

1988

Kyle Miller v. Larry D. Lofthouse : Brief of Respondent

Utah Court of Appeals

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David H. Epperson; Hanson, Epperson & Smith; Attorneys for Respondent.

John S. Adams; Robert M. Taylor; Taylor, Ennenga, Adams & Lowe; Attorneys or Appellant.

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880545

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.

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Court of Appeals

No. 880545-CA

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RESPONDENT'S BRIEF

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

-----oooOooo-----

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IN THE COURT OF APPEALS

OF THE STATE OF UTAH

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

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RESPONDENT'S BRIEF

STATEMENT OF ISSUES PRESENTED ON APPEAL

The sole issue on Appeal is whether the Honorable Richard H. Moffat, Judge, committed error in granting Summary Judgment in favor of Larry D. Lofthouse, D.D.S., by finding that Appellant Miller had established no genuine issue as to any material fact under the following circumstances:

A. Appellant failed to file any Affidavit of a medical expert to refute or counter the Affidavit of Dr. L. Douglas Israelsen in support of Dr. Lofthouse's Motion for Summary Judgment; and where Dr. Israelsen's Affidavit established that Respondent Lofthouse complied with all appropriate standards of medical care and disclosure in the treatment of Appellant.

B. That the Summary Judgment hearing of June 3, 1988 was approximately nine months after the Complaint filing of September 11, 1987, and was approximately two and one-half years after the first Notice of Intent to Commence a Medical Malpractice Action was filed by Mr. Miller on November 26, 1985.

C. That the Summary Judgment hearing of June 3, 1988 was five weeks after the April 29, 1988 filing of the Motion for Summary Judgment of Larry D. Lofthouse, D.D.S.

D. Where Appellant, at the Summary Judgment hearing, relied solely upon his own Affidavit which never requested that Judge Moffat "refuse the application for judgment" or that he grant "a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had" as required by Rule 56(f) of the Utah Rules of Civil Procedure, and where the Affidavit of Appellant Miller was found by the Court to create no genuine issue as to any material fact.

STATEMENT OF FACTS

1. Respondent Larry D. Lofthouse, D.D.S., from 1970 and up to the present time, has been licensed to practice and has practiced general dentistry within the State of Utah. His office is located at 2414 West 7800 South in West Jordan, Utah 80484.

2. Larry D. Lofthouse, D.D.S. graduated from a fully accredited, four year, dental school, the St. Louis, Missouri Dental School, in 1970.

3. Larry D. Lofthouse, D.D.S. first saw the Petitioner, Kyle Miller, on June 22, 1978. Mr. Miller gave a history of having a former dentist by the name of Killpack who had last treated him in 1975.

4. On May 28, 1981 Dr. Lofthouse extracted wisdom tooth No. 1, and on April 7, 1983 he extracted wisdom tooth No. 16. Both of these upper extractions went well and are not at issue in the case.

5. On April 20, 1983 wisdom teeth 17 and 32, the lower wisdom teeth, were extracted. The Complaint of Kyle Miller alleges in paragraph 13, "On April 20, 1983, defendant proceeded to extract tooth No. 17, but in doing so carelessly and negligently injured the lingual nerve."

6. On April 25, 1983, Mr. Miller was seen in follow-up by Dr. Lofthouse and was prescribed pain medication. The anterior two-thirds of the left side of the patient's tongue was noted to have sensory loss (not motor loss) at that time. On April 27, 1983 the sutures were removed and a pack was placed for dry socket. Because numbness or paresthesia in the mouth region following a wisdom tooth extraction most often resolves

spontaneously within six months, the patient was requested to return in October of 1983 for evaluation.

7. Dr. Lofthouse next saw Mr. Miller on October 10, 1983, six months post-surgery. the patient was still complaining of sensory loss or numbness to the anterior two-thirds of the left side of his tongue. Dr. Lofthouse advised Mr. Miller that it could take one to two years for the numbness to resolve, if at all. Dr. Lofthouse suggested the patient consult with Dr. Roger Adams, an oral surgeon, for a second opinion. Mr. Miller never returned to Dr. Lofthouse subsequent to the six month check-up of October 10, 1983.

