SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
Civil Division

JANET SCHMIDT	:	
Plaintiffs,	:	**Case No.: 06 CA 0008796 M** **Cal. # 9 – Judge Anderson**
v.	:	**Next Event: Pretrial Conference 01/10/2008**
JEFFREY C. POSNICK, M.D., *et al.*	:	
Defendants.	:	

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

COMES NOW the Plaintiff, Janet Schmidt, by and through counsel, and hereby opposes Defendants' Motion for Summary Judgment. Defendants Jeffrey C. Posnick, M.D., Posnick Center for Facial Plastic Surgery and G. Paul Tiwana, D.D.S., M.D. contend that this Court should grant summary judgment in their favor because (1) Plaintiff cannot adduce the requisite expert testimony that Defendant Dr. Posnick and Dr. Tiwana breached the standard of care and (2) Plaintiff cannot make a legally cognizable claim under the District of Columbia Consumer Protection Procedures Act, as amended. Defendants argue, that they are entitled to judgment as a matter of law. Plaintiff contends that Defendants are not entitled to judgment as a matter of law because she has presented sufficient evidence of breaches by Defendants and has sufficient facts to support her CPPA claims as set forth herein, and respectfully requests that this Court deny Defendants' Motion for Summary Judgment in its entirety. In support thereof, Plaintiff respectfully refers this Court to the attached Memorandum of Points and Authorities.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Plaintiff's Opposition and Response was electronically filed and mailed postage prepaid, this 21st day of December, 2007 to:

Michael F. Flynn, Jr., Esquire
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/s/ Catherine D. Bertram
Catherine D. Bertram

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

COMES NOW the Plaintiff, Janet Schmidt, by and through counsel, and respectfully submits this Memorandum of Points and Authorities in Support of her Opposition to Defendants' Motion For Summary Judgment. Plaintiff contends that Defendants are not entitled to judgment as a matter of law and addresses each of their arguments below.

I. STATEMENT OF FACTS

1. Plaintiff filed her verified complaint against Defendants Jeffrey Posnick, M.D. ("Posnick"), the Posnick Center for Plastic Surgery ("Posnick Center") and G. Paul Tiwana, D.D.S. ("Tiwana") on December 8, 2006.[1]

2. The Claims against the other defendant, Defendant Whitten-Perraut, have been dismissed.

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[1] See Exhibit 1, Verified Complaint, December 8, 2006.

3. The Complaint included three counts: medical malpractice as to all defendants[2], lack of informed consent as to all defendants[3] and violations of the District of Columbia Consumer Protection Procedures Act ("CPPA") as to Defendants Posnick and Posnick Center.[4]

4. Contrary to the statements in Defendants Motion[5], Janet Schmidt's subsequent treating physician, Dr. Robert M. Dryden, provided ample deposition testimony, as well as an affidavit[6], which clearly meets the necessary threshold for expert testimony for all the elements of the medical malpractice claims, and the lack of informed consent claims and provides key testimony in support of the violations of the CPPA. In addition, Janet Schmidt testified in deposition[7] and gave sworn answers to interrogatories regarding key facts and contentions that constitute admissible evidence and support her claims against all three Defendants in terms of the medical negligence, lack of informed consent and violations of the CPPA.[8]

5. The CPPA violations are centered around statements and assurances made by Defendants Posnick and Tiwana, as well as statements and images on Defendant Posnick Center's website, as well as written personalized assurances that Defendant Posnick made to Janet Schmidt, all of which induced her to purchase and pay a lump sum fee in advance for the medical services for Defendants which resulted in her

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[2] Exhibit 1, Complaint, Count I, paragraphs 36-39.
[3] Exhibit 1, Complaint, Count II, paragraphs 40-46.
[4] Exhibit 1, Complaint, Count III, paragraphs 47-59.
[5] Defendants' Motion, Memorandum p. 1.
[6] Exhibit 2, Affidavit of Dr. Robert Dryden and Deposition of Dr. Dryden, specified herein, Exhibit 3.
[7] Exhibit 4, Deposition of Janet Schmidt, as specified herein and Exhibit 5, Plaintiff's Answers to Interrogatories Nos. 8 and 22.
[8] Exhibit 2, Affidavit of Robert M. Dryden, MD, para 12.

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permanent and disabling condition. Some of the voluminous evidence on these various acts are set forth below, by category of conduct, in order to refute Defendants' motion. Janet Schmidt testified to several statements made by made by Defendant Posnick, which she contends were intentional misrepresentations/omissions, fraudulent inducement or knowingly taking advantage of the patient:

a. Before the first office visit, Janet Schmidt was enticed into making an e-mail inquiry based on certain promises and photographs on Defendant Posnick Center's website. The language written by Defendant Posnick, promises patients if they have a blepharoplasty that "(T)he positive results of your eyelid surgery include a more alert, youthful and refreshed look."[9] The website also described how the surgery on the eyelids would be performed, "(T)he incisions follow within the natural creases of your upper lids, and just below (or on the inside of) the lashes of your lower lids"[10], leading Janet Schmidt to believe there would be no visible scars, which was not accurate in her case. She was left with a visible scar under one eye. There is no indication in that section of the website of any potential risks or recognized complications of this type of surgery. None of the risks set forth on Defendant Posnick's five page, single spaced consent form[11] are mentioned on the website for consumers to consider.

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[9] See Exhibit 6 from Defendant Posnick's website; see also, Exhibit 4, Deposition of Janet Schmidt, 98:14-22 through 99:1-2; 132:11-15 and 133:2-9; 135:4-17.
[10] Exhibit 6, from Defendant Posnick's website.
[11] Exhibit 7, Defendants' Consent Form for Blephraplasty.

