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SUPREME COURT  
STATE OF WASHINGTON

2012 MAY 25 P 2: 25 NO. 86822-1

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BY RONALD R. CARPENTER  
SUPREME COURT OF THE STATE OF WASHINGTON

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LEYA REKHTER, et al.,

Plaintiffs/Respondents,

v.

STATE OF WASHINGTON DEPARTMENT OF SOCIAL AND  
HEALTH SERVICES, et al.,

Defendants/Appellants.

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**APPELLANTS' OPENING BRIEF**

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ROBERT M. MCKENNA  
*Attorney General*

Jay D. Geck, WSBA 17916  
*Deputy Solicitor General*

Christina Beusch, WSBA 18226  
*Deputy Attorney General*

Carrie L. Bashaw, WSBA 20253  
*Senior Counsel*

Michael M. Young, WSBA 35562  
*Assistant Attorney General*

Attorneys For Appellants

**ORIGINAL**

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## I. NATURE OF THE CASE

The Department of Social and Health Services (DSHS) appeals a judgment awarding almost \$100 million to a class of home care providers based on a claim that DSHS breached Independent Contractor Agreements with the provider class when DSHS used an existing, but later invalidated, agency rule to regulate public assistance awards. For four years, DSHS used the “shared living rule” as part of a needs-assessment tool applied to recipients of Medicaid-funded in-home assistance. DSHS started applying the rule in April 2003, and repealed the rule in June 2007 shortly after this Court held the rule invalid in *Jenkins v. Department of Social & Health Services*, 160 Wn.2d 287, 157 P.3d 388 (2007). Although two superior courts in 2005 concluded the rule was invalid, the court of appeals and this Court stayed those superior court rulings, allowing DSHS to use the rule while *Jenkins* was pending. Notation Order, *Gasper and Myers v. DSHS*, No. 78931-2 (Wash. July 14, 2006) (granting joint motion for stay).

Two classes of plaintiffs filed suit immediately after *Jenkins* to claim damages. One is a “client class” made up of persons whose public assistance was determined, in part, using the former rule. The second is a “provider class” made up of the live-in providers selected and employed by members of the client class to provide services.

Although selected and employed by DSHS clients, the provider class members entered into Independent Contractor Agreements with DSHS. DSHS agreed to pay the provider for performing, at a client's direction, in-home care for a client. Each contract limited DSHS to paying only for hours it authorized for a DSHS client in a Service Plan. The providers claimed that DSHS breached the contracts by using the shared living rule to reduce the number of assistance hours for clients. A jury rejected this claim in part, returning a special verdict that DSHS did *not* breach a term in the contracts. CP 2985-86. The jury, however, found that reducing the hours using the rule breached an implied duty of good faith and fair dealing. CP 2985-86. The jury found \$57,123,794.50 in damages, to which the court added more than \$38 million in prejudgment interest.

The court also ruled that RCW 74.08.080 authorized judicial review of past DSHS public assistance decisions. CP 3466 (App. 17). The court concluded that it would not apply the statutory time limits barring judicial review for four-plus years of past public assistance decisions made prior to *Jenkins*, and concluded the class did not need to exhaust administrative remedies. CP 451-59, 797-800, 1466-71. However, the court denied damages to the client class because it was the

same damages claimed by the provider class and the “client class actually received the Rule related services.” CP 3475 (App. 26).

This Court should reverse the judgment for the provider class. The providers’ facts do not establish a legal basis for relief based on breach of an implied covenant of good faith and fair dealing. Their claim fails as a matter of law because no term of the Independent Contractor Agreements triggered an implied covenant of good faith that would apply to DSHS’s assessment of clients, e.g., the decision to use the shared living rule to determine assistance hours. The implied covenant cannot be used to create free floating obligations outside the contract terms. Additionally and alternatively, the jury instructions for the implied covenant claim erred by relieving the jury of finding all elements of the claim. Finally, the court erred by granting prejudgment interest because the providers’ claims were unliquidated as a matter of law.

This Court should also hold that the client class did not state a claim for judicial review. Agency decisions not appealed within a statutory time limit become final. The time bar in RCW 74.08.080(2) prevented judicial review of DSHS assistance decisions except for decisions issued less than 90 days before the May 2007 complaint. The failure to exhaust administrative remedies barred review of those DSHS

decisions made within 90 days of the complaint. The client class claim should have been dismissed on these two bases.

## II. ASSIGNMENTS OF ERROR AND ISSUES PRESENTED

***Assignment of Error 1: The court erred by entering a judgment for the provider class.***

Issues Presented:

1.1 Should the provider class claim for judgment based on breach of an implied covenant of good faith be reversed because the providers do not show a basis upon which legal relief can be granted?

1.2 The implied covenant of good faith and fair dealing in a contract is limited to cooperation in the performance of existing contract terms and cannot change, or conflict with, the terms of a contract. The jury determined that DSHS did not violate a term of the contract when it applied the shared living rule to reduce client hours, necessarily finding that the process for determining client hours was not a contract term. Does the implied covenant claim fail as a matter of law because it depends on adding this term to the contract, or adding contractual obligations that contradict the existing contract terms and rights?

1.3 A breach of contract claim does not provide a remedy based on duties created by statutes outside the terms of a contract. Does the implied covenant claim fail as a matter of law because it depends on

creating a contractual right for providers based on an agency duty not to adopt rules that violate Medicaid requirements?

***Assignment of Error 2.1: The court erred by giving Instructions 18 and 19 (App. 8-9) on the implied covenant of good faith and fair dealing.***

***Assignment of Error 2.2: The court erred refusing to give proposed Instructions 25A, 35, and 35A (App. 12-14).<sup>1</sup>***

Issue Presented:

2.1 Did the instructions misstate the law by directing the jury to apply an implied duty of good faith and fair dealing directly to DSHS's use of the shared living rule to determine client assistance hours, relieving the providers of their duty to demonstrate that a contract term governed determination of client assistance hours? That is, did the instructions compel the jury to apply the implied covenant to "reducing a client's authorized hours by application of the SLR [shared living rule]," without regard to whether that described a performance called for by the contract?

2.2 Did the instructions err by allowing the jury to impose a free-floating obligation of good faith and fair dealing to DSHS's "reduc[tion of] a client's authorized hours by application of the SLR [shared living rule]"?

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<sup>1</sup> The text of instructions referenced in this brief are in the Appendix at pages App. 1-14.

2.3 Did the instructions misstate the law by directing the jury to apply an implied duty of good faith and fair dealing based on external laws governing DSHS determination of client hours?

2.4 Did the court err by refusing Instruction 35A, which would have addressed the provider class claims that the implied covenant required DSHS to make disclosures regarding the operation of the shared living rule, and by refusing Instruction 25A, which would have informed the jury that statutes and rules were not part of the contracts?

***Assignment of Error 3: The court erred by awarding prejudgment interest on the provider class claim. CP 3449-51, 3459-63.***

Issue presented:

3. Provider class damages were based on estimating hours DSHS was likely to have authorized for client class members in the absence of the shared living rule. Damages depended on estimating how a DSHS case manager would have exercised professional judgment to individually assess clients in the absence of the shared living rule. The jury had to choose among different estimations, and apply discretion to measure the damages. Did the superior court err by concluding that the provider claims were liquidated amounts and erroneously award prejudgment interest based on that legal error?

**Assignment of Error 4: The superior court erred when it issued orders bypassing and equitably tolling the statutory time limits that create finality for unappealed DSHS public assistance decisions.<sup>2</sup>**

Issues Presented:

4.1 Does the 90-day limit in RCW 74.08.080(2)(a), and case law giving finality to unappealed agency decisions bar a superior court from conducting judicial review of DSHS public assistance decisions not appealed within the 90 days allowed by statute?

4.2 Did the superior court err by concluding that equitable tolling could avoid the statutory time limits by applying a standard for tolling in conflict with this Court's limitation on equitable relief from final agency decisions, and by relying on inequitable reasons for tolling the statute?

4.3 Did the superior court err when it concluded that futility of exhausting administrative remedies prior to *Jenkins* excused clients from all statutory time limits and finality bars?

**Assignment of Error 5: The superior court erred by failing to require exhaustion of effective administrative remedies that were available at the time of the complaint and which would have corrected any DSHS assistance decisions that were not time barred.<sup>3</sup>**

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<sup>2</sup> See opinion dated September 15, 2009 (CP 451-59); order dated October 30, 2009 (CP 797-800); oral rulings dated January 29, 2010 (VRP 143-62); oral rulings dated May 7, 2010 (VRP 232-60); and order dated June 4, 2010 (CP 1466-71).

<sup>3</sup> See orders and rulings *supra* note 1.

Issue presented:

5. Did the court err by failing to consider and require client class members to use administrative remedies readily available in May 2007 to address errors in DSHS decisions made in the 90 days before the complaint?

NOTE: As of May 24, 2012, the court had not ruled on post-judgment motions for attorney fees and costs by the plaintiffs. The appellant reserves the right to file a supplemental notice of appeal and brief with regard to any award of attorney fees and costs.

### III. STATEMENT OF THE CASE

On the heels of this Court's May 2007 ruling in *Jenkins*, three lawsuits were filed and consolidated as *Rekhter v. State*, No. 07-2-00895-8.<sup>4</sup> Two of the complaints included federal law claims, and defendants removed those cases to federal court. CP 33-40. The federal court dismissed all federal claims and remanded the remaining state law claims. *Pfaff v. State*, 2008 WL 5142805 (W.D. Wash. 2008) (describing failed federal laws claims). On remand from federal court, the superior court reaffirmed the two classes certified by the federal court for purposes of

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<sup>4</sup> The three lawsuits are *Pfaff v. Arnolds-Williams*, Thurston County Superior Court Cause No. 07-2-00911-3, *Rekhter v. State*, Thurston County Superior Court Cause No. 07-2-00895-8, and *Service Employees International Union 775, Weens v. Arnold-Williams*, King County Superior Court Cause No. 07-2-17710-8SEA.

determining liability (and later, damages) and affirmed the federal court's appointment of class counsel. CP 1077-90.

The "*client class*" was defined as:

All persons who (1) were determined eligible for Medicaid or state funded in-home personal care assistance and (2) had their base hours adjusted by the operation of Wash. Admin. Code § 388-106-0130(3)(b) (or its predecessor) [the shared living rule], except to the extent that they (3) requested an adjudicative proceeding pursuant to Wash. Rev. Code § 74.08.080 challenging the downward adjustment and have received or will receive back benefits as a result.

CP 3465. The "*provider class*" was defined as:

All providers of Medicaid or state funded in-home personal care employed by persons who (1) were determined eligible for Medicaid or state funded in-home personal care assistance and (2) had their base hours adjusted by the operation of Wash. Admin. Code § 388-106-0130(3)(b) (or its predecessor) [the shared living rule], except to the extent that they (3) requested an adjudicative proceeding pursuant to Wash. Rev. Code § 74.08.080 challenging the downward adjustment and have received or will receive back benefits as a result.

CP 3465-66.

**A. Statement Of Facts**

**1. April 2003—DSHS Applies CARE Tool To Assess Client Needs For Long Term In-Home Care**

DSHS administers long-term in-home assistance programs funded in part by the federal government under Title XIX of Social Security—the Medicaid Act. The programs serve low income Washingtonians with

functional disabilities as defined in RCW 74.39A.009(11) and provides assistance with certain personal care tasks, such as ambulation, bathing and toileting, and certain household tasks, including meal preparation, housework, essential shopping, wood supply, and travel to medical services. CP 3467-68 (App. 18-19). A client who receives such public assistance may employ a qualified individual to provide the services, and DSHS will pay that provider directly according to an Independent Contractor Agreement. WAC 388-106-0040(1); WAC 388-71-0500 to -05909. A client can also select a homecare agency to provide services. WAC 388-106-0040(2).<sup>5</sup>

Clients are allocated in-home services on an hours-per-month basis (240 hours per month, for example) based on assessment of relative need. WAC 388-106-0130. A DSHS representative performs an individualized assessment using the Comprehensive Assessment Reporting Evaluation (CARE) tool. WAC 388-106-0050 to -0145. The CARE tool is used to determine the client's functional eligibility for services in the programs, services to be authorized, and authorized hours-per-month of care. WAC 388-106-0055; CP 3468. It is also used to develop a "plan of care" (or "service plan") for the client. WAC 388-106-0055(10). The CARE tool

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<sup>5</sup> These programs are the Community Options Program Entry System program, WAC 388-106-0300 to -0335; the Medicaid Personal Care program, WAC 388-106-0200 to -0235; the Medically Needy In-Home Waiver program, WAC 388-106-0500 to -0535; and the Chore program, WAC 388-106-0600 to -0630. CP 3467-68.

assessment uses classification groups to determine a client's "base" hours. WAC 388-106-0125; CP 3468. The CARE tool also allows adjustments to the base hours, including reductions for "informal supports" such as care provided by family or friends without compensation. WAC 388-106-0130(2); VRP 549; CP 3472 (App. 23). Under these rules, the DSHS assessor judges whether a client's need for assistance with a particular personal care or household task is one quarter, one half, three quarters, or fully met by informal support (or not met by informal support). CP 3469, 3472 (App. 20, 23). When a client's need regarding a task is partially or fully met by informal support, the assessment reduces authorized hours using formulas in the CARE tool. WAC 388-106-0130(2); VRP 549.

Clients receive CARE tool assessments when they apply for assistance, on an annual basis thereafter, and more often if there is a change in a client's condition. WAC 388-106-0050; CP 3468 (App. 19). After assessment or reassessment, DSHS issues a service plan to specify services to be provided, and a "planned action notice" (PAN) to the client, notifying him or her (or the appropriate guardian) of the total hours authorized, and that the DSHS decision can be appealed within 90 days. CP 3468 (App. 19); *see also* CP 1118, 1224-41.

From its inception in April 2003, the CARE tool rules included a rule reducing hours for a client who lived with his or her paid provider,

known as the “shared living rule.” Former WAC 388-106-0130(2)(b), (3) (2005); former WAC 388-72A-0095 (2005); CP 3468-69 (App. 19-20). The shared living rule concerned certain assistance furnished by live-in providers—housekeeping, meal preparation, essential shopping, and where applicable, wood supply—that intertwined with the provider’s personal needs so that assistance on those tasks benefitted the entire household, including the provider. Former WAC 388-106-0130(2)(b), (3) (2005). The rule (and the related CARE tool algorithms) determined that needs for housekeeping, meal preparation, essential shopping, and wood supply (if applicable) were fully “met” by informal support if a client selected a provider who was a member of the household. VRP 553-54, 1274, 1277, 2052-53, 2058-59, 2276-77; CP 3471-72 (App. 8-9). However, in the absence of the shared living rule, an assessor would have individually assessed the extent to which a client’s need for assistance with certain tasks was met by informal support. *E.g.*, VRP 1283-84, 1307-09, 2052-53, 2058-59; CP 3470-73 (App. 20, 22-24).

## **2. This Court In *Jenkins v. DSHS* Invalidated The Shared Living Rule**

In 2004, three DSHS in-home care clients (Gasper, Myers, and Jenkins) filed timely administrative appeals contesting the planned action notices determining their in-home service hours. In each appeal, an administrative law judge (ALJ) concluded that the challenge was based

solely on a theory that the shared living rule was invalid, and denied administrative relief based on an ALJ's lack of authority to review and invalidate agency rules. The three clients timely petitioned for judicial review. In March 2005, a Thurston County superior court concluded that the rule was invalid and that hours had been erroneously determined for Gasper and Myers. In August 2005, a King County court issued a similar ruling for Jenkins. CP 3469 (App. 20).

The Department appealed the cases and obtained stays pending appeal. CP 3469 (App. 20). In March 2006, the court of appeals affirmed two cases. CP 3470 (App. 21); *Gasper v. Dep't of Soc. & Health Servs.*, 132 Wn. App. 42, 129 P.3d 849 (2006). This Court accepted review of *Gasper* and *Myers*, and granted direct review of *Jenkins*. On May 3, 2007, the Court held that the shared living rule was invalid because it violated Medicaid comparability laws. *Jenkins v. Dep't of Soc. & Health Servs.*, 160 Wn.2d 287, 303, 157 P.3d 388 (2007). The Court remanded the three cases to allow correction of the public assistance decisions. *Id.* at 302-03. DSHS corrected the hours, and the courts on remand only addressed fees and costs. CP 3470 (App. 21).

**3. DSHS Used The Shared Living Rule To Assess Client Needs Until Repealing The Rule Shortly After *Jenkins***

During the *Gasper*, *Myers*, and *Jenkins* appeals, DSHS obtained judicial stays and continued to apply the shared living rule to determine

hours. CP 3469 (App. 20); *supra* p. 1. After *Jenkins*, DSHS repealed the rule effective June 29, 2007. CP 3470 (App. 21); *see also* Wash. St. Reg. 07-14-070 (repealing rule). DSHS applied the CARE tool, without the shared living rule, as each client was reassessed thereafter. CP 3470 (App. 21). By June 2008, every client affected by past application of the rule had been reassessed without the rule. CP 3470 (App. 21). Although the shared living rule was used to determine hours for the client class between April 2003 and repeal of the rule, client class members did not seek relief until this post-*Jenkins* lawsuit. CP 3470-71 (App. 21-22).

#### **4. The Independent Contractor Agreements Between DSHS And Individual Providers**

As noted above, each client can select and hire a qualified individual to provide services, who is paid directly by DSHS as an individual provider. WAC 388-106-0040(1), (2). A union represents providers and collectively bargains with the state over certain aspects of this employment by clients, but state law expressly holds that the providers are *not* state employees. RCW 74.39A.270. Under the agreements between DSHS and providers, the providers were described as Independent Contractors. Ex. 66 at 1 (App. 29).

