

ORIGINAL

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Appellate Case No. 2012-210888

RECEIVED

NOV 27 2012

SC Court of Appeals

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

In re: John Hollman Respondent

v.

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

In re: Danielle Hollman Respondent,

v.

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

SUPPLEMENTAL RECORD ON APPEAL

November 26, 2012

Greenville, South Carolina

Douglas F. Patrick, S.C. Bar #04358
Stephen R.H. Lewis, S.C. Bar #12947
COVINGTON, PATRICK, HAGINS,
STERN & LEWIS, P.A.

P.O. Box 2343

Greenville, SC 29602

(864) 242-9000 Phone

(864) 233-9777 Fax

dpatrik@covpatlaw.com

slewis@covpatlaw.com

ATTORNEYS FOR THE RESPONDENTS

INDEX

I. PLEADINGS

1. Complaint, *Hollman v. Woolfson, et al.*, C.A. No. 2006-CP-40-027 919
2. Amended Complaint, *Hollman v. Woolfson, et al.*, C.A. No. 2007-CP-23-2347 926

II. TRANSCRIPTS

1. Transcript of Proceedings of June 30, 2008 936
2. Transcript of Proceedings of November 21, 2011 939

III. OTHER MATERIALS

A. Motions and Memoranda

1. Appellants' Notice of Motion and Motion for Order and Rule to Show Cause dated April 13, 2010, *Hollman v. Woolfson, et al.*, C.A. No. 2007-CP-23-2347 950
2. Respondents' Motion for a Protective Order Due to Spoliation of Evidence and Memorandum in Support filed April 20, 2010, *Hollman v. Woolfson, et al.*, C.A. No. 2007-CP-23-2347 961
3. Appellants' Notice of Motion and Motion for Order and Rule to Show Cause, Motion to Modify Protective Order, and Motion for Sanctions filed April 13, 2010, *Hollman v. Woolfson, et al.*, C.A. No. 2007-CP-23-2347 972
4. Respondents' Motion for a Protective Order Due to Spoliation of Evidence and Memorandum in Support filed July 2, 2010, *Hollman v. Woolfson, et al.*, C.A. No. 2007-CP-23-2347 986
5. Respondents' Response to Appellants' Notice of Motion and Motion for Order and Rule to Show Cause, Motion to Modify Protective Order, and Motion for Sanctions filed July 22, 2010, *Hollman v. Woolfson, et al.*, C.A. No. 2007-CP-23-2347 997

6.	Appellants' Motion to Dismiss filed April 28, 2011, <u>Luce v. TLC, et al.</u> , C.A. No. 2010-CP-23-9956	1012
----	--	------

7.	Appellants' Motion to Dismiss filed April 28, 2011, <u>Dickerson v. TLC, et al.</u> , C.A. No. 2010-CP-23-9954	1015
----	---	------

B. Discovery Requests and Responses

1.	Respondents' Supplemental Discovery Requests dated March 10, 2008, <u>Hollman v. Woolfson, et al.</u> , C.A. No. 2007-CP-23-2347	1019
----	--	------

C. Other

1.	TLC/Campbell Medical Record of John Hollman dated 06/26/2003	1032
2.	Excerpts from the deposition testimony of Allan Webb, of 09/23/2009.....	1033
3.	Excerpts from the deposition testimony of John Potter, of 09/24/2009	1037

IV. CERTIFICATE OF COUNSEL

1.	Certificate	1059
----	-------------------	------

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

John Hollman,

Plaintiff,

vs.

Dr. Jonathan Woolfson, individually;
Woolfson Eye Institute – Clemson,
LLC; Woolfson Eye Institute –
Columbia, LLC; Woolfson Eye
Institute – Greenville; LLC; Woolfson
Eye Institute – Atlanta, LLC,
Woolfson Eye Institute – Gwinnett,
LLC; Woolfson Eye Institute – South
Atlanta, LLC; Woolfson Eye Institute
– LASIK Espanol, LLC; Woolfson
Enterprises, Inc.; TLC Laser Eye
Centers (Piedmont/ Atlanta) LLC;
TLC The Laser Center (Institute), Inc.;
Jonathan Woolfson, M.D., P.C.;

Defendant.

) IN THE COURT OF COMMON PLEAS

) FIFTH JUDICIAL CIRCUIT

) CIVIL ACTION NO.: 06-CP-40-____

) COMPLAINT

) (Medical Malpractice)

FILED
JAN 11 2007
CLERK OF COURT
FIFTH JUDICIAL CIRCUIT
SOUTH CAROLINA

The Plaintiff, John Hollman, by and through his counsel, Vaux & Marscher, P.A., complaining of the Defendants respectfully alleges and shows unto this Honorable Court as follows:

JURISDICTIONAL FACTS

1. At all material times, Plaintiff John Hollman was a resident and citizen of Beaufort County, South Carolina.
2. At all material times, Defendant Dr. Jonathan Woolfson (hereinafter Dr. Woolfson) was licensed to practice medicine in the State of South Carolina and the State of Georgia; and practiced medicine in Greenville, South Carolina, and Atlanta, Georgia.
3. The Defendant TLC Laser Eye Centers (Piedmont/ Atlanta) LLC is, upon information and belief, a corporation licensed to do business in the state of South

Carolina with its principal place of business at 30 Patewood Dr., Building 1, Suite 140, Greenville, South Carolina, 29615.

4. The Defendant Woolfson Eye Institute – Clemson, LLC is, upon information and belief, a corporation licensed to do business in the state of South Carolina with its principal place of business in South Carolina.

5. The Defendant Woolfson Eye Institute – Columbia, LLC is, upon information and belief, a corporation licensed to do business in the state of South Carolina with its principal place of business in South Carolina.

6. The Defendant Woolfson Eye Institute – Greenville, LLC is, upon information and belief, a corporation licensed to do business in the state of South Carolina with its principal place of business in South Carolina.

7. The Defendant Woolfson Eye Institute – Atlanta, LLC is, upon information and belief, a corporation licensed to do business in the state of Georgia with its principal place of business in Georgia.

8. The Defendant Woolfson Eye Institute – Gwinnett, LLC is, upon information and belief, a corporation licensed to do business in the state of Georgia with its principal place of business in Georgia.

9. The Defendant Woolfson Eye Institute – South Atlanta, LLC is, upon information and belief, a corporation licensed to do business in the state of Georgia with its principal place of business in Georgia.

10. The Defendant Woolfson Eye Institute – LASIK Espanol, LLC is, upon information and belief, a corporation licensed to do business in the state of Georgia with its principal place of business in Georgia.

11. The Defendant Woolfson Enterprises, Inc. is, upon information and belief, a corporation licensed to do business in the state of Georgia with its principal place of business at Atlanta, GA.

12. The Defendant TLC The Laser Center (Institute), Inc. is, upon information and belief, a corporation licensed to do business in the State of Delaware and maintains its principal place of business in Delaware.

13. The Defendant Jonathan Woolfson, M.D., P.C., is, upon information and belief, a corporation licensed to do business in the state of Georgia with its principal place of business at Atlanta, GA.

14. This Court has jurisdiction over all parties and controversies in this action.

FOR A FIRST CAUSE OF ACTION
(Gross Negligence/ Negligence)

15. Each and every allegation set forth above is fully incorporated herein.

16. Upon information and belief, the named Defendants are related and interconnected to the point that the Plaintiff does not know which the function each entity performed, or which entity was responsible for his medical treatment, or the capacity each entity served in connection with his care. Thus, all Defendants will be referred to collectively as "Defendants," unless otherwise designated.

17. At all material times, Defendants held themselves out as having expertise on the delivery of ophthalmological services and the performance of eye surgeries including LASIK (laser-in-situ keratomileusis) eye surgery.

18. At all material times, Plaintiff was a patient of Dr. Woolfson, and in a patient physician relationship with this particular Defendant.

19. In on or about the month of June, 1999, the Plaintiff was referred to the Defendants for eye problems.

20. On or about July 8, 1999, Dr. Woolfson performed eye surgery on Plaintiff. This surgery was performed at Dr. Woolfson's office located in Greenville, South Carolina.

21. After the July 8, 1999 surgery, due to continuing problems that Plaintiff suffered as a result of the LASIK surgery, the Defendants recommended that an "enhancement" be performed on the Plaintiff.

22. The Defendants told Plaintiff that he needed further "enhancements," when in fact the "enhancements" that were to be performed were further surgeries to attempt to correct the previously unsuccessful LASIK surgery.

23. On or about November 22, 1999, Dr. Woolfson performed a second eye surgery on Plaintiff. This surgery was performed at Dr. Woolfson's office located in Greenville, South Carolina.

24. After the November 22, 1999 surgery, due to continuing problems that Plaintiff suffered as a result of the LASIK surgery, the Defendants recommended that another "enhancement" be performed on the Plaintiff.

25. On or about June 26, 2001, Dr. Woolfson performed a third eye surgery on the Plaintiff. This surgery was performed at the Dr. Woolfson's office located in Atlanta, Georgia.

26. After the June 26, 2001 eye surgery, the Plaintiff continued to suffer from complications as a result of his multiple eye surgeries.

27. The Defendants informed Plaintiff that he would not longer be a candidate for eye surgery, and that the operations had created permanent damage, on October 13, 2003.

28. As a result of the negligent conduct of the Defendants in connection with his medical treatment and these surgeries, the Plaintiff has developed ectasia, and did not learn of this condition until May of 2006.

29. At the times of Plaintiff's surgery, Defendants had a duty to provide reasonable medical care, which duty Defendants breached in one or more of the following particulars:

- a) By failing to properly evaluate the Plaintiff's eye and its condition before performing each and all of the surgeries;

- a) By performing surgery on the Plaintiff's eye when the Plaintiff was not a proper candidate for the surgeries performed on the Plaintiff;

- b) By performing surgeries which should not have been performed because of the Plaintiff's irregular shape of his cornea;

- c) By performing surgeries which should not have been performed because of the Plaintiff's exceptionally thin cornea;

- d) In failing to obtain informed consent from Plaintiff to perform the surgeries by:

- i) not accurately describing the surgical procedures Plaintiff was to undergo;

- ii) not advising Plaintiff that he faced a significant risk of visual problems as a result of the surgeries; including halos, double vision, ghosting, smearing, and starbursts;

iii) not advising the Plaintiff that he faced a significant risk of developing ectasia;

iv) not advising Plaintiff that the surgical procedures Plaintiff was to undergo were contraindicated because of the shape of the Plaintiff's eyes;

v) not advising Plaintiff that the surgical procedures Plaintiff was to undergo were contraindicated because of the Plaintiff's thin cornea;

vi) not advising the Plaintiff of the risks of multiple LASIK surgeries.

30. The Defendants' care and treatment did not conform with the applicable standard of care required of such professionals.

FOR A SECOND CAUSE OF ACTION
(Lack of Informed Consent/ Battery)

31. Each and every allegation set forth above is fully incorporated herein.

32. The Defendants did not properly explain the potential dangers of each surgery to the Plaintiff.

33. The Plaintiff would not have consented to the Defendants' touching and surgeries if he had been properly informed of the risks inherent to such surgeries.

34. The Plaintiff's damages as will be later set forth as a result of these surgeries.

35. As a direct and proximate result of Defendants' negligence, gross negligence, and/or battery Plaintiff was foreseeably injured and he has suffered physical and mental pain, permanent loss of visual acuity and contrast, ghosting, double vision, smearing, starburst, and worsening condition of ectasia. As a further result, Plaintiff has had to undergo treatment for the loss of his vision, acuity, including repeated trips to eye specialists, repeated trials of corrective lenses and contact lenses, and a trip to Germany to undergo a medical procedure known as "riboflavin-ultraviolet type A rays induced cross-linking of corneal collagen." As a further result of the Defendants' negligence, Plaintiff has suffered interference with his daily activities and employment as a schoolteacher and athletic sports coach.

36. As a direct and proximate result of the Defendants' negligence, gross negligence, and/or battery, the Plaintiff has incurred medical expenses and will incur medical expenses in the future.

37. As a direct and proximate result of the Defendants' negligence, gross negligence,

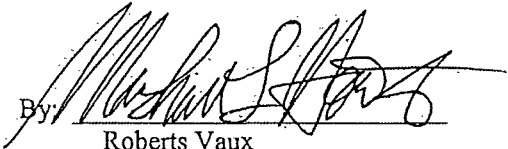
and/or battery, the Plaintiff was unable to work for a substantial time period and has lost income and diminished earning capacity. The Plaintiff will lose future income earning capacity because of his condition.

38. The Plaintiff accordingly is entitled to recover compensatory damages from the Defendants in an amount to be proven at trial.

39. The Plaintiff is also entitled to recover punitive damages from the Defendants in an amount to be proven at trial.

WHEREFORE, the Plaintiff prays for judgment against the Defendants in a fair and reasonable amount, for actual damages and is further entitled to punitive damages in addition thereto for his losses, for the costs and disbursements of this action, and for such further and other relief as this Honorable Court may deem just and equitable, all in an amount to be determined by a jury.

VAUX & MARSCHER, P.A.

By: 

Roberts Vaux
Marshall L. Horton
Attorneys for John Hollman
1251 May River Road
Bluffton, SC 29910
(843) 757-2888

Bluffton, South Carolina
October __, 2006

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

AFFIDAVIT OF ROBERTS VAUX

John Hollman)

vs.)

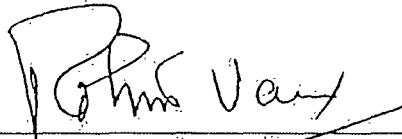
Dr. Jonathan Woolfson, et al.)

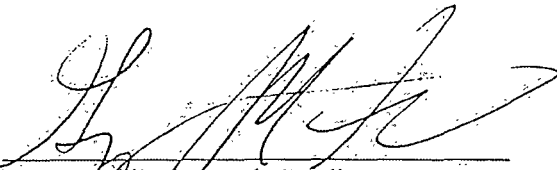
Personally appeared before me Roberts Vaux, the undersigned, who, upon being duly sworn, states and affirms as follows:

1. I am an attorney licensed to practice law in the State of South Carolina;
2. My good faith analysis of the cause of action which John Hollman is filing against the various named Defendants contains a statute of limitations which will expire within 10 days from the date of filing of the attached complaint; and
3. As a result of this potential expiration of the statute of limitations, I have not filed an affidavit of an expert witness with the filing of this action.

FURTHER THE AFFIANT SAYETH NOT

Witness my hand and official seal
the 12th day of October, 2006


ROBERTS VAUX


Notary Public for South Carolina

My commission expires: 9/20/16

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
C.A. No. 2007-CP-23-2347

John Hollman,

Plaintiff,

vs.

Dr. Jonathan Woolfson, individually;
TLC Laser Eye Centers (Piedmont/Atlanta)
LLC; TLC The Laser Center (Institute), Inc.;
Dr. Michael A. Campbell, individually;
Optical Solutions, Inc.; and Optical Solutions
of Bluffton, LLC,

Defendants.

AMENDED COMPLAINT

(Jury Trial Demanded)

FILED CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSHER
2008 FEB 13 P 2:03

The Plaintiff, John Hollman, by and through his counsel, Covington, Patrick, Hagins, Stern & Lewis, P.A., complaining of the Defendants respectfully alleges and shows unto this Honorable Court as follows:

JURISDICTIONAL FACTS

1. At all times relevant hereto, Plaintiff John Hollman was a resident and citizen of Beaufort County, South Carolina.

2. At all times relevant hereto, Defendant Dr. Jonathan Woolfson (hereinafter "Dr. Woolfson") was licensed to practice medicine in the State of South Carolina and the State of Georgia, and practiced medicine in Greenville, South Carolina, and Atlanta, Georgia.

3. The Defendant TLC Laser Eye Centers (Piedmont/Atlanta) LLC (hereinafter "TLC Eye Centers") is, upon information and belief, a limited liability company authorized to do business in the state of South Carolina, and at all times relevant hereto, was doing business at 30 Patewood Dr., Building 1, Suite 140, Greenville, South Carolina, 29615.

4. The Defendant TLC The Laser Center (Institute), Inc. (hereinafter "TLC Institute") is, upon information and belief, a corporation organized and existing under the laws of the State of Delaware and maintains its principal place of business in St. Louis, Missouri, and maintains an office for the purpose of transacting business in Greenville, South Carolina, at 30 Patewood Drive, Building 1, Suite 1400, Greenville, South Carolina 29615.

5. The Defendant Dr. Michael A. Campbell (hereinafter "Campbell") at all times relevant hereto was licensed to practice medicine in the State of South Carolina and practiced medicine in Beaufort County, South Carolina.

6. The Defendant Optical Solutions, Inc. is, upon information and belief, a corporation organized and existing under the laws of the State of South Carolina and is transacting business in the County of Beaufort, South Carolina.

7. The Defendant Optical Solutions of Bluffton, LLC is, upon information and belief, a limited liability company organized and existing under the laws of the State of South Carolina and is transacting business in the County of Beaufort, South Carolina.

8. This Court has jurisdiction over all parties and controversies in this action.

FOR A FIRST CAUSE OF ACTION AS TO ALL DEFENDANTS
(Gross Negligence/Negligence)

9. Each and every allegation set forth above is fully incorporated herein.

10. At all material times, Defendants held themselves out as having expertise on the delivery of optometry and/or ophthalmological services, including, but not limited to, enhancement and/or correction of eyesight problems or difficulties, and the performance of eye surgeries including LASIK (laser-in-situ keratomileusis) eye surgery.

11. At all material times, Plaintiff was a patient of the Defendants, and in a patient physician relationship with the Defendants.

12. On or about the month of June, 1999, the Plaintiff saw Defendant Campbell, Optical Solutions, Inc., and Optical Solutions of Bluffton, LLC (hereinafter collectively referred to as "Defendant Campbell"), who assumed care of the Plaintiff and, thereafter, recommended Plaintiff undergo LASIK surgery. The Plaintiff was referred by Defendant Campbell to Defendant Woolfson and the TLC Defendants for LASIK surgery. At this time, the Defendants also assumed the care of Plaintiff.

13. On or about July 8, 1999, Dr. Woolfson and TLC Defendants performed eye surgery on Plaintiff. This surgery was performed at Dr. Woolfson's office located in Greenville, South Carolina.

14. After the July 8, 1999 surgery, due to continuing problems that Plaintiff suffered as a result of the LASIK surgery, the Defendants recommended that an "enhancement" be performed on the Plaintiff.

15. On or about November 22, 1999, Dr. Woolfson performed a second eye surgery on Plaintiff. This surgery was performed at Dr. Woolfson's office located in Greenville, South Carolina.

16. After the November 22, 1999 surgery, due to continuing problems that Plaintiff suffered as a result of the LASIK surgery, the Defendants recommended that another "enhancement" be performed on the Plaintiff.

17. On or about June 26, 2001, Dr. Woolfson performed a third eye surgery on the Plaintiff. This surgery was performed at the Dr. Woolfson's office located in Atlanta, Georgia.

18. After the June 26, 2001, eye surgery, the Plaintiff's vision and corneal health declined dramatically, and Plaintiff continued to suffer from complications as a result of his eye surgeries, both individually and jointly.

19. After June 26, 2001, the Defendants continued to treat the plaintiff and advised him on a course of care which included further enhancements.

20. That after June 26, 2001, the Defendants knew or reasonably should have known that the Plaintiff's vision and corneal health was adversely affected by their improper and/or unwarranted surgical procedures and, in addition, separately and jointly, either knew or reasonably should have known that the Plaintiff had contracted visual acuity and instability problems.

21. As a result of the negligent conduct of the Defendants in connection with the medical treatment and these surgeries, the Plaintiff has developed worsening and unstable visual acuity and ectasia but was not informed of these facts by Defendants and did not learn of those facts and condition until May of 2006.

22. At the time of Plaintiff's surgeries, Defendants, jointly and severally, had a duty to provide reasonable medical care, which duty Defendants breached in one or more of the following particulars:

- a) By holding themselves out as having expertise on the delivery of services and treatment of eye and eyesight problems, ophthalmological services and the performance of eye surgeries, including LASIK eye surgery, when, in fact, they are not so qualified;
- b) By recommending the Plaintiff undergo LASIK eye surgeries on July 8, 1999, when the Defendants knew or should have known such surgery was contraindicated.