Janet Schmidt testified that she was not given the blepharoplasty consent form to execute until well after Defendant Posnick provided her with specific written and verbal assurances about her surgical outcome and then instructed her to go to the counter, make her lump sum payment and then told her that the consent form had to be signed or he would not do those procedures.[12] Plaintiff contends the is admissible evidence of Defendant Posnick's aggressive, high pressure attempts to sell Defendants' medical services in violation of section 5.02 of the AMA's Code of Ethics[13] as well as the CPPA.

b. Janet Schmidt reviewed "before and after" photographs on Defendants' website of a female patient who underwent a blepharoplasty by Defendant Posnick. Janet Schmidt believed this pictorial patient testimonial[14] purposefully placed on Defendants' website and again referred to by Dr. Posnick in writing, as the best way for her anticipate her outcome, provided her with an example of what she could expect if she paid Defendant Posnick to perform this same surgery on her eyes. There was no indication or warning that these results may not be typical or comparable to other patients, in fact to the contrary. Janet Schmidt was told on August 14, 2003 in writing to refer to Defendant Posnick's "before

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[12] Exhibit 4, Deposition of Janet Schmidt, p. 188:13-17.
[13] Exhibit 8, AMA Code of Ethics, section 5.02, Advertising and Publicity, pp. 127.
[14] See Exhibit 8 AMA Code of Ethics, section 5.02, "certain types of communications have a significant potential for deception and should therefore receive special attention. For example, testimonials of patients as to a physician's skill or the quality of a physician's professional services tend to be deceptive..."

and after" photos, he stated "I feel you are better off looking at some of my patients who have undergone similar procedures to yours – to get an idea of what to expect."[15]

c. Janet Schmidt also testified that Defendants' website also claimed that it was Dr. Posnick's "creative vision and skilled hands that render such changes possible."[16] Of course this is also a statement of particularized skill which led Janet Schmidt to believe her results would be better if Dr. Posnick performed her surgeries as opposed to other qualified surgeons.

d. Before her first office consultation with Defendant Posnick, Janet Schmidt sent an email to Defendant Posnick Center's website. She then recalled receiving a direct phone call from Defendant Posnick which she estimated lasted about 45 minutes wherein he began to sell her on his practice and the surgeries he could offer her, before he had even examined her or seen her.[17]

e. Defendant Posnick tried to cajole her into paying him a large fee to perform the two surgeries by saying she should not have the other surgeons she was considering perform her surgery "because not just any doctor can do your eyes". [18] Dr. Posnick insinuated that he had some

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[15] Exhibit 9, Email from Defendant Posnick to Janet Schmidt, August 14, 2003.

[16] Exhibit 6, Defendants' Website excerpt; Exhibit 4, Deposition of Jane Schmidt, p. 134: 19-22.

[17] Exhibit 4, Deposition of Janet Schmidt, p. 113:17-22

[18] Exhibit 4, Deposition of Janet Schmidt, p.91:17-22 and p. 92:1-7.

type of special skill that the other highly qualified doctors she was considering did not have. When Janet Schmidt got up to leave Defendant Posnick's office at the end of a consultation visit she indicated she was probably going to have her eyes done by Dr. Baker and her jaw surgery performed by Dr. Levin, a surgeon in Pennsylvania, where it would have been almost completely covered by insurance, Defendant Posnick insisted that "Not just anybody can do your jaw".[19] Plaintiff contends these statements were aggressive, high pressure attempts to sell his medical services and also that such statements were an attempt to imply that Dr. Posnick had a special skill or remedy not comparable to the other surgeons, in violation of section 5.02 of the AMA's Code of Ethics.[20]

f. Dr. Posnick purposefully denigrated the abilities of the other surgeons she told him she was considering and claims that he had a "superior eye for aesthetics" and insisted that she get both the jaw and eye surgeries done at once. Plaintiff contends these statements were aggressive, high pressure attempts to sell his medical services and also that such statements were an attempt to imply that Dr. Posnick had a special skill or remedy not

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[19] Exhibit 4, Deposition of Janet Schmidt, p. 121:3-7.

[20] Exhibit 8, AMA Code of Ethics, section 5.02, Advertising and Publicity, pp. 127.

comparable to the other surgeons, in violation of section 5.02 of the AMA's Code of Ethics.[21]

g. Janet Schmidt testified that Defendant Posnick boasted about how he had operated on former Vice President Al Gore's daughter and then Defendant Posnick insinuated that the White House would only select the best.[22] Not only was this statement a violation of HIPAA and patient privacy, it also constituted another aggressive, high pressure attempt to sell his medical services and also that such statements were an attempt to imply that Dr. Posnick had a special skill or remedy not comparable to the other surgeons, in violation of section 5.02 of the AMA's Code of Ethics.[23]

h. When Ms. Schmidt was deciding whether or not to allow Dr. Posnick to perform surgery on her, she asked specific questions, including "the shape of my eye won't change will it?" on August 14, 2003, in the form of an email. Defendant Posnick responded with patient specific assurances on August 18, 2003, "The lower eyelid surgery that we discussed should reduce the puffiness to the lower lids. No major effects on your eyes themselves should be expected."[24] Dr. Robert Dryden, the patient's

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[21] Exhibit 8, AMA Code of Ethics, section 5.02, Advertising and Publicity, pp. 127.

[22] Exhibit 4, Deposition of Janet Schmidt, p. 93:3-4.

[23] Exhibit 8, AMA Code of Ethics, section 5.02, Advertising and Publicity, pp. 127.

[24] Exhibit 10, Electronic mail on August 14, 2003 from Janet Schmidt to Defendant Posnick and Defendant Posnick's August 18, 2003 response.

subsequent eye surgeon, has indicated both in deposition[25] and in his affidavit [26]that those assurances were unreasonable given the patient's clinical presentation, the surgeries Defendants actually performed and her outcome. Janet Schmidt also testified that she relied on Defendant Posnick's written email assurances when she decided to proceed with the surgery, specifically that her eye shape would not change and they he did not expect any complications.[27]

i. Janet Schmidt also testified that Defendant Posnick provided her verbal assurances that he would be the only surgeon performing her surgeries. Janet Schmidt would not have agreed to let him conduct the surgeries without this specific assurance.[28]

j. Defendant Posnick gave Janet Schmidt specific assurances that she did not have to worry about dry eye following the surgery he was going to perform because that "Dr. Posnick told me [it] would not occur in my case. He said that happened when bad doctors – he said he could not remove skin, and that's when people would have lid retraction."[29]

k. Janet Schmidt's verified interrogatory answers set forth in detail her testimony that Dr. Posnick provided her verbal assurances and promised her that he would be the only one performing her surgeries, that his

