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Kyle Miller v. Larry D. Lofthouse : Reply Brief

Utah Court of Appeals

David H. Epperson; Hanson, Epperson & Smith; Attorneys for Respondent.
John S. Adams; Robert M. Taylor; Taylor, Ennenga, Adams & Lowe; Attorneys or Appellant.

IN THE COURT OF APPEALS

OF THE STATE OF UTAH

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KYLE MILLER, Plaintiff and Appellant, v. LARRY D. LOFTHOUSE, D.D.S. Defendant and Respondent.	**Court of Appeals** **No. 880545-CA** 14(b)

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APPELLANT'S REPLY BRIEF

Appeal from the Third Judicial District Court of Salt Lake County
the Honorable Richard H. Moffat, Judge, Presiding

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IN THE COURT OF APPEALS

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KYLE MILLER,	:	Supreme Court
	:	No. 880311
Plaintiff and Appellant,	:	
	:	**Court of Appeals**
v.	:	**No. 880545-CA**
	:	14(b)
LARRY D. LOFTHOUSE, D.D.S.	:	
	:	District Court
Defendant and Respondent.	:	No. C87-6056

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APPELLANT'S REPLY BRIEF

Plaintiff/Appellant, Kyle Miller ("Plaintiff" herein) respectfully submits this Reply Brief to respond to the new factual and legal issues raised by the Respondent's Brief.

SUMMARY OF ARGUMENTS

The Defendant failed to satisfy the requirements of Rule 56 of the Utah Rules of Civil Procedure, and, therefore, was not entitled to summary judgment upon the motion made and pleadings, together with affidavits, in the file. The Defendant attempts, in Respondent's Brief, to advance an altered standard and to raise inaccurate statements of facts. There are genuine issues as to material fact appropriate for trial.

If the evidence on the record from Plaintiff, as is argued by Defendant, was insufficient for the purpose of showing a material question of fact concerning the medical malpractice of Defendant, for lack of adequate expert testimony, the court below, under Rule 56(f) of the Utah Rules of Civil Procedure, should have granted additional time to Plaintiff to submit such expert testimony.

POINTS IN REPLY, AND ARGUMENT

The arguments of the Defendant, although persuasively presented, do not ring true because they are slightly, but significantly skewed from the established legal standard and from the evidence which was before the trial court.

THE LEGAL STANDARD.

On page 10 of Respondent's Brief, Defendant inaccurately presumes that "[s]ummary judgment is the time for parties to establish that they can prove their case at trial." Defendant then argues further that Plaintiff Miller had time to submit, but failed to submit, expert evidence concerning the alleged malpractice.

The time which Plaintiff had prior to the hearing is not the foundation upon which support for an order for summary judgment can be built. Those arguments would be appropriate in connection with a motion to dismiss Plaintiff's Complaint for

failure to prosecute. (The need for extra time is an issue, however, as provided for by Rule 56(f) of the Utah Rules of Civil Procedure. The issue is argued in Appellant's Brief and referred to below.) Further, there is no admission, affidavit or other evidence in the record concerning Plaintiff's use of time upon which such an issue could be judiciously resolved. Notwithstanding that point, however, Plaintiff respectfully suggests that the Court take judicial notice of the fact that it is sometimes difficult to arrange for the testimony of experts before discovery is complete.

The long-standing standard for a motion for summary judgment is not "to establish that a case can be proven"; but rather is for the movant to show the court, based upon the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, that there is no genuine issue as to any material fact, and that the law, as applied to the established facts, leads to the conclusion that the moving party is entitled to judgment as a matter of law. See Robinson v. Intermountain Health Care 740 P.2d. 262, at 263 (Utah App. 1987); Rule 56(c), Utah Rules of Civil Procedure The difference is important. A party opposing a motion to summary judgment need not prove their case at the time of the summary

proceeding, but instead need only show that one or more material questions of fact exist (or that for any other reason the moving party is not entitled to the judgment).

THERE ARE MATERIAL QUESTIONS OF FACT.

