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**I. IDENTITY OF RESPONDENT**

Audit & Adjustment Co., Inc. was the Plaintiff below and the Respondent herein.

**II. RESTATEMENT OF THE CASE**

This case began as a simple collection case brought by Audit in 2007 against Mr. Earl for unpaid medical bills. CP Vol. II, 2a-2e. Audit did not purchase the accounts, but rather received the authority from Jefferson General Hospital to collect on the bills through assignment. Along with itemized billing, the written assignment, from the Hospital to Audit, was admitted into evidence at the first trial without any objection from Mr. Earl. CP Vol. I, 1-5. That evidence was Audit's case-in-chief, and Mr. Earl never denied receiving the medical services, nor did he dispute that the bills were unpaid. Id. His defense centered around charity care / sliding fee scale policies and Washington law, which he asserts applied to his financial situation. Id.

At trial, Mr. Earl stated:

"This is uncomfortable, because to defend this, I have to provide

personal documents that are -- you know, I don't really want to be a matter of public record [.]"

CP Vol. I, 4 (page 4 of the trial transcript).

Mr. Earl proceeded to submit a portion of his 2005 Income Tax Return as evidence of his defense. Prior to that point, Audit had not submitted any of Mr. Earl's personal financial data. However, in rebuttal to his testimony and submission of page one of his 2005 tax return, Audit called Hospital representative Kimberly Bachelor to testify regarding reasons for the Hospital's denial of Mr. Earl's application, and the fact that the Hospital had sent notice of the denial to the Department of Health. CP Vol. I, 5-12.

At the close of the evidence, the trial court ruled that it did not have authority to hear the charity care / sliding fee scale defense because that was an administrative decision that the Hospital had made in 2006 and submitted to the Department of Health, and neither Mr. Earl nor the DOH had taken further action. CP Vol. I, 14-16 (pages 31-33 of the trial transcript).

Mr. Earl appealed that ruling, and Jefferson County Superior Court

remanded for an Additional Trial, for the court to determine whether Mr. Earl qualified for relief under the charity care / sliding fee scale. CP Vol. I, 17-19.

The Additional Trial was held on March 29, 2009. Evidence was offered by Audit through the testimony and documents brought to court by the Hospital's representative; the documents were

Exhibit 1- Charity Care / Sliding Fee Scale Policy

Exhibit 2- Jefferson Healthcare Sliding Fee Scale Income Chart

Exhibit 3-Letter from Donald Earl to Jefferson Healthcare 7/13/06

Exhibit 4-Letter from Chaney to Earl 12/21/06

Exhibit 5- Wa. State 2006 Charity Care Hospitals (handbook)

CP Vol. II, 32.

Mr. Earl objected to Exhibit 3, stating it contained privileged information,<sup>1</sup> but the trial court overruled this objection, finding that it went to the heart of the case and that he had waived confidentiality by asserting his defense relating to income and qualifications for sliding fee

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<sup>1</sup> Exhibit 3 did not contain any account numbers, nor a social security number; none of the Exhibits contained personal health information.

scale. CP Vol. I, 74-76.

Mr. Earl testified as to his income and financing activities, stating that he "leveraged his assets and /or unsecured credit." CP Vol .I, 115.

After hearing testimony and receiving documents from both sides, the trial court took the case under advisement, then issued a decision on June 2, 2009. CP 36a-36c. The trial court found that Mr. Earl did not qualify for relief under Washington's Hospital Charity Care regulations because the proceeds from sale of his second home constituted "investment activities" and therefore fell under "income" as defined as defined in WAC 246-453-010(17). Id.

Mr. Earl appealed, and at the RALJ hearing Superior Court Judge Hartman affirmed the trial court's decision. CP 135.

Mr. Earl then filed a Motion for Discretionary Review, raising four primary arguments: (1) that the district court improperly admitted [at the second trial] confidential documents as evidence of the money he received from the sale of his property, and the Superior Court improperly affirmed this conduct [Earl's Issues 1 - 3, 8], (2) the district court erroneously found that Mr. Earls' sale proceeds constituted "income" as contemplated by

RCW 70.170.060(5) and WAC 246-453-010(17) [Earl's Issues 5-7], and (3) that the Superior Court took "judicial notice" of facts at the RALJ hearing without allowing Mr. Earl an opportunity to argue based on those facts [Earl Issue 4].

Although Commissioner Skerlec denied the Motion for Discretionary Review, the Court granted Mr. Earl's subsequent Motion to Modify the Ruling, and Review was granted.