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[25] Exhibit 3, Deposition of Dr. Robert Dryden, p. 86:20-25 through p. 87:1-12.
[26] Exhibit 2, Affidavit of Dr. Robert Dryden, paragraph 11.
[27] Exhibit 4, Deposition of Janet Schmidt, p. 180:16-22 through p. 181:1-12
[28] Exhibit 4, Deposition of Janet Schimdt, p. 171:22 through 172:1-21.
[29] Exhibit 4, Deposition of Janet Schmidt, p. 181:2-5.

surgical approach the eyes was the best approach, that he had obtained clearance from her LASIK surgeon, that because of his expertise she should do the eye and jaw surgeries together with him.[30]

6. The Complaint includes allegations that "Dr. Tiwana was an employee, agent, fellow, dentist, trainee, surgical assistant and/or servant of Defendant Dr. Posnick and/or Defendant Posnick Center during all times relevant to the care and treatment rendered to Plaintiff in Washington, D.C. on December 11, 2003."[31]

7. The verified complaint includes allegations that Defendant Tiwana was involved in the surgeries at issue, the lack of informed consent and the CPPA claims.

8. Contrary to the statements in Defendants' Motion, Janet Schmidt testified in deposition and gave sworn answers to interrogatories regarding key facts and contentions that constitute admissible evidence and support her claims against Defendant Tiwana individually. Those claims include his role in intentionally providing her assurances that the LASIK surgeon provided clearance for her eye lid surgeries, his role in planning her surgeries despite promises that Defendant Posnick would do that and Defendant Tiwana's role in the technical aspects of the eye lid surgeries which, according to Ms. Schmidt's subsequent treating physician,[32] were performed below the national standard of care and caused her permanent disabling injuries.

9. Janet Schmidt testified that Defendant Tiwana told her he had done the planning models for her surgery and she was unable to get Defendant Posnick to

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[30] Exhibit 5, Answers to Interrogatories 8 and 22.
[31] Exhibit 1, Complaint, paragraph 8.
[32] Exhibit 2, Affidavit of Robert M. Dryden, MD, para 12.

confirm that he was involved, even as of the day of surgery. Ms. Schmidt testified that Defendant Posnick admitted that he had not decided where the chin would be as of the day of the surgery.[33]

10. Janet Schmidt also testified, when confronted with contrary factual assertions, that she clearly recalled a telephone conversation with Defendant Tiwana a day or two before surgery, where Defendant Tiwana told Ms. Schmidt that he had just finished the model surgery.[34]

11. Furthermore, following the surgery, when Ms. Schmidt received a reimbursement check from her insurance company for a very minor part of the costs of the procedures, she received a call from Defendant Tiwana asking her to endorse the check, for an "assistant surgeon's fee", over to the Defendant Posnick Center because "he had done a lot of work on her case."[35] Interestingly, and in contrast to the contentions in Defendants' Motions for Summary Judgment, the document presented to Janet Schmidt to sign at the last minute regarding this fee, does state that it's for an "assistant surgeon".[36]

12. Ms. Schmidt then explained that she refused to give the reimbursement funds to Defendant for Defendant Tiwana's role in her surgery since she had specifically requested and been promised by Defendant Posnick, as a condition precedent to her agreement to have the surgeries, that Defendant Posnick alone would

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[33] Exhibit 4, Deposition of Janet Schmidt, pp. 162: 15-22 – 163:1-16.
[34] Exhibit 4, Deposition of Janet Schmidt, pp. 163: 17-22 – 164:1-9.
[35] Exhibit 4, Deposition of Janet Schmidt, pp. 171:8-21.

[36] Exhibit 11, Letter from Defendant Posnick Center regarding an assistant surgeon's fee.

perform her surgeries. In fact, she explained that she was upset when she received the call from Defendant Tiwana because it was her firm understanding that Defendant Tiwana would have no role in the actual performance of her surgery, "he wasn't supposed to be working on me."[37] His contemporaneous statements prove otherwise and their own internal document for the fee reimbursement referenced above also argues otherwise.

13. Janet Schmidt also testified in deposition regarding an admission uttered by Defendant Tiwana in her hospital room after the surgery. Ms. Schmidt testified that Defendant Tiwana admitted he performed the surgery on one eye:

> ***Question:*** *Do you have any information from any other individual who was present at the surgery that would refute the testimony of Dr. Tiwana and Dr. Posnick?*
> ***Answer:*** *Dr. Tiwana's statements to me.*
> ***Question:*** *What; that he worked hard on the case?*
> ***Answer:*** *No. Post-surgically, when I was at the hospital, I brought to his attention that I had a recess under my left eye that kind of deviated into the cheek, and that the incision deviated from the lash line, and I didn't think it looked good, and he said to me, "My eye looks good." He seemed a little angry. He said, "My eye looks good."*[38]

12. At that point in the deposition Janet Schmidt was confronted again and asked about evidence regarding Defendant Tiwana's involvement and she again verified that the conversation with Defendant Tiwana took place in her hospital room, that

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[37] Exhibit 4, Deposition of Janet Schmidt, p. 171:21-22, p. 172 and p. 173:1-3.
[38] Exhibit 4, Deposition of Janet Schmidt, p. 175:2-13.

Defendant Tiwana made the statement about "my eye" and that Defendant Tiwana admitted he did the model planning.[39]

13. Ms. Schmidt also testified about Defendant Tiwana's role in providing her with assurances that Defendant Posnick had obtained clearance from Ms. Schmidt's ophthalmologist and LASIK surgeon, Dr. Whitten, for the complex surgery on her upper and lower eye lids. Dr. Whitten had recently performed her LASIK surgery.[40] Ms. Schmidt specifically recalls Defendant Tiwana calling her and gave her affirmative assurance: "*Dr. Tiwana confirmed that they had received clearance. And I said to Dr. Tiwana, "So it is safe to go ahead, "and he said yes.*"[41]

14. When asked specifically about paragraphs in the verified complaint which alleged that she was intentionally misled by the defendants, Plaintiff again testified that she was relying on the statements made by Defendant Tiwana following the surgery about which eye he had operated on as well as his statements that he had obtained clearance from her ophthalmologist for the December 11, 2003 procedures by the Defendants.[42]

15. Janet Schmidt also executed answers to interrogatories dated April 4, 2007. The answers to interrogatories eight (8) and twenty-two (22) set forth similar factual testimony regarding Defendant Tiwana's involvement in the surgery, his comments to her after surgery, his assurances regarding clearance from the eye surgeon

