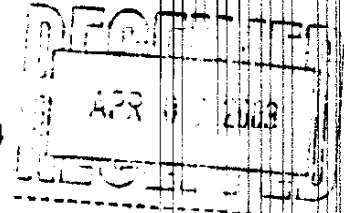


BEFORE THE MONTANA
MEDICAL-LEGAL PANEL

RICHARD & MALLIE ZICKEFOOSE,)

Claim No. 0334



Claimants,)

ORDER SETTING HEARING

vs.)

TLC LASER EYE CENTERS,)
ET AL.,)

Health Care)
Providers.)

IT IS HEREBY ORDERED that the above-entitled claim be heard before the Panel on *Wednesday, July 30, 2003*, at 10:00 a.m., of said day at the Red Lion Colonial Inn, 2301 Colonial Drive, Helena, Montana.

Any requests for a change of this hearing date **must** be in writing and be received for consideration **within 20 days** of below entered date.

DATED this 3rd day of April, 2003.

A handwritten signature in cursive script that reads "Kathleen Whitehead".

ASSISTANT DIRECTOR OF PANEL

Copy to:

Larry G. Grubbs, Esq.
Joseph E. Darrah, Esq.
TLC Laser Eye Centers

David A. Boes, M.D.
Mark A. Kontos, M.D.

POSTED

Handwritten initials, possibly "PA" or "JD", in dark ink.

APPLICATION FOR REVIEW OF CLAIM

TO: Director, Montana Medical-Legal Panel
2021 Eleventh Avenue, Suite 1
Helena, MT 59601

1. INFORMATION AS TO PARTIES:

A. CLAIMANTS:

Name: *Richard Zickefoose and Mallie Zickefoose(wife)*
Address: *P.O. Box 2841*
Cody, Wyoming 82414
Telephone: *(307) 587-3945*

Status of Claimants (check one): Patient Other
Patient's Name If Different From Claimant:

B. CLAIMANTS' LEGAL COUNSEL:

Larry G. Grubbs
Lynaugh, Fitzgerald,
Eiselein & Grubbs
225 N. 23rd Street
P. O. Box 1729
Billings, Montana 59103
(406) 252-3461

Joseph E. Darrah
DARRAH & DARRAH, PC
254 East Second Street
Powell, Wyoming 82435
(307) 754-2254

C. HEALTH CARE PROVIDERS AGAINST WHOM CLAIM IS MADE: This claim is made against eight (8) Health Care Providers, plus several "John Does" whose true names are unknown (see attached separate listing):

1. Name: *TLC The Laser Center (Big Sky) Inc.* Tel: *(406) 651-0202*
Address: *2001 Rosebud Drive, Suite A, Billings, Montana 59102*

2. Name: *TLC Billings* Telephone: *(406) 651-0202*
Address: *2001 Rosebud Drive, Suite A, Billings, Montana 59102*

3. Name: *TLC Laser Eye Centers* Telephone: *(406) 651-0202*
Address: *2001 Rosebud Drive, Suite A, Billings, Montana 59102*

(If additional parties are involved, please attach a separate listing of their Names, Addresses, and Telephone Numbers under this category designation.)

D. OTHER NECESSARY AND PROPER PARTIES NOT DESIGNATED HEALTH CARE PROVIDERS: There are seven (7) other parties who are necessary or proper parties for any court action which might subsequently arise out of the same factual circumstances as set forth in this application: (See attached separate listing, including "John Does")

(If additional parties are involved, please attach a separate listing of their Names under this category designation.)

C. ADDITIONAL HEALTH CARE PROVIDERS AGAINST WHOM CLAIM IS MADE:

4. Name: *TLC Big Sky Laser Center, Inc.* Telephone: (406) 651-0202
Address: 2001 Rosebud Drive, Billings, Montana 59102
5. Name: *David Boes, M.D.* Telephone: (406) 651-0202
Address: 2001 Rosebud Drive, Billings, Montana 59102
6. Name: *Mark Kontos, M.D.* Telephone: (406) 651-0202
Address: 2001 Rosebud Drive, Billings, Montana 59102
7. Name: "TLC" and/or TLC Laser Eye Centers
Address: Nationwide
8. Name: *TLC The Laser Center Inc.* Telephone: (406) 651-0202
Address: 2001 Rosebud Drive, Billings, Montana 59102
9. Name: *John Does I through X*, individuals or entities whose true names, capacities, and whereabouts are unknown at this time.

