IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS

SUE POFF	)	**PLAINTIFF**
	)	
v.	)	**NO. CV 12-261-4**
	)	
JAMES P. ELKINS, M.D., and JAMES P. ELKINS, M.D., P.A.	)	**DEFENDANTS**

PLAINTIFF'S MOTION FOR LEAVE OF COURT TO PROPOUND ADDITIONAL DISCOVERY TO JAMES P. ELKINS, M.D.

Comes now Plaintiff, and for her Motion for Leave of Court to Propound Additional Discovery to Defendant, James P. Elkins, M.D., states:

I. MOTION

1. The Court heard Defendant's Motion to Limit Discovery in this case on July 25, 2012, and ordered, in part, that:

   a. The parties shall limit their discovery to matters that have changed or developed since December 7, 2011; and,

   b. A party who wishes to conduct discovery on matters other than those that have changed or developed since December 7, 2011 may file a motion for leave of Court showing good cause for request and obtain Court approval before proceeding.

2. On August 30, 2012, Defendant, James P. Elkins, M.D. (hereinafter, "Defendant") served upon Plaintiff his Amended Response to Plaintiff's 6/7/12 Requests for Admission, which stated, in part, that Defendant admitted that the outpatient surgery center where he performed the laser surgery on Sue Poff on January 22, 2009, was NOT licensed by the State of Arkansas Department of Health on January 22, 2009. See Plaintiff's Exhibit 1, Defendant's Amended Response to Plaintiff's 6/7/12 Set of Request for Admissions, attached.

3. In a related Interrogatory, also initially served on Defendant on June 7, 2012, asking for any dates when the surgery center in question had been licensed by the State of Arkansas, Defendant, Elkins, responded that the outpatient surgery center has not been licensed by the Arkansas Department of Health. See Plaintiff's Exhibit 2, Defendant's Amended Response to Plaintiff's 6/7/12 Set of Interrogatories and Requests for Production of Documents, attached.

4. Plaintiff believes the responses, above, represent a matter that has changed or developed since December 7, 2011, but in an abundance of caution requests leave of Court to propose additional discovery to establish whether Defendant plans to claim that his surgery center was not required to be licensed by the Arkansas Department of Health by either the Rules and Regulations of the Arkansas Department of Health or a 2005 consent Order between the Defendant and the Arkansas Medical Board. See Plaintiff's Exhibit 3, Plaintiff's 9/26/12 Set of Requests for Admission to Defendant James Elkins, M.D. and James P. Elkins, M.D., P.A., attached and Exhibit 4, Consent Order, attached.

5. Plaintiff's Brief in support of this Motion is attached and incorporated by reference as if repeated word for word herein.

II. PLAINTIFF'S BRIEF IN SUPPORT OF HER MOTION FOR LEAVE OF COURT TO PROPOUND ADDITIONAL DISCOVERY

a. INTRODUCTION

Defendant has conclusively established by his responses to a Request for Admission and Interrogatory that the Surgery Center in which he performed the procedure on Ms. Poff on January 22, 2009, was not at that time, nor before or since that time, licensed by the Arkansas

Department of Health. See Exhibit No. 1. Defendant has recently made the claim that no such licensure is necessary, and that the issue of such licensure is irrelevant to any matter in this case. See Plaintiff's Exhibit 5, September 24, 2012, Email from Counsel for the Defendants to Counsel for the Plaintiff, attached.

b. THE MATTER OF LICENSURE OF THE SURGERY CENTER IS RELEVANT TO THE ISSUE OF INFORMED CONSENT IN THIS CASE

Ms. Poff has stated in her affidavit, and is expect to so testify at trial, that:

- She assumed that Dr. Elkins' surgery center was fully licensed by the State of Arkansas; and,
- Had she been aware that the surgery center was not so licensed, she would not have consented to the procedure performed by Dr. Elkins on 1/22/09.

See Plaintiff's Exhibit 6, Affidavit of Sue Poff, attached.

Further, Dr. Shewmake has stated in his affidavit, and is expected to so testify at trial, that IF Dr.Elkins' surgery center were NOT licensed, AND if there were a requirement for such licensing, he would be of the opinion that knowledge of such information would have a bearing on whether the average patient would consent to have surgery by Dr. Elkins. Under those circumstances, it would be Dr. Shewmake's opinion that Dr. Elkins would have a duty to his patients, in this case, Ms. Poff, to disclose that his center were not licensed. See Plaintiff's Exhibit 7, Medical Report of Dr. Shewmake.

Accordingly, both the issue of whether the surgery center was licensed and the issue of whether the surgery center was required to be licensed at the time of Ms. Poff's surgery would be relevant and material to the fact finding of the jurors in this case.

c. THE RULES AND REGULATIONS OF THE ARKANSAS DEPARTMENT OF HEALTH REQUIRE A LICENSE FOR THE SURGERY CENTER OF DR. ELKINS

The Rules and Regulations for Hospitals and Related Institutions in Arkansas of the Arkansas Department of Health, Section 3(S), define an Ambulatory Surgery Center as any facility in which surgical services, other than minor dental surgery, are offered which require the use of general or intravenous anesthetics and/or render the patient incapable of taking actions for self-preservation under emergency conditions without assistance from others, and where, in the opinion of the attending physician, hospitalization is not necessary. Those same Rules and Regulations state, in Section 4(A), that no outpatient surgery center may be established, conducted, or maintained in the State without first obtaining a license. See Plaintiff's Exhibit 8, Rules and Regulations for Hospitals and Related Institutions in Arkansas, attached.

