

CONFIDENTIAL RELEASE AND SETTLEMENT AGREEMENT

That for the sole consideration of **ONE MILLION DOLLARS (\$1,000,000.00)**, Seven Hundred Fifty Thousand Dollars (\$750,000.00) of which shall be paid in cash at the time of the execution of this Agreement, and the remaining Two Hundred Fifty Thousand Dollars (\$250,000.00) shall be distributed as specifically set forth below in that portion of this document entitled, "Annuity"; **We, PAMELA METHENY AND KENNY METHENY, INDIVIDUALLY AND AS THE DULY APPOINTED CO-CONSERVATORS OF THE ESTATE OF CODY METHENY**, having been so appointed by the Probate Division of the Circuit Court of Pulaski County, Arkansas, on April 21, 2008, ("**Releasors**") do hereby release, acquit and forever discharge **BADIH ADADA, M.D.**, as well as his respective heirs, insurers, including First Professionals Insurance Company (FPIC), administrators, executors, trustees, predecessors, successors and assigns, as well as all other agents, servants, and employees of the University of Arkansas for Medical Sciences not otherwise previously named, or any of them, and any and all of their associated entities (hereinafter referred to as "the parties released") of and from any and all claims, actions, causes of action, whether for alleged compensatory or punitive damages, administrative actions of any kind or nature, demands, rights, damages, costs, loss of services, suits at law or in equity of whatsoever kind or nature or expenses and compensation whatsoever, including court costs, legal expenses and attorneys' fees, for or because of any matter or thing alleged to have been done, omitted or suffered to be done by any of the parties released herein, prior to and including the date hereof, regarding any and all care, treatment or other action of every kind or nature, whether intentional, malicious, negligent or otherwise, done to, for the benefit of, or in any way relating to Cody Metheny at any time in the past, including up until the date hereof. We, the Releasors, hereby affirmatively state that by the

above language, we hereby totally and completely release **BADIH ADADA, M.D.**, as well as his respective heirs, insurers, including First Professionals Insurance Company (FPIC), administrators, executors, trustees, predecessors, successors and assigns, as well as all other agents, servants, and employees of the University of Arkansas for Medical Sciences not otherwise previously named, or any of them, and any and all of their associated entities, from any and all further civil actions, equitable proceedings, criminal prosecutions or other court or administrative proceedings of any kind or nature, whether for compensatory or punitive damages, and further totally and completely release **BADIH ADADA, M.D.**, as well as his respective heirs, insurers, including First Professionals Insurance Company (FPIC), administrators, executors, trustees, predecessors, successors and assigns, as well as all other agents, servants, and employees of the University of Arkansas for Medical Sciences not otherwise previously named, or any of them, and any and all of their associated entities, from any and all further vicarious liability associated with any of their employees.

We, the Releasors, understand that by this Confidential Release and Settlement Agreement, the parties released do not admit or acknowledge any fault, intentional act, malice or negligence on their part, and that, to the contrary, they specifically deny the same and have entered into, executed and performed this Confidential Release and Settlement Agreement to buy their peace and to otherwise avoid any further litigation.

We, the Releasors, agree that any and all costs and expenses, and liens related thereto, whether referenced herein or not are released hereby in relation to the parties released, including but not limited to Medicare, Medicaid, medical, hospital, physician, legal and attorneys' expenses, costs, fees and liens, shall be the sole responsibility and liability of, and shall be paid by Pamela Metheny, Kenny Metheny and/or the Estate of Cody Metheny, the Releasors, and/or

their attorneys, without any further consideration, compensation or involvement of any kind by the parties released. Further, the Releasors hereby state, warrant and represent that they have the full and complete authority to enter into and execute this Confidential Release and Settlement Agreement on their own individual behalf, and specifically in the case of *In The Matter Of The Estate of Cody Metheny*, that the Releasors, as the duly appointed Co-Conservators of the Estate of Cody Metheny pursuant to Ark. Code Ann. § 28-67-108, have obtained the authority of the Probate Division of the Circuit Court of Pulaski County, by its Order of May 19, 2008, both to settle any and all claims that Cody Metheny has as to Dr. Badih Adada and to execute this binding Release. Further, the Releasors hereby acknowledge that it is and at all times will be their responsibility to obtain any and all authority or orders of any other court as may be necessary to enter into, execute and perform pursuant to this Confidential Release and Settlement Agreement.

JOINT TORTFEASOR

THE EXECUTION of this Release shall operate as a satisfaction of all our claims as against other tortfeasors to the extent of the pro rata share of the liability of the parties released herein, who are being released herein pursuant to the Arkansas Uniform Contribution Among Joint Tortfeasors Act (Ark. Code Ann. §16-61-201 et seq.) It is further agreed that this release shall operate as a reduction to the extent of the pro rata share of liability attributed to the parties released, of all our claims for damages on account of any acts or events, whether intentional, malicious, negligent or otherwise, recoverable as against any other Tortfeasor named as a defendant in the Complaint and any and all amendments thereto filed in the Sixteenth Division of the Pulaski County Circuit Court and originally styled, *Pamela and Kenny Metheny, Individually*

and as Guardians and Next Friends of Cody Ryan Metheny, a Minor v. Badih Adada, M.D., et al., pursuant to the Arkansas Uniform Joint Contribution Among Joint Tortfeasors Act.

INDEMNITY

As further consideration for the sums paid or to be paid, we, the Releasors, hereby agree to indemnify, protect and hold harmless **BADIH ADADA, M.D.**, as well as his respective heirs, insurers, including First Professionals Insurance Company (FPIC), administrators, executors, trustees, predecessors, successors and assigns, as well as all other agents, servants, and employees of the University of Arkansas for Medical Sciences not otherwise previously named, or any of them, and any and all of their associated entities, of and from all further claims, demands, costs, attorneys' fees, expenses or judgments and from any and all liens that might be claimed or asserted by Medicare or Medicaid which might be incurred by or against any of them related to any claims arising out of this matter for civil money damages by any person or individual who might claim or attempt to claim that they were in any way personally damaged or injured as a result of the events relating to and/or referenced in this matter and contained in this Confidential Release and Settlement Agreement.

It is specifically understood that nothing contained either in this paragraph or in this Release obligates or is intended to obligate Releasors or their attorneys to pay or otherwise be responsible for any attorneys' fees that may be incurred for the defense of Dr. Adada for any claims or causes of action that may be brought against Dr. Adada by Arkansas Children's Hospital or their liability insurance carrier, Medical Assurance Company.

We, the Releasors, understand that no representation as to liability and no agreement or promise has been made by the parties released or anyone on their behalf to induce us into this Confidential Release and Settlement Agreement, and that the sum paid pursuant hereto is solely

by way of compromise of disputed claims. We, the Releasors, therefore, specifically agree that this Confidential Release and Settlement Agreement shall be a complete bar of all claims or suits of whatsoever nature as to **BADIH ADADA, M.D.**, as well as his respective heirs, insurers, including First Professionals Insurance Company (FPIC), administrators, executors, trustees, predecessors, successors and assigns, as well as all other agents, servants, and employees of the University of Arkansas for Medical Sciences not otherwise previously named, or any of them, and any and all of their associated entities, and that this Confidential Release and Settlement Agreement contains the entire agreement between the parties with the terms hereof being contractual and not a mere recital.

We, the Releasors, agree that this Confidential Release and Settlement Agreement has been read by and/or to us, and it has been explained to us by our attorneys, who have also signed this Agreement. We fully understand that acceptance of the consideration set forth herein is in FULL and FINAL compromise of any and all claims and causes of action which we now or ever will have either personally, individually or in our representative capacity against the parties released as a result of any care or treatment rendered by, or any other negligent, malicious, intentional or other act by the parties released.

ANNUITY

Payments

In addition to the cash payment of Seven Hundred Fifty Thousand Dollars (\$750,000.00) to Releasors and their attorneys, the Insurer, on behalf of the parties released, agrees to pay to the individual named below (the "Payee") the sums outlined below:

One Hundred Thousand Dollars (\$100,000.00) shall be paid to the **Cody R. Metheny Special Needs Trust** at the time of the execution of this Agreement.

Periodic payments payable to **Cody R. Metheny Special Needs Trust** made according to the schedule as follows (the "Periodic Payment"):

\$2,764.29 per month guaranteed for five (5) years, certain only, beginning January 1, 2009, with the last payment on December 1, 2013.

All such guaranteed payments noted above are guaranteed whether or not Cody Metheny survives the payment schedule.

All sums set forth herein constitute damages on account of personal injuries or sickness, within the meaning of Section 104(a)(2) of the Internal Revenue Code of 1986, as amended.

Payee's Rights to Payments

The Releasors acknowledge that the Periodic Payments cannot be accelerated, deferred, increased or decreased by the Releasors or any Payee; nor shall the Releasors nor any Payee have the power to sell, mortgage, encumber or anticipate the Periodic Payments, or any part thereof, by assignment or otherwise.

