

FINDINGS OF FACT

1. Plaintiff filed these consolidated civil actions against the Defendant and others in 2003, alleging negligence, wrongful death, fraud, spoliation of evidence, fraudulent concealment, the tort of outrage, negligent credentialing, and vicarious liability for certain of his claims. See Plaintiff's Complaints in Civil Actions 03-C-296 and 623, filed on June 30, 2003, and December 19, 2003, respectively.
2. The Defendant, Camden-Clark Memorial Hospital Corporation ("Camden-Clark"), denied the bulk of the allegations in each Complaint and following disposition of a number of procedural issues, the parties commenced discovery in late 2003 and early 2004.
3. On approximately September 20, 2005, Plaintiff filed a Motion for Sanctions pursuant to Rule 37 of the West Virginia Rules of Civil Procedure.
4. A hearing was conducted on this Motion on December 19, 2005, and this Court granted Plaintiff's Motion. At that time, the Court noted that it would take the nature of the Sanction to impose against Camden-Clark, and/or its counsel, under advisement. In addition, this Court noted that it would review the extensive record of this case.
5. In March of 2006, the case was tried and the jury returned a verdict in this case favorable to Mr. Boggs.
6. On or about May 22, 2006, Plaintiff filed a Renewed Motion for Sanctions and Motion for Attorney's Fees for misconduct committed by Camden-Clark and its counsel throughout the course of this case. A hearing was conducted on this Motion on July 10, 2006. At that time this Court indicated it would take the issues presented under advisement.
7. Subsequent to the hearings of December 19, 2005, and July 10, 2006; after reviewing the complete record of this case; and after considering the briefs and arguments of

counsel, this Court has determined that Camden-Clark, and its counsel, have committed multiple acts of litigation misconduct towards this Court and towards the Plaintiff.

8. The Court will address representative acts of misconduct in this Order together with the procedural and legal grounds it has considered in reaching its determinations.

I. Camden-Clark's Answers to Written Discovery

a. Plaintiff's First Set of Discovery Requests: Interrogatories

(i) Interrogatory Number Three

9. On June 7, 2004, the Plaintiff served his initial set of discovery requests upon Camden-Clark. Interrogatory Number Three stated as follows:

State the full name and last known business and residence address and telephone number of every person known to you or your attorney who has knowledge of any discoverable matter with respect to the subject matter of this civil action and give a description of the information and/or knowledge possessed by such person.

See Plaintiff's First Set of Discovery Requests served on June 15, 2004.

10. Camden-Clark, stated in its answer to this interrogatory, filed on or about July 15, 2004:

Discovery and investigation are in their most rudimentary stage and it is impossible to give a global answer to this interrogatory. At present, those persons with knowledge of any of the relevant facts and circumstances surrounding this case are identified in the medical records ...

See Camden-Clark's Return to Plaintiff's First Set of Discovery Requests served on July 15, 2004.

11. Counsel for Camden-Clark signed these answers and the Risk Manager for Camden-Clark, Sherry Johnston ("Ms. Johnston") verified that these answers were true to the best of her knowledge. Id.

12. This discovery response served by Camden-Clark was erroneous and both its counsel, and its certifying representative Johnston, had reason to know this.

13. At the time these answers were served, Camden-Clark knew that at least the following persons had or could have discoverable knowledge regarding this case: Rebecca J. Hines, Roberta Howard, Cynthia Carpenter, Cynthia Kern, Ms. Johnston, Todd Kruger and Thomas Corder.

14. Documents in Camden-Clark's possession (in the form of notes, memoranda, interview summaries, and e-mails, among others) and subsequent depositions later verified that each of the individuals identified in Paragraph 20 had discoverable information and that Camden-Clark, its risk manager Johnston and its counsel, Richard Hayhurst, knew this.

15. For example, Rebecca J. Hines ("Ms. Hines"), a nursing supervisor, had written a detailed email on the subject of Mrs. Boggs' aborted surgery. Crucially, the email from Ms. Hines revealed that Nurse Hines had instructed everyone in the operating room during Mrs. Boggs' aborted surgery to document what they had observed. Since Camden-Clark repeatedly denied that it possessed notes from the operating room personnel, a claim that later proved false, the omission of Ms. Hines' name and the concomitant failure to produce her email was highly material.

16. Additionally, perhaps the most egregious omission was that of Sherry Johnston herself. Ms. Johnston, the Hospital's own corporate representative, had interviewed at least eight key witnesses and possessed numerous documents critical to the facts of this case.¹ Moreover, Ms. Johnston had specifically instructed at least two witnesses to "throw away" or

¹ The documents included witness interviews, witness statements, contemporaneous notes from relevant personnel, emails regarding what happened to Mrs. Boggs, telephone logs, lists of CRNA privileges, information regarding the time indexes that disappeared from Mrs. Boggs EKG strips, variance histories for the doctors involved and other relevant materials.

“destroy” notes, copies or documents, they had made regarding Mrs. Boggs’ surgery and she had documented that she did this. This evidence was directly relevant to the Plaintiff’s claims of fraudulent concealment and spoliation, but Ms. Johnston was not even identified as a person having knowledge of the matters, despite the fact that she herself verified the interrogatory answers, referred to in Paragraphs 9 – 11 on behalf of Camden-Clark.

17. None of the individuals identified in Paragraph 13 are identified in the medical record of Mrs. Boggs, and Camden-Clark never supplemented its response to Plaintiff’s interrogatory pursuant to Rule 26(e) of the West Virginia Rules of Civil Procedure. The full scope of these individuals’ involvement in the case was only fully disclosed when the previously withheld documents were released to the Plaintiff by the Court on February 10, 2006. Plaintiff was significantly prejudiced by the failure of Camden-Clark to reply to the discovery, as he had not taken depositions of some of these individuals and had no opportunity to conduct further discovery based on the notes they had made in the scant days left before trial.²

(ii) Interrogatory Number Four

18. Interrogatory Number Four of Plaintiff’s First Set of Discovery Requests stated as follows:

Identify by name, residence and business address and residence and business telephone number, all individuals who participated in the care and treatment of Hilda Boggs while a patient at Camden-Clark Memorial Hospital Corporation and for each individual, identify their position, duties and shift(s) worked while Hilda Boggs was a patient at Camden-Clark Memorial Hospital Corporation and describe what was done by each of these individuals and when it was done and identify all documents which memorialize what was done by each such individual.

See Plaintiff’s First Set of Discovery Requests served on June 15, 2004.

² The Court notes that discovery in this case was closed on January 6, 2006.

19. Camden-Clark, in its answer to this interrogatory, filed on or about July 15, 2004:

Discovery and investigation are in their most rudimentary stage and it is impossible to give a global answer to this interrogatory. At present, those persons with knowledge of any of the relevant facts and circumstances surrounding this case are identified in the medical records, *qv.*, and which are incorporated herein pursuant to Rule 33(d) and Rule 10(c) of the West Virginia Rules of Civil Procedure. The defendant acknowledges its obligations under Rule 26(e) of said Rules.

See Camden-Clark's Return to Plaintiff's First Set of Discovery Requests served on July 15, 2004.

20. As discussed at Paragraphs 13 - 17, supra, the representation that the medical records identify all of those persons with knowledge of any of the relevant facts and circumstances surrounding this case is erroneous.

21. In addition, the representation that the medical record identifies all of the persons who participated in the care and treatment of Hilda Boggs is also erroneous.

22. At the very least, two individuals who participated in the care and treatment of Mrs. Boggs were not identified in the medical record of Mrs. Boggs.

23. First, Ms. Hines, nursing supervisor, participated in the resuscitation effort involving Mrs. Boggs. No documentation of her participation in these efforts is contained in the medical record of Mrs. Boggs.

24. Second, Bernice Burns ("Ms. Burns") also participated in the resuscitation effort involving Mrs. Boggs. Once again, no documentation in the medical record of Mrs. Boggs clearly demonstrates her participation in these efforts. Mrs. Burns was a crucial witness who later testified that she made notes about what happened to Mrs. Boggs and gave them to the hospital, but the notes were never produced by Camden-Clark.

25. In addition, the representation that Camden-Clark's investigation of the facts surrounding the events involving Mrs. Boggs was in 'their most rudimentary stage' was false. In fact, Camden-Clark had conducted such a comprehensive investigation by the time of the filing of Plaintiff's Complaint, that Ms. Johnston's claim investigation file included hundreds of pages of documents, including, but not limited to:

- a. Witness statements;
- b. E-mails;
- c. Interview summaries;
- d. CRNA privilege reports;
- e. Nurse's personal notes;
- f. CRNA's personal notes;
- g. Claims notices to insurers;
- h. Variance histories for the doctors involved;
- i. State agency investigations;
- j. "Root Cause Analysis"; and
- k. Letter from the treating cardiologist.

26. Finally, Camden-Clark's answer to this interrogatory was false in that it failed to identify the documents which memorialized what each of the persons who cared for and treated Mrs. Boggs did. As was later determined, at the time of the filing of this response, Camden-Clark had in its possession, which it failed to identify in its response to this interrogatory, at least the following documents:

- a. Interview summary for Anna Haney;
- b. Interview summary for Sheila Sleeth;

- c. Interview summary for Ms. Burns;
- d. Interview summary for Ms. Hines;
- e. Interview summary for Betsy Collins;
- f. Interview summary for Charles Weddle;
- g. Interview summary for Denise Humphries;
- h. Handwritten statement of Sheila Sleeth;
- i. Handwritten statement of Denise Humphries;
- j. Handwritten statement of Charles Weddle;
- k. Handwritten statement of Betsy Collins;
- l. Written notes of Anna Haney;
- m. Written notes of Evelyn Melvin;
- n. E-mail from Ms. Hines; among others.

27. Finally, Camden-Clark asserted that it acknowledged its obligations under Rule 26(e) of the West Virginia Rules of Civil Procedure but it failed to ever supplement the answers it provided to Interrogatories Three or Four.

28. As discussed, herein, the identification of these witnesses and documents, just weeks before trial, provided crucial information to Plaintiff regarding his claims.

b. Plaintiff's First Set of Discovery Requests: Request for Production

29. As part of his requests for production, served on June 15, 2004, Plaintiff requested the following:

REQUEST NO. 16: Please provide a copy of any written statements that were taken from anyone regarding the facts of this case.

See Plaintiff's First Set of Discovery Requests served on June 15, 2004.

30. In its answers, Camden-Clark made the following response:

RESPONSE: Objection. Work product. Without waiver of the foregoing objection, no statement was taken from the plaintiff's decedent other than that which is reflected in the medical records, and no statement was taken from the plaintiff other than his deposition, q.v.

See Camden Clark's Return to Plaintiff's First Set of Discovery Requests served on July 15, 2004.

31. Camden-Clark's answer was simultaneously false and misleading. It was false, because Camden-Clark knew that it had taken numerous statements from witnesses as part of its investigation. It was misleading because Camden-Clark failed to disclose or file a proper privilege log regarding its purported work-product claims for the statements in its possession. Camden-Clark later claimed it had no statements and that nothing was being withheld pursuant to its objections. See infra at ¶¶116-17, 121, 123, 131-32, 135.

32. The identification and substance of witness statements and/or interview summaries by Camden-Clark were critical factors involved in this case.

