No._____

In The

Supreme Court of the United States

CEDRICK AND TAMARA FRAZIER,

*Petitioner*s,

v.

SOUTHEAST GEORGIA HEALTH SYSTEM, INC. ("SGHS"), COOPERATIVE HEALTHCARE SERVICES, INC. ("CHSI") d/b/a SOUTHEAST GEORGIA PHYSICIAN ASSOCIATES – Ear, Nose & Throat ("SGPA-ENT"),

And

SHERMAN A. STEVENSON, M.D.,

Respondents.

On Petition for a Writ of Certiorari To the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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February 27, 2025

QUESTIONS PRESENTED

1. Now exists split of authority where Ninth Circuit, in Gregory v. State of Montana, 118 F.4th 1069 (9th Cir. 2024), held district court committed legal error by relying on inherent authority in imposing sanctions because Fed.R. Civ.P.37(e) governs both loss of electronically stored information ["ESI"] and by its plain terms displaces court's power to invoke inherent authority. Here, the suit was colorable because it was scheduled for trial and there was a prior finding of "No Bad Faith." Goodyear Tire and Rubber Co. v. Haeger, 137 S.Ct. 1178, 1189 (2017). Tenth and Seventh Circuits hold "fraud upon the court" is directed to judicial machinery itself and not alleged fraud between parties. Here, the attorney was not implicated and parties were not given notice of "fraud upon the court" prior to hearing. Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944).

The first question presented is:

Whether federal court's case-ending sanction relying on inherent authority based on implied fabrication of ESI and surprise finding of "fraud upon the court" is punitive and legal error violating Seventh Amendment and due process rights thereby requiring criminal protections and application of Rule 37(e) where: 1) colorable MedMal jury trial scheduled; 2) no willful contempt; 3) dismissal Order omits prior finding of "No Bad Faith;" and 4) record modification by other parties during litigation?

2. The second question presented is:

Whether a federal court commits legal error when partial summary judgment order dismisses professional negligence, informed consent and punitive damages claims specifically pleaded in the complaint against individual doctor supported by non-excluded, medical expert affidavits alleging breaches of the standard of care, to include the falsification of patient record that is admittedly incorrect and backdated?

LIST OF PARTIES AND PROCEEDINGS

Petitioners Cedrick and Tamara Frazier ("Fraziers") were Appellants in the Eleventh Circuit proceedings and plaintiffs in the proceedings in the Southern District of Georgia.

Southeast Georgia Health System, Inc., Cooperative Healthcare Services, Inc. d/b/a Southeast Georgia Physician Associates – Ear, Nose & Throat and Sherman A. Stevenson, M.D., Respondents to this Petition, were Appellees in the Eleventh Circuit proceedings, and defendants in the proceedings in the Southern District of Georgia.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
CEDRICK AND TAMARA FRAZIER, Plaintiffs, v.
SOUTHEAST GEORGIA HEALTH SYSTEM, INC.; COOPERATIVE HEALTHCARE SERVICES, INC. d/b/a SOUTHEAST GEORGIA PHYSICIAN ASSOCIATES – Ear, Nose & Throat; and SHERMAN A. STEVENSON, M.D.
Defendants.
CIVIL ACTION FILE NUMBER: 2:21-cv-00021-LGW-BWC
Date of Judgment: March 1, 2024

No. 24-10976-G
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT CEDRICK AND TAMARA FRAZIER, Plaintiffs-Appellants; v.
SOUTHEAST GEORGIA HEALTH SYSTEM, INC. ("SGHS"), COOPERATIVE HEALTHCARE SERVICES, INC. ("CHSI") d/b/a SOUTHEAST GEORGIA PHYSICIAN ASSOCIATES – Ear, Nose & Throat ("SGPA-ENT"), And SHERMAN A. STEVENSON, M.D., Defendants-Appellees.
Appeal from the United States District Court for the Southern District of Georgia No. 2:21-cv-00021-LGW-BWC
Date of Judgment: October 1, 2024

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INTRODUCTION

If left undisturbed, the Eleventh Circuit Panel's opinion and district court's case-ending sanctions order will grant healthcare providers an unchecked power to backdate and falsify patients' medical records, which are legal documents pursuant to O.C.G.A. Title 31 (Health records) with impunity. The Fraziers respectfully petition for a writ of *certiorari* to review the judgment of the Eleventh Circuit concerning case-ending sanctions relying on inherent authority. There is no decision by this Court addressing whether it is legal error for a district court to rely solely on inherent authority to impose case-ending sanctions based on disputed ESI *after* jury trial has been scheduled without affording the sanctioned parties criminal protections and notice of alleged "fraud upon the court" in violation of the Seventh Amendment and constitutional due process. Such case-ending sanctions are punitive in nature.

The district court is clear in its intent to punish the Fraziers when, for the first time after over two years of litigation and no prior notice, it states in the dismissal order, "In the event an explicit finding of judicial abuse and fraud upon the court is necessary, the Court emphatically makes that finding now." Dkt. No. 280 at 29 (reprinted in the appendix to this Petition ("Pet. App.") at 36). A finding, without doubt, concerning judicial abuse and the demanding standard required for "fraud upon the court" should be coupled with the procedural protections afforded in criminal cases.

Int'l Union v. Bagwell, 512 U.S. 821 (1994). In Mine Workers, unlike the union which had more than 400 violations and found in contempt by the trial court, the Fraziers were never found in contempt or sanctioned prior to the dismissal. Again, we have yet another decision illustrating the devastating consequences for sanctioned parties who do not receive procedural protections that are designed to constrain a court's inherent powers, especially when case-ending. This Court should accept *certiorari*, and reverse.

OPINIONS BELOW

The decision of the Southern District of Georgia's order scheduling case for trial is reported at Frazier v. Se. Ga. Health Sys., 2:21-CV-21, Dkt. No. 238 (S.D. Ga. Aug. 31, 2023), and reprinted at Pet. App. at 122-151.

The decision of the Southern District of Georgia imposing case-ending sanctions dismissal with prejudice is reported at Frazier v. Se. Ga. Health Sys., 2:21-CV-21, Dkt. No. 280 (S.D. Ga. Mar. 1, 2024), and reprinted at Pet. App. at 9-61.

The Eleventh Circuit Panel opinion, Frazier v. Se. Ga. Health Sys., No. 24-10976 (11th Cir. Oct. 1, 2024), is unpublished and reprinted in the appendix at Pet. App. at 2-8.