Payee's Beneficiary

Any payments to be made after the death of Cody Metheny pursuant to the terms of this Settlement Agreement and Release shall be made to the **Cody R. Metheny Special Needs Trust**, which will repay the State of Arkansas for any Medicaid claims paid on behalf of Cody Metheny according to the terms of the **Cody R. Metheny Special Needs Trust**. This designation is irrevocable.

Consent to Qualified Assignment

The Releasors acknowledge and agree that the parties released and/or the Insurer will make a "qualified assignment", within the meaning of Section 130(c) of the Internal Revenue Code of 1986, as amended, of the parties released's and/or Insurer's liability to make the Periodic Payments set forth above to **Pacific Life & Annuity Services, Inc.** ("the Assignee"). The

Assignee's obligation for payment of the Periodic Payments shall be no greater than that of the parties released and/or the Insurer (whether by judgment or agreement) immediately preceding the assignment of the Periodic Payment obligation.

Any such assignment, if made, shall be accepted by the Releasors without right of rejection and shall completely release and discharge the parties released and the Insurer from the Periodic Payments obligation assigned to the Assignee. The Releasors recognize(s) that, in the event of such an assignment, the Assignee shall be the sole obligor with respect to the Periodic Payments obligation, and the Releasors agree that such assignment shall constitute a full release and discharge of all the parties released's and Insurer's obligations relative to the Periodic Payments set forth above.

Right to Purchase an Annuity

The parties released and/or the Insurer, itself or through its Assignee, reserve the right to fund the liability to make the Periodic Payments outlined above through the purchase of an annuity policy from **Pacific Life and Annuity Company**. The Assignee shall be the sole owner of the annuity policy and shall have all rights of ownership. The Assignee may have Pacific Life and Annuity Company mail their respective payments directly to the Payee. The Payee shall be responsible for maintaining a current mailing address for Payee with Pacific Life and Annuity Company and Pacific Life & Annuity Services, Inc.

Discharge of Obligation

Upon assignment, the Assignee or its designee shall mail future payments directly to the Payee. The Releasors shall be responsible for maintaining and providing their current and proper mailing address to the Assignee.

The obligation to make the Periodic Payments described above shall be discharged upon the electronic transfer of monies or the mailing of a valid check in the amount of the Periodic Payment then due to the address last designated by the party to whom the payment is required to be made under this Agreement.

If the periodic payment is not made in full on the 9th day after the payment date of the periodic payment as set out above, the Payee shall be responsible for notifying the Assignee immediately in writing, and the Assignee will be required to make the periodic payment obligation immediately whole, as long as the check has not been improperly cashed.

CONFIDENTIALITY

The parties hereto mutually agree that neither they nor their attorneys nor their representatives shall reveal to anyone other than as may be mutually agreed to in writing, any of the terms of this agreement, or any of the amounts, numbers, ranges of amounts or numbers, terms or conditions of any sums paid in settlement. In the event that any party or attorney is asked about the outcome or status of the action by any non-party or member of the media, it is agreed that the reply to be given shall be the words, "no comment," "the case has been dismissed," "the case has been compromised," or "the case has settled," without further comment or remarks. The parties hereto further agree that the pending legal action styled *Pamela and Kenny Metheny, Individually and as Guardians and Next Friends of Cody Ryan Metheny, a Minor v. Badih Adada, M.D., et al.*, Pulaski County Circuit Court No. CV- 05-9572, has been or will be dismissed with prejudice as to Badih Adada, M.D. We, the Releasors, further agree that no other legal action of any nature has been or will be commenced against the parties released herein by the Releasors and that, in the event that any such litigation has been initiated or should be commenced in the future, the same shall be promptly dismissed with prejudice.

ENTIRE AGREEMENT

This Agreement, along with:

- Exhibit "A" April 21, 2008, Circuit Court of Pulaski County, Arkansas, Probate Division (PGD. No. 2005-0004) Co-Conservatorship Order;
- Exhibit "B" April 28, 2008, Circuit Court of Circuit Court of Pulaski County, Arkansas, Sixteenth Division (No. CV2005-9572) Order of Dismissal with Prejudice of Badih Adada, M.D.;
- Exhibit "C" May 19, 2008, Circuit Court of Pulaski County, Arkansas, Probate Division (PGD No. 2005-0004) Order authorizing settlement of all claims;

contain the entire agreement between the parties hereto and shall be binding upon and inure to the benefit of the executors, administrators, trustees, personal representatives, heirs, successors and assigns of each.

It is not the intention of this Confidential Release and Settlement Agreement to operate as a release or dismissal of any administrative claim that Releasors feel they may have against the State of Arkansas or The University of Arkansas. Likewise, it is not the intention of this Confidential Release and Settlement Agreement to operate as a release or dismissal of any claim that Releasors feel they may have against Arkansas Children's Hospital or its liability insurance carrier, except to the extent provided for under the provisions of the Arkansas Uniform Contribution Among Joint Tortfeasors Act (Ark. Code Ann. § 16-61-201, et seq.) as noted in this document.

GOVERNING LAW

This Confidential Release and Settlement Agreement shall be construed and interpreted in accordance with the laws of the State of Arkansas.


PAMELA METHENY, INDIVIDUALLY AND
AS CO-CONSERVATOR OF THE ESTATE
CODY METHENY


KENNY METHENY, INDIVIDUALLY AND
AS CO-CONSERVATOR OF THE ESTATE
CODY METHENY

READ, APPROVED AND STIPULATED:

Duncan Firm, P.A.
Three Financial Centre Building
900 S. Shackleford, Suite 725
Little Rock, AR 72211

By: 
Phillip Duncan

Roberts Law Firm, P.A.
20 Rahling Circle
P.O. Box 241790
Little Rock, AR 72223

By: 
Mike Roberts

**ATTORNEYS FOR PAMELA METHENY AND
KENNY METHENY AS CO-CONSERVATORS FOR THE
ESTATE OF CODY METHENY**

ACKNOWLEDGMENT

STATE OF ARKANSAS)
) ss:
COUNTY OF PULASKI)

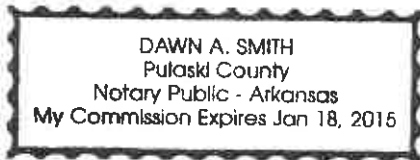
On this 21st day of May, 2008, before me, the undersigned officer, personally appeared **Pamela Metheny and Kenny Metheny, Individually and as Co-Conservators of the Estate of Cody Metheny**, and executed the foregoing instrument for the purposes therein contained, by signing their names.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.


NOTARY PUBLIC

MY COMMISSION EXPIRES:

January 18, 2005
(SEAL)



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CLAIMANTS

IN THE ARKANSAS STATE CLAIMS COMMISSION

KENNY & PAMELA METHENY,
GUARDIAN OF CODY METHENY

v.

CASE NO. 12-0196-CC

UNIVERSITY OF ARKANSAS FOR
MEDICAL SCIENCES

RESPONDENT

**RESPONDENT'S PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

Findings of Facts.

1. Cody Metheny was a patient of Arkansas Children's Hospital ("ACH") and not UAMS.
2. Dr. Badih Adada performed neurosurgery on Cody at ACH on August 2, 2004.
3. At the time of Cody's surgery, ACH policy AP19 – Verification of Patient, Procedure and Operative/Pro was in place which required that the surgical team verify the patient, surgery and site prior to beginning surgery. The surgical consent, OR schedule and history and physical for the patient are used in the process. The team must be unanimous in the verification.
4. The only policies applicable to the surgery at ACH were ACH policies and procedures.

5. UAMS policies and procedures did not apply to surgery at ACH.
6. The individuals in the surgical suite for Cody's surgery included Dr. Adada, Dr. James Crosland, Dr. Scott Suhrer, Dr. Ali Raja, Ellen Powell and Earnice McDaniel. These individuals were all responsible for verifying that they had the correct patient, the correct surgery and the correct site for surgery. Only these individuals were responsible for complying with ACH policy AP19 prior to Cody's surgery.
7. The surgical consent, OR schedule and history and physical included the word craniotomy but there was no indication on whether the procedure should be on the right side or the left side.
8. No one on the surgical team questioned the consistency of the documents or whether the procedure should be on the left side or the right side.
9. Dr. Adada began the procedure on the wrong side of Cody's head and ultimately took a .1 cm x .1 cm biopsy of Cody's left amygdala.
10. Physicians practicing at ACH are ACH credentialed physicians.

11. UAMS is not involved in the credentialing of physicians at ACH.
12. All physicians at ACH are not UAMS physicians.
13. ACH and UAMS had an affiliation agreement that provided UAMS physicians to perform services at ACH. Those physicians had to be credentialed through the ACH credentialing process.
14. The affiliation agreement specifically states that ACH and UAMS will remain separate entities.
15. The affiliation agreement provides that professional conduct of physicians at ACH, including "standards for patient care and quality assurance" are to be carried out according to ACH bylaws, rules and regulations.
16. The affiliation agreement specifically states that patients seen at ACH are patients of ACH, and not UAMS, and the ACH Board had institutional responsibility for those patients.
17. The affiliation agreement does not provide for any liability sharing between ACH and UAMS.
18. ACH and UAMS do not intend to share debts or liabilities between their institutions.

