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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
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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.

THERESE OLENBERGER
(479) 271-1022

Mr. Tucker, you may take the jury out.

MR. BAILIFF: All rise.

(Wherein, the jury left the courtroom at 10:47 a.m.)

(Wherein, the following proceedings were held outside the presence of the jury.)

JUDGE SCOTT: Be seated, please. Ladies and gentlemen, those of you who were not selected for this jury, I want to thank, let you know that we're all appreciative of the interruptions in your lives. And I appreciate very much the attention that you have demonstrated today in your obligation to be good citizens here in Benton County. You are free to leave, or you are free to remain in the courtroom and observe the trial if you wish to do so. Should your service be needed in the future, Ms. Hensley will contact you. You are excused.

Counsel, I have marked the plaintiff's strikes as Court Exhibit 1 and the defendants' strikes as Court Exhibit 2. I anticipate when we return from recess having opening statements from both sides and then letting the jury go to lunch. That may end up being a few minutes after 12, but I think that makes the most sense to get on down the way.

Mr. Keever, are you going to be doing the

opening?

(Wherein, Court's Exhibits 1 and 2 were admitted into evidence.)

MR. KEEVER: I will, Your Honor.

JUDGE SCOTT: Okay. Thank you. Are you prepared to proceed ahead with witnesses for all afternoon and all day tomorrow?

MR. KEEVER: Yes, Your Honor. I am.

JUDGE SCOTT: Okay. We need -- any scheduling problems or issues we need to address?

MR. KEEVER: Not at this time, Your Honor. I think we got it covered.

JUDGE SCOTT: Okay.

MR. KEEVER: But thank you.

JUDGE SCOTT: Thank you. Mr. Lisle, anything else we need to cover?

MR. LISLE: No, sir. We're -- we're ready.

JUDGE SCOTT: All right. We'll be in recess ten minutes.

MS. REPORTER: All rise.

MR. KEEVER: Your Honor?

JUDGE SCOTT: Yes?

MR. KEEVER: I'll just need Mr. Tucker to get the equipment going. But I think we'll have time I guess at break.

JUDGE SCOTT: Okay.

MR. KEEVER: Thanks, Judge.

(Wherein, there was a break from 10:50 to 11:05 a.m.)

MR. BAILIFF: All rise.

JUDGE SCOTT: Counsel, no one has asked for the rule, but I expect that both of you --

MR. LISLE: Yes, sir.

JUDGE SCOTT: -- want the rule invoked. I trust that you all recognize your witnesses on sight. Do you, Mr. Keever?

MR. KEEVER: Yes. I expect none of my fact witnesses here and then my expert's not coming until tomorrow.

JUDGE SCOTT: Mr. Lisle, you're just going to call Dr. Elkins?

MR. LISLE: Dr. Elkins and Ms. Poff.

JUDGE SCOTT: I'd ask for your cooperation then if some of the witnesses do come in, to call that to Mr. Tucker's attention or to my attention. Mr. Keever, you ready for the jury to come in?

MR. KEEVER: If I -- let me get this off this screen, Your Honor, if I may, sir. Is that -- and, Will, -- Mr. Tucker, we going to shut that off for the opening statement?

MR. BAILIFF: We have to leave it on since it's on.

MR. KEEVER: Oh. Gotcha. Ms. Court Reporter, do you have Scotch tape?

MS. REPORTER: I do not have Scotch -- oh, I do.

MR. KEEVER: May I? Thank you. Your Honor, before the jury comes in, I have something I'd just like to proffer on the record.

JUDGE SCOTT: Let's do that when we take our recess. Are you ready for the jurors now, Mr. Keever?

MR. KEEVER: Let me make sure I'm not in the way, Your Honor. I believe I am now ready.

JUDGE SCOTT: Okay.

MR. KEEVER: Thank you.

JUDGE SCOTT: Mr. Lisle, are you ready for the jurors to come in?

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

JUDGE SCOTT: Mr. Tucker, bring the jurors in.

MR. BAILIFF: All rise.

(Wherein, the jury entered the courtroom at 11:09 a.m.)

JUDGE SCOTT: Be seated, please. Ladies and gentlemen, I apologize for the close quarters up

there. As you can imagine, we had to make this space work as a courtroom. So it is tight, and I apologize for that.

You have been selected and sworn as the jury to try the case of *Sue Poff v. James P. Elkins, M.D., and James P. Elkins, M.D., P.A.* It is your solemn responsibility to determine the facts in this case. And your verdict must be based solely on the evidence as it is presented to you in this trial and the law on which the Court instructs you during and at the close of the trial.

The jury is concerned with the facts. The Court is concerned with the law. The Court is concerned with the facts only to see that they are properly and lawfully presented to the jurors. The jury is concerned with the law only as the Court instructs it on the law during and at the close of the trial. Thus the responsibility of the jury and the responsibility of the Court are well-defined and they do not overlap. This is one of the fundamental principles of our system of justice.

During the trial, you will be permitted to take notes. The Court has provided you with pencils and notepaper for your convenience. For many years, the practice of taking notes was

discouraged because the taking of notes distracts your mind from the evidence that is presented while you are busy taking notes. The other reason was that the best note taker might have more influence on the jurors than is wanted.

Remember, each of you must individually determine the issues in this case. It is your responsibility to observe the witnesses as they testify and to listen attentively to all of the testimony. At the end of the case, in deliberations, your collective minds will then reach a verdict. The notes are only to be used as a memory aid and should not be allowed to take precedence over other jurors' independent memory of facts. Please understand that testimony cannot be repeated nor the trial delayed to permit the accurate taking of notes.

It is your responsibility to observe witnesses and to listen to the testimony. There is no requirement that you take notes. Before we hear opening statements of counsel and begin to take evidence, it may be helpful if you have some preliminary instructions to follow in listening and considering the evidence that you will hear in this case. It is the duty of the judge to instruct you

on the law and it is your duty to follow the law as I will state it to you, both now and from time to time during the trial and at the conclusion of the trial.

You have the exclusive duty to determine all facts submitted to you. In connection with this duty, you must determine the effect and value of the evidence. You must not be influenced in your decision by sympathy, prejudice, or passion toward any party, witness, or attorney in this case. In the event you should experience a personal problem during the course of the trial, you may explain it to the bailiff, and the message will be relayed to the Court.

The attorneys will, of course, play active roles in the trial. They will make opening statements to you, question witnesses, cross-examination of witnesses, make objections, and will finally argue the case to you as the last step before you commence your deliberations. Remember that the lawyers are not witnesses. And since it is your duty to decide this case solely on the evidence that you see or hear in this case, you must not consider as evidence any statement of any attorney made during the trial.

There is an exception, and that is if the attorneys agree to any fact. That agreement or stipulation or admission of fact will be brought to your attention and it will be your duty to regard that fact as being conclusively proved without the necessity of further evidence of that fact.

If a question is asked and an objection to the question is sustained, you will not hear the answer. You must not speculate as to what the answer might have been or as to the reason for the objection. If an answer is given to a question and the Court then grants a motion to strike that answer, you are to completely disregard that question and answer and not consider them for any purpose. A question, in and of itself, is not evidence, and may be considered by you only as it supplies meaning to the answer.

When an objection is made, it does not mean that anyone is trying to conceal evidence from you. There are rules governing the admissibility of evidence that must be followed. And the Court attempts to accomplish this by ruling on those objections. The objection is made to call the Court's attention to a possible transgression of the rules. Over the centuries, the law has

determined what evidence is reliable and what evidence is not reliable.

In order to preserve the integrity of the trial, each side attempts to ensure that only reliable evidence is presented to the jury. This is usually the reason for the objection. As you have already observed, there will be occasions when the attorneys will approach the bench and speak to the Court out of your hearing. You must not speculate as to what those discussions are because they are points of law, not evidence. It would be unfair to all parties before the Court for the jury to be in on or consider those discussions, which are not part of the evidence upon which you will base your decision.

As jurors, you will have the solid and exclusive duty to decide the credibility of witnesses who will testify in this case, which simply means that it is you who must decide whether to believe or disbelieve a particular witness. In making that determination, you will apply the test of truthfulness that you apply in your ordinary lives. These tests include the appearance of each witness on the stand; his or her manner of testifying; the reasonableness of the testimony;

the opportunity the witness had to see, hear, or know the things concerning which he or she testified; the accuracy of the witnesses' memory; the frankness of it; intelligence; interest; and bias, if any; together with all the facts and circumstances surrounding the testimony.

Applying these tests, you will assign to the testimony of each witness the weight you deem simply because it is given under oath. You may believe or disbelieve all or any part of the testimony of any witness. You should not decide the issue merely based upon the number of witnesses who testify on each side of an issue. Rather, the final test in judging the evidence should be the force and the weight of the evidence, regardless of the number of witnesses on each side.

If there are discrepancies in a witness' testimony or between witness' testimony and the testimony of other witnesses, this does not necessarily mean you should disbelieve the witness, as people commonly forget facts or recollect them differently after the passage of time. You are all certainly aware that two people who witness an event may see or hear it differently. In considering a discrepancy in a witness' testimony,

you should consider whether that discrepancy concerns an important fact or a trivial fact.

If you conclude that a witness has willfully lied in his or her testimony, you would then have the right to reject all the testimony, unless from all the evidence, you believe that the probability of truth favors the testimony in other particulars.

The opening statements of counsel are concise and orderly descriptions of each side's claims and defenses and the evidence counsel expects to produce in support of those claims and defenses. Opening statements are not evidence. They are previews of the respective cases designed to give you some perspective on the evidence. They are to be considered by you only as a guide, so that you may understand and evaluate the evidence as it comes to you.

Following opening statements, witnesses will be called to testify. They will be examined and cross-examined by the attorneys. Documents and other exhibits may be introduced into evidence. When the evidence is completed, I will instruct you on the law applicable to this case. After the instructions are given, the attorneys will then argue the merits of the case.

Remember, what the attorneys say is not evidence. The arguments are given for the purpose of assisting you in evaluating the evidence and arriving at the conclusion concerning the facts. Their arguments may be accepted or rejected. Each side will address you once during opening statements. In accord with the rules which govern these proceedings, the attorney for the plaintiff will speak first. I anticipate completing opening statements from both sides before we go to lunch. I understand that may be a little bit later in the day than you are used to eating, but I think that would make the most sense.

After you've completed your noon meal, we'll return and start testimony. Mr. Keever, you may make your opening statement.

MR. KEEVER: Your Honor, may we approach very briefly?

JUDGE SCOTT: Yes, sir. Counsel.

(Wherein, the following proceedings were held at the bench outside the hearing of the jury.)

MR. KEEVER: I just wanted your ruling on the record before my opening that I may show nothing that's not already entered into evidence, if I may, Your Honor?

JUDGE SCOTT: That's correct. My ruling was nothing may be used in opening statement that has not been admitted already or that is clearly observable in the courtroom at this time.

MR. KEEVER: I appreciate it, Your Honor.

JUDGE SCOTT: Certainly.

(Wherein, the bench conference concluded.)

MR. KEEVER: Thank, Your Honor.

May it please the Court, ladies and gentlemen. Don't really have to re -- reintroduce myself. We just talked a few minutes ago, but I'm Jim Keever. And along with Ken Swindle, represent Sue Poff in this medical negligence case. Now, medical negligence cases, a lot of them are really complicated. You know, they got drugs with big names and biochemistry and anatomy, but got good news, this isn't one of those.

This is a very simple case. It's a case about a lady who got burned during a medical procedure. Now, to be sure she was burned because of cosmetic laser -- so I guess, if we wanted to go into all the numbers and all the math and all the physics, we could. But, you know, you don't have to be a laser physicist to understand how to operate a laser. It's really no more complicated than your

microwave oven. You read the owner's manual, get the safe settings, turn it on, and it performs just like it's supposed to.

And that's what happened in this case, except the settings were unnecessarily high. Now, a doctor's really never allowed to unnecessarily place his or her patient at risk of harm or injury. It's kind of like the Hippocratic Oath, first of all, do no harm, the number one patient safety rule.

And one way a doctor can unnecessarily put his or her patient at risk of harm or energy [*sic*] is to use a medical device, any medical device, but like a medical laser, without doing one of two things. Number one, the doctor could be that laser physicist and physiologist, know everything about lasers and everything they do to the human body. Or he can just do like you do with microwave oven, read the owner's manual, keep the settings in the safe guidelines. And if that's done, this machine that was used is perfectly safe. It performs just like it's supposed to.

But may I tell you the story about what happened in this case? You got to go back a ways, over four years, October 2008. Defendant went from

his office in Rogers down to Dallas, Texas, and took a one-day seminar on how to operate this new medical laser. The defendant is not a plastic surgeon. He advertises himself as a cosmetic surgeon. His training was in obstetrics and gynecology. The defendant has no hospital privileges. He can't do surgery in a hospital. He can't admit patients to a hospital. He does everything in his own outpatient surgery center.

Now, he first used the medical laser a month after the seminar. We're in November 2008. He -- he rented it for two days and did three or four patients each day. The next month, he rented it again and did three or four more patients. And then sometime in January, he gets a call from a patient of his, someone he's known for years. Actually, she was calling to refer one of her friends to him for a cosmetic procedure.

And during the course of the phone call, they talked about the laser procedure. And she arranged to come to Rogers from her home in Heber Springs several days later. And she had the laser procedure. Now, the laser procedure is not just a great big beam. It's little, little, tiny -- if this is a square of skin, it's little, little, tiny

beams. I mean, these beams drill holes in the skin. And they're so -- I mean, there's, like, 73 you can line up to an inch.

And the effect of the laser depends on how strong the beam is, how long the beam's applied, and how much healthy skin is in between. The defendant had two documents to tell him safe settings. Kind of like any piece of equipment you buy, like a backhoe, it comes with an owner's manual, safety manual. And the company sends with it what they call a Clinical User Manual. And it has settings for various conditions.

And then from the one-day seminar, he had a packet of materials. And they gave what they call suggested parameters. Now, both of those documents made a firm point and a firm warning that the suggested parameters are for the face. And if you're going to use this laser on the chest, you have to be very careful and you have to decrease the energy because -- you know, you feel the face skin, it's about as thick as any skin on the body. It has great blood supply, so it heals very well. But if you feel the skin on your chest, it's about as thin as anywhere on the body.

That's a big deal. That's a big, big deal and

a big, big safety rule. Tomorrow, hopefully, first thing in the morning, you will hear from Dr. Kris Shewmake. Dr. Shewmake is a board-certified plastic surgeon. He's coming up from Little Rock. And he will testify. And Dr. Shewmake will tell you that he uses lasers in his plastic surgery, cosmetic surgery practice.

He owns a laser that's very similar to the one that was used in this case. And he'll also tell you that if you want to put him on laser knowledge, say, one to ten, ten you can design a laser, he'd say he's probably theoretically down on a one and a half to two. But he's never had any problem with his laser because he would never use it outside of the safe parameters.

He'll also say that to understand what's going on, you don't have to understand what generates the energy to burn through the skin. You can think about it like a hot iron, a real teeny hot iron. So if you put a little teeny hot iron on your skin, the hotter it is, the deeper the burn's going to be. And the longer you apply it, the deeper the burn and the more the burn damage will spread out.

See, the -- the way this procedure works is you got these teeny little holes. And when they

heal up on the surface, it kind of shrinks the skin. And then it's designed to only barely penetrate the top layers of the skin and the surrounding little edge of burn damage will then cause collagen to lay down. So you get tighter skin and you get plumper skin. That's what the procedure's supposed to do. And if the laser's used properly, that's exactly what it'll do.

But if it's too hot, if it's on too long, it'll burn deep down and into the blood supply of the skin. It'll also spread out. If it spreads out enough, it'll burn the little healthy islands of skin, and you basically fry the skin and you destroy the blood supply. And that's a third-degree burn. And that's exactly what happened in this case.

Now, there are three settings. And I kind of alluded to them. You know, how much power, how hot; how much time; and how close together. And in this particular machine, each one of those settings is controlled independently by the doctor. And we will be looking at the documents themselves. You know, the -- primarily the seminar materials. But if you look at the seminar materials, Dr. Shewmake will say that the settings that would've been

appropriate for this for the condition -- and you you'll -- you you'll see -- my goodness. I may be -- I may be limited to this sheet. That should shorten things up.

But Dr. Shewmake will say that we've got power. We've got time. And then we got spacing. And you will see the pictures of Sue's chest beforehand. And she had some sun damage here in the V. Okay. She was 47 years old when this happened. And that's what the defendant was going to take care of with this -- the laser. Now, Dr. Shewmake will say that if you go to his own documents, that pigment, which is the setting for redness would be as much as Dr. Shewmake thought would be safe. But he might say you could go a notch up for texture.

And I'm just going to put down here 25. And I apologize for turning my back. I've never learned to write with my left hand. I just can't do it. And time is a hundred and fifty, three hundred, and three hundred, and four hundred. And we'll just call these units. Wattage is the power, twenty-five, twenty-five. The time units, we'll show how that's calculated, and it's one fifty, or three hundred. Spacing, three hundred or four hundred.

The defendant used settings that were significantly higher. And we'll show you his records, there's actually -- there's only one treatment, but there's two sets of settings. And one of them, the power's 25 and 30. So the power's pretty much the same all the way up and down. The spacing, four fifty, and four hundred, so, again, not a whole lot of difference. But the time, 1,200; 1,800 units of time. They're all measured in the same units.

In other words, even if you give the benefit of the doubt to the defendant, and say that this more aggressive setting was okay, he's 400 percent higher on the mildest of the settings he reported. He's 600 percent higher on the other setting, 400 percent and 600 percent. Now, Dr. Shewmake can show you -- he won't like to do this. He said he doesn't like to do math in public. But you can find the mathematical formula that takes power, time, and spacing and convert it into an energy number.

And if you take the energy number from the user's manual, point nine three; energy number from the seminar, one point three three; energy number for the mild setting, four point six; and nine

point six. So roughly the same proportionality. Actually, if you compare them to the manufacturer's numbers, he's between five and ten times, five hundred percent to a thousand percent higher than the recommended safe settings.

The patient's name, of course, is Sue Poff. And Sue came out of her laser procedure, and she felt seriously burned. And she was. You'll see a picture of what she looked like the next day. A month later, you'll see what she looked like. Her face looked pretty bad at that point, but it went ahead and pretty much recovered. There's a little patch of scarring that's noticeable more at some times the year than others.

But her chest developed third degree burn type of scarring in this area. And it just got worse and then like scars got -- the scars got whiter. And you'll see what that looked like as they progress. And you'll see what it looks like now. So we're bringing this lawsuit on Sue's behalf. And the first reason we're bringing the lawsuit is the settings were just unreasonably, negligently high. I mean, it not only put Sue at a possible chance of burning and scarring, not only probable, but there was a virtual certainty, with those

settings, used on the chest, that Sue was going to have the scarring that she ended up with.

Now, there's a second reason why we're bringing this lawsuit. The treatment didn't -- shouldn't have happened. I mean, had the defendant given Sue all of the information that she needed, including the fact that he was going to use settings that were 400 to 600 percent higher than he learned about, well, if she'd have heard that number, she sure would've questioned it more.

If he told her there was a strong possibility, a likelihood, let alone a certainty of visible permanent scarring, Sue wouldn't have consented to the procedure. She had no idea. Now, the -- the defendant did have a poster up in his -- up in his office that she saw before she contacted him about the procedure. And then there was a phone call. And then it was a phone call -- well, she called for a friend of hers and said, "I got this friend, Lisa Jones. And Ms. Jones wants to have liposuction." Defendant got on the phone with Sue, they talked about her friend. They talked about the laser procedure, and that's when they decided to have it done.

The only warning Sue had was, "This is a new

procedure. I just had my nurse do it on my own face. It's great. There's no risk. And if you want more information, you can go to this website. And it's www.dottherapy.com." And that's what was on the poster that Sue saw. And, indeed, she went to the website. And the website, put out by the company, specifically said, "No adverse effects. Minimal downtime."

Sue didn't feel the need to do anymore research. This is her doctor. She trusted him and went to the website. She did what she was told. So she presented on the 22nd of January. And she had the procedure. And we'll go through in much more detail, of course, the circumstances. And you'll hear the conversation. You'll hear both sides of the conversation. But the procedure was done.

And the defendant told her, "You know, you can go out to dinner that night. And in three days, you can be back to work wearing makeup." Well, that didn't happen. And Sue missed some 45 days of work recovering and being treated for burns. At the end of this trial, you'll get a verdict form. You'll hear the Judge instruct you. Judge Scott will instruct you on the law. And we will be

asking you to put money in a verdict for what can be fixed, what can be helped, and compensation for that which has been taken away.

Now, what can be fixed, that's a hard number, that's past medical expenses. And Sue will show you a book of receipts like that (indicating). And between the lost work, compensation for that, and the actual expenses, it's going to be somewhat less than $40,000, about $38,000. And we will ask you to put that in the verdict.

Sue has seen a number of other doctors, plastic surgeons, trying to find the best treatment for her burns, trying to find the best way to help her. And there's been a number of things that have been suggested. And we'll go through those. Dr. Shewmake will talk to those. And it's going to be a pretty darn big number. That number's going to be somewhere between three hundred and four hundred thousand dollars. And Sue will ask you to put that in the verdict to protect her against her future expenses.

But what about the greatest harm of all? What about what's been taken away from Sue, not just the pain and suffering, but the scarring and the disfigurement. You know, the -- the defendant

testified in his deposition that he didn't think it was his fault, didn't think his settings were too high. Must've been something wrong with Sue. And besides that, he said she could cover up with a little makeup, little Maybelline. Well, you'll see Sue. You'll actually see a before and after because she had a picture taken just weeks before for use in a website. She had a -- a beauty salon at that time. And then you'll see the picture of the scarring she has now.

And you'll see the scarring when Sue shows it to you. Dr. Shewmake's not going to leave any doubt in your minds. It's a real easy call. It's kind of like computers. It's garbage in, garbage out. Any of you ever of heard that? Well, this kind of a laser, you put the settings in and you will get a predictable product out. You put in settings like this, particularly this top one, and you will have a modest improvement safely. Second setting might be a little bit more downtime, but still probably okay. Put these settings in, you're guaranteed the result that Sue got.

So when we're done with this case, when you've heard all of Sue's story, you're going to understand, I think, why we've come to you and

asked for a verdict that's really a large verdict. But, after all, part of that verdict will be the part that could be fixed, no less than $40,000; the part that could be helped, which is hundreds of thousands of dollars. But adding those two together won't come to half a million, but it'll be bumping it. And then what was taken away.

And I think you'll understand why this is the kind of case, the kind of case where it's not only proper, but it's necessary that I come to you and ask for a total verdict of at least one million dollars. Thank you.

JUDGE SCOTT: Mr. Elkins -- excuse me -- Mr. Lisle?

MR. LISLE: I am Steve Lisle. I represent Dr. Elkins. And just as the Judge told you before that opening statement, that opening statement's not evidence. You're going to hear evidence from the witness stand about what happened in the case. And this case, as much as anything else, is not just about what did Dr. Elkins do to Sue Poff, but what did Sue Poff do to herself? There were a lot of things in that narrative that you heard, that you didn't hear that are going to be crucial to this case. Because as much as anything, it's going to

be about her personal responsibility, her -- what she did and how we ended up here today.

The first thing she did is she chose to have a procedure which is an elective procedure. It's a laser procedure and you -- you have as much time as you want to learn about it, as much time as you need to figure out the risk. You don't have to do it, at all. You only do it if you feel like you are dissatisfied enough with your current appearance that you need to undergo a substantial procedure to try to improve your appearance along with the risk that go -- that are associated with that.

Because you -- it may've been lost in this, but every laser procedure is a burn. That's what it is. If you don't like the appearance of this wall, you put paint on it, and it immediately looks better. A laser doesn't fix anything. As strange as this may sound, the laser injures the body. The result is when the body heals itself. What you're doing is intentionally inflicting an injury on the body, difficult as that may be to grasp, and then the body, over time, heals and rejuvenates itself.

So what's crucial in the case is there has to be an injury and then a healing process. You're

going to hear this from me many times: if you have a -- an injury without allowing the healing to begin, you have what? You have an injury. And you heard a lot about her -- you know, she would not have consented to this procedure if she had known the risk. Well, Ms. Poff, at the time of this procedure, was a licensed esthetician, herself.

And in her role as a licensed esthetician, she also had an additional license in electrolysis, which is the electric hair removal process. She had a lot of training in skin care. She marketed her own skin care products. She -- in her -- in her work, did chemical peels of the face, which is a -- using an acid, again, as difficult as that may sound, to -- to take off the top layer of skin. Those -- those are things she did.

And she had prior experience with Dr. Elkins. She came up here from Heber Springs because he had done procedures for her in the past. You're going to hear that she has had a very extensive history with cosmetic and plastic surgery. And in every one of those procedures she has been warned of risk many, many times, including the risk of complications.

Now, what -- a complication -- in every

procedure that you do that disrupts the skin or the body, there is a chance for a complication. A complication simply means even if the procedure was done according to plan, you can have an unexpected negative result. That can happen every time. So what happens is she is going to have been advised about the risk of complications many times. She decided that she wanted to -- to take on that risk yet again.

She chose Dr. Elkins because his way background Dr. Elkins has been a board-certified obstetrician/gynecologist in Rogers since 1977. He's delivered hundreds if not thousands of babies. He's done invasive surgeries. He started back at that time C-section, hysterectomy, a lot of things like that. He innovated some things for the first time in Benton County like laparoscopy, fetal heart monitors, first to allow fathers in the delivery rooms, some things like that.

And so what happened, over time, is you're going to hear that his -- his practice involved women, women's health. And over time, as these new technologies became available, more and more of his patients started asking about them, "Can I" -- "Can I get a liposuction? Can I" -- you know, "Can you

do these things for me?" And so he developed his practice in those areas as well. He's done liposuction, breast augmentation, and all these different things.

And he's had an extensive history with lasers, diode lasers, alexandrite lasers. Again, as technology has developed, his practice developed, and he took on the new technologies, the lasers that do varicose vein treatments, and all those things. And this -- you're going -- you may get lost in some of the technology if we're not careful. The laser he used is called a SmartXide DOT Laser. It's a -- what's called a fractional laser. It -- it sends out a beam that's in -- by fractional, it means it's not just one steady beam, it's -- it's points of -- of a beam.

He -- he attended -- the training that he attended was the -- where they have experts by this manufacturer that are assigned to train new people in the use of -- new doctors in the use of this particular laser. He also had a manufacturer's representative come to his office when he was treating people for the first time. What you -- what you just heard there is, to me, possibly the most confusing thing in this case. And I'm going

to ask you to listen to this testimony about the numbers very, very carefully.

If somebody tells you they can operate a laser on your skin like it's a microwave oven, don't believe it, just don't do it. You don't just plug in numbers into this machine. You come to the doctor, he analyses your skin type, the pigmentation -- not just skin type, the skin condition, your history of sun damage, all -- a lot of factors. You don't just plug the numbers in. They don't turn themselves on. You have to do a lot of things, a lot of judgment calls. Is -- is your pigment type this one or is it this one? Are you treating only scars, are you treating wrinkles? There's a lot of things, and they're not always the same. You have to blend the numbers.

It depends on the particular patient. Anyone who says that they can turn it on -- that -- that anybody can turn it on like your microwave, that my kids can operate, cannot do a laser procedure. You -- you have to be a licensed doctor, first of all. So what you're going to hear over and over from the plaintiffs, which is going to be crucial that you understand, is that the manual is a floor. The standard of care is a ceiling. They're going to

say he did -- he exceeded the floor. That's what they're going to be saying, he exceeded the minimum standard, the minimum settings.

Those aren't the maximum settings. And that's going to come out in the testimony. They took the deposition of the CEO of the company, and he said those are conservative entry-level numbers. They're going to be put across to you as though they're the maximum numbers. Be careful for that. Listen to way he told about the difference between -- and the manual itself will say doctors can use higher or lower settings.

Based on his training with the experts that were hired by the manufacturer, he came up with the settings he came up with, which also, by the way, include patient preference. A patient can choose to -- you heard three to four days off work. That's when everything goes according to plan. It's not just walk in and -- I mean, it's -- there's some pain involved. And then there's a months-long healing process.

So the -- so what he did was he -- he met with her. He came up with a treatment plan. You can choose to be more aggressive, which means I want to try to do it in one session, or I want to string it

out over three or four sessions. Based on their conversation, they chose to be more aggressive, which it does expect you'll have a longer downtime. In the best case scenario, after you're burned by a laser, you have a lot -- three to four days off work. A lot of us would think that's significant.

You can have oozing, crusting of the skin, all of which is normal. It could take months for the skin to re -- reestablish collagen. It can take a year, all of this, again, being normal for the skin -- for the skin to re -- regain the same color. So what happened is, Ms. Poff came in and she was warned of those risks. She signed the consent form. She had signed many consent forms in the past. They underwent the procedure.

Almost immediately she was dissatisfied with her healing, "I'm" -- you know, "I'm oozing. I feel burned," those sorts of things. The last time -- this procedure was in January, January 22nd of 2009. The last time she comes to see Dr. Elkins is the end of February 2009, just a couple weeks later. The last thing he said to her was, "I think this is going to be okay. You're going to improve. Don't over treat. Do not over treat it."

From what you heard just here, did you get --

you probably got the impression there was one laser treatment. The rest of the story is that from April 2009, three months after this procedure, until the end of 2009, she had eight more laser treatments. So this case isn't about one laser treatment; it's about nine. Dr. Elkins did not know about those other laser treatments, no idea until after the case was filed. In fact, I think you'll hear, early on, he felt very bad. From what she was telling him late in 2009 and 2010, he thought she had a complication.

Again, not saying "I did anything wrong, but I'm sorry that it didn't turn out the way you'd hoped." And he gave her, her money back. He didn't know then she had undergone additional laser treatments on her own in Little Rock eight times, one in Tulsa. So what you're going to hear from us is that you're in the healing process, but you keep injuring, keep injuring, keep injuring. It's picking at a scab.

You're going to have to try to figure out, as best you can, if she reveals scar tissue to you during this trail, did that happen because of something in January 2009, or a key date -- going to ask you to think about this, April 22nd, 2009.

Any time you see a photograph or hear testimony, that's when she started other laser treatments. That's well within the healing period from the first one.

So that's -- you'd have to look at the standard of care, which I mean -- you know, they're saying is based on the manual, then you have to also figure out what -- even if he violated the standard of care, did he cause her problems, or were they caused by something else? And then if you get that far, then you're going to be asked about damages, which you just heard, I guess, is going to be a million dollars.

Now, you know, we talked about they go first and -- and then I come second. But I'm going to spoil a little bit of the story for you by telling you included in what you just heard as three or four hundred thousand dollars of future medical is a couple of hundred thousand dollars for, guess what? More laser treatments. This case is going to -- she is going to come to you and say that she wants to be paid in advance for eight laser treatments per year for the next 30 years. Every laser treatment you have runs a risk of complication. That's 240 laser treatments. That's

included in those damages.

So she's going to come to you and say I would never have had a laser treatment if I had known it was risky. I was burned in a laser treatment. I then went out and had eight more laser treatments. And I need to be awarded enough money so that I can have 240 more. I want you to keep that in mind as you're listening to the testimony that develops.

JUDGE SCOTT: Thank you. Mr. Tucker, would you move that easel out of the way and move the podium, please, sir?

Ladies and gentlemen, we're going to take our noon recess. When you return this afternoon, and any other time, you're welcome to bring a bottle of water -- water into the courtroom you'd like or any other drink that has a screw cap on it. If you would, be mindful of that.

Ms. Sisemore, when we leave, would you please move your chair toward the flags so the other jurors can come and go? All right.

I wonder where Mr. Tucker went. Mr. Tucker, you may take the jury out.

MR. BAILIFF: Admonition.

JUDGE SCOTT: Oh. Thank you. Thank you. I apologize. Thank you, Mr. Tucker. Remember what

I've told you already and I will repeat some version of this each time you leave the courtroom.

Do not talk among yourselves about this case or the people involved in it until I send you to the jury room to commence your deliberations. Do not talk with or otherwise communicate with any of the parties, the lawyers, or the witnesses, even to exchange the pleasantries of the time of day. Do not communicate with anyone, at all, about this case or the persons involved in it, including your family, your friends, your acquaintances.

Do not use any means, whatsoever, to communicate about this case or the people involved in it. Do not talk in person or by telephone or communicate in any other way, such as electronic devices like cell phones, iPhones, smartphones, Blackberries, PDAs, iPads, computers or any other electronic device. Do not use them to talk, send, or receive any sort of communication regarding this case, the people involved in it, the witnesses involved, or the issues involved in it.

Do not share information or your thoughts, opinions, views, updates, or impressions about the case or the people involved in it with anyone through any means. Do not allow anyone else to

communicate with you regarding the issues, the people, or this case in any form or fashion.

Mr. Tucker, you may take the jury out.

MR. BAILIFF: All rise.

(Wherein, the jury left the courtroom at 11:57 a.m.)

(Wherein, the following proceedings were held outside the presence of the jury.)

JUDGE SCOTT: Be seated please. Ladies and gentlemen, I anticipate that the jury will be at lunch somewhere around 45 minutes. As soon as they are back and squared away, we will come back into session and start with testimony. Mr. Keever, if you want to make any proffers of anything, you may do so after I leave the bench. Court will be in recess.

MS. REPORTER: All rise.

(Wherein, a break was taken from 11:58 a.m. to 1:13 p.m.)

(Wherein, during the break, the following proceedings were held outside the presence of the Court.)

MR. LISLE: He didn't give us a time to come back?

MR. KEEVER: I'll just give copies of this

later on.

MR. LISLE: Yeah.

MR. KEEVER: The plaintiff has taken exception to the Court's ruling that she may not introduce any visual images to the jury during opening statement except the things that they can already see in the courtroom. And that excludes not only pictures of things that will be admitted into evidence, but any demonstrative evidence.

And I am proffering a brief that explains our position that law should allow us to not only introduce the visual images of the evidence we're going to use at trial in opening statement, but also various demonstrative aids, which are designed to help the jury understand the case. I have attached as a composite exhibit copies of a Power Point presentation that I had planned to use in opening. And I'll run over these very briefly and describe each one of them.

The first slide is a picture of an illustration that is from the user manual and shows how the laser works. The second picture is a page out of the user manual that warns decrease in power on the chest. The third page is a demonstrative exhibit that we expect to be used by our expert to

show how laser works. The fourth is a picture of an illustration showing how over treatment burns the skin. The sixth is a picture of Sue's chest before the surgery. The seventh is just a picture of the -- Dr. Elkins. The eighth is a slide that says a doctor's never allowed to needlessly endanger his patient.

The ninth is a picture of Sue the day after the laser. The tenth, two pictures of Sue on February 18th, 2009. The eleventh, pictures of Sue's chest on 3/13/09. The twelfth is a picture of Sue's chest on 6/01/10. The thirteenth is simply stating "Sue Poff v. James Elkins, M.D. and James P. Elkins, M.D., P.A." There will be some duplicates. The next slide is a collage of the various pictures of Sue from the day after treatment through 6/1/10.

The next slide is a summary of calculation of the energy from the settings in the Clinical User Manual, one-day seminar, and chosen by the defendant. The next is a copy of the poster in the doctor's office that was referenced in the opening. The next is just a slide about expenses with no values in it. The next is a slide, a picture of Sue one week before the surgery. And the next is a

picture, a split-screen of one week before the surgery and June 2010.

