J., dissenting) (“It is as much the duty of a court to exercise jurisdiction where it is conferred as not to usurp it when it is not conferred.”).

E. TLC did not have an “affirmative duty” to request an order denying the motion for reconsideration, and even if it did, TLC discharged the duty by requesting that an order be prepared, which was denied.

The January 12 Order explicitly holds that TLC had an “affirmative duty” to request the preparation of an order denying the motion for reconsideration, but because TLC failed to request the preparation of an order prior to the 2011 settlement and dismissal of Respondents’ claims against Dr. Woolfson and Dr. Campbell, TLC

v. Guardian Life Ins. Co., 511 U.S. 375 (1994), and Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990)).

waived the right to have an order entered.⁶⁷ However, there is absolutely no basis in law for the proposition that a party has an affirmative duty to ask the court for an order which disposes of a motion. To the contrary, Rule 58, SCRCP, is clear about the responsibility for the preparation of orders:

[U]pon a decision by the court granting other relief . . . , the court shall promptly prepare the form of the judgment, or direct counsel to promptly prepare the form of judgment, to which may be attached the decision, order or opinion of the court, and after review and approval by the court, the clerk shall promptly enter it.⁶⁸

On November 23, 2010, the court explicitly directed Respondents' counsel "to prepare a brief order . . . which would include the denial of the [Rule] 59(e) motion."⁶⁹ The court never indicated that in addition to its instructions, TLC was also required to ask Respondents' counsel to comply with the order. TLC believed—and continues to believe—that Respondents' counsel had a duty to prepare an order as instructed without any further prompting by TLC.

In fact, TLC was actively led by Respondents' counsel to believe that an order would be prepared. On December 17, 2010, Respondents' counsel sent an email to the court—copying the undersigned counsel for TLC—which advised that "[they were] working on the proposed [o]rder regarding the [m]otion for [r]econsideration. . . [I]n order to be accurate with regard to several references made to hearings before Judge Few, we are in the process of requesting copies of the transcripts, but we have not yet received them. Upon receipt of the transcripts, [we] will forward the proposed

⁶⁷ Jan. 12 Order 5.

⁶⁸ Rule 58(a)(2), SCRCP.

⁶⁹ Nov. 2010 Tr. 62.

[o]rder to you with a copy to all parties.”⁷⁰ Then, on April 20, 2011, Respondents’ counsel sent a letter to the undersigned counsel for TLC, which stated as follows:

I am writing to confirm our telephone conversation of last week in which I advised you that **we have settled Mr. Hollman’s case against Dr. Woolfson and Dr. Campbell.** In light of settlement, **I had called to discuss with you whether we needed to submit a proposed [o]rder to Judge Miller regarding the [m]otion to [r]econsider** you filed several months ago. . . . **I have now received copies of the transcripts from the previous hearings and am prepared to draft a proposed [o]rder** should your client feel it to be necessary considering the fact that this case will be dismissed soon. . . . As I understand it, you were going to talk with your client about [this] and get back to me. . . .⁷¹

This letter is significant for three reasons. First, Respondents’ counsel states that they had settled—past tense—their claims against Dr. Woolfson and Dr. Campbell. TLC is not sure how it could have discharged its “affirmative duty” to request the preparation of an order before settlement, when TLC did not learn about the settlement until after the fact. Second, the letter confirms that TLC did not have an “affirmative duty” to request the preparation of an order. To the contrary, Mr. Lewis contacted TLC to inquire whether he could be released of his affirmative duty to prepare an order as instructed by the court. Third, the letter also confirms the parties’ understanding that the settlement of Respondents’ claims against Dr. Woolfson and Dr. Campbell did not relieve Respondents’ counsel of their obligation to prepare an order. Indeed, Mr. Lewis acknowledges his continuing duty to prepare an order. TLC never advised Respondents’ counsel that an order was not necessary. By letter dated August 25, 2011, TLC reminded Respondents’ counsel that it was still waiting

⁷⁰ Email from Mr. Lewis to the Honorable Edward W. Miller, Dec. 17, 2010.

⁷¹ Letter from Mr. Lewis to Mr. Tate, Apr. 20, 2011 (emphasis added).

for an order to be prepared.⁷² Then, for the first time, Respondents' counsel took the position that they had no intention of preparing an order on the motion for reconsideration.⁷³ This prompted TLC to file the motion to compel Respondents' counsel to prepare an order as instructed, or in the alternative, requesting the court to issue its own order.

Therefore, to the extent that the January 12 Order holds that TLC did not discharge its "affirmative duty" to request the preparation of an order, that is not supported by the record. Through its motion to compel, TLC requested the preparation of an order and was denied. However, the more fundamental issue is whether TLC had such an "affirmative duty" at all. It did not. The court directed Respondents' counsel to prepare an order, and there were no conditions attached. Respondents' counsel simply did not prepare an order as they were instructed to do, and as they were required to do promptly under the South Carolina Rules of Civil Procedure.⁷⁴

F. A "special release" was not necessary to preserve TLC's right to an order denying the motion for reconsideration.

According to the January 12 Order, "[t]he [Respondents] rightly argue[] that due to the pending dismissal of the remaining parties, had TLC wanted to reserve its

⁷² (Letter from Mr. Boyd to Mr. Fayssoux, Aug. 25, 2011; see also Letter from Mr. Boyd to Mr. Lewis, Sept. 14, 2011.) Although TLC did not respond in writing to the April 20 letter until August, this did not relieve Respondents' counsel of its obligation to prepare an order as previously instructed. It should be noted that during May, June, and July 2011, TLC was extensively involved in preparing, briefing, and arguing substantial motions to dismiss in Dickerson and Luce.

⁷³ Letter from Mr. Lewis to Mr. Boyd, Sept. 16, 2011.

⁷⁴ Rule 58, SCRPC.

right to appeal the [c]ourt’s denial of [the] [m]otion for [r]econsideration, a *special release* would have been required to preserve their rights yet dismiss the other parties fully.”⁷⁵ Notably, there is no authority cited in support of this assertion. The court has not identified any case, statute, or rule of civil procedure which supports the proposition that a “special release” is necessary to preserve a party’s appellate rights when other, unrelated litigants enter into a settlement agreement, or that a procedural device known as a “special release” even exists.

Furthermore, the January 12 Order concludes that the court was divested of its jurisdiction over all issues in Hollman—collateral and otherwise—because Respondents’ counsel was not able to draft “a release to address the protection of the settling parties.”⁷⁶ With all due respect, this conclusion is preposterous. If the court’s jurisdiction somehow depends on the types of agreements that counsel enter into, then the source of the court’s jurisdiction is not constitutional or statutory, it is something more subjective, and that conclusion is repugnant to the rule of law. See, e.g., Cox v. Lunsford, 272 S.C. 527, 532, 252 S.E.2d 918, 921 (1979) (holding that the existence of subject matter jurisdiction is not affected by the acts or agreements of the parties); see also Petroleum Transp., Inc. v. Pub. Serv. Comm’n, 255 S.C. 419, 179 S.E.2d 326 (1971). Any release that allows counsel to define the contours of the court’s jurisdiction—especially in hotly contested matters regarding a party’s compliance with a protective order—would indeed be special.

⁷⁵ Jan. 12 Order 6 (emphasis added to the term “special release”).

⁷⁶ Id.

III. In furtherance of judicial economy and expediency, the Court should adjudicate the issues arising from the August 17 Order.

Even if TLC prevails in this appeal on the jurisdictional issue, if the Court simply remands the case for further proceedings without disposing of the issues arising from the August 17 Order, TLC will not be provided with complete relief. The only proceedings left in the circuit court involve the entry of an order disposing of TLC's motion for reconsideration. The court has previously denied the motion, subject to the submission of a proposed order.⁷⁷ This is a purely administrative act that could be accomplished with a Form 4. Consequently, if this case is remanded for further proceedings, the circuit court will almost certainly—and swiftly—deny TLC's motion for reconsideration, which will force TLC to file a subsequent appeal as to the issues arising under the August 17 Order exclusively. Therefore, as matters of judicial economy and expediency, the issues arising under the August 17 Order should be decided together with the jurisdictional issues in this appeal. See, e.g., Whaley v. CSX Transp., Inc., 362 S.C. 456, 481, 609 S.E.2d 286, 299 n.15 (2005).⁷⁸

IV. As a matter of law, the August 17 Order fundamentally misconstrues the Protective Order, resulting in substantially diminished protection.

The August 17 Order constitutes a substantial misconstruction of the Protective Order, notably through its holding that “Confidential Health Information”

⁷⁷ Nov. 2010 Tr. 62.

⁷⁸ See also Elam v. South Carolina Dep't of Transp., 361 S.C. 9, 27, 602 S.E.2d 772, 781 (2004); State v. McMillian, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002); State v. Moore, 343 S.C. 282, 290, 540 S.E.2d 445, 449 (2000); Hollins v. Richland County Sch. Dist. One, 310 S.C. 486, 491, 427 S.E.2d 654, 656 n.2 (1993); Lizee v. South Carolina Dep't of Mental Health, 367 S.C. 122, 127, 623 S.E.2d 860, 863 n.1 (Ct. App. 2005); City of Aiken v. Cole, 289 S.C. 239, 243, 345 S.E.2d 760, 762 n.3 (Ct. App. 1986).

is limited to only health information coupled with patient identity.⁷⁹ Consistent with this misconception, any use of health information which is not associated with the name of a specific patient is ostensibly not subject to protection. However, as explained below, the Protective Order expressly protects more than just health information coupled with patient identity. In no uncertain terms, the Protective Order protects “Confidential Health Information,” as well as information based on, containing, or derived from “Confidential Health Information,” a critical aspect of the protective scheme that the August 17 Order simply disregards.

A. Specific Prohibitions Established by the Protective Order

The Protective Order applies to “all information or discovery materials produced by any party or their agents during the course of discovery in this action, all information derived therefrom, and extracts, copies, excerpts, or summaries thereof,” including “Confidential Health Information.”⁸⁰ Furthermore, there are two fundamental prohibitions established by the Protective Order: one prohibition pertains to the permissible uses and disclosures of protected information; the other pertains to the individuals who are authorized to receive protected information.

Regarding the limitations on use and disclosure, the Protective Order expressly states that “the dissemination of Confidential Health Information [is prohibited] for any purpose other than the prosecution or defense of this litigation.”⁸¹ “This litigation” refers quite obviously to the caption under which the Protective

⁷⁹ Aug. 17 Order 3.

⁸⁰ Prot. Order 4.

⁸¹ Id.

Order was issued, which itself refers to three cases: (1) John Hollman v. Woolfson et al.; (2) Danielle Hollman v. Woolfson et al.; and (3) Carter et ux. v. Nimmons et al.⁸² Later in the Order, at Paragraph 8, the Court states again, “Confidential Health Information shall be used for no purpose other than this litigation.”

Regarding authorized personnel, Paragraph 7 states that “[n]o person, firm, corporation, or other entity subject to th[e] [Protective] Order shall give, show, disclose[], make available, or communicate [Confidential Health] Information to any person, firm, corporation, or other entity not expressly authorized by this Order to receive such Confidential Health Information.” Paragraph 3 establishes which individuals and entities are authorized to receive Confidential Health Information. Generally, those classes of individuals and entities are: (1) court personnel; (2) the parties and their counsel; (3) the parties’ experts; (4) litigation assistance personnel; and (5) individuals who are identified on a document as its author or recipient. Importantly, Paragraph 3 states that “Confidential Health Information may be disclosed only” to these express classes of individuals or entities.

Obviously, the cornerstone of the specific prohibitions is the term “Confidential Health Information.” The Protective Order provides a clear definition of the term, which was unreasonably misconstrued by the August 17 Order.

B. “Confidential Health Information,” as Defined by the Protective Order

“[C]ourt orders and judgments are to be construed under the same rules of interpretation as those applied to other written instruments.” West Virginia ex rel.

⁸² These cases were never formally consolidated, but discovery was pursued on a consolidated basis, and the Protective Order was intended to govern the use and disclosure of protected information in each.

State Farm Mut. Auto. Ins. Co. v. Bedell, 719 S.E.2d 722, 737 (W. Va. Ct. App. 2011) (citations omitted). Therefore, the threshold question is whether the order at issue is ambiguous. “Where the lower court’s order is unambiguous[,] the court’s intent must be discerned solely from the plain meaning of the words used,” giving “force and effect to every word, if possible, in order to give the decree a consistent, effective[,] and reasonable meaning in its entirety.” Id. (citations and alterations omitted). See generally 60 C.J.S., Motions & Orders § 73 (2012).

With regard to the definition of Confidential Health Information, the Protective Order is clear and unambiguous. Paragraph 2 establishes the definition of Confidential Health Information, which consists of three operative sentences. Those sentences are as follows:

Sentence 1

The term “Confidential Health Information[.]” means . . . any document or information supplied that identifies an individual or subscriber in any manner and relates to the past, present, or future payment for the provision of health care to such individual or subscriber.

Sentence 2

The term “Confidential Health Information” specifically includes “protected health information” as such term is defined by the Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. parts 160 and 164, promulgated pursuant to the Health Insurance Portability and Accountability Act of 1996. See 45 C.F.R. sections 164.501 (“protected health information”) and 160.103 (“individually identifiable health information”).

Sentence 3

“Confidential Health Information” includes all notes, summaries, compilations, extracts, abstracts, or oral communications that

contain, are based on, or are derived from Confidential Health Information.⁸³

Together, Sentence 1 and Sentence 2 establish that “Confidential Health Information” is intended to embrace the definition of the term “individually identifiable health information,” as that term is used in the context of HIPAA.⁸⁴

Individually identifiable health information is information that . . . [r]elates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and (1) [t]hat identifies the individual; or (2) [w]ith respect to which there is a reasonable basis to believe the information can be used to identify the individual.⁸⁵

However, “Confidential Health Information” is not synonymous with “individually identifiable health information;” it is broader. Sentence 3 explains that “‘Confidential Health Information’ includes all notes, summaries, compilations, extracts, abstracts, or oral communications that contain, are based on, or are derived from Confidential Health Information.” Therefore, quite explicitly, the term “Confidential Health Information” not only includes “individually identifiable health information,” but more broadly, information based on, containing, or derived from “individually identifiable health information.”

For example, under the Protective Order, “John Doe had LASIK eye surgery on May 5, 2012” would be “Confidential Health Information,” because it is health information coupled with patient identity. Furthermore, because “Confidential Health

⁸³ Prot. Order 4–5 (emphasis added).

⁸⁴ The Health Insurance Portability & Accountability Act of 1996, Pub. L. 104-191 (1996) (“HIPAA”); 45 C.F.R. parts 160, 162 & 164.

⁸⁵ 45 C.F.R. § 160.103.

Information” includes information based on, containing, or derived from individually identifiable health information, the identity of “John Doe” is subject to protection, regardless of whether it is explicitly coupled with patient information.

C. “Confidential Health Information,” as Misconstrued by the August 17 Order

The August 17 Order states that “for information to be ‘confidential health information’ it must include both the health information and the identity of the patient.”⁸⁶ This statement of law not only misconstrues the Protective Order, it misconstrues HIPAA. HIPAA protects “individually identifiable health information,” which is health information coupled with either: (1) the patient’s identity; or (2) any information which provides a basis from which it is reasonably possible to identify the patient.⁸⁷ The August 17 Order disregards the second part of the definition,⁸⁸ and therefore, results in the circumstance where the Protective Order—as construed under the August 17 Order—provides even less protection than HIPAA would.

However, as explained previously, the Protective Order is explicitly broader than HIPAA. While HIPAA protects “individually identifiable health information,” the Protective Order also prohibits the use and disclosure of information based on, containing, or derived therefrom. Yet the August 17 Order treats the protections established for “derivative” information as if they do not exist.

Notably, the August 17 Order appears to hold that Respondents’ counsel may use or disclose information based on, containing, or derived from Confidential Health

⁸⁶ Aug. 17 Order 3 (emphasis added).

⁸⁷ 45 C.F.R. § 160.103.

⁸⁸ Aug. 17 Order 4 n.2.

Information, if the derivative information does not itself constitute Confidential Health Information.⁸⁹ For example, if Respondents' counsel learned from protected information that "John Doe had LASIK eye surgery on May 5, 2012," counsel could not use or disclose the fact that "John Doe had LASIK eye surgery on May 5, 2012," but could use or disclose the fact that "an unnamed patient had LASIK eye surgery on May 5, 2012," and not be in violation of the Protective Order. If this is, in fact, the holding of the August 17 Order, it is irreconcilable with the plain, unambiguous language of the Protective Order and must be corrected.⁹⁰

D. Appellants have relied to their detriment on the reasonable expectations of protection established in the Protective Order.

When the Protective Order was issued in 2008, TLC had a reasonable expectation that the parties would observe the plain, unambiguous terms of the Protective Order, and if not, that the court would enforce the Protective Order according to its plain meaning. Since that time, almost nothing has proceeded according to TLC's reasonable expectations.

For example, the Protective Order created a reasonable expectation that the confidentiality of protected information would be secure against unauthorized uses and disclosures. However, the August 17 Order frustrated those expectations. The

⁸⁹ Undeniably, all of Respondents' knowledge about third parties was based on, contained in, or derived from the treatment records and database information disclosed under the Protective Order.

⁹⁰ Indeed, if the Protective Order contemplated the circumstance where third-party medical information could be used in furtherance of medical negligence litigation, inevitably, what would result is a mini-trial as to each third-party's circumstances, resulting in targeted discovery against each third-party. Therefore, regardless of whether a specific third-party's identity is disclosed with personal health information in the allegations of a pleading, his or her identity will absolutely be disclosed when that person becomes a witness at his deposition or a trial of the case.

Protective Order created a reasonable expectation that Respondents' counsel would be prohibited from using or disclosing protected information for any purpose unrelated to Hollman. Yet Respondents' counsel has filed three additional actions against TLC—all using protected information—without any repercussion, thereby frustrating that expectation. The Protective Order created a reasonable expectation that Respondents' counsel would be prohibited from using protected information to contact third-party patients. Yet twice now, Respondents' counsel has tried to do so. The first time, they were enjoined by the Supreme Court.⁹¹ Hollman v. Woolfson, 384 S.C. 571, 683 S.E.2d 495 (2009). The second time, Respondents' counsel evaded the Supreme Court by filing the class action in federal court, which was dismissed before Respondents' counsel could begin contacting putative class members.

TLC is frustrated by the Sisyphean ordeal which has characterized its efforts to enforce a very simple, straightforward Protective Order. However, there is some comfort to be found in Ex parte Bland, 380 S.C. 1, 667 S.E.2d 540 (Ct. App. 2008), which involved the enforcement of a protective order under similar circumstances. In Bland, the protective order at issue stated that protected information could be used only for the purposes of the immediate litigation and that use of protected information for any other purpose was prohibited. Despite these clear prohibitions, plaintiffs' counsel used protected information to support subsequent litigation activities. The Supreme Court held that this was impermissible.

