

1988

# Mary Alene Hunt v. Dr. J. Earl Hurst : Brief of Appellant

Utah Supreme Court

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David G. Williams; attorney for respondent.

Robert N. Macri; attorney for appellant.

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UTAH SUPREME COURT

BRIEF

880284

IN THE SUPREME COURT OF UTAH

MARY ALENE HUNT,  
Plaintiff/Appellant

vs.

DR. J. EARL HURST,  
Defendant/Respondent.

:

:

:

:

Case No. 880284  
Priority No. 14b

BRIEF OF APPELLANT

Appeal from an order of Summary Judgment against Appellant on June 14, 1988 and an Order affirming same dated July 14, 1988, both issued by Honorable J. Dennis Frederick, Third Judicial District Court, presiding.

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**FILED**  
NOV 18 1988

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF UTAH

MARY ALENE HUNT,	:	
Plaintiff/Appellant	:	Case No. 880284
vs.	:	Priority No. 14b
	:	
DR. J. EARL HURST,	:	
Defendant/Respondent.	:	

BRIEF OF APPELLANT

Appeal from an order of Summary Judgment against Appellant on June 14, 1988 and an Order affirming same dated July 14, 1988, both issued by Honorable J. Dennis Frederick, Third Judicial District Court, presiding.

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Plaintiff/Appellant, Mary Alene Hunt, by and through her undersigned counsel submits the following brief.

#### JURISDICTIONAL STATEMENT AND CASE HISTORY

This Appeal is from an Order and Summary Judgment granted to Respondent and against Appellant on June 14, 1988 and an order affirming same on July 14, 1988 in the Third Judicial District Court of Utah, Judge J. Dennis Frederick presiding.

The Notice of Appeal was filed July 14, 1988 and the authority believed to confer jurisdiction on this Court to hear this Appeal is 78-2-2(1) Utah Code Annotated.

#### STATEMENT OF ISSUES

Two issues, with a correlary to the first issue, are presented by this case. First, was there sufficient evidence to prove that the malpractice action against Dr. Hurst should have been litigated, rather than disposing of same by Summary Judgment, as was done? The correlary to this issue was, in the absence of strong and convincing evidence of a medical expert, was there sufficient evidence to demonstrate res ipsa loquitur causation such as to keep the matter open? Second, where there has been strong expert medical opinion backing Appellant's claim, and same was subject to a rebutting Deposition, was it an abuse of discretion on the part of the Trial Judge not to allow Appellant to secure expert medical opinion to buttress the original medical opinion, when same was requested prior to the decision of the Trial Court upholding the conclusions of the rebutting Deposition, and the Appellant had commenced the

the suit pro se, was indigent, and had secured funding to travel to experts out of State and demonstrated to the Court that she had commenced her efforts to gain that supporting medical evidence and needed additional time to do so, and informed the Trial Court of this fact.

#### STATEMENT OF THE CASE

Appellant alleges dental malpractice against Respondent, an Orthodontist. Respondent treated Appellant, starting when she was a young girl in 1972, through and including 1985. The treatment began because Appellant had injured a front tooth. Respondent used the space he created by removing the injured front tooth to reduce crowding of the lower anterior teeth. (Affidavit of Dr. Hurst, paragraphs 4 & 6, Exhibit 1, attached.)

Appellant had frequent and painful consequences of the dental treatment and her bite changed, and her jaw became misaligned (Affidavit of Appellant, paragraphs 2-9, Exhibit 2, attached). She suffered extreme pain and continued to suffer pain until treated by Dr. Stobbe. (Letter from Dr. Stobbe, dated December 17, 1987, Exhibit 3, attached.)

In 1985, Dr. Hurst admitted work needed to be done to correct the problems with Appellant's bite and accepted \$1000, loaned to Appellant by Charles Gordon, (Affidavit of Charles Gordon, Exhibit 4, attached). This issue is subject of a separate contractual lawsuit which has been filed in the matter.

Dr. Scott Daynes originally prepared and executed an affidavit (Exhibit 5, attached) in which he declared that dental problems existed because of the orthodontia suffered by Appellant. Subsequently, Respondent conducted a Deposition of Dr. Daynes and moved for

Summary Judgment based on the information developed therein. That matter, including the conclusions of Respondent, became subject of a detailed analysis by both Appellant and Respondent (Memoranda discussing the original Affidavit and Deposition are Exhibits 6 and 7 attached).

Appellant's financial condition prevented her from having an attorney originally, but she was able to secure financial help around the time of the Motion for Summary Judgment (Appellant's Affidavit, Attachment 2, paragraph 11, and the Court was made aware of this in Exhibit 6, the Memorandum, in the last two paragraphs. This is the reason Appellant had moved for a continuance of the Summary Judgment Motion (Exhibit 8), which continuance was not allowed. At the time of these motions, Appellant had begun to acquire supporting evidence from medical experts (See, Exhibits 9 through 11, 13 and 14 attached) to buttress the case she had been financially unable to prosecute to that time but which, because of the unusual Statutes of Limitations and requirements of medical malpractice legislation, she was required to bring, and which she had brought, pro se. Note also this rebutting evidence and affidavits directly controverted Respondent's Affidavits which claimed Appellant had no abnormal dental problems.

Judge Frederick, presiding, held Appellant had not as a matter of law been able to support her case and, inferentially, Dr. Scott Daynes' Affidavit had been nullified by the Deposition which followed. He would not give Appellant additional time to renew her position with additional medical experts which she could afford, and granted Summary Judgment.

A subsequent Motion to open judgment, to stay proceedings, etc.,

was subsequently denied, and the res ipsa loquitur arguments inherent in Appellant's affidavit, and that of her father (Exhibit 12) in which the history of her dealings with Dr. Hurst were outlined, and which had been before the Court, was also denied by Judge Frederick. Additional evidence was supplied at that time, including a tape recording of the leading expert in the field, in which he both predicts Mary's symptoms from the treatment she had received from Dr. Hurst and also implied that if knowledge that this condition was made available to the general public (the tape recording was of his lecture to specialists) that this could be very threatening (to the profession).

#### ARGUMENT

#### DISPUTED FACTS EXISTED TO PRECLUDE SUMMARY JUDGMENT, ON THE FACE OF THE PLEADINGS, OR RES IPSA LOQUITUR

According to Rule 56 Utah Rules of Civil Procedure Summary Judgment may be granted (if) ". .there is no genuine issue as to any material fact and that moving party is entitled to a judgment as a matter of law." (Rule 56 (c) U.R.C.P.

In this case there were ~~a~~ disputed material facts.

Both Appellant and her father, who contracted with Dr. Hurst when Appellant was a minor, have declared in their Affidavits, attached, that nothing other than the orthodontic treatment caused the injuries, pain and suffering that Appellant had suffered through the 12 or more years from the treatment.

The fact that this could have been anticipated, but was not disclosed, appears in both Dr. Dayne's Affidavit (Exhibit 5) and in the recorded lecture presented to the Court of Dr. Henry Tanner.

Dr. Daynes is uncontroverted that the realignment of the teeth as done by Dr. Hurst could have caused the pain which Ms. Hunt suffered. Dr. TAnner supports Dr. Daynes' conclusions when he says, "The young girls when they're going through their growth period and having orthodontics too, those are predominantly the ones I see. Because they're in pain." He added that all people want is comfort, "And if you've got comfort, then you've got stability. . ." Appellant, according to her affidavit, never had stability or comfort.

Before the Court was a letter from Dr. Stobbe who admitted that he was "treat(ing) Mary Alene Hunt. . . for Tempromandibular Joint Dysfunction." He qualifies his letter by saying "The purpose of this letter is only to state . . ." Dr. Tanner's caveat in his lecture about being "real careful" and that the proper method for obtaining occlusions through equilibration "is very, very threatening" is instructive. Clearly Dr. Stobbe, although attempting to rescue Mary Alene from her pain, is not ready to say, "He didn't do it right" or "Well, I wouldn't have done that". Dr. Daynes has stated unequivocally that the fact the appliance Mary was wearing gave her relief is evidence of a misalignment. (i.e., #8 in his affidavit," . . recent alignment of her bite by a spling (band-aid approach) has released her from years of pain and self-image problems.") These are the problems Dr. Murdoch and Dr. Tanner, and now Dr. Bybee, agree come consequential to these orthodontice treatments administered to Mary as a young girl and three times after by Dr. Hurst.