19. In 2005, Claimants filed a lawsuit in Pulaski County Circuit Court against Dr. Adada, Dr. James Crosland, Dr. Scott Suhrer, Dr. Ali Raja, Dr. Gregory Sharp, Dr. Osamma Al-Mefty, Dr. George Burson, Dr. Bonnie Taylor, and Dr. Paul Rivas-Gorrin as well as others as a result of Cody's 2004 surgery.
20. Claimants settled the 2005 matter with Dr. Adada for \$1 million dollars and dismissed him from the lawsuit with prejudice and without a finding of negligence.
21. Claimants dismissed all other UAMS physicians without a finding of negligence.
22. Claimants nonsuited the 2005 lawsuit and refiled in 2009 against ProAssurance, the insurance company for ACH.
23. Claimants did not pursue insurance remedies against any of the other UAMS physicians involved in Cody's surgery.
24. Claimants did not exhaust against all insurers.
25. Following a three week jury trial in September 2010, the jury returned a \$20 million verdict against ProAssurance which was reduced to \$11 million by the Court.
26. The decision was upheld on December 13, 2012 by the Arkansas Supreme Court.

27. Claimants did not present any evidence in the Pulaski County trial demonstrating UAMS liability in Cody's surgery.
28. Cody lived in a Neurological Rehabilitation Center from February 2008 until early 2013.
29. Cody went home to live with his parents in early 2013, after they received the money from the 2010 jury trial verdict.
30. Claimants have received a total of \$12 million from ProAssurance and Dr. Adada.

Conclusions of Law.

1. The Arkansas State Claims Commission "shall hear no claim until the claimant has exhausted all remedies against insurers." Ark. Code Ann. § 19-10-302 (emphasis added). See also Rules and Regulations of the Arkansas State Claims Commission, Claims Excluded.
2. Claimants did not exhaust all available remedies against the physicians' insurers.
3. It is well-established that the "test of a partnership" is the parties' "actual intent to form and operate a partnership." See *Rigsby v. Rigsby*, 346 Ark. 337, 342, 57 S.W.3d 206, 210 (2001).

4. The intention of the parties to form a partnership is determined by examining the contract entered into by the parties. See Slaton v. Jones, 88 Ark. App. 140, 148, 195 S.W.3d 392, 397 (2004).
5. The affiliation agreement between ACH and UAMS did not create a legal partnership.
6. UAMS is not liable for acts of medical negligence that occur at ACH.
7. "Vicarious liability is tied to the negligence of the employee. It is well-settled that when an employee has been released or dismissed, and the employer is sued solely on a theory of vicarious liability, any liability of the employer is likewise eliminated." *Stephens v. Petrino*, 350 Ark. 268, 279 (2002); *Hartford Ins. Co. v. Mullinax*, 336 Ark. 335 (1999).
8. Because the physicians were released or dismissed from the Pulaski County lawsuit without a finding of negligence, UAMS is not vicariously liable for any act by its employees.
9. The Claims Commission cannot grant relief on any claim that would be dismissed "as a matter of law" in a court of law or equity or general jurisdiction. Ark. Code Ann. § 19-10-204(b)(3).

10. For these reasons, Claimants claim against UAMS is denied.

Respectfully submitted,

THE BOARD OF TRUSTEES FOR
THE UNIVERSITY OF ARKANSAS
Acting for and on behalf of
THE UNIVERSITY OF ARKANSAS
FOR MEDICAL SCIENCES,
Respondent

By: 
SHERRI L. ROBINSON, #97194
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(501) 686-7608
Srobinson3@uams.edu

Attorneys for Respondent

CERTIFICATE OF SERVICE

I, Sherri L. Robinson, do hereby certify that a copy of the foregoing pleading has been served on claimant herein by mailing a copy of same, by U.S. Mail, postage prepaid, this 7th day of October, 2015, addressed to the following:

Phillip J. Duncan
Richard Quintus
DUNCAN FIRM, P.A.
Three Financial Centre
900 S. Shackelford, Suite 725
Little Rock, AR 72211


Sherri L. Robinson

IN THE ARKANSAS STATE CLAIMS COMMISSION

**KENNY & PAMELA METHENY,
GUARDIANS OF CODY METHENY**

CLAIMANTS

v.

CASE NO. 12-0196-CC

**UNIVERSITY OF ARKANSAS FOR
MEDICAL SCIENCES**

RESPONDENT

RESPONDENT'S POST-HEARING BRIEF

Introduction and Statement of Issues.

Claimants brought the present action alleging that UAMS is liable for the \$8 million of the jury verdict that exceeded the Arkansas Children's Hospital ("ACH") insurance policy limit and combined settlement with former UAMS surgeon Dr. Badih Adada. Claimants bring the claim even though it is undisputed that Dr. Adada performed surgery on Claimants' son, Cody, at ACH and not at UAMS. Claimants argue that based on the Academic Affiliation agreement between ACH and UAMS -- and the legal principle of vicarious liability -- UAMS should bear liability for the alleged negligent acts of ACH and the UAMS physicians working at ACH.

Claimants listed 25 individuals on their witness list for the hearing for whom they intended to present testimony via trial and/or deposition transcripts. Additionally, Claimants listed 25 specific exhibits and three general exhibits on their exhibit list. Prior to the hearing, Claimants' counsel provided Respondent's counsel with a disk containing thousands of pages of documents -- none of which were given exhibit designations. At the hearing on October 14, Claimants provided the Commissioners and Respondent's counsel

with a binder containing 48 marked exhibits and a table of contents. This is the first time the exhibits were provided to Respondent's counsel in an organized format.

At the hearing, Claimants' counsel attributed testimony to various witnesses without noting for the Commissioners or Respondent's counsel where the specific testimony came from -- e.g., from one of the two trials, or from one of the numerous depositions. Many witnesses were deposed more than once, and many testified at both trials. Respondent was not a participant in the proceedings below, so it has not had the benefit of receiving all transcripts. To date, Respondent does not have copies of all transcripts which Claimants have supposedly relied on in the instant case. Much of the information relied upon by Claimants during their "evidentiary" presentation/argument was inaccurate, incomplete or inapplicable to the issues relevant to the hearing before the Commission.

After approximately two hours of "evidentiary" presentation/argument, the Commission requested evidence on the following issues: (1) exhaustion; (2) the Affiliation Agreement; and (3) damages. Respondent submits that vicarious liability must be included because it is a dispositive issue in this matter. The Commission also asked that the parties supplement their pre-hearing briefs on these issues. Respondent provides its supplement in the form of this post-hearing brief.

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The evidence presented in the hearing clearly supports a decision in favor of UAMS. First, Claimants released all UAMS physicians from liability, so

UAMS cannot be vicariously liable for the physicians' acts as a matter of law. Second, Claimants did not exhaust all possible insurance remedies prior to bringing a claim against UAMS. Third, under the unmistakable language of the Affiliation Agreement, UAMS is not liable for acts of medical negligence occurring at ACH. Finally, Claimants did not prove they are entitled to damages in excess of what they have already received from ACH and Dr. Adada.

Argument.

- I. Issue 1: Is UAMS vicariously liable for the alleged negligent acts by its physicians with regard to Cody Metheny's surgery that occurred at ACH?**

Answer: No.

Evidence Supporting UAMS:

- **Deposition testimony of Arthur Shorr**
 - **114:16-19 - Everyone in the OR had "a demonstrated duty and responsibility" for the time-out that would have prevented the wrong-sided surgery.**
- **Claimants' Exhibit 39 - ACH AP 19, Patient Verification Procedure**
- **Trial testimony and counsel statements that surgical team members are responsible for time-out**
 - **Grant Davis, Claimants' counsel**
 - **Ellen Powell, ACH circulating nurse**
 - **Mary McDaniel, ACH Vice President of Patient Care Services**
 - **Judie Holleman, Claimant's nursing expert**
 - **Kathy Farrington, ACH surgery nurse**
- **Hearing testimony of Dr. Roxane Townsend, UAMS CEO, Ms. Rhonda McKinnis, ACH General Counsel, and Ms. Lea Woodrow, ACH nurse that ACH policies apply to ACH surgeries and only individuals in the operating room are responsible for the time-out**
- **Claimants' Exhibit 41 - Confidential Release & Settlement Agreement**

Evidence Against UAMS: None.

The issue of vicarious liability is dispositive of this case and can be resolved by simply following the well-settled law.

It is obvious from the evidence presented that the only UAMS employees who could have prevented an injury to Cody as a result of medical negligence were the physicians in Cody's surgery. Those individuals were Dr. Badih Adada (the neurosurgeon), Dr. James Crosland (the anesthesiologist), Dr. Ali Raja (the neurosurgeon resident), and Dr. Scott Suhrer (the anesthesiology fellow). It is undisputed that these were the only UAMS employees in the surgery.¹ Moreover, Arthur Shorr, the Claimants' "administrative expert" agreed that these were the individuals directly responsible for the wrong-sided surgery. (Shorr depo., 114:16-19).

