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FILED
COURT OF APPEALS
DIVISION II
2010 PM 2:02
STATE OF WASHINGTON
BY
DEPUTY

No. 34497-1-II

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

MYSTIE MICHAEL,

Appellant

v.

BRIGHT NOW DENTAL, INC., a Washington Corporation

Respondent.

BRIGHT NOW! DENTAL, INC.'S BRIEF IN RESPONSE

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ORIGINAL

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I. STATEMENT OF THE CASE

A. Procedural History.

The appellant, Mystie Michael, brought this case for alleged dental malpractice in connection with a periodontal bone graft procedure in July, 2004. (CP 152-155.) Plaintiff's complaint, filed in November, 2004, alleged three causes of action against two defendants, Dr. Mosquera-Lacy, a periodontist, and Bright Now! Dental, Inc. ("BNDI"): negligence, medical battery, and a violation of the Consumer Protection Act ("CPA"). (CP 152-155.) In January, 2006, the trial court dismissed Ms. Michael's CPA claims against both defendants on summary judgment. (CP 130-137.) Ms. Michael settled her negligence and medical battery claims against Dr. Mosquera-Lacy and Dr. Mosquera-Lacy is no longer a party.[1] (CP 230-232.) Ms. Michael then voluntarily dismissed her negligence and medical battery claims against BNDI. (CP 138-140.) The only issue remaining on appeal is whether the trial court erred when it dismissed Ms. Michael's CPA claim against BNDI.

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[1] Ms. Michael's settlement with Dr. Mosquera-Lacy renders any claims that BNDI is vicariously liable for her actions non viable. Perkins v. Children's Orthopedic Hospital, 72 Wash. App. 149, 864 P.2d 398 (1994).

B. Ms. Michael Underwent a Bone Graft Procedure.

Ms. Michael underwent her bone graft at an Olympia dental clinic owned by Dr. Charles Stirewalt, who is not a party to this action. (CP 124.) Dr. Mosquera-Lacy was an employee of Dr. Stirewalt, who provided periodontal services at the Olympia clinic and other dental clinics owned by Dr. Stirewalt. (CP 23.) BNDI provided administrative support services to the Olympia clinic. (CP 24.)

Prior to undergoing the complained-of bone graft procedure, Ms. Michael consulted with Dr. Mosquera-Lacy about her periodontal needs at the Olympia clinic. (CP 92.) Ms. Michael was informed by Dr. Mosquera-Lacy of her options regarding a bone graft at that time. (CP 92.) The bone graft procedure took place on July 27, 2004. (CP 96.)

C. Ms. Michael Suffered a Bout of Syncope after the Procedure.

Ms. Michael experienced an incident of vasovagal syncope after the procedure was completed, and was taken to the hospital emergency room by EMTs. (CP 163, 206.) She blames this incident on an alleged allergic reaction to lidocaine,[2] which was used as an anesthetic during the procedure. (CP 27, 35-37.) Although Ms. Michael's medical history included an incident where she had previously reacted to lidocaine in a

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[2] BNDI disputes this claim, but it is not material to the issues on appeal.

non-dental setting, Dr. Mosquera-Lacy decided to use lidocaine, a long lasting anesthetic, during the procedure because she felt it was the best anesthetic available for the procedure. (CP 20, 31, 89, 93.)

D. Ms. Michael Bases Her CPA Claim on Dr. Mosquera-Lacy's Alleged Use of the Wrong Bone Graft Material.

Ms. Michael's CPA claim is based on her other complaint regarding the bone graft procedure, which relates to the alleged use of "cow bone" as a bone graft material. (Appellant's Opening Brief, p. 13.) Dr. Mosquera-Lacy used primarily allograft, or human cadaver bone graft material, for the bone graft. (CP 21.) She testified that she used a small amount of xenograft, or bovine bone graft material, because the bony deficit was larger than expected and she had insufficient allograft to address the bony deficit during the procedure. (CP 21.) Plaintiff alleges that she told Dr. Mosquera-Lacy that she did not want "cow bone" used in her mouth.[3] (CP 28, 35-37.)