D. OTHER NECESSARY AND PROPER PARTIES NOT DESIGNATED HEALTH CARE PROVIDERS:

1. Name: *TLC The Laser Center (Big Sky) Inc.* Tel: (406) 651-0202
Address: 2001 Rosebud Drive, Suite A, Billings, Montana 59102
2. Name: *TLC Billings* Telephone: (406) 651-0202
Address: 2001 Rosebud Drive, Suite A, Billings, Montana 59102
3. Name: *TLC Laser Eye Centers* Telephone: (406) 651-0202
Address: 2001 Rosebud Drive, Suite A, Billings, Montana 59102
4. Name: *TLC Big Sky Laser Center, Inc.* Telephone: (406) 651-0202
Address: 2001 Rosebud Drive, Billings, Montana 59102
5. Name: "TLC" and/or TLC Laser Eye Centers
Address: Nationwide
6. Name: *TLC The Laser Center Inc.* Telephone: (406) 651-0202
Address: 2001 Rosebud Drive, Billings, Montana 59102
7. Name: *John Does I through X*, individuals or entities whose true names, capacities, and whereabouts are unknown at this time.

2. INFORMATION AS TO CLAIM.

A. SEPARATE SPECIFIC ACCOUNT OF CLAIM: On a separate sheet of paper please set out in reasonable detail:

1. The elements of the health care provider's conduct (either act or omissions or both) which are believed to constitute a claim of malpractice
2. The places and dates the acts or omissions occurred;
3. The names and addresses of all physicians, hospitals, or other health care providers having contact with the patient relative to the incident or incidents in question, including health care providers not named as parties to the claim, specifying whether such health care providers are parties to the claim or mere individuals or entities having had contact with the patient relative to the incident;
4. The names and addresses of all other witnesses to the incident in question.

B. CLAIM INFORMATION: For Panel purposes, even if the following information is provided in your separate specific account of the claim, please indicate as to the primary incident:

1. Date of Occurrence of the Incident: 3/24/00
2. Date of Discovery of Incident by Patient: After 3/24/00
3. Place of Incident:
 - (a) County: Yellowstone
 - (b) Location (check one):
 - (1) Doctor's Office
 - (2) Hospital
 - (3) Other (Please specify: _____)

3. AUTHORIZATION TO RELEASE INFORMATION: Please have the claimant sign an return (in duplicate) a consent form (FORM B) for each health care provider named in the claim as a party to the claim or named as otherwise having had contact with the patient relative to the incident even if not named as a party to the claim.

THE UNDERSIGNED, AS CLAIMANT CLAIMANTS' ATTORNEY, REQUEST CONSIDERATION OF THE ABOVE CLAIM, INCLUDING ALL ATTACHED MATERIALS, BY THE MONTANA MEDICAL LEGAL PANEL, IN ACCORDANCE WITH MCA 27-6-101, ET. SEQ., THE MONTANA MEDICAL LEGAL PANEL ACT.

DATE: 3/20/2003  (Signed Name)
Larry C. Grubbs, Attorney for Claimants

**ATTACHMENT TO APPLICATION FOR REVIEW OF CLAIM
SUBMITTED TO THE MONTANA MEDICAL LEGAL PANEL
BY RICHARD ZICKEFOOSE**

Richard Zickefoose and his wife, Mallie, are long-time residents of Cody, Wyoming. Prior to the vision problems he acquired as a result of the treatment in question, Mr. Zickefoose made his living as an artist. His work involved the creation of intricately detailed works of art, which required good vision. The procedures in question have caused diminished vision and, consequently, diminished his abilities to earn a living as an artist. The malpractice complained of herein has injured Mr. Zickefoose's eyes and permanently damaged his vision, caused him to incur substantial health care expenses, diminished the quality of his life, and caused other economic and non-economic damage and harm, past and future.