Dr. Shewmake has stated in his report that Ms. Poff had more than enough sedation to place Dr. Elkins' surgery center under the ambit of Rule 3(S), above, and confirmed that opinion by consulting the Chief of Anesthesiology at Baptist Medical Center, Little Rock. See Plaintiff's Exhibit 7, Medical Report of Kris Shewmake, M.D., Para. 15, attached.[1] Plaintiff wishes to establish conclusively by further written discovery that Defendant will not claim at trial that his surgery center was not required, under sections 3(S) and 4(A) of the Arkansas Department of Health Rules and Regulations for Hospitals and Related Institutions, to be licensed by the Arkansas Department of Health. In the event that Defendant is going to claim that the sedation received by Ms. Poff did not render her "incapable of taking actions for self-preservation under emergency conditions without assistance from others," Plaintiff will supplemental her responses

[1] Dr. Shewmake mistakenly refers to Section 3(g) in Paragraph 15 of the report instead of Section 3(S).

to Interrogatories and name a rebuttal expert in anesthesiology.

d. DR. ELKINS WAS, AND IS, UNDER AN ORDER FROM THE ARKANSAS MEDICAL BOARD TO PERFORM SURGERY ONLY IN A HOSPITAL OR AMBULATORY SURGERY CENTER LICENSED BY THE STATE OF ARKANSAS

Plaintiffs have obtained through the Freedom of Information Act a copy of a consent Order between Dr. James Elkins and the Arkansas Medical Board that states, in part, that "James Phillip Elkins, M.D. will refrain from performing any surgical procedures unless they are performed in a hospital or outpatient surgical center licensed by the Arkansas Department of Health pending further Orders of the Board." See Plaintiff's Exhibit 4, attached. Plaintiff has also obtained a copy of the file of Dr. Elkins from the Arkansas Medical Board and finds no evidence of any Order that would state that Dr. Elkins had been relieved of the duties demanded by this consent Order at the time he performed the laser procedure on Ms. Poff.

Plaintiff wishes to establish conclusively by further written discovery that Dr. Elkins' was under an Order by the Arkansas Medical Board not to perform any surgery, including the laser surgery performed on Ms. Poff, unless in a licensed hospital or outpatient surgery center.

III. CONCLUSION

Plaintiff has identified an issue that has developed, or certainly changed, since the former December 7, 2011, trial date, and should be allowed to explore this matter with further limited written discovery.

Respectfully submitted,

Ken Swindle
Ark. Bar No. 97234
619 West Persimmon Street
Rogers AR 72756
Tel. (479) 621-0120
Fax (479) 621-0838

and

James Keever, M.D., J.D.
Arkansas Bar No. 2005176
2801 Richmond Road, # 57
Texarkana, Texas 75503
Telephone: (903) 793-5316
Telecopier: (903) 642-0066
kukeevs@keever.cc

CERTIFICATE OF SERVICE

I, Ken Swindle, hereby certify that I have served a copy of this document upon Steve Lisle, attorney for Defendants, by facsimile, on this 26th day of September, 2012.

Ken Swindle

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS
CIVIL DIVISION

SUE POFF	)	PLAINTIFF
	)	
v.	)	No. CV 12-261-4
	)	
JAMES P. ELKINS, M.D. and JAMES P. ELKINS, M.D., P.A.	)	DEFENDANTS

DEFENDANTS' AMENDED RESPONSE TO PLAINTIFF'S 6/7/12 SET OF REQUESTS FOR ADMISSION

COME NOW the Defendants, James P. Elkins, M.D. and James Elkins, M.D., P.A., and for their Amended Response to Plaintiff's 6/7/12 Set of Requests for Admission, respectfully state as follows:

REQUEST FOR ADMISSION NO.1: Please admit that the outpatient surgery center where you performed the laser procedure on Sue Poff on January 22, 2009, was NOT accredited by the Accreditation Association for Ambulatory Health Care on January 22, 2009.

RESPONSE TO REQUEST FOR ADMISSION NO. 1: Denied.

REQUEST FOR ADMISSION NO. 2: Please admit that the outpatient surgery center where you performed the laser procedure on Sue Poff on January 22, 2009, was NOT accredited by any National Accreditation Body or Entity on January 22, 2009.

RESPONSE TO REQUEST FOR ADMISSION NO. 2: Denied.

REQUEST FOR ADMISSION NO. 3: Please admit that the outpatient surgery center where you performed the laser procedure on Sue Poff on January 22, 2009, was NOT licensed by the State of Arkansas Department of Health on January 22, 2009.

RESPONSE TO REQUEST FOR ADMISSION NO. 3: Admitted.

JAMES P. ELKINS, M.D. and JAMES P. ELKINS, M.D., P.A., Defendants.

By: _____

Stephen Lisle, AR Bar No. 94103
LISLE RUTLEDGE, P.A.
1458 Plaza Place, Suite 101
P. O. Box 7977
Springdale, AR 72766-7977
(479) 750-4444
(479) 751-6792 (facsimile)

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of August 2012, a true and correct copy of the foregoing has been forwarded by facsimile to 479-621-0838 and to 903-642-0066 and placed in the United States Mail, postage prepaid, and addressed to the following:

Ken Swindle
Swindle Law Firm
619 W. Persimmon Street
Rogers, AR 72756

James E. Keever
Attorney at Law
2801 Richmond Road, #57
Texarkana, TX 75503

_____
Stephen Lisle

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS
CIVIL DIVISION

SUE POFF	)	PLAINTIFF
	)	
v.	)	No. CV 12-261-4
	)	
JAMES P. ELKINS, M.D. and	)	
JAMES P. ELKINS, M.D., P.A.	)	DEFENDANTS

DEFENDANTS' AMENDED RESPONSE TO PLAINTIFF'S 6/7/12 INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS

COME NOW the Defendants, James P. Elkins, M.D. and James Elkins, M.D., P.A., and for their Amended Response to Plaintiff's 6/7/12 Interrogatories and Requests for Production of Documents, respectfully state as follows:

INTERROGATORY NO. 1: If the outpatient surgery center where you performed the laser procedure on Sue Poff on January 22, 2009, is or has ever been accredited by the Accreditation Association for Ambulatory Health Care, please state:

(a) the date when the surgery center was first accredited by the Accreditation Association for Ambulatory Health Care

(b) The (sic) date of any subsequent renewals of such accreditation, and

(c) The (sic) date(s) such accreditation was removed or revoked.

RESPONSE TO INTERROGATORY NO. 1:

(a) August 27, 2005

(b) Continuous coverage from August 27, 2005 to August 27, 2009

(c) Accreditation cancelled by Respondent on August 27, 2009

REQUEST FOR PRODUCTION NO. 1: Please provide Plaintiff's attorneys with copies of any and all documents relative to your responses to Interrogatory No. 1, above.