JURISDICTION

The Eleventh Circuit issued a Panel opinion on October 1, 2024. Petitioners filed a timely petition for panel rehearing and hearing *en banc*, which was

denied on November 26, 2024. Pet. App. at 174. This timely Petition followed. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

This petition does not involve the interpretation of statutory provisions, but involves the Federal Rule of Civil Procedure 37, Seventh Amendment right to a jury trial, federally-recognized "inherent authority" of a court to impose case-ending sanctions, and the constitutional due process restraints upon such authority. See U.S. Const. amend. V. and VII. reprinted in the appendix. USCA11 16-1 at 12 and Pet. App. at 176.

STATEMENT OF THE CASE

In this Med-Mal lawsuit, the Fraziers alleged the respondents committed professional negligence, failed to acquire informed consent, negligence per se, administrative negligence, gross negligence, loss of consortium, and punitive damages due to a septoplasty on January 20, 2021. The Fraziers also alleged the respondents altered and fabricated portions of Mr. Frazier's medical records after the surgery. Documentary evidence maintained by the respondents includes a failed sponge count and surgery/operative report of pledgets being placed in Mr. Frazier's nasal cavity but not removed, and most damning, the hospital's admission that a record was created on 4/10/2020, backdated to 2/6/2020, and that it did not take place at the time indicated as the Fraziers were not in the city. The alleged 2/6/2020 office visit is significant because it is an examination of Mr.

Frazier, describing him as "Progressing as expected" although: 1) surgery caused a septal perforation; 2) there was a failure to resolve sponge count during and at end of surgery; 3) on 1/31/2020, Mrs. Frazier called Dr. Stevenson's office and reported Mr. Frazier was still having nosebleeds and front teeth numbness; 4) on 2/14/2020, Mrs. Frazier called again and complained that Mr. Frazier had a severe headache and his blood pressure was high due to pain; and 5) sponges and/or packing were inadvertently left in the nose, according to the affidavit by non-excluded expert Suzette Mikula, M.D., ENT and respondents' office messages/emails. USCA11 16-1 at 34.

The Fraziers filed complaints concerning incorrect and altered medical records with the U.S. Department of Health and Human Services ("HHS"), Office for Civil Rights ("OCR"), Federal Bureau of Investigation and U.S. Department of Justice ("DOJ"). HHS, OCR determined to resolve this matter informally through the provision of technical assistance to SGHS. The Fraziers received internal correspondence from DOJ, not addressed to them, noting insufficient evidence to support a criminal prosecution without explanation of whether 18 USC 1035 (False statements relating to health care matters) applies. USCA11 16-1 at 41; and Pet. App. at 176-177.

The case-ending sanctions involves an "8-second YouCut video" the Fraziers testified consistently that they recorded approximately 35 days *after* the surgery while at Suite 480 for a requested office visit due to Mr. Frazier's ongoing headaches, pain, nose bleeds and teeth numbness. Mrs. Tamara

Frazier accompanied Mr. Frazier to a preop visit and on the date of the requested office visit when they recorded the "8-second YouCut video" footage.

The Fraziers produced the "8-second YouCut video" at the advice of counsel during discovery in July 2021 along with a forensic expert report stating the video and other relevant audio and video files on the cellphone are authentic. USCA11 16-1 at 21 and 46, 24-1 at 14, 29-1 at 8, and 33-1 at 5. In a hearing on May 23, 2022 regarding subject matter jurisdiction/domicile, the district court knew about the differences in the appearance of the Frazier's "8-second YouCut video" recorded on 2/25/2020 and a subsequent walk-through video of only 3 out of 13 exam rooms at Suite 480 recorded during discovery in October 2021 as noted in a Reply brief by the respondents. USCA11 16-1 at 37.

During the hearing on subject matter jurisdiction/domicile, the respondents discussed at length the "8-second YouCut video," the deposition testimony of Dr. Stevenson, affidavit of Mr. Crosby, and calling into question the credibility of the Fraziers in open court. Once Mr. Steve Bristol (attorney for respondents) was done speaking, the district court moved on to address the question of domicile and did not mention the "8-second YouCut video." USCA11 16-1 at 38. In the Order establishing subject matter jurisdiction/domicile, the District Court stated, "Mr. Frazier's statements are entirely in accordance with the facts overall." USCA11 16-1 at 38. The respondents waited until after the close of discovery to file a motion for dismissal sanctions, which was the last possible day to file any motion. Id. Instead of filing motion

for dismissal sanctions shortly after their expert examined the cellphone in 2021, the respondents continued to defend and litigate this case after the district court found the Fraziers had established diversity jurisdiction.

At the start of the evidentiary hearing, the Magistrate stated,

> Now, both sides have presented a number of exhibits and relied on exhibits that were submitted previously in the litigation as well. I've reviewed all those exhibits. I'm familiar with them. There is no need to reintroduce exhibits that have already been submitted or cited on the docket at various points. USCA11 29-1 at 15.

Expert reports and affidavits filed on the docket by the Fraziers before the evidentiary hearing were not considered in the R&R and dismissal Order although the Magistrate stated, "I'm familiar with them." Over five months before the evidentiary hearing, the respondents filed 93 pages of the Fraziers' ENT expert deposition transcript and affidavit by Dr. Mikula along with demonstrative exhibits to be used at trial outlining breaches of the standard of care during surgery and injury caused by the surgery, to include failure to obtain informed consent and falsifying medical records—supporting professional negligence and punitive damages claims, which had absolutely nothing to do with the "8-second YouCut video" footage.

An electronic medical records ("EMR") forensic expert report and affidavits by Kathryn Crous were filed in discovery and well before the evidentiary hearing by the Fraziers about medical record alteration, and specifically, modification of his records during the litigation. In a supplemental affidavit filed in October 2022, EMR Forensic Expert Crous stated, "Dr. Stevenson was in Mr. Frazier's medical records on August 31, 2021, at 1:43 pm. He MODIFIED ORDERS to show a backdated Future Order for Mr. Frazier to make an appointment PRN ENT Brunswick. Dr. Stevenson KNOWINGLY modified the records inappropriately." USCA11 29-1 at 19. According to EMR Forensic Expert Crous, Dr. Stevenson modified Mr. Fraziers' patient records during the pendency of this litigation, but this fact has been ignored by both the district court and the Eleventh Circuit despite it being brought to their attention.

As of the date of the evidentiary hearing, dates for a pretrial conference and jury trial had been scheduled and both parties notified. Before the hearing, the Fraziers had begun contacting their liability and damages experts to clear their calendars for a trial beginning the third week in January 2024. While it was understood at hearing that the court find by clear and convincing evidence that the Fraziers acted in bad faith, no standard was mentioned for proving fabrication of evidence. However, note that in an Order permitting the Fraziers' medical ENT doctors to testify at trial, the district court stated that whether the 8-second video was fabricated would have to be a conclusive determination—and not by implication. USCA11 16-1 at 12; and Dkt. No. 224 at 10.