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[39] Exhibit 4, Deposition of Janet Schmidt, p.176:3-16
[40] Exhibit 4, Deposition of Janet Schmidt, p. 185:10 -22 and 186:1-19.
[41] Exhibit 4, Deposition of Janet Schmidt, p. 186:17-19
[42] Exhibit 4, Deposition of Janet Schmidt, p. 289:22 and 290:1-19.

as well as the fact that her two eyes do not look the same following the December 11, 2003 surgery by Defendants Posnick and Tiwana.[43]

16. Janet Schmidt's subsequent treating surgeon, Dr. Robert M. Dryden, is an ocular cosmetic surgeon who is board certified in both ophthalmology and general cosmetic surgery. His deposition was taken on November 20, 2007 in Tucson, Arizona. Defendants contend that Janet Schmidt has not obtained sufficient expert testimony to meet the elements of her medical malpractice claim in their motion. This is not correct, Dr. Dryden provided sufficient testimony to the limited and focused questions he was asked at deposition by defense counsel and then in order to assist the Court, the undersigned obtained an affidavit from Dr. Dryden to clarify the elements of his opinion.

17. Dr. Dryden testified in deposition that the Defendants caused Janet Schmidt's dry eye condition during the surgery they conducted.[44] He further explained that dry eye is not a recognized complication of the blepharoplasties Janet Schmidt underwent when the surgery is performed correctly. [45]

18. Furthermore, based on photographs of Janet Schmidt from before the Defendants' surgery, Dr. Dryden is of the opinion that the wrong surgery was

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[43] Exhibit 5, Plaintiff's Answers to Interrogatories 8 and 22, April 4, 2007.
[44] Exhibit 3, Deposition of Dr. Robert Dryden, p. 40:25 through p. 41:1-8 and p. 80:2 and p. 80:8-25 through p. 81:1-24; and Exhibit 2, Affidavit of Dr. Dryden, para. 12.
[45] Exhibit 3, Deposition of Dr. Robert Dryden, p. 39:11-21.

performed. Janet Schmidt had a condition called blepharoptosis and needed an aponeurotic dehiscence repair for that condition.[46]

19. Dr. Dryden is also of the opinion that the Defendants' conduct during the surgeries performed on December 11, 2003 was the proximate cause of Janet Schmidt's dry eye condition. [47]

20. Dr. Dryden formulated these opinions the first day he examined and interviewed Janet Schmidt.[48]

21. Dr. Dryden testified, as a subsequent treating surgeon, that he did not know whether Defendant Posnick or Defendant Tiwana performed the surgery at issue on December 11, 2003.

> ***Question***: *What mechanically -- surgically, in terms of the surgical technique, what do you speculate he may have done when he did the upper blepharoplasty to remove the palpebral lobe of the lacrimal gland?*
> ***Answer***: *He may have taken out part of the lacrimal gland thinking it was orbital fat. He or his associate, whoever did the surgery.*
> ***Question***: *But you don't know, do you?*
> ***Answer***: *I don't know that. I don't know who did the surgery. I wasn't there.*[49]

22. Dr. Dryden also admitted that he was not certain how much involvement Dr. Tiwana had.[50] This is an issue of disputed fact for the jury.

23. In the affidavit attached to this opposition, Dr. Dryden clarifies that "the blepharoplasties performed by Drs. Posnick and/or Dr. Tiwana" were performed below

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[46] Exhibit 2, Affidavit of Dr. Dryden, para. 10.
[47] Exhibit 2, Affidavit of Dr. Dryden, para. 13.
[48] Exhibit 3, Deposition of Dr. Robert Dryden, p. 82:15-20.
[49] Exhibit 3, Deposition of Dr. Robert Dryden, p. 49: 18-25 and p. 50:1-3.
[50] Exhibit 3, Deposition of Dr. Dryden, p. 82:9-12.

the standard of care and were the substantial factor in Ms. Schmidt's severe eye condition.[51] It is up to the jury to decide whether Defendant Posnick is solely responsible or whether Defendant Tiwana performed one of the surgeries on Ms. Schmidt's eyes in light of the conflicting testimony cited by Defendants and the admissions Ms. Schmidt testified to by Dr. Tiwana.

24. With regard to the jaw and chin surgeries, Janet Schmidt testified that several treating physicians, including Drs. Funari and Schwartz criticized Defendant Posnick's surgery.[52] These physicians are treating physicians, not retained experts, who provided these opinions to the patient during the course and scope of their treatment.

25. With regard to the chin and placement of the screws for the genioplasty, on or about December 12, 2007, Janet Schmidt was informed by her orthodontist, Dr. Lawyer, after consultation with an oral surgeon, that they had determined that the screw placed during the December 11, 2003 at issue in this case was placed into either her tooth or into the periodontal ligament space of the tooth and that as a result she needed additional surgery.[53]

26. A progress note from Dr. Gary J. Funari, dated December 13, 2007 her oral surgeon, is also attached to this motion, which states that the plan is to do "surgery under general anesthesia" to remove the screw and hardware.[54]

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[51] Exhibit 2, Affidavit of Dr. Robert Dryden, paragraph 12.
[52] Exhibit 4, Deposition of Janet Schmidt, pp. 81 through 84.
[53] Exhibit 12, Image of screw into tooth or root space and Exhibit 13, progress note by Dr. Lawyer dated 12/12/07.
[54] Exhibit 14, December 13, 2007 Progress Note of Dr. Gary J. Funari, D.M.D.

27. According to Defendant Posnick in Defendants' Motion for Summary Judgment as to Dr. Tiwana, they admit it was Defendant Tiwana who placed the screws in Janet Schmidt's lower jaw. That is the very screw that is in her tooth or in the ligament space which is causing the concern.

28. As a result of this very latest development, Plaintiff intends to have the screw and surgical plating removed. She is not certain what damages will result from this improper placement of the screw. Of course, she already has to undergo another surgery and the costs, inconvenience and pain associated with this procedure.

29. Plaintiffs are filing a motion for additional time to explore this aspect of the case and will most likely seek leave to name additional experts on this issue. However, this cannot be determined until after the screw and plating device are removed and Ms. Schmidt's surgeon(s) and reviewing experts can determine the extent of the damages. A reviewing expert has been contacted who is willing to review the case.