RESPONSE TO REQUEST FOR PRODUCTION NO. 1: Documents were previously provided to Plaintiff with Defendants' Amended Response to Plaintiff's 5/7/12 Interrogatories and Requests for Production of Documents.

INTERROGATORY NO. 2: If the outpatient surgery center where you performed the laser procedure on Sue Poff on January 22, 2009, is or ever was accredited by any National Accreditation Body or Entity, please state:

(a) The name of the entity(ies) that accredited the outpatient surgery center

(b) The inclusive dates of any accreditations of the outpatient surgery center, and

(c) If there were any revocations or relinquishing of accreditations, the reasons for those revocations or relinquishments.

RESPONSE TO INTERROGATORY NO. 2: Refer to Response to Interrogatory No. 1 above.

REQUEST FOR PRODUCTION NO. 2: Please provide Plaintiff's attorneys with copies of any and all documents relative to your responses to Interrogatory No.2, above.

RESPONSE TO REQUEST FOR PRODUCTION NO. 2: Refer to Response to Request for Production No. 1 above.

INTERROGATORY NO. 3: If the outpatient surgery center were you performed the laser procedure on Sue Poff on January 22, 2009, is or ever was licensed by the State of Arkansas Department of Health, please state:

(a) The inclusive dates of such licensing of the outpatient surgery center, and

(b) If there were any revocations or relinquishing of licensing, the reasons for those revocations or relinquishments.

RESPONSE TO INTERROGATORY NO. 3: The outpatient surgery center has not been licensed by the State of Arkansas Department of Health.

REQUEST FOR PRODUCTION NO. 3: Please provide Plaintiff's attorneys with copies of any and all documents relative to your responses to Interrogatory No. 3, above.

RESPONSE TO REQUEST FOR PRODUCTION NO. 3: Defendants do not possess any documents responsive to this request.

JAMES P. ELKINS, M.D. and JAMES P. ELKINS, M.D., P.A. Defendants,

By: _____

Stephen Lisle, AR Bar No. 94103
LISLE RUTLEDGE, P.A.
1458 Plaza Place, Suite 101
P. O. Box 7977
Springdale, AR 72766-7977
(479) 750-4444
(479) 751-6792 (facsimile)

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of August 2012, a true and correct copy of the foregoing has been forwarded by facsimile to 479-621-0838 and to 903-642-0066 and placed in the United States Mail, postage prepaid, and addressed to the following:

Ken Swindle
Swindle Law Firm
619 W. Persimmon Street
Rogers, AR 72756

James E. Keever
Attorney at Law
2801 Richmond Road, #57
Texarkana, TX 75503

Stephen Lisle

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS

SUE POFF	)	**PLAINTIFF**
	)	
v.	)	**NO. CV 12-261-4**
	)	
JAMES P. ELKINS, M.D., and JAMES P. ELKINS, M.D., P.A.	)	**DEFENDANTS**

PLAINTIFF'S 9/26/12 SET OF REQUESTS FOR ADMISSION TO DEFENDANT JAMES ELKINS, M.D. AND JAMES P. ELKINS, M.D., P.A.

Plaintiff by her attorney, propounds the following discovery requests to defendant to be answered in writing and signed under oath within thirty (30) days after service of said requests:

REQUEST FOR ADMISSION NO. 1: Attached as Exhibit No. 1 to these requests is a copy of The Arkansas Department of Heath Rules and Regulations for Hospitals and Related institutions in Arkansas, Sections 3(S), 4(A) and 39(A). Please admit that, under these regulations, there was a requirement for the outpatient surgery center where you performed a laser surgery or procedure on Sue Poff on January 22, 2009, to be licensed by the Arkansas Department of Health.

REQUEST FOR ADMISSION NO. 2: Please admit that Ms. Poff received sufficient sedation on January 22, 2009, to render Ms. Poff incapable of taking actions for self-preservation under emergency conditions without assistance from others.

REQUEST FOR ADMISSION NO. 3: Attached to these Requests for Admission as Exhibit No. 2 is a Consent Order between James Elkins, M.D. and the Arkansas Medical Board, signed and dated March 11, 2005. Please admit that the provisions of this Order were in effect on January 22, 2009.

Respectfully submitted,

Ken Swindle
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619 West Persimmon Street
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Tel. (479) 621-0120
Fax (479) 621-0838

and

James Keever, M.D., J.D.
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Telephone: (903) 793-5316
Telecopier: (903) 642-0066
kukeevs@keever.cc

CERTIFICATE OF SERVICE

I, Ken Swindle, hereby certify that I have served a copy of this document upon Steve Lisle, attorney for Defendants, by facsimile, on this 26th day of September, 2012.

Ken Swindle

BEFORE THE ARKANSAS STATE MEDICAL BOARD

IN THE MATTER OF: JAMES PHILLIP ELKINS, M.D.

CONSENT ORDER

On this 3rd day of February, 2005, comes on for hearing the matter of James Phillip Elkins, M.D. The Arkansas State Medical Board appeared by a quorum of its membership, together with its attorney, William H. Trice. James Phillip Elkins, M.D. appeared pro se. From the pleadings, testimony of the witnesses, evidence introduced, and agreement of the parties, the Board finds that:

1. James Phillip Elkins, M.D. is a licensed physician in the State of Arkansas under the provisions of the Medical Practices Act.

2. The Arkansas State Medical Board entered an Order and Notice of Hearing dated the 18th of October, 2004, alleging that James Phillip Elkins, M.D. had violated the Medical Practices Act, more specifically, ACA § 17-95-409(A)(2)(g), that is, he exhibited gross negligence and ignorant malpractice in the treatment of a patient identified in the hearing as "C.J."

3. The Order and Notice of Hearing of 18 October, 2004 scheduled a disciplinary hearing for the 2nd of December, 2004, but the matter was continued at the request of James Phillip Elkins, M.D. to the 3rd of February, 2005, at which time it proceeded to a hearing. The Board received testimony of the witnesses, evidence introduced, and the record was closed. Prior to the Board voting to determine whether or not there had been a violation of the Medical Practices Act, and imposing penalties or sanctions against James Phillip Elkins, M.D., Dr. Elkins presented an offer to the Arkansas State Medical Board, pursuant to ACA § 25-15-208(b) of the Administrative Procedure Act, as follows:

A. The Arkansas State Medical Board would continue the hearing until the April 2005 meeting, prior to voting on whether there had been a violation of the Medical Practices Act, and what sanctions to impose.

