

COPY OF 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

APPEAL RECORD
VOLUME 2 OF 5
PAGES 301 THROUGH 600

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 49
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR

SWINDLE LAW FIRM

KEN SWINDLE, Esq.
619 W. Persimmon Street
Rogers AR 72756
Phone: (479) 621-0120 Fax: (479) 621-0838

December 12, 2012

Stephen Lisle, Esq.
1458 Plaza Place
Springdale AR 72764

Via Electronic Mail: slisle@lislerutledge.com

Re: *Poff v. Elkins, et al.*
Benton County Circuit Court, CV 10-2385-4

Dear Steve,

We have yet to receive any supplementation to our Interrogatory No. 6 which asks: "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, 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."

This subject was discussed at length at yesterday's hearing, and Judge Scott suggested that I send a good-faith letter detailing the supplementation required, and, if satisfactory responses were not obtained, to file a Motion to Compel. Your disclosure to the Court yesterday was that you would be calling no medical witness other than Dr. Elkins. It is obvious that you will be eliciting opinions from Dr. Elkins that can only be termed expert opinions. We respectfully request that you fully supplement your discovery response detailing the subject matter to which Dr. Elkins is expected to testify, the substance of the specific facts and opinions to which Dr. Elkins is expected to testify, and a summary of the grounds for each opinion. This is not asking for any new information, but simply the supplementation required under Rule 26(e) of the Arkansas Rules of Civil Procedure. Please respond prior to Monday, December 17, 2012, so that we are not required to file a Motion to Compel. If Dr. Elkins requires additional time to respond, please advise.

Also, we anticipate filing a Motion in Limine prohibiting you from eliciting any testimony from Dr. Elkins on expert issues that are not fully disclosed in accordance with Rule 26 of the Arkansas Rules of Civil Procedure. We look forward to your responses and working with you to the conclusion of this case.

Sincerely,

/s/ Ken Swindle

cc: James Keever, M.D., J.D.

301B



LISLE | RUTLEDGE
ATTORNEYS

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Donnie Rutledge
Stephen Lisle

1458 Plaza Place
P. O. Box 7977
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James K. Hatcher
Gino Franco
Mona J. Teague

December 17, 2012

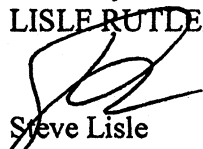
Ken Swindle
Attorney at Law
619 Persimmon St.
Rogers, AR 72756

Re: *Poff v. Elkins*

Dear Ken:

As we have previously disclosed on multiple occasions, Dr. Elkins will testify about his treatment of Sue Poff. It is expected that his testimony will include expert opinions related to all aspects of her treatment. The substance of his testimony, which is more fully discernible from the medical records and deposition testimony previously provided, will be that he treated her appropriately, within his medical judgment, and that any problems that developed afterwards were either complications of surgery, or consequences of Ms. Poff's failure to comply with his post-operative instructions, or some other treatment that she received. His testimony will be grounded on his experience and training, the medical records that have been provided from all sources, and the deposition testimony of the witnesses.

Sincerely,
LISLE RUTLEDGE, P.A.


Steve Lisle
Attorney at Law

cc: Client

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JAMES E. KEEVER, M.D., J.D.
2801 RICHMOND ROAD # 57
TEXARKANA, TEXAS 75503
903 793 5316 (telephone)
kukeevs@keever.cc
December 19, 2012

Steve Lisle
Via e-mail and facsimile

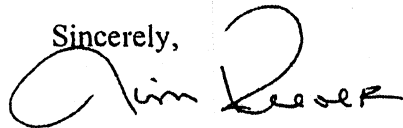
Dear Steve,

We received your December 17, 2012, letter responding to our request that you supplement your responses to our Interrogatory No. 6. You have not responded in a meaningful way. Rule 26 (b)(4)(A)(i) states that 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.

You do use the word "substance" in your letter-response, but you completely fail to apprise us of the **substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion**. We understand that Dr. Elkins will testify about his treatment of Ms. Poff, and we have no objection to his testimony as a treating doctor. However, if he plans to offer any true expert opinions, such as the standard of care expected of a cosmetic surgeon, or whether or not the sedation given to Ms. Poff rendered her incapable of taking actions for her self-preservation without assistance in case of an emergency, we expect a detailed disclosure of each and every opinion to which the doctor is expected to testify.

The Rule is clearly written and the Rule's application to this situation is obvious. Please have a complete response to us by this Friday, December 21, 2012, or we will have no choice except to do as Judge Scott suggested and file our motion to compel. Along with that motion will be our motion to limit your clients' testimony to opinions specifically disclosed prior to the end of discovery.

Sincerely,


Jim Keever



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IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS
CIVIL DIVISION

2013 JAN 7 PM 2 56

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 TO COMPEL

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 to Compel and state as follows:

I. Plaintiff Continues to Challenge the Court's July 25, 2012 Order.

This Motion is yet another attempt by Plaintiff to circumvent this Court's July 25, 2012, Order limiting discovery ("Discovery Order"). 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. The Discovery Order granted Defendants' motion and limited the parties' discovery to matters that have changed or developed since December 7, 2011.

A. Plaintiff's First Challenge and October 9, 2012 Order.

Following the Court's July 25, 2012, Order, Plaintiff filed a motion ("September Motion") asking 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."

Defendants argued that Plaintiff's September Motion was an obvious attempt to re-open the argument about discovery on matters already resolved by the Court's Discovery Order. By

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Order dated October 9, 2012, ("October Order") the Court denied Plaintiff's request to conduct this additional discovery.

B. Plaintiff's Second Challenge and December 11, 2012 Order.

In spite of the Court's previous Discovery Order and the subsequent October Order prohibiting additional discovery on matters that were in existence prior to December 7, 2011, Plaintiff filed yet another request to conduct discovery on matters that were clearly limited by the existing orders. In November 2012, Plaintiff 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." These matters were clearly addressed in the Court's prior orders.

Plaintiff's sole basis to reopen discovery into these areas were her counsels' inaccurate representation to the Court that Defendant had not identified Dr. Elkins as a potential expert witness prior to his first deposition. This request required another hearing, at which it was established (a fact which Plaintiff now concedes) that Dr. Elkins was identified as an expert witness prior to his first deposition. Based on these findings, the Court entered a third order denying Plaintiff's requests for additional discovery on these issues on December 11, 2012 ("December Order").

C. Plaintiff's Request to Supplement Discovery.

Having twice unsuccessfully attempted to re-open full discovery in this case, and in the face of three Orders on the subject, Plaintiff's counsel now attempt to conduct additional discovery by calling their new inquiries a request for "supplemental information." It is not clear

precisely what Plaintiff demands in her latest Motion to Compel. The Interrogatory at issue reads as follows:

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 either 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.

It should be noted that Defendants first responded to this Interrogatory on December 2, 2010, and Plaintiff did not request any supplemental information about it until two years later after the Court denied her request to take Dr. Elkins's deposition a second time. In their first response, Defendants identified Dr. Elkins as a potential expert witness. Included in Defendants' response to Plaintiff's request for the identities of expert witnesses was the following: "Defendant expects to testify and reserves the right to call as witness any and all persons so named by Plaintiff." (emphasis added). This portion of Defendants' response was omitted from Plaintiff's Exhibit I to her Motion to Compel and is attached as Exhibit I to this Response.

In response to Plaintiff's December 12, 2012 request for a supplement of Defendants' response to this very general interrogatory, Defendants provided the following:

As we have previously disclosed on multiple occasions, Dr. Elkins will testify about his treatment of Sue Poff. It is expected that his testimony will include expert opinions related to all aspects of her treatment. The substance of his testimony, which is more fully discernible from the medical records and deposition testimony previously provided, will be that he treated her appropriately, within his medical judgment, and that any problems that developed afterwards were either complications of surgery, or consequences of Ms. Poff's failure to comply with his post-operative instructions, or some other treatment that she received. His testimony will be grounded on his experience and training, the medical records that have been provided from all sources, and the deposition testimony of the witnesses.

It is not at all clear what additional response Plaintiff expects to this general inquiry. The documents and deposition provided have given Plaintiff the identity of Dr. Elkins as an expert, the dates and manner of his treatment, and his opinions regarding the standard of care. During the course of his 113 page deposition, he stated all of the procedures that a cosmetic surgeon performing a DOT CO2 laser treatment is to follow. He outlined the consent obtained and provided the forms signed by Plaintiff, he provided information on the laser setting that he used and stated that the settings were determined by his examination of the plaintiff, his training and experience, and the treatment goals. He indicated that the standard of care for the laser procedure is that the physician uses his medical judgment to determine the laser settings based on his physical examination of the patient and the goals of the procedure. He also provided Plaintiff with information about his experience and training. This information addresses all of the issues raised by Plaintiff in her complaint.

Dissatisfied with this response, Plaintiff's Counsel demanded not only the expert opinions that have previously been provided, but also Dr. Elkins's opinion as to whether or not **"the sedation he gave to Ms. Poff rendered her incapable of taking actions for her self-preservation without assistance in case of an emergency . . ."** (Letter from Jim Keever dated December 19, 2012). This is the same information requested by Plaintiff in her two prior unsuccessful requests to re-open discovery in this case.

The sedation inquiry is not relevant to the issues in the case. There is no allegation that the sedation level was inappropriate or caused or contributed to any damages sought by Plaintiff. Defendant will object to any testimony or evidence on this issue and will only present an opinion about it for impeachment purposes if his objection is overruled.

This is now the third time that Plaintiff has requested an expansion of discovery to include the sedation-level issue. As first outlined in Defendants' response to Plaintiff's September Motion, Plaintiff's counsel notified Defendants he intended to submit a 2005 consent order from the Arkansas Medical Board as evidence in this case. See the email from James Keever attached as Exhibit 2. The only goal in attempting to admit this order is to try and cast Dr. Elkins in a negative light with a wholly unrelated incident about which the jury would not be provided with full information. 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 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 3. 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. They have now filed three motions related to it and submitted an interrogatory on this subject in the guise of a request to "supplement."

II. Plaintiff's Counsels' Lack of Good Faith Effort to Resolve Discovery Disputes.

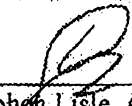
After Defendants provided the December 12, 2012, supplement, Plaintiff's counsel sent the demand for an additional response during the afternoon of December 19, 2012. This demand informed Defendants' counsel that Plaintiff's counsel would file this motion to compel if a "complete response" was not provided by December 21, 2012. It is not at all clear what sort of

"complete response" would have satisfied Plaintiff's counsel, nor does Plaintiff's counsel provide any further insight into that in the current motion. Even if it was clear what information Plaintiff is requesting, it would have been impossible to comply with Plaintiff's "good faith" demand for the requested information prior to the expiration of his arbitrary deadline of December 21, 2012.

The intent of the Discovery Order was to curtail Plaintiff's unduly burdensome and unreasonable use of discovery procedures. Plaintiff has refused to comply with the Discovery Order and has required additional pleadings and hearings based on her counsels' dogged attempts to pursue discovery that was prohibited by that Order.

WHEREFORE, Defendants respectfully request that Plaintiff's motion be denied and that Defendants' be awarded their costs and fees incurred in defending this motion.

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

By: 

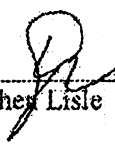
Stephen Lisle, AR Bar No. 94103
Lisle Rutledge P.A.
1458 Plaza Place, Suite 101
P. O. Box 7977
Springdale, AR 72766-7977
(479) 750-4444
(479) 751-6792 (facsimile)

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of January 2013, 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

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 relied 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;

Filters Used:

1 Tagged Record

Email Report

Form Format

Date Printed: 1/07/2013

Time Printed: 10:05AM

Printed By: MC

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

EXHIBIT

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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)

PAYTON REPORTING, INC.

L. Kay Payton
(479) 521-8060

EXHIBIT

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314

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

3 MR. KEEVER: Okay.

4 BY MR. KEEVER:

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

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

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

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

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

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

21 (Deposition Exhibit Number 7 was marked for
22 identification.)

23 BY MR. KEEVER:

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

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L. Kay Payton
(479) 521-8060

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

5 A Yes.

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

9 A Yes.

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

12 MR. LISLE: Just answer as best you can.

13 A I don't remember that.

14 BY MR. KEEVER:

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

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

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

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

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

24 BY MR. KEEVER:

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

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L. Kay Payton
(479) 521-8060

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

5 (Deposition Exhibit Number 8 was marked for
6 identification.)

7 BY MR. KEEVER:

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

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

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

14 BY MR. KEEVER:

15 Q Yes, sir.

16 A And I don't.

17 Q Okay. Well, if that -- if there is a copy of the
18 transcript of that hearing available to you through your
19 attorney, may we see a copy of it?

20 MR. LISLE: You can make a request for it and
21 I'll respond to it.

22 MR. KEEVER: Okay. Fair enough.

23 BY MR. KEEVER:

24 Q Let's see. Do you remember a Mrs. Allen who filed a
25 lawsuit against you in 2002?

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L. Kay Payton
(479) 521-8060

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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

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L. Kay Payton
(479) 521-8060

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1 certified and delivered to the custodial attorney, or that
2 requires me to provide any service not made available to
3 all parties to the action.
4
5

6 Leah Kay Payton, CCR No. 277

7 Court Reporter and Notary Public
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PAYTON REPORTING, INC.

L. Kay Payton
(479) 521-8060

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HOPE, FUQUA & CAMPBELL, P.A.

ATTORNEYS AT LAW

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431 WEST CAPITOL AVENUE, SUITE 480
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(501) 372-4146
Facsimile (501) 372-7480

RONALD A. HOPE
DAVID M. FUQUA
PHIL CAMPBELL
JASON D. FILBS
ABBEY D. DECKER
KEVIN M. O'DWYER
PATRICK L. SPITVEY
SAMUEL S. HIGH

**DEPOSITION
EXHIBIT**
8WILLIAM H. PRICE III
COUNSEL

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.

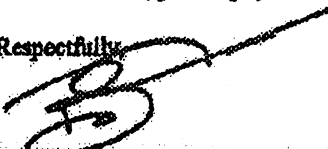
Dear Stephen:

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.

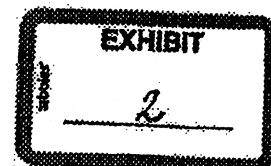
The cost of the record to have transcribed, as well as the exhibits will be billed to you. When you receive the bill, please pay it immediately and reimburse us for these out-of-pocket costs.

Respectfully,


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

WHT:hlm

cc: Peggy Cryer, Executive Secretary, Arkansas State Medical Board



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12/02/2011 14:23

5015371001

LAW OFFICES

PAGE 01/03

Issued by the
Circuit COURT
Benton County, Arkansas

Sub Poet

SUBPOENA IN A CIVIL CASE

CASE NUMBER CV 10-2385-4

v.

James Elkins, M.D.

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

102 N.E. A Street
Bentonville AR 72712

Courtroom

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 corporation 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 Rule of Civil Procedure 30(b)(5).

EXHIBIT

3

321

Ken Swindle, Attorney at Law 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 N. 10 th #460 LITTLE ROCK, AR 72204
JANE GASKILL		PERSONAL @ 10:42 A.M.
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

Address of Server

9 KING & LITTLE ROCK, AR
 72211

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 43(c), 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 43(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 normal fee cost of such production. Rule 43(d), 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 43(e), 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 43(g), Ark. R. Civ. P.

12/02/2011 14:23

5015371001

LAW OFFICES

PAGE 03/03

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 6316
Cell 903 314 6914
Fax 903 642 0066

EXHIBIT

4

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@lisle Rutledge.com
To 'Jim Keaver'; '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

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EXHIBIT

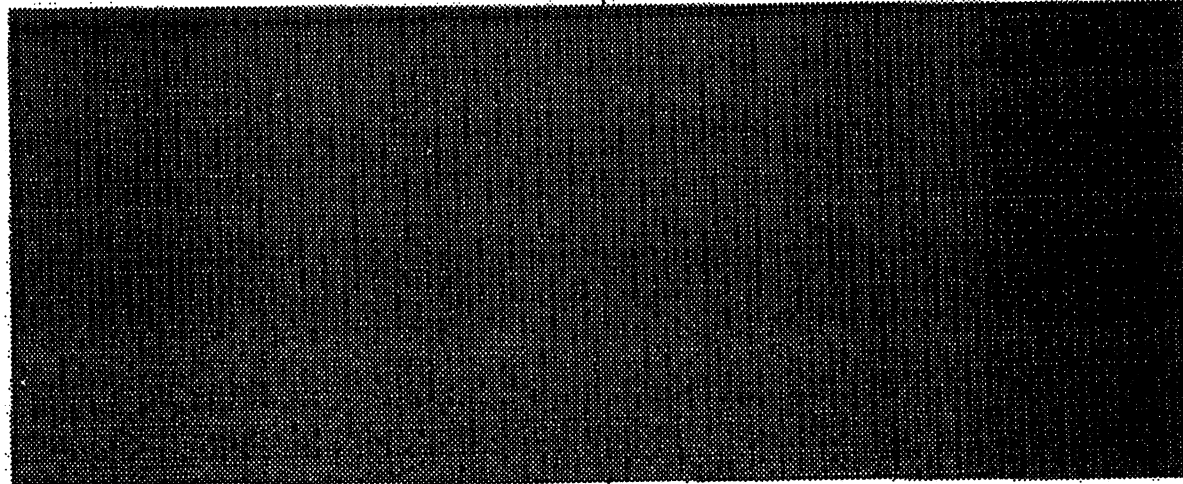
5

09/17/2012 12:54

5812961895

REGULATORY

PAGE 83/83

Board History

Appearance: Yes

Reason: Board Related

Date of Action: 4/8/2008

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 assume surgeries with Dr. Beaton 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: 2/2/2008

Minutes:

ELKINS, James Philip, M.D. appeared in response to a request of the Board to discuss the details of cases #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.

326

Filters Used:
1 Tagged Record

Email Report

Form Format

Date Printed: 10/01/2012
Time Printed: 2:36PM
Printed By: SL

Date 9/24/2012 Time 2:25PM 2:25PM Duration 0:00 (hours) Code
Subject Puff v. Elkins Stat 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@lisle Rutledge.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

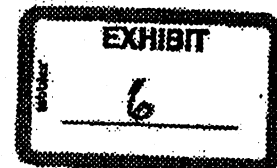
Lisle Rutledge P.A.

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

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COPY OF TRANSCRIPT

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.

**IN THE CIRCUIT COURT OF
BENTON COUNTY, ARKANSAS**

Sue Poff

Plaintiff

vs.

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

NO. CV 12-261-4

FILED

2013 JAN 14 AM 8 52

**BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR.**

JURY REQUESTED

Defendants

**PLAINTIFF'S REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFF'S
MOTION TO COMPEL**

Comes now, Plaintiff, and for this, her reply, would state:

I. INTRODUCTION

Defense Counsel continues to be confused about the following issues:

- a. ARCP 26(a)(4)(A)(i) requires specific disclosures of expert witnesses, and defendant has yet to comply with this requirement;
- b. Plaintiff has never challenged the authority or the Orders of this Court, but has followed the Court Guidelines in her requests for discovery; and
- c. Plaintiff's requests for information in supplementation to Defendant's initial discovery responses has never been vague or open-ended, but has been specifically stated.

**II. ARCP 26 REQUIRES SPECIFIC DISCLOSURES OF TESTIFYING
EXPERTS**

Defense Counsel continues to present the fiction that he disclosed Defendant as a testifying Expert in his initial, untimely, response to Plaintiff's Interrogatories. By any reading of that vague response, there was not a disclosure of a testifying expert that included the substance of the facts and opinions to which the expert was expected to

testify and a summary of the grounds for those opinions. The lack of disclosure was acknowledged by Defense Counsel's response at Defendant's deposition, when he stated that he would disclose his testifying experts according to the Rules of Civil Procedure, and agreed to present Defendant for a second deposition if he were to be designated as a testifying expert.

The past history of this dispute is really not relevant at this time, since it is now not contested that Defense Counsel expects Defendant to offer expert opinions at trial. What is relevant is the fact that the defense has yet to offer more than the vague disclosure recently offered that Defendant will testify to his treatment of Ms. Poff, and offer the opinions that he "treated her appropriately, within his medical judgment, and that any problems were related to complications of surgery, or consequences that Ms. Poff's failure to comply with his post-operative instructions, or some other treatment that she received." This so-called disclosure says nothing about that degree of training and skill possessed and used by the defendant in his treatment of Ms. Poff, which is the critical issue in determining whether or not there was medical negligence. See A.C.A. sec. 16-114-206.

The above disclosure also completely ignores one of the two allegations of negligence in this case, the allegation that the defendant did not disclose to Ms. Poff that information necessary for Ms. Poff to give informed consent for the laser surgery performed. Plaintiff is entitled to know exactly what opinions the Defendant is going to offer at trial, if any, on both the issue of direct negligence and the issue of informed consent.

III. PLAINTIFF HAS NOT CHALLENGED THE AUTHORITY OR ORDERS OF THIS COURT, BUT HAS FOLLOWED THE DISCOVERY GUIDELINES SET UP BY THE COURT

Defense counsel spends almost five pages of his response discussing what he calls Plaintiff's "Challenges" to the discovery order of the Court. To the contrary, Plaintiff has

followed the direction of the Court to the letter, which directs all discovery to be directed through the Court in a Motion for Further Discovery.

The court will recall that Plaintiff's Motion to Compel discovery on the licensing of the ambulatory surgery center was granted at the time of our July 25, 2012, hearing. That Order was the result of Plaintiff's argument that the issue of whether or not the center was licensed was a factor in the allegation of lack of informed consent. The Court's order was linked to a requirement that Plaintiff disclose her expert witness prior to August 8, 2012, and the firm expectation of the Court that Plaintiff's expert would support the thesis that the licensing of the center was a material fact regarding informed consent. Defendant has since admitted that his surgery center was not licensed, nor had it ever been licensed.

Defendant is correct that the issue of the licensing of the "Gynecology and Cosmetic Surgery Centre" of the Defendant was raised at the December 11, 2012, hearing. The Defendant should also recall that the suggestion of the Court at that time was that Plaintiff send a good-faith letter to Defense Counsel requesting supplementation of her interrogatory No. 6, and in the event that the response was not adequate, file her Motion to Compel. That is exactly what Plaintiff has done.

IV. PLAINTIFF'S REQUEST FOR SUPPLEMENTATION OF DISCOVERY HAS BEEN QUITE SPECIFIC

Defense Counsel states in his response that he is unsure exactly what Plaintiff is seeking in her request for supplementation. Plaintiff is asking that Defendant comply with ARCP (a)(4)(A)(i) and state with specificity each and every expert opinion to be offered at trial. Defense counsel could simply refer to the expert disclosure of Plaintiff if he needs a guide as to the information required.

Plaintiff disclosed the substance of the opinions expected of her expert witness, Dr. Shewmake, on August 8, 2012. That disclosure was detailed and specifically stated

the substance of the opinions and facts that it expected to be discussed by Dr. Shewmake in his testimony, and the basis for those opinions and facts. One section of those opinions deals with informed consent. A subsection of that opinion deals with the issue of whether or not the status of the licensing of the center had been disclosed to Ms. Poff, stating in paragraphs 14 to 20:

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.

Defense Counsel states in his Response that he plans to object to any questions about the licensing of the surgery center on grounds of relevance, and supports that with a vague entry in the Arkansas Medical Board file on Dr. Elkins that states the Defendant's surgical activities no longer require active mentoring by the Board. That statement evidently refers to the 2005 formal Consent Order between the defendant and the Arkansas Medical Board that orders the Defendant to limit his surgeries to licensed hospitals or ambulatory surgery centers until there is a further order from the board. See attached as Exhibit No. 1. Plaintiff fails to see that the materials submitted by Defendant constitute a "later order by the board." See attached as Exhibit no. 2.

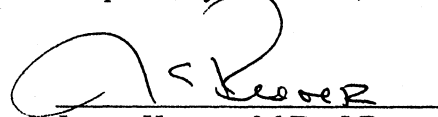
Further, Defense Counsel claims that Defendant is doing surgery in his office, which presumably is not classified as an ambulatory surgery center by the Arkansas Department of Health Rules and Regulations, and his office does not require a license by the State. See Exhibit No. 3. Dr. Shewmake's report offers the clear and specific opinion that the medications given Ms. Poff would place the Gynecology and Cosmetic Surgery Centre of the defendant under the definition of a hospital or related facility that required licensing by the State of Arkansas. It is clear from the record that Ms. Poff's surgery was in the defendant's Gynecology and Cosmetic Surgery Centre. See attached Exhibit No. 4, Sedation record. Dr. Shewmake's report also makes it clear that, under the circumstances of this case,

disclosure of the non-licensure of the center would have been required by the standard of care. This disclosed expert testimony not only makes the licensure of the clinic a material issue, but the requirement for that licensure, which deals with the drugs used for sedation, an expert issue. Plaintiff is entitled to know exactly what opinions the defendant will offer on this issue, as well as any other specific opinions expected to be offered.

V. SUMMARY

Plaintiff simply asks the Court to compel the defendant to disclose the information required by ARCP 26(a)(4)(A)(i), including any opinions regarding the sedation given to Ms. Poff and the licensure of the surgery center. Plaintiff also respectfully requests an order that no expert opinion may be offered at trial unless that same opinion has been specifically disclosed to the other party prior to the end of discovery.

Respectfully submitted,



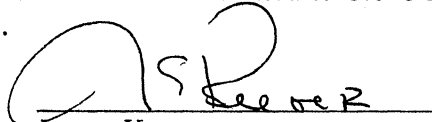
James Kever, M.D., J.D.
Arkansas Bar No. 2005176
2801 Richmond Road, # 57
Texarkana, Texas 75503
Telephone: (903) 79305316
Telecopier: (903) 642-0066
kukeevs@keever.cc

and

Ken Swindle, J.D.
Arkansas Bar No. 97234
619 West Persimmon Street
Rogers AR 72756
Telephone: (479) 621-0120
Telecopier: (479) 621-0838
ken@swindlelawfirm.com

CERTIFICATE OF SERVICE

I hereby state the above document was transmitted to Steve Lisle, via electronic mail, this 9th day of January, 2013.


James Keever

COPY OF TRANSCRIPT

Located here 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.



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. Beaton as his proctor and providing a report of each case with a copy of the operative report attached. The Board further voted to readress this matter at the June meeting.	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. Beaton as his proctor and providing a report of each case with a copy of the operative report attached. The Board further voted to readress 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. Pienze, 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.	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. Pienze, 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.

Poff v. Elkins



Inbox x

Steve Lisle <slisle@listerutledge.com>

to me, Ken

9/24/12

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

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Redacted Board History-MC120924.PDF

324K View Download

340

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS

SUE POFF PLAINTIFF

FILED

2013 JAN 28 PM 4 19

v.

NO. CV 2012-261-4

BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR.

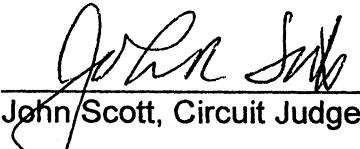
JAMES P. ELKINS, M.D., and

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

ORDER

ON THIS, THE 28th January, DAY OF 2013, the Court considered Plaintiff's Motion to Compel or to Limit Expert Testimony, Defendant's Response, and Plaintiff's Reply, and FINDS THAT Plaintiff's Motion should be and is DENIED.

IT IS SO ORDERED.


John Scott, Circuit Judge

Prepared by:

James E. Keever
Attorney for Plaintiff

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CV13 000911

✓

IN THE CIRCUIT COURT OF
BENTON COUNTY, ARKANSAS
Sue Poff, Plaintiff
vs.

NO. CV 2012-261-4

FILED

2013 FEB 4 AM 10 23

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

BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR.

PLAINTIFF'S MOTION TO PREADMIT TRIAL EXHIBITS

Comes now Plaintiff, and for this, her Motion to Pre-admit Trial exhibits, would state:

1. During the first trial of this matter, the Court required that any image to be shown to the jury on a screen be first admitted as a trial exhibit.
2. Because some of the items to be shown to Plaintiff's expert had not been previously admitted, Plaintiff's unfamiliarity with the Court's preference led to an interruption of the trial for the purpose of authenticating numerous documents prior to the actual testimony of the expert.
3. Plaintiff has attached as Exhibit No. 1 to this motion a list of forty-four (44) exhibits which, with the exception of Exhibit No. 6 (Summary of laser settings) and Exhibit No. 24 (AMI 306, Assumption of Risk, Definitions), were admitted into evidence in the first trial. This list has a notation as to the proposed sources of authentication of each item at the March 11, 2013, trial of this matter, including:
 - a. Dr. Elkins
 - b. Dr. Shewmake
 - c. Ms. Poff
 - d. Mr. O'Brien
 - e. AREvid. 1006 for Summaries
 - f. Official State Document
 - g. Judicial Notice.
4. Plaintiff would respectfully request that these exhibits be pre-admitted for use at the March 11, 2013, trial of this matter. Pre-admission would reduce the time

necessary for the trial of this matter, promoting judicial efficiency and reducing the waiting time for the jurors between witnesses.

5. Copies of all of the documents submitted have been provided to Defense Counsel.

WHEREFORE, FOR PREMISES CITED, Plaintiff respectfully requests that the Exhibit's listed in Exhibit No. 1 to this Motion be pre-admitted for use at the March 11, 2013, trial of this matter.

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 USPS on this, the 31 day of January, 2013.

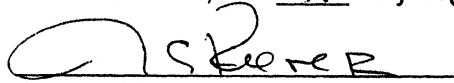

James Keever

Exhibit no. 1.

EXHIBIT

EXPECTED AUTHENTICATION BY:

1. SmartXide Clinical User Manual	Shewmake, Elkins, O'Brien
2. Core Dimension Materials	Elkins
3. Eclipsed billing	Elkins, O'Brien
4. Elkins partial records	M.R. stipulation
5. 1/22/09 of chest	Poff, Elkins
6. Summary of laser settings	Rule 1006
7. 1/23/09 picture	Poff, Elkins
8. 2/18/09 face	Poff, Elkins
9. 2/18/09 chest	Poff, Elkins
10. 4/09/09 chest	Poff
11. Eclipsed e-mail	Elkins, M.R. stipulation
12. Bauer note	M.R. stipulation
13. Yee notes	M.R. stipulation
14. ADH R/R	Official State Document
14.(a). Same Sec 39-H	Official State Document
14.(b) Same Sec 3-29	Official State Document
14.(c) Same Sec 4(A)	Official State Document
15. Summary of sedatives	Rule 1006
16. January calendar	Judicial Notice
17. Lisa Jones office note	Jones, Elkins
18. Elkins billing records	M.R. stipulation
19. Poff check	Poff
20. Prescriptions	Poff, Elkins
21. 1/22/09 cheek picture	Poff, Elkins
22. 2002 cheek picture	Poff, Elkins
23. June 1, 2010 of cheek	Poff
24. AMI 306	Judicial Notice

25. SmartXide poster	Poff, Elkins
26. Website Photo	Poff
27. 1/22/09 Day planner	Poff
28. Facebook photo	Poff
29. Summary of past medical expenses	Poff, Rule 1006
30. (a) Supporting documents for Exhibit no. 34	Poff
31. Summary of past and future medical expenses	Poff, Shewmake Rule 1006
32. Longevity chart	ACA 18-2-105
33. Four pictures taken on 1/22/09	Poff, Elkins
34. Shewmake C.V.	Shewmake
35. Buffalo records	M.R. stipulation
36. McNair records	M.R. stipulation
37. Holland records	M.R. stipulation
38. Burns' records	M.R. stipulation
39. Small iron illustration	Shewmake
40. Overtreatment illustration	Shewmake
41. Bar Graph of energy calculations	Shewmake

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

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BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR.

PLAINTIFF'S MOTION IN LIMINE AND BRIEF IN SUPPORT

Comes now the Plaintiff and for her Motion in Limine and Brief in Support states:

I. MOTION

Counsel anticipates that the defendant may seek to introduce evidence or make comments on the following topics in this matter. Such evidence would be irrelevant and/or unfairly prejudicial to the plaintiff and should therefore be excluded. See Ark. R. Evid. 402, 403. Plaintiff does not know whether it is the intention of the Defendant to raise any of these topics in the presence of the jury, but if he were to do so, Plaintiff would suffer prejudice. Wherefore, Plaintiff moves that any mention of the following topics in the presence of the jury be prohibited:

1. Any reference to prior cosmetic procedures that Plaintiff has undergone, whether at the hands of defendant or any other cosmetic surgeon. This case is about alleged negligence from the conduct of the defendant regarding a laser skin procedure on January 22, 2009. This procedure was recommended and performed by the Defendant, and agreed by Plaintiff. To refer to Plaintiff's prior history of having had liposuction, breast implants, lip implants, and/or Botox injections would be completely irrelevant to any issue in this case; would be prejudicial to Plaintiff; and would only serve to confuse the jury. Ark. R. Evid. 402, 403.

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2. Any reference to a prior bankruptcy proceeding by Plaintiff. Personal bankruptcy is a fundamental Constitutional right. Article I, Section 8, of the United States Constitution authorizes Congress to enact "uniform Laws on the subject of Bankruptcies" for the benefit of debtors who are United States citizens. Plaintiff's prior exercise of the right is completely irrelevant to any issue in this case. Any mention of Plaintiff's prior bankruptcy would only serve to prejudice the jury, and would be as inappropriate as allowing the prosecution to comment on the decision of a criminal defendant to exercise his or her right not to testify in a criminal proceeding, and should not be allowed. Ark. R. Evid 402, 403.

3. Any reference to generate passion, prejudice or personal consequence to the defendant physician that might result from an adverse verdict, such as the effect it will have on his practice, standing in the medical community, relationship to the hospital, whether he would stay in the community, or any other negative effect upon the physician. This would merely be an attempt to appeal to passion and prejudice and is not relevant. Ark. R. Evid. 402, 403.

4. Any reference to any payment of attorney's fees to plaintiffs counsel from the verdict or the tax consequences of the verdict. These are irrelevant. Ark R. Evid. 402

5. No mention should be made of any collateral source received by the plaintiff. See, *Parrish v. Newton*, 298 Ark. 404, 768 S.W.2d 17 (1989) (Evidence showing an injured person received a benefit from a collateral source is inadmissible unless relevant for some purpose other than the mitigation of damages).

6. Defense counsel should be prohibited from making any reference or innuendo in closing argument or at any stage during the trial regarding the financial,

social, or economic effect or impact of a verdict on behalf of the plaintiff and any adverse effect it may have on the Defendant individually, the practice of medicine, or medical services and their availability. Such evidence is irrelevant and could cause the jury to decide the case on an improper basis. Ark. R. Evid. 402, 403.

7. No reference should be made that an adverse verdict might result in a defendant losing his license, privileges, or his reputation would be damaged, or that the jury should not “convict” the defendant of medical malpractice, or that the doctor would be essentially put out of business. Ark. R. Evid. 402, 403.

8. No mention should be made by the Defendant, his witnesses, or defense counsel that this is a “frivolous suit.” This case is proceeding to trial; the Court has denied Defendant’s Motion for Summary Judgment and the claim is obviously “not frivolous.” Such would merely be an attempt to prejudice the jury and appeal to passion. Ark. R. Evid. 403.

9. No mention should be made of the number of medical negligence suits filed against physicians either in Arkansas or across the country in a given year, the success rate physician defendants may generally have in front of juries, or any other such generalized reference to medical negligence litigation. Ark. R. Evid. 402, 403.

10. No reference should be made that a verdict for the Plaintiff against the Defendant would amount to a “conviction” as such is prejudicial, and implies a higher burden of proof, i.e. beyond a reasonable doubt. Ark. R. Evid. 403.

11. There has been no written ruling from the Court on Plaintiff’s objection to the Defendant being identified as an expert witness on any jury instructions. For the reasons discussed in Plaintiff’s Brief in Support of her Reply to Defendant’s Response to

Plaintiff's Motion to take the Second Deposition of Dr. Elkins, filed on December 5, 2012, which is incorporated by reference as if repeated word for word herein, Plaintiff asks that Defendant Dr. Elkins not be identified as an expert witness by the Court in any way, including Jury Instructions.

12. Defendant has yet to formally respond to Plaintiff's Interrogatory No. 6 asking for the disclosures called for under ARCP 26(b)(4)(A)(i). For the reasons stated in her December 31, 2012, Motion to Compel with Brief in Support, and her Reply to Defendant's Response to that Motion, both of which are incorporated by reference as if repeated word for word herein, Plaintiff renews her objection to any expert opinions not specifically and fully disclosed in accordance with ARCP 26(b)(4)(A)(i) prior to the close of discovery, and asks that such opinions be prohibited at the trial of this matter.

13. Defendant, Dr. Elkins, should be prohibited from making reference to his treatment of other patients, and specifically should not be allowed to make such statements as, "I used these same settings on other patients and they did just fine." Unless Dr. Elkins names those patients as witnesses and brings them forward to testify and allows inspection of the relevant portions of their medical records, any such testimony would constitute hearsay without exception, would lack the reliability requirements of a *Daubert* analysis, and should not be allowed. *Farm Bureau Mutual Insurance Co. v. Foote*, 341 Ark. 105, 14 S.W.3d 512 (2000), A. R. Evid. 402, 403, 802.

14. Defendant, Dr. Elkins, should be prohibited from offering any testimony based upon conversations with other physicians unless those physicians have been disclosed as testifying or consulting expert witnesses, and have been made available to Plaintiff for deposition. Plaintiff specifically asks that this Motion in Limine apply

particularly in the field of sedation and anesthesiology. Plaintiff has no objection to the Defendant testifying as to the drugs used in Ms. Poff, why he chose those drugs, and what he observed during that time, but any conversations with other doctors about the sedation of Ms. Poff would constitute hearsay without exception and should be prohibited. A.R.C.P. 26 (b)(4), A. R. Evid. 802.

15. At the first trial of this matter, defense counsel asked two separate lay witnesses of Plaintiff, Lisa Jones and Jill Sory, about Plaintiff's medical treatments following the laser surgery that is the subject of this lawsuit. Neither witness has any expert qualifications, and both witnesses testified that they had no direct knowledge of any such treatments. Such questions at the trial of the present case would be asking for either speculation or hearsay, would be prejudicial to Plaintiff, would be improper, and should not be allowed at the second trial of this matter. A. R. Evid. 402, 403, 802.

16. It is anticipated that the Defendants intend to interject the Plaintiff's mental health treatment into this case by means of *voir dire*, opening statements, cross-examination, direct examination, and closing argument. Such records or any testimony regarding Plaintiff's mental health treatment would be irrelevant to any issue in this case, would be highly prejudicial, and should be prohibited. Because of the complexity of this issue, Plaintiff files a brief below regarding the admissibility of mental healthcare.

