

1988

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

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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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO.

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

(46)

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APPELLANT'S BRIEF

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

-----ooo0ooo-----

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IN THE COURT OF APPEALS
OF THE STATE OF UTAH

-----ooo0ooo-----

KYLE MILLER,

Plaintiff and Appellant,

v.

LARRY D. LOFTHOUSE, D.D.S.,

Defendant and Respondent.

Court of Appeals

No. 880545-CA

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Appeal from the Third Judicial District Court of Salt Lake County
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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF JURISDICTION AND NATURE OF PROCEEDINGS	1
STATEMENT OF ISSUES PRESENTED ON APPEAL	2
DISPOSITIVE RULES	3
STATEMENT OF THE CASE	3
STATEMENT OF FACTS	4
SUMMARY OF THE ARGUMENT	5
ARGUMENT	6
SUMMARY JUDGMENT WAS NEITHER PROPER NOR JUSTIFIED IN THE TRIAL COURT	6
A. PLAINTIFF’S AFFIDAVIT, FILED IN THE COURT BELOW, CLEARLY RAISED MATERIAL ISSUES OF FACTS SUFFICIENT TO REQUIRE THE DISTRICT COURT TO DENY RESPONDENT’S MOTION FOR SUMMARY JUDGMENT	7
B. RULE 56(f) <u>UTAH RULES OF CIVIL PROCEDURE</u> AFFORDS APPELLANT THE RIGHT FOR ADDITIONAL TIME TO COMPLETE DISCOVERY OR OBTAIN EXPERT TESTIMONY, IF NECESSARY	12
CONCLUSION	16
ADDENDUM	18

TABLE OF AUTHORITIES

CASES CITED

Bowen v. Riverton City, Utah, 656 P.2d 434 (1982)	6
Fox v. All State Insurance Company, 22 U(2d) 383, 453 P.2d 701 (1969)	10
Frisbee v. K. & K. Construction Co., Utah, 676 P.2d 387 (1984)	6, 9
Hoopiiaina v. Intermountain Health Care, 740 P.2d 270 (Ct. of App. of Utah, 1987)	15
Reliable Furniture Company v. Fidelity and Guarantee Insurance Underwriters, 16 U(2d) 211, 398 P.2d 685 (1965)	7
Robinson v. Intermountain Health Care, Inc., 740 P.2d 762 (Ct. of App. of Utah, 1987)	10, 11, 13, 14, 15
Whitaker v. Department of Human Resources, 86 F.R.D. 689 (1980)	14

RULES CITED

Utah Rules of Civil Procedure, Rule 56	3, 9
Utah Rules of Civil Procedure, Rule 56(c)	6
Utah Rules of Civil Procedure, Rule 56(f)	12, 13, 14, 15, 16
Federal Rules of Civil Procedure, Rule 56(f)	14

TREATISES AND OTHER AUTHORITIES CITED

73 American Jurisprudence 2nd, Summary Judgment, §37	10
<u>Medical Malpractice</u> , Volume 1, Louisell and Williams (1988)	9

IN THE COURT OF APPEALS
OF THE STATE OF UTAH

-----ooo0ooo-----

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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APPELLANT'S BRIEF

STATEMENT OF JURISDICTION AND NATURE OF PROCEEDINGS

Jurisdiction was conferred on the Utah Court of Appeals pursuant to a transfer of the case by the Utah Supreme Court on September 12, 1988, pursuant to Rule 4(a) of the Rules of the Utah Supreme Court.

This Appeal is taken pursuant to and based upon Rule 3, Rules of the Utah Supreme Court and jurisdiction is conferred upon the Court pursuant to S78-2-2(3)(i) Utah Code Annotated (1988).

This is an appeal from a Final Order of Summary Judgment of the District Court, Third Judicial District, in and for Salt Lake County, the Honorable Richard H. Moffat, Judge,

granting Summary Judgment in favor of Defendant upon a medical malpractice claim filed by Kyle Miller against Defendant. The date of the Summary Judgment sought to be reviewed is July 7, 1988.

