

JOE DIXON,
Plaintiff,

v.

WILLIAM A. BOOTHE, M.D., Individually
and d/b/a BOOTHE EYE CARE &
LASER CENTER,
Defendants.

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IN THE DISTRICT COURT

199TH JUDICIAL DISTRICT

COLLIN COUNTY, TEXAS

PLAINTIFF'S FIRST AMENDED PETITION

TO THE HONORABLE COURT:

NOW COMES JOE DIXON, Plaintiff, and files this his First Amended Petition and for cause of action show as follows:

I.

Discovery Control Plan

Plaintiff designates this a Level Two discovery case pursuant to the Texas Rules of Civil Procedure §190.1.

II.

Service

Plaintiff is an individual residing in Denton County, Texas.

Defendant William Boothe, M.D., individually and d/b/a Boothe Eye Care & Laser Center, is an individual residing in who may be served with citation at his place of business located 3900 W. 15th Street, Suite 102, Plano, Texas 75075.

III.

Jurisdiction and Venue

Jurisdiction and venue are proper in Collin County, as provided in §15.002 of the Texas Civil Practice and Remedies Code.

FILED

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CLERK OF DISTRICT COURT
COLLIN COUNTY, TEXAS
BY: *[Signature]*

IV.
Background

Plaintiff is an individual who sought medical treatment from Defendant on or about July 17, 2001. Defendant at all times represented that Plaintiff was a candidate for such procedure and that Plaintiff could expect improved vision as the result of the procedure. Based upon Defendant's representations, Plaintiff agreed to undergo the procedure suggested by Defendant.

Defendant performed the procedure to correct Plaintiff's vision. Plaintiff's eyesight initially improved, but then dramatically deteriorated. Consequently, Plaintiff contacted Defendant for further advice and treatment. Defendant represented that further corrective surgery was required, that such "touch up" surgery is often required, and that Plaintiff was a candidate for such "touch up". Based on the representations of Defendant, Plaintiff agreed to the "touch up" surgery, which was performed by Defendant.

Plaintiff's vision did not significantly improve and began further deterioration. Plaintiff reported these concerns to Defendant and was told that "custom abrasion", a new procedure, would be approved within the next year and that such surgery would resolve Plaintiff's problems. Defendant represented to Plaintiff that he would be an ideal candidate for custom abrasion and that Defendant would refund Plaintiff's money on the initial surgeries. Based on Defendant's representations that the custom abrasion procedure would be available and would resolve Plaintiff's problems, Plaintiff and his wife executed the "Release of All Claims", attached hereto as Exhibit "A", on November 8, 2002.

In April 2003, Plaintiff contacted Defendant's office to ascertain the availability of the custom abrasion procedure. Plaintiff was informed that Defendant did not see patients after one year. Plaintiff has further learned that he was not a candidate for the initial surgical procedure, that he was certainly not a candidate for the "touch up" procedure after the failure of the initial

procedure, and that as a result of the two initial surgeries, he is not a candidate for the custom abrasion procedure.

V.
Fraud

Defendant's conduct as set forth above constitutes a fraud upon Plaintiff. Specifically, Defendant made material representations to Plaintiff to induce him into obtaining laser eye surgery, induce him into obtaining "touch up" surgery, and induce him into executing the "Release of All Claims". Plaintiff relied upon Defendant's representations as set forth above. Defendant's representations were false at the time that they were made. Based on the foregoing, Plaintiff has suffered actual damage in an amount within the jurisdictional limits of the Court. Based on the intentional and malicious nature of Defendant's fraudulent conduct, Plaintiff seeks the recovery of exemplary and/or punitive damages in an amount to be determined by the trier of fact.

VI.
Breach of Fiduciary Duty

Defendant's conduct as set forth above constitutes a breach of his fiduciary duty to Plaintiff. Defendant made misrepresentations to Plaintiff regarding the appropriateness of and availability of medical procedures to induce Plaintiff into executing the "Release of All Claims". Defendant's misrepresentations amount to a breach of his fiduciary duty to Plaintiff and such breach has caused Plaintiff actual damages in an amount within the jurisdictional limits of the Court. As Defendant's breach of his duty to Plaintiff was done with actual malice, Plaintiff is entitled to the recovery of exemplary damages in an amount to be determined by the trier of fact.

VII.
Violations of Business and Commerce Code Section 17.41, et seq.

Plaintiff would show that he is a "consumer" pursuant to Business and Commerce Code section 17.41, *et seq.* ("D.T.P.A"). Plaintiff sought goods and/or services from Defendant. As set forth, above, Defendant engaged in an unconscionable course of action in misrepresenting the availability of future medical procedures to Plaintiff.

In addition, Defendant (1) caused confusion as or misunderstanding as to the source, sponsorship, approval, or certification of goods or services, (3) represented that an agreement conferred or involved rights, remedies, or obligations which it does not have or involve, (4) knowingly made false or misleading statements of fact concerning the need for corrective service, and (6) failed to disclose information about goods or services that was known at the time of the transaction to induce Plaintiff into entering into a transaction that the consumer would not have entered into had the information been disclosed. Defendant further represented that Plaintiff had an astigmatism to "upcharge" Plaintiff for the initial surgery. On information and belief, Defendant's normal practice is to indicate astigmatism in each of his patients in an effort to increase the cost of the surgery.

Plaintiff would show that Defendant's actions, as set forth above, were the producing cause of economic damages to Plaintiff. Plaintiff seeks the recovery of its economic damages in an amount within the jurisdictional limits of the Court. In addition, Defendant's actions were committed knowingly and intentionally and have caused personal injury to Plaintiff as well as pain, suffering and mental anguish. Based on the knowing and intentional nature of Defendant's violations, Plaintiff seeks the recovery of treble damages pursuant to the DTPA. Plaintiff further seeks the recovery of its attorney's fees incurred in bringing this action in a sum of not less than \$5,000.00, together with his costs of court and prejudgment and post-judgment interests. Finally, Plaintiff seeks injunctive relief pursuant to DTPA section 17.50(b)(2) enjoining Defendant from

making false representations to consumers that they have astigmatisms in order to charge patients for unnecessary services and/or services that are not actually performed.

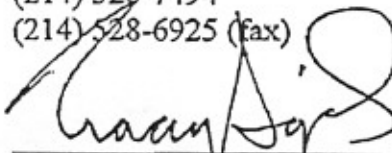
VIII
Request for Disclosure

Pursuant to the Texas Rules of Civil Procedure, you are hereby requested to disclose, within fifty (50) days of service of this request, the information or materials described in Rule 194.2 (a), (b), (c), (d), (e), (f), (g), (h), (i), (j), and (k).

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that Defendant be cited to appear and answer and that upon trial of this cause judgment be entered for Plaintiff and against Defendant herein for Plaintiff's actual damages, economic damages, exemplary damages, prejudgment interest at the highest lawful rate from the date of suit through the date of judgment, post-judgment interest at the highest lawful rate, Plaintiff's reasonable and necessary attorney's fees incurred in the prosecution of this suit, Plaintiff's costs of suit, injunctive relief as set forth herein, and all other relief the Court deems Plaintiff justly and equitably entitled.

Respectfully submitted,

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