WHEREFORE, the Plaintiff prays for an order from this Court prohibiting the Defendant Counsel for the Defendant, or any witness in this matter from broaching the above-referenced topics from *voir dire*, or opening statements, or cross-examination, or direct examination, or closing argument.

II. BRIEF IN SUPPORT OF PLAINTIFF'S MOTION IN LIMINE,
PARAGRAPH 16

As the Court knows, the Plaintiff claims damages for pain and suffering; lost earnings; medical expenses; disfigurement, and punitive damages. Complaint, paragraph 17, incorporated herein. Ark. R. Civ. P. 10(c). Therefore, the Plaintiff has chosen not to pursue damages for mental anguish. AMI 2205.

Only relevant evidence is admissible. Ark. R. Evid. 402. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ark. R. Evid. 401. As the Plaintiff has not sought damages for mental anguish, her mental healthcare treatment is not relevant. Therefore, it is not admissible. In the alternative, any probative value of such evidence would be "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury" and therefore still not be admissible. Ark. R. Evid. 403.

Moreover, evidence of the Plaintiff's mental healthcare is privileged. Specifically, Rule 503(b) of the Arkansas Rules of Evidence states:

A patient has a privilege to refuse to disclose and to prevent any other person from disclosing his medical records or confidential communications made for the purpose of diagnosis or treatment of his physical, mental or emotional condition, including alcohol or drug addiction, among himself, physician or psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist, including members of the patient's family.

Therefore, even if the Plaintiff's mental healthcare was relevant (which it is not), it would still be inadmissible as a privileged communication.

The Plaintiff anticipates that the Defendant will argue that the Plaintiff waived her right to assert this privilege upon the first trial of this matter when such evidence was admitted over her objection. However, the Defendant would err in such argument. Even if the Plaintiff did waive this privilege at her first trial (which she did not), the privileged is not required to be waived at a subsequent trial. *Johnson v. State*, 342 Ark. 186, 27 S.W.3d 405 (2000), *cert. denied* 532 U.S. 944 (2001).

Plaintiff also anticipates that the Defendants will argue that the exception to the privilege applies. Specifically, Rule 503(d)(3)(A) states:

There is no privilege under this rule as to medical records or communications relevant to an issue of the physical, mental, or emotional condition of the patient in any proceeding **in which he or she relies upon the condition as an element of his or her claim or defense**, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his or her claim or defense. (Emphasis added.)

However, as shown above, Plaintiff has not put her mental or emotional condition at issue. Therefore, the Defendants would be in error to attempt to apply the exception to this case.

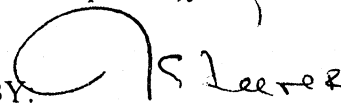
Below-signed counsel has not found a case exactly on-point interpreting what constitutes the "mental, or emotional condition of the patient in any proceeding in which he or she relies upon the condition as an element of his or her claim". However, this matter is similar to the facts in *Miles v. Century 21 Real Estate L.L.C.*, 2006 WL 2711534 (U.S.D.C., E.D. Ark., Jonesboro Div.) (Attached for the Court's convenience). In that case, Plaintiffs stipulated that they "will not call a doctor nor discuss any of the psychotherapist-patient communications they had with their marriage counselor. Instead, the Miles' will simply describe, in their own words, the distress Defendants' conduct caused." p. 2. After discussion of the different views of what it takes to waive

psychotherapist-patient privilege, the Court concluded that the facts, as stated above, do not waive said privilege in the 8th Circuit.

In the current case, the prohibition against application of any supposed waiver of psychotherapy-patient privilege is even clearer. Unlike the facts in *Miles*, here, the Plaintiff stipulates that she does not intend to seek any damages for mental anguish. Therefore, if the psychotherapy-patient privilege was not waived when the plaintiff did intend to seek compensation for mental anguish, but did not intend to use any mental health records to support such a claim, surely it is not waived where, as here, the Plaintiff does not intend to ask for mental anguish damages.

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

and

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

CERTIFICATE OF SERVICE

I, James E. Keever, hereby certify that I have served a copy of this document upon Steve Lisle, via USPS, on the 31st day of January 2013.


James Keever

IN THE CIRCUIT COURT OF
BENTON COUNTY, ARKANSAS
Sue Poff, Plaintiff
vs.

NO. CV 2012-261-4

FILED

2013 FEB 6 AM 10 44

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

BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR.

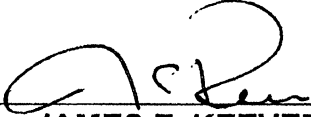
PLAINTIFF'S FIRST AMENDED MOTION TO PREADMIT TRIAL EXHIBITS

Comes now Plaintiff, and for this, her Motion to Pre-admit Trial exhibits, would state:

1. Plaintiff's Motion to pre-admit Exhibits was filed on February 4, 2013, and is incorporated by reference as if repeated word for word herein.
2. Plaintiff has the following changes in Exhibit No. 1 to that Motion, included in Exhibit no 1 to this amended motion:
 - a. An illustration from Exhibit No. 1 (Clinical User manual) has been added as a separate exhibit.
 - b. The addition of copies of photographs of the chest of Ms. Poff taken on 3/13/09 and 6/010/10.
 - c. Substitution of the June 1, 2010, photograph of Ms. Poff's cheek with a photograph of the same area taken September 21, 2010. Previous exhibits no 14 (a-c) are now separately number as Exhibits no. 16-18.
 - d. The entire 345 page document list in previous exhibit No. 14 (Arkansas Department of Health Rule and Regulations for hospitals and Related Institutions) has been deleted.
 - e. A second "small iron" illustration has been added.
 - f. The CV of Dr. Daniel Atwood has been added.
3. All of the additional exhibits have been provided to defense counsel, and all were admitted at the first trial of this matter.

WHEREFORE, FOR PREMISES CITED, Plaintiff respectfully requests that the Exhibit's listed in Exhibit No. 1 to this Amended Motion be pre-admitted for use at the March 11, 2013, trial of this matter.

Respectfully Submitted,

BY: 

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Texarkana, Texas 75503

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kukeevs@keever.cc

and

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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 USPS on this, the 5th day of January, 2013.

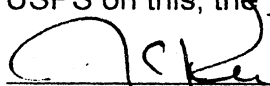

James Keever

Exhibit no. 1 to Amended Motion to Pre-admit Exhibits.

EXHIBIT	EXPECTED AUTHENTICATION BY:
1. SmartXide Clinical User Manual	Shewmake, Elkins, O'Brien
2. Core Dimension Materials	Elkins
3. SmartXide illustration of action	Exhibit No 1, No 2
4. Eclipsemed billing	Elkins, O'Brien
5. Elkins partial records	M.R. stipulation
6. 1/22/09 of chest	Poff, Elkins
7. Summary of laser settings	Rule 1006
8. 1/23/09 picture	Poff, Elkins
9. 2/18/09 face	Poff, Elkins
10. 2/18/09 chest	Poff, Elkins
11. 3/13/09 chest	Poff, Elkins
12. 4/09/09 chest	Poff
13. 6/01/10 of chest	Poff
14. Eclipsemed e-mail	Elkins, M.R. stipulation
15. Bauer note	M.R. stipulation
16. Yee notes	M.R. stipulation
17. Arkansas Department of Health Rules and Regulations for Hospitals and Related Institutions, Sec 3, Definitions	Official State Document
18. Same, Sec 4, Licensure and Codes	Official State Document
19. Same, Sec 39, Ambulatory Surgery Centers	Official State Document
20. Summary of sedatives	Rule 1006
21. January calendar	Judicial Notice
22. Lisa Jones office note, redacted of private health information	Jones, Elkins
23. Elkins billing records	M.R. stipulation

24. Poff check	Poff
25. Prescriptions	Poff, Elkins
26. 1/22/09 cheek picture	Poff, Elkins
27. 2002 cheek picture	Poff, Elkins
28. September 21, 2010 cheek. picture	Poff
29. AMI 306	Judicial Notice
30. SmartXide poster	Poff, Elkins
31. SmartXide office flier	Poff, Elkins, Jones
32. Website Photo	Poff
33. 1/22/09 Day planner	Poff
34. Facebook photo	Poff
35. Summary of past medical expenses	Poff, Rule 1006
36. Supporting documents for Exhibit no. 31	Poff
37. Summary of future medical expenses and lost earnings	Poff, Shewmake, Rule 1006
38. Longevity chart	ACA 18-2-105
39. Four pictures taken on 1/22/09	Poff, Elkins
40. Shewmake C.V.	Shewmake
41. Baptist Hospital, Heber Springs, Records	M.R. stipulation
42. Buffalo records	M.R. stipulation
43. McNair records	M.R. stipulation
44. Holland records	M.R. stipulation
45. Burns' records	M.R. stipulation
46. Small iron illustration I	Shewmake
47. Small iron illustration li	Shewmake
48. Overtreatment illustration	Shewmake
49. Energy calculations summary	Shewmake
50. Daniel Atwood, M.D. C.V.	Atwood

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS

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SUE POFF

PLAINTIFF

2013 FEB 6 AM 11 27

vs.

CASE NO. CV-2012-0261-4

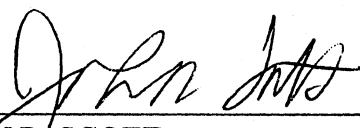
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR.

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

DEFENDANTS

NOTICE OF HEARING ON PLAINTIFF'S MOTION
TO PRE-ADMIT TRIAL EXHIBITS

Please take notice that the above captioned matter has been scheduled for hearing, by the Court, along with the pretrial and show cause hearing previously set on February 22, 2013, 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: ~~January~~ 5, 2013
Feb 6

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

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

CUB 001257 359 ✓

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2013 FEB 13 AM 9 36

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

DEFENDANTS' MOTION IN LIMINE

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

1. Under the Rules of Evidence, Plaintiff cannot be allowed to introduce evidence, comment on, or argue in opening and closing statements, that Defendants were negligent in other surgeries or medical procedures not involving the Plaintiff, or involved in administrative procedures with the Arkansas Medical Board.
2. Under the Rules of Evidence, Plaintiff cannot be allowed to make allegations concerning whether or not the Defendant has medical malpractice insurance.
3. Under the Rules of Evidence, Plaintiff should be prohibited from attempting to elicit an expert opinion or opinions from the Defendants, his agents, servants, and employees, regarding the standard of care required of the Defendants, or what caused the Plaintiff's alleged injuries and/or damages.
4. Under Arkansas statutes, the Plaintiff may only put forth testimony from an expert who practices in the same specialty as the Defendants. The Plaintiff should be prohibited from attempting to elicit an expert opinion from any witness other than a member of the medical care

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profession in good standing, engaged in the same type of practice or specialty in the same locality in which Defendant practices.

5. Plaintiff and her witnesses should be precluded from testifying or introducing any evidence pertained to out-of-court statements by non-parties, as such evidence constitutes hearsay. Specifically, Plaintiff's counsel should be precluded from eliciting hearsay testimony from the Plaintiff or her witnesses about any oral statements that may have been made by the Plaintiff's medical care providers (excluding the Defendants), medical expert witnesses, or other family members.

6. This is a bifurcated proceeding. No testimony regarding punitive damages should be permitted at the trial on the merits of this case. Therefore, the income of the Defendants is not relevant and should not be admitted at trial. Further, the finances, size of practice, or number of the Defendants' employees are not relevant and should not be admitted at trial. Further, the Plaintiff should be prohibited from mentioning punitive damages, or that the Defendants should be "punished," or any other similar "send a message" type language or references.

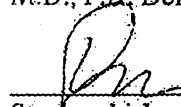
7. Plaintiff's counsel should be precluded from eliciting testimony regarding any conduct or statements that may have been made during settlement negotiations, or the fact that settlement was offered, attempted, or reached between any of the parties to this suit. Any such evidence is inadmissible under Arkansas law.

8. The fact that the Defendants have filed a pre-trial motion addressing the admissibility of certain evidence and has requested that certain evidence be excluded from the jury should be not referred to or mentioned in the presence of the jury. It is not relevant to the issues and places the Defendants in a position of unfair prejudice by the jury.

9. Defendants move the Court for an Order precluding the admission of evidence on these matters and request that the Court admonish the Plaintiff and her attorneys and witnesses from mentioning, referring to, or otherwise attempting to inject such evidence at trial.

10. Defendants file a Brief in Support of this Motion that is incorporated herein by reference.

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

By: 

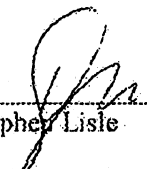
Stephen Lisle, AR Bar No. 94103
Lisle Rutledge P.A.
1458 Plaza Place, Suite 101
Springdale, AR 72764-5273
(479) 750-4444
(479) 751-6792 (facsimile)

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of February, 2013 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
Attorney at Law
2801 Richmond Road, #57
Texarkana, TX 75503


Stephen Lisle

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2013 FEB 13 AM 9 36

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS
CIVIL DIVISION

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

BRIEF IN SUPPORT OF DEFENDANTS' MOTION IN LIMINE

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

Defendants request that the Court preclude the introduction of certain evidence at trial. It has long been established that evidence that in no way logically tends to prove or disprove any of the elements of the case, or which is not properly admissible based on the standard of proof required, should be excluded from the evidence or from even being offered as evidence so as not to prejudice the jury.

1. Claims of Other Negligent Acts.

Plaintiff's claim for damages against Defendants arises solely from a surgical procedure that took place on January 22, 2009. Based on prior statements by Plaintiff's counsel, Defendants believe that Plaintiff will attempt to introduce evidence, comment on, or argue in opening and closing statements, that Defendants were negligent in other surgeries not involving the Plaintiff. It is well established that "where the issue is one of negligence or non-negligence on the part of a person on a particular occasion, other acts of negligence are not admissible." *Dubrymple v. Fields*, 276 Ark. 185, 633 S.W.2d 362, 364 (1982) (citing *Myers v. Martin*, 168

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Ark. 1028, 272 S.W. 856 (1925)). The Arkansas Supreme Court has stated that, "[o]ne act of negligence cannot be proved by another." *Missouri Pacific Railroad Co. v. Emberton*, 230 Ark. 865, 327 S.W.2d 726 (1959). Whether Dr. Elkins has been sued in other unrelated cases is not relevant in this case. Furthermore, such information is highly prejudicial and its probative value is substantially outweighed by the danger of unfair prejudice. The mere fact that other lawsuits or complaints may have been filed against Dr. Elkins does not make it more probable than not that he was negligent in this case. Therefore, there should be no mention of any other lawsuits or administrative actions against Dr. Elkins. Ark. R. Evid. 401, 402, 403.

2. Reference to Medical Malpractice Insurance.

The fact or alleged fact that the Defendants do not have medical malpractice insurance is irrelevant, inadmissible and highly prejudicial. Ark. R. Evid. 401, 402 and 403; *Shamblin v. Albright*, 278 Ark. 565, 647 S.W.2d 470 (1983); *Hively v. Edwards*, 278 Ark. 435, 646 S.W.2d 688 (1983); *Johnson Timber Corp. v. Sturdivant*, 295 Ark. 622, 752 S.W.2d 241 (1988). Accordingly, there should be no mention of the Defendants' medical liability insurance coverage, or lack thereof, at trial.

3. Limitation on Testimony Regarding Standard of Care.

The Plaintiff should be prohibited from attempting to elicit an expert opinion or opinions from the Defendants' employees regarding the standard of care required of the Defendants, or what caused the Plaintiff's alleged injuries and damages. A medical malpractice defendant, or his employees, cannot be compelled to give opinion testimony at trial. Such evidence, assuming it is not inadmissible for other reasons, such as hearsay, is irrelevant and immaterial to the issue of whether or not Defendants performed negligently in the January 22, 2009, surgery. Ark. Code Ann. § 16-114-207.

Because this is a medical malpractice case, who may testify regarding the standard of care, a breach thereof, and causation of injury is governed by statute. See Ark. Code Ann. § 16-114-206. Arkansas law is clear that to prove what the standard of care is and whether it was breached, the plaintiff may only put forward testimony from an expert witness who practices in the same specialty as the defendant. The statute states in pertinent part that the plaintiff has the burden of proving:

"By means of expert testimony provided only by a medical care provider of the same specialty as the defendant, the degree of skill and learning ordinarily possessed and used 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 locality; . . ."

"By means of expert testimony provided only by a medical care provider of the same specialty as the defendant that the medical care provider failed to act in accordance with that standard; and . . ."

Ark. Code Ann. § 16-114-206(a)(1) and (2) (emphasis added). The statute goes on to define who is qualified to render opinions as to the causation of any injury alleged. A plaintiff must prove causation, "by means of expert testimony provided only by a qualified medical expert." Ark. Code Ann. § 16-114-206(a)(3) (emphasis added).

Plaintiff may attempt to elicit opinions from the nurses and/or assistants involved in the Plaintiff's treatment. Because the nurses and/or assistants are not "medical care providers of the same specialty" as the Defendants, they should be precluded from testifying as to the standard of care applicable to the Defendants and how the Defendants may have allegedly failed to act in accordance with that standard. They should also not be allowed to testify as to causation issues.

Opinions from non-doctors should be precluded pursuant to Ark. Code Ann § 16-114-206(a)(1)-(2). Additionally, they should be precluded from offering causation opinions to the

jury pursuant to Ark. Code Ann. § 16-114-206(a)(3). Any such testimony is not relevant and any probative value it might have would be substantially outweighed by the danger of unfair prejudice. Ark. R. Evid. 401, 402 and 403.

4. Out of Court Statements by Medical-Care Providers

Plaintiff and her witnesses should be precluded from testifying or introducing any evidence pertaining to out-of-court statements by non-parties. Such evidence constitutes inadmissible hearsay under Ark. R. Evid. 802. Specifically, Plaintiff's counsel should be precluded from eliciting hearsay testimony from the Plaintiff or her witnesses about any oral statements that may have been made by the Plaintiff's medical care providers (excluding the Defendants), medical expert witnesses, or other non-parties. Such testimony is nothing more than inadmissible hearsay. Ark. R. Evid. 801, 802.

5. Financial Information of Defendants.

This is a bifurcated proceeding. Punitive damages are not addressed in this trial on the merits. Therefore, the financial information of the Defendants is not relevant and should not be admitted at trial. Ark. R. Evid. 401, 402, 403. Further, the finances, size of practice, or number of the Defendants' employees are not relevant and should not be admitted at a trial on the merits. Ark. R. Evid. 401, 402, 403. Still further, the Plaintiff should be prohibited from mentioning punitive damages or using inflammatory language, such as Defendants should be "punished" or any other similar "send a message" type language or reference. Such testimony or argument is not relevant in this trial, is unfairly prejudicial and should not be allowed. Ark. R. Evid. 401, 402, and 403.

Plaintiff's counsel should be precluded from eliciting any testimony regarding any conduct or statements that may have been made during settlement negotiations, or the fact that

settlement was offered, attempted, or reached between any of the parties to this suit. Any such evidence is inadmissible under Arkansas law. Ark. R. Evid. 408.

6. Reference to Exclusion of Evidence.

The very fact that the Defendants have filed a pre-trial motion addressing the admissibility of certain evidence, and has requested that certain evidence be excluded from the jury, should not be referred to or mentioned in the presence of the jury. It is not relevant to the issues that are before the jury and any probative value it might have would be substantially outweighed by the danger of unfair prejudice. Ark. R. Evid. 402 and 403.

Arkansas Rule of Evidence 402 states that relevant evidence is admissible, and evidence that is not relevant is not admissible. Ark. R. Evid. 402. Furthermore, Arkansas Rule of Evidence 403 provides that evidence, even if relevant, is inadmissible if its probative value is substantially outweighed by the danger of prejudice, confusion of the issues, or misleading the jury.

Since the only issue in this case is the standard of care provided to Plaintiff on the date of her surgery and following, any discussion of other alleged negligent acts by Defendants or any of their employees is irrelevant. The admission of any such testimony, evidence or argument about these matters would be made solely to prejudice the jury. This would unfairly prejudice Defendants and the impact of this evidence could not be removed by any correcting instruction from the Court. Therefore, Defendants respectfully request an appropriate Order from the Court preventing the introduction of this evidence, and further moves the Court to admonish the Plaintiff and her attorneys and witnesses from mentioning, referring to, or otherwise attempting to inject such evidence at trial.

7. Licensure by Health Department.

In the guise of an informed consent claim, Plaintiff will attempt to make the jury believe that Dr. Elkins was required to have a license from the Arkansas Health Department to perform the procedure at issue at his clinic. Dr. Elkins will testify that he has been conducting procedures at his clinic since at least as early as 1993 and that no one from the Arkansas Health Department, or any other governing authority, has ever instructed him to obtain a license. Defendants' facility was even accredited by the Accreditation Association for Ambulatory Health Care at the time of Plaintiff's procedure. When this case was first set for trial, Plaintiff's counsel issued a subpoena for Jane Gaskill of the Arkansas Health Department and she informed counsel that she could not testify that Defendant was required to have a license.

Plaintiff intends to ask this legal question of her medical expert, Dr. Kris Shewmake. In Dr. Shewmake's affidavit, he states "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." See Exhibit 1, ¶ 14. Dr. Shewmake goes on to say, "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."

Dr. Shemake cannot be allowed to testify about that information regarding licensure. His testimony is conjecture and he intends to rely solely on information provided by Plaintiff's attorneys. There is no foundation for admitting his testimony as an expert on regulatory or licensing issues.

The proof required for a lack of informed consent claim is set out by statute in Ark. Code Ann. § 16-114-206 (b)(2):

(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;

(emphasis added).

Dr. Shewmake simply intends to state that, based on the information provided by Plaintiff's attorney, Dr. Elkins' "surgery center" was required to be licensed and that he should have told Plaintiff if it was not. The statute requires proof that the physician failed to disclose risks, not regulatory matters. There is no evidence that Defendants licensure or lack thereof are related to any claim of damages or risk of the procedure at issues. Plaintiff simply intends to introduce this issue as an irrelevant, prejudicial attack on Defendants.

8. 2005 Consent Order

In another attempt to generally discredit Defendants, Plaintiff seeks to have Dr. Shewmake testify about a 2005 Medical Board Consent Order that is not related to this case. See Exhibit 1. He further makes reference to a 2005 consent order from the Arkansas Medical Board and claims that it obligated Dr. Elkins to refrain from practicing in an unlicensed center. This information is not only irrelevant but grossly misleading.

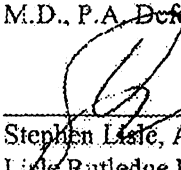
The Consent Order, entered on March 11, 2005, provided only that Dr. Elkins could only perform surgical procedures in a hospital or Health Department approved surgery center

"pending further Orders of the Board." The Order specifically stated that this was a limitation put in place while the Board was reviewing Dr. Elkins's facility and equipment. By subsequent Order issued February 2, 2006, the Board "released Dr. Elkins from any further monitoring." See Exhibit 2.

Plaintiff is simply trying to get into evidence unrelated matters in an attempt to generally discredit Defendants. As discussed above, such information is highly prejudicial and its probative value is substantially outweighed by the danger of unfair prejudice. The mere fact that there was a review conducted by the Medical Board involving Dr. Elkins does not make it more probable than not that he was negligent in this case. Therefore, there should be no mention of it in this case. Ark. R. Evid. 401, 402, 403.

WHEREFORE, in the light of the Motion in Limine filed herein, taken with the argument and discussion above, the Defendants respectfully pray that the Court grant the Defendants' Motion in Limine and direct the Plaintiff and her counsel as to the exclusion of certain testimony in this matter.

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 12th day of February 2013, 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
Attorney at Law
2801 Richmond Road, #57
Texarkana, TX 75503


Stephen Lisle

COPY OF TRANSCRIPT

Located here 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.

PAGE 83/83

1. The first step in the process of the investigation is the identification of the problem. This is done by the investigator who is responsible for the study. The investigator must first identify the problem that is being studied. This is done by the investigator who is responsible for the study. The investigator must first identify the problem that is being studied. This is done by the investigator who is responsible for the study.

Abstract

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 surgery with Dr. Bacon 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.

Minutes:

ELIGNS, James Philip, M.D. appeared in response to a request of the Board to discuss the details of issue #D5-103. After discussion and upon a motion by Dr. J. Zini, seconded by Dr. T. Pierce, the Board unanimously voted to accept Dr. Elign's appearance for information only. In addition the Board voted Dr. Elign is released from any further monitoring at this time.

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373

IN THE CIRCUIT COURT OF
BENTON COUNTY, ARKANSAS

FILED

Sue Poff

2013 FEB 19 AM 11 23

Plaintiff

vs.

NO. CV 12-261-4

BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR.

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

JURY REQUESTED

Defendants

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION IN LIMINE

Comes now, Plaintiff, and for this, her response to Defendants' Motion in Limine, would state:

1. SECTION NO 1 OF DEFENDANT'S MOTION—Plaintiffs agree that, absent the door being opened by questions from defense counsel or statements by defendant, prior negligent acts by the Defendant should be out of bounds for questions or statements.
2. SECTION NO 2 OF DEFENDANT'S MOTION —Plaintiffs agree that, absent the door being opened by questions from defense counsel or statements by defendant, the lack of medical malpractice insurance by the defendant should be out of bounds for questions or statements.
3. SECTION NO 3 OF DEFENDANT'S MOTION —Defendant has made it clear that he expects to offer expert opinions in his defense, including opinions on standard of care and causation. See Defendant's Response to Plaintiff's 12/31/12 Motion to Compel, page 3. (In their first response [to discovery] Defendants identified Dr. Elkins as a potential expert witness...in response to Plaintiffs' request for the identities of expert witnesses was the following: "Defendant **expects to testify**...it is expected that his testimony will include expert opinions related to all aspects of her treatment....")

A.C.A. 16-114-207(3) has been specifically held to be a constitutional statute, allowing a medical care provider to refuse to give expert testimony against himself. See *Whorton v. Dixon*, 214 s.w.3d 225 (ARK 2005). However, the *Whorton* Court specifically noted that the privilege not to testify is lost if the defendant voluntarily gives expert testimony in his favor. *Id* at 231. In short,

defendant simply cannot have his cake and eat it too. He has stated his intention to offer expert opinions in his defense, which waives the protection available under A.C.A. sec 16-114-206(3). The Court should deny the third portion of Defendant's Motion in Limine and allow Plaintiff to ask any relevant questions of Defendant about expert issues.

4. SECTION NO 4 OF DEFENDANT'S MOTION —Defendant claims that Arkansas law states that the Plaintiff may only put forth testimony from an expert who practices in the same specialty of the Defendants. This would have been an accurate statement of Arkansas Law prior to the decision of the Arkansas Supreme Court in the case of *Broussard v. St Edwards Mercy Health System, et al*, No. 11-561, decided January 19, 2012. The Court stated in *Broussard* that the challenged language, "By means of expert testimony provided only by a medical care provider of the same specialty as the defendant," which adds requirements to Rule 702, attempts to dictate procedure and invades the province of the judiciary's authority to set and control procedure. As such, it violates the separation of powers doctrine, Amendment 80, and the inherent authority of the courts to protect the integrity of proceedings and the rights of the litigants." The Court accordingly ruled the offending language unconstitutional.

The Court should deny the fourth portion of Defendant's Motion in Limine

5. SECTION NO 5 OF DEFENDANT'S MOTION —Plaintiff agrees that hearsay is not admissible. However, Plaintiff expects Ms. Poff to testify as to her understanding as to why she underwent various treatments subsequent to her laser surgery by the defendant. The Court should grant the Fifth portion of Defendant's Motion only to the extent that Plaintiff does not offer hearsay.

6. SECTION NO 6 OF DEFENDANT'S MOTION — Plaintiffs agree that, absent the door being opened by questions from defense counsel or statements by defendant, the issue of punitive damages is out of bounds for questions or statements during the compensatory stage of the proceedings, including any statements of sending a message with damages.

7. SECTION NO 7 OF DEFENDANT'S MOTION — Plaintiffs agree that, absent the door being opened by questions from defense counsel or statements by defendant, the issue of settlement negotiations is out of bounds for questions or statements. Plaintiffs have no objection to the seventh part of Defendants' Motion in Limine.

8. SECTION NO 8 OF DEFENDANT'S MOTION — Plaintiffs agree that, absent the door being opened by questions from defense counsel or statements by defendant, the issue of Defendants' pretrial motions is out of bounds for questions or statements. Plaintiffs have no objection to the eighth part of Defendants' Motion in Limine.

9. SECTIONS 7 and 8 OF DEFENDANT'S BRIEF: Defendant does not address licensure by the Arkansas Health Department in his Motion, but does have two long sections in his brief entitled, "Licensure by Health Department" and "2005 Consent Order." In those sections Defendant curiously quotes portions only of section (b)(2) of A.C.A. sec. 16-114-206 for the proof required for a lack of informed consent claim, but neglects to cite the relevant portion of the statute, which is section (b)(1). The entire portion of section (b)(1) of the statute reads:

(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. (Emphasis added.)

Section (b)(2), on the other hand, deals with matters which may be considered material issues, and reads, in its entirety:

(b)(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.

Both of Defendant's last two brief sections deal with licensure of his surgery center. The Court considered the issue of that licensure at our July 25, 2012, hearing, when the Court granted Plaintiff's Motion to Compel answers to written discovery concerning the licensure of the surgery center. Defendant has since admitted that his center is not, and never has been, licensed by the State of Arkansas. The requirements for licensure are contained within the Arkansas Department of Health Rules and Regulations for Hospitals and Related Institutions. As has been briefed previously by Plaintiff, if a surgery center utilizes intravenous anesthetics or administers such sedatives that a patient is unable to care for herself without assistance in the case of an emergency, that surgery center requires licensure by the Arkansas Department of Health. Dr. Shewmake's medical report makes it clear that it is his expert opinion that the intravenous narcotics and sedatives given to Ms. Poff by the defendant meet the above definition.

Dr. Shewmake also makes it clear that it is his expert opinion that, if a surgery center is required to be licensed and surgery is planned in such a center, the doctor has a duty to inform the patient of the lack of licensure. That is the minimum that would be required under A.C.A. sec. 16-114-206(b)(1). Contrary to Defendant's claim in his brief, the statute requires disclosure of "that type of information regarding the treatment, procedure, or surgery as would customarily have been given to a patient." Whether or not the patient would be expected to independently know of the risks or hazards of the procedure is simply one possible material issue the jury may consider. According to Dr. Shewmake's report and expected testimony, the circumstances of this case would require the disclosure of the licensure status of the clinic. That is to be Dr. Shewmake's testimony, and the Defendant will have opportunity to counter that testimony with his own opinions or to cross-examine Dr. Shewmake. Defendant does not have the right to bar testimony that is not only relevant but also material.

The Defendant argues that he was ignorant of the law and not aware that his center required licensing. See page 6 of Defendant's Response (Dr. Elkins will testify that he has been conducting procedures at his clinic since at least as early as 1993 and that no one at the Arkansas Health Department or any other governing authority has ever instructed him to obtain a license). That argument's disingenuousness is clear in light of the Consent Order attached as Exhibit No. 1 to Defendant's Motion in Limine. That Consent Order required the Defendant to 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 order by the Board." Defendant has not produced any Order (nor is Plaintiff aware of any such order from Defendant's file at the Arkansas Medical Board) of the Board that relates to the issue of where Defendant performs his surgery. That is an entirely different thing than the order produced by Defense Counsel, as an exhibit to his response, that says Defendant is no longer required to have a physician monitor for his surgeries.

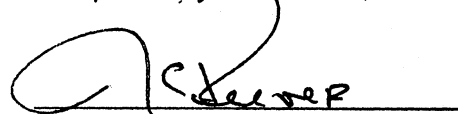
Just as disingenuous is Defendant's statement about Ms. Jane Gaskill on page 6 of his brief ([S]he informed counsel that she could not testify that Defendant was required to have a license.). Ms. Gaskill, as the in-house counsel for the Health Department, informed Plaintiff that she was not in a position to personally testify to anything because of her role as counsel, but confirmed that the Health Department had no documentation that defendant's center had been licensed from the period 1999 to 2011. See *attached* as Exhibit No. 1. If asked, Plaintiff believes that a representative of the Arkansas Health Department would testify that the responsibility for making himself aware of the rules and Regulations of the Department falls upon any person or entity operating a surgery center.

Regardless of Defendant's arguments, Ms. Poff has stated under oath and is expected to testify that the issue of the licensure of the center is a factor that would have been relevant and material to her in deciding whether or not to give her informed consent. Dr. Shewmake is expected to testify that, in his expert opinion, the drugs given to Ms. Poff place the surgery center under the ambit of the State Licensure Regulations. Dr. Shewmake is also expected to testify that he has participated in a similar surgery center in Arkansas, and that it is the obligation of the doctor to be aware of the relevant State Regulations regarding operating a surgery center, just as it is the doctor's obligation to be aware of the State Regulations on being licensed to practice medicine.

Plaintiff should be allowed to make inquiries into the status of the licensure of Defendant's surgery center, and to ask Defendant whether or not he disclosed the licensure status of his surgery center to Ms. Poff.

9. Plaintiffs would further ask that any restrictions on Plaintiff apply equally to Defendants.

Respectfully submitted,



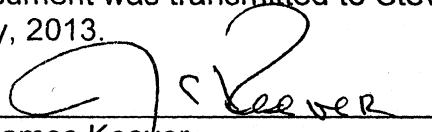
James Keever, M.D., J.D.
Arkansas Bar No. 2005176
2801 Richmond Road, # 57
Texarkana, Texas 75503
Telephone: (903) 79305316
Telecopier: (903) 642-0066
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and

Ken Swindle, J.D.
Arkansas Bar No. 97234
619 West Persimmon Street
Rogers AR 72756
Telephone: (479) 621-0120
Telecopier: (479) 621-0838
ken@swindlelawfirm.com

CERTIFICATE OF SERVICE

I hereby state the above document was transmitted to Steve Lisle, via
USPS on this, 15th day of February, 2013.


James Keever



RE: Poff v. Elkins SDT

Jane Gaskill <Jane.Gaskill@arkansas.gov>

Mon, Dec 5, 2011 at 1:33 PM

To: Jim Keever <kukeevs@keever.cc>, Ken Swindle <Ken@swindlelawfirm.com>

Ken and Jim:

FYI Staff's review for ASC license under the below names went back to 1999.

Jane Gaskill, Section Counsel

Arkansas Department of Health

From: Jim Keever [mailto:kukeevs@keever.cc]

Sent: Thursday, December 01, 2011 6:12 PM

To: Jane Gaskill

Subject: Re: Poff v. Elkoins SDT

And thank you, Jane. Ken would appreciate your simply destroying the check

Jim

On Thu, Dec 1, 2011 at 5:36 PM, Jane Gaskill <Jane.Gaskill@arkansas.gov> wrote:

Thank you, Jim.

I have provided Ken Swindle with an authenticated copy of the Ambulatory Surgery Center provider list which is the official record of all licensed ASCs in Arkansas. Upon diligent review, staff has found no record of past ASC license under the names Gynecology and Cosmetic Surgery Centre, James Elkins, MD or James P. Elkins MD PA.

The 2007 Rules and Regulations for Hospitals and Related Institutions in Arkansas which are in effect this date are available on the Arkansas Department of Health website by following this link:

<http://www.healthy.arkansas.gov/aboutADH/RulesRegs/Hospitals.pdf>

I believe that completes the list of documents. Ken, shall I destroy the check #3813 which accompanied the subpoena or would you like it returned?

Thank you gentlemen for your courtesies.

Jane Gaskill, Section Counsel

Arkansas Department of Health

Health Facility Services Section

5800 W. 10th St., Suite 400

Little Rock, AR 72204

(501) 661-2201

jane.gaskill@arkansas.gov

From: Jim Keever [mailto:kukeevs@keever.cc]

Sent: Thursday, December 01, 2011 4:35 PM

To: Jane Gaskill

Subject: Fwd: Poff v. Elkoins SDT

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS
CIVIL DIVISION

FILED

SUE POFF	)	PLAINTIFF	2013 FEB 20 AM 11 21
	)		
v.	)	No. CV 12-261-4	BRENDA DESHIELDS
	)		CLERK AND RECORDER
JAMES P. ELKINS, M.D. and	)		BENTON COUNTY, AR.
JAMES P. ELKINS, M.D., P.A.	)	DEFENDANTS	

**DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION TO PREADMIT TRIAL
EXHIBITS**

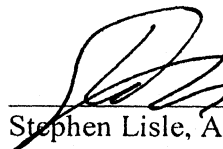
Come now Defendants, James P. Elkins, M.D. ("Elkins") and James P. Elkins, M.D., P.A., ("PA"), and for their Response to Plaintiff's Motion to Preadmit Trial Exhibits and state as follows:

Plaintiff's request to "preadmit" exhibits is improper. She provides no authority indicating that a party can ask the Court to admit evidence without first complying with all of the Rules of Evidence, including, authentication, showing or relevance, and that it is not subject to any other valid objection by the opposing counsel.

Defendants request that Plaintiff be required to meet her burden of proof with admissible evidence; that Plaintiff be required to comply with all of the Rules of Evidence when tendering exhibits for admission into evidence at trial; and, that Defendants be allowed to make all objections to admissibility as allowed under the Rules of Evidence.

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

By:


Stephen Lisle, AR Bar No. 94103

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✓

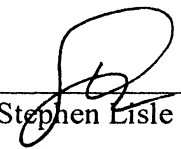
Lisle Rutledge P.A.
1458 Plaza Place, Suite 101
P. O. Box 7977
Springdale, AR 72766-7977
(479) 750-4444
(479) 751-6792 (facsimile)

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of February, 2013 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
Attorney at Law
2801 Richmond Road, #57
Texarkana, TX 75503



Stephen Lisle

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS
CIVIL DIVISION

FILED

SUE POFF	)	PLAINTIFF	2013 FEB 20 AM 11 21
	)		
v.	)	No. CV 12-261-4	BRENDA DESHIELDS
	)		CLERK AND RECORDER
JAMES P. ELKINS, M.D. and	)		BENTON COUNTY, AR.
JAMES P. ELKINS, M.D., P.A.	)	DEFENDANTS	

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION IN LIMINE

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 in Limine and state as follows:

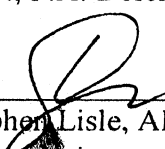
Plaintiff's medical history, both before and after the surgical procedure that is the subject of this case, is relevant to her claims. Her prior knowledge of the potential risks of cosmetic surgery is relevant to the claim for lack of consent that she has alleged in this case. Defendants further reserve the right to impeach any of plaintiff's testimony.

