

NO. 34423-8-II

**COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON**

PIERCE COUNTY, a political subdivision of the State of Washington;
PIERCE COUNTY REGIONAL SUPPORT NETWORK, a division of
the Pierce County Department of Human Services; PUGET SOUND
BEHAVIORAL HEALTH, a psychiatric facility owned by Pierce County
Regional Support Network; and WASHINGTON PROTECTION AND
ADVOCACY SYSTEM, INC.,

Respondents/Cross Appellants,

v. 

STATE OF WASHINGTON; and STATE OF WASHINGTON,
DEPARTMENT OF SOCIAL AND HEALTH SERVICES;
MARYANNE LINDEBLAD in her official acting capacity as Director of
Mental Health Division; and ANDREW PHILLIPS in his official capacity
as Chief Executive Officer of WESTERN STATE HOSPITAL,

Appellants/Cross Respondents.

REPLY BRIEF OF APPELLANTS/CROSS RESPONDENTS

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I. INTRODUCTION

The Washington Legislature has attempted to establish an integrated continuum of public mental health services based on a collaborative relationship between local jurisdictions and the State. This philosophy was reemphasized by passage of chapter 333, Laws of 2006, which *inter alia* established the requirement that any disputes between the State and local jurisdictions be resolved nonjudicially through the mechanisms established in the contracts between the parties. Through this collaborative relationship, the Department and the county-based Regional Support Networks are called upon to find ways to balance the needs of all persons requiring short-term and long-term involuntary mental health care.

The County¹ knowingly and voluntarily entered into contracts with Appellant Department of Social and Health Services (DSHS or the Department) to implement the public mental health system, including both the Involuntary Treatment Act, RCW 71.05 (ITA) and the Community Mental Health Services Act, RCW 71.24 (CMHSA), in Pierce County. As noted in the Department's opening brief, the County filed this lawsuit in an attempt to avoid the consequences of voluntary decisions it made in providing services under the contracts.

¹ As noted in the Department's opening brief, all three respondents in this appeal are components of Pierce County. Br. App. at 9. Accordingly, they are referred to collectively in this brief as "Pierce County" or "the County."

In its response brief, as it has throughout this litigation, Pierce County attempts to cobble together legal justifications to excuse failures to comply with its voluntarily undertaken contractual obligations regarding the use of state hospital beds, and the resulting financial consequences. In effect the County seeks judicially-sanctioned special treatment as it relates to the care of both long-term and short-term patients, and a judicial rewrite of the contracts it entered into with the Department so that they read more to the County's liking. The trial court's orders granting relief to the County should be reversed, the County's cross-appeal denied, and this matter remanded with directions to dismiss the case.

II. RESPONSE TO PIERCE COUNTY'S COUNTER-STATEMENT OF THE CASE

Several things are noteworthy in the counter-statement of the case found in Pierce County's brief at 4-20. First, the County does not assign error to any of the trial court's findings, and accordingly they are treated by this Court as verities on appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). *See also* RAP 10.3(g) ("The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.").² The County's omission is particularly significant

² This Court has waived the requirement of RAP 10.3(g) for a *separate* assignment for each challenged finding of fact. *See* General Order 98-2 In RE The

with respect to its cross-appeal on one issue, as discussed more fully below in part IV.B.

Second, many of the County's factual assertions are either misleading, inaccurate or both. For example, the County states that "DSHS took the position that it had the discretion to refuse long-term patients . . . depending upon then-existing conditions at [Western State Hospital (WSH)], such as overcrowding or staffing constraints." Brief of Respondents/Cross-Appellants (Br. Resp.) at 15. But the evidence was uncontroverted that decisions about which patients were admitted to WSH and when were based on agreements reached with the RSNs, competing demands for limited beds by all the requesting RSNs, and based on *medical judgments* made by the hospital's medical director, taking into account the need for safety of all patients, including those in the hospital and those for whom admission was being sought. CP 242; 1697-1705; Ex. 7 at P-EX07-001-000027 ¶ 2.4.9. *See also* CP 12-24, 244-53, 248-49, 594-608, 1642-50, 2267-70, 2383-87.

Similarly, the County asserts that "some patients waited [for admission to WSH] for periods as long as 26 days[.]" Br. Resp. at 15. In support of this statement, the County cites CP 4339, which is page two of the trial court's judgment and order, and says nothing about delay times.

Matter of Assignments of Error. However, that does not relieve the County of the consequences of noncompliance with the balance of the rule or RAP 10.3(g).

Moreover, while there were a few instances of lengthy delays, the average wait time was two to four days. CP 17-18; 260-62; 901; 1066-68.

Third, and most importantly, the County makes a number of assertions scattered throughout its brief regarding the funding provided to it under the contract. *See*, for example, Br. Resp. at 10 n.8 (“[W]hen [the County] entered into the contracts with [the Department] in 2001 and 2003, it did not know the amount of available resources that it would receive to provide the services required by statute and contract.”); *Id.* at 17 (“Because the contract required [the County] to provide certain non-Medicaid services without regard to funding, the only way that [the County] could pay for such services was through use of its Medicaid savings or by cutting non-mandatory services.”). These assertions do not stand up to even moderate scrutiny of the record.

By signing the contracts, the County agreed to provide a defined set of services for a specified set of allocated funds. As it related to non-Medicaid services, the County’s obligation was limited to those that could be provided “within available resources.” Ex. 6. at P-EX06-001-000005, ¶ 3. (“Medically necessary services described shall be provided. . . within available resources to non-Medicaid consumers.”); Ex. 7 at P-EX07-001-000021 (“Persons who meet the non-Medicaid ‘state priority populations’ . . . shall be served based on available resources.”). While “available

resources” was not defined in the contracts, it was defined in RCW 71.24.025 as consisting of “funds appropriated for the purpose of providing community mental health programs” plus non-Medicaid federal funds (i.e. the block grant). Nothing prevented the County from using its own funds if the “available resources” funds were insufficient. Likewise nothing prevented the County from terminating the contract upon ninety-days notice or from not signing the contract in the first place.

The trial court found that “based on the total amount of funding appropriated by the Legislature and allocated to PCRSN...it had available all the financial resources it needed to pay for services under the...contracts.” CP 4330 ¶ 9. The County did not challenge this finding. Further, Ms. Lewis, the County’s mental health administrator, testified that if she had thought that offered funds were not sufficient, the County would have elected not to enter into contracts with the Department. RP Lewis (Nov. 17, 2005) at 87-89; Ex. 318. Mr. Stewart, a Pierce County mental health program administrator, admitted that the County never ran out of money for services. RP Stewart (Nov. 10, 2005) at 101-103; CP 3170-79. Despite the laundry list of services that Pierce County claims were required under its contracts (Br. Resp. at 10-11), Ms. Lewis was hard-pressed to identify services that could not be provided due lack of “available resources.” RP Lewis (Nov. 16, 2005) at 20-22. Thus, even

assuming *arguendo* that the funds provided under the contract were insufficient, the County knew this before signing the contracts. CP 4329-30.

Moreover, contrary to the County's assertion (Br. Resp. at 10 n.8), prior to entering into the contracts the Department provided information regarding the expected funding allocation from all of the various sources for the contract period. RP Dula (Nov. 14, 2005) at 47-49, 72-73; RP Gunther (Nov. 21, 2005) at 55-57; Exs. 331-336. Pierce County knew how much total money it would receive during the contract period, and it chose to estimate a lower amount because it thought the Department estimates were too high. RP Dula (Nov. 14, 2005) at 47-49; CP 4330, ¶ 9; Ex. 319. Not only did Pierce County receive all of these various funds, but during the course of this lawsuit it received additional funds to help operate Puget Sound Behavioral Health. RP Lucas (Nov. 22, 2005) at 17; Ex. 6 at P-EX06-001-001071-73; Exs. 41-43, 314.

Prior to restrictions being placed on the use of Medicaid savings by the Center for Medicare and Medicaid Services (CMS), the federal agency responsible for oversight of state Medicaid programs, the "state-only" funds were a constant figure from year to year at \$33.4 million dollars for all RSNs. RP Dula (Nov. 14, 2005) at 47-49, 72-73. After

CMS announced its decision limiting the use of Medicaid savings after July 1, 2005 the Washington Legislature appropriated between eighty and one hundred twenty-one million new “state only” funds to cover the “Medicaid savings” shortfall caused by the federal change in policy. *Id.*

Further, with respect to the claim that the contract “forced” the use of Medicaid savings, the County’s own expert, Dr. Wallace, testified that the contracts did not have provisions forcing the County to use its Medicaid savings.³ CP 3155-57. At no time did the Department tell the County that it had to use Medicaid savings, or that it was not meeting contractual obligations because it was electing to not use Medicaid savings. RP Stewart (Nov. 10, 2005) at 110.