And there is a final slide that is a comparison of the actual power, timing, and spacing settings from the one-day seminar and that were actually chosen by the defendant, or at least are in his records as what he chose, one or the other. Thank you.

I've got one more thing that I was looking at --

(Wherein, there was a brief off-the-record conversation between plaintiff's counsel.)

(Wherein, the proffer concluded.)

(Wherein, the following proceedings were held outside the presence of the jury.)

MR. BAILIFF: All rise.

JUDGE SCOTT: Be seated, please. During the noon hour, Mr. Keever has informed the Court that he observed one of the jurors, Ms. Melinda Duty, conversing with what Dr. Keever believes to be the defendant, Dr. Elkins', girlfriend. I do not see any such person in the courtroom at this time. Mr. Lisle, do you know where Dr. Elkins' girlfriend is?

DR. ELKINS: Actually, she's my fiancé, Judge.

JUDGE SCOTT: That's enough, Mr. Elkins. We

want you to talk, we'll let you know. Go ahead, Mr. Lisle.

MR. LISLE: I'll find her.

JUDGE SCOTT: Okay.

MR. LISLE: I believe she's right out here, but I...

JUDGE SCOTT: Why don't you ask her to step in, please? Just stand right there, ma'am. Let Mr. Lisle by. Ma'am, what is your name?

MS. MILBURN: My name is Marty Milburn.

JUDGE SCOTT: Mr. Tucker, if you would, swear Ms. Milburn in.

(Wherein, Ms. Milburn was sworn.)

JUDGE SCOTT: Ms. Milburn, I believe I noticed that you were sitting in the jury box with some other jurors during our voir dire. Is that correct?

MS. MILBURN: That is correct, sir.

JUDGE SCOTT: I think I also observed you sitting in the courtroom during the opening statements of the attorneys and all the proceedings. Is that also correct?

MS. MILBURN: Yes, sir.

JUDGE SCOTT: Did you have a conversation during the noon hour with one of the jurors?

MS. MILBURN: About nothing regarding the trial.

JUDGE SCOTT: And what did you think my question was?

MS. MILBURN: No -- yes, sir. I did.

JUDGE SCOTT: What was the nature of your conversation with the juror?

MS. MILBURN: A -- a mutual friend had died, Bill Grimes.

JUDGE SCOTT: How did you know that you had a mutual friend with Ms. Duty?

MS. MILBURN: Because the Grimes introduced me to them when -- years ago when -- to her. I got -- when I first came to town.

JUDGE SCOTT: You thought the Grimes introduced you to Ms. Duty?

MS. MILBURN: Yes.

JUDGE SCOTT: All right. Mr. Keever, you have any questions?

MR. KEEVER: Not of -- not of this witness.

JUDGE SCOTT: Mr. Lisle, any questions?

MR. LISLE: No, sir, Your Honor.

JUDGE SCOTT: All right. Ms. Milburn, if you would, go back outside.

MS. MILBURN: Yes, sir.

JUDGE SCOTT: Mr. Tucker, ask deputy Duty -- Juror Duty to come in please.

(Wherein, Juror Duty entered the courtroom.)

JUDGE SCOTT: Just stand right there, Ms. Duty. Ms. Duty, Mr. Tucker's going to swear you in to testify. I have some questions I want to ask you. Mr. Tucker.

(Wherein, Juror Duty was sworn.)

JUDGE SCOTT: Ms. Duty, are you acquainted with Bill Grimes?

JUROR DUTY: As a administrator at the high school that I went to, school.

JUDGE SCOTT: All right. Did you have a conversation during the noon hour with a lady regarding Mr. Grimes' recent passing?

JUROR DUTY: She asked me if I knew Bonnie Grimes. And I told her no. She said that I looked familiar. I said that I knew them as members of the community and as he was -- they were both involved with the school, Rogers High School, when I went to school there. And, no, I did not know that he had passed away.

JUDGE SCOTT: All right. Thank you. Mr. Keever, any questions?

MR. KEEVER: Ms. Duty, did -- do you have any

prior acquaintance with Ms. -- Ms. Milburn, the lady that you were visiting with out in the hall?

JUROR DUTY: No. I thought I saw her in here as a potential juror earlier this morning.

MR. KEEVER: And has she -- you didn't have -- had maybe known her from way back when?

JUROR DUTY: No. She said she -- I looked familiar because she said that when she came to move to this community that she was friends with Mr. and Mrs. Grimes' daughter and that Mr. and Mrs. Grimes introduced her around to a group of people. And she said I looked familiar as one of those people that she got introduced to that point in time. But I -- I didn't know -- excuse me. I'm sorry. I didn't know the woman. I just knew the Grimeses from their involvement with school --

MR. KEEVER: Sure.

JUROR DUTY: -- where I attended school and then throughout the community, they were big in the community in Rogers where I lived and worked and a whole lot.

MR. KEEVER: Thank you.

JUDGE SCOTT: Thank you. Any questions, Mr. Lisle?

MR. LISLE: No, Your Honor. No questions.

JUDGE SCOTT: Thank you, Ms. Duty, you may go back to the jury room.

(Wherein, Juror Duty left the courtroom.)

JUDGE SCOTT: Any motions, Mr. Keever?

MR. KEEVER: Your Honor, I think the plaintiff has to ask for a mistrial at this point. I -- I don't feel comfortable with -- or I have to ask for the juror to be excused.

JUDGE SCOTT: All right.

MR. KEEVER: And -- and, in the alternative, we'd ask for a mistrial.

JUDGE SCOTT: Well -- Mr. Lisle, you want to respond to that?

MR. LISLE: Well, Your Honor, I didn't hear anything there that would even be grounds for her to recuse. She didn't even know the woman speaking to her, obviously didn't know she was connected to -- to Dr. Elkins, thought it was another potential juror that had been released. I don't see how it affects her ability to act as a juror in this case, didn't hear anything from her to that effect. Certainly no need for a mistrial.

JUDGE SCOTT: I think Mr. Lisle makes a good point on -- on the mistrial aspect of that, Mr. Keever. I am going to excuse Ms. Duty and

substitute our first alternate, Ms. Marcella Shuey. And I -- I'm not going to tell either one of them at this time why that happened. Mr. Lisle, I think you're correct. I don't think Ms. Duty had any notion of the identity of the woman she was talking to.

I am a little concerned that Dr. Elkins' fiancé sat in this courtroom and listened to the admonition and instructions I gave everyone here and she went up and engaged a juror in conversation. I trust that error in judgment will not reoccur. Mr. Tucker, if you would, ask Ms. Duty to come back in please.

(Wherein, Juror Duty entered the courtroom.)

JUDGE SCOTT: Ms. Duty, it's going to be necessary that I excuse you from this jury. I want to assure you that you have done nothing improper or inappropriate, that your excuse is not for anything you have done or said or not said or not done. It's not your fault. I will send you a letter when this trial is complete and explain to you what has happened.

JUROR DUTY: Thank you.

JUDGE SCOTT: Thank you. I appreciate your service.

You ready for the jury to come in, Mr. Keever?

MR. KEEVER: Can I just collect myself for just a second, sir?

JUDGE SCOTT: Well, it'll take Mr. Tucker just a second to get --

MR. KEEVER: I think -- I think we've about got it.

JUDGE SCOTT: All right. Mr. Lisle, you ready?

MR. LISLE: Your Honor, I was just going to ask Ms. Marty to -- can I talk to her, Dr. Elkins' fiancé very quickly?

JUDGE SCOTT: Sure.

MR. LISLE: About what just happened?

JUDGE SCOTT: Sure. Yes. That'd be fine. Mr. Lisle, if you would, unlock the back of the -- back door of the courtroom. It looks like someone's trying to get in back there. You ready, Mr. Lisle?

MR. LISLE: Yes, sir. I'm ready.

JUDGE SCOTT: Mr. Keever, you ready now?

MR. KEEVER: Can we just get our -- our slideshow spooled up? I --

JUDGE SCOTT: Sure.

MR. KEEVER: -- should've had that done

before. I apologize.

JUDGE SCOTT: Certainly may. You ready, Mr. Keever?

MR. KEEVER: I'm ready, Your Honor. Thank you.

JUDGE SCOTT: Mr. Tucker, bring the jury in, please.

MR. BAILIFF: All rise.

(Wherein, the jury entered the courtroom at 1:25 p.m.)

JUDGE SCOTT: Be seated, please.

Ladies and gentlemen, it has become necessary to excuse Juror Melinda Duty. Ms. Shuey, if you would, move one seat to your right. You are no longer an alternate. You are a member of the jury. Ms. Pasmore, if you would, scoot up to that seat up there. And you can push the wheelie chair out of the way. It'll make it a little easier for us to get in and out -- or Ms. Sisemore. Excuse me.

ALTERNATE JUROR SISEMORE: It's -- it's fine.

JUDGE SCOTT: Did you-all enjoy your lunch?

JURORS: Yes, sir.

JUDGE SCOTT: Good. Good. Mr. Keever, call your first witness.

MR. KEEVER: Thank you, Your Honor. We call

the defendant, Dr. Elkins, as an adverse witness.

JUDGE SCOTT: Dr. Elkins, come up to the witness stand. The bailiff will show you where it is.

(Wherein, the witness was sworn.)

MR. BAILIFF: Thank you. Have a seat. Sit up close and speak clearly into the microphone.

DR. ELKINS: Thanks.

JUDGE SCOTT: You may proceed.

MR. KEEVER: Thank you, sir. May it please the Court, ladies and gentlemen.

JAMES PHILLIP ELKINS, having been called upon by the plaintiff to testify, testified as follows, to wit:

DIRECT EXAMINATION

BY MR. KEEVER:

Q. Would you give your name for the record, please?

A. James Phillip Elkins.

Q. We met first in May of 2011 when I came up to take your deposition. Is that right?

A. Don't remember exact date.

Q. Well, am I correct in understanding that you're going to offer opinions on what's called the standard of care in this case?

A. May I talk with my lawyer?

JUDGE SCOTT: Just -- just answer the

question, Dr. Elkins. If you don't know, tell us you don't know.

A. Can you repeat the question, please?

Q. (Mr. Keever continued.) Yes, sir. Am I correct in assuming that you're going to offer opinions on the standard of care in this case?

A. Yes.

Q. And opinions on whether or not your treatment of Ms. Poff caused her burning and scarring?

A. Yes.

Q. And those opinions would be based on your experience as a medical doctor. Is that correct?

A. Yes.

Q. Tomorrow, Dr. Kris Shewmake is going to be here from Little Rock, a plastic surgeon. Do you know Dr. Shewmake?

A. No.

Q. You've never met him?

A. Not that I can remember.

Q. Have you seen his medical report?

A. Yes. Excuse me. You mean his curriculum vitae?

Q. No, sir. The medical report that he prepared offering his opinions on the care given in this case.

A. I'm not exactly sure what you're referring to.

Q. Well, you've seen his Curriculum Vitae, that's like a resume?

A. Yes.
Q. And Dr. Shewmake is a board-certified plastic surgeon. Is that what you recall from his resume?
A. That's on his resume.
Q. Isn't it true to become a board-certified plastic surgeon you have a two-year fellowship after a preliminary surgical residency?
A. Generally, in the United States, that's true.
Q. And do you recall from his resume that he, in fact, had a general surgery residency and then a plastic surgery two-year fellowship?
A. I can't say that I recall that, but I'm sure that's probably correct.
Q. Okay. Now, you have never had a plastic --
DR. ELKINS: Am I talking too close to this?
JUDGE SCOTT: Yes, sir. You are.
DR. ELKINS: Thank you.
JUDGE SCOTT: It's all right.
Q. (Mr. Keever continued.) You've never had a plastic surgery residency?
A. No.
Q. You had a residency in obstetrics and gynecology.
A. Yes.
Q. And you advertise your services now as a cosmetic surgeon. Is that correct?

A. Yes.
Q. There are no fellowship training requirements to become or to advertise oneself as a cosmetic surgeon. Is that correct?
A. There are no fellowship requirements to advertise yourself as a cosmetic surgeon.
Q. And -- and, in fact, you make it clear in your own advertising in your website that you are a cosmetic surgeon, not a plastic surgeon. Isn't that true?
A. Correct.
Q. Now, do you plan to tell the jurors that you met the standard of care in your selection of the settings of the laser that you used on Sue?
A. Yes.
Q. And do you plan to tell the jurors that you gave Sue the full information that she needed to make a full informed decision on consenting to that surgery?
A. Yes.
Q. Did the settings that you chose cause deep burning to Sue's face and neck?
A. Mr. Keever, I can't really answer that question. I guess I would have to say there are a lot of variables in that. And in the long run, I guess I would have to say, probably, no. My first treatment of her did not cause that.
Q. Well, would you concede that the burns and scarring were

at least a complication from your treatment?
A. No, sir. I would have to say that I did an in -- initial CO2 laser resurfacing, a fractional laser resurfacing of her. And without my knowledge and definitely without my encouragement, she began having the same type of laser procedures or trauma or burning to her skin over what I had done beginning three months after I did the initial laser therapy. And subsequently she had eight, total. So she burned and burned and burned and burned and never gave it time to heal.
Q. Now, the type of laser that you used was called a SmartXide Laser that's for resurfacing the skin. Is that correct?
A. That's the generic name of the fractional CO2 laser machine that I used.
Q. Okay. And what information and what records have you looked at that would show what laser treatment Sue had after your surgery?
A. We obtained -- my lawyer obtained records from the Star Skin Laser -- or Star Skin -- I think it's called Star Skin Laser Center in Little Rock where she had four Fraxel treatments, and also she had four Genesis Laser treatments, which are YAG lasers, period.
Q. Different type of laser than you use?
A. The YAG laser is. The fractional -- the Fraxel is a

similar type of machine, in that it uses CO2 in the fractional mode. The setting -- different -- there are differences in settings, there are differences in the places that you -- the titles that they call energy and spacing and dwell time. But it's -- it's a basic similar -- only basically similar instrument. But it is a burning CO2 laser instrument.

Q. After you have a burn, it takes a certain amount of time before the wound will heal. It will crust over and then it heals with new skin over the scar tissue. Isn't that correct?

A. Yes.

Q. And within a month -- we'll look at some pictures in -- in a few minutes. But within about a month of her treatment, Sue had stopped oozing, stopped bleeding, and actually had kind of a smooth layer over her scar tissue on her chest. Isn't that correct?

A. As I remember. I would have to look at the pictures and the dates to confirm that.

Q. Okay. We'll look at those. And those were the pictures that you provided to us. So do you remember in your deposition, we looked at some pictures that were at two months out and then at three months out? And the -- what we had was maturing scar tissue with no bleeding and no oozing? Do you remember that?

A. I remember looking at pictures at the deposition two months out and three months out. And like you were saying, in general, that's what I remember looking -- pictures. Yes.
Q. Okay. Her first treatment at SkinStar Laser was a test patch in April of 2009. Isn't that what those records show?
A. It showed that she had a treatment at the SkinStar place in April.
Q. And it was a test patch?
A. 2009.
Q. It was a test patch, wasn't it?
A. It didn't say that.
Q. Okay. How long before the next appearance of a laser at the SkinStar?
A. It was approximately one month laser -- later.
Q. It was actually June, wasn't it?
A. It was approximately one month later.
Q. Okay. So we're now up to June, which would've been going on five months out from your laser procedure?
A. Yes.
Q. And then the next one was in July?
A. Yes.
Q. And then August?
A. You're talking about her fourth CO2 laser treatment at the SkinStar?
Q. We're talking about the fourth time that there was

something done at SkinStar, whether it was a test patch or a laser, but, yes. That's what I'm talking about.

A. Yes.

Q. And then it wasn't until September that she had the three Genesis Laser treatments. Is that correct?

A. I think that's correct.

Q. Okay. Just so that we have the timing -- timing down. And we'll come back to that. Now, where'd you do Sue's laser at?

A. Excuse me?

Q. Where'd you do the procedure on Sue?

A. At my office.

Q. And you -- you have a surgery center that you call the Gynecology and Cosmetic Surgery Centre?

A. Yes.

Q. Spelled C-E-N-T-R-E?

A. Yes.

Q. How do you pronounce that?

A. Center.

Q. Center. Center. Well, you do more than just laser treatments there, don't you, Doctor?

A. Yes.

Q. Do bigger operations, like abdominoplasties and breast augmentations?

A. Yes, I do.

Q. So you have what's called an ambulatory surgery center?
A. Yes.
MR. LISLE: Your Honor, may we approach?
JUDGE SCOTT: No need to, Mr. Lisle.
MR. LISLE: I'm going to object.
JUDGE SCOTT: Have a seat. Next question, Mr. Keever.
Q. (Mr. Keever continued.) So it's for operations for patients who don't go to the hospital, a surgery center is?
A. There for my particular patients that I treat in an outpatient setting. Some physicians would do these surgeries in a hospital setting.
Q. Well, but you don't have credentials to operate at any hospital, do you?
A. No.
Q. And when a doctor wants to have credentials at a hospital to do a particular operation, he applies to --
MR. LISLE: Your Honor, I'm going to object to the relevance.
JUDGE SCOTT: Sustained. Next question, Mr. Keever.
Q. (Mr. Keever continued.) Do hospitals have what they call peer review committees to review complications?
MR. LISLE: Your Honor, again, I object to the relevance.

JUDGE SCOTT: Sustained.

Q. (Mr. Keever continued.) Well, in your outpatient surgery center, you're the only one who really oversees what you do. Isn't that true?

A. That's correct.

Q. Do you have a -- a written agreement with a hospital to accept your patients if they have a -- a complication that requires hospitalization after one of your procedures?

A. No.

Q. Isn't that a safe -- wouldn't that be a safety --

MR. LISLE: Your Honor, again, I object to the relevance. This has nothing to do with this case.

JUDGE SCOTT: Sustained.

Q. (Mr. Keever continued.) Well, okay. Let's see if -- if we can establish some things about the treatment on Sue that maybe we agree on. And maybe we can get through things a little quicker that way.

Would you agree that a doctor using a cosmetic laser, like you used on Sue, should at the very minimum know about the published safe settings for the laser?

A. I -- I would think I would agree with that.

Q. Okay. And that would be -- include having knowledge about the -- the things that might come in the owner's manual, the use -- Clinical User Manual?

A. Yes.

Q. And that'd be a safety rule to protect the patients. Right?
A. I'm not sure that's the reason it was done. It was probably required by the federal government that any kind of machine have a -- a manual, not necessarily they want it to be a safety manual, but because it was required.
Q. Well, in your practice, do you follow the safety rule, try and be familiar with the published safe guidelines for a medical device that you're going to use on your patients?
A. Yes.
Q. Now, you had two sources of published guidelines for settings on this laser you used on Sue. Is that correct?
A. Mr. Keever, I have been attending continued education courses with the American Academy of Cosmetic Surgeries since it began in 1990s. I've gone every year.
JUDGE SCOTT: Dr. Elkins, if you would, answer the question. Ask your question again, Mr. Keever.
Q. (Mr. Keever continued.) Doctor, you had two published references for safe guideline settings on the laser you used on Sue. Is that correct?
A. I've had two that you have available. I had seen many before that.
Q. Well, let's just talk about the two that -- that we talked about in your deposition. Would that be okay?
A. Yes.

MR. KEEVER: May I approach the witness, Your Honor?

JUDGE SCOTT: Yes, you may.

Q. (Mr. Keever continued.) I'm going to hand you two documents, which we have marked as Exhibit No. 1 and 2. One of them is -- No. 1 is the Clinical User Manual put out by the manufacturer of the SmartXide Laser. Is that correct?

A. It's a copy of that. Yes.

Q. Yes. Thank you. And No. 2 is a copy that you provided us of the materials that you got from the one-day seminar you went to in Dallas. Is that correct?

A. It's a copy of the manual. Yes.

Q. And that was provided by you?

A. Yes.

MR. KEEVER: Your Honor, I'd move to admit Exhibit 1 and 2.

JUDGE SCOTT: Any objections, Mr. Lisle?

MR. LISLE: No objection, Your Honor.

JUDGE SCOTT: Plaintiff's 1 and 2 will be admitted without objection.

(Wherein, Plaintiff's Exhibits 1 and 2 were admitted into evidence.)

Q. (Mr. Keever continued.) Doctor, would you agree that a surgeon has an obligation to explain the risks of a procedure he proposes to his patient?

A. Yes.
Q. And would you agree that that goes beyond asking the patient if they have any questions, but actually being proactive and letting the patient know what the risks are?
A. Yes.
Q. In fact, if the patient was under the impression that the procedure was relative -- almost risk free, then the doctor would have an even greater obligation to be sure that the patient understood the risk. Wouldn't that be fair?
A. It's necessary that the doctor explain the risks.
Q. Would you agree that a doctor must never unnecessarily -- and I emphasize the word unnecessarily -- put his patient at risk of harm or injury?
A. Using a scalpel puts a patient at harm and injury. So I can't really -- I -- would you restate that? We do a lot of things that cause harm that, in the long run, cause good effects in medicine.
Q. Well, using a scalpel to do a surgery is a -- is a necessary harm. Isn't that true?
A. No. When you do a breast augmentation, it's not necessary. When you're doing a face lift, it's not necessary. When you do a tummy-tuck, it's not necessary. But we cause harm initially.
Q. Okay. The -- the question was -- and I'm just going to ask it one more time and go on. But emphasizing the word

unnecessary, would you agree that a doctor should not put his patient at an unnecessary risk of harm or energy -- injury?

A. Okay. Yes.

Q. Okay. Thank you.

A. Sure.

Q. Now, if a doctor chooses to use a medical device, like the laser you used on Sue, if he attends -- intends to use settings that are above the published safe guidelines, should he have a scientific basis for that decision?

MR. LISLE: Your Honor, I'm going to object to referring to published safe guidelines in that there's a manual and there's some course materials. Those have not been established as quote, unquote published safe guideline.

JUDGE SCOTT: Sustained.

MR. KEEVER: Okay. Let me -- may I rephrase, Your Honor?

JUDGE SCOTT: You may.

Q. (Mr. Keever continued.) In -- in Exhibit No. 2, on the last page, or thereabouts, there is a chart. And it says, "Suggested Parameters." And we'll look at that after a bit. But instead of published safe guidelines, let's use suggested parameters. So if you're going to use the SmartXide Laser and use settings that are in excess of the suggested parameters, should you have a scientific basis for doing

that?
A. There's both a scientific basis and a clinical basis for the parameters that we use in the settings of a CO2 laser.
Q. And on Sue?
A. Sure.
MR. KEEVER: Okay. Now, Your Honor, I'm going to just show a page from one of -- Exhibit 1 and 2, may I, to the jury?
JUDGE SCOTT: Yes, you may.
MR. KEEVER: Slide No. 2 please.
Q. (Mr. Keever continued.) Now, do you recall this illustration that's in both of those publications? Illustration that shows --
MR. KEEVER: No. I'm sorry. Slide No. 2, not -- yeah. Yeah. There you go.
Q. (Mr. Keever continued.) Do you recall this illustration, Doctor, and having them talk about that while you were down in Dallas, in terms of how the laser worked?
A. Yes.
Q. The burning -- the burning of the laser is directly related to how much power you have in the beam and how long the beam's applied to the skin. Is that fair?
A. Yes.
Q. And -- and -- and that's -- the burning's actually directly related to the energy that is generated and

transmitted to the skin?
A. In separate tunnels.
Q. Sure. Of course, the closer those cones are, the more energy in any unit area of skin. Right?
A. Yes.
Q. And -- and that's just a scientific fact, isn't it?
A. Yes.
Q. In fact, the energy is -- can be calculated by a mathematical calculation and can be delved out just pretty much as pure science. And the energy is pure science, isn't it?
A. If you look at it that way, yes.
Q. So the idea that a treatment is you have these little laser beams and they barely go through the skin and they leave holes. And then when the holes heal up it kind of tightens the skin. And then you have a little burn injury underneath the skin. And that causes collagen to be put down and that makes the skin look better. Is that pretty much the sum of how it works?
A. Could you repeat that again? If I'm going to answer yes to that, I need to think out what you're --
Q. Well --
A. -- exactly you've got the terms correct.
Q. All right. And let me break it up. That might make it easier.

A. Thanks.
Q. The idea is to have the energy set so that it barely drills a hole through the top layer of the skin. Is that correct?
A. It depends. It depends on the patient, Mr. Kleever [*sic*]. There are some patients you would have the energy drill barely through the skin. Sometimes, you want to go further. That depends on the clinical setting.
Q. If you're -- well, okay. But if you go down too far, you can damage the blood supply to the skin. Isn't that correct?
A. You can go down far enough to obliterate the whole dermis if you go far enough.
Q. And that would be the equivalent of a third-degree burn?
A. It depends. Yes. It depends on the specific situation, but, yes.

MR. KEEVER: May I approach the witness, Your Honor?

JUDGE SCOTT: Yes, you may.

Q. (Mr. Keever continued.) I'm just asking you to look at two pictures. They're marked Plaintiff's 3 and 4. And these were pictures that you supplied to us from your office taken of Sue on January 22nd, 2009, right before the laser procedure.

JUDGE SCOTT: Dr. Elkins, put those

photographs down so the jurors cannot see them.

DR. ELKINS: Oh, okay. I thought they needed to. I'm sorry.

Q. (Mr. Keever continued.) Can you just identify the photographs, sir?

A. Okay. Ask me again, please.

Q. Well, aren't those photographs that you provided us from your office that showed what Sue's right cheek and her chest looked like immediately before the procedure on January 22nd, 2009?

A. Yes.

MR. KEEVER: Move to admit 3 and 4, Your Honor.

JUDGE SCOTT: Any objections, Mr. Lisle?

MR. LISLE: No objection, Your Honor.

JUDGE SCOTT: Plaintiff's 3 and 4 will be admitted without objection.

(Wherein, Plaintiff's Exhibits 3 and 4 were admitted into evidence.)

MR. KEEVER: Approach, Your Honor?

JUDGE SCOTT: Yes, sir.

Q. (Mr. Keever continued.) And do you remember at your deposition, Dr. Elkins, we talked about this picture? And you confirmed that that was what Sue looked like the day after her laser procedure?

A. Yes.

MR. KEEVER: Marked as Exhibit 5 and move to admit Exhibit 5?

JUDGE SCOTT: Any objections, Mr. Lisle?

MR. LISLE: No, Your Honor.

JUDGE SCOTT: Plaintiff's 5 will be admitted without objection.

(Wherein, Plaintiff's Exhibit 5 was admitted into evidence.)

MR. KEEVER: Okay. Let's look at the next slide, Ken.

Q. (Mr. Keever continued.) This is what Sue looked like immediately before the laser procedure. And on the left, she had this redness in the V of her chest. Yes?

A. Sorry. I was just listening to what you were saying. Was that a question? I'm sorry.

Q. That was a question. She -- did she have this redness? Does that represent the redness that she came to see you for?

A. Yes.

Q. And then on the right, we see her right cheek, and has a little brown spot?

A. Right.

MR. KEEVER: Now, let's look at the next slide, please, Ken.

Q. (Mr. Keever continued.) And this is what Sue looked

like the day after the laser. That would be Exhibit No. 5. Is that true?

A. Yes.

Q. Now, the burns that she has here were caused by the laser procedure. Is that true?

A. Yes.

MR. KEEVER: Let's -- let's look at the next slide, Ken. And -- oh, my goodness. Take that back off. I need to have these -- these exhibits admitted first place. I'm sorry, Your Honor. My apologies to the Court.

Q. (Mr. Keever continued.) Would you identify Plaintiff's Exhibit 6 and 7? And would you agree that these are the pictures taken in your office just short of a month after the procedure?

A. Yes.

Q. Thank you.

MR. KEEVER: Move to admit 6 and 7, Your Honor?

JUDGE SCOTT: Any objection, Mr. Lisle?

MR. LISLE: No objection, Your Honor.

MR. KEEVER: Now you can --

JUDGE SCOTT: Plaintiff's Exhibits 6 and 7 will be admitted without objection.

(Wherein, Plaintiff's Exhibits 6 and 7 were

admitted into evidence.)

MR. KEEVER: Thank, Your Honor.

Q. (Mr. Keever continued.) And this is what it looked like, and we talked about this a little bit earlier. Sue's face had that appearance, but her chest had this shiny appearance. Would you agree that's early scarring?

A. No. That's early recovery. The face heals quicker than the chest. This was recovery time for both of them. This is a typical way that a face and chest would look about one month after this kind of surgery or laser treatment.

Q. Doctor, we may get back to it later, but didn't you tell Sue that she could expect to actually be able to go out to dinner that night and be off work three or four days and then back wearing makeup?

A. I don't remember telling her that. No.

Q. If -- if you look at, like, page 22 of Exhibit No. 1, the owner's manual, you may even remember this, but there's a complicated mathematical formula not -- yeah -- that tells you how to calculate the energy for each laser setting. Do you -- you recall that formula?

A. Page 22?

Q. I may be off. It's right at the end of the tables of settings. It may be right in front of the settings.

A. There's a formula on page 18, which --

Q. My apologies. You're right. It is 18.

A. -- tells you how to calculate the fluence of the energy. Yes.

Q. And I didn't see anything like that in your seminar materials. Was there -- was that covered in your one-day seminar on how to calculate the energy?

A. I don't remember.

Q. Well, maybe a better way to phrase my question is what science did you use to calculate the settings and the energy that you were going to use on Sue?

A. Primarily clinical judgment.

Q. How's that work?

A. Well, you look at the patient, you look at their skin. First of all, you have a good knowledge of the skin. And you look at the patient and you see the texture of the skin, the color of the skin, the skin type, the laxity, the number of wrinkles, the amount of wrinkles, and you have a judgment as to how the laser will affect that particular skin type, that particular skin that you're looking at.

And then also you combine that with the patient's desire because you can make this be a long treatment where you space it out four to five weeks, or you can do more aggressive treatment and just do a one-time treatment.

Q. Okay. Well, that kind of sounds like Kentucky Wendy where you look at things and churn your mind around and just decide on a setting?

A. It's called a clinical judgment, Doctor. Most doctors that have been around for a while know about clinical judgment.

Q. But most laser users know about at least the concept that laser energy is a mathematical scientific calculation. Isn't that true?

A. You can take one set of settings, laser energy, both the dwell time, the spacing, and the power used and use it on one individual, and use it on another individual, and you could have a completely separate reaction because of the thickness of the skin, the type of the skin, mainly the way it reacts.

Q. And you're basing your clinical judgment, in terms of what you did on Sue, on a one-day seminar and at most three days' experience, maximum 12 patients' experience, with the laser?

A. No. No.

JUDGE SCOTT: Ms. Sterling, would you like a cough drop? Would you like a cough drop?

DR. ELKINS: Sorry. My knee. I got to stand up a second.

JUDGE SCOTT: It's all right. Feel free to move around, stand up, whenever you want to, Doctor.

DR. ELKINS: Thank you.

JUDGE SCOTT: Go ahead, Mr. Keever.

MR. KEEVER: Thank you, Your Honor.

Q. (Mr. Keever continued.) Okay. So you used the SmartXide Laser, and we'll hear that word. And the Clinical User Manual is kind of like the owner's manual that came with the machine. Right?

A. Yes.

Q. And you're only training on that machine was that one-day seminar?

A. No.

Q. Oh. Have you had prior experience with the laser that we didn't talk about at your deposition?

A. I guess I did. Yes.

Q. Oh, really? On this type of laser?

A. Yes.

Q. And when was that?

A. The representative for the company had brought the laser back at least -- by at least three times on individual dates. I used the fractional CO2 laser on my staff and several patients with no charge, at all.

Q. I guess that's why there's nothing on the billing invoices from the company that would document that?

A. That's right.

Q. You got anything to document that?

A. Just my knowledge, and also it's not uncommon for that to happen.

Q. Now -- well --

MR. KEEVER: Approach, Your Honor?

JUDGE SCOTT: Yes, you may.

Q. (Mr. Keever continued.) I'm going to show you what we've marked as No. 8. And would you agree that that is a copy of the invoicing materials from the company in Dallas that rented you the laser?

A. Yes.

Q. The first time there's an invoice with any notation on those materials is what date?

A. Looks like 12/19/08.

Q. December 19, '08?

A. I'm sorry.

Q. I thought there was a --

A. No -- November -- November 21st, 2008.

Q. There you go. So it was in November. So it was just about a month after you'd been to the seminar.

A. Uh-huh.

Q. And that was the day that you rented the laser?

A. Yes.

Q. I think you told us you did three or four patients that day?

A. Yes.

Q. And you rented it for the next day, too, and did another three, four patients?

A. I don't remember.
Q. Doesn't it say there were two -- there was two days' rental? Well, didn't you tell me in your deposition --
A. Yes. It says two.
Q. -- that the first time you rented it for two days?
A. Two. Uh-huh.
Q. There you go. And then the next month, in December, you rented it for one day?
A. Yes.

MR. KEEVER: Okay. Move to admit Exhibit No. 8.

JUDGE SCOTT: Any objections?

MR. LISLE: No objection.

JUDGE SCOTT: Plaintiff's 8 will be admitted.

(Wherein, Plaintiff's Exhibit 8 was admitted into evidence.)

Q. (Mr. Keever continued.) So would you agree that, at most, you had experience with 12 patients before you did Sue's laser procedure?
A. No.
Q. Would you agree that in your office you had only treated 12 patients before you did Sue's procedure?
A. No.
Q. Outside of the treatments on you and your staff then -- well, how many patients had you done, outside of you and your

staff, before you did Sue?
A. I had done some at the seminar. I had done some on my staff and other patients, and it would only be a -- a guess, but probably around 15 or 20.
Q. But you told us at the deposition that it would've been three or four a day for those three days. Do I -- do I not remember that?
MR. LISLE: Your Honor, I object to this use of --
JUDGE SCOTT: Sustained.
MR. KEEVER: Okay. All right. Move along.
Q. (Mr. Keever continued.) Not only the longer the laser beam burns the skin the deeper the burn, but the longer the laser beam burns the skin the greater the chance of scarring. Isn't that true?
A. Yes.
MR. KEEVER: Approach?
JUDGE SCOTT: Yes.
Q. (Mr. Keever continued.) Doctor, I'm going to show you what's marked as Exhibit 9, 9-A, 9-B, and 9-C. And these are small excerpts from your office records on Sue. Would you just go ahead and look through those and confirm that that's from your office records on Sue?
A. Put them down?
Q. Would you, please?

MR. KEEVER: Your Honor, may I publish to the jury Exhibits 3, 4, 5, 6, and 7?

JUDGE SCOTT: Yes, sir. You may.

MR. KEEVER: Thank you, Your Honor.

JUDGE SCOTT: You all can look at those and pass them down the row if you want to.

JUROR D'AUBIN: Okay.

Q. (Mr. Keever continued.) Are those all from your records?

A. Yes.

Q. Okay. Now, you know, you'll notice on the bottom of 9 and 9-A -- and, let's see, 9-A is the 2009 dictated office notes. And then the 9-B is the consent forms, and the dictated operative note. You see some little tiny numbers there, "LR000," something between one eighteen, one eighty-one? You see the little -- lower right-hand corner of the page?

A. Yeah, I see. Yeah. Yeah.

Q. Okay. Yeah. The numbers are tiny. And then if you look on 9-B, which is something called the treatment log, and 9-C, which is the sedation record, there aren't those little numbers on the bottom right on the treatment log and sedation record?

