COPY OF TRANSCRIPT

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS
DIVISION 4

SUE POFF — PLAINTIFF

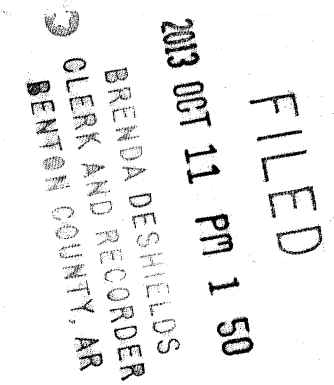
CASE NO: CIV-2012-0261-4

v.

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

APPEAL RECORD
VOLUME 4 OF 5
PAGES 901 THROUGH 1200

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
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shows the energy penetrating down to what?

A. Thirteen point fifty-nine micrometers, yeah.

Q. So is that -- is that one point --

A. Microns.

Q. -- three five nine millimeters?

A. No. Not millimeters, microns.

Q. Microns? Well, it's 1300 microns. That right?

A. No. It's -- yeah. 1359 microns.

Q. Okay. How does that translate to millimeters?

A. That's one point three millimeters.

Q. Okay. Do you see here what -- what the folks operating this laser were -- were -- were assuming that because the treatment is fractional there's minimal chance of treating too deeply?

A. On the face, that's true.

Q. Well, these folks were treating the neck and chest as well, weren't they?

A. Yeah.

Q. And if you look at that treatment level they were using in that last one, it's 29 percent coverage.

A. Uh-huh.

Q. That means all the dots were very close together, doesn't it?

A. Well, not part -- no. A hundred percent coverage would mean they were close together. They're -- they're a third --

you're treating a third of the surface area that you're -- area -- working on. Basically, less than a third.

Q. Which is -- which is a higher coverage area than Dr. Elkins used?

A. Yes.

Q. Doctor, I'm going to show you two pages of -- it's three pages. Two -- two dates of treatment by Dr. Buffalo, Sue Poff's family physician. You see that?

A. Yes.

Q. Do you see that on the second of July --

MR. KEEVER: Excuse me, Your Honor. Medical records were ruled as hearsay when I asked to introduce them earlier. If he's going to quote from the medical records, then that would also be hearsay, so --

JUDGE SCOTT: Mr. Lisle?

MR. LISLE: Your Honor, what I'm going to read is a statement by the party opponent.

MR. KEEVER: It would be hearsay if it's a statement by the party opponent --

JUDGE SCOTT: Is it an admission against interest, Mr. Lisle?

MR. LISLE: Yes, sir.

JUDGE SCOTT: You dispute that, Mr. Keever?

MR. KEEVER: Well, I believe it is hearsay

because it's coming from Dr. Buffalo and not from the party opponent.

MR. LISLE: Well, Your Honor, it's -- it's her -- it's consistent statement and she's going to have an opportunity to testify contrary.

JUDGE SCOTT: Overruled. I'll allow it. Go ahead, Mr. Lisle.

MR. LISLE: I guess I need to move to admit this as an Exhibit 2.

JUDGE SCOTT: Do you object, Mr. Keever?

MR. KEEVER: I'm sorry?

JUDGE SCOTT: Do you object?

MR. KEEVER: Oh, yes, sir. I do object.

JUDGE SCOTT: Defendants' 2 will be admitted over the plaintiff's objection.

(Wherein, Defendants' Exhibit 2 was admitted into evidence.)

Q. (Mr. Lisle continued.) You see on July the 2nd, 2009 --

JUDGE SCOTT: Just a minute, Mr. Lisle. I haven't seen that exhibit, Counsel. I'm limiting its admissibility solely to the statement made by the plaintiff. Go ahead, Mr. Lisle.

Q. (Mr. Lisle continued.) "The patient is going through a really rough time now in regard to a divorce and the legal proceeding associated with this. The patient states that she

just cannot keep fluids down and is becoming dehydrated." You see that?

A. Yes.

Q. That was July the 2nd, 2009. Correct?

A. Correct.

Q. Now, if you turn over to August the 24th, 2009, it states (as read) "The patient is a white female who represents to the clinic today for evaluation. The patient reports that is becoming dehydrated again. She reports her typical symptoms when this happens that she cannot think. She is dizzy. Specifically is having trouble with orthostatic problems with this. She tries to drink and re" -- "rehydrate herself from an oral standpoint but just cannot do so. She reports she had no appetite for this but also feels like she's losing fluid through her burn that is on her neck and anterior chest from the laser." You see that?

A. Yes.

Q. Doctor, we've looked at photographs of Ms. Poff, in April of 2009 and she didn't have any open burns that would be losing liquid, did she?

A. No.

Q. Now, if you look back to that last SkinStar record, last Fraxel treatment, is it August 31st, the August 31st, 2009, record where they used the maximum settings on her?

A. Yes.

Q. That would've been just a few days after she reported that she was dehydrated, dizzy, and couldn't think?
A. Yes.
Q. In fact, Doctor, if you read on it says that, "She states that she is compliant with her medications, but simply feels like she's going to have to be hospitalized to have" -- "if she cannot be improved from dehydration." You see that?
A. Yes.
Q. Is that an appropriate time to be doing a laser treatment on somebody?
A. Can I answer -- answer the question?
JUDGE SCOTT: Answer it yes, sir or no, sir or I don't know.
A. Please -- please repeat the question.
Q. (Mr. Lisle continued.) Let me start by saying in your earlier testimony, you acted like you -- you testified that if a patient comes and they're stressed and they're upset and that's not a healthy patient, probably shouldn't be doing the laser treatment, at all, didn't you?
A. That's true.
Q. And in this case a lady saying she may have to be hospitalized for dehydration and within a very short period of time they did a Fraxel Laser treatment at maximum settings.
A. Yes, they did.

Q. Would you have done that? Maximum settings right after -- if she said, "I" -- "I can't think. I may have to go to the hospital"?

A. If I was the doctor at SkinStar and she -- it depends on how she looked when she came in to see me as to whether I would do it or not. If she's been rehydrated with IV fluids, which he did, and she's fine when I saw her, then yes.

Q. Okay. So -- and do you have any -- this -- this other record on the 24th of July, she was reporting being dehydrated just a few days after another SkinStar laser treatment.

A. Uh-huh.

Q. Correct?

A. Yes.

Q. And we know that that's a potential reaction to the laser, isn't it, becoming dehydrated?

A. I've never seen a patient get dehydrated after a laser -- after a Fraxel Laser.

Q. Okay. It's important to stay hydrated after a Fraxel Laser treatment, though, isn't it?

A. It's important to stay in good health, yes. Hydrated, yes. Yes.

Q. I mean, didn't you just testify that -- that the -- the Fraxel Laser is treating primarily water in the skin, it's heating the water?

A. Microscopic water, yes.
Q. Yes. And then she went on a series of four Genesis Laser treatments. Do you see that, from the same place, SkinStar, September the 14th of 2009?
A. See September the 3rd and September 14th.
Q. Okay. I think if you look at those carefully, there will be two laser treatments on one page.
A. Oh, yes. You're right.
Q. Is this a -- a machine that you use, yourself?
A. No. No.
Q. And this was used on her chest, neck, and cheeks?
A. Apparently.
Q. And this -- I think we already talked about that all lasers pose some risk of complication?
A. Yes.
Q. Up to and including scarring?
A. Yes.
Q. At each one of these treatments, then, Ms. Poff elected to have another cosmetic procedure, assume the risk of that treatment, didn't she?
A. Yes.
Q. Whether she was informed, or not, we don't know. But -- but she did choose these multiple treatments?
A. Yes.
Q. We talked about if some -- talk about skin care products

and moisturizers. As a plastic surgeon, don't you tell everybody to use moisturizers on their skin?

A. Depends on their skin. Tell them all to use sunscreen, not necessarily moisturizers.

Q. Everybody should use sunscreen. Right? Stay out of -- stay out of the sun?

A. Yeah.

Q. Is it -- and it's -- that's particularly true after any laser treatment?

A. Yes.

Q. Whether it went perfectly or had complications, they should always stay out of the sun, always use sunscreen?

A. Yes.

Q. And after any laser treatment, you prescribe moisturizers?

A. Ultimately, yes. Skin's very dry after laser treatment.

MR. LISLE: Pass the witness.

JUDGE SCOTT: Mr. Keever, any redirect?

MR. KEEVER: Thank you, Your Honor. Mr. Lisle, thank you.

REDIRECT EXAMINATION

BY MR. KEEVER:

Q. Dr. -- Dr. Shewmake, may I see Exhibit No. -- No. 1, please? That would be the SmartXide clinical -- and turn to page 19.

And Mr. Lisle asked you about those settings for mild and -- and severe skin aging out of the manual. And I wonder, if you could, Doctor, let's -- let's start with -- with mild aging. And then I'll turn this back around. So we'll say this is the manual and mild. What's the power for what would be appropriate for Sue?

A. 30.

Q. 30. And what's the -- what's the time?

A. Thousand microseconds.

Q. One -- and what's the spacing?

A. Thousand microns.

Q. And now let's go to severe. What's the power?

A. 30.

Q. And what's the timing, sir?

A. 1500. Wait. I'm sorry. I'm -- I'm looking at acne scarring and hypertrophic scarring.

Q. Oh. I'm sorry. Yeah. Let's not do that. So this is the manual for severe.

A. So manual for severe with her skin type, power would be 30.

Q. Okay.

A. Dwell time 2,000.

Q. 2,000.

A. Spacing --

Q. And what's the spacing?

A. Thousand.
Q. A thousand. So we compared these top three settings with the -- close on the power and close on the spacing and kind of a big difference on the timing.
A. Yes.
Q. But with these, we have kind of a big difference on the spacing where there's a lot more space.
A. Yeah, two and a half times as much spacing.
Q. Have you looked at -- have you tried to compare apples to oranges with a -- something like an energy or something like that?
A. Well, I didn't look at severe skin aging because that's what -- not what we were treating for. But --
Q. Okay.
A. Or not "we" -- but not what she was being treated for. But when you increase the dwell time, you have to increase the spacing.
Q. And, in fact, Doctor, how is -- how's that done on the SmartXide? Is it automatically adjust itself for safety, or are the settings just set and that's what the doctors get?
A. Oh. I've never used the SmartXide. I assume that you can set those things --

MR. LISLE: Your Honor, I don't want him to assume anything about the SmartXide.

DR. SHEWMAKE: Okay. Okay.

JUDGE SCOTT: Sustained.

MR. KEEVER: Okay.

A. I never used it.

Q. (Mr. Keever continued.) How about in the -- the Fraxel?

A. In the Fraxel, it's all set by the computer. You set the treatment level and the power. It -- it sets everything else.

Q. Okay.

A. And it won't let you -- you know, it -- it -- it won't -- it -- it automatically increases the spacing based on how much power you use. It won't let you overheat.

Q. Okay. You said it's not below standard of care to be aggressive?

A. No.

Q. And, I believe, you said that you had been up to 110 percent aggressive.

A. Yeah, 115.

Q. 15. When does aggressive change from being aggressive to being reckless?

A. I don't know where that is.

Q. How would you term 400 percent?

A. I think that's aggressive, very aggressive.

Q. Can a patient ever consent to being burned? Can you get informed consent for something that is very close to certainly going to cause a patient to be burned?

A. I guess you could if you told them, you know, you're -- you're going to have third degree burns and scarring from this. And, I mean, I'd never do it even if they did consent to it, but I guess, theoretically, you could.

Q. Would it be below the standard of care for a doctor to get that consent and go ahead and deliberately burn a patient?

A. I would think so.

Q. Now, how many types of CO2 fractional lasers are there?

A. Gosh, probably 20.

Q. And what kind of comparison of one fractional laser to the other do you get from these various meetings and -- and -- that you go to?

A. Well, I think each laser is individual in that it has its own settings and its own strengths and weaknesses. You know, I -- I can only speak for Fraxel because that's what I own for a long time. I -- you know, there's at least 30, if not more, peer-reviewed articles about using Fraxel. It's -- was the first generation fractional laser. There's a -- there are a lot of people that have it. A lot of -- and -- and there are parts of our meetings where all we talk about are laser resurfacing. So I -- I think that's why I bought that instead of the others, because it's got a great safety history.

MR. KEEVER: Mr. Tucker, could you put us

back on our slideshow? And, Mr. Swindle, could you get me slide No. 9, please?

Q. (Mr. Keever continued.) And what I'm going to put up on the screen is that -- that part from the -- yeah. Yeah. That one will be fine here. And this was the thing that we were reading from earlier. Can you see that okay --

A. Yes.

Q. -- from there?

A. That's what I was looking for.

Q. The last sentence in the above section, (as read) "There is no substitute for peer to peer training and experience" --

A. "Consultation."

Q. -- "and consultation." Thank you. Have -- have you ever had -- being on the end of the consultant or the end of the person who's asking for a consultation, sent pictures of a patient to someone with significant experience in lasers and ask for their consultation that way?

A. Yeah. I -- Missy Clifton, up here, and I correspond frequently about patients. No. She's a dermatologist.

Q. She's a dermatologist up here --

A. She has --

Q. -- in Rogers?

A. -- a lot of lasers. Yeah.

Q. Okay. Not an uncommon way to share information?

A. No.

Q. Based on reasonable medical probability, would Sue's complication have occurred if the laser settings were 25, 300, and 400?
A. I think her chances of having complications would've been significantly less, but complications can occur in any setting depending on the patient.
Q. But based upon a more likely than not scenario, reasonable medical probability --
A. Yeah, much less likely with those settings.
Q. Based upon reasonable medical probability, what caused her -- her burn?
A. Super high settings in the laser.
Q. Based upon -- is clinical judgment, itself, something that falls under the standard of care?
A. I -- yes.
Q. I mean, does -- we talked about that the degree of learning and skill possessed and reasonably used by a physician in good standing in the community, is that --
A. Yes.
Q. Does judgment fall into that?
A. Yes.
Q. So there's -- is -- there's a period of time where judgment would fall outside the standard of care?
A. Yes.
Q. Based upon the things that you reviewed before you

presented your initial opinions, what other material would you have requested for that opinion? What would you like to have had, other than the box load that you got? Let me rephrase that.

After you saw the SkinStar settings, were your opinions altered in any way?

A. No, because she had scarring, severe scarring, before she ever went to SkinStar. You know, that -- she -- she described to me that she felt like it was better after having gone to SkinStar. She can tell. She sees this every day. What she reported to me, as a patient, was that after she had been to these settings, she felt like it was better.

Now, I didn't see the settings, but the fact that she had scars there before she ever went to SkinStar that were bad, and that they were improving with treatments she was receiving, I assume that they weren't detrimental to her.

Q. It would be that kind -- that would be the kind of assumption that would be based upon reasonable medical probability?

A. Common sense.

Q. Okay. Now, do you know Dr. Valones (phonetic) in Little Rock?

A. No.

Q. Okay. The record keeping at SkinStar, you said was below the standard of care.

A. Yes.
Q. Would it be below the standard of care if a physician dictated the settings for one patient in another patient's chart?
A. Oh, it -- it could be a mistake.
Q. Would it be below the standard of care just for record-keeping purposes?
A. Well, I mean, I'm sure I've got mistakes in my charts, too. So I'm not going to condemn him on that.
Q. That's --
A. I mean, you see a lot of patients in a day. You can't -- that's why you take records. That's why I think that's below the standard of care, these SkinStar records. That needs to be done at the time of the procedure, 'cause you forget.
Q. And you depend upon what you put in your records to be the record of what you did to --
A. Yeah.

MR. KEEVER: -- the patients? Okay. Doctor, I thank you very, very much. And I'm going to pass the witness.

JUDGE SCOTT: Anything else, Mr. Lisle?

MR. LISLE: Your Honor, I don't have any further questions.

JUDGE SCOTT: Mr. Keever, may this witness be

excused?

MR. KEEVER: Yes, sir.

JUDGE SCOTT: Mr. Lisle?

MR. LISLE: Yes, sir.

JUDGE SCOTT: Dr. Shewmake, you are free to leave the courtroom or stay --

DR. SHEWMAKE: Thank you, Your Honor.

JUDGE SCOTT: -- as you wish.

DR. SHEWMAKE: I'll take off. Do I leave these?

JUDGE SCOTT: Yes, sir. Just leave them right there. Thank you. Ladies and gentlemen, we're going to take our noon recess. Mr. Tucker will accompany you to your noon meal. I remind you of the rules. Do not communicate with anyone about this case, the people involved in it or the issues involved in this matter. Do not talk to any party, litigant, or attorney, or a witness involved in this case, even if it is just to pass the time of day. Do not do any research on your own by electronic media or any other fashion regarding the issues in this case. We will be in recess 'til you have completed your noon meal.

Mr. Tucker, you may take the jury out.

MR. BAILIFF: All rise.

(Wherein, the jury left the courtroom at 11:58 a.m.)

JUDGE SCOTT: Be seated, please. Mr. Rutledge, I apologize. I didn't recognize you out of uniform back there in the back.

MR. RUTLEDGE: Okay.

JUDGE SCOTT: Counsel, before you leave, I want you to get with Ms. Olenberger, make certain we have all the exhibits stacked up. Here's a black marker. Mr. Lisle, I want you to redact all of Defendants' Exhibit 2 that does not have the statements attributed to the plaintiff that you used in your cross-examination of Dr. Shewmake.

MR. LISLE: Yes, Your Honor.

JUDGE SCOTT: We'll be in recess 'til the jury comes back. I would expect that to be, once again, somewhere around 45 minutes.

MS. REPORTER: All rise.

(Wherein, a break was taken from 12:00 to 1:27 p.m.)

MR. BAILIFF: All rise.

JUDGE SCOTT: Be seated, please. Mr. Keever, you ready for the jury to come in?

MR. KEEVER: Yes, sir. I am.

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 1:27 p.m.)

JUDGE SCOTT: Be seated please. Ladies and gentlemen, did you enjoy lunch?

JURORS: Yes. Yes, very.

JUDGE SCOTT: Good. I apologize it took longer than I anticipated and also longer than it ever has before. We -- we will address that in the future. Thank you. Mr. Keever, call your next witness.

MR. KEEVER: We will call Jill Eades Sorey. Miss Sorey's outside.

JUDGE SCOTT: Ms. Sorey's outside? Jill Eades Sorey, Mr. Tucker.

MR. BAILIFF: If you would, remain standing and raise your right hand, please.

(Wherein, the witness was sworn.)

MR. BAILIFF: Thank you. Have a seat. Speak clearly into the microphone please.

JUDGE SCOTT: You may proceed.

MR. KEEVER: Thank you, Your Honor. May it

please the Court, ladies and gentlemen, Counsel.

JILL SOREY, 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. Jill Sorey.

Q. And would you just turn and introduce yourself to the jury, tell them just a little bit about you, where you live and so forth?

A. My name is Jill Sorey. I have four children. I live in Heber Springs, Arkansas, and -- around the lake. We just think that's God's country. I'm a mom. I'm a full-time mom.

Q. Thank you, Ms. Sorey. Now, would you tell the jurors a little bit about your relationship with Sue Poff?

A. I met Sue, I don't know, maybe six, seven years ago. And she was -- I was working -- I mean, I was exercising at a place that she worked, so she was an esthetician there. And she done our -- my facials for me, so I would go about every two weeks or so to get a facial from Sue.

Q. And what was your -- what were your, kind of, contacts with Sue during January of 2009, on -- on that schedule?

A. Oh, of course, yes. I was -- in fact, I had an appointment with her on the day in question. I know I had a standing appointment every other Wednesday. So around

midmorning, so...

Q. Okay. And I -- and I appreciate that, Ms. Sorey. Now, we have talked before about your testimony. Is that correct?

A. Yes.

Q. Okay. Now, the question I want to ask you is -- and I'm going to just hold up the calendar here and maybe I can get it to stay so that you can see. Can you see that calendar okay there --

A. Yes.

Q. -- Ms. Sorey? On Wednesday, January 21st, 2009, where were you?

A. I had an appointment about -- around ten -- ten, ten thirty. Usually, ten -- between ten and eleven, but I know on that day I was there on the 21st, the --

Q. How --

A. -- midmorning.

Q. How can you be so sure that on that particular day, you were in Heber Springs getting a skin treatment from Sue?

A. She had talked about and she was real excited about her treatment that she was going to receive the next day. And she was, you know, just talking, you know, "Won't be here tomorrow," and "I'll call you when I get back," that kind of thing. So I knew that she was going to leave that next morning to go. That was her plans; it's what she told me.

Q. Ms. Sorey, what direct know -- now, she did have the

surgery the next day. Now we're going to go beyond that, and I'm going to ask you about any medical treatment Sue had after her January 22nd surgery. And what direct knowledge do you have of any medical treatments that Sue had after she had the laser procedure?

A. Only what she would've told me because I didn't -- I wasn't with her any of those times.

MR. KEEVER: Okay. Thank you, Ms. Sorey. I'll pass the witness.

JUDGE SCOTT: Mr. Lisle, any questions?

CROSS-EXAMINATION

BY MR. LISLE:

Q. Ms. Sorey, did Ms. Poff ever do chemical peels on your skin while you were at her clinic?

A. Yeah. The real mild ones that just -- that she was allowed to do there.

Q. That's an acid treatment that -- that -- that takes off the top layer of skin. Is that correct?

A. Just like a -- it doesn't even really take off skin. It just kind of opens it up where she can get in and extract any black heads or oily things that are needing -- need extracted, so --

Q. Just --

A. I mean, I'm not sure what it was that she used, but I know that it wasn't very strong, whatever it was. This same

thing you can get from Beauty Co.

Q. Just, if you would, let me ask a question. Did -- she did an acid peel on your face. Is that -- yes or no?

A. I'm not sure what kind of acid, but, yes, probably.

Q. Okay. And she was in the business of -- of skin care?

A. Yes.

MR. LISLE: No further questions.

JUDGE SCOTT: Anything else, Mr. Keever?

MR. KEEVER: No. No more questions.

JUDGE SCOTT: May this witness be excused?

MR. KEEVER: She may be excused.

MR. LISLE: Yes, sir.

MS. SOREY: Thank you.

JUDGE SCOTT: Ms. Sorey, you're free to leave or stay in the courtroom as you wish.

MS. SOREY: Thank you.

JUDGE SCOTT: Call your next witness, Mr. Keever.

MR. KEEVER: We call Lisa Jones.

JUDGE SCOTT: Lisa Jones, Mr. Tucker.

MR. BAILIFF: Remain standing and raise your right hand please.

(Wherein, the witness was sworn.)

MR. BAILIFF: Thank you. Have a seat. Speak clearly into the microphone please.

JUDGE SCOTT: You may proceed.

MR. KEEVER: Thank you, Your Honor.

LISA JONES, 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. Lisa Jones.

Q. Ms. Jones, would you just introduce yourself to the jurors? And tell them just a little bit of an introduction to you.

A. Okay. I'm Lisa Jones. I'm from Tulsa and I do oil and gas work.

Q. Tell us, tell the jurors, please, about your relationship with Sue.

A. She's one of my best friends.

Q. When did you meet her?

A. 2003, 2004, somewhere. I think it was 2004.

Q. And where were you living at that time?

A. I was living in Heber Springs, Arkansas.

Q. Now, was that your -- your work home or your actual home, home?

A. No. That was my work home.

Q. Okay.

A. I was there, though, for almost eight years, so kind of

became home.
Q. Gosh. What kind of work were you doing?
A. I do -- I'm a landman. I do work for oil and gas. At that time, I was doing title on the Fayetteville shale.
Q. Now -- and in -- what was your -- your -- your living situation, I guess, in January of 2009?
A. I was living in Heber Springs in a duplex there, working there, but my home's in Tulsa. That's my permanent residence.
Q. And where is your -- where are you living now?
A. Tulsa.
Q. Okay.
A. Yeah.
Q. Would you tell the jurors how you learned about the defendant, Dr. Elkins?
A. Through Sue. She told me about him.
Q. And tell -- tell us -- share with us, if you wouldn't mind, what were the circumstances whereby you were -- you learned about Dr. Elkins?
A. Sue -- I was wondering -- I was talking to her about somebody who -- to -- to do a procedure for me. And she recommended him and said that she had known him.
Q. And what -- what did you decide to do in terms of having a procedure?
A. Oh, I had liposuction.

Q. I wasn't going to say that, but -- but --
A. You asked.
Q. Did you -- did you -- what'd you decide to do about having the liposuction?
A. What do you mean? I mean --
Q. Did you have it?
A. Yes, I did.
Q. Okay. And when was your surgery scheduled to take place?
A. In 2009, January 23rd.
Q. Okay. Can you see the --
A. Uh-huh.
Q. -- calendar okay? So your -- your surgery was on a Friday --
A. Right.
Q. -- January 23rd.
A. Uh-huh.
Q. Okay. Now, how did -- how -- how was that arranged? How was it set up?
A. She set it up. Sue set it up for me. I -- I kind of told her the week I'd like to have it done. And she called his office and made that appointment for me.
Q. And the appointment that she made, was it for a appointment before the surgery date?
A. The one she made for me -- she made herself one, too,

but, yes, she made -- that was before my surgery.
Q. Okay.
A. Day before.
Q. And let me just -- let me just be clear. Your surgery was on Friday the 23rd.
A. Right.
Q. When was the first time that you ever spoke to or laid eyes on Dr. Elkins?
A. The day before, the 22nd.
Q. Thursday, the 22nd?
A. Yes.
Q. Now, Ms. Jones, what plan did you and Sue make for your trip to Rogers?
A. We were going to leave that morning, Thursday. The -- early in the morning so we could get down there in time for her to have her procedure done and for me to see Dr. Elkins.
Q. And then you would have your procedure the following day?
A. The very next morning. I --
Q. Sure. When was the first time that you set foot in Dr. Elkins' office?
A. That Thursday, 22nd.
Q. Where were you on Wednesday, January 21st?
A. At work.
Q. In?

A. Heber Springs, Arkansas. Yeah.
Q. Now, what do you -- what can you tell us about the actual trip to Rogers? And if I -- if you would, just walk us through starting with exactly what date it was, the time that you got together and -- and the trip to Rogers? Would you mind?
A. Sure. We -- I -- we left that morning. We had talked about leaving Wednesday, but Sue had clients, I had work. And so we were going to leave early the next morning. And she knew where we were going. So, you know, we knew where -- how long it was going to take us. So we left Thursday morning and drove here.
Q. Who -- who drove?
A. I did.
Q. And what do you recall about Sue taking or not taking any medication on that trip?
A. I don't remember her taking any medication --
Q. Okay.
A. -- at all.
MR. KEEVER: Now, may I approach the witness, Your Honor?
JUDGE SCOTT: Yes, you may.
Q. (Mr. Keever continued.) Ms. Jones, I'm going to show you what has been marked as Plaintiff's Exhibit No. 21. Can you identify that for us?

A. Looks like a description of me. It has my name and my birthday.
Q. Would that be a part of the medical record that you obtained from Dr. Elkins' office?
A. It looks like it.
Q. Okay. And what was the date on that?
A. 1/22.
Q. Does that correspond with what you remember about when you saw Dr. Elkins on Thursday, the 22nd?
A. It does.
Q. Okay. Okay. The night of Sue's laser, which would've been, we all agree, that was on the 22nd, where did you --
A. The night before?
Q. The night of Sue's laser, which was the 22nd.
A. Right. Right.
Q. If I understand, you left the morning, drove to Rogers --
A. That morning, she had it that afternoon.
Q. Right. Do you recall what time you got there?
A. I think it took us a little under four hours to get there. So it was, like, before noon.
Q. Okay. And, Ms. Jones, where did you and Sue stay that night?
A. A hotel right down the road. I think it may've been the Red Roof Inn.

Q. It's been a while?
A. Yeah. It has.
Q. Yeah. What did -- were you kind of Sue's caretaker that night?
A. I was.
Q. What'd she look like when she came out of surgery?
A. Horrible.
Q. About what time was that?
A. It was dark. It was in January, so it was, you know -- it was just getting dark, so I don't -- I don't know, five, five thirty.

MR. KEEVER: Okay. May I approach again, Your Honor?

JUDGE SCOTT: Yes, you may.

MR. KEEVER: Thank you, sir.

Q. (Mr. Keever continued.) Ms. Jones, I'm going to show you what has been previously marked as Exhibit No. 5. And do you recognize that photograph?
A. I do.
Q. Where was that taken?
A. At my house in Tulsa.
Q. And about when -- when was it taken?
A. It was the day after my surgery. So it would've been little over 24 hours after Sue's, so morning after.
Q. Okay.

A. That's my bed. That's how I recognize it.
Q. After -- after your surgery, which was on Friday the 23rd, can you kind of walk us through what -- what you and Sue did?
A. Yeah. After my surgery, it was -- it was dark. It was late. And we drove to Tulsa. We drove to my house, to Tulsa, where we stayed for a couple of days.
Q. And who -- who -- who drove?
A. Sue drove. Yeah. Sue drove me.
Q. Do you -- what do you remember of that trip?
A. Nothing really.
Q. Okay.
A. At all.
Q. There --
A. Right as we came into town, right as we came into Tulsa, I started remembering.
Q. Okay. Now, there's an office note saying Sue came back to Rogers to see the defendant on February 4th, which would've been actually the following Monday. Did you accompany her on the following -- no. I'm sorry. I'm sorry.
A. On the --
Q. On -- on January 26th.
A. On the 26th.
Q. Pardon me.
A. Yes.

Q. Did you accompany her back to that visit?
A. We -- I did.
Q. Was that a routine planned return, or were you aware of what -- what were the arrangements for Sue seeing Dr. Elkins on Monday?
A. Well, we were supposed to go straight back to Heber Springs, but she was in pain and very worried. And so she called him and he agreed to meet us at her office -- his office. And I remember 'cause it was a really bad snow storm. So we drove to Fayetteville, and then we drove -- or not to Fayetteville, but to Rogers-Bentonville area and then drove to Heber Springs, which increased our trip by about three or four hours.
Q. And I may've misspoken. I -- I don't remember exactly if there was an office note. But I appreciate you filling in that blank for us. Ms. Jones, there is a note, though, that says that she came back on February 4th. What -- what do you remember about Sue's appearance about two weeks after the surgery?
A. It didn't look good. It was -- you know, you could see the -- the -- the squares raised. They were red and white and still bleeding, still oozing all over her face and her chest.
Q. Over the course of the next year, or so, how much contact did you have with Sue through the rest of 2009?

A. Every day that I was in Heber Springs, we saw each other. She had a house on the lake, and -- and we were there a lot. I saw her every day.

Q. Do you have -- what direct knowledge do you have of any of the medical treatment that Sue had with other doctors?

A. I don't have -- I don't remember -- I didn't go to -- go to any of those appointments or go to anything like that with her, so I don't know.

Q. Before the laser, how much time did Sue spend on the lake or outdoor activities?

A. Quite a bit. We were -- we were on the lake a lot. We -- you know, neither one of us had a boat at that point, but -- or I didn't, and -- but we were on the lake quite a bit.

Q. How about after Sue's laser, say, the -- up through the rest of 2009 until the summer of 2009, how much time did sue spend on the lake?

A. Very little. She wasn't supposed to be in the sun.

Q. And did she cooperate with that -- with that recommendation, that --

A. Yes.

Q. -- she stay out of the sun?

A. And when the few times that she did go out, she was always completely covered.

MR. KEEVER: Okay. Thank you, very much, Ms. Jones. I will pass the witness.

JUDGE SCOTT: Mr. Lisle, any questions?

MR. LISLE: Yes, sir.

CROSS-EXAMINATION

BY MR. LISLE:

Q. Did Ms. Poff ever do any treatments for you as an esthetician?

A. Who -- oh, Sue?

Q. Sue.

A. Yes.

Q. What sort of treatments did she do on you?

A. Just regular, mostly deep, you know, extraction facials, facial work.

Q. Does that include acid peel?

A. Uh-huh.

Q. Did she -- did she ever use an IPL machine on you?

A. What is that?

Q. Intense pulse light?

A. Yes, under my arms.

Q. Okay. And she operated that machine for you?

A. She did.

Q. Okay. What about -- I know this is personal, but I'm sorry. But electrolysis, any other machines like that?

A. Yes, electrolysis.

Q. She -- she did that, as well?

A. It wasn't a machine, though.

Q. Okay. Did she ever have you sign consent forms when -- before she would do those procedures?
A. No.
Q. Warn you of any possible risk?
A. Just, you know, regular conversation, you know. By the time I went in to see Sue as an esthetician, I had already looked into anything I've asked her to do.
Q. Okay. So you didn't need her to continue to tell you about the -- any risks that were associated with a acid peel?
A. No. Just in general conversation.
Q. Okay. And you both had scheduled to take time off after these procedures that you had?
A. Those were my regular days off. That's why we went -- that's why I scheduled mine on Friday morning.
Q. Uh-huh.
A. And I got off half the day on Thursday. And I was off again on Monday. It was called my long weekend.
Q. And you -- you planned a recovery period. You knew there was going to be some downtime?
A. Yeah. I went back to work Tuesday morning.
Q. Okay. Would you describe Sue's condition -- you say she looked horrible, was it raw, oozing, that sort of thing?
A. It was raw. It was oozing. It looked like -- just reminded me specifically of like one of those meat cleavers, you know, that I used to see my grandmother --

Q. She -- she blister, that sort of thing?
A. I would say blisters.
Q. Did you --
A. I would say raised whelps.
Q. Did you ever see her develop a yellow oozing crust?
A. No. Not specifically, oozing crust, no. But there was plenty of oozing.
Q. Did you see her applying any treatments to herself?
A. Sure.
Q. What sorts of things was she doing?
A. Different kinds of lotion, moisturizers because it was tightening up and pulling in.

MR. LISLE: I don't have any further questions.

JUDGE SCOTT: Anything else, Mr. Keever?

MR. KEEVER: I have no further questions. Thank you, Ms. Jones.

JUDGE SCOTT: May this witness be excused?

MR. KEEVER: She may be excused.

JUDGE SCOTT: Mr. Lisle?

MR. LISLE: Yes, sir.

JUDGE SCOTT: Ms. Jones, you're free to leave or stay in the courtroom as you wish. Call your next witness, Mr. Keever.

MR. KEEVER: Dr. Daniel Atwood.

JUDGE SCOTT: Dr. Daniel Atwood, Mr. Tucker.

MR. BAILIFF: If you would, remain standing and raise your right hand.

(Wherein, the witness was sworn.)

MR. BAILIFF: Thank you, sir. If you would, speak clearly into the microphone.

DR. ATWOOD: Okay.

MR. BAILIFF: Would you like some water? Would you like some water, sir?

DR. ATWOOD: Please, if that's okay.

JUDGE SCOTT: You may proceed.

MR. KEEVER: Thank you, Your Honor.

HORACE DANIEL ATWOOD, 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. Yes. Horace Daniel Atwood.

