

12-28-2010

# Bridge Tower Dental, P.A. v. Meridian Computer Center, Inc. Clerk's Record v. 1 Dckt. 37931

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IN THE  
SUPREME COURT  
OF THE  
STATE OF IDAHO

---

BRIDGE TOWER DENTAL, P.A.,

PLAINTIFF-APPELLANT,

vs.

MERIDIAN COMPUTER CENTER, INC.,

DEFENDANT-RESPONDENT.

---

*Appealed from the District Court of the Fourth Judicial  
District of the State of Idaho, in and for ADA County*

*Hon D. DUFF MCKEE, District Judge*

---

SHELLY C. SHANNAHAN

*Attorney for Appellant*

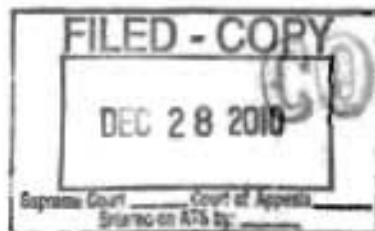
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JOE BORTON

*Attorney for Respondent*

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VOLUME I



37931

IN THE SUPREME COURT OF THE STATE OF IDAHO

BRIDGE TOWER DENTAL, P.A.,

Plaintiff-Appellant,

vs.

MERIDIAN COMPUTER CENTER, INC.,

Defendant-Respondent.

Supreme Court Case No. 37931

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the Fourth Judicial District, in and for the County of Ada.

HONORABLE D. DUFF MCKEE

SHELLY C. SHANNAHAN

ATTORNEY FOR APPELLANT

BOISE, IDAHO

JOE BORTON

ATTORNEY FOR RESPONDENT

MERIDIAN, IDAHO

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## ROA Report

Case: CV-OC-2007-12775 Current Judge: Richard D. Greenwood

Bridge Tower Dental PA vs. Al Colson, etal.

Bridge Tower Dental PA vs. Al Colson, Kathryn Colson, Meridian Computer Center Inc

Date	Code	User		Judge
7/16/2007	NCOC	CCAMESLC	New Case Filed - Other Claims	Kathryn A. Sticklen
	COMP	CCAMESLC	Complaint Filed	Kathryn A. Sticklen
12/31/2007	AMCO	CCTOONAL	First Amended Complaint Filed	Kathryn A. Sticklen
	SMFI	CCTOONAL	Summons Filed (2)	Kathryn A. Sticklen
1/3/2008	NOAP	CCSTROMJ	Notice Of Appearance (Howell for Al Colson)	Kathryn A. Sticklen
1/8/2008	AFOS	CCEARLJD	Affidavit Of Service 1.2.08	Kathryn A. Sticklen
1/11/2008	AFOS	CCMCLILI	Affidavit Of Service (1/3/08)	Kathryn A. Sticklen
1/16/2008	NOTD	CCDWONCP	Notice Of Taking Deposition Duces Tecum of Meridian Computer Center Inc Pursuant to IRCP 30(b)(6)	Kathryn A. Sticklen
	NOTD	CCDWONCP	Notice Of Taking Deposition Duces Tecum of Al Colson dba I T Works	Kathryn A. Sticklen
1/23/2008	ANSW	MCBIEHKJ	Answer to Frst Amended Complaint (Howell for Colson)	Kathryn A. Sticklen
1/25/2008	NOAP	CCTEELAL	Notice Of Appearance (Prior for Meridian Computer)	Kathryn A. Sticklen
1/28/2008	HRSC	CCKENNJA	Hearing Scheduled (Status by Phone 03/05/2008 03:30 PM) No Stipulation	Kathryn A. Sticklen
2/1/2008	AMEN	CCDWONCP	Amended Notice of Taking Deposition Duces Tecum of Al Colson dba IT Works	Kathryn A. Sticklen
	AMEN	CCDWONCP	Amended Notice of Taking Deposition Duces Tecum of Meridian Computer Center Inc Pursuant to IRCP 30(b)(6)	Kathryn A. Sticklen
2/15/2008	ANSW	CCTOONAL	Answer (Prior for Meridian Computer Center Inc)	Kathryn A. Sticklen
	AMEN	CCWRIGRM	(2) Second Amended Notice of Taking Deposition	Kathryn A. Sticklen
2/19/2008	NOTC	MCBIEHKJ	Notice of Compliance	Kathryn A. Sticklen
3/5/2008	HRHD	CCKENNJA	Hearing result for Status by Phone held on 03/05/2008 03:30 PM: Hearing Held No Stipulation	Kathryn A. Sticklen
3/7/2008	ORDR	CCKENNJA	Order Governing Proceedings and Setting Trial	Kathryn A. Sticklen
	HRSC	CCKENNJA	Hearing Scheduled (Pretrial Conference 02/03/2009 04:30 PM) Phone	Kathryn A. Sticklen
	HRSC	CCKENNJA	Hearing Scheduled (Jury Trial 02/17/2009 09:00 AM) 4 Days	Kathryn A. Sticklen
	NOTD	CCWATSCL	Notice Of Taking Deposition	Kathryn A. Sticklen
3/18/2008	NOTC	CCPRICDL	Notice of Compliance	Kathryn A. Sticklen
	AMEN	CCPRICDL	Amended Notice of Taking Oral Deposition Duces Tecum of Bridge Tower Dental	Kathryn A. Sticklen
4/8/2008	MOTN	MCBIEHKJ	Motion for Protective Order	Kathryn A. Sticklen
	AFFD	MCBIEHKJ	Affidavit of Shelly H Cozakos	Kathryn A. Sticklen
4/9/2008	NOHG	CCTOWNRD	Notice Of Hearing	Kathryn A. Sticklen
	HRSC	CCTOWNRD	Hearing Scheduled (Motion 04/29/2008 02:00 PM) Motion for Protective Order	Kathryn A. Sticklen

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Bridge Tower Dental PA vs. Al Colson, Kathryn Colson, Meridian Computer Center Inc

Date	Code	User	Judge
4/29/2008	DCHH	CCKENNJA	Hearing result for Motion held on 04/29/2008 02:00 PM: District Court Hearing Held Court Reporter: Leslie Anderson Number of Transcript Pages for this hearing estimated: Less than 100 pages. Motion for Protective Order Kathryn A. Sticklen
5/12/2008	NOTC	MCBIEHKJ	Third Amended Notice of Taking Oral Deposition of Bridge Tower Dental Kathryn A. Sticklen
9/8/2008	NOTS	CCRANDJD	Notice Of Service Kathryn A. Sticklen
10/24/2008	NOTS	CCCHILER	Notice Of Service of Discovery Kathryn A. Sticklen
11/17/2008	MOTN	CCCHILER	Motion to Extend Expert Disclosures, or in Alternative, to Strike Plaintiff's Expert Disclosures Kathryn A. Sticklen
	MEMO	CCCHILER	Memorandum in Support of Motion to Extend Expert Disclosures, or in Alternative to Strike Plaintiff's Expert Disclosures Kathryn A. Sticklen
	AFFD	CCCHILER	Affidavit of Kenneth C Howell Regarding Disclosures Kathryn A. Sticklen
	MISC	CCBURGBL	Defendant Meridian Computer Centers Disclosure of Expert Witnesses Kathryn A. Sticklen
12/5/2008	NOTS	CCAMESLC	Notice Of Service Kathryn A. Sticklen
12/9/2008	MOTN	CCCHILER	Motion to Withdraw Kathryn A. Sticklen
	AFFD	CCGARDAL	Affidavit of Kenneth C Howell in Support of Motion to Withdraw Kathryn A. Sticklen
	NOHG	CCGARDAL	Notice Of Hearing 2.5.09 @ 3 pm Kathryn A. Sticklen
	HRSC	CCGARDAL	Hearing Scheduled (Motion to Withdraw 02/05/2009 03:00 PM) Kathryn A. Sticklen
1/8/2009	CHRT	CCKENNJA	Changed Assigned Judge: Retired (batch process)
1/28/2009	MOTN	CCRANDJD	Motion to Compel Richard D. Greenwood
	AFFD	CCRANDJD	Affidavit Regarding Motion to Compel Richard D. Greenwood
	MEMO	CCRANDJD	Memorandum in Support of Motion to Compel and for Sanctions Richard D. Greenwood
	MOTN	CCRANDJD	Motion to Shorten Time and Request for Hearing Richard D. Greenwood
1/30/2009	NOTS	CCTOWNRD	Notice Of Service of Discovery Richard D. Greenwood
2/2/2009	AFFD	CCNELSRF	Supplemental Affidavit of Kenneth Howell Regarding Motion to Compel and for Sanctions Richard D. Greenwood
2/3/2009	MISC	MCBIEHKJ	Non Opposition to Motion to Withdraw Richard D. Greenwood
	OBJE	MCBIEHKJ	Objection to Motion to Shorten Time and Request for Hearing Richard D. Greenwood
	DCHH	CCKENNJA	Hearing result for Pretrial Conference held on 02/03/2009 04:30 PM: District Court Hearing Held Court Reporter: Leslie Anderon Number of Transcript Pages for this hearing estimated: Phone 100 pages Kathryn A. Sticklen
	ORDR	CCKENNJA	Order allowing withdraw of counsel & vacate trial Richard D. Greenwood

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Bridge Tower Dental PA vs. Al Colson, Kathryn Colson, Meridian Computer Center Inc

Date	Code	User		Judge
2/4/2009	HRVC	CCKENNJ	Hearing result for Motion to Withdraw held on 02/05/2009 03:00 PM: Hearing Vacated	Kathryn A. Sticklen
	HRVC	CCKENNJ	Hearing result for Jury Trial held on 02/17/2009 09:00 AM: Hearing Vacated 4 Days	Kathryn A. Sticklen
2/23/2009	NOAP	CCCHILER	Notice Of Appearance (Robert Hancock for Al Colson)	Richard D. Greenwood
4/1/2009	NDIS	CCKENNJ	Notice Of Intent To Dismiss	Richard D. Greenwood
4/20/2009	MOTN	MCBIEHKJ	Motion for Retention and Request for Trial Setting	Richard D. Greenwood
4/24/2009	HRSC	CCKENNJ	Hearing Scheduled (Scheduling Conference 06/08/2009 04:30 PM) Plaintiff's shall initiate the call	Richard D. Greenwood
6/9/2009	HRHD	CCKENNJ	Hearing result for Scheduling Conference held on 06/08/2009 04:30 PM: Hearing Held Plaintiff's shall initiate the call	Richard D. Greenwood
6/11/2009	ORDR	CCKENNJ	Order Governing Proceedings and Setting Trial	Richard D. Greenwood
	HRSC	CCKENNJ	Hearing Scheduled (Pretrial Conference 04/05/2010 03:45 PM) Defendant's counsel to initiate call	Richard D. Greenwood
	HRSC	CCKENNJ	Hearing Scheduled (Jury Trial 04/22/2010 09:00 AM) 5 Days	Richard D. Greenwood
	NOTC	CCBURGBL	Notice of Change of Address	Richard D. Greenwood
6/22/2009	MOTN	CCWRIGRM	Motion for First (Automatic) Disqualification of Judge	Richard D. Greenwood
6/24/2009	ORDR	CCKENNJ	Order for First (Automatic) Disqualification of Judge --- Alternative Judge Dennis Goff	Richard D. Greenwood
12/7/2009	MOTN	CCAMESLC	Motion to Withdraw As Attorney and Notice of Hearing	Richard D. Greenwood
	HRSC	CCAMESLC	Hearing Scheduled (Motion to Withdraw 01/06/2010 03:00 PM)	Richard D. Greenwood
	AFFD	CCMAXWSL	Affidavit of John Prior	Richard D. Greenwood
12/30/2009	MISC	CCWATSCL	Plaintiff's Non-Opposition to Defendant Meridian Computer Center, Inc's. Motion to Withdraw as Attorney	Richard D. Greenwood
1/4/2010	NOTC	CCNELSRF	Defendants Colson's Notice of Non-Opposition to Defendant Meridian Computer Center, Inc's. Motion to Withdraw as Attorney	Richard D. Greenwood
1/5/2010	DCHH	CCKENNJ	Hearing result for Motion to Withdraw held on 01/06/2010 03:00 PM: District Court Hearing Held Court Reporter: Leslie Anderson Number of Transcript Pages for this hearing estimated:	Richard D. Greenwood
1/6/2010	ORDR	CCRANDJD	Order Allowing Attorney to Withdraw	Richard D. Greenwood
1/26/2010	AFMA	CCNELSRF	Affidavit Of Mailing	Richard D. Greenwood
1/27/2010	NOAP	MCBIEHKJ	Notice Of Appearance (J Borton for Meridian Computer)	Richard D. Greenwood
2/26/2010	NOTH	TCJOHNKA	Notice of Hearing	Richard D. Greenwood

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## ROA Report

Case: CV-OC-2007-12775 Current Judge: Richard D. Greenwood

Bridge Tower Dental PA vs. Al Colson, etal.

Bridge Tower Dental PA vs. Al Colson, Kathryn Colson, Meridian Computer Center Inc

Date	Code	User	Judge
3/12/2010	NOTC	CCTOWNRD	Defendant Colson's Notice of Joinder in Motion to Exclude Expert Witness Testimony
	NOTS	CCTOWNRD	Notice Of Service
3/17/2010	HRSC	TCJOHNKA	Hearing Scheduled (Motion 03/26/2010 11:00 AM) motion in limine
3/19/2010	MISC	CCLATICJ	Defendant Meridian Computer Center, Inc.'s Witness List
3/26/2010	DCHH	TCJOHNKA	Hearing result for Motion held on 03/26/2010 11:00 AM: District Court Hearing Held Court Reporter: Leslie Anderson Number of Transcript Pages for this hearing estimated: less than 20 pages
3/29/2010	CONT	TCJOHNKA	Continued (Pretrial Conference 04/12/2010 03:45 PM) Defendant's counsel to initiate call
4/7/2010	MOTN	CCMASTLW	Motion In Limine
	AFFD	CCMASTLW	Affidavit of Robert B. Hancock
4/8/2010	NOTS	MCBIEHKJ	Notice Of Service
4/12/2010	AFFD	TCJOHNKA	Affidavit of Shelly C. Shannahan in Support of Plaintiff's Memorandum in Opposition to Defendant Al Colson, DBA I.T. Works' Motion in Limine
	MEMO	TCJOHNKA	Plaintiff's Memorandum in Opposition to Defendant Al Colson, DBA I.T. Works' Motion in Limine
	MISC	MCBIEHKJ	Meridian Computer Center Exhibit List
	MISC	TCJOHNKA	Defendant Meridian Computer Center, Inc.'s Witness List
	MISC	TCJOHNKA	Defendant Meridian Computer Center, Inc.'s Exhibit List
	MISC	CCRANDJD	Meridian Computer Center Incs Proposed Jury Instructions
	MISC	TCJOHNKA	Plaintiff's Witness and Exhibit List
	MISC	TCJOHNKA	Plaintiff's Proposed Jury Instructions
	DEEX	CCRANDJD	Defendant's Trial Witness and Exhibit List
	DCHH	TCJOHNKA	Hearing result for Pretrial Conference held on 04/12/2010 03:45 PM: District Court Hearing Held Court Reporter: No reporter Number of Transcript Pages for this hearing estimated: held in chambers
4/14/2010	NOTC	MCBIEHKJ	Notice of Joinder in Motion in Limine
4/20/2010	ORDR	DCTYLENI	Memorandum Decision and Order
4/22/2010	DCHH	TCJOHNKA	Hearing result for Jury Trial held on 04/22/2010 09:00 AM: District Court Hearing Held Court Reporter: Tauna Tonks Number of Transcript Pages for this hearing estimated: less than 500 pages

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Bridge Tower Dental PA vs. Al Colson, Kathryn Colson, Meridian Computer Center Inc

Date	Code	User	Judge
4/22/2010	HRSC	TCJOHNKA	Hearing Scheduled (Jury Trial 04/23/2010 09:00 AM) 2nd day of trial
4/23/2010	DCHH	TCJOHNKA	Hearing result for Jury Trial held on 04/23/2010 09:00 AM: District Court Hearing Held Court Reporter: Tauna Tonks Number of Transcript Pages for this hearing estimated: less than 500 pages
	PLJI	TCJOHNKA	Plaintiff's First Supplement Proposed Jury Instructions
	STIP	TCJOHNKA	Stipulation Regarding Expert Witnesses
4/26/2010	HRSC	CCNELSRF	Hearing Scheduled (Jury Trial 04/26/2010 09:00 AM) 3rd Day J.T.
	HRSC	CCNELSRF	Hearing Scheduled (Jury Trial 04/27/2010 09:00 AM) 4th Day J.T.
	DCHH	CCNELSRF	Hearing result for Jury Trial held on 04/26/2010 09:00 AM: District Court Hearing Held Court Reporter: Tauna Tonks Number of Transcript Pages for this hearing estimated: less than 500 Tauna Tonks 3rd Day J.T.
4/27/2010	DCHH	CCNELSRF	Hearing result for Jury Trial held on 04/27/2010 09:00 AM: District Court Hearing Held Court Reporter: Tauna Tonks Number of Transcript Pages for this hearing estimated: Less than 500. 4th Day J.T.
	JUIN	CCNELSRF	Jury Instructions Filed
	VERD	CCNELSRF	Verdict Form
5/11/2010	MOTN	CCNELSRF	Defendant MCC Motion for Attorney Fee's And Costs
	AFSM	CCNELSRF	Affidavit In Support Of Motion
	NOHG	CCNELSRF	Notice Of Hearing
	HRSC	CCNELSRF	Hearing Scheduled (Motion 05/26/2010 03:00 PM) Motion for Attonrey's Fees and Costs
	MOTN	CCWRIGRM	Motion for Judgment Notwithstanding the Verdict or in the Alternative, Motion for New Trial
5/13/2010	NOHG	CCNELSRF	Notice Of Hearing
	HRSC	CCNELSRF	Hearing Scheduled (Motion 06/22/2010 03:00 PM)
5/14/2010	NOTC	MCBIEHKJ	Amended Notice of Hearing (6/22/10 @ 3pm)
5/21/2010	HRVC	TCJOHNKA	Hearing result for Motion held on 05/26/2010 03:00 PM: Hearing Vacated Motion for Attonrey's Fees and Costs
6/8/2010	AFFD	CCWRIGRM	Affidavit of Shelly C Shannahan
	MEMO	CCWRIGRM	Memorandum in Support of Plaintiffs Motion for Summary Judgment

Bridge Tower Dental PA vs. Al Colson, Kathryn Colson, Meridian Computer Center Inc

Date	Code	User		Judge
6/15/2010	MOTN	CCCHILER	Plaintiff's Motion for Enlargement of Time to File Objection to Defendant's Motion for Attorney's Fees and Costs	Richard D. Greenwood
	AFFD	CCCHILER	Affidavit of Aaron Bushor in Support of Plaintiff's Motion for Enlargement of Time to Object to Defendant's Motion for Attorney's Fees and Costs	Richard D. Greenwood
6/16/2010	OBJE	MCBIEHKJ	Objection o Motion for Fees and Costs	Richard D. Greenwood
6/17/2010	OBJE	MCBIEHKJ	Objection to Enlargement of Time	Richard D. Greenwood
	MEMO	MCBIEHKJ	Memorandum in Opposition to Motion for Judgment	Richard D. Greenwood
6/21/2010	MEMO	MCBIEHKJ	Memorandum in Support of Request of Costs and Fees	Richard D. Greenwood
	AFFD	MCBIEHKJ	Supplemental Affidavit of Joseph Borton	Richard D. Greenwood
	MEMO	MCBIEHKJ	Rebuttal Memorandum in Support of Request	Richard D. Greenwood
	MOTN	CCGARDAL	Motion to Strike Meridian Computer Center's Memorandum in Opposition to Motion for Judgment Notwithstanding the Verdict or in the Alternative Motion for a New Trial	Richard D. Greenwood
	RPLY	CCGARDAL	Reply Memorandum in Support of Motion to Strike Meridian Computer Center's Memorandum in Opposition to Motion for Judgment Notwithstanding the Verdict or in the Alternative Motion for a New Trial	Richard D. Greenwood
	RPLY	CCGARDAL	Reply Memorandum in Support of Motion for Enlargment of Time to File Objection to Defendants Motion for Attorney Fees and Costs	Richard D. Greenwood
6/22/2010	DCHH	DCJOHNSI	Hearing result for Motion held on 06/22/2010 03:00 PM: District Court Hearing Held Court Reporter: penny tardiff Number of Transcript Pages for this hearing estimated:50	D. Duff McKee
7/8/2010	JDMT	DCTYLENI	Judgment	D. Duff McKee
	ORDR	DCTYLENI	Order Allowing Attorney Fees and Awarding Costs	D. Duff McKee
	ORDR	DCTYLENI	Order Denying Post Trial Motions	D. Duff McKee
	CDIS	DCTYLENI	Civil Disposition entered for: Colson, Al, Defendant; Colson, Kathryn, Defendant; Meridian Computer Center Inc, Defendant; Bridge Tower Dental PA, Plaintiff. Filing date: 7/8/2010	D. Duff McKee
	STAT	DCTYLENI	STATUS CHANGED: Closed	D. Duff McKee
8/2/2010	APSC	CCTHIEBJ	Appealed To The Supreme Court	Richard D. Greenwood
8/16/2010	REQU	CCTHIEBJ	Request For Additional Material	Richard D. Greenwood
9/1/2010	MOTN	CCRANDJD	Motion to Stay Execution	Richard D. Greenwood
9/7/2010	MOTN	CCWRIGRM	Defendants Motion for Posting of Bond as Condition of Stay	Richard D. Greenwood

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No SMF1

JUL 18 2007

J. Denton, Clerk  
By L. ALLEN  
Deputy

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Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BRIDGE TOWER DENTAL, P.A.,

Plaintiff,

v.

AL COLSON and KATHRYN COLSON,  
husband and wife, dba I. T. WORKS, and  
MERIDIAN COMPUTER CENTER,  
INC., an Idaho corporation,

Defendants.

CV OC 0712775

Case No. \_\_\_\_\_

COMPLAINT AND DEMAND FOR JURY  
TRIAL

Plaintiff Bridge Tower Dental, P.A. ("Plaintiff") for a claim against Defendants I. T. Works and Meridian Computer Center, Inc. ("Defendants"), complains and alleges as follows:

1. Plaintiff Bridge Tower Dental, P.A. is an Idaho Professional Association in good standing and does business in Meridian, Ada County, Idaho.

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2. Defendants Al and Kathryn Colson are husband and wife and reside in Meridian, Ada County, Idaho. I. T. Works is an assumed business name by which Defendants Al and Kathryn Colson do business in Meridian, Ada County, Idaho ("Colson").

3. Defendant Meridian Computer Center, Inc. is an Idaho corporation in good standing and does business in Meridian, Ada County, Idaho ("Meridian Computers").

4. This Court has jurisdiction over this complaint pursuant to Idaho Code § 5-404. Venue is proper in this district pursuant to Idaho Code § 5-414.

#### **FACTUAL ALLEGATIONS**

5. On or about March 27, 2003, Defendant Colson provided a computer software and hardware bid to Plaintiff including several computer workstations and a server, monitors, printers and other computer accessories. The total bid for the equipment was \$14,659.00. Installation was also bid by Defendant Colson for \$1600.00. A true and correct copy of the bid is attached hereto as Exhibit A and incorporated herein by this reference.

6. The bid contained a custom design computer package prepared by both Defendants specifically for Plaintiff.

7. Plaintiff accepted the bid and thereafter, on or about April 3, 2003, Defendant Meridian Computer Center, Inc. ("Meridian Computer") sold to Plaintiff, at the direction and per the specifications of Defendant Colson, the computers and associated equipment and accessories more particularly described in Exhibit B, attached hereto and incorporated herein by this reference, all together referred to herein as "the Meridian Computer products".

8. Defendant Colson installed the Meridian Computer Products, and invoiced the Plaintiff for such installation, as set forth in the Exhibit C, true and correct copies of invoices from Defendant Colson, attached hereto and incorporated herein by this reference.

9. On or about October 1, 2003, Defendant Colson prepared and submitted to Plaintiff a Monthly Service Contract (the "Service Contract") to provide computer software, hardware, data, and server maintenance and support, consultation and training, and other services to the Meridian Computer Products, all as more particularly described in the Service Contract, a true and correct copy of which is attached hereto as Exhibit D and incorporated herein by this reference. Plaintiff executed the Service Contract on October 1, 2003.

10. In June, 2005, while performing a software update under the Monthly Service Contract, Defendant Colson noted several errors and system lock-ups occurring in the server component of the Meridian Computer Products (hereafter "the server"). Defendant Colson, suspecting the mirror drives were failing, took the server and drives to Defendant Meridian Computers for repair.

11. The server was taken to Defendant Meridian Computers contained all of the software and data Plaintiff used to operate their dental practice. Neither Defendant at any time stored or back-up the data on the server after it was disconnected and removed from Plaintiff premises.

12. Thereafter, in June, 2005, Meridian Computers performed service and warranty work on the server at the request of Defendant Colson and for the express benefit of Plaintiff.

13. On or about July 21, 2005, Plaintiff was informed that none of the data stored in the server at the time the server was removed from Plaintiff's premises by Defendant Colson was recoverable. The data had been removed in the course of the services performed by Defendants.



14. In the course of investigating the cause of the loss of data from the server, it was determined that the drives had been installed in the server incorrectly, thus contributing to the lack of back-up data.

