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No. 34497-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MYSTIE MICHAEL,

Appellant,

vs.

DR. BETSY MOSQUERA-LACY & BRIGHT NOW DENTAL,

Appellee

APPELLANT'S OPENING BRIEF

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I. ASSIGNMENT OF ERROR

The trial court erred in ruling that there was not sufficient evidence to support Ms. Michael's claim that she suffered an "injury to business and/or property" for purposes of the Consumer Protection Act with respect to the undisclosed substitution of bone grafting product (cow bone versus human bone) that was implanted in her jaw while at her dentist's office.

II. ISSUE RELATED TO ASSIGNMENT OF ERROR

Did the trial court err in holding that there was not sufficient evidence to create a jury question as to the "injury to business and/or property" element of the Consumer Protection Act claim? The ruling is reviewed *de novo*.

III. STATEMENT OF THE CASE

Bright Now Dental of Olympia offers routine dental care as well as periodontal services to the general public.[1] With regard to the advertised periodontal services, Bright Now Dental of Olympia does not have a licensed periodontist on staff full time.[2] Instead, Bright Now Dental of Olympia employs

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[1] (CP 83-118); *Exhibit A pg. 10-11, to Declaration of Beauregard* (Deposition of Dr. Suneet Bath). For the ease of the Court, the pin citations contained herein are referenced with regard to the declarations that were submitted in support and opposition to the underlying motion for summary judgment.

[2] (CP 83-118); *Exhibit A pg. 10-11, to Declaration of Beauregard.*

peridontists such as Dr. Lacy to perform the corresponding periodontal services as multiple locations throughout the Puget Sound area.[3]

During the spring of 2004, Ms. Michael visited Bright Now Dental of Olympia and inquired about certain needed dental care including a potential bone grafting procedure. At the initial consultation, Dr. Lacy represented to Ms. Michael that an assortment of different bone grafting products were available:

> Q. What did you explain to Ms. Michael about the different bone graft options?
>
> A. I talk about autogenous, I talk about xenografts [cow bone], I talk about allografts [human bone], I talk about synthetic bone.
>
> Q. Why did you tell Ms. Michael about the different bone grafts?
>
> A. Because I wanted her to know the different options that she have.[4]

Thereafter, Bright Now Dental of Olympia's customer service representative, Kate Guthrie, distinctly recalls that Ms. Michael specifically requested that no cow bone, but instead human bone, be used during her bone grafting procedure:

> Q. Okay. At any point in time, did she tell about any specific concerns of hers with relation to the procedure?
>
> A. She wanted human bone instead of cow bone.
>
> Q. And do you remember her expressing that to you?

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[3] (CP 83-118); *Exhibit A pg. 10-11, to Declaration of Beauregard.*

[4] (CP 83-118); *Exhibit B pg. 25, to Declaration of Beauregard* (Deposition of Dr. Betsy Lacy).

A. Yes.[5]

Ms. Guthrie recalls conveying Ms. Michael's request directly to Dr. Lacy.[6] In response, Dr. Lacy explained the following to Ms. Guthrie:

> Q. (By Mr. Beauregard) And do you know Dr. Lacy's reaction?
>
> A. She told me that **cow bone is what she generally used**, but instead, it was possible to use a different type of bone.[7]

The bone grafting procedure was performed by Dr. Lacy upon Ms. Michael on July 27, 2004. Before the procedure began, Ms. Michael received specific assurances from Dr. Lacy that only human bone would be used.[8] Dr. Lacy performed the dental procedure using lidocaine as a local aesthetic – a drug to which Ms. Michael was admittedly profusely allergic.[9] It is not disputed that during the procedure, Dr. Lacy did in fact implant a cow bone composite into Ms. Michael's jaw.[10] When deposed, Ms. Michael described the moments before the surgery:

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[5] (CP 83-118); *Exhibit C, pg. 26, to Declaration of Beauregard* (Deposition of Kate Guthrie).

[6] (CP 83-118); *Exhibit C, pg. 26-27, to Declaration of Beauregard.*

[7] (CP 83-118); *Exhibit C, pg. 26-27, to Declaration of Beauregard* (emphasis added).