Plaintiff's ability or inability to pay for subsequent medical treatment may become relevant to the damages she claims in this case. Defendants request their right to a thorough cross-examination of Plaintiff on these issues.

Defendants have identified Dr. Elkins as an expert witness, and he expects to testify. He further expects to testify as to his experience in conducting the surgical procedure at issue in this case. Plaintiff's citation of support for exclusion of his testimony under the *Daubert* analysis does not apply.

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

By:


Stephen Lisle, AR Bar No. 94103

384

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 18th day of February, 2013 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
Attorney at Law
2801 Richmond Road, #57
Texarkana, TX 75503



Stephen Lisle

FILED

2013 FEB 20 PM 12 29

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS
CIVIL DIVISION

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' WITNESS AND EXHIBIT LISTS

Come now Defendants, James P. Elkins, M.D. ("Elkins") and James P. Elkins, M.D., P.A., ("PA"), and for their Witness and Exhibit Lists and submit as follows:

1. Witness List:
 - a. James Elkins, M.D.
 - b. Sue Poff
2. Exhibit List.
 - a. Dr. Elkins medical records related to the treatment of Sue Poff.
 - b. Consent forms for treatment signed by Sue Poff.
 - c. Sue Poff tax records.
 - d. Sue Poff business advertising.
 - e. Dr. Sharp medications summary.
 - f. Medical Records from Dr. Holden.

FAX

FEB 20 2013

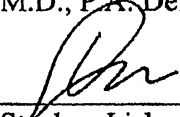
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Respectfully submitted,

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

By:



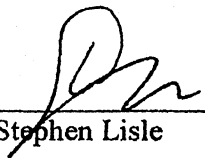
Stephen Lisle, AR Bar No. 94103
Lisle Rutledge P.A.
1458 Plaza Place, Suite 101
Springdale, AR 72764-5273
(479) 750-4444
(479) 751-6792 (facsimile)

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of February 2013, 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

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
2013 FEB 22 AM 8 36
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR.

PLAINTIFFS' MOTION AND BRIEF TO USE ITEMIZED VERDICT

Come now the Plaintiffs, and for their Motion and Brief to Use Itemized Verdict state:

I. MOTION

1. The parties disagree on the verdict form.
2. Plaintiffs believe that an itemized verdict form is more appropriate for use in their case. See, Plaintiffs' previously supplied Interrogatory No. 3.
3. Plaintiffs contemporaneously file a Brief in Support of their Motion.

II. BRIEF

The Defendant has denied liability. It is anticipated that the jury pool may consist of jurors who, as a life principal, do not believe in awarding damages for pain and suffering or disfigurement. If there is a general verdict form, if the jury awards no damages, it would be impossible to know whether the jury was finding for the Defendant on liability or finding for the Plaintiffs on liability but refusing to follow the law regarding the amount the damages incurred by the Estate and statutory beneficiaries. A jury is not allowed to fail to take into account all the elements of the total damages proven. *Tirado v. O'Hara*, 70 Ark. App. 152, 15 S.W.3d 715 (2000). However, there would be absolutely no way to ever know whether the jury was in fact failing to take into account all the elements proven with a general verdict form. For this reason, an itemized verdict form is more appropriate to ensure the protection of the Plaintiff's rights in the current matter.

An itemized form of jury verdict will help the Court by avoiding jury confusion and avoiding inconsistent verdicts, as well as by providing the Court with a basis to determine if a new trial on inadequacy of damages, or excessive damages, is appropriate.

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In addition, the Arkansas Supreme Court has strongly inferred that a party has the right to request the giving of an itemized form of jury verdict by stating that, "When special interrogatories concerning liability or damages are not requested, we are left in the position of not knowing the basis for the jury's verdict, and we will not question nor theorize about the jury's findings." *Tyson Foods, Inc. v. Davis*, 347 Ark. 566; 66 S.W.3d 568 (2002); *Esry v. Carden*, 328 Ark. 153, 942 S.W.2d 846 (1997); and, *Jefferson Hosp. Assn. v. Garrett*, 304 Ark. 679, 804 S.W.2d 711 (1991). See also, Brill, *Arkansas Practice Series: Law of Damages* §4:2 (5th ed.).

Moreover, itemized verdict forms should be used on separate pages for each verdict for each itemized element of damage, with the signature lines on each page, because it might be easier for the jury to reach a consensus of nine persons on each verdict rather than have to reach a single consensus of nine persons on all the elements of damages collectively. When the case is submitted on more than one interrogatory, any nine jurors may return a verdict. It is not necessary that the interrogatories, each of which constitutes a separate verdict, be signed by the same nine jurors when the verdict is not unanimous. See, e.g., *McChristian v. Hooten*, 245 Ark. 1045, 436 S.W.2d 855 (1969).

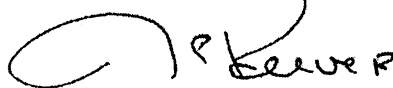
The law as embodied within AMI 2201 is that the jury shall render a verdict for each and every element of Plaintiff's damages caused by the Defendant's negligence. The only method for the Court and the parties to know whether the jury followed their legal duty is to give the itemized form of jury verdict on interrogatories. It is impossible to know whether the jury considered all the elements of damages proven by using only a general verdict form, and which in turn causes extreme prejudice to the Plaintiff.

A jury's failure to make an award for each element of damages is a gross error justifying a Judgment Notwithstanding the Verdict (JNOV) or requiring a new trial for the Plaintiff. In *Tirado v. O'Hara*, 70 Ark. App. 152, 15 S.W.3d 715 (2000), the trial court gave the same form of itemized jury verdict on interrogatories as requested herein, and the jury rendered an itemized verdict for past medical expenses in the amount of \$16,832.03, future medical expenses in the amount of \$25,000.00, the value of working time lost in the amount of \$10,500.00, and the value

of any ability to earn in the future in the amount of \$25,000.00. The jury awarded "\$0" for pain, suffering and mental anguish experienced in the past; awarded "\$0" for pain, suffering and mental anguish reasonably certain to be experienced in the future; and awarded "\$0" for the nature, extent and duration and permanency of Plaintiff's injury. The appellate court affirmed the trial court's order granting a new trial. The Court held that the jury verdict was erroneous and supported the granting of a new trial where, "the jury failed to take into account all the elements of the total injury proven". The Court also cited the case of *Saber Mfg. Co. v. Thompson*, 286 Ark. 150, 689 S.W.2d 567 (1985), that affirmed the granting of a new trial, "when the jury awarded damages only in the amount of the medical expenses incurred." The Court went on to note that "the jury failed to take into account all of the elements of Mr. O'Hara's damages . . . the injury manifested itself in the form of pain . . . It was also uniformly recognized in the testimony that the injury was most likely to some degree permanent."

There is absolutely no way to know whether the jury performed its duty to take into account all the elements of damages proven with a general verdict form. For this reason, an itemized verdict form is necessary to ensure the protection of the Plaintiffs' rights, as well as to help the Trial Court as noted above by avoiding jury confusion, avoiding inconsistent verdicts, providing a basis to determine any subrogation claims, and providing the Court with a basis to grant JNOV relief, and in the alternative to determine if a new trial should be granted, based upon inadequacy of damages or excessive damages.

Respectfully submitted,



JAMES E. KEEVER, M.D., J.D.
Arkansas Bar No. 2005176
2801 Richmond Road, # 57
Texarkana, Texas 75503
ATTORNEY FOR PLAINTIFFS

and

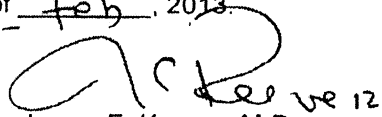
KEN SWINDLE
Ark. Bar #97234
1039 W. Walnut Ste. 2
Rogers AR 72756
Tel. (479) 621-0120

390

Fax (479) 621-0838

CERTIFICATE OF SERVICE

I, James E. Keever, M.D., J.D., certify that I have served a copy of the foregoing document to Steve Lisle via e-mail and facsimile on this the 21st day of Feb, 2013.


James E. Keever, M.D.

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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
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BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR.

PLAINTIFF'S MOTION AND BRIEF FOR PUNITIVE DAMAGES-QUALIFIED JURY

Comes now the Plaintiff, and for her Motion and Brief for a Punitive Damages-Qualified Jury hereby states:

1. This is a medical negligence claim in which Plaintiff has asked for both compensatory damages.
2. The Court has granted Defendants' Motion to bifurcate the compensatory and punitive phases of the trial.
3. Defendants have requested in a Motion in Limine that no mention be made of punitive damages during the compensatory phase of the trial.
4. While Plaintiff agrees that she should not mention the income of the Defendant nor ask about punitive damages during the compensatory phase of the trial, she asks that this prohibition not apply to an inquiry into attitudes regarding punitive damages during the voir dire in this case.
5. Specifically, Plaintiff requests that the Court disqualify from being seated as a jury any individual who holds out the attitude that punitive damages should not be assessed in a medical malpractice case.
6. Plaintiff would further request that the Court make the inquiry into attitudes, and that follow-up questions may be allowed by either party.

WHEREFORE, the Plaintiff respectfully requests that the Court, in accordance with the below-stated laws strike jurors who are not qualified to serve on a jury to determine punitive damages because they are substantially impaired from performing their duties.

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II. BRIEF

As the Court knows, persons are disqualified to act as jurors “who are not of good character or approved integrity, are lacking in sound judgment or reasonable information, are intemperate or are not of good behavior.” Ark. Code Ann. Sec. 16-31-102(a)(5)(A-D). For this reason, both the Court and, in the Court’s discretion, the attorneys may voir dire the potential jury and make challenges for cause. Ark. Code Ann. Secs. 16-33-101-102. The Constitution does not dictate a particular voir dire process; it demands only that the process be “adequate . . . to identify unqualified jurors.” *U.S. v. Quiones*, 511 F.3d 289, 301 (1992). For this reason, the Constitution does not prohibit states from death-qualifying juries. *Lockhart v. McCree*, 476 U.S. 162 (1986). Plaintiff believes that just as *Lockhart* allows death-qualifying juries, logic and equity would allow the same process in bifurcated punitive damages cases. Thus, said jurors are unqualified to serve on a plaintiff’s civil case pursuant to the Due Process Clauses just as potential jurors who are opposed to the punitive damage are unqualified to serve in a punitive damages case. U.S. Const., Amends. V; XIV.

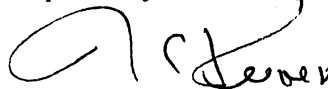
The Court has agreed to use jury questionnaires to help determine a juror’s qualification to serve. Ark. Code Ann. Sec. 16-33-101(c)(1)(A)(i). The Court may exclude jurors based upon their responses to written voir dire. *Miller v. State*, CR 08-1297 (2010). Also, the Eighth Circuit has upheld the removal of a prospective juror in a death-sentence case based upon that prospective juror’s written answers to a questionnaire expressing strong views against the death penalty. *U.S. v. Purkey*, 428 F.3d 738 (8th Cir. 2005).

Motions to strike a juror may be made for actual or implied bias. Ark. Code Ann. Sec. 16-33-304(b)(2)(A)-(B). It would be impossible to make a complete list of all the circumstance in which potential bias is evident. *See, e.g., Owens v. State*, 354 Ark. 644, 128 S.W.3d 445 (2003). Therefore, the Court must use its discretion to strike a juror where there is even the appearance of bias to one party. *See, e.g., Ruiz v. State*, 273 Ark. 94, 617 S.W.2d 6, cert. denied, 454 U.S. 1093, 102 S.Ct. 659 (1981). For example, the Court may strike a prospective juror for a “presumptive bias” based upon the jurors’ answers in voir dire and life experiences. This is true even when a juror subjectively believes that his or her opinions and life experiences would not influence the juror’s verdict. *See, e.g., Pickens v. State*, 260 Ark. 633, 542 S.W.2d 764 (1976). In fact, the Court can even refuse to allow opposing counsel to ask rehabilitative questions to prospective jurors. *Thessing v. State*, 365 Ark. 384, 230 S.W.3d 526 (2006). This is

so because the standard for juror qualification is not whether a juror subjectively believes that s/he can be fair or follow the law as the judge instructs the jury. "[T]he proper standard for determining when a prospective juror may be excluded for cause because of his or her views . . . is whether the juror's view would *substantially impair* the performance of his [or her] duties as a juror in accordance with his [or her] instructions and his [or her] oath." *Wainwright v. Witt*, 469 U.S. 412, 424 (1985)(footnote omitted) (emphasis added). In articulating the "substantial impairment" standard, the U.S. Supreme Court observed that:

[T]his standard does not require that a juror's bias be proved with "unmistakable clarity." This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law .*Id.*, 469 U.S. at 424-26, 105 S.Ct. at 852-53.

Respectfully submitted,



JAMES E. KEEVER, M.D., J.D.
Arkansas Bar No. 2005176
2801 Richmond Road, # 57
Texarkana, Texas 75503
ATTORNEY FOR PLAINTIFFS

and

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

CERTIFICATE OF SERVICE

I, James E. Keever, M.D., J.D., certify that I have served a copy of the foregoing document to Steve Lisle via e-mail and facsimile on this the 21st day of Feb, 2013.


James E. Keever, M.D.

IN THE CIRCUIT COURT OF
BENTON COUNTY, ARKANSAS

SUE POFF

PLAINTIFF

vs.

No. CIV 12-261-4

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

DEFENDANTS

FILED

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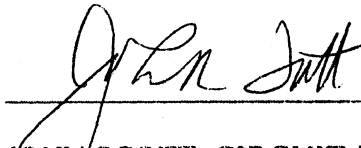
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BENTON COUNTY, AR.

ORDER ON PLAINTIFF'S MOTION TO PRE-ADMIT EXHIBITS

Plaintiff's Motion to Pre-admit Exhibits and her Amended Motion to Pre-admit

Exhibits is DENIED.

IT IS SO ORDERED THIS 22^d DAY OF February, 2013



JOHN SCOTT, CIRCUIT JUDGE
March 4, 2013

Prepared by:


James E. Keever

James E. Keever

Attorney for Plaintiff

CW13 002133 396✓

IN THE CIRCUIT COURT OF
BENTON COUNTY, ARKANSAS

SUE POFF

PLAINTIFF

vs.

No. CIV 12-261-4

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

DEFENDANTS

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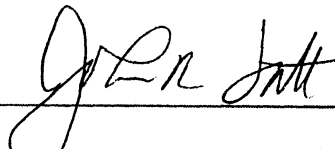
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BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR.

**ORDER ON PLAINTIFF'S MOTION FOR PUNITIVE DAMAGES-QUALIFIED
JURY**

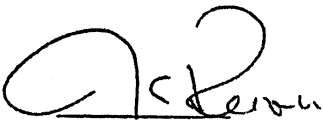
Plaintiff's Motion for Punitive Damages-Qualified Jury is DENIED.

IT IS SO ORDERED THIS 22^d DAY OF February, 2013



JOHN SCOTT, CIRCUIT JUDGE
March 4, 2013

Prepared by:



James E. Keever

Attorney for Plaintiff

CW13 002192

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397

IN THE CIRCUIT COURT OF
BENTON COUNTY, ARKANSAS

SUE POFF

PLAINTIFF

vs.

No. CIV 12-261-4

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

DEFENDANTS

FILED

2013 MAR 5 PM 12 37

BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR.

ORDER ON PLAINTIFF'S MOTION IN LIMINE

1. Part one of Plaintiff's Motion in Limine is DENIED. Defendant may inquire into the prior similar cosmetic procedures that Plaintiff had performed by Defendant to show knowledge of the risks of such cosmetic procedures.
2. Part two of Plaintiff's Motion in Limine is GRANTED. Defendant may not inquire of Plaintiff's prior bankruptcy proceedings.
3. Part three of Plaintiff's Motion in Limine is GRANTED. Defendant may make no reference to generate passion, prejudice or personal consequence to the defendant physician that might result from an adverse verdict, such as the effect it will have on his practice, standing in the medical community, relationship to the hospital, whether he would stay in the community, or any other negative effect upon the physician.
4. Part four of Plaintiff's Motion in Limine is GRANTED. Defendant may make no reference to any payment of attorney's fees to plaintiffs counsel from the verdict or the tax consequences of the verdict.

5. Part five of Plaintiff's Motion in Limine is GRANTED. No mention

should be made of any collateral source received by the plaintiff, and the Plaintiff shall not testify or present evidence as to her financial circumstances. JRS

CW13 002138 398

6. Part six of Plaintiff's Motion in Limine is GRANTED. Defense counsel is prohibited from making any reference or innuendo in closing argument or at any stage during the trial regarding the financial, social, or economic effect or impact of a verdict on behalf of the plaintiff and any adverse effect it may have on the Defendant individually, the practice of medicine, or medical services and their availability.

7. Part seven of Plaintiff's Motion in Limine is GRANTED. No reference should be made that an adverse verdict might result in a defendant losing his license, privileges, or his reputation would be damaged, or that the jury should not "convict" the defendant of medical malpractice, or that the doctor would be essentially put out of business.

8. Part eight of Plaintiff's Motion in Limine is GRANTED. No mention should be made by the Defendant, his witnesses, or defense counsel that this is a "frivolous suit."

9. Part nine of Plaintiff's Motion in Limine is GRANTED. No mention should be made of the number of medical negligence suits filed against physicians either in Arkansas or across the country in a given year, the success rate physician defendants may generally have in front of juries, or any other such generalized reference to medical negligence litigation.

10. Part ten of Plaintiff's Motion in Limine is GRANTED. No reference should be made that a verdict for the Plaintiff against the Defendant would amount to a "conviction."

11. Part eleven of Plaintiff's Motion in Limine is GRANTED. It is the Court's ruling that no doctor will be identified by the Court as an expert witness. Doctors

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CW13 002139

will be allowed to testify to matters within their competence and their status as an expert witness will be left to the jury.

12. Part four of Plaintiff's Motion in Limine is DENIED. Dr. Elkins may testify to matters within his competence as a medical doctor.

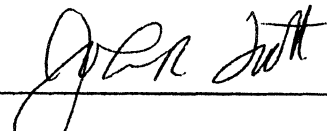
13. Part thirteen of Plaintiff's Motion in Limine is ^{Denied GR} GRANTED. Defendant, ^{may refer} Dr. Elkins, ~~is prohibited from making reference~~ to his treatment of other patients, and specifically ^{may} ~~shall not~~ make such statements as, "I used these same settings on other patients and they did just fine."

14. Part fourteen of Plaintiff's Motion in Limine is GRANTED. Defendant, Dr. Elkins, shall not offer any testimony based upon conversations with other physicians unless those physicians have been disclosed as testifying or consulting expert witnesses, and have been made available to Plaintiff for deposition. This ruling applies specifically particularly in the field of sedation and anesthesiology. Defendant may testify as to the drugs used in Ms. Poff, why he chose those drugs, and what he observed during that time, but any conversations with other doctors about the sedation of Ms. Poff is prohibited.

15. Part fifteen of Plaintiff's Motion in Limine is ^{DENIED} GRANTED. Defense ^{may ask} counsel is ~~prohibited from asking of the~~ lay witnesses of Plaintiff, Lisa Jones and Jill Sory, about Plaintiff's medical treatments following the laser surgery that is the subject of this lawsuit.

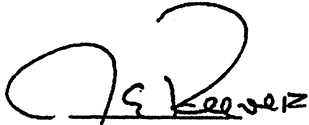
16. Part sixteen of Plaintiff's Motion in Limine is DENIED. Defendants may inquire into Plaintiff's mental health treatment.

IT IS SO ORDERED THIS 22nd DAY OF February, 2013



JOHN SCOTT, CIRCUIT JUDGE
March 4, 2013

Prepared by:



James E. Keever

James E. Keever

Attorney for Plaintiff

401

CW13 002131

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS
CIVIL DIVISION

SUE POFF)
)
v.)
)
JAMES P. ELKINS, M.D. and)
JAMES P. ELKINS, M.D., P.A.)

PLAINTIFF
No. CV 12-261-4
DEFENDANTS

FILED

2013 MAR 5 PM 12 37

BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR.

ORDER REGARDING DEFENDANTS' MOTION IN LIMINE

Comes now before this Court on this 22nd day of February, 2013, the Defendants' Motion in Limine. 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. Plaintiff does not object to Defendants' motion to exclude any evidence or allegation of prior acts of negligence by Defendants, and Defendant's motion to exclude such evidence is hereby GRANTED.

2. Plaintiff does not object to Defendants' motion to exclude any evidence or allegation of Defendants' medical liability insurance coverage, or lack thereof, at trial, and Defendant's motion to exclude such evidence is hereby GRANTED.

3. No witness will be allowed to testify as to the standard of care, a breach thereof, or causation without first demonstrating sufficient qualifications for stating such an opinion. Objections regarding a witness's qualifications for stating an expert opinion shall be addressed at trial. Non-doctors will not be allowed to state opinions on matters that require the opinion of a properly qualified physician. If Dr. James Elkins provides testimony regarding the standard of care, Plaintiff shall be entitled to cross-examine him on those opinions.

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CW13 002185 402

4. Plaintiff does not object to Defendants' motion to exclude all hearsay testimony from the Plaintiff or her witnesses about any oral statements that may have been made by the Plaintiff's medical care providers (excluding the Defendants), medical expert witnesses, or other non-parties, and Defendant's motion to exclude such evidence is hereby GRANTED.

5. Plaintiff does not object to Defendants' motion to exclude all evidence concerning the financial information of the Defendants and all arguments about punitive damages and punishing Defendants during the compensatory phase of the trial, and Defendant's motion to exclude such evidence is hereby GRANTED.

6. Plaintiff does not object to Defendants' motion to exclude any mention that certain evidence shall be excluded, and Defendant's motion preventing any mention of the exclusion of evidence is hereby GRANTED.

7. Defendant's motion to exclude any mention of Defendants' licensure, or lack thereof, by the Arkansas Health Department is GRANTED.

8. Defendant's motion to exclude any evidence about, or mention of, Defendants' 2005 Medical Board Consent Order is GRANTED.

IT IS SO ORDERED.



HONORABLE JOHN R. SCOTT
CIRCUIT JUDGE

March 4, 2013

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

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

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

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BRENDA DESHIELDS
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BENTON COUNTY, AR.

PLAINTIFF'S MARCH 11, 2013, MOTION IN LIMINE AND BRIEF IN SUPPORT

Comes now the Plaintiff and for her March 11, 2013, Motion in Limine and Brief in

Support states:

I. MOTION

1. Plaintiff previously filed a Motion in Limine in this matter.

2. As part of said motion, Plaintiff moved for an order that: "No mention should be made of any collateral source received by the Plaintiff. See, *Parrish v. Newton*, 298 Ark. 404, 768 S.W.2d 17 (1989) (Evidence showing an injured person received a benefit from a collateral source is inadmissible unless relevant for some purpose other than the mitigation of damages)."

Plaintiff's Motion in Limine, para. 5.

3. Counsel for Defendants objected and argued that he should be allowed to question the Plaintiff about her health insurance if Plaintiff testifies that she has been unable to afford recommended remedial treatment.

4. Counsel for the Plaintiff, without citation to any law, disagreed with Counsel for the Defendant.

5. On March 5, 2013, the Court granted said motion and added that "Plaintiff shall not testify or present evidence as to her financial condition."

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CLERK AND RECORDER
BENTON COUNTY, AR.

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6. Upon further research, and for the reasons stated in Plaintiff's brief below, the Plaintiff is of the opinion that she was incorrect in her argument referenced above. Therefore, Plaintiff moves in limine for permission to introduce her collateral sources (or lack thereof) and of her financial condition in the context that she was forced to forego additional medical care.

WHEREFORE, the Plaintiff prays for an order from this Court allowing her to testify regarding her collateral sources (or lack thereof) and of her financial condition in the context that she was forced to forego additional medical care and further allowing Counsel for the Defendants to question Plaintiff on the issue of health insurance upon testimony by the Plaintiff regarding her collateral sources (or lack thereof) and of her financial condition.

II. BRIEF IN SUPPORT

a. The Rules of Evidence

There are two insurance exclusionary rules about which attorneys are sometimes confused. Firstly, there is a rule excluding evidence of liability insurance. That rule is explicitly contained in the Federal Rules of Evidence, Rule 411¹, but the rule was not explicitly adopted by the Arkansas Supreme Court. Even without the specific rule of evidence, there is ample case law in Arkansas adopting the same principle. *See, e.g., Pekin Stave & Mfg. Co. v. Ramey*, 104 Ark. 1, 147 S.W. 83 (1912). However, evidence of insurance can be admissible when a party seeks to use the liability insurance to prove a matter other than fault. *See, e.g. Peters v. Pierce*, 308 Ark. 60, 823 S.W.2d 820 (1992) (to correct misleading the jury); *Ashmore v. Ford*, 267 Ark 854 (Ark.

¹ "Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or proving agency, ownership, or control." Fed. R. Evid. 411. The treatise *McCormick on Evidence* criticizes the general rule that insurance is inadmissible. *Id.* 6th Edit. (2006) §201. The Notes on Rule 411 of the Federal Rules of Evidence cite *McCormick* and generally agree that insurance can be admissible if used for some purpose other than to prove fault.

App. 1979) (to show ownership or control); *Phillips Co-op v. Toll* 232 Ark 236 (1960) (to show employment or independent contractor); *Dedmon v. Thalheimer*, 226 Ark 402 (1956) (to allow voir dire about liability insurance).

b. The Collateral Source Rule

The second exclusionary rule is the “collateral source” rule. “The collateral source rule is both a principle of the substantive law of damages, providing that a plaintiff’s receipt of benefits or payments from the collateral source does not reduce the plaintiff’s recovery from defendant, and a rule of evidence, generally precluding a defendant from eliciting or introducing evidence of such payments.” AMI 2215, Comment. A trial court must “exclude evidence of payments received by an injured party from sources ‘collateral’ to . . . the wrongdoer, such as private insurance or government benefits”. *Bell v. Estate of Bell*, 318 Ark. 483, 490, 885 S.W.2d 877, 880 (1994). Recoveries from collateral sources “do not redound to the benefit of a tortfeasor, even though double recovery for the same damage by the injured party may result.” *Id.* at 490, 880.

Like the liability insurance exclusionary rule, the collateral source rule is subject to exceptions:

We recognize four situations in which the rule does not apply, as explained in *Evans v. Wilson*, 279 Ark. 224, 650 S.W.2d 569 (1983). They are cases in which a collateral source of recovery may be introduced (1) to rebut the plaintiff’s testimony that he or she was compelled by financial necessity to return to work prematurely or **to forego additional medical care**; (2) to show that the plaintiff had attributed his condition to some other cause, such as sickness; (3) to impeach the plaintiff’s testimony that he or she had paid his medical expenses himself; (4) to show that the plaintiff had actually continued to work instead of being out of work, as claimed. *Id.* at 226, 650 S.W.2d at 570. See also *Arkansas Law of Damages* §9-4 (Howard Brill, 3d. Ed. 1994). This Court has also allowed evidence of collateral sources when the plaintiff opens the door to his or her

financial condition. See *Babbitt v. Quik-Way Lube & Tire, Inc.*, 313 Ark. 207, 853 S.W.2d 273 (1993); *Younts v. Baldor Electric Co.*, 310 Ark. 86, 832 S.W.2d 832 (1992).

Montgomery Ward & Co., Inc. v. Anderson, 334 Ark. 561, 566, 976 S.W.2d 382, 384-85 (1998) (emphasis supplied).

c. A Party's Own Insurance

Neither the liability insurance exclusionary rule nor the collateral source rule address whether a party may introduce evidence of his own insurance (let alone lack of insurance). The rule is frequently stated, “[a]s a general rule, it is improper for either party to introduce or elicit evidence of the other party’s insurance coverage.” *Esry v. Carden*, 328 Ark.153, 942 S.W.2d 846 (1997) (emphasis supplied); *Younts v. Baldor Elec. Co., Inc.*, 310 Ark. 86, 89, 832 S.W.2d 832, 834 (1992).²

Relevant evidence is admissible unless it is excluded by another rule. The Court must therefore ask if Plaintiff’s lack of coverage is relevant. Rule 401 defines “relevant evidence” as that “having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Ark. R. Evid. 401 (emphasis supplied.) Under Rule 402 of the Arkansas Rules of Evidence, “All relevant evidence is admissible except as otherwise provided by statute or by these rules or by other rules applicable in the courts of this State.”

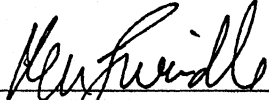
Here, Plaintiff contends that her lack of health insurance is relevant to show why she has

² The reference to “the other party’s insurance” appears in numerous Arkansas cases. See, e.g. *Peters v. Pierce*, 308 Ark. 60, 823 S.W.2d 820 (1992); *York v. Young*, 271 Ark. 266, 608 S.W.2d 20 (1980); *Dovers v. Stephenson Oil Co., Inc.*, 354 Ark. 695, 707, 128 S.W.3d 805, 812 (2003); *Synergy Gas Corp. v. Lindsey*, 311 Ark. 265, 269, 843 S.W.2d 825, 828 (1992); *Rose Care, Inc. v. Ross*, 91 Ark. App. 187, 206, 209 S.W.3d 393, 405 (2005); *Williams v. Alexander*, CA 06-803, 2007 WL 3088258 (Ark. Ct. App. Oct. 24, 2007); *Ethyl Corp. v. McBroom*, CA98-596, 1999 WL 318036 (Ark. Ct. App. May 12, 1999).

not received all the health care she needs. It is likely that a jury would wonder why someone with complaints as serious as those voiced by the Plaintiff would have had as little medical care as she has. The Plaintiff's lack of insurance is relevant. Unlike the case in *York, supra*, Plaintiff's testimony that she was uninsured for the treatment recommended and that she was unable to afford what she needed would not be misleading, but would be truthful and is relevant to explain why he did not get that treatment. There is no reason to exclude it if a valid other purpose exists to admit it.

This is an unusual issue. Indeed Plaintiff has found no case where this exact scenario has arisen. Perhaps that is because no one ever raises an objection to a party revealing his own insurance or lack of it. However, the repeated references by the appellate courts that evidence of the *other party's insurance* is inadmissible suggest that evidence of one's own insurance (or lack of it) is perfectly acceptable.

Respectfully submitted,

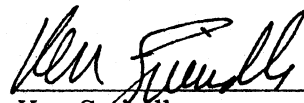
BY: 
KEN SWINDLE
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and

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2801 Richmond Road, # 57
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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, and email, slisle@lislerutledge.com, on this, the 10th day of March, 2013.


Ken Swindle

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS
CIVIL DIVISION

FILED

2013 MAR 13 AM 10 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

BRIEF IN SUPPORT OF MOTION FOR DIRECTED VERDICT

Come now James P. Elkins, M.D., James P. Elkins, M.D., P.A., Defendants, and for their
Brief in Support of Motion for a Directed Verdict and state:

Directed Verdict Challenge

The facts of this case are nearly identical to that of *Williamson v. Elrod*, 348 Ark. 307, 72 S.W.3d 489 (2002). In that case, the Arkansas Supreme Court ruled that the trial court should have directed a verdict in favor of the defendant doctor because the plaintiff's expert failed to establish the standard of care in the locality in which the defendant practiced medicine. In so ruling, the Court held that the defendant was not obligated to object to the expert's testimony during direct or cross-examination. Rather, the appropriate time to raise the issue with the trial court was through the directed-verdict motion. *Williamson*, 72 S.W.3d at 492-493.

Plaintiff's Burden of Proof

Plaintiff alleges that she was injured when Elkins performed fractional DOT CO2 laser treatment on her. Complaint ¶9. Plaintiff specifically alleges 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 Shewmake and permanent scarring." Complaint ¶12. Plaintiff further alleges that she incurred damages as a result of

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Defendants' "act of medical negligence." She also claims 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 plaintiff] . . . by other medical care providers with similar training and experience at the time of the treatment . . . in the locality in which [Defendant] practices." Complaint ¶13.

Plaintiff's assertions of negligence and lack of consent do not lie within a jury's comprehension as a matter of common knowledge. The standard of care applicable to a DOT CO2 laser treatment and the proper execution of that procedure are not common knowledge. In addition, it is not common knowledge whether or not such an alleged breach of the standard of care is the proximate cause of any injuries sustained by Plaintiff. The issue of what information would have been provided by other medical-care providers in obtaining consent for surgery is also beyond the scope of common knowledge.

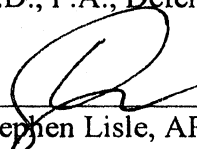
Establishment of Local Standard of Care is a Necessary Element of Proof.

Plaintiff has not produced any admissible evidence on some of the elements of her case. "In actions for medical injury, the plaintiff has the burden of proving three propositions by expert testimony: the applicable standard of care, that the medical provider failed to act in accordance with that standard and that such failure was the proximate cause of the plaintiff's injuries." *Dodd v. Sparks Regional Medical Center*, 90 Ark. App. 191, 197, 204 S.W.3d 579, 583 (2005). Ark. Code Ann. §16-114-206(a). When expert testimony is required for proof of a plaintiff's claim for medical malpractice and a defendant demonstrates the plaintiff's failure to produce such testimony, there are no genuine issues of material fact and the defendant is entitled to summary judgment as a matter of law. *Robson v. Tinnin*, 322 Ark. 605, 911 S.W.2d 246 (1995).

Dr. Shewmake's testimony does not provide sufficient proof to support Plaintiff's claim. The testimony presented by Plaintiff is devoid of any mention of the standard of care in Benton County, Arkansas, and is therefore insufficient to create a question of fact on the issue. *Williamson v. Elrod*, 348 Ark. 307, 73 S.W.3d 489 (2002); *Mitchell v. Lincoln*, 366 Ark. 592, 237 S.W.3d 455 (2006). The plaintiff must provide specific proof about what the standard of care is and how it was breached, not merely "broad statements about the incident." *Reagan v. City of Piggott*, 305 Ark. 77, 805 S.W.2d 636 (1991). Plaintiff must first prove the applicable standard of care before presenting testimony that the defendant failed to meet the standard. *Williamson, supra*, 72 S.W.3d at 492. Dr. Shewmake failed to state what the relevant standard is. He merely testified that Dr. Elkins used laser settings that were higher than the guidelines in the manufacturer's operating manual. The operating manual itself clearly states that it is not to be relied on for treatment standards and the CEO of the laser manufacturer testified that the setting in the manual were "conservative entry levels." While he testified that Dr. Elkins failed to meet the standard of care, he failed to first establish what the standard is. Therefore, the court should direct a verdict for the Defendants.

WHEREFORE, Defendants request that a directed verdict be granted in their favor, and that they be awarded their attorneys' fees and costs incurred in defending this action, as well as 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 13th day of March 2013 a true and correct copy of the foregoing has hand-delivered 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

FILED

v.

No. CV 2012-0261-4

2013 MAR 14 AM 8 54

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

DEFENDANTS

BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR.

INTERROGATORY NO. 1

Do you find from a preponderance of the evidence that James P. Elkins, M.D. was negligent in relation to the care and treatment of Sue Poff which was a proximate cause of any damages to Sue Poff?

ANSWER: _____ YES ☒ NO

FOREPERSON

IF NOT UNANIMOUS, BUT NINE (9) OR MORE AGREE, EACH MUST SIGN:

Stan O'Neil
Paul O'Neil
Harleen Olson
K. K. O.
Caren Hensley
Nidia Starling
Dave Mason

Larry D. Pruitt
Kenneth A. Reynolds
Bill A. Holcomb

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS

SUE POFF

) PLAINTIFF

FILED

v.

) No. CV 2012-02 ~~2013~~ MAR 14 AM 8 54

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

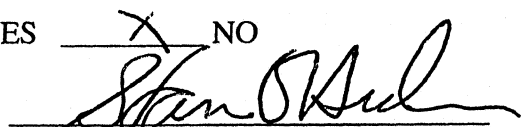
) DEFENDANTS

BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR.

INTERROGATORY NO. 2

Do you find from a preponderance of the evidence that (a) Ms. Poff, or a person of ordinary intelligence and of awareness in a position similar to that of Ms. Poff, could not reasonably be expected to know of the risks or hazards inherent in the treatment provided by James P. Elkins, M.D., (b) Ms. Poff would not have undergone treatment because of the risks involved, and (c) James P. Elkins, M.D. failed to provide Sue Poff adequate information to enable Sue Poff to make a reasoned and intelligent decision to give or withhold consent for the treatment of Sue Poff, and (d) such a failure was a proximate cause of any damages to Sue Poff?

ANSWER: _____ YES ☒ NO


FOREPERSON

IF NOT UNANIMOUS, BUT NINE (9) OR MORE AGREE, EACH MUST SIGN:

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
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IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS
CIVIL DIVISION

FILED

2013 MAR 21 PM 1 06

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

BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR.

JUDGMENT

On the 11th day of March, 2013 this cause came on to be heard, Plaintiff appearing in person and by her attorneys, James Keever and Ken Swindle, and the Defendants appearing in person and by their attorney, Steve Lisle, and all parties being prepared for trial, a jury composed of twelve members of the regular panel of petit jurors of this court was selected, impaneled, and sworn according to law to try the issues of fact arising in this case. After hearing all of the evidence introduced, the instructions of the court and the arguments of counsel, the jury retired to consider its verdict, and after deliberating thereon returned the following verdict:

INTERROGATORY NO. 1

Do you find from a preponderance of the evidence that James P. Elkins, M.D. was negligent in relation to the care and treatment of Sue Poff which was a proximate cause of any damages to Sue Poff?

Answer: ___ YES X No

FOREPERSON

IF NOT UNANIMOUS, BUT NINE (9) OR MORE AGREE, EACH MUST SIGN:

/s/ Stanley D' Aubin
/s/ Pamela Hogate
/s/ Darleen Olson
/s/ Kendra Andrews
/s/ Carlee Hensley

/s/ Larry Pruitt
/s/ Kenneth Reynolds
/s/ Betty Holcomb

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/s/ Nidia Sterling
/s/ David Mason

and

"INTERROGATORY NO. 2

Do you find from a preponderance of the evidence that (a) Ms. Poff, or a person of ordinary intelligence and of awareness in a position similar to that of Ms. Poff, could not reasonably be expected to know of the risks or hazards inherent in the treatment provided by James P. Elkins, M.D., (b) Ms. Poff would not have undergone treatment because of the risks involved, and (c) James P. Elkins, M.D. failed to provide Sue Poff adequate information to enable Sue Poff to make a reasoned and intelligent decision to give or withhold consent for the treatment of Sue Poff, and (d) such a failure was a proximate cause of any damages to Sue Poff?