E. Dr. Mosquera-Lacy Was Responsible for Her Bone Graft Supplies.

At the Olympia clinic, Dr. Mosquera-Lacy was responsible for maintaining all of the materials and supplies that she used, including bone graft material, in her own kit. (CP 108, 110.) When she ran low on bone

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[3] Dr. Mosquera-Lacy denied this allegation, but it is not material to the current appeal.

grafting materials, Dr. Mosquera-Lacy was responsible for making sure more got ordered. (CP 87, 108.)

F. BNDI Was Not Responsible for Dr. Mosquera-Lacy's Professional Judgment.

As noted above, BNDI provides administrative services to the Olympia clinic. Dr Mosquera-Lacy testified:

> Q: And do you know what Bright Now Dental, Inc., is or does?
>
> A: It's a corporation in California.
>
> Q: Okay.
>
> A: And [it] provides support to independent dentists.
>
> [. . .]
>
> Q: Would Dr. Bath [the managing dentist at the Olympia clinic] also be an independent dentist that was provided support by Bright Now Dental, Inc.?
>
> A: Yes.

(CP 24.) There is no evidence in the record that BNDI was responsible for Dr. Mosquera-Lacy's professional judgment.[4]

G. The Procedure Was Necessary and Successful.

Ms. Michael makes no allegation that she did not need the bone graft procedure, and acknowledges that it was necessary. (CP 32.) The

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[4] Furthermore, even if BNDI was responsible for Dr. Mosquera-Lacy's professional judgment, plaintiff's settlement with her vitiates any claim for vicarious liability.

procedure was successful in that the bone graft was completed and healed satisfactorily. (CP 30, 89.)

H. Ms. Michael Was Not Charged for the Procedure.

Due to the syncope incident, BNDI did not charge Ms. Michael for the bone graft procedure. (CP 42, 181.) Ms. Michael acknowledges that she was not charged for the bone graft procedure:

> Q: [. . .] You have not had to pay any money for any dental care or treatment by Dr. Bath or Dr. Lacy or anybody at Bright Now Dental that you claim was bad or wrong or is a basis for this lawsuit?
>
> A: No.

(CP 181.) Kate Guthrie, BNDI's front desk person at the time, stated in her deposition that BNDI collected no money from Ms. Michael ("Patsy") or the insurance company ("Delta") for this procedure.

> Q: So what money was collected for the services that -- the bone graft procedure from either Delta or Patsy?
>
> A: Zero. [. . .]

(CP 41.)

I. Ms. Michael's Only Claimed Damages Are for Personal and Emotional Injuries.

Ms. Michael's only claimed damages are for her personal and emotional injuries. In her complaint, she seeks typical personal injury damages, including medical special damages, wage loss, and general damages for pain and suffering. (CP 152-155.) Ms. Michael's statement

of damages makes no allegations regarding injury to business or property, and repeats the personal injury damages allegations set forth in the complaint.

> Plaintiff Mystie Michael's general damages are ongoing. At the time of this incident, she was still working and enjoying like [sic]. There has been a substantial change in her health since the incident. She would rather be as she was than as she is regardless of the amount of general damages awarded. General damages award [sic] are left to the jury.
>
> With regard to special damages and additional elements, expenses have not been calculated and are ongoing. Plaintiff reserves the right to supplement her answer to this interrogatory.

(CP 50.) Her interrogatory answers repeat that theme. (CP 35-37.) The only reference in the record to consequences from the use of xenograft is this statement: "Daily Ms. Michael is disgusted of [sic] the thought of having cow bone in her mouth." (CP 37.) In the entire record below, there is no mention of any injury to business or property.

J. Ms. Michael's Experience at the Olympia Clinic Was Unique.

Nothing similar to the incident complained of by Ms. Michael had happened before, or has happened since at that clinic. Kate Guthrie, the front desk person testified:

> Q: Referring to the incident with Ms. Michael, had anything like that ever happened before when you were working at Bright Now Dental?

> A: No.
>
> Q: Had anything – anything ever happened since when you were working at Bright Now Dental?
>
> A: No.