Notably, the Supreme Court held that Nexsen Pruet had a right to rely on the expectation that the protective order would be performed by plaintiffs' counsel and enforced by the court. Id., 380 S.C. at 7–11, 667 S.E.2d at 543–45. Regardless of

⁹¹ But not before Respondents' counsel was able to contact at least fifteen patients.

any other harm that may have resulted from the breach of the protective order, the failure of that expectation was material and prejudicial. Id. The Court also held that the prohibition against use for any other purpose was not merely advisory; it was mandatory. Id. The information disclosed under the protective order could not be used in subsequent litigation, even if plaintiffs' counsel and the defendant were the same individuals. Id. Additionally, the Court held that it was not acceptable for a party to decide unilaterally to violate the terms of a court order, and there was no justification or excuse whatsoever for that unilateral decision. Id.

The parallels between Bland and the circumstances of this appeal are undeniable. Respondents' counsel is using information that they are not entitled to in clear disregard of the Protective Order. Although Respondents' counsel initially made the unilateral decision to violate the Protective Order, their violations have since been absolved by the circuit court's decisions. It is TLC's hope that, also like Bland, the appellate courts will vindicate its rights under the Protective Order and restore TLC's expectations of enforcement and compliance.

V. **The August 17 Order and January 12 Order contain "findings of fact" and "conclusions of law" which were never adjudicated by the court, are material to the underlying issues, and are prejudicial to TLC's interests; therefore, to the extent these Orders contain improper findings and conclusions, they must be vacated.**

Rule 52, SCRCP, authorizes the circuit court to make findings of fact and conclusions of law in connection with the disposition of motions. However, the court's findings and conclusions should be supported by the record, and the record should demonstrate that the facts and conclusions were actually adjudicated. See, e.g., [Abernathy v. Latham](#), 345 S.C. 106, 109–10, 545 S.E.2d 848, 850 (Ct. App.

2001). Findings and conclusions that are not supported by the record or which were not adjudicated by the court should be vacated.

For these reasons, many of the findings of fact set out in the August 17 Order and the January 12 Order must be vacated. Regarding the August 17 Order, the underlying hearing was held on July 26, 2010. At that time, the court took the disposition of the motion for an order and rule to show cause under advisement; the court did not make any findings of fact. Then, on August 4, 2010, the court sent an email to the parties, which is notable because of its brevity. In that email, Respondents' counsel was directed to prepare an order as follows:

The issues presented to the Court are governed by the clear language of paragraph 15 of the Protective Order and Settlement Agreement. The return of the database is not required until the conclusion of the state's action. Thus, TLC's motion is premature.

At this time, the Court decides to avoid sanctions, fees, costs and will hold these issues in abeyance until the conclusion of the case.⁹²

Somehow, from this brief instruction, Respondents' counsel was able to extrapolate a seven-page decision, which is now known as the August 17 Order. Among other things, the August 17 Order concluded—significantly—that the Protective Order does not protect information “based on, containing, or derived from” protected information. This was not addressed at the hearing, and it was not set out in the court's email. It was a material conclusion of law that Respondents' counsel simply manufactured out of thin air. Additionally, the August 17 Order contains the following “findings of fact” and/or “conclusions of law,” which are not supported by the record and were never adjudicated by the court:

⁹² Email from the Honorable Edward W. Miller to Mr. Patrick and Mr. Lewis, Aug. 4, 2010.

**Improper Findings of Fact and/or
Conclusions of Law**

TLC contends it is entitled to file this motion based on Paragraph 15 of the Settlement Agreement which permits a petition by TLC to modify or vacate the existing Protective Order filed in this litigation. (Aug. 17 Order 2.)

Accurate Statements of Fact

Fundamentally, TLC is entitled to enforce the Protective Order under the authority of that order itself, in addition to any other ground that Appellants may have, such as the Settlement Agreement.

TLC objected, claiming that the Complex Case system and Advocacy log as well as the data were prepared in anticipation of litigation and, therefore, work product. TLC did not make any other objections to discovery and this Court overruled the anticipation of litigation position. (Aug. 17 Order 3.)

TLC strenuously objected to the disclosure of protected information on the basis of relevance, necessity, attorney/client privilege, the doctrine of work product, patient confidentiality, and the interests of internal risk management practices. The court ostensibly gave due consideration to each argument, but overruled them.

At the time these matters were heard, the Court conducted an in-camera review of the database collective [sic] under Complex Case and Advocacy and concluded that it was discoverable but contained the confidential health information of other patients which needed to be protected as permitted by existing HIPAA regulations. The concern, as enunciated by this Court and confirmed by the parties, was that these patients' confidential health information needed protection from dissemination to the public. This was the purpose and scope of the Protective Order. (Aug. 17 Order 3.)

TLC's concerns were grounded upon respect for patient privacy, relevance, necessity, attorney/client privilege, the doctrine of work product, patient confidentiality, and the interests of internal risk management practices. TLC was also concerned that Respondents' counsel would abuse non-party health information by fomenting additional litigation, which is exactly what they have done. Consequently, the Protective Order explicitly prohibits the use and disclosure of individually identifiable health information, and information based on, containing, or derived therefrom, for any purpose other than Hollman. The Protective Order offers more protection than the August 17 Order and Respondents' counsel claim.

The conduct of the parties following imposition of this Protective Order

This "finding of fact" is hotly contested and simply indefensible. At all relevant

confirms this interpretation [of “Confidential Health Information” as health information coupled with patient identity]. All litigants filed subsequent briefs and engaged in discovery depositions which extensively referred to health information contained either in the collective databases or individual medical records [of] patients without referring to the identity of those patients. (Aug. 17 Order 3–4.)

times, TLC has acted as though Confidential Health Information included individually identifiable health information, as well as information based on, containing, or derived therefrom. Respondents’ counsel—and only Respondents’ counsel—has acted as though “Confidential Health Information” has the narrowest possible meaning and provides the least amount of protection.

All of the violations claimed to have occurred pre-dated the Settlement Agreement and, in accord with the Court’s further ruling, would not constitute a predicate upon which TLC could request a modification of the Protective Order. (Aug. 17 Order 4–5.)

The amendment to include Charles Benjamin Dickerson as the class representative of the Federal Class Action, which was done after settlement, constitutes a continuing violation of the Protective Order. Furthermore, Dickerson and Luce, which are based on protected information, have since been filed, and also represent continuing violations.

The court never adjudicated the improper “findings of fact” and conclusions of law. There is no evidence in the record to support these “facts” or conclusions. And most importantly, each of these “facts” and conclusions actually represents issues that remain hotly contested between the parties. Yet because the court signed the proposed order prepared by Respondents’ counsel verbatim, these material, prejudicial, and fictitious “facts” and conclusions became, and remain, a part of the August 17 Order.⁹³

Regrettably, history repeated itself with the January 12 Order. The underlying hearing on the order occurred on November 21, 2011. At that time, the court stated its intention to deny TLC’s motion to compel the preparation of an order and

⁹³ TLC objected to the inclusion of these findings and conclusions prior to their entry. (See Letter of Mr. Boyd to the Honorable Edward W. Miller, Aug. 10, 2010.)

instructed Respondents' counsel to prepare a brief order denying the existence of subject matter jurisdiction.⁹⁴ The court did not make any findings of fact. Yet what resulted was an eight-page order featuring sixteen separate findings of fact. Among them:

Improper Findings of Fact and/or Conclusions of Law

Defendant TLC objected to the production of [the database] material on the basis of work product privilege prepared in anticipation of litigation. (Jan. 12 Order 2.)

Accurate Statements of Fact

Again, TLC objected to the disclosure of protected information on the basis of relevance, necessity, attorney/client privilege, the doctrine of work product, patient confidentiality, and the interests of internal risk management practices.

In connection with the required production, upon concerns expressed by the parties as to non-litigant patient privacy, on November 14, 2008, the Court entered a Protective Order prohibiting the dissemination of confidential health information contained in the databases and other material produced pursuant to the Order. (Jan. 12 Order 2.)

As explained above, TLC's concerns involved more than just non-litigant patient privacy.

In June 2010, [Respondents] and TLC entered into a settlement agreement in which TLC was dismissed as a party to the litigation. As a result, all pending motions between the parties were dismissed. The terms and conditions of the Protective Order relating to return of the confidential materials remained in effect as well as any enforcement provisions for post settlement violations of the Order. (Jan. 12 Order 3.)

Including continuing violations of the Protective Order, such as the unauthorized disclosure of protected information to Charles Benjamin Dickerson and the use and disclosure of protected information for impermissible purposes.

⁹⁴ Hr'g Tr. 15–25, 56–69, 104–06, Nov. 21, 2011.

In July 2010, TLC filed a second Motion for Sanctions against [Respondents'] counsel which realleged the allegations contained in the previously dismissed Motion for Sanctions. (Jan. 12 Order 3.)

The July 2010 motion for an order and rule to show cause was based on Respondents' counsel's continuing violations of the Protective Order.

On April 13, 2011, Plaintiff's counsel, Stephen Lewis, had a telephone conversation with TLC defense counsel, Ron Tate, advising Mr. Tate the Hollman case had been settled and that the settlement would end with prejudice the Hollman case. The purpose of the call was to discuss the pending issues with TLC concerning the database, its return, and outstanding Order denying reconsideration. **Mr. Lewis advised Mr. Tate that if TLC wanted the proposed Order drafted and submitted to this Court, it should notify Plaintiff's counsel prior to the dismissal of the case with prejudice, which was imminent.** In addition, Plaintiff's counsel discussed with TLC counsel the return of certain discovery materials pursuant to the aforementioned Protective Order and suggested that since additional lawsuits in the Dickerson and Luce cases had been filed, and Plaintiff would seek discovery of the identical materials, the databases should be filed under seal with this Court until any discovery issues related to the production of the databases could be addressed by this Court. **Plaintiff's counsel recited in Court that it was his understanding that TLC counsel agreed with this proposal.** (Jan. 12 Order 3-4) (emphasis added).

This "finding of fact"—which was authored by Respondents' counsel—is explicitly contradicted by a letter dated April 20, 2011, which was also authored by Respondents' counsel. That letter was sent to confirm the very telephone conversation this "finding of fact" describes. In that letter, **Mr. Lewis proposes that the Hollman protected information be filed under seal in Dickerson and Luce, but expresses his understanding that there is no agreement.** Furthermore, according to the letter, Mr. Lewis was informing Mr. Tate that Respondents had settled—past tense—their claims with Dr. Woolfson and Dr. Campbell. Therefore, there was no opportunity to advise Respondents' counsel prior to settlement of the need for an order. **The letter further establishes that despite settlement, Respondents' counsel were aware of their pending obligation to prepare an order as instructed, which was not discharged by the settlement of claims against Dr. Woolfson and Dr. Campbell.** The April 20 letter confirms Appellants' position, contradicts the challenged "finding of fact," and speaks for itself.

As with the findings of the previous order, these "facts" and conclusions were never adjudicated. There is no evidence of record to support them. In some cases, the

evidence contradicts the “facts” and conclusions. The findings and conclusions also address issues that remain hotly contested in this and other litigation. Yet because the court signed the proposed order prepared by Respondents’ counsel verbatim, these material, prejudicial, and fictitious facts and conclusions are now a part of the judicial record.⁹⁵

There is nothing inherently improper about allowing the prevailing party to prepare an order for the court’s signature. However, this practice should not be tolerated as an opportunity for the prevailing party to engage in “winner-take-all” revisionism, or to sandbag an opponent for an appeal or in other litigation. See, e.g., Roberts v. Ross, 344 F.2d 747, 751–52 (3d Cir. 1965) (cautioning against the adoption of findings prepared by the winning party ex post facto, as often “they are loaded down with argumentative overdetailed partisan matter[,] much of which is likely to be of doubtful validity or even wholly without support in the record”); see also United States v. El Paso Natural Gas Co., 376 U.S. 651, 656–57 (1964) (expressing a preference for findings “drawn with the insight of a disinterested mind”); Chicopee Mfg. Corp. v. Kendall Co., 288 F.2d 719, 724–25 (4th Cir. 1961) (describing the practice of adopting findings prepared by the winning party ex post facto as a “failure” of the judicial function); 9C Charles Alan Wright et al., Federal Practice & Procedure: Civil § 2578 (3d ed. 2012) (“The practice of verbatim adoption of counsel’s findings is now viewed with disfavor.” (citations omitted)).⁹⁶ In any

⁹⁵ TLC objected to the inclusion of these findings and conclusions prior to their entry. (See Letter of Mr. Boyd to the Honorable Edward W. Miller, Dec. 6, 2011.)

⁹⁶ Interestingly, courts and commentators do not appear to have addressed the other problem with allowing prevailing parties to prepare orders; that is, the party who prevails may

event, the Orders of August 17 and January 12 are loaded with improper findings of fact and conclusions of law, which are material and prejudicial to TLC, and which must be removed.

VI. The circuit court erred in concluding that the only acts which constituted violations of the Protective Order occurred before the 2010 settlement of Respondents' claims against TLC.

The August 17 Order erroneously concludes that “[a]ll of the violations claimed to have occurred pre-dated the [2010] Settlement Agreement and . . . would not constitute a predicate upon which TLC could request a modification of the Protective Order. . . . TLC’s right to request modification must be based on events or conduct that occurs after the entry of the Settlement Agreement.”⁹⁷ Although it is not clear, it appears as though the August 17 Order further erroneously concludes that TLC cannot seek enforcement of the Protective Order because “[a]ll of the violations . . . pre-dated the [2010] Settlement Agreement.” These are not accurate statements or conclusions. Respondents’ counsel did not have the authority to use or disclose protected information in furtherance of the Federal Class Action, and did not withdraw the offending allegations after the 2010 settlement. This was a continuing violation not resolved by settlement. Respondents’ counsel did not have the authority to disclose protected information to Charles Benjamin Dickerson, which (presumably) did not occur until after the 2010 settlement. This is also a continuing violation not resolved by settlement. More recently, Respondents’ counsel has used protected information to file the Dickerson and Luce medical negligence lawsuits.

unreasonably delay the preparation of an order, or not prepare an order at all, thereby frustrating his opponent’s attempt to appeal.

⁹⁷ Aug. 17 Order 4–5, 6.

Furthermore, they have used protected information in furtherance of discovery and dispositive motions. Consequently, Respondents' counsel's conduct which violates the Protective Order is eminently capable of judicial scrutiny.

VII. The circuit court erred in concluding that the 2010 Settlement Agreement limited TLC's ability to enforce the Protective Order.

The August 17 Order seems to suggest that TLC waived its ability to enforce the Protective Order by entering into the 2010 Settlement Agreement with Respondents.⁹⁸ If this were the court's conclusion, it is not supported by the record. As explained previously, the authority to enforce protective orders ordinarily survives for as long as the need for protection persists. TLC did not waive any rights to enforce the Protective Order, and there are no provisions in the 2010 Settlement Agreement to suggest that TLC did so. To the contrary, the 2010 Settlement Agreement expressly contemplates the survival of the Protective Order and establishes additional remedies arising under the Settlement Agreement, which are consistent with those authorized by the Protective Order. There is nothing in the 2010 Settlement Agreement that impairs any right or ability that TLC may have to enforce the Protective Order. To the extent that the August 17 Order holds otherwise, it is incorrect.

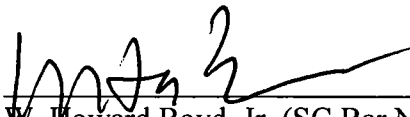
CONCLUSION

For the reasons stated herein, or for any reason that may appear in the record, TLC respectfully requests that this Court reverse the circuit court's orders of January 12, 2012 and March 2, 2012, and thereby hold that the court has subject matter jurisdiction to issue an order on TLC's Motion for Reconsideration of the order of

⁹⁸ Id. 6-7.

August 17, 2010, by which the court denied TLC's Motion for an Order and Rule to Show Cause. Furthermore, in the interests of judicial economy, this Court should reverse, vacate, or otherwise modify the circuit court's order of August 17, 2010 to hold that the Protective Order applies to "Confidential Health Information," as well as information "based on, containing, or derived" therefrom, and that Respondents' counsel's use and disclosure of protected information for purposes other than Hollman is a violation of the Protective Order. Finally, the Court is requested to vacate the findings of fact and conclusions of law set out in the Orders of August 17, 2010 and January 12, 2012 which were not directed by the court and are not supported by the record.

Respectfully submitted,



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Greenville, SC
July 13, 2012

Counsel for Appellants
TLC Laser Eye Centers (Piedmont/Atlanta) LLC
and TLC The Laser Center (Institute), Inc.

The Supreme Court of South Carolina

Ex Parte: TLC Laser Eye Centers (Piedmont/Atlanta),
LLC; and TLC the Laser Center (Institute), Inc.,
Intervenors, Appellants,

In re: John Hollman, Respondent,

v.

Dr. Jonathan Woolfson, Individually; Dr. Michael A.
Campbell, Individually; Optical Solutions, Inc.; and
Optical Solutions of Bluffton, LLC, Defendants.

and

Ex Parte: TLC Laser Eye Centers (Piedmont/Atlanta),
LLC; and TLC the Laser Center (Institute), Inc.,
Intervenors, Appellants,

In re: Danielle Hollman, Respondent,

v.

Dr. Jonathan Woolfson, Individually; Dr. Michael A.
Campbell, Individually; Optical Solutions, Inc.; and
Optical Solutions of Bluffton, LLC, Defendants.

Appellate Case No. 2012-210886

ORDER

This appeal is currently pending before the Court of Appeals. Appellants move to have the case certified to this Court pursuant to Rule 204(b), SCACR. Respondents have filed a return in opposition to the motion. The motion is denied.


C.J.
FOR THE COURT

Columbia, South Carolina

June 7, 2012

cc:

Stephen R.H. Lewis

Douglas F. Patrick

Steven Edward Buckingham

W. Howard Boyd, Jr.

The Honorable Jenny Kitchings

The South Carolina Court of Appeals

2007-CP-23-02347,
Ex Parte: TLC Laser Eye Centers (Piedmont/Atlanta)
LLC; TLC The Laser Center (Institute), Inc., Appellants,

In Re: John Hollman, Respondent,

v.

Dr. Jonathan Woolfson, individually; Dr. Michael A.
Campbell, individually, Optical Solutions, Inc.; and
Optical Solutions of Bluffton, LLC, Defendants,

2007-CP-23-08364,
Danielle Hollman, Respondent,

v.

Dr. Jonathan Woolfson, individually; Dr. Michael A.
Campbell, individually, Optical Solutions, Inc.; and
Optical Solutions of Bluffton, LLC, Defendants.

Appellate Case No. 2012-210888

ORDER

Appellants have filed a motion to expedite this appeal. After careful consideration of the motion, return, and reply, Appellants' motion to expedite is denied. However, extensions will not be granted absent a showing of extraordinary circumstances.