**COUNT 1**

***Breach of Contract***  
**(Against Defendant Colson)**

15. Plaintiff hereby incorporates paragraphs 1 through 14 as though set forth in full.

16. Defendant Colson breached the Monthly Service Contract by failing to provide data/server maintenance, failing to provide system recovery, failing to provide off-site storage of backup media, and generally failing to maintain Plaintiff's computer equipment in good and functioning order.

17. Defendant Colson also breached his installation of hardware and software agreement with Plaintiff, as that agreement is represented in Exhibit A hereto, by failing to properly install the drives and other equipment identified in Exhibit A.

18. As a result of Defendants' breach, Plaintiff has suffered damages in such amounts that will be proven at trial.

**COUNT 2**

***Breach of Contract***  
**(Against Defendant Meridian Computers)**

19. Plaintiff hereby incorporates paragraphs 1 through 18 as though set forth in full.

20. Defendant Meridian Computers breached its purchase and sale of goods agreement, as that agreement is represented in Exhibit B. hereto, by failing to provide properly configured equipment.

21. Defendant Meridian Computers also breached the service and repair agreement with Defendant Colson, of which Plaintiff was a third party beneficiary, by failing to properly perform those services, resulting in a “low-level formatting” by Defendant Meridian Computers of the only drive on which Plaintiff’s data was contained.

22. As a result of Defendants’ breach, Plaintiff has suffered damages in such amounts that will be proven at trial.

**COUNT 3**

***Negligence***  
**(Against Defendant Meridian Computers)**

23. Plaintiff hereby incorporates paragraphs 1 through 22 as though set forth in full.

24. As a retailer generally, Defendant had a duty of reasonable care to Plaintiff, a regular customer.

25. Defendant breached their duty to Plaintiff by not providing Plaintiff with competent computer inspection, maintenance and repair services.

26. Defendant’s breach resulted in a total loss of Plaintiff’s entire database.

27. As a result of Defendant’s breach, Plaintiff has suffered damages to in such amounts that will be proven at trial.

**COUNT 4**

***Negligence***  
**(Against Defendant Colson)**

28. Plaintiff hereby incorporates paragraphs 1 through 27 as though set forth in full.

29. As a provider of retail customer service, Defendant Colson has a duty of reasonable care to Plaintiff, a regular customer.

30. Defendant Colson breached his duty to Plaintiff by not providing Plaintiff with competent computer installation, maintenance, back-up, data storage services.

31. Defendant's breach resulted in a total loss of Plaintiff's entire database.

32. As a result of Defendant's actions, Plaintiff has suffered damages in such amounts that will be proven at trial.

**ATTORNEY'S FEES AND COSTS**

As a result of the wrongful conduct of Defendants, Plaintiff has been forced to retain the services of Business Legal Consulting, Pllc, and Perkins Coie, LLP to bring this Complaint and Demand for Jury Trial. Plaintiff is entitled to recover attorney's fees and costs pursuant to Idaho Code §§ 12-120, 12-121 and other applicable Idaho law.

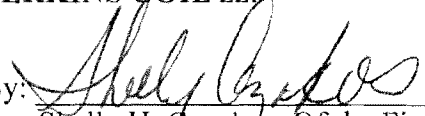
**WHEREFORE**, Plaintiff prays for relief against Defendants as follows:

1. A judgment in favor of Plaintiff and against Defendants in an amount to be proven at trial;
2. An award of pre-judgment and post-judgment interest on Plaintiff's damages;
3. An award of all attorney's fees and costs incurred by Plaintiff in prosecuting this action;

4. An award of damages incurred by Plaintiff as a result of Defendants' wrongful conduct, in an amount to be proven at trial, which amount exceeds \$10,000;
5. Such further relief this Court deems just under the circumstances.

DATED: July 16, 2007

**PERKINS COIE LLP**

By:   
\_\_\_\_\_  
Shelly H. Cozakovs, Of the Firm  
Attorneys for Plaintiffs

03/27/2003 14:36 8874832

KATHRYN & AL COLSON

PAGE 2

**Bridge Tower computer equipment/support bid.**

**Hardware**

**Computers:**

One file server with tape backup and active mirroring (full tower, air cooled)	\$2800.00
Seven workstations with 15 inch LCD monitors (small footprint/ liquid cooled)	\$7889.00
One workstation with 18 inch LCD monitor	\$1250.00
(server and workstations covered by a 3 yr warranty from Meridian Computer Center)	
One UPS (uninterpretable power supply) for file server	\$150.00
Ten surge protectors	\$150.00

**Networking:**

One Router/Firewall	\$50.00
One sixteen port switch	\$150.00

**Printers:**

Canon D680 digital Copier/Printer/Fax	\$700.00
Single cartridge system	
13 pages per minute	
30 sheet automatic document feeder and flatbed scanner	
500 sheet front loading cassette tray and 100 sheet front loading tray	
600X600 dpi copy/print resolution	
energy saving mode	
super G3 33.6Kpps fax modem built in	
3-yr limited warranty, 1st yr on site	

Hp 2230 Business inkjet Printer	\$300.00
Individual high capacity ink cartridges for low cost per page	
11ppm black and 7.5 ppm color	
1200X600 dpi	
250 sheet paper tray	
10,000 page duty cycle	
96/167 MHZ dual processor and 16 meg of on-board memory	

**Software**

Norton anti-virus for eleven systems	\$440.00
StarOffice 6.0, four copies	\$340.00

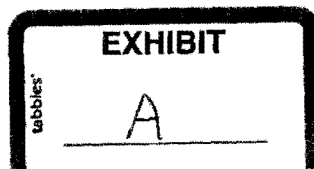
**Miscellaneous Items**

Seven backup tapes for file server	\$140.00
Cables (network, monitor, keyboard and mouse extensions)	\$300.00

Total for equipment (excluding tax)  
 Total for Installation

\$14659.00

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16185

Print Close

THE POWER TO REALIZE A DREAM

INVOICE

Meridian Computer Center  
1580 W 4th  
Meridian Id  
83642  
1-208-884-4991

Date	Invoice #
April 07, 2003 10:30 AM	10575
Sales by: Jason Patten	

Customer
<b>Bridge Tower Dental</b> 3250 N. Towerbridge Way Meridain, ID 98642 322-0030

Terms: On Account

QTY	ITEM	PRICE TOTAL
-1	MINI KEYBOARD	\$34.27 (\$34.27)
ea.		
1 ea.	Logitech iTouch Cordless Freedom w/ Mouse	\$65.87 \$65.87
-1	Logitech Optical Mouse (Not Cordless)	\$19.17 (\$19.17)
ea.		
1 ea.	BENQ 15" FLAT PANEL	\$348.29 \$348.29

Order Notes:  
Al Colson changes.

Sub Total: \$360.72

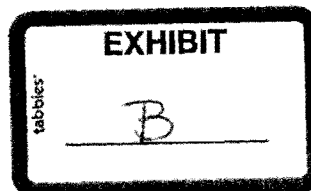
Shipping: \$0.00

Tax: \$18.04

Total: \$378.76

Amount Tendered: \$0.00

Balance Due: \$378.76



Print Close

**"THE POWER TO REALIZE A DREAM"**

**INVOICE**

**Meridian Computer Center**  
 1580 W 4th  
 Meridian Id  
 83642  
 1-208-884-4991

Date	Invoice #
April 07, 2003 10:32 AM	10576
Sales by: Jason Patten	

Customer
<b>Bridge Tower Dental</b> 3250 N. Towerbridge Way Meridain, ID 98642 322-0030

Terms: On Account

QTY	ITEM	PRICE	TOTAL
4 ea.	SHUTTLE / SK41G / SOCKET A	\$294.08	\$1,176.32
4 ea.	AMD ATHLON XP 1700 @ 266 FSB	\$75.86	\$303.44
4 ea.	DDR 256 MB RAM PC2100	\$50.53	\$202.12
4 ea.	3.5 FLOPPY DRIVE	\$16.08	\$64.32
4 ea.	MAXTOR 20 GIG 7200	\$81.18	\$324.72
4 ea.	SONY 16X DVD-ROM	\$58.81	\$235.24
4 ea.	MATROX G450 MARVEL ETV 32MB	\$225.00	\$900.00
4 ea.	MINI KEYBOARD	\$34.27	\$137.08
4 ea.	Logitech Optical Mouse (Not Cordless)	\$19.17	\$76.68
4 ea.	BENQ 15" FLAT PANEL	\$348.29	\$1,393.16
4 ea.	Microsoft Windows 2000 PRO (OEM)	\$167.50	\$670.00
8 ea.	25' PS/2 EXTENSION	\$13.88	\$111.04
4 ea.	25' SVGA 3 COAX / HDB15 M/F	\$16.97	\$67.88

**Order Notes:**  
 AI-Operatories

**Sub Total: \$5,662.00**

**Shipping: \$0.00**

**Tax: \$283.10**

**Total: \$5,945.10**

**Amount Tendered: \$0.00**

**Balance Due: \$5,945.10**

Print Close

**"THE POWER TO REALIZE A DREAM"**

# INVOICE

**Meridian Computer Center**  
 1580 W 4th  
 Meridian Id  
 83642  
 1-208-884-4991

Date	Invoice #
April 07, 2003 10:34 AM	10577
Sales by: Jason Patten	

Customer
<b>Bridge Tower Dental</b> 3250 N. Towerbridge Way Meridain, ID 98642 322-0030

Terms: On Account

QTY	ITEM	PRICE	TOTAL
1 ea.	SHUTTLE / SK41G / SOCKET A	\$294.08	\$294.08
1 ea.	AMD ATHLON XP 1700 @ 266 FSB	\$75.86	\$75.86
1 ea.	DDR 256 MB RAM PC2100	\$50.53	\$50.53
1 ea.	3.5 FLOPPY DRIVE	\$16.08	\$16.08
1 ea.	MAXTOR 20 GIG 7200	\$81.18	\$81.18
1 ea.	LG 48X24X48 CD-CDRW / DVD COMBO	\$98.43	\$98.43
1 ea.	Keytronic PS/2 Keyboard	\$15.95	\$15.95
1 ea.	Logitech Optical Mouse (Not Cordless)	\$19.17	\$19.17
1 ea.	SAMPO 17" LCD FLAT PANEL	\$479.00	\$479.00
1 ea.	Microsoft Windows 2000 PRO (OEM)	\$167.50	\$167.50

**Order Notes:**  
 A1--Consultation

**Sub Total: \$1,297.78**

**Shipping: \$0.00**

**Tax: \$64.89**

**Total: \$1,362.67**

**Amount Tendered: \$0.00**

**Balance Due: \$1,362.67**

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4/7/2003



Print Close

# INVOICE

**Meridian Computer Center**  
1580 W 4th  
Meridian Id  
83642  
1-208-884-4991

Date	Invoice #
April 07, 2003 10:36 AM	10578
Sales by: Jason Patten	

Customer
<b>Bridge Tower Dental</b> 3250 N. Towerbridge Way Meridain, ID 98642 322-0030

Terms: On Account

QTY	ITEM	PRICE	TOTAL
1 ea.	SHUTTLE / SK41G / SOCKET A	\$294.08	\$294.08
1 ea.	AMD ATHLON XP 1700 @ 266 FSB	\$75.86	\$75.86
1 ea.	DDR 256 MB RAM PC2100	\$50.53	\$50.53
1 ea.	3.5 FLOPPY DRIVE	\$16.08	\$16.08
1 ea.	MAXTOR 20 GIG 7200	\$81.18	\$81.18
1 ea.	LG 48X24X48 CD-CDRW / DVD COMBO	\$0.00	\$0.00
1 ea.	MINI KEYBOARD	\$34.27	\$34.27
1 ea.	Logitech Optical Mouse (Not Cordless)	\$19.17	\$19.17
1 ea.	BENQ 15" FLAT PANEL	\$348.29	\$348.29
1 ea.	Microsoft Windows 2000 PRO (OEM)	\$167.50	\$167.50
1 ea.	LPT PCI Port (1 LPT Ports)	\$39.95	\$39.95

**Order Notes:**  
Al--Sterilization

**Sub Total: \$1,126.91**

**Shipping: \$0.00**

**Tax: \$56.35**

**Total: \$1,183.26**

**Amount Tendered: \$0.00**

**Balance Due: \$1,183.26**

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1,183.26 +  
 2,450.85 +  
 2,319.17 +  
 1,362.67 +  
 378.76 +  
 5,945.1 +  
 13,539.87 \*

*M. Lee*  
*Comp*  
 13,539.87  
 000020

Print Close

**"THE POWER TO REALIZE A DREAM"**

# INVOICE

**Meridian Computer Center**  
1580 W 4th  
Meridian Id  
83642  
1-208-884-4991

Date	Invoice #
April 07, 2003 10:38 AM	10579
Sales by: Jason Patten	

Customer
<b>Bridge Tower Dental</b> 3250 N. Towerbridge Way Meridain, ID 98642 322-0030

Terms: On Account

QTY	ITEM
2 ea.	SHUTTLE / SK41G / SOCKET A

**PRICE TOTAL**  
\$294.08 \$588.16

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THE POWER TO REALIZE A DREAM

INVOICE

Meridian Computer Center  
1580 W 4th  
Meridian Id  
83642  
1-208-884-4991

Date	Invoice #
April 07, 2003 10:38 AM	10579
Sales by: Jason Patten	

Customer
<b>Bridge Tower Dental</b> 3250 N. Towerbridge Way Meridain, ID 98642 322-0030

Terms: On Account

QTY	ITEM	PRICE	TOTAL
2 ea.	SHUTTLE / SK41G / SOCKET A	\$294.08	\$588.16
2 ea.	AMD ATHLON XP 1700 @ 266 FSB	\$75.86	\$151.72
2 ea.	DDR 256 MB RAM PC2100	\$50.53	\$101.06
2 ea.	3.5 FLOPPY DRIVE	\$16.08	\$32.16
2 ea.	MAXTOR 20 GIG 7200	\$81.18	\$162.36
2 ea.	LG 48X24X48 CD-CDRW / DVD COMBO	\$98.43	\$196.86
2 ea.	Keytronic PS/2 Keyboard	\$15.95	\$31.90
2 ea.	Logitech Optical Mouse (Not Cordless)	\$19.17	\$38.34
2 ea.	BENQ 15" FLAT PANEL	\$348.29	\$696.58
2 ea.	Microsoft Windows 2000 PRO (OEM)	\$167.50	\$335.00

Order Notes:  
All--Receptions

Sub Total: \$2,334.14

Shipping: \$0.00

Tax: \$116.71

Total: \$2,450.85

Amount Tendered: \$0.00

Balance Due: \$2,450.85

Print Close

**THE POWER TO REALIZE A DREAM**

**INVOICE**

**Meridian Computer Center**  
1580 W 4th  
Meridian Id  
83642  
1-208-884-4991

Date	Invoice #
April 07, 2003 10:40 AM	10580
Sales by: Jason Patten	

Customer
<b>Bridge Tower Dental</b> 3250 N. Towerbridge Way Meridain, ID 98642 322-0030

Terms: On Account

QTY	ITEM	PRICE	TOTAL
1 ea.	VICTOR PRO TOWER/CASE4677	\$59.01	\$59.01
1 ea.	GIGABYTE SOCKET A 7VXP W/ RAID	\$140.60	\$140.60
1 ea.	AMD ATHLON XP 2100 @ 266 FSB	\$120.39	\$120.39
1 ea.	80 MM 4 PIN CHASSIS FAN	\$9.63	\$9.63
1 ea.	Global Win WBK68 Athlon Fan	\$18.86	\$18.86
1 ea.	DDR 512 MB PC-2700	\$95.13	\$95.13
1 ea.	3.5 FLOPPY DRIVE	\$16.08	\$16.08
2 ea.	MAXTOR 80 GB 7200	\$118.74	\$237.48
1 ea.	Lite On 52x CDROM Drive	\$37.05	\$37.05
1 ea.	ASUS GEFORCE2 MX-400	\$54.86	\$54.86
1 ea.	Keytronic PS/2 Keyboard	\$15.95	\$15.95
1 ea.	Logitech Optical Mouse (Not Cordless)	\$19.17	\$19.17
1 ea.	BENQ 15" FLAT PANEL	\$348.29	\$348.29
1 ea.	Microsoft Windows 2000 PRO (OEM)	\$167.50	\$167.50
1 ea.	KOUTECH SCSI CARD 910UW	\$98.72	\$98.72
1 ea.	SONY DAT DDS3 DRIVE	\$642.40	\$642.40
7 ea.	SONY DDS-3 DAT TAPE	\$18.23	\$127.61

**Order Notes:**  
Al Colson--Cox Server

**Sub Total: \$2,208.73**

**Shipping: \$0.00**

**Tax: \$110.44**

**Total: \$2,319.17**

**Amount Tendered: \$0.00**

**Balance Due: \$2,319.17**

*Added to (800) 601-5  
5-9-03*

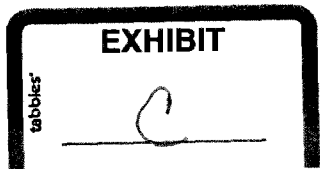
**INVOICE**  
**Bridge Tower Dental**  
05/02/03

Al Colson  
5975 South Ten Mile  
Meridian Idaho 83642-6852

Installation of new hardware (8 PCs, 1 server, 1 Mfp printer, 1 cable modem,  
1 router/firewall and 1 scanX scanner) and software (Practice works, FX digital xray,  
Nortons antiviruse and StarOffice). .....\$1600.00 ✓  
Final contract invoice for hardware and software for Bridge Tower Dental. ....\$1752.14

- Star 80
- Norton's Antivirus \$40 x 9
- new windows 3000 165 x 9
- back-up software

**Total \$ 3352.14**



000024

**INVOICE**  
**Bridge Tower Dental**  
05/02/03

Al Colson  
5975 South Ten Mile  
Meridian Idaho 83642-6852

Reimbursement for new dat tape.....	\$ 19.43
Reimbursement for new modem.....	\$ 26.78
Training/initial support (16 hr).....	\$ 500.00
Additional out of bid support/installation (setup/network existing systems, install and configure PC Anywhere and router for remote access, installation of additional hardware/networking) .....	\$ 500.00

Total \$ 1046.21

000025

P 11

# INVOICE

Bridge Tower Dental  
04/24/03

Al Colson  
5975 South Ten Mile  
Meridian Idaho 83642-6852

Installation of new hardware (8 PCs, 1 server, 1 Mfp printer, 1 cable modem, 1 router/firewall and 1 scanX scanner) and software (Practice works, FX digital xray, Nortons antiviruse and StarOffice).	\$1600.00	- part 5
Training/initial support (16 hr)	\$ 500.00	
Additional out of bid support/installation (setup/network existing systems, install and configure PC Anywhere and router for remote access, installation of additional hardware/networking)	\$ 500.00	

Total \$ 2600.00  
 - 1600 519  
 \$ 1,000

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# Monthly Service Contract

10/01/03

For: Bridge Tower Dental

Provided by I.T. Works - Al Colson

## Monthly cost:

Monthly charges would be \$500.

## Hardware:

1. Computers will be cleaned yearly to maintain optimal cooling performance.
2. Maintain equipment requiring warranty/non warranty service (excluding parts).
3. Networking as needed (very large/complicated networking needs may require outside support).
4. Equipment upgrades.

## Software:

1. Insuring that software is up to date (i.e. Norton Anti Virus).
2. Updating/installing current or new software.
3. Applying system/security and virus updates as needed.
4. Removal of any virus found on systems.
5. Assisting with software questions/training when possible. Do to the large number of packages available knowledge of specific packages and their operation may vary.

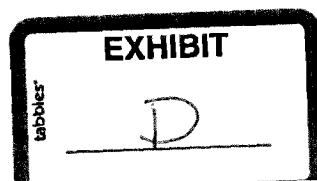
## Data/Server Maintenance:

1. Insuring that system backups are completing successfully.
2. Imaging server on a monthly basis or as needed.
3. Tracking disk space usage, insuring that the server never runs out of space
4. Disaster recovery due to system failure, fire..... etc.
5. Off-site storage of backup media

## Consulting:

The two areas that I offer this type of service for are :

1. Areas concerning Information Technology.
2. Areas concerning Management/personnel issues.



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### Items not covered:

1. Any software/hardware required to upgrade or replacement of defective components not covered under warranty. All hardware/software that is required will be purchased at cost.
2. Labor exceeding 20 hours per month to be negotiated prior to work being performed.

### Advantages of a monthly service contract:

1. Saving money---Usual fee is \$50.00 per hour, therefore after the first ten hours the remaining time is free.
2. Budgeting---Level pay rather than never knowing from month to month what your IT costs will be.
3. Personnel will be able to call directly with small problems before they become critical.
4. Assisting personnel with software/hardware issues, allowing them to utilize their time for business matters rather than technical matters.
5. On call when needed, with same day support in most cases.
6. Weekly office visits, to check on how things are going and to answer questions that most likely would never be called in.
7. System/software updates/patches would be scheduled either after hours or at a time that would reduce/eliminate the impact on your organization.

*At Cash*  
*W. J. Jones*

FILED  
P.M. 3:53

DEC 31 2007

D. DAVID NAVARRO, Clerk  
By A. YOONE  
DEPUTY

Shelly H. Cozakos, Bar No. 5374  
Cynthia L. Yee Wallace, Bar No. 6793  
PERKINS COIE LLP  
251 East Front Street, Suite 400  
Boise, ID 83702-7310  
Telephone: 208.343.3434  
Facsimile: 208.343.3232

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BRIDGE TOWER DENTAL, P.A.,

Plaintiff,

v.

AL COLSON dba I. T. WORKS, and  
MERIDIAN COMPUTER CENTER,  
INC., an Idaho corporation,

Defendants.

Case No. CV OC 0712775

**FIRST AMENDED COMPLAINT AND  
DEMAND FOR JURY TRIAL**

Plaintiff Bridge Tower Dental, P.A. ("Plaintiff") for a claim against Defendants I. T. Works and Meridian Computer Center, Inc. ("Defendants"), complains and alleges as follows:

1. Plaintiff Bridge Tower Dental, P.A. is an Idaho Professional Association in good standing and does business in Meridian, Ada County, Idaho.
2. Defendant Al Colson resides in Meridian, Ada County, Idaho. I. T. Works is an assumed business name by which Defendant Al Colson does business in Meridian, Ada County, Idaho ("Colson").

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3. Defendant Meridian Computer Center, Inc. is an Idaho corporation in good standing and does business in Meridian, Ada County, Idaho (“Meridian Computers”).

4. This Court has jurisdiction over this complaint pursuant to Idaho Code § 5-404. Venue is proper in this district pursuant to Idaho Code § 5-414.

#### **FACTUAL ALLEGATIONS**

5. On or about March 27, 2003, Defendant Colson provided a computer software and hardware bid to Plaintiff including several computer workstations and a server, monitors, printers and other computer accessories. The total bid for the equipment was \$14,659.00. Installation was also bid by Defendant Colson for \$1600.00. A true and correct copy of the bid is attached hereto as Exhibit A and incorporated herein by this reference.

6. The bid contained a custom design computer package prepared by both Defendants specifically for Plaintiff.

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9. On or about October 1, 2003, Defendant Colson prepared and submitted to Plaintiff a Monthly Service Contract (the “Service Contract”) to provide computer software, hardware, data, and server maintenance and support, consultation and training, and other

services to the Meridian Computer Products, all as more particularly described in the Service Contract, a true and correct copy of which is attached hereto as Exhibit D and incorporated herein by this reference. Plaintiff executed the Service Contract on October 1, 2003.

10. In June, 2005, while performing a software update under the Monthly Service Contract, Defendant Colson noted several errors and system lock-ups occurring in the server component of the Meridian Computer Products (hereafter "the server"). Defendant Colson, suspecting the mirror drives were failing, took the server and drives to Defendant Meridian Computers for repair.

11. Plaintiff's server, which was taken to Defendant Meridian Computers, contained all of the software and data Plaintiff used to operate its dental practice, including all Plaintiff's confidential patient information. Neither Defendant at any time stored or created a back-up the data on the server after it was disconnected and removed from Plaintiff's premises.

12. Thereafter, in June, 2005, Meridian Computers performed service work on the server at the request of Defendant Colson and for the express benefit of Plaintiff.

13. On or about July 21, 2005, Plaintiff was informed that none of the data stored in the server at the time the server was removed from Plaintiff's premises by Defendant Colson was recoverable. The data had been removed in the course of the services performed by Defendants.

14. In the course of investigating the cause of the loss of data from Plaintiff's server, it was determined that the drives had been installed in the server incorrectly, thus contributing to the loss of Plaintiff's patient data.

15. As a result of the lost patient data, Plaintiff was unable to continue normal operations of its dental practice. Plaintiff was forced to recreate patient files and perform a large number of dental services and examinations of Plaintiff's patients at no charge in order to create adequate patient files so it could provide adequate care to its patients.

**COUNT 1**

***Breach of Contract***  
**(Against Defendant Colson)**

16. Plaintiff hereby incorporates paragraphs 1 through 15 as though set forth in full.

17. Defendant Colson breached the Monthly Service Contract by failing to provide data/server maintenance, failing to provide system recovery, failing to provide off-site storage of backup media, and generally failing to maintain Plaintiff's computer equipment in good and functioning order.

18. Defendant Colson also breached his installation of hardware and software agreement with Plaintiff, as that agreement is represented in Exhibit A hereto, by failing to properly install the drives and other equipment identified in Exhibit A.