8. On November 26, 1985 a Notice of Intent to Commence an Action was filed by attorney Robert W. Hughes on behalf of Kyle Miller.

On March 30, 1987 a second Request for Prelitigation Hearing was filed by attorney C. Reed Brown on behalf of Kyle Miller. (Par. 8, Plaintiff's Complaint). A prelitigation hearing was held on August 12, 1987. (Par. 10, Plaintiff's Complaint).

9. A Complaint was filed by Kyle Miller in the Salt Lake County District Court in September of 1987. (See Complaint and Par. 4(h) of Amended Docketing Statement of Appellant).

10. An Answer was filed to the Complaint by Dr. Larry D. Lofthouse on September 29, 1987. Discovery for Dr. Lofthouse

continued thereafter, including the obtaining of Interrogatory Answers from Kyle Miller on November 30, 1987.

11. On April 29, 1988 a Motion for Summary Judgment was filed by Dr. Larry D. Lofthouse. That Motion was heard five weeks later on June 3, 1988 by Judge Richard H. Moffat of the Salt Lake County District Court. That hearing was approximately nine months after the Complaint filing of September 11, 1987, and was approximately two and one-half years after the first Notice of Intent to Commence an Action filing of November 26, 1985.

12. Counsel for Kyle Miller, in paragraph 4(i) of the Amended Docketing Statement, alleges, "In June of 1988, after little discovery and pursuant to Motion made by Respondent, the trial court granted summary judgment in favor of Respondent, dismissing Appellant's Complaint in its entirety." However, counsel for Kyle Miller, at the hearing of June 3, 1988 before Judge Richard H. Moffat, never at any time complained of lack of opportunity for discovery and never filed nor requested orally, pursuant to Rule 56(f), a continuance "to permit affidavits to be obtained or depositions to be taken, or discovery to be had..." See Affidavit of David H. Epperson, Exhibit "A".

13. On April 29, 1988, five weeks before the Summary Judgment hearing before Judge Moffat, Dr. Larry D. Lofthouse filed a Memorandum in Support of Motion for Summary Judgment and

the Affidavit of L. Douglas Israelsen, D.D.S., attached hereto as Exhibit "B".

14. The Affidavit of L. Douglas Israelsen, D.D.S., in support of the Motion for Summary Judgment of Dr. Lofthouse, established that:

a) Dr. Israelsen had been licensed by the State of Utah to practice dentistry and oral surgery for more than 11 years, with an office located at 7001 South 900 East in Midvale, Utah;

b) That Dr. Israelsen obtained a Bachelor's Degree from Brigham Young University; a D.D.S. Degree from the University of Nebraska at Lincoln; and received specialized oral surgery training at the Mayo Clinic in Minnesota and Wayne State University in Detroit;

c) That he was familiar with the standards of professional care ordinarily possessed and used by dentists and oral surgeons in this and similar communities in the performance of wisdom tooth extractions in 1983, the time in question in the Complaint of Kyle Miller;

d) That he had formed an opinion on the disclosure and consent issues in this lawsuit and on the health care rendered by Dr. Lofthouse to Kyle Miller based upon a review of the entire treatment chart and x-rays, review of the pleadings, etc.;

e) That it was his opinion that injury to a lingual nerve which may cause a paresthesia is a result that can occur without negligence on the part of the dentist in the extraction of an impacted wisdom tooth; and that said numbness often repairs naturally, with sensation returning within six months, but that permanent numbness can occur without negligence on the part of the dentist;

f) That injury to a lingual nerve is a remote risk and not a substantial and significant risk, and that such a paresthesia is sufficiently remote that a dentist who extracts an impacted wisdom tooth is not expected to caution a patient about its possibility;

g) That it was his opinion that Dr. Lofthouse appropriately treated Kyle Miller in the removal of wisdom tooth 17, and in follow-up treatments, and that the x-rays showed that the extraction of tooth 17 would be within the abilities of Dr. Lofthouse as an experienced general dentist;

h) That it was his opinion that the medical care and treatment rendered by Dr. Lofthouse to Kyle Miller complied in all respects with the standards of professional care, learning, skill and treatment ordinarily possessed and used by dentists in good standing in this and similar communities in April of 1983.