Respondent has filed a motion to dismiss, contending the issues on appeal are moot and the notice of appeal was not timely filed with this Court. After careful consideration of the motion to dismiss and the return, Respondent's motion is

dismissed. However, nothing in this order prevents the parties from arguing the mootness issue in their briefs.

H B. Joe

FOR THE COURT

Columbia, South Carolina

cc:

Steven Edward Buckingham

W. Howard Boyd, Jr.

Stephen R.H. Lewis

Douglas F. Patrick

FILED

6-13-12 UAF

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COVINGTON, PATRICK, HAGINS, STERN & LEWIS, P.A.

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June 12, 2012

The Honorable Jenny Abbott Kitchings
Clerk of Court, S.C. Court of Appeals
Calhoun State Office Building
1015 Sumter Street
Columbia, SC 29201

**RE: *Ex Parte TLC Laser Eye Centers (Piedmont/Atlanta) LLC; and
TLC The Laser Center (Institute), Inc., Intervenor***

***In re: John Hollman v. Dr. Jonathan Woolfson, et al.
C.A. No. 2007-CP-23-2347***

- AND -

***Ex Parte TLC Laser Eye Centers (Piedmont/Atlanta) LLC; and
TLC The Laser Center (Institute), Inc., Intervenor***

***In re: Danielle Hollman v. Dr. Jonathan Woolfson, et al.
C.A. No. 2007-CP-23-8364***

Appellate Case No.: 2012-210888

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SC Court of Appeals

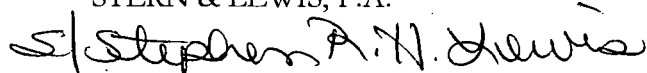
Dear Ms. Kitchings:

Pursuant to your discussion with my office, please find enclosed our firm's check in the amount of \$25.00 to cover the filing fee for Respondents' Motion to Dismiss Appeal in the above-referenced matter.

Should you have any questions or need anything further, please do not hesitate to contact me or Deborah Scott in my office.

Sincerely,

COVINGTON, PATRICK, HAGINS,
STERN & LEWIS, P.A.



Stephen R.H. Lewis

SRHL:dcs
Enclosure

cc: W. Howard Boyd, Jr.
Steven E. Buckingham
Douglas F. Patrick

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

RECEIVED
MAY 14 2012
SC Court of Appeals

Case No. 2007-CP-23-2347

Ex parte TLC Laser Eye Centers (Piedmont/Atlanta) LLC; and
TLC The Laser Center (Institute), Inc. Appellants,

In re:

John Hollman Respondent,

v.

Dr. Jonathan Woolfson, Individually;
Dr. Michael A. Campbell, Individually;
Optical Solutions, Inc.; and Optical
Solutions of Bluffton, LLC Defendants.

Case No. 2007-CP-23-8364

Ex parte TLC Laser Eye Centers (Piedmont/Atlanta) LLC; and
TLC The Laser Center (Institute), Inc. Appellants,

In re:

Danielle Hollman Respondent,

v.

Dr. Jonathan Woolfson, Individually;
Dr. Michael A. Campbell, Individually;
Optical Solutions, Inc.; and Optical
Solutions of Bluffton, LLC Defendants.

**APPELLANTS' REPLY IN SUPPORT OF
THE MOTION FOR AN EXPEDITED APPEAL**

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Counsel for Appellants

TO: THE HONORABLE JUDGES OF THE SOUTH CAROLINA COURT OF APPEALS

Respondents' counsel has suggested that, through this appeal, TLC is inviting the Court to render an "advisory opinion." In a certain sense, Respondents' counsel is absolutely right. Respondents' counsel should be advised that they must observe the terms and conditions of the Protective Order.¹ Furthermore, because the Supreme Court's decision in Hollman v. Woolfson prohibits irrelevant and unnecessary third-party medical information from being used to sustain non-party claims, 384 S.C. 571, 683 S.E.2d 495 (2009), Respondents' counsel should be advised that they cannot use database information—obtained in Hollman—in furtherance of Dickerson, Luce, or the federal class action, which they are actively doing. These issues are real, concrete, and justiciable, and because they arise from a final, appealable order of the circuit court, they are ripe for decision.²

Notably, a close reading of Respondents' counsel's Return shows little substantive opposition to the relief Appellants have requested; instead, the Return is addressed more to the merits of the underlying appeal than to the propriety of Appellants' request. The central themes of Appellants' position—(1) that there is good cause to support an expedited disposition, (2) that in the absence of expediting

¹ A copy of the Protective Order is attached hereto as Exhibit A.

² To the say the least, the procedural circumstances of this case are extraordinary. Respondents' counsel violated the Protective Order, which was issued under Hollman, by using database information to bring Dickerson, Luce, and the federal class action, which have now spawned Holley. Therefore, while the issues in this appeal have a substantive effect upon these four cases, the critical issue—the enforcement of the Protective Order—must be brought under Hollman, even though the underlying merits of Hollman have been resolved.

the appeal, Appellants will incur prejudice, and (3) that an expedited appeal serves the best interests of justice and judicial economy—are largely undisputed. It is also undisputed that the database disclosed in Hollman is a central aspect of the ongoing litigation in Dickerson, Luce, Holley, and the federal class action. Therefore, it is at least reasonably possible—if not likely—that the disposition of this appeal will have a significant impact on the course and scope of discovery in each of those cases. Frankly, with the certainty this appeal is likely to provide, Respondents’ counsel should be just as interested in obtaining an expedited disposition as Appellants are.³

Although the threshold issue on appeal is whether the circuit court has subject matter jurisdiction to enforce a protective order after the underlying case has been resolved,⁴ the more substantive issues are whether the circuit court properly construed the Protective Order in this case and, more critically, whether the database information disclosed in Hollman is relevant and necessary to the claims of any other

³ However, Respondents’ counsel is strongly opposed to the appellate courts’ consideration, expedited or otherwise, of any issues arising from or related to the Hollman Protective Order and their use of database information. This is most likely because Respondents’ counsel’s use of database information is impermissible under the Supreme Court’s decision in Hollman v. Woolfson, and constitutes a violation of the clear, unambiguous terms of the Protective Order.

⁴ Which, of course, it does. It is essentially a matter of black-letter law that the court which issues a protective order retains the authority to enforce it, even after resolution of the underlying litigation. See, e.g., 8A Charles Alan Wright et al., Federal Practice & Procedure: Civil § 2044.1 (3d ed.). If this were not so, protective orders could be violated flagrantly without recourse, a proposition which is offensive to the guiding principles of order, justice, and equity. The “authority” cited for the contrapositive by Respondents’ counsel, Ex parte Doe, 393 S.C. 147, 711 S.E.2d 892 (2011), is simply inapposite. Doe addresses the question of a party’s residual rights to maintain merits-based litigation after the execution of a settlement agreement, as opposed to the instant question, which addresses the court’s continuing jurisdiction to enforce a protective order—essentially a continuing injunction on a collateral issue—after the termination of underlying litigation.

individual. In 2008, over strenuous objections,⁵ Appellants were compelled to produce the very database which is at issue in this appeal. Notably, the circuit court never made any determination about whether database information was “specifically relevant” or “necessary” to any matters at issue in Hollman.⁶ 384 S.C. 571, 578–79, 581, 683 S.E.2d 495, 498–99, 500 (2009) (“Petitioners’ treatment of other patients is not necessary to establish any element of respondents’ causes of action.”). However, because Appellants were given assurances of protection against unauthorized use and disclosure of database information, Appellants decided against taking an immediate appeal to the Supreme Court and provided database information to Respondents’ counsel. In hindsight, Appellants should have taken the immediate appeal, because for the last four years, the database has proven to be nothing more than a true-life Pandora’s Box, having become the centerpiece of issues in Hollman, Dickerson, Luce, Holley, and the federal class action; the merits of these cases have become mere afterthoughts.⁷

⁵ Appellants have consistently opposed production of database information on the basis of irrelevance, lack of necessity, privilege as attorney/client communications, and protection as attorney work product and self-critical analysis, despite Respondents’ counsel’s specious claims of waiver, (Resp’ts Return 6).

⁶ In light of the decision in Hollman, it appears reasonably certain that production of the database should not have been compelled, certainly not without a showing of specific relevance and necessity.

⁷ For example, in Dickerson and Luce, it is undisputed that the last relevant medical procedure for the purposes of each plaintiff’s claim occurred in 1999. Their lawsuits were not filed until 2010. As a matter of simple mathematics, under South Carolina Code § 15-3-545(A), each plaintiff’s claim was time-barred by the statute of repose long before their suits were ever filed. Yet the circuit court denied TLC’s motions to dismiss in Dickerson and Luce on the basis of the statute of repose, ostensibly because of confusion due to the injection of database issues. (See Order Den. TLC’s Mot. Dismiss, Dickerson, Sept. 1, 2011, attached hereto as Exhibit B (the order

And there is no end in sight to the vexatious database litigation. On April 25, 2012, Respondents' counsel filed motions to compel against TLC in Dickerson and Luce—in which they are also plaintiffs' counsel of record—seeking the production of all database information for each and every of TLC's patients, as well as their charts. Ostensibly, Respondents' counsel intends to use Dickerson and Luce as vehicles for litigating medical malpractice, fraud, and UTPA actions against TLC on behalf of hundreds of patients, regardless of whether Respondents' counsel has a claim, a client, or even standing.⁸ This is astonishing in its own right, but even more so since the Supreme Court has already addressed the very same issues in Hollman, and frankly, could not have been clearer. 384 S.C. 571, 683 S.E.2d 495 (2009).⁹

denying the Motion to Dismiss in Luce is substantially the same).) This decision has a high probability of being appealed.

⁸ As the Court can well imagine, litigating the issues of healthcare provided to individuals other than the plaintiff is not only unnecessary and irrelevant, it is also unreasonably invasive upon personal privacy rights, as well as administratively impracticable, if not impossible. To do so would require discovery as to each non-party patient's personal health information, depositions of each non-party patient to discuss their personal health information, and mini-trials as to the representations and quality of care provided to each non-party patient. Yet, throughout the Return, this is the very type of litigation contemplated by Respondents' counsel.

⁹ With regard to medical malpractice claims, the Supreme Court has held that “[t]he evidence relating to treatment of the nonparty patients is irrelevant . . . in that it cannot be used to show petitioners breached the standard of care with a particular patient.” Hollman, 384 S.C. at 579, 683 S.E.2d at 499. With regard to fraud claims, the Supreme Court has held that “[t]he treatment received by the nonparty patients is irrelevant Whether other patients were similarly treated does not prove any of the elements required to show fraudulent conduct by petitioners toward respondents.” 384 S.C. at 580, 683 S.E.2d at 499. With regard to UTPA claims, the Supreme Court has held that access to third-party private health information “is not necessary for respondents to establish that cause of action.” 384 S.C. at 580, 683 S.E.2d at 500. The Court went on to hold that “[Appellants’] treatment of other patients is not necessary to establish any element of respondents’ causes of action. In fact, no information obtained in the interviews could establish whether petitioners breached

Regardless, it is incontrovertible that in the context of Dickerson, Luce, and perhaps Holley,¹⁰ Respondents' counsel will try to contact Appellants' patients whose private health information is set out in the database. In part, this assertion is based on the history of Respondents' counsel's conduct. In February 2009, just three months after having received the database, Respondents' counsel was requesting to contact Appellants' non-party patients, which was expressly prohibited by the plain, unambiguous language of the Protective Order.¹¹ It took nothing less than the Supreme Court's intervention—twice—to stop this from happening. Hollman v. Woolfson, 384 S.C. 571, 683 S.E.2d 495 (2009). As the Court observed, it would have been inequitable “to allow [R]espondents to obtain nonparty patient information

the standard of care when treating respondents or committed fraud on respondents.” 384 S.C. at 581, 683 S.E.2d at 500. If database information was not relevant and necessary to sustain medical malpractice, fraud, and UTPA claims in Hollman, by the greater force of simple logic, there is no reason to believe they would be relevant or necessary in Dickerson, Luce, Holley, or the federal class action.

¹⁰ The federal class action was dismissed for failure to state a claim for which relief can be granted. Fed. R. Civ. P. 12(b)(6). Respondents' counsel has appealed the disposition to the United States Court of Appeals for the Fourth Circuit, where it remains pending.

¹¹ In relevant part, the Order “prohibits the dissemination of Confidential Health Information beyond the parameters established by th[e] Order or use of Confidential Health Information for any purpose other than the prosecution or defense of this litigation.”¹¹ (Protective Order, attached hereto as Exhibit A, 4.) “No person, firm, corporation, or other entity subject to this Order [is authorized to] give, show, disclosure [sic], make available, or communicate [Confidential Health] Information to any person, firm, corporation, or other entity not expressly authorized by this Order to receive such Confidential Health Information.” (Protective Order, Ex. A, ¶ 7.) Furthermore, “[e]xcept as may be provided by subsequent Order of this Court: 1) Confidential Health Information shall be used for no purpose other than this litigation; [and] 2) No person who receives, pursuant to this or other Orders of the Court, Confidential Health Information concerning persons who are not parties to the captioned lawsuits (hereinafter “Third Parties”) shall directly or indirectly contact or attempt contact with Third Parties or their medical providers (except those who are parties to these actions)” (Protective Order, Ex. A, ¶ 8.)

from [Appellants] with the understanding the patients would not be contacted, only to subsequently permit [R]espondents to contact the patients.”¹² Id., 384 S.C. at 581–82, 683 S.E.2d at 500.

Then, less than six months after the Supreme Court’s decision, Respondents’ counsel tried to make an end-run around Hollman by filing a federal class action against TLC. The putative plaintiff class members were the very patients the Supreme Court prohibited Respondents’ counsel from contacting. There is no mistaking the intentions of Respondents’ counsel in bringing the class action. To quote Mr. Patrick: “[T]he federal court case is designed to notify these [database] patients so that they no longer suffer the irreparable harm that they are suffering. . . . [T]hat’s the federal court case.” (Hr’g Tr. 61, July 26, 2010, attached hereto as Exhibit C.) Even in their Return to this Motion, Respondents’ counsel candidly admits that “had the class been certified, Respondents[’ counsel] would have been required to notify the putative class.” (Resp’ts Return 8)(emphasis in original).

Respondents’ counsel’s plans for using database information are also revealed by their statements of prospective intentions. Mr. Edward Bell, Esq., who is among counsel of record in the class action, stated to the federal court as follows: “[W]e believe there are people out there still today that can be helped today if told about this. We felt like after finding or after seeing these several cases that we had individually, that this is the reason why we brought this class action. We think these

¹² The Supreme Court’s decision was also driven out of respect for patient privacy. “[N]o protective device can limit the invasion of the nonparty patients’ privacy once contact with them is permitted. The nonparty patients have a valid and legitimate expectation that their medical information will remain confidential” Hollman, 384 S.C. at 578, 683 S.E.2d at 498–99.

people need to have these records. We think these people need to be told about the problem.” (Hr’g Tr. 82–83, Dec. 29, 2010, attached hereto as Exhibit D.) For some reason, Respondents’ counsel continues to believe that, after Hollman, the database of private health information continues to be “specifically relevant” and “necessary” to the claims asserted in Dickerson, Luce, and the federal class action, which is plainly incorrect under Hollman.¹³ 384 S.C. 571, 683 S.E.2d 495 (2009). Therefore, Appellants reasonably anticipate that Respondents’ counsel intends to renew their efforts to contact non-party patients through at least Dickerson and Luce in the very near future.

To be fair, Respondents’ counsel appears to believe in good faith that it is not a violation of the Protective Order to use database information for other lawsuits if they merely remove the name of the individual patient. However, this interpretation is plainly inconsistent with the Protective Order. Under the Order, information subject to protection is called “Confidential Health Information,” and it cannot be used, disseminated, or possessed for any purpose unrelated to Hollman v. Woolfson. (Protective Order, Ex. A, ¶¶ 3, 7, 8.) Confidential Health Information is defined by the Protective Order in two ways. First, it is information that is at least reasonably capable of identifying an individual, and which relates either to the provision of health care to the individual, or the individual’s past, present, or future physical or mental health or condition. (Protective Order, Ex. A, ¶ 2.) Second, it is information that includes “all notes, summaries, compilations, extracts, abstracts, or oral

¹³ Notably, despite Hollman, it appears the circuit court also believes that database information continues to be relevant and necessary to the claims of unrelated individuals. Consequently, guidance regarding permissible uses and limitations as to database information will be as helpful to the circuit court as it is to the litigants.

communications that contain, are based on, or are derived from Confidential Health Information.” (Id.) Therefore, quite explicitly, the Protective Order safeguards individually identifying health information, as well as information based on or derived therefrom.

That being said, in the order of August 17, 2010, the circuit court inexplicably held that “Confidential Health Information” does not include information “based on” or “derived from” Confidential Health Information. (See Aug. 17, 2010 Order, attached hereto as Exhibit E.) This order essentially authorized Respondents’ counsel to use or disseminate as much database information as they wanted, so long as they did not disclose patient names, which is an egregious misconstruction of the Protective Order. Appellants intended to seek immediate review of the decision through the ordinary appellate process, and to that end, promptly filed a motion for reconsideration in September 2010. After a great deal of delay, due primarily to Respondents’ counsel’s failure to prepare an order as instructed,¹⁴ the circuit court held in January 2012 that it lacked subject matter jurisdiction to enforce the Protective Order. (See Jan. 12, 2012 Order, attached hereto as Exhibit F.)

¹⁴ Appellants are confused about the relevant chain of events. At a hearing on November 23, 2010, Respondents’ counsel was instructed to prepare a brief written order denying Appellants’ motion for reconsideration. Respondents’ counsel initially stated that a copy of the transcript would be necessary, but later advised that the transcript had been received by April 2011. (Resp’ts Return 4–5.) However, according to newly discovered information from the court reporter, Respondents’ counsel never requested a transcript, and therefore, a transcript could not have been received. (Email Exchange between Margaret Woods (Court Reporter) and Cheryl Rogers (Paralegal for Appellants), April 18, 2012, attached hereto as Exhibit G; Email Exchange between Margaret Woods and Cheryl Rogers, April 27, 2012, attached hereto as Exhibit H.) Therefore, it is not clear whether Respondents’ counsel was ever in a position to prepare an order as instructed.

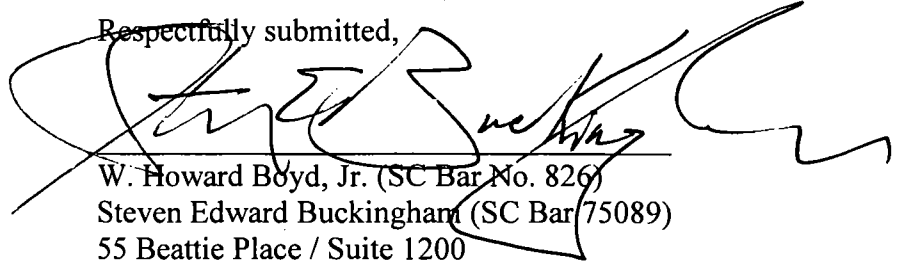
Consequently, the Protective Order has been gutted of any meaningful protections against the use and disclosure of database information, which has caused Appellants to incur a substantial amount of prejudice.

