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COURT OF APPEALS
DIVISION II

2015 MAY 12 AM 9:46

STATE OF WASHINGTON

No. 46914-6-II

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

NEW VISION PROGRAMS INC, a Washington corporation,
Appellant

v.

STATE OF WASHINGTON DEPARTMENT OF SOCIAL AND
HEALTH SERVICES, an agency of the State of Washington;
and RANDY ROBERTS, individually,
Respondents

BRIEF OF APPELLANT

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I. INTRODUCTION

This case involves question of whether Respondent State of Washington Department of Social and Health Services (“DSHS” or “Respondent”) must exercise good faith in acting pursuant to the contracts that it has entered into with foster care providers. Respondent has maintained—and the trial court held—that Respondent was not required to act in good faith in its dealings with contractors and could make decisions regarding the placement and removal of children from foster homes for any reason it wanted, even if that reason was grounded in bad faith.

The Washington Supreme Court recently interpreted a similar contract involving Respondent and held that, because the contract gave Respondent discretion in the enforcement of contract terms, Respondent’s exercise of such discretion was governed by the implied covenant of good faith and fair dealing. *Rekhter v. Dep’t of Soc. & Health Servs.*, 180 Wn.2d 102, 108 (2014).

The situation is the same here. The contract at issue in this case is between Appellant New Vision Programs Inc (“Appellant”) and Respondent, and gave Respondent discretion over a number of

contract terms. Appellant has alleged that Respondent breached the contract by acting in bad faith when enforcing those terms that vested discretion in Respondent. Because Respondent's actions were governed by the implied covenant of good faith and fair dealing, the lower court erred in holding that Respondent did not have to act in good faith and in granting Respondent's motion for summary judgment. This Court should reverse that erroneous decision.

II. ASSIGNMENT OF ERROR AND ISSUES PRESENTED

A. Assignment of Error

The single inclusive assignment of error is the trial court's January 5, 2015 Amended Order Nunc Pro Tunc Granting Defendant's Second Motion for Summary Judgment, which dismissed Appellant's Complaint as of October 31, 2014.

B. Issue Presented

With respect to this reversible error, the following issue is presented:

1. Whether Respondent, as party to a contract related to the placement of children in foster homes, was bound by the duty of good faith and fair dealing in making

discretionary decisions regarding the placement of children, the removal of children, the issuance of Corrective Action Plans, and the termination of the contract.

III. STATEMENT OF THE CASE

On June 7, 2012, Appellant and Respondent renewed a Behavioral Health Services contract and a Child Placing Agency contract (collectively, the “Contract”) covering Respondent’s placement of foster children into the homes owned and operated by Appellant. (CP 518-557, 560-621). The Contract established that Respondent would pay Appellant a monthly rate established by state law for all children placed in Appellant’s homes. (CP 533).

After years of operating in Washington with relatively few issues, Respondent’s attitude towards Appellant changed in late 2012. On or about December 4, 2012, an incident involving a foster child at one of Appellant’s homes who had harmed herself and abused staff spurred an investigation by Respondent. (CP 490, ¶ 14). Respondent found that an employee had not yet cleared her background check and entered into a Compliance Action Plan with Appellant to remedy the issue. *Id.* In the weeks that followed,

Respondent found that Appellant was meeting all expectations.
(CP 666-674).

However, within the agency, certain employees, specifically Rebecca Taylor and Jennifer White, were convinced that Appellant should be shut down. On December 19, 2012, after an unannounced visit by DSHS personnel showed that Appellant had addressed the issues in the compliance plan and was meeting expectations, Ms. White sent out an email stating that she was “unhappy” and “under impressed at the moment.” (CP 666).

On January 7, 2013, when a supervisor sent an email asking why Appellant was still being investigated when a compliance plan was already in place, Ms. White sent an email to another employee stating that she was “pissed.” (CP 675-676). She then sent out an email stating, “Who needs to be told to butt out until I am done? When you find that out tell them to read up on OK boys ranch.” (CP 677). OK Boys Ranch was a foster home in Washington where extensive physical and sexual abuse of foster children occurred; Ms. White admitted during her deposition that this “wasn’t an appropriate comparison.” (CP 661:2).