15. The only pleading in opposition to the Summary Judgment Motion was an unsigned Affidavit of the Plaintiff/Petitioner, Kyle Miller, which was filed one day prior to the June 3, 1988 Summary Judgment hearing. That Affidavit, attached as Exhibit 1 to Appellant's Brief, alleges that:

a) Dr. Lofthouse never explained to Kyle Miler the risks of lingual nerve paresthesia, which is a known complication of wisdom tooth extraction;

b) That Kyle Miller never signed a consent for extraction that contained any warning about lingual nerve paresthesia;

c) That Kyle Miller was never informed by Defendant that extractions of this type are normally performed by oral surgeons and not by general dentists;

d) That Dr. Blaine Austin, by letter of January 23, 1987, stated, "It is common that most impacted wisdom teeth are removed by oral surgeons.";

e) That Kyle Miller intended "to rely at trial on the testimony of Dr. Robert L. Pekarsky to establish the breach of standard of care by the Defendant."

Kyle Miller further notes, "The Plaintiff has not obtained a written report from Dr. Pekarsky at this time, and Dr. Pekarsky's deposition has not yet been taken," but no Rule 56(f)

Motion was made nor request for additional time to conclude discovery. No Affidavit from a medical expert was produced by Petitioner to refute the Affidavit of Dr. L. Douglas Israelsen filed in support of the Summary Judgment Motion of Dr. Lofthouse.

16. On June 3, 1988 the Honorable Richard H. Moffat, Judge, after having reviewed the file pleadings, including the Motion, Memorandum of Law, and Affidavit of Dr. L. Douglas Israelsen in support of Larry D. Lofthouse, D.D.S.; and after having reviewed the Affidavit of Kyle Miller in opposition to the Summary Judgment Motion; and after having heard oral argument from the attorneys for each party, entered an Order granting the Motion for Summary Judgment of Larry D. Lofthouse, D.D.S. That Order was subsequently signed by Judge Moffat on July 7, 1988.

ARGUMENT

SUMMARY JUDGMENT WAS PROPERLY GRANTED

BY THE TRIAL COURT

A. Expert medical testimony was required to establish the standard of care in this case.

The Summary Judgment granted by Judge Richard H. Moffat in favor of Larry D. Lofthouse, D.D.S. should be summarily affirmed inasmuch as Petitioner Kyle Miller clearly failed in the lower court to establish any genuine issue of fact through expert medical testimony that either patient disclosure or the medical

treatments relating to the extraction of wisdom tooth No. 17 was in violation of any standard of care and practice.

Summary judgment is the time for parties to establish that they can prove their case at trial. In McBride v. Jones, 615 P.2d 431 (Utah 1980), the Court stated that in circumstances where the granting of a motion for summary dismissal is justified, it serves the salutary purpose of eliminating the time, trouble and expense of a trial which would be to no avail anyway. Similarly, in Reagan Outdoor Adv., Inc. v. Lundgren, 692 P.2d 776 (Utah 1984), the Utah Supreme Court stated that a major purpose of summary judgment is to avoid unnecessary trial by allowing the parties to pierce the pleadings to determine whether there is a genuine issue to present to the fact finder.

For over 30 years, the Utah Courts have consistently upheld the position that in medical malpractice actions the lack of supporting expert testimony may entitle a defendant to summary judgment as a matter of law. The landmark case which has been adhered to since 1959 in Utah is Marsh v. Pemberton, 10 U.2d 40, 247 P.2d 1108 (1959). The Court stated:

This Court has held that expert testimony is unnecessary to establish liability in malpractice cases only where the question of propriety of treatment of a patient by a physician is a matter of common knowledge of laymen, or when a physician shows a gross neglect or want of care and skill, such as

leaving medical supplies in the incision of a patient.