David Boes, M.D., and agent or employee of the TLC entities, performed a LASIK procedure on Mr. Zickefoose's eyes at TLC Laser Eye Center in Billings, Montana, on March 24, 2000. Prior to the surgery, Dr. Boes assured Mr. Zickefoose that he was a good candidate for this surgery despite his need for strong correction and the fact that he was unable to wear contacts in the past due to dry eyes. Dr. Boes further advised Mr. Zickefoose that in light of the strong correction his eyes required, Dr. Boes would do the procedure in a manner to get the correction close to where it should be, and that enhancement procedures would then be performed three months later in order to "fine tune" the corrections. Dr. Boes further advised and recommended that he would perform the procedure in a way that would result in "monovision," meaning that one of Mr. Zickefoose's eyes would be corrected to facilitate near viewing, while the other would be corrected to facilitate distance vision. Dr. Boes represented that if the "monovision" didn't work out, a procedure could be performed so that the left and right eyes would both be corrected for distance vision.

As the records to be gathered by the Panel will reveal, the surgery did not go well, and resulted in injury to the eyes, blurry vision, and other long-term and continuing problems. From there, a long, confusing, and expensive course of examinations and treatments by TLC and various other health care practitioners ensued.

There was no post-operative surgical follow-up by the surgeon for almost four months. In the interim, Mr. Zickefoose's Cody, Wyoming, optometrist, Dr. Richard Jones, a "Laser Vision Correction Referral Center" and the "Comanaging Doctor" for TLC, recommended to Mr. Zickefoose that the upcoming enhancement procedures should be done in a manner to achieve near vision in both eyes.

On July 14, 2000, Mr. Zickefoose arrived at TLC for his enhancement procedures. However, Dr. Boes did not attend. Mark Kontos, M.D., another agent or employee of the TLC entities, appeared and inquired as to how Mr. Zickefoose liked his "new eyes." He answered honestly, telling Dr. Kontos that he did not like them, that he had been unable to work effectively for almost four months, and that the situation was driving him crazy. Dr. Kontos told Mr. Zickefoose that he did not want him bad-mouthing his clinic. After examining Mr. Zickefoose's eyes, Dr. Kontos advised that both eyes should be corrected for distance vision rather than near vision. In due course, Mr. Zickefoose advised of his decision to follow Dr. Jones' recommendation regarding near vision correction for both eyes. Dr. Kontos thereupon proceeded with a "LASIK enhancement" procedure, but on the right eye only.

Mr. Zickefoose continued to experience visual difficulties. On August 30, 2000, he was examined by Dr. Greg Toland, an optometrist practicing in Powell, Wyoming. Like Dr. Kontos, Dr. Toland advised that Mr. Zickefoose should have both eyes corrected for distance vision.

On August 31 or September 1, 2000, Mr. Zickefoose returned to TLC for further enhancement procedures. A woman, whose name is unknown ("Dr. Doe"), who may or may not be a doctor, met with him. "Dr. Doe" advised of an intention to "fine tune" his left eye for close vision. Mr. Zickefoose indicated that per recommendations he sought to have his left eye corrected for distance vision. He told her of having obtained a second

opinion from Dr. Toland. Some hubbub ensued. "Dr. Doe" insisted that Dr. Jones was right, and that he should have his left eye corrected for close viewing. This was the opposite of what Dr. Kontos had recommended just a few weeks before. Without telling Mr. Zickefoose that she would do so, "Dr. Doe" telephoned Dr. Jones. Mr. Zickefoose was then put on the telephone with Dr. Jones, who recommended that Mr. Zickefoose have his left eye corrected for near viewing. After completing this telephone conversation with Dr. Jones, Mr. Zickefoose was asked by "Dr. Doe" what he had decided. He replied that he would follow their recommendation and go with the near vision correction. "Dr. Doe" left. Then, Dr. Boes appeared.