In any event, the appellate court's final word is necessary to put these tired database issues to rest. Appellants have been litigating about the database for nearly four years straight. The Protective Order is not providing any meaningful protection at all. Respondents' counsel has become obsessed with talking to third-parties about their personal health information. The cancer of unnecessary litigation is metastasizing. All things considered, it is high time that the unyielding cycle of database litigation is brought mercifully to an end.

For these reasons, and for the reasons set out in the Motion to Expedite the Appeal, Appellants are requesting an expedited disposition of this case pursuant to Rule 263(b), SCACR, so that finality to the litigation of database-related issues may be brought about more swiftly.¹⁵ Until Respondents' counsel is prohibited, once and for all, from using the database to fuel their litigation against TLC in violation of the Protective Order, Appellants will be battling the same issues, on the same fronts, with the same, disappointing results: the Protective Order upon which Appellants relied in disclosing the database to Respondents' counsel will continue to provide no protection at all. This request is based on the Notice of Appeal, the pleadings in the underlying case of Hollman v. Woolfson, and all documents attached to or incorporated into the motion, the memorandum in support, and this reply.

¹⁵ By way of information only, while this Motion is pending before the Court of Appeals, Appellants have also filed a Motion to Certify the Case for Review by the Supreme Court pursuant to Rule 204(b), SCACR. That Motion also remains pending.

Respectfully submitted,



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Greenville, SC
May 10, 2012

Counsel for Appellants
TLC The Laser Center (Institute), Inc. and
TLC Laser Eye Centers (Piedmont/Atlanta)
LLC

EXHIBIT A

WHEREAS, discovery materials or information otherwise provided or disclosed by any party to this action may contain confidential, trade secret and/or sensitive proprietary information.

WHEREAS, by separate Order the Court has ordered the production of documents containing health information that may be deemed confidential under applicable law.

WHEREAS, the parties acknowledge and agree that it is appropriate for the Court to provide proper safeguards to protect confidential, trade secret and/or sensitive proprietary information, Confidential Health Information (as defined in paragraph 2 below), which may be disclosed and used for purposes of this action;

WHEREAS, the Court recognizes that requests for the disclosure of documents or other information containing Confidential Health Information necessarily implicate the privacy rights of individuals not parties to this litigation;

WHEREAS, such privacy interests must be protected under applicable federal statutes, rules, regulations, and common law principles (collectively "Governmental Regulations"), including, but not limited to, the privacy regulations promulgated pursuant to the Administrative Simplification provisions of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and privacy statutes, rules, regulations, and common law principles promulgated under South Carolina law (collectively "State Laws");

WHEREAS, the Court finds that the disclosure and use of certain information and documents containing such Confidential Health Information is essential to the litigation of the claims being asserted. The Court further finds that it is not practicable, given the scope of this action, either to give notice of the discovery requests (or an opportunity to consent or object to disclosure) to each and every patient or individual whose health information may be the subject

of the discovery requests or to conduct an in camera review of the requested Confidential Health Information. The Court further finds that it would be unduly burdensome and would further deprive the parties of meaningful access to information if the parties were to attempt to redact all medically related and payment related information that could potentially be used to identify an individual;

WHEREAS, this Order requires that any use or disclosure of Confidential Health Information be made consistent with the terms of this Order and the requirements of the South Carolina Rules of Civil Procedure;

WHEREAS, certain limited categories of Confidential Health Information that pertain to certain types of medical conditions or treatment (including, without limitation, records of diagnosis or treatment of alcohol or substance abuse, certain sexually transmitted diseases such as HIV/AIDS, mental health and certain information pertaining to genetic testing) are afforded heightened protection under applicable Governmental Regulations or State Laws, and generally may not be produced under such applicable Governmental Regulations or State Laws even with a qualified protective order absent consent of the parties involved, a good cause determination by a court of competent jurisdiction, and/or other procedural safeguards set forth under the applicable Governmental Regulations or State Laws. The Court finds that the procedures set forth herein for the disclosure and use of Confidential Health Information are reasonable and appropriate to protect against the improper disclosure or unauthorized use of such sensitive Confidential Health Information;

WHEREAS, the public interest outweighs any minimal risk attendant to the disclosure and use of Confidential Health Information in the manner set forth herein;

3

WHEREAS, the Court further finds that the procedures set forth herein are adequate to safeguard against the unauthorized use, disclosure, or subsequent dissemination of Confidential Health Information. The Court hereby prohibits the dissemination of Confidential Health Information beyond the parameters established by this Order or use of Confidential Health Information for any purpose other than the prosecution or defense of this litigation;

PROTECTIVE ORDER

1. This Stipulation and Protective Order shall apply to all information or discovery materials produced by any party or their agents during the course of discovery in this action, all information derived therefrom, and extracts, copies, excerpts, or summaries thereof, including, without limitation, documents produced pursuant to Rule 33(c) or Rule 34 of the South Carolina Rules of Civil Procedure, answers to requests for admissions, answers to interrogatories, documents subpoenaed in connection with depositions and deposition transcripts (hereinafter referred to collectively as "discovery materials"). The term "documents" as used herein is intended to be comprehensive and includes any and all materials in the broadest sense contemplated by Rule 34 of the South Carolina Rules of Civil Procedure, and shall include all written, oral, recorded, or graphic material, however produced or reproduced, including, but not limited to: all written or printed matter of any kind, including the originals and all nonidentical copies thereof; computer data, all graphic or manual records or representations of any kind; electronic, mechanical, or electric records or representations of any kind.

2. The term "Confidential Health Information," means, without regard to whether the material has been designated confidential generally or "Confidential Health Information" specifically, any document or information supplied that identifies an individual or subscriber in any manner and relates to the past, present, or future payment for the provision of health care to



such individual or subscriber. The term "Confidential Health Information" specifically includes "protected health information" as such term is defined by the Standards for Privacy of Individually Identifiable Health Information, 45 CFR parts 160 and 164, promulgated pursuant to the Health Insurance Portability and Accountability Act of 1996. See 45 C.F.R. sections 164.501 ("protected health information") and 160.103 ("individually identifiable health information"). "Confidential Health Information" includes all notes, summaries, compilations, extracts, abstracts, or oral communications that contain, are based on, or are derived from Confidential Health Information. All documents and all transcripts, exhibits, and videotapes of any deposition or testimony containing Confidential Health Information shall be treated in accordance with this Order without regard to any designation.

3. Confidential Health Information may be disclosed only to the following, and pursuant to the terms and conditions set forth in this Order:

- a. the Court and all persons assisting the Court in this action, including court reporters and necessary stenographic and clerical personnel thereof;
- b. the parties, the parties' counsel and their partners, associates, paralegals, and clerical and support personnel.
- c. persons retained as consultants or experts for any party and principals and employees of the firms with which consultants or experts are associated;
- d. persons other than consultants or experts who are retained to provide purely administrative assistance to counsel for any party for the purpose of this action, including litigation support services and outside copying services;
- e. the persons listed on the document as authors or recipients (including persons copied on or forwarded the document);



- f. any person who may testify as a witness at a deposition, hearing, mediation, trial, or other proceeding in this action, and for the purpose of assisting in the preparation or examination of the witness; and
- g. any other person hereafter designated by written stipulation of the parties or by further order of the Court.

4. No Confidential Health Information may be disclosed to any person pursuant to the provisions of paragraph 4 of this Order unless counsel first informs such person that pursuant to this Order the material to be disclosed may only be used for purposes of preparing and presenting evidence in this litigation and must be kept confidential. No Confidential Health Information may be disclosed to any person identified in subparagraphs 4 (c) through (g) of this Order unless such person first is given a copy of this Order and advised that the information contained in the document is Confidential Health Information and informed that an unauthorized disclosure of their information may constitute a contempt of this Court. Each person to whom Confidential Health Information is disclosed pursuant to Paragraph 4 (c), (d), (f) and (g) of this Order shall execute an Acknowledgement in the form attached hereto as "Exhibit A" and shall agree to be bound by this Order prior to receiving any Confidential Health Information. Copies of the executed Acknowledgements, and a current log of the materials disclosed to each person executing an Acknowledgement shall be retained by counsel for the party or parties who disclosed the Confidential Health Information to such persons. Copies of all Acknowledgements executed pursuant to this paragraph shall be disclosed to the party who produced or supplied the Confidential Health Information (a) within 30 days after the final resolution of this action (including resolution of all appellate proceedings); (b) within 30 days after settlement with the producing party, or (c) on good cause shown.

5. Counsel for a party may show documents containing Confidential Health Information to a witness during a deposition, hearing, trial or other proceeding without providing prior notice to the party producing the Confidential Health Information. Before doing so, however, the witness shall be shown a copy of this Order and advised that the information contained in the document is Confidential Health Information and informed that an unauthorized disclosure of such information may constitute a contempt of this Court. The only exception to this requirement is if the witness has previously been authorized to receive Confidential Health Information as specified in paragraph 3. Persons present at a deposition or mediation who are not entitled to receive Confidential Health Information pursuant to the provisions of this Order may be excluded from the room while such deposition or mediation is occurring.

6. Notwithstanding any other provision of this Order, nothing in this Order shall limit: (a) the ability of any party to disclose to any person Confidential Health Information that is a business record of that party; (b) any defendant's ability to disclose Confidential Health Information that is a business record of that defendant to other defendants or their counsel or to others as the defendant may mutually agree; (c) any named plaintiff's ability to disclose Confidential Health Information of that plaintiff to other named plaintiffs in this action or their counsel or to others.

7. No person, firm, corporation, or other entity subject to this Order shall give, show, disclosures, make available, or communicate Information to any person, firm, corporation, or other entity not expressly authorized by this Order to receive such Confidential Health Information. A party's use for any purpose of its own documents and information which it produces or discloses in this litigation shall not be considered a violation of this Order.



8. Except as may be provided by subsequent Order of this Court: 1) Confidential Health Information shall be used for no purpose other than this litigation; 2) No person who receives, pursuant to this or other Orders of this Court, Confidential Health Information concerning persons who are not parties to the captioned lawsuits (hereinafter "Third Parties") shall directly or indirectly contact or attempt contact with Third Parties or their medical providers (except those who are parties to these actions); and, 3) No discovery shall be directed to such Third Parties or their medical providers (except those who are parties to these actions) by means of subpoena, request for production, deposition or otherwise.

9. A party shall not be obligated to challenge the classification or propriety of a designation of material as Confidential Health Information or other action under the terms of this Order at the time made, and any failure to do so shall not preclude or act as a waiver of a subsequent challenge thereto. In the event that any party to this lawsuit disagrees at any point in these proceedings with the designation by the producing party of any information as Confidential Health Information or other action under the terms of this Order, the parties shall try first to resolve such dispute in good faith on an informal basis. If the dispute cannot be resolved in this manner, the objecting party may seek appropriate relief from the Court and the producing party asserting confidentiality or defending an action under this Order shall have the burden of proving same to the Court.

10. All documents of any nature, including briefs, motions, appendices, etc., which are filed with the Court for any purpose and which contain information which have been designated Confidential Health Information, shall be filed in sealed envelopes or containers marked with the title of the action and bearing a statement substantially in the following form:

CONFIDENTIAL HEALTH INFORMATION



Filed under seal pursuant to Protective Order governing the confidentiality of documents and information obtained during the course of this litigation. This envelope is not to be opened nor the contents thereof displayed or revealed except by or to qualified persons or by Court order.

11. This Order shall not prevent any discovery materials designated as Confidential Health Information from being used by the Court or counsel of record in any hearing in this action, or from being received into evidence at trial, subject to such confidentiality measures as the Court may then prescribe.

12. Within sixty (60) days after the conclusion of trial and all appeals or any other termination of this action, all discovery materials designated as Confidential Health Information, including copies, extracts, and summaries thereof, shall be returned to the producing party or destroyed. If such materials are destroyed, the party destroying such materials shall execute a certificate in the form attached hereto as "Exhibit B" certifying such destruction. Additionally, each party shall destroy all work product materials, as such are defined at law, containing or referring to Confidential Health Information, in whatever form, stored or reproduced.

13. Nothing in this Order shall bar or otherwise restrict any attorney representing any of the parties to this lawsuit from rendering advice to his or her client with respect to this lawsuit and in the course thereof relying upon his or her examination of Confidential Health Information.

14. The provisions of this Order are without prejudice to any application by any party at any time, upon notice, to seek a modification to or release from any provisions of this Order.

AND IT IS SO ORDERED.

Dated at Greenville, SC
this 14 day of November, 2008.


Circuit Judge

9/12

EXHIBIT A

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

)
) IN THE COURT OF COMMON PLEAS
)

John Hollman,

Plaintiff,

vs.

Dr. Jonathan Woolfson, et al,

Defendants.

)
)
) **AGREEMENT TO ABIDE BY**
) **PROTECTIVE ORDER**
) **GOVERNING CONFIDENTIAL**
) **HEALTH INFORMATION**
)

) C.A. No. 2007-CP-23-2347
)

AND

Danielle Hollman,

Plaintiff,

vs.

Dr. Jonathan Woolfson, et al,

Defendants

) C.A. No. 2007-CP-23-8364
)

AND

George E. Carter, Jr. and Jean Carter,

Plaintiffs,

vs.

William T. Nimmons, OD, et al,

Defendants.

) C.A. No. 2007-CP-23-7587
)

I hereby acknowledge that I have read the stipulation and protective order entered in this action, that I have had the terms thereof explained to me by counsel, that I fully understand such terms and that compliance with these procedures is a condition of receipt of confidential health information, that I agree to be bound by such terms and that I voluntarily hereby submit to the

jurisdiction of this court for purposes of this order, which court may impose civil and criminal sanctions against me if I violate this protective order in any way.

Dated: _____

AS

EXHIBIT B

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

)
) IN THE COURT OF COMMON PLEAS

John Hollman,

)
)
) Plaintiff,

)
)
) **CERTIFICATE OF COMPLIANCE**

vs.

Dr. Jonathan Woolfson, et al,

)
)
) Defendants.

)
)
) C.A. No. 2007-CP-23-2347

AND

Danielle Hollman,

)
)
) Plaintiff,

vs.

Dr. Jonathan Woolfson, et al,

)
)
) Defendants

)
)
) C.A. No. 2007-CP-23-8364

AND

George E. Carter, Jr. and Jean Carter,

)
)
) Plaintiffs,

vs.

William T. Nimmons, OD, et al,

)
)
) Defendants.

)
)
) C.A. No. 2007-CP-23-7587

I, _____, counsel for Plaintiff(s), pursuant to the stipulation and protective order entered in this action by the Greenville County Court of Common Pleas, hereby certify that all Confidential Health Information produced by the Defendants have been destroyed.

Dated: _____

EXHIBIT B

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
 COUNTY OF GREENVILLE) THIRTEENTH JUDICIAL CIRCUIT
 Charles Benjamin "Ben" Dickerson and) C.A. No. 2010-CP-23- 9954
 Gale M. Dickerson,)
)
 Plaintiffs,)
 vs.)
)
TLC Corporate) ORDER DENYING
) MOTIONS TO DISMISS
)
 TLC The Laser Center (Institute), Inc., f/k/a)
 TLC The Laser Center (Piedmont), Inc.,)
)
TLC Physicians)
)
 Jonathan Woolfson, M.D., Jeffery Machat, M.D.)
 Derek P. Van Veen, O.D., Cynthia Wike)
 Yeager, O.D., John Potter, M.D., and David)
 Kohler, O.D.,)
)
 Defendants.)
)
 _____)

The Defendants, TLC The Laser Center (Institute), Inc., Cynthia Wike Yeager, O.D., and Jonathan Potter, M.D., have moved to dismiss all claims asserted against them in the First Amended Complaint [hereinafter referred to as FAC] by Plaintiffs Charles Benjamin "Ben" Dickerson and Gale M. Dickerson. For the reasons set forth herein, Defendants' Motions are DENIED.

STATEMENT OF FACTS

For the purpose of considering Defendants' Motions to Dismiss, the following statement of facts is taken from Plaintiffs' First Amended Complaint, and all allegations of fact contained therein shall be viewed in the light most favorable to Plaintiffs and must be accepted as true.

ENTERED COMPUTER

The Defendant TLC The Laser Center (Institute), Inc. (hereinafter "TLC") is a corporation authorized to do business in South Carolina and, at all times relevant to this action, was doing business in Greenville, South Carolina. The Defendants Cynthia Wike Yeager, O.D. and John Potter, M.D. were treating and/or monitoring physician/optometrists of Mr. Dickerson who at all times pertinent to the FAC were employed by TLC and acting within the scope of their employment.

Plaintiff Ben Dickerson appeared at the offices of TLC in Greenville, South Carolina on or about April 17, 1998 to determine if he was a candidate for the laser surgery procedure offered by TLC known as LASIK surgery. Patient evaluation and testing showed that Plaintiff was not a candidate for surgery. Additionally, the topographical study revealed that Ben Dickerson had form fruste keratoconus / keratoconus, which was an absolute contraindication for LASIK surgery. The topographical study, standing alone, eliminated Ben Dickerson as a candidate for laser correction of his vision.

On April 30, 1998, despite being a poor candidate for LASIK surgery, the various TLC agents and employees cleared Plaintiff Dickerson for the initial surgery that was performed by Defendant Woolfson.¹ Following the surgery, the Defendants provided Mr. Dickerson with post-surgery medical care. Defendants' agents and employees who participated in Plaintiff's treatment and post-surgery conduct relating to Plaintiff included Dr. Wike/Yeager and Dr. John Potter.

¹ The Defendant Jonathan Woolfson, M.D. is a Georgia citizen and resident. The Defendant Jeffrey Machat, M.D. is a citizen of Canada who not only performed the enhancement surgery but also participated in and directed medical care on Mr. Dickerson performed in South Carolina. Both are TLC employees who acted in the scope of their employment at all times pertinent to this FAC. (FAC, para. 4, 32).

In the time period immediately subsequent to the initial surgery, Ben Dickerson had improved vision. However, as time passed, Ben Dickerson's visual acuity worsened. As a result, Plaintiff then had an enhancement surgery performed by Defendant Machat in Windsor, Canada on or about August 25, 1999.

Mr. Dickerson developed corneal ectasia as a result of the surgeries. Ectasia is a progressive thinning of the cornea that can lead to a continuous decrease in visual acuity and ultimately the need for corneal transplants. The effects of ectasia can be greatly mitigated, however, by prompt treatment. At least by 2005 ectasia could be treated by "riboflavin-ultraviolet type A rays induced cross-linking of corneal collagen." TLC employees reviewed Plaintiff's records in 2005 and recognized Plaintiff's surgically-induced ectasia. However, the Defendants – and other employees of TLC - failed to disclose to him that he had developed this disease despite their actual knowledge of his ever-worsening condition.

