

NO. 43678-7-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

SOUND SUPPORT, INC., a Washington Corporation,
JAMES L. SIBBETT and MARY ANNA N. SIBBETT, individually and
as husband and wife,

Appellant,

v.

STATE OF WASHINGTON DEPARTMENT OF SOCIAL AND
HEALTH SERVICES and its subdivision, DIVISION OF
DEVELOPMENTAL DISABILITIES,

Respondent

BRIEF OF RESPONDENT

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I. INTRODUCTION

Sound Support, Inc. and its owners, James and Mary Anna Sibbett (collectively Sound Support) provided community residential services and supports to developmentally disabled adults under a series of Client Service Contracts (hereafter the “contract”) with The Department of Social and Health Services (DSHS) Division of Developmental Disabilities (DDD) during the period 2001 to 2009. In September 2009, DDD terminated Sound Support’s contract for default for violating the terms of the contract by failing to ensure the health and safety of vulnerable adults in its care. DDD had overwhelming evidence to support its determination of default, obtained from DDD contract monitoring reports, DSHS Residential Care Services (RCS) investigative findings, health care reports, Sound Support admissions, and the reports of guardians whose wards were served by Sound Support, among others. DDD worked with Sound Support to create a plan for transitioning Sound Support’s clients to other providers. As authorized in the contract, DDD did not consent to Sound Support’s request to assign the contract to a third party, and Sound Support’s attempt to sell its assets to the third party was not completed.

Sound Support brought a breach of contract claim and six tort claims against DSHS and DDD. The trial court dismissed all claims on

summary judgment and Sound Support appealed. Sound Support does not dispute the material facts leading to contract termination, but contends the trial court erred because those facts did not provide a reasonable basis for DDD to terminate the contract. Even if DDD's reasonable basis determination was mistaken, however, the contract was properly terminated for convenience under *Myers v. State*, 152 Wn. App. 823, 218 P.3d 241 (2009), *review denied*, 168 Wn.2d 1027 (2010). This Court should affirm the decisions of the trial court.

II. COUNTER STATEMENT OF THE ISSUES

1. Whether DDD's determination that Sound Support was in default of its service contract is supported by the evidence in the record, which includes undisputed facts and admissions.
2. Whether the implied covenant of good faith and fair dealing can be applied to set aside a right granted by an express and unconditional contract term.
3. Whether Sound Support is entitled to an advisory opinion concerning lost profits/wind-up costs on termination for convenience when that issue is not properly before this Court.
4. Whether there is a private right of action for negligent investigation when DDD monitors compliance with a client service contract.
5. Whether DSHS was absolutely privileged in declining to consent to Sound Support's request to assign its client service contract to a third party.
6. Whether Sound Support alleged facts sufficient to support a negligent infliction of emotional distress claim.

7. Whether DSHS engaged in tortiously outrageous conduct when its employees performed tasks authorized and required by rule, policy, and contract.

8. Whether the trial court abused its discretion by denying Sound Support's motion to strike portions of two declarations.

III. COUNTER STATEMENT OF THE CASE

A. Washington Law And DSHS Contract Requirements For Providing Services To The Developmentally Disabled

The Division of Developmental Disabilities (DDD) contracts with privately-owned companies such as Sound Support to provide community residential services and support to developmentally disabled clients in their own homes.¹ DSHS Central Contract Services manages these contracts independently of DDD to ensure that valid contracts are always in place so that clients are not suddenly left without an authorized provider to provide services and so that DDD has continuing legal authority to monitor the quality of those services. CP 49 ¶ 3-4; CP 215 ¶ 3. DDD monitors the performance of the contracted providers and supplies them with training and technical assistance. *Id.* A third DSHS division, Residential Care Services (RCS), independently certifies contracted providers and investigates their performance, including allegations of abuse and neglect of DDD clients CP 154-55 ¶ 2.

¹ See WAC 388-101 for the rules governing supported living services and 388-101-3970 through -4060 for the Community Protection Program. The rules refer to the privately owned contracting companies as "agencies." This brief will refer to them as "provider(s)" to avoid confusion with the activities or responsibilities of state agencies.

See also WAC 388-101-3130, 3140, 3160.

Each provider enters into a client service contract with DDD. CP 215-16 ¶ 3-6. Each client service contract includes standardized general terms and conditions (General Terms) and special terms and conditions (Special Terms). CP 215 ¶ 5. These contract terms are the same for all service providers. CP 215 ¶ 5. Each client service contract includes an additional exhibit (called Exhibit B) that is unique to each provider and sets forth the specific clients to be served by that provider and the rate schedule for each client. CP 215-16 ¶ 5. DSHS is not obligated to guarantee a contractor will have clients to serve. CP 215 ¶ 5-6. The contract only obligates DSHS to pay a contractor for “authorized services provided in accordance with the contract.” CP 215 ¶ 6.

Client service contracts can be terminated for default or for convenience. CP 216 ¶ 7; WAC 388-825-300, 390. A contract may be terminated for default if “DSHS has a reasonable basis to believe” that one or more of the following has occurred: the provider (a) failed to meet or maintain any requirement for contracting with DSHS; (b) failed to protect the health or safety of any DSHS client; (c) breached any term or condition of the contract; (d) violated any applicable law or regulation.

CP 58, General Term 26. DDD notifies a provider of termination for default via written notice. *Id.*

If a contract is terminated by default, but it is later determined that the contractor was not in default, then the termination automatically converts to a termination for convenience. CP 58, General Term 26. A contract may be terminated for convenience when DDD determines it is in the best interest of DSHS to do so, if DDD provides written notice at least 30 days prior to the effective date. CP 57, General Term 25.

Contract terms preclude assignment without DDD approval, which is solely within the Division's discretion. CP 53, General Term 3; CP 442:23 to 443:14; 465.² Limitations on contract assignment helps protect clients' legal right to choose among qualified providers. WAC 388-831-0020(3), 0250. No provider can "sell" vulnerable adults to another provider by simply selling its business. WAC 388-831-0050(1)(a-b); CP 224 ¶ 24.

All service contracts require providers to comply with state law and regulations. CP 53, General Term 5; WAC 388-101-3020. Each provider must ensure that its designated Administrator oversees all aspects of staffing, training, and policy development. WAC 388-101-3220. Providers must promote and protect client rights, including the right to

² The citation format "CP 442:23" refers Clerk's Papers page 442, line 23.

privacy; the right to a public education; and the right to be free from unnecessary physical restraint, isolation, abuse, neglect, and financial exploitation. WAC 388-101-3320. Providers must provide support for medication management and health appointments, and ensure transport is provided to clients. WAC 388-101-3370 to 3380. Providers must ensure a safe and healthy home environment and promote personal choice of agency provider. WAC 388-101-3390, 3350. Providers must use the least restrictive intervention needed to protect each client and to keep clients free from involuntary seclusion, and such procedures must be approved by DDD. WAC 388-101-3900(3)(c), 3920, 3950. All providers must treat clients with dignity and consideration respecting their civil and human rights. WAC 388-101-3330.

B. Statement Of Facts

1. Sound Support, Inc.

Sound Support, Inc. was incorporated in 2000 to provide personal care services to both Community Protection Program clients and supported living clients. CP 303:25 to 304:13; CP 306:14 to 308:20. The Community Protection Program provides a structured, therapeutic environment where eligible clients can live safely and successfully in the community while minimizing the risk to public safety. CP 217 ¶ 9; RCW 71A.12.200; WAC 388-831. Supported living clients have fewer

public safety concerns but can still exhibit significant and challenging behaviors requiring constant staff support. CP 217 ¶ 9; RCW 71A.12.080; WAC 388-101-3000; WAC 388-828-4200 to -5100.

Sound Support contracted with DDD from January 2001 to September 2009 to provide residential services to developmentally disabled adults. CP 49 ¶ 3. James Sibbett (hereinafter Sibbett) and his wife, MaryAnna, were directors of, and shareholders in, Sound Support. CP 305:7-10. Sibbett was Sound Support's Administrator, responsible for the company's day-to-day operations. CP 309:5-7; CP 319:16 to 320:7.

2. Sound Support's July 2009 Client Services Contract

The last client services contract between the parties had been automatically renewed by DSHS Central Contract Services on July 2, 2009, in the normal course of business. CP 323:16 to 324:6; CP 463-78; CP 49 ¶ 3-4; CP 217 ¶ 10. Automatic renewal ensures continuity of service to clients while unresolved concerns about service, contract compliance, and certification are being addressed. CP 217 ¶ 10.

Sound Support was bound by the General and Special Terms set forth in the contract. The contract required Sound Support to perform all contractual obligations in a manner that did not compromise the health and safety of a client. CP 444:14 to 445:16. Contract termination conditions

and procedures were clearly described. CP 57-58, General Terms 25-26; CP 445:25 to 450:13; CP 469-70.

Based on several sources of evidence, described below, DDD determined Sound Support was in default of its contract due to a continuing, uncorrected course of conduct that put the health and safety of its clients at risk, and that any further efforts to assist Sound Support would be futile. CP 225-26 ¶ 27; CP 509-10. The contract was terminated for default effective September 2, 2009. CP 441, 511.

3. A Changed Business Model Resulted In Failure

Sound Support's problems apparently began in spring 2007, when Sibbett changed his business management model to assume a consulting role, delegating responsibility for day-to-day operations to his Client Services Director and his Employee Services Director. CP 367:7 to 369:4. The Client Services Director was to ensure that client services and daily supports were provided to clients, and the Employee Services Coordinator managed employees. CP 309:8 to 312:24; CP 314:13 to 315:6. This new model led to a two year decline in the quality of service that continued through the summer of 2009. CP 367:21 to 373:6; CP 482-83. Sibbett identified it as "the crux of the problem" for Sound Support. CP 482. On April 13, 2009, Sibbett admitted in a letter to DDD:

We have allowed ourselves as an agency to not always stay focused on the problem which leads to problems with the most important part of our jobs . . . the clients. Backsliding has become more common. After sharing your observations, I have spent the day bemoaning my decision to take a hands-off approach and the consequences we are seeing.