33. For example, a written statement by Denise Humphries ("Ms. Humphries") exhaustively detailed the timeline of events in the operating room where the events involving Mrs. Boggs took place and Ms. Humphries' actions involving her care and treatment of Mrs. Boggs. See Handwritten Statement of Ms. Humphries dated October 18, 2001. Ms. Humphries made no record of her actions involving Mrs. Boggs in the medical record produced to the Plaintiff by Camden-Clark, and Camden-Clark provided no further documentation to the Plaintiff regarding Ms. Humphries' actions.

34. In another example, a statement given by Anna Haney ("Ms. Haney") directly to Camden-Clark's Risk Manager, Ms. Johnston, revealed that Dr. Koyawala had attempted, in Ms. Haney's words, to "get a story together" with other physicians. See Interview of Anna Haney dated November 1, 2001.

35. In yet another example, a statement taken from circulating nurse Sheila Sleeth (“Ms. Sleeth”) by Ms. Johnston confirmed that time indexes had disappeared from Mrs. Boggs’ cardiac rhythm strips. See Interview of Sheila Sleeth dated October 11, 2001.

36. As will be discussed, infra, at Paragraphs 38 et seq., Camden-Clark repeatedly failed, even after multiple orders of this court had issued, to timely submit these important documents for in camera review or to produce them to the Plaintiff.

37. The result of Camden-Clark’s failure to fairly and fully respond to these written discovery requests was that factual information was denied to the Plaintiff to which he was lawfully entitled until just a few weeks before trial. By the time Plaintiff obtained information and documents to which he had been entitled for over one year, there was no time left to conduct discovery, depose witnesses, disclose additional experts or theories or to develop additional evidence based on what Plaintiff learned from the wrongfully withheld documents.

II. Camden-Clark’s Serial Violations of Court Orders Regarding Discovery

a. Camden-Clark’s Failure to Comply with Three Court Orders regarding Privilege Logs and/or Production of Documents

38. Plaintiff filed motions to compel complete answers to written discovery in this matter on several occasions. Hearings on Plaintiff’s motions were held before each judge of this circuit, on December 20th, 2004; May 23rd, 2005; August 3rd, 2005; and December 19th, 2005.

39. At each of the first three hearings, the circuit judge³ ordered Camden-Clark to produce a privilege log, pursuant to West Virginia law, of the documents it was withholding from the Plaintiff pursuant to privilege claims. In the latter two of those three hearings, the

³ The first hearing was held before Judge Hill in case 03-C-623; the second was held before Judge Reed in case 03-C-623 and the third and fourth were held before the undersigned Chief Judge in both case 03-C-623 and 0c-C-296. By previous order of this Court, all discovery taken in one case was held to be operative in the other.

Court's order provided that the documents also be submitted for in camera review and that if they were not, they should be produced to the Plaintiff.

40. At the first hearing on December 20, 2004, the Court instructed Camden-Clark to produce a privilege log within thirty (30) days regarding any documents that were responsive to Plaintiff's previously served discovery requests.

41. Following the December 20, 2004, hearing, Camden-Clark produced a 'bare-bones' privilege log with respect to the credentialing file of Manish I. Koyawala, M.D. However, it did not produce a privilege log with respect to any other documents it had in its possession that were responsive to Plaintiff's discovery requests. See Part I, supra.

42. At the second hearing on May 23rd, 2005, Plaintiff asked the Court to overrule all objections raised by Camden-Clark to production of documents that were not included in any previously filed or prepared privilege log and which were the subject of previously served discovery requests. The Court declined to do so, but granted Plaintiff's Motion to Compel and allowed Camden-Clark an additional ten (10) days to produce a log or a protective order motion justifying its non-production. Camden-Clark neither filed a log nor produced the documents to the Court. It simply ignored the Court's second Order regarding the subject documents.

43. At the third hearing on August 3rd, 2005, Plaintiff again asked the Court to overrule all objections raised by Camden-Clark to production of documents that were not included in any previously filed or prepared privilege log and which were the subject of previously served discovery requests and granted Motions to Compel. Once again, the Court declined to do so and gave Camden-Clark an additional seven (7) days to produce a log and provide the documents to the Court for in camera review. Once again, Camden-Clark neither

produced a log nor produced the documents for in camera review. Once again, Camden-Clark simply ignored the Court's third Order regarding the subject documents.

44. After failing to comply with the Court's third order regarding these issues, the Plaintiff, for the fourth time, moved to compel production of the previously undisclosed documents and for sanctions for failure to comply with this Court's prior Orders. Plaintiff's Motion was heard on December 19th, 2005. At that time, the Court noted Camden-Clark's failure to comply with the prior Court Orders and GRANTED Plaintiff's Motion for Sanctions, while taking the nature of the sanctions under advisement.

45. Moments before the hearing on December 19th, 2005, Camden-Clark produced to the Plaintiff and filed with this Court its second purported privilege log in this case. In addition, Camden-Clark also provided the Court with a large volume of documents in a banker's box with two expandable folders with nineteen individual file folders. Among these documents were dozens of critical documents about which no prior disclosure had been made, either to Plaintiff or the Court, despite the repeated orders. See Part I, ¶¶ 9-28, supra.

b. Camden-Clark's Failure to Comply with Legal Requirements for Production of Privilege Log pursuant to Court Order

46. Significantly, the privilege log submitted in December, 2005, after one year and three court orders had issued did not satisfy the criteria set forth by State ex rel. Allstate Insurance Company v. Madden, 215 W.Va. 705, 601 S.E.2d 25 (2004) and State ex rel. Shroades v. Henry, 187 W.Va. 723, 421 S.E. 2d 264 (1992) with respect to documents claimed to be privileged based on attorney-client/work-product or the medical peer review protections of W.Va. Code §30-3C-3. See Second Privilege Log filed by Camden-Clark on December 19, 2005. While the second privilege log does contain columns entitled Description of Document, Date of Document, Custodian, and Source of Document, it fails to include the reason for

creation of the various documents identified. Furthermore, the log lists only a dozen or so items, when hundreds of pages of documents were withheld. Very few of the documents provided to the Court were specifically identified. Furthermore, Camden-Clark provided no justification for the documents in question being privileged other than boiler-plate assertions of attorney-client/work-product protections or peer review.

c. Camden-Clark's failure to comply with Court Orders after December 19, 2005.

47. Even after Camden-Clark's submissions and filings on December 19, 2005, it continued to withhold key evidence from the Plaintiff that was neither specifically identified in any privilege log submitted to the Plaintiff, or to the Court nor provided to the Court for in camera review prior to the trial of this case.

48. For example, on the first day of trial, counsel for Camden-Clark produced four additional witness interview summaries prepared by Ms. Johnston. Those interview summaries included two of the most important fact witnesses in this case, Nurses Haney and Burns, as well as scrub tech Charles Weddle and Nurse Betsy Collins. These interview summaries were the subject of Plaintiff's prior discovery requests and the prior Orders of this Court regarding production of these documents and/or an appropriately prepared privilege log. Furthermore, these documents were, once again, in the possession of Ms. Johnston or Camden-Clark's counsel.

49. Three of the interview summaries provided key information to Plaintiff regarding certain aspects his claims, including destruction of documents, attempts to coordinate stories, falsification of medical records, and negligence. For example, Weddle's interview summary specifically recited that he was told to destroy his notes. Burns' statement stated that she repeatedly asked to have her notes returned to her from Sherry Johnston – notes Camden-

Clark claimed did not exist. Nurse Haney's interview summary extensively corroborated her whistle-blowing testimony regarding Dr. Koyawala's attempt to "get a story together" and to tamper with the medical record. Virtually all of the withheld documentation of what happened to Mrs. Boggs in the OR supported Plaintiff's allegations of negligence in some manner.

50. None of these documents were identified in a privilege log; none were the subject of a pending protective order motion; none were provided to the Court for in camera review prior to the first day of trial; and none were produced to the Plaintiff pursuant to his discovery requests. Once again, Camden-Clark had failed to comply with this Court's Orders regarding discovery.

51. On the fourth day of trial, Camden-Clark produced a statement from Charlie Weddle, the day after the jury was told that the such notes had likely been destroyed by Camden-Clark, based on Camden-Clark's own internal document stating that Weddle was told to "get rid of" his copy of the notes and Camden-Clark's failure to produce any of its own original or copies of such notes during discovery of this case. See Interview Summary of Charles Weddle.

52. Once again, the statement referenced in Paragraph 51 were the subject of Plaintiff's previous discovery requests and this Court's three prior court Orders regarding such documents. However, once again, Camden-Clark failed to identify this document in any appropriately prepared privilege log, failed to seek a protective order for such notes, refused to produce such notes for in camera review, and refused to provide such notes to the Plaintiff prior to the fourth day of trial. Once again, Camden-Clark had failed to comply with this Court's Orders regarding discovery.

53. Throughout all of these events related to Camden-Clark's failure to comply with this Court's Orders, at no time did Camden-Clark claim that it was entitled to defy the Court's Orders based on an 'open contention that no valid obligation existed.' In fact, Camden-Clark, through its counsel, routinely promised to comply with this Court's Orders. See Transcript of December 20, 2004, hearing at 46; Transcript of May 23, 2005, hearing at 22; and Transcript of August 3, 2005, hearing at 31 – 33.

54. However, at the hearing on August 3, 2005, counsel for Camden-Clark asserted that any work performed by the custodian of most of these records, Ms. Johnston, including any documents she may have generated or assembled during her work on this case, would be protected by the work-product privilege. This Court found that Ms. Johnston's work would not be protected by the work-product privilege. Counsel for Camden-Clark asked for, and received a thirty (30) day stay of said Order to produce Ms. Johnston's file for the specific purpose of seeking appellate review of this Order in the Supreme Court of Appeals.

55. Camden-Clark never sought a writ during this thirty (30) day stay period or even within six (6) months of the August 3, 2005 Order.

56. Rather, Camden-Clark waited until February 21, 2006, seven days before trial and over six months after this Court granted the thirty day stay on August 3, 2005, to seek a writ regarding the release of certain of Ms. Johnston's documents with the Supreme Court of Appeals.⁴ After the stay expired in September of 2005, Camden-Clark did nothing to comply with this Court's Order of August 3rd until Plaintiff had again moved to compel and for sanctions and was heard on December 19th, 2005.

⁴ That writ was unanimously turned down by the West Virginia Supreme Court of Appeals on February 27, 2006.

III. Camden-Clark Filed Inaccurate Legal Filings with this Court in Regard to the Court Orders it had Ignored and Disobeyed.

57. On February 10, 2006, this Court released certain documents to the Plaintiff that had been submitted by Camden-Clark for in camera review.

58. Based on this Court's review, Camden-Clark had not sufficiently established that some documents it had submitted were protected by attorney-client, work product, or medical peer review privilege. Other documents were found to be privileged and this Court withheld them from the Plaintiff. See infra at ¶67.

59. On February 15, 2006, Camden-Clark filed "Emergency Motions."

60. In its motion, Camden-Clark, through its counsel, represented to the Court as follows:

b. The issue of how those documents would be handled was discussed before the Court on August 3, 2005, at which time, by agreement, Camden-Clark was granted a thirty-day stay of proceedings after the Court determined what documents were not subject to the attorney-client privilege, the doctrine of attorney work-product or the peer-review exemption from discovery and disclosure, to seek appellate relief with the Supreme Court of Appeals, if this Court determined to overrule any of Camden-Clark's claims to exemption from discovery and disclosure. See transcript of hearing of August 3, 2005, page 35.