A. In Respondent's Brief, Defendant attempts to demonstrate by his recitation of facts that no question of material fact exists. Defendant, however, relies upon assertions which are not fully established by the affidavits or other evidence before the court. Further, Defendant's own evidence raises questions of fact.

An example relates to the issue of Defendant's negligence after the injury. In paragraph 6 of Respondent's Statement of Facts, Defendant states that Plaintiff was requested to return in six (6) months, because numbness in the mouth region " *** most often resolves spontaneously within six (6) months ***". And, in paragraph 7 of that section of his brief, facts are asserted concerning a follow-up visit by Plaintiff to Defendant and advice allegedly given by Dr. Lofthouse. However, there is no evidence in the record, by affidavit or otherwise, as to the visits alleged or the reasons which Defendant may have chosen for his alleged behavior. Further, the Affidavit of Dr. Israelsen, for Defendant, makes a subtly, but strikingly different statement concerning his opinion regarding such

numbness. In paragraph 10 of his Affidavit, Dr. Israelsen cautiously stated that numbness resulting from injury or trauma to the lingual nerve

> *** often repairs naturally with sensation returning to the affected area within six (6) months. However, permanent numbness can occur, which is considered a bad result, ***

Defendant's exaggeration in his brief, that such numbness <u>most</u> often resolves itself, draws attention to the unresolved material question of fact concerning Plaintiff's allegation that Defendant negligently treated him after damaging the nerve.

Careful scrutiny of a key portion of Dr. Israelsen's Affidavit reveals another failure to establish a material fact. In paragraph 14e) of Defendant's Statement of Facts, Defendant asserts that Dr. Israelsen formed the opinion that such numbness " *** is a result that can occur without negligence on the part of the dentist in the extraction of an impacted wisdom tooth; ***." An investigation of the sworn statement by Dr. Israelsen, in comparison with Defendant's quoted characterization indicates that the witness took a more cautious approach. See paragraph 10 of the Affidavit of Dr. Israelsen, pages 3 and 4, where Dr. Israelsen states:

> *** permanent numbness can occur, which is considered a bad result, but not a result <u>that in and of itself is attributable</u> to any negligence on the part of the dentist. [emphasis supplied]

See also paragraph 12 of that Affidavit, on page 4.

The fact that it is possible for such numbness to occur without negligence gives rise to a reasonable inference (in the light most favorable to Plaintiff) that it is at least equally possible that it would occur as a result of negligence. Under scrutiny, the statement raises doubts, which must be construed in favor of the party opposing summary judgment. Robinson, **supra.** at 263.

It is also important to observe that Dr. Israelsen's carefully worded testimony does not clearly state a conclusion, but rather acknowledges one of an apparent set of possibilities. Further, the acknowledgment is in the abstract, and is made without specific reference to Mr. Miller's mouth; because Dr. Israelsen made no examination of Mr. Miller, or of records concerning the condition of Mr. Miller's mouth, after the operation.

The court below should have determined, therefore, without reference to opposing affidavits by Plaintiff, that Defendant failed to carry its burden.

B. Plaintiff, in Appellant's Brief, showed that the evidence before the court established that questions of material fact do exist. The letter of Dr. Austin, at least when it is reviewed in the light most favorable to Plaintiff, establishes

factual issues sufficient that the court below should have denied Defendant's Motion for Summary Judgment. See the argument on pages 7-11 of Appellant's Brief.

Respondent's Brief only mentions that letter to argue that Dr. Austin does not establish plaintiff's case. Whether it did, or did not, is not the issue. It is elementary that a summary proceeding is to determine if an issue of fact exists, not to decide one.

ADDITIONAL TIME TO SECURE AND SUBMIT AFFIDAVITS.

If the letter and affidavit, considered in the light most favorable to Plaintiff, were not sufficient to raise a material question of fact; then they were at least sufficient (together with counsel's request made in open court) to give notice that such testimony was obtainable. There is no requirement that a separate affidavit or written motion be filed to raise the issue. The court below, therefore, should have granted Plaintiff additional time to present such an affidavit under the provisions of Rule 56(f).