19. As a result of Defendants' breach, Plaintiff has suffered damages in such amounts that will be proven at trial.

**COUNT 2**

***Breach of Contract***  
**(Against Defendant Meridian Computers)**

20. Plaintiff hereby incorporates paragraphs 1 through 19 as though set forth in full.

21. Defendant Meridian Computers breached its purchase and sale of goods agreement, as that agreement is represented in Exhibit B. hereto, by failing to provide properly configured equipment.

22. Defendant Meridian Computers also breached the service and repair agreement with Defendant Colson, of which Plaintiff was a third party beneficiary, by failing to properly perform those services, resulting in a complete loss of Plaintiff's patient data.

23. As a result of Defendants' breach, Plaintiff has suffered damages in such amounts that will be proven at trial.

**COUNT 3**

***Negligence***  
**(Against Defendant Meridian Computers)**

24. Plaintiff hereby incorporates paragraphs 1 through 23 as though set forth in full.

25. Defendant owed Plaintiff a duty of reasonable care to perform the agreed upon services.

26. Defendant breached its duty to Plaintiff by not providing Plaintiff with reasonable and customary computer maintenance and repair services.

27. Defendant's breach resulted in a total loss of Plaintiff's entire database.

28. As a result of Defendant's breach, Plaintiff has suffered damages in such amounts that will be proven at trial.

**COUNT 4**

***Negligence***  
**(Against Defendant Colson)**

29. Plaintiff hereby incorporates paragraphs 1 through 28 as though set forth in full.

30. As a provider of retail customer service, Defendant Colson owed a duty of reasonable care to Plaintiff.

31. Defendant Colson breached this duty by not providing Plaintiff with reasonable, ordinary and customary computer installation, maintenance and data storage services.

32. Defendant's breach resulted in a total loss of Plaintiff's entire database and patient data.

33. As a result of Defendant's actions, Plaintiff has suffered damages in such amounts that will be proven at trial.

**ATTORNEY'S FEES AND COSTS**

As a result of the wrongful conduct of Defendants, Plaintiff has been forced to retain the services of Perkins Coie, LLP to bring this Complaint and Demand for Jury Trial. Plaintiff is entitled to recover attorney's fees and costs pursuant to Idaho Code §§ 12-120, 12-121 and other applicable Idaho law.

**WHEREFORE**, Plaintiff prays for relief against Defendants as follows:

1. A judgment in favor of Plaintiff and against Defendants in an amount to be proven at trial;

2. An award of pre-judgment and post-judgment interest on Plaintiff's damages;
3. An award of all attorney's fees and costs incurred by Plaintiff in prosecuting this action;
4. An award of damages incurred by Plaintiff as a result of Defendants' wrongful conduct, in an amount to be proven at trial, which amount exceeds \$10,000;
5. Such further relief this Court deems just under the circumstances.

DATED: December 31, 2007

**PERKINS COIE LLP**

By: *Cy Wallace for*  
Shelly H. Cozacos, Of the Firm  
Attorneys for Plaintiffs



03/27/2003 14:36 8874832

KATHRYN&AL COLSON

PAI

**Bridge Tower computer equipment/support bid.**

**Hardware**

**Computers:**

- One file server with tape backup and active mirroring (full tower, air cooled) \$2800.00
- Seven workstations with 15 inch LCD monitors (small footprint/ liquid cooled) \$7889.00
- One workstation with 18 inch LCD monitor \$1250.00
- (server and workstations covered by a 3 yr warranty from Meridian Computer Center)
- One UPS (uninterpretable power supply) for file server \$150.00
- Ten surge protectors \$150.00

**Networking:**

- One Router/Firewall \$50.00
- One sixteen port switch \$150.00

**Printers:**

- Canon D680 digital Copier/Printer/Fax \$700.00
  - Single cartridge system
  - 13 pages per minute
  - 30 sheet automatic document feeder and flatbed scanner
  - 500 sheet front loading cassette tray and 100 sheet front loading tray
  - 600X600 dpi copy/print resolution
  - energy saving mode
  - super G3 33.6Kpps fax modem built in
  - 3-yr limited warranty, 1st yr on site

- Hp 2230 Business inkjet Printer \$300.00
  - Individual high capacity ink cartridges for low cost per page
  - 11ppm black and 7.5 ppm color
  - 1200X600 dpi
  - 250 sheet paper tray
  - 10,000 page duty cycle
  - 96/167 MHZ dual processor and 16 meg of on-board memory

**Software**

- Norton anti-virus for eleven systems \$440.00
- StarOffice 6.0, four copies \$340.00

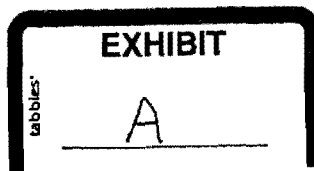
**Miscellaneous Items**

- Seven backup tapes for file server \$140.00
- Cables (network, monitor, keyboard and mouse extensions) \$300.00

Total for equipment (excluding tax)

Total for Installation

\$14650.00  
~~\$1600.00~~  
 000038



164

Print Close

THE POWER TO REALIZE A DREAM

INVOICE

Meridian Computer Center  
1580 W 4th  
Meridian Id  
83642  
1-208-884-4991

Date	Invoice #
April 07, 2003 10:30 AM	10575
Sales by: Jason Patten	

Customer
<b>Bridge Tower Dental</b> 3250 N. Towerbridge Way Meridain, ID 98642 322-0030

Terms: On Account

QTY	ITEM	PRICE TOTAL
-1	MINI KEYBOARD	\$34.27 (\$34.27)
ea.		
1 ea.	Logitech iTouch Cordless Freedom w/ Mouse	\$65.87 \$65.87
-1	Logitech Optical Mouse (Not Cordless)	\$19.17 (\$19.17)
ea.		
1 ea.	BENQ 15" FLAT PANEL	\$348.29 \$348.29

Order Notes:  
Al Colson changes.

Sub Total: \$360.72

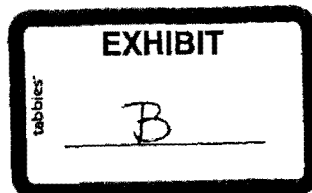
Shipping: \$0.00

Tax: \$18.04

Total: \$378.76

Amount Tendered: \$0.00

Balance Due: \$378.76



Print Close

**"THE POWER TO REALIZE A DREAM"**

**INVOICE**

**Meridian Computer Center**  
 1580 W 4th  
 Meridian Id  
 83642  
 1-208-884-4991

Date	Invoice #
April 07, 2003 10:32 AM	10576
Sales by: Jason Patten	

Customer
<b>Bridge Tower Dental</b> 3250 N. Towerbridge Way Meridain, ID 98642 322-0030

Terms: On Account

QTY	ITEM	PRICE	TOTAL
4 ea.	SHUTTLE / SK41G / SOCKET A	\$294.08	\$1,176.32
4 ea.	AMD ATHLON XP 1700 @ 266 FSB	\$75.86	\$303.44
4 ea.	DDR 256 MB RAM PC2100	\$50.53	\$202.12
4 ea.	3.5 FLOPPY DRIVE	\$16.08	\$64.32
4 ea.	MAXTOR 20 GIG 7200	\$81.18	\$324.72
4 ea.	SONY 16X DVD-ROM	\$58.81	\$235.24
4 ea.	MATROX G450 MARVEL ETV 32MB	\$225.00	\$900.00
4 ea.	MINI KEYBOARD	\$34.27	\$137.08
4 ea.	Logitech Optical Mouse (Not Cordless)	\$19.17	\$76.68
4 ea.	BENQ 15" FLAT PANEL	\$348.29	\$1,393.16
4 ea.	Microsoft Windows 2000 PRO (OEM)	\$167.50	\$670.00
8 ea.	25' PS/2 EXTENSION	\$13.88	\$111.04
4 ea.	25' SVGA 3 COAX / HDB15 M/F	\$16.97	\$67.88

**Order Notes:**  
 Al-Operatories

**Sub Total: \$5,662.00**

**Shipping: \$0.00**

**Tax: \$283.10**

**Total: \$5,945.10**

**Amount Tendered: \$0.00**

**Balance Due: \$5,945.10**

Print Close

**"The Power to Realize a Dream"**

# INVOICE

**Meridian Computer Center**  
1580 W 4th  
Meridian Id  
83642  
1-208-884-4991

Date	Invoice #
April 07, 2003 10:34 AM	10577
Sales by: Jason Patten	

Customer
<b>Bridge Tower Dental</b> 3250 N. Towerbridge Way Meridain, ID 98642 322-0030

Terms: On Account

QTY	ITEM	PRICE	TOTAL
1 ea.	SHUTTLE / SK41G / SOCKET A	\$294.08	\$294.08
1 ea.	AMD ATHLON XP 1700 @ 266 FSB	\$75.86	\$75.86
1 ea.	DDR 256 MB RAM PC2100	\$50.53	\$50.53
1 ea.	3.5 FLOPPY DRIVE	\$16.08	\$16.08
1 ea.	MAXTOR 20 GIG 7200	\$81.18	\$81.18
1 ea.	LG 48X24X48 CD-CDRW / DVD COMBO	\$98.43	\$98.43
1 ea.	Keytronic PS/2 Keyboard	\$15.95	\$15.95
1 ea.	Logitech Optical Mouse (Not Cordless)	\$19.17	\$19.17
1 ea.	SAMPO 17" LCD FLAT PANEL	\$479.00	\$479.00
1 ea.	Microsoft Windows 2000 PRO (OEM)	\$167.50	\$167.50

**Order Notes:**  
Al-Consultation

**Sub Total: \$1,297.78**

**Shipping: \$0.00**

**Tax: \$64.89**

**Total: \$1,362.67**

**Amount Tendered: \$0.00**

**Balance Due: \$1,362.67**

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Print Close

THE POWER TO REALIZE A DREAM

INVOIC

Meridian Computer Center
1580 W 4th
Meridian Id
83642
1-208-884-4991

Table with 2 columns: Date, Invoice #. Date: April 07, 2003 10:36 AM. Invoice #: 10578. Sales by: Jason Patten

Customer
Bridge Tower Dental
3250 N. Towerbridge Way
Meridain, ID 98642
322-0030

Terms: On Account

Table with 3 columns: QTY, ITEM, PRICE TOTAL. Lists items like SHUTTLE / SK41G / SOCKET A, AMD ATHLON XP 1700 @ 266 FSB, etc.

Order Notes:
Al--Sterilization

Sub Total: \$1,126.91

Shipping: \$0.00
Tax: \$56.35

Total: \$1,183.26

Amount Tendered: \$0.00

Balance Due: \$1,183.26

••0••

1,183.26 +
2,450.85 +
2,319.17 +
1,362.67 +
378.76 +
5,945.1 +
13,539.8 \*

Handwritten notes and stamp: 000040

Print Close

**"THE POWER TO REALIZE A DREAM"**

# INVOICE

**Meridian Computer Center**  
1580 W 4th  
Meridian Id  
83642  
1-208-884-4991

Date	Invoice #
April 07, 2003 10:38 AM	10579
Sales by: Jason Patten	

Customer
<b>Bridge Tower Dental</b> 3250 N. Towerbridge Way Meridain, ID 98642 322-0030

Terms: On Account

<b>QTY</b>	<b>ITEM</b>
2 ea.	SHUTTLE / SK41G / SOCKET A

<b>PRICE TOTAL</b>
\$294.08 \$588.16

000041

Print Close

**"THE POWER TO REALIZE A DREAM"**

**INVOICE**

**Meridian Computer Center**  
 1580 W 4th  
 Meridian Id  
 83642  
 1-208-884-4991

Date	Invoice #
April 07, 2003 10:38 AM	10579
Sales by: Jason Patten	

Customer
<b>Bridge Tower Dental</b> 3250 N. Towerbridge Way Meridain, ID 98642 322-0030

Terms: On Account

QTY	ITEM	PRICE	TOTAL
2 ea.	SHUTTLE / SK41G / SOCKET A	\$294.08	\$588.16
2 ea.	AMD ATHLON XP 1700 @ 266 FSB	\$75.86	\$151.72
2 ea.	DDR 256 MB RAM PC2100	\$50.53	\$101.06
2 ea.	3.5 FLOPPY DRIVE	\$16.08	\$32.16
2 ea.	MAXTOR 20 GIG 7200	\$81.18	\$162.36
2 ea.	LG 48X24X48 CD-CDRW / DVD COMBO	\$98.43	\$196.86
2 ea.	Keytronic PS/2 Keyboard	\$15.95	\$31.90
2 ea.	Logitech Optical Mouse (Not Cordless)	\$19.17	\$38.34
2 ea.	BENQ 15" FLAT PANEL	\$348.29	\$696.58
2 ea.	Microsoft Windows 2000 PRO (OEM)	\$167.50	\$335.00

**Order Notes:**  
 Al--Receptions

**Sub Total: \$2,334.14**

**Shipping: \$0.00**

**Tax: \$116.71**

**Total: \$2,450.85**

**Amount Tendered: \$0.00**

**Balance Due: \$2,450.85**

Print Close

**THE POWER TO REALIZE A DREAM**

**INVOICE**

**Meridian Computer Center**  
 1580 W 4th  
 Meridian Id  
 83642  
 1-208-884-4991

Date	Invoice #
April 07, 2003 10:40 AM	10580
Sales by: Jason Patten	

Customer
<b>Bridge Tower Dental</b> 3250 N. Towerbridge Way Meridain, ID 98642 322-0030

Terms: On Account

QTY	ITEM	PRICE	TOTAL
1 ea.	VICTOR PRO TOWER/CASE4677	\$59.01	\$59.01
1 ea.	GIGABYTE SOCKET A 7VXP W/ RAID	\$140.60	\$140.60
1 ea.	AMD ATHLON XP 2100 @ 266 FSB	\$120.39	\$120.39
1 ea.	80 MM 4 PIN CHASSIS FAN	\$9.63	\$9.63
1 ea.	Global Win WBK68 Athlon Fan	\$18.86	\$18.86
1 ea.	DDR 512 MB PC-2700	\$95.13	\$95.13
1 ea.	3.5 FLOPPY DRIVE	\$16.08	\$16.08
2 ea.	MAXTOR 80 GB 7200	\$118.74	\$237.48
1 ea.	Lite On 52x CDROM Drive	\$37.05	\$37.05
1 ea.	ASUS GEFORCE2 MX-400	\$54.86	\$54.86
1 ea.	Keytronic PS/2 Keyboard	\$15.95	\$15.95
1 ea.	Logitech Optical Mouse (Not Cordless)	\$19.17	\$19.17
1 ea.	BENQ 15" FLAT PANEL	\$348.29	\$348.29
1 ea.	Microsoft Windows 2000 PRO (OEM)	\$167.50	\$167.50
1 ea.	KOUTECH SCSI CARD 910UW	\$98.72	\$98.72
1 ea.	SONY DAT DDS3 DRIVE	\$642.40	\$642.40
7 ea.	SONY DDS-3 DAT TAPE	\$18.23	\$127.61

**Order Notes:**  
 Al Colson--Cox Server

**Sub Total:** \$2,208.73

**Shipping:** \$0.00

**Tax:** \$110.44

**Total:** \$2,319.17

**Amount Tendered:** \$0.00

**Balance Due:** \$2,319.17



*faxed to 18  
5-9-03*

**INVOICE**  
**Bridge Tower Dental**  
05/02/03

Al Colson  
5975 South Ten Mile  
Meridian Idaho 83642-6852

Installation of new hardware (8 PCs, 1 server, 1 Mfp printer, 1 cable modem,  
1 router/firewall and 1 scanX scanner) and software (Practice works, FX digital xray,  
Nortons antiviruse and StarOffice). .....

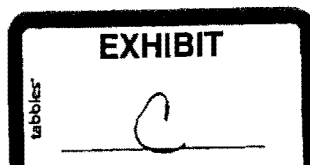
\$1600.00 ✓

Final contract invoice for hardware and software for Bridge Tower Dental. ....

\$1752.14

- Star 80
- Norton's Antivirus \$40 x 9
- Windows 2000 165 x 9
- Back-up software

Total \$ 3352.14



000044

**INVOICE**  
**Bridge Tower Dental**  
05/02/03

Al Colson  
5975 South Ten Mile  
Meridian Idaho 83642-6852

Reimbursement for new dat tape.....	\$ 19.43
Reimbursement for new modem.....	\$ 26.78
Training/initial support (16 hr).....	\$ 500.00
Additional out of bid support/installation (setup/network existing systems, install and configure PC Anywhere and router for remote access, installation of additional hardware/networking) .....	\$ 500.00

Total \$ 1046.21

000045

# Monthly Service Contract

10/01/03

For: Bridge Tower Dental

Provided by I.T. Works - Al Colson

## Monthly cost:

Monthly charges would be \$500.

## Hardware:

1. Computers will be cleaned yearly to maintain optimal cooling performance.
2. Maintain equipment requiring warranty/non warranty service (excluding parts).
3. Networking as needed (very large/complicated networking needs may require outside support).
4. Equipment upgrades.

## Software:

1. Insuring that software is up to date (i.e. Norton Anti Virus).
2. Updating/installing current or new software.
3. Applying system/security and virus updates as needed.
4. Removal of any virus found on systems.
5. Assisting with software questions/training when possible. Do to the large number of packages available knowledge of specific packages and their operation may vary.

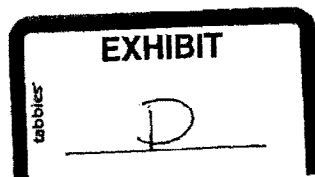
## Data/Server Maintenance:

1. Insuring that system backups are completing successfully.
2. Imaging server on a monthly basis or as needed.
3. Tracking disk space usage, insuring that the server never runs out of space
4. Disaster recovery due to system failure, fire..... etc.
5. Off-site storage of backup media

## Consulting:

The two areas that I offer this type of service for are :

1. Areas concerning Information Technology.
2. Areas concerning Management/personnel issues.



000046

JAN 22 2008

J. DAVID NAVARRO, Clerk  
By A. COONE  
CLERK

Kenneth C. Howell, ISB No. 3235  
HAWLEY TROXELL ENNIS & HAWLEY LLP  
877 Main Street, Suite 1000  
P.O. Box 1617  
Boise, ID 83701-1617  
Telephone: (208) 344-6000  
Facsimile: (208) 342-3829  
Email: kch@hteh.com

Attorneys for Defendant Al Colson

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BRIDGE TOWER DENTAL, P.A., )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 AL COLSON dba I.T. WORKS, and )  
 MERIDIAN COMPUTER CENTER, INC., an )  
 Idaho corporation, )  
 )  
 Defendants. )  
 )

Case No. CV OC 0712775  
ANSWER TO FIRST AMENDED  
COMPLAINT

COMES NOW Al Colson ("Colson") and for an answer to Plaintiff's Amended  
Complaint avers as follows:

**I.  
GENERAL DEFENSE**

Except as specifically admitted herein, Colson denies each and every provision of  
Plaintiff's Amended Complaint.

3

## II. ADMISSIONS AND DENIALS

1. Colson admits the provisions of paragraphs 1 through 4 of Plaintiff's Amended Complaint, except the provisions of paragraphs 1 and 3 insofar as they describe the business entity's status as that of "good standing." With respect to these references, Colson does not have sufficient knowledge to admit the same, and accordingly denies these provisions on the basis of a lack of information and belief.

2. With respect to paragraph 5 of Plaintiff's Amended Complaint, Colson admits providing to Plaintiff the document attached as Exhibit A, but denies that Plaintiff's description of the document or the transaction is accurate or complete. Colson admits that installation was proposed for the sum of \$1600. Colson denies the balance of the provisions of this paragraph.

3. Colson denies the provisions of paragraph 6 of Plaintiff's Amended Complaint.

4. With respect paragraph 7 of Plaintiff's Amended Complaint, Colson admits that defendant Meridian Computer Center, Inc. sold to Plaintiff certain computers and associated equipment and accessories partially described in Exhibit B.

5. Colson admits the provisions of paragraph 8 of Plaintiff's Amended Complaint.

6. With respect to paragraph 9 of Plaintiff's Amended Complaint, Colson admits the preparation and submission of the proposed monthly service contract as described. Colson further admits that Plaintiff initially approved the service contract. Colson denies that the service contract continued uninterruptedly in force, or that Plaintiff fully performed all of its contractual obligations incumbent upon it to perform with respect to that service contract, or that the service contract is a complete integrated expression of any contractual agreement based wholly or partially upon that document.

7. With respect paragraph 10 of Plaintiff's Amended Complaint, Colson admits only that due to operational errors, and at the request of Plaintiff, the server was delivered to Meridian Computers.

8. Colson admits the provisions of paragraph 11 of Plaintiff's Amended Complaint, but denies that Colson had any obligation to create a backup of the data on the server after it was disconnected and removed from Plaintiff's premises.

9. With respect paragraph 12 of Plaintiff's Amended Complaint, Colson admits that in June of 2005 Meridian Computers performed service work on the server at Colson's request, acting in his capacity as Plaintiff's representative.

10. With respect paragraph 13 of Plaintiff's Amended Complaint, Colson admits that in July of 2005, both Colson and Plaintiff were advised that none of the data stored in the server was recoverable. Colson denies that any data had been removed in the course of the services performed by Colson.

11. Colson denies the provisions of paragraph 14 of Plaintiff's Amended Complaint.

12. Colson denies the provisions of paragraph 15 of Plaintiff's Amended Complaint.

13. With respect paragraph 16 of Plaintiff's Amended Complaint, Colson incorporates his admissions and denials to the referenced paragraphs as if set forth here in full.

14. Colson denies the provisions of paragraphs 17, 18 and 19 of Plaintiff's Amended Complaint.

15. With respect to paragraph 20 of Plaintiff's Amended Complaint, Colson incorporates his admissions and denials to the referenced paragraphs as if set forth here in full.

000049

16. With respect paragraph 21 of Plaintiff's Amended Complaint, Colson does not have sufficient information or belief enabling an admission of this paragraph, and accordingly denies the same on the basis of a lack of information and belief.

17. Colson denies the provisions of paragraph 22 and 23 of Plaintiff's Amended Complaint.

18. With respect paragraph 24 of Plaintiff's Amended Complaint, Colson incorporates his admissions and denials to the referenced paragraphs as if set forth here in full.

19. Colson denies the provisions of paragraphs 25, 26, 27 and 28 of Plaintiff's Amended Complaint.

20. With respect paragraph 29 of Plaintiff's Amended Complaint, Colson incorporates his admissions and denials to the referenced paragraphs as if set forth here in full.

21. Colson denies the provisions of paragraph 30, 31, 32 and 33 of Plaintiff's Amended Complaint.

### **III. AFFIRMATIVE DEFENSES**

22. Plaintiff failed to fully perform all contractual conditions precedent incumbent upon it to perform.

23. Plaintiff materially breached any contract with defendant Colson, excusing any further performance by Colson.

24. Defendant Colson is not the actual or proximate cause of any of Plaintiff's claimed damages. By making this affirmative defense, Colson does not admit that Plaintiff in fact suffered any damages, and denies the same.

25. Colson's negligence, if any, was less than that of Plaintiff or other defendants or other material participants, and Plaintiff should accordingly be denied all relief as against

000050

defendant Colson. By making this affirmative defense, Colson does not admit any negligence, but to the contrary affirmatively denies the same.

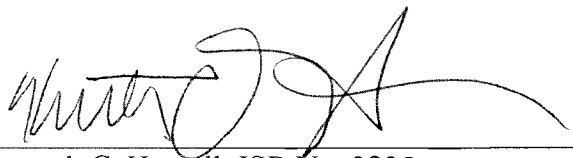
26. Colson has considered and believes that he may have additional affirmative defenses to Plaintiff's Amended Complaint which cannot be stated at this time due to the strictures of Idaho Rule of Civil Procedure 11. Colson reserves the right to amend these affirmative defenses and state additional affirmative defenses as discovery, and/or additional factual investigations progress.

WHEREFORE: Colson prays for relief against Plaintiff as follows:

1. That Plaintiff's Amended Complaint be dismissed and it take nothing thereby;
2. For an award of all of Colson's costs and attorneys fees incurred in defense of this action;
3. For such further and equitable relief as to the Court may seem just and equitable.

DATED THIS 22<sup>nd</sup> day of January, 2008.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By   
Kenneth C. Howell, ISB No. 3235  
Attorneys for Defendant AL COLSON



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27<sup>th</sup> day of January, 2008, I caused to be served a true copy of the foregoing ANSWER TO FIRST AMENDED COMPLAINT TO FIRST AMENDED COMPLAINT by the method indicated below, and addressed to each of the following:

Shelly H. Cozakos  
Cynthia L. Yee Wallace  
PERKINS COIE LLP  
251 East Front Street, Ste. 400  
Boise, ID 83702-7310

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 Telecopy



Kenneth C. Howell

FEB 15 2008

DAVID NAVARRO, Clerk  
D/A TOONE  
DEPUTY

**JOHN PRIOR**  
**LAW OFFICES OF JOHN PRIOR**  
ISB #5344  
16 12<sup>th</sup> Avenue S., Suite 113  
Nampa, ID 83651  
(208) 465-9839 Telephone  
(208) 465-9834 Facsimile

Attorney for Defendant, Meridian Computer Center, Inc.