Q. And what's your profession, sir?

A. I'm a plastic surgeon.

Q. And where do you practice?

A. Fayetteville, Arkansas.

Q. Dr. Atwood, I'm Jim Keever. And we've had the occasion to meet and visit on a couple of occasions. Isn't that

correct?
A. Yes, sir.
Q. And -- and I -- I represent your patient, Sue Poff, in -- in this lawsuit. I want to thank you for taking your time to come visit with us today.
A. You're welcome.
Q. Now, Doctor, would you just tell the jury a little -- introduce yourself and tell the jury about your -- your background and your -- and your present medical practice?
A. I grew up in rural South Mississippi, went to high school, went to the Air Force Academy after high school. Then I went to medical school back at the University of Mississippi. Sorry to all the Razorback fans. But then I went through general surgery training. I was a general surgeon in the Air Force for a short time. And then did a plastic surgery residency; practiced plastic surgery in the Air Force before they let me go. And then I settled here and have been here since 1987.
Q. What -- how many military academy or Air Force Academy, I guess, graduates go directly into medical school right out of academy?
A. Usually less than one percent.
Q. And -- I'm sorry. Your res -- was your residency in Mississippi?
A. No. Just medical school.

Q. Oh, okay.
A. I had to do all my residencies under the auspices of the Air Force because of my long commitment to them.
Q. And so where'd you do your plastic surgery training?
A. Also in the Air Force at Wilford Hall Medical Center in San Antonio, Texas.
Q. Now, you've been to -- you've been to Northwest Arkansas for how long? Been up here in Northwest Arkansas for how long?
A. Since 1987. I guess that makes about 25 years now.
Q. And your practice -- kind of tell us about your present practice, the practice you developed in Fayetteville.
A. Well, I do a combination of reconstructive and cosmetic plastic surgery. And I do somewhere between 30 to 50 percent reconstructive surgery, depending on how the economy goes at the time. And the rest of it is what you would call cosmetic surgery.
Q. And what is the relationship between a plastic surgeon and a cosmetic surgeon? How do those two titles or appellations interact?
A. Well, there's -- there's no law that says someone can't call themselves whatever they wish to call themselves. Now, most of us that call ourselves plastic surgeons do so because we're certified by the American Board of Plastic Surgery. But -- and historically that was the -- who did cos --

cosmetic surgery. But of course that -- things have changed over the years and so there are a lot of people now that do cosmetic surgery that are not plastic surgeons. And anyone who wishes to practice in that realm can do so. There's no rules about who can or who can't. Now, if you want to practice at a hospital, obviously, you have to get privileges through the hospital to do that.

Q. And the hospital privileges would be what --

MR. LISLE: Your Honor --

Q. (Mr. Keever continued.) -- would require special --

MR. LISLE: I object to this line of questioning.

JUDGE SCOTT: Sustained. Move on, Mr. Keever.

Q. (Mr. Keever continued.) The hospital privileges --

JUDGE SCOTT: Sustained. Let's move on.

Q. (Mr. Keever continued.) You use cosmetic lasers in your practice?

A. Yes, sir. I do.

Q. And you had occasion to see Sue Poff as a patient back in 2010?

A. Somewhere around, yes, I believe that's right.

Q. And actually you've seen her before that --

A. I'd seen her several times before that.

Q. Now, Sue was treated by fractional CO2 laser called the SmartXide or SmartXide. What experience do you have with

that laser?
A. Well, I don't personally use that laser, so I don't have any direct experience. I'm just a little familiar with some of the basics of it.
Q. Do you use a fractional laser in your practice?
A. We don't. We looked into using a fractional laser with the thought being that people would have less recovery time with those, but we already had a non-fractional laser that was working quite well. The important thing was that the fractional lasers were supposed to allow our patients to have less downtime and less reaction from the laser treatment and get well quicker.

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

JUDGE SCOTT: Sustained.

MR. LISLE: -- he's a fact witness on this treatment.

JUDGE SCOTT: Ask another question, Mr. Keever.

MR. KEEVER: Okay.

Q. (Mr. Keever continued.) Have you had occasion to see Sue for her burn injuries?
A. Yes. But that was -- I -- that wasn't directly what I was seeing her for, but I did see them, yes, sir.
Q. And what were your conclusions about the cause of Sue's

burn after you saw her?

MR. LISLE: Your Honor --

JUDGE SCOTT: Sustained.

MR. LISLE: -- objection to foundation.

JUDGE SCOTT: Let's lay a foundation, Mr. Keever.

Q. (Mr. Keever continued.) When you saw Sue for the other procedure, did -- did you also evaluate her burn injuries?

A. Yes, sir. I did.

Q. And from that evaluation, what was your diagnosis as to the cause of the burn injury?

A. Well, she had received scars from her laser treatment.

Q. And what did you suggest to Sue?

A. Well, I told her that the problem that she had was -- wasn't anything that I thought I could help. So I recommended that she see Dr. Jay Burns in Dallas, Texas.

Q. And, Doctor, have you -- have you had any follow up or an opportunity to see what Dr. Burns did as her treating doctor?

A. Well, I understand that --

MR. LISLE: Your Honor, again, objection.

JUDGE SCOTT: Sustained.

Q. (Mr. Keever continued.) What kind of treatments are available for scarring? You know, as a plastic surgeon, do you treat scars?

A. Yes, sir.

Q. And do you see patients who are -- have scars from burns?

MR. LISLE: Your Honor, he's been called as a fact witness about his treatment of Sue Poff. And he's just asking general expert questions at this point.

JUDGE SCOTT: Mr. Keever?

MR. KEEVER: Your Honor, I think that we've qualified him as a -- as a plastic surgeon. He's competent to testify to plastic surgery. And I would like to ask him for his medical opinions --

JUDGE SCOTT: Over --

MR. KEEVER: -- on the scars.

JUDGE SCOTT: Overruled. Go ahead and answer your question.

MR. LISLE: Your Honor, he was not -- Your Honor, he was not identified as an expert witness to -- to give any opinions about that in this case.

JUDGE SCOTT: Was he identified as a witness?

MR. LISLE: Yes, sir.

JUDGE SCOTT: Overruled. Ask your question.

MR. KEEVER: Thank you, very much.

Q. (Mr. Keever continued.) Dr. Atwood, what kinds of treatments -- as a plastic surgeon who treats burn scars,

what kind of treatments are -- are available to treat the kind of scars Sue has?

A. Well, unfortunately, there are not a lot. Steroid injection is one thing that can be done. There's thought that actually even some further laser treatments of a very specific kind might help the scars. And then along the same lines, some people are recommending -- but this is very new -- actually sticking a lot of needle holes in the scars to try to disrupt the scar pattern and flatten it.

Topically, you can put silicone compounds on the scars. If you can get pressure to the scar, that will help. If we have an isolated scar, we just like to cut it out and start over with a better one, but obviously that's not available to Sue.

Q. And you said that there are some kinds of laser treatments. Do you have familiarity, generally, in the laser treatment area, Doctor? Could you tell us about that?

A. Well, I just know that some have recommended using a frac -- fractional laser, a Fraxel Laser to actually burn some small holes in the scar to try to disrupt the pattern and see if that can flatten the scar. I have no experience with that myself, though.

Q. Have you ever sent any of your patients for that -- that type of treatment?

A. No, sir. I have not. I have not.

Q. Okay. How about other -- not the fractional lasers, but other types of lasers to treat the color -- discoloration changes around the scar?
A. Right. Well, discoloration can be treated by any type of laser that will target the redness in there. And a pulsed dye laser's been the one that's used -- been used most commonly over the years because it targets red, and that's what we're going after.
Q. How about something like some of the various intense pulse light treatments? How -- how would that play into the pigment changes?
A. Well, they can help with the redness, as well. And that's just another modality, along with pulsed dye laser, that we use. Yes.

MR. KEEVER: Okay. Well, Doctor, we really appreciate you taking time out from your practice to come and talk to the jurors today. And I'll pass the witness.

JUDGE SCOTT: Mr. Lisle, any questions?

MR. LISLE: Yes, sir.

CROSS-EXAMINATION

BY MR. LISLE:
Q. Dr. Atwood.
A. Hello.
Q. You -- you did not provide any treatment of any kind to

Ms. Poff as far as any burns to her neck or chest, did you?
A. No, sir. I didn't provide treatment to her burns.
Q. And she wasn't in your office to -- to ask you about that primarily when she came to your office, was she?
A. Not primarily when she came. No, sir.
Q. And you've had a longer history with your treatment of Ms. Poff for other things, didn't you?
A. That is correct.

MR. LISLE: Could I -- just want to look. I'm sorry. What am I on?

JUDGE SCOTT: You looking for a number?

MR. LISLE: Yes.

JUDGE SCOTT: Next one is 3.

MR. KEEVER: Can we approach, Your Honor?

JUDGE SCOTT: Yes, sir. Ladies and gentlemen, this is your first opportunity this afternoon to stand up and swing your arms around a bit.

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

MR. KEEVER: Your Honor, these are -- this is an operative note about a breast augmentation. It's pretty private stuff, and it's really not at all relevant to anything to do with the laser procedure or the --

MS. REPORTER: I'm sorry. Could you speak up,

Dr. Keever?

MR. KEEVER: This is a -- an operative note about a breast augmentation, it has very personal information. And it has no relevance, at all, to any of the issues in this case. There's nothing here. It was back in 1999.

JUDGE SCOTT: How would that be relevant, Mr. Lisle?

MR. LISLE: For two reasons, Your Honor. First of all, he's testified that -- I'm sorry. He's testified that he was treating her and left the impression he was treating her for the laser.

JUDGE SCOTT: Well, he's testified he was not.

MR. LISLE: The second thing, Your Honor, is the primary issue in this case, in my opinion, is in -- is the informed consent. They have to prove that she would not have had this procedure that Dr. Elkins did if she had known of the risk. And I intend to show that she's had a lot of cosmetic procedures after she was informed of the risk. And that shows that she would've done it again. In fact, these records are going to show that she had complications from prior cosmetic procedures and then continued having more, including Dr. Elkins'.

JUDGE SCOTT: I think that's a valid point.

You may inquire as to the consent for the procedure. Leave the procedure out of it.

MR. LISLE: Okay. I'm wanting to show that she'd had complications with a prior procedure that he had to fix and then continued to have other procedures.

JUDGE SCOTT: You can do that.

MR. KEEVER: Okay.

(Wherein, the bench conference concluded.)

JUDGE SCOTT: All right. Thank you, ladies and gentlemen. If you would, have a seat and come to order. Proceed, Mr. Lisle.

Q. (Mr. Lisle continued.) Doctor, I hand you what's been marked as Defendants' Exhibit No. 3. Do you recognize that as your records of Sue Poff?

A. I'm sorry. I don't have those.

Q. Oh. You don't have -- give you a copy. Do you recognize those as being records of your treatment of Sue Poff on November the 17th of 1999?

A. Yes, sir. I do.

MR. LISLE: Did we move -- I'd move to admit Defendants' 3.

JUDGE SCOTT: Any objections, Mr. Keever?

MR. KEEVER: Oh, yes. I object for the reasons that we just talked -- I -- I don't know

what Exhibit 3 is. I apologize. I don't even have this.

MR. LISLE: That's Exhibit 3.

MR. KEEVER: Then I object for the reasons that we stated.

JUDGE SCOTT: Defendants' 3 will be admitted over the Plaintiff's objection.

(Wherein, Defendants' Exhibit 3 was admitted into evidence.)

Q. (Mr. Lisle continued.) And on that occasion, Doctor, weren't you treating Ms. Poff primarily in 1999 for a complication that she had had with a prior cosmetic procedure?

A. Yes, sir. I was.

Q. And in order to correct the prior -- I guess the prior procedure she had was in, what, 1996, do your records say?

A. I don't think it says in this particular sheet, and honestly I can't remember.

MR. LISLE: Your Honor, I think I'm going to have to inquire about your ruling so I don't step -- step over the bounds.

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

JUDGE SCOTT: He's already testified she had a complication.

MR. LISLE: Okay.

JUDGE SCOTT: That's good enough.

MR. KEEVER: Your Honor, may I ask to read this if he's not going to be able to talk about the breast augmentation --

JUDGE SCOTT: Yeah. You can redact it we take a recess.

MR. KEEVER: Perfect.

(Wherein, the bench conference ended.)

Q. (Mr. Lisle continued.) In order to correct that complication, did you have to do an invasive surgery?

A. Yes, we did.

Q. A scalpel-cutting-skin surgery?

A. Yes, we did.

Q. And so both procedures, both the one that you were correcting and the one that you did were cosmetic procedures?

A. That's correct.

Q. I want to show you what's been marked Defendants' Exhibit 4. You recognize this as office notes from your clinic?

A. Yes, I do.

MR. LISLE: Your Honor, I'd move to admit Defendants' 4.

JUDGE SCOTT: Any objection, Mr. Keever?

MR. KEEVER: Same objection for the privacy

information. If that's redact -- all privacy information redacted, I don't have any objection.

JUDGE SCOTT: You can redact it when we take a recess.

MR. KEEVER: Thank you, sir.

JUDGE SCOTT: Defendants' 4 will be admitted over the plaintiff's objection.

(Wherein, Defendants' Exhibit 4 was admitted into evidence.)

Q. (Mr. Lisle continued.) On October the 27th, 1999, when you saw Ms. Poff, among other things, did she report, that's reflected in your records, that she had been on Obagi products for one and a half to two years?

A. That's correct.

Q. And at that time, she also had a two layer blue peel?

A. Well, she mentioned that she would like one.

Q. I see. I understand -- it states in the -- in the -- can you describe for the jury what a two layer blue peel is?

A. Gladly. Sometimes chemical peels are done to help the skin resurface and make it look fresher and younger. It's generally a much milder thing than what we would do with a laser resurfacing. And the blue peel, just because it has a blue substance in it so that you can actually see where the medicine goes. That's the problem with peels sometimes you just can't tell where you've been and where you haven't been.

So it's just asking to repeat it once so that you get a little extra dose of the medicine for maybe a more effective result.

Q. Are there possible complications attached to that procedure?

A. Yes.

Q. And in our -- among those complications are there hypopigmentation or hyperpigmentation?

A. Yes, sir. With any of these things, that is a risk.

Q. And scarring is a possible risk?

A. Possible.

Q. And that's also true with every laser treatment that you're aware of?

A. Correct.

JUDGE SCOTT: It's five for the next.

MR. LISLE: Five. I'm sorry.

Q. (Mr. Lisle continued.) I show you what's been marked Defendants' Exhibit 5. Can you identify those as an operative report from your office in January, January the 29th of 2010?

A. Yes.

Q. I'll -- I'll tell you that what we're trying to do here is not talk about what the specific procedures were in some of these things for privacy reasons. So if I ask a question that's going to lead you to do that, remind me. Okay?

A. Okay.
Q. It's a difficult process without telling you that.
A. Right.
Q. But in January of 2010, and that's the same time you testified that you first saw burn scars, were you also doing a cosmetic procedure to address the same issue that you addressed in 1999?
A. Well, not exactly the same. I mean, the same body part if that's --
Q. Okay.
A. Okay.
Q. Is it fair to characterize it as Ms. Poff had experienced a -- a common complication of the procedure that you did for her in 1999 and you had to -- to address it in 2010?
A. Yes.
Q. So she had a complication with a procedure in 1996. You fixed it in 1999. She had a complication and you fixed it again in 2010?
A. Yes.
Q. Okay. And at each of those -- all three of those procedures -- I -- I realize you didn't do the first one, but all three of those procedures involved possible complications, as well, didn't they?
A. All -- yes, sir. All do. Yes.

Q. And these were invasive procedures that also involve the possibility of scarring?
A. Possibly, yes.
Q. And you advised Ms. Poff of all those risks associated with that procedure at each juncture, didn't you?
A. Yes, sir. I did.
Q. And she elected to go forward with it?
A. Yes, she did.
Q. Did Ms. Poff ever talk to you about having additional cosmetic procedures?
A. I can't recall anything that we haven't already discussed right here off the top of my head.
MR. LISLE: Self-redacting a little bit here. Just -- six.
Q. (Mr. Lisle continued.) I'm going to show you what's been marked as Defendants' Exhibit No. 6. Do you recognize that, Doctor, from your office?
A. Oh, yes. I do.
Q. And the date of that is September the 20th, 2010?
A. Yes.
Q. So this is just a few months after Ms. Poff came to you, you first recognized what you've identified as some scarring?
A. Correct.
Q. And then on that date, did she inquire about the possibility of having you perform an unrelated -- completely

unrelated cosmetic procedure that involved invasive surgery?
A. Yes, she did. And that's what this reflects.
Q. And at this time would you have advised her of the possible risk and complications of that procedure?
A. Of course.
Q. And do the risk and -- and complications of that procedure involve scarring?
A. Yes, they do.
Q. Specifically potentially scarring to the face?
A. Yes.
Q. Now, you mentioned in your direct testimony that you saw scarring and you attributed it to her laser procedure. Is that correct?
A. Yes, sir. That is correct.
Q. And that was in June of 2010? Does that -- does that date look right?
A. Without something written in front of me, I -- I can't be specific. I'm guessing you probably have that.
Q. I do, but I -- okay. I believe I handed that one to you.

MR. KEEVER: We'll stipulate that that was -- June 2010 was the visit which you're referring.

Q. (Mr. Lisle continued.) And at that visit, when you said "her laser procedure," did you -- did -- were you under the impression that she'd only had one laser procedure on that

date?
A. At that time, correct, I was under the impression she'd only had the -- the one.
Q. One. The one being the one --
A. The one --
Q. -- the one she had --
A. The one that Dr. Elkins had performed. Yes, sir.
Q. She did not tell you at that time that she had had another Fraxel Laser treatment in April of 2009?
A. I wasn't aware of that at the time. No.
Q. And you weren't aware of another one that she had in June of 2009?
A. Correct. I was not.
Q. She didn't inform you about a third Fraxel -- actually, a fourth, including Dr. Elkins, that she had on July the 14th of 2009?
A. Right. I was not aware of that at the time.
Q. Okay. And another one on August the 31st of 2009?
A. Right. I wasn't aware of that at the time.
Q. I'm going to go through a few more. She didn't tell you about another laser treatment she had on September the 3rd of 2009?
A. No. She did not.
Q. You had no knowledge of another treatment on -- laser treatment on September the 14th, 2009?

A. To the best of my recollection, I was unaware of those at the time.
Q. And yet another one on September the 25th of 2009?
A. Again, same -- same answer.
Q. Okay. One more, November the 6th of 2009?
A. Correct.
Q. Okay.
A. I mean, at the time, I didn't know that.
Q. She didn't -- she didn't tell you about any of those additional treatments?
A. Not when I had seen her at the time. No.
Q. So and you didn't know that as of June, 2010, in the year 19 -- I'm sorry -- in the year 2009, she had had nine laser treatments?
A. Right.
Q. And, Doctor, isn't it true with each one of those laser treatments, she could've had complications up to and including scarring?
A. It's possible.
Q. Permanent scarring?
A. Possible.
Q. And after every laser treatment, doesn't the patient need a time to heal so that their skin can restore?
A. Right. And, of course, that varies. Yes, sir.
Q. Sure. But the laser causes an injury. The cosmetic

effect comes after the body heals itself, doesn't it?

A. Yes, sir, it does.

Q. And sometimes the -- the body can take up to a year, so I've been told today, to -- to reestablish collagen. Is that correct?

A. Well, for the entire process to run full cycle, yes.

MR. LISLE: No further questions.

JUDGE SCOTT: Mr. Keever, any questions?

MR. KEEVER: Yes, I have, Your Honor. Thank you.

REDIRECT EXAMINATION

BY MR. KEEVER:

Q. Doctor, what would giving consent to open invasive surgery have to do with whether somebody had the knowledge necessary to consent to a laser surgery?

A. I'm sorry. Could you ask me the question --

Q. Okay. Well, Mr. Lisle was asking about whether you had advised Ms. Poff about the surgical procedures and they were invasive surgical procedures, she gave her consent. Would having been through that process with you, would you think that that would give her information necessary to make a decision on laser surgery?

A. Not exactly because it's a lot -- it's a much different procedure.

Q. What's the level of risk with a blue skin peel, in terms

of risk of -- of scarring as opposed to the risk of a laser resurfacing?

A. Oh, the blue peel probably has a risk of something maybe at five to ten percent of what a laser procedure may have.

Q. Now, we talked about the procedures that you had. And -- and I think you said the '99 procedure was necessitated because of a complication from a prior procedure?

A. Yes, sir.

Q. So not entirely an elective procedure?

A. Not entirely, no.

Q. And in 2010, was Ms. Poff involved in a car accident before that that -- that had some influence on her needing to have the 2010 surgery?

A. That is quite possible. I have not documented that in my records. But if she were involved in a car wreck, that could certainly have a lot to do with that situation.

Q. Okay. Did she have -- I believe it was Exhibit 5, which was the estimate list for some cosmetic procedures. Did she have any of those procedures?

A. Exhibit 6. I'm sorry.

Q. No. 6. Thank you, very much, Doctor. Did she have any of those procedures?

A. No, sir. She did not.

MR. KEEVER: Now -- and may I approach the witness, Your Honor?

JUDGE SCOTT: Yes, you may.

Q. (Mr. Keever continued.) Doctor, I'm going to show you Defendants' Exhibit 1, which are some records from a place called SkinStar Laser, and exhibits -- various exhibits that show her chest from 1/22/09 before the laser, and a month, two months, kind of like two and a half months, and then a year and a half after the laser procedure, if I may, sir. And I'd like to ask you a question about those.

Now, the SkinStar Laser, if you look at the first treatment, which was the April of 2009 treatment, what -- what -- did it involve the chest, at all, as far as you can tell?

A. They have listed just the neck at that point.

Q. Okay. So, Doctor, would there be any way that that laser treatment would've interfered with the healing of Ms. Poff's chest?

A. No, sir.

Q. And then if you would go to the pictures. And one of the pictures is from February 18th, I believe, of the chest.

A. Yes, sir.

Q. What degree of healing do you see there, in terms of recovering from -- from her laser procedure?

A. Well, we see the -- the skin -- the entire area has been recovered superficially, but we see already scarring and multiple areas where there's unevenness in the skin, I'm

afraid.
Q. Okay. And then as you just go through there, there's an April 9th, I believe, 2009 picture?
A. Yes, sir. I have it.
Q. What's the degree of healing that's gone on at that point?
A. Well, the scars have matured some. Some have already gone on to lightening, which is a little surprising. If they were left unattended, I wouldn't have expected to see this much lightening already. But we can still see the marked unevenness in the skin surface.
Q. And then you've got a picture from actually June of 2010, which is about when you saw Sue.
A. Correct.
Q. If you look at the April 2009 and compare it with the June of 2010, what would you expect to have seen if she had no treatment, at all, had just let time do its work?
A. Well, actually, this is probably what I would've expected had she had no treatment, at all.
Q. Okay. Now, go to the SkinStar schedule on the front. And I think you mentioned to my previous question, that Fraxel Laser can be used to break up scar tissue. Did I remember that testimony correctly?
A. You -- you were correct. Yes.
Q. Now, in April -- well, not in April, that -- that was

just the neck. But the first treatment, isn't it -- is -- for the Fraxel is in June of 2009. Is that what the records show?

A. Yes, sir. It is.

Q. Was the maturity of the scar tissue in June of 2009, then sufficient that a Fraxel treatment might've helped? And we don't -- we -- April is the last one in 2009 that we have.

A. Right, unfortunately. Again, that's what's theorized. I've -- I've seen a couple of articles published on that. And one said they had some significant improvement, and one said they didn't so...

Q. How -- what -- what do you think, based upon reasonable medical probability, the chances are that those Fraxel treatments made Sue worse?

MR. LISLE: Your Honor, I'm going to object. There's no -- there's no --

JUDGE SCOTT: Sustained.

MR. LISLE: -- foundation. He hasn't reviewed those other Fraxel treatments.

Q. (Mr. Keever continued.) The Fraxel treatments in the record that you see there and the dates of the Fraxel treatments -- let me just make it more generic. I'll rephrase.

Doctor, from what you've seen there, and we have Fraxel treatments in June, July, and August, I believe, and would

Fraxel treatments at five, six, seven months out from a scar have made the scarring worse?

MR. LISLE: Your Honor, can I voir dire the witness on this?

JUDGE SCOTT: You may.

VOIR DIRE EXAMINATION

BY MR. LISLE:

Q. Dr. Atwood, before you could evaluate the effects of any Fraxel treatment, wouldn't you need to know the laser settings that were used?

A. Yes, certainly.

Q. Wouldn't you need to know who the operator was, what their training was?

A. Well, assuming they used the settings that were appropriate --

Q. I -- I don't want you to assume anything. That's why I'm asking these questions.

A. Okay.

Q. In order to say what caused something, wouldn't you have to review all the -- we can do that, but wouldn't you have to review all the documents related to each one of those treatments to see how it was treated, what they were treating, what laser settings they used, what the recovery time was, and all of those things?

A. To be strictly technical, yes.

MR. LISLE: Yes. Okay.

JUDGE SCOTT: So the objection's sustained.

MR. KEEVER: I'm not going to ask the --

JUDGE SCOTT: Let's move on, Mr. Keever.

MR. KEEVER: -- strictly technical question. I'll withdraw my question, Your Honor.

Doctor, thanks again for taking the time to come up here. I -- I think I have no further questions.

JUDGE SCOTT: Anything else, Mr. Lisle?

MR. LISLE: Your Honor, I -- I believe based on that redirect, he's opened up the question of what's in those medical records, too, because he -- we were talking about them as being elective procedures and then he started saying they weren't really elective procedures, so...

JUDGE SCOTT: I -- I think you're correct. Go ahead.

RE-CROSS-EXAMINATION

BY MR. LISLE:

Q. The first procedure that Ms. Poff had in 1996 was a breast augmentation, wasn't it, Doctor?

A. If that's the correct date.

Q. The one -- I'm sorry. Prior to your 1999 --

A. Prior to -- prior to my surgery.
Q. She was dissatisfied with a prior breast augmentation and possibly had complications and asked you to redo it, didn't she?
A. Yes.
Q. And that's a purely elective procedure at that point?
A. Correct.
Q. That one was purely elective. She was dissatisfied. She'd had a surgery. She wanted to have another surgery.
A. Correct.
Q. The second one, she -- for -- your records may show that she had a ruptured breast implant, and you were fixing that, weren't you?
A. Well, interestingly enough, we didn't know that at the time that we went in. That was just a fortuitous finding. We're glad that we caught it when we did.
Q. And a rupture is a possible complication of a breast implant operation, isn't it?
A. It is, yes.
Q. That's one of the things you tell somebody, if you get implants, you have to know that this could rupture and it can cause problems for you down the road?
A. Correct.
Q. What are some of the problems that can be caused by a ruptured implant?

A. Well, other than the --

DR. ATWOOD: Well, how -- Your Honor, how technical can I get here? As technical as I --

JUDGE SCOTT: Just answer the question. What are some of the problems with a ruptured implant, Doctor?

A. Well, it depends if it's a saline or silicone implant. With a saline implant, the only problem is that it looks flat. Now, with a silicone implant, here's the rub, because if it's ruptured, again, like was here, we may not even know it's ruptured. It may not even look any different. The risk is that over time, and this was much more true the silicones from over seven or eight years ago, there's a risk that the silicone would migrate through the scar tissue capsule that the body forms around an implant, and then it would get into some of the breast tissue or muscle tissue locally and then we'd have to take that out as well.

So unless one were to let a rupture go for years, usually that even is not problem.

Q. (Mr. Lisle continued.) But you do have to come back and do another invasive surgery, create a scar?

A. Just to -- just to swap them, yes.

Q. And one of the things you tell folks before they have a breast implant surgery is that it's -- it's not likely a one-time lifetime surgery, don't you?

A. If you're smart, that's correct.
Q. You have to tell them that there can be possible unacceptable cosmetic outcomes, don't you?
A. Yes, sir.
Q. And some of those complications can include contracture, asymmetry, breast pain. Are those -- are those possible complications?
A. Those are all possible. Yes.
Q. And those were all explained to Ms. Poff at each of those procedures?
A. Yes.
Q. And she elected to have those procedures?
A. Correct.

JUDGE SCOTT: Is that all, Mr. Lisle?

MR. LISLE: That's it, Your Honor.

JUDGE SCOTT: Anything else, Mr. Keever?

MR. KEEVER: Very, very briefly, Your Honor.

REDIRECT EXAMINATION

BY MR. KEEVER:

Q. Well, Dr. Atwood, is contracture, asymmetry, and pain a reasonable indication to have a revisional surgery?
A. Well, it -- it all depends on how severe it is and whether the patient wants it.
Q. So it's an election of the patient --
A. Yes.

Q. -- depending upon -- upon their symptoms?
A. Correct.

MR. KEEVER: Well, for the third time, I'll thank you for your time, Dr. Atwood. I have no further questions right now, Doctor.

JUDGE SCOTT: Anything else, Mr. Lisle?

MR. LISLE: No, sir. No further questions.

JUDGE SCOTT: May this witness be excused, Mr. Keever?

MR. KEEVER: Yes, sir. He may.

JUDGE SCOTT: Mr. Lisle?

MR. LISLE: Yes, sir.

JUDGE SCOTT: Dr. Atwood, you're free to leave or stay in the courtroom as you wish.

DR. ATWOOD: Thank you, Your Honor.

JUDGE SCOTT: Thank you. Mr. Keever, call your next witness.

MR. KEEVER: Your Honor, we will need to be sure the technology's working. We call Ms. Poff.

JUDGE SCOTT: Ms. Poff, come up to the witness stand. The bailiff will show you to the witness stand.

MS. POFF: Wow.

MR. BAILIFF: If you would, you remain standing and raise your right hand please.

(Wherein, the witness was sworn.)

MR. BAILIFF: Thank you. Have a seat.

MS. POFF: I don't want to mess it up.

MR. BAILIFF: Just -- there you go. If you would speak -- sit up close and speak clearly into the microphone, please.

JUDGE SCOTT: You may proceed.

SUE POFF, having been called upon to testify on her own behalf, testified as follows, to wit:

DIRECT EXAMINATION

By MR. KEEVER:

Q. Would you give the court reporter your name, please?

A. I'm Sue Poff.

JUDGE SCOTT: If you would, ma'am, scoot -- scoot up and speak directly into that microphone. You can pull it down if you need to. Thank you.

A. I'm Sue Poff.

Q. (Mr. Keever continued.) Thank you, Sue. Sue, would you just turn and introduce yourself to the jurors?

A. Hi. I'm Sue Poff. I'm 51 years old. I live in Little Rock, Arkansas. I'm the medical biller for a billing office.

MS. REPORTER: Ma'am, I need you to speak right into that microphone.

MS. POFF: Oh, I'm sorry. Is that better?

JUDGE SCOTT: You'll need to stay right up

next to it, Ms. Poff. Thank you.

A. Did they hear all that?

Q. (Mr. Keever continued.) Yeah. Go ahead.

A. I'm sorry. I'm 51 years old. I live in Little Rock, Arkansas. I am a medical biller for a billing office. I was born in Little Rock, but Northwest Arkansas's my home base. This is where my family lives, my sisters, my aunts, my uncles, and cousins. My parents are here and I come up very often to take care of people.

Q. Thank you, Sue. And -- and I'll remind you if you're speaking too softly. And others may, too. And we're not fussing, but you're soft spoken. So try to stay close to the mic. Okay?

A. Yes.

Q. Now, Sue, you talked about the connections that you have with Benton County. Maybe you could just go from Little Rock and take broad slices of time, going backwards, and -- and let us know where you've live -- lived. You're in Little Rock now.

A. I've lived in Springdale, Farmington, Fayetteville, Rogers, and Heber Springs briefly -- well, Heber Springs.

Q. And where were you living at the time of your laser?

A. I was living in Heber Springs.

Q. That was January 22nd, 2009.

A. Yes, it was.

Q. And you drove all the way from Heber Springs to Rogers to have your laser by Dr. Elkins?
A. Yes, I did. He's my doctor.
Q. What is -- your records will show that you made several trips back over ten -- ten-year period, or so, to see Dr. Elkins. What other professionals did you travel back to the Rogers area to see when you were living in Heber Springs?
A. I saw my dentist, in Fayetteville; and I saw Dr. Holden, in Springdale; and Dr. Elkins, in Rogers.
Q. And did your treatments with Dr. Holden have anything, at all, to do with this case?
A. Nothing, at all. No.
Q. Okay. Now, Sue, I'd like to go back to January of 2009, if you would. And I want you to tell us about your life in Heber Springs during that -- that period.
A. I had my own facial skin care business, a salon. And -- and I lived on the lake, self-employed.
Q. Well, tell us about your facial beauty salon. What -- what kind of licensing or qualifications did you have to do that?
A. I had a cosmetology license in the State of Arkansas and esthetician's license. It was four months of schooling in Little Rock, or 600 hours' equivalency.
Q. And closer to the mic, please.
A. I'm sorry.

Q. And -- well, Sue, this -- how does that relate to the kind of cosmetology license you have where you're licensed to do hair and -- and the whole hair thing?

A. I think for hair, it's one and a half to two years. It's a lot more extensive than mine. Mine was just four months.

Q. What kind of services did you offer your customers?

A. Superficial skin care and treatments. I did facials; facial massage; makeup; facial waxing, eyebrows, lips; body waxing; things like that.

Q. Hair removal?

A. Yes. I did hair removal.

Q. What did you learn about lasers in your cosmetology school?

A. Nothing. I didn't study that, at all.

Q. And -- and since then, what have you learned about -- up to the time of your laser procedure, what -- what was your level of knowledge about lasers?

A. I didn't have much understanding, at all.

Q. Okay. Up to the microphone.

A. I'm sorry.

Q. I know. I'd like to ask about some of your medical treatments by the defendant before your laser. And we can -- we've got those records admitted into the -- your medical records admitted. So if you need to refresh your memory on a

date, just let us know, and I'll provide those. Okay?
A. Okay.
Q. Now, your laser was in 2009, January 2009. When did you first have an opportunity to look at Dr. Elkins' medical records about that procedure?
A. After I filed this lawsuit during discovery process.
Q. And how long had you been seeing the defendant as a patient?
A. I started seeing him, probably, in the early to mid-eighties.
Q. And what were you seeing him for back then?
A. Infertility treatments.
Q. Now, as -- as time progressed, how did the defendant's practice change and -- and how did your treatment by him change?
A. He was always a gynecologist and obstetrician. And he was -- I used him for hormone replacement regularly. His practice started changing more into a cosmetic design practice. And he liked to stay current on trends and was real interested in skin health and wellness.
Q. Now, what was the first cosmetic treatment you had from the defendant?
A. I think it was Botox.
Q. And when was that?
A. I don't remember.