Answer: ____ YES X No

/s/ Stanley D'Aubin
FOREPERSON"

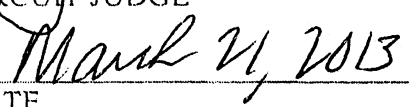
The verdict as to Interrogatory Number 1 was agreed to and signed by ten jurors, is in proper form, and is accepted by the Court.

The verdict as to Interrogatory Number 2 was unanimous, signed by the jury foreman, Stanley D'Aubin, is in proper form, and is accepted by the Court.

It is therefore by the Court, Considered, Ordered and Adjudged that the complaint of the Plaintiff, Sue Poff, against the Defendants, James P. Elkins, M.D. and James P. Elkins, M.D., P.A., is hereby dismissed with prejudice and that Plaintiff recovers nothing from Defendants.

IT IS SO ORDERED.



HONORABLE JOHN R. SCOTT
CIRCUIT JUDGE


DATE

Prepared by:



Stephen A. Lisle, ABA # 94103
Lisle Rutledge, P.A.
P.O. Box 7977
Springdale, AR 72766

cc:

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

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

FILED

2013 APR 5 AM 10 41

**IN THE CIRCUIT COURT OF
BENTON COUNTY, ARKANSAS**

BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR.

Sue Poff

Plaintiff

vs.

²⁶¹
NO. CV 12-~~021~~-4

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

JURY REQUESTED

Defendants

NOTICE OF APPEAL

Notice is hereby given that Plaintiff Sue Poff, appeals to the Arkansas Court of Appeals from the Judgment entered on March 21, 2013, which dismissed the Complaint of the Plaintiff with prejudice. Plaintiff also appeals all adverse rulings by the Court in this case, including, but not limited to, the *sua sponte* Directed Verdict regarding Plaintiff's claim for punitive damages, all adverse pre-trial rulings, and all adverse rulings during the trial.

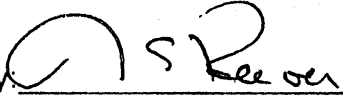
Plaintiff believes there are no unresolved claims in this case, and if any unresolved claims exist Plaintiff abandons such claims pursuant to Rule 3(e)(vi) of the Arkansas Rules of Appellate procedure—Civil.

Plaintiff hereby designates for inclusion in the contents of the record on appeal the entire Circuit Court record and all proceedings (including, without limitation, all pre-trial hearings and rulings, and all items submitted to the Court *in camera*), orders, pleadings, exhibits, testimony and all other evidence presented, introduced or proffered in the matter. This designation includes all briefs, pleadings, hearing, rulings and orders in this case, including all the evidence, transcripts of all hearings and testimony, and all pleadings and rulings filed with the Circuit Clerk .

420
✓

Appellants have ordered the designated portions of the trial transcripts and the record as designated above from the Court Reporter(s), and any financial arrangements for transcribing and copying the record have been made pursuant to Ark. Code Ann Sec. 16-13-510(c).

Respectfully submitted,
Attorneys for Plaintiffs;

By: 
James E. Keever, M.D., J.D.
2801 Richmond Road PMB # 57
(903) 793 5316
kukeevs@keever.cc
Arkansas Bar # 2005176
Telephone (903) 793-5319
Facsimile (903) 642-006

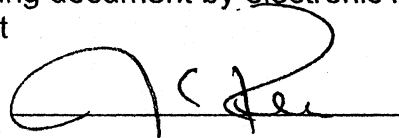
And

Ken Swindle
Arkansas Bar No. 97234
619 West Persimmon Street
Rogers AR 72756
Telephone: (479) 621-0120
Facsimile: (479) 621-0838

And

CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing document by electronic mail a true copy to Steve Lisle, attorney for Defendant on this 3rd day of April, 2013.


James Keever

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
2013 APR 8 AM 11 11
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR.

**PLAINTIFFS' MOTION FOR EXTENSION OF TIME TO
DOCKET RECORD WITH THE CLERK OF THE SUPREME COURT**

Comes now the Plaintiff, Sue Poff, and hereby states:

1. This is a medical malpractice case which was tried to a jury with an entry of Judgment in favor of the Defendants which dismissed Plaintiff's case with Prejudice, filed with the Clerk on March 21, 2013.
2. Plaintiff filed her Notice of Appeal on April 5, 2013.
3. Under Arkansas Rule of Appellant Procedure - Civil 5(a), Plaintiff's Record on Appeal is to be docketed no later than 90 days from March 21, 2013.
4. Plaintiff has fulfilled her obligations under Rule 6(b) in ordering her record for appeal, and made any financial arrangements necessary for its preparation.
5. The time to file her Record on Appeal has not expired.
6. Due to the demands of the docket and the current workload of the Court Reporters, an extension of time is necessary for the Reporter to include the stenographically reported material in the record on appeal.
7. Plaintiff asks for an extension of time until September 21, 2013, to lodge her record on appeal with the Clerk of the Supreme Court pursuant to Arkansas Rule of Appellate

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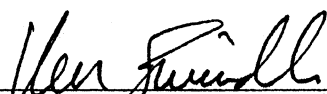
Civil Procedure 5(b).

8. Counsel for Defense has no objection to this motion and has approved Plaintiffs' proposed order. See attached as Exhibit No. 1.

WHEREFORE, FOR PREMISES STATED, Plaintiff respectfully asks that Plaintiff's time to lodge her record on appeal with the Clerk of the Supreme Court be extended until September 21, 2013.

Respectfully submitted,

BY:

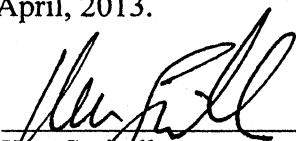

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and

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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 8th day of April, 2013.


Ken Swindle

2013-04-04

Fax

To : All

From : Lisle Rutledge P.A.

Stephen A. Lisle / mrc

Phone : 479-750-444

FAX Number : 479-751-6792

Total Number of Pages (including cover) : 3

Re : Re: Poff v. Elkins

Signed Order to Extend Time to File Record to follow.



LISLE | RUTLEDGE
ATTORNEYS

John Lisle (of counsel)
Chris Lisle
Donnie Rutledge
Stephen Lisle

1458 Plaza Place
Springdale, AR 72764
P 479.750.4444
F 479.751.6792
www.lislerutledge.com

James K. Hatcher
Gino Franco
Mona J. Teague

Message:

CONFIDENTIALITY NOTE: The information in this facsimile transmitted is legally privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of the transmittal is strictly prohibited. If you receive this transmittal in error, please immediately notify us by telephone, and return the original transmittal to us at the above address via the United States Postal Service. Thank you.

424

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

ORDER TO EXTEND TIME TO FILE THE RECORD

Before the Court is a motion pursuant to Rule 5 (b) of the Rules of Appellate Procedure-Civil to extend the time to file the record on appeal in order for the court reporter to include stenographically reported material. The Court makes the following findings:

1. SUE POFF ("Appellant") has filed a motion explaining the reasons for the requested extension.
2. Appellant has served the motion on all counsel of record and pro se parties.
3. The time to file the record on appeal has not yet expired.
4. All parties have had the opportunity to be heard on the motion, and hereby expressly waive the necessity of a hearing and agree to the extension.
5. Appellant, as required by Rule 6 (b) of the Rules of Appellate Procedure-Civil, has timely ordered the stenographically reported material from the court reporter and made any financial arrangements required for its preparation.
6. Due to the demands of the docket and her current workload, an extension of time is necessary for the court reporter to include the stenographically reported material in the record on appeal.

Based on these findings, good cause has been shown to extend the time to file the record on appeal.

IT IS THEREFORE ORDERED that Appellant's motion is granted. The time for filing the record is extended to October 18th, 2013, which is within the seven month deadline set by Ark. R. App. P.-Civil 5 (b)(2).

John R. Scott
CIRCUIT COURT JUDGE

Dated: _____

APPROVED AS TO FORM AND CONTENT:


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

and


KEN SWINDLE
Attorneys for Plaintiff


STEPHEN LISLE
Attorney for Defendants

FILED

2013 APR 8 PM 3 10

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS
DIVISION 4BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR.

SUE POFF

PLAINTIFF

CASE NO. CIV-2012-0261-4

v.

JAMES P. ELKINS, M.D., and

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

DEFENDANTS

ORDER TO EXTEND TIME TO FILE THE RECORD

Before the Court is a motion pursuant to Rule 5 (b) of the Rules of Appellate Procedure-Civil to extend the time to file the record on appeal in order for the court reporter to include stenographically reported material. The Court makes the following findings:

1. SUE POFF ("Appellant") has filed a motion explaining the reasons for the requested extension.
2. Appellant has served the motion on all counsel of record and pro se parties.
3. The time to file the record on appeal has not yet expired.
4. All parties have had the opportunity to be heard on the motion, and hereby expressly waive the necessity of a hearing and agree to the extension.
5. Appellant, as required by Rule 6 (b) of the Rules of Appellate Procedure-Civil, has timely ordered the stenographically reported material from the court reporter and made any financial arrangements required for its preparation.
6. Due to the demands of the docket and her current workload, an extension of time is necessary for the court reporter to include the stenographically reported material in the record on appeal.

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Based on these findings, good cause has been shown to extend the time to file the record on appeal.

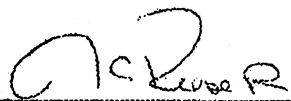
IT IS THEREFORE ORDERED that Appellant's motion is granted. The time for filing the record is extended to October 18th, 2013, which is within the seven month deadline set by Ark. R. App. P.-Civil 5 (b)(2).

John R. Scott

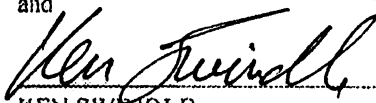
CIRCUIT COURT JUDGE

Dated: April 8, 2013

APPROVED AS TO FORM AND CONTENT:


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

and


KEN SWINDLE
Attorneys for Plaintiff


STEPHEN LISLE
Attorney for Defendants

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS

SUE POFF) PLAINTIFF 2013 SEP 16 AM 11 24
)
v.) NO. CV 12-261-4 BRENDA DESHIELDS
) CLERK AND RECORDER
JAMES P. ELKINS,) BENTON COUNTY, AR.
M.D., and JAMES P.)
ELKINS, M.D., P.A.) DEFENDANTS

PLAINTIFF'S MOTION AND BRIEF TO SEAL COPY OF THE RECORD

Comes now the Plaintiff, Sue Poff, and hereby moves this Court for an order to seal the exhibits in this matter, and as grounds therefore states:

1. Plaintiff has appealed the judgment in this case.
2. The record is due October 18, 2013.
3. The exhibits in this case contain numerous medical records and other information deemed confidential pursuant to Administrative Orders of the Supreme Court, Number 19.
4. When a copy of the record is prepared, the Benton County Circuit Clerk's Office will maintain a copy of the record.
5. Plaintiff moves for an order to seal the copy of the record after the Court's Reporter prepares it and the Circuit Clerk file-marks it.
6. Plaintiff will make a separate motion to seal the record to be lodged with the Clerk of the Arkansas Supreme Court and Arkansas Court of Appeals.

WHEREFORE, Plaintiff requests an order to seal the copy of the record after the Court's Reporter prepares it and the Circuit Clerk file-marks it.

Respectfully submitted,

BY: 
KEN SWINDLE

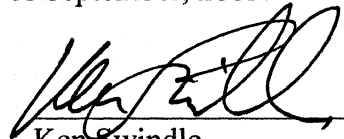
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CERTIFICATE OF SERVICE

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 13th day of September, 2013.


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

The Plaintiff/Appellant's Motion to Seal is granted. The copy of the record shall be sealed after it is prepared and file-marked.

WHEREFORE, the Plaintiff/Appellant's Motion to Seal the record that remains with the Benton County Circuit Court after it is filed should be and hereby is granted.

IT IS SO ORDERED.


Honorable John Scott
Benton County Circuit Court
Division Four

Date: September 26, 2013

FILED
2013 SEP 26 PM 1 08
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR.

FILED

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS

2013 SEP 26 PM 1 53

SUE POFF

BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR

CASE NO: CIV-2012-0261-4

v.

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

DEFENDANTS

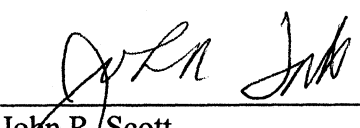
ORDER

NOW ON this 26th day of September, 2013, this matter comes before the Court, *sua sponte*, regarding the appeal record to be submitted to the Court of Appeals and related documents and/or exhibits to be attached thereto, and the Court finds that:

1. The Court Reporter has in her possession certain documents and/or exhibits which were admitted into evidence at trial that are oversized and enlarged for the ease of viewing by a jury and the Court.

2. For the purposes of judicial economy for the submission of the record to the Court of Appeals, the Court hereby orders the Court Reporter to cause a reduction in the size of any documents and/or exhibits which are in her possession that are larger than 8 1/2" X 11" in size to be submitted with the appeal record in this matter to the Court of Appeals.

IT IS SO ORDERED.



John R. Scott
CIRCUIT COURT JUDGE

cc: Mr. James E. Keever
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CW13 008820

432

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COPY OF 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

PROCEEDINGS

Hearing held before the Honorable John R. Scott,
Circuit Judge at Benton County Circuit Court, Bentonville,
Arkansas on June 4th, 2012, at 10:08 a.m.

APPEARANCES

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

FOR THE PLAINTIFF

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and

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MR. STEPHEN LISLE

FOR THE DEFENDANTS

Lisle, Rutledge Attorneys
1458 Plaza Place
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1 JUDGE SCOTT: We'll now take up the matter of
2 *Sue Poff v. James P. Elkins, M.D., and James P.*
3 *Elkins, M.D., P.A.* This is Case No. CV-2012-261.
4 Parties approach and have a seat at the counsel
5 tables please.

6 MR. SWINDLE: Your Honor, I -- I think I have
7 an announcement that may please the Court if I may.

8 JUDGE SCOTT: All right. The plaintiff is
9 represented by Ken Swindle and James Keever. The
10 defendants are represented by Steve Lisle. All
11 right. Mr. Swindle, what is it?

12 MR. SWINDLE: Your Honor, there -- there was
13 some confusion from the plaintiff's perspective on
14 what the defendant is -- was claiming. Based on a
15 conversation that I had with Mr. Lisle before the
16 hearing today, if I -- if I could just state that
17 conversation on the record I think it will make all
18 the motions moot.

19 JUDGE SCOTT: All right. Go ahead.

20 MR. SWINDLE: The confusion, from the
21 plaintiff's perspective, was whether the defendant
22 was claiming any Rule 12 service issues,
23 insufficiency of service of process or
24 insufficiency of process. There was some ambiguity
25 from our perspective on those issues. After

1 discussion with Mr. Lisle today, and -- and
2 certainly Mr. Lisle can correct me if I misstate
3 that discussion, but I -- I do not believe Mr.
4 Lisle is asserting any of those defenses under Rule
5 12.

6 If that's the case, we'll withdraw all our
7 motions as moot.

8 JUDGE SCOTT: All right. Mr. Lisle?

9 MR. LISLE: I don't know that I understand
10 that, Judge.

11 JUDGE SCOTT: Are you asserting any Rule 12
12 defenses?

13 MR. LISLE: We have -- I believe what we've
14 asserted is a Rule 12 defense. We -- as we were
15 required to raise as an affirmative defense
16 ineffective service, which is an affirmative
17 defense. I don't --

18 JUDGE SCOTT: Are you --

19 MR. LISLE: I'm not --

20 JUDGE SCOTT: -- disputing service at this
21 time?

22 MR. LISLE: We -- I don't believe in -- it's
23 an affirmative defense. We haven't done any
24 discovery. I don't think that based on what
25 they've told us, I think they did get service on

1 the Attorney General's office, so I suspect that we
2 will not be raising that in future. But I -- be
3 honest with you, Judge, there's -- there are
4 several issues in this case that are pending right
5 now that I don't have a clear picture on.

6 One is a Motion to Strike. There were two
7 Motions to Strike, which went to -- my
8 interpretation of those motions was that they went
9 to us, the defendants, raising the ineffective
10 service to -- to challenge the constitutionality of
11 the medical malpractice statute.

12 JUDGE SCOTT: Mr. Lisle, are you disputing
13 service upon either one of your clients?

14 MR. LISLE: No, sir. I'm not disputing
15 service --

16 JUDGE SCOTT: Okay.

17 MR. LISLE: -- on my clients.

18 JUDGE SCOTT: All right. What other issues in
19 this case are you confused about?

20 MR. LISLE: Well, they filed a Motion for
21 Sanctions that related, I believe, to the Motions
22 to Strike. And I would like to have that resolved.
23 My -- my interpretation of that motion was that
24 they're asking for sanctions against my clients for
25 raising the affirmative defenses. And I would like

1 to have that resolved because I don't understand
2 where you --

3 JUDGE SCOTT: Are you -- are you alleging
4 defective service upon the Attorney General?

5 MR. LISLE: I reserve that -- I did raise that
6 as an affirmative defense, because at the time the
7 -- when we raised that affirmative defense, the
8 Attorney General had not been served. Since I
9 raised that as an affirmative defense, plaintiffs
10 have filed a proof of service. And so I do not
11 anticipate as we go to trial that we will be
12 maintaining that position.

13 JUDGE SCOTT: Okay.

14 MR. LISLE: But the issue was at the time we
15 filed our affirmative defense.

16 JUDGE SCOTT: Okay. Anything else you're
17 confused about?

18 MR. LISLE: There -- well, there also was the
19 Motion for -- on the Request for Admissions. And I
20 don't know if we want to address that separately or
21 if we were going to take that up all at the same
22 time. That --

23 JUDGE SCOTT: We're going to do it all at the
24 same time, right now. Go ahead.

25 MR. LISLE: Well, Your Honor, it was their

1 motion. I -- so I -- I don't -- you know,
2 overstate their position, but -- but I do want to
3 respond to their -- they had filed two Requests for
4 Admission asking whether or not our affirmative
5 defense was based solely on the application of a
6 statute. And I objected to that because it was not
7 a request for admission of fact. It was a -- it
8 was a -- purely a question of law. When I raised
9 that as an -- and I did answer, separately,
10 interrogatories as to the facts. We did answer
11 those.

12 And then without any discussion with the
13 plaintiffs, they filed a motion -- kind of a high -
14 - motion that says deem them admitted or compel the
15 answer and award them attorney's fees. And so I
16 don't know -- I -- I wasn't sure about what Mr.
17 Swindle just said, if he is --

18 JUDGE SCOTT: Okay.

19 MR. LISLE: -- waiving that, or --

20 JUDGE SCOTT: Have a seat, Mr. Lisle.

21 All right. Mr. Swindle, Mr. Lisle has
22 acknowledged that his clients were properly served
23 and he's acknowledged that he's not claiming the
24 Attorney General was improperly served. Anything
25 else you think we need to take up today?

1 MR. SWINDLE: With -- with those
2 acknowledgments, we'll submit an order denying all
3 our motions as moot, Your Honor, if that pleases
4 the Court if Mr. Lisle has no objection.

5 JUDGE SCOTT: All right. What about these
6 Requests for Admissions?

7 MR. SWINDLE: The -- there was a Motion to
8 Deem them Admitted, that, too -- there -- there was
9 two Motions to Strike, a Motion for Sanctions, and
10 a Motion to deem the Requests for Admissions
11 admitted. We'll submit an order denying all those
12 motions as moot based on Mr. Lisle's assertion here
13 today, Your Honor, if that pleases the Court and if
14 there's no objection from Mr. Lisle.

15 JUDGE SCOTT: All right. That'll be fine.
16 Are you ready to set this matter for trial, Mr.
17 Swindle?

18 MR. SWINDLE: We are. We would respectfully
19 request a five-day jury trial. I understand that
20 will probably set us out to 2013.

21 JUDGE SCOTT: Well, I don't know that it will,
22 but it'll put you to November or December, for
23 sure. Mr. Lisle, you ready to set it for trial,
24 too?

25 MR. LISLE: Yes, I am, Your Honor.

1 JUDGE SCOTT: That timeline?

2 MR. LISLE: Yes, sir.

3 JUDGE SCOTT: Okay. All right. You-all see
4 Ms. Schrader, and get a trial --

5 MR. LISLE: Your Honor, can -- can I ask one -
6 - one more indulgence of the Court before we leave
7 this issue?

8 JUDGE SCOTT: Sure. Sure.

9 MR. LISLE: The -- this is -- this has been
10 very troublesome to us as defendants. And -- and I
11 -- you know -- you know, this -- this case was
12 filed. We -- we -- we prepared the case for almost
13 a year. We started a trial that was non-suited.
14 There were twelve sets of discovery filed the first
15 time this case was tried. There -- there have been
16 now, separately, two or three Requests for
17 Admission sets already and two or three requests
18 for productions and interrogatories. I am -- I am
19 happy that they have withdrawn all their motions
20 that were pending today. But this is a very
21 troublesome way to handle this case, Judge.

22 They -- they filed two Motions to Strike that
23 could've been handled with -- should've been able
24 to be handled with -- just as they were today,
25 months ago. We weren't given that opportunity.

1 Filed a Motion for Sanctions on an issue that they
2 now have abandoned, and this completes a -- this is
3 a consistent pattern that we had in the last round
4 on this case. And I'm asking for the Court's help
5 because as a matter of course, in this case, I will
6 get demands for discovery or something followed by
7 an immediate threat of requesting the Court's
8 involvement on sanctions.

9 And then -- until this time, then they've gone
10 away. But in this case, they actually filed a
11 Motion for Sanctions and did this thing that I've
12 never seen before, which is they served the Motion
13 for Sanctions on me but didn't file it. Put me in
14 a position where I -- under the rules, I'm -- I'm
15 obligated to respond to the Motion for Sanctions,
16 even though it was not filed.

17 Then when I respond and we come in for
18 hearing, then all of the sudden, it's like, well,
19 we're -- they -- they're saying, well, we've got it
20 all worked out, but -- but we had -- we're in the
21 same -- the defendants have not changed our
22 position to resolve this prior to today. We've had
23 the same position. The motion shouldn't have been
24 filed.

25 And so when we appeared for court after having

1 to respond to two separate Motions to Strike, the
2 Motion for Sanctions, and a Motion to compel
3 answers to Request for Admissions, so four
4 pleadings that we responded to prior to today, same
5 position that I have today, now all of the sudden
6 we didn't need to do all that. And -- and, Your
7 Honor, I just would ask that we get some help so
8 that the case can proceed to trial without this
9 using of -- of the pleading process and discovery
10 to make it more complicated.

11 JUDGE SCOTT: Mr. Swindle, would you like to
12 respond to that?

13 MR. SWINDLE: No, Your Honor, unless the Court
14 has some question.

15 JUDGE SCOTT: I have no questions.

16 Mr. Lisle, I'm sympathetic to your plight.
17 And I think it is accurately and correctly stated.
18 In the future, should such a motion or any pleading
19 be filed and have no merit or have no argument, I
20 will order payment of attorney's fees summarily,
21 right then. Next time you come to Court, Mr.
22 Lisle, bring your affidavit as to your fees as of
23 the time you walk in the door. Any questions about
24 that, Mr. Swindle?

25 MR. SWINDLE: No, Your Honor.

1 JUDGE SCOTT: Mr. Lisle, any questions?
2 MR. LISLE: No, sir. Thank, Your Honor.
3 JUDGE SCOTT: All right. See Ms. Schrader and
4 get a trial date.
5 MR. KEEVER: Thank you, Your Honor.
6 JUDGE SCOTT: Certainly.
7 (Wherein, the proceedings ended at 10:18 a.m.)

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS

SUE POFF

vs.

CASE NO. CV-2012-0261-4

JAMES ELKINS, M.D., ET AL

PROCEEDINGS

Proceedings held before the Honorable John R. Scott Circuit
Judge at Benton County Circuit Court, Bentonville, Arkansas on
July 25th at 10:24 a.m.

APPEARANCES

ON BEHALF OF THE PLAINTIFF:

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JAMES KEEVER
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479-621-0120

ON BEHALF OF THE DEFENDANT:

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SPRINGDALE, ARKANSAS 72764
479-750-4444

1 P R O C E E D I N G S

2 THE COURT: The next matter to come before the
3 Court is the case of Sue Poff versus James P. Elkins
4 M.D. and James P. Elkins M.D., P.A. This is Case
5 Number CV-2012-261. The plaintiff is represented by
6 Ken Swindle and James Keever. The Defendants are
7 represented by Steve Lisle.

8 We are here today regarding the Defendant's
9 Objection to Request for Admissions objections, I
10 guess. And the Defendant's Motion for Limitation of
11 Discovery. It appears that the parties are in
12 agreement as to the bifurcation of the punitive
13 damages request by the Plaintiff.

14 Mr. Lisle, prepare a precedent -- or have you
15 prepared an order consistent with that?

16 MR. LISLE: I have not, Your Honor, but I will.

17 THE COURT: All right. Why don't you prepare an
18 order to that effect. Mr. Lisle, I would like for
19 you to make your argument regarding your request for
20 limitation of discovery, and along with that address
21 the objections you made to the Plaintiff's discovery
22 propounded May 7, 2012.

23 And I appreciate you commencing to use the
24 dates on those discovery requests.

25 MR. LISLE: Yes, Your Honor.

1 THE COURT: It makes it much easier for me to
2 locate and try and follow. Go ahead.

3 MR. LISLE: Yes, Your Honor, may it please the
4 Court. I'd also point out that there was a follow-up
5 after I raised my objection to the May 7th Discovery,
6 the Plaintiffs also filed -- then filed 6712
7 Discovery and I made essentially the same objections
8 and they are very similar requests.

9 So Your Honor, first I'd like to start with the
10 standard of review and a discovery issue, the Court
11 has very wide discretion -- the trial court has very
12 wide discretion in these matters, the Supreme Court
13 says it very often. An illustrative case is Parker
14 versus Southern Farm Bureau, 935 SW 2nd 556. What
15 all those cases say of course is that the goal is to
16 allow preparation without imposing an onerous burden
17 on the adversary. And what those -- apart from my
18 ideas of relevance and all of those things that go
19 into discovery, there is also this over-arching
20 concept of what discovery is intended to be, and
21 that's trial preparation, not wearing out the other
22 side.

23 And so when we get into -- first of all my
24 Motion for a Limitation, I guess at this point I am
25 asking the Court for help, you to know when to do it

1 in a case like this, you don't know when -- I mean a
2 typical case that I've had in my, you know, 18 years
3 of practice, you get a set of interrogatories and
4 request for production, after some deposition you may
5 get another set, kind of fine tuning those things,
6 and that's typically it. So you don't know -- and at
7 what point -- if you're talking about the number of
8 requests, do you do it after the third set, the
9 fourth set, the twelfth set?

10 You know, when you start getting them,
11 they're -- in sequential months, you know, do you
12 look at each individual set and say well, that was
13 only three requests, I should go ahead and answer
14 those? And that's where we are today. And I feel
15 the need to stand by my objections because of course
16 this is not the first time we've prepared for trial
17 in this case.

18 Before the Plaintiffs nonsuited last time they
19 had filed some initial discovery that -- that -- and
20 asked for some financial information. I did not
21 object to those at the time because we'd actually
22 given some financial information to the prior
23 attorney prefiling of the case. And then we got down
24 to shortly before trial and I got hit with a motion
25 to compel. I think it was about a week or so before

1 trial and I tried to say, look these -- these things
2 that you are asking me to produce at some trouble to
3 my client are not even relevant.

4 The -- the plaintiffs insisted on a hearing on a
5 Motion to Compel, and I'm just pointing out -- not
6 that it's relevant -- but the Defendants never
7 objected to it, so at the last minute we produced a
8 bunch of financial documents that they never even
9 intended to use in trial. As it came out, they never
10 even followed up on those requests and had a witness
11 there to use those things in trial.

12 So this time I feel like I have to take a very
13 hard line, much more than I'm accustomed to, in
14 stating objections and holding to those objections,
15 and then even asking for a limitation of discovery.

16 If you talk about -- and first of all, just on
17 the relevance of what they've asked for in the
18 latest -- both the May 7th and the June 7th
19 discovery -- they're asking for information on
20 whether or not the Defendant's surgery center is
21 accredited by the association for ambulatory
22 healthcare. That's not relevant to the case. They
23 try to say it's relevant to the informed consent
24 issue, but they've submitted two expert affidavits in
25 this case. Going back, the experts that they've had,

1 neither one of them ever mentioned accreditation as
2 an issue. It's not a subjective standard, the -- the
3 standard on what we have to give information to the
4 patient is not what the patient wants, it's what
5 we're required to give by the standard of care.
6 Their experts never said that we are obligated to
7 tell a patient whether or not a clinic is accredited
8 by some third-party association. It's essentially
9 like saying to a lawyer that you have to disclose
10 whether or not you are a member of the Benton County
11 Bar Association before they hire you.

12 This is not a regulatory issue, this is just
13 some association that says yes you're accredited or
14 no you're not. And so they're trying to say that,
15 well you have to tell every patient that walks in
16 whether or not you are accredited by some third-party
17 association, not a regulatory body. So that is not
18 even relevant. None of their witnesses ever said it
19 was relevant. This is something that they -- they --
20 a few days before trial last time they started
21 subpoenaing witnesses from the health department and
22 things like that for issues that were never even
23 mentioned by any of their witnesses in their
24 testimony about the standard of care.

25 So same thing, they were also asking for

1 information about the Arkansas Health Department.
2 This issue cropped up maybe two or three days before
3 the trial last time where they subpoenaed witnesses
4 from the Arkansas Health Department. That we're --
5 that they were going to say -- or come in and say
6 that -- that the clinic was not accredited. The
7 problem with that is no one ever said -- I'm sorry,
8 licensed -- no one ever was going to testify that it
9 had to be licensed.

10 So they're trying to put on evidence that it
11 wasn't licensed, yet you can ask me if my office is
12 licensed by the health department and the answer is
13 no. But the problem is if you do that in medical
14 malpractice case, you're leaving the jury with the
15 impression that that is important without a witness
16 saying that they have to do that. Again, their
17 expert witnesses never said that that was required,
18 there was no information that -- that applied that to
19 the standard of care. It was just an issue that they
20 wanted to raise and say that it was important to
21 their client.

22 So the -- the information that they've requested
23 is not relevant to the issues of standard of care,
24 breach, damages that we're here to try. And going
25 beyond that -- again when you're practicing law as a

1 trial lawyer you want to just say -- part of you
2 says, well it would be easier just to answer these
3 things and move on. But when we've had twelve sets
4 of written discovery, the first go-round in this
5 case, for 18 months of pretrial work, and then along
6 with four depositions and all the things we -- and
7 then they nonsuit, and then they refile. And now
8 we've already had eight sets of discovery since it
9 was refiled. At some point we have to say we need
10 some help, we need some relief. We -- it's -- it's a
11 stream of consciousness approach to discovery that
12 they have where it's as though they -- they wake up
13 in the -- you know, like we all do, trial lawyers,
14 you wake up middle of the night and think about
15 something. But when they do it they are running to
16 the computer and they're printing out two or three
17 interrogatories and they're putting them in the mail
18 or a request for admission.

19 And -- and I don't -- it's not my obligation to
20 prepare the entire case. It's -- we -- you know, in
21 the federal court if you ask for more than 25
22 interrogatories you have to explain yourself and
23 we're at 20 sets of written discovery in this case.

24 So it -- what we're asking for is just that -- I
25 have no problem -- I feel like I'm going to have to

1 update my discovery because it's been almost a year
2 since we started the first time. There may be some
3 new issues about medical treatment, there may be some
4 new issues about damages that have happened since we
5 got prepared the first time. But as far as trying to
6 go back and you know, come up with new issues when
7 you've already deposed witnesses, you've already
8 submitted 20 sets of discovery, I just think that
9 it's gotten to the point where it's unduly burdensome
10 and it's onerous and we need a direction from the
11 Court so that we have some limits on the new issues
12 so that -- because we haven't been able to agree on
13 these things so far in the case. So that we can, in
14 my opinion, reign in the amount of work and
15 litigation costs that are not probably justified by
16 the amount and the manner.

17 It's not just the amount, it's the way that the
18 discovery is being conducted in this -- you know,
19 like I say, two interrogatories here, three request
20 for admission here, and then next month another set.
21 And I'd like just to have the Court say, if you have
22 a new issues that you haven't had a chance to develop
23 that -- that you are not -- you know that have
24 occurred from the time we tried to set the case for
25 trial first until now, okay. But you've already

1 deposed the witnesses and for you to go back and
2 start coming up with new issues that are -- that in
3 this case that aren't relevant, we would like for
4 that to be reigned in, Your Honor.

5 THE COURT: All right, thank you.

6 Mr. Keever, Mr. Swindle, who's going to talk for
7 you all?

8 MR. SWINDLE: Mr. Keever.

9 MR. KEEVER: I will, Your Honor.

10 THE COURT: All right, go ahead, sir.

11 MR. KEEVER: May it please the Court. First to
12 address the Motion, there are at least three
13 procedural reasons why this Motion should be denied
14 and then I will be glad to go into the substantive
15 part of what the discovery was.

16 First procedural issue is that even though Mr.
17 Lisle didn't use the word "protective order" what
18 he's in effect asking for is a protective order.
19 Under rule 26(c) there is a condition precedent, and
20 the first part of that rule says that upon motion by
21 a party or by the person for whom discovery is sought
22 stating that the movement has in good faith and
23 conferred or attempted to confer with other affected
24 parties in an effort to resolve the dispute without
25 court action.

1 There's been -- certainly there's nothing in the
2 Motion about a good faith attempt and there really
3 has not been a good faith attempt to resolve this
4 without court action.

5 The second problem with this is that under Rule
6 41 the plaintiff has an absolute right to nonsuit his
7 case. Your Honor's words in chambers when I
8 announced our intention was "It's a God-given right."
9 but certainly the Supreme Court gives us a right and
10 it's an unfettered absolute right.

11 Now, one of the reason that a plaintiff may, and
12 often does, nonsuit a case is that he or she
13 discovers that there's some discovery issue, there's
14 some witness issue that means he really doesn't want
15 to go to trial with what he has. Mr. Lyle will say,
16 well, we've had discovery in the first case so you've
17 got an absolute right to nonsuit it, but you don't
18 have a right to do further discovery, which in effect
19 rewrites Rule 41.

20 The third procedural issue is that if you read
21 Rule 41(b) in connection with Rule 36 and the case
22 law, it's clear that the responses to requests for
23 admissions in the original suit do not follow and do
24 not bind the party in the second suit, it's a
25 separate --

1 THE COURT: I understood that you had discussed
2 that issue and agreed that you would use the prior
3 discovery in the new trial. Am I mistaken?

4 MR. KEEVER: Yes, sir, I believe you are, Your
5 Honor. I proposed on January --

6 THE COURT: Let me stop you there.

7 MR. KEEVER: Yes, sir.

8 THE COURT: Mr. Lisle, do you have any
9 objections to that?

10 MR. LISLE: Yes, Your Honor, that's not true.
11 We -- in fact, I think they've attached e-mails and
12 stated in their own response today that we agree --

13 THE COURT: My question is, are you agreeable to
14 use prior discovery?

15 MR. LISLE: Oh, yes, Your Honor. I am, yes.

16 THE COURT: There you go, Mr. Keever, next
17 subject.

18 MR. KEEVER: Your Honor, if you would look at
19 Exhibit Number 1 to our response, which is my
20 proposal to Mr. Lyle. It states --

21 THE COURT: Your response to what, sir?

22 MR. KEEVER: My response to his Motion to Limit,
23 Sir.

24 THE COURT: Is that Defendant's Response to the
25 Plaintiff's Motion Compel in the first case?

1 MR. KEEVER: No, sir. This is -- may I
2 approach, sir?

3 THE COURT: Yes, you may.

4 MR. KEEVER: This is our Response to his Motion
5 to Limit.

6 THE COURT: Let me see the front page of
7 whatever pleading that is.

8 MR. KEEVER: That should have been filed Monday.

9 THE COURT: What week?

10 MR. KEEVER: Actually just this last Monday.

11 THE COURT: Oh.

12 MR. KEEVER: Did you not have a --

13 THE COURT: I don't have that. I probably had
14 the file pulled before the clerk got that.

15 MR. KEEVER: Oh, well you can use mine if you
16 wish, Your Honor.

17 So if you'll see, back in January, I proposed to
18 Mr. Lisle that we go ahead and use the depositions,
19 the interrogatories, and the request for production
20 of documents, so that we didn't have to redo all of
21 that.

22 THE COURT: Did you just hear Mr. Lisle's
23 response to my question?

24 MR. KEEVER: Yes, sir.

25 THE COURT: Okay.

1 MR. KEEVER: But it did not apply to requests
2 for admission.

3 THE COURT: Mr. Lisle, do you have any
4 objections to using request from admissions from --

5 MR. LISLE: No, Your Honor, I do not.

6 THE COURT: Anything else, Mr. Keever?

7 MR. KEEVER: Well, yes, sir.

8 THE COURT: Mr. Applegate, could you give that
9 back to Mr. Keever, please.

10 MR. KEEVER: So certainly, Your Honor, I think
11 that any request for admissions, whether they were
12 answered in the first case or not answered in the
13 first case, would certainly be proper in the present
14 case. And -- and that's exactly what we have filed
15 in the present case.

16 There have been, really two, but you could say
17 three sets of discovery filed in this present case.
18 The initial set of discovery was the subject of some
19 of the discussion at the last hearing and it had to
20 do with a problem -- a perceived problem with
21 sufficiency of service of process. And Your Honor,
22 if you will go to Exhibit Number 2 in that response,
23 it's a letter that I wrote to Mr. Lisle that -- that
24 kind of goes through what had happened. We were
25 under the impression when we left with the nonsuit

1 Mr. Lisle would except service. We asked him about
2 that when we refiled and he said he could not accept
3 service. He answered he -- we did get service, but
4 unfortunately the Sheriff's deputy let Dr. Elkins'
5 nurse sign for the service. If she's an authorized
6 agent, it's good service or if Mr. Lisle waives the
7 objection under 12(b)5, then it's good service. But
8 in his response he made a -- had an affirmative
9 defense that service was inadequate to challenge the
10 constitutionality of the statute. And we frankly
11 just -- Mr. Swindle could not figure out if he was
12 claiming insufficiency of service of process. And if
13 the Court remembers it was a little difficult for the
14 Court to figure out what Mr. Lisle's response --
15 position was initially. That's one set of discovery.

16 The second set has to do with the issue of
17 whether the -- the surgery center was accredited or
18 licensed at the time of Ms. Poff's surgery.