This Court could have allowed a res ipsa loquitur evaluation of Mary's condition given expert opinion that the problem could have been caused by the treatment and Mary's clear statements that there were no other causes. "As a general rule res ipsa loquitur applies

where the occurrence of the injury is of such a nature that it can be said, in the light of past experience, that it probably was the result of negligence by someone and that the Defendant is probably the person who is responsible". Tomei v. Henning 431 P.2d 633. In Utah the Supreme Court held in Talbot v. Dr. W.H. Groves' Latter Day Saint Hospital, Inc. 440 P.2d 872, 21 Ut 2d 73, Res ipsa loquitur may be applied in a malpractice case if there is sufficient evidentiary foundation for application of the doctrine."

Further, the Court should recognize that a jury, in consideration of whether a physician's ministrations tendered Plaintiff ordinary skillful and proper care is not bound to accept testimony of physician's expert witnesses. Sisler v. Whitten 393 P.2d 497.

Finally, this Court should recognize in granting Summary Judgment that in Bitzen v. Parisi\*, 545 P.2d 578; the Court observed "There is no reason laymen may not testify to their sensory perceptions, the weight of evidence to be determined by the trier of fact." Further, the Court declared that physical movement of the injured party can be seen and described by a layman with no prior medical training or skill. Here the Court had testimony from Mary and from her father which both testified to the physical problems which attended Dr. Hurst's treatment.

What emerges from a comparison of dentistry and orthodontics is a philosophical disagreement which has revealed in Dr. Daynes' affidavit. Dentists do not believe a tooth should be removed to accomplish orthodontic ends. Orthodontists have less qualms about that and in fact, according to Dr. Daynes', after having spoken with Dr. Quinn, now believes that such practice is within the standard of orthodontia.

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\*reversed on other grounds 558 P.2d 775

But, what about Mary Alene/Hunt? At 12 years old, did she give informed consent to the procedure which, she declares and experts cite is consequential to the procedure, has caused her such unending pain? Is the failure to make full disclosure and to secure informed consent malpractice?

What about the decision of Dr. Hurst as cited in his affidavit, that he decided nothing could be done for Mary Alene in 1985 to relieve her pain? Why has she received relief at the hand of Dr. Stobbe, which Dr. Daynes cites as proof of misalignment? Remember that Defendant, at Dr. Daynes' deposition, asked whether placebo effect of the splint could be causing the relief. Dr. Daynes said that he considered that, but doubted it. Dr. Tanner said that it's to get relief that "you do an appliance." Dr. Bybee agreed.

Summary Judgment requires that all inferences be decided in favor of the person against whom the motion is taken. Clearly, here all the inferences, taken for Mary, would require that no Summary Judgment be granted.

Further, the Court was aware that Plaintiff has been without funds. According to Defendant's interrogatory answers, she has never earned more than \$100 per week and that she was practically indigent. Just at the time of the Summary Judgment motion, she secured funding from her father to pursue this case. As the Court can see by exhibits 9 through 12, she has secured a local expert and as the Court can take judicial notice, there are numerous other experts waiting when money is available. Defendant already benefits from the Statute of Limitations in malpractice actions which forced Ms. Hunt to represent herself before the pre-litigation panel and to file this action herself. She must be given some latitude by this

by this Court, in equity, because she is unable to proceed as quickly as the well-funded Defendant has been able to.

Further, this Court should realize why local experts were not available. The inference as to cause is plain in Dr. Tanner's exposition, and this matter, as well as the fact the head of the medical malpractice insurance plan was sitting with Dr. Hurst across the table from Dr. Daynes at the time of his deposition. This fact was presented to the Court at the time the Summary Judgment motion was argued.

This Court can also draw an inference from the fact that Dr. Hurst tried three times, as recounted in Ms. Hunt's affidavit, to give her stability and comfort. He failed three times. He was hired the fourth time, took the money, and then returned it. Relief was gained from Dr. Stobbe's treatments, as both Ms. Hunt and Dr. Daynes have testified.

Finally, Plaintiff submits that in a Summary Judgment hearing, she does not have to prove the negative. According to Bitzen v. Parisi, 545 P.2d 578, "A physical condition cannot be couched in terms of possibility." This District Court has denied Ms. Hunt the right to prove no other events did not occur which Dr. Daynes has suggested were other "possible" causes of her suffering and T.M.J. problem.

In conclusion, with deference to Ms. Hunt, and to put matters in perspective, and granting her the permissible inference, the fact three dentists testify to mental problems in Ms. Hunt does not prove this fact. In truth, the fact these three presume to pontificate on her mental health is further evidence of their collusion and the hint of obstruction of justice.

For these reasons, Plaintiff asked the District court to take whatever equitable step it deems appropriate to relieve Ms. Hunt of the Summary Judgment which was granted against her, to give her leave of Court to use her new resources, and to present this Court within a month the proof that Court had requested.

Please remember, also, that local experts have argued and their Affidavits are in the record, that Dr. Hurst's treatment was within the standard of care. Dr. Rasmussen in his Affidavit, on p. 3, para. 7, that" . . . the result of the treatment plan was good. . . ." despite Plaintiff's plaintive complaint of her pain, and the other experts' description of the failed treatment (i.e., Dr. Daynes' affidavit and Dr. Tanner's lecture, and the information contained in Affidavits Exhibits 9 through 11, 13, 14, attached). Dr. Quinn concluded the pain Appellant is suffering is "all in her head" despite the Appellant's experts' testimony of objective symptoms.


Surely there is enough, objectively and through the doctrine of res ipsa loquitur.

Finally, this Court should examine the issue of abuse of discretion by the trial court in refusing to grant the formerly indigent Appellant a continuance to gather the medical evidence she could begin to afford at the time of the hearing, especially since that preliminary evidence was presented to the Court in a timely fashion, including evidence of Appellant's newfound ability to prosecute the matter, and given the fact that at the time Summary Judgment was granted, the issue of whether Dr. Daynes' testimony was still good and un rebutted had not yet been determined.

#### SUMMARY OF ARGUMENT

Appellant has not had her day in Court. Her financial condition combined with the relative financial strength of her opposition, and the structure of the Statutes of Limitation and Malpractice Statutes, put impossible pressures on her, though she had still been able to present credible evidence, included in the Exhibits herewith and presented to the trial Court, that a real issue of causation existed, and that Respondent was the actual cause of her long term and apparently permanent pain and suffering of which she had complained.

DONE this 18th day of November, 1988.

  
\_\_\_\_\_  
ROBERT N. MACRI

#### CERTIFICATE OF MAILING

I certify on this 18<sup>th</sup> day of November, 1988, a true and correct copy of the foregoing BRIEF OF APPELLANT was mailed, postage prepaid, U.S. Mail to: David G. Williams, Esq., P.O. Box 45000, Salt Lake City, Utah 84145.

  
\_\_\_\_\_

## Table of Exhibits

### Exhibit

1. Partial Affidavit of Respondent
2. Affidavit of Appellant
3. Medical letter of Dr. Stobbe, Dentist
4. Affidavit of Charles Edward Gordon
5. Affidavit of Scott DAYnes, D.D.S.
6. Memorandum discussing Deposition filed by Appellant
7. Memorandum discussing Deposition filed by Respondent
8. Motion for Continuance (of Summary Judgment Hearing)
9. Affidavit of Dr. John R. Bybee
10. Affidavit of Grant B. Cannon., D.D.S., M.D.
11. Notarized letter of Dennis J. Machaelson DMD, MS
12. Affidavit of GAyle Dean Hunt
13. Letter from Dr. Christensen, D.D.S., Ph.D
14. Letter fo Dr. Aoki, M.D.

DAVID G. WILLIAMS - A3481  
SNOW, CHRISTENSEN & MARTINEAU  
Attorneys for Defendant  
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P.O. Box 45000  
Salt Lake City, Utah 84145  
Telephone: (801) 521-9000

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

- - - - -

MARY ALENE HUNT,  
  
Plaintiff,

AFFIDAVIT OF J. EARL  
HURST, D.D.S., M.S.

vs.

DR. J. EARL HURST,  
  
Defendant.