(Emphasis added).

In the present case, the Affidavit of Respondent's medical expert, Dr. L. Douglas Israelsen, established that a sensory nerve loss such as that complained of by Appellant can occur without negligence on the part of the dentist. And, Judge Moffat in the lower court found that the surgical extraction of a wisdom tooth was a sufficiently complex dental procedure so as to not be within the common knowledge of laymen. The standard of care for such a surgical extraction is a matter that requires expert medical testimony. In the lower court, such expert medical testimony in favor of Dr. Lofthouse's Summary Judgment Motion was supplied by L. Douglas Israelsen, D.D.S. No medical Affidavit or testimony was produced by Respondent in the lower court in opposition to such medical testimony, and Judge Moffat granted summary judgment in favor of Dr. Lofthouse as a matter of law. In Marsh v. Pemberton, Supra, the Court further stated:

In the absence of a standard of care established by expert medical testimony and some evidence showing a deviation from this standard, it must be presumed that the physician skillfully operated on and treated the plaintiff. To allow the question of negligence to be submitted to the jury without first establishing a standard of care would allow a jury to indulge in a type of speculation not generally allowed...It is seldom that a doctor's standard of care,

because it is too specialized, is known or is within the knowledge of a layman.

See also, Robinson v. Intermountain, 740 P.2d 262, 264 (Utah App. 1987); Nixdorf v. Hicken, 612 P.2d 348, 352 (Utah 1980).

These cases all stand for the position that expert medical testimony is required in a malpractice case involving a complex medical procedure such as that at issue in the present action.

B. No genuine issue of fact was established by Appellant to defeat the Summary Judgment Motion.

The specific Complaint allegations of Plaintiff against Dr. Lofthouse included the following:

* * *

13. On April 20, 1983 Defendant proceeded to extract tooth No. 17, but in doing so carelessly and negligently injured the lingual nerve.

14. As a proximate result of the negligence of Defendant, Plaintiff suffers a permanent numbness and paralysis of the left anterior two-thirds of the tongue and lack of sensation in the floor of his mouth...

* * *

17. Defendant breached his duty in that he failed to disclose to plaintiff the risks, dangers and possible consequences involved in removing a full bony impacted wisdom tooth.

* * *

22. Defendant breached his duty to Plaintiff by failing to advise Plaintiff that

his lingual nerve had been severed during the extraction process of tooth No. 17.

23. Defendant knew that Plaintiff's condition was beyond his knowledge or technical skill to treat with the likelihood of reasonable success. Defendant had a duty to disclose this to Plaintiff and to advise Plaintiff that his condition required the services of a health care provider skilled in a special branch of medical surgical science.

24. Defendant failed to refer Plaintiff for appropriate follow-up care.

Petitioner/Plaintiff Kyle Miller failed to support these complaint allegations of negligence against Dr. Lofthouse with expert medical testimony. Petitioner's failure to support his claim with competent expert testimony in the lower court is evidence that such claims were based upon mere conjecture and speculation.

In support of the Summary Judgment Motion in the lower court, Dr. Lofthouse submitted the Affidavit of L. Douglas Israelsen, D.D.S. (See Exhibit "A"). Dr. Israelsen has a D.D.S. Degree and has practiced within the Salt Lake community for more than 11 years. Dr. Israelsen is also a board certified oral and maxillofacial surgeon. The Affidavit of Dr. Israelsen was based upon his independent review of Plaintiff's medical records, x-rays, the pleadings in this action, and a review of the surgical technique utilized by Dr. Lofthouse. Dr. Israelsen's Affidavit affirmatively states the following:

* * *

9. It is my opinion, based upon the foregoing, that Larry D. Lofthouse, D.D.S. appropriately treated Kyle Miller in the removal of wisdom tooth 17 on or about April 20, 1983; and in the follow-up treatments. That the x-rays show that the extraction of Tooth 17 would be within the abilities of Dr. Lofthouse as an experienced general dentist.