TLC entered into a contract with Plaintiff, referred to as the "TLC Lifetime Commitment" pursuant to which TLC promised as follows:

21. For the additional fee paid by the patient under the LTC, all TLC LASIK Centers, all TLC Clinical Directors, and all TLC Surgeons agreed to provide lifetime vision care for the patients to include any additional LASIK surgery needed and any treatment for vision-related problems associated with or caused by the LASIK surgery performed under the LTC.

(FAC, para. 21). TLC also promised more generally to

...stand behind your vision results for life because we have confidence in our surgeons and in our stability of our patient's long-term results. Our intention is to help you maintain the best possible vision throughout your life.

(FAC, misnumbered para. 63). According to Plaintiffs, TLC breached its commitments made to Mr. Dickerson and the implied covenant of good faith and fair dealing, by failing to stand behind his vision results for Plaintiff's lifetime and by Defendants' conduct otherwise referenced in Plaintiffs' Complaint.

By 2002, the Defendants and other TLC employees all recognized that a substantial number of patients were affected with surgery-induced vision injuries emanating from the breach of standard of care in the performance of LASIK surgery on those with substantially similar LASIK surgical contraindications. The Defendants recognized that this posed a tremendous liability risk to the entire TLC enterprise as well as to each individual Defendant. In response, the Defendants developed a plan to avoid responsibility for their respective acts of malpractice.

The Defendants realized that, because of the slow progression of the visual instability created by the improper LASIK surgery, the patients would not realize that they had been injured for years and might not connect their decreasing vision with the surgery. Plaintiffs further allege that Defendants consequently formulated a plan to conceal the true facts from these patients until their medical malpractice claims were time barred. As alleged in the FAC, this fraudulent plan included the following features:

- a) Creation of a system to identify these patients subjected to substandard LASIK surgeries without informing the patient of his/her condition or cause;
- b) Use of that system to monitor the patients' condition without the knowledge and/or consent of the patient;
- c) Maintenance of a separate file for each patient outside of the typical medical records of the patients for purposes of identification, monitoring and/or control of these patients and the risk posed to the Defendants' assets;

d) Delay both in treatment of and discovery by the patient of his/her medical conditions;

e) Communication of false representations to the patients concerning the use of new LASIK equipment and surgeries to enhance or correct vision in the patients when the Defendants knew the patients were not candidates for LASIK surgery;

f) The periodic scheduling, canceling and rescheduling of the LASIK surgery described above in order to create delay and buy time until the expiration of patients' rights;

g) Misrepresentation of the patient true medical condition and cause;

h) Withholding of the information and diagnosis of known surgery induced eye condition from the patient;

i) Use of the Lifetime Commitment Contract to cover costs of treatments, examinations, glasses, contact lenses and medicines as a method to keep patients at TLC facilities and physicians, along with representations that such conduct would continue for the life of the patient.

j) Predetermined decision by Defendants that the LTC contract benefits described above would be withdrawn or discontinued when patients' risk to the Defendants expired;

k) Creating and perpetuating a separate file on the patients which included medical diagnosis, treatment options and risk information not contained in the patients' medical records;

l) Ongoing efforts by the Defendants to keep patients at TLC facilities and physicians by discouraging outside consultations or physician intervention;

m) Obtaining releases for nominal consideration for some patients after the expiration of the patients' rights said expiration caused by the actions of the Defendants;

n) Intentional misrepresentation of the patients' true medical conditions through misleading diagnosis and dissemination of medical information and advice and/or the omission of necessary medical information, advice and/or diagnosis

(FAC, para. 53).

Plaintiffs allege that Defendants accordingly concealed from Mr. Dickerson his serious and correctable decreasing vision problem by taking the following steps:

a) Created a separate file of medical information and used this file to communicate information about him without his knowledge or consent and for purposes contrary to his best medical treatment and patient rights;

b) Failed to disclose his medical diagnosis and cause until after expiration of his right to bring a claim and further specifically hid the actual diagnosis of ectasia thereby exacerbating the disease and causing additional injury;

c) Failed to treat his known surgery induced condition in order to delay discovery until the expiration of his right to bring a claim;

d) Advised to Ben Dickerson that he was a LASIK surgery candidate when they knew such representation was false;

e) Repeated scheduling, canceling and rescheduling of Ben Dickerson for LASIK surgery upon representing that new technology existed and without disclosing their real reasons for such tactics and, in particular, without disclosing to him that he was not a candidate for LASIK surgery;

f) Failed to disclose Ben Dickerson's correct medical condition to him and placing erroneous or misleading medical information in his medical records;

g) Paid for cost of medical treatment, glasses and contact lenses and agreeing to pay for travel and associated expenses under the Lifetime Commitment Contract program while repeatedly representing that these types of benefits would continue for life;

h) Following the expiration of Dickerson's right to pursue a claim, discontinuing his lifetime commitment benefits and he was no longer viewed as a risk to company assets;

i) Forever hiding his true diagnosis in an effort to mitigate potential malpractice suits;

j) Illegally and without the patient's permission, disseminating his medical records to physicians and risk managers throughout the county in furtherance of the fraud and scheme.

(FAC, para. 54).

In order to further this plan of institutional fraud and deceit, the Defendants utilized an existing system created and used by all TLC LASIK Centers, all TLC Clinical Directors, and all TLC Management, called the Complex Case System. (FAC, para. 55). The original purpose of the Complex Case System was to provide additional diagnostic and treatment options for the TLC patients with post-surgery complications. The Complex Case System required patient consent and all actions were part of the patient's medical care and records. (FAC, para. 56).

The Defendants used Complex Case forms to gather medical data and continue updating patient conditions without patient consent and/or knowledge, thereby creating a separate file and database in which patient medical information was surreptitiously placed so the Defendants could freely monitor, control and delay without the patient's knowledge. (FAC, para. 57).

In addition, in order to manage certain patient risks that required more aggressive measures or for which the Defendants believed a threat of litigation might exist, the Defendants created an Advocacy Program where active intervention with the patient could occur without disclosing to the patient the true purpose. This permitted integration of patient medical information for improper purposes and internal discussion and collaboration about patients was designed to harm rather than help the patients. (FAC, para. 58).

For patients still under active treatment, monitoring, and/or control, the Defendants would, after the expiration of claim rights, nullify or void the Lifetime Commitment Contract, advise the patient of his/her condition, advise the patient that no

claim could be brought and based on those circumstances offer nominal settlements and/or close the separate files and discontinue monitoring of the patient. (FAC, para. 59).

All actions by the Defendants were designed to hide the patients' (inclusive of Plaintiff) true conditions and to manage their expectations until Defendants believed they no longer posed a risk to their assets because of the expiration of the statute of limitation governing the patient's claim. Plaintiffs further allege that the Defendants fraudulently and/or negligently misrepresented facts to induce Plaintiff to use their laser facility. Specifically:

- a) Defendants represented to the Plaintiff that they had established a standard setting policy to ensure continued ocular health care throughout the lifetime of the patient;
- b) Those representations were false and never intended to be upheld;
- c) The aforementioned representations were material to the Ben Dickerson's decision to obtain LASIK surgery and establish a physician-patient relationship with the Defendants;
- d) Defendants knew that they would never honor the commitment for lifetime care, or in the alternative were reckless in promising to do so;
- e) Defendants knew that patients were relying on those representations in making their decision to obtain LASIK surgery from the Defendants and were unaware of the falsity of those representations;
- f) As a result, Ben Dickerson did in fact rightfully rely on the Defendants' representations the decision to choose their respective surgery care centers and physicians; and finally,
- g) Plaintiffs proximately suffered great physical and economic damage as a result of the Defendants' fraudulent misrepresentations.

In furtherance of their efforts to hide the underlying malpractice, the Defendants:

- a) Represented to the Ben Dickerson that he had good ocular health, that new equipment and procedures were being approved in the immediate future which would resolve their [sic] condition and further concealed that the various visual disorders were surgically created;
- b) That those representations were false and made with the specific intent to placate and deceive the Plaintiff so to prevent him from seeking legal redress;
- c) The aforementioned representations were material to his decision not to seek intervening medical treatment or seek legal remedies;
- d) Defendants knew that they were harming the Plaintiff by misrepresenting or concealing his medical condition, or in the alternative were reckless in doing so;
- e) Defendants knew that the Plaintiff was relying on those representations in making his decision to remain in the Defendants medical care and not seek legal remedies and that he was unaware of falsity of the representations;
- f) As a result, the Plaintiff Ben Dickerson did in fact rightfully rely on those representation and chose not to seek intervening medical treatment or seek legal remedies; and finally,
- g) Plaintiffs Ben and Gale Dickerson proximately suffered great physical and economic damage as a result of the Defendants' fraudulent misrepresentations.

(FAC, para, 60).

In 2005, the Defendants reviewed Mr. Dickerson's medical records. This review confirmed that he suffered from ectasia in 2000. However, the Defendants – and other TLC employees - still failed to inform him of his true diagnosis. (FAC, para. 43).

This failure to inform Mr. Dickerson of his true diagnosis was particularly harmful because new technology had been developed that would have greatly mitigated the effects of his ectasia. As alleged in paragraph 37:

37. As a result of the conduct of the Defendants both individually and by and through their agents and employees, in connection

with the 1998 and 1999 surgeries and subsequent concealment of Plaintiff's condition, the Plaintiff has developed worsening and unstable visual acuity and ectasia, and was deprived of measures such as "riboflavin-ultraviolet type A rays induced cross-linking of corneal collagen" which would have mitigated Plaintiff's damages. As a direct result of Defendant's acts and/or omissions, Ben Dickerson has suffered irreparable damage to his eyes and vision. The damage to his vision has directly impacted his professional, personal, and social life significantly and permanently. Due to Defendants' collective conduct, Plaintiff lost critical opportunities for surgical intervention thereby further exacerbating the condition.

(FAC, para. 37).

Count One asserts a claim against all Defendants for negligence in failing to comply with the standard in the diagnosis and treatment of Mr. Dickerson from April of 1998 to 2005 and thereafter. (FAC, para. 40(h)). This count also alleges that the Defendants failed to obtain the Plaintiff's informed consent prior to the two surgeries.

(FAC, para. 40(j)).

Count Two asserts a claim for loss of consortium by Plaintiff Gale M. Dickerson. This count alleges that the Plaintiffs were married at all times relevant to this action and that the Defendants' negligence has proximately deprived her of the loss of the services, society, and companionship of her husband.

Count III asserts a claim for fraud arising from the Defendants' failure to disclose - and their active concealment of - Mr. Dickerson's ineligibility for laser surgery, his subsequent development of ectasia, and the new technology - viz., "riboflavin-ultraviolet type A rays induced cross-linking of corneal collagen" - that would have greatly mitigated this condition and perhaps made a corneal transplant unnecessary.

Count V asserts a claim for violation of the South Carolina Unfair and Deceptive Trade Practices Act. Count VI asserts a claim for breach of contract.

The Plaintiffs filed the original Complaint in this action on December 7, 2010.

The Plaintiffs filed the FAC on March 22, 2011 and served it on the Defendants.

CONCLUSIONS OF LAW

I. THE MOTION TO DISMISS MAY NOT BE GRANTED ON GROUNDS THAT THE SIX YEAR "STATUTE OF REPOSE" CONTAINED IN S.C. CODE ANN. § 15-3-545(A) BARS THIS ACTION

Defendants initially contend that the six-year statute of repose governing medical malpractice actions requires the Court to dismiss this action under Rule 12(b)(1), SCRPC, for lack of subject matter jurisdiction. This statute provides:

(A) In any action, other than actions controlled by subsection (B), to recover damages for injury to the person arising out of any medical, surgical, or dental treatment, omission, or operation by any licensed health care provider as defined in Article 5, Chapter 79, Title 38 acting within the scope of his profession must be commenced within three years from the date of the treatment, omission, or operation giving rise to the cause of action or three years from date of discovery or when it reasonably ought to have been discovered, not to exceed six years from date of occurrence, or as tolled by this section.

S.C. Code Ann. § 15-3-545 (A). The Defendants contend that the Plaintiffs filed the Complaint in this action more than six years from the "date of occurrence" within the meaning of this statute and, therefore, that all claims are time-barred. However, this contention fails.

A. The FAC does not contain facts showing that the "date of occurrence" was more than six years prior to December 7, 2010, the date of the filing of the Complaint.

Count I seeks damages for medical malpractice. The Court may not dismiss these counts pursuant to S.C. Code Ann. § 15-3-545(A) because the pleading does not contain allegations showing the "date of occurrence" for these causes of action. Furthermore,

S.C. Code Ann. § 15-3-545(A) does not define the “date of occurrence” for purposes of the six year repose provision.

Aside from the allegations that malpractice occurred in the first two surgeries, Plaintiffs allege that Defendants committed a new and distinct breach of the applicable standard of care in 2005 when they reviewed Mr. Dickerson’s medical records and formally diagnosed him with ectasia yet hid this fact from the Plaintiff. The date of occurrence for this instance of medical malpractice could be no earlier than 2005 and accordingly, *this claim* may not be dismissed under the statute of repose given that the lawsuit was filed in 2010.

The Defendants’ argument that the second surgery, which took place in 1999, is the “date of occurrence” for the other counts is also rejected. Count II asserts a claim for loss of consortium by Gale Dickerson. Mrs. Dickerson did not have a cause of action for loss of consortium until she first began to lose her husband’s society, companionship, and services as a result of the Defendants’ malpractice. Mrs. Dickerson would not likely have lost her husband’s society, companionship, and services the minute he returned from the second surgery. FAC paragraph 49 alleges that Mrs. Dickerson lost her husband’s society, companionship, and services as a result of the severe and permanent injuries he suffered. Mr. Dickerson presumably had to know, or have a reason to know, he was injured before he could change his conduct so as to deprive his wife of a husband’s normal society, companionship, and services. Hence, the date the loss of consortium claim arose was not likely to precede the date Mr. Dickerson had actual knowledge of his injuries and then changed his marital conduct so as to deprive his wife of his society,

companionship, and services. The FAC contains no allegations as to when this occurred. Count II accordingly cannot be dismissed on the pleading.

Similarly, the “date of occurrence” for Count VII – which alleges that TLC entered into a contract with Plaintiff, referred to as the “TLC Lifetime Commitment” contract – cannot begin before this contract was formed and breached. The FAC does not allege the dates either occurred. Further, Mr. Dickerson obviously could not have demanded treatment for injuries caused by the two surgeries until he knew he had been injured. The date that his ectasia produced discernible symptoms accordingly is also crucial to determining the date of occurrence for this count. Thus, none of the counts may be dismissed as time-barred by the statute of repose because the FAC does not contain factual allegations that enable the Court to determine the date of occurrence for each count.

B. The statute of repose is tolled by the fraud of the Defendants and the Defendants are estopped from asserting the repose provision

The South Carolina Supreme Court has recognized that fraudulent concealment will toll S.C. Code Ann. § 15-3-545(A)'s statute of limitations for an adult patient, so long as a doctor-patient relationship exists, and even after if the defendant withholds or alters the patient's records:

Next, Plaintiff claims that the Medical School fraudulently concealed the negligent follow-up treatment of the Plaintiff. “[T]he practically universal rule is that deliberate acts of deception by a defendant calculated to conceal from a potential plaintiff that he has a cause of action, thereby inducing him to postpone institution of suit will be held to toll the statute.”. . . The fraudulent concealment defense to the statute of limitations flows from the patient-physician relationship. When the relationship ends, the duty to disclose, which is the basis of fraudulent concealment claim, ceases to exist absent extenuating circumstances such as the withholding or altering of plaintiff's medical records. . . O'Neal v. Throop, 596 N.E.2d 984 (Ind.Ct.App. 1992) (when physician-patient

relationship terminates, the constructive fraud terminates and the statute of limitations begins to run).

Strong v. University Of S.C., 316 S.C. 189, 447 S.E.2d 850 (1994). It is crucial to note that the court made this ruling notwithstanding the express language of S.C. Code Ann. § 15-3-545(A) which provides that both the three year statute of limitations and the six year repose period apply, unless tolled by the statute itself. The statute does not contain a fraudulent concealment tolling provision except for minors; hence, the court was willing to toll the statute of limitations for adults as a matter of common law.

While the South Carolina Supreme Court has held on several occasions that the statute of repose "constitutes an outer limit beyond which a medical malpractice claim is barred, regardless of whether it has or should have been discovered," our Courts have not addressed the statute of repose issue in the context of fraudulent concealment and deceit by a treating physician. The only reasonable construction of Strong is that the statute of repose is likewise tolled by fraud during the doctor-patient relationship, or when records are withheld or altered. These are precisely the allegations in this case and for purposes of Defendants' motions must be deemed as true.

Additional support for this conclusion can be found by looking at other jurisdictions. Courts in the great majority of jurisdictions which have addressed this issue have ruled that fraudulent concealment either tolls the statute of repose or estops the wrongdoer from asserting the statute of repose as a defense. Annot., "Effect of Fraudulent or Negligent Concealment of Patient's Cause of Action on Timeliness of Action Under Medical Malpractice Statute of Repose," 19 A.L.R. 6th 475 (2006). Of the twenty-six jurisdictions which have addressed the issue, twenty-three of them have ruled

that fraudulent or negligent concealment either tolls the statute of repose or estops a defendant from raising it as a defense.

Construing the facts in a light most favorable to Plaintiffs, the Lifetime Commitment Contract establishes that a doctor-patient existed between Mr. Dickerson and TLC for all times pertinent to this action. In addition, the FAC alleges that TLC altered and withheld Mr. Dickerson's true medical records as part of the Complex Case system fraud. This Court accordingly may not grant the motion to dismiss on statute of repose grounds as the fraud alleged would toll the statute of repose until within six years of December 7, 2010, the date of the filing of the Complaint.

Assuming arguendo that the Court concludes that S.C. Code Ann. § 15-3-545 contains the exclusive grounds under which the statute of repose may be *tolled*, the Court alternatively finds the Defendants are equitably *estopped* from asserting the statute of repose. The doctrine of equitable estoppel has been routinely applied in South Carolina courts. See Dillon v. Sheet Metal Works, Inc., 286 S.C. 207, 332 S.E.2d 555 (Ct. App. 1985); Wiggins v. Edwards, 314 S.C. 126, 442 S.E.2d 169 (1994); Holy Loche Distributors, Inc. v. R.L. Hitchcock, 332 S.C. 247, 503 S.E.2d 787 (Ct. App. 1998). Courts in five other states have concluded that that fraudulent or negligent concealment estops the wrongdoer from raising the statute of repose as a defense.