Dr. Boes wanted to know why Mr. Zickefoose had gotten a second opinion. Dr. Boes advised that he agreed with Dr. Jones, and recommended that Mr. Zickefoose have his left eye corrected for near viewing. Dr. Boes also, advised, however, that he would not go forward with any enhancement procedure because Mr. Zickefoose was "too undecided" as to the type of enhancement to be done.

In light of Dr. Boes' and TLC's unwillingness to treat him, Mr. Zickefoose was left with no alternative but to consult other health care providers in his ongoing effort to regain vision adequate for him to resume earning a living and enjoying his life. As will be shown by the records to be gathered by the Panel, Mr. Zickefoose consulted a Cody doctor, Dr. Cole (also a TLC "referring doctor"), and Dr. Ramsay of Rock Springs, Wyoming. He also consulted an attorney, Joseph Darrah of Powell, Wyoming, to review the situation and advise him.

Mr. Zickefoose attempted to arrange for the completion of the enhancement procedures by TLC, both directly and through Dr. Cole, who made multiple contacts to TLC. Despite these contacts, TLC would not schedule it, and indeed went so far as to deny having been contacted by Dr. Cole in this regard. Ultimately, in early December of 2000, TLC declined to treat Mr. Zickefoose further, and abandoned him as a patient, because he had retained the services of an attorney.

As will be detailed in the records, Mr. Zickefoose eventually was able to find a surgeon in Houston, Texas, Jack Holladay, M.D., who was willing to try to help him even though he had gotten his initial treatment from TLC.

During the course of those months, TLC personnel had represented to Mr. Zickefoose that he had had "a textbook perfect" result and needed no further treatment. As indicated, post-operatively TLC recommended that Mr. Zickefoose have additional treatment to achieve distance vision in both eyes, then recommended that he should have both eyes corrected to achieve near vision. Then, they abandoned him.

Mr. Zickefoose's vision remains poor, despite his best efforts and incurring of substantial expenses toward corrective health care. It is claimed that this poor vision and consequent economic and non-economic damages were the direct result of the procedures and recommendations by Dr. Boes, Dr. Kontos, the TLC entities, and/or other TLC personnel. Mr. Zickefoose believes and claims that his poor vision and the resulting past and future economic and non-economic damages were caused by the negligent care and treatment below applicable standards of care on the parts of Dr. Boes, Dr. Kontos, the myriad TLC entities, and/or their agents and employees. Without waiving the generality of the foregoing allegations, Mr. Zickefoose believes and claims that, among other things, such malpractice includes (but is not necessarily limited to) the Health Care Providers' negligently assessing Mr. Zickefoose as a candidate for LASIK; negligently advising Mr. Zickefoose that he was a good candidate for LASIK procedures; negligently recommending that Mr. Zickefoose undergo LASIK; negligently performing LASIK procedures, and failing to provide timely and appropriate post-operative care; negligently misinforming and advising Mr. Zickefoose with respect to the advisability and outcome of his procedures and follow-up procedures; negligently advising Mr. Zickefoose that he did not need follow-up treatment and misrepresenting that he had had a "textbook perfect" result; failing to obtain informed consent and using misleading and coercive tactics to manipulate their patient's health care decisions; and, abandoning Mr. Zickefoose as a patient simply because he sought the assistance and advice of an attorney, thereby forcing him to endure further hardship and difficulties.