The Independent Contractor contracts did not significantly change between April 2003 and May 2007. Trial Exhibit 66 included the slightly

different formats used between 2002 and 2008. The Statement of Work in the contract, ¶ 2 (App. 31), states:

The Contractor agrees to assist, as specified by the client, with those personal care services, authorized household care tasks, and/or self-directed health care tasks which are included in the client's Service Plan.

The contractor had to show that a client "selected the Contractor to provide services at the established rate" (¶ 4a(1) (App. 31)), and that the "Contractor has provided services to the client which are included in the client's Service Plan" (¶ 4a(2), (App. 31)). DSHS promised it "will pay the Contractor the established rate [for] *all services authorized* and provided under this Contract," but "[t]he monthly payment for *all services* provided to any client *will not exceed the amount authorized in the client's Service Plan.*" (¶ 4b (App. 32) (emphases added)). Each of the named provider class plaintiffs who testified at trial testified that he or she understood the "amount authorized in the client's Service Plan" represented the maximum amount of hours for which they could be paid for providing services to the clients they served. VRP 928-29, 1203-08, 1835-38. It was undisputed that DSHS paid contractors up to the maximum hours authorized. Under ¶ 31 (App. 36), a provider could freely terminate a contract.

## **B. Trial Court Proceedings**

After remand from the federal court, the primary claims left in the case were: (1) a client class claim for relief under the APA and RCW 74.08.080; and (2) a provider class claim for breach of contract.<sup>6</sup>

### **1. The Court Ruled The Client Class Could Obtain Judicial Review Of Past Public Assistance Decisions, Back To 2003, Even Though DSHS Awards Were Final And Not Subject To Appeal By Statute**

In a series of pre-trial orders, the court rejected the DSHS argument that the client class claim for judicial review was time barred and/or barred for failure to exhaust administrative remedies. The court's first order on this subject was in response to a client class motion asking the court to rule that it would "apply" *Jenkins* to the class and that judicial review could allow compensatory payments from the date public assistance decisions were first affected by the shared living rule. CP 77-100. The state argued that RCW 74.08.080(2) and (3) governed appeals of assistance awards, and that judicial review was both time barred and barred for failure to exhaust administrative remedies. CP 127-46. The court ruled that it could use RCW 74.08.080 to

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<sup>6</sup> Prior to trial, the court dismissed the providers' wage and hour claims for the provider class because the providers are not employees of the state. CP 1064-76; 1462-65. The court left breach of contract, unjust enrichment, and *quantum meruit* claims for trial. CP 1462-65. Mid-trial, the court dismissed unjust enrichment and *quantum meruit* because those claims were precluded by the contracts between DSHS and providers. VRP 1901-05; CP 3446-48.

review public assistance decisions because it would have been futile for the clients to have sought administrative remedies before *Jenkins*. CP 451-59.

In response to this first order, the state moved for reconsideration or summary judgment, arguing that futility did not excuse time limits in RCW 74.08.080(2)(a), which made assistance decisions final if not appealed within 90 days. Subsection (1)(a) provides “[a] public assistance applicant or recipient” with “the right to an adjudicative proceeding.” Under subsection (2)(a), “[t]he applicant or recipient must file the application for an adjudicative proceeding . . . within ninety days after receiving notice of the aggrieving decision.” Finally, subsection (3) provides for a right to “file[] a petition for judicial review as provided in RCW 34.05.514 of an adjudicative order entered in a public assistance program[.]” Subsection (3) authorizes a court conducting judicial review to order correction “from date of the denial of the application for assistance . . . or in the case of a recipient, from the effective date of the local community services office decision.”

The court clarified that its first order had merely decided a general proposition that client class members could seek “retroactive

compensatory relief under RCW 74.08.080(3).” Pretrial VRP 146, 153.<sup>7</sup> The court refused DSHS’s argument that client class claims were time barred by the 90-day statutory requirement. Pretrial VRP 148. The court, however, stated it had not yet ruled whether judicial review could address decisions back to 2003. Pretrial VRP 152. The court directed the parties to brief “[h]ow far back this retroactive recovery . . . should be permitted to go[.]” Pretrial VRP 157.

After further briefing, the court issued orders on the client class claim in a hearing on May 7, 2010, and with an order dated June 4, 2010. Pretrial VRP 232-50; CP 1466-71. The court concluded that a 90-day limit in RCW 74.08.080(2) applied to “run-of-the-mill appeals resulting in compensatory recovery” and ran from the “date of the local community services office decision.” Pretrial VRP 234. The court concluded that the 90-day statutory time limit could not affect its jurisdiction. Pretrial VRP 235. The court also concluded that res judicata or claim preclusion did not bar judicial review of unappealed public assistance decisions back to 2003. Pretrial VRP 236.

The court then ordered the statutory time limits in RCW 74.08.080(2) would be equitably tolled, and gave several

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<sup>7</sup> The record of proceedings includes two volumes of pretrial proceedings with pages numbered 1-382, and then fifteen volumes of trial proceedings that start with page 1. This brief cites to “Pretrial VRP” where the reference is to pages in the the pretrial proceedings.

reasons. First, the court reasoned that a timely lawsuit to review the past DSHS decisions (e.g., before *Jenkins*) would have been “impractical” and “risky,” and therefore the client class claim was diligent. Pretrial VRP 240-42. The court reasoned that tolling was equitable because DSHS owed responsibilities to clients, knew its rule was being challenged, knew that superior courts had ruled against the rule, and that DSHS “created” a barrier to administrative relief because its rule could not be invalidated in administrative hearings. Pretrial VRP 245. The court also concluded that equitable tolling was entirely within its discretion. Pretrial VRP 247. The court summarized that “compliance with administrative procedures has been excused under the futility doctrine [and] the requirement to file in court to hold a place, if such a requirement exists, has been tolled.” Pretrial VRP 247. The court added that fiscal impacts of reviewing otherwise untimely claims were immaterial to tolling, saying it was “nonsense” for the government to be concerned about reviving claims barred by statutes. Pretrial VRP 249.

**2. A Trial On The Provider Class Claim Determined That DSHS Did Not Breach Any Terms Of The Contracts With Providers, But Found A Breach Of The Implied Covenant Of Good Faith And Fair Dealing**

The parties tried the provider class claim in a three-week trial in late November and December 2010. CP 2469-89. Plaintiffs called three of the named provider class plaintiffs as witnesses, Judith Alberts

(VRP 684-1022), Cathleen Bayer (VRP 1128-1225), and Maureen Pfaff (VRP 1737-1856, 2532-34), who testified about the care they provided to their clients and about their contracts with DSHS. The contract language was established by numerous examples of the providers' contracts and Service Plans or Summaries, which universally specified the maximum authorized hours for particular clients, as determined through CARE assessments. *See, e.g.*, Exs. 1-46, 66 (App. 28-36). Both sides called witnesses familiar with DSHS's long-term care programs, the CARE tool, and the shared living rule: the plaintiffs called Ann Peterson (VRP 585-683) and Susan Engels (a DSHS employee) (VRP 1236-1348); defendants called Bea-Alise Rector (a DSHS employee who knew about the CARE tool, its development, and its operation, and the shared living rule) (VRP 1916-2021, 2273-2492) and Kim Peterson (VRP 2493-2531). Both sides produced experts to testify about damages: plaintiffs called Dr. Nayak Polissar (a statistician) (VRP 1376-1617) and Douglas McDaniel (an accountant) (VRP 1620-1736); defendants called Dr. David Mancuso (an economist employed by DSHS) (VRP 2033-2133) and William Partin (an accountant) (VRP 2134-2298).

**a. The Jury Finds DSHS Did Not Breach A Term Of The Contracts**

The provider class claimed DSHS breached the Independent Contractor Agreements by calculating client Service Plans hours using the

shared living rule. Instruction 11 (App. 3-6) described the providers' theory that by reducing hours using the shared living rule, DSHS breached a contract term:

- The providers claimed the Independent Contractor agreements "incorporated by reference the care plan and assessment process prepared annually for the client, including the algorithm (i.e., formula) for determining the maximum number of hours the department was obligated to compensate the provider." CP 2971 (App. 3).
- The providers claimed "that for the period April 1, 2003 to June 30, 2008, the algorithm . . . was invalid because it did not comply with Medicaid comparability law." CP 2971 (App. 3).
- The providers claimed the contracts "included an implied duty of the department to comply with law governing the Medicaid programs" (CP 2971-72 (App. 3-4)), and this term of the contract was a necessarily implied contract term given by Instruction 17 (CP 2978 (App. 7)).
- "The providers claim[ed] the contract must be modified to exclude that invalid portion of the algorithm, and that when so modified, the department has failed to compensate the provider for the hours of service determined in the client's care plan." CP 2972 (App. 4).
- "The providers claim[ed] the department breached . . . by failing to compensate the provider up to the maximum number of hours authorized in each care plan, as modified to remove the invalid automatic exclusion under the Shared Living Rule." CP 2972 (App. 4).

The jury, in a special interrogatory constituting its verdict, answered "No" to the question "Do you find that the Department breached a term in the Individual Provider Contracts?" CP 2985; VRP 2832-33.

**b. The Jury Finds A Breach Of An Implied Covenant Of Good Faith And Fair Dealing**

The provider class also claimed that “the contract include[d] an implied duty of good faith and fair dealing in the department’s performance of the contract, specifically in making its determination of the maximum authorized hours for which it would compensate a provider.” CP 2972 (App. 4). As with claims that DSHS breached a term of the contract, the implied covenant claim was based on “*reduc[ing] authorized hours* by application of the Shared Living Rule.” CP 2972 (App. 4) (emphasis added). The parties disputed the jury instructions regarding an implied covenant claim, with the court giving Instructions 18 and 19, while refusing DSHS’s proposed Instruction 35 (App. 13) and related Instructions 25A (App. 12), 35A (App. 14), and others. E.g., VRP 2605. The jury answered “Yes” to the question “Do you find that the Department breached an implied duty of good faith and fair dealing with the providers as to the Department’s performance of a specific term in the Individual Provider Contracts?” CP 2985; VRP 2832-33.

**3. The Court Rules That The Provider Class Is Entitled To Prejudgment Interest**

The jury was instructed to measure damages by “determin[ing] the sum of money that will put the providers in as good a position as they would have been in if both providers and the department had performed all

of their promises under the contract.” CP 2981 (App. 10). DSHS and the providers put on evidence from which they argued damages ranging from \$52 million to over \$90 million; the jury found damages at \$57,123,794.50. CP 2985-86; VRP 2832-33. *See generally* discussion *infra* Argument, Part C, pp. 53-56 (damages evidence).

The providers moved for prejudgment interest on the damages found by the jury and DSHS opposed, arguing, *inter alia*, that the providers’ claims were unliquidated, which precluded prejudgment interest. CP 3011-44. The court granted the providers’ motions and awarded \$38,652,219.85 in prejudgment interest. CP 3414-16, 3459-63.

#### **4. The Court Enters Findings And Conclusions And Denying Relief To Client Class**

After the provider class trial ended, the court entered findings and conclusions on judicial review of the client class claim. CP 3464-76 (App. 15-27). The findings recited the prior rulings allowing the claim to proceed, and summarized the factual basis for the clients’ challenge to past DSHS decisions determining hours. The findings also considered the evidence and jury decision on damages from the provider trial, and found “the Client Class suffered the same damages as the Provider Class, \$57,123,794.50.” CP 3473-74 (App. 24-25). The court, however, concluded that the findings did not justify an award of damages to the clients:

The Client Class has proved the same damages claimed by the Provider Class claim, except that the Client Class *actually received the Rule related services and thus it sues to pass damages through to the Provider Class*. . . . [T]he Client Class is not entitled to judgment for the damages because judgment for that amount will be entered in favor of the Provider Class and only one recovery can be permitted.

CP 3475 (App. 26) (emphasis added). The court added that it did “not necessarily conclude that, in the absence of a judgment in favor of the Provider Class, the Client Class would be entitled to judgment for the amount of damage . . . because the clients cannot receive directly the monetary payment for services that were wrongfully withheld.” CP 3475-76 (App. 26-27).

The court entered separate judgments for the two classes. The client class obtained no relief. CP 3477-79. The provider class received a judgment for \$95,776,014.35 based on \$57,123,794.50 in damages and \$38,652,219.85 in prejudgment interest. CP 3459-63. The court reserved claims for costs, attorneys fees, and administration of the class judgment. CP 3459-63. This timely appeal followed. CP 3480-3505.

#### IV. SUMMARY OF ARGUMENT

The *Jenkins* decision involved three individual DSHS clients with timely claims. In this case, the Court’s decision in *Jenkins* has been converted *post hoc* into class action lawsuits based on all public assistance awards to which the shared living rule was ever applied. This occurred

even though class members did not participate in *Jenkins*, and the DSHS decisions applying the shared living rule were long final under rules limiting appeals. A contract claim became the vehicle to award monetary damages—granting the provider class contractual rights as to how DSHS exercised its governmental functions of adopting rules and determining the hours for clients under public assistance laws.

The judgment to the provider class should be reversed because, as a matter of law, the providers did not establish a legal basis for relief. The law implies a covenant of good faith and fair dealing, but the obligations created by the implied covenant are limited to performance of the terms of a contract. The implied covenant does not add terms to a contract, add obligations that conflict with the terms of a contract, or impose a free-floating obligation of good faith and fair dealing. Here, the implied covenant claim fails because the agreements between DSHS and the providers had no terms regarding how DSHS applied statutes and rules to determine hours of public assistance for clients. The jury necessarily found that no such contract term existed when it rejected the providers' claim that the terms of the contract breached by DSHS's use of the shared living rule included a term governing the process for determining client hours. The implied covenant claim also fails because it depends on requiring DSHS to pay contractors for hours never authorized, an

obligation contrary to express contract terms stating that DSHS would pay only the amount of service hours it authorized. Finally, the implied covenant claim fails because it depends on using the contract to enforce duties created by statutes external to the contract.

In the alternative, the provider class judgment should be reversed and remanded because the jury instructions for the implied covenant claim reflect errors of law. An implied covenant of good faith and fair dealing claim applies only to performance of certain contract terms. The parties disputed whether the contracts included a term addressing how DSHS determined client hours and applied the CARE tool rules, including the shared living rule. In the most significant error, Instruction 19 compelled the jury to apply a good faith duty directly to DSHS's action of using the shared living rule to reduce client hours, erroneously pre-ordaining that determining client hours under the CARE tool was the performance of a contract term. Moreover, it commanded the jury to apply good faith to DSHS's use of the shared living rule *even if* the jury found that reduction of hours using the shared living rule was not part of the contract. Instruction 19 relieved the jury of finding all elements of the implied covenant claim.

If the Court does not reverse the provider class judgment, the Court should hold that the trial court erred by awarding an additional \$38 million

in prejudgment interest. Whether prejudgment interest applies to a claim depends on whether the amount of a claim can be determined precisely, using objective facts and math (a “liquidated” amount), or whether the claim amount can only be estimated, using discretion and reasonableness (an “unliquidated” amount). The damages found by the jury involved unliquidated amounts. The damages depended on estimating the amount of public assistance hours DSHS would have authorized to clients in the absence of the shared living rule. In the absence of the rule, DSHS would have assessed each client individually using professional judgment and discretion to determine if various needs were unmet, partly met, or fully met by informal support. The hours awarded without the rule, therefore, depended on reasonable estimates of how clients might have been individually assessed without the rule.

Finally, the Court should reject any reliance on the client class claim for judicial review to support the judgment. The superior court erred by failing to dismiss the client class claim. Under RCW 74.08.080 and case law, DSHS decisions on client hours not appealed within 90 days are final and no longer subject to appeals. This time limit barred judicial review of all DSHS decisions on client hours made more than 90 days before the May 4, 2007 complaint. DSHS decisions made less than 90 days before the complaint were barred because the client class failed to

exhaust a readily available administrative remedy to correct such decisions. Accordingly, the client class stated no claim for a class-based judicial review of DSHS assistance decisions.

## V. ARGUMENT

### A. **As A Matter Of Law, Use Of The Shared Living Rule Did Not Violate An Implied Covenant Of Good Faith And Fair Dealing In The Performance Of The Provider Contracts**

The claim that DSHS breached an implied covenant of good faith and fair dealing depended on the same facts that the plaintiffs offered in their failed claim that DSHS breached a term of the contracts. The factual basis for the claim included: DSHS applied the shared living rule to reduce hours authorized for clients starting in April 2003; the rule violated Medicaid comparability as established by court decisions; some people and groups criticized the rule; administrative law judges could not invalidate the rule; DSHS did not individually notify providers that the rule was used to determine client hours; DSHS repealed the rule in June 2007; and by June 2008 DSHS had reassessed all clients without the rule. For purposes of appeal, however, this Court must also consider facts established by the verdict that DSHS did not breach a term of the agreements, and that legal rulings allowed DSHS to apply the rule while appeals were pending.

The Court may assume the existence of all facts presented by the providers to address the legal questions of whether the facts meet the legal standards for an implied covenant of good faith and fair dealing claim under Washington law.

**1. Standard Of Review**

Whether the implied covenant of good faith and fair dealing applies to a contract term presents a question of law. *E.g., Trimble v. Washington State Univ.*, 140 Wn.2d 88, 97-98, 993 P.2d 259 (2000) (employment at will contract does not include an implied covenant of good faith and fair dealing limiting termination); *Storek & Storek, Inc. v. Citicorp Real Estate, Inc.*, 100 Cal. App. 4th 44, 55, 122 Cal. Rptr. 2d 267 (2002) (a jury verdict presented “a question of law” in a breach of implied covenant of good faith and fair dealing claim because the issue was “whether the covenant of good faith contradicted the express terms of the loan agreement”). Questions of law are reviewed de novo. *E.g., Ang v. Martin*, 154 Wn.2d 477, 479, 114 P.3d 637 (2005).