30. The Defendants admit Defendant Tiwana assisted during the surgery, including holding retractors, suctioning fluids from the surgical field with regard to both the eye and jaw/chin surgeries.[55]

31. The only two surgeons in the operating room for Ms. Schmidt's surgeries on December 11, 2003 were Defendants Posnick and Tiwana.[56]

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[55] Exhibit 15, Deposition of Defendant Posnick, pp. 14:5-14 and p. 19:8-20.
[56] Exhibit 15, Deposition of Defendant Posnick, p. 15:21-22 and p. 16:1.

32. Dr. Robert Dryden, Plaintiff's subsequent treating surgeon, testified that the cause of Janet Schmidt's dry eye problems was the surgery performed by a doctor in D.C. because she had no symptoms of dry eye prior to that surgery and then suddenly after surgery she had a severe problem.[57]

33. Dr. Dryden testified that he believed the patient had lid surgery called a blepharoplasty performed by either Dr. Posnick or his fellow, "whoever did it".[58]

34. Dr. Dryden also explained that dry eye problems are not a recognized complication of this type of surgery if it is performed correctly; patients don't develop dry eye problems as the result of blepharoplasty if it is done properly, such as in his practice.[59]

35. Dr. Dryden also testified that he consulted with another prominent ocular surgeon in Oregon, who is also a lacrimal expert, about Janet's presentation and that surgeon confirmed that he has seen patients who suddenly experience severe dry eye after blepharoplasties have been performed by other surgeons and while they are not certain the exact mechanism of the injury but what they see is that these other surgeons do something wrong during surgery and the patient's dry eye problem becomes much worse.[60]

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[57] Exhibit 3, Deposition of Dr. Dryden, p. 40:25 and p. 41:1-7.
[58] Exhibit 3, Deposition of Dr. Dryden, p. 49:4-7.
[59] Exhibit 3, Deposition of Dr. Dryden, p. 39:11-21.
[60] Exhibit 3, Deposition of Dr. Dryden, p. 50:3-16 and p. 89:17-25 -90:1-14.

36. Dr. Dryden's affidavit[61] states: "In my opinion, the blepharoplasties performed by Dr. Posnick and/or Tiwana on or about December 11, 2003, were performed below the national standard of care and as such were the substantial factor in Ms. Schmidt's severe dry eye condition."

37. Dr. Dryden has several theories about what was likely done improperly during the surgery that caused the patient's severe dry eye condition: the surgeon may have cut the lacrimal glands, the surgeon may have removed her palpebral lobe of the lacrimal glands or removed or altered the orbital lobes of the lacrimal glands.[62] Regardless of the exact mechanism of injury, Dr. Dryden is of the opinion that the Defendants performed the surgery at issue below the standard of care and that the defendants' conduct during the surgery is the proximate cause of Janet Schmidt's severe dry eye condition, which is severe and disabling.[63] Janet Schmidt has set forth the necessary elements from a qualified treating surgeon to meet her burden.

38. Dr. Dryden explains that when they are teaching young surgeons about the anatomy of the eye, "we have to emphasize that the lacrimal gland sits in the lateral aspect of the upper lid, or the latter aspect of the upper lid, and should be avoided totally."[64]

39. Again, Dr. Dryden testified that whoever performed this aspect of the surgery, Defendant Posnick or Defendant Tiwana, "he or his associate, whoever did the

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[61] Exhibit 2, Affidavit of Dr. Robert Dryden, para. 12.
[62] Exhibit 3, Deposition of Dr. Dryden, p. 46:23-25 and p. 47:1-15.
[63] Exhibit 2, Affidavit of Dr. Dryden.
[64] Exhibit 3, Deposition of Dr. Dryden, p. 94:13-17.

surgery" they did something improper that negatively impacted on Janet Schmidt's tear production. Dr. Dryden explained that they may have taken out part of the lacrimal gland thinking it was orbital fat.[65]

40. Dr. Dryden further testified that Janet Schmidt's dry eye condition is both severe and disabling.[66]

41. When asked when he formulated his opinions regarding the breaches by the defendants, Dr. Dryden testified that it was the first day he examined Janet Schmidt as her treating physician.[67]

II. STANDARD OF REVIEW FOR SUMMARY JUDGMENT

Under Rule 56, the trial court may grant summary judgment only where the moving papers and affidavits establish that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See Super. Ct. R. Civ. P. 56(c); Beckman v. Farmer, 579 A.2d 618, 627 (D.C. 1990). The role of the court is not to resolve disputed factual issues, but rather to determine whether the record as a whole supports any issues that require a trial. See Nader v. de Toledano, 408 A.2d 31, 48-49 (D.C. 1979), cert. denied, 444 U.S. 1078 (1980).

Summary judgment is an "extreme" remedy. Swann v. Waldman, 465 A.2d 844, 846 (D.C. 1983). It is a "drastic procedural weapon because 'its prophylactic function, when exercised, cuts off a party's right to present his case to the jury.'" Garza v. Marine

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[65] Exhibit 3, Deposition of Dr. Dryden, p. 49: 18-24.
[66] Exhibit 3 , Deposition of Dr. Dryden, p. 47:9-10.
[67] Exhibit 3, Deposition of Dr. Dryden, p. 82:15-20.

Trans. Lines, Inc., 861 F.2d 23, 26 (2d Cir. 1988) (citation omitted). Accordingly, the moving party bears the burden of demonstrating the absence of any genuine issue of material fact, and the court must view the evidence in the light most favorable to the non-moving party. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). This standard applies to all evidentiary facts as well as to all inferences to be drawn from them. See McCoy v. Quadrangle Dev. Corp., 470 A.2d 1256, 1258 n.3 (D.C. 1983). Finally, at all times, the trial court must be aware that "***[t]he very nature of a controversy may render summary judgment inadvisable***." McWhirter Distrib. Co. v. Texaco Inc., 668 F.2d 511, 519 (Em. App. 1981) (emphasis added).

Bearing the foregoing standards in mind, the Plaintiff now turns to an application of the specific law to the material disputed facts.