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

BRIDGE TOWER DENTAL, P.A., )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 AL COLSON, dba I.T. WORKS, and )  
 MERIDIAN COMPUTER CENTER, INC., )  
 an Idaho Corporation, )  
 )  
 Defendants. )

CASE NO. CV OC 0712775

**ANSWER TO PLAINTIFF'S  
FIRST AMENDED COMPLAINT**

COMES NOW, the above named Defendant, Meridian computer Center, Inc., by and through counsel of record, JOHN PRIOR, and hereby answers the Amended Complaint filed by the Plaintiff, and admits, denies and alleges as follows:

**I**

**GENERAL DEFENSE**

Except as specifically admitted herein, Meridian Computer Center denies each and every allegation contained in Plaintiff's Amended Complaint.

**II**  
**ADMISSIONS AND DENIALS**

1. Meridian Computer Center admits the provisions of paragraph 1 of the Amended Complaint, except the provision of paragraph 1 insofar as it describes the business entity's status of "good standing." With respect to this reference, Meridian Computer Center does not have sufficient knowledge to admit the same, and accordingly denies this provision on the basis of lack of information and belief.

2. Meridian Computer Center admits the provision of paragraph 2 of the Plaintiff's Amended Complaint, except the provision of paragraph 2 insofar as it describes the business entity's "assumed business name of I.T. Works." With respect to this reference, Meridian Computer Center does not have sufficient knowledge to admit the same, and accordingly denies this provision on the basis of lack of information and belief.

3. Meridian Computer Center admits the provisions of paragraphs 3 and 4 of the Plaintiff's Amended Complaint.

4. Meridian Computer Center denies the provisions of paragraph 5 on the basis of lack of information and belief.

5. Meridian Computer Center denies the provisions of paragraph 6 of Plaintiff's Amended Complaint.

6. With respect to paragraph 7 of Plaintiff's Amended Complaint, Meridian Computer Center admits selling to the Plaintiff the computers and associated equipment and accessories described in Exhibit "B".

7. Meridian Computer Center denies the provisions of paragraph 8 of Plaintiff's Amended Complaint on the basis of lack of information and belief.

8. Meridian Computer Center denies the provisions of paragraph 9 of Plaintiff's Amended Complaint on the basis of lack of information and belief.

9. With respect to the provisions in paragraph 10 of Plaintiff's Amended Complaint, Meridian Computer Center admits only that Defendant Colson delivered the server to Meridian Computer Center for repair.

10. With respect to the provisions in paragraph 11 of Plaintiff's Amended Complaint, Meridian Computer Center admits only that the Plaintiff's server was delivered to Meridian Computer Center for repair. With respect to the reference that the server contained all of the software and data Plaintiff used to operate its dental practice, including all Plaintiff's confidential patient information, Meridian Computer Center does not have sufficient knowledge to admit the same, and accordingly denies this provision on the basis of lack of information and belief. Meridian Computer Center denies that it was under any obligation to create a back-up on the data on the server after it was disconnected and removed from the Plaintiff's premises.

11. Meridian Computer Center admits the provisions of paragraph 12 of the Plaintiff's Amended Complaint.

12. Meridian Computer Center denies the provisions of paragraph 13 and 14 of the Plaintiff's Amended Complaint.

13. Meridian Computer Center denies the provisions of paragraph 15 of Plaintiff's Amended Complaint on the basis of lack of information and belief.

16. With respect to paragraph 16 of Plaintiff's Amended Complaint, Meridian Computer Center incorporates his admissions and denials to the referenced paragraphs as is set forth and here in full.

17. Meridian Computer Center denies the provisions of paragraph 17 of Plaintiff's Amended Complaint on the basis of lack of information and belief.

18. Meridian Computer Center denies the provisions of paragraph 18 of Plaintiff's Amended Complaint on the basis of lack of information and belief.

19. Meridian Computer Center denies the provisions of paragraph 19 of Plaintiff's Amended Complaint on the basis of lack of information and belief.

20. With respect to paragraph 20 of Plaintiff's Amended Complaint, Meridian Computer Center incorporates his admissions and denials to the referenced paragraphs as is set forth and here in full.

21. Meridian Computer Center denies the provisions of paragraphs 21, 22, and 23 of the Plaintiff's Amended Complaint.

22. With respect to paragraph 24 of Plaintiff's Amended Complaint, Meridian Computer Center incorporates his admissions and denials to the referenced paragraphs as is set forth and here in full.

23. Meridian Computer Center denies the provisions of paragraphs 25, 26, 27, and 28 of the Plaintiff's Amended Complaint.

24. With respect to paragraph 29 of Plaintiff's Amended Complaint, Meridian Computer Center incorporates his admissions and denials to the referenced paragraphs as is set forth and here in full.

25. With respect to the provisions of paragraphs 30 and 31 of Plaintiff's Amended Complaint, Meridian Computer Center does not have sufficient knowledge to admit the same, and accordingly denies these provisions on the basis of lack of information and belief.

26. Meridian Computer Center denies the provisions of paragraphs 32 and 33 of the Plaintiff's Amended Complaint.

### III

#### AFFIRMATIVE DEFENSES

27. Defendant Meridian Computer Center is not the actual or proximate cause of any of Plaintiff's claimed damages. By making this affirmative defense, Meridian Computer Center does not admit that Plaintiff in fact has suffered any damages, and denies the same.

28. Meridian Computer Center's negligence, if any, was less than that of Plaintiff or other defendants or other material participants, and Plaintiff should accordingly be denied all relief as against defendant Meridian Computer Center. By making this affirmative defense, Meridian Computer Center does not admit any negligence, but to the contrary affirmatively denies the same.

29. Meridian Computer Center has considered and believes that he may have additional affirmative defenses to Plaintiff's Amended Complaint which cannot be stated at this time due to the strictures of Idaho Rule of Civil Procedure 11. Meridian Computer Center reserves the right to amend these affirmative defenses and state additional affirmative defenses as discovery, and/or additional factual investigations progress.

WHEREFORE, Meridian Computer Center prays for relief against Plaintiff as follows:

1. That Plaintiff's Amended Complaint be dismissed and it takes nothing thereby;
2. For an award of all of Meridian Computer Center's costs and attorneys fees in defense of this action;
3. For further and equitable relief as to the Court may seem just and equitable.

DATED this 14<sup>th</sup> day of February, 2008

  
JOHN PRIOR  
Attorney for Defendant  
MERIDIAN COMPUTER CENTER, INC.

**CERTIFICATE OF SERVICE**

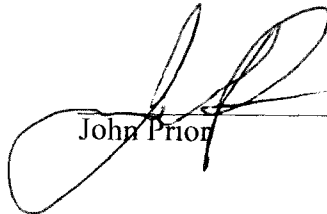
I HEREBY CERTIFY that on this 14<sup>th</sup> day of February, 2008, I served a true and correct copy of the within and foregoing ANSWER TO PLAINTIFF'S FIRST AMENDED COMPLAINT by the method indicated below and addresses to the following:

Shelly H. Cozakos  
PERKINS COIE, LLP  
251 East Front St., Ste 400  
Boise, ID 83702-7310  
Fax: (208) 343-3232

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile

Kenneth C. Howell  
HAWLEY TROXELL  
ENNIS & HAWLEY, LLP  
877 Main Street, Suite 1000  
Boise, ID 83701-1617  
Fax: (208) 342-3829

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile

  
John Prior



NO \_\_\_\_\_  
A.M. \_\_\_\_\_ FILED P.M. 2:30

APR 12 2010

J. DAVID NAVARRO, Clerk  
By J. RANDALL  
DEPUTY

Joe Borton [ISB No. 5552]  
BORTON LAW OFFICES  
1310 N. Main Street  
Meridian, Idaho 83642  
(208) 908-4415

*Attorneys for Defendant Meridian Computer Center, Inc.*

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

BRIDGE TOWER DENTAL, PA.,

Plaintiff,

v.

AL COLSON, dba I.T. WORKS., and  
MERIDIAN COMPUTER CENTER, INC.,  
an Idaho Corporation.

Defendants.

Case No.: CVOC-0712775

**DEFENDANT MERIDIAN COMPUTER  
CENTER, INC.'S PROPOSED JURY  
INSTRUCTIONS**

COMES NOW the Defendant Meridian Computer Center, Inc., by and through its counsel of record Joe Borton of Borton Law Offices, and submits the following proposed jury instructions.

000060

## DEFENDANT'S PROPOSED INSTRUCTION NO. 1

These instructions explain your duties as jurors and define the law that applies to this case. It is your duty to determine the facts, to apply the law set forth in these instructions to those facts, and in this way to decide the case. Your decision should be based upon a rational and objective assessment of the evidence. It should not be based on sympathy or prejudice.

It is my duty to instruct you on the points of law necessary to decide the case, and it is your duty to follow the law as I instruct. You must consider these instructions as a whole, not picking out one and disregarding others. The order in which these instructions are given or the manner in which they are numbered has no significance as to the importance of any of them. If you do not understand an instruction, you may send a note to me through the bailiff, and I will try to clarify or explain the point further.

In determining the facts, you may consider only the evidence admitted in this trial. This evidence consists of the testimony of the witnesses, the exhibits admitted into evidence, and any stipulated or admitted facts. While the arguments and remarks of the attorneys may help you understand the evidence and apply the instructions, what they say is not evidence. If an attorney's argument or remark has no basis in the evidence, you should disregard it.

The production of evidence in court is governed by rule of law. At times during the trial, I sustained an objection to a question without permitting the witness to answer it, or to an offered exhibit without receiving it into evidence. My rulings are legal matters, and are solely my responsibility. You must not speculate as to the reason for any objection, which was made, or my ruling thereon, and in reaching your decision you may not consider such

a question or exhibit or speculate as to what the answer or exhibit would have shown. Remember, a question is not evidence and should be considered only as it gives meaning to the answer.

The law does not require you to believe all of the evidence admitted in the course of the trial. As the sole judges of the facts, you must determine what evidence you believe and what weight you attach to it. In so doing, you bring with you to this courtroom all of the experience and background of your lives. There is no magical formula for evaluating testimony. In your everyday affairs, you determine for yourselves whom you believe, what you believe and how much weight you attach to what you are told. The considerations you use in making the more important decisions in your everyday dealings are the same considerations you should apply in your deliberations in this case.

IDJI 1.00

Given \_\_\_\_\_  
Refused \_\_\_\_\_  
Modified \_\_\_\_\_  
Covered \_\_\_\_\_  
Other \_\_\_\_\_

DEFENDANT'S PROPOSED INSTRUCTION NO. 2

During your deliberations, you will be entitled to have with you my instructions concerning the law that applies to this case, the exhibits that have been admitted into evidence and any notes taken by you in the course of the trial proceedings.

If you take notes during the trial, be careful that your attention is not thereby diverted from the witness or his testimony; and you must keep your notes to yourself and not show them to other persons or jurors until the jury deliberations at the end of the trial.

IDJI 1.01

Given \_\_\_\_\_  
Refused \_\_\_\_\_  
Modified \_\_\_\_\_  
Covered \_\_\_\_\_  
Other \_\_\_\_\_

000063

DEFENDANT'S PROPOSED INSTRUCTION NO. 3

The corporations involved in this case are entitled to the same fair and unprejudiced treatment that an individual would be under like circumstances. You should decide this case with the same impartiality that you would use in deciding a case between individuals.

IDJI 1.02

Given \_\_\_\_\_  
Refused \_\_\_\_\_  
Modified \_\_\_\_\_  
Covered \_\_\_\_\_  
Other \_\_\_\_\_

DEFENDANT'S PROPOSED INSTRUCTION NO. 4

There are certain things you must not do during this trial:

1. You must not associate in any way with the parties, any of the attorneys or their employees, or any of the witnesses.
2. You must not discuss the case with anyone, or permit anyone to discuss the case with you. If anyone attempts to discuss the case with you, or to influence your decision in the case, you must report it to me promptly.
3. You must not discuss the case with other jurors until you retire to the jury room to deliberate at the close of the entire case.
4. You must not make up your mind until you have heard all of the testimony and have received my instructions as to the law that applies to the case.
5. You must not contact anyone in an attempt to discuss or gain a greater understanding of the case.
6. You must not go to the place where any alleged event occurred.

IDJI 1.03

Given \_\_\_\_\_  
Refused \_\_\_\_\_  
Modified \_\_\_\_\_  
Covered \_\_\_\_\_  
Other \_\_\_\_\_

DEFENDANT'S PROPOSED INSTRUCTION NO. 5

Any statement by me identifying a claim of a party is not evidence in this case. I have advised you of the claims of the parties merely to acquaint you with the issues to be decided.

IDJI 1.05

Given \_\_\_\_\_  
Refused \_\_\_\_\_  
Modified \_\_\_\_\_  
Covered \_\_\_\_\_  
Other \_\_\_\_\_

DEFENDANT'S PROPOSED INSTRUCTION NO. 6

The following facts are not in dispute:

1. That on October 1, 2003 Plaintiff Bridgetower Dental entered into a written contract with Defendant Al Colson for the purchase and support of a new computer system for its dental business. A copy of that Contract has been admitted into evidence as Plaintiff's Exhibit \_\_\_\_.
2. That Plaintiff did not enter into a contract with Defendant Meridian Computer Center.

IDJI 1.07

Given \_\_\_\_\_  
Refused \_\_\_\_\_  
Modified \_\_\_\_\_  
Covered \_\_\_\_\_  
Other \_\_\_\_\_



DEFENDANT'S PROPOSED INSTRUCTION NO. 7

When a contract expresses no specific time for its performance, the law implies that it is to be performed within a reasonable time, as determined by the subject matter of the contract, the situation of the parties, and the circumstances attending the performance. If you find a contract exists in this case, you are to determine what a reasonable time would be for the performance of this contract under these circumstances.

IDJI 6.14.2

Given \_\_\_\_\_  
Refused \_\_\_\_\_  
Modified \_\_\_\_\_  
Covered \_\_\_\_\_  
Other \_\_\_\_\_

DEFENDANT'S PROPOSED INSTRUCTION NO. 8

You must determine what was intended by the parties as evidenced by the contract in this case. In making this determination you should consider, from the evidence, the following:

1. The contract must be construed as a whole, including all of the circumstances giving rise to it, to give consistent meaning to every part of it.
2. Language must be given its ordinary meaning, unless you find from the evidence that a special meaning was intended.
3. Any communications, conduct or dealings between the contracting parties showing what they intended and how they construed the doubtful language may be considered, provided that such may not completely change the agreement or construe one term inconsistently with the remainder of the terms.
4. The contract should be construed to avoid any contradiction or absurdities.
5. Persons within a specialized field are deemed to have contracted with reference to any generally known and customarily accepted language in that field, unless you find from the evidence that this was not intended.

IDJI 6.08.1

Given \_\_\_\_\_  
Refused \_\_\_\_\_  
Modified \_\_\_\_\_  
Covered \_\_\_\_\_  
Other \_\_\_\_\_

DEFENDANT'S PROPOSED INSTRUCTION NO. 9

You may not consider any explanation or interpretation of the contract offered by any witness, or any oral agreement of the parties occurring before execution of the written agreement, which is inconsistent with the plain, ordinary meaning of the written agreement.

While you may consider the testimony of witnesses if necessary to clarify an ambiguity, you may not consider such testimony to completely change the agreement, or to construe a term of the agreement in such a fashion that it no longer fits with the other, non-ambiguous terms or parts.

IDJI 6.08.2

Given \_\_\_\_\_  
Refused \_\_\_\_\_  
Modified \_\_\_\_\_  
Covered \_\_\_\_\_  
Other \_\_\_\_\_

DEFENDANT'S PROPOSED INSTRUCTION NO. 10

Where there is ambiguous language in a contract, and where the true intent of the parties cannot be ascertained by any other evidence, the ambiguity can be resolved by interpreting the contract against the party who drafted the contract or provided the ambiguous language.

IDJI 6.08.3

Given \_\_\_\_\_  
Refused \_\_\_\_\_  
Modified \_\_\_\_\_  
Covered \_\_\_\_\_  
Other \_\_\_\_\_

DEFENDANT'S PROPOSED INSTRUCTION NO. 11

The plaintiff has the burden of proving each of the following propositions:

1. A contract existed between plaintiff and defendant;
2. The defendant breached the contract;
3. The plaintiff has been damaged on account of the breach; and
4. The amount of the damages.

If you find from your consideration of all the evidence that each of the propositions required of the plaintiff has been proved, then you must consider the issue of the "affirmative defenses" raised by the defendant, and explained in the next instruction.

If you find from your consideration of all the evidence that any of the propositions in this instruction has not been proved, your verdict should be for the defendant.

IDJI 6.10.1

Given \_\_\_\_\_  
Refused \_\_\_\_\_  
Modified \_\_\_\_\_  
Covered \_\_\_\_\_  
Other \_\_\_\_\_

000072

DEFENDANT'S PROPOSED INSTRUCTION NO. 12

In this case Defendant Meridian Computer Center has asserted certain affirmative defenses. The Defendant has the burden of proof on each of the affirmative defenses asserted. If you find from your consideration of all the evidence that each of the propositions required of the defendant has been proved, then your verdict should be for the defense. If you find from your consideration of all the evidence that any of the propositions has not been proved, then the defendant has not proved the affirmative defense in this case.

IDJI 6.10.4

Given \_\_\_\_\_  
Refused \_\_\_\_\_  
Modified \_\_\_\_\_  
Covered \_\_\_\_\_  
Other \_\_\_\_\_

DEFENDANT'S PROPOSED INSTRUCTION NO. 13

The plaintiff has the burden of proof on each of the following propositions as to each Defendant:

1. The defendant was negligent.
2. The plaintiff was damaged.
3. The negligence of the defendant was a proximate cause of the injury to the plaintiff.
4. The elements of damage and the amounts thereof.

If you find from your consideration of all the evidence that each of the propositions required of the plaintiff has been proved, then you must consider the issue of the "affirmative defenses" raised by the defendant, and explained in instruction No \_\_\_\_\_.

If you find from your consideration of all the evidence that any of the propositions in this instruction has not been proved, your verdict should be for the defendant.

Given \_\_\_\_\_  
Refused \_\_\_\_\_  
Modified \_\_\_\_\_  
Covered \_\_\_\_\_  
Other \_\_\_\_\_

000074

DEFENDANT'S PROPOSED INSTRUCTION NO. 14

In this case, the defendant has also alleged that the plaintiff was negligent. On this defense, the defendant has the burden of proof on each of the following propositions:

1. The plaintiff was negligent.
2. The negligence of the plaintiff was a proximate cause of its own damages.

You will be asked the following question on the jury verdict form:

*Was the plaintiff negligent, and if so was the plaintiff's negligence a proximate cause of its injuries?*

If you find from your consideration of all the evidence that both of these propositions has been proved, you should answer this question "Yes." However, if you find that either of these propositions has not been proved, then the defendant has not met the burden of proof required and you should answer this question "No."

Given \_\_\_\_\_  
Refused \_\_\_\_\_  
Modified \_\_\_\_\_  
Covered \_\_\_\_\_  
Other \_\_\_\_\_

000075



DEFENDANT'S PROPOSED INSTRUCTION NO. 15

By giving you instructions on the subject of damages, I do not express any opinion as to whether the plaintiff is entitled to damages."

Given \_\_\_\_\_  
Refused \_\_\_\_\_  
Modified \_\_\_\_\_  
Covered \_\_\_\_\_  
Other \_\_\_\_\_

DEFENDANT'S PROPOSED INSTRUCTION NO. 16

We, the Jury, answer the Special Interrogatories as follows:

Question No. 1: Was there a contract between defendant Al Colson and Plaintiff Bridgetower Dental?

Answer to Question No. 1:        Yes     No

If you answered this question "No," skip to Question No 4. If you answered this question "Yes," continue to the next question.

Question No. 2: Did Defendant Al Colson breach its contract with Plaintiff Bridgetower Dental?

Answer to Question No. 2:        Yes     No

If you answered this question "No," skip to Question No 4. If you answered this question "Yes," continue to the next question.

Question No. 3: What is the total amount of damage sustained by the plaintiff as a result of Defendant' Al Colson's breach of contract?

Answer to Question No. 3: We assess plaintiff's damages as follows:

\$ \_\_\_\_\_

Question No. 4: Was there a contract between defendant Meridian Computer Center and Plaintiff Bridgetower Dental?

Answer to Question No. 4:        Yes     No

If you answered this question "No," skip to Question No 7. If you answered this question "Yes," continue to the next question.

Question No. 5: Did Defendant Meridian Computer Center breach its contract with Plaintiff Bridgetower Dental?

Answer to Question No. 5:        Yes     No

If you answered this question "No," skip to Question No 7. If you answered this question "Yes," continue to the next question.

Question No. 6: What is the total amount of damage sustained by the plaintiff as a result of Defendant' Meridian Computer Center's breach of contract?

Answer to Question No. 6: We assess plaintiff's damages as follows:

\$ \_\_\_\_\_

Question No. 7: Was Defendant **Al Colson** negligent?

Answer to Question No. 7:        Yes     No

If you answered this question "No," skip to question No 9. If you answered this question "Yes," continue to the next question.

Question No. 8: Was Defendant **Al Colson's** negligence a proximate cause of Plaintiff's damages?

Answer to Question No. 8:        Yes     No

Question No. 9: Was Defendant **Meridian Computer Center** negligent?

Answer to Question No. 9:        Yes     No

If you answered this question "No," skip to question No 11. If you answered this question "Yes," continue to the next question.

Question No. 10: Was Defendant **Meridian Computer Center's** negligence a proximate cause of Plaintiff's damages?

Answer to Question No. 10:        Yes     No

If you answered questions 7 or 8 “no”, and questions 9 or 10 “no,” you are finished. Sign the verdict as instructed and advise the Bailiff. If you answered questions 7 and 8 “yes”, or questions 9 and 10 “yes,” then continue to the next question.

Question No. 11: Was the plaintiff **Bridgetower Dental** negligent, and if so, was this negligence a proximate cause of some or all of its own damages?

Answer to Question No. 11      Yes       No

Question No. 12: Was another individual or entity, not a party to this lawsuit, negligent, and if so was the other individual or entity’s negligence a proximate cause of the plaintiff’s damages?

Answer to Question No. 12      Yes       No

If you answered “Yes” to questions 7 *and* 8, and also answered ‘yes’ to either  
Question 9 *and* 10, or  
question 11, or  
question 12

then proceed to answer Question No. 13.

Question No. 13: You will reach this question if you have found that one defendant and either or both the plaintiff and the other defendant, or a non-party, were negligent, which negligence caused the damages to the plaintiff. If such a finding is made, you are to apportion the fault between these parties in terms of a percentage. As to each party or entity to which you found there to be negligence which proximately caused damages to the Plaintiff, you are now asked to determine the percentage of fault for that party or entity, and enter the percentage on the appropriate line. If you answered “No” to any of the above questions and found that party to not have been negligence, or that their

negligence was not a proximate cause to any Plaintiff's damages, insert a "0" or "Zero" as to that party or entity. Your total percentages must equal 100%.

What is the percentage of fault (if any) you assign to each of the following:

To the Defendant, Al Colson \_\_\_\_\_ %

To the Defendant, Meridian Computer \_\_\_\_\_ %

To the Plaintiff, Bridgetower Dental \_\_\_\_\_ %

To a non-party \_\_\_\_\_ %

Total must equal 100%

If the percentage of fault you assigned to the plaintiff is equal to or greater than the percentage of fault you assigned to the defendants, you are done. Sign the verdict and advise the Bailiff.

If the percentage of fault assigned to the plaintiff is less than the percentage of fault you assigned to the defendants, answer the next question.

Question No. 14: What is the total amount of damage sustained by the plaintiff, if any, that was proximately caused by the negligence of Defendants?

Answer to Question No. 14: We assess plaintiff's damages as follows:

\$ \_\_\_\_\_

Given \_\_\_\_\_  
Refused \_\_\_\_\_  
Modified \_\_\_\_\_  
Covered \_\_\_\_\_  
Other \_\_\_\_\_

DEFENDANT'S PROPOSED INSTRUCTION NO. 17

A company who has been damaged must exercise ordinary care to minimize the damage and prevent further damage. Any loss that results from a failure to exercise such care cannot be recovered.

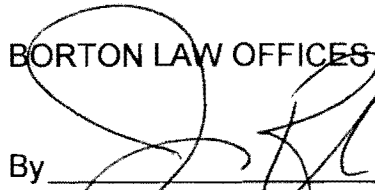
IDJI 9.14

Given	_____
Refused	_____
Modified	_____
Covered	_____
Other	_____

DATED this 12<sup>th</sup> day of April, 2010.

BORTON LAW OFFICES

By

  
\_\_\_\_\_  
Joseph W. Borton

*Attorneys for Defendant*

*Meridian Computer Center, Inc.*

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12<sup>th</sup> day of April, 2010, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals by the method indicated below, addressed as follows:

Shelly C. Shanahan  
PERKINS COIE, LLP  
251 E Front St Suite 400  
Boise, Idaho 83702-7310  
Fax: 343-3232

\_\_\_\_\_ U.S. Mail  
\_\_\_\_\_ Facsimile  
\_\_\_\_\_ Overnight Mail  
\_\_\_\_\_ Hand Delivery

Robert Hancock  
Attorney At Law  
PO Box 937  
Boise, Idaho 83701  
Fax: 424-3100

\_\_\_\_\_ U.S. Mail  
\_\_\_\_\_ Facsimile  
\_\_\_\_\_ Overnight Mail  
\_\_\_\_\_ Hand Delivery

  
\_\_\_\_\_  
Joseph W. Borton

APR 12 2010

J. DAVID NAVARRO, Clerk  
By K. JOHNSON  
DEPUTY

Shelly C. Shannahan, Bar No. 5374  
PERKINS COIE LLP  
1111 West Jefferson Street, Suite 500  
P.O. Box 737  
Boise, Idaho 83701-0737  
Telephone: 208.343.3434  
Facsimile: 208.343.3232

*Attorneys for Plaintiff*

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BRIDGE TOWER DENTAL, P.A.,

Plaintiff,

v.

