IN THE STATE COURT OF HALL COUNTY
STATE OF GEORGIA

JENNIFER A. BOSTEDT,	)	
	)	
Plaintiff,	)	CIVIL ACTION FILE
	)	
v.	)	NO. 2014SV68N
	)	
HARLEY M. BROWN,	)	
	)	
Defendant.	)	

DEFENDANT HARLEY M. BROWN'S MOTION FOR RECONSIDERATION

COMES NOW Harley M. Brown ("Defendant") and respectfully requests reconsideration of the Court's April 2, 2015 Order which granted non-party ML Healthcare Services, LLC's ("MLH") Motion to Quash and for Protective Order, showing this Honorable Court as follows:

I. INTRODUCTION

By filing this Motion for Reconsideration, Defendant does not intend to make a proverbial "mountain out of a molehill" on the issue of whether the documents requested of non-party MLH are discoverable. The parties have fully briefed this issue and presented their arguments to this Court, after which time the Court entered an Order quashing Defendant's subpoena to MLH. Defendant is obligated, however, to request that this Court reconsider its ruling because the Court of Appeals' decision in *Med. Ctr., Inc. v. Bowden*, 327 Ga. App. 714, 761 S.E.2d 116 (2014), a case that both MLH and this Court relied, was recently overturned by the Georgia Supreme Court. *See Bowden v. Med. Ctr., Inc.*, No. S14G1632, 2015 WL 3658819 (Ga. June 15, 2015).[1]

Consequently, MLH's basis for withholding these subpoenaed documents is no longer viable, and as such, Defendant respectfully requests that this Court order the production of these

[1] A copy of the decision is attached hereto as Exhibit A.

documents.

II. <u>BRIEF RECAP OF FACTS AND MATTERS AT ISSUE</u>

On October 17, 2014, Defendant served a Subpoena Duces Tecum to MLH, a non-party in this lawsuit, requesting certain documents related to MLH's involvement in this case in order to evaluate the reasonableness of treatment costs and to examine the potential bias of Plaintiff's treating physicians. [Exhibit B hereto] Notwithstanding having failed to respond by the requested deadline, MLH ultimately filed a Motion to Quash and for Protective Order.

The basis of MLH's motion was two-fold: 1.) the requested information is barred by the collateral source rule; and 2.) the information sought constitutes a trade secret. In MLH's initial motion, reply brief <u>and</u> at oral argument, the foremost case they relied on to support their objection was *Med. Ctr., Inc. v. Bowden*, 327 Ga. App. 714, 761 S.E.2d 116 (2014). MLH relied on this decision because "*Bowden* requested the same kind of information that is being requested here." [Civil Motion Hearing, February 13, 2015, p. 7:11-12] Indeed, MLH represented to the Court that, since the Court of Appeals' decision in *Bowden*, MLH "has litigated two cases on the same issue, and both of those cases have been decided in favor of MLH." [*Id.* at 7:21-23] Those "rulings are the only final rulings on the issue that [MLH] has received since *Bowden*." [*Id.* at 9:1-3]

Further, in its attempt to distinguish the pre-*Bowden* federal court orders Defendant attached as exhibits to its brief in opposition – which supported Defendant's argument that this information is discoverable – MLH claimed that "we would argue that the federal court should apply the state substance of law. . .<u>and that it should follow *Bowden*</u>. [*Id.* at 9:8-12 (emphasis added)] In fact, MLH's counsel admitted that "I think that [following *Bowden*] is the correct view of the law." [*Id.* at 9:12-13]

MLH's substantial reliance on the Court of Appeals' decision in *Bowden* has been subverted now that Georgia's highest court recently overturned that opinion. Accordingly, for the reasons discussed below, Defendant respectfully requests that this Court reconsider its Order granting MLH's Motion to Quash, and consistent with the Georgia Supreme Court's well-reasoned analysis, find the requested documents are discoverable.

III. <u>ARGUMENT AND CITATION OF AUTHORITY</u>

A. <u>Standard of Review</u>

Although there is no express statutory authorization for motions for reconsideration in the trial courts, they are frequently filed and often times granted. *Johnson v. Barnes*, 237 Ga. 502, 229 S.E.2d 70 (1976). It is well established that a judgment or order is "in the breast of the court" during the term of court in which it is entered. *Sunn v. Mercury Marine*, 166 Ga. App. 567, 305 S.E. 2d 6 (1983). During that time, the trial court has the inherent authority to set it aside for any "meritorious reason." *Smith v. Ross*, 168 Ga. App. 817, 310 S.E. 2d 567 (1983). Therefore, this Court has the inherent authority to reconsider its Order granting MLH's Motion to Quash and to compel the production of documents sought by Defendant.