[8] (CP 16-51); *Exhibit C to Declaration of Jody Campbell.*

[9] (CP 16-51); *Exhibit C to Declaration of Jody Campbell.* It should be noted that Dr. Lacy blames the dental assistant employed by Bright Now Dental for Ms. Michael's having passed out in that the dental assistant allegedly allowed Ms. Michael to stand up too quickly. (CP 83-118); *Exhibit B, pg. 32, to Declaration of Beauregard.*

[10] Dr. Lacy claims that Ms. Michael never requested that no cow bone be used. Upon suggestive questioning when being deposed by counsel for Bright Now Dental, Dr. Lacy conceded that she initially used human bone, and then, after running out of human bone, she admittedly used cow bone. This is a telling admission in that while Dr. Lacy claims not to have known about Ms. Michael's special request, she did know to use the human bone first, and only

> Q. Okay. Who at Bright Now Dental, Inc., lied about the use of cow bone?
>
> A. I would have to say that Dr. Lacy didn't necessarily lie to me. She just didn't tell me when I told her – I asked her while I was laying in the chair "Can I see the bone?"
>
> And she said "Yes." So she showed it to me.
>
> And I said, "And this is human bone?"
>
> And she said, "No, it's cow bone."
>
> And I said, "Dr. Lacy, I said I didn't want cow bone."
>
> I said, "I just can't fathom the thought of animal parts being in my body." I said, "Do you have human bone?"
>
> And she said, "Yeah, **I have some in the back**. I'll go get it."
>
> I said, "I just don't want any cow bone in me."
>
> And she's, like, "I understand." So she went back, and I thought she was getting human bone. And then it wasn't until days later when she talked to me that I found out that she used cow bone.[11]

At the end of the procedure, Ms. Michael began projectile vomiting, passed out, and had to be rushed to the emergency on a stretcher for treatment. During

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then did she opt to use the cow bone after purportedly after running out of human bone. (CP 83-118); *Exhibit B, pg. 74, to Declaration of Beauregard.* Later, in the same deposition, Dr. Lacy again, while claiming not to have known about Ms. Michael's request with regard to no cow bone being used, admitted that first she supposedly used the human bone and then, after running out, allegedly used the human bone. (CP 83-118); *Exhibit B, pg. 98-99, to Declaration of Beauregard.* In truth, in all probability Dr. Lacy's assertion that *any* human bone was used is likely false and for purposes of this motion, with all the inferences in Ms. Michael's favor, it must be presumed the bone graft was solely comprised of cow bone. As is set forth in this brief, Bright Now Dental of Olympia does not stock any special request bone grafting products, including human bone, and none would have been in stock unless Dr. Lacy took steps to have the human bone grafting materials ordered through an assistant – which she admittedly did not. Because the evidence at issue is now permanently implanted in Ms. Michael's jaw, all the parties other than Dr. Lacy are left wondering what the truth actually is.

[11] (CP 16-51); *Exhibit B, pg. 31 of Declaration of Jody Campbell.*

subsequent calls with Dr. Lacy in regard to medical treatment stemming from the administration of lidocaine and the over dosage[12] of other prescription drugs prescribed by at Bright Now Dental of Olympia, Ms. Michael learned that cow bone had in fact been implanted in her jaw despite the representations of the part of Dr. Lacy that other bone graft materials were available and stocked "in the back" and would be used instead.

Ms. Guthrie described the reaction of the dental assistant that assisted Dr. Lacy, Danyell Tyler, after Ms. Michael was taken away on the stretcher by the paramedics:

> Q. At any point in time, did you become aware of what happened to Patsy, why she was carried out on a stretcher?
>
> A. Yes.
>
> Q. How did you become aware of that?
>
> A. She – Danyell, the assistant, came out of the back while the paramedic were still here, and she was hysterical. She was crying, and I could tell that she was upset. And she went into the break room, so I followed her into the break room to, you know, console her. And she said that they had given Patsy lidocaine or Septocaine, whichever one she was allergic to.
>
> Q. Okay. And what else was discussed during that conversation with Danyell?