Civil No. C87-5212  
  
Judge J. Dennis Frederick

- - - - -

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

J. Earl Hurst, D.D.S., M.S., being first duly sworn, deposes  
and says:

1. I am an orthodontist licensed to practice in the State  
of Utah and a diplomate of the American Board of Orthodontics.  
Exhibit "A" hereto is a true and correct copy of my curriculum  
vitae, which accurately sets forth my education, training and  
professional experience. I am familiar with the standard of  
care ordinarily exercised by orthodontists in Salt Lake City and  
comparable communities during the period of 1972 to the present.

2. Mary Alene Hunt was referred to my office for consultation and orthodontic care in June 1972 by her general dentist, Jack Rasmussen, D.D.S. At that time Mary was 11 years old and her father reported she had injured her lower front teeth in a swimming pool accident.

My clinical examination in June 1972 revealed that the crown of tooth no. 25 (lower right central incisor) had been fractured, exposing the pulp and causing a large abscess and fistula. A radiograph (x-ray) showed that tooth had been endodontically treated (root canal therapy had been performed). A large abscess was present in teeth nos. 23, 24, 25 and 26 (the lower front teeth). It was my opinion at that time that the prognosis for tooth no. 25 was poor, but teeth nos. 23, 24 and 26 could probably be saved by endodontic care.

3. In June 1972 I performed an orthodontic evaluation on Mary, which included taking orthodontic records (plaster study models) and cephalometric (skull) x-rays. My evaluation showed 5 mm of lower anterior crowding (crowding of the lower front teeth), good alignment of the upper teeth and a class III occlusion tendency (a lower jaw bite protusion).

4. After careful diagnostic evaluation and consultations with Dr. Rasmussen and Gayle Hunt, Mary's father, it was agreed that tooth no. 25, which was seriously damaged and had a very questionable prognosis, would be extracted and <sup>e</sup>that space used to reduce the crowding of the lower anterior teeth, through the application of

braces. It was felt the removal of tooth no. 25 would also help resolve the infection around the lower anterior teeth.

5. The endodontically damaged anterior teeth (nos. 23, 24 and 26) were observed for approximately three months before commencing the orthodontic treatment. By September 1972 I felt those teeth were stable, but may respond unfavorably and need endodontic care and I commenced orthodontic treatment, placing bands on her teeth.

6. Orthodontic treatment continued from September 1972 through 1974. By July 1974 the goal of the orthodontic treatment had been achieved and a good result obtained. The lower anterior teeth had been moved to reduce the crowding and had evenly taken up the space of tooth no. 25. Retainers were given to the patient at that time with instructions on use of the retainers, but the actual orthodontic treatment was completed. The positions of Mary's lower anterior teeth and her bite relationship, concerning which she now complains, have been essentially unchanged since July 1974. My records show that Mary visited my office periodically from 1974 through 1982, but only for minor adjustments to her retainers or for new retainers. No additional treatment was rendered during that time which changed the position of her teeth or her bite.

7. In March 1985 Mary requested minor retention adjustments in the alignment of her upper anterior teeth. Bands were applied in March 1985 and removed in September 1985. Only very minor

AFFIDAVIT

1. My name is Mary Alene Hunt, the complaining party.
2. I have told the Court in a previous affidavit that nothing other than the orthodontic mistreatment I suffered altered my jaw.
3. I have received no stress other than the deformities which were visited on me without my consent, which series of treatments affected my performance in all areas, caused me great pain and great suffering.
4. In my father's affidavit, which is before the Court, there is testimony that my teeth were normal before the banding. I have also submitted photos from which the Court can determine how Dr. Hurst's treatment misaligned my jaw.
5. Perhaps I was hasty in presenting what has been thought to be T.M.J. (which I do not deny is part of my suffering) but I believe that it is the "standard of care" by orthodontists which created the underlying misalignment problems which in turn caused the symptoms of which I have complained. Hearing Dr. Tanner's explanation to the dentists has confirmed my previous informed intuitions.
6. I know that I believe there is sufficient evidence to support my claims and that Mr. Macri argues those points elsewhere.
7. My respect for Dr. Stobbe kept me from involving him in this lawsuit, at his request, because his ministrations were giving me relief, as both I and Dr. Daynes have previously testified, which testimony is uncontroverted.
8. I believe this Court may have accepted the conclusion of dentists banded together to prove I am crazy because I have the temerity to object to the way Dr. Hurst banded my mouth over and over again, and then was ready to accept another \$2,000. to try to correct his earlier errors.
9. I state I am not crazy. I have allowed my attorney to speak for me, but has he once convinced you of my suffering? If 20 orthodontists agree that I should not have pain, if I cry "I am in pain. Help me.", you as the Court must not think me crazy on the advice of these men seeking to discredit me for their profession's economic gain.
10. I have no animosity for anything that has happened to me. I believe it is only necessary to compensate me for the pain I suffered as a victim of an expensive, dreaded and unnecessary face alignment whose consequences we now know were predictable
11. I am now able to afford the underwriting of trips around the country which I now know are necessary to visit experts of other, less fraternal, clubs.
12. Thanks to Dr. Tanner we now know this treatment does cause the pain complained of, as Dr. Daynes has said and as Dr. Murdoch has attested.

Dated this 13th June, 1988.

  
\_\_\_\_\_  
Mary Alene Hunt

State of Utah/Co of Salt Lake)ss

Subscribed and sworn before me by Mary Alene Hunt this 13 June, 1988.



JOSEPH W. WILLIAM STOBBE, JR., D.M.D.



*Family Dentistry*  
715 East 3900 South • Suite 112  
Salt Lake City, Utah 84107

December 17, 1987

Re: Mary Alene Hunt

To Whom It May Concern:

The purpose of this letter is only to state that I began treatment on Mary Alene Hunt on June 15, 1987, for Tempromandibular Joint Dysfunction.

Sincerely;

A handwritten signature in cursive script, reading "Joseph W. Stobbe Jr.".

Joseph W. Stobbe Jr. D.M.D.

Exhibit 4

Robert Macri 2043

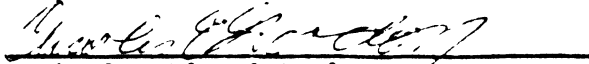
Salt Lake City, Utah 84102  
Tel. 364-3018

IN THE THIRD DISTRICT COURT OF UTAH, SALT LAKE COUNTY

:  
: :  
:  
... AFFIDAVIT  
:  
: Case No.  
:  
:

COMES NOW CHARLES EDWARD GORDON under oath to declare;

1. I have been acquainted with Plaintiff Mary Alene Hunt for more than 3 years.
  2. Shortly after becoming acquainted and friendly with her, I had occasion to loan her a thousand dollars to help her work on dental problems with Dr. Hurst.
  3. Dr. Hurst said that he would help Mary Alene with her dental problems (that she always complained he had originally caused) for \$2,000. I spoke with Dr. Hurst and he indicated he would accept the \$1000. I loaned Mary as a down payment for this work.
  4. Some substantial amount of time passed, and no dental work was being done. Finally I checked with Dr. Hurst and he informed me that he had decided not to do the work because Mary was so "irate". We talked about this, and he indicated that although he wouldn't do the work needed, Mary owed some \$300-400. dollars to him. I told him to keep that money and send me the difference. He hesitated and then said he would refund the entire \$1000., which he did.
  5. Thereafter I tried to help Mary find a specialist to help her. All reported she needed dental work, and I was willing to apply the \$1,000. but every time we got to the point of contracting, when Dr. Hurst was mentioned, ---and this may just be coincidence--- the specialist decided he would not be able to help after all.
  6. One dentist with whom we consulted, Dr. Pandall, had indicated he would help Mary. He took X-rays and was ready to begin treatment, using an "appliance". Then he decided not to help. We were very surprised at the pre-litigation hearing, which I attended, to hear both Dr. Randall and Dr. Hurst indicate Mary had no problems.
  7. We finally located Dr. Stobbe with whom Mary has been receiving treatment these past months. Having known her well during the past two years, I can observe that since her treatments by Dr. Stobbe, Mary Alene has been pain-free, her expression has loosened, she has been happy and much more easy to be with. I believe that Dr. Stobbe's dental treatments of Mary Alene's problem has caused her to experience relief from a dental condition which had been plaguing her as long as I have known her.
- Dated this 16th December, 1987.

  
Charles Edward Gordon

State of Utah/Co of Salt Lake)ss


Subscribed and sworn before me by Charles Edward Gordon this 16 December, 1987.