In reality, as admitted by the County witnesses, the County used much of its Medicaid savings on the voluntary purchase and subsidization of Puget Sound Behavioral Health (PSBH), housing services and enhancing crisis triage services. RP Stewart (Nov. 10, 2005) at 14-15, 41-42, 84-85; RP Lewis (Nov. 16, 2005) at 23-24, (Nov. 17, 2005) at 5-15, 22-42; RP Gunther (Nov. 21, 2005) at 38-40; CP 4329-30 ¶ 8; Exs. 9, 12, 253-54, 393. Continuing to pay for “non-

³ References in the contracts to the use of “savings” were limited to making sure that all funds received under the contract were used to support the public mental health system, otherwise Pierce County could use the savings as it chose. RP Dula (Nov. 14, 2005) at 26-27; RP Gunther (Nov. 21, 2005) at 36; Ex. 6 at P-EX06-001-000029 ¶ 7.1.3, Ex. 7 at P-EX-07-001-000031-32 ¶ 6.1.1; CP 252-254, 393.

Medicaid services” with Medicaid savings when “available resources” ran out were at the discretion of PCRSN. CP 4328-31.

In practice, both the State and the County considered the various sources of funds as “all of the funds,” a “green dollar,” “mushed together,” a “pot of money,” or a “combined payment.” RP Stewart (Nov. 10, 2005) at 101-105; RP Dula (Nov. 14, 2005) at 11-12, 20, 26; RP Gunther (Nov. 22, 2005) at 65; RP Lucas (Nov. 22, 2005) at 10-11; CP 3170-79. Thus, once the allocated funds were paid to the County, the money lost its distinction. Ex. 388. Until July 1, 2005, this was acceptable to all the entities involved. CP 4328-31.

The County first asserted that it was being “forced to use Medicaid savings” when it filed the Fourth Amended Complaint (CP 55) on July 1, 2005, after the two contracts at issue were completed. Pierce County always elected to sign the contracts and the amendments, regardless of whatever funding concerns it articulated or failed to articulate. RP Lewis (Nov. 17, 2005) at 28, 43-82; CP 4329 ¶ 7; Exs. 6, 7, 209-211, 221, 222, 226-227, 263-264, 394. As former RSN Administrator Fran Lewis testified:

We feel very strongly that the local government, in response to its citizens, has the best chance of developing care for the citizens and the things we need. And the County, thus far, in spite of [the County Executive’s]

almost not signing the contract, has stood behind that commitment to manage the system.

RP Lewis (Nov. 17, 2005) at 33. This sentiment is both admirable and consistent with the Legislature's intent to establish a public mental health system that is statewide in scope but locally managed. However, Pierce County's posture in this lawsuit suggests that the County favors local administration only so long as the County is not required to use local funds and has unfettered access to state resources whenever it chooses.

The County's claims that it did not know what resources it would have, or was forced to use Medicaid savings are, like many other statements in its brief, not supported by the record below.

III. REPLY BRIEF ARGUMENT

A. RCW 71.05.320 Requires Trial Courts To Commit Patients, But Should Be Read As Allowing The Department A Reasonable Period Of Time To Admit Patients To The Hospital, Taking Into Account The Agreement Reached By The RSNs And The Impact On Other Patients. In Any Event, The Legislature Has Directed That Disputes Relating To The Use Of Hospital Beds Be Resolved Under The Contract.

The trial court held, as a matter of law, that RCW 71.05.320 required WSH to admit patients committed for long-term care no later than the day following commitment. CP 1863 ¶ 1a; 4340 ¶ C(1). This ruling was based on an overly narrow reading of the statute without taking into account "all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question."

(Brief of Appellant) (Br. App.) at 38, quoting *State ex rel Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002). The *Campbell & Gwinn* Court noted that “this formulation of the plain meaning rule provides the better approach because it is more likely to carry out legislative intent.” *Campbell & Gwinn*, 146 Wn.2d at 11-12.

Pierce County attempts to support the trial court’s ruling using the same narrow reading of the statute devoid of its context and ignoring the 2006 legislation directing that disputes such as those at issue here be resolved without judicial intervention. This is the wrong approach. First, RCW 71.05.320 states that when a person meets the standards warranting involuntary commitment for long-term care, “the *court* shall remand him or her to the custody of the department[.]” RCW 71.05.320 (emphasis added). Thus the statutory obligation is on the committing court, not the Department.⁴

Second, neither the trial court nor Pierce County identified a counterpart statute dictating a time limit within which the Department must physically accept such individuals, and thus there is no statutory basis for the trial court’s arbitrary imposition of a no-later-than-next day timeframe for admission, an approach that disregards the impact on the other patients in the hospital, patients committed from other counties and

⁴ As noted in the Department’s opening brief, the trial judge initially agreed with this analysis. Br. App. at 37 n.23.

also awaiting admission, or for that matter the committed persons themselves.

Significantly, Pierce County does not assert that the Department's responsibility for long-term patients arises instantaneously upon the issuance of the commitment order, and thus tacitly admits that its contractual obligation to administer the ITA includes responsibility for long-term patients for some period of time following their commitment.⁵ Thus, the real issue is whether should have worked these matters out in the best interest of all those affected, as intended by the Legislature, or whether the trial court was justified in establishing an arbitrary time-frame for admission regardless of the parties' agreements and legislative intent?

The statute should be read consonant with the statutory scheme that underlies the entire public mental health system that the Legislature envisioned would be a collaborative framework focused on the needs of all of the patients, not the kind of adversarial environment engendered by the County's litigious approach.

The County relies on two cases in its defense of the trial court ruling: *Pierce County v. Western State Hospital*, 97 Wn.2d 264, 644 P.2d 131 (1982) (*Pierce County I*) and *In re Detention of W*, 70 Wn. App. 279, 852 P.2d 1134 (1993). As discussed more fully in the Department's

⁵ The trial court explicitly recognized as much by allowing a reasonable time—up to the day following the commitment order—for the Department to admit patients to WSH without violating its injunction. CP 1863, 4340.

opening brief (Br. App. at 36-39), neither case supports the County's position. *Pierce County I* involved a statute⁶ that—unlike RCW 71.05.320—specifically directed that a facility providing short-term evaluation and treatment “must immediately accept” patients presented to it. *Detention of W* addressed the “court shall remand” language of RCW 71.05.320, but the Court of Appeals’ opinion confirmed that the actual placement decision was within the discretion of the Department and not the court issuing the remand order.

Ultimately the County’s attempt to defend the trial court’s ruling on long-term patients fails—that decision should be reversed with direction to dismiss the County’s complaint in this regard.

B. The Trial Court Erred In Awarding Damages.

The trial court also read RCW 71.05.320 as transferring financial responsibility for Pierce County long-term care patients waiting for admission to the state hospital to the Department, and as damages awarded the County the costs it incurred for caring for long-term patients after the date of commitment. CP 4333, ¶¶ 2-3. The Department’s opening brief pointed out that this award of damages was error for several reasons: (1) there was a contract addressing the general topic, and therefore it was error to award damages on an unjust enrichment theory;⁷ (2) no statute or

⁶ Former RCW 71.05.170.

⁷ At least as to the 2003-2005 contract, Pierce County contractually agreed that the administrative remedies were limited to the dispute resolution clauses under the

contract provision expressly required the Department to assume financial responsibility for patients prior to their actual admission to the hospital; and (3) equitable principles did not support a damages award. Br. App. at 56-63.

In response, the County acknowledges the absence of an explicit contract provision, but inexplicably argues that this absence justifies the trial court's reliance on an unjust enrichment theory. Br. Resp. at 48. None of the cases relied on by the County support the notion that a party to a contract can recover additional compensation under an unjust enrichment theory. *Bailie Comm., Ltd. v. Trend Bus. Sys.*, 61 Wn. App. 151, 810 P.2d 12 (1991), cited at Br. Resp. at 48, involved whether prejudgment interest was appropriate under the facts of the case, and the opinion only incidentally described the elements of an unjust enrichment claim. *Heaton v. Imus*, 93 Wn.2d 249, 608 P.2d 631 (1980), and *Eaton v. Engelcke Mfg. Inc.*, 37 Wn. App. 677, 681 P.2d 1312 (1984) (Br. Resp. at 48) both involved recovery of the value of work performed under an oral agreement. These opinions contain correct statements of the unjust enrichment theory; they do not, however, support the notion that the theory justifies recovery when there is a contract relating to the same subject.

contract. These clauses did not provide for "damages." Thus, the contract did not afford the County a right to damages under the APA. CP 1408-10; Ex. 7 at P-EX07-001-000004.