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[12] It should be noted that Dr. Lacy blames the managing dentist, Dr. Bath, for having prescribed Ms. Michael an over-dosage of drugs. (CP 83-118); *Exhibit B, pg. 45, to Declaration of Beauregard.*

> A. Danyell was very upset and blamed herself, and I just asked her if I can call Bryce, who's her husband, to come get her or if she was okay to drive.[13]

The dental facility's manager, Candace Gunderson, described Dr. Lacy's reaction after Ms. Michael had passed out:

> Q. Why was she freaking out?
>
> A. She had never had anything like that occur before.
>
> Q. So was Dr. Lacy just there saying, "I'm freaking out. I'm freaking out. My patient is passed out."
>
> MS. MAR: Objection to form
>
> THE WITNESS: The one thing I can clearly remember her saying, and a lot of it is, "Oh my God. Oh, my God. Oh, my God." That's what kind of freaking out she was doing. It's like her mind was going a million miles an hour and she couldn't slow it down to think a clear thought, much less to verbalize it. I mean, that's how I perceived the conversation to be.[14]

Then, after learning that Ms. Michael had been taken away on the stretcher and after learning that she had been administered lidocaine, the managing dentist, Dr. Suneet Bath, actually oversaw the alteration of a portion of the dental records with respect to the sticker that is placed on the record to alert dentists performing procedures of known allergies – in this case lidocaine:

> Q. And were you present at the time that the sticker was placed onto the record?

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[13] (CP 83-118); *Exhibit C, pg. 40 to Declaration of Beauregard* (Deposition of Kate Guthrie).

[14] (CP 83-118); *Exhibit D, pg. 18-19, to Declaration of Beauregard* (Deposition of Candace Gunderson).

A. Yes.

Q. Any why was the sticker placed on the record?

A. Just basically, for this incident that occurred.

Q. It was placed after Patsy passed out; is that right?

A. Correct.

Q. Why wasn't it placed on there before?

A. Normally when a patient come in, I didn't see her afterwards and what happens is any time between when I see a patient for a new patient exam and the next visit, we will paste this sticker on there.

Sometimes the assistant will place it right after the new patient exam or the front desk will place it. Sometimes when we see the patient for the subsequent visit, we review the medical history at each visit, and at that point we will place the sticker.

But when we see a patient for a new patient exam, the chart, in essence, isn't complete, so everything is kind of, I guess, finalized when the patient is seen for treatment later.[15]

For weeks thereafter, Ms. Michael remained ill with gastrointestinal problems,[16] and with her doctors recommending, as is documented in the medical records dated August 5, 2004, that she "**make a specific appointment with her oral surgeon and her dentist to ado a face-to-face blunt discussion in regards**

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[15] (CP 83-118); *Exhibit A, pg.43 to Declaration of Beauregard.*

[16] It should be noted that Ms. Michael has suffered excruciating injuries as a result of the botched procedure and having been over dosed with drugs by Dr. Lacy and Dr. Bath. After the bone grafting procedure, Ms. Michael experienced several weeks of pain, was unable to work, and eventually was compelled to have hernia repair surgery resulting from the effect of the drugs to her bowels. (CP 16-51); *Exhibit C to Declaration of Jody Campbell.* Ms.

to why they are paying for her care and were there any mistakes made."[17]

During a subsequent call to Bright Now Dental of Olympia, apparently out of guilt and concern, Ms. Guthrie explained that following to Ms. Michael:

> Q. Do you recall telling Patsy she should come ask you for her records and to do so and make it clear that she was asking for her records?
>
> A. Yes.
>
> Q. Can you tell me what you recall about that occurrence?
>
> A. I told her that her medical doctor would benefit greatly from reviewing her dental records and that she should come by and pick them up.
>
> * * *
>
> Q. Can you tell me what – what made you call her and give her that information?
>
> A. I felt there'd been no communication between Dr. Lacy and her medical doctor and she was not feeling well still. And I believe about two weeks had passed and she was still feeling ill, and she was having lots of problems with her intestines. And I felt that it was information her doctor would like to know. Maybe it would help her treatment of what was bothering her or help the diagnosis of her treatment.[18]

Ms. Guthrie knew that perpetuating this disclosure to Ms. Michael placed her job with Bright Now Dental of Olympia in jeopardy:

Michael continues to have blood in her stool and extreme discomfort with regard to trusting health care practitioners.