- c) By recommending the Plaintiff undergo LASIK eye surgeries on November 22, 1999, when the Defendants knew or should have known such surgery was contraindicated.
- d) By recommending the Plaintiff undergo LASIK eye surgeries on June 26, 2001, when the Defendants knew or should have known such surgery was contraindicated.
- e) By failing to properly evaluate the Plaintiff's eye and its condition before recommending and performing each and all of the surgeries;
- f) By performing such surgery on the Plaintiff's eye when the Plaintiff was not a proper candidate for the surgeries performed on the Plaintiff;
- g) By performing surgeries which should not have been performed because of the Plaintiff's irregular shape of his cornea;
- h) By failing to engage in reasonable medical care and treatment following the surgery of July 8, 1999;
- i) By failing to engage in reasonable medical care and treatment following the surgery of November 22, 1999;
- j) By failing to engage in reasonable medical care and treatment following the surgery of June 26, 2001;
- k) By performing surgeries which were contraindicated as a result of the condition of Plaintiff's corneas prior to and following each surgery;
- l) By performing surgeries which should not have been performed because of the Plaintiff's exceptionally thin cornea;
- m) In failing to obtain informed consent from Plaintiff to perform the surgeries by;

- i) not accurately describing the surgical procedures Plaintiff was to undergo;
- ii) not properly advising the Plaintiff of the conditions or results caused by each surgery;
- iii) not recommending appropriate medical treatment following each surgery;
- iv) not advising Plaintiff that he faced a significant risk of visual problems as a result of the surgeries, including halos, double vision, ghosting, smearing, and starbursts;
- v) not advising the Plaintiff that he faced a significant risk of developing ectasia;
- vi) not advising Plaintiff that the surgical procedures Plaintiff was to undergo were contraindicated because of the shape of the Plaintiff's eyes;
- vii) not advising Plaintiff that the surgical procedures Plaintiff was to undergo were contraindicated because of the Plaintiff's thin cornea;
- viii) not advising the Plaintiff of the risks of multiple LASIK surgeries.

23. The Defendants' care and treatment, jointly and severally, did not conform with the applicable standard of care required of such professionals.

FOR A SECOND CAUSE OF ACTION AS TO ALL DEFENDANTS
(Lack of Informed Consent/Battery)

24. Each and every allegation set forth above is fully incorporated herein.

25. The Defendants, jointly and severally, did not properly explain the potential dangers of each surgery to the Plaintiff.

26. The Plaintiff would not have consented to the Defendants' touching and surgeries if he had been properly informed of the risks inherent to such surgeries.

FOR A THIRD CAUSE OF ACTION
(Breach of Contract)

27. Each and every allegation set forth above is fully incorporated herein.

28. The Defendants entered into a contract with Plaintiff, referred to as the "TLC Lifetime Commitment" ("Commitment"). The Plaintiff was eligible for, and qualified for, the TLC Lifetime Commitment. Pursuant to the terms of the Commitment, TLC would:

...stand behind your vision results for life because we have confidence in our surgeons and in our stability of our patient's long-term results. Our intention is to help you maintain the best possible vision throughout your life.

29. In addition to the written terms of the Commitment, the Defendants, on July 28, 2003, orally informed Plaintiff that they would "stand behind him" and that "new technology may help him in the future".

30. In addition, on November 6, 2003, the Plaintiff was informed by the Defendants that TLC would "pay surgical fees".

31. The Defendants have breached both the written Commitment contract and the verbal contract made to Plaintiff as outlined above by failing to stand behind his vision results for the lifetime of the Plaintiff.

32. Upon information and belief, the costs for the treatment of Plaintiff's condition, including corneal transplants and lifetime follow-up care will be extremely expensive and costly to Plaintiff.

33. By the Defendants' breach of the above-referenced contract, Plaintiff is damaged, with such damage being proximately being caused by the Defendants' breach.

FOR A FOURTH CAUSE OF ACTION AS TO ALL DEFENDANTS
(Fraud)

34. Each and every allegation set forth above is fully incorporated herein.

35. Following the first surgery of July 8, 1999, the Defendants made representations to Plaintiff regarding the health of his eyes, specifically, his corneas, and that additional surgeries, referred to as "enhancements", would be beneficial to him and remedy any vision problems he was experiencing.

36. Following the second surgery on November 22, 1999, Defendants again made representations to the Plaintiff that his eyes, including his corneas, were healthy and that another "enhancement" would resolve any problems he was having with his vision.

37. Following the third surgery on June 26, 2001, Defendants made representations to the Plaintiff that despite the problems he was continuing to have with his vision, there was treatment available to remedy his vision problems. In addition, the Defendants represented to Plaintiff that they would "stand behind" him and provide lifetime care for his vision. Further, Defendants represented to Plaintiff that his vision problems were the result of conditions which were treatable and able to be corrected or reversed or circumstances other than a corneal condition known as "ectasia". Lastly, Defendants represented to Plaintiff that there was new technology which would soon be available to remedy his vision problems.

38. All of the above representations made by the Defendants to the Plaintiff were material and false. In addition, the Defendants either knew of the falsity of the representations or recklessly disregarded the truth or falsity of the representations. Further, the Defendants intended that the representations be acted or relied upon by the Plaintiff.

39. The Plaintiff was ignorant of the falsity of the representations, relied upon the truth of the representations, and had a right to rely on the truth of the representations.

40. As a result of the false, material representations made by the Defendants to the Plaintiff, the Plaintiff has been injured and damaged, with such damage being proximately caused by the Defendants' fraudulent misrepresentations.

DAMAGES

41. Each and every allegation set forth above is fully incorporated herein.

42. As a direct and proximate result of Defendants' conduct as described herein, both jointly and severally, the Plaintiff was injured and has suffered physical and mental pain, permanent loss of visual acuity and contrast, ghosting, double vision, smearing, starburst, and worsening the ectasia condition. As a further result, Plaintiff has had to undergo treatment for the loss of his visual acuity, including repeated trips to eye specialists, repeated trials of corrective lenses and contact lenses, and a trip to Germany to undergo a medical procedure known as "riboflavin-ultraviolet type A rays induced cross-linking of corneal collagen." As a further result of the Defendants' negligence, Plaintiff has suffered interference with his daily activities and employment as a schoolteacher and athletic sports coach.

43. As a further direct and proximate result of the Defendants' conduct, the Plaintiff has incurred medical expenses and will incur medical expenses in the future.

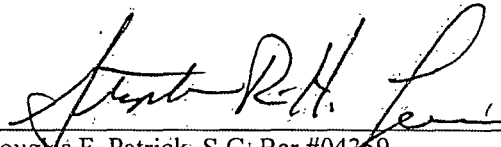
44. As a further direct and proximate result of the Defendants' conduct, the Plaintiff was unable to work for a substantial time period and has lost income and diminished earning capacity. The Plaintiff will lose future income earning capacity because of his condition.

44. The Plaintiff accordingly is entitled to recover compensatory damages from the Defendants in an amount to be proven at trial.

45. The Plaintiff is also entitled to recover punitive damages from the Defendants in an amount to be proven at trial.

WHEREFORE, the Plaintiff prays for judgment against the Defendants in a fair and reasonable amount, for actual damages and is further entitled to punitive damages in addition thereto for his losses, for the costs and disbursements of this action, and for such further and other relief as this Honorable Court may deem just and equitable, all in an amount to be determined by a jury.

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



Douglas F. Patrick, S.C. Bar #04359
Stephen R.H. Lewis, I.D. #012947
P.O. Box 2343
Greenville, SC 29602
(864) 242-9000

ATTORNEYS FOR THE PLAINTIFF

February 13, 2008

Greenville, South Carolina

1 conceal it.

2 **MR. LEWIS:** That's right. And because the
3 preexisting condition, keratoconus, they never
4 should have --

5 **THE COURT:** All right. Now, explain to me
6 how it is that this advocacy group and this
7 other, uh, sources of discovery relate to those
8 claims?

9 **MR. LEWIS:** Your Honor, again, the advocacy
10 group, his case was designated to be in the
11 advocacy group. We found that through an email
12 that I can show you that says, in fact, let me
13 see -- uh, --

14 **THE COURT:** Okay. All right. There is no
15 -- this not a situation where there's any type of
16 peer review privilege available to the Defendant,
17 is it?

18 **MR. TATE:** I don't believe so, Your Honor.

19 **MR. LEWIS:** Your Honor, they have alleged
20 peer review in one of their responses.

21 **MR. TATE:** In one of our responses that
22 doesn't --

23 **THE COURT:** So the only -- the only -- the
24 only reason -- there is some discussion within
25 this entity called advocacy group of the

1 Plaintiff, how and when the Plaintiff was first
2 considered for inclusion, and we haven't gotten
3 any of that. It's my understanding.

4 THE COURT: All of those are separate
5 categories of 30(b)(6) designation?

6 MR. LEWIS: Yes, sir. Under an advocacy
7 group category, yes, sir.

8 MR. TATE: That's under issue number 1.
9 We're simply saying that we can't tell you the
10 criteria for --

11 THE COURT: Well, wait a minute now. If Mr.
12 Hollman was included in the advocacy group in
13 what, some time before 2001 --

14 MR. TATE: Actually --

15 THE COURT: Let me finish my question.

16 MR. TATE: Yes, sir.

17 THE COURT: For purposes, or I should say,
18 in anticipation of litigation, then doesn't that,
19 uh, uh, -- I'm assuming that nobody -- continued
20 course of treatment from '99 to '06?

21 MR. LEWIS: Yes, sir.

22 THE COURT: Well, you better be careful
23 here.

24 MR. TATE: I just want to --

25 THE COURT: All right. I still want to

1 finish my question,

2 MR. TATE: Yes, sir. Okay.

3 THE COURT: If Mr. Hollman is included in
4 this advocacy group in such a manner as to bring
5 about the work product privilege, which would
6 mean that this was done in anticipation of
7 litigation, then wouldn't there also, as a
8 practical matter, at some point along in there,
9 be some duty to disclose to Mr. Hollman who is
10 otherwise apparently, at least they allege
11 unaware that he has a problem and if that failure
12 to disclose is not made -- I'm assuming a few
13 things but ---

14 MR. TATE: Yes, sir.

15 THE COURT: --- if that failure to disclose
16 was not made at the same time that you are
17 contending the work within the advocacy group was
18 done in anticipation of litigation, I mean, does
19 that not give me reason to believe that there is
20 grounds for him to explore this fraud theory and,
21 uh, uh, which would, of course, if true
22 eviscerate any claims or privilege that you may
23 have either way? It seems to me that what you
24 are telling me plays right into their hands.

25 MR. TATE: That's exactly right. Under your

1 At that time, you had the hearing and that was the
2 motion for -- essentially the rehearing on motion
3 for sanctions. Then, November 23rd, you asked us
4 to prepare the order denying their motion for
5 reconsideration.

6 If you remember -- and you probably don't
7 because you've had a million hearings since then --
8 but I specifically asked if we could have a little
9 bit of time to request the transcripts because we
10 felt like the transcripts -- because there were
11 multiple hearings in this case. One, we had to
12 adjourn early. But there were at least three
13 hearings. I asked to be able to get those
14 transcripts so we could do an accurate order. Uh,
15 I requested those transcripts.

16 On December 7th though -- I think this is
17 where Mr. Boyd was off. On December 7th, 2010,
18 only a couple of weeks after that, we filed the
19 Dickerson and Luce Complaints. December 17th, I
20 wrote you and opposing counsel and, uh, said that
21 the order might be delayed because we still had not
22 gotten the transcripts at that point. We were
23 requesting three of them, I think three different
24 court reporters. We just haven't gotten them yet.
25 All right. That's December 17th.

1 In February, we actually received the
2 transcripts. All right. Now, but in the interim,
3 between the time of December 17th and February, we
4 have a mediation in the Hollman case, because the
5 Hollman case is still pending and we're trying to
6 get it resolved if we can. We actually have -- Tom
7 Stephenson mediated the case. We go to mediation.
8 We believe we've got a settlement. We had to work
9 out some details, but ultimately got the case
10 resolved right -- either right before or right
11 after we receive the transcripts.

12 So once we got the details worked out -- it
13 was actually the week before April 20th. April
14 13th, I call Ron Tate. I said, Ron, uh, you
15 probably heard this by now, but we've got the
16 Hollman case settled. We intend to dismiss that
17 case with prejudice. We intend to settle it. And,
18 you know, my idea is we've got this discovery issue
19 out there with the databases. You know we've filed
20 Dickerson and Luce cause we filed it in December.
21 Does it make any sense -- and I told him, I said,
22 pursuant to the protective order, we're supposed to
23 give you the databases back.

24 We have asked -- by this time, we have asked
25 for in discovery in Dickerson and Luce copies of

1 the same things that Judge Few gave us in the
2 Hollman case. So Ron and I talked. I said, Look,
3 it just makes sense to me -- Judge Miller is going
4 to have to rule on this discovery issue. We know
5 it's coming up. Makes sense to me we'll hold on to
6 the database or we'll file it with the court,
7 whatever you want to do. And then when Judge
8 Miller rules on it, we can get it back. Or we
9 won't have to actually get it back from you.

10 Now, a side note, Your Honor, one of the
11 reasons we didn't want to give it back to the
12 defendants is because -- and we can get into this
13 in just a few minutes, and I will -- but there is
14 significant evidence. You've heard it before --
15 but you've heard a lot of things in this case. You
16 may not remember. There's significant evidence
17 that we believe shows that TLC intentionally
18 destroyed evidence in the database.

19 In fact, we went to St. Louis. Took two
20 depositions up there. One of the database, the guy
21 who did the database name is Allan Webb. We asked
22 him about the modifications that were done to the
23 database. He said, yeah, once you make a
24 modification, you can tell when it's been modified,
25 but you can't tell what has been modified.

1 Dr. Potter, by his own admission and by the
2 deposition we took, went in. He changed a lot of
3 things in the database. We can't tell what they
4 are. He did them within a certain period of time
5 that Doug will address in a little bit when we talk
6 about the motion for sanctions. He did it in a
7 period in time when lawsuits were pending, when
8 discovery was pending. And we take the position,
9 Your Honor, that he did it intentionally and
10 modified significant information in the database.
11 So I had that on my mind when I talked to Ron. I
12 was concerned about if we give them back the
13 database, then it may be destroyed.

14 We didn't ever get that far in our
15 conversation because Ron said -- and as a matter of
16 fact, Judge, if you'll look at my letter of April
17 20th, 2011, I followed up my conversation with Ron.
18 In that conversation, I said, look, go talk to your
19 client about it. Uh, we've got this order for
20 reconsideration pending. Uh, there's really no
21 need to do that since we've settled the Hollman
22 case. So we talked about two issues. We talked
23 about, uh, you see in that first paragraph, I
24 called to discuss with you whether we need to
25 submit a proposed order to Judge Miller regarding

1 the motion to reconsider you filed several months
2 ago. I say reviewed copies of the transcripts and
3 am prepared to draft an order -- told Ron that both
4 verbally on the phone a week before and in the
5 letter -- said should your client feel it necessary
6 considering the fact this case will be dismissed
7 soon. We also discussed our intention to comply
8 with the judge's order regarding the return of the
9 database.

10 However, as you know, we filed these
11 additional law suits, turned out to be Dickerson
12 and Luce. Soon will be submitting discovery
13 requests, seeking discovery of the database. My
14 suggestion is file the database currently under
15 seal with the court, uh, until Judge Miller can
16 rule on those issues.

17 And here is the key, Your Honor. As I
18 understand it, you were going to talk with your
19 client about these two issues and get back to me.
20 It appears we received checks and releases within
21 the next week. After execution of releases and the
22 filing the stipulation of dismissal, we've got 60
23 days in which to return the database.

24 Then the next page, I tell him get back to me.
25 We need to know. And one of the reasons we need to

1 know -- I look forward to hearing from you within
2 that time period with regard to your client's
3 position on these two issues.

4 I essentially told Ron, Your Honor, we're
5 about to settle this case and dismiss it with
6 prejudice. We've got these issues out there, order
7 for reconsideration, return of the database. We
8 don't feel like the order for reconsideration needs
9 to go forth but check with your client about it.
10 Then return the database. Let's file it under seal
11 until Judge Miller rules on it.

12 Let's go back to the timeline. All right.
13 After that letter, Your Honor, then some
14 interesting things start occurring. There's an
15 order of dismissal in May. I didn't hear back from
16 Ron. Never heard one word from him. Not telephone
17 call, not letter, not anything. May 2nd, uh, we
18 dismiss the Hollman case. Uh, May 3rd is when TLC
19 filed the motion to dismiss in Dickerson and Luce.

20 June 9th, we have the hearing in Dickerson and
21 Luce on the motions to dismiss. June 1st [sic],
22 you advise us, uh, that you had denied those
23 motions. Then August 19th, uh, is their first
24 demand. August 19th. From April 20th, when I
25 talked to Ron and sent a letter, until August 19th,

1 didn't hear one word about the order or about the
2 databases.

3 Now, Howard had said in his brief that they
4 requested several times or a number of times that
5 we draft the order. This is the first notice we
6 had, Your Honor, August 19th, which was four months
7 later from when I wrote Ron the letter. And it
8 just so happens that comes after you denied their
9 motions to dismiss in the Dickerson and Luce cases.

10 Uh, I write a letter to Howard that says,
11 look, we'll give you back the databases, but we've
12 got two scenarios that we would feel comfortable
13 with because the discovery issues are pending in
14 front of Judge Miller. We've got two scenarios.
15 One, let's just file it under seal like I had asked
16 Ron or told Ron in the April 20th letter. Let's
17 file it under seal. Then when Judge Miller rules,
18 uh, we'll figure all this out.

19 The second one is we'll give you back the
20 database and all the relevant materials associated
21 with the database if you'll just put in writing
22 that you're not going to destroy it or that it
23 hasn't been destroyed at all. TLC refused to do
24 that, Your Honor. They wrote -- Howard wrote me a
25 letter and said we don't like either one of your

1 scenarios. September 14th is when, uh, I get that
2 letter from Howard where he refuses my two
3 scenarios on the return of the database. And then
4 October 13th, they filed motions to stay in
5 Dickerson and Luce.

6 Your Honor, here's what we think. We believe
7 that they didn't care about the order for
8 reconsideration, didn't really care about the
9 return on the database until you denied their
10 motions to dismiss in Dickerson and Luce. Now, all
11 of a sudden, after you do that, wait a minute, it's
12 important that we get it because we want to go up
13 to the Supreme Court. The ruling they want from
14 the Supreme Court, Your Honor, is a global ruling
15 that nothing in the database can ever be used again
16 forever and ever, amen, because their
17 interpretation of the protective order is that all
18 information is subject to the protective order. We
19 believe that's a ruling they wanted from the
20 Supreme Court.

21 So, Your Honor, the timeline is clear. They
22 knew that we were going to dismiss Hollman. We
23 dismissed it with prejudice. We understood that we
24 had an agreement, uh, by virtue of Ron or nobody
25 over at the Boyd firm responding to us when we told

1 them, hey, we're about to dismiss this. If you
2 want it back, let us know. If you want the order
3 drafted, let us know. They didn't do it. Our
4 position is they've given up their right to now
5 resurrect the Hollman case to essentially not let
6 Mr. Dickerson or Mr. Luce have their day in court.
7 They told us they think if they get a favorable
8 ruling from Supreme Court that Dickerson and Luce
9 ought to be dismissed. That's the breadth of the
10 Supreme Court ruling they are seeking.

11 So Your Honor, we don't think it could be any
12 clearer and we think the law is clear that the
13 protective order -- it certainly would allow them
14 to seek their database back. I'll talk about that
15 in just a minute. It also allows them to, if we
16 violate the protective order from this point on,
17 then they certainly can bring a motion in front of
18 you and say they violated. But they can't
19 resurrect a motion for sanctions on conduct that
20 was way before the motions for -- the, uh, case was
21 settled by resurrecting Hollman to do that -- to
22 use that as a sword in the Dickerson and Luce case
23 to try to get those cases dismissed. We believe
24 that's clearly what's happening. So Your Honor --

25 THE COURT: Y'all have the transcript of

1 previous hearings and am prepared to draft a
2 proposed order should your client feel it to be
3 necessary. If he had written us and said we don't
4 think the motion for reconsideration withstands the
5 settlement, I promise you, we would have gotten
6 back in front of you and said that's crazy.

7 Again, I understand I can petition for a writ
8 of mandamus, but I really think its unfair to put
9 me in that possession because frankly,
10 understandably, the appellate courts don't like
11 writs of mandamus. I don't like moving for them.
12 Okay. I was involved as a young lawyer trying to
13 get a writ of mandamus from a federal judge and it
14 wasn't a very pleasant experience.

15 In any event, I don't want to belabor the
16 point, but I think this is nuts that the Plaintiffs
17 can forestall our right to seek appellate relief by
18 refusing to do what the court has directed and what
19 needs to be done to resolve the motion, uh, for a
20 rule to show cause.

21 THE COURT: Okay.

22 MR. LEWIS: Your Honor, I need to get on the
23 record. My conversation with Ron was if you -- if
24 you -- I was prepared to do it because I had
25 received the transcripts. But I also said we've

1 settled this case. If you want me to do it, you
2 need to let me know. There was no -- Ron said it
3 sounds like a good idea to me, both giving the
4 database back or not giving the database back. And
5 I'll let you know if we need to do an order. It
6 was understood, Your Honor, that the case was ended
7 and there was really no need to do any of that.