CP 483.³

No one on Sound Support's management team was tasked with ensuring quality control over daily operations or seeing that client homes were properly maintained. CP 313:5-21; CP 316:10-17; CP 318:8 to 319:15. There was no formal procedure to record issues raised by DDD at quarterly performance meetings. CP 388:6 to 389:23. The result was repeated failure to address deficiencies in a timely manner, to properly report serious incidents to DDD, to ensure that corrective actions by the provider became the new operational standard, to protect the health and safety of clients, to protect the rights of clients, and to serve clients pursuant to WAC 388-101. CP 218-21 ¶¶ 12, 13, 15, 16; CP 72-78 ¶¶ 4, 6-12; CP 514:21 to 530:17; CP 372:6-22.

³ Sibbett's "hands off" approach was also in violation of WAC 388-101-3220: Service providers must ensure that their administrator oversee all aspects of staffing, training and performance reviews . . .

4. DDD Elected To Work With Sound Support To Try To Rehabilitate Its Performance, But Sound Support Repeatedly Failed To Remedy Its Deficient Performance

DDD did not precipitously terminate the contract with Sound Support. The 2009 default was preceded by a lengthy course of conduct in which frequent and serious deficiencies were recorded of which Sound Support had notice. CP 514-530; CP 330:8 to 439:25; CP 72-75, ¶ 4-6. In November 2008, a client wrote a suicide note and gave it to Sound Support staff. CP 218:13-23; CP 353:14 to 364:8. Rather than report the incident or obtain professional help, staff's only action was to leave the client's door ajar. It was over a week later before the client reported his mental state to his therapist and action was taken to protect him. CP 37, 42.

In January 2009, a client's guardian visiting her ward discovered he had not had his immunizations for over a year and no medical records were kept at his home. CP 542:1-13. She found broken plexiglass shards in his bedroom window, no privacy covering on the windows, and heavily stained and ill-fitting clothes. CP 543:17 to 545:5.

Other clients were experiencing poor care and living conditions. One had an unrepaired toilet, another an unaddressed mice infestation, and

a third was drinking out of the toilet because she did not have regular, supervised access to safe drinking water. CP 73:16-21.

On April 13, 2009, in response to DDD's concerns, Sound Support met with DDD representatives to review its service deficiencies. Sibbett did not attend but was informed of the discussion by his staff and wrote a letter to DDD later the same day. CP 482-83. In it he admitted "there was truth in everything you brought up," described a management "rift" that had been ongoing for a year and was negatively impacting his operations, and admitted "cracks in services." *Id.*

Despite receiving the Department's support and advice, conditions for clients did not improve after the meeting. In April 2009, DDD found Sound Support was out of compliance with its medication policies. CP 88. In May 2009, Sound Support reported two medication errors that required medical consultation. CP 90. RCS had found similar medication errors in a certification inspection in September 2008. CP 189.

On June 29, 2009, DDD Case Manager Dick Jennings reported water leakage, wall damage, and uncovered electrical outlets posing a hazard to clients in a patient's home. CP 44. When DDD staff revisited on July 24, 2009, repairs still had not begun. CP 111-14, 117-20.

The conditions existing in a client's home since March 2009 had not been corrected as of July 2009. CP 395:15 to 398:11; CP 492, 497.

On March 27 and March 30, 2009, Sound Support admitted in an e-mail to DDD that staff in K.G.'s home were "unstable" and deficient in "professionalism and conduct as employees, such as teamwork, cohesion, reliability, and showing up for shifts as scheduled." CP 81. But when DDD visited the home four months later on July 17 and July 22, 2009, they found no improvement. K.G. was extremely dirty and her hair was unwashed. She had been left in clothes that had not been changed after she urinated on herself. CP 220:22 to 221:8. Her home was bare and filthy, and a detached garage was strewn with loose garbage and used adult briefs mixed in with her personal belongings. CP 220:12-21; CP 75:7-22. The July 17 visit found unapproved locks on K.G.'s refrigerator and she had no access to food. CP 492, 159. There was dangerous electrical wiring hanging down above the back porch. CP 220:19-21. Photographs were taken to record the conditions. CP 71-79, 239-46.

On July 24, 2009, DDD staff discovered Sound Support client H.S. living in an outside garage area in an unapproved restrictive setting resembling a cage. CP 400:6 to 401:12; CP 77-78 ¶ 11; CP 124-127, 71-79.

DDD was not alone in its criticisms of Sound Support. Meredith and Phillip Dennis are the owners of Life Force Services, a

certified supported living and community protection provider in operation since 1997; they serve as voluntary guardians for K.G. and J.D. CP 534:1 to 535:25; CP 540:13-25; CP 536:17 to 540:12. Both wards were clients of Sound Support but were moved by their guardians from Sound Support's care in 2009. *Id.* Ms. Dennis cites poor care, lack of support, unsanitary conditions, inappropriate restrictions, an inability to follow through with corrective actions, and deplorable living conditions as the reasons for transfer in each case. CP 541:20 to 559:2. All are violations of WAC 388-101 and the client services contract.⁴ She concludes:

[W]e had had the difficulties in the beginning of the year with [J.D.] and because some of those same issues were occurring with [K.G.], you know, six months later. And because those things weren't getting corrected with [K.G.], how could I, as guardian, justify keeping [J.D.] in the same care?

CP 558-59.

DDD convened at least nine meetings with Sound Support between April 2009 and July 2009 to address ongoing service deficiencies, but adequate improvements did not occur. CP 143:24-25 to 144:1-10. In addition, DDD's psychologist, Ameer Kile, provided ongoing training and

⁴ See specifically WAC 388-101-3240, 3320, 3330, 3350, 3390, 3890, 3900(3)(c), 3920, 3950.

consultation with Sound Support staff during this same period. also without any significant improvement. CP 203:12-25 to 204:1-8.

5. Sibbett Admitted Sound Support's Default

On August 3, 2009, Sibbett admitted he had known about the conditions at K.G.'s home for at least three months prior to the July 17 complaint. CP 222-23 ¶ 21. Sibbett did not question a written statement by his Client Services Director dated July 17, 2009, with regard to K.G.'s home:

I admit this has been happening slowly, and I am behind on how fast I said things would be put in place...There are things I own up to that contribute to a lack of timeliness in implementation of supports discussed

CP 399:1 to 400:5. In that same document Sound Support's Client Services Director acknowledged, "I also am concerned that what occurred in this specific example relates to a broader concern that DDD may have with Sound Support." CP 500-01. In addition, when shown photographs of the conditions resembling a cage at H.S.'s home, Sibbett admitted this was an accurate depiction of the living conditions to which H.S. was subject at the time. CP 400:7 to 401:12.

6. Sound Support Voluntarily Sought Contract Termination; Sibbett Made Further Admissions

On August 6, 2009, when confronted with overwhelming evidence of default, Sibbett decided to voluntarily terminate his contract.

CP 222-24 ¶ 21-22. He and DDD Field Services Administrator Nancy Pesci created a plan to transition Sound Support's clients to new providers. CP 508; CP 414:19 to 415:2; CP 440:6-19. On August 11, 2009, Sibbett wrote a memo to Pesci in which he admitted:

From the time we met in the back of the conference room I have been concentrating on how to transition clients and staff to other agencies in a smooth manner... (and that little distraction of an evaluation hasn't helped). Believe me no one is more disappointed in my inattention to detail than me. I have been accepting that as a consequence I will lose everything, but have not allowed myself to really think about it.

CP 508; CP 414:10 to 415:24. Sibbett continued: "I really do understand the gravity of our shortcomings and failings, and perhaps no excuse is worthy of consideration...." CP 508.

7. Sound Support Considered A Sale Of Assets

Shortly after his decision to terminate the service contract, however, Sibbett verbally requested a slow down in client transition so he could explore "alternate options." CP 224 ¶ 23; CP 225 ¶ 26. This was his first attempt to approach Pesci to change the "course of action that had been outlined by she and I [sic] in the August 6th meeting." CP 414:10-18. In his August 11, 2009, memo to Nancy Pesci, he also asked that he be given a few days to review alternate options. CP 508. It was not until August 18 or 19 that Sibbett informed Ms. Pesci he was

considering a sale of the assets of Sound Support to a third party.
CP 418:18 to 419:5; CP 452:21 to 453:22.

8. Meanwhile, RCS Made Findings That Sound Support Violated WAC And DDD Finalized Its Decision To Terminate The CSC For Default

On August 12, 2009, RCS issued a Certification Evaluation Report finding that Sound Support had violated WAC 388-101-3370 (inadequate medical record keeping); WAC 388-101-3860 (inadequate behavior support plan); and WAC 388-101-3610, 3550, and 3540 (improper and incomplete financial record keeping). CP 162, 165-169. On August 13, RCS faxed to Sound Support the K.G complaint investigative report finding Sound Support in violation of WAC 388-101-3390 (failure to maintain a safe and healthy environment), 3890 (failure to document justification for restrictions on client's access to food), and 3900 (failure to obtain approval of restrictive procedures). CP 154-160, 162, 174-178; CP 430:20 to 434:5; CP 509-10. Sound Support did not contest or appeal any of the RCS findings. CP 165-69.

