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;
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 OPENING BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

1. Whether the circuit court erred in determining that it had been divested of subject matter jurisdiction to enforce one of its own protective orders by the settlement and dismissal of the underlying litigation, where the need to protect confidential information was continuing, the party seeking to enforce the protective order was a third-party intervenor, and the intervenor was not involved in the settlement or dismissal.

2. Whether the circuit court erred in failing to interpret the protective order of November 14, 2008 according to its plain, unambiguous meaning and/or in failing to give effect to every relevant provision, including but not necessarily limited to the following:

   a. By failing to conclude that the protective order applies to "Confidential Health Information," as that term is defined, as well as to information based on, containing, or derived therefrom; and/or,

   b. By failing to conclude that Respondents' counsel has violated the prohibitions of the protective order against using and/or disclosing protected information for any purpose other than the case in which the order was issued, by using protected information to bring a federal class action lawsuit against Appellants (as well as other subsequent litigation), and/or by disclosing protected information to unauthorized recipients.

3. Whether the circuit court erred in issuing orders prepared by Respondents' counsel that contained material, prejudicial "findings of fact" and/or "conclusions of law" which are not supported by the record and were never adjudicated by the court.

4. Whether the circuit court erred in concluding that there were no violations of the protective order of November 14, 2008 which could have supported Appellants' motion for an order and rule to show cause filed in July 2010.

5. Whether the circuit court erred in concluding that the 2010 settlement agreement between Appellants and Respondents limited in any way Appellants' ability to seek enforcement of the protective order of November 14, 2008.

STATEMENT OF THE CASE

In 2007, Respondents filed a medical malpractice action against Appellants (hereinafter referred to as "TLC") arising out of three LASIK eye surgeries performed on John Hollman during 1999 and 2001.[1] It was alleged that these surgeries caused Hollman to develop "ectasia." During the litigation, TLC was required to produce certain confidential, sensitive, and proprietary information to Respondents, consisting of treatment records of non-party patients, as well as a database of patient information that was intended for TLC's internal uses only under the administration of its general counsel. The non-party patient treatment records and database were produced to Respondents under a protective order, which prohibits the use and disclosure of protected information for any purpose other than Hollman.[2] The critical issue in this appeal involves Respondents' counsel's compliance with the protective order.

In May 2010, TLC entered into a settlement agreement with Respondents and was subsequently dismissed from the litigation. However, in July 2010, TLC became a third-party intervenor in Hollman for the limited, collateral purpose of enforcing the protective order. This was necessary because Respondents' counsel had used, and was continuing to use, protected information in furtherance of a separate class action against TLC, and had disclosed protected information to unauthorized recipients.

[1] More precisely, there were two lawsuits. One was filed by Respondent John Hollman, C.A. 2007–CP–23–2347; the other, by Respondent Danielle Hollman, C.A. 2007–CP–23–8364. Respondent John Hollman's claim consisted of actions for negligence, battery, breach of contract, and fraud. Mrs. Hollman's claim was for loss of consortium. These actions were never formally consolidated in the circuit court; however, discovery was pursued on a consolidated basis, and the orders at issue in this appeal feature a consolidated caption.

[2] As it is used herein, the term "protected information" describes any "Confidential Health Information" that was disclosed under the Protective Order of November 14, 2008, as well as any information based on, containing, or derived therefrom.

Since then, Respondents' counsel has filed two additional medical negligence lawsuits on behalf of two new plaintiffs against TLC, both of which are based on protected information. Respondents' counsel is actively using protected information obtained in the course of Hollman in furtherance of these new cases, specifically to attain an advantage in discovery and dispositive motions.

To enforce the protective order against Respondents' counsel's unauthorized use and disclosure of protected information, on July 8, 2010, TLC intervened in Hollman and filed a motion for an order and rule to show cause. However, by order dated August 17, 2010, the circuit court held that protected information consisted only of health information coupled with patient identity. This was a novel construction of the protective order which was not only contrary to its plain language, but which resulted in substantially diminished protection for TLC and its patients. Consequently, the court held that Respondents' counsel had not violated the protective order, and TLC's motion for an order and rule to show cause was denied.

On September 2, 2010, TLC filed a motion for reconsideration. A hearing on the motion was held on November 23, 2010, at which time the court indicated that the motion would be denied and instructed Respondents' counsel to prepare an order. In May 2011, Respondents and the remaining Defendants (not including TLC as third-party intervenor) entered into a settlement agreement which resolved all remaining merits-based claims. In late September 2011, TLC filed a motion requesting the preparation of an order on the motion for reconsideration, which had still not been done. On January 12, 2012, TLC's motion was denied on the basis of lack of subject matter jurisdiction. TLC promptly filed a motion for reconsideration, which was

denied by order dated March 2, 2012. TLC's notice of appeal, pertaining to the orders of August 17, 2010, January 12, 2012, and March 2, 2012, was filed on April 2, 2012.

Critically, this appeal does not involve any issues pertaining to the merits of the underlying Hollman litigation. Instead, the fundamental questions are whether the court had continuing jurisdiction to enforce the protective order after the 2011 settlement and dismissal, whether the court misconstrued the protective order, and whether the court erred in concluding that Respondents' counsel had not violated the protective order. These issues are collateral to the merits of the Hollman litigation.[3]

For the reasons set out below, TLC respectfully requests that the circuit court's order denying the existence of subject matter jurisdiction to enforce the protective order be reversed. TLC also requests that the court's order regarding the construction of the protective order, which holds that there was no violation by the unauthorized use and disclosure of protected information, be modified to conclude that Respondents' counsel's use and disclosure of protected information was a material breach of the order. Finally, TLC requests that certain material "findings of fact" and "conclusions of law" set out in the orders of August 17, 2010 and January 12, 2012, which are material, improper, and prejudicial to TLC, be vacated.

[3] This appeal also involves the propriety of including material "findings of fact" and "conclusions of law" in an order where no such findings and conclusions were made or are supported by the record.

STATEMENT OF FACTS

This case arises out of three LASIK eye surgeries performed on Respondent John Hollman in 1999 and 2001.[4] The first two surgeries were performed on July 8, 1999 and November 22, 1999 at Appellants' facility in Greenville, South Carolina. A third procedure was performed on June 26, 2001 in Atlanta, Georgia. In 2007, Hollman brought a medical negligence action against TLC, Dr. Woolfson (the ophthalmologist who performed Hollman's LASIK eye surgery), and Dr. Campbell (the independent optometrist who treated Hollman)[5] in which it was alleged that, as a result of the surgeries, Hollman had developed a condition known as "ectasia."[6] Hollman also brought a cause of action against TLC for fraud. His theory was that TLC knew or should have known that LASIK eye surgeries were contraindicated for patients with ocular topographies like his, specifically because of the risk associated with developing post-surgical complications, but that TLC was motivated by financial interests to disregard those risks. Furthermore, it was alleged that after the appearance of post-surgical complications, TLC deliberately misled Hollman into believing his condition was or would become treatable, specifically so that he would not pursue litigation.

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[4] The term "LASIK" is an acronym for the medical procedure known as "laser-assisted in situ keratomileusis," a form of refractive eye surgery which uses an excimer laser to reshape the structure of a patient's cornea. LASIK eye surgery can be an effective treatment for myopia and astigmatism, and presents a practical alternative to traditional forms of vision correction, such as eyeglasses and contact lenses.

[5] Because these proceedings involve issues which are collateral to the merits of the underlying litigation, Dr. Woolfson and Dr. Campbell are not involved in this appeal.

[6] As it is used in the Complaint, the term "ectasia" describes the condition where an individual's cornea experiences progressive destabilization, which results in diminishing visual acuity.

In 2008, Respondents served discovery requests seeking the production of Hollman's medical chart and the charts of other patients who were not parties to the action, but who had ocular topographies like Hollman's or who had reported complaints following their surgeries. Respondents also sought the production of a proprietary database, which contained not only information taken from TLC's patient charts, but also information collected for TLC's internal purposes under the administration of its general counsel.[7] TLC did not believe that third-party confidential health information was discoverable since such information was neither relevant nor necessary to Respondents' claims.[8] Furthermore, TLC did not believe that the database or its contents was discoverable pursuant to the work product doctrine, the privilege for attorney/client communications, the protection for self-critical analysis, and the legitimate purposes of TLC's risk management and legal interests, as well as other similar uses. TLC was also concerned that Respondents or their counsel would use this information to contact third-party patients. Accordingly, for all these reasons, TLC objected to the production of the database and third-party medical charts, which caused Respondents to file a motion to compel.

A hearing on Respondents' motion was held on June 30, 2008, at which time the court ordered TLC to produce all responsive information, including the database, for in camera inspection.[9] Before the circuit court had ruled on the first motion to

[7] Affidavit of Brian Andrew, TLC's General Counsel, May 7, 2008 (R. p. 874).

[8] Hr'g Tr. 6–8, 39–42 June 30, 2008 (R. pp. 313–15, 327–30) (hereinafter referred to as "June 2008 Tr."); Hr'g Tr. 6–20, Oct. 14, 2008 (R. pp. 332–46) (hereinafter referred to as "Oct. 2008 Tr."); Hr'g Tr. 21–25, 47–54, May 14, 2009 (R. pp. 348–52, 353–60) (hereinafter referred to as "May 2009 Tr.").

[9] June 2008 Tr. 39–42 (R. pp. 327–30).

compel, a second motion to compel was filed which sought the production of additional "medical records of all other ectasia patients of the Piedmont TLC facility."[10] A hearing on the second motion was held on October 14, 2008, at which time the court took the matter under advisement. On November 14, 2008, both motions to compel were granted.[11] However, in conjunction with the order granting the motions to compel, the court also issued a Protective Order, which provides in relevant part:

> **The Court hereby prohibits the dissemination of Confidential Health Information beyond the parameters established by this Order or use of Confidential Health Information for any purpose other than the prosecution or defense of this litigation.**
>
> 1. This Stipulation and Protective Order shall apply to all information or discovery materials produced by any party or their agents during the course of discovery in this action, all information derived therefrom, and extracts, copies, excerpts, or summaries thereof . . .
>
> 2. The term "Confidential Health Information," means . . . any document or information supplied that identifies an individual or subscriber in any manner and relates to the past, present, or future payment for the provision of health care to such individual or subscriber. The term "Confidential Health Information" specifically includes "protected health information" as such term is defined by the Standards for Privacy of Individually Identifiable Health Information, 45 CFR parts 160 and 164, promulgated pursuant to the Health Insurance Portability and Accountability Act of 1996. See 45 C.F.R.

[10] Order Granting Resp'ts Mot. Compel, Nov. 14, 2008 (R. p. 1).

[11] Although Respondents' counsel has repeatedly claimed that TLC waived all objections to producing database information other than work product, this assertion is simply not supported by the record. TLC's objections were made to the court, given due consideration, and overruled. (June 2008 Tr. 6–8, 39–42 (R. pp. 313–15, 327–30); Oct. 2008 Tr. 6–20 (R. pp. 332–46); see also May 2009 Tr. 21–25, 47–54 (R. pp. 348–52, 353–60).) Accordingly, while the court was concerned only with protecting patient privacy rights, at all relevant times, TLC has been concerned with protecting not only patient privacy, but also its own rights and privileges against disclosing information that is sensitive, proprietary, and confidential. Those objections are based on the privilege for attorney/client communications, the protections of the work product doctrine, the privileges for self-critical analysis, and the protection for confidential business information and third-party medical records.

