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.

FINAL BRIEF OF RESPONDENTS

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November 26, 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 (R. pp. 919-925).[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 (R. pp. 820, 821, 822, 858-873). Respondent requested production of the database and other documents and, by Order dated November 14,

[1] The Amended Complaint alleged Hollman had a pre-existing condition known as kerataconus for which LASIK surgery was contraindicated. (R., pp. 929-931)

2008, the circuit court compelled the production of the database and also issued a Protective Order (R. p. 1-33).[2]

In June of 2010, Appellant and Respondent entered into a settlement agreement, dismissing Appellant as a party to the litigation (R. pp. 543-553). 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 (Appellants' original Motion for Sanctions, R. pp. 950-960). 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 (R. pp. 972-985). 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 (R. p. 62-68).

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 (R. p. 468). A delay in preparing the Order occurred when Respondent's counsel requested transcripts of the numerous hearings held by the circuit court,

[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.

and the transcripts were not immediately forthcoming (R. p. 826). In the interim, Respondent entered into a settlement agreement with the remaining defendants (R. pp. 554-557). 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 (R. p. 827), 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 3, 2011, the Order of Dismissal with Prejudice was filed (R. pp. 537-542). 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 (TR 831-832). 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 (R. pp. 650-655). By Order dated January 12, 2012, Appellant's Motion was denied (R. pp. 160-167). Appellant's Motion for Reconsideration was also denied (R. pp. 168-169), 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 (R. pp. 919-924). 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 order[4]. 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]

[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. (R. p. 820); 2) e-mail from Owen to Van Veen – 11/10/03 @ 6:35 p.m. (R. p. 821); 3) e-mail from Van Veen to Owen – 11/11/03) (R. p. 822). 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(R. pp. 858-859) and complex case form dated 6/01/05) (R. pp. 860-861). Lastly, TLC produced complex case and advocacy standard operating procedures (complex case process SOP [R. pp. 862-869], advocacy SOP [R. pp. 810-811], authorization for release of information [R. p. 872], and SOP flowchart [R. p. 873]).

[5] (Supp Plaintiff's Discovery Requests) June 30, 2008, Hearing Transcript, p. 6, l. 5-10 (R. p. 313, l. 5-10).

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 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. (R. p. 936, l. 15-18).

> 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, pp. 33-34. (R. p. 325, l. 20-25 and R. p. 326, l. 1-3).

> 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.

[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.

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. (R. pp. 317-318).

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. (R. pp. 322-324).

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. (R. pp. 325-326).

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

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[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 (R. p. 1032) states, "ocular health good" while the Complex Case form dated 07/28/03 (R. p. 859) 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".

was held on October 14, 2008, in which Judge Few ordered the production of the databases and other relevant documents (R. pp. 331-346). 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.

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. (R. p. 332).

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. (R. pp. 333-335).

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. (R. pp. 337-338).

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. (R. pp. 339-341).

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 (R. pp. 1-24). 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]

On March 17, 2010, Hollman filed a Federal Court Class Action in which the Appellant was named as a Defendant (R. pp. 195-223).[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 _Holllman_ state court litigation a Motion for Order and Rule to Show Cause, Motion to Modify Protective Order, and Motion for Sanctions (R. pp. 950-960).[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 (R. p. 957).[11] On April 20, 2010, Respondent filed a Motion for a Protective Order Due to Spoliation of Evidence by Appellant (R. pp. 961-971). The motion alleged the Appellant had intentionally and systematically modified the databases in a manner which could not be traced nor could the

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

[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 to that motion included a Petition for Writ of Certiorari to the South Carolina Supreme Court.

information be recovered.[12] Prior to a hearing 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 21, 2010, a Stipulation of Dismissal with Prejudice as to Appellant was filed with the circuit court (R. pp. 533-534). 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) (R. p. 551). 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

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[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 (R. p. 887, l. 9-13; R. p. 889, 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 (R. pp. 820, 822). 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 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 (R. pp. 543-553).

Sanctions (R. pp. 609-622).[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 Appellant and for Sanctions (R. pp. 972-985). A hearing on cross motions was held on July 26, 2010 (R. pp. 361-419). 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]

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[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.

[15] August 17th Order, p. 2 (R. p. 63).

[16] August 17th Order, p. 3. (R. p. 64).

Appellant filed a Motion for Reconsideration on September 12, 2010 (R. pp. 638-649). On November 23, 2010, the circuit court held a hearing regarding Appellant's Motion for Reconsideration (R. pp. 457-468). 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 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 (R. pp. 939-949). 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

[17] December 17, 2010, E-mail from Mr. Lewis to the Circuit Court. (R. p. 826).

[18] April 20, 2011 Letter from Mr. Lewis to Mr. Tate. (R. pp. 827-828).

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 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 3, 2011 (R. pp. 537-542). 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 (R. pp. 831-832). More than five weeks later, on September 28, 2011, Appellant filed its Motion to Compel Respondent to file a proposed Order (R. pp. 650-655). In the hearing on the matter, the Court denied the motion and issued its Order of January 12, 2012 (R. pp. 160-167). The circuit court also denied Appellant's Motion to Reconsider (R. pp. 168-169), and this appeal followed.

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[19] April 20, 2011 Letter from Mr. Lewis to Mr. Tate. (R. pp. 827-828).

[20] January 12, 2011, Order, p. 5. (R. pp. 160-167).

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.

