

1988

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

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

David G. Williams; Snow, Christensen, and Martineau; attorney for respondent.

Robert N. Macri; attorney for appellant.

Recommended Citation

Brief of Appellee, *Hunt v. Hurst*, No. 880284.00 (Utah Supreme Court, 1988).

https://digitalcommons.law.byu.edu/byu_sc1/2246

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH
DOCUMENT
KFU
45.9
S9
DOCKET NO:

UTAH SUPREME COURT,

BRIEF

880284

SUPREME COURT OF UTAH

STATE OF UTAH

MARY ALENE HUNT,

Plaintiff and
Appellant,

vs.

Case No. 880284

DR. J. EARL HURST,

Defendant and
Respondent.

BRIEF OF RESPONDENT

ON APPEAL FROM THE DECISION OF
THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH
HONORABLE J. DENNIS FREDERICK, DISTRICT JUDGE

DAVID G. WILLIAMS (3481)
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place
Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

Attorneys for Defendant and
Respondent

ROBERT N. MARCI
230 South 1000 East
Salt Lake City, Utah 84102
Telephone: (801) 354-3018

Attorney for Plaintiff and
Appellant

SUPREME COURT OF UTAH

STATE OF UTAH

MARY ALENE HUNT,

Plaintiff and
Appellant,

vs.

Case No. 880284

DR. J. EARL HURST,

Defendant and
Respondent.

BRIEF OF RESPONDENT

ON APPEAL FROM THE DECISION OF
THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH
HONORABLE J. DENNIS FREDERICK, DISTRICT JUDGE

DAVID G. WILLIAMS (3481)
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place
Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

Attorneys for Defendant and
Respondent

ROBERT N. MARCI
230 South 1000 East
Salt Lake City, Utah 84102
Telephone: (801) 354-3018

Attorney for Plaintiff and
Appellant

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT OF JURISDICTION AND NATURE OF PROCEEDINGS BELOW	1
STATEMENT OF ISSUES	1
STATEMENT OF RELEVANT RULES AND STATUTES	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENTS	15
ARGUMENT	19
 POINT I	
PLAINTIFF CANNOT ESTABLISH A PRIMA FACIE CASE OF PROFESSIONAL NEGLIGENCE OR CAUSATION WITHOUT COMPETENT EXPERT TESTIMONY AND THERE IS NO COMPETENT EVIDENCE IN THE RECORD THAT DR. HURST'S TREATMENT WAS NEGLIGENT OR CAUSED ANY INJURY	19
A. <u>Summary Judgment Was Appropriate Because The Record In This Case Contains Uncontroverted And Competent Expert Testimony That Dr. Hurst's Treatment Of Plaintiff Complied In All Respects With The Applicable Standard Of Care And Did Not Cause Her Alleged Injuries</u>	21
B. <u>Plaintiff Was Given Adequate Time And Opportunity To Consult Experts And Produce Competent Opposing Affidavits In Accordance With Rule 56(e), Utah Rules of Civil Procedure</u>	30
C. <u>The Doctrine Of Res Ipsa Loquitur Is Not Applicable In This Case And Even If It Were Applicable, Competent Expert Testimony Would Be Necessary To Raise A Question Of Fact Regarding Causation</u>	32
D. <u>Plaintiff Has Not Stated A Claim For Relief Based On Lack Of Informed Consent</u>	38

POINT II

PLAINTIFF'S CLAIMS ARE BARRED BY THE PROVISIONS
OF § 78-4-4, U.C.A. (1953 AS AMENDED) BECAUSE
THIS ACTION WAS NOT COMMENCED WITHIN FOUR YEARS
AFTER THE ALLEGED NEGLIGENT TREATMENT WHICH
PLAINTIFF CLAIMS CAUSED HER ALLEGED INJURIES . . . 40

POINT III

THE SUMMARY JUDGMENT ENTERED BY THE TRIAL
COURT SHOULD BE AFFIRMED BECAUSE PLAINTIFF
HAS FAILED TO CITE ANY PORTION OF THE RECORD
WHICH FACTUALLY SUPPORTS HER CONTENTIONS ON
APPEAL 42

POINT IV

THE COURT SHOULD AWARD DR. HURST COSTS AND
ATTORNEYS' FEES BECAUSE THE APPEAL IS
FRIVOLOUS AND BECAUSE OF PLAINTIFF'S FAILURE
TO COMPLY WITH THE COURT'S RULES 43

CONCLUSION 45

ADDENDUM

TABLE OF AUTHORITIES

	Page
CASES	
<u>Anderson v. Nixon</u> , 104 Utah 2d 262, 139 P.2d 216 (1943)	20
<u>Chadwick v. Nielsen</u> , 94 Utah Adv. Rep. (Utah Ct. App. 1988)	20
<u>Hoopilaina v. Intermountain Health Care</u> , 740 P.2d 270 (Utah Ct. App. 1987)	20
<u>Kim v. Anderson</u> , 610 P.2d 1270 (Utah 1980)	20
<u>Marsh v. Pemberton</u> , 10 Utah 2d 40, 347 P.2d 1108 (1959)	20
<u>Nixdorf v. Hicken</u> , 612 P.2d 348 (Utah 1980)	19, 20, 33
<u>O'Brien v. Rush</u> , 744 P.2d 306 (Utah S. Ct. 1987)	43
<u>Robinson v. Intermountain Health Care, Inc.</u> , 740 P.2d 262 (Utah Ct. App. 1987)	33, 35, 37, 38
<u>Sorenson v. Larsen</u> , 740 P.2d 1336 (Utah S. Ct. 1987)	32, 38, 41
<u>State v. Tucker</u> , 657 P.2d 755 (Utah 1982)	42
<u>Talbot v. Dr. W. H. Groves, Latter Day Saints Hospital</u> , 21 Utah 2d 73, 440 P.2d 872 (1968)	33
<u>Topik v. Thurber</u> , 739 P.2d 1101 (Utah S. Ct. 1987)	32, 38
<u>Trees v. Lewis</u> , 738 P.2d 612 (Utah S. Ct. 1987)	42

STATUTES AND RULES

Utah Code Ann. § 78-2-2(3)(j)	1
Utah Code Ann. § 78-14-4	2, 9, 18, 40, 41, 42

	Page
Utah Code Ann. § 78-14-5(1)(c) & (g)	2, 39
Utah Code Ann. § 78-14-5(4)(a)	39
Utah Rules of Civil Procedure, Rule 56(e)	1, 23, 30
Rules of Utah Supreme Court, Rule 24(a)(7)	3, 42
Rules of Utah Supreme Court, Rule 24(e)	3, 42
Rules of Utah Supreme Court, Rule 33(a)	3, 43

STATEMENT OF JURISDICTION AND
NATURE OF PROCEEDINGS BELOW

The plaintiff appeals an Order entered June 14, 1988 by the Honorable J. Dennis Frederick, District Judge, Third Judicial District Court of Salt Lake County, granting summary judgment to the defendant, Dr. Hurst, on plaintiff's claims of dental malpractice. This Court has jurisdiction of the appeal based on § 78-2-2(3)(j), U.C.A. (1953 as amended).

STATEMENT OF ISSUES

Plaintiff's appeal raises two issues:

1. Based on the record before the trial court, was there a genuine issue of fact with respect to plaintiff's claim that Dr. Hurst's treatment of her was below the applicable standard of care and with respect to her claim that Dr. Hurst's treatment caused her alleged injuries? and,

2. Did the trial court abuse its discretion by denying plaintiff's Motion for Continuance of the June 6, 1988 hearing on Dr. Hurst's Second Motion for Summary Judgment?

STATEMENT OF RELEVANT RULES AND STATUTES

The following rules and statutes are relied upon by Dr. Hurst in this brief:

1. Rule 56(e), Utah Rules of Civil Procedure:

(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.

2. Section 78-14-5(1), U.C.A. (1953 as amended):

(1) When a person submits to health care rendered by a health care provider, it shall be presumed that what the health care provider did was either expressly or impliedly authorized to be done. For a patient to recover damages from a health care provider in an action based upon the provider's failure to obtain informed consent, the patient must prove the following:

. . . .