Only these four UAMS employees, along with the ACH employees in the surgery, could have followed ACH Policy AP 19, which states: "This policy applies to all operative and other invasive procedures that expose the patient to more than minimal risk." The policy states that the patient, procedure and site will be verified during the pre-operative assessment. Moreover, it states: "Team members will conduct a final verification of the correct patient, the correct procedure, correct site, correct patient position." This policy is written in plain, ordinary language, and the individuals responsible for complying with the policy all have an advanced education.

¹ Claimants' counsel referred to nurses in the OR as UAMS nurses, but that is not true and there is no evidence to support the statement. There was a student nurse, but there was no testimony that she had an equivalent duty or even understanding of AP 19 and its requirements.

It is undisputed that AP 19 applied to Cody's surgery. Claimants acknowledged in the Pulaski County case that the "time-out" policy applied to Cody's surgery. See Complaint, Pulaski County Docket, 60CV-09-96, ¶¶ 37-39; Amended Complaint, ¶¶ 42-44. In the September 2010 trial, counsel for Claimants acknowledged in the Pulaski County trial that AP 19 applied to the team members which "include the surgeon [and] everyone else in the room." (Plaintiffs' Opening statement, trial transcript, 2927:11-13). Counsel also stated "the team members will conduct the final verification of the correct patient, correct procedure, correct site, correct patient position." (Id., 2927:23-2928:1).

Ellen Powell, an ACH circulating nurse in Cody's surgery, testified at trial that there was a time-out procedure at ACH that they were supposed to follow to ensure that the surgery was being done on the correct site. (Powell trial testimony, 3054:22-23; 3055:8-11; 3061:12-18). Mary McDaniel, ACH Vice President of Patient Care Services, testified that under AP 19, the team members involved in the time-out are those who "are directly participating in the procedure." (McDaniel trial testimony, 3155:22-3156:7; 3282:15-22).

It is undisputed that the team members "directly participating" in Cody's surgery were the surgeon, anesthesiologist, scrub nurse, and circulator.² (Id., 3282:25-3283:9). Judie Holleman, one of the Claimants' experts, testified that those involved in Cody's surgery knew how to do a time-out and that when Cody's surgery occurred, time-outs were "a big deal." (Holleman trial testimony,

² The evidence shows that there was also an anesthesiology fellow, Dr. Suhrer, present during the time-out.

3344:11-17; 3469:22-3470:5). ACH nurse Kathy Farrington, who was also a nurse at some point in Cody's surgery, testified that the time-out procedure was listed on a poster in the OR, the physicians lounge and in the OR changing room. (Farrington trial testimony, 3583:13-18; 3644:25-3645:15).

There is no evidence that anyone at UAMS other than the four physicians directly involved in Cody's surgery should or even could have been involved in the time-out procedure during his surgery. Respondent presented testimony in the hearing from Dr. Roxane Townsend, UAMS CEO, and Rhonda McKinnis, ACH General Counsel and Vice President of Legal Affairs, that only ACH policies applied to surgery at ACH, and that UAMS physicians, as members of the ACH medical staff, are expected to follow those policies. Moreover, Dr. Townsend and Ms. McKinnis testified that only ACH can enforce those policies, and no one on the UAMS campus has authority to enforce policies at ACH.

Lea Woodrow, an ACH surgical nurse, testified in the hearing that no one outside of the surgical suite is involved in the time-out. Unquestionably, no one in UAMS administration is consulted during a time-out at ACH. The physicians involved in Cody's surgery were the only four UAMS employees responsible for ensuring that a time-out was taken and that the patient, procedure, site and position were all correct.

Dr. Townsend and Ms. McKinnis testified that UAMS is not involved institutionally in surgeries that occur at ACH. UAMS does not receive paperwork regarding surgeries at ACH so that it can opine on whether a procedure is designated properly; it is not present during surgeries at ACH to

ensure that a timeout is taken and the patient is prepped for the proper procedure. Because UAMS is not involved institutionally in surgeries at ACH, it is not liable for any acts of medical negligence of physicians while working at ACH.

According to the Arkansas Supreme Court, "Vicarious liability is tied to the negligence of the employee. It is well-settled that when an employee has been released or dismissed, and the employer is sued solely on a theory of vicarious liability, any liability of the employer is likewise eliminated." *Stephens v. Petrino*, 350 Ark. 268, 279 (2002); *Hartford Ins. Co. v. Mullinax*, 336 Ark. 335 (1999) (emphasis added).

Claimants argue that when releasing the UAMS physicians, they specifically reserved the right to pursue UAMS under a theory of vicarious liability. However, *Rhodes v. Progressive Casualty Insurance Co.*, 36 Ark. App. 185 (1991), is a case directly on point, and it contradicts Claimants' argument.

In *Rhodes*, the plaintiff sued her insurance agent and the insurance company claiming that a lapse in her coverage was as a result of the agent's negligence. *Id.* The plaintiff settled her case with the agent and executed a release that reserved any right she might have against the insurance company. *Id.* at 187. The Arkansas Court of Appeals stated that the complaint did not allege that the insurance company was negligent. *Id.* The Court then concluded that since the plaintiff sued the insurance company because of its position as the agent's employer, a valid release of the agent operated to release the employer as well. *Id.* at 187-88. "When appellant released [the insurance agent]

from liability and settled her claim with him, there remained no cause of action against appellee (agent's employer) based on the acts of its agent." *Id.* at 188.

The same is true here. Claimants have sued UAMS because of its position as the employer of the physicians involved in Cody's case. There has not been any allegation of negligence against UAMS independent of its physicians' actions. It is undisputed that only those individuals in the operating room with Cody were responsible for ensuring that a time-out was taken and that the proper procedure was performed at the correct site. These individuals included the four UAMS physicians who were acting in their capacity as members of the ACH medical staff.

It is undisputed that Claimants released and dismissed these four physicians from the Pulaski County lawsuit without a finding of negligence against any of them. (See Claimants' Exhibit 41, Confidential Release and Settlement Agreement). In fact, the agreement specifically states that "the parties released do not admit or acknowledge any fault, intentional act, malice or negligence on their part, and that, to the contrary, they specifically deny the same." (*Id.* at 2). It is further undisputed that Claimants released any other UAMS physicians who could have been sued -- e.g., Adada's supervisors, Drs. Taylor and Al-Mefty, as well as those who could have taken other administrative actions -- Dr. Taylor. (*Id.*).

The General Assembly provides that the Commission cannot grant relief on any claim that would be dismissed "as a matter of law" in a court of law or equity or general jurisdiction. Ark. Code Ann. § 19-10-204(b)(3). As a matter of

law, because Claimants released the physicians (UAMS employees) and all other UAMS employees from liability, any potential vicarious liability by UAMS has been eliminated, and there is no cause of action remaining against UAMS.

As a result, the Commission must find in favor of Respondent.

II. Issue 2: Did Claimants exhaust all possible insurance remedies?

Answer: No.

Evidence Supporting UAMS:

- Claimants' Exhibit 41 - Confidential Release and Settlement Agreement
- Deposition testimony of Arthur Shorr
 - 114:16-19 - Everyone in the OR had "a demonstrated duty and responsibility" for the time-out.
 - 112:16-113:9 - Drs. Al-Mefty and Taylor "failed to create an understanding in their subordinates."
- Hearing testimony of Dr. Roxane Townsend - insurance policies on all UAMS physicians with \$1 million limit per event
- Hearing testimony of Lea Woodrow - all those in operating room are responsible for time-out
- Deposition testimony of Dr. William Singer, Claimants' neurology expert
 - 14:6-13; 60:19-61:4; 64:5-14 - Dr. Sharp, Cody's neurologist, fell below the standard of care.
- Deposition of Dr. John Shershow, Claimants' Joint Commission expert
 - 73:7-18, 132:14-25, 134:17-23, 135:10-13 - everyone in the OR is responsible for time-out; anesthesia fell below the standard of care
- Deposition of Dr. James Crosland, UAMS anesthesiologist
 - 130:12-14 - anesthesiologist is involved in the time-out
- Deposition of Sondra McNatt, ACH Director of Surgical Services
 - 68:15-69:4, 83:14-84:1 - surgeon, anesthesia, circulator and surgical technologist are involved in the time-out and all must agree

- Trial testimony of Mary McDaniel, ACH Vice President of Patient Care Services, that those participating directly in the surgery are responsible for the time-out

Evidence Against UAMS: None.

The Arkansas State Claims Commission “shall hear no claim until the claimant has exhausted all remedies against insurers.” Ark. Code Ann. § 19-10-302 (emphasis added). See also Rules and Regulations of the Arkansas State Claims Commission, Claims Excluded. The evidence demonstrates that Claimants did not exhaust all remedies against insurers.

