

TAMMIE KAY LEE,
Plaintiff,

VS.

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

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IN THE DISTRICT COURT OF

COLLIN COUNTY, TEXAS

416TH JUDICIAL DISTRICT

PLAINTIFF'S SECOND AMENDED ORIGINAL PETITION

TO THE HONORABLE COURT:

TAMMIE KAY LEE ("Plaintiff") files this Second Amended Original Petition against WILLIAM A. BOOTHE, M.D., d/b/a BOOTHE EYE CARE & LASER CENTER ("Defendant").

I.

DISCOVERY LEVEL

Plaintiffs plead that discovery should be conducted under Discovery Control Plan Level 2.

II.

JURISDICTION AND VENUE

Jurisdiction is proper in this court because the amount in controversy exceeds the minimum jurisdictional limits of this court.

Venue is proper in Collin County, Texas under Civil Practice and Remedies Code §15.002 because Defendant resides in Collin County.

III.

PARTIES

Plaintiff is an individual resident of Franklin County, Texas.

Defendant William A. Boothe, M.D., d/b/a Boothe Eye Care & Laser Center is an individual resident of Collin County. He has previously appeared and answered herein.

FILED

2005 JAN 21 AM 11:53

HANNAH KUNKLE
DISTRICT CLERK
COLLIN COUNTY, TEXAS
BY *[Signature]* DEPUTY

IV.

FACTS

Defendant advertises and has advertised his services extensively throughout North Texas for several years. Plaintiff heard these advertisements and was familiar with Defendant and the services he offered. Among the benefits which Defendant advertised were that his services were virtually pain free and that the services would be "absolutely free" if vision is not corrected to 20/20.

Plaintiff's son went to Defendant to have the InterLasik procedure performed. Plaintiff accompanied him. When she mentioned she might be interested, she, too, was given the sales pitch, which included a presentation describing the procedure as painless and written materials describing the procedure as without "any discomfort." Moreover, the 20/20 guaranty was again made.

Based on these representations, Plaintiff decided to undergo the procedure.

Defendant's office resembles an assembly line. Patients are moved through the system in large numbers for a relatively short procedure. Patients move from pre-operative procedures, to the operation, to post-operation recovery rapidly and continuously.

Plaintiff's troubles began with the patient before her. Apparently, one of Defendant's nurses had placed the wrong chart with the wrong patient and Dr. Boothe nearly started the procedure using the wrong measurements on that patient. Fortunately for that previous patient, the mistake was caught. Unfortunately for Plaintiff, Dr. Boothe became so outraged, that he could not control his temper.

Plaintiff was rushed through the pre-operative procedure and apparently not given the proper topical anesthetic on her eyes. She was then set in the operative chair and approached by a screaming, out-of-control Dr. Boothe. Dr. Boothe yanked her right eye open and slammed the clamp on it, causing intense pain and bruising. Plaintiff screamed in pain. Dr. Boothe leaned over and threatened her with stopping the procedure in midcourse. Plaintiff was terrified

and in agony and afraid that Dr. Boothe would leave her with a partially performed procedure.

After the less than two-minute procedure on the right eye, Dr. Boothe again used brute force to yank open the left eye and slammed the clamp into place. After the brief second procedure, Dr. Boothe threw down his instruments and stomped off.

When Plaintiff's son saw her in the recovery room, she was sobbing and hyperventilating, the pain had been so intense.

Plaintiff went to several follow-up visits. At the second follow-up visit, she asked to see her chart to determine whether it reflected what had transpired. Dr. Boothe personally refused to let her see the chart. She was told that if she signed a waiver and paid \$25, a copy would be mailed to her. When she finally got it, over a month later, it reflected that eye drops were put in her eyes at 1:29 p.m., long after she had left the facility and was on her way back home to Mount Vernon.

After that second follow-up visit, Defendant's office manager apologized for Dr. Boothe's behavior and stated that there was no excuse for what he had done.

Plaintiff was in pain for up to three weeks after the procedure. The procedure did not restore her vision to 20/20.

Defendant acknowledged the 20/20 guaranty by having the office manager call Plaintiff, and agree to give her her money back. However, instead of sending her her money, Defendant sent a release of any and all claims of whatever nature.

Plaintiff fully paid the amount charged.

V.

CAUSE OF ACTION

Plaintiff incorporates the preceding paragraphs by reference.

A. BREACH OF CONTRACT

Plaintiff fully performed her part of the bargain and paid all of the charges requested by Defendant. Defendant partially performed by attempting to do the procedure. But Plaintiff's

vision has not been returned to 20/20. Defendant has failed to live up to the guaranty.

Accordingly, Defendant breached his contract.

The statute of frauds does not apply to a contract which one party has completely performed and the other party has partially performed. Defendant should be estopped to assert the statute of frauds. It would constitute fraud to enforce the statute of frauds when Defendant has and continues to advertise this guaranty.

B. DECEPTIVE TRADE PRACTICES

This cause of action is brought pursuant to the Texas Deceptive Trade Practices/Consumer Protection Act.

Plaintiff is a "Consumer" within the meaning of Texas Business and Commerce Code §17.45(2). Defendant is a provider of "Services" within the meaning of Texas Business and Commerce Code §17.45.

Defendant is in the business of providing services; to wit, eye surgery. Plaintiff purchased or acquired Defendant's services when she contracted for the performance of surgery on her eyes.

Among the deceptive trade practices that Defendant committed, causing damages to Plaintiff, were these:

- (1) Representing that services have characteristics, uses, benefits, or qualities that they do not have;
- (2) Representing that his services are of a particular standard, quality, or grade and, in fact, were of another;
- (3) Advertising services with intent not to sell or provide them as advertised;
- (4) Representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law.

Defendant's actions constitute a producing cause of damages to Plaintiff. Defendant's conduct was committed intentionally and knowingly, thus entitling Plaintiff to recover damages for mental anguish, economic damages, and three times the amount of damages for mental anguish and economic damages, and attorney's fees.

C. ASSAULT

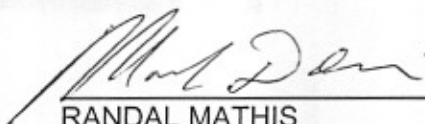
Plaintiff would additionally show that Defendant's threatening and out of control behavior at the time of the surgery constituted civil assault and battery, committed intentionally and knowingly, and proximately causing damages to Plaintiff as set forth above. To the extent permission was given, Defendant far exceeded said permission in the amount of force used.

D. FRAUD

Additionally, Defendant advertised, both on television and radio, his "20/20 or its absolutely free" guaranty. Defendant's representatives told Plaintiff that this guaranty applied. Now, Defendant asserts the statute of frauds. Making a representation with the express intent not to abide by it, knowing the representation will be relied upon, is fraud.

WHEREFORE, Plaintiff requests that Defendants William A. Boothe, M.D., d/b/a Boothe Eye Care & Laser Center be cited to appear and answer and that upon final hearing the Plaintiff have judgment against the Defendant for an amount within the jurisdictional limits of this court, together with pre-judgment and post-judgment interest as provided by law, costs, and for such other and further relief at law or in equity to which Plaintiff is justly entitled.

Respectfully submitted,



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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been forwarded to all other known counsel of record in accordance with the Texas Rules of Civil Procedure on this 20th day of January, 2005.



MARK DONHEISER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been forwarded to all other known counsel of record in accordance with the Texas Rules of Civil Procedure on this 20th day of January, 2005.


MARK DONHEISER