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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

No. 312704

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

ELSIE FLEMMER

Plaintiff/Appellant,

v.

REGENCY PACIFIC, INC., a Washington corporation, dba REGENCY AT THE PARK; and JONATHAN OWENS, an individual

Defendant/Respondent

REPLY BRIEF OF APPELLANT

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I. ARGUMENT

A. Summary Judgment is Not Proper On Any Issue in this Case, Neither Issues in the Complaint Nor the Counterclaim

Flemmer appeals the trial court's award of summary judgment on all counts. The trial judge granted summary judgment for Regency on the complaint and on the counterclaim. Flemmer appeals the decision on "all counts", the complaint and the counterclaim. This case is not about the sufficiency of evidence to support the judgment. This case is about contested facts.

1. The Record Reflects Issues of Fact on Breach of Contract

Regency states that Flemmer "has failed to present evidence that raises a genuine issue of material fact" but merely pointed out inadvertent mistakes that Regency already found and corrected by making up "a manual bill for plaintiff's benefit." Respondent's Brief at page 11. Yet there is no evidence in the record of this case that shows whether any of the errors were corrected.

Respondents' arguments miss the mark. Indeed, there is no issue of fact regarding Regency's accounting records being rife with error. The pertinent issue of fact that proscribes summary judgment is the determination of the amount due from Regency to Flemmer on the complaint or the amount due from Flemmer to Regency on the

counterclaim. That is the ultimate issue of the case, obviously material to the outcome.

Another piece of evidence besides those discussed in Flemmer's Appellant's Brief, is the Explanation of Benefits form that shows payment for services rendered in September 2008, Flemmer's second month at Regency. CP 175. This exhibit bears a Bates stamp of REGENCY0861. It came from Regency. CP 172. It shows a billing to the insurance of $6,909.57, a negotiated discount of $3,224.48, and plan payment at 100% in the amount of $3,685.09. The ineligible amount is $0.00. The deductible, copay and coinsurance are all $0.00. Yet the "manual statement" created by Mr. Krise and relied on by the trial court for judgment against Flemmer does not take into account this negotiated discount. This is a genuine issue of material fact that shows Flemmer was overbilled. Regency has this information in their accounting records. There is nothing in the record of this case that shows Regency corrected this billing error. To the contrary, Regency continues to refuse to make the adjustment. This single transaction is one third of the amount awarded to Regency. This overbilling was pointed out to the trial court who decided that it was not a material fact. CP 170. Flemmer purchased insurance for her benefit, not for Regency's benefit. A reasonable person could conclude that Flemmer has been overbilled. A reasonable person could conclude that overbilling in excess of $3,000 is a material fact. Summary judgment is appropriate "only if [the court] determine[s], based

on all of the evidence, reasonable persons could reach but one conclusion." *Indoor Billboard Washington, Inc. v. Integra*, 162 Wn.2d 59, 70, 170 P.3d 10 (2007). Here, as in *Indoor Billboard*, summary judgment should be reversed and the case remanded for trial.

2. The Trial Court Inappropriately Relied on Affidavits and Evidence Provided by Defendants

Regency responds to Flemmer's opening brief by stating that "Contrary to [Flemmer's] assertions, the evidence does support the trial court's order … for summary judgment." Respondents' Brief 18. Regency then proceeds with a sufficiency of the evidence argument which is inapposite to this appeal. Respondents' argument presents their own evidence, it does not analyze Flemmer's evidence.

The primary evidence submitted by Regency is the Declaration of John Krise, an accounting supervisor employed by Regency Pacific. CP 85-93. Mr. Krise claims that he reviewed the file and made all necessary corrections when errors were discovered. CP 88. Respondent's claim that Mr. Krise "…created a detailed spreadsheet in order to provide the calculations…" Respondent's Brief at page 7. The calculation supplied was a summary schedule, not a detailed spreadsheet. A detailed spreadsheet would have included a reconciliation from the amount due shown by the accounting records to the amount due claimed by Regency. This summary schedule is not a reconciliation which can be analyzed for

accuracy and completeness. It is a bald assertion completely at odds with the accounting records. As such Regency themselves create a genuine issue of material fact as to the correct number.

Regency's bill showing $10,367.79 due is not reviewable. Regency responds by saying "To the contrary, defendants provided hundreds of pages of discovery to plaintiff." Respondents' Brief 18. This merely proves Flemmer's point. A review of those hundreds of pages does not support the fabricated statement.

3. Regency Has Not Engaged in Good Fair and Fair Dealing

Respondents claim that Regency responded to Flemmer's concerns with "a number of audits of her account." Respondents' Brief at page 21. That is not the record before this court. Mr. Krise stated that he was asked "to review and reconcile Ms. Flemmer's accounts." CP 88 paragraph 15. He then states that he "reviewed" the accounts and "created a manual statement." CP 88 paragraph 15 – 16. A "review" and an "audit" are not the same thing. An audit includes verification and substantiation procedures not used in a review. In fact, an audit of financial information requires a license. RCW 18.04.350(5), WAC 4-30-010(6). An audit is conducted according to professional standards and provides the highest level of assurance, a review does not. That Regency conducted an audit is not in the evidence before this court.