**2. The Implied Covenant Of Good Faith And Fair Dealing Cannot Add Or Contradict Contract Terms And Does Not Impose A Free Floating Obligation Of Good Faith**

The implied covenant of good faith and fair dealing does not rewrite contracts, does not add terms, and does not add a free-floating obligation of good faith and fair dealing. *E.g., Badgett v. Sec. State Bank*,

116 Wn.2d 563, 569, 807 P.2d 356 (1991). In *Badgett*, the Court reversed a lower court ruling concluding that an implied covenant claim existed where the alleged facts were that “the parties’ course of dealing had created a good faith obligation on the part of the Bank to consider the Badgetts’ proposals” for renegotiating loans. *Badgett v. Sec. State Bank*, 56 Wn. App. 872, 878, 786 P.2d 302 (1990). This Court ruled, as a matter of law, that an implied covenant requiring the bank to renegotiate a loan could not exist in that contract. The implied covenant could not “inject substantive terms into the parties’ contract.” *Badgett*, 116 Wn.2d at 569. It “requires only that the parties perform in good faith the obligations imposed by their agreement.” *Id.* If the implied covenant added a duty to renegotiate a loan, then it would “create obligations on the parties *in addition to those contained in the contract*—a free-floating duty of good faith unattached to the underlying legal document.” *Id.* at 570.

*Badgett* reflects well-established legal principles that limit claims based on the implied covenant. In *Keystone Land & Development Co. v. Xerox Corp.*, 152 Wn.2d 171, 94 P.3d 945 (2004), the Court stated that it has “consistently held there is no free-floating duty of good faith and fair dealing that is unattached to an existing contract. The duty exists *only in relation to performance of a specific contract term*.” *Keystone Land*, 152 Wn.2d at 177 (emphasis added) (citation and internal quotation marks

omitted). In *Johnson v. Yousoofian*, 84 Wn. App. 755, 930 P.2d 921 (1996), the court of appeals explained that “[t]he implied duty of good faith is derivative, in that it applies to the performance of specific contract obligations. *If there is no contractual duty, there is nothing that must be performed in good faith.*” *Johnson*, 84 Wn. App. at 762 (emphasis added) (citations omitted); *see also State v. Trask*, 91 Wn. App. 253, 272-73, 957 P.2d 781 (1998) (implied covenant creates “a duty not to interfere with the other party’s performance[,]” but not “a duty to affirmatively assist in the other party’s performance”); *Seattle-First Nat’l Bank v Westwood Lumber, Inc.*, 65 Wn. App. 811, 829 P.2d 1152 (1992) (an implied covenant of good faith and fair dealing cannot obligate a party to do something not in the contract).

When these established legal principles are applied to the facts of this case, the providers did not establish a basis for legal relief based on an implied covenant claim.

**a. The Jury Verdict That DSHS Did Not Breach A Contract Term Necessarily Established That No Term Controlled Determining Client Hours; Therefore, The Contracts Lacked The Term Required To Apply An Implied Covenant Of Good Faith And Fair Dealing To Determining Client Hours**

The providers’ implied covenant claim depended on the existence of a contract term that addressed how DSHS determined public assistance

hours for clients. Without a contract term addressing how DSHS would determine client hours, there is no legal basis for a claim that DSHS's use of the shared living rule to calculate client hours breached the implied covenant. The jury found that applying the shared living rule to reduce client hours did not violate a term of the contract when DSHS used the shared living rule to determine client hours. By finding no breach of a contract term, the jury necessarily found that the process for determining client hours using the CARE tool was not a term of the contract. The implied covenant claim therefore fails because of the absence of the required contract term, and because it results in adding terms to the contract.

Presented with similar circumstances, the Ninth Circuit rejected an implied covenant claim after a jury verdict established that conduct did not breach the contract terms. *See Monotype Corp., PLC v. Int'l Typeface Corp.*, 43 F.3d 443 (9th Cir. 1994).<sup>8</sup> Monotype entered a Subscriber Agreement with International Typeface (ITC). As a subscriber, Monotype agreed to distribute typefaces and pay royalties to ITC, and agreed it would not sell or lease ITC typefaces outside the subscriber agreement. Monotype, however, developed a set of typefaces it offered to license to Microsoft. *Monotype Corp.*, 43 F.3d at 447. ITC sued, claiming

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<sup>8</sup> *Monotype* applied New York contract law which is analogous to Washington contract law reviewed above.

Monotype breached the Subscriber Agreement by offering versions of ITC typefaces. *Id.* at 448. A jury, by special verdict, found that Monotype did not breach a term of the subscriber agreement by offering the typefaces to Microsoft. *Id.* at 448. On appeal, ITC claimed the trial court should have instructed the jury on breach of an implied covenant of good faith and fair dealing, arguing that duties of good faith and fair dealing prevented Monotype from offering the typefaces. Monotype responded “that the jury determined that Monotype’s conduct was not inconsistent with the intent of the parties expressed in the agreement [and] any verdict in favor of ITC on an implied covenant would be inconsistent with the intent of the parties and the jury verdict.” *Monotype Corp.*, 43 F.3d at 452. The Ninth Circuit agreed.

The jury was asked to determine what the parties intended when they entered into the Agreement and then to decide whether Monotype’s conduct was contrary to that intent. ITC argued that the contract was meant to prohibit the marketing of commercial substitutes, but the jury’s verdict entailed a finding that it believed the parties did not intend to go that far.

*Id.* (footnote omitted). “[A]n implied covenant of good faith and fair dealing does not permit a Court to supply additional terms for which the parties did not bargain.” *Id.* Thus, “[i]t would have been an error to submit a separate theory of good faith and fair dealing, where the only

answer that could favor ITC would be one that conflicted with the jury's finding." *Id.* (emphasis added).

Similar to *Monotype*, a jury determined that providers and DSHS did not intend to have contract terms where the process of determining client hours to the effect that a contractual duty owed to providers. The jury established this by finding that DSHS's application of the shared living rule to reduce assistance hours did not breach a term. This necessarily rejected the providers' claim that the agreements "incorporated by reference the care plan and assessment process prepared annually for the client, including the algorithm (i.e., formula) for determining the maximum number of hours the department was obligated to compensate the provider[.]" "that for the period April 1, 2003 to June 30, 2008, the algorithm . . . was invalid because it did not comply with Medicaid comparability law[.]" and that the contracts included an implied term for "the department to comply with the law governing the Medicaid programs[.]" *See* CP 2971-72 (App. 3-4); *see also* CP 2978 (App. 7). The first jury verdict confirms that these were not terms of the contracts.<sup>9</sup>

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<sup>9</sup> The providers' closing arguments also explain why the jury necessarily found that the client assessment process applying the shared living rule was not a term of the contract. To claim that application of the rule breached the contract, the providers asked the jury to find that assessing clients was a term of the contract and following federal law (such as Medicaid comparability requirements) was a term of the contract. VRP 2800-01. The providers were unequivocal that the jury should reject DSHS's argument that the client assessment processes were not a term or part of the contract. VRP 2801. For example, the providers asked the jury to find: "The assessment process did not follow the law. The assessment process is part of the contract." VRP 2801.

This Court should follow the holding and reasoning in *Monotype*. As a matter of law, the implied covenant cannot add contract terms contrary to a determination that such terms were not intended. Because the implied covenant claim here cannot exist unless the contract had a term regarding the process of assessing clients, the providers did not establish a basis for relief.

**b. The Independent Contractor Agreements Specifically Provided That DSHS Would Pay The Bargained For Hourly Rate Only For Hours Authorized In A Client's Service Plans**

The Independent Contractor Agreements on their face did not include any promises to the providers regarding the process of determining client hours. The agreements were far simpler. The provider agreed to be paid a rate to provide services to a client as authorized by DSHS's Service Plan for the client. DSHS agreed to pay the contractor directly for providing the assistance it authorized. *See supra* at 15-16 (reviewing contract terms); Ex. 66 (App. 28-36). When DSHS authorized assistance, every provider was universally informed of the maximum hours eligible for payment under the contract. VRP 928-29, 1203-08, 1835-58.

The contracts, however, referred to client Service Plans for the number of authorized hours. From this, the providers asserted that the entire process of determining hours was a performance of the contract subject to being tested by the implied covenant:

[T]here is a complex federal regulatory scheme and even a state scheme that guides and controls the assessment of authorized hours . . . . We believe, *as a matter of law*, that the implied duty of good faith and fair dealing *should apply to the State's discretionary authority to set the authorized hours*.

VRP 2600-01 (emphases added). Notably, no case has ever used the implied covenant of good faith in an independent service provider's contract to review government decisions granting public assistance to clients.

The providers relied on *Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 86 Wn. App. 732, 935 P.2d 628 (1997), to claim that reducing hours based on the rule was subject to an implied covenant duty. *Goodyear*, however, supports the opposite conclusion, and further demonstrates that the providers did not establish a legal basis for relief. *Goodyear* arose when a tire dealer, Whiteman Tire, claimed that Goodyear breached the implied covenant of good faith and fair dealing in its tire dealership contract. Goodyear was retailing tires in Whiteman's trade area at prices lower than Goodyear's wholesale price to Whiteman. But a term in the dealership contract allowed Goodyear to retail tires. The court held that Whiteman Tire did not state a claim for relief on the basis of the implied covenant because its claim depended on adding obligations contrary to the contract term that allowed Goodyear to compete as a retailer. *Goodyear Tire*, 86 Wn. App. at 738.

The providers' implied covenant fails to establish a basis for relief for the same reasons that Whiteman Tire's claim failed. The contract term the providers cited for triggering the implied covenant is ¶ 5.b. That provision states that "DSHS will pay the Contractor only for authorized services provided under this Contract." App. 32. But ¶ 4.b of the contracts expressly stated that payment "will not exceed the amount authorized[.]" App. 32. The implied covenant claim would require DSHS to pay for hours never authorized, contradicting the contract terms.

**c. The Implied Covenant Claim Depends On Adding Terms To The Contract**

The facts relied on by the providers confirm that their implied covenant claim depended on adding terms and obligations to the contract. For example, DSHS allegedly breached the implied covenant in April 2003 when it first used the shared living rule to determine client hours. By claiming breach in April 2003, the providers necessarily impose a contract obligation that DSHS not adopt rules that will be determined to be invalid in the future. This obligation cannot be justified when the contracts did not address the process of determining client hours.

As a second example, the providers complained that DSHS violated the implied covenant because they were not individually informed that the shared living rule was used to reduce hours. VRP 2804 (claiming that when DSHS did not tell providers that the rule was used to determine

hours, it violated a “duty to act in good faith and fair dealing”). Again, this theory depended on *adding* a contractual term requiring disclosure of details of how Service Plans and hours are calculated for clients. Such an obligation necessarily required that the CARE assessment process, including the shared living rule, was part of the contract terms. VRP 2806 (providers argued it was not “fair to embed [the shared living rule in the contract] without telling the other side”). A claim based on failure to disclose the methodology for determining hours fails because the implied covenant cannot add disclosure obligations that are not part of the contract. See Teri J. Dobbins, *Losing Faith: Extracting The Implied Covenant Of Good Faith From (Some) Contracts*, 84 Or. Law Rev. 227, 281 (2005) (implied covenant “should not be used to impose obligations in addition or contrary to those included in the parties’ agreement, or to make otherwise enforceable contracts ‘fair’”).<sup>10</sup>

### **3. The Implied Covenant Claim Fails Because It Depends On Enforcing Duties Originating From Outside The Contract**

The Court should also conclude that the providers’ implied covenant claim fails because the duties the claim is premised upon come from *outside* the contract. “If a party alleges breach of a duty imposed by

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<sup>10</sup> In the alternative, if the Court were to conclude that the answers to the special verdicts cannot be reconciled, the Court should reverse for a new trial because, where jury verdicts cannot be reconciled, “the only proper recourse is to remand the cause for a new trial.” *Blue Chelan, Inc. v. Dep’t of Labor & Indus.*, 101 Wn.2d 512, 515, 681 P.2d 233 (1984).

an external source, such as a statute or the common law, the party does not bring an action on the contract, even if the duty would not exist in the absence of a contractual relationship.” *Boguch v. Landover Corp.*, 153 Wn. App. 595, 615, 224 P.3d 795 (2009). This rule applies even when a statute alleged to have been violated is referenced by the contract. *Id.* at 617 (“Although the statute may be read as being incorporated into the listing agreement by reference, it does not follow that any act taken in fulfillment or derogation of that duty constitutes specific contractual performance or breach thereof.”).<sup>11</sup>

This Court in *Jenkins* confirmed that the duty at the very heart of the providers’ contract claim is an external statutory duty owed to clients. Medicaid comparability required that medical assistance “for any categorically needy *individual* ‘shall not be less in amount, duration, or scope’ than the assistance provided to any other categorically needy *individual*.” *Jenkins*, 160 Wn.2d at 296 (emphases added). The shared living rule violated Medicaid comparability because “some *recipients* are treated differently from other *recipients*[.]” *Id.* at 297 (emphases added). Federal statutes create privately enforceable rights only when Congress includes explicit “rights-creating language.” *Gonzaga Univ. v. Doe*, 536

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<sup>11</sup> Washington law has long held that duties imposed by external sources, such as statute or tort law, are not actionable as a breach of contract. *See Compton v. Evans*, 200 Wash. 125, 130, 93 P.2d 341 (1939) (distinguishing between the specific legal obligations created by a contract and legal duties from outside the contract, where the remedy would not lie as breach of contract).

U.S. 273, 290, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002). Moreover, as a matter of federal law, similar provisions of the Medicaid Act do not confer individually enforceable rights. *See Sanchez v. Johnson*, 416 F.3d 1051 (9th Cir. 2005) (Section 30A of Medicaid Act does not confer individually enforceable rights on recipients or providers).

The trial court recognized that Medicaid comparability “is a duty owed to the Department’s clients” and that “to permit the providers to avail themselves of a claim of breach of that duty, the duty must in some manner be extended to reach those providers.” VRP 2579. Contract law, however, cannot be used to enforce the Medicaid comparability duty when that obligation is not a term of the contract.<sup>12</sup>

Again, this shows why the providers failed to establish a legal basis for relief. DSHS grants public assistance to clients. It applies existing rules for public assistance because of state and federal laws. But those laws are independent of contracts with the providers. An error in determining client hours is not an error that accrues to an independent contractor if the contractor is paid for the amount of hours that DSHS actually authorized for the client.

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<sup>12</sup> The court allowed the providers to claim that complying with Medicaid comparability in setting hours was a contract term, instructing the jury on how this could be a necessarily implied contract term in Instruction No. 17. CP 2978. Because it was undisputed that DSHS applied the rule and that the rule violated Medicaid, the first jury verdict that DSHS did not breach a contract term necessarily finds that determining hours consistent with Medicaid was not a contract term.

**4. Allowing An Implied Covenant Claim Without A Contract Term Allows Endless Litigation By Contractors Over Legal Or Factual Mistakes In Public Assistance Decisions**

If a contract claim for good faith and fair dealing is applied to obligations outside any term of the contracts, it results in a remedy that is contrary to the public assistance statutes themselves. As a matter of law, a client must appeal an assistance decision within 90 days. RCW 74.08.080(2)(a); *infra* pp.57-64. After 90 days, a client's right to correct a mistake in hours is limited. A provider's implied covenant claim, however, could reach back six years. RCW 4.16.040(1). This expansive cause of action, unhitched from contract terms, undermines finality of public assistance and creates an immense fiscal uncertainty for complex federal and state programs that operate with limited public moneys.

In summary, DSHS past use of the shared living rule to determine hours, even if legally erroneous in light of *Jenkins*, cannot support legal relief under an implied covenant claim. Contractor rights are limited by contract terms. Rulemaking and assistance decisions by DSHS for clients are not private contractual obligations to Independent Contractors.

**B. The Court Erroneously Instructed The Jury Regarding The Providers' Claim For Breach Of The Implied Covenant Of Good Faith And Fair Dealing**

A "trial court's decisions on the underlying issues of law (as reflected in the instructions) are subject to full de novo review on appeal,

and not simply review for abuse of discretion.” 14A Karl B. Tegland, *Washington Practice: Civil Practice* § 31.17 (2009); *see also Monotype Corp.*, 43 F.3d at 451 (“Whether a jury instruction misstates the elements that must be proved at trial is a question of law that is reviewed *de novo*.”). The instructions on the implied covenant claim misinformed the jury on the law and elements in several respects.

First, the instructions compelled the jury to decide if DSHS’s application of the shared living rule to reduce client hours violated good faith, regardless of whether DSHS’s application of the shared living rule to determine client hours involved performance of a contract term. The instructions thus erred by relieving the jury of finding a fundamental element of the claim, because good faith and fair dealing applies only to performance of contract terms. *See supra* pp. 29-31.

Second, the instructions provided an erroneous legal standard for triggering an obligation of good faith and fair dealing. The jury was told that a good faith duty applied unless DSHS had “unconditional authority” to determine *a client’s* hours. This instruction imposed an implied covenant duty from the mere fact that government determination of public assistance is necessarily governed by various statutes and regulations.

Finally, the instructions gave the jury unbounded discretion to decide what breached the implied covenant. Instructions 25A and 35A,

offered by DSHS, would have properly limited the jury from considering facts not related to cooperative performance of a contract term.