(CP 124.) There is no evidence in the record suggesting that there is a likelihood of repetition of the type of incident at issue.

K. <u>BNDI Did Not Seek to Cover up the Incident.</u>

Ms. Michael alleges that BNDI tried to "cover up" the incident. Her lawyer was clever in his questioning of Ms. Guthrie, the front desk person.

> Q: Do you think it was wrong for Bright Now Dental to cover up the fact that she'd been given lidocaine?
>
> A: I do.

(CP 121.) Upon clarification, though, Ms. Guthrie admitted that she did not think BNDI tried to cover up what happened.

> Q: Do you think that they tried to cover up what happened?
>
> A: No, I don't think they tried to cover up what happened.
>
> Q: Do you think if they had tried to cover it up, it would have been wrong?
>
> A: Yes.

(CP 124.) There is no evidence regarding a "cover up" by BNDI.[5]

L. There Is No Evidence of BNDI's Advertising Practices.

The only evidence in the record of BNDI's advertising practices is contained in the deposition of Candace Gunderson:

> Q: Do you know, are you familiar with the different brochures used by Bright Now! Dental?
>
> A: Some of them.
>
> Q: Which ones can you recall being available to patients?
>
> A: I can't recall right now to be honest with you.

(CP 110.)

M. The Record Does Not Support Ms. Michael's Claim.

The record before the trial court, and here, does not contain facts Ms. Michael would need to prove a prima facie CPA claim. Scrutiny of the entire record reflects the absence of facts supporting injury to business or property; the absence of facts that would imply that the incident has any likelihood of repetition; and the absence of facts evidencing a "cover up" by BNDI.

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[5] The alleged "cover up" related to the use of lidocaine, not the use of xenograft. (CP 121.) Ms. Michael's CPA claim against BNDI may have originally included the use of lidocaine as well as "cow bone", and her claim that she was not told of the use of those materials in a timely manner (CP 28, 35-37, 174). On appeal Ms. Michael bases her CPA claim solely on the use of xenograft. (Appellant's Opening Brief, p. 12-13.)

II. SUMMARY OF ARGUMENT

The trial court held that Ms. Michael failed to present evidence of injury to business or property. In itself, failure to present evidence of injury to business or property is sufficient to defeat her CPA claim. This Court may, however, sustain the trial court's order on summary judgment on any basis supported by the record.

Ms. Michael cannot maintain a CPA claim because the CPA does not cover dental or medical malpractice claims. In addition, Ms. Michael cannot prove the five elements a plaintiff must satisfy to prove a CPA claim: (1) an unfair or deceptive act or practice; (2) in trade or commerce; (3) which affects the public interest; (4) injury to the plaintiff's business or property; (5) and a causal link between the unfair or deceptive act complained of and the injury suffered. Hangman Ridge Training Stables, Inc. v. Safeco Title Insurance Co., 105 Wash.2d 778, 719 P.2d 531 (1986). Ms. Michael failed to provide evidence on at least three of the elements of a CPA claim: (1) that BNDI had committed an unfair or deceptive act or practice; (2) injury to business or property; and (3) an effect on the public interest. Therefore, this Court should uphold the trial court's dismissal of her CPA claim against BNDI.

III. ARGUMENT

A. Procedural Posture on Review.

> We engage in the same inquiry as the trial court when reviewing an order of summary judgment; all facts and reasonable inferences are considered in a light most favorable to the nonmoving party, while all questions of law are reviewed de novo. [. . .] Additionally, we 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), (citing Berger v. Sonneland, 144 Wash.2d 91, 26 P.3d 257 (2001); and LaMon v. Butler, 112 Wash.2d 193, 200-201, 770 P.2d 1027 (1989)).

B. Dental Malpractice Claims Are Not within the Consumer Protection Act with Limited Exceptions Not Applicable Here.

The CPA does not apply to claims arising out of alleged malpractice by a health care provider. The CPA is codified at RCW 19.86. RCW 19.86.020 provides: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."

