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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
JEAN WATKINS, as Personal Representative of the Estate of Mildred Watkins, Plaintiff, vs. STERLING HEALTHCARE, INC., COUNTRY WOOD NURSING CENTER, LLC, and GUARDIAN RESOURCES, LLC, Defendants.	)	Case No.: 2016-CP-40-04463 **ORDER STRIKING ANSWERS OF ALL DEFENDANTS**

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SC Court of Appeals

This matter came before the Court on Plaintiff Jean Watkins' ("Plaintiff") Motion for Rule to Show Cause and Sanctions. A hearing was conducted on July 10, 2017. Present at the hearing were Jennifer Purdy, Esq. for Plaintiff and Brantley Rowlen, Esq. and Leah Parker, Esq. for Defendants Sterling Healthcare, Inc., Country Wood Nursing Center, LLC., and Guardian Resources, LLC. ("Defendants").

Based upon the record, motion, memoranda, and legal arguments of the parties, this Court finds as follows:

PROCEDURAL HISTORY AND FINDINGS OF FACT

The Plaintiff's decedent, Mildred Watkins, was a resident of the Defendants' nursing home, Country Wood, from March 2011 until December 2011. The Plaintiff filed a Complaint against all defendants alleging negligence which resulted in injuries to the Plaintiff and ultimately caused her death. Plaintiff served all Defendants with discovery requests on or about August 22, 2014 and counsel for the Defendants accepted service on September 5, 2014. The Defendants submitted partial responses on or about November 20, 2014. Thereafter, Plaintiff's

counsel wrote defense counsel to request complete responses. On May 5, 2015 and September 25, 2015, Defendant Country Wood partially supplemented their responses.[1] Thereafter, the Plaintiff notified defense counsel that their responses continued to be delinquent and that additional documents and information were needed. The Plaintiff's Care Plans were later produced by defense counsel via email, however, no additional documents or responses were produced at that time.

This case was removed from the roster July 31, 2015, pursuant to Rule 40(j), due to the missing discovery responses and the need for other discovery. The case was restored to the docket on July 25, 2016. During the year the case was removed from the docket, no additional information was produced to the Plaintiff by the Defendants.

The Plaintiff filed a Motion to Compel on July 29, 2015 and the matter was scheduled for a hearing. At the time of the filing of her Motion to Compel, the Plaintiff had been provided with only two documents each from Defendants Sterling and Guardian.[2]

Even though the case had been stricken pursuant to Rule 40(j) a hearing on the motion to compel was scheduled before the Honorable Edgar Dickson who heard the Plaintiff's Motion to Compel on February24, 2016. Following the hearing, counsel for both parties received an email from Emily Burgis, the law clerk who assisted Judge Dickson at the hearing, advising that Judge Dickson had granted Plaintiff's Motion to Compel and requesting that both parties submit proposed Orders. On November 30, 2016, Judge Dickson signed the Plaintiff's version of the Order Granting Plaintiff's Motion to Compel Against All Defendants. All Defendants were directed to produce the information specified in the Order within twenty (20) days from the date

[1] The first supplemental production only identified an expert and produced his Curriculum Vitae. The second production included portions of a heavily redacted employee handbook; redacted contracts related to Evergreen and Health Services, which were inapplicable to the period of Plaintiff's residency; records from the Richland County Sheriff's Department; and the fee schedule of the defense expert.

[2] The Articles of Incorporation and a "Consulting Agreement" with Country Wood.

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of the Order. The time period specified in the Order expired on December 20, 2016 and no information or documents whatsoever were produced by the Defendants by that deadline.

On December 29, 2016, Plaintiff's counsel sent a letter to counsel for Defendants asking for production of all documents and information specified in the Order no later than January 6, 2017. On January 3, 2017, Plaintiff's counsel received an email from counsel for Defendants, advising that they "inadvertently did not calendar the date" but were gathering the information. Subsequently, on January 5, 2017, co-counsel for Defendants, contacted Plaintiff's counsel by email, again referencing the "inadvertent calendaring", and indicated that counsel had been unable to communicate with Defendants about the discovery production until that week, five (5) weeks after the Order was issued by Judge Dickson.[3] Defense counsel requested an additional week to produce the information specified in the Order. Upon agreement by counsel the deadline to produce the discovery was extended to January 13, 2017. No documents or information was forthcoming from the Defendants.

