ORIGINAL TRANSCRIPT

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS
DIVISION 4

SUE POFF — PLAINTIFF

CASE NO: CIV-2012-0261-4

v.

JAMES P. ELKINS, M.D., and
JAMES P. ELKINS, M.D., P.A. — DEFENDANTS

RECEIVED
SUPREME COURT OF APPEALS
CLERK'S OFFICE
2013 OCT 17 P 2:06
LESLIE W. STEEN, CLERK

APPEAL RECORD
VOLUME 1 OF 5
PAGES 1 THROUGH 300

Proceedings before the Honorable John R. Scott, Circuit Judge, Division IV, 19th Judicial District West, the Judgment being filed for record on the 21st day of March, 2013.

FILED
2013 OCT 11 PM 1 46
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR

THERESE OLENBERGER
(479) 271-1022

ORIGINAL TRANSCRIPT

I N D E X

Complaint
Filed 2/15/12 ---------- 5
Summons/Subpoena Sheet
Appearing ---------- 12
Answer to Complaint
Filed 3/26/12 ---------- 13
Notice of Pretrial Conference
Filed 3/27/12 ---------- 17
Proof of Service
Filed 4/2/12 ---------- 18
Motion and Brief to Strike
Filed 4/12/12 ---------- 23
Response to Motion to Strike
Filed 4/17/12 ---------- 26
Plaintiff's Reply to Defendants'
Response to Plaintiff's Motion to Strike
Filed 4/20/12 ---------- 28
Plaintiff's Second Motion and
Brief to Strike
Filed 4/23/12 ---------- 31
Requests for Admissions to Defendant,
James Elkins, M.D., P.A.
Filed 4/23/12 ---------- 33
Requests for Admissions to Defendant,
James Elkins, M.D.
Filed 4/23/12 ---------- 35
Notice of Hearing on Plaintiff's
Motion to Strike
Filed 4/27/13 ---------- 37
Response to Second Motion to Strike
Filed 4/27/13 ---------- 38
Plaintiff's Reply to Defendants'
Response to Plaintiff's Second
Motion to Strike
Filed 5/1/12 ---------- 40
Response to Plaintiff's Motion for
Sanctions
Filed 5/2/12 ---------- 43
Motion and Brief for Sanctions
Filed 5/14/12 ---------- 64
Plaintiff's Motion and Brief for
Requests for Admissions to be Answered, or,
In the alternative, to be Deemed
Admitted, and for Expenses incurred in
Relation to the Motion
Filed 5/22/12 ---------- 69
Notice of Hearing on Plaintiff's

Motion for Requests for Admissions to be Answered, or, in the Alternative, to be Deemed Admitted, and for Expenses Incurred in Relation to the Motion
Filed 5/23/12 ---------- 76
Response to Plaintiff's Motion and Brief for Requests for Admissions to be Answered, or, in the Alternative, to be Deemed Admitted, and for Expenses Incurred in Relation to the Motion
Filed 5/25/12 ---------- 77
Order Setting Jury Trial
Filed 6/4/12 ---------- 88
Amended Order Setting Jury Trial
Filed 6/5/12 ---------- 91
Defendants' Answers to Plaintiff's 5/7/12 Requests for Admission
Filed 6/5/12 ---------- 94
Order
Filed 6/11/12 ---------- 97
Notice of Hearing on Defendants' Objections to Plaintiff's May 7, 2012, Requests for Admissions
Filed 6/21/12 ---------- 98
Defendants' Response to Plaintiff's 6/7/12 Set of Requests for Admission
Filed 7/6/12 ---------- 99
Defendants' Motion for Limitation of Discovery
Filed 7/6/12 ---------- 101
Request for a Bifurcated Proceeding
Filed 7/6/12 ---------- 106
Notice of Hearing on Defendants' Request for a Bifurcated Proceeding and Motion for Limitation of Discovery
Filed 7/11/12 ---------- 108
Plaintiff's Response to Defendants' Motion to Limit Discovery
Filed 7/20/12 ---------- 109
Plaintiff's Response to Defendants' Motion to Bifurcate
Filed 7/20/12 ---------- 130
Brief in Support of Plaintiff's Response to Defendants' Motion to Limit Discovery

Filed 7/20/12 ---------- 132
Order
Filed 8/2/12 ---------- 149
Order
Filed 8/3/12 ---------- 151
Defendants' Amended Answers to
Plaintiff's 5/7/12 Requests for
Admission
Filed 8/8/12 ---------- 153
Plaintiff's 8/8/12 Disclosure of
Testifying Expert
Filed 8/8/12 ---------- 155
Plaintiff's 8/10/2012 Notice of Correction of
Scrivener's Errors in Disclosure of Expert
Witness Exchanged on 8/8/12
Filed 8/10/12 ---------- 177
Order
Filed 8/30/12 ---------- 179
Defendants' Amended Response to Plaintiff's
6/7/12 Set of Requests for Admissions
Filed 8/30/12 ---------- 180
Plaintiff's Motion for Leave of Court to
Propound Additional Discovery to
James P. Elkins, M.D.
Filed 9/27/12 ---------- 181
Defendants' Response to Plaintiff's
Motion for Leave of Court to Propound
Additional Discovery to James P.
Elkins, M.D.
Filed 10/3/12 ---------- 209
Plaintiff's Reply to Defendants' Response to
Plaintiff's Motion for Leave of Court to
Propound Additional Discovery to Defendant,
James P. Elkins, M.D.
Filed 10/4/12 ---------- 229
Order
Filed 10/9/12 ---------- 234
Motion for Leave of Court to
Conduct Discovery
Filed 11/7/12 ---------- 236
Notice of Hearing on Motion for
Leave to Conduct Discovery
Filed 11/16/12 ---------- 238
Reply to Plaintiff's Response to
Motion for Leave of Court to
Conduct Discovery
Filed 11/28/12 ---------- 239
Plaintiff's Response to Defendants'

Motion to Take Discovery
Filed 12/4/12 ---------- 249
Plaintiff's Motion for Expanded
Jury Pool and for Juror Questionnaire
Filed 12/5/12 ---------- 253
Plaintiff's Reply to Defendant's
Response to Plaintiff's Motion to Take
Second Deposition of Dr. Elkins
Filed 12/5/12 ---------- 263
Plaintiff's Brief in Support of
Reply to Defendants' Response to
Plaintiff's Motion to Take Second
Deposition of Dr. Elkins
Filed 12/5/12 ---------- 271
Order
Filed 12/11/12 ---------- 286
Plaintiff's Motion to Compel with
Brief in Support
Filed 12/31/12 ---------- 288
Response to Plaintiff's Motion to
Compel
Filed 1/7/13 ---------- 304
Plaintiff's Reply to Defendant's
Response to Plaintiff's Motion to
Compel
Filed 1/14/13 ---------- 330
Order
Filed 1/28/13 ---------- 342
Plaintiff's Motion to Preadmit
Trial Exhibits
Filed 2/4/13 ---------- 343
Plaintiff's Motion in Limine and
Brief in Support
Filed 2/4/13 ---------- 347
Plaintiff's First Amended Motion to
Preadmit Trial Exhibits
Filed 2/6/13 ---------- 355
Notice of Hearing on Plaintiff's
Motion to Pre-Admit Trial Exhibits
Filed 2/6/13 ---------- 359
Defendant's Motion in Limine
Filed 2/13/13 ---------- 360
Brief in Support of Defendant's
Motion in Limine
Filed 2/13/13 ---------- 363
Plaintiff's Response to Defendants'
Motion in Limine
Filed 2/19/13 ---------- 374

Defendants' Response to Plaintiff's
Motion to Pre-Admit Trial Exhibits
Filed 2/20/13 ---------- 382
Defendant's Response to Plaintiff's Motion in
Limine
Filed 2/20/13 ---------- 384
Defendants' Witness and Exhibit Lists
Filed 2/20/13 ---------- 386
Plaintiff's Motion and Brief to use
Itemized Verdict
Filed 2/22/13 ---------- 388
Plaintiff's Motion and Brief for
Punitive Damages-Qualified Jury
Filed 2/22/13 ---------- 392
Order on Plaintiff's Motion to
Pre-Admit Exhibits
Filed 3/5/13 ---------- 396
Order on Plaintiff's Motion for
Punitive Damages-Qualified Jury
Filed 3/5/13 ---------- 397
Order on Plaintiff's Motion in
Limine
Filed 3/5/13 ---------- 398
Order Regarding Defendants'
Motion in Limine
Filed 3/5/13 ---------- 402
Plaintiff's March 11, 2013,
Motion in Limine and Brief in
Support
Filed 3/11/13 ---------- 405
Brief in Support of Motion for
Directed Verdict
Filed 3/13/13 ---------- 411
Interrogatory No. 1
Filed 3/14/13 ---------- 415
Interrogatory No. 2
Filed 3/14/13 ---------- 416
Judgment
Filed 3/21/13 ---------- 417
Notice of Appeal
Filed 4/5/13 ---------- 420
Plaintiffs' Motion for Extension of
Time to Docket Record with the Clerk of the
Supreme Court
Filed 4/8/13 ---------- 422
Order to Extend Time to
File the Record
Filed 4/8/13 ---------- 427

ORIGINAL TRANSCRIPT

Plaintiff's Motion and Brief to Seal
Copy of the Record
Filed 9/16/13 ---------- 429
Order
Filed 9/26/13 ---------- 431
Order
Filed 9/26/13 ---------- 432

PROCEEDINGS HELD ON JUNE 4th, 2012:

Opening by Judge Scott ---------- 435
Discussions Regarding Rule 12 Objections ---------- 435
Argument by Mr. Lisle Regarding Motion for Sanctions -- 437
Pretrial Discussions ---------- 440
Discussions Regarding Discovery ---------- 441
Proceedings Ended ---------- 444

PROCEEDINGS HELD ON JULY 25TH, 2012:

Opening by Judge Scott ---------- 446
Argument by Mr. Lisle ---------- 447
Argument by Mr. Keever ---------- 454
Ruling by Judge Scott ---------- 467
Proceedings Ended ---------- 469

PROCEEDINGS HELD ON DECEMBER 11th, 2012:

Opening by Judge Scott ---------- 471
Discussions Regarding 2nd Deposition of Dr. Elkins ---- 472
Proceedings Ended ---------- 571

PROCEEDINGS HELD ON FEBRUARY 22nd, 2013:

Opening by Judge Scott ---------- 500
Argument by Mr. Keever as to his Motion to
Preadmit Exhibits ---------- 501
Ruling by Judge Scott ---------- 501
Argument by Mr. Keever as to his Motions in
Limine ---------- 501
Argument by Mr. Lisle ---------- 502
Ruling by Judge Scott ---------- 504
Ruling by Judge Scott ---------- 505
Argument by Mr. Lisle as to his Motions in
Limine ---------- 506
Argument by Mr. Keever ---------- 507
Argument by Mr. Lisle ---------- 509
Argument by Mr. Keever ---------- 511

Ruling by Judge Scott ---------- 514
Discussion as to pretrial issues ---------- 514
Discussion as to punitive damages phase of Trial ---------- 517

Proceedings end ---------- 519

PROCEEDINGS HELD ON MARCH 11th, 2013:

Opening by Judge Scott ---------- 521
Voir Dire Examination by Judge Scott ---------- 524
Voir Dire Examination by Mr. Keever ---------- 534
Voir Dire Examination by Mr. Lisle ---------- 581
Jurors Called ---------- 592
Jury Accepted ---------- 599
Instructions by Judge Scott ---------- 604
Opening Statements by Mr. Keever ---------- 613
Opening Statements by Mr. Lisle ---------- 626

TESTIMONY OF JAMES PHILLIP ELKINS

Direct Examination by Mr. Keever ---------- 650
Cross-Examination by Mr. Lisle ---------- 741
Redirect Examination by Mr. Keever ---------- 755

Proffer by Mr. Keever ---------- 639
Proffer by Mr. Keever ---------- 763
Proceedings Recessed ---------- 767

PROCEEDINGS HELD ON MARCH 12th, 2013:

Proceedings Commence ---------- 769

TESTIMONY OF KRIS SHEWMAKE

Direct Examination by Mr. Keever ---------- 770
Cross-Examination by Mr. Lisle ---------- 860
Redirect Examination by Mr. Keever ---------- 908

TESTIMONY OF JILL SOREY

Direct Examination by Mr. Keever ---------- 920
Cross-Examination by Mr. Lisle ---------- 922

TESTIMONY OF LISA JONES

Direct Examination by Mr. Keever ---------- 924

Cross-Examination by Mr. Lisle ---------- 934

TESTIMONY OF HORACE DANIEL ATWOOD

Direct Examination by Mr. Keever ---------- 937
Cross-Examination by Mr. Lisle ---------- 945
Redirect Examination by Mr. Keever ---------- 958
Voir Dire Examination by Mr. Lisle ---------- 963
Re-Cross-Examination by Mr. Lisle ---------- 964
Redirect Examination by Mr. Keever ---------- 967

TESTIMONY OF SUE POFF

Direct Examination by Mr. Keever ---------- 969
Cross-Examination by Mr. Lisle ---------- 1024

Proffer by Mr. Keever ---------- 1043
Proceedings Recessed ---------- 1044

PROCEEDINGS HELD ON MARCH 13th, 2013:

Proceedings Commenced ---------- 1046
Motion in Limine by Mr. Swindle ---------- 1050

TESTIMONY OF SUE POFF

Cross-Examination by Mr. Lisle Continued ----- 1052
Redirect Examination by Mr. Keever ---------- 1102
Re-Cross-Examination by Mr. Lisle ---------- 1108
Redirect Examination by Mr. Keever ---------- 1109

Mr. Keever Rests ---------- 1110
Motion for Directed Verdict by Mr. Lisle ---------- 1111
Response by Mr. Keever ---------- 1116
Response by Mr. Lisle ---------- 1119
Proffer by Mr. Keever ---------- 1121
Ruling by Judge Scott ---------- 1124
Mr. Lisle Rests ---------- 1125
Motion for Directed Verdict Renewed by Mr. Lisle ------- 1127
Ruling by Judge Scott ---------- 1127
Motion for Directed Verdict by Mr. Keever ---------- 1127
Ruling by Judge Scott ---------- 1127

Jury Instructions by Judge Scott ---------- 1129
Closing Argument by Mr. Keever ---------- 1151
Closing Argument by Mr. Lisle ---------- 1168
Second Closing Argument by Mr. Keever ---------- 1188

Verdict ---------- 1195

Proceedings Concluded ---------- 1200

E X H I B I T S

Exhibits		Admitted/Appearing
Court's Exhibits		
1	(Plaintiff's Strikes)	602/1201
2	(Defendants' Strikes)	602/1203
3	(Note from Jury)	1000/1205
4	(Note from Jury)	/1206
5	(Response from Judge to Note from Jury)	/1207
Plaintiffs' Exhibits		
1	(SmartXide Clinical User Manual)	661/1208
2	(Core Dimension Training)	661/1252
3	(Photo)	667/1270
4	(Photo)	667/1271
5	(Photo)	668/1272
6	(Photo)	669/1273
7	(Photo)	669/1274
8	(SmartXide Rental Forms)	675/1275
9	(Medical Records)	/1283
9-A	(Consent Form/Medical Record)	/1287
9-B	(Treatment Log)	/1290
9-C	(Sedation Record)	/1291
10	(Summary of Sedation)	704/1292
12	(E-Mail)	712/1293
18	(January 2009 Calendar)	725/1294
19	(Medical Bills)	725/1295
21	(Medical Record for Lisa Jones)	730/1299
22	(Copy of Check)	732/1300
23	(Prescriptions)	/1301
24	(Skin Laser Med Spa Medical Records)	757/1309
25	(Curriculum Vitae)	771/1319
26	(Photo)	790/1325
27	(Photo)	790/1326
28	(Photo)	790/1327
29	(Photo)	790/1328
30	(Photo)	790/1329
34	(Demonstrative Aid)	807/1330
35	(Demonstrative Aid)	807/1331
37	(Expense Summary)	1048/1332
39	(Photo)	977/1435

40 (Calendar Page) ---------- 984/1436
41 (Photo) ---------- 1008/1437
42 (Photo) ---------- 1008/1438
43 (Photo) ---------- 1008/1439

Defendant's Exhibits

1 (Medical Records - Skin Spa) ---------- 889/1440
2 (Med Records - Dr. Buffalo) ---------- 903/1450
3 (Medical Records - Washington Regional) - 949/1453
4 (Medical Records) ---------- 951/1456
5 (Operative Report) ---------- 1051/1457
6 (Estimate) ---------- 1051/1459
7 (Website) ---------- 1032/1460
8 (Consent Form) ---------- 1032/1464
9 (Consent Form) ---------- 1032/1465
10(Consent Form) ---------- 1032/1466
11(Consent Form) ---------- 1051/1467
12(Consent Form) ---------- 1098/1468
13(Consent Form) ---------- 1098/1469
14(Tax Return) ---------- 1098/1471
15(Tax Return) ---------- 1098/1474
16(Consent Form) ---------- 1098/1477
17(Medical Records) ---------- 1101/1478

Plaintiff's Proffered Exhibits

1 (Consent Order) ---------- 767/1496
2 (Regs for Hospitals) ---------- 767/1498
3 (Motion and Brief) ---------- 639/1513
4 (Brief on Punitive Damages) ---------- 1124/1540
5 (AMI 1501) ---------- 1149/1552
6 (AMI 106A ---------- 1149/1553
7 (Verdict Form) ---------- 1149/1554

Ms. Copeland's Certificate ---------- 1558
Ms. Olenberger's Reporter Certificate ---------- 1559
Clerk's Certificate ---------- 1560

Reporter's Notes:

Located in the file attached to the Plaintiff's Motion for Leave of Court to Propound Additional Discovery to James P. Elkins, M.D., file marked 9/27/12, was Plaintiff's Exhibit

7, the Medical Report by Dr. Kris Shewmake, which appears previously in the record herein, in its entirety, at pages 157 through 168.

Located here in the file appeared the Response to Plaintiff's Motion to Compel, file marked 1/8/13, which appears previously in the record herein, file marked on 1/7/13, in its entirety, at pages 304 through 328.

Located in the file attached to the Plaintiff's Reply to Defendant's Response to Plaintiff's Motion to Compel, file marked 1/14/13, was Plaintiff's Exhibit 1, the Consent Order, which appears previously in the record herein, in its entirety, at pages 195 through 196.

Located in the file attached to the Defendant's Motion in Limine, file marked 2/13/13, was Exhibit 1, the Consent Order, which appears previously in the record herein, in its entirety, at pages 195 through 196.

The pleading entitled Plaintiff's March 11, 2013, Motion in Limine and Brief in Support, file marked 3/11/13, indicates a page number on the bottom of each page. The pages are numbered 1 through 5 and then 7. There is no page 6 in this pleading in the court file.

CHJ105 BENTON COUNTY DATE: 10/07/13 TIME: 15:4

CIVIL : C-12-0261 JUDGE # 4 PAGE # 1

STYLE: POFF VS ELKINS, M.D., JAMES P.
NATURE: MALPRACTICE

PLAINTIFFS	PLAINTIFF ATTY:
POFF, SUE	SWINDLE, KEN
DEFENDANTS	**DEFENDANT ATTY:**
ELKINS, M.D., JAMES P.	LISLE, STEPHEN
ELKINS, M.D., JAMES P. - P.A.	

CASE TYPE: MP MANNER FILED: OR TYPE TRIAL: CONTESTED

CASE STATUS: CLOSED 03/21/13

DATE FILED: 02/15/12 ANSWER FILED: 08/08/12 DATE CLOSED: 03/21/13

DATE OF DISP. 03/21/13 MANNER: DW JUDGMENT AMT $0.00 DIVC/GRT:

DATE OF N/A: 00/00/00 TNA: DATE L/A: 00/00/00 TLA:

TEMP HRG DATE:00/00/00 TIME 00:00
PRETRIAL DATE:00/00/00 TIME 00:00
TRIAL DATE: 00/00/00 TIME 00:00 TYPE: J

***** ACTION SUPPLEMENTS ***** FILM #

02/15/12 OPN ----- ORIGINAL FILING OF THIS CASE-----
02/15/12 COMPLAINT
02/17/12 SUMMONS ISSUED X2
03/05/12 SHERIFF'S RETURN - SERVED DEFENDANT VIA LAURI CAWTHON (NURSE)
03/05/12 ON 02-29-12
03/05/12 SHERIFF'S RETURN - SERVED DEFENDANT VIA LAURI CAWTHON (NURSE)
03/05/12 ON 02-29-12
03/07/12 CIVIL SERVICE RECEIPT - SERVED DEFENDAT VIA LAURI CAWTHON (NURSE)
03/07/12 ON 02-29-12
03/07/12 CIVIL SERVICE RECEIPT - SERVED DEFENDANT VIA LARI CAWTHON (NURSE)
03/07/12 ON 02-29-12
03/26/12 ANSWER TO COMPLAINT - BY DEFS
03/27/12 NOTICE OF PRETRIAL CONFERENCE/6-4-12 @9AM
04/02/12 PROOF OF SERVICE - SERVED "ATTORNEY GENERAL" VIA MAIL ON 3-29-12
04/12/12 MOTION AND BRIEF TO STRIKE - BY PLF
04/17/12 RESPONSE TO MOTION TO STRIKE - BY DEF
04/20/12 PLAINTIFF'S REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFF'S
04/20/12 MOTION TO STRIKE - BY PLF
04/23/12 PLF'S SECOND MOTION & BRIEF TO STRIKE
04/23/12 REQUESTS FOR ADMISSIONS TO DEF, JAMES ELKINS MD, PA
04/23/12 REQUESTS FOR ADMISSIONS TO DEF, JAMES ELKINS MD
04/27/12 NOTICE OF HEARING ON PLF'S MOTION TO STRIKE/ 6-4-12 @9AM
04/27/12 RESPONSE TO SECOND MOTION TO STRIKE/ DEFS
05/01/12 PLF'S REPLY TO DEF'S RESPONSE TO PLF'S SECOND MOTION TO STRIKE
05/02/12 RESPONSE TO PLF'S MOTION FOR SANCTIONS/ DEFS
05/14/12 MOTION & BRIEF FOR SANCTIONS/ PLF
05/22/12 PLF'S MOTION & BRIEF FOR REQUESTS FOR ADMISSIONS TO BE ANSWERED,
05/22/12 OR, IN THE ALTERNATIVE, TO BE DEEMED ADMITTED, & FOR
05/22/12 EXPENSES INCURRED IN RELATION TO THE MOTION
05/22/12 SUMMONS ISSUED X2
05/23/12 NOTICE OF HEARING ON PLF'S MOTION FOR REQUESTS FOR ADMISSIONS TO
05/23/12 BE ANSWERED, OR IN THE ALTERNATIVE, TO BE DEEMED, & FOR

****** SUPPLEMENTS CONT.******

05/23/12	EXPENSES INCURRED IN RELATION TO THE MOTION/ 6-4-12 @9AM	
05/25/12	RESPONSE TO PLF'S MOTION AND BRIEF FOR REQUESTS FOR	
05/25/12	ADMISSIONS TO BE ANSWERED, OR, IN THE ALTERNATIVE,	
05/25/12	TO BE DEEMED ADMITTED, AND FOR EXPENSES INCURRED IN	
05/25/12	RELATION TO THE MOTION	
06/04/12	ORDER SETTING JURY TRIAL/ 3-11-15 @8:45	C12 04589
06/05/12	FAX- DEF'S ANSWERS TO PLF'S 5-7-12 REQUESTS FOR ADMISSION	
06/05/12	AMENDED ORDER SETTING JURY TRIAL/ 3-11-13 @8:45	C12 04627
06/06/12	AFFIDAVIT/ JAMES P ELKINS MD PA	
06/06/12	AFFIDAVIT/ JAMES P ELKINS MD	
06/11/12	ORDER/ RELIEF REQUESTED IN PLF'S MOTION DENIED	C12 04721
06/21/12	NOTICE OF HEARING ON DEF'S OBJECTIONS TO PLF'S 05/07/12	
06/21/12	REQUESTS FOR ADMISSIONS/ 7-25-12 @9AM	C12 05016
07/06/12	DEF'S RESPONSE TO PLFS 6/7/12 SET OF REQUEST FOR ADMISSION	
07/06/12	DEFS MOTION FOR LIMITATION OF DISCOVERY	
07/06/12	REQUEST FOR A BIFURCATED PROCEEDING	
07/11/12	NOTICE OF HEARING ON DEFENDANTS REQUEST FOR A BIFURCATED	
07/11/12	PROCEEDING AND MOTION FOR LIMITATION OF DISCOVERY	C12 05635
07/20/12	PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO BIFURCATE	
07/20/12	PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO LIMIT	
07/20/12	DISCOVERY	
07/20/12	BRIEF IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANT'S	
07/20/12	MOTION TO LIMIT DISCOVERY	
08/02/12	ORDER - MOTION FOR A LIMITATION OF DISCOVERY	C12 06318
08/03/12	ORDER - DEF'S MOTION FOR A LIMITATION OF DISCOVERY	
08/03/12	GRANTED	C12 06350
08/08/12	DEFENDANT'S AMENDED ANSWERS TO PLAINTIFF'S 5/7/12	
08/08/12	REQUESTS FOR ADMISSION	
08/08/12	PLAINTIFF'S 08/08/12 DISCLOSURE OF TESTIFYING EXPERT	
08/10/12	PLAINTIFF'S 08/10/12 NOTICE OF CORRECTION OF SCRIVENER'S	
08/10/12	ERRORS IN DISCLOSURE OF EXPERT WITNESS EXCHANGED ON	
08/10/12	08/08/12	
08/30/12	DEFENDANTS' AMENDED RESPONSE TO PLAINTIFF'S 06/07/12 SET	
08/30/12	OF REQUESTS FOR ADMISSION	
08/30/12	ORDER - DEF'S TO ANSWER THE PLF'S DISCOVERY	C12 07161
09/27/12	PLAINTIFF'S MOTION FOR LEAVE OF COURT TO PROPOUND	
09/27/12	ADDITIONAL DISCOVERY TO JAMES P. ELKINS, M.D.	
10/03/12	DEFS RESPONSE TO PLFS MOTION FOR LEAVE OF COURT TO	
10/03/12	PROPOUND ADDITIONAL DISCOVERY TO JAMES P. ELKINS	
10/03/12	MD	
10/04/12	PLAINTIFF'S REPLY TO DEFENDANT'S RESPONSE TO PLF'S	
10/04/12	MOTION FOR LEAVE OF COURT TO PROPOUND ADDITIONAL	
10/04/12	DISCOVERY TO DEFENDANT, JAMES P. ELKINS, M.D.	
10/09/12	ORDER - PLF'S MOTION FOR LEAVE OF COURT TO PROPOUND	
10/09/12	ADDITIONAL DISCOVERY TO DEF/JAMES P ELKINS - IS	
10/09/12	DENIED	C12 08245
11/07/12	MOTION FOR LEAVE OF COURT TO CONDUCT DISCOVERY - DEFS/	
11/07/12	JAMES P. ELKINS, M.D. AND JAMES P. ELKINS M.D./P.A.	
11/16/12	NOTICE OF HEARING ON MOTION FOR LEAVE TO CONDUCT	
11/16/12	DISCOVERY - HEARING HAS BEEN RESCHEDULED FOR	
11/16/12	12/11/12 @ 0900AM	C12 09530
11/28/12	REPLY TO PLFS RESPONSE TO MOTION FOR LEAVE OF COURT	
11/28/12	TO CONDUCT DISCOVERY-DEF	
12/04/12	PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO TAKE	
12/04/12	DISCOVERY	

****** SUPPLEMENTS CONT.******

12/05/12		PLAINTIFF'S REPLY TO DEFENDANT'S RESPONSE TO	
12/05/12		PLAINTIFF'S MOTION TO TAKE SECOND DEPOSITION OF DR.	
12/05/12		ELKINS - PLF	
12/05/12		PLAINTIFF'S BRIEF IN SUPPORT OF REPLY TO DEFENDANT'S	
12/05/12		RESPONSE TO PLAINTIFF'S MOTION TO TAKE SECOND	
12/05/12		DEPOSITION OF DR. ELKINS - PLF	
12/05/12		PLAINTIFF'S MOTION FOR EXPANDED JURY POOL AND FOR JUROR	
12/05/12		QUESTIONNAIRE - PLF	
12/11/12		ORDER-PLF IS ORDERED TO PROVIDE CLERK ON OR BEFORE	
12/11/12		1/31/13 THE JURY QUESTIONNARIES & ORDERED TO	
12/11/12		PROVIDE TO COUNSEL FOR PLF & DEF ON OR BEFORE	
12/11/12		1-31-13; CLERK IS ORDERED TO DRAW 70 JURORS ON	
12/11/12		2-25-13 TO SEND TO JURORS ON 2-27-13; STATUS	
12/11/12		HEARING IS SCHEDULED FOR 1/31/13 @ 9; PLFS REQUEST	
12/11/12		TO FURTHER DEPOSE THE SEP DEF JAMES ELKINS M.D.	
12/11/12		IS DENIED	C12 10438
12/31/12		PLAINTIFF'S MOTION TO COMPEL WITH BRIEF IN SUPPORT -	
12/31/12		PLF/SUE POFF	
01/07/13		RESPONSE TO PLF MOTION TO COMPEL / DEF	
01/08/13		RESPONSE TO PLF MOTION TO COMPEL / DEF ORIGINAL COPY	
01/09/13		LETTER FROM SWINDLE LAW FIRM REQUESTING COPIES OF	
01/09/13		JURY QUESTIONAIRES BE MAILED TO 70 POTENTIAL JURORS	
01/14/13		PLF REPLY TO DEF RESPONSE TO PLF MOTION TO COMPEL	
01/28/13		ORDER - PLF MOTION TO COMPEL IS DENIED	C13 00911
02/04/13		PLF'S MOTION TO PREADMIT TRIAL EXHIBITS - PLF	
02/04/13		PLF'S MOTION IN LIMINE AND BRIEF IN SUPPORT - PLF	
02/06/13		PLF'S FIRST AMENDED MOTION TO PREADMIT TRIAL EXHIBITS	
02/06/13		- PLF	
02/06/13		NOTICE OF HEARING ON PLF'S MOTION TO PRE-ADMIT TRIAL	
02/06/13		EXHIBITS - 2-22-13 @ 9:00	C13 01257
02/13/13		DEF'S MOTION IN LIMINE	
02/13/13		BRIEF IN SUPPORT OF DEFS' MOTION IN LIMINE	
02/19/13		PLF'S RESPONSE TO DEFS' MOTION IN LIMINE - PLF	
02/20/13		FAX - DEFS' WITNESS AND EXHIBIT LISTS - DEF	
02/20/13		DEFS' RESPONSE TO PLF'S MOTION TO PREADMIT TRIAL	
02/20/13		EXHIBITS - DEF	
02/20/13		DEFS' RESPONSE TO PLF'S MOTION TO LIMINE - DEF	
02/22/13		PLFS' MOTION AND BRIEF TO USE ITEMIZED VERDICT - PLF	
02/22/13		PLF'S MOTION AND BRIEF FOR PUNITIVE DAMAGES-QUALIFIED	
02/22/13		JURY - PLF	
03/05/13		ORDER ON PLF'S MOTION TO PRE-ADMIT EXHIBITS - DENIED	C13 02193
03/05/13		ORDER ON PLF'S MOTION FOR PUNITIVE DAMAGES-QUALIFIED	
03/05/13		JURY - DENIED	C13 02192
03/05/13		ORDER ON PLF'S MOTION IN LIMINE - PART 1 DENIED, PART	
03/05/13		2 THROUGH 11 GRANTED, PART 12,13,15,16 DENIED, PART	
03/05/13		PART 14 GRANTED	C13 02188
03/05/13		ORDER REGARDING DEFS' MOTION IN LIMINE - GRANTED	C13 02185
03/11/13		PLF'S MARCH 11,2013, MOTION IN LIMINE AND BRIEF IN	
03/11/13		SUPPORT - PLF	
03/13/13		BRIEF IN SUPPORT OF MOTION FOR DIRECTED VERDICT - DEF	
03/14/13		INTERROGATORY NO. 1 - NO	
03/14/13		INTERROGATORY NO. 2 - NO	
03/21/13		JUDGMENT - COMPLAINT OF PLF IS DISMISSED WITH PREJUDICE	C13 02944
03/21/13	DSP	++++ DISPOSITION DATE: 03/21/13 TYPE 'DW ++++	
03/21/13	CLO	------ CASE CLOSED AS OF THIS DATE -----	

4C

****** SUPPLEMENTS CONT.******

04/05/13	NOTICE OF APPEAL - PLF	
04/08/13	ORDER TO EXTEND TIME TO FILE RECORD - APPELLANT'S	
04/08/13	MOTION IS GRANTED	C13 03485
04/08/13	PLF'S MOTION FOR EXTENSION OF TIME TO DOCKET RECORD	
04/08/13	WITH THE CLERK OF THE SUPREME COURT - PLF	
09/16/13	PLFS MOTION & BRIEF TO SEAL COPY OF THE RECORD	
09/26/13	***ORDER- MOTION TO SEAL TRANSCRIPT IS GRANTED***	C13 08817
09/26/13	ORDER- ORDERS THE COURT REPORTER TO CAUSE A REDUCTION	
09/26/13	IN THE SIZE OF ANY DOC AND/OR EXHIBITS LARGER THAN	
09/26/13	8 1/2 X11	C13 08820
09/26/13	****** LAST ENTRY OF CASE **********	

4D

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS

FILED
2012 FEB 15 PM 1 16
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR.

SUE POFF	)	**PLAINTIFF**
	)	
v.	)	**NO. CV 12-** 000261-4
	)	
JAMES P. ELKINS, M.D., and JAMES P. ELKINS, M.D., P.A.	)	**DEFENDANTS** SCOTT

COMPLAINT

COMES NOW SUE POFF, PLAINTIFF in the above captioned matter, and makes and files this Complaint against DEFENDANTS JAMES ELKINS, M.D. AND JAMES P. ELKINS, M.D., P.A., and would show unto the Court as follows:

I. PARTIES AND CITATION

1. PLAINTIFF SUE POFF is a citizen of Little Rock, Pulaski County, Arkansas.

2. The acts complained of by Plaintiffs occurred in Benton County, Arkansas, at the offices of James P. Elkins, M.D., P.A., at 201 S. 19th Street, Suite 5 Rogers, AR 7275.

3. Defendant James Elkins, M.D., sometimes hereinafter referred to as "ELKINS," is an individual and licensed physician, duly licensed to practice medicine in the State of Arkansas, and practiced in Rogers, Arkansas, at all material times. Dr. Elkins can be served with Summons in this case at 201 S. 19th Street, Suite 5 Rogers, AR 7275, or wherever he may be found.

4. DEFENDANT James P. Elkins, M. D., P.A., is an Arkansas for profit Corporation, and may be served through its registered agent James Elkins, M.D. at 1116 Poplar Place, Rogers, AR 72756 or wherever he may be found.

II. FACTUAL ALLEGATIONS

5. SUE POFF (Hereinafter sometimes referred to as "POFF") sought the services of

5

ELKINS for the treatment of sun damaged skin on her face, neck and chest.

6. On January 22, 2009, ELKINS performed fractional DOT CO2 laser treatment, laser treatment of the affected areas, the face, neck, and chest of POFF.

7. POFF was not given specific preoperative counseling from ELKINS regarding the possible risks of the procedure, but rather directed POFF to the internet to look at websites, including https://www.eclipsemed.com/smartxide-dot-laser-overview. POFF was led to understand that the proposed treatment would lead to no serious complications, including no chance of loss of pigment in the treated areas and no risk of serious burns.

8. POFF was given an operative consent form to sign only after having received preoperative medication on January 22, 2009.

9. Following the above referenced treatment, POFF developed third degree burns over portions of the treated area, leading to permanent scarring and hypo-pigmentation of the treated areas.

III. VENUE

10. Venue is proper in Benton County pursuant to §16-55-213(e) and § 16-60-112(e) of the Arkansas Code as Benton is the County in which the alleged negligent acts occurred.

IV. NEGLIGENCE

11. Plaintiff would show that Defendant ELKINS was negligent in the treatment of POFF'S medical condition and that such negligence was a direct and proximate cause of POFF'S injuries and damages.

12. Plaintiff would also show, specifically, that ELKINS either used a power setting for the laser unit that was too powerful, or used a technique that reapplied the laser procedure

repeatedly on the treated areas, resulting in third degree burns and permanent scarring.

13. POFF would further show that ELKINS failed to supply to her that type of information regarding the treatment, procedure, or surgery as would customarily have been given to a patient in the position of the injured person or other persons authorized to give consent for such a patient by other medical care 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.

14. POFF would further show that, even if ELKINS had attempted to provide her that type of information regarding the treatment, procedure, or surgery as would customarily have been given to a patient in the position of the injured person or other persons authorized to give consent for such a patient by other medical care 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 prior to her signing the operative permit, her capacity to give informed consent at the time of the signing of said permit was impaired by the pre-operative sedation she had received.

15. POFF would further show that had ELKINS informed her that there was the possibility of third degree burns to her skin, with the type of scarring that actually occurred, she would not have given consent for the DOT CO2 laser treatment.

16. Plaintiff also would show that Defendant ELKINS was at all times acting in the course and scope as the employee and/or agent for Defendant James P. Elkins, M.D., P.A., and that Defendant James P. Elkins, M.D., P.A., is therefore vicariously liable for any negligent acts of ELKINS through the doctrine of *respondeat superior*.

V. DAMAGES

17. As a proximate result of the acts of medical negligence of defendants, Plaintiff is entitled to recover damages in an amount to be set by a finder of fact in excess of the amount for federal court diversity jurisdiction, for the injuries to POFF, including, but not limited to:

a) Conscious past pain and suffering by SUE POFF,

b) Conscious future pain and suffering by SUE POFF,

c) Past lost earnings of SUE POFF;

d) Future lost earning capacity of SUE POFF;

e) Past medical expenses of SUE POFF;

f) Future medical expenses of SUE POFF;

g) Past disfigurement of SUE POFF, and

h) Future disfigurement of SUE POFF.

i) Punitive damages.

