

Respondents National Surety Corporation and Fireman's Fund Insurance Company (collectively "Fireman's Fund") submit this supplemental citation in response to certain questions asked by the Court at oral argument, which raised two issues about the content of the record not addressed by the parties' briefing.

1. Opened Eyes. The Chief Justice, in response to a statement by Dr. Woo's counsel during his rebuttal argument, asked whether counsel was saying that Tina Alberts' eyes were taped open to monitor the level of anesthesia, and not to make the picture of the "practical joke" more authentic.¹ Counsel responded in the affirmative, and when queried by another member of the Court about where support for counsel's statement could be found in the record, responded that this point had not been addressed in the briefs, and that supporting pages from the record would be located and submitted to the Court through a postargument citation of authorities.

Dr. Woo subsequently submitted a citation, attaching copies of pages 474 through 476, Volume III of the Verbatim Report of Proceedings of the jury trial of Dr. Woo's "bad faith" and related claims, which are pages from the direct examination of Dr. Woo by his counsel. The undersigned counsel has reviewed the entirety of Dr. Woo's testimony during the "bad faith" trial, and also the deposition testimony of Dr. Woo

¹The recitation of exchanges between the Court and counsel was based on a postargument review of the audio of the argument, which has been posted on the TVW web site. The audio can be located at the web site, under the "archives" maintained by TVW for oral arguments heard by this Court.

taken in Ms. Alberts' action, the transcript of which forms a part of the record that was before the trial court at the time of its "duty to defend" pretrial summary judgment determinations. Fireman's Fund is not aware of any other portion of the record that would bear on the issue raised by counsel's oral argument statement, concerning the reason why Ms. Alberts' eyes show open in the photographs of the "practical joke."

- Concerning Dr. Woo's trial testimony, Fireman's Fund submits as its citation pages 545 through 548, from Volume IV of the Verbatim Report of Proceedings of the "bad faith" trial, which are pages from the cross-examination of Dr. Woo by Fireman's Fund's counsel. The Court's attention is directed to the examination of Dr. Woo, beginning at line 10 on page 545 and ending at line 20, on page 548. Copies of these pages are attached as Exhibit A.

- Concerning Dr. Woo's deposition testimony taken in the underlying Alberts' action, Fireman's Fund submits as its citation Clerk's Paper page 575, which reproduces miniscript pages 53 through 56. Fireman's Fund refers the Court to miniscript page 53, lines 17-23 (testimony by Dr. Woo that the flow of anesthesia had ceased by the time of the "practical joke").

2. Oxygen. The Chief Justice, during the argument by the undersigned on behalf of Fireman's Fund, asked whether there was any testimony concerning whether removing the oxygen mask could have endangered Ms. Alberts. During the review of Dr. Woo's deposition transcript, the undersigned counsel located testimony by Dr. Woo that

Ms. Alberts no longer required oxygen after the administration of anesthesia had ceased. This testimony appears on miniscript page 61, lines 6 through 11, which is reproduced at Clerk's Papers page 577. A copy of that page is attached as Exhibit C. (Because of the poor quality of the original copy, Fireman's Fund has marked the edge of the cited lines for ease of locating those lines, and indicated this mark with an asterisk ("*").)

RESPECTFULLY SUBMITTED this 13th day of September, 2006.

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Date: 09-13-2006

By: Hathryn Savaris

1 A That's right.

2 Q And you told one of your staff while the
3 boar tusk were in, while her mouth was opened and her lips
4 were being pulled apart by a dental instrument and her eyes
5 were propped open either with your fingers or one of your
6 staff's fingers, you directed a staff member to take
7 pictures.

8 A I did. I asked my staff to take a picture,
9 yes.

10 Q And the reason why the mouth was opened, the
11 eyes were propped open, took pictures is because that was
12 part of the practical joke that you were going to show Tina
13 later.

14 A As far as the eye goes it could be. I don't
15 know why. Could be we checking the eye, could be the staff
16 thought it would be more funny so they do that.

17 Q Doctor, turn to page 36 of your deposition.

18 A What page again?

19 Q 36?

20 A 36.

21 Q Actually let's go back to 35.

22 A Page 35.

23 Q Starting at line four.

24 A Line four? Okay.

25 Q Let's go back to 34, line 21. I'm sorry.

EXHIBIT A

1 A Page 34, line 21.

2 Q Line 21.

3 A Thank you.

4 Q Were the following questions asked you at
5 the time of your deposition, doctor, starting at line 21.

6 "Question: Without her eyelids being
7 propped open would her eyes be open at this point?

8 Answer: Probably not.

9 Question: All right."

10 Skip down, I'm sorry.

11 "Her eyes would ordinarily be closed at this
12 point in the anesthesia?