8 THE COURT: Okay.

9 MR. LEWIS: I just want that on the record.

10 THE COURT: Okay. All right. Now, where
11 are we?

12 MR. BOYD: Your Honor, would you agree to
13 stay Dickerson and Luce until we can try to get a
14 writ of mandamus because I think these issues are
15 all inextricably intertwined. There's no way in
16 the world we can go forward now with all of these
17 issues undone. In fact, you know, we would have to
18 go through a-whole-nother scenario in Dickerson and
19 Luce involving the discovery motions and all that.
20 It makes sense to me to stay all of that and see if
21 we can get this issue before the Supreme Court or
22 the Court of Appeals.

23 That would be my request, Your Honor, in light
24 of the fact that we haven't gotten the order. We
25 need to see if we can get an order. Which again,

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

John Hollman,

2010 APR 13 AM 10:20

Plaintiff,

vs.

Dr. Jonathan Woolfson, individually, TLC
Laser Eye Centers (Piedmont / Atlanta) LLC,
and TLC The Laser Center (Institute), Inc.,
Dr. Michael A. Campbell, individually;
Optical Solutions, Inc., and Optical Solutions
Of Bluffton, LLC,

Defendants.

DEFENDANT TLC'S NOTICE OF
MOTION AND MOTION FOR ORDER
AND RULE TO SHOW CAUSE

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

Danielle Hollman,

Plaintiff,

vs.

Dr. Jonathan Woolfson, individually, TLC
Laser Eye Centers (Piedmont / Atlanta) LLC,
and TLC The Laser Center (Institute), Inc.,
Dr. Michael A. Campbell, individually;
Optical Solutions, Inc., and Optical Solutions
Of Bluffton, LLC,

Defendants.

ENTERED COMPUTER

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

George E. Carter, Jr. and Jean Carter,

Plaintiffs,

vs.

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

Defendants.

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

Scanned

TO: PLAINTIFFS, JOHN HOLLMAN AND DANIELLE HOLLMAN, AND THEIR ATTORNEYS, COVINGTON, PATRICK, HAGINS, STERN & LEWIS, P.A., AND PLAINTIFFS, GEORGE E. CARTER, JR. AND JEAN CARTER, AND THEIR ATTORNEYS, FAYSSOUX LAW FIRM, PA

YOU WILL PLEASE TAKE NOTICE that Defendants, TLC The Laser Center (Institute), Inc. and TLC Laser Eye Centers (Piedmont/Atlanta) LLC (collectively referred to as "TLC")¹, will move the Court at such date and time as the Court shall direct, but not sooner than ten days after service hereof, for an Order and Rule to Show Cause compelling Plaintiffs and Plaintiffs' counsel to show good, just, and legal cause why they have failed to comply with the Protective Order of this Court, issued on November 14, 2008, prohibiting "the dissemination of Confidential Health Information beyond the parameters established by [the] Order or use of Confidential Health Information for any purpose other than the prosecution or defense of this litigation." A copy of said Protective Order is attached as **Exhibit A**.

This Motion is based upon the grounds stated herein:

BACKGROUND

This Motion asks the Court to impose sanctions against plaintiffs and their counsel for numerous and repetitive violations of this Court's Orders. TLC was required to produce highly confidential and sensitive documents to plaintiffs and their counsel pursuant to a Discovery Order issued in November 2008. Since that time, plaintiff's counsel has repeatedly filed materials with this Court and with a Bankruptcy Court in Delaware in direct violation of a Protective Order entered simultaneously with the Discovery Order. Further, plaintiff's counsel has used Confidential Health Information as defined in the Protective Order in violation of that Order by filing a purported federal Class Action Complaint in March 2010. Plaintiff's counsel has also violated the terms of the Protective Order by referring to Confidential Health

¹ The refractive facilities where Dr. Woolfson performed eye surgeries upon the Plaintiff are owned and operated by TLC The Laser Center (Institute) Inc. TLC Laser Eye Centers (Piedmont/Atlanta) LLC was dissolved on June 4, 2007, and is not a proper defendant in this case.

Information in making inappropriate and highly prejudicial statements reported in the public media. These egregious violations of this Court's Order should be addressed with the severest sanctions available.

On November 14, 2008, over Defendants' vigorous objections, this Court compelled TLC's production of certain unredacted documents and databases containing identifying Confidential Health Information, but did so pursuant to a restrictive Protective Order. *See Exhibit A.* TLC complied with the Court's Order and produced voluminous documents and databases subject to the Protective Order. The terms and provisions of the Protective Order are incorporated fully herein by reference. The Protective Order provides in pertinent part, as follows:

- (a) "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." (*Exhibit A*, at p. 4).
- (b) "Confidential Health Information may be disclosed only to . . . the Court in this action . . . the parties, the parties' counsel[, and] . . . experts" (*Exhibit A*, at pp. 5-6).
- (c) "No person, firm, corporation, or other entity subject to this Order shall give, show, [disclose], make available, or communicate Information to any person, firm, corporation, or other entity not expressly authorized by this Order to receive such Confidential Health Information." (*Exhibit A*, at p. 7).
- (d) "Confidential Health Information shall be used for no purpose other than this litigation." (*Exhibit A*, at p. 8).
- (e) "No person who receives, pursuant to this or other Orders of this Court, Confidential Health Information concerning persons who are not parties to the captioned lawsuits (hereinafter 'Third Parties') shall directly or indirectly contact or attempt contact with Third Parties or their medical providers (except those who are parties to these actions)." (*Exhibit A*, at p. 8).

"Confidential Health Information" is defined in the Order to include any document or information that identifies an individual in any manner and specifically includes "protected

health information" as defined by federal law. It further includes "all notes, summaries, compilations, extracts, abstracts, or oral communications that contain, are based on, or are derived from Confidential Health Information." (Exhibit A, at pp. 4-5).

Plaintiff's counsel mishandled Confidential Health Information almost immediately after the Protective Order was signed. Judge Few signed both the Order requiring TLC to produce confidential information and the corresponding Protective Order while out of town. By consent of the parties, he faxed a copy of the signed order to counsel. Upon information and belief, Plaintiff's counsel was instructed to file the fax copy of the Discovery Order on February 14, 2008. Attached to the Discovery Order was a document, Exhibit A, containing a list of TLC patients whose records and confidential patient information were involved in the discovery motions. Plaintiff's counsel filed the Order in its entirety, including Exhibit A containing the personally identifiable patient information. A Consent Order was issued on November 21, 2008 by this Court that sealed Exhibit A from the public record and stated that Exhibit A "shall be subject to the Protective Order also issued by this Court on November 14, 2008." Accordingly, the Clerk of Court removed the document and placed it under seal.

Some time after this Court compelled production of this confidential information over TLC's objection, Plaintiffs moved the Court to modify the Protective Order. Plaintiffs sought modification of the Order to allow their counsel to contact and interview nonparty patients of TLC whose identity and medical records were disclosed pursuant to the previous Discovery Order. With the Motion to modify the Protective Order, plaintiffs filed an Affidavit of Expert Witness, Dr. Bradley Williams. Attached to Dr. Williams' Affidavit was an exhibit containing the names of TLC patients. Those patients' names were covered by the Protective Order that prohibited dissemination of the information except in accord with its terms. Notwithstanding the limitations and restrictions on the dissemination of protected information contained in the

November 14, 2008 Protective Order, plaintiff's counsel filed Dr. Williams' Affidavit and the names of the individual patients in the public record in violation of the Protective Order. Counsel for TLC inquired of plaintiff's counsel whether this information had been filed in the public record. Plaintiff's counsel acknowledged that he had done so and prepared yet another Consent Order sealing records to correct the error. TLC's counsel learned this very day, however, that the Order that plaintiff's counsel was to submit sealing those records was never entered. According to the Affidavit of Cheryl Rodgers attached hereto as **Exhibit B**, Dr. Williams' Affidavit and the Exhibit to his Affidavit including all of the patient names remains freely available in the public record of the Circuit Court.

Ultimately, the Circuit Court granted plaintiff's Motion to Modify the Protective Order. Prior to the time Plaintiffs' counsel was permitted to begin making contacts, TLC filed an action in the original jurisdiction of the South Carolina Supreme Court to obtain a writ of certiorari to enjoin enforcement of the Order. The Supreme Court granted writ, vacated this Court's ruling modifying the Order and, in doing so, recognized the privacy interests of the third parties, as well as the equitable interests of TLC. *See Hollman v. Woolfson*, 384 S.C. 571, 683 S.E.2d 495 (2009).²

The Supreme Court stated the "Protective Order was issued to prohibit the use of confidential information obtained through the medical records and to prohibit any person from contacting the nonparty patients or their medical providers." *Hollman*, 384 S.C. at 577, 683 S.E.2d at 497 (emphasis added). In vacating the Circuit Court's order modifying the Protective Order, the Supreme Court held the evidence relating to treatment of the nonparty patients is

² This was actually the second opinion issued by the South Carolina Supreme Court on the issue of whether the Protective Order should be modified to permit the use of the confidential information to identify and contact nonparty patients. After this Court first issued an order modifying the Protective Order, TLC successfully petitioned the Supreme Court for a writ of certiorari and the Supreme Court reversed and remanded the issue in an unpublished opinion. *See Hollman v. Woolfson*, 2009-MO-025 (S.C. May 28, 2009) (unpublished). On remand, this Court again granted Hollman's motion to modify the order, which was subsequently vacated in *Hollman v. Woolfson*, 384 S.C. 571, 683 S.E.2d 495 (2009).

irrelevant and not necessary to either of plaintiffs' claims for malpractice or fraud. *Id.* at 579-580, 683 S.E.2d at 499-500. Significantly, while noting privacy rights of patients is "an issue of significant public interest, and issues involving the release of patient information in discovery [are] arising more often in the courts," the Court held "it would be inequitable to allow [plaintiffs] to obtain nonparty patient information from [TLC] with the understanding the patients would not be contacted, only to subsequently permit [plaintiffs] to contact the patients." *Id.* at 577 and 581, 683 S.E.2d at 498 and 500.

On March 17, 2010, Plaintiff Hollman appeared in the United States Bankruptcy Court for the District of Delaware in the matter of TLC Vision (USA) Corporation, et al., C.A. No. 09-14473 and filed an objection to TLC Vision's disclosure statement. Subsequently, on March 29, 2010, Hollman filed a motion to lift the stay imposed by the bankruptcy of TLC Vision. In support of the Lift Stay Motion, Hollman's counsel Doug. Patrick filed an Affidavit in the Bankruptcy Court. A copy of Mr. Patrick's Affidavit is enclosed herewith as Exhibit D. Mr. Patrick's Affidavit referred to some thirty-one separate exhibits that were filed in the Bankruptcy Court and contained within the public records. None of the documents in issue were filed under seal.

At least two of the documents that were filed with Mr. Patrick's Affidavit in the public records of the Bankruptcy Court violated the November 14 Protective Order and the subsequent November 21 Consent Protective Order. Shockingly, Mr. Patrick filed full and complete and unredacted copies of *the very same documents* that his firm mistakenly filed in the Circuit Court and for which corrective action had to be taken. Specifically, Exhibit 15 to Mr. Patrick's Affidavit contains a copy of this Court's Discovery Order directing TLC to produce documents relating to other TLC patients who were not parties to the litigation. It included a patient list that contained the names and diagnostic information concerning a total of thirty-four TLC patients.

Their names and diagnostic information were available in the Court Record and were obtained on this date over the internet through the Federal Pacer System. See Exhibit B, Affidavit of Cheryl Rodgers. Filing this document in the Bankruptcy Court of Delaware undoubtedly and clearly violates the express terms of the Protective Order of November 14 and, further, it violates the terms of the Consent Protective Order issued by this Court on November 21, 2008 to correct Mr. Patrick's firm's earlier violation.

Exhibit 12 to Mr. Patrick's Affidavit filed in the Bankruptcy Court is the Affidavit of Expert Witness signed by Dr. Bradley Williams. The Affidavit contains three exhibits, Exhibits A, B and C. Exhibit A to Dr. Williams' Affidavit contained the names of twenty-two TLC Patients other than the plaintiffs in these cases, and their dates of surgery. Exhibit B to the Affidavit contained the names of fourteen other TLC patients and their dates of surgery. Exhibit C contained the names of five other TLC patients and one of their dates of surgery. Dr. Williams stated in his Affidavit that the patients identified in Exhibit A developed post-surgery loss of vision, corneal instability or ectasia caused by Lasik surgery, that they had substantially similar pre-surgical conditions to the plaintiff's and suffered substantially similar breaches of the standard of care. Likewise, Dr. Williams commented diagnostically on the patients identified in Exhibit B. Thus, Exhibit 12 to Mr. Patrick's Affidavit filed in the Bankruptcy Court, in the public record with no protection whatsoever, revealed the names and identifies of numerous TLC patients whose identities are explicitly protected by this Court's Protective Order. Their diagnostic information is likewise currently available over the internet for anyone with a PACER account.

Also on March 17, 2010, plaintiff Hollman filed a purported class action complaint in the United States District Court for the District of South Carolina Greenville Division, Case Number 6:10-685-RBH. A copy of the complaint is attached as Exhibit C, and is incorporated fully

herein by reference. Hollman's class action complaint directly violates the Court's Protective Order limiting the disclosure and use of the Confidential Health Information of nonparty patients in the following particulars:

- (a) Contrary to the provisions limiting "use" of the confidential information to this action, Plaintiffs have improperly used the information subject to the Protective Order to identify a number of the Defendants named in the class action.
- (b) Plaintiffs' allegations in the class action complaint, in significant part, are based on and/or derived from Confidential Health Information TLC produced subject to the extensive protections of the Protective Order. *See e.g., Exhibit C*, at ¶ 54(a) ("Class B consists of potentially 1600 patients who were entered into a known database, of which the Plaintiff has confirmed a [sic] least 181 . . . have the same or similar condition which precipitated their inclusion in the fraudulent database.").
- (c) Plaintiffs indicated they intend to file documents containing Confidential Health Information which are protected against dissemination by the provisions of the Protective Order in the District Court of South Carolina. *See Exhibit C*, at ¶ 51(a) ("[A] combined list of patients who have suffered ocular problems post LASIK surgery has been produced in other litigation and will be provided to [the District Court of South Carolina] under seal in a separate filing . . .").

Hollman's class action complaint also violates this Court's Protective Order because it is a vehicle for Plaintiffs to improperly make contact with nonparty patients. *See e.g., Exhibit C*, at ¶ 54(a) ("Class members may be notified of the pendency of this action by regular mail and also by published notice . . .").

Further, upon information and belief, Plaintiffs' counsel has violated the Protective Order by speaking with various media about matters relating to Confidential Health Information produced pursuant to Court Order and subject to this Court's Protective Order. Following the filing of Hollman's class action complaint, numerous news articles contained comments by Plaintiffs and counsel. TLC is informed and believes Plaintiffs' counsel has improperly disclosed information in violation of the Protective Order. *See e.g., News articles attached hereto as Exhibit E*, which are incorporated fully herein by reference.

- "Attorneys later discovered that Hollman was among approximately 1,600 patients who did not know that their records were kept in a confidential database, Fayssoux said."
- "Lewis, who is handling both cases, said a patient database – maintained by TLC LASIK and released during discovery for the state case – prompted his client to pursue the class-action suit."
- "The database, which dates back to at least 2003, contains the names of at least 181 people who shouldn't have gotten eye surgery, Lewis said."
- "In that database, Hollman's lawyers say they have found nearly 200 other TLC patients who have experienced problems similar to those of their client."
- "post-operative treatment for the 181 patients wrongly operated on by TLC LASIK, Hollman's attorneys said"
- "30 TLC locations performed LASIK surgery on patients with conditions that should have disqualified them from the procedure."
- "TLC kept a database of patients with conditions that could lead to injury down the road. The database contained the statutes of limitations for legal claims that could arise from the procedures."
- "Hollman's lawyers stumbled onto the database almost by accident, uncovering it during discovery for a state-court The database contained 180 additional patients in situations similar to Hollman's."³

DISCUSSION

The actions of Plaintiffs and their counsel in using and disseminating confidential information violate the Circuit Court's Protective Order, dated November 14, 2008 (Exhibit A). Therefore, TLC moves the Court to require Plaintiffs to show cause why they should not be found in contempt of the Protective Order. TLC further moves the Court for sanctions against Plaintiffs and their counsel for using the confidential information in another action, willfully defying the Protective Order in place.

Under South Carolina law, this Court has "the inherent power to punish for contempt, which is essential to the preservation of order in judicial proceedings, and to the enforcement of

³ TLC reserves the right to supplement this motion as necessary to include any other violations of the Protective Order of which it becomes aware.

the judgments, orders and writs of the courts, and consequently to the due administration of justice.” *Ex Parte Cannon*, 385 S.C. 643, 660, 685 S.E.2d 814, 824 (Ct. App. 2009) (quoting *Miller v. Miller*, 375 S.C. 443, 453, 652 S.E.2d 754, 759 (Ct. App. 2007)). In addition, this Court has “the inherent power to punish for offenses that are calculated to obstruct, degrade, and undermine the administration of justice.” *Id.* at 661, 685 S.E.2d at 824 (quoting *Miller*, 375 S.C. at 455, 652 S.E.2d at 760). “[J]udges have the authority to . . . use contempt proceedings to preserve the authority and dignity of their courts.” *Id.* (quoting *McEachern v. Black*, 329 S.C. 642, 649, 496 S.E.2d 659, 662-63 (Ct.App.1998)). “The existence of this inherent contempt power is ‘essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice.’” *Cheap-O's Truck Stop, Inc. v. Cloyd*, 350 S.C. 596, 606, 567 S.E.2d 514, 519 (Ct. App. 2002) (quoting *Curlee v. Howle*, 277 S.C. 377, 382, 287 S.E.2d 915, 917 (1982)).

Based upon the foregoing, TLC respectfully requests that the Court issue an order granting the following relief and sanctions for these violations:

- (a) Enjoin Plaintiffs and their counsel from using any of the protected information in unrelated proceedings, specifically including the federal class action, Case Number 6:10-685-RBH (*See id.*, 350 S.C. at 607, 567 S.E.2d at 519 (“Judicial sanctions in civil contempt proceedings may . . . be employed . . . to coerce the [violating party] into compliance with the court’s order.”));
- (b) Plaintiffs and their counsel be ordered to return all confidential documents, and file a certificate of compliance with the Court (*See Hunter Eng’g Co. v. Hennessy Indus., Inc.*, 2010 WL 1186454, at *5 (E.D.Mo. March 29, 2010 (ordering party to return confidential documents after violating a protective order by disclosing documents to third parties));
- (c) Because the class action was brought in violation of this Court’s Protective Order, Plaintiffs and their counsel should be enjoined from further prosecuting the class action (*See id.*, at *7 (enjoining party from using or disclosing confidential documents in unrelated proceedings pursuant to terms and provisions of protective order));

- (d) Dismiss Plaintiffs' state court Complaints with prejudice (*See Brandt v. Gooding*, 368 S.C.618, 627, 630 S.E.2d 259, 263-264 (2006) (affirming dismissal of complaint in legal malpractice action as a sanction for civil contempt pursuant to court's inherent power and Rule 41(b), SCRPC));
- (e) That costs and attorneys' fees be assessed against Plaintiffs in connection with the filing this motion and TLC's effort to prevent further disclosure and use of the confidential information (*See Cloyd*, 350 S.C. at 608-609, 567 S.E.2d at 520 ("Courts, by exercising their contempt power, can award attorney's fees under a compensatory contempt theory.")); and
- (f) Any additional relief which the Court may deem just and proper.

April 9, 2010



Ronald G. Tate, Jr. (S.C. Bar No. 5475)

rtate@gwblawfirm.com

J. Matthew Whitehead (S.C. Bar No. 73803)

mwhitehead@gwblawfirm.com

GALLIVAN, WHITE & BOYD, P.A.

55 Beattie Place, Suite 1200 (29601)

Post Office Box 10589

Greenville, SC 29603

Phone: (864) 271-9580

FAX: (864) 271-7502

Attorneys for the Defendants, TLC The Laser
Center (Institute), Inc., and TLC Laser Eye Centers
(Piedmont/Atlanta) LLC

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE)

2010 APR 20 P 12: 59

John Hollman,)

Civil Action No. 2007-CP-23-2347

Plaintiff,)

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
DATE: 4/20/10 BY: WICKENHOFER

vs.)

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

Dr. Jonathan Woolfson, et al,)

Defendants.)

Danielle Hollman,)

Plaintiff,)

Civil Action No. 2007-CP-23-8364

vs.)