However, Mr. Earl's opening brief sets forth, as Assignments of Error, issues that were never raised before, either at trial, during the RALJ appeal, or even in his Motion for Discretionary Review.

### **III ARGUMENT**

#### **A. THE TRIAL COURT PROPERLY ALLOWED TESTIMONY OF A HOSPITAL REVIEW COMMITTEE**

Mr. Earl cites RCW 70.41.200 for his proposition that hospital committee testimony and exhibits are inadmissible under Washington law. However this statute does not support his Assignment of Error.

RCW 70.41.200 is inapplicable to this case. The "review

committee" referenced in the statute is a peer review committee, for hospital quality control and the prevention of malpractice. RCW 70.41.200. It is not a review committee for individual charity care applicants, as Mr. Earl asserts in his opening brief. Br. of Pet. at 3, 4, 10 and 13.

Thus, Assignment of Error 1 is without merit.

B. THE TRIAL COURT PROPERLY ALLOWED THE HOSPITAL TO TESTIFY AND PRODUCE DOCUMENTS

RCW 4.24.250 applies only to health care providers who share private health information as part of review of claimed incompetency by another member of the profession; it has no applicability to the facts at bar. Mr. Earl's private health information was not discussed in the testimony; rather, it was the sale of his real property and related financial situation that was at issue for the trial court. CP Vol. I, 74-78.

Moreover, this statute speaks to documents not being subject to discovery. None of the documents introduced at trial were obtained in discovery, and none were provided in advance of trial to Audit. The documents were part of the business records of Jefferson Hospital and

brought to trial by the Hospital's representative. The documents were introduced in response to the issue raised by Mr. Earl regarding denial of his charity care / sliding fee application.

Thus, Assignment of Error 2 is without merit.

C. THE TRIAL COURT DID NOT DEPRIVE MR. EARL OF DUE PROCESS WHEN THEY TOOK JUDICIAL NOTICE OF FACTUAL DETERMINATIONS THAT WERE SUPPORTED BY SUBSTANTIAL EVIDENCE.

Mr. Earl asserts that he did not receive due process because he was unaware that the Superior Court, during oral argument on his second RALJ appeal, was going to take 'judicial notice adjudicative facts' and that he was not given an opportunity to present oral argument. Br. of Pet. at 5, 12-13. In a RALJ appeal, the Superior Court reviews the District Court record and accepts the factual determinations supported by substantial evidence. RALJ 9.1 This procedure is part of the appeal process and does not violate due process.

In addition, Mr. Earl was given his opportunity to argue prior to Judge Hartman's ruling at the second RALJ appeal. RALJ 8.

Finally, any colloquy between Mr. Earl and the Superior Court is not a basis for any Assignments of Error.

Thus, Assignment of Error 3 are without merit.

D. The Proceeds from the Sale of Petitioner's Residence  
Constitute "Income" within the Meaning of WAC §  
246-453-010(17) for Purposes of Determining Petitioner's  
Eligibility for Charity Care under Chapter 70.170 RCW and  
Jefferson Healthcare's Charity Care Policy.

The Superior Court correctly concluded that the proceeds from the sale of Petitioner's residence constitute "income" within the meaning of WAC § 246-453-010(17) for purposes of determining Petitioner's eligibility for charity care under Chapter 70.170 RCW and Respondent Jefferson Healthcare's Charity Care/Sliding Fee Scale Policy ("Jefferson Healthcare's Charity Care Policy").

Petitioner appears to argue that, because the \$70,000 of proceeds he received from the sale of his residence were not reported on line 13 of his 2005 federal income tax return, that this \$70,000 he received does not constitute "income" within the meaning of WAC § 246-453-010(17). Petitioner further argues that, because the \$70,000 he received from the sale of his residence does not constitute "income," he is an indigent person entitled to charity care under Washington's Charity Care Law, chapter

70.170 RCW and Jefferson Healthcare's Charity Care Policy. Simply stated, Petitioner received a \$70,000 windfall from the sale of his residence and now argues that he should not have to spend any of that \$70,000 on his own healthcare and that Jefferson Healthcare should have to pay for his personal healthcare needs. Petitioner's argument is without merit.

Under Washington's Charity Care Law, "charity care" is necessary hospital health care rendered to "indigent persons, to the extent that the persons are unable to pay for the care or to pay deductibles or co-insurance amounts required by a third-party payer, as determined by the department." RCW § 70.170.020(4). "Indigent persons" are those patients who have exhausted any third-party sources, including Medicare and Medicaid, and "whose income is equal to or below 200% of the federal poverty standards, adjusted for family size or is otherwise not sufficient to enable them to pay for the care or to pay deductibles or coinsurance amounts required by a third-party payor; ..." WAC § 246-453-010(4) (emphasis added).