13 Answer: Yes, yes.

14 Question: And it also looks as though her
15 lips are being pulled apart --

16 Answer: Yes.

17 Question: -- by some kind of instrument.

18 Are those mirrors, dental mirrors?

19 Answer: Yes, yes.

20 Question: And who is pulling apart her
21 lips?

22 Answer: There's four of us inside the
23 surgery room. So eight pair -- four pair of hands, so one
24 of us.

25 Question: You don't recall who?

1 Answer: I don't recall.

2 Question: All right. Whose idea was it to
3 pull apart her lips?

4 Answer: It's a combination of everybody
5 because without pulling apart the lips we can't take
6 pictures.

7 Question: Okay.

8 Answer: I mean, it won't show -- the lips
9 would just close over.

10 Question: We see four photographs here.
11 Were any more photographs taken --

12 Answer: No.

13 Question: -- of Tina Alberts?

14 Answer: No, no.

15 Question: And this was all part of the
16 practical joke, is that right?

17 Answer: Yes.

18 Question: Pulling open the eyes?

19 Answer: No, no. That's just for the
20 picture. For checking the anesthetic level -- anesthesia.
21 Could be taking the picture if we're checking the
22 anesthetic, dentalling anesthetic.

23 Question: Okay. So pulling open her
24 eyelids is really not for purposes of the picture, is that
25 what you're telling us?

1 Answer: It could be.

2 Question: Could be?

3 Answer: It could be.

4 Question: And was taking the picture part
5 of the practical joke?

6 Answer: It was.

7 Question: So everything you did for the
8 picture was also part of the practical joke, isn't that
9 right?

10 Answer: What do you mean everything I did?

11 Question: Well, pulling up her eyes,
12 retracting her mouth, everything you did to set up the
13 picture.

14 Answer: To set up the picture, yes.

15 Question: Was part of the practical joke.

16 Answer: Yeah, so she can see what we did."

17 Were those your answers --

18 A Yes.

19 Q -- at the time of your deposition?

20 A In my deposition, that's true.

21 Q Now, had she been under local anesthetic she
22 could have stopped you at any time during the practical
23 joke.

24 A Yes.

25 Q After you were done with the joke you took

- (1) Initials?
- (2) A. It looks like it.
- (3) Q. Who would have filled out this report?
- (4) A. I presume the recorder.
- (5) Q. And Ms. Alberts actually began her general
- (6) anesthesia on - under column 25, correct?
- (7) A. Yes.
- (8) Q. And that would be when the Fentanyl and
- (9) Versed were originally administered, correct?
- (10) A. Yes.
- (11) Q. And that was administered through an -
- (12) intravenously, correct?
- (13) A. Correct.
- (14) Q. Nitrous oxide, that's not considered a
- (15) general anesthesia, correct?
- (16) A. No.
- (17) Q. When the boar-shaped flipper - when you
- (18) implanted that into her mouth, she was under
- (19) anesthesia, correct?
- (20) A. The anesthetic was finished.
- (21) Q. You had stopped the flow of the anesthesia
- (22) into her veins, correct?
- (23) A. Yes.
- (24) Q. She was still unconscious, correct?
- (25) A. She was coming out from anesthetic.

- (1) back on Exhibit 2, the anesthesia stopped being
- (2) administered at the mark that says 50, is that
- (3) correct?
- (4) A. No, actually, the last dose was given at
- (5) about 40.
- (6) Q. Would it have then stopped at that point?
- (7) A. Usually the anesthetic will have - reach
- (8) anesthetic time about two or three minutes. After
- (9) that, she's in the process of emerging from the
- (10) anesthetic, coming out of it.
- (11) Q. As far as the actual time that anesthesia
- (12) was being administered to her, she was - that took
- (13) approximately 15 minutes?
- (14) A. From where to where you say?
- (15) Q. From the column 25 on Exhibit 2 through -
- (16) A. From 25 to 40.
- (17) Q. Yes.
- (18) A. Within that interval, we gave her those
- (19) medication.
- (20) Q. Then no other anesthetics were
- (21) administered?
- (22) A. No.
- (23) Q. So do you have any records that would
- (24) indicate at what point the procedure, the original
- (25) extraction of C and H was - began?

- (1) Q. She would have no recollection of that
- (2) event, correct?
- (3) MR. VERSNEL: Object to the form of the
- (4) question, lack of foundation.
- (5) Q. (By Mr. Hughes) You're an
- (6) anesthesiologist, correct?
- (7) A. Not in a true sense.
- (8) Q. You're licensed to administer anesthetic,
- (9) correct?
- (10) A. Yes.
- (11) Q. You're familiar with their effect on
- (12) individuals, correct?
- (13) A. Yes.
- (14) Q. You know that when one is coming out of a
- (15) general anesthesia, they oftentimes will not recall
- (16) what is occurring to them?
- (17) A. That could be true.
- (18) Q. Did Ms. Alberts seem to indicate to you
- (19) that she was aware of what was happening to her when
- (20) you were placing the boar teeth -
- (21) A. No, no.
- (22) Q. Did she say anything at all while you were
- (23) placing the boar teeth in her mouth?
- (24) A. No.
- (25) Q. How long - just for the record, looking Page 575