19 Now -- may I approach again, Your Honor?

20 THE COURT: Yes, you may.

21 MR. KEEVER: Your Honor, I've provided the Court
22 with a highlighted copy of ACA 16-114-206, which
23 talks about the burden of proof that we have to show.
24 As the Court's aware, we have both an allegation of
25 negligent performance of a procedure and we have an

1 allegation of failure to obtain informed consent.
2 Under Section(b) of that statute, which is the part
3 that deals with informed consent, there is indeed a,
4 shall we say an objective or an expert issue as to
5 what information should have been supplied. We
6 expected that our expert will testify -- and we will
7 supplement that discovery in the present case -- he
8 will testify that if a doctor is going to do a
9 procedure like was done on Ms. Poff, in an unlicensed
10 and unaccredited facility, he has a duty to disclose
11 that. Then if you go on Section(d)2 --

12 THE COURT: Have you had any expert's affidavit
13 to that provision as to the standard of care?

14 MR. KEEVER: No, sir.

15 THE COURT: All right.

16 MR. KEEVER: Although, I have, informally, let
17 Mr. Lisle know that we'll have a second expert as
18 opposed to Dr. Burns. And we will be updating the
19 discovery as to his full opinions. We don't expect
20 him to change a great deal, but this will be added,
21 and Mr. Lisle has been notified to that recently.

22 Now, there's also some issues as to whether a
23 person of ordinary intelligence would know certain
24 things, whether or not Ms. Poff knew certain things,
25 whether she would've undergone the treatment that she

1 did had she known certain things, and whether or
2 not -- well, the last one doesn't really apply.

3 Ms. Poff will testify -- and I've discusses this
4 with Mr. Lisle over the phone -- and there is an
5 affidavit from Ms. Poff, which is Number 4 to the
6 Brief in Support -- actually, let me -- Your Honor,
7 you didn't have the Motion -- may I approach?

8 THE COURT: Yes.

9 MR. KEEVER: And here's a copy of our Brief in
10 Support.

11 So Ms. Poff will testify that had she known the
12 center was neither licensed nor accredited -- and
13 particularly licensed -- it would've been a negative
14 factor in her decision to have surgery and she likely
15 would not have had the surgery.

16 So, Your Honor, I think that this is a relevant
17 issue, it's a material issue, and we would rather
18 have it admitted or denied. If it's admitted, then
19 we need to go to -- actually I think Ohio or
20 Illinois, wherever the Accreditation Association for
21 Ambulatory Health Care facilities is and we will need
22 to have a deposition of a representative of the
23 Department of Health. And we have reason to believe,
24 actually, Your Honor, that this center was not
25 licensed. Attached to --

1 THE COURT: Did you ask Dr. Elkins when you took
2 his deposition if it was licensed?

3 MR. KEEVER: Nope, and that was bad on me. It
4 was --

5 THE COURT: Did you --

6 MR. KEEVER: -- after that that I got some
7 additional material from the Arkansas Medical Board.
8 And what can I say, I wish I had.

9 But there is -- Exhibit 3, the Brief in Support,
10 is a copy of the first part of a certified copy from
11 the Department of Health showing the licensed
12 ambulatory surgery centers in Benton County as of
13 November of 2011, and Dr. Elkins is not listed. It
14 will take them a little more effort and it would
15 likely require a subpoena duces tecum, according to
16 my conversations with their attorney, to get back to
17 January of 2009. And we would rather not have to do
18 that, and that is precisely, I believe, the reason
19 why the Request for Admissions are allowed. In an
20 attempt to establish a fact without the time and
21 expense of going through alternative methods of
22 discovery, particularly from third-parties.

23 As Mr. Lisle's comment that whether it's
24 licensed or not is like asking an attorney if he's a
25 member of the Bar Association, that is not -- that's

1 not even close. It's like asking him if he's got a
2 license to practice law. And there are rules and
3 regulations for hospitals and related agencies which
4 state that an ambulatory surgery center is required
5 to have a license from the state. The definition of
6 an ambulatory surgery center, which is in -- and I'm
7 not going to attach it as an exhibit, it's a state
8 document. But it's Section 3, rules and regulation
9 for hospitals and related institutions in Arkansas,
10 Arkansas Department of Health 2007. And it says that
11 an ambulatory surgery center means any facility in
12 which surgical services, other than minor dental
13 surgery, are offered which require the use of general
14 or intravenous anesthetics and/or render the patient
15 incapable of taking actions for self-preservation
16 under emergency conditions without assistance from
17 others.

18 We expect to Dr. Shoemake to testify that with
19 the amount of sedation Ms. Poff had, she certainly
20 was incapable of getting herself up and walking out
21 the door in case of an emergency. And then in
22 Section 4 of that same set of rules and regulations,
23 necessity for license. And it lists a lot of things,
24 but it says, no outpatient surgery center may be
25 established, conducted, or maintained in the state

1 without first obtaining a license.

2 And finally, Your Honor, we will -- we can show
3 that Dr. Elkins was under a further duty to have a
4 license through a consent order in 2005 from the
5 Arkansas Medical Board. So we believe that the issue
6 of whether or not the surgery center was licensed is,
7 as I said, relevant. Certainly relevant, we think
8 it's material and we think, in fact, it will be a
9 admissible evidence.

10 And then I guess finally, Your Honor, back to a
11 procedural point, I'm not entirely sure from
12 Mr. Lisle's -- Mr. Lisle's argument and his motion as
13 to the relief that he's seeking, but it sounds like
14 he is asking -- he is seeking a prohibition on
15 discovery, period, based upon the fact that we've had
16 a preceding case. And once again, this is a new
17 preceding. If you go on to 26(c), after the part on
18 good faith it says, for a good cause shown the Court
19 in which the action is pending may make any order
20 which Justice requires to prevent and protect any
21 party or persons from annoyance, embarrassment,
22 depression, undo burden, or expense. It gives
23 different types of relief, and Mr. Lisle seems to be,
24 at least as it applies to the plan of asking for the
25 maximum relief, that we simply not be allowed to

1 follow up on discovery.

2 We think that there's -- procedurally, his
3 motion is suspect and should be denied. I'd be happy
4 talk about the discovery in the first case, which I
5 believe was not onerous, it was not overly
6 burdensome, it was pointed and direct and as focused
7 as we could make it.

8 And I don't know of Mr. Lisle's usual cases of
9 medical malpractice case, but it is certainly my
10 experience that it's more than two sets of discovery.
11 Things come up, things come up in deposition, we get
12 answers that are ambiguous. In one instance, one of
13 those onerous sets of discovery was that Dr. Elkins
14 refused to release the records in his office to one
15 of our witnesses, Lisa Jones. So we filed a Request
16 for Production, you know, one request for production.
17 And if you go through -- may I approach again, Your
18 Honor.

19 THE COURT: Yes.

20 MR. KEEVER: I'm offering -- I'm offering the
21 Court a summary of that discovery in the first case.
22 And I have copies of all of those. And I have made
23 comments as to where -- where the issues come up, why
24 we asked the questions. You know, the last one
25 was -- was -- I agree, I filed a late request and

1 Mr. Lisle objected to it as late. And that 10/10/11
2 set of discovery was asking about the licensing of
3 the surgery center.

4 Well, it's a new preceding and I believe under
5 Rule 26 we are allowed reasonable discovery. I will
6 tell the Court that we don't plan a whole lot more
7 discovery. I wanted to get into this licensing
8 thing, because I believe it's the central issue. I
9 can't say that nothing else will come up, I can't say
10 that we may not want to, depending on what happens
11 with the Court's ruling on the objections, we may
12 feel like we should go take that deposition of this
13 Accreditation Association of Ambulatory Healthcare.
14 We may feel like we should take the deposition of a
15 representative of the Department of Health. But, I
16 think that our discovery has been focused. It will
17 be focused in the future. And as I say, we really
18 don't plan on a lot more discovery, but we don't
19 think a blanket prohibition against new discovery is
20 consistent with the rules.

21 Thank you, Your Honor.

22 THE COURT: Thank you.

23 Mr. Kever, you misread the Defendant's request.
24 They want an order limiting discovery in the second
25 case to the matters that have changed or developed

1 since December 7, 2011. That is not a blanket
2 prohibition.

3 MR. KEEVER: I stand corrected, Your Honor.

4 THE COURT: Certainly. Have a seat.

5 Mr. Lisle, I want you to prepare an Order in
6 this case in addition to the Plaintiff's agreement to
7 bifurcation of the punitive damages portion. I'm
8 Ordering that the Defendant's Answer, the May 7, 2012
9 and June 7, 2012 Discovery by August 8, 2012.

10 I'm also ordering that the Plaintiffs file their
11 expert witnesses' affidavits as to standard of care,
12 which they have represented they will be preparing on
13 or before August 8, 2012.

14 And I'm going to grant the Defendant's request
15 that discovery be limited to matters that have
16 changed or developed since December 7, 2011.

17 Mr. KEEVER, if you think there is something that
18 you need to propound further discovery on, you may
19 file a motion, after notice I'll conduct a hearing
20 and I will make a decision as to whether not that
21 discovery is a matter that has changed or developed
22 since December 7, 2011.

23 The parties have agreed and acknowledged that
24 all discovery from the first trial shall be relevant
25 material and used by each party in the second trial

1 to be conducted March 11, 2013.

2 Mr. Lisle, do you have any questions about all
3 that?

4 MR. LISLE: No, sir, I don't believe so.

5 THE COURT: All right.

6 Mr. Keever, do you?

7 MR. KEEVER: Just one -- well, one, Your Honor.

8 THE COURT: All right.

9 MR. KEEVER: I had planned to prepare a
10 supplementation of discovery with a disclosure as
11 required by Rule 26, I had not necessarily planned
12 another affidavit. May I ask that the order be
13 modified that I simply supplement my discovery
14 according to the rules?

15 THE COURT: How would you supplement the
16 discovery to comply with the representation that you
17 just made?

18 MR. KEEVER: Under Rule 26, Your Honor, I am
19 required to disclose certain things which include the
20 expected opinions of my expert and the basis of those
21 opinions. The rule doesn't require an affidavit, and
22 frankly I think my new expert is on vacation right
23 now. But I visited with him to the extent that I
24 could supplement that discovery, as -- as I say,
25 under Rule 26, disclosure. Would that be sufficient

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for the Court?

THE COURT: Yes, sir, it will.

MR. KEEVER: Thank you.

THE COURT: You need to be on notice, in the event your expert doesn't testify as you represent, I will assess substantial attorney's fees.

MR. KEEVER: Yes, sir, I'm in notice and that's not going to be a problem.

THE COURT: Okay.

MR. KEEVER: Thank you, Your Honor.

THE COURT: Thank you.

Anything else, Mr. Lisle?

MR. LISLE: No, Your Honor.

THE COURT: Counsel, if you would, take leave.

(WHEREUPON, the proceedings were concluded in the matter at 10:58 a.m.)

* * * * *

COPY OF 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

PROCEEDINGS

Hearing held before the Honorable John R. Scott,
Circuit Judge at Benton County Circuit Court, Bentonville,
Arkansas on December 11th, 2012, at 9:05 a.m.

APPEARANCES

MR. JAMES E. KEEVER, M.D., J.D.
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FOR THE PLAINTIFF

and

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FOR THE DEFENDANTS

1 JUDGE SCOTT: The next matter to come before
2 the Court is the matter of *Sue Poff v. James P.*
3 *Elkins, M.D., and James P. Elkins, M.D., P.A.* This
4 is Case No. CV-2012-261. The plaintiff is
5 represented by Ken Swindle and James Keever. The
6 defendants are represented by Steve Lisle. Today
7 is a hearing set for all pending motions before the
8 Court.

9 Counsel, I'm not exactly certain what remains
10 unresolved in this dispute. Is the most -- or the
11 oldest motion unresolved, the Defendant's Motion
12 for Leave of Court to Conduct Discovery, which was
13 filed November 7th, 2012, or is there something
14 before that? Mr. Lisle?

15 MR. LISLE: Your Honor, we filed that motion.
16 My understanding is the plaintiffs have agreed to
17 produce Ms. Poff for a follow-up deposition as we
18 requested. So our motion has been resolved.

19 JUDGE SCOTT: Okay.

20 MR. LISLE: The only thing I'm aware of is --
21 is in their response to my motion, in which they
22 agreed to produce Ms. Poff, they also made a
23 request to take a second deposition of Dr. Elkins.
24 And -- and we object to that.

25 JUDGE SCOTT: Okay. Mr. Keever, Mr. Swindle,

1 who's going to talk for you-all today?

2 MR. KEEVER: I will, Your Honor.

3 JUDGE SCOTT: All right. Have you agreed to
4 produce Ms. Poff for another deposition?

5 MR. KEEVER: We have. If -- if it pleases the
6 Court, we'll proceed with that immediately after
7 this hearing.

8 JUDGE SCOTT: All right. And do you want to
9 conduct another deposition of Dr. Elkins?

10 MR. KEEVER: We do, Your Honor, limited to any
11 expected testimony that -- that would be classified
12 as expert testimony.

13 JUDGE SCOTT: Okay. Would you stand at the
14 podium, please --

15 MR. KEEVER: I would, sir.

16 JUDGE SCOTT: -- Mr. Kever? Thank you.
17 Well, I was a little perplexed by that request. Do
18 you expect Dr. Elkins to be asked some question he
19 has not already been asked?

20 MR. KEEVER: We do, Your Honor.

21 JUDGE SCOTT: What is an example of such a
22 question?

23 MR. KEEVER: An example to that -- of such a
24 question would be whether or not there -- there is
25 a requirement that his surgery center be licensed.

1 And the -- that issue has to be resolved with
2 expert testimony. There is an Arkansas Department
3 of Health regulation -- set of rules and
4 regulations --

5 JUDGE SCOTT: Well, let me stop you there, Mr.
6 Kever.

7 MR. KEEVER: Yes, sir.

8 JUDGE SCOTT: How is that new or different
9 since December 7th, 2011?

10 MR. KEEVER: On December 7th, 2011, we did not
11 have an admission from the defendant that his
12 surgery center was not licensed. We had filed some
13 discovery, as -- as the Court may recall, in the
14 old case. And it was ruled to be untimely. And
15 that discovery asked that question. In the new
16 case, in the 2012 case, we re-served discovery
17 asking about the licensure status of the surgery
18 center. And that was the subject of a previous
19 hearing that Your Honor may recall.

20 And Mr. Lisle was ordered to answer that
21 discovery. And the answer says, no, this license -
22 - there is no license. There's never been a
23 license. So we have that information, which is
24 new. Subsequently, Your Honor, we have an e-mail
25 from Mr. Lisle on September 24th with a claim. And

1 I'll read from it, (as read) "The procedures were
2 performed under supervision of the Board and took
3 place in Dr. Elkins's office, which was not
4 required to be licensed by the Arkansas Department
5 of Health."

6 Our expert, Dr. Shewmake, in his report,
7 stated that under -- that the sedation given to Sue
8 Poff would've rendered her incapable of taking
9 action for self-preservation in case of an
10 emergency. That is the core of a definition of a
11 surgery center by the Arkansas Department of
12 Health. If a facility is classified as a surgery
13 center by that definition is required under the
14 same rules and regulations to be licensed. It ties
15 --

16 JUDGE SCOTT: Let me stop you there, Mr.
17 Kever.

18 MR. KEEVER: Yes, sir.

19 JUDGE SCOTT: What is it you want to ask Dr.
20 Elkins?

21 MR. KEEVER: I want to ask Dr. Elkins what his
22 opinions will be as to the sedation used in Ms.
23 Poff and whether or not that would've rendered her
24 incapable of taking actions for self-preservation.
25 The --

1 JUDGE SCOTT: And how is that new or different
2 since December 7th, 2011?

3 MR. KEEVER: We didn't have the foundation to
4 even ask that question on December 7th, 19 -- 2011,
5 because we didn't have an admission that the center
6 was not licensed, and we didn't have a statement by
7 the defendant that it was not required to be
8 licensed.

9 JUDGE SCOTT: Are there any other questions
10 you want to ask?

11 MR. KEEVER: I want to ask Dr. Elkins to list
12 each and every expert opinion he expects to offer
13 that go to the standard of care and causation,
14 which is a question that, you know, if -- if I take
15 the deposition of an expert, that's kind of the --
16 the overall question that I'm asking. I want to
17 know each and every opinion so I'm not surprised at
18 trial. In his first deposition --

19 JUDGE SCOTT: Well, let me stop you there.

20 MR. KEEVER: Yes, sir.

21 JUDGE SCOTT: I haven't, I don't think,
22 actually seen the interrogatories, but haven't you
23 already asked the defendants what experts they're
24 going to offer testimony from?

25 MR. KEEVER: We have asked the defendant to

1 name his experts. He has -- he has never done so.
2 He said he would supplement it. We've asked for
3 supplementation. It's not been supplemented.
4 We've asked for --
5 JUDGE SCOTT: Mr. Lisle, have you named your
6 experts?
7 MR. LISLE: Yes, Your Honor. And --
8 JUDGE SCOTT: Do you, by chance, have a copy
9 of that responsive pleading you could give Mr.
10 Keever here?
11 MR. LISLE: I do. I --
12 JUDGE SCOTT: Okay.
13 MR. LISLE: I just have one copy with me, but
14 --
15 JUDGE SCOTT: All right.
16 MR. LISLE: This is from the -- our first
17 Answers to Interrogatories, which were back in
18 2010. Prior to --
19 JUDGE SCOTT: Let me stop you there. Mr.
20 Keever, do you need for the bailiff to go make a
21 copy of that responsive --
22 MR. KEEVER: No, sir. I'm -- I'm -- I'm aware
23 of it.
24 JUDGE SCOTT: Okay.
25 MR. KEEVER: And I think I've got it in my

1 file somewhere.

2 MR. LISLE: This --

3 JUDGE SCOTT: Okay.

4 MR. LISLE: This was about six months prior to
5 Dr. Elkins giving his deposition.

6 JUDGE SCOTT: Mr. Lisle, that's okay. You can
7 have a seat.

8 MR. LISLE: Oh. Okay.

9 JUDGE SCOTT: Now, why do you think there are
10 other experts besides the ones that have already
11 been identified?

12 MR. KEEVER: Well, Your Honor, he's never --
13 he has never procedurally identified Dr. Elkins as
14 an expert. He never supplemented that initial
15 interrogatory. The answer was to the effect that
16 our decision on testifying experts is pending and
17 this will be supplemented. It's never been
18 supplemented. And here we have Rule 26 disclosure.

19 JUDGE SCOTT: Well, Mr. Keever, I -- I
20 apologize. I don't recall when we started this
21 case the first time whether I had ceased
22 identifying witnesses as experts before the jury,
23 but that is my policy now. As an example, should
24 some attorney ask me to qualify a witness as an
25 expert, I will refuse to do so.

1 I'll give an instruction to the jury that they
2 can consider any witness an expert that they see
3 fit to consider an expert. So we're not going to
4 have anyone identified as an expert to the jury.
5 It's going to be up to them to decide. Now, does
6 that help you out any?

7 MR. KEEVER: That helps me out a great deal,
8 Your Honor.

9 JUDGE SCOTT: Okay.

10 MR. KEEVER: That will -- I -- and I think we
11 can deal with the jury instruction issue when we
12 deal with jury instructions. The -- yeah. Boy,
13 that does help out a lot. That -- I wish every
14 judge would do just that.

15 JUDGE SCOTT: Well, I -- I did not start doing
16 that, but I have come to the conclusion that's the
17 appropriate way to handle such a situation. That -
18 - I can tell you that's -- that is what I'm going
19 to do in this case.

20 MR. KEEVER: So I've already received part of
21 the -- the relief that I'm asking. That was part
22 of the relief I was asking. The second part of the
23 relief that I'm asking, Your Honor, is that in
24 accordance with the agreement that was made at Dr.
25 Elkins' first deposition, and I had that little

1 part of the deposition in my pleading in which I
2 asked -- I believe I asked the doctor, "Are you
3 going to be offering expert testimony?"

4 Mr. Lisle's reply was to the effect, "We will
5 disclose our experts when we're required to by the
6 rules." My comeback was, "Well, I'm taking this
7 deposition as a defendant, not as an expert. And
8 if Dr. Elkins is identified as offering expert
9 opinions, I reserve the right to re-depose him on
10 expert issues." And Mr. Lisle said, "Okay."

11 JUDGE SCOTT: What question are you going to
12 ask him that you have not already asked him?

13 MR. KEEVER: I'm going to ask him what is the
14 standard of care, the basis for him stating what is
15 the standard of care. The -- the questions -- then
16 I'm going to ask him specifically the standard of
17 care for operating the SmartXide laser. Ask him
18 the standard of care for --

19 JUDGE SCOTT: Did you not ask those questions
20 the first time?

21 MR. KEEVER: No, sir, not -- not -- not in the
22 -- in the sense of a standard of care issue. I
23 asked him questions that were basically what did
24 you do, what did you know, why did you do it, what
25 were you bases. But not specifically the expert

1 issues of what is the standard of care, which of
2 course is central. I mean, I can't show that he
3 didn't meet the standard of care unless I know what
4 he believes is the standard of care.

5 JUDGE SCOTT: My prior order required you to
6 submit in writing any additional questions you
7 wanted to ask any witness. Did you do that in your
8 response?

9 MR. KEEVER: Not -- not in the -- not in the
10 deposition, Your Honor. I had not planned to have,
11 like, a deposition on written questions. I wanted
12 to explore just like you would at every deposition.
13 You ask your question, get an answer, and it may
14 lead to further questions that are related. I do
15 not plan to ask him anything about his finances,
16 anything about how he ran his practice. I just
17 want to ask questions directly related to expert
18 issues.

19 And one of the big expert issues is this
20 definition of whether or not the sedation would've
21 made Sue incapable of taking action for self-
22 preservation, and whether or not his surgery center
23 was required to be licensed. And I -- you know,
24 those are -- obviously, the substance of the
25 answers is -- goes back before December 7th, but

1 the foundation to be able to ask the questions
2 didn't arise until after December 7th when we got
3 his responses through discovery.

4 JUDGE SCOTT: Are there any other questions
5 you want to ask the defendant?

6 MR. KEEVER: Any other questions, other than
7 the expert issues?

8 JUDGE SCOTT: Yes, sir.

9 MR. KEEVER: No, sir.

10 JUDGE SCOTT: All right. Thank you. Mr.
11 Lisle, do you plan to have Dr. Elkins testify as to
12 the standard of care?

13 MR. LISLE: No, Your Honor. I was not going
14 to have him testify this is the standard of care.
15 He -- he was going to test -- he was asked all
16 those questions in his deposition; however, not --
17 not what is the standard of care. But he was asked
18 how do you decide what you set the laser levels on,
19 and what is the right -- every question that they
20 could think of to ask.

21 And -- and, Judge, I just want to back up
22 because in May of 2010, six months before they took
23 Dr. Elkins' deposition, we answered -- when asked
24 expert witnesses, we answered in part, "Defendant
25 expects to testify and reserves the right to call

1 any" -- "as witnesses any other persons" -- "any
2 other persons identified as a witness." So we --
3 we -- we told him --

4 JUDGE SCOTT: You mean as an expert?

5 MR. LISLE: As an expert. That was in
6 response to: "Who are your expert witnesses?" So
7 we -- then we take the deposition and this is the
8 deposition transcript. A hundred and thirteen
9 pages into this thing, I didn't make any objections
10 to any questions they asked about treatment of Ms.
11 Poff. Mr. Keever just announced, well, I'm -- I'm
12 taking your deposition as a -- as a fact witness.
13 And -- and concluded the deposition.

14 I didn't understand that distinction then and
15 I still don't understand it now. He limited
16 himself in his questions. And like we all do in
17 this business, six months later, he started
18 thinking, boy, I wish I had asked something else.
19 When he's talking about sedation levels and are you
20 licensed, those are expert -- that's a fact
21 question. Was your clinic licensed? That's a
22 fact. That's not an expert opinion.

23 Even -- even if there is a distinction there -
24 - but the rules don't say he's limited in his
25 deposition. I didn't limit him in his deposition.

1 He limited himself. And now he's thinking of
2 things a year later, more than a year later, and
3 he's thinking, boy, I wish I had asked this
4 question. After 20-something sets of written
5 discovery, which got us here in the first place to
6 limit the amount of discovery.

7 So we have -- you know, we -- we -- after all
8 the discovery that went on to the point that we
9 asked the Court for assistance, we had an order
10 limiting discovery. Right after that, they filed
11 the motion asking for additional discovery on the
12 licensure issue, which the Court denied. Now,
13 they're asking for additional discovery from Dr.
14 Elkins in a deposition on that same issue which was
15 an issue that was in place in 2009, not 2010 or
16 '11.

17 And so we identified him as an expert. They
18 took -- and that's all the rule says, who your
19 expert's going to be. Well, we expect Dr. Elkins
20 to be one. We don't know of anybody else. Well,
21 you haven't named anybody else. We're not going to
22 name anybody else. They take Dr. Elkins'
23 deposition, which is the only other thing Rule 26
24 gives you the opportunity to do. They limit their
25 own questions, and now they have second thoughts

1 about it. They want to retake his deposition.

2 You know, they -- there's just no -- there's
3 just no basis for it. There was not -- there's
4 nothing they're wanting to ask him now that is a
5 new development that they couldn't have asked at
6 the time. And -- and things like "Was your clinic
7 licensed," and all that, "What were the sedation
8 levels," those are facts anyway. If they -- even
9 if they were saying "We're only taking his
10 deposition as a fact witness," which again there's
11 no distinction made, and they're allowed under the
12 rules to take a full deposition, they didn't ask
13 those questions. And they could have.

14 JUDGE SCOTT: Mr. Tucker?

15 MR. BAILIFF: Yes, sir?

16 JUDGE SCOTT: Bring me Mr. Lisle's copy of the
17 response to the discovery request, please.

18 MR. KEEVER: May I look at -- at it on the
19 way?

20 JUDGE SCOTT: Sure. Sure. I'm sorry. Do you
21 need a copy of it, Mr. Keever?

22 MR. KEEVER: Yeah.

23 JUDGE SCOTT: I thought you had a set.

24 MR. KEEVER: I thought I did, too. Do you
25 mind, Mr. Tucker, making a copy of just that page

1 right there for me? The one that's --

2 JUDGE SCOTT: Go make that copy, Mr. Tucker.

3 MR. LISLE: They -- it continues on to the

4 next page.

5 MR. KEEVER: Well, then the next page, too,

6 then. Thank you. Your Honor, we'll get back to

7 that, because I want to talk to that discovery. I

8 -- I think I heard Mr. Lisle say the Court

9 disallowed questions on the licensing of the

10 clinic. And, actually, those were specifically the

11 questions that the Court ordered the defendant

12 answer in the two sets of discovery. And we had an

13 issue, as the Court will recall, about how far

14 ranging that would be. But there is a --

15 JUDGE SCOTT: Well, Mr. Keever, that's not why

16 we're here today.

17 MR. KEEVER: No, sir.

18 JUDGE SCOTT: Right now, we're talking about

19 your request to take an additional deposition of

20 the defendant, Dr. Elkins.

21 MR. KEEVER: Yes, sir. And Rule 26 does

22 require more than Mr. Lisle said. Rule 26, Section

23 (b)(4)(a)(1) says, (as read) "A party may through

24 interrogatory require any other party to identify

25 each person whom the other party expects to call as

1 an expert witness to trial" -- and we'll see from
2 the interrogatories that's what we asked -- "to
3 state the subject matter on which he is expected to
4 testify, and to state the substance of the facts
5 and opinions to which the expert is expected to
6 testify and a summary of the grounds for each
7 opinion."

8 Now, Mr. Lisle on -- oh, my, well, you got --
9 you got the -- you got the Interrogatory No. 5,
10 which doesn't -- which he gave you the answer to,
11 that isn't about experts. That's about other
12 witnesses. "The subject of the foregoing defendant
13 expects to testify and reserves the right to call
14 as witness any and all persons so named by
15 plaintiff." And then Interrogatory No. 6, "With
16 respect to each and every expert witness," and the
17 answer to that says nothing about they expect
18 defendant to be an expert.

19 It says, "No" -- "determination has not been
20 made. When such determination of testifying
21 experts is made plaintiff's counsel will be
22 notified in a timely manner prior to trial on the
23 merits. Expects" -- well, it does say, "Defendant
24 expects to testify." I misspoke.

25 JUDGE SCOTT: Let me stop you there, Mr.

1 Keever.

2 MR. KEEVER: But --

3 JUDGE SCOTT: Mr. Lisle, do you plan to call

4 any physician to testify, other than your client?

5 MR. LISLE: No, sir. I do not.

6 JUDGE SCOTT: All right. Mr. Tucker?

7 MR. BAILIFF: Yes, sir?

8 JUDGE SCOTT: Give that back to Mr. Lisle

9 please.

10 MR. BAILIFF: Okay.

11 JUDGE SCOTT: Mr. Keever, I'm going to deny

12 your request to take an additional deposition of

13 the defendant, James P. Elkins. I think the answer

14 to that interrogatory puts you on notice that he's

15 going to testify. You've had the opportunity to

16 depose him. Now, we also have, I notice, filed

17 last week, a Motion for Expanded Jury Pool and for

18 Juror Questionnaire. Mr. Lisle, have you received

19 a copy of that motion?

20 MR. LISLE: I have, Your Honor.

21 JUDGE SCOTT: Have you filed a response to it?

22 MR. LISLE: No, sir. I have not.

23 JUDGE SCOTT: Okay. Do you have any objection

24 to an expanded jury pool or juror questionnaire?

25 MR. LISLE: No, sir. I don't. But, of

1 course, with -- with some understanding how the
2 procedure would work, how the notices would -- how
3 the questionnaires would be sent out. Obviously,
4 we -- we expect -- we -- we don't want to bear any
5 of the cost of that. And we also don't want any
6 identifying information showing that it came from
7 plaintiff's counsel or -- or something, you know,
8 on those lines. But as far as the questionnaires,
9 themselves, we don't object to those.

10 JUDGE SCOTT: All right. Mr. Kever?

11 MR. KEEVER: Well, thank you, Your Honor. As
12 I said in my very brief motion, this is a
13 questionnaire that's almost word for word one
14 that's been used by this Court in the past. I
15 couldn't agree more with Mr. Lisle that there
16 should be nothing that identifies it from us or
17 him. And certainly agree that we're willing to
18 bear the expenses of this and do anything we can to
19 help the clerk in the logistics of getting it out,
20 just whatever they want us to do.

21 JUDGE SCOTT: All right. Have you talked to
22 Ms. DeShields about the expense or the logistics of
23 such?

24 MR. KEEVER: I have not, Your Honor. I -- I
25 wanted to have your input on it before I did it.

1 JUDGE SCOTT: All right. I am not exactly
2 certain what the logistics of such are. We -- we --
3 -- you are correct. We did send out a similar
4 questionnaire in the *Brantley* case last month.
5 Since there's no opposition, I will go ahead and
6 grant that motion. When are we set for trial?
7 March --

8 MR. KEEVER: March 11th, I believe, Your
9 Honor.

10 JUDGE SCOTT: March 11th. Let me talk with
11 Ms. DeShields. I'm not certain of what the expense
12 is. And I don't know whether she feels like it
13 would be appropriate to allocate any of her hourly
14 deputy clerk cost to such a thing. Since we've got
15 plenty of time, I will prepare the order denying
16 the request to depose Dr. Elkins again. And I will
17 also include in that order granting of the motion
18 for expanded juror pool of 70 jurors and to
19 distribute a questionnaire. And I will talk with
20 Ms. DeShields as to the cost and the timing and the
21 postage and that sort of thing. And include those
22 -- that -- that information in the order.

23 While you're all here today, I'd like for you
24 to see Ms. Schrader and get a hearing date for our
25 next hearing. I'm confident that we'll need to

1 have more hearings prior 'til we get to trial. In
2 the off-chance that we do not, we can cancel those
3 if they're not needed. I would anticipate setting
4 another hearing sometime mid to late January, so
5 that you've got the questionnaires. We can address
6 any problems before we get to trial in March.

7 I will include that date in the order that I
8 prepare and send out.

9 MR. KEEVER: Thank, Your Honor.

10 JUDGE SCOTT: Mr. Kever, is there anything
11 else that we need to address today that's pending
12 before the Court?

13 MR. KEEVER: Your Honor, I -- if I could, I'd
14 just like a very -- a short time to make my record
15 taking exception to the ruling regarding Dr.
16 Elkins. We -- it's our position that he has not
17 been procedurally declared as an expert. We've
18 never had a Rule 26 disclosure. And for that --
19 those reasons, while we're not asking for
20 reconsideration, we understand the Court's order,
21 and appreciate the opportunity to make this record.

22 JUDGE SCOTT: All right.

23 MR. KEEVER: Thank you.

24 JUDGE SCOTT: Is that all you wanted to say?

25 MR. KEEVER: I think so. Ken, is that

1 adequate?

2 JUDGE SCOTT: Okay. Mr. Swindle, anything
3 else?

4 MR. SWINDLE: Your Honor, I -- I think also
5 included in the motion that we filed was a request
6 to supplement the interrogatory responses regarding
7 what the expert opinion was. I -- I'm not sure
8 that was specifically addressed. Was that
9 addressed?

10 MR. KEEVER: Thank you, Mr. Swindle. Yes,
11 Your Honor. We did file a Motion to Compel, but we
12 have asked that the interrogatories be
13 supplemented. And Rule 26 does say that for any
14 expert testimony we're allowed to know the
15 substance of the opinions and the basis for those
16 opinions. And we would ask that defendant be
17 ordered to simply supplement that interrogatory to
18 any expert opinions expected to be offered by Dr.
19 Elkins.

20 And if he's going to be silent on the issue as
21 to whether or not under that definition of sedation
22 making Ms. Poff incapable of taking actions for
23 self-preservation, then we would like to have that
24 in a pleading. And I think -- I think that ends it
25 for us.

1 If you wish, we can just simply file -- if you
2 wish, Your Honor, I'll -- I'll send a good faith
3 letter asking Mr. Lisle to supplement it and be
4 specific in it. Then he has 30 days to do that.
5 And you got time to work through that before the
6 end of discovery. Would that -- that would perhaps
7 be better?

8 JUDGE SCOTT: No, sir. I'm -- Mr. Kever, I'm
9 sorry. I'm having a difficult time tracking what -
10 - what it is you're saying. What sort of
11 supplement are you looking for? Other than the
12 doctor's going to testify he didn't violate the
13 standard of care, what is it you want to know?

14 MR. KEEVER: I want to know, Your Honor -- you
15 know, if that's all his testimony's going to be,
16 then that's all I need to know. But if he is going
17 to offer any other expert opinions, in accordance
18 with Rule 26, I want him to state the subject
19 matter of the opinions he's -- to which he's
20 expected to testify; to state the substance of the
21 facts and opinions to which he's expected to
22 testify; any summary of the grounds for each
23 opinion.

24 JUDGE SCOTT: Well, how is that going to be
25 different from the questions you've already asked

1 him?

2 MR. KEEVER: I never asked him a question
3 about the amount of sedation and the effect it
4 would've had on Sue, which is an expert opinion. I
5 mean, a certain amount of sedation does this make
6 the lady incapable of taking actions --

7 JUDGE SCOTT: And how is that new or different
8 from December 7th, 2011, or whatever our cutoff
9 was?

10 MR. KEEVER: It's different than the Rule
11 26(f) requires supplementation of discovery. And
12 we've not received any supplementation of
13 discovery. And we're asking that it be
14 supplemented to that extent.

15 JUDGE SCOTT: To what extent?

16 MR. KEEVER: To the extent -- I apologize,
17 Your Honor. I'm obviously in -- in -- inartfully
18 making this point. To the extent that each and
19 every expert opinion that Dr. Elkins is going to
20 make be written down so we see what it is. And if
21 he comes out at trial with something other than
22 that, we'll object to it because it hadn't been
23 disclosed. And one of those expert opinions, I
24 would think, has to be an opinion that with the
25 sedation Sue got, she was capable of getting up off

1 that gurney and walking to the door in case of a
2 fire. That's basically what it means. If that's
3 going to be an opinion --

4 JUDGE SCOTT: And tell me how that's new or
5 different from December 7th, 2011.

6 MR. KEEVER: It's new and different because we
7 did not have established as a fact that the center
8 was not licensed. We did not have established a
9 statement from defense counsel that their position
10 is it was not required to be licensed. That's all
11 new information that has come out in 2012, sir.

12 JUDGE SCOTT: So in 2012, a regulation was
13 enacted that required the defendant's procedure or
14 where it was conducted to be licensed in December
15 of 2011?

16 MR. KEEVER: No, sir. I -- I apologize if
17 that's what it sounded like I was saying.

18 JUDGE SCOTT: My point is, whatever it is
19 you're trying to do, you knew or reasonably
20 could've known or could've done whatever you wanted
21 to years ago and certainly prior to December 7th,
22 2011. Now, if something is new or different
23 because of some action or inaction of the defendant
24 since December 7th, 2011, I will allow additional
25 discovery. If there's not, I will not allow

1 additional discovery.

2 Is there anything the defendant has done or
3 not done since December 7th, 2011 that should allow
4 you to conduct additional discovery?

5 MR. KEEVER: Yes, sir. He has admitted his
6 center was not licensed. That's -- that is an
7 admission and it's binding on him. We didn't have
8 that admission before December 7th, 2011.

9 JUDGE SCOTT: Is that your fault or his fault?

10 MR. KEEVER: Well, we -- we asked in a -- in a
11 request for admission, and he didn't answer it
12 saying that the request was untimely. And I'll
13 have to agree with -- tell Your Honor that at the
14 time we were right before trial, and I did not, as
15 I perhaps should have, made my record and ask it to
16 be compelled. But we were in that 60-day period
17 before trial. So I -- I was estopped because of
18 the timing before December 7th, 2011. With a new
19 scheduling order and a new trial date, that barrier
20 to pursuing the request for admissions was removed.

21 We resubmitted the Requests for Admissions.
22 Your Honor compelled the responses to those request
23 for permission -- for admission, and now we have
24 information that is new. And I would submit that
25 it's on that basis that we made our good-faith

1 motion, which we still believe is in good faith to
2 proceed with further discovery on that expert
3 issue.

4 JUDGE SCOTT: All right. Anything else?

5 MR. KEEVER: No, Your Honor.

6 MR. SWINDLE: Your Honor, may -- may I clarify
7 what I was attempting to bring to the Court's
8 attention? Can I --

9 JUDGE SCOTT: Yes, Mr. Swindle, you may.

10 MR. SWINDLE: I -- I think I -- I may have
11 caused some confusion here. What I was trying to
12 bring to the Court's attention is not that the
13 plaintiff should be allowed to conduct additional
14 or new discovery; only, that the old discovery, we
15 already have produced was never fully answered.
16 And under 26(e) there -- it should be supplemented
17 and it should be updated. Not -- I wasn't asking
18 that we should be allowed to conduct new discovery
19 on that issue. And I apologize if I wasn't clear
20 in my previous statement.