**1. The Instructions Erroneously Directed The Jurors To Apply The Implied Covenant Directly To DSHS's Use Of The Shared Living Rule To Calculate Client Hours, When That Was Not A Term Of The Contract**

Instructions 18 (App. 8) and 19 (App. 9) addressed the implied covenant of good faith and fair dealing.<sup>13</sup> Instruction 19 errs by relieving jurors of the fundamental obligation to apply the implied covenant of good faith and fair dealing only to DSHS's performance of a specific contract term. Instruction 19, however, repeatedly commanded the jurors to apply a duty of good faith and fair dealing directly to DSHS's application of the shared living rule to reduce client hours, without regard to whether it was part of the contract. This error starts from the first sentence of Instruction 19:

*If you find that reduction of authorized hours by application of the Shared Living Rule was not part of the provider contract, you must consider the claim that the department violated the duty of good faith and fair dealing in applying the SLR.*

App. 8 (emphasis added).

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<sup>13</sup> Instruction 11 outlined the nature of this claim, stating that "the providers claim the contract includes an implied duty of good faith and fair dealing in the department's performance of the contract, specifically in making its determination of the maximum authorized hours for which it would compensate a provider. The providers claim that section 5.b of the provider contract obligated the department to pay for all authorized services provided under the contract and that the department breached the contract when it reduced authorized hours by application of the Shared Living Rule." CP 2972 (App. 4).

This instruction literally directed the jury to apply a good faith duty to “reduction of authorized hours by application of the Shared Living Rule,” by directing the jury to consider if DSHS violated the duty of good faith “in applying the SLR.” Moreover, the instruction told the jury that it “must” decide if DSHS violated the implied covenant even if the jury found “that application of the Shared Living Rule was not part of the provider contract.” This misstated the elements of an implied covenant claim. As a matter of law the implied covenant does not apply if DSHS’s use of the shared living rule to determine client hours was not the performance of a contract term. *See supra* pp. 29-31. If the jury found that “that reduction of authorized hours by application of the Shared Living Rule was not part of the provider contract,” the jury should have been excused from deciding if “applying the SLR” violated a duty of good faith and fair dealing.<sup>14</sup>

Instruction 19 then directs the jury to apply good faith directly to “reducing a client’s hours by application of the SLR” to decide if there was a “breach”:

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<sup>14</sup> Instruction 19 referred directly to DSHS’s action of determining client hours twice when instructing the jury on when the implied covenant applies. CP 2980 (“If you find the provider contract gives the department unconditional authority *to determine authorized hours in the client’s service summary*” and “does not give the department unconditional *authority to determine authorized hours . . .*”). Again, this formulation invited the jury to assume that determining hours was itself performance of a contract term.

To establish breach of the implied duty of good faith and fair dealing, providers must prove that *in reducing a client's authorized hours by application of the SLR*, the department acted in a manner that prevented the provider from attaining his or her reasonable expectations under the contract.

CP 2980 (App. 9) (emphasis added). This instruction empowered the jury to find a breach simply because “reducing a client’s authorized hours by application of the SLR” was an act that “prevented the provider from attaining his or her reasonable expectations.” Instruction 19, therefore, erred by disconnecting the implied covenant claim from a required element of the claim—performance of a contract term.

The harm from Instruction 19 is severe. First, the DSHS act (“reducing a client’s authorized hours by application of the SLR”) is the same act the jury found *did not* violate a term of the contract in the first special verdict. Second, the parties hotly disputed whether application of the CARE tool and shared living rule to determine client hours was a contract term. The crux of the provider’s breach of contract claim was that the contract terms included the process of determining client hours, but the crux of DSHS’s defense was that determining client hours was not the performance of a contract term. *See* VRP 2800-01 (providers’ rebuttal).

The Court should reverse based on Instruction 19 alone. Instruction 19 eliminated the jury’s obligation to limit the implied covenant claim to the performance of a contract term. It did this by telling

the jury to apply the implied covenant even if reduction of client hours using the rule was not part of the contract, and to decide simply whether reduction of client hours using the rule violated provider expectations. Instruction 19 left the jury no chance to limit the implied covenant solely to performance of an existing contract term, as required by the law. In substance, Instruction 19 constituted an erroneous conclusion of law that determination of client hours using the CARE tool rules was a term of the contract, but the court had no basis for such a conclusion of law. It turned the implied covenant into a free-floating obligation applied directly to DSHS's application of rules that regulate client hours, contrary to this Court's repeated holdings that the implied covenant does not create free-floating obligations. *See supra* pp. 29-31.

**2. The Instructions Erred By Imposing Implied Covenant Duties Simply Because Assistance Decisions For Clients Are Governed By Statutes And Regulations**

The second and third paragraphs of Instruction 18 (App. 8) misstated the law for deciding if implied covenant duties are triggered:

When parties to a contract, at the time of making the contract, defer a decision regarding performance terms of the contract, application of the duty of good faith and fair dealing in setting that unstated term at a later date depends upon the language of the contract. *If the contract grants one party unconditional authority to later set the term, the duty does not apply. On the other hand, if the contract is silent on how the term will be set, the party acting to set the term has the duty of good faith and fair dealing with respect to setting that term.*

If the duty applies, a party setting an unstated term of a contract must act in such a manner that each party will attain their reasonable expectations under the contract. Failure to act in this manner is a breach of the contract.

CP 2979 (emphasis added). This instruction contained two related conclusions of law. First, that the covenant of good faith and fair dealing must be applied if there is any “condition” on how the amount of client hours is set, or “if the contract is silent on how” the amount of hours will be set. Second, that setting hours must be an “unconditional” power to avoid a duty of good faith and fair dealing. Instruction 19 repeats this distinction, with “conditional” and contractual silence on one side, and “unconditional” on the other:

If you find the provider contract *does not give the department unconditional authority to determine authorized hours, or is silent as to the department’s authority*, you must then determine if the duty has been breached.

CP 2980 (App. 9) (emphasis added).

The providers illustrated how this instruction reflected an erroneous conclusion of law. The providers argued that the jury must apply good faith and fair dealing to the determination of client hours because of the “obvious” fact that federal laws governed how DSHS determined client hours:

*The State obviously had discretion, not unconditional authority in setting this term.* You’ll know

*that because the term – or how much they are paid or what the service hours are, are affected by federal guidelines, federal law, and this duty of good faith and fair dealing.*

VRP 2698 (emphasis added); VRP 2805 (rebuttal argument that because shared living rule violated Medicaid comparability, determining hours was not “unconditional” and the implied covenant applied). The legal test using “conditional,” “unconditional,” or “silence” is legal error because it triggered the implied covenant too easily, simply because federal laws govern that process for the benefit of clients and the public. This instruction erroneously expanded the implied covenant because every act by DSHS is conditioned by *some* law and, under this instruction, would be subject to an implied covenant.

As with Instruction 19, Instruction 18 led the jury away from addressing the required elements of an implied covenant claim. An implied covenant claim required the providers to prove that the process of determining client hours under public assistance laws was a contractual term. The instructions, however, concluded that any “condition” (including general federal Medicaid laws) and even “silence” with regard to DSHS’s legal authority to determine client hours, triggered the implied covenant duties for determining client hours.<sup>15</sup>

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<sup>15</sup> The fact that the implied covenant was triggered based on the existence of federal laws governing DSHS also supports DSHS’s primary argument that this case can be decided as a matter of law. Such federal requirements do not, as a matter of law,

**3. The Instructions Proposed By DSHS Would Have Preserved The Jury's Ability To Limit Good Faith And Fair Dealing To Performance Of Contract Terms**

DSHS argued against and formally objected to Instructions 18 and 19, proposing Instruction 35 (CP 2903 (App. 13)) in its place. VRP 2605. Instruction 35 stated the general principles of an implied covenant claim. Instruction 35, however, did not include the errors of Instructions 18 and 19. For example, Instruction 35 did not direct the jury to apply good faith and fair dealing directly to DSHS's use of the shared living rule to determine client hours even if that was not part of the provider contracts. It did not launch the jury into making legal judgments about whether setting hours was sufficiently "unconditional" or "conditional" or "silent." See *Zwink v. Burlington Northern, Inc.*, 13 Wn. App. 560, 536 P.2d 13 (1975) (error to submit issues of law to the jury). Finally, Instruction 35 would have provided an important clarification by emphasizing that the implied covenant

only requires that parties perform the obligations imposed by their contract in good faith. There is no "free floating" duty of good faith and fair dealing; the duty exists only in relation to performing a specific contract term.

CP 2903 (App. 13).

In contrast, Instructions 18 and 19 gave the jury discretion to go beyond the elements of an implied covenant claim. The jury was told to

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convert the public duty of determining client hours into a private contractual performance for the providers, subject to an implied covenant of good faith and fair dealing.

decide if application of the shared living rule to determine client hours “prevented the provider from attaining his or her reasonable expectations.”

This opened the door to a free-floating obligation of good faith, where DSHS must meet the providers’ expectations in adopting and applying public assistance rules to clients.

The court’s instructions also allowed the providers to argue for a free-floating obligation that DSHS give individualized notice to each provider about how client hours were calculated, without a contractual basis for such disclosures. Given the providers’ argument for a disclosure obligation, the court erred by not giving Instruction 35A (App. 14), which would have cautioned the jury not to misuse the fact that DSHS did not inform providers individually regarding the rules and processes that determine authorized client hours. CP 2904 (App. 14).

DSHS also proposed Instruction 25A, which would have explained that the CARE Tool, and statutes and regulations governing how DSHS determined hours, are not terms of the provider contracts merely because the contracts reference service plans or recite a statutory or administrative code provision. CP 2892 (App. 12). Given the providers’ legally mistaken reliance on federal laws to create an implied covenant, the court abused its discretion by not using this instruction to ensure that the providers were required to prove the essential element of an implied

covenant claim—the existence of a contractual term governing how DSHS determined client hours.

DSHS proposed instructions that accurately stated the law. Given the providers' invitation to impose free floating contractual obligations to DSHS acting in its governmental capacity when it adopted and applied rules for determining the client service hours, it was legal error to give Instructions 18 and 19, and abuse of discretion to refuse Instructions 35, 25A, and 35A.

**C. The Judgment To The Providers Is Not Subject To Prejudgment Interest Because It Is Not A Liquidated Amount Owed Under A Contract**

If the Court does not reverse the provider class judgment, it must address the award of more than \$38 million in prejudgment interest. Whether the court erred by awarding prejudgment interest depends on whether the provider class contract claims were liquidated or unliquidated. Whether a claim is liquidated or unliquidated presents a question of law reviewed de novo. *Dep't of Corr. v. Fluor Daniel, Inc.*, 160 Wn.2d 786, 789, 161 P.3d 372 (2007).

The claims by providers were unliquidated because the claims depended on *estimating* how the CARE tool would have individually assessed home assistance needs met by informal sources and shared benefits. The damage amounts were necessarily uncertain because they

depended on how an assessor would have exercised judgment and discretion in an individualized evaluation. The jury necessarily exercised discretion and judgment to determine damages, which means that the providers' claims were unliquidated. The court erred by concluding otherwise, and awarding prejudgment interest. CP 3414-16, 3459-63 (order awarding prejudgment interest).

**1. Prejudgment Interest May Be Awarded Where Claims Are “Liquidated,” But Not Where Claims Are “Unliquidated”**

“A party [claiming breach of contract] is entitled to prejudgment interest if the damages awarded are liquidated.” *Dep’t of Corr.*, 160 Wn.2d at 789. The test for whether a contract claim “was liquidated” asks if the court “could determine the amount precisely.” *Id.* at 790 (citing *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 723, 153 P.3d 846 (2007) (overtime is liquidated only when objective evidence indicates the amount due with exactness)). “[D]amages [are] considered ‘liquidated’ if they could be determined by ‘reference to a fixed standard contained in the contract, without reliance upon opinion or discretion[.]’” *Id.* at 789 (quoting *Mall Tool Co. v. Far W. Equip. Co.*, 45 Wn.2d 158, 176, 273 P.2d 652 (1954)).

Similarly, a claim is for a liquidated amount only “where the evidence furnishes data which, if believed, makes it possible to compute

the amount [of the claim] *with exactness, without reliance on opinion or discretion.*” *Hansen v. Rothaus*, 107 Wn.2d 468, 472, 730 P.2d 662 (1986) (emphasis added) (quoting *Prier v. Refrigeration Eng’g Co.*, 74 Wn.2d 25, 33, 442 P.2d 621 (1968)). “An unliquidated claim, by contrast, is one ‘where the exact amount of the sum to be allowed cannot be *definitely fixed* from the facts proved, disputed or undisputed, but must in the last analysis depend upon the opinion or discretion of the judge or jury as to whether a larger or a smaller amount should be allowed.’” *Hansen*, 107 Wn.2d at 473 (emphasis added). Under the test, a “claim is unliquidated, for instance, if the amount must be arrived at by a determination of reasonableness.” *McConnell v. Mothers Work, Inc.*, 131 Wn. App. 525, 536, 128 P.3d 128 (2006). Or, “if the factfinder must exercise discretion to determine the measure of damages, the claim is unliquidated.” *Car Wash Enterprises, Inc. v. Kampanos*, 74 Wn. App. 537, 549, 874 P.2d 868 (1994).

**2. The Providers’ Claims Depended On Estimating What Individual, Judgment-Based Determinations Of Hours Would Have Been In The Absence Of The Shared Living Rule**

Instruction 20 recognized that damages required the jury to determine the hours that would have been authorized in the absence of the shared living rule: CP 2981-82 (App. 10). Instruction 9 also told the jury that hours of assistance could consider informal supports. CP 2969

(App. 2). The instructions recognized that, without the shared living rule, DSHS assessors would have individually assessed each client's needs for various assistance tasks, and applied reasonable professional judgment to determine the extent needs were unmet, or if certain needs were one-quarter, one-half, three-quarters, or fully met by informal support.

The evidence confirmed that the provider claims depended on reasonableness and estimations; no evidence could definitively calculate the hours that would have been authorized after an individualized assessment of clients in the absence of the shared living rule. *See* VRP 1404-05, 1534, 1674, 1677, 2008, 2047, 2096. The damages evidence invited the jury to reasonably estimate the likely additional hours and did not give the jury objective facts to definitively or exactly calculate the claims. This characterization of the evidence for damages was conceded in the providers' closing argument:

The State, when they calculate damages, they considered informal supports and the shared living concept. *And it's actually a very fair way to look at this.* There's no doubt about that. . . . [DSHS's expert] Dr. Mancuso was very articulate in this. He said well, you know, before the Shared Living Rule, we looked at informal supports, and we looked at the shared living concept. And those are both fine concepts. *Nobody is attacking those concepts.*

VRP 2705 (emphases added) (plaintiff's closing argument). The providers asked the jury to reject Dr. Mancuso's approach; but agreed that there was no "right or wrong" number. VRP 2705. The providers stated that

Dr. Mancuso “*did not have the data* to accurately determine what the contract damages would be during the Shared Living Rule period. *He estimated it. He had to speculate on some level.*” VRP 2709 (emphasis added). The providers’ characterization is critical, because the verdict on damages reflected Dr. Mancuso’s evidence.<sup>16</sup>

The subjective and inexact nature of the providers’ claims is confirmed by considering a single provider. No provider had objective evidence to calculate with exactness the hours that would have been authorized for a client in the absence of the shared living rule. *E.g.*, VRP 2708. A case manager, client, provider, or expert could give a reasonable opinion on the results of an individual assessment under the CARE tool, but no such assessment had occurred. Therefore, every claim depended on multiple levels of reasonableness and discretion. First, it depended on an individual assessment that would have exercised reasonable professional

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<sup>16</sup> This view of the evidence is echoed by the findings of fact on the client class claim. The court recognized that the providers “sought recovery for all hours reduced because of the Rule regardless of shared benefits or informal supports” but DSHS “contended that recovery, if any, should account for shared benefits and informal supports.” CP 3472 (App. 23). The court found that, in the absence of the shared living rule, a case manager would have conducted an “individualized assessment” with “consideration of informal support and shared benefit” and that assessment could conclude the client’s needs were met, or partially met. CP 3472 (App. 23). The court also found that “[i]n performing this aspect of the individualized assessment, the case manager was expected to exercise professional judgment in determining a client’s needs.” CP 3472 (App. 23). The court found DSHS’s experts estimated the amount of assistance that would have been granted, and their “opinions and explanations” were “more persuasive” than plaintiffs’ attempt to ignore how a case manager’s judgment would have affected the hours that would have been granted in the absence of the shared living rule. CP 3473 (App. 24).

judgment. VRP 1283-84, 1307-09, 2505, 2516-17; CP 3472 (App. 23).

Second, the fact finder had to apply reasonableness and discretion to estimate the number of additional hours that might have been awarded in an individual assessment.

When DSHS's experts addressed damages, they explicitly depended on the need to estimate the results of individual assessments for which there was no data or objectively certain numbers. Their approach used the following steps:

- Using available data from application of the CARE tool, a statistician determined an average level of informal support available for shared living tasks for recipients with live-in providers, for each classification level of clients. The statistician used data from the period following the repeal of the shared living rule, when assessors for client's with live-in providers made the required individual judgments about informal supports for shared living tasks. VRP 2056-93.
- The statistician took the average levels of informal support from step one and adjusted it to account for certain demographic changes. The statistician applied those adjusted averages to members of the client class for the period when the shared living rule was applied. This estimated the hours that were likely to have been authorized to clients at different classification levels. VRP 2056-93.
- An accountant multiplied the additional authorized hours estimated by the previous steps by the applicable hourly rate for each provider class member. The accountant also made other adjustments including accounting for clients with more than one provider where one provider did not share living quarters, and accounting for a number of clients for whom the shared living rule was not applied while an administrative hearing was pending. VRP 2071-84.