In North Carolina, estoppel is a recognized defense to both the statute of limitations and the statute of repose. Blizzard Bldg. Supply v. Smith, 77 N.C. App. 594, 595, 335 S.E.2d 762, 763 (1985), cert. denied, 315 N.C. 389, 339 S.E.2d 410 (1986); Duke Univ. v. St. Paul Mercury Ins. Co., 95 N.C. App. 663, 673, 384 S.E.2d 36, 42 (1989). Based on South Carolina appellate courts' consistent opinions with regard to the

impact fraud and deceit have on a wrongdoer's ability to hide behind a limitations period, it is likely that when presented with this novel issue, South Carolina would follow the other jurisdictions which have estopped the wrongdoing party from asserting a statute of repose as a defense. At the very least, this issue should not be decided on Plaintiffs' Complaint alone and prior to the completion of discovery. Accordingly, the parties should have the opportunity to develop a full record in this case, and Defendants' motion to dismiss must be denied.

Defendants' motions to dismiss essentially seek a ruling from this Court on issues of public policy without giving it the opportunity to hear all of the facts and circumstances surrounding the allegations in the complaint. Langley v. Pierce, 313 S.C. 401, 438 S.E.2d 242 (1993) and Nash v. Tindall Corp., 375 S.C. 36, 650 S.E.2d 81 (1997) are not to the contrary. The Nash court stated that the effect of the statute of repose "is not only for the convenience of society but also due to necessity. At that point (when the statute has expired), society is secure and stable." Nash, 375 S.C. 42. In understanding the *Nash* decision, this Court must note that the South Carolina Court of Appeals, under a choice of law analysis, was determining if a North Carolina statute of repose for actions alleging defective or unsafe condition of an improvement to real property barred the plaintiff's claims. In addition, Nash did not involve any allegations of fraud or deceit. It is compelling to this Court that North Carolina is one of the jurisdictions cited above which has ruled that a practitioner's or facility's fraudulent concealment of a patient's cause of action does not toll the running of the statute of repose but, instead, estops the party from asserting the statute of repose as a defense.

This is a novel question of law in South Carolina, but the other jurisdictions to consider the issue have overwhelmingly ruled in favor of crafting an exception to the statute of repose in cases of fraudulent concealment or have otherwise ruled that wrongdoing defendants are equitably estopped from raising the statute of repose as a defense. Accepting Plaintiffs' allegations as true for purposes of Defendants' motions, this Court believes that South Carolina's appellate courts, if faced with this issue, will side with the strong majority of jurisdictions and will find: (1) an exception to the statute of repose exists when defendants engage in conduct which is specifically calculated to defraud known plaintiffs and prevent them from discovering and therefore bringing a cause of action; and/or (2) a defendant who engages in conduct specifically calculated to defraud known plaintiffs and prevent them from discovering a cause of action will be equitably estopped from raising the statute of repose as a defense. Accordingly, Defendants' motions must be denied.

II. BECAUSE THE FAC DOES NOT SHOW THAT THE STATUTE OF LIMITATIONS EXPIRED PRIOR TO THE FILING OF THIS LAWSUIT, THE MOTION TO DISMISS MAY NOT BE GRANTED ON STATUTE OF LIMITATIONS GROUNDS.

The Defendants alternatively ask the Court to dismiss all claims on statute of limitations grounds. S.C. Code Ann. § 15-3-545(A) (medical malpractice), S.C. Code Ann. § 15-3-530 (the general statute of limitations), and S.C. Code Ann. § 39-5-150 (unfair trade practices) all provide a three year limitation period, subject to the discovery rule. The Defendants contend that the FAC alleges facts which, even viewed in the light most favorable to Mr. Dickerson, show that Mr. Dickerson should have known by August 25, 1999 – the date of the enhancement surgery – that he had a malpractice claim against the Defendants and, therefore, the statute of limitations bars all claims.

The South Carolina Rules of Civil Procedure are very similar to the Federal Rules of Civil Procedure. In federal court, “[a] motion to dismiss based on the running of the statute of limitations period may be granted only ‘if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled.’” Jablon v. Dean Witter & Co., 614 F.2d 677, 682 (9th Cir. 1980). Accord Supermail Cargo, Inc. v. United States, 68 F.3d 1204, 1206-07 (9th Cir. 1995). Tested against this standard, the motion to dismiss on limitations grounds must be denied. The FAC alleges facts which, if proved, would show that the statute of limitations was tolled both by the discovery rule and by the Defendants’ fraudulent concealment. Alternatively, the Defendants are equitably estopped from raising a limitations defense.

The Defendants’ argument that the FAC itself shows all claims are time-barred is based on three paragraphs in the pleading:

31. On April 30, 1998, despite being a poor candidate for LASIK surgery, the various TLC agents and employees cleared Plaintiff Dickerson for the initial surgery that was performed by Defendant Woolfson.

...

34. In the time period immediately subsequent to the initial surgery, Ben Dickerson had improved vision. However, as time passed, Ben Dickerson’s visual acuity worsened. As a result, Plaintiff then had an enhancement surgery performed by Defendant Machat in Windsor Canada on or about August 25, 1999.

...

37. As a result of the conduct of the Defendants both individually and by and through their agents and employees, in connection with the 1998 and 1999 surgeries and subsequent concealment of Plaintiff’s condition, the Plaintiff has developed worsening and unstable visual acuity and ectasia....,

(FAC, para. 31, 34, 37).

The Defendants argue that once Mr. Dickerson’s vision started deteriorating after the first surgery, he should have known that he had a malpractice claim. However, the

FAC alleges that the Defendants intentionally and fraudulently concealed that Mr. Dickerson was not a candidate for LASIK surgery and to this day have not disclosed that he suffers from ectasia. (FAC 36).² Paragraph 54 pleads the fraudulent concealment with specificity:

54. With regards to Ben Dickerson, the Defendants:
- a) Created a separate file of medical information and used this file to communicate information about him without his knowledge or consent and for purposes contrary to his best medical treatment and patient rights;
 - b) Failed to disclose his medical diagnosis and cause until after expiration of his right to bring a claim and further specifically hid the actual diagnosis of ectasia thereby exacerbating the disease and causing additional injury;
 - c) Failed to treat his known surgery induced condition in order to delay discovery until the expiration of his right to bring a claim;
 - d) Advised to Ben Dickerson that he was a LASIK surgery candidate when they knew such representation was false;
 - e) Repeated scheduling, canceling and rescheduling of Ben Dickerson for LASIK surgery upon representing that new technology existed and without disclosing their real reasons for such tactics and, in particular, without disclosing to him that he was not a candidate for LASIK surgery;
 - f) Failed to disclose Ben Dickerson's correct medical condition to him and placing erroneous or misleading medical information in his medical records;
 - ...
 - i) Forever hiding his true diagnosis in an effort to mitigate potential malpractice suits.

(FAC, para 54).

² As previously noted, the South Carolina Supreme Court has ruled that fraud will toll the statute of limitations. Strong v. University Of S.C., 316 S.C. 189, 447 S.E.2d 850 (1994).

Given these allegations, and viewing all of the allegations in the light most favorable to the Plaintiffs, the Court cannot conclude as a matter of law that Mr. Dickerson should have known he had a claim against the Defendants for medical malpractice, fraud, negligent misrepresentation, or unfair trade practices as of August 25, 1995, the date of the second surgery. Although he knew his vision was deteriorating notwithstanding the first surgery, Mr. Dickerson had a pre-existing condition of poor vision. Based on what the Defendants told Mr. Dickerson, Mr. Dickerson believed that he was a proper candidate for laser surgery and that the first surgery had been correctly performed but simply had been ineffective. On these allegations, Mr. Dickerson could have believed that his deteriorating vision was the natural progression of his pre-existing condition. The FAC does not allege what the Defendants told Mr. Dickerson about why his vision was declining or why he needed the second surgery. The allegations of concealment of the true facts implies that Mr. Dickerson reasonably believed for several years that his vision problems were not due to either unnecessary surgery or negligent performance of the surgery. Moreover, even assuming Mr. Dickerson should have known he had a claim against the Defendants for the first surgery on April 30, 1998, he obviously could not have known of his claim arising from the Defendants' breach of the standard of care that occurred in 2005.

Finally, the FAC does not allege when Mr. Dickerson contracted ectasia, or when the disease first manifested discernible symptoms. Based on the allegations of the FAC, this was not discovered until within three years of December 2010.³ The motions to

³ Judge Childs' ruling in the federal case does not permit a different result. The federal case was a RICO action seeking damages for injury to property. Mr. Dickerson did not seek personal injury recovery in that lawsuit but sought compensation for the conversion

dismiss the medical malpractice, fraud, negligent misrepresentation, and unfair trade practices accordingly must be denied to the extent they are based upon the statute of limitations.

With respect to Count II, the loss of consortium claim, the motions to dismiss must be denied because there are no allegations as to when Mrs. Dickerson lost the companionship, society, and services of her husband, as previously argued. Until this happened, her claim did not accrue, and it is therefore impossible to determine from the pleading if the claim is barred by the statute of limitations.

The same is true as to Count VI. Count VI alleges that TLC "entered into a contract with Plaintiff, referred to as the "TLC Lifetime Commitment," pursuant to which TLC promised as follows:

21. For the additional fee paid by the patient under the LTC, all TLC LASIK Centers, all TLC Clinical Directors, and all TLC Surgeons agreed to provide lifetime vision care for the patients to include any additional LASIK surgery needed and any treatment for vision-related problems associated with or caused by the LASIK surgery performed under the LTC.

(FAC, para. 21). TLC also promised more generally to

...stand behind your vision results for life because we have confidence in our surgeons and in our stability of our patient's long-term results. Our intention is to help you maintain the best possible vision throughout your life.

(FAC, misnumbered para. 63).

According to Plaintiffs, TLC breached its commitments made to Mr. Dickerson and the implied covenant of good faith and fair dealing by failing to stand behind his

of his medical records. Moreover, personal injury recovery is not permitted under RICO. Hence Judge Childs' ruling that Mr. Dickerson's claim accrued in 2005 is a ruling that his RICO claim occurred in that year and, furthermore, is subject to a pending motion for reconsideration.

vision results for the lifetime of the Plaintiff and by Defendants' conduct otherwise referenced in Plaintiffs' Complaint. (FAC, misnumbered para. 65). In this regard, it is a reasonable inference from the facts pled that TLC has refused to pay for the treatment Mr. Dickerson needs to treat his ectasia – viz., a corneal transplant and related follow-up care. (FAC, misnumbered para. 65).

There are no allegations in the FAC as to when TLC and Mr. Dickerson entered into the TLC Lifetime Commitment; nor are there any allegations as to when TLC breached the contract or Mr. Dickerson discovered the breach; nor are there any allegations as to when he discovered that he had ectasia or incurred medical expenses for the same. Hence, the FAC lacks the allegations of facts needed to determine the merits of any limitations defense. Accordingly, Plaintiffs' claims may not be dismissed on limitations grounds, and Defendants' motions are denied.

III. RES JUDICATA DOES NOT BAR THIS LAWSUIT

Under South Carolina law, "the application of res judicata and collateral estoppel principles are not matters of subject matter jurisdiction." Mr. T v. Ms. T, 378 S.C. 127, 133, 662 S.E.2d 413, 416 (Ct.App. 2008). Rather, "[t]he defense of preclusion by a former judgment is an affirmative defense which ordinarily must be specially pleaded." Wagner v. Wagner, 286 S.C. 489, 491, 335 S.E.2d 246, 247 (Ct.App. 1985). Because res judicata is an affirmative defense, the burden is on the Defendants to show that it bars this lawsuit.

Although Mr. Dickerson was the named plaintiff in Dickerson v. TLC The Laser Eye Center (Institute), Inc., et al, CA No. 6:10-685-HFF, United States District Court for the District of South Carolina, and the Honorable United States District Court Judge

Childs did grant the Defendants' motion to dismiss on the merits, the federal lawsuit did not arise out of the same transaction or occurrence as this lawsuit. The Plaintiffs in the federal case alleged that after the Defendants committed malpractice in 1998 and 1999, the Defendants conversion of Mr. Dickerson's medical records injured him in his business and property and also violated the Racketeer Influenced and Corrupt Organizations Act (RICO). The sole damages they sought were for the injury to business and property – viz., the lost value of their converted medical records and the amounts paid for unnecessary surgery. (FAC, para. 68).

The RICO lawsuit accordingly did not arise out of the two surgeries performed on Mr. Dickerson. Rather, the lawsuit alleged solely RICO violations based on what the Defendants did with Mr. Dickerson's medical records *after the surgeries*. Moreover, the plaintiffs did not seek to recover for personal injury damages. Neither personal injury damages nor the economic effects of personal injuries are recoverable under RICO. Bast v. Cohen, Dunn & Sinclair, PC, 59 F.3d 492, 495 (4th Cir. 1995).

Nor were the personal injury claims asserted in the instant lawsuit claims that the plaintiffs could have asserted in the federal class action lawsuit. There was no diversity jurisdiction in the federal lawsuit – jurisdiction was based solely on federal question jurisdiction. Judge Childs could have exercised jurisdiction over Mr. Dickerson's personal injury claims only if grounds existed for supplemental jurisdiction.

But federal district courts have supplemental jurisdiction only over “claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under...[the Constitution.]” 28 U.S.C. § 1367(c).

This Court does not believe that the medical records conversion which occurred subsequent in time to the malpractice is part of the same case or controversy within the meaning of this statute.

Even assuming that both cases are part of the same case or controversy, the burden would be on the Defendants to show that Judge Childs would have exercised supplemental jurisdiction had the Plaintiffs asserted their state law claims. The Defendants have made no effort to do so and have failed to carry their burden of proving this affirmative defense. Also, since Judge Childs dismissed the RICO claims, there is no basis to assume that she would have exercised supplemental jurisdiction over state law claims had they been joined with the RICO claims. This Court further understands that both Plaintiff's and defense counsel argued in the federal case that the proper venue for any medical malpractice/personal injury claims would be in state court.

Finally, the federal lawsuit was a class action premised on allegations that, with respect to the conversion of medical records, common issues of fact and law predominated over individual issues. Had personal injury claims been alleged, the individual issues would have predominated and the class action dismissed on this ground. The personal injury claims thus were not claims that could have been brought as part of the class action.

Accordingly, res judicata does not provide a basis for dismissal of this lawsuit, and Defendants' motions are denied.

IV. THE FRAUD, MISREPRESENTATION, AND UNFAIR TRADE PRACTICES CLAIMS MAY NOT BE DISMISSED FOR FAILURE TO PLEAD ALL THE REQUIRED ELEMENTS

The Defendants argue that the fraud, negligent misrepresentation, and unfair trade practices claims must be dismissed because the FAC purportedly fails to allege all of the required elements for these claims.

With respect to the fraud and negligent misrepresentation claims, the Defendants contend that the FAC does not allege that any representations were made to Mr. Dickerson as opposed to TLC patients generally. However, Plaintiffs allege that Defendants “[a]dvised Ben Dickerson that he was a LASIK surgery candidate when they knew such representation was false.” (FAC, para. 54(d)). Plaintiffs alleged that the Defendants concealed that Mr. Dickerson was not a candidate for LASIK surgery and concealed that he had developed ectasia.

Second and third, the Defendants contend that the FAC fails to allege facts that the Defendants intended for the representations to be acted upon by Mr. Dickerson, that Mr. Dickerson relied on the truth of the representations, or that he had a right to rely. However, Plaintiffs have alleged that Defendants made false representations and concealed the true facts to induce Mr. Dickerson to pay for LASIK surgery; he in fact relied on these representations and concealment of the true facts in deciding to undergo surgery that not only posed no chance of improving his vision but actually would ruin his vision; and he had a right to rely because a doctor–patient relationship existed between Mr. Dickerson and the Defendants. The FAC alleges sufficient facts on all of these points. (FAC, para. 50-60).

Finally, the Defendants contend the fraud count is defective because it fails to allege that Mr. Dickerson suffered damages different from those he already sought for medical malpractice. There is no such requirement for either fraud or negligence. If

either causes personal injury, that is a recoverable damage even if the plaintiff is also seeking the same damages in a malpractice action. Restatement (Second) of Torts § 310 (“An actor who makes a misrepresentation is subject to another for physical harm which results from an act done by the other or a third person in reliance upon the truth of the representation, if the actor (a) intends his statement to induce or should realize that it is likely to induce action by the other, or a third person, which involves an unreasonable risk of physical harm to the other, and (b) knows (i) that the statement is false, or (ii) that he has not the knowledge he professes”). The benefit of the bargain rule is simply one way to measure damages for fraud when the fraud causes the plaintiff to lose the benefit of his bargain. It is not the exclusive measure of damages.

With respect to the unfair trade practices claim, the Defendants contend the FAC fails to allege an adverse impact on the public interest and seek to characterize this case as seeking a remedy for a private wrong that is not capable of repetition. However, Plaintiffs have pled detailed allegations about the Complex Case system and how the Defendants engaged in the same conduct with respect to many other patients. (FAC, para. 51-60). Furthermore, the parties have referenced the fact that Plaintiff filed a class action in federal court based upon, in part, the aforementioned conduct by Defendants. Thus, FAC thus alleges facts that indicate considerable repetition and permit an inference that Defendants’ conduct has had, and will in the future have, a substantial impact on the public interest.

The motions to dismiss the fraud, negligent misrepresentation, and unfair trade practices claims for alleged pleading deficiencies accordingly must be denied.

V. PLAINTIFFS’ CAUSE OF ACTION FOR CIVIL CONSPIRACY IS DISMISSED BY CONSENT OF THE PARTIES

At the hearing on Defendants' motions to dismiss, Plaintiffs' counsel agreed to dismiss Plaintiffs' cause of action for civil conspiracy. Accordingly, that cause of action is dismissed by consent of the parties.

VI. DEFENDANTS' REQUEST TO INCLUDE PORTIONS OF PLAINTIFF BEN DICKERSON'S MEDICAL RECORDS IN THE RECORD ON DEFENDANTS' MOTIONS TO DISMISS IS DENIED

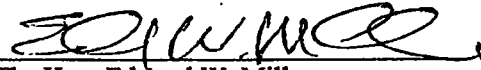
Defendants have requested that Plaintiffs' medical records be considered along with Plaintiff's Complaint for purposes of Defendants' motion to dismiss. However, based upon Plaintiff's Complaint in this matter and the arguments of counsel, it appears to this Court that there is a dispute over what documents constitute Mr. Dickerson's medical records. It appears that full discovery will be needed to make such a determination, and a request to include certain records is therefore premature at this stage. Furthermore, this Court finds that the allegations contained within Plaintiffs' Complaint alone are sufficient to withstand Defendants' challenge, and therefore whether the Court considers or does not consider *additional* information that is the subject of dispute would not, at this stage, affect the Court's ruling.

Furthermore, no party has requested that this Court consider matters outside of the pleadings in a manner that would convert Defendants' motions to dismiss into motions for summary judgment. Accordingly, no matters outside the pleadings will be considered.

CONCLUSION

Viewing Plaintiffs' allegations as true and in a light most favorable to Plaintiffs, this Court finds that Mr. and Mrs. Dickerson have alleged facts sufficient to survive

Defendants' motions to dismiss. For the reasons stated, Defendants' motions to dismiss are DENIED.