> sections 164.501 ("protected health information") and 160.103 ("individually identifiable health information"). **"Confidential Health Information" includes all notes, summaries, compilations, extracts, abstracts, or oral communications that contain, are based on, or are derived from Confidential Health Information. . . .**
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> 8. Except as may be provided by subsequent Order of this Court: 1) **Confidential Health Information shall be used for no purpose other than this litigation**; 2) No person who receives, pursuant to this or other Orders of this Court, Confidential Health Information concerning persons who are not parties to the captioned lawsuits (hereinafter "Third Parties") shall directly or indirectly contact or attempt contact with Third Parties or their medical providers . . . .[12]

Soon after the entry of the Protective Order on November 14, 2008, TLC produced the information required by the order granting Respondents' motion to compel, including third-party treatment records and the patient database.

On February 17, 2009, Respondents filed a motion to modify the Protective Order to allow their counsel to contact and interview patients who were identified by the protected information that TLC had been forced to disclose. Specifically, Respondents' counsel sought permission to discuss the Hollmans' lawsuit against TLC, "as well as the patient's own experience if they so choose." By order dated April 17, 2009, Respondents' motion was granted.[13]

On May 6, 2009, TLC filed a petition for writ of certiorari with the Supreme Court asking the Court to exercise its original jurisdiction on the basis of exceptional

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[12] Protective Order, Nov. 14, 2008, 4–5, 8 (R. pp. 28–29, 32) (hereinafter referred to as "Prot. Order") (emphasis added).

[13] (Order Granting Resp'ts Mot. Mod. Prot. Order, Apr. 21, 2009 (R. p. 37).) Respondents' counsel immediately began contacting third-party patients, and in fact, successfully contacted fifteen. (See Affidavits of Douglas F. Patrick, Esq. (R. p. 876), Stephen R.H. Lewis, Esq. (R. p. 879), and James W. Fayssoux, Jr., Esq. (R. p. 882), May 6, 2009.) TLC has no information whether Charles Benjamin Dickerson and/or Michael "Chad" Luce were among those fifteen initial contacts.

circumstances and review the circuit court's decision of April 17. The petition was granted, and by decision dated May 28, 2009, the Supreme Court reversed the April 17 order and remanded the case for further proceedings to determine if the information to be gained from interviewing third-party patients was relevant and necessary to Respondents' claims.[14]

By supplemental order dated July 7, 2009, the circuit court found that the information to be gained from such interviews was "highly relevant" and necessary to Respondents' claims,[15] prompting TLC to file a second petition for writ of certiorari on July 16, 2009. The petition was granted, and by decision dated September 21, 2009, the circuit court's orders of April 21 and July 7 were vacated. Hollman v. Woolfson, 384 S.C. 571, 683 S.E.2d 495 (2009). In no uncertain terms, the Supreme Court held that neither Respondents nor their counsel could contact third-party patients, specifically because the treatment received by third-parties was not relevant or necessary to establish any element of Respondents' actions for medical negligence or fraud,[16] nor were patient interviews necessary to establish any element of an action for violation of the Unfair Trade Practices Act. Id., 384 S.C. at 579–80, 683 S.E.2d at 499–500.[17]

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[14] Hollman v. Woolfson, Op. No. 2009-MO-025 (S.C. S. Ct. filed May 28, 2009) (R. p. 42).

[15] Supp. Order, July 7, 2009 (R. p. 45).

[16] "Whether [TLC] breached the standard of care with any patients other than [R]espondents is irrelevant to whether [TLC was] negligent in [its] treatment of [R]espondents. . . . Whether other patients were similarly treated does not prove any of the elements required to show fraudulent conduct by [TLC] toward [R]espondents." Hollman, 384 S.C. at 579–80, 683 S.E.2d at 499.

[17] The Supreme Court's decision was also based on equitable grounds: "[I]t would [have been] inequitable to allow [R]espondents to obtain non-party patient information from [TLC]

Six months later, on March 17, 2010, Respondents' counsel filed a complaint on behalf of John Hollman and "all others similarly situated" in the United States District Court for the District of South Carolina, Greenville Division, naming as defendants dozens of TLC Centers, Clinical Directors, affiliated Surgeons, and Management personnel.[18] The complaint was purportedly brought under the federal civil RICO statute,[19] and it was alleged that each defendant participated personally in a massive conspiracy to conceal unsuccessful LASIK surgeries from patients, who had also allegedly been deprived of certain indeterminable property rights. The allegations of the complaint were based almost exclusively on protected information. Some of the information pertained only to John Hollman; other information pertained to patients who were alleged to be members of the putative class, which was comprised of individuals whose confidential health information was contained in the database.[20]

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with the understanding the patients would not be contacted, only to subsequently permit [R]espondents to contact the patients." Hollman, 384 S.C. at 581, 683 S.E.2d at 500.

[18] Complaint, Hollman v. TLC LASIK Centers *et al.*, C.A. No. 6:10-CV-685 (U.S.D.C., D.S.C.) (R. p. 195) (hereinafter referred to as "the Federal Class Action"). Ultimately, on February 3, 2011, the Federal Class Action was dismissed for failure to state a claim for which relief could be granted, Fed. R. Civ. P. 12(b)(6), (Order Granting Mots. Dismiss, Feb. 3, 2011 (R. p. 76)), though the case is still pending on appeal.

[19] 18 U.S.C. § 1962(c).

[20] There is little doubt that the Federal Class Action was an attempt to circumvent the Supreme Court's decision in Hollman, as these were the same individuals who the Supreme Court had expressly prohibited Respondents' counsel from contacting just six months earlier. In fact, to quote Mr. Patrick: "[T]he federal court case is **designed to notify** these [database] patients so that they no longer suffer the irreparable harm that they are suffering. . . ." (Hr'g Tr. 61, July 26, 2010 (R. p. 413) (hereinafter referred to "July 2010 State Tr.") (emphasis added); see also July 2010 State Tr. 4–15, 22–67 (R. pp. 362–419).)

Based on the filing of the Federal Class Action and other conduct which violated the Protective Order,[21] on April 9, 2010 TLC filed a motion in circuit court for an order and rule to show cause against Respondents and their counsel. However, on May 5, 2010, before a hearing on the motion had been held, TLC entered into an oral settlement agreement of the Hollman state court case with Respondents. The agreement was eventually reduced to writing and formally executed on June 16, 2010.[22] In relevant part, the 2010 Settlement Agreement provides as follows:

> Pursuant to the terms of the Protective Order entered in the State Action on November 14, 2008, each party to the State Action receiving Confidential Health Information shall return or destroy all copies of such Confidential Health Information to the producing party in accordance with the Protective Order. At the conclusion of the State action, counsel for the Hollmans shall comply with the terms of the Protective Order as it exists or as modified by subsequent Court Order by returning all such discovery materials including all records of patients other than John Hollman and the Complex Case and Advocacy databases, and certifying the data, any hard copies, or any work-product containing names of patients and private healthcare information (hereinafter "Protected Information"): **(1) Has not been disseminated to any third parties, including clients, consultants, co-counsel, or experts; and, if it has, identifying all third parties, in what form the information was disseminated and what measures were taken to assure destruction; . . . (3) Will not be used for any purpose, except those as permitted by Court Order.**[23]

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[21] Specifically, Respondents' counsel admittedly used and disclosed protected information in furtherance of other judicial proceedings, (see Order Den. TLC's Mot. Order & Rule to Show Cause, Aug. 17, 2010 (R. p. 62) (hereinafter referred to as "the August 17 Order")), and disclosed protected information through popular media outlets, (see Miscellaneous Media Reports ((R. p. 892); Respt's' Mem. in Opp. to TLC's Mot. Barring Extrajudicial Statements, Fed. Class Action, Apr. 26, 2010 (R. p. 567)).

[22] (Redacted Settlement Agreement between John and Danielle Hollman and TLC, June 16, 2010 (R. p. 543) (hereinafter referred to as "2010 Settlement Agreement").)

[23] (2010 Settlement Agreement 9 (R. p. 551) (emphasis added).) To date, Respondents' counsel has not made the certifications required by this paragraph, nor can they.

The Settlement Agreement did not modify or abrogate any of the terms of the Protective Order, but expressly confirms that the Protective Order was intended to continue in full force and effect. Furthermore, the Settlement Agreement terminated only Respondents' claims against TLC; Respondents' claims against Dr. Woolfson and Dr. Campbell were not affected by the 2010 settlement and dismissal. Consequently, on June 24, 2010, TLC was voluntarily dismissed from the case.[24]

Following the 2010 settlement and dismissal, Hollman withdrew as the class representative in the federal case. However, Respondents' counsel did not withdraw the complaint itself. Instead, on May 14, 2010 Respondents' counsel substituted a stranger to the Protective Order—Charles Benjamin Dickerson—as the class representative and continued the litigation.[25] The allegations based on protected information were not withdrawn, despite the fact that neither Dickerson nor Respondents' counsel, who were now acting as Dickerson's counsel, had any right to use or possess protected information in furtherance of the Federal Class Action.[26]

On July 8, 2010, TLC intervened in the ongoing Hollman litigation between Respondents and Dr. Woolfson and Dr. Campbell to enforce the Protective Order's

[24] Stipulation of Dismissal as to TLC, June 21, 2010, John Hollman v. Woolfson, C.A. No. 2007–CP–23–2347 (R. p. 533); Stipulation of Dismissal as to TLC, June 21, 2010, Danielle Hollman v. Woolfson, C.A. No. 2007–CP–23–8364 (R. p. 535).

[25] The Settlement Agreement provided that "[t]he Hollmans further agree that they shall withdraw their claims and John Hollman shall forever withdraw as class representative and member of the putative class action currently pending in [federal court]. John Hollman shall either dismiss the putative class action or cause an amended complaint to be filed to substitute another person for him as class representative within twenty-one (21) days." (See 2010 Settlement Agreement 5–6 (R. pp. 547–48).) Neither the Settlement Agreement nor the Protective Order authorized Hollman, Dickerson, or Respondents' counsel to use or disclose protected information for the purposes of litigation in federal court.

[26] See Amended Complaint, Fed. Class Action (R. p. 224).

prohibition against unauthorized use and disclosure of protected information by filing a motion for an order and rule to show cause.[27] A hearing on the motion was held on July 26, 2010, at which time the court allowed TLC's intervention and took the matter of the rule to show cause under advisement.[28]

TLC also sought enforcement of the Protective Order in federal court. On June 25, 2010, Respondents' counsel filed a motion for precertification discovery for the purpose of contacting TLC's patients.[29] TLC filed a memorandum in opposition on July 9, 2010, requesting that Respondents' counsel's motion be stricken on the basis of the Protective Order, which prohibits the use and disclosure of protected information in furtherance of the Federal Class Action.[30] A hearing was held on July 28, 2010, at which time United States Magistrate Judge Hendricks held that she would defer to the state court as to matters of interpretation and enforcement.[31]

On August 17, 2010, the circuit court issued an order on TLC's motion for an order and rule to show cause holding that the Protective Order prohibited the use and disclosure of protected information only if such information was coupled with the patient's identity.[32] Under this standard, the court concluded, it was not a violation of

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[27] TLC's Mot. Order & Rule to Show Cause, July 8, 2010 (R. p. 609).