  
Notary Public, State of Utah MCF:



AFFIDAVIT

- . My name is Scott Daynes and I am a dentist practicing in general dentistry in Salt Lake City.
- . I am licensed to practice in the State of Utah and have my D.S. degree.
- . I have had the opportunity to examine Mary Alene Hunt on December 29, 1987 and received a dental history presented by her.
- . Miss Hunt has explained that in 1972 she had an injured front tooth removed and ortodontia was used to restore her bite.
- . I am of the opinion that change of bite can be caused by orthodontia and this is well known.
- . As recently as ten years ago, however, it was not well known that a change of bite created by ortodontia could cause stress and pain in other parts of the body.
- . I don't think it's normal procedure to take out a tooth to solve an orthodontic problem as described by Miss Hunt.
- . Assuming the foregoing I can state that I believe Miss Hunt has been dentally mistreated and this is evidenced by the fact that recent alignment of her bite by a splint (band-aid approach) has released her from years of pain and self-image problems.
- . Miss Hunt describes classic signs of the previously unidentified consequences of the procedure of shifting bite through orthodontia.
- . I further believe that emotional problems can result from undiagnosed and unabated pain and believe that Miss Hunt is a member of the class of young white females we have discovered are especially susceptible to the orthodontic consequences above described.

Dated this 29th December, 1987

  
Scott Daynes, D.D.S.

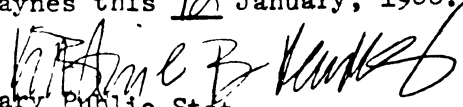
Witnesses:

Executed in Office  
1020 Atherton  
Salt Lake City  
December 29, 1987

State of Utah )  
County of Salt Lake ) ss

Subscribed and sworn before me by Dr. Scott Daynes this 12th January, 1988.

  
Notary Public State of Utah

Robert Macri 2043  
230 South 1000 East  
Salt Lake City, Utah 84102  
Tel. 364-3018

IN THE THIRD JUDICIAL DISTRICT COURT OF UTAH, SALT LAKE CO.

MARY ALENE HUNT,  
Plaintiff

vs.

DR. J. EARL HURST,  
Defendant

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MEMORANDUM SUPPORTING DENIAL OF  
DEFENDANT'S SUMMARY JUDGEMENT MOTION

C87-5212

While Plaintiff still believes a Summary Judgement Motion is premature in this matter because she has been handicapped because of finances and has only just been able to secure the backing to proceed with this action, and because Plaintiff has been unable to depose Dr. Hurst yet, still she has been able to secure supportive testimony from Dr. Daynes, which testimony was not contradicted, only modified, and from Dr. Murdoch, original of which is attached hereto.

Defendant's position that Dr. Daynes has contradicted his affidavit is not correct. The following excerpts from the deposition are instructive in this regard, as follows:

Mary Hunt was wearing her "bite therapy splint" when she visited Dr. Daynes (p.38 line 13, p. 61, lines 17-20.) It is because this splint was giving relief to Plaintiff that Dr. Daynes made the statements recorded in his previously submitted affidavit.

Dr. Daynes, in his deposition, suggests that hearing the report of Dr. Guinn which Attorney Williams read to him "qualifies" or "discounts" the importance he gave the popping in diagnosing the T.M.J. problems, which he had suggested had developed in Mary. Dr. Guinn found the popping to be "simple subluxation of the condyle under the eminence." However, later on in the deposition, Dr. Daynes is still not willing to discount popping as only simple subluxation(opening of jaw) and states on p. 59 at lines 20-

Memorandum p. 2 of 3

25 that subluxation " . . . is an alternate explanation" and he concludes, "I don't have an answer for you, is it really a simple subluxation or is that morning a symptom of a significant T.M.J. problem, and I'm not sure either of us (referring to Dr. Guinn) can come to that conclusion."

Dr. Daynes, on p. 42 at lines 4-8, states he can't understand the T.M.J. issue he previously diagnosed because wearing the splint " . . . made things better for (Mary)." He says, "... so I felt---and I still do--- have a question about the possibility of a T.M.J. problem in that she was wearing the splint." He adds on page 43 at line 15-17, "All I can say is there was a possibility of a T.M.J. problem because all those things are made better by the splint."

Defendant seems to argue that because there are numerous causes, including dental mistreatment, which cause the symptoms Mary has suffered since her dental treatment, that Mary does not deserve to argue that it was the dental treatment which caused the problems. This is not good logic. The fact that Dr. Daynes maintains that one of the causes of the problems is dental mistreatment raises an issue of fact so as to preclude summary judgment. Mary does not have to prove at this point that she suffered the other possible causes of the symptoms; she has been unequivocal. The problems were caused by the extraction which changed her bite and, as Dr. Daynes observed in his affidavit and in this deposition p. 62, lines 15-17 " . . . we know a lot more about the problem, the T.M.J. problem, than we did 15 or 20 years ago. . (when treatment was originally given by Dr. Hurst.)"

The fact that the T.M.J. problem can be caused by treatment such as Dr. Hurst gave (changing the bite to accommodate a lost tooth) is reinforced by Dr. Daynes when he says on p. 46, lines 55-6, "All I felt was that there is a possible link (between her orthodontic treatment and the problems Mary described) and the T.M.J. problem."

Memorandum n. 3 of 3

The essence of Mary's complaint is answered and supported by Dr. Daynes on n. 50, line 7-12, "It's convenient to take out a crowded incisor at times, and I generally try not to do that because I don't want to cause a bite problem or other problems . . ." We need Dr. Hurst's deposition on the issue whether he knew of these consequences when he opted for this mode of treatment. As Dr. Daynes reports on n. 51 at lines 17-21, "Dr. Hurst would have handled this case differently if he had to do it again." (emphasis added). This would seem a clear indication of a lapse in standard of care.

Further, Dr. Daynes states that Dr. Hurst's treatment of Mary ". . . may have been a part of the problem, development, it may in some way be connected with it." (Deposition n. 55, lines 20-24.)

Finally, Dr. Daynes still maintains ". . . a restructuring of teeth can cause alignment problems which cause pain and stress and are consistent with T.M.J." (Deposition p. 61, lines 2-7). These are the problems Mary maintains she has suffered since her treatment by Dr. Hurst. He also maintains that consequences of an extraction such as Mary underwent at the hands of Dr. Hurst may be the T.M.J. syndrome of which Mary has complained (Ibid n. 62, lines 1-9).

THUS, while it is true we have no dentist who declares that Dr. Hurst's treatment caused Mary's problems; and while we have other possible causes, which Mary denies having occurred, still it is shown by expert testimony that Dr. Hurst's treatments could have caused the problems complained of and denying it is a position on which reasonable experts could disagree.

Because of problems of finances and logistics, Mary has been unable to take Dr. Hurst's Deposition as yet and put his treatment and his standard of care on the record. It is Plaintiff's position that this matter should be continued to allow that or that this Motion for Summary Judgement should be denied.

Dated this 3rd June, 1988.

*Robert M. Allen*

Exhibit 1

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

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MARY ALENE HUNT,  
  
Plaintiff,

vs.

DR. J. EARL HURST,  
  
Defendant.

MEMORANDUM IN SUPPORT OF  
DEFENDANT'S SECOND MOTION  
FOR SUMMARY JUDGMENT

Civil No. C87-5212

Judge J. Dennis Frederick

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Defendant submits this memorandum, including his prior Memorandum attached hereto as part of Exhibit A, in support of his Second Motion for Summary Judgment.

FACTS AND PROCEDURAL STATUS

This is an action alleging dental malpractice against Dr. Hurst, an orthodontist. Defendant's memorandum in support of his prior motion for summary judgment, attached hereto as part of Exhibit A, contains separate numbered statements of material facts as to which no genuine issues exist in accordance with Rule 2.8 Rules of Practice in the District Courts and Circuit

Courts of the State of Utah and Rule 3, Supplemental Rules of Practice - Third District. Those uncontroverted facts are not all restated herein, but a brief factual and procedural summary is presented.

