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DIVISION II

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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 REPLY BRIEF

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I. REPLY ARGUMENT

A. Bright Now Dental of Olympia Has Not And Cannot Distinguish Precedent Which Is On Point As Set Forth In *Tallmadge v. Aurora Chrysler* and *Quimby v. Fine.*

On page 18 footnote 9 of the response brief, Bright Now Dental of Olympia commits a fundamental error as to the characterization of the facts of this case by asserting: "*plaintiff did not purchase either xenograft or allograft. Instead, she purchased a service – a bone graft – which was successfully completed.*" Indeed, Ms. Michael patronized Bright Now Dental of Olympia for the purpose of purchasing both a "service" and a bone grafting "product." Is the cow bone which is still lodged in Ms. Michael's jaw any less of a "product" because it is now permanently implanted in her face? That cannot be the law. Is Bright Now Dental of Olympia off the hook because it decided not to charge for the botched procedure after being caught in the act of switching products? That would not be justice or consistent with the purposes of the Consumer Protection Act.

Moreover, when responding to Ms. Michael's opening brief, Bright Now Dental of Olympia completely avoided analogous and controlling precedent as set forth in *Quimby v. Fine, et al.*, 45 Wn. App. 175, 181, 724 P.2d 403 (1986).[1] In *Quimby*, Division I of the Court of Appeals already held that under the Consumer

[1] Even though Ms. Michael relied strongly upon *Quimby* in the opening brief, Bright Now of Olympia does not even discuss this case let alone distinguish it. There is not a single citation to *Quimby* in the entirety of the response brief.

Protection Act, in the health care context, a consumer has a claim against a doctor for deceptively switching out medical services and products. *Id.* *Quimby* is right on point, and Bright Now Dental of Olympia completely avoided addressing this precedent – probably because *Quimby* is not distinguishable from the case at bar. Based upon this and other precedent such as *Tallmadge* as was cited in the opening brief, both Bright Now Dental of Olympia and the trial court are not correct, and Ms. Michael has an actionable claim under the Consumer Protection Act.

Additionally, Bright Now of Olympia contends that *Tallmadge* is distinguishable because the plaintiff in that case "paid for the vehicle" whereas Ms. Michael was ultimately not charged for the procedure and bone graft implant. In *Tallmadge*, whether the plaintiff "paid for the vehicle" was immaterial to the holding of the Court. The *Tallmadge* Court expressly held that even though there were no "pecuniary damages" that 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 property, and received an automobile with defects needing repair." 25 Wn. App. at 93-4. Indeed, there was no corollary between any payment for the vehicle and the injury suffered for purposes of the Consumer Protection Act, and the plaintiff was still permitted to recover attorney fees and costs. This case is no different.

It should further be noted that, under Consumer Protection Act cause of action, Ms. Michael is not trying to recover conventional compensatory damages. Instead, as in *Tallmadge*, the relevant question is whether or not Ms. Michael suffered some form of an injury, as a threshold question and even if only intangible, thereby triggering the availability for a recovery of attorney fees and costs under RCW Chapter 19.86 *et seq*. for vindicating her consumer rights in open court. The practical purposes for filing a Consumer Protection Act claim must not be ignored. In the consumer context, the injury suffered to the patron of a business may be relatively small, if not nominal, rendering it otherwise impracticable to seek redress in open court against the offending business. In the absence of the Consumer Protection Act coupled with the availability of a potential recovery for attorney fees and costs, many consumers would never file suit and many lawyers would never take the offended consumers cases even if they did elect to try going to court.

In *Tallmadge*, the offending car dealership specifically "contend[ed] that it was error to award attorney's fees under the Consumer Protection Act because of the finding that Tallmadge had sustained no actual damages." 25 Wn. App. 93. The Court held that "[a]lthough the trial judge did not award Tallmadge 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 property, and received an automobile with defects needing repair." *Id.* at 93-4. In that same vein, Ms. Michael was "injured" and has an actionable claim under the Consumer Protection Act.