10. That despite reasonable and prudent care on the part of a dentist in the extraction of an impacted wisdom tooth, injury or trauma can occur to the lingual nerve which may cause a paresthesia (numbness). Such a paresthesia often repairs naturally with sensation returning to the affected area within six months. However, permanent numbness can occur, which is considered a bad result, but not a result that in and of itself is attributable to any negligence on the part of the dentist.

11. The incidence of permanent lingual nerve injury and paresthesia as the result of the surgical extraction of a wisdom tooth constitutes a remote risk and not a substantial and significant risk; and that such a paresthesia is sufficiently remote that a dentist who extracts an impacted wisdom tooth is not expected to caution a patient about its possibility.

12. That the paresthesia complained of by Kyle Miller is a result and risk that can occur to a patient despite reasonable and prudent care by the treating dentist.

13. That from my total review from all information outlined herein, and based upon my experience and expertise as a dentist and oral surgeon, that it is my opinion that the medical care and treatment rendered by Larry D. Lofthouse, D.D.S. to Kyle Miller complied in all respects with the standards of

professional care, learning, skill and treatment ordinarily possessed and used by dentists in good standing in this and similar communities in April of 1983.

(Emphasis added).

There was no evidence before the lower court which contradicted the testimony of Dr. Israelsen, or otherwise established that Dr. Lofthouse's negligence caused the plaintiff's injuries. A case precisely on point is Robinson v. Intermountain Health Care, Inc., 740 P.2d 262 (Ct. of App. of Utah, 1987). In that case a medical malpractice action was brought against the hospital for injuries from a severe infection allegedly introduced by injection. The Third District Court entered summary judgment for the hospital and an appeal was taken. The Court of Appeals, Jackson, Judge, held that the doctrine of res ipsa loquitur was not applicable to that case and that the hospital was not liable absent expert testimony contradicting the hospital's expert testimony that non-negligent causes of plaintiff's infection were probable. The Court noted that, "Robinson did not file any affidavits in support of her **opposition** to the Motion for Summary Judgment." She did attempt to direct the Court to certain deposition testimony. The Court noted that in a medical malpractice case, like other negligence cases, it must be shown as follows:

The elements of a negligence action are 1) duty of reasonable care owed by the defendant to plaintiff; 2) a breach of that duty; 3) the causation, both actually and proximately, of the injury; and 4) the suffering of damages by the plaintiff. Weber v. Springville City, 725 P.2d at 1363. In most medical negligence cases, a plaintiff must introduce expert testimony to establish the first and second element, i.e., the standard of care and a breach of that standard. Nixdorf v. Hicken, 612 P.2d 348, 352 (cited at pg. 264).

(Emphasis added).

The Court, at pg. 266, cited with approval the following language from an earlier decision:

The fact that plaintiff's disability resulted from an uncommon or rare occurrence does not relieve him of the burden of establishing causation. An inference of negligence cannot be permitted solely upon the basis that the plaintiff developed a rare complication while undergoing medical and surgical treatment. The doctrine of res ipsa loquitur has no application unless it can be shown from past experience that the occurrence causing the disability is more likely the result of negligence than some other cause.

Applying the facts of the Robinson case to the case at issue, the paresthesia is a reported complication that can follow wisdom tooth extractions without negligence on the part of an operating surgeon. (See Affidavit of Dr. Israelsen). Dr. Israelsen's Affidavit further notes that it is a "remote" risk, and not a "substantial and significant risk," and as such a

dentist is not required to disclose its possible occurrence to a patient.

The Utah Health Care Malpractice Act, at §78-14-5(f), only requires that a patient be informed of a "substantial and significant risk." Remote risks need not be disclosed. See also, Ficklin v. MacFarlane, 550 P.2d 1295 (Utah 1976).

The Court in Robinson further stated as follows:

In order to create a genuine factual dispute on this point, Robinson thus had to come forward with evidence to counter Dr. Burke's affidavit opinion--that non-negligent causes of her infection were probable--with expert testimony to the effect that Robinson's infection most likely resulted from negligence, assuming it was possible to find an expert who could and would make such a statement.