VI. PUNITIVE DAMAGES REQUESTED

18. ELKINS knew or should have known that the proposed procedure, with his planned settings and number of passes, would lead to serious injury and disfigurement to POFF, but proceeded with that same procedure in reckless disregard for the safety of POFF. ELKINS therefore should be ordered to pay punitive damages to POFF in an amount to be set by the finder of fact in this matter.

VII. CONSTITUTIONAL OBJECTIONS TO THEAPPLICABILITY OF ACT 649 RESERVED

19. In the 2003 Session of the Arkansas General Assembly, the Legislature passed an

Act entitled The Civil Justice Reform Act of 2003 ("The Act"), which was signed by the Governor and became effective on or about March 27, 2003, and is codified presently at A.C.A. 16-55-201, *et seq*. This is an action for medical negligence accruing after the effective date of the Act.

20. The Act obviously violates Article 5, § 32 of the Arkansas State Constitution, which plainly prohibits legislative limitations on recoveries and Article 4, §§ 1 and 2 of that Constitution, which prohibit legislative incursions on judicial power. Additionally, the Act violates the constitutional scheme that formally worked to limit governmental incursion on common law rights and limited legislative power to assist special interests. This scheme is embodied in provisions in Article 2, §§ 4, 13, and 21, recognizing the right to petition the government for redress, Article 2, § 13, guaranteeing the right of every injured person to a remedy, Article 2, § 7, prescribing a right to a jury trial which "shall remain inviolate"; Article 2, §§ 13 and 21, mandating due process and application of the law of the land; Article 2, §§ 3, 18, and 21, recognizing that all citizens shall receive equal treatment and the related Article 5, § 25, limiting unequal treatment to times when it is justified; requiring "that where a general law can be made applicable, no special law shall be enacted."

21. Act 649 of 2003 provides various and sundry onerous and burdensome provisions, which include but are not limited to the requirement of specialty affidavits prior to instituting suit, limitations on the amount of punitive damages, provisions creating "phantom defendants," the abrogation of traditional rights to plea joint and several liability, and joint and several liability, to name a few. Several of these provisions have already been held unconstitutional by the Arkansas Supreme Court, and it is the position of the PLAINTIFF that the entire Act is

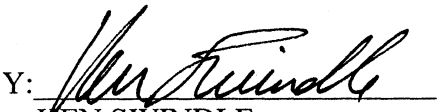
unconstitutional and the fact that PLAINTIFF has attempted to comply with some of its provisions in order to not delay the proceedings herein are not to be construed as a waiver thereof.

22. In the event that it is alleged that the PLAINTIFF has not complied with any provision of Act 649, the PLAINTIFF prays for a declaratory judgment that the Act is itself unconstitutional, in whole or in applicable parts.

VIII. PRAYER

WHEREFORE, PREMISES CONSIDERED, PLAINTIFF prays that DEFENDANTS be cited to appear and answer, and that upon final trial, PLAINTIFF recover her damages as specified above from DEFENDANTS, including costs of Court, pre-judgment and post-judgment interest, and have such other and further relief, at law and in equity, to which PLAINTIFF may show herself to be justly entitled.

Respectfully submitted,

BY: 

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

and

JAMES E. 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

ATTORNEYS FOR PLAINTIFF

ORIGINAL TRANSCRIPT

Summons

Summons Issued To: James P. Elkins, M.D.

Issued: 2/17/12

Served: 2/29/12 Return of Service Filed: 3/5/12

Summons Issued To: James P. Elkins, M.D., P.A.

Issued: 2/17/12

Served: 2/29/12 Return of Service Filed: 3/5/12

Summons Issued To: James P. Elkins, M.D.

Issued: 5/22/12

Served: 6/4/12 Return of Service Filed: 6/6/12

Summons Issued To: James P. Elkins, M.D., P.A.

Issued: 5/22/12

Served: 6/4/12 Return of Service Filed: 6/6/12

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

FILED
2012 MAR 26 AM 8 34
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR.

ANSWER TO COMPLAINT

COME NOW the Defendants herein, James P. Elkins, M.D. and James P. Elkins, M.D., P.A., by and through their undersigned attorneys, and for their Answer to Complaint, respectfully state as follows:

1. Defendants are without information or knowledge sufficient to admit or deny the allegations contained in Paragraph 1 of the Complaint. Therefore, they are denied.

2. Paragraph 2 is admitted.

3. Paragraph 3 is admitted.

4. Paragraph 4 is admitted.

5. Paragraph 5 is admitted.

6. Paragraph 6 is admitted.

7. Paragraph 7 is denied.

8. Paragraph 8 is denied.

9. Defendants are without information or knowledge sufficient to admit or deny the allegations contained in Paragraph 9 of the Complaint. Therefore, they are denied.

10. Defendants admit that venue is proper in this Court. All remaining allegations contained in Paragraph 10 are denied.

11. Paragraph 11 is denied.

12. Paragraph 12 is denied.

13. Paragraph 13 is denied.

14. Paragraph 14 is denied.

15. Paragraph 15 is denied.

16. Defendants admit that James P. Elkins acted within the scope of his employment, but deny that he was negligent as alleged in paragraph 16.

17. Paragraph 17, and all sub-parts thereof, is denied.

18. Paragraph 18 is denied.

19. Paragraph 19 is admitted.

20. Paragraph 20 is denied.

21. Paragraph 21 is denied.

22. Paragraph 22 is denied.

23. Defendants deny that Plaintiff is entitled to the relief that she requests.

24. Defendants deny any and all allegations of Plaintiff's Complaint and any inferences that can be drawn from those allegations that are not specifically admitted in this Answer.

AFFIRMATIVE DEFENSES

25. Pleading affirmatively, Defendants state that Plaintiff's claims are barred by comparative fault.

26. Pleading affirmatively, Defendants state that Plaintiff's claims are barred by assumption of the risk.

27. Defendants allege that Plaintiff has failed to name a necessary party to challenge the constitutionality of a statute.

28. Defendants allege that Plaintiff has failed to make effective service of her complaint as required to challenge the constitutionality of a statute.

29. Defendants reserve the right to amend their pleadings following discovery.

WHEREFORE, Defendants request that the Complaint be dismissed, that they be awarded their attorneys' fees and costs incurred in defending this action, and all other appropriate relief.

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 23rd day of March 2012, a true and correct copy of the foregoing has been 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, M.D., J.D.
Attorney at Law
2801 Richmond Road, #57
Texarkana, TX 75503

Stephen Lisle

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS

SUE POFF — PLAINTIFF

vs. — CASE NO. CV-2012-0261-4

JAMES P. ELKINS, M.D. and
JAMES P. ELKINS, M.D., P.A. — DEFENDANTS

NOTICE OF PRETRIAL CONFERENCE

Please take notice that the above-captioned cause is hereby set for a pretrial conference on June 4, 2012, at 9:00 a.m., in Room 208 of the Benton County Courthouse, Bentonville, Arkansas. Counsel are advised to bring calendars with them to schedule future hearings and/or trial in this matter. ***Your presence in person is required at this pretrial conference.***

IT IS SO ORDERED this 27th day of March, 2012.

JOHN R. SCOTT
CIRCUIT JUDGE

cc: Ken Swindle
Attorney at Law
619 West Persimmon Street
Rogers, AR 72756
VIA TELEFAX 1-479-621-0838

James E. Keever, M.D., J.D.
Attorney at Law
2801 Richmond Road, #57
Texarkana, TX 75503
VIA TELEFAX 1-903-642-0066

Stephen Lisle
Attorney at Law
1458 Plaza Place, Suite 101
Springdale, AR 72764-5273
VIA TELEFAX 1-479-751-6792

FILED
2012 MAR 27 PM 3 25
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR

17

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS

FILED
2012 APR 2 PM 12 43
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR.

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

PROOF OF SERVICE

Comes now the Plaintiff, by her attorneys, and, pursuant to Arkansas Code Annotated, Section 16-111-106, gives notice that she has served on March 29, 2012, a copy of the Complaint in this matter on the Office of the Attorney General. See Green Card attached. The Office of Attorney General has responding accordingly. See March 30, 2012 letter from the Office of Attorney General, attached.

Respectfully submitted,

BY: Ken Swindle

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

and

18

JAMES E. 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 e-mail, slisle@lislerutledge.com, on this, the 31st day of March, 2011.

Ken Swindle

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

ARKANSAS ATTORNEY GENERAL
323 CENTER STREET
LITTLE ROCK AR 72201

COMPLETE THIS SECTION ON DELIVERY

A. Signature

X ☐ Agent ☐ Addressee

B. Received by *(Printed Name)*

C. Date of Delivery 3/29/12

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☒ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? *(Extra Fee)* ☐ Yes

2. Article Number
(Transfer from service label) 7011 1570 0001 5354 5164

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

THE ATTORNEY GENERAL
STATE OF ARKANSAS
DUSTIN MCDANIEL

Dennis R. Hansen
Deputy Attorney General, Civil Department

Direct dial: (501) 682-2081
E-mail: Dennis.Hansen@arkansasag.gov

March 30, 2012

Mr. Ken Swindle
SWINDLE LAW FIRM
619 West Persimmon Street
Rogers, Arkansas 72756

RE: ***Poff v. Elkins, et al.***
Benton County Circuit No. CV-12-261-4
Act 649 of 2003

Dear Mr. Swindle:

This office received your recent letter notifying us that a party in the above-referenced case is challenging the constitutionality of the above-referenced law.

Ark. Code Ann. Sec. 16-111-106 provides that when a statute is alleged to be unconstitutional the Attorney General shall be notified of the statute being challenged, be provided with a copy of the relevant pleading, "and be entitled to be heard." The Arkansas Supreme Court has held that Section 16-111-106 requires notice to the Attorney General but "does not require [the Attorney General] to appear or to be made a party." *City of Little Rock v. Cash*, 277 Ark. 494, 512 (1982). The notice requirement is intended to ensure that there is a fully adversarial and complete adjudication of the constitutional issues. *Prater v. St. Paul Ins. Co.*, 293 Ark. 547, 554 (1987).

In this case it appears that the goals of the notice provision will be satisfied because the existing parties have adverse interests and there is no reason to doubt that the constitutionality of the challenged statute will be fully and competently defended. Accordingly, our office will not intervene at this time. Please notify us if you have any reason to believe that the constitutionality of the relevant statute is not being fully and fairly defended or if the statute is declared unconstitutional. We reserve the right to intervene later if appropriate.

Thank you for your continued cooperation with our office. Please let us know if we can be of further assistance.

Very truly yours,

DENNIS R. HANSEN
Deputy Attorney General

DRH/jh

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**

FILED
2012 APR 12 PM 12 07
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR.

MOTION AND BRIEF TO STRIKE

Comes now the Plaintiff and for her Motion to Strike states:

I. MOTION

1. The Defendants filed an Answer containing numerous affirmative defenses.

2. Said affirmative defenses included "Plaintiff has failed to make effective service of her complaint as required to challenge the constitutionality of a statute."

3. As is shown in the Brief below, said affirmative defense should be stricken by this Court.

II. BRIEF IN SUPPORT OF MOTION TO STRIKE

The Court has the authority to strike the affirmative defenses. Specifically,

> Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 30 days after the service of the pleading upon him or upon the court's own initiative at any time, *the court may order stricken from any pleading any insufficient defense* or any redundant, immaterial, impertinent or scandalous matter.

Ark. R. Civ. P. 12(f) (emphasis supplied).

As the Court knows, the rules for service of process are generally stated in Rule Four of the Arkansas Rules of Civil Procedure. If the affirmative defenses of insufficiency of process and insufficiency of service of process are not pled in the first responsive pleading, those affirmative

23

defenses are waived. Ark. R. Civ. P. 12(b)(4-5). The Defendants did not plead insufficiency of process or insufficiency of service of process, and therefore, these defenses should be held by this Court to be waived.

The Defendants did plead that "Plaintiff has failed to make effective service of her complaint as required to challenge the constitutionality of a statute." Presumably, the Defendants refer to Arkansas Code Annotated, Section 16-111-106, which requires service of any "proceeding" challenging the constitutionality of a statute. Technically, then, this is not a service of process issue. Subsequent to the Defendant's filing of its Answer, the Plaintiff served the Attorney General, in compliance with Arkansas Code Annotated, Section 16-111-106. Proof of said service was filed with the Court on April 2, 2012. Therefore, the affirmative defense that "Plaintiff has failed to make effective service of her complaint as required to challenge the constitutionality of a statute" is insufficient and the Court should strike said defense.

WHEREFORE, Plaintiff prays that the Defendants' affirmative defense that "Plaintiff has failed to make effective service of her complaint as required to challenge the constitutionality of a statute" be stricken and that the Court hold that the Defendants have waived the right to plead insufficiency of process and insufficiency of service of process.

Respectfully submitted,

BY:

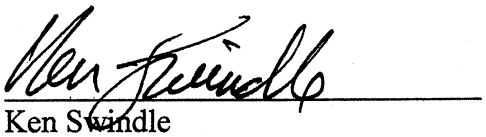
KEN SWINDLE
Ark. Bar No. 97234
619 West Persimmon Street
Rogers AR 72756
Tel. (479) 621-0120
Fax (479) 621-0838

and

JAMES E. 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 e-mail, slisle@lislerutledge.com, on this, the 10th day of April, 2011.



Ken Swindle

FILED
2012 APR 17 PM 12 24
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR.

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

RESPONSE TO MOTION TO STRIKE

COME NOW the Defendants herein, James P. Elkins, M.D. and James P. Elkins, M.D., P.A., by and through their undersigned attorneys, and for their Response to Plaintiff's Motion to Strike, state as follows:

Plaintiff asks the Court to prematurely strike one of Defendants' affirmative defenses. Plaintiff acknowledges that Defendants asserted the defense of insufficient service of process. The Arkansas Supreme Court has made it clear that when a party has asserted the defense of insufficiency of process and insufficient service or process in its original response, it has preserved those defenses under Rule 12. *Shotzman v. Berumen*, 365 Ark. 215, 213 S.W.3d 13 (2005).

Plaintiff argues that Defendants were required to state that the process was "insufficient" rather than "ineffective." However, it is axiomatic in Arkansas law that pleadings are to be liberally construed and are sufficient if they advise a party of its obligations and allege a breach of them. *Bethel Baptist Church v. Church Mut. Ins. Co.*, 54 Ark. App. 262, 924 S.W.2d 494 (1996). Furthermore, the Court in *Shotzman* specifically ruled that the defendant is not required

26

to specifically point out in what manner the plaintiff has failed to satisfy the requirements of service. 213 S.W.3d at 20. Plaintiff is essentially asking the Court to rule in her favor on an issue that is supposed to be proven at trial.

WHEREFORE, Defendants request that Plaintiff's Motion to Strike be denied.

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
Springdale, AR 72764-5273
(479) 750-4444

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of April 2012, a true and correct copy of the foregoing has been 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

27

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS

FILED
2012 APR 20 AM 11 00
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR

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 REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION TO STRIKE

Comes now the Plaintiff and for her Reply to Defendants' Response to Plaintiff's Motion to Strike states:

In the Plaintiff's Motion to Strike, previously filed with the Court, the Plaintiff showed that the Defendants' affirmative defense that "Plaintiff has failed to make effective service of her complaint as required to challenge the constitutionality of a statute" is invalid. The Defendants responded only by stating: "Plaintiff asks the Court to prematurely strike one of Defendant's affirmative defenses." However, as is shown above, a pleading must be "well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation" at the time of the filing, not at some uncertain time in the future. Therefore, where, as here, a moving party shows that a pleading is without any basis in fact, it is not premature to ask for a ruling on such a pleading.

In support of its argument that the Plaintiff's Motion to Strike is premature, the Defendants cited *Shotzman v. Berumen*, 365 Ark. 215, 213 S.W.3d 13 (2005). The Defendants' reliance on *Shotzman* is in error. In *Shotzman*, the Plaintiffs failed to complete service of process

28

on the Defendant, St. Edward Mercy Medical Center (SEMMC). SEMMC filed an answer claiming the affirmative defenses of insufficiency of process and insufficiency of service of process. SEMMC then moved to dismiss the complaint filed against it, which was appropriately granted.

However, nowhere in the opinion does it state that Plaintiff moved to strike the affirmative defense claimed. Indeed, it would have been odd to so move as the defense was valid. Nor does the opinion state that a Plaintiff may not have an invalid defense stricken under Rule 12. Again, such a statement would be odd and in direct contradiction to Rule 12. Nor does the opinion state a motion to strike an invalid defense is premature if made before trial. In short, everything that the Defendants cite for support in *Shotzman* was not actually pled, argued, or ruled upon in *Shotzman*. The opinion in *Shotzman* does state that a defendant does not have to specifically plead the facts to support its affirmative defense in its first responsive pleading. No where does the opinion state that a defendant does not have to respond to a motion to strike an affirmative defense.

Therefore, the Motion to Strike is not premature or unripe.

Respectfully submitted,

BY: _____

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

and

JAMES E. 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 e-mail, slisle@lislerutledge.com, on this, the 19th day of April, 2011.

Ken Swindle

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**

FILED
2012 APR 23 AM 8 46
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR.

PLAINTIFF'S SECOND MOTION AND BRIEF TO STRIKE

Comes now the Plaintiff and for her Motion to Strike states:

I. MOTION

1. The Defendants filed an Answer containing numerous affirmative defenses.

2. Said affirmative defenses included "Plaintiff has failed to name a necessary party to challenge the constitutionality of a statute."

3. As is shown in the Brief below, said affirmative defense should be stricken by this Court.

WHEREFORE, Plaintiff prays that the Defendants' affirmative defense that "Plaintiff has failed to name a necessary party to challenge the constitutionality of a statute" be stricken.

II. BRIEF IN SUPPORT OF MOTION TO STRIKE

The Court has the authority to strike the affirmative defenses. Specifically,

> Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 30 days after the service of the pleading upon him or upon the court's own initiative at any time, *the court may order stricken from any pleading any insufficient defense* or any redundant, immaterial, impertinent or scandalous matter.

Ark. R. Civ. P. 12(f) (emphasis supplied).

31

Presumably, the Defendants refer to Arkansas Code Annotated, Section 16-111-106(b), which requires: "In any proceeding *which involves the validity of a municipal ordinance or franchise*, the municipality shall be made a party and shall be entitled to be heard, and if the statute, ordinance, or franchise is alleged to be unconstitutional, the Attorney General of the state shall also be served with a copy of the proceeding and be entitled to be heard."

Here, there is no municipal ordinance or franchise being challenged. Therefore, no municipality needs to be made a party to this matter.

Respectfully submitted,

BY: Ken Swindle

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

and

JAMES E. KEEVER, M.D., J.D.
Arkansas Bar No. 2005176
2801 Richmond Road, # 57
Texarkana, Texas 75503
Telephone: (903) 793-5316
Telecopier: (903) 642-0066

CERTIFICATE OF SERVICE

I, Ken Swindle, hereby certify that I have served a copy of this document upon Steve Lisle, attorney for Defendants, by e-mail, slisle@lislerutledge.com, on this, the 20th day of April, 2011.

Ken Swindle

Ken Swindle

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**

REQUESTS FOR ADMISSIONS TO DEFENDANT, JAMES ELKINS, M.D., P.A.

REQUEST FOR ADMISSION NO 1: Admit or deny that your affirmative defense of "Plaintiff has failed to make effective service of her complaint as required to challenge the constitutionality of a statute" is based exclusively on application of Arkansas Code Annotated, Section 16-111-106.

REQUEST FOR ADMISSION NO 2: Admit or deny that your affirmative defense of "Plaintiff has failed to name a necessary party to challenge the constitutionality of a statute" is based exclusively on application of Arkansas Code Annotated, Section 16-111-106.

Respectfully submitted,

BY: _____

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

and

FILED
2012 APR 23 PM 12 04
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR.

33

JAMES E. KEEVER, M.D., J.D.
Arkansas Bar No. 2005176
2801 Richmond Road, # 57
Texarkana, Texas 75503
Telephone: (903) 793-5316
Telecopier: (903) 642-0066

CERTIFICATE OF SERVICE

I, Ken Swindle, hereby certify that I have served a copy of this document upon Steve Lisle, attorney for Defendants, by e-mail, slisle@lislerutledge.com, on this, the 21st day of April, 2011.

Ken Swindle

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**

REQUESTS FOR ADMISSIONS TO DEFENDANT, JAMES ELKINS, M.D.

REQUEST FOR ADMISSION NO 1: Admit or deny that your affirmative defense of "Plaintiff has failed to make effective service of her complaint as required to challenge the constitutionality of a statute" is based exclusively on application of Arkansas Code Annotated, Section 16-111-106.

REQUEST FOR ADMISSION NO 2: Admit or deny that your affirmative defense of "Plaintiff has failed to name a necessary party to challenge the constitutionality of a statute" is based exclusively on application of Arkansas Code Annotated, Section 16-111-106.

Respectfully submitted,

BY: Ken Swindle

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

and

FILED
2012 APR 23 PM 12 05
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR.

35

JAMES E. KEEVER, M.D., J.D.
Arkansas Bar No. 2005176
2801 Richmond Road, # 57
Texarkana, Texas 75503
Telephone: (903) 793-5316
Telecopier: (903) 642-0066

CERTIFICATE OF SERVICE

I, Ken Swindle, hereby certify that I have served a copy of this document upon Steve Lisle, attorney for Defendants, by e-mail, slisle@lislerutledge.com, on this, the 21st day of April, 2011.

Ken Swindle

FILED
2012 APR 27 AM 8 30
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS

SUE POFF PLAINTIFF

vs. CASE NO. CV-2012-0261-4

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

NOTICE OF HEARING ON PLAINTIFF'S MOTION TO STRIKE

Please take notice that the above-captioned cause is hereby set for hearing along with the previously scheduled pretrial conference on June 4, 2012, at 9:00 a.m., in Room 208 of the Benton County Courthouse, Bentonville, Arkansas.

JOHN R. SCOTT
CIRCUIT JUDGE
Dated: April 26, 2012

cc: Ken Swindle
Attorney at Law
619 West Persimmon Street
Rogers, AR 72756
VIA TELEFAX 1-479-621-0838

James E. Keever, M.D., J.D.
Attorney at Law
2801 Richmond Road, #57
Texarkana, TX 75503
VIA TELEFAX 1-903-642-0066

Stephen Lisle
Attorney at Law
1458 Plaza Place, Suite 101
Springdale, AR 72764-5273
VIA TELEFAX 1-479-751-6792

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

FILED
2012 APR 27 PM 1 01
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR

RESPONSE TO SECOND MOTION TO STRIKE

COME NOW the Defendants herein, James P. Elkins, M.D. and James P. Elkins, M.D., P.A., by and through their undersigned attorneys, and for their Response to Plaintiff's Second Motion to Strike, state as follows:

In her Complaint, Plaintiff alleges that Ark. Code Ann. §16-55-201 *et seq* is unconstitutional. Complaint ¶¶19-22. Plaintiff argues that "the entire Act is unconstitutional" in paragraph 21 and perhaps alternatively, "In the event that it is alleged that PLAINTIFF has not complied with any provision of Act 649. the PLAINTIFF prays for a declaratory judgment that the Act is itself unconstitutional, in whole or in applicable parts." Complaint ¶22.

Plaintiff did not plead that she had served the Arkansas Attorney General nor that she intended to do so. Ark. Code Ann. §16-11-106 Parties, states in pertinent part, "if the statute . . . is alleged to be unconstitutional, the Attorney General of the state shall also be served with a copy of the proceeding and entitled to be heard."

Because Plaintiff did not allege that the Attorney General had been, or would be, served and given an opportunity to be heard, Defendants properly preserved their right to affirmatively prove at trial that Plaintiff could not challenge the constitutionality of the statute.

WHEREFORE, Defendants request that Plaintiff's Second Motion to Strike be denied.

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
Springdale, AR 72764-5273
(479) 750-4444

CERTIFICATE OF SERVICE

I hereby certify that on this 24 day of April 2012, a true and correct copy of the foregoing has been 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

39

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**

FILED
2012 MAY 1 AM 11 59
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR

PLAINTIFF'S REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFF'S SECOND MOTION TO STRIKE

Comes now the Plaintiff and for her Reply to Defendants' Response to Plaintiff's Second Motion to Strike states:

In the Defendants' Response to Plaintiff's Second Motion to Strike, the Defendants state: "Plaintiff did not plead that she had served the Arkansas Attorney General nor that she intended to do so." If this statement is read to mean that the Plaintiff did not plead in her complaint that she had served the Attorney General, this is a most curious statement. Firstly, there is no requirement that a party state in its complaint that it has served a copy of the complaint upon the Attorney General. Indeed, it would be me a very odd thing to require a statement in a complaint that a party has already served the Attorney General at the time of filing. Secondly, there is no requirement that a party claim lack of service on any other party in its first responsive pleading, which is what the Defendants are trying to do. See, Ark. R. Civ. P. 12. Again, this would be a rather strange requirement, as the Plaintiff in such a situation is not asserting service on a third-party (the Attorney General or any other party) at the time of service on the Defendants. Thirdly, although the statute cited by the Defendant does require service on the Attorney General, there is no requirement that a party must plead that it *intends* to serve the

40

Attorney General.

If the statement that "Plaintiff did not plead that she had served the Arkansas Attorney General nor that she intended to do so" is read to refer to any pleading after the complaint in this matter, then the statement is simply factually wrong. The Plaintiff has shown service of process on the Attorney General, and filed this proof with the Clerk of the Court on April 2, 2012. The Defendants were copied on said proof of service. Therefore, it is unclear why the Defendants continue to argue that the Plaintiff has not properly served the Attorney General or why the Defendants refuse to withdraw said defense.

Finally, even if the Plaintiff had not served the Attorney General (which she has), or even if the Plaintiff had not already shared said proof of service with the Defendants (again, which she has), service of complaint on the Attorney General is not even the subject of the Plaintiff's Second Motion to Strike. The subject of the Plaintiff's Second Motion to Strike is that "Plaintiff has failed to name a necessary party to challenge the constitutionality of a statute." As the Plaintiff showed in her Second Motion to Strike, there is no requirement for the Plaintiff to make anyone other than the Defendants a party because she is not challenging a "municipal ordinance or franchise". Ark. Code Ann. Sec. 16-111-106(b). The Defendants completely fail to even respond to the Plaintiff's showing that she is entitled to have the Defendant's affirmative defense stricken.

Respectfully submitted,

BY: _____

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

and

JAMES E. 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 e-mail, slisle@lislerutledge.com, on this, the 30th day of April, 2011.

_____
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

FILED
2012 MAY 2 AM 11 25
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR

RESPONSE TO PLAINTIFF'S MOTION FOR SANCTIONS

COME NOW the Defendants herein, James P. Elkins, M.D. and James P. Elkins, M.D., P.A., by and through their undersigned attorneys, and for their Response to Plaintiff's Motion for Sanctions, state as follows:

I. Timing of Response.

On April 19, 2012, Plaintiff sent a demand that Defendants withdraw one of their affirmative defenses within 21 days, or Plaintiff would file a Motion and Brief requesting sanctions. Plaintiff's demand and the Motion and Brief attached to it by Plaintiff's counsel are attached as Exhibit 1. The Motion and Brief for Sanctions ("the Motion") and the Certificate of Service attached were dated April 19, 2012, and signed by Plaintiff's counsel.

Because the Motion and the accompanying certificate of service were signed and dated on the 19th of April, Defendants' counsel asked Plaintiff's counsel if the Motion had been filed and, if not, whether Plaintiff's counsel would provide notice of its filing in the future. The April 27, 2012, email making these inquiries is attached as Exhibit 2. Plaintiff's counsel responded by stating that the certificate of service was in order and that he would not provide additional notice if, or when, he filed the Motion in the future. Plaintiff's April 27, 2012 email is attached as

Exhibit 3. Defendants attempted one last time, on May 1, 2012, to determine if Plaintiff would provide notice if, and when, the Motion was filed. Plaintiff's counsel again indicated that he intends to file the motion at some point more than 21 days after it was served, but that he does not intend to provide Defense counsel with notice of its filing. Defendants' May 1, 2012, email and Plaintiff's response are attached as Exhibit 4.

Because Plaintiff served the Motion, but did not file it, Defendants are left in the unusual position of having to respond to a motion that has not been filed. Rule 5(c), *Filing* states, in section 1, "All papers after the complaint required to be served upon a party or his attorney shall be filed with the clerk of the court either before service or within a reasonable time thereafter." Rule 5 (c)(1), Ark. R. Civ. P. Plaintiff intends to hold the Motion for at least 21 days before filing, which has forced Defendants to file a response now, because of Rule 8(c), even though Plaintiff has not filed the Motion with the clerk of the court. Because of the threats of sanctions raised by Plaintiff's counsel in the past, Defense counsel is concerned that if a response is not made, even though the Motion has not been filed, Plaintiff's counsel will file the Motion in the future and take the position that any response was waived. An example of Plaintiff's prior threats of sanctions is attached as Exhibit 5.

II. Response to the Motion.

Defendants were required to plead all affirmative defenses listed in Rule 12(h) in their original responsive pleading to avoid waiver. Rule 12 (h)(1), Ark. R. Civ. P. When Defendants filed their Answer, their only source of information about service was the Plaintiff's complaint. In her Complaint, Plaintiff alleges that Ark. Code Ann. §16-55-201 *et seq.* is unconstitutional. Complaint ¶¶19-22. Plaintiff argues that "the entire Act is unconstitutional" in paragraph 21 and, perhaps alternatively, "In the event that it is alleged that PLAINTIFF has not complied with any

provision of Act 649, the PLAINTIFF prays for a declaratory judgment that the Act is itself unconstitutional, in whole or in applicable parts." Complaint ¶22.

Plaintiff did not plead that she had served the Arkansas Attorney General or that she intended to do so. Ark. Code Ann. §16-11-106 Parties, states in pertinent part, "if the statute . . . is alleged to be unconstitutional, the Attorney General of the state shall also be served with a copy of the proceeding and entitled to be heard." Because Plaintiff did not allege that the Attorney General had been, or would be, served and given an opportunity to be heard, Defendants properly preserved their right to affirmatively prove at trial that Plaintiff could not challenge the constitutionality of the statute. Plaintiff essentially argues that Defendants should have assumed that the Attorney General would be served.

Defendants' Answer was filed on March 22, 2012. In support of her demand that Defendants strike their affirmative defense of insufficient service, Plaintiff's counsel attached a Proof of Service indicating that the Arkansas Attorney General may have received a copy of the complaint by certified mail on March 29, 2012. See the Proof of Service attached as Exhibit 6. Plaintiff's counsel served the Proof of Service on March 31, 2012. Defense counsel therefore not only had a good-faith basis to raise the defense on March 22, 2012, but, as of that date, it is undisputed that Defendants were correct in alleging that the Attorney General had not been served. Plaintiff is asking the Court to sanction Defendants for making an assertion that they know was correct at the time that it was made.

Even assuming that Plaintiff has properly served the Attorney General at some time after the Answer was filed, Plaintiffs cite no authority holding that a party is obligated to retroactively strike from its pleadings allegations that were properly made at the time they were presented. Nor is there any authority requiring a party to amend its pleadings based solely on the

representations of the opposing party's counsel. Defendants' only obligation is to prove facts supporting its affirmative defenses in order to prevail on them at trial.

Plaintiff's Motion for Sanctions is without merit, and Defendants are entitled to recover their expenses and attorneys' fees incurred in opposing the Motion. Rule 11(b), Ark. R. Civ. P.

WHEREFORE, Defendants request that Plaintiff's Motion for Sanctions be denied and that they recover their expenses and attorneys' fees incurred in opposing the Motion.

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
Springdale, AR 72764-5273
(479) 750-4444

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of May 2012, a true and correct copy of the foregoing has been 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

Filters Used:
1 Tagged Record

Email Report

Form Format

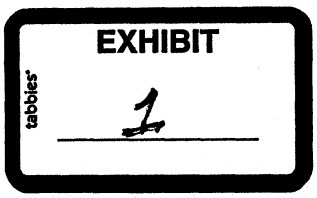
Date Printed: **5/01/2012**
Time Printed: **11:32AM**
Printed By: **MC**

Date	**4/19/2012**	Time	**10:06AM**	**10:06AM**	Duration	**0.00**	(hours)	Code				
Subject	**Sanctions**							Staff	**Stephen Lisle**			
Client	**Jim Elkins**				MatRef	**Elkins, Jim; Sue Poff v.**				MatNo	**CV 2012-261-4**	
From	**Ken@swindlelawfirm.com**											
To	**Steve Lisle**											
CC To	**Jim Keever**											
Bcc To												
Reminders		(days before)	Follow	**N**	Done	**N**	Notify	**N**	Hide	**N**	Trigger **N**	Private **N** Status

User1
User2
User3
User4

Steve, Find attached the motion and brief for sanctions that I will file in 21 days if your clients do not amend and withdraw their affirmative defense of "Plaintiff has failed to make effective service of her complaint as required to challenge the constitutionality of a statute."

Ken Swindle



47

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**

MOTION AND BRIEF FOR SANCTIONS

Comes now the Plaintiff and for her Motion for Sanctions states:

I. MOTION

1. The Defendants have refused to withdraw or amend its Answer in violation of the Arkansas Rules of Civil Procedure and Arkansas Statutory Law.

2. As is shown below, the Plaintiff is entitled to attorney fees and costs for having to respond to the Answer filed in violation of the Arkansas Rules of Civil Procedure.

WHEREFORE, Plaintiff respectfully requests attorney fees and costs for having to respond to the Defendants' refusal to Amend their Answer that is in violation of the Arkansas Rules of Civil Procedure and Arkansas Statutory Law and for all other proper relief. Plaintiff prays for an opportunity to file an affidavit of his time after a hearing in this matter.

II. BRIEF IN SUPPORT OF MOTION TO STRIKE

The Arkansas Rules of Civil Procedure states:

> a) Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. *The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or*

48

> *other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.*
>
> (b) A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (a). It shall be served as provided in Rule 5 but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. *If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion.*

Ark. R. Civ. P. 11 (emphasis supplied).

In the Plaintiff's Motion to Strike, previously filed with the Court, the Plaintiff showed that the Defendants' affirmative defense that "Plaintiff has failed to make effective service of her complaint as required to challenge the constitutionality of a statute." The Defendants responded only by stating: "Plaintiff asks the Court to prematurely strike one of Defendant's affirmative defenses." However, as is shown above, a pleading must be "well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation" at the time of the filing, not at some uncertain time in the future. Therefore, where, as here, a moving party shows that a pleading is without any basis in fact, it is not premature to ask for a ruling on such a pleading.

In support of its argument that the Plaintiff's Motion to Strike is premature, the Defendants cited *Shotzman v. Berumen*, 365 Ark. 215, 213 S.W.3d 13 (2005). The Defendants' reliance on *Shotzman* is in error. In *Shotzman*, the Plaintiffs failed to complete service of process on the Defendant, St. Edward Mercy Medical Center (SEMMC). SEMMC filed an answer claiming the affirmative defenses of insufficiency of process and insufficiency of service of process. SEMMC then moved to dismiss the complaint filed against it, which was appropriately granted.

However, nowhere in the opinion does it state that Plaintiff moved to strike the affirmative defense claimed. Indeed, it would have been odd to so move as the defense was valid. Nor does the opinion state that a Plaintiff may not have an invalid defense stricken under Rule 12. Again, such a statement would be odd and in direct contradiction to Rule 12. Nor does the opinion state a motion to strike an invalid defense is premature if made before trial. In short, everything that the Defendants cite for support in *Shotzman* was not actually pled, argued, or ruled upon in *Shotzman*. The opinion in *Shotzman* does state that a defendant does not have to specifically plead the facts to support its affirmative defense in its first responsive pleading. No where does the opinion state that a defendant does not have to respond to a motion to strike an affirmative defense.

Therefore, the Motion to Strike is not premature or unripe. The Plaintiff has demonstrated to the Court the affirmative defense of "Plaintiff has failed to make effective service of her complaint as required to challenge the constitutionality of a statute" is a defense not in compliance with Rule 12 of the Arkansas Rules of Civil Procedure, and yet the Defendants refuse to withdraw or otherwise respond to the evidence of the Plaintiff.

As the Court knows, the Arkansas legislature has provided a remedy for parties that unnecessarily waste the time and resources of the Courts. Specifically,

> (a) (1) In any civil action in which the court having jurisdiction finds that there was a *complete absence of a justiciable issue of either law or fact raised by the losing party or his attorney, the court shall award an attorney's fee* in an amount not to exceed five thousand dollars ($5,000), or ten percent (10%) of the amount in controversy, whichever is less, to the prevailing party *unless* a voluntary dismissal is filed or the pleadings are amended as to any nonjusticiable issue within a reasonable time after the attorney or party filing the dismissal or *the amended pleadings knew, or reasonably should have known, that he would not prevail.*
>
> . . .
>
> (b) In order to find [a] . . . defense to be lacking a justiciable issue of law or fact, the court must find that the . . . defense was commenced, used, or continued in bad faith solely for purposes of harassing or maliciously injuring another or delaying adjudication without just cause or that the party or the party's attorney knew, or should have known, that the . . . defense was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification, or reversal of existing law.
>
> (c) In awarding attorney's fees, the court may pronounce its decision on the fees at the conclusion of the trial or special proceedings without written motion and with or without presentation of additional evidence. The judgment for attorney's fees, if any, shall be included in the final judgment entered in the action.
>
> (d) On appeal, the question as to whether there was a complete absence of a justiciable issue shall be determined de novo on the record of the trial court alone.

Ark. Code Ann. §16-22-309 (emphasis added).

Respectfully submitted,

BY: _____

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

and

JAMES E. 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 e-mail, slisle@lislerutledge.com, on this, the 19th day of April, 2011.

_____
Ken Swindle

Filters Used:
1 Tagged Record

Email Report

Form Format

Date Printed: **5/01/2012**
Time Printed: **10:14AM**
Printed By: **SL**

Date **4/27/2012** Time **7:43AM** **7:43AM** Duration **0.00** (hours) Code **Clnt Related**
Subject **Poff v. Elkins** Staff **Marilynn R Curry**
Client **Jim Elkins** MatRef **Elkins, Jim; Sue Poff v.** MatNo **CV 2012-261-4**
From **slisle@lislerutledge.com**
To **'Ken Swindle'**
CC To **'Marilynn Curry'**
Bcc To
Reminders (days before) Follow **N** Done **N** Notify **N** Hide **N** Trigger **N** Private **N** Status

User1 User3
User2 User4

Ken,

You sent me an email attaching a motion for sanctions. In the email, you said that you would file the motion in 21 days if I did not withdraw an affirmative defense. However, the motion for sanctions was signed as was the certificate of service. Have you filed the motion for sanctions? If not, please provide me with notice if you do.