The district court improperly imposed the burden on the Fraziers—and not the respondents—to show "compelling" or clear and convincing evidence, and had already come to a decision before the hearing took place. Pet. App. at 114. At hearing and without notice, the lower court pronounced for the first time:

> Today *Plaintiffs have an opportunity* to explain why the video that they produced in discovery does not appear to have been recorded in the same exam rooms at Defendants' offices. At this point, if I conclude that the video was not recorded in the place that Plaintiffs claim it was on the date that Plaintiffs claim it was recorded and I'm not provided with another alternative explanation for where it was recorded, I'm left with only one plausible explanation, and that is that Plaintiffs manufactured the video in bad faith in an effort to introduce fabricated evidence… USCA11 29-1 at 15-16.

The Fraziers explained, but their arguments were rejected. Byrne, at 1124.

Following the evidentiary hearing where each side was given only 1.5 hours to present and encouraged to use time efficiently, the Magistrate stated in the R&R, "The implication of this conclusion is that Plaintiffs manufactured the video." The parties litigated for over two years and the Fraziers were never sanctioned or found in

contempt. The district court knew about this heavily disputed "8-second YouCut video" throughout discovery and found "No Bad Faith" by the Fraziers when the video footage was produced at advice of counsel. USCA11 16-1 at 37; 29-1 at 8. The Panel opinion never acknowledged the district court's prior finding of "no bad faith" under Rule 37 when the "8-second YouCut video" was produced, supported by expert forensic and image analyst, James "Jim" Stafford, whose testimony has been cited by the Supreme Court of Florida in a decision upholding the death penalty at Bush v. State of Florida, 295 So.3d. 179 (Fla. 2020). USCA11 16-1 at 26. Nor does the Panel opinion indicate that the suit had already been scheduled for jury trial on the merits before the case-ending sanction was ordered.

Mr. Frazier was a career Sheriff detention officer requiring background investigation. He has a history of honorable discharge from the U.S. Marine Corp after sustaining an injury during basic training, and he applied for an overseas position with Garda World Services/AEGIS providing security at U.S. Embassies abroad. Garda World Services received contracts from the United States Department of State, which requires background investigation and security clearance. Mrs. Frazier is a quality auditor with a health insurance company and had to pass background checks to have access to Medicare systems. Prior to the filing of this lawsuit on October 9, 2020, Nancy Lorenz, Director of Corporate Compliance/HIPAA Privacy Officer offered a sincere letter of apology in response to Mr. Frazier's written complaint of highly inappropriate

treatment by Dr. Rudolph G. Nunneman of him, his son, Avin Frazier, and Avin's mother. USCA11 16-1 at 14, 49-50. According to this letter, the incident was referred to Medical Staff Services for Peer Review, a committee on which sat Dr. Sherman Stevenson, Vice Chief of Surgery at that time—currently Chief of Surgery.

The Fraziers' lives have been changed for the worse since the surgery. In an ENT expert affidavit, Dr. Suzette Mikula, unequivocally concluded the unnecessary surgery and prolonged nasal packing caused Mr. Frazier's trigeminal neuralgia and an inability to play the trumpet as he had done in the past. USCA11 16-1 at 34, and 29-1 at 11, 16. Even wind blowing on the site of his facial pain can set off chronic pain associated with trigeminal neuralgia, according to the affidavit of Dr. Margaret Dennis, orofacial pain specialist. USCA11 16-1 at 14.

REASONS FOR GRANTING THE PETITION

I. Case-ending Sanction After Jury Trial Scheduled And Proposed Pretrial Order Filed Is Punitive In Nature When There Are Colorable Claims

A. Eleventh Circuit's Panel Opinion and District Court Violated Seventh Amendment Right to Jury Trial

The finding of issues in fact by the court upon the evidence as altogether cannot be recognized as

a judicial act.…"Such questions are exclusively within the province of the jury;…" Campbell v. Boyreau, 62 U.S. (21 How.) 223, 226 (1859). The aim of the Seventh amendment is to preserve the substance of the common law right of trial by jury where issues of law are to be resolved by the court and issues of fact are to be determined by the jury. Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 657 (1935). Ever since concerns that the proposed Constitution lacked a provision guaranteeing a jury trial right in civil cases in the American Revolution's aftermath, "every encroachment upon [the jury trial right] has been watched with great jealousy." Sec.&Exh. Comm'n v. Jarkesy, et al., 603 U.S.___, at 2 (2024) (No.22-859) (quoting Parsons v. Bedford, 3 Pet. 433, 446. Pp. 7–8). The right of trial by jury includes claims that are legal in nature. Like the facts in Jarkesy, for the alleged fabrication of ESI and the district court's surprise finding of "fraud upon the court," the respondents sought both case-ending sanctions and attorney's fees, a form of monetary relief. Such relief is legal in nature when it is designed to punish or deter the wrongdoer rather than solely to 'restore the status quo.' Id. at 3 (citing Tull v. United States, 481 U. S. 412, 422 (1987)). With the Fraziers' suit previously scheduled for jury trial, any subsequent allegations of fabrication and "fraud upon the court" should be heard by a jury pursuant to the Seventh Amendment.

The Fraziers' due process and Seventh Amendment rights to a jury were trampled once a trial was scheduled in the district court's partial summary judgment Order and then taken away based on allegations not asserted by the

respondents and never mentioned at the evidentiary hearing. In 1994, this Court held that "Disqualification is required if an objective observer would entertain reasonable questions about the judge's impartiality. If a judge's attitude or state of mind leads a detached observer to conclude that a fair and impartial hearing is unlikely, the judge must be disqualified." [Emphasis added]. Liteky v. U.S., 114 S.Ct. 1147, 1162 (1994). The Fraziers' right to a jury were hijacked and questions should be asked concerning the judge's impartiality.

This Court discussed how "Goodyear would still have had plausible defenses to the Haegers' suit," where it was claimed to have knowingly concealed crucial 'internal heat test' records that would have caused the parties to settle much earlier. Goodyear Tire & Rubber Co. v. Haeger, at 1184-85. Sanctions were imposed in Goodyear *after* the parties had settled. Even more prejudicial, the Fraziers were victims of case-ending sanctions *before* a possible settlement could be reached on their colorable claims, which had already been scheduled for jury trial by the district court. The Eleventh Circuit Panel opinion does not mention the Frazier's claims were scheduled for a jury trial on the merits before the sanctions dismissal. The Tenth Circuit concluded as follows:

> for 'the exceedingly narrow bad faith exception' to the American Rule to apply, 'there must be clear evidence that the challenged claim is entirely without color *and* has been asserted wantonly, for purposes of harassment

> or delay, or for other improper reasons.' *F.T.C. v. Kuykendalk* 466 F.3d 1149, 1152 (10th Cir. 2006) (quotation marks omitted). 'Whether the bad faith exception applies turns on the party's subjective bad faith,' based on a district court's factual findings. We must again REVERSE and REMAND this matter to the district court for "specific findings on whether defendants' conduct after the first merits order exhibited bad intent or improper motive.'"'