The DSHS evidence estimated hours reduced by the shared living rule, compared to an individualized assessment, at between \$52.7 and \$61 million. VRP 2144, 2171-84. The jury verdict was in the middle of the state's range, \$57,123,794.50 (CP 2976 ), but entirely rejected the providers' approach pinning damages at \$90 million.

**3. The Provider Claims Were Unliquidated And Did Not Warrant Prejudgment Interest**

Whether the claims were unliquidated or liquidated depends on the nature of the claim. Here, the nature of the provider claims is established by the jury that relied on DSHS's experts who, in the providers' words, "estimated" the damages. VRP 2708. Because the damages claims depended on estimations, the court should have concluded that the claims were not determined "by computation with reference to a fixed standard contained in the contract, without reliance on opinion or discretion." *Hansen*, 107 Wn.2d at 472 (quoting *Prier*, 74 Wn.2d at 32). There is no dispute that state experts did not use objective facts to determine with exactness the additional hours that would have been authorized because no such objective, exact numbers existed. VRP 2056-93, 2708.

The provider claims, therefore, are legally analogous to unliquidated claims that depend on reasonableness to determine the amount. In *Segall v. Ben's Truck Parts, Inc.*, 5 Wn. App. 482, 486, 488 P.2d 790 (1971), the claim was unliquidated because the amount due was

determined not based on “the mathematical process of computation” but on evidence “establish[ing] the reasonable value of the service.” In *Ski Acres Development Co. v. Gorman*, 8 Wn. App. 775, 781, 508 P.2d 1381 (1973), the amount of the claim for work was not based on objective facts but on “the reasonableness of the costs of repairs.” In *Aker Verdal A/S v. Neil F. Lampson, Inc.*, 65 Wn. App. 177, 828 P.2d 610 (1992), the plaintiff’s claim for labor was unliquidated because there was no objective measure that could resolve the dispute about labor costs. “Since it was within the jury’s discretion to determine a reasonable hourly rate, the labor costs were unliquidated.” *Id.* at 192.

Dependence of estimation and reasonableness distinguishes the cases involving liquidated claims. For example, *McConnell*, involved back wages where the amount of the claim was based on multiplying unpaid hours worked by the hourly rate, and the jury determined an objective fact—the exact number of unpaid hours worked. *McConnell*, 131 Wn. App. at 536. In *Stevens v. Brink’s Home Security, Inc.*, 162 Wn.2d 42, 50, 169 P.3d 473 (2007), the Court held that a claim for back wages was liquidated when the hours worked reflected the objective fact of driving times, which were multiplied to determine the amount of the claim. Driving time is an objective, knowable fact, but the likely public assistance hours for clients is not. Similarly, in *Bostain*, the claim amount

was liquidated because it was based on “*objective* evidence of the overtime due,” an audit of logs showing exact time worked. *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 723, 153 P.3d 846 (2007) (emphasis added).

A claim amount is not liquidated where the claim depended on reasonable estimation of assistance hours likely to have been granted after individualized evaluations using professional judgment. Therefore, if the Court upholds the judgment for the provider class, it should reverse the order granting prejudgment interest.

**D. RCW 74.08.080 Makes Public Assistance Awards Final If Not Appealed Within 90 Days, And Bars Judicial Review Of Public Assistance Decisions Issued Before February 2007; Public Assistance Decisions That Are Not Time Barred Are Barred Because Clients Failed To Exhaust Administrative Remedies**

The client class obtained no relief after the court concluded that it could not recover for the same damages claimed by the provider class. CP 3474 (App. 25-27), 3477-79 (Judgment). To preserve objections, and because the client class claims need to be explained to understand the provider claim, DSHS assigns errors regarding the court’s orders on the client class claim in this brief.

The court erred by concluding that the APA and RCW 74.08.080 provide authority to review unappealed, long-final DSHS public assistance decisions. Under the 90 day statutory time limit for appeals, review of the

client class public assistance decisions was time barred, except for decisions issued within 90 days of the May 4, 2007, complaint. With regard to those DSHS decisions that were not time barred, the court should have concluded that judicial review was barred because of failure to exhaust administrative remedies.

**1. Standard Of Review**

The court's decisions regarding the statutory time limits for appeals, finality, and exhaustion requirements were made on motions for partial summary judgment, which this Court reviews de novo. *See, e.g., Elcon Const., Inc. v. Eastern Washington Univ.*, \_\_ Wn.2d \_\_, 273 P.3d 965 (2012). Whether statutory time limits and the requirement to exhaust administrative remedies bars the client class judicial review claims present questions of law that this Court reviews de novo. *See, e.g., Goodman v. Goodman*, 128 Wn.2d 366, 373, 907 P.2d 290 (1995) (“Whether the statute of limitations bars a suit is a legal question[.]”); *Estate of Friedman v. Pierce Cnty.*, 112 Wn.2d 68, 75, 768 P.2d 462 (1989) (whether exhaustion of administrative remedies would have been futile is a question of law for the court).

**2. The Superior Court Erred By Concluding It Could Conduct Judicial Review Of Unappealed Public Assistance Decisions Outside The Statutory Time Limit For Appeals In RCW 74.08.080(2)**

The substance of the client class claim asked the court for judicial review of DSHS's public assistance decisions dating back to April 2003, when DSHS first used the shared living rule in assessing clients. The APA, however, does not authorize compensation or damages on judicial review. A court "may award damages [or] compensation . . . only to the extent expressly authorized by another provision of law." RCW 34.05.574(3). The client class relied on RCW 74.08.080, the statute allowing administrative and judicial appeals of public assistance decisions. *See* Pretrial VRP 156; Suppl. CP Attach. B at 23 (Second Amended Class Action Complaint). RCW 74.08.080 does not create perpetual rights to judicial review.

**a. RCW 74.08.080 Provides Explicit Time Periods For Appeal Of DSHS Benefit Decisions**

The bulk of the client class claim for judicial review is time barred because RCW 74.08.080(2)(a) requires that a client pursue a remedy within 90 days of a challenged notice of public assistance:

(1)(a) A public assistance applicant or recipient who is aggrieved by a decision of the department or an authorized agency of the department has the right to an adjudicative proceeding. . . .

(2) . . . (a) The applicant or recipient *must* file the application for an adjudicative proceeding with the secretary *within ninety days after receiving notice of the aggrieving decision.*

(Emphases added.)

Judicial review, addressed in subsection (3), assumes the applicant or recipient has timely exercised the administrative remedy in subsection (2). Subsection (3) provides that the applicant or recipient may “file[] a petition for judicial review as provided in RCW 34.05.514 of an adjudicative order entered in a public assistance program[.]” In a judicial review of a timely appeal of a DSHS decision, the court may correct the assistance “from date of the denial of the application for assistance . . . or in the case of a recipient, from the effective date of the local community services office decision.”<sup>17</sup> RCW 74.08.080(3).

RCW 74.08.080(2)(a) and (3) impose clear time limits to appeal public assistance decisions. Specifically, the recipient may challenge an assistance award within a 90-day period by seeking administrative review, and may pursue judicial review within 30 days after an administrative decision. RCW 34.05.542(3). Decisions not challenged within 90 days are, therefore, final and not subject to an appeal. The client class judicial review claim was filed May 4, 2007. Public assistance decisions more

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<sup>17</sup> The “local community services office decision” is reflected in the planned action notice (PAN) provided to each client following a CARE assessment.

than 90 days old were already *final* under RCW 74.08.080(2)(a). The court should have dismissed judicial review of DSHS assistance decisions made before February 4, 2007 (90 days before the complaint).

This conclusion follows from this Court's ruling dismissing a class action similarly based on a statutory claim for relief. In *Lacey Nursing Center, Inc. v. Department of Revenue*, 128 Wn.2d 40, 905 P.2d 338 (1995), a class of persons sought tax refunds. The Court dismissed the case because there are "specific conditions upon taxpayers seeking excise tax refunds." *Id.* at 50. When a class pursues a statutory cause of action for monetary relief against the state, *the entire class* must show that it fulfilled the requirements of statute. *Lacey Nursing Ctr.*, 128 Wn.2d at 50. Therefore, a class cannot bypass the requirements set by RCW 82.32.180 for excise tax refund suits.

*The [class members] did not satisfy the statutory requirements of RCW 82.32.180. And, logically, unnamed and unidentified plaintiffs in a class action could not satisfy those requirements. We therefore reverse the decision of the trial court that an excise tax refund lawsuit could be maintained as a class action under RCW 82.32.180.*

*Lacey Nursing Ctr.*, 128 Wn.2d 51-52 (emphasis added) (footnote omitted).<sup>18</sup>

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<sup>18</sup> The ruling enforced statutory requirements that each taxpayer "must (1) identify themselves, (2) state the correct amount of tax each concedes to be the true amount, (3) state reasons why the tax should be reduced or abated, and then (4) prove that the tax paid by the taxpayer is incorrect. The taxpayer must satisfy those specific conditions to initiate an excise tax refund appeal." *Lacey Nursing Ctr.*, 128 Wn.2d at 50.

The client claim also depends on statute and, therefore, *Lacey Nursing Center* applies and the clients must meet statutory time limits. Judicial authority to review an agency action requires a timely petition for judicial review. See, e.g., *Skagit Surveyors & Eng'rs, LLC v. Friends Of Skagit Cnty.*, 135 Wn.2d 542, 556-79, 958 P.2d 962 (1998) (compliance with statute required to invoke jurisdiction to conduct judicial review).

**b. Washington Courts Have Long Held That Agency Decisions Are Given Finality Unless Appealed Within The Time Limits And Boundaries Allowed By Law**

Washington courts have long recognized that unappealed agency decisions are final, and that untimely attempts to challenge unappealed agency decisions are time barred. *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 886 P.2d 189 (1994) (unappealed L&I decisions on worker compensation benefits become final and bar later administrative or judicial review of the unappealed decision). *Marley* concerned an L&I agency-level decision granting benefits to a deceased worker's sons, but denying benefits to his surviving spouse. *Id.* at 536. L&I informed the surviving spouse of the decision and that she had to exercise administrative appeal rights within 60 days. *Id.* Several years later, the spouse tried to challenge the decision. This Court held that the initial agency decision became final and binding when it was not appealed in the time allowed by statute, describing the result as "claim preclusion." *Id.* at

537-38 (citing Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 Wash. L. Rev. 805, 825-26 (1985)). The *Marley* Court explained:

If a party to a claim believes the Department erred in its decision, that party *must* appeal the adverse ruling. The failure to appeal an order, *even one containing a clear error of law, turns the order into a final adjudication*, precluding any reargument of the same claim.

*Marley*, 125 Wn.2d at 538 (emphases added). “‘Obviously the power to decide includes the power to decide wrong, and an erroneous decision is as binding as one that is correct until set aside or corrected in a manner provided by law.’ *Freeman on Judgments*, 5th Ed., section 357, p. 744.” *Id.* at 543.

This Court reaffirmed the finality of unappealed agency decisions a few years after *Marley*, explaining the long history of this rule. The time limits for administrative or judicial review

provide[] finality to decisions of the Department. An unappealed Department order is res judicata as to the issues encompassed within the terms of the order, absent fraud in the entry of the order, as we stated in *Abraham v. Department of Labor & Indus.*, 178 Wash. 160, 34 P.2d 457 (1934)[.]

*Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 169, 937 P.2d 565 (1997). Again, the recipient's “failure to appeal within the required 60 days” barred review “even where the decision by the Department may have been wrong[.]” *Id.* at 170. “[A]n erroneous decision by the

Department which was not timely appealed is final and binding on all parties, and cannot be reargued by a claimant.” *Id.*

Finality of agency decisions has barred claimants who, like the client class, rely on a decision of this Court to seek review of past agency decisions. In *Hyatt v. Department of Labor & Industries*, 132 Wn. App. 387, 132 P.3d 148 (2006), a group of workers claimed that L&I erred in deciding their time-loss compensation rates by not accounting for the value of health benefits. This Court had just decided *Cockle v. Department of Labor & Industries*, 142 Wn.2d 801, 16 P.3d 583 (2001), holding that L&I time-loss decisions must account for the value of such health benefits. The court held that the unappealed agency decisions were final and binding, and barred the untimely appeals. *Hyatt*, 132 Wn. App. at 394-95.

There is no good reason why finality would vary between unappealed L&I decisions and unappealed DSHS decisions. For both decisions, statutes provide deadlines for administrative and judicial review. Both involve agency-level decisions determining a person’s right to benefits, where the decision explicitly notified the client of the deadlines for appeals. The finality of public assistance decisions is, if anything, more appropriate. A public assistance recipient has a longer period to challenge a DSHS decision, plus applicants and recipients are

reassessed at least annually. In contrast, the errors claimed in *Marley*, *Kingery*, and *Hyatt* will not be corrected by a future reassessment.

**c. The Superior Court Erred By Concluding That It Could Avoid Or Equitably Toll The Statute Of Limitations For Challenging DSHS Decisions**

The superior court's rulings struggled with the time bar of RCW 74.08.080 because the client class tried to equate itself with the *Jenkins* plaintiffs. The *Jenkins* plaintiffs, however, timely sought administrative and judicial review. The client class, in contrast, waited until after *Jenkins* to sue over DSHS decisions made during the same time, or even before the decisions challenged by the *Jenkins* plaintiffs.

In its second set of rulings on the client class claim, the court recognized it needed to decide “[h]ow far back this retroactive recovery . . . should be permitted to go[.]” Pretrial VRP 157. By the third ruling, the court agreed that the 90-day limit in RCW 74.08.080(2) applied to “run-of-the-mill appeals resulting in compensatory recovery” imposing a time bar based on the “date of the local community services office decision.” Pretrial VRP 234. The court then erred by concluding it could bypass the statute to review the decisions at issue.

First, the court reasoned that the 90-day requirement in RCW 74.08.080(2) could not affect jurisdiction, citing to its own conclusion that it had jurisdiction. Pretrial VRP 235. This reasoning was

circular and erroneous. The time limits in RCW 74.08.080(2) and (3) define finality, and the legislature undoubtedly may limit a court's power to conduct judicial review of public assistance decisions. *See Skagit Surveyors & Eng'rs*, 135 Wn.2d 542; *Bock v. Bd. of Pilotage Comm'rs*, 91 Wn.2d 94, 97, 100, 586 P.2d 1173 (1978).

Second, the court concluded that res judicata or claim preclusion, did not bar review of the thousands of unappealed public assistance decisions. Pretrial VRP 236. This conclusion was error as shown by the *Marley/Kingery/Hyatt* line of cases discussed above. Under those cases, the statutory finality of an unappealed agency decision bars an untimely appeal or judicial review, which this Court described as "claim preclusion" and "res judicata." *Kingery*, 132 Wn.2d at 169; *Marley*, 125 Wn.2d at 537-38.

Third, the court concluded that it could equitably toll the statutory time limit. The court relied on an erroneous view that such tolling was entirely within its discretion. Pretrial VRP 247. This conclusion was error because the court used equitable powers to displace legislative policies for finality. As the Court in *Kingery* held, equitable powers to "undo" an unappealed, final agency order are "very narrow" and "rarely exercised." *Kingery*, 132 Wn.2d at 173. The "key" to avoiding finality depends entirely upon: (1) a claimant's legal incompetency to understand an order,

and (2) “misconduct on the part of the [agency] in communicating its order to the claimant.” *Id.* at 174.

The superior court’s equitable tolling ruling did not address or find that the client class members all met the two “keys” in *Kingery*. There was no showing that clients were legally incompetent or lacked competent guardians, or that their failure to seek timely judicial review was caused by incompetence. There was no showing that DSHS committed any misconduct causing the client class to fail to seek timely review, particularly where it was undisputed that decisions were always accompanied by notice of appeal rights. The client class simply waited until May 2007 because it was waiting for *Jenkins* to be decided.

The superior court erred because it substituted reasons for tolling that violated the narrow exception in *Kingery*. It reasoned that the class representatives were “diligent” by *waiting* until after *Jenkins*, concluding it might have been “wasteful and impractical” or “risky” to sue before *Jenkins*. Pretrial VRP 240-42. This is not diligence by any ordinary measure, and it is immaterial. It does not show agency misconduct prevented the class from seeking review of public assistance decisions long before May 2007. It also overlooks the obvious: the *Jenkins* plaintiffs were able to file timely challenges to 2004 DSHS decisions.

The court also reasoned that DSHS had responsibilities to clients, that DSHS knew its rule was being challenged, knew two superior courts had ruled against the rule, that DSHS would not be prejudiced, and that these facts together justified bypassing the statutory time limit. Pretrial VRP 245. This is immaterial because it is not misconduct that prevented the clients from filing earlier. Moreover, using these facts is arbitrary, because similar facts will exist in every application of RCW 74.08.080. DSHS always deals with needy and/or disabled clients, and DSHS will always know its rule was being challenged if rule invalidity is the basis for the untimely appeal of a public assistance decision.

The court reasoned that DSHS had created a “barrier” because administrative law judges (ALJs) could not have invalidated the shared living rule if a timely hearing had been requested. Futility of administrative remedies does not excuse the statutory time limit; it addresses only whether a client can skip administrative remedies and proceed to court. RCW 34.05.534(3). If the class believed that exhaustion was futile, it could have still sought judicial review of assistance decisions with a timely judicial challenge to such decisions.<sup>19</sup>

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<sup>19</sup> Moreover, the inherent limit on ALJ power to review rules is an untenable reason for equitable tolling. It is not agency misconduct that ALJs lack authority to invalidate rules. ALJs are required to *apply* agency rules to adjudicative proceedings. The legislature did not give ALJs the judicial branch’s authority to review and invalidate agency rules under RCW 34.05.570(2).