Similarly, the County's attempt to distinguish *Chandler v. Wash. Toll Bridge Auth.*, 17 Wn.2d 591, 137 P.2d 97 (1943) (cited at Br. App. at 59 for the principle that a party to a contract may not bring an action on an implied contract relating to the same subject matter) are ineffective. The *Chandler* reasoning has been applied in a number of contexts. *See e.g.*, *McDonald v. Hayner*, 43 Wn. App. 81, 715 P.2d 519 (1986) (law firm not entitled to additional compensation because level of effort exceeded what the parties originally contemplated); *Mountain Pac. Chap. Assoc. Gen'l Contractors v. Highway Comm'n*, 10 Wn. App. 406, 518 P.2d 212 (1974) (unjust enrichment did not authorize state to offset for taxes that were contemplated when highway construction contract was awarded but were subsequently eliminated, thus resulting in windfall to contractors).⁸

⁸ Also unpersuasive is Plaintiffs' argument that the trial court was justified in awarding damages in a judicial review brought under RCW 34.05, the Administrative Procedure Act (APA), even though RCW 34.05.574 states that in judicial review proceedings "[t]he court may award damages, compensation, or ancillary relief only to the extent expressly authorized by another provision of law." In support, the County cites *Sherman v. State*, 128 Wn.2d 164, 905 P.2d 355 (1995) (Br. Resp. at 50). *Sherman* involved the dismissal of a medical resident from the University of Washington Medical School. Dr. Sherman challenged the dismissal by invoking the administrative remedy available to him under his residency agreement. When that proceeding was decided adversely to him, he sought judicial review under the APA in the King County Superior Court. Ultimately the administrative appeal was consolidated with other lawsuits in which Dr. Sherman sought damages and other relief under a variety of theories including federal and state handicap discrimination, breach of contract, and retaliatory discharge. *See* King County Cause Nos. 90-2-21803-1, 90-2-25569-7, and 90-2-10339-1. While it is true that the trial court purported to award damages in part based on the APA (*Sherman*, 128 Wn. App. at 182), the Supreme Court reversed that award and all other trial court orders favorable to Dr. Sherman. *Sherman*, 128 Wn. 2d at 206-07. On remand, *all* of Dr. Sherman's claims were dismissed. The *Sherman* case provides no support whatsoever for Pierce County's arguments.

Moreover, the facts and circumstances of this case do not justify the trial court's imposition of an equitable damages award. It was undisputed below that Pierce County voluntarily contracted to administer the ITA within its borders; that it had no obligation to do so but for the contract that it voluntarily signed; and that it could have withdrawn from that contract at any time upon ninety days notice. CP 4328-30, Ex. 6, 7, 226, 227.

Further, the evidence demonstrated that the times during which Pierce County patients waiting admission to WSH coincided with times during which the County was significantly exceeding the number of WSH beds allocated to it. CP 266-69, 724-58, 939-47, 1063-65, 1642-67, 2364-81. Finally, it was also undisputed that no patient suffered harm because they were being cared for at PSBH and awaiting transfer to WSH. CP 609-11, 613-17.

In this factual context, the trial court's ruling shifting financial responsibility to the Department at an arbitrary point in time regardless of the surrounding circumstances was error, and should be reversed.

C. The Trial Court Erred By Invalidating WAC 388-825-0203 And By Requiring A Refund Of Liquidated Damages Incurred Under The Contracts.

The Community Mental Health Services Act vests the Department with broad rule-making authority. RCW 71.24.035(5)(c). Pursuant to this broad authority, and in concert with the RSNs, the Department developed

an allocation of beds at the state hospitals, and a liquidated damages methodology to manage its bed capacity among the competing demands. That methodology was set forth in former WAC 388-825-0203, and the County, by signing the RSN contracts, agreed to comply with it. Ex. 6 at P-EX06-001-000036 ¶ 7.4.8.1(b), .2; Ex. 7 at P-EX07-001-000039 ¶¶ 6.5.1.1, 6.5.2; Ex. 226, ¶ 8.4 (D0170002).

The trial court invalidated the WAC, and ordered the Department to refund the liquidated damages. CP 4339. In its opening brief the Department explained that this was error because not only was the rule within the Department's authority, Pierce County had contractually agreed to be bound by the terms of the rule. Br. App. at 65-69. The Department also pointed out that the County's agreements with its subcontractors included similar language, and that all liquidated damages imposed on the County had been passed on to those subcontractors, and thus the County incurred no financial loss as a result of the imposition of liquidated damages. *Id.* at 68-70; CP 760, 4328 ¶ 8, 4334 ¶ 3; Ex. 366-68.⁹

In response, the County argues that the liquidated damages provision conflicted with the statute and constituted an illegal penalty. Br. Resp. at 51-60. Further, although it acknowledges that the financial loss

⁹ The trial court recognized that allowing the County to receive the refund amounted to a windfall to the County, and placed specific conditions on how the funds could be expended. CP 4334. While neither party has challenged that aspect of the trial court's ruling, its existence does not justify the order requiring the refund.

was passed on to its subcontractors, the County argues that the order requiring a refund was appropriate. *Id.* at 60-61. These arguments lack merit and should be rejected.

The County's statutory argument is two-fold. First, it rehashes the arguments made in support of the trial court's interpretation of RCW 71.05.320 regarding the financial responsibility for long-term patients.¹⁰ Those arguments are even less persuasive in this context than in the context to which they are directly pertinent.

Second, the County argues that the liquidated damages constitute an illegal penalty. This argument is disingenuous given that the County incorporated exactly the same requirement in the contracts with its subcontractors, and that the County voluntarily agreed to the provision in its contract with the Department. Further the County's argument is contradicted by the undisputed evidence supporting the amount of the liquidated damages as a reasonable approximation of the additional costs incurred when the census at WSH exceeded its funded capacity. CP 931-34, 938. *See, e.g., Watson v. Ingram*, 124 Wn.2d 845, 881 P.2d 247 (1994) (noting that liquidated damages are favored in Washington, and

¹⁰ In essence the County argues that RCW 71.05.320 gives it unfettered access to beds at WSH, and that it has no responsibility to limit use of those beds. This was not the agreement of the parties; nor does it reflect the kind of collaborative approach to management of the public mental health system that the Legislature intended.

stating that they will be upheld if, at the time of contracting, they represent a reasonable estimate of the damages that will result from the breach).

Finally, it is undisputed that neither the County nor its contractors incurred a financial loss as a result of incurred liquidated damages. Under these circumstances, it was error for the trial court to require the Department to refund them, and that order should be reversed.

D. The Trial Court's Injunction Was Improperly Issued.

The Department's opening brief demonstrated that the trial court's injunction was improper because: (1) Pierce County had an adequate remedy without invoking the court's equitable powers in that it could withdraw from the contract or, assuming the trial court was correct that damages were available, could sue for damages; (2) the trial court failed to consider the public interest and particularly the needs of other patients; and (3) the effect of the injunction was to require the Department to expend funds beyond the amounts appropriated by the Legislature, contrary to both statutory and the constitutional provisions. Br. App. at 44-52. Pierce County responds to these arguments by claiming that the damages remedy is insufficient when the "injury is ongoing." Br. Resp. at 30-31. But the "injury" is "ongoing" *only* if Pierce County *chooses* it to be so; the County could limit its damages at any time by withdrawing from the contract. Indeed the County could have avoided its alleged injury completely by declining to sign the contract in the first instance, or

following through with the threats to terminate the contract. CP 4329 ¶ 6; RCW 71.24.035(4).

Even more astonishing is the County's argument that the trial court allegedly considered the public interest. The evidence of this alleged balancing of interests is the fact that "the trial court injunction (at DSHS' request)¹¹ limited the scope of the injunction to Pierce County patients." Br. Resp. at 31 (footnote added). But the effect of that limitation is to give even the least seriously ill Pierce County patient priority over patients from other RSNs who might in greater need of the treatment available at WSH.¹² This limitation reflects a complete subjugation of all other interests implicated in the complex public mental health system to those of Pierce County. The County's suggestion that this represents any consideration of the public interest, never mind an appropriate balancing of interests, is ludicrous.¹³

¹¹ This parenthetical statement, like many others in the County's brief, is misleading. While it is true that the Department argued that the scope of the injunction should be limited to Pierce County residents, the argument was based on the fact that none of the other counties or RSNs had joined in the lawsuit, and that Pierce County's standing was necessarily limited to advocating its own interests. The Department argued much more vigorously that the Court should decline to enter an injunction in the first instance, in large part because of the risk of harm to patients already in the hospital, and those in other counties waiting for admission, or committed from other counties.