Q. Was it before the laser?
A. Years before, probably.
Q. Okay. Now, Sue, I want to just kind of go through the cosmetic things that you had by the defendant, and they're in your medical records. It looks like, in '98, you had a scar revision and liposuction. Could you tell us about that?
A. Yes. I had three ectopic pregnancies, which are where the baby's in the tube and it explodes. So my scars on my stomach were very unsightly, stretched out. And I went to Dr. Elkins for scar revision. And at the time he suggested liposuction would help even out the unevenness of the scar.
Q. And that was in '98. And I think that there's in your records there's something about Nu-Derm or Obagi treatments and a blue skin peel in '99?
A. Yes.
Q. Can you tell us about that?
A. Yes. I grew up on the water pretty much up here with Beaver Lake and in Heber Springs, of course. And sun damage has always been challenge. And Dr. Elkins has always been proactive in helping prevent and fix sun damage. And he had suggested the Obagi blue peel, which is a chemical peel, like Dr. Atwood said, to help get rid of the sun damage. But to prepare for that, you have to use the Obagi skin care products for I think a minimum of three months to six months I think to prepare for that peel.

Q. And you did both of those?
A. Yes. Dr. Elkins did.
Q. And then you had another blue peel and -- and even a second liposuction in 2002?
A. Yes. I had gained a lot of weight. And as Dr. Elkins had said, if you do that, it's going to make it uneven, so suggested smooth it out.
Q. Now, Sue, according to the records, and you confirmed this in 2006, 2007, 2008, there are no dictated doctor notes in the defendant's records. Does that correspond to your memory?
A. Yes. I don't think I saw him during that time.
Q. But your billing rec -- the billing records show that you -- you did come to the office periodically. And -- and would you tell us about that?
A. Oh, yes. He still monitored all my hormones. So I would see his staff regularly for blood draws and occasional Botox injections.
Q. And -- and that leads us into the period that we want to talk about. There is a cash charge on December 23rd, 2008. And it said, "Botox." Do you recall that visit?
A. Yes. I do. I was --
Q. And --
A. I'm sorry.
Q. No. I didn't mean to over talk you. I apologize. What

would -- do you remember what that visit was about?
A. Yes. I was coming up to spend Christmas break with -- my very best friends lives in Bentonville. And I stopped by Dr. Elkins' office to have a Botox injection in my forehead on the day before Christmas Eve.
Q. Okay. And I want to talk about that visit.
MR. KEEVER: Your Honor, may I just confirm with the Court what my next exhibit number would be?
JUDGE SCOTT: 39 is the next one, Mr. Keever.
MR. KEEVER: Thank you, Your Honor.
Q. (Mr. Keever continued.) Sue, tell us about that visit to the office.
A. It was uneventful. I came in and saw Susie, his nurse. And got the injection and -- and left.
Q. And what else did you see while you were there?
A. Above the receptionist's desk was a poster, a pretty large poster, probably what'd you'd see regularly, over two, three feet long, big, advertising for the DOT therapy laser. It said "Repairs sun damage. Minimal downtime. Encourages skin health and wellness. One treatment."
MR. KEEVER: May I approach the witness, Your Honor?
JUDGE SCOTT: Yes, you may.
Q. (Mr. Keever continued.) Sue, we -- I -- I think we

actually viewed this yesterday, but we didn't admit it. Would you identify what you see and what we've marked as Exhibit 39?

A. This is a very small version of the poster that was up above his receptionist.

MR. KEEVER: Your Honor -- I'm sorry. I didn't mean to cut you off. Your Honor, we would like to admit Exhibit 39 at this time.

JUDGE SCOTT: Any objections, Mr. Lisle?

MR. LISLE: No, sir. No objection.

JUDGE SCOTT: Plaintiff's 39 will be admitted without objection.

(Wherein, Plaintiff's Exhibit 39 was admitted into evidence.)

MR. KEEVER: And could we dim the lights, please, Mr. Tucker? Do you mind?

Q. (Mr. Keever continued.) And up on the slide is a copy of the poster. (As read) "Too Good To Be True." "Revolutionary DOT CO2 Laser surfacing. Ideal for the treatment of" -- a number of things, in fact, including scars. "Single Treatment - Minimal Downtime - Outstanding Results." And then there's a website down there, www.dottherapy.com. Is -- is that as you remember the poster?

A. Yes. Yes.

Q. Now, what conversation did you have with anyone at the office about the laser that day?

A. I didn't discuss it with anybody.

MR. KEEVER: Okay. Now, may I approach the witness again, Your Honor?

JUDGE SCOTT: Yes, you may.

Q. (Mr. Keever continued.) Sue, I'm afraid I've gotten these out of order, if you'll just give me a moment. I've got a number of pictures here that are dated. And I would ask you to go through these and just confirm -- they're -- they've all been admitted, 4, and 5, and 27, 29, 7, and 27. And -- and would you just confirm that the dates that are either on the front or the backs of these pictures are accurate? Would --

A. Yes.

Q. Yeah. Just go through each one, one by one.

MR. KEEVER: And then, Your Honor, I would simply ask to publish those to the jury.

JUDGE SCOTT: All right.

Q. (Mr. Keever continued.) Go ahead.

A. Number 4 is January 22nd, 2009.

MR. LISLE: Can I see what's on the back? There's something -- I didn't realize there's anything on the backs of the page?

JUDGE SCOTT: Yes, you may.

MR. KEEVER: Your Honor, it's just her signature and the date.

MR. LISLE: Oh. Is that the same on all of them?

MR. KEEVER: Yes.

MR. LISLE: Okay. No objection.

MR. KEEVER: Pardon me.

A. Number 5, January 23rd, 2009.

Q. (Mr. Keever continued.) That was the day after your surgery.

A. Yes, sir. Number 7, February 18th, 2009.

Q. That's the one that we looked at with Dr. Atwood.

A. Yes. Number 27, 3/13 2009.

Q. Two months after the surgery.

A. Yes. Number 29, April 9th, 2009.

Q. And not quite three months after the surgery.

A. Number 30, June 1, 2010.

Q. And a year and a half. And I had -- well, did we -- did I hand you the one before the surgery?

A. Yes. It's in there.

Q. The one before the surgery?

MR. KEEVER: Fine. Thank you, very, very much. Thank you, Your Honor. I appreciate the Court letting me do that.

Q. (Mr. Keever continued.) Now, we'd asked the defendant

preserve that poster, but instead we simply have this. And now I'd like to bring up the next slide, which is one of the exhibits. And that's the one you identified as having been made on what day, Sue? January six --

A. 16th, 2009.

Q. A week before your procedure.

A. Yes, sir.

Q. Sue, why would anyone who looks as good as this choose to have a laser procedure?

A. There was sun damage on my chest. And as the poster said, it was help to -- more preventive to stimulate healthy skin growth. And the side effect would be great not minimizing some fine lines.

Q. Okay. So now we've left the office. We're late December. When is the next time you talk to somebody about the poster of the laser?

A. I spoke with Dr. Elkins January to schedule Lisa Jones' surgery.

Q. Telephone call?

A. Yes. I called the clinic and asked to schedule her. And he got on the phone and I asked him about the -- the poster that I had seen in his office. And he said that it was a great thing. He had it done himself. It'd be great for me and my skin. And to go to www.dottherapy.com and it would see the procedure and everything I wanted to know about

it.
Q. What did the defendant tell you about the risk of the procedure?
A. We didn't discuss risks about it.
Q. What did the defendant tell you about the downtime?
A. I could have it done Thursday, go out to dinner with my friend Thursday night, and be back at work with full makeup Monday morning.
Q. Now, what did the defendant discuss with you about the difference between, you know, having light settings and downtime versus heavier settings and downtime?
A. We didn't discuss settings.
Q. And how about the actual settings that he was proposing to use on you? What -- what did we discuss about that?
A. It wasn't discussed. I trusted him totally.
Q. Did you go to that website?
A. Yes, I did.
Q. And what did you learn?
A. No adverse reactions. It had a demonstration of a procedure being done. You -- she was just a little inflamed, red, little uncomfortable, and it was great.
Q. What did the website information tell you about the risk of permanent scarring?
A. Nothing. It's not mentioned.
Q. Sue, what other websites did you go to to research the

procedure?
A. None other ones. That one was good.
MR. KEEVER: Could I have the next slide, please, Ken?
Q. (Mr. Keever continued.) Now, Sue, these have previously been admitted. And this is -- these are the pictures that the defendant took in his office the day of the surgery right before the surgery. It doesn't show well, but is there a brown spot on your right cheek there?
A. Yes. There is.
Q. What were you asking him to do about the brown spot?
A. That was my beauty mark. I'd had it my whole life. It was a flat mole, actually. I asked him to leave it. I was kind of attached to it.
Q. Okay. How about the chest? What were you expecting to accomplish with the chest?
A. To get rid of the redness.
Q. Now, Sue, we got -- we know that there are three different settings on the laser. And the next slide will be something that we've seen before out of the defendant's records.
A. Yes.
Q. Did you ask -- what did you ask the defendant in terms of explaining just how much power, how high the settings were going to be?

A. We didn't discuss that.
Q. What would've been your response if you had been told that the settings would be up to 400 percent higher than recommended by the manual?
A. That would've been a huge red flag. I would've asked a lot more questions and possibly gotten a second opinion.
Q. What would've your -- been -- been your response if the defendant had told you that his planned treatment was likely to give you some degree of permanent visible scarring?
A. If I'd had any idea that the scars and burns that I have were possible, I would've never done the procedure.
Q. Sue, you heard the testimony about seeing you and defendant saying he saw you and Lisa in the office. And -- and the note was dated Wednesday, January 21st. Where were you on Wednesday, January 21st?
A. I was at Heber Springs, working.

MR. KEEVER: May I approach, Your Honor, give something to Mr. Swindle?

JUDGE SCOTT: Yes, you may.

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

JUDGE SCOTT: Yes, you may.

MR. KEEVER: Thank you.

Q. (Mr. Keever continued.) Sue, I am going to give you what is marked --

JUDGE SCOTT: 40 is the next number.

Q. (Mr. Keever continued.) -- Exhibit No. 40. Now, how can you be sure that you were in Heber Springs on January the 21st?

A. This is my appointment calendar. I had a client --

Q. Don't show it. Don't show it yet please.

A. Oh, I'm sorry.

Q. That's fine. You're okay.

A. I had an appointment scheduled on here.

MR. KEEVER: And I would ask to admit Exhibit 40 at this time, Your Honor.

JUDGE SCOTT: Any objection, Mr. Lisle?

MR. LISLE: No, sir. No objection.

JUDGE SCOTT: Plaintiff's 40 will be admitted without objection.

(Wherein, Plaintiff's Exhibit 40 was admitted into evidence.)

MR. KEEVER: Thank you. May I publish Exhibit 40?

JUDGE SCOTT: Yes, you may.

MR. KEEVER: Thank you, sir.

Q. (Mr. Keever continued.) And we've heard from Jill Sorey. Tell us Jill -- about Jill Eades.

A. She got married recently. Her name's Sorey now. It was Jill Eades.

Q. Okay. Now, we've got in the next slide an office note from the defendant dated January 21st, 2009. And that would've been on that Wednesday that you just said you were in Heber Springs, not in Rogers, Arkansas. When -- when did you actually go to Rogers, Arkansas, for your January 22nd surgery?

A. My friend, Lisa Jones, drove me Thursday, the morning of the procedure.

Q. Okay. It also says that you were -- that you paid $2,000 for your laser, and it's dated January 21st. How much did you pay for your laser?

A. I paid $2,000. I paid $1300 in cash and I wrote a check for $700.

Q. Okay. And we've already admitted a copy of this check, which we will --

MR. KEEVER: You can go ahead and go ahead. Thank you.

Q. (Mr. Keever continued.) And this is your check dated January 22nd?

A. Yes, it is.

Q. Not January 21st?

A. No. That's the day I wrote it.

Q. Now, Sue, that's the date on the piece of paper on the check, but when did you actually write that check?

A. I wrote it January 22nd, prior to procedure.

Q. And do you remember writing it?
A. Kind of fuzzy, but I remember going to the clinic and walking in the reception desk and paying my cash and writing the check. I do remember.
Q. Okay. I want to ask a little bit about that fuzzy and about the medications that you took before your procedure. May I?
A. Sure.
Q. Closer to the --
A. Yes.
Q. Okay. The next slide is from Exhibit No. 23 and it's for a drug called Ativan or lorazepam. And it says to take one at bedtime the night before the appointment and one 30 minutes before the appointment. Did you get that prescription filled?
A. Yes, I did.
Q. And how did you take it?
A. Exactly as prescribed by Dr. Elkins.
Q. In that same exhibit is also a drug called Compazine. And it says to take 30 minutes before appointment. How did you take that one?
A. Exactly as he prescribed it for me.
Q. So you took two different sedatives 30 minutes before you got to the doctor's office?
A. Yes, sir. I did.

Q. How'd they work?
A. Very well.
Q. How'd you feel by the time you got to the doctor's office?
A. Very happy, very relaxed.
Q. Now, the next slide is part of the defendant's records. And it's -- we've looked at this before. And it's the sedation record, which says that you took those at 12:30 p.m. Does that sound about right?
A. Yes, sir. It does.
Q. Okay. I want to talk a little bit more in detail about the day of your surgery, Thursday, January 22nd, 2009. What time did you and Lisa leave out for Rogers?
A. It was still dark and very cold. I don't remember an exact time.
Q. And who was driving?
A. Lisa was driving.
Q. Why didn't you guys go over Wednesday evening, the 21st?
A. I had to work and Lisa had to work. If we had left Wednesday night, she would've missed a half a day.
Q. Now, we talked about the medications. But in your records there is a consent form that you signed dated 1/22. Is that correct?
A. Yes, sir. It is.
Q. When in -- when did you sign that consent form in

relationship to when you got to the clinic?
A. I got to the clinic, paid my money, and was taken back to exam room where I undressed. Dr. Elkins came in, talked to me for a little bit, left, and then I think his nurse, Susie, came in, and took me back to start my IV, and she had me sign those forms then.
Q. You have -- well, that is a consent form. I guess either Mr. Swindle pre -- predicted or we were ahead. Now, do you remember reading it over carefully and understanding it on the day of surgery?
A. No, sir. I don't.
Q. Have you read the form since?
A. Yes, I have.
Q. Warns about the possibility of burning and scarring.
A. Yes. It does.
Q. Let's see. I have a little laser. Now, let's see, "Possibility of short-term effects." Let's see, been fully informed -- I apologize to the jury. I -- I -- but it -- it does -- oh, here it is up here, "scarring," and "permanent discoloration," so it is in there.
A. Yes, it is.
Q. Okay. Now, poster says single treatment, minimal downtime.
A. Uh-huh.
Q. And -- and, again, what did Dr. Elkins --

MR. KEEVER: I think we have the next slide posted, Mr. Swindle.

Q. (Mr. Keever continued.) What did Dr. Elkins tell you in your particular case you could expect from the downtime? How many days off of work?

A. That I would be back Monday or Tuesday.

Q. How important was that to you?

A. I was self-employed. It's extremely important. I had clients, customers scheduled for the week.

Q. Now, where did you and Lisa spend the night after your surgery?

A. In a hotel, in Rogers.

Q. What do you remember about that night?

A. I remember waking up in the hotel room bleeding through the sheets in the bed.

Q. And next day?

A. We went to Dr. Elkins' office. And I was waiting -- I was to wait for Lisa's procedure. And I was hurting so badly that I spent the day laying on an exam bed.

Q. And then that night?

A. I drove Lisa and I to Tulsa that night and --

Q. You okay?

A. Yeah. I'm fine. Sorry. I was hurting so badly on the trip that I called Dr. Elkins' nurse, and said that it was an extreme pain. It was bloody. And she said that the

ointments probably weren't heavy enough. So she suggested I use Crisco. So I called Lisa's husband and he went out and bought me a new can of Crisco to put on when I got to Tulsa.

Q. And the next slide was -- I believe, Lisa identified that as having been taken in her bed that night? That --

A. Yes, sir. It was. That's Crisco.

Q. So that's the white stuff that we're seeing, is Crisco?

A. Yes.

Q. Now, I want to talk a little bit about the weeks and months after the laser. May we?

A. Sure.

Q. The next slide is -- should be a split screen. And, again, it just shows those -- those preoperative areas. And then the next slide, we -- we admitted a -- a picture of your cheek earlier today and -- and that's on the right. And you identified that as being in June of 2010?

A. Yes, sir.

Q. That's where the brown spot was?

A. Yes, it is.

Q. And now it looks like we've got a square white spot?

A. Looks like a hashtag.

Q. How does it -- how does it look today?

A. I've got it covered up pretty heavily, but if you look, you can see it.

Q. And -- and we --

A. And you can see these.
Q. We may ask you to give the jurors a closer view. But how does it -- how does that change during the course of the year?
A. I wear strong sunscreen, but as soon as summer's here it really stands out because my face gets darker.
Q. Okay. Now, Sue, I want to -- I want to talk now about the skin on your chest and neck, and primarily the skin on your neck -- or your chest. The next slide should be the preoperative photo. And it shows us the -- the redness. You said that Dr. Elkins said that you'd be back to work make -- wearing makeup in three or four days?
A. Yes. He did.
Q. Had you been told that you could have burning and scarring that would cause you to miss a lot of time at work, how would that have affected your decision to have the surgery?
A. I wouldn't have done it. I couldn't have done that.
Q. Well --
A. I would not have done that.
Q. How many -- how many days did you miss over the next three months?
A. 45 from work.
Q. Here's the next slide, is the defendant's note from February 4th, 2009. And it says pictures were taken, but we

haven't seen those pictures. What'd you look like then? This is, like, 13 days after the surgery?

A. Pretty much the same as I did right after surgery. It wasn't so bloody.

Q. And the very top line, it says, (as read) "She's happy with the results of her surgery." Is that true?

A. No. No.

Q. Next slide is -- Sue, is -- now this is that set of pictures from one month after the surgery. How were you feeling at that time?

A. Pretty terrible. My face was scabbed. My chest was red and raw. My face was raw. You can see scabs on my upper lips. Look at my eyes, there's scabs under both them. And my chest was tightening up. I'd have to do this (indicating) and stretch it all the time.

Q. But your face, actually, other than the white spot, the white patch that -- forget how you termed it -- healed up pretty well after -- after this. Wouldn't that be fair?

A. Yes, thankfully. Thank God.

Q. The next slide is you identified it as 3/13/09. I believe it was taken at another doctor's office?

A. Yes, sir.

Q. And that would be Doctor --

A. Jay Holland in Little Rock.

Q. Okay. And we -- and we've heard a little bit about Dr.

Holland. How were you feeling at this time?

A. Somewhat better, but still pretty bad.

Q. How about the -- you mentioned the chest was tightening up and -- and so forth. What was -- what was it feeling like at this time?

A. My neck would form what are called bands, scar bands. They have to be stretched and broken out, and here (indicating), too.

Q. Sue, the next picture, we -- we had this picture on the left admitted earlier. And we don't have it dated here, but it was 4/09/09. And then compared with the picture on the right, and this the last time I'll ask you this, but how happy were you feeling about your surgery on the 9th of April 2009?

A. Not at all.

Q. Next slide is an office note from the defendant's records which is six days later. He clarified that this wasn't a personal visit, but it was a telephone call where he says, (as read) "She's happy with the results of her CO2." Now, Sue, when did you first see those two office notes from two weeks and three months after your procedure that says you were happy with the notes?

A. After this lawsuit was file, my attorney got the records for me.

Q. How'd you feel when you saw those notes?

A. Totally violated.
Q. And this is going to be the last picture that we'll have in this series. And that's the picture that, again, we already saw and I think it was published to the jury. And that's in June 1st, 2010.
A. Yes, sir.
Q. Okay. Sue, the next section, we're going to go ahead and talk about some of the treatments that you got from Dr. Elkins and -- and other places after your burns.
A. Okay.
Q. Okay.
A. Sorry.
Q. Go ahead and take some water if you need some. Now, I think the medical records show and I believe Dr. Elkins confirmed that the last time you saw him was February 25th, 2009. But you had some telephone con -- contacts after that?
A. Yes, I did.
Q. And his -- his -- his February 25th records say he gave you a copy of an e-mail. And it's already been admitted and I think it's up here. Do you recall this e-mail?
A. Yes, I do.
Q. What can you tell us about that?
A. I had asked Dr. Elkins to get in touch with the laser manufacturer because something was terribly wrong with me. I didn't know what we needed to do, but we needed help. And I

asked him to research it and please find out what to do.
Q. And he gave you that e-mail?
A. Yes, he did.
Q. The -- the note on February 25th -- and -- and I -- I don't have it up there, but it also talks about a prescription for ultrasound and some skin products to apply. What was the sequence of getting the ultrasound in terms of whether you asked for it, or whether Dr. Elkins suggested it?
A. Actually, on the ultrasound, Dr. Buffalo, my primary care doctor, his wife had suggested that that might help with these bands that were form -- forming -- excuse me -- to break up the scar tissue. So I called Dr. Elkins and asked him what he thought about it, and he wrote a prescription for it.
Q. Okay. And then the -- the e-mail also talks about some other -- more treatments: skin care, microdermabrasion, and something called IPL. Which of those did the defendant suggest that you go ahead and start out with right away?
A. Nothing at that time.
Q. And then there is a -- in the records, we'll find a March 8th note about a telephone call that -- that does mention a local doctor and some hyperbaric treatments.
A. Yes.
Q. And can you tell us about that?
A. I went to see my family physician because I was just not

doing well. And my chest was still sore, still raw. And he said he needed to put me in the hospital for dehydration. And I went to the parking lot and called Dr. Elkins and told him that Dr. Buffalo is going to hospitalize me. And what -- and Dr. Elkins said, "Find somebody with a hyperbaric oxygen chamber treatment. That will help your body heal." There was a local doctor in Heber that was reputed to have one. I called him, a Dr. McNair. And he told me that he no longer had one, but Jay Holland in Little Rock was a wound treatment specialist and he could help me.

Q. And then you went to Jay Holland and got set up with hyperbaric?

A. Yes, I did.

Q. The last note in your records from the defendant's office is on -- about the burns, is on 5/19/09. It's a phone call. And it says that (as read) "She'll come in for steroid injections," and "She'll treat the areas with her IPL." Now, let's talk about the IPL, first of all. In fact, Lisa, I think, said that you did some -- some hair removal using IPL?

A. Yes. The one that I used was to remove hair. That's what it did.

Q. You -- was it able to be used to treat scars?

A. No. It was not.

Q. Did you use it on yourself, at all?

A. No. I did not.

Q. And how about the steroid injections?
A. We didn't do those either. I had seen Dr. Bauer in Little Rock. Dr. Holland had referred me. After our hyperbaric oxygen treatments ended, he said it was time to go see plastic surgeons for some consults for some really scar help. And Dr. Bauer was one of those he sent me to. And Dr. Bauer said that at this time my scars wouldn't -- they were so extreme that the skin would be more damaged by the steroid shots than not. And he would not do them.
Q. So you chose not to have those done?
A. Yes, I did.
Q. And, finally, the note talks about tanning. Says, (as read) "She will start tanning soon." Now, this is four months after your burn?
A. Yes, it was.
Q. And what -- what's this about the tanning?
A. Dr. Elkins wanted me to get in a tanning bed to see if the white spots would turn color.
Q. And did you do that?
A. No, sir. I did not. I had seen so many doctors and every one of them said --
MR. LISLE: Your Honor, object --
A. -- to stay out of the sun.
MR. LISLE: -- to hearsay with other doctors.
JUDGE SCOTT: Sustained.

Q. (Mr. Keever continued.) What was your understanding of whether or not you should be exposed to tanning or sun exposure after your burn?
A. That I needed to be especially protective of my chest and neck and skin.
Q. And what other -- without telling us what they said exactly, but what other plastic surgeons did you see as 2009 and 2010 rolled through?
A. I saw Dr. Bauer in Little Rock. I saw Dr. Suzanne Yee in Little Rock.
Q. Dallas.
A. Oh, I'm sorry. I saw Dr. Jay Burns in Dallas.
Q. Tulsa?
A. I saw Dr. -- well, I saw Dr. Patel in Tulsa, first. And then I saw Dr. Jay Burns in Dallas.
Q. And what was your understanding of what Dr. Yee would've -- would've recommended for continuing treatment for the scar and -- and then the discoloration?
A. Dr. Yee had sent my pictures to the laser manufacturer and got suggested recommendation protocol from them. She suggested that --

MR. LISLE: Your Honor, again.

JUDGE SCOTT: Sustained.

MR. LISLE: Same objection.

MS. POFF: I'm sorry.

JUDGE SCOTT: Why don't we stop there, and we'll take out afternoon recess at this time.

MR. KEEVER: Thank you, Your Honor.

JUDGE SCOTT: Ladies and gentlemen, we're going to take our afternoon recess. I remind you of the admonition I've told you before. You're not to discuss this case or anything involved with it with anyone, including among yourselves, until I dismiss you to go commence your deliberations. Do not do any research or any investigation regarding any of the witnesses, the parties, or the issues involved in this case. Mr. Tucker, you may take the jury out.

MR. BAILIFF: All rise.

(Wherein, the jury left the courtroom at 3:14 p.m.)

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

(Wherein, a break was taken from 3:14 to 3:35 p.m.)

MR. BAILIFF: All rise.

JUDGE SCOTT: Be seated, please. Mr. Tucker, give each -- one of those to each of the attorneys, please.

Counsel, this is a first. I have received a note before the jury has retired. Mr. Tucker tells

me that Ms. Shuey's husband is concerned that she is hearing a criminal case and that somebody bad is going to come after her. I propose when the jury comes in that I tell her this is a civil case. Any objections to that, Mr. Keever?

MR. KEEVER: Absolutely not, Your Honor.

JUDGE SCOTT: Mr. Lisle, any objections?

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

JUDGE SCOTT: Mr. Tucker, bring the jurors in. Counsel, I have marked the original note Court Exhibit 3.

(Wherein, Court Exhibit 3 was admitted into evidence.)

MR. KEEVER: Thank you, sir.

MR. BAILIFF: All rise.

(Wherein, the jury entered the courtroom at 3:36 p.m.)

JUDGE SCOTT: Be seated please. Ladies and gentlemen, this is a civil case. This is not a criminal case. You may proceed, Mr. Keever.

MR. KEEVER: Thank, Your Honor.

Q. (Mr. Keever continued.) Sue, are you up to the microphone?

A. Yes, sir.

Q. Thank you. Now, Sue, we talked about the -- a SkinStar

Laser Spa in Little Rock during some of your earlier testimony?

A. Yes, sir.

Q. And my first question is do you -- well, do you have Defense Exhibit No. 1 there so that you can refer to it?

A. Yes, sir. I do.

Q. What doctors were involved in supervising your treatment at SkinStar?

A. Dr. Jay Holland in Little Rock and Dr. Suzanne Yee in Little Rock. And --

Q. And who's the medical director of SkinStar Laser?

A. Doctor -- I never could pronounce her last -- his last name.

Q. Beoniece (phonetic)?

A. B -- something. Sorry.

Q. Okay. So there were three doctors involved to some degree or another?

A. Yes, sir.

Q. Now, Sue, looking through the records there, do you find -- I mean, there -- we couldn't find any consents in that exhibit. What type of consents did you sign at SkinStar?

A. I signed general consent forms prior to any treatment.

Q. Similar to the consent form that you signed for the treatment in the defendant's office?

A. I assume so.

Q. Okay.
A. Well, I'm not supposed to -- I'm sorry. Yes.
Q. Now, Sue, I'd like to just go through those treatments. First one was on what day in April? And -- and I think they're --
A. I'm sorry.
Q. -- in order.
A. No. Is this the summary sheet, sir?
Q. Oh. Yeah. If can -- if you can do it from the summary sheet, what was -- what was first treatment?
A. April 22nd, 2009.
Q. And I believe that we established that the treatment sheet said that was the neck only?
A. Yes, sir. That was the test patch.
Q. And the -- the -- what was the reason, from your perspective or your understanding, as to why it was another two months before you went back for a more full treatment?
A. Wanted to see how my body responded and healed.
Q. And how did it do?
A. Beautifully.
Q. And then you had the treatment in June?
A. Yes, sir. June 1st.
Q. And how did you react to that treatment?
A. I did well.
Q. Now, when you say you did well, Sue, what was your

understanding of the goal of these treatments with the Fraxel?

A. It was to help the scar tissue lay flatter and the bands to get softer so that this tightness would stretch out.

Q. And was that accomplished?

A. Yes, it was.

Q. The next treatment was in July, I believe?

A. Yes, sir. July 14th, 2009.

Q. Same result?

A. Yes, sir.

Q. And then another one in August, I believe?

A. Yes. August 31st.

Q. Now, that was the last of the -- so you had three Fraxel treatments to the scars on your chest.

A. Yes, sir.

Q. And what was your understanding of why the next treatments were not going to be Fraxel but were going to be Genesis?

A. The Fraxel was to target the scar tissues and the tightening. And Genesis was to address some redness.

Q. And the Genesis treatments were really much closer together, weren't they?

A. Yes, sir. I think.

Q. And how -- how did they do, in terms of improving the redness?

A. Beautifully.
Q. What -- what has happened to that redness over -- you're actually talking, like, 2010, over two and a half years now?
A. It looks terrible.
Q. And how does it look now compared to when you started the Genesis Lasers?
A. Terrible.
Q. What would be your preference in terms of your options -- well, not your options. What would be what you would like to do in terms of future laser treatment and what your understanding is?
A. I would like to do what was suggested by Dr. Yee to me, my understanding of the Genesis Lasers for the redness and what Dr. Shewmake talked about as far the Fraxel for the scar bands that are forming again and a flattening. And that helps.
Q. Okay. And -- and we have that testimony from Dr. Shewmake, so we don't need to go through that again. Now, you talked about a Dr. Patel. And you went to Tulsa to see Dr. Patel. And without getting, really, into the how you got there, what was your understanding of what Dr. Patel was recommending for your chest scar?
A. Dr. Patel had a Lumenis Laser, which had been proven for, was being used to treat burn scars very successfully. You --

MR. LISLE: Your Honor, foundation.

JUDGE SCOTT: Sustained.

MS. POFF: I'm sorry.

Q. (Mr. Keever continued.) Your -- your understanding of not -- not what had been done or was -- had been proven to be done, but what was your understanding of what treatment was recommended by Dr. Patel for you?

A. She wanted to do the Lumenis Laser on my neck and chest.

Q. And purpose of that would be?

A. To break up the scar bands that were forming and to help the thick areas lay flatter and not get tight.

Q. And I believe you -- did you have a test patch done?

A. Yes, sir. I did. She did a small patch on my neck and on my chest.

Q. How did that work out?

A. It was a lot more invasive than I thought it would be. It was very traumatic.

Q. And what did you decide to do on moving forward after the test patch? What are your plans now in terms of moving -- doing any further work with the Lumenis like she did?

A. I can't do that.

JUDGE SCOTT: Ms. Poff, would you speak directly into the microphone please?

MS. POFF: I'm sorry.

A. I chose not to -- to follow that.

Q. (Mr. Keever continued.) And then I think that the last doctor that you mentioned was a Dr. Jay Burns in Dallas.
A. Yes, sir.
Q. And what's your understanding of what Dr. Burns thought was going to help your scars?
A. My understanding was Dr. Burns said the focus would have to be on burn management and scar reduction. His suggestion was medical tattooing, which would help the bands lay flatter and the scars lay flatter and break up the scar tissue and help with pigmentation to get a more even appearance.
Q. And have you embarked upon the medical tattooing treatments?
A. I've had three.
Q. And --

MR. KEEVER: May I approach, Your Honor?

JUDGE SCOTT: Yes, you may.

MR. KEEVER: Are we 42? Are we 42?

JUDGE SCOTT: No, sir. Four zero. 39 was the last one.

MR. KEEVER: Okay. Yes, sir.

Q. (Mr. Keever continued.) Sue, I'm going to hand you three photographs which I have marked as Plaintiff's Exhibit --

JUDGE SCOTT: Just -- just a minute, Mr. Keever. I apologize. Ms. Olenberger, where are we here? Have I

missed some?

MS. REPORTER: I believe the next one is 41, Your Honor.

JUDGE SCOTT: What was 40?

MS. REPORTER: I don't have written down what it was.

MS. POFF: This is 39.

JUDGE SCOTT: The poster is 39. Did you admit something after the poster, Mr. Keever?

MR. KEEVER: Yes, sir. The day planner.

JUDGE SCOTT: Oh. I apologize, 41's the next one.

MR. KEEVER: Thank you, sir.

JUDGE SCOTT: Thank you. Thank you, Ms. Olenberger.

Q. (Mr. Keever continued.) Sue, would you just identify for the jury what has been marked as 41, 42, 43, Plaintiff?

A. This is a picture of my chest prior to tattooing treatment. It's 41. 42 is after the tattooing treatment. And 43 is during it.

Q. During the tattooing treatment?

A. Yes, sir.

MR. KEEVER: Your Honor, we would move to admit 41, 42, 43.

JUDGE SCOTT: Any objections, Mr. Lisle?

MR. LISLE: No, sir.

JUDGE SCOTT: Plaintiff's 41 through 43 will be admitted without objection.

(Wherein, Plaintiff's Exhibits 41, 42, and 43 were admitted into evidence.)

MR. KEEVER: Could we just show those up there?

Q. (Mr. Keever continued.) Sue, what we have up here is 41. And this was just before you had a tattooing treatment on March 1st, 2011. Is that correct?

A. Yes, sir. It is.

Q. And then the next one is after that medical tattooing treatment?

A. Yes, sir. It is.

Q. And then the third one is a close up during the treatment?

A. Yes, it is.

Q. Sue, how -- how does that feel?

A. It hurts pretty badly.

Q. What -- exactly what are they doing in this -- in this treatment itself?

A. In these three treatments, no pigment was used. It was more like a treatment to get my skin ready for the pigment, more of a prep type thing. But they tattooed with saline from here to here (indicating).

Q. And have you been given an estimate from the tattooist

as to the cost for the treatments?
A. Yes, I have.
Q. And what was that estimate?
A. About $11,000 a treatment.
Q. And how -- kind of how long will those treatments last before they -- what's your understanding about how long --
A. My understanding is --

MR. LISLE: Your Honor, that's -- that's the same thing.

MR. KEEVER: Well --

JUDGE SCOTT: Sustained.

MR. KEEVER: Okay. Well, we heard -- we've heard what -- thank you, very much, Your Honor. Your Honor, at this time -- oh, goodness. At this time -- may we approach?

JUDGE SCOTT: Yes. Ladies and gentlemen, this is an opportunity to stand up and swing your arms around.