Kornfeld v. Kornfeld, 393 F. App'x 575, 579-80 (10th Cir. 2010). The district court and Panel opinion do not cite or reference any specific findings on whether the Fraziers' conduct exhibited "subjective bad-faith," bad intent or improper motive in the context of case-ending sanctions.

This Court's 1985 opinion in Anderson v. City of Bessemer City states, "Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it." 470 U.S. 564 at 575 (1985). The district court ignored a failed sponge count on date of surgery, operative report showing pledgets placed in Mr. Frazier's nasal cavity but not being removed, expert affidavits, and deposition testimony and admissions that certain hospital records pertaining to Mr. Frazier are backdated and fraudulent. The district court's understanding of the facts are implausible and unbelievable. The district court set this case for trial, but

subsequently dismissed the entire lawsuit to preclude a jury from seeing and hearing highly disputed facts showing the surgical procedure caused the Fraziers to sustain an incurable condition including trigeminal neuralgia and emotional/mental damages plus loss of consortium. Mr. Frazier currently suffers from chronic and intractable pain (trigeminal neuralgia) requiring significant medication for the rest of his life. USCA11 29-1 at 12.

The Seventh Circuit stated, "Subjective bad faith or malice is important only when the suit is objectively colorable." In re TCI Ltd., 769 F.2d 441, 445 (7th Cir. 1985). The district court believes that the Fraziers' claims are colorable because it scheduled the suit for jury trial; and thus, violated their Seventh amendment and due process rights by subsequently dismissing their claims without proper and adequate notice of both alleged "subjective bad-faith" **and** "fraud upon the court."

The district court's conclusion was based on implication that the Fraziers manufactured the 8-second video without any proof. The Law Dictionary online at thelawdictionary.org defines implication as "An inference of something not directly declared," or hinting at a conclusion based on information given. The district court's conclusion was not based on underlying facts found in its alleged investigation, but rather on heavily disputed allegations made by the respondents. Next, the district court overruled the Fraziers' request to add findings to the R&R, which also violated their Constitutional rights under the Seventh Amendment for jury trial because the

Fraziers' proposed findings in their objection to the R&R included documentary evidence that proves both: 1) cottonoid pledgets were used during surgery but not taken out, and 2) the date and times they recorded the YouCut Video. Securities Exch. Comm'n v. Coffey, 493 F.2d 1304, 1311 (5th Cir. 1974), cert. denied, 420 U.S. 908 (1975) (stating that the major rationale for deferring to district court findings is that the district court is able to observe the demeanor of witnesses but that issue is lacking with documentary evidence). Here, the documentary evidence consists of a failed sponge count and operative report showing a pledget/cottonoid placed in the nasal cavity, but not removed. Federal Rule of Civil Procure 38 recognizes the Seventh Amendment right to trial by jury and provides for demand of jury, which was requested by both parties in pleadings.

This case was scheduled for jury trial and should involve a "battle of the experts." It is plain error, among other errors of law and fact, for the district court to dismiss the Fraziers' complaint over an "8-second YouCut video" that the hospital failed to admit as an exhibit at the evidentiary hearing AND where their forensic expert did not testify as a live witness. The hospital had the burden of admitting the video into evidence at the hearing, but did not. The JSON files placing the Fraziers at Suite 480 on 2/25/2020 during the times of their office visit were admitted as exhibits at the hearing and are clear and convincing/rebuttal evidence.

This Court granted *certiorari* in Chambers because of the importance of observing that the

inherent power "'is not a broad reservoir of power, ready at an imperial hand, but a limited source; an implied power squeezed from the need to make the court function,'" Chambers v. Nasco, Inc., 501 U.S. 32, 42 (1991). There were no proposed findings of fact in the R&R suggesting that the court was unable to function because of an "8-second YouCut video" that it has known about since the early stages of discovery and after over two years of litigation up until setting the case for jury trial.

B. Eleventh Circuit's Opinion and District Court Violated Constitutional Due Process

The district court violated the Fraziers' constitutional due process rights and made an error of law to find "Plaintiffs abused the judicial process and committed a fraud upon the court" based on an implication of fabrication in bad faith without proof, considering the medical records and expert affidavits in support of the Fraziers' colorable claims that were scheduled for trial. USCA11 16-1 at 20, 42-43. The Frazier's attorney was never implicated in their alleged fabrication as established in Hazel-Atlas Glass Co., 322 U.S. 238 (1944). According to the Fifth Circuit, "fraud on the court" is a demanding standard, includes a fraud perpetrated by officers of the court, and requires a showing of an unconscionable plan or scheme which is designed to improperly influence the court in its decision. Preyor v. Davis, No. 17-70017, *15 (5th Cir. 2017)(citing Wilson v. Johns-Manville Sales Corp., 873 F.2d 869, 872 (5th Cir. 1989). There was never an investigation by the district court of "fraud on the court" in Fraziers as in

Martin where the district court sanctioned parties five separate times. Martin v. Automobili Lamborghini Exclusive, Inc., 307 F.3d 1332 (11th Cir. 2002).

The Tenth Circuit has stated that fraud upon the court is fraud which is directed to the judicial machinery itself and not fraud between parties.

> "Fraud upon the court is fraud which is directed to the judicial machinery itself and is not fraud between the parties or fraudulent documents, false statements or perjury. It is where the court or a member is corrupted or influenced or influence is attempted or where the judge has not performed his judicial function --- thus where the impartial functions of the court have been directly corrupted."

Bulloch v. United States, 763 F.2d 1115, 1121 (10th Cir. 1985).

In the Seventh Circuit, "Fraud upon the court" has been defined to "embrace only that species of fraud which does, or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." Kenner v. C.I.R., 387 F.3d 689, 691 (7th Cir. 1968). The district court never articulates "a decision" made that was based on fraud. The district court states that the Fraziers committed fraud upon the court when they fabricated the

YouCut video and submitted it to Defendants during discovery, which is allegation of "fraud between the parties"—and not directed to the judicial machinery itself. The district court never states that the "8-second YouCut video" was a fraud perpetrated by the Frazier's attorney (an officer of the court) so that the judicial machinery can not perform in the usual manner. The Fraziers only complied with the Rules to produce relevant information at advice of counsel, and complied with the district court's order to turn over/produce their cellphone—and nothing more.