Steve Lisle

Lisle Rutledge P.A.

P. O. Box 7977

Springdale AR 72766-7977

(479) 750-4444

(479) 751-6792 fax

This electronic message transmission contains information from Lisle Rutledge P.A. Please be advised that this e-mail and any files transmitted with it may be confidential attorney-client communication or may otherwise be privileged or confidential and are intended solely for the individual or entity to whom they are addressed. If you are not the intended recipient please do not read, copy or re-transmit the communication but destroy it immediately. Any unauthorized dissemination, distribution or copying of this communication is strictly prohibited.

EXHIBIT
tabbies
2
53

Marilynn Curry

From: Ken Swindle [Ken@swindlelawfirm.com]
Sent: Friday, April 27, 2012 8:47 AM
To: Steve Lisle
Cc: Marilynn Curry; Jim Keever
Subject: Poff v. Elkins

Steve, the certificate of service is in compliance with Rule 11 for the 21 day safe-harbor provision. I do not know of any rule that I am required to reserve the motion on you after 21 days. See, Ark. R. Civ. P. 5(e). I have already given you notice that it will be filed after 21 days if the defenses are not withdrawn. Frankly, I am at a loss on why you will not withdraw them. I really do NOT want to file a motion for sanctions and I do not understand why you are being uncooperative on this point as the law is so clear that we have, in fact, complied with the statute.

Also, you never responded to my repeated requests to state your position on whether we can still use the discovery from the last case. I really do not want to do the discovery all over again, but I guess that we can if you are just not going to cooperate on anything. That seems like an incredible waste of resources for both of us. Either way, could you please let me know your decision on this issue?

Ken

-----Original Message-----
From: Steve Lisle [mailto:slisle@lislerutledge.com]
Sent: Friday, April 27, 2012 7:43 AM
To: Ken Swindle
Cc: 'Marilynn Curry'
Subject: Poff v. Elkins

Ken,

You sent me an email attaching a motion for sanctions. In the email, you said that you would file the motion in 21 days if I did not withdraw an affirmative defense. However, the motion for sanctions was signed as was the certificate of service. Have you filed the motion for sanctions? If not, please provide me with notice if you do.

Steve Lisle

Lisle Rutledge P.A.

P. O. Box 7977

Springdale AR 72766-7977

(479) 750-4444

(479) 751-6792 fax

This electronic message transmission contains information from Lisle

EXHIBIT tabbies 3

54

Rutledge P.A. Please be advised that this e-mail and any files transmitted with it may be confidential attorney-client communication or may otherwise be privileged or confidential and are intended solely for the individual or entity to whom they are addressed. If you are not the intended recipient please do not read, copy or re-transmit the communication but destroy it immediately. Any unauthorized dissemination, distribution or copying of this communication is strictly prohibited.

55

Steve Lisle

From: Ken Swindle [Ken@swindlelawfirm.com]
Sent: Tuesday, May 01, 2012 9:34 AM
To: Steve Lisle
Cc: Jim Keever
Subject: Poff v. Elkins

Steve, Possibly you do not recall my email to you on April 19, 2012 where I stated:

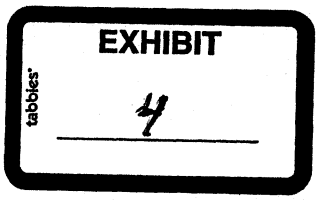
"Find attached the motion and brief for sanctions that I will file in 21 days if your clients do not amend and withdraw their affirmative defense of 'Plaintiff has failed to make effective service of her complaint as required to challenge the constitutionality of a statute.' "

You are a very smart person. I know that you can count 21 days from April 19.

Also, I have no desire to quibble with you either. Remember, I am not the one who is getting paid by the hour, so I have no interest in quibbling over frivolous matters. I want to get down to the heart of the matter in this case. As I have shown in my motions to strike, replies, and the motion for sanctions, your clients do not have a reasonable affirmative defense regarding service on the attorney general or adding another party and nothing in your responses has shown otherwise. These defenses should be withdrawn so we can focus on the substantive aspects of the case. Other than creating unnecessary billable hours for the one side that is billing by the hour, why are we even spending time on this? That is not rhetorical; that is a serious question. Why are we having to spend time dealing with these defenses when it is obvious that they do not apply in this case? That is why I called you ultiple times to discuss it before I ever even bothered to file a motion to strike. I just not understand why you are digging in about this.

Ken Swindle

-----Original Message-----
From: Steve Lisle [mailto:slisle@lislerutledge.com]
Sent: Tuesday, May 01, 2012 8:57 AM
To: Ken Swindle
Cc: 'Marilynn Curry'
Subject: RE: Poff v. Elkins



Ken,

I'm not trying to quibble with you, but I simply don't see how I am going to know when or if I need to respond to the motion for sanctions if you file it at some point in the future without giving me notice. Surely you don't think that would be reasonable. In my opinion, neither the motions to strike nor the motion for sanctions are necessary. Unfortunately, my previous experience with you and Jim Keever on this case leads me to believe that debating the issues with you may not be fruitful. It seems that any time I disagree with your analysis of the case, you deem me to be uncooperative. You can't very well expect greater cooperation from me when you continue the pattern, begun in the previous case, of making immediate demands of me followed by threats of sanctions. When Jim threatened me with sanctions for filing a motion for summary judgment in the last case (after making many other threats of sanctions), I decided that we obviously don't see eye-to-eye on some issues and that it might better for us to limit contact.

As for the discovery, I do not have any objection to using information or documents produced during the last case, and I plan to limit my discovery in this case accordingly.

56

Steve Lisle
Lisle Rutledge P.A.
P. O. Box 7977
Springdale AR 72766-7977
(479) 750-4444
(479) 751-6792 fax

This electronic message transmission contains information from Lisle Rutledge P.A. Please be advised that this e-mail and any files transmitted with it may be confidential attorney-client communication or may otherwise be privileged or confidential and are intended solely for the individual or entity to whom they are addressed. If you are not the intended recipient please do not read, copy or re-transmit the communication but destroy it immediately. Any unauthorized dissemination, distribution or copying of this communication is strictly prohibited.

-----Original Message-----
From: Ken Swindle [mailto:Ken@swindlelawfirm.com]
Sent: Friday, April 27, 2012 8:47 AM
To: Steve Lisle
Cc: Marilynn Curry; Jim Keever
Subject: Poff v. Elkins

Steve, the certificate of service is in compliance with Rule 11 for the 21 day safe-harbor provision. I do not know of any rule that I am required to reserve the motion on you after 21 days. See, Ark. R. Civ. P. 5(e). I have already given you notice that it will be filed after 21 days if the defenses are not withdrawn. Frankly, I am at a loss on why you will not withdraw them. I really do NOT want to file a motion for sanctions and I do not understand why you are being uncooperative on this point as the law is so clear that we have, in fact, complied with the statute.

Also, you never responded to my repeated requests to state your position on whether we can still use the discovery from the last case. I really do not want to do the discovery all over again, but I guess that we can if you are just not going to cooperate on anything. That seems like an incredible waste of resources for both of us. Either way, could you please let me know your decision on this issue?

Ken

-----Original Message-----
From: Steve Lisle [mailto:slisle@lislerutledge.com]
Sent: Friday, April 27, 2012 7:43 AM
To: Ken Swindle
Cc: 'Marilynn Curry'
Subject: Poff v. Elkins

Ken,

You sent me an email attaching a motion for sanctions. In the email, you said that you would file the motion in 21 days if I did not withdraw an affirmative defense. However, the motion

57

for sanctions was signed as was the certificate of service. Have you filed the motion for sanctions? If not, please provide me with notice if you do.

Steve Lisle

Lisle Rutledge P.A.

P. O. Box 7977

Springdale AR 72766-7977

(479) 750-4444

(479) 751-6792 fax

This electronic message transmission contains information from Lisle Rutledge P.A. Please be advised that this e-mail and any files transmitted with it may be confidential attorney-client communication or may otherwise be privileged or confidential and are intended solely for the individual or entity to whom they are addressed. If you are not the intended recipient please do not read, copy or re-transmit the communication but destroy it immediately. Any unauthorized dissemination, distribution or copying of this communication is strictly prohibited.

58

Filters Used:
1 Tagged Record

Email Report

Form Format

Date Printed: **5/01/2012**
Time Printed: **12:27PM**
Printed By: **MC**

From: Jim Keever [mailto:kukeevs@keever.cc]
Sent: Monday, November 21, 2011 3:50 PM
To: 14797516792@maxemailsend.com; Steve Lisle; Marilynn Curry; Ken Swindle; Jim Keever
Subject: D. D. Atwood contact

ATTN: Steve Lisle

See attached

--
James E. Keever, M.D., J.D.
2801 Richmond Road #57
Texarkana, TX 75503
kukeevs@keever.cc
903 793 5316
Cell 903 314 6914
Fax 903 642 0066

59

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**

PROOF OF SERVICE

Comes now the Plaintiff, by her attorneys, and, pursuant to Arkansas Code Annotated, Section 16-111-106, gives notice that she has served on March 29, 2012, a copy of the Complaint in this matter on the Office of the Attorney General. See Green Card attached. The Office of Attorney General has responding accordingly. See March 30, 2012 letter from the Office of Attorney General, attached.

Respectfully submitted,

BY: Ken Swindle

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

and

EXHIBIT
tabbies
6
60

Filters Used:
1 Tagged Record

Email Report

Form Format

Date Printed: **5/01/2012**
Time Printed: **12:04PM**
Printed By: **MC**

Date **6/13/2011** Time **11:30AM** **11:30AM** Duration **0.00** (hours) Code
Subject **Elkins** Staff **Stephen Lisle**
Client **Jim Elkins** MatRef **Elkins, Jim; Sue Poff v.** MatNo **CV 2012-261-4**
From **kukeevs@keever.cc**
To **Steve Lisle; Ken Swindle**
CC To
Bcc To
Reminders (days before) Follow **N** Done **N** Notify **N** Hide **N** Trigger **N** Private **N** Status

User1 User3
User2 User4

Steve,. I will have my response to your obviously premature MSJ in the next week or so. I can't believe you think that this is a non-frivolous filing, but would really prefer not to be in a position where I would be obligated to ask for Rule 11 sanctions. Yeah, I know, you have never been threatened by anyone else on sanctions issues, and I havn't been in practice as long as you, but I do nothing but medmal, and have never had the defense file what is basically a "no evidence" MSJ before adequate time for discovery.

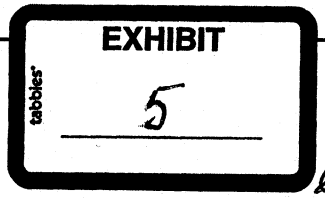
My suggestion is the same as at the deposition. We can agree on a disclosure schedule for experts, and my suggestion is as follows:

That Plaintiff shall disclose her testifying experts no later than August 9, 2011; that Plaintiff's experts shall be made available for deposition no later than the earlier of (a) thirty (30) days after disclosure of Plaintiff's Expert or (b) no later that September 8, 2011; that Defendants shall disclose their testifying on the earlier date of sixty (60) days after the disclosure of Plaintiff's experts or no later than October 8, 2011: and that Defendant shall produce their experts for deposition on the earlier of thirty (30) days after disclosure of such experts or no later than November 7, 2011.

I am asking you to consider this and withdraw your MSJ. This gives us plenty of time to complete discovery, and is what I will be asking Judge Scott in my Response. Let me know.

Jim

--
James E. Keever, M.D., J.D.
2801 Richmond Road #57
Texarkana, TX 75503
kukeevs@keever.cc
903 793 5316
Cell 903 314 6914
Fax 903 642 0066



61

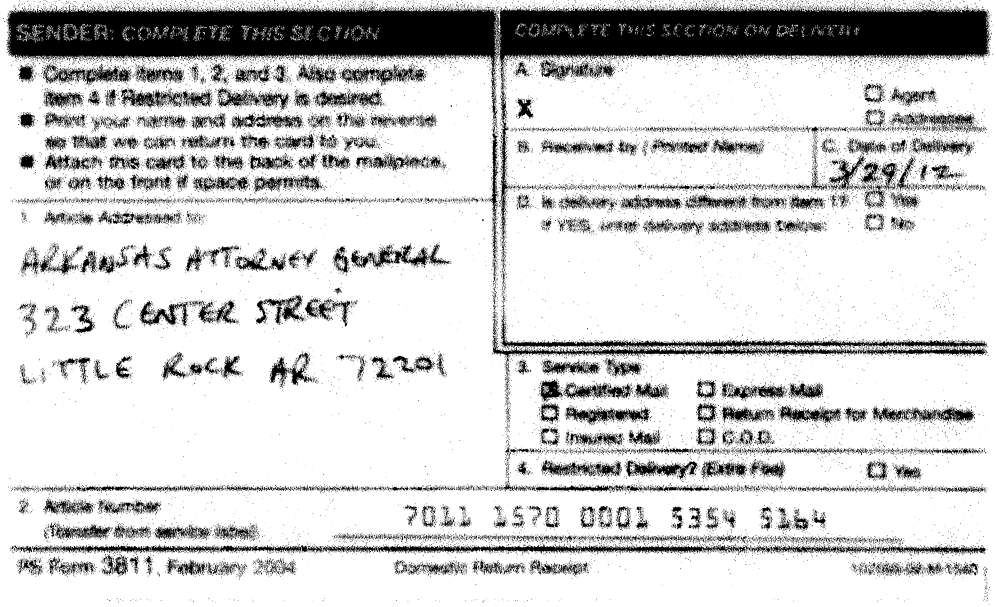
JAMES E. KEEVER, M.D., J.D.
Arkansas Bar No. 2005176
2801 Richmond Road, # 57
Texarkana, Texas 75503
Telephone: (903) 793-5316
Telecopier: (903) 642-0066
kukeevs@keever.cc

CERTIFICATE OF SERVICE

I, Ken Swindle, hereby certify that I have served a copy of this document upon Steve Lisle, attorney for Defendants, by e-mail, slisle@lislerutledge.com, on this, the 31st day of March, 2011.

Ken Swindle

62



SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

ARKANSAS ATTORNEY GENERAL
323 CENTER STREET
LITTLE ROCK AR 72201

COMPLETE THIS SECTION ON DELIVERY

A. Signature

X ☐ Agent ☐ Addressee

B. Received by (Printed Name) C. Date of Delivery 3/29/12

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☑ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

2. Article Number (Transfer from service label) 7011 1570 0001 5354 5164

PS Form 3811, February 2004 Domestic Return Receipt

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**

FILED
2012 MAY 14 AM 8 29
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR

MOTION AND BRIEF FOR SANCTIONS

Comes now the Plaintiff and for her Motion for Sanctions states:

I. MOTION

1. The Defendants have refused to withdraw or amend its Answer in violation of the Arkansas Rules of Civil Procedure and Arkansas Statutory Law.

2. As is shown below, the Plaintiff is entitled to attorney fees and costs for having to respond to the Answer filed in violation of the Arkansas Rules of Civil Procedure.

WHEREFORE, Plaintiff respectfully requests attorney fees and costs for having to respond to the Defendants' refusal to Amend their Answer that is in violation of the Arkansas Rules of Civil Procedure and Arkansas Statutory Law and for all other proper relief. Plaintiff prays for an opportunity to file an affidavit of his time after a hearing in this matter.

II. BRIEF IN SUPPORT OF MOTION TO STRIKE

The Arkansas Rules of Civil Procedure states:

> a) Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. *The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or*

64

other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

(b) A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (a). It shall be served as provided in Rule 5 but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. *If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion.*

Ark. R. Civ. P. 11 (emphasis supplied).

In the Plaintiff's Motion to Strike, previously filed with the Court, the Plaintiff showed that the Defendants' affirmative defense that "Plaintiff has failed to make effective service of her complaint as required to challenge the constitutionality of a statute." The Defendants responded only by stating: "Plaintiff asks the Court to prematurely strike one of Defendant's affirmative defenses." However, as is shown above, a pleading must be "well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation" at the time of the filing, not at some uncertain time in the future. Therefore, where, as here, a moving party shows that a pleading is without any basis in fact, it is not premature to ask for a ruling on such a pleading.

In support of its argument that the Plaintiff's Motion to Strike is premature, the Defendants cited *Shotzman v. Berumen*, 365 Ark. 215, 213 S.W.3d 13 (2005). The Defendants' reliance on *Shotzman* is in error. In *Shotzman*, the Plaintiffs failed to complete service of process on the Defendant, St. Edward Mercy Medical Center (SEMMC). SEMMC filed an answer claiming the affirmative defenses of insufficiency of process and insufficiency of service of process. SEMMC then moved to dismiss the complaint filed against it, which was appropriately granted.

However, nowhere in the opinion does it state that Plaintiff moved to strike the affirmative defense claimed. Indeed, it would have been odd to so move as the defense was valid. Nor does the opinion state that a Plaintiff may not have an invalid defense stricken under Rule 12. Again, such a statement would be odd and in direct contradiction to Rule 12. Nor does the opinion state a motion to strike an invalid defense is premature if made before trial. In short, everything that the Defendants cite for support in *Shotzman* was not actually pled, argued, or ruled upon in *Shotzman*. The opinion in *Shotzman* does state that a defendant does not have to specifically plead the facts to support its affirmative defense in its first responsive pleading. No where does the opinion state that a defendant does not have to respond to a motion to strike an affirmative defense.

Therefore, the Motion to Strike is not premature or unripe. The Plaintiff has demonstrated to the Court the affirmative defense of "Plaintiff has failed to make effective service of her complaint as required to challenge the constitutionality of a statute" is a defense not in compliance with Rule 12 of the Arkansas Rules of Civil Procedure, and yet the Defendants refuse to withdraw or otherwise respond to the evidence of the Plaintiff.

As the Court knows, the Arkansas legislature has provided a remedy for parties that unnecessarily waste the time and resources of the Courts. Specifically,

> (a) (1) In any civil action in which the court having jurisdiction finds that there was a *complete absence of a justiciable issue of either law or fact raised by the losing party or his attorney, the court shall award an attorney's fee* in an amount not to exceed five thousand dollars ($5,000), or ten percent (10%) of the amount in controversy, whichever is less, to the prevailing party *unless* a voluntary dismissal is filed or the pleadings are amended as to any nonjusticiable issue within a reasonable time after the attorney or party filing the dismissal or *the amended pleadings knew, or reasonably should have known, that he would not prevail.*
>
> . . .
>
> (b) In order to find [a] . . . defense to be lacking a justiciable issue of law or fact, the court must find that the . . . defense was commenced, used, or continued in bad faith solely for purposes of harassing or maliciously injuring another or delaying adjudication without just cause or that the party or the party's attorney knew, or should have known, that the . . . defense was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification, or reversal of existing law.
>
> (c) In awarding attorney's fees, the court may pronounce its decision on the fees at the conclusion of the trial or special proceedings without written motion and with or without presentation of additional evidence. The judgment for attorney's fees, if any, shall be included in the final judgment entered in the action.
>
> (d) On appeal, the question as to whether there was a complete absence of a justiciable issue shall be determined de novo on the record of the trial court alone.

Ark. Code Ann. §16-22-309 (emphasis added).

Respectfully submitted,

BY: _____

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

and

JAMES E. 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 e-mail, slisle@lislerutledge.com, on this, the 19th day of April, 2011.

_____
Ken Swindle

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS

FILED
2012 MAY 22 AM 10 45
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR

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 AND BRIEF FOR REQUESTS FOR ADMISSIONS TO BE ANSWERED, OR, IN THE ALTERNATIVE, TO BE DEEMED ADMITTED, AND FOR EXPENSES INCURRED IN RELATION TO THE MOTION

Comes now the Plaintiff and for her Motion and Brief for Requests for Admission to be Answered, or, in the Alternative, to be Deemed Admitted, and for Expenses Incurred in Relation to the Motion states:

I. MOTION

1. On April 2, 2012, the Plaintiff's exchanged two requests for admissions to the Defendants. These Requests were:

- Admit or deny that your affirmative defense of "Plaintiff has failed to make effective service of her complaint as required to challenge the constitutionality of a statute" is based exclusively on application of Arkansas Code Annotated, Section 16-111-106.
- Admit or deny that your affirmative defense of "Plaintiff has failed to name a necessary party to challenge the constitutionality of a statute" is based exclusively on application of Arkansas Code Annotated, Section 16-111-106.

See Requests for Admissions filed with the Clerk and incorporated herein. Ark. R. Civ. P. 10(c).

2. Said requests were straightforward and self-explanatory.

3. Instead of answering the requests, the Defendants objected, stating: "The requests asks Defendant to divulge it legal theories and opinions." See Defendants' Answers to Requests

69

for Admissions, attached.

4. As shown in the Brief below, said objections are not allowed by the Arkansas Rules of Civil Procedure.

5. As shown in the Brief below, said objections should be overruled by this Court as insufficient. The Defendants should be required to answer, or, in the alternative, the requests should be deemed admitted, and the Plaintiff should be awarded the costs incurred in from the current motion.

II. BRIEF

The Arkansas Rules of Civil Procedure provide:

> A party may serve upon any other party a written request for the admission, for purposes of the pending action, of the truth of any matters within the scope of Rule 26(b) set forth in the request *that relate to* statements or opinions of fact or *the application of law to fact*, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Ark. R. Civ. P. 36(a) (emphasis added.) Here, this is exactly the procedure followed by the Plaintiff. The Defendants objected on the basis of "legal theories and opinions". However, the Official Reporter's Notes explains that "the rule expands the scope of matters which may be determined through the use of requests *to include statements and opinions of fact*." Therefore, the objections of the Defendants are misplaced.

The Court of Appeals has further clarified that requests for admissions are designed to ascertain an adversary's position. *In re Dailey*, 30 Ark. App. 8, 784 S.W.2d 782 (1989). Specifically, the purpose of the rule is to weed out facts about which there is no true controversy

but which are often difficult or expensive to prove. *Id.* Therefore, it is improper for a party to object based upon divulging legal theories. That is the entire purpose of requests for admissions - to clarify an adversary's position, that is, its legal theories.

Plaintiff agrees that it would be improper to request an admission on the conclusion of a legal theory, or bare conclusion of law. However, that is not what the Plaintiff has done and not what the Defendant even alleges that the Plaintiff has done. The Plaintiff has not requested an admission of whether the Defendant's theory is correct or incorrect.

What the Plaintiff has done is simply to try to narrow down what the Defendants are claiming and not claiming in their affirmative defenses - not whether that claim is legally valid. As the Court in *Dailey* made clear:

> An element of the burden of proof, or even the ultimate issue in the case may be addressed in a request for admission under Rule 36, and *the admission of these matters may not be avoided because the request calls for application of the facts to the law, the truth of an ultimate issue, or opinion or conclusion so long as the opinion called for is not on an abstract proposition of law*. It is the concession of the issue, otherwise determinable by the trier of fact, which comes into evidence, not the assumptions of the party who makes the admission.
>
> *Id.* (Citation omitted; emphasis added.) See opinion attached.
>
> Further, the Arkansas Rules of Civil Procedure provide:
>
> The matter is admitted unless, within 30 days after service of the request, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter . . . If objection is made, the reasons therefor shall be stated. The party answering requests for admissions shall repeat each request immediately before the answer or objection. The answer shall specifically admit or deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as

a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. *A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request*; he may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why he cannot admit or deny it. *The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served.* If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

Ark. R. Civ. P. 36(a) (emphasis added).

WHEREFORE, the Plaintiff prays for the Court to determine the sufficiency of the answers and objections of the Defendant, that the Defendant be ordered to answer, or, in the alternative, that the requests for admissions be deemed admitted, for expenses incurred in relation to the current motion, and for all other proper relief.

Respectfully submitted,

BY: _____

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

and

JAMES E. 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 e-mail, slisle@lislerutledge.com, on this, the 20th day of May, 2012.

Ken Swindle

MATTER OF ADOPTION OF DAILEY

784 S.W.2d 782 (1989)

30 Ark.App. 8

In the Matter of the ADOPTION OF Jennifer DAILEY.

No. CA 89-63.

Court of Appeals of Arkansas, Division II.

December 13, 1989.

William A. Lafferty, Little Rock, for appellant.

Philip Dixon, Little Rock, for appellee.

COOPER, Judge.

The v

This is the second appeal in this adoption case. The appellant, the natural mother, argues that the probate judge erred in granting the appellees' motion for summary judgment and in dismissing the appellant's petition to withdraw her consent to the adoption. We reverse and remand.

On January 16, 1986, the appellant signed a consent to the adoption of her daughter by the appellees, and on January 17, 1986, the probate court entered an adoption decree. The appellant attempted to withdraw her consent, asserting that it

[784 S.W.2d 783]

had been obtained by fraud and duress. The probate court ruled that the decree was final and, that as a matter of law, she could not raise an issue of fact as to her right to withdraw consent. On appeal to this Court, we reversed and remanded, holding that the appellant could withdraw her consent upon a showing that it was obtained by fraud, duress, or intimidation. *In re Jennifer Dailey,*20 Ark.App. 180, 726 S.W.2d 292 (1987). We remanded after finding that the trial court had erred in granting summary judgment, and ordered a hearing on whether the appellant's consent was wrongfully obtained.

On May 27, 1988, the appellees filed sixteen requests for admissions. Request number two asked the appellant to admit that she was "not acting under duress, fraud or under misrepresentation at the time [she] executed the Consent to Adopt," and request number sixteen asked the appellant to admit "that it would be in the best interests of the minor child that this adoption be granted." The requests for admissions were to be answered by June 29, 1988; however, they were not filed until July 8, 1988. The probate court, noting that the responses were unverified and relying on Ark.R.Civ.P. 36, deemed the requests for admissions admitted and granted the appellees' motion for summary judgment. In his order the probate judge clearly relied on requests for admissions numbers two and sixteen in granting the summary judgment. Verification by the parties is no longer necessary on requests for admissions. Ark.R.Civ.P. Rule 36(a)(1987).

Requests for admissions are generally considered to be designed to ascertain an adversary's

74

position, and are not discovery devices to ascertain relevant facts. *Van Langen v. Chadwick,* 173 N.J.Super. 517, 414 A.2d 618 (1980). The purpose of the rule is to facilitate trial by weeding out facts about which there is no true controversy but which are often difficult or expensive to prove. *Id.; see United Coal Cos. v. Powell Construction Co.,* 839 F.2d 958 (3d Cir.1988); *ASEA, Inc. v. Southern Pacific Transportation Co.,* 669 F.2d 1242 (9th Cir.1981); *Webb v. Westinghouse Electric Corp.,* 81 F.R.D. 431 (E.D.Pa.,.1978); *Linde v. Kilbourne,* 543 S.W.2d 543 (Mo. App. 1976).

Although the Arkansas Rules of Civil Procedure allow for a request for an admission which concerns the application of law to fact, Ark.R.Civ.P. 36(a), admissions designed to directly discover what legal conclusions the opposing attorney intends to draw from those facts are improper. *See Equal Employment Opportunity Commission v. Otto,* 75 F.R.D. 624 (D.Md. 1976). An element of the burden of proof, or even the ultimate issue in the case may be addressed in a request for admission under Rule 36, and the admission of these matters may not be avoided because the request calls for application of the facts to the law, the truth of an ultimate issue, or opinion or conclusion so long as the opinion called for is not on an abstract proposition of law. *Linde, supra.* It is the concession of the issue, otherwise determinable by the trier of fact, which comes into evidence, not the assumptions of the party who makes the admission. *Id.* A request for admission of a pure matter of law is improper. *Jensen v. Pioneer Dodge Center, Inc.,* 702 P.2d 98 (Utah 1985).

In the present case, the probate court relied entirely upon requests for admissions two and sixteen, both of which are bare conclusions of law. There are no facts mentioned in the requests and, therefore, we cannot call them the "application of facts to law." We hold that in this case, where the appellant has attempted to obtain a hearing on the fraud and duress issues as they apply to her signing the consent to adopt, where we remanded the case and ordered such a hearing to be held, and where the issues are already developed and narrowed for trial, that the probate court erred in granting summary judgment on the basis of the improper requests for admissions. Even had the requests for admission been proper, to allow this result to stand would be to allow technical considerations to prevail over substantial justice. *See Jensen, supra.* We reverse and remand with directions to the probate court to hold a hearing to determine whether fraud or duress was employed in obtaining

[784 S.W.2d 784]

the appellant's signature on the consent to adopt.

Reversed and remanded.

CORBIN, C.J., and ROGERS, J., agree.

75

FILED
2012 MAY 23 PM 2 44
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS

SUE POFF PLAINTIFF

vs. CASE NO. CV-2012-0261-4

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

NOTICE OF HEARING ON PLAINTIFF'S MOTION FOR REQUESTS FOR ADMISSIONS TO BE ANSWERED, OR, IN THE ALTERNATIVE, TO BE DEEMED ADMITTED, AND FOR EXPENSES INCURRED IN RELATION TO THE MOTION

Please take notice that the above-captioned cause is hereby set for hearing along with the previously scheduled pretrial conference and Plaintiff's Motion to Strike on June 4, 2012, at 9:00 a.m., in Room 208 of the Benton County Courthouse, Bentonville, Arkansas.

JOHN R. SCOTT
CIRCUIT JUDGE
Dated: May 23, 2012

cc: Ken Swindle
Attorney at Law
619 West Persimmon Street
Rogers, AR 72756
VIA TELEFAX 1-479-621-0838

James E. Keever, M.D., J.D.
Attorney at Law
2801 Richmond Road, #57
Texarkana, TX 75503
VIA TELEFAX 1-903-642-0066

Stephen Lisle
Attorney at Law
1458 Plaza Place, Suite 101
Springdale, AR 72764-5273
VIA TELEFAX 1-479-751-6792

76

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS
CIVIL DIVISION

FILED
2012 MAY 25 PM 12 19
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR.

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

RESPONSE TO PLAINTIFF'S MOTION AND BRIEF FOR REQUESTS FOR ADMISSIONS TO BE ANSWERED, OR, IN THE ALTERNATIVE, TO BE DEEMED ADMITTED, AND FOR EXPENSES INCURRED IN RELATION TO THE MOTION

COME NOW the Defendants herein, James P. Elkins, M.D. and James P. Elkins, M.D., P.A., by and through their undersigned attorneys, and for their Response to Plaintiff's Motion and Brief for Requests for Admission to be Answered, or, in the Alternative, to be Deemed Admitted, and for Expenses Incurred in Relation to the Motion, state as follows:

1. Plaintiff's Requests for Admission were Improper.

Plaintiff served Requests for Admission that asked Defendants to admit or deny that certain affirmative defenses were "based exclusively on application of Arkansas Code Annotated, Section 16-111-106."

> Although the Arkansas Rules of Civil Procedure allow for a request for an admission which concerns the application of law to fact, Ark. R. Civ. P. 36(a), admissions designed to directly discover what legal conclusions the opposing attorney intends to draw from those facts are improper. (*citation omitted*). . . A request for admission of a pure matter of law is improper. *(citation omitted)*.
>
> *In re Adoption of Dailey*, 30 Ark. App. 8, 10-11, 784 S.W.2d 782, 783 (1989).

Plaintiff's request regarding a pure matter of law was improper, and Defendants' objections were warranted. It should be noted that Defendants answered Plaintiff's related

Interrogatories and Requests for Production of Documents in which Plaintiff requested information about the facts and documents that support Defendants' affirmative defenses. See Exhibit 1.

2. Plaintiff Failed to Comply with Rule 37 and is Not Entitled to an Order Compelling Discovery or Expenses Related to this Motion.

Defendants served their responses to Plaintiff's discovery on Friday, May 18, 2012. Plaintiff served this motion requesting an award of expenses on Sunday, May 20, 2012, without first conferring with Defendants. Under Rule 37(a)(2), a party is required to confer in good faith with the opposing party to resolve any discovery dispute before it files a motion to compel. A motion to compel, such as this one, must also include a statement that "the movant has attempted to confer with the person or party failing to make discovery in an effort to secure the information of material without court action." Rule 37(a)(2), Ar. R. Civ. P.

Plaintiff had the information it needed to prepare for argument on the underlying issue via Defendants' responses to Interrogatories and Requests for Production. Plaintiff made no effort to confer in good faith before filing this motion, nor did Plaintiff comply with the conditions of seeking court intervention.

WHEREFORE, Defendants request that Plaintiff's Motion be denied and that they recover their expenses and attorneys' fees incurred in opposing the Motion.

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
Springdale, AR 72764-5273
(479) 750-4444

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of May 2012, a true and correct copy of the foregoing has been 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

JAMES ELKINS, M.D.'S RESPONSE TO INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS

COMES NOW the Defendant, James Elkins, M.D., and for his Response to Interrogatories and Requests for Production of Documents, respectfully states as follows:

INTERROGATORY NUMBER 1: State all facts that support your affirmative defense that "Plaintiff has failed to make effective service of her complaint as required to challenge the constitutionality of a statute."

RESPONSE TO INTERROGATORY NUMBER 1: At the time of answering, the facts in support of the allegation include, but are not necessarily limited to, the Plaintiff's failure to allege that she had or would serve the Attorney General, and the fact that Plaintiff had not served the Attorney General. Defendants reserve the right to conduct discovery on this issue prior to trial on the merits.

REQUEST FOR PRODUCTION NUMBER 1: Produce all documents that support your response to the above Interrogatory.

RESPONSE TO REQUEST FOR PRODUCTION NUMBER 1: At the time of Answering, the Plaintiff's complaint supported the response. The subsequently produced Proof

80

EXHIBIT
tabbies
1

of Service, in Plaintiff's possession, also supports the response. Defendants reserve the right to conduct discovery on this issue prior to trial on the merits.

INTERROGATORY NUMBER 2: State all facts that support your affirmative defense that "Plaintiff has failed to name a necessary party to challenge the constitutionality of a statute."

RESPONSE TO INTERROGATORY NUMBER 2: At the time of answering, the facts in support of the allegation include, but are not necessarily limited to, the Plaintiff's failure to allege that she had named or would serve the Attorney General, and the fact that Plaintiff had not named or served the Attorney General. Defendants reserve the right to conduct discovery on this issue prior to trial on the merits.

REQUEST FOR PRODUCTION NUMBER 2: Produce all documents that support your response to the above interrogatory.

RESPONSE TO REQUEST FOR PRODUCTION NUMBER 2: At the time of Answering, the Plaintiff's complaint supported the response. The subsequently produced Proof of Service, in Plaintiff's possession, also supports the response. Defendants reserve the right to conduct discovery on this issue prior to trial on the merits.

INTERROGATORY NUMBER 3: For anything that an unconditional "admitted" to the Plaintiff's Requests for Admissions, exchanged simultaneously herewith, state all facts to support your response.

RESPONSE TO INTERROGATORY NUMBER 3: See Defendant's objections to Plaintiff's Request for Admission and the responses to the preceding Interrogatories and Requests for Production.

REQUEST FOR PRODUCTION NUMBER 3: For anything that an unconditional "admitted" to the Plaintiff's Requests for Admissions, exchanged simultaneously herewith, produce for inspection all documents to support your response.

RESPONSE TO REQUEST FOR PRODUCTION NUMBER 3: See Defendant's objections to Plaintiff's Request for Admission and the responses to the preceding Interrogatories and Requests for Production.

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)

82

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of May 2012, a true and correct copy of the foregoing has been 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

83

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

JAMES ELKINS, M.D., P.A.'S RESPONSE TO INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS

COMES NOW the Defendant, James Elkins, M.D., P.A., and for its Response to Interrogatories and Requests for Production of Documents, respectfully states as follows:

INTERROGATORY NUMBER 1: State all facts that support your affirmative defense that "Plaintiff has failed to make effective service of her complaint as required to challenge the constitutionality of a statute."

RESPONSE TO INTERROGATORY NUMBER 1: At the time of answering, the facts in support of the allegation include, but are not necessarily limited to, the Plaintiff's failure to allege that she had or would serve the Attorney General, and the fact that Plaintiff had not served the Attorney General. Defendants reserve the right to conduct discovery on this issue prior to trial on the merits.

REQUEST FOR PRODUCTION NUMBER 1: Produce all documents that support your response to the above Interrogatory.

RESPONSE TO REQUEST FOR PRODUCTION NUMBER 1: At the time of Answering, the Plaintiff's complaint supported the response. The subsequently produced Proof

of Service, in Plaintiff's possession, also supports the response. Defendants reserve the right to conduct discovery on this issue prior to trial on the merits.

INTERROGATORY NUMBER 2: State all facts that support your affirmative defense that "Plaintiff has failed to name a necessary party to challenge the constitutionality of a statute."

RESPONSE TO INTERROGATORY NUMBER 2: At the time of answering, the facts in support of the allegation include, but are not necessarily limited to, the Plaintiff's failure to allege that she had named or would serve the Attorney General, and the fact that Plaintiff had not named or served the Attorney General. Defendants reserve the right to conduct discovery on this issue prior to trial on the merits.

REQUEST FOR PRODUCTION NUMBER 2: Produce all documents that support your response to the above interrogatory.

RESPONSE TO REQUEST FOR PRODUCTION NUMBER 2: At the time of Answering, the Plaintiff's complaint supported the response. The subsequently produced Proof of Service, in Plaintiff's possession, also supports the response. Defendants reserve the right to conduct discovery on this issue prior to trial on the merits.

INTERROGATORY NUMBER 3: For anything that an unconditional "admitted" to the Plaintiff's Requests for Admissions, exchanged simultaneously herewith, state all facts to support your response.

RESPONSE TO INTERROGATORY NUMBER 3: See Defendant's objections to Plaintiff's Request for Admission and the responses to the preceding Interrogatories and Requests for Production.

REQUEST FOR PRODUCTION NUMBER 3: For anything that an unconditional "admitted" to the Plaintiff's Requests for Admissions, exchanged simultaneously herewith, produce for inspection all documents to support your response.

RESPONSE TO REQUEST FOR PRODUCTION NUMBER 3: See Defendant's objections to Plaintiff's Request for Admission and the responses to the preceding Interrogatories and Requests for Production.