See Emergency Motions by Defendant Camden-Clark Memorial Hospital Corporation at 10.

61. The representation made by Camden-Clark and its counsel in Paragraph 60 is inaccurate.

62. The pertinent sections of the August 3, 2005, hearing transcript states as follows:

COURT: However, I do not believe work done by Ms. Johnston, a hospital employee, would be considered work product. Unless there's some other privilege, I don't think we've had a log submitted, have we Mr. Hayhurst?

MR. HAYHURST: No. ...

...
MR. HAYHURST: The only other issue I think there was was I declined – it's the issue about her, Mrs. Johnston, testifying about the counterclaim,

MR. REGAN: factual basis for the claim, and we're withdrawing the counterclaim without prejudice.

MR. HAYHURST: In any case, what Ms. Johnston knows about the factual basis for the counterclaim may lead to discoverable information in this case, so that doesn't take away the motion to compel. I'm not sure we can stop them from withdrawing a counterclaim, but we still want to know what the hospital believed its basis to be to sue Ray Boggs and allege he abused the court system or whatever the counterclaim specifies. We're not going to abandon discovery into that issue. Obviously, if somebody at Camden-Clark sat down and said, we've got reason to believe this lawsuit's frivolous and abusive to the court process, that's certainly pertinent to—certainly pertinent to Mr. Boggs' underlying –

MR. HAYHURST: I agree with that, but they have to do that by 30(b)(7) deposition rather than by selecting the attorney's investigator and attempting to make her disclose what the attorney knows.

MR. REGAN: I think that's covered by the Court's ruling, though. She's not the investigator.

MR. HAYHURST: He's not made that ruling yet.

MR. REGAN: That's the third one I have written down, that the work done by Sherry Johnston is not work product.

MR. HAYHURST: I don't think he's made that.

THE COURT: I think so.

MR. HAYHURST: Well, your Honor, I want a thirty day stay of that ruling so I can appeal that to the Supreme Court. That's too critical to us, to our method of operating, not to seek intermediate review. I don't know that I'll get it, but I want to seek it if the Court will allow me that time, the thirty days.

MR. REGAN: I have no objection to them getting thirty days to pursue his rights.

See pages 24, 34-35 of August 3, 2005, hearing transcript. Moreover, this Court's Order specifically stated:

The Court further ORDERED that the Hospital follow the above-described procedure [either submit for in camera review or produce to Plaintiff] as to any documents it contends are privileged which were identified specifically in the Motion to Compel or at the hearing, including but not limited to witness statements or interviews, however characterized, in the file of Sherry Johnston

See Order dated August 31st, 2006, at 3. That Order further stated:

Counsel for the Hospital requested a 30 day stay of this Court's ruling in Plaintiff's favor and said stay is GRANTED, for the purpose of allowing the Hospital to pursue any relief from this Court's ORDER to which it may believe it is entitled.

Id. at 3-4. But Camden-Clark never took advantage of the stay, produced no documents until December 19th, 2005, withheld critical documents even after that date, and later claimed the Court had not yet ruled in Plaintiff's favor and this was not true.

63. Furthermore, in its emergency motions, Camden-Clark represented to the Court as follows:

- c. On January 17, 2006, the Court announced that it intended to overrule Camden-Clark's objections to disclosure of witness statements but agreed to a request that it would disclose to the parties specifically what was being disclosed before disclosure to allow Camden-Clark to pursue its appellate/prohibition remedies, if needed.

See Emergency Motions by Defendant Camden-Clark Memorial Hospital Corporation at 10.

64. Once again, Camden-Clark's representation in Paragraph 60 is inaccurate.

65. This Court did not agree on January 17, 2006, that it would disclose to the parties specifically what documents were being disclosed before disclosure to allow Camden-Clark to pursue its appellate/prohibition remedies. At that point, five different hearings had taken place, four motions to compel had been granted, Camden-Clark had been given a stay and the matter was ripe for decision.

66. However, this Court did, in fact, disclose on January 17, 2006, what it intended to disclose to Plaintiff:

...But I think things like witness statements, notes, hospital records, all that is disclosable. Some of these things you may already have, because some of it's even correspondence between the three lawyers that were involved when ...⁵

Then there's some things on standards, which I think anybody has access to, but I don't see how they would be privileged.⁶

The area with Medicaid complaints, I would think that's from a governmental agency, so wouldn't that be

...⁷

⁵ See August 3, 2005, hearing transcript at 63.

⁶ Id. At 63-64.

⁷ Id. At 66. Counsel for Camden-Clark concedes the State of West Virginia does not believe Medicaid complaints are quality improvement subject to protection by the peer-review exemption from disclosure. Id.

Well, whatever's in the Haney notes I think is disclosable as a prior witness statement.⁸ And then there's an incident report ... So that would go.⁹

67. Furthermore, this Court disclosed on January 17, 2006, what it intended not to disclose:

I determined that some is disclosable and some's not. There's obviously some that are attorney/client privilege, because there are letters back and forth between Mr. Hayhurst and his client. So, obviously that would not ...¹⁰

And, of course, credentialing files would be privileged. The actual peer review meeting, that would be privileged under peer review.¹¹

68. Finally, with respect to the request to provide a pre-disclosure list of what this Court intended to disclose, the Court was clear that it did not intend to provide a pre-disclosure list:

MR. HAYHURST: May I make a suggestion? Would you consider dictating a brief letter saying what you intend to release and then let me have a day to digest it to make sure that there's – that there's nothing – I don't think there's going to be anything I'd take exception to, but would you let me have just a day to look at it before they're released to the Plaintiff?

THE COURT: You don't want me to do the release or –

MR. HAYHURST: I'd like to have –

THE COURT: We'd have to keep a record, I guess. If we keep a record of what's not released, I guess that's what would be needed for any appeal in the future. Obviously, I at least have to keep copies of what's not released, but go ahead and release –

...

MR. HAYHURST: I think both – what you're going to release, I think both of us need copies, but I'd like, before the actual release, I'd like to have 24 hours to know what it is.

THE COURT: I don't think there's going to be anything earth-shattering, like the Gnegy letter.

MR. HAYHURST: I don't think so either, your Honor.¹²

69. Finally, in its emergency motions, Camden-Clark represented to this Court:

⁸ *Id.* At 69.

⁹ *Id.* At 71.

¹⁰ *Id.* At 63.

¹¹ *Id.* At 64.

¹² *Id.* At 65-66. As this excerpt shows, the Court made no agreement to provide a pre-disclosure letter of what it intended to release. Furthermore, Camden-Clark did not cite the Court's attention to any authority, and this Court is not aware of any authority, that would require the Court to dictate such a letter.

- d. On February 10, 2006, without notifying counsel for Camden-Clark of its decision, this Court disgorged to counsel for the plaintiff certain documents that should never have been disclosed to the plaintiff ...

See Emergency Motions by Defendant Camden-Clark Memorial Hospital Corporation at 10.

70. Once again, Camden-Clark's representations in Paragraph 69 are inaccurate.

71. As documented in Paragraph 66 – 68, this Court notified both parties what it intended to disclose at the hearing of January 17, 2006.

72. Camden-Clark's filings with respect to the release of certain documents by this Court on February 10, 2006, continued in Camden-Clark's Response to Plaintiff's Renewed Motion for Judgment by Default and Request for a Rule 55(b)(2) Hearing ("Camden-Clark's Response") filed on February 27, 2006.

73. In this filing, Camden-Clark stated, in pertinent part:

Camden-Clark cannot by statute divulge the information accumulated by it through the peer review process ...

Furthermore, there is no case law in West Virginia to date which even contemplates that a trial court can engage in an in camera inspection of peer-review materials, since the provisions of the West Virginia Act do not make materials so generated 'privileged,' in the same sense as the attorney-client privilege or the work-product privilege ... To the contrary, the materials, by statute, 'shall be confidential and privileged and shall not be subject to subpoena or discovery proceedings or be admitted as evidence in any civil action arising out of the matters which are subject to evaluation and review by such organization.' There never should have been an in camera review of these materials; a fortiori, they never should have been disclosed to the plaintiff; they are not admissible into evidence in this trial of this action.

...
The plaintiff takes the position that Camden-Clark made false statements to the Court about the existence of witness statements. The interviews conducted by Mrs. Johnston resulted in summaries – it was the peer review investigation conducted by the Medical Staff of Camden-Clark that resulted in the specific statements and those were and are confidential and not subject to the discovery process in their entirety. Hence, the answers given were accurate given that its lips were sealed by the statutory provision of confidentiality and exemption from discovery process...

See Camden-Clark's Response at 7-8, 10, 16-17.

74. Once again, the representations made by Camden-Clark, and its counsel, were inaccurate.

75. The West Virginia Supreme Court of Appeals has determined the procedure to follow when a party seeks discovery of allegedly confidential peer-review materials protected from discovery by W.Va. Code §30-3C-3. In State ex rel. Shroades v. Henry, 187 W.Va. 723; 421 S.E.2d 264 (1992), the Court stated:

When discovery is sought by identifying existing documents or of documents held by a non-review organization, the party claiming the document is privileged should identify the document by name, date, custodian, source and reason for creation. The mere identification of the documents does not breach the confidentiality afforded by W.Va. Code, 30-3C-1 ... because documents' content, rather than their identity, may be protected from discovery.

Id. At 270, 729.

76. Thus, Camden-Clark was under a legal obligation, from the beginning in 2004, to disclose the identity of the documents it was withholding in the form of a privilege log pursuant to Shroades.

77. Furthermore, Camden-Clark was, or should have been, aware of this case law far before February 27, 2006.

78. On approximately March 1, 2005, Plaintiff cited Shroades and the procedures to be followed under W.Va. Code §30-3C-3 in his Motion to Compel filed with this Court. See Plaintiff's Motion to Compel filed on or about March 2, 2005 at 3.

79. On July 21, 2005, the Plaintiff, again, cited Shroades and the procedure to be followed when claiming a privilege related to W.Va. Code §30-3C-3 in its Response to Camden-Clark's Motion for Protective Order. See Response to Camden-Clark's Motion for Protective Order filed on July 21, 2005, at 3.

80. Based on this history, this Court can only conclude that Camden-Clark's action in regard to its justifications for not producing a privilege log were an effort to deny or delay until the last possible minute discovery which the Plaintiff was entitled to. Moreover, Camden-Clark's last contention, that patently false testimony should be deemed true because a party's "lips are sealed" by a privilege is not only baseless and unsupportable, but insulting to the rule of law generally, which has no provisions allowing false testimony under oath because of a purported privilege. There are rules for the assertions of privileges and Camden-Clark intentionally disregarded them.

IV. Inaccurate Testimony Provided by Camden-Clark's Corporate Representative

81. Camden-Clark was represented by Ms. Johnston, its Risk Manager, at trial and throughout the litigation. Ms. Johnston attended most of the depositions that took place in the Parkersburg area as well.

82. During the pendency of Plaintiff's several motions to compel regarding production of documents, Plaintiff took the deposition of Ms. Johnston on two occasions. On both occasions, Ms. Johnston, who was herself the custodian of many of the withheld documents in this case, testified inaccurately regarding material matters.