¹² As discussed in the Department's opening brief (Br. App. at 25-26), the Department opened a new ward in December 2005 to comply with the Court's injunction. Almost immediately the hospital was once more at capacity, largely because the number of patients committed from the County had increased markedly. Nonetheless, the County sought contempt sanctions against the Department, in effect arguing that its patients were entitled to priority over those from all other RSNs.

¹³ The only other evidence cited by the County for the proposition that the trial court considered the public interest is the fact that, in ordering the Department to open new wards, the trial court allowed a reasonable period of time to do so rather than

Most astonishing of all is the County's argument that the trial court did not intrude into the Legislature's appropriation responsibility because *after* the injunction was issued "the Legislature, by supplemental appropriation, provided funds for additional beds [and t]herefore there was no violation" of RCW 43.88.130 and .290.¹⁴ Br. Resp. at 34. This argument misses the point. The prohibition on judicial intrusion into appropriation decisions is designed to avoid the Legislature having to make the unsavory choice of either appropriating additional funds or placing a state agency in jeopardy of violating a court order. The fact that the Legislature chose to supplement the budget and avoid the potential confrontation with the judiciary does not justify the trial court overstepping its bounds by setting up such a choice in the first instance.

The Washington Supreme Court recognizes that allocation of scarce public resources is in the domain of the Legislature. In *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 932 P.2d 139 (1997) (discussed in Br.

requiring them to be opened immediately. Br. Resp. at 32. This delay was nothing more than a recognition of the practicalities involved in opening new wards, and did nothing to benefit patients waiting for admission from other RSNs, especially when Pierce County doubled the number of patients to fill the new beds. CP 1855-59; 1860-66. It would have been an abuse of discretion for the Court not to allow a reasonable time to comply with the order to open a new ward. *Matter of J.S.*, 124 Wn.2d 689, 699, 880 P.2d 976 (1994).

¹⁴ As explained in the Department's opening brief, these statutes require that agencies limit their expenditures to the amounts appropriated (RCW 43.88.130) and impose personal liability on state officers who cause an agency to overspend (RCW 43.88.290). Br. App. at 48-50. These statutes implement article VIII, section 4 of the Washington Constitution, which vests the Legislature with the only authority to appropriate state funds.

App. at 50-51), the Court reversed a mandatory injunction issued to a state agency because compliance would have required the agency to expend funds beyond those appropriated. While noting that issuing orders to state agencies as a means of appropriating funds might be “tempting,” the *Hillis* Court vacated the order because “specific appropriation to fund a statutory right, not involving constitutional rights or judicial functions, is normally beyond our powers to order.” *Hillis*, 131 Wn.2d at 389-90.¹⁵ As explained in the Department’s brief, *Hillis* is instructive here because the order at issue was based on a statute and involved neither a constitutional right nor a judicial function, and ultimately required the Department to expend funds beyond its appropriation and subsequently required the Legislature to supplement the Department’s budget.¹⁶

The County attempts to evade *Hillis* by mischaracterizing the holdings of two subsequent, but inapposite, cases: *Coalition for the*

¹⁵ Oregon courts are similarly limited. See *Matter of L.*, 24 Or. App. 257, 268, 546 P.2d 153 (1976) (although Juvenile Court had statutory authority to order specialized treatment for ward of the state, it exceeded its authority in doing so when there were insufficient funds appropriated to pay for the treatment.)

¹⁶ The County argues that “DSHS has never submitted an iota of proof that it in fact was required to violate the Budget & Accounting Act by expending funds for added beds.” Br. Resp. at 33. This statement is just plain false. Defendant MaryAnne Lindeblad, Acting Director of the DSHS Division of Mental Health, and Dr. Phillips, CEO for WSH, submitted declarations in support of Defendants’ Motion To Amend Injunction in which they stated that the maximum funded capacity of WSH for the 03-05 biennium was 912 patients, and that in order to comply with the court’s injunction a new ward had been opened increasing the capacity to 941 beds at a cost of \$7.5 million. CP 2499-2501, 2677-78. While Ms. Lindeblad stated that the additional funds had been included in the supplemental budget request, this did not change the fact that the court’s order required expenditures of money beyond what had been legislatively appropriated for that purpose at the time the order was entered.

Homeless v. Dep't of Soc. & Health Servs., 133 Wn.2d 894, 949 P.2d 1291 (1997), and *McGowan v. State*, 148 Wn.2d 278, 60 P.3d 67 (2002). Br. Resp. at 34-36. *Coalition* involved a challenge to the adequacy of a plan developed pursuant to a statutory mandate. While the Department unsuccessfully sought reversal of a trial court's declaratory judgment regarding the adequacy of the plan it had developed, it did so not on the basis of a lack of funding, but because the trial court's reading of the statute at issue did not accord the Department the range of discretion it previously thought it possessed. There was no injunction involved, and no discussion in the opinion about whether the Department would have been able to comply with the Court's interpretation within its available funding.

Similarly *McGowan* involved a judicial construction of Initiative 732, specifically whether the provision mandating cost-of-living increases for school district employees required the state to fund the increases for all such employees or only those funded with state funds.¹⁷ In answering affirmatively, the *McGowan* Court denied that it was ordering the Legislature to provide funding for the increases which would be contrary to *Hillis*. *McGowan*, 148 Wn.2d 297 n.3. As in *Coalition*, no injunction

¹⁷ In addition to the state funds they receive, school districts can, with voter approval, generate additional funds through local property tax levies. RCW 84.52.0531. A portion of these funds are typically used to hire teachers beyond those whose salaries are funded by the state. The initiative was clear that all teachers were to receive cost-of-living increases; what was at issue in *McGowan* was whether the state was required to pay the increases for the teachers funded through locally imposed taxes.

had been issued and the *McGowan* Court declined to “speculate on what future appropriations will be made in light of our decision construing I-732.” *Id.*

Neither of these cases involved injunctions or orders requiring a particular expenditure of state funds in excess of amounts appropriated by the Legislature. In neither case did the opinion purport to limit the holding in *Hillis*: the *Coalition* majority did not even mention *Hillis*, and the *McGowan* Court specifically disclaimed departing from its holding. These cases have no bearing on the issue before this Court, and the County’s reliance on them is misplaced. The injunction intruded upon the Legislature’s appropriation authority and should be set aside.

E. Even If The Injunction Was Proper When Issued, It Should Be Vacated Because Of The 2006 Legislation.

The trial court ignored both the retroactive and prospective effect of the 2006 legislation providing that counties cannot bring the types of claims Pierce County brought in this suit, i.e., “the use or allocation of state hospital beds; or . . . financial responsibility for the provision of inpatient mental health care.” Laws of 2006, ch. 333, §§ 103(3), 310(3); Br. App. at 52-55. In response, the County argues that the legislation is unconstitutional and in any event does not apply to this case. Br. Resp. at 36-46. These arguments lack merit.

1. The 2006 legislation clarifies the Legislature’s intent that claims such as those advanced by the County be resolved under the contract, not through litigation.

Chapter 333, Laws of 2006 included twin provisions providing that counties have “no claim . . . against the state or state agencies . . . with regard to . . . the use or allocation of state hospital beds; or . . . financial responsibility for the provision of inpatient mental health care.” The legislation further provides that it applies to all claims “that exist on or arise after March 29, 2006” the date that it was signed into law. RCW 71.05.026(1); RCW 71.24.370(1). The enactment of this legislation deprived the trial court of jurisdiction to enforce the injunction prospectively, and the injunction should have been vacated on that basis alone. Br. App. at 52-55.

In response, Pierce County attempts to avoid the plain meaning of the legislative clarification by attempting to distinguish the “judgment” entered by the trial court from the “claims” which the 2006 legislation addresses. Br. Resp. at 38-43. Regardless of the weight given to this argument with regard to retroactive application of the legislation, it is undeniable that any future judicial enforcement of the injunction would have to be based on Pierce County’s post-legislation “claim” of a violation of the injunction relating to the “use or allocation of state hospital beds; or . . . financial responsibility for the provision of inpatient mental health

care.” Under the statute such claims are not susceptible to judicial resolution.

Pierce County argues that applying the legislation to this case “raises obvious constitutional problems”, citing *American Discount Corp. v. Shepherd*, 129 Wn. App. 345, 355-56, 120 P.3d 96 (2005) and *Personal Restraint of Stewart*, 115 Wn. App. 319, 339, 75 P.2d 521 (2003). These cases stand for the proposition that legislation purporting to overrule an authoritative judicial construction of a statute will not be given effect because of separation of powers implications. What the County fails to point out is that both of these cases—and the cases on which they rely—found the separation of powers doctrine to be implicated *only* if the Legislature attempts to override an *appellate court’s* construction of a statute. Pierce County has found no case—and none exists—placing trial court constructions beyond legislative clarification.