Dr. Jonathan Woolfson, et al,)

Defendants.)

George E. Carter, Jr. and
Jean Carter,)

Plaintiffs,)

Civil Action No. 2007-CP-23-7587

vs.)

Nimmons, et al,)

Defendants.)

PLEASE TAKE NOTICE that the Plaintiffs, by and through their undersigned counsel,
do hereby move this Court for an immediate Order to prevent further spoliation of evidence
relevant to the litigation in this matter by the Defendants TLC Laser Centers, Piedmont/Atlanta

LLC and TLC The Laser Center (Institute), Inc. (hereinafter collectively referred to as "TLC") and for sanctions against TLC for spoliation and destruction of critical evidence to this litigation. This Motion is based on the pleadings filed and memorandum of law incorporated herein.

SPOILIATION OF EVIDENCE

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

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

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

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

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

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

A: -- to see:

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

A: No.

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

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

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

A: Yes.

[Potter Deposition: P 136, L 22 - P 137, L 3]

These two processes contained vital information highly relevant to TLC's scheme of fraudulent and improper risk avoidance. For example, the diagnosis and treatment options found

in the "private files" differed from the medical information and treatment recommendations in the patient's medical records. Incredibly, TLC has acknowledged that from 2003 forward, the Complex Case system and the Advocacy Program were used in anticipation of litigation - litigation it anticipated and planned for while withholding the medical basis for claims from its own patients.

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

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

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

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

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

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

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

A: ...And we have a medical malpractice insurance provider that, you know, we have to deal with.
A: We have premiums that we pay, and so general counsel in his wisdom said, Let's learn more about ectasia, I want to know more. And he assigned me to do it, and I was happy to do it. And I learned a great deal and I still use what I learned from that project today.
[Potter Deposition: P 167, L 12-21]

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

Affidavit of Brian L. Andrew:

- #5. The "advocacy group" is organized and operates under the direction and control of the General Counsel's office.
- #6. The "advocacy group's" activities are carried out in anticipation of litigation...
[Excerpt of Affidavit of Brian L. Andrew in *Hollman v. TLC, et al.*, CA# 2007-CP-23-2347 - Full Text - **EXHIBIT D**]

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

A: What I do, and have done for years, is begin a day with a folded piece of paper like this. I'll make notes of my conversations with patients or whatever. At the end of the day I shred this and I start over with the next day.
Q: Why would you do that?
A: Well, it's private information. It's about patients and I don't want it to be just lying around. So I get rid of it.
Q: Okay. And - And so by shredding it, whatever those conversations may have been, the documentation of those is - any documentation of that, then, is destroyed.
A: Yeah.
[Potter Deposition: P 78, L15 - P. 79, L3]
[Relating to his pattern of conduct from 2003 - 2008]

A: Well, yeah, I shredded them.
Q: Shredded what?
A: All the records that I had.
[Potter Deposition: P 224, L 4-8]
[Relating to his conduct in January 2008]¹

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

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

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

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

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

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

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

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

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

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

A: No, it does not.

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

A: That's correct.

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

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

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

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

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

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

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

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

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

LEGAL ANALYSIS

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

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

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

1. Evidence destroyed was relevant to the litigation

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

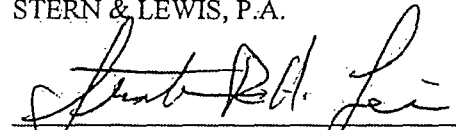
Nucor Corp. v. Bell, 251 FRD 191 (DCSC, 2008).

TLC's past conduct strongly suggests it will attempt to avoid responsibility through the continued destruction of evidence. Based on TLC's conduct thus far in the litigation, Plaintiffs seek an immediate Order to prevent further spoliation of evidence. The Plaintiffs further request that TLC be sanctioned severely for the intentional spoliation of critical evidence that has already

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

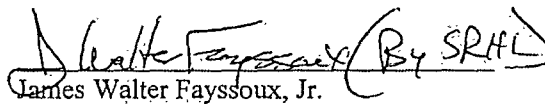
Respectfully Submitted,

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



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

ANDERSON, FAYSSOUX & CHASTEEN



James Walter Fayssoux, Jr.
Post Office Box 1749
Greenville,, SC 29602

ATTORNEYS FOR PLAINTIFFS

April 20, 2010

Greenville, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

John Hollman,

Plaintiff,

vs.

Dr. Jonathan Woolfson, individually, TLC
Laser Eye Centers (Piedmont / Atlanta) LLC,
and TLC The Laser Center (Institute), Inc.,
Dr. Michael A. Campbell, individually;
Optical Solutions, Inc., and Optical Solutions
Of Bluffton, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS

DEFENDANT TLC'S NOTICE OF
MOTION AND MOTION FOR ORDER
AND RULE TO SHOW CAUSE,
MOTION TO MODIFY PROTECTIVE
ORDER, AND MOTION FOR
SANCTIONS

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

Danielle Hollman,

Plaintiff,

vs.

Dr. Jonathan Woolfson, individually, TLC
Laser Eye Centers (Piedmont / Atlanta) LLC,
and TLC The Laser Center (Institute), Inc.,
Dr. Michael A. Campbell, individually;
Optical Solutions, Inc., and Optical Solutions
Of Bluffton, LLC,

Defendants.

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

TO: PLAINTIFFS, JOHN HOLLMAN AND DANIELLE HOLLMAN, AND THEIR
ATTORNEYS, COVINGTON, PATRICK, HAGINS, STERN & LEWIS, P.A.

YOU WILL PLEASE TAKE NOTICE that Defendants, TLC The Laser Center
(Institute), Inc. and TLC Laser Eye Centers (Piedmont/Atlanta) LLC (collectively referred to as
"TLC"), will move the Court at such date and time as the Court shall direct, but not sooner than
ten days after service hereof, for an Order and Rule to Show Cause compelling Plaintiffs and

Plaintiffs' counsel to show good, just, and legal cause why they have failed to comply with the Protective Order of this Court, issued on November 14, 2008, prohibiting "the dissemination of Confidential Health Information beyond the parameters established by [the] Order or use of Confidential Health Information for any purpose other than the prosecution or defense of this litigation."¹ Additionally, TLC further moves to modify the Protective Order to compel Plaintiffs and their counsel to immediately surrender all Confidential Health Information due to (1) the settlement of Plaintiffs with TLC thus making Plaintiffs' continued possession of the information unnecessary and (2) their repeated violations of the Order. Finally, TLC moves for sanctions for Plaintiffs' and their counsel's flagrant disregard of the Protective Order and their cavalier disclosures of the Confidential Health Information it was designed to safeguard. This Motion is based upon the grounds stated herein.

FACTUAL AND PROCEDURAL BACKGROUND

This is a medical malpractice lawsuit, and this Court is well aware of its long and arduous procedural history, which includes repeated disputes over the disclosure of the identities of nonparty patients and their confidential medical histories. Despite the entry of a thorough and detailed Protective Order governing the usage of such Confidential Health Information,² Plaintiffs and their counsel have consistently refused to abide by its provisions and exploited the

¹ Throughout this motion, Defendants refer to the counsel of Mr. Hollman as Plaintiffs' counsel. For the purposes of securing compliance with the protective order entered in this case, Defendants include the following attorneys and firms when using that term (in addition to Douglas F. Patrick, Stephen R. H. Lewis, and the Covington, Patrick, Hagins, Stern and Lewis firm): James Edward Bell, III and J. Ryan Heiskell of the J. Edward Bell III Law Office in Georgetown, South Carolina, James W. Fayssoux, Jr. of the Fayssoux Law Firm in Greenville, South Carolina, and W. Walter Wilkins, III of the Wilkins Law Firm in Greenville, South Carolina. Each of those attorneys represented Mr. Hollman in the federal RICO action filed in the U.S. District Court for the District of South Carolina and continue to represent Mr. Charles Benjamin "Ben" Dickerson, who was substituted in as a Plaintiff in that matter.

² "Confidential Health Information" is defined in the Protective Order to include any document or information that identifies an individual in any manner and specifically includes "protected health information" as defined by federal law. It further includes "all notes, summaries, compilations, extracts, abstracts, or oral communications that contain, are based on, or are derived from Confidential Health Information." (See Exhibit A, at pp. 4-5).

Confidential Health Information for non-permitted public purposes. TLC's concern from the outset was that Plaintiffs and their counsel, in being provided access to this Confidential Health Information, would attempt to expand the scope of its permitted use in order to assert new claims and seek out potential new clients. Unfortunately, these fears have proven true. In light of these continued flagrant abuses, TLC seeks (1) an Order modifying the Protective Order to require the immediate surrender of any and all Confidential Health Information in the possession of Plaintiffs and their counsel; (2) an Order and Rule, to show good, just, and legal cause why Plaintiffs and Plaintiffs' counsel have failed to comply with the Protective Order of this Court; and (3) an Order sanctioning Plaintiffs and their counsel for such conduct.

Throughout this litigation, TLC has consistently fought to protect the privacy of Confidential Health Information. In TLC's view, the disclosure of such information was wholly irrelevant in a medical malpractice action.³ Despite those concerns, Plaintiffs and their counsel argued that such confidential information was relevant to their recently settled fraud claims against TLC. On November 14, 2008, over Defendants' vigorous objections, this Court compelled TLC's production of certain unredacted documents and databases containing identifying Confidential Health Information, but did so pursuant to a thorough and restrictive Protective Order. *See* Exhibit A. TLC complied with the Court's Order and produced voluminous documents and databases subject to the Protective Order. Still in effect, the Protective Order provides in pertinent part, as follows:

³ *See In re Columbia Valley Reg'l Med. Ctr.*, 41 S.W.3d 797, 803 (Tex. App. – Corpus Christi 2001, orig. proceeding) (holding that the trial court abused its discretion in ordering the production of redacted nonparty medical records); *Glassman v. St. Joseph Hosp.*, 631 N.E.2d 1186, 1198-99 (Ill. Ct. App. 1994) (finding that the trial court properly denied plaintiffs' motion to compel discovery of medical records, with the nonparty patients' names and identifying numbers deleted, for any nonparty patient who underwent surgery by the same surgeons and who experienced similar to the litigated difficulties); *Yoe v. Cleveland Clinic Found.*, No. 81335, 2003 WL 549923, at *3 (Ohio Ct. App. Feb. 27, 2003) (unpublished) (finding appellants failed to demonstrate that their need for non-party patients' records outweighed the non-party patients' privacy interests).

- (a) "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." (Exhibit A, at p. 4).
- (b) "Confidential Health Information may be disclosed only to . . . the Court in this action, . . . the parties, the parties' counsel[, and] . . . experts" (Exhibit A, at pp. 5-6).
- (c) "No person, firm, corporation, or other entity subject to this Order shall give, show, [disclose], make available, or communicate Information to any person, firm, corporation, or other entity not expressly authorized by this Order to receive such Confidential Health Information." (Exhibit A, at p. 7).
- (d) "Confidential Health Information shall be used for no purpose other than this litigation." (Exhibit A, at p. 8).
- (e) "No person who receives, pursuant to this or other Orders of this Court, Confidential Health Information concerning persons who are not parties to the captioned lawsuits (hereinafter "Third Parties") shall directly or indirectly contact or attempt contact with Third Parties or their medical providers (except those who are parties to these actions)." (Exhibit A, at p. 8).⁴

However, Plaintiffs and their counsel were not content with mere access to the Confidential Health Information; they wanted to utilize it to foment potential additional claims and proceedings. Subsequent to the entry of the original Protective Order, Plaintiffs and their counsel moved to modify the Protective Order to permit them to contact and interview nonparty patients of TLC whose identity and medical records were only disclosed pursuant to the previous Protective Order. Ultimately, over TLC's strenuous objections, this Court granted that request. Prior to the time Plaintiffs' counsel was permitted to begin making contacts, TLC filed an action in the original jurisdiction of the South Carolina Supreme Court to obtain a writ of certiorari to enjoin enforcement of that ruling. The Supreme Court granted the writ, vacated this Court's ruling modifying the Order and, in doing so, recognized the privacy interests of the third party

⁴ The full Protective Order is incorporated by reference herein for any and all purposes.

patients, as well as the equitable interests of TLC. See generally *Hollman v. Woolfson*, 384 S.C. 571, 683 S.E.2d 495 (2009).⁵ The Supreme Court stated the “Protective Order was issued to prohibit the use of confidential information obtained through the medical records and to prohibit any person from contacting the nonparty patients or their medical providers.” *Hollman*, 384 S.C. at 576, 683 S.E.2d at 497 (emphasis added). In vacating this Court’s order modifying the Protective Order, the Supreme Court held that the evidence relating to treatment of the nonparty patients is irrelevant and not necessary to either of plaintiffs’ claims for malpractice or fraud. *Id.* at 579-580, 683 S.E.2d at 499. Significantly, while noting privacy rights of patients is “an issue of significant public interest, and issues involving the release of patient information in discovery [are] arising more often in the courts,” the Court held “it would be inequitable to allow [plaintiffs] to obtain nonparty patient information from [TLC] with the understanding the patients would not be contacted, only to subsequently permit [plaintiffs] to contact the patients.” *Id.* at 577, 581, 683 S.E.2d at 498, 500.

In addition to Plaintiffs’ efforts to expand the scope of the Protective Order, they have also disclosed Confidential Health Information in clear violation of its terms. Almost immediately after the entry of the Protective Order, Plaintiffs and their counsel mishandled the Confidential Health Information subject to the Protective Order. By consent of the parties, this Court faxed a copy of the Discovery Order compelling production of the Confidential Health Information to Plaintiffs’ counsel, who was to file the faxed copy of the Discovery Order on February 14, 2009. Attached to that was Exhibit A, a document listing nonparty TLC patients

⁵ This was actually the second opinion issued by the South Carolina Supreme Court on the issue of whether the Protective Order should be modified to permit the use of the confidential information to identify and contact nonparty patients. After this Court first issued an order modifying the Protective Order, TLC successfully petitioned the Supreme Court for a writ of certiorari and the Supreme Court reversed and remanded the issue in an unpublished opinion. See *Hollman v. Woolfson*, No. 2009-MO-025 (S.C. May 28, 2009) (unpublished). On remand, this Court again granted Hollman’s motion to modify the order, which was subsequently vacated in *Hollman v. Woolfson*, 384 S.C. 571, 683 S.E.2d 495 (2009).

whose records and confidential patient information were at issue in the discovery motions. Plaintiffs' counsel filed the Order in its entirety, including the unredacted Exhibit A containing the Confidential Health Information. Two months before that mishandling of the confidential records, this Court had signed a November 21, 2008 Consent Order sealing Exhibit A from the public record and stating Exhibit A "shall be subject to the Protective Order also issued by this Court on November 14, 2008." Accordingly, to rectify the presumably inadvertent disclosure of the Confidential Health Information, the Clerk of Court removed Exhibit A from the public record and placed it under seal. But that was not the first time Plaintiffs and their counsel made such an error. In initially moving to modify the Protective Order to seek the aforementioned interviews with the nonparty patients, Plaintiffs and their counsel filed an expert witness affidavit to which they attached an exhibit containing the names of TLC patients—names which were clearly and explicitly prohibited from public disclosure by the Protective Order. When confronted with this clear violation of the Court's order, Plaintiffs' counsel acknowledged the violation and prepared a Consent Order sealing the private records to correct the error. That Consent Order was never filed by Plaintiffs' counsel, and a second order had to be prepared to ensure the removal of the documents from the public record. Defendants went to great lengths to remove these documents from the public record, although Defendants are currently unable to confirm their removal.

Of most concern are Plaintiffs' and their counsel's efforts to use the Confidential Health Information to further entirely separate litigation and their standing in the media. First, Plaintiffs and their counsel violated the Protective Order by filing a purported federal Class Action Complaint in U.S. District Court for the District of South Carolina on March 17, 2010. *See*

Hollman v. TLC The Laser Eye Center (Institute), Inc., No. 6:10-685-RBH.⁶ That lawsuit could not have been filed without Plaintiffs' counsel's use and exploitation of the Confidential Health Information gained in this litigation. Accordingly, by its very nature, the would-be class action complaint directly violates the Court's Protective Order limiting the disclosure and use of the Confidential Health Information. Specifically, it does so as follows:

- (a) Contrary to the provisions limiting "use" of the confidential information to this action and this action alone, Plaintiffs have improperly used the Confidential Health Information to identify a number of the Defendants named in the class action.
- (b) Plaintiffs' allegations in the class action complaint, in significant part, are purportedly based on and/or derived from Confidential Health Information TLC produced subject to the extensive protections of the Protective Order. *See, e.g.,* Exhibit B, at ¶ 54(a) ("Class B consists of potentially 1600 patients who were entered into a known database, of which the Plaintiff has confirmed a [sic] least 181 . . . have the same or similar condition which precipitated their inclusion in the fraudulent database."). Without the Confidential Health Information, Plaintiffs would not have been able to plead the causes of action set forth in the original federal complaint and its subsequent amended version.
- (c) Plaintiffs indicated they intend to file documents containing Confidential Health Information which are protected against dissemination by the provisions of the Protective Order in the District Court of South Carolina. *See* Exhibit B, at ¶ 51(a) ("[A] combined list of patients who have suffered ocular problems post LASIK surgery has been produced in other litigation and will be provided to [the District Court of South Carolina] under seal in a separate filing . . ."). Plaintiffs have already begun to file such documents in the federal court.
- (d) On May 14, 2010, Plaintiffs' counsel amended their complaint in the pending federal action to drop Mr. Hollman as the lead Plaintiff and purported class representative and substitute in Charles Benjamin Dickerson, an entirely new Plaintiff who was not a party to the original state court litigation or the November 2008 Protective Order. This substitution means that the lead Plaintiff and the purported class representative in the federal litigation has access to the Confidential Health Information but is not subject to the Protective Order.

⁶ Copies of both the original federal complaint and the subsequent amended complaint are attached as Exhibit B, and is incorporated fully herein by reference.

- (e) The would-be class action complaint also violates this Court's Protective Order because it is a vehicle for Plaintiffs to improperly make contact with nonparty patients. *See, e.g.*, Exhibit B, at ¶ 54(a) ("Class members may be notified of the pendency of this action by regular mail and also by published notice . . .").

In addition to the federal class action litigation, Plaintiffs and their counsel have also improperly disclosed Confidential Health Information in a bankruptcy proceeding pending in Delaware. On March 17, 2010 (the very same day Plaintiff Hollman filed his would-be class action complaint), Plaintiff Hollman appeared in the United States Bankruptcy Court for the District of Delaware in the matter of *TLC Vision (USA) Corp.*, No. 09-14473 and filed a formal objection to TLC Vision's disclosure statement. Less than two weeks later, on March 29, 2010, Hollman filed a motion to lift the stay imposed by the bankruptcy of TLC Vision. In support of that motion, Hollman's counsel Doug Patrick filed an affidavit in the bankruptcy court. A copy of Mr. Patrick's affidavit is enclosed herewith as Exhibit C. None of the exhibits attached to Mr. Patrick's affidavit were filed under seal, despite the fact that they contained Confidential Health Information. At least two of the documents filed with Mr. Patrick's affidavit in the public records of the bankruptcy court violated the Protective Order and the subsequent November 21 Consent Protective Order. Shockingly, Mr. Patrick filed full and complete and unredacted copies of *the very same documents* that his firm mistakenly filed in this Court and for which corrective action had to be taken. Specifically, Exhibit 15 to Mr. Patrick's affidavit contains a copy of this Court's Discovery Order directing TLC to produce documents relating to other TLC patients who were not parties to the litigation. It included a patient list that contained the names and diagnostic information concerning a total of thirty-four TLC patients.⁷ Filing this document in the bankruptcy court clearly violates the express terms of the Protective Order and, further, it

⁷ Their names and diagnostic information were available in the Court Record and were obtained on this date over the internet through the Federal Pacer System.

violates the terms of the Consent Protective Order issued by this Court on November 21, 2008 to correct Mr. Patrick's firm's earlier violation of the Order.

Further, Exhibit 12 to Mr. Patrick's affidavit filed in the bankruptcy court is an expert witness affidavit executed by Dr. Bradley Williams. The affidavit contains three exhibits, Exhibits A, B and C. Exhibit A to the affidavit contained the names of 22 TLC patients other than the Plaintiffs in these cases and their dates of surgery. Exhibit B to the affidavit contained the names of 14 other TLC patients and their dates of surgery. Exhibit C contained the names of five other TLC patients and one of their dates of surgery. Dr. Williams stated in his affidavit that the patients identified in Exhibit A developed post-surgery loss of vision, corneal instability or ectasia caused by Lasik surgery, that they had substantially similar pre-surgical conditions to the Plaintiffs' and suffered substantially similar breaches of the standard of care. Likewise, Dr. Williams commented diagnostically on the patients identified in Exhibit B. Thus, Exhibit 12 to Mr. Patrick's affidavit filed in the bankruptcy court, in the public record without any protection, revealed the names and identities of numerous TLC patients. Due to Plaintiffs' counsel's error, their diagnostic information was available over the Internet for anyone with a PACER account. Defendants were forced to take steps to ensure that document's removal from the public record in that bankruptcy proceeding. As a result of this violation of the Protective Order, Mr. Patrick was forced to file with the bankruptcy court what can only be described as an ex parte mea culpa affidavit, in which he noted that the documents were "subject to a Protective Order and should not have been included" with the filing and that he "alone [was] responsible for the error." See Exhibit D; ¶ 3 and 4.