(c) the patient suffered personal injuries arising out of the health care rendered; and

. . . .

(g) the unauthorized part of the health care rendered was the proximate cause of personal injuries suffered by the patient.

3. Section 78-14-4(1), U.C.A. (1953 as amended):

(1) No malpractice action against a health care provider may be brought unless it is commenced within two years after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered the injury, whichever first occurs, but not to exceed four

years after the date of the alleged act,
omission, neglect or occurrence

4. Rule 24(a)(7) and (e), Rules of the Utah Supreme Court:

(a) Brief of the appellant. The brief of the appellant shall contain under appropriate headings and in the order here indicated:

. . .

(7) a statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. There shall follow a statement of the facts relevant to the issues presented for review. All statements of fact and references to the proceedings below shall be supported by citations to the record (see Paragraph (e)).

. . .

(e) References in briefs to the record. References shall be made to the pages of the original record as paginated pursuant to Rule 11(b), to pages of the reporter's transcript, or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11(f) or 11(g). References to exhibits shall include exhibit numbers. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the transcript at which the evidence was identified, offered, and received or rejected.

5. Rule 33(a), Rules of the Utah Supreme Court:

(a) Damages for delay or frivolous appeal. If the court shall determine that a motion made or appeal taken under these rules is either frivolous or for delay, it shall award just damages and single or double costs, including reasonable attorney's fees, to the prevailing party.

STATEMENT OF THE CASE

This is a tort action in which plaintiff alleges dental malpractice. (R. at 2-5, Complaint) Plaintiff's claims arise from orthodontic treatment rendered to her by Dr. Hurst, an orthodontist licensed to practice in the State of Utah and a Diplomate of the American Board of Orthodontics. (R. at 15, Aff'd of J. Earl Hurst, D.D.S., M.S., ¶ 1)

The trial court granted Summary Judgment in favor of Dr. Hurst because plaintiff was unable to adduce any expert testimony to establish the elements of her prima facie case and the uncontroverted facts in the record establish that Dr. Hurst's treatment of plaintiff was in accordance with the applicable standard of care and did not cause her alleged injuries. (R. at 196 & 197)

In June 1972 plaintiff, then 11 years old, was referred to Dr. Hurst for orthodontic care by her general dentist, Jack Karl Rasmussen, D.D.S., following a swimming pool accident and injury to her lower front teeth. (R. at 16, Aff'd of Hurst ¶ 2; R. at 38, Aff'd of Jack Karl Rasmussen, D.D.S., ¶ 3) Dr. Rasmussen referred plaintiff to Dr. Hurst because of crowding of her lower anterior (front) teeth and because he felt the treatment of the lower right central incisor, the most severely injured tooth, should be considered in the context of a plan for orthodontic care. (R. at 38, Aff'd of Rasmussen ¶ 3)

When plaintiff presented to Dr. Hurst in June 1972 the lower right central incisor was fractured and the pulp exposed,

causing a large abscess and fistula. Root canal therapy had been performed on that tooth, but the prognosis was poor. Three other lower anterior teeth were also abscessed, but the prognosis for those teeth was better, given appropriate endodontic care. Orthodontically, plaintiff's lower front teeth were crowded. (R. at 16, Aff'd of Hurst ¶¶ 2 & 3; R. at 38, Aff'd of Rasmussen ¶ 3)

After careful diagnostic evaluation and consultations with Dr. Rasmussen and plaintiff's father, it was agreed by them and Dr. Hurst that the injured lower right central incisor would be extracted and its space used to reduce the crowding of the remaining lower anterior teeth, through the application of braces. It was believed that removal of the lower right central incisor would also help resolve the infection around the other lower anterior teeth. (R. at 16, 17 & 20, Aff'd of Hurst ¶¶ 4 & 11; R. at 38, Aff'd of Rasmussen ¶ 4)

In accordance with the treatment plan presented by Dr. Hurst and agreed upon by Dr. Rasmussen and plaintiff's father, the lower right central incisor was extracted and in September 1972 Dr. Hurst commenced plaintiff's orthodontic treatment. By July 1974, in Dr. Hurst's and Dr. Rasmussen's judgment, the goal of the orthodontic treatment had been achieved and a good result had been obtained. The lower anterior teeth had been moved, reducing the crowding, and had evenly taken up the space of the extracted lower right central

incisor. (R. at 17, Aff'd of Hurst ¶ 6; R. at 38 & 39, Aff'd of Rasmussen ¶¶ 5 & 7) From 1974 through 1982 plaintiff visited Dr. Hurst's office periodically, but only for minor adjustments to her retainers or for new retainers. Dr. Hurst did not provide any treatment to plaintiff after 1974 which changed the position of her lower teeth. (R. at 17-18, Aff'd of Hurst ¶¶ 6 & 7; R. at 38, Aff'd of Rasmussen ¶ 5)

In March 1985 plaintiff visited Dr. Hurst and requested minor adjustments in the alignment of her upper anterior teeth. Dr. Hurst had not previously treated plaintiff's upper teeth. Bands were applied to plaintiff's upper teeth in March 1985 and removed in September 1985. Plaintiff has not complained or asserted any claims regarding the adjustment of her upper teeth during 1985. (R. at 17-18, Aff'd of Hurst ¶ 7; R. at 3-4, Plaintiff's Complaint ¶¶ 7-9)

In September 1985 plaintiff complained to Dr. Hurst that she wanted her lower right central incisor and her wisdom teeth, which had also been extracted, but not by Dr. Hurst, replaced because that was the way God created her. She also requested that Dr. Hurst return her lower anterior teeth to their original positions. Dr. Hurst advised plaintiff it would not be in her interest or medically advisable to attempt to restore her lower anterior teeth to their original positions and that such an effort could possibly damage her then healthy mouth. He further advised her that even if her requests were

feasible, it would cost her a substantial amount of money for no benefit. Plaintiff persisted in her request and Dr. Hurst agreed to make a plaster study model of her teeth for evaluation. After making the plaster study model and evaluating it, Dr. Hurst advised plaintiff that it was not advisable to move the lower anterior teeth back to their original positions and refused to undertake such treatment. (R. at 18, Aff'd of Hurst ¶ 8)

When Dr. Hurst refused plaintiff's request, she became angry and began harassing him and his office personnel. Over the next several months, Dr. Hurst received telephone calls from eight other orthodontists, a specialist in craniofacial pain, an endodontist, and a general dentist, advising that plaintiff had made similar requests to them. Each reported he had declined to undertake the requested treatment and expressed the opinion that plaintiff's orthodontic condition was then healthy and normal. (R. at 19, Aff'd of Hurst ¶ 9)

On March 3, 1986, Dr. Hurst received a telephone call from Richard Randle, D.D.S., M.S., an orthodontist who had examined plaintiff. Dr. Randle advised Dr. Hurst that plaintiff had threatened to kill Dr. Hurst and then kill herself if she did not get the treatment she was requesting. (R. at 19, Aff'd of Hurst ¶ 10; R. at 26, Aff'd of Richard E. Randle, D.D.S., M.S.) Out of concern over this threat and plaintiff's continuing harassment, Dr. Hurst first contacted Dr. Duncan Wallace,

a psychiatrist who had been treating plaintiff, and then contacted the State Attorney General's Office. He was referred to a city prosecutor, who commenced a proceeding against plaintiff and obtained an order restraining her from any contact with Dr. Hurst for a period of six months. At the end of the six month period, Dr. Hurst received a Notice of Intent to Commence a malpractice action. (R. at 19, Aff'd of Hurst ¶ 10)

This action was filed August 5, 1987. (R. at 2) On November 2, 1987 defendant filed a Motion for Summary Judgment (R. at 45) supported by the Affidavits of Dr. Hurst, (R. at 15) Wallace B. Brown, D.D.S., an endodontist who treated plaintiff's lower front teeth which were injured in the swimming pool accident (R. at 34), Richard E. Randle, D.D.S., M.S., an orthodontist who examined plaintiff in January 1986 (R. at 23), James L. Guinn, D.M.D., a dentist specializing in craniofacial pain and temporomandibular joint dysfunction who examined plaintiff in July 1986 (R. at 37), Jack Karl Rasmussen, D.D.S., plaintiff's general dentist (R. at 37), and George R. Parker, D.D.S., M.S., an orthodontist who examined plaintiff in December 1985 (R. at 41).