The Hon. Edward W. Miller
Circuit Court Judge
Thirteenth Judicial Circuit

This 1 day of Sept, 2011
Greenville, South Carolina

EXHIBIT C

State of South Carolina

County of Greenville

In the Court of Common Pleas

John Hollman)

Plaintiff,)

-vs-)

2007-23-CP-2347

Dr. Jonathan Woolfson, individually,)
TLC Laser Eye Centers)
(Piedmont/Atlanta) LLC, and TLC)
The Laser Center (Institute), Inc.,)
Dr. Michael A. Campbell,)
individually; Optical Solutions,)
Inc., and Optical Solutions of)
Bluffton, LLC,)

Defendants.)

AND)

Danielle Hollman,)

Plaintiff,)

-vs-)

2007-23-CP-8364

Dr. Jonathan Woolfson, individually,)
TLC Laser Eye Centers)
(Piedmont/Atlanta) LLC, and TLC)
The Laser Center (Institute), Inc.,)
Dr. Michael A. Campbell,)
individually; Optical Solutions,)
Inc., and Optical Solutions of)
Bluffton, LLC)

Defendants.)

Transcript of Record

July 26, 2010

BEFORE:

The Honorable Edward W. Miller, Judge

APPEARANCES:

**Douglas Patrick, Esquire
Stephen Lewis, Esquire
Attorneys for the Plaintiff**

**W. Howard Boyd, Esquire
James M. Dedman IV, Esquire
Ron Tate, Esquire
Attorneys for Defendant**

**Shelton W. Haile, Esquire
Attorney for Defendant Woolfson
Jack G. Gresh, Esquire
Attorney for Defendant Campbell & Optical Solutions**

**Renee Tollison
Circuit Court Reporter**

1 filed that document four specific cases in which the
2 patient has suffered irreparable harm. And we know that
3 there are at least a hundred and eighty-one other
4 patients who have a similar diagnosis in this database
5 that most likely don't even know what their diagnosis is.
6 Now, that's the federal court case. So the federal court
7 case is designed to notify these patients so that they no
8 longer suffer the irreparable harm that they are
9 suffering. They can make decisions what they want to do
10 with that. Now, that's the federal court case.

11 T.L.C. is here because they know they've got to stop
12 this so that they continue this hiding of patient
13 information from patients. And so they're trying to sell
14 you with an idea that they have some kind of right to
15 protect this database. We're going to discuss this in
16 more detail. There are three real essential issues that
17 we want to talk about. The first is that they have no
18 standing. Because of the settlement, they have
19 absolutely no standing to be in front of you. They're
20 not asking for modification to the protective order.
21 They're asking for sanctions and relief under the
22 protective order, and they have no standing.

23 The next though is even more important. And that is
24 not only do they have no standing, they have no
25 meritorious argument. Their argument is that any use of

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

CHARLES BENJAMIN DICKERSON,)
on behalf of himself and all)
others similarly situated,) 6:10-685
Plaintiffs,)
)
-versus-) December 29, 2010
)
TLC The Laser Eye Center)
Institute, Inc., et al.,) Greenville, SC
Defendants.)

TRANSCRIPT OF MOTION HEARING

BEFORE THE HONORABLE J. MICHELLE CHILDS
UNITED STATES DISTRICT JUDGE, presiding

A P P E A R A N C E S:

For the Plaintiffs: DOUGLAS F. PATRICK, ESQ.
PO Box 2343
Greenville, SC 29602

JAMES E. BELL, JR., ESQ.
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JAMES W. FAYSSOUX, JR. ESQ.
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For the Defendants: W. HOWARD BOYD, JR., ESQ.
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E. BROWN PARKINSON, JR. ESQ.
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C. HOUSTON FOPPIANO, ESQ.
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Cary, NC 27513

Court Reporter:

KAREN E. MARTIN, RMR, CRR
300 E. Washington Street
Room 304
Greenville, SC 29601

The proceedings were taken by mechanical stenography and
the transcript produced by computer.

1 horrible financial risk of thousands of people out there
2 in the country who may have lawsuits or claims against
3 them. And they devised this scheme to cover that up.

4 And in so doing, they just didn't sit down with
5 their lawyers and figure it out, they sat down with
6 medical records that were different than those records in
7 their own -- the records they were showing the patients.
8 And can you imagine, Judge, if I have had a surgery with
9 TLC, most of these people are from way out of town,
10 Charleston, Hilton Head, they come to Greenville to have
11 this surgery. They go back home and they go see their
12 optometrist or their ophthalmologist. And they ride up
13 here to get their medical records. All they are getting
14 is ocular health good, no problem, nothing wrong with the
15 surgery. They don't put in there about the keratoconus.

16 The other file that they refuse to turn over
17 would have had that information. And these people, many
18 of them, many of them could have had surgery that could
19 have repaired and stopped the progression of this ectasia.

20 Judge, we believe there are people out there
21 still today that can be helped today if told about this.
22 We felt like after finding or after seeing these several
23 cases that we had individually, that this is the reason
24 why we brought this class action. We think these people
25 need to have these records. We think these people need to

1 be told about the problem. We think their doctors should
2 know. Their own treating doctors right now, Judge, cannot
3 get these records.

4 So if I was one of those patients and I had
5 gotten treated the way they treated me, and it was all
6 just against one doctor, I might have a malpractice claim.
7 But all of the sudden you have a corporate scheme, you
8 have the people -- they got all the managers, the
9 optometrists, they got everybody together and the evidence
10 will show and we have alleged it that they have set out a
11 scheme, do not tell these people, do not let them go, just
12 keep them under this program until the statute of
13 limitations is up. And then the closer will come in to
14 give hem the story.

15 Now, Judge, I can't imagine, and like I told you
16 before --

17 **THE COURT:** When you say the closer will give
18 them the story, are you meaning that after some point at
19 which you contend the statute of limitations ran, they
20 then find out about the diagnosis?

21 **MR. BELL:** A large -- some of the people did and
22 some did not.

23 **THE COURT:** How so?

24 **MR. BELL:** They hired this fellow.

25 **MR. PATRICK:** Your Honor, Mr. Bell was going to

EXHIBIT E

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS

TLC Laser Eye Centers (Piedmont/
Atlanta) LLC; TLC The Laser
Center (Institute), Inc.)
)

IN RE:)

John Hollman,)
)
Plaintiff,)

Civil Action No. 2007-CP-23-2347

vs.)

ORDER

Dr. Jonathan Woolfson, indivi-
dually; Dr. Michael A. Campbell,)
individually; Optical Solutions, Inc.;)
and Optical Solutions of Bluffton,)
LLC,)
)
Defendants.)

Danielle Hollman,)
)
Plaintiff,)

Civil Action No. 2007-CP-23-8364

vs.)

Dr. Jonathan Woolfson, indivi-
dually; Dr. Michael A. Campbell,)
individually; Optical Solutions, Inc.;)
and Optical Solutions of Bluffton,)
LLC,)
)
Defendants.)

This matter came before the court on a Motion by TLC Laser Eye Centers
(Piedmont/Atlanta) LLC; TLC The Laser Center (Institute), Inc. (hereinafter referred to as TLC)
for an Order and Rule to Show Cause, To Modify Protective Order, and Sanctions. These

motions were filed after TLC was dismissed from the present lawsuit pursuant to a settlement agreement. By agreement of the parties at the hearing, the caption has been changed to more accurately reflect TLC's status as a non-party. TLC contends it is entitled to file this motion based on paragraph 15 of the Settlement Agreement which permits a petition by TLC to modify or vacate the existing Protective Order filed in this litigation. In response to TLC's motion, the Plaintiffs, John and Danielle Hollman (hereinafter referred to as Hollman) filed a Motion to Enforce the Settlement Agreement, including a request for sanctions and a Motion for Sanctions based on TLC's alleged spoliation of evidence. A hearing on all issues was held on July 26, 2010 at which time all parties presented extensive oral argument.

Based on a review of all evidence submitted and the arguments of the parties, the Court makes the following rulings:

1. The Protective Order filed November 14, 2008, is clear and unambiguous in its definition of the information to be protected and does not need to be modified;
2. The Settlement Agreement permits TLC to request modification of the Protective Order following settlement, but no post settlement events exist that would permit or require the modifications sought by TLC and, therefore, the request is premature; and,
3. The parties' cross motions for sanctions need not be decided at this time and should be deferred until the conclusion of this case.

PROTECTIVE ORDER

In order to more fully understand this Court's Order, a brief review of the extensive history of this litigation as it relates to the filing of the Protective Order is necessary. Hollman originally filed a medical malpractice suit but later amended to include allegations of fraud and breach of contract. The fraud allegations contended that the Defendants, inclusive of TLC, had

intentionally deceived Hollman to prevent his discovery of his malpractice claim until the expiration of the statute of limitations. Initial discovery revealed that Hollman had been placed into TLC's Complex Case system and Advocacy log. Hollman sought discovery in connection with TLC's formation and use of Complex Case and Advocacy and the data stored therein including Hollman's data as well as that of other patients. TLC objected, claiming that the Complex Case system and Advocacy log as well as the data were prepared in anticipation of litigation and, therefore, work product. TLC did not make any other objections to discovery and this Court overruled the anticipation of litigation position. At the time these matters were heard, the Court conducted an in-camera review of the database collective under Complex Case and Advocacy and concluded that it was discoverable but contained the confidential health information of other patients which needed to be protected as permitted by existing HIPAA regulations.¹ The concern, as enunciated by this Court and confirmed by the parties, was that these patients' confidential health information needed protection from dissemination to the public. This was the purpose and scope of the Protective Order.

Paragraph 2 of this Order defines "confidential health information" in clear and unambiguous terms. The term is defined as "any information or document supplied that identifies an individual" inclusive of "protected health information" as defined by HIPAA in 45 CFR Parts 160 and 164. Reference to these sections confirms that for information to be "confidential health information" it must include both the health information and the identity of the patient.² The conduct of the parties following imposition of this Protective Order confirms

¹ In addition to the database of Complex Case and Advocacy, the Court also permitted a review of the medical records of TLC patients who were found within these systems. These records, as well as the database, mandated a Protective Order.

² 45 CFR §160.103

"Individually identifiable health information" is defined as follows:

this interpretation. All litigants filed subsequent briefs and engaged in discovery depositions which extensively referred to health information contained either in the collective databases or individual medical records or patients without referring to the identity of those patients. The use of this information in this manner was not prohibited by the Protective Order and such use did not constitute a violation. As an example, TLC contended that Hollman violated the terms of the Protective Order by filing a Federal Class Action lawsuit wherein reference to the Complex Case and Advocacy systems and the data contained therein was extensively made. Upon the mutual request of both parties, this Court has reviewed both the original and amended Federal Class Action complaints which were attached as Exhibits to TLC's motions. I find no violation of the terms of the Protective Order. This finding is based on the fact that nothing contained within those documents identifies patients and health information such that the combination of the two would violate a patient's privacy rights or be considered Confidential Health Information as defined in the Protective Order or HIPPA. Both parties did present to the Court specific instances in which, through inadvertence, confidential health information (patient identity included) was disclosed. In each instance, the violation was discovered and corrected and neither party has produced evidence of harm which would require the imposition of sanction. All of the

"Individually identifiable health information" is information that is a sub-set of health information, including demographic information collected from an individual, and:

- (1) Is created or received by a healthcare provider, health plan, employer or healthcare clearing house; and
- (2) Relates to the past, present or future physical or mental health or condition of an *individual*; the provision of healthcare to an *individual*; or the past, present or future payment for the provision of healthcare to an *individual*; and

- (i) That *identifies the individual*;

violations claimed to have occurred pre-dated the Settlement Agreement and, in accord with the Court's further ruling, would not constitute a predicate upon which TLC could request a modification of the Protective Order.

SETTLEMENT AGREEMENT

TLC contends that the Settlement Agreement permits it to move for an enforcement and modification of the Protective Order post settlement. It acknowledges that the present motion is based solely on events that preceded settlement and, in fact, were before the Court on TLC's Motion for Sanctions which was pending at the time of settlement. As a result of the settlement, TLC dismissed this motion and, correspondingly, Hollman dismissed motions for sanctions due to alleged spoliation of evidence by TLC. After the Settlement Agreement and TLC's dismissal from the action, TLC essentially re-filed its pre-settlement motion changing it to request modification of the Protective Order as it asserts is permitted under the terms of the Settlement Agreement.³

TLC and Hollman entered into a settlement agreement which resulted in TLC's dismissal from this litigation. Within the terms of this agreement issues with regard to the Protective Order are fully addressed in Paragraph 15. This paragraph specifically references language with Protective Order that provides for a return of "confidential health information" at the conclusion of the pending State Court litigation (Protective Order specifically requires such action within sixty (60) days of the conclusion of litigation, inclusive of appeals). Paragraph 15 also specifically references the pending Federal Class Action and provides that nothing prevents Hollman from being bound by orders promulgated in that litigation. Also, Paragraph 15

³ Hollman has sought sanctions for what it contends is an improper motion based on TLC's alleged deception of dismissing the pre-settlement sanction motion to induce settlement and then re-instituting it after it received settlement protection. As will be addressed later herein, the Court defers ruling on this issue until the conclusion of this case.

recognizes the right of the litigants in the class action to request the production of confidential health information in that case which would further support this court's interpretation of the terms of the Protective Order. Finally, paragraph 15 extends to TLC the right to seek modification or vacation of the Protective Order. TLC contends this gave it the right to essentially re-file its pre-settlement motion for sanctions and/or to use the pre-settlement conduct of Hollman to claim a right of modification of the Protective Order to require immediate return of the database. The Court has already dealt with the allegations of violation of the Protective Order in its rulings on the interpretation of the term "confidential health information". However, to determine if TLC has grounds for modification under the terms of the Settlement Agreement, paragraph 15 requires this Court's interpretation. The language, when viewed in its entirety, is clear and unambiguous. TLC's right to request modification must be based on events or conduct that occurs after the entry of the Settlement Agreement. In that regard, its present Motion is premature and, based on allegations, not proper for modification. For these reasons, TLC's Motion for Modification is denied.

SANCTIONS

Both parties have moved for Sanctions. TLC contends that Hollman's pre-settlement conduct in violating the Protective Order requires sanctions. Hollman contends that TLC's pre-settlement conduct in spoliating the evidence and post settlement conduct in bringing the motion for modification mandates the imposition of sanctions. The Court retains the inherent power to sanction parties before it for improper conduct. This is true, both as to Hollman and TLC. However, consistent with the courts rulings as stated above, this Court declines to address the issues of sanctions at this time. The Court specifically retains jurisdiction of these matters and will address issues of sanctions at the conclusion of this pending litigation.


IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED, that:

1. The Protective Order entered into on November 14, 2008, governs the use of "confidential health information" which is defined as health information inclusive of patient identity. The use of discovery, including documents and databases that reveals health information but not patient identity is not a violation of the Protective Order;

2. TLC's Motion for Modification of the Protective Order is denied;

3. TLC's Motions for Sanctions and Hollman's Motions for Sanctions are retained by this Court to be addressed, if necessary, at the conclusion of the pending litigation.

IT IS SO ORDERED.



Judge, Thirteenth Judicial Circuit

Greenville, South Carolina
Dated: August 17, 2010

EXHIBIT F

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

FILED-CLERK OF COURT
GREENVILLE, SOUTH CAROLINA
PAUL B. WICKENSIMER 2007-CP-23-2347

2017 JAN 12 A 11:42

TLC Laser Eye Centers (Piedmont/Atlanta),
LLC; TLC The Laser Center (Institute), Inc.,

Intervenor,

IN RE:

John Hollman,

Plaintiff,

v.

Dr. Jonathan Woolfson, individually;
Dr. Michael A. Campbell, individually; Optical
Solutions, Inc.; and Optical Solutions of
Bluffton, LLC,

Defendants.

ORDER

THIS MATTER comes before the Court on: 1) Intervenor TLC's Motion to Compel Plaintiff's Counsel to Prepare an Order for the Court as Directed by the Court; 2) TLC's Motion to Compel Observance of the Protective Order of November 14, 2008; and, 3) Plaintiff's Motion for Sanctions.

Intervenor TLC was represented by W. Howard Boyd, Jr., Esquire, and Stephen Buckingham, Esquire. Plaintiff was represented by Douglas F. Patrick, Esquire and Stephen R.H. Lewis, Esquire.

Both sides identified exhibits, including deposition testimony and prior hearing transcripts, in support of their arguments as well as engaged in lengthy oral arguments. Based on the exhibits, memoranda of law, arguments and authorities submitted by both parties, this Court denies Intervenor TLC's Motion to Compel Plaintiff's Counsel to Prepare an Order as Directed by the Court and denies

1
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ENTERED COMPUTER

Plaintiff's Motion for Sanctions as to TLC's Motion to Compel Observance of the Protective Order. During the hearing, the parties agreed to a process for compliance with the provisions of the Protective Order regarding the return of certain documents. This agreement is included as a part of the Order.

The Court makes the following findings of fact as a basis for its rulings:

FINDINGS OF FACT

1. In 2006, John Hollman brought a claim for medical malpractice against TLC and other Defendants. Following initial discovery, Hollman amended his complaint to include a cause of action for fraud based on information received in discovery. As part of supplemental discovery requests, he sought additional documents and information relating to Complex Case and Advocacy Log databases created and maintained by TLC and sought production of medical records of other TLC patients.

2. Defendant TLC objected to the production of this material on the basis of work product privilege prepared in anticipation of litigation.

3. The Court granted the Plaintiff's discovery request and required production of the Complex Case and Advocacy databases as well as production of medical records of approximately 60 TLC patients.

4. In connection with the required production, upon concerns expressed by the parties as to non-litigant patient privacy, on November 14, 2008, the Court entered a Protective Order prohibiting the dissemination of confidential health information contained in the databases and other material produced pursuant to the Order.

5. Issues arose between the parties concerning the use of the database information and its alleged spoliation. In April 2010, TLC filed a Motion for Sanctions alleging violations of the Protective Order, and Hollman filed a Motion for Sanctions alleging intentional spoliation of the database evidence.

6. In June 2010, Hollman and TLC entered into a settlement agreement in which TLC was dismissed as a party to the litigation. As a result, all pending motions between the parties were dismissed. The terms and conditions of the Protective Order relating to return of the confidential materials remained in effect as well as any enforcement provisions for post settlement violations of the Order.

7. In July 2010, TLC filed a second Motion for Sanctions against Plaintiff's counsel which re-alleged the allegations contained in the previously dismissed Motion for Sanctions.

8. On July 26, 2010, this Court held a hearing on TLC's Motion for Sanctions. This Court issued an Order on August 17, 2010, denying Defendant's motion. This Court also made a finding interpreting the November 14, 2008, Protective Order prohibiting the dissemination of confidential health information which the Court defined as health information coupled with the identity or identifying information of the patient.

9. TLC filed a Motion for Reconsideration of the August 17th Order which was heard by this Court on November 23, 2010. This Court denied the motion and instructed Plaintiff's counsel to prepare a proposed Order consistent with its ruling.