Even though it appeared that Appellant was meeting expectations, Respondent decided to move forward with a comprehensive review of Appellant's program. (CP 656:4-7). When one of Respondent's administrators first brought up the possibility of revoking Appellant's license, both Ms. Taylor and Ms. White commented that they wanted to hug the administrator. (CP 679-680).

In her deposition, Ms. White could not say whether she had already come to the conclusion that Appellant's license should be revoked even before the comprehensive review began. (CP 662:4-9). However, in an email to Ms. Taylor prior to the review, Ms. White stated that, if a review happened, "everything will look good." (CP 681). She further stated during her deposition that she thought that Appellant would "hustle and get everything in order" if there were a review and that, even if it looked like Appellant was complying with Respondent's expectations, she did not think that Appellant would actually be complying. (CP 663:18-19, CP 664:18-20, CP 665:16-19).

The decision was made to move forward with the comprehensive review at a meeting on March 27, 2013. (CP 656:4-7). At that same meeting, Respondent also decided to issue a stop placement order, meaning that children would not be placed in Appellant's homes. (CP 657:10-12). The stop placement order was issued on April 17, 2013. (CP 684). Beginning on April 19, 2013, without advance notice to Appellant, Respondent began removing children from Appellant's homes with the goal of removing all children by May 13, 2013. (CP 685-686). It was not until May 1, 2013—weeks after DSHS began removing children—that Respondent thought to ask the social workers who were heavily involved with the children and their experiences at Appellant's homes for their opinions of Appellant. (CP 658:13-21, CP 659:19-21, CP 687-706). Ms. Taylor was "surprised" to find that the social workers' opinions of Appellant were so positive. (CP 658:7-8).

Nonetheless, the comprehensive review resulted in Respondent revoking Appellant's license and declining to renew the Contract. On May 7, 2013, Appellant filed a Complaint initiating

this action and alleging that Respondent had breached the Contract. (CP 8-14). On October 3, 2014, Respondent moved for summary judgment on Appellant's claim. (CP 624-625). In support of its motion, Respondent argued that its actions under the Contract were not governed by any duty of good faith and fair dealing. (CP 635-638). The trial court accepted this argument, granted Respondent's motion, and dismissed Appellant's claim. (CP 769-770).

IV. ARGUMENT

A. Standard of Review

This Court reviews summary judgment rulings *de novo*. *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 491 (2008). "When reviewing an order granting summary judgment, this court engages in the same inquiry as the trial court, considering all facts and reasonable inferences in the light most favorable to the nonmoving party." *Id.* "Summary judgment is appropriate if the record before the court shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Id.*; CR 56(c).

B. The trial court erred in holding that Respondent was not bound by a covenant of good faith and fair dealing.

Under Washington law, “an implied covenant of good faith inheres in every contract” that “requires faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.” *Edmonson v. Popchoi*, 172 Wn.2d 272, 280 (2011). “The duty of good faith and fair dealing applies when one party has discretionary authority to determine certain terms of the contract, such as quantity, price, or time” *Goodyear Tire & Rubber Co. v. Whiteman Tire*, 86 Wn. App. 732, 739 (1997). “It may violate the duty of good faith and fair dealing to, for example, (1) evade the spirit of a bargain; (2) willfully render imperfect performance; (3) interfere with or fail to cooperate in the other party’s performance; (4) abuse discretion granted under the contract; or (5) perform the contract without diligence.” *McDermott v. Avaya, Inc.*, 2015 U.S. Dist. LEXIS 49066, at 14 (W.D. Wash. Apr. 14, 2015).

Respondent has not disputed that there are questions of fact as to whether one or more of these violations occurred here. Rather,

Respondent moved for summary judgment based entirely on the argument that the implied covenant of good faith and fair dealing did not attach to the Contract. (CP 630).