83. Ms. Johnston testified inaccurately about her instructions to witnesses to provide copies of notes to her. For example, the following exchange took place during Ms. Johnston's deposition on June 24, 2005:

MR. HAYHURST: Chris, I need to tell you when you use the term 'witness statement,' if you are -- if you are contemplating something that the person filled out in his or her handwriting and signed or something that was prepare for him or her and signed by the person, that's not what we have. What we have is her summary of her interviews with witnesses rather than what I would call a written statement. ...

MR. REGAN: We've talked about eight people, I guess, or maybe seven that you interviewed. And Mr. Hayhurst just mentioned that -- well, why don't you describe to me what you do when you do these interviews in terms of what's produced in terms of a witness statement.

A: What is produced?

Q: Yeah. What do you end up with?

A: All I want to do is capture whatever memory they might have. I let them do the talking. I do explain to them why I'm doing what I'm doing and who's requesting it.

Q: Uh-huh.

A: And then I make notes in my own handwriting. I did not ask any of these people to provide their own notes to me or to make notes and then provide them to me.

See Deposition Transcript of Ms. Johnston dated June 24, 2005, at 14-16.

84. In fact, Ms. Johnston had requested notes from Sheila Sleeth (See Interview Summary of Sheila Sleeth dated October 11, 2001) and Ms. Haney (See Interview Summary of Ms. Haney dated November 1, 2001). In addition, there is evidence that Ms. Johnston asked for notes made by Ms. Burns (See Interview Summary of Ms. Burns dated October 16, 2001).

85. In addition, Ms. Johnston testified inaccurately regarding her knowledge of notes or other documents made by hospital employees outside the medical record.

86. In her June 24, 2006, deposition, Ms. Johnston testified as follows:

Q: Did any hospital employees besides -- well, no. Did any hospital employees make any notes or records of the incident involving Mrs. Boggs or the aftermath outside of the medical record?

A: I can only tell you what I know personally. I think that Anna Haney told me that she did make some notes at the request of, and I can't remember who it was ...

See Deposition Transcript of Ms. Johnston dated June 24, 2005, at 20-21.

87. In fact, Ms. Johnston's knowledge of documents extraneous to the medical record regarding Mrs. Boggs made by other Camden-Clark employees was extensive. From Ms. Johnston's interview summaries, she knew that Ms. Haney made notes (See Ms. Haney's Interview Summary dated November 1, 2001); that Sheila Sleeth made notes (See Sheila Sleeth

Interview Summary dated October 11, 2001, and Ms. Hines' Interview Summary dated October 15, 2001); that Charlie Weddle made notes (See Charlie Weddle Interview Summary dated October 30, 2001); and that Ms. Burns certainly claimed she made notes (See Ms. Burns' Interview Summary dated October 16, 2001, with notation made on March 15, 2005).

88. In addition to Paragraph 88, Ms. Johnston had the following documents in her possession, as custodian, as listed on the second purported privilege log, referenced in Paragraph 52:

- a. E-mail written by Ms. Hines and sent to Ms. Johnston on October 29, 2001, describing the incident involving Mrs. Boggs;
- b. Handwritten notes/statement prepared by Betsy Collins on October 4, 2001;
- c. E-mail drafted by Cynthia L. Carpenter sent to Ms. Johnston on October 8, 2001, regarding the medications provided to Mrs. Boggs;
- d. Typewritten notes/statement by Sheila Sleeth dated as received on October 10, 2001;
- e. Handwritten notes/statement by Ms. Humphries, dated October 18, 2001; and
- f. Handwritten notes/statement by Charlie Weddle

89. Furthermore, Ms. Johnston inaccurately testified regarding those she had consulted with outside of the individuals she had identified in the deposition.

90. Ms. Johnston testified on June 24, 2005, that she had discussed the Boggs case with the following individuals: Tom Corder, Richard Hayhurst, Allen Butcher, Cynthia Carpenter, Ms. Haney, Sheila Sleeth, Ms. Burns, Ms. Humphries, Scott Riser, Betsy Collins, and Cindy Carpenter. She testified that she could not think of anyone else that she had consulted with. See Deposition Transcript of Ms. Johnston dated June 24, 2005, at 30.

91. In fact, Ms. Johnston's files document that she had consulted or discussed the Boggs' case with the following additional individuals: Charlie Weddle, Ms. Hines, Teresa

Criss, Kathy Decker, Jonni Stoker, Tracey Fletcher, Roberta K. Howard, Becky Lofty, Jacklyn S. Reed, Patti Williams, and Tammy Mayhew.

92. Ms. Johnston's inaccurate testimony continued in her deposition of January 5, 2006.

93. During that deposition, she testified inaccurately regarding her instructions to witnesses to destroy notes, copies or otherwise.

94. For example, Ms. Johnston testified as follows regarding the notes of Ms. Burns:

Q: Are -- are you in possession of the notes that Bernice Burns testified in her deposition?

A: I have no notes from Bernice Burns.

Q: Do you know who does?

A: I have no idea. I am not aware of the existence of the notes.

Q: Were you ever aware of their existence?

A: No.

Q: Did you ever ask Bernice Burns for her notes?

A: I have no specific memory of that. I may have -- I may have asked her if she had any, but I don't remember doing that.

Q: Is there anything about Bernice Burns' notes reflected in your memo, if you made one from interviewing her after what happened to Mrs. Boggs?

A: Now, say that again, I'm sorry.

Q: Sure. Did you interview Bernice Burns after --

A: I did.

Q: -- what happened to Mrs. Boggs?

A: I did.

Q: Did you make a memo after that interview?

A: I did.

Q: Does that memo include anything about Ms. Burns' notes?

A: It does not.

See Deposition of Ms. Johnston dated January 5, 2006, at 8-9.

95. This testimony is directly contradicted by the Interview Summary of Ms. Burns prepared by Ms. Johnston. This Interview Summary, dated October 16, 2001, mentions Ms. Burns' notes more than once. In fact, Ms. Johnston reports in her Interview Summary that Ms. Burns believed she made notes and gave them to Ms. Johnston. Moreover, the Interview

Summary also documents that Ms. Burns asked Ms. Johnston for her notes back. Ms. Johnston claimed later that the notes never existed. However, her testimony that her Interview Summary memorandum did not "include anything about Ms. Burns' notes" was plainly inaccurate.

96. This omission was material because Ms. Burns was an important witness not only to the medical care Mrs. Boggs received, but also regarding the disappearance of time indexes from Mrs. Boggs' cardiac rhythm strips. Furthermore, Ms. Burns' interview tended to support the Plaintiff's allegations of spoliation and record destruction, because it documented Ms. Burns' clear recollection that she had made notes and given them to Ms. Johnston, a fact that contrasted with the Camden Clark's claim that the notes did not exist.

97. Furthermore, Ms. Johnston continued to inaccurately testify regarding those she interviewed.

98. In her January 5, 2006, deposition, Ms. Johnston stated she interviewed the following individuals: Ms. Haney, Ms. Burns, Sheila Sleeth, Ms. Humphries, and Charlie Weddle.

99. However, Ms. Johnston also interviewed Ms. Hines and Teresa Criss. Neither of these individuals were ever identified by Ms. Johnston as being interviewed by her even though written Interview Summaries were produced from her files.

100. Furthermore, Ms. Johnston gave additional testimony that was both inaccurate and misleading in her January 5, 2006, deposition, regarding instructions to nurses to destroy notes. In that deposition, she stated:

Q: Okay. Have you ever told a nurse to do that?

A: To do what?

Q: To destroy notes they had made regarding a patient.

A: That's not something that I would normally do. Would I ever do it? You know, nurses don't go around making a great deal of notes. I just don't see that happening very often. I always ask them or at least I always try to ask them, Do

you have notes? That I can tell you for certain. I have never told a nurse, Destroy your notes so that they can't be discovered, ever. Now, would I like a nurse -- would I like to have the only copy of notes, you know, that -- that depends. You know, in this case she's already given the notes or at least she says she's given the notes to the family. Why would I ever tell her, Well, destroy your copy so that they can't be discovered. It just doesn't make sense.

....
Q: -- if you can clarify what I'm getting at, what you're saying, I would appreciate it. When you say I wouldn't normally tell a nurse to destroy her notes after you get a copy or you get the originals, you wouldn't normally do that, it strikes me that you can envision some circumstance where you would do it, where it happened.

A: It's just not part of my normal repertoire. You know, I will -- I'm gonna ask them if they have notes, and if they do I'd like to have them. And it usually ends right there.

Q: So you just can't remember whether it's come up before or not whether you've had to tell a nurse to destroy her copies?

A: To destroy her copies?

Q: Right.

A: I don't have a memory of it. . . .

See Deposition Transcript of Ms. Johnston dated January 5, 2006, at 41 - 44.

101. Documents later established that Ms. Johnston had told Ms. Haney to "throw away" her copy of her notes and had told Charlie Weddle to "destroy" his. See Interview Summaries of Ms. Haney and Charles Weddle taken by Ms. Johnston. Moreover, Ms. Burns had told Ms. Johnston she had taken Ms. Burns' notes and asked for them back, though Ms. Johnston claimed never to have had them. This was documented in Ms. Johnston's own files, regarding interviews she conducted herself.

102. In addition, Ms. Johnston's testimony concerning instructions to destroy notes was misleading because although it was true that Ms. Haney had provided some of her notes to the family, Ms. Johnston did not appear to know that when she instructed Ms. Haney to "throw away" her copy. Ms. Johnston's detailed interview summary with Ms. Haney nowhere indicates that Ms. Haney told her the Boggs family had the notes, though the interview lists every other person to whom they might have been disclosed.

103. Finally, Camden-Clark's counsel represented on the record during Ms. Burns' depositions that her notes were being withheld as privileged, but later argued the notes did not exist. The following colloquy took place at Ms. Burns' deposition:

MR. REGAN: Just so I'm not under any misapprehension, counsel, those have not been produced in discovery, have they?
MR. HAYHURST: What are you talking about?
MR. REGAN: The notes.
MR. HAYHURST: What notes?
MR. REGAN: The ones Mrs. Burns is talking about.
MR. HAYHURST: No.
MR. REGAN: They have not been produced?
MR. HAYHURST: Correct.
MR. REGAN: Are they being withheld under some claim of privilege?
MR. HAYHURST: Yes. And they're statutorily exempt from disclosure.

See Deposition Transcript of Ms. Burns at 57-58. Camden-Clark has never produced the Burns notes at all, later claiming they did not exist.

V. Incorrect and Incomplete Testimony Given by Hospital Employees that went Uncorrected, Despite Camden-Clark's and its Counsel's Knowledge that it was Incomplete and Incorrect.

104. As described above, Camden-Clark possessed contemporaneous interviews of and also notes from most of the key witnesses under Camden-Clark's control. These interviews and notes, made close to the time of the incident involving Mrs. Boggs, revealed a far more detailed picture of what happened to Mrs. Boggs than the depositions of those same individuals taken several years after the fact.