The Supreme Court has expressly held that, with respect to the injury to business or property element of a Consumer Protection Act claim, "that nonquantifiable injuries, such as loss of goodwill would suffice for this element of the *Hangman Ridge* test. This is bolstered by the fact that the act allows for injunctive relief, clearly implying that injury without monetary damages will suffice." *Nordstrom, Inc. v. Tampourlos*, 107 Wn. 2d 735, 740, 733 P.2d 208 (1987). "This requirement is based on RCW 19.86.090, which uses the term 'injured' rather than suffering "'damages.'" *Id.* "This distinction makes it clear that no monetary damages need be proven..." *Id.* Upon establishing a "nonquantifiable" injury for purposes of the Consumer Protection Act, a claimant is permitted to recover attorney fees and costs. *Id.*

In *Tallmadge*, Division I held that injuries in the form of inconvenience, loss of enjoyment, and receiving a product needing repair were appropriate injuries upon which to premise Consumer Protection Act claim lending to a recovery of attorney fees and costs. This principle was illuminated and fortified by the Supreme Court in *Nordstrom* wherein the Court again affirmed the principle that establishment of an "injury" under the Consumer Protection Act was a threshold

question upon which an attorney fee award may be based even in the absence of a quantifiable injury. In this case, Ms. Michael was deceptively given a product that she did not bargain for thereby lending to her injury to property (such as inconvenience, loss of enjoyment, and a having received a cow bone graft product in need of replacement) for purposes of the Consumer Protection Act.

B. Bright Now Dental of Olympia's Arguments That Are Offered In Support Of The Attempt To Shift To Focus Of This Appeal Are Without Merit.

After failing to even discuss focal and controlling precedent such as *Quimby*, Bright Now Dental of Olympia attempts to shift the focus by arguing that the trial court erred when ruling that Ms. Michael satisfied the other elements of the Consumer Protection Act. More specifically, Bright Now Dental of Olympia argues that, contrary to the ruling of the trial court, Ms. Michael claim is lacking as to whether: (1) Bright Now Dental committed and unfair or deceptive act, and (2) whether there was an impact on the public interest. In so doing, and because the trial court agreed with Ms. Michael on these two issues, Bright Now Dental of Olympia notes and argues that this Court "may sustain such an order on any basis supported by the record." *Copernoll v. Reed*, 155 Wash.2d 290, 296, 119 P.3d 318 (2005). Bright Now Dental of Olympia is compelled to shift to focus in this manner in order to suppress its glaringly deficient inability to distinguish *Quimby* and *Tallmadge* with regard to the "injury to business or property" element of Ms.

Michael's claim. In all respects, Bright Now Dental of Olympia is not correct.

1. There is ample evidence from which the jury could find that Bright Now Dental of Olympia engages in an unfair and/or deceptive practice of offering products that are not really stocked or available.

With respect to the unfair of deceptive practice element of Ms. Michael's Consumer Protection Act claim, there is plentiful evidence from which the jury could, and probably will find that Bright Now Dental of Olympia engaged in such practices. Ms. Michael was offered, *i.e.* induced in an *entrepreneurial* manner to attract Ms. Michael as a consumer, one bone graft product when she first visited Bright Now Dental of Olympia and then later, and unwittingly, provided different bone graft product. It should be noted that in *Quimby*, the Court explained that entrepreneurial activities in the health care sphere include acts "such as when the doctor promotes an operation or service to increase profits and the volume of patients, then fails to adequately advise the patient of risks or alternative procedures." 45 Wn.App. at 181. In order to solicit Ms. Michael's patronage, Dr. Lacy represented, *i.e.* advertised, 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.[2]

Indeed, Bright Now Dental represented, *i.e.* advertised, the availability of bone grafting products to Ms. Michael that are not even stocked and for which there is no describable ordering system. As is illustrated in *Tallmadge* and *Quimby*, providing a different service and/or product than is represented to be available is an unfair and/or deceptive act that is actionable under the Consumer Protection Act. In this regard, the trial court correctly held that the evidence was sufficient for Ms. Michael to maintain her claim.