[28] (July 2010 State Tr. 5–6 (R. pp. 363–64).) The ongoing database litigation in state court from which this appeal is taken is identified as TLC Laser Eye Centers (Piedmont/Atlanta) LLC; TLC The Laser Center (Institute), Inc. In re: Hollman v. Woolfson, or simply, In re Hollman.

[29] Resp'ts Mot. Disc., June 25, 2010, Fed. Class Action (R. p. 580).

[30] TLC's Memo. Opp., July 9, 2010, Fed. Class Action (R. p. 623).

[31] Hr'g Tr. 15–17, July 28, 2010 (R. pp. 421–23) (hereinafter referred to as "July 2010 Fed. Tr."). See generally July 2010 Fed. Tr. 15–36 (R. pp. 421–42).

[32] Aug. 17 Order 3–4 (R. pp. 64–65).

the Protective Order for Respondents' counsel to bring the Federal Class Action using information based on, containing, or derived from protected information.[33] The circuit court also ostensibly held that the TLC's ability to enforce the Protective Order was limited by the 2010 Settlement Agreement, and that in any event, all of the allegedly wrongful acts complained of by TLC pre-dated the 2010 Settlement Agreement and were therefore incapable of judicial scrutiny.[34] TLC subsequently filed a motion pursuant to Rule 59, SCRCP, requesting that the circuit court alter or amend its judgment.[35] A hearing on the motion for reconsideration was held on November 23, 2010, at which time the court indicated orally that the motion would be denied and instructed Respondents' counsel to prepare an order.[36]

On December 7, 2010, Respondents' counsel filed two new actions against TLC in the Circuit Court of Greenville County on behalf of Charles Benjamin Dickerson and Michael "Chad" Luce. Initially, Dickerson's and Luce's complaints were filed as ordinary medical negligence actions. However, on February 3, 2011,

[33] Specifically, the acts prompting TLC's motion for an order and rule to show cause were: (1) on several occasions, Respondents' counsel disclosed protected information on the record in other judicial proceedings (such as TLC's bankruptcy proceedings in Delaware); (2) Respondents' counsel brought the Federal Class Action based explicitly on protected information; and (3) Respondents' counsel had admittedly disclosed significant amounts of protected information to the media. (See Miscellaneous Media Reports (R. p. 892); see also Respondents' Mem. in Opp. to TLC's Mot. Barring Extrajudicial Statements, Fed. Class Action, Apr. 26, 2010 (R. p. 567).) Item No. 1 was ostensibly excused as a violation on the basis that the disclosures were inadvertent and promptly corrected. (Aug. 17 Order 4 (R. p. 65).) Item No. 2 was found not to be a violation. (Id. 3–4 (R. pp. 64–65).) Item No. 3 was not addressed.

[34] Id. 4–6 (R. pp. 65–67).

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

[36] Hr'g Tr. 27–33, 59–62, Nov. 23, 2010 (R. pp. 458–64, 465–68) (hereinafter referred to as "Nov. 2010 Tr.").

the Federal Class Action was dismissed with prejudice. Then, on March 22, 2011, Respondents' counsel amended Dickerson's and Luce's complaints to include allegations that are substantially identical to the allegations that had been set out in the Federal Class Action, including, in particular, the allegations that had been based on protected information.[37]

On April 28, 2011, TLC filed motions to dismiss the amended Dickerson and Luce complaints.[38] Among other grounds, the motions to dismiss were based on the fact that Dickerson and Luce were both filed long after the expiration of the applicable statute of limitation and repose, which is three years and six years, respectively.[39] It is undisputed that Dickerson underwent LASIK eye surgery in 1998 and 1999; Luce's surgery also occurred in 1999. Therefore, as a matter of law, Dickerson's and Luce's claims should have expired in 2004 and 2005, respectively, fully five years before their complaints were filed.[40] However, by orders dated

[37] Compare Amended Complaint, Fed. Class Action, (R. p. 224), with Amended Complaint, Charles Benjamin "Ben" Dickerson *et ux.* v. TLC The Laser Center (Institute), Inc. *et al.*, C. A. No. 2010–CP–23–9954 (R. p. 255) (hereinafter referred to as "Dickerson"), and Amended Complaint, Michael "Chad" Luce v. TLC The Laser Center (Institute), Inc. *et al.*, C. A. No. 2010–CP–23–9956 (R. p. 274) (hereinafter referred to as "Luce").

[38] The original Dickerson and Luce complaints were filed but never served.

[39] It is undisputed that the allegations of the Dickerson and Luce claims sound in medical negligence. Therefore, the periods of limitation and repose set out at South Carolina Code § 15-3-545 apply.

[40] Langley v. Pierce, 313 S.C. 401, 403, 438 S.E.2d 242, 243 (1993) ("A statute of repose creates a substantive right in those protected to be free from liability after a legislatively-determined period of time. . . . [T]he six-year repose provision in § 15-3-545 constitutes an outer limit beyond which a medical malpractice claim is barred, regardless of whether it has or should have been discovered." (citation omitted)); see also Kerr v. Richland Mem'l Hosp., 383 S.C. 146, 678 S.E.2d 809 (2009) (citation omitted).

September 1, 2011, the court denied TLC's motions to dismiss.[41] Soon thereafter Respondents' counsel sought to file protected information under seal in both Dickerson and Luce.[42] Respondents' counsel had also served discovery that requested the disclosure of protected information.[43] TLC filed motions in Dickerson and Luce to strike the allegations based impermissibly on protected information, but these motions were denied.[44]

Meanwhile, no order had been prepared by Respondents' counsel following the November 23, 2010 hearing on TLC's motion for reconsideration. Respondents' counsel initially stated there would be some delay in preparing an order because of the need to obtain a transcript of the hearing.[45] By spring 2011, an order had still not been prepared, but a letter from Respondents' counsel dated April 20, 2011

[41] (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).) At the hearing on TLC's Motions to Dismiss, Respondents' counsel argued that the statute of repose should be disregarded due to the evidence of alleged fraud which the contents of the database as to other patients would conclusively establish and the statute of limitations was subject to equitable tolling. (Hr'g Tr. 17–18, 34–38, TLC's Mots. Dismiss, Dickerson and Luce, June 9, 2011 (R. pp. 484–85, 486–90).) Although TLC objected at the hearing to the introduction of argumentation based impermissibly on database information, the court considered the information and denied TLC's motion. Respondents' counsel also relied upon protected information in arguing against TLC's motion to dismiss the Federal Class Action. (Hr'g Tr. 73–74, 82–83, 88, 97–101, 116–18, Dec. 29, 2010, Fed. Class Action (R. pp. 470–71, 472–73, 474, 475–79, 480–82.)

[42] Respondents' counsel had already successfully sought to file redacted versions of protected information under seal in the Federal Class Action. (Order Granting Resp'ts Mot. to Seal, Sept. 1, 2010, Fed. Class Action (R. p. 69); see also Resp'ts Mot. to Seal, Fed. Class Action, Mar. 17, 2010 (R. p. 558); Hr'g Tr. 5–17, Aug. 31, 2010, Fed. Class Action (R. pp. 444–56).)

[43] (First Set Disc. Req. to TLC, Dickerson, 1, 6, 9–13 (R. pp. 806–12); First Set Disc. Req. to TLC, Luce, 1, 6, 9–13 (R. pp. 813–19).) Respondents' counsel had also sought discovery of protected information in the Federal Class Action. (First Set Disc. Req. to TLC, Fed. Class Action, 1, 6–9 (R. pp. 801–05).)

[44] Order Denying TLC's Mots. Stay / Strike, Dickerson & Luce, Mar. 9, 2012 (R. p. 170).

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

acknowledged that an order was needed.[46] On May 2, 2011, Respondents entered into a settlement agreement with Dr. Woolfson and Dr. Campbell and dismissed all remaining claims in Hollman.[47] Appellants were not a party to these settlement negotiations. By August 2011, Respondents' counsel had still not prepared an order denying TLC's motion for reconsideration as instructed at the November 23, 2010 hearing. After an exchange of correspondence, on September 16, 2011 Respondents' counsel made the unilateral decision that, due to the intervening settlement of Hollman, an order was unnecessary and would not be prepared.[48] Accordingly, on September 28, 2011, TLC filed a motion to compel Respondents' counsel to prepare an order as directed by the court, or in the alternative, requesting the court to prepare its own order.[49] A hearing on TLC's motion was held on November 21, 2011, and by

[46] (Letter from Mr. Lewis to Mr. Tate, Apr. 20, 2011 (R. p. 827).) By its own terms, the April 20 letter was sent to confirm a prior telephone conversation among counsel. Respondents' counsel has taken the position that during this phone conversation, an agreement was reached that an order arising from the November 23, 2010 hearing was unnecessary. This is unambiguously contradicted by the April 20 letter, which was authored by Respondents' counsel.

[47] Redacted Settlement Agreement between Respondents and Dr. Woolfson, April 20, 2011 (R. p. 554); Redacted Settlement Agreement between Respondents and Dr. Campbell, April 20, 2011 (R. p. 554) (together, these agreements are hereinafter referred to as "the 2011 Settlement Agreement"); see also Stipulation of Dismissal as to Dr. Woolfson and Dr. Campbell, May 3, 2011, John Hollman v. Woolfson, C.A. No. 2007–CP–23–2347 (R. p. 537); Stipulation of Dismissal as to Dr. Woolfson and Dr. Campbell, May 3, 2011, Danielle Hollman v. Woolfson, C.A. No. 2007–CP–23–8364 (R. p. 540).

[48] Letter from Mr. Boyd to Mr. Lewis, Aug. 19, 2011 (R. p. 831); Letter from Mr. Lewis to Mr. Boyd, Aug. 22, 2011 (R. p. 833); Letter from Mr. Boyd to Mr. Lewis, Aug. 25, 2011 (R. p. 835); Letter from Mr. Boyd to Mr. Fayssoux, Aug. 25, 2011 (R. p. 837); Letter from Mr. Lewis to Mr. Boyd, Sept. 6, 2011 (R. p. 839); Letter from Mr. Boyd to Mr. Lewis, Sept. 14, 2011 (R. p. 842); Letter from Mr. Lewis to Mr. Boyd, Sept. 16, 2011 (R. p. 845).