Dr. Hurst treated plaintiff orthodontically from 1972 through 1974, by extracting an injured lower central incisor and using that space to reduce crowding of the lower anterior teeth. (Affid. of J. Earl Hurst, D.D.S., M.S., ¶¶ 4 & 6). By July 1974 the goal of the orthodontic treatment had been achieved and a good result had been obtained. (Affid. of J. Earl Hurst, D.D.S., M.S., ¶ 6). Thereafter Dr. Hurst made minor adjustments on several occasions through September 1985, but the moving of plaintiff's teeth was completed by July 1974 and the subsequent minor adjustments did not significantly affect her bite. (Affid. of J. Earl Hurst, D.D.S., M.S., §§ 6 & 7).

In September 1985 plaintiff visited Dr. Hurst and complained of an unnatural bite which she claimed was caused by the extraction of her lower front tooth and by the movement of the lower anterior teeth. She also complained about the extraction of her wisdom teeth, with which Dr. Hurst had no involvement. Plaintiff requested that Dr. Hurst restore her teeth to their original positions. Dr. Hurst advised plaintiff it would not be advisable to attempt such a restoration and declined to do so.

This action was commenced in August 1987. On November 2, 1987, defendant filed a Motion for Summary Judgment, supported by a memorandum and the Affidavits of J. Earl Hurst, D.D.S., M.S., Wallace B. Brown, D.D.S., Richard E. Randle, D.D.S., M.S., James L. Guinn, D.M.D., Jack Karl Rasmussen, D.D.S., and George R. Parker, D.D.S., M.S. (Copies of the memorandum supporting the first Motion for Summary Judgment and the foregoing Affidavits are attached hereto as Exhibit "A" for the Court's convenience.)

Defendant's Motion for Summary Judgment was based on the absence of any expert testimony in support of plaintiff's claims or controverting the expert affidavits filed in support of defendant's motion and on the four year statute of limitations or statute of repose in § 78-14-4, UCA (1953 as amended). The first Motion for Summary Judgment was heard on December 21, 1987 and was granted by the Court.

On January 22, 1988, plaintiff filed a Motion for Relief from Judgment, supported by the Affidavit of Scott Daynes, D.D.S. (A copy of Dr. Daynes' Affidavit is attached hereto as Exhibit "B" for the Court's convenience.) Plaintiff's Motion for Relief from Judgment was heard January 25, 1988. By minute entry dated January 26, 1988, the Court granted plaintiff's Motion and vacated the summary judgment.

On March 18, 1988, defendant took Dr. Daynes' deposition. Based on his deposition testimony, defendant has filed this Second Motion for Summary Judgment.

#### ARGUMENT

DR. DAYNES' TESTIMONY DOES NOT RAISE ANY ISSUES OF FACT REGARDING DR. HURST'S COMPLIANCE WITH THE APPLICABLE STANDARD OF CARE OR CAUSATION.

Defendant has attached hereto as Exhibit "A" the memorandum and Affidavits filed in support of his first Motion for Summary Judgment and will not reargue herein the basic principles that plaintiff must adduce competent expert testimony to establish both a breach of the applicable standard of care and causation. Regarding those issues defendant refers the Court to his earlier memorandum, included in Exhibit "A" hereto. This argument will focus on Dr. Daynes' Affidavit and deposition testimony because it was on the basis of Dr. Daynes' Affidavit that the first summary judgment was vacated.

It is defendant's position that Dr. Daynes retracted and withdrew any opinions or inferences in his affidavit that may have created any questions of fact regarding breach of the standard of care or causation. It is clear from Dr. Daynes' deposition that he now does not believe or have the opinion that Dr. Hurst breached the applicable standard of care and

does not express the opinion that Dr. Hurst's treatment of plaintiff was or "probably" was the cause of plaintiff's symptoms. In the absence of such expert opinion testimony from Dr. Daynes, the expert affidavits offered in support of defendant's motion are uncontroverted and Dr. Hurst is entitled, again, to summary judgment.

The balance of this memorandum will examine the testimony of Dr. Daynes' regarding two essential elements of plaintiff's prima facie case: breach of standard of care and causation.

#### BREACH OF STANDARD OF CARE

With respect to whether Dr. Hurst breached the applicable standard of care or was negligent, Dr. Daynes' affidavit stated:

7. I don't think it's normal procedure to take out a tooth to solve an orthodontic problem as described by Miss Hunt.
8. Assuming the foregoing I can state that I believe Miss Hunt has been dentally mistreated and this is evidenced by the fact that recent alignment of her bite by a splint (band-aid approach) has released her from years of pain and self-image problems.

When plaintiff presented to Dr. Hurst in 1972, she had two conditions: (1) crowding of the lower front teeth requiring orthodontic treatment, and (2) the crown of tooth no. 25, a lower central incisor, was fractured and the pulp was exposed causing a large abscess and fistula. Tooth no. 25 had been

treated endodontically and was observed by Dr. Hurst for a few months beginning in June 1972. By September 1972 the prognosis for tooth no. 25 was very poor and the decision was made to extract it and use the space to reduce the crowding of the other lower anterior teeth. (Affid. of J. Earl Hurst, D.D.S., M.S., ¶¶ 2-5).

At his deposition, Dr. Daynes, who is a general dentist and claims no expertise in orthodontics (Depo. of Scott P. Daynes, D.D.S., at pp. 5, 6 & 46), explained that when he signed the Affidavit, he was not aware that extraction of lower incisors was appropriate and acceptable orthodontic treatment for reducing crowding of lower anterior teeth and that he had not seen x-rays of plaintiff's damaged tooth no. 25. He further explained that since signing the Affidavit, he consulted with an orthodontist with whom he is familiar and he now understands that extraction of incisors to reduce crowding of lower anterior teeth is not only acceptable orthodontic practice, but is the preferred treatment in many cases. When given an opportunity to examine the x-ray of tooth no. 25 taken June 19, 1972, by Dr. Hurst, Dr. Daynes agreed completely with Dr. Hurst's assessment that the tooth had a poor prognosis and testified that extracting the tooth was reasonable. Regarding these issues Dr. Daynes testified as follows:

Q. Doctor, I asked you some questions before about your training and your practice, and it's clear that you don't either consider yourself to be a specialist in orthodontics or profess any formal training in that area; is that accurate?

A. Yes, sir.

Q. Do you claim to know the standard of care ordinarily exercised by orthodontics? (sic)

A. I hope so. I'm educated in that at all times. In other words, I'm becoming more aware, more aware today than I was at the time I signed this affidavit or that I did Mary's exam.

Q. Well, do you claim that you are sufficiently familiar with the standard of care exercised by orthodontics (sic) to give opinions concerning the quality of treatment by an orthodontist?

A. Only in the most general terms.

Q. Okay. In the affidavit marked exhibit 3, I think in paragraph eight there's a statement concerning Mary having been dentally mistreated. Do you see where I'm referring to?

A. Yes, sir. I'm reading that.

Q. Did you, by that statement, intend to express an opinion that Dr. Hurst had treated Mary negligently or in violation of the standard of care ordinarily exercised by other orthodontists?

A. No, sir. I'm sure that I didn't because I remember talking to Mary and telling her that what happened to her or the work that was done wasn't done with any intention of causing problems or allowing these problems to happen.

If these problems had happened and we look at the problem now, it's more that we know about these problems and we look at those problems now, where then we didn't understand that these problems even existed.

Q. Have you formed any opinion as to whether the treatment rendered to Mary by Dr. Hurst was in compliance with or in violation of the standard of care ordinarily exercised by other orthodontists at the time he rendered the treatment?

A. Yes, I have formed an opinion in that I'm--I have worked on that opinion and developed it to a better state than the one I used, relied upon when I gave the information which has been presented in this affidavit.

Q. And what is your opinion now?

A. My opinion now is this is rather--if I might say this: I'm referring to the fact that a tooth was removed in the orthodontic treatment which I do not see normally removed. Normally I see bicuspids removed. This is an incisor, and that set up a little red flag for me at the time of Mary's exam because I wasn't familiar with that tooth being removed at all.

And I think that's the basis for my opinion at that time, and I had never seen this done before. I had no idea that could be done or was done or was normally considered an option.

Since then, partially because of our conversation the other day when you read me the opinion of one of the other orthodontists, I called, in fact, the orthodontist that you mentioned, and I asked him in the most general terms without mentioning Mary's case or even involving this particular event or history, if it was possible for an orthodontist to consider removing a lower incisor to handle a conventional crowding problem which I assumed Mary had. And I was greatly informed that that is not only often done or considered, it's often the treatment of choice for reasons which I quickly wrote down on these notes this morning, and I can go into those notes. But the general feeling that I developed was that it's normal. It not only is done, it's preferred treatment by orthodontic treatment, and I didn't know this then, at the time I did Mary's exam.