The trial court agreed and granted Respondent's motion. (CP 770). However, the court erred in doing so. Contrary to Respondent's arguments, Appellant's claim is not based on a free-floating obligation of good faith; rather, it is based on Respondent's bad faith reasons for taking action pursuant to specific terms of the Contract that give discretionary authority to Respondent. Because Respondent had discretion as to the placement of children, and because Respondent's actions implicated a number of other specific contract provisions vesting discretion in Respondent, the law is clear that Respondent was required to exercise that discretion in good faith. The trial court's holding to the contrary was in error and should be reversed.

1. Respondent was required to act in good faith in making decisions about the placement of foster children.

The trial court accepted Respondent's argument that the duty of good faith does not apply to Respondent's decisions regarding

whether or not to place children in Appellant's homes because the Contract states that Respondent is not obligated to place children with Appellant. However, because the Contract did not impose such an obligation, Respondent had discretionary authority to determine when children would be placed in Appellant's homes and what services would be authorized. Such discretion implicates the duty of good faith and fair dealing.

The Washington Supreme Court recently interpreted a similar DSHS contract that, like the Contract here, stated that "DSHS will only pay for authorized services." *Rekhter*, 180 Wn.2d at 108. The Court found that, under this arrangement, "neither DSHS nor the provider knew what services would be needed by the clients or how much would be paid to the providers. These provisions give DSHS the discretion to set a future contract term: the quantity of hours and the types of services for which providers will be compensated." *Id.* at 113-14. As a result, the Court held that Respondent's actions in exercising its discretion were governed by the implied covenant of good faith and fair dealing. *Id.* 115.

The situation is the same here. Respondent had discretion to determine how many children would be placed in Appellant's homes, what services would be authorized, and how much Appellant would be compensated. As a result, Respondent was required to act in good faith in exercising discretion.

Even the trial court acknowledged that the Contract vested discretion in Respondent in determining the placement of children. (RP 29:17-19) ("I would also indicate that clearly the Department has to have discretion when it relates to kids and where kids are going to be placed."). The trial court also acknowledged that there were limitations on this discretion. In response to Appellant's argument that Respondent would be acting in bad faith if they made placement decisions based on the skin color of the provider or child, the court stated, "... I agree with [Appellant] that if this were [race] based, I mean, something like that, that possibly there could maybe be an issue ,..." (RP 29:19-22).

However, there is no support for the contention that there are degrees of good faith that may or may not apply, or that good faith is only implicated if one's motives are especially insidious. If the duty

of good faith applies, the only question is whether a party violated that duty by taking some wrongful action, such as evading the spirit of the bargain or abusing its discretion. *McDermott*, 2015 U.S. Dist. LEXIS 49066, at 14. The party's motives for taking that action are irrelevant.

Here, if the duty of good faith applied, it did not matter whether Respondent made placement decisions on the basis of Appellant's race or whether it made placement decisions based on an employee's personal issues with Appellant. Both are wrongful and both would violate the duty of good faith.

In arguing that no duty of good faith applied, Respondent argued that it was able to make placement decisions based on any reason, including, for instance, the skin color of the provider or the child. The trial court did not appear to agree with this, but granted summary judgment anyway. However, it is not possible to have it both ways. Either no duty of good faith applies and Respondent can make decisions for whatever reasons it wishes, including race, or the duty of good faith applies and Respondent must act in conformance with that duty.

As the trial court acknowledged, the Contract vested discretion in Respondent in determining the placement of children. Under Washington law, such discretion implicates the duty of good faith. Because there are questions of fact as to whether this occurred, summary judgment was improperly granted and the trial court's decision should be reversed.

2. Respondent was required to act in good faith in making the decision to stop placement of children in Appellant's homes.