- (1) A. No.
- (2) Q. Do you have any records as to when the
- (3) actual procedure as far as suturing up the extraction
- (4) of C and H -
- (5) A. No. We -
- (6) MR. VERSNEL: Let him finish the question.
- (7) Q. (By Mr. Hughes) - occurred?
- (8) A. No.
- (9) Q. Do you remember when?
- (10) A. When what?
- (11) Q. Do you remember how long the actual
- (12) procedure occurred or lasted, the extraction of C and
- (13) H?
- (14) A. I do not.
- (15) Q. And from the time from the beginning of
- (16) applying the general anesthesia to the suturing of C
- (17) and H, do you have any idea how long that occurred?
- (18) MR. VERSNEL: C and H are teeth. You mean
- (19) the suturing of the sockets?
- (20) MR. HUGHES: Thank you.
- (21) A. Ask that again.
- (22) Q. (By Mr. Hughes) Do you have any
- (23) recollection as to how long it took you to - from
- (24) the time that you began administering the general
- (25) anesthesia to the final suturing of the sockets? Page 575

EXHIBIT B

(1) Q. None that you can recall?

(2) A. Asked and answered.

(3) Q. Now, you're saying that Exhibit 3 occurred after the anesthesia record and she was not being administered anesthesia, correct?

(4) A. Yes.

(5) Q. Would she be requiring oxygen at this point?

(6) A. No.

(7) Q. When is the oxygen typically removed?

(8) A. Just before they are ready to be moved to

(9) out of the surgery room.

(10) Q. Out of the surgical room?

(11) A. Yes.

(12) Q. To a recovery room?

(13) A. Yes.

(14) Q. Who removed the surgical mask?

(15) A. One of us. Usually the chinner.

(16) (Marked Deposition Exhibit No. 4.)

(17) Q. (By Mr. Hughes) Showing you what's been

(18) marked as Exhibit 4, is that her - is that

(19) Ms. Alberts's progress notes?

(20) A. Yes.



(1) Q. It has initials, do you see that, where it

(2) says "RN, SA, SA" in the left-hand corner, upper left

(3) hand? Do you see those initials?

(4) A. Yes.

(5) Q. The "RN" is usually the chinner, correct?

(6) A. Yes.

(7) Q. And that would indicate the initials of

(8) Cherie Cuman, correct?

(9) A. Yes.

(10) Q. And then the other two surgical assistants-

(11) "JM" reflects Jayna Marshall, correct?

(12) A. Yes.

(13) Q. The "RG" reflects Robln Goff, as well?

(14) A. Yes.

(15) Q. We know from Exhibit 2 that - Robln was

(16) which position now? If she was recording the

(17) anesthesia, which position would she be?

(18) A. Probably be the instrument passer.

(19) Q. If you could read your progress notes

(20) indicated on 5/5/99. Read it out loud, if you could.

(21) A. Twenty-eight year old female referred for

(22) extraction of number C and H. Surgery planned with

(23) general anesthetic. Surgery general anesthetic,

(24) flipper inserted.

(25) Q. Now, why do you record - why do you make

(1) progress notes?

(2) A. For this particular occasion to indicate what has been done.

(3) Q. Did you indicate the beam hand flippers

(4) in this progress note?

(5) A. No.

(6) Q. How come?

(7) A. That was a practical joke.

(8) Q. So you didn't think it was necessary to put

(9) that on her medical record?

(10) A. I wasn't thinking. I wasn't making a

(11) conscious decision at that time.

(12) Q. Was there anything that was affecting your

(13) ability to make decisions during the surgical

(14) procedure and during the practical joke?

(15) A. Say one more time again.

(16) Q. Was there anything that was affecting your

(17) mental capacity when you were performing her surgery

(18) on May 5th?

(19) A. No.

(20) Q. Was there anything affecting your mental

(21) capacity while you were playing a practical joke on

(22) Ms. Alberts?

(23) A. No.

(24) Q. Do you recall a staff meeting that occurred

(25) in April of 1999?

(1) A. No.

(2) Q. Did you hold staff meetings periodically?

(3) A. Yes.

(4) Q. Do you remember your asking Tina Alberts

(5) and the other surgical assistants to attend a laser

(6) seminar?

(7) A. Yes, sometime during that year.

(8) Q. Ms. Alberts's laser seminar was scheduled

(9) in mid May 1999?

(10) A. No, I don't think so.

(11) Q. Okay.

(12) A. I think that was earlier than that.

(13) Q. Do you recall when she was - when you

(14) asked her to - you asked her to attend a laser

(15) workshop, correct?

(16) A. Yes, I did.

(17) Q. And don't you recall that when you asked

(18) her to attend that she said, "I'll only attend if I

(19) I'm paid" or something to that effect?

(20) A. Say one more time.

(21) Q. Don't you recall her voicing a concern over

(22) whether she would be paid to attend that workshop?

(23) A. No, I don't.

(24) Q. Was it your practice to compensate sta

(25) Page 577

EXHIBIT C