A. Correct.

Q. You recall at your deposition we mentioned that in the

records that you had provided us, through your attorney, that we didn't have the sedation record or the treatment log? And you had them in your original chart when you came to the deposition? Does that ring -- ring a bell?

A. I don't remember that. No.

Q. Well, when you provided records to us through your attorney after you filed this lawsuit, why wouldn't the sedation record and treatment log be included?

A. I don't know if they were. I would assume they would've been. There were -- you -- we copied the whole record, I assume.

Q. But you -- you did bring the entire record to your deposition?

A. Yes. And I have it now if you want to see it.

Q. Okay. Good. Now, you told us in your deposition that your previous experience --

MR. LISLE: Your Honor, I'm object to the reference to the deposition --

JUDGE SCOTT: Sustained.

MR. LISLE: -- without asking a question.

Q. (Mr. Keever continued.) Doctor, did your previous experience with chemical skin peels give you the experience needed with the SmartXide Laser to use more aggressive settings than were in the suggested parameters?

A. Not necessarily.

Q. Well, Doctor, I'm going to -- did you review your deposition before the -- the trial today?

A. Yes.

MR. KEEVER: May I approach the witness with his original of his deposition, Your Honor?

JUDGE SCOTT: Yes, sir. You may.

Q. (Mr. Keever continued.) And, Doctor, I'm going to read to you from page 87, line 12. And my question is, "As you progressed in your experience level, did you start using more deep resurfacing settings for that reason?" And would you read your answer to the jury starting at line 14?

A. "You have to realize that I had been using phenol for over 15 years as a phenol" -- "as a peeling substance. Phenol is equal to the old CO2 laser as far as its effects go." Want me to keep going?

Q. No. That's fine.

A. Okay.

Q. Now, does that refresh your memory in terms of whether or not you relied on your experience with chemical skin peels to allow you to go beyond the suggested parameters and the settings on Sue?

A. What I was referring to is the old CO2 laser procedures. That's different than the fractional CO2 laser.

Q. So you weren't relying on your -- your previous experience treating the skin with acid peels when you made

your judgment call on what the settings should be for Sue?
A. No.
Q. Well, there is something in common with a chemical peel and the laser you used on Sue in that you would never use settings as strong on the chest as you might get away with on the face. Isn't that true?
A. It's true, in general.
Q. I'm sorry?
A. In general -- let me rephrase -- that, in general, it's true. It really depends on the specific patient and the specific characteristics of their skin.
Q. Well, in any one patient -- do you recall in the clinical treatment manual, there is a picture that says you have to reduce the energy by 30 percent if you're going to move from the face to the chest? Doesn't it say that in there?
A. Talking about this one?
Q. Yeah.
A. Those are the suggested changes. Yes.
MR. KEEVER: Okay. What slide are we on -- we on now, Mr. Swindle? Number -- yeah. Go to -- go to the next slide please.
Q. (Mr. Keever continued.) Now, this is from the last day -- last page of materials that you furnished us. Correct?
A. Excuse me. This is from the -- excuse me --

Q. Seminar materials.
A. I assume it was with that. I mean, I've seen this before, a lot. Yes.
Q. Okay. And down below, there's a highlighted area, "Eyes and Non-facial - reduce dwell time by 25 %." You see that?
A. Yes. Those are the base -- those are the baseline recommendations.
Q. Well, are you talking about reducing by 25 percent as a baseline recommendation, or is that not a recommendation for every patient?
A. I'm talking about these are recommendations -- starter recommendations. These are the -- the beginner recommendations that the company suggests that you have knowledge of. It also says at the top of the page that many variables exist that may use higher and lower settings and modifications in the treatment plan. Every patient's individual.
Q. Sure.
A. Same thing with the statements you're talking about there.
Q. But every patient is pretty much the same in that the chest is more sensitive to burning than their face, wouldn't that be fair?
A. Yes.
Q. Thank you. Okay. Well, we've got this up here, and

there are in the second horizontal column is the three different kinds of settings that -- that we use. And it's power, timing, and separation is down below that. So we've got power, timing, and separation. Those are all independently controlled by you on this machine?

A. Yes.

Q. And to treat redness in someone, would you be treating pigment? Would it be a pigment setting? Would that be the starting point --

MR. LISLE: Your Honor, I'm going to --

Q. (Mr. Keever continued.) -- pigment --

MR. LISLE: I'm going to object to the continued -- they've got highlighting on here that it's as though that's been established that these are the key parts of this document.

JUDGE SCOTT: Well, I understood the witness to testify this was a page out of a document that's already been admitted into evidence.

MR. LISLE: Yes, Your Honor. I don't object to the -- the document, itself, but the highlighting. It's -- I think it's misleading.

JUDGE SCOTT: It's overruled. The jury can understand that. Go ahead, Mr. Keever.

MR. KEEVER: Thank you, Your Honor.

Q. (Mr. Keever continued.) Okay. So the baseline would be

you're going to treat for redness, it would be epidermal pig -- pigment. Would that be the baseline you'd start from?
A. No, sir.
Q. Okay.
A. Epi -- epidermal pigment can be different than redness. Redness can be related to -- to blood flow, other things besides pigment. It's the contour of the skin, color of the skin. Pigment is generally related to increased melatonin.
Q. Okay. And then if you're going to treat for skin texture, that would be roughening of the skin? Is that what you're talk -- they're talking about in your one-day seminar?
A. No. Generally, that means the thickness of the skin, the texture and the roughness also. But generally the thickness -- a person who's had a lot of sun damage in their life, the skin is going to thicker. It's going to be more coarse. It's going to be rougher than someone who hasn't had as much skin sun exposure.
Q. And then if you're going to be treating for laxity, they've got a -- they've got a -- a -- kind of a starting point for laxity, don't they, there?
A. Yes.
Q. So you were treating Sue -- you were treating Sue for what on her chest?
A. I was treating Sue for poor texture; increased laxity; pigmentation, especially under the eyes and in the right

lower cheek area, mandi -- mandibular area; and -- and also right-age wrinkles around her mouth, around her face, her eyes, her neck, and her chest.

Q. Doctor, do you recall telling me that the laxity you were treating would've been the sagging of the chin and neck, on page 98? You can go to 98, 25 of your deposition if you'd like to confirm that. So --

A. Tell me what I said again?

Q. Well, you said that the laxity -- you said you were treating for wrinkles, laxity, and discoloration. And the laxity would've been in the chin and neck area. And --

A. And -- and also under the eyes and the upper cheeks also, but the main thing was the jowl. She had jowling forming here. She had loose skin on her neck that was starting to fall.

Q. Talking about the chest, the chest she had this discoloration that we saw in Exhibit -- I think it was probably 4, one of the first exhibits. You weren't treating that for laxity, were you?

A. No, primarily textural changes.

Q. Okay.

A. Her -- her -- the skin on her chest was very thick. You can't tell that from the picture.

Q. Perfect. So the -- the starting out as you said -- the starting figures would've been -- for texture, would've been

25 of power, 400 of time -- oh, we got to reduce that by 25 percent. So it would be 300 in time and a spacing of 400. That would've been the starting things that were recommended by your own seminar. Is that fair?

A. Those were the beginning levels, the basement levels that you would use on a treatment. The treatment levels would go higher depending on particular patient and the particular characteristics of the skin. I hate to keep harping on that, but it's important for the jury to understand that each individual is different. There's no skin that's exactly the same.

Q. But you're not relying upon your many years' experience of acid chemical peels, and you've only documented that you used the laser for three days plus a one-day seminar. So that's the experience you were putting behind the settings that you chose for Sue?

A. I had approximately 40 years of experience with evaluating skin texture and skin laxity. So I was taking all those factors of evaluation to determine the settings that I used.

Q. In four months of experience from the time that you went to the one-day seminar until you treated Sue, would that be fair?

A. No. Because, like I said, approximately six to eight months before that, the rep for the company had brought the

machine by at least three times and we had -- I had treated patients in my office free. So I had had some experience with that.

Q. But that's not in any documentation and you haven't brought us -- produced anything to show that, other than your testimony today. Is that -- would that be fair?

A. Yes.

Q. By the way, you didn't have any reason to suspect that the machine didn't function as it was supposed to, did you?

A. No.

Q. And that's what the company responded when -- when they were asked, isn't that true?

A. Yes.

MR. KEEVER: Okay. Let's go to the next slide, please, Ken. Yeah. I'm thinking this is -- should be 8.

Q. (Mr. Keever continued.) And this is from page 2 of your seminar materials. And it says on the bottom what?

A. You mean my writing?

Q. Yeah.

A. (As read) "Not trying to hit a homerun first time, first treatment."

Q. And that's your handwriting?

A. Sure is.

Q. And above that, it says, "DOT Therapy offer single pass,

single treatment, minimal downtime, outstanding results." Is that what you were taught to use in marketing this?

A. No.

Q. Is that what you promised Sue?

A. No. I assume my lawyer's going to let me explain that later on.

MR. KEEVER: Let's -- let's go on to the next slide, Ken.

Q. (Mr. Keever continued.) Now, this is -- let's see. This is -- think it's on page 14 of the materials. It's entitled, "Transform Your" --

MR. LISLE: Object to the relevance of this, Your Honor.

JUDGE SCOTT: Mr. Keever?

MR. KEEVER: It's -- it's the training that he received, Your Honor. And I just wanted to go through the training that he received from the company and how much of it was and wasn't related to actual clinical materials and how much was related to marketing materials.

JUDGE SCOTT: The objection's sustained. Next question.

MR. KEEVER: All right. The next slide. Okay. Yeah.

Q. (Mr. Keever continued.) So what did you charge your

patients, $2500 a treatment?

A. Usually 2,000.

Q. So in the first couple months, your profits would've been twenty, twenty-five thousand?

MR. LISLE: Your Honor, again, object to this line of questioning.

JUDGE SCOTT: Sustained.

MR. KEEVER: Okay. Let's move ahead to slide No. 11, please, Ken.

MR. LISLE: Your Honor, if I -- could we approach?

JUDGE SCOTT: Yes, you can. Ladies and gentlemen, you've been here about an hour. Why don't you stand up and swing your arms around a little.

DR. ELKINS: Thank you, sir.

(Wherein, the following proceedings were held at the bench outside the hearing of the jury.)

MR. LISLE: Your Honor, this was a bifurcated trial. There's not supposed to be any evidence of financial considerations about the defendant. And I think that's the second time it was intentionally done in this questioning the witness. I'd ask that we not let it happen anymore.

JUDGE SCOTT: Mr. Keever?

MR. KEEVER: Well, I didn't think it was getting into the defendants' assets, which is what I understood was --

JUDGE SCOTT: Did you think it was getting into his medical treatment?

MR. KEEVER: It could get into his motivation for treatment and the degree of training he had. He spent one day and how much time was spent in marketing, how much time was spent clinical education. I mean, you -- you told me to move on from that and I did.

JUDGE SCOTT: Let's move on and keep moving.

MR. KEEVER: I'll keep on moving.

JUDGE SCOTT: All right.

(Wherein, the bench conference concluded.)

JUDGE SCOTT: Thank you, ladies and gentlemen, if you would, sit down. Let's come to order.

MR. KEEVER: Okay. Can we bring that slide back up, Mr. Swindle? Keep going. There. There.

Q. (Mr. Keever continued.) So we're going to get back to Sue. And this is -- again, this is a slide from, let's see, I think it's Exhibit No. 4. And you were working to improve that red discoloration?

A. Yes.

Q. And -- and also the texture I think you said?

A. Yes.

MR. KEEVER: Next slide.

Q. (Mr. Keever continued.) And, again, this is really just kind of what we've looked at before. So, again, if we're working on texture, the baseline is going to be -- and remember this is 25, 300 reduced from 400, and 400. You agree that that's what you were taught?

A. I agree that that's what this chart says. But, again, I want to emphasize that these -- these are the starting settings that the company recommend. They -- as it says above, (as read) "Many variations exist which may dictate higher or lower settings," depending on your clinical knowledge.

Q. Okay. But we're talking about the baselines that the company gives. And -- and we agree that -- that it would've been, by the baseline, 25; time is 300; and spacing is 400. Is that fair, from this chart?

A. That's what the chart says.

Q. Now, your office records actually show two different settings for Sue.

MR. KEEVER: Next slide, please. May I ask if my flip chart's going to get in the way of the visualization of that? Will it be okay?

JUDGE SCOTT: I don't think so.

Q. (Mr. Keever continued.) Okay. In the -- in your chart,

we've got two different areas. We've got the -- the top part of this slide, which is from the treatment log that we saw at your deposition. And then the bottom part of the slide was a dictated note dated 13 days after the deposition -- or after the -- the treatment. You agree that that's what your records show?

A. Yes.

Q. And you got a timing of 1200 on one, and timing of 1800 on the other. Is that -- do you agree that that's what the records show?

A. Yes.

Q. So if you're treating for -- well, we'll -- we'll not go to pigment. Pigment would've been a time of only 150 instead of 300. But if you're treating for texture, the milder of your settings is going to be four times the baseline recommendations, and the lower setting is going to be six times or 400 percent or 600 percent of the timing suggested in your own seminar materials.

A. I appreciate you using the term baseline suggestions because that's what they were.

Q. Okay. And, actually, if you -- if you take this -- and we'll say the -- the top one is your one and bottom one is your two, the power's about the same, 25 and 30. Spacing's about the same, four fifty and 400. And the big difference is the timing. Is that correct?

A. Yes.
Q. And, in fact, do we really know from your records which setting you actually used?
A. All I know -- I wrote the settings down at the time I was doing them on the treatment log. The dictation was done 13 days later. It was actually typed a week after it was dictated. I know I had done three or four patients the same day that I did Sue. I saw them all back at the same time. One of the people that I actually did the same day as I did Sue, I had used the higher settings on her.

MR. KEEVER: Objection, Your Honor, non-responsive. May I approach?

MR. LISLE: I believe he's answered the question.

JUDGE SCOTT: I think he --

MR. LISLE: He asked him where those numbers came from.

JUDGE SCOTT: I think he was trying to tell you there, Mr. Keever. Go ahead.

MR. KEEVER: All right.

DR. ELKINS: Thank you.

A. And so, as I was saying, I saw all the patients back on -- on the same day, the same interval timing. And one of the patients that I had done on the same day I did Sue, I had used those higher recommendations -- I mean higher settings.

And I assume that I had her chart when I was dictating that. And that happens.

Q. (Mr. Keever continued.) So it was just a mistake in your record?

A. Yes.

Q. And that -- the treatment log that we saw at your deposition, what -- represented what you did for Sue?

A. That's the one that I wrote down -- that's my handwriting -- at the time I did the procedure.

Q. Okay. Did you tell Sue your laser settings were going to have timing that would be somewhere at least 400 percent more than the baseline recommendations?

A. No.

Q. Did you tell her the energy would be four times more than the energy in the baseline recommendation?

A. No.

Q. Would a reasonable -- have you had a reasonable patient consent to surgery when -- when you told them that you were going to use settings four to six times the baseline recommendations?

A. I'm sorry. Could you repeat that?

Q. Have you ever revealed to your patients that you're going to use settings that are above the baseline recommendation?

A. No.

Q. You -- you decided to be aggressive in your settings?
A. Yes.
Q. You know, you told me you didn't recall whether you'd seen Dr. Shewmake's report. Just to refresh your memory, you did some cal -- there's calculations of the energy in that report. Does that refresh your memory any?

MR. LISLE: Your Honor, I'm going to object. There's no foundation that Dr. Shewmake did any calculations that we're aware of.

JUDGE SCOTT: Sustained.

MR. KEEVER: Okay.

Q. (Mr. Keever continued.) Well, did you read all the way through the owner's manual before you tried out the laser on people?
A. Yes.
Q. That would be you read all the way through Exhibit No. 1?
A. This?
Q. Yeah.
A. That was almost five years ago now. I -- to my recollection I did, yes.
Q. But you didn't recall earlier that that was actually the manual that you had seen. Isn't that what you told us in answer to our question?
A. I don't remember saying that, if you can show me that.

I know it's been, like I say, almost five years ago now, so...

MR. KEEVER: May I approach, Your Honor?

JUDGE SCOTT: Yes, you may.

MR. KEEVER: Will not be an exhibit.

Q. (Mr. Keever continued.) Doctor, here is your response to some questions we had in August of 2011. And if you want to just read to yourself the first question and answer. Does that help you refresh your memory? Interrogatory, please.

A. All I said was I just -- I didn't know anything except it was a user manual which is this.

Q. Okay. Fair enough.

A. I didn't deny that I -- I didn't say that I didn't read it.

Q. Well, okay. So you read it. You read some user manual. Is that right?

A. I think so.

Q. Now, you saw Sue back on the day after her surgery?

A. Yes.

Q. And, in fact, she spent most of the day in your clinic while a friend of hers was having surgery in your clinic also. Isn't that correct?

A. According to the records, that's true. I don't exactly remember all of that.

Q. Well, we'll get back to that. But --

MR. KEEVER: Next slide, Ken, which I think should -- next slide.

Q. (Mr. Keever continued.) And we've already looked at that slide and that was Sue the next day. Then -- then you saw her back two times the next month, in February. Is that what your records show or what your memory says? That would be Exhibit No. --

MR. LISLE: Your Honor, does the witness have a copy of his records in front of him? I can't see.

DR. ELKINS: He just gave me -- copy --

JUDGE SCOTT: He said he did.

DR. ELKINS: Thank you.

A. Yes, on the 4th of February and the 18th of February.

MR. KEEVER: Okay. Go back -- go to the next slide, please, Ken.

Q. (Mr. Keever continued.) So this is that February 4th note. And the first line of your note says, (as read) "She's happy with the results of her surgery." Do you remember what Sue told you that led you to that conclusion?

A. I can't say I remember. That's, like I say, been four years ago, almost five. She was healing well. Her face was doing well. I -- I don't know. She appeared to be happy.

Q. You look down at the bottom, it says, "Pictures were taken today."

A. Uh-huh.
Q. And we asked you for those and, you know, we never received them. What happened to those pictures?
A. We might -- they probably got -- I don't know.
Q. Well, on February 4th, did sue look pretty much like she did in the previous slide, except more oozing and scabbing?
MR. KEEVER: Just go back up to the previous slide, Ken.
A. Actually, she looks really good there. All the white stuff is cream. It's moisturizing cream. It's not oozing and scabbing. You don't -- I don't see any oozing and scabbing in that particular picture. She looks very typical for one-day postop.
Q. (Mr. Keever continued.) Okay. Well, since we don't have your pictures, would it be fair to take Sue's word for how she looked on February 4th?
A. I'm sorry. Go over that again.
Q. Well, do you have direct memory of how Sue looked on February 4th, yes or no?
A. She probably looked similar to what she -- that picture you showed me a while ago of one month out.
Q. But with -- with -- with more oozing and bleeding and scabbing?
A. I don't remember that. I -- I would've made a note about that. I think she looked pretty typically like the

picture you showed me a while ago that was one month postop if you want to put that back up.

MR. KEEVER: Yeah. Go ahead. Go down two slides.

Q. (Mr. Keever continued.) And this was the picture from -

-

A. Yeah.

Q. -- one month out. So she really pretty much healed at that point, at least healed over from the oozing and the scabbing, hadn't she?

A. Yes.

Q. When you saw Sue on February 18th, did you tell her that she was going to have permanent scarring on her neck and chest?

A. No.

Q. Did you think she was going to have permanent scarring?

A. No.

Q. Did you tell her at that time that your settings were at least 400 percent of the timing that was recommended?

A. On the baseline settings?

Q. Sure. Call them that.

A. If we're referring to the baseline settings, no, I didn't tell her anything like that. We didn't talk about settings at that time.

Q. Okay. You knew -- you did know from your one-day

seminar that the possibility of scarring existed from using this laser?

A. Yes. Excuse me. The possibility of scarring exists with the use of any laser.

Q. Okay. But you never told Sue that there was a possibility that she could be burned and looking like this at one month, did you?

A. It was on her operative permit. And I told her that there was -- she asked for me to be aggressive. She had just gone through a divorce. She didn't have any money. She was depressed. She'd lost weight. I was trying to help her. I told her if we were aggressive, there was more of a chance of complications. And she said, "Don't worry about it. That's what I want," something to that effect. So, no, I didn't tell her, to answer your -- to answer your question, I didn't tell her that her chest would look like this in a month because there was no need to at her preop.

Q. And you didn't tell her that there was the chance of permanent scarring like this, did you?

A. I told her there's a chance of permanent scarring. It's in the operative permit, the thing she signed.

Q. And it's not in your dictated note, though, is it? Oh, we'll get to that. Let me just -- I'll withdraw that question for now 'cause we'll get back to it.

When you -- when you talked to Sue about the possible

complications, did you tell her that you had the laser used on your face?

A. I don't remember.

Q. Had you?

A. Yes.

Q. Turned out not -- nothing to it?

A. They were low settings, just beginning settings. The rep did it, actually.

Q. Did you tell Sue that she could go out to dinner that night, be back to work with makeup on in three days?

A. I don't remember saying that. No.

Q. Well, you had a poster up in your office in late 2008 that advertised the laser. Isn't that right?

A. Yes.

Q. And we had asked you to preserve that poster. Did you bring that poster with you today? No?

MR. LISLE: Didn't bring -- didn't bring anything for you.

JUDGE SCOTT: Mr. Keever, ask the witness a question.

MR. KEEVER: I'm sorry.

Q. (Mr. Keever continued.) You didn't bring the poster with you?

A. No. You made a picture of it at the deposition.

MR. KEEVER: Go ahead, the next slide.

Q. (Mr. Keever continued.) Okay. Is this like the poster that you had in your office?
A. It is.
Q. And it says, let's see, (as read) "Skin Resurfacing you will not believe." "Too Good To Be True." "Single Treatment. Minimal Downtime. Outstanding Results." And then it gives a website, "www.dottherapy.com." Was that a website of the company's?
A. Yes.
Q. And did you tell Sue to go to that website and that would give her the additional information she needed to know about the laser treatment?
A. I gave her the website address to give her some information as to how the procedure was done.
Q. Well, that website says there are no adverse effects with this laser, doesn't it?

MR. LISLE: Your Honor, I object to the foundation.

JUDGE SCOTT: Sustained. Next question, Mr. Keever.

Q. (Mr. Keever continued.) What information did you expect your patients to get from that website about risk?
A. Not necessarily any information about risk. Primarily, to see how the procedure was done, because a lot of people want to see how a procedure is done, especially one like this

that's non-invasive.
Q. Oh. Was there any information about the risk of scarring?
A. I've never watched the video. Or, excuse me, I have watched the video. It was a long time ago. I really don't remember. Excuse me.
Q. Okay. Well, there's certainly nothing in your poster that warns about -- warns about scarring, is there? Sir?
A. Oh. Was that a question?
Q. Yes. Is there anything in that poster that warns about scarring?
A. No.

MR. KEEVER: Your Honor, I'm kind of at a -- a natural break point, and about halfway through my examination. I just wanted -- for the Court's information.

JUDGE SCOTT: Proceed, Mr. Keever.

MR. KEEVER: Yes, sir. Let's see. Let's go to the next slide, Ken.

Q. (Mr. Keever continued.) This is from your records and this is I believe in 9 -- maybe it was in 9-A. And that's the consent form that Sue signed?
A. Yes.
Q. And when's it dated?
A. January 22nd.

Q. And that would've been the day of the procedure?
A. Yes.
Q. And it was signed after Sue had already taken sedatives for her procedure?
A. It was my understanding, from her deposition, that she had taken her mild tranquilizer and anti-nausea medication before signing this.
Q. Okay. And you go to the next slide, that is -- that's the sedation record for -- from your Gynecology and Cosmetic Surgery Centre on Sue on 1/29.
A. Got it.
Q. Correct?
A. I'm sorry. I have it. What do you want me to do?
Q. Well, I just want you to compare what's on the slide, and -- and confirm that that's out of your records and says that Sue took her preoperative medication Ativan and Compazine at 12:30 p.m.
A. Yes.
Q. And that was how you prescribed it?
A. Yes.
Q. Now, I'm going to show you what --

MR. KEEVER: Ms. Court Reporter, have you got a number that we're up to?

JUDGE SCOTT: Your next number is 10, Mr. Keever.

MR. KEEVER: Thank you, Your Honor. The last number was 10?

JUDGE SCOTT: No, sir. The last number was 9-C.

Q. (Mr. Keever continued.) I'm going to show you what I've marked as Exhibit No. 10 and ask you if that is an accurate summary of the sedation that Sue got before and during her procedure.

A. Yes. Yes.

MR. KEEVER: Your Honor, I would move to admit Exhibit No. 4 -- or Exhibit No. 10 as a summary under Rule 1006.

JUDGE SCOTT: Any objections, Mr. Lisle?

MR. LISLE: No, Your Honor.

JUDGE SCOTT: Plaintiff's 10 will be admitted without objection.

(Wherein, Plaintiff's Exhibit 10 was admitted into evidence.)

MR. KEEVER: All right. Let's go to the next slide.

Q. (Mr. Keever continued.) So this is sedation and the anesthesia that Sue had before and after her procedure?

A. Yes.

Q. Isn't one of the big advantages of this kind of resurfacing, compared to the standard CO2, is that it could

be done with no or just a local anesthetic?

MR. LISLE: Your Honor, I am going to object to relevance at this point. There's been nothing in any of the allegations having to do with sedation record.

JUDGE SCOTT: Mr. Keever?

MR. KEEVER: I'm -- I'm establishing how she was treated under his care, Your Honor.

JUDGE SCOTT: Why don't you ask that question then? The objection's sustained.

MR. KEEVER: Okay. Thank you, sir.

Q. (Mr. Keever continued.) Sue wouldn't have been able to tolerate the kind of deep burning she had without being under heavy sedation, would've she, Doctor?

A. It all depends on what you mean by "heavy sedation," Mr. Keever. And we could've used less medication. This was the typical amount that our nurses were used to. So generally we didn't do -- or I don't do any type of work on anyone unless they've had this kind of sedation. We could've used less. It's -- it's just a very safe, good dose.

Q. Well, isn't one of the safety checks of the laser procedure that if the patient is alert, she can tell you she's getting burned by excessive settings?

A. I've never heard of that.

Q. Were Sue's burns deeper than you intended?

A. No.
Q. And the result that you got, then, was exactly what you thought you were going to get and calculated for?
A. The answer to that is initially I was surprised. Her face healed up like it should have. Her chest seemed to take longer, but the chest always takes longer. I had mentioned that the chest sometimes takes up to a year to heal. I didn't know that she went out and started doing more laser procedures very similar to the one that I did three months after her -- the initial one that I did. Three months after, four months after, five months after. I -- I don't think that it had time to heal, at all. She just kept injuring that area.
Q. Okay. Let's go back to dictated office notes.
MR. KEEVER: Have the next slide please?
Q. (Mr. Keever continued.) This is, what, February 25th, if you want to follow in there or follow up there. You wrote her a prescription for ultrasound for the face, neck, and chest to soften the treated areas. Yes?
A. Yes.
Q. Ultra -- that's to soften up the scarring?
A. According to Sue, she had already been getting ultrasounds done, which I wouldn't have recommended. But since she had already started doing them, I asked was it helping. She said yes. So she asked me to write her a

prescription for it. So I said okay. It's probably not hurting anything. And I did.

Q. Okay. So that wasn't something that you claim Sue did that caused her to have a bad result?

A. I'm not sure what the ultrasound attributed to her result.

Q. But you wrote a prescription for it.

A. Because she was already doing it and she was happy with it. She was also, Mr. Keever, very depressed, frustrated, a little bit angry. So sometimes you do things to help people out.

Q. She was burned, too, wasn't she?

A. She was supposed to have been burned, Mr. Keever, that's what a laser does.

Q. You don't say in this note that she's happy with her treatment, though. She didn't tell you that, that time, did she?

A. I don't remember. I don't say that on every note that I dictate on patients. If you looked in my charts, you wouldn't see that on every patient that was postop.

MR. KEEVER: Let's go to the next slide.

Q. (Mr. Keever continued.) It's -- now we're up to April 15th, 2009. She has some contracted areas around her neck. Is that from scar tissue?

A. Mr. Keever, the last time that I saw Sue was one month

after surgery on 2/25/09. I didn't see her on 4/15/09. All this was hearsay. I would've had to -- I asked her to come back. I think the proper follow-up would've prevented a lot of the problems that she had. And so this is just hearsay that Dr. Buffalo or Sue said. It was a phone call.

Q. It was what Sue said to you. Correct?

A. Yes.

Q. It wasn't what -- hearsay from Dr. Buffalo. This was Sue to her doctor communication. Correct?

A. Over the phone.

Q. Over the telephone. And --

A. A lot of times people will say something to me over the phone, and I say, "Come in, let me look at it." And it's different than they describe over the phone.

Q. Said she was going to send you a picture.

A. She said that. Uh-huh.

Q. Did you get a picture?

A. I'm sure you had one for me.

Q. No, sir. I'm -- I'm -- my question was did you receive a picture from Sue?

A. I don't remember.

Q. Your next note -- and I don't have it up here -- was -- was on May 19th. I think you have it there. Doesn't that say she did send you a picture?

A. It says in the dictation, "She sent me some pictures of

her chest and neck."

Q. And we asked for those, and we -- we didn't get those either. Do you know where those are?

A. All I know is what I dictated. I don't know whether I really got those. Anything that she sent me, I put in her chart. You've gotten a complete copy of my chart including all the pictures that were in there.

Q. What did the -- the 5/19 note say? Doesn't it say you received a picture?

A. It says, (as read) "I talked to Sue today on the phone. She has manelia on her face. She requests a prescription. I called in a prescription for Cleocin and Keflex 500 mg for ten days. She sent me some pictures of her neck and chest" -- "chest and neck." And then it says, (as read) "There are track marks on her chest and some hypertrophy scarring on her chest. She will come in on 5/26 for follow up."

Q. Okay. And does it say that she's going to come in for steroid injections?

A. Yes.

MR. KEEVER: Okay. Approach?

JUDGE SCOTT: Yes, you may.

Q. (Mr. Keever continued.) Picture, this is marked Exhibit No. 11. And if you look on the back of it, it's dated by Sue as a picture taken in another doctor's office on April 9, 2009. Would that have been the picture that you received,

and does that meet the description that you put in your note of what her chest looked like?

A. It meets the description. I can't guaranty that this is the picture she sent.

MR. KEEVER: Okay. Your Honor, we'd move to admit Exhibit No. 11.

MR. LISLE: Your Honor, I don't think he was able to authenticate that picture.

JUDGE SCOTT: Denied.

MR. KEEVER: Okay.

Q. (Mr. Keever continued.) The description of the picture that you had in your April 15th -- was it -- I'm sorry. It would've been May 19th note. Would that have been -- would've that been a picture you would expect to see from a patient who was happy with her treatment, the description that you have, since we don't have a picture in evidence to look at?

A. Are you talking about the dictation from 5/19?

Q. That's the dictation of the picture that you said you received, and the description of the picture. But didn't your note on April 9th say that she's happy with the results? Or April 15th? Let's see, what's the -- yeah.

A. Uh-huh.

Q. It says April -- here it is -- well, here -- here. We have it up here. (As read) "She states she has some

contracted areas around her neck. She will send me a picture. She is happy with the results of the CO2." And then you describe a picture in your next telephone contact. So would the picture description that you got in there be from someone that you think would be happy with their treatment?

A. It takes some healing time, Mr. Keever, especially on the chest. This is -- is not really unusual response. That can occur with the healing process, and it will repair itself over time if you give it enough time.

Q. And you're basing that upon how much experience with this kind of a laser now?

A. I'm basing that on experience that I've had as a clinician for sev -- many years.

Q. But talking about how patients heal from this particular laser, you had -- well, we documented that you rented the laser for three sessions before Sue, then we had Sue's session. And there were, what, another couple sessions after that, would that be the total sum of your experience in terms of how people heal from burns from this laser?

A. From -- for this particular laser, I guess we could say that. Uh-huh.

Q. During that February 25th visit, you gave Sue a copy of an e-mail that you received from the company that did the laser. Isn't that correct?

A. Yes.

MR. KEEVER: And may I?

JUDGE SCOTT: Yes, you may.

Q. (Mr. Keever continued.) We've marked this -- this as Exhibit No. 12. Is that a copy of the e-mail?

A. Yes.

MR. KEEVER: Move to admit Exhibit No. 12, sir.

JUDGE SCOTT: Any objection, Mr. Lisle?

MR. LISLE: No objection, Your Honor.

JUDGE SCOTT: Plaintiff's 12 will be admitted.

(Wherein, Plaintiff's Exhibit 12 was admitted into evidence.)

MR. KEEVER: Next slide. Next slide.

Q. (Mr. Keever continued.) And the e-mail is up here. And it recommends some continuing treatment, some skin care, microdermabrasion treatments and IPL treatments. What's IPL?

A. Intense pulse light.

Q. That's not like a laser?

A. It's a light treatment.

Q. It's a light treatment.

A. Uh-huh.

Q. Okay. What were -- what were your recommendations to Sue on that last office visit? You go back to that 2/25/09 office visit, to use some creams you had prescribed,

something called Silvadene?
A. Yes.
Q. And is Silvadene a product that's prescribed for burns?
A. Yes.
Q. And then you -- some Bifane and something called Obagi products?
A. Yes.
Q. Is there any reason to believe Sue didn't follow those recommendations?
A. I don't know.
Q. Well, do you have any reason to know whether or not Sue followed your recommendations? That was my question.
A. Do I have any --
Q. Yes.
A. -- reasons to know? No.
Q. Okay. Do you remember having a conversation with Sue sometime while she was being admitted to a hospital in Heber Springs?
A. Yes.
Q. And you suggested to Sue that she get some hyperbaric oxygen treatments?
A. Actually, she was -- when she called me saying she was going to be admitted for dehydration, she was very anxious and apprehensive. And she said she knew a physician that had used hyperbaric oxygen treatments in the past and what did I

think about that. And I said, well, that would be fine if you want to.

Q. That's not something that you think that Sue did to make her condition worse?

A. I really don't know. I don't know of anyone that's been treated -- treated with laser, healing time hyperbaric oxygen.

Q. Okay. And --

JUDGE SCOTT: Mr. Keever, why don't we stop there and take our afternoon recess?

MR. KEEVER: Yes, sir.

JUDGE SCOTT: Mr. -- Mr. Tucker, if you would, remove that easel just a little. Ladies and gentlemen, we're going to take a 15 minute recess now. I remind you of the instruction I have given you previously. Do not talk among yourselves about this case or anyone involved with it. Do not talk to any of the attorneys or the witnesses or the litigants about this case. Do not communicate with anyone in any way, shape, manner, form, or fashion about this case. We will be in recess for 15 minutes. Mr. Tucker, you may take the jury out.

MR. BAILIFF: All rise.

(Wherein, the jury left the courtroom at 3:00 p.m.)

JUDGE SCOTT: We'll be in recess 15 minutes.

(Wherein, a break was taken from 3:01 to 3:21 p.m.)

JUDGE SCOTT: Be seated please. Mr. Keever, Mr. Tucker tells me your client felt compelled to go to her car, wherever it's parked. Is that correct?