AL COLSON dba I. T. WORKS, and  
MERIDIAN COMPUTER CENTER,  
INC., an Idaho corporation,

Defendants.

Case No. CV OC 0712775

**PLAINTIFF'S PROPOSED JURY  
INSTRUCTIONS**

Pursuant to the Order Governing Proceedings and Setting Trial filed June 11, 2009,  
Plaintiff, by and through its attorney of record, Perkins Coie LLP, submit the attached Proposed  
Jury Instructions.

DATED: April 12, 2010

**PERKINS COIE LLP**

By: Cy Wallace for  
Shelly C. Shannahan, Of the Firm  
*Attorneys for Plaintiffs*



**CERTIFICATE OF SERVICE**

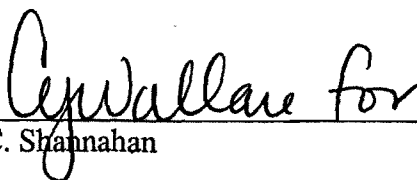
I, the undersigned, certify that on April 12, 2010, I caused a true and correct copy of the foregoing to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Rules of Procedure, to the following person(s):

Robert B. Hancock  
MANWEILER, BREEN, BALL &  
HANCOCK, PLLC  
355 W. Myrtle St., Ste. 100  
P.O. Box 937  
Boise, ID 83701-0937  
FAX: 424-3100

Hand Delivery	<u>  X  </u>
U.S. Mail	<u>      </u>
Facsimile	<u>      </u>
Overnight Mail	<u>      </u>

Joseph W. Borton  
BORTON LAW OFFICES  
2537 W. State St., #110  
Boise, ID 83702

Hand Delivery	<u>  X  </u>
U.S. Mail	<u>      </u>
Facsimile	<u>      </u>
Overnight Mail	<u>      </u>

  
\_\_\_\_\_  
Shelly C. Shannahan

## PLAINTIFF'S PROPOSED INSTRUCTION NO. 1

These instructions explain your duties as jurors and define the law that applies to this case. It is your duty to determine the facts, to apply the law set forth in these instructions to those facts, and in this way to decide the case. Your decision should be based upon a rational and objective assessment of the evidence. It should not be based on sympathy or prejudice.

It is my duty to instruct you on the points of law necessary to decide the case, and it is your duty to follow the law as I instruct. You must consider these instructions as a whole, not picking out one and disregarding others. The order in which these instructions are given or the manner in which they are numbered has no significance as to the importance of any of them. If you do not understand an instruction, you may send a note to me through the bailiff, and I will try to clarify or explain the point further.

In determining the facts, you may consider only the evidence admitted in this trial. This evidence consists of the testimony of the witnesses, the exhibits admitted into evidence, and any stipulated or admitted facts. While the arguments and remarks of the attorneys may help you understand the evidence and apply the instructions, what they say is not evidence. If an attorney's argument or remark has no basis in the evidence, you should disregard it.

The production of evidence in court is governed by rule of law. At times during the trial, I sustained an objection to a question without permitting the witness to answer it, or to an offered exhibit without receiving it into evidence. My rulings are legal matters, and are solely my responsibility. You must not speculate as to the reason for any objection, which was made, or my ruling thereon, and in reaching your decision you may not consider such a question or exhibit or speculate as to what the answer or exhibit would have shown. Remember, a question is not evidence and should be considered only as it gives meaning to the answer.

000085

[There were occasions where an objection was made after an answer was given or the remark was made, and in my ruling on the objection I instructed that the answer or remark be stricken, or directed that you disregard the answer or remark and dismiss it from your minds. In your deliberations, you must not consider such answer or remark, but must treat it as though you had never heard it.]

The law does not require you to believe all of the evidence admitted in the course of the trial. As the sole judges of the facts, you must determine what evidence you believe and what weight you attach to it. In so doing, you bring with you to this courtroom all of the experience and background of your lives. There is no magical formula for evaluating testimony. In your everyday affairs, you determine for yourselves whom you believe, what you believe and how much weight you attach to what you are told. The considerations you use in making the more important decisions in your everyday dealings are the same considerations you should apply in your deliberations in this case.

IDJI2d 1.00.

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

000086

**PLAINTIFF'S PROPOSED INSTRUCTION NO. 2**

During your deliberations, you will be entitled to have with you my instructions concerning the law that applies to this case, the exhibits that have been admitted into evidence and any notes taken by you in the course of the trial proceedings.

If you take notes during the trial, be careful that your attention is not thereby diverted from the witness or his testimony; and you must keep your notes to yourself and not show them to other persons or jurors until the jury deliberations at the end of the trial.

IDJI2d 1.01.

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

000087

**PLAINTIFF'S PROPOSED INSTRUCTION NO. 3**

The Professional Association involved in this case, Bridge Tower Dental, P.A. is entitled to the same fair and unprejudiced treatment that an individual would be under like circumstances. You should decide this case with the same impartiality that you would use in deciding a case between individuals.

IDJI2d 1.02. (modified)

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

000088

**PLAINTIFF'S PROPOSED INSTRUCTION NO. 4**

There are certain things you must not do during this trial:

1. You must not associate in any way with the parties, any of the attorneys or their employees, or any of the witnesses.
2. You must not discuss the case with anyone, or permit anyone to discuss the case with you. If anyone attempts to discuss the case with you, or to influence your decision in the case, you must report it to me promptly.
3. You must not discuss the case with other jurors until you retire to the jury room to deliberate at the close of the entire case.
4. You must not make up your mind until you have heard all of the testimony and have received my instructions as to the law that applies to the case.
5. You must not contact anyone in an attempt to discuss or gain a greater understanding of the case.
6. You must not go to the place where any alleged event occurred.

IDJ12d 1.03.

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

000089

**PLAINTIFF'S PROPOSED INSTRUCTION NO. 5**

Members of the jury, I remind you that you are not to discuss this case among yourselves or with anyone else, nor to form any opinion as to the merits of the case, until after I finally submit the case to you.

IDJI2d 1.03.1.

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

000090

**PLAINTIFF'S PROPOSED INSTRUCTION NO. 6**

Any statement by me identifying a claim of a party is not evidence in this case. I have advised you of the claims of the parties merely to acquaint you with the issues to be decided.

IDJI2d 1.05.

GIVEN	_____
REFUSED	_____
MODIFIED	_____
COVERED	_____
OTHER	_____

000091



**PLAINTIFF'S PROPOSED INSTRUCTION NO. 7**

The following facts are not in dispute:

1. Plaintiff Bridge Tower Dental, P.A., is a professional association formed for the purpose of practicing dentistry. The owners of Bridge Tower Dental are Dr. Thomas Cox and his wife, Lisa Cox.

2. During the years 2003 through 2008, Defendant Al Colson did business as I.T. Works, providing computer support to businesses and individuals.

3. During the years 2003 to the present, Defendant Meridian Computer Center, Incorporated, operated a business located in Meridian, Idaho, which sells and services computer hard drives.

2. In October of 2003, Bridge Tower Dental entered into a contract with Defendant Al Colson d/b/a I.T. Works, under which Mr. Colson agreed to provide computer services to Bridge Tower Dental in exchange for a monthly fee.

3. In June of 2005, while performing a software update on Bridge Tower Dental's software system, Mr. Colson discovered that the hard drives were failing.

4. Mr. Colson, on behalf of Bridge Tower Dental, delivered the hard drive along with a mirrored copy of the hard drive to Meridian Computer System to see if the hard drive could be restored. At the time of delivery, the mirrored copy of the hard drive was intact and contained all of Bridge Tower Dental's data that had been stored on the hard drive.

5. Meridian Computer Center took possession of both the hard drive and mirror copy of the hard drive, and agreed to try and diagnose and service the problem.

6. Meridian Computer Center ultimately determined that Bridge Tower Dental's hard drive could not be restored.

000092

7. Employees of Meridian Computer Center erased the mirrored hard drive, thereby erasing all of Bridge Tower Dental's patient data, etc.

8. Neither Mr. Colson nor Bridge Tower Dental had a back up copy of the data on the hard drive and the mirrored hard drive.

9. Plaintiff Bridge Tower Dental brought this lawsuit against defendants Al Colson d/b/a I.T. Works and Meridian Computer Center, Incorporated, to recover damages incurred. Plaintiff claims the defendants were negligent and breached the contract between them.

10. Defendants both deny any wrongdoing.

IDJ12d 1.07.

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

000093

**PLAINTIFF'S PROPOSED INSTRUCTION NO. 8**

In deciding this case, you may not delegate any of your decisions to another or decide any question by chance, such as by the flip of a coin or drawing of straws. If money damages are to be awarded or percentages of fault are to be assigned, you may not agree in advance to average the sum of each individual juror's estimate as the method of determining the amount of the damage award or percentage of negligence.

IDJI2d 1.09.

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

000094

**PLAINTIFF'S PROPOSED INSTRUCTION NO. 9**

If it becomes necessary during your deliberations to communicate with me, you may send a note signed by one or more of you to the bailiff. You should not try to communicate with me by any means other than such a note.

During your deliberations, you are not to reveal to anyone how the jury stands on any of the questions before you, numerically or otherwise, unless requested to do so by me.

IDJI2d 1.11.

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

000095

**PLAINTIFF'S PROPOSED INSTRUCTION NO. 10**

I have given you the rules of law that apply to this case. I have instructed you regarding matters that you may consider in weighing the evidence to determine the facts. In a few minutes counsel will present their closing arguments to you and then you will retire to the jury room for your deliberations.

Each of you has an equally important voice in the jury deliberations. Therefore, the attitude and conduct of jurors at the beginning of the deliberations are important. At the outset of deliberations, it is rarely productive for a juror to make an emphatic expression of opinion on the case or to state how he or she intends to vote. When one does that at the beginning, one's sense of pride may be aroused and there may be reluctance to change that position, even if shown that it is wrong. Remember that you are not partisans or advocates, but you are judges. For you, as for me, there can be no triumph except in the ascertainment and declaration of the truth.

Consult with one another. Consider each other's views. Deliberate with the objective of reaching an agreement, if you can do so without disturbing your individual judgment. Each of you must decide this case for yourself; but you should do so only after a discussion and consideration of the case with your fellow jurors.

IDJI2d 1.13.

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

000096

**PLAINTIFF'S PROPOSED INSTRUCTION NO. 11**

On retiring to the jury room, select one of your number as a foreman, who will preside over your deliberations.

Appropriate forms of verdict will be submitted to you with any instructions. Use only the ones conforming to your conclusions and return the others unused.

A verdict may be reached by three-fourths of your number, or nine of you. If your verdict is unanimous, your foreman alone will sign it; but if nine or more, but less than the entire jury, agree, then those so agreeing will sign the verdict.

As soon as you have completed and signed the verdict, you will notify the bailiff, who will then return you into open court.

IDJI2d 1.15.1.

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

000097

**PLAINTIFF'S PROPOSED INSTRUCTION NO. 12**

You have now completed your duties as jurors in this case and are discharged with the sincere thanks of this Court. You may now discuss this case with the attorneys or with anyone else. For your guidance, I instruct you that whether you talk to the attorneys, or to anyone else, is entirely your own decision. It is proper for you to discuss this case, if you want to, but you are not required to do so, and you may choose not to discuss the case with anyone at all. If you choose to talk to someone about this case, you may tell them as much or as little as you like about your deliberations or the facts that influenced your decisions. If anyone persists in discussing the case over your objection, or becomes critical of your service, either before or after any discussion has begun, you may report it to me.

IDJI2d 1.17.

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

000098

**PLAINTIFF'S PROPOSED INSTRUCTION NO. 13**

When I say that a party has the burden of proof on a proposition, or use the expression "if you find" or "if you decide," I mean you must be persuaded that the proposition is more probably true than not true.

IDJI2d 1.20.1.

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

000099



**PLAINTIFF'S PROPOSED INSTRUCTION NO. 14**

Evidence may be either direct or circumstantial. The law makes no distinction between direct and circumstantial evidence. Each is accepted as a reasonable method of proof and each is respected for such convincing force as it may carry.

IDJI2d 1.24.1.

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

000100

**PLAINTIFF'S PROPOSED INSTRUCTION NO. 15**

It was the duty of the defendants, Al Colson and Meridian Computer Center, before and at the time of the occurrence, to use ordinary care for the safety of the plaintiff, Bridge Tower Dental's property.

IDJI2d 2.00.1.

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

000101

**PLAINTIFF'S PROPOSED INSTRUCTION NO. 16**

When I use the word "negligence" in these instructions, I mean the failure to use ordinary care in the management of one's property or person. The words "ordinary care" mean the care a reasonably careful person would use under circumstances similar to those shown by the evidence. Negligence may thus consist of the failure to do something which a reasonably careful person would do, or the doing of something a reasonably careful person would not do, under circumstances similar to those shown by the evidence.

IDJI2d 2.20.

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

000102

**PLAINTIFF'S PROPOSED INSTRUCTION NO. 17**

When I use the expression "proximate cause," I mean a cause which, in natural or probable sequence, produced the complained injury, loss or damage, and but for that cause the damage would not have occurred. It need not be the only cause. It is sufficient if it is a substantial factor in bringing about the injury, loss or damage. It is not a proximate cause if the injury, loss or damage likely would have occurred anyway.

There may be one or more proximate causes of an injury. When the negligent conduct of two or more persons or entities contribute concurrently as substantial factors in bringing about an injury, the conduct of each may be a proximate cause of the injury regardless of the extent to which each contributes to the injury.

IDJI2d 2.30.1.

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

000103

**PLAINTIFF'S PROPOSED INSTRUCTION NO. 18**

The Plaintiff has the burden of proof on each of the following propositions.

1. That defendants were negligent.
2. The plaintiff was injured.
3. The negligence of the defendants was the proximate cause of the injury to the plaintiff.
4. The elements of damage and the amounts thereof.

You will be asked the following question on the jury verdict form:

Were the defendants negligent, and if so, was the negligence a proximate cause of the injuries to the plaintiff?

If you find from your consideration of all the evidence that each of these propositions have been proved, you should answer this question "Yes." However, if you find that any of these propositions have not been proved, then the plaintiff has not met the burden of proof required and you should answer this question "No."

IDJI 1.41.4.1

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

**PLAINTIFF'S PROPOSED INSTRUCTION NO. 19**

A contract is an agreement between two or more parties to do or not do something that is supported by consideration.

There are four elements to complete a contract. Every contract must have these four elements. The four elements are:

1. Competent parties;
2. A lawful purpose;
3. Valid consideration; and
4. Mutual agreement by all parties to all essential terms.

It is not disputed that the above elements are present in the two contracts alleged in this case between Bridge Tower Dental and Al Colson d/b/a I.T. Works and between Bridge Tower Dental and Meridian Computer Center.

IDJ12d 6.01.1.

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

000105

**PLAINTIFF'S PROPOSED INSTRUCTION NO. 20**

A contract may be written or oral, or may contain both written terms and oral terms. So long as all the required elements are present, it makes no difference whether the agreement is in writing.

IDJ12d 6.06.1.

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

000106

**PLAINTIFF'S PROPOSED INSTRUCTION NO. 21**

An oral agreement that contains all of the elements of a contract is a binding contract.

IDJI2d 6.06.5.

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

000107



**PLAINTIFF'S PROPOSED INSTRUCTION NO. 22**

You may not consider any explanation or interpretation of the contract offered by any witness, or any oral agreement of the parties occurring before execution of the written agreement, which is inconsistent with the plain, ordinary meaning of the written agreement. While you may consider the testimony of witnesses if necessary to clarify an ambiguity, you may not consider such testimony to completely change the agreement, or to construe a term of the agreement in such a fashion that it no longer fits with the other, non-ambiguous terms or parts.

IDJI2d 6.08.2.

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

000108

**PLAINTIFF'S PROPOSED INSTRUCTION NO. 23**

The plaintiff has the burden of proving each of the following propositions with respect to its claim for breach of contract against defendant Al Colson:

1. A contract existed between plaintiff and defendant;
2. The defendant breached the contract;
3. The plaintiff has been damaged on account of the breach; and
4. The amount of the damages.

If you find from your consideration of all the evidence that each of the propositions required of the plaintiff has been proved, then your verdict should be for the plaintiff.

IDJI2d 6.10.1.

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

000109

**PLAINTIFF'S PROPOSED INSTRUCTION NO. 24**

The plaintiff has the burden of proving each of the following propositions with respect to its claim for breach of contract against defendant Meridian Computer Center:

1. A contract existed between plaintiff and defendant;
2. The defendant breached the contract;
3. The plaintiff has been damaged on account of the breach; and
4. The amount of the damages.

If you find from your consideration of all the evidence that each of the propositions required of the plaintiff has been proved, then your verdict should be for the plaintiff.

IDJ12d 6.10.1.

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

000110

**PLAINTIFF'S PROPOSED INSTRUCTION NO. 25**

In this case, plaintiff contends that Al Colson was acting as its agent when he delivered the computer to Meridian Computer Center and entered into the contract with Meridian Computer Center. The term "agent" refers to a person authorized by another, called the "principal," to act for or in the place of the principal. The principal is responsible for any act of the agent within the agent's scope of authority.

IDJI2d 6.40.1.

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

000111

**PLAINTIFF'S PROPOSED INSTRUCTION NO. 26**

An agency relationship exists where one, called the "principal," has authorized another, called the "agent," to act on behalf of the principal.

Agency requires the consent of the principal, which consent may be expressed or implied. Compensation of the agent is not required.

IDJI2d 6.40.5.

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

**PLAINTIFF'S PROPOSED INSTRUCTION NO. 27**

If the jury decides the plaintiff is entitled to recover from the defendants, the jury must determine the amount of money that will reasonably and fairly compensate the plaintiff for any of the following elements of damages proved by the evidence to have resulted from the defendants' breach of contract:

Those damages that will fairly and reasonably compensate plaintiff for the losses suffered as a result of the breach of contract.

Whether any of these elements of damage has been proved is for you to determine.

IDJI2d 9.03.

*O'Dell v. Basabe*, 119 Idah o796, 812, 810 P.,2d 1082, 1098 (1991).

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

000113

**PLAINTIFF'S PROPOSED INSTRUCTION NO. 28**

If the jury decides that the plaintiff is entitled to recover from the defendants, the jury must determine the amount of money that will reasonably and fairly compensate the plaintiff for any damages proved to be proximately caused by the defendants' negligence.

The elements of damage to plaintiffs' property are:

1. The reasonable cost of necessary repairs to the damaged property, plus the difference between its fair market value before it was damaged and its fair market value after repairs.

and

2. Any incidental or consequential damage suffered by the plaintiff that is within the foreseeable chain of proximate causation.

IDJI2d 9.07.

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

APR 21 2010

J. DAVID WILSON, Clerk  
By: [Signature] DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BRIDGE TOWER DENTAL, P.A.,

Plaintiff,

vs.

AL COLSON dba I. T. WORKS, and  
MERIDIAN COMPUTER CENTER, INC.,  
an Idaho corporation,

Defendants.

Case No. CV-OC0712775D

MEMORANDUM DECISION  
AND ORDER

The Court has reviewed the motion in limine together with the opposition. As to the motion to preclude witnesses, the same is denied. Plaintiff reserved the right to call any witness disclosed in discovery. The Order Governing Trial Proceedings contemplates the parties will make final designation of trial witnesses at the pre-trial conference. The Plaintiff's witness list filed at the time of the pre-trial identifies Thomas Cox, Lisa Cox, Al Colson and Jason Patten. These are essentially the principals of the parties or, in the case of Mr. Colson, the party himself. There is no showing of unfair surprise or prejudice here.

As to the documents, the Court will grant the Motion as to any documents not produced at the Deposition of Dr. Cox. Plaintiff is limited in is case in chief to use of those documents bearing Bates Stamp numbers BTD 0001 -391 and BTD 20001-20026 together with any

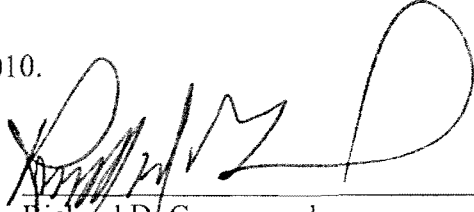
MD



1 documents attached to the Amended Complaint. The Court makes no ruling regarding use of  
2 any other document for impeachment or rebuttal purposes.

3 IT IS SO ORDERED.

4 Dated this 20 day of April, 2010.

5   
6 \_\_\_\_\_  
7 Richard D. Greenwood  
8 District Judge

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CERTIFICATE OF MAILING

I, J. David Navarro, the undersigned authority, do hereby certify that I have mailed, by United States Mail, a true and correct copy of the within instrument as notice pursuant to Rule 77(d) I.R.C.P. to each of the attorneys of record in this cause in envelopes addressed as follows:

SHELLY C. SHANNAHAN  
PERKINS COIE, LLP  
PO BOX 737  
BOISE, ID 83701-0737

ROBERT B. HANCOCK  
MANWEILER BREEN BALL & HANCOCK, PLLC  
PO BOX 937  
BOISE, ID 83701-0937

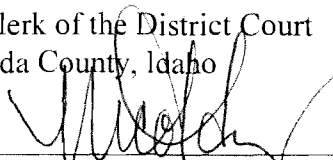
JOSEPH W. BORTON  
ATTORNEY AT LAW  
1310 N MAIN ST  
MERIDIAN, ID 83642

J. DAVID NAVARRO  
Clerk of the District Court  
Ada County, Idaho

Date:

4/20/10

By

  
Deputy Clerk

000117

**ORIGINAL**

**APR 23 2010**

J. DAVID NAVARRO, Clerk  
By K. JOHNSON  
DEPUTY

Shelly C. Shannahan, Bar No. 5374  
PERKINS COIE LLP  
1111 West Jefferson Street, Suite 500  
P.O. Box 737  
Boise, Idaho 83701-0737  
Telephone: 208.343.3434  
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*Attorneys for Plaintiff*

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BRIDGE TOWER DENTAL, P.A.,

Plaintiff,

v.

AL COLSON dba I. T. WORKS, and  
MERIDIAN COMPUTER CENTER,  
INC., an Idaho corporation,

Defendants.

Case No. CV OC 0712775

**PLAINTIFF'S FIRST SUPPLEMENTAL  
PROPOSED JURY INSTRUCTIONS**

Plaintiff Bridge Tower Dental, P.A. by and through its attorneys of record Perkins Coie  
LLP, submit the attached First Supplemental Proposed Jury Instructions.

DATED: April 23, 2010

**PERKINS COIE LLP**

By: *Shelly Shannahan*  
Shelly C. Shannahan, Of the Firm  
*Attorneys for Plaintiffs*

**CERTIFICATE OF SERVICE**

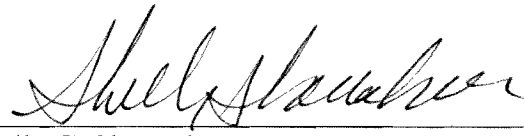
I, the undersigned, certify that on April 23, 2010, I caused a true and correct copy of the foregoing to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Rules of Procedure, to the following person(s):

Robert B. Hancock  
MANWEILER, BREEN, BALL &  
HANCOCK, PLLC  
355 W. Myrtle St., Ste. 100  
P.O. Box 937  
Boise, ID 83701-0937  
FAX: 424-3100

Hand Delivery \_\_\_\_\_  
U.S. Mail \_\_\_\_\_  
Facsimile \_\_\_\_\_  
Overnight Mail \_\_\_\_\_

Joseph W. Borton  
BORTON LAW OFFICES  
2537 W. State St., #110  
Boise, ID 83702

Hand Delivery   X    
U.S. Mail \_\_\_\_\_  
Facsimile \_\_\_\_\_  
Overnight Mail \_\_\_\_\_



\_\_\_\_\_  
Shelly C. Shannahan

**PLAINTIFF'S PROPOSED INSTRUCTION NO. 29**

A bailment is the delivery of goods or personal property in trust, by one person to another, in order for a purpose to be carried out with respect to the goods or property, such as repair or servicing. The person who delivers the goods or property is the "bailor" and the person who receives the goods property is the "bailee."

In this case, Plaintiff alleges that it was a bailor and that the Defendant was a bailee.

*See Quinto v. Millwood Forest Products, Inc.*, 130 Idaho 162, 165, 938 P.2d 189, 192 (Ct. App. 1997) (citations omitted)

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

**PLAINTIFF'S PROPOSED INSTRUCTION NO. 30**

On the issue of whether Defendant has breached a bailment contract, Plaintiff has the burden of proof on each of these propositions:

- (1) The existence of a bailment contract,
- (2) Delivery of the bailed property to the bailee (Defendant), and
- (3) Failure of bailee (Defendant) to redeliver the bailed property undamaged at the termination of the bailment.

If you find from your consideration of all the evidence in the case that each of the foregoing propositions has been proved, your verdict should be for the Plaintiff. If you find that any of the propositions has not been proved, then your verdict should be for the Defendant.

*See Daugherty v. Univ. of Akron*, 631 N.E.2d 176 (Ohio Ct. Cl. 1992) (citation omitted).

