

**OWNERS OF A DOG SUED VETERINARIAN FOR NEGLIGENCE AND
MISREPRESENTATION UNDER THE DECEPTIVE TRADE PRACTICES
ACT FOLLOWING THE DEATH OF THE DOG AFTER SURGERY.**

Downing v Gully, 915 S.W. 2d 181 (Ct. App 1996)

BASIS OF THE COMPLAINT:

The Downings brought their dog to Dr. Gully's clinic for a neutering operation which was needed because one of the dog's testicles failed to drop into the scrotum and remained in his abdomen. The Downings signed an anesthetic risk authorization form but declined to have preoperative blood screening done. After surgery, but before the dog had fully recovered from the anesthesia, he died.

LEGAL PROCEEDINGS:

The Downings sued, asserting that Clinic was negligent in failing to properly administer the anesthesia and to properly control their employees. They also asserted that a DTPA claim arose from a statement made by Dr. Gully before the operation that he would be able to adequately handle the procedure. The Clinic moved for summary judgment on both claims and summary judgment was granted by the trial court. The Downings appealed the summary judgment of the trial court.

DISCUSSION BY THE COURT:

Negligence:

In medical negligence cases, the court is guided by expert opinion. A summary judgment may be based on an expert's uncontroverted testimony if the testimony is clear, positive, direct, otherwise credible, free from contradictions and inconsistencies, and capable of being readily controverted. The affidavit of an interested expert who is also a party to the case can support summary judgment if it meets those requirements. But, an expert cannot merely state that he knows the standard of care and conclude that it was met because affidavits that only state conclusions, as opposed to facts, are insufficient summary judgment proof. Instead, the expert must state what the standard of care is and discuss what was done to meet it.

Dr. Gully, the clinic owner, and Dr. Kutch, the veterinarian who performed the surgery, both filed affidavits in support of summary judgment. Appellants argue that the affidavits are legally insufficient to sustain summary judgment because they are mere conclusions and fail to establish the applicable standard of care. We disagree. Although neither affidavit declares specifically what the standard of care is, absent any evidence to the contrary, it can reasonably be inferred from the affidavits of Dr. Gully and Dr. Kutch that they acted in accordance with the applicable veterinary standard of care. The Downings' other argument under this point is that the doctrine of *res ipsa loquitur* should apply and preclude the Clinic from summary judgment. However, the administration of anesthetics and the particulars of a neutering operation are not in the common knowledge of a layman and, therefore, the doctrine does not apply in this case.

Deceptive Trade Practices Act claim:

Because section 18C of the Act expressly states that the DTPA “does not apply to a veterinarian licensed under this Act with respect to claims for damages for veterinary malpractice or alleged to have resulted from the negligence on the part of the veterinarian,” we find that the Clinic is entitled to judgment as a matter of law on the Downings’ DTPA claim. The Downings contend that this results in a violation of the Texas Constitution’s open courts provision. But, because the open courts provision applies only to common-law claims and the DTPA is a statutory cause of action, the open courts provision does not apply to the restriction placed on the DTPA by the Veterinary Licensing Act.

Request for attorneys’ fees by the Clinic:

The clinic requests damages under rule 84 of the Texas Rules of Appellate Procedure. According to that rule, Appellees are entitled to damages against Appellants when an appeal has been taken “for delay and without sufficient cause.” Because we find that the Downings’ appeal was taken without unnecessary delay and with sufficient cause, we deny the Clinic’s request for damages.

WE AFFIRM THE SUMMARY JUDGMENT.