MR. KEEVER: That's -- that -- it wasn't -- I asked her to get me something, so I'll take -- take the heat on that. But it's okay with us to proceed.

JUDGE SCOTT: All right.

MR. KEEVER: Is that --

JUDGE SCOTT: Are you ready to proceed, Mr. Lisle?

MR. LISLE: Yes, sir. I am.

MR. KEEVER: Your Honor?

JUDGE SCOTT: Yes, sir?

MR. KEEVER: May I -- may I have the permission to use my bench?

JUDGE SCOTT: I'm sorry?

MR. KEEVER: May I have the Court's permission to use a bench? My back's starting to --

JUDGE SCOTT: Certainly. Certainly. Feel free to, by all means.

MR. KEEVER: Thank you.

JUDGE SCOTT: Mr. Tucker, bring the jury in.

MR. BAILIFF: All rise.

(Wherein, the jury entered the courtroom at 3:22 p.m.)

JUDGE SCOTT: Be seated, please. You may proceed, Mr. Keever.

MR. KEEVER: Thank you, Your Honor. The lights are dim.

Q. (Mr. Keever continued.) Now, you made comments today to the effect that you think that Sue's scarring was made worse because of treatment she had from other doctors. Is that what I -- we understand?

A. No.

Q. Oh. What -- what -- what kind of treatment -- I misunderstood then. You -- did you -- did you not say that the things that Sue had done to her, including the laser treatments, made her skin worse? Did I misunderstand?

A. I specifically said the worst thing that she did was to have re -- repeat fractional laser treatments to a healing area. It's my understanding that the Skin -- the Star Skin Center, wherever that is, I'm not sure, in Little Rock, that wasn't done by a physician. It might've been ordered by a physician, but the treatment wasn't done by a physician. Now, I wasn't there. I don't know. That's why I said no.

Q. Okay. Well, you know that Sue did see a number of other physicians after she suffered her burns. Right?
A. I know this -- according to her records, she consulted several physicians, actually beginning several weeks after the initial laser procedure. All of which I -- wish she would've stayed with one physician. Many times jumping from one physician to another, especially people that don't -- I'm sorry -- that don't know about postoperative healing care of laser surgery tends to get you off track.
Q. Well, she had a family doctor in Heber Springs, Dr. Buffalo.
A. Yes.
Q. Ryan Buffalo?
A. I -- that's my understanding.
Q. And you said you had -- you looked at her records from her subsequent treaters?
A. I have done that. Yes.
Q. And Dr. Buffalo referred her for the hyperbaric oxygen treatment --

MR. LISLE: Your Honor, I object to the form of that question. That -- that's not in evidence.

JUDGE SCOTT: Sustained.

MR. KEEVER: Okay.

Q. (Mr. Keever continued.) You were aware, Doctor, that Sue had been hospitalized at Baptist, Heber Springs?

A. She called me and told me that she was being hospitalized. And then also reviewing her records that we obtained for preparation of this defense, I knew that she had been hospitalized.

Q. Sure. And that would be -- and I'm going to mark that as 12.

JUDGE SCOTT: No, sir. Your last Exhibit was 12.

MR. KEEVER: This would be 13.

Q. (Mr. Keever continued.) And I'll just mark and hold it right now, so that we move right along. And then were you aware that she had been seen by a Dr. Jay Holland, in Little Rock?

A. Yes.

Q. Have you reviewed those records?

A. A while back, yes.

Q. And those, we'll mark as 14. And then we have a Dr. David Bauer, in Little Rock. Do you know Dr. Bauer?

A. Not personally.

Q. You know who he is?

A. No.

Q. What he is?

A. Just from the findings and for this trial.

Q. We'll mark his records as 15. And you know a Dr. Suzanne Yee?

A. Yes.
Q. And did you look at her records on Sue?
A. I actually trained her how to do breast augmentations.
Q. My question, Doctor, was --
A. I'm sorry.
Q. -- whether you looked at her records on Sue.
A. Did I look at her records on Sue? Yes.
Q. So that would be 16. And there was a Dr. Patel in Tulsa. You recall looking at Dr. Patel's records?
A. I -- I remember the name, and I'm sure I looked at the records. I can't recall anything about that right now, except what he recommended I think.

MR. KEEVER: May I approach the witness, Your Honor?

JUDGE SCOTT: Yes, you may.

Q. (Mr. Keever continued.) I'm just going to have here 13, 14, 15, 16, 17 for your reference if you would like.

MR. KEEVER: And I would ask to admit those medical records at this time.

MR. LISLE: Your Honor, I object. Those medical records have hearsay that -- it's not subject to cross-examination.

JUDGE SCOTT: Sustained.

MR. KEEVER: Huh.

Q. (Mr. Keever continued.) Well, you recommended that Sue

get injections into her scars, yes, in -- in that telephone conversation? In fact, I think, wasn't it May 19th, you said Sue's going to -- going to come back and -- in a couple weeks and have you inject the scars?

A. I'm trying to read exactly what I said, because I was actually reminding myself by putting that in the note to evaluate to see if I felt like steroid injections would be applicable in this situation since I hadn't seen her since one month postop. A lots of times, you put notes in your records just to remind you to check over things when the patient comes back.

Q. Uh-huh. Well, but she didn't come back for those injections.

A. No.

Q. And when you looked at Dr. Bauer's note, what -- what did Dr. Bauer recommend?

MR. LISLE: Your Honor, again --

JUDGE SCOTT: Sustained.

MR. LISLE: This is hearsay.

Q. (Mr. Keever continued.) Is it your position, then, Doctor, that the treatments that were offered by her other doctors that we've talked about, without going into the specific thing, Dr. Bauer and Dr. Yee and Dr. Patel and then Dr. Burns in -- in Dallas, did not cause complications from this burn or make the scarring worse, the doctor's treatment?

A. That's a very broad question. You listed four or five different doctors. And then you said that that -- that I agreed that that did not cause --

Q. Let me just withdraw that question.

A. That's a good idea. Thanks.

Q. I agree that that wasn't a very good question. I'd like to withdraw it.

Doctor, we talked about -- you talked about the laser treatments as being burn injury over burn injury over burn injury. Is that true?

A. That's what I said.

Q. But lasers can be used for treating burn scars. Isn't that -- isn't that a fact? Different kinds of lasers can be used for treating burns scars.

A. Certain types have been used for that. I can't recall ever hearing of a CO2 laser being used for that.

Q. Right. And the CO2 laser was the one that you were using.

A. And the one that she was treated with subsequently, too, eight times.

Q. Okay.

A. I'm sorry. Four times.

Q. So if -- well, she was treated with the Fraxel only three times, as a matter of fact, wasn't she?

A. I think four times and then the YAG four times.

Q. And the YAG is not the kind of laser that would cause a burn. It was -- it would treat a scar? Is that what you're saying?
A. I'm not saying -- no. I'm not saying that.
Q. All right. Do you know of any treatments that Sue received for her laser burns that were not recommended either by you or by another doctor?
A. I'm not sure that I know of all the treatments that Sue did. I was -- or all the things that she did to her areas that I'd worked on initially. I was very surprised at all the topical medications and things that she was using when I had specifically asked her primarily to keep it moist and initially use things like Vaseline and Aquaphor.
Q. What did you understand my question to be, Doctor?
A. You asked me if I thought that -- I'm not sure. I can't remember.
Q. I asked you, sir -- if I may repeat it. I asked you if you knew of any treatments that Sue had for her burn scars that were not recommended by either you or another doctor.
A. I don't know who recommended her Fraxel treatments.
Q. Well, Doctor, did you review the medical records, particularly Dr. Yee's records?
A. Yes.
Q. Did Dr. Yee indicate in those records whether she thought Fraxel was good for burn scars?

A. She had sent her pictures to a physician in New York who looked at the pictures and made some recommendations. The physician in New York never saw the patient; she never touched her before or after. The areas that are your -- you're calling scars, she only looked at those. She didn't actually feel of them.

Q. Back to the question. Do you know of any treatments that Sue got for her burns that weren't recommended by either you or another physician?

A. I guess I'll have to say, with the knowledge I have, no.

Q. And you -- and that knowledge included reviewing her medical records --

A. Yes.

Q. -- in preparation for this trial?

A. Yes.

Q. Okay.

JUDGE SCOTT: Mr. Keever, excuse me. Ms. Andrews, is the sun bothering you?

JUROR ANDREWS: No. I'm fine. Thank you.

JUDGE SCOTT: Okay. Go ahead, Mr. Keever.

MR. KEEVER: Okay. Thank you, Your Honor.

Q. (Mr. Keever continued.) All right. I want to ask you about the information Sue received with you about your proposed surgery. Do you understand?

A. Yes.

Q. Okay. Now, the next slide should be the January 21st --

MR. KEEVER: Keep going. January 21st, keep going. There you go.

Q. (Mr. Keever continued.) The January 21st, 2009, office note.

A. Uh-huh.

Q. And in your depo -- and -- and is it your testimony that you saw Sue in your office on the 21st of January 2009?

A. According to my medical records, which is her chart, she was in the office on that day and I saw her.

MR. KEEVER: Your Honor, may I show January 2009 calendar on the -- on the tripod?

JUDGE SCOTT: Yes, sir, you may.

MR. KEEVER: And may I ask the Court what our last Exhibit number was, sir?

JUDGE SCOTT: The last one that was not admitted was 17. The last one that was admitted was 12.

MR. KEEVER: We'll go ahead, since I've marked them -- we'll make this 18?

JUDGE SCOTT: All right.

MR. KEEVER: And I'd ask that it be admitted as simply a printout of January of 2009 calendar?

JUDGE SCOTT: Any objections, Mr. Lisle?

MR. LISLE: No, sir. No, sir.

JUDGE SCOTT: Plaintiff's 18 will be admitted.

(Wherein, Plaintiff's Exhibit 18 was admitted into evidence.)

Q. (Mr. Keever continued.) Okay. So the 21st -- I don't think I positioned that so you can see, Dr. Elkins. And I hope that -- am I tall enough, so you can see the right line there?

A. Uh-huh.

Q. So the 21st is a Wednesday. And Sue's surgery was on the 22nd, a Thursday. Now, do you remember what you told us at your deposition, page 97, line 18, about the date of that meeting?

MR. KEEVER: While he's looking, Your Honor, I just need to get -- look for an exhibit.

JUDGE SCOTT: All right.

DR. ELKINS: Are you ready for an answer?

MR. LISLE: Your Honor, at this -- I'm going to object to this again --

JUDGE SCOTT: Sustained.

MR. LISLE: -- to the form of the question.

JUDGE SCOTT: Mr. Keever?

MR. KEEVER: Yes, sir?

JUDGE SCOTT: The correct way to use a deposition is to ask the same question. And if you get a different response, you may use the

deposition to cross-examine the witness.

MR. KEEVER: Yes, sir.

Q. (Mr. Keever continued.) Is your testimony, Doctor, after reviewing your deposition that the meeting with Sue was on the 21st? Is that fair?

A. Yes. I think -- I said she came in, I think, on the 21st and brought her friend in.

Q. And is it your testimony that she came in the day before the procedure and you talked to her about the risk of the procedure?

A. Yes. At that time, I had reviewed my records. It had been a while since the surgery. And I reviewed my records. And according to my -- her chart, which were my records, I had seen her on the 21st.

Q. And on the 21st -- and I'm not talking about the telephone call initially. We're on the 21st. Did you disclose to Sue that your settings were going to be 400 percent of the baseline settings?

A. No.

Q. Did you dis -- disclose to Sue on the 21st -- not talking about the telephone conversation -- that the settings you chose were likely to give her some degree of visible scarring, yes or no?

A. No.

Q. Thank you.

MR. KEEVER: Now, Mr. Swindle, next slide should be the summary that we had on the board. The -- Your Honor, is this -- this is from the records. Is this proper?

JUDGE SCOTT: Mr. Keever, I don't know enough to answer that question.

MR. KEEVER: Take it down. Take it down.

Q. (Mr. Keever continued.) All right. We agreed that according to your records, you used either 1200 units of time or 1800 units of time on Sue.

A. Yes.

MR. KEEVER: And if you would, Mr. Swindle, go ahead to -- pop ahead to the slide that's from the suggested parameters. Another one. Another one. Yeah. No. Right. That one right there.

Q. (Mr. Keever continued.) So the only thing on the parameters that would really call for 1800 would be for acne scars.

A. Again, these were baseline settings. They were beginning settings that the manufacturer recommended, but that's correct. On that chart, it says 1800 under acne scars.

Q. And when you're treating an acne scar, aren't you accepting that you're going to have a scar? In other words you're going to burn out an unattractive scar in hopes that

you leave a more attractive scar. Would that be fair?
A. Yes.
Q. Should you have known that your settings that you used on Sue, whether it as 1800 or 1200, would lead to at least some degree of permanent scarring?
A. No. I wouldn't have done it if I thought it was going to lead to permanent scarring.
Q. Okay. Now, let's go back to the telephone call when Sue called you in early January of 2009 about referring a friend of your -- hers to you, Lisa Jones, for liposuction.
A. Yes.
Q. And -- and that is a telephone call where you first discussed with Sue the laser?
A. To my recollection, yes.
Q. And then the next time you actually saw Sue would've been the 21st, according to your testimony?
A. According to my records, yes.
Q. Well, do you have -- have -- do you now have any reason to testify to something other than that? That you -- is your testimony you saw her on the 21st and that's what you believe happened or that you didn't see her on the 21st?
A. Mr. Keever, I've had enough time to sit through Sue's deposition and your questioning. And I know there's a discrepancy in the dates. And so that's why I refer to my records. And then she has a different opinion on our time

setting. We both agree when she had her laser procedure done. And --

Q. What is your testimony under oath as to what day you saw Sue to do that discussion that we noted in that last office note, sir? That's what I'm asking.

A. Mr. Keever, all I can do is go by my notes. My -- my -- the chart, her chart, it's 1/21/09.

Q. Okay. I'm almost afraid to ask. See -- the next slide should be the 1/21 note again.

MR. KEEVER: No. Go back to the 1/21 note.

Q. (Mr. Keever continued.) Now, your note says that she paid you $2,000 that day.

A. Yes.

Q. Can't even read my own writing. Was that -- was this No. 19?

JUDGE SCOTT: No, sir. It was No. 18.

MR. KEEVER: No. 18. Thank you, very much.

Q. (Mr. Keever continued.) I'm going to mark as No. 19, Plaintiff's 19, this document, which is your billing records from your office. Would you confirm that, sir? Billing records for Sue Poff from your office?

A. Yes.

MR. KEEVER: And I would ask that they be admitted as No. 19.

JUDGE SCOTT: Any objection, Mr. Lisle?

MR. LISLE: No, Your Honor.

JUDGE SCOTT: Plaintiff's 19 will be admitted without objection.

(Wherein, Plaintiff's Exhibit 19 was admitted into evidence.)

Q. (Mr. Keever continued.) We got the calendar and when did you see Sue's friend, Lisa Jones, in the office?

A. I would have to look at her chart. Lisa Jones had her surgery on the 23rd, so I must've seen her before that. I don't remember. I'd have to look at her chart.

Q. Well, here's what I have marked as Exhibit No. 21, which is Lisa Jones' office note from your chart with her personal information redacted. Do you agree that's what we marked as 21?

A. It looks like what would've been her chart. Yes.

MR. KEEVER: Like to admit Exhibit No. 21, sir.

JUDGE SCOTT: Any objection, Mr. Lisle?

MR. LISLE: No, Your Honor.

JUDGE SCOTT: Plaintiff's 21 will be admitted without objection.

(Wherein, Plaintiff's Exhibit 21 was admitted into evidence.)

MR. KEEVER: Okay. Next slide, please, Ken. After -- we're going to have to go down there to

next. Next. Next. Next. Next. Okay.

Q. (Mr. Keever continued.) And that's Lisa Jones' office note. What was your prior testimony -- I'm sorry? What was your prior testimony about when you saw Lisa in the office with Sue? Do you recall?

A. No.

Q. Would you go to page 97 of your deposition? Will you refresh your memory?

A. Which line?

JUDGE SCOTT: Ask a question, Mr. Keever.

Q. (Mr. Keever continued.) What -- when did you see Ms. Jones in your office, Doctor?

A. When did I see Ms. Jones in my office?

Q. Uh-huh.

A. I don't -- all I have is -- I don't have the total chart with me. So I -- I assume if this is all that I have in my chart, on the 22nd.

Q. Not the 21st?

MR. KEEVER: Okay. Next slide.

Q. (Mr. Keever continued.) Here is that billing record. And your office note says that on the 21st Sue paid you $2,000. And when does this billing record, which we had already admitted, say that Sue paid the twenty-two thousand -- or $2,000?

A. On the 22nd. I know there's some discrepancy there.

That's obvious.

Q. Thank you. Thank you the answer was to the question. I appreciate it. Now, on -- I'm going to show you what I have marked as Exhibit 22. And it's a copy of the check -- a -- or a check written by Ms. Poff to you. And what is the date on that check?

A. 1/22.

Q. Not the 21st?

A. No. 1/22.

MR. KEEVER: We'd ask to admit Exhibit 22.

JUDGE SCOTT: Any --

MR. LISLE: Your Honor, we'll accept the exhibit. We'll also stipulate that she paid for this procedure on the 22nd.

JUDGE SCOTT: All right.

MR. LISLE: If that'll help.

JUDGE SCOTT: Plaintiff's 22 will be admitted.

(Wherein, Plaintiff's Exhibit 22 was admitted into evidence.)

Q. (Mr. Keever continued.) Okay. Now, you gave Sue some prescriptions for some drugs to be taken before the surgery. Yes?

A. I don't know if I gave them to her or called them in. I know after our telephone conver -- I -- I'm not sure which one, but yes. Well, I mean --

MR. KEEVER: May I, Your Honor?

A. -- one or the other.

JUDGE SCOTT: Yes, Mr. Keever, you may.

Q. (Mr. Keever continued.) Marked as 23 are prints of prescriptions that were called in to Fred's of Heber Springs on what date, sir?

A. Looks like the 19th.

Q. Okay. Now, we've already looked at the summary of the drugs and when she took her preoperative drugs, the Ativan and the Compazine. Ativan is what they call a hypnotic sedative?

A. Ativan is a mild sedative medication some people take it four times a day. There are different -- everybody is -- there are different sensitivities to it. But, generally, we use it as a preoperative sedation relaxation medication.

Q. Well, it's also been used recreationally as a date rape drug, hadn't it?

A. I don't know, sir. You know more about that than I do.

MR. KEEVER: Okay. Next slide. Next slide. Next slide. Thank you.

Q. (Mr. Keever continued.) This consent form, it was signed after Sue had the Ativan and the Compazine. Is that correct?

A. According to her testimony, yes. I wasn't actually in the room when this was done.

Q. Well, you saw your own sedation record that showed that she took her preoperative medications at 12:30.
A. Seems to correlate with being signed on the 22nd.
Q. Okay. Now, this con -- this operative consent is -- well, you actually had it faxed to you from the company that rented you the laser. It's a specific permit for this laser. Isn't that right?
A. Yes.
Q. And it does mention in there the possibility of burning and scarring.
A. It does.
Q. And that's the only place in the record where there's any warning of possible scarring from the laser. Isn't that true?
A. In the record?
Q. In the record.
A. Yes.
Q. There's nothing about that in your office note, which is dated the 21st.
A. That's true.
Q. And there's really no other place in the record that talks about the risks of the surgery, at all. Is that true?
A. That's true.
Q. And Sue signed this after she had her sedative?
A. According to the record, yes.

Q. Well, if you -- if you were to do counseling and explanation of the risks of a procedure the day before a surgery when the patient's not under sedation, why wouldn't you have them sign their operative consent then?
A. We had talked about this on the phone, also. I talked to her about the procedure. I talked to her about the complications on the phone. So I also had done three or four other surgeries. She'd had several procedures in my office before. I -- Sue was an esthetician. Sue knew a lot about complications. She's seen a lot of them.
Q. Well, Doctor, my question was, wouldn't the proper medical procedure be to have your patient sign an operative consent before they were under the effect of sedation?
A. Yes.
Q. And wouldn't have that been pretty easy to get done on the 21st if Sue were in your office at that time?
A. Yes.
Q. We didn't do that?
A. According to the records, that didn't -- that didn't correlate.
Q. All right. Now, you -- you also saw a large brown spot on Sue's face?
A. Yes.
Q. And that was something that had or had not been present previously?

A. I had never seen it before. But, of course, I -- it had been since 2007 that I actually seen her personally.
Q. Okay. But you took that off with a laser?
A. Yes.
Q. And now she has -- instead of the brown spot, she has kind of a square white scar on her face?
A. Yes.
Q. Did you tell Sue before the procedure that she might end up with this white square scar on her face?
A. No.
Q. You were hoping for the best from Sue's procedure, were you not?
A. Yes.
Q. But isn't a doctor supposed to tell his patients about the worst, as well as the best?
A. There are a lot of different ways to handle it. You have to take the specific patient into consideration with their environment that they're living in, what's happened to them, how long you've known them. There are a lot of things to consider when you treat patients.
Q. Isn't a doctor supposed to inform his patient of the risk of any procedure that he proposes?
A. Yes. You don't always inform them of the worst possible thing.
Q. If a patient's going to come to you for a redness on her

chest, and the worst possible thing is what happened to Sue, didn't she have a right to know that?

A. That's not the worst thing that could've happened to her. She could've died. I tell patients that sometimes when they ask me, "What's the worst thing that can happen to me," which is a frequent thing when I'm discussing complications and possible side effects with them. They say, "What's the worst thing that could happen to me?" And I say, "You could die."

Q. In your complaint -- or your Answer, you denied then -- are you still denying today any responsibility for Sue's injuries?

A. Well, Mr. Keever, now -- now that I know that she's had eight other laser procedures, I don't think that I am going to accept that my initial laser procedure, which did not have time to heal before she started treating it with other burns, was the reason for the result she has now. I think if she would've let it heal, it would've done fine. It would've healed. Time heals a lot of things.

Q. Well, you also have claimed, have you not, Doctor, that Sue assumed the risk of the scarring that she ended up with?

A. Yes.

Q. And is an assumption of risk when a patient/person voluntarily exposes themselves to a dangerous situation inconsistent with their safety, but does it anyway --

MR. LISLE: Your Honor, I think he's --

Q. (Mr. Keever continued.) -- knowing -- knowing --

MR. LISLE: -- asking a legal question.

JUDGE SCOTT: Sustained. Next question, Mr. Keever.

Q. (Mr. Keever continued.) Did Sue voluntarily expose herself to a dangerous situation inconsistent with her safety knowing of the danger and risk of injury from it?

A. I think you're trying to put me in a box. Say that again. Ask me again.

Q. Did Sue voluntarily expose herself to a dangerous situation inconsistent with her safety knowing the danger and risk of injury from that situation?

A. She exposed herself to a situation which is surgery. It's the same danger as driving out on the highway. I -- I can't really say yes or no to that. I -- I'm confused as to what you're asking me.

Q. But you agreed that that's your -- one of your defenses in this case.

A. Tell me again.

Q. Should you have known that those settings would lead to at least some degree of permanent scarring?

A. No. No. No. Every patient is individual. I've used higher settings than that on one -- like one of the same patients that I treated the -- the day that Sue did. It

depends on the skin thickness, the pigment that you're working with, the type of skin. You have to individualize every patient. If I would've known there was going to be permanent scarring there, as you say, as you say permanent scarring, I wouldn't have done it. I've been practicing medicine for a long time. I would've been in trouble a long time before this if I would've done that.

Q. Are you saying you haven't been in this kind of trouble before?

A. I'm saying, Mr. Keever, if I would've known that it was going to have permanent scarring, as you were saying, I wouldn't have used those settings.

Q. But that wasn't my question, Dr. Elkins. Are you saying that you haven't been in this kind of trouble before?

A. What are you trying to get -- what do you want me to say, Mr. Keever?

Q. I -- I -- I want an answer to my question. You said, "I would've been in this kind of trouble before."

MR. LISLE: Your Honor, I object to this line of questioning.

JUDGE SCOTT: Overruled. Answer the question, Doctor.

Q. (Mr. Keever continued.) Let's take a medical malpractice lawsuit like this --

JUDGE SCOTT: No, sir. The question is, Mr.

Keever, "Doctor, have you ever been in this kind of trouble before?" What is the answer?

Q. (Mr. Keever continued.) Have you ever been in this kind of trouble before?

A. No.

Q. And define for us, "this kind of trouble."

JUDGE SCOTT: No, sir. Next question, Mr. Keever.

Q. (Mr. Keever continued.) You said that Sue had special knowledge about complications.

A. I think she had more knowledge than the general public because of her profession and her years of working with skin and treatment for skin.

Q. But you treated her with a resurfacing CO2 laser. You're not saying that she had special knowledge about that, are you?

A. No.

Q. You're the only one in the room with that treatment that had that special knowledge. Is that not true?

A. Yes.

MR. KEEVER: Your Honor, I'll -- I'll pass the witness.

JUDGE SCOTT: Mr. Lisle, any questions?

MR. LISLE: Yes, sir. You have the sedation record exhibit, the one that has a time? Is it 8?

JUDGE SCOTT: I think it'd be 9-C.

MR. LISLE: 9 -- 9C. Thanks.

CROSS-EXAMINATION

BY MR. LISLE:

Q. Dr. Elkins, what kind of training did you receive in Dallas on this DOT -- the DOT SmartXide Laser?

A. It started in the morning. We had a lecture. And then all through the afternoon and in the late evening we had patients that had volunteered to have fractional laser treatments done. We used different settings. They had, like, four machines in the room. And we would actually have hands -- hands-on -- hand -- hands-on experience with treating the patients and see how they reacted to it.

Q. Who were the doctors that were the instructors at this course?

A. The primary one was Dr. Janson from Arizona, I think. He was --

Q. And what -- maybe what I should say is how were they selected? What were you -- what were their credentials?

A. They were experienced in the use of the DOT CO2 laser.

Q. And -- and one of the things you were shown was some preoperative photographs of Sue Poff. Can you diagnose a patient by looking at a single photograph or two?

A. Not by looking at just a photograph, no. You have to actually feel the skin. And talking to the patient helps,

too. But the -- the texture of the skin, you cannot -- you can't tell by -- the texture and surfacing of the skin, you can't tell by a photograph.

Q. I'm going to show you the -- in the manual that you have that -- that Mr. Keever, I believe, started off by referring to as safety guidelines and end -- you ended up referring to it as baseline guidelines. You have that document in front of you, the manual?

A. Yes.

Q. Okay. Okay. I'm going to -- would you turn to page 1 of that manual?

A. Okay.

Q. So I believe he was -- the indication was if you exceeded the numbers in that manual, that somehow that was something you should warn your patients about. Would you read the first sentence of the page 1 entitled "Disclaimer" for that document?

A. (As read) "While the information contained in these pages has been compiled from sources believed to be current and reliable" -- the company -- "DEKA cannot be held responsible for any error, omission, defects in, or the accuracy, completeness, timeliness, and usefulness of, the information supplied to users in this document."

Q. So at the very first, are they already telling you before you read any further, they're not saying to you that

this is accurate, complete, or useful?
A. Yes.
Q. And then the first par -- the second paragraph, first sentence?
A. "The following materials are presented for educational purposes only."
Q. All right. Read the second -- second sentence. Continue on there with the next sentence.
A. (As read) "Methods described may not be the only or the best method for each or every case."
Q. Go down and read the first sentence of the third paragraph.
A. "Information on this document may contain technical inaccuracies and technological [*sic*] errors."
Q. So was that consistent with what you were told in the seminar, the training that was put on by this company, did they tell you, you have to follow every -- you can't do anything other than these -- the -- the settings that are in this manual?
A. No. The -- the instructors, the doctors at the seminar told us that these are only baseline levels. And they told of many patients, they -- they had used higher levels. And they also indicated that the baseline levels many times didn't get hardly any results, at all, which I found to be true because I -- when I first started doing the procedure, I

did use the lower levels and I had some very angry patients that had to come back and have it done again because they weren't happy with the baseline levels, the results.

Q. And one of the documents you had, this is from Exhibit 2, the Core Dimension materials. This was shown several times. What is the very first thing that this document says before it goes into the settings? Going to get it oriented here.

A. The first line up there says, (as read) "The protocol outlined above is for reference" -- "reference purposes only. Many variables exist which may dictate higher or lower settings or modifications of treatment plans. There's no substitute for peer to peer training or consultation" -- "and consultation."

Q. So are you told that this is like a microwave oven where you just turn it on those settings and -- and hit go and that's how it works?

A. Definitely not.

Q. In fact, how do you even know when -- when you're looking at all these different columns, does the manual tell you who falls into which column?

A. No.

Q. How do you -- how do you decide what to treat -- how to treat somebody, what levels to use?

A. Clinical judgment. Many times you have to mix the

amount of values that use -- like, you might use a higher power setting and a lower dwell time and higher spacing. You can mix them all together to get the results that you want. You definitely have to come out with more energy than they recommend on the initial sheet here.

Q. But not only that, when they're talking about treatments, there -- this is for people that are coming in multiple times, as well, aren't they?

A. Yes. These are for recommendations of people that have three to four treatments, two to three weeks apart. The only problem with that is the majority of patients don't want to come back two or three times. For one thing, the expense is much higher. The time off work is much higher. They want to have a treatment done once, and get the result that they want. But they want to see some result.

Q. Back to the manual on page 17 -- having a hard time getting -- look at the last paragraph in the manual. What does it tell you about the -- the possibility of using conservative, which is the beginning settings, versus using aggressive settings?

A. It says the (as read) "DOT offers the possibility to adapt the procedure according to the expect" -- "expectations of the patient" -- "expectations of the patient" -- what's the patient wants -- "more or less aggressive" -- "aggressive treatment corresponds to longer and shorter down times after

every session."

Q. So are you told that if you have a more aggressive treatment you're going to permanently scar somebody, or are you told that if you do a more aggressive treatment, you're going to have more downtime?

A. More downtime.

Q. Is that something that you discussed with Ms. Poff?

A. Yes.

Q. Mr. Keever also mentioned that this -- this formula here. Is this something that doctors use in a clinical study?

A. No.

Q. Now, I just want to point out to you that -- oh, in this table, for instance, it says "Skin Resurfacing for Severe Aging," and then it gives some parameters. Correct?

A. Yes.

Q. Okay. Now I'm going to look at this and it goes to "Skin Resurfacing for Mild Aging." In this manual, does it even have any -- any parameters for something between severe and mild?

A. No. And there are a lot of patients that fall within the severe to mild -- moderate -- we call them moderate skin damage or photo aging changes due to the sun damage.

Q. So the manual doesn't tell you how to do those things, to gradiate [*sic*] somebody between something like mild all

the way up to severe? You're on your own when it comes to that, aren't you?

A. Use clinical experience. Yes.

Q. Now, you also testified, had you used higher settings -- the same settings or higher on other patients that you used on Ms. Poff?

A. Oh, yes, higher settings.

Q. Is she the only one that you're aware of that's claimed a -- a complication of any kind?

A. Yes.

Q. Did Ms. Poff have an opportunity to read and sign this document?

A. Yes.

Q. Do you have that in front of you?

A. Yes, sir.

Q. Apologize for keep making you read. I think you could probably use some water, but I'm going to ask you to go ahead and read the first paragraph in full.

JUDGE SCOTT: Mr. Lisle, you can take him some water up there if you want to.

MR. LISLE: Okay.

DR. ELKINS: I'm okay. Yeah.

MR. LISLE: You got some? Okay.

DR. ELKINS: Thanks. Uh-huh.

A. (As read) "I understand that the SmartXide DOT Laser is

a procedure performed with a laser device designed to obliterate skin" -- I'm sorry. Yeah. -- "designed to ablative skin resurfacing and that clinical results may vary in different skin types. I understand there is a possibility of short-term effects such as redness, blistering, scabbing, temporary bruising and temporary discolorment of the skin, as well as a rare side effect such as scarring and permanent discolorations. These effects have been well explained to me."

Q. (Mr. Lisle continued.) Okay. And then if you go on, I -- I won't ask you to read the whole thing, but also then, of course, mentions that "Clinical results may vary," you can see that, next paragraph?

A. Yes. (As read) "Clinical results may vary" -- "are very dependent on individual factors, including medical history, amount of sun damage and textural problems, skin type, patient compliance with postop" -- "preoperative and postoperative treatments, instructions, and individual response to treatment."

Q. Do any two people have the -- exactly the same skin?

A. No.

Q. Now, that same day, Ms. Poff also signed another consent form. I'm not sure. Was this part of your medical record that was put into evidence?

A. Yeah. Yes.

Q. Okay.

MR. KEEVER: No.

MR. LISLE: Was not?

DR. ELKINS: Yes, it was.

MR. LISLE: Oh, involving the -- the peel?

MR. KEEVER: Uh-huh.

MR. LISLE: Okay.

MR. KEEVER: My apologies.

Q. (Mr. Lisle continued.) So the same day she signed two consent forms. I -- it may be hard to read it on the overhead. But would you look at the first highlighted complication that she was -- it was -- she was told about in this procedure?

A. What number you referring to?

Q. The very first one that's highlighted on the screen.

A. I can't see what you --

Q. Oh. The edema?

A. Oh. Okay. "Edema (Swelling)."

Q. Uh-huh.

A. You want me to read it?

Q. Yes.

A. (As read) "This occurs to some degree with every surgery. It may last for days, weeks or months. Some swelling may remain after surgery for a year or more. You will be given special instructions for treatment

appropriate."

Q. And then also number 3, hypopigmentation, was she warned about the possibility of hypopigmentation?

A. Yes. It says, (as read) "Lightening of skin color will occur with phenol peels. In each case, the skin may lose the ability to tan. There will possibly be a difference in skin color between the face and the neck."

MR. KEEVER: Objection, Your Honor. This is talking about something that's not really part of this case, at all. It's a chemical peel procedure, not the laser procedure.

JUDGE SCOTT: Well, that may well be, Mr. Keever, but it's your exhibit that you admitted into evidence. I think you're going to have to live with it.

MR. KEEVER: Point taken, Your Honor.

JUDGE SCOTT: Go ahead, Mr. Lisle.

Q. (Mr. Lisle continued.) And Number 5, was she also warned about scarring?

A. It says, (as read) "Scarring: Healing and tendency to scar is very variable in different persons and in different areas of the body on the same person. How well a person will heal cannot be" -- "exactly be predicted or controlled. Extensive wide and thickened scars (hypertrophic or keloids) may occur."

Q. Now, did she -- it looks like on the right she initialed each one of these individual paragraphs. Is that correct?
A. Yes.
Q. Do you have any other record as a doctor of whether or not someone was told about the risk of a procedure, other than them signing the form?
A. No. Not -- no.
Q. Do you rely on them signing the form rather than dictating that into your records?
A. Yes. That's the typical way that most doctors do, and I do, too.
Q. I notice that neither one of these forms have a time record for those for when they were signed. Is that correct?
A. That's right. Yes.
Q. The sedation record indicates that Ms. Poff wasn't given any Ativan until, what, 12:30 p.m.?
A. Yes.
Q. I was a little confused on your testimony with Mr. Keever there towards the end. Do you know whether or not she had -- this -- that form was signed before 12:30 p.m.?
A. Do I know?
Q. Yes.
A. No.
Q. Is -- is Ativan the kind of drug that if given to her at 12:30 p.m., if she'd signed it immediately thereafter or

short time thereafter she would've not had any cognitive ability?