The Eleventh Circuit so far departed from the accepted and usual course of judicial proceedings and sanctioned such a departure by the district court when it failed to review "de novo the argument that the sanctions imposed by the district court violated due process." Serra Chevrolet, Inc. v. Gen. Motors Corp., 446 F.3d 1137, 1147 (11th Cir. 2006). The Eleventh Circuit Panel's opinion by Circuit Judges Wilson and Luck conflicts with and fails to follow this Court's authority found in Hazel-Atlas Glass Co. as cited in the Fifth Circuit's Rozier opinion and its progeny, and Eleventh Circuit's unpublished Rivera opinion—also written by Circuit Judges Wilson and Luck stating that an attorney should be implicated if there is alleged fabrication of evidence to constitute fraud on the court. United States of America v. Rivera, No. 20-11628 (11th Cir. 2024)(quoting Rozier v. Ford Motor Co., 573 F.2d 1332, 1338 (5th Cir. 1978) ("[O]nly the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by

a party in which an attorney is implicated, will constitute a fraud on the court.").

The Fifth Circuit, in Hesling ex rel. Buck v. CSX Transportation, Inc., explained how in Rozier it determined that if fraudulently withheld documents had been produced, then it would have changed the way that counsel would have approached the case and prepared for trial. 396 F.3d 632, 642 (5th Cir. 2005). Under the facts at bar, citing Rozier for the proposition that "fabricating evidence and lying about it constitutes fraud on the court" is a misstatement of the law because this language is not found or suggested at the page cited in Rozier by the Panel's opinion. This misstatement of the law is also cited in the unpublished Eleventh Circuit opinion, Oniha v. Delta Air Lines, Inc., No. 21-13532, *5 (11th Cir. 2022).

The Fraziers did not withhold evidence, but voluntarily produced an "8-second YouCut video/ESI" during discovery in support of their theory of the case and were subsequently compelled to turn over their cellphone containing several other video and audio files including the "8-second YouCut video" to be used at trial—and they complied. Nothing else changed concerning this "8-second YouCut video" following its production in over two years of litigation until after discovery had closed.

The surprise finding and legal conclusion of "fraud upon the court" by the district court is an error of law and a blatant abuse of discretion under the circumstances at bar, especially where the ESI

was produced at advice of counsel. The R&R states, "I do not find Plaintiffs' counsel, Mr. Thomas, engaged in willful or bad faith misconduct." USCA11 16-1 at 30 and Pet. App. at 115. The Fraziers had no notice of "fraud upon the court" and were first made aware of this finding and legal conclusion in the Order of dismissal. USCA11 29-1 at 15. The respondents did not allege "fraud on the court" in their motion for dismissal sanctions filed after discovery had closed, according to the Fifth Amended Scheduling Order. Id. The Order denying the Frazier's motion to appear for the evidentiary hearing remotely *via* video conference did not mention "fraud upon the court." USCA11 16-1 at 20, 50; 29-1 at 15, and Dkt. No. 234. The issue of "Fraud upon the court" was never raised at the evidentiary hearing, but was a consciously orchestrated surprise legal conclusion.

II. Rule 37(e) Exclusively Governs Case-Ending Sanctions Imposed For Disputed Fabrication of ESI

The Ninth Circuit, in Gregory v. State of Montana, held that the district court committed legal error by relying on its inherent authority in imposing the sanctions because Fed.R. Civ.P.37(e) governs both the loss of ESI and the sanctions imposed in that case, and by its plain terms displaces the district court's power to invoke its inherent authority in imposing sanctions. In addition, the Ninth Circuit held dismissal sanction may be imposed only upon a finding that the party acted with intent to deprive another party of the information's use in the litigation. Four out of five factors identified by the district court for clear and

convincing evidence in the dismissal order involve disputed fabrication of ESI although the district court previously found "no bad faith" under Rule 37 when the 8-second/YouCut video was initially produced. USCA11 16-1 at 3, 12; 29-1 at 20; and Pet. App. 50-51. Nonetheless, the district court's Order and Eleventh Circuit's Panel opinion are silent on this prior finding of "no bad faith" as discussed *infra*.

"On December 6, 2024, the U.S. Court of Appeals for the Federal Circuit issued a precedential opinion in PS Products Inc. v. Panther Trading Co. Inc. that appears to allow a district court to sanction under its inherent authority when the sanctionable conduct is arguably covered by a specific rule." William P. Ramey, III, Esq., A Court's Inherent Authority Is Not To Be a Broad Reservoir of Power, IPwatchdog.com, https://ipwatchdog.com/2024/12/11/courts-inherent-authority-not-broad-reservoir-power/id=183961/. No. 2023-1665 (Fed. Cir. December 11, 2024). The Federal Circuit is another likely split of authority on this issue at the intersection of the Rules and inherent authority.

In the Eleventh Circuit's spoliation precedents, bad faith "generally means destruction [of evidence] for the purpose of hiding adverse evidence." Tesoriero v. Carnival Corp., 965 F.3d 1170, 1184 (11th Cir. 2020). However, it appears that the Eleventh Circuit is no longer following its own precedent as no such finding is expressed in the Fraziers' Panel opinion to suggest that they destroyed evidence for the purpose of hiding it. Quite the opposite, the Fraziers produced the

evidence as required under the Rules and in compliance with the district court's order compelling their cellphone.

"The Fourth Circuit has stated that the district court's range of discretion to impose sanctions under Rule 37 is narrower when entering a dismissal or default judgment because that sanction represents an infringement upon the party's right to trial by jury. Wilson v. Volkswagen of America, Inc., 561 F.2d 494, 503-04 (4th Cir. 1977), cert. denied, 434 U.S. 1020, 98 S.Ct. 744, 54 L.Ed.2d 768 (1978)." See Wyle v. R.J. Reynolds Industries, Inc., 709 F.2d 585, 592 (9th Cir. 1983).

The R&R and the defendants' motion for dismissal sanctions do not cite FRCP 37 or any other federal rule or statute as the basis or ground for the case-ending sanction. Two defendants' Partial Summary Judgment Motions and their Motion for Dismissal Sanctions were all filed on March 31, 2023 after the close of discovery, on March 1, 2023. The respondents simply missed their opportunity to file the appropriate motion during discovery under Rule 37(e), and the district court knew it.

The Order on the respondent's motion to exclude expert testimony states that a "conclusive determination the video was fabricated" would be required, only later to find in the R&R that ESI was fabricated by mere implication. It is manifest injustice, usurpation of power and punitive for the district court to change its mind about jury trial based on implication instead of a conclusive determination of fabricated ESI.