Thereafter, DDD made its final decision to terminate Sound Support's contract for default, regardless of further cooperation from Sound Support, and advised Sound Support to finish making transition arrangements for its clients. CP 225-26 ¶ 26-27. This decision was made based on the extensive evidence of default, including the poor

conditions and lack of services and supports in K.G.'s home, (CP 492⁵); a July 17, 2009, unreported physical assault by staff on another client⁶ (CP 484), and the cage-like conditions in H.S.'s garage (CP 503-07). These and other concerns had arisen after the automatic renewal of Sound Support's contract on July 2, 2009. CP 390:8 to 439:25.

9. St. Andrews Term Sheet And Refusal Of Request For Assignment Of Contract

On August 14, 2009, Sibbett received a Confidential Term Sheet from St. Andrews Acquisition, Inc., a certified provider of community residential services and supports, which contemplated an asset purchase and included the assignment of Sound Support's client service contract to St. Andrews. CP 326:7 to 327:21; CP 328:1-7; CP 454:25 to 455:15; CP 457:24 to 458:11; CP 479-81. The term sheet was non-binding and conditioned on "Approval by the appropriate parties of the assignment of the Company's government contracts." CP 457:3 to 458:11; CP 479. Sibbett understood DSHS was the approving authority under the terms of the client services contract. CP 457:3 to 458:11. He sought approval for the assignment from Region 6 DDD Administrator Geoff Hartford, but was denied. CP 328:1-22. Sibbett did not disclose the existence of the

⁵ Conditions independently verified by Life Force Administrator Meredith Dennis. CP 550:16 to 558:7).

⁶ The terms of the contract made Sound Support a "mandatory reporter" of suspected abuse and neglect. CP 451:10-24.

term sheet to DDD nor did he advise DDD of its terms. CP 325:6 to 326:5; CP 455:18 to 456:3. The sale to St. Andrews was never finalized. CP 326:17-21.

10. Written Notice Of Termination For Default Is Issued

On September 1, 2009, DDD sent a letter to Central Contract Services requesting termination of Sound Support's contract for default. CP 68. That same day a letter was sent to Sound Support notifying it of the termination for default effective September 2, 2009, because DDD had a "reasonable good faith belief that you are unable to protect the health and safety of your clients." CP 70.

11. Sound Support Filed Suit; The Trial Court Dismissed All Claims On Summary Judgment

In 2010, Sound Support brought a Breach of Contract claim and six tort claims⁷ against DSHS and DDD. CP 8-29, 1367-1397. Following discovery, the State filed a Motion for Summary Judgment on all claims (filed January 13, 2012). CP 264-293. On February 17, 2012, Sound Support was granted a sixty-day CR 56(f) continuance during which additional discovery took place but no discovery motions were filed.⁸ On April 27, 2012, at summary judgment oral argument, Sound Support

⁷ (1) Interference with Sound Support's contract with the state, (2) interference with a third party business expectancy, (3) breach of the duty of good faith and fair dealing, (4) intentional infliction of emotional distress, (5) negligent infliction of emotional distress, and (6) negligent investigation.

⁸ See fn 24, *infra*.

voluntarily withdrew its claim alleging interference with the state's own contract. Thereafter, the trial court issued a Letter Opinion dated May 11, 2012, dismissing all remaining claims. CP 1138-44.

Sound Support's motion for reconsideration, together with a motion to strike⁹ the declarations of Fee-Krehbiel (CP 71-141) and Keesee (CP 142-53), was heard on June 8, 2012. The trial court issued a Revised Letter Opinion on June 11, 2012, denying both motions. CP 1355-59. The trial court's Order set forth the basis for dismissal. CP 1360-64. Most significantly, the trial court found that "as a matter of law, reasonable minds could not differ on the record before the Court that Defendants terminated Plaintiffs' client service contract for default." CP 1362. *See also* CP 1356, 1143. The trial court also dismissed the claim of intentional tortious interference because, "DSHS/DDD and Mr. Hartford are absolutely privileged in refusing to consent to any assignment of the client service contract for any reason based on the unconditional, unambiguous language of the contract provision." CP 1357.

⁹Filed for the first time on June 1, 2012.

IV. ARGUMENT

A. Standard Of Review

The Superior Court's summary judgment ruling is reviewed de novo. *Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 708, 153 P.3d 846 (2007); *Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006). Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c), *Hubbard v. Spokane County*, 146 Wn.2d 699, 707-08, 50 P.3d 602 (2002). The facts and reasonable inferences therefrom are viewed most favorably to the nonmoving party. *Korlund v. DynCorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 177, 125 P.3d 119 (2005). Summary judgment is proper if reasonable minds could reach only one conclusion from the evidence presented. *Korlund*, 156 Wn.2d at 177. An appellate court may affirm a superior court's summary judgment ruling on any ground the record adequately supports. *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027, *cert. denied*, 493 U.S. 814 (1989).

B. Abundant Evidence In The Record, Including Undisputed Facts And Admissions, Establish That Sound Support Was In Default Of Its Service Contract. (Assignment Of Error No. 1)

1. Reasonable Minds Can Reach But One Conclusion On The Facts In This Case – DDD Had A Reasonable Basis To Believe Sound Support Was In Default.

Washington follows the objective manifestation theory of contracts. *Hearst Commc'ns, Inc. v. Seattle Times, Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005). Under that approach, courts attempt to determine the parties' intent by focusing on the objective manifestations of the agreement rather than any unexpressed, subjective intent. *Id.* Thus, a court will look beyond the plain language of a contract only to determine the meaning of specific words and terms used in the contract, and not to vary, modify or contradict the written word. *Id.* Moreover, courts are to impute an intention that corresponds to the reasonable meaning of the words used in the contract. *Id.*

General Term 26(b) of the client service contract gives DDD the authority to immediately terminate the contract for default if it has a reasonable basis to believe a service provider has failed to protect the health or safety of a client in violation of WAC 388-101. This contractual authority is clear and apparent from the plain language of the provision.

On August 13, 2009, RCS found Sound Support failed to comply with WAC 388-101-3390, 3890 and 3900. CP 430. Sound Support did

not dispute those findings. CP 434-35. These findings were only the most recent evidence known to DDD that Sound Support was in breach of General Term 26.

In evaluating the “reasonable basis to believe” standard, the question is whether, considering all the facts, a reasonable DDD official would have a reasonable basis to believe there was a default under General Term 26. In this case, that belief was based on abundant, well documented evidence. SOF at 7-18. As summarized above, Sound Support had a continuing history of non-compliance with rule, policy and contract terms, as well as a repeated failure to take corrective action to address this noncompliance. This quantum of evidence was substantial and overwhelming and established a “reasonable basis to believe” that Sound Support failed to protect the health and safety of its clients, a basis on which reasonable minds cannot differ. CP 1143, 1356.

Ordinarily, questions of fact are for the jury. Nonetheless, factual questions may be decided as a matter of law on summary judgment if reasonable minds can reach but one conclusion on them. *Korslund*, 156 Wn.2d at 177; *Allen v. State*, 118 Wn.2d 753, 760, 826 P.2d 200 (1992). That is what the trial court found.¹⁰ This Court should affirm that finding.

¹⁰ The trial court found that “...as a matter of law, reasonable minds could not differ on the record before the Court that Defendants terminated Plaintiffs’ client service contract for default.” CP 1143, 1356.

2. Even If This Court Were To Find The Evidence Insufficient, The Contract Is Deemed Terminated For Convenience.

General Term 26 contains a termination for convenience provision that automatically terminates the contract, should the basis for a default termination be found inadequate. CP 58. Accordingly, even if DDD erred in concluding there was a reasonable basis to believe there was a default, Sound Support's breach of contract claim must still be dismissed under the plain language of General Term 26. *Myers v. State*, 152 Wn. App. at 829-30. *Myers* is directly on point and controls this case.

In that case, Myers contracted with DDD to provide in-home care to her sister, a vulnerable adult. *Myers*, 152 Wn. App. at 825. An Adult Protective Services (APS) investigator investigated an incident involving an injury to Myer's sister. *Id.* at 824-26. The investigator ultimately found that the injury was not serious, required little treatment, and reported her finding to DDD. *Id.* at 827. Despite the finding, DSHS notified Myers that APS found she had neglected a vulnerable adult and that DSHS was terminating its contract with Myers based on that finding. *Id.* Myers appealed and an administrative law judge reversed the finding of neglect. *Id.* Myers then sued DSHS for breach of contract and tortious interference with business relationship. *Id.*

The trial court dismissed both claims on summary judgment relying, in part, on the termination for convenience provision in that contract.¹¹ *Id.* at 829-30. That same language is found at the end of paragraph 26 of the contract in this case.

The Court of Appeals affirmed the trial court's dismissal order, observing that the *Myers* service contract granted DSHS broad authority to terminate the contract.¹² *Id.* The court observed that even though Myers made a case for having done nothing wrong (which is not the case here) DSHS's authority to terminate the contract for convenience obviated her breach of contract claim, even if the basis for default was later determined to be unfounded. *Id.* The same result applies here.

C. The Implied Covenant Of Good Faith And Fair Dealing Can Not Be Applied To Set Aside An Express And Unconditional Contract Right. (Assignment Of Error No. 2)

The requirement of good faith and fair dealing is inherent in every contract under Washington law. *Myers*, 152 Wn. App. at 828. However, the covenant of good faith cannot be used by Sound Support to contradict the express and unconditional language in the termination for convenience section of the default provision in the client services contract.

¹¹ The language of section 27 of the *Myers* contract provided for termination for default. Additional language at the end of the section provided, "If it is later determined that the Contractor was not in default, the termination shall be considered a termination for convenience." *Myers*, 152 Wn. App. at 828.