A. No. Ativan takes 30 to 45 minutes to take effect.

Q. And, even then, did you say earlier that it's a drug that some people take every day?

A. Yes. Sometimes people take that amount four times a day to just relax them.

Q. I want to show you your -- referring back to your -- your medical notes, as well. If you look back on May the 19th of '09.

A. Okay.

Q. Did Sue Poff tell you on that date that she had already had another Fraxel Laser treatment before she called you on that day?

A. No.

Q. Did she tell you that she had had a Genesis Laser treatment before she called you on that day?

A. No.

Q. Did she inform you of any other treatments she had gone -- undertaken from February, when you last saw her, 'til that date, other than the ones noted in your -- in your records?

A. Not other than the ones that I noted in the record, no.

Q. Look back up the last time -- I guess the last time you saw her in your office was February the 25th. Is that correct?

A. That's correct.
Q. What was the last thing that you said to her about other treatment? If you look, it's towards the bottom of that paragraph under: "The Bifane should be used twice daily."
A. (As read) "Bifane should be used twice daily. She knows that she is very emotional and going through a lot of stress with her divorce and domestic situation. She was encouraged to not over treat the areas and let the areas heal."
Q. From that time on, did she keep you posted of the other treatments that she was undertaking?
A. Like I said a while ago, I didn't know that she was getting other laser treatments. No.
Q. There was also a question put to you about hyperbaric oxygen treatments from March. I believe the question was worded that you told her to have those hyperbaric treatments. Would you look back at your March 10th record and see what it says?
A. On March the 10th it says that she was seven weeks post Fraxel CO2 laser. (As read) "I talked with Sue today on the phone. She is on" -- "She is receiving hyperbaric oxygen treatments at a friend of hers in Little Rock twice a week."
Q. Okay.
A. So she was already -- had been doing that.
Q. Yeah. So was she -- was she asking you if that was -- that's something she should do, or is she telling you she's

already doing it?
A. She was telling me she was already doing it.
Q. Doctor, doesn't every laser treatment intentionally injure the patient initially?
A. Yes.
Q. So there -- you were asked kind of a legal definition, but did Sue Poff go into this knowing that she was going to have a laser injury?
A. Yes.
Q. And then, what's the -- but what's the plan? Then why -- why would anybody do that?
A. Be -- because the laser injures the skin, takes off the initial epidermis. And goes into the dermis and stimulates the dermis to resurface or heal and produce more collagen and more fibrin, and tighten the skin, decrease wrinkles, decrease pigmentation. So you have to go through a insult to the skin to have a healing period and a resurfacing. Now, a lot of people ask why does this work and sunlight doesn't work? Isn't it the same thing? Sunlight is damaging. It damages DNA. It's ultraviolet ray. It's a different kind of light altogether.

MR. LISLE: Okay. Your Honor, that's all the questions I have for now, save I'd like to reserve my opportunity to call Mr. Elkins in our case.

JUDGE SCOTT: All right.

MR. LISLE: Dr. Elkins.

JUDGE SCOTT: Any redirect, Mr. Keever?

MR. KEEVER: Just briefly, Your Honor.

DR. ELKINS. Stretch. Sorry.

JUDGE SCOTT: You need to move around some more, Doctor?

DR. ELKINS: Huh?

JUDGE SCOTT: You need to move around some more?

DR. ELKINS: He won't be very long. No thanks.

JUDGE SCOTT: All right.

MR. KEEVER: May I ask the Court what exhibit we're up to numerically now, sir?

JUDGE SCOTT: Your last one was 23.

MR. KEEVER: Thank you, sir.

REDIRECT EXAMINATION

BY MR. KEEVER:

Q. Dr. Elkins, I only have one copy of this, but it's the SkinStar Laser MedSpa report. And would you agree with me that the only treatment before June was on 4/22, and it wasn't on the chest but only on the neck. Is that correct?

A. According to this record, her first treatment was on 4/22, which was three months out.

JUDGE SCOTT: Doctor --

DR. ELKINS: I'm sorry. Yes.

JUDGE SCOTT: -- excuse me just a minute.

DR. ELKINS: Sorry.

JUDGE SCOTT: Mr. Keever, how could that document not be hearsay?

MR. KEEVER: A medical record that was exchanged in discovery.

MR. LISLE: Your Honor, I'll -- I'll allow him to introduce that document.

MR. KEEVER: Okay.

JUDGE SCOTT: All right.

MR. KEEVER: And -- and -- and by stipulation.

JUDGE SCOTT: Go ahead, Doctor. You may answer the question.

MR. KEEVER: Okay.

Q. (Mr. Keever continued.) So, Doctor, the -- the treatment on 4/22 was not on the chest. Is that correct?

A. Correct.

Q. Okay.

A. Was on the neck.

Q. And, Doctor, you -- you answered some questions with Mr. Lisle about that -- that one-day seminar, the kind of training you had. How much of that one day was on clinical materials and treatment materials, and how much was on marketing materials?

A. The majority of it was on treatment materials and evaluation and actually hands-on hand -- hands-on use of the laser. The marketing was only a small part of it, just as in the manual only show -- you were going to show a while ago is only a couple slides was on that.

Q. Okay. Thank you very much. And that would be Exhibit 2? Yes. The manual. The seminar manual is Exhibit No. 2.

MR. KEEVER: Your Honor, I'd ask to publish Exhibit No. 2 to the jury.

JUDGE SCOTT: That'd be fine. You may go ahead.

MR. KEEVER: Thank you, sir.

JUDGE SCOTT: Plaintiff's 24 will also be admitted without objection.

(Wherein, Plaintiff's Exhibit 24 was admitted into evidence.)

MR. KEEVER: Thank you, sir. May I have your --

Q. (Mr. Keever continued.) You mentioned to Mr. Lisle that you talked to your peers about what you were doing, and they advised you to set the settings higher so the patients would be more satisfied. Did I understand that correctly?

A. I don't believe so.

Q. Well, explain that to us then.

A. Tell me what you -- what -- what -- where would I --

when -- when I was talking about that.
Q. You were talking about the training seminar and your peers and how you were told to move your -- your -- the settings higher, and you'd have better patient satisfaction.
A. Sure.
Q. Okay.
A. We had all physicians at this meeting. There were probably 25 -- 25 physicians that were at this training meeting. And there were four instructors primarily -- this Janson guy was the primary instructor. And in discussions when we were doing the hands-on procedures which we were only using local numbing medicine usually, the physicians would tell us that generally in their practice they would go -- they would use higher settings and have to use a little more sedation to get good results, get results that patients would see an improvement in their -- their appearance.
Q. Did you talk with those same peers about Sue's case and how she turned out?
A. No.
Q. Haven't had any peers examine Sue's case, at all?
A. I only saw Sue for one month after her surgery. I didn't have much concern one month after when she appeared to be healing adequately for what had been done.
Q. And you -- you told us you'd used these same settings on other patients and had good results. But we don't see those

patients on the witness list, do we?
A. No.
Q. We haven't been provided any medical records saying that you've ever used these settings on anyone else but Sue, have we?
A. Didn't think it was necessary.
MR. KEEVER: Your Honor, I think that that's all the questions I have of Dr. Elkins on redirect. I -- and I'll pass the witness at this time.
JUDGE SCOTT: Thank you. Anything else, Mr. Lisle?
MR. LISLE: No, Your Honor. Just reserve the right to recall him in our case.
JUDGE SCOTT: Certainly. You may step down, Dr. Elkins.
DR. ELKINS: Do I gather all this stuff, or leave it?
JUDGE SCOTT: No, sir. Leave it right there.
DR. ELKINS: Okay.
JUDGE SCOTT: Ladies and gentlemen, I think this is a good time to recess for the day. Do any of you have any difficulty commencing back to work at 8:30 in the morning here?
(Wherein, there was no response.)
JUDGE SCOTT: All right. Let's plan on that.

The courthouse will open at eight o'clock. I'd like for you to commence to assemble in the jury room around 8:15, so that we'd be ready to start at 8:30. Mr. Tucker will secure the jury room tonight. You may leave any items in there you want to, or you may take any items home with you if you want to.

I want to remind you in general before I read the specific words to you, you don't tell your spouses, you don't tell your friends, you don't tell your neighbors anything about what you're doing here. Tell them I instructed you not to discuss it. When we get done, you'll certainly be free and able to do that. In general, you are not to do any research in any way, shape, manner, or form on your own.

Do not communicate about this case and the people involved in it or the issues by any means whatsoever with anyone, at all, or look for or receive any information whatsoever about this case, other than the evidence you receive in this courtroom and the law as I will instruct you until you have completed your duty. Do not talk among yourselves about this case or the people or issues involved in it until I send you to the room for

your deliberations.

Do not talk with or otherwise communicate with any of the parties, lawyers, witnesses, or anyone involved in this case, even if it is just to pass the time of day or exchange pleasantries. Do not communicate with anyone, at all, including your family members, friends, neighbors, or acquaintances. Do not use any means whatsoever to do any research or instruction with any electronic devices or electronic media. Do not share any of your thoughts or opinions or views or impressions about this case until your service on this jury has been completed.

Mr. Tucker, you may take the jury out.

MR. BAILIFF: All rise.

(Wherein, the jury left the courtroom at 4:30 p.m.)

JUDGE SCOTT: Mr. Lisle, I believe these documents are yours. Be seated, please. Those yours?

MR. LISLE: Yes, sir.

JUDGE SCOTT: Okay. Counsel, you're welcome to leave your materials here in the courtroom. Mr. Tucker will secure it this evening. If you prefer to leave your materials on the counsel table in my

office, you're welcome to do that or if you want to take them home, you can do that. Before you leave tonight, I want both of you, each of you, all of you to get with Ms. Olenberger and make certain we have all of our exhibits stacked up, and in place, and know what they are and where they are. We will commence in the morning at 8:30, Mr. Keever, with your next witness.

Is there anything else we need to tend to, Mr. Keever?

MR. KEEVER: Your Honor, I have some documents and testimony to proffer on Dr. Elkins regarding the licensing issue. Would this be a good time to do that?

JUDGE SCOTT: Not 'til I've left the bench, but then it would be. Anything else?

MR. KEEVER: No. That's -- that's it.

JUDGE SCOTT: All right. Mr. Lisle, is there anything we need to take up?

MR. LISLE: No, sir.

JUDGE SCOTT: All right. You may proceed, Mr. Keever. Thereafter, we'll be in recess 'til 8:30 in the morning.

MR. KEEVER: Thank you.

MS. REPORTER: All rise.

(Wherein, the proceedings recessed at 4:32 p.m.)

(Wherein, the following proceedings were held outside the presence of the Court.)

MR. KEEVER: Dr. Elkins, would you take the stand, pretty please? Yeah. I'm going --

MR. LISLE: No.

MR. KEEVER: -- to proffer --

DR. ELKINS: You're crazy.

MR. KEEVER: Oh, no. I wanted to proffer -- I wanted to proffer his --

MR. LISLE: No. Not without the Judge here.

MR. KEEVER: -- his testimony.

DR. ELKINS: Good luck.

MR. LISLE: You can just --

MR. KEEVER: He didn't --

MR. LISLE: You proffer it just by telling what you think it would've been.

MR. SWINDLE: No, you don't. That's not the way it works, Lisle.

DR. ELKINS: You're not getting me to get up there.

MR. SWINDLE: All right. Let's go get the Judge.

(Wherein, Mr. Swindle left the courtroom.)

DR. ELKINS: Are you recording all this?

MR. LISLE: This is not the way it works.

MR. KEEVER: Yeah. Not until -- let's -- let's get the Judge.

DR. ELKINS: Sorry.

(Wherein, Judge Scott and Mr. Swindle entered the courtroom.)

MR. SWINDLE: Sorry about that.

JUDGE SCOTT: So am I.

MS. REPORTER: All rise.

JUDGE SCOTT: What is it?

MR. KEEVER: I had -- I had wanted to proffer by asking the defendant some questions and then proffer the documents as exhibits.

JUDGE SCOTT: You can make an argument. That's it.

MR. KEEVER: Okay. Thank you.

(Wherein, Judge Scott left the courtroom.)

MR. KEEVER: Okay.

DR. ELKINS: Make your argument.

MR. KEEVER: Don't get up there.

DR. ELKINS: I'm not going to.

MR. KEEVER: Plaintiff have been instructed by order not to inquire into the status of the licensing of the ambulatory surgery center of Dr.

Elkins. I had planned to ask Dr. Elkins at the time of trial the following questions. Is your ambulatory surgery center licensed by the Arkansas Department of Health? Was it licensed at the time you did Sue's surgery? Has it ever been licensed by the State of Arkansas?

MR. SWINDLE: Can he just give you that list? Would that be easier for you?

MR. KEEVER: It's not going to take long, Therese. And I had planned to proffer documents that would show that there are Arkansas Department of Health rules and regulations that establish the definition of an ambulatory surgery center and establish that if the facility falls under that definition that it is required to be licensed.

And the definition is contained in -- will it be Proffer No. 1, Proffer Exhibit No. 1? It will be contained in Proffer Elkins Testimony Exhibit No. 1, the Rules and Regulations for Hospitals, Related Institutions in Arkansas, Arkansas Department of Health.

And in the definitional section, it says, an "Outpatient Surgery Center (Ambulatory Surgery Center) means any facility in which surgical services, other than minor dental surgery, are

offered which require the use of general or intravenous anesthetics and/or render the patient incapable of taking actions for self-preservation under emergency conditions without assistance from others, and where, in the opinion of the attending physician, hospitalization is not necessary."

It has been established by Responses to Request for Admission in the record that Dr. Elkins surgery center is not and has never been licensed. I also planned to ask the defendant whether he had ever been under an order by the Arkansas Medical Board to have a license. And I would proffer Exhibit No. -- Plaintiff's Proffer Exhibit No. 2, a Consent Order that states under section 3(D): (as read) "James Elkins, M.D. will refrain from performing any surgical procedures unless they're performed in a hospital or outpatient surgery center licensed or approved by the Arkansas Department of Health pending further Orders from the Board."

And I would have asked Dr. Elkins has there been a subsequent order that addresses where you may do surgery? And I expect that the answer will be the only subsequent order, which is in the record from Mr. Lisle's response to our Motion in

Limine, there is an order that he is no longer required to be monitored by a physician. That completes my proffer and I have two exhibits with this proffer. Thank you.

(Wherein, Plaintiff's Proffered Exhibits 1 and 2 were proffered.)

(Wherein, the proffer concluded.)

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 12th, 2013, at 8:29 a.m.

APPEARANCES

MR. JAMES E. KEEVER, M.D., J.D. — FOR THE PLAINTIFF
Attorney at Law
2801 Richmond Road, # 57
Texarkana, Texas 75503
(903) 793-5316

and

MR. KEN SWINDLE
Attorney at Law
619 West Persimmon Street
Rogers, Arkansas 72756
(479) 621-0120

MR. STEPHEN LISLE — FOR THE DEFENDANTS
Lisle, Rutledge Attorneys
1458 Plaza Place
Springdale, Arkansas 72766
(479) 750-4444

MR. BAILIFF: All rise. Benton County Circuit Court is now in session, the Honorable John R. Scott presiding.

JUDGE SCOTT: Be seated, please. Mr. Keever, you ready for the jury to come in?

MR. KEEVER: I'm ready, Your Honor.

JUDGE SCOTT: Mr. Lisle, you ready for the jury to come in?

MR. LISLE: Yes, sir. I am.

JUDGE SCOTT: Mr. Tucker, bring the jury in please.

MR. BAILIFF: All rise.

(Wherein, the jury entered the courtroom at 8:30 a.m.)

JUDGE SCOTT: Be seated please. Good morning, ladies and gentlemen, you ready to go to work?

JURORS: Yes. Uh-huh. Yes, sir.

JUDGE SCOTT: Good. Mr. Keever, call your first witness.

MR. KEEVER: Thank you. May it please the Court, ladies and gentlemen, the plaintiff will call Dr. Kris Shewmake.

JUDGE SCOTT: Dr. Shewmake, come up to the witness stand. The bailiff will show you where it is.

MR. BAILIFF: Remain standing and raise your right hand, please.

(Wherein, the witness was sworn.)

MR. BAILIFF: Thank you. Have a seat. Sit close and speak clearly into the microphone, please.

DR. SHEWMAKE: Thank you.

JUDGE SCOTT: You may proceed, Mr. Keever.

MR. KEEVER: Thank you, Your Honor.

KRIS SHEWMAKE, having been called upon to testify on behalf of the plaintiff, testified as follows, to wit:

DIRECT EXAMINATION

BY MR. KEEVER:

Q. Would you give your name for the court reporter, please?

A. Kris Shewmake.

Q. And what's your profession?

A. Plastic surgery.

Q. Thank you. Dr. Shewmake, would you just introduce yourself to the jurors?

A. I'm Kris Shewmake. Yes.

Q. Well, tell them a little bit, like your -- your age and where you live.

A. Okay. I'm 57. I live in Little Rock, Arkansas, practice there; grew up in Pine Bluff, practiced there for 20 years after my training.

Q. Thank you. Would you tell the jurors a little bit about your training as a plastic surgeon, sir?
A. Uh-huh. In the -- in -- back in the days when I trained, you had to complete a -- another residency first. So I did five years of general surgery training, followed by two years of plastic surgery training. And then I did an extra year of birth deformity training at UCLA for facial birth deformities in kids.

MR. KEEVER: May I approach the witness, Your Honor?

JUDGE SCOTT: Yes, you may.

Q. (Mr. Keever continued.) Dr. Shewmake, would you identify this document, please?
A. This is my Curriculum Vitae.
Q. And it's what doctors call a -- it's a resume?
A. Resume. Uh-huh.

MR. KEEVER: I -- I have it marked as Exhibit No. 25 and I would ask that it be admitted as Exhibit 25.

JUDGE SCOTT: Any objections, Mr. Lisle?

MR. LISLE: No, sir. No objection.

JUDGE SCOTT: Plaintiff's 25 will be admitted without objection.

(Wherein, Plaintiff's Exhibit 25 was admitted into evidence.)

MR. KEEVER: Thank you, Your Honor.

Q. (Mr. Keever continued.) Now, Doctor, what's the difference between a plastic surgeon and a cosmetic surgeon?

A. Well, I think the main difference is plastic surgeons do cosmetic surgery, but there are a lot of people who do cosmetic surgery who are not plastic surgeons, based on training. There are a lot of paths to get to do cosmetic surgery. The residency that I discussed earlier with you was -- was one, five years of general surgery, two years of plastics. There are other ways to do cosmetic surgery that are not necessarily approved or accredited. But anyone can go out and take a course or multiple courses on weekends and call themselves a cosmetic surgeon.

State and Medical Board has no problem with that. But, you know, there -- there are accrediting bodies of medicine that sort of look at training that -- that will give you what's called board certification. There's board certification in obstetrics-gynecology. There's board certification in -- in general surgery, plastic surgery, and a lot of different things. There's no board -- board certification in cosmetic surgery.

Q. And you may've mentioned this, but what are your board certifications?

A. Board certified by the American Board of Plastic Surgery, which is the only one really recognized by the

governing bodies of medicine, American -- American board system.

Q. Thank you. Now, would you just kind of give us a bullet-point-type of presentation to explain to the jurors what your practice has been since you finished your fellowship trainings in -- what year was that?

A. 1992.

Q. Okay.

A. I came back to Arkansas to try to start a division of plastic surgery at the University of Arkansas Medical Science's campus. There's not one here. So joined faculty as chief of the Division of Plastic Surgery, worked at -- between the University Hospital doing reconstructive surgery, and then also ran the birth deformities clinic at Children's Hospital for about 10 years. When it became clear that -- my -- my goal was to start a training program in plastic surgery here, 'cause we're one of the few states that doesn't have one.

When it became clear that that was not high priority for the University, I was wanting to move back to Dallas to join the place that I trained. So I -- I was asked to come back there, but my wife loves Little Rock and didn't want to leave Arkansas. Her family's here, so we stayed. So I went into private practice at that point. After about seven years, I guess of being back private practice, and I've been in

private practice ever since.

So my actual practice, what I do has changed from doing primarily reconstructive surgery, head and neck cancer reconstruction, breast reconstruction, and pediatric birth deformities, to now as I'm older and get tired easier, I -- I do pretty much all cosmetic surgery now except when I'm on -- doing mission work where I still do birth deformity stuff.

Q. Doctor, what special training and experience have you had in treating burns or burn scars?

A. Well, during the five years of general surgery, I spent six months doing burn research, and then also spent six months in the burn unit at Arkansas Children's Hospital. That was during the five years that I was training in general surgery. And then in plastic surgery, I trained at Parkland Hospital, in Dallas, which is a huge -- huge national burn referral center. And we did all the burn management reconstruction. Not the acute burn resuscitation where someone would come in from a house fire, but all the reconstruction and all the scar management for that two years.

And then when I came back, I did a lot of -- came back to Little Rock at Children's and the University, did a lot of burn reconstruction.

Q. What's your familiarity with the various communities in Arkansas and -- and the standard of care or the -- the

practice of cosmetic surgery around the State of Arkansas?
A. Well, I think I'm very familiar with the practice of cosmetic surgery around Arkansas. We have a -- a meeting in Little Rock of plastic surgeons every year where a lot of -- of the doctors from Northwest Arkansas will come to. We present cases, we -- we review literature, we -- we -- you know, I get to find out what they're doing, they get to find out what we're doing. And it's a nice interchange of -- of information.

I have many friends who practice in Northwest Arkansas. I just purchased some land up in -- in this area and plan to retire up here. So I have a lot of friends who -- who, you know, I want to stay in touch with up here who are plastic surgeons and -- and dermatologists.

The -- Rob Lewis is an oral maxillofacial surgeon here in town. And he and I go on mission trips together. And he allowed me to use his office up here for about a year, year and a half, to see patients in. So I would come up once a -- once a month and see patients in his office, operated in his surgery center, doing cosmetic surgery up here. I did that for about a year and a half, probably three or four years ago. And it just got to be logistically too hard to follow up on those patients adequately. So I quit doing that, but also worked at the Heber Springs Hospital doing cancer reconstruction for about two years.

So I'm familiar with pretty much all parts of, at least North -- Northern Arkansas.

Q. You mentioned mission surgery. Can you just very briefly tell us about that?

A. Well, I started doing mission surgery when I was a resident in -- in Dallas. There was a active mission team and then went with my church for about five years. And then sort of -- I started a -- I was one of three guys, Rob Lewis, another oral surgeon, who started going to Honduras and teaching at the medical center there. It's a very poor, poor country and the medical school there has just one plastic surgeon and a lot of plastic surgery patients. And so we'd go down there and try to teach the residents how to do the things that we do, sort of like going back in time.

MR. KEEVER: Your Honor, may I publish Exhibit No. 25 to the jury?

JUDGE SCOTT: Yes, sir, you may.

Q. (Mr. Keever continued.) Dr. Shewmake, you've agreed to come and give medical opinions in this case on behalf of Sue Poff. How many times have you testified in medical negligence cases?

A. From the -- from the witness stand, probably three or four in twenty years.

Q. And of those three or four, how many were you called on behalf of the injured patient and how many on behalf of the

doctor?
A. Yeah. All -- all but one on behalf of the injured patient.
Q. On behalf of the injured patient or the doctor?
A. Or the doctor. Sorry. Yeah.
Q. Thank you, sir. So it would be -- if it -- if it was four, it would be three with the doctor and one with the injured patient?
A. Right. That's why I went to medical school and not law school.
Q. Plus this one.
A. Yeah. Right. Plus this one.
Q. I'll try not have you do any more math in public.
A. Thank you.
Q. Would you just briefly tell the jurors what I asked you to do in this case?
A. First, you asked me to just look at the records and see if I felt like there was any deviation of the standard of care, and gave me a massive volume of records to look at to do that. And so I -- I looked at those records and decided that I felt like there was.
Q. And why did you decide to take your time to drive up here to Northwest Arkansas to testify?
A. Well, I feel like we -- you know, it's -- it's partly our duty to help protect patients, as well as others. And

that's part of the oath that we take, whether it's in the operating room or whether it's here. I felt like that the care that was given was well beyond the standard of care in any community that I'm aware of. I understand that there's no malpractice insurance here, so it's -- it's hard to get -- it's hard for patients to be represented.

MR. LISLE: Your Honor?

JUDGE SCOTT: Yes, sir?

MR. LISLE: We move to strike that testimony.

JUDGE SCOTT: Ladies and gentlemen, you will disregard that last statement and pay it no mind. Ask your next question, Mr. Keever.

MR. KEEVER: Thank you, sir.

Q. (Mr. Keever continued.) Now, Dr. Shewmake, in a minute, or so, I'm going to get to specific questions on the standard of care, but first can we just talk a little bit about lasers?

A. Uh-huh.

Q. Do you use a cosmetic laser in your practice?

A. Yes, several.

Q. Several? There are different kinds of lasers?

A. A lot of different kinds of lasers.

Q. Tell us about that briefly.

A. The medical lasers or all kinds of lasers?

Q. Your lasers, and if that will help understand --

A. Okay.

Q. -- the difference between lasers.

A. Okay. Well, what lasers are used for, of course, a variety of reasons, but in the medical field, they're used to remove everything from vascular tumors in kids to cosmetic resurfacing of the skin to make it look younger or -- or less sun damaged or less red, whatever. Lasers basically are just a tool to deliver energy to the -- the tissue and to either destroy that tissue or change -- change the pigment in that tissue. So and -- and there are many, many types of lasers. The wavelength of that laser sort of determines what it targets.

So for skin resurfacing, for example, the wavelengths will target water. So you -- you can -- you can beam a laser beam into -- into the skin and anything has water in it, that water will absorb the energy and -- and vaporize. If it's pigment -- if it's red -- red blood cells, like it's a vascular tumor in a child, it's a specific laser that -- that the red blood cells absorb the energy. So it doesn't hurt the -- the skin, at all. You can go right through the skin, but it's the red blood cells that absorb that energy. And so laser -- lasers are tapered -- are -- are designed to -- to hit specific targets in -- in the body, whether it's a tumor, whether it's a blood vessel, whether it's pigment, whether it's cancer. You know, whatever it is.

And so depending on what we're trying to accomplish with that, well, that -- that determines what type of laser we use and -- and what settings we use.

Q. And what lasers do you have in your office and do you kind of use, if -- if that won't be too technical?

A. Oh. We have a -- we have a hair removal laser. A lot of ladies don't like to shave under their arms and so we have a -- a laser hair removal machine that targets the pigment in the hair follicle, the dark pigment in the hair follicle. And anything dark is -- absorbs the energy and it destroys it. I have several different other -- other types of lasers, but what we use primarily is a -- what's called a fractional CO2 laser, which is very similar to the SmartXide Laser that we're dealing with here. And it does things like gets rid of sun damage, gets rid of premalignant problems on the skin.

Sometimes we'll -- we'll address blood vessels. Sort of causes the skin to sort of fall off so that new skin, healthy skin, will grow under it, just depending on what you're trying to accomplish with that.

Q. This -- this laser pointer, which came on last night and isn't coming on now. You have a laser pointer right up there.

A. Uh-huh.

Q. Just to compare what this does -- how -- what's the power of -- of that laser pointer?

A. Well, let's see. Okay. Output less than five milliwatts.

Q. How does the power of that -- and -- and just, you know, hit it up on the screen there. That works. Yours works better than mine.

MR. KEEVER: Thanks, Mr. Tucker.

Q. (Mr. Keever continued.) How does the power of that, for instance, compare to the power of the laser that the defendant, with the settings he used, the -- the defendant used on Sue?

A. Oh, it's -- it's -- you know, medical lasers are much more powerful, of course, than this. It's probably 500 times stronger than this.

Q. Well, are there a thousand milliwatts in a watt?

A. Yes.

Q. And he used 25 watts?

A. Yes.

Q. So --

A. So 25,000.

Q. Yeah.

A. Yeah.

Q. Okay. So -- thank you, very much. Would you look right in front of you, Doctor? And there's two documents marked Exhibit 1 and Exhibit 2. And you've got the Exhibit 1 pulled out. Have you reviewed that document?

A. Yes.

MR. KEEVER: Could I have that first slide --

A. Yes, sir.

MR. KEEVER: -- Mr. Swindle? You're probably going to have to go to slides -- may I just take a second, Your Honor?

JUDGE SCOTT: Yes.

MR. KEEVER: Or, Mr. Tucker, would you help Mr. Swindle get us -- get us moving along? There you go, from the beginning. Now, the second slide. Thank you very much.

Q. (Mr. Keever continued.) And this is just the -- the face sheet of -- of the manual. What kind of information do you have in -- in that manual?

A. This is typically what you get when you take a course on lasers. Which is -- you know, if you buy a new laser, they'll send you to a course or you can pay for a course. You usually travel somewhere to do that. There are people from all over the country that go to these courses. And this is probably a copy of what was given with the SmartXide Laser.

Q. Okay. And so that would be like the owner's manual that would come when you rent or buy the laser?

A. Well, not really the owner's manual, be -- because that -- that would be more about the machine, but this is probably

the --
Q. Clin --
A. -- technical reference. You know, how do you -- how do you -- how do you choose settings? How do you -- how do you treat the in -- the wounds afterwards, various settings for various types of purposes that you might use that laser for.
Q. Clinical User Manual, I think, is the title.
A. Right.
Q. All right. Now, is there a scientific way to calculate the energy for various settings in this particular laser?
A. There are scientific-based, yes, that the physicists use to design these lasers and that -- and that get sent to the FDA to get approved, for these lasers to be approved by the FDA.
Q. And if you go to page 18, there's kind of an exotic formula there. Would you -- do -- do --
A. Okay.
Q. Do doctors use that formula and calculate the energy every time they treat a patient?
A. No.
Q. Okay.
A. No. I don't. I don't know of anybody that does.
Q. How does -- how does the Smart -- I think you said that your Fraxel Laser was similar to the SmartXide Laser?
A. Very similar.

Q. And how many years have you used lasers in your practice?
A. Well, I started in my residency in '89 -- '89, and I've used them since.
Q. And what kind --
A. So 25 years.
Q. Oh. I'm sorry. I didn't mean to over talk you.
A. That's okay.
Q. So how long have you been using -- how long have -- have the -- the kinds of lasers, these Fraxel CO2 lasers, Fraxel CO2 lasers that send the little beams --
A. Uh-huh.
Q. -- how long have they been around?
A. Fraxel is a brand, the brand that I use. And it was the first -- one of the first fractional lasers that was put out, probably about eight years ago, nine years ago. It's been out the longest probably of any of these lasers.
Q. I'm going to -- the next slide is a picture from Exhibit 1. And can you use this illustration to kind of describe how this -- how this thing works?
A. Well, the -- the -- I think it's important to know what the difference between a fractional laser and a normal earlier-generation resurfacing laser was to -- to really understand what this does. In the early days of laser, back when I first trained, the laser would go in and just

basically vaporize everything from the top layer, down. And -- and how strong you dialed in that -- those laser powers would determine how deep it goes. Sort of like peeling the skin off an onion. You could decide how -- how many layers of skin you wanted to remove.

So everything -- so this is the -- you know, the outer layer of skin, epidermis. This is sort of the dermis -- or the next layer of skin. This is all what's called subcutaneous fat, which is yellow in real life, as well. And how deep you -- or how strong you turn that -- that laser up, would determine how deep this went. And so depending on how -- what you were trying to accomplish with it would determine how deep you go with that. The problem was, with those lasers, is that it took all the skin off. It was like the worst bad skinned knee, and it took a long time for that to heal.

And if that was on your face or neck or chest or whatever, you know, it would just take forever for that to heal. So Fraxel, the -- the company, came up with a way to do this in -- in small fractions. So that there was not the down time or the pain that would -- that was associated with it. So they would fractionate this laser. So you'd -- instead of one treatment where you took it all down, you would do treatments like this where you're just taking a small fraction of the skin out at any one time, but you'd

have to do it four or five times depending on what you're trying to accomplish.

So in here you can see that -- that wherever that laser beam hits it creates a -- just a vaporized area similar to what you'd get with that first generation laser where it would take it all down, but it was only in spots. And so you'd have -- you'd have the damage that was done here and then you'd have this normal tissue around it that could then promote healing.

So you'd get what's called side-to-side healing, rather than sort of bottom-up healing. And so you could do this laser in -- on a face, for example, and you might have two or three days' worth of down time where it would be red and irritated because you've left -- if you've taken, sort of, a fifth of all the skin off, but it's in small spots, you've left four-fifths of the skin to -- to heal normally. And so you don't really see the down time as opposed to looking like you've been, you know, drug behind a car for three weeks.

And then you come back in about three weeks later and you hit it again, once this is healed, and then you've taken a second fifth of the skin out. And you come back about three weeks later, hit it again, and you take out maybe about three fifths of it out, four fifths. And then ultimately after four or five treatments, depending on what you're going after -- acne scars take more -- take longer treatments

'cause they're deeper -- you've resurfaced the entire skin, but you haven't had the down time associated with -- with just taking it all off at once.

So that would be like taking a -- instead of peeling the layers off an onion, taking a little pin sticking in the onion, you wouldn't really look at it -- you couldn't really look at it and tell that you've even done anything because it's microscopic. But after four or five treatments you've accomplished the same thing with very little down time, very little risk, very little risk of scarring and such.

So fractional laser -- the -- the down side of laser resurfacing is always the healing time. Patients would have to take three or four weeks off work. You know, and then it was a long drawn-out healing process, a lot of lotions and potions that they'd have to put on their face; whereas, with this, two or three days later, they can go back to work. But yet -- but it's more -- more treatments. So, you know, there's good sides and bad sides to it. But -- so it's really revolutionized laser resurfacing and made it a much more tolerable procedure for most patients.

Q. Thank you. Doctor, have you reviewed various pictures of Sue in your preparation for your testimony?

A. I -- I have.

Q. And did you rely upon those pictures to form your opinions?

A. Yes.
Q. I'm just going to ask you to identify, just by date, and then simply a statement as to whether or not these were pictures upon which you relied for your testimony, sir. And just read out the number on the upper left and the date and tell us whether you relied upon it, if you would, sir?
A. This is -- this is Plaintiff's Exhibit 3.
Q. Uh-huh.
A. And the date is 1/22/09.
Q. Uh-huh.
A. I guess that's the date of her treatment.
Q. Uh-huh. Just -- yeah. Just flip through them one by one and just let us know the dates that are there and the number --
A. Okay.
Q. -- and whether you relied upon it. You know, exhibit -- what's that --
A. This is a picture of -- Exhibit 4. This is a picture of Sue's chest, sun damage in her chest, 1/22/09.
Q. Relied upon?
A. Yes.
Q. Okay.
A. We going to show these?
Q. Not -- not until --
A. Okay.