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

MR. KEEVER: Your Honor, Ms. Poff has testified she's 51 years old. And from Section 18-2-105 is it appropriate for me to ask the Court to take judicial notice that her life expectancy is another 29.35 years?

JUDGE SCOTT: You have any objection to that?

MR. LISLE: None. No.

JUDGE SCOTT: Okay. Yes.

MR. LISLE: I do have objection to these numbers that are --

MR. KEEVER: I'm not -- I'm not going to admit --

MR. LISLE: Okay.

MR. KEEVER: -- it. That's why I didn't want to admit it.

MR. LISLE: Okay.

MR. KEEVER: Thank you, Your Honor.

(Wherein, the bench conference concluded.)

JUDGE SCOTT: Thank you, ladies and gentlemen.

MR. KEEVER: Your Honor, at this time, we would ask that the Court take judicial notice that according to the statutory life expectancy tables that Ms. Poff at age 51 has a remaining life expectancy of 29.35 years.

JUDGE SCOTT: Any objections, Mr. Lisle?

MR. LISLE: No, sir. No objection to that.

JUDGE SCOTT: Mr. Keever, that motion's granted. Ladies and gentlemen, you are to accept the fact that according to Arkansas statutes, Ms. Poff has a remaining life expectancy of 29.35

years. You may continue, Mr. Keever.

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

JUDGE SCOTT: Yes, you may.

Q. (Mr. Keever continued.) And same thing. I'm going to hand you what's marked as Exhibits 36, 37, and 38, Sue.

A. Yes, sir.

Q. Sue, can you just tell us what document 36 is?

A. It's a summary of my past medical expenses.

Q. And who prepared that?

A. I did.

Q. Okay. And how about 37?

A. It's my past medical expenses, but it's got copies of all the receipts in it.

Q. And is that -- do those include all the receipts that would be accounted for in the summary?

A. Yes, sir. It does.

Q. And then 38?

A. This is an accounting of my loss of work.

Q. And?

A. And the backup for that.

Q. Okay. And -- and -- and tell me, Sue, over -- you did that accounting, that summary, how far did that carry up to?

A. Of -- of which one, the expenses?

Q. Of -- of -- of the expenses, those -- were those current

as of now, or were those current as of a year ago?
A. Looks current up to May 16th of 2011.
Q. Okay. And over the last year, year and a half, what additional treatment expenses have you had that were attributable to -- to your burn or your scar?
A. Treatment expenses or just --
Q. Or -- or whether it's prescription or whether it's self-applied, the -- the camouflage makeup that they've talked about?
A. About a thousand dollars.
Q. And that's based upon, what, the camouflage makeup?
A. Mostly the makeup and just a few skin care products of the Obagi line, not very many.
Q. Sue, according to your accounting method, what have been the past expenses that you've had related to treatment for your burns?
A. $27,120 and 95 cents.
Q. And how did you calculate your loss of work? What -- how much per day?
A. A hundred and seventy-five dollars a day.
Q. And you arrived at that estimate based upon what your -- what your average income was at your salon?
A. Yes, sir.
Q. And how much did you calculate was your lost wages because of recovering or treatment?

A. $12,600.

Q. So it's somewhat less than $40,000 for past expenses?

A. Yes, sir.

MR. KEEVER: Your Honor, at this time, I would like to move to admit Exhibits 36, 37, and 38, which were marked but not admitted because of lack of document -- authentication earlier.

JUDGE SCOTT: Any objection, Mr. Lisle?

MR. LISLE: I believe I do have an objection, Your Honor. Your Honor, I don't object to the receipts, but the spreadsheet contains commentary by the witness --

MR. KEEVER: I'll --

MR. LISLE: -- all throughout.

MR. KEEVER: I'll withdraw that. That's in the summary?

MR. LISLE: And that's -- and I -- I object to --

JUDGE SCOTT: Hang on there, Mr. Lisle. What number is the one you're --

MR. LISLE: Sorry. That was in 36.

JUDGE SCOTT: Yes. That is the summary, Mr. Keever.

MR. KEEVER: I will -- I'll with --

JUDGE SCOTT: All right.

MR. LISLE: And that's true with -- with 38, as well. Well, all of them in the summaries.

JUDGE SCOTT: Are you claiming they're comments by someone other than Ms. Poff?

MR. LISLE: Yes. It's her commenting on what other people have told her.

JUDGE SCOTT: Is that correct, Mr. Keever?

MR. KEEVER: It may be, Your Honor. And I'd be glad to go through and redact all of that.

JUDGE SCOTT: All right. Well, I'm not going to admit it with that sort of hearsay statement in there.

MR. KEEVER: Yes, sir. We'll --

JUDGE SCOTT: You -- if you'd like to take it this evening and redact it and clean it up, you may do so and we'll cross this bridge again in the morning.

MR. KEEVER: I appreciate it, Your Honor. Thank you, very much.

JUDGE SCOTT: Mr. Lisle, why don't you hand those three exhibits to Mr. Keever, so we don't get them misplaced.

Q. (Mr. Keever continued.) Okay. So, Sue, what are -- we have, according to your accounting, not admitted into evidence as an exhibit, but according to your accounting,

some $39,000, plus, of past expenses. What are you asking the jury to do?

A. I'd like to be reimbursed in the verdict for what I've spent.

Q. Okay.

JUDGE SCOTT: I'm sorry. Would you repeat that please? And speak directly into the microphone if you would.

MS. POFF: I'm sorry.

A. I'd like it to be included in the verdict --

Q. (Mr. Keever continued.) Okay.

A. -- for what I've spent.

Q. Now, Sue, we -- there are some future medical things that were talked about earlier and Dr. Shewmake talked about them. I'd like to talk first about the Obagi skin care. Would that be okay?

A. Yes, sir.

Q. Now, you've talked about using the Obagi skin care back around '98 or '99 'til 2002 with the blue peels. Had you been on Obagi skin care products on a regular basis in the years just prior to the laser?

A. No, sir. I had not.

Q. And what doctors have recommended that you use Obagi at this point?

A. Every doctor that I've consulted for this.

Q. Well, every doctor or every plastic surgeon?
A. Every plastic surgeon. Sorry.
Q. Okay. And, Sue, you -- are you familiar with the cost of the Obagi skin care?
A. Yes, sir. I am.
Q. And how much -- how much does it cost for a year?
A. Around two to three thousand dollars a year.
Q. And how long is -- is your understanding that you will need that?
A. The rest of my life.
Q. So at, say, 39 years, 2,000 a year is 78,000; 3,000 a year is, like, 88,000. Is that what your -- you're presenting to the jury?
A. Yes, sir. It is.
Q. And then skin hydration systems, what -- Dr. Shewmake talked about that a little bit. What skin hydration systems have you been using and that you would like to be able to continue to use?
A. It's called Cicaplast Recovery System. It seems to be one that my burns tolerate very well and there's no chemical reaction or adverse effects and it keeps it moist.
Q. And what's the cost of C-plast recovery care?
A. I'd have to see my sheet. It's expensive.
Q. Have you done some calculations?
A. I need -- I need --

Q. Would you like to refresh your memory with the summary that you had?

A. Yes, sir.

MR. KEEVER: May I approach?

JUDGE SCOTT: Yes, you may.

Q. (Mr. Keever continued.) This is not marked. Thanks.

A. Thank you.

Q. And from -- from the calculations that you have done and the -- what you know about the cost, what would be your lifetime cost of C-plast? Did I pronounce that right?

A. I'm not sure how it's pronounced.

Q. The hydration system -- remember speak in the microphone please.

A. I'm sorry. It's $14,800.

Q. For a year?

A. For the -- the rest of my --

Q. That would be for a lifetime?

A. Yes, sir.

Q. Okay. So that's 14,800 and we had 78,000, and 88,000. And then I think that you have down in your summary something about special sunscreens?

A. Yes, sir. It's called Athelios [*sic*].

Q. Well, Sue, wouldn't you need sunscreens anyway?

A. Yes, sir. With my burnt skin, it's extremely fragile and there's usually a reaction in most of them. This one was

suggested by Dr. Patel.

Q. And --

A. And it does well.

Q. Under what you've calculated that you need, what would be your lifetime need for Athelios?

A. $42,200.

Q. And then there is the medical tattooing.

A. Yes, sir.

Q. And you told us what your estimate was. What would $11,000 a treatment -- what is your expectation that your lifetime cost would be for medical tattooing?

MR. LISLE: Your Honor, I -- there's been no foundation for that.

JUDGE SCOTT: Overruled. Go ahead and answer the question, ma'am.

A. $55,000.

Q. (Mr. Keever continued.) Have I hit everything on that side of the --

A. No, sir.

Q. What else?

A. Special camouflage makeup.

Q. Oh, yes. Dr. -- I think Dr. Shewmake said it'd be -- it's about a hundred dollars a month extra.

A. Yes, sir.

Q. Is that consistent with what consistent what you -- same

thing?
A. Yes, sir. It is.
Q. And so how much is that over your lifetime?
A. $35,000.
Q. And then we get to the -- the moving target of future laser treatments. And we've heard some discussion of that pro and con. Is it your desire to have some future laser treatments like Dr. Shewmake recommended?
A. Yes, sir. It is.
Q. And I believe -- would you choose to have the Fraxel treatment that he suggested that would be a -- a set of treatments for $3600?
A. Yes, I would.
Q. And how about -- I think that his suggestion was intense pulse light instead of the Genesis Laser. Is that your understanding?
A. I think so. Yes.
Q. What would be -- what would be your wish if you were able to have it?
A. I'd like to do that for the redness.
Q. And said I believe that was $2,000, plus -- what's your expectation of how much it would be for the maintenance treatments?
A. Five -- 500 to a thousand dollars a year.
Q. So that would be 29 years, so that's going to be -- plus

fourteen five plus four thirty-nine. Twenty -- no that'd be fourteen thousand, twenty-eight thousand.

Okay. So what you're suggesting is the Obagi, which will be somewhere between 78,000 and $88,000 over your lifetime; the hydration system, which is a little over four -- almost 15,000; and the special sunscreens, at 42,000; the tattooing, at 55,000; and the camouflage makeup at 35,000; and then for the lasers, somewhere between 18,000 and $33,000. Is that -- is that what you're asking the jury to include in the verdict protect --

A. Yes, it is.

Q. -- you against medical expenses in the future?

A. Yes, it is.

Q. Okay. Now, Sue, Mr. Lisle asked Dr. Atwood --

A. Uh-huh.

Q. -- about your breast reconstructions. And we heard that you had had three separate reconstructive surgeries on your breasts. Is that true?

A. Yes, I have.

Q. What led to the first one? And -- and do you remember what year it was?

A. I don't remember the year. It had to be -- no, I -- I don't.

Q. We know it was before '99 'cause that's when you had the revision by Dr. Atwood.

A. Yes.
Q. So what were the -- I mean, was this just a pure cosmetic procedure that you wanted to have a breast augmentation?
A. No, sir. It wasn't. I had a breast lump in my right breast that was removed. And to make them uniform, it was suggested to get implants in both breasts.
Q. And then you had some complications from that that led to Dr. Atwood's -- the second procedure. And what was that about?
A. I had a second breast lump form in the same breast. And when the surgeon removed the lump, he cut the valve off one of the implants where the lump was.
Q. So that led to Dr. Atwood 1999
A. Yes.
Q. -- procedure?
A. So I had to have those replaced.
Q. And then what led to -- let's see. Now, we're up to 2010. Dr. Atwood talked about how one of the -- one of the implants had actually ruptured.
A. Yes, it had.
Q. And how -- I mean, what led to you going in and having those -- that third operation?
A. On the way to one of the hyperbaric oxygen chamber treatments in Little Rock, my tire blew and my car rolled

about three times. It ruptured my left implant.
Q. And what happened -- what happened to your breast at that time?
A. You couldn't tell it, but it just felt funny. Something's wrong. Looked different, felt different, something was not right.
Q. And when he did the reconstructive procedure that's when he found out that your silicone implant was ruptured?
A. Yes, sir.
Q. Sue, we talked about -- we talked about the medical expenses. We've talked somewhat about your loss of wages expenses. And -- and we've talked about your pain. And we've seen the scarring. What about your scarring? How has that affected you?
A. It's changed my whole life. I don't know if men would understand this well, but every single article of outer clothing that I had had to be replaced. I can't wear a normal t-shirt because it shows my scars and people stare and ask me about it. My skin constantly gets tight. I do this (indicating) often. I have to use creams that keep it hydrated and messy.
Q. Sue?
A. Yes, sir.
Q. The jurors have been able to see what your pictures look like.

A. Yes.

Q. Would you be able to pull your shawl down enough to show them what your actual scars look like? Would you be able to do that?

A. Yes.

MR. KEEVER: Your Honor, may -- may Ms. Poff stand in front of the jury box just so that they can see her scars?

JUDGE SCOTT: Any objection, Mr. Lisle?

MR. LISLE: No, Your Honor.

JUDGE SCOTT: Yes, ma'am, you may.

MR. LISLE: May I, Your Honor?

JUDGE SCOTT: Yes, you may.

MS. POFF: Where you want me?

MR. KEEVER: Just come right over here in front of the jury box if you would, Sue.

MS. POFF: These are the ones --

MR. KEEVER: Just --

JUDGE SCOTT: No.

MR. KEEVER: Just show them.

MS. POFF: Oh, I'm sorry. I'm sorry.

MR. KEEVER: Don't -- don't talk. Just show them please. Okay. That's fine. Thank you, Sue.

MS. POFF: You're welcome.

Q. (Mr. Keever continued.) Do you need a minute?

A. I'm okay. Sorry.

Q. Get up to the microphone.

A. I'm okay. I'm sorry.

Q. Okay. Okay. Sue, we've talked about the -- the medical expenses.

A. Yes, sir.

Q. And we haven't really talked about how you put a value on pain and on disfigurement. But what would you ask the jury to put into the verdict to compensate you for what you've gone through and what's been taken away?

A. I just want what's fair.

Q. Let's go to the next slide. It's -- it's the split screen slide. Sue, if you could have our jurors just remember one thing about your testimony and your story, what would it be?

A. This was supposed to be a minor thing, minimal downtime. This will never go away, ever. I have to do things so that it can be tolerated the rest of my life.

MR. KEEVER: Thank you, Sue. I'll pass the witness.

JUDGE SCOTT: Ms. Poff, if you would, scoot up to the microphone, pull it down, stay right in front of it. Any questions, Mr. Lisle?

MR. LISLE: Yes, sir.

CROSS-EXAMINATION

BY MR. LISLE:

Q. Ms. Poff, I'm going to come back to this in a little bit. But I can't go on until I -- I say in opening statement I told this jury that one of the things you were going to be asking for was over $200,000 for eight Genesis Laser treatments per year. And that was documentation that I was provided, wasn't it?

A. Yes, sir.

Q. So coming in here on Monday, in addition to everything else that you've just asked for, you were going to be asking for $200,000 worth of Genesis Laser treatments. And that changed during the course of this trail, didn't it?

A. Yes, sir.

Q. Okay. We talked a little bit. You talked a little bit about your training as an esthetician. That was your full-time occupation at the time of this laser procedure?

A. Yes, sir. It was.

Q. You had training in skin care. That's how you made your living, caring for other people's skin?

A. Yes.

Q. And you had a license to operate electrolysis machine?

A. Yes.

Q. And you also had an IPL?

A. I had use of one. It was not my unit.

Q. Okay. And that's the machine that you're now asking to

have used on you in the future, same machine?
A. No, sir.
Q. Oh. And you also worked for Dr. Aguilar before you went to have this laser treatment?
A. That was some years ago. I don't remember when I worked for Aguilar.
Q. Okay. You worked -- you don't remember working in a medical office for Dr. Aguilar?
A. Yes, sir. I did. I don't know the years. It's a long time ago.
Q. Okay. And in addition to working as an esthetician, you made and sold your own skin care products, didn't you?
A. No, sir. I made a body butter bar, which was body butter.
Q. Okay.

MR. LISLE: I'm up -- I'm up to --

JUDGE SCOTT: Seven would be your next.

MR. LISLE: Seven?

Q. (Mr. Lisle continued.) Do you recognize this ad for the product that -- that you marketed?
A. Yes, I do.
Q. And that's something you did to earn money, as well?
A. Mr. Lisle, it was never profitable. It was more like a hobby.
Q. Okay. It's a product you developed. And it says here

that it is to moisturize, protect your skin. (As read) "Daily use provides rich, continuous, luxurious moisture to the body: hands, cuticles, feet," that sort of thing?

A. Yes.

Q. And you -- in your work as an esthetician, you also -- you did acid peels of the skin on the face of other people?

A. Yes.

Q. You went through some of your prior medical treatments with Dr. Elkins. I'd like to go through -- and this is important because one of the things you said is that if there had -- if you had known there was any possibility of being permanently scarred, you would not have done this procedure.

A. I don't think those were my words, Mr. Lisle.

Q. So you were willing to accept some risk of permanent scarring to do this procedure?

A. I think I said something similar to if I had any idea that I would've been burned or scarred this extensively, I would not have consented to the procedure.

Q. Well, I understand. But I -- when we buy a lottery ticket, we all think we're going to win the lottery. And when we sign a consent form saying we could get scarred, does that mean you just didn't believe it could happen or does it mean you -- you're willing to accept the risk? I'm not sure I understand your testimony.

A. What was the question?

Q. Did you accept some risk of permanent scarring from this operation, or not?
A. I signed the consent forms.
Q. Okay. And that was not the first time you had been willing to undertake a purely cosmetic procedure with a risk of scarring, was it?
A. Which -- what are you referring to?
Q. Well, let me --

JUDGE SCOTT: Just a minute, Mr. Lisle. Ms. Poff, if you would, listen to the question and answer the question.

MS. POFF: Okay.

JUDGE SCOTT: Don't try to tell us something else. Don't ask a question. Just answer it. Ask your --

A. Will you repeat it please? I'm sorry.
Q. (Mr. Lisle continued.) Yes.

JUDGE SCOTT: Ask your question again, Mr. Lisle.

Q. (Mr. Lisle continued.) Prior to this procedure, you've had a -- you've had a long history of being willing to accept the risk of other purely cosmetic procedures that involve at least some risk of scarring.
A. Yes.
Q. I'm going to show you what I've marked as Defense

Exhibit 8. Can you -- do you see your signature on that form?

A. Yes, I do.

Q. You see that this is dated 4/8/95, I believe?

A. I think that's '99, sir.

Q. '99. And this was for a blue peel chemical resurfacing of the face. Is that correct?

A. Yes, sir. It was.

Q. And if you would look with me up under "To Aid in Optimal Results and Healing," I'm -- I'll read it. Tell me if I read this correctly. It says, (as read) "Avoid sun exposure and the uses of sun" -- "and use sunscreens until healing has occurred." Correct?

A. Yeah.

Q. "Do not pick, rub, or force off any skin." And then if you look down under (as read) "Potential Risk and Complications," it says, "This procedure is one of the safest available for skin rejuvenation. However, medical treatment is not an exact science and the degree of improvement is variable." Then following that it says, (as read) "Due to the light nature of the peel, complications usually seen in deeper peels, laser dermabrasion procedures such as keloids, or scars are possible, but are un" -- "are unlikely to occur."

A. Yes.

Q. So this not only told you that this procedure had the possibility of scarring, but it also said the complication usually seen in deeper things, such as laser, usually don't happen.

A. I don't understand the question.

Q. "Due to the light nature of the peel, complications usually seen in deeper peels" -- comma -- "laser or dermabrasion procedures such as keloids, or scars are possible, but are unlikely to occur."

A. Yes. That's what it says.

Q. Did you understand that this is comparing itself to the more risky procedure such as a laser?

A. I didn't see this at the time I signed the laser consent form. I didn't understand the relevance at the time.

Q. Okay. I'm going to show you what I'm marking as Defense' Exhibit No. 9. Do you recognize your signature on the bottom of that document?

A. Yes, sir. I do.

Q. And this was a procedure that you had done by Dr. Elkins?

A. This is for laser hair removal. Yes.

Q. This was for the Epitouch Alexandrite Laser procedure that you had done by Dr. Elkins?

A. Yes, for hair removal.

Q. Please wait for my question.

A. Sorry.
Q. If you look in the -- in the end of the first paragraph, it says, (as read) "I understand there's a possibility of rare side effects such as scarring and permanent discoloration as well as short-term effects such as reddening, mild burning, and temporary discoloration of the skin." Did I read that correctly?
A. Yes, sir.
Q. And that was a -- a procedure that you voluntarily undertook --
A. Yes, sir.
Q. -- knowing that risk?
A. Yes.
MR. KEEVER: May I ask what the number on that last --
JUDGE SCOTT: It was 9.
MR. KEEVER: Thank you, Your Honor.
Q. (Mr. Lisle continued.) I'm going to show you what I marked as Defense Exhibit 10.
A. Yes.
Q. Do you recognize your signature on the bottom of that page?
A. Yes, I do.
MR. LISLE: And in case I haven't done it, I move to admit 1 through, I guess, 10 where we are.

JUDGE SCOTT: 7, 8, 9, and 10 are the ones that have not been --

MR. LISLE: 7, 8, 9, and 10.

JUDGE SCOTT: -- admitted.

MR. LISLE: Yes, sir.

JUDGE SCOTT: Any objections, Mr. Keever?

MR. KEEVER: No. I have no objections, Your Honor.

JUDGE SCOTT: Defendants' 7 through 10 will be admitted without objection.

(Wherein, Defendants' Exhibit 7, 8, 9, and 10 were admitted into evidence.)

Q. (Mr. Lisle continued.) If you look at this, this is dated February the 12th of 2002?

A. Yes.

Q. This was a procedure performed by Dr. Elkins?

A. Yes.

Q. At your request?

A. Yes.

Q. Again, all these procedures are purely elective. You don't have to do it. It's just up to you. Correct?

A. This is the same as the Obagi Blue Peel from '99. Yes.

Q. Please, if you'll wait for my question. I -- I don't want to lose my train of thought.

A. Sorry.

Q. Thank you. If you look -- I want to point out to you another side effect that is on that same page, it says -- and the second potential risk, it says "Infections due to bacterial contamination may occur if post peels" -- "post peel instructions are not followed." You see that?

A. Yes, I do.

Q. "Temporary, mild pigmentation problems may occur and can usually be corrected using the Obagi NU-DERM system."

A. Yes.

Q. You had a long history with the Obagi products, didn't you?

A. No, sir.

Q. Well, did you understand from both your training and these various procedures you had done over the years how important it was to follow your post procedure instructions?

A. Yes.

Q. From the acid peels of the skin that you did for other folks, did you understand -- and your training in skin and -- and blue peels, did you understand that the skin rejuvenates from the out -- inside out?

A. The acid peels that I did weren't invasive such as a blue peel.

Q. Okay. You've had multiple blue peels here that we've talked about.

A. I've had two, yes, sir.

Q. Did you understand that the skin was going to rejuvenate from the inside, out? It had to heal?
A. I understood that it had to heal.
Q. In other words, the blue peel, like the laser, it doesn't -- it's not like painting a wall and fixing it, it -- it causes an injury and takes off a couple -- two layer -- two layer blue peel, two layers of skin, and then the skin rejuvenates afterwards?
A. Yes. You peel like a snake for a while.
Q. But that's what's to be expected?
A. Yes.
Q. It's uncomfortable for a while, isn't it?
A. Not very badly.

MR. LISLE: Okay. We up to 11?

JUDGE SCOTT: Yes. That's the next one.

MR. LISLE: Thank you.

Q. (Mr. Lisle continued.) I show you what's marked as Defendants' Exhibit 11. You recognize your signature on that page, ma'am?
A. Yes, I do.
Q. In June of 2002?
A. Yes.
Q. And this was for a lip implant procedure?
A. Yes, it was.
Q. And if you will look with me under section 3, I'll read

what it was told to you were some risks known to be associated with med -- (as read) "medical/surgical procedures, including anesthesia, are (or may be): infection, blood loss resulting in anemia or requiring blood transfusion and the risk associated with blood transfusion" -- including -- "hepatitis, Acquired Immune" -- or -- "Deficiency Syndrome, untoward drug reactions, loss of function or damage to the organ or area being operated on, loss of organ, disfiguring scars, nerve or blood vessel damage, persistent and long term pain associated with the area being operated upon, brain damage," and "death."

A. That's what it says, yes.

Q. And you -- this was a purely cosmetic procedure.

A. Yes.

Q. You willingly signed this form and you had this procedure?

A. Yes.

Q. And in fact --

JUDGE SCOTT: Ms. Poff, would you scoot up --

MS. POFF: I'm sorry.

JUDGE SCOTT: -- speak directly into the microphone please?

MS. POFF: Yes. I --

JUDGE SCOTT: Don't move the microphone away from you. Get closer to it.

MS. POFF: Feel like I'm going to eat it.

JUDGE SCOTT: Thank you.

Q. (Mr. Lisle continued.) Knowing all these associated risks with having to go be under anesthesia, and be cut on, and -- and take on the risk of all these things, you went ahead and -- and agreed to have your lip implants?

A. Yes. I trusted Dr. Elkins totally.

Q. And as it turned out, you became dissatisfied with these lip implants and had them removed a few years later, didn't you?

A. No, sir. They were removed within two months.

Q. Two years?

A. Two months.

Q. Two months.

A. Yes. They just didn't work out.

Q. And so from that experience and also with the -- the breast implant procedures you've had, you know that these things don't always work out?

A. Yes.

Q. And you knew that from 1996 or before 1999, with breast implants; and at least 2002, with the lip implants?

A. Yes.

Q. As much as you trust Dr. Elkins and you trusted the other doctor, and Dr. Atwood, sometimes things can happen, complications can happen, can't they?

A. Yes.
Q. And you knew that going forward from anyone of those days that if you did another one, there was still a risk of a complication associated with every procedure that you were planning to do?
A. Yes.
Q. And you didn't have to do it. Right?
A. No.
Q. And that brings us to the January 22nd procedure and we've already got into evidence the not one, but two consent forms you signed with regard to that procedure. Correct?
A. Yes.
Q. The one we're here about today?
A. Yes.
Q. And you heard me go through all the risk of -- of complications and problems that could result from these two procedures too, didn't you?
A. Yes.
Q. And you read, initialed, and signed every paragraph on the one -- well, actually on both of them. You read -- you read through, initialed, and signed every paragraph?
A. I don't think I read through them, Mr. Lisle, at the time. I don't remember, barely remember signing them.
Q. Well, I'm going to ask you some more about that.
A. Okay.

Q. Before I move on, though, I -- I forgot to ask you about you had two liposuction procedures, as well, that are not included in -- in those documents?

A. Yes, I did.

Q. And after each of those liposuction procedures, there's a healing period, some time of discomfort, it's -- it's an invasive procedure. Correct?

A. Yes.

Q. Okay. Now, I asked you in your deposition -- you just testified that you didn't read and sign those January 22nd, '09, consent forms. Is that correct?

A. I think I said I didn't remember reading them thoroughly.

Q. And the way I understood your testimony today was that you had already been medicated and you felt so good by the time you got to Dr. Elkins' office. Did I -- did I understand that correctly?

A. Yes, sir.

Q. All right. I'm going to show you line 21, page 26 in your deposition. While you're finding that, will you confirm for me that you gave a deposition under oath --

A. Yes, sir.

Q. -- May the 12th of 2011?

A. Yes, sir.

Q. Almost two years ago?

A. Yes.
Q. And I asked you on line 21, question, "Did you take that medication on your own, or" -- "or was it administered to you at the clinic when you arrived?" Can you read your answer for the jury?
A. I said, "I don't remember."
Q. Okay. So based on your testimony today, we would have to assume that your memory somehow improved about this event over the last two years.
A. Yes, sir. After reviewing the sedation -- I'm sorry.
Q. No. I'm -- I'd just like for you to -- you -- you've answered a lot of questions that your lawyered prepared for you to answer today. And I would just like to ask mine.

MR. KEEVER: Objection to the characterization.

JUDGE SCOTT: Sustained. Mr. Lisle, why don't we just stop there and we'll take out evening recess.

MR. LISLE: Yes, sir.

JUDGE SCOTT: Ms. Poff, if you would, step down and return to the counsel table.

Ladies and gentlemen, we're about to take our evening recess. Once again, Mr. Tucker will secure the jury room. If you'd like to leave your materials there, if you'd prefer to take them with

you, you may do so. I caution you to make certain that you comply with my instructions during this recess. Do any of you have any trouble assembling at 8:15 in the morning so that we may get started at 8:30?

(Wherein, there was no response.)

JUDGE SCOTT: Okay. Let's plan on that again. Do not communicate about this case and the places or people or persons involved by any means whatsoever or with anyone whatsoever. Do not talk among yourselves about this case or the people involved in it until I instruct you to start your deliberations. Do not talk with or otherwise communicate with any of the parties, the lawyers, or witnesses involved in this case, even to ex -- exchange pleasantries or to pass the time of day.

Do not communicate with anyone, at all, about this case or the persons or people involved with it, including your family, friends, or acquaintances. You may tell your family members and loved ones this is a civil case and not a criminal case. Do not use any means whatsoever to communicate. Do not talk to any person using a telephone or any electronic device. Do not do any research regarding any of the evidence or testimony

that you have seen or heard in this case.

Do not share your information, thoughts, opinions, or expressions of your thoughts or opinions. Mr. Tucker, you may take the jury out.

MR. BAILIFF: All rise.

(Wherein, the jury left the courtroom at 4:31 p.m.)

JUDGE SCOTT: Be seated please. Counsel, once again, before you leave, see that we have all of the exhibits that have been admitted into evidence and Ms. Olenberger has control of those. Mr. Keever, how many more witnesses do you plan to call?

MR. KEEVER: I'll --

JUDGE SCOTT: I'm not asking for a commitment. I'm just trying to get a timeline where we are, sir.

MR. KEEVER: I'll give you commitment. This is my last witness.

JUDGE SCOTT: All right. Mr. Lisle, do you plan to call any witnesses other than Tom O'Brien and your client at this time?

MR. LISLE: No, sir. At this time, that -- that's it.

JUDGE SCOTT: Okay. You think there's a

chance there may be others?

MR. LISLE: I don't anticipate any others, Your Honor.

JUDGE SCOTT: Okay. All right. All right. We will be in recess until we come back into session in the morning. It sounds to me like we may get instructions and possibly closing tomorrow afternoon. If not then, I would certainly expect to do that on Thursday. If that does happen, I will see if one of my colleagues will be able to cover, assuming that deliberations actually commence before noon. I'm going to withhold telling the jury anything about a recess Thursday at noon until we see further into tomorrow how far we get.

Anything else we need to take up, Mr. Keever?

MR. KEEVER: Your Honor, I would like to have -- to offer a proffer of Ms. Poff's testimony, be very, very short on the consent and licensing issue.

JUDGE SCOTT: Oh, certainly. You may do that when I leave.

MR. KEEVER: You know, I predicted that.

JUDGE SCOTT: Yes, sir. Anything else, Mr. Keever?

MR. KEEVER: No, sir.

JUDGE SCOTT: Mr. Lisle, anything else need to do?

MR. LISLE: No, sir. Nothing from me.

JUDGE SCOTT: All right. Court will be in recess.

MS. REPORTER: All rise.

(Wherein, the proceedings recessed at 4:34 p.m.)

(Wherein, the following proceedings were held outside the hearing of the Court.)

MR. KEEVER: Sue, take the stand again. Just going to ask you a couple questions about the licensing issue.

(Wherein, there was a brief off-the-record conversation between Mr. Keever and his client.)

MR. KEEVER: This is plaintiff's proffer of the testimony of Sue Poff.

Sue, what did you know about whether or not Dr. Elkins' clinic was licensed at the time of your laser surgery?

MS. POFF: I had no knowledge.

MR. KEEVER: And, Sue, had you known that Dr. Elkins' clinic was required to be licensed, but was not licensed, what would've been your reaction in

terms of giving consent for the surgery?

MS. POFF: That would've been a red flag. I don't think I would've given consent.

MR. KEEVER: Thank you, Sue, for your testimony. That's all we'll require.

MS. POFF: Thank you.

MR. KEEVER: Thank you. Thank you, Therese.

(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 13th, 2013, at 8:29 a.m.

APPEARANCES

MR. JAMES E. KEEVER, M.D., J.D. — FOR THE PLAINTIFF
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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: Your Honor, before that, could we just ask the Court about these two exhibits? I have redacted what was marked as Exhibit No. 36, and that was this one, Mr. Lisle. And I believe Mr. Lisle is agreeable to admitting Exhibit 36.

MR. LISLE: Well --

JUDGE SCOTT: 36, 37, and 38, have they been redacted?

MR. KEEVER: The -- 36 is -- oh. He did -- he -- let -- let me just rephrase that. He did have -- have some reservations on an issue.

JUDGE SCOTT: Well, just a minute, gentlemen. Mr. Keever, have you redacted the exhibits?

MR. KEEVER: Yes, sir. I have, sir.

JUDGE SCOTT: Mr. Lisle, do you --

MR. LISLE: Well --

JUDGE SCOTT: -- have any objections?

MR. LISLE: I -- I haven't seen the latest redaction, Your Honor. The first time I looked at it this morning, there were still some things I

objected to. This is the first time I've had it since.

JUDGE SCOTT: All right. Well, why don't you take -- have you redacted all three exhibits, Mr. Keever?

MR. KEEVER: I have, but I agree with Mr. Lisle that one of them --

MR. LISLE: It -- it's --

JUDGE SCOTT: Just a minute. Go ahead, Mr. Keever.

MR. KEEVER: Yes, sir. I have, but -- but only one to the satisfaction of Mr. Lisle. And one that I think should be satisfactory, sir.

JUDGE SCOTT: Have you reviewed these, Mr. Lisle?

MR. LISLE: I've re -- I have, Your Honor. I've not reviewed the latest redaction. What my -- what I would like to do at this point, Your Honor, if we can, I don't have any objection to him putting in the receipts and having her testify. I don't like the summaries where I -- you know, I have to -- every time I re --

JUDGE SCOTT: Mr. Lisle, you don't need to make an argument.

MR. LISLE: Yes, sir.

JUDGE SCOTT: What number is --

MR. KEEVER: No. 37 is -- is not objected to, Your Honor.

JUDGE SCOTT: All right. Plaintiff's 37 will be admitted without objection.

(Wherein, Plaintiff's Exhibit 37 was admitted without objection.)

MR. KEEVER: Thank you, Your Honor.

JUDGE SCOTT: Now, Mr. Lisle, why don't you review the summary, 36. And what was 38?

MR. KEEVER: Eight -- 36 -- 38.

JUDGE SCOTT: 38 was her time off that had some objectionable comments.

MR. KEEVER: Your Honor, at this time we would ask not to pro -- present 38 because I agree with Mr. Lisle, we didn't do an adequate job of redacting it. There --

JUDGE SCOTT: All right. Do you want to withdraw 38 then?