105. In a number of instances, Camden-Clark, the corporation, knew its current or former employees or agents were testifying inaccurately or incompletely, but permitted them to do so. In addition, Camden-Clark's counsel, who had received and reviewed all of the information held by Camden-Clark also allowed Camden-Clark's employees to testify falsely or incompletely. It is entirely possible that the employees innocently failed to recall certain facts after several years had passed, but Camden-Clark possessed detailed documentation of the facts

such that the inaccurate and erroneous character of the employee testimony was within its corporate knowledge. See W.Va.R.Civ.Pro. 30(b)(6)-(7). Moreover, Camden-Clark was under court order to produce these documents, but did not do so.

106. For example, Ms. Johnston and Mr. Hayhurst were present at the deposition of Charles Weddle on December 19, 2005.

107. At that deposition, Charles Weddle testified that he never made any notes or documents related to the Boggs case. See Deposition Transcript of Charles Weddle at 17.

108. In fact, Ms. Johnston conducted an interview with Charles Weddle on October 10, 2001. In her Interview Summary, Ms. Johnston documents that Mr. Weddle indicated he had made notes or written down his memories of what happened and provided this writing to Cindy Carpenter. He also indicated he kept a copy, which Ms. Johnston instructed him to destroy. See Interview Summary of Charles Weddle dated October 30, 2001.

109. Furthermore, Camden-Clark and its counsel allowed Ms. Burns and Sheila Sleeth (“Ms. Sleeth”) to testify inaccurately or in materially incomplete ways at their respective depositions. Ms. Johnston’s interview summaries with respect to Ms. Burns and Ms. Sleeth provide very detailed descriptions of what took place with Mrs. Boggs on September 29, 2001. Their respective deposition testimony is not nearly as specific or as suggestive of the liability of Camden-Clark or Koyawala as their interviews. Cf. Interview Summaries of Ms. Burns and Ms. Sleeth with Deposition Transcripts of Ms. Burns and Ms. Sleeth.

110. Ms. Sleeth’s interview summary also provides information related to Plaintiff’s claim regarding destruction of medical records. This was not mentioned by Ms. Sleeth during her deposition.

111. Ms. Sleeth also testified that she did not write anything down. In fact, Ms. Johnston had possession of a written statement made by Ms. Sleeth.

112. Ms. Burns' interview summary provides information related to the possible destruction of notes made by Ms. Burns' that was far more detailed than the discussion of this topic during Ms. Burns' deposition.¹³

113. Finally, Camden-Clark and its counsel allowed Ms. Haney, Ms. Burns, Ms. Sleeth, Charles Weddle, and Ms. Hines to testify over four years after the incident involving Mrs. Boggs without letting them review their respective interview summaries or written statements or notes prepared by Ms. Johnston in the immediate aftermath of September 29, 2001 even though Burns specifically asked for them. Given the lapse of time between the events and the deposition, it is possible and even likely that the incorrect testimony was brought on by innocent lack of recollection. However, Camden-Clark possessed detailed documents, letting it and its counsel know that the testimony was incorrect or incomplete.

114. This pattern of allowing witnesses to testify incompletely or falsely is significantly aggravated Camden-Clark's counsel's assertions that Camden-Clark's counsel represented the witnesses who testified incompletely or inaccurately in this case. See, e.g., Deposition Transcript of Ms. Sleeth at 53; Deposition Transcript of Ms. Burns at 76; Deposition Transcript of Ms. Hines at 10.

VI. Camden-Clark, through its Counsel and its Witnesses made Misleading or Inaccurate Statements to the Court, the Plaintiff and the Jury, both in Pre-trial Proceedings and at Trial.

115. In June of 2004, Plaintiff served his first set of discovery requests upon Camden-Clark. Camden-Clark filed objections and responses in July of 2004. After a good faith effort

¹³ In addition, counsel for Camden-Clark claimed, during Ms. Burns' deposition, that these notes were being withheld under a claim of privilege and later argued they did not exist.

to resolve certain objections to the discovery asserted by Camden-Clark, in December of 2004, Plaintiff moved to compel. During the hearing on the parties' respective motions to compel held on December 20, 2004, Plaintiff's counsel stated:

MR. REGAN: ... the Defendant [Camden-Clark] is withholding a substantial number of documents from us, and we would like to get ahold of these documents and have the opportunity to discover our case.

See Transcript of December 20, 2004, hearing at 39.

116. Counsel for Defendant Camden-Clark stated:

MR. HAYHURST: The only thing we have held from them is the privilege files of the doctors involved. Everything else has been supplied.

Id.

117. As of the time the previous statement was made, Camden-Clark was, in fact, withholding, at least, the following:

- a. An incident report regarding Mrs. Boggs' death;
- b. A letter from David A. Gnegy ("Dr. Gnegy") recounting the events leading to Mrs. Boggs' death;
- c. Witness statements taken by Ms. Johnston;
- d. Notes and handwritten statements by personnel involved in Mrs. Boggs' medical care; and
- e. Hundreds of other pages of documents submitted to this Court in December of 2005. See infra.

118. Pursuant to this hearing, counsel for Camden-Clark represented that it would produce a privilege log related to materials it was withholding:

THE COURT: I will not do an in camera inspection, but you can produce the log of these matters. You can't just erect a Chinese wall and say we can't go beyond that.

MR. HAYHURST: May I have the same 30 days, Your Honor?

THE COURT: Yeah, sure. All right.

See Transcript of December 20, 2004, hearing at 46.

119. Following this hearing, Camden-Clark submitted a privilege log related to the credentialing file of Dr. Koyawala. However, it did not submit a privilege log or protective order with respect to any other documents it was withholding.

120. At a Court hearing on May 23, 2005, five months after the hearing discussed previously, Camden-Clark's discovery responses were again discussed. When the Court took notice of Plaintiff's concerns regarding Camden-Clark's answers, the following exchange took place:

MR. REGAN: The basis for its [motion to compel's] resolution was Mr. Hayhurst's representation to the Court that nothing that had been requested in Plaintiff's discovery of which we are complaining in that motion, nothing had been withheld, except what's being submitted for in camera review.

MR. HAYHURST: Yeah.

See Transcript of May 23, 2006, hearing at 15-16.

121. The Court inquired further, and a colloquy took place emphasizing what it was Plaintiff sought from Camden-Clark including written statements, variances, incident reports, complaints, written statements and allegedly peer-review materials. Id. At 16-18, 21-22.

122. Counsel for Camden-Clark assured the Court:

MR. HAYHURST: I don't want to misrepresent anything. I don't think there's been anything – any complaint made about Dr. Koyawala, except insofar as the peer review that's involved in this case is implicated, but I don't want – I want to confirm that before I – but if there were, I would take the same position and would make the same – I'd submit them as well within ten days. And what else were they?

...

MR. HAYHURST: Well, that's not so. My investigator has interviewed some of the percipient witnesses, but that's clearly work product.

...

I'm not sure anything in the investigation constituted a statement, but I'll have to review it; and if the Court please, I will deal with it the same way you allowed me to deal with the Koyawala letter [i.e. to file a motion for a protective order within ten days].

Id. At 17-18. See also Order from May 23, 2005, hearing at 2-3.

123. This was the first disclosure to the Court of both the existence of an ‘investigator’ and the existence of statements taken from witnesses by Camden-Clark. They were not identified as being withheld or as existing at all, before the May 23 hearing, despite Camden-Clark’s counsel’s representation at the December 20, 2004, hearing that nothing was being withheld under claim of work product privilege. Cf. Transcript of December 20, 2004 hearing at 40.

124. In addition, at the hearing on May 23, 2005, Camden-Clark, through its counsel, once again agreed to provide a privilege log or protective motion:

THE COURT: But you said ten days; right?

MR. HAYHURST: You said ten days, and that’s perfectly acceptable to me.

THE COURT: I never said ten days on this one.

MR. HAYHURST: No, I’m asking for ten days.

THE COURT: Okay. All right. The Motion to Compel is granted. The information requested to interrogatory number 9, 10, and 11, and request for production 16, 5, 6, 7, and 8 are to be provided within ten days, unless within that time a Motion for a Protective Order or some kind of privilege log or the procedure is complied with.

MR. HAYHURST: Thank you, Your Honor.

See Transcript of May 23, 2005, hearing at 22.

125. Camden-Clark filed a motion for a protective order, it pertained only to the credentialing file of Dr. Koyawala (as to which it was granted) and a letter written by Dr. Gnegy (as to which it was denied). No in camera submission of any other documents was made after May 23, 2005, and before the Court’s next hearing on this issue on August 3, 2005, regarding any allegedly peer review documents, incident reports, witness statements or any of the documents pertinent to the alleged investigation conducted by Ms. Johnston.

126. The issue of discovery of an incident report regarding Mrs. Boggs and the events of September 29, 2001, was addressed at each of the hearings on December 20, 2004 and May

23, 2005. See Transcript of December 20, 2004, hearing at 43 and Transcript of May 23, 2005, hearing at 17.

127. The existence of an incident report was not identified as existing in any of Camden-Clark's discovery responses or at either of the first two hearings previously discussed.

128. During Ms. Johnston's deposition on June 24, 2005, the existence of an incident report was confirmed:

Q: Does the hospital require incident reports or does it have a process of creating incident reports when unusual events take place at the hospital?

A: Yes.

Q: Okay. Was an incident report created with respect to the death of Hilda Boggs?

A: I believe, yes.

Q: Where is that incident report?

A: I am the keeper of all incident reports.

Q: Do you keep the incident reports in your office or somewhere else?

A: In my office in a locked file, yes?

Q: When was the incident report regarding Hilda Boggs prepared?

A: I don't remember.

Q: What would be typical?

A: Typical would be within the 24-hour period of the incident itself.

Q: What does the incident report consist of?

A: It would consist of, and I'm just gonna pull this out of my memory, patient's name, patient demographics found on the addressograph, date of the occurrence, the date of the incident report, the name of the person filling out the incident report, a narrative of the incident, whether the doctor had been notified of the incident.

Q: Is there a form that --

A: Yes.

Q: -- requests all those different thing?

A: Yes, there is.

Q: And is that form filled out routinely by hospital personnel when incidents occur?

A: Yes.

See Deposition Transcript of Ms. Johnston dated June 24, 2005 at 10-12.

129. Furthermore, Camden-Clark's counsel was present for the deposition of Ms. Johnston on June 24, 2005.

130. However, less than six weeks later, on August 3, 2005, after Ms. Johnston had confirmed the existence of an incident report for the incident involving Mrs. Boggs, counsel for Camden-Clark represented to this Court that such an incident report is, in fact, a different document, or may not even exist:

MR. HAYHURST: Your Honor, that is not so. The incident report refers to Doctor Gnegy's letter. That has been submitted to the Court for in-camera review.

THE COURT: Is that what you're calling the incident report?

MR. HAYHURST: Yes, that's what he's calling the incident report, but Doctor Gnegy's letter –

THE COURT: Is there something besides Doctor Gnegy's letter that –

MR. HAYHURST: No. Doctor Gnegy's letter was addressed to Doctor Daniel McGraw, who was the chairman of the –

...
-- medical staff, and it was the initiating factor in the peer review investigation of medical care administered to the Plaintiff's decedent ...

...
MR. REGAN: I want to be just clear, Judge, that we do have testimony that there is an incident report and a letter. Those are two separate documents....

MR. HAYHURST: Judge, I am unaware of any separate incident report. Now, my best belief is that the – what they're calling an incident report is the letter from Dr. Gnegy. I don't want to misrepresent anything to the Court. I want to be careful about what I say, but I'm unaware of any other incident report.