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_  
65940-0001/LEGAL18162497.1

000121

**PLAINTIFF'S PROPOSED INSTRUCTION NO. 31**

A bailee is required to exercise ordinary or reasonable care to protect the goods or property entrusted to its custody for repairs or servicing.

*Low v. Park Price Company*, 95 Idaho 92, 503 P.2d 291, 292 (1972) (citations omitted)

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

**PLAINTIFF'S PROPOSED INSTRUCTION NO. 32**

A bailee must establish by a preponderance of the evidence that he has been free from fault in connection with the loss, theft or destruction of the property that has been delivered to him.

*Low v. Park Price Company*, 95 Idaho 92, 503 P.2d 291, 292 (1972) (citations omitted)

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_



**PLAINTIFF'S PROPOSED INSTRUCTION NO. 33**

If you find that the bailee received property in good condition but returned it damaged, you must find that the bailee was negligent.

*See T-Craft Aero Club, Inc. v. Blough*, 102 Idaho 833, 834, 642 P.2d 70, 72 (1982) (citation omitted); *Compton v. Daniels*, 98 Idaho 915, 917, 575 P.2d 1303, 1305 (1978).

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF IDAHO APR 27 2010

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA J. DAVID NIVART, Clerk  
DEPUTY

BRIDGE TOWER DENTAL, P.A., )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 MERIDIAN COMPUTER CENTER, )  
 INC., an Idaho corporation, )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

Case No. CVOC0712775

JURY INSTRUCTIONS

THE HONORABLE DUFF MCKEE

DISTRICT JUDGE

PRESIDING

INSTRUCTION NO. 1

These instructions explain your duties as jurors and define the law that applies to this case. It is your duty to determine the facts, to apply the law set forth in these instructions to those facts, and in this way to decide the case. Your decision should be based upon a rational and objective assessment of the evidence. It should not be based on sympathy or prejudice.

It is my duty to instruct you on the points of law necessary to decide the case, and it is your duty to follow the law as I instruct. You must consider these instructions as a whole, not picking out one and disregarding others. The order in which these instructions are given or the manner in which they are numbered has no significance as to the importance of any of them. If you do not understand an instruction, you may send a note to me through the bailiff, and I will try to clarify or explain the point further.

In determining the facts, you may consider only the evidence admitted in this trial. This evidence consists of the testimony of the witnesses, the exhibits admitted into evidence, and any stipulated or admitted facts. While the arguments and remarks of the attorneys may help you understand the evidence and apply the instructions, what they say is not evidence. If an attorney's argument or remark has no basis in the evidence, you should disregard it.

The production of evidence in court is governed by rule of law. At times during the trial, I sustained an objection to a question without permitting the witness to answer it, or to an offered exhibit without receiving it into evidence. My rulings are legal matters, and are solely my responsibility. You must not speculate as to the reason for any objection, which was made, or my ruling thereon, and in reaching your decision you may not consider such a question or exhibit or speculate as to what the answer or exhibit would have shown. Remember, a question is not evidence and should be considered only as it gives meaning to the answer.

The law does not require you to believe all of the evidence admitted in the course of the trial. As the sole judges of the facts, you must determine what evidence you believe and what

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weight you attach to it. In so doing, you bring with you to this courtroom all of the experience and background of your lives. There is no magical formula for evaluating testimony. In your everyday affairs, you determine for yourselves whom you believe, what you believe and how much weight you attach to what you are told. The considerations you use in making the more important decisions in your everyday dealings are the same considerations you should apply in your deliberations in this case.

INSTRUCTION NO. 2

The corporation[s] involved in this case [is/are] entitled to the same fair and unprejudiced treatment that an individual would be under like circumstances. You should decide this case with the same impartiality that you would use in deciding a case between individuals.

INSTRUCTION NO. 3

When I say that a party has the burden of proof on a proposition, or use the expression “if you find” or “if you decide,” I mean you must be persuaded that the proposition is more probably true than not true.

**INSTRUCTION NO. 4**

In this case, it is not disputed that Bridge Tower Dental caused certain computer equipment to be delivered to Meridian Computer Center for repair or servicing. It is not disputed that the equipment delivered to Meridian Computer included two hard drives. One of the hard drives was failing and Meridian Computer Center was to repair or replace the failing hard drive.

INSTRUCTION NO. 5

You are instructed that at all times relevant, Al Colson was the agent of Bridge Tower Dental in dealing with Meridian Computer Center in connection with the computer equipment of Bridge Tower Dental. The acts and omissions of Al Colson are to be considered by you to be the acts and omissions of Bridge Tower Dental.

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INSTRUCTION NO. 6

There is no dispute in this case that the two hard drives on the computer delivered to Meridian Computer Center contained business data of the Bridge Tower Dental practice. While the computer equipment was in the custody of MCC, the data on both hard drives was lost. The issue for the jury to determine in this case is whether Meridian Computer Center is liable in damages to Bridge Tower Dental for the loss of data.

Bridge Tower Dental alleges two theories for recovery:

First, Bridge Tower Dental argues that there was an express agreement between the parties, entered into by Al Colson on behalf of the dental practice, that Meridian Computer Center would protect or backup the data; that it breached this agreement in failing to return the hard drive with the data intact; and that Bridge Tower Dental was damaged thereby.

Second, Bridge Tower Dental argues that Meridian Computer Center was given custody of the data when it received the computers for service or repair; that it knew of the existence of the data on the hard drive when it received the computer; that it had a duty to return the hard drive with the data intact; that it breached this duty; and that it was damaged thereby.

INSTRUCTION NO. 7

As relevant to this case, and “express agreement” is an agreement between two or more parties to do or not do something that is supported by consideration.

There are four elements to complete a contract. Every contract must have these four elements. The four elements are:

1. Competent parties.
2. A lawful purpose.
3. Valid consideration; and
4. Mutual agreement by all parties to all essential terms.

It is not disputed that the parties are competent, and the alleged purposes are valid.

“Valid consideration” means the exchange of value. A promise may be a valid consideration.

“Mutual agreement” means the verbal or written statement of an offer or expectation by one party and the verbal or written acceptance or agreement by the other. Provided, that acceptance or agreement may also be demonstrated by conduct.

INSTRUCTION NO. 8

On its theory that there was an express agreement to protect its data, Bridge Tower Dental has the burden of proof on each of the following elements:

1. That there was an express agreement between Meridian Computer Center and Bridge Tower Dental that Meridian Computer Center would protect and backup the data contained in the computer delivered for repair;
2. That while the computer was in the care and control of Meridian Computer Center the data stored in the hard drive was lost;
3. That as a proximate cause of this loss, Bridge Tower Dental suffered damages, and the amounts thereof.

In the case of an express agreement to protect the property of another, the custodian of the property, in this case Meridian Computer Center, owes a high duty of care to the owner to redeliver the property in the same condition as received. If the property is lost or damaged while in the custodian's care, it is liable to the owner unless it can prove it acted with a high degree of care carrying out its duty. In this case, this means that if you find there was an express agreement for the care of the data, the burden of proof is on Meridian Computer Center to prove it acted with a high degree of care; if it does not sustain this burden, your verdict should be for the plaintiff.

If any of the elements has not been proved, or if Meridian Computer Center proves it did act with a high degree of care to protect the data, your verdict should be for the defendant.

INSTRUCTION NO. 9

On its theory that Bridge Tower Dental was the custodian of property other than under an express agreement, the plaintiff has the burden of proof on each of the following elements:

1. The Meridian Computer Center received custody of the data of Bridge Tower Dental, as contained on the two hard drives;
2. That it received custody of the data as an incident of its agreement to repair or service the computer equipment of Bridge Tower Dental;
3. That Meridian Computer Center knew or should have known of the existence of the data, and knew or should have known of the importance or significance of the data to Bridge Tower Dental;
4. That while the data was in the care and control of Meridian Computer Center, the data was lost or destroyed;
5. That as a proximate cause of this loss, Bridge Tower Dental suffered damages, and the amounts thereof.

In the case of property in the custody of another other than by express agreement for care, the custodian of the property, in this case Meridian Computer Center, owes a duty of reasonable care to the owner to redeliver the property in the same condition as received. If the property is lost or damaged while in the custodian's care, the custodian is liable to the owner unless it can prove it acted reasonably. In this case, this means that if you find there was not an express agreement for the care of the data, but the property was under Meridian Computer Center's care, the burden of proof is on Meridian Computer

Center to prove it acted reasonably under the circumstances of this case; if it does not sustain this burden, your verdict should be for the plaintiff.

If any of the elements has not been proved, or if Meridian Computer Center proves it did act reasonably under the circumstances, your verdict should be for the defendant.

**INSTRUCTION NO. 10**

If the jury decides that the plaintiff is entitled to recover from the defendant, the jury must determine the amount of money that will reasonably and fairly compensate the plaintiff for any of the following elements of damage proved by the evidence to have been proximately caused by the defendant's breach:

1. The reasonable cost to repair or replace the property that is lost or destroyed; or
2. The market value of the property lost, if it cannot be replaced or repaired.

Whether any of these elements has been proved is for you to determine.

**INSTRUCTION NO. 11**

Bridge Tower Dental had the duty, both before and after the loss here in question, to act with reasonable care to protect its property, and minimize any damages that may result. Any loss that results from the failure to exercise such care cannot be recovered.

INSTRUCTION NO. 12

When I use the phrase “reasonable care” or “acts reasonably” in these instructions, I mean care or acts of an ordinary prudent person when acting under like circumstances. It is the doing of something an ordinary prudent person would not do, or the failure to do something an ordinary prudent person would do, under circumstances similar to that shown by the evidence. The law does not say how an ordinary person should act; that is for the jury to determine.

When I use the phrase “high degree of care” in these instructions, I mean that the care or actions of the party or individual in question must be substantially greater than ordinary. This standard requires that the actor be especially careful to avoid the loss, injury or damage complained of. The law does not say how much greater the care or attention must be; that is for the jury to determine.



INSTRUCTION NO. 13

When I use the expression "proximate cause," I mean a cause which, in natural or probable sequence, produced the complained injury, loss or damage, and but for that cause the damage would not have occurred. It need not be the only cause. It is sufficient if it is a substantial factor in bringing about the injury, loss or damage. It is not a proximate cause if the injury, loss or damage likely would have occurred anyway.

INSTRUCTION NO. 14

If it becomes necessary during your deliberations to communicate with me, you may send a note signed by one or more of you to the bailiff. You should not try to communicate with me by any means other than such a note.

During your deliberations, you are not to reveal to anyone how the jury stands on any of the questions before you, numerically or otherwise, unless requested to do so by me.

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INSTRUCTION NO. 15

I have given you the rules of law that apply to this case. I have instructed you regarding matters that you may consider in weighing the evidence to determine the facts. In a few minutes counsel will present their closing arguments to you and then you will retire to the jury room for your deliberations.

Each of you has an equally important voice in the jury deliberations. Therefore, the attitude and conduct of jurors at the beginning of the deliberations are important. At the outset of deliberations, it is rarely productive for a juror to make an emphatic expression of opinion on the case or to state how he or she intends to vote. When one does that at the beginning, one's sense of pride may be aroused and there may be reluctance to change that position, even if shown that it is wrong. Remember that you are not partisans or advocates, but you are judges. For you, as for me, there can be no triumph except in the ascertainment and declaration of the truth.

Consult with one another. Consider each other's views. Deliberate with the objective of reaching an agreement, if you can do so without disturbing your individual judgment. Each of you must decide this case for yourself; but you should do so only after a discussion and consideration of the case with your fellow jurors.

INSTRUCTION NO. 16

On retiring to the jury room, select one of your number as a presiding juror, who will preside over your deliberations.

An appropriate form of verdict will be submitted to you with any instructions. Use only the ones conforming to your conclusions and return the others unused.

A verdict may be reached by three-fourths of your number, or nine of you. If your verdict is unanimous, your foreman alone will sign it; but if nine or more, but less than the entire jury, agree, then those so agreeing will sign the verdict.

As soon as you have completed and signed the verdicts, you will notify the bailiff, who will then return you into open court.

Dated this 27<sup>th</sup> day of April, 2010.



HON. DUFF MCKEE  
District Judge

APR 27 2010

J. DAVID NAVABRO, Clerk

*Rand*  
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BRIDGE TOWER DENTAL, P.A., )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
MERIDIAN COMPUTER CENTER, )  
INC., an Idaho corporation, )  
 )  
Defendant. )  
\_\_\_\_\_ )

Case No. CVOC0712775

**VERDICT**

We, the Jury, find for the Defendant.

DATED this 27<sup>th</sup> day of April, 2010.

Foreperson

Angela Pollard

Jeff Spin

Jeri Bloomfield

Don W. R. 9th

Rachelle McKittay

Connie Van Kowenby

Jeff Bierman

Walter Moulton

Paul Rogers

John C.

000144

*W*

Joe Borton [ISB No. 5552]  
BORTON LAW OFFICES  
1310 N. Main Street  
Meridian, Idaho 83642  
(208) 908-4415  
joe@bortonlawoffices.com

FILED  
MAY 11 2010  
J. DAVID NAVARRO, Clerk  
By E. HOLMES  
DEPUTY

*Attorneys for Defendant Meridian Computer Center, Inc.*

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

BRIDGE TOWER DENTAL, PA.,

Plaintiff,

v.

AL COLSON, dba I.T. WORKS., and  
MERIDIAN COMPUTER CENTER, INC.,  
an Idaho Corporation.

Defendants.

Case No.: CVOC-0712775

**DEFENDANT MERIDIAN COMPUTER  
CENTER, INC.'S MOTION FOR  
ATTORNEY'S FEES AND COSTS**

COMES NOW the Defendant Meridian Computer Center, Inc., by and through its counsel of record Joe Borton of the firm Borton Law Offices, and pursuant to Idaho Rule of Civil Procedure 54 and Idaho Code §12-120(3) hereby moves this Court for an order awarding Defendant its attorney's fees and costs incurred in this matter.

This Motion is based upon Defendant's position as the "prevailing party" in the four day jury trial upon the commercial transaction between the parties wherein a jury returned a verdict in favor of Defendant Meridian Computer Center, Inc on April 27, 2010.

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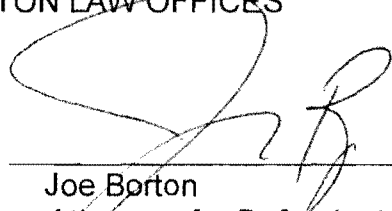
The total amount of fees and costs to be reimbursed to Defendant is \$33,358.19, which is comprised of \$27,145.00 for Borton Law Offices, and \$6,213.19 for John Prior Law Offices (Defendant's former counsel on this matter).

This motion is further supported by the *Affidavit of Joseph W. Borton in Support of Defendant Meridian Computer Center, Inc.'s Motion for Attorney's Fees and Costs* filed contemporaneously herewith.

DATED this 10 day of May, 2010.

BORTON LAW OFFICES

By

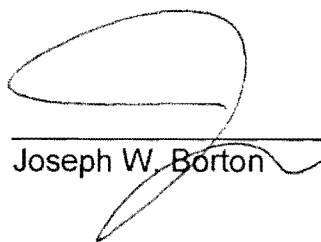
  
\_\_\_\_\_  
Joe Borton  
*Attorneys for Defendant*  
*Meridian Computer Center, Inc.*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 10 day of May, 2010, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals by the method indicated below, addressed as follows:

Shelly C. Shannahan  
PERKINS COIE, LLP  
251 E Front St Suite 400  
Boise, Idaho 83702-7310  
Fax: 343-3232

- U.S. Mail
- Facsimile
- Overnight Mail
- Hand Delivery

  
\_\_\_\_\_  
Joseph W. Borton

131

Joe Borton [ISB No. 5552]  
BORTON LAW OFFICES  
1310 N. Main Street  
Meridian, Idaho 83642  
(208) 908-4415  
joe@bortonlawoffices.com

MAY 11 2010  
J. DAVID NAVARETO, Clerk  
By E. HOLMES  
DEPUTY

*Attorneys for Defendant Meridian Computer Center, Inc.*

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

BRIDGE TOWER DENTAL, PA.,  
  
Plaintiff,  
  
v.  
  
MERIDIAN COMPUTER CENTER, INC.,  
an Idaho Corporation.  
  
Defendants.

Case No.: CVOC-0712775

**AFFIDAVIT OF JOSEPH W. BORTON IN  
SUPPORT OF DEFENDANT MERIDIAN  
COMPUTER CENTER, INC.’S MOTION  
FOR ATTORNEY’S FEES AND COSTS**

STATE OF IDAHO )  
                                                                  ) ss.  
County of Ada                     )

JOSEPH W. BORTON, being duly sworn on oath deposes and states as follows:

1. I am the attorney of record for the Defendant Meridian Computer Center, Inc and make the following statements based upon my own personal knowledge. I am an attorney duly licensed and in good standing with the Idaho State Bar. I have fourteen years' experience litigating hundreds of cases in the fourth judicial district of a similar nature to this matter.



2. My hourly rate for legal services provided to Defendant is \$200 per hour, and my associate attorney Cherese McClain's rate is \$125.00 per hour, both of which are reasonable rates given the complexity of the issues and legal expertise required for diligent defense of this matter. All Borton Law Offices Invoices are attached hereto as Exhibit A.

3. Prior to hiring my law firm the Defendant had employed attorney John Prior, whose hourly rate for legal services provided to Defendant through Law Offices of John Prior was \$225 per hour, which is also a reasonable rate given the complexity of the issues and legal expertise required for diligent defense of this matter. All Law Offices of John Prior Invoices are attached hereto as Exhibit B.

4. Defendant was able through diligent litigation to obtain a judgment in Defendant's favor against Plaintiff Bridge Tower Dental, PA, at the conclusion of a four day jury trial. The attorneys fees and costs set forth herein are due to be reimbursed to the Defendant pursuant to Idaho Rules of Civil Procedure 7(b)(1) and 54(d) and (e) and Idaho Code §12-120(3). The commercial transaction and bailment contract between the parties was litigated to which the Defendant prevailed with a verdict in its favor.

5. A summary of costs and attorney's fees incurred by Defendant thus far are as follows:

**ATTORNEY FEES**

ATTORNEY	BORTON LAW OFFICES RATE	FEES
JOSEPH W. BORTON	\$200/HR	\$25,170.00
CHERESE MCLAIN	\$125/HR	\$1,975.00
JOHN PRIOR	\$225/HR	<u>\$5,469.50</u>
	TOTAL:	<b>\$32,614.50</b>

**TOTAL ATTORNEY'S FEES: \$32,614.50**

**COSTS**

**LAW OFFICES OF JOHN PRIOR**

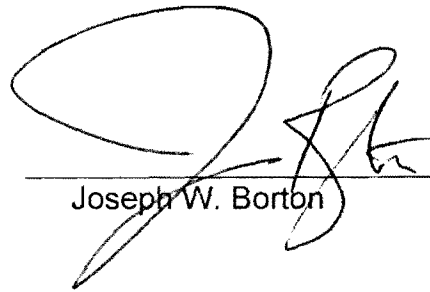
Deposition/Ct Reporter: \$743.69

**TOTAL: \$743.69**

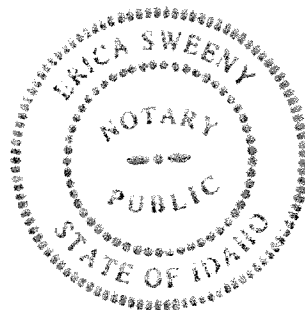
**TOTAL COSTS: \$ 743.69**

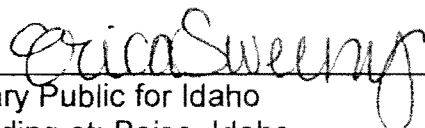
**TOTAL ATTORNEY'S FEES AND COSTS: \$33,358.19**

DATED this 10<sup>th</sup> day of May, 2010.

  
\_\_\_\_\_  
Joseph W. Borton

SUBSCRIBED and sworn to before me this 10<sup>th</sup> day of May, 2010.



  
\_\_\_\_\_  
Notary Public for Idaho  
Residing at: Boise, Idaho  
My Commission expires: 04/19/2016

# EXHIBIT A

## BORTON LAW OFFICES PLLC

1310 N Main St.  
Meridian, Idaho 83642  
208-908-4415

# INVOICE

Bill To:

Meridian Computer Center  
Jason Patten  
1580 W 4th St #102  
Meridian, Idaho 83642

Date	Invoice #
5/7/2010	1146

Work Completed	Time	Description of Services	Rate	Amount
Prepare for court proceeding	7.8	Trial preparations and meeting with client	200.00	1,560.00
Prepare documents for Court	9.5	continued trial prep; witness exam trees; objection plan and evidence admission/exclusion plan	200.00	1,900.00
C.M.	4.5	research damages option; bailment update;s and economic loss rule; applications to case claims; lost profit damages	125.00	562.50
Court Appearance	6	Jury Trial Day 1	200.00	1,200.00
Prepare for court proceeding	4.8	trial prep for day 2	200.00	960.00
Court Appearance	6	Jury Trial Day 2	200.00	1,200.00
Prepare for court proceeding	6.9	prep for Jury Trial day 3	200.00	1,380.00
Prepare for court proceeding	7.8	final witness outlines and cross plan; trial prep for day 3; closing base structure	200.00	1,560.00
Court Appearance	6	Jury Trial day 3	200.00	1,200.00
Prepare for court proceeding	4.75	jury instructions and closing preparations	200.00	950.00
Draft Documents	1.85	Affidavit and Memorandum in support of claim for attorney fee recovery	200.00	370.00
Court Appearance	1.25	Jury Trial day 4	200.00	250.00
Draft Documents	0.5	Final Judgement document for Court re: jury verdict/dismissal	200.00	100.00
telephone call	0.2	John Prior	200.00	40.00

*All work is complete!*

**TOTAL:** ~~13232.50~~  
000150

**BORTON LAW OFFICES PLLC**

1310 N Main St.  
Meridian, Idaho 83642  
208-908-4415

Bill To:

Meridian Computer Center  
Jason Patten  
1580 W 4th St #102  
Meridian, Idaho 83642

**INVOICE**

Date	Invoice #
4/19/2010	1113

Work Completed	Time	Description of Services	Rate	Amount
tele call w/ opposing counsel	0.3	re: Motion in Limine	200.00	60.00
Draft Documents	4.75	Jury Instruction drafts for pre-trial conference	200.00	950.00
Draft Documents	2	exhibit list (preliminary)	200.00	400.00
tele call w/ opposing counsel	0.3	re: basis for our claimed defenses	200.00	60.00
Tele conference with client	0.25	re: witness meetings and authorization for settlement offer	200.00	50.00
Consulting	0.5	review and join Colson's Motion in Limine	200.00	100.00
Draft Documents	1.4	Supplemental response to discovery re: witness testimony and notice of service	200.00	280.00
tele call w/ opposing counsel	0.2	Rob Hancock re: trial issues	200.00	40.00
Prepare for court proceeding	1	Pre-Trial conference	200.00	200.00
Draft Documents	3.9	finalize jury instructions and special verdict format for filing per Court Order	200.00	780.00
Court Appearance	0.5	Pre-Trial tele conference	200.00	100.00
Tele conference with counsel	0.2	re: conf call for pre-trial	200.00	40.00
telephone call	0.3	with Judge Clerk	200.00	60.00
tele call w/ opposing counsel	0.1	Rob Hancock re: trial issues	200.00	20.00
Draft Documents	1.25	Joinder of Motion in Limine to exclude Plaintiff witnesses and damage evidence	200.00	250.00
Prepare for court proceeding	3.75	review of Plaintiff's proposed jury instructions, witness list and exhibit list for trial - formulate objections and response to each	200.00	750.00
tele call w/ opposing counsel	0.2	re: damages defense	200.00	40.00
Office Meeting	2.9	witness preparations for testimony outline and meeting with client to review strategy	200.00	580.00
tele call w/ opposing counsel	0.2		200.00	40.00
C.M.	3.8	preparations for Power Point opening outline	125.00	475.00
Prepare for court proceeding	8.85	jury trial preparations	200.00	1,770.00

Thank you for your business!

TOTAL: \$7045.00

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**BORTON LAW OFFICES PLLC**

1310 N Main St.  
 Meridian, Idaho 83642  
 208-908-4415

Bill To:

Meridian Computer Center  
 Jason Patten  
 1580 W 4th St #102  
 Meridian, Idaho 83642

**INVOICE**

Date	Invoice #
3/26/2010	1087

Work Completed	Time	Description of Services	Rate	Amount
C.M. research	0.6	IDAPA and HIPPA rules	125.00	75.00
C.M.	0.5	HIPPA findings re: duty to maintain electronic records	200.00	100.00
C.M.	3.2	Research basis for HIPPA, CFR, caselaw and summary on duty to maintain records	125.00	400.00
C.M. Office Meeting	0.6	research mitigation of damages for jury instructions	125.00	75.00
email	0.75	to review case status	200.00	150.00
C.M.	0.25	from and to Rob Hancock re: deadlines for expert disclosures	200.00	50.00
C.M. tele call w/ opposing counsel	0.3	loss of income jury instruction research	125.00	37.50
research	0.2	re: motion in limine	200.00	40.00
email	0.75	and review joinder of our motion in limine and discovery responses from Colson, forward all to client	200.00	150.00
Draft Documents	0.2	to opposing counsel for stip to exclude experts	200.00	40.00
Draft Documents	0.6	stipulation re: exclusion of experts in lieu of court hearing	200.00	120.00
Consulting	1.25	Witness List per Court Order for filing	200.00	250.00
Prepare for court proceeding	0.3	stipulation work re: experts	200.00	60.00
Court Appearance	1.75		200.00	350.00
	1	Motion in Limine argument	200.00	200.00

Thank you for your business!