The genesis of the separation of powers doctrine in this context is in *Johnson v. Morris*, 87 Wn.2d 922, 557 P.2d 1299 (1976). That case addressed the Legislature’s attempt to override the Washington Supreme Court’s holding (*In re Carson*, 84 Wn.2d 969, 530 P.2d 331 (1975)) that juvenile court jurisdiction over an individual terminated on his eighteenth birthday. The Supreme Court rejected the attempt, stating:

Petitioner cites no authority for the proposition that the legislature is empowered to retroactively “clarify” an existing statute, when that clarification contravenes the

construction placed upon that statute *by this court*. Such a proposition is disturbing in that it would effectively be giving license to the legislature to overrule *this court*, raising separation of powers problems.

Johnson, 87 Wn.2d at 926 (emphasis added). This language was relied on in both *Stewart* (115 Wn. App. at 338) and *American Discount* (129 Wn. App. at 354).¹⁸ The Supreme Court has made it clear that the rule relied on in *Johnson* does not apply to a single trial court's statutory construction:

We often apply amendments retroactively "where an amendment is enacted during a controversy regarding the meaning of the law." *Tomlinson v. Clarke*, 118 Wn.2d 498, 511, 825 P.2d 706 (1992); *see also State v. Riles*, 135 Wn.2d 326, 343, 957 P.2d 655 (1998). Curative amendments adopted in response to lower court decisions have been applied retroactively. *Tomlinson*, 118 Wn.2d at 510, 825 P.2d 706; *Overton v. Wash. State Econ. Assistance Auth.*, 96 Wn.2d 552, 558, 637 P.2d 652 (1981).

McGee Guest Home v. Dep't of Soc. & Health Servs., 142 Wn.2d 316, 325, 12 P.3d 144 (2000).

In short, there is no constitutional reason for not giving the legislation the retroactive effect that its drafters obviously intended.

¹⁸ Two aspects of the Court of Appeals' decision in *American Discount* are worth noting. First, the Court explicitly stated that its decision was not based on separation of powers principles. 129 Wn. App. at 353. Second, the Washington Supreme Court granted discretionary review of the Court of Appeals' decision and affirmed, but did so without any discussion of the separation of powers doctrine. *American Discount Corp. v. Shepherd*, ___ Wn.2d ___, ___ P.3d ___ (April 19, 2007) (WL 1160436).

2. Chapter 333 does not violate article II, section 19 of the Washington Constitution.

The County also alleges that chapter 333 violates the “subject-title” and “single-subject” provisions of Washington Constitution article II, section 19 because chapter 333 “effectively” amends statutes governing judicial review of state agency action without setting forth those statutes in the title of the bill. Br. Resp. at 44-45. The County asserts that there is no unity between the provision of mental health services and enactment of legislation addressing how disputes between public agencies over the provision of mental health services are to be resolved Br. Resp. at 46. These arguments lack merit and should be rejected.

Art. II, § 19 of the state constitution provides that:

No bill shall embrace more than one subject, and that shall be expressed in the title.

See State ex rel. Citizens Against Tolls v. Murphy, 151 Wn.2d 226, 249, 88 P.3d 375, 387 (2004). As applied by the Supreme Court, the provision has two components:

The first is that no bill shall embrace more than one subject (the single-subject rule). The purpose of this prohibition is to prevent logrolling or pushing legislation through by attaching it to other necessary or desirable legislation. The second prohibition is that no bill shall have a subject which is not expressed in its title (the subject-in-title rule). The purpose of this prohibition is to notify members of the Legislature and the public of the subject matter of the measure.

State ex rel. Citizens Against Tolls v. Murphy, 151 Wn.2d at 249 (citations and quotations omitted).

Courts construe article II, section 19 liberally in favor of upholding the legislation being challenged. *Id.* Because the statute is presumed constitutional, “a party asserting that [a statute] violates the state constitution ‘bears the heavy burden of establishing its unconstitutionality beyond a reasonable doubt.’” *Pierce County v. State*, 150 Wn.2d 422, 430, 78 P.3d 640 (2003) (quoting *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 205, 11 P.3d 762 (2000)). Pierce County fails to carry its burden, and this challenge should be rejected.

a. Chapter 333 does not violate the single subject rule.

As noted above, the single subject rule is intended “to prevent logrolling or pushing legislation through by attaching it to other necessary or desirable legislation.” *State ex rel. Citizens Against Tolls v. Murphy*, 151 Wn.2d at 249. Here, the legislation is confined to addressing matters involving the public mental health system and the parties’ obligations and limitations in implementing and operating the system. The legislation does not go beyond that subject, and therefore does not violate the single subject rule.

b. Chapter 333 does not violate the subject-in-title rule.

Pierce County contends that chapter 333 “effectively” amends various statutes governing the Administrative Procedure Act, (ch. 34.05 RCW), RCW 4.92.010, RCW 36.01.010 and the Declaratory Judgment Act, (ch. 7.24 RCW), without setting forth those statutes in the title of the bill. Br. Resp. at 44-45.¹⁹

In determining whether the title of a bill provides the notice required by article II, section 19, courts broadly construe the term “subject.” *Retired Pub. Employees Council of Wash. v. Charles*, 148 Wn.2d 602, 628, 62 P.3d 470 (2003). In addition, objections to a title “must be *grave* and the conflict between it and the constitution *palpable* before [courts] will hold an act unconstitutional.” *Washington Ass’n of Neighborhood Stores v. State*, 149 Wn.2d 359, 372, 70 P.3d 920 (2003) (emphasis added) (quotation marks omitted). “Any reasonable doubts are resolved in favor of constitutionality.” *Charles*, 148 Wn.2d at 628.

¹⁹ This aspect of Pierce County’s constitutional argument reads more like a claimed violation of Const. article II, section 37, which prohibits revising an existing statute unless “the act revised or the Section amended [is] set forth at full length.” To prevail under such a theory, the County would have to demonstrate that the restrictions on litigation set forth in chapter 333 can only be accomplished by explicit amendment of the Administrative Procedure Act, (ch. 34.05 RCW), the Declaratory Judgment Act, (ch. 7.24 RCW), RCW 4.92.010 (the statute waiving the state’s sovereign immunity in certain circumstances) and RCW 36.01.010 (the statute authorizing counties *inter alia* to “sue and be sued”). It is well established, however, that legislation amending existing law incidentally or by implication does not violate article II, section 37. *Citizens for Responsible Wildlife v. State*, 149 Wn.2d 622, 642, 71 P.3d 644 (2002), citing *Naccarato v. Sullivan*, 46 Wn.2d 67, 75, 278 P.2d 641 (1955). Presumably aware that any claim of an article II, section 37 violation would fail, Pierce County has attempted to reframe its challenge under article II, section 19.

To satisfy the constitutional standard, the title merely needs to give “notice that would lead to an inquiry into the body of the act” or would “indicate to an inquiring mind the scope and purpose of the law.” *Neighborhood Stores*, 149 Wn.2d at 371 (quotation marks omitted). The title “need not be an index to the contents, nor must it provide details of the measure.” *See Citizens for Responsible Wildlife Management v. State*, 149 Wn.2d at 639.

The title of Ch. 333 reads as follows:

AN ACT Relating to specifying roles and responsibilities with respect to the treatment of persons with mental disorders; amending [specifically identified RCW sections]; adding a new section to chapter 71.24 RCW; adding a new section to chapter 71.05 RCW; creating new sections; repealing RCW 71.05.550; providing an effective date; and declaring an emergency.

Laws of 2006, ch. 333.

As with its claim under the single subject rule, the County does not specify which parts of chapter 333 “effectively” amend the existing statutes it claims are affected. Any existing sections directly amended by the legislation are specifically mentioned in the legislation’s title--thus the County’s claim of constitutional infirmity must refer to the three new sections. The first of these, section 101, is a statement of legislative intent that state and county roles and responsibilities for mental health treatment be governed “solely by the terms of the regional support network

contracts.” The other two new sections, 103 and 301, are identical provisions inserted into RCW chapters 71.24 and 71.05, respectively. They implement the legislative intent set forth in section 101 by specifying that disputes regarding state and county public mental health treatment responsibilities be resolved by nonjudicial means.

Each of these three provisions is directly related to “specifying the roles and responsibilities with respect to the treatment of persons with mental disorders.” Each is “fairly within” the title of chapter 333. The title of the legislation gives fair notice of these provisions, and the County’s contrary argument should be rejected.

IV. RESPONSE TO ARGUMENT ON CROSS-APPEAL

On cross-appeal, Pierce County challenges trial court rulings that (1) declined to “reform” the parties’ contracts to align with the County’s view of alleged violation of “federal law and policy”; (2) dismissed the County’s claim that it should be able to use WSH beds to meet its obligation to treat eighty-five percent of short-term patients within the County; and (3) denied the County’s claim for prejudgment interest on the damages awarded by the Court. None of these claims has merit, and all should be rejected.