[17] (CP 16-51); *Exhibit E to Declaration of Beauregard* (excerpt of medical record)

> Q. Did you feel as though there might be some sort of adverse action taken against you for communicating the information about the records?
>
> A. I – nobody said anything to me specifically, but when I decided to inform Patsy that she should request her records, I knew that my job would be on the line.[19]

Upon learning about having been administered lidocaine, Ms. Michael called her doctor's office as is reflected in a message from an assistant to her medical doctor indicating:

> *Mystie Michael...Now has dental reports gave her 7 vials of lidocaine which she is allergic to plus other things – needs to talk to you 8/10/04*[20]

It should be noted that Ms. Guthrie felt that the deceptive manner in which Bright Now Dental of Olympia was wrong:

> Q. (By Mr. Beauregard) Do you think it was wrong for Bright Now Dental to cover up the fact that she'd been given lidocaine?
>
> A. I do.[21]

Returning to the issue of bone grafting composites, though Dr. Lacy had represented that assorted bone grafting alternatives were available with regard to the periodontal services offered by Bright Now Dental is the fact that, in reality,

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[18] (CP 83-118); *Exhibit C, pg. 46-47, to Declaration of Beauregard.*

[19] (CP 83-118); *Exhibit C, pg. 49, to Declaration of Beauregard.*

[20] (CP 83-118); *Exhibit F to Declaration of Beauregard* (excerpt of medical record)

[21] (CP 83-118); *Exhibit C, pg. 89, to Declaration of Beauregard.*

Bright Now Dental of Olympia has virtually no defined way of tracking and/or fulfilling periodontal related special requests and, according to Ms. Gunderson, the assorted bone grafting materials are not even kept in inventory:

> Q. Does Bright Now! Dental keep an inventory of bone grafting materials at the Olympia facility?
>
> A. **No.**[22]

Ms Gunderson also had not idea how a patient could make a specific request:

> Q. Okay. Please describe for me the process by which a patient requests bone grafting material at Bright Now! Dental in Olympia?
>
> A. **I don't know.**[23]

Dr. Bath, the managing dentist, admitted being charge of ordering supplies, but had not idea how special requests with regard to periodontal bone grafting procedures were satisfied:

> Q. So you managed the dental facility?
>
> A. I managed the back office duties basically.
>
> Q. Can you tell me what those duties encompassed?
>
> A. Making sure in regards specifically to general dentistry, making sure that supplies were there for the dentistry and then managing flow and assistants.[24]

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[22] (CP 83-118); *Exhibit D, pg. 24, to Declaration of Beauregard.*

[23] (CP 83-118); *Exhibit D, pg. 46, to Declaration of Beauregard.*

[24] (CP 83-118); *Exhibit A, pg. 11, to Declaration of Beauregard.*

> Q. Can you tell me who was responsible for getting the bone graft materials for Dr. Lacy to use during the bone graft procedure on Patsy?
>
> A. **I don't know on that.** That's Dr. Lacy's responsibility. Specialists sometimes have their own assistants and sometime they utilize our office assistants, but in the end, a specialist's materials are their responsibility.[25]

And Ms. Gunderson, the facility manager, testified that if dental practitioners need supplies, they can "scribble" such requests on the "want list" which was a "pad of paper" in the "back on a cupboard."[26]

> Q. Can you tell me – describe the want list for me.
>
> A. Pretty much a piece of paper. I mean, sometimes it was an actual like, you know, note pad, like a standard size rip off sheet, and other times it was just one sheet that they would simply tape up on the wall in the back and people would scribble whatever their needs were.
>
> Q. And so, for example, it they were low on lidocaine they would put that on the list?
>
> A. Right.[27]

Evident from this telling testimony is that while at face value Bright Now Dental of Olympia represents being able to offer competent periodontal services to patients seeking care, in reality, the facilities and procedures needed to ensure that patients are provided the services that they request are not truly and/or effectively

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[25] (CP 83-118); *Exhibit A, pg. 37, to Declaration of Beauregard* (emphasis added)

[26] (CP 83-118); *Exhibit D, pg. 37, to Declaration of Beauregard.*

in existence.