These affidavits established the following: (1) that the treatment plan outlined for plaintiff in 1972 by Dr. Hurst was appropriate (R. at 20, 26, 39 & 44), (2) that the orthodontic treatment rendered by Dr. Hurst to plaintiff was, in all respects, within the standard of care ordinarily exercised by

other orthodontists (R. at 20, 26 & 44), (3) that the result from the orthodontic treatment was good (R. 20, 39 & 44), (4) that the endodontic damage to plaintiff's lower anterior teeth in 1972 was caused by trauma to her teeth and not by the orthodontic treatment (R. at 20 & 35), (5) that Dr. Hurst's treatment did not cause any of plaintiff's teeth to die, did not cause any damage to facial nerves and did not cause any damage to her jaw or bite (R. at 20, 26, 28 & 39), and (6) that any headaches, tension, pain or depression suffered by plaintiff were not caused or contributed to by her orthodontic treatment. (R. at 6, 26 & 28)

The bases of defendant's Motion for Summary Judgment were that the foregoing facts established by the affidavits filed in support of the Motion were uncontroverted, that plaintiff could not establish a prima facie case without competent expert testimony regarding the applicable standard of care and causation, and that plaintiff's claims were based on treatment rendered more than four years prior to commencing this action and were thus barred by the four year statute of repose in § 78-14-4, U.C.A. (1953 as amended). (R. at 45-57) Plaintiff filed affidavits of herself (R. at 64), Charles Edward Gordon (R. at 65) and Gayle Dean Hunt (R. at 66), her father. None of those affiants set forth any credentials qualifying them to render expert opinions regarding the standard of care for orthodontists, the quality of the orthodontic care rendered by

Dr. Hurst or the cause of plaintiff's alleged present condition or symptoms. Additionally, plaintiff filed a letter signed by Joseph W. Stobbe, Jr., D.M.D., which stated "the purpose of this letter is only to state that I began treatment of Mary Alene Hunt on June 15, 1987 for temporomandibular joint dysfunction." The letter was not signed under oath and did not comment on Dr. Hurst's treatment of plaintiff or the cause of her alleged temporomandibular joint dysfunction. (R. at 70)

On December 21, 1987, Judge Frederick heard Dr. Hurst's Motion for Summary Judgment, including arguments by plaintiff's counsel, and granted the motion. (R. at 63)

In January 1988, plaintiff filed a Motion for Relief from Judgment supported by an Affidavit of Scott Daynes, D.D.S. (R. at 86 & 88) Plaintiff's motion was heard on January 25, 1988 and on January 26, 1988, Judge Frederick issued a minute entry, granting plaintiff's Motion for Relief from Judgment and vacating the Summary Judgment. (R. at 85 & 89) An Order of Summary Judgment had not been signed.

On March 18, 1988, defendant took Dr. Daynes' deposition. The Affidavit of Dr. Daynes, which had been the basis for vacating the Summary Judgment, stated in pertinent part:

4. Miss Hunt has explained that in 1972 she had an injured front tooth removed and orthodontia was used to restore her bite.

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.

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. (R. at 88)

In his deposition, Dr. Daynes testified:

1. That he is a general dentist and does not claim expertise in orthodontics. (Depo. of Scott P. Daynes, D.D.S., at 5, 6 & 46)
2. 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. (Id. at 48 & 49)
3. That since signing the Affidavit, he had consulted an orthodontist with whom he was familiar and it is now his understanding that extraction of incisors to reduce crowding of lower anterior teeth is acceptable orthodontic practice and in many cases the preferred treatment. (Id. at 48 & 49)
4. That at the time he signed the Affidavit he had not seen x-rays of the lower right central incisor extracted in 1972. (Id. at 17, 23, 24 & 56)
5. That after having an opportunity to review the x-ray of the extracted tooth at his deposition, he agreed with Dr. Hurst's assessment that the

tooth had a poor prognosis and that extracting the tooth was reasonable. (Id. at 56-58)

6. That based on his examination of the plaintiff, the history he took from her, his review of Dr. Guinn's report and his discussions with Dr. Parker, an orthodontist, it is not his opinion that Dr. Hurst was in any way negligent or breached the standard of care. (Id. at 55-56)
7. That orthodontic treatment is only one of many possible causes of plaintiff's symptoms. (Id. at 43-46)
8. That he never intended to state or suggest that the orthodontic treatment rendered to plaintiff by Dr. Hurst was or probably was the cause of her problems. (Id. at 45-46)

Based on Dr. Daynes' deposition, defendant filed a Second Motion for Summary Judgment and Motion to Publish the Deposition of Scott P. Daynes, D.D.S., in May 1988. (R. at 167) In opposition to defendant's Second Motion for Summary Judgment, plaintiff filed an affidavit of Dallas E. Murdoch, D.D.S. of Soda Springs, Idaho. (R. at 175) Dr. Murdoch expressed his opinion that plaintiff had an "abnormal occlusal relationship," but no opinion was expressed regarding the cause of that condition or the propriety of the treatment rendered by Dr. Hurst. (R. at 175) On June 6, 1988, ten months after this action was commenced, Judge Frederick granted defendant's Second Motion for Summary Judgment, (R. at 171) and on June 14, 1988 the Order and Summary Judgment from which this appeal is taken was entered. (R. at 196)

After Judge Frederick granted defendant's Second Motion for Summary Judgment, plaintiff filed a "Motion to Deny Defendant's

Proposed Order: Motion to Open Judgment: Motion for Relief from Judgment: Motion for Stay of Proceedings" (R. at 178), an Affidavit of John R. Bybee, who purports to have a Ph.D. in "physiology and the training of science teachers" (R. at 185), an Affidavit signed by plaintiff, dated June 10, 1988, with an attached "resume" of alleged facts (R. at 186), another Affidavit dated June 1, 1988, signed by plaintiff (R. at 191), a letter dated June 8, 1988 to plaintiff's counsel from Technical Advisory Service for Attorneys (R. at 192), a proposed contract dated June 1988 from Technical Advisory Service for Attorneys (R. at 195), a letter dated June 7, 1988, to plaintiff's counsel from the Medical Quality Foundation (R. at 193), a cassette tape, represented to be the tape of a lecture presented by Henry Tanner, D.D.S., a Salt Lake City prosthodontist, in September 1986 (R. at 199) and a two-page transcript, represented to be a transcript of certain portions of Dr. Tanner's lecture (R. at 183).

On June 20, 1988, plaintiff's motions titled "Motion to Deny Defendant's Proposed Order: Motion to Open Judgment: Motion for Relief from Judgment: Motion for Stay of Proceedings" were argued to the court and denied by Judge Frederick. (R. at 200-202)

On June 21, 1988, after the court had denied plaintiff's motions, plaintiff filed a document entitled "Additional Opinions" (R. at 203) with two attachments: a letter "dictated

but not read" by Gordon J. Christensen, D.D.S, Ph.D. (R. at 204), and a handwritten note from John Richard Aoki, M.D., an otorhinolaryngologist. (R. at 205) Dr. Christensen's letter is not a sworn affidavit, is not signed by Dr. Christensen, states it was not read by Dr. Christensen and does not express an opinion that Dr. Hurst's treatment was in any way negligent or in violation of the applicable standard of care. (R. at 204) Dr. Aoki's note, likewise, is not a sworn affidavit and does not express an opinion concerning the treatment rendered by Dr. Hurst. (R. at 205)

On July 14, 1988, plaintiff filed the Notice of Appeal. (R. at 246) Thereafter, on September 20, 1988, plaintiff filed a Motion for Relief from Judgment and an affidavit of Dennis J. Michaelson, D.M.D., M.S., purportedly an orthodontist in Chubbuck, Idaho. These documents are the last two pages in the Court file before the clerk's index and are not numbered as part of the record, presumably because they were filed after the Notice of Appeal. The affidavit does not express any opinion concerning the orthodontic treatment rendered by Dr. Hurst or the cause of plaintiff's present alleged symptoms. There is no mailing certificate or affidavit of service evidencing service of the Motion for Relief from Judgment or Dr. Michaelson's sworn statement on defendant and defendant's counsel hereby represents that copies were not received and receipt of appellant's brief (Exhibit 11) was the first notice to defendant of the Michaelson affidavit.