21 JUDGE SCOTT: No. I -- that's the way I
22 understood it. Mr. Lisle, you want to respond?

23 MR. LISLE: Just that, Judge, we've -- we've
24 had 20 sets of written discovery, we've had
25 hearings on Motion to Compel. As far as we know,

1 we've answered all the discovery. You know, we
2 went to trial. I mean, we -- this didn't just --
3 we -- we prepared this case for a year and a half
4 and went to trial. And so, you know, whatever
5 happened -- I don't -- I don't have any idea what
6 they're talking about, as far as, you know, new
7 opinions. That's why we just ask the Court for
8 some closure. It's plenty of discovery, and -- and
9 we just ask that we stick with that.

10 JUDGE SCOTT: All right. I'm -- Mr. Swindle,
11 I'm not exactly certain what it is you're wanting,
12 hence my earlier statements I'm confident we'll
13 need to have more pretrial hearings in this matter.
14 Why don't you file a Motion to Compel after you've
15 written a letter to Mr. Lisle and tell him what it
16 is you want to know?

17 MR. SWINDLE: Yes, sir.

18 JUDGE SCOTT: If you're unhappy with his
19 response, we'll take that issue up on the motion
20 that you file at our January hearing.

21 MR. SWINDLE: Yes, Your Honor. And -- and,
22 again, I apologize for the confusion.

23 JUDGE SCOTT: That's all right, Mr. Swindle.
24 I'm -- I'm well-acquainted with this matter.
25 That's why I said we'll need to have another

1 hearing in January.

2 MR. SWINDLE: Thank, Your Honor.

3 JUDGE SCOTT: Anything else, Mr. Lisle?

4 MR. LISLE: No, sir. Not from me.

5 JUDGE SCOTT: Why don't you-all see Ms.

6 Schrader and get a hearing date in January? And I

7 will include that in my order.

8 (Wherein, the proceedings ended at 9:40 a.m.)

COPY OF 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

PROCEEDINGS

Hearing held before the Honorable John R. Scott,
Circuit Judge at Benton County Circuit Court, Bentonville,
Arkansas on February 22nd, 2013, at 9:00 a.m.

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1 JUDGE SCOTT: The next matter to come before
2 the Court is the case of *Sue Poff v. James P.*
3 *Elkins, M.D., and James P. Elkins, M.D., P.A.* This
4 is Case No. CV-2012-261. Parties approach and have
5 a seat at the counsel tables, please. The
6 plaintiff is represented by Ken Swindle and James
7 Kever. The defendants are represented by Stephen
8 Lisle. Today was set for a pretrial hearing
9 regarding various pleadings filed by the parties.
10 Who's going to speak for the plaintiffs today,
11 gentlemen?

12 MR. KEEVER: I will, Your Honor.

13 JUDGE SCOTT: All right. Mr. Kever, you may
14 make your argument regarding your Motion to
15 Preadmit Trial Exhibits.

16 MR. KEEVER: Thank, Your Honor. May it please
17 the Court, Counsel. Your Honor, I filed this
18 motion. And since then, I have gone over the
19 exhibit more carefully. I think I had some 40
20 exhibits that I had asked to have preadmitted. I
21 have two, four, seven exhibits that I now believe
22 were not admitted at the first trial. And I think
23 that I -- you know, I'd like to just withdraw them
24 from consideration.

25 At the first trial, we admitted a number of

1 exhibits. It was a little bit of a time-consuming
2 exercise as I put my expert witness on. And since
3 those exhibits had already been admitted, and to
4 save the time of the Court and the jury, I propose
5 to preadmit the exhibits.

6 I understand the defense has -- has objected
7 to that procedure. And I'm certainly willing to
8 admit them one at a time, and have them
9 authenticated by the witness at that time. But I
10 just thought that it would streamline the process
11 and -- and make it more convenient, and that's the
12 purpose of my -- my motion, Your Honor.

13 JUDGE SCOTT: All right. Well, I think Mr.
14 Lisle's response is well taken. I don't know how
15 we could have a record or be able to know what was
16 going on if they were not admitted just like they
17 were the first time, so that motion will be denied.

18 MR. KEEVER: Very good. Thank you, Your
19 Honor. I appreciate getting it cleared up now.

20 JUDGE SCOTT: Mr. McKeever, you may make your
21 argument regarding your Motions in Limine.

22 MR. KEEVER: Thank you, Your Honor. We have
23 our Motion in Limine, and I have it as a, let's
24 see, 16-part motion.

25 JUDGE SCOTT: Yes, sir.

1 MR. KEEVER: My -- Mr. Lisle filed a response.
2 And it's -- looks like he has objections to, oh,
3 our Sections 1, 5, 12, and 16, as nearly as I can
4 tell from his response. If the other sections are
5 not objected to, I would suggest that we may want
6 to consider just admitting 2, 3, 4, 6, 7, 8, 9, 10,
7 11, 13, 14, and 15, or go through them one by one,
8 whichever the Court prefers.

9 JUDGE SCOTT: Ms. -- Mr. Lisle, which ones of
10 the defendants' -- I mean, the plaintiff's motions
11 are you objecting to?

12 MR. LISLE: Your Honor, there was -- there was
13 a -- a motion to eliminate any of the plaintiff's
14 prior cosmetic procedures, we're objecting to that.

15 JUDGE SCOTT: All right. That's No. 1, what's
16 the next one?

17 MR. LISLE: The other one is the -- her -- her
18 financial condition. We do think that there's
19 going to be an issue about her inability to --

20 JUDGE SCOTT: Is that No. 5?

21 MR. KEEVER: 5.

22 MR. LISLE: Your Honor, I have my motion -- I
23 --

24 MR. KEEVER: I -- I didn't see on -- I'm
25 sorry. I didn't --

1 MR. LISLE: Well, there was an issue about
2 bankruptcy. There were two things that kind of
3 overlapped, bankruptcy, and -- and collateral
4 source. I don't believe there's going to be any
5 evidence of collateral source, anyway. I haven't
6 seen anything about that, so I didn't address that
7 specifically. But I do think there will be -- I
8 didn't know how broadly he was intending that. But
9 I do think that the plaintiff's financial condition
10 is going to be an issue in a broader sense, no --
11 whether it's specific --

12 JUDGE SCOTT: Why would it be an issue, Mr.
13 Lisle?

14 MR. LISLE: Your Honor, because there's going
15 to be some testimony that there were medical
16 procedures that she wanted to have after the fact
17 and couldn't do it because she didn't have the
18 money. And -- and I think that that's going to be
19 an issue.

20 JUDGE SCOTT: Okay.

21 MR. LISLE: In other words, her --

22 JUDGE SCOTT: Do you dispute that, Mr.
23 McKeever?

24 MR. KEEVER: Well, I -- I -- I don't dispute
25 that there will be testimony that she has medical

1 treatments that have been recommended that she
2 hasn't had because she couldn't afford them. I --

3 JUDGE SCOTT: Okay. What's your next
4 objection, Mr. Lisle?

5 MR. LISLE: And there was just some -- I
6 wasn't really sure I understood his motion on --
7 where he talked about the *Daubert* analysis, but I
8 just -- so I just said in -- generally, in
9 response, that Dr. Elkins is an expert that expects
10 to testify. And -- I mean, I -- I really think
11 that that -- going beyond that is something we'll
12 have to address at trial because I didn't really
13 understand the basis for the -- the motion.

14 JUDGE SCOTT: All right. Mr. McKeever, I'm
15 going to deny your Motion in Limine as to your
16 client's prior cosmetic procedures. I do that
17 because of the allegation of her treatment, and I
18 expect that the defense will show that she had
19 prior similar treatments and was knowledgeable
20 about the treatments. I'm also going to deny your
21 Motion No. 12 as to expert opinions.

22 So that you all understand, once again, the
23 jury will not be told who is an expert or who is
24 not. You may question a witness about
25 qualifications and then proceed to ask questions.

1 MR. KEEVER: Thank you very much for clearing
2 that up, Your Honor.

3 JUDGE SCOTT: And --

4 MR. KEEVER: I don't think we had a written
5 order on that before. And --

6 JUDGE SCOTT: We're going to have one now, Mr.
7 Kever.

8 MR. KEEVER: And I wanted to be sure we had it
9 in there.

10 JUDGE SCOTT: As to the plaintiff's mental
11 health, No. 16, I'm going to deny that, also. I
12 think that goes to elements of her claimed damages,
13 and I think the defendant is entitled to inquire
14 into that. That means that 1, 12, and 16 are
15 denied. Mr. Kever, why don't you prepare an order
16 in addition to the denial of the Motion to Preadmit
17 Trial Exhibits, an order as to the Motion in
18 Limine? I'm also going to deny the plaintiff's
19 First Amended Motion to Preadmit Exhibits.

20 MR. KEEVER: Yes, sir.

21 JUDGE SCOTT: All right. I think that takes
22 care of the plaintiff's motions. Mr. Lisle, your
23 turn. On your Motion in Limine, it appears that
24 the plaintiffs are in agreement on 1, 2, 6, 7, and
25 8, possibly 9, but are in disagreement on 4 and 5,

1 as to the specialty. Would you address the
2 *Broussard* case that the plaintiff cited, please?

3 MR. LISLE: Well, I will, Your Honor. And --
4 that *Broussard* case does apply. The -- my -- my
5 motion was intended more broadly to avoid the
6 situation where you put a nurse on the stand and --
7 or get testimony from a nurse or someone that's a -
8 - working in the office and start asking them what
9 would be expert opinions. I think, as far as the
10 specialty, based on the *Broussard* case, I think if
11 a -- if the plaintiff puts on her expert and they
12 show that he has basis for opinions in this case,
13 then the judge could allow it. I think we're going
14 to have to do that at trial, though.

15 JUDGE SCOTT: Okay.

16 MR. LISLE: But -- but my testimony, really,
17 was based on -- intended to -- I'm sorry. My
18 motion was intended to limit people that -- that
19 are working in the field, but aren't necessarily
20 experts, like office staff, my -- and,
21 particularly, my -- my clients' staff. And that
22 was -- now, I think -- I -- and the -- he addressed
23 something. And, of course, if I put my defendant
24 on the stand, Dr. Elkins, and he testifies about
25 the standard of care, then obviously they can ask

1 him about the standard of care.

2 Let's see, the other --

3 JUDGE SCOTT: Well, to the extent you're
4 talking about witnesses who are not qualified, I'm
5 going to grant that motion. But I think you're
6 correct, we'll have to cross that bridge when we
7 see what witnesses say what.

8 MR. LISLE: Yes, sir. Now, I believe the --

9 MR. KEEVER: Your Honor, may I -- may I -- may
10 I comment on this No. 3? Mr. Lisle --

11 JUDGE SCOTT: Are you talking about No. 3 or
12 No. 4?

13 MR. KEEVER: No, sir. I think we're on -- on
14 No. 3. And Mr. Lisle has made it clear that Dr.
15 Elkins is going to offer expert opinions. And I
16 think that -- I mean, we talked about this in the
17 last pretrial. I think that I understand the
18 Court's ruling. Gets offered -- it's been declared
19 as an expert.

20 JUDGE SCOTT: He's not going to be declared an
21 expert, Mr. Keever.

22 MR. KEEVER: Oh. Yes.

23 JUDGE SCOTT: Whatever you need to do to get
24 that straight, let's take another attempt.

25 MR. KEEVER: Okay.

1 JUDGE SCOTT: Go ahead.

2 MR. KEEVER: He will be offering expert

3 opinions. So --

4 JUDGE SCOTT: We'll let the jury decide that.

5 MR. KEEVER: Thank you, Your Honor, so --

6 JUDGE SCOTT: All right.

7 MR. KEEVER: Even before he offers an expert

8 opinion, I -- I wanted it clear that I can ask him

9 expert opinions. He can't have the benefit of

10 being shielded from ask -- opinions against

11 himself, since he's already declared he's going to

12 offer opinions for himself.

13 JUDGE SCOTT: Mr. Kever, I don't follow you.

14 What is it you're trying to say?

15 MR. KEEVER: Okay. The *Whorton* case and the

16 Arkansas Statute says a medical care provider may

17 not be forced to give opinions against himself, but

18 he loses that protection if he offers expert

19 opinions.

20 JUDGE SCOTT: Yes, sir.

21 MR. KEEVER: I -- I -- I think it's

22 established he's going to offer expert opinions.

23 So I just want to be sure that I'm on sound ground

24 if I want to ask the doctor an opinion that may be

25 against his interest.

1 JUDGE SCOTT: I don't know why you would think
2 you would not be. But so that you understand, if
3 he offers an opinion, you may ask him questions
4 about his opinion.

5 MR. KEEVER: Thank you, sir.

6 JUDGE SCOTT: Certainly. Anything else, Mr.
7 Lisle?

8 MR. LISLE: Let's see. I believe the -- the
9 last -- the only issues that we still -- were
10 disputed were No. 7 and -- No. 7 and No. 8. And --

11 JUDGE SCOTT: I understood the plaintiffs were
12 in agreement on 7 and 8, assuming you don't open
13 doors.

14 MR. LISLE: On the licensure by the health
15 department and the -- the 2005 Consent Order?

16 JUDGE SCOTT: Well, I was looking at their
17 response. Let me look at yours, 7 regards
18 settlement negotiations, and 8 is talking about
19 admissibility of evidence.

20 MR. LISLE: Well --

21 JUDGE SCOTT: What number are you on?

22 MR. LISLE: Your Honor, my brief, I -- my No.
23 7 is licensure by the health department.

24 JUDGE SCOTT: Are you looking at your motion
25 filed February 13th, 2013?

1 MR. LISLE: Well, Your Honor, I was actually
2 looking at the brief in support of that motion. I
3 may've got my numbers mistaken there.

4 JUDGE SCOTT: Okay.

5 MR. KEEVER: Your motion...

6 MR. LISLE: Well, Your Honor, I didn't
7 specifically address it in the -- the motion. It's
8 in the brief. There's a --

9 JUDGE SCOTT: Well, let me stop you there, Mr.
10 Lisle. As I understand it, the licensure hearing
11 and restriction was sometime prior to this
12 procedure. Is that correct?

13 MR. LISLE: Yes, Your Honor. There's two --

14 JUDGE SCOTT: And was it all completed and
15 over with by the time this procedure took place?

16 MR. LISLE: It certainly was on the Consent
17 Order. So you got these two issues, and they're
18 trying to tie them together.

19 JUDGE SCOTT: What was left remaining on the
20 disciplinary action at the time this took --
21 procedure took place?

22 MR. LISLE: There was nothing left at the time
23 this procedure took place. In fact, that was over
24 --

25 JUDGE SCOTT: Okay. Let me stop you there.

1 MR. LISLE: Okay.

2 JUDGE SCOTT: Mr. Keever, you agree with that

3 representation?

4 MR. KEEVER: No, sir. I don't.

5 JUDGE SCOTT: What do you think was left at

6 the time of this procedure?

7 MR. KEEVER: I think there was a Consent Order

8 that stated he was not to do any surgery in any

9 facility that was not licensed by the State of

10 Arkansas. And he was also ordered --

11 JUDGE SCOTT: Wasn't there a timeline where

12 that restriction ended?

13 MR. KEEVER: Until a further order from the

14 court. And there was also a provision where he

15 would be monitored by a physician. Now, there is,

16 in his Arkansas Medical Board file, a note that

17 he's no longer required to be monitored.

18 JUDGE SCOTT: And what was the date of that

19 note, Mr. Keever?

20 MR. KEEVER: It's in Mr. Lisle's --

21 MR. LISLE: Your Honor, it was February the

22 2nd of 2006.

23 JUDGE SCOTT: And when was this procedure?

24 MR. KEEVER: 2009, Your Honor.

25 JUDGE SCOTT: And what makes you think there

1 was something remaining?

2 MR. KEEVER: The wording of the order that he
3 is no longer required to be monitored. There was
4 no wording in the order that says that he is no
5 longer required to restrict his surgery to
6 hospitals and surgery centers that are licensed by
7 the State of Arkansas. And there's -- I think it's
8 been admitted that the center is not and has never
9 been licensed by the State of Arkansas.

10 MR. LISLE: Right, Your Honor. We -- we
11 contend it's not required to be licensed, and
12 there's no proof that it is required to be
13 licensed. And --

14 JUDGE SCOTT: Well, let me stop you there.
15 I'm not going to allow any testimony about any of
16 this administrative procedure. If the medical
17 board wants to bring an action or take some sort of
18 coarse of disciplinary action, that's up to them.
19 But as far as I'm concerned, this Consent Order was
20 over -- what'd you say, 2006?

21 MR. LISLE: Yes, Your Honor, February the 2nd
22 of 2006.

23 JUDGE SCOTT: And -- and our procedure at
24 issue took place in 2009. Anything else, Mr.
25 Keever?

1 MR. KEEVER: Well, the other issue -- and --
2 and the -- the other fact is that the center was
3 not licensed. Mr. Lisle has represented that it
4 wasn't required to be licensed. There are rules
5 and regulations by the Arkansas Department of
6 Health that state the requirements for licensure.
7 It becomes an expert issue because it has to do
8 with the effect of the sedative drugs that are
9 given to the patient.

10 In other words, if they receive sedatives to
11 the extent that the patient is unable to take care
12 of themselves without assistance during an
13 emergency, licensure is required. Dr. Shewmake, in
14 his expert report, make it clear that it's his
15 opinion that the drugs given to Ms. Poff would've
16 made it impossible for her to take care of herself
17 without assistance. Therefore, it is required to
18 be licensed.

19 In his response or in his brief, Mr. Lisle
20 makes the comment that Dr. Elkins has been doing
21 surgery in this center since '96, and no one from
22 the Department of Health has ever come to him and
23 told him he needs to be licensed. The requirement
24 is set by the laws of and regulations of the State
25 of Arkansas. My client has -- has stated under

1 oath and will testify that if she were aware the
2 center had not been licensed, it would've been a
3 relevant and material fact in her giving informed
4 consent.

5 So I understand the Court's ruling on the
6 Consent Order. And I'm not asking for
7 reconsideration of that. But the fact of the
8 licensure I believe is relevant. It was relevant
9 and an active factor at the time of the surgery,
10 and is material in that it would've been a factor
11 considered important by my client in informed
12 consent. So I would ask that this Motion in
13 Limine, which isn't in the motion, be denied and --
14 and we be allowed to ask questions about the
15 licensure, knowing that we're not to get into the
16 administrative action or the medical board's --

17 MR. LISLE: Your Honor --

18 JUDGE SCOTT: That's -- that's denied. We're
19 not going to have any testimony or any evidence
20 about any licensure. If the State wants to take
21 some sort of action, the State can with its own
22 board, its own experts. We're not going to try a
23 case within a case here. Mr. Lisle, prepare an
24 order consistent with that ruling granting your
25 Motion in Limine.

1 Counsel, we're set for trial on March 11th,
2 2013. Our procedure will be much the same as the
3 first time we tried this case. I want to read to
4 you what I'm going to read to the jury. Ladies and
5 gentlemen, is there anyone in the audience that is
6 currently on the jury panel for Benton County
7 Circuit Court? Thank you.

8 "Ladies and gentlemen, this is a civil case.
9 Sue Poff claims that she sustained injuries as a
10 result of a medical procedure performed on her by
11 Dr. James P. Elkins on January 22nd, 2009. Dr.
12 Elkins denies that his treatment breached his
13 standard of care, and he denies that his actions
14 caused Ms. Poff any damages. Your job is to
15 determine if Dr. Elkins breached his standard of
16 care in the treatment of Ms. Poff; and if he did,
17 did he cause Ms. Poff damages; and that amount, if
18 any, of those damages."

19 Any objections to that, Mr. Keever?

20 MR. KEEVER: No, sir.

21 MR. LISLE: No, Your Honor.

22 JUDGE SCOTT: Mr. Lisle? Okay. Mr. Swindle,
23 you still practice by your -- no. You've got an
24 associate now, don't you?

25 MR. SWINDLE: Yes.

1 JUDGE SCOTT: What --
2 MR. SWINDLE: Bradley Mullins.
3 JUDGE SCOTT: I'm sorry?
4 MR. SWINDLE: Bradley Mullins, M-U-L-L-I-N-S.
5 JUDGE SCOTT: Thank you.
6 MR. SWINDLE: Thank you, Your Honor.
7 JUDGE SCOTT: Mr. Kever, do you have anyone
8 practicing with you, still solo?
9 MR. KEEVER: No, sir.
10 JUDGE SCOTT: Okay.
11 MR. KEEVER: Or, yes, sir. I'm still solo.
12 JUDGE SCOTT: Okay. Mr. Lisle, are the
13 attorneys in your firm John Lisle, Chris Lisle,
14 Donnie Rutledge, and James K. Hatcher, Gino Franco,
15 and Mona Teague?
16 MR. LISLE: That's correct, Your Honor.
17 JUDGE SCOTT: Any others?
18 MR. LISLE: No, sir. That's it.
19 JUDGE SCOTT: Okay. Counsel, our witnesses
20 have changed a bit from last time. The current
21 witnesses I have are Sue Poff; Lisa Jones; Jill
22 Eades; Susie Reed, from Hull Dermatology; Dr.
23 Daniel Atwood; Dr. Jay Holland; Howard Middleton;
24 and Dr. Chris Shewmake; Tom O'Brien; and Dr.
25 Elkins.

1 Mr. Keever, do you plan to call any witnesses
2 to testify that I did not identify?

3 MR. KEEVER: I don't think so. I think it's
4 Middlecamp.

5 JUDGE SCOTT: Middlecamp?

6 MR. KEEVER: Yes, sir.

7 JUDGE SCOTT: I apologize. I can't read my
8 handwriting. Thank you. Mr. Lisle, do you plan to
9 call any witnesses that I did not name?

10 MR. LISLE: No, Your Honor, do not.

11 JUDGE SCOTT: Okay. Counsel, do you still
12 think this will take five days, Mr. Keever?

13 MR. KEEVER: Well, Your Honor, it kind of goes
14 to my next question, which had to do with the
15 bifurcation of the punitive damages stage. And I
16 wonder if the Court would tell me how you plan to
17 handle that part of it.

18 JUDGE SCOTT: I don't think we can say
19 anything about punitive damages 'til we get there.
20 Therefore, I'm going to deny your motion -- I'm not
21 exactly sure what it is you called it.

22 MR. KEEVER: Motion for and Brief for Punitive
23 Damages-Qualified Jury, asking to inquire in voir
24 dire as to asking for punitive damages in medical
25 malpractice suits.

1 JUDGE SCOTT: I'm going to deny that motion.
2 And as to the itemized verdict form, I want to wait
3 until we get through the trial and we'll see --
4 MR. KEEVER: Sure.
5 JUDGE SCOTT: -- what we do on that.
6 MR. KEEVER: Sure. That's what I expected,
7 Your Honor.
8 JUDGE SCOTT: Okay.
9 MR. KEEVER: So as to the procedure on the
10 punitive damages phase of the trial, do I
11 understand that we'll complete compensatory phase.
12 And then, with the same jury, proceed immediately
13 into the punitive damages stage after the verdict?
14 JUDGE SCOTT: Yes, sir. That's correct.
15 MR. KEEVER: Okay. I think that -- I think we
16 can probably do it all in five days. But I'm --
17 JUDGE SCOTT: Okay.
18 MR. KEEVER: Because of the bifurcation, I
19 suspect it might take all five days.
20 JUDGE SCOTT: All right. Do you agree with
21 that, Mr. Lisle?
22 MR. LISLE: I can't see it taking more than
23 five days, Your Honor.
24 JUDGE SCOTT: Okay.
25 MR. LISLE: So five or less.

1 JUDGE SCOTT: Counsel, how many alternates do
2 you want to seat this time, Mr. Keever?

3 MR. KEEVER: I think -- I think two, Your
4 Honor. I think we had two last time.

5 JUDGE SCOTT: Two all right with you, Mr.
6 Lisle?

7 MR. LISLE: That's -- that's fine, Your Honor.

8 JUDGE SCOTT: Okay. All right. Mr. Keever,
9 is there anything else we need to take up today?

10 MR. KEEVER: No, Your Honor. I don't think
11 so. We'll get busy and prepare some written
12 orders, and shoot them over to you.

13 JUDGE SCOTT: All right.

14 MR. KEEVER: Should have them there this
15 afternoon.

16 JUDGE SCOTT: Mr. Lisle, anything else today?

17 MR. LISLE: Nothing else, Your Honor.

18 JUDGE SCOTT: All right. Thank you, Counsel.
19 I'll see you next month.

20 MR. KEEVER: We look forward to it, sir. Your
21 Honor, very efficient pretrial

22 (Wherein, the proceedings ended at 9:25 a.m.)

COPY OF 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

PROCEEDINGS

Hearing held before the Honorable John R. Scott,
Circuit Judge at Benton County Circuit Court, Bentonville,
Arkansas on March 11th, 2013, at 8:49 a.m.

APPEARANCES

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1 MR. BAILIFF: All rise. Circuit Court of
2 Benton County, State of Arkansas, Division 4 is now
3 in session, the Honorable John R. Scott presiding.
4 JUDGE SCOTT: Be seated, please.
5 This is the matter of *Sue Poff v. James P.*
6 *Elkins, M.D., and James P. Elkins, M.D., P.A.* This
7 is Case No. CV-2012-261. Ladies and gentlemen, I
8 am Circuit Judge John Scott. Ma'am, if you'd like
9 to come forward, there's a seat in the jury box.
10 DEPUTY CLERK COFFELT: Ma'am, what's your
11 name?
12 MS. MILBURN: Marty Milburn.
13 DEPUTY CLERK COFFELT: Wilburn.
14 JUDGE SCOTT: You were all instructed to be
15 here at 8:30. It's now ten to nine. A few of your
16 colleagues have not made it in yet, but we are
17 going to go ahead and commence this proceeding. I
18 want to thank each of you for being here. I know
19 everyone involved in this case, from the litigants
20 to the attorneys, realize this is an interruption
21 in your life, the lives of your loved ones, the
22 lives of your employers, and your life in general.
23 But your service as a juror in Benton County is
24 absolutely essential to our system of justice.
25 As we proceed through this trial, I want each

1 of you to be the kind of juror that you would want
2 hearing your case or the lawsuit of a loved one
3 that you were involved with at that time. The
4 ladies on your left are Ms. Sherry Coffelt and Ms.
5 Kerry Hensley. They are deputy circuit clerks and
6 are responsible to see that the communication with
7 you is timely, efficient, that includes getting you
8 paid at the end of your jury term.

9 Make certain they have all of your current
10 contact information. Make certain that you can
11 contact them in event you have some experience or
12 circumstance that might interfere or prohibit you
13 from serving as a juror at this trial or any
14 subsequent trial through next month when your term
15 will end.

16 The lady directly in front of me is Ms.
17 Therese Olenberger. You will notice she's speaking
18 into a mask. Her job is to take down every word
19 that is said during this trial and the speaker of
20 those words. In a few minutes, I'm going to ask
21 you some questions. I anticipate the attorneys
22 will want to ask you some questions. When you do,
23 it is necessary that you stand, state your name,
24 and make your response.

25 It is not our objective to embarrass you or to

1 make you uncomfortable or feel awkward. If you
2 feel like that or think for some reason your
3 response would be prejudicial to this trial, you
4 may approach the bench immediately in front of me
5 and make your response. Ms. Olenberger will record
6 your response. The attorneys will hear your
7 response. But only the attorneys, Ms. Olenberger,
8 and I will hear your response. Your other jurors,
9 fellow jurors, will not hear your response.

10 The gentleman on your right in the deputy
11 sheriff uniform is Deputy Will Tucker. He's a
12 deputy sheriff for Benton County permanently
13 assigned as bailiff to this Court. He will be your
14 contact with the outside world during this trial.
15 If you have any problems, difficulties that you
16 need to communicate with the Court, he is the one
17 that you will communicate with. He will stay with
18 you outside the jury room at all times. He will
19 accompany you to lunch when we have lunch recesses.

20 Mr. Tucker, would you stand and raise your
21 right hand please.

22 (Wherein, the bailiff was sworn.)

23 JUDGE SCOTT: Thank you.

24 Ladies and gentlemen, you have previously been
25 sworn in as members of the jury panel for this

1 four-month term here in Benton County. Our job now
2 is to see if you should serve as a juror in this
3 case. You have previously been sworn as members of
4 the panel. You will now be sworn as members of
5 this trial's panel. Ms. Coffelt, or Ms. Hensley,
6 which one's going to do it?

7 DEPUTY CLERK HENSLEY: I don't care.

8 JUDGE SCOTT: All right.

9 DEPUTY CLERK HENSLEY: If you'll stand and
10 raise your right hand please.

11 (Wherein, the jury panel was sworn.)

12 JUDGE SCOTT: Be seated please. I see some of
13 you removing your jackets. I want you to feel free
14 to remove your outer coats or put them on. As you
15 might suspect, a building built in 1926 was not
16 designed with an efficient heating system that
17 still operates. Our experience in this courtroom
18 is that it is either hot or it is cold. So feel
19 free to put coats on or take coats off as you are
20 comfortable.

21 Once again, I remind you if you think that you
22 need to make a response to some question, you need
23 to stand, state your name, and make your response.
24 If for whatever reason, you would prefer to make
25 your response in private to me at the bench, you

1 are welcome to approach and do so.

2 Ladies and gentlemen, this is a civil case.
3 Sue Poff claims that she sustained injuries as a
4 result of a medical procedure performed on her by
5 Dr. James P. Elkins on January 22nd, 2009. Dr.
6 Elkins denies that his treatment breached his
7 standard of care, and he denies that his actions
8 caused any of Ms. Poff's damages.

9 Your job is to determine if Dr. Elkins
10 breached his standard of care in the treatment of
11 Ms. Poff. And if he did, did he cause Ms. Poff any
12 damages, and the amount of those damages? With
13 that little bit said, do any of you have any
14 knowledge of Ms. Poff, Dr. Elkins, or any of these
15 circumstances?

16 PROSPECTIVE JUROR BROWN: Not this
17 circumstance -- my name's Deborah Brown.

18 JUDGE SCOTT: If -- I'm sorry. Yes, Ms.
19 Brown?

20 PROSPECTIVE JUROR BROWN: I've seen Dr.
21 Elkins' work before.

22 JUDGE SCOTT: I'm sorry, ma'am. Ladies and
23 gentlemen, I am a little bit hard of hearing. You
24 may've noticed the air just kicked on. So if you
25 would, speak clearly, distinctly, and slowly.

1 Okay. Ms. Brown --

2 PROSPECTIVE JUROR BROWN: I have --

3 JUDGE SCOTT: -- what was it you said?

4 PROSPECTIVE JUROR BROWN: I have seen Dr.

5 Elkins' work before. And I've also --

6 JUDGE SCOTT: Are you a patient or you're --

7 PROSPECTIVE JUROR BROWN: No.

8 JUDGE SCOTT: -- just acquainted with it?

9 PROSPECTIVE JUROR BROWN: I'm an esthetician.

10 JUDGE SCOTT: You are excused, Ms. Brown.

11 Thank you. Just a minute, sir. Yes, sir, you in

12 the back?

13 PROSPECTIVE JUROR BASTIAN: Rod Bastian.

14 JUDGE SCOTT: Yes, Mr. Bastian?

15 PROSPECTIVE JUROR BASTIAN: I know Dr. Elkins.

16 I've advised Dr. Elkins personally.

17 JUDGE SCOTT: Mr. Bastian, you are excused.

18 Thank you. Yes, sir?

19 PROSPECTIVE JUROR COWHERD: Gary R. Cowherd.

20 I also know Dr. Elkins.

21 JUDGE SCOTT: How do you spell your last name,

22 sir?

23 PROSPECTIVE JUROR COWHERD: C-O-W-H-E-R-D.

24 JUDGE SCOTT: How are you acquainted with Dr.

25 Elkins, sir?

1 PROSPECTIVE JUROR COWHERD: Went to church
2 with him.

3 JUDGE SCOTT: Is that a regular circumstance?

4 PROSPECTIVE JUROR COWHERD: Regularly went to
5 church with him.

6 JUDGE SCOTT: You are excused, Mr. Cowherd.
7 Thank you, sir. Yes, sir?

8 PROSPECTIVE JUROR CHASTEEN: Kelly Chasteen.

9 JUDGE SCOTT: Yes, Mr. Chasteen?

10 PROSPECTIVE JUROR CHASTEEN: He was my
11 brother-in-law for about 20 years.

12 JUDGE SCOTT: You are excused, Mr. Chasteen.
13 I'm just waiting for the day my wife gets called
14 for jury duty. Yes, ma'am?

15 PROSPECTIVE JUROR BRIGHT: Lauren Bright.

16 JUDGE SCOTT: Yes, Ms. Bright?

17 PROSPECTIVE JUROR BRIGHT: I went to
18 elementary with his children.

19 JUDGE SCOTT: Were you friends with his
20 children, acquainted? If you are --

21 PROSPECTIVE JUROR BRIGHT: I don't know him
22 personally, but I know his kids.

23 JUDGE SCOTT: You are excused, Ms. Bright.
24 Thank you, ma'am. Any other juror feel that a
25 response would be appropriate?

1 Ladies and gentlemen. I'm going to ask Ms.
2 Hensley to call the roll of the jurors. When she
3 does, if you would, please stand up. The purpose
4 of this is to allow the attorneys to put some names
5 with your faces.

6 DEPUTY CLERK HENSLEY: We've already called
7 them, Your Honor.

8 JUDGE SCOTT: Did they stand up? Let's call
9 again. Thank you.

10 DEPUTY CLERK HENSLEY: All right.

11 (Wherein, jury roll was called.)

12 JUDGE SCOTT: Thank you. Ladies and
13 gentlemen, this is one of the opportunities, the
14 first opportunity, that you have if you'd like to
15 stand up and move your arms and legs around a
16 little bit, you may.

17 (Wherein, there was a brief off-the-record
18 conversation between Judge Scott and the deputy
19 clerks.)

20 JUDGE SCOTT: Thank you. Ladies and
21 gentlemen, if you'd be seated, please.

22 Ladies and gentlemen, the attorneys tell me
23 that this could be a five-day trial, go through the
24 entire week. Each day that you are in trial, the
25 County will provide you lunch. And if you want to

1 proceed in the evening with testimony or with
2 deliberations, the County will also provide you
3 with your evening meal. In addition to 12 jurors,
4 we're also going to select two alternate jurors in
5 event there's some personal emergency or difficulty
6 with one of the 12 jurors.

7 Ms. Poff, would you stand and face the jury
8 please? Ladies and gentlemen, this is Ms. Sue
9 Poff. She is the plaintiff, and she is a resident
10 of Rogers. Thank you, Ms. Poff.

11 Dr. Elkins, would you stand and face the jury,
12 please? Ladies and gentlemen, this is Dr. James P.
13 Elkins. He resides in Rogers and his medical
14 practice is located in Rogers. Thank you, Dr.
15 Elkins.

16 The plaintiff, Ms. Poff, is represented by
17 two attorneys. Mr. Swindle, would you stand up
18 please? Ladies and gentlemen, this is -- remain
19 standing. Ladies and gentlemen, this is Mr. Ken
20 Swindle. He lives and practices in Rogers with the
21 Swindle Law firm. Thank you, Mr. Swindle.

22 MR. SWINDLE: Thank you.

23 JUDGE SCOTT: The second attorney representing
24 the plaintiff is Mr. James Keever. Mr. Keever
25 lives and practices in Texarkana, Texas. Thank

1 you, Mr. Keever.

2 The defendant is represented by Steve Lisle
3 and Mr. Gino Franco of the Lisle Law Firm in
4 Springdale. The other attorneys in their firm are
5 John Lisle, Chris Lisle, Donnie Rutledge, James K.
6 Hatcher, and Mona Teague. Thank you, Counsel. Is
7 any juror related by blood or marriage to any of
8 the parties in this case? Is any juror related by
9 blood or marriage to any of the attorneys involved
10 in this case? Is there any juror who has been
11 subpoenaed or expects to testify in this case?

12 (Wherein, there was no response.)

13 JUDGE SCOTT: Do any of the attorneys that I
14 have identified represent any juror in any
15 unfinished legal business? Do any of the attorneys
16 that I identified regularly represent any juror or
17 a business entity or family member?

18 (Wherein, there was no response.)

19 JUDGE SCOTT: Ladies and gentlemen -- Mr.
20 Lisle?

21 MR. LISLE: Your Honor, I noticed I -- I've
22 done some work for one of the juror's employer. I
23 didn't know if I should --

24 JUDGE SCOTT: Which juror is that?

25 MR. LISLE: Mr. Brust.

1 JUDGE SCOTT: Mr. Brust, would you stand up
2 please?

3 PROSPECTIVE JUROR BRUST: Yes, sir.

4 JUDGE SCOTT: Who is your employer, sir?

5 PROSPECTIVE JUROR BRUST: Harrison, French &
6 Associates.

7 JUDGE SCOTT: Are you acquainted with Mr.
8 Lisle?

9 PROSPECTIVE JUROR BRUST: Don't believe so.

10 JUDGE SCOTT: All right. Thank you, Mr.
11 Brust.

12 Ladies and gentlemen, I'm going to read a list
13 of the possible witnesses in this case. I want you
14 to listen to this list and determine whether or not
15 you have any relationship or knowledge of any of
16 these witnesses that would impair your ability to
17 be a fair and impartial juror in this matter: Sue
18 Poff; Lisa Jones; Jill Eades; Susie Reed, who is an
19 R.N. with Hull Dermatology; Howard Middlecamp, who
20 resides in Cave Springs; Millicent Roberson, who is
21 an employee of Hull Dermatology; Dr. Jay Holland, a
22 physician from Little Rock; Dr. James P. Elkins;
23 Dr. Kris Shewmake, who is a physician from Little
24 Rock; and Tom O'Brien.