Regency may respond that these words are used in the layman's sense. But Mr. Krise is a Fielding Accounting Supervisor, not an accounting layman. CP 85.

Respondents continue their argument by stating that "... the evidence shows that defendants made significant efforts to address plaintiff's concerns". Respondents' Brief page 21. This argument would have meaning if this was an appeal following trial to determine the sufficiency of the evidence. Indeed, their evidence does show something contrary to Flemmer's evidence. Therefore, summary judgment is not appropriate.

Regency has created yet another amount due, still without showing any underlying accounting proof to support the number. To this day Regency does not explain the amount except to say that Mr. Krise says so. That is not good faith and fair dealing. Flemmer is entitled to a trial.

4. Flemmer is Entitled to a Trial on the Issue of Negligent Infliction of Emotional Distress

Regency's response to the question of distress is devoid of authority. There is no dispute about the legal standards at play here. But again, Regency is arguing sufficiency of the evidence, not contested facts. The *Hawkins* case cited by Respondents is an appeal after trial, not an analysis of summary judgment. *See, Hawkins v. Diel*, 166 Wn.App 1, 269 P.3d 1049 (2011).

Flemmer's declaration presents specific facts regarding actions by Defendant Owens that support her claim. CP 125-126. Mr. Owens

declaration contradicts Flemmer's statements. CP 95-96. Contested facts preclude summary judgment. Flemmer is entitled to a trial to determine the sufficiency of her facts.

Respondents cite the *Segaline* case for the proposition that Flemmer must prove both negligence and symptomatology. *Segaline v. State, Dep't of Labor & Indust.*, 144 Wn.App. 312, 182 P.3d 480 (2008), *rev'd on other grounds*, 169 Wn.2d 467, 238 P.3d 1107 (2010). That case affirmed summary dismissal of a claim for negligent infliction of emotional distress, as happened here to Flemmer. But that case is quite different than Flemmer's case. Mr. Segaline was belligerent to L&I staff. L&I ordered him to stay out of their office. The court, analyzing the dismissal of his claim for negligent infliction of emotional distress, stated that Mr. Segaline's distress was not foreseeable. *Id.* 182 P.3d at 489. The court stated "The chance is slight that a person of ordinary sensibilities who had engaged in numerous heated verbal confrontations with L & I staff would develop objective symptoms of emotional distress from being served a no trespass notice and removed from the L & I property." *Id.* Mr. Segaline was the one that caused the contention, Ms. Flemmer was not. Mr. Segaline was a troublemaker, Ms. Flemmer was not.

Moreover, Flemmer presents a motive for Mr. Owens' actions. CP 125 paragraph 24. Regency was behind with its own bills and he was desperate for cash. She was sick and wheelchair bound. He knew

Regency owed her a refund. CP 125 paragraphs 22-23. There is no supplemental declaration denying the motive. The Segaline court stated:

> Thus, regardless of L & I's duty to Segaline, we hold that as a matter of law any emotional distress resulting from L & I's conduct to protect its employees was not reasonably foreseeable. Therefore, the trial court did not err when it granted summary judgment to L & I on this claim. *Id.*

Here Owens knew that Regency owed Flemmer a refund. Therefore, Flemmer's distress is and was foreseeable. Flemmer has presented a triable issue.

5. Flemmer is Entitled to Trial on the Consumer Protection Claim

Regency argues that "evidence presented supports a conclusion that errors made ... were inadvertent (and not deceptive or unfair)." Respondents' Brief 24. Indeed, Regency's evidence does support that conclusion. Flemmer's evidence does not. Hence, a trial is necessary. Regency has the records that prove the case against them. "[W]here material facts are particularly within the knowledge of the moving party ... ' " it is advisable that the cause proceed to trial in order that the opponent may be allowed to disprove such facts by cross-examination and by the demeanor of the moving party while testifying." ' " *Riley v. Andres,* 107 Wash.App. 391, 395, 27 P.3d 618 (2001) (quoting *Mich. Nat'l Bank v. Olson,* 44 Wash.App. 898, 905, 723 P.2d 438 (1986))." *Richards v. Brown, et al,* 157 Wn.App. 803, 820, 239 P.3d 602 (2010).

Regency's own witness describes their accounting system the same for all patients. CP 87 paragraph 12. All patients were subjected to

periodic statements that did not reflect all charges, did not reflect insurance payments, did not explain the balance due. The system has the same capacity to harm everyone.

Regency quotes the statute at RCW 19.86.093 that states five ways that a claimant may establish that an act injures the public and then argues that summary judgment is appropriate because Flemmer "...fails to show that she can meet all of the elements of that specific claim." Respondents' Brief 24. Flemmer's argument here is that Regency's shadow accounting system for the insurance side of a patient's account is not only deceptive but has the capacity to injure other persons. RCW 19.86.093(3)(b). That system injured Flemmer. Of course Regency denies any deception but Flemmer is still entitled to put the matter to the trier of fact.