The letter from Grant B. Cannon, D.D.S., M.D., attached to Appellant's Brief as Exhibit 10 is not found in the record and likewise was never served on defendant.

SUMMARY OF ARGUMENTS

This Court should affirm the Summary Judgment entered by the District Court because there are no genuine issues of material fact and the trial court did not abuse its discretion by denying plaintiff's Motion for Continuance.

Plaintiff alleges Dr. Hurst committed dental malpractice and that his treatment caused various injuries. To establish a prima facie case she must prove three elements:

1. The standard of care applicable to Dr. Hurst,
2. That Dr. Hurst's treatment of her breached the applicable standard of care, and
3. That the substandard treatment proximately caused her alleged injuries.

Dr. Hurst filed affidavits of six competent dentists, including himself, expressing competent expert testimony that his treatment of plaintiff was appropriate and complied in all respects with the applicable standard of care and that his treatment did not cause plaintiff's alleged injuries.

The record contains no competent expert testimony controverting the affidavits filed by Dr. Hurst or otherwise raising a question of fact with respect to the elements of

plaintiff's prima facie case. The only affidavit filed by plaintiff which even purports to express an expert opinion regarding the treatment rendered by Dr. Hurst or the cause of plaintiff's alleged injuries is the affidavit of Scott Daynes, D.D.S.

After Dr. Daynes' affidavit was filed, his deposition was taken. At his deposition, Dr. Daynes testified that he is a general dentist and when he signed the affidavit, he was not familiar with the standard of care ordinarily exercised by orthodontists with respect to extraction of lower incisors to correct crowding of lower anterior teeth. After signing the affidavit Dr. Daynes consulted an orthodontist and learned that lower incisors are often extracted as part of orthodontic treatment. At his deposition, Dr. Daynes admitted he made an erroneous assumption when he signed the affidavit and testified it was not his opinion that Dr. Hurst breached the standard of care ordinarily exercised by other orthodontists. Additionally, Dr. Daynes viewed the 1972 x-ray of plaintiff's lower right central incisor at his deposition and testified that in his opinion, extraction of the tooth was reasonable.

Dr. Daynes further testified that orthodontic treatment was only one of many possible causes of plaintiff's alleged injuries and that he has no opinion as to the actual cause of her symptoms. He also explained that by signing the affidavit he did not intend to express the opinion that plaintiff's alleged symptoms were caused by Dr. Hurst's treatment.

Plaintiff's argument that res ipsa loquitur applies and therefore no expert testimony is required is without merit. First, res ipsa was not raised in the trial court. Second, res ipsa only applies when the alleged incident would not normally occur without negligence, the instrumentalities causing the injuries are under the control of the defendant and the incident occurred irrespective of any participation by the plaintiff. Those foundational requirements for res ipsa are not present in this case. Finally, res ipsa creates an inference of negligence only and does not affect the requirement of proving causation with competent expert testimony.

Plaintiff's argument that Dr. Hurst failed to obtain her informed consent is likewise without merit. First, the claim of failure to obtain informed consent was not raised in the trial court and therefore cannot be considered by this Court on appeal. Second, to prevail on a theory of failure to obtain informed consent, plaintiff must prove that the alleged unauthorized treatment was the proximate cause of her alleged injuries. As discussed above, the affidavits filed by Dr. Hurst establish that his treatment did not cause plaintiff's alleged injuries and are uncontroverted. There is therefore no issue of fact regarding causation. Finally, there is no issue of fact regarding informed consent. Dr. Hurst and Dr. Rasmussen testify in their affidavits that Dr. Hurst explained the proposed treatment to plaintiff's father and that her father agreed

to the treatment. Plaintiff's father admits in his affidavit that the proposed treatment was explained to him and he does not dispute that he agreed to the treatment. Plaintiff was a minor and her father was authorized, by statute, to consent to health care for her.

On June 6, 1988, the day scheduled for hearing Dr. Hurst's Second Motion for Summary Judgment, plaintiff filed a Motion for Continuance asking the court to continue the hearing at least three weeks. The trial court's denial of that motion was not an abuse of discretion because the lawsuit had been pending for ten months, the affidavits of Dr. Hurst, Dr. Randle, Dr. Guinn, Dr. Brown, Dr. Rasmussen and Dr. Parker had been on file over seven months and plaintiff's Notice of Intent to Commence a malpractice action had been filed nearly two and one-half years earlier. Additionally, four months earlier the court had vacated a summary judgment giving plaintiff additional time to file appropriate counter-affidavits. The lower court's denial of the Motion for Continuance was therefore not an abuse of discretion.

The treatment which plaintiff claims was negligent was rendered in 1972 through 1974. Section 78-14-4, U.C.A. (1953 as amended) provides that no malpractice action against a health care provider may be brought unless it commenced within four years after the date of the alleged negligent treatment. Accordingly, plaintiff's claims are barred.

Dr. Hurst contends that this court should affirm the Summary Judgment entered by the trial court because plaintiff has failed to cite any portion of the record in support of her appeal. Without citing facts in the record which support plaintiff's contentions on appeal, she cannot demonstrate any factual basis for reversing the lower court. Additionally, Dr. Hurst contends this appeal is frivolous because it lacks any reasonable legal or factual basis and the court should therefore award him double costs and attorney's fees.

ARGUMENT

POINT I

PLAINTIFF CANNOT ESTABLISH A PRIMA FACIE CASE OF PROFESSIONAL NEGLIGENCE OR CAUSATION WITHOUT COMPETENT EXPERT TESTIMONY AND THERE IS NO COMPETENT EVIDENCE IN THE RECORD THAT DR. HURST'S TREATMENT WAS NEGLIGENT OR CAUSED ANY INJURY.

To establish a prima facie case in a medical/dental malpractice case, the plaintiff must present competent evidence establishing the following elements:

1. The standard of care ordinarily exercised by practitioners in the defendant's field of practice,
2. That the defendant departed from the standard of care ordinarily exercised by other practitioners in the same field of practice, and
3. That such departure from the applicable standard of care proximately caused injury to the plaintiff. Nixdorf v.

Hicken, 612 P.2d 348 (Utah 1980); Anderson v. Nixon, 104 Utah 2d 262, 139 P.2d 216 (1943); Chadwick v. Nielsen, 94 Utah Adv. Rep. 45 (Utah Ct. App. 1988); Hoopilaina v. Intermountain Health Care, 740 P.2d 270 (Utah Ct. App. 1987). Except in the unusual case where the propriety or impropriety of the medical or dental treatment is within the common knowledge and experience of lay persons, these elements of a plaintiff's prima facie case must be established by competent expert testimony. Marsh v. Pemberton, 10 Utah 2d 40, 347 P.2d 1108 (1959); Nixdorf v. Hicken, supra; Kim v. Anderson, 610 P.2d 1270 (Utah 1980); Chadwick v. Nielsen, supra; Hoopilaina v. Intermountain Health Care, supra.

The rationale for requiring expert testimony is compelling. The issues presented by medical/dental malpractice cases generally involve technical questions and judgments beyond the knowledge and experience of laymen. Without the assistance of expert testimony, the finder of fact would be left to impermissibly base its verdict on speculation and conjecture with respect to the standard of care, whether the standard of care was met or breached and whether the treatment caused the alleged injuries.

This case clearly does not fall within the exception to the general rule. It cannot be said that laymen are sufficiently knowledgeable to determine the propriety of Dr. Hurst's orthodontic treatment or whether such treatment caused the injuries

of which plaintiff complains without help from experts in the field of orthodontics. Accordingly, plaintiff cannot rely upon mere assertions or her own opinions. She must produce competent expert testimony that Dr. Hurst violated the applicable standard of care and that his treatment caused her alleged injuries, to make a prima facie case or create a question of fact.