B. At the April 2005 meeting, James Phillip Elkins, M.D. will present to the Board for the Board's approval and consideration, the following:

(i). A method for the Board to evaluate his surgical facility and the equipment contained therein to determine whether it was adequate and safe to perform the procedures that

setting.

(ii). A method for the Arkansas State Medical Board to evaluate his surgical skills, to include both his diagnostic skills and including what surgical procedures to perform on a patient. and an evaluation of his performance of the surgical procedures.

(iii). A method for the Arkansas State Medical Board to evaluate and proctor his ongoing surgical procedures, to include his plan for surgery and the outcomes of complications of the surgery.

C. Until such time as James Phillip Elkins, M.D. submits to the Board and the Board approves of a surgeon skilled in the surgical procedures that he is going to proctor, and said proctoring surgeon agrees to preapprove the surgical procedures to be performed on a patient by James Phillip Elkins, M.D., then review the outcome of the surgery and submit reports to the Board on every surgical procedure until the April 2005 meeting, then James Phillip Elkins, M.D. will refrain from performing any surgical procedures.

D. James Phillip Elkins, M.D. will refrain from performing any surgical procedures unless they are performed in a hospital or outpatient surgery center licensed or approved by the Arkansas Department of Health pending further Orders of the Board.

4. Pursuant to ACA § 25-15-208(B) of the Administrative Procedure Act, the Arkansas State Medical Board accepts the offer of James Phillip Elkins, M.D.

WHEREFORE, it is considered, ordered, and adjudged that the agreement of the parties stated in Paragraphs 3 and 4 above is fair and equitable, and protects the citizens of Arkansas and the rights of James Phillip Elkins, M.D.

IT IS SO ORDERED.

ARKANSAS STATE MEDICAL BOARD

W. Ray Jouett

W. RAY JOUETT, M.D., CHAIRMAN

3-11-05

DATE

Approved as to Form:

William H. Trice, III
Attorney for the Arkansas State Medical Board

James Phillip Elkins MD

James Phillip Elkins, M.D.

RECEIVED
A.S.M.B.
2005 MR -7 PM 12:19

From: Steve Lisle [mailto:slisle@lislerutledge.com]
Sent: Monday, September 24, 2012 2:08 PM
To: 'Jim Keever'; Ken Swindle
Subject: Poff v. Elkins

Jim and Ken,

You have both mentioned the 2005 Consent Order and its potential bearing on this case. As you can see from the attached Board Minutes, Dr. Elkins was monitored for a short time following the entry of the order. During this time, he continued to perform procedures in his office with a proctor present. These procedure were performed under supervision of the Board and took place in Dr. Elkins's office, which was not required to be licensed by the Ark. Dept. of Health. As of 2/2006, he was released from all monitoring by the Board. Therefore, the 2005 Consent Judgment and the Arkansas Dept. of Health licensure of his clinic is not relevant to this case.

Steve Lisle

Lisle Rutledge P.A.

P. O. Box 7977

Springdale AR 72766-7977

(479) 750-4444

(479) 751-6792 fax

AFFIDAVIT

1. My name is Sue Poff.
2. I am over twenty-one years of age and am competent to make this affidavit.
3. My assumption in January of 2009 was that the Gynecology and Cosmetic Surgery Centre in Rogers, Arkansas, was a fully accredited ambulatory surgery center and licensed by the State of Arkansas.
4. Had I been informed that the Gynecology and Cosmetic Surgery Centre in Rogers, Arkansas, was NOT a fully accredited ambulatory surgery center and licensed by the State of Arkansas, I would not have consented to have my laser surgery by James Elkins, M.D., performed on me at that facility on January 22, 2009.

FURTHER THE AFFIANT SAYETH NOT.

Sue Poff

STATE OF ARKANSAS)
)ss.
COUNTY OF Pulaski)

Subscribed and sworn to before me, the undersigned Notary Public, this 22 day of June, 2012.

Notary Public

My Commission Expires:

11/20/2021

STACYI WESOLOWSKI
PULASKI COUNTY
NOTARY PUBLIC - ARKANSAS
My Commission Expires Nov. 20, 2021
Commission # 12384924

Medical Report

1. My name is Kris Shewmake, M.D.
2. I am in the practice of plastic and cosmetic surgery on a full time basis.
3. I have been asked by James E. Keever, M.D., J.D., to review the care delivered to Sue Poff by James Elkins, MD. during a D.O.T. laser treatment on January 22, 2009. In performing this review I have been provided and have relied upon the following records relative to Ms. Poff:
   a. Clinic Records from Dr. Elkins.
   b. Records from various physicians who have seen Ms. Poff since January 22, 2009.
   c. Various photographs of Ms. Poff.
   d. The deposition of Dr. Elkins.
   e. The deposition of Ms. Poff.
   f. Materials from "Core Dimension Training," September 15, 2008.
   g. DEKA SmartXide Clinical User Manual, Version 2.5, September 2008.
   h. Affidavits of Ms. Poff, Lisa Jones and Jill Eades.
   i. Dr. Elkins' office records on Jill Eades.
   j. Ms.Poff's check of 1/22/09.
   k. Elkins office billing records.
   l. 1/19/09 prescriptions for Ms. Poff.
   m. ADH certified list of ambulatory surgery centers as of 11/14/11.
   n. ADH R/R for Hospitals and related Institutions
   o. Consent Order between Dr. Elkins and the AMB dated 3/11/05.
   p. Eclipsemed LTD business invoices.
   q. The medical report of Dr. Jay Burns.
   r. The deposition of Tom O'Brien
4. I have also been supplied, by Dr. Keever, the following definitions, and whenever I use the following terms in this report such usage incorporates these definitions:

a. "Standard of care" means the degree of skill and learning ordinarily possessed and used with reasonable care by members of the profession of the medical care provider in good standing, engaged in the same type of practice or specialty in the locality in which he or she practices or in a similar community. Negligence is a failure to meet this standard.

b. "Proximate cause," means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be conduct that breaches the standard of care.