Plaintiffs' counsel has also violated the terms of the Protective Order by referencing Confidential Health Information while making inappropriate and highly prejudicial statements

reported in the public media. Following the filing of Hollman's class action complaint, numerous news articles contained comments by Plaintiffs and their counsel. TLC believes Plaintiffs' counsel has improperly disclosed information in violation of the Protective Order. See, e.g., News articles attached hereto as Exhibit E, which are incorporated fully herein by reference:

- "Attorneys later discovered that Hollman was among approximately 1,600 patients who did not know that their records were kept in a confidential database, Fayssoux said."
- "Lewis, who is handling both cases, said a patient database – maintained by TLC LASIK and released during discovery for the state case – prompted his client to pursue the class-action suit."
- "The database, which dates back to at least 2003, contains the names of at least 181 people who shouldn't have gotten eye surgery, Lewis said."
- "In that database, Hollman's lawyers say they have found nearly 200 other TLC patients who have experienced problems similar to those of their client."
- "post-operative treatment for the 181 patients wrongly operated on by TLC LASIK, Hollman's attorneys said,"
- "30 TLC locations performed LASIK surgery on patients with conditions that should have disqualified them from the procedure."
- "TLC kept a database of patients with conditions that could lead to injury down the road. The database contained the statutes of limitations for legal claims that could arise from the procedures."
- "Hollman's lawyers stumbled onto the database almost by accident, uncovering it during discovery for a state-court The database contained 180 additional patients in situations similar to Hollman's."⁸

As set forth above, Plaintiffs and their counsel have consistently violated the terms of the Protective Order to benefit themselves in entirely separate litigation or the media. At times, they have negligently exposed Confidential Health Information to the public while, at other times,

⁸ TLC reserves the right to supplement this motion as necessary to include any other violations of the Protective Order of which it becomes aware:

they have intentionally disclosed it when it served their purpose in other litigation. Clearly, this is in flagrant violation of the original Protective Order. To hold Plaintiffs and their counsel to account, the Protective Order in place should be modified to require the immediate surrender by Plaintiffs and their counsel of any and all Confidential Health Information and their consistent and flagrant violations of this Court's Order should be addressed by means of sanctions.

ARGUMENT

The terms of the Protective Order could not be more clear. The aforementioned actions of Plaintiffs and their counsel in using and disseminating confidential information violate this Court's Protective Order. Therefore, TLC moves the Court to require Plaintiffs to show cause why they should not be found in contempt of the Protective Order. TLC also moves to modify the Protective Order to require the immediate surrender of all Confidential Health Information. TLC further moves the Court for sanctions against Plaintiffs and their counsel for using the confidential information in another action, willfully defying the Protective Order in place.

First and foremost, the Protective Order contemplates the Confidential Health Information being returned or destroyed upon the end of this litigation:

Within sixty (60) days after the conclusion of trial and all appeals or any other termination of this action, all discovery materials designated as Confidential Health Information, including copies, extracts, and summaries thereof, shall be returned to the producing party or destroyed Additionally, each party shall destroy all work product materials, as such are defined by law, containing or referring to Confidential Health Information, in whatever form, stored or reproduced.

.See Exhibit A, ¶12.

Despite that provision, Plaintiffs' and their counsel's refusal to obey the Protective Order require the immediate surrender of all Confidential Health Information. Although this litigation is still ongoing, Plaintiffs and their counsel no longer need the Confidential Health Information

to pursue their medical malpractice claim against Dr. Woolfson. Indeed, the only reason Plaintiffs and their counsel articulated to support their request for the Confidential Health Information was to develop their fraud claims against TLC. With TLC now out of this litigation and only the malpractice action left pending, there is no justifiable reason for Plaintiffs and their counsel to retain this Confidential Health Information. Coupled with their abuses of the Protective Order, Plaintiffs and their counsel cannot be trusted to respect this Court's order, and thus, TLC requests that the Protective Order be modified to require the immediate surrender of any and all Confidential Health Information and work product materials referencing same.

The Protective Order requires that the Confidential Health Information is to be used for no purpose other than this litigation, demanding the conclusion that Plaintiffs and their counsel's disclosure of same in a Delaware bankruptcy proceeding and an entirely separate South Carolina federal action violate both the specific terms and the spirit of the Agreement. So too have Plaintiffs and their counsel violated the provisions of the Protective Order which require that the Confidential Health Information can be disclosed to no one other than permitted by the order itself (which, of course, would not include the media). Through their contumacious conduct, Plaintiffs and their counsel have repeatedly illustrated that they simply cannot be trusted to abide by the Protective Order. Further, because Plaintiffs improperly used the Confidential Health Information to further claims in the federal action, they should be required to immediately surrender their work product materials containing the Confidential Health Information in that action as well.

Finally, because of the continuing and persistent nature of the violations, TLC asks that this Court sanction Plaintiffs and their counsel for the repeated and flagrant nature of their violations. Under South Carolina law, this Court has "the inherent power to punish for contempt,

which 'is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice.'" *Ex parte Cannon*, 385 S.C. 643, 660, 685 S.E.2d 814, 824 (Ct. App. 2009) (quoting *Miller v. Miller*, 375 S.C. 443, 453, 652 S.E.2d 754, 759 (Ct. App. 2007)). In addition, this Court has "the inherent power to punish for offenses that are calculated to obstruct, degrade, and undermine the administration of justice." *Id.* at 661, 685 S.E.2d at 824 (quoting *Miller*, 375 S.C. at 455, 652 S.E.2d at 760). "[J]udges have the authority to . . . use contempt proceedings to preserve the authority and dignity of their courts." *Id.* (quoting *McEachern v. Black*, 329 S.C. 642, 649, 496 S.E.2d 659, 662-63 (Ct. App. 1998)). The existence of this inherent contempt power is "essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice." *Cheap-O's Truck Stop, Inc. v. Cloyd*, 350 S.C. 596, 606, 567 S.E.2d 514, 519 (Ct. App. 2002) (quoting *Curlee v. Howle*, 277 S.C. 377, 382, 287 S.E.2d 915, 917 (1982)).

Based upon the foregoing, TLC respectfully requests that the Court issue an order granting the following relief and sanctions for these violations:

- (a) Enjoin Plaintiffs and their counsel from using any of the protected information in unrelated proceedings, specifically including the federal class action, Case Number 6:10-685-HFF (*See Cheap-O's Truck Stop, Inc.*, 350 S.C. at 607, 567 S.E.2d at 519 ("Judicial sanctions in civil contempt proceedings may . . . be employed . . . to coerce the [violating party] into compliance with the court's order . . ."));
- (b) Order Plaintiffs and their counsel to return all confidential documents, and destroy all work product materials referencing same and file a certificate of compliance with the Court (*See Hunter Eng'g Co. v. Hennessy Indus., Inc.*, No. 4:08-cv-465, 2010 WL 1186454, at *5 (E.D. Mo. March 29, 2010) (ordering party to return confidential documents after violating a protective order by disclosing documents to third parties));
- (c) Because the class action was brought in violation of this Court's Protective Order, Plaintiffs and their counsel should be enjoined from

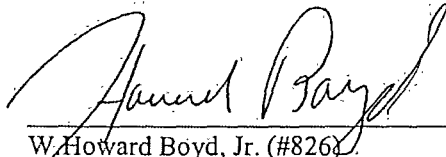
further prosecuting the class action (*See id.*, at *7 (enjoining party from using or disclosing confidential documents in unrelated proceedings pursuant to terms and provisions of protective order));

- (d) That costs and attorneys' fees be assessed against Plaintiffs in connection with the filing of this motion and TLC's effort to prevent further disclosure and use of the confidential information (*See Cloyd*, 350 S.C. at 608-609, 567 S.E.2d at 520 ("Courts, by exercising their contempt power, can award attorney's fees under a compensatory contempt theory.")); and
- (e) Any additional relief which the Court may deem just and proper.

CONCLUSION

For the foregoing reasons, TLC respectfully requests that this motion be granted.

July 8, 2010



W. Howard Boyd, Jr. (#826)

hboyd@gwblawfirm.com

GALLIVAN, WHITE & BOYD, P.A.

55 Beattie Place, Suite 1200 (29601)

Post Office Box 10589

Greenville, SC 29603

Phone: (864) 271-9580

FAX: (864) 271-7502

Attorneys for the Defendants, TLC The Laser Center (Institute), Inc., and TLC Laser Eye Centers (Piedmont/Atlanta) LLC

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF GREENVILLE)
JUL 2 2007)

John Hollman,

Plaintiff,

vs.

Dr. Jonathan Woolfson, et al,

Defendants.

Civil Action No. 2007-CP-23-2347

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

Danielle Hollman,

Plaintiff,

vs.

Dr. Jonathan Woolfson, et al,

Defendants.

Civil Action No. 2007-CP-23-8364

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

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

SPOILIATION OF EVIDENCE

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

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

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

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

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

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

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

A: -- to see.

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

A: No.

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

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

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

A: Yes.

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

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

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

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

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

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

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

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

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

- A: *...And we have a medical malpractice insurance provider that, you know, we have to deal with.*
- A: *We have premiums that we pay, and so general counsel in his wisdom said, Let's learn more about ectasia, I want to know more. And he assigned me to do it, and I was happy to do it. And I learned a great deal and I still use what I learned from that project today.*
[Potter Deposition: P 167, L 12-21]

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

Affidavit of Brian L. Andrew:

- #5. *The "advocacy group" is organized and operates under the direction and control of the General Counsel's office.*
- #6. *The "advocacy group's" activities are carried out in anticipation of litigation...*
[Excerpt of Affidavit of Brian L. Andrew in Hollman v. TLC, et al., CA# 2007-CP-23-2347 - Full Text - EXHIBIT D]

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

- A: *What I do, and have done for years, is begin a day with a folded piece of paper like this. I'll make notes of my conversations with patients or whatever. At the end of the day I shred this and I start over with the next day.*
- Q: *Why would you do that?*
- A: *Well, it's private information. It's about patients and I don't want it to be just lying around. So I get rid of it.*
- Q: *Okay. And - And so by shredding it, whatever those conversations may have been, the documentation of those is - any documentation of that, then, is destroyed.*
- A: *Yeah.*
[Potter Deposition: P 78, L15 - P. 79, L3]
[Relating to his pattern of conduct from 2003 - 2008]
- A: *Well, yeah, I shredded them.*
- Q: *Shredded what?*
- A: *All the records that I had.*
[Potter Deposition: P 224, L 4-8]

[Relating to his conduct in January 2008]¹

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

A: *...Certainly consolidate the – certainly consolidate the – the ability to get the data into one place...we – we still need the separation of advocacy and in complex case.*
[Webb Deposition: P 31, L 22-23; P 32, L 1-2]

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

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

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

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

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

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

A: *No, it does not.*

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

A: *That's correct.*

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

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

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

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

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

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

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

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

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

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

LEGAL ANALYSIS

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

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

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

I. Evidence destroyed was relevant to the litigation

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

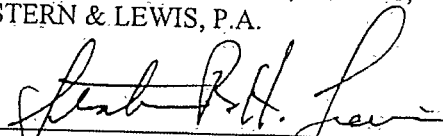
Nucor Corp. v. Bell, 251 FRD 191 (DCSC, 2008).

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

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

Respectfully Submitted,

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



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

ATTORNEYS FOR PLAINTIFFS

July _____, 2010

Greenville, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS

John Hollman,)
)
Plaintiff,)

Civil Action No. 2007-CP-23-2347

vs.)

**PLAINTIFFS' RESPONSE TO DEFENDANT'S
MOTION FOR ORDER AND RULE TO
SHOW CAUSE, MOTION TO MODIFY
PROTECTIVE ORDER, AND MOTION
FOR SANCTIONS**

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

Danielle Hollman,)
)
Plaintiff,)

Civil Action No. 2007-CP-23-8364

vs.)

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

TO: DEFENDANTS TLC THE LASER CENTER (INSTITUTE), INC. AND
TLC LASER EYE CENTERS (PIEDMONT/ATLANTA) LLC AND THEIR
ATTORNEYS, GALLIVAN, WHITE & BOYD, P.A.

FACTUAL AND PROCEDURAL BACKGROUND

TLC is hiding medical information from its patients. Despite numerous requests having been made, it refuses to give to the patient his/her own medical information. In many instances, this information includes the diagnosis of a serious eye condition that progressively worsens over time. As a result of TLC's action in hiding medical information, some patients have eye injuries that cannot be corrected and others still do not know their true diagnosis and are suffering.

irreparable harm. A Federal Class Action lawsuit was filed to prevent this tragedy by affording TLC patients access to their own medical records.¹

As for the procedural history leading to Defendant's filing of these motions, Plaintiffs crave reference to Exhibit "A" attached to Plaintiffs' Motion to Enforce Settlement and to Dismiss Defendant TLC's Motion for Sanctions.

As for a factual background, Plaintiffs crave reference to Sections I, II, and III of Plaintiffs' Memorandum in Support of Plaintiffs' Motion to Compel and in Opposition to Defendant's Motion to Quash attached hereto as Exhibit "B" as well as Plaintiffs' Motion for Protective Order Due to Spoliation and Memorandum in Support, filed on July 21, 2010. The basis for Defendant's motions center around the Protective Order issued by Judge John Few following repeated attempts by TLC to withhold production of information and documents which were clearly discoverable. In its motions, TLC essentially takes the position that *any and all* information and/or documents *relating in any way* to the Complex Case and Advocacy databases is subject to the Protective Order. TLC would have this Court believe that the Protective Order issued by Judge Few is so all encompassing that it prohibits the disclosure of information such as the mere existence of the Complex Case System, the protocol for that system, the violations of

¹In the Federal Class Action, Plaintiff intends to file a Motion for Emergency Relief due to the potential for ongoing irreparable harm to the TLC patients. This motion will be based on affidavit testimony of Plaintiffs' experts, Dr. Brad Randleman and Dr. Kenneth Lebo (Exhibits "C" and "D") in which both doctors testify TLC's failure to advise its patients of a deteriorating condition known as ectasia and thereby delaying treatment for the condition, has caused permanent damage to the patients. This ongoing harm is directly related to TLC's efforts to hide from its patients crucial medical information relating to the patients' ocular health and deteriorating eye condition which is known to TLC. TLC is hiding and withholding this information from their patients, even in the face of knowing they are continuing to harm their patients by failing to disclose their true medical conditions to them.

that protocol, the mere existence of the Advocacy Log System, its set-up, the uses of it by TLC and, most importantly, the mere existence of the Complex Case and Advocacy databases as well as any and all information contained in those databases. TLC's position is meritless for two reasons: 1) it is inconsistent with Judge Few's ruling and the terms of the Protective Order; and, 2) it is inconsistent with the conduct of the parties following the issuance of the Order.

ARGUMENT

i. THE TERMS OF THE PROTECTIVE ORDER

Following his *in camera* review of the documents requested by the Plaintiffs regarding the Complex Case System and Advocacy Log System which included portions of the Complex Case and Advocacy databases, Judge Few granted the Plaintiffs' Motion to Compel production of the requested information and documents as well as denied the Defendant's Motion to Quash Plaintiffs' 30(b)(6) subpoena and subpoena *dices tecum*. The basis for Judge Few's ruling, as stated in both the hearing and in the Discovery Order, was that Judge Few did not consider the requested information to be prepared in anticipation of litigation.² The relevant portions of the Order are as follows:

1) Advocacy Group: The Court has reviewed *in camera* The standard operating procedures ("SOP") and numerous related documents which relate to a process for handling patient complaints referred to as a patient "advocacy log or group". The Advocacy Group/Log as created and operated does not reference the handling or anticipation of litigation. Substantial information within this system and database is directly related to the issues central to Holliman's and Carter's malpractice claims. For example, the system notes or tracks patients who contracted post-

²At the time of the hearing, TLC effectively abandoned any objection to the production of the documents with the exception of the fact they were prepared in anticipation of litigation (see Exhibit "A" 06/05/08 for references to TLC testimony inconsistent with this objection).

surgery ectasia. Since a central issue in these claims involves the applicable standard of care as it evolved during and after the time of Hollman's and Carter's surgeries, discovery of other patients with similar problems and treatment is clearly relevant.

2) **Complex Cases:** The Court has reviewed the SOP and other documents relating to the designation of TLC patient cases as "complex". These documents establish that the management system was designed to assist in the treatment of patients. The complex case designation and system as created does not reference or involve the handling or anticipation of litigation. The rationale to permitting discovery in this area, including the identity of other patients, is identical to that involving the "advocacy group". In connection with the complex case system, TLC has alleged in discovery responses that its SOP was not strictly followed, suggesting there were other reasons for its use. However, even with those deviations from SOP, the testimony of TLC employees does not support a claim of privilege. Therefore, any use of the complex case system other than its designated and defined use has failed to establish a reason to prevent discovery.

The Discovery Order recites that production of the requested information shall be subject to an appropriate Protective Order. Specifically, the Court stated:

TLC has raised confidentiality concerns, including HIPAA requirements. These issues can best be handled by a protective order, which provides appropriate safeguards to confidentiality and specific reference to HIPAA compliance. This protective order is filed contemporaneously with this Order and is incorporated herein by reference.

It is important to note that the "confidentiality concerns, including HIPAA requirements" raised by TLC at each and every hearing, including hearings following the issuance of the Protective Order relating to Plaintiffs' Motion to be allowed to interview other TLC patients, were most often stated to be "protecting the privacy rights of their patients". (See Exhibit "E").

TLC represented to this Court and to the S.C. Supreme Court in its Petition for Writ of Certiorari that its paramount concern was protecting the privacy rights of its patients, including the right of the patient not to be "bothered" by Plaintiffs' lawyers contacting them. In hindsight

and in light of the evidence uncovered since the Supreme Court vacated Judge Few's Order allowing Plaintiffs' counsel to interview other TLC patients (see Plaintiffs' Motion for Protective Order for Spoliation of Evidence), as well as the position now taken by TLC, protecting the rights of its patients is the last thing on the minds of TLC and its attorneys. Instead, TLC's only interest is in hiding critical information from its patients in an effort to protect its own assets.

Nevertheless, TLC argues the terms of the Protective Order have been violated by Plaintiffs and their counsel "consistently" and on numerous occasions, warranting not only sanctions, but, incredibly, an Order from this Court enjoining Plaintiffs' counsel from prosecuting a Federal Court Class Action. Essentially, TLC is asking this Court to effectively dismiss a Federal Court Class Action. TLC's request is squarely outside the jurisdiction of this Court. In addition, TLC has made no showing of the requisite elements necessary under Rule 65 of the *S.C. Rules of Civil Procedure* to support injunctive relief. Again TLC would have this Court believe that the Protective Order issued by Judge Few encompasses every single piece of information or documents ordered by Judge Few to be produced by TLC, including the mere existence of documents and information. TLC's position is meritless. The terms of the Protective Order are clear as to the scope of the information subject to it. The Protective Order clearly contemplates the protection of "Confidential Health Information". The Order defines Confidential Health Information as follows:

The term "Confidential Health Information" means...any document or information supplied that *identifies an individual* or subscriber in any manner *and* relates to the past, present or future payment for the provision of healthcare to such individual or subscriber. The term "Confidential Health Information" specifically includes "protected health information" as such term is defined by the Standards for Privacy of Individually Identifiable Health Information, 45 CFR Parts 160 and 164, promulgated pursuant to

the Health Insurance Portability and Accountability Act of 1996.
See 45 CFR §§164.501 ("protected health information") and
160.103 ("individually identifiable health information").
"Confidential Health Information" includes all notes, summaries,
compilations, extracts, abstracts, or oral communications that
contain, are based on, or are derived from Confidential Health
Information. [emphasis added]

Protective Order, p. 4, ¶2.

"Protected Health Information" is defined as follows:

Protected Health Information means individually identifiable
health information:

(1) Except as provided in paragraph (2) of this definition, that is:

- (i) transmitted by electronic media;
- (ii) maintained in electronic media;
- (iii) transmitted or maintained in any other form or medium.