As discussed in the Fraziers' objections to the R&R filed over a year ago (USCA11 16-1 at 12, 19, 22, 46-47, and 29-1 at 20; and Dkt. No. 272 at 13-14), courts acknowledge that they must evaluate alleged spoliation of electronically stored information ("ESI") pursuant to FRCP 37(e) and not resort to inherent authority. Matthew Enter., Inc. v. Chrysler Group LLC, 2016 U.S. Dist. LEXIS 67561, *10-11 (N.D. Ca.)("The [advisory] committee also sought to foreclose 'reliance on inherent authority or state law to determine when certain [curative or sanctioning] measures should be used.' To that end, Rule 37(e) now provides a genuine safe harbor for those parties that take 'reasonable steps' to preserve their electronically stored information."); Fiteq Inc. v. Venture Corp., 2016 U.S. Dist. LEXIS 60213, * 10-11 (N.D. Ca.)(agreeing with the defendant that the advisory committee's note to Rule 37(e) explicitly forecloses reliance on inherent authority to sanction). Metadata is contemplated in FRCP 26 and is a key part of ESI. The 8-second YouCut video recorded by the Fraziers on 2/25/2020 readily qualifies as ESI just like the video footage identified by the Ninth Circuit in Gregory. The defendants' forensic expert obtained the Fraziers' cellphone in September 2021 *via* Court Order. Pet. App. at 162. This video was not a surprise and shows a lack of diligence by the respondents, who waited to file a motion involving metadata/ESI after the close of discovery; therefore, they were unable to utilize FRCP 37. The law does not permit the use of court's inherent authority to dismiss a case on an ESI issue governed by the Rules.

III. District Court Dismissal and Partial Summary Judgment Orders Omit Prior Finding of "No Bad Faith" under Rule 37, Failed Sponge Count, Admittedly Falsified and Backdated Record and Culpability of Other Parties

In an Order dated September 22, 2021, the Magistrate found the Fraziers provided a good explanation for the inability to provide the original video and metadata, and to produce same, hired their own forensic expert. The Magistrate concluded there was no bad faith. USCA11 16-1 at 37, and 29-1 at 8. The respondents—not the Fraziers—referenced the admittedly false and backdated records regarding February 6, 2020 in a motion to compel the phone. USCA11 16-1 at 20. The Second Amended Complaint was filed in response to the hospital's assertion of a physical exam that did not occur on February 6, 2020 with Dr. Stevenson.

The proverbial smoking guns are the medical records showing "n/a" for a failed, final sponge count verified by the respondent's registered nurse and a surgical tech, and an operative report noting the placement of surgical material in Mr. Frazier's nasal cavity, but no removal. USCA11 16-1 at 13; and Pet. App. at 7. The hospital initially represented to the district court the existence of patient records showing a 2/6/2020 follow-up with Dr. Stevenson, only later to admit in pleadings/Answers the visit did not occur at time noted on the record. On March 12, 2020, Dr. Charles Greene, second opinion ENT, stated the "history was felt to be very reliable" when Mr.

Frazier reported surgical packing was left in his sinuses on February 25, 2020. USCA11 16-1 at 32; 29-1 at 16.

The 2/6/2020 medical record was fabricated and created on April 10, 2020, over two months later and after Dr. Stevenson was aware Mr. Frazier sought a second opinion about his ongoing pain from the surgery. USCA11 16-1 at 19; 29-1 at 9. This is "fraud upon the Court" by the respondents. The backdated 2/6/2020 record was created to deceive and lead downstream healthcare providers into believing an exam occurred in between the 1/28/2020 visit and 2/25/2020 visit thereby making it appear Mr. Frazier was physically okay before being seen on February 25, 2020. Mr. Frazier was not progressing as expected as of February 6, 2020 as he continued to experience pain, headaches, bleeding and teeth numbness on January 31, 2020 when Dr. Stevenson noted in office emails, "Having nosebleeds are not normal." USCA11 16-1 at 20; 29-1 at 11-12. The 5/27/2020 audio recording found on the Fraziers' cell phone and corresponding medical record from that office visit are relevant as this is date that Mr. Frazier confronted Dr. Stevenson about what he removed from his nasal cavity on February 25, 2020. The respondents offer no audit trail or other medical record as proof that Dr. Stevenson saw Mr. Frazier during the afternoon of February 6, 2020, and whether Mr. Frazier's medical record should be corrected was always a disputed matter for trial, according to the district court in June 2023. Pet. App. at 163. Based on briefing alone, the district court accepted the respondents' unsupported denial of the Fraziers' fraud and fabrication claims. Id. ("However,

Defendants have denied Plaintiffs' fraud and fabrication claims."). The Fraziers denied the respondents' claims of fabrication at the evidentiary hearing through their testimony and live expert witness testimony along with evidence admitted as exhibits, but the district court would not accept the Fraziers' denials.

A "screenshot" was not the only evidence produced by the Fraziers to show the video was created on the date they alleged, according to the Panel's opinion. At hearing, live expert testimony and metadata associated with images taken from the video were produced and retrievable *via* forensic examination of the phone. USCA11 16-1 at 21; 29-1 at 9. Metadata of Jpg images from the video, which is different from the screenshot was recovered by the Fraziers' live expert and admitted as exhibits at the evidentiary hearing.

The hospital committed "fraud upon the court" when it presented to the district court that it had records of a follow-up visit on February 6, 2020 in a motion to compel the Fraziers' cellphone. USCA11 16-1 at 30. In verified/notarized pleadings, Answers state: "It is denied that Dr. Stevenson maintains that an office visit occurred at 11:08 EST on 2/6/2020 rather than that afternoon." USCA11 16-1 at 20-21; 29-1 at 19. The hospital admitted in discovery responses that Dr. Stevenson physically examined Mr. Frazier on the afternoon of 2/6/2020 with no proof and never produced any record to date—part of the cover up. Schedule shows Dr. Stevenson seeing female patients around time Mr. Frazier arrived only to pick up and pay for his Family and Medical Leave Act ("FMLA")

paperwork at 2:09pm on 2/6/2020. USCA11 16-1 at 20-21; 29-1 at 19.

Kathyrn Crous, RN, BSN, the Fraziers' medical records expert determined there was an incorrect record created on 4/10/2020 and backdated over 60 days earlier to 2/6/2020 as "a deliberate medical record alteration" and "blatant attempt to fraudulently create medical records." USCA11 16-1 at 19. Eppes v. Snowden, 656 F.Supp. 1267, 1279 (E.D.Ky.1986) (defendant's answer and counterclaim stricken where defendant committed 'fraud on the court' by producing 'backdated' letters). As a breach of the standard of care, Dr. Mikula stated the creation of a back dated office visit is considered falsification of a medical record and is grounds for dismissal. USCA11 16-1 at 20.