Further, Appellant's claim is not solely based on Respondent's discretionary power to place some children in homes other than those that are operated by Appellant. Rather, it is also based on Respondent's decision to issue a stop placement order suspending the placement of all children in Appellant's homes under the Contract. Such a decision is specifically contemplated by the Contract, which states "DSHS may, without prior notice, suspend the Contractor's performance of the Contract if the Contractor ... is investigated by DSHS ... regarding any matter that, if ultimately established, could ... [i]n the sole discretion of DSHS, adversely affect the delivery of services under this Contract or the health,

safety or welfare of DSHS client.” (CP 535). The Contract, therefore, gives Respondent discretion to define what circumstances give rise to the issuance of a stop placement order. As a result, Respondent’s actions in exercising that discretion were governed by the duty of good faith. *Rekhter*, 180 Wn.2d at 113.

Respondent acted under this provision here. At the same time as Respondent made the decision to begin an investigation related to Appellant’s delivery of services and the health and welfare of children in Appellant’s homes, it also made the decision issue a stop placement order suspending the placement of children in Appellant’s homes under the Contract. (CP 656:4-7, 657:10-12, 684). There is no question that Respondent had the discretion to make this decision; however, the law is clear that it was required to exercise good faith in doing so. Because there are questions of fact as to whether or not that occurred, the trial court’s grant of summary judgment was in error and should be reversed.

3. Respondent was required to act in good faith in instituting a Corrective Action Plan with Appellant.

Another aspect of Respondent's investigation of Appellant is that Respondent moved forward with taking action against Appellant without giving Appellant an opportunity to comply with a Corrective Action Plan that Respondent had put in place. The statements of Respondent's agents indicate that they did not trust Appellant's apparent compliance with the Corrective Action Plan and that an inspector's finding that Appellant was meeting expectations left one DSHS employee feeling "unhappy" and "under impressed." (CP 665:16-19; CP 666).

The Contract addresses the issuance of Corrective Action Plans: "In the event that DSHS identifies deficiencies in Contractor's performance under this Contract, DSHS may, at its option, establish a Corrective Action Plan. When presented with a Corrective Action Plan, Contractor agrees to undertake the actions specified in the plan within the timeframes given to correct the deficiencies. Contractor's failure to do so shall be grounds for termination of this Contract." (CP 535).

This provision establishes a process to address deficiencies, gives Respondent discretion to institute Corrective Action Plans, and also gives Respondent discretion to determine if such plans have been followed. Because this discretion is vested with Respondent, the implied covenant of good faith and fair dealing applies to this provision and Respondent was required to act in good faith throughout the corrective action process. *Rekhter*, 180 Wn.2d at 113.

If Respondent issued a Corrective Action Plan without a valid basis, determined that a Corrective Action Plan was not followed without a valid basis, or did not give a provider an opportunity to comply with a Corrective Action Plan, that would be a violation of the implied covenant of good faith and fair dealing. Because there are questions of fact as to whether this is what occurred, the trial court erred in granting summary judgment and its decision should be reversed.

4. Respondent was required to act in good faith in making the decision to remove children from Appellant's homes.

Another basis of Appellant's claim is that Respondent failed to exercise good faith in making the decision to remove children that had already been placed in Appellant's homes. Under the Contract, Respondent is to work with Appellant to determine how long a child is placed in one of Appellant's homes. (CP 543). In other words, Respondent has discretion in determining each child's appropriate exit date. Further, Respondent's actions with respect to the removal of children are governed by regulation. Under WAC 388-25-0035, Respondent may only remove a child without notice, as it did here, if it determines that there is an "emergency situation."

Simply put, Respondent has discretion in determining when a child leaves one of Appellant's homes and must exercise good faith in making that determination. Respondent may depart from an agreed-upon date and take action to effectuate the immediate removal of a child if it determines that there is an emergency situation. Again, however, the fact that Respondent possesses this

discretion means that it must exercise good faith in making such a determination. *Rekhter*, 180 Wn.2d at 113.

If Respondent's reasons for removing children—or for finding that an emergency situation existed that justified the immediate removal of children—were grounded in bad faith, Respondent breached its contract with Appellant. Because there are questions of fact as to whether such bad faith existed here, the trial court erred in granting summary judgment and its decision should be reversed.