B. The Trial Court Inappropriately Denied Flemmer's Motion to Amend Her Complaint

Flemmer should be allowed to amend her complaint, especially for the count of abuse of a vulnerable adult. Regency knew the guidelines and the administrator, Mr. Owens, violated them causing Flemmer to feel threatened. CP 125. Her fear was reasonable given the circumstances.

Regency erroneously claims that the motion should be denied because it is not perfected due to a failure to state with particularity the grounds therefore pursuant to CR 7(b). Respondents' Brief 28. The grounds are given in the motion and the amended complaint itself which was attached to the motion. CP 141. Regency further argues that the

amendments would be duplicative, futile and of questionable merit. Respondents' Brief 29. Flemmer agrees that there is no need for duplicative claims. As for facts supporting the claim, the allegations in the complaint are sufficient to state a cause of action and are supported by Flemmer's declaration. Viewing the matter in the light most favorable to Flemmer, the motion should be granted.

Respondents' third argument is that the motion is untimely. Respondents' Brief 29. The trial judge agreed with this argument. It is an abuse of discretion under the limited facts of this case for the reasons already argued. That is, the relationships among Flemmer, Regency and Mr. Owens, and Regency's and Owens' own courses of conduct towards Flemmer. Regency did not provide a sensible accounting system, did not respond to Flemmer's concerns in a responsible, timely manner but instead threatened her and took advantage of her vulnerability. While the trial judge stated that the request was untimely, he also stated that this case was "an accounting nightmare." RP 12. Yet he is willing to let Regency sweep it under the rug. Flemmer has stated the elements necessary to proceed to trial and should be allowed to do so.

Regency's fourth argument is prejudice to their interest in promptly resolving the claims. This has been Flemmer's interest and concern for four years. Regency is the party that caused this entire problem. Flemmer should be allowed to proceed.

C. The Trial Court Inappropriately Denied Flemmer's Motion for Reconsideration

The denial of a motion for reconsideration is reviewed for an abuse of discretion. *August v. U.S. Bancorp*, 146 Wn.App 328, 339, 190 P.3d 86, 92 (2008). The *August* case was presented to the trial court. CP 169. The court in *August* reversed a grant of summary judgment, and reversed denial of reconsideration and motion to amend the complaint to include a count first raised on the motion for reconsideration. *Id.*, 146 Wn.App. at 349. Mr. August raised the issue of fraudulent concealment by the bank in his motion for reconsideration of summary judgment granted to the bank. The court stated:

> Because the underlying motion is a summary judgment motion, we must determine whether the court erred by determining that there was no issue of material fact concerning Nick's claim of fraudulent concealment.
> *August*, at 348.

The court also stated that "in the context of summary judgment, unlike in a trial, there is no prejudice if the court considers additional facts on reconsideration." *Id.* at 347.

Therefore, the issue is actually the same on reconsideration as to whether summary judgment is appropriate. The court should consider the additional evidence presented to determine the original question of summary judgment. The court reasoned that the question of what Mr. August knew "is a question of material fact that cannot be resolved here." *Id.* at 349. The entire case was reversed and remanded. This court should do likewise for Flemmer.

D. Attorney Fees

Regency seeks attorney fees on appeal based on the contract which states in part that "the prevailing party … shall be entitled to recover from the other costs and reasonable attorney's fees incurred in connection therewith, included all appeals." CP 23. As such the prevailing party in this appeal would be entitled to its costs and attorney's fees pursuant to RAP 18.1. Likewise, upon reversal of the trial court's orders, Flemmer should be awarded fees.

II. CONCLUSION

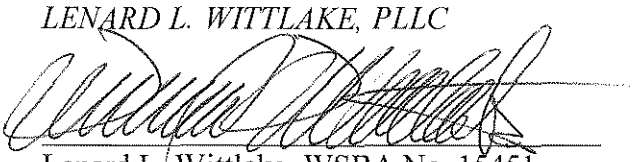
Summary judgment is not appropriate in this case. Regency and Owens refused to substantiate their bill, coerced Flemmer into paying a large sum when she was sick and wheelchair bound, changed their story, did not bill insurance as they agreed in the Admission Agreement, then overbilled her insurance, double billed Flemmer and her insurance for the same services, billed at greater than the contract daily rate, maintained a secret shadow accounting system that enabled them to double bill without being caught, did not provide regular bills, took a year to review her account, collected substantially more than they are entitled and still claim that Flemmer is the one that breached the contract by not paying on time. Her breach is excusable, theirs is not.

The proof of this case lies largely in accounting records and medical records. Records that are just as available today as they were

yesterday or a year ago. This matter should be reversed and remanded to allow Flemmer to amend her complaint and proceed to trial.

Respectfully Submitted this 6th day of May, 2013.

LENARD L. WITTLAKE, PLLC



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PROOF OF SERVICE

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

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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.

Signed this 6th day of May, 2013, at Walla Walla, Washington.

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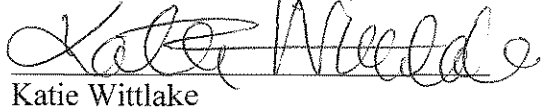

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