Ms. Crous opined that Dr. Stevenson modified Mr. Frazier's medical records during the pendency of the litigation based on her review of the audit trail. USCA11 16-1 at 47; and Stimson v. Stryker Sales Corporation, 1:17-cv-00872-JPB, *26 (N.D. Ga. November 12, 2019)(the fact remains that Plaintiff used his cellular phone during the pendency of the litigation)).

In the Eleventh Circuit Panel's opinion, there are errors of fact as to alleged fabrication and perjury, when the video was referenced by the Fraziers, the evidence produced at the hearing and the misapprehension of a finding of subjective bad-faith by the district court. The Fraziers were surprised by the Panel's omission of the proper wording for sanction orders as *quoted* by the Eleventh Circuit in Stimson (also a fact pattern

involving a cellphone): "The district court abuses its discretion when it applies an incorrect legal standard, applies the standard in an unreasonable or incorrect manner, or ignores or misunderstands the relevant evidence." No. 19-14997, *3-4 (11th Cir. 2020) (citing Purchasing Power at 1222); see Sciarretta, at 1212). The Panel omits the "Buildout" of at least 13 exam rooms that are not the same, work orders of painting/ceiling tile changes in unidentified rooms of Suite 480, and "live" expert testimony that there was no evidence of alteration of metadata by the Fraziers. USCA11 29-1 at 9-10. Purchasing Power states: "In assessing whether a party should be sanctioned, a court examines the wrongdoing in the context of the case, including the culpability of other parties." Purchasing Power, at 1225 (citing Chambers). The district court applied incorrect legal standards, ignored or misunderstood relevant evidence and failed to examine the hospital's and Dr. Stevenson's culpability.

The R&R as adopted by the district court did not make specific findings as to the party's conduct, subjective bad-faith and perjury by the Fraziers in the Proposed Findings of Fact to warrant dismissal. The district court fails to cite to the record where it was proven that the Fraziers committed perjury, and destroyed or doctored evidence. Mr. Stafford testified there is no evidence that metadata was altered and no evidence to show that the date and time [on the phone] were changed. USCA11 29-1 at 9-10. The respondents as the movants have the burden to show what each room in Suite 480 looked like as of February 2020, the time that the Fraziers' forensic expert

concluded their 8-second video was taken. The respondents only showed the appearance of 3 exam rooms as of October 2021. Mr. Stafford (forensic expert) testified that he would want to see an extant image, something that was from the same time period—February 2020, which was not produced by the respondents. USCA11 16-1 at 44. Dr. Stevenson does not know what room that he and the Fraziers were in on February 25, 2020. There can be no clear and convincing evidence if the Magistrate concludes that "it is unclear in which one of these three exam rooms the exam occurred." USCA11 33-1 at 8. The Buildout of Suite 480 shows 13 exam rooms—not 3.

IV. Eleventh Circuit and District Court Made Errors of Law Because There Is No Violation Of Court Order, No Contempt Finding, And No Subjective Bad-Faith

Since the beginning this Court has known that the "subjective bad-faith standard was difficult to establish, and courts were therefore reluctant to invoke it as a means of imposing sanctions." Chambers, at 47 n.11 (1991). The Panel's opinion and the district court appear to combine two very distinct concepts related to a court's inherent authority: contempt power and bad faith based on a subjective bad-faith standard. The underlying concern for contempt power is disobedience to the orders of the Judiciary. Chambers, at 44. There is no disobedience under the facts at bar.

In the dismissal order, the district court acknowledges that "the inherent-powers standard is a subjective bad faith standard," but it failed to determine whether the Fraziers' conduct met this standard. USCA11 29-1 at 13. The R&R is silent as to this Court's subjective bad-faith standard. The district court first analyzed the Fraziers' "objections to the Magistrate Judge's finding of willful conduct, i.e., that Plaintiffs willfully fabricated the YouCut Video.[16] Dkt. No. 268 at 41 (Plaintiffs 'willfully fabricated video evidence in bad faith to bolster a pivotal claim in this case.')." Dkt. No. 280 at 31. To make "willfulness" the same as intentional action, the district court cited Jove Eng'g, Inc., at 1555. Id. In Jove Eng'g, Inc., the interpretation of willfulness was being used within the context of the contempt power, and not as a means of unlocking inherent authority by finding subjective bad-faith because the case involved the violation of a bankruptcy statute. The district court and Panel opinion confuses the use of contempt power with subjective bad-faith, which is an error of law. USCA11 29-1 at 13.

The district court failed to cite and apply legal authority for the vague proposition that a finding of willfulness is a requirement for dismissing a case as a sanction. This is an error of law. The district court adopted the Magistrate's finding that 'the bad faith and willful inquiries are largely coextensive.' USCA11 29-1 at 18. This is also an error of law and an incorrect legal standard for subjective bad-faith, which is an abuse of discretion, according to the U.S. Supreme Court in Koon v. United States, 518 U.S. 81 (1996). These are perfunctory statements, which have no legal foundation when analyzing

facts applicable to the standard of review for dismissing a case as a sanction with prejudice. USCA11 29-1 at 18.

V. The District Court Failed To Meet Eleventh Circuit Betty K Standards for Dismissal With Prejudice

The district court applied an incorrect legal standard in dismissing the Fraziers' complaint with prejudice as it did not identify and failed to apply facts at bar to the elements in Betty K, at 1338. The Fraziers were surprised as the Eleventh Circuit quoted and analyzed the facts to the Betty K "elements" although not mentioned in the respondent's motion for dismissal sanctions, Order denying the Frazier's motion to appear for the evidentiary hearing remotely *via* video conference, not analyzed at the evidentiary hearing, and not mentioned in the R&R nor in the Order of dismissal by the district court. USCA11 29-1 at 18-19. Dismissal with prejudice "is an extreme sanction that may be properly imposed only when: (1) a party engages in a clear pattern of delay or willful contempt (contumacious conduct); and (2) the district court specifically finds that lesser sanctions would not suffice." Betty K Agencies, Ltd. v. M/V MONADA, 432 F.3d 1333, 1338 (11th Cir. 2005) (quotation marks omitted).