STATEMENT OF ISSUES PRESENTED ON APPEAL

The issues presented by the Appeal center upon whether or not the trial court erred in granting Summary Judgment in favor of Respondent where there existed material questions of fact with respect to including but not necessarily limited to the following:

A. Did Respondent properly inform Appellant of the probable or possible dangers and consequences involved in removing a full bony impacted wisdom tooth sufficient that Appellant underwent said procedures with full informed consent?

B. Did Respondent misrepresent his skill, ability and training necessary to properly diagnose and treat Appellant?

C. Did Respondent commit negligence in the performance of his duties in connection with removing the bony impacted wisdom teeth of Appellant?

D. Did Respondent commit negligence in failing to refer Appellant for appropriate specialized follow-up care in light of the circumstances known by Respondent following Appellant's surgery?

DISPOSITIVE RULES

Subsections (c) and (f) of Rule 56 Utah Rules of Civil Procedure are dispositive in this matter and are, therefore, set out verbatim below. The entire text of Rule 56, Utah Rules of Civil Procedure, is provided to the Court in the Addendum to this Brief.

(c) **Motion and Proceedings Thereon.** The motion shall be served at least ten (10) days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in nature, may be rendered on the issues of liability alone although there is a genuine issue as to the amount of damages.

(f) **When Affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

STATEMENT OF THE CASE

This was an action filed by Plaintiff, Kyle Miller, against Defendant for negligence and dental malpractice in connection with the extraction of wisdom teeth and follow-up

care. 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.

STATEMENT OF FACTS

The following facts are material to a consideration of the questions presented upon appeal:

1. In April, 1983, Appellant consulted Respondent for routine dental work. Appellant was not experiencing difficulty with his wisdom teeth, but upon Respondent's recommendation agreed to the extraction of three wisdom teeth known as teeth numbers 16, 17 and 32.

2. On April 7, 1983, Appellant's tooth number 16 was extracted by Respondent without incident.

3. On April 20, 1983, Respondent extracted tooth number 17 and tooth number 32. Both teeth were described as "full bony impacted."

4. At some point during the extraction of teeth numbers 17 and 32, Appellants lingual nerve was severed resulting in Appellant's suffering numbness and paralysis of the left anterior two-thirds (2/3) of the tongue and lack of sensation in the floor of the mouth.

5. Respondent failed to inform Appellant of the probable or possible dangers and consequences involved in removing a full bony impacted wisdom tooth prior to performing said procedure.

6. Had Appellant been informed of the probable or possible dangers and consequences involved in removing a full bony impacted wisdom tooth, he would not have consented to such a procedure being performed by Respondent.

7. Respondent failed to refer Appellant for appropriate specialized follow-up care for a period in excess of twenty-four (24) months following the procedure and injury to Appellant.

8. After completing appropriate pre-litigation procedures, Appellant filed a Complaint alleging breach of duty and negligence against Respondent which Complaint was filed in September of 1987.

9. 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.

SUMMARY OF THE ARGUMENT

1. Summary Judgment should not have been granted by the court below where Affidavits filed with the Court clearly raised material issues of fact.

2. The court below should have in any event granted Appellant the right for additional time to complete discovery or obtain expert testimony, if necessary.

ARGUMENT

SUMMARY JUDGMENT WAS NEITHER PROPER NOR JUSTIFIED IN THE TRIAL COURT

The granting of a Motion for summary Judgment is justified only when "it serves the salutary purpose of eliminating the time, trouble and expense of a trial which would be to no avail anyway." Summary judgment however, is not justified where there does exist genuine issues of material fact to be decided. It is well established in Utah that:

Summary judgment is proper only if the pleadings, depositions, affidavits and admissions show that there is no genuine issue of material fact and that the moving party is entitled to the judgment as a matter of law. If there is any doubt or uncertainty concerning questions of fact, the doubt should be resolved in favor of the opposing party. Thus, the court must evaluate all the evidence and all reasonable inferences fairly drawn from the evidence in a light most favorable to the party opposing summary judgment. [Emphasis added]

Bowen v. Riverton City, Utah, 656 P.2d 434, 436 (1982), as quoted in Frisbee v. K & K Construction Company, Utah, 676 P.2d 387 (1984). See also Rule 56(c), Utah Rules of Civil Procedure.