A. Summary Judgment Was Appropriate Because The Record In This Case Contains Uncontroverted And Competent Expert Testimony That Dr. Hurst's Treatment Of Plaintiff Complied In All Respects With The Applicable Standard Of Care And Did Not Cause Her Alleged Injuries.

In his affidavit, Dr. Hurst outlines the treatment he provided plaintiff, explains the objectives and results of the treatment, and testifies that the treatment plan was appropriate, that the treatment rendered was in all respects within the standard of care ordinarily exercised by other orthodontists and that there were no complications of the treatment. (R. at 15-22) Additionally, the record contains the following:

1. The Affidavit of Richard E. Randle, D.D.S., M.S., a practicing orthodontist in the Salt Lake City community for twenty years, who examined plaintiff in January 1986. (R. at 23-26) Dr. Randle incorporates in his affidavit, a statement which he dictated at the time of his examination of the plaintiff, which he testifies accurately states his findings and opinions. It states:

I advised her (plaintiff) that her tooth allignment and bite were within normal limits and that her

previous orthodontist had done a good job in straightening and alligning her teeth . . .

After several visits, it became apparent to me that her problem was psychological or emotional rather than a physical problem relating to her dentition . . .

In my opinion, the orthodontic treatment done by Dr. Hurst has been very satisfactory, and my hope is that Mary can get professional help in overcoming her emotional problems. (R. at 26)

2. The Affidavit of George R. Parker, D.D.S., M.S., a practicing orthodontist for seventeen years, who examined plaintiff in late 1985. (R. at 41-44) Dr. Parker also incorporates in his affidavit, a letter which he dictated to plaintiff on December 3, 1985, which he attests accurately states his findings and opinions with respect to her orthodontic condition at that time and her prior orthodontic treatment. He states:

After a thorough review of your mouth and occlusion we have determined that to do any thing further in orthodontics would not be to your advantage. The results you have obtained are well within the normal range of acceptable treatment and we feel that you would be advised to leave the teeth and surrounding tissues as they are.

You are really a very pretty girl and have much to offer and we feel like you should not concentrate your time and efforts on this situation. If you were my very own daughter the advice would be the same. (R. at 44)

3. The Affidavit of James L. Guinn, D.M.D., a practicing dentist in this community who limits his practice to cranio-facial pain and T.M.J. dysfunctions. (R. at 27-33) Dr. Guinn examined plaintiff on July 30, 1986, and testifies:

In my opinion, Mary's jaw and bite have not been adversely altered or affected in any way by her orthodontic treatment. If she has in fact been suffering facial pain or tension, it has not been caused by any malocclusion or poor bite relationship. (R. at 28)

4. The Affidavit of Jack Karl Rasmussen, D.D.S., a practicing general dentist in this community for over twenty years and plaintiff's general dentist since prior to 1972. (R. at 37-40) Dr. Rasmussen testifies:

In my opinion, the treatment plan was entirely appropriate and was the best course of treatment available. In my opinion, the result of the orthodontic treatment was good and the objectives of the treatment plan were fully achieved.

I am aware of Mary's claims and complaints regarding the orthodontic treatment rendered by Dr. Hurst through repeated discussions with Mary and with Dr. Hurst. In my opinion, Mary's complaints are psychological or emotional in origin and are not factually or medically related to the orthodontic treatment rendered. (R. at 39)

There is no competent evidence in the record controverting the testimony of Dr. Hurst, Dr. Randle, Dr. Parker, Dr. Guinn and Dr. Rasmussen regarding Dr. Hurst's treatment or causation. According to Rule 56(e), Utah R. Civ. P., plaintiff cannot rely upon mere allegations, but must set forth specific facts by competent testimony to create a question of fact and avoid summary judgment.

Rule 56(e), Utah R. Civ. P. provides:

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 matter 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.

Of all the letters, statements and/or affidavits submitted by plaintiff to the trial court and directly to this court, the only one that purports to express an expert opinion regarding the propriety of Dr. Hurst's treatment or comments on possible causes of plaintiff's alleged injuries is the Affidavit of Scott Daynes, D.D.S. All but the affidavits of Daynes and Stobbe were filed after the second summary judgment was granted. Dr. Daynes' affidavit and deposition testimony are addressed below. All of the other statements, letters and affidavits from purported experts and the reasons they do not present competent evidence raising a question of fact are addressed separately in the Addendum to this brief.

The trial court vacated the first Summary Judgment based on Dr. Daynes' affidavit. Thereafter, Dr. Daynes' deposition was taken. Based on a review of Dr. Daynes' deposition testimony, the trial court concluded that his testimony did not create a

question of fact with respect to negligence or causation and again granted Summary Judgment.

In his affidavit (R. at 88), Dr. Daynes stated that in his opinion orthodontia "can" cause a change of bite, which "could cause" stress and pain in other parts of the body and that plaintiff describes signs and symptoms which can result from a change of bite due to orthodontia. His affidavit does not state that in his opinion the orthodontic treatment rendered by Dr. Hurst caused or even "probably" caused plaintiff's alleged symptoms.

Regarding the propriety of the orthodontic treatment plan followed by Dr. Hurst, Dr. Daynes' affidavit states that he did not "think" it is normal procedure to take out a tooth to solve an orthodontic problem as described by plaintiff and that "assuming" he is correct, he believes plaintiff has been dentally mistreated.

Dr. Daynes' deposition revealed that he signed the affidavit prepared by plaintiff's counsel, as a favor to his friend Mr. Macri, after only one cursory examination of plaintiff, and without reviewing any records or reports from dentists who had previously treated or examined plaintiff. (Depo. of Daynes at 17, 23-27 & 54) More importantly, however, Dr. Daynes explained in his deposition that he is not an orthodontist and the statement in his affidavit that he believed plaintiff had been "dentally mistreated" was based on his perception as a

general dentist that it is ~~not~~ normal procedure to extract an incisor for orthodontic treatment. His understanding as a general dentist was that bicuspid are normally extracted to treat overcrowding. Also, he had not seen the x-ray of the incisor which was extracted. After signing the affidavit, however, Dr. Daynes consulted an orthodontist and learned that extraction of incisors is not unusual in orthodontic treatment and is often the treatment of choice. (Depo. of Daynes at 5, 6, 46, 48-51, 55 & 56) Additionally, at his deposition Dr. Daynes had an opportunity to view a June 1972 x-ray of plaintiff's lower right central incisor. After reviewing the x-ray, Dr. Daynes testified as follows:

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. (Depo. of Daynes at 58)

Dr. Daynes further testified:

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 to Mary evidently, and that seems to be the standard of care of a conventional orthodontic treatment.

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?

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. . . .

(Depo. of Daynes at 50, 55-56)

Regarding causation, 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 Daynes at 25-26) Dr. Daynes also 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. (R. at 28, Aff'd of

James L. Guinn, D.M.D. ¶ 4; Depo. of Daynes at 38) Additionally, after identifying approximately a dozen possible causes of plaintiff's symptoms, Dr. Daynes testified as follows:

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 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.

(Depo. of Daynes at 43-46)

Perhaps Dr. Daynes' testimony regarding the intended meaning of his affidavit is best summarized by the following questions asked by plaintiff's counsel and Dr. Daynes' answers thereto:

Mr. Macri Q: And do you recall when I suggested Mary was to come in to you what the purpose was? It wasn't to treat her; is that correct?

A. No. No, it wasn't to treat her; it was to give an evaluation or just to "look at Mary."

Q. And wasn't it true and reflected by the affidavit, defendant's exhibit 3, that the statements were designed to convey the message that a restructuring of teeth can cause alignment problems which cause pain and stress and are consistent with T.M.J.?

A. Yes. By what you're saying, that it's possible, an orthodontic cause can be considered as to why there's a T.M.J. problem, yes, I would agree with that along with the other problems which may cause a T.M.J. problem that we mentioned.