In the original lawsuit filed in Pulaski County in 2005, the Methenys sued the following UAMS physicians: Dr. Adada, the surgeon in charge of Cody’s procedure; Dr. Crosland, the attending anesthesiologist; Dr. Gregory Sharp, a Neurology faculty member and Cody’s treating neurologist at the time; Dr. Suhrer, an anesthesiology fellow; Dr. Raja, a neurosurgery resident; Dr. Osamma Al-Mefty, Chair of the Department of Neurosurgery; Dr. George Burson, a Neurosurgery faculty member; Dr. Bonnie Taylor, the Medical Director at ACH at the time; and Dr. Paul Rivas-Gorrin, an anesthesiology resident. Dr. Townsend testified that each UAMS physician carried a malpractice insurance policy with a \$1 million limit for attending physicians. While she thought the residents carried a policy with the same limit, UAMS submits that it carries a \$500,000 policy limit for residents. The total amount of malpractice insurance available for the physicians listed in the 2005 lawsuit was \$7.5 million.

The only UAMS employees directly involved in Cody's surgery were Dr. Adada, Dr. Crosland, Dr. Raja, and Dr. Suhrer. While Dr. Taylor was not in the surgery, she was a UAMS physician working as an ACH administrator and covered by malpractice insurance as well. Claimants' expert Arthur Shorr testified in his deposition that only the individuals in Cody's surgery were responsible to call a time-out and that all of those in the surgery had that obligation. (Shorr depo., 114:16-19).

Shorr also stated that other than Dr. Adada, Dr. Raja, Dr. Suhrer, Dr. Crosland and maybe Dr. Sharp, there were no other UAMS officials who could have done anything differently in Cody's case, and Shorr did not recall if anyone else had a duty of care to Cody. (Id. at 55:10-19; 56:7-17). In other testimony, Shorr also blamed Dr. Al-Mefty, Dr. Adada's department chair, and Dr. Taylor for "failing to create an understanding in their subordinates." (Id. at 112:16-113:9).

In addition to Shorr, Dr. Singer, a neurology expert for Claimants, testified that Dr. Sharp, Cody's neurologist prior to surgery, fell below the standard of care by allowing Cody to have the surgery. (Singer depo., 14:6-13; 60:19-61:4; 64:5-14). Dr. Shershow, Claimants' Joint Commission expert, also testified that the anesthesiologist has the same obligation in a time-out to ensure that they have the correct patient, procedure and site. (Shershow depo., 73:7-13, 132:14-25). In fact, according to Joint Commission "everybody standing around the table should be a part of the time-out procedure." (Id., 73:14-18). Dr. Shershow further testified that anesthesia standards were

violated when surgery was then performed on the correct side and consent was not obtained prior to beginning surgery on the correct side. Thus, Dr. Shershow was obviously faulting Drs. Crosland and Suhrer. (Id., 134:17-23, 135:10-13).

Lea Woodrow, a surgical nurse at ACH not associated with this case, testified at the hearing that it is the responsibility of all of the members of the surgical team, including the anesthesiologist, to ensure the verification of the patient, procedure and site prior to surgery. This point was also emphasized by ACH AP 19, the verification and time-out procedure applicable at the time, and affirmed by the testimony of Dr. Crosland, and ACH employees Sondra McNatt and Mary McDaniel. (Respondent's Ex. 2; Crosland depo., 130:12-14; McNatt depo., 68:15-69:4, 83:14-84:1; McDaniel trial testimony, 3282:15-3283:15). Ms. McKinnis confirmed at the hearing that only ACH policies applied to surgical procedures at ACH.

In order to fully exhaust all remedies as required by the statute, Claimants were obligated to pursue the potential insurance remedies against the other physicians who shared responsibility for the wrong-sided surgery by either settling the Pulaski County case against each physician or seeing the case through to a verdict. Despite considerable evidence of their negligence, Claimants released all of the physicians involved in Cody's case in the Adada settlement agreement. (Claimants' Exhibit 41). Claimants assert that these physicians were released because the insurance agent [and attorney] told Claimants' counsel that it was impossible for Cody to recover against them.

Claimants provided no evidence in support of this position except the arguments of Claimants' counsel. The testimony from Claimants' own experts concludes that the neurologist, the anesthesiologist and the anesthesiology fellow all acted below the standard of care in this case, that is, they clearly acted negligently.

Claimants chose not to pursue insurance remedies against these physicians who shared responsibility for the wrong-sided surgery. Accordingly, Claimants have failed to exhaust all remedies against the insurers as required by law prior to seeking additional monies from Arkansas taxpayers. The Commission is to recommend payment of claims that it finds from the evidence are just debts of the State. If an alleged wrong to a claimant can be satisfied by insurance or other private means, then there is no just debt for the State to satisfy, and Arkansas taxpayers should not be assessed the burden of making the claimant whole. The only way to avoid placing this burden on taxpayers is to require full compliance with the exhaustion provision of Ark. Code Ann. § 19-10-302.

To hold that a would-be claimant merely has to file a complaint against a physician in Circuit Court and then dismiss the case because an insurance agent said the claimant couldn't win would absolutely circumvent the statutory exhaustion requirement. For the Commission to allow this process to serve as exhaustion will effectively render the statute meaningless and could subject the Commission to an outpouring of claims that do not fulfill the statutory

requirement to exhaust. Exhaustion is a mandatory requirement that the Commission cannot waive.

Claimants received a total of \$12 million -- an \$11 million judgment from ACH and a \$1 million settlement with Dr. Adada. However, because Claimants chose to dismiss and release the other UAMS physicians, who Claimants' experts charge with negligence, Claimants failed to exhaust all remedies as required by state law. As a result, the Commission should find in favor of Respondent.

III. Issue 3: Does the Affiliation Agreement between UAMS and ACH create a legal partnership between the entities making UAMS responsible for ACH's debt?

Answer: No.

Evidence Supporting UAMS:

- **Respondent's Exhibit 1 – Affiliation Agreement**
- **Hearing testimony of Dr. Roxane Townsend and Rhonda McKinnis of intent to maintain status as separate entities, no intent to share liabilities, and no intent to share patients**
- **Deposition testimony of Dr. Johnathan Bates, ACH CEO**
 - **24:14-18 – as CEO, I have “direct or indirect responsibility and accountability for everything that happens in the hospital.”**
 - **75:25-76:24 – the governing body of the hospital is legally responsible for the conduct of the hospital even services furnished under contract**

Evidence Against UAMS: Marketing materials.

It is undisputed that Cody Metheny was not a patient at UAMS. Claimants allege that because UAMS and ACH have an academic affiliation agreement that allows UAMS doctors to care for patients at ACH, then UAMS is also liable for medical negligence claims occurring at ACH that involve a UAMS

physician. Claimants repeatedly use the term “partnership” to describe the relationship between UAMS and ACH. However, the best evidence of the relationship between UAMS and ACH is the Affiliation Agreement in effect during the time of Cody’s surgery. (Respondent’s Exhibit 1). Claimants cannot point to any language in the Affiliation Agreement to support their position that there is a legal partnership between the two entities.

The Affiliation Agreement does not provide for any sort of liability sharing of medical negligence claims between UAMS and ACH. In fact, the 1982 Affiliation Agreement, which was in effect in 2004 with only minor amendments, states that UAMS and ACH “shall continue to exist and function as separate institutions.” (Id.). Moreover, the agreement provides that professional conduct of physicians at ACH, including “standards for patient care and quality assurance” are to be carried out according to ACH bylaws, rules and regulations. (Id.). Finally, the agreement states that all patients of ACH are “acknowledged to be” patients of ACH and not UAMS and that ACH will have “sole institutional responsibility” for its patients. (Id.). It is evident that UAMS and ACH never intended to share liability for acts of medical negligence, and there is no statement to the contrary in the Affiliation Agreement or the amendments that followed.

Dr. Townsend testified in the hearing that the Affiliation Agreement is an academic affiliation that allows UAMS to train future specialists in pediatric care by treating pediatric patients. There must be an academic affiliation with UAMS College of Medicine faculty in order to meet the medical education

accreditation requirements. Ms. McKinnis testified that the agreement creates an academic affiliation allowing ACH to in essence be a teaching hospital, and it meets the accreditation requirements by having medical school faculty on its campus. Both witnesses testified that there was no intent to create a legal partnership between the entities.

Dr. Townsend and Ms. McKinnis testified that ACH is solely responsible for the creation, implementation and enforcement of policies applicable to the ACH campus, and that the UAMS administration is not involved in that process. Both witnesses testified that ACH and UAMS have wholly separate credentialing processes, and that UAMS physicians desiring to practice at ACH must be credentialed at ACH. Dr. Townsend testified that UAMS is not involved in the credentialing of physicians at ACH. Both witnesses testified that sentinel event (or root cause) information from ACH is not shared with the UAMS administration. In addition, Dr. Johnathan Bates testified in his deposition on March 31, 2008 that as the ACH CEO he had "direct or indirect responsibility and accountability for everything that happens in the hospital." (Bates depo., 24:14-18) (emphasis added). Moreover, he testified that the ACH governing body is legally responsible for the conduct of the hospital as an institution which includes "services furnished in the hospital, whether or not they're furnished under contracts." (Id., 75:25-76:24).