"Income" is defined broadly as,

[T]otal cash receipts before taxes derived from wages and salaries, welfare payments, Social Security payments, strike benefits, unemployment or disability benefits, child support, alimony, and net earnings from business and investment activities paid to the individual; ...

WAC § 246-453-010(17) (emphasis added). As indicated above, the definition of "income" is broad and includes as an element "net earnings from ... investment activities paid to the individual," and this element is not limited by statute or regulation or by common law.

1. Treatment of Proceeds from the Sale of an Individual's Residence under Washington's Medical Assistance Program Is Instructive.

The definition of "income" set forth in the regulations implementing the Charity Care Law does not specifically address treatment of proceeds from the sale of an individual's residence; nor does the Charity Care Law or its implementing regulations specifically address it. However, the treatment of such proceeds under Washington's Medical Assistance Program, chapter 74.09 RCW, is instructive.

Washington's Legislature delegated to the Department of Social and Health Services (the "Department") the authority to establish eligibility requirements for receiving medical assistance. See RCW § 74.09.035(1). When determining an applicant's eligibility for medical assistance, the Department considers certain resources of the applicant. See WAC § 388-470-0045; WAC § 388-470-0005. Among the types of real property that the Department does not consider when determining an applicant's

eligibility is the applicant's home (and the surrounding property) in which the applicant lives. WAC § 388-470-0045(3)(a). If, however, the applicant sells the home, then absent good cause the Department will consider the proceeds from the sale a resource, if the proceeds are not reinvested into an exempt resource within 90 days. WAC § 388-470-0045(5) states:

If you sell your home, you have ninety days to reinvest the proceeds from the sale of a home into an exempt resource.

(a) If you do not reinvest within ninety days, we will determine whether there is good cause to allow more time. Some examples of good cause are:

- (i) Closing on your new home is taking longer than anticipated;
- (ii) You are unable to find a new home that you can afford;
- (iii) Someone in your household is receiving emergent medical care;

or

(iv) Your children are in school and moving would require them to change schools.

(b) If you have good cause, we will give you more time based on your circumstances.

(c) If you do not have good cause, we count the money you got from the sale as a resource.

(Emphasis added.) As evidenced by WAC § 388-470-0045, the Legislature considers it appropriate to consider proceeds from the sale of an individual's residence when determining eligibility for medical assistance or similar benefits. Where, as here, the individual receives \$70,000 from the sale of his residence and does not reinvest the proceeds from the sale of that home, the \$70,000 windfall is no longer considered "exempt" and is

considered by the Department when determining the individual's eligibility.

The same reasoning should apply here. Charity Care is provided for those whose funds are "not sufficient to enable them to pay for [their own health] care." Someone who has \$70,000 sitting in the bank from the recent sale of his residence has "sufficient funds" to pay for his own healthcare.

2. Treatment of Proceeds from the Sale of an Individual's Residence for Federal Income Tax Purposes Is Instructive.

While Petitioner acknowledges having received \$70,000 from the sale of his residence, he argues that such proceeds are not income. In support of his argument, Petitioner produced his federal income tax returns, claiming that he had no income related to the sale of his residence because his tax return does not show any income related to the sale of his residence. Specifically, Petitioner argues that, because his return shows no capital gain from the sale of his residence, he has no income from the sale. Petitioner is correct that the treatment of the proceeds from the sale of his residence for federal income tax purposes is instructive here. However, a review of the relevant statutes and regulations demonstrates that the proceeds are in fact income; and, the fact that Petitioner's income tax return does not show any income from the sale of his residence is

irrelevant.

In general, "income" on a federal tax return includes not only compensation but also capital gains on the sale of property, among other things. 26 U.S.C. § 61(a) defines "gross income" as follows:

[G]ross income means all income from whatever source derived, including (but not limited to) the following items:

- (1) Compensation for services, including fees, commissions, fringe benefits, and similar items;
- (2) Gross income derived from business;
- (3) Gains derived from dealings in property;
- (4) Interest; ... .