Ms. Michael's lawsuit, however, is not based on practices within the conduct of trade or commerce: it is based on "health care activities" under RCW 7.70, which governs any action for damages based on an

injury resulting from health care, and RCW 7.70.020, which provides that a dentist is a "health care provider."[6]

A health care provider may be sued for CPA violations only when the suit is based upon entrepreneurial activities. Jaramillo v. Morris, 50 Wash. App. 822, 750 P.2d 1301 (1988), rev. denied 110 Wash.2d 1040 (1988) (claims of medical malpractice or negligence exempt under the CPA, as they did not involve the entrepreneurial aspects of the hospital's business); Wright v. Jeckle, 104 Wash. App. 478, 16 P.3d 1268 (2001) (claim allowed to proceed as to allegations involving advertising, marketing and sale of prescription diet drugs by a doctor motivated by financial gain).

In Jaramillo, the plaintiffs sued a podiatrist for malpractice, and the hospital for CPA violations. The court stated:

> Here, the Jaramillos' claims against the hospital concern its alleged negligence in not determining Dr. Morris' qualifications to perform ankle surgery and, if the ankle surgery is not within his podiatry license, negligence in not determining that fact. [. . .] The entrepreneurial aspects of the hospital's business, such as billing, were not

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[6] Washington courts define the provision of "health care" as "the process in which [a physician is] utilizing the skills which he [or she] had been taught in examining, diagnosing, treating, or caring for the plaintiff as his [or her] patient." Branom v. State, 94 Wash. App. 964, 974 P.2d 335 (1999), quoting Sly v. Linville, 75 Wash. App. 431, 878 P.2d 1241 (1994).

> implicated. [. . .] We see no reason to distinguish here between claims against doctors or hospitals for failure to meet that standard. Thus, we hold the Jaramillos' negligence claims against Sunnyside Hospital are not properly cognizable under the CPA.

Jaramillo, 50 Wash. App. at 827. The status of BNDI is analogous to Sunnyside Hospital in Jaramillo. Even if Ms. Michael had cognizable negligence claims against BNDI, those claims are not properly cognizable under the CPA in accordance with Jaramillo.

The record is completely silent regarding advertising, marketing, or other entrepreneurial activities of BNDI. Because the evidence required to support her claim is not in the record, Ms. Michael may not maintain a CPA claim against BNDI.

C. Ms. Michael Has Not Presented Evidence to Support a Prima Facie CPA Claim.

> To establish a violation of the CPA, a private plaintiff must establish five elements: (1) an unfair or deceptive act or practice; (2) occurring within trade or business; (3) affecting the public interest; (4) injuring the plaintiff's business or property; and (5) a causal relation between the deceptive act and the resulting injury.

Robinson v. Avis Rent A Car System, Inc., 106 Wash. App. 104, 115, 22 P.3d 818 (2001) (citing Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wash.2d 778, 780, 719 P.2d 531 (1986)). Ms. Michael cannot prove an unfair or deceptive act or practice by BNDI; she cannot

prove injury to business or property; and she cannot prove the alleged act or practice affects the public interest. Her claim was properly dismissed.

1. There Is No Evidence of an Unfair or Deceptive Act.

Ms. Michael failed to provide any evidence regarding advertising, promotional, or entrepreneurial practices by BNDI. The record contains no evidence whatsoever of any advertising, promotional, or entrepreneurial practices undertaken by BNDI.[7]

Instead of focusing on BNDI's advertising, promotional, or entrepreneurial practices, Ms. Michael alleges a "bait and switch," arguing that the use of any amount of xenograft constituted a "bait and switch" giving rise to a CPA violation. There is no evidence to support the contention that BNDI, which provided administrative support services to the Olympia clinic, was responsible for any alleged "bait-and-switch," even if one occurred Further, even if Dr. Mosquera-Lacy promised allograft and used xenograft instead,[8] the settlement with and release of Dr. Mosquera-Lacy precludes claims for vicarious liability against BNDI. Perkins v. Children's Orthopedic Hospital, 72 Wash. App. 149, 864 P.2d 398 (1994).

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[7] BNDI's summary judgment motion was brought after significant discovery. Ms. Michael did not request additional discovery under CR 56(f) before the motion was heard.