...
The incident report, as I say, I believe that we're talking about Doctor Gnegy's letter there. If there is another one, I don't – I'm not – I don't appreciate that there's another one. They say there is. They seem to know more about what's going on in my hospital than I do, but I don't know of any other ...

See Transcript of August 3, 2005, hearing at 14-15, 16-17, 29-30. Cf. with Deposition Transcript of Ms. Johnston dated June 24, 2005, at 10-12. Additionally, the preparation of incident reports is routine at Camden-Clark and counsel's representation that he knew nothing about one is not credible.

131. Also at the August 3 hearing the issue of witness statements was raised again:

THE COURT: What about witness statements?

MR. HAYHURST: We have taken no witness statements, your Honor.

THE COURT: They said there were.

MR. HAYHURST: No, there are summaries of interviews. ... They are not formal witness statements; they're not signed by the witnesses ...

See Transcript of August 3, 2005, hearing at 11.

132. Mr. Hayhurst's statements in Paragraph 131 were inaccurate. At the time of this hearing, Camden-Clark had written and/or signed statements from Betsy Collins, Ms. Sleeth, Ms. Humphries, and Charles Weddle.

133. Furthermore, also at the hearing of August 3, 2005, the failure of Camden-Clark to comply with the previous two Court orders was again raised. By the conclusion of this hearing, the Court had again ordered Camden-Clark to respond to the Plaintiff's discovery requests and to either produce all the documents contemplated by the requests and at the hearing to the Plaintiff within seven (7) days, unless a privilege log and in camera submission was made first. See Transcript of August 3, 2005, hearing at 31-32.

134. Counsel for Camden-Clark agreed to comply with this Order:

THE COURT: Okay. Anything that's not been turned over can you submit within seven days?

MR. HAYHURST: Yes, sir.

THE COURT: Submit it to the Court for an in-camera review anything that's not previously been provided to the Plaintiff and you're asserting a privilege of either attorney/client or work product.

MR. HAYHURST: And identify which and the basis for it.

THE COURT: Correct.

See Transcript of August 3, 2005, hearing at 33.

135. Camden-Clark did not comply with this Court's August 3 Order or with its representation to this Court. This is the third Order regarding production of documents that Camden-Clark directly disobeyed and, at least, the third misrepresentation to this Court regarding Camden-Clark's willingness to comply. See Part II, supra.

136. Due the failure of Camden-Clark to file a privilege log or an appropriate motion for protective order for the documents it was withholding from Plaintiff, Plaintiff filed a Motion for Sanctions that was heard on December 19, 2004.

137. At this hearing, counsel for Camden-Clark admitted that it had previously failed to comply with this Court's orders on three occasions, which he himself represented they would do:

MR. HAYHURST: ... The issue that's before the Court is – has to do with the failure earlier to deposit documents with the Court for in-camera review on our claim of work product, attorney/client privilege and the statutory bar against discovery that's set forth in West Virginia Code, Section 30-3C-3. I admit freely that the prior deadlines of the Court were not met ...

See Transcript of December 19, 2005, hearing at 49.

138. Counsel for Camden-Clark's inaccurate representations to this Court continued in the same hearing of December 19, 2005. When the issue of the pursuit of a writ from this Court's Orders of August 3, 2005, the following colloquy took place:

THE COURT: Mr. Hayhurst, you had talked about appealing the August 3, 2005, order, but you never did?

MR. HAYHURST: Well, my intention was if you directed anything to be disclosed to the Plaintiff, that I was going to seek a writ of prohibition, and for obvious reasons, you haven't ordered any disclosure yet.

THE COURT: It looks like they got it today.

MR. HAYHURST: I understand. I don't mean to be cute about it. There wasn't any particular reason for me to seek a writ of prohibition against your determination that she wasn't my agent.

MR. REGAN: That's why he asked for the stay. It makes sense.

MR. HAYHURST: No, it was incident to the issue of whether her file was to be disclosed, and you've not ordered disclosure of any file yet.

See Transcript of December 19, 2005, hearing at 54-55.

139. Mr. Hayhurst's representations in Paragraph 138 regarding the circumstances surrounding the issued stay are erroneous. See August 31st Order of this Court at 3-4. See also pages 24, 34-35 of August 3, 2005, hearing transcript; ¶ 62, supra.

140. The inaccurate representations to this Court continued in the same hearing regarding the existence/non-existence of Ms. Burns' notes:

MR. REGAN: It's unbelievable. It is unfathomable to conceal to that extent. He told me two weeks ago he had notes from Burnice Burns and that they were subject to privilege.

MR. HAYHURST: No, we didn't. Absolutely not

See Transcript of December 19, 2005, hearing at 63.

141. Despite Mr. Hayhurst's statement "[a]bsolutely not" at the December 19 hearing, he had in fact told Mr. Regan that Ms. Burns' notes were being withheld subject to privilege, exactly as attorney Regan had said:

MR. REGAN: Just so I'm not under any misapprehension, counsel, those have not been produced in discovery, have they?

MR. HAYHURST: What are you talking about?

MR. REGAN: The notes.

MR. HAYHURST: What notes?

MR. REGAN: The ones Mrs. Burns is talking about.

MR. HAYHURST: No.

MR. REGAN: They have not been produced?

MR. HAYHURST: Correct.

MR. REGAN: Are they being withheld under some claim of privilege?

MR. HAYHURST: Yes. And they're statutorily exempt from disclosure.

See Deposition Transcript of Bernice Burns at 57-58.¹⁴

142. Counsel for Camden-Clark's erroneous statements continued during the trial of this case.

143. During opening statements for Camden-Clark, conducted on February 28, 2006, counsel for Camden-Clark stated to the jury:

Once they have successfully completed their professional status, then it is up to the doctors, in the hospital, to decide whether they want this physician as a part of their company. Administration doesn't make that decision. The CEO of the hospital doesn't make that decision. Truly, the board of directors doesn't make

¹⁴ Ms. Burns' deposition took place on November 28, 2005, approximately three weeks prior to the December 19, 2005, hearing.

that decision. It is other doctors in the hospital, called the medical staff, who make, the decision whether to issue credentials to a physician.

See Transcript of Defendant's Opening Statement dated February 28, 2006, at 21.

144. The representation made by counsel in Paragraph 143 was inaccurate.

145. In fact, it is the Board of Directors of Camden-Clark Memorial Hospital Corporation who make the ultimate decision as to whether to issue credentials to a physician or not.

146. On March 6, 2006 Camden-Clark called Cynthia Carpenter ("Ms. Carpenter") to testify on its behalf. Ms. Carpenter is a former employee of Camden-Clark who, at the time of the incidents involving Mrs. Boggs, was responsible for Camden-Clark's quality program; for overseeing the medical staff; and for overseeing the office functions of credentialing and privileging of physicians.

147. During Mr. Hayhurst's direct examination of Ms. Carpenter, the following exchange took place:

Q: Application, verification of credentials, credentials committee looks at the matter and makes a recommendation to medical executive; medical executive committee looks at it and then what happens?

A: They review it and they would make a recommendation on up to the board whether or not this person should be put on staff and as to what privileges should be granted.

Q: And the board of directors ultimately decides –

A: Ultimately makes the decision which physicians should be on staff and what privileges they should be granted.

See Direct Examination of Ms. Carpenter dated March 6, 2006, at 83-84.

148. Also during Opening Statements, counsel for Camden-Clark stated:

The evidence in this case will be that Dr. Koyawala successfully passed his screening and was successful in passing his recertification process every two years from 1994 until 2002. In 2002, he went to – he decided to move to Columbus, and he was re-examined in Columbus by the doctors of Children's

Hospital, the large regional Children's Hospital in Columbus, as an applicant to provide anesthesia to children there. And he successfully passed that credentialing examination.

See Opening Statement of Camden-Clark at 23.

149. In fact, Dr. Koyawala does not have privileges at Children's Hospital in Columbus, and one of Plaintiff's witnesses, Glenn P. Gravlee, M.D., corrected counsel for Camden-Clark:

Q: Are you familiar with Children's Hospital?

A: Yes.

Q: Do you practice over there?

A: No.

Q: Do you interface with doctors who do?

A: Occasionally.

Q: Do you know that to be a hospital that is careful about its credentialing hospitals?

A: I don't know that no.

Q: Do you have an impression?

A: My impression is that they do.

Q: All right. Are you aware that Dr. Koyawala is now credentialed and has been, since 2002, to deliver pediatric anesthesia at Children's Hospital in Columbus?

A: No.

Q: You are not aware of this?

A: No.

Q: Didn't you read his deposition?

A: I thought his deposition indicated that he was practicing at Grant Hospital in Columbus.

Q: And you may very well be right. Do you know Grant to be a carefully credentialing hospital?

A: To my knowledge, yes.

Q: Do you know of any reason, based on everything you know, why he shouldn't have been credentialed at Grant Hospital to deliver pediatric anesthesia?

A: Well, it wouldn't be pediatric anesthesia, necessarily. Grant Hospital is not a pediatric hospital, but I know of no reason why he shouldn't.

See Cross-Examination of Glenn P. Gravlee by Mr. Hayhurst dated March 1, 2006, at 66-67.

No evidence ever surfaced to support counsel for Camden-Clark's claim that Dr. Koyawala had privileges at Children's.

150. Finally, in opening statements, counsel for Camden-Clark stated:

So, in contrast to what Mr. Regan said he going to prove to you, the time signatures – the time indications on the rhythm strips, that were taken in the OR, were not obliterated, did not disappear. They were never there in the first place.

See Opening Statement of Camden-Clark dated February 28, 2006, at 33.

151. The representation made by Mr. Hayhurst in Paragraph 150 were inaccurate based upon clear and convincing evidence at the trial.

152. In fact, the beginning portions of Mrs. Boggs cardiac monitor strips containing information such as the date and time of when the strips were produced had not been included in her medical record. It was uncontroverted at trial that the EKG machines produce time indexes, either at the beginning of a strip, along the top, or both. The indexes for Mrs. Boggs' strips disappeared.

153. In addition, Camden-Clark, and its counsel presented testimony from its expert witnesses, by soliciting them to give expert testimony without allowing them to review all the relevant factual evidence in this case.

154. For example, Camden-Clark allowed Cynthia Kern, its Director of Medical Staff and Information Services and an expert on medical records, to testify that Camden-Clark maintained the integrity of Mrs. Boggs' medical record and that it was the responsibility of Camden-Clark to guarantee or vouch for the accuracy of Mrs. Boggs' medical record. See Direct Examination of Cynthia Kern at 49-50.

155. However, despite Camden-Clark's knowledge to the contrary as discussed herein, Ms. Kern was never informed by anyone at Camden-Clark that Mrs. Boggs' record was incomplete (See Id. At 52); that Dr. Koyawala had been observed removing documents from the medical record (See Id. At 53); that Dr. Koyawala was observed attempting to alter the

notes of another physician (See Id.); that Mrs. Boggs' cardiac rhythm strips may have been tampered with (See Id. At 55 – 58); or that nurses had taken separate notes outside of the medical record (See Id. At 69).¹⁵

156. In another example, Camden-Clark allowed Philip Balestrieri (“Dr. Balestrieri”), an anesthesiologist called as an expert by Camden-Clark, to testify that Dr. Koyawala did not commit negligence in his care and treatment of Mrs. Boggs.