* * *

Since appellant did not submit evidence creating a genuine issue of fact about the most likely cause of her injuries, the trial judge properly proceeded to conclude that respondents were entitled to summary judgment as a matter of law.

(Emphasis added, at pg. 267).

In the present case, Petitioner Kyle Miller failed to produce an expert medical affidavit in opposition to the Affidavit of Dr. Israelsen. Petitioner Miller did file, and relied solely on, his own Affidavit. Paragraphs 2 and 3 of that Affidavit state that Dr. Lofthouse did not explain to Kyle Miller

the risks of lingual nerve paresthesia or provide a consent form that contained any warning about lingual nerve paresthesia. However, no standard of disclosure from a medical expert is provided in behalf of Kyle Miller, and the Affidavit of Dr. Israelsen specifically states that such a paresthesia is a remote risk and not a substantial and significant risk, and that a general dentist is not expected to disclose such a risk to a patient. And as a matter of statutory law, such a risk need not be disclosed. See §78-14-5(f), U.C.A. Accordingly, no factual dispute was raised by Kyle Miller's Affidavit concerning a standard of disclosure and informed consent.

Paragraph 4 of Kyle Miller's Affidavit claims that he was never informed by Dr. Lofthouse that "extractions of this type are normally performed by oral surgeons and not by general dentists." Even if we were to assume that the letter of January 23, 1987 from Dr. Blaine Austin attached to Kyle Miller's Affidavit was appropriate and in a proper Affidavit form to counter a Rule 56 motion, Dr. Austin only suggested, "I believe that it is common that most impacted wisdom teeth are removed by oral surgeons and that as a complication this is something that has been indicated in the oral surgery literature." This does not establish any standard, breach or causation as required in a medical negligence case. To the contrary, it supports the result

as a reported complication. Furthermore, the Affidavit of Dr. Israelsen specifically states that based upon his review of Kyle Miller's x-rays taken by Dr. Lofthouse that the extraction was well within the capabilities of Dr. Lofthouse as an experienced general dentist. Thus, no factual dispute is raised on this issue by Mr. Miller's Affidavit.

Finally, paragraph 7 of Kyle Miller's Affidavit notes that he "intends to rely at trial on the testimony of Dr. Robert L. Perkasky to establish the breach of a standard of care by the defendant." In the Robinson case, Supra, Petitioner made the same argument. At page 264, the Court notes, "Finally, she argued that, even if she did have to produce expert testimony on this point, she did not have to do so before trial." The Court expressly rejected this argument, as did Judge Moffat in this case. See Affidavit of David H. Epperson, Exhibit "A".

CONCLUSION

The Summary Judgment Order of Judge Richard H. Moffat in favor of Dr. Larry D. Lofthouse should be summarily affirmed based upon the clear record of the lower court which found no factual dispute in favor of Respondent, and which found a total lack of expert medical testimony in favor of Kyle Miller to counter the medical testimony of Affiant L. Douglas Israelsen, D.D.S. Appellant Miller chose to rely on his own deficient

Affidavit to oppose the Summary Judgment Motion and did not make a Motion to Continue and did not "present by affidavit facts essential to justify his opposition" to the timing of the hearing as required by Rule 56(f) of the Utah Rules of Civil Procedure. No reversible error should be claimed against the lower court for Petitioner's own failure to timely establish by Affidavit and expert medical testimony any genuine issue of fact.

RESPECTFULLY SUBMITTED this 17th day of March, 1989.

HANSON, EPPERSON & SMITH

A handwritten signature in cursive script, reading "David H. Epperson". The signature is written in dark ink and is positioned above a horizontal line.