Last but not least, the court relied on a flawed assumption that it did not need to be concerned about resurrecting claims or imposing fiscal impacts on the taxpayers. Pretrial VRP 249. This reasoning usurped the legislative decision to place time limits on review of DSHS decisions. It also contradicted this Court's decisions recognizing that unappealed agency decisions have finality. Moreover, the court should consider fiscal repercussions. Public assistance programs depend on annual budget forecasting to plan the careful use of tax dollars. Budgeting certainty is undermined if there is no finality for bringing claims alleging errors in past public assistance decisions.

For all these reasons, the court erred when it concluded that it did not have to apply the statutory time limit. Tolling the statute constituted legal error and abuse of discretion. This Court should hold RCW 74.08.080 barred judicial review of DSHS assistance decisions made more than 90 days before the May 2007 complaint.

**3. The Court Erred By Ruling That The Class Representatives And Members Were Not Required To Use Available Administrative Remedies Readily Available At The Time Of The Suit In May 2007**

As discussed above, the only decisions not time barred as of the May 2007 complaint relate to DSHS decisions made within the 90 days before the complaint (Feb. 4, 2007). Judicial review of the DSHS decisions made within 90 days before the complaint was barred because

the class representatives and members were required to exhaust a readily available administrative remedy.<sup>20</sup>

**a. Exhaustion Is Required By The APA And Case Law**

Under RCW 34.05.534, a “person may file a petition for judicial review under this chapter only after exhausting all administrative remedies available within the agency whose action is being challenged, or available within any other agency authorized to exercise administrative review[.]” By May 4, 2007, clients had an obvious administrative remedy. This Court had invalidated the shared living rule in *Jenkins*. Therefore, ALJs could be asked to apply *Jenkins* and conclude that a DSHS decision based on the invalidated rule should be corrected (if the decision was not time barred).

The exceptions to the exhaustion requirement are set forth in RCW 34.05.534(3), but none apply here:

- (a) The remedies would be patently inadequate;
- (b) The exhaustion of remedies would be futile; or
- (c) The grave irreparable harm that would result from having to exhaust administrative remedies would

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<sup>20</sup> DSHS made an offer of proof with regard to damages based on a scenario where the client class’ failure to exhaust administrative remedies was excused for the public assistance decisions made within 90 days of the May 2007 complaint, but where the statute barred review of client class claims from more than 90 days before the complaint. VRP 2292-97. Depending on assumptions, damages for this scenario were approximately \$8 or \$9 million to the client class.

clearly outweigh the public policy requiring exhaustion of administrative remedies.

An administrative remedy on May 2007 would be adequate for any client whose claim was not time barred, because it would order the assistance to be recalculated. There is no reasonable basis for claiming futility after May 3, 2007, because ALJs and DSHS are bound to follow *Jenkins* and conclude that a public assistance decision based on the rule should be corrected. There is no “grave irreparable harm” that results from using this remedy.

The superior court erred because its rulings on futility only examined circumstances before *Jenkins*. The court did not address the remedy available *at the time of the complaint*. Because decisions before February 4, 2007, (90 days before the complaint) were time barred, the relevant legal question was whether client class representatives and members should have exhausted an administrative remedy in May 2007. The answer to this question is yes.

**b. Class Actions Do Not Excuse Exhaustion Requirements For Class Representatives**

The court expressed concern that class actions were not available at the administrative level, so that an administrative remedy would not have universally aided client class members. The holding in *Lacey Nursing Center* demonstrates that class actions are not an exception for

class representatives or members to avoid statutory requirements. Moreover, the APA provides that court rules regarding “class actions” apply only “to the extent not inconsistent with this chapter[.]” RCW 34.05.510(2). Accordingly, the exhaustion requirement should not be suspended merely because a class action provides a broader remedy for more class members. The APA still governs the review of client class decisions and exhaustion was required by law.

**E. Attorney Fees And Costs**

As of the date of this brief, the trial court had not ruled on post-judgment motions for attorney fees and cost motions. DSHS reserves the right to file a supplemental notice of appeal and briefing to address attorney fees and cost decisions by the trial court. At this time, DSHS objects to any award of fees and costs on the basis that the plaintiffs should not prevail.

**VI. CONCLUSION**

The Court should reverse and dismiss the judgment for the providers and enter judgment for DSHS on the providers’ implied covenant claim. In the alternative or additionally, the Court should conclude that the jury instructions were error, and reverse the judgment for the provider class. The Court should also reverse the court’s award of prejudgment interest on the provider class claims. Finally, the Court

should deny relief to the client class and conclude that judicial review of DSHS decisions made more than 90 days before the complaint were final and not subject to appeals, and that DSHS decisions made within 90 days before the complaint were barred by the client class members' failure to exhaust administrative remedies.

RESPECTFULLY SUBMITTED this 25th day of May 2012.

ROBERT M. MCKENNA  
*Attorney General*



Jay D. Geck, WSBA 17916  
*Deputy Solicitor General*

Christina Beusch, WSBA 18226  
*Deputy Attorney General*

Carrie L. Bashaw, WSBA 20253  
*Senior Counsel*

Michael M. Young, WSBA 35562  
*Assistant Attorney General*

Attorneys For Appellants

# APPENDIX

FILED  
SUPERIOR COURT  
THURSTON COUNTY, WA

2010 DEC 20 PM 3:11

BETTY J. GOULD, CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF THURSTON

LEYA REKHTER et al., )  
 )  
 Plaintiffs, )  
 vs. )  
 )  
 STATE OF WASHINGTON, )  
 DEPARTMENT OF SOCIAL AND )  
 HEALTH SERVICES, et al., )  
 Defendants. )  
 \_\_\_\_\_ )

NO. 07-2-00895-8

COURT'S INSTRUCTIONS  
TO THE JURY  
(Original Set)

Dated December 16, 2010

  
Thomas McPhee, Judge

#### Instruction No. 8

Under the Shared Living Rule, the department did not authorize hours for shopping, housework, laundry, meal preparation, or wood supply when the client lived in the same household as his or her care provider. The department began applying the Shared Living Rule on April 1, 2003 and continued applying it through June 30, 2008.

#### Instruction No. 9

A client care plan may reduce a client's authorized hours when there is a person, other than the provider, available to provide the support. This person is called an "informal support," which means it is a person or resource available to provide assistance with certain care tasks without being paid by the department to do so. A live-in provider may also be determined to be an informal support for some activities of daily living (ADL) or Instrumental Activities of Daily Living (IADL) tasks.

### Instruction No. 11

The following is a summary of the claims of the parties provided to help you understand the issues in the case. You are not to take this instruction as proof of the matters claimed. It is for you to decide, based upon the evidence presented, whether a claim has been proved.

The providers claim the department entered into a contract with each provider that:

1. Required the provider to perform for the client identified in the contract all services determined by the department to be necessary in annual care plans prepared by the department for the client and stated in the service summary.
2. Required the department to pay the provider for services performed at an hourly rate fixed by law or collective bargaining agreement up to the maximum number of hours determined in the care plan and stated in the service summary.

The providers claim the provider contract incorporated by reference the care plan and assessment process prepared annually for the client, including the algorithm (i.e., formula) for determining the maximum number of hours the department was obligated to compensate the provider.

The providers claim that for the period April 1, 2003 to June 30, 2008, the algorithm used by the department to determine the maximum compensable hours in a client care plan was invalid because it did not comply with Medicaid comparability law. The providers claim the provider contract included an implied duty of the

[Instruction No. 11, page 2]

department to comply with law governing the Medicaid programs administered by the department.

The providers claim the contract must be modified to exclude that invalid portion of the algorithm, and that when so modified, the department has failed to compensate the provider for the hours of service determined in the client's care plan.

The providers claim the department breached the contract with the provider by failing to compensate the provider up to the maximum number of hours authorized in each care plan, as modified to remove the invalid automatic exclusion under the Shared Living Rule.

Alternatively, the providers claim the contract includes an implied duty of good faith and fair dealing in the department's performance of the contract, specifically in making its determination of the maximum authorized hours for which it would compensate a provider. The providers claim that section 5.b. of the provider contract obligated the department to pay for all authorized services provided under the contract and that the department breached the contract when it reduced authorized hours by application of the Shared Living Rule.

Alternatively, the providers claim that the provider contract contains inconsistencies concerning payment that must be resolved by applying the Order of Precedence Clause in the contract and construing the inconsistencies against the department. When so construed, providers claim the department breached the contract.

[Instruction No. 11, page 3]

The providers claim they sustained damages as a result of these claims, and they seek judgment against the department for these damages.

The department claims that only the annual care plans and service summary are incorporated by reference into the contracts with the providers. The department further contends that contract directs that a provider is authorized, under the care plan and at the direction of the client, to perform any of the services identified in service summary or assessment documents up to the amount of hours authorized. The department contends that the process of determining those hours is solely the department's authority; and that the process of determining hours for the client is an obligation to the client, and not an obligation to the provider.

The department denies that the algorithm, the CARE tool, general references to rules or regulations (WACs or RCWs) or any document relating to the assessment process of the client is incorporated by reference in the provider contract. The department denies there are any implied terms in the provider contract.

The department contends that the contract did not require it to retroactively increase the authorized hours and payment to the providers if at a later date it was determined that the client's authorized hours were not determined correctly.

The department denies that section 5.b. of the provider contract obligates it to pay for "all services". In addition, the department contends that, as to the providers, it has no duty to assess clients in a particular manner and that section 5.b. does not preclude it from

[Instruction No. 11, page 4]

reducing hours as a result of that assessment process and denies that it breached an implied duty of good faith and fair dealing in those determinations.

Finally, the department denies that the providers were damaged as a result of the Shared Living Rule. The department disputes the formula providers used to calculate damages and denies the extent of claimed damages.

#### Instruction No. 12

The providers have the burden of proving each of the following propositions on their claim of breach of contract:

(1) That the department entered into a contract with the providers.

(2) That the provider contract includes the terms that the providers contend the department breached.

(3) That the department breached the provider contract in one or more ways claimed by the providers.

(4) That the providers were damaged as a result of the department's breach.

If you find from your consideration of all the evidence that each of these propositions has been proved, your verdict should be for the providers on the claim for breach of contract. On the other hand, if any of these propositions has not been proved, your verdict should be for the department on this claim.

### Instruction No. 17

In assessing for eligibility and need of its clients for long term care services and in providing such services to its clients, the department has a duty to comply with law governing the Medicaid programs administered by the department. This duty is owed to the department's clients.

To extend this duty to providers, the providers must prove that the duty to comply with law governing the Medicaid programs administered by the department was an implied duty of the provider contract.

In determining whether providers have proved the implied duty in the provider contract, you must consider the following principles:

(1) An implied contractual duty must arise from the language used in the contract or it must be indispensable to effectuate the intention of the parties.

(2) It must appear from the language used in the contract that the implied contractual duty was so clearly within the contemplation of the parties that they deemed it unnecessary to express it.

(3) A promise to perform a duty can be implied only where it can be rightfully assumed that the promise would have been made expressly if attention had been called to it.

(4) There can be no implied promise where the subject is completely covered by the contract.

Instruction No. 18

A duty of good faith and fair dealing is implied in every contract. It exists only in relation to the performance of specific terms in the contract and cannot be used to contradict contract terms or require a party to accept new or different contract obligations. This duty requires the parties to cooperate with each other so that each may obtain the full benefit of contract performance.

When parties to a contract, at the time of making the contract, defer a decision regarding performance terms of the contract, application of the duty of good faith and fair dealing in setting that unstated term at a later date depends upon the language of the contract. If the contract grants one party unconditional authority to later set the term, the duty does not apply. On the other hand, if the contract is silent on how the term will be set, the party acting to set the term has the duty of good faith and fair dealing with respect to setting that term.

If the duty applies, a party setting an unstated term of a contract must act in such a manner that each party will attain their reasonable expectations under the contract. Failure to act in this manner is a breach of the contract.

Instruction No. 19

If you find that reduction of authorized hours by application of the Shared Living Rule was not a part of the provider contract, you must consider the claim that the department violated the duty of good faith and fair dealing in applying the SLR

To prevail on this claim the providers must prove first, that the duty applies, and second, that the department breached the duty.

If you find that the provider contract gives the department unconditional authority to determine authorized hours in the client's service summary, the duty does not apply and the claim has not been proved.

If you find the provider contract does not give the department unconditional authority to determine authorized hours, or is silent as to the department's authority, you must then determine if the duty has been breached. To establish breach of the implied duty of good faith and fair dealing, providers must prove that in reducing a client's authorized hours by application of the SLR, the department acted in a manner that prevented the provider from attaining his or her reasonable expectations under the contract.

Instruction No. 20

It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages the court does not mean to suggest for which party your verdict should be rendered.

In order to recover actual damages, the providers have the burden of proving that the department breached the provider contract in one of the ways claimed by providers, and that providers incurred actual economic damages as a result of the department's breach, and the amount of those damages.

If your verdict is for the providers and if you find the providers proved that they incurred actual damages for the breach of contract and the amount of those actual damages, then you shall award actual damages to the providers on this claim.

Actual damages are those losses that were reasonably foreseeable, at the time the contract was made, as a probable result of a breach. A loss may be foreseeable as a probable result of a breach because it follows from the breach either

- (a) in the ordinary course of events, or
- (b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.

In calculating the providers' actual damages, you should determine the sum of money that will put the providers in as good a position as they would have been in if both providers and the department had performed all of their promises under the contract.

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FILED  
SUPERIOR COURT  
THURSTON COUNTY, WASH.

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BETTY J. GOULD, CLERK

BY \_\_\_\_\_  
DEPUTY

STATE OF WASHINGTON  
THURSTON COUNTY SUPERIOR COURT

LEYA REKHTER, et al.,

Plaintiffs

v.

STATE OF WASHINGTON  
DEPARTMENT OF SOCIAL AND  
HEALTH SERVICES, et al.,

Defendants

NO. 07-2-00895-8

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DEFENDANTS' PROPOSED JURY INSTRUCTIONS (CITED)  
AND SPECIAL VERDICT FORM (DECEMBER 14, 2010)

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Respectfully submitted,

ROBERT M. MCKENNA  
Attorney General of Washington



CARRIE L. BASHAW, WSBA #20253

WILLIAM G. CLARK, WSBA #9234

Senior Counsel, Assistant Attorneys General

MICHAEL M. YOUNG, WSBA # 35562

Assistant Attorney General

Attorneys for Defendants

#### INSTRUCTION NO. 25A

Contracts may contain terms that exist entirely in documents or materials outside the contract document itself through contract language that incorporates those documents by reference into the contract document. An example of incorporation by reference is found in Trial Exhibit 66, paragraph 10(a), which specifically incorporates by reference the client Service Summaries into the contracts. The effect of incorporation by reference is to make the Service Summaries a part of the contract.

However, not every reference in a contract to documents, materials, rules, regulations, RCWs or WACs or other items found outside the contract itself makes the referenced items a part of the contract. Though the contracts between the department and the providers have terms in the contract that refer generally to federal and state law or to specific provisions of the Revised Code of Washington (RCW) or to the Washington Administrative Code (WACs), the contracts do not incorporate those federal or state laws, including the WACs, into the provider contracts. Specific provisions of federal and state law are not terms incorporated by reference into these contracts like the service summary is incorporated by reference into the contracts.

Similarly, the provider contracts do not incorporate by reference the department's manner or processes for assessing the needs of the clients. The CARE Tool and Legacy assessment mechanisms/processes are not a part of the terms of the provider contracts.

This Court's ruling of December 9, 2010 re: the departments' CR 50(a) Motion.

#### INSTRUCTION NO. 35

While every contract has an implied duty of good faith and fair dealing, that implied duty exists only in relation to the performance of specific terms in the contract. The duty of good faith and fair dealing cannot be used to contradict contract terms and it does not require a party to accept new or different contract obligations. Moreover, while this duty obligates the parties to cooperate with each other so that they each may obtain the full benefit of contract performance, the duty of good faith does not inject or create substantive terms into the parties' contract. It only requires that parties perform the obligations imposed by their contract in good faith. There is no "free floating" duty of good faith and fair dealing; the duty exists only in relation to performing a specific contract term.

Adapted from *Carlile v. Harbor Homes, Inc.*, 147 Wn. App. 193, 215-16, 194 P.3d 280 (2008) and *Johnson v. Yousoofian*, 84 Wn. App. 755, 930 P.2d 921, review denied, 132 Wn.2d 1006 (1996).

INSTRUCTION NO. 35A<sup>1</sup>

The providers are contending that the department breached their contracts by not informing the providers of the paid hours impacted as a result of assessing clients under the shared living rule and by not informing the providers of the existence and status of litigation in state courts over the shared living rule.

The duty to disclose these matters is not directly addressed in the contracts. In the absence of such a contract obligation there is no basis for concluding that the failure to disclose these matters, if proven by the providers, was a breach of contract or of the implied duty of good faith and fair dealing.

Adapted from *Carlisle v. Harbor Homes, Inc.*, 147 Wn. App. 193, 215-16, 194 P.2d 280 (2008); *Goodyear Tire v. Whiteman Tire*, 86 Wn. App. 732, 935 P.2d 638 (1997)

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<sup>1</sup> To be given if providers are contending the department breached the contracts by not disclosing the impact of the shared living rule on hours of paid care or by not disclosing the existence of, and court rulings in, the litigations concerning the shared living rule.

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THURSTON COUNTY, WA  
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THURSTON COUNTY

LEYA REKHTER, *et al.*,  
Plaintiffs/Petitioners,  
v.  
STATE OF WASHINGTON,  
DEPARTMENT OF SOCIAL AND  
HEALTH SERVICES, *et al.*,  
Defendants/Respondents.