On January 19, 2017, Plaintiff's counsel received Defendants' Supplemental Responses to Plaintiff's Interrogatories and Requests for Production Pursuant to the Order of Judge Dickson.[4] The materials produced did not fully comply with the Order of Judge Dickson in a variety of ways. Many responses indicated: "Defendant is still in the process of collecting information responsive to this request and will fully respond to the same as soon as such information is located." Other non-compliant responses referred Plaintiff's counsel to government agencies for answers.[5] Ultimately, the Defendant's responses speak for themselves and do not comply with Judge Dickson's Order in timeliness or in content.

[3] Additionally, defense counsel was aware on February 24, 2016, eleven (11) months earlier, that Judge Dickson had ruled in favor of the Plaintiff pursuant to the email of his law clerk to counsel.

[4] See Exhibit B to Plaintiff's Notice of Motion and Motion for Rule to Show Cause and Sanctions.

[5] Judge Dickson's Order specifically stated that such a response is insufficient. See, inter alia, paragraph #20 and #30 of Order.

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On January 23, 2017, the Plaintiff filed a Motion for a Rule to Show Cause and Sanctions for Defendants' failure to comply with the November 30, 2016 Order of Judge Dickson. Defendants were properly served with the same. During the six (6) months between the Plaintiff's filing of the Motion and the date of hearing, no further documents or information were produced by any Defendant to the Plaintiff, until just prior to the hearing. At that time, a document production of several hundred pages was made to the Plaintiff. The documents did not reference the discovery requests to which they were responsive. Furthermore, this production again failed to include all of the items Ordered by Judge Dickson.

At the hearing on Plaintiff's Motion for Rule to Show Cause and Sanctions, the Court ordered defense counsel to produce a detailed list to the Plaintiff of all documents produced to date and the specific discovery request to which the document or information was responsive prior to leaving the courthouse.[6] No such list was produced prior to leaving the courthouse and no such list has been produced to the Plaintiff more than eight (8) months after the hearing.

LAW AND ANALYSIS

"The imposition of sanctions is generally entrusted to sound discretion of the Circuit Court.[7] The sanction imposed should serve to protect the rights of discovery provided by the Rules.[8] "Overleniency [in imposition of sanctions] is to be avoided where it results in inadequate protection of discovery."[9] The most severe sanctions must be available to a court, not only to penalize those whose conduct warrants sanctions, but to deter those who may consider such conduct in the future.[10] The Courts have held that sanctions that are too lenient tend to

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[6] Rule to Show Cause (hereinafter, RTSC) hearing transcript p. 29, ll. 3-20
[7] *Morgan v. Jones* 281 S.C. 270, 276, 315 S.E.2d 136, 139 (Ct. App. 1984); See also, *Kershaw County Bd. of Educ. v. United States Gypsum Co.,* 302 S.C. 390, 396 S.E.2d 369 (1990).
[8] *Downey v. Dixon*, 294 S.C. 42, 45, 362 S.E.2d 317, 318 (Ct. App 1987).
[9] Id.
[10] Id.

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encourage, rather than discourage, noncompliance with the Rules.[11]

In determining whether to order sanctions, the trial judge should consider the nature of the discovery request, the discovery posture of the case, the willfulness of the violation, and the degree of prejudice to the opposing party.[12] When a party fails to comply with a discovery order, the trial court has the discretion to impose a sanction it deems just, including an order dismissing the action.[13] If a party fails to obey an order to provide or permit discovery, the trial court may impose sanctions such as striking pleadings, dismissing the action, or rendering a default judgment.[14] Severe sanctions are warranted in cases involving bad faith, willful disobedience, or gross indifference to the opposing party's rights.[15]