A. The County Does Not Have Standing To Challenge The Contract On The Basis Of Alleged Non-compliance With Medicaid Law.

As a threshold matter, Pierce County, by operating the pre-paid health plan (PHP), was acting as a provider, and providers generally do not have enforceable rights under the Medicaid Act. *Sanchez v. Johnson*, 416 F.3d 1051 (9th Cir. 2005). This is because federal law is not to be read as creating privately enforceable rights absent explicit “rights creating language” in the specific section under which a claim is being advanced. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 290, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002).

In an attempt to avoid this limitation, the County instead cast its claims as an allegation that the contract violated “Medicaid law and policy”.²⁰ However, the only statute cited by the County in support of its “Medicaid contract claim” is Section 1902(m)(2)(A)(iii) of the Social Security Act (42 U.S.C. § 1396b(m)(2)(A)(iii)), cited in Br. Resp. at 64. With certain exceptions not here relevant this section provides that “no payment shall be made under this subchapter to a State with respect to expenditures incurred [by the state for services] unless [] such services are provided for the benefit of individuals eligible for benefits under this subchapter[.]” This provision is nothing more than a limitation on the

²⁰ The County initially claimed that the per capita rates paid for Medicaid services under the contract violated Medicaid law because they were not actuarially sound. However, that claim was withdrawn. CP 4325.

federal government's participation in a state's Medicaid program, and does not create rights enforceable by a provider.

The County also attempts to rely on a letter sent to State Medicaid Directors in 1998, allegedly creating "federal policy" regarding the use of "Medicaid savings." Ex. 45. In relying on this letter, the County argues that because there were insufficient "available resources" the contracts allegedly "forced it to use Medicaid savings" in ways that it did not want to use these funds, and thus, the contracts "violate federal policy." Br. Resp. at 62-64. Assuming, without agreeing, that a single letter rises to the level of creating "federal policy," the County failed to demonstrate how it was "forced to use Medicaid savings" in violation of this letter, or how the County—and not the federal government—was harmed as a result.

As noted above, at p. 7, nothing in the contract forced the County to use Medicaid funds for non-Medicaid eligible individuals, but even if that had been the case, it was the federal government—and not Pierce County—that would have suffered injury. Ultimately, the federal government directed that as of July 1, 2005 Medicaid savings could not be used for anyone or anything not allowable under the Medicaid Act. CP 4330 ¶ 4; RP Dula (Nov. 14, 2005) at 36-39; RP Shoenfeld (Nov. 16, 2005) at 34; RP Lewis (Nov. 17, 2005) at 5-7, 9; RP Gunther (Nov. 21, 2005) at 25, 52; RP Winans (Nov. 21, 2005) at 14; RP Lucas (Nov. 22,

2005) at 10-11; Ex. 389. However, the federal government has never concluded that the County was forced to use Medicaid savings in violation of the 1998 letter, nor did the County directly complain to CMS that it was being “forced to use Medicaid savings.”

In short, despite the County’s attempt to recast its claim into a “Medicaid contract claim,” it lacks standing to complain about alleged noncompliance with Federal Medicaid law and policy. Even if there were factual and legal support for its claim, the County suffered no harm. The County’s appeal should be rejected on these bases alone.

B. The Trial Court Correctly Refused To “Reform” The Parties’ Contract.

The trial court made a number of findings of fact relevant to this aspect of the County’s cross-appeal. They are paraphrased as follows:

- During the relevant period, the Department provided Pierce County more Medicaid funds than were necessary to provide services to the county’s Medicaid eligible clients, thus generating surpluses that were referred to as “Medicaid Savings.” Finding of Fact (FF) C.2, CP 4328.
- While the County objected to certain aspects of the contracts proffered by the Department, no objection was based on the lack of sufficient state dollars to provide services to non-Medicaid eligible clients. FF C.3, CP 4329.
- The total funding appropriated by the Legislature and provided to the County under the contracts was sufficient for the County to provide the services required under the contracts for the 01-03 and 03-05 biennia. FF C.9, CP 4330.

- Pierce County knew before it signed the contracts at issue that the level of non-Medicaid funding was inadequate by itself to cover all services for all non-Medicaid eligible persons. FF C.4, CP 4329.
- The County knew that it had no obligation to sign any of the contracts and could terminate them upon 90 days notice. Notwithstanding, the County elected to sign the contracts. Further, the County considered terminating the contract for the 01-03 biennium, but ultimately did not do so. FF C.4, C.5 and C.6, CP 4329.
- Any Pierce County expenditures of funds above those provided by the Department through the contract were voluntarily. FF C.8, CP 4329-30.
- Between July 1, 2000 and June 30, 2005 the Center for Medicare and Medicaid Services (CMS), the federal agency responsible for oversight of state Medicaid programs, tacitly permitted the use of Medicaid savings to provide services to non-Medicaid clients. FF D.3, CP4330.
- The County, by signing the 01-03 and 03-05 contracts, relied on the use of Medicaid savings to provide non-Medicaid services, and knew that the non-Medicaid funds provided through the contract were insufficient to provide all non-Medicaid services included in the contract. FF D.4, CP 4330-31.

As noted above, Pierce County has not assigned error to any of the trial court's findings of fact, and under well-established rules those findings are to be treated as verities on appeal. *Supra* pp. 2-3, citing *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). This Court has authority to waive technical violations of RAP 10.3(g) (requiring appellants to identify by number the trial court findings being challenged) where "the appellant's brief makes the nature

of the challenge clear and includes the challenged findings in the text.”

Harris v. Urell, 133 Wn. App. 130, 137, 135 P.3d 530 (2006).²¹

Pierce County does not identify any specific finding being challenged in the manner contemplated by RAP 10.3(g); in fact, the only trial court finding mentioned in the County’s argument on cross-appeal is the finding that, during the relevant contract periods, “CMS tacitly permitted the use of Medicaid dollars for other services.” FF C.2., D.3, CP 4328-30. The County claims that this finding “if it is indeed a finding of fact, is not supported by substantial evidence” (Br. Resp. at 64), the record demonstrates otherwise.

First, it is undisputed that the Department and the RSNs had operated the public mental health system under a series of Medicaid waivers issued by CMS since 1993 for outpatient treatment and 1997 for inpatient treatment. Under traditional “non waiver” Medicaid programs, participating providers were paid on a fee-for-service basis. To encourage states to explore more cost-effective and efficient programs, Congress enacted Section 1915b of the Social Security Act, (42 U.S.C. § 1396b) to authorize CMS to issue “waivers”, agreements under which CMS waives certain statutory requirements or limitations that would

²¹ The Court appeared to be more favorably inclined to waive technical compliance with the RAPs in *Harris* in part because the appellants were pro se. That circumstance is not present in the instant case.

otherwise apply to a state's Medicaid program.²² RP Dula (November 14, 2005) at 36-37.

To obtain the waivers for the services and time periods at issue in this case—each one of which was for a two-year biennial period—the Department submitted a detailed application that included (among other things) copies of the contract to be executed with the RSNs. RP Gunther (Nov. 21, 2005) at 26, 28-29; RP Gunther (Nov. 22, 2005) at 36; Exs. 6, 7, 377-70, 380, 386; CP 3217-18. The County also reviewed the waiver applications before signing the contracts, as the applications are exhibits to the contracts. RP Gunther (Nov. 21, 2005) at 58; Ex. 6 at P-EX06-001-000124-253, Ex. 7 at P-EX07-001-000078-600. For all time periods related to this lawsuit, CMS approved the waivers and the approval process included review of the contracts. This in and of itself is sufficient evidence to support the trial court's finding.

²²Although not specifically argued in the Respondent's brief, the County tried to suggest below that Medicaid law precluded it from using Medicaid money to pay for services to persons between the ages of 21-64 admitted while in an Institute for Mental Disease (IMD). An IMD is generally considered a mental health inpatient facility with greater than 16 beds. Both WSH, and at the time, Puget Sound Behavioral Health, were IMDs. Without the Medicaid waiver and CMS's liberal use of Medicaid savings, the Medicaid Act does preclude the use of Medicaid dollars to pay for inpatient services to individuals between the ages of 21-64 at an IMD. However, under the waivers, the use of these "Medicaid savings" for these types of patients was permissible. RP Stewart (Nov. 10, 2005) at 20; RP Gunther (Nov. 21, 2005) at 19-20, 23-25 (Nov. 22, 2005) at 32; RP Dula (Nov. 14, 2005) at 36-39, 62-63. At one significant point in this case, the County wanted its allocated Medicaid funds to be used to pay for inpatient services at PSBH regardless of age of the patient. RP Gunther (Nov. 21, 2005) at 49, (Nov. 22, 2005) at 4-10; RP Lucas (Nov. 22, 2005) at 7-10; Exs. 6, 7, 101, 226, 227, 340, 341B, 342, 345.