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 (R. pp. 62-68), 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

[21] Appellant's Initial Brief, p. 1.

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

[22] Appellant's Initial Brief, p. 18.

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, 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

[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".

[24] Appellant's Initial Brief, p. 20, footnote 60.

[25] Appellant's Initial Brief, p. 20, footnote 60.

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 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

[26] See July 26, 2010 State Court transcript (R. pp, 362, 363, 370, 372).

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

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 Order[28]; 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 (R. pp. 638-649). 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 (R. p. 826). Appellant did not object, and the Court 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 (R. pp. 827-828), confirmed the conversation and advised Appellant's counsel that if Appellant still

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[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, R. pp. 63-64). The Court's finding is addressed in detail in Section V of Respondent's brief.

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* cases[29] 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 any ongoing dispute between Appellant and Respondent.[31] Appellant did not respond, and the Stipulation of Dismissal with Prejudice was filed on May 3, 2011 (R. pp. 537-542). 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 (R. pp. 831-832), to advise Respondent it, indeed, wanted an Order denying its Motion for Reconsideration.[32] [33]

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

[30] April 20, 2011, Lewis letter to Tate. (R. pp. 827-828).

[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.

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 (R. pp. 827-828), 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.
>
> 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. (R. pp. 827-828).

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

[33] The hearing on Respondent's Motions to Dismiss in the _Dickerson_ and _Luce_ cases were heard on June 9, 2011 (R. pp. 483-490). The Order denying the motions was filed on September 1, 2011. Appellant filed its Motion to Compel on September 28, 2011 (R. pp. 650-655).

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 hearing[34], 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 filed its motions to dismiss in the Dickerson and Luce cases (R. pp. 1012-1015). 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 (R. pp. 483-490). 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

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[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 (R. pp. 939-949). 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, 1012, Order (R. p. 164).

[36] January 12, 2012, Order (R. p. 165).

[37] July 1, 2011, E-Mail from Judge Miller to all parties. (R. p. 829).

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 (R. pp. 831-832). 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:

> 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

[38] August 18, 2011, E-Mail from Paul Landis to Judge Miller, copying all parties (R. p. 830).

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 reason[39], 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 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

[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.

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. <u>The stage to which the litigation has progressed</u>

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

4. <u>The prejudice the original parties would suffer from granting intervention and the applicant would suffer from denial</u>

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

[40] Appellant's Initial Brief, p. 32.

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 have never been determined by any judge or court to be "protected" by the 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

[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). (R. p. 551).

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. (R. p. 28).

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, 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 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

[42] November 14, 2008 Protective Order, p. 2-3. (R. pp. 26-27).

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:
>
> (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.

[43] November 14, 2008 Protective Order, p. 4, ¶2 (R. p. 28).

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 information[44]. 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

[44] November 14, 2008, Discovery Order, p. 4. (R. p. 4).

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 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.

[45] See Respondent's Statement of Facts, pp. 5-7. June 30, 2008 Hearing Transcript, p. 19-20 (R. pp. 317-318), 27-29 (R. pp, 322-324), and 33-34 (R. pp. 325-326).

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, 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,

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

pursuant to the Protective Order, the witnesses should not identify any patients contained in the database (Deposition of John Potter, R. pp. 1033-1058). 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. <u>If This Court Chooses to Interpret the Protective Order, It Must Still Remand to the Circuit Court to Conduct Unfinished Business</u>

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:

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

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[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.

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]

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

[48] August 17th Order, p. 3. (R. p. 64).

[49] Appellant's Initial Brief, p. 41.

[50] Appellant's Initial Brief, p. 41.

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.

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

[51] Respondent's Statement of Facts, p. 5-7, June 30, 2008 Hearing Transcript, pp. 17 (R. p. 936) and 33 (R. p. 325).

[52] Respondent's Statement of Facts, p. 10-11.

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 Court deny Appellant's request to "adjudicate" the issues arising from the August 17th Order

[53] Appellant's Initial Brief, p. 43.

[54] Settlement Agreement, ¶4, p. 5-6 (R. pp. 547-548). This fact was also discussed extensively in the settlement negotiations between Appellant and Respondent.

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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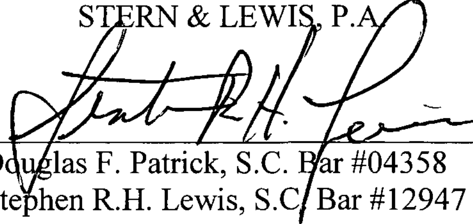

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November 26, 2012

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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In re: John Hollman .... Respondent

v.

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v.

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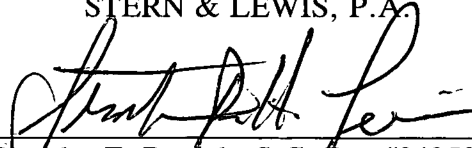
CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondents complies with Rule 211(b), SCAR.

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



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PROOF OF DELIVERY

I hereby certify that I have served a copy of the Final Brief of Respondents on counsel of record for the Appellants as specified below, via U.S. Mail, proper postage affixed thereto, addressed as follows:

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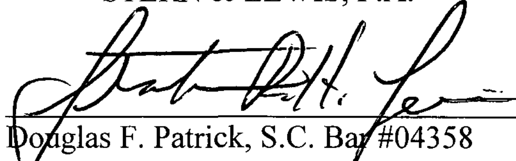

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