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 15th day of May 2012, a true and correct copy of the foregoing has been 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

87

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS

FILED
2012 JUN 4 PM 2 49
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR

SUE POFF PLAINTIFF

vs. CASE NO. CV-2012-0261-4

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

ORDER SETTING JURY TRIAL

The above-captioned cause is hereby set for a five-day jury trial beginning on March 11, 2013, at 8:45 a.m., in Room 208 of the Benton County Courthouse, Bentonville, Arkansas. At the present time, this case is scheduled first out in order of the cases to be tried that day. ***Counsel shall be present in chambers at 8:15 a.m. on the morning of trial.***

The following deadlines will be followed:

1. All pleadings naming additional parties shall be filed one-hundred and twenty (120) days before trial.

2. Written discovery shall be completed sixty (60) days before trial; depositions shall be completed thirty (30) days prior to trial; no dispositive motions shall be filed within sixty (60) days of trial.

3. Counsel shall exchange witness and exhibit lists no later than the date set forth in paragraph 4 below and provide a copy of such lists to the Court; confer in good faith on proposed jury instructions; and, no later than the date set forth in paragraph 4 below, counsel shall submit to the Court proposed instructions upon which there is agreement, along with proposed instructions on which agreement could

not be reached. ***Counsel shall send a hard copy, as well as via e-mail (in WORD format) to bschrader@co.benton.ar.us, of the proposed instructions.*** Jury instructions shall be entitled "Instruction No. _____," and shall contain no language identifying them as Plaintiff's or Defendant's requested instructions.

4. If the witness list, exhibit list, and jury instructions have not been submitted to the Court **by February 21, 2013, counsel shall appear at 9:00 a.m. on February 22, 2013,** and show cause why counsel should not be held in contempt for failure to comply with of this Court's Order Setting Jury Trial.

5. ***If an interpreter will be required for the testimony of any witness and/or party to this action, counsel shall advise the Court no later than February 22, 2013, or by the show cause date for witness list, exhibit list, and jury instructions.***

6. A pretrial hearing to consider all outstanding motions and pretrial matters will be held at 9:00 a.m. on February 22, 2013.

IT IS SO ORDERED this 4th day of June, 2012.

JOHN R. SCOTT
CIRCUIT JUDGE

cc: Ken Swindle
Attorney at Law
619 West Persimmon Street
Rogers, AR 72756
VIA TELEFAX 1-479-621-0838

James E. Keever, M.D., J.D.
Attorney at Law
2801 Richmond Road, #57
Texarkana, TX 75503
VIA TELEFAX 1-903-642-0066

Stephen Lisle
Attorney at Law
1458 Plaza Place, Suite 101
Springdale, AR 72764-5273
VIA TELEFAX 1-479-751-6792

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS

SUE POFF PLAINTIFF

vs. CASE NO. CV-2012-0261-4

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

FILED
2012 JUN 5 AM 11 24
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR

AMENDED ORDER SETTING JURY TRIAL

The above-captioned cause is hereby set for a five-day jury trial beginning on March 11, 2013, at 8:45 a.m., in Room 208 of the Benton County Courthouse, Bentonville, Arkansas. At the present time, this case is scheduled first out in order of the cases to be tried that day. ***Counsel shall be present in chambers at 8:15 a.m. on the morning of trial.***

The following deadlines will be followed:

1. All pleadings naming additional parties shall be filed one-hundred and twenty (120) days before trial.

2. Written discovery shall be completed sixty (60) days before trial; depositions shall be completed thirty (30) days prior to trial; no dispositive motions shall be filed within sixty (60) days of trial.

3. Counsel shall exchange witness and exhibit lists no later than the date set forth in paragraph 4 below and provide a copy of such lists to the Court; confer in good faith on proposed jury instructions; and, no later than the date set forth in paragraph 4 below, counsel shall submit to the Court proposed instructions upon which there is agreement, along with proposed instructions on which agreement could

not be reached. ***Counsel shall send a hard copy, as well as via e-mail (in WORD format) to bschrader@co.benton.ar.us, of the proposed instructions.*** Jury instructions shall be entitled "Instruction No. _____," and shall contain no language identifying them as Plaintiff's or Defendant's requested instructions.

4. If the witness list, exhibit list, and jury instructions have not been submitted to the Court **by February 21, 2013, counsel shall appear at 9:00 a.m. on February 22, 2013,** and show cause why counsel should not be held in contempt for failure to comply with of this Court's Order Setting Jury Trial.

5. ***If an interpreter will be required for the testimony of any witness and/or party to this action, counsel shall advise the Court no later than February 22, 2013, or by the show cause date for witness list, exhibit list, and jury instructions.***

6. A pretrial hearing to consider all outstanding motions and pretrial matters will be held at 9:00 a.m. on February 22, 2013.

IT IS SO ORDERED this 5th day of June, 2012.

JOHN R. SCOTT
CIRCUIT JUDGE

cc: Ken Swindle
Attorney at Law
619 West Persimmon Street
Rogers, AR 72756
VIA TELEFAX 1-479-621-0838

James E. Keever, M.D., J.D.
Attorney at Law
2801 Richmond Road, #57
Texarkana, TX 75503
VIA TELEFAX 1-903-642-0066

92

CV12 004628

Stephen Lisle
Attorney at Law
1458 Plaza Place, Suite 101
Springdale, AR 72764-5273
VIA TELEFAX 1-479-751-6792

CV12 004629 93

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

FILED
2012 JUN 5 PM 3 04
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR

DEFENDANTS' ANSWERS TO PLAINTIFF'S 5/7/12 REQUESTS FOR ADMISSION

COMES NOW the Defendants, James P. Elkins, M.D. and James Elkins, M.D., P.A., and for their Answers to Plaintiff's 5/7/12 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 accredited by the Accreditation Association for Ambulatory Health Care.

ANSWER TO REQUEST FOR ADMISSION NO. 1: Objection. This request for admission seeks information that is irrelevant and is not reasonably calculated to lead to the discovery of admissible evidence.

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 the Accreditation Association for Ambulatory Health Care.

ANSWER TO REQUEST FOR ADMISSION NO. 2: Objection. This request for admission seeks information that is irrelevant and is not reasonably calculated to lead to the discovery of admissible evidence.

FAX
JUN 05 2012
RECEIVED

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 accredited by any National Accreditation Body or Entity on January 22, 2009.

ANSWER TO REQUEST FOR ADMISSION NO. 3: Objection. This request for admission seeks information that is irrelevant and is not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST FOR ADMISSION NO. 4: 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.

ANSWER TO REQUEST FOR ADMISSION NO. 4: Objection. This request for admission seeks information that is irrelevant and is not reasonably calculated to lead to the discovery of admissible evidence.

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)

95

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of June 2012, a true and correct copy of the foregoing has been 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

96

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

FILED
2012 JUN 11 PM 1 35
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR

ORDER

On the 4th day of June 2012, the Plaintiff's First and Second Motions to Strike, Motion for Sanctions, and Motion for Request for Admissions to be Answered or, in the Alternative, to be deemed Admitted, and for Expenses Incurred in Relation to the Motion came on for hearing. Upon calling the case, Plaintiff announced that she was withdrawing all four of these motions. The relief requested in Plaintiff's motions is therefore denied. Plaintiff has been cautioned that any future pleadings that are filed for the purpose of annoyance, to cause undue expense, or without a good-faith basis, shall subject the Plaintiff to sanctions.

IT IS SO ORDERED.

HONORABLE JOHN SCOTT
CIRCUIT JUDGE
June 11, 2012

97

CV12-004721

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS

SUE POFF — PLAINTIFF

vs. — CASE NO. CV-2012-0261-4

JAMES P. ELKINS, M.D. and
JAMES P. ELKINS, M.D., P.A. — DEFENDANTS

FILED
2012 JUN 21 PM 2 31
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR

NOTICE OF HEARING ON DEFENDANTS' OBJECTIONS TO PLAINTIFF'S MAY 7, 2012, REQUESTS FOR ADMISSIONS

Please take notice that the above captioned matter has been scheduled for hearing, by the Court, on July 25, 2012, at 9:00 a.m. before the Honorable John R. Scott in Room 208 of the Benton County Courthouse, Bentonville, Arkansas.

JOHN R. SCOTT
CIRCUIT JUDGE
Dated: June 21, 2012

cc: Ken Swindle
Attorney at Law
619 West Persimmon Street
Rogers, AR 72756
VIA TELEFAX 1-479-621-0838

James E. Keever, M.D., J.D.
Attorney at Law
2801 Richmond Road, #57
Texarkana, TX 75503
VIA TELEFAX 1-903-642-0066

Stephen Lisle
Attorney at Law
1458 Plaza Place, Suite 101
Springdale, AR 72764-5273
VIA TELEFAX 1-479-751-6792

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS
CIVIL DIVISION

FILED
2012 JUL 6 PM 3 34
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR.

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

DEFENDANTS' 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 Answers to Plaintiff's 5/7/12 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: Objection. This request for admission seeks information that is irrelevant and is not reasonably calculated to lead to the discovery of admissible evidence.

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: Objection. This request for admission seeks information that is irrelevant and is not reasonably calculated to lead to the discovery of admissible evidence.

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: Objection. This request for admission seeks information that is irrelevant and is not reasonably calculated to lead to the discovery of admissible evidence.

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 31st day of July 2012, a true and correct copy of the foregoing has been 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

100

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS
CIVIL DIVISION

FILED
2012 JUL 6 PM 3 35
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR.

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

DEFENDANTS' MOTION FOR LIMITATION OF DISCOVERY

Come now Defendants, James P. Elkins, M.D. ("Elkins") and James P. Elkins, M.D., P.A., ("PA"), and for their Motion for Limitation of Discovery and state as follows:

Plaintiff first filed a Complaint in this action on June 23, 2010 (the "First Case"). During the pre-litigation phase of the First Case, the Plaintiff, through her counsel, propounded multiple sets of Interrogatories, Requests for Production and Requests for Admissions upon the Defendants. Specifically, the discovery requests served by the Plaintiff in the First Case were the following:

1. Plaintiff's First Set of Interrogatories and Requests for Production to Defendant James Elkins, M.D. served on August 16, 2010.
2. Plaintiff's First Set of Requests for Admissions to Defendant James Elkins, M.D. served on August 16, 2010.
3. Plaintiff's First Set of Interrogatories and Requests for Production Propounded to Defendant James P. Elkins, M.D., P.A. served on August 16, 2010.
4. Plaintiff's Second Set of Interrogatories and Third Set of Requests for Production Propounded to Defendant James P. Elkins, M.D. served on August 16, 2010.

101

5. Plaintiff's 5/31/11 Set of Interrogatories and Third Set of Requests for Production Propounded to Defendant James P. Elkins, M.D. served on May 31, 2011.

6. Plaintiff's 7/11/11 Set of Interrogatories and Requests for Production Propounded to Defendants James Elkins, M.D. and James P. Elkins, M.D., P.A. served on July 11, 2011.

7. Plaintiff's Second Set of Requests for Admissions to Defendant James Elkins, M.D. served on July 21, 2011.

8. Plaintiff's 8/22/11 Set of Interrogatories and Requests for Production to Defendant James Elkins, M.D. served on August 22, 2011.

9. Plaintiff's Third Set of Requests for Admissions to Defendant James Elkins, M.D. served on August 22, 2011.

10. Plaintiff's 9/20/11 Set of Requests for Production to Defendants James Elkins, M. D. and James P. Elkins, M.D., P.A. served on September 20, 2011.

11. Plaintiff's 10/10/11 Set of Interrogatories and Requests for Production of Documents to Defendant James Elkins, M.D. and James P. Elkins, M.D., P.A. served on October 10, 2011.

12. Plaintiff's 10/10/11 Set of Requests for Admission to Defendant James Elkins, M.D. and James P. Elkins, M.D., P.A. served on October 10, 2011.

In addition to the written discovery listed above, the parties deposed four witnesses. A jury was impaneled to hear the First Case beginning December 6, 2011. During the second day of trial, on December 7, 2011, Plaintiff made an oral motion to non-suit her case.

Plaintiff re-filed her claims on February 15, 2012 (the "Second Case"). Upon the re-filing of the case, the parties agreed that the information gathered during discovery in the First Case

could be used, subject to admissibility and the adherence to the Rules of Evidence, in the Second Case. Since filing the Second Case, Plaintiff has served the following sets of written discovery:

1. Plaintiff's Interrogatories and Requests for Production of Documents to James Elkins, M.D. (served April 21, 2012).

2. Plaintiff's Interrogatories and Requests for Production of Documents to James Elkins, M.D., P.A. (served April 21, 2012).

3. Requests for Admission to Defendant, James Elkins, M.D., P.A. (served April 21, 2012).

4. Requests for Admission to Defendant, James Elkins, M.D., (served April 21, 2012).

5. Plaintiff's 5/7/12 Set of Requests for Admission to Defendant James Elkins, M.D. and James P. Elkins, M.D., P.A. (served May 7, 2012).

6. Plaintiff's 5/7/12 Set of Interrogatories and Requests for Production to Defendant James Elkins, M.D. and James P. Elkins, M.D., P.A. (served May 7, 2012).

7. Plaintiff's 6/7/12 Set of Requests for Admission to Defendant James Elkins, M.D. and James P. Elkins, M.D., P.A. (served June 7, 2012).

8. Plaintiff's 6/7/12 Set of Interrogatories and Requests for Production to Defendant James Elkins, M.D. and James P. Elkins, M.D., P.A. (served June 7, 2012).

Plaintiff had ample opportunity to conduct discovery in the eighteen months from the filing of the complaint to the beginning of trial in the First Case. In fact, she served Defendants with twelve separate sets of written discovery during that time. Plaintiff has the benefit of that discovery for trial preparation in the Second Case, yet she has already filed an additional eight sets of written discovery. Plaintiff files her written discovery in a piecemeal fashion requiring

Defendants to continually respond to isolated requests. The amount of discovery, and the manner in which has been conducted, is unduly burdensome and unreasonable.

Defendants respectfully request that the Court enter an order limiting discovery in the Second Case to matters that have changed or developed since December 7, 2011. The parties should be allowed to discover the identity and testimony of new witnesses, new information related to medical care or damages, or any other matter that was unknown prior to the initiation of trial in the First Case. However, Defendants request that Plaintiff's discovery be limited to those matters.

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
Springdale, AR 72764-5273
(479) 750-4444
(479) 751-6792 (facsimile)

104

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of July 2012, a true and correct copy of the foregoing has been sent via facsimile 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
2801 Richmond Road, #57
Texarkana, TX 75503

Stephen Lisle

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS
CIVIL DIVISION

FILED
2012 JUL 6 PM 3 35
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR.

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

REQUEST FOR A BIFURCATED PROCEEDING

Come now Defendants, James P. Elkins, M.D., Individually and James P. Elkins, M.D., P.A.(referred to hereinafter as "Elkins") and for their Request for a Bifurcated Proceeding and state as follows:

1. The Plaintiff seeks punitive damages in this case.

2. Defendants request a bifurcated proceeding pursuant to Ark. Code Ann. §16-55-211.

3. Pursuant to Ark. Code Ann. §16-55-211, Defendants request that the issues of liability and compensatory damages be determined prior to any determination regarding liability for, and assessment of, punitive damages.

4. Pursuant to Ark. Code Ann. §16-55-211(b), Defendants request that the Court exclude any admission of the financial conditions of the defendants and any other evidence relevant only to punitive damages during the determination of the liability for, and assessment of any, compensatory damages.

WHEREFORE, Defendants respectfully request that the Court conduct a bifurcated proceeding.

106

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
Springdale, AR 72764-5273
(479) 750-4444
(479) 751-6792 (facsimile)

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of July 2012, a true and correct copy of the foregoing has been sent via facsimile 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, M.D., J.D.
2801 Richmond Road, #57
Texarkana, TX 75503

_____
Stephen Lisle

107

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS

FILED
2012 JUL 11 PM 2 54
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR.

SUE POFF PLAINTIFF

vs. CASE NO. CV-2012-0261-4

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

NOTICE OF HEARING ON DEFENDANTS' REQUEST FOR A BIFURCATED PROCEEDING AND MOTION FOR LIMITATION OF DISCOVERY

Please take notice that the above captioned matter has been scheduled for hearing, by the Court, on July 25, 2012, at 9:00 a.m. before the Honorable John R. Scott in Room 208 of the Benton County Courthouse, Bentonville, Arkansas.

JOHN R. SCOTT
CIRCUIT JUDGE
Dated: July 10, 2012

cc: Ken Swindle
Attorney at Law
619 West Persimmon Street
Rogers, AR 72756
VIA TELEFAX 1-479-621-0838

James E. Keever, M.D., J.D.
Attorney at Law
2801 Richmond Road, #57
Texarkana, TX 75503
VIA TELEFAX 1-903-642-0066

Stephen Lisle
Attorney at Law
1458 Plaza Place, Suite 101
Springdale, AR 72764-5273
VIA TELEFAX 1-479-751-6792

CV12-005635

108

FILED
2012 JUL 20 AM 8 01
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR.

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 RESPONSE TO DEFENDANTS' MOTION TO LIMIT DISCOVERY

Plaintiff, by her attorney, for her Response to Defendants' Motion to Limit Discovery, would state:

1. Defendants complain in the first page of their Motion that Plaintiff propounded twelve sets of written discovery (actually seven sets of written discovery, each involving requests for admission, interrogatories, and/or requests for production of documents) in the original case involving Plaintiffs allegations of medical malpractice, and that the parties have agreed to use that same information in the current, re-filed case. Plaintiff agrees, at least as to the use of previous depositions, interrogatories, and requests for production of documents, and it was Plaintiff who initiated that agreement. See attached as Exhibit No. 1, January 26, 2012 e-mail from Jim Keever to Steve Lisle.

2. Defendants complain in the second page of their Motion that Plaintiff has served additional requests for discovery since the re-filing of this case, the dates of such service being April 21, 2012; May 7, 2012; and June 7, 2012. Plaintiff agrees, and would point out the following:

a. The requests for discovery served on April 21, 2012, were necessitated because of the inability of Plaintiff to ascertain if Defendants were or were not claiming

109

insufficiency of process or insufficiency of service of process. The Court will recall that this issue was discussed at our June 6, 2012, pre-trial, and Mr. Lisle's position was a matter of some confusion even to the Court. See attached as Exhibit No. 2, June 6, 2012 (mis-dated as May 6, 2012), Letter from Jim Keever to Steve to Lisle.

b. The materials served on 5/7/12 were related to requests for admission and related interrogatories/requests for production relative to the accreditation and licensing status of Defendant's outpatient surgery center. Defendants' objections to those discovery requests have been set by the Court, *sua sponte*, for a hearing on July 25, 2012.

c. The discovery requests of June 7, 2012, were sent as a shortened version of the May 7, 2012, requests, along with a good faith letter requesting that Defendant re-consider his position relative to his objections. See attached as Exhibit No. 3, June 7, 2012, Letter from Jim Keever to Steve to Lisle, with attachments.

3. Plaintiffs Counsel has repeatedly asked Defense Counsel to re-consider his position regarding the pending discovery, including a telephone conference on July 9, 2012. To date Defense Counsel remains firm in his position that the pending discovery, referred to in paragraph 2(b) and (c), above, is objectionable. See Exhibit No. 4, July 9, 2012, e-mails between Jim Keever and Steve Lisle.

4. Plaintiff has no intention of propounding any unwarranted discovery in this case, but takes exception to Defendant's position that Discovery should be prohibited. There are at least two procedural reasons why the Defense Motion should be denied:

a. First, as Counsel for Plaintiff mentioned in his letter of January 26, 2012, it is clear under Arkansas law that the responses to Requests for Admission in the original

case lose their effectiveness in the event of a nonsuit, and may not be used to bind the responding party in a re-filed case. See Arkansas Rule of Civil Procedure 41(b). *See also Norrell v. Giles*, 36 S.W.3d 342 (2001), and, *Head v. Giles*, 36 S.W.3d 344 (2001). Surely Defense Counsel is not asking the Court to disregard this settled Arkansas law.

b. Second, the Court has already entered an Order in this case setting the date of the Jury Trial on March 11, 2013, and ordering that written discovery shall be completed sixty (60) days before trial and depositions shall be completed thirty (30) days before trial. See attached as Exhibit No. 5. The Court also made it clear at the time of the June 6, 2012, pre-trial, that it would entertain a motion for attorney fees, under Arkansas Rule of Civil Procedure 11, in the event a party believes that he or she has been subjected to frivolous discovery requests.

5. Plaintiff believes that the Court's Order present is sufficiently clear, along with the relief available under Rule 11 of the Arkansas Rules of Civil Procedure, to protect the rights of all parties.

WHEREFORE, FOR PREMISES CITED, Plaintiff respectfully requests that Defendants' Motion to Limit Discovery be denied, and for all such other relief to which she may be entitled.

111

Respectfully submitted,

BY: _____

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

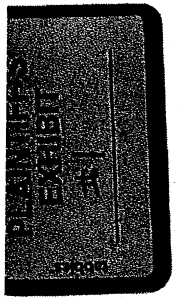
and

JAMES E. 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 first-class mail, on this 20th day of July, 2011.

_____
Ken Swindle



113

Jim Keever
to Steve, Marilynn, Ken, sue

Jan 26

January 26, 2012

Steve Lisle
Lyle and Rutledge
Via E-mail and facsimile

re: Poff v. Elkins

Dear Steve,

I hope that you and your family had a wonderful holiday season. I spent the few weeks between our trial and Christmas preparing for a January 9, 2012, trial in Van Buren, which was continued on the defense's motion the week before trial. Go figure.

We are ready to re-file Poff v. Elkins, but I wanted ask first if Dr. Elkins would like to re-consider his position on settlement. I guess that technically our previous demand of $350,000.00 is still on the table, but I believe that if Dr. Elkins would make a reasonable proposal for settlement, Ms. Poff would give it serious consideration.

Yesterday Dr. Kris Shewmake of Little Rock agreed to come to Bentonville to testify on standard of care, causation, and the reasonableness of our claims for medical expenses. I will be able to confirm that with a timely formal supplementation to discovery or response to new interrogatories, depending upon what we agree to do. The Rules specify that Requests for Admission do not carry over to a re-filing, but I would suggest that we agree to honor the previous interrogatory answers, responses to request for documents, and depositions to minimize the need to duplicate our previous work. Does that sound reasonable to you?

Gmail by Google

Jim Keever <kukeevs@keever.cc>

Poff v. Elkins

1 message

Jim Keever <kukeevs@keever.cc> Wed, Jun 6, 2012 at 11:51 AM
To: 14797516792@maxemailsend.com, Steve Lisle <slisle@lislerutledge.com>, Ken Swindle <Ken@swindlelawfirm.com>, Jim Keever <kukeevs@keever.cc>

ATTN: Steve Lisle

–

James E. Keever, M.D., J.D.
2801 Richmond Road #57
Texarkana, TX 75503
kukeevs@keever.cc
903 793 5316
Cell 903 314 6914
Fax 903 642 0066

JAMES E.docx
115K

114

JAMES E. KEEVER, M.D., J.D.
2801 RICHMOND ROAD # 57
TEXARKANA, TEXAS 75503
903 793 5316 (telephone)
kukeevs@keever.cc **May 6, 2012**

Steve Lisle
Via e-mail and facsimile

Dear Steve,

I really do think that, had you but answered Ken's question about whether or not you were claiming insufficiency of process or insufficiency of service of process as to the Complaint, all of the motion practice in which you and Ken were engaging would not have occurred. Please let me make clear what I believe happened in this whole service misunderstanding, if there was a misunderstanding.

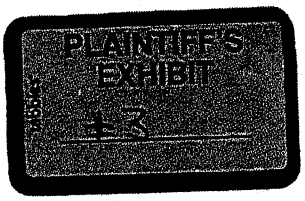
- You represented to us verbally at the time of the last trial that you would accept service of our renewed complaint.
- When Ken asked you directly if you would accept service this Spring, your response was that you no longer represented Dr. Elkins and could not accept service.
- Ken arranged for service on Dr. Elkins, but the Sheriff's department allowed Dr. Elkins' nurse to sign for the service, which arguably was insufficient service.
- Your answer contained an affirmative defense that arguably was about the sufficiency of the service of the complaint.

Please let me know if I am mistaken about what has been happening. You and Ken evidently just could not communicate well enough to resolve this issue. On the other hand, Ken and I simply could not leave any question of sufficiency of service of the Complaint hanging out there because, as you know, that could have been the basis of a valid motion to dismiss for lack of personal jurisdiction.

Steve, any time we have a discovery issue I will be available to take your call and work things out. Right now you have in your possession my Requests for Admission regarding the certification of the clinic. These are the same requests that you refused to answer in the first case based on an untimeliness objection. I hope these were not included in your complaint to the judge about "unnecessary" discovery, and look forward to your responses, which I believe are due next Monday.

Sincerely,

Jim Keever



JAMES E. KEEVER, M.D., J.D.
2801 RICHMOND ROAD # 57
TEXARKANA, TEXAS 75503
903 793 5316 (telephone)
kukeevs@keever.cc
June 7, 2012

Steve Lisle
Via e-mail and facsimile

Dear Steve,

I received your responses to our 5/7/12 requests for written discovery, and simply do not see how you can maintain your responses that information about the accreditation of Dr. Elkins' outpatient surgery facility is not only irrelevant but not reasonably calculated to lead to discoverable information. Please reconsider your responses. I do believe we could have avoided the last hearing had you but responded to Ken's questions as to whether or not your were asserting a Rule 12 defense based upon insufficiency of service of the Complaint, and I would like to avoid another unnecessary hearing on my discovery requests.

You have received a certified copy of the Arkansas Department of Health's provider list of licensed Ambulatory Surgery Centers, which does not list the Elkins' Centre as being licensed as of 11/11/2011. The website of the AAAHC did not list Dr. Elkins' Centre as being certified during that same period of time. This is evidence that on depositions we will find the same scenario existed in January of 2009. We can certainly furnish an affidavit from Ms. Poff that knowledge of the lack of licensing and/or certification of the Elkin's Centre would have been a factor in her decision to consent to her surgery.

I am attaching a second set of requests for written discovery that basically requests the same information, but not in the alternative, so it will be an easier version for the Court to approve the admissions deemed. Please respond to these requests at your earlier convenience.

As I mentioned in my letter of Tuesday, I am always available to discuss these issues with you. Please call me or give me a convenient time to call you. I look forward to working with you in this matter.

Sincerely,

Jim Keever

Jim Keever

IN THE CIRCUIT COURT OF
BENTON COUNTY, ARKANSAS

Sue Poff

Plaintiff

vs. NO. CV 2010-2385-4

James Elkins, M.D., and
James P. Elkins, M.D., P.A.

JURY REQUESTED

Defendants

PLAINTIFF'S 6/7/12 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: 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.

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.

117

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.

Respectfully Submitted,

BY: _____

JAMES E. 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

and

KEN SWINDLE
Ark. Bar #97234
1039 W. Walnut Ste. 2
Rogers AR 72756
Tel. (479) 621-0120
Fax (479) 621-0838

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I, James Keever, hereby certify that I have served a copy of this document upon Steve Lisle, attorney for Defendants, by e-mail on this, the 7th day of June, 2012.

_____
JAMES E. KEEVER, M.D., J.D.

IN THE CIRCUIT COURT OF
BENTON COUNTY, ARKANSAS

Sue Poff

Plaintiff

vs. NO. CV 2010-2385-4

James Elkins, M.D., and
James P. Elkins, M.D., P.A.

JURY REQUESTED

Defendants

PLAINTIFF'S 6/7/12 SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS 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:

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 date of any subsequent renewals of such accreditation, and

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

REQUEST FOR PRODUCTION NO. 1: Please provide Plaintiff's attorneys with

119

copies of any and all documents relative to your responses to Interrogatory No. 1, above.

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.

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.

INTERROGATORY NO. 3: If the outpatient surgery center where 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.

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

Respectfully Submitted,

BY: _____
JAMES E. 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

and

KEN SWINDLE
Ark. Bar #97234
1039 W. Walnut Ste. 2
Rogers AR 72756
Tel. (479) 621-0120
Fax (479) 621-0838

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I, James Keever, hereby certify that I have served a copy of this document upon Steve Lisle, attorney for Defendants, by facsimile on this, the 7th DAY OF June, 2012.

_____
JAMES E. KEEVER, M.D., J.D.

Gmail by Google

MaxEmail Send Delivery Report Job 56384870

MaxEmail Send <SendAdmin@maxemail.com> Thu, Jun 7, 2012 at 12:24 PM
To: kukeevs@keever.cc

==========

Maxemail Send Job Confirmation For Job ID 56384870

==========

Job Information

Maxemail Job ID : 56384870
Number of Pages : 0007
Recipient Count : 1
Total Charges : $0.25
Report Time Zone: America/Chicago (GMT-0500)

File Summary
1) Fax cover page
2) 2012_06_07_materials served.pdf

Recipient Delivery Summary

Delivered : 1
Errorred : 0

Rec	Fax Number	Pgs*	Duration	Calls	Status	Charge
0000	14797516792	0007	00:02:11	1	Delivered	$0.25

==========

Individual Call Detail

==========

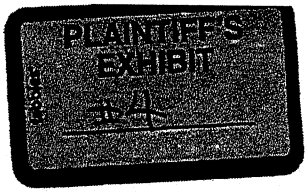
Call Detail for Item 00000 ID 5279582 Sent To 14797516792 0007 Pages Delivered

Date/Time	Duration	Pgs*	Status	Charge
06/07-12:27	00:02:11	7	Transmission Successful	n/a

==========

End Of Report

==========



Jim Keever <kukeevs@keever.cc> Mon, Jul 9, 2012 at 12:01 PM
To: Steve Lisle <slisle@lislerutledge.com>, Marilynn Curry <mcurry@lislelawfirm.com>, Ken Swindle <Ken@swindlelawfirm.com>, Jim Keever <kukeevs@keever.cc>, 14797516792@maxemailsend.com

Good morning, Steve

We received your responses to our 6/7/12 requests for discovery, which were virtually identical to your responses to our prior, 5/6/12 requests, objecting that the material sought was irrelevant and not likely to lead to discovery of admissible evidence. I do have Sue's affidavit, which we will use if necessary in a Motion to Compel, stating that, had she been informed that the Gynecologic and Cosmetic Surgery Centre of Dr. Elkins was NOT licensed nor accredited, she would not have consented to surgery at that center. Surely you would agree this makes the discovery requests relevant.

As you know, Judge Scott has set your objections to the earlier discovery for hearing on July 25, 2012. Would you please call me this afternoon so we can discuss this? If I do not hear from you I will call tomorrow morning at 9 a.m. If neither of those times are convenient for you, please let me know a convenient time prior to Wednesday morning when we can confer.

Thank you.

Jim Keever

to me
□□□

Jim,
I don't agree that it's relevant. It is like asking if an attorney accused of malpractice was a member of his county bar association. Not at all relevant to standard of care. I also filed a motion to limit discovery. I believe that 20 separate sets of written discovery is per se abusive and I want to get a handle on these off-the-cuff requests that your side sends me in ones and twos. I think we should just bring our discovery from the first case current.

Steve Lisle
Lisle Rutledge P.A.
P. O. Box 7977
Springdale AR 72766-7977
(479) 750-4444
(479) 751-6792 fax

This electronic message transmission contains information from Lisle Rutledge P.A. Please be advised that this e-mail and any files transmitted with it may be confidential attorney-client communication or may otherwise be privileged or confidential and are intended solely for the individual or entity to whom they are addressed. If you are not the intended recipient please do not read, copy or re-transmit the communication but destroy it immediately. Any unauthorized dissemination, distribution or copying of this communication is strictly prohibited.

From: Jim Keever [mailto:kukeevs@keever.cc] **Sent:** Monday, July 09, 2012 12:02 PM **To:** Steve Lisle; Marilynn Curry; Ken Swindle; Jim Keever; 14797516792@maxemailsend.com **Subject:** Poff v. Elkins

Good morning, Steve

Jim Keever□□□2:52 PM (7 minutes ago)□□ □□to Steve, Ken □□□□□□
□□2:52 PM (7 minutes ago)□□ □□to Steve, Ken □□□□□□

2:52 PM (7 minutes ago)□□ □□to Steve, Ken □□□□□□

to Steve, Ken □□□□□□
□□□□□

□□□

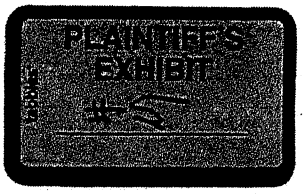
Steve, thank you for taking my call. I am sorry we cannot reach an agreement on this issue. I do understand your position, but as for the few discovery requests still on the table, I reminded you today that:

1. Arkansas law is clear that Requests for Admission do not follow a re-filing after a nonsuit.
2. The discovery requests we are dealing with, both my 5/6/12 requests, which were restated in briefer form on 6/7/12, are requests for admission regarding the accreditation and licensing of the surgery center, or lack thereof. These were propounded late last year in the

first case, and you objected on the basis of their being untimely.
3. My client is going to testify that knowledge that the surgery center was not certified or licensed would have been a major negative factor in her giving consent.

I also expect my expert to testify that a reasonable patient would take into account whether or not a surgery center was licensed or accredited and that Dr. Elkins had a duty to inform his patient if the surgery center were not licensed or accredited.

So, as I said, we can agree to disagree without being disagreeable. The Court has already set your objections for hearing without a motion, so, unless you have a change of heart and agree to give me a response, whatever that response would be, I will see you at the July 25, 2012, hearing.



IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS

SUE POFF PLAINTIFF

vs. CASE NO. CV-2012-0261-4

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

AMENDED ORDER SETTING JURY TRIAL

The above-captioned cause is hereby set for a five-day jury trial beginning on March 11, 2013, at 8:45 a.m., in Room 208 of the Benton County Courthouse, Bentonville, Arkansas. At the present time, this case is scheduled first out in order of the cases to be tried that day. ***Counsel shall be present in chambers at 8:15 a.m. on the morning of trial.***

The following deadlines will be followed:

1. All pleadings naming additional parties shall be filed one-hundred and twenty (120) days before trial.

2. Written discovery shall be completed sixty (60) days before trial; depositions shall be completed thirty (30) days prior to trial; no dispositive motions shall be filed within sixty (60) days of trial.

3. Counsel shall exchange witness and exhibit lists no later than the date set forth in paragraph 4 below and provide a copy of such lists to the Court; confer in good faith on proposed jury instructions; and, no later than the date set forth in paragraph 4 below, counsel shall submit to the Court proposed instructions upon which there is agreement, along with proposed instructions on which agreement could

not be reached. ***Counsel shall send a hard copy, as well as via e-mail (in WORD format) to bschrader@co.benton.ar.us, of the proposed instructions.*** Jury instructions shall be entitled "Instruction No. _____," and shall contain no language identifying them as Plaintiff's or Defendant's requested instructions.

4. If the witness list, exhibit list, and jury instructions have not been submitted to the Court by **February 21, 2013, counsel shall appear at 9:00 a.m. on February 22, 2013,** and show cause why counsel should not be held in contempt for failure to comply with of this Court's Order Setting Jury Trial.

5. ***If an interpreter will be required for the testimony of any witness and/or party to this action, counsel shall advise the Court no later than February 22, 2013, or by the show cause date for witness list, exhibit list, and jury instructions.***

6. A pretrial hearing to consider all outstanding motions and pretrial matters will be held at 9:00 a.m. on February 22, 2013.

IT IS SO ORDERED this 5th day of June, 2012.

JOHN R. SCOTT
CIRCUIT JUDGE

cc: Ken Swindle
Attorney at Law
619 West Persimmon Street
Rogers, AR 72756
VIA TELEFAX 1-479-621-0838

James E. Keever, M.D., J.D.
Attorney at Law
2801 Richmond Road, #57
Texarkana, TX 75503
VIA TELEFAX 1-903-642-0066

128

Stephen Lisle
Attorney at Law
1458 Plaza Place, Suite 101
Springdale, AR 72764-5273
VIA TELEFAX 1-479-751-6792

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 RESPONSE TO DEFENDANTS' MOTION TO BIFURCATE

Plaintiff, by her attorney, for her Response to Defendants' Motion to Bifurcate, states:

1. Defendants have requested a bifurcated proceeding pursuant to Arkansas Code Annotated Section 16-55-211.

2. Plaintiff has no objection to Defendants' request for a bifurcated proceeding.

Respectfully submitted,

BY: _____

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

and

JAMES E. 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

FILED
2012 JUL 20 AM 8 01
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR.

130

CERTIFICATE OF SERVICE

I, Ken Swindle, hereby certify that I have served a copy of this document upon Steve Lisle, attorney for Defendants, by first-class mail, on this 20th day of July, 2011.

Ken Swindle

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

FILED
2012 JUL 20 AM 8 02
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR.

BRIEF IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO LIMIT DISCOVERY

Defendants have complained to the Court, both orally during the June 6, 2012, Pretrial hearing and now in their Motion to Limit Discovery, that they have been subjected to "unduly burdensome and unreasonable" discovery (*See* page 4 of Defendants' motion). In support of this complaint they point to the discovery propounded in the first, nonsuited case, and three separate sets of discovery propounded in the current, re-filed case.

DISCOVERY IN "FIRST" CASE

Examination of the discovery in the "first" case will show that Plaintiff's discovery was neither burdensome nor unreasonable, and the initial problems with discovery (acknowledged by Mr. Rutledge at the December, 6, 2011, hearing on Plaintiff's Motion to Compel), were a result of the refusal of Defendants to offer any responses to discovery served with the Complaint (with an advance copy to counsel for Defendants' three days before service of the Complaint) until the Defendants' Response to Plaintiff's Motion to Compel. *See* Exhibit No. 1, Defendant's Response to Motion to Compel, para. 2.

Plaintiff served five separate sets of follow-up discovery over the seventeen-month history of the "first" case, totaling five separate requests for admission, seven interrogatories, and

132

six requests for production of documents. Counsel for the defense never asked for relief in the "first" case because of a claim Plaintiff's discovery was overly burdensome or unreasonable; such a request would have been unsustainable; and it is not something with which he should be bothering the Court in this, a completely separate case.