[49] TLC's Mot. Compel Resp'ts' Counsel to Prepare an Order for the Court as Directed by the Court, or Alternatively, to Request the Court to Issue an Order on TLC's Prior Mot. for Reconsideration, Sept. 28, 2011 (R. p. 650); see also TLC's Mot. Compel Resp'ts' Counsel to Observe the Protective Order of Nov. 14, 2008 and Return or Destroy Materials Produced Thereunder, Sept. 28, 2011 (R. p. 656).

order dated January 12, 2012, the motion was denied on the basis of lack of subject matter jurisdiction.[50] On February 10, 2012, TLC filed a motion for reconsideration pursuant to Rule 59, SCRCP,[51,52] which was denied by order dated March 2, 2012.[53] This appeal followed.

ARGUMENT

I. The standard of review for each question presented in this appeal is *de novo*.

This appeal involves both legal and equitable questions. When questions of law are presented on appeal, they are evaluated under the *de novo* standard of review. See, e.g., Crystal Pines Homeowners Ass'n v. Phillips, 394 S.C. 527, 533, 716 S.E.2d 682, 685 (Ct. App. 2011) (citation omitted). The existence of subject matter jurisdiction is a question of law, see, e.g., Linda Mc Co. v. Shore, 390 S.C. 543, 550, 703 S.E.2d 499, 503 (2010) (citations omitted), as are issues involving the construction of orders, see, e.g., J.C. Lynch & Son v. Cusaac, 104 S.C. 507, ___, 89 S.E. 392, 393 (1916).

[50] Order Den. TLC's Mot. Compel, Jan. 12, 2012 (R. p. 160) (hereinafter referred to as "the January 12 Order").

[51] TLC's Mot. for Reconsideration, Feb. 10, 2012 (R. p. 666).

[52] Due to a clerical error of the Greenville County Clerk of Court's Office, TLC did not receive notice that the January 12 Order had been entered until February 3, 2012. (See Letter from Mr. Boyd to Greenville County Clerk's Office, Feb. 6, 2012 (R. p. 854); Letter from Greenville County Clerk of Court's Office to Mr. Boyd, May 14, 2012 (R. p. 857).) However, after receiving the January 12 Order, TLC promptly moved for reconsideration, (see Letter from Mr. Boyd to Greenville County Clerk's Office accompanying TLC's Motion for Reconsideration, Feb. 10, 2012 (R. p. 856); Cert. of Service for TLC's Mot. for Reconsideration, Feb. 10, 2012 (R. p. 890)), which was denied on its merits, not on procedural grounds.

[53] Order Den. TLC's Mot. for Reconsideration, Mar. 2, 2012 (R. p. 168).

Likewise, when an appeal involves equitable questions, the Court may find the facts in accordance with its own view of the preponderance of the evidence. See, e.g., Lewis v. Lewis, 392 S.C. 381, 384, 709 S.E.2d 650, 651 (2011). This is also described as *de novo* review. Id., 392 S.C. at 386, 709 S.E.2d at 652. An appeal regarding the disposition of a motion for an order and rule to show cause is a question arising in the court's equitable jurisdiction. See, e.g., Ex parte Boddie, 200 S.C. 379, ___, 21 S.E.2d 4, 9 (1942).

Therefore, because the appropriate standard of review is *de novo* for each of the questions presented, the Court may decide this case without any particular deference to the decisions of the courts below. See, e.g., Wiegand v. U.S. Auto. Ass'n, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011) (citations omitted).

II. The circuit court was not divested of subject matter jurisdiction to enforce the Protective Order by the 2011 settlement and dismissal of Respondents' claims against Dr. Woolfson and Dr. Campbell.

According to the January 12 Order, "[a] dismissal with prejudice creates finality with respect to pending matters," and therefore, "[t]he dismissal of the Hollman case in May[] 2011 terminated the [c]ourt's jurisdiction to issue an [o]rder on TLC's Motion for Reconsideration. . . . [H]ad TLC wanted to reserve its right to appeal the [c]ourt's denial of its Motion for Reconsideration, a ***special release*** would have been required . . . ."[54] The circuit court also held that TLC had an "affirmative duty" to request that an order disposing of its motion be prepared prior to Hollman's dismissal. "Since no request [for an order] was made by TLC, the case was

[54] Jan. 12 Order 6 (R. p. 165) (emphasis added to the term "special release").

dismissed."[55] Accordingly, the court held it was divested of its subject matter jurisdiction with regard to Hollman, and "TLC's Motion to Compel [Respondents'] counsel to prepare an [o]rder on the Motion for Reconsideration [was] denied[,] as [was] TLC's request for the [c]ourt to prepare and enter its own [o]rder."[56]

The ultimate legal conclusion reached by the January 12 Order—that the 2011 settlement and dismissal divested the court of jurisdiction to enforce its own Protective Order—is contrary not only to South Carolina law, but also the overwhelming weight of legal authority from other jurisdictions, as is the proposition that the court was powerless to enforce the Protective Order against continuing violations. Indeed, the need for protection is just as strong now as it has ever been. It was also error to conclude that TLC had an "affirmative duty" to request the preparation of an order on the motion for reconsideration. There is no such duty at law; and even if there were, TLC requested an order and was denied. Finally, there is no such thing as a "special release" capable of affecting the court's jurisdiction. The court has not only the authority, but the obligation, to exercise its jurisdiction to enforce the Protective Order. The Orders of January 12 and March 2 represent an abdication of that responsibility, and therefore, must be reversed.

A. TLC was not involved in the 2011 settlement and dismissal of Respondents' claims against Dr. Woolfson and Dr. Campbell.

The January 12 Order holds that "a dismissal with prejudice indicates an adjudication on the merits and precludes subsequent litigation to the same extent as if

[55] Id. 5 (R. p. 164).

[56] Id. 6 (R. p. 165).

the action had been tried to a final adjudication."[57] The court found that not only had "the parties" entered into a settlement agreement, they had also dismissed Hollman with prejudice. Consequently, the court held it had been divested of jurisdiction.

In arriving at this conclusion, the court overlooked a critical issue: Which parties were actually involved in the 2011 settlement and dismissal? The implication of the January 12 Order is that "the parties" to the underlying motion—TLC and Respondents—were the settling parties.[58] But this was not the case. TLC had entered into a settlement agreement with Respondents one year earlier, in June 2010.[59] At that point, Hollman was not over. Respondents' merits-based claims were still pending against Dr. Woolfson and Dr. Campbell. TLC subsequently intervened in Hollman for the limited purpose of enforcing the Protective Order.[60] This was collateral to the ongoing merits-based litigation between Respondents and Dr. Woolfson and Dr. Campbell, which was resolved by the 2011 settlement and

[57] Id. 5 (R. p. 164) (citing in support of this proposition Jones v. City of Folly Beach, 326 S.C. 360, 366, 483 S.E.2d 770, 772 (Ct. App. 1997); W.T. Ferguson Lumber Co. v. Elliott, 171 S.C. 455, ___, 172 S.E.2d 616, 617–18 (1934); Pryor v. Newbold, 69 S.C. 426, ___, 48 S.E. 275, 276 (1904)). The authority cited in furtherance of the court's jurisdictional analysis is inapplicable. These cases deal with the circumstance where the parties to a lawsuit enter into a settlement agreement which releases all claims, and later, one of the settling parties tries to renew merits-based claims that had been released. These were not the circumstances before the court.

[58] Jan. 12 Order 5 (R. p. 164).

[59] 2010 Settlement Agreement (R. p. 543); Stipulations of Dismissal as to TLC, June 21, 2010 (R. pp. 533, 535).

[60] (See July 2010 State Tr. 14 (R. p. 372) (reflecting that the court allowed TLC's intervention and noting Respondents' counsel's consent); Aug. 17 Order 2 (R. p. 63) (confirming TLC's intervention).) Accordingly, the court recognized TLC's separate interest in enforcement of the Protective Order.

dismissal among those parties.[61] TLC was not a party to the 2011 agreement, and the agreement did not pertain to TLC's collateral litigation with Respondents to enforce the Protective Order.

B. Intervention was the only procedural mechanism available for TLC, as a third party, to seek enforcement of the Protective Order.

Although TLC was dismissed from Hollman in June 2010, almost immediately thereafter it became necessary for TLC to seek the court's enforcement of the Protective Order. However, because of the 2010 settlement and dismissal, TLC was no longer a party to the litigation. This put TLC in the unusual position of needing to enforce an order issued for its protection in a case to which it was no longer a party. Consequently, in July 2010, TLC intervened in Hollman for the limited, collateral purpose of seeking enforcement of the Protective Order, which was procedurally necessary and appropriate. Davis v. Jennings, 304 S.C. 502, 405 S.E.2d 601 (1991); see also Rule 24, SCRCP.

In Davis, the circuit court granted a motion to seal the judicial record permanently in conjunction with a voluntary dismissal among the parties. The Charlotte Observer, a third-party to the litigation, wanted to obtain records of the proceeding, which required a challenge to the protective order by which the records were sealed. The Observer's motion to intervene was denied. The Observer then appealed, and the decision was reversed. Id., 304 S.C. at 503, 405 S.E.2d at 602. The Supreme Court recognized that intervention is ordinarily relied upon by individuals seeking status as a party to the merits-based litigation. Id., 304 S.C. at 504, 405 S.E.2d at 602–03. Rule 24, SCRCP, does not expressly contemplate the circumstance

[61] 2011 Settlement Agreement (R. p. 554); Stipulations of Dismissal as to Dr. Woolfson and Dr. Campbell, May 3, 2011 (R. pp. 537, 540).

where third-parties seek to intervene for collateral issues, such as the administration of protective orders. Id., 304 S.C. at 503–04, 405 S.E.2d at 602 (citations omitted). "[H]owever, many courts [have held] that challenges to protective orders are appropriately raised through motions to intervene." Id., 304 S.C. at 503–04, 405 S.E.2d at 602 (citations omitted). This type of intervention "is provisional in nature and for the limited purpose of permitting the intervenor to file a motion, to be considered separately, requesting that access to proceedings or other matters be granted." Id., 304 S.C. at 504, 405 S.E.2d at 603 (alterations and citations omitted). Accordingly, the Supreme Court held that Rule 24 is the appropriate mechanism for third-parties to intervene in litigation for the limited purpose of addressing the administration of protective orders. 304 S.C. at 504, 405 S.E.2d at 603.

Davis is therefore controlling on this appeal. After the 2010 settlement and dismissal, the only appropriate way for TLC to seek enforcement of the Protective Order was to intervene for that limited purpose, which is exactly what TLC did.

C. The court's jurisdiction to enforce the Protective Order was not affected by the 2011 settlement and dismissal of Respondents' merits-based claims against Dr. Woolfson and Dr. Campbell.

The January 12 Order holds that the 2011 settlement and dismissal of Respondents' claims against Dr. Woolfson and Dr. Campbell caused the court to lose its jurisdiction with respect to Hollman, including the authority to issue an order on TLC's motion for reconsideration.[62] However, it is well-established that an intervenor's action survives dismissal of the underlying litigation as long as there are

[62] Jan. 12 Order 5–6 (R. pp. 164–65).

independent grounds of jurisdiction.[63] See, e.g., 7C Charles Alan Wright et al., Federal Practice & Procedure: Civil § 1920 (3d ed. 2012) (discussing intervention).[64] Furthermore, there is a wealth of authority—from this appellate court, no less—for the proposition that the court which issues a protective order has the authority to modify, enforce, or vacate the order, regardless of the dismissal or termination of the underlying litigation. See Ex parte Bland, 380 S.C. 1, 667 S.E.2d 540 (2008); Davis v. Jennings, 304 S.C. 502, 405 S.E.2d 601 (1991); see also 8A Charles Alan Wright et al., Federal Practice & Procedure: Civil § 2044.1 (3d ed. 2012) (discussing protective orders).