5. My familiarity with the standard of care in issue, that is, the degree of skill and learning ordinarily possessed and used with reasonable care by a cosmetic surgeon utilizing fractional laser treatment (D.E.K.A. SmartXide D.O.T. treatment in this case) in Rogers, Arkansas, or a similar community is established by the following:

   a. Attached to this affidavit as Exhibit No. 1 is my curriculum vitae, explaining my educational and professional practice background.

   b. I have experience with cosmetic lasers, including fractional CO2 lasers, similar to the laser used by Dr. Elkins on Ms. Poff.

   c. I have practiced cosmetic surgery, including cosmetic laser treatments, for over 20 years in Little Rock, Arkansas. This includes six years as the chief of Plastic Surgery at UAMS.

   d. I am familiar with a number of cosmetic surgeons in the NorthWest Arkansas area of Fayetteville and Bentonville, and am familiar with their practices and the applicable standard of care. In addition, in 2010 I operated an outreach clinic and performed cosmetic surgery in Bentonville, Arkansas.

   e. In my practice I routinely utilize a non-hospital outpatient setting for cosmetic surgery, including the use of a fractional CO2 laser, which

is a setting virtually identical to that used by Dr. Elkins in his laser procedure on Ms. Poff.

f. I understand that Arkansas does not recognize the concept of a National Standard of Care, *per se*. However, I believe that paragraphs (a-e), above, give the basis for and support my conclusion that the degree of skill and learning expected to be possessed and used with reasonable care by a cosmetic surgeon under the circumstances of this case would be the same for any locality or community in the United States in which a cosmetic surgeon is utilizing a fractional laser in an out patient setting, and I am very familiar with that standard.

6. I have been asked to comment on the following issues in this case:
   a. Did Dr. Elkins meet the standard of care for obtaining informed consent from Ms. Poff for his 1/22/09 D.O.T. laser treatment?
   b. Did Dr. Elkins meet the standard of care in the performance of his 1/22/09 D.O.T. laser treatment on Ms. Poff?
   c. Were any failures to meet the standard of care by Dr. Elkins a proximate cause of an injury to Ms. Poff?

DID DR. ELKINS MEET THE STANDARD IN OBTAINING THE INFORMED CONSENT OF MS. POFF?

7. I have also been informed by Dr. Keever that in Arkansas the standard of care when obtaining informed consent is that the medical care provider must supply that type of information regarding the treatment, procedure, or surgery as would customarily have been given to a patient, in the position of the patient, by other medical providers with similar training and experience at the time of the treatment, procedure or surgery in the locality in which the medical care provider practices or in a similar locality.

8. There are some obvious discrepancies in the stories of Dr. Elkins and Ms. Poff regarding the pre-operative counseling.
9. On pages 24 through 28 of her deposition, Ms. Poff states that Dr. Elkins told her this would be a minor procedure associated with essentially no down time, and was discussed only over the telephone several days before the procedure. Ms. Poff further states that she had taken preoperative sedation before signing the operative permit.
10. Dr. Elkins states on page 97 of his deposition that Ms. Poff came into his office the day before the procedure (corroborated by an office note dated 1/21/09) and that there was a lengthy discussion, including a discussion of possible complications, and that Ms. Poff asked him to be "aggressive."
11. If one believes Dr. Elkins' version, appropriate informed consent as to the information relative to the proposed procedure may have been obtained. If one believes Ms. Poff, appropriate informed consent was absolutely not obtained.
12. The standard of care in this case, considering the settings chosen, would have included providing the information that using those settings would, at the very least, result in a prolonged recovery time, and that the settings chosen would have a high chance, in fact, a likely chance, of resulting in significant deep burns and permanent scarring:
13. The following leads me to the opinion that Dr. Elkins did not offer to Ms. Poff the information that would be considered usual for a cosmetic surgeon in Rogers, Arkansas, or any other out patient location, to obtain informed consent for the procedure that he performed.
    a. The billing records, showing a payment of $2,000.00 on 1/22/09 are inconsistent with the office note, which indicates a payment of $2,000.00 on 1/21/09.
    b. Ms. Poff has produced a cancelled check for $700.00, dated 1/22/09, which is consistent with both her memory and the billing records of Dr. Elkins.

c. There are pharmacy records showing that preoperative sedative medication was ordered by Dr. Elkins on 1/19/09, or two days before the office visit he describes.

d. There are affidavits from two witnesses, Lisa Jones and Jill Eades, stating that Ms. Poff was in Heber Springs, Arkansas, on 1/21/09, and I understand that both witnesses have testified that Ms. Poff did not travel to Rogers, Arkansas, until 1/22/09.

e. Ms. Poff testified in her deposition that she did not wish to have the dark lesion (referred to in the depositions as a flat mole) on her face removed, and there is nothing in the records or the consent form indicating any discussion by Dr. Elkins about that lesion, which obviously was removed during the 1/22/09 procedure.

f. All of the above leads me to the opinion that Ms. Poff did not receive the information necessary to give informed consent in this case, and that Dr. Elkins did not meet the standard of care in this regard.

g. It is my further opinion that if Dr. Elkins had truly given complete information on the settings that he chose to use, which were exceedingly high in relationship to the manufacturer's guidelines (as will be discussed below) and would carry with them not only an absolutely foreseeable marked increase in the time for recovery, but also a significant chance of serious burning and permanent scarring, Mrs. Poff or any reasonable patient would have refused such treatment.

h. It is also my opinion that the failure to meet the standard of care in obtaining informed consent in this case was a proximate result of unnecessary pain and suffering, and permanent scarring and disfigurement in Ms. Poff.

14. Dr. Keever has also asked me to address a secondary issue regarding the standard of care relating to whether or not the ambulatory surgical center of Dr. Elkins' was licensed by the State of Arkansas at the time of

Ms. Poff's surgery, and, if not, whether disclosure of such lack of licensing would have been required in order to meet the standard of care vis-à-vis giving adequate information as discussed in paragraph 7, above. The short answer is that, IF Dr.Elkins' surgery center were NOT licensed, AND if there were a requirement for such licensing, I am of the opinion that knowledge of such information would have a bearing on whether or not the average patient would consent to have surgery by Dr. Elkins. Under those circumstances, it would be my opinion that Dr. Elkins would have a duty to his patients, in this case, Ms. Poff, to disclose that his center were not licensed.