45 CFR §160.103

"Individually identifiable health information" is defined as follows:

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

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

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

(i) That *identifies the individual*; or

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

45 CFR §160.103

“Health information” is defined as follows:

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

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

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

45 CFR §160.103

Clearly, TLC’s interpretation of the scope of the Protective Order is unreasonably broad, bordering on absurd. The definition of “Confidential Health Information” and the terms of the Order itself prohibit the disclosure and public use of information which identifies the individual patient. Judge Few found and so ruled in the Discovery Order that TLC’s *sole* objection to the production of the documents and information—that they were prepared in anticipation of litigation—was not valid and overruled the objection, thereby ordering the production of the information. It would defy both logic and reason to issue a Protective Order, and for both parties to agree to a Protective Order, of such broad scope that it prohibited *any* disclosure or use of *any* information produced in the absence of revealing the identity of the patient. Mere information about a patient isn’t “confidential” if the identity of the patient is not disclosed. Further, the mere existence of a database that contains information about patients is not confidential if the identity of the patients is not disclosed. Instead, the purpose and terms of the Protective Order clearly establish the Court sought protection of the identity of the patients. TLC has never argued the

information produced constituted a trade secret or proprietary information. Instead, the argument used time and time again in both open court and in briefs addressing the issue was "the protection of the privacy rights of the individual patients". An interpretation of the Protective Order which prohibits the Plaintiffs from using information contained in the database which does not specifically identify an individual patient is nothing more than an attempt by TLC to continue its longstanding pattern of withholding crucial information from its patients.

2. INCONSISTENT CONDUCT OF THE PARTIES

In addition to the unreasonable and self-serving interpretation of the language of the Protective Order, TLC's course of conduct following the issuance of the Protective Order establishes the scope of the protection.

Following the issuance of the Protective Order and throughout the course of this litigation, TLC has used the Confidential Health Information in a manner which they now claim is in violation of the Protective Order. In deposition testimony in this litigation, a TLC employee, Dr. John Potter, "violated" the Protective Order on several occasions by referring to patients by their I.D. number or name (See Exhibit "F"). In addition, TLC's filings in the Federal Class Action also contain numerous references to what it now characterizes as "Confidential Health Information" (see Exhibit "G"). Despite these violations, TLC never moved to seal the deposition of the Federal Court filings which contained the "violative" information in an effort to remedy what it now claims are clear violations of the Protective Order. Although TLC will most likely argue its filings were being used in defense of the Federal Class Action, the fact remains TLC used information they now define as "Confidential Health Information" outside of the State Court action with no effort to seal or protect the information contained in its filings. In essence,

TLC's use of "Confidential Health Information", which, according to its interpretation of the terms of the Protective Order would be a violation of the Protective Order, was never considered to be a violation of the Order by either party because it did not disclose, contemporaneously with that information, the identity of the patient.

In fact, the Federal Court action was filed based on the same premise. The Plaintiffs used the existence of the information contained in the database to make certain allegations but went to great lengths to protect the privacy of the patients (see Exhibit "H", Plaintiffs' Motion for a Protective Order and to Seal Documents). Therefore, Plaintiffs have not violated the Protective Order since the identities of the patients have not been disclosed and the identities of the patients have been put under seal.

In addition, subsequent to the entry of the Protective Order, Plaintiffs discovered a significant amount of evidence which made it imperative that a Federal lawsuit be filed alleging RICO violations in an effort to force TLC to turn over critical patient information to its patients. One of the first pieces of evidence Plaintiffs discovered, which was not known prior to the entry of the Protective Order, was that the vast majority of information contained in the databases and medical records produced was a secret. Dr. Potter testified that under no circumstances would TLC turn this information over to the patients (Potter Deposition, p. 120, l. 2-11; p. 136, l. 22 - p. 137, l. 3). In addition, the database itself, in a significant number of entries, contains the following language: "The following are opinions based on the information provided, are not part of the patient's record, and should not be included in the patient's chart". The "opinions" relate to the patient's ocular condition and the diagnosis and treatment of the patient.

Based on this and other information discovered after the filing of the Protective Order, Plaintiffs' counsel felt compelled to file the RICO Class Action in Federal Court asking the Court to force TLC to turn this "secret" information over to the patients. In fact, Plaintiffs' allegations of TLC's hiding crucial information from its patients has been confirmed subsequent to the filing of the Federal Class Action. Attached as Exhibit "I" is the Affidavit of Chad Luce, a patient of TLC who specifically requested from TLC information and documents regarding his designation into the Complex Case System and/or Advocacy Group, and this request was denied. In addition, according to New York attorney Todd Kröuner, who represents an injured TLC patient in Virginia State Court, the same TLC entity both before this Court and before the Virginia Court, in discovery responses, has denied the existence of Mr. Kröuner's client being included in the Advocacy Group and/or Complex Case databases and has also denied the ability to access any information responsive to Mr. Kröuner's request (Exhibit "J").

PLAINTIFFS' ALLEGED VIOLATIONS OF THE PROTECTIVE ORDER

In an effort to convince this Court that the Plaintiffs and their counsel have engaged in "consistent and flagrant violations of this Court's Order", TLC has cited numerous examples of "violations" and conduct for which it is asking this Court to sanction Plaintiffs and their counsel.

1. State Court Action

TLC has alleged Plaintiffs' counsel has violated the Protective Order by "mishandling" exhibits to State Court filings, which contained the names of TLC patients. While both cited instances did occur and were technical violations of the Protective Order, they were clearly inadvertent on the part of Plaintiffs' counsel as evidenced by the fact that as soon as the mistake

was discovered, it was immediately remedied by Plaintiffs' counsel by the drafting and filing of Motions to Seal the documents containing the names of the TLC patients. The violations were neither intentional nor flagrant. In addition, TLC has shown no evidence of any harm nor any impact on the privacy rights of any TLC patients as a result of the inadvertent violations.

2. Other Litigation

TLC also alleges violations have occurred in litigation other than the State Court action. Specifically, TLC alleges the mere act of filing the Federal Class action complaint was an "exploitation" of the Confidential Health Information. Although stated earlier in this Response, this point bears repeating. Nowhere in the Federal Court filings by the Plaintiff has the Plaintiff or Plaintiff's counsel disclosed the identity of the TLC patients other than to file the databases under seal with the Federal Court pending a determination of how the information would be disclosed in the Federal Court Action. TLC's position that disclosure of *any and all* information and/or documents *relating in any way* to the Complex Case and Advocacy databases constitutes a violation of the Protective Order is untenable. For example, TLC attempts to convince this Court that Plaintiffs' allegation in the Federal Court Class Action Complaint which cites the fact that the databases contain approximately 1,600 patients, of which 181 had similar diagnoses of the Plaintiff, is a violation of the Protective Order, when, in fact, no patient identities were disclosed and no identifying information was disclosed. Similarly, the use of the database to identify potential Defendants did not disclose the identity of the patients or any possible identifying information. In fact, incredibly, TLC chastises the Plaintiffs for attempting to protect the identities of the TLC patients by moving the Federal Court to seal the databases until the Court could establish the parameters for the use of the information. In addition, TLC's allegation

that the Protective Order has been violated by virtue of Class Representative Ben Dickerson having access to the database is nonsensical, especially in light of the fact that no Confidential Health Information has been disclosed to Mr. Dickerson and will not be until the Federal Court, pursuant to Plaintiffs' Motion for a Protective Order and to Seal Documents, determines the parameters for the use of the Confidential Health Information in the Federal Court action.

The Defendant's last example of a violation of the Protective Order in other litigation shows TLC's true motivation behind its motions. TLC alleges, "The would-be Class Action complaint also violates this Court's Protective Order because *it is a vehicle for Plaintiffs to improperly make contact with nonparty patients*." In support of its conclusion, TLC cites the last sentence of ¶54(a) of Plaintiffs' original Class Action complaint, which is nothing more than a standard recitation designed to advise the Court as to how the Class Members can be notified of the pendency of the action, if and when the Court certifies the Class. TLC's mischaracterization of the purpose of this standard language shows its true concern regarding its patients receiving information concerning their ocular health—the patients may seek legal redress for the harm caused. Unfortunately for TLC, the fact that patients who may have been harmed by TLC's conduct may choose to seek legal redress is not a valid reason to withhold crucial health information from them.

3. Bankruptcy Proceeding

TLC asserts a violation occurred when Plaintiffs' counsel filed an Affidavit attached to a pleading in Bankruptcy Court in Delaware in a proceeding involving the bankruptcy of TLC Vision Corp. TLC is correct that an exhibit to the Affidavit contained the names and diagnostic information of TLC patients, which was a violation of the Protective Order. However,

immediately after Plaintiffs' counsel discovered the mistake, counsel filed an Affidavit with the Bankruptcy Court admitting responsibility for the error and subsequently went to great lengths to remove the information from the Court filings as well as seek the return of documents from all Bankruptcy counsel.

Again, the above-referenced violation of the Protective Order was inadvertent and clearly not intentional and was remedied immediately upon discovery by Plaintiffs' counsel. In addition, TLC has once again shown no harm from this violation which would warrant sanctions and/or the return of the information and documents produced pursuant to the Protective Order.

4. **Statements to the Media**

TLC asserts that Plaintiffs' counsel's statements to the media following the filing of the Federal Court Class Action complaint violated the Protective Order. Once again, TLC's position is without merit. TLC has cited no comment by Plaintiffs' counsel to the media which identifies any TLC patient or gives any information which could possibly reveal the identity of any TLC patient. TLC is once again attempting to interpret the terms of the Protective Order to encompass *any* reference to the documents and information produced pursuant to Judge Few's discovery order as being "Confidential Health Information" subject to the prohibitions of the Protective Order. TLC's position is nothing more than an attempt to deflect this Court's attention from TLC's true motive throughout the course of the State Court litigation and, so far, in the Federal Court litigation, which is to hide information from its patients and prevent them from discovering the nature of its conduct and thereby avoiding the consequences thereof.

CONCLUSION AND RELIEF SOUGHT

The Protective Order signed by Judge Few is not so broad in scope that it encompasses *any* possible reference to *any* document or piece of information contained in the databases and medical records produced by the Defendant. It was never intended to do so, the terms of the Order do not provide for such a broad and unreasonable interpretation, and the conduct of the parties following the issuance of the Protective Order clearly demonstrate the intent and scope of the Order—to protect the identities of the TLC patients. None of the conduct cited by TLC, with the exception of the inadvertent violations which were immediately corrected, in any way revealed the identity of the TLC patients and were, therefore, not violations of the Protective Order. TLC's assertions of wrong-doing by the Plaintiffs and Plaintiffs' counsel is a thinly veiled attempt to divert this Court's attention from the truth—TLC has critical health information which it is keeping from its patients, and continued delay in doing so is causing irreparable harm to the very patients it claims to be protecting by filing these unfounded Motions. Any assertion by TLC that its attempt to withhold vital information other than the identity of its patients because it is concerned about its patients' privacy rights is simply untrue.

THEREFORE, Plaintiffs respectfully requests the following relief:

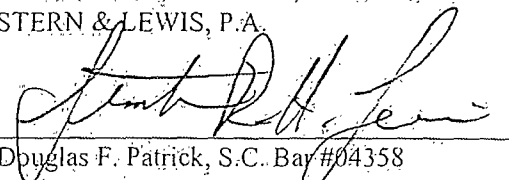
1. TLC's Notice of Motion and Motion for Order and Rule to Show Cause be dismissed;
2. TLC's Motion to Modify the Protective Order be dismissed;
3. TLC's Motion for Sanctions be dismissed;
4. For a finding by this Court that the violations of the Protective Order by Plaintiffs' counsel with regard to the filing of Affidavits and Exhibits in this action and in

the Bankruptcy proceeding regarding TLC Vision Corp were inadvertent, unintentional, and resulted in no known harm to TLC and TLC's patients;

5. For a finding by this Court that with the exception of the inadvertent and harmless violations of the Protective Order referenced in #4 above, neither Plaintiffs nor Plaintiffs' counsel have violated the November 14, 2008, Protective Order;
6. For an Order modifying the November 14, 2008, Protective Order to clarify the definition of "Confidential Health Information" to be consistent with the legitimate concern for protecting from disclosure the identity of the TLC patients;
7. For an Order finding the November 14, 2008, Protective Order prospectively subordinate to any Protective Order issued in the Federal Class Action with regard to procedural and discovery issues before the Federal Court;
8. For costs and attorneys' fees to be assessed against TLC relating to the filing of its motions for which the Plaintiffs were required to respond; and,
9. For any additional relief which the Court may deem just and proper.

Respectfully Submitted,

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


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

July 22, 2010

Greenville, South Carolina

ATTORNEYS FOR PLAINTIFFS.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
Michael "Chad" Luce	)	C.A. No.: 2010-CP-23-9956
	)	
Plaintiff,	)	
	)	
vs.	)	<u>MOTION TO DISMISS OF DEFENDANTS</u>
	)	<u>TLC THE LASER CENTER (INSTITUTE),</u>
<u>TLC Corporate</u>	)	<u>INC., JONATHAN POTTER, M.D., AND</u>
	)	<u>CYNTHIA YEAGER, O.D. AS TO</u>
TLC The Laser Center (Institute),	)	<u>PLAINTIFF'S FIRST AMENDED COMPLAINT</u>
Inc. f/k/a TLC The Laser Center	)	
(Piedmont), Inc.,	)	
	)	
<u>TLC Physicians</u>	)	
	)	
Jonathon Woolfson, M.D.; Derek P.	)	
Van Veen, O.D.; Cynthia Wike	)	
Yeager, O.D.; and John Potter, M.D.,	)	
	)	
Defendants,	)	

TO: JAMES W. FAYSSOUX, JR., PAUL S. LANDIS, DOUGLAS F. PATRICK,
STEPHEN R.H. LEWIS, J. EDWARD BELL, III, AND J. RYAN
HEISKELL, ATTORNEYS FOR PLAINTIFF

PLEASE TAKE NOTICE that Defendants, TLC The Laser Center (Institute), Inc.
f/k/a TLC The Laser Center (Piedmont), Inc., Jonathan Potter, M.D., and Cynthia Yeager,
O.D. (referred to collectively as "TLC"), by and through their undersigned counsel, will
move the Court at a date and time to be set by the Court, but not sooner than ten (10)
days after service hereof, for an order pursuant to Rule 12(b)(1) and (6) of the South
Carolina Rules of Civil Procedure, dismissing the First Amended Complaint of Plaintiff,
Michael "Chad" Luce, upon the following grounds:

A. Pursuant to Rule 12(b)(6):

1. Each of Plaintiff's claim against TLC is barred by the statute of limitation set out at S.C. Code § 15-3-545;

Alternatively or additionally:

2. Each of Plaintiff's claims against TLC, except the action for violation of the S.C. Unfair Trade Practices Act, is barred by the statute of limitation set out at S.C. Code § 15-3-530;

Alternatively or additionally:

3. Plaintiff's cause of action against TLC for violation of the S.C. Unfair Trade Practices Act is barred by the statute of limitation set out at S.C. Code § 39-5-150;
4. Plaintiff's cause of action against TLC for fraud fails to state facts sufficient to constitute a cause of action;
5. Plaintiff's cause of action against TLC for negligent misrepresentation fails to state facts sufficient to constitute a cause of action;
6. Plaintiff's cause of action against TLC for civil conspiracy fails to state facts sufficient to constitute a cause of action;
7. Plaintiff's cause of action against TLC for violation of the S.C. Unfair Trade Practices Act fails to state facts sufficient to constitute a cause of action; and,
8. Plaintiff's cause of action against TLC for breach of contract fails to state facts sufficient to constitute a cause of action.

B. Pursuant to Rule 12(b)(1), alternatively or additionally:

1. Plaintiff's claim against TLC is barred by the statute of repose set out at S.C. Code § 15-3-545.

WHEREFORE, for the reasons stated herein, TLC requests that the Court dismiss Plaintiffs' First Amended Complaint in its entirety pursuant to Rule 12(b)(1) and (6) of the South Carolina Rules of Civil Procedure. This Motion is based on the First Amended Complaint, any and all documents incorporated by reference into the First Amended Complaint, and any memoranda that may be filed by TLC in support hereof.

Respectfully submitted,

By: Luanne L. Runge
W. Howard Boyd, Jr.
S.C. Bar No. 826
Luanne L. Runge
S.C. Bar No. 65389
Steven Edward Buckingham
S.C. Bar No. 75089
55 Beattie Place / Suite 1200
Post Office Box 10589
Greenville, SC 29603
(o) 864.271.9580
(f) 864.271.7502
hboyd@gwblawfirm.com
lrunge@gwblawfirm.com
sbuckingham@gwblawfirm.com

Counsel for Defendants
TLC The Laser Center (Institute), Inc.
f/k/a TLC The Laser Center (Piedmont),
Inc., Jonathan Potter, M.D., and Cynthia
Yeager, O.D.

April 28, 2011
Greenville, South Carolina

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
Charles Benjamin "Ben"	)	C.A. No.: 2010-CP-23-9954
Dickerson and Gale M. Dickerson,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	<u>MOTION TO DISMISS OF DEFENDANT</u>
	)	<u>TLC THE LASER CENTER (INSTITUTE),</u>
<u>TLC Corporate</u>	)	<u>INC., JONATHAN POTTER, M.D., AND</u>
	)	<u>CYNTHIA YEAGER, O.D. AS TO</u>
TLC The Laser Center (Institute),	)	<u>PLAINTIFFS' FIRST AMENDED COMPLAINT</u>
Inc. f/k/a TLC The Laser Center	)	
(Piedmont), Inc.,	)	
	)	
<u>TLC Physicians</u>	)	
	)	
Jonathon Woolfson, M.D.; Jeffrey	)	
Machat, M.D.; Derek P. Van Veen,	)	
O.D.; Cynthia Wike Yeager, O.D.;	)	
John Potter, M.D.; and David Kohler,	)	
O.D.,	)	
	)	
Defendants.	)	

TO: JAMES W. FAYSSOUX, JR., PAUL S. LANDIS, DOUGLAS F. PATRICK,
STEPHEN R.H. LEWIS, J. EDWARD BELL, III, AND J. RYAN
HEISKELL, ATTORNEYS FOR PLAINTIFFS

PLEASE TAKE NOTICE that Defendants, TLC The Laser Center (Institute), Inc.
f/k/a TLC The Laser Center (Piedmont), Inc., Jonathan Potter, M.D., and Cynthia Yeager,
O.D. (referred to collectively as "TLC"), by and through their undersigned counsel, will
move the Court at a date and time to be set by the Court, but not sooner than ten (10)
days after service hereof, for an order pursuant to Rule 12(b)(1) and (6) of the South
Carolina Rules of Civil Procedure, dismissing the First Amended Complaint of Plaintiffs,
Charles Benjamin "Ben" Dickerson and Gale M. Dickerson, upon the following grounds:

A. Pursuant to Rule 12(b)(6):

1. Each of Plaintiff Benjamin Dickerson's causes of action against TLC is barred by the statute of limitation set out at S.C. Code § 15-3-545;
2. Plaintiff Gale Dickerson's cause of action for loss of consortium is barred by the statute of limitation set out at S.C. Code § 15-3-545;

Alternatively or additionally:

3. Each of Plaintiff Benjamin Dickerson's causes of action against TLC, except the action for violation of the S.C. Unfair Trade Practices Act, is barred by the statute of limitation set out at S.C. Code § 15-3-530;
4. Plaintiff Gale Dickerson's cause of action for loss of consortium is barred by the statute of limitation set out at S.C. Code § 15-3-530;

Alternatively or additionally:

5. Plaintiff Benjamin Dickerson's cause of action against TLC for violation of the S.C. Unfair Trade Practices Act is barred by the statute of limitation set out at S.C. Code § 39-5-150;
6. Plaintiff Benjamin Dickerson's cause of action against TLC for fraud fails to state facts sufficient to constitute a cause of action;
7. Plaintiff Benjamin Dickerson's cause of action against TLC for negligent misrepresentation fails to state facts sufficient to constitute a cause of action;
8. Plaintiff Benjamin Dickerson's cause of action against TLC for civil conspiracy fails to state facts sufficient to constitute a cause of action;
9. Plaintiff Benjamin Dickerson's cause of action against TLC for violation of the S.C. Unfair Trade Practices Act fails to state facts sufficient to constitute a cause of action;
10. Plaintiff Benjamin Dickerson's cause of action against TLC for breach of contract fails to state facts sufficient to constitute a cause of action;
11. Plaintiff Gale Dickerson's cause of action against TLC for loss of consortium fails to state facts sufficient to constitute a cause of action; and,

Alternatively or additionally:

12. The claims presented in the First Amended Complaint are subject to the doctrine of claim preclusion.

B. Pursuant to Rule 12(b)(1), alternatively or additionally:

1. Each of Plaintiff Benjamin Dickerson's causes of action against TLC is barred by the statute of repose set out at S.C. Code § 15-3-545; and,
2. Plaintiff Gale Dickerson's cause of action for loss of consortium is barred by the statute of repose set out at S.C. Code § 15-3-545.