In Davis v. Jennings, which was discussed in the preceding section, the Charlotte Observer filed a motion to intervene as a third party for the purpose of accessing sealed litigation records in a case which had already been dismissed. 304 S.C. 502, 405 S.E.2d 601 (1991). The order dismissing the case and sealing the records had been entered on December 29, 1989. Id., 304 S.C. at 503, 405 S.E.2d at 602. The Observer's motion was denied on January 25, 1990, one month after dismissal. Id. On appeal, the circuit court's order was reversed and remanded for a disposition of the Observer's intervention on the merits. In providing this relief, the

[63] Subject matter jurisdiction describes the court's authority, constitutional or statutory, to hear and determine cases of the general class to which the proceedings in question belong. See, e.g., Theisen v. Theisen, 394 S.C. 434, 440–41, 716 S.E.2d 271, 274 (2011); Johnson v. South Carolina Dep't of Probation, Parole & Pardon Servs., 372 S.C. 279, 284, 641 S.E.2d 895, 897 (2007) (citations omitted). Since South Carolina courts are courts of general jurisdiction, S.C. Const. art. V, § 11, the need for independent jurisdictional grounds is not nearly as important as it may very well be in federal court.

[64] See also Rockwell Int'l Corp. v. United States, 549 U.S. 457, 478 (2007) (citation omitted); U.S. Steel v. EPA, 614 F.2d 843 (3d Cir. 1979); Magdoff v. Saphin Television & Appliance, Inc., 228 F.2d 214, 215 (5th Cir. 1955); Hunt Tool Co. v. Moore, Inc., 212 F.2d 685, 688 (5th Cir. 1954).

Supreme Court necessarily determined that the circuit court had continuing jurisdiction over the protective order even after dismissal. Otherwise, the Court would not have remanded the case for further proceedings. The only conclusion that may be reasonably inferred from Davis is that the circuit court—as the court which issued the protective order—had continuing jurisdiction to administer the order, which was not impaired by the termination of the underlying litigation.

The same conclusion was reached in Ex parte Bland, 380 S.C. 1, 667 S.E.2d 540 (2008). Bland started out as an action for legal malpractice between a law firm—Nexsen Pruet—and a set of former clients. In the course of litigation, plaintiffs' counsel sought confidential information from Nexsen Pruet, which was ultimately disclosed pursuant to a protective order. The protective order stated that all information disclosed under the order must be returned or destroyed upon the conclusion of litigation, and that no protected information could be used for any purpose other than the legal malpractice action. Id., 380 S.C. at 3, 667 S.E.2d at 541. Eventually, the legal malpractice case settled. However, two years after the case had been dismissed, plaintiffs' counsel filed another legal malpractice action against Nexsen Pruet. Id., 380 S.C. at 5–6, 667 S.E.2d at 542. Soon thereafter, it was discovered that plaintiffs' counsel had retained substantial amounts of protected information, which prompted Nexsen Pruet's counsel to file a motion under the caption of the first legal malpractice action to enforce the protective order. Id., 380 S.C. at 6, 667 S.E.2d at 542. The motion was heard and decided against Nexsen Pruet. Id., 380 S.C. at 7, 667 S.E.2d at 543. Nexsen Pruet appealed and the Supreme Court reversed, ultimately concluding that plaintiffs' counsel had committed a

material breach of the protective order. Id., 380 S.C. at 12, 667 S.E.2d at 545. Notably, all of the acts that constituted the breach had occurred after the termination of the underlying litigation. Despite the fact that Bland had been over for two years prior to the filing of the motion for enforcement, the Supreme Court remanded the case to the circuit court for further proceedings to determine the amount of sanctions to be imposed. Id., 380 S.C. at 14, 667 S.E.2d at 547. As with Davis, it was necessarily implied in the Supreme Court's decision that the court which issues a protective order has continuing jurisdiction to enforce the order, even if years have passed since the case through which the order was issued was resolved.[65]

The jurisdictional holdings in Davis and Bland are consistent with the conclusions reached by other jurisdictions. For example, in Public Citizen v. Liggett Group, Inc., the First Circuit held that "[d]uring the pendency of the protective order, including times after judgment, the order act[s] as an injunction, setting forth strict limitations on the parties' use of discovery materials. In support of this 'injunction,' the district court necessarily [has] the power to enforce the order, at any point while the order [is] in effect, including periods after judgment." 858 F.2d 775, 782–83 (1st Cir. 1988) ("We note that courts and commentators seem unanimous in finding such an inherent power to modify discovery-related protective orders, even after judgment,

[65] Cf. Brady v. Anders, 294 S.C. 342, 364 S.E.2d 467 (1988) (upholding the enforcement of an injunction issued in 1981, and noting that "the court which rendered the permanent injunction has the inherent power or authority to vacate or modify the injunction"); Rogers v. Citizens & S. Nat'l Bank, 220 S.C. 264, 268, 66 S.E.2d 873, 874 (1951) ("[A] court has the inherent power, necessarily an adjunct to the effectiveness of its rulings, to enforce such findings and judgments issued by it."); State v. Miller, 122 S.C. 468, ___, 115 S.E. 742, 744 (1923) ("[A] court having jurisdiction to render a judgment has inherent authority to carry such judgment into effect."); see also Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 9–10, 630 S.E.2d 464, 469 (2006) (observing that "[e]very court has supervisory power over its own records and files").

when circumstances justify." (numerous citations omitted)). Likewise, in United Nuclear Corp. v. Cranford Insurance Co., the Tenth Circuit held that "[a]s long as a protective order remains in effect, the court that entered the order retains the power to modify it, even if the underlying suit has been dismissed." 905 F.2d 1424, 1427 (10th Cir. 1990). A similar decision was reached in Marshall v. Plantz, in which the court held that its jurisdiction to administer a protective order was not disturbed by an underlying settlement, since the order was outstanding and there was still information in the hands of other parties subject to protection. 347 F. Supp. 2d 1198, 1201 (M.D. Ala. 2004) (holding "that it [the court] has the power to modify, and even vacate, its protective orders, even after final judgment[,] as long as the orders are outstanding and thus enforceable") (citations omitted). Thus, as a Maryland district judge observed, "[t]here seems to be little doubt that a protective order issued by a court, either state or federal, which on its face survives the underlying litigation, continues to have full force and effect on the parties subject to it even after final resolution of the underlying case, and the issuing court retains jurisdiction and authority to modify or revoke it." Tucker v. Ohtsu Tire & Rubber Co., 191 F.R.D. 495, 499 (D. Md. 2000) (citations omitted).[66]

[66] See, e.g., Eli Lilly & Co. v. Gottstein, 617 F.3d 186, 195 (2d Cir. 2010); United States v. Pollard, 416 F.3d 48, 59 (D.C. Cir. 2005); Gambale v. Deutsche Bank AG, 377 F.3d 133, 140–41 (2d Cir. 2004) (observing that "every court has supervisory power over its own records and files," and that this power "does not disappear because jurisdiction over the relevant controversy has been lost. . . . So long as [the record and files of a case] remain under the aegis of the court, they are superintended by the judges who have dominion over the court." (citing Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 598 (1978)) (alterations omitted); Poliquin v. Garden Way, Inc., 989 F.2d 527, 535 (1st Cir. 1993); Al Wady v. Obama, 623 F. Supp. 2d 20, 22 (D.D.C. 2009); In re Cessna 208 Series Aircraft Prods. Liab. Litig., 2009 WL 951532, *3 (D. Kan. Apr. 7, 2009) (unpublished opinion); Pac. Gas & Elec. Co. v.

Therefore, under the precedents of our appellate courts and consistent with the decisions of our sister jurisdictions, the circuit court erred when it concluded that the 2011 settlement and dismissal divested the court of its subject matter jurisdiction to enforce the Protective Order.

D. Because the court is vested with continuing jurisdiction to enforce the Protective Order, the court has an obligation to do so.

The existence of subject matter jurisdiction is fundamental to judicial authority. In the absence of jurisdiction, the court has no authority to act, and any judgments made under the auspices of its jurisdiction are void. See, e.g., Coon v. Coon, 364 S.C. 563, 566, 614 S.E.2d 616, 617 (2005) (citations omitted). However, in circumstances where subject matter jurisdiction exists, then not only does the court have the authority to exercise its jurisdiction, it has the "virtually unflagging obligation" to do so. Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817–18 (1976); see also Segars v. Parrott, 54 S.C. 1, ___, 31 S.E. 677, 696 (1898) (Buchanan, Cir. J., dissenting) ("It is as much the duty of a court to exercise jurisdiction where it is conferred as not to usurp it when it is not conferred.").

United States, 79 Fed. Cl. 744, 746 (2007); Adem v. Bush, 425 F. Supp. 2d 7, 20 (D.D.C. 2006); Zurich Am. Ins. Co. v. Rite Aid Corp., 345 F. Supp. 2d 497, 501 (E.D. Pa. 2004); Colaprico v. Sun Microsystems, Inc., 1994 WL 514029 (N.D. Cal. Aug. 22, 1994) ("A voluntary dismissal divests [the court] of jurisdiction over the underlying claims in the action and the settlement thereof, unless it is expressly retained in the final order. However, [the court] may consider collateral matters after an action has been terminated, and may assert ancillary jurisdiction 'to manage its proceedings, vindicate its authority, and effectuate its decrees.'" Id. (citing Kikkonen v. Guardian Life Ins. Co., 511 U.S. 375 (1994), and Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990)).

E. TLC did not have an "affirmative duty" to request an order denying the motion for reconsideration, and even if it did, TLC discharged the duty by requesting that an order be prepared, which was denied.

The January 12 Order explicitly holds that TLC had an "affirmative duty" to request the preparation of an order denying the motion for reconsideration, but because TLC failed to request the preparation of an order prior to the 2011 settlement and dismissal of Respondents' claims against Dr. Woolfson and Dr. Campbell, TLC waived the right to have an order entered.[67] However, there is absolutely no basis in law for the proposition that a party has an affirmative duty to ask the court for an order which disposes of a motion. To the contrary, Rule 58, SCRCP, is clear about the responsibility for the preparation of orders:

> [U]pon a decision by the court granting other relief . . . , the court shall promptly prepare the form of the judgment, or direct counsel to promptly prepare the form of judgment, to which may be attached the decision, order or opinion of the court, and after review and approval by the court, the clerk shall promptly enter it.[68]

On November 23, 2010, the court explicitly directed Respondents' counsel "to prepare a brief order . . . which would include the denial of the [Rule] 59(e) motion."[69] The court never indicated that in addition to its instructions, TLC was also required to ask Respondents' counsel to comply with the order. TLC believed—and continues to believe—that Respondents' counsel had a duty to prepare an order as instructed without any further prompting by TLC.