15. The Rules and Regulations for Hospitals and Related Institutions in Arkansas of the Arkansas Department of Health, Section 3(g) defines an Ambulatory Surgery Center as any facility in which surgical services, other than minor dental surgery, are offered which require the use of general or intravenous anesthetics and/or render the patient incapable of taking actions for self-preservation under emergency conditions without assistance from others, and where, in the opinion of the attending physician, hospitalization is not necessary.

16. Ms. Poff received the following medications prior to and during her surgery:
    a. Ativan 2 mg and Compazine 10 mg pre-operatively at 12:30 p.m
    b. Intravenous sedation over a period of from 1:45 p.m. to 3 p.m., consisting of:
        i. Demerol, two 50 mg doses between 1:50 p.m. and 2 p.m.
        ii. Valium, two 5 mg doses between 1:50 p.m. and 2 p.m. and an additional 5 mg at 2:15 p.m.
        iii. Brevitol, a total of 20 cc given between 2:30 p.m. and 3 p.m.
        iv. Compazine, an additional 10 mg given at 1:50 p.m.

17. It is my opinion that Ms. Poff had more than enough sedation to prevent her from "taking actions for self-preservation under emergency conditions without assistance from others," an opinion that was

confirmed by the Chief of Anesthesiology of Baptist health Medical Center, Little Rock. I would thus believe that Dr. Elkins' surgery center would fall within the ambit of the Rules and Regulations of the Department of Health. Those same Rules and Regulations state, In Section 4(A) the no outpatient surgery center may be established, conducted, or maintained in the State without first obtaining a license.

18. In addition, it would appear from the 2005 consent order from the Arkansas Medical Board that Dr. Elkins was under an obligation to refrain from practicing in an unlicensed center in order to meet the orders of that Board.
19. Ms. Poff has offered an affidavit stating that she had no knowledge about the licensure status of the clinic, and that if she had known the clinic were not licensed, she would not have consented to the surgery.
20. Accordingly, as stated above, if Dr. Elkins' surgery center were not licensed on 1/22/09, not only would he apparently have been in defiance of the Rules and Regulations of the Arkansas Health Department and the Order of the Arkansas Medical Board, but he would have had a duty to so inform Ms. Poff in order to meet the requirements for obtaining informed consent for his proposed procedure.

DID DR. ELKINS MEET THE STANDARD OF CARE IN CHOOSING THE SETTINGS FOR THE D.O.T. LASER TREATMENT OF MS. POFF ON 1/22/09?

21. The standard of care under the circumstances of this case would be for any doctor utilizing a fractional CO2 laser to be familiar with the properties of that particular laser, including the power, dwell time, and spacing settings that had been determined to be adjudged to fall within the safe range of use. At the very minimum this would require a familiarity with the manufacturer's clinical use manual. The doctor would further be required to understand that, in a fractional CO2 laser, there is virtually no way for the doctor to monitor the amount of energy delivered

to his patient from visual perceptions. Unlike an ablative laser procedure, where there is a certain amount of art and individual doctor talent involved in determining the correct amount of energy delivered, with the fractional CO2 laser the energy is delivered through and beneath what appears to be intact skin, and the safe calibration of that energy is very much dependent upon reliance on the science of the physics of lasers and the calibration of the particular laser unit employed.

22. The literature provided to Dr. Elkins from the manufacturer of the laser unit was clear in what the company regarded as the recommended settings for the laser treatment. The settings chosen by Dr. Elkins were significantly higher than anything recommended for treating either lax skin or wrinkles, and would foreseeably have caused significant thermal damage far beyond what was necessary for the purposes of this procedure.

23. Dr. Elkins explanation that he choice to use high settings was predicated upon Ms. Poff desire for him to be "aggressive" and upon his experience as a skin peel cosmetic surgeon. These factors simply do justify the settings used, particularly on the chest. First of all, as discussed above, I find no evidence that there was a discussion of just what "aggressive" laser use would have certainly meant in terms of the recovery time, and, as discussed below, the settings chosen by Dr. Elkins, particularly for the chest and neck area, were far beyond what even an "aggressive" approach would have allowed. Secondly, Dr. Elkins states on page 79 of his deposition that he usually would treat three or four patients a day when he rented the laser machine, and the Eclipsmed records show that he had access to that laser on only three previous days prior to its use on Ms. Poff. This would mean that, at most, he had only treated no more than 8-12 patients in his facility prior to Ms. Poff, with limited follow-up. I would conclude that he was not particularly experienced in the use of this laser. Finally, experience in

chemical peels is simply inapplicable to the use of a fractional CO2 laser.

24. My understanding from Dr. Elkins' discovery responses and deposition testimony is that the complete extent of his training on the fractional CO2 laser was a one day, proprietary, seminar on September 15, 2008, sponsored by Eclipsemed, LTD. While many, if not most, surgeons, including myself, do gather information from equipment representatives, one has to understand that this is not the most objective source of information. A better source would be a peer reviewed CME course, where faculty can instruct on the principles of the laser, and compare various products. It is my opinion that depending solely on proprietary information prior to using the SmartXide laser, as occurred in this case, would not give the learning expected of a medical care provider to use a medical laser on a patient and, would in itself, be below the standard of care.
25. On pages 88 and 89 of his deposition, Dr. Elkins agreed with the proposition that the chest area skin is not only thinner than the face, but also has a less robust blood supply. This fact is emphasized in the D.E.K.A. Clinical User Manual for the SmartXide laser in section 5.3.1.9, where it is recommended, when treating the chest and decolletage area, that the fluence be decreased by at least 30% relative to use on the face. This is accomplished by decreasing both power and dwell time.
26. If one were to use the recommended settings from the Clinical User Manual for mild skin aging, which is what would have been appropriate for Ms. Poff in the chest area (as seen on the preoperative photographs), this would have been a power of no more than 20 watts (decreased from 30 watts for the face), a dwell time of 700 microseconds (decreased from1000 microseconds for the face), and a spacing of 1200 micrometers.
27. Dr. Elkins, instead, chose to treat the chest area with significantly higher settings than those recommended by either of the above two sources.