IV. PROCEDURAL POSTURE ON REVIEW

It should be noted that the trial court found that there was sufficient evidence to withstand summary judgment on every aspect of Ms. Michael's claim with the exception of the "injury to business and/or property" element of the cause of action.[28] Ms. Michael now appeals the trial court's ruling as to this incorrect finding with respect to the "injury to business and/or property" element of her claim under the Consumer Protection Act.[29] Because the trial court ruled in Ms. Michael's favor as to the sufficiency of evidence in regard to all of the remaining elements of a cause of action under the Consumer Protection Act as delineated in *Hangman Ridge Training Stables, Inc v. Safeco Title Insurance Company*, 105 Wn. 2d 778, 719 P.2d 531 (1986), the focus of this appeal is narrowly tailored to only one reversible aspect of the trial court's decision as to the sufficiency of evidence as to an "injury to business and/or property" with regard to the substitution of bone graft products[30]

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[27] (CP 83-118); *Exhibit D, pg. 37, to Declaration of Beauregard.*

[28] (CP 138-140)

[29] *Id.*

V. ARGUMENT

A. Ms. Michael Suffered An Intangible Injury That Was Caused By Dr. Lacy and Bright Now Dental of Olympia.

Because Ms. Michael received a different bone grafting implant than was represented to be available by Dr. Lacy and Bright Now Dental of Olympia, Ms. Michael suffered an injury for purposes of the Consumer Protection Act. *See e.g. Tallmadge v. Aurora Chrysler Plymouth, Inc.*, 25 Wn. App. 90, 605 P.2d 1275 (1979) (baiting and switching of products even in the absence of any actual compensable injury actionable under the CPA). By comparison, in *Tallamadge*, the Court held "that the act of advertising to the public the sale of a new car, but selling one that has been repaired or repainted, is an unfair and deceptive" for purposes of the Consumer Protection Act. 25 Wn. App. at 93. The Court also noted that:

> ...Aurora Chrysler next contends that it was error to award attorney's fees under the Consumer Protection Act because of the finding that Tallamadge had sustained no actual damages. We do not agree. Although the trial court did not award Tallamadge pecuniary damages, the record indicates that he suffered injuries for purposes of the Consumer Protection Act in that he was inconvenienced, deprived of the use and enjoyment of his

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[30] *Id.*

> property, and received an automobile with defects needing repair.

Id. at 93-4.

Even though this case involved the substitution of bone graft products rather than a new versus used car, *Tallamadge* provides the perfect analogy and illustrates that Ms. Michael also has an actionable claim under the Consumer Protection Act. How is Ms. Michael's case any different than that of plaintiff in *Tallamadge*? From the record before the Court, it can easily be inferred that Ms. Michael certainly does not "enjoy" the use of the cow bone that is implanted in her jaw the same way that she would the human bone that she requested – much the same as the plaintiff in *Tallamadge* would have liked to have had the new car that he thought he purchased rather than a used car of the same value. And furthermore, in Ms. Michael's eyes, much like the automobile in *Tallamadge*, the animal matter that is implanted in her jaw is essentially "defective" and eventually requires removal if and when possible.[31] There is no doubt that Ms. Michael was deceived and thereby suffered injuries even though the injuries are not readily quantifiable.

It should be noted that "a lack of informed consent claim can be based on dishonest and unfair practices used to promote the entrepreneurial aspects of a doctor's practice, such as when a doctor promotes an operation or service or

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[31] Thus far, Ms. Michael's phobia of dentists is precluding her from having the cow bone removed. It cannot be disputed that if she had done so, the expense of the replacement surgery would be a compensable injury. How can it

increase profits and the volume of patients, then fails to adequately advise the patient of the risks or alternative procedures." *Quimby v. Fine, et al.*, 45 Wn. App. 175, 181, 724 P.2d 403 (1986). As an example, in *Quimby*, the plaintiff "maintain[ed] that [the doctor] substituted a Hulka Clip tubal ligation procedure in lieu of a Pomeray procedure. The Quimbys claim that the substitution was made without the wife's consent or without advising her of the risks or alternative procedures available." *Id.* at 176-77. On appeal, Division I ruled that if, under the facts in *Quimby*, there was any evidence of an "entrepreneurial aspect" in relation to the substitution of products or services, than the plaintiff had an actionable claim under the Consumer Protection Act. *Id.* at 182.