25 Mr. Keever?

1 MR. KEEVER: Dr. Dan Atwood from Fayetteville.
2 JUDGE SCOTT: Oh. I didn't realize. In
3 addition to those witnesses, Dr. Dan Atwood, a
4 physician from Fayetteville will also be
5 testifying. Yes, sir?
6 PROSPECTIVE JUROR ALLEN: Dr. Hull has been my
7 dermatologist for the last --
8 JUDGE SCOTT: What is your name, sir?
9 PROSPECTIVE JUROR ALLEN: Homer Allen.
10 JUDGE SCOTT: All right. Mr. Allen.
11 PROSPECTIVE JUROR ALLEN: The names you
12 mentioned, I don't -- I wouldn't have known if I
13 knew them or not.
14 JUDGE SCOTT: All right. I appreciate that.
15 Dr. Hull will not be a witness.
16 PROSPECTIVE JUROR ALLEN: Okay.
17 JUDGE SCOTT: Some of her employees will be.
18 PROSPECTIVE JUROR ALLEN: Okay. Well, I don't
19 really know them.
20 JUDGE SCOTT: Okay. Thank you, Mr. Allen.
21 Yes, ma'am?
22 PROSPECTIVE JUROR SHUEY: Marcella Shuey. I'm
23 also a patient of Dr. Hull, but I don't recognize
24 the names.
25 JUDGE SCOTT: All right. Ms. Shuey, be the

1 same thing with you. Thank you.

2 MR. BAILIFF: Judge...

3 DEPUTY CLERK HENSLEY: Judge, there's one
4 other juror.

5 JUDGE SCOTT: Oh. Forgive me. I apologize.
6 Yes, ma'am?

7 PROSPECTIVE JUROR IDA CLARK: Ida Clark. I
8 was a patient of Dr. Atwood's in Fayetteville.

9 JUDGE SCOTT: How long ago, ma'am?

10 PROSPECTIVE JUROR IDA CLARK: Like, five years
11 ago.

12 JUDGE SCOTT: You are excused, Ms. Clark. Is
13 any juror acquainted with any of the witnesses by
14 blood or marriage that I have identified? Have any
15 of you had any particular relationships or
16 circumstances with any of the witnesses that I have
17 identified that would impair your ability to be
18 fair and impartial jurors in this case?

19 (Wherein, there was no response.)

20 JUDGE SCOTT: You've had a few minutes to sit
21 there and I've talked a little bit. Have any of
22 you thought of any response to an earlier question
23 that you believe you should've made that you did
24 not make at that time? Yes, ma'am?

25 PROSPECTIVE JUROR COFIELD: My name's Erin

1 Cofield. I took civil litigation with Mr. Lisle.
2 I don't think it would impair my judgment, but
3 thought I would tell you.

4 JUDGE SCOTT: Thank you, Ms. Cofield. Any
5 other juror feel appropriate response to that
6 question? Has any juror discussed this case with
7 any person purporting to know the facts of this
8 case? Has any juror formed or expressed an opinion
9 on this case? Does any juror know of any reason
10 why if chosen to serve as a juror you could not be
11 absolutely fair and impartial and base your verdict
12 strictly upon the law as given to you by the Court
13 and the evidence gained from the witness stand?

14 (Wherein, there was no response.)

15 JUDGE SCOTT: Does the plaintiff have any
16 questions?

17 MR. KEEVER: Thank you, Your Honor. We do.
18 Good morning.

19 JURY PANEL: Good morning.

20 MR. KEEVER: And good morning. I'm Jim
21 Keever, as the Judge said. And along with Ken
22 Swindle, we represent Sue Poff. Can y'all hear me
23 okay? And I, like the Judge, have a little bit of
24 a hearing problem. So I apologize in advance if I
25 ask you to repeat something. The Court sent out

1 that questionnaire, and you were so responsive. We
2 -- we all want to thank you. That -- I know it
3 took a little time to fill it out send it back.
4 But hopefully it'll kind of streamline the process.
5 And we have a lot of people to visit with and may -
6 - hopefully it'll get done a little bit quicker.
7 So thanks for your cooperation.

8 This is the only time that I, as an attorney
9 for Sue, get to talk to you, and ask you questions,
10 you get to talk back to me. So this is a -- a nice
11 courtroom. It's small. It's intimate. It's
12 almost like a living room. And that's what I hope
13 we can have, is a discussion just like we're in
14 your living room or my living room because the more
15 that -- that I can hear from you, and really the
16 less I'm talking, the better the process will go.

17 How about that, a lawyer who doesn't want to
18 talk? Now, this is a very important case. It's
19 important for Sue. It's important for the
20 defendant. And I want to just visit really
21 briefly, hear me talking again, about something
22 called bias. Every one of you is qualified to be a
23 juror on some case. The question is, is this the
24 right case for you to be sitting. Who's old as I
25 am and remembers the first President Bush? Any

1 hands? All right. Do you remember there when he
2 got in trouble with a broc -- with a vegetable.
3 Tell me. It was -- what was it? What was the
4 vegetable?

5 JURY PANEL: Broccoli.

6 MR. KEEVER: Broccoli. I think his quote was,
7 "I didn't like broccoli as a kid. I don't like
8 broccoli as an adult. And I'm the president of the
9 United States, and I'm not going to eat any
10 broccoli." And he really got -- got some publicity
11 from the broccoli growers association. President
12 Bush had a bias against broccoli. It wasn't --
13 couldn't do anything about it. Right? And I'll
14 bet you that, seriously, if he were asked to serve
15 on a jury that involved broccoli, he would've asked
16 to be excused because of his bias.

17 Just like -- I don't know -- I have a bias
18 against slow drivers in both lanes on the
19 interstate. Anyone -- anyone with me on that one?
20 And some people have a bias against fast drivers on
21 the interstate. If you have a strong enough bias,
22 you might not be the best juror for an accident
23 caused by someone going 55 on the interstate. Is
24 that fair? And that's just all we're trying to do.

25 In your -- in your juror questionnaires -- oh,

1 and by the way, on those questionnaires, some of
2 you wrote down things that you would like to have
3 private. And -- and we will certainly respect
4 that. And I'll try not to ask anyone something
5 about their questionnaire if they mentioned it
6 private. And if that or another question, as the
7 Judge said, is something you just don't want to
8 share with 70 people, just raise your hand and come
9 up. And Judge Scott has offered to do that at the
10 bench in privacy just for the attorneys and the
11 reporter. Is that fair enough?

12 Sir, you -- I don't think I had you on my
13 list. What was your name again?

14 PROSPECTIVE JUROR ENLGER: Robert Engler.

15 MR. KEEVER: Could you spell it?

16 PROSPECTIVE JUROR ENGLER: It's Robert Engler,
17 E-N-G-L-E-R.

18 MR. KEEVER: Thank you, Mr. Engler. Thank
19 you, very much. There's a rule in the law that
20 gives a judge the right to dismiss a frivolous
21 lawsuit, a lawsuit without merit. And I'm just
22 bringing that up because there were a number of
23 responses on the questionnaires --

24 JUDGE SCOTT: Mr. Keever.

25 MR. LISLE: Your Honor --

1 JUDGE SCOTT: Mr. Kever.
2 MR. KEEVER: Yes, sir?
3 JUDGE SCOTT: Let's move along.
4 MR. KEEVER: Okay. Who here feels like a
5 judge ought to be able to dismiss a lawsuit if it
6 has no merit?
7 JUDGE SCOTT: Mr. Kever.
8 MR. LISLE: Can -- can we approach for one
9 second?
10 JUDGE SCOTT: No, sir. Next question.
11 MR. KEEVER: Okay. Thank you, sir. Who here
12 has to follow rules at work? And in the front row,
13 second seat, sir. Your name is?
14 PROSPECTIVE JUROR CHILES: Ryan Chiles.
15 MR. KEEVER: Hi, Mr. Chiles. What kind of
16 rules do you have to follow at work?
17 PROSPECTIVE JUROR CHILES: I'm a teacher, sir.
18 And so there's conduct rules that we have to follow
19 in relation to other coworkers, in relation to our
20 students, dress code type of rules, things like
21 that.
22 MR. KEEVER: Safety rules?
23 PROSPECTIVE JUROR CHILES: Sure.
24 MR. KEEVER: Who -- thank you, Mr. -- Chiles?
25 PROSPECTIVE JUROR CHILES: Yes, sir.

1 MR. KEEVER: Okay. Thank you. Who -- who has
2 a situation like Mr. Chiles where they have safety
3 rules they have to follow at work? Yes, sir? On
4 the front row.

5 PROSPECTIVE JUROR ELLIS: James Ellis.

6 MR. KEEVER: Hello, Mr. Ellis.

7 PROSPECTIVE JUROR ELLIS: How you doing?

8 MR. KEEVER: Fine. What kind of rules are you
9 talking about?

10 PROSPECTIVE JUROR ELLIS: Just -- I work for
11 Nestle. So it's -- it's just safety in the office,
12 safety behind the wheel, not anything major,
13 holding the handrail up and down the stairs, things
14 of that nature.

15 MR. KEEVER: Mr. Ellis, do you think that
16 people in the medical profession should have safety
17 rules to protect the people they're around,
18 including their patients?

19 PROSPECTIVE JUROR ELLIS: I do.

20 MR. KEEVER: What -- what -- what would you
21 think of when you thought of a safety rule for
22 patients?

23 PROSPECTIVE JUROR ELLIS: The patient or the -
24 - the doctor?

25 MR. KEEVER: For the patient.

1 PROSPECTIVE JUROR ELLIS: That the patient
2 should follow?

3 MR. KEEVER: No. That the doctor should
4 follow. I'm sorry. I phrased that inartfully, Mr.
5 Ellis.

6 PROSPECTIVE JUROR ELLIS: Proper
7 qualifications, cleanliness, following -- you know,
8 paying attention to the best of their ability what
9 they've been taught.

10 MR. KEEVER: Okay. Well, thank you. Thank
11 you. Who here would -- would add something to that
12 on safety rules in the medical profession? I saw
13 some other hands up out there. Work with me here.
14 How about my group on the right?

15 (Wherein, there was no response.)

16 MR. KEEVER: Well, who here has some -- some
17 association with the medical profession, either
18 working in it or related to somebody who works in
19 the medical profession? Yes, ma'am? The second
20 row.

21 PROSPECTIVE JUROR MANUS: Debra Manus. My
22 mother is a retired R.N. And I was a certified
23 CNA. And the care that we were charged to give to
24 each patient and each client was our utmost
25 responsibility. And if a doctor or a nurse did not

1 follow that, then it was the business of whoever
2 they worked for to rectify it. And I see that if
3 that is not followed, then the patient or client's
4 life or livelihood could be in danger.

5 MR. KEEVER: Thank you, Ms. -- was it Manus?

6 PROSPECTIVE JUROR MANUS: Yes.

7 MR. KEEVER: Did I pronounce it right?

8 PROSPECTIVE JUROR MANUS: Yes.

9 MR. KEEVER: And in the front row? Sir, you
10 raised your hand.

11 PROSPECTIVE JUROR WOLF: Good morning.
12 Stephen Wolf.

13 MR. KEEVER: Good morning, Mr. Wolf.

14 PROSPECTIVE JUROR WOLF: I work as the vice
15 president and team leader for the Abbott nutrition
16 division of Abbott Laboratories.

17 MR. KEEVER: Uh-huh.

18 PROSPECTIVE JUROR WOLF: We -- while I don't
19 have direct connection with the healthcare
20 industry, our products and services are provided to
21 healthcare industry.

22 MR. KEEVER: Do you have connection with
23 manufacturing and shipping and so forth, that sort
24 of thing?

25 PROSPECTIVE JUROR WOLF: Yeah. Yes.

1 MR. KEEVER: What kind of safety rules do you
2 have for the people that are under you? Sounds
3 like you have a -- a big job.

4 PROSPECTIVE JUROR WOLF: Well, the safety
5 rules, sir, are very similar to fellow juror who
6 just spoke up and referenced about safety rules
7 behind the wheel; safety rules at work, both in the
8 office environment, as well as in the manufacturing
9 facilities. And so to adhere and comply to those
10 safety rules, to ensure the safety of all of the
11 employees.

12 MR. KEEVER: Okay. Well, thank you. I'm
13 sorry. I've blocked on your name already.

14 PROSPECTIVE JUROR WOLF: Wolf.

15 MR. KEEVER: Wolf. Mr. Wolf, thank you. Who
16 here has a job or experience with operating, say,
17 heavy machinery that could be dangerous to people
18 around the machinery? Yes, ma'am, in the second
19 row?

20 PROSPECTIVE JUROR DUTY: I work at a Wal-Mart
21 warehouse and I operate power equipment and
22 vehicles that load pallets or pick up pallets.

23 JUDGE SCOTT: Ms. Duty, would you state your
24 name, please?

25 PROSPECTIVE JUROR DUTY: I'm so sorry.

1 JUDGE SCOTT: It's all right.

2 PROSPECTIVE JUROR DUTY: Melinda Duty.

3 MR. KEEVER: Thank you. And thank you, Your
4 Honor. Thank you, Ms. Duty. This equipment, when
5 -- when you are introduced to a new piece of
6 equipment, what kind of orientation, what kind of
7 paperwork, what kind of manuals do you --

8 PROSPECTIVE JUROR DUTY: We do a -- we read
9 and study a manual, then we take a written exam,
10 and have to score a certain percentage on that
11 exam. And then we do a field trip around the
12 warehouse on the actual equipment with the asset
13 protection team asking us questions and verifying
14 that we've been trained properly on that equipment.

15 MR. KEEVER: Thank you.

16 PROSPECTIVE JUROR DUTY: You must have your
17 license with you at all times when you operate the
18 equipment.

19 MR. KEEVER: Do you -- do you always have kind
20 of an owner's manual that you have to go through
21 for a new piece of equipment?

22 PROSPECTIVE JUROR DUTY: Well, you -- you
23 basically just do a study of how the -- the
24 operation of the equipment and the safety
25 procedures that you need to follow and the

1 inspection that you need to do of the vehicle
2 before you get on the vehicle every time you get on
3 a piece of equipment. And then AP may stop you at
4 -- at general times and ask you just brief
5 questions about your training and -- and make sure
6 you have your license available and your protective
7 glasses that you must wear at all times.

8 MR. KEEVER: Okay. Well, thank you, Ms. Duty.
9 Would anyone else -- yes, ma'am?

10 PROSPECTIVE JUROR ANDERSON: I'm Teresa
11 Anderson. I have a -- back to the medical question
12 you asked. Anybody being related to anybody in the
13 medical field?

14 MR. KEEVER: That was actually the Judge
15 asked. Yes.

16 PROSPECTIVE JUROR ANDERSON: Okay. My -- my
17 sister-in-law was a retired nurse, and currently
18 lead counsel as an attorney for a -- for a hospital
19 group. I don't know if that applies or not.

20 MR. KEEVER: Well, it -- it might. And I'm
21 sorry. That was my question.

22 PROSPECTIVE JUROR ANDERSON: Okay.

23 MR. KEEVER: Ms. Anderson, would -- so you've
24 been around folks that have connections with the
25 medical field?

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PROSPECTIVE JUROR ANDERSON: Yes.

MR. KEEVER: What kind of work -- do you mind if I ask what kind of work you do?

PROSPECTIVE JUROR ANDERSON: I'm a stay-at-home mom.

MR. KEEVER: I'm sorry?

PROSPECTIVE JUROR ANDERSON: Stay-at-home mom.

MR. KEEVER: Ms. Anderson, you know, this is a medical negligence suit. And the idea what we're trying to do is to get a jury that both parties kind of start out even. One doesn't have to play catch-up ball. To -- Sue won't have to catch up to prove her case, and Doctor won't have to catch up to prove his defenses. With the folks that you know and love and you been around, it sounds like you might -- Sue might start out just a little bit behind in a lawsuit. That -- would that be fair?

PROSPECTIVE JUROR ANDERSON: I'm not sure what you mean by that.

MR. KEEVER: Well, would Sue have a little bit more to prove to prove her case to you than the doctor? In other words, we talked about President Bush's bias on broccoli. You can have a positive bias as well as a negative bias. And what I'm saying is would your experiences have given you a

1 positive bias for the doctor so that he might start
2 out just a little bit ahead in this lawsuit?

3 PROSPECTIVE JUROR ANDERSON: Not necessarily.
4 So we have my sister-in-law who's retired -- well,
5 was an oncology nurse and went back to law school.
6 So she lead counsel of her hospital group. But my
7 father-in-law's also retired Supreme Court Justice
8 of Tennessee, so we kind of got both sides in my
9 family, medical side plus the law side.

10 MR. KEEVER: Okay. You think that Sue
11 wouldn't be starting out even a teeny bit behind?

12 PROSPECTIVE JUROR ANDERSON: No.

13 MR. KEEVER: Okay. Well, Ms. Anderson --

14 PROSPECTIVE JUROR ANDERSON: She's the nurse.
15 I know nothing medically, so...

16 MR. KEEVER: Okay. Thank you very much, Ms.
17 Anderson. Yes, ma'am?

18 PROSPECTIVE JUROR JOHNSON: My name is Donna
19 Johnson. I am a registered nurse. I work in the
20 medical field, so...

21 MR. KEEVER: Well, where do you work, Ms.
22 Johnson?

23 PROSPECTIVE JUROR JOHNSON: I work for the
24 Benton County Health Department, public health
25 nurse.

1 MR. KEEVER: Would -- would your experiences
2 in that field and knowing that -- that at the end
3 of the trial if the verdict was for the plaintiff
4 and against the doctor, would that be a little bit
5 difficult for you when you went back and faced the
6 medical colleagues you work with?

7 PROSPECTIVE JUROR JOHNSON: No, don't believe
8 so.

9 MR. KEEVER: And I didn't make it very clear
10 probably, but do you understand my question about
11 does Sue start out a little bit behind in this case
12 in your mind?

13 PROSPECTIVE JUROR JOHNSON: No. I -- I think
14 she's a -- she's a patient. I've been a patient,
15 too, so...

16 MR. KEEVER: Okay. Thank you, Ms. Johnson.

17 PROSPECTIVE JUROR JOHNSON: I've been a
18 patient and I am a nurse.

19 MR. KEEVER: I appreciate it. And we've got a
20 couple over here. This lady first, sir.

21 PROSPECTIVE JUROR SHUEY: Sorry. I'm Marcella
22 Shuey.

23 MR. KEEVER: Hi, Ms. Shuey.

24 PROSPECTIVE JUROR SHUEY: My mom's deceased
25 but she was an R.N. in OB.

1 MR. KEEVER: And --

2 PROSPECTIVE JUROR SHUEY: I can tell you
3 stories about babies being born, but other than
4 that I...

5 MR. KEEVER: I'll bet you can. Having that
6 kind of identification with someone in the medical
7 field, does that -- does that kind of mean that Sue
8 might start out a little bit behind trying to prove
9 a doctor was negligent?

10 PROSPECTIVE JUROR SHUEY: No. I wouldn't have
11 a problem with judging it fairly.

12 MR. KEEVER: I appreciate it. Thank you, Ms.
13 Shuey. Yes, sir?

14 PROSPECTIVE JUROR WILSON: James Wilson.

15 MR. KEEVER: Hi, Mr. Wilson.

16 PROSPECTIVE JUROR WILSON: My daughter-in-law
17 is an R.N. in North Carolina.

18 MR. KEEVER: And may I ask what you do, Mr.
19 Wilson?

20 PROSPECTIVE JUROR WILSON: I'm retired.

21 MR. KEEVER: You're retired? Your contacts
22 with the medical profession, do you view doctors
23 pretty favorably?

24 PROSPECTIVE JUROR WILSON: Most of them.

25 MR. KEEVER: Okay. Well, the question is,

1 would those kind of contacts and that life
2 experience have put you in a position where it
3 might be hard for you to put them aside and give
4 Sue an absolutely even starting line with the
5 doctor in this lawsuit?

6 PROSPECTIVE JUROR WILSON: I have no prejudice
7 one way or the other.

8 MR. KEEVER: Okay. Mr. Wilson, thank you very
9 much. Was there another hand over here? Yes, sir?
10 Second row.

11 PROSPECTIVE JUROR REYNOLDS: Kenneth Reynolds.

12 MR. KEEVER: Hi, Mr. Reynolds.

13 PROSPECTIVE JUROR REYNOLDS: My wife's an R.N.
14 in Springdale.

15 MR. KEEVER: And kind of the same question.
16 It's really going toward -- I mean, I've got
17 friends who are -- have medical families and in the
18 discussions they say, you know, I -- I really
19 admire my doctors. And I just think that the
20 patient's going to have to prove a lot more just
21 because they're a patient, this is a doctor. How -
22 - how would you react to that?

23 PROSPECTIVE JUROR REYNOLDS: I don't believe
24 it make any difference.

25 MR. KEEVER: Okay. Thank you very much for

1 your response. Yes, sir?

2 PROSPECTIVE JUROR HARRIS: Good morning.
3 Michael Harris.

4 MR. KEEVER: Hi, Mr. Harris.

5 PROSPECTIVE JUROR HARRIS: Morning. Not part
6 of the medical field, but part of the health and
7 wellness field, a therapeutic massage clinic here
8 in Rogers called Massage Envy, so...

9 MR. KEEVER: Well, that -- that does kind of
10 put you in the field. And I suspect you deal with
11 healthcare providers and your -- you got clients
12 that you work with?

13 PROSPECTIVE JUROR HARRIS: Well, as far as --
14 we do not deal with any of the chiropractors or
15 anything like that. They refer them into our
16 business at times, but we don't -- we do not have
17 one-on-one contact.

18 MR. KEEVER: How do you feel about a lawsuit
19 involving someone that's basically kind of in your
20 general business? Does -- does -- do you have some
21 feelings that patient is going to start out, as I
22 said, just a little bit behind?

23 PROSPECTIVE JUROR HARRIS: Honestly, sir, I
24 don't. I think you have to listen to all the
25 facts. And if there's something with merit, I

1 think there's justification.

2 MR. KEEVER: All right. I appreciate your
3 honesty.

4 PROSPECTIVE JUROR HARRIS: You bet.

5 MR. KEEVER: And -- and, ladies -- yes, ma'am?

6 PROSPECTIVE JUROR HARRELSON: Andrea
7 Harrelson.

8 MR. KEEVER: Hi, Ms. Harrelson.

9 PROSPECTIVE JUROR HARRELSON: I don't have any
10 problem or issue. My mother was an adult medical
11 assistant when I was a kid, was, so...

12 MR. KEEVER: You don't think that would
13 influence you one way or the other?

14 PROSPECTIVE JUROR HARRELSON: No. But I just
15 wanted you to know that.

16 MR. KEEVER: Well, I appreciate it very much.
17 And I appreciate all those responses. You know,
18 we're asking you to be brutally honest with us.
19 You're not going to hurt my feelings. You're not
20 going to hurt Sue's feelings. And can I ask
21 everyone that? Just will your answers be brutally
22 honest, brutally, brutally? Okay. Anyone else?
23 Yes, ma'am?

24 PROSPECTIVE JUROR NEWMAN: Lindsey Newman. I
25 work in a physical therapy office, but I just do

1 office work.

2 MR. KEEVER: In -- in that work you have
3 contact, of course, with healthcare providers.

4 PROSPECTIVE JUROR NEWMAN: Uh-huh.

5 MR. KEEVER: And how -- how would -- how would
6 you feel going back to the office if -- if you were
7 part of a jury that did give a verdict against a
8 doctor? Would that be a little bit awkward?

9 PROSPECTIVE JUROR NEWMAN: No. Not that I can
10 think of.

11 MR. KEEVER: Okay. Thank you very, very much.
12 Yes, sir?

13 PROSPECTIVE JUROR THOMPSON: Robert Thompson.

14 MR. KEEVER: Hi, Mr. Thompson.

15 PROSPECTIVE JUROR THOMPSON: My wife is a CNA.
16 She works as a chiropractic assistant over in
17 Siloam. But to answer your question that you've
18 been asking everybody is can you make an honest
19 decision, the only thing my wife always tells me is
20 I can't discuss what happens in town. So I don't
21 really know a whole lot that goes on up there. And
22 so I feel like everybody starts out with an even
23 keel.

24 MR. KEEVER: I appreciate that. I appreciate
25 that. Does anyone else have connections with a

1 healthcare field that might give them a bias in
2 favor of the doctor? Just go right down the line.
3 Anyone? Front row here? Oh. Yes, sir?

4 PROSPECTIVE JUROR LEE: I need to talk to you
5 and Judge.

6 MR. KEEVER: Please.

7 JUDGE SCOTT: Ladies and gentlemen, this is
8 another opportunity that you can stand up and move
9 around a little bit if you like.

10 (Wherein, the following proceedings were held
11 at the bench outside the hearing of the jury
12 panel.)

13 JUDGE SCOTT: What is your name, sir?

14 PROSPECTIVE JUROR LEE: My name is William
15 Lee. And my wife, I believe, worked for Dr. Elkins
16 about ten years ago doing x-rays, doing mammography
17 for him. So I've never met the man, I know nothing
18 about him.

19 JUDGE SCOTT: You are excused, Mr. Lee, sir.

20 PROSPECTIVE JUROR LEE: Thank you.

21 JUDGE SCOTT: Thank you, sir.

22 MR. KEEVER: Thank you for your service.

23 (Wherein, the bench conference concluded.)

24 JUDGE SCOTT: Thank you, ladies and gentlemen.
25 If you would, have a seat please.

1 (Wherein, there was a brief off-the-record
2 conversation between Judge Scott and the bailiff.)

3 MR. KEEVER: Thank you. Ladies and gentlemen

4 --

5 JUDGE SCOTT: Mr. Kever.

6 MR. KEEVER: Yes, sir?

7 JUDGE SCOTT: Excuse me just a minute. Ladies
8 and gentlemen, one of our jurors had to leave
9 temporarily. Mr. Kever, if you would, have a
10 seat. We are going to take a ten-minute recess
11 right now. Many times during the trial, it will be
12 necessary that I read instructions to the members
13 of the jury. This is going to be the first time of
14 the reading. When I dismiss you, you're free to go
15 to the restroom or move wherever you want to. I'd
16 like for you to be back in ten minutes.

17 When you return, please be certain to sit in
18 the same seat. Look around, see who's next to you,
19 make sure you get back to the same seat.

20 The basic rule is that you do not communicate
21 about this case, the people involved by any means,
22 whatsoever, with anyone, at all, or look for or
23 receive any information, whatsoever, about this
24 case other than the evidence that you receive in
25 this courtroom and the law as I will instruct you

1 during the trial and at the end of the trial. You
2 are not to discuss this case with anyone, under any
3 circumstances, until your jury duty has been
4 completed and I have discharged you. Do not talk
5 among yourselves about this case or the people
6 involved in it until I send you to the jury room to
7 commence deliberations.

8 Do not talk with or otherwise communicate with
9 any of the parties, lawyers, or witnesses involved
10 in this case, even if it is simply to pass the time
11 of day or the pleasantries of life. Remember that
12 the parties have entrusted this case to you. All
13 of us are depending upon you to follow these rules
14 so that you can fairly and justly decide this case
15 based solely on the evidence received in Court.

16 This means that you do not communicate by any
17 means, whatsoever, at any time, under any
18 circumstances. This includes various electronic
19 devices such as cell phones, iPhones, smartphones,
20 Blackberries, PDAs, iPads, computers, or any other
21 electronic device. Do not use them to talk, send,
22 or receive text messages, or e-mail, or participate
23 in or read about a chat room, or any type of post
24 involving this case, including social media such as
25 Facebook, MySpace, blog, tweet, Twitter, or

1 communicate through any other similar media
2 involving this case.

3 Do not share any information, your thoughts,
4 opinions, views, updates, or impressions about this
5 case or the people or the issues involved in it
6 through any means. Do not allow anyone else to
7 communicate with you regarding this case or the
8 people or the issues involved in it.

9 Do not ask anyone in person or by telephone or
10 through any other electronic means for advice or
11 information about this case. Do not let anyone
12 outside the courtroom say anything to you or
13 otherwise communicate to you about the case or the
14 people or the places involved. If someone does try
15 to say something to you or communicate with you
16 about this case, you are to immediately report it
17 to Deputy Tucker. We will be in recess ten
18 minutes.

19 MR. BAILIFF: All rise.

20 (Wherein, a break was taken from 9:37 to 9:52
21 a.m.)

22 MR. BAILIFF: All rise.

23 JUDGE SCOTT: Be seated please. You may
24 proceed, Mr. Kever.

25 MR. KEEVER: Thank, Your Honor. You know,

1 this is a civil lawsuit. And in a civil lawsuit,
2 if the plaintiff prevails, she asks for money
3 damages. That's the only way that we can resolve
4 civil disputes in this country. So -- and -- and
5 it'll be medical expenses, past and future; lost
6 wages, past and future; and pain and suffering.
7 Now, I got people in my family I dearly love that
8 would say -- have no problem including medical
9 expenses and lost wages in a jury, but I'm just not
10 going to put pain and suffering in a jury.

11 Now, I got other folks that I know that would
12 say pain and suffering, if it's proven, is
13 something that should be in a money verdict. So
14 who here tends to lean toward my sister-in-law, and
15 either wouldn't feel comfortable putting pain and
16 suffering money damages in a verdict or would have
17 some limit on -- this -- just don't really feel
18 comfortable with that? Raise -- can I see your
19 hands? Over here?

20 Gosh, it seemed like we had a lot more on the
21 questionnaire. And I might go to those. Well, who
22 here then would -- here's the flip side. Who --
23 who feels like pain and suffering is a valid
24 element of money damages and they have no problem
25 with putting it in a jury? Who didn't raise their

1 hands, at all?

2 Okay. Well, I mean, it's an important issue
3 and I'd just like to go row by row. My left, your
4 right, first row, who raised your hand that you
5 have trouble awarding pain and suffering? You guys
6 are all okay. Second row? Hand? Yes, sir? Your
7 name is?

8 PROSPECTIVE JUROR MAY: Larry May.

9 MR. KEEVER: Hi, Mr. May. Well, tell us how
10 you feel.

11 PROSPECTIVE JUROR MAY: Well, I don't know
12 what the law is, and so to give money to people for
13 lost wages and medical expenses, that makes a lot
14 of sense. How in the world could you discern what
15 pain and suffering, is it a little, a lot? I mean,
16 I don't know what the law is. I'm a human resource
17 guy.

18 MR. KEEVER: So -- in fact, I think in your
19 questionnaire, if you don't mind me sharing, I
20 think you said that pain and suffering's part of
21 life and that shouldn't be part of a money verdict.
22 That would -- that --

23 PROSPECTIVE JUROR MAY: As a general rule.

24 MR. KEEVER: Something -- that's something
25 you've thought about, isn't it?

1 PROSPECTIVE JUROR MAY: Sure.

2 MR. KEEVER: So is it fair to say that's a
3 strongly-held belief?

4 PROSPECTIVE JUROR MAY: I don't like broccoli.

5 MR. KEEVER: You don't like broccoli. If I
6 was to say, "Mr. May, would you change your mind
7 for this case?" I'm not likely to be successful,
8 am I?

9 PROSPECTIVE JUROR MAY: I have no -- I have no
10 -- I don't know what the law is. I've never --
11 this is my first time to be a juror. I mean, I'm
12 completely ignorant.

13 MR. KEEVER: Well, even if the Judge said --
14 if -- if someone says, "Mr. Lisle" -- the Judge
15 said, "Mr. May, would you put all that aside, this
16 deeply held belief aside, and be completely open to
17 putting pain and suffering in a jury," that
18 wouldn't be easy for you to do, would it?

19 PROSPECTIVE JUROR MAY: I would do my best,
20 think most people would.

21 MR. KEEVER: Your Honor, the plaintiff would
22 ask that Mr. May be excused.

23 JUDGE SCOTT: Denied.

24 MR. KEEVER: Thank you, Mr. May. Okay. How
25 about the third row on the left? Yes, sir, your

1 name?

2 PROSPECTIVE JUROR MASON: David Mason.

3 MR. KEEVER: Hi, Mr. May, I don't believe
4 we've talked yet.

5 PROSPECTIVE JUROR MASON: No. I don't
6 necessarily have a problem with pain and suffering.
7 I would put limits on it. I don't agree with the
8 20 million dollar spilling hot coffee on your lap.
9 The -- you know, the -- I just think there should
10 be -- you know, depending on the case and what was
11 asked for, I would seriously think about it. But I
12 don't see a problem with pain and suffering in
13 general, just not ungodly amounts.

14 MR. KEEVER: There would be some level in your
15 mind --

16 PROSPECTIVE JUROR MASON: There would be a
17 level, a cap I would -- I would -- would put on it
18 in my head. Yes.

19 MR. KEEVER: Okay. And, you know, regardless
20 of the evidence, regardless of what your other
21 jurors thought, you -- and I don't want to know the
22 number --

23 PROSPECTIVE JUROR MASON: Right.

24 MR. KEEVER: But there is a -- going to be a
25 number in your head, and you'll just say --

1 PROSPECTIVE JUROR MASON: I -- I would --

2 MR. KEEVER: Don't like broccoli above that.

3 PROSPECTIVE JUROR MASON: Well, I would think
4 I would form the number during -- you know, I would
5 hear the evidence and form the number then. You
6 know, I can't say now that I would have a number
7 for every -- in general, this is the number. I
8 wouldn't go above this, no matter what. So --
9 that's how I feel about it.

10 MR. KEEVER: Would you be more comfortable
11 serving on a jury where pain and suffering might
12 not be an issue in the damages?

13 PROSPECTIVE JUROR MASON: No, not necessarily.
14 Like I said, I do think that pain and suffering, in
15 some cases, I think should be there. Just I would
16 have to hear the case and form that decision then
17 and then decide what my cap would be.

18 MR. KEEVER: Okay. Well, thank you, very
19 much. Mr. Ellis, you were shaking your head there.
20 Did you have -- did you -- something -- you have a
21 thought that -- on the pain and suffering?

22 PROSPECTIVE JUROR ELLIS: No. I just looked
23 at my watch and I noticed I didn't change it.

24 MR. KEEVER: Got here on time. Yes, sir? And
25 your name is?

1 PROSPECTIVE JUROR BOTT: My -- my name is Joe
2 Bott.

3 MR. KEEVER: Hi, Mr. Bott.

4 PROSPECTIVE JUROR BOTT: Hello. I feel like
5 David. You know, I -- I believe that there should
6 be an award for pain and suffering. However, it --
7 it doesn't need to go as high as 20 million dollars
8 or whatever that number might be. And there should
9 be some kind of reward or award, for having gone
10 through that if in case that event was factual and
11 happened.

12 MR. KEEVER: Okay. Mr. Bott, thank you, very
13 much.

14 PROSPECTIVE JUROR BOTT: You're welcome.

15 MR. KEEVER: Last row, back there. Yes,
16 ma'am?

17 PROSPECTIVE JUROR ANDREWS: Kendra Andrews.
18 I'm an accountant, so I like substantiation of
19 numbers. I can see the black and white, the
20 medical expenses, lost wages, et cetera. But I do
21 believe also with these other two, that there
22 should be a cap on pain and suffering. If it can
23 be proven for future years and some substantiate --
24 substantiation, too, but other than that...

25 MR. KEEVER: Pretty hard to find a number that

1 you could pick out of a -- a document, though,
2 isn't it?

3 PROSPECTIVE JUROR ANDREWS: Yes.

4 MR. KEEVER: Would that be difficult for you?

5 PROSPECTIVE JUROR ANDREWS: Probably.

6 MR. KEEVER: Would you be more comfortable
7 being on a jury where maybe that wasn't an issue,
8 you wouldn't kind of have that conflict?

9 PROSPECTIVE JUROR ANDREWS: I can't really
10 say, but I do think -- I mean, I get that there is
11 pain -- pain and suffering. I -- I do believe
12 that, but I don't believe that that should be the
13 basis of a case.

14 MR. KEEVER: Okay. Are you comfortable
15 sitting on this case --

16 PROSPECTIVE JUROR ANDREWS: Yes, sir.

17 MR. KEEVER: -- where pain and suffering might
18 be a big part of -- of the case?

19 PROSPECTIVE JUROR ANDREWS: It would depend.
20 I can't -- I can't say yes or no. I think it would
21 depend.

22 MR. KEEVER: Well, we're not going to talk
23 about the facts of the case, but --

24 PROSPECTIVE JUROR ANDREWS: Right.

25 MR. KEEVER: But it will be part of the facts,

1 and does that make you uncomfortable?

2 PROSPECTIVE JUROR ANDREWS: A little bit.

3 MR. KEEVER: Uncomfortable enough that you

4 might ask to be excused to sit on another jury?

5 PROSPECTIVE JUROR ANDREWS: Possibly, yes.

6 MR. KEEVER: Pardon?

7 PROSPECTIVE JUROR ANDREWS: Possibly, yes.

8 JUDGE SCOTT: Mr. Kever, let's move on.

9 MR. KEEVER: And right next to you, yes,

10 ma'am?

11 PROSPECTIVE JUROR SISEMORE: Amber Sisemore,

12 and I agree with them. I think that there's a

13 limit, kind of, to the pain and suffering. I don't

14 think people should take advantage of the system.

15 MR. LISLE: Your Honor?

16 PROSPECTIVE JUROR SISEMORE: And if they're,

17 you know, trying to take advantage of it, I think

18 there should be a limit set. But I agree that

19 there is pain and suffering, but there is kind of a

20 limit.

21 MR. KEEVER: Okay. Thank you. Well, let's go

22 down this side, front row. But did I miss someone

23 back there?

24 PROSPECTIVE JUROR D'AUBIN: I -- my -- my

25 name's Stan D'Aubin. I -- I think it's just going

1 to depend on the circumstances. I think that I
2 could -- I could come up with a number that was a
3 reasonable number based on the facts. I don't
4 think I'd have -- I don't really wrestle with that.
5 But I think it needs to be a reasonable --
6 reasonable number, and I think it -- it -- it can
7 be -- and you used the word frivolous and he -- he
8 steered us away from the word frivolous. It can --
9 it can be an indicator of frivolous.

10 I don't -- wouldn't -- I don't have any
11 problems being on it, but I'll tell you I'm going
12 to hear the facts, listen to the facts. And if I
13 were on the jury, I'd find based on the facts.

14 MR. KEEVER: And can I try -- your name is
15 pronounced D'Aubin?

16 PROSPECTIVE JUROR D'AUBIN: You did a great
17 job.

18 MR. KEEVER: Man, I was --

19 PROSPECTIVE JUROR D'AUBIN: Almost --

20 MR. KEEVER: I worried about that.

21 PROSPECTIVE JUROR D'AUBIN: Almost as good as
22 she did, back there.

23 MR. KEEVER: Thank you, Mr. D'Aubin. And I
24 appreciate it. Yes, ma'am?

25 PROSPECTIVE JUROR BRINSON: I thought the

1 initial question --

2 JUDGE SCOTT: Ma'am, could you state your
3 name, please?

4 PROSPECTIVE JUROR BRINSON: I'm sorry. Lori
5 Brinson.

6 MR. KEEVER: Hi, Ms. Brinson.

7 PROSPECTIVE JUROR BRINSON: Lorraine.

8 MR. KEEVER: Hi.

9 PROSPECTIVE JUROR BRINSON: I thought the
10 initial question was just if you would award money
11 for pain and suffering. I didn't know we were
12 talking about limits. I do think money should be
13 awarded for pain and suffering, so I raised my hand
14 for that. But I do agree with some of my jurors
15 here that there should be a limit.