Claimants provided absolutely no testimony to refute the testimony cited above. Arthur Shorr, while using the terms "partner, affiliate, alter-ego" throughout his affidavit testified that he was not using these terms in a legal

sense. (Shorr depo., 64:4-10). Claimants submitted marketing materials that included the term “partner” as evidence on this point. Yet, none of the marketing materials provided were from 2004. (See Claimants’ Exhibit 26, dated March 4, 2012 and October 3, 2012; Claimants’ Exhibit 34 dated March 4, 2012). Accordingly, such materials could not have been reasonably relied on to establish an implied partnership between UAMS and ACH in 2004.

Dr. Shershow, Claimants’ Joint Commission expert, testified that “the Joint Commission standards [are] directed to the hospital. We are accrediting the hospital. We’re not accrediting a doctor, accrediting a nurse. We’re accrediting an entire hospital.” (Shershow depo., 132:18-22). Dr. Shershow continued, “The hospital has an obligation, whatever their legal relationship is to the doctor, they have an obligation that the medical staff of the hospital comply with the hospital policies. They have to see to it, even though the medical staff may be in private practice, not being paid by the hospital, they have an obligation that the doctors are practicing within the Joint Commission compliance standards. That’s the hospital’s obligation to see that they are.” (Id. at 133:11-21).

Arkansas courts consistently look to party intent in determining whether or not a partnership exists. See *Rigsby v. Rigsby*, 346 Ark. 337, 342, 57 S.W.3d 206, 210 (2001) (explaining the well-established “test of a partnership between the parties is their actual intent to form and operate a partnership”); *Slaton v. Jones*, 88 Ark. App. 140, 148, 195 S.W.3d 392, 397 (2004) (“The primary test to determine whether there was a partnership between the parties is their

actual intent to form and operate a partnership.”) See also *Boeckmann v. Mitchell*, 322 Ark. 198, 204, 909 S.W.2d 308, 311 (1995); *Gammill v. Gammill*, 256 Ark. 671, 510 S.W.2d 66 (1974); *Brandenburg v. Brandenburg*, 234 Ark. 1117, 356 S.W.2d 625 (1962); *Culley v. Edwards*, 44 Ark. 423 (1984); *Bice v. Green*, 64 Ark. App. 203, 210, 981 S.W.2d 105, 108 (1998).

Crucially, “the intention of the parties to form a partnership is discovered by examination of the contract into which they entered, construed in the light of all the pertinent facts and circumstances.” *Bice*, 64 Ark. App. at 210, 981 S.W.2d at 108–09. “When construing a contract that purports to create a partnership, a court should consider the contract as a whole.” *Id.* The party asserting the existence of a partnership has the burden of showing the partnership’s existence by a preponderance of the evidence. See *Brandenburg*, 234 Ark. at 1119, 356 S.W.2d at 627.

It is unmistakable based on the 1982 Affiliation Agreement that UAMS and ACH did not have the intent to create a legal partnership obligating one entity for debts and legal liabilities of the other. The clear intent of the parties as expressed in the Affiliation Agreement is to remain separate entities, for UAMS physicians to function at ACH under ACH policies, and for patients seen at ACH to remain ACH patients -- not UAMS patients. Dr. Townsend and Ms. McKinnis reiterated this intent, as well as the actual practice at ACH in their hearing testimony.

Claimants did not provide any evidence or testimony that alters the legal relationship between UAMS and ACH as set forth in the Affiliation Agreement.

The evidence shows that ACH and UAMS are completely separate institutions, and the intent is for them to stay that way. The Affiliation Agreement is also very specific to state that all patients seen at ACH are ACH patients, and ACH has sole institutional responsibility for those patients. Claimants allege that Cody was a joint patient of ACH and UAMS; however, the Affiliation Agreement proves differently. The Affiliation Agreement is the only document that can be relied upon to define the legal relationship between ACH and UAMS.

Ms. McKinnis also testified in the hearing that she thought it was unconstitutional for UAMS to assume the debts of ACH. Ms. McKinnis is correct. The Arkansas Constitution states:

Except as herein otherwise provided, the State shall never assume, or pay the debt or liability of any county, town, city or other corporation whatever; or any part thereof; unless such debt or liability shall have been created to repel invasion, suppress insurrection, or to provide for the public welfare and defense. Nor shall the indebtedness of any corporation to the State, ever be released, or in any manner discharged, save by payment into the public treasury.

Ark. Const. Art. 12, § 12 (emphasis added).

Claimants provided no evidence that another document governs the legal relationship between UAMS and ACH. As Dr. Bates testified, ACH is legally responsible for services provided at ACH even if those services are provided under contract. Moreover, the Arkansas Constitution prohibits UAMS from assuming liability for the remaining \$8 million of the Pulaski County jury verdict against ACH. As a result, the Commission must find in favor of UAMS.

IV. Issue 4: Are Claimants entitled to damages from UAMS in excess of the \$12 million they have already received from ACH and Dr. Adada?

Answer: No.

Evidence Supporting UAMS:

- Trial testimony of Dr. O'Shanick
- Deposition testimony of Dr. Singer
- Trial testimony of Dr. Patrick
- Trial testimony of Jan Klosterman
- Trial testimony of Dr. Bernard Pettingil, Jr.
- Deposition testimony of Dr. Stephen Bates
- Respondent's Exhibit 4 – Affidavit of Dr. Robert Voogt
- Respondent's Exhibit 3 – Arkansas Business article dated January 19, 2015

Evidence Against UAMS: None.

Claimants have already received \$12 million, and as discussed in section II, they did not pursue an additional \$7.5 million from the malpractice insurance of the other physicians named in the original lawsuit. Moreover, UAMS cannot be liable for the debts of ACH as set forth in section III. The question then becomes can Claimants establish that Cody suffered harm over and above the \$12 million, and is UAMS directly responsible for that damage. The evidence Claimants presented in the trial in September 2010 to the Pulaski County jury demonstrated that Cody was not damaged to the extent to justify a \$20 million verdict. Moreover, the Claimants' actions after the verdict was paid suggest that the evidence presented to the jury that led to the \$20 million verdict was misleading.

At the time of the 2010 trial, Cody was in a residential rehabilitation facility in Virginia and had been since February 2008. (Respondent's Exhibit 4,

Affidavit of Dr. Voogt, ¶ 8). Several of Claimants' experts testified in the September 2010 that Cody needed residential treatment and would for the rest of his life. Despite this testimony, on cross-examination these experts also testified that Cody was cognitively no different after surgery than he was before the surgery, and one expert even testified he was better.

Dr. Gregory O'Shanick, a physician specializing in neuropsychiatry and neurobehavior, testified on behalf of Claimants at trial that he saw Cody for the first time in March 2009. (O'Shanick trial testimony, 4218:19-24; 4337:22-25). Dr. O'Shanick noted that Cody's vocabulary was age appropriate, he had appropriate word binding skills, and his way of speech was normal. (Id. at 4356:3-12). Dr. O'Shanick testified that Cody demonstrates emotion; specifically, he noted that Cody had a history of infrequent crying spells, anger spells and "in a socially immature way, emotions associated with laughter and humor." (Id. at 4356:13-23).

Dr. William Singer, a neurologist for Claimants, testified that he did neurological evaluations on Cody in April 2008 and June 2009, and Cody was within normal limits on those tests. (Singer depo., 69:23-70:3). Dr. Singer testified that Cody's neuropsych testing before and after surgery were relatively unchanged. (Id. at 44:8-16). In fact, Dr. Singer testified that Cody's IQ, verbal performance, verbal memory, visual memory, and visual recognition tests all remained the same or improved after surgery. (Id. at 45:3-10). Dr. Singer testified that Cody was going to need a structured environment and sheltered workshop before he even had surgery. (Id. at 42:14-19). He testified that Cody

would be able to perform an entry level job which was true before and after surgery. (Id. at 123:20-124:5).

Dr. Peter Patrick, a clinical psychologist specializing in neuropsychology, also testified for Claimants at trial in September 2010. Dr. Patrick had been involved with Cody for over four years at that point. (Patrick trial testimony, 3887:17-24; 3903:17-21). Dr. Patrick testified that he'd tested Cody several times, monitored and evaluated him in the Virginia rehab facility and met with him in person eight times. (Id. at 3904:2-20). Dr. Patrick noted that Cody was evaluated and tested by a neuropsychologist, Dr. Snow, prior to his 2004 surgery. (Id. at 3914:6-12). Dr. Patrick testified that his "testing of [Cody's] intellectual skills and some of his memory skills were exactly the same as Dr. Snow's." (Id. at 3918:9-11). He testified further that Cody's ability to think, reason and remember, have "remained pretty strong and good." (Id. at 3918:12-14; 4088:17-23; 4089:16-19).