The facts of this case are of little or no difference to *Quimby* in that, without Ms. Michael's consent, a cow bone product was implanted in her jaw rather than a human bone product as was represented as being available before the procedure. The trial court already ruled that there was sufficient evidence of a financial, *i.e.* entrepreneurial, motive on the part of Dr. Lacy and Bright Now Dental of Olympia to support a claim under the Consumer Protection Act as is illustrated by the evidence suggesting that patients were solicited and/or retained by representing the availability of products that, in all actuality, would not be provided. *See e.g. Wright v. Jeckle, et al.*, 104 Wn. App. 478, 16 P.3d 1268 (2001) (determination as

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be logical or consistent with the purposes of the Consumer Protection Act for the defendants to be less liable simply

to entrepreneurial aspects of practice question of fact). Given that in this case there is evidence of entrepreneurial motive on the part of Dr. Lacy and/or Bright Now Dental of Olympia making the claim even less disposable on summary judgment than in *Quimby* -- in which Division I held that the Consumer Protection Act claim was actionable based upon the allegations set forth in the plaintiff's complaint if evidence was presented of entrepreneurial aspect of the acts. *Id.*

The case before the Court is of the precise nature for which the Consumer Protection Act was intended. Dr. Lacy and Bright Now Dental of Olympia represented the availability of a certain product to Ms. Michael even though that product was not even kept in stock and there was no established manner in which to actually order the product. Through an act of deception and in the absence of proper informed consent, the product was permanently implanted in Ms. Michael's jaw. To be sure, Ms. Michael does not enjoy the use of the animal matter bone the same as she might the human bone, and if she elects to have the procedure reversed she will inevitably have to pay money to do so thereby causing a direct financial injury. If this case involved the substitution of faulty heart valves or silicone breast implants instead of bone grafting products would it even be perceived as a close call on these issues? Dr. Lacy and Bright Now Dental of Olympia should not be permitted to luck out on the fact that their own egregious conduct caused Ms.

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because Ms. Michael has not yet developed the courage to return to a dental office?

Michael's anxiety that arguably prevents her from remedying the implantation of unwanted animal matter in her jaw. Because the facts of this case support a claim under the Consumer Protection Act, the trial court should be reversed and this matter remanded.

B. Under The Consumer Protection Act, Damages Are To Be Broadly Construed.

It should be noted that according the controlling authority, "[d]amages for the purpose of the Consumer Protection Act, must be broadly construed so that the beneficial purpose of the act may be served." *St. Paul Fire & Marine Insurance Company v. Arlie Updegrave, et al.,* 33 Wn. App. 653, 658, 656 P.2d 1130 (1983); *State Farm Fire and Casualty Co. v. Huynh, et al.*, 92 Wn. App. 454, 962 P.2d 854 (1998); RCW 19.86.090. "These damages include the consumer's inconvenience, financial considerations such as loss of time in helping prepare the case, actual time spent in court, and litigation costs for attorney's fees, filing fees, in investigative expenses, and expert witness fees." *Id.* at 659. Again, "the failure to show actual monetary damages only precludes the recovery of treble damages. It does not act as a complete bar to a recovery under the act." *Id.* at 660; *see also*

Nordstrom, Inc. v. Tampourlos, 107 Wn.2d 735, 733 P.2d 208 (1987) (distinguishing injuries from actual damages).[32]

In this instance, in addition to the costs of filing this lawsuit, Ms. Michael suffered an "intangible" injury in that she had a different bone graft product permanently implanted in her jaw then she believed was being purchased.[33] RCW 19.86.010(3) (assets, *i.e.* property, can be intangible wherever situate). Looking to the controlling legal principles set forth by statute under RCW 19.86.010(3) and as interpreted by case law such as in the *Tallmadge*, *St. Paul* and *Sign-O-Lite* opinions, even though the injury suffered by Ms. Michael is not readily quantifiable with regard to the differing values of the bone grafting products, the fact that she was deceived and provided a different product then was represented and/or asked for constitutes an injury for purposes of the Consumer Protection Act.

Furthermore, as is illustrated by the controlling case law, the fact that Ms. Michael was deceived at Bright Now Dental of Olympia in the manner at issue allows for a recovery of the expenses incurred litigating this case in order to prove to the public and put other consumers on notice through the courts system of this

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[32] The basic thrust of this law is to allow consumer to bring claims for relatively nominal damages that may arise in tort or contract with the added incentive of an attorney fee recovery. Otherwise, such claims may never be filed, though in the public interest, because the financial realities of litigation would prove cost prohibitive. *See* Chapter 19.86 *et seq*.