(Emphasis added.) A gain derived from dealings in property described in 26 U.S.C. § 61(a)(3) is equal to the difference between the amount one receives for selling property and the price paid for the property. 26 U.S.C. § 1001(a) provides:

The gain from the sale or other disposition of property shall be the excess of the amount realized there from over the adjusted basis provided in section 1011 for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

(Emphasis added.) "Adjusted basis" is defined in 26 U.S.C. § 1011(a) as:

The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis (determined under section 1012 or other applicable sections of this subchapter and subchapters C (relating to corporate distributions and adjustments), K (relating to partners and partnerships), and P

(relating to capital gains and losses)), adjusted as provided in section 1016.

"Basis" is defined in 26 U.S.C. § 1012 as:

The basis of property shall be the cost of such property, except as otherwise provided in this subchapter and subchapters C (relating to corporate distributions and adjustments), K (relating to partners and partnerships), and P (relating to capital gains and losses). The cost of real property shall not include any amount in respect of real property taxes which are treated under section 164(d) as imposed on the taxpayer.

The fact that Petitioner's tax return does not show a gain from the sale of his residence does not mean there was no gain from the sale of the residence. The IRS does not require taxpayers to report all gains on their tax returns. Instead, the IRS allows taxpayers to exclude some or all of the gain from the sale of a residence, if certain conditions are met.

Consequently, taxpayers are only required to report a gain from the sale of a residence (on Schedule D of Form 1040), if the gain does not qualify for an exclusion.

Despite generally being considered income under 26 U.S.C. § 61, certain gains may be excluded from gross income. The gain on the sale of a principle residence is a gain that may be excluded from gross income as provided in 26 U.S.C. § 121(a) as follows.

Gross income shall not include gain from the sale or exchange of

property if, during the 5-year period ending on the date of the sale or exchange, such property has been owned and used by the taxpayer as the taxpayer's principal residence for periods aggregating 2 years or more. ...

However, the exclusion provided in 26 U.S.C. § 121(a) is conditional and elective, as provided in 26 U.S.C. § 121(f):

This section shall not apply to any sale or exchange with respect to which the taxpayer elects not to have this section apply.

Thus, a gain from the sale of a residence falls within the definition of income, but a taxpayer may qualify for a partial or complete exclusion of the gain. If a taxpayer elects to use the exclusion for income related to a gain on the sale of a residence, the IRS does not require the taxpayer to report the gain on his tax return. Alternatively, the taxpayer can elect to forego the exclusion, in which case the gain will be considered income.

The federal income tax laws make clear that the exclusion noted above simply allows the taxpayer to avoid paying a tax on a specific portion of their income, *i.e.*, income derived from the sale of his residence. There is nothing in the federal tax law that states or implies that the taxpayer can shield this money in a way that allows them to avoid paying legitimate debts that they incur such had demanding and receiving healthcare services.

In summary, the treatment of the proceeds from the sale of Petitioner's residence for federal income tax purposes is instructive, as Petitioner indicates. However, in contrast to Petitioner's contention, the relevant authority makes clear that, for federal income tax purposes, the proceeds from the sale of Petitioner's residence constitute income, even though Petitioner may have qualified for an exclusion.

D. THE TRIAL COURT PROPERLY ALLOWED AUDIT TO ACT AS ASSIGNEE OF JEFFERSON HEALTHCARE.

As a general rule, courts will not consider issues raised for the first time on appeal. RAP 2.5(a). The only exception to this rule is where the petitioner asserts a (1) manifest error, that (2) affects a constitutional right. *State v. WWJ Corp.*, 138 Wn.2d 595, 601-602 (1999). However, RAP 2.5(a) is not a vehicle by which parties may obtain a new trial whenever they can 'identify a constitutional issue not litigated below.' *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988).

The Brief of Petitioner raises issues regarding Audit's standing to pursue claims against him, alleging for the first time that Audit failed to

meet the statutory requirements to bring and maintain an action against him. Pet. Brief. at 7 (Issue 10). Petitioner's Brief also contains a significant and serious misstatement of the facts: Mr. Earl alleges, repeatedly, that Audit did not possess, nor file, a written assignment with the Court. Pet. Brief at 4, 16 and 21.

Audit not only filed the written assignment from the Hospital with the trial court, it sent Mr. Earl an advance copy via an ER 904 statement. CP Vol. I, 1-3. Mr. Earl did not serve an objection to the ER 904 statement, nor did he object when the assignment was handed up for admission at trial. *Id.*

Audit did not originally move to supplement the record because Mr. Earl had never objected to the assignment when questioned by the trial court and, moreover, the record on appeal provided by Mr. Earl contains the transcript from the first trial wherein the written assignment is offered by Audit as part of its case-in-case and Mr. Earl affirms that he has no objection to the document.