Q. -- identified. No.
A. Okay. This is one day after surgery. This shows a picture of the patient with the -- having had the laser treatment with some sort of cream to soothe the -- ease the pain on her.
Q. That's Exhibit 7?
A. Sorry. I -- Exhibit 5.
Q. Five? Thank you, sir.
A. And I -- I did rely on that. This Exhibit 6 is from 2/18/09. You know, two weeks -- two and a half weeks after the treatment.
Q. Relied upon?
A. Yes. And this just shows a picture of her face as it's trying to heal from laser.
Q. Uh-huh.
A. Exhibit 7, 2/18/09, it's a picture of her chest after treatment, you know, three -- about three or -- three and a half weeks after treatment. This is showing some signs of scarring.
Q. Yes?
A. And I -- I did rely on that. Exhibit 26, there's no date on this. It looks like a pre-op picture --
Q. Is there a date on the back of the picture perhaps?
A. Oh. January 16, 2009.
Q. Have you seen that --

A. This was taken beforehand. Yes.
Q. Okay. And relied upon it?
A. Yes. Exhibit 27, 3/13/09. This is a picture of Sue's chest as it's trying to heal. Exhibit 28, June 1st, 2010. This is a picture of the side view of her face -- face long time after treatment. I did rely on those. Exhibit 29, April 9th, 2009, another picture of her chest.
Q. Yes, sir.
A. Exhibit 30, 6/1/2010, of -- another picture of her chest showing the scarring.

MR. KEEVER: Thank you, doctor. Your Honor, I would ask that what has been marked and identified Exhibits 26 through 30 be admitted into evidence.

JUDGE SCOTT: Any objections?

MR. LISLE: Your Honor, I haven't seen -- I don't think I've seen 26 through 30.

JUDGE SCOTT: Why don't you come up and look at it then?

MR. LISLE: No objection.

JUDGE SCOTT: Plaintiff's 26 through 30 will be admitted without objection.

MR. KEEVER: Thank you, Your Honor.

Q. (Mr. Keever continued.) Now, doctor, I just want to ask you, have you looked at various medical records in reviewing this -- for this case?

A. Yes. I have.
Q. And if you could, sir -- I'm just going to bring these medical records, and we'll do it as -- as quickly as expediently --
A. Okay.
Q. If you would, just see if -- call out the exhibit number, the name of the record, and if you reviewed it and relied upon it.
A. This is Exhibit 13. These look like medical records from the hospital in Heber Springs, Baptist Hospital in Heber Springs from an admission by Dr. Buffalo --
Q. Uh-huh.
A. -- to the hospital. I -- I have looked at those. Plaintiff's Exhibit 14, these are medical records from Jay Holland. He's a -- sort of a wound care specialist in Little Rock.
Q. Uh-huh.
A. This is Exhibit 15. This is from my partner in Little Rock -- used to be partner in Little Rock, David Bauer. And Exhibit 16, notes from Suzanne Yee. These are, 17, notes from Dr. Patel, medical records. Exhibit 31, from Dr. Buffalo again, and they look like -- these look like clinic notes, X-ray --
Q. Had you seen those before?
A. -- clinic notes, admission/discharge summary. Yes.

Plaintiff's Exhibit 32, and this is from Jay Burns, a plastic surgeon that I actually trained under in Dallas at Southwestern.

Q. And have you reviewed all of those records?

A. Yes.

Q. Was that all of them?

A. No one more.

Q. Okay.

A. Well, two more, Exhibit 33 is from McNair Eye Clinic. These are just -- look like office notes.

Q. And, Doctor, have you reviewed all of those records?

A. Yes.

Q. And did you rely upon those records in forming your opinion?

A. Yes.

MR. KEEVER: Your Honor, we would ask that Exhibits 13 through 17, 31, 32, and 33 be admitted into evidence at this time.

JUDGE SCOTT: Any objection, Mr. Lisle?

MR. LISLE: Yes, Your Honor, I do object to the wholesale publishing of all those documents to the jury because even though he may've relied on them, they contain -- contain hearsay statements and that none of those doctors are subject to cross-examination.

JUDGE SCOTT: Mr. Keever?

MR. KEEVER: All of these records have been disclosed to Mr. Lisle for a long time. And he had -- certainly had the opportunity to depose and cross-examine the doctors and find out about the records, Your Honor.

JUDGE SCOTT: The objections are sustained.

MR. KEEVER: Thank you.

Q. (Mr. Keever continued.) You might just want to put those in a stack to the side.

Now, how much of the defendant's chart on Sue did you review?

A. I -- everything relating to the treatments that were done, her overall health. There was a lot of gynecology stuff in there that I didn't really review, hormone -- results of hormone testing, things like that, I didn't spend a lot of time reviewing.

Q. Okay. Thank you. Now, I'd like to ask you about what's called the standard of care in this case. Do you understand?

A. Uh-huh.

Q. Okay. And we -- we talked about your familiarity in Arkansas with the cosmetic surgery in Arkansas, so I won't go over that again. But did you furnish a detailed written report on your opinions in this case?

A. Yes.

Q. And have you got a copy of that for reference to refer to if you need to?
A. Probably not, but if you have one, I could look at...
Q. I don't know.
A. Huh?
Q. Well --
A. I can find it.
Q. Yeah. It -- it might be -- it might be helpful. Well, maybe you won't need it, Doctor.
A. Okay.
Q. When -- when we talk about the standard of care, what does that mean to you when you're testifying to the standard of care?
A. Well, in -- in layman's terms, I think the standard of care is -- is the skill and knowledge that you bring as a physician, needs to be at a certain -- in treating patients, needs to be at a certain standard. And that standard should be the same as any other plastic surgeon or anyone who does cosmetic surgery in the community in which you practice.
Q. And that's -- and when you refer to the standard of care, you would be talking about that degree of training and skill that a --
A. Yes, sir. Yeah.
Q. -- cosmetic surgeon in good standard in Rogers possesses and uses?

A. Rogers or Bentonville or -- oh -- yeah.
Q. And would it require that it be used with reasonable care?
A. Yes, sir.
Q. Now, I can just go -- go through a lot of questions, 'cause you've covered it already. What are -- what -- what do you -- facilities do you need to do that fractional CO2 resurfacing laser on a patient? What's necessary?
A. Oh, you need clean -- you know, clean facilities, obviously. You're taking the skin off, and so it's subject to infection at any point. So you need clean instruments, clean facility. You know, really the facility that you need to do these procedures is -- is not so much related to the laser as it is to how much sedation or pain control you have to have to do it 'cause it hurts. This stuff hurts. So if it didn't require -- if you had a procedure or laser procedure that didn't require -- didn't -- didn't cause any pain, you could do it in here. You could do it in the -- you know, in the courtroom. But -- and many demonstrations are done in -- in areas just not much more sterile or clean than this.

But it really has to do with -- with how much you're going to sedate that patient and how much you're going to compromise their airway. Whenever you sedate someone with IV medications, especially heavy IV med -- medications, you

know, they can't -- they can't -- they're not responsible for their actions. They couldn't get up and -- you know, if the place caught on fire, they couldn't get up and take care of themselves and get out if they had to. So it -- it's that. It's -- it's also a lot of these medications, if you give a lot, can stop breathing. You've got a risk for -- and patients all react differently.

So, you know, if you give something to someone that's -- they're allergic to -- not -- you know, unknowingly that they're allergic to, can stop breathing and you've got to have resuscitative equipment there to potentially save their life. So it's more about the sedation than it is the -- the procedure, itself. Now, this -- because we're not talking about surgery, this is just outside stuff. So that's...

Q. Yeah. I think that's fine. Now, what does the standard of care require in terms of, you know, a really in-depth understanding of laser physics?

A. Oh, I don't think many doctors really understand -- except maybe Jay Burns, or the guys who publish on this stuff, really have an in-depth understanding it like physicists -- a laser physicist would. I know I don't.

Q. How about what does the standard of care require about being familiar with the published safe settings, recommendations, say, the manufacturer or --

A. Yeah.

Q. -- or from someone else who's studied the laser?
A. Well, I think in these cases, it's the manufacturer's burden of proof to -- to come up with setting -- setting recommendations that are well within the safety margin for these patients. That's what they do. They do research on these lasers. They -- they define these settings, these safe settings. They submit that -- that to the FDA. The FDA reviews it, reviews their studies. And they say, yes, we'll approve this laser for hyperpigmentation or for acne scarring or for redness or whatever it is, based on these settings, knowing that with experience, and depending on the patient, that you can vary these settings somewhat.

But this is sort of a -- what -- that's what they publish in these manuals and that's what they teach you in these manuals, is this is how -- you know, this is -- these are the settings that we -- we know are safe in most patients. Not that there's not exceptions, but in most patients if you use these settings, you're well -- well within a -- a wide safety margin.

Q. And would those settings that are in the manuals be appropriate for a cosmetic surgeon as he's just kind of starting out on his journey with the CO2 fractional laser?
A. Yes.
Q. What additional knowledge and experience, if any, would be required if a doctor wanted to deviate significantly above

the settings, in other words make -- make them significantly more --

A. Right.

Q. -- aggressive or harsh?

MR. LISLE: Your Honor, I'm going to object to this line of questioning. There hasn't been any foundation laid for his -- he's -- he's testifying about how he uses a CO2 laser. He hasn't testified as to a basis that would give him sort of an opinion to instruct other doctors in what they can and can't do.

JUDGE SCOTT: Overruled. Ask your question again, Mr. Keever.

MR. KEEVER: Thank you, Your Honor.

Q. (Mr. Keever continued.) If a doctor were going to decide to deviate significantly above the settings, you know, to harsher or more aggressive settings, what additional training and experience would be required to meet the standard of care?

A. Well, I think the -- once you've gained experience, like with anything, whether it's a -- operating a trackhoe or a bulldozer, once you've gained experience at something then you can start sort of pushing the envelope a little bit with regards to what you're trying to do. Once you get more comfortable with it. I think that only comes with

experience. It -- it comes with talking to other doctors about what they've -- maybe they've -- they've had more experience than you. You find out that, you know, they have increased the settings somewhat to get a better result or more -- more long-lasting result. Going to national meetings, participating in continuing medical education events where you're with 30 or 40 different doctors who are using this same laser from around the country, around the world to find out, you know, what -- what they're doing.

And so it's a -- it's not a -- it's a gradual process of getting more comfortable with what you're doing. And then also patient selection, I think is -- you know, you could take the same settings and -- and do ten patients and -- and get some that do great and some that -- that have a problem. You've got to learn how to select the right patients for these procedures because not everybody responds the same.

I had, you know, when I first started using the first generation lasers after my training, that was -- it was a laser called Coherent Laser. And it was very frustrating to me because the -- you know, I could do three patients the same day and same surgeon, same anesthesia, same laser, same barometric pressure, everything was the same, and I'd get one that would heal in -- in a week and I'd get one that would take three weeks to heal. That -- you know, I couldn't -- that's the problem with those first generation lasers, is

they were not very scientific and not very predictable results.

So it -- it really comes down, I think, to -- to, like anything life, experience, talking to others, trying to learn as much as you can about it before you start -- before you start -- you know, when you learn how to drive, you know, you don't -- you don't start out driving hundred miles an hour. You start out driving, you know, slow until you get comfortable with that car and then you drive faster.

Q. And, well, Dr. Shewmake, you said that when you start out with the first generation laser, it wasn't very scientific and the results were frustratingly inconsistent. How about with the fractional type lasers? How does the -- the science in terms of a specific setting for a patient and the predictability of results, how's that improved?

A. Well, I think with time -- you know, that was 25 years ago. And I think with time, the FDA has learned that, you know, they don't -- they don't trust any company that comes to them with some new gadget for making you look prettier. So the FDA has really cracked down a lot on regulations with regard to lasers. And so there's -- the burden of proof is really on the laser companies now to show that they are safe and predictable.

And so I think that -- like with any technology, I think it's much -- much safer now than it -- than it ever has been

with limitations. You know, there's certain lasers that you can -- you know, it's still up to us as far as how we set those lasers. But -- but I think that the science behind the settings that they submit to the FDA I think is pretty solid.

Q. Now, in addition to the medical records that we talked about -- you reviewed the medical records of the defendant on Sue?

A. Yes.

Q. And did -- and you reviewed the defendant's sworn testimony in his deposition?

A. Yes, sir.

Q. What is your understanding, from your review, as to what kind of training the defendant had, training and experience the defendant had before he did the procedure on Sue?

A. I think he -- he -- according to the records, he took the course that DEKA, the company, prescribed for him, which is what we all do. And that's a one-day course. There are physicians there who -- who -- I'm -- I'm assuming, you know, I wasn't at the course, but I -- I'm assuming there were physicians --

MR. LISLE: Your Honor, I'm going to object to him talking about the course if -- if he wasn't there.

JUDGE SCOTT: Sustained.

DR. SHEWMAKE: Well, I got --

JUDGE SCOTT: Next next question, Mr. Keever.

Q. (Mr. Keever continued.) Without talking about specifically what happened at that course --

A. Okay.

Q. I mean, the question was, what's your understanding of the training --

A. Yeah.

Q. -- from viewing his deposition and the material?

A. Yeah. Sorry. I -- I think there was a one-day course that he took. And then I think the rep, when they bring the machine to your office probably, you know, helps you with set up and things like that. I -- I -- the machine was rented, according to the records, three times before the day he did Sue. And I don't know how many patients were done on those times. But the -- the records say three or four, so that's, you know, 12 patients.

Q. How -- how does that rate, in terms of the experience of the defendant? How experienced --

A. I don't think 12 patients -- and -- and we're talking about the chest here. I don't know how many of those had their chest done, but I don't think 12 patients is -- is -- would be considered a lot of experience.

Q. And in your --

A. Or -- or even 20 patients.

Q. I'm sorry.

A. All right.
Q. I didn't mean to talk over you.
A. It's all right.
Q. In your practice and the experience -- your experience of the practice of other people who do laser resurfacing, what percentage of patients would have their chest done, as opposed to just their face?
A. I think a lot of people have their face done. I think it's -- it's -- it's the exception or very, very small percentage of people who get their neck and chest done because that area's such a high risk for problems with chem - - with -- with anything that you do, chemical peels, laser. The neck and chest are really considered, in our specialty, tiger country. You just want to stay away from that.
Q. How would you rate the experience of the defendant at the time he did Sue, in terms of having adequate learning and -- and -- and skill to safely disregard the company's settings --

MR. LISLE: Your Honor --

Q. (Mr. Keever continued.) -- or the settings in the manual?

MR. LISLE: Object to form. He already -- he's already put some facts into that question about --

JUDGE SCOTT: Sustained. Let's try again, Mr.

Keever.

Q. (Mr. Keever continued.) Okay. How experienced would a surgeon need to be or what kind of additional training would a surgeon need to have before you would think it would be proper to disregard and deviate above the settings in the manuals?

A. Well, I think it depends on how much you deviate. You know, I did about 50 patients before I ever, ever started changing the settings any. And -- and even then, it's a very gradual thing. You know, you may go up 10 percent or 15 percent from -- from the published settings. But, again, that's based on -- on experience and talking to others. And, you know, I don't want to be on the first -- the first one on the block to try something new when I've got a lot of friends around the country I can call and say have you tried this?

I -- I think -- I think the -- the thing about the -- the -- the range of -- of energy levels that you can use on the neck and chest is just -- again, whether -- any kind of resurfacing, whether it's chemical peels or laser resurfacing, you have to be so careful with. Now, the face, I think -- you'd think the face would be more, but the face has a lot of blood supply. You can do a lot of things to the face and it'll heal. But the neck and chest, we've learned over the years, is not very forgiving.

Now -- and what -- what -- so what I do is if I'm going

to deviate, I will start conservatively and see how they do. You can always bring them back for a second treatment if -- if you need to be more aggressive. But you start conservatively, see how they heal, that individual patient heals. And then if they heal okay, then you can maybe go up a little higher the next time. But I would never go 400 or 600 percent higher than the normal settings.

Q. What's -- what's kind of the most that you've ever gone above the normal settings?

A. I -- again, I haven't calculated it, but I -- you know, 10 or 15 percent. That's why I mentioned that earlier.

Q. That would be, like, a hundred and ten or a hundred and fifteen percent of the normal settings?

A. Normal settings.

Q. Okay. We've -- we've already been kind of been introduced to the -- the -- there's three different settings on this machine. Is that correct?

A. Uh-huh.

Q. What are those?

A. Well, there's the energy level, there's the depth, and then there's the -- how close these little dots are together.

Q. By "the depth," is that related to the timing?

A. It's how -- the dwell time, how long -- how long you leave that heat applied to that field determines how deep it goes, sort of like a drill.

Q. Dr. Shewmake, from your review of the records, what did the defendant, in your opinion -- what's your opinion as to what the defendant used as a basis for his settings on Sue? It wasn't very well phrased. May I rephrase that question, Doctor?

From your review of the materials, what's your opinion as to how the defendant arrived at the numbers that he used for the settings?

A. Well, I don't really know how he arrived at those numbers because it -- it says in the manuals to decrease the power by 20 or -- 25 or 30 percent. And what he used was much higher than that, actually went way up on that. So I -- I don't know how he came up with that. And I'm talking about dwell time, how long you leave it applied, the heat applied. I don't know how.

MR. KEEVER: May I approach the witness, Your Honor?

JUDGE SCOTT: Yes, you may.

Q. (Mr. Keever continued.) Would you identify what I've handed you and marked as Exhibit 34 and 35?

A. Well, Exhibit 34 is a -- sort of a schematic of a -- sort of what the effects of placing a hot object like a laser or, in this example, an iron on the skin.

Q. And is that something that you use in your explanation of how laser work -- lasers work when you talk to groups?

A. The -- the iron? Yes.
Q. And the second illustration?
A. Second illustration is a picture very similar to -- well -- 35 is a picture that would show what the effect of a thermal -- thermal injury to that same slide would be.
Q. And is that an illustration that you would rely upon to help a group better understand the effects of the laser?
A. Yes.

MR. KEEVER: Your Honor, I would ask Exhibits 34 and 35 be admitted.

JUDGE SCOTT: Any objections, Mr. Lisle?

MR. LISLE: No, sir. No objection.

JUDGE SCOTT: Plaintiff's 34 and 35 will be admitted without objection.

(Wherein, Plaintiff's Exhibits 34 and 35 were admitted into evidence.)

MR. KEEVER: Now, if we could have the next slide.

Q. (Mr. Keever continued.) And I believe the slide on the -- on the screen shows Exhibit 34. Did -- you've got your laser pointer, if you want it?
A. I got it.
Q. Could you use that to help ex -- explain this laser stuff to us?
A. Uh-huh. Well, there's a lot of variables here. But I

think the thing to know is that you can not only control how high you turn the heat on the iron up, you know, there's a dial on these irons that you go from a one to a ten or whatever the iron shows as to how hot it gets depending on what you're trying to iron. And this just shows that the longer you leave that iron -- you know, if you burn yourself on your arm with an iron, the longer you leave it on there, the worse the burn's going to be.

And so that's what it's trying to show here with this schematic diagram is -- is you place a hot object, the longer you leave it with time, going this way, the longer you leave it, the greater the depth of injury that can occur. If you have that iron set at one or two, then -- then these -- these injury zones are not nearly as deep. But if you have that iron set at seven, then it's going to be much, much deeper. But it really has to do with how long that heat is applied to the surface of the skin or the surface of the piece of material.

Q. Thank you, Doctor.

MR. KEEVER: Now, let's go to the next slide, Ken.

Q. (Mr. Keever continued.) This is just back to the same slide. So --

A. Okay.

Q. I think we've gone over that.

MR. KEEVER: Let's try the next slide, which I think should be Exhibit No. 5. Next slide. Oh. No. Go back. Go back to -- to there.

Q. (Mr. Keever continued.) This has Exhibit No. Thirty --

A. Five.

Q. -- five on the right. And can you use that to help -- help us understand this concept?

A. Yeah. I think what this basically shows is that there's a -- once you get down to where the thermal injury is so deep and so widespread --

Q. Thermal is burn injury?

A. Burn injury. Sorry. It affects -- you -- you know, the -- the way these things heal is by these blood vessels. And if there's blood supply to this area, then most of the time it'll heal. If you have blood supply, most of the time, in a healthy patient, it'll heal. But when you get down this deep where this -- where these blood vessels are, these -- this is called the subdermal plexus, critical blood vessels. When you get down that deep with that much damage, there's -- there's just no blood supply to that area.

So then it has to heal by scar and not by remodeling with new collagen and new elastin and all the things that we normally expect and want with healing. It's just -- it's just scar at that point because all the cells are dead that could bring -- bring about that healing.

Q. Thank you.

MR. KEEVER: Next slide, please, Mr. Swindle.

Q. (Mr. Keever continued.) And this is -- I think it's Exhibit No. 4. And this is one of the exhibits -- one of the pictures you relied upon?

A. Yes.

Q. And this is Sue just before the procedure. What can you tell about the condition of her chest?

A. Oh, I think this is typical for someone who at a young -- young age got a lot of sun exposure, spent a lot of time at the -- at the pool. What you see is a typical sort of this V -- V distribution of sun damage. You see the areas that were not exposed to the sun still look fine. But the -- but this -- this area sort of in the shadow of the chin tends to get a lot of sun. And what you see there is you see thinning of the skin, extreme thinning of the skin. You see a lot of just dilated blood vessels. And most of what you see here in this photograph, if you looked at it, would just be red capillary blood vessels. Put your finger on it, it would turn white, and it would turn immediately red again.

What you can't see on these photographs sometimes is -- is dark spots, the -- what we call hyperpigmentation, like big freckles that are also associated with -- with sun damage or sun exposure.

Q. What would be your goal for treatment of a patient like

this with a laser?

A. Well, goal is to make her -- to make that area look better. And, you know, there's really two components to that. There's the -- the red blood vessels, which usually bother -- usually bother patients the most. Then there's all the hyperpigmentation or the dark, dark brown spots there, which you can't really see on this picture, but they all have it. So you'll -- there would be two, one to get rid of the brown spots, and then try to thicken that skin a little bit with one type of laser and then to -- to try to address the red blood vessels.

Typically, we would use a different type of treatment for that than the -- the -- the fractional CO2 lasers don't do much for redness. They do a lot for pigment. They do a lot for texture. But they don't do really anything well for redness.

Now, if you -- if you can scar some of these blood vessels up and cause them to -- to just coagulate, then -- then that helps a little bit with the redness. But that's -- fractionated CO2 lasers like we're using don't really do -- they're not designed to treat redness. There are other lasers that do that much better or other treatments that do that much better.

MR. KEEVER: Could I have the next slide, Mr. Swindle?

Q. (Mr. Keever continued.) This is from the Clinical User Manual. And can you use this to help us understand what happened to...

A. Yeah. Well, we learned from chemical peels long ago and -- and from early use of laser that the face heals totally differently than the neck and chest do. Neck and chest, like I mentioned earlier, is just sort of no-man's land. You want to be extremely conservative there compared to the face, which is why in -- in -- on every manual that I've seen and in the manual that came with this laser, they even make a special point say that the neck area and the décolletage area, like the upper chest, skin is thinner, recommended decreased fluence or the power that's -- that results in that laser, as well as the dwell time or how long you leave that iron on there.

Q. And --

A. So you turn the settings down, the power -- the heat down. You turn the -- the dwell time down by 20 -- by 30 percent is what they recommend.

Q. Fluence means energy?

A. Energy. Uh-huh.

Q. Now, is this same -- this is from the Clinical User Manual. Is this same type of information or warning in the materials from the seminar?

A. Yes.

Q. This next picture is from the seminar materials. And did you review this?
A. Yes.
Q. "Suggested parameters"?
A. Yes.
Q. There's some sentences up there at the top, "Protocols" -- or -- "outlined above is for reference purposes only." Would -- would you agree with that?
A. Yes.
Q. Okay. And "Many variables exist which may dictate higher or lower settings or modification of treatment plan."
A. Yes.
Q. And "There is no substitute for peer to peer training and consultation."
A. Yes.
Q. Now, how -- how does that kind of a disclaimer play into a -- a particular doctor on a particular patient deciding to go above these suggested parameters?
A. Oh, I think there's -- there's a -- number one, it's a disclaimer. So if someone gets burned using these settings, then, you know -- but I think it just means that -- that this is a -- this is sort of starting point. And that as you gain experience and you talk to other doctors who are doing these procedures, go to conferences to -- to get consensus about, you know, the direction that they're going, and then you can

-- sort of gives you license to -- to increase or decrease the settings depending on your experience, your knowledge that you've gained.

Q. I'm sorry. Go ahead, sir.

A. But I think these -- but this is -- this is sort of a safety zone that they put you in to start with.

Q. And in your practice, if you have deviated above the safety zone set for your Fraxel Laser, again, how high have you deviated above that?

A. Oh, again, 10 or 15 percent. My -- my laser's a little bit different, different brand laser. It won't let you -- it won't let you get outside this envelope too much. It -- it -- the computer's just -- they're smarter than we are. You know, they just won't let you do it.

Q. And how many patients have you treated in your office, under your supervision, with the Fraxel Laser?

A. Probably 250.

Q. And how many before you ever deviated any above the suggested parameters?

A. Oh, I did the first 50 without deviating, at all. And -- and -- or significantly. What was the question, how long? How --

Q. How -- how many have you done before you --

A. Oh, I'd say 50, 60.

Q. Now, based upon what you gleaned from the records,

including looking at the pictures of Sue's chest, what would your feeling be would be the safe setting to treat on her chest?

A. Well, this is kind of a busy slide aspect, but -- but I think the -- what we're looking at is -- is pigment, you know, that -- the brown spots that I've talked to you about, and skin texture. Again, it doesn't say anything about redness on here. So we're looking at that brown pigment and trying to get that skin a little thicker. And so, for example, you know, the power setting on -- if you're just looking at both pigment and trying to help skin texture, would be about 25. Dwell time, or how long you leave that heat applied, basically, with pigment, it's not very long, 200. With skin texture, you leave it on about 400 microseconds.

And the spacing between those two, between all the dots in -- in microns, which is a real small measurement, 300 for pigment, 400 for skin texture.

Q. And down below, it says, "reduce dwell time by 25 %." How would that play into the --

A. Right.

Q. -- end the settings up above?

A. Right. For eyes and anything off the face, reduce dwell time by 20 -- 20 percent. So that would -- get me to do math again. So that would be, you know, by 20, 25 percent, that

would be down to 300 for skin texture and 300 for spacing.
Q. And then over on the -- the pigment, 200 down to 150?
A. 200 down to 150. Yeah.
Q. Now, Doctor, I'm just going to -- I'm just going to -- oh, no. I know what I want to do. I apologize.

MR. KEEVER: I apologize to the Court and the jury. Go to the next slide, please, Mr. Swindle.

Q. (Mr. Keever continued.) Doctor, do you recall these two sections of various pages out of the defendant's record?
A. Yes.
Q. And would you talk to us about what we're seeing here, what -- what you think?
A. Well, this is from two different sources. This is a chart that, I guess, his assistant used as he was doing the laser showing the settings he used on the -- you know, on -- on each area. The face, used a power -- power setting of 30 and a dwell time of 1800 milliseconds, which is good. Outer face, neck, 1600; chest, power was 25, but instead of 300, it's 1200. And the spacing was about 450, which is okay. But I think this is the number right here (indicating) that is well -- well above what was recommended.
Q. How about how did it compare to what was safe?
A. Well, it was -- you know, between -- depending on the calculation, four to six times what you consider safe.
Q. And down below is a progress note from the -- from the

defendant's own records. And there's another set of numbers down there.

A. Yeah. This was 13 days -- this is two weeks postop, a note that was dictated: "happy with results of her surgery." (As read) "Inflammatory reaction on the outside of her neck and chest." Basically her laser settings were 30 watts on the face, neck, and chest. Saying here it's 30 watts on the chest with a dwell -- a drill time -- but a dwell time of 2,000 on the mid face, 1800 on the outer face check and nest -- sorry -- neck and chest, and spacing of 450. So he's saying this was 1800 here instead of 1200, and then a spacing of 400 on the outer face, neck, and chest. Again, the spacing's okay. So here it's -- it's written down by the nurse as 1200 -- I assume she's a nurse -- 1200, and the dictated is 1800.

Q. Dr. Shewmake --

MR. KEEVER: Your Honor, may I show this, we did the other day with Dr. Elkins, to the jury?

JUDGE SCOTT: Yes.

Q. (Mr. Keever continued.) I've got kind of a summary here that we did yesterday. And can you see it from that angle, Doctor?

A. Yes, sir. Uh-huh.

Q. And above, I put down the -- the settings from the suggested parameters for texture with the time reduced from

400 to 300. And then we have these -- what we call Elkins 1 and Elkins 2 down here. I don't -- will your laser hit it at that angle?

A. I'm not -- yeah.

Q. Oh, good.

A. Yeah.

Q. How -- how does this help us understand what actually happened in this case?

A. Well, this just sort of simplifies what we're looking at up here. This is a recommended setting for the chest. 25 power, 300 dwell time, and 400 spacing. And this is from this chart up here he used 2500 -- I'm sorry 25 power rating, 1200 the dwell time, and 450 on the spacing. And then down in this note, three weeks -- two weeks later, he described the power setting as 30 and then dwell time is 1800 with 400. That should be 400 spacing. So either -- either way, you know, whether it was 1200 or -- or 1800, well above 300.

Q. Dr. Shewmake, with settings like he used, whether it's 1200 or 1800, what is your opinion as to the likelihood of Sue having some visible scarring as an end result?

A. Oh, I think there's a very high likelihood. In that area with those settings, very high likelihood.

Q. And what was the likelihood, in your opinion, of a -- well, let me just rephrase that.

Using those settings, either one of them, what would

your expectation be the recovery time would be from the procedure?
A. Well, you know, recovery time has a lot to do with the health of the patient, which I think in looking at the records, I don't think the patient was very healthy at that time. But -- but -- well, you know, assuming she didn't get -- well, when you say "recovery," do you mean recovery from the scarring or recovery from just the burn or what -- what --
Q. And I'll clarify that. When would a patient, in your opinion -- and -- and you can qualify it by a patient of Sue's health or a patient in topnotch health -- when would she be able to expect to, say, go back to work wearing normal clothing?
A. It's -- I think it's hard to say, you know, three or four or five weeks, hard to say.
Q. And what is your opinion as -- from the review of all your materials and Dr. Elkins' deposition, what is your opinion as whether or not the defendant knew or should've known the settings were likely to leave Sue with permanent scarring?
A. Oh, I -- I think he should've known at 600 percent or 400 percent, even of normal settings that -- that in that area, it was a high probability it wasn't going to heal well.
Q. And what is your opinion as to whether or not the

defendant knew or should've known that Sue's recovery time would be significantly more than the three or four days?

A. I think that's predictable. He should've known.

Q. You might need to step up. Up.

A. Should've known. Yeah. Very predictable.

Q. Thank you, Dr. Shewmake.

Dr. Shewmake, I would like to ask you about informed consent.

A. Okay.

Q. Do you understand?

A. Uh-huh.

Q. Thank you. Now, is informed consent necessary when a cosmetic surgeon's going to do a cosmetic laser on a patient?

A. Yes.

Q. And we talked about what your treatment goals would be. What's your understanding of what the defendant's treatment goals were for Sue's chest?

A. Well, I got that written down somewhere. But I -- I think that, you know, the hyperpigmentation he was trying to address; the texture of the skin he was trying to address; on the -- on the face it was some laxity, but not really so much on the chest. So I think -- I think hyperpigmentation, texture, things are in that chart.

Q. What kinds of information is required by -- well, I didn't phrase that very well.

What is the doctor required to give in terms of information to obtain informed consent on a procedure like this?

A. Well, I think you have to go over the -- you know, I try to go over the -- the benefits of what this can do for the patient, and also the risk of what would be the worst case scenario if things didn't go well.

Q. Well --

A. And you -- you bring that patient into the decision making process if you give them an accurate description of that. And -- and they -- you know, they -- 'cause there's a big part that they play in this, too, as far as their recovery and healing. That -- you know, it's risks; benefits; limitations, what it won't do, what it will do; what -- what are the worse-case scenarios that can happen.

Q. Now, specifically, in informed consent -- and I'm talking about the material that -- the information that a doctor's required to give. How about if the doctor -- and I apologize for blocking this. How about if the doctor's planning to use settings that are significantly above the safety range? What is required in the informed consent discussion?

A. Well, I think that needs to be, of course, included in the informed consent. I mean, if -- I think when you give informed consent, you -- you're giving it based on what would

be otherwise considered to be normal -- a -- a normal procedure. If it's liposuction, if it's skin resurfacing, no matter what it is, if you're going to go outside the normal limits of what your settings would be, I think that patient needs to know so they can participate in that decision. If they're willing -- if they're willing to risk that, then -- you know, you -- then it's still up to you to decide if you're going to do it or not. But it -- it need -- the patient needs to play a part in that.

Q. And how about, Doctor -- how about the -- the likelihood of scarring? What is required in terms of that for informed consent?

A. I tell every patient, even with normal settings, that there's a likelihood of scarring. But -- but that that -- you know, the higher the settings that you use, the more you push the envelope, especially on certain areas, I think the risk of scarring goes significantly higher.

Q. Is that required to be disclosed?

A. Yes. To get completed informed consent, yes.

Q. And then how about a discussion of the downtime?

A. Yeah. I think a patient would want to know what a reasonable downtime was going to be.

Q. Now, you talked about the worst scenario, the best scenario, kind of like hope for the best, prepare for the worst. How much do you -- how much is a doctor required to

be sure the patient understands about the worst case scenario?

A. Well, I -- I -- there's no law that requires it, but I think to -- to -- to fully inform that patient, the patient needs to know what the -- what's going -- what's -- when -- when can I go back to work? What's my downtime going to be? What's the -- what's the worst-case scenario, they need to know.

Q. Now, in -- in this particular case, we know what the settings are. What is your opinion as to what would've been required for information for Sue to understand in order for her give informed consent?

A. Well, I think if -- if you knew ahead of time you were going to use super high settings, well outside what's recommended by the company, that's something a patient should know.

Q. And -- and what should've she been informed about the likelihood of scarring?

A. And then -- that that significantly increases that patient's risk of scarring, significantly can increase their downtime, healing, et cetera. The -- the more power you put there, the -- and the longer you leave it, the greater the chances of all those things, bad things happening.

Q. Dr. Shewmake, in your experience as a plastic surgeon and talking with others in the field and so forth, what is

your opinion as to whether or not a reasonable patient would give consent if she were told that the settings were going to be 400 percent above -- above the safe settings --

MR. LISLE: Your Honor, I'm going to object to him speculating on what a patient would --

JUDGE SCOTT: Sustained. Next question, Mr. Keever.

Q. (Mr. Keever continued.) Doctor, I want to talk a little bit about the -- the drugs that Sue was given. Okay?

A. Okay.

Q. And I'm going to take this down because it may be blocking some of the juror's view from the -- from the board.

MR. KEEVER: Can we have the next slide, please?

Q. (Mr. Keever continued.) This is the summary of sedation that we looked at yesterday, and what Sue had. I want to talk about, first of all, the -- the top ones, the preoperative sedations. Is this correct, as far as you -- what you saw in the record?

A. Yes.

Q. What's Ativan?

A. Ativan is a drug that used for anxiety. It's an -- it's like Valium, in that it's an anti-anxiety drug. It's a -- it's a hypnotic drug. It causes sort of retrograde amnesia. After you take it, you can't really remember what's -- you

can't really remember what happened, which is sometimes they can still experience pain, but they don't remember it. And -- and it's a fairly strong, moderate to strong medication, especially if you hadn't been taking it before.

Q. What do you find if you Google Ativan and -- and date rape drugs?

MR. LISLE: I'm going to object to --

JUDGE SCOTT: Sustained.

MR. LISLE: -- Googling is a scientific --

JUDGE SCOTT: Next question, Mr. Keever.