TOTAL: \$2097.50  
 000152

**BORTON LAW OFFICES PLLC**

1310 N Main St.  
 Meridian, Idaho 83642  
 208-908-4415

**INVOICE**

Bill To:

Meridian Computer Center  
 Jason Patten  
 1580 W 4th St #102  
 Meridian, Idaho 83642

Date	Invoice #
3/10/2010	1061

Work Completed	Time	Description of Services	Rate	Amount
C.M.	0.6	Drafting (initial) for Motion in Limine	125.00	75.00
Office Meeting	0.9	re: motion in Limine with CM	200.00	180.00
tele call w/ opposing counsel	0.25	to Rob Hancock	200.00	50.00
Draft Documents	1.9	completion of Motion in Limine to exclude expert testimony	200.00	380.00
C.M.	2.2	draft Motion in Limine base argument	125.00	275.00
telephone call	0.3	from and to Rob H re: Motion in Limine plan	200.00	60.00
tele call w/ opposing counsel	0.3	re: experts	200.00	60.00
Consulting	1.85	review additional documents 1-389 from Bridgetower's counsel and forward to client	200.00	370.00
email	0.2	to Bridgetower counsel to get clarification	200.00	40.00
email	0.3	to opposing counsel re: basis of select items within their discovery responses	200.00	60.00

*Thank you for your business!*

**TOTAL: \$1550.00**

000153

**BORTON LAW OFFICES PLLC**

1310 N Main St.  
Meridian, Idaho 83642  
208-908-4415

Bill To:

Meridian Computer Center  
Jason Patten  
1580 W 4th St #102  
Meridian, Idaho 83642

**INVOICE**

Date	Invoice #
2/21/2010	1049

Work Completed	Time	Description of Services	Rate	Amount
client meeting	1		200.00	200.00
Draft Documents	0.35	Notice of Appearance for court proceedings	200.00	70.00
Consulting	3.8	review entire pleading and discovery file from client for assessment of needs and case strategies; to discuss all findings with client	200.00	760.00
Consulting	2.5	review discovery documents for client meeting	200.00	500.00
telephone call	0.4	with D Kirk (hospital admin) re: HIPPA requirements	200.00	80.00
Letter to opposing counsel	0.3	re: status of her expert witness disclosures - need for additional information	200.00	60.00
research	2.25	review deposition transcripts of Dr Cox, J Patten, Al Colson for fact matters v trial theme framework. issues prep for client meeting	200.00	450.00
Office Meeting	0.9	with client	200.00	180.00
Draft Documents	1.75	supplemental request for discovery from Dr Cox and notice of service	200.00	350.00
Tele conference with counsel	0.2	to Rob Hancock	200.00	40.00
Letter to opposing counsel	0.3	to get supplements to expert disclosures	200.00	60.00
email	0.3	from and to ShellyC re: updates to discovery documents and damages data	200.00	60.00
tele call w/ opposing counsel	0.25	Rob Hancock re: mediation	200.00	50.00
email	0.3	demand to Plaintiff counsel to supplement expert data re: financial loss	200.00	60.00
Draft Documents	1.5	initial drafting of Motions in Limine for exclusion of Bridgetower expert evidence and testimony	200.00	300.00

*We appreciate your prompt payment.*

**TOTAL: \$3220.00**  
**000154**

# EXHIBIT B

## LAW OFFICES OF JOHN PRIOR

ATTORNEY AT LAW  
16 12th Avenue South, Suite 113  
Nampa, ID 83651

February 01, 2008

Jason Patten  
Meridian Computer Center  
1580 W. 4th St., Suite 102  
Meridian, ID 83642

In Reference To: Civil Matter

Invoice # 13577

### Professional Services

	<u>Hrs/Rate</u>	<u>Amount</u>
1/28/2008 Open File	0.50 225.00/hr	112.50
1/22/2008 Notice of Appearance	0.20 225.00/hr	45.00
1/28/2008 Answer	1.50 225.00/hr	337.50
1/29/2008 Phone call to opposing counsel Re: Depo's	0.10 65.00/hr	6.50
1/23/2008 Phone call to opposing counsel	0.20 225.00/hr	45.00
For professional services rendered	2.50	\$546.50
Additional Charges :		
1/25/2008 Filing Fee		58.00
Total costs		\$58.00
Total amount of this bill		\$604.50
2/1/2008 Payment from account		(\$604.50)
Total payments and adjustments		(\$604.50)

000155



Jason Patten

Page 2

	<u>Amount</u>
Balance due	\$0.00
Previous balance of Client Funds	\$2,000.00
2/1/2008 Payment from account	(\$604.50)
New balance of Client Funds	<u>\$1,395.50</u>

000156

**LAW OFFICES OF JOHN PRIOR**

ATTORNEY AT LAW  
16 12th Avenue South, Suite 113  
Nampa, ID 83651

February 29, 2008

Jason Patten  
Meridian Computer Center  
1580 W. 4th St., Suite 102  
Meridian, ID 83642

In Reference To: Civil Matter

Invoice # 13619

Professional Services

	<u>Hrs/Rate</u>	<u>Amount</u>
1/31/2008 Discovery Responses	1.00 225.00/hr	225.00
2/13/2008 Phone call to opposing counsel Re: Depo's	0.10 65.00/hr	6.50
Phone call from opposing counsel	0.10 65.00/hr	6.50
Discovery Response - Prep	2.00 225.00/hr	450.00
Notice of Depo	0.30 225.00/hr	67.50
For professional services rendered	3.50	\$755.50
2/29/2008 Payment from account		(\$755.50)
Total payments and adjustments		(\$755.50)
Balance due		\$0.00
Previous balance of Client Funds		\$1,395.50
2/29/2008 Payment from account		(\$755.50)
New balance of Client Funds		\$640.00

000157

**LAW OFFICES OF JOHN PRIOR**

ATTORNEY AT LAW  
16 12th Avenue South, Suite 113  
Nampa, ID 83651

June 02, 2008

Jason Patten  
Meridian Computer Center  
1580 W. 4th St., Suite 102  
Meridian, ID 83642

In Reference To: Civil Matter

Invoice # 13747

Professional Services

	<u>Hrs/Rate</u>	<u>Amount</u>
3/5/2008 Phone call from Judge's Secretary Re: Phone Conference	0.10 65.00/hr	6.50
3/10/2008 Conference with client	1.00 225.00/hr	225.00
Revisions - Final draft interrogatories	0.50 225.00/hr	112.50
Notice of Compliance	0.30 225.00/hr	67.50
Faxed discovery responses to S. Cozacos	0.10 225.00/hr	22.50
Faxed discovery responses to K.Howell	0.10 225.00/hr	22.50
3/11/2008 Court Appearance	6.00 225.00/hr	1,350.00
3/12/2008 Court Appearance	4.00 225.00/hr	900.00
3/13/2008 Phone call to M & M Court Reporting	0.10 65.00/hr	6.50
Amended Notice of Depo.	0.20 225.00/hr	45.00

000158

	<u>Hrs/Rate</u>	<u>Amount</u>
3/13/2008 Letter to opposing counsel Re: Depo	0.20 225.00/hr	45.00
4/23/2008 File Review	2.00 65.00/hr	130.00
5/12/2008 Phone call to Court Reporter to set depo.	0.10 65.00/hr	6.50
For professional services rendered	14.70	\$2,939.50
6/2/2008 Payment from account		(\$640.00)
Total payments and adjustments		(\$640.00)
Balance due		<u>\$2,299.50</u>
Previous balance of Client Funds		\$640.00
6/2/2008 Payment from account		(\$640.00)
New balance of Client Funds		<u>\$0.00</u>

**LAW OFFICES OF JOHN PRIOR**

ATTORNEY AT LAW  
16 12th Avenue South, Suite 113  
Nampa, ID 83651

August 01, 2008

Jason Patten  
Meridian Computer Center  
1580 W. 4th St., Suite 102  
Meridian, ID 83642

In Reference To: Civil Matter

	<u>Amount</u>
Previous balance	\$2,299.50
6/30/2008 Credit for Invoice # 27559	(\$150.00)
7/10/2008 Credit for Invoice # 27637	(\$190.00)
	<hr/>
Total payments and adjustments	(\$340.00)
	<hr/>
Balance due	<u>\$1,959.50</u>

000160

**LAW OFFICES OF JOHN PRIOR**

ATTORNEY AT LAW  
16 12th Avenue South, Suite 113  
Nampa, ID 83651

September 05, 2008

Jason Patten  
Meridian Computer Center  
1580 W. 4th St., Suite 102  
Meridian, ID 83642

In Reference To: Civil Matter

Invoice # 13852

Professional Services

	<u>Hrs/Rate</u>	<u>Amount</u>
8/22/2008 Discovery Requests	3.00 225.00/hr	675.00
Notice of Service	0.20 225.00/hr	45.00
For professional services rendered	3.20	\$720.00
Previous balance		\$1,959.50
Balance due		<u>\$2,679.50</u>

000161

**LAW OFFICES OF JOHN PRIOR**

ATTORNEY AT LAW  
16 12th Avenue South, Suite 113  
Nampa, ID 83651

November 05, 2008

Jason Patten  
Meridian Computer Center  
1580 W. 4th St., Suite 102  
Meridian, ID 83642

In Reference To: Civil Matter

	<u>Amount</u>
Previous balance	\$2,679.50
8/1/2008 Payment - Thank You	(\$500.00)
Total payments and adjustments	<u>(\$500.00)</u>
Balance due	<u><u>\$2,179.50</u></u>

000162

**LAW OFFICES OF JOHN PRIOR**

ATTORNEY AT LAW  
16 12th Avenue South, Suite 113  
Nampa, ID 83651

December 03, 2008

Jason Patten  
Meridian Computer Center  
1580 W. 4th St., Suite 102  
Meridian, ID 83642

In Reference To: Civil Matter

Invoice # 13938

Professional Services

	<u>Hrs/Rate</u>	<u>Amount</u>
11/13/2008 Objection	0.20 225.00/hr	45.00
Motion to Extend Time	0.30 225.00/hr	67.50
Order to Extend Time	0.20 225.00/hr	45.00
For professional services rendered	0.70	\$157.50
Previous balance		\$2,179.50
Balance due		<u>\$2,337.00</u>

000163



**LAW OFFICES OF JOHN PRIOR**

ATTORNEY AT LAW  
16 12th Avenue South, Suite 113  
Nampa, ID 83651

January 05, 2009

Jason Patten  
Meridian Computer Center  
1580 W. 4th St., Suite 102  
Meridian, ID 83642

In Reference To: Civil Matter

Invoice # 13962

Professional Services

	<u>Hrs/Rate</u>	<u>Amount</u>
12/16/2008 Letter to opposing counsel	0.20 225.00/hr	45.00
For professional services rendered	0.20	\$45.00
Previous balance		\$2,337.00
12/18/2008 Payment - Thank You / Receipt No. 233893. Check No. 12602		(\$400.00)
Total payments and adjustments		(\$400.00)
Balance due		<u>\$1,982.00</u>

000164

**LAW OFFICES OF JOHN PRIOR**

ATTORNEY AT LAW  
16 12th Avenue South, Suite 113  
Nampa, ID 83651

January 28, 2009

Jason Patten  
Meridian Computer Center  
1580 W. 4th St., Suite 102  
Meridian, ID 83642

In Reference To: Civil Matter

	<u>Amount</u>
Previous balance	\$1,982.00
1/19/2009 Payment - Thank You / Receipt No. 233903. Check No. 12666	<u>(\$337.50)</u>
Total payments and adjustments	<u>(\$337.50)</u>
Balance due	<u><u>\$1,644.50</u></u>

000165

**LAW OFFICES OF JOHN PRIOR**

ATTORNEY AT LAW  
16 12th Avenue South, Suite 113  
Nampa, ID 83651

February 25, 2009

Jason Patten  
Meridian Computer Center  
1580 W. 4th St., Suite 102  
Meridian, ID 83642

In Reference To: Civil Matter

	<u>Amount</u>
Previous balance	\$1,644.50
2/11/2009 Payment - Thank You / Receipt No. 233916. Check No. 12720	<u>(\$337.50)</u>
Total payments and adjustments	<u>(\$337.50)</u>
Balance due	<u><u>\$1,307.00</u></u>

000166

**LAW OFFICES OF JOHN PRIOR**

ATTORNEY AT LAW  
16 12th Avenue South, Suite 113  
Nampa, ID 83651

March 30, 2009

Jason Patten  
Meridian Computer Center  
1580 W. 4th St., Suite 102  
Meridian, ID 83642

In Reference To: Civil Matter

	<u>Amount</u>
Previous balance	\$1,307.00
3/23/2009 Payment - Thank You / Receipt No. 233936. Check No. 12826	<u>(\$337.50)</u>
Total payments and adjustments	<u>(\$337.50)</u>
Balance due	<u><u>\$969.50</u></u>

000167

**LAW OFFICES OF JOHN PRIOR**

ATTORNEY AT LAW  
16 12th Avenue South, Suite 113  
Nampa, ID 83651

May 04, 2009

Jason Patten  
Meridian Computer Center  
1580 W. 4th St., Suite 102  
Meridian, ID 83642

In Reference To: Civil Matter

	<u>Amount</u>
Previous balance	\$969.50
4/20/2009 Payment - Thank You / Receipt No. 233949. Check No. 12893	<u>(\$337.50)</u>
Total payments and adjustments	<u>(\$337.50)</u>
Balance due	<u><u>\$632.00</u></u>

000168

**LAW OFFICES OF JOHN PRIOR**

ATTORNEY AT LAW  
16 12th Avenue South, Suite 113  
Nampa, ID 83651

June 02, 2009

Jason Patten  
Meridian Computer Center  
1580 W. 4th St., Suite 102  
Meridian, ID 83642

In Reference To: Civil Matter

Invoice # 14045

Professional Services

	<u>Hrs/Rate</u>	<u>Amount</u>
5/4/2009 Letter to Shelly Cozakos	0.20 225.00/hr	45.00
5/5/2009 Letter to Shelly Cozakos	0.20 225.00/hr	45.00
5/4/2009 Phone call to Colson's Attorney	0.20 225.00/hr	45.00
For professional services rendered	0.60	\$135.00
Previous balance		\$632.00
5/26/2009 Payment - Thank You / Receipt No. 233968		(\$200.00)
Total payments and adjustments		(\$200.00)
Balance due		<u>\$567.00</u>

000169

**LAW OFFICES OF JOHN PRIOR**

ATTORNEY AT LAW  
16 12th Avenue South, Suite 113  
Nampa, ID 83651

June 28, 2009

Jason Patten  
Meridian Computer Center  
1580 W. 4th St., Suite 102  
Meridian, ID 83642

In Reference To: Civil Matter

Invoice # 14063

Professional Services

	<u>Hrs/Rate</u>	<u>Amount</u>
6/4/2009 Phone call to Colsen lawyer	0.10 225.00/hr	22.50
For professional services rendered	0.10	\$22.50
Previous balance		\$567.00
6/29/2009 Payment - Thank You / Receipt No. 233980. Check No. 13031		(\$283.50)
Total payments and adjustments		(\$283.50)
Balance due		<u>\$306.00</u>

000170

**LAW OFFICES OF JOHN PRIOR**

ATTORNEY AT LAW  
16 12th Avenue South, Suite 113  
Nampa, ID 83651

September 02, 2009

Jason Patten  
Meridian Computer Center  
1580 W. 4th St., Suite 102  
Meridian, ID 83642

In Reference To: Civil Matter

Invoice # 14105

Professional Services

	<u>Hrs/Rate</u>	<u>Amount</u>
7/1/2009 Court date letter	0.20 225.00/hr	45.00
For professional services rendered	0.20	\$45.00
Previous balance		\$306.00
7/21/2009 Payment - Thank You / Receipt No. 233995. Check No. 13131		(\$153.00)
Total payments and adjustments		(\$153.00)
Balance due		<u>\$198.00</u>

000171



**LAW OFFICES OF JOHN PRIOR**

ATTORNEY AT LAW  
16 12th Avenue South, Suite 113  
Nampa, ID 83651

September 30, 2009

Jason Patten  
Meridian Computer Center  
1580 W. 4th St., Suite 102  
Meridian, ID 83642

In Reference To: Civil Matter

	<u>Amount</u>
Previous balance	\$198.00
9/18/2009 Payment - Thank You / Receipt No. 234419. Check No. 13257	<u>(\$99.00)</u>
Total payments and adjustments	<u>(\$99.00)</u>
Balance due	<u><u>\$99.00</u></u>

000172

**LAW OFFICES OF JOHN PRIOR**

ATTORNEY AT LAW  
16 12th Avenue South, Suite 113  
Nampa, ID 83651

November 02, 2009

Jason Patten  
Meridian Computer Center  
1580 W. 4th St., Suite 102  
Meridian, ID 83642

In Reference To: Civil Matter

Invoice # 14167

Professional Services

	<u>Hrs/Rate</u>	<u>Amount</u>
10/7/2009 Court date letter	0.20 225.00/hr	45.00
For professional services rendered	0.20	\$45.00
Previous balance		\$99.00
11/2/2009 Payment - Thank You		(\$99.00)
Total payments and adjustments		(\$99.00)
Balance due		<u>\$45.00</u>

000173

**LAW OFFICES OF JOHN PRIOR**

ATTORNEY AT LAW  
16 12th Avenue South, Suite 113  
Nampa, ID 83651

November 30, 2009

Jason Patten  
Meridian Computer Center  
1580 W. 4th St., Suite 102  
Meridian, ID 83642

In Reference To: Civil Matter

	<u>Amount</u>
Previous balance	\$45.00
11/16/2009 Payment - Thank You / Receipt No. 234446. Check No. 14022	<u>(\$45.00)</u>
Total payments and adjustments	<u>(\$45.00)</u>
Balance due	<u><u>\$0.00</u></u>

000174

**M & M Court Reporting Service, Inc.**

**Rebill Invoice**

visit our web site at [www.m-m-service.com](http://www.m-m-service.com)

421 West Franklin Street  
P.O. Box 2636  
Boise, ID 83701-2636  
Phone: (208) 345-9611

Fax: (208) 345-8800

Invoice Date	Invoice #
Monday, March 31, 2008	22768B5

John Prior  
Prior Law Office  
16 12th Avenue South, Ste. 113  
Nampa, ID 83651

Phone: (208) 465-9839 Fax: (208) 465-9834

<b>Witness:</b>	Al Colson, dba I.T. Works
<b>Case:</b>	Bridge Tower Dental v. Colson
<b>Venue:</b>	Ada County, Idaho
<b>Case #:</b>	CV OC 0712775
<b>Date:</b>	3/11/2008
<b>Start Time:</b>	10:15 AM
<b>End Time:</b>	4:15 PM
<b>Reporter:</b>	Tauna Tonks
<b>Claim #:</b>	
<b>File #:</b>	16770B4

Item	Description	Each	Quan	Total
C	Transcript Fee for Copy of Deposition	\$1.95	205	\$399.75
SR	Howell to Obtain Signature	\$0.00	1	\$0.00
P	Postage / Delivery	\$4.60	1	\$4.60
	per request, exhibits not provided	\$0.00	1	\$0.00
Interest	7/23/2008 finance charge	\$15.15	1	\$15.15
<b>Sub Total</b>				<b>\$419.50</b>
<b>Payments</b>				<b>\$0.00</b>
<b>Balance Due</b>				<b>\$419.50</b>

Fed. I.D. # 82-0298125

*Thank you for your business. We accept VISA and MasterCard.*

000175

**M & M Court Reporting Service, Inc.****Rebill Invoice**visit our web site at [www.m-m-service.com](http://www.m-m-service.com)

421 West Franklin Street

P.O. Box 2636

Boise, ID 83701-2636

Phone: (208) 345-9611

Fax: (208) 345-8800

**Invoice Date**

Tuesday, April 01, 2008

**Invoice #**

22793B5

John Prior  
 Prior Law Office  
 16 12th Avenue South, Ste. 113  
 Nampa, ID 83651

Phone: (208) 465-9839 Fax: (208) 465-9834

<b>Witness:</b>	Jason Patten
<b>Case:</b>	Bridge Tower Dental v. Colson
<b>Venue:</b>	Ada County, Idaho
<b>Case #:</b>	CV OC 0712775
<b>Date:</b>	3/12/2008
<b>Start Time:</b>	10:10 AM
<b>End Time:</b>	1:40 PM
<b>Reporter:</b>	Tauna Tonks
<b>Claim #:</b>	
<b>File #:</b>	16771B4

Item	Description	Each	Quan	Total
SalesTax	6% sales tax	\$17.43	1	\$17.43
	per request, exhs not provided	\$0.00	1	\$0.00
C	Transcript Fee for Copy of Deposition	\$1.95	149	\$290.55
SR	Prior to Obtain Signature	\$0.00	1	\$0.00
P	Postage / Delivery	\$4.60	1	\$4.60
Interest	7/23/2008 finance charge	\$11.61	1	\$11.61
			<b>Sub Total</b>	<b>\$324.19</b>
			<b>Payments</b>	<b>\$0.00</b>
			<b>Balance Due</b>	<b>\$324.19</b>

Fed. I.D. # 82-0298125

*Thank you for your business. We accept VISA and MasterCard.*

000176

Shelly C. Shannahan  
Cynthia L. Yee Wallace  
Perkins Coie LLP

ORIGINAL

FILED 4:41 PM

MAY 11 2010

DAVID NAVARRO, Clerk  
REG. CLERK  
DEPUTY

Shelly C. Shannahan, Bar No. 5374  
Cynthia L. Yee Wallace, Bar No. 6793  
PERKINS COIE LLP  
1111 West Jefferson Street, Suite 500  
P.O. Box 737  
Boise, Idaho 83701-0737  
Telephone: 208.343.3434  
Facsimile: 208.343.3232

*Attorneys for Plaintiff*

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BRIDGE TOWER DENTAL, P.A.,

Plaintiff,

v.

AL COLSON dba I. T. WORKS, and  
MERIDIAN COMPUTER CENTER,  
INC., an Idaho corporation,

Defendants.

Case No. CV OC 0712775

**MOTION FOR JUDGMENT  
NOTWITHSTANDING THE VERDICT OR  
IN THE ALTERNATIVE, MOTION FOR  
NEW TRIAL**

Plaintiff Bridge Tower Dental, P.A. ("Plaintiff"), by and through its attorneys of record, Perkins Coie LLP, hereby moves the Court, pursuant to Rule 50(b) of the Idaho Rules of Civil Procedure, to enter Judgment in the Plaintiff's favor notwithstanding the verdict, on the grounds that the jury's verdict rendered on April 27, 2010, is not supported by the evidence, or in the alternative, order a new trial in this matter.

Plaintiff intends to file a Memorandum in support of this Motion within fourteen days pursuant to Rule 7(b)(3) of the Idaho Rules of Civil Procedure.

ORAL ARGUMENT IS REQUESTED.

DATED: May 11, 2010

PERKINS COIE LLP

By: Shelly Shannahan  
Shelly C. Shannahan, Of the Firm  
Attorneys for Plaintiffs

**CERTIFICATE OF SERVICE**

I, the undersigned, certify that on May 11, 2010, I caused a true and correct copy of the foregoing to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Rules of Procedure, to the following person(s):

~~Robert B. Hancock  
MANWEILER, BREEN, BALL &  
HANCOCK, PLLC  
355 W. Myrtle St., Ste. 100  
P.O. Box 937  
Boise, ID 83701-0937  
FAX: 424-3100~~

Hand Delivery \_\_\_\_\_  
U.S. Mail \_\_\_\_\_  
Facsimile \_\_\_\_\_  
Overnight Mail \_\_\_\_\_

Joseph W. Borton  
BORTON LAW OFFICES  
2537 W. State St., #110  
Boise, ID 83702

Hand Delivery \_\_\_\_\_  
U.S. Mail \_\_\_\_\_  
Facsimile X \_\_\_\_\_  
Overnight Mail \_\_\_\_\_

Shelly Shannahan  
Shelly C. Shannahan

ORIGINAL

NO. \_\_\_\_\_ FILED 445  
A.M. \_\_\_\_\_ P.M.

JUL 8 9 2010

J. DAVID NAVARRO, Clerk  
BY \_\_\_\_\_ DEPUTY

Shelly C. Shannahan, Bar No. 5374  
Cynthia L. Yee Wallace, Bar No. 6793  
PERKINS COIE LLP  
1111 West Jefferson Street, Suite 500  
P.O. Box 737  
Boise, Idaho 83701-0737  
Telephone: 208.343.3434  
Facsimile: 208.343.3232

*Attorneys for Plaintiff*

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BRIDGE TOWER DENTAL, P.A.,

Plaintiff,

v.

AL COLSON dba I. T. WORKS, and  
MERIDIAN COMPUTER CENTER,  
INC., an Idaho corporation,

Defendants.