DISCOVERY IN THE CURRENT, "SECOND" CASE

Defense Counsel also complains that Plaintiff has served three sets of discovery in the current case, each with a set of requests for admission and related interrogatories and requests for production of documents. Defense Counsel seems to take the position that such discovery is overly burdensome, unreasonable, and not necessary in light of the completed discovery in the "first" case. The Defense Motion does admit that discovery in the present case is proper, but only for "the identity and testimony of new witnesses, new information related to medical care or damages, or any other matter that was unknown prior to the initiation of trial in the First case." *See* Page four of Defendants' Motion.

Defense counsel does not support his Motion with any Rule or case law. In fact, Defense counsel's Motion flies in the face of the Arkansas Rules of Civil Procedure. In general, the scope of discovery allowable in any case is that parties may obtain discovery regarding any matter, not privileged, which is relevant to the issues in the pending actions, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, identity and location of any books, documents, or other tangible things and the identity and location of persons who have knowledge of any discoverable matter or who will or may be called as a witness at the trial of any cause. It is not ground for objection that the information sought will be inadmissible at the trial if the

information sought appears reasonably calculated to lead to the discovery of admissible evidence. Ark. R. Civ. P. 26(b)(1).

Plaintiff has an absolute right to a nonsuit under Arkansas Rule of Civil Procedure 41. *See Beverly Enters.-Ark., Inc. v. Hillier*, 341 Ark. 1, 14 S.W.3d 487 (2000); *Blaylock v. Shearson Lehman Bros., Inc.*, 330 Ark. 620, 954 S.W.2d 939 (1997); *Pugh v.Griggs*, 327 Ark. 577, 940 S.W.2d 445 (1997); *Whetstone v. Chadduck*, 316 Ark. 330, 871 S.W.2d 583 (1994). Defense Counsel's position would mean that Plaintiff's absolute right to a nonsuit under Rule 41 would carry with it a prohibition on further discovery that is to be found nowhere in Rule 41, or, indeed, in any Rule or case law of which Plaintiff is aware. The fact that Plaintiff does have an absolute right to a Rule 41 nonsuit means that such an elective dismissal could be, and often is, made on the basis of a strategic decision to add new witnesses or seek additional discovery before proceeding to a verdict. Granting Defendants' Motion to Limit Discovery would be tantamount to rewriting Rule 41.

Further, it is clear that under Rule 41(b) the responses to Requests for Admission in the original case lose their effectiveness in the event of a nonsuit, and may not be used to bind the responding party in a re-filed case. *See* Arkansas Rule of Civil Procedure 41(b). When the claim is reinstated, it becomes a new action or proceeding, complete with a new docket number and court schedule. The Arkansas Supreme Court has specifically held that the matters that were deemed admitted by a party in the first, nonsuited, action are of no effect in the second action. *See Norrell v. Giles 36 S.W.3d 342. (2001); Head v. Giles, 36 S.W.3d 344. (2001).*

Plaintiff agrees that she has propounded three sets of request for admissions, with related and focused interrogatories and requests for production of documents, in the current case. The

first of these was necessitated by Defendant's refusal to clarify the simple question of whether or not they were claiming a jurisdictional defect of service of process. Unfortunately, the Benton County Sheriff's office allowed an employee of Dr. Elkins to sign for the service of the re-filed Complaint. See attached as Exhibit No. 2 to this Brief. Plaintiff's Counsel had an absolute duty to ascertain the status of Defendants' waiver or non-waiver of an objection to the sufficiency of service, and that duty led to the first set of discovery propounded by Plaintiff on April 21, 2012.

Plaintiff's second set of discovery in the "second" case was propounded on May 7, 2012, and deals with the issue of whether or not the surgery center of Dr. Elkins was accredited or licensed at the time of Ms. Poff's January 22, 2009, surgery. The Court is aware of the defense's objections to those requests, and has set those objections for hearing on July 25, 2012. Those requests for admission were propounded in the alternative, i.e. admit the facts are admitted or admit the same facts are not admitted. In an effort to simplify the requests for admission in terms of a possible motion to have the requests deemed admitted, the discovery was re-submitted in a shortened form (the third set of discovery in this "second" case), along with a good faith letter on June 7, 2012. See Exhibit no. 3 to Plaintiff's response.

None of these three sets of discovery requests, all of which involved targeted requests for admission, could be characterized as overly burdensome or unreasonable. The Court will be making a decision on the validity of Defendants' irrelevancy objections on July 25, 2012. Plaintiff's position on those objections are addressed in Exhibit No. 4 to Plaintiff's Response. Briefly, Plaintiff expects to show the Court at that hearing that she anticipates the following evidence at trial:

- There already is evidence that the surgery center was not licensed by the State of

Arkansas in November of 2011. See attached as Exhibit No. 3. Certified list of Licensed Ambulatory Surgery Centers in Benton County, Arkansas, as of November 15, 2011;

- The surgery center was not listed in November of 2011, nor at the present time, as being accredited by the Accreditation Association of Ambulatory Health Care;
- Plaintiff believes that, if necessary, he can obtain testimony from representatives of the Arkansas Department of health and the Accreditation Association for Ambulatory Health Care that the surgery center was neither licensed nor accredited in January of 2009;
- Ms. Poff will testify that knowledge that the surgery center was neither licensed nor accredited would have been a major negative factor in her decision to consent to Dr. Elkin' surgery, *See* attached as Exhibit No. 4, Poff affidavit;
- Ms. Poff is also expected to testify, consistent with her deposition, that she was not aware of a risk of serious burns or scarring from the proposed procedure; and
- Our expert witness is expected to testify that:
    - A surgeon has a duty to inform his patient if he is going to perform surgery in any surgery center that is neither accredited nor licensed by the state;
    - A person of ordinary intelligence and awareness in a position similar to that of Ms.Poff could not reasonably be expected to know of the risks or hazards inherent in such treatment, procedure, or surgery; and
    - There was no reason under the circumstances of this case to limit such disclosure to Ms. Poff.

Arkansas Code Annotate Section 16-11206(b) states:

(b) (1) Without limiting the applicability of subsection (a) of this section, when the plaintiff claims that a medical care provider failed to supply adequate information to obtain the informed consent of the injured person, the plaintiff shall have the burden of proving that the treatment, procedure, or surgery was performed in other than an emergency situation and that the medical care provider did not 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 injured person or other persons authorized to give consent for such a patient by other medical care 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.

(2) In determining whether the plaintiff has satisfied the requirements of subdivision (b)(1) of this section, the following matters shall also be considered as material issues:

(A) Whether a person of ordinary intelligence and awareness in a position similar to that of the injured person or persons giving consent on his or her behalf could reasonably be expected to know of the risks or hazards inherent in such treatment, procedure, or surgery;

(B) Whether the injured party or the person giving consent on his or her behalf knew of the risks or hazards inherent in such treatment, procedure, or surgery;

(C) Whether the injured party would have undergone the treatment, procedure, or surgery regardless of the risk involved or whether he or she did not wish to be informed thereof; and

(D) Whether it was reasonable for the medical care provider to limit disclosure of information because such disclosure could be expected to adversely and substantially affect the injured person's condition.

The expected testimony of Plaintiff's expert will satisfy Plaintiff's burden under subsections (b)(1) and (b)(2)(A) and (D) above, and the expected testimony of our client will meet address subsections (2)(B) and (C) of section 206. The fact of whether the surgery center was accredited or licensed on January 22, 2009, is therefore clearly relevant and material in

Plaintiff's claim that she was not given the information necessary to give informed consent in this case. This has been explained to Defense Counsel, but Defendants persist in refusing to withdraw their relevancy objections to the discovery propounded on 5/7/12, and have repeated those same objections in their responses to the discovery propounded on July 7, 2012.

DISCUSSION

Plaintiff filed a medical malpractice case, Case No. CV 2010-2385-4, which was nonsuited. Plaintiff has refilled this case under No. CV 12-261-4. The two cases are legally separate, although dealing with the same facts and parties. The only legal connection of the two cases is that, if Plaintiff wishes to nonsuit the present, CV 12-261-4 case, the dismissal will be with prejudice.

Plaintiff proposed an agreement whereby the interrogatories; requests for production of documents, and depositions of the "first" case would be honored and supplemented as necessary in the current case. *See* Exhibit No. 1 to Plaintiff's Response. That agreement was never intended to be an agreement to limit further discovery, as needed, by either party under the Arkansas Rules of Civil Procedure. Both parties have the well known and time tested remedies of Arkansas Rules of Civil Procedure 11, 26, and 37, in the event that they believe there has been overly burdensome or unreasonable discovery requests, or failure to appropriately respond to discovery requests. At this point, the record is clear that Plaintiff's discovery requests in the current case have been consistent with the Arkansas Rules of Civil Procedure and the Court's own discovery control order. See Exhibit No. 5 to Plaintiff's Response.

The Court has already entered a Discovery Control Order in this case, which, along with the protections of the Arkansas Rules of Civil Procedure, adequately provides for the protection

of the parties. Plaintiff would respectfully request that Defendants' Motion to Limit Discovery be denied.

Respectfully submitted,

BY: _____

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

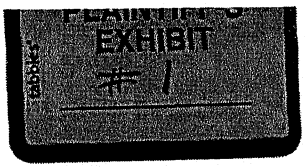
and

JAMES E. 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 first-class mail, on this 20th day of July, 2011.

_____
Ken Swindle



IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS

SUE POFF — PLAINTIFF

vs. — No. CIV 2010-2385-4

JAMES P. ELKINS, M.D., and
JAMES P. ELKINS, M.D., P.A. — DEFENDANTS

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION TO COMPEL

Come now Defendants, James P. Elkins, M.D. ("Elkins") and James P. Elkins, M.D., P.A. (the "PA"), by and through his undersigned attorneys, and for their Response to Plaintiff's Motion to Compel, state as follows. As the plaintiff notes in her Motion, this case was filed on August 13, 2010. She served, along with the complaint: (1) as a set of request for admissions; (2) a comprehensive set (9 pages) of interrogatories and request for production of documents to the PA; (3) a comprehensive set (19 pages) of interrogatories and request for production of documents to Elkins; and (4) another comprehensives set (8) pages of interrogatories and request for production of documents to Elkins.

On the same day this Response is being mailed, the defendants are sending answers to the three sets of interrogatories and request for production of documents to plaintiff's counsel. Although the answers are being provided more than 45 days after service, Rule 33 states: "All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown." The defendants have limited their objections to: (1) those which seek information protected by the attorney-client privilege or work product of defendants' counsel, and (2) those which seek medical records or other information that require a HIPPA-compliant

release. It should be noted that much of the information sought by the plaintiff in these sets for discovery involve financial information, assets, debts, and the like, all of which is most likely not even discoverable at this point in the litigation because it has nothing to do with whether the defendants committed malpractice. Nevertheless the defendants did not object to providing this information and instead answered the questions and provided all the documents that they have been able to acquire to date.

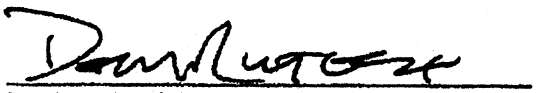
Though the plaintiff cites *Dunkin v. Citizens Bank of Jonesboro*, 291 Ark. 588, 727 S.W.2d 138 (1987) for the proposition that "... no privilege may be validly taken unless asserted in a timely manner," this proposition violates Rule 33's language cited above. Further, the reporter's notes to Rule 33 clearly show that the foregoing language was added to the Rule in 1997 (after *Dunkin* was decided). "Paragraph (4), which is new, makes clear that objections must be specifically justified and that unstated or untimely grounds for objection are ordinarily waived." The key phrase is "*ordinarily* waived". If the lack of timely objection is excused by the court for good cause shown, the objection can be asserted later.

The defendants assert that good cause exists to excuse the delay in providing discovery responses and in asserting their objections. This is a substantial amount of discovery that was served with the original complaint. Only a very few documents were withheld under the well-established principles of attorney-client privilege and the work product doctrine, and the defendants went further to explain that no investigations, statements or other substantial "work-product" information even exists in this case. Essentially the only things withheld are counsel's notes and some emails and notes concerning discovery issues. The items concerning the plaintiff's medical records implicate HIPPA, and the defendants are willing to provide those documents if the plaintiff simply provides a HIPPA-complaint authorization. The only other

documents involve the medical records and other information which involve another patient and which also fall under HIPPA, and the defendants do not believe they can provide those items without – again – a proper signed HIPPA authorization.

For the foregoing reasons the defendants assert that the plaintiff's motion to compel is moot or alternatively should be denied.

Respectfully submitted for the Defendants,
JAMES P. ELKINS, M.D. and
JAMES P. ELKINS, M.D., P.A.,

By: 

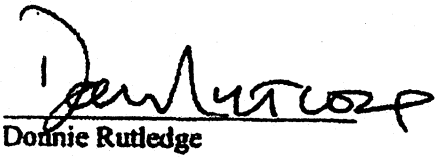
Stephen A. Lisle, ABA # 94103
LISLE RUTLEDGE P.A.
1458 Plaza Place, Suite 101
Springdale, AR 72764-5273
(479) 750-4444

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of December, 2010, a true and correct copy of the foregoing has been 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, M.D., J.D.
2801 Richmond Road, #57
Texarkana, TX 75503


Donnie Rutledge

142

PLAINTIFF'S EXHIBIT #2

Office of the Sheriff

Keith A. Ferguson

Chief Deputy
Don Townsend

Major
Gene Drake

SHERIFF'S RETURN

Plaintiff: Sue Poff Case: CV12-261-4

Defendant: James Elkins, M.D. Court: Benton County Circuit

STATE OF ARKANSAS
COUNTY OF BENTON
On this 29 day of Feb. 2012 at 9:05 O'clock A M

I have duly served the (put a check mark beside the appropriate one)

X Summons/Complaint	____ Pickup Order
____ Writ of Garnishment	____ Body Attachment
____ Writ of Assistance	____ Order to Show Cause
____ Writ of Possession	____ Notice of Motion
____ Writ of Execution	____ Subpoena
____ Order of Delivery	____ Notice to Vacate

_____ SUCH PERSON BEING
(put a check mark beside the appropriate one)

____ The person named herein as Defendant _____

____ A member of the Defendant's family, 14 years of age or older at Defendant's usual place of abode,

Namely _____ Relationship _____

____ The Duly Designated Agent of service or process for the Defendant, namely _____

_____

X Other Lauri Crowthon (Nurse)

In Benton County, Arkansas

Keith Ferguson, Sheriff

By Gage BC83 Deputy Sheriff

Criminal Investigation	Field Division	Detention Center	Admin Division
Cpt. Mike Sydoriak	Cpt. Mike Jones	Cpt. Chris Sparks	Cpt. Hunter Petray

Attn: Civil Process, 1300 SW 14th Street Bentonville, Arkansas 72712 Office 479-271-1012 Fax 479-271-5791 Email dcarmichael@co.benton.ar.us

PLAINTIFF'S EXHIBIT #3 RLS

Arkansas Department of Health

Health Facility Services
5800 West Tenth Street, Suite 400 • Little Rock, Arkansas 72204-1704 • Telephone (501) 661-2201
Governor Mike Beebe
Paul K. Halverson, DrPH, FACHE, Director and State Health Officer

November 14, 2011

Ken Swindle
619 West Persimmon Street
Rogers, AR 72756

RE: Request for certified copy of licensed Outpatient Surgery Clinics – Rogers, AR

Dear Mr. Swindle:

Enclosed per your request please find a certified copy of the provider list for all licensed Outpatient Surgery Clinics in Arkansas.

Sincerely,

Jane Gaskill
Section Counsel

enclosure

144

Arkansas Department of Health

Health Facility Services
[redacted] • Little Rock, Arkansas 72204-1704 • Telephone (501) 661-2201
Governor Mike Beebe
Paul K. Halverson, DrPH, FACHE, Director and State Health Officer

November 14, 2011

TO WHOM IT MAY CONCERN:

Please find attached a copy of the current provider list for all licensed Ambulatory Surgery Centers (also called Outpatient Surgery Centers) in Arkansas.

I HEREBY CERTIFY that this document is a complete and authentic copy of the provider list for all licensed Ambulatory Surgery Centers in Arkansas.

Connie Melton

Connie Melton, MBA, FACHE
Section Chief, Health Facility Services

11-15-11

Date

ACKNOWLEDGEMENT

STATE OF ARKANSAS)

COUNTY OF PULASKI)

Subscribed to before me, [redacted], a Notary Public, within and for Pulaski County, State of Arkansas, on this 15th day of November, 2011.

[redacted]

Notary Public

My Commission Expires: April 26, 2015

SEAL

145

AMBULATORY SURGERY CENTERS/OUTPATIENT SURGERY CENTERS
PROVIDER LIST & LICENSE VERIFICATION

County Located: Baxter
Harrison Surgery Center
2943 Highway 62 Southwest
Mountain Home, AR 72653
Phone No.: 870-424-3838
License Type: **Outpatient Surgery Center**
License No.: **AR4367** Cert. Card No.: **18080**
Expiration Date: **12/31/2011**

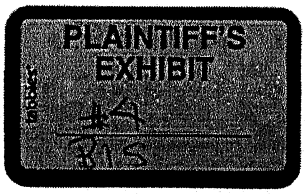
County Located: Baxter
Outpatient Surgery Center, Inc.
160 North Highway 201
Mountain Home, AR 72653
Phone No.: 870-424-2020
License Type: **Outpatient Surgery Center**
License No.: **AR4377** Cert. Card No.: **18078**
Expiration Date: **12/31/2011**

County Located: Baxter
Ozark Eye Center
360 Highway 5 North
Mountain Home, AR 72653
Phone No.: 870-425-2277
License Type: **Outpatient Surgery Center**
License No.: **2345** Cert. Card No.: **18079**
Expiration Date: **12/31/2011**

County Located: Benton
Boozman-Hof Eye Surgery & Laser Center
3737 West Walnut Street
Rogers, AR 72756
Phone No.: 479-246-1751
License Type: **Outpatient Surgery Center**
License No.: **AR4136** Cert. Card No.: **18081**
Expiration Date: **12/31/2011**

County Located: Boone
Harrison Surgery Center
105 Sawgrass Point
Harrison, AR 72601
Phone No.: 870-741-9700
License Type: **Outpatient Surgery Center**
License No.: **AR4264** Cert. Card No.: **18082**
Expiration Date: **12/31/2011**

Last Updated: 10/25/11



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

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 understanding 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 and

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 ____ }

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

Notary Public

My Commission Expires:

148

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS
CIVIL DIVISION

FILED
2012 AUG 2 PM 1 26
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR.

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

ORDER

Comes now before this Court on this 25th day of July 2012, the Defendants' Request for a Bifurcated Proceeding, Defendants' Motion for a Limitation of Discovery, and Defendants' Objections to Plaintiff's May 7, 2012 Discovery.

Based on the pleadings and the arguments of Counsel, the Court, being well-advised of the law and premises herein, finds and orders as follows:

1. The parties agree that Defendants are entitled to a bifurcated proceeding. This case shall be submitted to the jury to first determine whether any compensatory damages are to be awarded, and if so, in what amount. Plaintiff shall not present any evidence of the Defendants' financial condition, or any other evidence relevant only to punitive damages during the compensatory damages determination. If supported by the evidence and the compensatory damages determination, the jury shall be asked subsequently to determine whether, and in what amount, to award punitive damages.

2. Defendants shall answer Plaintiff's May 7, 2012 discovery on or before August 8, 2012.

CV12 006318 149

3. Plaintiff shall identify all expert witnesses she intends to call and provide an accurate summary of each expert's expected testimony to Defendants on or before August 8, 2012.

4. Defendants' Motion for a Limitation of Discovery is granted. The parties shall limit their discovery to matters that have changed or developed since December 7, 2011.

5. 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 the request and obtain Court approval before proceeding.

IT IS SO ORDERED.

HONORABLE JOHN R. SCOTT
CIRCUIT JUDGE
August 2, 2012

Order Prepared By:
Stephen A. Lisle, ABA # 94103
LISLE RUTLEDGE P.A.
P.O. Box 7977
Springdale, AR 72766
(479) 750-4444
(479) 751-6792 (facsimile)

cc:

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

WB 006319

150

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

FILED
2012 AUG 3 PM 2 11
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR.

ORDER

Comes now before this Court on this 25th day of July 2012, the Defendants' Request for a Bifurcated Proceeding, Defendants' Motion for a Limitation of Discovery, and Defendants' Objections to Plaintiff's May 7, 2012 Discovery.

Based on the pleadings and the arguments of Counsel, the Court, being well-advised of the law and premises herein, finds and orders as follows:

1. The parties agree that Defendants are entitled to a bifurcated proceeding. This case shall be submitted to the jury to first determine whether any compensatory damages are to be awarded, and if so, in what amount. Plaintiff shall not present any evidence of the Defendants' financial condition, or any other evidence relevant only to punitive damages during the compensatory damages determination. If supported by the evidence and the compensatory damages determination, the jury shall be asked subsequently to determine whether, and in what amount, to award punitive damages.

2. Defendants shall answer Plaintiff's May 7, 2012 discovery on or before August 8, 2012.

C12 006350

151

3. Plaintiff shall identify all expert witnesses she intends to call and provide an accurate summary of each expert's expected testimony to Defendants on or before August 8, 2012.

4. Defendants' Motion for a Limitation of Discovery is granted. The parties shall limit their discovery to matters that have changed or developed since December 7, 2011.

IT IS SO ORDERED.

HONORABLE JOHN R. SCOTT
CIRCUIT JUDGE
August 3, 2012

Order Prepared By:
Stephen A. Lisle, ABA # 94103
LISLE RUTLEDGE P.A.
P.O. Box 7977
Springdale, AR 72766
(479) 750-4444
(479) 751-6792 (facsimile)

cc:

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

CI2 006351

152

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS
CIVIL DIVISION

FILED
2012 AUG 8 AM 8 13
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR.

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 ANSWERS TO PLAINTIFF'S 5/7/12 REQUESTS FOR ADMISSION

COMES NOW the Defendants, James P. Elkins, M.D. and James Elkins, M.D., P.A., and for their Amended Answers to Plaintiff's 5/7/12 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 accredited by the Accreditation Association for Ambulatory Health Care.

ANSWER TO REQUEST FOR ADMISSION NO. 1: Admit.

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 the Accreditation Association for Ambulatory Health Care.

ANSWER TO REQUEST FOR ADMISSION NO. 2: Deny.

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 accredited by any National Accreditation Body or Entity on January 22, 2009.

ANSWER TO REQUEST FOR ADMISSION NO. 3: Admit.

REQUEST FOR ADMISSION NO. 4: 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.

ANSWER TO REQUEST FOR ADMISSION NO. 4: Deny.

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 7th day of August 2012, a true and correct copy of the foregoing has been 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

154

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 8/8/12 DISCLOSURE OF TESTIFYING EXPERT

Comes now Plaintiff, and for this, her 8/8/12 disclosure of testifying expert states:

1. At the Original trial in this case, Plaintiff called Jay Burns, M.D. as her testifying expert.

2. At this time, Plaintiff discloses that she intends to call Kris Shewmake, M.D., at trial as a testifying expert in cosmetic and plastic surgery.

3. Attached to this disclosure is a medical report signed by Dr. Shewmake, M.D.

Respectfully submitted,

BY: _____

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

and

FILED
2012 AUG 8 AM 11 14
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR.

155

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 8th day of July, 2011.

Ken Swindle

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), that 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 his choice to use high settings was predicated upon Ms. Poff's 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 safely 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 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 should have known that his settings carried the likelihood of injury to Ms. Poff, but proceeded with his treatment plan in spite of the likelihood of an injury to Ms. Poff.
37. All of the opinions expressed by me in this report are based on at least a reasonable degree of medical probability.
38. 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 MD, F.A.C.S.

Kris Shewmake, M.D.

EXHIBIT NO. 1
C.V. OF Kris Shewmake, M.D.

EXHIBIT NO. 1
C.V. OF Kris Shewmake, M.D.

CURRICULUM VITAE

NAME:	**Kris Boulden Shewmake**
DATE/PLACE OF BIRTH:	**August 10, 1955 Charlotte, North Carolina**
CITIZENSHIP:	**U.S.A.**
MARITAL STATUS:	**Married, Denise Gramlich Shewmake December 19, 1981**
CHILDREN:	**Kristopher Michael Shewmake Born: June 8, 1987** **Connor Nicole Shewmake Born: December 11, 1992** **Christian Alexander Shewmake Born: January 12, 1995** **Anna Catherine Shewmake Born: June 16, 2001** **Alexandra Elise Shewmake (Ali) Born: October 28, 2004**
OFFICE ADDRESS:	**Arkansas Plastic Surgery 9500 Kanis Road, Suite 502 Little Rock, AR 72205**
HOME ADDRESS:	**33801 Kanis Road Paron, AR 72122**
ACADEMIC AFFILIATION:	**Assistant Clinical Professor of Surgery Division of Plastic and Reconstructive Surgery UAMS Department of Surgery** **University of Arkansas Medical Center 4301 W. Markham, Slot 720 Little Rock, AR 72205-7199**
MEDICAL LICENSURE:	**Arkansas C6666**

updated 11/08/10

EDUCATION:

University of California, Los Angeles	1991-92	Fellowship in Craniomaxillofacial Surgery
University of Texas-Southwestern Surgery Medical Center, Dallas, TX	1989-91	Residency in Plastic and Reconstructive Surgery
University of Arkansas Medical Center	1984-89	Residency in General Surgery
University of Arkansas Medical Center	1980-84	M.D.
University of Arkansas	1978-80	Graduate Program, Natural Sciences
Hendrix College	1973-77	B.A. Biology

ADDITIONAL TRAINING: Advanced Cardiac/Trauma Life Support

WORK HISTORY:

1992-1996	Chief, Division of Plastic Surgery, Dept. of Surgery. UAMS
1996-present	Private Practice-Plastic Surgery Arkansas Plastic Surgery

PROFESSIONAL SOCIETIES:

Alpha Omega Alpha Medical Honor Society
American Society of Plastic and Reconstructive Surgeons
Member (5284)

American Society for Aesthetic Plastic Surgery
Arkansas Medical Society
American Association of Plastic Surgeons
Pulaski County Medical Society
Fellow American College of Surgeons-
October 1996-present

COMMITTEES: ASPRS- Young Plastic Surgeons Committee 1992-98

PLASTIC SURGERY NATIONAL IN-SERVICE EXAM: 1990 90th percentile
1991 99th percentile

AMERICAN BOARD OF PLASTIC SURGERY: Certified: November 12, 1994
Certificate No: 4719

updated 11/08/10

HONORS/AWARDS:

"Best Doctors In America"	Woodward/White	past 11 yrs consecutively
"Best Doctors in Arkansas"	Arkansas Times Magazine	past 11 yrs consecutively

Resident Delegate-Young Plastic Surgeons American Society of Plastic/Reconstructive Surgeons (ASPRS)	1990-91
Alternate Delegate ASPRS-resident Physicians Section, American Medial Association	1990-91
Congenital Research Award, Plastic Surgery Senior Resident's Conference, Madison, Wisconsin	1991
Robert M. Bransford Outstanding Chief Resident Award, General Surgery	1989
Keith Kilcrease Memorial Research Award-First Place	1989
Keith Kilcrease Memorial Research Award-First Place	1987
H. Elvin Shuffield Medical Leadership Award	1984
Alpha Omega Alpha (top 10% of medical school class)	1984
President, University of Arkansas-Senior Class of Medicine	1984-84
President, University of Arkansas-Junior Class of Medicine	1982-83
Council of Academic Affairs	1983-84
Eagle Scout	1970
Vigil Honor, Order of the Arrow	1973
President, 1970 Class of Eagle Scouts	1970

AVOCATIONS/HOBBIES: Flying, Woodworking, Outdoor Activities, Mission Surgery

updated 11/08/10

PUBLICATIONS:

Shewmake, K.B., Eaton, D. " Craniomaxillofacial prosthetics" book chapter in Thaller, Garri, Bradley - Craniofacial Surgery. Informa Healthcare, New York, N.Y. 2008.

Shewmake, K.B., Boop, F.A. "Surgical management of hypertelorbitism" book chapter in Linn, Ogle, and Jane - Craniofacial Surgery : Science and Surgical Techniques., W.B. Saunders, Philadelphia, PA., 2001

Yuen, J.C., Zhou, A.T., Shewmake, K.B. "Staged sequential reconstruction of a total lip, chin, and mandible defect", Plastic and Reconstructive Surgery, 1997

Hassed, S., Shewmake, K.B., Teo, C., et al... "Shprintzen-Goldberg Syndrome with osteopenia and progressive hydrocephalus", Genetics, 1997.

McGhee, M.A., Stern, S.A., Shewmake, K.B., "Osteointegrated implants in the head and neck cancer patient: with and without mandibular reconstruction", Head and Neck Cancer, December 1997

Shewmake, K.B., "Total dental restoration"-The ultimate goal in the head and neck cancer reconstruction", Plastic Surgery Assistants Association, 1997

Boop, F.A., Chadduck, W.M,, Shewmake, K.B., "Management of sagittal synostosis: a review", Childs Nervous System, 1996.

Yuen, J.C., Zhou, A.T., Shewmake, K.B., "Double skin paddle fibular flap for a through-and-through oromandibular defect" Annals of Plastic Surgery, 36:6,1-5,1996.

Boop, F.A., Chadduck, W.M., Shewmake, K.B. Teo, c., "Pi procedures for correction of sagittal synostosis", Journal of Neurosurgery, 1996.

Shewmake, K.B., "Reduction mammaplasty and mastopexy" Selected Readings in Plastic Surgery. 7:30, 1994.

Shewmake, K.B., et al..."Current status of silicone breast implants" Arkansas Medical Journal. 1993.

Byrd, H.S., Hobar, P.C., Shewmake, K.B., "Clinical experience with porous hydroxyapatite granules for augmentation of the craniofacial skeleton" Plastic and Reconstructive Surgery. 91:1, 15-26, 1993.

Shewmake, K.B., Kawamoto, K.S., "Congenital clefts of the nose-principles of surgical management" Cleft Palate- Craniofacial Journal. 29:6 531539, 1992.

Rohrich, R.J. and Shewmake, K.B., "Evolving concepts of craniomaxillofacial fracture management" Clinics in Plastic Surgery-Advances in Craniomaxillofacial Fracture Management. 19:1 Jan. 1992.

Rohrich, R.J., Shewmake, K.B., Johns, D.R., "Optimal management of the cleft lip/palate by combined plastic surgery and speech-language pathology interaction" TEJAS 17:1, 79-82 1991.

Shewmake, K.B., Wagner, C.W., Golladay, E.S., "Traumatic asphyxia" Contemporary Surgery 35:13-15, 1989.

Shewmake, K.B., Talbert, G.E., Wallace, B.B., Caldwell, F.T., Cone, J.B. "Alterations in plasma copper, zinc, and ceruloplasmin in patients with thermal trama" Journal of Burn Care and Rehabilitation 9:1,13-17, 1988.

Lang, N.P., Maners, A., Broadwater, J., Shewmake, K.B., et al... "Management of airway problems in lung cancer patients using the Nd-YAG laser and endobronchial radiotherapy" American Journal of Surgery, 154:463-65, 1988.

updated 11/08/10

Lang, N.P., Talbert, G.E., Shewmake, K.B., et al... "The current evaluation of nonpalpable breast lesions" Archives of Surgery. 122:1389-91, 1987.

Moore, D.B., Rainey, W.C. Caldwell, F.C., Wallace, B.B., Shewmake, K.B. " the effect of rapid resuscitation on cardiac index following thermal trauma in the porcine model" Journal of Trauma. 27:2, 141-146, 1987.

VIDEO PRESENTATIONS:

Four Compartment Fasciotomy for Compartmental Syndrome of the lower Extremity. Paul R. Petty, M.D., Kris B. Shewmake, M.D., Robert Barnes, M.D.

Clinical Usage of the Tensor Fascia Lata Flap for Coverage of Greater Trochanteric Pressure Sores. Paul R. Petty, M.D., Kris B. Shewmake, M.D., Robert Barnes, M.D.

ORAL PRESENTATIONS:

"Facelifts- What I Have Learned in the Last 20 Years". Michigan Association of Plastic Surgeons, Mackinac Island, September 2010

"Management of Difficult Areas in Aesthetic Surgery". Facial Aesthetic Panel – Moderator, Michigan Association of Plastic Surgeons, Mackinac Island, September 2010

"Missionary Surgery – Giving Back" Visiting Professor, U.T. Southwestern Medical Center – Department of Plastic Surgery, Dallas, Texas. PJune 27, 2008

"Adverse Effects of Devascularization of the Frontal Sinus Development" Plastic Surgery Research Council, Houston, TX, 1993.

Residency Training in Aesthetic Surgery" Panel on Aesthetic Surgery, 1992 Association of Plastic Surgeons Meeting, Vancouver, Canada.

Faculty, Basic Course in Maxillofacial Surgery. American Society of Maxillofacial Surgeons, 1992. Los Angeles, CA.

"Modification of the Ortichochea pharyngoplasty for the correction of VPA: seven year experience." American Cleft Palate-Craniofacial Association Symposium, Portland, Oregon. May 1992 and California Society of Plastic Surgeons- Annual Meeting, Newport Beach, March, 1992.

"Vascular anatomy of the velopharynx: clinical correlation with surgical procedures for the correction of velopharyngeal insufficiency" American Cleft Palate- Craniofacial Symposium, Portland, Oregon. May 1992 and Plastic Surgery Senior Resident's Conference, Madison, Wisconsin, 1991 (Congenital Research Award).

"A functional comparison of primary and secondary repair after rat sciatic nerve injuries" Texas Medical Association, Dallas, Texas, 1991, and Plastic Surgery Senior Resident's Conference, Madison, Wisconsin, 1991.

"Alterations in plasma copper, zinc, and ceruloplasmin in patients with thermal trauma" American Burn Association National Meeting, Washington, D.C., 1988.

RESEARCH GRANTS:

Plastic Surgery Educational Foundation 1990 Award. "A functional comparison of primary and secondary repair of rat sciatic nerve injuries"

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**

FILED
2012 AUG 10 PM 1 13
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, ARK

PLAINTIFF'S 8/10/2012 NOTICE OF CORRECTION OF SCRIVENER'S ERRORS IN DISCLOSURE OF EXPERT WITNESS EXCHANGED ON 8/8/2012

1. On 8/8/12 Plaintiff disclosed Kris Shewmake as her testifying witness, and presented Dr. Shewmake's 8/7/12 medical report.

2. This supplementation is to correct two errors in said report.

3. Paragraph 3(i) of said report indicates that Dr. Shewmake reviewed the Elkins' clinic records of Jill Eades.

4. Paragraph 3(i) should have read that Dr. Shewmake reviewed the 1/22/09 office note made by Dr. Shewmake on Lisa Jones, who accompanied Ms. Poff to Dr. Elkins' office the morning of 1/22/09.

5. The second sentence of paragraph 23 reads "These factors simply do justify the settings used, particularly in the chest." That sentence should read, "These factors simply do *not* justify the settings used, particularly in the chest."

6. The above-described errors were typographical errors made in the transcription of Dr. Shemake's opinions and the Plaintiff hereby gives notice of correction of these typographical errors to correctly reflect Dr. Shewmake's opinions.

177

Respectfully submitted,

BY: _____

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 10th day of August, 2012.

_____
Ken Swindle

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**

ORDER

On this 25th day of July, 2012, comes now the Court and, for the reasons stated in at the hearing on July 25, 2012, hereby directs the Defendants to Answer the Plaintiff's Discovery of June 7, 2012, by the 8th day of August, 2012.

IT IS SO ORDERED.

Honorable John Scott
Benton County Circuit Court
Division Four

Date: August 30, 2012

FILED
2012 AUG 30 AM 11 44
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR.

C12-007161

179

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

FILED
2012 AUG 30 PM 3 10
LINDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR

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.

FAX
AUG 30 2012
RECEIVED

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

181

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**

FILED
2012 SEP 27 AM 11 49
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY AR

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.

1813

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

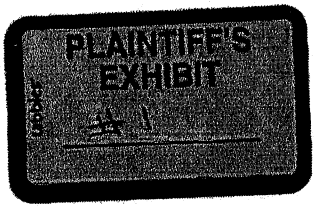
and

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

188

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)

191

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.

193

PLAINTIFF'S EXHIBIT 3

Respectfully submitted,

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

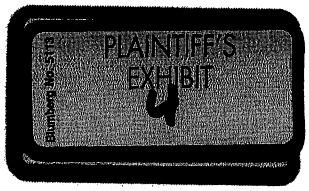
and

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



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

RECEIVED
2005 MAR -7 PM 12:11
A.S.M.B.

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

ORIGINAL TRANSCRIPT

Located here in the file attached to the Plaintiff's Motion for Leave of Court to Propound Additional Discovery to James P. Elkins, M.D., file marked 9/27/12, was Plaintiff's Exhibit 7, the Medical Report by Dr. Kris Shewmake, which appears previously in the record herein, in its entirety, at pages 157 through 168.