¹² In *Myers*, the authority was grounded in WAC 388-71-0556. The Department's authority in this case arose from WAC 388-825-300; 390. The pertinent language is substantially identical.

Myers, 152 Wn. App. at 828 (because a contract term explicitly permitted the termination of a contract “for convenience,” the duty of good faith did not require the surrender of this right by DSHS).

In upholding the trial court’s dismissal in *Myers*, the Court of Appeals discussed the implied covenant of good faith and fair dealing. *Myers*, 152 Wn. App. at 828. The court explained that “covenants of good faith and fair dealing do not trump express terms or unambiguous rights in a contract.” *Id.* The Court added that, despite a persuasive argument that she did nothing wrong, *Myers* was not able to recover because the termination for convenience clause in the contract gave DSHS the authority to terminate the contract at any time. *Id.* at 829-30.

The Sound Support’s contract is similar to the one in *Myers*; both contained default and convenience provisions. In facts similar to *Myers*, an RCS investigation found that Sound Support had “failed to maintain a safe and healthy home” in violation of WAC 388-101-3390 and that the conditions were “potentially hazardous.” CP 154-60. The report found Sound Support “failed to identify approval of a restrictive procedure in writing and implemented a prohibited restrictive procedure without approval.”¹³ *Id.* This report, by itself, provides a reasonable basis on which to terminate the contract for default. But even if (*arguendo*), as in

¹³ Violations of WAC 388-101-3890 and 3900 were found.

Myers, the termination for default were later deemed improper, an unconditional contract term explicitly provides for termination “for convenience,” and that term is authorized by WAC 388-825-300; 390. The duty of good faith does not require the surrender of this valid contract right by a state agency authorized to include that contract term.

The court in *Myers* simply applied the general rule that the implied covenant of good faith applies to a party’s exercise of an express and unconditional contract right, citing *Goodyear Tire & Rubber Company v. Whiteman Tire, Inc.*, 86 Wn. App. 732, 935 P.2d 628 (1997). In that case, Goodyear entered into a dealership contract with Whiteman, but expressly reserved the right to sell tires in Whiteman’s trade area. Even though Whiteman was an independent Goodyear tire dealer, Goodyear established Goodyear company stores in the same trade area, eventually forcing Whiteman out of business. Goodyear then sued Whiteman to recover amounts due and owing on account and Whiteman counterclaimed.¹⁴

The superior court summarily dismissed these counterclaims. On appeal, the court held that the duty of good faith and fair dealing “may be relied upon only when the manner of performance under a specific contract term *allows for discretion on the part of either*

¹⁴ Asserting breach of contract, breach of fiduciary duties, violation of the Washington Consumer Protection Act, and tortious interference with its business expectancies.

party. . . . However, it will not contradict terms or conditions for which a party has bargained.” *Id.* at 739 (emphasis in original). The *Goodyear* court cited *Badgett v. Security State Bank*, 116 Wn.2d 563, 570, 807 P.2d 356 (1991), for the proposition that “[a]s a matter of law, there cannot be a breach of the duty of good faith when a party simply stands on its rights to require performance of a contract according to its terms.”

In this case, the state’s right to terminate the contract for convenience was absolute and unconditioned. As a matter of law, the unconditional term cannot be contradicted or changed by application of the covenant of good faith.

Sound Support fails to cite any Washington authority contradicting *Myers*, *Goodyear Tire*, and *Badgett*. The unconditional language in General Term 26 meets the requirement.

D. Sound Support Is Not Entitled To An Advisory Opinion Concerning Lost Profits/Wind-Up Costs On Termination for Convenience When That Issue Is Not Properly Before This Court. (Assignment Of Error No. 3)

Sound Support claims a right to lost profits and wind-up costs and ties that claim for damages to its breach of contract theory (the arbitrariness of a termination for convenience). The claim is spurious because: (1) There is no termination for convenience in this case, (2) Any such damages in breach of contract would be subsumed when the trial

court dismissed that claim for default, (3) Sound Support is the breaching party and not entitled to damages, and (4) The client service contract does not expressly provide for those damages. Furthermore, to the extent lost profits or wind-up costs represent damages for claims not alleged in Sound Support's complaint and argued in the case in chief, they represent an untimely attempt to amend their complaint with a new theory following an unsatisfactory outcome in summary judgment.¹⁵ *Wilcox v. Lexington Eye Institute*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005); *JDFJ Corp. v. Int'l Raceway, Inc.*, 97 Wn. App. 1, 7, 970 P.2d 343 (1999).

Sound Support's damages claim depends on a finding of termination for convenience in the court below and is moot. The trial court dismissed Sound Support's breach of contract claim at summary judgment for default. CP 1359.¹⁶ There is no proper assignment of error and the issue is not properly before this court. Sound Support is not entitled to an advisory opinion. *See State v. Norby*, 122 Wn.2d 258, 269, 858 P.2d 210 (1993) (advisory opinions disfavored by courts).

¹⁵ Appellants did not plead claims of "rescission" or "quantum meruit" in their complaint and may not now raise those separate and independent claims on reconsideration or on appeal. Doing so would violate equitable rules of estoppel, election of remedies, and the invited error doctrine. *JDFJ Corp.*, 97 Wn. App. at 7.

¹⁶ The trial court did advise in its letter opinion that *Myers v. State* would apply to the facts in this case and would result in the dismissal of the breach of contract claim if proper conditions were met but that was not the basis on which breach of contract claim was dismissed in summary judgment.

Sound Support argues that because a termination for convenience is available, should the conditions for a termination for default be found inadequate on appeal, it is entitled to a remand to determine damages for lost profits and wind-up costs. This Court would first have to decide that reasonable minds could differ in the face of overwhelming evidence of default before a termination for convenience could take place. Should that occur, the proper remand would be on the issue of whether the remedy sought is available at all, not the extent of damages to which Sound Support would be entitled under that remedy.

In that vein, Sound Support cites no Washington case that contradicts or overrules *Myers v. State*, 152 Wn. App. 823, *supra*, nor any Washington case or statute that would give them this remedy. *Lampson Universal Rigging, Inc. v. WPPSS*, 44 Wn. App. 237, 721 P.2d 996 (1986), is a liquidated damages case in which the right to liquidated damages was expressly contained in the termination for convenience provision. There is no such provision in the DDD service contract. In *Taylor v. Shigaki*, 84 Wn. App. 723, 930 P.2d 340 (1997), a non-breaching party sought payment for the substantial performance of services rendered under a contingency fee agreement. Not only has Sound Support failed to allege a substantial performance theory, *it* is the breaching party in this case. Finally, in *Johnson v. Nasi*, 50 Wn.2d 87, 309 P.2d 380 (1957), a

voluntary care provider sought to enforce an implied contract against a decedent's estate for the value of *inter vivos* services rendered to the decedent. In this case, Sound Support has never complained that it was not fully paid for all services rendered by it from month to month under the contract.

Sound Support cites no authority that would import into Washington jurisprudence the federal case law it cites. The absolute, unconditioned language in General Term 26 is dispositive. Where the question of interpretation of an integrated agreement does not depend on extrinsic evidence, it is a question of law. *Berg v. Hudesman*, 115 Wn.2d 657, 668, 801 P.2d 222 (1990). This is particularly true where the equities balance in DDD's favor. DDD's overriding responsibility is the health and safety of its vulnerable clients, not Sound Support's business advantage, and DDD has substantial evidence that client health and safety was being severely compromised by Sound Support. Even in *Myers*, where the plaintiff arguably was faultless and where the grounds for default termination were overturned, the court provided no equitable remedy and cited no authority by which Myers could obtain damages. *Myers*, 152 Wn. App. at 829-30.

E. There Is No Private Right Of Action For Negligent Investigation When DDD Monitors A Client Service Contract. (Assignment Of Error No. 4)

Sound Support's Complaint states very clearly their theory of recovery is based on a claim of negligent investigation by DDD. CP 1376. To prove a negligence claim, Sound Support must establish four essential elements: duty, breach, proximate cause, and damages. *Couch v. Wash. Dep't of Corr.*, 113 Wn. App. 556, 563, 54 P.3d 197 (2002), *review denied*, 149 Wn.2d 1012 (2003). Accordingly, it must be proven that DDD breached a legal duty to refrain from a negligent investigation and that the breach was the proximate cause of the improper termination of the contract and any resultant damages.

The threshold issue is whether a duty exists, and that is a question of law. *Murphy v. State*, 115 Wn. App. 297, 305, 62 P.3d 533, *review denied*, 149 Wn.2d 1035 (2003). "State agencies are creatures of statute, and their legal duties are determined by the Legislature" *Murphy*, 115 Wn. App. at 317. State statutes cannot be construed as imposing a duty on a sovereign government unless that statute expressly imposes a duty, *id.* at 314, or unless the statute is found to contain an implied duty. *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d. 1258 (1990).¹⁷

¹⁷ The court in *Bennett*, 113 Wn.2d at 920-21, articulated a three-part test for showing an implied duty: (1) whether the plaintiff is within the class for whose benefit the statute was enacted; (2) whether the legislative intent supports creating a remedy; and

The courts may, on a case by case basis, infer a private cause of action from a statutory duty. *M.W. v. DSHS*, 149 Wn.2d 589, 596, 70 P.3d 954 (2003). “When determining whether we may infer a cause of action from a statutory duty, we apply the analysis from *Bennett v. Hardy*,” *Id.* But that analysis is used only when the statute itself gives rise to the duty and the court must imply a cause of action. *M.W.*, 149 Wn.2d at 596, n.4 (*citing Bennett*, 113 Wn.2d at 920-21). Without any court-ordered or statutory authority there is no legal basis supporting imposition of a tort duty. *See Couch*, 113 Wn. App. at 564-65.