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[67] Jan. 12 Order 5 (R. p. 164).

[68] Rule 58(a)(2), SCRCP.

[69] Nov. 2010 Tr. 62 (R. p. 510).

In fact, TLC was actively led by Respondents' counsel to believe that an order would be prepared. On December 17, 2010, Respondents' counsel sent an email to the court—copying the undersigned counsel for TLC—which advised that "[they were] working on the proposed [o]rder regarding the [m]otion for [r]econsideration. . . . [I]n order to be accurate with regard to several references made to hearings before Judge Few, we are in the process of requesting copies of the transcripts, but we have not yet received them. Upon receipt of the transcripts, [we] will forward the proposed [o]rder to you with a copy to all parties."[70] Then, on April 20, 2011, Respondents' counsel sent a letter to the undersigned counsel for TLC, which stated as follows:

> I am writing to confirm our telephone conversation of last week in which I advised you that **we have settled Mr. Hollman's case against Dr. Woolfson and Dr. Campbell**. In light of settlement, **I had called to discuss with you whether we needed to submit a proposed [o]rder to Judge Miller regarding the [m]otion to [r]econsider** you filed several months ago. . . . **I have now received copies of the transcripts from the previous hearings and am prepared to draft a proposed [o]rder** should your client feel it to be necessary considering the fact that this case will be dismissed soon. . . . As I understand it, you were going to talk with your client about [this] and get back to me. . . .[71]

This letter is significant for three reasons. First, Respondents' counsel states that they had settled—past tense—their claims against Dr. Woolfson and Dr. Campbell. TLC is not sure how it could have discharged its "affirmative duty" to request the preparation of an order before settlement, when TLC did not learn about the settlement until after the fact. Second, the letter confirms that TLC did not have an "affirmative duty" to request the preparation of an order. To the contrary, Mr. Lewis

[70] Email from Mr. Lewis to the Honorable Edward W. Miller, Dec. 17, 2010 (R. p. 826).

[71] Letter from Mr. Lewis to Mr. Tate, Apr. 20, 2011 (R. p. 827) (emphasis added).

contacted TLC to inquire whether he could be released of his affirmative duty to prepare an order as instructed by the court. Third, the letter also confirms the parties' understanding that the settlement of Respondents' claims against Dr. Woolfson and Dr. Campbell did not relieve Respondents' counsel of their obligation to prepare an order. Indeed, Mr. Lewis acknowledges his continuing duty to prepare an order. TLC never advised Respondents' counsel that an order was not necessary. By letter dated August 25, 2011, TLC reminded Respondents' counsel that it was still waiting for an order to be prepared.[72] Then, for the first time, Respondents' counsel took the position that they had no intention of preparing an order on the motion for reconsideration.[73] This prompted TLC to file the motion to compel Respondents' counsel to prepare an order as instructed, or in the alternative, requesting the court to issue its own order.

Therefore, to the extent that the January 12 Order holds that TLC did not discharge its "affirmative duty" to request the preparation of an order, that is not supported by the record. Through its motion to compel, TLC requested the preparation of an order and was denied. However, the more fundamental issue is whether TLC had such an "affirmative duty" at all. It did not. The court directed Respondents' counsel to prepare an order, and there were no conditions attached. Respondents' counsel simply did not prepare an order as they were instructed to do,

[72] (Letter from Mr. Boyd to Mr. Fayssoux, Aug. 25, 2011 (R. p. 837); see also Letter from Mr. Boyd to Mr. Lewis, Sept. 14, 2011 (R. p. 842).) Although TLC did not respond in writing to the April 20 letter until August, this did not relieve Respondents' counsel of its obligation to prepare an order as previously instructed. It should be noted that during May, June, and July 2011, TLC was extensively involved in preparing, briefing, and arguing substantial motions to dismiss in Dickerson and Luce.

[73] Letter from Mr. Lewis to Mr. Boyd, Sept. 16, 2011 (R. p. 845).

and as they were required to do promptly under the South Carolina Rules of Civil Procedure.[74]

F. A "special release" was not necessary to preserve TLC's right to an order denying the motion for reconsideration.

According to the January 12 Order, "[t]he [Respondents] rightly argue[] that due to the pending dismissal of the remaining parties, had TLC wanted to reserve its right to appeal the [c]ourt's denial of [the] [m]otion for [r]econsideration, a ***special release*** would have been required to preserve their rights yet dismiss the other parties fully."[75] Notably, there is no authority cited in support of this assertion. The court has not identified any case, statute, or rule of civil procedure which supports the proposition that a "special release" is necessary to preserve a party's appellate rights when other, unrelated litigants enter into a settlement agreement, or that a procedural device known as a "special release" even exists.

Furthermore, the January 12 Order concludes that the court was divested of its jurisdiction over all issues in Hollman—collateral and otherwise—because Respondents' counsel was not able to draft "a release to address the protection of the settling parties."[76] With all due respect, this conclusion is preposterous. If the court's jurisdiction somehow depends on the types of agreements that counsel enter into, then the source of the court's jurisdiction is not constitutional or statutory, it is something more subjective, and that conclusion is repugnant to the rule of law. See, e.g., Cox v. Lunsford, 272 S.C. 527, 532, 252 S.E.2d 918, 921 (1979) (holding that the existence

[74] Rule 58, SCRCP.

[75] Jan. 12 Order 6 (R. p. 165) (emphasis added to the term "special release").

[76] Id.

of subject matter jurisdiction is not affected by the acts or agreements of the parties); see also Petroleum Transp., Inc. v. Pub. Serv. Comm'n, 255 S.C. 419, 179 S.E.2d 326 (1971). Any release that allows counsel to define the contours of the court's jurisdiction—especially in hotly contested matters regarding a party's compliance with a protective order—would indeed be special.

III. In furtherance of judicial economy and expediency, the Court should adjudicate the issues arising from the August 17 Order.

Even if TLC prevails in this appeal on the jurisdictional issue, if the Court simply remands the case for further proceedings without disposing of the issues arising from the August 17 Order, TLC will not be provided with complete relief. The only proceedings left in the circuit court involve the entry of an order disposing of TLC's motion for reconsideration. The court has previously denied the motion, subject to the submission of a proposed order.[77] This is a purely administrative act that could be accomplished with a Form 4. Consequently, if this case is remanded for further proceedings, the circuit court will almost certainly—and swiftly—deny TLC's motion for reconsideration, which will force TLC to file a subsequent appeal as to the issues arising under the August 17 Order exclusively. Therefore, as matters of judicial economy and expediency, the issues arising under the August 17 Order should be decided together with the jurisdictional issues in this appeal. See, e.g., Whaley v. CSX Transp., Inc., 362 S.C. 456, 481, 609 S.E.2d 286, 299 n.15 (2005).[78]

[77] Nov. 2010 Tr. 62 (R. p. 510).

[78] See also Elam v. South Carolina Dep't of Transp., 361 S.C. 9, 27, 602 S.E.2d 772, 781 (2004); State v. McMillian, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002); State v. Moore, 343 S.C. 282, 290, 540 S.E.2d 445, 449 (2000); Hollins v. Richland County Sch. Dist. One, 310 S.C. 486, 491, 427 S.E.2d 654, 656 n.2 (1993); Lizee v. South Carolina Dep't of Mental

IV. As a matter of law, the August 17 Order fundamentally misconstrues the Protective Order, resulting in substantially diminished protection.

The August 17 Order constitutes a substantial misconstruction of the Protective Order, notably through its holding that "Confidential Health Information" is limited to only health information coupled with patient identity.[79] Consistent with this misconstruction, any use of health information which is not associated with the name of a specific patient is ostensibly not subject to protection. However, as explained below, the Protective Order expressly protects more than just health information coupled with patient identity. In no uncertain terms, the Protective Order protects "Confidential Health Information," as well as information based on, containing, or derived from "Confidential Health Information," a critical aspect of the protective scheme that the August 17 Order simply disregards.

A. Specific Prohibitions Established by the Protective Order

The Protective Order applies to "all information or discovery materials produced by any party or their agents during the course of discovery in this action, all information derived therefrom, and extracts, copies, excerpts, or summaries thereof," including "Confidential Health Information."[80] Furthermore, there are two fundamental prohibitions established by the Protective Order: one prohibition pertains to the permissible uses and disclosures of protected information; the other pertains to the individuals who are authorized to receive protected information.

Health, 367 S.C. 122, 127, 623 S.E.2d 860, 863 n.1 (Ct. App. 2005); City of Aiken v. Cole, 289 S.C. 239, 243, 345 S.E.2d 760, 762 n.3 (Ct. App. 1986).

[79] Aug. 17 Order 3 (R. p. 64).

[80] Prot. Order 4 (R. p. 28).

Regarding the limitations on use and disclosure, the Protective Order expressly states that "the dissemination of Confidential Health Information [is prohibited] for any purpose other than the prosecution or defense of this litigation."[81] "This litigation" refers quite obviously to the caption under which the Protective Order was issued, which itself refers to three cases: (1) John Hollman v. Woolfson *et al.*; (2) Danielle Hollman v. Woolfson *et al.*; and (3) Carter *et ux.* v. Nimmons *et al.*[82] Later in the Order, at Paragraph 8, the Court states again, "Confidential Health Information shall be used for no purpose other than this litigation."

Regarding authorized personnel, Paragraph 7 states that "[n]o person, firm, corporation, or other entity subject to th[e] [Protective] Order shall give, show, disclose[], make available, or communicate [Confidential Health] Information to any person, firm, corporation, or other entity not expressly authorized by this Order to receive such Confidential Health Information." Paragraph 3 establishes which individuals and entities are authorized to receive Confidential Health Information. Generally, those classes of individuals and entities are: (1) court personnel; (2) the parties and their counsel; (3) the parties' experts; (4) litigation assistance personnel; and (5) individuals who are identified on a document as its author or recipient. Importantly, Paragraph 3 states that "Confidential Health Information may be disclosed only" to these express classes of individuals or entities.

[81] Id.

[82] These cases were never formally consolidated, but discovery was pursued on a consolidated basis, and the Protective Order was intended to govern the use and disclosure of protected information in each.

Obviously, the cornerstone of the specific prohibitions is the term "Confidential Health Information." The Protective Order provides a clear definition of the term, which was unreasonably misconstrued by the August 17 Order.

B. "Confidential Health Information," as Defined by the Protective Order

"[C]ourt orders and judgments are to be construed under the same rules of interpretation as those applied to other written instruments." West Virginia *ex rel.* State Farm Mut. Auto. Ins. Co. v. Bedell, 719 S.E.2d 722, 737 (W. Va. Ct. App. 2011) (citations omitted). Therefore, the threshold question is whether the order at issue is ambiguous. "Where the lower court's order is unambiguous[,] the court's intent must be discerned solely from the plain meaning of the words used," giving "force and effect to every word, if possible, in order to give the decree a consistent, effective[,] and reasonable meaning in its entirety." Id. (citations and alterations omitted). See generally 60 C.J.S., Motions & Orders § 73 (2012).