PLAINTIFF'S EXHIBIT 8
Blumberg No. 6110

Agency # 007.05

Rules and Regulations For Hospitals

and

Related Institutions in Arkansas

ARKANSAS DEPARTMENT OF HEALTH

2007

TABLE OF CONTENTS

SECTION 1: AUTHORITY..... ...1.1
SECTION 2: PURPOSE..... ...2.1
SECTION 3: DEFINITIONS..... ...3.1-3
SECTION 4: LICENSURE AND CODES..... ...4.1-3
SECTION 5: GOVERNING BODY.....5.1-2
SECTION 6: MEDICAL STAFF..... ...6.1-5
SECTION 7: GENERAL ADMINISTRATION..... ...7.1-4
SECTION 8: PERSONNEL ADMINISTRATION..... .....8.1
SECTION 9: ADMINISTRATION REPORTS..... ....9.1
SECTION 10: PATIENT IDENTIFICATION..... ....10.1
SECTION 11: PATIENT CARE SERVICE..... .....11.1-4
SECTION 12: MEDICATIONS..... ....12.1-3
SECTION 13: RESTRAINTS..... .....13.1
SECTION 14: HEALTH INFORMATION SERVICES.....14.1-7
SECTION 15: MEDICAL RECORD REQUIREMENTS FOR OUTPATIENT SERVICES, EMERGENCY ROOM, OBSERVATION SERVICES AND PSYCHIATRIC RECORDS.... ....15.1-4
SECTION 16: PHARMACY..... ...16.1-12
SECTION 17: FOOD AND NUTRITION SERVICES..... ....17.1-8
SECTION 18: INFECTION CONTROL..... ....18.1-6
SECTION 19: LABORATORY..... .19.1-27
SECTION 20: RADIOLOGICAL SERVICES..... ....20.1-7
SECTION 21: PHYSICAL THERAPY..... ....21.1-2
SECTION 22: OCCUPATIONAL THERAPY..... ....22.1-2
SECTION 23: SPEECH PATHOLOGY/AUDIOLOGY SERVICES..... ....23.1-2
SECTION 24: RECREATIONAL THERAPY..... ....24.1-2
SECTION 25: PET THERAPY PROGRAM:..... ....25.1-2
SECTION 26: SPECIALIZED SERVICES: SURGICAL SERVICES..... .....26.1-2
SECTION 27: SPECIALIZED SERVICES: POSTANESTHESIA CARE UNIT..... ... 27.1
SECTION 28: SPECIALIZED SERVICES: AMBULATORY SURGERY SERVICES.... .....28.1
SECTION 29: SPECIALIZED SERVICES: ANESTHESIA SERVICES..... .....29.1
SECTION 30: SPECIALIZED SERVICES: LABOR, DELIVERY, LABOR DELIVERY RECOVERY (LDR), LABOR DELIVERY RECOVERY POST PARTUM (LDRP), POST PARTUM AND MATERNAL-CHILD EDUCATION..... 30.1-5
SECTION 31: NURSERY SERVICES..... .31.1-2
SECTION 32: SPECIALIZED SERVICES: CRITICAL CARE..... .....32.1-2
SECTION 33: SPECIALIZED SERVICES: DENTAL SERVICES..... .....33.1
SECTION 34: SPECIALIZED SERVICES: CENTRAL STERILIZATION AND SUPPLY. 34.1-4
SECTION 35: SPECIALIZED SERVICES: RESPIRATORY CARE..... .....35.1-3
SECTION 36: SPECIALIZED SERVICE: EMERGENCY SERVICES..... .....36.1-3
SECTION 37: SPECIALIZED SERVICE: PSYCHIATRIC SERVICES..... .....37.1-3
SECTION 38: SPECIALIZED SERVICE: CARE OF PATIENTS WITH PULMONARY DISEASE IN GENERAL HOSPITALS..... .....38.1
SECTION 39: AMBULATORY SURGERY CENTERS..... .....39.1-7
SECTION 40: OUTPATIENT PSYCHIATRIC CENTERS..... .....40.1-2
SECTION 41: REHABILITATION HOSPITALS AND UNITS..... .....41.1-2
SECTION 42: RECUPERATION CENTERS..... .....42.1-2

SECTION 43: PSYCHIATRIC HOSPITALS..... ....43.1-2
SECTION 44: INFIRMARIES..... ....44.1-4
SECTION 45: ALCOHOL/DRUG ABUSE INPATIENT TREATMENT CENTER..... ....45.1-9
SECTION 46: PHYSICAL ENVIRONMENT..... ....46.1-10
SECTION 47: PHYSICAL FACILITIES..... ....47.1-18
SECTION 48: PHYSICAL FACILITIES, PATIENT ACCOMMODATIONS (ADULT MEDICAL, SURGICAL, COMMUNICABLE OR PULMONARY DISEASE)..... .....48.1-5
SECTION 49: PHYSICAL FACILITIES, CRITICAL CARE UNIT..... .....49.1-6
SECTION 50: PHYSICAL FACILITIES, NURSERY UNITS..... ... .50.1-3
SECTION 51: PHYSICAL FACILITIES, PEDIATRIC AND ADOLESCENT UNIT..... ... .51.1-2
SECTION 52: PHYSICAL FACILITIES, PSYCHIATRIC NURSING UNIT..... ... .52.1-3
SECTION 53: PHYSICAL FACILITIES, SURGICAL FACILITIES..... ....53.1-7
SECTION 54: PHYSICAL FACILITIES, OBSTETRICAL FACILITIES..... .....54.1-6
SECTION 55: PHYSICAL FACILITIES, EMERGENCY SUITE..... .....55.1-3
SECTION 56: PHYSICAL FACILITIES, IMAGING SUITE..... ....56.1-5
SECTION 57: PHYSICAL FACILITIES, NUCLEAR MEDICINE..... ... .57.1-5
SECTION 58: PHYSICAL FACILITIES, MOBILE, TRANSPORTABLE, AND RELOCATABLE UNITS..... .58.1-4
SECTION 59: PHYSICAL FACILITIES, LABORATORY SERVICES..... ..59.1
SECTION 60: PHYSICAL FACILITIES, REHABILITATION THERAPY DEPARTMENT. ..60.1-3
SECTION 61: PHYSICAL FACILITIES, MORGUE AND NECROPSY..... . .61.1
SECTION 62: PHYSICAL FACILITIES, PHARMACY..... .62.1-2
SECTION 63: PHYSICAL FACILITIES, DIETARY FACILITIES..... ..63.1-3
SECTION 64: PHYSICAL FACILITIES, ADMINISTRATION AND PUBLIC AREAS..... ....64.1
SECTION 65: PHYSICAL FACILITIES, HEALTH INFORMATION UNIT..... ....65.1
SECTION 66: PHYSICAL FACILITIES, CENTRAL MEDICAL AND SURGICAL SUPPLY DEPARTMENT..... ....66.1
SECTION 67: PHYSICAL FACILITIES, CENTRAL SUPPLY AND RECEIVING..... ....67.1
SECTION 68: PHYSICAL FACILITIES, LINEN SERVICES..... ..68.1-2
SECTION 69: PHYSICAL FACILITIES, CLEANING AND SANITIZING CARTS, EMPLOYEE FACILITIES AND ENVIRONMENTAL CLOSETS..... ...69.1
SECTION 70: PHYSICAL FACILITIES, ENGINEERING SERVICE AND EQUIPMENT AREAS..... ....70.1
SECTION 71: PHYSICAL FACILITIES, WASTE PROCESSING SERVICES..... ...71.1
SECTION 72: PHYSICAL FACILITIES, DETAILS AND FINISHES..... ...72.1-6
SECTION 73: PHYSICAL FACILITIES, CONSTRUCTION, INCLUDING FIRE RESISTIVE REQUIREMENTS..... ...73.1-3
SECTION 74: PHYSICAL FACILITIES, MECHANICAL REQUIREMENTS..... ...74.1-7
SECTION 75: PHYSICAL FACILITIES, PLUMBING AND OTHER PIPING SYSTEMS.. ...75.1-3
SECTION 76: PHYSICAL ENVIRONMENT, ELECTRICAL STANDARDS..... ...76.1-4
SECTION 77: HYPERBARIC SUITE..... ...77.1-2
SECTION 78: PHYSICAL FACILITIES, HELICOPTER LANDING AREA..... ...78.1
SECTION 79: PHYSICAL FACILITIES, FREESTANDING AMBULATORY SURGERY CENTERS..... ....79.1-5
SECTION 80: PHYSICAL FACILITIES, OUTPATIENT CARE FACILITIES..... ...80.1-6
SECTION 81: PHYSICAL FACILITIES, REHABILITATION FACILITIES..... ..81.1-5
SECTION 82: PHYSICAL FACILITIES, PSYCHIATRIC HOSPITALS AND ALCOHOL/DRUG ABUSE INPATIENT TREATMENT CENTERS.....82.1-3
SECTION 83: PHYSICAL FACILITIES, INFIRMARIES..... ..83.1-2

APPENDIX

TABLE 1 – Filter Efficiencies for Central Ventilation and Air Conditioning Systems in Health Care Facilities

TABLE 2 - Sound Transmission Limitations in Health Care Facilities

TABLE 3 – Temperature and Relative Humidity Requirements

TABLE 4 – Ventilation Medical Gas and Air Flow Requirements in Health Care Facilities

TABLE 5 – Final Occupancy Inspection Check List

TABLE 6 – Behavioral Screening Exam

TABLE 7 – Dog History

TABLE 8 – Record Retention Time Frames

TABLE 9 – Required Temperatures

TABLE 10 – Newborn Screening Requirements

TABLE 11 – Central Station Outlets of Oxygen Vacuum (Suction) and Medical Air Systems in Hospitals

TABLE 12 – VERBAL ORDER

TABLE 13 – REUSE

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;

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS
CIVIL DIVISION

FILED
2012 OCT 3 PM 12 18
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR

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

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

Come now Defendants, James P. Elkins, M.D. ("Elkins") and James P. Elkins, M.D., P.A., ("PA"), and for their Response to Plaintiff's Motion for Leave of Court to Propound Additional Discovery and state as follows:

After Plaintiff filed her twentieth set of written discovery in this matter, Defendants filed a motion asking the Court to limit the scope of any additional discovery in this case. In their Motion for Limitation of Discovery, Defendants argued that, "[t]he parties should be allowed to discover the identity and testimony of new witnesses, new information related to medical care or damages, or any other matter that was unknown prior to the initiation of trial in the First Case. However, Defendants request that Plaintiff's discovery be limited to those matters." The Court, by Order entered July 25, 2012, granted Defendants' motion and limited the parties' discovery to matters that have changed or developed since December 7, 2011.

Plaintiff now asks the Court for permission to file additional, unspecified, 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." Presumably, Plaintiff plans to make Defendants' licensure by the Health Department, or lack thereof, an issue at trial, and her attorneys act as though they need to expand discovery to see whether or not Defendants will contest this issue.

Plaintiff's motion is an obvious attempt to re-open the argument on the issues already resolved by the Court's July 25 Order, and it also signals Plaintiff's determination to cloud the issues in this case by tendering an unrelated consent order.

1. Defendants' Licensure is not an Issue that has Changed or Developed Since December 7, 2011.

Whether or not Defendants were required to be licensed by the Health Department is an issue that was fully developed as of the date of Plaintiff's surgery – January 22, 2009. There has been no new development regarding this issue since that date. Plaintiff certainly had access to all relevant documents and witnesses on the subject prior to the Court's July 25, 2012 Order limiting discovery. Plaintiff had ample opportunity to conduct discovery on this topic in the eighteen months from the filing of the complaint to the beginning of the first trial in this case. She served Defendants with twelve separate sets of written discovery during that time and the parties conducted four depositions.

Plaintiff deposed Defendant James Elkins, M.D. on matters related to his prior hearing before the Arkansas Medical Board during his deposition of May 12, 2011. Excerpts of Elkins's deposition transcript are attached as Exhibit 1. Plaintiff's counsel even made documents related to the 2005 consent order exhibits to the deposition. See Exhibit 8 from the Elkins's deposition, which is made Exhibit 2 to this Response. Plaintiff's counsel obtained access to these records under the public records law. They indicated that they might conduct additional discovery

regarding them back in May of 2011. They had ample opportunity to do so prior to the Court's limitation order.

On November 28, 2011, Plaintiff's Counsel issued a subpoena to Jane Gaskill, a representative of the Arkansas Department of Health, for attendance at the first trial. See the subpoena attached as Exhibit 3. In conjunction with the subpoena, Plaintiff requested that Ms. Gaskill produce all records regarding Defendants' licensure with the Health Department, and all rules and regulations that "define ambulatory surgery center, and states when such a center must be licensed." Exhibit 3.

Since Plaintiff chose to make licensure part of her case, she has always carried the burden of proving: (1) the relevance of any proof on the licensure issue, and (2) that Defendants were required to be licensed by the Health Department, and (3) that Defendants were not licensed as required. This is not a new issue. It is not a new development for Defendants to disagree with Plaintiff's arguments on these points of proof. As with many other issues in this case, Plaintiff's counsel has waxed and waned in their feelings about the importance of this information. Their stream-of-consciousness approach to discovery is precisely what led Defendants to seek relief from the Court.

It is Plaintiff's trial strategy that has changed and developed, not this fact issue. Plaintiff recently notified Defendants that she intended to submit the 2005 consent order as evidence in this case. See the email from James Keever attached as Exhibit 4. At about the time that Mr. Keever sent the email notifying Defendants of Plaintiff's intention to tender the consent order into evidence, Mr. Swindle left a telephone message for defense counsel asking Defendants to consider the potential impact of the 2005 consent order and consider making a settlement offer. In an effort to informally convince Plaintiff that the 2005 consent order and licensure by the

211

Health Department is not relevant to this case, Defense counsel sent Plaintiff's attorneys additional information from the Medical Board showing that Defendants were not under any consent order at the time of Plaintiff's 2009 procedure. See Exhibit 5. Unfortunately, rather than dissuade Plaintiff's counsel from pursuing this irrelevant issue at trial, it apparently spurred Plaintiff's counsel to conduct additional discovery and file additional pleadings. See Exhibit 6.

WHEREFORE, Defendants respectfully request that Plaintiff's motion be denied.

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 2nd day of October 2012, a true and correct copy of the foregoing has been sent via facsimile 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
2801 Richmond Road, #57
Texarkana, TX 75503

Stephen Lisle

213

COPY

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS

SUE POFF — PLAINTIFF

vs. NO. CIV 2010-2385-4

JAMES P. ELKINS, M.D., and
JAMES P. ELKINS, M.D., P.A. — DEFENDANTS

VIDEOTAPED DEPOSITION OF

JAMES P. ELKINS, M.D.

Taken at the Swindle Law Firm
619 W. Persimmon, Rogers, Arkansas
May 12, 2011

APPEARANCES

Mr. James E. Keever, M.D., J.D.
2801 Richmond Road, #57
Texarkana, Texas
And
Mr. Ken Swindle
Swindle Law Firm
619 W. Persimmon Street
Rogers, Arkansas — for the Plaintiff

Mr. Steve Lisle
Lisle Rutledge
1458 Plaza Place, Suite 101
Springdale, Arkansas — for the Defendants

(Also present: Sue Poff and Mike Middlecamp)

214

EXHIBIT
tabbies
1

question the best you can, but for the record, you know, I am objecting to the use of any of this at trial.

MR. KEEVER: Okay.

BY MR. KEEVER:

Q And I was asking you, you remember there were two physicians who had testified against you at the hearing?

A The term "impeach his credibility," I assume that's what you're trying to do to me.

Q Right now I'm just asking you a question, Doctor.

A No. You said you were going to impeach my credibility.

Q Doctor, I'm asking you a question. I haven't -- I've had a legal discussion with your attorney, but I'm asking you the question, and the question was, do you remember that two doctors testified against you, and both testified that your conduct in this Cynthia Jones case was gross negligence?

A I don't know that I -- I remember they testified against me. I'm not exactly sure they testified the words that you used.

(Deposition Exhibit Number 7 was marked for identification.)

BY MR. KEEVER:

Q Do you remember receiving copies of -- receiving copies of the reports which we will furnish you as Exhibit

Number 7? And I will tell you that that's out of your Arkansas Medical Board file, which is available publically through the Freedom of Information Act. Do you remember seeing those reports?

A Yes.

Q So now can we say that you clearly remember, or that you do remember, there was an Arkansas Medical Board case opened on Cynthia Jones?

A Yes.

Q Through your attorney you received a transcript of that hearing. Is that correct?

MR. LISLE: Just answer as best you can.

A I don't remember that.

BY MR. KEEVER:

Q You don't remember ever seeing a transcript of the hearing, a written transcript?

MR. LISLE: From me? Is that -- are you --

MR. KEEVER: No. I was asking the question to the doctor.

MR. LISLE: I understand, but I think you were saying that I gave him the transcript.

MR. KEEVER: I might have phrased that better. So let me try.

BY MR. KEEVER:

Q Doctor, I -- you know, I don't know if I can just pull

it up real quickly, but I believe that your attorney furnished us a letter from Bill Trice which indicated that he had sent a copy of the transcript of that hearing, and, yeah, -- we'll mark this Number 8.

(Deposition Exhibit Number 8 was marked for identification.)

BY MR. KEEVER:

Q And that's Exhibit Number 8. Do you remember ever seeing a copy of that letter?

MR. KEEVER: I apologize. I only made one copy of it, Steve. You can take a look when he's finished.

A Are you asking me if I remember ever seeing a copy of this letter?

BY MR. KEEVER:

Q Yes, sir.

A And I don't.

Q Okay. Well, if that -- if there is a copy of the transcript of that hearing available to you through your attorney, may we see a copy of it?

MR. LISLE: You can make a request for it and I'll respond to it.

MR. KEEVER: Okay. Fair enough.

BY MR. KEEVER:

Q Let's see. Do you remember a Mrs. Allen who filed a lawsuit against you in 2002?

C E R T I F I C A T E

STATE OF ARKANSAS

COUNTY OF WASHINGTON

I, LEAH KAY PAYTON, Certified Court Reporter, a notary public in and for the aforesaid county and state, do hereby certify that the witness, JAMES P. ELKINS, M.D., was duly sworn by me prior to the taking of the testimony as to the truth of the matters attested to and contained therein, that the testimony of said witness was taken by me verbatim and was thereafter reduced to typewritten form by me or under my direction and supervision; that the foregoing transcript is a true and accurate record of the testimony given to the best of my understanding and ability.

I FURTHER CERTIFY that I am neither counsel for, related to, nor employed by any of the parties to the action in which this proceeding was taken, and, further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially interested, or otherwise, in the outcome of this action; and that I have no contract with the parties, attorneys, or persons with an interest in the action that affects or has a substantial tendency to affect impartiality, that requires me to relinquish control of an original deposition transcript or copies of the transcript before it is

certified and delivered to the custodial attorney, or that requires me to provide any service not made available to all parties to the action.

Leah Kay Payton, CCR No. 277

Court Reporter and Notary Public

HOPE, FUQUA & CAMPBELL, P.A.

ATTORNEYS AT LAW

METROPOLITAN TOWER
425 WEST CAPITOL AVENUE, SUITE 400
LITTLE ROCK, ARKANSAS 72201
(501) 372-4144
Facsimile (501) 372-7480

RONALD A. HOPE
DAVID M. FUQUA
PHIL CAMPBELL
JASON D. FILES
ABBIE D. DECKER
KEVIN M. O' DWYER
PATRICK L. SPIVEY
SAMUEL S. HIGH

WILLIAM H. TRICE III
COUNSEL

DEPOSITION EXHIBIT 8

March 1, 2005

Stephen Lisle
Lisle Law Firm
1458 Plaza Place, Ste. 101
Springdale, AR 72764-5273

Re: My Client: Arkansas State Medical Board
Your Client: James Elkins, M.D.

Dear Stephen:

Pursuant to your request, I have enclosed the following:

1. A transcript of the hearing dated the 3rd of February, 2005
2. Board Exhibit #1, the Order and Notice of Hearing and proof of service
3. Board Exhibit #2, the National Practitioner Databank report of medical malpractice
4. Board Exhibit #3, the patient records of the patient involved
5. Board Exhibit #4, a written report by Dr. Chris Schumake, who also testified at the hearing.
6. Board Exhibit #5, definitions of gross negligence.
7. Board Exhibit #6, treatise introduced by James S. Beckman.
8. Board Exhibit #7, report of James, S. Beckman, M.D. who also testified
9. Board Exhibit #8, a treatise introduced
10. Board Exhibit #9, a treatise introduced
11. Board Exhibit #10, a treatise introduced.

The cost of the record to have transcribed, as well as the exhibits will be billed to you. When you receive the bill, please pay it immediately and reimburse us for these out-of-pocket costs.

Respectfully,

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

WHT:hlm
cc: Peggy Cryer, Executive Secretary, Arkansas State Medical Board

220

EXHIBIT tabbies 2

Issued by the

Circuit COURT

Benton County, Arkansas

Sue Poff

v.

James Elkins, M.D.

SUBPOENA IN A CIVIL CASE

CASE NUMBER CV 10-2385-4

TO: Jane Gaskill

☑ YOU ARE COMMANDED to appear in the Circuit Court of Benton County, Arkansas, at the place, date, and time specified below to testify in the above case.

Place of Testimony	Courtroom
102 N.E. A Street Bentonville AR 72712	Division Four
	Date and Time December 8, 8:30 a.m.

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify in the taking of a deposition in the above case.

Place of Deposition	Date and Time

☑ YOU ARE COMMANDED, at the time of the trial, hearing or deposition described above, to produce and permit inspection and copying of the following documents or objects (list documents or objects):

See attached.

☐ YOU ARE COMMANDED, no more than _____ business days after receiving this subpoena, to produce and permit inspection and copying of the following documents or objects (list documents or objects):

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Arkansas Rules of Civil Procedure 30(b)(6).

221

EXHIBIT

tabbies

3

Ken Swindle Attorney for Plaintiff 11/28/11

Issuing Officer Signature and Title (Indicate if Attorney for Plaintiff or Defendant) Date

Ken Swindle, 619 West Persimmon Street, Rogers AR 72756, (479) 621-0120

Issuing Officer's Name, Address, and Phone Number

PROOF OF SERVICE

SERVED	Date	Place
JANE GASKILL	12-1-2011	5800 W. 10th # 400 LITTLE ROCK, AR 72204
Served On (Print Name)	**Manner of Service**	
JANE GASKILL	PERSONAL @ 10:42 A.M.	
Served By (Print Name)	**Title**	
JAMES W. GARRETT	PROCESS SERVER # 24	

DECLARATION OF SERVER

I declare, under penalty of perjury under the laws of the State of Arkansas that the foregoing information contained in the Proof of Service is true and correct.

Executed on 12-1-2011 (Date)

Signature of Server

9 KINGS CT LITTLE ROCK, AR 72211

Address of Server

NOTICE TO PERSONS SUBJECT TO SUBPOENAS

Regardless of his or her county of residence, a witness subpoenaed for examination at a trial or hearing must be properly served with a subpoena at least two days prior to the trial or hearing, or within a shorter time if the court so orders. The subpoena must be accompanied by a witness fee calculated at the rate of $30.00 per day for attendance and $0.25 per mile for travel from the witness' residence to the place of the trial or hearing. Rule 45(d), Ark. R. Civ. P.

A witness subpoenaed in connection with a deposition must be properly served with a subpoena at least five business days prior to a deposition, or within a shorter time if the court so orders. The witness is required to attend a deposition at any place within 100 miles of where he or she resides, is employed, or transacts business in person, or at such other convenient place set by court order. The subpoena must be accompanied by a witness fee calculated at the rate of $30.00 per day for attendance and $0.25 per mile for travel from the witness' residence to the place of the deposition. Rule 45(e), Ark. R. Civ. P.

A subpoena may command the person to whom it is directed to produce for inspection any books, papers, documents, or tangible things designated in the subpoena. The person subpoenaed may ask the court to quash or modify the subpoena if it is unreasonable or oppressive or to require that the person on whose behalf the subpoena is issued pay the reasonable cost of such production. Rule 45(b), Ark. R. Civ. P. The person subpoenaed may also object in writing to inspection or copying of any or all of the designated materials or seek a protective order from the court. If a written objection is made within ten days of service of the subpoena or on or before the time specified for compliance if such time is less than ten days, the party causing the subpoena to be issued is not entitled to inspect the materials unless the court so orders. Rule 45(c), Ark. R. Civ. P.

When a witness fails to attend in obedience to a subpoena or intentionally evades the service of a subpoena by concealment or otherwise, the court may issue a warrant for arresting and bringing the witness before the court to give testimony and answer for contempt. Rule 45(g), Ark. R. Civ. P.

1. Produce any and all records to show the licensing history of an ambulatory surgery center called Gynecology and Cosmetic Surgery Centre, or any other ambulatory surgery center in Rogers, Arkansas, in any way connected to James Elkins, M.D. or james P.Elkins M.D., P.A.

2. Produce a copy those sections of the Arkansas Department of Health Rules and Regulations for Hospitals and Related institutions in Arkansas that defines ambulatory surgery center, and states when such a center must be licensed by the state.

Filters Used:
1 Tagged Record

Email Report

Form Format

Date Printed: **10/01/2012**
Time Printed: **2:37PM**
Printed By: **SL**

Date **9/11/2012** Time **12:04PM** **12:04PM** Duration **0.00** (hours) Code
Subject **POFF V. ELKINS** Staff **Stephen Lisle**
Client **Jim Elkins** MatRef **Elkins, Jim; Sue Poff v.** MatNo **CV 2012-261-4**
From **kukeevs@keever.cc**
To **Steve Lisle; Ken Swindle; Jim Keever**
CC To
Bcc To
Reminders (days before) Follow **N** Done **N** Notify **N** Hide **N** Trigger **N** Private **N** Status

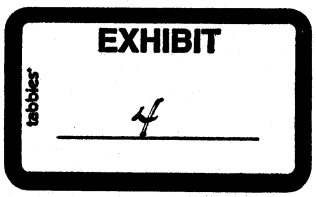
User1 User3
User2 User4

GOOD AFTERNOON, STEVE,

I AM SURE THAT YOU HAVE A COPY OF THE 2005 CONSENT ORDER BETWEEN YOUR CLIENT AND THE ARKANSAS MEDICAL BOARD, BUT I WANT YOU TO KNOW THAT WE WILL BE ADDING THIS TO OUR TRIAL EXHIBIT LIST. A COPY IS ATTACHED FOR YOUR CONVENIENCE.

PLEASE CALL IF YOU HAVE ANY QUESTIONS.

--
James E. Keever, M.D., J.D.
2801 Richmond Road #57
Texarkana, TX 75503
kukeevs@keever.cc
903 793 5316
Cell 903 314 6914
Fax 903 642 0066



Filters Used:
1 Tagged Record

Email Report

Form Format

Date Printed: 10/01/2012
Time Printed: 2:37PM
Printed By: SL

Date 9/24/2012 Time 2:07PM 2:07PM Duration 0.00 (hours) Code
Subject Poff v. Elkins Staff Stephen Lisle
Client Jim Elkins MatRef Elkins, Jim; Sue Poff v. MatNo CV 2012-261-4
From slisle@lislerutledge.com
To 'Jim Keever'; 'Ken Swindle'
CC To
Bcc To
Reminders (days before) Follow N Done N Notify N Hide N Trigger N Private N Status
User1 User3
User2 User4

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.

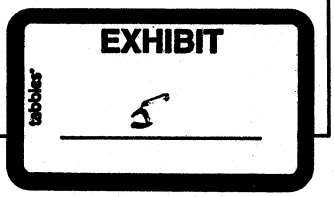
P. O. Box 7977

Springdale AR 72766-7977

(479) 750-4444

(479) 751-6792 fax

This electronic message transmission contains information from Lisle Rutledge P.A. Please be advised that this e-mail and any files transmitted with it may be confidential attorney-client communication or may otherwise be privileged or confidential and are intended solely for the individual or entity to whom they are addressed. If you are not the intended recipient please do not read, copy or re-transmit the communication but destroy it immediately. Any unauthorized dissemination, distribution or copying of this communication is strictly prohibited.



Board History

[redacted]

Appearance: Yes
Reason: Board Related
Date of Action: 4/8/2005

Minutes:
ELKINS, James P., M.D. appeared due to an Order and Notice of Hearing. Upon a motion by Dr. J. Zini, seconded by Dr. D. Smart, the Board unanimously voted to allow Dr. Elkins to resume surgeries with Dr. Becton as his proctor and providing a report of each case with a copy of the operative report attached. The Board further voted to readdress this matter at the June meeting.

Appearance: Yes
Reason: Board Related
Date of Action: 2/2/2006

Minutes:
ELKINS, James Philip, M.D. appeared in response to a request of the Board to discuss the details of Issue #05-103. After discussion and upon a motion by Dr. J. Zini, seconded by Dr. T. Pierce, the Board unanimously voted to accept Dr. Elkin's appearance for information only. In addition the Board voted Dr. Elkins is released from any further monitoring at this time.

09-18-12:11:21 ;Gynecology@Cosmetic_Surgery_Ce14797516792 ;4796364576 # 4/ 4

226

Filters Used:
1 Tagged Record

Email Report

Form Format

Date Printed: **10/01/2012**
Time Printed: **2:38PM**
Printed By: **SL**

Date **9/24/2012** Time **2:25PM** **2:25PM** Duration **0.00** (hours) Code
Subject **Poff v. Elkins** Staff **Stephen Lisle**
Client **Jim Elkins** MatRef **Elkins, Jim; Sue Poff v.** MatNo **CV 2012-261-4**
From **Ken@swindlelawfirm.com**
To **Steve Lisle; Jim Keever**
CC To
Bcc To
Reminders (days before) Follow **N** Done **N** Notify **N** Hide **N** Trigger **N** Private **N** Status

User1 User3
User2 User4

Steve, I left you a telephone message asking if the Defendants were interested in making an offer to settle this case. Is your email below your way of answering in the negative? Either way, thank your reply and I look forward to working with you in this matter.

Ken

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

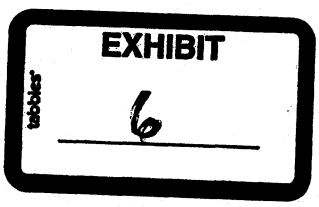
Lisle Rutledge P.A.

P. O. Box 7977

Springdale AR 72766-7977

(479) 750-4444

(479) 751-6792 fax



Filters Used:
1 Tagged Record

Email Report

Form Format

Date Printed: **10/01/2012**
Time Printed: **2:38PM**
Printed By: **SL**

This electronic message transmission contains information from Lisle Rutledge P.A. Please be advised that this e-mail and any files transmitted with it may be confidential attorney-client communication or may otherwise be privileged or confidential and are intended solely for the individual or entity to whom they are addressed. If you are not the intended recipient please do not read, copy or re-transmit the communication but destroy it immediately. Any unauthorized dissemination, distribution or copying of this communication is strictly prohibited.

228

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**

FILED
2012 OCT 4 PM 12 46
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR

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

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

I. Standard of Review

Although not specifically stated, what the Defendant seeks is actually a protective order from discovery. A court may grant a protective order to protect a party from "annoyance, embarrassment, oppression, or undue burden or expense". Ark. R. Civ. P. 26(c).

The Supreme Court has instructed that:

> One of the purposes of discovery procedures is to provide a device for ascertaining not only facts, but information as to the existence or whereabouts of facts relative to the basic issues between the parties. It is intended that these procedures make a trial more nearly a fair contest than a game of blindman's buff by requiring disclosure of basic issues and facts to the fullest practicable extent. The ascertainment of the sources from which evidence that may be used at trial might be obtained, such as the identity and location of persons having knowledge of relevant facts, is as much a purpose of discovery as any other. This permits a litigant to secure the type of information which may lead to the production of other relevant evidence, or which will facilitate his preparation for trial.
>
> We have recognized the importance of cross-examination of an adverse witness not only to test his credibility but also in an attempt to wring disclosures which might modify or explain his testimony on direct examination or bring it into a perspective which might present a view more favorable to the cross-examiner.

> Planning effective cross-examination of adversary witnesses is one of a trial lawyer's most important responsibilities in preparation for trial, particularly when the witnesses are experts.

Rickett v. Hayes, 473 SW 2d 446 at 448-449 (Ark., 1971) (Emphasis in the original; citations omitted.) Moreover,

> In all matters pertaining to discovery the trial judge is necessarily vested with a wide latitude of discretion, and appellate courts will review orders in the exercise of this discretion only to determine whether there has been an abuse of discretion which is prejudicial to the party appealing. Under ordinary circumstances, any error in the exercise of this discretion will be harmless because of ultimate mootness or absence of prejudice. Yet, *when there has been an undue limitation of pretrial discovery to the prejudice of substantial rights of appellant under the circumstances prevailing, a judgment will be reversed if subsequent developments have not rendered the question moot.*
>
> Decisions upholding limitations on discovery of an expert witness, particularly where there was a foreclosure of inquiry as to the expert's opinions and conclusions, are abundant . . . Still, there are recognized exceptions to the otherwise proper limitation of discovery of the conclusions of an adverse party's expert where the evidence is indispensable to a determination of a material issue and would be otherwise unavailable. An entirely different situation obtains, however, when the expert's testimony pertains to the very crux of the issue to be determined on trial.

Id. (Emphasis added.)

The Court affirmed this standard in 2001, stating:

> This court has long held that the trial court has wide discretion in matters pertaining to discovery and that a trial court's decision will not be reversed absent an abuse of discretion. Although this court recognizes the magnitude of the trial court's discretion in discovery matters, it has found an abuse of discretion where there has been an undue limitation of substantial rights of the appellant under the prevailing circumstances. A motion for production of documents must be considered in the light of the particular circumstances which give rise to it, and the need of the movant for the information requested. In cases where the appellant is relegated to having to prove his claim by documents, papers, and letters kept by the appellee, the scope of discovery should be broader. We consider this factor in deciding whether there has been an abuse of discretion in denying a discovery request. The goal of discovery is to permit a litigant to obtain

230

whatever information he may need to prepare adequately for issues that may develop without imposing an onerous burden on his adversary.

Dodson v. Allstate, 345 Ark. 430, 47 S.W.3d 866, at 874-75 (2001).

II. Application of Standard to the Facts

The Defendant seeks to limit discovery. However, the Defendant has failed to show how responding to the very limited discovery is in any way annoying, embarrassing, oppressive, or unduly burdensome or expensive. In fact, it would seem that simply answering the very limited discovery would be much less burdensome and expensive than filing a motion opposing it.

Here, as far as Plaintiff knew, Defendant, James P. Elkins, P.A., might have demonstrated in its responses to June 7, 2012, Discovery that it was licensed by the State Department of Health at the time of the incident complained of. If this would have occurred, that would have been the end of the matter. Instead, this was denied. Even then, it was only denied after a hearing, and after an order from the court, and after having the transcript of the hearing delivered to the parties. Obviously, the Defendant's concession that it was not, in fact, licensed by the State Department of Health created a new development that would allow for more discovery. See, Defendants' Amended Response to 6/7/12 Requests for Admissions filed with the Clerk.

Moreover, the Defendant's own exhibit shows that there is a new fact not previously known. The Defendant has produced some type of redacted action taken by the Arkansas Medical Board. See, Defendant's Exhibit 5 attached to Response and incorporated herein. Ark. R. Civ. P. 10(c). Both the redaction and the requirement of "proctors" to monitor the Defendant raise multiple additional issues requiring more discovery to the Defendant. This is a development that has occurred after December 7, 2011, and, for that reason alone, should be

subject to additional discovery, including re-deposing of Dr. Elkins on this limited topic.

Finally, one benefit of discovery is for both parties to properly evaluate their cases. Although not originally argued by the Plaintiff in her Motion, the topic of settlement was broached by the Defendant in its Reply. See, Defendant's Exhibit 6 attached to Response and incorporated herein. Ark. R. Civ. P. 10(c). It seems odd that the Defendant simultaneously does not make any offer to settle while refusing the Plaintiff the opportunity to do discovery on the merits of the case. Obviously, prohibiting discovery does not tend to help either side properly evaluate their own cases for purposes of settlement negotiations and thus does not promote judicial economy.

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 3rd day of October, 2012.

Ken Swindle

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS

FILED
2012 OCT 9 PM 2 19
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR

SUE POFF — PLAINTIFF

vs. — CASE NO. CV-2012-0261-4

JAMES P. ELKINS, M.D. and
JAMES P. ELKINS, M.D., P.A. — DEFENDANTS

ORDER

NOW ON this 9th day of October, 2012, this Court finds from a review of the Plaintiff's Motion for Leave of Court to Propound Additional Discovery to Defendant, James P. Elkins, M.D., the Defendant's Response to said Motion, and the Plaintiff's Reply to the Defendant's Response, that:

1. This Court has jurisdiction of the parties and subject matter involved herein.

2. Pursuant to this Court's Order entered July 25, 2012, the Plaintiff has raised no issue that has changed or developed since December 7, 2011.

3. The Plaintiff's Motion for Leave of Court to Propound Additional Discovery to Defendant, James P. Elkins, M.D., is denied.

4. Should either party desire to seek leave to propound additional discovery, that moving party is to attach to the motion asking for leave, a copy of the written discovery that party desires to propound to the adverse party.

IT IS SO ORDERED.

John R. Scott
CIRCUIT COURT JUDGE

234

CV12 008245

cc: Ken Swindle
Attorney at Law
619 West Persimmon Street
Rogers, AR 72756
VIA TELEFAX 1-479-621-0838

James E. Keever, M.D., J.D.
Attorney at Law
2801 Richmond Road, #57
Texarkana, TX 75503
VIA TELEFAX 1-903-642-0066

Stephen Lisle
Attorney at Law
1458 Plaza Place, Suite 101
Springdale, AR 72764-5273
VIA TELEFAX 1-479-751-6792

CV12-008246
235

FILED
2012 NOV 7 PM 1 19
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR

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

MOTION FOR LEAVE OF COURT TO CONDUCT DISCOVERY

Come now Defendants, James P. Elkins, M.D. ("Elkins") and James P. Elkins, M.D., P.A., ("PA"), and for their Motion for Leave of Court Conduct Discovery and state as follows:

1. At issue in this case are Plaintiff's claims for damages for past and future medical expenses, the extent of her alleged injuries, and her claims for economic damages.

2. Defendants require Plaintiff's limited deposition to evaluate Plaintiff's claims on these issues with regard to any new developments since December 7, 2011.

3. Since December 7, 2011, Plaintiff has identified a previously undisclosed expert witness, Dr. Kris Shewmake. Defendants request leave to depose Dr. Shewmake in the event that they determine that his deposition is needed to prepare for trial.

WHEREFORE, Defendants respectfully request leave of Court to depose Plaintiff with regard to her medical condition, medical treatment, and facts related to her claims for economic damages that have occurred since December 7, 2011 and for permission to depose Dr. Kris Shewmake.

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

By: _____
Stephen Lisle, AR Bar No. 94103

FAX
NOV 07 2012
RECEIVED

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 7th day of November 2012, a true and correct copy of the foregoing has been sent via facsimile 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
2801 Richmond Road, #57
Texarkana, TX 75503

Stephen Lisle

237

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS

SUE POFF	PLAINTIFF
vs.	CASE NO. CV-2012-0261-4
JAMES P. ELKINS, M.D. and JAMES P. ELKINS, M.D., P.A.	DEFENDANTS

NOTICE OF HEARING ON MOTION FOR LEAVE TO CONDUCT DISCOVERY

Please take notice that the above captioned matter has been scheduled for hearing, by the Court, **on December 11, 2012,** at 9:00 a.m. before the Honorable John R. Scott in Room 208 of the Benton County Courthouse, Bentonville, Arkansas.