28. Dr. Elkins actually recorded two different settings in his records. The first, from the treatment log, shows 25 watts of power, a dwell time of 1200 microseconds and a spacing of 450 micrometers. This would have delivered almost 6 times the fluence, or energy per unit area, recommended by the Clinical User Manual (4.6 J/cm2 versus 0.8 J/ cm2).
29. Dr. Elkins recorded a second set of settings in his dictated office notes, showing a higher energy setting of 30W, with 1800 microseconds of dwell time and a spacing of 400 micron. This would give an even higher fluence calculation of 9.8J / cm2, or some twelve times the energy recommended by the clinical user manual.
30. Even if one accepted that the power settings in the Core Dimension Training materials from the proprietary seminar were proper (that would have been a power of 20 watts (decreased from 25 watts for the face), a dwell time of 300 microseconds (decreased from 400 microseconds for the face) and a spacing of 400 micrometers for no more than1.65 J / cm2 fluence), Dr. Elkins chose settings that would have delivered some 3 to 6 times the fluence recommended even by these slightly more aggressive guidelines, depending upon whether or not the treatment log or dictated notes actually represented the settings chosen.
31. Regardless of the guidelines used by Dr. Elkins, the settings chosen by Dr. Elkins were well outside the range that would have been chosen by a cosmetic surgeon using the learning that should be possessed and used with reasonable care by a cosmetic surgeon anywhere in the United States, including Rogers, Arkansas, using the SmartXide D.O.T. laser. It is therefore my opinion that the settings chosen by Dr. Elkins failed to meet the standard of care and had, as a foreseeable result, the serious burning and permanent scarring suffered by Ms. Poff.

WAS THE LASER UNIT USED BY DR. ELKINS FUNCTIONING PROPERLY?

32. I have also been asked by Dr. Keever to comment upon the possibility that the laser unit used on Ms. Poff had malfunctioned, causing the injury.
33. Dr. Elkins stated in his deposition that he believed the laser unit used on Ms. Poff was functioning properly.
34. Mr. Tom O'Brien, CEO of the company that leased the laser unit to Dr. Elkins, stated that there is nothing in his records to indicate that the laser unit used on Ms. Poff had malfunctioned. According to Mr. O'Brien, that same unit had been leased to other physicians for use before and after the procedure on Ms. Poff, and there had been no reports of any problems.
35. It would therefore be my opinion that the laser unit used on Ms. Poff functioned as intended, and that the injury to Ms. Poff was proximately caused by the excessive settings chosen by Dr. Elkins.

FURTHER OPINIONS AND STATEMENTS

36. It is my further opinion that Dr. Elkins knew, or should have known, that his settings carried the likelihood of injury to Ms. Poff, but proceeded with his treatment plan in spite of such knowledge.
18. All of the opinions expressed by me in this report are based on at least a reasonable degree of medical probability.
19. I reserve the right to amend or supplement my opinion in the future, based on the receipt of additional information, additional records, or deposition testimony.

By my signature below I certify that my opinions in this medical report are based upon my education, training and experience, as indicated by my curriculum vitae and the statements in this report, as well as the materials reviewed by me specifically for this report. Each of my opinions is also based upon at least a reasonable degree of medical probability, which means that each opinion is more likely than not a correct conclusion based upon the facts presented.

Signed this 7 day of August, 2012.

Kris Shewmake, M.D.

Agency # 007.05

Rules and Regulations For Hospitals

and

Related Institutions in Arkansas

ARKANSAS DEPARTMENT OF HEALTH

2007

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APPENDIX

SECTION 3: DEFINITIONS.

The word shall as used in these regulations means mandatory.

A. Administrator means the person responsible for the management of any facility requiring licensure under these regulations.

B. Department means the Arkansas Department of Health.

C. Licensee means the person to whom a license is issued for the purpose of operating the institution described in the application for licensure, who shall be responsible for maintaining approved standards for the institution of any state, county or local government unit and any division, board or agency thereof.

D. State Health Officer means the Secretary of the State Board of Health.

The following categories of facilities (G-Q), as defined herein, established for the purpose of providing inpatient diagnostic care and treatment for more than 24 hours for two or more persons not related to the proprietor, may not be conducted or maintained in this state without being licensed.

E. Alcohol/Drug Abuse Inpatient Treatment Centers means a facility or distinct part of a facility, in which services are provided for the diagnosis, treatment and rehabilitation of alcohol and drug abuse; a facility which provides only counseling and room and board is not included in this definition.

1. For the purpose of these regulations an alcohol/drug abuse treatment center is a facility (either licensed as a hospital or an established diagnostic unit of an acute psychiatric or rehabilitation hospital) or a free-standing unit in which services are provided over a continuous period, exceeding 24 hours for two or more persons not related to the proprietor for the diagnosis, treatment and rehabilitation of alcohol and drug abuse.

2. Alcohol and drug abuse inpatient center regulations are to be applied in conjunction with the Rules and Regulations for Hospitals and Related Institutions in Arkansas where applicable. (See Section 45, Alcohol/Drug Abuse Inpatient Treatment Centers.)

3. The requirements established for alcohol/drug abuse inpatient treatment centers shall not be construed as changes in the requirements already established for licensing of any health care facility as delineated in these regulations.

F. Critical Access Hospital (CAH) means a hospital located in a rural area that is:

1. Located more than a 35 mile drive (or, in the case of mountainous terrain or in areas with only secondary roads available, a 15 mile drive) from a hospital; or

2. Provides 24 hour emergency care services as determined necessary for ensuring access to emergency care in each area served by a CAH;

3. Provides staffing according to Rules and Regulations for Hospitals and Related Institutions in Arkansas; and

4. Meets Centers for Medicare and Medicaid Services (CMS) Conditions of Participation for Critical Access Hospitals; or

5. Was operating as a licensed Critical Access Hospital in Arkansas as of April 2007.

G. When a hospital converts to a CAH and then at a later date decides to return to a full service with no limits on bed or length of stay, the hospital shall be surveyed using the Life Safety Code under which the hospital entered into the CAH program. The hospital shall be able to show that it has continued to be licensed and complied consistently with the Life Safety Code as a CAH.