Respondent has filed, pursuant to RAP 9.6(a), a Supplemental Designation of Clerk's Papers, identifying the written assignment that was entered into evidence without objection, and a copy is included in the

Appendix.

It is improper for Mr. Earl to now claim that Audit did not file a written assignment, as the trial transcript clearly shows the contrary. Thus, Assignment of Error 7 is completely without merit.

E. THE TRIAL COURT HAD SUBJECT MATTER JURISDICTION TO HEAR THIS CASE.

Finally, Mr. Earl makes the interesting argument that the trial court did not have jurisdiction to hear his charity care defense, that only the Department of Health has such jurisdiction. Br. of Pet. at 9.

This assertion is interesting, because Mr. Earl, in his first RALJ appeal, argued strenuously that the trial court had jurisdiction to hear his defense. It was actually Audit that originally argued, and the trial court concluded at the first trial, that Mr. Earl may have administrative remedies following the denial of his charity care application by the Hospital, but such remedies were not before the trial court. CP Vol. I, 13-16.

If this Court agrees with Mr. Earl and determines that only the Department of Health has jurisdiction to rule on charity care denials, Mr. Earl's failure to pursue that administrative remedy following the 2006

denial by the Hospital leaves him in the same position he is currently in: the unpaid bills were assigned for collection and the District Court was well within its authority to grant judgment for Audit.

This, Assignment of Error 8 is without merit.

**IV. CONCLUSION**

Individuals who can finance two pieces of real property and net \$70,000 in proceeds do not fall into the category of individuals intended to benefit from the charity care laws. The Court should affirm the trial court's ruling.

Respectfully submitted January 19<sup>th</sup> 2011.



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LUKE, CASTEEL & OLSEN, PSC  
Attorney for Respondent  
WSBA #28773

# APPENDIX

# EXHIBIT A

05/09/2007 09:27 FAX 3603792282

JCH BILLING

4257765454

010/010

P.6

AUDIT & ADJUSTMENT COMPANY  
PO BOX 1959  
LYNNWOOD, WA 98046  
(425) 776-2577

RECEIVED  
MAY 09 2007  
BY:

05-04-07

JEFFERSON GENERAL HOSPITAL  
834 SHERIDAN AVE  
PORT TOWNSEND WA 98368  
ATTN: JENNIFER OR KIM B.

DATE ASSIGNED: 04-02-07  
DEBTOR NAME(S): DONALD EARL and/or  
PATIENT NAME(S): EARL, DONALD R  
YOUR ACCOUNT #: J4671889  
DATE OF SERVICE: 06-21-06  
BALANCE: \$6497.49

A S S I G N M E N T

The attached Assignment requires your signature before we file legal action on your account. Please sign form below and return the assignment to our office as soon as possible.

FOR VALUE RECEIVED, I/we do hereby transfer, assign and set over my/our/its claim against the above named debtor in the amount stated to the above named agency to sue for, compromise, settle, or reassign in their name, said account for collection purpose. Under penalty of perjury on the date indicated below, we hereby represent and warrant that the amount stated above is currently due and owing after application of all credits, offsets and payments as of the date of this assignment.

Credit grantor gives assurance to agent that it has complied with disclosure and other provisions contained in TRUTH IN LENDING.

EXECUTED this 8<sup>th</sup> day of May, 2007.

Assignor signature Jennifer Shunko Jurec

ANY INFORMATION OBTAINED FROM THIS NOTICE IS FOR THE PURPOSE OF COLLECTING A DEBT. 625422 - 32



I, Kimberlee Walker Olsen, state and declare as follows:

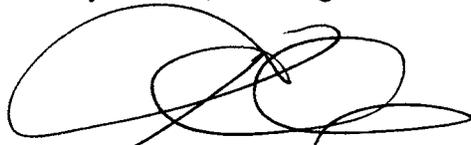
1. I am over the age of 18 and not a party to the above-entitled action, and make this declaration based upon my personal knowledge. I am counsel for the Respondent.

2. On January 19th, 2011, I caused to be served upon Donald R. Earl, pro se, the Brief of Respondent together with this Certificate of Service, by e-mailing a copy to don-earl@waypoint.com and sending a hard copy via Federal Express, addressed to the following:

Donald R. Earl  
3090 Discovery Road  
Port Townsend, WA 98368

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

DATED January 19, 2011 at Lynnwood, Washington.

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the left.

Kimberlee Walker Olsen