Q. (Mr. Keever continued.) Okay. How is Ativan related to the drugs that are called date rape drugs?

MR. LISLE: Your Honor, same objection as what --

JUDGE SCOTT: Sustained.

MR. KEEVER: Okay.

JUDGE SCOTT: Next question, Mr. Keever.

Q. (Mr. Keever continued.) Now, when did Sue take her Ativan in terms of -- in relationship to when she signed the operative consent? Were you able to determine that?

A. I don't know exactly how long, but it was -- she took the Ativan before she signed her consent form.

Q. What's your opinion --

MR. LISLE: Your Honor, I object to the -- there's no foundation for that, either.

JUDGE SCOTT: Overruled. You may cross-examine the witness --

MR. LISLE: Okay.

JUDGE SCOTT: -- Mr. Lisle. Next question, Mr. Keever.

Q. (Mr. Keever continued.) And what is your opinion as to whether or not Sue was competent to sign her consent form on January 22nd, 2009?

A. I don't think you can sign -- legally, sign a consent form and have surgery after you've taken a -- a drug like that. I know in our accredited institution where I work, if a patient takes a Valium that morning before they come, they can't have surgery that day. They won't let them sign their consent form because it's considered -- they're not considered with it enough to understand the risk, benefits, limitations, all the things that they need to.

Q. Can you lean forward to the mic --

A. I'm sorry.

Q. -- where our court reporter can --

A. So in surgery centers where I've always ever worked, if you take a drug like that, Valium, Ativan, anything that alters your -- your sensorium, makes your judgment off, you can't legally sign a consent. They will cancel the case. And I've had patients that we've had cancel because of that, whenever they don't feel like that's -- they're capable of

giving an informed consent after taking a drug like this.

Q. You reviewed Sue's deposition as well as the defendant's deposition, sir?

A. Yes.

Q. And other thank a theoretical discussion of -- of what is supposed to be done in your surgery center or is done in your surgery center, what's your opinion as to whether or not Sue would've been able to read and understand the consent forms that she signed?

MR. LISLE: Your Honor, I'm going to object to that. He's asking him to pass --

JUDGE SCOTT: Sustained.

MR. LISLE: -- credibility determinations.

MR. KEEVER: I'm -- I'm asking about --

JUDGE SCOTT: Next question, Mr. Keever.

MR. KEEVER: -- the effects of the medication. Move on?

JUDGE SCOTT: Move on.

MR. KEEVER: Got it. Yes, sir.

Q. (Mr. Keever continued.) Doctor, you talked a little bit about the patient's physical and emotional -- or physical condition anyway. What was Sue's physical and emotional condition at the time that she underwent this procedure? Was that able to be determined from your review of the records?

A. Well, from -- from reviewing the deposition and the

medical records, I think Dr. Elkins felt like that she was under a lot of stress. It's written in his record under a lot of stress, had lost a lot of weight, had thinning hair, had thin skin. Does -- does not sound like a very healthy patient at the time that that was done by -- by the accounts in -- in these records. Any patient that's under a great deal of stress -- you know, stress decreases your immune system, can't heal well.

You have had a lot of weight loss or you -- no -- no fat under the skin, which is one of the things that was described, you know, that's not a very healthy patient. And when you're inducing a burn, basically, a controlled burn in someone, you know, that's a big stress to the body. So I think it -- it -- probably not a great candidate at that time for anything like this, and probably had an outcome on her -- on her healing.

Q. Had Sue been in -- in the pink of health, physically and emotionally, would the settings chosen by Dr. Elkins met the standard of care?

JUDGE SCOTT: Mr. Tucker?

MR. BAILIFF: Yes, sir.

JUDGE SCOTT: Go talk to that person who just came in the courtroom.

MR. BAILIFF: Okay.

A. I think the --

DR. SHEWMAKE: Judge, you want me to wait?

JUDGE SCOTT: Yes, sir.

MR. KEEVER: That's not a witness.

JUDGE SCOTT: Why don't you ask your question again, Mr. Keever.

MR. KEEVER: Yes, sir.

Q. (Mr. Keever continued.) Oh. If -- if sue had been in the pink of physical and emotional health, would the settings chosen by the defendant, either the 400 percent or 600 percent have met the standard of care?

A. No.

Q. If -- if she'd been in the pink of health, would her result have been less -- less bad for want of a better word?

A. I don't think there's any way to know that.

Q. How does that go -- you were talking about patient selection. How does that discussion on Sue's health go into patient selection and judgment?

A. Oh, I think patients -- patients who are in good health heal well. We -- we -- we all know that. Patients who are in poor health tend not to heal as well. There was another reference to liposuction on a friend of hers. He said that, you know, I'd be happy to do liposuction on her if -- assuming she's in good health. So I know that that's a consideration that we all make as doctors, is -- is she -- is she healthy enough to -- to withstand the operation that I'm

going to put her through or the procedure that I'm going to put her through.

So I think that has a bearing on -- patient -- patient selection has a bearing on everything, which is probably why some patients do well in certain settings and some patients don't.

Q. And as it applies to this particular case -- I'll withdraw that question. I think you've already answered it.

Dr. Shewmake, you reviewed Sue's medical records and relied upon them in forming your opinions on her subsequent treatment?

A. Yes.

Q. Now, the defendant's records, of course, are in evidence, and if you need to look at them, we can sure pull those up. But on 2/25, which would've been about a month after the surgery, the defendant says that he wrote a prescription for ultrasound. What was that for?

A. Ultrasound is a way to sort of break up scar tissue. It -- it can break up kidney stones if you've got a kidney stone. Ultrasound can -- can help break down scar tissue as it's forming. So it's a treatment. Superficial ultrasound can be a treatment for breaking up scars.

Q. Would ultrasound -- what would be the role of ultrasound in a patient who was healing as you wish after a -- a resurfacing procedure without scar tissue? What would

ultrasound do in that situation?
A. Well, I -- I don't think you would use ultrasound if -- if they didn't have scar tissue. If they were healing normally, you wouldn't use ultrasound.
Q. Okay.
A. You wouldn't need to.
Q. On March 10th, 2009, in the -- in the doctor's records, he talks about hyperbaric oxygen therapy. Could you determine who ordered that from the records?
A. Jay Holland, in Little Rock, ordered that hyperbaric oxygen treatment. He's a wound care specialist in Little Rock, internal medicine doctor who's -- sort of focuses on wound care. And hyperbaric oxygen is a powerful tool in -- in promoting healing and use it on brown recluse bites, use it on snake bites, any area where the blood supply to the tissue has had -- has been impacted negatively. Delivering more oxygen to that area can -- can -- you know, it's all about oxygen, not about blood supply, really, it's about oxygen. If you can force more oxygen into that tissues, then -- into those tissues, then typically heals much better.
Q. And in the May 19th note from the defendant, he talks about Sue will treat her areas with IPL. What's IPL?
A. IPL's an abbreviation for intense pulse light therapy. Not laser, but it -- it's very good for those dilated blood vessels on the chest if -- if -- if light is sort of at the

wave length that it affects red or blood -- blood cells. So that's what we use to get rid of red spots on the face, or people that have rosacea on their face, we use IPL. That's what we use to -- that's what I use primarily to get rid of this redness on the chest, not the brown stuff, but -- although it helps with brown stuff.

So probably she had some residual redness or just reaction of blood vessels from the -- all the trauma that had been done to her chest and she was trying to minimize the red -- sometimes when you have white scar tissue, and it's surrounded by red, it makes it stand out more. So if you can get rid of the redness, then it -- it makes the scar tissue look less noticeable.

MR. KEEVER: May I approach the witness, Your Honor?

JUDGE SCOTT: Yes, you may.

Q. (Mr. Keever continued.) Doctor, I'm going to give you what has been marked and admitted as Exhibit 24, Plaintiff's 24, the -- some records from a place called SkinStar Laser Spa. Have you reviewed those records?

A. Yes.

Q. And can you just kind of summarize from that -- well, first of all, from your review of the other records, were you able to determine how Sue was referred to SkinStar Laser?

A. You know, I -- I read that, but I can't remember how she

was referred to SkinStar either. Was it Dr. Patel?

MR. LISLE: Your Honor, I would ask that he not speculate.

JUDGE SCOTT: Sustained.

A. I don't know.

JUDGE SCOTT: Next question, Mr. Keever.

Q. (Mr. Keever continued.) Well, the -- the front sheet summarizes some fractional laser -- Fraxel Laser treatment and also some Genesis Laser treatments. Could you talk about those treatments in Sue's specific case and when they were done and what you think the effect was on Sue's healing?

A. Well, the first treatment that was done was probably three months after her initial treatment with Fraxel -- Fraxel Laser, which is the laser that I use the most. And two months later, I think she had a test dose at that point just to see how she was going to respond to it. Two months later or month and a half later, she had another Fraxel treatment. Month after that, six weeks after that, she had another Fraxel treatment. And then another month after that, she had another Fraxel treatment. But those repeated treatments are what I was talking about.

You -- you fractionate the energy so that you don't cause more damage. And Fraxel Laser is -- is a great way to break up scar tissue. It -- it -- we use it on acne scars. It's no different than a -- a scar is a scar is a scar. Burn

scars and acne scars are the same. And it's very effective. Matter of fact, it's one of the few lasers that's approved by the FDA for acne scarring. So I think it was an attempt to sort of soften these scars, keep them from getting worse, try to get some -- some -- you know, these scars tend to contract. And it's probably a way to relax those scars somewhat.

Q. And let's -- let's talk a little bit -- could you tell us a little bit more in depth about your specific training and experience in treating burn scars, first, sir?

A. Well, I mentioned that in my general surgery training -- you -- is that what you're talking about?

Q. Yes, sir. And -- and then up through your experience in your professional life --

A. Yeah.

Q. -- and your training.

A. Well, I've already mentioned that -- the formal training that I had in burn scars. But as a plastic surgeon, we see burn scars all the time. At Children's Hospital, I saw a lot of burn scars; I treated a lot of burn scars. In my private practice, I see a lot -- a lot of burn scars, as well. So there's -- there's all kind of modalities that we use to try to treat burn scars. They're very difficult to treat and they never end up looking normal. But you try to release the -- the tightness, wherever it is, and try to make them look

better. And you do that with a multitude of treatment options.

You know, one of the old sayings about things that are difficult to treat is that -- that -- you know, the more options there are to treat something, usually the harder it is to treat 'cause there's no one good option. And I think that's -- that's the same with burn scars. We use topical steroids. We use steroid injections. We use tat -- medical tattooing. We use Fraxel Laser. We use Genesis Laser to get rid of the redness around it. There's just a lot of things that you do try to minimize the appearance of it.

Q. Now, Dr. Shewmake, you looked at the pictures. We'll probably have them to show in a few minutes. But could you talk to us about the timeline that you expect for healing when we go from burn to kind of healed burn to early scar tissue to, you know, matured scar tissue to as healed as it'll get? What's that timeline in the usual patient?

A. Well, the burn scars we usually say that it takes about a year for -- for scars to sort of mature on their own. If you didn't do anything to them it takes about a year to -- for a scar to really go through its whole maturation process. The times when you would do something earlier than that is if it really bothered the patient, if it was causing a functional problem. If it's a burn scar to the face and it's got the eye pulled down, you know, you can't wait a year to -

- to address that. So there are -- there are exceptions to that rule. But -- but it depends on the patient, depends on -- you know, what -- what -- how much of an issue it is for the patient. If it's on an area of the body that patients don't, you know, care about, then we -- we try to give it a year before you would see what you'd do with it.

Q. In this case, what was the earliest time that Sue was seen at that SkinStar Laser?

A. About three months.

Q. And what -- and -- and from your review of the records, of course, and the pictures, how mature was Sue's scar on -- just on her -- talking on her chest now?

A. Well, it was three months mature. So -- you know, I don't know. I don't -- I guess I don't get the question.

Q. Well, from your review of the records, was that -- that treatment three months after the laser directed toward her chest, at all?

A. Well, it was on her neck, primarily. Yeah.

Q. So would that have had any effect, one way or the other, in terms of the final outcome on the chest?

A. No. Not if it wasn't treated, no.

Q. Okay. And when was the first Fraxel treatment at SkinStar that was directed toward her chest?

A. I'll look. That was treatment number two, and that was a -- looks like a test dose. That was -- I'm sorry. That

was nine -- 9/3/09.
Q. On -- on the very front, there's a summary sheet of the -- of the -- of the treatments that -- that the record from SkinStar. Does that help you on your chronology?
A. Well, it doesn't say the -- what area was treated. It just says the dates of -- well, the first treatment she had was 4/22/2009.
Q. And that would've been on the neck --
A. That was on the neck.
Q. -- not on the chest?
A. Looks like it -- so 6/1, I guess.
Q. Okay. Was that a treatment on the chest?
A. I'll look. Yes.
Q. Now, 6/1 is going to be -- you know, 1/22, so like two, three, four, five --
A. Four and a half.
Q. Four and a half months.
A. Uh-huh.
Q. What are your -- what are your comments about how appropriate it would be to use Fraxel on the chest for the scars that Sue had at four and a half?
A. Four and a half months?
Q. Yeah.
A. We -- we've Fraxeled burn scars all the time, or even earlier than that.

Q. And what is your opinion as to whether or not that particular laser treatment caused a problem in the sense of making Sue's eventual outcome worse? Did that cause problems?
A. Well, I think the pictures after that look better, actually, so I don't -- I don't think it caused anything worse to happen. She already had bad scars. I don't think it hurt anything. I think if -- if anything, it -- Sue thought it helped and so did the -- the pictures showed that it was better.
Q. And then the same question for the -- I believe there was another Fraxel in July and another Fraxel in August?
A. Yes.
Q. Would either of those treatments have done anything to make Sue's problem worse?
A. No.
Q. And then there's a -- a series of that Genesis Laser you talked about that's used to treat redness?
A. Uh-huh.
Q. What month's that?
A. September.
Q. September?
A. September of '09. Basically, all within the month of September, she had three treatments.
Q. And what's your opinion as to whether or not those

Genesis Laser treatments did anything to make Sue's condition worse?

A. That basically just treats redness. I -- I can't say that it would have any effect on the burn scars.

Q. Of all the treatments that you saw in reviewing Sue's records, what treatments, if any, did you see that Sue got that weren't recommended either by the defendant or one of her treating doctors?

A. None.

Q. Now, this next slide -- next slide is a picture that's already been admitted. I believe it's Exhibit 5, but it's admitted into evidence. And it's Sue one day after the laser. What can you tell about Sue's condition at this time?

A. Oh, I think that's typically how they would look one day after laser treatment. She's red. You know, she's got a, some sort of, you know, cream that cools things and helps -- helps with keeping it moist. But you can see that, though, where the laser stopped here. You know, anything that's red basically. Now, she had a phenol peel, a chemical peel of her lower eyelids. But -- but face, neck, and chest look about like they're supposed to look at 24 hours after. It's pretty scary.

Q. And can you tell from this how severe her burning is going to be and the outcome?

A. No.

Q. How about the next slide? Next slide is the February 18th, again this has already been admitted previously. We've seen it. About a month after the laser, Dr. Shewmake, what can you tell us about that?

A. Well, first of all, you can see, you know, this -- this SmartXide Laser has sort of a stamp. It's sort of this rectangular stamp. You can see everywhere the laser hit. It's harder to get good contact down here around the bones, especially when you're real thin. So it's only partially hit down there. But you can see everywhere that laser was fired all the way up. And, you know, this is just hyperpigmentation that you see many times at three or four weeks after laser treatment. That -- that typically goes away if it's just pigment. You know, photographs, it's hard to tell.

These, though, are not normal. And -- and these are early hypertrophic scars.

Q. Can you help us with the word "hypertrophic"?

A. I'm sorry. Yeah. Hyper -- hypertrophic scars is sort of an over-healing when you -- normally, when the skin -- when you have an injury, whether it's just an abrasion or a cut, the skin heals normally, the skin just sort of stops healing when it reaches its normal anatomy. In certain areas of the body -- and the chest is an area real prone to it, the body just doesn't cut off. And -- and so you get over-

healing. So you get -- it lays down much, much more tissue, collagen, just organized scar tissue. And it's called a hypertrophic scar, which means it's over-healed. And you see that many times after burns, especially in the chest.

Q. And the next -- the next slide. This is -- we've already looked at this once today. And -- and it says pictures were taken, but we've already established that they couldn't be located. So you've seen a month later and you saw a day later. What would Sue have looked like, in your opinion, at 13 days after her surgery?

MR. LISLE: Your Honor, I'm going to object. How -- how can he make an opinion what she looked like if he didn't see her?

JUDGE SCOTT: Sustained. Next question, Mr. Keever.

Q. (Mr. Keever continued.) Based upon your experience with similar laser patients and patients that had treatment and how they looked at two weeks versus a month, are you able to form a professional opinion as to what Sue's appearance would've been?

MR. LISLE: Your Honor, I'm going to object again because this witness already said he had three patients one day and they all healed different.

JUDGE SCOTT: Sustained.

Q. (Mr. Keever continued.) You see where it says she's happy with the results of her surgery?
A. Yes.
Q. What is your experience with patients who went on to look similar to that of --
MR. LISLE: Your Honor --
Q. (Mr. Keever continued.) Well, have you ever had a patient look like that at one month?
A. No.
Q. Okay. So -- okay. That's fine. Now, how about this next slide? Now, on 4/15, we don't have a picture of this time. But we do have that picture that was admitted of four 'oh nine.
MR. KEEVER: And I think it's on the next slide, Mr. Swindle.
Q. (Mr. Keever continued.) This is how her -- her chest looked like at four 'oh nine. Have you had any patients, not necessarily from laser treatments, but with similar type of scarring from either accidents or other treatments in your practice?
A. Yes.
Q. And how's their general attitude about how their outcome is?
MR. LISLE: Your Honor --
JUDGE SCOTT: Sustained. Next question, Mr.

Keever.

Q. (Mr. Keever continued.) Okay. Doctor, we've had an opportunity to see what's happened. And can you tell us about from Sue's present condition what she might expect in the future?

A. Well, I think these scars are permanent. They're not going to go away. The -- the -- the only thing that can really do is to try to make them better or camouflage them. They'll get softer with time. You know, they're not hard. You know, the -- the more time you get behind you, the softer they typically get. They will be very, very easily affected by the sun. If -- you know, there -- there's no -- she's going to have to have sun protection, you know, from that area. The sun can cause this to look much, much worse, not so much in the scar tissue but in the tissue around it 'cause it brings out the -- the color contrast between the white scar and the -- and the regular chest tissue.

I think that the brown areas in here, this sort of hyperpigmentation will -- will hopefully get better, unless she gets out in the sun, then it'll get worse. So I think sun protection is going to be critical for that, too. But I -- I think she's -- you know, the -- these scars are permanent. She's going to have to try to, you know, just do things that will try to camouflage that so that she can wear normal clothes.

MR. KEEVER: Thank you, Doctor. Your Honor, may I --

JUDGE SCOTT: Excuse me just a minute. Ms. Hensley, what is it?

JUROR HENSLEY: Can we turn the lights down just a little bit so --

JUDGE SCOTT: Sure. Mr. Tucker --

JUROR HENSLEY: It's kind of a glaring.

JUDGE SCOTT: -- turn the lights down. I apologize. I didn't know what you were telling me.

JUROR HENSLEY: It's okay. I'm sorry.

MR. KEEVER: Your Honor, while we're doing that, may I trouble the Court? I don't remember. Was No. 36 the last exhibit?

JUDGE SCOTT: No, sir, 35 was.

MR. KEEVER: 35. Thank you, Your Honor.

Q. (Mr. Keever continued.) Doctor, I'm going to hand you what is marked Plaintiff's 36, 37, 38, and ask you if you have reviewed these documents.

A. Yes, I have.

Q. And --

MR. LISLE: I'd like to take -- take another look?

MR. KEEVER: Sure.

Q. (Mr. Keever continued.) And the No. 36 is a summary of

Sue's past medical expenses. No. 37 is a big, thick book of materials used to document those expenses. And No. 38 is a smaller book that documents the time that she was off from work. The medical expenses added up to what according to the summary?

MR. LISLE: Your Honor, I'm going to object.

MR. KEEVER: Okay.

JUDGE SCOTT: Sustained. Next question, Mr. Keever.

Q. (Mr. Keever continued.) Have -- have you looked through the 37, 38, the two larger books that Mr. Lisle just -- is bringing back to you?

A. Yes.

Q. And the one about medical expenses, the various medical expenses that are documented in there, was that related to -- reasonably related to the treatment from the burns?

MR. LISLE: Your Honor, I'm going to object. This -- if you look at the document, it's just a list of things that -- hearsay statements by somebody, not this witness. He -- he's not in a position to say whether or not those were -- those receipts were related to something she did or not.

JUDGE SCOTT: Mr. Keever?

MR. KEEVER: I'll -- I'll rephrase the question, Your Honor.

JUDGE SCOTT: All right.

Q. (Mr. Keever continued.) Did Sue have various medical expenses that were related to her burn treatment?

A. Yes.

MR. LISLE: Your Honor, I'm going to object.

JUDGE SCOTT: Sustained. Next question, Mr. Keever.

Q. (Mr. Keever continued.) And was -- was Sue -- have been required, because of her treatment, miss at least some time from work?

MR. LISLE: Your Honor --

JUDGE SCOTT: Sustained. Next question, Mr. Keever.

Q. (Mr. Keever continued.) Now, various doctors have suggested to Sue various treatments to help with her scarring and -- and to prevent further injury from sun damage. Have you reviewed the records and -- and formed an opinion as to whether Sue will require some type of treatments for her scar in the future?

MR. LISLE: Your Honor, I'm going to object to him talking about other doctors. If he wants to state his own opinion under oath, we can -- we can have that.

JUDGE SCOTT: Sustained. Ask that question, Mr. Keever, if you want to.

Q. (Mr. Keever continued.) Well, Doctor, what is your opinion as to whether or not Sue will benefit from future treatment for her burn scars?
A. I think she will benefit from future treatment, both preventative to keep it from looking worse and getting worse, and treatments to improve what she has as time goes on.
Q. Well, let's talk about the preventative treatment. What kind of -- kind of daily, so on, skin treatment procedures would -- would you suggest would be benefit -- beneficial to Sue?
A. Well, I agree with Dr. Elkins that Obagi Skin Care is a great line of skin care that would benefit Sue. This will -- this scar tissue doesn't -- doesn't have any oil glands, so it can't protect itself. Doesn't have any pigment, so it can't protect itself against the sun. So these -- these -- this line of medical skin products is designed -- part of that line is designed toward that. So I think that's certainly something that would benefit her.
Q. Do you use Obagi in your practice?
A. Yes.
Q. And can you tell us what the usual cost for a year of the Obagi treatments would be?
A. I can't because I -- it depends on -- I mean, I could prepare something, but I -- I --
Q. Would your patients who are getting the Obagi from you

be able to tell what it cost?
A. Yeah. Should. Should.
Q. How -- how -- how long does Sue need to use the Obagi?
A. Oh. I think for the rest of her life.
Q. Okay. How about special hydrating type of material? What would she require or what would help her in the way of hydrating materials?
A. Well, there are a lot of different brands of -- of good hydrating materials. The problem's with some of these sunscreens and moisturizers that -- in this area is that people are very, very sensitive to them, especially the sunscreens. So you'd have to find something that is extremely hypoallergenic and doesn't cause it to look worse and there are a lot of those out there.
Q. And -- so that's not something that you need a prescription for?
A. No.
Q. And the price would depend upon where the patient went, I guess?
A. Yes.
Q. And then how about --
JUDGE SCOTT: Mr. Keever, let me stop you there.
MR. KEEVER: Yes, sir.
JUDGE SCOTT: Ladies and gentlemen, why don't

we take our morning recess at this time. Ms. Sisemore, my wife would be the first person to tell me I'm not to give fashion advice, but if you don't mind, could you put your juror button on the exterior of your clothing so everybody can see it?

JUROR SISEMORE: Sorry.

JUDGE SCOTT: That's all right. Ladies and gentlemen, you're going to eat lunch today at Tavola Trattorium just down the street here. Mr. Tucker will have the menus for you to make your meal selection when you take your recess. I want to remind you of the admonition I have previously given you. You are not to discuss this case, the people involved with it with anyone, including among yourselves until I dismiss you to commence your deliberation.

Do not do any -- any independent research in any way, shape, manner, form, or fashion. Do not even communicate in any way with any of the attorneys, the witnesses, or the litigants involved in this case. We will be in recess for 15 minutes. Mr. Tucker, you may take the jury out.

MR. BAILIFF: All rise.

(Wherein, the jury left the courtroom at 10:17 a.m.)

JUDGE SCOTT: Court will be in recess 15 minutes.

(Wherein, a break was taken from 10:17 to 10:33 a.m.)

MR. BAILIFF: All rise.

JUDGE SCOTT: Be seated please. Mr. Keever, you ready for the jury to come in?

MR. KEEVER: Yes, sir.

JUDGE SCOTT: Mr. Lisle?

MR. LISLE: Yes, sir. I am.

JUDGE SCOTT: Mr. Tucker, bring the jury in, please.

MR. BAILIFF: All rise.

(Wherein, the jury entered the courtroom at 10:33 a.m.)

JUDGE SCOTT: Be seated, please. You may proceed, Mr. Keever.

MR. KEEVER: Thank you.

Q. (Mr. Keever continued.) Dr. Shewmake, when we finished up for our -- our morning recess, we were talking about the treatments in the future that you think would be indicated to help Sue out with her scarring. And I believe that we just finished up talking about the Obagi products. How about -- and I apologize if I asked this before. How about special hydration sunscreen? No.

A. Yes.
Q. I'll withdraw that. We did talk about that before. I'll withdraw that. How about something like a treatment with something like called a Lumenis Laser? Would that -- how would that play into your future management of Sue's condition?
A. Well, there -- there are a lot of different types of lasers. Lumenis is not one that I'm totally familiar with, never used it. But I -- I think that just comes down to --
MR. LISLE: Your Honor, I'm going to object if he's not used it.
JUDGE SCOTT: Sustained.
Q. (Mr. Keever continued.) Then how about --
JUDGE SCOTT: Next question, Mr. Keever.
MR. KEEVER: Thank you, sir.
Q. (Mr. Keever continued.) How about future kind of aggressive fractional DOT Lasers to go back and break up the scar tissue again like you described?
A. I have used that, not the DOT but the Fraxel Laser. And I -- I think that, you know, this is a changing -- this chest is going to change as she ages, as her hormones change. It's sort of a moving target. So I think to -- to say exactly today what it's going to require, nobody really knows. But I think it -- just the history of these types of scars, I -- I just looked at her chest again. It's different than even

several months ago when I looked at it. So it's worse. So I think the -- the Fraxel Laser is -- is one laser that I'm totally familiar with that I think would help her along the way. It softens things. It replaces scar with healthy tissue gradually. So I think the Fraxel would be a good choice for her.

Q. How many times -- and I know it's a moving target, but are you able with the information you have and your training and experience, Doctor, are you able to give us a number of treatments based upon reasonable medical probability that Sue would require with a Fraxel type laser?

A. No, because it's a moving target. No.

Q. Would -- is her condition to the state right now where you would think a Fraxel Laser might be of benefit?

A. Yes, I do.

Q. And based upon reasonable medical probability?

A. Yes.

Q. What in your practice, Doctor, if you were going to do that treatment, what would be the cost to the -- to your patient for a -- a total chest treatment with your Fraxel Laser?

A. We do it by area. It -- it's about $3600 depending on how many -- you know, you buy these in sort of sets of four or five treatments, 3600 to $4,000 per set of treatments.

Q. Okay.

A. And that's four or five treatments. That would -- that would equal about four or five treatments.

Q. Now, how -- you mentioned medical tattooing.

A. Uh-huh.

Q. What -- what role would medical tattooing play in what you think would benefit Sue?

A. Well, I think that, you know, camouflage makeup is what it would take to -- to sort of help blend that in. And that's -- that's available and -- and usable. It's expensive but -- but I think the -- the only chance to get that white scar tissue back to normal color again is -- is -- permanently, or at least for a period of time, would be with tattooing. And you'd have to go to an expert medical tattooer. You know, we have people that tattoo nipples after breast cancer reconstruction.

And -- and things that -- I would go to someone who's specifically trained for medical tattooing and have them sort of match that -- try to match that skin color, you know, that adjacent skin color so that whatever -- if she -- so that she'd be able to wear something and not -- it just -- your eye wouldn't be drawn to that white.

MR. KEEVER: Would you go to the next slide, Ken?

Q. (Mr. Keever continued.) And the slide on the right, I don't remember the number, but -- but it was admitted earlier

with the pictures. And the slide on the left is the one that was taken a week before the procedure. And let's direct your eyes over to the right. That was June of 2010. How does that area look compared to what you saw when you examined Sue today?

A. Oh. Well, parts of it look better, parts of it look worse.

Q. Okay. And that would be the -- that would be what you'd be using first, the camouflage makeup for, your patient --

A. Medical tattooing?

Q. First let's go to the camouflage makeup.

A. Oh, yeah.

Q. I just wanted to ask you a follow-up question on that. You said it's more expensive than regular makeup. Have -- from your experience with patients who have to use that, can you tell us about how much more expensive it is?

A. Yeah. I -- I called my girls that -- you know, I spoke to my girls that sell this stuff. It -- it -- it ends up being about a hundred dollars more a month than most people spend on normal makeup. But, again, it depends on if it's whole face or if it's the whole chest or if it's just one spot. Totally depends on how much you're putting on. This is a large area, so...

Q. Okay. And then -- and then we talked about the next item was the -- the tattooing.

A. Uh-huh.
Q. And you've had patients that you've sent for medical tattooing.
A. Yes.
Q. And with your experience and -- what -- have you an idea about what a single medical tattooing treatment would be for -- for Sue?
A. No. I don't. That -- we don't have that in our office. I have someone that I send patients to, and I don't know what she charges.
Q. Okay. How often, assuming she has medical tattooing done, how often is that going to have to be redone, if -- if ever?
A. Well, tattoos typically fade. So it's several -- it's -- the initial tattooing session would be several treatments because you make them really, really, really dark to start with because the body kind of metabolizes that pigment that you put in there. So you have to make them over -- overly dark. And then you give it three or four months and let that sort of settle and then you see where you are. And if you're lucky, you hit it the first time. Most the time, you're not and scarring doesn't typically take tattoo as well as normal skin does, because again the color's off.

So it's -- it's kind of a -- you have to sort of gradually build up to it. So it could be, you know, three or

four times just to get it right first time. And then with time that -- all tattoos fade. And so maybe a year later, 18 -- 18 months later, might have to get it done again. It just depends.

Q. Based upon reasonable medical probability, if Sue's 51 now and she lives to the expected age of 80, can you give us an estimate or a -- a -- your opinion based on reasonable medical probability as to how many times if she's tattooed successfully the fading would require it to be redone? Have you have experience to do that?

A. No.

Q. Okay. Have you an opinion as to whether or not Sue's going to be required to take off work in the future for medical treatments?

MR. LISLE: Your Honor, I'll object to that. Impossible --

JUDGE SCOTT: Sustained.

Q. (Mr. Keever continued.) For medical tattooing, would Sue be required to take off from work?

A. No.

Q. Okay.

A. Well, other than to go to that appointment. Not as far as recovery.

Q. Okay. Let's now talk about any -- any -- any utility of further laser treatments. We talked about the aggressive

breaking up of scar. But how about cosmetic lasers to take care of the redness and try to blend it in with the white scar. What role future lasers have in Sue's treatment?

A. Oh. I think they have a -- a powerful role. They -- the -- the redness is going to be -- again, the white's not going to change color. So it's everything surrounding that white that you have to try to keep under control so that it doesn't make that white stand out even more against that darker background. So, you know, even now, even in that picture, and -- and I just looked at Sue's chest. And, I mean, there's -- there's a lot of red from all those dilated blood vessels. So IPL is a treatment that we use for that. It's very safe, predictable.

Q. IPL is?

A. Intense pulse light therapy. It's not a laser, but it's -- it works really well for red blood vessels. Typically, you -- you get a -- a session of five or six of those treatments to really get the redness gone. And then once or twice a year you have to come back and get that treatment again, just one -- one treatment again, not five or six again.

Q. From the experience that you've had in your practice, what would the cost to the patient be of that first set of treatments?

A. Yeah. Our -- the girls in our office charge $2,000 for

a set of six treatments.
Q. And then how often, thereafter, for the rest of her life would Sue need kind of touch up treatments if that's successful?
A. Well, usually in six months you need just one treatment and that's about four or five hundred dollars. And, I mean, a year later, she might need another treatment, another four or five hundred dollars. So the initial set is the most expensive.
Q. So 2,000 and then $500 a year for indefinitely?
A. Yeah. Or a thousand, just depends on if it's one or two treatments a year.
Q. Oh, okay. One or two. Oh. When you're saying treatments, you're talking about a set of six treatments?
A. No. No. There's an initial set of six just to get it under control. Then you have to sort of maintain it under control. If you do that every six months, you can usually get away with just one treatment every six months. And that would be anywhere from 500 to a thousand dollars, depending if she needed it or if --
Q. And based upon reasonable medical probability, would Sue likely need that?
A. Yes.
Q. Okay. Now, Dr. Shewmake, what caused Sue's burns?
A. This is a heat injury, thermal injury to the skin.

Q. And, ultimately, how is that related to the actual settings on the machine?
A. Oh. I think the settings on the machine generated a lot of heat, enough to cause a thermal injury like that.
Q. And it's a simplistic question, but who is responsible for those settings on the machine?
A. Whoever dialed them in on the machine.
Q. And in this case?
A. Dr. Elkins.
Q. Have you ever heard of anyone using a fractional laser with a time setting that would've been 400 to 600 percent of that recommended in the manual?
A. No.
Q. Have you ever seen it reported in medical journals?
A. No. That doesn't mean it hasn't been, but I haven't seen it.
Q. Well, have you ever seen a report of a burn by a fractional laser to the extent that was suffered by Sue?
A. No.
Q. What is your opinion, Doctor, as to whether or not the defendant met the standard of care in choosing his settings for Sue?
A. I think that was below the standard of care to go that high on the settings.
Q. What's your opinion as to whether or not the defendant

met the standard of care in the information he provided to Sue to obtain informed consent.

A. I think if you -- if he didn't tell the patient he was using super high settings for what she thought was an otherwise standard treatment, that's below the standard of care.

Q. What's your opinion as to whether or not Sue's condition, her scarring is permanent?

A. It, a hundred percent, is permanent.

Q. Now, the last slide compares Sue to -- last slide was that slide. The split screen slide which I'd put up a little earlier than I'd intended. But it compares Sue from I believe January 17th, 2009 to what she was like in June of 2010 and your report of what she looked like today. What's your opinion as to whether or not simply the use of makeup can restore Sue's appearance to what it was before the laser?

A. Camouflage makeup is hard to make look good. I mean, to make her look normal, it'd be hard to keep that. It washes off when you get wet. You know, it's --

MR. KEEVER: Dr. Shewmake, I thank you very much, and I will pass the witness.

DR. SHEWMAKE: Okay.

JUDGE SCOTT: Mr. Lisle, any questions?

MR. LISLE: Yes, sir.