The Utah Supreme Court has gone even further to indicate that the granting of a motion for summary judgment is a harsh remedy and that the sole purpose of summary judgment is to bar from the courts unnecessary and unjustified litigation and only where it clearly appears that the party against whom the judgment would be granted cannot possibly establish a right to recover should such a judgment be granted. Any doubt should be

resolved in favor of such party when summary judgment against him is being considered. See Reliable Furniture Company v. Fidelity and Guaranty Ins. Underwriters, 16 U.(2d) 211, 398 P.2d 685 (1965). It is against this long-standing backdrop that this Court should consider the issues presented on appeal in this matter.

A. Plaintiff's Affidavit, filed in the Court below, clearly raised material issues of fact sufficient to require the District Court to deny Respondent's Motion for Summary Judgment.

The Affidavit of Kyle Miller filed in the Court below (attached hereto in the Addendum as Exhibit "1"), clearly raised critical issues of fact which required the denial of Respondent's Motion for Summary Judgment. More specifically, the attachment to that Affidavit, which was made a part thereof, contained a letter from an oral surgeon by the name of Dr. Blaine D. Austin. Among other things, Dr. Austin's letter clearly stated that "lingual nerve parathesia . . . is a report complication of mandibular third molar removal." Dr. Austin's letter also stated, "that as a complication this is something that has been indicated in the Oral Surgery Literature." As such, Dr. Austin's letter clearly raised an issue as to the standard

in the community that a proper practice for the dentist involved in this matter would be to disclose such a risk to a patient.

Dr. Austin, as a respected oral surgeon in the Salt Lake community, also indicated in his letter that, "I believe that it is common that most impacted wisdom teeth are removed by Oral Surgeons" thereby raising the issue complained of by Mr. Miller in his Complaint and his Affidavit that Dr. Lofthouse should have referred him, under the circumstances, for such specialized care.

Likewise, Dr. Austin in his letter made a part of Kyle Miller's Affidavit stated that " . . . being that this was a late date for his injury that the best result would have been obtained, had some type of definitive treatment been initiated within the first six months to a year, as this usually provides the best result." Dr. Austin's statement in this regard also raised a material issue of fact as to the proper follow-up care which Dr. Lofthouse failed to render in this matter.

Each of these issues raised by Dr. Austin in the attachment to Kyle Miller's Affidavit consisted of medical opinion produced by Appellant in the lower Court in opposition to the medical testimony presented by Respondent before Judge Moffat contrary to the representations made by Respondent in his Memorandum in support of his Motion for

Summary Disposition. Each likewise supported the Complaint allegations of negligence against Dr. Lofthouse with expert medical testimony consistent with and as required by Rule 56 of the Utah Rules of Civil Procedure.

The courts have traditionally denied summary judgment motions in medical malpractice and negligence cases where any genuine fact issue exists. The reason for this rule was succinctly stated by two experts as follows:

To arbitrarily decide a genuine fact issue under the guise of summary judgment is, of course, a serious deprivation of the fundamental right of trial.

Medical Malpractice, Vol. 1, Louisell & Williams, Para. 12.13 (1988).

The argument of Respondent in the court below and theoretically before this Court appears to be that the medical testimony of Dr. Austin which was made a part of Kyle Miller's Affidavit in the court below, did not go far enough. Our Utah Supreme Court has, however, made it clear that it is the duty of the Court to " . . . evaluate all the evidence and all reasonable inferences fairly drawn from the evidence in a light most favorable to the party opposing Summary Judgment . . . " at such time as it makes its decision. See Frisbee v. K & K Construction Company, Utah, 676 P.2d 387 (1984). Further,

It is said that because of the drastic potentials of a Motion for Summary Judgment, it is almost universal practice to

scrutinize with care and particularity the Affidavits of the moving party while indulging in some leniency with respect to the Affidavits of the opposition. It has been held that upon a motion for summary judgment, the court must be critical of the moving papers but not those in opposition.