5. Respondent was required to act in good faith in terminating the Contract with Appellant.

Finally, by stopping placement of children in Appellant's homes and taking action to remove the children that had already been placed in Appellant's homes, Respondent effectively terminated the Contract. Although Respondent has maintained that it did not terminate the Contract, but rather allowed the Contract to expire a couple of months after it took action against Appellant, the reality is that the sole purpose of the Contract was terminated. As a result, the Contract was effectively terminated, as well.

The Contract specifically addresses when Respondent may terminate the Contract:

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 the section entitled Health and Safety of this Contract;
- c. Failed to perform under, or otherwise breached, any term or condition of this Contract; and/or
- d. Violated any applicable law or regulation.

(CP 525-526). Respondent's decision to effectively terminate the Contract was based on these exact reasons: its purported belief that Appellant had failed to meet the standards of the Contract and had jeopardized the safety of the children in its care.

Under the Contract, Respondent has discretion to determine when the circumstances exist that would justify termination of the Contract. Again, Respondent is required to exercise good faith in making such a determination. *Rekhter*, 180 Wn.2d at 113. If

Respondent terminated the Contract without a good faith belief that circumstances existed that would justify termination, that would be a breach of the Contract. Because there are questions of fact as to whether Respondent had a good faith belief that circumstances existed that would justify its actions, the trial court's grant of summary judgment was in error and should be reversed.

6. While Respondent must be given some flexibility to protect the safety of foster children, it should not be given *carte blanche* to act in bad faith.

The trial court appeared to accept Respondent's argument that policy considerations and the duty that Respondent owed to the children in its care supported giving Respondent wide latitude in making decisions regarding the removal of children from foster homes. (RP 29:24-30:5). Appellant agrees that the health and welfare of foster children is paramount. However, by accepting Respondent's argument, the trial court granted Respondent unchecked power in all decision-making that affects youth in its care. This is a disservice to all parties involved.

There must be some limits to Respondent's power to remove children. Appellant has never suggested that Respondent should be

required to meet some burdensome standard of proving a significant threat to a child's wellbeing before it can take any action. Rather, Appellant has simply sought to hold Respondent to a duty of good faith, just as is required of any other contracting party. It is difficult to see how the contrary position taken by Respondent and accepted by the trial court—that Respondent should be given *carte blanche* to make any decision it wants, even if it is grounded in bad faith—would be beneficial to anyone, especially the children whose lives are affected by Respondent's decisions.

Here, there are questions of fact about whether Respondent's actions were made in good faith. These questions should not have been allowed to go unanswered through the grant of summary judgment; rather, they should be resolved by a factfinder. The trial court's grant of summary judgment was in error and, as a result, its decision should be reversed.

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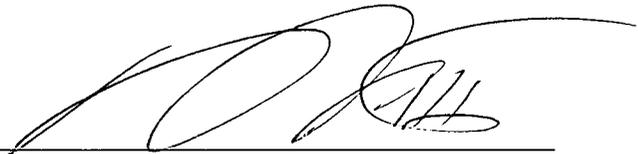
V. CONCLUSION

For the reasons discussed herein, the trial court erred in granting summary judgment and its decision should be reversed.

DATED: May 11, 2015

KELL, ALTERMAN & RUNSTEIN, L.L.P.

BY



Thomas R. Rask, III, WSBA No. 39212
Of Attorneys for Appellant

CERTIFICATE OF SERVICE

I certify that on May 11, 2015, I caused to be served a true and correct copy of the foregoing BRIEF OF APPELLANT on the following recipients:

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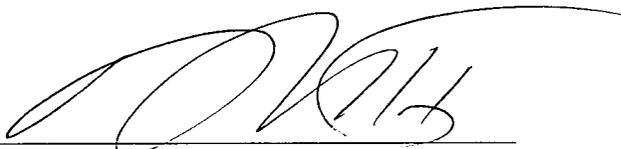
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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

KELL, ALTERMAN & RUNSTEIN, L.L.P.

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