Q. And how has that altered your opinion as it was expressed in the affidavit?

A. The opinion I expressed in the affidavit was greatly colored by the fact that I thought Mary had a T.J.M. problem. And not directly connected, but another fact was that I felt she had some orthodontic treatment that perhaps wasn't conventional. I didn't feel at that time it was normal to take out an incisor to make a correction for a crowding problem. My training was, as a general dentist, it's not always the best thing just to do the most convenient thing.

It's convenient to take out a crowded incisor at times, and I generally try not to do that because I don't want to cause a bite problem or other problems, and my feeling there was developed from my training as a general dentist. It had nothing to do with orthodontics. I had no specific basis for my opinion in that area.

Q. Okay. And now that you've talked to Dr. Parker, what is your opinion concerning the treatment rendered by Dr. Hurst?

A. Well, rather than get into Dr. Hurst but in general, it seems to be quite normal treatment to consider removing the incisors when tooth room and spacing is needed.

And I didn't know that and now I know that, and I can see that as a fact, and that's what happened for Mary evidently, and that seems to be the standard of care of a conventional orthodontic treatment.

Q. Okay.

A. And I didn't know that then. I think that's part of what formed my feeling that there was an orthodontic basis--or excuse me--an orthodontic possible basis for Mary's T.M.J. problem.

Deposition of Scott P. Daynes, D.D.S, at pp. 46-51.

Q. Based on all the information you have now, your examination of Mary, the history you took from her, Dr. Guinn's report, your discussions with Dr. Parker and all other information that you have concerning Mary today, do you either have the opinion or intend

to express any opinion in this litigation that Dr. Hurst was in any way negligent or breached the standard of care? Is that question too long?

Qm  
16  
A. No, sir, I understand the question. I want to pause and reflect on it because it's obviously an important question, and I feel there has been no significant treatment which directly caused Mary's problem either directly or indirectly, and I don't look at the orthodontic treatment as the cause of Mary's problem per se. It may be part of the problem, development, it may in some way be connected with it. I just don't know, and I don't have any way of saying that. I don't mean to say that. If I might, I'd really have to reflect on this number eight paragraph in my affidavit. I think I was beyond the bounds of my normal dental experience in that statement, and I kind of didn't mean to say what it says there. I didn't sit down and help to make up this sentence. This was done by Mr. Macri while I examined Mary, and I believe it came out of the comment I was making to Mary trying to be helpful to make her understand about a T.M.J., which I felt if it was understood as a T.M.J., and treated like that, fine. Like a bandaid approach, and that's where I was coming from, and I was trying to be helpful.

.....

Q. Dr. Daynes, I'm going to provide you the panorex (x-ray) taken by Dr. Hurst on June 19, 1972, of Mary, and I'll represent some facts to you to give you a little background.

.....

Q. Having had an opportunity to see that x-ray, does that help explain to you why tooth number 24 (sic) was extracted?

A. Yes, it clarifies what I read in Dr. Hurst's report as to the particular problems of that tooth and its lack of a favorable prognosis and its infliction for causing problems for the adjoining teeth.

.....

Q. Based on that x-ray, you would not now have any criticism of that extraction of that tooth; is that right?

A. No, I have no criticism of the extraction of the tooth for the dental reason, for the tooth reason. I only had a question for the orthodontic reason. I hope I clarified that, that I improved my opinion in that area.

Id. at 55-58.

#### CAUSATION

According to Dr. Daynes, the plaintiff complained to him of numerous symptoms, only some of which he believed could possibly have been caused by a change in her bite due to orthodontic treatment. Regarding causation, Dr. Daynes' affidavit states:

4. Miss Hunt has explained that in 1972 she had an injured front tooth removed and orthodontic was used to restore her bite.
5. I am of the opinion that change of bite can be caused by orthodontia and this is well known.
6. As recently as ten years ago, however, it was not well known that a change of bite created by orthodontia could cause stress and pain in other parts of the body.
9. Miss Hunt describes classic signs of the previously unidentified consequences of the procedure of shifting bite through orthodontia.
10. I further believe that emotional problems can result from undiagnosed and unabated pain and believe that Miss Hunt is a member of the class of young white females we have discovered are especially susceptible to the orthodontic consequences above described.

In his deposition, Dr. Daynes explicitly stated that orthodontic treatment is only one of many possible causes of the plaintiff's symptoms and that he never intended to state or suggest that the orthodontic treatment she received from Dr. Hurst was the actual or probable cause of her problems. In fact, Dr. Daynes' examination of the plaintiff did not reveal any evidence of an abnormal bite or any abnormalities in her temporomandibular joints. Dr. Daynes acknowledged James L. Guinn, D.M.D. as an expert in temporomandibular joint dysfunction and one to whom he would defer and look for guidance regarding issues of bite alignment and T.M.J. dysfunction. (Depo. of Scott P. Daynes, D.D.S. at 25, 26). Dr. Daynes testified that he does not disagree with or dispute Dr. Guinn's finding that plaintiff's symptoms are not explained by any jaw or temporomandibular joint problems and that, in his opinion, her jaw and bite have not been adversely altered or affected in any way by her orthodontic treatment. (Affid. of James L. Guinn, D.M.D., ¶ 4 and Exhibit "B"; Depo. of Scott P. Daynes, D.D.S., p. 38).

Regarding causation Dr. Daynes testified:

Q. Okay. So basically, based on your records and your recollection, you found nothing abnormal about Mary's bite or her Temporomandibular joints?

A. Yes, Sir.

Q. I'm going to hand you what's been marked deposition exhibit 2 to your deposition, which is an affidavit of James L. Guinn with his report attached

to it, and ask you to take what time you need and read that, and I want to ask you some questions concerning it.

. . . .

A. All right. I have read this exhibit.

. . . .

Q. Okay. Do you disagree with any of the conclusions or opinions expressed by Dr. Guinn either in his report dated September 17, 1986, or in the affidavit?

A. No, sir. If I might, I'd like to comment that I have been educated by reading his report and clarified as to some of my questions which I noted in my notes.

Q. Okay.

A. If you're not going to ask me about that, I'd like to comment.

Q. About what?

A. The particular note I just mentioned.

Q. Go ahead and do so.

A. I was impressed that Mary told me she had popping noises. Beyond the fact that I was listening for popping noises, she began telling me she had popping noises, and that was important to me. It was significant of a problem, and that was part of what formed my opinion which I presented later on or which was taken later on by Mr. Macri. That popping noise which Mary mentioned, Dr. Guinn addresses here and seems to answer it, seems to qualify it or, in fact, discount its importance. That is important to me because Dr. Guinn has a lot more experience in this field than I have.

Q. Dr. Guinn explained that as being a subluxation; is that right.

A. May I read the sentence?

Q. Sure.

A. It's on this exhibit page, the examination. "Mary Alene stated that she had felt noises in her joint previously upon opening. This was found to be a simple subluxation of the condyle under the eminence. This is very normal for someone who opens as wide as Mary Alene. There is no evidence or history of internal derangements in either joint," and it goes on.

That really clarifies my questioning or my feeling that there was a problem there.

Q. Okay.. And you don't disagree with that statement or those statements you read by Dr. Guinn in any respect?

A. No, I would not disagree at all. I'm educated by them.

Id. at 36-40.

. . . .

Q. The symptoms that Mary expressed that you were really considering in dealing with your diagnosis were pain and stiffness and stress in the neck and face, correct?

A. Yes, sir.

Q. And isn't it true that those symptoms can be caused by a lot of different problems or factors?

A. Yes, sir, absolutely. There's no feeling on my part that the fact that she has these symptoms means that she has a T.M.J. problem. They may be caused by a skeletal abnormality, a growth abnormality, or some other thing I'm not able to think of right now, but other things may cause these, all of which I may not be able to define or know. All I can say is there was a possibility of T.M.J. problem because all those things are made better by the splint.

Q. You're just suggesting that T.M.J. dysfunction is one of many possible causes of those symptoms?

A. Yes.

Q. Would those other causes include hereditary factors?

A. Yes.

Q. Trauma?

A. Yes.

Q. Even fetal development?

A. Yes.

Q. Arthritis?

A. Developmental. I would include all developmental, possibly neoplastic, which means deformation of the developing symptoms, the growth structures.