MR. KEEVER: At this time, sir.

JUDGE SCOTT: All right. I'll let you do that. All right. When we take our first recess, Mr. Lisle, why don't you review 36, the summary, and if you have any objections to that, we'll cross that bridge then.

MR. LISLE: Yes, Your Honor. I -- I believe I will.

JUDGE SCOTT: You need the marker?

MR. LISLE: Yes, sir.

JUDGE SCOTT: Here you go.

MR. LISLE: Do you --

JUDGE SCOTT: All right. Other than that, are you ready for the jury to come in, Mr. Keever?

MR. LISLE: You --

MR. KEEVER: Your Honor, Mr. Swindle has an issue, we can present briefly.

JUDGE SCOTT: All right.

MR. SWINDLE: May I, Your Honor?

JUDGE SCOTT: What is it, Mr. Swindle?

MR. SWINDLE: Your Honor, on the first day of trial, the defendant referenced that he had other documents that he had relied upon or that he had seen, other than the manual that came with the machine and seminar material. And this goes to the discovery in this case. We had specifically asked for all materials that he had seen or any materials that any expert would rely upon.

I have the interrogatory responses here. I don't think that they'll dispute this though. They never told us about any of these documents. And so

that we would move in limine that if Dr. Elkins does testify again, that he -- he be prohibited from mentioning these other documents that we -- we don't know about.

JUDGE SCOTT: Mr. Lisle, are there any other documents your client plans to rely upon?

MR. LISLE: No, sir. I -- I don't really know what they're talking about. But --

JUDGE SCOTT: You've answered my question, Mr. Lisle.

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

JUDGE SCOTT: Anything else, Mr. Swindle?

MR. SWINDLE: That's all, Your Honor. Thank you.

JUDGE SCOTT: Are you ready for the jury to come in?

MR. SWINDLE: Yes, Your Honor.

JUDGE SCOTT: Thank you.

MR. LISLE: Your Honor, can I do one more housekeeping thing? I realize I had a couple of exhibits. Can I tender 5 -- Defendants' 5, 6, and 11 that I don't believe made it into evidence yesterday.

JUDGE SCOTT: They did not.

MR. KEEVER: Without objection, Your Honor.

JUDGE SCOTT: All right. Defendants' 5, 6, and 7 will be admitted without objection. Those were all consents, weren't they, Mr. Lisle?

(Wherein, Defendants' 5, 6, and 7 were admitted into evidence.)

MR. LISLE: Yes, sir. I believe they were.

JUDGE SCOTT: Okay.

MR. LISLE: Yes, sir. They -- they were. Well, No. 5 is an operative report.

JUDGE SCOTT: Okay.

MR. LISLE: 6 is an estimate for surgery, and 11 was a -- a consent.

JUDGE SCOTT: Well, we were talking about 5, 6, and 7. Is that -- you said 11 --

MR. LISLE: It's 5, 6, and 11. Is it 7 or 11?

MS. REPORTER: I believe 7 was introduced yesterday, Your Honor.

JUDGE SCOTT: Okay.

MR. LISLE: Yes, sir.

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

MR. BAILIFF: All rise.

(Wherein, the jury entered the courtroom at 8:34 a.m.)

JUDGE SCOTT: Be seated, please. Good morning,

ladies and gentlemen.

JURORS: Good morning.

JUDGE SCOTT: You all ready to go to work?

JURORS: Uh-huh.

JUDGE SCOTT: Good. Ms. Poff, if you would, come back up to the witness stand. If you would, scoot up. Continue to speak directly into the microphone.

MS. POFF: Yes, sir.

JUDGE SCOTT: You may proceed, Mr. Lisle.

MS. POFF: Excuse me.

SUE POFF, having been called upon to testify on her own behalf, testified as follows, to wit:

CROSS-EXAMINATION CONTINUED

BY MR. LISLE:

Q. Ms. Poff, when you testified on direct yesterday, you started some of your testimony by talking about your long-standing patient-doctor relationship with Dr. Elkins, recall that? First started treating you in the 1980s, I believe?

A. Yes.

Q. And that's for infertility treatment?

A. Yes, it was.

Q. And was he also your gynecological doctor at times over -- during those years?

A. Yes.

Q. And then as his practice developed and he started doing cosmetic surgeries, you went to him for those things?
A. Yes.
Q. And I think you specifically mentioned his expertise in cutting -- well, leading-edge knowledge of skin care, skin issues?
A. I don't think I said leading-edge, but he liked to focus on skin health and wellness.
Q. And stay on top of the new innovations in those fields?
A. Yes.
Q. And in -- so from the time of the 1980s until the time of this surgery, you were satisfied that he was caring for you, looked out for your wellbeing?
A. Yes.
Q. And, in fact, you were satisfied with the results of the procedures he had done for you, and you referred your -- your best friend to him, as well, didn't you?
A. Yes.
Q. Did you have a -- a friendship with Dr. Elkins, as well, in those years?
A. Just professional.
Q. Okay. I'm -- we -- we talked about a lot of consent forms you'd signed for different procedures yesterday. I realized that I had left out two more. The -- I want to show you what's been marked as Defense 12.

MR. KEEVER: Thank you.

Q. (Mr. Lisle continued.) Do you recognize your signature on that page?

A. Yes, I do.

Q. We talked about this procedure, but we didn't have the -- the consent form in front of you at the time. This was for dermal filler injections?

A. Yes.

Q. Do you see that -- where you initialed all the possible complications of that procedure?

A. Yes, I did.

Q. This was on January the 22nd of 2008?

A. Yes.

Q. I'm going to read to you the paragraph -- part of the paragraph under "Complications," and you tell me if this is accurate: (as read) "Swelling and/or bruising may last for several days upon injections. Common side effects are tenderness and pain at the injection sites, swelling, bruising, redness, reoccurrence of facial cold sores (if prone to cold sores) and hardened areas under the skin." Were you advised of those risks and decide to go forward with that procedure?

A. Yes.

Q. That was an elective procedure?

A. Yes.

Q. Show you what's been marked as Defense Exhibit No. 13. You see your signature on the second page -- I guess the third page of that consent form?

A. Yes.

Q. And this is a consent form that's three pages long with 19 separate paragraphs?

A. I only have two pages.

Q. Okay. Swap with you.

A. But it has 19 paragraphs, sir.

Q. I'm sorry. It is two pages. The -- I won't read all of these. But if you'll look at the -- the -- the fact that it says that there are complications that have to be told to you before you have this procedure, the first paragraphed? (As read) "Informed consent requires that complications are made known to you. Most of these are not expect to occur, but all must be considered." You see that in the very first paragraph of the form? Not Number 1. The paragraph that's --

A. Yes, sir. I see it. I'm sorry.

Q. Okay. And this was for a liposuction procedure?

A. Yes.

Q. This was August the 23rd of 2002?

A. Yes, it was.

Q. You see that this surgery involved the risk of swelling, paragraph 2?

A. Yes.

Q. Could last days, weeks, or months?
A. Yes.
Q. "Some swelling may remain after surgery for a year or more"?
A. Yes.
Q. Had a risk of bleeding, paragraph 3?
A. Yes.
Q. "In a very rare case, extensive bleeding or other complications could require hospitalization and blood transfusion." Did you see that?
A. Yes.
Q. You see in paragraph 4 there's a risk of infection?
A. Yes.
Q. And paragraph 5 there's a risk of scarring?
A. Yes.
Q. And, in fact, it says some scarring will result wherever there's a cut?
A. Yes.
Q. So you knew there was going to be some scarring from this procedure.
A. Yes.
Q. Then -- and continue on that paragraph it ends with, "How well a person will heal cannot be exactly predicted or controlled."
A. Yes.

Q. "Extensive wide or thickened scars (hypertrophic or keloid) may occur if you are prone to them." Did you see that?
A. Yes.
Q. And you initialed next to that paragraph saying you agreed with that?
A. Yes.
Q. The next paragraph talks about numbness, about how cutting the skin can cause permanent numbness --
A. Yes.
Q. -- in some cases? Continue on even to paragraph 8, respiratory heart failure. (As read) "These are unusual complications of conscious sedation. They are, however, known risk. Heart attack or blood clots can occur."
A. Yes.
Q. And you initialed that -- that paragraph, as well?
A. Yes, I did.
Q. No. 10, it says, (as read) "Follow-Up Care and Appointments: I agree to keep the doctor informed of any change of address and phone numbers, and agree to cooperate with the doctor in my care after surgery until completely discharged. I will make and keep follow-up appointments, take medications and follow other instructions as prescribed. I fully understand that the success or failure of the operation depends upon assuming my responsibility in certain facets of

my post-operative care." -- did you read and sign that paragraph?

A. Yes.

Q. If you turn over to the back page, paragraph 18, titled (as read) "Satisfaction: Cosmetic surgery is inexact and can be complicated. To achieve improvement in appearance" -- "in appearance we undergo serious risk of discomfort and the possibility of looking worse than we did before this" -- "before with severe disappointment. There can be no guaranty that either you or anyone else" -- and this is all capital letters -- "you or anyone else will be satisfied or pleased with the result." Did you read and initial that paragraph?

A. Yes, I did.

Q. And in paragraph No. 19, it says, (as read) "I'm aware that the practice of medicine and surgery is not an exact science, and I acknowledge that no guarantees have been made to me as to the results of the operation or procedure. It is understood that my result cannot be like any pictures or drawings or any pre" -- "preconceived idea or goal." And that last sentence is in all capital letters, isn't it, ma'am?

A. Yes. But I think it says "or an preconceived idea" not "any."

Q. Okay. And you initialed and signed that one, as well?

A. Yes.

Q. And that was in 2002?

A. Yes, it was.
Q. And, ma'am, I believe you testified on direct examination -- we -- we know it's been well-established that you started having -- after this surgery in January, you began having other fractional CO2 laser treatments in April, 2009. Correct? From SkinStar?
A. Yes.
Q. I believe you testified on direct examination that Dr. Yee and Dr. Holland were overseeing that fractional laser treatment?
A. They had suggested that as treatment plan.
Q. They weren't monitoring that treatment, were they?
A. I don't know.
Q. In fact, who was the doctor at SkinStar that conducted these fractional laser treatments on your skin?
A. I don't know how to pronounce the name.
Q. Was there a doctor involved?
A. Yes.
Q. Okay. Do you recall me asking you that question in your deposition?
A. No. I don't.
Q. Okay. If you look at page 61, I ask you a -- a question on line 7. I'm going to read this, and I want you to confirm whether or not I read this correctly. My question was, "Which ones have you done?" Answer, "I've had Fraxel Laser

treatments done." Question, "And on each one is it Dr. Yee or is that a different doctor?" Answer, "No. It's the SkinStar Laser Center." Question, "Where is that located?" Answer, "Little Rock." "Can you tell me the doctor's name?" "It's not -- I don't know the doctor's name. It's just a laser center." Is that correct?

A. Yes. It's what it says.

Q. And when you went to that SkinStar Laser Center, did you -- did they -- you testified you signed consent forms?

A. Yes, I did.

Q. And you knew that those laser treatments involved all the com -- potential complications of every Fraxel Laser treatment you've had? Correct? They -- they involve the complications possible swelling, discoloration, and scarring?

A. Yes.

Q. And you signed a consent form in April and you went ahead with another procedure?

A. Yes.

Q. Who -- who can physically put that laser on your skin and perform that procedure?

A. Pardon? I don't understand the question.

Q. Who conducted that procedure? You went in and someone had a laser and they applied it to your skin. Who -- who had their hand on the laser?

A. Sabrina.

Q. Who is Sabrina?
A. She was the trained laser technician at the center.
Q. Is she a -- a medical doctor?
A. I don't think so.
Q. Do you know if she's had any professional training in that, at all? Do you have any idea what -- did she go to a manufacturer's course and be trained by experts?
A. There were a lot of certificates. I don't know exactly what her training was.
Q. She certainly wasn't a board certified plastic surgeon, was she?
A. No.
Q. And -- and you knew that at the time --
A. Yes.
Q. -- when you -- when you let her turn the power on that machine and put it on your skin?
A. Yes.
Q. And you knew that by doing that, she was going to be inflicting an intentional injury on your skin?
A. Yes, to break up the scar tissue, is the intent.
Q. Not unlike the same -- it was the exact same, in fact, procedure that Dr. Elkins had done, a Fraxel Laser treatment?
A. No, sir. It was not the exact same.
Q. It was a fractional laser that was being applied to your skin, wasn't it, ma'am?

A. Yes, sir.
Q. Did you have any conversation with her about -- about how aggressive they were going to be in that treatment?
A. Yes.
Q. Okay. And did you see that when you went back to see her in -- was it the same person in June of 2009?
A. Yes, it was.
Q. Have you looked at the notes and seen that no one signed the notes or even indicated what the treatment levels were?
A. I've seen them since.
Q. And in that treatment, it was -- there was not a doctor conducting that procedure, as well, was there?
A. No.
Q. And you knew that?
A. Yes. She was acting under the doctor.
Q. Was there a doctor in the room?
A. She'd sent my pictures to the doctor -- no, sir.
Q. And we don't have any records from SkinStar with a doctor's name on them anywhere, do we?
A. No, sir.
Q. And July 14th of '09, she came in -- was it the same -- was it Sabrina again?
A. Yes.
Q. And you -- once you -- now, every time, every date that I'm mentioning, you went in and you -- first of all, you

signed a consent form saying you were agreeing to the treatment?

A. Yes.

Q. In spite of any potential complications?

A. Yes.

Q. And in spite of the fact that there was not a doctor at the -- at the controls of the laser?

A. Yes.

Q. And you did that again July of 2009?

A. Yes.

Q. And on the last one, August the 31st of 2009, was that Sabrina, again, that was conducting this procedure?

A. Yes.

Q. You heard Dr. Shewmake testify, he confirmed that that was the highest energy level that that machine is capable of, and that she applied that to your neck and chest?

A. Yes.

Q. Did she advise you of the elevated risk of complication, potential complications, up to and including permanent scarring that can result from using that high of a power setting on your skin?

A. Yes. But that laser, sir --

Q. Ma'am, just -- if you just answer my question?

A. Sorry. Sorry.

Q. Did you sign a consent form that said you've been coming

in for other treatments, now we're going to the maximum power that this machine is capable of and we're going to put it on your chest? We need you to sign an additional consent form?

A. No. It was just standard consent forms.

Q. Okay.

A. It wasn't additional.

Q. And you realize in that treatment, that was -- she was applying over six times the amount of energy that she had done in the first treatment?

A. Yes.

Q. So if the first treatment was a safe level, the last treatment was six times the safe level, more than six times.

A. I don't know what safe would be on that one.

Q. Okay.

A. I'm not trained in that.

Q. And then after that, you had -- you continued to have Genesis Laser treatments, the same place?

A. Yes.

Q. With no -- no doctor applying the -- the Genesis Laser?

A. Yes.

Q. And you did that in September of '09. Correct?

A. Yes.

Q. And you had to sign a consent form for that procedure, as well?

A. Yes.

Q. Because every laser -- laser treatment has a potential of causing complications, including scarring?
A. Yes.
Q. And you went ahead and did that procedure, September the 3rd?
A. Yes.
Q. And then you did it again on September the 14th?
A. Yes.
Q. And you did it again on September the 25th?
A. I'm not sure of the dates, but I'm sure you can show me something.
Q. In fact, in going through your -- the exhibit that was submitted with your past medical expenses, it turns out there was another SkinStar laser treatment that -- that we hadn't even talked about with Dr. Shewmake, wasn't there? You had a receipt for another one in April?
A. I don't know. I'd have to look at the record. Excuse me.
Q. Okay. I'd like for you to look at -- in the medical bills that you're asking for payment for in this case, if you look at page 40, what dates in April do you see that you had treatments at SkinStar, just in April of 2009?
A. Says April 22nd.
Q. Okay. Now, flip over two pages, page 42.
A. Yes.

Q. And tell the jury what that document is.
A. It says it's a receipt from SkinStar to me for April 27th, 2009 for $265. It says for the neck.
Q. Okay. So --
A. So my --
Q. Both of those documents are bills for treatment, aren't they? 42 show -- Number 40 shows a list of treatments at SkinStar for which you're asking for payment in this case?
A. Pardon? Will you ask again?
Q. Look at -- at page 40, and that's a list of expenses related to treatments at SkinStar that you're asking to be re -- reimbursed for in this case, isn't it?
A. Yes, sir. Yes.
Q. Okay. And then page 42 is another payment for -- a receipt for a payment you made to SkinStar that you're asking for reimbursement on, as well, isn't it?
A. Yes, sir.
Q. We don't have any record of your treatment at SkinStar on the 27th, do we?
A. Not according to this, just my receipts.
Q. And when we went through all the details with Dr. Shewmake, we went through all the details of the procedures that are listed on page 40.
A. I assume so. I think so.
Q. The same ones that you and I just walked through today?

A. Yes, sir.
Q. You had an additional treatment on your neck that we haven't -- that we haven't got the medical records on? Is that what we're seeing there?
A. It looks like it. That's what my receipt said. Correct. Yes, sir.
Q. All right. And then you asked -- you -- you went to see Dr. Patel in Tulsa in October of 2009. Is that correct?
A. Yes. I'm not sure of the date. I'm sure if I have something to look at I could confirm that.
Q. Okay.

JUDGE SCOTT: Ms. Poff, if you would, scoot up and speak directly into the microphone --

MS. POFF: Sorry.

JUDGE SCOTT: -- please.

MS. POFF: Yes, sir.

Q. (Mr. Lisle continued.) And Dr. Patel's a doctor that you found on your own by doing Internet research?
A. Yes. I was researching for the laser, that type of laser.
Q. Okay. And so you -- you went to Dr. Patel and you're asking for reimbursement for expenses for that initial concert -- consult with Dr. Patel. You say you took four days off work?
A. For the consultation, I --

Q. Yes, ma'am.
A. I don't know. I'll have to look at my records.
Q. Did you take four days off work to go have a consult with Dr. Patel?
A. I don't remember how many days off I took.
Q. You recall that that first examination by Dr. Patel was purely a consult, no procedure was done?
A. I'll have to look at my records. I know there was no procedure, but I don't know if she prescribed things at that time, or not. I don't remember.
Q. Did she perform a -- a surgical procedure on you at that time?
A. No, sir. Like I said, no.
Q. You have any recollection of having to take four days off work to have that examination?
A. I don't know how long it was, sir. I'd have to look.
Q. Can you explain why it would take four days to go to Tulsa and have a -- a single consult with a doctor?
A. Yes, sir. If it was in Tulsa, I would've scheduled it, hopefully, around Lisa Jones' schedule, so that I could ride with her and stay at her home.
Q. Okay. So your friend, Lisa, that testified, you would've stayed with her?
A. Yes, sir.
Q. And then you returned to Dr. Patel and actually had a

Lumenis Laser test treatment done. Is that correct?
A. Yes. I did.
Q. And was that on November the 6th of 2009?
A. I don't remember. I'd have to look.
Q. Do you recall taking four days off of work again for that procedure?
A. I don't know, again, how long I took off for that.
Q. Okay. Are you going to be presenting testimony of your days off work?
A. I don't know.
Q. Okay. Did you return to Dr. Patel for a follow-up on November the 9th after that procedure?
A. I did have a follow-up. I'm not sure of the date, sir.
Q. All right.

JUDGE SCOTT: Excuse me, Mr. Lisle. Ms. Holcomb, are you okay?

JUROR HOLCOMB: Excuse me.

JUDGE SCOTT: It's all right.

JUROR HOLCOMB: Allergies. I've got water. It's --

JUDGE SCOTT: Are you ready to proceed, ma'am? Ms. Holcomb, you okay?

JUROR HOLCOMB: Yeah. I think this'll help.

JUDGE SCOTT: All right.

JUROR HOLCOMB: I think this'll help.

JUDGE SCOTT: Would you like some water? Oh.

MS. POFF: I have a cough drop, sir.

JUROR HOLCOMB: Would you like me to step out for a minute?

JUDGE SCOTT: No, ma'am. I wouldn't. I don't mind --

JUROR HOLCOMB: I'm sorry. I just have these attacks every now and then.

JUDGE SCOTT: It's all right. Do you need to take a recess, Ms. Holcomb?

JUROR HOLCOMB: Couple minutes, maybe.

JUDGE SCOTT: Okay. Why don't we take a ten-minute recess? I remind you of the same instruction I've given you before. You are not to discuss this matter with each other or with anyone else or do any research. Mr. Moore, why don't you go ahead and go on out.

MS. REPORTER: All rise.

JUROR HOLCOMB: I'm really sorry.

JUDGE SCOTT: It's no problem, Ms. Holcomb, perfectly all right.

(Wherein, the jury left the courtroom at 8:59 a.m.)

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

(Wherein, a break was taken from 8:59 to 9:08

a.m.)

JUDGE SCOTT: Be seated please. Mr. Keever, you ready for the jury to come in?

MR. KEEVER: I am, 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 9:09 a.m.)

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

MS. POFF: Mr. Lisle, in looking at these records --

MR. LISLE: Ma'am --

JUDGE SCOTT: No, ma'am. If you would, just be quiet 'til you're asked a question. Next question, Mr. Lisle.

CROSS-EXAMINATION CONTINUED

BY MR. LISLE:

Q. It appeared that you weren't able to confirm some of the dates that you were out. So I'm going to show you a document, your Responses to Interrogatories. We flip over to the page I've tabbed that says, "Verification."

A. Yes, sir.
Q. You recognize your signature there on that page?
A. Yes, I do.
Q. And can you -- does it have a date next to that?
A. The date of my signature?
Q. Yes.
A. Yes. The 13th of January 2011.
Q. And you -- you appeared at that time that every statement in these interrogatories on that date, every response was under oath, and it was correct to the best of your knowledge?
A. Yes, sir.
Q. Was under oath just like your testimony today is under oath?
A. Yes, sir.
Q. Okay. If you look at the attachment to that, you'll see a -- kind of an Excel spreadsheet, it appears, of various past expenses you're claiming. You see that?
A. Is that three pages over? Yes, sir. I think it's --
Q. And they're dated --
A. -- cut off.
Q. If you keep following down 'til you get to November the 5th through November the 10th of 2009, do you see that you -- you're claiming reimbursement for four days off work to go see Dr. Patel?
A. Yes.

Q. And then do you see on November the 15th and 16th you also took -- you were also in Tulsa to see Dr. Patel?
A. Yes. It says for the test patches.
Q. Okay. You're claiming reimbursement for those expenses as well?
A. Yes, sir.
Q. Now, at the time Dr. Patel did test patches on you, that was with a Lumenis fractional laser, wasn't it?
A. Lumenis Laser, yes.
Q. And at that point, I believe, from your direct testimony, based on the test patches, you decided you didn't want to have that procedure. Is that correct?
A. Yes. I did.
Q. And did you make that decision right after she did those test patches? Well, why -- why did you decide not to do it? Let's start there.
A. It was extremely invasive and the expense.
Q. So from -- would -- did you make that decision when you went back at the follow up and talked to her and you decided in -- in November the 16th of 2009, I've decided this is too invasive, so I'm not going to do it?
A. I don't remember. I don't think so.
Q. Do you have any idea when you made that conscious decision that you were not going to go -- I -- I understood on direct that you -- you testified to the jury that it was way

too invasive, I decided I didn't want to have any part of it. Was I understanding that correctly?

A. Yes.

Q. Okay. What --

MR. KEEVER: Your Honor?

JUDGE SCOTT: Yes, sir?

MR. KEEVER: Can we approach?

JUDGE SCOTT: Yes. Ladies and gentlemen, you may stand up and move around a little bit.

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

MR. KEEVER: Your Honor, as per your instructions and order, I have told this client not to say she couldn't afford the procedure. But I think that Mr. Lisle opened the door when he said why didn't you have that procedure. And that was her original testimony.

JUDGE SCOTT: We're not going to talk any more about money, Mr. Keever.

MR. KEEVER: Yes, sir.

JUDGE SCOTT: All right.

MR. KEEVER: Thanks.

MR. LISLE: That's not what she testified to.

(Wherein, the bench conference concluded.)

JUDGE SCOTT: You may have a seat. Thank you.

Q. (Mr. Lisle continued.) Just trying to establish a timeline. You -- you went for a consult. Right? You went back and had a test patch.

A. Yes.

Q. Then you went back a third time and you had a follow-up consult?

A. Yes, sir.

Q. At that third meeting, did -- had you decided that I was not going to go forward with a Lumenis Laser because it was far too invasive?

A. No, sir.

Q. How -- how -- how much time did it take for you to come to that decision?

A. Actually, recently, probably the last six months.

Q. Okay. So as we sit here today, you decided you no longer want to have that -- that Lumenis Laser treatment by Dr. Patel?

A. That's correct.

Q. Even though at the time, you knew how invasive it was back in November of 2009, but within the last six months you decided not to go forward with it?

A. Yes, sir. And it's had enough time to heal and see the results.

Q. So it's --

A. So it's not -- no. I chose not to.

Q. Okay. Three or four years' decision making time?
A. Yes.
Q. And when did you first see Dr. Shewmake who testified for you as your expert witness?
A. I don't remember.
Q. And you were sent to him by your -- your lawyers. Correct?
A. Yes.
Q. He wasn't a treating physician? In other words, he wasn't doing anything to try to improve your care, he was just preparing for trial testimony.
A. Yes. I'd seen his partner, Dr. David Bauer.
Q. Ma'am, he -- you went to him solely at the direction of your attorneys, few months ago, so that you could prepare for this trial -- so that he could prepare for this trial. Is that correct?
A. Yes.
Q. Okay. And in this case, you're going to be asking this jury to award you several things, your past medical expenses. Correct?
A. Yes, sir.
Q. Past lost wages?
A. Yes, sir.
Q. Future medical expenses?
A. Yes, sir.

Q. Future lost wages? Do you see on your answer to Interrogatory No. 53 that you provided in January, 2011 --
A. Where am I looking, sir?
Q. Well, if you start on page 14 --
A. Are we back to this?
Q. No. The Answers to Interrogatories.
A. I don't under -- is that this that you handed me?
Q. Yes, ma'am. It is.
A. Okay. Where do you want me to go under, verification again?
Q. I think I've tabbed it. It's Interrogatory No. 53.
A. Sir, I can't read it. What did -- which -- where do you want me to look? Thank you.
Q. We asked you at this time, under oath, specifically what days you were claiming for lost wages. Do you see that?
A. That would be this A, the 2009. Is that correct?
Q. Yes. You see that down there?
A. Yes.
Q. And specifically what we ask is days that you had to miss work solely because of Dr. Elkins' treatment of you. Is that correct?
A. Yes, sir.
Q. And so you were answering under oath that these are the days you had missed work solely because of what Dr. Elkins' had done and not because of any other reason.

A. Yes, sir.
Q. And we won't go through the individual days, but you totaled -- it was a grand total of 106 days of lost work that you claimed just in the -- in the year -- calendar year 2009. Is that correct?
A. Yes, sir. But that was in the interrogatories. I think I'm only asking for 45 days of lost work.
Q. Well, that's where -- we're coming to that. Okay. So you asked for -- at -- at this time, though, when you answered this interrogatory, you were looking backwards. You weren't guessing about the future, you were looking backwards at the same calendar, same information that you're going to provide to the jury today. And you were saying based on everything I've got, I missed 106 days of work solely because of what Dr. Elkins did.
A. Yes, sir.
Q. And you value that time at $250 per day.
A. Yes.
Q. Now, back to what you were saying. As of today, you're claiming 45 days' lost work?
A. Yes, sir.
Q. And how much per day?
A. 175.
Q. So if Dr. Elkins -- if -- if this jury had been impaneled and you had been sworn in in January of 2011, and they

accepted your testimony, they would've paid you more than double the amount of lost wages that you're asking for today?

A. Yes.

Q. Based on your sworn testimony at that time?

A. Yes, sir.

Q. So they would've -- they would've assessed -- if they had believed your testimony under oath, at that time, it was $26,500; and as of today, it's $12,600?

A. Yes, sir.

Q. Difference of thirteen thousand nine -- more than double, $13,900.

A. Yes, sir.

Q. And that's based on the exact same receipts and information that you have at both dates, then and now?

A. Yes, sir.

Q. And you also claimed you had to take four days off work to go to Dallas for -- that was just an office consult, as well, wasn't it? There were no -- no medical procedures done in Dallas?

A. No, sir. That was to see Dr. Burns.

Q. Okay. Now -- where did you come up with the $250 figure that you used back in 2011?

A. My accountant had told me to take an average week and average the days of what my income was.

Q. But, in fact, you -- you were -- you're self-employed.

And I believe your testimony was as an esthetician, you have between five and ten clients per day. Is that roughly right?

A. I don't remember, like I said.

Q. You don't have any idea?

A. Pardon? Ask the --

Q. You don't have any idea?

A. Will you ask the question again?

Q. How many -- roughly how many clients per day would you see as an esthetician?

A. On a good day, anywhere from 5 to 15.

Q. So -- what about on a bad day?

A. Sometimes none.

Q. Okay. And you had the flexibility to, large part, to reschedule those folks, didn't you?

A. Within reason, yes.

Q. I mean, you weren't -- you weren't getting paid per hour and then missing work and asking for getting repaid per hour, are you?

A. No, sir.

Q. What you're saying is I wasn't in my office that day.

A. And if I'm not there, I can't see customers.

Q. That's true. And if you don't have any patients to see, you don't need to see patients.

A. I don't have patients, sir.

Q. Okay. You understand what I'm saying? If you don't have

clients, you don't need to be there anyway?
A. Yes, sir.
Q. You're not losing money if -- unless you are losing clients.
A. No, sir. But I wouldn't schedule on a day I couldn't be there.
Q. But if you had five one day and you're capable of taking ten, you can move those people around?
A. Yes.
Q. So now you've changed that number, though, to $175 per day?
A. Yes, sir.
Q. Based on the same information you had from your accountant back in 2011?
A. I think that's more reasonable.
Q. Do you recall in your deposition you had a separate spreadsheet that valued those days off at $150 a day?
A. Pardon?
Q. Your deposition, there was an attachment to your deposition where you had a spreadsheet that was a hundred and fifty dollars a day.
A. I do believe -- will you show me?
Q. You see the highlighted days of work there?
A. Yes, sir. And what was this attached to?
Q. If you look at the bottom, the exhibit sticker?

A. I do recall in my deposition, I don't know where -- if you would -- I guess I could look for it -- there was some discrepancy or some confusion on which spreadsheet we were going to use.

Q. Uh-huh.

A. And Dr. Keever and I addressed it in my deposition and you agreed to it that we would adjust --

Q. Ma'am, I -- I don't know how much money you charge for your day off. I -- I'm asking the question. Were you --

A. Okay.

Q. I think the answer is at one point you valued your time at $150 per day, in the deposition.

A. Yes.

Q. And then in the interrogatory it was $250 a day --

A. Yes.

Q. -- at 106 days. And then today it's forty-some-odd days at a hundred and seventy-five days.

A. Yes. A hundred and seventy-five dollars.

Q. I mean, $175 per hour -- I mean, per day. Okay.

A. It's gone down each time.

Q. Well, it's gone up since the deposition, down since the interrogatory. All right. Now, if you look back at your answer to Interrogatory No. 53, after you summed up the total of 106 days off work --

A. Sir, I'm not trying to be obtuse. What am I supposed to

follow in here, is it No. 5? The -- I don't know the numbering. Thank you.

Q. After you listed the days off work and did a sum total of 106 days -- I'm going to read your -- the remainder of your answer and you tell me if I read this correctly. "The days above do not include half days plaintiff was unable to work, the weeks lost in a car accident on the way to hyperbaric oxygen" -- "oxygen chamber treatment, weeks off from a ruptured breast implant from a car wreck, months off for neck surgery from break in car accident, or future loss of time."

A. Yes, sir.

Q. So breaking that down in addition to these 106 days, you just -- you also mention that you lost weeks from the car wreck, more weeks from the ruptured implant, and then months from the neck surgery.

A. That's true.

Q. In addition to the 106 days.

A. Yes.

Q. And the proof for all that is going to be in the -- the calendar that you submitted to the jury?

A. Yes, sir.

Q. And I believe all it shows is just I'm out, you know, you have a line through that day in the calendar. Is that -- that the extent of the testimony, the proof?

A. I don't know. I'd have to see it, sir. I did write

notes on it, but you asked me to redact that.
Q. Did you -- did you -- did you put that stuff together as proof in this case?
A. Yes, I did.
Q. But the -- the bottom line, ma'am, is that when we're talking about past lost wages, we're -- you're saying if not for this procedure, I would've had more income. I lost income because of this, aren't you?
A. Yes.
Q. Because you weren't paid hourly.
A. No, sir. I wasn't.
MR. LISLE: It's Defendants' --
JUDGE SCOTT: 14 is your next one.
MR. LISLE: 14?
Q. (Mr. Lisle continued.) I'm going to show you what I've marked as Defendants' Exhibits 14 and 15.
A. Do I leave this with you?
Q. If you look at -- I'm sorry. I left additional copies up here. All right. I'd like for you to look at your tax return for 2008.
A. Yes, sir.
Q. You're Schedule S because you're self-employed.
A. Yes.
Q. Correct?
A. Yes, sir.

Q. If you look at the top line "Gross receipts," you confirm for me that it says $24,934?
A. Yes, it does.
Q. This is before Dr. Elkins' treatment, which was in January of 2009.
A. Yes, sir.
Q. The calendar year --
A. So would --
Q. -- before --
A. I'm sorry. So would this be for 2007's expenses, or --
Q. It's your 2008 tax return.
A. Oh. Okay.
Q. Now, I'd like for you to look at your 2009 tax return, which is the next exhibit.
A. Yes, sir.
Q. This is after -- this is the calendar year 2009 after you missed whatever work you say you missed including the months for the car wreck, the neck surgeries, breast implant, and 106 for Dr. Elkins. Correct?
A. Yes.
Q. Is it thirty -- $36,959?
A. I think it's thirty-six nine fifty-eight, but that's close.
Q. Okay. So the calendar year after this procedure you made more money than the calendar year before the procedure.