WHEREFORE, for the reasons stated herein, TLC requests that the Court dismiss Plaintiffs' First Amended Complaint in its entirety pursuant to Rule 12(b)(1) and (6) of the South Carolina Rules of Civil Procedure. This Motion is based on the First Amended Complaint, any and all documents incorporated by reference into the First Amended Complaint, and any memoranda that may be filed by TLC in support hereof.

[SIGNATURE BLOCK FOLLOWS]

Respectfully submitted,

By: Luanne L. Runge

W. Howard Boyd, Jr.

S.C. Bar No. 826

Luanne L. Runge

S.C. Bar No. 65389

Steven Edward Buckingham

S.C. Bar No. 75089

55 Beattie Place / Suite 1200

Post Office Box 10589

Greenville, SC 29603

(o) 864.271.9580

(f) 864.271.7502

hböyd@gwblawfirm.com

lrünge@gwblawfirm.com

sbuckingham@gwblawfirm.com

Counsel for Defendants

TLC The Laser Center (Institute), Inc.

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

Inc., Jonathan Potter, M.D., and Cynthia

Yeager, O.D.

April 28, 2011
Greenville, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

) IN THE COURT OF COMMON PLEAS
) C.A. No. 2007-CP-23-2347
)

John Hollman,

Plaintiff,

vs.

)
)
)
) **PLAINTIFF'S SUPPLEMENTAL
DISCOVERY REQUESTS**
)
)

Dr. Jonathan Woolfson, individually; TLC
Laser Eye Centers (Piedmont/Atlanta) LLC;
TLC The Laser Center (Institute), Inc.,
Dr. Michael A. Campbell, individually;
Optical Solutions, Inc.; and Optical Solutions
of Bluffton, LLC;

Defendants.

TO: THE DEFENDANTS ABOVE-NAMED AND THEIR ATTORNEYS

The Plaintiff above-named, by and through undersigned counsel, hereby serve the following Supplemental Discovery Requests on the Defendants pursuant to the *S.C. Rules of Civil Procedure*. These Supplemental Discovery Requests are served pursuant to and governed by inter alia, Rule 26, Rule 33 and Rule 34 of said *S.C. Rules of Civil Procedure*. Defendants' responses shall be separately and fully stated in writing and under oath.

Definitions and General Provisions:

"Advocacy Group", also known as the "clinical advocacy group" includes any group or designation, regardless of name, as referenced in the attached e-mails.

"Document", when used in its customary broad sense and includes, but is not limited to, all writings of every kind, including but not limited to letters, telegrams, memoranda, reports,

studies, engineering drawings, engineering calculations and records of engineering analysis, calendar and diary entries, maps, pamphlets, notes, charts, tabulations, analyses, statistical information, accumulations, advertisements, any kind or records of meetings and conversations, film, impressions, magnetic tape, sound or mechanical reproductions and the like, brochures, files, computer data on disk or hard drive capable of reproduction in printable form, financial and accounting records, microfilm, notes used to prepare memoranda, and all other printed or readable material which is in the Defendant's possession, custody or control or is available and obtainable by the Plaintiff within the purview of the Federal Rules of Civil Procedure.

"Identify", when referring to a person, shall include:

- (a) His or her name;
- (b) Address and telephone number at the time referred to;
- (c) Present or last known address;
- (d) Employer at the time referred to;
- (e) Employer's address at the time referred to;
- (f) Present employer and employer's address;
- (g) Position, title and responsibilities at the time referred to and to the present and most recent position, title and responsibilities;

When referring to a company, identify shall include:

- (a) The name of the entity at the time referred to;
- (b) Current name;
- (c) Address and telephone number at the time referred to; and,
- (d) Present address.

All of the following Discovery Requests are directed to your knowledge and to the contents of your books and records and to the knowledge of your attorneys, investigators, employees, agents, insurance carriers and to the contents of their respective books and records and to the knowledge of all other persons of who inquiry may reasonably be made.

In answering these Discovery Requests, please furnish all information available to you. For any Discovery Requests answered in whole or in part by "I don't know" or by "unknown", state in detail all efforts to obtain the information requested, and any continuing efforts in that regard and by whom such continuing efforts are being made.

For any Discovery Requests answered in whole or in part by "investigation is continuing" or "discovery is continuing", state the nature of any such continuing investigation, the name of each person or entity conducting such investigation, and the anticipated date of completion of each such investigation.

With respect to any items which seek to identify a document, you may, in lieu of the identifying information, simply attach a copy of said document to your answers. With respect to any Discovery Requests which ask for the contents of a document you may, if you wish, in lieu of answering said Discovery Request, attach a copy of said document, with the statement to the Discovery Request that the copy attached is a true copy of the original of said document.

With respect to any items which refer to a communication, oral or in writing, identify the nature of the communication, and the name, address and job title of the person who presently has custody of copy of such written communication; or if the communication was oral and a recording of any kind was made of it, identify the name, address and job title of the person who presently has custody of such recording.

With respect to each Discovery Request, such request shall also extend to and include all documents which are made, altered, or modified during the period commencing from the date of the Complaint and shall extend forward in time to the present date. These first discovery requests shall be continuing in nature as provided by the applicable Rules of Civil Procedure requiring timely additions or supplementations as further information, documents, and records are discovered or become available to the Defendant, its agents, representatives, employees, accountants and attorneys.

DISCOVERY REQUESTS

1. For your past or current employees or independent contractors listed in response to Plaintiff's Discovery Requests, please provide a full curriculum vitae.
2. Produce any and all documents, correspondence, e-mail, or other electronic communication which in any way relates to the Plaintiff John Hollman, whether internal between employees or independent contractors or external to third parties. This includes, but is not limited to, documents, etc. involving the Plaintiff's inclusion in the advocacy group or designation as complex case.
3. Provide the following information and documents relating to the "advocacy group":
 - a) When it was originally formed and why;
 - b) The purpose for its formation and its operation;
 - c) The identity and curriculum vitae of each employee and independent contractor who was involved in its formation or operation;
 - d) The criteria for inclusion in the advocacy group (also known as the clinical advocacy group) or placement on an advocacy list;

- e) When the Plaintiff's case was first designated to be placed on the "advocacy group" list;
- f) When the Plaintiff was first notified of his inclusion or placement;
- g) Produce all documents and forms normally used or prepared for use;
- h) Produce all documents relating to or prepared as a result of John Hollman's case being assigned to the "Advocacy Group";
- i) Produce all documents relevant to the issues raised in this discovery request.

4. Provide the following information and documents relating to the designation of cases as "complex cases":

- a) When the designation was formed and why;
- b) The purpose for its formation and its use;
- c) All employees and independent contractors who were involved in the assignment of the designation or operation of cases under this designation;
- d) The criteria for inclusion as a complex case or designation as a complex case;
- e) When the Plaintiff's case was first assigned this designation.
- f) When the Plaintiff was first notified his case was designated as complex;
- g) Produce all documents and forms normally used or prepared for use;
- h) Produce all documents relating to or prepared as a result of the designation of John Hollman's case as "complex";
- i) Produce all documents relevant to the issues raised in this discovery request.

5. As a result of the Plaintiff's care, treatment, or designation of "complex" or assignment to the "advocacy group", were any:

- a) Treatment plans prepared. If so, produce and, if oral, describe in detail;

- b) Cost/expense plans, cost projections or estimated reserves prepared. If so, produce, and, if oral, describe in detail; and,
- c) Financial reserve or contingency funds calculated, appropriated, set aside, or designated. If so, produce, and, if oral, describe in detail.

6. Identify each patient who has been assigned to, placed in, associated with, or designated by the "advocacy group" from its inception to the present. For each patient, provide the following:

- a) Date assigned to the advocacy group;
- b) Reason(s) for assignment;
- c) Identify all employees or independent contractors who were involved with the patient as a result of the assignment and the duties of each;
- d) The date the patient was notified of his/her inclusion in the "advocacy group"
- e) Produce all medical records of each patient; and,
- f) Produce all documents relevant to or relating to the patient and the "advocacy group", including internal correspondence, e-mails, or other notes or memoranda.

7. Identify each patient whose case has been designated as a "complex case" from the inception of the "complex case" designation system to the present. For each patient, provide the following:

- a) Date designated as complex case;
- b) Reason(s) for designation;
- c) Identify all employees or independent contractors who were involved with the patient as a result of the designation and the duties of each;
- d) The date the patient was notified of his/her designation as complex case;

e) Produce all medical records of each patient; and,

f) Produce all documents relevant to or relating to the patient and the "complex case" designation, including internal correspondence, e-mails, or other notes or memoranda.

8. Identify each patient referred to in the attached e-mail (Exhibit "A") and:

a) Produce all medical records of the patient; and,

b) Produce all documents not in the medical records relevant to the handling of the patient care and problems, including documents relating to notification to patient.

9. For the surgery dated July 8, 1999, identify all employees and/or independent contractors including, but not limited to, medical doctors, optometrists, technicians, assistants, and nurses who saw, treated, tested, and/or physically examined or performed diagnostic examinations of the Plaintiff John Hollman prior to such surgery. For each person so identified, describe in detail the work performed by that person.

10. For the surgery dated November 22, 1999, identify all employees and/or independent contracted persons including, but not limited to, medical doctors, optometrists, technicians, assistants, and nurses who saw, treated, tested, and/or physically examined or performed diagnostic examinations of the Plaintiff John Hollman prior to such surgery. For each person so identified, describe in detail the work performed by that person.

11. For the surgery dated June 26, 2001, identify all employees and/or independent contracted persons including, but not limited to, medical doctors, optometrists, technicians, assistants, and nurses who saw, treated, tested, and/or physically examined or performed

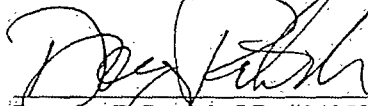
diagnostic examinations of the Plaintiff John Holliman prior to such surgery. For each person so identified, describe in detail the work performed by that person.

12. Explain in detail and produce all documents relating to:

- a) The relationship between TLC Laser Eye Centers (Piedmont/Atlanta) LLC and the TLC the Laser Center (Institute), Inc.;
- b) The relationship between TLC Laser Eye Centers (Piedmont/Atlanta) LLC and the TLC the Laser Center (Institute), Inc. and Dr. Jonathan Woolfson;
- c) The relationship between TLC Laser Eye Centers (Piedmont/Atlanta) LLC and the TLC the Laser Center (Institute), Inc. and/or Optical Solutions, Inc. and Optical Solutions of Bluffton, LLC.

*Note these requests include but are not limited to information and documents in relation to financial payments made between these entities relating to patient care, treatment, or handling.

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



Douglas F. Patrick, I.D. #04358
Stephen R.H. Lewis, I.D. #12947
P.O. Box 2343
Greenville, SC 29602
(864) 242-9000

March 10, 2008

Greenville, South Carolina

Exhibit A

-----Original Message-----

From: Derek Van Veen
Sent: Tuesday, November 11, 2003 4:53 PM
To: Jim Owen
Subject: RE: John Hollman

Jim,

I already have these pt's submitted as active complex cases. I have added them to the advocacy list. Maybe I should.

Thanks,
Derek

Derek P Van Veen, OD
Clinical Director, TLC Piedmont
Phone 864-297-6299
Fax 864-297-6598

HOLL-EMAIL- 0004

Derek Van Veen

From: Jim Owen
Sent: Monday, November 10, 2003 6:35 PM
To: Derek Van Veen
Subject: RE: John Hollman

Derek

These cases usually progress. What is not known is when is the best time to stabilize the cornea. Mine opinion is when the cornea is identified as ectatic you have the best opportunity to "normalize" the cornea and thus maintain better quantity and quality of vision. The post-op care is very simple. The patient is on an antibiotic and steroid for a week just like lasik. There is a suture that is put in that is remove between 2 and 6 weeks. Vision is better day one but we are not critical of vision until about a month and 3 months is when it is usually stable.

Regarding the other cases, were those included in your patient advocacy log to Dr. Potter. John can be a big help in dealing with these patients. Also, he will support the clinical decisions of you and the co-managing doctor in the care of the patient. Finally, we should try to get Dr. Wolfson involved in paying for the cost to care for these patients. Again, John can be a big help in that situation.

I hope this helps - Jim

HOLL-EMAIL- 0003

01028

-----Original Message-----

From: Derek Van Veen
Sent: Monday, November 10, 2003 2:19 PM
To: Jim Owen
Subject: RE: John Hollman

Jim,

I spoke with Campbell last Thurs. He's trying an RGP fit to buy some time for now. I'll see him in person and possibly the pt in Dec. I spoke with Stacy Lerum who informed me how things normally go from a cost standpoint. This was also conveyed to Mike.

What's your gutt feeling on this procedure? Do you think the cornea will remain stable? What's the post op like for the comanaging doc. Campbell and I are 4 hrs apart. Unfortunately, I've got multiple cases which are the same but only a different name on the chart.

Thanks,
Derek

Derek P Van Veen, OD
Clinical Director, TLC Piedmont
Phone 864-297-6299
Fax 864-297-6598

HOLL-EMAIL- 0002

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

) IN THE COURT OF COMMON PLEAS
) C.A. No. 2007-CP-23-2347
)

John Hollman,

Plaintiff,

vs.

Dr. Jonathan Woolfson, individually; TLC
Laser Eye Centers (Piedmont/Atlanta) LLC;
and TLC The Laser Center (Institute), Inc.,
Dr. Michael A. Campbell, individually;
Optical Solutions, Inc.; and Optical Solutions
of Bluffton, LLC;

Defendants

CERTIFICATE OF SERVICE

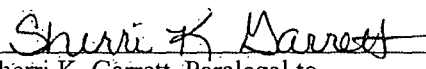
I did this date serve a copy of Plaintiff's Supplemental Discovery Requests, Notice of Depositions, and Subpoena Duces Tecums upon counsel for the Defendants as specified below by placing a copy of the same in the United States mail, proper postage affixed thereto, and addressed as follows:

George C. Beighley
Richardson, Plowden, Carpenter & Robinson, P.A.
P.O. Drawer 7788
Columbia, SC 29202
Attorneys for Defendant Dr. Jonathan Woolfson, Individually

K. Scott Katrosh
Gallivan, White & Boyd, P.A.
P.O. Box 10589
Greenville, SC 29603
Attorneys for Defendants TLC The Laser Center (Institute) Inc. and
TLC The Laser Eye Centers (Piedmont/Atlanta) LLC

Jack G. Gresh, Esquire
Hall, Booth, Smith & Slover, P.C.
1180 W. Peachtree St. NW, Suite 900
Atlanta, GA 30309-3479
Attorneys for Defendants Dr. Michael A. Campbell, Optical Solutions, Inc., and Optical
Solutions of Bluffton, LLC

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


Sherri K. Garrett, Paralegal to
Douglas F. Patrick, S.C. Bar #4358
P.O. Box 2343
Greenville, SC 29602
(864) 242-9000

March 10, 2008

Greenville, South Carolina

Patient's Name: John Holliman Date: 6-26-03 PG.

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

Fundus Examination:

Dilated Funduscopy: BIO DIRECT VOLK-SLE

Undilated Funduscopy: DIRECT VOLK-S

Dilation refused: Reappointed:

PVD FLOATERS CLEAR

VITREOUS

CLEAR PVD FLOATERS

PINK PALE CLEAR

CUP DISC
DISC ASSESSMENT

0.1/0.2
CLEAR PINK PALE

DISTINCT INDISTINCT

MARGINS

DISTINCT INDISTINCT

< 1/2 1/2 2/3 > 2/3

A/V RATIO

same
< 1/2 1/2 2/3 > 2/3

 RPE Disp DRUSEN CLEAR

MACULAR

CLEAR RPE Disp DRUSEN

L/B S/B

+ DV REFLEX

L/B S/B

✓ FLAT/INTACT LATTICE

PERIPHERY

 FLAT/INTACT LATTICE

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

Manifest Refraction:

OD: +1.75 - 3.50 x 071 20/25+

Add:

OS: +0.75 - 1.50 x 101 20/25+

Add: PT 4

Medical Decision Making: A-Assessment of Data and Plan

Final RX: SPH CYL AXIS PRISM ADD

OD: RX = M

OS: RX = M

C +1.75 - 3.50 x 071 20/25+
+0.75 - 1.50 x 103 25+

Contact Lens Lens Order: Boxes Trials

Contact Type:

Contact RX: OD:

OS:

Diagnoses:

1. CHA ax 19 cyl (Konus?)
2. ocular health good
3. Enhancement, Necessity - Custom Lenses

Management Options:

1. RX = M
2. Pt to go to TLC - Rxediment
3. etc in 141 for CER

Other Notes/Drawings/Follow-up/CL Check:

Dr. end time: am pm Total Dr./Pt. face to face time minutes.

Time spent in counseling/coordination of care minutes

Patient Education:

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

Other Instructions:

Dr. Michael A. Campbell

Dr. Michael A. Campbell

841

Print Doctor's Full Name

Doctor's Signature

HOLL-WOLFSON
0022

License #

Page 31

1 number of, call them independent or disparate user
2 created databases, that they were having a lot of
3 challenges with to be able to, you know, keep the
4 data consistent across these -- these various
5 platforms, and they were having some problems
6 with -- with reporting. That was about the extent
7 of what he told me and I got the rest of the details
8 from Stacy.

9 Q Okay. Now, what were the other databases
10 that were in place at that time? As I understand
11 it, it sounds like you've got a lot of different
12 databases you needed to --

13 A That's --

14 Q -- consolidate --

15 A Yeah,

16 Q -- may not --

17 A It's --

18 Q -- be the right word, but that's the way

19 I --

20 A No, that's -- No, that's actually very --
21 that's a very good way of -- of looking at it.
22 Certainly consolidate the -- Certainly consolidate
23 the -- the ability to get the data into one place
24 and -- and be able to look up the -- the information
25 from one place. But of course, as it turns out,

Page 32

1 we -- we still need the separation of advocacy and
2 in complex case.

3 The other two areas were -- involved
4 clinical incidents database that was there and a
5 litigation database. So there were four distinct
6 databases that needed to be --

7 Q Okay. And the four were clinical incidents,
8 litigation, advocacy and complex case?

9 A And complex case, that is correct.

10 Q Okay.

11 A Now, the reason for needing to consolidate
12 those four into the single -- the single application
13 for getting at all this data, again, very much
14 related to what I said earlier where you could have
15 one individual patient who is in a -- an advocacy
16 process, who may or may not have had a clinical
17 incident occur at some point in time, may be
18 involved in -- in a complex case process, may be
19 involved in litigation.

20 Q The four databases, let's talk about those.
21 And I'm going to call them predecessor databases.

22 A The predecessor databases?

23 Q Right.

24 A That -- Yes.

25 Q Let's talk about those for a minute. Were

1 A -- column here?

2 Q Right.

3 A On the screen they would see created by,
4 created by ID, and the date created.

5 Q Okay.

6 A For modified, they'd see modified by,
7 modified by ID, and date modified.

8 Q Okay.

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

14 Now, by looking at the modified date, you
15 don't know what was modified --

16 Q Right.

17 A -- you know that something was modified.

18 Q Right. Okay. So there's no -- you know, in
19 a -- in a Microsoft Word document you can do red
20 line edits, what they call --

21 A Right.

22 Q -- so you --

23 A Right.

24 Q -- can see what other people have edited and
25 actually see the language that's been either put in

Page 159

1 something had been modified, you --

2 Q Okay.

3 A -- just wouldn't know exactly what had been
4 modified.

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

7 A No, it does not.

8 Q Okay.

9 A Now --

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

13 A That's correct.

14 Q Okay. All right.

15 A So you know -- yeah, you know that one field
16 of the information that you're looking at has been
17 changed.

18 Q Okay. Can -- Can the user opt to leave in
19 old information?

20 A That would be the -- that would depend on --
21 on a couple of things. First of all, whether or not
22 the field of information would actually be able
23 to -- to hold both the old and the new information.

24 Q Okay.

25 A And again, if we're talking about -- There

1 that -- that TLC intended John Hollman to see.

2 A No. Complex case forms are not for
3 patients --

4 Q Okay. So that --

5 A -- to see.

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

11 A No.

12 Q Okay. All right. Where -- Where are you --
13 Where is --

14 A Fifty-nine.

15 Q Yeah. What did I do with mine?

16 MR. LEWIS: What is it?

17 MR. PATRICK: Fifty-nine.

18 MR. LEWIS: I mean, what's the document?

19 MR. PATRICK: It is -- No. 60 is what I'm
20 looking for. I don't know what I did with mine, the
21 ones that have the exhibit numbers on them. It is
22 entirely possible that I have -- We may want to take
23 a break while I find my stuff because I can't find
24 it right now. I hate to do that because I think
25 we're -- we still have plenty of time left on the --

1 could permit -- or -- or -- or the recipient or
2 sender of the e-mail could -- could allow him to see
3 them, how would John Hollman know that they even
4 existed?