Q. And you weren't asked anything about Dr. Hurst?

A. I don't think his name was mentioned, no.

Q. And the words "dentally mistreated" were the words that I chose to describe?

A. Yes. You wrote this up and I--You wrote it.

(Depo. of Daynes at 60, 61)

Clearly, Dr. Daynes retracted any suggestion or implication in his affidavit that Dr. Hurst breached the applicable standard of care. Additionally he explained that all he ever intended to suggest or state in the affidavit regarding causation was that orthodontic treatment is one of many possible causes of the plaintiff's alleged symptoms.

Dr. Daynes is unable and unwilling to testify that Dr. Hurst's treatment of plaintiff was improper or breached the standard of care ordinarily exercised by other orthodontists or that Dr. Hurst's treatment, whether negligent or not, is a

cause of plaintiff's alleged injuries. Accordingly, based on Dr. Daynes' deposition testimony, the trial court was correct in concluding that Dr. Daynes' testimony does not raise a question of fact as to whether Dr. Hurst's treatment complied with the applicable standard of care or whether his treatment caused plaintiff's alleged injuries. Summary judgment was therefore appropriate.

B. Plaintiff Was Given Adequate Time And Opportunity To Consult Experts And Produce Competent Opposing Affidavits In Accordance With Rule 56(e), Utah Rules Of Civil Procedure.

On June 6, 1988, the day set for hearing Dr. Hurst's Second Motion for Summary Judgment and Motion to Publish Deposition of Scott P. Daynes, D.D.S., plaintiff filed a Motion for Continuance, asking the court to continue the hearing for at least three weeks. (R. at 176) The trial court denied plaintiff's motion and on appeal plaintiff claims the lower court abused its discretion.

The trial court initially granted Summary Judgment in December 1987. Thereafter plaintiff filed the affidavit of Scott Daynes, D.D.S. His affidavit did not comply with Rule 56(e), Utah R. Civ. P. because it did not affirmatively show that Dr. Daynes was competent to testify to the matters stated therein. Specifically, the affidavit did not state that Dr. Daynes had any knowledge or familiarity with the standard of care ordinarily exercised by orthodontists in 1972 through

1974. Perhaps more importantly, the affidavit did not express an opinion that Dr. Hurst's treatment caused or probably caused plaintiff's alleged injuries. Nevertheless, the trial court showed great leniency to plaintiff and allowed her a second chance by vacating the Summary Judgment.

Plaintiff served her Notice of Intent to Commence a Malpractice Action pursuant to the Health Care Malpractice Act in December 1985. (R. at 2, Complaint ¶ 4) The Summary Judgment from which she appeals was granted in June 1988. (R. at 196-197) Thus, plaintiff had two years and five months from the time she formally asserted a claim of malpractice against Dr. Hurst to obtain expert testimony in support of her claims before the Summary Judgment was finally entered. This lawsuit had been pending for ten months when the Summary Judgment was finally granted. Defendant's first Motion for Summary Judgment and the supporting affidavits were filed on November 2, 1987. (R. at 15-46) By vacating the first Summary Judgment, the trial court allowed plaintiff seven months from the time the Motion for Summary Judgment and supporting affidavits were filed to produce counter-affidavits raising a question of fact, before Summary Judgment was finally entered.

Plaintiff correctly identifies the standard for this Court's review of the trial court's refusal to grant plaintiff additional time as "abuse of discretion". (Appellant's Brief, p. 9) Clearly, the District Court did not abuse its discretion

in refusing to grant plaintiff more time, when she had already been allowed seven months to produce counter-affidavits, particularly in view of the fact that plaintiff had asserted her claims of malpractice nearly two and one-half years earlier. In exercising its discretion, the trial court could properly consider the rights of the defendant to have claims of professional negligence against him promptly resolved.

C. The Doctrine Of Res Ipsa Loquitur Is Not Applicable In This Case And Even If It Were Applicable, Competent Expert Testimony Would Be Necessary To Raise A Question Of Fact Regarding Causation.

Plaintiff argues that the trial court should have recognized the doctrine of res ipsa loquitur and therefore should not have granted summary judgment. (Appellant's Brief at 5) Plaintiff's position is without merit for the following reasons:

1. Res ipsa was not raised by plaintiff's pleadings or arguments in the trial court. This Court has consistently held it will not consider issues which were not properly raised below. Sorenson v. Larsen, 740 P.2d 1336 (Utah S. Ct. 1987); Topik v. Thurber, 739 P.2d 1101, 1103 (Utah S. Ct. 1987).

2. The doctrine of res ipsa loquitur is not applicable to the facts of this case. In order to rely on res ipsa loquitur a plaintiff must establish a sufficient evidentiary foundation to support application of the doctrine, including:

a. That the accident was of a kind which, in the ordinary course of events, would not have happened had the defendant used due care,

b. That the instrument or thing causing the injury was under the management and control of the defendant, and

c. That the accident happened irrespective of any participation by the plaintiff.

Nixdorf v. Hicken, supra; Talbot v. Dr. W. H. Groves, Latter Day Saints Hospital, 21 Utah 2d 73, 440 P.2d 872 (1968);

Robinson v. Intermountain Health Care, Inc., 740 P.2d 262 (Utah Ct. App. 1987).

In this case it clearly cannot be said that plaintiff's injuries probably would not have occurred without negligence by the defendant, or that the instrument or thing causing the injury was under the management of the defendant, or that plaintiff's alleged injuries happened irrespective of her participation. According to Dr. Daynes, the symptoms of which plaintiff complains could have been caused by numerous factors not under the control of Dr. Hurst, including factors directly involving plaintiff's participation. Regarding the symptoms plaintiff claims resulted from Dr. Hurst's treatment, Dr. Daynes testified:

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.

(Depo. of Daynes at 43-45)

Based on Dr. Daynes' testimony, plaintiff's alleged injuries are not of a kind which would not have happened without negligence on the part of defendant. Numerous instruments or factors potentially causing plaintiff's alleged injuries were not under the control or management of Dr. Hurst and many of the potential causes of her alleged injuries involve plaintiff's participation. Accordingly, the doctrine of res ipsa loquitur is not applicable in this case.

In Robinson v. Intermountain Health Care, Inc., supra, the plaintiff entered the defendant hospital for a tonsillectomy. During her hospital stay the plaintiff was given three injections in her left hip. The day after her discharge from the

hospital, the plaintiff was readmitted with extreme pain and inflammation at the injection site and in serious septic shock. At the time of her readmission, the physicians involved concluded that the infecting organism was clostridia introduced by the needles used for plaintiff's injections. Surgery was performed, but later culture results showed the infecting organism was beta streptococcus, the most typical cause of common tonsillitis, rather than clostridium. The defendant hospital filed a motion for summary judgment based on supporting affidavits of one of the physicians and the nurses who administered the injections. The affidavits averred that the shots had been given in accordance with accepted standards of practice for sterility and administration of injections. The doctor's affidavit stated that it was probable the plaintiff's tonsils were infected with beta strep bacteria and that the infection probably spread from her throat to the injection site either internally through her blood stream or externally by plaintiff or someone else handling the injection site. The plaintiff did not file any counter-affidavits, but relied upon the doctrine of *res ipsa loquitur*, arguing that based thereon she was not required to produce expert testimony to controvert the affidavits filed by the defendant. Plaintiff further argued that even if she were required to produce expert testimony, she was not required to do so before trial. The trial court rejected plaintiff's arguments and granted summary

judgment. The Court of Appeals affirmed the summary judgment stating:

The evidence in this case, even when viewed most favorably to Robinson, does not present sufficient foundation for the application of *res ipsa loquitur*. There is no expert testimony in the record from which it could reasonably be concluded that Robinson's infection ordinarily would not happen in the absence of negligence. Although she did not have to rule out all other possible non-negligent causes, she did have to offer evidence showing that the balance of probabilities weighed in favor of negligence.

In order to create a genuine factual dispute on this point, Robinson thus had to come forward with evidence to counter Dr. Burke's affidavit opinion--that non-negligent causes of her infection were probable--with expert testimony to the effect that Robinson's infection most likely resulted from negligence, assuming it was possible to find an expert who could and would make such a statement. . . . Since appellant did not submit evidence creating a genuine issue of fact about the most likely cause of her injuries, the trial judge properly proceeded to conclude that respondents were entitled to summary judgment as a matter of law.