II. ARGUMENT

a. Plaintiff Has Presented Sufficient Expert Testimony that Dr. Posnick and/or Dr. Tiwana Breached the Standard of Care and Proximately Caused Plaintiff's Injuries

It is well established in this jurisdiction that, in a medical malpractice action, a plaintiff must prove that a defendant breached the national standard of care[68] and that this breach was the proximate cause the plaintiff's injury. See Travers v. District of Columbia, 672 A.2d 566, 568 (D.C. 1996) (citations omitted). In order to establish the

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[68] It is not necessary that the expert use the words "national standard," as the primary concern is that it is reasonable to infer from the testimony that such a standard is nationally recognized. See Snyder v. George Washington University, 890 A.2d 237, 245 (D.C. 2006) (citations omitted).

national standard, the plaintiff must establish through expert testimony that course of action that a reasonably prudent physician with the defendant's specialty would have taken under the same or similar circumstances. Id. (citations omitted). In order to establish proximate cause, "the expert need only state an opinion, based on a reasonable degree of medical certainty, that the defendant's negligence is more likely than anything else to have been the cause (or a cause) of the plaintiff's injuries." Travers at 570 (citing Psychiatric Inst. of Washington v. Allen, 509 A.2d 619, 624 (D.C. 1986)). Further, it is well recognized in this jurisdiction that expert testimony is required to establish each of the three elements - national standard of care, breach and causation – "except where proof is so obvious as to lie within the ken of the average lay juror." Snyder at 244 (citations omitted).

With regard to causation, this jurisdiction does not require that a plaintiff explain the mechanism of injury. Snyder at 248. Indeed, a plaintiff needs to establish that the defendant's conduct, based on a reasonable degree of medical certainty, was a likely cause of the plaintiff's injuries. Id. (citations omitted). Put another way, a plaintiff must show that the defendant's conduct was "more likely than anything else to have been the cause" of the injuries. Snyder at 249 (citations omitted). This jurisdiction does not *require* that that a testifying expert be "personally certain" of the cause or that the cause is discernable to a certainty, insofar as a reasonable medical certainty reflects an objectively well-founded conviction that the likelihood of one cause is greater then the other. District of Columbia v. Watkins, 684 A.2d 395, 402-403 (D.C. 1996).

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Dr. Robert M. Dryden was deposed on November 20, 2007. He is Janet Schmidt's subsequent surgeon who specializes is ocularplastics. Dr. Dryden testified in deposition and provided the attached affidavit which sets forth his opinions. First, he is of the opinion that the wrong surgery was performed. This is set forth in his affidavit. The wrong surgery was performed, it was performed below the national standards and caused the patient's dry eye condition. He specifically opined that the Defendants breached the national standards in the performance of the December 11, 2003 surgery and that the Defendants' conduct during the surgery was the proximate cause of Janet Schmidt's dry eye condition. He also stated that he holds his opinions to a reasonable degree of medical certainty. While he cannot state exactly what the mechanism of injury was, because he was not present at the surgery, he can and did explain that the sudden onset of this type of severe dry eye and the absence of the lacrimal gland are all evidence of the negligence. Plaintiff disagrees that the type of dry eye Janet Schmidt has is a commonly accepted complication of blepharoplasty and Dr. Dryden explained in his deposition that he disagreed as well. While a temporal association alone is arguably not sufficient, we have more in this case. Dr. Dryden explained that Janet Schmidt now has a tear production problem which was caused by the defendants' interference with the lacrimal gland, although he cannot state exactly how they damaged it, he did explain the three possible ways[69]: 1) cut her lacrimal ductless; 2) removed her

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[69] Exhibit 3, Deposition of Dr. Dryden, pp. 49-51.

palpebral lobes, or 3) taken out part of her kacrimal gland thinking it was orbital fat.[70] This is certainly sufficient under Lasley. Dr. Dryden's opinions, are set forth succinctly in his affidavit and also in several sections of his deposition, meet the requirements under Travers and, as a result, Defendants motion for summary judgment on the medical malpractice claim related to her eye surgeries should be denied.

b. Plaintiff Can Establish a Prima Facie Case Against the Defendants for Medical Negligence With Respect to Her Claims About Her Jaw/Chin Surgery

Plaintiff only recently learned, seven days after this motion was filed, that Defendants placed a screw directly into her tooth in the December 11, 2003 surgery. She is filing a motion seeking additional time to explore this issue under the circumstances. She has attached the image of the screw as well as the two notes from her orthodontist and oral surgeon. She needs to have the surgery performed in order to verify the conduct and ascertain what the consequences of this disturbing finding will be.

Because this was just discovered, Plaintiff seeks additional time to response to this argument in order to have an expert review the results of her surgery and make a determination as to this newly discovered wrongdoing.

c. Plaintiff Has Asserted Facts to Support Claims Under the District of Columbia Consumer Protection Procedures Act, as amended

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[70] Exhibit 3, Deposition of Dr. Dryden, pp. 47-49.

Defendants argue that "[i]n Caulfield v. Stark, 893 A.2d 970 (D.C. 2006), the District of Columbia Court of Appeals addressed for the first time whether or not CPPA claims could survive in the context of a medical malpractice case." Defendants' Motion at 11. Defendants acknowledge that Caulfield preceded an amendment to the statutory language of the CPPA; however, they characterize the amendment as a "minor change."[71] Defendants' Motion at 12. They further argue that the Court "specifically reserved on the issue of whether or not this minor change to the statute would impact its later decisions." Defendants' Motion at 12. Defendants then conclude, noting the Caulfield Court's "alignment" [72] with the United States District Court for the District of Columbia[73], that actions brought as medical malpractice claims should not be "recast as a consumer claim." Defendants' Motion at 12.

We begin with both versions of the statutory language relevant here. Subsequent to the events in Caulfield, the Council of the District of Columbia amended the CPPA to read as follows:

> (k)(1) A person, whether acting for the interest of itself, its members, or the general public, may bring an action under this chapter in the Superior Court of the District of Columbia seeking relief from the use by any person of a trade practice in violation of a law of the District of Columbia and my recover or obtain the following remedies:

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[71] Defendants also refer to the change as "removing only one phrase" (see Defendants' Motion at 11) and thus fail to recognize the important implications of deleting the jurisdictional ties to statutory claims in the CPPA.
[72] Defendants state that the Caulfield Court "[aligned] itself in large part" with the District Court. Defendants' Motion at 11.
[73] It is unclear which of this Court's opinions Defendants reference, Dorn v. McTigue, 121 F.Supp.2d 17 (D.D.C. 2000) (Dorn I) and/or Dorn v. McTigue 157 F.Supp.2d 37 (D.D.C. 2001) (Dorn II).