The Panel's opinion states the district court properly found a clear pattern of willful contempt, but there was no finding in the R&R and the Order of dismissal of a "clear pattern of delay" or "clear pattern of willful contempt." There was no contumacious conduct by the Fraziers when

compared to the conduct of plaintiff Deon D. Jones in Jones v. United States Veterans Admin., 22-11828 (11th Cir. Nov 04, 2022). In Jones, the district court made explicit findings that the plaintiff's conduct rose to a level of "contumacious" behavior, based on (1) his total failure to attempt to comply with the October 19 order; (2) his repeated filings attempting to relitigate issues previously adjudicated, thus wasting the court's resources; and (3) his "increasingly aggressive posture" towards the court, including his allegations that the U.S. Marshalls were conspiring and threatening to attack him at the direction of the trial judge. Id. at *5.

The R&R does not cite a federal rule, law or otherwise where the burden is on the plaintiff to request a lesser sanction. This is plain error by the Court to ask the Plaintiffs to assist with fashioning a lesser sanction when there was no record of bad faith. Unlike plaintiff's attorney during the hearing in Oniha, who admitted, "Mr. Oniha has difficulty remembering exactly when he drafted it, but that's the worst—that's his worst crime, in which case the document should be excluded (Dkt. No. 275-4 at 2 and 10)," the Fraziers' attorney maintained the Fraziers' testimony that they recorded the video at Suite 480 during their encounter with Dr. Stevenson. USCA11 16-1 at 22, 25-27,43; and 29-1 at 15. Query whether a clear error of judgment occurred when the district court pressed the Fraziers' attorney to assume for the sake of argument that the Fraziers engaged in willful, bad faith conduct without pressing the respondents in the same manner, and then pressed that the Fraziers propose a sanction short of

dismissal with prejudice in a case where the respondents admitted to creating a record of Mr. Frazier's office visit on 4/10/2020 and then backdating it to 2/6/2020 at 11:08am—a time when the Fraziers were not in the city of Brunswick. Eppes v. Snowden, at 1279.

VI. District Court Committed Legal Error and Usurped Power To Dismiss Professional Negligence, Informed Consent and Punitive Damages Claims In The Face of Non-excluded Expert Testimony

In the partial summary judgment order, the district court asserts its understanding that professional negligence and informed consent are two distinct and separate claims as informed consent is merely a component of "Count I - Professional Negligence" in the Second Amended Complaint when it states, "Plaintiffs allege Defendants committed professional negligence, failed to acquire informed consent, committed fraud, and altered and fabricated portions of Mr. Frazier's medical records. Dkt. No. 77." USCA11 16-1 at 34-35, 48; 24-1 at 24-25; and Pet. App. at 10.

The district court never addressed the medical expert affidavits by ENT Drs. Mikula and Armstrong in the partial summary judgment order and the fact that it had already granted them permission to testify at trial. USCA11 16-1 at 34. In a blatant usurpation of power and clear abuse of discretion, the district court assisted respondents

by dismissing the Fraziers' professional negligence claim in its entirety while respondents never filed a motion to dismiss on or before the close of discovery alleging the Fraziers' medical expert affidavits were defective as required by O.C.G.A. §9-11-9.1(e). It is the Fraziers' understanding that Drs. Ajir (neurosurgeon) and Dennis (orofacial pain specialist) would also be permitted to testify about their opinions in their disclosures under Federal Rule of Civil Procedure 26(a)(2) as they relate to Counts I – Professional Negligence, II – Negligence Per Se, III - Respondeat Superior Liability, IV – Administrative Negligence, V – Gross Negligence, and IX – Loss of Consortium and XII – Punitive Damages. Punitive damages were specifically pleaded in the operative Second Amended Complaint pursuant to O.C.G.A. §51-12-5.1 (Punitive Damages). Dr. Mikula, Dr. Armstrong, Dr. Ajir and Dr. Dennis articulated specific breaches of the standard of care, causation and punitive damages to establish professional negligence/malpractice by the respondents as set forth in Counts I, II, III, IV, V, and IX and XII. As stated by the district court in an Order,

> "Dr. Mikula opined Dr. Stevenson breached the standard of care because he: (6) ***falsified records*** by creating an office note on April 10, 2020 and backdating it to February 6, 2020. Id. at 53. Dr. Mikula also opined 'the unnecessary surgery and prolonged nasal packing without antibiotics led to inflammation, nerve damage, septal perforation and chronic pain.' Id. at 54." USCA11 16-1 at 34.

It is also the Fraziers' understanding that the following damages experts: Linda Jones, MRC, MBA, MPA, CRC - vocational expert; Kathryn Crous, RN, BSN - medical records expert; L. Wayne Plumly, Ph.D – Economist; Jim Stafford, ACI, ACE - forensics expert; and Laura Lampton, RN, BSN, CRRN, CNLCP - trial nurse expert will be permitted to testify about their opinions in their disclosures under Federal Rule of Civil Procedure 26(a)(2). The respondents were provided with Supplemental Rule 26(a)(1) Initial Disclosures in August 2022 identifying Ms. Jones, Dr. Plumly and Ms. Lampton along with their notarized affidavits.

The respondents did not take the depositions of Linda Jones, Dr. Plumly and Laura Lampton during discovery and neither challenged nor moved to exclude their damages testimony, which was provided by way of notarized affidavits/reports. Dr. Stevenson acknowledged and confirmed that he saw Mr. Frazier on May 27, 2020 and the audio was played while Dr. Stevenson read the transcript of their conversation, page by page and line-by-line during his deposition for accuracy. Mr. Frazier has received treatment and expert review of his records from a myriad of physicians, such as ENTs, neurologists, neurosurgeons, psychiatrists, orofacial pain specialists, and psychologists from Jacksonville ENT to the Mayo Clinic Pain Rehabilitation Center to The Orofacial Pain Center after this life-altering surgery in January 2020, and specified providers and experts said they had no reason not to believe his history of present illnesses and subjective complaints.

In the partial summary judgment and case-ending sanction orders, the district court acknowledged the presence of the professional negligence claim, which is specifically about breaches of the standard of care on the date of surgery. USCA11 16-1 at 3, 25, 34 and 48. The respondents have always defended against the professional negligence claim in their Twelfth Defense of the Answer concerning negligence during the surgery or it is waived under Georgia state law. Dkt. No. 80 at 3. The respondents did not file a motion for partial summary judgment as to professional negligence, but only the claim of informed consent. A Rule 60 motion filed by the Fraziers remained pending even though it was filed immediately after receiving the partial summary judgment order, filed before the evidentiary hearing, and filed before the submission of the combined draft pretrial order. USCA11 16-1 at 19, and 24-1 at 11. This Rule 60 motion remained pending and had not been considered at the time of the dismissal order. USCA11 16-1 at 31 and 35.

CONCLUSION

For the foregoing reasons, Petitioners respectfully requests that this Court grant this petition for writ of *certiorari*.

Dated: February 27, 2025

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