73 American Jurisprudence 2nd, Summary Judgment, § 37, P. 764. (Citations omitted).

Defendant Dr. Lofthouse in the court below, by failing to move to strike or otherwise object to Plaintiff's Affidavit and its attachment filed in opposition to Motion for Summary Judgment, waived his right to contest the Affidavit with its attachments. See Fox v. Allstate Insurance Company, 22 U.(2d) 383, 453 P.2d 701 (1969). As such, Dr. Austin's statements were admissible for purposes of constituting expert medical testimony in opposition to the medical testimony produced by Respondent in favor of his Motion for Summary Judgment below.

Respondent, in his Memorandum in support of his Motion for Summary Disposition filed earlier with this Court, cited the case of Robinson v. Intermountain Health Care, Inc., 740 P.2d 762 (Ct. of App. of Utah, 1987) decided by this Court, in support of his contention that some medical testimony is necessary to establish the standard of care applicable in a medical malpractice case. Not only did Plaintiff do so in the case at bar, but in the Robinson case, this Court made it clear in its decision that Mrs.

Robinson did not file any affidavits in support of her opposition to the Motion for Summary Judgment. Robinson, supra., at page 264. Such is not the circumstance of the case at bar. Likewise, even in the Robinson case, the court below granted Robinson thirty (30) days to provide an expert witness to establish her theory of negligence. This was in part done because, in the Robinson case, other possible sources of the injury were set forth and in part because Mrs. Robinson argued that, even if she did have to produce expert testimony on this point, she did not have to do so before trial. Such is not the case at issue here as Appellant Kyle Miller clearly produced expert medical testimony in opposition to Respondent's Motion for Summary Judgment and said Appellant, by Affidavit, clearly indicated that he would be relying at trial on the testimony of Dr. Robert L. Pekarsky to establish the breach of standard of care of the Defendant.

In light of the fact that there were raised and remain material issues of fact to be determined with respect to the questions of informed consent, negligence by Dr. Lofthouse in removing Kyle Miller's wisdom tooth, and follow-up care rendered (or not rendered) by Dr. Lofthouse, the District Court erred in granting summary judgment in favor of Respondent and that Order of the District Court should be reversed.

B. Rule 56(f) Utah Rules of Civil Procedure
affords Appellant the right for additional time to complete discovery or obtain expert testimony, if necessary.

Rule 56(f) of the Utah Rules of Civil Procedure provides as follows:

Should it appear from the Affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Should this Court decide that the Affidavit of Kyle Miller filed in the court below, together with its attachment, did not establish material issues of fact with respect to the standard of care and the treatment provided by Respondent Dr. Lofthouse thereunder, said affidavit did meet the requirements of Rule 56(f) in every respect. As such, the trial court abused its discretion in not allowing Plaintiff additional time to complete discovery including but not limited to the obtaining of the deposition and/or a sworn statement of Plaintiff's expert.

Paragraph 7 of Kyle Miller's Affidavit states that,

The Plaintiff intends to rely at trial on the testimony of Dr. Robert L. Pekarsky to establish the breach of standard of care by the Defendant. The Plaintiff has

not obtained a written report from Dr. Pekarsky at this time and Dr. Pekarsky's deposition has not yet been taken.

Such a statement clearly raised the issues addressed in Rule 56(f) and was sufficient to call upon the Court to allow Plaintiff additional time to complete discovery and obtain medical expert opinion should the Court have felt that the same was necessary to dispute Respondent's Motion for Summary Judgment.

The question of additional time was addressed by Mr. Brown, attorney for Plaintiff, in the court below and was considered by Judge Moffat. Judge Moffat chose, however, to deny Plaintiff additional time to complete discovery or obtain additional expert opinion from Dr. Pekarsky or others. (See Affidavit of C. Reed Brown which is included in the Addendum hereto, marked Exhibit "2" which was also included with Appellant's earlier Memorandum in Opposition to Motion for Summary Disposition.) In doing so, the Court abused its discretion.