Sound Support fails to cite any statute expressly establishing an actionable duty or from which a private right of action may be inferred, and it has not provided any analysis of any statute pursuant to *Bennett v. Hardy*. Dismissal must be affirmed.

F. DSHS Was Absolutely Privileged In Declining To Consent To Sound Support’s Request To Assign Its Client Service Contract To St. Andrews. (Assignment Of Error 5)

In August 2009, after Sound Support learned its contract would be terminated and its clients transferred to other service providers, it solicited a purchase offer from St. Andrews in the form of a Term Sheet. CP 479-81. The term sheet was structured as an asset purchase and conditioned the completion of the deal on “approval by the appropriate

(3) whether the underlying purpose of the legislation is consistent with inferring a remedy.

parties of the assignment of the Company's government contracts." *Id.* DDD was the appropriate party to approve the assignment. CP 443.

Sound Support did not show the term sheet to anyone at DSHS, but asked for consent to assign the contract. Sound Support was aware of the provision in the contract at General Term 3 providing "The Contractor shall not assign this Contract or any Program Agreement to a third party without the written consent of DSHS." This provision does not require DSHS to consent to an assignment, place conditions upon the granting or withholding of consent, or list factors to be considered before granting or withholding consent. It is, in other words, unconditional.

Sound Support claims that DDD officials, using an "improper means" or "improper purpose," intentionally interfered with the sale of Sound Support assets, which included the client service contract, by declining to consent to the assignment of that contract to St. Andrews.¹⁸

To prevail on an action for tortious interference, a plaintiff must prove (1) the existence of a valid contractual relationship or business expectancy; (2) that defendants had knowledge of that relationship or expectancy; (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; (4) that defendants

¹⁸ More accurately, Sound Support does not allege DSHS opposed the prospective sale of assets to St. Andrews; just that DSHS did not consent to the assignment of the DSHS contract, thereby interfering with that sale.

interfered for an improper purpose or used improper means; and (5) resultant damage. *Woody v. Stapp*, 146 Wn. App. 16, 189 P.3d 807 (2008); *Pleas v. City of Seattle*, 112 Wn.2d 794, 774 P.2d 1158 (1989).

Any duty DSHS owed to Sound Support arose out of the client service contract. The contract contained an unconditional consent to assignment provision requiring DDD to either grant or decline to consent.

As a matter of logic and common sense, and for the sake of good public policy, there can be no “duty of non-interference” where there is a contractual requirement to act. There is no interference for a wrongful purpose when a contract term imposes no conditions at all on an act. There is no interference by wrongful means when the means used are set forth in the terms of an existing agreement between the parties. A claim of intentional interference in this context is factually insufficient because the act of exercising one’s legal interest in good faith is not improper interference. *Elcon Constr., Inc. v. E. Wash. Univ.*, 174 Wn.2d 157, 168, 273 P.3d 965 (2012). Accordingly, refusing to consent to an assignment of contract under an unambiguous, unconditional, contract term is not an “improper means” or “improper motive”. This becomes even more apparent when the contract requirement at issue is based on DSHS duty to protect the health and safety of its vulnerable clients.

Matters of policy aside, the specific issue in this case has already been decided by the Court of Appeals of Washington, Division 1, in *Johnson v. Yousoofian*, 84 Wn. App. 755, 930 P.2d 921 (1997). In that case Johnson (the lessee) brought an action for declaratory relief and damages for breach of a commercial lease and for intentional interference with business expectancy based on the lessor's failure to consent to a lease assignment. The lease contained a provision (Paragraph 12) that provided in relevant part: "Lessee shall not . . . assign this lease or any part thereof without the written consent of the Lessor, or Lessors agents." *Id.* at 757.

The trial court ruled:

Paragraph 12 of the lease does not impose an obligation on the Defendant to consent to assignment of the lease. Paragraph 12 rather imposes a prohibition upon tenants from assigning the lease without the written consent of the landlord. Under Paragraph 12, the Defendant was legally privileged to withhold consent.

Id. at 759. The trial court added that the implied covenant of good faith imposed no duty to consent to any proposed assignment without an express contractual obligation. *Id.*

The central issue on appeal was "whether the implied covenant of good faith requires a landlord to be reasonable in refusing consent to a lease assignment, when the lease prohibits assignment without the landlords' consent but imposes no explicit standard of conduct."

Id. at 759. Division 1 agreed with the trial court, finding that Yousoofian had an absolute privilege to refuse to consent to assignment under the lease. *Id.* at 762. The Court reasoned that the implied duty of good faith is derivative, in that it applies to the performance of specific contract obligations. *Id.*, citing *Miller v. U.S. Bank of Wash.*, 72 Wn. App. 416, 426 n.5, 865 P.2d 536 (1994). The Court stated:

If there is no contractual duty, there is nothing that must be performed in good faith. Contrary to the lessees' characterization of the trial court's ruling in this case, it did not create an exception to the good faith requirement for landlord-tenant leases. This lease simply does not impose an obligation on the landlord to consent to any assignment sought by the lessees.

Yousoofian, 84 Wn. App. at 762.

The facts in this case are nearly identical to the facts in *Johnson v. Yousoofian*. The unqualified contract provision says, "3. **Assignment.** The Contractor shall not assign this Contract or any Program Agreement to a third party without the prior written consent of DSHS." CP 53 ¶ 3.

The unambiguous, unconditional language of General Term 3 established the contractual right of the parties. The derivative implied duty of good faith and fair dealing cannot be asserted when there is nothing that must be performed in good faith. DSHS was absolutely privileged in refusing to consent to the assignment of the contract. Any

inquiry into the motivation or conduct of any DDD employee is both irrelevant and immaterial.

G. Sound Support Failed To Allege Facts Sufficient To Support A Negligent Infliction Of Emotional Distress Claim. (Assignment Of Error No. 6)

Sound Support argues that dismissing the negligent infliction of emotional distress (NIED) claim is error because this is a case of “direct liability” not subject to “bystander liability standards”. Opening Brief at 22. As authority, it incorrectly cites *Price v. State*, 114 Wn. App. 65, 57 P.3d 639 (2002), and *Thomas v. French*, 99 Wn.2d 95, 659 P.2d 1097 (1983).¹⁹

NIED is a bystander tort available only to certain individuals and their immediate family members who are negligently placed in an imminent risk of peril. The tort and the boundaries put on it were discussed at length in *Cunningham v. Lockard*, 48 Wn. App. 38, 736 P.2d 305 (1987). The *Cunningham* court stated:

Because the tort of outrage limits the plaintiff class and involves conduct of greater severity than that required for the negligent infliction of emotional distress, we conclude that policy considerations dictate that the legal liability of defendants who negligently inflict emotional

¹⁹ The underlying cause of action in *Price v. State* was the breach of the state’s duty to inform prospective adoptive parents of the full extent of a child’s handicaps in a pre-adoption setting. Emotional distress in *Price* was an element of damage available to the plaintiff parents as a result of the breach of that duty. The underlying cause of action in *Price* was not NIED - plaintiffs were not required to prove the elements of NIED in that case. *Price* is unhelpful here. *Thomas v. French* has nothing to do with emotional distress and is unhelpful.

distress must be limited to plaintiffs who are actually placed in peril by the defendant's negligent conduct and to family members present at the time who fear for the one imperiled.

Id. at 44-45. See also *Gain v. Carroll Mill Company, Inc.*, 114 Wn.2d 254, 787 P.2d 553 (1990) (whether NIED can be supported depends on proximity to the scene of the accident or physical harm) and *Colbert v. Moomba Sports, Inc.*, 163 Wn.2d 43, 176 P.3d 497 (*en banc*) (2008) (negligent infliction of emotional distress “is a limited, judicially created cause of action that allows a family member a recovery for ‘foreseeable’ intangible injuries caused by viewing a physically injured loved one shortly after a traumatic accident”). *Colbert*, 163 Wn.2d at 49.

These bystander cases involve proximity to the harm and the element of physical harm. As a result, no duty is owed to the Sibbetts because they were not foreseeable victims. They were not subjected to physical harm, the threat of physical harm, or the proximity of physical harm to an immediate family member.

In addition, the Sibbetts were not exposed to “unreasonably dangerous conduct” by any DSHS employee at any time relevant to the facts in this case. *Keates v. City of Vancouver*, 73 Wn. App. 257, 869 P.2d 88, *review denied*, 124 Wn.2d 1026 (1994). Unless the

employee's conduct is unreasonably dangerous, DSHS owes no duty. *Id.* at 265-66.

Sound Support fails to allege facts sufficient to support this claim.

H. DSHS Did Not Engage In Outrageous Conduct When Its Employees Performed Tasks Authorized And Required By WAC, Policy, And Contract. (Assignment Of Error No. 7)

To prevail on a claim of intentional infliction of emotional distress, also known as outrage, one must prove (1) the wrongdoer engaged in extreme and outrageous conduct; (2) in order to intentionally or recklessly inflict emotional distress; which then (3) resulted in severe emotional distress to the victim. *Corey v. Pierce County*, 154 Wn. App. 752, 225 P.3d 367 (2010); *Strong v. Terrell*, 147 Wn. App. 376, 195 P.3d 977 (2008), *review denied sub nom Wright v. Terrell*, 165 Wn.2d 1051, 208 P.3d 555 (2009) (Outrage claim was properly dismissed when plaintiff failed to show that defendant's conduct exceeded all bounds of decency).