A. Yes, sir. If I'd not been injured, I could've made more I think.
Q. Well, you made more than you made in 2008.
A. Yes, sir. I did.
Q. Okay. All right. Now, when we get to the future aspects of this case --
A. Okay.
Q. You're asking this jury today to cause Dr. Elkins to write a check today for things that you are saying you are going to pay for up to and including 30 years from now when you are 80 years old?
A. Yes, sir.
Q. And after that check is written, it is up to you to spend that money?
A. Yes, sir.
Q. It's not a -- it's not a card that says you have to use this on an IPL, or you have to -- it -- it's -- it's going to be your money. So this jury needs to be able to rely on your testimony about what is required and how you're going to spend it, don't they?
A. Yes, sir.
Q. And that -- not only do they have to be able to rely on it, they have to know that if you tell them that today, it's not going to change for 30 years. Do you agree with that?
A. No, sir. Technology will change. There may be more

treatments or better treatments for burn scars.
Q. So it's possible if they awarded damages for something today you won't need it or it'll be less?
A. Possibly.
Q. In -- in the future -- well, let me ask it this way.
Are -- are you claiming any -- in those receipts that the jury has -- I think those are -- are past medical expenses.
A. This?
Q. That exhibit that was put in.
A. That's not an exhibit.
Q. Believe it's this one, ma'am. This exhibit that's in evidence that the jury's going to look at, Exhibit 37 --
A. Yes, sir.
Q. -- you're -- these are the receipts. Correct?
A. Yes, sir.
Q. And what you're telling the jury -- not -- not what you told them in 2011 under oath, or in the deposition under oath, but what you're telling them today under oath is that but for Dr. Elkins, you would not need to pay for everything that's in that book?
You paid for all that stuff and you're wanting him to pay you back?
A. Yes, sir.
Q. And you've looked through that, haven't you?
A. Yes, sir.

Q. And you've confirmed that everything you said in there is accurate and they can rely on it just like they're going to rely on your testimony for the next 30 years.
A. To the best of my knowledge.
Q. Best of your knowledge. And they have to rely on your testimony for a lot of things in this case, don't they? I mean, they need to know that you -- you -- what you said about the preoperative medication is true, what you said about your other treatments is true. They had -- they need to be able to rely on all that stuff.
A. Yes, they do.
Q. Okay. Turn to page 84, would you, in that receipt book?
A. Is that this?
JUDGE SCOTT: It's Exhibit 37, Ms. Poff.
MS. POFF: Oh, thank you. I'm -- what page? I'm sorry, sir.
Q. (Mr. Lisle continued.) Page 84.
A. Yes, sir.
Q. Would you tell the jury what that is that you're asking for $10,135 for?
A. I consulted with Dr. Atwood, or this is Dr. Sloan --
MS. REPORTER: Ma'am, could you speak right in the microphone, please?
MS. POFF: I'm sorry.
Q. (Mr. Lisle continued.) Believe --

MS. POFF: I'm so sorry.

A. It was a surgery proposal --

Q. (Mr. Lisle continued.) Right. I'm sorry. Go ahead.

A. -- to get a lift to try to minimize scars and pull up.

Q. So -- but this actually is not Dr. Atwood. If you look at the top right, you see that you went to Aesthetic Plastic Surgery, in -- LLC in Little Rock.

A. Dr. Gene Sloan.

Q. Dr. Sloan. And let me read along with you. This was for a face lift, permanent lip implant, and it was valued at $10,135.

A. Yes, it was.

Q. Is that something that -- that you're still asking for today? Have you had this procedure?

A. No, sir. No.

Q. And if you look back at your interrogatory, that -- that procedure was included in your -- your answers to interrogatories for future medical, wasn't it, that spreadsheet that's attached.

A. Is that this?

Q. Yes, ma'am. It's still that document.

A. I don't know if it is, or not. I'd have to find it.

Q. Turn to page 2 of the future medical spreadsheet that you included in that document. You just went past it.

A. Pardon?

Q. You just went past it.
A. It's not numbered. Yes, sir. It's here.
Q. Okay. And at that time you were showing that that was a future expense that you were asking for Dr. Elkins to pay in the future.
A. Yes. It says to correct sagging chin and eyes from the phenol acid burn.

JUDGE SCOTT: Ms. Poff --

MS. POFF: Sir?

JUDGE SCOTT: If you want anyone to understand you --

MS. POFF: Oh, I'm sorry.

JUDGE SCOTT: -- you're going to have to speak into the microphone.

Q. (Mr. Lisle continued.) Now --

MS. POFF: Is there any way I can -- or I -- thank you.

JUDGE SCOTT: The microphone moves up, down, left, and right.

MS. POFF: Thank you.

JUDGE SCOTT: Proceed, Mr. Lisle.

Q. (Mr. Lisle continued.) Now, I'm going to show you what was provided to me as a -- as a supplement to your answers to interrogatories for 2011. This was provided in 2013. Can you recognize that as a list from a few weeks ago of the future

expenses summary that you are going to claim today?
A. Yes, sir. It is.
Q. Okay. Is Dr. Sloan's face lift and lip implant surgery for $10,000 included on this list?
A. No, sir. It's not.
Q. Okay. So if -- if this jury had been impaneled back in January of 2011 after you initiated this case and they accepted your sworn testimony at that time, they would've paid for a face lift and lip implant surgery that you're no longer claiming?
A. Yes.
Q. And if you also look at that -- that list, ma'am, there is a -- under Number 6 you have a total cost for a Lumenis Laser treatment from Dr. Patel that you were asking at that time, a few weeks ago, $7,865 for.
A. Yes, sir. Not now.
Q. But -- from -- from a couple weeks ago 'til today you decided you don't need that surgery.
A. No.
Q. So if they had accepted your testimony a couple weeks ago, Dr. Elkins would've unnecessarily paid $7,850 for a Lumenis surgery that you do not intend to have?
A. Yes.
Q. All right. Look back at your answer to interrogatory again, ma'am, the spreadsheet for future medical that's

attached to that document.
A. Back here? Yes, sir. Which date?
Q. The spreadsheet, the future medical.
A. There's no page numbers. It's by date. Which one?
Q. I've got it tabbed for future medical.
A. Okay. Yeah. I can see.
Q. And if you'll turn to the first page where that tab is?
A. Yes, sir.
Q. You read down the left column, you'll come to an entry that says Hydroquinone. It says "Date," it says "Forever."
A. No, sir. That's what mine says.
Q. Turn to the -- the page that's tabbed, preceding page.
A. Yes, sir.
Q. If you read down the left column, your answers under oath on that day.
A. Yes, sir.
Q. You said that you expected forever, in all caps, yearly to spend $262 on hydroquinone and for a grand total of $8,143.
A. Yes, sir.
Q. Now, if you look at the updated list, and from your testimony earlier yesterday, that -- that expense is no longer included, either, is it?
A. That's part of the Obagi system, sir.
Q. Well, didn't you also have a separate entry for the Obagi system on the answer for interrogatories?

A. Obagi is skin care products and it also uses hydroquinone, which is a skin bleach.
Q. Yeah. And -- and in here you have several entries, special sunscreen for neck and chest, special camouflage makeup, special kin -- skin care product. Okay. Let's just start at the top. If you -- you had Genesis Laser treatments --
A. Yes, sir.
Q. -- ten weeks per year -- weekly, for ten weeks per year, forever, which would've been 300 Genesis Laser treatments? Correct?
A. Yes.
Q. At that time, you valued those at $124,000.
A. Yes, sir.
Q. And you're no longer claiming those.
A. No. After consulting with Dr. Shew --
Q. Ma'am, just please answer my question.
A. No.
Q. You're no longer claiming them?
A. No.
Q. But as of a couple of weeks ago, you were claiming those?
A. Yes.
Q. You had reduced it, though, however, from ten per year to eight per year.
A. Yes.

Q. So if this jury had accepted your sworn testimony in January of 2011, they would've required Dr. Elkins to pay upwards of -- actually, a total cost that you're showing here, a couple weeks ago is over $200,000.

A. Yes, sir. At the time, I thought that's what was necessary.

Q. Right. And -- and if they had thought that, too, he -- he would've paid $200,000, ma'am, for -- for procedures that you do not intend to have. Is that correct?

A. I don't know. Are you -- are you saying --

Q. Are you -- are you going to -- are you going to have these Genesis Laser treatments, or not?

A. No.

Q. I think your testimony -- you're not. So if he had written you a check for those two weeks ago, that would've been $200,000 that you were going to spend on something else.

A. Yes, sir. That's before Dr. Shewmake said the --

Q. Well, I understand that. But it was long after you'd answered your answers to interrogatories in 2011, and just a couple weeks from today. Right?

A. Yes.

Q. And you were prepared to testify under oath until yesterday that -- that you were going to need those.

A. Yes, sir, based to the best of my knowledge at the time.

Q. Okay. And then we talked about special skin care

products. And at the time, in 2011, you had those listed at $62,000.

A. Yes, sir.

Q. And today you're asking for $88,000. Is that correct?

A. Yes, sir. If you're calling that the Obagi system.

Q. Okay. And then you asked -- in your direct testimony, you said you need Cicaplast?

A. Yes.

Q. And that's fourteen -- you're asking for $14,700 for that?

A. Yes, sir.

Q. And that was not -- that was a -- that's a new item that was not included as of 2011, two years after this procedure that Dr. Elkins did?

A. What was your question, sir?

Q. This procedure --

A. That was two --

Q. -- was in January 2009.

A. Yes, sir.

Q. You answered the interrogatories in January of 2011.

A. Uh-huh.

Q. And you stated under oath at that time that you didn't need Cicaplast.

A. I --

Q. It was not included in your testimony.

A. I'm sorry. I don't remember.
Q. Well, ma'am, if you'd like to look at the spreadsheet, I believe it's right there.
A. It's not itemized as far as that brand name. No. It's not.
Q. Okay. There's not a $14,792 line item on this sheet.
A. No, sir.
Q. But there is the ten thousand dollar one hundred thirty-five face lift and lip implant surgery.
A. Yes.
Q. Let me see the -- the receipts, you know, for your past medical. Believe it's Exhibit 37. That's the only copy we have. Well, there -- there's some expenses here for a rental car and -- and November the 16th, did you rent a car to go to Tulsa to see Lisa and to see Dr. Patel, that part of your expenses there that you're claiming?
A. If that was for my follow-up visit, yes. I had to rent a car and Lisa was not there that time.
Q. In addition to -- did you do anything else while you were at Dr. Patel's office besides just talk about your laser treatment?
A. Which day is it, sir? I don't remember.
Q. November the 16th of 2009.
A. What page?
Q. Well, the receipt that you have there is page 68, but

what I'm asking you is did you do anything else while you were at Dr. Patel's office? Let me -- let me start over. You -- you're -- you're asking for Dr. Elkins to reimburse you for rental car and expenses relating to going to see Dr. Patel on the 11/16/2009. Is that correct?

A. Yes.

Q. Okay. And the reason Dr. Elkins would be required to reimburse you would be if it was something that was required by the procedure that he did. Right?

A. Yeah. Oh. There -- there it is.

JUDGE SCOTT: 9 -- excuse me, 16.

A. Is this what you're talking about?

Q. (Mr. Lisle continued.) Ma'am, do you see your signature on that document that I just handed to you marked as Exhibit 16?

A. Yes, I do.

Q. And it's dated 11/16 of '09.

A. Yes, it is.

Q. It's a consent form from Aesthetic Surgery Institute of America.

A. Dr. Patel's office. Yes.

Q. Yes. And, ma'am, on that date, did you have Botox injection?

A. Yes, I did.

Q. Okay. And if you read, there were also some com --

potential complications that you were warned of on that date by Dr. Patel relating to Botox injections, weren't there?

A. Yes.

Q. Okay. And this is the same trip to Dr. Patel that you're asking for Dr. Elkins and this jury to award you damages?

A. Yes.

MR. LISLE: Your Honor, I -- I don't know where I am as far as moving my exhibits, but I -- I've tendered all the ones that are numbered and I move to admit all of them.

MR. KEEVER: Without objection.

JUDGE SCOTT: It's 12 through 16. Any objections, Mr. Keever?

MR. KEEVER: No, sir. Without objection.

JUDGE SCOTT: Defendants' 12 through 16 will be admitted without objection.

(Wherein, Defendants' Exhibits 12, 13, 14, 15, and 16 were admitted into evidence.)

Q. (Mr. Lisle continued.) Let's be clear about your -- your lost wages that you're claiming. This -- this -- the injury you're complaining of doesn't prevent your ability to work. You can still work?

A. Now I can. Sure.

Q. You have a job, and -- and you're -- how much are you making now?

A. I make fifteen ninety-seven an hour.
Q. And you're able to do your job normally?
A. Yes, I am.
Q. Ma'am, are you claiming -- would you look at page 53 in your receipt book and tell me what -- what damages you're claiming for that expense?
A. Page 53?
Q. Yes.
A. Sir, that's a -- I don't think that's what you're referring to. I don't think that's it.
Q. Well, I am. I -- I don't know what that is.
A. Oh. Yes, sir.
Q. What -- what is it you're claiming with regard to that receipt that's in your exhibit book?
A. $2,771 and 12 cents to Sandra Williams.
Q. Okay. And what was that?
A. She's a licensed counselor in Heber Springs, Arkansas.
Q. You're saying you wouldn't have needed that counseling if not for Dr. Elkins' medical procedure?
A. No, sir. I wouldn't have. It was beneficial.
MR. LISLE: Your Honor, now we're up to 18. Is that correct?
JUDGE SCOTT: 17.
MR. LISLE: 17. I'm sorry.
Q. (Mr. Lisle continued.) Okay. I'm not going to belabor

the point, but -- but prior to January 2009, you were already receiving counseling and -- and treatment for depression and -- and depressive-related issues, weren't you? You see the exhibit that's I've attached?

A. This?

Q. Yes.

A. Yes.

Q. From Dr. Holden?

A. Yes, sir. That's not relevant to this case.

Q. Okay.

A. It's not.

Q. All right. I move to --

A. At all. Excuse me.

MR. LISLE: I move to tender Exhibit 17.

JUDGE SCOTT: Any objection, Mr. Keever?

MR. KEEVER: Yes, Your Honor, for the reasons that we stated before. And -- and we've already filed a brief and you had a ruling on that, but I want to make my objection for the record that I really don't think that these are relevant to the issues at trial.

JUDGE SCOTT: Counsel, I don't know what this exhibit is.

MR. KEEVER: Dr. Holden's medical records.

MR. LISLE: Your Honor, I tender these based on

she is indicating that she had to receive counseling solely because of this procedure. And so I think this goes to show whether or not the counseling received was caused by Dr. Elkins' procedure.

JUDGE SCOTT: Mr. Keever?

MR. KEEVER: I didn't see the document that he was -- where he was referring to as the counseling being a charge in the damages that we're claiming right now. If I could just see that, that might clear it up or -- Your Honor, I don't believe that we had that in the list of past expenses, but I don't -- I can't say it's in --

JUDGE SCOTT: Well, Mr. Keever, you may not, but your client has testified she's seeking damages for those counseling services in that exhibit.

MR. KEEVER: Well, I withdraw my objection, Your Honor.

MS. POFF: What I said --

JUDGE SCOTT: All right. Defendants' 17 will be admitted without objection.

(Wherein, Defendants' Exhibit 17 was admitted into evidence.)

MR. LISLE: That's okay. I don't --

Q. (Mr. Lisle continued.) Ma'am, you -- the jury has to distinguish between things that were caused or possibly caused

by Dr. Elkins versus other causes. You understand that, don't you?

A. Yes.

Q. Okay. And how many days are you claiming for lost work in the future?

A. I don't know.

Q. Well, you -- do you have any idea how you're going to calculate those?

A. No.

Q. Do you have a number that you're putting forth to this jury about this is how many days I'm going to lose in future?

A. I don't know.

Q. You got any other damages that you're going to claim that we haven't discussed?

A. I don't know. I think just the future that we've addressed.

Q. Okay.

A. I don't know.

MR. LISLE: Pass the witness.

JUDGE SCOTT: Mr. Keever, any redirect?

MR. KEEVER: Yes, sir, I do. Thank you.

REDIRECT EXAMINATION

BY MR. KEEVER:

Q. Sue, Mr. Lisle asked you about your lower income in 2008 versus your income in 2009.

A. Yes.
Q. Were you employed full time in 2008?
A. I was, but my father was extremely ill during that time and had three major cancers and I was the primary caregiver. I was also going through a divorce. I was not able to be here -- in Heber very much working.
Q. Into the microphone.
A. I'm sorry.
Q. Maybe pull it over, so it's easier. Now, Sue, has your condition changed over the last couple of years?
A. Conditions?
Q. Yeah. Has your scarring and -- and so forth, has that been a -- kind of a changing condition over the last couple of years?
A. Yes, sir. It changes almost daily.
Q. So what you would have thought at any point in time as to what you would elect to undergo was also a moving target?
A. Yes, sir. It was based on the knowledge at that time that I was given from the caregivers.
Q. Now, we're talking about the chest, we're talking about treatments to soften the scar and treat the redness. Is that correct?
A. Yes, sir. And stop those bands from forming so I can move.
Q. And -- and what you -- and just frankly, Sue, what you

do, whether it's the Fraxel treatments to soften up the scar, or the intense pulse light to treat the redness, that's really going to be kind of up to you as to what you think you can --

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

MR. KEEVER: Oh.

JUDGE SCOTT: Sustained.

Q. (Mr. Keever continued.) Well, who makes the decision on what to do? I'll just rephrase it. Who makes the decision on whether you get the Fraxel or whether you get the intense pulse light?

A. I do.

Q. And -- and has that changed -- and that changes based upon information you get from various doctors?

A. Yes, sir, and how my skin does.

Q. Dr. Shewmake the last plastic surgeon that you talked to?

A. Yes, sir.

Q. And what did he recommend in terms of the rather expensive Genesis treatments from -- that Dr. Yee recommended versus --

MR. LISLE: Your Honor, again --

MR. KEEVER: I'm sorry.

JUDGE SCOTT: Sustained.

Q. (Mr. Keever continued.) What did -- what did -- what were the recommendations of Dr. Shewmake, in terms of treating

your chest in the future?
A. He suggested a Fraxel treatment.
Q. One?
A. No. I think he considers one treatment be a set of, like, three treatments.
Q. Okay.
A. For about $3600. He said he would suggest that now to break up the bands that are forming and the thickness that's developing there. Then he suggested I -- IPL treatments in his office, which was a series of six to start for $2,000 and then possibly one to two a year for neck and/or chest at 500 to a thousand dollars for the rest of my life which is a lot less than the Genesis Laser, which is a lot less invasive so it's nice.
Q. And is --
A. Nice to --
Q. Is that what you're asking the jury to put in the verdict to protect you against those future expenses for the chest?
A. Yes, I am, which is a lot less.
Q. And -- and basically a substitution for the $211,000 that you had previously asked for?
A. Yes. It's a lot less.
Q. Dr. Lisle asked -- or Mr. Lisle -- I'm sorry -- asked you about future treatments and asked you whether they -- new technology might cause them to make them less expensive?

A. That'd be great.
Q. But would -- what's the possibility that future technology would actually be more expensive?
A. Almost always it is.
Q. Sue, Mr. Lisle talked a lot about these consent forms.
A. Yes, sir.
Q. But did you ever give your consent to a laser treatment that was 400 percent to 600 percent higher than the recommended suggested parameters?
A. No, sir. I did not.
Q. Did you ever give your consent to a laser treatment that was likely to burn and scar you like happened?
A. No, sir. I did not.
Q. Just one -- one last item, Sue. On these days off --
A. Yeah.
Q. -- how did you decide to pare down the 111 days to 45 days in terms of what you were actually going to ask the jury, not your initial thing, but you were actually going to ask the jury?
A. I had included appointments and things where I could've worked half a day. If I was physically able to work that day, I did not include that when I redid my days. So when it went from 106 down to 45, which I thought was fair where I could physically not see clients or customers if I had any. Where I was not --

Q. And, Sue -- oh. I'm sorry. I didn't mean to cut you off. Sue, on those 45 days we talked about what your accountant suggested back then and what you make now. Would you be willing to just accept whatever the jury used as a multiplier for the 45 days?

A. Yes, I would, totally.

Q. And if -- if you go down to $150 a day, that's actually less than $7,000, would you agree that's fair?

A. Yes.

Q. If that's what they think?

A. Yes, I would

Q. Okay. Mr. Lisle also asked you about a consent form that said that you might require hospitalization. You recall that?

A. I remember him showing it to me. Yes.

Q. Were you aware at the time that you had the laser that Dr. Elkins had no hospital privileges?

A. No. I was not.

Q. And then you read a paragraph about how important it was to follow doctor's orders. Remember that?

A. Yes, sir. I do.

Q. Do you remember any paragraph -- that was out of the lip implant or one of the other consent forms. What do you remember about the CO2 consent form that I know you've reviewed since that say -- had a section about following doctor's orders?

A. I followed doctor's orders to the letter.
Q. And, even then, how long after you weren't physically going back to Dr. Elkins, when you were seeing Dr. Buffalo and Dr. Holland and Dr. Yee, how often did you contact Dr. Elkins to keep him advised of the treatment that your other doctors were suggesting?
A. Every time something would come up, I would inform Dr. Elkins and discuss it with him.
Q. And what was his advice in terms of following the recommendations that you were getting from your doctors in Little Rock?
A. He was supportive.

MR. KEEVER: Okay. Thank you, Sue. Pass the witness, Your Honor.

JUDGE SCOTT: Anything else, Mr. Lisle?

RE-CROSS-EXAMINATION

BY MR. LISLE:
Q. Ma'am, you just testified that this change from the Genesis Laser treatment that you were claiming yesterday morning until the IPL treatment that you're claiming now was because of an examination you had by Dr. Shewmake?
A. Yes, sir.
Q. Dr. Shewmake --
A. On his suggestion.
Q. Dr. Shewmake was your expert witness that was not a

treating physician that was hired solely for this trial? Correct?

A. He has seen me before.

Q. Right. Well, since in the opening statement your lawyers asked for a lot of money, future medical, including those Genesis Laser treatments, until now, did you learn, like we all did, in this courtroom from Dr. Shewmake that that wasn't necessary? Is that when you first learned it?

A. No, sir. I learned when I saw him yesterday.

Q. Yesterday?

A. Before.

MR. LISLE: No further questions.

JUDGE SCOTT: Anything else, Mr. Keever?

MR. KEEVER: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. KEEVER:

Q. Sue, Mr. Lisle just said that Dr. Shewmake was an expert that you had hired.

A. Oh.

Q. What are you paying Dr. Shewmake for the services that he provided you?

A. Nothing. Dr. Shewmake's just doing it.

MR. KEEVER: Thank you.

JUDGE SCOTT: Anything else, Mr. Lisle?

MR. LISLE: No, sir. No further questions.

JUDGE SCOTT: You may step down, Ms. Poff. Call your next witness, Mr. Keever.

MS. POFF: Want me to leave this?

MR. KEEVER: Your Honor, at this time, we have a very brief proffer that when the Court is -- when it's convenient --

JUDGE SCOTT: Mr. Keever --

MR. KEEVER: Yes, sir. I have no further --

JUDGE SCOTT: Call your next witness.

MR. KEEVER: I have -- Your Honor, I have no further witnesses and the plaintiff will rest her case in chief.

JUDGE SCOTT: Thank you, sir.

Ladies and gentlemen, it's going to be necessary that we take a recess at this time. I remind you once again you are not to discuss this matter or the issues or the people involved with each other or with anyone else, nor are you to make any investigation or do any research on your own, nor are you to communicate in any way with the parties, the attorneys, or any of the witnesses. When we're ready to come back into session, Mr. Tucker will make you aware. Mr. Tucker, you may take the jury out.

MR. BAILIFF: All rise.

(Wherein, the jury left the courtroom at 10:02 a.m.)

JUDGE SCOTT: Be seated please.

MR. KEEVER: My apologies, Your Honor. That was not a proper statement by me and I -- I deserved the rebuke.

JUDGE SCOTT: Mr. Lisle?

MR. LISLE: Yes, sir. At this time I'd like to make a motion, going to move for a directed verdict on several grounds, Your Honor. The -- the first one is that there was no proof established in the standard of care in this case. The -- the medical malpractice statute requires that before moving on to questions of breach of the standard of care, they have to have expert testimony. And clear -- clearly in this case the settings used on a laser device are not up to a layman's discretion. Everyone stipulates to that.

So they have to have expert testimony establishing, first, what the standard of care is in a locality, Benton County, Arkansas; what a reasonably -- a trained physician would use in a laser procedure when treating a patient. So first they have to establish what the standard of care is. Dr. Shewmake was very clear, he has never used the

SmartXide Laser. He uses -- he has used other lasers that don't have the same settings. He's never even seen one. I think he said he saw one from a distance. He's never had his hands on one.

He testified that he's never talked to -- to any other doctors in Benton County about what settings they use on a SmartXide DOT laser. He -- he said that it's -- he clear -- clearly testified that it was not the same as the laser that he uses in his practice. He had never seen the manual for the SmartXide Laser that he used to testify until it was given to him by plaintiff's attorneys. It's not something he used in his practice.

He -- he then went on to say and I -- I've got a copy of the transcript from yesterday in his redirect, if we look on -- starting on page 5, these are when Dr. Keever, Mr. Keever was asking him his --

JUDGE SCOTT: What -- what line you on? I --

MR. LISLE: I'm sorry. Let me go to page 4, first, Your Honor. There was a -- there was a question about -- on line 6, "Oh. I've never" -- He answered, (as read) "Oh. I've never used the SmartXide. I assume you can set those things," I objected, said don't assume. And then he said, "I

never used it."

Mr. Keever continued, (as read) "How about in the Fraxel?" He answered, (as read) "In the Fraxel, it's all set by the computer. You set the treatment level and power. It sets everything else," which is different from the SmartXide. So he -- then he went on to say, in question 22, "You said it's not below the standard of care to be aggressive." The answer was, "No."

And I -- and, question, (as read) "And, I believe, you said you'd been up to 110 percent aggressive?" Answer, "Yeah, 115." Question, "15. When does aggressive change from being aggressive to being reckless?" Answer, "I don't know where that is." "How about" -- "How would you term 400 percent?" "I think that's aggressive, very aggressive." Then you went down to question on page 5, line 19, "How many types of CO2 fractional lasers are there?" "Gosh, probably 20." "And what kind of comparison of one fractional laser to the other do you get from these various meetings and -- and -- that you go to?"

(As read) "Well, I think each laser's individual in that it has its own settings, its own strengths and weaknesses. You know, I can only

speak for Fraxel because that's what I own for a long time." And then he went on to talk about the Fraxel Laser. So, again, that's on top of all the other testimony where he said he had never used this machine. This -- this case is very, very specific about the settings on this machine that he hasn't used. So, number one, he didn't have a foundation for it 'cause he's not used the machine.

Number two, the documents he based his testimony on all say that they are not to be relied on for that purpose. The manual says it's not a -- it doesn't say it's the standard of care. Fact, it says the doctor can do something else. The -- then he leaves open the possibility that the doctor can be aggressive. Well, how aggressive? Well, I don't know. He doesn't say what the standard is. You can't jump over that step and say I don't know what the standard is, but this was too much. And there's -- I've got a brief that has the case law on that.

You can't do that. Then we have a -- we have a causation problem if you read on -- on -- so I move for directed verdict on that, as well. He said, "Based on" -- question on line 11, (as read) "Based on reasonable medical probability, would Sue's complication have occurred if the laser settings

were 25, 30, and 400?"

JUDGE SCOTT: Whoa. Whoa. What page you on now?

MR. LISLE: I'm sorry. It's page 7, Your Honor.

JUDGE SCOTT: Okay. Start again now.

MR. LISLE: Page 7, question 11, "Based on reasonable medical probability, would Sue's complication have occurred if the laser settings were 25, 300, and 400?" (As read) "I think her chances of complications would've been significantly less, but complications can occur at any setting depending on the patient." So that's a causation problem. He can't say that it was caused by that.

I also want to move for directed verdict on the reasonableness of all these past medical expenses, which was not established by any physician. Plaintiff says it's my opinion that these were related, but there's no one saying she needed this treatment because of Dr. Elkins.

I'd also like to move for directed verdict on some of her future medical expenses. She's going to testify that she's going to need multiple tattooing procedures, and Dr. Shewmake said you can't determine how many she would need. And, in general,

just her future medical expenses, Your Honor, she just testified she can't calculate that.

She says something could happen in the future. There could be an improvement. They could go up. They could go down. She doesn't know if she's going to need any of those treatments that she said. And so based on that testimony that is too -- there's -- there's no support for it proving that it's reasonable to ask for those things in the future when she said she doesn't know if she's going to need any of them, or not. That's all I got, Your Honor.

JUDGE SCOTT: Mr. Keever?

MR. KEEVER: Well, Your Honor, Dr. Shewmake testified for probably a hundred pages before this -- this part of the redirect. He did establish what the standard of care was. He established that there are some 20 different brands of fractional lasers and they're all very similar. He not only looked at the Clinical User Manual, he had been exposed to the SmartXide Laser at various professional meetings. He had talked to other doctors about it. I believe he mentioned Jay Burns from Dallas, who's a leader in the field. He did rely on the Clinical User Manual.

But I think it's clear that he did offer testimony on what was the standard of care. And he was very clear in his testimony that the Defendants' settings, which were 400 percent above were beyond the standard -- were below the standard of care, that he breached the standard of care. He was asked what they would be in terms of aggressive, he says very, very aggressive. He did not go to reckless, but he made it very, very clear that he did go that those settings were so high that they were below the standard of care and they caused the injury in Ms. Poff.

Clearly, there's enough testimony on standard of care, breach of standard of care, and causation to go to the jury. And for that reason, the directed verdict should be denied. Now, I didn't bring it with me, but there is an Arkansas statute that says that a plaintiff can testify to her medical bills and validate her own medical bills and that they don't need to be authenticated by a medical expert as reasonable. So I would ask that that part of his request for directed verdict on past medicals be denied.

As far as her future medical bills, Dr. Shewmake testified that it was reasonably likely

that Sue would require the Obagi products in the future, this hydration products, the special sunscreens, and the camouflage makeup, and the tattooing. He, indeed, did say that every person varies in terms of how often tattooing would need to be revised. And, in fact, I believe his testimony said it could be one year, it could be five years. And Sue offered her estimate, which she obtained from the medical tattooist.

That name had been disclosed to the defense counsel months ago, so he -- he knew about the -- Randy Hatchall, had an opportunity to depose him if he wish. And I believe that it's a jury question as to what they believe would be a reasonable amount to put in the future for medical tattooing. As for the future laser -- not laser -- yeah. The one Fraxel treatment and the intense pulse light that -- that exactly tracks the testimony of Dr. Shewmake, whose medical opinion was that's what he would recommend at this point in time.

So, Your Honor, I would ask that Defendants' motion be denied in its entirety. Thank you.

JUDGE SCOTT: Thank you. Mr. Lisle?

MR. LISLE: Your Honor, I'd just like to -- I do have a written brief about this primarily on the

standard of care issue, about how you have to -- you have to establish a standard before you can go about trying to prove that it wasn't met. And one of the cases, the strong case that's relied on is very similar to this one talking about how directed verdict was appropriate. It's *Williamson v. Elrod.* In it the court said by failing to establish the standard, any testimony the doctor gave as to the appellant's failure to meet the standard is of no merit because Elrod never initially established the app" -- "the applicable standard of care under which the appellate allegedly fell.

That was not done in this case. They -- they overleapt that element and tried to prove a breach of the standard without establishing what the standard was.

JUDGE SCOTT: Mr. Keever?

MR. KEEVER: Well, Your Honor, I -- I completely disagree. I know that --

JUDGE SCOTT: You can go ahead and turn the podium around, Mr. Keever, if you want to.

MR. KEEVER: Thank you, Your Honor. I know that Dr. Shewmake said that the settings that were used were below the standard of care, and that no reasonable prudent doctor would've done that. I --

direct testimony will absolutely nail that. I think he said that it would be below the standard of care to go 20 percent, or more, above, particularly in a patient like Sue. And I believe he also stated that the other reason why the settings were way above the standard of care in a patient like Sue is because of her physical and emotional condition at the time.

So I absolutely disagree and I believe that the direct examination Mr. Shewmake's going to be rock solid. He did establish what was the standard of care. Thank you, Your Honor.

JUDGE SCOTT: Thank you. Counsel, I want to take a brief recess to consider this motion. I'm going to sua sponte dismiss the plaintiff's claim for punitive damages. I don't think there's been any showing that Dr. Elkins knew or should've known that his actions would result in injury or that they were done with malice or that there's been a course of conduct or behavior that was injurious to the plaintiff or anyone else, other than this one instance of treatment. Court will be in recess.

MR. KEEVER: Your Honor?

JUDGE SCOTT: Yes, sir?

MR. KEEVER: May I make my record on the punitive damages?

JUDGE SCOTT: Certainly.

MR. KEEVER: Okay.

JUDGE SCOTT: Mr. Keever -- you all have a seat. My court reporter has advised me that for some reason you thought the appropriate way to make a proffer was to have testimony by a witness.

MR. KEEVER: Yes, sir.

JUDGE SCOTT: That is improper.

MR. KEEVER: Yes, sir.

JUDGE SCOTT: Court will be in recess.

MS. REPORTER: All rise.

(Wherein, there was a break taken from 10:16 to 10:30 a.m.)

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

MR. KEEVER: Ms. Court Reporter?

MS. REPORTER: Mr. Keever, are you still on the record?

MR. KEEVER: What's that?

MS. REPORTER: Are we still on the record?

MR. KEEVER: I'm going to make my record on the punitive damages.

MS. REPORTER: Okay.

MR. KEEVER: Mr. Lisle, I'm going to hand you a

copy of my trial brief, which I will then give to the court reporter.

The Court has ruled that it -- or granted directed verdict on our -- our request for punitive damages in this case. We object to that ruling. The standard for obtaining punitive damages in a medical malpractice case, which is seen in *Montgomery v. McCoy*, one standard is that if they -- there's testimony that shows that the defendant knew or should've known that his conduct would likely cause an injury to -- to the plaintiff -- I'm sorry -- that the defendant knew or should've known that his conduct was likely to injure the -- the plaintiff but proceeded in reckless disregard of that knowledge, then malice is to be inferred and punitive damages are to be granted.

The standard is clear that if there's sub -- any substantial evidence in existence that tends to establish that a party's entitled to a jury question, directed verdict against that party on that point is improper. And that is from *Rose Care, Inc. v. Ross*, and it's in my trial brief on the punitive damages.

Dr. Shewmake clearly testified that the defendant knew or should've known that his selected

settings on Ms. Poff would lead to her injury, but he proceeded in spite of that knowledge. This establishes a jury question as to whether or not the defendant acted with reckless disregard to the safety of Ms. Poff. And the plaintiff is entitled to ask the jury for punitive damages. And -- and I will proffer, and I believe it is now Proffer No. 4, Plaintiff's Proffer No. 4, our trial brief on punitive damages, which also discusses what we would have asked the Court to allow us to present to a jury on punitive damages, which includes the issue of the licensing of the outpatient surgery center. It includes the issue of the conducts -- Defendants' conduct in the case of Cynthia Jones, which is a file available to the public under the Arkansas Freedom of Information Act and obtained from the addressed Arkansas Medical Board.