As pointed out hereinabove, Respondent, in his Memorandum in support of his Motion for Summary Disposition filed earlier with the Court, cited the case of Robinson v. Intermountain Health Care, Inc., supra. In the Robinson case, however, this Court specifically recognized the application of Rule 56(f) and clearly noted that the lower court in the Robinson case initially denied a motion for

summary judgment made by the defendant doctor and allowed the plaintiff thirty (30) additional days to obtain expert testimony in opposition thereto. It was only after plaintiff in the Robinson case failed to obtain additional expert testimony that the district court granted the summary judgment requested by the defendant in that case.

There need be no formal written motion presented to the court to obtain additional time for discovery under the terms of Rule 56(f). No such requirement exists. On the contrary, the court is given the power to allow a plaintiff under such circumstances additional time to complete discovery and, as has long been recognized, is encouraged to do so.

Rule 56(f) of the Utah Rules of Civil Procedure is identical to Rule 56(f) of the Federal Rules of Civil Procedure. In explaining the substance and purpose for the Rule, the Federal court has stated the following:

Rule 56(f) permits a party opposing a summary judgment motion to file affidavits stating why he is unable to present by affidavit facts justifying his opposition; Rule 56(e) provides the form of affidavits. When the requirements of Rule 56(f) are met, the court may deny the summary judgment motion, permit a continuance, order more discovery or make any order which is fair.
[emphasis added]

Whitaker v. Department of Human Resources, 86 F.R.D. 689, 691 (1980).

The Utah Court of Appeals, as evidenced by the Robinson case, supra., and others, has long agreed with the foregoing standard in the case of a motion made for summary judgment. This Utah Court, in the case of Hoopiiaina v. Intermountain Health Care, 740 P.2d 270 (Ct. of App. of Utah, 1987), recognized the proper denial of a motion for summary judgment twice based upon the representation of the Plaintiff that he was attempting to obtain expert testimony and would have an expert before trial. See Hoopiiaina, supra., at P. 271. As such, Judge Moffat in the court below should have in any event granted Plaintiff additional time to obtain the written opinion and/or take the deposition of Dr. Pekarsky in order to allow Plaintiff to have filed an affidavit setting out facts essential to justify opposition to Defendant's Motion.

In light of the foregoing, the Trial Court clearly should have granted Appellant relief pursuant to Rule 56(f) in order to allow additional and/or the completion of discovery and to obtain the deposition and/or sworn statement of Plaintiff's medical expert in opposition to Defendant's Motion for Summary Judgment.

CONCLUSION

The trial court clearly erred in granting summary judgment in favor of Respondent in the court below where genuine and material issues of fact were raised and remain for decision by a trier of fact. In the event that the trial court decided that Plaintiff had not raised material issues of fact in opposition to Defendant's Motion below, the trial court erred in not applying the standards of Rule 56(f) of the Utah Rules of Civil Procedure in granting Plaintiff additional time to complete discovery and obtain the necessary expert medical testimony to contradict the Affidavit filed by Defendant in support of his motion.

WHEREFORE, Appellant respectfully prays that this Court reverse the Summary Judgment granted by the trial court and remand allowing additional discovery to be completed and the matter to proceed through a trial before a trier of fact.

RESPECTFULLY SUBMITTED this 19th day of January, 1989.