Sound Support claims outrage because DDD terminated its contract for default and withheld consent to assign the contract to a third party. Both actions were plainly and unconditionally set forth and authorized in a written contract between the parties and authorized by Washington Administrative Code. Nothing suggests DDD employees engaged in conduct so extreme as to be beyond all possible bounds of decency or intolerable to a civilized community. *Keates*, 73 Wn. App. at

263. DDD's conduct is not outrageous just because the Sibbetts do not like it or, due to their own shortcomings, suffer from it. On this point reasonable minds cannot differ. *Strong*, 147 Wn. App. at 385, *citing Robel v. Roundup Corp.*, 148 Wn.2d 35, 51, 59 P.3d 611 (2002).

The Sibbetts had entered into numerous contracts with DDD over time and understood the serious obligations undertaken in caring for vulnerable, developmentally disabled clients. They also knew the consequences of failing to meet their obligations. Sibbett admitted over and over that he and Sound Support had fallen terribly short in meeting those obligations. Now they claim outrage because DSHS fulfilled its obligations under the law and the contract.

The focus of legal causation "rests on considerations of policy and common sense as to how far the defendant's responsibility for the consequences of its actions should extend." *Hertog, ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 282, 979 P.2d 400 (1999), *citing Taggart v. State*, 118 Wn.2d 195, 822 P.2d 243 (1992). Finding legal causation is essential to finding proximate cause.²⁰ In this case, legal causation should not attach to conduct by state employees who follow the unambiguous, unconditional language of a written contract and the requirements of the

²⁰ A cause is proximate only if it is both a cause in fact and a legal cause. *Gall v. McDonald Industries*, 84 Wn. App. 194, 926 P.2d 934 (1996), *review denied*, 131 Wn.2d 1013 (1997).

law. Exercising business judgment in that context is, as a matter of law, not outrageous and does not establish legal causation.

Sound Support set forth seven facts it claims give rise to genuine issues of material fact sufficient to establish the tort of outrage. OB at 25-26. Though these are facts in the case, they are not material to the claim of outrage.²¹ The material fact in this case is legal authority. DDD employees were acting within the scope of their employment and their legal authority. It cannot and should not be the law that the conduct of state employees doing their jobs, as required by law, can be deemed outrageous.

I. The Trial Court Did Not Abuse Its Discretion By Denying Sound Support's Motion To Strike Portions Of The Fee-Krehbiel And Keesee Declarations. (Assignment Of Error No. 8)

Sound Support sought to exclude from the summary judgment record evidence set forth in the declarations of Fee-Krehbiel (CP 71-141) and Keesee (CP 142-53) for two reasons: (1) the declarations relied on documents not listed by the state in a discovery letter dated September 28, 2011; and, (2) the declarations were, in part, hearsay because they were observations by DDD employee Anna Facio of which neither declarant had personal knowledge. Neither reason has merit.

²¹ As the court said of Ms. Myer in *Myer v. State*, "She raises questions of fact. But they are not material questions of fact." *Myer*, 152 Wn. App. at 830.

The proper standard of review for admission of evidence is abuse of discretion.²² *State v. Aguirre*, 168 Wn.2d 350, 361-62, 229 P.3d 669 (2010). A trial court abuses its discretion only when it takes a view that no reasonable person would take. *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 450, 191 P.3d 879 (2008). *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997).

Sound Support first filed its motion to strike on June 1, 2012, well after the April 27, 2012, summary judgment oral argument where all evidence was considered without objection. That motion was heard at oral argument on the motion for reconsideration on June 8, 2012. Sound Support failed to adequately preserve its record on the issue of admissible evidence.²³ Although the trial court denied the motion to strike in its June 11 letter opinion, the Court advised it had given all pleadings “appropriate consideration on summary judgment”. CP 1359. Under the circumstances, having already considered the evidence once without objection, this was not abuse of discretion.

²² While the trial court's interpretation of the rules of evidence is a question of law that we review de novo, we, nevertheless, review the court's application of the rules to particular facts for abuse of discretion. *State v. Sanchez-Guillen*, 135 Wn. App. 636, 642, 145 P.3d 406 (2006).

²³ “An objection to evidence offered for purposes of summary judgment must be timely.” 4 Karl B. Tegland, *Washington Practice: Rules Practice*, at 377 (2006).

1. Records Not Listed In The September Letter

In August 2011, Sound Support sought a written listing of the documents and records the state believed were “foundational” to the breach of contract claim. The state provided that list in a letter dated September 28, 2011. CP 1323-33. Those records were a portion of the documents produced to Sound Support in CR 26 discovery. Thereafter, written discovery continued and depositions were held. On January 13, 2012, the state filed its motion for summary judgment with appendices and attachments. Those appendices and attachments included records that were not listed in the September 28 letter, but had been provided in discovery. Most had been used at deposition.

Sound Support now asserts that any document used to support the state’s motion for summary judgment that was not listed in the September 28 letter should have been excluded from consideration. Sound Support does not cite any authority that would limit the use of these records in summary judgment under these facts.

The summary judgment requirement that documents submitted in connection with a summary judgment affidavit be authenticated in order to be admissible does not limit the type of evidence allowed to authenticate a document; it merely requires some evidence which is sufficient to support a finding that the evidence in question is what its proponent claims it to

be. CR 56(e); *Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 746, 87 P.3d 774 (2004). The proponent of the document must only make a prima facie showing of authenticity, and that is met if the proponent shows proof sufficient for a reasonable fact-finder in favor of authenticity. *Id.* In other words, listing documents in a discovery letter is not a prerequisite to authenticity. Each document submitted by the state in this case was supported and authenticated by a declaration and every document used in summary judgment had been previously produced to Sound Support.

It would be improper to restrict competent evidence as Sound Support asks. Discovery is dynamic and ongoing. While there is an obligation to produce discoverable documents, which the state did, there is no obligation to do opposing counsels' work for them. This is particularly true in light of the sixty-day discovery continuance granted to Sound Support by the trial court under CR 56(f) on February 17, 2012.²⁴ CP 1355; Verbatim Report of Proceedings (February 17, 2012) at 20-22; Verbatim Report of Proceedings (April 27, 2012) at 69, 75; Verbatim Report of Proceedings (June 8, 2012) at 24-26.

²⁴ As noted above, Sound Support was given a sixty day window, after the state filed its summary judgment motion and before it filed its Response, to examine the appendices and attachments and file appropriate discovery and procedural motions objecting to the evidence, as the court invited it to do. Sound Support failed to do so and thereby waived any objection to the use of these documents in support of the summary judgment motion.

Sound Support seeks a penalty now for an imagined discovery violation that could have been, but was not, brought to the attention of the trial court, on motion, at an earlier time. Even had an objection been timely made, there is no basis on which to object to properly authenticated documents. It was not an abuse of discretion to consider the evidence.

2. Hearsay Objections

As a threshold matter, the facts set forth in each challenged declaration are within the personal knowledge of each declarant. Fee-Krehbiel and Keesee were personally at the homes in question and their statements are based on personal experience. Fee-Krehbiel also authenticated photographs taken by her colleague, Anna Facio, as true and accurate depictions of the deplorable conditions in the homes. They are not hearsay and are admissible.

In addition, when considering the breach of contract claim, the real issue is not whether specific portions of each declaration were excludable as hearsay, but whether the quantum of evidence available to DDD in July/August 2009 was sufficient to establish a reasonable basis to believe there was a default under General Term 26. Thus, the information contained in the two declarations was not hearsay because it could have

been offered, not for the truth of the matter asserted,²⁵ but, rather, to demonstrate that the sum total of evidence available to DDD was sufficient to lead to a “reasonable basis to believe”- the ultimate issue on this claim. The challenged portions of each declaration were admissible under ER 402.

Even if the trial court had erred in failing to exclude these small portions of evidence as hearsay, the overwhelming amount of “competent” evidence would still cause reasonable minds to reach but one conclusion. *See* SOF at 8-18. Accordingly, any error caused by letting portions of two declarations into evidence would be harmless error under the circumstances. Error is harmless unless it was reasonably probable that it changed the outcome of the trial or proceeding. *Brundridge*, 164 Wn.2d at 452-53; *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Error without prejudice is not grounds for reversal, and error will not be considered prejudicial unless it affects, or presumptively affects, the outcome of trial. *Thomas v. French*, 99 Wn.2d at 104.

²⁵ The truth of a single fact was not the issue. The issue was whether all the facts known at the time, taken together, would satisfy the standard of “reasonable basis to believe”. That is a matter entirely different from whether an employee had personal knowledge of a fact. The persuasive point was whether that fact was actually in the Sound Support file itself. Of this fact, each declarant did have personal knowledge. In that respect, the evidence is also admissible under RCW 5.45.020.

The relatively few facts in each declaration, when considered against the backdrop of other overwhelming evidence, do not change the outcome of these proceedings. It was not an abuse of discretion to consider the evidence.

V. CONCLUSION

Overwhelming evidence compels the conclusion that DDD had a reasonable basis to believe Sound Support was in default of its contract. As a matter of law, reasonable minds cannot differ on this conclusion. Furthermore, DDD was privileged in declining to consent to the assignment of the contract to a third party. In all matters related to the facts in this case, DDD employees acted within the scope of their employment and authority and in a manner consistent with law, regulation, and the express, unconditional terms of the service contract. Reasonable minds cannot otherwise conclude. In addition, Sound Support has failed to state facts sufficient to sustain an NIED claim and failed to find authority imposing a duty sufficient to sustain a claim of negligent investigation. Sound Support is not entitled to an advisory opinion on its

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windup costs, a matter not before this Court. Finally, the trial court did not abuse its discretion in admitting evidence in the summary judgment proceeding, but any error would be harmless. The rulings of the trial court should be affirmed and the case dismissed.

