

**COURT OF APPEALS  
FAIRFIELD COUNTY, OHIO  
FIFTH APPELLATE DISTRICT**

TERRI LYNN KELLER, et al.,	:	<b>JUDGES:</b>
	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
Plaintiffs-Appellants	:	Hon. John F. Boggins, J.
	:	
-vs-	:	
	:	Case No. 01CA7
MARTHA A. CUTRIGHT, Executor of	:	
the Estate of David T. Cutright,	:	
D.D.S., deceased,	:	<b><u>O P I N I O N</u></b>
	:	
Defendant-Appellee	:	

**CHARACTER OF PROCEEDING:** Civil appeal from Fairfield County Court  
of Common Pleas, Case No. 99 CV 244

**JUDGMENT:** Affirmed

**DATE OF JUDGMENT ENTRY:** 9/17/2001

**APPEARANCES:**

**For Plaintiffs-Appellants**

**ANN M. VALENTINE  
175 South Third Street  
Penthouse One  
Columbus, Ohio 43215**

**For Defendant-Appellee**

**JEFFREY J. JURCA  
EDWARD G. HUBBARD  
175 South Third Street  
Columbus, Ohio 43215**

**[Cite as *Keller v. Cutright, Exr.*, 2001-Ohio-1387]  
*Boggins, J.***

**This is an appeal from a decision of the Common Pleas Court of Fairfield County sustaining a defense motion for Summary Judgment.**

**The sole Assignment of Error is:**

**I**

**THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT APPELLANT'S EXPERT FAILED TO OFFER THE EXPERT TESTIMONY NECESSARY TO PROVE MEDICAL MALPRACTICE.**

**The history of this cause is that appellant engaged the services of appellee's decedent dentist to extract wisdom tooth number thirty-two.**

**Appellant asserts that the lingual nerve was severed resulting in numbness to her tongue, loss of taste and other effects.**

**Appellant subsequently underwent nerve graft surgery.**

**She alleges that the damage to such nerve was the result of negligence during the removal of such tooth.**

**A deposition of appellant's expert, Dr. Bloch, was taken and, based upon such testimony, appellee filed a Motion for Summary Judgment.**

**Other than responding to the Motion, no supplemental affidavits were filed.**

**Civil Rule 56(C) states, in pertinent part:**

**Summary Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving**

party is entitled to judgment as a matter of law....A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor.

Pursuant to the above rule, a trial court may not enter a summary judgment if it appears a material fact is genuinely disputed. In order to survive a motion for summary judgment, the non-moving party must produce evidence on any issue to which that party bears the burden of production at trial. *Wing v. Anchor Media Ltd. of Texas* (1991), 59 Ohio St.3d 108, citing *Celotex v. Catrett* (1986), 477 U.S. 317. Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36.

This court's responsibility requires a complete review of the material before the court even though the trial Judge rendered an extensive review thereof and considered in detail the applicable case law as applied to C.R. 56.

Prior to his testimony, Dr. Bloch reviewed Dr. Cutright's notes, his radiographs and those of the subsequent surgery together with the records and evaluation related to the latter surgery. He also reviewed Dr. Cutright's deposition.

The pertinent portions of Dr. Bloch's deposition testimony are as follows:

\*\*\*

A. Well, the position of this wisdom tooth, it's a vertical partial bony impaction and in my opinion,

because of the position of the tooth, there should not have been any lingual nerve damage when they took the tooth out.

**Q.** So just because of the anatomical position of that tooth prior to extraction it was susceptible to extraction without lingual nerve damage?

**A.** I believe so.

**Q.** And so damage of the lingual nerve under those circumstances would fall below the standard of care?

**A.** I believe so.

\*\*\*

So I wanted to clarify that because the tooth has a vertical inclination, it's not horizontal or obliquely angled. The removal of the distal portion of the bone here it would have been very -- my opinion, it would have been very easy to just split the tooth and take it out in a few pieces, coming straight out of the mouth, as opposed to removing it to the lingual or to the buccal.