TAYLOR, ENNENGA, ADAMS & LOWE

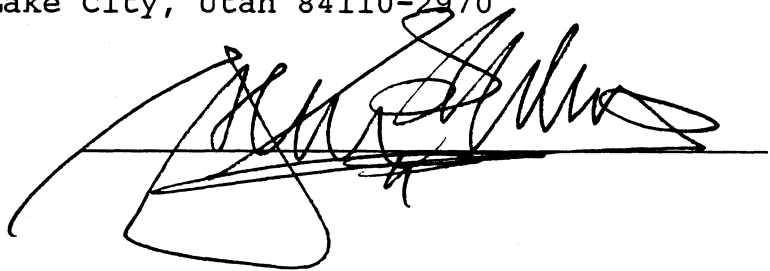


John S. Adams
Attorneys for Plaintiff/Appellant

CERTIFICATE OF MAILING

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

David H. Epperson, Esq.
HANSON, EPPERSON & SMITH
Attorneys for Defendant/Respondent
4 Triad Center, Suite 500
P. O. Box 2970
Salt Lake City, Utah 84110-2970

A handwritten signature in black ink, appearing to read "David H. Epperson", is written over a horizontal line.

ADDENDUM

EXHIBIT "1"

C. REED BROWN, P.C. [A0446]
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3450 Highland Drive, Suite 301
Salt Lake City, Utah 84106
Telephone: (801) 484-7632

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

KYLE MILLER,)	
)	
Plaintiff,)	AFFIDAVIT OF KYLE MILLER
)	
vs.)	
)	
LARRY D. LOFTHOUSE, D.D.S.,)	
)	Civil No. C87-6056
Defendant.)	Judge Richard H. Moffat
)	

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

COMES NOW Kyle Miller and being first duly sworn
upon oath deposes and says:

1. That is the plaintiff above named and most knowledgeable to make this affidavit.
2. That the defendant never explained to him the risks of lingual nerve parasthesia which is a known complication of extraction of Tooth No. 17.
3. Plaintiff never signed a consent for extraction of Tooth No. 17 that contained any warning about lingual nerve parasthesia.
4. Plaintiff was never informed by defendant that extractions of this type are normally performed by oral surgeons and not by general dentists.

5. The medical report of Dr. Blaine D. Austin D.D.S./Oral Surgeon dated January 23, 1987 attached as Exhibit "A" indicates that oral surgeons generally perform this type of surgery and not general dentists. Dr. Austin also indicates that lingual nerve parasthesia is a "report complication of mandibular third molar removal".

6. The medical report referred to in defendant's Motion for Summary Judgment provided by Dr. Moszary was not obtained for litigation purposes and does not address the issue of Dr. Lofthouse's medical negligence.

7. The plaintiff intends to rely at trial on the testimony of Dr. Robert L. Pekarsky to establish the breach of standard of care by the defendant. The plaintiff has not obtained a written report from Dr. Pekarsky at this time and Dr. Pekarsky's deposition has not yet been taken.

DATED this _____ day of June, 1988.

KYLE MILLER

SUBSCRIBED AND SWORN to before me this _____ day of June, 1988.

NOTARY PUBLIC

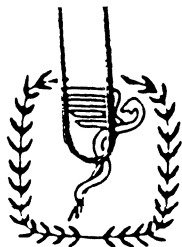
My Commission Expires:

Residing in Salt Lake County, UT

CERTIFICATE OF HAND DELIVERY

I hereby certify that a true and correct copy of the foregoing Affidavit of Kyle Miller was hand delivered this 2nd day of June, 1988, to the following:

David H. Epperson, Esq.
HANSON, EPPERSON & SMITH
Attorneys for Defendant
175 South West Temple, #650
Salt Lake City, Utah 84101



ORAL
SURGERY
ASSOCIATES

445 east 4500 south
suite 175
Salt Lake City, Utah 84107
(801) 262-9748

January 23, 1987

Re: Kyle Miller

To Whom It May Concern:

At the request of Mr. Miller, I am presenting this letter having been asked as a second opinion for an evaluation for his left Lingual Paresthesia. Mr. Miller indicates to me that approximately three years ago he had a removal of a left boney impacted wisdom tooth and at this point in time has no resolution of his Lingual Paresthesia.

Mr. Miller's consult was regarding possible follow up treatment for his condition. I advised him initially that his best result would be for referral to an individual who has provided care for other patients with nerve paresthesia and nerve injuries and that there was a possibility of treatment of micro-neuro vascular surgery.