RESPECTFULLY SUBMITTED this 26th day of October, 2012.

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PROOF OF SERVICE

I certify that I served a copy of this document on all parties or their
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- US Mail Postage Prepaid via Consolidated Mail Service
- ABC/Legal Messenger
- State Campus Delivery
- Hand delivered by Kristi Basic

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

DATED this 29th day of October, 2012 at Tumwater, WA.


KRISTI BASIC, Legal Assistant

APPENDIX

Client Service Contract dated June 2, 2009

DSHS General Terms & Conditions

3. **Assignment.** The Contractor shall not assign this Contract or any Program Agreement to a third party without the prior written consent of DSHS.

Client Service Contract dated June 2, 2009

DSHS General Terms & Conditions

26. **Termination for Default.** The Contracts Administrator may immediately terminate this Contract for default, in whole or in part, by written notice to the Contractor if DSHS has a reasonable basis to believe that the Contractor has:
- a. Failed to meet or maintain any requirement for contracting with DSHS;
 - b. Failed to protect the health or safety of any DSHS client pursuant to Additional Terms and Conditions Section 3;
 - c. Failed to perform under, or otherwise breached, any term or condition of this Contract; and/or
 - d. Violated any applicable law or regulation.

If it is later determined that the Contractor was not in default, the termination shall be considered a termination for convenience.

WAC 388-101-3020

Compliance.

The service provider must be in compliance with:

(1) All the requirements of this chapter. Except that, the licensing requirements for adult family homes and boarding homes supersede this chapter if the requirements under respective chapters 388-76 and 388-78A WAC conflict with this chapter;

(2) The laws governing this chapter, including chapter 71A.12 and 71A.22 RCW;

(3) The requirements of chapter 74.34 RCW;

(4) The department's residential services contract. Except that, the requirements of this chapter supersede any conflicting requirements with the contract, or appendices to the contract; and

(5) Other relevant federal, state and local laws, requirements, and ordinances.

[Statutory Authority: Chapter 71A.12 RCW. 08-02-022, § 388-101-3020, filed 12/21/07, effective 2/1/08.]

WAC 388-101-3220

Administrator responsibilities and training.

(1) The service provider must ensure that the administrator delivers services to clients consistent with this chapter, and the department's residential services contract. This includes but is not limited to:

(a) Overseeing all aspects of staffing, such as recruitment, staff training, and performance reviews;

(b) Developing and maintaining policies and procedures that give staff direction to provide appropriate services and support as required by this chapter and the department contract; and

(c) Maintaining and securely storing client, personnel, and financial records.

(2) Before assuming duties, an administrator must complete required instruction and support services staff training if the administrator may provide instruction and support services to clients or may supervise instruction and support services staff.

[Statutory Authority: RCW 71A.12.030 and [71A.12]030. 12-02-048, § 388-101-3220, filed 12/30/11, effective 1/30/12. Statutory Authority: RCW 71A.12.080, chapter 74 39A RCW. 10-16-084, § 388-101-3220, filed 7/30/10, effective 1/1/11. Statutory Authority: Chapter 71A.12 RCW. 08-02-022, § 388-101-3220, filed 12/21/07, effective 2/1/08.]

WAC 388-101-3240

Policies and procedures.

- (1) The service provider must develop, implement, and train staff on policies and procedures to address what staff must do:
- (a) Related to client rights, including a client's right to file a complaint or suggestion without interference;
 - (b) Related to soliciting client input and feedback on instruction and support received;
 - (c) Related to reporting suspected abuse, neglect, financial exploitation, or abandonment;
 - (d) To protect clients when there have been allegations of abuse, neglect, financial exploitation, or abandonment;
 - (e) In emergent situations that may pose a danger or risk to the client or others, such as in the event of death or serious injury to a client;
 - (f) In responding to missing persons and client emergencies;
 - (g) Related to emergency response plans for natural or other disasters;
 - (h) When accessing medical, mental health, and law enforcement resources for clients;
 - (i) Related to notifying a client's legal representative, and/or relatives in case of emergency;
 - (j) When receiving and responding to client grievances; and
 - (k) To respond appropriately to aggressive and assaultive clients.
- (2) The service provider must develop, implement, and train staff on policies and procedures in all aspects of the medication support they provide, including but not limited to:
- (a) Supervision;
 - (b) Client refusal;
 - (c) Services related to medications and treatments provided under the delegation of a registered nurse consistent with chapter 246-840 WAC;
 - (d) The monitoring of a client who self-administers their own medications;
 - (e) Medication assistance for clients needing this support; and
 - (f) What the service provider will do in the event they become aware that a client is no longer safe to take their own medications.
- (3) The service provider must maintain current written policies and procedures and make them available to all staff; and to clients and legal representatives upon request.

[Statutory Authority: Chapter 71A.12 RCW. 08-02-022, § 388-101-3240, filed 12/21/07, effective 2/1/08.]

WAC 388-101-3320

Client rights.

Clients have the same legal rights and responsibilities guaranteed to all other individuals by the United States Constitution, federal and state law unless limited through legal processes. Service providers must promote and protect all of the following client rights, including but not limited to:

- (1) The right to be free from discrimination;
- (2) The right to be reasonably accommodated in accordance with state and federal law;
- (3) The right to privacy, including the right to receive and send private mail and telephone calls;
- (4) The right to participate in an appropriate program of publicly supported education;
- (5) The right to be free from harm, including unnecessary physical restraint, isolation, excessive medication, abuse, neglect, abandonment, and financial exploitation; and
- (6) The right to refuse health services, medications, restraints, and restrictions.

[Statutory Authority: Chapter 71A.12 RCW. 08-02-022, § 388-101-3320, filed 12/21/07, effective 2/1/08.]

WAC 388-101-3330

Treatment of clients.

Service providers must treat clients with dignity and consideration, respecting the client's civil and human rights at all times.

[Statutory Authority: Chapter 71A 12 RCW. 08-02-022, § 388-101-3330, filed 12/21/07, effective 2/1/08.]

WAC 388-101-3350
Residential guidelines.

The service provider must use the following department residential guidelines when providing services to each client:

- (1) Health and safety;
- (2) Personal power and choice;
- (3) Competence and self-reliance;
- (4) Positive recognition by self and others;
- (5) Positive relationships; and
- (6) Integration in the physical and social life of the community.

[Statutory Authority: Chapter 71A RCW. 08-02-022, § 388-101-3350, filed 12/21/07, effective 2/1/08.]

WAC 388-101-3370

Client health services support.

The service provider must provide instruction and/or support as identified in the individual support plan and as required in this chapter to assist the client with:

- (1) Accessing health, mental health, and dental services;
- (2) Medication management, administration, and assistance;
- (3) Maintaining health records;
- (4) Arranging appointments with health professionals;
- (5) Monitoring medical treatment prescribed by health professionals;
- (6) Communicating directly with health professionals when needed; and
- (7) Receiving an annual physical and dental examination unless the appropriate medical professional gives a written exception.

[Statutory Authority: Chapter 71A 12 RCW. 08-02-022, § 388-101-3370, filed 12/21/07, effective 2/1/08.]

WAC 388-101-3380

Client transportation.

- (1) The service provider must meet the client's transportation needs by:
 - (a) Not charging the client for transportation costs except as specified in the client's individual support plan;
 - (b) Using the client's medicaid coupons for covered transportation, if available; and
 - (c) Ensuring that other transportation is provided as specified in the client's individual support plan.
- (2) The service provider must provide transportation or ensure that clients have a way to get to and from:
 - (a) Emergency medical care;
 - (b) Medical appointments; and
 - (c) Therapies.
- (3) As specified in the client's individual support plan, the service provider must provide necessary assistance with transportation to and from:
 - (a) School or other publicly funded services;
 - (b) Work;
 - (c) Leisure or recreation activities; and
 - (d) Client-requested activities.
- (4) A vehicle that the service provider uses to transport clients must be insured as required by chapters ~~46.29~~ and ~~46.30~~ RCW.
- (5) The service provider must maintain a business automobile insurance policy on service provider owned vehicles used to transport clients.
- (6) The service provider must maintain nonowned vehicle insurance coverage for vehicles not owned by the service provider but used to transport clients.
- (7) Service providers, employees, subcontractors, and volunteers who transport clients must have a valid driver's license as required by chapter ~~46.20~~ RCW.

[Statutory Authority: Chapter ~~71A.12~~ RCW. 08-02-022, § 388-101-3380, filed 12/21/07, effective 2/1/08.]

WAC 388-101-3390

Physical and safety requirements.

- (1) Crisis diversion support service providers are exempt from the requirements in this section.
- (2) The service provider must ensure that the following home safety requirements are met for each client unless otherwise specified in the client's individual support plan:
 - (a) A safe and healthy environment;
 - (b) Accessible telephone equipment and a list of emergency contact numbers;
 - (c) An evacuation plan developed and practiced with the client;
 - (d) Unblocked door and window for emergency exit;
 - (e) A safe storage area for flammable and combustible materials;
 - (f) An operating smoke detector, with a light alarm for clients with hearing impairments;
 - (g) An accessible flashlight or other safe accessible light source in working condition; and
 - (h) Basic first-aid supplies.
- (3) The service provider must assist clients in regulating household water temperature unless otherwise specified in the client's individual support plan as follows:
 - (a) Maintain water temperature in the household no higher than one hundred and twenty degrees Fahrenheit;
 - (b) Check water temperature when the client first moves into the household and at least once every three months from then on; and
 - (c) Regulate water temperature for clients who receive twenty-four hour support, and for other clients as specified in the individual support plan.
- (4) The service provider must document and keep records that indicate that physical safety requirements are met for each client.
- (5) A client may independently document these requirements are met when the client's individual support plan specifies this level of client involvement.