5 A The only way he would know is if
6 Dr. Van Veen told him.

7 Q Okay.

8 A Or if John asked him to -- I don't know how
9 else he would know.

10 Q All right. But -- But these -- Well, here,
11 are these part of his medical record or are these
12 the personal property of the physician, or the
13 sender or receiver?

14 A They are not a part of his medical record.
15 (Exhibit No. 75 marked for identification.)

16 **QUESTIONS BY MR. PATRICK:**

17 Q Okay. That's -- That's fair enough. I
18 asked you -- I'm -- I'm going to include Exhibit 75,
19 which is in the same -- It -- It's just another one
20 I didn't have, okay --

21 A Yeah.

22 Q -- in there. But if I understand correctly,
23 none of these e-mails sent from one physician to the
24 other, or from one employee -- or from one person
25 affiliated with TLC to the other, is -- is part of

1 his medical record, they are internal correspondence
2 of TLC.

3 A Yes.

4 Q Okay.

5 MR. TATE: Could we see 75, please?

6 MR. PATRICK: All right.

7 MR. TATE: Thank you.

8 (Exhibit No. 74 marked for identification.)

9 QUESTIONS BY MR. PATRICK:

10 Q Okay. This -- This Exhibit No. 74, I don't
11 know whether you've ever seen -- You can look at
12 this. It's a -- It's a series of two e-mails that
13 are dated May the 2nd of 2002.

14 A Okay.

15 Q The e-mail -- One is from Leann Geerts to
16 Tom --

17 A Spetalnick.

18 Q Yeah, thank you.

19 A Mm-mm.

20 Q I wouldn't have gotten that one right. And
21 the other one is -- is one from Tom to her, okay?

22 A Mm-mm.

23 Q I'm looking at -- It appears that the -- I'm
24 going to -- The exhibit number is on the second page
25 but I believe, chronologically, if you look at the

Page 167

1 resources and the programs in place to help the
2 patients in a way that would mitigate a great deal
3 of the litigation that was taking place that we felt
4 didn't need to happen.

5 And in the Schiffer case, which I -- I was
6 very, very familiar with, I think that -- that could
7 have been resolved much sooner for much less money,
8 and the patient would have been much better off.
9 About -- That was a \$7 million verdict and every
10 refractive surgeon on this planet knew about it. It
11 was a big deal. And there were some other cases and
12 other issues. And we have a medical malpractice
13 insurance provider that, you know, we have to deal
14 with.

15 Q Mm-mm.

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

22 Q Did you reduce what you learned to writing
23 in a form of a report or -- or some document?

24 A No.

25 Q Is there any document trail that would help

1 Q All right. When's the first time you had
2 personal contact with him?

3 A I don't remember. I don't remember.

4 Q Do you document that in any way?

5 A No.

6 Q The database has provisions for entering
7 information concerning contacts.

8 A That's correct.

9 Q Is that done? Was that done by you?

10 A No, not in the database.

11 Q Okay. Do you keep notes in which you note
12 that you're talking to John Hollman?

13 A Yes.

14 Q And where would those notes be?

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

20 Q Why would you do that?

21 A Well, it's private information. It's about
22 patients and I don't want it to be just laying
23 around. So I get rid of it.

24 Q Okay. And -- And so by shredding it,
25 whatever those conversations may have been, the

Page 79

1 documentation of those is -- any documentation of
2 that, then, is destroyed.

3 A Yeah.

4 Q Okay. So you don't know when you would have
5 first talked to or contacted John Hollman?

6 A No, I'm sorry.

7 Q Okay. Do you recall how many personal
8 meetings you had with John Hollman?

9 A Face-to-face?

10 Q Yes, Sir.

11 A One.

12 Q Okay. And that was in, when?

13 A 2006?

14 Q The information I have, I'm going to --

15 A It's 2 -- Yeah.

16 Q -- yeah, right. The information I have --

17 A Yeah, yeah.

18 Q -- was it was sometime either May or -- I
19 think it's May of 2006.

20 A Springtime.

21 Q Okay.

22 A It was springtime.

23 Q All right. At the time you went and
24 personally met with him, what phase were -- did you
25 believe you were in? Were you in the helping the

1 A They would have put them in storage.

2 Q Okay. So the -- the -- Yeah, I heard you
3 say two things. One, storage and shredding.

4 A Well, yeah, I shredded them.

5 Q Who shredded them?

6 A I did.

7 Q Shredded what?

8 A All the records that I had.

9 Q Okay. So the -- If you had the advocacy
10 records --

11 A Mm-mm.

12 Q -- on patient number 34 --

13 A Mm-mm.

14 Q -- and -- and you made this entry, what
15 would have happened to the physical records?

16 A Well, there are two copies of the physical
17 record --

18 Q Okay.

19 A -- one residing in an open file in the Legal
20 Department in St. Louis --

21 Q Okay.

22 A -- and one copy I had.

23 Q Okay. You would have just shredded your
24 copy.

25 A Indeed: No, I wouldn't have -- No,

1 conditions that he might have had that would be
2 contraindications of surgery?

3 A Before surgery?

4 Q Before surgery. Did you see anything --

5 A I don't know.

6 Q Well, do you see anything in the record that
7 would say he was ever notified?

8 A I don't recall.

9 Q Okay. Well -- All right.

10 MR. PATRICK: Where were the others?

11 MR. LEWIS: Oh --

12 QUESTIONS BY MR. PATRICK:

13 Q We're going to switch gears a little bit.
14 I'm going to ask you some questions -- What I'm
15 looking for is our summary list, and I may have -- I
16 have noted in some of the medical records we have
17 received --

18 A Mm-mm.

19 Q -- pursuant to a protective order, and
20 we're -- without giving you a precise number, that
21 in many of those instances medical records have been
22 sent to you by Dr. Van Veen. There seem to be a
23 number of them in 2005 and a number of them in 2006.
24 Do you know why those records were sent to you?

25 A I asked him to send them to me.

1 Q For what reason?

2 A I wanted to see the records, I wanted to
3 enter the patients in the patient advocacy database,
4 and I wanted to follow those patients over time to
5 see what happened.

6 Q Okay. Why?

7 A He was one of two clinical directors who was
8 very cooperative in the ectasia study that I did for
9 general counsel, had the opportunity to get records
10 from him --

11 Q Mm-mm.

12 A -- had the opportunity to review those
13 records with him, had the opportunity to question
14 him about the care of the patients. I asked him to
15 send me copies of the records and I specifically put
16 those patients in the patient advocacy database so I
17 could follow those patients over time.

18 Q So their -- their -- their inclusion in the
19 advocacy database was not as a result of a complaint
20 emanating from the patient --

21 A No.

22 Q -- or from the clinical director, but a
23 decision by you to include them in.

24 A Yes.

25 Q And -- And --

Page 211

1 A Well, let me -- I want to be careful here.

2 Let -- Let me -- Give me a moment to recall the
3 patients, unless you've got their names, because --

4 Q We -- We can go through it, it'll take some
5 time --

6 A No, I under -- I understand, and I -- I know
7 time's an issue for you. So if -- I'm reasonably
8 confident that those records that are ectasia
9 records that are in that 41 --

10 Q Mm-mm.

11 A -- list of charts that you have, that had
12 surgery at TLC Piedmont, they are records that I
13 requested. I don't believe I got any additional
14 ectasia patients referred to me.

15 Q Okay. And those --

16 A I believe that's correct.

17 Q And -- And -- And so you specifically
18 requested those.

19 A That's correct. And -- And -- And in this
20 case most of those ectasia patients were doing all
21 right.

22 Q Okay.

23 A But even at that, I still wanted to follow
24 these patients over time. I was very interested in
25 the subject.

1 Q Did you contact the patients?

2 A No. Absolutely not.

3 Q Did you -- How did you follow them over
4 time?

5 A Dr. Van Veen either saw them in clinic, or
6 there were a few cases where the patients had moved
7 away and they were lost to follow-up. But I tried
8 to rely upon our TLC doctors to follow them up.

9 Q Okay. And so you -- you placed them into
10 the advocacy database and monitored their condition.

11 A Tried to, yes.

12 Q Okay. All right.

13 A Yes.

14 Q There are a number, and I'm going to show
15 you these records and -- and --

16 A Mm-mm.

17 Q -- I'm just trying to understand what --
18 what was happening here. Again, remember that I --
19 We -- We -- We discussed this early on, okay?

20 A Mm-mm.

21 Q And I'm going to decide whether to put these
22 in as an exhibit or not, but --

23 A Oh.

24 Q -- but these are patients, and they have a
25 number. They have an advocacy entry in them.

1 **A** Mm-mm.

2 **Q** They have a -- a close date, okay?

3 **A** Mm-mm.

4 **Q** And in -- in all of these cases that I've
5 got here, they also have a date modified that all
6 seem to be right around the same time. I can -- I
7 can let you look through these --

8 **A** Yeah.

9 **Q** -- all 1/27/2008, within about a week
10 period --

11 **A** Okay.

12 **Q** -- of time, it appears that for this
13 group --

14 **A** Mm-mm.

15 **Q** -- where there's an advocacy database
16 file --

17 **A** Mm-mm.

18 **Q** -- there's a modification of their record,
19 and the modification is done by you.

20 **A** Mm-mm.

21 **Q** Okay. And, you know, maybe -- I'm just
22 trying to understand what happened, if you know.

23 **A** Mm-mm.

24 **Q** All of these -- The -- The -- The unifying
25 feature is, they all had modifications after a close

1 date.

2 A Mm-mm.

3 Q And -- And then all within a period of about
4 a week.

5 MR. GRESH: If we're not going to attach
6 them, can you tell at least how many there are?

7 MR. PATRICK: I don't mind -- We can mark
8 them in -- in their entirety as a group. Why don't
9 we do that? Have you got a big clip and a --
10 a number? Why don't we just mark --

11 MR. LEWIS: 77.

12 (Exhibit No. 77 marked for identification.)

13 MR. PATRICK: Okay. And -- And I'll -- Then
14 I'll identify the number of them, and I'm going to
15 identify them by number -- patient ID number,
16 because you will have that within the other exhibit
17 that I did. All right. And there's one --

18 MR. TATE: And we need to get that exhibit.
19 We don't -- We've not --

20 MR. PATRICK: -- four --

21 MR. TATE: -- been given the --

22 MR. PATRICK: -- five --

23 MR. TATE: -- the summary --

24 MR. PATRICK: -- six --

25 MR. TATE: -- exhibit --

1 MR. PATRICK: -- seven --

2 MR. TATE: -- and the key to --

3 MR. PATRICK: -- eight --

4 MR. TATE: -- the summary exhibit with the
5 names.

6 MR. PATRICK: -- nine, ten, 11 -- All right.
7 Unless I have counted wrong, which is a distinct
8 possibility, there are 11 individual patients and
9 their ID numbers are as follows: 34, 27, 21, 20,
10 16, 10, 8, 7, 6, 5, 4, and 3A, which is -- 3A and 3
11 were duplicate files of the same patient --

12 THE WITNESS: Mm-mm.

13 MR. PATRICK: -- one with his first name,
14 one with his middle name, so that's why there's a 3
15 and 3A. It's the same patient, it's just -- They
16 were just duplicate files --

17 THE WITNESS: Let me take a look.

18 QUESTIONS BY MR. PATRICK:

19 Q Now --

20 A And these are all patient -- There's not
21 complex case things attached to it --

22 Q They -- They have complex case data in them,
23 okay?

24 A Okay.

25 Q But -- But the data I'm looking at --

1 A Yes, Sir.

2 Q -- and asking you about is the advocacy data
3 that -- where there's an indication that you would
4 have modified --

5 A Yes.

6 Q -- the advocacy data --

7 A Well, I'm --

8 Q -- in -- in a time period around January --

9 A Yeah.

10 Q -- the 27, 2008.

11 A Sure, I'm good.

12 Q Many of them, I'm not going to give you a
13 number but --

14 A Okay.

15 Q -- the vast majority --

16 A Yeah.

17 Q -- are on the same day.

18 A Yep.

19 Q A couple within a week.

20 A They would be, yeah.

21 Q Okay. And I'm just trying to understand, if
22 you know, what you did and what you modified.

23 A I do.

24 Q Okay. What did you do and what did you
25 modify?

1 **A** Well, I want to look at the --

2 **Q** Huh?

3 **A** I want to look at these first.

4 **Q** Oh, oh, yeah, please, go ahead. Yeah.

5 **MR. TATE:** I've got to think it would be
6 helpful to him if he had the key with the names of
7 the people keyed to the numbers?

8 **MR. PATRICK:** I can -- I can try -- I can
9 try to make that happen. I can give you the key
10 that we introduced which did not have the names.

11 **MR. TATE:** Right.

12 **MR. PATRICK:** And give me a moment and I can
13 probably find my key with the names. Stephen, did
14 you see my list? It -- It was entitled Doug's List.
15 Unfortunately, that had the -- is the list of -- of
16 the patients --

17 **MR. LEWIS:** Yeah --

18 **MR. PATRICK:** -- with the names.

19 **MR. LEWIS:** -- you had -- you had it earlier
20 in the deposition.

21 **MR. PATRICK:** I know I did. I had -- I had
22 a blank one that we introduced, and I'm just trying
23 to find the one with the names, if that would assist
24 him. So if you find it --

25 **MR. LEWIS:** I may have one of those.

Page 218

1 **MR. PATRICK:** If you don't -- I'm going to
2 look through these exhibits here.

3 **THE WITNESS:** Oh, sure. You're going to
4 take my 66, aren't you?

5 **QUESTIONS BY MR. PATRICK:**

6 **Q** No, your 66 is safe, I hope.

7 **MR. LEWIS:** Here's the one I've got that's
8 got my notes on it, but the numbers are right.

9 **MR. PATRICK:** Well, let's see, these are
10 the --

11 **MR. LEWIS:** The numbers are right. I'll
12 look for yours.

13 **MR. PATRICK:** I thought I put them in -- in
14 the inside of this when I gave it to you. I'm not
15 blaming you, please don't misunderstand what I say
16 when I say that. In the -- I thought I had it in
17 there attached to it and I don't see it. I thought
18 I had it in here somewhere. I'm doing a great job
19 of getting these confused.

20 **MR. LEWIS:** You had it earlier.

21 **MR. PATRICK:** I know I did.

22 **MR. LEWIS:** Here you go, is that it?

23 **MR. PATRICK:** Yeah. We have not introduced
24 this one as an exhibit --

25 **MR. LEWIS:** Well, wait a minute.

Page 219

1 **MR. PATRICK:** We haven't introduced this one
2 yet.

3 **MR. LEWIS:** Yeah.

4 **MR. PATRICK:** We've introduced 64.
5 Sixty-four is the exhibit we placed in. It has the
6 numbers and corresponding Bates numbers, okay? This
7 is my working copy, which I don't mind him looking
8 at, I -- I intentionally didn't introduce it because
9 it has names.

10 **MR. TATE:** Right.

11 **MR. PATRICK:** Okay.

12 **QUESTIONS BY MR. PATRICK:**

13 **Q** If -- If you need this to look at, if you
14 can correspond this number to the number in the far
15 left-hand column --

16 **A** Yeah.

17 **Q** -- and look across to the extent you need to
18 know who the patient is, it will tell you.

19 **A** Well, I -- I know who they are.

20 **Q** Sometimes the information's actually --

21 **A** Yeah, I -- I under --

22 **Q** -- contained in there, sometimes it's not.

23 **A** Yeah, if I need it, I'll --

24 **Q** It's all subject to a protective order,

25 so ...

1 **A** I understand.

2 **MR. PATRICK:** Steve, if you want to put
3 those two up, then I'll take those two and that, and
4 leave the rest for you, if I'm going to make it. I
5 don't know that I will.

6 **THE WITNESS:** I'm good.

7 **QUESTIONS BY MR. PATRICK:**

8 **Q** Okay. Do you remember the question,
9 or -- or do you want me to rephrase it?

10 **A** I think it's been a day that's long enough
11 that you might need to repeat the question.

12 **Q** Well, that'll be a challenge in and of
13 itself but we will try. The question is that in
14 these documents that have been marked as Exhibit
15 No. 70 -- 71?

16 **A** Seventy-seven.

17 **Q** Seventy-seven, I'm sorry, I don't have my
18 glasses on. There appears that there is a
19 modification date for the data in complex -- in --
20 in advocacy --

21 **A** Mm-mm.

22 **Q** -- that is after the date that the files
23 were closed, and all of them appear to be within a
24 really consistent small frame of time.

25 **A** Yes.

Page 221.

1 Q I'm trying to understand why that was
2 done -- what was done and why it was done, if you
3 know.

4 A I do.

5 Q Okay. Good.

6 A In 2008 we made a decision to try to save
7 some cost. And because we had a reduced number of
8 employees, as I've pointed out to you earlier,
9 we've -- we've lost a fair number of people. So
10 we're looking for efficiencies in our business. As
11 you know, we're -- the company's not exactly having
12 a -- an easy time of it.

13 Q Mm-mm.

14 A All right? And so I was to send my records
15 that I had, my paper records which I had in file,
16 either to St. Louis or to shred them, that we were
17 going to go completely electronic as far as patient
18 advocacy files were concerned.

19 So under the circumstances I really wanted
20 to publish these data on ectasia patients. I --
21 My -- I had a real scientific interest in these
22 people. And so what I wanted to do was, I went
23 back -- Every year I try to summarize what -- what I
24 did the year before. And so I -- In January of 2008
25 I went back and I took every patient's record here,

Page 222

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

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

8 Q What I'd -- Yeah.

9 A I -- I'm sorry.

10 Q Well --

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

13 Q There you go. That would --

14 A Sorry.

15 Q -- be better.

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

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

19 A Yeah.

20 Q -- we need to.

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

24 Q Mm-mm.

25 A So I was trying to build the narrative here

Page 223

1 so I would have enough information so that if I was
2 going to pursue publication of these data, I would
3 have a bit more direction to it.

4 Q Mm-mm.

5 A And then during 2008, it's to the point now
6 I have maybe six or eight patient records in my desk
7 and that's it, everything else is electronic.

8 Q The --

9 A That was the idea.

10 Q Do I -- And I'm trying to make sure I
11 understand this.

12 A Yeah.

13 Q In -- In -- For example, with patient 34 --

14 A Yes.

15 Q -- you -- you added information into this
16 notes field.

17 A Right.

18 Q And that would show up as the 1/27/2008
19 modification date?

20 A Yes.

21 Q Okay. Now, then correspondingly you have
22 then sent your patient advocacy file to TLC
23 headquarters?

24 A Mm-mm.

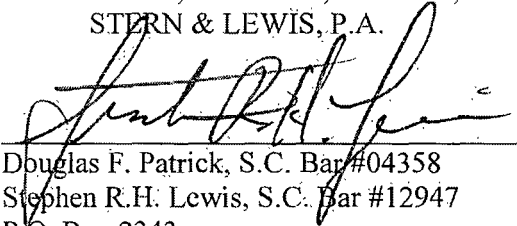
25 Q And what would they have done with it?

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Supplemental Record on Appeal contains all supplemental material proposed to be included by any of the parties and not any other material.

Pursuant to Rule 212(b) of the *S.C. Appellate Court Rules*, Respondents submit the following supplement to the Record on Appeal. Respondents' submission is done with the consent of all attorneys of record.

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



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

Greenville, SC 29602

(864) 242-9000 Phone

(864) 233-9777 Fax

dpatrik@covpatlaw.com

slewis@covpatlaw.com

ATTORNEYS FOR THE RESPONDENTS

November 26, 2012

Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Appellate Case No. 2012-210888

RECEIVED

NOV 27 2012

SC Court of Appeals

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

In re: John Hollman Respondent

v.

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

In re: Danielle Hollman Respondent,

v.

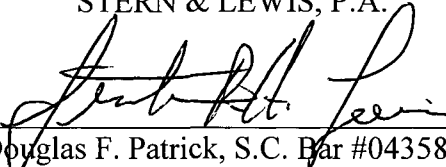
Dr. Jonathan Woolfson, Individually; Dr. Michael A. Campbell,
Individually; Optical Solutions, Inc.; and Optical Solutions of
Bluffton, LLC Defendants.

PROOF OF DELIVERY

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

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

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



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

Greenville, SC 29602

(864) 242-9000 Phone

(864) 233-9777 Fax

dpatrick@covpatlaw.com

slewis@covpatlaw.com

ATTORNEYS FOR THE RESPONDENTS

November 26, 2012

Greenville, South Carolina