DAVID H. EPPERSON
Attorney for Defendant/Respondent

CERTIFICATE OF MAILING

I hereby certify that four true and correct copies of the foregoing RESPONDENT'S BRIEF were mailed postage prepared to the following on the 17th day of March, 1989:

John S. Adams, Esq.
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ADDENDUM

EXHIBIT "A"

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IN THE COURT OF APPEALS
OF THE STATE OF UTAH

KYLE MILLER,)	
)	
Plaintiff and Appellant,)	AFFIDAVIT OF DAVID H.
)	EPPERSON, ESQ.
v.)	
)	
LARRY D. LOFTHOUSE, D.D.S.,)	
)	
Defendant and Respondent.)	Case No. 880545-CA

STATE OF UTAH)
 :ss.
COUNTY OF SALT)

David H. Epperson, the below-named Affiant, having been placed under oath states and alleges as follows:

1. I am an attorney licensed to practice law in the State of Utah.

2. I represented the above-named Respondent, Larry D. Lofthouse, D.D.S., in the above-referenced case before the District Court, the Honorable Richard H. Moffat presiding.

3. That on April 29, 1988 I filed a Motion for Summary Judgment, a Memorandum in support of the Motion for Summary

Judgment, and Affidavit of L. Douglas Israelsen, D.D.S., on behalf of Respondent Larry D. Lofthouse, D.D.S.

4. I filed the summary judgment motion to resolve a "stale" claim which had been pending since a November 26, 1985 Notice of Intent to Commence an Action had been filed by Kyle Miller. The Complaint of Mr. Miller had been subsequently filed on September 11, 1987, an Answer was filed to the Complaint by Dr. Larry D. Lofthouse on September 29, 1987, and Interrogatory Answers had been obtained from Kyle Miller on November 30, 1987. The Motion for Summary Judgment, although filed on April 29, 1988, was scheduled for hearing on June 3, 1988, which was five weeks, or 35 days later, and not only 10 days as allowed by Rule 56(c), Utah Rules of Civil Procedure.


5. I appeared on behalf of Larry D. Lofthouse, D.D.S. before the Honorable Richard H. Moffat to argue the Motion for Summary Judgment on June 3, 1988 at 9:00 a.m. upon the Court's law and motion calendar. Unfortunately, said proceedings were not transcribed.

6. Prior to that hearing, attorney C. Reed Brown, the attorney for Mr. Miller, never at any time requested a courtesy extension or expressed a need for additional time to obtain an Affidavit from a medical expert. Prior to the hearing, Attorney Brown never requested a continuance based upon Rule 56(f), of the

Utah Rules of Civil Procedure, and never filed an Affidavit opposing the timeliness of the summary judgment motion, or that he could not, for reasons stated, present facts essential to justify his opposition to the motion.

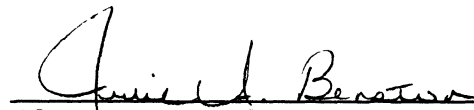
7. At the hearing, Judge Moffat, in the absence of any Affidavit for Continuance, or Rule 56(f) motion by Attorney Brown, and after stating that the Affidavit of Kyle Miller raised no genuine issue as to any material fact, granted summary judgment. In doing so, Judge Moffat commented that the case had been pending in his court for nine months, that Plaintiff Miller had five weeks notice of the summary judgment hearing, and that the summary judgment motion was appropriate for consideration at that scheduled time.

DATED this 16 day of March, 1989.



DAVID H. EPPERSON

SUBSCRIBED and SWORN TO before me this 16th day of March, 1989.



NOTARY PUBLIC
Residing at: Salt Lake City, UT

My Commission Expires:

4-5-91

EXHIBIT "B"

David H. Epperson, #1000
HANSON, EPPERSON & SMITH
Attorneys for Defendant
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Salt Lake City, Utah 84101
Telephone: (801) 363-7611

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

KYLE MILLER,)	
)	
Plaintiff,)	AFFIDAVIT OF L. DOUGLAS
)	ISRAELSEN, D.D.S.
vs.)	
)	
LARRY D. LOFTHOUSE, D.D.S.,)	Civil No: C87-6056
)	
Defendant.)	Judge <u>Richard H. Moffat</u>

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

L. Douglas Israelson, D.D.S., being first duly sworn deposes
and says:

1. My name is L. Douglas Israelson, D.D.S., and the
information contained in this Affidavit is true and is based on
my personal knowledge.