Moreover, the County also did not complain to CMS that it was being “forced to use Medicaid savings.” RP Gunther (Nov. 21, 2005) at 35; RP Lucas (Nov. 22, 2005) at 21; RP Stewart (Nov. 10, 2005) at 81-87, 89-92, 113-114; RP Dula (Nov. 14, 2005) 51-59, 62-63; Exs. 209, 211, 221-222, 233-235, 253, 263-264, 345, 392-394.

CMS never expressed a concern that Pierce County was being “forced to use savings.” RP Gunther (Nov. 21, 2005) at 31, 34-36; CP 2045-48, 3063-68, 4328-32; Ex. 378, 380, 381, 383, 386, 389.²³ The Department and the RSNs first became aware that the federal government was beginning to take the position that Medicaid savings could not be used for non-Medicaid services in March of 2004. *Id.*; RP Shoenfeld (Nov. 16, 2005) at 34. CMS did not stop the use of the federal portion of Medicaid money for non-Medicaid services until July 1, 2005. *Id.*²⁴

Because it is amply supported by substantial evidence, the trial court’s finding that CMS had tacitly approved the use of Medicaid savings to fund other services under the contract and the parties

²³ CMS did express concern that the rates being paid by states were too high and imposed a condition beginning in 2004 that states demonstrate that their rates were “actuarially sound”. RP Gunther (Nov. 21, 2005) at 31, 34-36; CP 2045-48, 3063-68; Ex. 378, 380, 381, 383, 386, 389. Earlier in this lawsuit, Pierce County challenged the contract rates on the alleged lack of actuarial soundness but that claim was abandoned prior to trial. CP 55, paragraph 121-122; CP 4325, paragraph Claim L; CP 4331.

²⁴ It is worth noting that CMS has not required the Department to reimburse the federal government for the federal share of any allegedly improper use of federal payments. RP Gunther (Nov. 21, 2005) at 61.

benefitted from this approval, should be affirmed. CP 4328-31. *In re Riddell*, ____ Wn. App. ____, ____ P.3d ____ (May 8, 2007) (WL 1328671) (Court of Appeals “review[s] findings of fact under a substantial evidence standard, determining whether the evidence was sufficient to persuade a rational fair-minded person the premise is ‘true,’” citing *Wenatchee Sportsmen Ass’n v. Chelan Cy.*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000)).

Even if the trial court’s finding was not correct, the trial court would not have been justified in “reforming” the contract in the manner sought by the County. No provision of the contracts required the use of Medicaid savings to provide services to non-Medicaid clients—the choice to do so was entirely that of the County. CP 4328-31. It could have used Medicaid savings to supplement services to its Medicaid clients or its non-Medicaid clients.

Further, the trial court found—in a finding not challenged by Pierce County—that any “funds used by PCRSN to provide services beyond the amount of state-only and/or Medicaid funds appropriated by the Legislature and allocated through the contracts and legislative appropriations were voluntarily provided.” FF C.8, CP 4329. The trial court correctly rejected Plaintiffs’ “Medicaid law and policy” claim, and that ruling should be affirmed.

C. The Trial Court Properly Dismissed Pierce County’s Claim Regarding Its Obligation To Treat Eighty-Five Percent Of Short Term Patients In The Community.

The County also seeks reversal of the trial court’s dismissal of its claim that it should be allowed to utilize beds at WSH beds to meet its obligation to provide at least eighty-five percent of short-term care needs within the community. Br. Resp. at 67-69. The statute at issue required that RSNs:

Provide within the boundaries of each regional support network evaluation and treatment services for at least eighty-five percent of persons detained or committed for periods up to seventeen days according to chapter 71.05 RCW.

Former RCW 71.24.300(1)(d)²⁵.

In the cross appeal, the Respondent contends that because WSH is physically located “within the boundaries” of Pierce RSN, i.e., within Pierce County, it should be able to have unfettered access to WSH for its short-term patients and short-term admissions should count towards meeting its eighty-five percent requirement. Br. Resp. at 67. The County does not explain how placing patients at a state hospital—where the state is entirely responsible for their care—constitutes compliance with the statutory requirement that the *County* “provide” services within its borders. More importantly, Pierce County’s argument runs counter to the

²⁵ The 2006 Legislature changed the requirement from eighty-five to ninety percent. Laws of 2006, ch. 333, § 106(6)(c), codified as RCW 71.24.300(6)(c).

legislative intent that short-term detentions be managed in community-based facilities and not the state hospitals.

It is well-settled that a statute must be read in its entirety and all pieces construed together rather than read as piecemeal provisions. *Campbell & Gwinn*, 146 Wn.2d 1 at 10-11; *Snoqualmie Valley School Dist. No. 410 v. Van Eyk*, 130 Wn. App. 806, 811, 125 P.3d 208 (2005). Statutes must not be read in a manner that would render a provision meaningless, or result in unlikely, strained or absurd consequences. *See, e.g., State v. Contreras*, 124 Wn.2d 741, 747, 880 P.2d 1000 (1994).

When the Legislature enacted the Community Mental Health Services Act, one of its primary objectives was to have most short-term patients treated in their communities. The eighty-five percent requirement was added by Laws of 1989, chapter 205, section 5(1)(c). It reinforced the legislative objective favoring community-based treatment by making local jurisdictions responsible for the short-term evaluation and treatment services for the mentally ill within their service areas. Bootstrapping state hospital admissions to this obligation—as Pierce County would have this Court do—would defeat the goal of treating individuals in local facilities, even if a state hospital happens to be located within the county.

In 1989, when the Legislature established the eighty-five percent requirement for RSNs, it also limited the Department's role in providing short-term care by stating, in relevant part, that “[t]he duty of a state

hospital to accept persons for evaluation and treatment under this section shall be limited by chapter 71.24 RCW.” RCW 71.05.170, as amended by Laws of 1989, ch. 205, § 9. At the same time, the Legislature restated its intention that the Department move away from providing short-term care services at the state hospitals.

It is the intent of the legislature to improve the quality of service at state hospitals, *eliminate overcrowding*, and more specifically define the role of the state hospitals. The legislature intends that eastern and western state hospitals shall become clinical centers for handling the most complicated long-term care needs of patients with a primary diagnosis of mental disorder. *Over the next six years, their involvement in providing short-term care shall be diminished in accordance with the revised responsibilities for mental health care under chapter 71.24 RCW. . . .*

Laws of 1989, ch. 205, § 21(1), now codified as RCW 72.23.025 (Emphasis added.) Again in 2001, the Legislature expressed its intent “that the community mental health service delivery system focus on maintaining mentally ill individuals in the community” and not in the state hospitals. RCW 71.24.016.

Pierce County’s argument is contrary to the plain language of RCW 71.05.170, former 71.24.300(1)(d), and 72.23.025(1). When read together, the statutes do not authorize Pierce County to use WSH to meet its obligation to provide at least eighty-five percent of short-term care.

If this Court finds that the statute is unclear as to whether short-term detentions at state hospitals count towards the eighty-five percent

requirement, it may resort to legislative history to determine intent. *Campbell & Gwinn*, 146 Wn.2d at 12. Significantly, the 1989 Legislature did consider giving preferential treatment to counties where state hospitals are located (i.e., Pierce and Spokane counties) with respect to their ability to use the state hospitals for short term evaluation and treatment. Early versions of the bill that ultimately became Laws of 1989, chapter 205, would have added the following language to RCW 71.05.070:

The duty of a state hospital to accept persons for evaluation and treatment under this section may be limited by chapter 71.24 if the person is referred from a county, *other than the county in which the state hospital is located*, that is within a regional support network formed under chapter 71.24 RCW.

CP 1894, 1897 (emphasis added). This language, had it been enacted, would have relieved both Pierce and Spokane County from the eighty-five percent requirement. The proposed language was not adopted and the final version reads as follows:

The duty of a state hospital to accept persons...under this section shall be limited by chapter 71.24.

Laws of 1989, ch. 205, § 10; CP 1898-99. The result, according to the House Human Services Committee's analyst, was that "Pierce and Spokane counties [were to be] treated equally with other counties in being required to provide most short-term commitment services within the community and not the state hospital." CP 1902 ¶ 18. The House Bill

Report further explained that “[c]ounties [that] have state hospitals located within their boundaries are required to provide short-term treatment as are all other [regional support] networks.” CP 1906.