Dr. Patrick testified that Cody's memory "is fairly well intact. His concentration is extremely poor and has been throughout, going all the way back to measurements in '95." (Id. at 3988:19-24). Dr. Patrick did the same memory tests that Dr. Snow did so that he could compare them. (Id. at 4085:21-4086:4). Dr. Patrick testified that in almost every test he did on Cody, Cody's scores were the same or better than just prior to the surgery. (Id. at 4089:16-19). The tests indicate that the seizure disorder damaged Cody's cognitive and memory functions, and his scores improved after the surgery. (Id. at 4090:1-12). Dr. Patrick testified that Cody's memory improved after the

surgery, and that whatever brain tissue Dr. Adada removed allowed Cody's brain to work better. (Id. at 4095:25-4096:10).

Dr. Patrick testified that the post-surgery test results of Cody's visual memory show improvement which is not consistent with the claims of continuing damage to the hippocampus. (Id. at 4131:12-24). He also agreed that Cody's scores suggest some improvement and that removal of the lesion, from a psychological standpoint, did what it was intended to do -- it removed an area of the brain that was encumbering Cody. (Id. at 4131:25-4132:13).

Dr. Patrick also testified that the surgery did not cause any damage to Cody's sensory motor skills. (Id. at 4105:11-23). He testified that there was no cognitive examination or cognitive testing that says Cody is worse after the surgery, and that not a single objective test shows Cody is worse now than he was before the surgery. (Id. at 4105: 24-4106:6). Dr. Patrick agreed that if Cody had not had the surgery in 2004, he possibly would have continued to decline in cognitive and memory function, but the surgery stopped the downward trend and actually reversed it. (Id. at 4142:10-24).

Regarding personality, Dr. Patrick testified that ACH nurse Kathy Farrington noted that Cody was charming, engaging and friendly prior to surgery. (Id. at 4038:24-4039:3). Dr. Patrick noted that Cody was also friendly and cooperative when he met Cody in 2006 almost two years following surgery. (Id. at 4039:4-7). Dr. Patrick testified that Cody is socially immature and was so before the surgery. (Id. at 4082:4-8). Before the surgery, Cody had trouble

reading expressions on people's face, had difficulty with humor, and would misread social cues. Cody did not understand sarcasm. (p. 4083:3-14).

Dr. Patrick testified that before the surgery, Cody had issues with interpersonal relationships and peer relationships. Cody would say inappropriate things and was not discreet. Cody did not mean to insult someone, but he did not know how to do these things correctly. (Id. at 4130:1-23). Dr. Patrick agreed that in his objective testing of Cody after surgery, Cody's ability to cognitively understand a social theme and to use social information to problem solve was generally intact and not damaged by the surgery. Cody was able to demonstrate cognitive perceptiveness and the ability to read other people's reactions. (Id. at 4132:14-4133:25).

During the second jury trial, Dr. Patrick acknowledged that Cody experienced "improvement in some of his neuropsychological functions . . . and he got better in certain ways." (Id. at 4042:16-20). Dr. Patrick also admitted that Cody experienced the emotions of anger, love and fond memories of his mother. (Id. at 4047:4-20). Cody also had a sense of humor according to Dr. Patrick, he had emotion attached to memory, and he remembered things that make him laugh. (Id. at 4048:2-10). He also missed his family and wanted to be home. (Id. at 4048:17-24). Dr. Patrick testified that Cody did not transition well from one activity to another but that was one of "biggest problems when he was in school before the surgery." (Id. at 4049:13-19).

While claiming that Cody is psychotic, Dr. Patrick admitted that Cody had not been treated by a psychiatrist or psychologist, and no treating

physician had referred him to one. (Id. at 4055:12-4056:6). Dr. Patrick also testified that Cody was not on any medication for psychoses. (Id. at 4057:7-16). Moreover, children with epilepsy like Cody's have an increased likelihood of psychiatric disorders. (Id. at 4058:13-16).

Dr. Patrick testified that the things Cody needed when he got out of high school in 2007 -- job coaching, preparations, social training -- were the same things he needed in 2004 before the surgery. (Id. at 4108:19-4109:9).

Claimants failed to refute any of this testimony; instead, Claimants' counsel stated that this testimony was provided on cross-examination and "we all know what that means." Cross-examination is a crucial element of the adversarial process of litigation. "It is one of the principal tests which the law has devised for the ascertainment of truth, and it is certainly one of the most efficacious." John Bouvier, A Law Dictionary, Adapted to the Constitution and Laws of the United States (1956). The witness is still under oath at the time of cross-examination and has sworn to tell the whole truth. Arguably, cross-examination testimony is more reliable because it is not rehearsed testimony prepared with the aid of an attorney.

There was also testimony from neurologists who treated Cody before and after surgery. Dr. Stephen Bates, a pediatric neurologist who treated Cody before and after surgery, testified that he did not see a significant difference in Cody two years after the surgery from the time he'd last seen Cody in April 2003. (Dr. Stephen Bates trial testimony, 5208:7-5209:18). Cody's affect, speech, and conversational skills were all the same; Cody acted the same way

as before. (Id. at 5209:19-24). Dr. Bates testified that he did a complete neurological exam in 2006, and Cody did not have any neurological deficits. Cody's movement and coordination were normal, and his intellectual level remained the same as before surgery. (Id. at 5210:2-5211:18). Dr. Bates concluded that neurologically, Cody was the same as before his surgery. (Id. at 5212:6-8; 5220:16-23).

Dr. Gregory Sharp is the pediatric neurologist who treated Cody immediately before and after surgery. (Dr. Gregory Sharp trial testimony, 5069:15-20; 5076:6-10; 5111:8-10). He testified that at an August 2005 appointment, he tested Cody's motor strength, reflexes, sensory systems, gait and hand movements which were all normal. (Id. at 5112:19-5113:25). Dr. Sharp testified that in his interactions with Cody before and after surgery, Cody interacted with him in the same manner. (Id. at 5115:12-17).

Cody's teachers also testified that he was the same before and after surgery, and he went on to finish high school. Carol Bland was Cody's teacher the year before and the year after surgery. (Carol Bland trial testimony, 5524:5-16). She testified that socially and academically, Cody did not change. In fact, during her time as Cody's teacher, he improved in both areas. Ms. Bland testified that the same problems she saw with Cody before surgery still existed after surgery but that he consistently improved, and she never saw a drop off. (Id. at 5524:17-5526:7). If anything, after surgery, Cody became more interactive with the students. (Id. at 5532:9-20). Ms. Bland testified that she did not see any new deficits in Cody after surgery. (Id. at 5549:11-13).

Linda Davis was a teacher for Cody during his senior year, but she did not know Cody before surgery. (Linda Davis trial testimony, 6042:10-15; 6043:1-3). Ms. Davis testified that in her experience with Cody, he worked well with others and tried his best. (Id. at 6047:1-8, 21-25). Cody enjoyed working as the football manager and fire marshal. (Id. at 6049:24-6050:11). Ms. Davis testified that Cody was conversational with her and with other students. (Id. at 6052:17-24). Ms. Davis testified that Cody did not need a paraprofessional to help him at school, and in her experience, she felt Cody could live independently and have a job. (Id. at 6052:4-16; 6057:1-11). Ms. Davis testified that she had worked with severely handicapped students who needed to be institutionalized, but Cody did not need to be in an institution. (Id. at 6071:10-6072:10).

Tellingly, Claimants, who were present during the hearing, did not testify even after the above-referenced testimony was read to the Commission regarding the experts' opinions of their son's post-surgical condition. Moreover, Cody himself was not present for the hearing, so the Commission could not make any independent observation of Cody's current condition.

In addition to the testimony from the above-referenced witnesses, including Claimants' own experts, that Cody did not suffer damage, Respondent contends that the evidence demonstrates that the jury was manipulated into rendering an excessive verdict. The award by the jury was based significantly on testimony regarding the care and treatment that Cody would allegedly need going forward. At the time of trial in September 2010,

Cody lived at a residential facility in Virginia where he had been since February 1, 2008. (Respondent's Exhibit 4, Affidavit of Dr. Voogt). In that trial, Claimants provided testimony from physicians and an economist regarding the need for, and cost of, a residential rehabilitation facility. (Trial transcript, 3909:2-12; 4015:5-9; 4017:6-8; 4305:1-5; 4333:1-7; 4507:14-22; 4508:2-25; 4517:10-24; 4518:10-14; 6372-6375).

Dr. Bernard Pettingill, Jr., an economist for Claimants, testified that he prepared a report based on past economic losses which included medical care and lost wages, losses for earning capacity, and ongoing treatment at a residential facility. (Bernard Pettingill, Jr. trial testimony, 4601:19-25; 4619:10-4620:9; 4621:2-4622:19). He testified that the total for those items based on his calculations was \$16,002,576; \$13,000,000 of that number represented residential care for the rest of Cody's life. (Id. at 4624:3-23; 4669:18-24).