With regard to the definition of Confidential Health Information, the Protective Order is clear and unambiguous. Paragraph 2 establishes the definition of Confidential Health Information, which consists of three operative sentences. Those sentences are as follows:

> Sentence 1
>
> The term "Confidential Health Information[]" means . . . any document or information supplied that identifies an individual or subscriber in any manner and relates to the past, present, or future payment for the provision of health care to such individual or subscriber.
>
> Sentence 2
>
> The term "Confidential Health Information" specifically includes "protected health information" as such term is defined by the

> Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. parts 160 and 164, promulgated pursuant to the Health Insurance Portability and Accountability Act of 1996. See 45 C.F.R. sections 164.501 ("protected health information") and 160.103 ("individually identifiable health information").
>
> **Sentence 3**
>
> **"Confidential Health Information" includes all notes, summaries, compilations, extracts, abstracts, or oral communications that contain, are based on, or are derived from Confidential Health Information.**[83]

Together, Sentence 1 and Sentence 2 establish that "Confidential Health Information" is intended to embrace the definition of the term "individually identifiable health information," as that term is used in the context of HIPAA:[84]

> *Individually identifiable health information* is information that . . . [r]elates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and (1) [t]hat identifies the individual; or (2) [w]ith respect to which there is a reasonable basis to believe the information can be used to identify the individual.[85]

However, "Confidential Health Information" is not synonymous with "individually identifiable health information;" it is broader. Sentence 3 explains that "'Confidential Health Information' includes all notes, summaries, compilations, extracts, abstracts, or oral communications that contain, are based on, or are derived from Confidential Health Information." Therefore, quite explicitly, the term "Confidential Health Information" not only includes "individually identifiable health information," but

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[83] Prot. Order 4–5 (R. pp. 28–29) (emphasis added).

[84] The Health Insurance Portability & Accountability Act of 1996, Pub. L. 104-191 (1996) ("HIPAA"); 45 C.F.R. parts 160, 162 & 164.

[85] 45 C.F.R. § 160.103.

more broadly, information based on, containing, or derived from "individually identifiable health information."

For example, under the Protective Order, "John Doe had LASIK eye surgery on May 5, 2012" would be "Confidential Health Information," because it is health information coupled with patient identity. Furthermore, because "Confidential Health Information" includes information based on, containing, or derived from individually identifiable health information, the identity of "John Doe" is subject to protection, regardless of whether it is explicitly coupled with patient information.

C. "Confidential Health Information," as Misconstrued by the August 17 Order

The August 17 Order states that "for information to be 'confidential health information' it must include both the health information and the identity of the patient."[86] This statement of law not only misconstrues the Protective Order, it misconstrues HIPAA. HIPAA protects "individually identifiable health information," which is health information coupled with either: (1) the patient's identity; or (2) any information which provides a basis from which it is reasonably possible to identify the patient.[87] The August 17 Order disregards the second part of the definition,[88] and therefore, results in the circumstance where the Protective Order—as construed under the August 17 Order—provides even less protection than HIPAA would.

However, as explained previously, the Protective Order is explicitly broader than HIPAA. While HIPAA protects "individually identifiable health information,"

[86] Aug. 17 Order 3 (R. p. 64) (emphasis added).

[87] 45 C.F.R. § 160.103.

[88] Aug. 17 Order 4 n.2 (R. p. 65).

the Protective Order also prohibits the use and disclosure of information based on, containing, or derived therefrom. Yet the August 17 Order treats the protections established for "derivative" information as if they do not exist.

Notably, the August 17 Order appears to hold that Respondents' counsel may use or disclose information based on, containing, or derived from Confidential Health Information, if the derivative information does not itself constitute Confidential Health Information.[89] For example, if Respondents' counsel learned from protected information that "John Doe had LASIK eye surgery on May 5, 2012," counsel could not use or disclose the fact that "John Doe had LASIK eye surgery on May 5, 2012," but could use or disclose the fact that "an unnamed patient had LASIK eye surgery on May 5, 2012," and not be in violation of the Protective Order. If this is, in fact, the holding of the August 17 Order, it is irreconcilable with the plain, unambiguous language of the Protective Order and must be corrected.[90]

D. Appellants have relied to their detriment on the reasonable expectations of protection established in the Protective Order.

When the Protective Order was issued in 2008, TLC had a reasonable expectation that the parties would observe the plain, unambiguous terms of the Protective Order, and if not, that the court would enforce the Protective Order

[89] Undeniably, all of Respondents' knowledge about third parties was based on, contained in, or derived from the treatment records and database information disclosed under the Protective Order.

[90] Indeed, if the Protective Order contemplated the circumstance where third-party medical information could be used in furtherance of medical negligence litigation, inevitably, what would result is a mini-trial as to each third-party's circumstances, resulting in targeted discovery against each third-party. Therefore, regardless of whether a specific third-party's identity is disclosed with personal health information in the allegations of a pleading, his or her identity will absolutely be disclosed when that person becomes a witness at his deposition or a trial of the case.

according to its plain meaning. Since that time, almost nothing has proceeded according to TLC's reasonable expectations.

For example, the Protective Order created a reasonable expectation that the confidentiality of protected information would be secure against unauthorized uses and disclosures. However, the August 17 Order frustrated those expectations. The Protective Order created a reasonable expectation that Respondents' counsel would be prohibited from using or disclosing protected information for any purpose unrelated to Hollman. Yet Respondents' counsel has filed three additional actions against TLC—all using protected information—without any repercussion, thereby frustrating that expectation. The Protective Order created a reasonable expectation that Respondents' counsel would be prohibited from using protected information to contact third-party patients. Yet twice now, Respondents' counsel has tried to do so. The first time, they were enjoined by the Supreme Court.[91] Hollman v. Woolfson, 384 S.C. 571, 683 S.E.2d 495 (2009). The second time, Respondents' counsel evaded the Supreme Court by filing the class action in federal court, which was dismissed before Respondents' counsel could begin contacting putative class members.

TLC is frustrated by the Sisyphean ordeal which has characterized its efforts to enforce a very simple, straightforward Protective Order. However, there is some comfort to be found in Ex parte Bland, 380 S.C. 1, 667 S.E.2d 540 (Ct. App. 2008), which involved the enforcement of a protective order under similar circumstances. In Bland, the protective order at issue stated that protected information could be used only for the purposes of the immediate litigation and that use of protected information for any other purpose was prohibited. Despite these clear prohibitions, plaintiffs'

[91] But not before Respondents' counsel was able to contact at least fifteen patients.

counsel used protected information to support subsequent litigation activities. The Supreme Court held that this was impermissible.

Notably, the Supreme Court held that Nexsen Pruet had a right to rely on the expectation that the protective order would be performed by plaintiffs' counsel and enforced by the court. Id., 380 S.C. at 7–11, 667 S.E.2d at 543–45. Regardless of any other harm that may have resulted from the breach of the protective order, the failure of that expectation was material and prejudicial. Id. The Court also held that the prohibition against use for any other purpose was not merely advisory; it was mandatory. Id. The information disclosed under the protective order could not be used in subsequent litigation, even if plaintiffs' counsel and the defendant were the same individuals. Id. Additionally, the Court held that it was not acceptable for a party to decide unilaterally to violate the terms of a court order, and there was no justification or excuse whatsoever for that unilateral decision. Id.

The parallels between Bland and the circumstances of this appeal are undeniable. Respondents' counsel is using information that they are not entitled to in clear disregard of the Protective Order. Although Respondents' counsel initially made the unilateral decision to violate the Protective Order, their violations have since been absolved by the circuit court's decisions. It is TLC's hope that, also like Bland, the appellate courts will vindicate its rights under the Protective Order and restore TLC's expectations of enforcement and compliance.

V. The August 17 Order and January 12 Order contain "findings of fact" and "conclusions of law" which were never adjudicated by the court, are material to the underlying issues, and are prejudicial to TLC's interests; therefore, to the extent these Orders contain improper findings and conclusions, they must be vacated.

Rule 52, SCRCP, authorizes the circuit court to make findings of fact and conclusions of law in connection with the disposition of motions. However, the court's findings and conclusions should be supported by the record, and the record should demonstrate that the facts and conclusions were actually adjudicated. See, e.g., Abernathy v. Latham, 345 S.C. 106, 109–10, 545 S.E.2d 848, 850 (Ct. App. 2001). Findings and conclusions that are not supported by the record or which were not adjudicated by the court should be vacated.

For these reasons, many of the findings of fact set out in the August 17 Order and the January 12 Order must be vacated. Regarding the August 17 Order, the underlying hearing was held on July 26, 2010. At that time, the court took the disposition of the motion for an order and rule to show cause under advisement; the court did not make any findings of fact. Then, on August 4, 2010, the court sent an email to the parties, which is notable because of its brevity. In that email, Respondents' counsel was directed to prepare an order as follows:

> The issues presented to the Court are governed by the clear language of paragraph 15 of the Protective Order and Settlement Agreement. The return of the database is not required until the conclusion of the state's action. Thus, TLC's motion is premature.
>
> At this time, the Court decides to avoid sanctions, fees, costs and will hold these issues in abeyance until the conclusion of the case.[92]

[92] Email from the Honorable Edward W. Miller to Mr. Patrick and Mr. Lewis, Aug. 4, 2010 (R. p. 823).

Somehow, from this brief instruction, Respondents' counsel was able to extrapolate a seven-page decision, which is now known as the August 17 Order. Among other things, the August 17 Order concluded—significantly—that the Protective Order does not protect information "based on, containing, or derived from" protected information. This was not addressed at the hearing, and it was not set out in the court's email. It was a material conclusion of law that Respondents' counsel simply manufactured out of thin air. Additionally, the August 17 Order contains the following "findings of fact" and/or "conclusions of law," which are not supported by the record and were never adjudicated by the court:

Improper Findings of Fact and/or Conclusions of Law	**Accurate Statements of Fact**
TLC contends it is entitled to file this motion based on Paragraph 15 of the Settlement Agreement which permits a petition by TLC to modify or vacate the existing Protective Order filed in this litigation. (Aug. 17 Order 2 (R. p. 63).)	Fundamentally, TLC is entitled to enforce the Protective Order under the authority of that order itself, in addition to any other ground that Appellants may have, such as the Settlement Agreement.
TLC objected, claiming that the Complex Case system and Advocacy log as well as the data were prepared in anticipation of litigation and, therefore, work product. TLC did not make any other objections to discovery and this Court overruled the anticipation of litigation position. (Aug. 17 Order 3 (R. p. 64).)	TLC strenuously objected to the disclosure of protected information on the basis of relevance, necessity, attorney/client privilege, the doctrine of work product, patient confidentiality, and the interests of internal risk management practices. The court ostensibly gave due consideration to each argument, but overruled them.
At the time these matters were heard, the Court conducted an in-camera review of the database collective [sic] under Complex Case and Advocacy and concluded that it was discoverable but contained the confidential health	TLC's concerns were grounded upon respect for patient privacy, relevance, necessity, attorney/client privilege, the doctrine of work product, patient confidentiality, and the interests of internal risk management practices.