PARTIES TO THIS PROCEEDING:

David Boes, M.D.
Mark Kontos, M.D.
TLC
TLC Billings
TLC Laser Eye Centers
TLC The Laser Center Inc.
TLC The Laser Center (Big Sky) Inc.
TLC Big Sky Laser Center, Inc.
John Does I-X (true names and capacities unknown)
2001 Rosebud Drive, Suite A
Billings, Montana 59102
(406) 651-0202

NON-PARTIES TO THIS PROCEEDING:

Richard D. Jones, O.D.
1708 Stampede Avenue
Cody, Wyoming 82414
(307) 587-2404

Barry P. Welch, M.D.
721 Sheridan Avenue
Cody, Wyoming 82414
(307) 587-5538

Terry J. Cole, O.D.
1531 Blcistein Avenue
Cody, Wyoming 82414
(307) 587-4206

Greg Toland, O.D.
255 West 3rd
Powell, Wyoming 82435
(307) 754-7151

Coby Ramsey, M.D.
3000 College Drive, Suite B
Rock Springs, Wyoming 82901
(307) 382-3753

Jack T. Holladay, M.D., M.S.E.E., F.A.C.S.
Holladay LASIK Institute
Bellaire Medical Plaza
5420 Dashwood Drive, Suite 207
Houston, TX 77081
(713) 668-7337

VA Salt Lake City Health Care System
500 Foothill Drive
Salt Lake City, Utah 84148
(801) 582-1565

Sheridan VA Medical Center
Optometry Clinic
1898 Fort Road
Sheridan, Wyoming 82801
(307) 672-3473

Cheyenne VA Medical Center
2360 East Pershing Blvd
Cheyenne, Wyoming 82001
(307) 778-7550

OTHER WITNESSES TO INCIDENTS:

Unknown at this time.

--END OF ATTACHMENT--

MONTANA MEDICAL LEGAL PANEL

CONSENT

TO: TLC Laser Eye Center - David Boes, M.D., Mark Kontos, M.D.

(Health Care Provider)

2001 Rosebud Drive, Suite A

Billings, Montana 59102

(Address)

(City/State)

Dates of Care Rendered All records

(ONLY RELEASE RECORD WITHIN THE DATES OF TREATMENT INDICATED ABOVE)

Name of Patient: Richard Zickefoose

Also known as: N/A

Date of Birth: [REDACTED]

Social Security Number: [REDACTED]

Patient's Address: P.O. Box 2841
Cody, Wyoming 82414

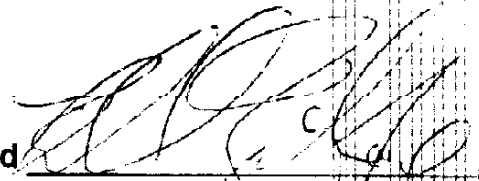
The undersigned hereby authorizes the *Montana Medical Legal Panel* to obtain access to all medical, dental, podiatric, and hospital records, x-rays and other health care information pertaining to the care and treatment of the above-named patient, whether generated by you or by any source, during the periods indicated above. All such health care information in your possession or control may be released to the *Montana Medical Legal Panel* for its consideration of the claim of the undersigned against a health care provider, pending before the Panel. The undersigned directs and requests the above-named health care provider to deliver any and all of such health care information or true and correct copies thereof to the Director of the *Montana Medical Legal Panel*, or his authorized agent. This release is subject to revocation at any time. The revocation is effective from the time it is communicated to the health care provider. If not revoked, this release terminates in accordance with MCA 50-16-527.

The purpose of obtaining the above records and x-rays is for their dissemination by the authorized staff of the MMLP to the attorney and health care provider panelists selected by the Panel to hear the claim of the claimant in a pending panel case under MCA Section 27-6-101, et. seq, and the dissemination of those records and x-rays to the attorneys for the parties to that claim, or to the parties where those parties are not represented by an attorney, for use by those individuals receiving such records and x-rays only in connection with the panel claim.

The undersigned waives any privilege or confidentiality as to the contents of those records for purposes of consideration of the claim by the Panel, including the above distribution. Nothing in this consent shall in any way be construed as waiving that privilege or confidentiality for any other purpose or in any other context, in or out of court, and the signing of this consent is not a waiver of any rights a patient has under state or federal constitutional provisions, statutes or regulations, the Montana Rules of Evidence, or common law, and this consent does not authorize the Panel or any of its authorized agents to discuss the records, x-rays or the patient's health with the person to whom this consent is directed or with the person creating such records.

Dated this 14th **day of** March, **2003**

Signed



Patient/Claimant