This testimony significantly impacted the jury's decision to award \$20 million to Claimants' family for Cody's care. The verdict was appealed by both the family and the insurance company in late 2010. The Arkansas Supreme Court upheld the decision in favor of Claimants in December 2012, and payment of the \$11 million was made in early 2013.

Dr. Voogt, the CEO and Program Director of the rehabilitation facility where Cody lived February 2008 to January 2013, testified that shortly after Claimants received payment of the jury verdict, Cody returned to Arkansas to live with his parents. (Respondent's Exhibit 4, ¶¶ 21-23). Cody's parents, the

Claimants, did not pay the bill for Cody's stay at the rehab facility until the facility filed a lawsuit in Arkansas federal court compelling them to pay. (¶¶ 24-27). See *Voogt Rehabilitation Center v. Cody Ryan Metheny, et al.*, 4:13-cv-353 JM, Document 70.³

It is worth noting that the \$2.1 million ordered as payment by the federal court represented \$1,156,860.00 in costs for Cody's care at the facility and \$943,349.29 in finance charges or late fees. (Id.). During the trial, Jan Klosterman, the life care planner, acknowledged that thousands of dollars listed in the Virginia rehab center bill presented in trial represented finance charges because the bill had not been paid. (Jan Klosterman trial testimony, 4480:6-12; 4588:18-4589:7). Ms. Metheny signed the original agreement for the facility agreeing that she understood that finance charges would accrue for each month that the bill was not paid. See *Voogt Rehabilitation Center v. Cody Ryan Metheny, et al.*, 4:13-cv-353 JM, Document 24-14.

The evidence demonstrates that Claimants are not entitled to additional damages over and beyond the \$12 million they received through the Pulaski County litigation. Based on the figures of Jan Klosterman and Bernard Pettingill, Jr., Claimants have been more than compensated for any possible losses that Cody suffered, particularly in light of the acknowledgement of Claimants' own experts that Cody did not suffer any cognitive impact. The Commission should not reward the manipulation of the Pulaski County Circuit Court jury by giving Claimants additional money.

³ Respondent is providing copies of the judgment and fee agreement from the federal court proceeding for the Commission's convenience.

Conclusion.

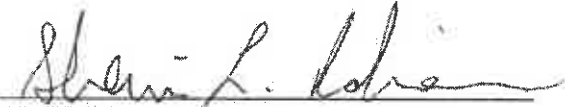
Respondent acknowledges that factually this is an emotional and sympathetic case. Arkansas law, however, requires that the Commission lay aside its sympathies and evaluate the applicable law and actual evidence in reaching its decision. Respondent must prevail for four reasons. First, Arkansas law provides that UAMS is not vicariously liable for the actions of any physician in this case because Claimants have legally released all physicians from any liability. The law clearly holds that the release of the employee from liability releases the employer. Second, the evidence shows that Claimants did not exhaust all remedies against insurance prior to seeking relief in the Claims Commission, so there is no just debt remaining for the State of Arkansas to satisfy. Third, the evidence shows that there is no legal partnership between UAMS and ACH providing that UAMS will assume any shortfalls in legal judgments; and in fact, the Arkansas Constitution prohibits it. Finally, the evidence shows that Cody did not suffer damage to the degree asserted by Claimants. Thus, Claimants are not entitled to damages from UAMS. For these reasons, the Commission must find in favor of UAMS.

WHEREFORE, Respondent respectfully requests that the Commission find in favor of UAMS and for all other relief to which it is entitled.

Respectfully submitted,

THE BOARD OF TRUSTEES FOR
THE UNIVERSITY OF ARKANSAS
Acting for and on behalf of
THE UNIVERSITY OF ARKANSAS
FOR MEDICAL SCIENCES,
Respondent.

By:


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Univ. of Arkansas for Medical Sciences
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Attorneys for Respondent

CERTIFICATE OF SERVICE

I, Sherri L. Robinson, do hereby certify that a copy of the foregoing pleading has been served on claimants herein by mailing a copy of same, by U.S. Mail, postage prepaid, this 22nd day of October, 2015, addressed to the following:

Phillip J. Duncan
Richard Quintus
DUNCAN FIRM, P.A.
Three Financial Centre
900 S. Shackleford, Suite 725
Little Rock, AR 72211


Sherri L. Robinson

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION**

**VOOGT REHABILITATION CENTER, LLC
D/B/A NEUROLOGICAL REHABILITATION
LIVING CENTER**

PLAINTIFF

vs.

NO. 4:13cv353 JM

**CODY RYAN METHENY; KENNY METHENY AND
PAMELA METHENY, AS CONSERVATORS OF THE
ESTATE OF CODY RYAN METHENY; ARGENT TRUST
COMPANY, AS TRUSTEE OF THE CODY R. METHENY
SPECIAL NEEDS TRUST**

DEFENDANTS

JUDGMENT

Based on the order of the Court entered this same date, judgment is entered on behalf of the plaintiff against and Kenny and Pamela Metheny, as conservators of the estate of Cody Ryan Metheny, and against Cody Ryan Metheny, jointly and severally, in the amount of \$2,100,209.29 (representing \$1,156,860.00 for neurological rehabilitation services, room, and board and \$943,349.29 in finance charges) plus additional finance charges of \$570.51 per day from this date until paid.

IT IS SO ORDERED, CONSIDERED, AND ADJUDGED this 10th day of December, 2014.



James M. Moody Jr.
United States District Court Judge

Neurological Rehabilitation Living Centers

614 W. 18th Avenue
Covington, LA 70433
985-875-3100 (o)
985-875-3103 (f)

1851 Old Donation Parkway
Virginia Beach, VA 23454
757-481-7565 (o)
757-481-7569 (f)

Date: February 1, 2008

Client Name: Cody Metheny

Case Number:

Attorney:

Fax:

Phone #:

Address:

Dear Client,

Thank you for requesting that we provide treatment and rehabilitation in conjunction with the pending court case. We have been informed that there is no insurance policy covering treatment and rehabilitation costs or that the client is unwilling to use his/her contracted insurance plan.

Fee and Lien Agreement

You agree Cody Metheny will be responsible to pay any and all bills for treatment and rehabilitation, the rate of \$950.00 per diem. A statement of services will be sent to the undersigned, the obligator, on a monthly basis. A monthly service charge of 1.5% compounded will be incurred per month (18% a year) on the outstanding balance until payment has been received. Depositions and trial testimony will not be given if there is an outstanding balance. The obligator is responsible for attorney's fees in the amount of 33 1/3 of any outstanding principle amount due, and any and all costs incurred in the event that this matter is turned over for collection.

Your obligation to pay our bills is not dependent on the outcome of the court case. Whether you win or lose in court, the bill will be paid in full. In the event that you do receive funds as a result of the court case, we will expect that you pay us from these funds. In the event that there are no proceeds as a result of a court case, or in the event the proceeds are less than Neurological Rehabilitation Living Centers' (NRLC) treatment and rehabilitation bills, you will be personally responsible for any unpaid amount.

Accordingly, this document will constitute a Lien Agreement. This means that Dr. Voegt and NRLC will obtain a legal lien on the proceeds of the recovery in court, if any. This Lien Agreement must be signed by you, prior to NRLC commencing treatment.

Most other rehabilitation centers, hospitals, laboratories and radiologists will not accept an agreement of this nature and, therefore, will require payment in advance for services such as surgery and specialized tests. Furthermore, any activity required by you, of a non-rehabilitation nature, including but not limited to telephone consultations, medical or legal reports, depositions, testimony, and court



appearances, will not be performed pursuant to this Lien Agreement. Such non-medical activities must be paid for in full before the service is rendered.

All payment for treatment performed under this Lien Agreement, along with interest as stated above, is due immediately upon your receipt of funds from any source in connection with the court case referenced above.

You agree to keep Dr. Voogt and NRLC advised of the progress regarding the case.

You agree to disperse collected funds in accordance with this Lien Agreement directly to NRLC and that such distribution to NRLC will receive a first priority position in the disbursement of the case net proceeds (i.e., NRLC will be first in line to be paid), except for attorney fees, costs, and expenses which will be deducted first from any gross recovery before any other disbursement.

You agree that nothing in this Lien Agreement, nor any other understanding between you, Dr. Voogt and NRLC, mandates that this treatment and rehabilitation program remains in effect. Dr. Voogt and NRLC shall have the right, consistent with professional obligations, to withdraw as the treating facility at any time, for any reason (at Dr. Voogt's and NRLC's discretion) and with thirty (30) days written notice.

You agree that by signing this Lien Agreement that it is expected that Dr. Voogt and NRLC shall prepare confidential documents relating to the client's medical condition and shall discuss the medical condition with others in connection with the case, and to permit and encourage such disclosure (in accordance with all federal, state, and local laws and regulations).

By signing the Lien Agreement, you are agreeing to the terms recited above.

X Pamela Metheny
Accepted and Approved-Guardians of Cody Metheny

Robert Viner
2/7/14