Defendant asserts and argues, concerning this issue, that Plaintiff made no request for additional time. See the Statement of Facts in Respondent's Brief, paragraph 12. It is to be noted, however, that the assertion made therein is inconsistent with the carefully sworn testimony of Defendant's attorney. A comparison of the affidavits of attorney Reed Brown

and attorney David Epperson, attached to the respective Briefs, reveals no contradiction between them. Mr. Epperson testified clearly that no requests were made by Mr. Brown prior to the hearing. [Epperson Affidavit, paragraph 6.] Mr. Brown stated that the request for " *** an additional thirty (30) days to conduct discovery and/or otherwise obtain expert testimony in opposition to the Affidavit submitted by Defendant ***" was made at the hearing; and that the request was discussed with the Court, but denied. [Brown Affidavit, paragraph 4.] Plaintiff submits that the trial court erred by refusing this request.

ROBINSON PRECEDENT.

It is important to note that the Defendant relies strongly upon statements made by the court in the Robinson opinion to establish his arguments. As indicated in Appellant's Brief, Plaintiff also finds value in that opinion.

It is of significant importance that, in Robinson, the trial court granted additional time to the Plaintiff to obtain an affidavit from an expert witness. [Robinson, **supra.**, P. 264.] In this matter the affidavits and pleadings show that medical expert testimony is available to establish Plaintiff's negligence claims, and, thereby, a material question of fact. However, if the court below did not agree, Plaintiff should have been given the same opportunity, in equity, under law, and specifically pursuant to Rule 56(f), to do so.

It is significant, however, to note that the issues in Robinson are to be distinguished from those in the case at bar. Although there is no substitute for a careful review of the opinion, the Court's conclusion reveals the Robinson context and the relevant opinion of the Court:

> We agree that trial courts should be extremely cautious in granting summary judgment for a defendant on the basis that plaintiff has failed to secure expert testimony to support a medical negligence action. **Chiero v. Chicago Osteopathic Hosp.**, [citation omitted]. But, appellant contends that a plaintiff suing on a theory of res ipsa loquitur is always is entitled to a trial on the merits, so that summary judgment is always inappropriate. Such an argument miscomprehends the purpose and application of the doctrine, as well as the pretrial responsibilities of a plaintiff faced with a summary judgment motion. In this regard, we concur in the reasoning of the appellate court quoted in **Chiero**:
>
> > We agree that if there is any sound basis to do so, a trial court should reject summary judgment in this type of case. Where, however, the record indicates that Plaintiff has [had] every opportunity to establish his case and has failed to demonstrate that he could show negligent acts or omissions . . . [on the part of the] defendant by expert medical testimony, where the issue is clearly one which cannot be determined by laymen alone, summary judgment could be allowed.
>
> [citations omitted].

[Robinson, **Supra**, at p. 267.]

Plaintiff submits that Miller has not had every opportunity to establish or demonstrate to the trial court that he could show negligent acts or omissions on the part of the Defendant by expert medical testimony.

CONCLUSION

The Defendant did not carry his burden in relation to his motion for summary judgment, in that he failed to establish that there is no genuine issue of material fact and that he is entitled to judgment, based upon the facts before the court, as a matter of law. In fact, scrutiny of the evidence submitted by the Defendant, in the light most favorable to Plaintiff, as is required for the benefit of the opposing party in a motion for summary judgment, indicates that questions of fact were raised, by Defendant, alone. Further, the evidence before the trial court, including the opinion of Dr. Austin, established questions of material fact.

If the trial court found that the submission of expert testimony was insufficient, then, based upon the Affidavit of Kyle Miller, and the request of his counsel at the hearing, additional time under Rule 56(f) of the Utah Rules of Civil Procedure should have been granted to Plaintiff to allow him an opportunity to submit that expert testimony for consideration.

The court, in either case, should not have granted the Defendant's Motion for Summary Judgment. Therefore, the said judgment should be reversed.

RESPECTFULLY SUBMITTED this 18 day of May, 1989.

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CERTIFICATE OF MAILING

I hereby certify that four true and correct copies of the foregoing APPELLANT'S REPLY BRIEF were mailed, postage prepaid, to the following on the 19th day of May, 1989.

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