16 What the limit would be, again, there's no way
17 to know. What the limit would be, again, if
18 there's no pain -- no way -- we'd have to hear the
19 case and everything, but I wanted to state that
20 because I didn't know that's what we were raising
21 our hand for was the limit.

22 MR. KEEVER: Well, I appreciate it. It was
23 probably my inartful question. I apologize. Thank
24 you. Second row. Anyone in the second row that
25 would have reservation? Yes, ma'am?

1 PROSPECTIVE JUROR HENSLEY: I'm Carlee
2 Hensley.

3 MR. KEEVER: Hi.

4 PROSPECTIVE JUROR HENSLEY: Will you please
5 just restate what question we're answering?

6 MR. KEEVER: You bet. And that's -- that's a
7 great question. So my question was that some
8 people feel comfortable putting money damages for
9 pain and suffering in a verdict. Other people
10 would -- well, they would, like our accountant,
11 would look at numbers for lost wages and medical,
12 put that in a verdict. But they really would have
13 a hard time putting money damages for pain and
14 suffering in a verdict. Did I state it better that
15 time?

16 And what I'm looking for is people that would
17 lean toward having a problem either putting pain
18 and suffering in the verdict, at all -- and there's
19 people I really respect who feel that way -- or
20 would have serious limits on the amount that they
21 think should be in pain and suffering.

22 PROSPECTIVE JUROR HENSLEY: Okay.

23 MR. KEEVER: And thank you for bringing that
24 up. Now second row. Anyone in the second row
25 raise your hand as leaning at least toward the

1 people that would have a problem with pain and
2 suffering money damages? Third row? Yes, sir?

3 PROSPECTIVE JUROR MOYER: Dan Moyer.

4 MR. KEEVER: Hi, Mr. Moyer.

5 PROSPECTIVE JUROR MOYER: Hello. My feeling
6 is that that's a big part of the reason that this
7 has come to trial, is that reasonable people can
8 agree that lost wages and some of these other
9 things that you can document are something that you
10 could agree upon. But obviously if you're talking
11 about large awards for pain and suffering -- excuse
12 me -- I believe that that's why we're here. So we
13 should be equipped to deal with that issue based on
14 the evidence.

15 MR. KEEVER: And you're -- you're okay with
16 doing that?

17 PROSPECTIVE JUROR MOYER: Certainly.

18 MR. KEEVER: Thank you. And your neighbor
19 over here. Yes, ma'am?

20 PROSPECTIVE JUROR INGLE: My name is Ronda
21 Ingle, and I know a lot of people who -- who buck
22 the system, take advantage of the system. And I
23 believe that there should be a limit on what the
24 pain and suffering should be simply for that reason
25 'cause it could go sky high very -- if you wanted

1 it to -- if she wanted it to. So that's what I
2 believe.

3 MR. KEEVER: Would it -- would you have -- let
4 -- let's see here. We talked about putting the
5 doctor or the patient with an even starting point.

6 PROSPECTIVE JUROR INGLE: Uh-huh.

7 MR. KEEVER: Would the patient -- from your
8 past experiences, would that mean the patient would
9 be starting a little bit behind in her proving her
10 damages for pain and suffering?

11 PROSPECTIVE JUROR INGLE: I --

12 MR. KEEVER: Would it be tougher for you?

13 PROSPECTIVE JUROR INGLE: I believe so, from
14 my medical history, myself. Uh-huh.

15 MR. KEEVER: Thank you, Ms. Ingle. Your
16 Honor?

17 JUDGE SCOTT: Mr. Kever, if you would, have a
18 seat.

19 Ladies and gentlemen, at the end of the trial,
20 I will instruct you on what the law is on all of
21 the elements of the alleged damages. Mr. May, Mr.
22 Bott, at that point you will know what the law is
23 in Arkansas. And it will be your responsibility to
24 apply that law to the facts as you find them. If
25 there's some reason that you feel you are unable or

1 unwilling to be fair and impartial and follow the
2 law as I instruct you and apply the facts as you
3 decide them, that is what we're trying to find out
4 here. And that is the framework of your responses
5 to these questions.

6 You may proceed, Mr. Keever. Let's move
7 along.

8 MR. KEEVER: Thank you. Ms. Ingle -- and I
9 appreciate the Judge clarifying that. With that --
10 with that note on what the law will be -- the law
11 will be instructed later, would the patient still
12 start out a little bit behind with you on proving
13 her pain and suffering damages?

14 PROSPECTIVE JUROR INGLE: Until I know what
15 the law is, yes.

16 JUDGE SCOTT: Ms. Ingle, you are excused.

17 MR. KEEVER: Thank you, Ms. Ingle. Thank,
18 Your Honor.

19 PROSPECTIVE JUROR ALLEN: I think basically --

20 JUDGE SCOTT: Could you state your name,
21 please, sir?

22 PROSPECTIVE JUROR ALLEN: Homer Allen.

23 JUDGE SCOTT: All right. Mr. Allen, what is
24 it you wanted to say?

25 PROSPECTIVE JUROR ALLEN: When it comes

1 talking to limits, how do you decide limits on
2 millions of different cases that have different
3 levels? Like to ask you, do you have -- tell me,
4 one through ten, how you going to put a limit? It
5 has to be the jury. In their mind, the evidence
6 presented, determine what they might give. Thank
7 you.

8 MR. KEEVER: Thank you, Mr. Allen. Yes, sir?

9 PROSPECTIVE JUROR HARRIS: Michael Harris.

10 MR. KEEVER: Hi, Mr. Harris. We've talked
11 already.

12 PROSPECTIVE JUROR HARRIS: You bet. I think
13 there's room for pain and suffering and I think you
14 have to have merit to that. You have to really
15 look at all the facts. From my experience, I
16 think, you know, it -- it can at times be abused to
17 where you have to be careful with that. But before
18 hearing the case, I still think that I could be
19 pretty open to either side. But -- but I -- it --
20 it could be abused.

21 MR. KEEVER: Thank you. And in the back row,
22 in the back, did anyone -- oh. I'm sorry. Did
23 someone else have their hand up? I apologize.
24 Your name, sir?

25 PROSPECTIVE JUROR PRUITT: Larry Pruitt.

1 MR. KEEVER: Hey, Mr. Brust.
2 PROSPECTIVE JUROR PRUITT: Pruitt.
3 MR. KEEVER: Brute?
4 PROSPECTIVE JUROR PRUITT: Pruitt.
5 MR. KEEVER: Pruitt.
6 PROSPECTIVE JUROR PRUITT: Yes.
7 MR. KEEVER: I finally got it. The third
8 time. I apologize.
9 PROSPECTIVE JUROR PRUITT: I've been self-
10 employed for over 35 years and being a diabetic and
11 everything, I understand insurance rates. And I'm
12 a firm believer that pain and suffering is what
13 drives a lot of the insurance rates and most of
14 them are unnecessary. But, however, I did watch 60
15 Minutes on the compounding case and believe in
16 honest mistakes can happen and -- and people
17 shouldn't be unjustly richened. But in the case of
18 some cases, yes, there's indeed a case for it.
19 MR. KEEVER: How would -- how would Sue start
20 out in the starting blocks on the proof of the pain
21 and suffering issue with you?
22 PROSPECTIVE JUROR PRUITT: She would have to
23 prove her case.
24 MR. KEEVER: Yes, sir. Would she have to
25 prove it more than she would except for your --

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MR. LISLE: Your Honor?

JUDGE SCOTT: Mr. Kever?

MR. KEEVER: Yes, sir?

JUDGE SCOTT: Why don't we approach the bench?
Ladies and gentlemen, this is another opportunity
you can stand up and move your legs and arms around
a little bit.

(Wherein, the following proceedings were held
at the bench outside the hearing of the jury.)

MR. KEEVER: Your Honor, there are -- there
are four jurors who on their questionnaire just
said they would not award pain and suffering, which
I thought about just a motion to ask Your Honor to
strike them on the questionnaires. And I chose,
instead, to go through this -- this this way. And
that's what I was trying to do to get to them.

JUDGE SCOTT: Well, until someone says they're
unable or unwilling to follow my directions, I'm
not going to strike them.

MR. LISLE: And, Your Honor, here -- here's
my objection. It's -- he's getting a neutral
answer, and he's badgering people until the point
that he gets them to disqualify themselves.

JUDGE SCOTT: I'm not --

MR. LISLE: He's getting a neutral answer, but

1 he won't stop there.

2 JUDGE SCOTT: I think that's a valid response

3 --

4 MR. KEEVER: We'll move on.

5 JUDGE SCOTT: Good. Thank you.

6 MR. KEEVER: We'll move on.

7 (Wherein, the bench conference concluded.)

8 JUDGE SCOTT: Thank you, ladies and gentlemen.

9 If you would, have a seat and come to order.

10 MR. KEEVER: Is there anyone else, or some --

11 on my right, who would feel like that they would

12 have difficulty following the Judge's instruction

13 of the law and the issue of putting money damages

14 for pain and suffering? Yes, ma'am?

15 PROSPECTIVE JUROR HARRELSON: I disagree agree

16 with the gentleman here.

17 JUDGE SCOTT: Ma'am, could you stand and state

18 your name please?

19 PROSPECTIVE JUROR HARRELSON: I'm sorry.

20 Apologize. Audra Harrelson.

21 MR. KEEVER: Hi, Ms. Harrelson, again.

22 PROSPECTIVE JUROR HARRELSON: Yes. I -- I

23 just want to say -- state for the Court that I

24 agree with most of the people on this side about,

25 you know, a lot of people can try to use the

1 system. And I'm -- I'm not for that. But I do
2 believe in awarding pain and suffering to a degree.

3 MR. KEEVER: Okay. Thank you, Ms. Harrelson.
4 Yeah. Mr. Wilson?

5 PROSPECTIVE JUROR WILSON: James Wilson. It's
6 hard to measure pain and suffering, how much
7 medical attention they obtained for pain would be
8 an indication of pain and suffering. That's the
9 only way I would know how to measure it.

10 MR. KEEVER: Would -- well, again, having --
11 having received the instruction from the Judge, if
12 pain and suffering were an element of damages,
13 would you be able to follow the law and put that
14 in, in accordance with the evidence?

15 PROSPECTIVE JUROR WILSON: If there was an
16 indication that they obtained medical help for it.

17 MR. KEEVER: Okay. Well, thank you, Mr.
18 Wilson.

19 Ladies and gentlemen, I really only got a
20 couple of broad topics and probably get through
21 those pretty quickly. May I share -- I want to
22 share just a real brief story. Six months ago, I
23 was in Baltimore and developed chest pain for the
24 first time in my life. I could've gone to Johns
25 Hopkins University, but I chose instead to wait

1 'til the next day when I could get back to the
2 doctor I'd known for 30 years.

3 Anyone here have a loved one or a personal
4 experience -- not going to ask about your medical
5 experience -- but where you waited to see a doctor
6 that knew you and had known your body and that you
7 trusted? Has anyone ever had that experience or
8 had a loved one have that experience? And it goes
9 to the question, should -- should we be able to
10 trust our doctors to tell us the truth? And -- and
11 when I had my problem, I was really happy that I
12 had a doctor that I trusted and everything worked
13 out fine. But I've heard -- I've heard that some
14 doctors might not always be completely honest.

15 Can -- can anyone here make out -- hold out
16 the room of possibility that a doctor might not be
17 completely forthcoming in his explanation or his
18 dictated notes may not be completely telling
19 everything that happened? Can anyone hold out that
20 possibility? Yes, sir, in the third row? I'm
21 sorry. I -- I forgot your name already.

22 PROSPECTIVE JUROR MOYER: Dan Moyer.

23 MR. KEEVER: Yes.

24 PROSPECTIVE JUROR MOYER: That -- that -- that
25 certainly is, you know, possible.

1 MR. KEEVER: Okay. Who -- who would agree
2 with Mr. Moyer? And how about the flip side? Who
3 would hold the opposite view that, you know, the
4 doctor's a professional. He's put it down in the
5 record, then that's pretty much what it would have
6 to be? Who would kind of at least lean toward that
7 view? So if it becomes a disputed issue between a
8 patient and a doctor, I -- I -- I think from the
9 questionnaires there were a number of people who
10 said they would tend to favor the doctor's side of
11 it. They would tend to favor his side over the
12 patient. Who would at least lean toward that point
13 of view? Yes, ma'am?

14 PROSPECTIVE JUROR HENSLEY: I'll say
15 something. I'm Carlee Hensley.

16 MR. KEEVER: Hi, Carlee.

17 PROSPECTIVE JUROR HENSLEY: I just feel like
18 it's our responsibility as individuals to make sure
19 that we are educated and informed on our own
20 personal circumstances. And, therefore, I would
21 say that while I would not inherently say whatever
22 my doctor puts in my file must be the gospel, I
23 would also say that I have taken the opportunity to
24 refuse medical treatment from one doctor to take my
25 children to their doctor because there is -- you

1 know, we're all human and we can all make mistakes.
2 So I feel like we just need to make room for that.

3 MR. KEEVER: Okay. Thank you. Yes, sir?

4 PROSPECTIVE JUROR DODSON: Hi. I'm Chris
5 Dodson. I just want -- on your question, are you
6 talking about a diagnosis only?

7 MR. KEEVER: No. Really, broader. What --
8 what --

9 PROSPECTIVE JUROR DODSON: Or treatment, or --

10 MR. KEEVER: We call it the whole commentary,
11 parts of the commentary.

12 PROSPECTIVE JUROR DODSON: I mean, I -- I
13 thinks there's varying answers, depending on what
14 we're talking about, treatment or diagnosis. If
15 it's a diagnosis that you don't like, what are we
16 going to do? We're going to go to another doctor
17 and get a second opinion. Right? If it's a
18 treatment, most of us probably going to follow that
19 treatment because we trust the doctor. But if it's
20 a diagnosis, that's maybe a little bit scary for
21 lack of a better word, I'm going to go somewhere
22 else and get -- get a second opinion.

23 MR. KEEVER: How about -- Mr. Dodson, how
24 about an issue where the patient thinks she's going
25 to have a procedure that's really a pretty -- in

1 her mind, a minor, minor procedure, and the doctor
2 suggested, does the patient have a responsibility
3 to go beyond what the doctor she trusts suggests?
4 I mean, does she have a responsibility to get a
5 second opinion or do research?

6 PROSPECTIVE JUROR DODSON: Well, you phrased
7 the -- the question, it's a minor, minor procedure
8 --

9 MR. KEEVER: In her -- in her mind.

10 PROSPECTIVE JUROR DODSON: In her mind, then I
11 would say no.

12 MR. KEEVER: Okay. Thank you, Mr. Dodson.
13 I've got probably just one other area. And I think
14 that the Judge will instruct you -- well, let me --
15 let me start this a different way.

16 Who here served on a jury before? How many
17 served on a criminal case like we have in Law and
18 Order? Anyone besides me kind of addicted to Law
19 and Order reruns? What's the burden of proof that
20 'ole Mr. McCoy has in a criminal case, beyond a...

21 JURY PANEL: Reasonable doubt.

22 MR. KEEVER: Beyond a reasonable doubt. How
23 about in the civil cases? What is that -- that
24 burden of proof in a civil case?

25 PROSPECTIVE JUROR MOYER: Preponderance of the

1 evidence.

2 MR. KEEVER: Man, that's good. Preponderance
3 of the evidence. Sounds like a legal --

4 JUDGE SCOTT: Mr. Moyer, could you state your
5 name, please, sir?

6 PROSPECTIVE JUROR MOYER: Oh. Dan Moyer. I'm
7 sorry.

8 JUDGE SCOTT: Thank you. It's okay.

9 MR. KEEVER: Moyer. Thank you, Your Honor. I
10 apologize. So preponderance of the evidence is
11 kind of like the weight of the evidence here, the
12 weight of the evidence here. And preponderance is
13 just enough to tip the scale, kind of like 51
14 percent, something like that. Some people think
15 preponderance of the evidence is okay, say, in a
16 car wreck where you're trying to decide who's at
17 fault, but that it's not really fair to a doctor in
18 a medical malpractice case.

19 And -- and I've -- I've had many people say
20 that you should have more than a mere preponderance
21 to find against a doctor in medical negligence.
22 Who tends to lean toward that group that would
23 think you need to have just a little bit more in
24 medical negligence?

25 (Wherein, there was no response.)

1 MR. KEEVER: Nobody? So you would all be able
2 to follow that standard on proof, not just a -- the
3 doctor's negligence, but on Sue's damages, just a
4 mere preponderance? Are we good with that?

5 UNIDENTIFIED SPEAKER: Yes.

6 MR. KEEVER: Could I have just a moment with
7 Mr. Swindle, Your Honor?

8 JUDGE SCOTT: A moment, Yes, sir.

9 MR. KEEVER: Well, ladies and gentlemen, I
10 want to thank you for being so responsive. And I
11 think you have been honest with me, brutally -- I
12 hope brutally honest. And I'm going to sit down
13 now. And Mr. Lisle, I suspect, might have some
14 questions for you. Thank you. Thank, Your Honor.

15 JUDGE SCOTT: Thank you. Any questions, Mr.
16 Lisle?

17 MR. LISLE: Yes, sir. Thank you.

18 My name's Steve Lisle. I represent Dr. Elkins
19 and his clinic in this case. And I'm here just to
20 defend the clinic and the doctor. I'm not here --
21 based on some of those questions, we're -- we're
22 not here advocating lack of rules and lack of
23 safety. I hope everyone understands that. We all
24 -- does everybody realize we all have rules? In
25 whatever business you're in, we are all subject to

1 safety rules every day, aren't we?

2 I don't think there's any profession out here
3 that didn't raise their hands. And Dr. Elkins has
4 lived in Rogers, Arkansas since 1977. So is there
5 anybody based on the questions you just heard that
6 has already assumed that he doesn't believe that
7 there should be safety regulations, either
8 professionally or just in general?

9 (Wherein, there was no response.)

10 MR. LISLE: And we also spent a lot of time
11 talking about pain and suffering and damages for
12 pain and suffering. Does everybody realize that if
13 you are seated on this jury, that may be the very
14 last question that you are asked? We haven't tried
15 this case yet. Does everybody realize that there's
16 going to have to be proof of a lot of things before
17 you're asked if there were pain and suffering
18 damages? Everybody open to that? Okay. 'Cause we
19 haven't had an opportunity for you to hear any
20 evidence as we sit here right now.

21 And I was -- I know that -- that it seemed
22 like everyone indicated that that's what you want.
23 You want to hear the case first. Is there anyone
24 who's already decided that the only issue in this
25 case is pain and suffering damages?

1 (Wherein, there was no response.)

2 MR. LISLE: Okay. The other thing is that
3 we've all been a patient. You know, you saw --
4 guess what? Dr. Elkins has been a patient. We
5 were talking about on break, I'm going to -- I -- I
6 noted his choice of footwear today and it's because
7 he had knee surgery. So the -- so we've all been
8 patients, and I think almost everyone has had
9 someone that they know, a cousin, brother, that's
10 in the medical profession. So are we still on the
11 same even footing that we talked about? Nothing --
12 nothing about that changes your view of this case?

13 (Wherein, there was no response.)

14 MR. LISLE: Okay. Because this case is only
15 about money damages. The -- the jurors that are
16 selected in this case are only going to be asked to
17 decide whether or not Dr. Elkins owes Sue Poff
18 money. You're not going to be asked to pass new
19 rules and safety regulations. Is everybody clear
20 on that?

21 (Wherein, there was no response.)

22 MR. LISLE: Okay. Now, in -- I've practiced
23 in Springdale since 1994. And Gino Franco's with
24 me today. There were some questions about do you
25 know us as lawyers. We both have acted as

1 prosecuting attorneys in the past. That can have a
2 large ripple effect. Has anyone had -- heard about
3 us through that -- that role that we've had in the
4 past? Front -- yes, ma'am?

5 PROSPECTIVE JUROR JOHNSON: My name is Donna
6 Johnson. And we -- Gino has represented by family
7 at one time.

8 MR. LISLE: Oh, okay. Represented --

9 MR. KEEVER: Your Honor?

10 MR. LISLE: Thank you.

11 JUDGE SCOTT: Ms. Johnson, is that
12 representation ongoing at this time?

13 PROSPECTIVE JUROR JOHNSON: No.

14 JUDGE SCOTT: Did you recognize Mr. Franco
15 when you saw him?

16 PROSPECTIVE JUROR JOHNSON: Yes.

17 JUDGE SCOTT: You are excused, Ms. Johnson.
18 Thank you.

19 PROSPECTIVE JUROR DODSON: I may be mistaken,
20 but I think our kids played on a -- on a baseball
21 team together.

22 MR. LISLE: I thought I recognized you, as
23 well.

24 JUDGE SCOTT: You are excused, Mr. Dodson.
25 Thank you. Yes, Mr. Brust?

1 PROSPECTIVE JUROR BRUST: Jeffrey Brust. I
2 believe my wife went to school with Mr. Franco.

3 JUDGE SCOTT: I'm sorry. What?

4 PROSPECTIVE JUROR BRUST: Her name's Jennifer
5 May.

6 JUDGE SCOTT: Does that in some way impair
7 your ability to be a fair and impartial juror in
8 this case?

9 PROSPECTIVE JUROR BRUST: Not at all.

10 JUDGE SCOTT: Thank you, Mr. Brust.

11 MR. LISLE: Okay. There -- there were some
12 questions about medicine in general. This case is
13 very specific. It's about a cosmetic procedure
14 that was done, an elected procedure. You don't
15 have to have it. You choose to have it. Is there
16 anyone who thinks that doctors just shouldn't offer
17 that sort of procedure, at all, because it is just
18 purely elective? It's not something that is
19 lifesaving or anything like that, even if a patient
20 requests it, wants to have it done?

21 (Wherein, there was no response.)

22 MR. LISLE: And I'm not going to call anybody
23 out ask you to raise your hand if you've had any
24 cosmetic procedures. And obviously that's what Dr.
25 Elkins does. We -- we're not opposed to it. But

1 if there's anything about that experience that
2 would make you feel like you -- you know, it might
3 affect your judgment in the case, just please let
4 the bailiff know or -- or come forward. Okay?

5 The other thing about this case is that there
6 are going to be -- it's a -- it is a medical case.
7 There's going to be a lot of testimony about a
8 medical procedure. Some of it's technical. There
9 are going to be some -- it's about a laser
10 procedure. When -- in a laser -- the -- in a laser
11 procedure you're going to see some photographs,
12 perhaps, of, you know, surgery. If you've ever
13 watched that stuff on TV, during a surgery things
14 may not look that good. Is -- is anybody going to
15 be squeamish about any of the photographs or the
16 testimony along those lines?

17 (Wherein, there was no response.)

18 MR. LISLE: Okay. Now, we -- we talked about
19 the responsibility following safety rules. Does
20 everybody feel like we -- we also -- all of us have
21 some personal responsibility for everything that we
22 do, just everything that we do, whether we're a
23 doctor, a patient, accountant, a lawyer? Anyone
24 who doesn't feel that way, that you can never just,
25 you know, completely hand over your thought

1 processes just to someone else?

2 (Wherein, there was no response.)

3 MR. LISLE: Now, there -- there was some
4 comment made during this course of talking about
5 pain and suffering about how we might not be here
6 if it was about the issue of pain and suffering.
7 But does everybody realize that there may be a
8 whole lot of issues in this case that we don't
9 agree about? You know, that the -- you assume that
10 we're just here because we couldn't agree on
11 damages, but you also realize we don't -- we don't
12 agree on anything for the most part. Okay?

13 And is there anyone who feels like when a case
14 gets this far it must have some merit, there must
15 be something to it? Or do you feel like -- ma'am,
16 were you shaking your head yes if you feel like
17 there must be something to the case or do you feel
18 like you'd have to wait and see?

19 PROSPECTIVE JUROR BRINSON: Sorry.

20 MR. LISLE: I -- yeah. I thought -- maybe I
21 mis -- misunderstood. I thought you were shaking
22 your head.

23 PROSPECTIVE JUROR BRINSON: I was just shaking
24 my head that, yes --

25 JUDGE SCOTT: Ma'am, could you state your name

1 please?

2 PROSPECTIVE JUROR BRINSON: Oh. I'm sorry.

3 Lori Brinson.

4 JUDGE SCOTT: Yes, Ms. Binson?

5 PROSPECTIVE JUROR BRINSON: I was shaking my

6 head just there obviously must be some merit to the

7 case because we're here.

8 MR. LISLE: Okay.

9 JUDGE SCOTT: Mr. Lisle, I apologize. Could

10 you step left or right, please?

11 MR. LISLE: Okay. I'm sorry.

12 JUDGE SCOTT: What was your name, ma'am?

13 PROSPECTIVE JUROR BRINSON: Lori Brinson.

14 JUDGE SCOTT: All right.

15 PROSPECTIVE JUROR BRINSON: Lorraine.

16 JUDGE SCOTT: Thank you. And what was your

17 response, Ms. Brinson?

18 PROSPECTIVE JUROR BRINSON: I was shaking my

19 head -- he said -- he had asked -- I thought he had

20 asked if there was some merit -- there -- if we

21 agreed that there must be some merit to the case.

22 JUDGE SCOTT: And you were agreeing

23 affirmatively?

24 PROSPECTIVE JUROR BRINSON: Yes. There must

25 be some merit for it -- for it to have gone this

1 far.

2 JUDGE SCOTT: You are excused, Ms. Brinson.

3 PROSPECTIVE JUROR BRINSON: Okay.

4 JUDGE SCOTT: Thank you, very much.

5 MR. LISLE: Now, I can't scan the whole room
6 at the same time. Was anybody else that felt that
7 way, that -- that there must be something
8 meritorious about the case or we wouldn't be here
9 today? You understand we still have the chance to
10 -- Dr. Elkins still has a chance to defend himself?

11 (Wherein, there was no response.)

12 MR. LISLE: Now, they -- is anyone going to if
13 you are -- if there's evidence put forward that
14 there -- there was a negative outcome or an injury,
15 are you going to assume that it was Dr. Elkins'
16 fault without proof? Would you at least be open to
17 hearing the proof about what caused any negative
18 outcome or injury before you decide whose fault it
19 was?

20 One thing we start with is I suspect that most
21 people are sympathetic. In fact, when one of your
22 fellow jurors was standing up and talking, you
23 probably felt some sympathy for that person because
24 you -- you identify with that person. But in this
25 case, what we're asking you to do is decide it

1 based on the facts. You know, the justice is
2 blind. And the reason is because you're trying to
3 decide this case on the facts.

4 Is there anyone who already feels any sort of
5 sympathy towards Ms. Poff that might make them just
6 feel like they need to help her, whether or not it
7 was Dr. Elkins' fault? And sometimes in this
8 business we have to say things that -- you know,
9 that -- this may not come across as politically
10 correct, but the -- the conventional wisdom is that
11 men typically, in a case like this, will be more
12 protective of a woman.

13 I'm not going to have you stand up and swear a
14 blood oath that you won't do that. But is there
15 anyone who kind of feels that sense already, that
16 you're in the role of a protector rather than a --
17 a juror passing judgment on the evidence?

18 (Wherein, there was no response.)

19 MR. LISLE: Well, the last thing I'll say is
20 just about the order of trial. The Judge is going
21 to instruct you about the law, the damages, and the
22 proof, for those of you who are here. But during
23 the course of the trial, just like happened in the
24 jury selection, the plaintiff always goes first.
25 So you're always going to hear one side of the

1 story first. And then the defendant comes second.

2 So we've talked about some TV shows, if you're
3 ever like me and watch 48 hours, sometimes you'll
4 be -- you think it's going one way, and then all of
5 the sudden it takes a sharp right turn and you hear
6 something else. Or if you have more than one child
7 like I do, sometimes you hear one version of the
8 story and then you come in and you hear a different
9 version of the story. You have to decide which one
10 is which.

11 So all we are asking is that will everybody
12 commit to waiting until you have heard both sides
13 of the story before you get too far along in your
14 feelings about the first version that you heard?
15 All right. Thank you, very much.

16 JUDGE SCOTT: Thank you. Ms. Hensley, if you
17 would, draw 24 names. Mr. Tucker, would you move
18 the podium out of the way?

19 MR. BAILIFF: Yes, sir.

20 JUDGE SCOTT: Counsel, would you either scoot
21 the counsel table forward or move to the other
22 side, please? Why don't you just go ahead and move
23 chairs around to the other side?

24 Ladies and gentlemen, would those of you that
25 are in the jury box, please get up and move to the

1 body of the courtroom. You can either stand at the
2 back or sit in an empty chair, whichever is most
3 convenient and comfortable for you.

4 Ladies and gentlemen, in a moment, Ms. Hensley
5 is going to call names of jurors that have been
6 selected. If your name is called, would you please
7 advance to the front and sit in the jury box where
8 Mr. Tucker directs you at that time?

9 DEPUTY CLERK HENSLEY: Are you ready, Judge?

10 JUDGE SCOTT: What? Yes. Uh-huh.

11 DEPUTY CLERK HENSLEY: Carlee Hensley.

12 Kenneth Reynolds. Darleen Olson.

13 MR. KEEVER: Darleen?

14 DEPUTY CLERK HENSLEY: Olson. Gregory Clark.

15 Nidia Sterling. James Wilson. Kendra Andrews.

16 Debra Manus. Betty Holcomb. Nicolas Nuno. David

17 Mason. Stanley D'Aubin. Melinda Duty.

18 JUDGE SCOTT: Excuse me just a minute. Ladies
19 and gentlemen, would those of you on the very front
20 row of the blue seats, please rise and take a seat
21 in the back or stand at the back? I apologize for
22 the inconvenience.

23 DEPUTY CLERK HENSLEY: Jeffrey Balentine.

24 Pamela Hogate. Larry Pruitt. Michael Harris.

25 Tommy Fulfer. Homer Allen. Daniel Moyer -- Moyer.

1 Marcella Shuey. Robin Cornwell. Amber Sisemore.
2 And Lindsey Newman.

3 JUDGE SCOTT: Thank you, Ms. Hensley.
4 Counsel, you may step outside for five minutes, if
5 you like.

6 MR. KEEVER: Thank you, Your Honor.

7 SPEAKER: Thank you, Your Honor.

8 JUDGE SCOTT: Mr. Lisle, if you would, go
9 through that door, please, sir.

10 Ladies and gentlemen, if each one of the
11 jurors is able to commence our trial at 8:30 each
12 morning, that is when we will start it. We will
13 take a midmorning recess. We will have a lunch
14 recess. And we will have a midafternoon recess
15 concluding sometime around 4:30 or 5, depending on
16 the testimony of the witnesses and the jurors'
17 desires.

18 It will be my objective that the absolute
19 longest period of time you will ever sit in those
20 chairs would be two hours. Hopefully, it will be
21 closer to an hour and a half. If you ever have any
22 problems or difficulties, get Mr. Tucker's
23 attention or get my attention, and we will
24 certainly be attentive to whatever needs or
25 circumstances that you have. You will select your

1 noon meal at the morning recess when you get here.
2 Today, you're going to have lunch across the street
3 at Table Mesa. You will be able to order from
4 their menu.

5 We will have restaurants arranged for you to
6 eat lunch either on the square where you can walk
7 or we'll have a meal brought in by another
8 restaurant caterer. If we're at a restaurant
9 ordering a meal, I'd like for you to be responsible
10 and remember we're all paying for the meals that
11 you're ordering. And order accordingly, just as if
12 it were your money you're spending because it is
13 your money that you are spending.

14 Mr. Tucker will remain with you at all times.
15 And will see to any problems or difficulties, make
16 sure that no one interferes with your service as --
17 as a juror in this case. How many of you have
18 gotten this far to be selected as a juror this
19 term, here in Benton County?

20 (Wherein, there was no response.)

21 JUDGE SCOTT: Good. I'm glad to see it.
22 We're -- we're into the third month. We're almost
23 to the middle of your third month. I don't -- some
24 of you were not in my orientation session. And for
25 those of you that were, I apologize. This is re --

1 repetition. But we call 750 jurors every four
2 months.

3 It is our objective that no juror will have to
4 serve more than once on a jury during that term.
5 That obviously does not always work out, but it is
6 our objective. Several years ago, we were calling
7 fewer jurors and we hit a rash where they had to
8 come and sit four or five times. And we took steps
9 to alleviate that many interruptions and problems
10 in -- in -- in -- in folks' lives. Do any of you
11 have any questions regarding your jury duty or jury
12 service or the process by which you got selected or
13 got here up to this point?

14 (Wherein, there was no response.)

15 JUDGE SCOTT: I usually get some questions
16 when I ask that.

17 PROSPECTIVE JUROR ALLEN: I'm curious to --to
18 how they pick people, but I --

19 JUDGE SCOTT: Could you stand and state your
20 name, please, sir?

21 PROSPECTIVE JUROR ALLEN: Homer Allen. I say
22 I'm curious, because this is my first time, how we
23 were picked.

24 JUDGE SCOTT: Well, that's an interesting
25 story, Mr. Allen. We have this computer software

1 program and we tell it how many names to pull from
2 the voter registration rolls of Benton County. But
3 you have to give it some place to start. One year
4 I picked my birth -- my year of birth and Ms. Debby
5 DeShields' year of birth. I happen to have been
6 born in 51, so every 51st registered voter on the
7 Benton County voter rolls got summons for jury duty
8 that year.

9 As you might suspect, that is a moving target.
10 People are moving in all the time, registering to
11 vote, that changes who's number 51. People are
12 dying or moving away, and that changes who is
13 number 51. But the answer to your question is a
14 software program pulls at random based on some
15 number we give it repetitiously however many voters
16 we tell it to pull. And -- and we do that three
17 times a year, call in 750 jurors to -- to start the
18 process.

19 We divide the orientation session up into
20 three sessions upstairs so that everybody can get
21 in and get acclimated to -- to what we're doing.
22 Mr. Tucker, would you go tell Mr. Lisle it's time?

23 MR. BAILIFF: Yes, sir. Coming in.

24 (Wherein, the following proceedings were held
25 at the bench outside the hearing of the jury.)

1 MR. LISLE: I got confused on the one out of
2 the second three. It should be this one.
3 JUDGE SCOTT: Okay.
4 MR. KEEVER: May we get another copy of this
5 from the clerk, Your Honor?
6 JUDGE SCOTT: Yes, she will give you a final
7 one.
8 MR. KEEVER: And here we marked which of the
9 jurors, three out of eighteen, one out of three,
10 and one out of three. And I've signed it.
11 JUDGE SCOTT: Thank you, sir.
12 MR. KEEVER: Thank you.
13 (Wherein, the bench conference concluded.)
14 Mr. Kever: Mr. Tucker?
15 MR. BAILIFF: Yes, sir?
16 (Wherein, there was a brief off-the-record
17 conversation between Mr. Kever and the bailiff.)
18 JUDGE SCOTT: Mr. Wilson, would you stand up,
19 please, sir? Ms. Duty, would you stand up? If you
20 would, reach out and look around the corner. You
21 see where Mr. Wilson is standing? He will be the
22 sixth juror, when we come back in, I'd like for you
23 to be in his place and sit in his chair. Mr.
24 Wilson, when I dismiss those who have not been
25 selected, you are free to leave or stay in the

1 courtroom as you wish.

2 PROSPECTIVE JUROR WILSON: Dismissed?

3 JUDGE SCOTT: You will be when I tell you, you
4 are. Yes, sir. Thank you. Have a seat. Ms.
5 Manus, would you stand up, please? Ms. Hogate,
6 would you stand up? When we come back in, I'd like
7 to -- you to be in the chair where Ms. Manus is.
8 You will be the eighth juror coming back in. Thank
9 you, Ms. Manus. Mr. Nuno, would you stand up,
10 please? Mr. Pruitt, would you stand up? When we
11 come back in, you will be the tenth juror, and you
12 will be in the place where Mr. Nuno is. And, Mr.
13 Nuno, you will be excused. Thank you.

14 Ms. Shuey, would you stand up? Ms. Shuey, you
15 will be our first alternate. When you come back
16 in, I'd like for you to sit in a chair that is
17 currently vacant. That means you will be the
18 seventh person coming back in. Thank you.

19 Ms. Sisemore, would you stand up please? Ms.
20 Sisemore, you will be our second alternate. And
21 you will be the last juror to come into the room
22 and you'll be the first to get to leave when we
23 leave each time. If you would, look around the
24 corner there. I apologize for our construction.

25 There will be another red chair there

1 available for you to sit in, in front of the empty
2 chair. And that's where you will sit during our
3 trial. Thank you. What says the plaintiff to the
4 jury?

5 MR. KEEVER: Jury's acceptable to the
6 plaintiff, Your Honor, thank you, very much.

7 JUDGE SCOTT: Thank you. What says the
8 defendant to the jury?

9 MR. LISLE: Acceptable, Your Honor.

10 JUDGE SCOTT: All right. Would those of you
11 who are going to serve as our jurors and our two
12 alternates please stand to be sworn in?

13 (Wherein, the jury was sworn.)

14 JUDGE SCOTT: Be seated please. Ladies and
15 gentlemen, we're going to take another recess. As
16 I indicated to you earlier, it is required of me
17 that I read you the instruction that will be
18 similar to the one I have read you earlier.

19 Do not communicate about this place -- about
20 this case or the people involved in it by any means
21 regarding any information, whatsoever, with anyone.
22 Keep an open mind throughout the trial and so that
23 it appears to others that you are keeping an open
24 mind throughout the trial. You are to decide this
25 case only on the evidence received in this

1 courtroom during the trial and upon the
2 instructions that I will provide to you. Do not
3 talk among yourselves about this case or the people
4 involved in it until I send you to the room to
5 commence your deliberations.

6 Do not talk with or otherwise communicate with
7 any of the parties, lawyers, witnesses involved in
8 the case even to exchange the pleasantries of the
9 day. Mr. Tucker will provide you with large
10 buttons that identify you as a juror. That is so
11 people will not approach you or engage you in
12 conversation. No one wants to be rude or
13 unpleasant to you. It is just imperative that you
14 not only do justice, but that you give the
15 appearance of providing justice for all parties.

16 Do not communicate with anyone or any entity
17 regarding this case including any electronic media
18 or any posting, blogging, communicating, or
19 anything remotely similar to that sort of
20 communication. We're going to be in recess for ten
21 minutes. Mr. Tucker will provide you with menus to
22 select your meals and you may make any personal
23 arrangements you need to make. We will come back
24 into session and commence the trial after this
25 recess.