[8] The record does not support allegations of a "bait and switch" by Dr. Mosquera-Lacy, but that issue need not be addressed here.

2. The Record Contains No Evidence of Injury to Business or Property.

Ms. Michael implicitly acknowledges that she cannot establish injury to business or property as typically understood. Instead, Ms. Michael argues that she suffered injury to "intangible property." Ms. Michael apparently defines "intangible property" as property that cannot be defined, detected, described or quantified.

Ms. Michael misuses the term "intangible property." Black's Law Dictionary defines "intangible property":

> As used chiefly in the law of taxation, this term means such property as has no intrinsic and marketable value, but is merely the representative or evidence of value, such as certificates of stock, bonds, promissory notes, copyrights, and franchises.

BLACK'S LAW DICTIONARY 809 (6th ed. 1990). Ms. Michael offers no evidence of injury to any such property.

In addition to misusing the term "intangible property", Ms. Michael fails to provide any evidence in the record that her intangible property, even as she uses the term, was injured. In fact, Ms. Michael incurred no injury to property of any kind.[9] The injury plaintiff alleges is an emotional impact – a classic form of personal injury.

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[9] This case is distinguishable from Tallmadge v. Aurora Chrysler Plymouth, Inc., 25 Wash. App. 90, 605 P.2d 1275 (1979), relied upon by Ms. Michael because the Tallmadge plaintiff paid for the vehicle, while

The only reference in the record to injury or damages from the use of xenograft is contained in her interrogatory answers: "Daily Ms. Michael is disgusted of [sic] the thought of having cow bone in her mouth." (CP 37). Emotional distress is not an injury to business or property covered by the CPA. American Manufacturers Mutual Insurance Company v. Osborn, 104 Wash.App. 686, 698, 17 P.3d 1229 (2001). In the absence of a showing of injury to business or property, Ms. Michael can not establish a prima facie case under the CPA. Stevens v. Hyde Athletic Industries, Inc., 54 Wash.App. 366, 773 P.2d 871 (1989).

The Stevens court determined that claims for personal injuries fail to satisfy the element of injury to "business or property" required in a CPA claim. Id. "Had the legislature intended to include actions for personal injury within the coverage of the CPA, it would have used a less restrictive phrase than 'business or property.'" Id. at 370. The Stevens court held, "We hold actions for personal injury do not fall within the coverage of the CPA." Id.

Ms. Michael did not pay for the procedure or the bone graft material. Tallmadge, 25 Wash.App. at 93. In addition, Tallmadge was decided prior to Stevens, Fisons, and Hiner, infra. Further, plaintiff in Tallmadge purchased a good – the car – while plaintiff here did not purchase either xenograft or allograft. Instead, she purchased a service – a bone graft – which was successfully completed.

Stevens was subsequently upheld by the Washington Supreme Court in Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wash. 2d 299, 318, 858 P.2d 1054 (1993), and was also adopted a third time in Hiner v. Bridgestone/Firestone, Inc., 91 Wash.App. 722, 730, 959 P.2d 1158 (1998) (citing Fisons, 122 Wash. 2d 299, 318, 858 P.2d 1054 (1993)): "[P]ersonal injuries are not recoverable under the CPA."

Ms. Michael has asserted only emotional injuries related to the use of xenograft: there is no evidence in the record to support an allegation of injury to "business or property." Because the plaintiff's injury is not to "business or property," her claims do not fall within the CPA.

3. Ms. Michael Can Not Demonstrate an Effect on the Public Interest.

"A breach of a private contract affecting no one but the parties to the contract, whether that breach be negligent or intentional, is not an act or practice affecting the public interest." Short v. Demopolis, 103 Wash.2d 52, 56, 61-62, 691 P.2d 163 (1984) (quoting Lightfoot v. MacDonald, 86 Wash.2d 331, 544 P.2d 88 (1976)). "Lightfoot is deemed the court's first attempt to articulate a theory which excluded from the Act purely private disputes." Demopolis, 103 Wash.2d at 60.