2. Whether Bright Now Dental of Olympia's deceptive practice impacts the public is a jury question.

With respect to the impact to the public interest, the trial court correctly found that the issue was a question of fact for the jury. According to the Supreme Court, "whether the public has an interest in any given action is to be determined by the trier of fact from several factors, depending upon the context in which the alleged acts were committed." *Hangman Ridge Training Stables, Inc v. Safeco Title Insurance Company*, 105 Wn. 2d 778, 790, 719 P.2d 531 (1986). The factors include: "(1) Were the alleged acts committed in the course of defendant's business? (2) Are the act part of a pattern or generalized course of conduct? (3)

Were repeated acts committed prior to the act involving plaintiff? (4) Is there a real and substantial potential for repetition of defendant's conduct after the act involving plaintiff? (5) If the act complained of involved a single transaction, were many consumers affected or likely to be affected by it?" *Id.* It must be noted that "not one of these factors is dispositive, nor is it necessary that all be present." *Id.* at 791.

Looking to the factors set forth in *Hangman*, there is an abundance of evidence from which the jury is likely to find that the public interest element of this Consumer Protection Act claim is more than satisfied. Bright Now Dental of Olympia was acting within the scope of its business affairs when providing the periodontal services and offering the assorted bone grafting products for use during the corresponding procedure. This factor cannot be disputed and will weigh heavily with the jury in favor of Ms. Michael towards the conclusion that the Consumer Protect Act has been violated.

Furthermore, the potential for repetition of this deceptive practice on the part of Bright Now Dental of Olympia is high. Bright Now Dental of Olympia represents to the public that it provides as assortment of capable periodontal services and products to patrons that come there for dental care and to receive their option of bone grafting products. In reality, there are no defined policies for

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

ensuring that patients needs and requests are accommodated with regard to periodontal services and products. 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.**[3]

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.**[4]

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.[5]

* * *

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

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

[5] (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.[6]

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."[7]

It should be noted that the aforementioned evidence in relation to the impact to the public interest is more than sufficient for the issue to be sent to the jury. Additionally, in the medical malpractice context, it is even more important that a case of this nature not be dismissed and allowed to proceed. Based upon health care privacy laws such as HIPPA, it is virtually impossible to obtain discovery with regard to the other patients that may have been impacted by Bright Now Dental of Olympia's deceptive practices. For that reason, when a consumer such as Ms. Michael discovers a deceptive practice occurring in the health care context, such as the deceptive substitution of sterilization procedures in *Quimby*, it is even more important that the issues be aired in open court. Other patrons of Bright Now

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

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

of Olympia may be subjected to similarly deceptive practices if cases such as that which comes before this Court are not allowed to proceed. On this specific issue, the trial court was correct.

C. The Vicarious Liability Issue That Was Raised For The First Time On Appeal Is Without Significance.

Bright Now Dental of Olympia contends for the first time on appeal that its vicarious liability is limited because Dr. Lacy settled her claim with Ms. Michael. This issue was never raised before the trial court, and does not preclude Bright Now Dental of Olympia's liability. *Martin v. Municipality of Metro. Seattle*, 90 Wn.2d 39, 42, 578 P.2d 525 (1978) (argument raised for the fist time on appeal will not be considered). Bright Now Dental of Olympia is independently liable under the Consumer Protection Act participating and perpetuating in the deceptive practice of substituting bone graft material by failing to inventory to the different bone grafting products that are offered by the dentists such as Dr. Lacy and by failing to establish a protocol for ordering such products. *See e.g. Glover v. Tacoma Gen. Hosp.*, 98 Wn. 2d 708, 658 P.2d 1230 (1983). Therefore, the vicarious liability issue raised for the first time on appeal is without significance to this appellate proceeding.

II. 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.

RESPECTFULLY SUBMITTED this 18 day of July, 2006

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THE UNDERSIGNED, pursuant to CR 5(b), affirms that on the 18th day of July, 2006, she sent by ABC Legal Messenger a copy of Appellant's Reply Brief to the following at their respective addresses set forth below:

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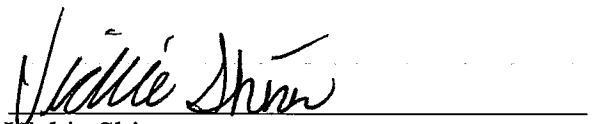

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