We agree that trial courts should be extremely cautious in granting summary judgment for a defendant on the basis that plaintiff has failed to secure expert testimony to support a medical negligence action. But appellant contends that a plaintiff suing on a theory of *res ipsa loquitur* is always entitled to a trial on the merits, so that summary judgment is always inappropriate. Such an argument misconprehends the purpose and application of the doctrine, as well as the pretrial responsibilities of a plaintiff faced with a summary judgment motion.

Id. at 266-267.

3. Even if the doctrine of *res ipsa loquitur* were applicable, summary judgment would be appropriate because there is no genuine issue of fact regarding causation.

In Robinson v. Intermountain Health Care, Inc., supra, the Court of Appeals explained:

Res ipsa loquitur is an evidentiary doctrine aiding in the proof of negligence; it has no bearing on the issue of causation, which must be separately and independently established.

Id. at 266.

There is no expert opinion or other competent evidence in the record controverting the affidavits of Dr. Hurst, Dr. Randle, Dr. Guinn, Dr. Rasmussen and Dr. Parker, all of which establish that plaintiff's alleged injuries were not caused by Dr. Hurst's orthodontic treatment.

D. Plaintiff Has Not Stated A Claim For Relief Based On Lack Of Informed Consent.

In her brief on appeal, plaintiff argues that she did not give informed consent to the procedures performed by Dr. Hurst when she was twelve years old. (Appellant's Brief at 7) Plaintiff's argument is without merit for the following reasons

1. Her Complaint does not allege a cause of action based on lack of informed consent and that theory was not otherwise raised in the trial court and therefore cannot be considered by this Court on appeal. Sorenson v. Larsen, supra; Topik v. Thurber, supra.

2. One of the elements of a cause of action for failure to obtain informed consent which must be proved by the plaintiff is that "the unauthorized part of the health care rendered

was the proximate cause of personal injuries suffered by the patient". § 78-14-5(1)(c) & (g), U.C.A. (1953 as amended).

The treatment rendered when plaintiff was eleven or twelve years old was the extraction of the incisor and the orthodontic treatment commenced in 1972 and concluded in 1974. Even under a theory of failure to obtain informed consent, plaintiff would have the burden of proving that such treatment caused her alleged injuries. As discussed above, the testimony of Dr. Hurst, Dr. Randle, Dr. Guinn, Dr. Rasmussen and Dr. Parker is uncontroverted and there is no genuine issue in the record regarding causation.

3. There is no genuine issue of fact in this case regarding plaintiff's consent to the treatment rendered by Dr. Hurst. Any parent is authorized and empowered to consent to health care for his minor child. § 78-14-5(4)(a), U.C.A. (1953 as amended) According to the affidavits of Dr. Hurst and Dr. Rasmussen, the extraction of plaintiff's incisor and the plan for orthodontic treatment were discussed with plaintiff's father and he agreed with the plan of treatment. (R. at 16, Aff'd of Hurst ¶ 4; R. at 38, Aff'd of Rasmussen ¶ 4) Gayle Dean Hunt, plaintiff's father, whose affidavit was filed after the affidavits of Dr. Hurst and Dr. Rasmussen were filed, does not controvert the testimony of Dr. Hurst and Dr. Rasmussen that he agreed to the proposed treatment. He testifies:

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.

(R. at 66) Accordingly, the uncontroverted facts in the record are that Dr. Hurst explained the proposed treatment to plaintiff's father and her general dentist and they agreed to the treatment, including extraction of the incisor and the application of orthodontic appliances.

POINT II

PLAINTIFF'S CLAIMS ARE BARRED BY THE PROVISIONS OF § 78-14-4, U.C.A. (1953 AS AMENDED) BECAUSE THIS ACTION WAS NOT COMMENCED WITHIN FOUR YEARS AFTER THE ALLEGED NEGLIGENT TREATMENT WHICH PLAINTIFF CLAIMS CAUSED HER ALLEGED INJURIES.

Section 78-14-4 provides:

No malpractice action against a health care provider may be brought unless it is commenced within two years after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered the injury, whichever first occurs, but not to exceed four years after the date of the alleged act, omission, neglect or occurrence, . . . (emphasis added)

Although plaintiff alleges Dr. Hurst's treatment continued through 1985, the acts she claims were negligent were the extraction of the lower right central incisor and moving the other lower anterior teeth to fill the space left by the

extraction. Plaintiff wore retainers subsequent to 1974, but it is uncontroverted that the incisor was extracted in 1972 and that by the end of 1974 the remaining lower anterior teeth had been moved to reduce the crowding and had evenly taken up the space of the extracted tooth. (R. at 17, Aff'd of Hurst; R. at 38, Aff'd of Rasmussen ¶¶ 5 & 6)

This Court recently reviewed the application of the four year statute of repose in § 78-14-4, in a similar case. In Sorensen v. Larsen, 740 P.2d 1336 (Utah S. Ct. 1987), Dr. Larsen, the defendant, performed corrective surgery on plaintiff's ankle in May 1973. In February 1982, the plaintiff allegedly discovered that the surgery had been negligently performed and in December 1982 he commenced the lawsuit. The plaintiff argued his complaint was timely because it was filed within two years of the date his injury was discovered and that to apply the four statute of repose in his case would result in his claim being extinguished before it was discovered. The trial court granted summary judgment and this court affirmed holding:

The trial court appropriately observed that the fore-going statute is stated in two parts. It is not only a statute of limitation; it is also a statute of repose. The statute begins to run from the time an injured person knows or should know that he has suffered an injury. But in any event, the statute requires that an action be commenced within four years after the date of the incident which caused the injury.

Id. at 1337.

There is no dispute that the treatment which plaintiff claims caused her injuries occurred in 1972 through 1974. Accordingly, her claims are barred as a matter of law by the provisions of § 78-14-4.

POINT III

THE SUMMARY JUDGMENT ENTERED BY THE TRIAL COURT SHOULD BE AFFIRMED BECAUSE PLAINTIFF HAS FAILED TO CITE ANY PORTION OF THE RECORD WHICH FACTUALLY SUPPORTS HER CONTENTIONS ON APPEAL.

This Court has consistently held that it will assume the correctness of the judgment below, where, as here, an appellant does not support facts set forth in his or her brief with citations to the record. Trees v. Lewis, 738 P.2d 612 (Utah S. Ct. 1987); State v. Tucker, 657 P.2d 755 (Utah S. Ct. 1982). In State v. Tucker, supra, this Court held:

A separate and independent basis for the affirmance of the trial court is that the defendant failed to refer to any portion of the record that factually supports his contention on appeal. This Court will assume the correctness of the judgment below where counsel on appeal does not comply with the requirements of Rule 75(p)(2)(2)(d), Utah Rules of Civil Procedure, as to making a concise statement of facts and citation of the pages in the record where they are supported.¹

Id. at 756-757.

¹Rule 24(a)(7) and (e), Rules of Utah Supreme Court, became effective in April 1987 and essentially replaced former Rule 75(p)(2)(2)(d), Utah Rules of Civil Procedure, but did not change the requirement that an appellant's brief contain a statement of facts supported by citations to the record.

In this case, appellant's brief does not contain a single citation to the record. Accordingly, there are no facts properly cited to this Court upon which reversal of the judgment of the lower court could be based. It is impossible for plaintiff to demonstrate that a question of fact existed without citing facts in the record. The Summary Judgment should therefore be affirmed.

POINT IV

THE COURT SHOULD AWARD DR. HURST COSTS AND ATTORNEYS' FEES BECAUSE THE APPEAL IS FRIVOLOUS AND BECAUSE OF PLAINTIFF'S FAILURE TO COMPLY WITH THE COURT'S RULES.

Rule 33(a), Rules of the Utah Supreme Court, provides for an award of damages and single or double costs, including reasonable attorneys' fees, if the Court determines that an appeal is frivolous. The Utah Court of Appeals has held that a frivolous appeal is one having no reasonable legal or factual basis and that lack of good faith is not required to find an appeal frivolous. O'Brien v. Rush, 744 P.2d 306 (Utah Ct. App. 1987).