B. <u>It is Undisputed that *Bowden* is Controlling, And As Such, MLH's Motion to Quash Should be Denied and It Should Be Compelled to Produce The Subpoenaed Documents</u>

MLH has already admitted that the operative facts giving rise to the Supreme Court's decision in *Bowden* are analogous to Defendant's Subpoena in this case because the party that subpoenaed documents in "*Bowden* requested the same kind of information that is being requested here." *See* Civil Motion Hearing, February 13, 2015, p. 7:11-12. Thus, because MLH contends *Bowden* was controlling when it was before the Court of Appeals, the Supreme Court's reversal of that decision is likewise controlling.

In *Bowden*, the plaintiff was injured in a car wreck and received treatment at The Medical Center ("TMC"). In a subsequent lawsuit, the plaintiff sought to invalidate a lien TMC had filed, claiming the charges "were grossly excessive." *Bowden*, 2015 WL 3658819, at *1. During discovery, the plaintiff requested documents from TMC including the amounts the hospital actually charged patients for care similar to what the plaintiff had received. Specifically, the plaintiff requested the following:

1) medical records and bills related to [the plaintiff's] treatment and the hospital lien;
2) TMC's pricing agreements with other providers;
3) specific, itemized charges that the plaintiff would have incurred if she were covered by certain insurers or government programs;
4) TMC's total gross revenues from services billed at varying rates;
5) information related to which patients paid certain percentages of rates; and
6) how many uninsured patients TMC had treated and how many of those patients TMC had billed for their treatment. *Id.* at *2.

TMC objected to producing the above information on the grounds that it was not discoverable. The trial court disagreed, found the information was discoverable and granted the plaintiff's Motion to Compel.

TMC filed a petition for immediate review to the Court of Appeals (the decision on which MLH relies on in this case), and the appellate court found that the trial court abused its discretion in granting the motion to compel because "the discovery [the plaintiff] seeks is not relevant to her claim that TMC's medical charges for her treatment were unreasonable." *Id.* at *1 (citation omitted).

The Georgia Supreme Court granted certiorari, and on June 15, 2015, reversed the Court

of Appeals' decision. In reversing the appellate court, the Georgia Supreme Court began its analysis by observing that, "in the discovery context, courts should and ordinarily do interpret 'relevant' very broadly to mean matter that is relevant to anything that is or may become an issue in the litigation." *Id.* at *4 (citing *Oppenheimer Fund, Inc. v. Sanders,* 437 U.S. 340, 351 (1978) (quotations omitted). The Supreme Court further "cautioned trial courts that in exercising their discretion to determine the permissible scope of discovery, they should keep in mind that **the discovery procedure is to be construed liberally in favor of supplying a party with the fact**." *Id.* (quotations and citations omitted).

With that framework in mind, the Supreme Court concluded that the information sought from TMC related to the actual amounts that it billed patients was not "entirely irrelevant—particularly in the broad discovery sense—**to the reasonableness of the charges for [the plaintiff's] care**." *Id.* at *5 (emphasis added). In the context of the discovery sought by the plaintiff in *Boweden*, the high court went on to note that

> [t]he fair and reasonable value of goods and services is often determined by considering what similar buyers and sellers have paid and received for the same product in the same market, with adjustments upward or downward made to account for pertinent differences, and **we see no reason why the same cannot be true of health care**. *Id.* (emphasis added)

Using a hypothetical scenario, the Supreme Court provided the following reasoning:

> Suppose that, as Bowden argued at the motion to compel hearing, 99% of TMC's patients who received the same care as she did during the same time period had insurance and therefore paid the same much lower sum for their care—say, just $1,000. Under that scenario, a fairminded juror might conclude that the "reasonable charge" for that care was much closer to $1,000 than to the $21,409.59 that TMC billed Bowden. **Bowden is entitled to determine if evidence exists to support such an argument**.
>
> Of course, TMC would be entitled to present evidence and to argue in response that what it charged its insured patients is not fairly comparable to what it charged uninsured patients like Bowden, because the insured patients were charged based on the hospital's contracts with their insurers that reasonably reflected such

> economic factors as volume discounts or promises of prompt and full payment, or based on the rates that the government was willing to pay under Medicare or Medicaid. *Id.* at *5 (emphasis added)

Furthermore, the Supreme Court squarely addressed MLH's argument in this case that withholding these requested documents can be cured because the "[parties are] free to present evidence – whether through an expert, or from other medical providers or consumers – to rebut [a witness's claim] that its charge was reasonable given the market rate for medical services." [Order on Non-Party ML Healthcare Services LLC Motion to Quash, p. 2 (citing *Bowden*, 327 Ga. App. at 717)].