[Statutory Authority: Chapter 71A.12 RCW. 08-02-022, § 388-101-3390, filed 12/21/07, effective 2/1/08.]

WAC 388-101-3540
Managing client funds.

- (1) Before managing a client's funds the service provider must either:
- (a) Obtain written consent from the client or the client's legal representative; or
 - (b) Become the representative payee.
- (2) For any client funds managed by the service provider, the service provider must:
- (a) Separately track each client's money, even when several clients reside together;
 - (b) Maintain a current running balance of each client account;
 - (c) Make deposits to the client's bank account within one week of receiving the client's money;
 - (d) Prevent the client's bank account from being overdrawn;
 - (e) Ensure that client cash funds do not exceed seventy-five dollars per client unless specified differently in the individual financial plan; and
 - (f) Retain receipts for each purchase over twenty-five dollars.
- (3) Social Security Administration requirements for managing the client's Social Security income take precedence over these rules if:
- (a) The service provider is the client's representative payee; and
 - (b) The Social Security Administration requirement conflicts with these rules.
- (4) When the service provider manages the client's funds and receives a check made out to the client, the service provider must:
- (a) Get the client's signature and designation "for deposit only"; or
 - (b) Get the client's "x" mark in the presence of a witness and cosign the check with the designation "for deposit only"; and
 - (c) Deposit the check in the client's bank account as required under subsection (2)(c) of this section.
- (5) If a check for the client is made out to a payee other than the client, the service provider must ask the payee to sign the check.
- (6) The service provider must not ask the client to sign a blank check.
- (7) The service provider may only assist the client to make purchases by check when the client signs the check at the time of the purchase unless:
- (a) Otherwise specified in the client's individual financial plan; or
 - (b) The service provider is the client's representative payee.
- (8) The service provider must document in the client's record the name of each staff that may assist the client with financial transactions.

[Statutory Authority: Chapter 71A 12 RCW. 08-02-022, § 388-101-3540, filed 12/21/07, effective 2/1/08.]

WAC 388-101-3550

Reconciling and verifying client accounts.

(1) For any client funds managed by the service provider, the service provider must:

- (a) Reconcile the client's bank accounts to the client's bank statements each month;
- (b) Reconcile the client's cash account each month; and
- (c) Verify the accuracy of the reconciliation.

(2) The service provider must not allow the same staff person to do both the verification and reconciliation of the client's account.

(3) The service provider must ensure that the verification or reconciliation is done by a staff person who did not:

- (a) Make financial transactions on the client's behalf; or
- (b) Assist the client with financial transactions.

[Statutory Authority: Chapter 71A.12 RCW. 08-02-022, § 388-101-3550, filed 12/21/07, effective 2/1/08.]

WAC 388-101-3610

Client reimbursement.

The service provider must pay the client the total amount involved when:

- (1) The service provider or staff has stolen, misplaced, or mismanaged client funds; or
- (2) Service charges are incurred on a trust account that the service provider manages for the client.

[Statutory Authority: Chapter 71A RCW. 08-02-022, § 388-101-3610, filed 12/21/07, effective 2/1/08.]

WAC 388-101-3860

Positive behavior support plan.

(1) The service provider must develop, train to, and implement a written individualized positive behavior support plan for each client when:

(a) The client takes psychoactive medications to reduce challenging behavior or treat a mental illness currently interfering with the client's ability to have positive life experiences and form and maintain personal relationships; or

(b) Restrictive procedures, including physical restraints, identified in the residential services contract are planned or used.

(2) The service provider must:

(a) Base each client's positive behavior support plan on the functional assessment required in WAC 388-101-3850; and

(b) Complete and implement the client's positive behavior support plan within ninety days of identifying the client's symptoms and challenging behavior.

(3) The service provider must develop and implement a positive behavior support plan that is consistent with the client's cross system crisis plan, if any.

(4) The service provider must include the following sections in the format of each client's written positive behavior support plan:

(a) Prevention strategies;

(b) Teaching and training supports;

(c) Strategies for responding to challenging behaviors; and

(d) Data collection and monitoring methods.

(5) If data indicates that progress is not occurring after a reasonable time, but not longer than six months, the service provider must:

(a) Evaluate the positive behavior support plan and the data collected;

(b) Conduct a new functional assessment when necessary; and

(c) Develop and implement revisions as needed.

[Statutory Authority: Chapter 71A.12 RCW. 08-02-022, § 388-101-3860, filed 12/21/07, effective 2/1/08.]

WAC 388-101-3890

Restrictive procedures.

(1) The service provider may:

(a) Only use restrictive procedures for the purpose of protecting the client, others, or property; and

(b) Not use restrictive procedures for the purpose of changing behavior in situations where no need for protection is present.

(2) The service provider must have documentation on the proposed intervention strategy before implementing restrictive procedures including:

(a) A description of the behavior(s) that the restrictive procedures address;

(b) A functional assessment of the challenging behavior(s);

(c) The positive behavior support strategies that will be used;

(d) A description of the restrictive procedure that will be used including:

(i) When and how it will be used; and

(ii) Criteria for termination of the procedure; and

(e) A plan to document the use of the procedure and its effect.

(3) The service provider must terminate implementation of the restrictive procedures as soon as the need for protection is over.

[Statutory Authority: Chapter 71A 12 RCW. 08-02-022, § 388-101-3890, filed 12/21/07, effective 2/1/08.]

WAC 388-101-3900

Restrictive procedures approval.

- (1) The service provider must have documentation of the proposed intervention strategy that:
- (a) Lists the risks of the challenging behavior(s);
 - (b) Lists the risks of the proposed restrictive procedure(s);
 - (c) Explains why less restrictive procedures are not recommended;
 - (d) Indicates nonrestrictive alternatives to the recommendation that have been tried but were unsuccessful; and
 - (e) Includes space for the client and/or the client's legal representative to write comments and opinions regarding the plan and the date of those comments.
- (2) The service provider must consult with the division of developmental disabilities if:
- (a) The client and/or the client's legal representative disagree with parts of the proposed restrictive procedure; and
 - (b) An agreement cannot be reached.
- (3) Before the service provider implements restrictive procedures they must be approved in writing by:
- (a) The service provider's administrator; or
 - (b) Someone designated by the service provider to have approval authority; and
 - (c) Someone designated by the division of developmental disabilities, when required by the residential services contract.

[Statutory Authority: Chapter 71A RCW. 08-02-022, § 388-101-3900, filed 12/21/07, effective 2/1/08.]

WAC 388-101-3920

Physical interventions.

- (1) The service provider must use the least restrictive intervention needed to protect each client, others, and property.
- (2) The service provider may only use physical interventions with a client when positive or less restrictive techniques have been tried and determined to be insufficient to:
 - (a) Protect the client;
 - (b) Protect others; or
 - (c) Prevent property damage.
- (3) The service provider must:
 - (a) Terminate the intervention for the client as soon as the need for protection is over; and
 - (b) Only use restrictive physical interventions for the client as part of a positive behavior support plan except:
 - (i) In an emergency when a client's behavior presents an immediate risk to the health and safety of the client or others, or a threat to property; or
 - (ii) When an unknown, unpredicted response from a client jeopardizes the client's or others safety.

[Statutory Authority: Chapter 71A.12 RCW. 08-02-022, § 388-101-3920, filed 12/21/07, effective 2/1/08.]

WAC 388-101-3950

Mechanical and chemical restraints.

(1) The service provider must protect each client's right to be free from mechanical and chemical restraints and involuntary seclusion.

(2) The service provider must use the least restrictive alternatives needed to protect the client, others, or property.

(3) If needed, mechanical restraints may only be used for needed medical or dental treatment and only under the direction of a licensed physician or dentist.

(4) Restraints used as allowed by subsection (3) of this section must be justified and documented in the client's record.

[Statutory Authority: Chapter 71A 12 RCW. 08-02-022, § 388-101-3950, filed 12/21/07, effective 2/1/08.]

WAC 388-831-0020

What is the community protection program?

(1) The community protection program is an array of services specifically designed to support persons who meet the definition of an "individual with community protection issues," as defined in WAC 388-831-0030.

(2) Community protection services and supports are designed to assist program participants to live safely and successfully in the community while minimizing the risk to public safety.

(3) Participation in the program is voluntary.

[Statutory Authority: RCW 71A.12.030 and 2006 c 303. 08-20-118, § 388-831-0020, filed 9/30/08, effective 10/31/08.]

WAC 388-831-0050

What steps are necessary for me to receive services through the community protection program?

In order to receive services through the community protection program, you must:

- (1) Receive an assessment of risk and/or dangerousness by a qualified professional, as specified in WAC 388-831-0060;
 - (a) You and your representative have the right to choose the qualified professional who is contracted with the state;
 - (b) The division will provide you with a list of these qualified professionals; and
- (2) Be informed of the information contained in WAC 388-831-0070.

[Statutory Authority: RCW 71A.12.030 and 2006 c 303. 08-20-118, § 388-831-0050, filed 9/30/08, effective 10/31/08.]

WAC 388-831-0250

Can i leave the community protection program at any time?

Your participation in the community protection program is voluntary. However, if you leave the community protection program and DDD determines that you require the community protection program to meet your health and safety needs and those of the community, you will not be eligible for other DDD residential services or employment/day program services.

[Statutory Authority: RCW 71A.12.030 and 2006 c 303. 08-20-118, § 388-831-0250, filed 9/30/08, effective 10/31/08.]

WASHINGTON STATE ATTORNEY GENERAL

October 29, 2012 - 10:03 AM

Transmittal Letter

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Court of Appeals Case Number: 43678-7

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