The record below demonstrates that Pierce County understood its obligations under the eighty-five percent requirement to be exclusive of admissions occurring at the state hospital. For example, in the six-year plan it submitted in 1991, it described plans announced by Puget Sound Hospital to create additional psychiatric beds. “Such an increase . . . could allow Pierce County to meet its commitment to caring for the 85% of short-term treatment *in its local facilities.*” CP 1917 (emphasis added). Other documents reflecting the County’s recognition of its statutory responsibility are found at CP 1918, 1923 ¶ V(c), 1929, 1930.

Further, Ms. Lewis acknowledged the requirement in her deposition testimony and at trial. CP 1934-35 (“The expectation for the Mental Health Division is that at least 85 percent of the persons we detain for the short-term treatment will be kept in the community. The other 15% we had access to Western State Hospital.”) RP Lewis (Nov. 16, 2005) at 8. (“And we were at the time, as we are now, expected to keep 85% of those patients in the community.”)

The County asserts that DSHS has had a “long-standing position” allowing Pierce County to meet its evaluation and treatment responsibility by using the state hospital. Br. Resp. at 69. The evidence supporting this

“long-standing position” consists entirely of one parenthetical expression buried in the last paragraph of a memorandum suggesting that prior Department staff had allegedly told the County it could use the hospital as its evaluation and treatment facility. *Id.*, citing CP 1546 and 1548. However, the Department employee who wrote this statement has no recollection of who made the statement, and it could have been someone within the county who stated it to him. CP 1956-57.

Such a statement, assuming *arguendo* that it was made by a Department employee and ignoring its double-hearsay nature, would be in derogation of the statute and thus *ultra vires* and unenforceable. *See Murphy v. State*, 115 Wn. App. 297, 317, 62 P.3d 533 (2003) (the testimony of several members of the Pharmacy Board that they looked to the Health Care Records Act, RCW 70.02, as a guide for handling of health care records received during investigations did not make the Board subject to the Act when the plain language of the statute did not bring the Board within its scope); *McGuire v. State*, 58 Wn. App. 195, 199, 791 P.2d 929 (1990) (alleged promises for benefits not available under civil service statute “would be ultra vires and void as a matter of law”).

In short, the County’s claim that it should be able to use of WSH to meet its obligations under RCW 71.24.300(6)(c) is without merit, and the trial court’s dismissal of this claim should be affirmed.

D. The trial court correctly denied Pierce County's claims for interest.

The County cross-appeals the trial court's ruling denying its claim for prejudgment interest on its damages award, relying on the Washington Supreme Court's decision in *Architectural Woods v. State*, 92 Wn.2d 521, 529-30, 598 P.2d 1372 (1979). Br. Resp at 70-71. Not only does the County misstate the Supreme Court's opinion, it ignores the subsequent legislative action enacting RCW 39.76 which codified the *Architectural Woods* holding. More importantly, the County completely disregards the trial court's ruling that *Architectural Woods* and RCW 39.76 had no bearing on the issue because the trial court did not award damages on the basis of a "valid contract."

Architectural Woods involved a construction contract between a state entity and a private contractor. The *Architectural Woods* court was persuaded by the argument that when the state does business with *private* entities, or assumes duties ordinarily undertaken by private business, it should be held to the same rights and responsibilities as would a private entity, including the duty to pay interest on contract damages.

It is our further opinion that by the act of entering into an authorized contract *with a private party*, the State, absent a contractual provision to the contrary, thereby waives its sovereign immunity in regard to the transaction and impliedly consents to the same responsibilities and liabilities as a the private party, including liability for interest.

Architectural Woods, 92 Wn.2d at 526-527 (emphasis added).

Both the *Architectural Woods* court and other courts addressing related issues acknowledge the general rule that the state is not liable for interest on judgments absent specific legislative consent. *See, e.g., Architectural Woods*, 92 Wn.2d at 526 (“By our present ruling, we reinstate the rule . . . that the state without its consent cannot be held to interest on its debts [and] decline to abrogate the doctrine of sovereign immunity [adhering] to [the]position [] that governmental immunity is a matter of state policy which can be changed only by the legislature.”); *Our Lady of Lourdes Hosp. v. Franklin County*, 120 Wn.2d 439, 455-456, 842 P.2d 956 (1993) (“The general rule is that as a matter of sovereign immunity, the state cannot, without its consent, be held to interest on its debts.”) (internal citations omitted); *State v. Thiessen*, 88 Wn. App. 827, 829, 946 P.2d 1207 (1997) (“A statutory waiver of sovereign immunity as to interest will apply only in those circumstances specifically delineated by statute. We do not read into a statute provisions that are not there; nor do we modify a statute by construction.”).

The County characterizes the *Architectural Woods* holding as reflecting “[t]he general rule in Washington [] that when the State enters into a contract, it impliedly waives sovereign immunity and consents to being sued on the contract[.]” Br. Resp. at 70. Significantly this statement omits the language emphasized above, i.e., that the decision was

limited to a state entity's contractual relationship with a *private* entity. Moreover, the County omits entirely any discussion of the legislative codification of the *Architectural Woods* holding by the enactment of Laws of 1981, chapter 68 (now RCW 39.76). That statute outlines the conditions under which public agencies will be required to pay interest on contracted indebtedness, and includes an express exemption for "intergovernmental transactions." RCW 39.76.020(1).

Unlike the County, the trial court recognized that the *Architectural Woods* case "is not specifically on point, because it does deal with a private party, not with a government agency." RP (Jan. 20, 2006) at 21, ll. 13-15. However, the trial court went on to say that this distinction was not determinative because the money damages being awarded were not based on statutorily authorized contracts. In the case of the damages for withholding liquidated damages, the trial court had determined that "the provision in the contract dealing with liquidated damages [the court has] declared to be an invalid provision." RP (Jan. 20, 2006) at 21, ll. 21-23. The court concluded that there was no statute authorizing DSHS to enter into an invalid contract, "so there is no authorization for the invalid liquidated damages provision of the contract and, therefore, no implicit waiver of sovereign immunity." *Id.* at p. 21 ll. 25 – p. 22 ll. 1-2.

Similarly, with respect to the damages award for care of long-term patients, the trial court concluded:

If the argument for the waiver of sovereign immunity is that DSHS had statutory authorization to contract with the RSN, that argument does not apply to the long-term care, because there was no contract for long-term care, statutorily authorized or not, and sovereign immunity was not waived.”

Id. at 22, ll. 8-12.

Thus the trial court was correct in concluding that sovereign immunity had not been waived by the Washington Legislature, either expressly or by implication. Moreover, even if the trial court was incorrect, and the basis for damages was somehow tied to Pierce County’s contract with DSHS, the Legislature’s exemption of “intergovernmental transactions” from the payment of interest under RCW 39.76.020(1) requires that the trial court’s decision denying the County’s claim for prejudgment interest be sustained. *Adcox v. Children’s Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 32, 864 P.2d 921 (1993) (a trial court decision can be affirmed on the basis of any theory that was argued to the court below, even if it differs from the basis on which the trial court ruled).

In short, there is no basis on which to award prejudgment interest to Pierce County, and the trial court’s ruling denying its claim should be affirmed.

V. CONCLUSION

For the reasons discussed above and in the Brief of Appellant, the trial court’s judgment awarding damages and issuing an injunction should

be vacated, and Pierce County's appeal should be denied. The case should be remanded with direction to dismiss the complaint.

RESPECTFULLY SUBMITTED this 11th day of May, 2007.

ROBERT M. MCKENNA
Attorney General

A handwritten signature in cursive script, appearing to read "Carrie L. Bashaw", written over a horizontal line.

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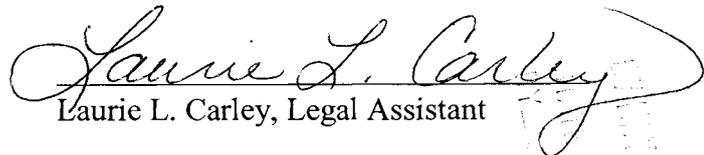
CERTIFICATE OF SERVICE

I, Laurie L. Carley, certify that I served a copy of Reply Brief of Appellants/Cross Respondents on counsel of record indicated on the date below to Sanford E. Pitler, Marie R. Westermeier, Michael Madden, Linda M. Coleman, William Leedom, and Elizabeth A. Leedom, attorneys for Plaintiffs, Pierce County, Pierce County Regional Support Network, and Puget Sound Behavioral Health, addressed to Sanford Pitler, et al., Bennett Bigelow & Leedom, P.S., 1700 Seventh Avenue, Suite 1900, Seattle, WA 98101, fax (206) 622-8986.

Via US Mail Postage Prepaid via Consolidated Mail Service

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 11th day of May, 2007, at Tumwater, Washington.


Laurie L. Carley, Legal Assistant

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