In rejecting this rationale, the Supreme Court noted that this argument

> **seems to acknowledge (correctly) that how much other patients are charged for the same services in the same market is relevant to the issue of reasonableness**. If that is so, then more directly applicable information of that type—how much TMC itself charged other patients for the same services—**would be even more relevant**. The availability of one form of proof does not make other forms of proof irrelevant under.

Id. at 8 (emphasis added).

Indeed, the Supreme Court held that "the general proposition that hospital charges are automatically 'reasonable' whenever the patient (or someone authorized to act on her behalf [e.g. MLH]) has signed a contract agreeing to pay those charges **is incorrect**, **because the contract price for goods and services does not necessarily equal their reasonable value**." *Id.* at 7 (emphasis added) In other words, simply because Plaintiff's providers charged a certain amount for her treatment does not necessarily mean those charges were reasonable.

These are precisely the same competing issues at play in this case. On the one hand, Defendant has a good faith basis to believe that "patients who received the same care as [Plaintiff] did during the same time period" paid a different amount than what MLH paid these providers for the same care that Plaintiff received. *Id.* Plaintiff's providers and/or MLH, on the

other hand, would be entitled to present contrary evidence that what they charged other patients compared to what Plaintiff was charged is not comparable because of other factors like "volume discounts or promises of prompt and full payment, or based on the rates that the government was willing to pay under Medicare or Medicaid." *Id.*

The more important takeaway though is that, at a minimum, this information is now discoverable. It is undisputed that Defendant requested in "the same kind of information" that was requested in *Bowden*. [Civil Motion Hearing, February 13, 2015, p. 7:11-12] Like the plaintiff in *Bowden*, Defendant has sought, among other things,

1) pricing agreements between MLH and Plaintiff's medical providers (Subpoena to MLH, ¶¶ 1-3, 8); and
2) the specific amount MLH paid these providers (*Id.* at ¶¶ 6, 10).

One of Defendant's stated purposes for this information is to compare the costs MLH paid for Plaintiff's treatment in this case to the costs MLH paid on behalf of similarly situated patients who underwent related treatment. Of course, without first knowing what MLH paid to Plaintiff's providers, Defendant cannot make any sort of comparison.

Defendant cannot envision how MLH has any basis to challenge this Motion for Reconsideration because they repeatedly represented that the facts giving rise to the Court of Appeals' decision in *Bowden* were analogous to this case. MLH cannot rely on *Bowden* when it is favorable to their position, then attempt to distinguish it, which Defendant suspects they will, when the Supreme Court rules contrary to their objection.

IV. CONCLUSION

Defendant respectfully requests that the Court reconsider its order granting MLH's Motion to Quash. The landscape of the law surrounding this issue has changed since this Court's

ruling. The information sought is Defendant's Subpoena is discoverable in light of the Supreme Court's reversal in *Bowden*, and therefore, Defendant respectfully requests that the Court order MLH to produce the requested documents.

Respectfully submitted, this 30th day of June, 2015.

DREW ECKL & FARNHAM, LLP

____

Barbara A. Marschalk
Georgia Bar. No. 324498
Matthew T. Jones
Georgia Bar No. 938189

880 West Peachtree Street (30309)
Post Office Box 7600
Atlanta, Georgia 30357-0600
Telephone: (404) 885-1400
Facsimile: (404) 876-0992
Email: bmarschalk@deflaw.com
Email: mjones@deflaw.com
Attorneys for Defendant
5849162/1
00353-088237

IN THE STATE COURT OF HALL COUNTY
STATE OF GEORGIA

JENNIFER A. BOSTEDT,	)	
	)	
Plaintiff,	)	CIVIL ACTION FILE
	)	
v.	)	NO. 2014SV68N
	)	
HARLEY M. BROWN,	)	
	)	
Defendant.	)	

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the *DEFENDANT HARLEY M. BROWN'S MOTION FOR RECONSIDERATION* upon opposing counsel by depositing true copies of same in the United States Mail with adequate postage affixed thereon and properly addressed to:

Roger W. Orlando, Esq.
The Orlando Firm, P.C.
Decatur Court; Suite 400
315 W. Ponce de Leon Avenue
Decatur, Georgia 30030

Michael R. Siavage, Esq.
Siavage Law Group
1360 Peachtree Street
Suite 1050
Atlanta, Georgia 30309

This 30th day of June, 2015.

____
Matthew T. Jones
Georgia Bar No. 938189

DREW, ECKL & FARNHAM, LLP
880 West Peachtree Street (30309)
Post Office Box 7600
Atlanta, Georgia 30357
Telephone: 404-885-1400
Email: bmarschalk@deflaw.com
Attorneys for Defendant
5849162/1 00353-088237