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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SC Court of Appeals

Appellate Case No. 2012–210888

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.

FINAL REPLY BRIEF OF APPELLANTS

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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 (R. pp. 28–29).

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

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[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 (R. p. 551).) 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.

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[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 (R. pp. 28–29).

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 settlement[8] 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-

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[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, 31.

[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

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[13] July 2010 State Tr. 4–6, 14 (R. pp. 362–64, 372).

[14] July 2010 State Tr. 4–6, 14 (R. pp. 362–64, 372).

[15] TLC's Mot. for Reconsideration, Sept. 2, 2010 (R. p. 638).

[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 (R. p. 650); Intervenor TLC's Mot. Compel Pltfs.' Counsel to Observe the Protective Order, Sept. 28, 2011 (R. p. 656).

[17] Intervenor TLC's Mot. for Reconsideration, Feb. 2, 2012 (R. p. 638).

[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, SCRCP. 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 (R. p. 32).

[23] Prot. Order ¶ 12 (R. p. 33).

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 (R. p. 656).

[25] (Nov. 2011 Tr. 56–59 (R. pp. 504–07); see also Order Allowing Resp'ts' Counsel to File Work Product under Seal, Dickerson & Luce, Sept. 18, 2012 (R. p. 185).) Respondents' counsel did not carry this order out until September 2012.

[26] Plfts.' Mot. Compel, Dickerson & Luce, Apr. 25, 2012 (R. p. 678).

[27] Plfts.' Memo. Supp. Mot. Compel, Dickerson & Luce, June 27, 2012 (R. p. 684) (including selected attachments); Hr'g Tr. 5–15, July 2, 2012 (R. pp. 522–32).

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 (R. p. 187).

[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

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[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 (R. p. 76); Order Den. Pltfs.' Mot. for Reconsideration, Fed. Class Action, Dec. 21, 2011 (R. p. 154); Order & Opinion of the United States Court of Appeals for the Fourth Circuit, Aug. 15, 2012 (R. p. 173) (affirming the district court's disposition of the Federal Class Action).

[32] TLC's Mot. Strike, Dickerson, Sept. 28, 2011 (R. p. 660); TLC's Mot. Strike, Luce, Sept. 28, 2011 (R. p. 663).

Hollman would have been resolved.[33] Instead, since TLC's motions to dismiss were 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

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[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.

[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 (R. p. 102); Order Den. TLC's Mot. Dismiss, Luce, Sept. 1, 2011 (R. p. 130).)

[35] Email of Mr. Landis to the Circuit Court, Aug. 18, 2011 (R. p. 830).

[36] Letter of Mr. Boyd to Mr. Lewis, Aug. 19, 2011 (R. p. 831).

would consent to an order not being prepared, TLC's counsel would let Respondents know.

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

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[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 (R. p. 32)), 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 (R. pp. 465–68).

[39] Nov. 2010 Tr. 62 (R. p. 468).

[40] Email from Mr. Lewis to the Circuit Court, Dec. 17, 2010 (R. p. 826).

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.

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[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 (R. p. 827).)

[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 (R. pp. 518–20).

[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 1, 2011 (R. p. 829).

[46] Email from Mr. Landis to the Circuit Court, Aug. 18, 2011 (R. p. 830).

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 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

[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 (R. pp. 114–18); Order Den. TLC's Mot. Dismiss, Luce, Sept. 1, 2012, 12–16 (R. pp. 141–45).) 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.

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 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

[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.

a brief order, it doesn't have to be terribly long, to submit to the [c]ourt which would 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;

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[54] Nov. 2010 Tr. 62 (R. p. 468).

[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 (R. pp. 232–36); Am. Compl., Dickerson, ¶¶ 51–58 (R. pp. 265–68); Am. Compl., Luce, ¶¶ 46–53 (R. pp. 283–87).

[58] Plfts.' Mot. Compel, Dickerson & Luce, Apr. 25, 2012 (R. p. 678); Plfts.' Memo. Supp. Mot. Compel, Dickerson & Luce, June 27, 2012 (including selected attachments); Hr'g Tr. 5–15, July 2, 2012 (R. pp. 522–32).

[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 (R. p. 32).

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

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[61] See, supra, fn. 3.

[62] Resp'ts' Br. § V.B–C, 35–37.

[63] Prot. Order ¶ 2 (R. pp. 28–29).

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 (R. pp. 313–15, 316–21, 327–30); Oct. 2008 Tr. 6–14 (R. pp. 332–40); Order Granting Resp'ts' Mot. Compel, Nov. 14, 2008 (R. p. 1).

[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

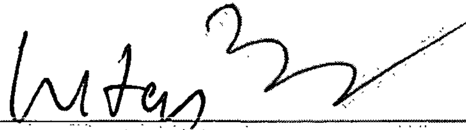
regarding Confidential Health Information.[66] There is no excuse for such material inventions to be included in proposed orders, and it is regrettable that such apparent offenses to traditional notions of due process have been tolerated for so long in Hollman without any recourse.

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 (R. p. 823).

Respectfully submitted,



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Greenville, SC
November 26, 2012

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;
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In re:

John Hollman . . . . Respondent,

v.

Dr. Jonathan Woolfson, Individually;
Dr. Michael A. Campbell, Individually;
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Danielle Hollman . . . . Respondent,

v.

Dr. Jonathan Woolfson, Individually;
Dr. Michael A. Campbell, Individually;
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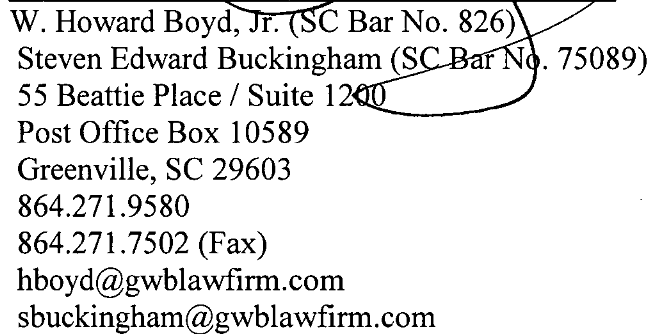
CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

Respectfully submitted,



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PROOF OF SERVICE

I certify that on the 26th day of November, 2012, I served a copy of Appellants' Final Reply Brief 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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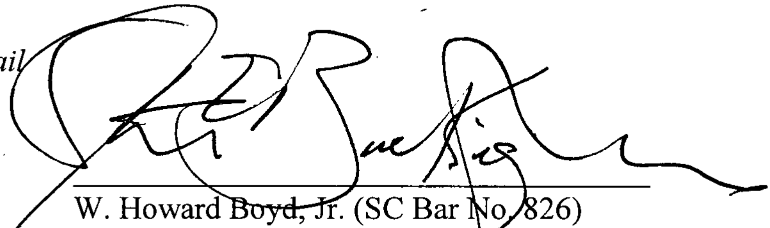

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