In regards to this, Mr. Miller asked regarding my experience removing wisdom teeth and indicated to him that, I had taken out several hundred wisdom teeth that I personally, never had a lingual nerve paresthesia. Although, it is a report complication of mandibular third molar removal. 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. I also indicated to Mr. Miller, that being that this was a late date for his injury that the best result would have been obtained, had some type of definitive treatment been initiated within the first six months to a year, as this ususally-provides the best result. I hope this fulfill's Mr. Miller's desires. Thank you.

Sincerely,

Blaine D. Austin

Dr. Blaine D. Austin D.D.S.
Oral Surgeon

BP

surgical orthodontics
orthognathic surgery
temporomandibular
joint surgery
preprosthetic surgery
reconstructive surgery

EXHIBIT "2"

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Robert M. Taylor, #3208
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5525 South 900 East, Suite 200
Salt Lake City, Utah 84117
Telephone: (801) 263-1112

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

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                                :
KYLE MILLER,                   :      AFFIDAVIT OF
                                :      C. REED BROWN, ESQ.
      Appellant,               :
                                :
      vs.                      :
                                :
LARRY D. LOFTHOUSE, D.D.S.,    :      Case No. 880545-CA
                                :
      Respondent.              :
                                :
-----ooo0ooo-----
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STATE OF UTAH)
 : ss.
County of Salt Lake)

C. Reed Brown, 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.

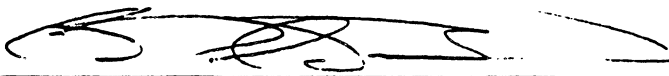
2. I represented the above-named Appellant, Kyle Miller, in the above-referenced case before the District Court, the Honorable Richard Moffat presiding.

3. I appeared on behalf of Kyle Miller before the Honorable Richard Moffat at the Defendant's Motion for Summary Judgment on June 3, 1988 at 9:00 a.m. upon the Court's Law and Motion Calendar. Said proceedings were not transcribed.

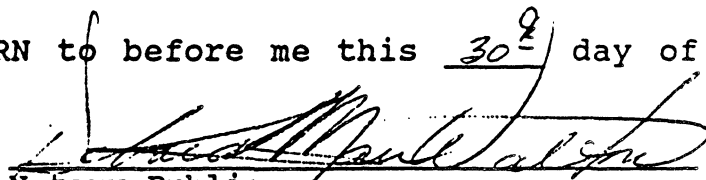
4. At the hearing upon Defendant's Motion for Summary Judgment, during argument and after review by the Court of the Affidavit submitted by Plaintiff Kyle Miller and the attachment thereto which included a letter dated January 23, 1987, from Dr. Blaine D. Austin, D.D.S., discussions were had with the Court about the possibility of granting Plaintiff an additional thirty (30) days to conduct discovery and/or otherwise obtain expert testimony in opposition to the Affidavit submitted by Defendant in support of his Motion for Summary Judgment.

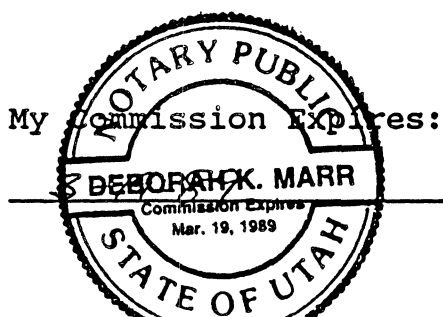
5. After discussion with the Court, the Honorable Judge Moffat ruled that he would not allow additional discovery time but would grant Defendant's Motion as prayed.

DATED this 30 day of September, 1988.


C. Reed Brown

SUBSCRIBED AND SWORN to before me this 30th day of September, 1988.


Notary Public
Residing in Salt Lake County, Utah



RULE 56

UTAH RULES OF CIVIL PROCEDURE

Rule 56. Summary judgment.

(a) **For claimant.** A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **For defending party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and proceedings thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case not fully adjudicated on motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits made in bad faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.