10. On December 17, 2010, Plaintiff's counsel gave notice to the Court and TLC counsel that the proposed Order would be delayed pending the receipt of the transcripts of the three hearings relating to the issues involved.

11. In January 2011, prior to the receipt of the hearing transcripts, a mediation between Hollman and the remaining parties (surgeon and optometrist) was held and on March 25, 2011, Hollman and the remaining parties reached a settlement agreement ending with finality the Hollman litigation through a dismissal with prejudice.

12. On April 13, 2011, Plaintiff's counsel, Stephen Lewis, had a telephone conference with TLC defense counsel, Ron Tate, advising Mr. Tate the Hollman case had been settled and that the

settlement would end with prejudice the Hollman case. The purpose of the call was to discuss the pending issues with TLC concerning the database, its return, and outstanding Order denying reconsideration. Mr. Lewis advised Mr. Tate that if TLC wanted the proposed Order drafted and submitted to this Court, it should notify Plaintiff's counsel prior to the dismissal of the case with prejudice, which was imminent. In addition, Plaintiff's counsel discussed with TLC counsel the return of certain discovery materials pursuant to the aforementioned Protective Order and suggested that since additional lawsuits in the Dickerson and Luce¹ cases had been filed, and Plaintiff would seek discovery of the identical materials, the databases should be filed under seal with this Court until any discovery issues related to the production of the databases could be addressed by this Court. Plaintiff's counsel recited in Court that it was his understanding that TLC counsel agreed with this proposal.

13. On April 20, 2011, Plaintiff's counsel memorialized his conversation with TLC counsel and asked that TLC counsel get back to him regarding his client's decision on submitting the proposed Order and the sealing of the database prior to the dismissal of the case with prejudice, which, according to the letter, would occur within the next week.

14. TLC counsel did not reply to Plaintiff's counsel, and on May 2, 2011, Hollman was dismissed with prejudice. The dismissal was global and contained no language regarding any pending matters.

15. On June 9, 2011, the Court heard TLC's Motion to Dismiss the Dickerson and Luce lawsuits. Then, on July 1, 2011, the Court informed the parties it was denying TLC's Motion to Dismiss.

¹The Dickerson and Luce cases are unrelated to the Hollman matter but involve similar allegations of malpractice, fraud, and unfair trade practice violations. Counsel for Hollman are also counsel in Dickerson and Luce and TLC counsel in Hollman are also counsel for TLC in Dickerson and Luce.

16. On August 19, 2011, four months following Plaintiff's counsel's letter of April 20, 2011, and shortly after TLC's Motions to Dismiss in the Dickerson/Luce cases were denied, TLC counsel made a demand to Plaintiff's counsel to file the proposed Hollman Order denying its Motion for Reconsideration.

COURT RULINGS

A. Proposed Order Denying Motion for Reconsideration

1. An action will be held to be ended when the parties agree upon a compromise and settlement of the cause of action and the terms of the agreement are complied with. W.T. Ferguson Lumbar Co. vs. Elliott, 171 S.C. 455, 172 S.E. 616 (1934). In Pryor vs. Newbold, 69 S.C. 426, 48 S.E. 275, the S.C. Supreme Court addressed whether a defendant could file a counterclaim against the Plaintiff after a case had been settled. The Court stated:

We consider first the defense of settlement, because, if it is found the parties themselves by contract ended the case, it would manifestly be not only unnecessary, but improper, for this Court to revive and discuss issues which the parties themselves had set at rest.

W.T. Ferguson Lumbar Co. vs. Elliott, 172 S.E. at 618, citing Pryor vs. Newbold, i.d.

In addition to entering into the Settlement Agreement, the parties also dismissed the Hollman case with prejudice. It is generally recognized that a dismissal with prejudice indicates an adjudication on the merits and precludes subsequent litigation to the same extent as if the action had been tried to a final adjudication. Jones vs. City of Folly Beach, 326 S.C. 360, 483 S.E.2d 770 (1997).

2. TLC contends it intended all along to have the proposed Order filed so it could appeal this Court's decision denying the Motion for Reconsideration. The Plaintiff contends, through his counsel, that this matter was discussed prior to the dismissal of Hollman, and TLC was aware it had an affirmative duty to request the Order be prepared prior to dismissal or the matter would be ended. Since no request was made by TLC, the case was dismissed with prejudice. The

record supports Plaintiff's position. This Court finds no evidence to support Defendant's position that it intended the Order to be filed. To the contrary, the facts support the finding that only after TLC's Motions to Dismiss in the Dickerson and Luce cases did TLC request the proposed Order be submitted. There is no indication in the record that TLC ever contacted Plaintiff's counsel after it received notice the case would be dismissed with prejudice to request the proposed Order be submitted or the issued be preserved or to object to Plaintiff's counsel proposal regarding filing the database under seal pending resolution of discovery matters in the Dickerson and Luce cases. There has been no evidence submitted by TLC to refute Plaintiff's counsel's position.

The Plaintiff rightly argues that due to the pending dismissal of the remaining parties, had TLC wanted to reserve its right to appeal the Court's denial of its Motion for Reconsideration, a special release would have been required to preserve their rights yet dismiss the other parties fully. Plaintiff's counsel stated at the hearing that they were ready, willing, and able to do so had TLC notified them of their desire to preserve their rights to appeal the Motion for Reconsideration. After receiving notice of the pending settlement, the burden was on TLC to advise Plaintiff's counsel of any request to have the proposed Order submitted so that Plaintiff's counsel could draft a release to address the protection of the settling parties. The dismissal of the Hollman case in May, 2011 terminated the Court's jurisdiction to issue an Order on TLC's Motion for Reconsideration.

The Court finds Hollman, in its entirety, was dismissed on May 2, 2011. This dismissal occurred with the knowledge of Intervenor TLC and serves to terminate the Intervenor's status with respect to a finding by the Court on its Motion for Sanctions. A dismissal with prejudice creates finality with respect to pending matters, and the Court lacks subject matter jurisdiction over TLC's request. Accordingly, TLC's Motion to Compel Plaintiff's counsel to prepare an Order on the Motion for Reconsideration is denied as is TLC's request for the Court to prepare and enter its own Order.

B. Return of the Database

1. All parties agree that the dismissal with prejudice did not deprive the Intervenor from moving this Court for an Order returning the database pursuant to the language of the November 14, 2008, Protective Order.

2. During the hearing, Plaintiff raised concerns regarding spoliation of evidence by TLC during the pendency of discovery matters in the Hollman case. While Plaintiff has offered to return the database to TLC counsel, they have sought assurances from TLC that the database would not be altered or modified in any way pending the litigation in Dickerson and Luce where production of the database has been requested. This Court orders that upon return of the database by Plaintiff, TLC counsel should retain the database and other information in their office pending the resolution of the discovery matters and/or final resolution of the Dickerson and Luce cases. The parties agreed this was a reasonable compromise.

An additional issue was raised about the Plaintiff's work product in rendering the database into usable form. The Court suggested that the Plaintiff file its work product under seal in the Dickerson and Luce cases. The parties found these conditions to be acceptable and consented to this procedure.²

3. Therefore, pursuant to an agreement of the parties, this Court grants Intervenor's Motion to Compel Observance of the Protective Order and return of the database with the following conditions consented to by the parties:

- a) Plaintiff's counsel will comply with Paragraph 12 of the November 14, 2008, Protective Order returning all discovery materials designated as Confidential Health Information to TLC counsel who will retain possession of the Confidential Health Information in its office here in Greenville.

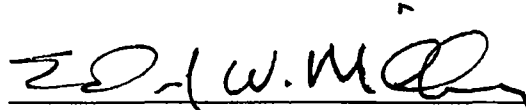
²The Court never ruled on Plaintiff's Motion for Sanctions Regarding Spoliation of Evidence filed in the Hollman case and does not need to reach the issue of spoliation because these matters were ended when the case was dismissed with prejudice.

- b) Plaintiff will file under seal with the Court its work-product derived from any Confidential Health Information obtained in the Hollman case. This work-product will remain under seal with the Court until further Order of the Court.

C. Order Denying Plaintiff's Motion for Sanctions

Plaintiff filed a Motion for Sanctions against TLC essentially alleging misconduct in filing the above Motions to Compel. After considering the memoranda in support of and in opposition to the Motions for Sanctions, this Court denies Plaintiff's Motion for Sanctions.

AND IT IS SO ORDERED.


Hon. Edward Miller

DATED: 1/12, 2012

Greenville, South Carolina

EXHIBIT G

Steven Buckingham

From: Cheryl Rodgers
Sent: Thursday, April 19, 2012 10:13 AM
To: 'Woods, Margaret'
Subject: RE: John Hollman V. Dr. Jonathan Woolfson, et al.

Margaret, in light of this information and due to the requirements of the appeal process, we are requesting that you expedite preparation of the transcript. We understand there is typically an additional fee for expedited transcripts. Again, if you can forward your invoice, we will process it for payment to move this along. Thanks for your help in this matter.

Cheryl Rodgers
Paralegal
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P.O. Box 10589
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-----Original Message-----

From: Woods, Margaret [mailto:mwoods@sccourts.org]
Sent: Thursday, April 19, 2012 9:38 AM
To: Cheryl Rodgers
Subject: RE: John Hollman V. Dr. Jonathan Woolfson, et al.

It has never been prepared. It was never requested by anyone.

Margaret A. Woods
Circuit Court Reporter
Seventh Judicial Circuit At-Large

From: Cheryl Rodgers [CRodgers@gwblawfirm.com]
Sent: Thursday, April 19, 2012 9:11 AM
To: Woods, Margaret
Subject: RE: John Hollman V. Dr. Jonathan Woolfson, et al.

We were assuming this transcript had already prepared, given the time that has passed since the date of the hearing. Is that not the case?

Cheryl Rodgers
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-----Original Message-----

From: Woods, Margaret [mailto:mwoods@sccourts.org]
Sent: Wednesday, April 18, 2012 10:18 PM
To: Cheryl Rodgers
Subject: RE: John Hollman V. Dr. Jonathan Woolfson, et al.

Cheryl, the only estimate I can give you right now is about three weeks and it could be a little earlier.

Margaret A. Woods
Circuit Court Reporter
Seventh Judicial Circuit At-Large

From: Cheryl Rodgers [CRodgers@gwblawfirm.com]
Sent: Wednesday, April 18, 2012 10:42 AM
To: Woods, Margaret
Subject: RE: John Hollman V. Dr. Jonathan Woolfson, et al.

Margaret, I am writing again to follow up on our request for a copy of the transcript of a hearing held in the Hollman matter on 11/23/10. As indicated previously, we are requesting the transcript in conjunction with an appeal. Please let me know when we can expect to receive the copy. If you'd like to email me the invoice, we can expedite the check for same.

Cheryl Rodgers
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-----Original Message-----

From: Woods, Margaret [mailto:mwoods@sccourts.org]
Sent: Wednesday, April 11, 2012 6:54 PM
To: Cheryl Rodgers
Subject: RE: John Hollman V. Dr. Jonathan Woolfson, et al.

Okay, thanks!

Margaret A. Woods
Circuit Court Reporter
Seventh Judicial Circuit At-Large

From: Cheryl Rodgers [CRodgers@gwblawfirm.com]
Sent: Wednesday, April 11, 2012 5:07 PM
To: Woods, Margaret
Subject: RE: John Hollman V. Dr. Jonathan Woolfson, et al.

Sorry for my delayed response.

I am requesting on behalf of Howard Boyd of our firm. We have intervened on behalf of TLC in this matter. This matter is now on appeal. Under the SC Court of Appeals Rules, we are required to obtain transcripts pertaining to the order(s) being challenged. See the attached Proof of Service. Please let me know if you need anything

further.

Cheryl Rodgers
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-----Original Message-----

From: Woods, Margaret [mailto:mwoods@sccourts.org]
Sent: Monday, April 09, 2012 6:34 PM
To: Cheryl Rodgers
Subject: John Hollman V. Dr. Jonathan Woolfson, et al.

Dear Ms. Rodgers,

I received your request for this transcript. Please let me know who the attorney is that you are ordering it for and if he was involved in the hearing. If he wasn't involved, I will need to know the reason why he needs the transcript and then I will have to obtain permission from the judge to release it to him. Thank you.

Sincerely,

Margaret A. Woods
Circuit Court Reporter
Seventh Judicial Circuit At-Large

EXHIBIT H

Steven Buckingham

From: Cheryl Rodgers
Sent: Friday, April 27, 2012 11:39 AM
To: 'Woods, Margaret'
Subject: RE: John Hollman v. Dr. Jonathan Woolfson, et al., C.A. No.: 2007-CP-23-2347

Yes, thanks very much.

Cheryl Rodgers
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-----Original Message-----

From: Woods, Margaret [mailto:mwoods@sccourts.org]
Sent: Friday, April 27, 2012 11:37 AM
To: Cheryl Rodgers
Subject: RE: John Hollman v. Dr. Jonathan Woolfson, et al., C.A. No.: 2007-CP-23-2347

Cheryl,

Thanks for sending the check so quick. I was the court reporter at the hearing on 11.23.10 and I typed it for your firm. It had never been prepared before so no one had ordered it before you. I hope this answers your questions.

Margaret A. Woods
Circuit Court Reporter
Seventh Judicial Circuit At-Large

From: Cheryl Rodgers [CRodgers@gwblawfirm.com]
Sent: Friday, April 27, 2012 11:19 AM
To: Woods, Margaret
Subject: John Hollman v. Dr. Jonathan Woolfson, et al., C.A. No.: 2007-CP-23-2347

Margaret,

Yesterday, I mailed the check to you in payment for the expedited transcript of the hearing of 11.23.10 in the above matter. You should receive it today or tomorrow. Thank you for getting that to us so quickly.

Can you please clarify a couple of points for me regarding this hearing/transcript?

In requesting another hearing transcript, I understand that the the transcript was not prepared by the court reporter who was in the court room at the time of the hearing. Were

you actually present at the hearing? And would you confirm that no one had previously requested a transcript of the 11.23.10 hearing until we did so?

Cheryl Rodgers

Paralegal

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
In The Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case Number 2007-CP-23-2347

RECEIVED

MAY 14 2012

SC Court of Appeals

Ex parte TLC Laser Eye Centers (Piedmont/Atlanta) LLC;
and TLC The Laser Center (Institute), Inc.,.....Appellants,

In re:

John Hollman.....Respondent

v.

Dr. Jonathon Woolfson, Individually;
Dr. Michael A. Campbell, Individually;
Optical Solutions, Inc.; and
Optical Solutions of Bluffton, LLC.....Defendants

Case Number 2007-CP-23-8364

Ex parte TLC Laser Eye Centers (Piedmont/Atlanta) LLC;
and TLC The Laser Center (Institute), Inc.,Appellants,

In re:

Danielle Hollman.....Respondent

v.

Dr. Jonathon Woolfson, Individually;
Dr. Michael A. Campbell, Individually;
Optical Solutions, Inc.; and
Optical Solutions of Bluffton, LLC.....Defendants

PROOF OF SERVICE

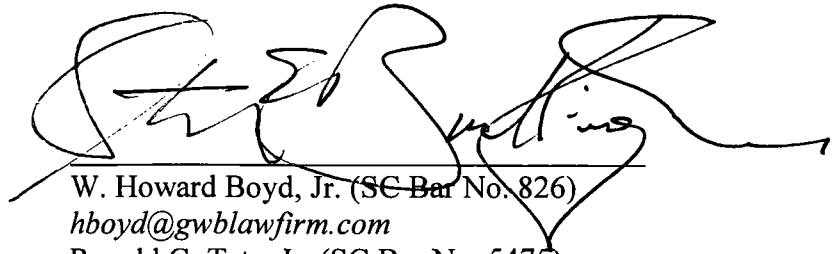
I certify that on the 10th day of May, 2012, I served a copy of the Appellants' Reply in Support of the Motion for an Expedited Appeal on counsel of record in the above-entitled matters by sending a copy of same by first-class mail addressed to the following:

Douglas F. Patrick, Esq.
Stephen R.H. Lewis, Esq.
Covington, Patrick, Hagins, Stern & Lewis, P.A.
P.O. Box 2343
Greenville, SC 29602
Counsel for Respondents

George C. Beighley, Esq.
Richardson Plowden Carpenter & Robinson, PA
P.O. Box 7788
Columbia, SC 29202
Counsel for Defendant Jonathan Woolfson

Jack G. Gresh, Esq.
Hall, Booth, Smith & Slover, P.C.
2113 Middle Street, Suite 305
Sullivan's Island, SC 29482
*Counsel for Defendants Michael A. Campbell,
Optical Solutions, Inc. and Optical Solutions of
Bluffton, LLC*

(signature on following page)



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Greenville, SC
May 10, 2012

Attorneys for the Defendants/Petitioners TLC
The Laser Center (Institute), Inc., and TLC
Laser Eye Centers (Piedmont/Atlanta) LLC

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Gallivan, White & Boyd, P.A.
ATTORNEYS AT LAW

May 10, 2012

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
Calhoun State Office Building
1015 Sumter Street
Columbia, SC 29201

Ex parte TLC Laser Eye Centers (Piedmont/Atlanta) LLC; and
TLC The Laser Center (Institute), Inc., Intervenor

In re: John Hollman v. Dr. Jonathan Woolfson, et al.
C.A. No.: 2007-CP-23-2347

And

Ex parte TLC Laser Eye Centers (Piedmont/Atlanta) LLC; and
TLC The Laser Center (Institute), Inc., Intervenor

In re: Danielle Hollman v. Dr. Jonathan Woolfson, et al.
C.A. No.: 2007-CP-23-8364

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MAY 14 2012

SC Court of Appeals

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of Appellants, TLC Laser Eye Centers (Piedmont/Atlanta) LLC and TLC The Laser Center (Institute), Inc. Reply in Support of the Motion for an Expedited Appeal and a Proof of Service showing that the Reply has been served on all Respondents. Please return one copy of the Reply, stamped as filed, in the enclosed self-addressed stamped envelope. Thank you for your assistance in this matter. Should you have any questions or concerns, please do not hesitate to contact me.

Respectfully,

GALLIVAN, WHITE & BOYD, P.A.

Steven Edward Buckingham

SEB/jws
Enclosures

cc: Douglas F. Patrick, Esquire
Stephen R.H. Lewis, Esquire
George C. Beighley, Esquire
Jack G. Gresh, Esquire

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2007-CP-23-2347

Ex parte TLC Laser Eye Centers (Piedmont/Atlanta) LLC; and
TLC The Laser Center (Institute), Inc. Appellants,

In re:

John Hollman Respondent,

v.

Dr. Jonathan Woolfson, Individually;
Dr. Michael A. Campbell, Individually;
Optical Solutions, Inc.; and Optical
Solutions of Bluffton, LLC Defendants.

Case No. 2007-CP-23-8364

Ex parte TLC Laser Eye Centers (Piedmont/Atlanta) LLC; and
TLC The Laser Center (Institute), Inc. Appellants,