NO. 07-2-00895-8

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

NATASHA PFAFF,  
Plaintiff,  
v.  
STATE OF WASHINGTON,  
DEPARTMENT OF SOCIAL AND  
HEALTH SERVICES, *et al.*,  
Defendants.

SERVICE EMPLOYEES  
INTERNATIONAL UNION 775, *et al.*,  
Plaintiffs,  
v.  
ROBIN ARNOLD-WILLIAMS, *et al.*,  
Defendants.

THIS MATTER came before the Honorable Thomas McPhee of the above-titled Court upon the Client Class (sometimes referred to as "Recipients" or "Clients" or "Beneficiaries") Petition for Judicial Review.

ORIGINAL



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except to the extent that they (3) requested an adjudicative proceeding pursuant to Wash. Rev. Code § 74.08.080 challenging the downward adjustment and have received or will receive back benefits as a result. [Provider Class]

**B. Constitutional Violations.** Specified state constitutional claims were dismissed by Order entered on June 4, 2010.

**C. Washington Law Against Discrimination.** All claims brought under the Washington Law Against Discrimination chapter 49.60 RCW were dismissed by Order entered on June 4, 2010.

**D. Eighth Cause of Action: Washington Wage Laws. RCW Ch. 49.52 and 49.46.** All claims brought under this section, including claims brought under RCW 49.52 and 49.46, were dismissed by Order entered on May 7, 2010.

**E. Petition for Review of Agency Decisions On Hours and Shared Living Rule.** The Client Class sought (1) judicial review of the shared living rule, (2) injunctive relief and (3) monetary relief under the Administrative Procedures Act RCW 34.05 and RCW 74.08.080(3), and based on the decision of the state supreme court in *Jenkins v. DSHS*, 160 Wn.2d 287, 129 P.3d 849 (2007), which concluded that automatic deduction of hours without conducting an individualized assessment part of the Shared Living Rule violated Medicaid comparability laws. The Client Class claims under the APA, *Jenkins*, and RCW 74.08.080 have been addressed in part by opinion of the Court dated September 15, 2009, oral opinion dated May 7, 2010 and by previous Orders of the Court entered on October 30, 2009, June 4, 2010 and September 30, 2011, identified below. The Client Class claims under the APA, *Jenkins*, and RCW 74.08.080 are now resolved by these findings of fact, conclusions of law, and order, which the Court enters pursuant RCW 34.05.574.

**F. Partial List Of Orders Pertaining To Class Claims**

1. The Defendants' Motion Requiring Plaintiffs to Notify the Classes was granted in part by Order November 12, 2010.



1 Medically Needy In-Home Waiver program, and the state-only Chore program. These are  
2 known collectively as the "in-home" service programs.

3 2. On April 1, 2003, the Department began phasing in the Care Assessment  
4 Reporting and Evaluation tool, commonly referred to as the "CARE tool," to assess needs of  
5 recipients of assistance programs. Under WAC 388-106-0050 through -0145, applicants for,  
6 and recipients of these federal and state programs are periodically assessed using the CARE  
7 tool. The CARE tool assessment is used to determine whether an individual is functionally  
8 eligible for long-term care services under one of the programs identified in Finding 1 above,  
9 and, if so, the total amount of services he or she is entitled to receive in the form of  
10 authorized hours-per-month.

11 3. The assessment process is not intended to identify all hours that a client  
12 might need for in-home assistance, because there are limits to the total number of hours a  
13 client can receive based on their classification group and other factors. The total number of  
14 hours is commonly referred to as the base hours. WAC 388-106-0126.

15 4. With regard to members of the Client Class, a CARE assessment is  
16 conducted upon application for long-term care services and reassessments occur at least  
17 annually and more often if necessitated by a significant change in the individual's condition.  
18 Following the CARE assessment or reassessment, the Department issues a "planned action  
19 notice" (PAN) to notify the recipient of the Department's determination of his or her total  
20 number of authorized hours. This determination can be appealed.

21 5. In April 2003, the Department first applied and adopted what became known  
22 as the "Shared Living Rule" ("the Rule"). The Rule was promulgated as WAC 388-106-  
23 0130 (earlier regulations embodying the Rule included WAC 388-71-0460 and WAC 388-  
24 72A-0095) and addressed clients of the assistance programs who chose live-in providers to  
provide in-home services. The difference in the Rule compared to periods before April 2003  
is that this version of the Rule automatically reduced in-home service hours by  
approximately 15% for shopping, laundry, housekeeping, meal preparation, and wood

1 supply services ("Rule related tasks"), and the automatic deduction applied only to the  
2 clients with providers who lived in their home. In the absence of the Rule, as with clients  
3 using providers that lived outside their homes, Client Class members would have received  
4 an individualized assessment involving these particular Rule related tasks. Any reduction of  
5 in-home service hours would have been based on the individual determination rather than an  
6 automatic deduction.

7 6. The Client Class includes clients whose in-home service hours were  
8 determined and reduced based on the Rule and excludes clients who previously filed an  
9 administrative review of a Department decision on benefits and received back benefits as a  
10 result. Only three clients (Gasper, Myers, and Jenkins) were eliminated from the class by  
11 this exclusion.

12 7. In 2004, three clients (Gasper, Myers, and Jenkins) timely filed separate  
13 administrative appeals contesting the Department's planned action notices determining their  
14 in-home service hours. Administrative law judges (ALJ) dismissed the three appeals because  
15 the appeals were based on the contention that the Shared Living Rule itself was invalid. The  
16 ALJs did not have authority to consider that contention. In July 2004, Gasper and Myers  
17 timely filed petitions for judicial review in Thurston County Superior Court, seeking review  
18 of the agency orders which dismissed their administrative appeals. Both judicial review  
19 petitions sought a declaration that the Rule was invalid. The two cases were consolidated. In  
20 December 2004, a third client, Jenkins, filed a petition for judicial review in King County  
21 Superior Court on the same basis.

22 8. In March 2005, Thurston County Superior Court concluded that the Shared  
23 Living Rule was invalid because it violated the Medicaid comparability law and that in-  
24 home service hours had been erroneously determined for Gasper and Myers. In August  
2005, King County Superior Court issued a similar ruling in the *Jenkins* petition. The  
Department appealed both cases and obtained stays of both decisions.

1           9.     In March 2006, the Court of Appeals affirmed the Thurston County Superior  
2 Court. *Gasper v. DSEHS*, 132 Wn. App. 42, 129 P.3d 849 (2006). The Department then  
3 sought discretionary review to the Washington Supreme Court and obtained a stay of the  
4 decision. In May 2006, the Supreme Court accepted direct review of the King County  
5 Superior Court ruling. In July 2006, the Supreme Court also accepted discretionary review  
6 of the *Gasper* decision.

7           10.    On May 3, 2007, the Supreme Court held that the Rule violated Medicaid  
8 comparability laws. *Jenkins v. DSEHS*, 160 Wn.2d 287, 303, 129 P.3d 849 (2007). The  
9 *Jenkins* Court remanded each case for a determination of the number of hours the  
10 Department wrongfully withheld. *Jenkins*, 160 Wn.2d at 302-03. The claims of all three  
11 clients were then resolved administratively; the superior courts only awarded fees and costs.  
12 This case was filed immediately after the Supreme Court's decision in *Jenkins*.

13           11.    While the *Gasper and Myers* and the *Jenkins* cases were on appeal, and based  
14 on judicial stays, the Department continued to apply the Rule to the Client Class members  
15 who were assessed for in-home service hours. Following the *Jenkins* decision in May 2007,  
16 the Department repealed the Rule effective June 29, 2007. The change in the CARE  
17 assessment required by repeal of the Rule was applied to each individual member of the  
18 Client Class at the time each member received a reassessment in the year following repeal of  
19 the Rule. At the time of the reassessment, the in-home service hours were recalculated and  
20 granted without application of the Rule. By June of 2008, all members of the Client Class  
21 and all affected clients had been reassessed without application of the Rule.

22           12.    The facts recited above show that the Rule was applied to members of the  
23 Client Class as each individual member was assessed with the CARE tool beginning in April  
24 2003 and then subsequently reassessed, until the repeal of the Rule and reassessments in  
2007 and 2008. The Rule affected approximately 17,000 unduplicated members of the  
Client Class between April 2003 and June 2008. However, for some members of the Client

1 Class, the Rule affected service hours for only a part of this period if, for example, the  
2 member received in-home services for a shorter period.

3 13. No Client Class member sought and obtained relief through administrative  
4 review or judicial review of the Rule or any planned action notices prior to bringing this  
5 lawsuit on May 4, 2007. This fact is inherent in the class definition.

6 14. Pursuit of administrative remedies by individual Client Class members would  
7 have been futile. Any administrative appeal related to the validity of the Shared Living Rule  
8 would have been dismissed for lack of jurisdiction. Furthermore, the Department lacked the  
9 capacity to conduct timely administrative hearings had Client Class members filed  
10 individual administrative review petitions and had no mechanism for considering appeals en  
11 mass.

12 15. At trial the evidence established that the Client Class members received Rule  
13 related services from their in-home providers or other non-paid providers. In the  
14 presentation of evidence relating to the damage claims of both classes, the plaintiffs and the  
15 Department expert witnesses agreed that the calculation methodology involved first a  
16 statistical analysis to determine the number of hours lost because of the Rule, and second,  
17 application of that determination of hours to the providers' hourly rate, lost pay raises and  
18 lost vacation hours.

19 16. During the period of the Rule, the Department conducted an annual  
20 individualized assessment for each client to determine base hours for that client. Included in  
21 each assessment was consideration of the tasks impacted by the Rule - i.e., shopping,  
22 laundry, housekeeping, meal preparation, and wood supply services. For clients who used  
23 live-out providers, an individualized assessment was conducted and for some the base hours  
24 were reduced where a shared benefit between the client and the provider or other members  
of the household existed for these tasks or where informal supports were available. This  
individualized assessment for these tasks did not occur for the Client Class. For these

1 clients, with live-in providers, the Rule was applied to automatically reduce base hours by  
2 approximately 15%.

3 17. At trial, plaintiffs sought recovery for all hours reduced because of the Rule  
4 regardless of shared benefits or informal supports. The Department contended that recovery,  
5 if any, should account for shared benefit and informal supports.

6 18. During the period of the Rule, for clients not affected by the Rule, the  
7 individualized assessment conducted by the Department included consideration of informal  
8 support and shared benefit. For those clients, if a client had informal support 100% of the  
9 time for a given task, the client was then assessed to have a totally "met" need for that task  
10 and the algorithm used by the Department reduced the base hours to reflect that met need. If  
11 a client was assessed to have a shared benefit or partial informal support, the client was  
12 determined to have a "partially met" need for the given task being assessed. In a partially  
13 met situation involving shared benefit, the case manager attempted to assess the percentage  
14 of the benefit shared for the task and apply the percentage allocated to the client to hours for  
15 performing that task. In a partially met situation involving informal support, the case  
16 manager attempted to assess the percentage of hours provided by the informal support. The  
17 case manager assessed whether the need was partially met less than 25% of the time, 25% to  
18 50% of the time, greater than 50% but less than 75% of the time, and greater than 75% of  
19 the time. In performing this aspect of the individualized assessment, the case manager was  
20 expected to exercise professional judgment in determining a client's needs.

21 19. During the period of the Rule, the Department's individualized assessment to  
22 identify the degree of shared benefit or informal support regarding Rule related tasks did not  
23 occur for Client Class members. There is no direct data from the CARE Tool assessment for  
24 the Rule period that informs the trier-of-fact regarding the degree of shared benefit or  
informal support that would have existed during that period.

20. There was no direct evidence quantifying the hours worked by Provider Class  
members for Rule related tasks, but the evidence viewed as a whole establishes that they

1 performed these tasks and that some work included shared benefit and informal support, as  
2 these concepts were applied to individualized assessments for clients with live-out providers  
3 during the period of the Rule.

4 21. Although the Department denied any wrongful act justifying award of  
5 damages, both sides offered expert witnesses who relied on statistical analysis of the data for  
6 Client Class members and other clients for periods before and after repeal of the Rule.  
7 Plaintiffs' experts did not attempt to account for any degree of shared benefit and informal  
8 support; the Department's experts did. The Department's primary expert witness utilized  
9 data from the period after the Rule and applied a case mix statistical analysis ("case mix  
10 adjustment"), and a weighted average to determine an average of shared benefit and  
11 informal support for Client Class base hour calculations that he concluded would have been  
12 applied to individual assessments had the Rule not required the automatic deduction. This  
13 calculation resulted in the greatest difference between the damage calculations of the two  
14 sides, although there were other differences and adjustments that were disputed. In final  
15 arguments to the jury on the claim of the Provider Class, plaintiffs argued for a maximum  
16 verdict of approximately \$90 million; the Department argued for a minimum of  
17 approximately \$50 million. Both sides argued for amounts in between.

18 22. The opinions and explanations of the Department's expert witnesses were  
19 more persuasive. In determining the amount for unpaid hours on the claim of the Client  
20 Class, the approach and calculation of the Department's experts is adopted by the Court. The  
21 range established by that approach and calculation is between \$52,754,771 and \$61,675,806.

22 23. In the trial of the Client Class claim, the Department made an offer of proof  
23 outside the presence of the jury that identified estimated damages using several different  
24 timeframes for damages other than April 2003 through June 2008. The Court has rejected  
25 those other timeframes for calculating damages.

26 25. The jury awarded the Provider Class damages in the amount of  
27 \$57,123,794.50. The court finds that the Client Class suffered the same damages as the

1 Provider Class, \$57,123,794.50.

2  
3 **III. CONCLUSIONS OF LAW**

4 1. By written opinion on September 15, 2009, and order dated October 30,  
5 2009, the Court declared that the Client Class may seek relief including money damages  
6 from the Department pursuant to RCW 34.05.570(2), which provides for judicial review of  
7 agency rules. As the Court ruled in its opinion and order, the APA does not provide for  
8 money damages as a remedy, but does permit money damages as a remedy when authorized  
9 by another statute. RCW 34.05.574(3) (“The court may award damages, compensation, or  
10 ancillary relief only to the extent expressly authorized by another provision of law.”). The  
11 Court has ruled that relief would be allowed under RCW 74.08.080(3). Subsection (3)  
12 applies “[w]hen a person files a petition for judicial review” and provides that “[i]f a  
13 decision of the court is made in favor of the appellant, assistance shall be paid from date of  
14 the denial of the application for assistance or thirty days after the application for temporary  
15 assistance for needy families or forty-five days following the date of application, whichever  
16 is sooner; or in the case of a recipient, from the effective date of the local community  
17 services office decision.”

18 2. The Court further ruled in its opinion on September 15, 2009, and its order of  
19 October 30, 2009, that the Client Class claim for judicial review and money damages is not  
20 barred by failure to exhaust administrative remedies or statutes of limitations applicable to  
21 seeking an administrative remedy or judicial review. On June 4, 2010, the Court ordered that  
22 the Client Class members “shall be permitted to seek compensatory relief from the wrongful  
23 withholding of benefits as a result of the application of the invalid Shared Living Rule from  
24 November 1, 2003, to the last date that DSHS applied the rule to a Class Recipient  
member.” Prior to trial, the Court modified this order orally to extend back to April 2003 at  
the request of the parties because the experts for both sides used April 1, 2003 as the start  
date for their calculations. The November 1, 2003 start date was based on the mid-point

1 between April 1, 2003, the date of first application of the Rule, and April 1, 2004, the last  
2 date that a Client Class member would have completed reassessment after application of the  
3 Rule. The bench ruling regarding this change in the beginning date for damages computation  
4 was issued on October 5, 2011 and the Order regarding the change was entered on  
5 September 30, 2011.

6 3. The jury was not instructed to render an advisory verdict on the Client Class  
7 claim because to so instruct would have possibly confused the jury, to the prejudice of either  
8 party. Nevertheless, this jury heard all the same evidence that an advisory jury would have  
9 heard except evidence from the offer of proof considered and rejected by the court. See  
10 Finding 23. Accordingly, the verdict of the jury on the claim of the Provider Class is  
11 accorded by the Court the same substantial weight in considering the claim of the Client  
12 Class as would be accorded a formal advisory verdict.

13 4. The Plaintiffs have argued that the Client Class should be awarded a money  
14 judgment, subject to offset from payment of a judgment to the Provider Class. The Court  
15 concludes that this is not appropriate. The Client Class has proved the same damages  
16 claimed by the Provider Class claim, except that the Client Class actually received the Rule  
17 related services and thus it sues to pass damages through to the Provider Class. The Court  
18 previously ruled that legal authority allows the Client Class to claim damages under *Jenkins*.  
19 However, the Client Class is not entitled to judgment for the damages because judgment for  
20 that amount will be entered in favor of the Provider Class and only one recovery can be  
21 permitted. The presence of a judgment entered in favor of the Provider Class precludes entry  
22 of a judgment in favor of Client Class.

23 5. The Plaintiffs' offset proposal implies a concern that the provider judgment  
24 will not survive appeal. But that possibility does not countenance issuing a money judgment  
for the Client Class when the Court has concluded it will enter a final judgment for the  
Provider Class. Accordingly, the result for the Client Class must account for and  
acknowledge that judgment. Further, the Court does not necessarily conclude that, in the

1 absence of a judgment in favor of the Provider Class, the Client Class would be entitled to  
2 judgment for the amount of damage it proved at trial. That uncertainty is because the clients  
3 cannot receive directly the monetary payment for services that were wrongfully withheld.  
4 The Court did not need to address that issue in its above determinations regarding the Client  
5 Class claim for damages based on *Jenkins*. However, these reasons cause the Court to  
6 conclude that it will not enter a judgment for the Client Class subject to offset.