(A) treble damages, or $1,500 per violation, whichever is greater, payable to the consumer;
(B) reasonable attorney's fees;
(C) punitive damages;
(D) an injunction against the use of the unlawful trade practice;
(E) in representative actions, additional relief as may be necessary to restore to the consumer money or property, real or personal, which may have been acquired by means of the unlawful trade practice; or
(F) any relief which the court deems proper.

D.C. CODE § 28-3905(d)(l).

Prior to 2000, the first clause of § 28-3905(k)(l) began with the phrase, "Any consumer who suffers any damage as a result of the use or employment by any person of a trade practice in violation of a law of the District of Columbia within the jurisdiction of the [Department of Consumer and Regulatory Affairs] may bring an action." D.C. CODE § 28-3905(k)(l)(1991).

Defendants' argument as set forth in their Motion is flawed in several respects. First and most simply, Caulfield "reserved" on the issue regarding post-amendment applicability to "actions for personal injury of a tortious nature"[74] *because the issue was not before it* – plaintiff's claims in Caulfield arose prior to the statute's amendment. It would have been improper for the Court to issue a ruling with regard to any post-amendment application of the statue. Moreover, the Court did not reserve "on the issue of whether or not this minor change to the statute would impact its later decisions." Defendants' choice of words suggests that the Court construed the amended language as

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[74] Caulfield at 977, footnote 9.

so minor as to have no legal effect on subsequent decisions. Indeed, Defendants fail to address the fact that in the Caulfield opinion, the Court acknowledged its decision in Childs v. Purll, 882 A.2d 227 (D.C. 2005), which stands for the proposition that prior to the amendment, a plaintiff could not pursue damages under CPPA for "personal injury of a tortuous nature." Childs at 237. Clearly, the Caulfield Court did not reserve "on the issue of whether or not this minor change to the statute would impact its later decisions" as Defendants contend. It referenced its previous decision that stands for the proposition that this "minor change" created a new claim under the CPPA – a claim for damages for personal injury of a tortuous nature. Caulfield at 977. Further consider Parker v. Martin, 905 A.2d 756 (D.C. 2006), where the Court cited Caulfield for the proposition that the CPPA "was amended to permit actions for damages for personal injury of a tortious nature." Parker at 763.

Second, Defendants fail to recognize that the Caulfield opinion stands for the proposition that the performance of medical services is a "trade practice" under the CPPA. In noting that it had previously ruled that the CPPA applied to the legal profession[75], it recognized that it had not so ruled with regard to the medical profession. The Court went on to say, however, that "[h]aving ruled as we did in Banks, with respect to legal services, *we can discern no reason why the performance of medical*

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[75] Banks v. District of Columbia Department of Consumer & Regulatory Affairs, 634 A.2d 433 (D.C. 1993).

services should not be a 'trade practice' as well under the CPPA." Caulfield at 976 (emphasis added).

Third, in characterizing the Court's references to the opinions of the United States District Court for the District of Columbia in Dorn I and Dorn II as "alignment," Defendants mischaracterize – or misunderstand – the Court's discussion of those decisions. Caulfield involved allegations of unintentional misrepresentation in the patient-physician context under the CPPA, an issue of first impression for the Court.[76] While Dorn I similarly involved questions of unintentional misrepresentation and held that such a claim would fall outside the scope of CPPA as it applies to the medical field, the Caulfield Court specifically stated – *in the very next sentence of the opinion* - that Dorn I "is not binding on this Court, however." Caulfield at 977. In a subsequent decision, Dorn II, the District Court suggested *without deciding* - as noted by the Caulfield Court - that the CPPA did not extend to "tort claims for malpractice, that is, to claims challenging a physician's competence." Caulfield at 977. As duly noted by the Caulfield Court, at the time of Dorn II, this was correct. However, once again, *in the very next sentence of the opinion*, the Court cited Childs and noted that "[r]ecently, he held that, before an amendment to the law in October 2000, a plaintiff could not pursue damages under the CPPA 'for personal injury of a tortious nature.'" Caulfield at 977. Again, the Court went on to characterize the amendment as allowing the recovery of damages for personal injury claims sounding in tort. Caulfield at 978.

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[76] The Court notes that in cases of intentional misrepresentation as we have here the clear and convincing evidence standard applies. Osbourne v. Capital City Mortgage Corp., 727 A.2d 322, 326 (D.C. 1999).

Based on the foregoing precedent, Plaintiff can indeed and has asserted a legally cognizable claim under the CPPA – one need only look to this jurisdiction's precedent.[77] Under the CPPA as interpreted by the District of Columbia Court of Appeals,[78] the law here recognizes the performance of medical services as a trade practice and permits actions for damages for personal injury of a tortious nature. Furthermore, contrary to Defendants' argument that permitting the CPPA to apply to medical malpractice claims "opens the door for every malpractice case [to proceed] also as a CPPA claim." Defendants' Motion at 18. Defendants' concern is misplaced, since presumably few malpractice cases share the facts of this case that are germane to the issue of intentional misrepresentation involved cosmetic surgery and specific representations on websites, photos in brochures. Most cases do not involve allegations that a physician denigrated other board certified physicians, who offered the patient the same procedure that would be paid for by insurance, in order to convinence the patient to pay the surgeon $22,000 in advance for the same surgery. Most cases do not involve evidence of specific and personalized email representations from a surgeon to a patient promising certain surgical results.

One of the reasons that States decided to apply their consumer protection statutes to physicians is because states recognize medicine has changed and in some instances

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[77] Interestingly, Defendants' Motion makes no mention of Childs and Parker.

[78] In their argument, Defendants looked to other jurisdictions for guidance in an attempt to persuade the Court. Defendants'' Motion at 12. This reliance is misplaced on this issue and does not merit discussion, as there is ample authority in this jurisdiction to conclude that the CPPA applies here.

consumers relationships with surgeons, especially in elective surgical cases, has changed. This is not a case about traditional medicine. This is the business of cosmetic surgery. This is about profit and a surgeon who convinced Janet Schmidt to pay him $22,000 for a surgery she could have had performed in another state for little or no out of pocket cost. Instead, she believed the hard sell, the "before and after" photos, the intimidating comment when she mentioned other doctors, that "not just any surgeon can do your eyes", the specific written promise that it would not change the shape of her eye and that she should not expect any complications.