H. Emergency Services Facility means a facility that is licensed only for emergency services. The Department is empowered to license hospitals which have discontinued inpatient services to continue to provide emergency services if there is no other hospital emergency service in the community Ark. Code Ann. § 20-9-218.

I. General Hospital means any facility used for the purpose of providing short-term inpatient diagnostic care and treatment, including general medical care, surgical care, obstetrical care and specialized services or specialized treatment.

J. Infirmary means any facility used for the purpose of offering temporary medical care and/or treatment exclusively for persons residing on a designated premise, e.g., schools, reformatories, prisons, etc. and where the persons are kept for 24 hours or more.

K. Institution means, for the purpose of these regulations, a facility which requires a license.

L. Maternity and General Medical Care Hospital means any facility limited to providing short-term inpatient obstetrical and general medical diagnostic care and treatment.

M. Maternity Hospital means any facility limited to providing short-term inpatient obstetrical diagnostic care and treatment.

N. Psychiatric Hospital means any facility, or a distinct part of a facility, used for the purpose of providing inpatient diagnostic care and treatment for persons having mental disorders.

O. Recuperation Center means any facility or distinct part of a facility, which includes inpatient beds with an organized Medical Staff, and with medical services that include physician services and continuous nursing services to provide treatment for patients who are not in an acute phase of illness but who currently require primarily convalescent or restorative services (usually post-acute hospital care of relatively short duration). A facility that furnishes primarily domiciliary care is not within this definition.

P. Rehabilitation Facility means, for the purpose of these regulations, an inpatient care facility or a distinct part of a facility, which provides rehabilitation services for two or more disabled persons not related to the proprietor, for more than 24 hours through an integrated program of medical and other restorative services. A disabled person shall be

considered to be an individual who has a physical or mental condition which, if not treated, will probably result in limiting the performance or activity of the person to the extent of constituting a substantial physical, mental or vocational handicap.

Q. Surgery and General Medical Care Hospital means any facility limited to providing short-term inpatient surgical and general medical diagnostic care and treatment.

The following categories (Q-R) of outpatient facilities may not be conducted or maintained in this state without being licensed:

R. Outpatient Psychiatric Center means a facility in which psychiatric services are offered for a period of 4 to 16 hours a day, and where, in the opinion of the attending psychiatrist, hospitalization as defined in the present licensure law is not necessary. This definition shall not include Community Mental Health Clinics and Centers, as they now exist. The requirements established for outpatient psychiatric centers shall not be construed as changes in the requirements already established for the licensing of any health care facility, as delineated in these Regulations.

S. Outpatient Surgery Center (Ambulatory Surgery Center) means any facility in which surgical services, other than minor dental surgery, are offered which require the use of general or intravenous anesthetics and/or render the patient incapable of taking actions for self-preservation under emergency conditions without assistance from others, and where, in the opinion of the attending physician, hospitalization is not necessary.

T. Observation is a designated patient status as opposed to a designated area. Patients in observation status are those patients requiring periodic monitoring and assessment necessary to evaluate the patient's condition or to determine the need for possible admission to the hospital in an inpatient status. Usually observation status shall be for 48 hours or less.

SECTION 4: LICENSURE AND CODES.

A. Necessity for License. No hospital or distinct part, recuperation center or distinct part, infirmary, rehabilitation facility or distinct part, outpatient surgery center, or alcohol/drug abuse inpatient treatment center or distinct part, outpatient psychiatric center or emergency services facility, as defined in Section 3, Definitions, may be established, conducted or maintained in the State without first obtaining a license, with the exception of the following:

1. A facility operated by the Federal Government; and

2. A First Aid Station.

B. Application for License.

1. An applicant shall file applications under oath with the Department upon forms provided by Health Facility Services and shall pay annual license fee as indicated by Ark. Code Ann. §20-9-214.

2. These fees shall be paid into the State Treasury or refunded to the applicant if a license is denied. The application shall be signed by the owner, if an individual or partnership, or in the case of a corporation, by two of its officers, or in the case of a governmental unit, by the head of the governmental department having jurisdiction over it. The application shall set forth the full name and address of the institution for which license is sought and such additional information as the Department may require, including affirmative evidence of ability to comply with such reasonable standards, rules and regulations as may be lawfully prescribed hereunder. The application for annual license renewal shall be postmarked no later than January 2 of the year for which the license is issued. The license applicant for an existing institution postmarked after the date shall be subject to a penalty of one dollar per day for each day and every day after January 2.

3. A license issued hereunder shall be effective on a calendar year basis and shall expire on December 31 of each calendar year. A license shall be issued only for the premises and persons in the application and shall not be transferable. If the facility changes ownership the license shall expire. The license shall be posted in a conspicuous place on the licensed premises. A license issued under previous regulations shall be effective through the period for which it was issued. The adequacy of cooperative agreements between hospitals in terms of service provided by each hospital and the type of licenses issued to each hospital shall be determined by the Arkansas Department of Health. .

C. Facility Change of Ownership.

1. It shall be the responsibility of the licensed entity to notify Health Facility Services in writing at least 30 days prior to the effective date of change of ownership.

SECTION 39: AMBULATORY SURGERY CENTERS.

A. General. Any facility in which surgical services, other than minor dental surgery, are offered which require the use of anesthesia, that renders the patient unable to be responsible for their actions, and where, in the opinion of the attending physician, hospitalization is unnecessary, shall be considered ambulatory surgery centers and shall conform with the following sections:

1. Section 3, Definitions;
2. Section 4, Licensure and Codes;
3. Section 5, Governing Body;
4. Section 6, Medical Staff;
5. Section 7, General Administration;
6. Section 11, Patient Care Service (Nursing);
7. Section 12, Medications;
8. Section 14, Health Information Services;
9. Section 16, Pharmacy;
10. Section 18, Infection Control;
11. Section 19 A, C.2 and F, Laboratory;
12. Section 20, Radiological Services;
13. Section 26, Specialized Services: Surgical Services;
14. Section 28, Specialized Services: Outpatient Surgical Services;
15. Section 29, Specialized Services: Anesthesia Services;
16. Section 34, Specialized Services: Central Sterilization and Supply;

Exclude Sections:

17. Section 14, Health Information Services, Obstetrical Records;
18. Section 14, Health Information Services, Newborn Records;