This appeal is without reasonable legal or factual basis. As discussed above, not a single citation to the record is made in appellant's brief. Without citing the record, no reasonable factual basis for the appeal can be demonstrated. At least two arguments raised by plaintiff on appeal were never raised in

the trial court; res ipsa loquitur and failure to obtain informed consent. This Court has consistently held that it will not consider issues raised for the first time on appeal, but plaintiff has ignored that basic time honored rule without suggesting any reason why this Court should consider those arguments. Plaintiff has filled the record in this case with clearly inadmissible materials, without any good faith effort to provide the required foundation. (See Addendum hereto) Additionally, plaintiff has attempted to put before this Court, two purported expert witness affidavits, which were never before the trial court. (Dennis J. Michaelson, D.M.D., M.S. included as an unnumbered page of the record and filed with the District Court more than two months after the Notice of Appeal was filed and the purported letter from Grant B. Cannon, D.D.S., M.D., Exhibit 10 to Appellant's brief, but not in the record.)

For the foregoing reasons, defendant submits that this appeal has no reasonable legal or factual basis and that plaintiff's blatant disregard for the rules of this Court and the Rules of Civil Procedure demonstrate bad faith and the frivolous nature of the appeal. Such conduct has greatly and unnecessarily increased the cost of defending this action. Accordingly, defendant requests that just damages, including double costs and reasonable attorneys' fees be awarded to him.

CONCLUSION

Based on the foregoing arguments, Dr. Hurst respectfully requests that the Order and Summary Judgment entered by the District Court be affirmed and that he be awarded double costs and attorneys' fees incurred because of this appeal.

Respectfully submitted this 16th day of December, 1988.

SNOW, CHRISTENSEN & MARTINEAU

By David G. Williams
David G. Williams
Attorneys for J. Earl Hurst,
D.D.S., M.S., Defendant and
Respondent

SCMDGW153

ADDENDUM

Following is a list of the materials, exclusive of Dr. Daynes' affidavit, submitted to the trial court and to this Court by plaintiff, purportedly in support of her claim that Dr. Hurst was negligent and that his treatment proximately caused her alleged injuries. Also set forth are reasons these materials do not raise a question of fact regarding the propriety of Dr. Hurst's treatment or causation. The various affidavits of plaintiff, her father, and Charles Edward Gordon are not included, as none of them purport to have any dental training or other qualifications as expert witnesses.

1. Letter from Joseph W. Stobbe, Jr., D.M.D. dated December 17, 1987. (R. at 70) Dr. Stobbe's letter is not signed under oath and does not affirmatively show that he is competent to testify as an expert, as required by Rule 56(e), Utah R. Civ. P. Moreover, this letter does not purport to address whether Dr. Hurst's treatment was appropriate or whether his treatment caused plaintiff's alleged injuries.

2. Affidavit of Dallas E. Murdoch, D.D.S., dated May 4, 1988. (R. at 175) Dr. Murdoch's affidavit does not state that he has any familiarity with the standard of care ordinarily exercised by orthodontists and does not otherwise affirmatively show that he is competent to testify as an expert. Additionally, Dr. Murdoch does not express any opinion regarding the

standard of care applicable to Dr. Hurst or regarding whether Dr. Hurst's treatment was within the applicable standard of care. At most, he suggests that the type of occlusal relationship plaintiff had in May 1988 "can" trigger a variety of health problems. He does not express an opinion that plaintiff's alleged injuries were or probably were caused by her orthodontic treatment.

3. Excerpt of Lecture to Dentists, September 1986, by Dr. Henry Tanner. (R. at 183-184) This document was submitted to the trial court on June 13, 1988, a week after the second Summary Judgment was granted. It was submitted without any foundation. It is not in affidavit form or attached to or incorporated in an affidavit. Additionally, the document does not purport to address the standard of care applicable to orthodontists in treating cases such as plaintiff presented to Dr. Hurst and does not purport to address the cause of plaintiff's alleged injuries.

According to the court's file (R. at 199) a cassette tape, purportedly the tape from which this excerpt was transcribed, was also submitted to the court on June 14, 1988. The tape has all the same evidentiary deficiencies, including specifically a total lack of foundation. The content of the tape is unknown because it was not offered or played at any hearing and was never provided to Dr. Hurst or his counsel.

4. Affidavit of John R. Bybee, dated June 13, 1988. (R. at 185) This affidavit was also submitted to the trial court a

week after the second Summary Judgment was entered. It states John R. Bybee has a Ph.D. in "physiology and the training of science teachers", but does not affirmatively state any qualifications making him competent to testify regarding the standard of care exercised by orthodontists or the cause of plaintiff's alleged injuries. Additionally, the affidavit does not state that John Bybee is familiar with the treatment rendered by Dr. Hurst and does not address the propriety of such treatment or express any opinion as to the cause of plaintiff's alleged injuries.

5. Letters and proposed contract addressed to Robert Macri from Technical Advisory Service for Attorneys and The Medical Quality Foundation. (R. at 192-195) These are materials sent to plaintiff's counsel by an expert witness locating agency. They were filed with the court a week after the second Summary Judgment was granted. The materials do not contain any expert opinions regarding Dr. Hurst's treatment or the cause of plaintiff's problems and obviously do not comply with Rule 56(e), Utah R. Civ. P. with respect to the form of evidence submitted to controvert affidavits filed in support of a motion for summary judgment.

6. Letter dated June 14, 1988, from Gordon J. Christensen, D.D.S., Ph.D. (R. at 204) This letter was filed with the court on June 21, 1988, two weeks after the Second Motion for Summary Judgment was granted. The letter is not

signed under oath. It is not signed by Dr. Christensen. It does not affirmatively show that Dr. Christensen or the person signing the letter is competent to testify regarding the issues in this case. The letter does not express any opinion that Dr. Hurst's treatment was negligent or in any way inappropriate.

7. Handwritten note dated June 15, 1988 from John Richard Oaki, M.D. (R. at 205) Again, this note is not in the form prescribed by Rule 56(e), Utah R. Civ. P. for evidence submitted to controvert affidavits filed in support of motions for summary judgment. It was also filed two weeks after the Second Motion for Summary Judgment was granted. Dr. Aoki, according to the material submitted, is an otorhinolaryngologist and there is no indication that he claims any familiarity with the standard of care exercised by orthodontists. He does not express an opinion concerning the propriety of the treatment rendered by Dr. Hurst.

8. Affidavit of Dennis J. Michaelson, D.M.D., M.S. dated September 13, 1988. This affidavit is the last document, other than the clerk's index, in the court file and is not numbered as part of the record. It was filed September 20, 1988, more than two months after the notice of appeal was filed. Again, this affidavit does not affirmatively show that the affiant is competent to testify as an expert regarding the issues in this case. The affiant does not state that he has any familiarity with the treatment rendered to plaintiff by Dr. Hurst and does

not express an opinion concerning the propriety of Dr. Hurst's treatment. He opines that in September 1988 plaintiff had some occlusal and dentally related problems, but does not express any opinion regarding the cause of such problems.

9. Letter dated July 8, 1988, from Grant B. Cannon, D.D.S., M.D. This letter is Exhibit 10 to Appellant's brief, but is not found in the record or in the court file. Again, this letter does not comply with the requirements of Rule 56(e), Utah R. Civ. P., for evidence submitted to controvert affidavits filed in support of motions for summary judgment. The letter does not affirmatively show that Dr. Cannon is familiar with the standard of care exercised by orthodontists. The letter is not signed under oath. Furthermore, Dr. Cannon does not purport to express an opinion that Dr. Hurst's treatment was in any way inappropriate or caused plaintiff's alleged injuries.

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of December, 1988,
four true and correct copies of the foregoing BRIEF OF
RESPONDENT were served by depositing copies of the same in the
United States mail, postage prepaid, to the following:

ROBERT N. MARCI
Attorney for Plaintiff/Appellant
230 South 1000 East
Salt Lake City, Utah 84102

Dan A. Will