In that case, the defendant pursued an aggressive liposuction and abdominoplasty which resulted in the loss of virtually all the abdominal skin required extensive reconstructive surgery by another physician. That aggressiveness is analogous to the conduct in this case and was termed by two medical reviewers for the medical board to be gross negligence.

Mr. Swindle? Okay. We'll make our proffer now, and I thank you, very much.

(Wherein, Plaintiff's Proffered Exhibit 4 was proffered.)

(Wherein, the proffer concluded.)

JUDGE SCOTT: Counsel, I'm going to deny the Defendants' motion for directed verdict. Mr. Lisle, I think the testimony of the expert in the *Williamson* case that a majority or most physicians would've been there in an hour is different from Dr. Shewmake's testimony that the burns to the plaintiff violated a standard of care, as -- and that, as a result, those burns were caused. I also think there's sufficient testimony and evidence regarding the causation of the Defendants' actions and result in case. And as Mr. Keever points out, a plaintiff may testify as to her past medical expenses. And I think there's also been sufficient showing of any future medical expenses. Mr. Keever, you ready for the jury to come in?

MR. KEEVER: I am, Your Honor.

JUDGE SCOTT: Mr. Lisle, you ready for the jury?

MR. LISLE: Yes, we're ready.

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

please.

MR. BAILIFF: All rise.

(Wherein, the jury entered the courtroom at 10:31 a.m.)

JUDGE SCOTT: Be seated please. Mr. Tucker, would you gather up the exhibits from the witness stand, please, sir? Mr. Lisle, call your first witness.

MR. LISLE: Your Honor, I would first like to -- can I -- make sure I've tendered all my exhibits?

JUDGE SCOTT: Yes, sir. You certainly may.

MR. LISLE: What are we up to?

MR. BAILIFF: Some of this stuff's not --

MR. LISLE: Believe my last was 18?

JUDGE SCOTT: Yes, sir. It was. Give that document back to Mr. Lisle there. 17 was your last exhibit. It was Dr. Holden's records.

MR. LISLE: And it was submitted?

JUDGE SCOTT: Yes, sir. It was in.

MR. LISLE: Your Honor, at this time, the defense will rest.

JUDGE SCOTT: All right. Ladies and gentlemen, we're going to have to take another recess at this time. I anticipate that -- thank you, Mr. Tucker --

MR. BAILIFF: Yes, sir.

JUDGE SCOTT: -- this recess will be somewhat lengthier than our previous recesses. It is my hope that we will be able to come back in session prior to lunchtime, perhaps in half hour or 45 minutes, but time will tell. I apologize for the inconvenience and the disruption of our schedule.

I remind you, once again, that you are not to discuss this matter with anyone. You are not to communicate with any of the attorneys, the parties, or the witnesses, nor are you to do any independent research on your own. You are to consider this matter only when I dismiss you to commence your deliberations, which I am not doing at this time.

You are not to do any dissemination of your opinions, thoughts, or express anything that has gone on during this proceeding in any way, shape, manner, or form. Mr. Tucker, you may take the jury out.

MR. BAILIFF: All rise.

(Wherein, the jury left the courtroom at 10:33 a.m.)

JUDGE SCOTT: Be seated please. Counsel, Ms. Schrader should have a draft of the instructions ready for you to review in the next three or four minutes. After you have had a few minutes, why

don't you come to my chambers and she will give you a copy of that. I'd like for you to review it. When you have both reviewed it and consider it, we'll go over them in my chambers. I'll make a decision. We'll print the final set of instructions. If you want to make any objections to those instructions, we'll do it after that.

MR. LISLE: Your Honor, can I renew my motion directed verdict?

JUDGE SCOTT: Yes. Forgive me, Mr. Lisle. Got me out of sequence there.

MR. LISLE: Your Honor, would like to on the record renew my motion for directed verdict and incorporate all the arguments I previously made. We believe that the plaintiff failed to establish the local standard of care, failed to establish a breach of that standard because the doctor did not have experience with this particular machine about which he testified.

He was not able to say when being aggressive became -- turned into becoming a violation of the standard of care. He said that being too aggressive was, but he -- he said he wasn't able to establish when that change happened. Would also renew my motion on the -- the lack of proof on the past

medical as being reasonable, the -- and the past wages being too speculative, future medicals as being too speculative, and future lost wages which not sure there's still a claim for those, but I -- I -- if there is, I would think they're too speculative, as well. And also just that the -- the doctor -- the plaintiff's physician was not able to establish the sufficient evidence to show causation of plaintiff's damages.

JUDGE SCOTT: Your motion is denied.

MR. KEEVER: Your Honor, may I make a motion?

JUDGE SCOTT: Yes, sir.

MR. KEEVER: Your Honor, at this time, plaintiff would move for directed verdict on the issue of liability. There's been virtually no credible evidence to dispute the plaintiff's charge that the defendant was negligent and caused the injury to Ms. Poff. Thank you, sir, Your Honor.

JUDGE SCOTT: That motion is denied. Court will be in recess.

MS. REPORTER: All rise.

(Wherein, a break was taken from 10:36 a.m. to 12:41 p.m.)

JUDGE SCOTT: Would you give each of the attorneys one of those instructions?

MR. BAILIFF: Yes, sir.

JUDGE SCOTT: Counsel, this is the most recent instruction, which I have labeled 13(A), I believe. Yes, 13(A). Mr. Keever, you ready for the jury to come in?

MR. KEEVER: Yes, Your Honor. May I post my objection to 13(A), just on the record, which I have just done?

JUDGE SCOTT: Yes, sir. You can do that when the jury goes out.

MR. KEEVER: Okay. Thank you.

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 12:42 p.m.)

JUDGE SCOTT: Be seated please. Members of the jury, it now becomes my duty to give you the law that will govern you in the trial of this case. As I previously told you, this law will be contained in the form of various instructions and I trust that you will listen carefully to the reading of those

instructions in hope you can better understand the law. Then it will be your duty to harmonize the law with the true facts as you find them and render a verdict in compliance with both the law and the instructions. You will be given a copy of these instructions to take with you to the jury room when you commence your deliberations.

Instruction No. 1: The faithful performance of your duties as jurors is essential to the administration of justice.

It is my duty as Judge to inform you of the law applicable to this case by instructions, and it is your duty to accept and follow them as a whole, not singling out one instruction to the exclusion of others. You should not consider any rule of law with which you may be familiar unless it is included in my instructions.

It is your duty to determine the facts from the evidence produced in this trial. You are to apply the law as contained in these instructions to the facts and render your verdict upon the evidence and law. You should not permit sympathy, prejudice, like, or dislike of any party to this action or of any attorney to influence your findings in this case.

In deciding the issues, you should consider the testimony of the witnesses and the exhibits received into evidence. The introduction of evidence is governed by law. You should accept without question my ruling as to the admissibility or rejection of evidence, drawing no inferences that by these rulings I have in any manner indicated my views on the merits of this case.

Opening statements, remarks during the trial, and closing arguments of the attorneys are not evidence but are made only to help you better understand the evidence and applicable law. Any argument, statements, or remarks of attorneys having no basis in the evidence should be disregarded by you.

I have not intended by anything I have said or done, or by any questions that I may've asked, to intimate or suggest what you should find to be the facts, or that I believe or disbelieve any witness who testified. If anything that I have done or said has seemed to so indicate, you will disregard it.

Instruction No. 2: In considering the evidence in this case you are not required to set aside your common knowledge, but you have a right to consider all the evidence in the light of your own

observations and experiences in the affairs of life.

Instruction No. 3: You are the sole judges of the weight of the evidence and the credibility of the witnesses. In determining the credibility of any witness and the weight to be given his or her testimony, you may take into consideration his or her demeanor while on the witness stand, any prejudice for or against a party, his or her means of acquiring knowledge concerning any matter to which he or she testified, any interest he or she may have in the outcome of the case, and the consistency or inconsistency of his or her testimony, as well as its reasonableness or its unreasonableness.

Instruction No. 4: Where relevant evidence is within the control of the party in whose interest it would be -- naturally be to produce it, and that party fails to do so without satisfactory explanation, you may draw the inference that such evidence would have been unfavorable to that party.

Instruction No. 5: An expert witness is a person who has special knowledge, skill, experience, training, or education on the subject to which he or she testifies.

An expert witness may give his or her opinion

on questions in controversy. You may consider his or her opinion in light of his or her qualifications and credibility, the reasons for -- given for his or her opinion, and the facts and other matters upon which the opinion is based.

You are not bound to accept an expert opinion as conclusive, but should give it whatever weight you think it should have. You may disregard any opinion testimony if you find it to be unreasonable.

Instruction No. 6: A fact in dispute may be proved by circumstantial evidence as well as direct evidence. A fact is established by direct evidence when, for example, it is proved by witnesses who testify to what they saw, heard, or experienced. A fact is established by circumstantial evidence when its existence can reasonably be inferred from other facts proved in the case.

Instruction No. 7: After I have completed the instructions to you by the law in this case, you will be given a number of written questions called interrogatories. These interrogatories present the issues of fact which you must decide. In order that you may be fully acquainted with the issues of fact which are being submitted in this case for your determination, I will now read each of these

interrogatories, some or all of which you may be called upon to answer. You should keep these in mind as I explain the applicable law to this case.

Interrogatory No. 1: Do you find from a preponderance of the evidence that James P. Elkins, M.D. was negligent in relation to the care and treatment of Sue Poff which was a proximate cause of any damages to Sue Poff?

Interrogatory No. 2: Do you find from a preponderance of the evidence that (a) Ms. Poff, or a person of ordinary intelligence and of awareness in a position similar to that of Ms. Poff, could not reasonably be expected to know of the risk or hazards inherent in the treatment provided by James P. Elkins, M.D.; (b) Ms. Poff would not have undergone treatment because of the risk involved; (c) James P. Elkins, M.D. failed to provide Sue Poff adequate information to enable Sue Poff to make a reasoned and intelligent decision to give or withhold consent for the treatment of Sue Poff; and (d) such a failure was a proximate cause of any damages to Sue Poff?

Interrogatory No. 3: If you answered Interrogatory No. 1 or Interrogatory No. 2, or both, "Yes," state the amount of damages you find that Sue

Poff incurred as a result of the negligence of the parties found to be liable.

Instruction No. 8: If you answered "no" to each of the two inter -- each of the first two interrogatories then go no further and return your answers to the Court. If you answered "yes" to at least one of the first two interrogatories, then answer the following interrogatory.

Instruction No. 9: A party who has the burden of proof on a proposition must establish it by a preponderance of the evidence, unless the proposition is so established by other proof in the case or unless a different standard of proof is required by another instruction. "Preponderance of the evidence" means the greater weight of the evidence. The greater weight of the evidence is not necessarily established by a greater number of witnesses testifying to any facts or state of facts. It is the evidence which, when weighed with that opposed to it, has more convincing force and is more probably true and accurate. If, upon any issue in the case, the evidence appears to be equally balanced, or if you cannot say upon which side it weighs heavier, you must resolve that question against the party who has the burden of proving it.

Instruction No. 10: James P. Elkins, M.D. contends that there was fault on the part of Sue Poff, which was a proximate cause of the injury. James P. Elkins, M.D. has the burden of proving this contention.

James P. Elkins, M.D. also contends that Sue Poff was comparatively negligent and assumed the risk of the laser procedure. James P. Elkins, M.D. has the burden of proving this contention.

Interrogatory -- excuse me.

Instruction No. 11: At the time of the occurrence, James P. Elkins, M.D. was acting as an employee and/or sole proprietor of James P. Elkins, M.D., P.A. Therefore, any negligence or failure to use the highest degree of care on the part of James P. Elkins, M.D. is charged to James P. Elkins, M.D., P.A. with respect to the claims of Sue Poff.

Instruction No. 12: When I use the term "assumption of risk," I mean a person voluntarily exposing himself or herself to a dangerous situation inconsistent with his or her safety, knowing of the danger and risk of injury from it.

Instruction No. 13: The law frequently uses the expression "proximate cause," with which you may not be familiar. When I use the expression

"proximate cause," I mean a cause which in a natural and continuous sequence, produces damage and without which the damage would not have occurred.

This does not mean the law recognizes only one proximate cause of damage. To the contrary, if two or more causes work together to produce damage, then you may find that each of them was a proximate cause.

Instruction 13(A): James P. Elkins, M.D. contends and has the burden of proving that following any act or omission on his part an event intervened that in itself caused damage completely of his conduct. If you so find, then James P. Elkins, M.D.'s act or omission was not a proximate cause of any damage resulting from any intervening event.

The fact that other causes intervened between any act or omission on the part of James P. Elkins, M.D., and the damage for which claim is made, which would not relieve James P. Elkins, M.D. of the liability if the damage is reasonably foreseeable as a natural and probable result of any act or omission on the part of James P. Elkins, M.D.

Instruction 14: The fact that an injury occurred is not, of itself, evidence of negligence

on the part of anyone.

Instruction 15: In treating a patient, a doctor must possess and apply with reasonable care the degree of skill and learning ordinarily possessed and used by members of his profession in good standing, engaged in the same type of practice in the locality in which he practices, or in a similar locality. A failure to meet this standard is negligence.

In determining the degree of skill and learning the law required and in deciding whether James P. Elkins, M.D. applied the degree of skill and learning which the law required, you may consider only the expert testimony provided by Dr. Kris Shewmake and James P. Elkins, M.D.

In deciding whether any negligence of James P. Elkins, M.D. was a proximate cause of injury to Sue Poff, you may consider only the expert testimony provided by Dr. Kris Shewmake and James P. Elkins, M.D.

In considering the evidence on any issue in this case, you are not required to set aside your common knowledge, but you have a right to consider all of the evidence in light of your own observations and experiences in the affairs of life.

Instruction 16: Sue Poff asserts two separate grounds for recovery of damages: First, that there was negligence on the part of James P. Elkins, M.D.; and, second, that James P. Elkins, M.D. failed to supply adequate information to obtain an informed consent to the treatment.

With respect to the claim of negligence, Sue Poff has the burden of proving each of three essential propositions: First, that she sustained damages; Second, that James P. Elkins, M.D. was negligent; Third, that such negligence was the proximate cause of the plaintiff's damages.

With respect to the asserted failure to supply adequate information to obtain an informed consent, the plaintiff has the burden of proving each of three essential propositions: First, that she sustained damages; Second, that James P. Elkins, M.D. failed to supply adequate information to obtain an informed consent to the treatment; and Third, that such failure was the proximate cause of Sue Poff's damages.

It will be necessary for you to consider separately each asserted ground for recovery. If you find from the evidence that every essential proposition with respect to any one ground for

recovery has been proved, then your verdict should be for Sue Poff; but if you find from the evidence that any essential proposition with respect to any one ground for recovery has not been proved, then your verdict with respect to that ground for recovery should be for James P. Elkins, M.D.

Instruction 17: In obtaining consent to perform treatment, a medical care provider is under a duty to supply adequate information to enable the patient to make a reasoned and intelligent decision to give or withhold consent.

Other than in an emergency situation, the information required is that as would customarily have been given at the time of treatment to a patient in a similar situation by other medical care providers with similar training and experience practicing in the locality in which he or she practices or in a similar locality.

In deciding whether adequate information was supplied, you may consider whether it was reason -- reasonable for James P. Elkins, M.D. to limit such disclosure because it could be expected to adversely and substantially affect Ms. Poff's condition.

Instruction No. 18: In determining whether the failure to obtain an informed consent was a

proximate cause of any damages sustained by Ms. Poff, you may consider the following factors: (a) Whether Ms. Poff knew, or whether a person of ordinary intelligence and of awareness in a position similar to that of Ms. Poff could reasonably be expected to know of the risk or hazards inherent in such treatment; (b) Whether Ms. Poff would've undergone treatment regardless of the risk involved, or whether she did not wish to be informed thereof.

Instruction 19: If you should find that the occurrence was proximately caused by the negligence on the part of James P. Elkins, M.D. and not on the part of negligence by Ms. Poff, then Ms. Poff is entitled to recover the full amount of any damages you may find she sustained as a result of the occurrence.

If you should find that the occurrence was proximately caused by the negligence of both Ms. Poff and James P. Elkins, M.D. then you must compare the percentages of their negligence.

If the negligence of Ms. Poff is of less degree than the negligence of James P. Elkins, M.D., then Ms. Poff is entitled to recover any damages which you may find she has sustained as a result of the occurrence after you reduced -- you have reduced

them in proportion to the degree of her own negligence.

On the other hand, if James P. Elkins, M.D. was not negligent or if the negligence of Ms. Poff is equal to or greater in degree than the negligence of James P. Elkins, M.D., then Ms. Poff is not entitled to recover any damages.

Instruction No. 20: If an interrogatory requires you to assess the damages of Sue Poff, you must then fix the amount of money which will reasonably and fairly compensate her for any of the following eight elements of damages sustained: (a) The nature, extent, and duration of any injury and whether it is temporary or permanent; (b) The reasonable expense of any necessary medical care, treatment, and services received; (c) The reasonable expense of any necessary medical care, treatment, and services reasonably to be required in the future; (d) Any pain and suffering experienced in the past; (e) Any pain and suffering reasonably certain to be experienced in the future;(f) The value of lost earnings in the past; (g) The present value of any earnings reasonably certain to be lost in the future; and/or (h) Any scars and disfigurement.

Whether any of these elements of damage has been proved by the evidence is for you to determine.

Instruction No. 21: If it becomes necessary for you to assess damages, then in fixing the amount of money which is reasonably and fairly -- you will -- which will reasonably and fairly compensate Ms. Poff, you are to consider that an injured person must use ordinary care to determine whether medical treatment is needed and to obtain medical treatment, to follow the instructions of her physician, and that any damages resulting from a failure to use such care cannot be recovered.

You have now heard all the evidence and the instructions on the law. And you must apply this law in reaching your verdict. You will soon hear the lawyers' closing arguments then go to the jury room to decide this case. I have a few final instructions for you on how to proceed.

Remember that you are to decide this case fairly, based only on the evidence presented in this courtroom and as instructed by me. Do not consider any information from any other source. And do not allow sympathy, prejudice, like, or dislike of any party or any attorney in this case to influence your decision.

Keep in mind the Basic Rule I have explained to you throughout the trial continues to apply during your deliberations: You are to -- to discuss this case only among yourselves. Do not communicate about this case and the places or people involved by any means whatsoever with anyone else at all, or look for or receive any information whatsoever about this case -- including through Electronic Devices -- other than the evidence in this courtroom and the law as I have instructed you, until your jury duty is complete and I have discharged you.

Any notes you may've taken during the trial may be taken to the jury room to use during your deliberations. Your notes are simply an aid to your own memory, and neither your notes nor those of any other juror are a substitute for your own memory or any other jurors' memory. Leave your notes in the jury room when you have concluded your deliberations.

Do not begin deliberations until all of you are assembled in the jury room. Once you are all there, the first thing for you to do is to elect one of your own to act as foreperson during your deliberations. The foreperson should see to it that your discussions are orderly and that everyone has a

fair opportunity to be heard.

No. 2: Case submitted on interrogatories.

I will now give you a verdict form with questions you must answer. Consider your answers to each of these questions as a separate verdict.

Nine or more of you must agree on any question for that answer to be your verdict. It is not necessary that the same nine or more of you agree on each verdict. Each question is separate.

If your answer to any question is unanimous, only the foreperson will sign the verdict form for that question. If your answer is not unanimous, but nine or more of you agree on that answer, each of you who agrees must sign the answer. Those who do not agree must not sign. The verdict form has the interrogatories I read to you.

Interrogatory No. 1: Do you find from a preponderance of the evidence that James P. Elkins, M.D. was negligent in relation to the care and treatment of Sue Poff which was a proximate cause of any damages to Sue Poff. And there's a place for an answer, a check mark yes, no, a signature line for the foreperson if your verdict is unanimous. And if it is not, there are signature lines for nine or more of you to sign.

Interrogatory No. 2: Do you find from a preponderance of the evidence that A, Ms. Poff or a person of ordinary intelligence and of awareness in a position similar to Ms. Poff could not reasonably be expected to know of the risk or hazards inherent in the treatment provided by James P. Elkins, M.D.; B, Ms. Poff would not have undergone treatment because of the risk involved; C, James P. Elkins, M.D. failed to provide Sue Poff adequate information to enable Sue Poff to make a reasoned and intelligent decision to give or withhold consent for treatment of Sue Poff; and D, such a failure was a proximate cause of any damages to Sue Poff.

Once again, there are blanks for an answer yes or no, signature line for the foreperson if your verdict is unanimous, and signature lines if nine or more of you agree to the verdict.

If you answered no to each of the preceding interrogatories, then go no further and return your answers to the Court. If you answered yes to at least one of the preceding interrogatories then answer the following interrogatory.

Interrogatory No. 3: If you answered Interrogatory No. 1 or Interrogatory No. 2 or both yes, state the amount of damages that you find Sue

Poff incurred as a result of the negligence of the parties found to be liable. Answer, and there's a blank for amount of dollars. There's a signature line for the foreperson if your verdict is unanimous, and then there are lines for each of you to sign.

We're going to take a brief recess at this time. I want you to keep in mind all of the instructions that I have given you. They are still applicable.

Mr. Tucker, you may take the jury out.

MR. BAILIFF: All rise.

(Wherein, the jury left the courtroom at 1:09 p.m.)

JUDGE SCOTT: Be seated please. Counsel, Mr. Tucker gave me a note that said Ms. Holcomb had requested a recess to get over her allergy and coughing that you heard. As soon as she is doing better, we will come back into session. I do not expect this to be lengthy. When we do, we will commence with the closing statements. Court will be in recess.

MS. REPORTER: All rise.

MR. KEEVER: Would this be a good time for me to make my proffer, Your Honor?

JUDGE SCOTT: If you'd like to.

MR. KEEVER: Thank you.

(Wherein, there was a break taken from 1:10 to 1:19 p.m.)

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

MR. KEEVER: At this time defendant [*sic*] would proffer the following jury instructions which he believe -- which she believes would've been proper in this case and she objects to the Court's form - Pen please? This would be proffer --

MR. LISLE: I believe you said the defendant is objecting.

MR. KEEVER: I'm sorry. The plaintiff is objecting to AMI 1501 and proffers the form of AMI 1501 that the defendant believes it would be Proffer No. 5. I'm sorry. I said defendant again. I meant plaintiff. It'll be Plaintiff's Proffer No. 5. Plaintiff also objects to the Court's form of AMI 106A and proffers as Plaintiff's Proffer No. 6 her 106A which she believes is correct.

Plaintiff also has previously filed a motion for an itemized jury form and objects to the general verdict form on Interrogatory No. 3, which the Court

has offered to the jurors, and proffers as Proffer No. 6 the form of Interrogatory -- I'm sorry Proffer No. 7 the form of Interrogatory No. 3 plaintiff believes is proffer -- proper.

In addition, plaintiff at this time, wishes to proffer testimony from the plaintiff Sue Poff. It is the plaintiff's understanding that the Court's form of proffered testimony is not to take the testimony of the witness, but rather have the attorney simply state the testimony that is to be expected.

It is expected that plaintiff, if asked on the stand, would have testified that she did not receive what she -- what she believed was reasonable and necessary medical care over the last approximately two years because she did not have the financial means to obtain such care.

She is -- would also have been expected to testify that at times she was without health insurance and at other times she had health insurance, but that none of the health insurance entities with which she'd been associated or is presently associated with would reimburse for cosmetic procedures which would be the classification for the treatment that she would be

seeking. This ends plaintiff's proffer. Thank you.

(Wherein, Plaintiff's Proffered Exhibits 5 through 7 were proffered.)

(Wherein, the proffer concluded.)

JUDGE SCOTT: Be seated please. Mr. Keever, you ready for the jury to come in?

MR. KEEVER: I am, Your Honor. May I just check my -- the slideshow and be sure it's spooled up?

JUDGE SCOTT: Yes, you may. Mr. Lisle, you ready for the jury to come in?

MR. LISLE: Yes, sir. I am.

JUDGE SCOTT: Okay.

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

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

MR. BAILIFF: All rise.

(Wherein, the jury entered the courtroom at 1:19 p.m.)

JUDGE SCOTT: Be seated please. Ladies and gentlemen, the attorneys at this time will make their final arguments to you. The attorney for the plaintiff will make the first argument. The attorney for the defendant will then have an opportunity to make an argument. The attorney for the plaintiff will then reply to the argument of the

defendant.

The attorneys in making these arguments to you will be commenting upon the testimony that you have heard and the evidence that has been presented in this case. They, as you, will be recalling the evidence that has been presented. They will not intentionally try to mislead you. However, if their recollection of the evidence differs from what your recollection is, you must follow your own recollection.

These final arguments are not to be construed by you as evidence in this case or instructions on the law. They are, however, intended to help you better understand the contentions of each side and the issues you are to decide.

Mr. Keever, you may make your first closing argument.

MR. KEEVER: Thank you, Your Honor. May it please the Court, Ms. Hensley, Mr. Reynolds, Ms. Olson, Mr. Clark, Ms. Sterling, Ms. Shuey, Ms. Andrews, and Ms. Hogate, Ms. Holcomb, Mr. Pruitt, Mr. Mason, Mr. D'Aubin, Ms. Sisemore.

Ladies and gentlemen, you've heard everything I can tell you about Sue's story. And I'm not going to just go ahead and repeat every piece of evidence.

In a few minutes, you're going to go to the jury room. You're going to have three jobs, not one. The end job, of course, is going to be to answer the questions on Judge Scott's Interrogatories.

The second job is to be sure that you as a jury follow the law because you have every right to leave this courthouse knowing that as a jury you followed the law. But the third job is you're -- you are charged with the duty of deliberating, talking to each other, explaining to each other why you feel like you do.

So over the next half hour, or so, I'd just like to give you some ideas on how to do that. Now, the first slide relates to the first Interrogatory, do you find from a preponderance of evidence that James Elkins was negligent and was his negligence was the proximate cause of injury to Sue? Preponderance of the evidence, we talked about that. And the Judge read you another instruction on it, the greater weight of the evidence, that which is more likely than not true.

And we talked about that Monday, if you remember. And you all promised and I -- I trust you that that's all that you'll require, preponderance of the evidence, not beyond a reasonable doubt, but

that Sue only need to prove her case by preponderance of the evidence.

Negligence is in that first instruction. And negligence in this case goes to the duty of a physician. And the duty -- the next slide, please, next slide. The duty of a physician is to possess and use reasonable care, that degree of skill and learning possessed and used by a doctor in the same or similar community, a doctor in good standing.

And the Judge read you an instruction that in determining that degree of learning and skill, you may only consider the opinions given by the qualified medical experts. And the experts on the standard of care in this case were Dr. Shewmake, who came up from Little Rock and testified, and of course the defendant testified on his own behalf.

Now, when you're considering the credibility not just of the other witnesses, but even the medical expert witnesses, you are the sole judge of the credibility. And the Judge read you this list of factors that you can consider. You can consider any factor that you would usually consider in determining how believable a person is because that's what credibility is. Particularly, you can -- you can consider what interest in the outcome of

this case the -- the witness had.

And one witness who obviously has a big interest in the outcome is the defendant, Dr. Elkins. And he also read you an instruction specifically on medical witnesses that you're not bound to accept even what a doctor says. Even what a doctor says is subject to the same credibility test, interest in the outcome, inconsistency, consistency of his testimony, any bias that you may feel that the witness had.

And you can disregard any expert testimony that you just simply find unreasonable. You have that right. There's one thing you're not going to have to decide. Remember, the Defendants' records were not clear, shall we say, as to what settings he recorded on the -- on the laser that he did on Sue Poff. There's one place that says one thing and one place that says another. Well, you don't have to worry about figuring out one versus the other because either one of them would be negligent.

The next slide is what we've looked at several times where I -- you had to read my handwriting, unfortunately. But if you go to the Defendant's own seminar guidelines, and you look at the guidelines for pigment, texture -- remember Dr. Shewmake went -

- went through that, and I don't think there was anything that anyone contradicted that these would be the settings that might have been appropriate in Sue.

Power, power, power, power is the same; spacing, spacing, spacing, spacing. The big difference is the time. And you can make that comparison pretty much directly. In other words, even the lower setting of Dr. Elkins', which was 1,200 microseconds or units of time would've been negligent. Dr. Shewmake was absolutely dead solid in his opinion, wasn't he? The standard of care would be to respect the safe settings to prevent harm to a patient.

And Dr. Shewmake said that in his practice, and he's very experienced, said that he's had over 250 patients treated by the same type of laser. And he said, yeah, you can deviate a little bit above the guidelines and he has gone as far as 15 percent above. That'd be like a hundred and fifteen percent. The Defendant's settings on Sue were at least 400 percent above, maybe 600 percent. It doesn't matter because either one was just ridiculously high. And it was not only a possibility Sue would be injured, not only a

probability, it was an almost certainty.

He might've gotten away with it if he had a really, really healthy patient who for some reason had tougher skin on her chest than anyone else, but he didn't. And remember -- I don't have the slide up here. Remember that one slide we showed reduce the power by 30 percent for the chest? It's a very, very important point. In fact, Dr. Shewmake said that -- what'd he call it, tiger country for plastic surgeons?

He said that he would just never, ever consider settings anywhere close in that probably for the face, although you might get away with it on the face, probably for acne scars in localized settings, but not for the entire chest. Now, this -- the next slide just shows you a collage of what happened from six days before to a year and a half after. And there's just no doubt that this happened because of negligently high settings. It's just -- it's hard to find any other way to term it.

Now, the second Interrogatory asks you about this informed consent issue. And there is a real controversy here, isn't there? And the controversy is was Sue in Rogers on Wednesday the 21st as the defendant claims in his note and his testimony where

he supposedly sat down and gave her all this information, that she knew all the risks, and told him to go ahead on, or was Sue in Heber Springs that day and didn't come in until the 22nd? Because if you remember, the defendant said that this was a -- the visit he's claiming that he wrote down on the 21st, dictated on the 21st did not occur on the day of surgery.

Next slide please. 21st, she paid $2,000 that day. Now, what's the evidence that Sue was in his office on the 21st? Well, he's got this note and he's got his own testimony. Next slide. What is the evidence that Sue was in Heber Springs? We can balance this with that, testimony, testimony, written note, written note. That's all we have, that is kind of a he said, she said, isn't it? And probably should go to the defendant. But there's more.

How about the testimony of Ms. Sorey? Pretty rock solid, I don't believe Mr. Lisle even asked her questions to try to show that she wasn't telling the absolute truth. She was in Heber Springs with Sue on the 21st getting a back treatment or a facial treatment. How about Ms. Jones? Ms. Jones picked Sue up the morning of the 21st, and we've got the

Defendant's own dictated office note, don't we? And you can see that in -- in the jury room as an exhibit. And that wasn't dated the 21st, like he testified in his deposition. I believe he testified here thought he saw Sue and -- and Lisa the 21st. That note was on the 22nd.

How about the Defendants' own billing records? Sue Poff's billing record says $2,000 was paid on the 22nd, not the 21st. And the cancelled check dated on the 22nd. So, ladies and gentlemen, you know, you -- you weigh the evidence. He said, she said, how does the evidence stack up as to who's telling, really, the true story about what happened? You decide. You -- you will just get to decide.

Now, remember that entry on the 21st is not the only questionable entry on the doctor's records, is it? We got two different settings for the laser, and we got those photographs, those pesky photographs that would've shown us what Sue looked like two weeks after the surgery, and a photograph that was sent to him four months after the surgery, three months. They're missing. And the Judge gave you an instruction that if there's a piece of evidence that is in the sole control of one party and it can't be produced, you can take an inference

from that against the party that didn't produce the evidence.

Now, regardless of how you stack it up, the Defendant's claim that he gave Sue all the information; told her all about the 400 percent high settings; told her all of the risk, the likelihood of scaring, it really just doesn't hold water. Now, Mr. Lisle did offer a little misdirection on the settings. We saw the other settings before where we can compare power, spacing, and the only change was time. And he threw in, Core Dimension, or the user manual settings. And remember that time was way out there? And that is a little -- could be a little confusing, but remember also the spacing was way out.

Now, if you go to page 18 of that -- that manual, you'll find a really complicated formula. You take that formula, you plug in the power, and the time, and the spacing, and you can get a single number, a single number so you can compare apples to apples. And if you want to try it, want to do the math, here's what you will see. The energy level for the recommended settings from the user manual, manufacturer's level, is point nine. From one-day seminar, it's about a hundred and fifty percent of

that, one point three three. But look at the setting, the -- the energy levels from the Elkins' settings, four point six, nine point six.

And what that means, ladies and gentlemen, is that if you compare to the manufacturer's settings, then the defendant was either five or ten times higher. And you can do that math, 500 percent or a thousand percent. There is just no doubt that the defendant -- there should be no doubt. But, again -- next slide please. Again, we don't have to go beyond a reasonable doubt, only preponderance of the evidence. The defendant was negligent in his choice of laser settings, and that negligent was a proximate cause of Sue's burning.

How do we know that? We know it because we heard very credible testimony from Kris Shewmake. And Dr. Shewmake told us it's below the standard of care to have excessive settings. And he defined excessive settings because he said he'd never used more than a hundred and fifteen percent. And I believe he said anything over a hundred and twenty percent would be approaching negligence, but certainly 400 percent is negligent. I believe there's no doubt about how Dr. Shewmake stated that.

He told you what the standard of care was. He

told you what the level was for negligence. He said that 400 percent was so aggressive -- he wouldn't go so far as to say that it was reckless, but I think he said "very, very aggressive." Well, when we're done, and we're just about there. You're going to be -- you are -- you will be asked to put in a verdict that that can be fixed, that can be helped, and compensation for what could be neither fixed nor helped.

Your Honor, I lost my timeline. How much time do I have to 30 minutes?

JUDGE SCOTT: To 30 minutes?

MR. KEEVER: Yes, sir.

JUDGE SCOTT: 20 more.

MR. KEEVER: I've only done ten minutes?

JUDGE SCOTT: Yes, sir.

MR. KEEVER: I'm talking fast. I'll slow down a little bit, ladies and gentlemen. The second thing that we know for sure, or we should know for sure, and maybe a better way to phrase it is doesn't the evidence show that Sue just never received the information she needed to make an informed consent? She didn't know about the risk.

And Sue, herself, said if she'd been informed that this -- this laser was going to be set 400

percent higher than was recommended, at the very least, it would've been a great big red flag, at the very least. And she would've wanted more information. But she didn't have a chance to do that. She got the information from her doctor that she trusted that this was a safe deal. Go see the website, www.dottherapy.com. It says no adverse effects, minimal downtime.

MR. LISLE: Your Honor?

MR. KEEVER: Really kind of went along with --

JUDGE SCOTT: Mr. Lisle?

MR. LISLE: Can we instruct the jury not to go look at any websites?

JUDGE SCOTT: Yes.