Case No. CV OC 0712775

**AFFIDAVIT OF SHELLY C.  
SHANNAHAN IN SUPPORT OF  
PLAINTIFF'S MOTION FOR JUDGMENT  
NOTWITHSTANDING THE VERDICT OR  
IN THE ALTERNATIVE, MOTION FOR  
NEW TRIAL**

STATE OF IDAHO            )  
                                          : ss.  
County of Ada             )

SHELLY C. SHANNAHAN, being first duly sworn upon oath, deposes and says:

1. I am the attorney of record for the Plaintiff in this action. This affidavit is based on my personal knowledge.
2. Attached hereto as Exhibit A is a true and correct copy of Plaintiff's First Supplemental Proposed Jury Instructions filed with the Court on April 23, 2010.
3. Attached hereto as Exhibit B are true and correct copies of the Court's Jury Instruction Nos. 8 and 9 given to the jury in this matter.

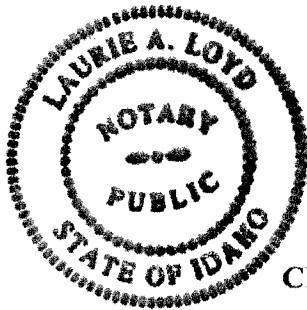
2



DATED: June 8, 2010.

[Signature]  
Shelly C. Shannahan

SUBSCRIBED AND SWORN to before me this 8<sup>th</sup> day of June, 2010.



[Signature]  
Notary Public for Idaho  
Residing at Boise  
My Commission Expires 9/19/2010

**CERTIFICATE OF SERVICE**

I, the undersigned, certify that on June 8, 2010, I caused a true and correct copy of the foregoing to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Rules of Procedure, to the following person(s):

Joseph W. Borton  
BORTON LAW OFFICES  
2537 W. State St., #110  
Boise, ID 83702

Hand Delivery \_\_\_\_\_  
U.S. Mail   X    
Facsimile   X    
Overnight Mail \_\_\_\_\_

[Signature]  
Shelly C. Shannahan



APR 23 2010

J. DAVID NAVARRO, Clerk  
By K. JOHNSON  
DEPUTY

 COPY

Shelly C. Shannahan, Bar No. 5374  
PERKINS COIE LLP  
1111 West Jefferson Street, Suite 500  
P.O. Box 737  
Boise, Idaho 83701-0737  
Telephone: 208.343.3434  
Facsimile: 208.343.3232

*Attorneys for Plaintiff*

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BRIDGE TOWER DENTAL, P.A.,

Plaintiff,

v.

AL COLSON dba I. T. WORKS, and  
MERIDIAN COMPUTER CENTER,  
INC., an Idaho corporation,

Defendants.

Case No. CV OC 0712775

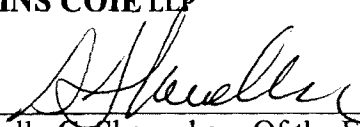
**PLAINTIFF'S FIRST SUPPLEMENTAL  
PROPOSED JURY INSTRUCTIONS**

Plaintiff Bridge Tower Dental, P.A. by and through its attorneys of record Perkins Coie LLP, submit the attached First Supplemental Proposed Jury Instructions.

DATED: April 23, 2010

**PERKINS COIE LLP**

By: \_\_\_\_\_

  
Shelly C. Shannahan, Of the Firm  
*Attorneys for Plaintiffs*

**CERTIFICATE OF SERVICE**


I, the undersigned, certify that on April 23, 2010, I caused a true and correct copy of the foregoing to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Rules of Procedure, to the following person(s):

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\_\_\_\_\_  
Shelly C. Shannahan

**PLAINTIFF'S PROPOSED INSTRUCTION NO. 29**

A bailment is the delivery of goods or personal property in trust, by one person to another, in order for a purpose to be carried out with respect to the goods or property, such as repair or servicing. The person who delivers the goods or property is the "bailor" and the person who receives the goods property is the "bailee."

In this case, Plaintiff alleges that it was a bailor and that the Defendant was a bailee.

*See Quinto v. Millwood Forest Products, Inc.*, 130 Idaho 162, 165, 938 P.2d 189, 192 (Ct. App. 1997) (citations omitted)

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

**PLAINTIFF'S PROPOSED INSTRUCTION NO. 30**

On the issue of whether Defendant has breached a bailment contract, Plaintiff has the burden of proof on each of these propositions:

- (1) The existence of a bailment contract,
- (2) Delivery of the bailed property to the bailee (Defendant), and
- (3) Failure of bailee (Defendant) to redeliver the bailed property undamaged at the termination of the bailment.

If you find from your consideration of all the evidence in the case that each of the foregoing propositions has been proved, your verdict should be for the Plaintiff. If you find that any of the propositions has not been proved, then your verdict should be for the Defendant.

*See Daugherty v. Univ. of Akron*, 631 N.E.2d 176 (Ohio Ct. Cl. 1992) (citation omitted).

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

**PLAINTIFF'S PROPOSED INSTRUCTION NO. 31**

A bailee is required to exercise ordinary or reasonable care to protect the goods or property entrusted to its custody for repairs or servicing.

*Low v. Park Price Company*, 95 Idaho 92, 503 P.2d 291, 292 (1972) (citations omitted)

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

**PLAINTIFF'S PROPOSED INSTRUCTION NO. 32**

A bailee must establish by a preponderance of the evidence that he has been free from fault in connection with the loss, theft or destruction of the property that has been delivered to him.

*Low v. Park Price Company*, 95 Idaho 92, 503 P.2d 291, 292 (1972) (citations omitted)

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_  
65940-0001/LEGAL18162497.1

000187



**PLAINTIFF'S PROPOSED INSTRUCTION NO. 33**

If you find that the bailee received property in good condition but returned it damaged, you must find that the bailee was negligent.

*See T-Craft Aero Club, Inc. v. Blough*, 102 Idaho 833, 834, 642 P.2d 70, 72 (1982) (citation omitted); *Compton v. Daniels*, 98 Idaho 915, 917, 575 P.2d 1303, 1305 (1978).

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_  
65940-0001/LEGAL18162497.1

000188



INSTRUCTION NO. 8

On its theory that there was an express agreement to protect its data, Bridge Tower Dental has the burden of proof on each of the following elements:

1. That there was an express agreement between Meridian Computer Center and Bridge Tower Dental that Meridian Computer Center would protect and backup the data contained in the computer delivered for repair;
2. That while the computer was in the care and control of Meridian Computer Center the data stored in the hard drive was lost;
3. That as a proximate cause of this loss, Bridge Tower Dental suffered damages, and the amounts thereof.

In the case of an express agreement to protect the property of another, the custodian of the property, in this case Meridian Computer Center, owes a high duty of care to the owner to redeliver the property in the same condition as received. If the property is lost or damaged while in the custodian's care, it is liable to the owner unless it can prove it acted with a high degree of care carrying out its duty. In this case, this means that if you find there was an express agreement for the care of the data, the burden of proof is on Meridian Computer Center to prove it acted with a high degree of care; if it does not sustain this burden, your verdict should be for the plaintiff.

If any of the elements has not been proved, or if Meridian Computer Center proves it did act with a high degree of care to protect the data, your verdict should be for the defendant.

INSTRUCTION NO. 9

On its theory that Bridge Tower Dental was the custodian of property other than under an express agreement, the plaintiff has the burden of proof on each of the following elements:

1. The Meridian Computer Center received custody of the data of Bridge Tower Dental, as contained on the two hard drives;
2. That it received custody of the data as an incident of its agreement to repair or service the computer equipment of Bridge Tower Dental;
3. That Meridian Computer Center knew or should have known of the existence of the data, and knew or should have known of the importance or significance of the data to Bridge Tower Dental;
4. That while the data was in the care and control of Meridian Computer Center, the data was lost or destroyed;
5. That as a proximate cause of this loss, Bridge Tower Dental suffered damages, and the amounts thereof.

In the case of property in the custody of another other than by express agreement for care, the custodian of the property, in this case Meridian Computer Center, owes a duty of reasonable care to the owner to redeliver the property in the same condition as received. If the property is lost or damaged while in the custodian's care, the custodian is liable to the owner unless it can prove it acted reasonably. In this case, this means that if you find there was not an express agreement for the care of the data, but the property was under Meridian Computer Center's care, the burden of proof is on Meridian Computer

Center to prove it acted reasonably under the circumstances of this case; if it does not sustain this burden, your verdict should be for the plaintiff.

If any of the elements has not been proved, or if Meridian Computer Center proves it did act reasonably under the circumstances, your verdict should be for the defendant.

**ORIGINAL**

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. **445**

**JUN 19 2019**

CLERK OF DISTRICT COURT  
FOURTH JUDICIAL DISTRICT  
IDAHO

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*Attorneys for Plaintiff*

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BRIDGE TOWER DENTAL, P.A.,

Plaintiff,

v.

AL COLSON dba I. T. WORKS, and  
MERIDIAN COMPUTER CENTER,  
INC., an Idaho corporation,

Defendants.

Case No. CV OC 0712775

**MEMORANDUM IN SUPPORT OF  
PLAINTIFF'S MOTION FOR JUDGMENT  
NOTWITHSTANDING THE VERDICT  
OR, IN THE ALTERNATIVE, MOTION  
FOR A NEW TRIAL**

Plaintiff Bridge Tower Dental, P.A., ("Plaintiff" or "Bridge Tower"), by and through its attorneys of record, Perkins Coie LLP, submit the following memorandum in support of Plaintiff's Motion for Judgment Notwithstanding the Verdict or, in the Alternative, Motion for a New Trial.

**I. INTRODUCTION**

Bridge Tower is entitled to judgment notwithstanding the verdict in this case as a matter of law because Meridian Computer Center ("MCC") failed to introduce evidence at trial tending to establish that the damage to the property at issue was due to other causes consistent with due care on its part. In the alternative, Bridge Tower is entitled to a new trial because the Court's

Jury Instruction Nos. 8 and 9 erroneously set forth the elements and burden in a negligent bailment for hire case and improperly combined Bridge Tower's breach of contract and negligence claims. Bridge Tower's claims were supported by the evidence at trial and it is thus entitled to relief as set forth below.

## II. LEGAL STANDARD

### A. Motion for Judgment Notwithstanding the Verdict.

Motions for judgment notwithstanding the verdict are governed by Idaho Rule of Civil Procedure 50(b), which Rule gives the court the power to either order a new trial or direct the entry of judgment. I.R.C.P. 50(b). A motion for judgment notwithstanding the verdict should be granted where there is not substantial or competent evidence to support the verdict of the jury. *See Mann v. Safeway Stores, Inc.*, 95 Idaho 732, 735, 518 P.2d 1194, 1195 (Idaho 1974). In this case, the jury's verdict in favor of Defendant Meridian Computer Center is not supported by substantial or competent evidence and thus, Plaintiff's motion should be granted.

### B. Motion for New Trial.

A trial judge has wide discretion to grant or deny a request for a new trial. *Crowley v. Critchfield*, 145 Idaho 509, 513, 181 P.3d 435, 439 (2007) (citations omitted). A trial judge must state the reasons for granting or denying a motion for a new trial, unless the reasons are obvious from the record. *Id.* (citing *Collins v. Jones*, 131 Idaho 556, 558, 961 P.2d 647, 649 (1998)) (additional citation omitted). A conclusory statement that has no factual basis for support is not sufficient. *Id.* (citing *Pratton v. Gage*, 122 Idaho 848, 853, 840 P.2d 392, 397 (1992)).

### III. FACTUAL & PROCEDURAL BACKGROUND

Following are undisputed facts presented at trial, and admitted to by Jason Patten, owner of MCC, which are relevant to this motion:

1. MCC sold Bridge Tower two hard drives in April 2003. One of the hard drives was to function as a "mirror image" and store the same data as the first drive ("the Hard Drives").
2. MCC issued a warranty covering repair and replacement of the Hard Drives.  
(See, Exhibit D.)
3. In June 2005, Al Colson, as an agent for Bridge Tower, delivered the Hard Drives to MCC to perform warranty work because one of the Hard Drives was not functioning properly.
4. MCC took possession of the Hard Drives owned by Bridge Tower in June 2005 and agreed to perform warranty work on the failing hard drive.
5. MCC was aware that the hard drives were owned by Bridge Tower when it took possession and agreed to perform the warranty work.
6. The second hard drive MCC took possession of contained Bridge Tower's data and was fully functioning ("the Good Drive).
7. Mr. Patten, on behalf of MCC, agreed to try and salvage any data and perform warranty work on the failing hard drive.
8. MCC admitted that it mistakenly erased all of the data on the Good Drive while the Hard Drives were in its possession.
9. When MCC returned the Good Drive to Bridge Tower, all of the data had been erased.
10. The data MCC erased from the Good Drive could not be recovered.



11. Plaintiff Bridge Tower Dental, PA, brought claims against Defendant Meridian Computer Center for negligence and breach of contract. (*See*, Amended Compl. at 4-6).

12. At trial, MCC failed to present any evidence that the admitted "mistake" by Mr. Patten on behalf of MCC that resulted in erasing all data on the Good Drive constituted ordinary care or was standard in the industry.

13. MCC also failed to present any evidence that the damage to the Good Drive was the result of other causes consistent with due care on the part of MCC. MCC produced no evidence, *via* testimony or exhibits that could lead the jury to conclude that the "mistake" made was done in the absence of negligence or was the result of an intervening cause.

14. Mr. Patten readily admitted he made a mistake when he was handling the Good Drive, by failing to identify the correct numbers on the mother board when he was trying to copy the Good Drive.

15. Bridge Tower also presented proposed jury instructions nos. 29 - 33, which would instruct the jury on the law of negligent bailment and bailment contract. The Court declined to give these proposed instructions.

16. The Court combined the theories of negligent bailment and bailment contract into one instruction. During the jury instruction conference in this case, counsel for Bridge Tower objected to the combined instruction.

17. The Jury returned a verdict for MCC, finding no liability on its part.

#### **IV. ARGUMENT**

Based on the undisputed facts above, Bridge Tower submits that, as a matter of law, it is entitled to a judgment of liability on its claim for negligent bailee. Alternatively, Bridge Tower

respectfully submits that an error of law occurred when Jury Instruction Nos. 8 and 9 were given by the Court, which should result in the grant of a new trial.

**A. The Court Should Enter Judgment for Bridge Tower Under Its Claim for Negligent Bailment.**

In *Quinto v. Millwood Forest Products, Inc.*, 130 Idaho 162, 165, 938 P.2d 189, 192 (Ct. App. 1997), the Idaho Supreme Court defined a bailment as follows:

A delivery of goods or personal property, by one person to another, in trust for the execution of a special object upon or in relation to such goods, beneficial either to the bailor or bailee or both, and upon a contract, express or implied, to perform the trust and carry out such object, and thereupon either to redeliver the goods to the bailor or otherwise dispose of the same in conformity with the purpose of the trust.

*Id.*

A bailee is required to exercise ordinary or reasonable care to protect the goods or property entrusted to its custody for repairs or servicing. *Low v. Park Price Company*, 95 Idaho 91, 92, 503 P.2d 291, 292 (1972) (citations omitted). A bailee for hire has the burden of proving ordinary care, meaning the burden of persuasion and not merely the burden of going forward with the evidence:

... when a bailee who is under the duty of exercising ordinary care is unable to redeliver the subject of the bailment, it is not enough for him to show that the property was lost, stolen or destroyed, but that if he relies upon such fact to excuse his failure, he must go further and show that the loss occurred without negligence on his part.

*Id.* at 94-96, 503 P.2d at 294-96.

When a bailee receives property in good condition but returns it damaged, there is a presumption that the damage resulted from negligence of the bailee. *T-Craft Aero Club, Inc. v. Blough*, 102 Idaho 833, 834, 642 P.2d 70, 72 (1982) (citation omitted). However, if the bailee

produces evidence sufficient to allow the trier of fact reasonably to find that the damage was not caused by negligence, then the burden of persuasion regarding negligence falls upon the bailor. *Id.* The bailee is under an obligation to introduce evidence tending to establish that the damage to the property at issue is due to other causes consistent with due care on his part, otherwise the bailor is entitled to judgment as a matter of law. *See Compton v. Daniels*, 98 Idaho 915, 917, 575 P.2d 1303, 1305 (1978).

In addition, a Bailee may not disclaim his own negligence. Indeed, "the law does not favor contract provisions which release a person from his own negligence" and it has been held that "the right of a bailee to limit his liability by special contract does not extend to relieve him wholly against his own negligence, for to do so would be against public policy." *McMahon v. Branhaven Motors, Inc.*, 2007 WL 3380435, \*4 (Oct. 26, 2007 Superior Ct. Conn.)

When all facts are taken in a light most favorable to MCC, Bridge Tower is entitled to judgment notwithstanding the verdict in this case because MCC failed to introduce evidence at trial tending to establish that the damage to the property at issue was due to other causes consistent with due care on its part. Thus, as a matter of law, MCC is entitled to judgment on its claim for negligent bailment. Because MCC took possession of the Hard Drives, it was undisputedly a bailee. Moreover, MCC took possession of the Hard Drives to perform warranty work pursuant to a warranty it issued in return for payment by Bridge Tower of the purchase price for the computer system, including both Hard Drives. Thus, MCC was a bailee for hire. Mr. Patten, on behalf of MCC, admitted at trial that the damage to the data on the Good Drive was the result of a mistake, specifically - MCC's mistake. Mr. Patten further admitted that he knew Bridge Tower's data was on the Good Drive when delivered to him and that when in his care he erased this data.

As a bailee for hire, MCC was required to prove at trial that the damage to the Good Drive was due to other causes consistent with due care on the part of MCC. *See Compton v. Daniels*, 98 Idaho 915, 917, 575 P.2d 1303, 1305 (1978). MCC failed to do so. MCC presented no evidence at trial from which the jury could draw even an inference that MCC's mistake constituted the exercise of due care or that the damage to the Good Drive was due to other causes other than MCC's actions. Similarly, MCC presented no evidence at trial from which the jury could draw an inference that the damage to the Good Drive was caused by an intervening cause. MCC therefore failed to meet its burden of production and persuasion as a bailee for hire. As such, Bridge Tower is entitled to judgment notwithstanding the verdict as a matter of law. *See Compton v. Daniels*, 98 Idaho 915, 917, 575 P.2d 1303, 1305 (1978).

**B. The Court's Jury Instruction Nos. 8 and 9 Constitute An Error of Law Warranting a New Trial.**

In the alternative, Bridge Tower requests a new trial pursuant to I.R.C.P. 59(a). It is well established that an instruction which incorrectly states the law provides grounds for ordering a new trial. *Sherwood v. Carter*, 119 Idaho 246, 805 P.2d 452 (1991); *Walton v. Pottlatch Corp.*, 116 Idaho 892, 781 p.2d 229 (1989); *see also Grooms v. Amos*, 99 Idaho 351, 581 P.2d 809 (1978) (affirming trial court's decision to grant the plaintiff a new trial where the negligence jury instruction erroneously addressed liability). Bridge Tower respectfully submits that Jury Instructions nos. 8 and 9 constitute such an error warranting a new trial in this case.

During the jury instruction conference, counsel for Bridge Tower duly objected to the Court's combined jury instructions on its theories of negligence and contract and asked instead that the Court submit its proposed instruction nos. 29 – 33. The Court's Jury Instruction No. 8 given at trial reads as follows:

On its theory that there was an express agreement to protect its data, Bridge Tower Dental has the burden of proof on each of the following elements:

1. That there was an express agreement between Meridian Computer Center and Bridge Tower Dental that Meridian Computer Center would protect and backup the data contained in the computer delivered for repair;
2. That while the computer was in the care and control of Meridian Computer Center the data stored in the hard drive was lost;
3. That as a proximate cause of this loss, Bridge Tower Dental suffered damages, and the amounts thereof.

In the case of an express agreement to protect the property of another, the custodian of the property, in this case Meridian Computer Center, owes a high duty of care to the owner to redeliver the property in the same condition as received. If the property is lost or damaged while in the custodian's care, it is liable to the owner unless it can prove it acted with a high degree of care carrying out its duty. In this case, this means that if you find there was an express agreement for the care of the data, the burden of proof is on Meridian Computer Center to prove it acted with a high degree of care; if it does not sustain this burden, your verdict should be for the plaintiff.

If any of the elements has not been proved or if Meridian Computer Center proves it did act with a high degree of care to protect the data, your verdict should be for the defendants.

(See, Jury Instruction No. 8, Exhibit B to Shannahan Aff.)

**1. The Court's Jury Instruction Nos. 8 and 9 Erroneously Instructed the Jury on the Elements and Burden in a Negligent Bailment Case.**

Instruction No. 8 instructs the jury that a high duty of care was owed by MCC to Bridge Tower and goes on to state that this high duty of care is only owed if the jury found that an express agreement between the parties for protection of Bridge Tower's property existed. *Id.* This is contrary to the law of a negligent bailee for hire. In *T-Craft Aero Club, Inc. v. Blough*,

102 Idaho 833, 834. 642 P.2d 70, 72 (1982), the Court held that when a bailee receives property in good condition but returns it damaged, there is a presumption that the damage resulted from negligence. This presumption arises irrespective of an express agreement between the parties. In addition, in *Low v. Park Price, supra*, the Court held that a bailee must establish by a preponderance of the evidence that he is free from fault in connection with the loss, theft or destruction of property. *Id.*, 503 P.2d 292. In other words, after Bridge Tower presented evidence that MCC return the Good Drive in a damaged condition, MCC was required to show that the loss/damage to the Good Drive occurred without negligence on its part. *See Id.*, 503 P.2d at 296 (citation omitted). MCC failed to present any such evidence. As a result, MCC failed to rebut the presumption that arises in a negligent bailment setting and a finding of negligence must follow as a matter of law. In this case, the jury was not provided with a jury instruction that correctly advised them of MCC's burden or the presumption that Bridge Tower was entitled to. Further, the jury could have mistakenly believed that if no express agreement took place between MCC and Bridge Tower pursuant to which MCC agreed to safeguard the Good Drive, then MCC did not have a burden of proof or persuasion to show that the damage occurred absent its negligence.

The Court's Jury Instruction Nos. 8 and 9 do not contain the correct standard or presumption afforded in a negligent bailment case. These Instructions erroneously describe a burden that is described as occurring in the event of an express agreement between the parties which is unsupported by Idaho law. The presumption and burden described in *Low v. Park Price Co.* and *T-Craft Aero Club v. Blough* is not dependent on the existence of an express contract between the parties but instead arises automatically in a bailment for hire transaction. The jury should have been instructed in accordance with Bridge Tower's proposed Jury Instruction Nos.

32 and 33, which instructions properly place the burden on MCC to prove that it was free from fault in connection the loss/damage to the Good Drive, and correctly sets forth the presumption afforded to Bridge Tower in the event that MCC failed to meet this burden. Thus, should the Court fail to grant Bridge Tower judgment notwithstanding the verdict as a matter of law, then Bridge Tower is entitled to a new trial as a result of the Court's erroneous jury instructions on negligent bailment.

**2. The Court's Jury Instruction Nos. 8 and 9 Erroneously Combined Bridge Tower's Breach of Bailment Claim and Negligence Claim.**

Bridge Tower pursued claims for both breach of contract and negligence against MCC and thus the jury should have been provided with separate jury instructions on both claims so that Bridge Tower could have been afforded relief on either claim. (First Amended Compl. at 4-6). In an action by a bailor against a bailee for failure of the bailee to deliver to the bailor the bailed goods in the same condition as when it received them, the bailor may choose various theories of its action and is entitled to have the jury instructed on its theories of the case if the theories are pleaded and supported by the evidence. *See, e.g., Waggoner v. General Motors Corp.*, 771 P.2d 1195, 1200 (Wyo. 1989).

Bridge Tower's proposed Jury Instruction Nos. 30 was submitted in connection with its breach of bailment contract claim and its proposed Jury Instruction Nos. 31-33 were submitted in support of its negligent bailment claim. (Shannahan Aff. Ex. A). Rather than giving these separate instructions, the Court combined Bridge Tower's breach of bailment claim and its negligence claim into one instruction stated two different ways in the Court's Jury Instruction Nos. 8 and 9, which had the effect of merging the two claims together and prevented the jury from considering each claim separately. Moreover, by combining these jury instructions, Bridge

Tower was confined to a finding of liability based solely upon MCC's failure to return the Good Drive in the condition within which it was received. Bridge Tower also alleged, and the evidence at trial showed, that MCC failed to fix the failing hard drive and failed to provide properly configured equipment, both allegations of which could have also sustained a breach of bailment contract claim. The Court's Jury Instruction Nos. 8 and 9 were combined with negligence instructions and were solely based upon MCC's failure to return the property at issue in the same condition as received. Thus, Bridge Tower was prevented from fully pursuing both of its claims for breach of contract claim and negligence as supported by the evidence and as written. The Court's Jury Instruction Nos. 8 and 9 were erroneous and improperly combined Bridge Tower's breach of contract and negligence claims. As a result, Bridge Tower is entitled to a new trial.

#### V. CONCLUSION

Based on the foregoing, Plaintiff hereby requests that the Court grant its Motion for Judgment Notwithstanding the Verdict or, alternatively, for a new trial.

DATED: June 8, 2010

PERKINS COIE LLP

By: Shelly C. Shannahan  
Shelly C. Shannahan, Of the Firm  
*Attorneys for Plaintiffs*



**CERTIFICATE OF SERVICE**

I, the undersigned, certify that on June 8, 2010, I caused a true and correct copy of the foregoing to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Rules of Procedure, to the following person(s):

Joseph W. Borton  
BORTON LAW OFFICES  
2537 W. State St., #110  
Boise, ID 83702

Hand Delivery	_____
U.S. Mail	_____✓_____
Facsimile	_____✓_____
Overnight Mail	_____

Shelly C. Shannahan for  
Shelly C. Shannahan