157. However, Camden-Clark only provided Dr. Balestrieri with, and he only reviewed, Mrs. Boggs' medical record, the discovery depositions, and Dr. Gravlee's trial testimony. See Cross-Examination of Dr. Balestrieri at 133.

158. He did not review the additional interview summaries, statements, and other documents, that provide a more detailed picture of what transpired with Mrs. Boggs on September 29, 2001. Id. At 133 – 134.

159. Finally, Camden-Clark allowed Melissa Martin to testify as an expert on medical recordkeeping. In her testimony, she testified that Camden-Clark had met all applicable standards of care in the preservation and maintenance of Mrs. Boggs' medical records. See Direct Examination of Melissa Martin dated March 7, 2006, at 166.

160. However, Camden-Clark had not provided Melissa Martin with any documents other than Cindy Kern's deposition, Arthur Shorr's deposition, Ms. Haney's deposition, the OHFLAC reviews, and the policies and procedures of Camden-Clark. See Cross-Examination of Melissa Martin dated March 7, 2006, at 180.

161. She was not made aware of Dr. Koyawala's attempts to coordinate stories (See Id. At 181); Ms. Haney's personal notes (See Id. At 182); the removal of records by Dr. Koyawala (See Id. At 182 – 183); the destruction of time records on Mrs. Boggs' cardiac rhythm strips

¹⁵ Ms. Kern testified that had she been aware of these issues, she would have investigated them thoroughly.

(See Id. At 184); witness interview summaries (See Id. At 185); or Dr. Gnegy's letter (See Id. At 198 – 199).

VII. Camden-Clark's Inaccurate Answer to the Plaintiff's Amended Complaint

162. The accuracy and integrity of the medical record of Mrs. Boggs was a central issue in the claims against Camden-Clark

163. As outlined below, Camden-Clark knew the medical record was inaccurate and incomplete but took the litigation position that the medical record was accurate and in accord with all applicable standards of care.

164. In his Amended Complaint filed on January 5, 2004, Plaintiff asserted that, subsequent to the medical care provided by Manish I. Koyawala, M.D. ("Dr. Koyawala"), the Defendant anesthesiologist in this case, Camden-Clark maintained a false, misleading, and/or inaccurate medical record related to the medical care of Mrs. Boggs. See Paragraph 50 of Plaintiff's Amended Complaint filed on January 5, 2004.

165. Camden-Clark denied this allegation in total in its Answer filed on May 4, 2004.

166. However, at the time Camden-Clark filed this Answer, it had the following information in its files, which was not contained in any of Mrs. Boggs' routinely kept medical records:

- a. Letter of David A. Gnegy dated September 30, 2001, documenting oxygen saturation levels of Mrs. Boggs;
- b. Handwritten notes of Evelyn Melvin, CRNA, dated received as of October 5, 2001, documenting care in the form of time-related blood pressures and a time of the initial sign of problems;
- c. Claims Summary dated October 9, 2001, documenting that the CRNA in this case had attempted to administer the spinal anesthetic in this case; that the monitor alarms in Mrs. Boggs' case were turned off; that the CRNA assigned in this case did not have privileges issued to her by Camden-Clark to administer spinal anesthetics at Camden-Clark Memorial Hospital, and that the CRNA's

- actions and treatment of Mrs. Boggs and the status of the monitors were not reflected in the medical record of Mrs. Boggs;
- d. Handwritten notes of Sheila Sleeth dated October 10, 2001, documenting that the CRNA attempted to perform the spinal two or three times prior to Dr. Koyawala administering the spinal and various observations of Mrs. Boggs;
 - e. Interview Summary for Sheila Sleeth dated October 11, 2001, documenting the care provided by the CRNA to Mrs. Boggs; that the CRNA's signature does not appear on any of the anesthesia related records; blood in the spinal needle; complaints from Mrs. Boggs regarding pain in her shoulder; and various observations of Mrs. Boggs during her treatment;
 - f. Interview Summary of Denise Humphries dated October 12, 2001, documenting the care provided by the CRNA; Mrs. Boggs' complaint regarding her shoulder; various observations of Mrs. Boggs during her treatment; and the proximity of the CRNA and anesthesiologist to Mrs. Boggs when the emergency in her medical care occurred;
 - g. Handwritten notes of Denise Humphries dated October 18, 2001, documenting the CRNA's attempted administration of the spinal;
 - h. West Virginia Office of Health Facility Licensure and Certification ("OHFLAC") Investigation Exit Summary Memorandum dated October 10, 2002, documenting that Mrs. Boggs' medical record was inaccurate; and
 - i. Camden-Clark Internal Memorandum dated February 12, 2003, documenting the Medical Records Committee's instruction to the Director of Medical Records to close Mrs. Boggs' medical record as incomplete.

167. These documents demonstrate that, without doubt, the medical record of Mrs. Boggs was inaccurate and incomplete. As such, the medical record presents a misleading picture of what actually transpired with Mrs. Boggs on September 29, 2001, in the operating room at Camden-Clark. Most of the evidence implicating Koyawala and the Hospital was in the myriad of documents kept out of the medical record and wrongfully withheld from the Plaintiff.

168. The documents referenced in Paragraph 166 were mostly disclosed to Plaintiff on February 10, 2006. Camden-Clark knew about the existence of these documents at the time the Answer referenced in Paragraph 166 was filed.

169. Compounding the intentional aspects of this conduct is the act of Camden-Clark and its counsel filing the exact same answer to Plaintiff's Amended Complaint filed on April 19, 2005. Cf. Answer, Crossclaim, and Counterclaim of Camden-Clark filed on May 23, 2005.

170. Camden-Clark's strategy in denying, throughout the case, things it knew well to be true went far beyond the privilege of putting the Plaintiff to his proof. By breaching court orders, filing false discovery responses and by giving and permitting to be given inaccurate testimony under oath, and through multiple false statements to the Court, the Plaintiff and the Jury, Camden-Clark engaged in litigation misconduct.

171. The Court has itemized numerous instances of misconduct in these Findings of Fact, but must also state that it is not an exhaustive listing.

CONCLUSIONS OF LAW

I. Jurisdiction of this Court to Determine the Issues Raised by Plaintiff

172. Camden-Clark has asserted that this Court lacks jurisdiction to entertain Plaintiff's request for sanctions due to this Court's entry of a judgment order. See Response of Defendant Camden-Clark to Plaintiff's Renewed Motion for Sanctions and Motion for Attorneys' Fees and Costs at 6. This contention is without merit.

173. The Supreme Court of Appeals of West Virginia has addressed this question in Bartles v. Hinkle, 196 W.Va. 381, 472 S.E.2d 827 (1996). In Bartles, the Supreme Court stated:

A trial court is deprived of jurisdiction only when it has entered a 'final' order within the contemplation of W.Va. Code, 58-5-1 (1925), and the final order has been appealed properly to this Court ... At the time of the appeal, there remained pending in the trial court a viable motion ...

See Bartles at 389, 834.

174. The Supreme Court further explained its decision in Bartles in Dodrill v. Egnor, 198 W.Va. 409, 481 S.E.2d 504 (1996):

Petitioner Dodrill first asserts that the trial court lacked jurisdiction over discovery after it entered judgment for the defendants on the issue of liability. We recently addressed the issue of a trial court's jurisdiction to entertain sanctions after the entry of judgment in Bartles v. Hinkle [citations omitted] ... This Court found that because there was a motion pending in the trial court at the time of the appeal, jurisdiction over that issue remained in the trial court ... A trial court is deprived of jurisdiction only when it has entered a 'final' order within the contemplation of W.Va. Code, 58-5-1 ... and the final order has been appealed properly to this Court ...

See Dodrill at 412-413, 507-508.

175. As the record clearly demonstrates, Plaintiff had filed a motion for sanctions prior to entry of judgment together with a renewed motion for sanctions and award of attorney's fees after entry of judgment but prior to appeal.

176. Based on the guidance of Bartles and Dodrill, this Court retains jurisdiction over the issue of sanctions since two motions for sanctions remain pending before this Court, since the litigation misconduct of Camden-Clark was not addressed in the Judgment Order entered in the case at bar, and since Camden-Clark had not filed an appeal regarding the Judgment Order when the motions were made.

II. Basis of Authority to Shift Attorney Fees from the Plaintiff to the Defendant

177. This Court has the authority to sanction litigants through the shifting of attorney fees, based on multiple sources of law.

178. The authority to impose sanctions on parties or their attorneys is one of the inherent powers recognized by the state of West Virginia.

179. In Daily Gazette Company, Inc. v. Canady, 175 W.Va. 249, 332 S.E. 2d 262, the West Virginia Supreme Court of Appeals ("Supreme Court") stated:

The concept of 'inherent power' of the judiciary is well recognized in this jurisdiction. In Syllabus Point 3 of Shield v. Romine [citations omitted], this Court noted the general rule that, 'A court 'has inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction.' ... This Court has acknowledge inherent judicial powers in a variety of contexts at both the appellate and trial court levels. See, e.g., ... Prager v. Mecklin, 310 S.E.2d 852 (W.Va. 1983) (imposition of sanctions to maintain a fair and orderly trial); ... Hendershot v. Hendershot, 263 S.E.2d 90, 96-97 (W.Va. 1980) (imposition of civil contempt sanctions) ...

...

Although there is an undeniable interest in the maintenance of unrestricted access to the judicial system, unfounded claims or defenses asserted for vexations, wanton, or oppressive purposes places an unconscionable burden upon precious judicial resources already stretched to their limits in an increasingly litigious society. In reality, to the extent that these claims or defenses increase delay or divert attention from valid claims or defenses asserted in good faith, they serve to deny the very access to the judicial system they would claim as justification for their immunity from sanction.

See Daily at 251-251, 265-266.

180. The Supreme Court further explained a Court's authority to sanction parties and attorneys with respect to fraud in Bowling v. Ansted Chrysler-Plymouth Dodge, 188 W.Va. 468 (1992). In discussing the awarding of attorneys' fees, the Court stated:

'A well established exception to the general rule prohibiting the award of attorney fees in the absence of statutory authorization, allows the assessment of fees against a losing party who has acted in bad faith, vexatiously, wantonly, or for oppressive reasons ... 'Bad faith' may be found in conduct leading to the litigation or in conduct in connection with the litigation... Consequently, we conclude that where it can be shown by clear and convincing evidence that a defendant has engaged in fraudulent conduct which has injured a plaintiff, recovery of reasonable attorney's fees may be obtained in addition to the damages sustained as a result of the fraudulent conduct.

See Bowling at 474-475.

181. Finally, the Supreme Court reinforced a Court's authority to sanction a party or its attorneys for fraud in Pritt v. Suzuki Motor Co. Ltd., 204 W.Va. 388 (1998):

This Court has long-recognized the inherent authority of trial courts to award attorney's fees as a sanction for fraud ... Based on our determination that 'fraud falls within the 'bad faith' exception to the American rule[,] we concluded ... that findings of fraud demonstrated by clear and convincing evidence permit attorney's fees to be awarded against a defendant ... The trial court's award of attorney's fees in this case was based

both on violations of specific rules of civil procedure, as well the court's inherent sanctioning power.