\*\*\*

I can't tell you exactly how from these materials this nerve was injured, but we all know it was, and reading the surgical report for the repair there was a good sized neuroma in proximity to where the tooth was removed.

I think that when he laid the flap it was -- the nerve was damaged either through improper retraction or actual trauma from either the drill or the elevator when he took the tooth out.

(T. at 16,17,18)

\*\*\*

**Q.** Would you agree with the proposition that nerve damage and numbness of the tongue is a known risk of this procedure?

**A.** Yes.

**Q. And would you agree that the lingual nerve can be damaged even if the dentist uses good techniques in the extraction?**

**A. Yes.  
(T. at 19)**

**\*\*\***

**Q. Based upon what you've read, and understanding that you're not clear on precisely what technique Dr. Cutright used, do you have an opinion as to a reasonable degree of medical probability as to what caused the nerve damage in this case?**

**A. I don't know.  
(T. at 24)**

**\*\*\***

**Q. The nerve could be damaged by the burr or elevator regardless of what type of elevator is used?**

**A. Correct.**

**Q. And those are known risks from those procedures?**

**A. I guess so, yes.**

**Q. And your next item is what?**

**A. The next was, did the tooth want to come out of the mouth toward the tongue lingually, through the lingual plate. It says it was taken out or extracted. Did he take precautions to remove this tooth occlusally. Did he remove extra bone around the distal portion to remove it, to prevent it from coming out of the lingual.**

**Q. Were you able to determine any answers to those questions based on what you reviewed?**

**A. No.  
(T. at 29)**

\*\*\*

**Q. And I think you have answered my questions but I want to make sure I understand your testimony. Do you have an opinion, based upon your training and experience, as well as your review of the records in this case, within a reasonable degree of medical probability, as to whether Dr. Cutright fell below the accepted standard of care?**

**A. Yes, I do.**

**Q. What is that opinion?**

**A. That he used some improper procedure that damaged the lingual nerve given the circumstances that he was faced with Mrs. Keller.**

**Q. And if I understand your prior testimony, the precise and proper procedure is something that you're not able to determine?**

**A. Correct.**

**Q. Based on what you've just told me, you cannot tell me, to a reasonable degree of medical probability, what precisely caused the nerve injury in this case, correct?**

**A. Correct  
(T. at 33 and 34)**

**As Judge Clark has stated, *Bruni v. Tatsumi* (1976), 46 Ohio St.2d 127 holds:**

**In evaluating conduct of physician and surgeon charged with malpractice, test is whether physician, in performance of his service, either did some particular thing or things that physicians and surgeons in that medical community, of ordinary skill, care and diligence would not have done under same or similar circumstances, or failed or omitted to do some particular thing or things which physicians and surgeons of ordinary skill, care and diligence would not have done**

**under the same or similar circumstances; he is required to exercise the average degree of skill, care and diligence exercised by members of the same medical specialty community in similar situations.**

**In the case *sub judice* Dr. Bloch clearly says that the nerve damage is a known risk of the procedure, that he cannot determine from the materials available for review the negligent conduct of Dr. Cutright but that he believes such fell below the standard of care.**

**We must conclude that such testimony is insufficient to support the claim of dental malpractice and therefore disagree with the sole Assignment of Error.**

**The decision of the trial court is affirmed.**

**By Boggins, J.**

**Gwin, P.J. and**

**Hoffman, J. concur**

---

---

---

**JUDGES**

[Cite as *Keller v. Cutright, Exr.*, 2001-Ohio-1387]  
IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

TERRI LYNN KELLER, et al.,	:	
	:	
Plaintiffs-Appellants	:	
	:	
-vs-	:	
	:	JUDGMENT ENTRY
MARTHA A. CUTRIGHT, executor of the	:	
Estate of David T. Cutright, D.D.S.,	:	
deceased,	:	
	:	
Defendant-Appellee	:	CASE NO. 01CA7

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Fairfield County Court of Common Pleas , Fairfield, Ohio is affirmed.

Costs to appellant.

---

---

---

JUDGES