In *McNair v. Fairfield County*, 379 S.C. 462 (Ct. App. 2008), the Court of Appeals upheld the trial court's decision to strike the Defendant's answer as a sanction for discovery abuse. The defendant had failed to produce documents more than seven months after a Court Order compelling production.[16] The Court determined that the delay was unconscionable and the defendant's conduct amounted to contempt.[17] The Court held that sanctions less than striking the Answer would not achieve justice and was a blatant violation of the South Carolina Rules of Civil Procedure, Rule 37(b)(2).[18] The Court specifically stated: "The defendant's conduct in

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[11] Id.
[12] *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 435, 673 S.E.2d 448, 457 (2009); See also, *Griffin Grading & Clearing, Inc.*, 334 S.C. at 199, 511 S.E.2d at 719.
[13] Rule 37(b)(2)(C), SCRCP, See also, *Barnette v. Adams Bros. Logging, Inc.*, 355 S.C. 588, 593, 586 S.E.2d 572, 575 (2003).
[14] Rule 37(b)(2)(C), SCRCP
[15] *Orlando v. Boyd*, 320 S.C. 509, 511, 466 S.E.2d 353, 355 (1996); *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 108-09, 410 S.E.2d 537, 541-42 (1991); *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 198-99, 511 S.E.2d 716, 719 (Ct.App.1999)
[16] *McNair v. Fairfield County*, 379 S.C. 462 (Ct. App. 2008)
[17] Id.
[18] Id.

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refusing to provide that which it has been ordered to produce is a serious affront to the integrity of the judicial system."[19]

CONCLUSIONS OF LAW

Over three (3) years and seven (7) months after being served with discovery requests, and despite Judge Dickson's Order compelling discovery over one (1) year and four (4) months ago, the Plaintiff remains without all of the information ordered by Judge Dickson and has been substantially prejudiced in the advancement of her case. The information withheld by the defense is essential to the Plaintiff's case and there is no legitimate reason for the defense to withhold the same. To date, the Plaintiff remains without even standard discovery responses such as insurance policies[20] and other basic information ordered by Judge Dickson.[21]

At the hearing, Defense counsel admitted that items ordered by Judge Dickson had still not been produced: "We're missing payroll records, which we're happy to go to our clients and try to see if they still have those." [22] Payroll records were one of many items specifically identified and Ordered for production by Judge Dickson. Defense counsel admitted that as of the date of the hearing, July 10, 2017, they had made no effort to contact their clients regarding the production of the payroll records following Judge Dickson's Order.[23] Defense counsel further admitted that they had no list or other documentation which would identify the documents produced to date, or to which Interrogatory and/or Request for Production documents previously

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[19] Id.

[20] Despite defense counsel's assertion that all defendants are self-insured, a Certificate of Insurance was produced which indicates the existence of liability coverage. Likewise, the limited tax returns produced by the Defendants reflect itemized deductions for the purchase of liability insurance. Yet, no policies have been produced by any defendant for any policy to date.

[21] For a complete list of the missing responses and information, please see the spreadsheet compiled by Plaintiff's counsel and made part of the record as Exhibits 3-8 to Plaintiff's Memorandum in Support of Rule of Show Cause.

[22] RTSC hearing transcript, p. 10, ll. 5-7

[23] RTSC hearing transcript, p. 10, ll. 5-15

produced were responsive.[24]

In an attempt to justify their failure to produce some documents and information, defense counsel asserted that Defendant Sterling went out of business in 2007 stating: "Sterling went out of business in 2007 prior to the plaintiff's residency at our nursing home. So there is no information."[25] However, this assertion does not align with the evidence that: 1) the April 1, 2014 Affidavit of Robert Hagan, (President of Defendant Sterling, Defendant Guardian and Defendant Country Wood), acknowledged his role as the President of Defendant Sterling in 2014[26]; 2) Defendant Sterling's existence and active involvement is well documented throughout numerous employee files for many years after 2007[27]; and 3) Defendant Sterling was clearly in existence and actively involved with the defense of the Plaintiff's claim when Defendant Sterling sent a letter on Sterling letterhead to Plaintiff's counsel regarding Plaintiff's claim on February 25, 2014, signed by a Sterling corporate officer[28]. This letter was sent seven (7) years after defense counsel alleged her client was out of business. Likewise, Sterling Healthcare is currently listed with Medicare and other government agencies as the active operator and/or manager of Country Wood Nursing Home.[29] Defendants' attempts at justification are without merit.