Q. Psychological factors?

A. Yes.

Q. Anything that causes stress?

A. Yes. And I would include in there any lifestyle problems. In other words, where I mentioned earlier about the lifestyle problems may be causing the T.M.J. symptoms.

Q. Things such as drug abuse?

A. Yes, sir.

Q. Excessive yawning or opening the mouth excessively wide?

A. Yes, sir.

Q. Grinding or clenching of her teeth?

A. Yes. . . .

Q. The aging process itself may contribute?

A. Yes, sir.

Q. And probably a host of other things we haven't even identified?

A. Very much so, and we may not ever be able to identify.

Q. And as I understand your testimony, of all those possible causes of Mary's symptoms, you're not able to express an opinion as to what the actual cause is?

A. Absolutely. I wouldn't try to.

Q. I'll hand you deposition exhibit 3 to your deposition, which is a copy of the affidavit you've previously signed, I believe, at Mr. Macri's request; is that correct?

A. Yes, sir.

Q. Would it be fair, then, based on the testimony you have given, to say that any references in your affidavit to bite or T.M.J. problems as a cause of Mary's symptoms were intended only to be an expression by you that that was a possible or one of many possible causes?

A. Yes.

Q. Did you intend in any way to express an opinion by that affidavit that bite or T.M.J. problems were the cause of Mary's symptoms?

A. Not directly. I had no strong feeling and have none, and I hoped I presented none, that these problems, particularly the T.M.J. problem, resulted directly from her orthodontic treatment. All I felt was that there is a possible link, and "possible" is the word that's most important there, not that it's caused or a direct connection.

Id. at pp. 43-46.

#### CONCLUSION

Dr. Daynes, as a favor to his friend, Mr. Macri, signed an affidavit prepared by Mr. Macri, after only one cursory examination of plaintiff, without knowledge of the standard of care

and accepted practice in orthodontics regarding extraction of incisors and without having reviewed any records or reports from the numerous dentists who had previously treated and/or examined plaintiff. (Depo. of Scott P. Daynes, D.D.S., pp. 17, 23-27, 48-51, 54, 61). His opinion expressed in the Affidavit regarding the appropriateness of Dr. Hurst's treatment was based on the assumption that extraction of incisors is not acceptable orthodontic treatment, an assumption which he now concedes was erroneous.

Regarding causation, Dr. Daynes has never claimed or opined that the orthodontic treatment rendered by Dr. Hurst was or "probably" was the cause of plaintiff's present symptoms. He admits that he cannot give the opinion that plaintiff has an abnormal bite or any abnormality in her temporomandibular joints and that, even if her symptoms are caused by an abnormal bite or temporomandibular joint dysfunction, he cannot identify the cause of such abnormality or dysfunction. According to Dr. Daynes' unequivocal testimony, orthodontic treatment is only one of many possible causes of the symptoms of which plaintiff complains.

The affidavits of J. Earl Hurst, D.D.S., M.S., Wallace B. Brown, D.D.S., Richard E. Randle, D.D.S., M.S., James L. Guinn, D.M.D., Jack Karl Rasmussen, D.D.S., and George R. Parker, D.D.S., M.S., remain uncontroverted. Plaintiff has failed to

produce any competent expert opinion that Dr. Hurst breached the applicable standard of care or that such breach caused plaintiff's alleged injuries. Plaintiff has had more than ample opportunity and time to produce such expert opinion if it were available to her. Accordingly, Dr. Hurst is entitled to summary judgment.

Respectfully submitted this 4<sup>th</sup> day of May, 1988.

SNOW, CHRISTENSEN & MARTINEAU

By David G. Williams  
David G. Williams  
Attorney for Defendant

SCMDGW93

Exhibit 8  
Robert Macri 2043  
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Salt Lake City, Utah 84102  
Tel 364-3018

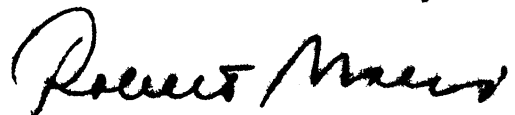
IN THE THIRD JUDICIAL DISTRICT COURT OF UTAH, SALT LAKE COUNTY

MARY ALENE HUNT,	:	
Plaintiff	: :	
	:	
vs.	:	MOTION FOR CONTINUANCE
	: :	and NOTICE OF HEARING
	:	Civil No. C87-5212
DR. J. EARL HURST,	:	Judge J. Dennis Frederick
Defendant	:	

COMES NOW PLAINTIFF to move this Court for a minimum of 3 weeks continuance of Defendant's scheduled Motion for Summary Judgement for the reason that Plaintiff has secured the attached document from an Idaho dentist, which notarized original has been lost and must be replaced, and because this diagnosis raises questions which must be answered by a deposition of Defendant and funds to accomplish that have just been obtained by Plaintiff and same could be stipulated conveniently within the month and would demonstrate the responsibility of Defendant for the conclusions which are apparent from Dr. Murdoch's attached statement.

Plaintiff's attorney has contacted Defendant's attorney and Defendant's attorney would not consent to this necessary continuance.

Dated this 31 May, 1988.

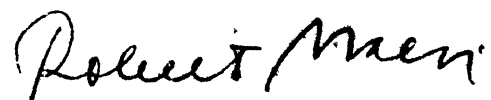


NOTICE OF HEARING

Unless stipulated to, Plaintiff's Motion for continuance will be heard on June 6, contemporaneous with Defendant's Motion for Summary Judgement.

Certificate of Delivery

I hereby certify that I delivered a copy of the foregoing to Defendant's attorney, David G. Williams, SNOW CHRISTENSEN & MARTINEAY, 10 Exchange Place, 11th Floor, Salt Lake City Utah this 31 May, 1989.



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

COMES NOW Dr. John R. Bybee of Salt Lake City to declare  
as true the following:

1. I have my Ph.d in Physiology and the training of  
science teachers.
2. I have listened to information provided by Mary Alene Hunt  
and further, have reviewed a tape and transcript purported to be by  
Dr. Henry Tanner regarding T.M.J. and "The Occlusion in Dentistry."
3. I believe that Dr. Tanner speaks with authority and  
knows what he is talking about. It is surely true that in cases on  
orthodontia, especially in young girls, much pain can result if the  
occlusal surfaces are not properly fitted following their movement and  
if equilibration is not properly completed which involves redesign of  
the occlusal surfaces and the incisal edges.
4. I have reviewed Mary Alene's personal history and have  
requested that I be given the opportunity to review her entire dental  
history, and applicable standards of patient care.
5. When these documents are before me, I will present to  
the Court a full exposition of these problems and how they specifically  
apply to Mary Alene.

Dated this 13th day of June, 1988.

  
DR. JOHN R. BYBEE

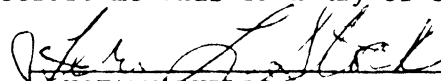
1972 - Ph.d Ohio State, Science Education and Physiology,  
and K-12 Curriculum Development.

1970-71 - Director of Autodidactic Laboratory, Ohio State  
Medical School.

1974-80 - Damm & Associates, Cleveland, Ohio, Medical Legal  
Consultations, Senior Consultant.

(a full Vita available if needed)

Subscribed and sworn to before me this 13th day of June, 1988.

  
NOTARY PUBLIC,  
Residing in Salt Lake County, Utah  
Joni

My commission expires:

10-5-91

Grant B. Cannon, D.D.S., M.D.

A PROFESSIONAL CORPORATION

1345 East 3900 South, Suite 114

Salt Lake City, Utah 84124

Exhibit 10

July 8, 1988

Maryalene Hunt  
68 "C" Street  
Salt Lake City, UT. 84103

Dear Ms. Hunt:

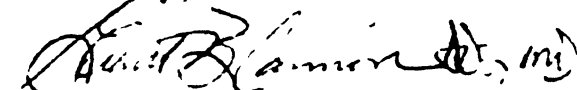
This letter is being written at your request regarding my personal opinion with regard to your occlusion and present state of oral health. This evaluation is incomplete because of a lack of history and inability to research previous treatment that you may have had.