2. That I am licensed to practice dentistry and oral
surgery within the State of Utah, and that my office is located
at 7001 South 900 East, Suite 100, Midvale, Utah 84047.

3. That I have been licensed by the State of Utah to practice dentistry and oral surgery for more than eleven years.

4. That my education consisted of a Bachelor's Degree from Brigham Young University; a D.D.S. Degree from the University of Nebraska at Lincoln; and specialized oral surgery training at the Mayo Clinic in Minnesota and Wayne State University in Detroit.

5. That since March of 1980 I have been board certified by the American Board of Oral and Maxillofacial Surgeons.

6. That I was involved in the practice of dentistry and oral surgery within the State of Utah in April of 1983, the time in question in the complaint of Kyle Miller.

7. That I am familiar with the standards of professional care, learning, skill and treatment ordinarily possessed and used by dentists and oral surgeons in this and similar communities in the performance of third molar or wisdom tooth extractions.

8. That my opinions set forth in this Affidavit are based upon my review of:

a) Notice of Intent to Commence an Action filed by counsel for Mr. Miller dated March 30, 1987;

b) The Complaint filed by counsel for Kyle Miller in September of 1987;

c) The Answer to the Complaint filed by counsel for Larry D. Lofthouse;

d) The entire treatment chart and record (including x-rays) of Dr. Larry D. Lofthouse for all treatments rendered to Kyle Miller (including the oral extraction of Tooth 17 at issue);

e) The report from Dr. Blaine Austin dated January 23, 1987;

f) The report of January 9, 1987 from Dr. Peter G. Mozsary of the State of California, together with the articles authored by Dr. Mozsary on the microsurgical reconstruction of the lingual nerve; and

g) A conference with Dr. Lofthouse to review the surgery and surgical technique utilized in the extraction of the tooth at issue, Tooth 17.

9. It is my opinion, based on the foregoing, that Larry D. Lofthouse, D.D.S. appropriately treated Kyle Miller in the removal of wisdom tooth 17 on or about April 20, 1983; and in the follow-up treatments. That the x-rays show that the extraction of Tooth 17 would be within the abilities of Dr. Lofthouse as an experienced general dentist.

10. That despite reasonable and prudent care on the part of a dentist in the extraction of an impacted wisdom tooth, injury or trauma can occur to the lingual nerve which may cause a paresthesia (numbness). Such a paresthesia often repairs naturally with sensation returning to the affected area within

six months. However, permanent numbness can occur, which is considered a bad result, but not a result that in and of itself is attributable to any negligence on the part of the dentist.

11. The incidence of permanent lingual nerve injury and paresthesia as the result of the surgical extraction of a wisdom tooth constitutes a remote risk and not a substantial and significant risk; and that such a paresthesia is sufficiently remote that a dentist who extracts an impacted wisdom tooth is not expected to caution a patient about its possibility.

12. That the paresthesia complained of by Kyle Miller is a result and risk that can occur to a patient despite reasonable and prudent care by the treating dentist.

13. That from my total review from all information outlined herein, and based upon my experience and expertise as a dentist and oral surgeon, that it is my opinion that the medical care and treatment rendered by Larry D. Lofthouse, D.D.S. to Kyle Miller complied in all respects with the standards of professional care, learning, skill and treatment ordinarily possessed and used by dentists in good standing in this and similar communities in April of 1983.

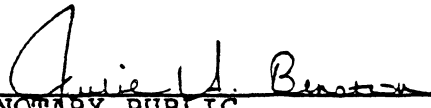
14. That it is further my opinion that the allegations of dental negligence and malpractice against Larry D. Lofthouse, D.D.S. are not supported by the documentation and records.

DATED this 25 day of April, 1988.



L. DOUGLAS ISRAELSEN, D.D.S.

SUBSCRIBED AND SWORN TO before me this 25th day of
April, 1988.



NOTARY PUBLIC

Residing at: SEC. 47

My Commission Expires:

4-5-91