MR. KEEVER: Oh. Yes, sir. Yeah. Yeah. That's what Sue said. And here is the poster. What does the poster say? "Too good to be true." And it lists all these indications. And, you know, Mr. Lisle talked on and on and on and on about how Sue had burned herself and burned herself and burned herself. Well, what does this website or this poster say? "Scars, scars, scars," that's -- you know, this kind of a laser can be used for scars, can be used for acne scars, which are some of the deepest scars that you have on the face.

If use it for acne scar, you're taking a deep scar, burning it out, and try and convert a larger kind of ugly scar into a smaller not-so-ugly scar. And that's exactly what Sue was doing in those treatments. The -- the treatments that she had, they didn't start three months after her laser surgery. She had a test patch on her neck exactly three months after the laser surgery. And then she had treatment for the contracting scar. And then later she had treatment for the redness.

She wishes that she had had that treatment for the redness with the intense pulse laser Dr. Shewmake recommends back in January of 2009. If she had, we wouldn't have the opportunity to be here together today. Now, what can be fixed? What can be helped? And what can be made up for? Fixing, well -- next slide and next slide please. Fixing, these were the numbers that Sue offered. And you'll have that thick wad of medical bills.

And, you know, we invite you to go through them. If there are some bills in there that you think were added up that shouldn't be there, toss them out, chop that down. I don't think you'll really find much there. The lost wages, this was initially calculated based upon what Sue's

accountant said was proper. It's initially based upon every day that she had some kind of treatment.

And before we got to the stage of being at trial, she decided that the fair thing to do was if she had a treatment and could've been back to work that day, that that shouldn't be counted out, counted off. So now it's 45 days. And I invite y'all to write that number down and then use your multiplier what you think is fair. Because you know what? That's all Sue wants, is what is fair.

Next slide. Now, what can be helped? This isn't the whole list. I purposely left off of this the ongoing laser -- or not laser, intense pulse light treatment that Dr. Shewmake recommended. But these are pretty firm deals, aren't they? I mean, Dr. Shewmake, Sue, and I don't -- to the degree that he could, Dr. Atwood, I don't think that -- that anyone has controverted this that she will benefit from the Obagi Skin Care. Unfortunately, it's pretty darn expensive.

The hydration system, again, not cheap over the lifetime of 29 years. The sunscreen, really not cheap, but Sue's skin just won't tolerate regular sunscreen. Camouflage makeup, I think Dr. Shewmake testified to that number, which is about -- that's

about a hundred dollars a month for the rest of her life. And then the medical tattooing, Sue gave you the estimate that she received from the medical tattooist. It's $11,000 per treatment. It's not a fun treatment. You saw that.

But Dr. Shewmake testified that all tattoos fade. I think we all know that. All tattoos fade with time. A little bit of fading in a butterfly isn't a big deal. But when your goal is to blend white scar into normal flesh-tone skin, it is a big deal. So it's going to have to be redone. We can't tell you one year, two year, five years, but based upon what Dr. Shewmake said, what Sue believes, she's asked for -- to be protected for five treatments.

Dr. Shewmake said that her condition right now with the scarring can be helped by a one-time course of Fraxel. And, yes, Fraxel is a CO2 laser. It's actually a safer laser than the one that -- that burned her, but it is a CO2 laser. And if you add all that up, about $240,000 and she -- Sue's going to ask that you put that in the juror -- in the verdict.

And the next slide shows the -- the intense pulse light laser treatment. And, initially,

indeed, Dr. Yee had recommended that she have six to eight treatments with a special laser, pulse dye laser, and it was going to be really expensive. I can't imagine why the defense -- defendant would be complaining that she's withdrawn $211,000 that she had thought she would be subject to.

And on the advice of Dr. Shewmake, that's now down to somewhere around sixteen to $30,000, depending on whether the maintenance is one treatment a year, or two. And we can't tell you that. I think Sue would like for you to consider the upper end, because if she needs it, she'll have to pay for it.

The subtotal's going to be somewhere -- or the total for past medical is going to be somewhere between a quarter of a million and $275,000. And then if you add the two together -- next slide, please, Ken -- you know, we're -- we're talking about a request for damages of about $300,000. All that goes to someone else. That's what Sue's going to ask that you include in the verdict.

But what about the greatest harm of all? What about the pain Sue went through? What about what's been taken away? As Sue said, that's never going to go away. Could I have the next slide, please, Ken?

That is never, ever, ever going to go away. What's the value for that? How do you put a value on that? Sue -- what Sue asked you to do? She said, "I just want what's fair."

She just wants what's fair on her past expenses. She wants to be fairly protected for her future expenses. And she just wants you to be fair in determining a value for what she's gone through and what's been taken away. And at -- at the end of the day, I haven't changed what I'm suggesting would be a fair verdict. You know, I'm asking you to fully and fairly compensate Sue with verdict of at least one million dollars.

Now, I'm asking you to do something that may be a little scary. It's going to put you out ahead of the pack, finding against a local doctor in favor of a patient. And that's not, frankly, going to be an easy thing to do, but it's the proper and the just thing to do. It -- it would be saying that this jury won't tolerate sloppy seat-of-the-pants type of treatment in an era and for something for which there's a good scientific basis to do something safely.

JUDGE SCOTT: Mr. Keever, you've used 25 minutes.

MR. KEEVER: Thank you, sir. So you decide. If you decide that one million dollars fairly and justly compensates Sue, that'll be what it is. If you decide it's more than that, be what it is. But you decide. I'm going to sit down now. Mr. Lisle will give you his closing argument, and then I'll -- have a -- a brief response. Thank you, very much.

JUDGE SCOTT: Mr. Lisle?

MR. LISLE: Hello. When we started with the opening statements, I did my best to give you a roadmap of exactly what I thought was going to happen in this case. Some things changed dramatically. But for the most part, we try to be consistent with the evidence that we knew we were coming in here with this week, and put it front of you so that you can make the best decision that you can.

But when it's all said and done here, Dr. James Elkins cared for Sue Poff for 25 years. She probably has the longest relationship with him of any of his patients. She testified that she followed him through his career from a obstetrician-gynecologist doing fertility treatments, all the -- you know, the gynecological work that he did with her, caring for her as a patient as his practice

developed. By the way, that's when a lot of cosmetic surgery was developing. He wasn't late to the game. He was developing his practice as those procedures became available.

And as she became interested in them, you heard that -- that he provided those to her. And she knew that he had special expertise in the skin, matters of the skin. How -- it seemed like there was some testimony that, you know, you need to be a board certified -- board certified plastic surgeon. That came out and we'll talk about that a little bit more. But when those guys were going to their residency, Dr. Elkins was already doing cosmetic surgeries, in addition to all the other types of surgeries that he had done over his career, much more invasive procedures.

And so the -- he had no incentive to mislead Ms. Poff. He had no financial incentive to do -- if you wanted to make more money on a cosmetic laser procedure, you would tell someone, let's use the lowest settings and have you come in four times. If he had said I'm going to use higher numbers than in my manual, what would that mean to a lay person? And we're going to talk about whether or not she's truly a lay person. But saying let's -- we can

either do this aggressively, or we can do it conservatively, that's what he told her. That was the discussion they had.

I didn't spend a lot of time on the January 21st versus 22nd. I -- I honestly don't really understand it too much. You know, Dr. Shewmake even testified, when you're dictating things after the fact, dates aren't always the same. The -- the evidence was that he -- they had the conversation. I guess she's saying even though she signed the consent forms, she at one point said, well, she was under the influence of -- of the preoperative medications, even though her friend didn't see her take it on the way from Heber Springs, even though the -- the sedation chart shows that she took it at 12:30 and her friend said they arrived before 12. And she clearly signed and initialed every paragraph in the consent form.

You know, I don't know what a doctor can do besides have you sign and initial everything in a consent form. And then if you come back later and say, you know, I was -- I -- I didn't know what I was doing, then, you know, that's your testimony. But -- but she had every opportunity to research this procedure that she planned in advance, planned

to take three or four days off work. I mean, you know, you -- if you're down for three or four days with the flu, off work, you might think that's kind of a big deal.

So when you're planning in advance to be off three or four days because of a laser procedure, you should -- you must have some indication that it's going to -- to involve, you know, some pretty -- some pretty uncomfortable times. And, in fact, that brings me to the next point about Ms. Poff. When you're getting -- when you heard the jury instruction there, you'll get to read it. The bottom line is going to be would she have done this procedure if -- if -- first of all, was everything disclosed to her? I -- even if it wasn't, would she have done the procedure anyway?

Well, she's a licensed esthetician who does acid peels and other things on other people. She's had training in that. She understands the -- the risk and complications. Now, her friend said that she doesn't always give me the consent form because we knew each other. You know, we didn't have to do that every time. But she's licensed to do electrolysis and things like that that -- that can cause skin complications, and up to and including

scarring. That's what she did in her job.

And we get to the prior medical procedures that she's had, all the purely cosmetic procedures she had. Now, I wasn't doing that to embarrass her, but that's the issue in the case. Would -- would someone willingly put themself out there, sign the form? How many times have you been warned? How many times have you accepted that risk? Is there any way to say -- was there any procedure that she wouldn't accept?

I mean, you know, if you say what's the worst thing that can happen and the answer is death? Now, I know people -- somewhere in the back of your mind, you think, well, it's not going to happen to me, perhaps. A low risk is still a risk.

You know, and it's like saying, like, you buy a lottery ticket, it might be one in a hundred million, you think you're going to win. But if somebody says, well you may have scarring, you go that's not going to happen to me. But -- but it can. And if you do it enough times, perhaps maybe it will. In fact, the -- the -- the evidence was that she's had complications from other procedures. And not only did she go into this one, but she went on to more after this one. So how could she say I

wouldn't have done this procedure if I had known about the risk?

And then she went out -- we'll get to all the reasons why, but she went out and did eight more laser procedures and other cosmetic procedures and then asked even for more. You know -- so the -- I just don't see how you can possibly say that if she'd been told more -- I mean, what do you say to somebody, it's going to be an aggressive treatment. Well, what does it mean? You're going to have more downtime.

Well, how can you -- is it eight percent more downtime? Everybody heals differently. Is it ten percent more downtime? It's an increased risk of scarring. Was it 20 percent risk? Nobody can tell you that from the witness stand. But Dr. Shewmake told you is there's a risk of scarring in every procedure, every one of them. You don't know if it's one percent; you don't know if it's 80 percent. He's had three patients on the same day, all -- all had different recovery times.

Okay. So let's -- the -- this is a big part of this case, too. The standard of care, Dr. Shewmake may be -- he's a great doctor, I'm sure. That -- that's great. But he has never used a Dot Xide

laser in his life. He's never had any training on it in his life. They all use similar principles. The settings, the dials, the pulse -- the pulse may be the same, but the way it's done, the -- the hand mechanisms different. But primarily, the settings, the dials, the numbers, the way it's set up are different.

Dr. Elkins had experience with what they call -- because they're younger -- the old CO2 laser that obliterates the entire skin. And he had done that before this procedure. This isn't the only laser he had ever used. And this laser has different capabilities, different settings. If you ask -- when I asked Dr. Shewmake, his laser that he's familiar with doesn't even have the same watts, dwell time, those things. He's -- he -- all -- every piece of information that he provided to you in this case came directly from Ms. Poff's lawyers.

Now, imagine for a second that if all you heard was two hours about this case from their side you might have a completely different opinion than you do right now. The most startling thing to me was that Dr. Shewmake never even saw all of those eight other -- seven or eight other laser treatment records until Monday night. Now, think about that.

They've -- they've got him to commit to an opinion that there's been malpractice. He's up here from Little Rock. And then they go, oh, by the way, you know it came up in opening statement that there were a bunch of other laser treatments. You might want to look at this.

Now, is he in a position to say, well, that could -- that could affect my opinion? I don't think so. I think -- I think that if he were doing -- that's the difference between an expert witness and someone who's trying to look at all the facts in the case. If your -- if your role is to present proof to help a case that's already been filed years in advance, and you're given one part of the information and not the whole story.

Again -- but there's some things we agreed about, even in those materials. Now, again, we talked about it before, it's -- when they put the numbers up, it's a -- it's a floor, not a ceiling. That was undisputed. You can be more -- the manual, itself, says you can be more aggressive. It doesn't say if you go past this number, you're going to burn somebody. It's -- you can be more aggressive. It's up to the doctor. You have to use clinical judgment on a lot of factors, skin type, skin condition, your

history with a patient, the patient's goals, a lot of different things.

Where Dr. Elkins increased the dwell time, he also increased the spacing. He did some -- now, if you factor it out from the lowest level possible, it's a higher percentage. But the lowest -- but saying it's a higher percentage doesn't mean it violated the standard of care. And, again, that's a manual and settings that Dr. Shewmake has never used. How does he know that the manual that -- that the SmartXide people use is based on the same factors as a Fraxel Laser? He has no understanding of where those underlying numbers come from. He just says, well, that's -- you just don't do that.

Well, Dr. Elkins went to the manufacturer's training session. And he had the manufacturer's rep back in his office. Dr. Shewmake never did that. So there's just no way for him -- he never saw anybody else do it. It's not just that he didn't do it, but he didn't see anybody else ever use this machine. One of the instructions that the jury read is that -- about causation. Again, the testimony over and over and over again was that every surgical procedure has the risk of complication -- complications.

And a complication is not compensable. In other words, if she had a complication of surgery, she's not entitled to money damages for it. That can happen. If you -- the law of averages is somebody's going to have a complication every now and then. It's just going to happen. There's no proof in this case that -- that completely rules out the -- the complication. You can't -- they don't rule it out.

I would say early on in the process, there were some indications that she had a complication. Complication can just be slow healing. Now, think what Dr. Shewmake -- this was interesting to me. I said to him it's going to take at least six months, isn't it, for the -- again, the -- the laser drills into the skin, the collagen has to reform and grow back out. That's -- that's what we're doing here. That's the whole goal.

I said to him it can take six months for that to happen. And he interrupted me, said it can take a year. I said, okay, it can take a year. So what we're talking about -- now, they're going to come back -- they're saying now those other treatments were to treat the scar, those were within three months, four months. The collagen hasn't reformed

yet. Interesting thing that Mr. Keever just said, I think he said if she had had those IPL treatments that he recommended yesterday, we wouldn't be here. Go back and look at the February e-mail when Dr. Elkins contacted the manufacturer, and see what he said for the -- for her to do. That's what he said.

Don't over treat, stay -- keep it moisturized. It should heal in time, and we'll look at some IPL treatments. She didn't come back. None of her treating physicians came in to testify. And there were a lot of them because she was going from person to person. And as you saw a little bit here, she wasn't telling them all the whole story. Dr. Shewmake and Dr. Atwood -- Dr. Atwood was a treating physician who thought she had -- who did surgery on her thinking she had had one laser treatment when she had had nine.

See the records from Dr. Buffalo, her family doctor, where she's dehydrated, doesn't tell him she's having more laser treatments. She's going to SkinStar, no indication she's telling them she dehydrated. Now, let's think about this for a second. If this -- if this case were against SkinStar, you know, it -- it's undisputed that she went to a place and was treated by someone who's not

a doctor who used a fractional CO2 laser on her skin. A lot was made about, you know, Dr. Elkins' experience. He's a physician doing cosmetic procedures for almost 40 years with training on the laser.

She went to this place and had no idea who was doing her treatment. No idea what their qualifications are. You know, no idea exactly -- they never indicate what they're treating, how they're going to do it. In the first one -- now -- and keep in mind, one thing that Dr. Shewmake had to admit was that these treatments violated the standard of care. You're going to have instruction about intervening cause. How can you say the way Ms. Poff looks today and her problems were caused by a surgery in 2009 when she's had four more that violated the standard of care since then?

This time, they're treating her with 12 megajoules at a nine treatment level, eight passes. Compare that to the number of passes that Dr. Elkins did. She comes back, and this is specifically on the neck and chest, no indication of anything, who did the treatment, what settings they used. It could've been anything, as far as we know. Here's another one on the chest, same thing, no idea what

happened here. But we know that this violates the standard of care. No idea what the qualifications of this operator are, somebody right how of high school, whether it's somebody that's had professional training, no idea.

But we do know that it's within her healing period. When she's supposed to be healing from the first one, she's having additional laser treatments. And then this one is the most dramatic because of the treatment levels. Again, I -- I can't tell you whether or not that, you know, violates the standard of care, just the number itself. But what I can tell you is that's the maximum power that that machine is capable of.

And what you're going to see in the records is this machine -- Dr. Shewmake confirmed this, this machine is capable at that maximum power of penetrating the skin -- you won't be able to read it from there, but you will in the exhibit -- to it's over 1.3 millimeters at its maximum power. And this last treatment level, if you saw, was at 10, that's 29 percent of the skin surface area. That's approaching the highest end of the coverage area that that machine is capable of.

Dr. Shewmake confirmed that that treatment area

is a higher number than what Dr. Elkins did. So back to the 1.33 millimeters or 1.35 millimeters, this is from the Core Dimension materials about this SmartXide Laser. The maximum penetration that the laser that Dr. Elkins used is shown right here, it's 1 millimeter. Some unknown person with unknown training used a laser on her that had a depth that was at 30 percent more with a greater coverage area while she was dehydrated.

This is something I want you to pay great attention to when you get back and start looking at the pictures. Look for a photograph from April when these treatments started until the next one you'll see is in June of 2010. That's 14 months. That's while she was doing these treatments. Look at the Dr. Buffalo record. It's the second time she was dehydrated in that July-August period where he says she appeared -- she says she's losing moisture from the laser burn. Well, she had -- this is seven months after Dr. Elkins.

If you look at the pictures where she is in the healing phase, and I believe Dr. Atwood said -- and from this one to this one, she looks like she's healing. There's some indications of, you know, hydro -- hytrophy [*sic*] here. But one of the next

she -- she looked like she was doing better. And then compare it with the one in June 2010. That's when you can see the dramatic change, and that's after all these other treatments. No medical records from that time. No photographs from that time.

So one of -- tell you a little bit about Dr. Shewmake and -- because he did talk about inconsistencies. When he's testifying for them, he indicates you really should be a plastic surgeon. I mean, he didn't say that, but you know that was kind of testimony. When he's testifying and I'm cross-examining, and I say, well, it was a laser tech, you know, we don't even know who it was at SkinStar, he goes, well, that's probably okay. Then -- then he testifies very graphically that too much energy on the skin of the chest is -- is almost certain to cause a laser burn.

Then I show him the same thing I showed you, the highest power setting possible on a machine with greater penetration than ours, greater coverage than ours, by a laser tech, and he says, well, that was probably okay. I mean, I think that's what he said. Well, to the extent he ever said that it improved it was because he says Ms. Poff told him it improved

her condition because he didn't examine her as a doctor.

Again, the same thing, he talked a lot about the experience needed to do the procedure, then I asked about the laser technician of unknown identity at SkinStar, and he says, you know, kind of like, oh, yeah that would be fine, too.

Most importantly, this gets back to the math of trying to take a low number and then say this is 500 percent more. Just compare the two SkinStar numbers. The one is 12 millijoules and the other is 70. On there -- so let's assume their first treatment was reasonable, the second one is six times more -- actually, it's more because it's not just a higher power, it's a higher treatment level, higher density. That's probably -- just in their own records, it's six or seven hundred percent. Now, is that -- so can they go from a low level and then increase their numbers by six or seven hundred percent and that's -- that's okay? That's within the standard of care?

It shows you one of two things, either that that's not uncommon, that people aren't always sticking to the low numbers, or worst case scenario, is it shows you that they -- you know, they -- they

caused an intervening cause. They -- they caused more damage. But since Dr. Shewmake acted like that was okay, it's okay for them to do it, but, presumably, it's not okay for Dr. Elkins to.

I want to spend some time on credibility in this case, because this -- there were some -- I had some frustration with this over the last couple days. When you file a lawsuit, you come to the -- anybody -- we have this great right in this country. Anybody can walk down and file a lawsuit. I don't -- I won't beat up -- I think we have the best system. You'll hear people complain about the system. I don't think so. You need to have that right. We should all have that right.

Well, what kind of country would we live in if you didn't? But when you do that, you're taking on a lot of responsibility. You're going to summons people, make them appear places they don't want to be. You're going to require them to produce documents that they don't want to produce. You can subpoena people. If they don't show up, you can have the sheriff arrest them. I mean, there's a lot of things that go along with it. But how many times does somebody in this process have to swear to tell the truth? The Judge swears in the bailiff. We all

get -- everybody gets sworn in.

That's not a formality. It's not I'm going to throw something out there and if it turns out I was misleading you under oath, then I'll just say, well, forget it. No -- you know, let's just pretend that didn't happen. The system requires the truth. Sworn testimony is considered reliable. It's evidence. There were a lot of hearsay objections because something out of court can't be counted on, 'cause you're supposed to be able to count on something under oath. If you can't then the system breaks down.

It's not the system's fault. What else are we going to do? If you're going to have your day in court, you should be able to have it. But you should also understand the responsibility that goes along with that. The things you're asking of other people, the resources that have to go in, not just from the defendant, but the entire system to give you that opportunity. And if you're not willing to do it, play by the rules, don't do it.

If you don't have any lost wages, just say I don't have any lost wages. Don't say I have 106 days; well, I'll take 45; well, just whatever you want to do. That's under oath. Same thing with the

medical records, don't hand me a big stack of records and say I'm entitled to payment on every one of these things and it has $10,000 for -- for something that, you know, is -- is a new elective procedure. I -- I guess the idea is that either I'm not going to look at it or you're not going to look at it.

Don't -- I don't know how to say this strongly enough, but those -- but where would -- where we are in this case right now, I don't know what the damages are. I'll be honest with you, when we started on Monday, I thought I knew what they were asking for. When -- right now, I'm not sure. They were changing faster than I could keep up with it.

JUDGE SCOTT: Mr. Lisle?

MR. LISLE: Yes, sir?

JUDGE SCOTT: Excuse me. You've used 25 minutes.

MR. LISLE: If you look at the medical record, she's asking for every doctor and every -- I mean, stuff -- receipts we don't even know what they are. I can't go track all those people down. You're not going to be able to track them down. When she was dehydrated and hospitalized seven, eight months after the treatment, she's asking for that. She --

well, she took four days off, went to Tulsa for an office consult. She's asking for that. You know, went back to Tulsa, had Botox injections, that's in there.

What I would suggest to you, is that you just -- this is her -- this was her day. This was her chance. The instructions you're going to get say that it has to be proof and evidence. Resist the temptation to go in and try to sort out what was accurate and what wasn't. It's her responsibility to give you credible evidence. It's not your responsibility to take this big mass of some things that are related and some things that aren't and sit back there and try and sort it out.

You're going to see that some of the instructions we're going to ask you to look is there's an assumption of the risk. I don't think there's any doubt that Ms. Poff knew that there were risks associated with these procedures. She was warned of them, and she had experienced them. There's going to be proof of the intervening cause. How could she say everything that happened to her -- she sits here today wasn't caused by these other treatments?

In the end, again, I would just say that you

only rely on the proof that she presented that you find credible. Don't add to it. Don't fill the blanks. And if you do, you -- if you read the instructions, rely on the evidence, I think you're going to have to come back with a verdict that Dr. Elkins is not liable for any of her damages.

JUDGE SCOTT: Mr. Keever, you may make your second closing.

MR. KEEVER: May I ask for a five minute warning --

JUDGE SCOTT: Yes, sir.

MR. KEEVER: -- at the end of my time, Your Honor?

JUDGE SCOTT: You bet.

MR. KEEVER: Well, ladies and gentlemen, I'm just looking for the exhibit -- ah. Found it. Mr. Lisle doesn't understand the importance of the difference between the 21st and the 22nd. Maybe just like he didn't understand what the consent form said. Did he say that the consent form for the SmartXide had an initial on each paragraph? It didn't.

Even if it had, it's an invalid consent form because she was on medication. You know, the bottom line on consent is Sue didn't give consent to be

burned. She didn't give consent for settings that were 400 to 600 percent in a way that they could be calculated.

I don't even know how you calculate the Fraxel energy levels, but we can calculate exactly what the energy levels were. You saw those. And you can do that. I was -- I was frankly surprised when he said that everything Dr. Shewmake said came from me or maybe from Mr. Swindle. You decide that. Was Kris Shewmake a credible, honest man? Was he a doctor? I mean, he came up here on his own nickel. Dr. Shewmake's not getting paid a penny. I don't think I had that much control, if any control. He was telling the truth.

He had no stake in the outcome. The other doctor who testified has a big stake in the outcome. That e-mail, gosh, I -- maybe I did misspeak. But if I said if Sue had had those intense pulse light treatments on the 25th of February we wouldn't be here, that isn't what I meant. I don't think that's what I said. I think I said that if instead of the laser performed by the defendant on the 22nd of January, she just had the redness treated with what it should've been treated with, a very mild form, like the intense pulse laser, we wouldn't have been

here.

Mr. Lisle wondered why we didn't have all those treating doctors up here to testify. I got a question for you, how come there's no doctor who came in to offer an opinion that Dr. Elkins is not negligent. The only testimony we have is rather self-serving from Dr. Elkins in that regard, isn't it? Dr. Shewmake did not say the SkinStar treatments violated the standard of care. I mean, I think Mr. Lisle's a little internally inconsistent with what he was saying a minute ago.

He did say that their record keeping violated the standard of care. And when you look at those records, you'll agree with him, and I do, too. They're pretty sloppy medical records. But you can't just -- it -- it's just -- it gets confusing, but -- and I don't completely understand the Fraxel, but there -- Dr. Shewmake mentioned that there's a software program in there that prevents the total energy from being too high. The SmartXide Laser, on the other hand, you just set the settings and they go.

The other point you might want to remember is the Fraxel treatments at SkinStar, we weren't resurfacing the chest of a patient who wanted a

cosmetic procedure. We were trying to break up scar tissue. I mean, you can't compare the two, at all. And, yeah, I do agree with one thing. There are some things we should be able to count on, aren't there? Like uncompromising integrity on the part of the doctors.

Every patient and the parent of every patient has a right to expect that because who's in charge of the information in the patient-doctor relationship? The doctor has all of the power. He has all of the knowledge and the patient really is, to a certain extent, at the mercy of their doctor. And if she's known the doctor for a long, long time and trusts the doctor, then she has even more of a right to expect that uncompromising integrity, does she not?

Could I have the next slide, please? Oh, can you push that over to PC and give me the slide on assumption of risk, please, Ken?

Assumption -- I mean, it's just hard to imagine that they're claiming this is Sue's fault. It's Sue's fault. She assumed the risk. Here is -- there, right there. That is what the Judge read to you, assumption of risk, (as read) "person voluntarily exposing herself to dangerous situation

inconsistent with her safety, knowing the risk and danger from it," knowing the risk and -- so I -- I guess that's their defense. Is that an admission on his part that this was a situation inconsistent with Sue's danger, knowing the danger and risk from it? Inconsistent with her safety, well, he didn't tell her what the settings would be. He admitted that.

If anyone knew whether this -- this was a situation inconsistent with her safety, it was the doctor. He was the one that was in charge. That's just silly to say that Sue assumed the risk. It's just silly to that say what Sue did was this intervening, superseding cause. We -- you saw the pictures and you will take them with you to the jury room. The scar tissue was well formed by April. We don't have any pictures between April and June or July or August. We have Sue's testimony. She said those treatments helped. It helped.

The initial Fraxel treatments helped the scars soften up. And then the last treatments that you'll see in the SkinStar, they were just for the redness. Yep. Decide on the evidence, but this is in the evidence. You don't have to go through it, but it's there if you want to. Decide on the testimony. Ladies and gentlemen, this case is coming to a

close. And it's now going to be in your hands.

We've made our arguments. Sue has given you her testimony. You've heard her. You had a chance to see her. You had a chance to judge Sue Poff's credibility. She'll stand by what she's asking you to do. Now, she just wants what's fair. That's the bottom line. She has some medical expenses. She has some time off from work. I think that -- that she's done a very reasonable job of trying to pare that down to what's fair, not what's inflated. Her future expenses are going to be there. She wants what's fair.

I just can't understand the complaint of the defendant, oh, this isn't fair. You're not asking for enough money. I've just never heard that before. But what she's asking for, and I -- I know -- I know you took notes, but it's going to be about $300,000 for her medical expenses, and then what you think is fair for what she's been through and what she's had taken away from her -- taken away from her.

Thank you.

JUDGE SCOTT: Ladies and gentlemen, I am just about to discharge you to commence your deliberations. Mr. Tucker will bring you the

original copy of the instructions and also one photocopy with a paperclip on it for your ease in reviewing. And he will bring you the exhibits that have been admitted into evidence. Ms. Sisemore, thank you for your contribution. This is where you will leave us when the jury leaves to commence their deliberations.

Mr. Tucker, you may take the jury out. Oh. Forgive me. I did forget one more thing. Would you raise your right hand?

(Wherein, the bailiff was sworn.)

JUDGE SCOTT: Thank you. Mr. Tucker, you may take the jury out.

MR. BAILIFF: All rise.

(Wherein, the jury left the courtroom at 2:20 p.m.)

JUDGE SCOTT: Be seated please. Counsel, it would be my intention to give the jury a choice as to how long they want to deliberate tonight. If they want to order an evening meal, we will do that. If they want to continue in the morning and recess tonight, we will do that. If you want to leave the immediate area of the courthouse, leave a cell phone number with Ms. Schrader so she can call you should the jury have a question -- have another question,

or in case a verdict should come in. We will be in recess until the verdict is in.

MS. REPORTER: All rise.

MR. KEEVER: Thank you, Your Honor.

(Wherein, a break was taken from 2:22 to 4:31 p.m.)

MR. BAILIFF: All rise.

JUDGE SCOTT: Be seated, please. Counsel, Mr. Tucker tells me that we have a verdict. Mr. Keever, are you ready for the jury to come in?

MR. KEEVER: We are, Your Honor.

JUDGE SCOTT: Mr. Lisle?

MR. LISLE: Yes, sir.

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

MR. BAILIFF: All rise.

(Wherein, the jury entered the courtroom at 4:32 p.m.)

JUDGE SCOTT: Be seated, please. Mr. D'Aubin, are you the foreperson of the jury?

FOREMAN D'AUBIN: Yes, sir.

JUDGE SCOTT: It's my understanding the jury's reached a verdict. Is that correct?

FOREMAN D'AUBIN: Yes, sir.

JUDGE SCOTT: Mr. Tucker, would you bring the

verdict to me, please? Interrogatory No. 1: "Do you find from a preponderance of the evidence that James P. Elkins, M.D. was negligent in relation to the care and treatment of Sue Poff which was a proximate cause of any damages to Sue Poff?" It's answered "No." And ten jurors have signed Interrogatory No. 1.

Mr. D'Aubin, was this the decision of the jury?

FOREMAN D'AUBIN: Yes, sir.

JUDGE SCOTT: Thank you. Interrogatory No. 2: (as read) "Do you find from a preponderance of the evidence that (a) Ms. Poff, or a person of ordinary intelligence and of awareness in a position similar to that of Ms. Poff, could not reasonably be expected to know the risks or hazards inherent in the treatment provided by James P. Elkins, M.D., (b) Ms. Poff would not have undergone treatment because of the risks involved, and (c) James P. Elkins, M.D. failed to provide Sue Poff adequate information to enable Sue Poff to make a reasoned and intelligent decision to give or withhold consent for treatment of Sue Poff; and (d) such a failure was a proximate cause of any damages to Sue Poff?" It is answered "No." And it is signed by

Mr. D'Aubin.

Mr. D'Aubin, was this the decision of the jury?

FOREMAN D'AUBIN: Yes, sir.

JUDGE SCOTT: Mr. Keever, would you like the jury polled?

MR. KEEVER: I would on Interrogatory No. 1, Your Honor.

JUDGE SCOTT: All right. Ladies and gentlemen, as I call your name, please tell me how you voted on Interrogatory No. 1.

Ms. Hensley?

JUROR HENSLEY: No.

JUDGE SCOTT: Mr. Reynolds?

JUROR REYNOLDS: No.

JUDGE SCOTT: Ms. Olson?

JUROR OLSON: No.

JUDGE SCOTT: Mr. Clark?

JUROR CLARK: Yes.

JUDGE SCOTT: Ms. Sterling?

JUROR STERLING: No.

JUDGE SCOTT: Ms. Shuey?

JUROR SHUEY: Yes.

JUDGE SCOTT: Ms. Andrews?

JUROR ANDREWS: No.

JUDGE SCOTT: Ms. Hogate?

JUROR HOGATE: No.

JUDGE SCOTT: Ms. Holcomb?

JUROR HOLCOMB: No.

JUDGE SCOTT: Mr. Pruitt?

JUROR PRUITT: No.

JUDGE SCOTT: Mr. Mason?

JUROR MASON: No.

JUDGE SCOTT: Mr. D'Aubin?

FOREMAN D'AUBIN: No.

JUDGE SCOTT: Anything else, Mr. Keever?

MR. KEEVER: No, Your Honor.

JUDGE SCOTT: Anything else need to tend to, Mr. Lisle?

MR. LISLE: No, Your Honor.

JUDGE SCOTT: Ladies and gentlemen, thank you very much for your service as members of the jury in this case. You will not be called again unless we go through all 700 of the other jurors for the rest of this term. You are free to discuss this case with anyone you deem appropriate to discuss it with. Should one of the attorneys contact you and have any questions, you can talk to them if you want to. If you do not want to, you certainly do not have to.

If you have any questions or would like to talk to me, I would be glad to meet with you in my office when we are done here.

JUDGE SCOTT: Mr. Tucker, you may take the jury out.

MR. BAILIFF: All rise.

(Wherein, the jury left the courtroom at 4:36 p.m.)

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

JUDGE SCOTT: Be seated, please. Counsel, before you leave, Ms. Olenberger will make copies of the jury verdicts and provide them to you. They will be filed in the morning, as the clerk's office is closed at this time of day. Mr. Lisle, I would like for you to prepare a judgment incorporating the findings of the jury in this case.

MR. LISLE: Yes, sir.

JUDGE SCOTT: Counsel, I have never spoken to attorneys in my court as I'm going to speak to you now. This has been the most unpleasant litigation that I have dealt with in the 12 years that I have had this job. It has been unpleasant and difficult because of your attitudes, your conduct, and your behavior. You didn't readily follow my direction.

We had to continually plow the same ground. The monthly hearings that I set since last summer always had motions to decide or argue about, except for the one in January of this year.

As my old partner used to say, it's hard to rise above your client. And I realize this is one of those cases, but I expect attorneys to do just that, and to conduct themselves in a civil, dignified, and proper manner.

Mr. Swindle, do not ever walk through the private door to my chambers without asking permission.

MR. SWINDLE: Apologize.

JUDGE SCOTT: Court is adjourned.

MS. REPORTER: All rise.

(Wherein, the proceedings ended at 4:39 p.m.)