JOHN R. SCOTT
CIRCUIT JUDGE
Dated: November 16, 2012

cc: Ken Swindle
Attorney at Law
619 West Persimmon Street
Rogers, AR 72756
VIA TELEFAX 1-479-621-0838

James E. Keever, M.D., J.D.
Attorney at Law
2801 Richmond Road, #57
Texarkana, TX 75503
VIA TELEFAX 1-903-642-0066

Stephen Lisle
Attorney at Law
1458 Plaza Place, Suite 101
Springdale, AR 72764-5273
VIA TELEFAX 1-479-751-6792

FILED
2012 NOV 16 PM 3 53
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR

CV12 009530
238

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS
CIVIL DIVISION

FILED
2012 NOV 28 PM 1 41
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR.

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

REPLY TO PLAINTIFF'S RESPONSE TO MOTION FOR LEAVE OF COURT TO CONDUCT DISCOVERY

Come now Defendants, James P. Elkins, M.D. ("Elkins") and James P. Elkins, M.D., P.A., ("PA"), and for their Reply to Plaintiff's Response to Motion for Leave of Court Conduct Discovery and state as follows:

Plaintiff, in her response, agrees to allow the depositions of Sue Poff and Dr. Shewmake, as requested in Defendants' motion. Therefore, Plaintiff has agreed to provide all the discovery requested by Defendants in their motion.

While Plaintiff consented to the discovery requested by Defendants, in her Response she also asked for leave to depose Dr. Elkins for a second time about "any expert opinions he will offer in this case, including opinions on whether or not the sedation given to Sue Poff on January 22, 2009 was such that it would have rendered Ms. Poff incapable of taking actions for self-preservation under emergency conditions without assistance from others."

The Court, by Order entered July 25, 2012, granted Defendants' motion and limited the parties' discovery to matters that have changed or developed since December 7, 2011. Clearly, the medical treatment provided by Dr. Elkins back in 2009 and Plaintiff's sedation level at that time has not changed or developed since December 7, 2011. Plaintiff's request is yet another

obvious attempt to re-open the argument on the issues already resolved by the Court's July 25 Order. In fact, this issue was already addressed in denying Plaintiff's "Motion in Limine Part 13" filed in November of 2011.

Plaintiff has had every opportunity to discover the information that she requests. Plaintiff was provided with Dr. Elkins's medical records before this suit was filed. In response to Plaintiff's discovery, Defendants identified Defendant, James Elkins, as a potential expert witness. On May 12, 2011, Plaintiff took a videotaped deposition of James Elkins that lasted several hours. The transcript of Plaintiff's deposition of Dr. Elkins's testimony is 113 pages and includes additional exhibits of similar weight. During that deposition, Plaintiff had full access to Dr. Elkins, his records, and his medical opinions. Plaintiff questioned Dr. Elkins not only on his treatment of the Plaintiff, but on the technical aspects of DOT lasers and recommended settings, and other expert matters which are at the heart of this case. Plaintiff's attorneys then, shortly before this matter was first set for trial, acted as though they were surprised that Dr. Elkins will be a witness qualified to give expert opinions in this case.

Defendants provided Plaintiff with all of the documents that pertain to Dr. Elkin's opinions in this case. Any other discovery requests identified in Plaintiff's Motion apply to expert witnesses who have been retained to provide opinions in the case. They do not apply to the treating physician, who is also qualified by experience and training to provide expert opinions.

Plaintiff could have, but chose not to, asked Dr. Elkins about his opinions as to standard of care and causation in his deposition.

> No medical care provider shall be required to give expert opinion testimony against himself or herself as to any matters set forth in 16-114-206 at trial. **However, this shall**

not apply to discovery. Discovery information can be used at trial as in other lawsuits.

Ark. Code Ann. § 16-114-207. (3).

Plaintiff's counsel makes no proffer of what information he could possibly need that was not accessible in the deposition. Counsel not only questioned Defendant about his entire treatment of Plaintiff, but on things like "what is the definition of medical malpractice." See pp. 7-8 of the excerpts of Elkins's deposition attached as Exhibit 1. There was no objection made when Plaintiff's Counsel asked a question about the standard of care in the deposition. Rather, he was asked if he was seeking a **legal** opinion. Plaintiff's counsel then announced that he was taking the deposition as a defendant not an expert. This was his choice. Defense counsel was not obligated to remind Plaintiff's counsel of his rights under the Rules of Civil Procedure, or suggest questions for him to ask. Elsewhere in the deposition, Plaintiff's counsel proceeded undaunted in spite of objections with regard to matters such as Defendant's finances, until Defense counsel had to instruct the witness not to answer. See pages 6 and 21-22 of Elkins's deposition attached as Exhibit 2.

It is simply disingenuous for Plaintiff's counsel to act as though he has not had ample discovery in this case. He has served 20 sets of written discovery and taken Dr. Elkins's deposition.

WHEREFORE, Defendants request that Plaintiff's request to depose Dr. Elkins for a second time be denied.

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.

241

WHEREFORE, Defendants request that Plaintiff's request to depose Dr. Elkins for a second time be denied.

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
Springdale, AR 72764-5273
(479) 750-4444

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of November 2012, a true and correct copy of the foregoing has been 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

COPY

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS

SUE POFF — PLAINTIFF

vs. NO. CIV 2010-2385-4

JAMES P. ELKINS, M.D., and
JAMES P. ELKINS, M.D., P.A. — DEFENDANTS

VIDEOTAPED DEPOSITION OF

JAMES P. ELKINS, M.D.

Taken at the Swindle Law Firm
619 W. Persimmon, Rogers, Arkansas
May 12, 2011

APPEARANCES

Mr. James E. Keever, M.D., J.D.
2801 Richmond Road, #57
Texarkana, Texas
And
Mr. Ken Swindle
Swindle Law Firm
619 W. Persimmon Street
Rogers, Arkansas — for the Plaintiff

Mr. Steve Lisle
Lisle Rutledge
1458 Plaza Place, Suite 101
Springdale, Arkansas — for the Defendants

(Also present: Sue Poff and Mike Middlecamp)

243

EXHIBIT
tabbies
1

MR. LISLE: Okay.

MR. KEEVER: Are you instructing him not to answer?

MR. LISLE: If your question is whether or not he can pay a judgment in this case -- is that the question as I understood it?

BY MR. KEEVER:

Q The question was, we have been told early on by your attorney that if you had a significant judgment against you, you would declare bankruptcy, and I'm just asking, is that still your position?

MR. LISLE: First of all, I'm going to object to the form of that question because you're -- you are taking out of context settlement negotiations that you and I have had and not fully describing those settlement discussions, and it's not admissible, and it's not reasonably calculated to lead to the discovery of admissible evidence. So, yes, I'm instructing him not to answer that question.

MR. KEEVER: Okay.

BY MR. KEEVER:

Q Doctor, what is your definition of medical malpractice?

MR. LISLE: You can provide your definition of medical malpractice, which is not necessarily the legal

definition of medical malpractice. He may ask a whole lot of questions that have absolutely nothing to do with this case, but to the extent that they may somehow lead to the discovery of admissible evidence in theory, then he is allowed to ask those questions. So I'm going to go ahead and let you to answer that based on your interpretation, as long as he's not asking for a legal definition of malpractice.

BY MR. KEEVER:

Q Do you remember the question after all that?

A Huh-uh.

Q What's your personal definition of medical malpractice?

A That would take a lot of thinking, and I would probably refer back to our bylaws of the Arkansas State Board.

Q Well, what would constitute, in your opinion, medical malpractice? Just give me an example.

A An example?

Q Uh-huh. An example probably would be if a patient was being operated on and the doctor slipped and the knife went through the heart and killed the patient.

Q All right. Are you the sole shareholder of James Elkins -- is it James P. Elkins, M.D., P.A.? Is that the proper name of your corporation?

attorney instructs you not to. So go ahead and answer the question.

MR. LISLE: If you're calling for a legal conclusion, I'm going to instruct him not to answer that question.

MR. KEEVER: Okay, and that's fine. We'll just continue making the record.

BY MR. KEEVER:

Q Do you carry liability insurance on your car and motorcycle?

A Yes.

Q And I've been told by Mr. Lisle early on that if you were to suffer a significant judgment against you, that you would declare bankruptcy.

MR. LISLE: I'm going to object to this. For this to be discoverable it has to be reasonably calculated to lead to the -- to admissible evidence.

MR. KEEVER: Are you instructing your client not to answer?

MR. LISLE: For the record, my objection is that his ability to pay a judgment in this case is in no way relevant to any of the issues of negligence, causation, or damages in this case.

MR. KEEVER: Then instruct him not to answer. Make your record, and we'll move on.

statement?

MR. LISLE: Don't answer that question. That has absolutely nothing to do with this case, and I think it's time that you start moving on to something that actually has to do with the case of Poff versus Elkins.

MR. KEEVER: Okay. You've made your record. You're instructing him not to answer; is that correct?

MR. LISLE: Yes. You don't have to -- don't answer that.

MR. KEEVER: Okay. We're going to take a real short break, because I drank too much coffee at lunch, and I apologize.

MR. LISLE: Okay.

MR. KEEVER: I'll be right back.

(There was a recess in the deposition.)

BY MR. KEEVER:

Q Okay. We're back on the record. Doctor, I'm going to hand you what we marked Exhibit Number 2, which was a notice for this deposition, and there is a page at the end of it -- hmm. Well, there is a page at the end of it, Exhibit A.

(Deposition Exhibit Number 2 was marked for identification.)

BY MR. KEEVER:

Q Have you seen that document before?

A I've seen a lot of things pertinent to this case. I don't know if I've seen this or not.
Q Okay. This was given to you through your attorney, and it gives a list in Exhibit A of the materials that you were to bring to the deposition, and I just want to be sure that we've got all of those. Now, you brought your original medical records, which we've talked about this morning, and we've copied. Are those the complete medical records?
A Yes.
Q Are they all of the records on Sue, including correspondence, billing records, and anything else?
A No.
Q Where are the -- do you have a separate correspondence file?
A No.
Q So do you have all the correspondence in this document?
A Correspondence of what?
Q Letters. Anything -- anything to -- I want to -- I asked for your entire record on Sue, and that would include any correspondence, any billing records, medical records, laboratory, photographs, everything. Every piece of paper that you have in your office on Sue is what I wanted to see.

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**

FILED
2012 DEC 4 AM 11 08
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO TAKE DISCOVERY

Comes now the Plaintiff, and for her Response to Defendants' Motion to Take Discovery, states:

1. Plaintiff has no objection to presenting for further limited deposition at a time mutually convenient to the Parties. The Parties have agreed to take the Deposition of the Plaintiff at the office of below-signed counsel immediately following the hearing on December 11, 2012. Said deposition will be limited to Plaintiff's condition after December 7, 2011.

2. Plaintiff has no objection to Defendants taking the deposition of Dr. Shewmake at a time mutually convenient to the Parties and Dr. Swewmake.

3. As the Court is aware, Defendant announced that Dr. Elkins will testify as his own expert witness. The following exchange occurred during Dr. Elkins' May 12, 2011, deposition:

> 21 Q All right. You understand that I have taken your
> 22 deposition today as the defendant, and if you are disclosed
> 23 as an expert witness, I reserve the right to depose him as
> 24 an expert.
> 25 MR. LISLE: Okay.

See Plaintiff's Exhibit 1, Deposition of Defendant, p. 110, attached.

4. Plaintiff requests leave of Court to take the deposition of Dr. Elkins to explore any expert opinions he will offer in this case, including opinions on whether the sedation given to the

249

Plaintiff on January 22, 2009, was such that it would have rendered her incapable of taking actions for self-preservation under emergency conditions without assistance from others.

WHEREFORE, Plaintiff asks that the Court grant Defendants' Motion and grant Plaintiff's Motion allowing further limited deposition of both parties.

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 3rd day of December, 2012.

Ken Swindle

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS

SUE POFF — PLAINTIFF

vs. NO. CIV 2010-2385-4

JAMES P. ELKINS, M.D., and

JAMES P. ELKINS, M.D., P.A. — DEFENDANTS

VIDEOTAPED DEPOSITION OF

JAMES P. ELKINS, M.D.

MAY 12, 2011

EX. 1 251

A That was a very long question. Would you repeat that, please?
Q All right. What's more likely the cause of this? Sue's unique skin physiology, or the fact that you used a 25 watt power and 1200 milli -- microsecond dwell time?
A I can't answer that because we don't have anything to compare it to. I know, just like you know, that she's had damage to her skin, and I wouldn't -- I wish that wouldn't have happened. I was trying to help her. It didn't turn out that way. It's a complication of surgery.
Q Are you going to offer any expert opinions in this case?

MR. LISLE: Are you asking him a legal question?

MR. KEEVER: No. I'm asking -- I'm asking if he is going to testify as to the standard of care and causation in this case.

MR. LISLE: Well, we'll disclose that when we need to under the rules.

BY MR. KEEVER:
Q All right. You understand that I have taken your deposition today as the defendant, and if you are disclosed as an expert witness, I reserve the right to depose him as an expert.

MR. LISLE: Okay.

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**

FILED
2012 DEC 5 PM 1 45
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR

PLAINTIFF'S MOTION FOR EXPANDED JURY POOL AND FOR JUROR QUESTIONNAIRE

Comes now Plaintiff, and for her Motion for Expanded Jury Pool and for Juror Questionnaire, states:

1. This is a medical malpractice case set for trial March 13, 201.

2. The defendant in this case is a local physician who has practiced in this community for over thirty (30) years.

3. It is anticipated that in any jury pool there will be a significant number of prospective jurors who will have an unavoidable bias, for or against the doctor, as a result of past professional contacts.

4. In order to have a sufficient number of jurors to support reasonable strikes for cause, Plaintiff would respectfully request that the jury pool be expanded so that a pool of at least seventy (70) prospective jurors is available for questioning.

5. The Court has the unquestioned discretion to send an expanded jury questionnaire to prospective jurors in any case, and this Court has exercised this discretion in the past.

6. Attached as Exhibit 1 to this Motion is a juror questionnaire that the Court found to be acceptable in the recent trial of *Brantley v. Northwest Medical Center, et al.*, Benton

253

County Circuit Court, CV 09-3526-4.

7. Plaintiff believes that the attached questionnaire is fair and balanced, would expedite the jury selection process, and would assist Counsel and the Court in selecting a fair and impartial jury.

8. The attached questionnaire was sent to Mr. Lisle on December 3, 2013, asking for his comments and suggestions. Unfortunately Mr. Lisle was unable to review the form at the time, but Plaintiff is certainly open to any suggestions from Mr. Lisle or the Court on improving the proposed form.

9. There are issues relevant to this case, indeed any medical malpractice case tried in Benton County, that common sense and the Court's own knowledge, are potential areas of high sensitivity and can display significant and even hidden bias and prejudice. Benton County is predominantly, and proudly, Republican, and not only many Republicans, but also indeed the platform of the Arkansas Republican Party has advocated and currently advocates tort reform, cap on damages, and the negative effect of lawsuits on doctors and other health care providers. See attached as Exhibit 2. Prospective jurors may be reluctant to verbalize responses in a crowd of people, and if all those with those views do so, it will take an in ordinate amount of time to identify each potentially biased juror individually and then follow up with each of the jurors the information sought to be elicited from this questionnaire.

10. There should be no prejudice to either party if this questionnaire is sent to the prospective jurors in this case.

11. Plaintiff will be happy to work with the Clerk's Office in any way possible to effect the mailing and receipt of this questionnaire, including reimbursing the County for any

costs involved.

WHEREFORE, Plaintiff respectfully requests the Court grant her Motion for an Expanded Jury Pool and for Juror Questionnaire.

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 4th day of December, 2012.

Ken Swindle

Jury Questionnaire Instruction

TO PROSPECTIVE JURORS

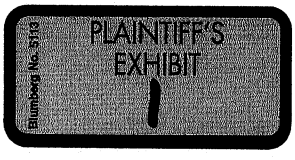
This questionnaire is meant to supplement the questionnaire on your jury summons form, which must also be filled out completely. These questions are intended to obtain information from you with respect to your service as a potential juror in this case. By the use of the questionnaire, the process of jury selection will be shortened. Please respond to the following questions as completely as possible. The information contained within the questionnaire will become part of the Court's permanent record, but it will not be distributed to anyone except the attorneys in the case and the judge. During the questioning by the attorneys you will be given an opportunity to explain or expand any answers, if necessary.

If there is any answer or explanation that you want the attorneys to ask you about in private, please write the word "PRIVATE" next to the question. Please do not leave any space blank.

Because the questionnaire is part of the jury selection process, the questions must be answered by you under oath and you should fill out this questionnaire by yourself without consulting any other person. If you need additional space for any of your answers, please use the back of the last page of this questionnaire.

If you do not understand a question, please write "I DO NOT UNDERSTAND" and the question will be explained to you in Court.
If you have any questions or problems filling out this form, please advise the bailiff of the Court.

PLEASE KNOW THAT THERE ARE NO RIGHT OR WRONG ANSWERS - JUST HONEST ONES.



JUROR NAME:_____ AGE:_____
PLACEOF BIRTH:_____ JUROR NUMBER_____
HIGHEST GRADE OR DEGREE EARNED:_____

1. Have you or any family member ever worked in the medical or legal field?
   [ ] Yes [ ] No If Yes, please explain:

2. Do you think there should be laws making it more difficult to file a medical malpractice lawsuit? [ ] Yes. [ ] No. Please explain:

3. Marital status:
   Spouse's/significant other's educational background:
   Spouse's/significant other's occupation:
   Parent's occupations (if retired or deceased, previous occupations):

4. Which group do you identify with the most?
   [ ] Democrat
   [ ] Republican
   [ ] Independent
   [ ] Other

5. What church do you attend if you attend church?

6. Are you a member of any clubs or organizations?
Yes [ ] No [ ]
   If yes, what organizations?

7. Have you or any family member ever been sued?
[ ] Yes [ ] No

Have you or a loved one ever sued anyone else?
[ ] Yes [ ] No
If either answer is yes, do you believe justice was served?

8. Have you ever served on a jury?
[ ] Yes [ ]No
If Yes: What was the case? [ ] Civil? [ ] Criminal?
[ ] Served on both types of cases?
Serve as Foreperson? [ ] Yes [ ] No

9. Do you think there should be tort reform such as limits on damages in law suits?
[ ] Yes [ ] No If yes, please explain:

10. If you or a loved one were harmed by someone's negligence in a car accident, would you file a lawsuit, if necessary, and ask for money damages? [ ] Yes [ ] No

11. Do you believe in awarding money for pain and suffering? [ ] Yes [ ] No
Please explain:

12. Do you believe that it is wrong to file a lawsuit against a doctor if the doctor intended to do no harm?
[ ] Yes [ ] No If Yes, please explain:

13. Have you or someone close to you ever suffered from a

chronic skin condition? [ ] Yes [ ] No If Yes please explain:

14. What do you enjoy doing in your spare time?

15. List three public persons you admire most (not family):
1.
2.
3.

16. Is there any reason you would not be a good juror for this case, which is a suit against a doctor?
[ ] Yes [ ] No If Yes, please explain:

17. Is there anything in this questionnaire that you would not want to discuss in open Court?
[ ] Yes [ ] No If Yes, please explain.

I HEREBY SWEAR OR AFFIRM THAT ALL THE ANSWERS CONTAINED IN THIS JUROR QUESTIONNAIRE ARE TRUE AND CORRECT.

_____ _____
Juror Signature Date

2012 Platform for the Republican Party of Arkansas

Platform Committee:

Nate Bell
Ann Clemmer
Jonelle Fulmer
Rodney Harris
Prissy Hickerson
Arlon Hickman, Chairman
Joe LeBlanc
Charlann Reely
Angel Roberson
Andrew Stricklin

260

PLAINTIFF'S EXHIBIT 2

prices are a threat to our economy. We believe that a long-term strategy for energy independence must include:

1. Establishment of a coherent policy that affords access to our vast natural resources while protecting our natural environment.

2. Opening of the Outer Continental Shelf, oil shale regions, and other domestic sources of oil for exploration and drilling now.

3. Loosening of the environmental regulations that make it impossible to build new oil refineries.

4. Investments in proven technologies that provide energy in a cost effective and environmentally safe process.

5. Arkansas is among the top natural gas producing states and we support responsible development and use of our domestic natural resources.

HEALTHCARE ISSUES

Healthcare is not a right; it is a service. As a compassionate society we will aid those in need; however, a government takeover of healthcare is detrimental to the entire health care system.

The Republican Party of Arkansas expresses support for:

1. Long-term Medicare solutions:
Form a bipartisan commission to make recommendations.
" Assure long-term solvency by implementing cost saving measures that reduce bureaucracy, fraud and abuse.
" Implement optional plans that combine public and private efforts to provide citizen access to and choices among various kinds of coverage.

2. Medical Savings Accounts which allow people to own and control their healthcare.

3. Freedom to choose fee-for-service plans.

4. Choices among various managed care plans.

5. Optional long-term care choices, including nursing home, hospice and home health care for certain diseases such as Alzheimer's.

6. Tax-deductible premiums for these and other such options.

7. Medicaid block grants to states with "No Federal Strings". Arkansas Republicans believe that such strings defeat the purpose of state grants. Distribution of Medicaid grant funds should be left to the discretion of each state.

8. We strongly support Medical tort liability reform through an amendment to the state constitution: Arkansas Republicans believe health care costs can be reduced by tort reform of medical liability regulations and statutes by limiting the circumstances under which such cases may be properly pursued and the extent of damage claims involving pain and suffering.

9. Freedom to choose doctors outside of the Medicare system: Arkansas Republicans hold that neither Medicare patients nor doctors choosing to practice outside the Medicare system should

be fined or otherwise punished for non-cooperation with the Medicare system, and patients should be free to voluntarily pay doctors out of personal funds for such medical care, even when rendered outside the Medicare system.

10. The repeal of all statutes, laws and regulations that would permit the Medicare system to pressure, prosecute, pursue, fine or otherwise punish any such patient or doctor.

11. Continuity of patient care when employers change health insurance plans and providers, we support the flexibility for physicians to provide services for any managed health care plan in any state that they are licensed to practice.

12. National legislation to treat mental and physical illnesses equitably and fairly.

13. Efforts to implement more access to Community Based Health Centers; to meet the health care needs of the uninsured and underinsured in their communities.

14. Association Health Plans to help small businesses on behalf of their employees; Health Savings Accounts so Americans can get help with out-of-pocket medical expenses; and a creation of refundable tax credit to help low income families purchase health insurance.

15. Creation of a legal environment for pharmaceutical companies to develop new drugs and lower costs to consumers.

16. Replace Obamacare with a well designed conservative initiative.

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**

FILED
2012 DEC 5 PM 1
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, ARK

PLAINTIFF'S REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION TO TAKE SECOND DEPOSITION OF DR. ELKINS

Comes now, Plaintiff, and for this, her Reply to Defendant's Response to Plaintiff's Motion to take an additional Deposition of Dr. Elkins states:

1. Defendants filed, on November 7, 2012, their Motion to Take Further Discovery, a request to take a second deposition of Plaintiff limited to any new developments since December 7, 2011.

2. Defendants also asked Plaintiff's Counsel on that day for a time and place that was mutually acceptable to accomplish that deposition.

3. Plaintiff responded to Defendant's Motion agreeing to the limited deposition, but inadvertently filed that response under the old case number, CV 2010-2385-4. In that response was a request for leave of Court to take the further deposition of Dr. Elkins on certain expert witness issues.

4. On December 3, 2012, Plaintiff corrected the misfiling of her Response

5. On November 20th, 2012, Defendants filed their Response and objections to Plaintiff's request to take a further deposition of Dr. Elkins.

6. At this time Plaintiff renews her objections to allowing Dr. Elkins to be identified

263

to the jury as an expert witness for the reasons articulated and briefed in Plaintiff's Motion in Limine from the first case.

7. As the Court knows from previous filings, Plaintiff first asked for discovery regarding Defendant's experts, including full disclosure pursuant to Rule 26 of the Arkansas Rules of Civil Procedure at the time of Original Service of the Complaint in the first case.

8. As the Court also knows from previous filings, Defendant did not answer Plaintiff's initial set of discovery until the day before Plaintiff's Motion to Compel was set to be heard, and at that time Defendant did not disclose any experts in response to Plaintiff's Interrogatories, See attached as Exhibit No. 1. Further, to date Defendant has not supplemented those responses as required by Rule 26(e) of the Arkansas Rules of Civil Procedure. While not conceding that Dr. Elkins is allowed to testify as an expert in his own case, Plaintiff requests that the Defendants be required to supplement their responses to the Plaintiff's Interrogatories and Requests for Production of Documents if they intend to offer Dr. Elkins as an expert in their case. Ark. R. Civ. P. 26(e).

9. Defendant's deposition was taken on May 12, 2011, as noted in Plaintiff's Response to Defendant's Motion, with the clear understanding that the deposition was of Defendant as Defendant, and that, if he were later to be disclosed to be expected to offer expert opinions, Plaintiff reserved the right to take a further deposition to explore those expected opinions. Defense Counsel agreed with that reservation. That is exactly the situation at this time - Defense Counsel has made it clear that he expects to elicit expert testimony from Defendant. At the time of the November 22, 2011, hearing on Motions and Instructions, the Court ruled that Dr. Elkins could, in the first trial, offer expert opinions in his own defense. If the Court is

inclined to all that testimony in the upcoming trial, Plaintiff wishes to take an additional deposition of Dr. Elkins limited to those expert opinions expected, including the expected opinion that the sedation given to Ms. Poff was insufficient to trigger the provisions of the Rules and Regulations of the Arkansas Department of Health to require licensure of the surgery center.

10. Rule 26(b)(4) and Rule 33 of the Arkansas Rules of Civil Procedure allow parties to obtain expert opinions prior to depositions and then allow further inquiry at deposition. Plaintiff anticipates that the Defendant will take the position that these questions could have and should have been asked at the first deposition. The Defendants' position is in error. Plaintiff has the right to have expert opinions disclosed prior to taking an expert deposition in order to adequately prepare for that deposition.

11. In the alternative that the Court denies Plaintiff's request that Dr. Elkins be denied expert witness status, Plaintiff would respectfully request that the court grant her request to take the supplemental deposition of Dr. Elkins, and further, that the Court Order that supplemental deposition to be taken at the Law Offices of Rutledge and Lisle at 1 P.M. on Friday, December 14, 2012, or at a time mutually convenient to the Defendant and all counsel, such time to be set at the time of the December 11, 2012, hearing on this matter.

12. With this Reply to Defendant's Response, Plaintiff attaches and incorporates by reference her Brief in Response to her Request to Deny Expert Witness Status to Dr. Elkins or in the alternative to grant her Request for a Supplemental Deposition of Dr. Elkins.

WHEREFORE, FOR PREMISES STATED, Plaintiff asks that Dr. Elkins be prohibited from offering expert testimony in this case or, in the alternative, that Defendants be required to supplement their Responses to the Plaintiff's Interrogatories, that Plaintiff be allowed to take

the supplemental deposition of Dr. Elkins at a time to be set at the December 11, 2012, hearing on this matter, and for any other relief to which Plaintiff may be entitled.

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 4th day of December, 2012.

Ken Swindle

PLAINTIFF'S EXHIBIT
#1

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS

SUE POFF — PLAINTIFF

vs. — No. CIV 2010-2385-4

JAMES P. ELKINS, M.D., and
JAMES P. ELKINS, M.D., P.A. — DEFENDANTS

JAMES P. ELKINS, M.D.'S RESPONSE TO PLAINTIFF'S FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS

COMES NOW the Separate Defendant, James P. Elkins, M.D., by and through his undersigned attorneys, and for his Response to Plaintiff's First Set of Interrogatories and Requests for Production of Documents, respectfully states as follows:

INTERROGATORY NO. 1: State whether you will present any documentary or demonstrative evidence at the trial or at any deposition of this matter. If your answer is affirmative, state:

(a) The description of each such document or demonstrative aid you propose to introduce or use at trial or deposition in any manner;

(b) The facts to be presented or described by each such document or demonstrative aid; and

(c) The name and address of the custodian of each such document or demonstrative aid.

RESPONSE TO INTERROGATORY NO. 1: At the time of answering, a complete list of trial exhibits has yet to be determined. When such a determination is made, Plaintiff's counsel will be provided with such list in a timely manner prior to a trial on the merits of this

interviewed by you or your attorneys, or any other agent or representative, or has provided a statement or account, either oral or written, to you, your attorneys, or any other agent or representative of yours.

RESPONSE TO INTERROGATORY NO. 5: At the time of answering, a complete list of trial witnesses has yet be to be determined. When such a determination is made, Plaintiff's counsel will be provided with such list in a timely manner prior to a trial on the merits of this action. Subject to the foregoing, Defendant expects to testify and reserves the right to call as witness any and all persons so named by Plaintiff.

REQUEST FOR PRODUCTION NO. 2: Produce a copy of any witness statements that are in your possession, custody, or control.

RESPONSE TO REQUEST FOR PRODUCTION NO. 2: Defendant has no knowledge of any documents responsive to this request.

INTERROGATORY NO. 6: With respect to each and every expert witness who may be called as a witness by you during the trial of this cause and with respect to each and every expert used for consultation whose work-product forms a basis wither in whole or part of the opinions of an expert who may be called at trial, identify each such witness, the date the witness was first contacted, and state the subject matter on which the witness is expected to testify, the substance of the specific facts and opinions to which the expert is expected to testify, and a summary of the specific grounds for each opinion.

RESPONSE TO INTERROGATORY NO. 6: At the time of answering, Defendant has not made a determination as to any expert witness to be called in a trial of this case. When such determination is made, Plaintiff's counsel will be notified in a timely manner prior to a trial

on the merits. Defendant expects to testify and reserves the right to call as witness any and all persons so named by Plaintiff.

REQUEST FOR PRODUCTION NO. 3: With respect to each and every expert witness who may be called as a witness by you during the trial of this cause and with respect to each and every expert used for consultation whose work product forms a basis either in whole or part of the opinions of an expert who may be called at trial, produce or identify the following:

(a) A complete list of all books, texts, treatises, articles, statutes, rules, regulations, guidelines or any other material which has been or may be referred to or relied upon by any expert witness in forming or explaining his or her opinions in connection with this case, together with citations to specific passages or sections relied upon;

(b) A current copy of witness' curriculum vitae;

(c) A list of all medical textbooks, treatises, articles, statutes, rules, regulations, guidelines or other written material referred to or relief upon by witness in forming the witness' opinions in this case with citations to specific passages or sections relied upon;

(d) A list of all computer programs, spreadsheets, analytical programs, statistical programs or any other computer-based tool utilized by the witness in any manner with related to the witness' opinions in this case;

(e) Any and all documents that the witness has read or reviewed in reference to this case;

(f) Copies of any and all reports, correspondence, notes, documents, writings, diagrams, charts, records, photographs, video or audio recordings of any type, computer files, e-mails or tangible items of any kind that the witness has sent to the counsel for Defendant, or any representative of the Defendant or Defendant's counsel;

Respectfully submitted for the Defendants,
JAMES P. ELKINS, M.D. and
JAMES P. ELKINS, M.D., P.A.,

By: Don Rutledge

Stephen A. Lisle, ABA # 94103
Donnie Rutledge, ABA # 93104
LISLE RUTLEDGE P.A.
1458 Plaza Place, Suite 101
Springdale, AR 72764-5273
(479) 750-4444

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of December, 2010, a true and correct copy of the foregoing has been 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, M.D., J.D.
2801 Richmond Road, #57
Texarkana, TX 75503

Don Rutledge
Donnie Rutledge

270

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**

FILED
2012 DEC 5 PM 1 55
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR

PLAINTIFF'S BRIEF IN SUPPORT OF REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION TO TAKE SECOND DEPOSITION OF DR. ELKINS

I. ANY EXPERT TESTIMONY BY DR. ELKINS FAVORABLE TO HIS CASE WILL OPEN THE DOOR TO FULL CROSS EXAMINATION

Defendants indicated during the pendency of the first filing of this matter that they wish Dr. Elkins to give expert testimony in this case, limited only by the statute, Arkansas Code Annotated Section 16-114-207(3), which states that, "No medical care provider shall be required to give expert opinion testimony against himself or herself as to any of the matters set forth in §16-114-206 at a trial. However, this shall not apply to discovery." It is expected that they will take the same position in the present filing. In other words, they seek to have Dr. Elkins testify in support of his actions just as if he were an objective expert witness, but would prohibit Counsel for Plaintiff from eliciting expert testimony that could be deleterious to Dr. Elkins. Surely the legislature did not intend such an result when they enacted Arkansas Code Annotated Section 16-114-207(3), and if Dr. Elkins were to offer any opinions on the standard of care or causation issues, other than his state of learning and knowledge about such matters at the time of the alleged negligence, then he will have opened the door for any and all questions on such matters from Plaintiff. That has universally been the procedure in Arkansas Courts; is the position of the Arkansas Supreme Court, which stated in *Whorton v. Dixon*, 214 S.W.3d 226, (2005), that,

271

"[T]he privilege not to testify (under section 16-114-207(3)) is lost if the defendant voluntarily gives expert opinion testimony favorable to himself"; and is the general rule which should be followed in this case.

II. DEFENDANT SHOULD BE BARRED FROM GIVING ANY EXPERT TESTIMONY BECAUSE HE HAS FAILED TO FOLLOW THE EXPERT DISCLOSURE RULES REQUIRED BY RULE 26(b)(4)(A) OF THE ARKANSAS RULES OF CIVIL PROCEDURE

Counsel for Defendants, again in the first filing and reasonable expected to occur in this filing, took the position in his initial discovery responses that he would designate any experts in accordance with the Arkansas Rules of Civil Procedure. Later, during the Plaintiff's deposition of Dr. Elkins, Defense Counsel indicated that he would disclose whether or not Dr. Elkins would be offering expert testimony "in accordance with the rules." As of the time that discovery was closed in the first filing, and up to the present time, Defendant had not designated Defendant, nor, indeed, any witness, as a expert as required by Arkansas Rule of Civil Procedure 26(b)(4)(A), which states:

> (4) Trial preparation: experts. -- Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:
>
> (A) (i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which he is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Subject to subdivision (b)(4)(C) of this rule, a party may depose any person who has been identified as an expert expected to testify at trial.

Further, Defendant, through Counsel, stated in an e-mail on July 20, 2011, again in the first filing, and not supplemented since, that he would not be calling an expert witness.

Defendants' Counsel, however, now seems to be taking the position that he should be allowed, without any of the disclosures required by the Rules, to have Dr. Elkins serve as his own expert witness, but, yet, deny Plaintiff the ability to cross examine the doctor. Defendants' position has no basis in rule, statutory law, or common law.

III. DR. ELKINS IS BARRED FORM OFFERING EXPERT TESTIMONY BY THE MEDIAL ETHICAL RULES, BY AR. R. PROF. RESP. 3.4, AND BY ARKANSAS CODE ANNOTATED SECTION 16-114-207(2)

There are other compelling reasons why Defendant should be barred from offering "expert" opinions in this case. Dr. Elkins is ethically barred from offering expert opinions on his own behalf. An expert witness is expected to educate the Court and jurors on issues that are beyond their common understanding. See Arkansas Rule of Evidence 702. In order to do this, the expert must have no stake in the outcome of the procedure, and for a retained expert to testify on any type of a contingency basis is clearly improper. Indeed, the American Medical Association has stated in a 2004 Report of the Council on Ethical and Judicial Affairs, CEJA Report 12-A-04, that, "The opinions of non-treating physician experts must remain honest and objective, free from any undue influence. An independent expert is not affected by the goals of the party for which she was retained and is not reticent to arrive at an opinion that fails to support the client's legal position. Avoiding undue influence as an expert once again involves self-examination to ensure that one's testimony is not biased by allegiance to any party in a legal proceeding."

The report goes on to say, "As certain fee structures for the payment of expert witnesses have been identified as potentially constituting undue influence, contingent fees create incentives to give testimony in support of specific legal outcomes, thereby interfering with witness

objectivity and the imperatives for honesty and independence." This same rule is stated in the comments to Arkansas Rule of Professional Conduct 3.4, which state, "With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. [But] the common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and *it is improper to pay an expert witness a contingent fee*." (Emphasis added).

In addition, subsection (2) of the very statute upon which Defendant relies to claim Dr. Elkins cannot be forced to give testimony against himself would prohibit the doctor from serving as an expert in his own case. Arkansas Code Annotated Section 16-114-207(2) states: (2) No witness whose compensation for his services is in any way dependent on the outcome of the case shall be permitted to give expert testimony. Nothing could be more clear than Dr. Elkins "compensation" for serving as his own expert is directly tied to the outcome of this case.

The situation in which a non-treating expert is testifying on a contingency fee basis is analogous to a defendant representing himself to be his own objective expert. In each case the testimony would be clearly biased in terms of the stake the witness has in the result. A scenario whereby the Defendant is presented to the jury to be an expert witness would carry with it such a biased position that any such "expert" testimony, other than questions such as, "What did you think the standard of care to be at the time you treated the Plaintiff?" or "What did you think caused the injury to the Plaintiff at the time it occurred?" would be misleading and confusing to the jury, and should be excluded. See attached as Exhibit No. 1 to this Supplemental Brief CEJA Report 12 - 04. See also Arkansas Rule of Evidence 403.

WHEREFORE, FOR PREMISES STATED, Plaintiff asks that Defendant should not be allowed to offer exert opinion testimony for the following reasons:

1. Defendants consistently denied that Dr. Elkins will give expert testimony in the first filing of this case until after the close of discovery.

2. Defendants have offered no disclosure of any expert, as required by Arkansas Rule of Civil Procedure 26. Indeed Defendants have actually taken the affirmative position that they would not be offering expert testimony.

3. Any expert testimony offered by Dr. Elkins would by necessity be biased and self serving, and to present such to the jury as true objective expert testimony would be misleading and confusing to the jury.

IN THE ALTERNATIVE that the Court believes that Dr. Elkins should be allowed to give any expert testimony, Plaintiff would ask for approval of Plaintiff's request to take a supplemental deposition of Dr. Elkins exploring his expected expert opinion, particularly in the area of sedation and the requirements of Defendants' surgical center to be licensed by the Arkansas Department of health that she may vigorously explore Dr. Elkins' opinions on either direct adverse or cross examination. This alternative request is pursuant to ARCP 26 and 33 as explained in Plaintiff's Reply.