I am unable to evaluate your chief complaint as I am not sure if you are concerned with pain, function or appearance. It is my understanding that you have had previous orthodontic therapy which you are quite unhappy with. Also there is a feeling that removal of ~~4 impacted wisdom~~ teeth and a lower central incisor tooth were inappropriate. You feel your occlusion is significantly impaired because of past treatment.

My examination reveals a Class I Malocclusion with an anterior open bite. Arch alignment is satisfactory. I do not feel that the shape of the dental arches has been compromised through the removal of any teeth. The open bite is the main dental problem that I can see. There is, in addition to this, a mild retrognathia. These problems could concurrently be corrected through orthognathic surgical procedures to reposition the maxilla or mandible to bring the teeth into proper dental alignment.

I hope this information will be helpful to you.

Sincerely,



Grant B. Cannon, D.D.S., M.D.

GBC/js

Exhibit 1 1

Diplomate of the  
American Board of  
Orthodontics

**Dennis J. Michaelson, DMD MS**

*Practice Limited to Orthodontics*

Pine Ridge Mall

4155 Yellowstone Highway

Chubbuck, Idaho 83202-2452

(208) 238-0974

American Association of  
Orthodontists



September 13, 1988

To Whom It May Concern:

Re: Mary Alene Hunt

This will confirm that we are undertaking orthodontic studies to determine Mary Alene Hunt's needs orthodontically and the reasons for her present problems which she claims are due to various orthodontic procedures. We will require some days to gather records and render an opinion. We trust we will be allowed a reasonable amount of time to do this. We do have part of her records now.

Examination of Mary Alene does indicate some occlusal and other dentally related problems.

Very truly yours,



Dennis J. Michaelson, DMD, MS

Dr. Dennis J. Michaelson, being duly sworn deposes and says he made and executes the forgoing statement.

September 13, 1988

State of Idaho  
County of Bannock



Ruth Ann Aller  
Notary Public

My commission expires, March 23, 1993.

Exhibit 12

ROBERT MACRI #2043  
Attorney for Plaintiff  
230 South 1000 East  
Salt Lake City, Utah 84102  
Telephone: 364-3018

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

MARY ALENE HUNT, :  
 :  
 : AFFIDAVIT  
Plaintiff, :  
 : CIVIL NO. C-87-5212  
vs. :  
 : HON. J. DENNIS FREDERICK  
DR. J. EARL HURST, :  
 :  
Defendant. :  
 :

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

Gayle Dean Hunt being duly sworn deposes and states as follows:

I am Mary Alene Hunt's father.

I accompanied Mary to consult Dr. Hurst after his examination of her teeth.

She had sustained a chipped front tooth and the same commenced to lean but was not capped and died.

Dr. Hurst proposed removal of same moving the adjoining teeth together to fill the resulting gap or space. I questioned moving teeth but was assured it was a regular procedure.

I paid some \$1,200.00 which seemed reasonable.

The work was performed with retainers apparently reducing the

lower bite size to fill the gap or space. Subsequently the adjoining two teeth died necessitating root canals.

Mary commenced to have bite or occlusion trouble. She said she could not chew gum.

Years went by with continued treatment by Dr. Hurst and periodic replacement of "retainers".

A protrusion of the upper teeth developed.

In approximately summer 1985 I was mailed by Dr. Hurst a contract for my signature to agree to pay some \$950.00 or \$1,000.00 to Dr. Hurst.

I telephoned Hurst's office and was told by the nurse same was for a "re-do" of Mary's tooth situation.

I met Mary who told me Dr. Hurst was going to reposition the bottom teeth placing an artificial tooth where she had lost a tooth.

I expressed alarm at what I expressed as transplanting old trees, she being 24 or so at the time and the earlier work at the age of 14 or so, and urged her to obtain a second opinion.

She obtained same from one Dr. Paulis who, according to her committed to do the work.

She said that later he, learning that previous work was by Dr. Hurst, apparently a friend, told her he would not perform same and to return to Hurst.

She said she went back to Dr. Hurst who declined further work.

I wrote to Dr. Paulis requesting an opinion as to what dental work he might recommend.

He telephoned, said he would not write a report nor accept

customary payment for writing a report but would explain to me what needed to be done.

He did so. The explanation was in technical terms and seemed to require extensive adjustment.

I suggested to Mary that she find another dentist or orthodontist.

She was examined by and interviewed by one Dr. Parker who telephoned me saying that she did indeed require work but that procedures of "re-doing" bottom bite, presumably by enlarging same to fit the upper was drastic and had risks.


By then she was frantic, desperate and at times when discussing her problem was almost incoherent and in either pretended or actual, but apparently, excruciating pain, related, she said and I believe visibly showed, to be related not only to occlusion but to a jaw functional situation.

She went from dentist to dentist, I suspect in an emotional state, not conducive to engagement and got nowhere.

She engaged a Dr. Stobe and invited me to see him with her for explanation as to diagnosis and possible remedial possibilities and cost.

With Mary in the dental chair he pointed out what he deemed to be amiss and discussed necessity of further diagnosis and possible eventual treatment procedures which are now underway.

After some weeks or months of treatment or adjustment Mary became visibly free or freer of pain, anxiety, and nervousness and is hopefully on her way to recovery.



---

GAYLE DEAN HUNT

Subscribed and sworn to before me this 18th day of December, 1987.



*Linda Hark*

NOTARY PUBLIC, Residing in Tooele County, Utah

My commission expires: 10-5-91

GORDON J. CHRISTENSEN, D.D.S., Ph.D.  
3707 NORTH CANYON ROAD, 7A  
PROVO, UTAH 84604

June 14, 1988

Ms. Mary Alene Hunt  
18 "C" St.  
Salt Lake City, UT 84103

Dear Mary Alene:

GORDON J. CHRISTENSEN D.D.S., P  
Diplomate American Board of Prosthodontics (P)



CRA Oral Health Institute  
3707 North Canyon Road, Suite 7A  
Provo, Utah 84604, USA, (801) 226-6565

87

I enjoyed meeting you and examining your clinical situation on June 14, 1988. This letter will summarize my clinical observations.

You have pain in the left facial area radiating from the left temporalis muscle down into the neck, shoulder and arm. Your jaw opening is normal with a slight right deviation. Your panoramic radiograph did not show any specific bone pathosis. Dental occlusion is very abnormal, showing contact of teeth on only a few posterior areas. You have had orthodontics 4 times with removal of several teeth for orthodontic purposes. You have a mandibular occlusal splint constructed for you about one year ago. This splint helps your signs and symptoms.

My opinion is that numerous factors are contributing to your jaw dysfunction and facial pain. They are:

1. Mental stress and anxiety causing clenching and bruxism.
2. Malocclusion with posterior tooth contact only.
3. Apparent nutritional deficiencies that may have caused tissue degeneration.
4. Previous tooth extraction and tooth movement that may have stimulated Temporomandibular joint remodeling.  
This is not abnormal with any orthodontic procedure.

I suggest that you do the following:

1. Get a well balanced maxillary splint constructed and wear it full time until pain subsides.
2. Have a thorough nutritional work up done and follow through with it. I suggest Cottonwood Hospital in South Salt Lake City.
3. After pain subsides continue with occlusal equilibration or orthodontics as needed.

Thank you.

Sincerely,

*Karen Smart for G.J.C.*

Gordon J. Christensen  
(dictated and not read)

Diplomat of the American  
Board of Otolaryngology

Telephone:  
(801) 966-8534

**JON RICHARD AOKI, M.D.**

Otorhinolaryngologist  
Ear, Nose and Throat  
Head and Neck Surgeon

4052 West Pioneer Parkway (3390 South)  
Suite 210  
West Valley City, Utah 84120

DEA

JON RICHARD AOKI, M.D.

OTORHINOLARYNGOLOGIST  
HEAD AND NECK SURGEON  
EAR, NOSE AND THROAT  
SUITE 210

4052 WEST PIONEER PARKWAY (3390 SOUTH)  
WEST VALLEY CITY, UT 84120  
801 966-8534

NAME

*Mary Hunt*

ADDRESS

DATE

*4/8/88*

Rx

*I suggest that your  
ear pain is probably  
referred from "TMJ  
Syndrome" (TMJ is often  
associated with teeth problems).*



Refill \_\_\_\_\_ times ~~PRN~~ NR

Substitution Permitted

M D

Dispense As Written

M D

06/24/5

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