The contract between a patient and her dentist is not a consumer transaction, such as that involved in Tallmadge v. Aurora Chrysler Plymouth, Inc., 25 Wash. App. 90, 605 P.2d 1275 (1979). Instead, it is a

private contract for medical services, analogous to an attorney-client relationship, or a realtor-property purchaser relationship. Hangman Ridge Training Stables, Inc. v. Safeco Title Insurance Co., 105 Wash.2d 778, 790, 719 P.2d 531 (1986).

The Hangman court used the following factors in determining the public interest in a private contract:

> (1) Were the alleged acts committed in the course of defendant's business? (2) Did defendant advertise to the public in general? (3) Did defendant actively solicit this particular plaintiff, indicating potential solicitation of others? (4) Did plaintiff and defendant occupy unequal bargaining positions?

Id. at 790-791. In this case, there is no evidence in the record of any of BNDI's advertising practices. Plaintiff's decision to undergo the complained of bone graft procedure was brought about through private conversations between herself and Dr. Mosquera-Lacy. There is no evidence in the record that BNDI actively solicited Ms. Michael, or, for that matter, that BNDI solicited anyone. There is no evidence in the record of the parties' bargaining positions. There is no evidence in the record which would support the contention that the public interest was affected by Ms. Michael's dealings with her dentist.

Even if the test for consumer transactions is applied, Ms. Michael can not establish that it falls within the public interest. The Hangman

court used the following factors in determining the public interest in a consumer transaction:

> (1) Were the alleged acts committed in the course of defendant's business? (2) Are the acts 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?

Hangman, 105 Wash.2d at 790. Ms. Michael offers no evidence that the acts were committed in the course of BNDI's business; that the acts complained of are part of a pattern or generalized course of conduct; that similar acts were performed prior to or after her surgery; that there is a real and substantial potential for repetition of defendants' alleged conduct; or that anyone other than plaintiff was affected by the alleged conduct. In fact, the allegations of use of xenograft instead of allograft are so unusual that the potential for repetition is vanishingly small or non-existent. Ms. Michael's analogies to faulty heart valves or silicone breast implants are meaningless in the absence of advertising or some inducement by BNDI to

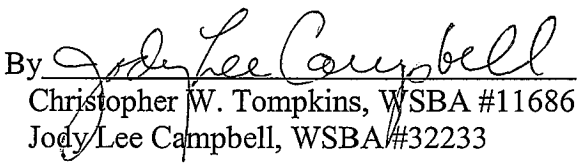
Ms. Michael or the public to undergo the procedure. There is no evidence of any such inducement.[10]

IV. CONCLUSION

Because dental negligence claims do not fall under the CPA, and because Ms. Michael cannot support a prima facie Consumer Protection Act Claim against Bright Now! Dental, Inc. based on the evidence in the record, the Court should affirm the trial court's ruling on summary judgment dismissing Ms. Michael's Consumer Protection Act claim.

Respectfully submitted this 10th day of July, 2006.

BETTS, PATTERSON & MINES, P.S.

By 
Christopher W. Tompkins, WSBA #11686
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Attorneys for Respondent Bright Now! Dental, Inc.

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[10] Ms. Michael attempts to explain her failure to produce facts which would bring her dispute within the public domain by reference to HIPPA and "other controlling privacy laws." Such laws do not eliminate the necessity for plaintiff to prove the essential elements of her claim.

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BRIGHT NOW! DENTAL, INC.'S CERTIFICATE OF SERVICE

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ORIGINAL

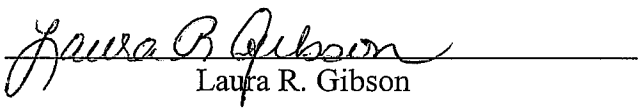
The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On July 10, 2006, I caused to be served via Washington Legal Messenger, Defendant Bright Now! Dental, Inc.'s Brief in Response, upon counsel of record as shown below:

Attorneys for Plaintiffs:

Lincoln C. Beauregard,
Law Offices of John R. Connelly, Jr.
2301 North 30th Street
Tacoma, WA 98403

Dated this 10th day of July, 2006.



Laura R. Gibson