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 4th day of December, 2012.

Ken Swindle

REPORT OF THE COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS*

CEJA Report 12 - A-04

Subject: Medical Testimony

Presented by: Michael S. Goldrich, MD, Chair

Referred to: Reference Committee on Amendments to Constitution and Bylaws (Mary W. Geda, MD, Chair)

In the mid-1980's, the Council on Ethical and Judicial Affairs issued Opinion E-9.07, "Medical Testimony," which addresses the physician's ethical obligation to provide evidence in court, the general qualifications necessary for those who testify, and the importance of honest testimony. The Council is undertaking a new report to provide greater guidance to physicians who testify in legal proceedings, building on prior AMA policy[1] and the efforts of other medical societies that currently engage in professional self-regulation related to the conduct of physicians who provide expert testimony.

A NEXUS BETWEEN PUBLIC NEED AND PROFESSIONAL EXPERTISE

The legal system adjudicates disputes and delivers decisions on such wide-ranging topics that it is impossible for the system to maintain expertise in all necessary areas. Therefore, the courts rely on experts such as engineers, actuaries, and others to help juries and judges render informed decisions. Because the medical profession possesses the experience and knowledge to address matters involving health and medicine, it is necessary for medical professionals to contribute their expertise to the courts. Without the contributions of physician witnesses, parties in dispute could not advance medical or health-related cases effectively, and the legal system would be more arbitrary and unfair.

While physicians' unique knowledge and skills qualify them to make important contributions to the legal system, they generally are not legally required to provide expert testimony in legal proceedings. Particularly at a time when professional liability is of great concern, physicians may view the adversarial nature of trials as contrary to professional collegiality and may eschew the role of medical expert. However, as members of a profession, physicians have a professional obligation to serve the needs of the public in settings where their expertise is required. Accordingly, the AMA encourages physicians' participation as "a matter of public interest" (H-265.994). The current ethical Opinion refers to a physician's obligation as citizen as advocated by *Principle VII*, which encourages physicians to participate in activities that contribute to the improvement of the community and the betterment of public health.

---

* Reports of the Council on Ethical and Judicial Affairs are assigned to the reference committee on Constitution and Bylaws. They may be adopted, not adopted, or referred. A report may not be amended, except to clarify the meaning of the report and only with the concurrence of the Council.

© 2004 American Medical Association. All Rights Reserved.

SCIENCE IN THE COURTS

In addressing medical testimony, it is important to distinguish between physicians who provide medical testimony as fact witnesses or as expert witnesses. Generally, fact witnesses present factual findings or observations. In contrast, expert witnesses' testimony relies on specialized knowledge that is applied to the facts of a case to help explain them. Physicians who serve as both fact and expert witnesses in a single proceeding may be conflicted, as roles for each have different goals.

The presentation of medical evidence in the courtroom often is fraught with controversy.[2] Physicians deliver expert testimony against the backdrop of constant technological and scientific advances.[3] Theories once deemed heretical later gain acceptance: famous examples include William Harvey's revolutionary theory of blood circulation and Ignaz Semmelweis' theory of hand washing.[4,5] Even today, when much of medical science is based on evidence, some well-accepted medical practices have not been proven through standard scientific research.[6] The lines separating certainty from probability, or standard, innovative, and inappropriate practices can easily be blurred when complete scientific explanations are not available or when beneficial results cannot be assured.[7,8] This can impact not only professional liability litigation but also products liability litigation, such as cases related to the safety of pharmaceuticals or the effect of tobacco, where medical experts must consider evolving perspectives and contested evidence. Similarly, medical testimony in criminal proceedings can be challenged when it relies on the application of new technologies such as "DNA fingerprinting," as experts debate the validity of these advances.[9] Even physicians who testify on the basis of medical examinations of a person's physical or mental condition may present testimony that over time would be altered by medical advances.[10] Regardless of the nature of the legal proceedings, physician experts cannot eschew their role in explaining that medical science is inherently dynamic, and in many cases, uncertain.[11]

Given the ever changing nature of scientific knowledge, many attempts have been made to establish rules of procedures to govern the admissibility of scientific testimony and evidence.[12] For the better part of the last century, courts required that the scientific theory be sufficiently established so as to have gained general acceptance in the relevant field.[13] Subsequently, Federal Rule of Evidence 702 established a more liberal standard:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.[14]

This standard was interpreted further by the US Supreme Court in a case alleging that an anti-nausea drug for pregnant women had caused birth defects. In *Daubert v. Merrell Dow Pharmaceuticals* (1993), the court was particularly concerned with determining whether the cause of the birth defects could be proven, beyond proving that a duty of care existed and had been breached. The Supreme Court ultimately ruled that scientific testimony should be limited to evidence that is relevant and reliable. Four considerations were outlined to determine that expert testimony was not simply a subjective belief or mere speculation: the evidence set forth was based on scientific knowledge that has given rise to a testable and tested hypothesis; it had been subjected to peer review and publication; it is generally accepted within the relevant scientific community;

and known or potential rates of error are made known to the court.[15] All jurisdictions are not required to apply these guidelines, but many do.[16,5]

Overall, it is ethically important for physician expert witnesses to make clear whether a consensus exists on the scientific theories presented in testimony. When a physician renders expert testimony based on theories not widely accepted, he or she should describe the degree of existing consensus. It also is important that probabilities not be misrepresented as definitive conclusions.[17,18,19]

Evidence in professional liability cases

Conflict often arises in cases of professional liability in which expert witnesses inform the courts of standards of care and draw conclusions about whether deviation from these standards has resulted in harm. As historian James C. Mohr explains, "There can be no *mal*practice without established *practice*; physicians cannot be convicted of deviating from accepted standards if no accepted standards exist."[20]

The standard of care has been characterized as "that level of care, skill and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar [physicians]"[21]; more concisely, it is that standard which a "reasonable and prudent [physician] similarly situated would provide under similar circumstances."[22,23,24]

A physician testifying with regard to the standard of care must be mindful of examining a case according to the standard that prevailed at the time the event under review occurred. Moreover, there often are variations in medical practice that can give rise to disagreements between experts even though each approach is medically acceptable. If a medical expert knowingly provides testimony based on a standard not widely accepted in the profession, the witness should characterize it as such. Similarly, innovative treatments require careful presentation. Overall, expert witnesses should avoid inflammatory accusations to express differences of opinion. They also must not merely offer speculations but rather be able to substantiate claims that are made, for example, on the basis of experience, published research, consensus statements or evidence-based guidelines, recognizing that some evidence may be more authoritative.[7,16]

Unexpected medical outcomes can occur for many reasons other than deviations from the standard of care.[25] In fact, as described by the Institute of Medicine,[26] and further discussed in a recent CEJA Report,[27] patient safety and continuing quality improvement efforts are premised on the understanding that a majority of adverse events are attributed to factors other than negligence, such as flawed systems.[28] These distinctions often can be drawn only through honest and independent testimony.[24]

HONESTY AND INDEPENDENCE IN THE PROVISION OF MEDICAL TESTIMONY

Honesty is a core ethical value in medicine and, according to the *Principles of Medical Ethics* [II], its significance extends to all spheres of professional conduct,[29] and is the basis of the trust that is placed in physicians. AMA policy makes clear that honesty is the most salient ethical principle for physicians providing testimony in court [H-265.991, H-265.994, AMA Policy Database]. Moreover, false testimony can place physicians in contempt of court, and subject them to legal and professional sanctions.[30] Although the testifying physicians' services may have been sought primarily by one party, they testify to educate the court as a whole.

Testimony of the Treating Physician

The patient-physician relationship requires physicians to dedicate themselves to their patients' best interests; according to the *Principles of Medical Ethics*, "[A] physician shall, while caring for a patient, regard responsibility to the patient as paramount"[VIII].[29] When a physician is called upon to serve as a fact witness in his or her own patient's case, the treating physician witness must be committed to delivering an honest opinion. In other words, patient advocacy must be limited by the requirement of honesty. The patient's attorney must be the advocate who advances the patient's legal goals.[31] This important distinction requires those who testify as treating physicians to engage in continuous self-examination to ensure that their testimony represents the facts of the case.

Providing testimony in a legal proceeding involving a current patient can have a significant impact on the therapeutic relationship. If the physician is called upon to testify in a matter that could adversely affect the patient's medical interests, the physician should decline to testify unless ordered to do so, or unless the patient has given the physician permission to do so, despite the possible adverse effect. In the latter case, it may be advisable that the physician witness discuss with a patient the testimony that will be presented prior to the appearance in court.

When a legal case makes opponents of a patient and a treating physician, such as a medical malpractice case, the trust necessary to the maintenance of the therapeutic relationship likely will be eroded. In those instances, it is appropriate that the physician transfer the care of the patient.[32]

Testimony of the Non-Treating Physician

The opinions of non-treating physician experts must remain honest and objective, free from any undue influence. "An independent expert is not affected by the goals of the party for which she was retained, and is not reticent to arrive at an opinion that fails to support the client's legal position."[31] Avoiding undue influence as an expert once again involves self-examination to ensure that one's testimony is not biased by allegiance to any party in a legal proceeding.

Certain fee structures for the payment of expert witnesses have been identified as potentially constituting undue influence. Contingent fees create incentives to give testimony in support of specific legal outcomes, thereby interfering with witness objectivity and the imperatives for honesty and independence.[31] According to AMA policies, a physician is entitled to reasonable compensation for time and effort spent on medico-legal service, but it is unacceptable for a physician to accept fees contingent on the outcome of a case [H-265.994, H-265.997, H-435.970 AMA Policy Database]. Disproportionate compensation for witness activities also could influence physician testimony, and would create the appearance of indebtedness to the contracting party.

As to physicians whose incomes depend largely upon expert witness activities, no direct relationship has been shown between amount of service provided to the legal system and degree of influence upon one's testimony. However, two distinct scenarios are possible: physicians as experts may have an incentive to present biased and dishonest testimony to ensure future testifying opportunities. Alternatively, the honesty and independence of an expert may ensure his or her reputation for objectivity and help secure future work. When physicians choose to provide expert testimony, particularly in professional liability cases, ethical conduct requires that they be willing to evaluate cases objectively and derive an independent opinion. In instances when a physician's expertise appears to serve primarily the interests of one class of litigants, it is especially important that objectivity and impartiality be maintained, for example by drawing on others' research. In

summary, the onus rests upon individual physician witnesses to avoid any undue influence from financial incentives.[33]

MAINTAINING STANDARDS FOR MEDICAL TESTIMONY

Qualifications for Expert Witnesses

Federal Rule of Evidence 702 explains that a witness can qualify as an expert by knowledge, skill, experience, training, or education. There are concerns that this legal standard is insufficient to ensure that only qualified physician experts testify. Therefore, many have advocated for additional standards establishing minimum requirements for expert witnesses' credentials to ensure that opinions presented are thoroughly informed by knowledge or experience in the relevant field. Particular concerns surround medical liability litigation with regard to an expert's licensure, training and experience compared to that of the physician defendant. To address possible gaps in the standards set for acceptable witness testimony, many state and specialty societies have developed guidelines for expert witness qualifications in their respective states and specialties. The AMA also has developed model state legislation to set legal standards for expert witnesses, and has enacted policy supporting the dissemination of these guidelines in hopes of achieving their widespread adoption [H-265.995]. In light of the importance of qualifications, failure to accurately disclose one's applicable qualifications and misrepresentation of qualifications each constitute a form of dishonest testimony.

Professional Self-Regulation of Testimony

If physicians deliver dishonest or fraudulent medical testimony, they discredit physicians as a group, and endanger the public's trust in physicians. Moreover, testimony that rejects applicable standards of care without supporting scientific evidence undermines the public's understanding of medicine. Organized medicine has a role to play in protecting individual patients, defendant physicians, and society as a whole, from the negative effects of false or misleading medical testimony. Some state and specialty medical societies as well as licensing boards now engage in the review of medical testimony to assess claims of dishonest or false testimony. The Council on Ethical and Judicial Affairs, in a 2003 informational on its judicial function, also explained how it may review complaints against expert witnesses who are AMA members or applicants only if a court has determined that the expert committed perjury for false testimony or if a licensing board has imposed licensure sanctions.[34] Overall, such review of testimony is justified in part on the basis that testimony lies within the sphere of professional activities that are intrinsically linked to a physician's medical education and training.

Some commentators have expressed concerns that review of physicians' testimony may have a "chilling effect" that extends to credible expert witnesses.[35,36,37,38] However, review and any consequent adverse action against a physician is legally condoned only if it is conducted fairly and in good faith, as prescribed in Opinions E-9.10, "Peer Review," of the AMA' Code of Medical Ethics. In the case of *Austin v. American Association of Neurological Surgeouns*,[39] the US Curt of Appeals For the Seventh Circuit concluded that, having respected its own procedural requirements, the Association could suspend a member who had provided "irresponsible" testimony. The court further stated that "discipline by the Association, therefore, served an important public policy." Other medical societies that review their members' conduct as expert witnesses help fulfill the profession's commitment to uphold the principles of honesty and integrity in all aspects of physicians' conduct.

CONCLUSION

The legal system relies on medical testimony to render informed and fair decisions. Therefore, physicians serve an important function in the pursuit of justice when they apply their expertise in court. Legally and ethically, this function is strictly bound by the obligation to testify honestly. In this regard, organized medicine has an important role to play in ensuring that physician testimony is honest and reflects the full knowledge of the medical community. By engaging in the review of expert testimony and promoting qualifying standards for medical witnesses, physician organizations can lend their collective expertise to the legal system.

RECOMMENDATION

The Council on Ethical and Judicial Affairs recommends that the following be adopted and the remainder of the report be filed.

In various legal and administrative proceedings, medical evidence is critical. As citizens and as professionals with specialized knowledge and experience, physicians have an obligation to assist in the administration of justice.

When a legal claim pertains to a patient the physician has treated, the physician must hold the patient's medical interests paramount, including the confidentiality of the patient's health information, unless the physician is authorized or legally compelled to disclose the information.

Physicians who serve as fact witnesses must deliver honest testimony. This requires that they engage in continuous self-examination to ensure that their testimony represents the facts of the case. When treating physicians are called upon to testify in matters that could adversely impact their patients' medical interests, they should decline to testify unless ordered to do so or unless the patient has given the physician permission to do so, notwithstanding the possible adverse effect. It is appropriate for a treating physician to transfer the care of the patient if, as a result of legal proceedings, the patient and the physician are placed in adversarial positions, eroding the trust necessary to maintain the therapeutic relationship.

When physicians choose to provide expert testimony, they should have recent and substantive experience or knowledge in the area in which they testify and be committed to evaluating cases objectively, and deriving an independent opinion. Their testimony should reflect current scientific thought and standards of care that have gained acceptance among peers in the relevant field. If a medical witness knowingly provides testimony based on a theory not widely accepted in the profession, the witness should characterize the theory as such. Also, testimony pertinent to a standard of care must consider standards that prevailed at the time the event under review occurred.

All physicians must accurately represent their qualifications and must testify honestly. Physician testimony must not be influenced by financial compensation; in particular, it is unethical for a physician to accept compensation that is contingent upon the outcome of litigation.

Organized medicine, including state and specialty societies, and medical licensing boards have important roles to play in promoting the ethical conduct of physician witness activities. With careful attention to due process, these organizations can help maintain high standards for

medical witnesses by assessing claims of false or misleading testimony and issuing disciplinary sanctions as appropriate. (New CEJA/AMA Policy)

Fiscal note: Less than $500

REFERENCES

[1] AMA Policy H-265.xxx and BOT Report 5-A-98, and model legislation
[2] Umbright E. Missouri Supreme Court finds testimony of doctor's experts inadmissible. St. Louis Daily Record/St. Louis Countian. December 30, 2003.
[3] Kassirer JP, Cecil, JS. Inconsistency in evidentiary standards for medical testimony: Disorder in the courts. *JAMA*: Vol 288, No. 11. 1382-1387.
[4] Schultz SG. William Harvey and the circulation of the blood: The birth of a scientific revolution and modern physiology. *News in Physiological Sciences*. Vol. 17, No. 5, 175-180, October 2002.
[5] Fenner, GM. The Daubert handbook: The case, its essential dilemma, and its progeny. 29 Creighton L. Rev. 939. April, 1996.
[6] Noah L. Medicine's epistemology: Mapping the haphazard diffusion of knowledge in the biomedical community. 44 Ariz. L. Rev. 373. Summer, 2002.
[7] Gittler GJ, Goldstein EJC. The standard of care is not so standard. *Clinical Infectious Diseases* 1997;24:254-7.
[8] Hutchinson CT, Ashby DS. Daubert v. Merrell Pharmaceuticals, Inc: Redefining the bases for admissibility of expert scientific testimony. 15 *Cardozo L. Rev.* 1875. April, 1994.
[9] Anonymous. Science and technology: Fingering fingerprints. *The Economist*. Vol. 357, Iss. 8201. 89-90. Dec 16, 2000.
[10] Faigman DL, Wright AJ. The battered woman syndrome in the age of science. 39 *Arizona Law Review* 67. Spring, 1997.
[11] Garmisa SP. Doctor gets green light to testify about 'possibilities' behind diagnosis. Chicago Daily Law Bulletin. April 7, 2004.
[12] Linn, SA. Admissibility v. sufficiency: The dilemma of expert evidence in toxic tort cases. *Defense Counsel Journal*. April 1, 1999. Vol 66. No. 2.
[13] Annas GJ. Scientific evidence in the courtroom – The death of the Frye rule. NEJM. 1994;330:1018-1021.
[14] USCS Fed Rules Evid R 702 (2004). (Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1937.)
[15] Carlson, R. 2002. *Evidence: Teaching Materials for An Age of Science and Statutes (5th Ed.)*. Matthew Bender & Co.
[16] Angell, M. Do breast implants cause systemic disease? Science in the courtroom. Vol 330(24) 16 June 1994, pp 1748-1749.
[17] Angell, M. Shattuck Lecture: Evaluating the health risks of breast implants: The interplay of medical science, the law, and public opinion. *NEJM* Vol 334(23) 6 June 1996, pp 1513-1518.
[18] Schuklenk U. Professional responsibilities of biomedical scientists in public discourse. *Journal of Medical Ethics*. Feb 2004, v30 i1 p53(8).
[19] Schwartz A. A "Dogma of Empiricism" revisited: Daubert v. Merrell Dow Pharmaceuticals, Inc. and the need to resurrect the philosophical insight of Frye v. United States. 10 *Harvard Journal of Law and Technology* 149.
[20] Mohr, J. C. 2000. "American Medical Malpractice Litigation in Historical Perspective." *JAMA:* Vol 283, No. 13.
[21] Connecticut General Statute § 52-184c (2003).
[22] Snow v. Bond 438 S.W. 2d 549.
[23] Studdert DM, Mello MM, Brennan TA. Medical malpractice. *NEJM* Vol 350: 283-292. January 15, 2004. Number 3.
[24] Finder, JM. The future of practice guidelines: Should they constitute conclusive evidence of the standard of care?. 10 *Health Matrix* 67 (2000).
[25] Danner D, Sagall EL. Medicolegal causation: A source of professional misunderstanding. 3 *American Journal of Law and Medicine* 303 (1977-1978).
[26] Corrigan J, Donaldson M, eds. *To Err Is Human: Building a Safer Health System*. Washington, DC: Institute of Medicine; 1999.
[27] CEJA Report 2-A-03, Ethical Responsibility to Study and Prevent Error and Harm in the Provision of Health Care.

[28] Thomas EJ, Studdert DM, Burstin HR, Orav EJ, Zeena T, Williams EJ, Mason HK, Weiler PC Brennan TA. Incidence and Types of Adverse Events and Negligent Care in Utah and Colorado. Medical Care. 38(3). 2000. pp 261-271.
[29] Principles of Medical Ethics. 2002. In Council on Ethical and Judicial Affairs. *Code of Medical Ethics 2002-2003 Edition*. American Medical Association.
[30] E.g , Illinois perjury statute 720 Ill. Comp. Stat. Ann. 5/32-2(2001) states that in Illinnois, perjury is a "class 3 felony" punishable by monetary fines and imprisonment.
[31] Lubet S. Expert Witnesses: Ethics and Professionalism. 12 *Georgetown Journal of Legal Ethics* 465. Spring, 1999.
[32] Strasburger LH, Gutheil TG, Brodsky A. On wearing two hats: Role conflict in serving as both psychotherapist and expert witness. *American Journal of Psychiatry* 154:4, April 1997. pp 448-456.
[33] Hirsh BD, Dunn J, Wilcox DP. Medical experts compete to testify for malpractice plaintiffs. *Texas Medicine. Volume 86, May 1990. 26-27.*
[34] CEJA Report 5-A-03, Professional Self-Regulation and the Judicial Function of the Council on Ethical and Judicial Affairs.
[35] Andrews, M. "Making Malpractice Harder to Prove." *The New York Times*. December 21 2003.
[36] Victoroff MS. Peer review of the inexpert witness, or...Do you trust the chickens to guard the coop?. *Managed Care*. September 2002.
[37] Ellman S. Medical associations step up scrutiny of doctors who testify for medical malpractice plaintiffs. Broward Daily Business Review. Vol.03, No. 6-25, pg. 1.
[38] Glabman M. Scared silent: The clash between malpractice lawsuits and expert testimony. *Physician Executive*. July-August 2003 v29 i4 p42(5).
[39] Austin v. American Association of Neurological Surgeons, 253 F.3d 967.

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS

SUE POFF — PLAINTIFF

vs. — CASE NO. CV-2012-0261-4

JAMES P. ELKINS, M.D. and
JAMES P. ELKINS, M.D., P.A. — DEFENDANTS

FILED
2012 DEC 11 PM 3 09
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR

ORDER

NOW ON this 11th day of December, 2012, the Plaintiff appearing by her attorneys, Ken Swindle and James E. Keever, and the Defendants appearing by their attorney, Stephen Lisle, this date having been set for hearing of all pending motions before the Court, this Court finds that:

1. This Court has jurisdiction of the parties and subject matter involved herein.

2. Counsel for the parties have agreed as to the Defendants' request to depose the Plaintiff.

3. The Plaintiff's request to further depose the separate Defendant James P. Elkins, M.D. is denied.

4. The Plaintiff's motion for the calling of 70 jurors and submission of a questionnaire to jurors is not opposed by the Defendants. The Defendants have no objection to the form of the questionnaire submitted by the Plaintiff with her motion regarding the jury questionnaire, and therefore the Plaintiff's motion is granted.

5. The Plaintiff is ordered to provide to the Clerk on or before January 31, 2013, the jury questionnaires, envelopes for mailing, and envelopes for returning the completed questionnaires with sufficient postage attached to the envelopes. The Circuit Clerk is hereby ordered to provide to

286
CV12 010438

counsel for Plaintiff and Defendants on or before January 31, 2013, her cover letter to be included in the mailing of the jury questionnaires.

6. The Clerk is ordered to draw seventy (70) jurors, on February 25, 2013, and to mail the questionnaires to the jurors on February 27, 2013, with the cover letter instructing that the questionnaires be returned to the Clerk on or before March 8, 2013.

7. A status hearing has been scheduled in this matter for January 31, 2013, at 9:00 a.m. to address any motions or issues that might be pending at that time.

IT IS SO ORDERED.

JOHN R. SCOTT
CIRCUIT JUDGE
Dated: December 11, 2012

cc: Brenda DeShields
Circuit Court Clerk

Ken Swindle
Attorney at Law
619 West Persimmon Street
Rogers, AR 72756
VIA TELEFAX 1-479-621-0838

James E. Keever, M.D., J.D.
Attorney at Law
2801 Richmond Road, #57
Texarkana, TX 75503
VIA TELEFAX 1-903-642-0066

Stephen Lisle
Attorney at Law
1458 Plaza Place, Suite 101
Springdale, AR 72764-5273
VIA TELEFAX 1-479-751-6792

CV12 010439 287

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS

FILED
2012 DEC 31 PM 12 09
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR

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 TO COMPEL WITH BRIEF IN SUPPORT

Comes now the Plaintiff and for her Motion to Compel states:

I. MOTION

1. On August 13, 2010, Plaintiff served upon Defendant, concurrently with service of Plaintiff's Original Complaint, certain requests for written discovery, including requests for admission, interrogatories, and requests for production.

2. On September 15, 2010, Defendant filed with the Court and served upon Counsel for Plaintiff his Responses to Plaintiff's Requests for Admission.

3. In accordance with Rules 33 and 34 of the Arkansas Rules of Civil Procedure, responses to this written discovery were due on or before September 27, 2010.

4. The Court will recall that Defendants did not serve answers to Plaintiff's initial written discovery until December 6, 2010, the day before this Court had set Plaintiff's Motion to Compel for hearing.

5. Defendants were asked, in Plaintiff's Interrogatory Number 6, to disclose the names and address of any expert witness, as well as the subject matter on which the witness is expected to testify; the substance of the facts and opinions to which each expert is expected to testify, and a

288

summary of the specific grounds for each opinion. This Interrogatory asks for the information that is required to be disclosed. Ark. R. Civ. P. 26(b)(4)(A)(i).

6. Defendant's initial response to Interrogatory Number 6 was: "At the time of answering, Defendant has not made a determination as to any expert witness to be called in a trial of this case. When such a determination is made, Plaintiff's counsel will be notified in a timely manner prior to a trial on the merits. Defendant expects to testify and reserves the right to call as witness any and all persons so named by Plaintiff." See attached as Exhibit No. 1.

7. Defense counsel has made it clear that he intends to elicit expert opinions from Defendant James Elkins, M.D. Plaintiff had previously asked for the disclosures required under Rule 26 regarding Dr. Elkins, without response from Defendant. At the suggestion of the Court, Plaintiff's Counsel sent a good faith communication on December 12, 2012, asking for the supplementation of Plaintiff's Interrogatory No. 6, which is required. Ark. R. Civ. P. 26(e). See attached as Exhibit No. 2.

8. Defendant replied to said letter on December 17, 2012, with a letter that fell far short of complying with the requirements of Rule 26 (a)(4)(A)(i) of the Arkansas Rules of Civil Procedure. See attached as Exhibit No. 3. Plaintiff's Counsel then sent a second good faith letter on December 19, 2012, to which there had been no reply as of December 28, 2012. See attached as Exhibit No. 4.

9. Rule 37(a)(4)(A) of the Rules of Civil Procedure states that if a motion to compel is granted or the requested discovery is provided after the motion is filed, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of the, to pay to the moving party the reasonable

expenses incurred in making the motion including attorneys' fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the discovery without court action, or that the opposing party's response or objection was substantially justified or that other circumstances make an award of expenses unjust. Plaintiff has attempted in good faith to resolve this discovery dispute without bothering the Court, and now files this Motion to Compel.

10. Plaintiff respectfully asks this Court to Order Defendant to fully respond with a supplementation to his previous responses to Interrogatory Number 6 that fully states the substance of the facts and opinions to which Dr. Elkins is expected to testify and a summary of the grounds for each opinion.

11. Plaintiff also respectfully requests an Order from this Court that prohibits Dr. Elkins from offering any expert opinion at trial not fully disclosed prior to the close of discovery in this case.

12. The Plaintiff also respectfully requests an Order from this Court directing the Defendants to pay Plaintiff's reasonable expenses, including attorney fees, that were incurred in making this motion, and for all other such relief to which plaintiff may be entitled.

WHEREFORE, the Plaintiff prays that the Defendant be ordered to supplement, without objection, Plaintiff's Interrogatory Number 6; be prohibited from offering any expert opinions not disclosed prior to the close of discovery; to pay Plaintiff's costs and attorney fees for necessitating the current motion; and for all other relief to which Plaintiff may be entitled.

II. BRIEF IN SUPPORT

A party has 45 days to respond to interrogatories served with the Original complaint and summons. Ark. R. Civ. P. 33(b)(3), 34(b)(2). Here, the Defendant did respond in a timely manner to

Plaintiff's Requests for Admission, but made no response to Plaintiff's Interrogatories and Requests for Production of Documents until well after the deadline. If no response is made to the party's discovery, the moving party should attempt in good faith to resolve the matter without court action. Ark. R. Civ. P. 37(a)(2). Here, the Defendants failed to respond to the initial discovery requests until three months after the responses were due, and only responded on the day before Plaintiff's 2010 Motion to Compel was set for hearing.

Rule 26(e) of the Arkansas Rules of Civil Procedure imposes a duty to supplement written discovery if the party learns that the response is in some way incomplete. The incompleteness of Defendant's initial response to Plaintiff's Interrogatory Number 6 has been pointed out to Defense Counsel on multiple occasions, notably at the pre-trial conference before the previous, December 5, 2010, trial; at the hearing on December 11, 2012; and with Plaintiff's good faith communications of December 12, 2012, and December 19, 2012.

The present discovery dispute involves the efforts of Plaintiff to discover the expert opinions that may be offered at trial by Defendant Elkins. One of the purposes of discovery procedures is to provide a device for ascertaining not only facts, but also information as to the existence or whereabouts of facts relative to the basic issues between the parties. *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947). "It is intended that these procedures make a trial more nearly a fair contest than a game of blindman's bluff by *requiring disclosure of basic issues and facts to the fullest practicable extent.*" *United States v. Proctor & Gamble*, 356 U.S. 677, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958). (Emphasis added.)

The Arkansas Supreme court has recognized the importance of cross-examination of an

adverse witness not only to test his credibility but also in an attempt to wring disclosures which might modify or explain his testimony on direct examination or bring it into a perspective which might present a view more favorable to the cross-examiner. *Washington National Ins. Co. v. Meeks*, 458 S.W.2d 135 (Ark. 1970). Planning effective cross-examination of adversary witnesses is one of a trial lawyer's most important responsibilities in preparation for trial, particularly when the witnesses are experts. *Allen v. Arkansas State Highway Commission*, 247 Ark. 857 (1969); *United States v. 23.76 Acres*, 32 F.R.D. 593, (D.C.Md.1963). Complete discovery prior to the cross-examination is one of the necessary parts of such preparation.

For these reasons, the Arkansas Supreme Court concluded in *Rickett v. Hayes*, 251 Ark. 395, 473 S.W.2d 446 (1971):

> Even though appellant's attorneys conducted an apparently extensive cross-examination of Dr. Stuckey, we cannot say that the error in unduly restricting the scope of discovery inquiry was harmless in view of what we have said. We could only speculate whether the cross-examination would have been more effective if appellant had not been limited in his discovery. We presume that error is prejudicial unless we can say with assurance that the record discloses that it is harmless.

Id. at 451.

In the instant case, the Trial Court has exercised its authority under Rule 26(b) of the Arkansas Rules of Civil Procedure to limit discovery to issues that have arisen since December 5, 2011, the date of the first trial in this matter. The Court has also denied Plaintiff's request to take a second deposition of the Defendant limited to exploring his expert opinions. Plaintiff has not asked for a reconsideration of the Court's rulings, but, pursuant to Rule 26(e) of the Arkansas Rules of Civil Procedure, has asked for a supplementation of its original interrogatories to include a full disclosure of each and every expert

opinion that will be offered by Defendant, including the substance of the facts and opinions to which Dr. Elkins is expected to testify and a summary of the grounds for each opinion. Only by compelling the full disclosure of the information required by Rule 26(a)(4)(A)(i) can Plaintiff's right to discovery under the Arkansas Rules of Civil Procedure be accomplished.

If a party continues to refuse to respond to discovery, the moving party may file a motion to compel a response. Ark. R. Civ. P. 37(a)(2). If the motion is granted or if the requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them, to pay to the moving party the reasonable expenses incurred in making the motion, including attorneys' fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the discovery without court action, or that the opposing party's response or objection was substantially justified or that other circumstances make an award of expenses unjust. Ark. R. Civ. P. 37(a)(4)(A).

Plaintiff respectfully requests such fees for being forced to file this motion, in addition to the relief requested (An Order compelling the Defendant to answer fully her Interrogatory Number 6 and to prohibit the testimony at trial of any opinions not previously disclosed). Attorney fees continue to be incurred by the current motion; therefore, Plaintiff respectfully requests a separate opportunity to submit an affidavit of exactly how much attorney fees she was forced to incur from the current motion after an opportunity to be heard and the entry of the order to compel against the Defendant.

Respectfully submitted,

BY: _____

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

and

JAMES E. KEEVER, M.D., J.D.
Arkansas Bar No. 2005176
2801 Richmond Road, # 57
Texarkana, Texas 75503
Telephone: (903) 793-5316
Telecopier: (903) 642-0066

CERTIFICATE OF SERVICE

I, Ken Swindle, hereby certify that I have served a copy of this document upon Steve Lisle, via facsimile, (479) 751-6792, on this, the 29th day of December, 2012.

_____
Ken Swindle

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS

SUE POFF — PLAINTIFF

vs. — No. CIV 2010-2385-4

JAMES P. ELKINS, M.D., and
JAMES P. ELKINS, M.D., P.A. — DEFENDANTS

JAMES P. ELKINS, M.D.'S RESPONSE TO PLAINTIFF'S FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS

COMES NOW the Separate Defendant, James P. Elkins, M.D., by and through his undersigned attorneys, and for his Response to Plaintiff's First Set of Interrogatories and Requests for Production of Documents, respectfully states as follows:

INTERROGATORY NO. 1: State whether you will present any documentary or demonstrative evidence at the trial or at any deposition of this matter. If your answer is affirmative, state:

(a) The description of each such document or demonstrative aid you propose to introduce or use at trial or deposition in any manner;

(b) The facts to be presented or described by each such document or demonstrative aid; and

(c) The name and address of the custodian of each such document or demonstrative aid.

RESPONSE TO INTERROGATORY NO. 1: At the time of answering, a complete list of trial exhibits has yet to be determined. When such a determination is made, Plaintiff's counsel will be provided with such list in a timely manner prior to a trial on the merits of this

295

PLAINTIFF'S EXHIBIT 1

Bloomberg Inc. 9158

RESPONSE TO INTERROGATORY NO. 2: Defendant has no knowledge of any persons with such knowledge other than James Elkins; provided that the defendants dispute the allegation of negligence and the extent of injuries and damages claimed.

INTERROGATORY NO. 3: Identify each and every person who observed or was present in the vicinity of any act of negligence or occurrence alleged in the Complaint or your Answer to the Complaint, or who may otherwise have knowledge of the allegations set forth in the Complaint or any defenses asserted in your Answer to the Complaint. State briefly the nature and substance of the knowledge or each such person, and identify each such person who has been interviewed by you, your attorneys, or any other agent or representative, or who has provided a statement or account (either oral or written) to you, your attorneys, or any other (sic) your agents or representatives.

RESPONSE TO INTERROGATORY NO. 3: Defendant has no knowledge of any persons with such knowledge other than James Elkins and the people named in the response to interrogatory number 14 below; provided that the defendants dispute the allegation of negligence and the extent of injuries and damages claimed.

INTERROGATORY NO. 4: Identify each person and that person's official capacity who contributed in any way to the gathering of the information upon which your responses to these discovery requests are based.

RESPONSE TO INTERROGATORY NO. 4: Defendant gathered all the information for these responses.

INTERROGATORY NO. 5: Identify all persons you or your attorneys intend to call as witnesses at the trial of this cause and state in detail the nature and substance of the proposed or expected testimony of each such witness and identify each such witness who has been

296

interviewed by you or your attorneys, or any other agent or representative, or has provided a statement or account, either oral or written, to you, your attorneys, or any other agent or representative of yours.

RESPONSE TO INTERROGATORY NO. 5: At the time of answering, a complete list of trial witnesses has yet be to be determined. When such a determination is made, Plaintiff's counsel will be provided with such list in a timely manner prior to a trial on the merits of this action. Subject to the foregoing, Defendant expects to testify and reserves the right to call as witness any and all persons so named by Plaintiff.

REQUEST FOR PRODUCTION NO. 2: Produce a copy of any witness statements that are in your possession, custody, or control.

RESPONSE TO REQUEST FOR PRODUCTION NO. 2: Defendant has no knowledge of any documents responsive to this request.

INTERROGATORY NO. 6: With respect to each and every expert witness who may be called as a witness by you during the trial of this cause and with respect to each and every expert used for consultation whose work-product forms a basis wither in whole or part of the opinions of an expert who may be called at trial, identify each such witness, the date the witness was first contacted, and state the subject matter on which the witness is expected to testify, the substance of the specific facts and opinions to which the expert is expected to testify, and a summary of the specific grounds for each opinion.

RESPONSE TO INTERROGATORY NO. 6: At the time of answering, Defendant has not made a determination as to any expert witness to be called in a trial of this case. When such determination is made, Plaintiff's counsel will be notified in a timely manner prior to a trial

Respectfully submitted for the Defendants,
JAMES P. ELKINS, M.D. and
JAMES P. ELKINS, M.D., P.A.,

By: Donnie Rutledge

Stephen A. Lisle, ABA # 94103
Donnie Rutledge, ABA # 93104
LISLE RUTLEDGE P.A.
1458 Plaza Place, Suite 101
Springdale, AR 72764-5273
(479) 750-4444

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of December, 2010, a true and correct copy of the foregoing has been 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, M.D., J.D.
2801 Richmond Road, #57
Texarkana, TX 75503

Donnie Rutledge

298

VERIFICATION

I, James Elkins, M.D., hereby verify that I have read the foregoing Response to Plaintiff's First Set of Interrogatories and Requests for Production of Documents, and that the responses contained therein are true and correct to the best of my knowledge and belief.

James Philip Elkins MD

James P. Elkins, M.D., Defendant

ACKNOWLEDGEMENT

STATE OF ARKANSAS)
) S.S.
COUNTY OF Washington)

On this the 2nd day of December 2010 before me, Jean Pinkston, the undersigned officer, personally appeared JAMES P. ELKINS, M.D., known to me or satisfactorily proven to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same for the purposes therein contained.

In witness whereof I hereunto set my hand and official seal.

Jean Pinkston

Notary Public

My Commission Expires:

OFFICIAL SEAL
JEAN PINKSTON
NOTARY PUBLIC . ARKANSAS
WASHINGTON COUNTY
COMMISSION EXP. 05/01/2013

Ken Swindle

From: Ken Swindle
Sent: Wednesday, December 12, 2012 10:52 AM
To: 'Steve Lisle'
Cc: 'Jim Keever'
Subject: Poff v. Elkins
Attachments: R. 26(e).wpd

Steve, Please see letter atttached.

Ken

300