One need only type "cosmetic surgery" into your internet search engine and several hundred thousand sites will appear. Some websites, such as Defendant Posnick Center's website, pages of which are attached to this pleading, carefully emphasize the benefits of these elective procedures without mentioning any of the risks. It is similar to a brochure for a vacation or a new home, which would certainly be subject to the CPPA Defendants' website and Defendant Posnick asserted certain specific claims and about his special clients and his special ability to work on patient's eyes and jaws. This is not informed consent, these are statements made to persuade consumers to purchase goods. Here it just happens to be patients purchasing surgeries. Few negatives, if any, are found in such promotional material, and much of the hype is not dissimilar to that used to market other lifestyle products. This is key evidence in the Consumer Protection claim. The difference between medically necessary healthcare for cancer or diabetes versus elective healthcare where these surgeons and their websites are competing for

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patients. Defendant Ponsick's websites, photos and brochures demonstrates the rise of the entrepreneurial approach to healthcare in his specific speciality. Cosmetic surgery is in demand and the cosmetic surgeons are competing for the limited population of patients willing and able to remit large advanced sums for this type of surgery.

If we think about a commonly accepted definition of Cosmetic Surgery, "cosmetic surgery" is any cosmetic procedure performed to reshape normal structures of the body or to adorn part of the body, with the aim of improving the consumer's appearance and self-esteem. It is initiated by the consumer, not medical need, and excludes reconstructive surgery due to trauma or cancer. This lies outside the traditional boundaries of medicine, which previously defined itself as dedicated to saving lives, healing and promoting health. For the most part, cosmetic surgery is not generally reimbursed under Medicare or covered by health insurance. Cosmetic surgeons are paid quite well for these procedures and do not have to deal with insurance companies or reimbursement rules.

Undoubtedly, this forms part of the rationale for applying trade practice law to the health sector and to advertising by doctors, and to the interpretation of such law both nationally and internationally. Just like those rules apply to attorney and the legal profession. The beauty industry promotes a body image that draws on vanity rather than on health. It creates expectations linked to perpetual youth, which can feed insecurities of consumers.

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The AMA's Code of Ethics recognizes, as a general principle, advertisements must be honest, must not exploit patients' vulnerability or lack of medical knowledge, and should provide factual information. Any advertisement for a doctor's services should present information that is reasonably necessary for making an informed decision about the appropriateness and availability of the medical services offered.

AMA Code of Ethics, 5.02 specifically addresses this issue and includes the following statements:

"The communication shall not be misleading because of omission of unnecessary information and shall not contain any false or misleading statement, or shall not otherwise operate to deceive."

"Because the public can sometimes be deceived by the use of medical terms or illustrations that are difficult to understand, physicians should design the form of communication to communicate the information contained therein to the public in a readily comprehensible manner. Aggressive, high-pressure advertising and publicity should be avoided if they create unjustified medical expectations or are accompanied by deceptive claims."

"At the same time, however, physicians are advised that certain types of communications have a significant potential for deception and should therefore receive special attention. For example, testimonials of patients as to the physician's skill or the quality of the physician's professional services tend to be deceptive when they do not reflect the results that patients with conditions comparable to the testimoniant's condition generally receive."

"Because physicians have an ethical obligation to share medical advances, it is unlikely that a physician will have a truly exclusive or unique skill or remedy. Claims that imply such a skill or remedy therefore can be deceptive. Similarly, a statement that a physician has cured or successfully treated a large number of cases involving a particular serious ailment is deceptive if it implies a certainty of results and creates unjustified and misleading expectations in prospective patients."

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Janet Schmidt has set for a multitude of admissible facts in the statement of facts section of her opposition, that support her claims that Defendants violated the CPPA, 28-3904(d) representing services of a particular quality, if in fact they are another; (e) misrepresenting material facts which have a tendency to mislead; (f) failing to state a material fact if such failure tends to mislead; and (g) disparaged the services of another by false or misleading representations of material facts.

The contentions in the verified complaint, paragraphs 54 through 56, provide specifics that are supported by the testimony of Janet Schmidt and Dr. Robert Dryden, the email assurances from Defendant Posnick, as well as the Affidavit of Dr. Dryden and the materials from Defendants' website. The specifics are set forth in detail above and certainly constitute admissible evidence of the elements necessary to survive a summary judgment as to Count III of the Complaint against these defendants.

The case law is clear that surgeons are subject to provisions of this Act and as such must be held accountable for their intentional conduct in terms of inducing consumers to undergo cosmetic surgery that is not the proper procedure for their clinical condition and is then, in fact, performed below the standard of care causing them several and disabling conditions.

IV. CONCLUSION

WHEREFORE, Defendants' Motion for Summary Judgment should be denied in its entirety.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Plaintiff's Opposition to Defendants Motions for Summary Judgment, Memorandum of Points and Authorities in support thereof and proposed Order was mailed via first class mail this 21st day of December, 2007 to the following:

Michael F. Flynn, Jr., Esquire
Gleason, Flynn, Emig & Fogleman
11 North Washington Street
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Rockville, Maryland 20850

/s/ Catherine D. Bertram
Catherine D. Bertram

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
Civil Division

JANET SCHMIDT	:	
Plaintiffs,	:	**Case No.: 06 CA 0008796 M** **Cal. # 9 – Judge Anderson**
v.	:	**Next Event: Pretrial Conference 01/10/2008**
JEFFREY C. POSNICK, M.D., *et al.*	:	
Defendants.	:	

ORDER

Upon consideration of the Defendants' Motions for Summary Judgment, the Plaintiff's Opposition thereto, and a review of the entire record herein, it is this _____ day of _____ 2008 hereby:

ORDERED that Defendants' Motions are DENIED in its entirety.

SO ORDERED.

_____
Judge Jennifer Anderson
Superior Court of the District of Columbia

cc: Catherine D. Bertram, Esquire
Jacqueline T. Colclough, Esquire
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