[33] Bright Now Dental emphasizes the fact that Ms. Michael was reimbursed for the corresponding services as a basis upon which the Consumer Protection Act claim must fail. As is set forth in the body of this brief, the injury does not have to be compensable, and if the law were such that all a wrongdoer needed to do was refund the money being charged to negate the injury element, public interest cases such as this could never be brought because, if caught, the consequences to the wrongdoer would be nominal and they could escape being brought to Court entirely.

wrongful, and potentially ongoing, practice. Therefore, the arguments set forth by Dr. Lacy and Bright Now Dental of Olympia, with respect to the purported lack of injury on the part of Ms. Michael, are without merit, and the trial court's ruling as to this issue should be reversed.

C. The Case Law Relied Upon Before The Trial Court By Bright Now Dental Of Olympia Is Not Analogous.

In the proceedings below, Bright Now Dental of Olympia cited *Stevens v. Hyde Athletic Industries, Inc.*, 54 Wn. App. 366, 773 P.2d 871 (1989) as controlling and dispositive. It must be recognized that the facts of the *Stevens* opinion are not analogous with relation the injuries that are at issue in this case. In the *Stevens* case, the plaintiff sought to recover for *personal injuries* derived from the use of the softball shoes that she purchased.[34] Unlike this case, the plaintiff in *Stevens* did not claim that the product that was sold to her was deceptively substituted for a different product, but instead, that the product she purchased was substandard, and therefore caused her to suffer *personal injuries* as a result of a of her using them to "slide into home plate when the outer cleat of her right shoe caught in the dirt." *Id.* at 368. In other words, the plaintiff's claim and corresponding injuries were akin to a products liability action (*See* Chapter 7.72 *et*

[34] The injuries at issue were "special damages such as hospital, physician, and rehabilitative expenses...and economic interests" directly related to the personal injuries that were suffered. 54 Wn.App. 370.

seq.) resting upon the negligent design and/or quality of the softball shoes rather than as a bait and then switch of the product at issue, as in this case.[35]

The Consumer Protection Act cause of action being asserted by Ms. Michael *is not* dependent upon her claim for personal injuries. As was previously noted, the proper, and virtually indistinguishable analogy can be found in the *Tallmadge* opinion involving the actual *substitution* of products (used versus new cars) being sold under false pretenses. 25 Wn. App. 90. Dr. Lacy and Bright Now Dental of Olympia offered to provide Ms. Michael a particular product and service, but then, deceptively switched out what was represented for something different. Whether in the form of an automobile or a bone graft product, when a business offers one product, and then deceptively substitutes it for another, the Consumer Protection Act is violated, and the injury, though not readily compensable, is the actual substituted product that was sold and the corresponding expenses for seeking vindication in open court.

VI. CONCLUSION

Because Ms. Michael did suffer an "injury to business and/or property" for purposes of the Consumer Protection Act, the trial court's order should be reversed, and this matter should be remanded for further proceedings.

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[35] Ms. Michael is not challenging the quality of the bone graft that was used, but instead, the fact that she was sold a different product than she asked for at the time that the different bone grafts were being offered.

RESPECTFULLY SUBMITTED this 8 day of ~~May~~ June, 2006

LAW OFFICES OF JOHN R. CONNELLY, JR.

By_____
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IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

MYSTIE MICHAEL, Plaintiff, vs. DR BETSY MOSQUERA-LACY, and BRIGHT NOW! DENTAL, a Washington corporation, Defendants.	Court of Appeals No. 34497-1-II **AFFIDAVIT OF SERVICE**

THE UNDERSIGNED, pursuant to CR 5(b), affirms that on the 8th day of June, 2006, she sent by ABC Legal Messenger a copy of Appellant's Opening Brief to the following at their respective addresses set forth below:

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Copies of the messenger slips showing receipt stamps are attached hereto.

DATED this 8th day of June, 2006.

Vickie Shirer
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Subscribed and sworn to before me this 8 day of June 2006.

Dawn R. Plaster
Notary Public in and for the State of Washington
Residing at Buckley.

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