information of other patients which needed to be protected as permitted by existing HIPAA regulations. The concern, as enunciated by this Court and confirmed by the parties, was that these patients' confidential health information needed protection from dissemination to the public. This was the purpose and scope of the Protective Order. (Aug. 17 Order 3 (R. p. 64).)	TLC was also concerned that Respondents' counsel would abuse non-party health information by fomenting additional litigation, which is exactly what they have done. Consequently, the Protective Order explicitly prohibits the use and disclosure of individually identifiable health information, and information based on, containing, or derived therefrom, for any purpose other than Hollman. The Protective Order offers more protection than the August 17 Order and Respondents' counsel claim.
The conduct of the parties following imposition of this Protective Order confirms this interpretation [of "Confidential Health Information" as health information coupled with patient identity]. All litigants filed subsequent briefs and engaged in discovery depositions which extensively referred to health information contained either in the collective databases or individual medical records [of] patients without referring to the identity of those patients. (Aug. 17 Order 3–4 (R. pp. 64–65).)	This "finding of fact" is hotly contested and simply indefensible. At all relevant times, TLC has acted as though Confidential Health Information included individually identifiable health information, as well as information based on, containing, or derived therefrom. Respondents' counsel—and only Respondents' counsel—has acted as though "Confidential Health Information" has the narrowest possible meaning and provides the least amount of protection.
All of the violations claimed to have occurred pre-dated the Settlement Agreement and, in accord with the Court's further ruling, would not constitute a predicate upon which TLC could request a modification of the Protective Order. (Aug. 17 Order 4–5 (R. pp. 65–66).)	The amendment to include Charles Benjamin Dickerson as the class representative of the Federal Class Action, which was done after settlement, constitutes a continuing violation of the Protective Order. Furthermore, Dickerson and Luce, which are based on protected information, have since been filed, and also represent continuing violations.

The court never adjudicated the improper "findings of fact" and conclusions of law.

There is no evidence in the record to support these "facts" or conclusions. And most

importantly, each of these "facts" and conclusions actually represents issues that remain hotly contested between the parties. Yet because the court signed the proposed order prepared by Respondents' counsel verbatim, these material, prejudicial, and fictitious "facts" and conclusions became, and remain, a part of the August 17 Order.[93]

Regrettably, history repeated itself with the January 12 Order. The underlying hearing on the order occurred on November 21, 2011. At that time, the court stated its intention to deny TLC's motion to compel the preparation of an order and instructed Respondents' counsel to prepare a brief order denying the existence of subject matter jurisdiction.[94] The court did not make any findings of fact. Yet what resulted was an eight-page order featuring sixteen separate findings of fact. Among them:

Improper Findings of Fact and/or Conclusions of Law	**Accurate Statements of Fact**
Defendant TLC objected to the production of [the database] material on the basis of work product privilege prepared in anticipation of litigation. (Jan. 12 Order 2 (R. p. 161).)	Again, TLC objected to the disclosure of protected information on the basis of relevance, necessity, attorney/client privilege, the doctrine of work product, patient confidentiality, and the interests of internal risk management practices.
In connection with the required production, upon concerns expressed by the parties as to non-litigant patient privacy, on November 14, 2008, the Court entered a Protective Order prohibiting the dissemination of confidential health information	As explained above, TLC's concerns involved more than just non-litigant patient privacy.

[93] TLC objected to the inclusion of these findings and conclusions prior to their entry. (See Letter of Mr. Boyd to the Honorable Edward W. Miller, Aug. 10, 2010 (R. p. 824).)

[94] Hr'g Tr. 15–25, 56–69, 104–06, Nov. 21, 2011 (R. pp. 493–503, 504–17, 518–20).

contained in the databases and other material produced pursuant to the Order. (Jan. 12 Order 2 (R. p. 161).)	
In June 2010, [Respondents] and TLC entered into a settlement agreement in which TLC was dismissed as a party to the litigation. As a result, all pending motions between the parties were dismissed. The terms and conditions of the Protective Order relating to return of the confidential materials remained in effect as well as any enforcement provisions for post settlement violations of the Order. (Jan. 12 Order 3 (R. p. 162).)	Including continuing violations of the Protective Order, such as the unauthorized disclosure of protected information to Charles Benjamin Dickerson and the use and disclosure of protected information for impermissible purposes.
In July 2010, TLC filed a second Motion for Sanctions against [Respondents'] counsel which re-alleged the allegations contained in the previously dismissed Motion for Sanctions. (Jan. 12 Order 3 (R. p. 162).)	The July 2010 motion for an order and rule to show cause was based on Respondents' counsel's continuing violations of the Protective Order.
On April 13, 2011, Plaintiff's counsel, Stephen Lewis, had a telephone conversation with TLC defense counsel, Ron Tate, advising Mr. Tate the Hollman case had been settled and that the settlement would end with prejudice the Hollman case. The purpose of the call was to discuss the pending issues with TLC concerning the database, its return, and outstanding Order denying reconsideration. **Mr. Lewis advised Mr. Tate that if TLC wanted the proposed Order drafted and submitted to this Court, it should notify Plaintiff's counsel prior to the dismissal of the case with prejudice, which was imminent.** In addition, Plaintiff's counsel discussed with TLC counsel the return of certain discovery	This "finding of fact"—which was authored by Respondents' counsel—is explicitly contradicted by a letter dated April 20, 2011, which was also authored by Respondents' counsel. That letter was sent to confirm the very telephone conversation this "finding of fact" describes. In that letter, **Mr. Lewis proposes that the Hollman protected information be filed under seal in Dickerson and Luce, but expresses his understanding that there is no agreement. Furthermore, according to the letter, Mr. Lewis was informing Mr. Tate that Respondents had settled—past tense—their claims with Dr. Woolfson and Dr. Campbell. Therefore, there was no opportunity to advise Respondents' counsel prior**

materials pursuant to the aforementioned Protective Order and suggested that since additional lawsuits in the Dickerson and Luce cases had been filed, and Plaintiff would seek discovery of the identical materials, the databases should be filed under seal with this Court until any discovery issues related to the production of the databases could be addressed by this Court. **Plaintiff's counsel recited in Court that it was his understanding that TLC counsel agreed with this proposal.** (Jan. 12 Order 3–4) (R. pp. 162–63) (emphasis added).

to settlement of the need for an order. The letter further establishes that despite settlement, Respondents' counsel were aware of their pending obligation to prepare an order as instructed, which was not discharged by the settlement of claims against Dr. Woolfson and Dr. Campbell. The April 20 letter confirms Appellants' position, contradicts the challenged "finding of fact," and speaks for itself.

As with the findings of the previous order, these "facts" and conclusions were never adjudicated. There is no evidence of record to support them. In some cases, the evidence contradicts the "facts" and conclusions. The findings and conclusions also address issues that remain hotly contested in this and other litigation. Yet because the court signed the proposed order prepared by Respondents' counsel verbatim, these material, prejudicial, and fictitious facts and conclusions are now a part of the judicial record.[95]

There is nothing inherently improper about allowing the prevailing party to prepare an order for the court's signature. However, this practice should not be tolerated as an opportunity for the prevailing party to engage in "winner-take-all" revisionism, or to sandbag an opponent for an appeal or in other litigation. See, e.g., Roberts v. Ross, 344 F.2d 747, 751–52 (3d Cir. 1965) (cautioning against the adoption of findings prepared by the winning party ex post facto, as often "they are loaded down with argumentative overdetailed partisan matter[,] much of which is

[95] TLC objected to the inclusion of these findings and conclusions prior to their entry. (See Letter of Mr. Boyd to the Honorable Edward W. Miller, Dec. 6, 2011 (R. p. 847).)

likely to be of doubtful validity or even wholly without support in the record"); see also United States v. El Paso Natural Gas Co., 376 U.S. 651, 656–57 (1964) (expressing a preference for findings "drawn with the insight of a disinterested mind"); Chicopee Mfg. Corp. v. Kendall Co., 288 F.2d 719, 724–25 (4th Cir. 1961) (describing the practice of adopting findings prepared by the winning party ex post facto as a "failure" of the judicial function); 9C Charles Alan Wright et al., Federal Practice & Procedure: Civil § 2578 (3d ed. 2012) ("The practice of verbatim adoption of counsel's findings is now viewed with disfavor." (citations omitted)).[96] In any event, the Orders of August 17 and January 12 are loaded with improper findings of fact and conclusions of law, which are material and prejudicial to TLC, and which must be removed.

VI. The circuit court erred in concluding that the only acts which constituted violations of the Protective Order occurred before the 2010 settlement of Respondents' claims against TLC.

The August 17 Order erroneously concludes that "[a]ll of the violations claimed to have occurred pre-dated the [2010] Settlement Agreement and . . . would not constitute a predicate upon which TLC could request a modification of the Protective Order. . . . TLC's right to request modification must be based on events or conduct that occurs after the entry of the Settlement Agreement."[97] Although it is not clear, it appears as though the August 17 Order further erroneously concludes that TLC cannot seek enforcement of the Protective Order because "[a]ll of the violations

[96] Interestingly, courts and commentators do not appear to have addressed the other problem with allowing prevailing parties to prepare orders; that is, the party who prevails may unreasonably delay the preparation of an order, or not prepare an order at all, thereby frustrating his opponent's attempt to appeal.

[97] Aug. 17 Order 4–5, 6 (R. pp. 65–66, 67).

. . . pre-dated the [2010] Settlement Agreement." These are not accurate statements or conclusions. Respondents' counsel did not have the authority to use or disclose protected information in furtherance of the Federal Class Action, and did not withdraw the offending allegations after the 2010 settlement. This was a continuing violation not resolved by settlement. Respondents' counsel did not have the authority to disclose protected information to Charles Benjamin Dickerson, which (presumably) did not occur until after the 2010 settlement. This is also a continuing violation not resolved by settlement. More recently, Respondents' counsel has used protected information to file the Dickerson and Luce medical negligence lawsuits. Furthermore, they have used protected information in furtherance of discovery and dispositive motions. Consequently, Respondents' counsel's conduct which violates the Protective Order is eminently capable of judicial scrutiny.

VII. The circuit court erred in concluding that the 2010 Settlement Agreement limited TLC's ability to enforce the Protective Order.

The August 17 Order seems to suggest that TLC waived its ability to enforce the Protective Order by entering into the 2010 Settlement Agreement with Respondents.[98] If this were the court's conclusion, it is not supported by the record. As explained previously, the authority to enforce protective orders ordinarily survives for as long as the need for protection persists. TLC did not waive any rights to enforce the Protective Order, and there are no provisions in the 2010 Settlement Agreement to suggest that TLC did so. To the contrary, the 2010 Settlement Agreement expressly contemplates the survival of the Protective Order and establishes additional remedies arising under the Settlement Agreement, which are

[98] Id. 6–7 (R. pp. 67–68).

consistent with those authorized by the Protective Order. There is nothing in the 2010 Settlement Agreement that impairs any right or ability that TLC may have to enforce the Protective Order. To the extent that the August 17 Order holds otherwise, it is incorrect.

CONCLUSION

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

Respectfully submitted,

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Greenville, SC
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;
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.

CERTIFICATE OF COUNSEL

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

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PROOF OF SERVICE

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