CROSS-EXAMINATION

BY MR. LISLE:

Q. Dr. Shewmake, when were you first contacted by the plaintiff's lawyers as an expert in this case?

A. Oh, gosh. I don't remember the date, but probably year, year and a half ago. I don't remember the date. I don't remember the date. Sorry.

Q. Sometime in 2012?

A. Probably.

Q. Did you realize this lawsuit was first initiated against Dr. Elkins in August of 2010?

A. No.

Q. But when her lawyers came to you, did -- they made it known to you that they had already initiated a lawsuit, already claimed that he had committed medical malpractice, and then asked you if you could help provide testimony in the case. Is that correct?

A. You know, I really don't remember. I think that Mr. Keever called me and asked me if I would review these records. I didn't know that it had already been filed and...

Q. Okay. And you -- you have that blue notebook there. Is that all the material that you reviewed prior to forming your opinions in the case?

A. No. No. There's a stack about this tall (indicating).

Q. Okay. Were the SkinStar records in your first round of documents, or were those given to you today or last night?

A. Copies of -- yeah. Last night. Yes. Yeah.
Q. So all the treatments that were had in Little Rock with the other lasers, you've had -- you got after you'd already formed all your opinions in this case?
A. No. Not all the treatments, but some I guess this --
Q. Okay.
A. I knew that she'd gone to SkinStar. I didn't know the settings.
Q. You hadn't seen any of the records about the settings or anything about that until last night?
A. You know, I don't remember. I looked at so much stuff, I don't remember.
Q. Okay. As far as you know, sitting here today, you cannot recall looking at those until last night?
A. The SkinStar records?
Q. Yes. The SkinStar laser treatments that she had subsequent to Dr. Elkins.
A. The actual treatment settings, no; the fact that she had been to SkinStar, yes, and the dates.
Q. Okay. So all the information you reviewed to form your opinions in this case were provided by the plaintiff's lawyers?
A. Yes.
Q. You didn't look at -- independently go out and look at any other information?

A. I looked at my Fraxel book, just to familiarize myself with --
Q. Your own -- that's your own manual --
A. -- our setting.
Q. -- your own manual for the laser that you use?
A. Yeah.
Q. Okay. And you had been retained by them solely to provide expert opinions in favor of Sue Poff?
A. Well, to provide opinions about the case. If they happen to be in favor of Sue, then yes.
Q. Based solely on the records that they provided?
A. I guess.
Q. Okay. And you talked about a lot of experience, in general, with the lasers, but you have never used a SmartXide Laser -- SmartXide DOT Laser, have you?
A. No.
Q. Have you ever seen one?
A. No. At meetings -- at meetings, I've seen one. Never used one.
Q. Had you ever even seen the manual before it was provided to you by the plaintiff's lawyer?
A. No.
Q. You've never been in a clinical setting where that laser was used?
A. I've never been there when the laser was turned on.

I've been in clinics that have SmartXide.

Q. Okay. You've never treated a patient with one?

A. No.

Q. You never -- you've never followed up on the care of a patient that's been treated with one?

A. No.

Q. The laser that you use does not use those same power settings, does it? It doesn't have watts, dwell time, and density in the same configuration that that SmartXide Laser does, does it?

A. Different language to say the same thing, but no.

Q. Well, if you look at your laser and it says just a power setting, and then it says just a treatment level, you'd have to be a physicist to calculate the same power, though, wouldn't you?

A. Wouldn't have to be a physicist, but I -- I -- you could do it. Yeah.

Q. You -- you would have to do that mathematical calculation --

A. Yes.

Q. -- which you have not done to --

A. Right.

Q. -- to compare your own treatments with what was done with the SmartXide?

A. No.

Q. You've never had any formal training on the SmartXide Laser?
A. No.
Q. Do you know whether or not that your -- the laser that you normally use uses the same -- what do you call the device that applies the laser treatment, itself?
A. No. It uses a different hand piece.
Q. Uses a different hand piece?
A. Uh-huh. SmartXide uses a stamp. It's a rectangular stamp. The one that I use has a roller where you can move around.
Q. And you talked about traditional CO2 lasers that use -- you know, that you no longer use, but they can take off all of the skin.
A. Right.
Q. Correct? In fact, the SmartXide Laser can still be used for that purpose?
A. Yes, it can.
Q. And that's one of the things they talk about in -- in the SmartXide manual, is that it gives the doctor flexibility to decide whether or not they want to go through four, five, six treatments at $2,000 apiece with a patient, or they can do one treatment that's more aggressive, can't they?
A. Yes, gives you a choice.
Q. Give you the choice.

A. Uh-huh.
Q. Gives the patient a choice?
A. Uh-huh.
Q. 'Cause some patients may not want to spend $8,000 or more. Correct?
A. Well, it's not that much, but, yeah. Yeah. Some patients would rather have one treatment and have the downtime associated with it than --
Q. Right.
A. -- no down time with the multiple treatments.
Q. And just in general, that manual doesn't say anywhere in there that if you use a dwell time of 1800 you're going to burn your patient.
A. Doesn't have to.
Q. It doesn't, though, does it?
A. No. It doesn't say if you -- if you use excessive settings, you're going to burn your patient.
Q. Right. You're relying on that manual to try to testify to the standard of care. And that manual doesn't say that.
A. It doesn't address standard of care, but it gives recommended settings of --
Q. In fact --
A. -- what is safe.
Q. And it -- and it also says that those settings can be adjusted upward.

A. With experience and with peer --
Q. Does -- does the manual say "with experience"?
A. Yes.
Q. Show me in the -- the DEKA manual where it says you have to have experience before you can adjust those settings.
A. Well, it says these settings are recommended and -- and adjustments can be made based on consultation and -- and --
Q. Show me the language that you're talking about.
A. Well, we read it on the top of that.
Q. Talking about the manual, sir.
A. Okay.
Q. Dr. Shewmake?
A. Yeah. I'm looking at it.
Q. Okay.
A. Trying to find it. Well, what did that chart that we showed come out of?
Q. Out of the Core Dimension manual -- the Core Dimension materials, the training materials.
A. Yeah. The one that we read.
Q. Right. My -- my question to you, sir, was about the manual that -- that you said that everyone should be aware of. Would you look at the last paragraph that's on the screen?
A. Uh-huh.
Q. (As read) "SmartXide DOT offers the possibility to adapt

the procedure according to the expectation of a patient: more or less aggressive treatment corresponds with a longer/shorter down time after every session." Did I read that correctly?

A. You did. Uh-huh.

Q. Did it say it allows the doctor with experience to that procedure or just says allows the --

A. Allows the doctor with experience, yes.

Q. That's what this says?

A. Not what you just read. Okay.

Q. Right. What I just read.

A. Okay. Let's read it again.

Q. Okay.

A. I'm still trying to remember where that chart we looked at came from.

Q. Well, if you would, just focus on my question and then your -- you'll have a chance to testify.

A. Okay. (As read) "Offers the possibility to adapt the procedure according to the expectations of the patient: more or less aggressive treatment corresponds to longer/shorter down time." Never states --

Q. There are two thing -- there are two things in your testimony that are missing from that sentence, one being allows a -- the experienced surgeon to adapt the procedure; and then the second one being longer/shorter downtime and

permanent scarring. It doesn't say either one of those things, does it?

A. No.

Q. Now, you use the slide showing the -- the hot iron analogy.

A. Yes.

Q. And my understanding of that is just simply if you picture a hot iron, the longer it stays on the skin, the more it burns.

A. That's --

Q. That correct?

A. That's one way to look at it. Yes.

Q. And in that analogy, the iron, if it's a -- I don't know how hot an iron is. But let's say it's at 500 degrees, and it -- it remains at 500 degrees and goes all the way through the skin. Right?

A. "It remains at 500 degrees and goes all the way through the skin." I don't understand.

Q. I'm talking about your slide with the hot irons --

A. Right.

Q. -- coming through.

A. Yeah. I got you.

Q. In that analogy, the -- the iron has a constant state of energy, in other words, heat.

A. Right.

Q. The heat of that iron's constant.
A. Right.
Q. So for that to be accurate, you have to have an iron that stayed at whatever temperature it was and never cooled off during the process?
A. No. What I -- the point is that the longer you leave -- if you take two irons and one has a lower setting and one has a higher setting --
Q. Uh-huh.
A. -- and you leave them both on the skin a long time --
Q. The --
A. -- more damage is done.
Q. Exactly. Now, are you familiar with the SmartXide Laser that has what's called a smart pulse?
A. Super pulse, smart pulse, yeah.
Q. So then it comes on the peak power for just a few tenths of a microsecond. And then it -- then it reduces the energy, doesn't it?
A. Yeah. When it hits the skin, it cools. All those lasers do that, but there's still a lot of heat generated. And if I could add, just like your iron cools when it hits something, when it hits the shirt or hits your skin, it --
Q. Well --
A. -- when it hits something colder, it cools. Yeah.
Q. Well, this was talking about --

A. But it's still hot.
Q. -- the laser, itself, shuts down the amount of energy, wasn't it?
A. It doesn't shut it down --
Q. The first part of --
A. -- it decreases it. It decreases it.
Q. Allow me to ask my question, please.
A. Sorry.
Q. "The" -- (as read) "The first part of the pulse has high peak power for a few tenths of a microsecond that allow for rapid ablation of the epidermis, the first layers of the derma, while the second part of the pulse has low peak power allowing for targeted heating of the deep areas of the skin. Did I read that correct?
A. That's true.
Q. Okay. When we get back to just laser treatments, in general, they -- they all cause an injury to the skin, every single one of them.
A. It's how they work.
Q. Including Genesis Laser causes heat damage to the skin.
A. Well, Genesis doesn't cause much heat damage. It's more -- it's more to the blood vessels, not to the skin.
Q. Well, if you were going to do a Genesis Laser treatment on a patient would you warn them of a possible complication --

A. Yeah. Of course.
Q. Including what?
A. Burns.
Q. Scarring?
A. Scarring. Yeah.
Q. And so for the patient to get the benefit of any laser treatment, they have to -- the -- the laser causes injury and then the body heals from the inside, out. Am I understanding that correctly?
A. Yes.
Q. And in that process, it can take months for the collagen to reform under the skin, can't it?
A. It can, depending on the degree of injury. Yes.
Q. So if it's a more aggressive treatment, it could take a much longer time for the collagen to form back into the skin and for the skin to be fully healed?
A. Yes.
Q. And while it's in that healing process, what are you supposed to do, keep moisturizer on it, stay hydrated, stay out of the sun?
A. Yeah. You're supposed to take care of it. Yeah.
Q. And in the initial phase, the -- the skin right after treatment would look like a -- it would look like a severe sunburn, raw, oozing, blisters, yellow crust?
A. Yes.

Q. And it's important not to touch any yellow crust that forms in those early phases, isn't it, or -- or it can be like picking a scab?
A. No. The yellow crust comes off. We try to keep people from -- from forming that yellow crust. That's why you put the moisturizer on it. It's why you put creams on it.
Q. Okay. But if it did -- does form --
A. Once it forms a scab, that's different. If you pick the scab off, then yes.
Q. And if you don't keep your skin moist and -- and care for it properly and it forms a yellow crust that is -- that is rubbed off, it can form a scar.
A. I think you're confusing yellow crust with scab. No. We -- we -- we take -- some -- many times Q-tips and peroxide to try to get that yellow crust as you're -- as you're describing it off. So, no, that -- that doesn't mean they're going to form a scab. I mean form -- form a scar.
Q. Are you familiar with the American Society of Plastic Surgeons?
A. Yes.
Q. Would you agree with this statement that they published about laser resurfacing, "A yellow liquid may ooze from the treated areas, form a crust" --
MR. KEEVER: Objection, Your Honor. This -- this isn't an exhibit as far as I know.

JUDGE SCOTT: Mr. Lisle?

MR. LISLE: Well, Your Honor, I was just asking if his opinion is whether or not he agrees with the statement.

JUDGE SCOTT: Well, take that down.

Q. (Mr. Lisle continued.) Okay. Would you agree with the statement, sir, that the skin -- depending on the treatment, some people may have what looks to be some a severe sunburn, the skin may be raw, oozing, and may even blister? A yellow liquid may ooze from the treated areas to form a crust. Do not scratch or pick at crust because this can cause scarring.

A. Uh-huh. The -- it's not from removal of the crust. It's from infection that you pick at -- most patients are picking at it. We tell them not to pick at it at home.

Q. Uh-huh.

A. If anybody's going to pick at it, it would be myself or my nurse.

Q. Okay.

A. It's not the picking at it that causes the scar, it's the fact that what you pick at it with. It's your fingernail, then yes. You know, that's raw skin. It could get infected very easily.

Q. So it's very, very important for the patient, then, to follow up with their doctor and make sure they're not doing anything during that healing phase that is going to

complicate their recovery?
A. Yes.
Q. And you tell every one of your patients that, don't you?
A. I tell my patients what to expect, and I see them back weekly to check on them. And then I do whatever picking needs to be done or my nurse.
Q. Well --
A. We see -- we see laser patients back very often.
Q. I appreciate that. Please wait for my question.
A. Okay. I'm sorry.
Q. Have you ever had a complication from surgery?
A. Yes.
Q. And would you define what a complication is?
A. Define what a complication is, unexpected result from surgery that's usually a negative result.
Q. And -- and if you do enough surgeries, you're going to have one, aren't you?
A. Yes, you are.
Q. What sorts of complications have you had with your laser treatments?
A. Oh, I've had skin that was depigmented, you know, where we used to do full-face laser with the older generation lasers. And you can't -- again, you -- with those lasers, you can't -- you can't laser the neck. And so you would -- there would be a -- a line where you had to stop the laser

that was a -- sort of a demarcation where it was light -- light skin, resurfaced skin, actually pretty skin, but then it would join this unresurfaced skin. So that was a negative outcome.

Q. And -- and is that -- and prior to that negative outcome, do you feel like you did everything appropriately in the care of that patient?

A. Yes.

Q. But the skin didn't react the way you had hoped or expected and you had a negative outcome.

A. No. I told the patients that was going to be an outcome.

Q. It could be an outcome?

A. Yeah. That it was a high chance it was going to be an outcome, that we would try to do other things less aggressive on the neck to make it match.

Q. And --

A. But that's -- that was 20 years ago. I don't do that anymore.

Q. When you -- when you advise your patients and give consent, do you have them sign a form?

A. Yes, very extensive form.

Q. And when you -- in the -- in the instances where you -- you, yourself, have exceeded what you call safe or standard guidelines for treatment of a laser, do you write that on the

form?
A. I do.
Q. And you have them initial it --
A. I do.
Q. -- separately? And is there someone that comes to you and says, Doctor, you are now experienced enough that you can start deviating from the manual?
A. No. There's nobody that comes to me and says that.
Q. It's just completely up to you in your own clinical judgment.
A. Your own judgment, yes.
Q. There's no governing body or -- or group of physicians in the neighborhood that come up to you and you say, Dr. Shewmake, you are now -- have achieved --
A. It'd be nice if it was that way. No. It's your conscience, basically.
Q. So the standard is it's just clinical judgment?
A. Yes. Based on many factors, but yes.
Q. So it's up to the individual patient -- I mean, sorry -- the individual doctor to use his clinical judgment in -- in coming up with the settings and deciding when they're -- when they've achieved enough experience to move on?
A. Yes.
Q. Do you recall when you first saw Sue Poff?
A. Oh, gosh. It's probably four months ago, maybe three,

four months ago.
Q. Did you make a note, any -- any record at all of your first examination of Sue Poff?
A. Yes.
Q. Do you have that with you? I've not been provided with that.
A. It -- it's probably in that box.
Q. It was four to five months ago?
A. I really can't remember.
Q. So from the time she had this laser treatment in January of two -- January the 22nd of 2009 until sometime late 2012, you never saw her?
A. Oh, in 2012 or late 2012. That's correct. I saw photographs, but I -- I didn't see her.
Q. And in your clinic, do you diagnose and treat patients solely off of a single photograph?
A. Course not.
Q. And -- and of course not implies that that's a silly question. So what is it that you have to do beyond looking at a photograph to diagnose and treat a patient?
A. Well, you get a history from that patient as to what they're there for. You -- you examine the patient. You look at their medications. You look at their health history. You look at previous surgical things that they've had done, how they've responded to that. You look at their overall health,

if they're in good shape, if they're under a lot of stress. You know, all -- all those things would factor into your decision about what you're going to do with that patient.

Q. And if you're specifically going to do a laser resurfacing procedure on someone, wouldn't you want to see, touch, feel the skin?

A. Course.

Q. In fact, it would be a violation of standard of care for a doctor to look at a single photograph and say you have blank pigmentation problems and here's the settings of the laser I'm going to use. You would never do that, would you?

A. Well, I think that as long as you're using standard out-of-the-box settings, your -- you -- you wouldn't do it, but you could.

Q. You -- you can look at a photograph, and not knowing the lighting conditions of the photograph, the angle of photographer, and -- and you can set laser settings that you would use on a patient?

A. No. I mean, I wouldn't do that, but -- but if you know their Fitz -- Fitzpatrick scales, you can say what you would recommend for that patient, certainly.

Q. And you would need --

A. I wouldn't do it based on that, but I -- you could recommend that.

Q. Well, if you're looking at all the different factors of

the skin condition that you're trying to treat, wouldn't you need to see -- not only see the picture, but also feel the skin, see the thickness of the skin, and -- and all the qualities of the skin?

A. Yes, you would.

Q. No two people have exactly the same skin.

A. That's correct.

Q. And a two -- two-dimensional photograph doesn't show you or give you access to all the -- all the clinical judgment things that you need to make the decision?

A. No. It doesn't.

Q. In fact, Doctor, when looking at any of these grids about treatment levels, it's first having to decide the skin type. Right? The --

A. Right. Fitzpatrick.

Q. The skin condition.

A. Right.

Q. And you're having to make a clinical judgment on what it is you're trying to treat and what kind of skin that patient has.

A. That's correct.

Q. And you need to physically touch the patient to do that.

A. To -- to accurately know how to set the computer -- I mean, the laser and treat the patient, yes.

Q. Have you ever worked -- I -- I may've asked this. But

have you ever talked to any doctors in Benton County Arkansas that are using the SmartXide DOT Laser?
A. No.
Q. Have no idea what their settings are that they're using?
A. No.
Q. Because I know while, in -- in theory, these laser are all -- work on the same principles, the -- the mechanism, the machine and the settings are all different.
A. That's correct.
Q. When you talked about Dr. Elkins' dwell times that he used, I believe you said that he should've been in the 400 range. Is that right? 300?
A. Well, if you -- if -- you're talking about on the chest?
Q. Yes.
A. Yes. Uh-huh. For what he was trying to accomplish with pigment and with texture, yes.
Q. Well, that -- the pigment and texture is -- is your testimony about what he should've been trying to accomplish. Correct?
A. Well, that's what he wrote in his note that he was trying to accomplish.
Q. And he also talked about wrinkles and laxity, didn't he?
A. Not in the chest.
Q. Oh.
A. No. He talked about wrinkles and laxity in the face,

but not in the chest. Those settings are fine for the face, but not for the chest.

Q. All right. And -- and these settings, these dwell times of 2,000 are -- are greatly in excess of the 300 that you talked about, whether it's for the face or the chest or any part of the body?

A. It's -- it's on a different part of the body, and it's for severe skin aging, but, yes, they are greatly in ex --

Q. And even if you reduce that by 30 percent or 25 percent, like you said, you would still be greatly in excess of 300 or 400.

A. Yes.

Q. So the doctor's having to make a clinical judgment about the skin condition, skin type, and looking at this chart to determine -- to determine a baseline conservative number to use. Correct?

A. Yes.

Q. Because even these numbers I just showed, the 2,000, that's considered a baseline line, entry level number, isn't it?

A. For severe skin aging on the face, yes.

Q. And with mild aging, we're still looking at numbers of over -- of a thousand, which is a lot more than 300.

A. Well, if you reduce it by 20 or 30 -- 25 or 30 percent.

Q. Well -- and, again -- now, is there any clinical

judgment to -- for -- this manual just goes from mild all the way to severe. Is there any clinical judgment for a doctor to say, "Well, this person's not really mild or severe. I could use something in between"?

A. I think that's where clinical judgment comes in. But that's -- the settings he used were still higher than those.

Q. That may be so, but the -- he -- they were -- those were also entry level settings. We talked about conservative settings. Correct?

A. Yeah.

Q. And that he had -- in your materials, you reviewed the deposition of Tom -- Thomas O'Brien, the manufacturer CEO?

A. Yes.

Q. And he flat out said that those were entry level settings and the doctor's free to use whatever settings he -- he decides.

A. That's right. We can do whatever we want.

MR. KEEVER: Objection, Your Honor, to using the deposition to examine this witness.

JUDGE SCOTT: Sustained. Next question.

Q. (Mr. Lisle continued.) You can use whatever settings you want?

A. Uh-huh.

Q. Based on your clinical judgment?

A. You can, with consequences, but yes.

Q. Well, what I'm saying to you, sir, is that this manual is -- you -- you can't say that -- that you can never deviate from that manual, can you?
A. No. I -- I never said that.
Q. Okay. And other than this manual, we don't have any other document out there that says this is the ceiling. In other words, these are entry level settings. Correct?
A. I wouldn't necessarily call them entry level settings. That's like a beginner -- that -- I mean, there are people who keep those settings all their life, whether it's Fraxel, whether it's SmartXide, the same -- same thing.
Q. Right.
A. These are published -- these are approved by the FDA. They're published for our education.
Q. And the conservative setting --
A. And there are doctors -- they're safe within -- well, within a safe safety range. Yes. Conservative, relatively speaking, but, still, there are doctors who never deviate that.
Q. Well, I --
A. So it's not necessarily entry level.
Q. I understand that. But there's a difference between doctors choosing to do what they want and doctors violating the standard of care. You know, doctors who choose to use the low settings versus doctors -- it's not against a -- it's

not a violation of the standard of care to be aggressive in your treatment, is it?

A. No.

Q. And there's no guaranty if you follow these settings in this manual that the patient will not have a complication up to and including permanent scarring.

A. No. There's no guaranty. That's true.

Q. And a -- a patient coming in for purely elective cosmetic procedure is balancing in their own mind, along with the consultation of their doctor, whether or not their present condition justifies them taking some -- some serious risk in trying to improve their appearance, doesn't it?

A. They are balancing, yes, having elective procedure with -- but they come to the doctor for information.

Q. And they have to decide for themselves am I willing to take on any risk?

A. As long as they have the right information, yes.

Q. That's right. Part of the clinical judgment that I'm not sure that we talked about is also the expectation of the patient, how many times they want to have treatment, how willing they are to accept risk. I believe you said that in your direct testimony.

A. Yes. That's true.

Q. In fact, there are still doctors out there right now and patients out there right now that are -- that are using the

old traditional CO2 treatment that just obliterates the entire skin, don't -- aren't --

A. There are, yes.

Q. And they can suffer, like you said, for months, take weeks off work.

A. They can.

Q. That's not a violation of the standard of care?

A. No.

Q. If you are going to state your opinion as to causation in this case, in other words the way we see Sue Poff today was caused by one thing, don't you have to exclude all the other possible causes?

A. Well, there -- it's a combination of things that causes complications. It's not one thing.

Q. Can you answer my question, though? If you're trying -- if you're trying to say what caused her condition, don't you have to look at all the potential causes?

A. Well, I don't think she would've had this injury had she not had laser surgery.

Q. Okay. But --

A. So I'm saying it's the laser treatment that caused the problem.

JUDGE SCOTT: Mr. Lisle, just a minute. Let me try.

DR. SHEWMAKE: I'm sorry.

JUDGE SCOTT: Doctor, just listen to the question and answer the question.

DR. SHEWMAKE: I'm trying to.

JUDGE SCOTT: Ask your question again, Mr. Lisle.

Q. (Mr. Lisle continued.) As a scientist, if there are -- you see the effect, don't you have to go back and look at each potential cause before you decide which one caused the effect?

A. Yes.

Q. And we understand that Ms. Poff had additional Fraxel Laser treatments beginning in April of -- of 2009.

A. Yes.

Q. Correct?

A. Correct.

Q. And you did not look at the set -- before you formed your opinions in this case, you had not looked at the settings of the -- of the lasers used in that case.

A. Not the actual power settings, no. I knew that she had Fraxel --

Q. But, it's -- it's not theoretical power settings. It's either you didn't look at the records that showed what sort of energy was used on her in that procedure, did you, Doctor?

A. No.

Q. And -- but you just testified if the -- if the energy

was too high, that can cause an injury?

A. I looked at the power settings and it's not.

Q. Okay. Well, we'll get to that.

A. Okay.

Q. Prior -- you had already formed your opinion before you looked at those power settings.

A. That the hypertrophic scars were a result of the initial laser, yes.

Q. Right. You --

A. Because I saw the scarring before she had that treatment.

Q. Sir, if you -- again, wait for my question.

A. I'm sorry.

Q. You had formed an opinion that this was the sole cause before you had even looked at the settings of other laser treatments?

A. Do you want a yes or no answer?

Q. Yes.

A. Yes.

Q. All right. Let's look at the treatment record from SkinStar on April the 22nd of '09. It was a plaintiff's exhibit. You have that in front of you?

A. Okay.

Q. While we're at it, I -- I'm not sure that that's a complete record of the SkinStar records. You see -- do you

see one of April the 22nd '09?
A. No.
Q. May have to flip through.
A. I can't tell if that's a four or is there another 22nd? Yeah. So -- okay. Now I'm looking at it.

MR. KEEVER: Steve.

MR. LISLE: Huh?

MR. KEEVER: That's fine.

MR. LISLE: Your Honor, just so we have the document put together the same way, I'm going to tender it Defendants' 1, I guess.

MR. KEEVER: No objection, Your Honor.

JUDGE SCOTT: All right. Defendants' 1 will be admitted without objection.

(Wherein, Defendants' Exhibit 1 was admitted into evidence.)

A. Okay.
Q. (Mr. Lisle continued.) All right. Let me -- let me mark that real quick before I hand it off. Okay. Let's look at the treatment that Ms. Poff received by SkinStar on April the 22nd, 2009.
A. Okay.
Q. Okay. At the top, we know that she was treated with a Fraxel SR 1500 Laser. Correct?
A. Correct.

Q. And that is a CO2 Fraxel Laser?
A. Yes.
Q. Similar in result capable -- capabilities as the one that Dr. Elkins used. Correct?
A. Works the same way, yes.
Q. Yes. Who was the doctor that -- that provided this treatment to Sue Poff?
A. I have no idea.
Q. Do you know of any plastic surgeons or cosmetic surgeons named, appears to be, Sabrina where it says "Provider Signature"?
A. No, I don't.
Q. Have you seen any notes --
A. Provider -- I don't see any provider signature. Oh, yeah, over here. Okay. Yeah. I don't know who Sabrina is.
Q. Indications being treated, it says simply "Neck." Is that correct?
A. It says, "What services are you interested in?" "Acne."
Q. I'm sorry. I'm talking about the April 22nd '09 --
A. That's what I'm looking at.
Q. -- treatment record.
A. Okay. That's her intake sheet. Excuse me. Okay. "Neck." Yes.
Q. Is there anything here in -- showing what clinical judgment these folks used in deciding her skin type, her skin

condition, and what it was they were trying to achieve?
A. Is there anything here describing it?
Q. Anything -- anything --
A. The judgment they used?
Q. -- showing it, at all?
A. No. I'm assuming that they touched her and examined her and talked to her.
Q. You -- you're willing to assume that --
A. No.
Q. -- without any records?
A. No. I'm -- I -- it's not in the record. That's what you want me to say.
Q. And it says this was treated on the neck.
A. Uh-huh.
Q. Correct?
A. Yes.
Q. Sir, would it be a violation of the standard of care for this to have been done without the oversight of a -- of a doctor, an M.D.?
A. Well, the State Medical Board requires that an M.D. be available --

JUDGE SCOTT: Doctor, what is the answer to the question?

DR. SHEWMAKE: Okay. I'm sorry.

A. Ask the question again.

Q. (Mr. Lisle continued.) Doesn't a doctor have to set the parameters what the treatment settings are going to be before they pass it off to a technician?
A. No.
Q. You don't think so?
A. No.
Q. Okay. So in this case, do you have any idea what the experience level of this person was, how many training seminars they had been to?
A. No, I don't.
Q. You don't even know if it was a medical doctor?
A. I don't -- don't have that information.
Q. Don't know if they had six months of experience, right out of high school, or an M.D. with four years' experience?
A. No, I don't.
Q. And they -- but they pointed a fractional laser at Ms. Poff and shot hot irons into her skin, didn't they?
A. Correct.
Q. And if they did it incorrectly, it was going to make her condition worse.
A. Potentially, yes.
Q. And there's no record here of what they told her as far as implied consent on the front end or post treatment care on the back end, is there?
A. No. No record.

Q. As dangerous as these things can be, she went to somebody who we don't even know if they're a doctor, and they -- they treated her again three months after she had already had a laser treatment?

A. Yes or no? Yeah. I don't know if she didn't know there was a doctor, or not. How could I say yes or no to that?

Q. Well, okay. But this was three months after she'd had a laser resurfacing.

A. Uh-huh.

Q. It can take up to six months at least for the collagen to -- to reform.

A. Yeah. I've told you we treat -- we treat scars --

Q. Sir --

A. -- with Fraxel.

Q. Please.

A. Okay.

Q. I know there's a lot of things you want to say but I get to --

A. Go ahead.

Q. -- ask my questions, too.

A. All right.

Q. It can take --

A. Ask the question again.

Q. It can take up to six months for the skin to fully reform collagen after a laser resurfacing, can't it?

A. Up to a year, yes.
Q. Up to a year. Three months later, she had a fractional laser treatment similar in -- in function to the dart -- to the SmartXide Laser by some unknown person?
A. Someone unknown -- unknown to me, yes.
Q. Turn to the next Fraxel Laser treatment she had, June the 1st of 2009.
A. Okay.
Q. Well, sorry. Before I leave the first one, let's look at -- on -- there was treatment of the neck at 12 megajoules of energy. Is that correct?
A. Yes.
Q. Treatment level of 9?
A. Yes.
Q. And eight passes with the laser?
A. Yes.
Q. And does this Fraxel Laser use the same power setting that the one you use? Are they --
A. Yes.
Q. -- described the same way?
A. Yes. But these power set -- can I say something?
Q. I just -- no. I'd like to keep my train of thought if I could.
A. Okay. Sorry.
Q. All right. So turn to the June 1st of '09 treatment

record --

A. Okay.

Q. -- and the chart that is supposed to show what was done. You see the area treated was neck/chest?

A. Yes.

Q. What was the energy level used on her here in that treatment?

A. I don't see anything written down.

Q. They didn't write anything down, did they? What was the treatment level?

A. No in -- no -- no information.

Q. They didn't write that down either? How many passes did they do?

A. No -- they didn't write it down.

Q. They didn't write it down.

A. Yeah.

Q. Who was the provider that signed this form saying who -- who operated the machine?

A. Yeah. I don't know.

Q. We don't have any idea, do we? Doctor, is that in compliance with the standard of care?

A. No. I think that's below the standard of care.

Q. And you certainly cannot evaluate, at all, the treatment -- as great a doctor as you are, I know you're not clairvoyant. You don't know -- have any idea what they did

to this woman?
A. I don't.
Q. There's no way to know.
A. You're right.
Q. And this was well within the one year of healing period that -- that could've been going on here. Correct?
A. Yes. Uh-huh.
Q. Now, let's turn to the next one, July the 14th of 2009.
A. Okay.
Q. What indications were being treated at -- at this time?
A. Oh, it's not written down.
Q. No idea?
A. The chest.
Q. Again, no -- no description, at all, of her condition and what it was they were trying to achieve, is there?
A. Uh-uh.
Q. And this treatment was solely on her chest, wasn't it?
A. Yes.
Q. What was the energy level that they used?
A. Well, they've got "TL8" written at the top. I assume that means treatment level 8.
Q. Do we have a -- a chart here that -- that has energy level?
A. Yes.
Q. Okay. And what is written in that box?

A. Nothing's written in the box.
Q. And what is treatment level written? What treatment level is written in there?
A. It -- it's written on the top of the page. It's not written in the box.
Q. Well, sir, I -- I promise you I'll get back to that 'cause I know you don't want to acknowledge that there is not a treatment level --
A. No. I understand there's nothing --
Q. -- written in the box.
A. -- nothing written in the box.
Q. Okay. There's nothing written in the box. They didn't indicate anywhere on this sheet --
A. No.
Q. -- how many passes they did, did they?
A. No.
Q. All right. Well, who was the doctor that performed that treatment?
A. Don't know.
Q. Was it a doctor that had had only a few days of seminar training and 30 years of experience, 20 patients, 100 patients?
A. Don't know.
Q. There's no way for you to know, is there?
A. Uh-uh.

Q. So once again, the -- they could have done anything as far as we know in this treatment?
A. They could've.
Q. With a fractional CO2 laser, which in the wrong hands can cause serious harm -- injury.
A. Can I --
Q. The wrong treatment level can cause serious injury.
A. Can I explain something about the Fraxel Laser? In the wrong hands can cause serious injury.
Q. Okay.
A. Okay.
Q. Okay. Flip over a couple pages to the August 31st, 2009 treatment.
A. Mine goes to September. You're looking --
Q. Yeah. The defendants' exhibit will have it.
A. August 31st.
Q. All right. August 31st, what areas were treated?
A. Chest and neck.
Q. How much energy was used?
A. 70 millijoules.
Q. And the 70 millijoules is more than five or six times what they used the first time. Correct?
A. From the test area, yes.
Q. What -- what is there to indicate to you, sir, that that was a test area?

A. Well, the first time they did a test area on her neck.
Q. On the -- on the 22nd?
A. On the one that said "test area." Yes.
Q. Okay. So they used 12 millijoules there and they used 70 on the second one? And 70 millijoules is as high as that machine will go, isn't it?
A. Yes.
Q. And they did a treatment level of 10 which is almost as high as that will go, isn't it?
A. Uh-huh.
Q. Sir?
A. Yes.
Q. And they did eight passes?
A. Yes.
Q. And who was the doctor that did that?
A. Don't know.
Q. So we've got all of these and not -- not a single consent form was signed as far as we know.
A. As far as I know.
Q. Should've been. Right?
A. Should've been.
Q. And they should've told her that every single one of these treatments carried the complicate -- possible complications of swelling, blistering, scarring, every single one of these did.

A. How do we know they didn't?
Q. I'm saying every one of these treatments pose those risks.
A. Yes, they do.
Q. Would you think that that risk goes up if the -- well, I believe you already testified that that risk goes up if the operator's not properly trained and experienced.
A. If the settings are not appropriate, yes.
Q. And they certainly should've signed off on who was doing those treatments?
A. Absolutely.
Q. I know you didn't do it, but that's -- that's a fact.
A. That's fact.
Q. And if you'd been called to testify on these treatments, you would've said that that falls below the standard of care.
A. Not documenting it, yes.
Q. What is the maximum depth of a lesion that can be treated by that Fraxel SR 1500?
A. Well, you can treat down into the fat if you want to. You treat -- depends on -- on the -- the Fraxel 1500?
Q. Yes. I believe on the plaintiff's version of the -- their exhibit, you turn to the last page. This was contained in the SkinStar records, wasn't it?
A. Let's see here. Oh, yes. Okay. I see it.
Q. You see at the maximum depth, maximum energy level, it