See Pritt at 392-393.

182. As discussed exhaustively, supra, in this case, Camden-Clark has:

- 1) Defrauded the Plaintiff, as found by the jury by clear and convincing evidence;
- 2) Violated multiple court orders, as found by the Court on December 19th, 2005;
- 3) Made numerous material misrepresentations of fact and law to the Plaintiff and to this Court, both before and during the trial of this matter;
- 4) Concealed important evidence until the commencement of trial and even in the middle of trial, including the very documents it had been ordered to produce by the Court;
- 5) Destroyed, concealed or altered material evidence in advance of trial, including cardiac monitor strip times and nurse's notes;
- 6) Advanced frivolous defenses before the Court; and
- 7) Wasted countless hours of the Court's time, as well as that of the Plaintiff and his counsel, through all of the above misconduct.

183. Camden-Clark's pre-litigation misconduct, including tampering with the medical record, and fraudulent concealment, was tried and sanctioned by the jury, it need play no part in the relief requested in Plaintiff's motions for sanctions, except as background information and context for Camden-Clark's litigation misconduct. However, the finding of fraudulent concealment by clear and convincing evidence could provide further support for the shifting of fees, pursuant to Bowling and Pritt, were any such further support required.

184. Camden-Clark's litigation misconduct was not tried to the jury, nor has it yet been sanctioned by the Court.

185. It would be an injustice to allow Camden-Clark's litigation misconduct to go unpunished, simply because it was punished by the jury for its primary misconduct that it attempted to cover up through its litigation misconduct.

186. Camden-Clark's violations of Court Orders, inaccurate answers in discovery, inaccurate testimony and all of its aggregated misconduct before this Court, warrant substantial sanctions.

187. Based on all of the above, the Court concludes that the Plaintiff's Motions should be GRANTED in part. Camden-Clark's litigation misconduct fully justifies the shifting of the Plaintiff's reasonable attorney's fees and expenses to the Defendant. See e.g. Pritt v. Suzuki Motor Co. Ltd., 204 W.Va. 388, 392-93 (1998).¹⁶

III. Amount of the Attorneys' Fees to be Awarded

188. "[T]he trial [court] ... is vested with a wide discretion in determining the amount of . . . court costs and counsel fees; and the trial [court's] ... determination of such matters will not be disturbed upon appeal . . . unless it clearly appears that [it] has abused [its] discretion." Syl. Pt. 3, in part, Bond v. Bond, 144 W.Va. 478, 109 S.E.2d 16 (1959).

189. "Where attorney's fees are sought against a third party, the test of what should be considered a reasonable fee is determined not solely by the fee arrangement between the attorney and his client. The reasonableness of attorney's fees is generally based on broader factors such as: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional

¹⁶ This decision is based on this Court's authority pursuant to Rule 37 of the West Virginia Rules of Civil Procedure and this Court's inherent authority to sanction parties and attorneys.

relationship with the client; and (12) awards in similar cases.” Syl. Pt. 4, Aetna Cas. & Sur. Co. v. Pitrolo, 176 W.Va. 190, 342 S.E.2d 156 (1986).

190. Under West Virginia law, there are no cases aside from those previously cited that guide this Court in determining what a ‘reasonable attorney fee’ in this case might be.

191. This Court has reviewed the relevant case law and is guided in its determinations by the lodestar analysis described in Heldreth v. Rahimian, 219 W.Va. 462, 637 S.E.2d 359 (February 21, 2006) (W.Va. 2006).¹⁷

192. In Heldreth, the Supreme Court of Appeals stated:

The calculation of reasonable fees must be made pursuant to standards which are well-established for awarding attorney’s fees ...

...

Reasonable attorneys’ fees should be determined by (1) multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate – the lodestar calculation – and (2) allowing, if appropriate a contingency enhancement. The general factors outlined in Syllabus Point 4 [of] [Aetna] should be considered to determine: (1) the reasonableness of both time expended and hourly rate charged; and (2) the allowance and amount of a contingency enhancement.

Id. at 19

193. The Court finds that several of the Aetna factors militate in favor of the Plaintiff:

- a. This case involved 5,650 hours of work by multiple attorneys from two law firms. Given the complex questions of law, both substantive and procedural, raised in this case together with Camden-Clark’s litigation misconduct, the Court finds that these hours are not an unreasonable amount of time to expend on this case.

¹⁷¹⁷ The Court notes that this case involved an analysis of the awarding of attorney fees pursuant to W.Va. Code §5-11-13(c), otherwise referred to as a fee-shifting statute. While Heldreth is factually distinct from this case and fee-shifting statute analysis does not apply fully to this case, the Court finds the guiding principles of Heldreth and the analysis for the awarding of attorney fees pursuant to fee-shifting statutes useful in this case.

- b. This case involved novel and complex questions of law involving fraud, spoliation of evidence, the tort of outrage, medical malpractice, and vicarious liability issues and developed new guidance from the West Virginia Supreme Court in the area of medical malpractice jurisprudence. Such issues took this case well beyond the realm of ordinary negligence litigation. In addition, the wrongful litigation conduct and discovery abuses of Camden-Clark contributed to the complexity of this case.
- c. The Court takes note that Plaintiff's attorneys exercised diligent and persistent skill in determining the facts of this case. While such skills may be routinely expected of ordinary lawyers, this Court takes special note of their skills in achieving a highly substantial, positive jury result for their client in light of Camden-Clark's misconduct.
- d. With 5,650 hours placed at risk through the prosecution of this case, the Court is aware that the lawyers involved were significantly precluded from other employment due to acceptance of this case.
- e. This case was initially turned down by three litigation law firms prior to Bordas & Bordas agreeing to represent Mr. Boggs. Thus, this case, at the outset, appeared to be undesirable to potential lawyers.

194. The Court notes that Mr. Boggs has received the largest jury verdict remembered in Wood County, West Virginia for the claims that he brought against Camden-Clark. However, his request for attorney's fees is made pursuant to the litigation misconduct of Camden-Clark during the prosecution of this case. This was not a factor in the jury's determination, nor was the jury instructed on it.

195. Based upon a review of the record and based on Heldreth, this Court finds that an appropriate sanction to be assessed against Camden-Clark for its litigation misconduct in this case as described herein is an award of Plaintiff's reasonable attorneys' fees and costs.

196. At the hearing on July 10th, 2006, counsel for the Defendant, Richard Hayhurst testified that he had surveyed area attorneys and that the highest hourly fees being charged in this area were \$265 per hour, including by Mr. Hayhurst himself.

197. Attorney James G. Bordas, jr. testified that his firm hires nationally, has a reputation throughout the Ohio Valley of taking and winning difficult cases and compensates its associates competitively with national law firms.

198. Mr. Bordas testified that his firm takes cases on contingent fees, but that were his firm to charge by the hour, attorneys at his firm would charge from \$175 per hour to \$450 per hour. More specifically, Mr. Bordas testified to a reasonable hourly rate for Mr. Regan and Mr. Brown, actual trial counsel of \$300/hr. Other involved members of the firm and hourly rates testified to were: Scott Blass - \$350/hr; Jim Bordas - \$400/hr; Jamie Bordas - \$300/hr; Linda Bordas- \$400/hr; Jason Causey - \$200/hr; Chris Heller -\$150; Jay Stoneking-\$300; and Bob Gaudis -\$150/hr.

199. The best evidence before the Court by affidavit filed is that trial counsel Brown and Regan expended a combined total of 1,555.95 hours. Other members of the Bordas firm spent the following number of hours on this case: Scott Blass – 20; Jim Bordas - 60; Jamie Bordas – 15; Linda Bordas – 10; Jason Causey – 10; Chris Heller – 10; Jay Stoneking – 15; and Bob Gaudis – 10.

200. Applying the time spent by each member of the Bordas firm to each attorneys hourly rate results in a reasonable attorney fee for the firm of Bordas & Bordas of \$515,785.00.

201. Christopher Rinehart kept contemporaneous billing records for the period between March, 2003 and the time of the filing of the motion when he was employed at the law firm of Carlile, Patchen, and Murphy. These hours totaled 2,051.10 for that period of time. Based upon those records the Court considering all the factors set forth above that \$175/hr was a reasonable fee to be charged by Mr. Rinehart. Prior to joining the law firm, Mr. Rinehart worked on this case extensively from October 2001 through March 2003. Mr. Rinehart has made a conservative estimate of 1,893 hours expended in this matter during this period of time. The Court finds the best evidence as to Mr. Rinehart's hours expended on this case is a total of 3,944.10 hours. Applying an hourly rate of \$175/hr to 3,944.10 produces a reasonable attorney fee for Mr. Rinehart and his firm of \$690, 217.50.

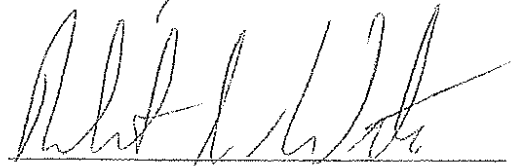
202. The Plaintiff has calculated a legal fee which includes a 2.0 contingency enhancement totaling \$2,994,500.00. However, the Plaintiff requests his actual contractual contingency fee, plus expenses in the total amount of \$2,888,978.24. The Court declines to award the requested amount. The Court is of the opinion that given all the facts and circumstances of the case including, but not limited to, the sizeable jury verdict returned that an award of attorney fees based upon the actual hours expended multiplied by a reasonable hourly rate plus all litigation expenses and costs is far and just compensation to the Plaintiff.

203. Plaintiff has documented expenses in the amount of \$153,238.52, not an unreasonable amount in a case that required Plaintiff to retain five different experts and to travel across the country on more than one occasion for the over two dozen depositions in the case and which case consumed two full weeks of trial at a location distant from Plaintiff's counsel's homes.

204. Based on the foregoing, this Court hereby awards expenses to Plaintiff in the amount of \$153,238.52.

IT IS THEREFORE ORDERED THAT the Plaintiff attorney's fees and expenses expended in this matter should be AWARDED TO THE PLAINTIFF as a SANCTION for litigation misconduct in this case committed by Camden-Clark. The amount to be awarded to the Plaintiff and paid by Camden-Clark includes expenses of \$153,238.52 and attorneys' fees of \$1,206,002.50 for a total amount of \$1,359,241.02, with interest to run at the Judgment Rate from the date of this Court's Order on this Motion, until such time as the Defendant discharges its obligation by paying the fees owed the Plaintiff.

IT IS SO ORDERED, THIS 24th DAY of May, 2007.

A handwritten signature in black ink, appearing to read "Robert A. Waters", written over a horizontal line.

Robert A. Waters
4th Judicial Circuit Judge

CERTIFICATE OF SERVICE

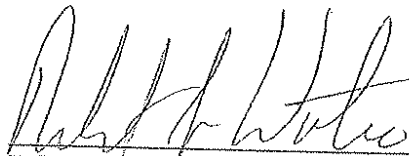
The undersigned hereby certifies that the foregoing Order Granting Plaintiff's Renewed Motion for Sanctions and Motion for Attorney's Fees was served on the 24th day of May, 2007, upon the following named counsel, by depositing a true copy thereof in the United States Mail, postage pre-paid, addressed to them as follows:

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ROBERT A. WATERS, JUDGE