At the hearing, defense counsel asserted "we have gone above and beyond" in responding to discovery requests.[30] Yet, defense counsel repeatedly admitted that they do not have even so much as a list or other documentation which reflects the items produced in response to each discovery request to date. In fact, defense counsel acknowledged that until just prior to the Rule to Show Cause hearing, she mistakenly believed that no additional information needed to be

[24] RTSC hearing transcript p. 29, ll. 13-16.
[25] RTSC hearing transcript p. 24, ll. 9-11.
[26] See Affidavit of Robert Hagan, attached as Exhibit 9 to Plaintiff's Memorandum in Support of Motion to Compel.
[27] See Exhibits 16-22 to Plaintiff's Memorandum in Support of Motion to Compel.
[28] See Exhibit 13 to Plaintiff's Memorandum in Support of Motion to Compel
[29] See Exhibit 15 to Plaintiff's Memorandum in Support of Motion to Compel
[30] RTSC hearing transcript, p. 16, l.10

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produced pursuant to Judge Dickson's Order.[31] Defense counsel was unable to determine which items had been produced and which items were still delinquent. Plaintiff's counsel, compiled a spread sheet of the received and missing information[32]; however, defense counsel clearly had not significantly reviewed Judge Dickson's Order in detail, to ensure complete and timely compliance. Wholly contrary to going "above and beyond", Defendants have failed to produce even the most basic responses to standard discovery requests and other relevant requests, more than three (3) years after being served with the same. The failure of the Defendants to produce the specific documents and information ordered by Judge Dickson, and their complete lack of effort and diligence in determining what has been produced and what is still due to the Plaintiff, is evidence of their on-going bad faith, willful disobedience, and gross indifference to the rights of the Plaintiff and the authority of the Court.

CONCLUSION

Service of the Plaintiff's discovery requests were accepted by the Defendants on September 5, 2014. The Plaintiff is no further along in the discovery process than she was nearly three (3) years ago when she filed her Motion to Compel. The unreasonable and unjustifiable delays in the production of discovery documents and responses for over three (3) years has resulted in a complete standstill in the progression of the case and the total inability of the Plaintiff's counsel to further her client's interests. In this passing time, memories fade, witnesses disappear, and critical documents can be lost and/or destroyed. The harm to the Plaintiff in this case is irreparable and must be met with the harshest of sanctions against the Defendants. The Defendants have acted in bad faith during the discovery process, with willful disobedience to the Court, and with gross indifference to the Plaintiff's rights and to the rule of law. Based on the

[31] RTSC hearing transcript, p. 8, ll. 7-15, 22-25 – p. 11, ll. 1-14.

[32] See spreadsheets at Exhibits 3-8 to Plaintiff's Memorandum in Support of Rule to Show Cause.

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egregious conduct of the Defendants, the sanction of striking the Defendants' Answers is clearly warranted.

ORDER

Based upon the foregoing, **IT IS HEREBY ORDERED** that Plaintiff's Motion for Rule to Show Cause and Sanctions is **GRANTED**. It is hereby ordered that the answers of all defendants are stricken. The Clerk of Court is directed to schedule this matter for a damages hearing. Counsel shall consult with the Chief Administrative Judge for Civil Matters to enable the Clerk of Court to schedule adequate time for the hearing.

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Richland Common Pleas

Case Caption:	Jean Watkins , plaintiff, et al vs Sterling Healthcare Inc , defendant, et al
Case Number:	2016CP4004463
Type:	Order/Sanctions

IT IS SO ORDERED!

s/ Alison Renee Lee

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