7 6. The Court does not adopt the Department's proposed conclusions that would  
8 deny the Client Class a money judgment based on the need for proof that the party is  
9 aggrieved under the APA, RCW 34.05.530, and RCW 74.08.080. A conclusion that the  
10 Client Class has not shown itself to be aggrieved would affect standing, which is  
11 jurisdictional. The Court concludes that an order addressing standing must focus on standing  
12 at the time of filing the case, not the party's status based on the results of the case. The Court  
13 previously ruled that the Client Class has standing to bring this case in light of the *Jenkins*  
14 decision, and concludes here that it is not deprived of jurisdiction by considering the results  
15 of the Client Class claim.

16 7. Because no judgment for money is awarded to the Client Class, the issue of  
17 prejudgment interest for the Client Class is not before the court.

18 8. As noted in Section II, Finding 12 above, because the Defendants repealed  
19 the Rule on June 29, 2007, the Plaintiffs' request to invalidate the rule and for injunctive  
20 relief is moot.

21 9. A final judgment shall be entered in this case. The judgment shall state that  
22 no money judgment for damages is entered for the Client Class.

23 DATED: December 2, 2011

24 

HONORABLE THOMAS MCPHEE  
THURSTON COUNTY SUPERIOR COURT JUDGE

# **EXHIBIT 66**



## CLIENT SERVICE CONTRACT INDIVIDUAL PROVIDER SERVICES

DSHS Contract Number:
SSPS Provider Number:
Program Contract Number:
Contractor Contract Number:

This Contract is between the State of Washington Department of Social and Health Services (DSHS) and the Contractor identified below.

CONTRACTOR NAME		CONTRACTOR doing business as (DBA)	
CONTRACTOR ADDRESS		WASHINGTON UNIFORM BUSINESS IDENTIFIER (UBI)	CONTRACTOR'S DSHS INDEX NUMBER
CONTRACTOR CONTACT	CONTRACTOR TELEPHONE	CONTRACTOR FAX	CONTRACTOR E-MAIL ADDRESS
DSHS ADMINISTRATION	DSHS DIVISION	DSHS CONTRACT CODE	
DSHS CONTACT NAME AND TITLE		DSHS CONTACT ADDRESS	
DSHS CONTACT TELEPHONE	DSHS CONTACT FAX	DSHS CONTACT E-MAIL ADDRESS	
IS THE CONTRACTOR A SUBRECIPIENT FOR PURPOSES OF THIS CONTRACT?		CFDA NUMBER(S)	
No.		93.778	
CONTRACT START DATE	CONTRACT END DATE	CONTRACT MAXIMUM AMOUNT	
		<b>Fee For Service</b>	
This Contract contains all of the terms and conditions agreed upon by the parties. No other understandings or representations, oral or otherwise, regarding the subject matter of this Contract shall be deemed to exist or bind the parties. The parties signing below warrant that they have read and understand this Contract and have authority to enter into this Contract.			
CONTRACTOR SIGNATURE	PRINTED NAME AND TITLE		DATE SIGNED
DSHS SIGNATURE	PRINTED NAME AND TITLE		DATE SIGNED
<i>Susan Bush</i>	Susan Bush, Contracts Manager		September 6, 2002
AUTHORIZED COUNTERSIGNATURE	PRINTED NAME AND TITLE		DATE SIGNED

1. **Definitions.** The words and phrases listed below, as used in this Contract, each have the following definitions:

- a. "Area Agency on Aging (AAA)" means a local public or private agency with which DSHS contracts to provide case management services to DSHS clients.
- b. "Authorized Countersignature" means any DSHS, AAA or AAA Subcontractor employee who has delegated authority to sign this Contract.
- c. "Authorization and Authorized" means the Contractor's services are included in the client's DSHS approved Service Plan and the service payment is submitted for payment as directed by the DSHS payment system.
- d. "Case Manager" means the DSHS or AAA social worker assigned to a client.
- e. "Central Contract Services" means the DSHS Office of Legal Affairs, Central Contract Services, or the office that takes over its responsibilities.
- f. "Client" means an individual that DSHS or the AAA determines to be eligible to receive services purchased from the Contractor. The client employs the Contractor to perform the personal care services, authorized household tasks, and/or self-directed health care tasks included in the client's Service Plan.
- g. "Client participation" means the amount of money, if any, that the Contractor collects directly from the client and applies to the cost of the client's authorized care.
- h. "Contract" means the entire written agreement between DSHS and the Contractor, including any Exhibits, documents, and materials that are incorporated by reference.
- i. "Contracting Officer" means the Manager, or their replacement, of DSHS Central Contract Services.
- j. "Contractor" means the individual provider performing services required by this Contract. The Contractor is employed by the client to perform the personal care services, authorized household tasks, and/or self-directed health care tasks included in the client's Service Plan.
- k. "COPES" means Community Options Program Entry System as defined under WAC 388-71.
- l. "DSHS" or "the department" or "the Department" means the State of Washington Department of Social and Health Services and its employees.
- m. "MPC" means Medicaid Personal Care as defined under WAC 338-71.
- n. "Personal Information" means information which identifies a person, including, but not limited to, information that relates to a person's name, health, finances, education, business, use or receipt of governmental services or other activities, addresses, telephone numbers, social security numbers, driver license numbers, other identifying numbers, and any financial identifiers.
- o. "Personal care services" means those specific services defined in WAC 388-15 provided to DSHS clients.

- p. "RCW" means the Revised Code of Washington. All references in this Contract to RCW chapters or sections shall include any statute that amends or replaces the referenced RCW.
- q. "Regulation" means any federal, state, or local regulation, rule, or ordinance.
- r. "Self-Directed Health Care Tasks" means health care tasks that an adult client would ordinarily perform for him or herself, but cannot perform because of a functional disability, and that the client trains, directs and supervises a paid personal aide to perform pursuant to RCW 74.39 and WAC 388-71.
- s. "Services" means the personal care services, authorized household tasks, and/or self-directed health care tasks the Contractor performs for the client as specified in the client's Service Plan.
- t. "Service Plan" means a written plan for long term care service delivery which identifies ways to meet the client's needs with the most appropriate services as described in chapter WAC 388-71 and/or RCW 74.39A.
- u. "Subcontract" means a separate contract between the Contractor and an individual or entity ("Subcontractor") to perform all or a portion of the duties and obligations which the Contractor is obligated to perform pursuant to this Contract. DSHS will not pay the Contractor for subcontracted work.
- v. "WAC" means the Washington Administrative Code. All references in this Contract to WAC chapters or sections shall include any regulation that amends or replaces the referenced WAC.

**2. Statement of Work.**

By signing this contract, the Contractor certifies and assures DSHS and the AAA that the Contractor meets the minimum qualifications for care providers in home settings as described in WAC 388-71, and is therefore qualified to perform the following services:

The Contractor agrees to assist, as specified by the client, with those personal care services, authorized household tasks, and/or self-directed health care tasks which are included in the client's Service Plan. The Contractor agrees to perform all services in a manner consistent with protecting and promoting the client's health, safety, and well-being. The Contractor agrees not to perform any task requiring a license unless he/she is licensed to do so or is a member of the client's immediate family or is performing self-directed health care tasks. See RCW 18.79 and 74.39 for laws relating to nursing care and self-directed health care tasks, respectively.

**3. Duty to Report Suspected Abuse.** In addition to the preceding services, the Contractor shall report, in accordance with state law, all instances of suspected client abuse immediately to the Department at the current state abuse hotline (1-800-562-6078).

**4. Billing and Payment.** Payment for services will be at the rate established and published by DSHS.

a. The Contractor agrees to meet the following requirements to obtain payment:

- (1) The client has selected the Contractor to provide services at the established rate;
- (2) The Contractor has provided services to the client which are included in the client's Service Plan and has complied with all applicable laws and regulations; including but not limited to the rules applicable to individual providers under WAC 388-71; and

- (3) The Contractor has turned in the payment invoice on time on a monthly basis, and on the form provided by DSHS.
- b. DSHS will pay the Contractor the established rate for services per client in the geographic area where services are provided within Washington State. Rates will apply to all services authorized and provided under this Contract no matter what the payment source. The monthly payment for all services provided to any client will not exceed the amount authorized in the client's Service Plan. Rate changes will not require a Contract amendment. Notification of rate increases will be made by publication of the DSHS Aging and Adult Services Administration rates in the Contractor's geographic area. Published rates are not disputable.
  - c. The Contractor accepts the DSHS payment amount, together with any client participation amount, as sole and complete payment for the services provided under this Contract. The Contractor agrees to be responsible for collection of the client's participation amount (if any) from the client in the month in which services are provided.
  - d. DSHS will mail the Contractor's payment for services to the address specified as "Contractor Address" on Page 1 of this Contract. Contractor is responsible for notifying DSHS of a change of the Contractor's address.
  - e. DSHS will only reimburse the Contractor for authorized services provided to clients in accordance with this Contract's Statement of Work and the client's Service Plan. If DSHS pays the Contractor for any other services, the amount paid shall be considered an overpayment, and must be returned to the Department.

**5. Advance Payment and Billing Limitations.**

- a. DSHS will not pay for services under this contract until the services have been provided.
- b. DSHS will pay the Contractor only for authorized services provided under this Contract. If this Contract is terminated for any reason, DSHS will pay only for services authorized and provided through the date of termination.
- c. Unless otherwise specified in this Contract, DSHS will not pay any claims for payment for services submitted more than twelve (12) months after the calendar month in which the services were performed.
- d. The Contractor agrees not to bill DSHS for services performed under this contract, and DSHS will not pay the Contractor, if the Contractor has charged or will charge the State of Washington or any other party under any other contract or agreement for the same services.

**6. Assignment.** The Contractor may not assign this Contract, or any rights or obligations contained in this Contract, to a third party.

**7. Background Check.** The contractor agrees to undergo a criminal history background check conducted by DSHS, as required by RCW 43.20A.710.

8. **Compliance with Applicable Law.** At all times during the term of this Contract, the Contractor shall comply with all applicable federal, state, and local laws, regulations and rules, including but not limited to the rules which apply to individual providers under WAC 388-71.
9. **Confidentiality.** The Contractor shall not use or disclose any Personal Information concerning any client for any purpose not directly connected with the performance of the Contractor's responsibilities under this Contract except by prior written consent of the client.
10. **Contractor Obligations.**
  - a. The Contractor has received a copy of the Service Plan of the client who has selected the Contractor and agrees to comply with the requirements of the Service Plan, and with all supplemental, or replacement requirements. The Service Plan of the client who has selected the Contractor, and the Service Plans of any additional clients who may also select the Contractor are incorporated into this Contract by reference.
  - b. The Contractor agrees to immediately notify the Case Manager for each client to whom the Contractor is providing services, as well as the Director of the Division of Home and Community Services, at P.O. Box 45600, Olympia WA 98504-5600, in the event that the Contractor accepts employment with the State of Washington.
  - c. By entering into this agreement, the Contractor certifies and provides assurances that the Contractor meets the minimum qualifications for individual providers as described under WAC 388-71 and that he/she has the ability and willingness to carry out his/her responsibilities relative to the Service Plan. The Contractor certifies that he/she understands that he/she may contact the client's DSHS or AAA case manager if at any time he/she has any concerns about his/her ability to perform those responsibilities.
  - d. The Contractor acknowledges that he/she is in compliance with Chapter 42.52 RCW, Ethics in Public Service, and agrees to comply with Chapter 42.52 RCW throughout the term of this Contract.
11. **Contractor Not an Employee of DSHS.** For purposes of this Contract, the Contractor acknowledges that the Contractor is an independent contractor and not an officer, employee, or agent of DSHS, the State of Washington, or the AAA. The Contractor agrees not to hold him or herself out as, nor claim status as, an officer, employee, or agent of DSHS, the State of Washington, or the AAA. The Contractor agrees not to claim for the Contractor any rights, privileges or benefits which would accrue to an employee of the State of Washington or the AAA. The Contractor shall indemnify and hold DSHS and/or the AAA harmless from all obligations to pay or withhold federal or state taxes or contributions on behalf of the Contractor unless otherwise specified in this Contract.
12. **Death of Clients.** The Contractor agrees to report the death of any client within twenty-four (24) hours to the Case Manager specified in the client's Service Plan.
13. **Debarment Certification.** The Contractor certifies that the Contractor is not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participating in this Contract by any Federal department or agency. If requested by DSHS, the Contractor shall complete a Certification Regarding Debarment, Suspension, Ineligibility, and Voluntary Exclusion form. Any such form completed by the Contractor for this Contract shall be incorporated into this Contract by reference.

14. **Drug-Free Workplace.** The Contractor agrees he or she shall not use or be under the influence of alcohol and/or illegal drugs in performing the Contractor's duties under this Contract.
15. **Execution, Amendment, and Waiver.** This Contract shall be binding on DSHS only upon signature by DSHS with an Authorized Countersignature. This Contract, or any provision, may not be altered or amended. Only the Contracting Officer or the Contracting Officer's designee has authority to waive any provision of this Contract on behalf of DSHS.
16. **Governing Law and Venue.** This Contract shall be governed by the laws of the State of Washington. In the event of a lawsuit involving this Contract, venue shall be proper only in Thurston County, Washington.
17. **Indemnification and Hold Harmless.** The Contractor shall be responsible for and shall indemnify and hold DSHS and the AAA harmless from all liability resulting from the acts or omissions of the Contractor.
18. **Inspection; Maintenance of Records.**
  - a. During the term of this Contract and for six (6) years following termination or expiration of this Contract, the Contractor agrees to maintain records which will:
    - (1) Document performance of all acts required by law, regulation, or this Contract;
    - (2) Substantiate the Contractor's statement of its organization's structure, tax status, capabilities, and performance; and
    - (3) Demonstrate accounting procedures, practices, and records which sufficiently and properly document the Contractor's invoices to DSHS and all expenditures made by the Contractor to perform as required by this Contract.
  - b. During the term of this Contract and for one (1) year following termination or expiration of this Contract, the Contractor agrees to give reasonable access to:
    - (1) the Contractor;
    - (2) Contractor's place of business;
    - (3) All records related to this Contract.

This access will be given to DSHS and to any other authorized employee, agent, or contractor of the State of Washington, or the United States of America, in order to monitor, audit, and evaluate the Contractor's performance and compliance with the terms of this Contract.
19. **Nondiscrimination.** The Contractor shall comply with all applicable federal, state, and local nondiscrimination laws and regulations.
20. **Notice of Overpayment.** If the Contractor receives a Vendor Overpayment Notice or a letter communicating the existence of an overpayment from DSHS, the Contractor may protest the overpayment determination by requesting an adjudicative proceeding pursuant to RCW 43.20B.
21. **Duty to Promote and Protect the Health and Safety of DSHS Clients.** The Contractor agrees to perform the Contractor's obligations under this Contract in a manner that does not compromise the health and safety of any DSHS client for whom services are provided by the Contractor.
22. **Order of Precedence.** In the event of an inconsistency in this Contract, unless otherwise provided, the inconsistency shall be resolved by giving precedence, in the following order, to:

- a. Applicable federal, state, and local law and regulations;
  - b. The terms and conditions of this Contract; and
  - c. Any Exhibit, document, or material incorporated by reference.
23. **Severability; Conformity.** If any court holds any provision of this Contract invalid, the other provisions of this Contract shall not be affected. The invalid provision shall be considered modified to conform to existing law.
24. **Significant Change in Client's Condition.** The Contractor agrees to report any significant change in the client's condition within twenty-four (24) hours to the Case Manager specified in the client's Service Plan.
25. **Subcontracting.** The Contractor shall not subcontract any of the services performed under this agreement.
26. **Survivability.** Some of the terms and conditions contained in this Contract are intended to survive the expiration or termination of this Contract. Surviving terms include but are not limited to: Confidentiality, Indemnification and Hold Harmless, Inspection, Maintenance of Records, Notice of Overpayment, Termination for Default, Termination and Expiration Procedure, Treatment of Assets Purchased by Contractor, and Treatment of DSHS Assets.
27. **Termination Due to Change in Funding.** If the funds DSHS relied upon to establish this Contract are withdrawn or reduced, or if additional or modified conditions are placed on such funding, DSHS may immediately terminate this Contract by providing written notice to the Contractor. The termination shall be effective on the date specified in the notice of termination.
28. **Termination Due to Update of Contract.** The execution of a new Individual Provider Contract between DSHS and the Contractor that occurs after the date this Contract is signed will automatically terminate this Contract.
29. **Termination for Convenience.** DSHS may terminate this Contract in whole or in part when it is in the best interests of DSHS by giving the Contractor at least thirty (30) calendar days' written notice. The Contractor may terminate this Contract for convenience by giving DSHS at least thirty (30) calendar days' written notice.
30. **Termination for Default.** The Contracting Officer may 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 meet the Contractor's duty to promote and protect the health or safety of any client for whom services are being provided under this Contract;
  - c. Failed to perform under, or otherwise breached, any term or condition of this Contract;
  - d. Violated any applicable law or regulation; and/or
  - e. Falsified any information provided to DSHS or the AAA.

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

31. **Termination and Expiration Procedure.** The following provisions apply if this Contract is terminated or expires:
- a. The Contractor shall cease to perform any services required by this Contract as of the effective date of termination or expiration, and shall comply with all instructions contained in the notice of termination.
  - b. The Contractor shall immediately deliver to the DSHS or AAA Contact named in this Contract, or to his or her successor, all DSHS or AAA assets (property) in the Contractor's possession, including any material created under this Contract. The Contractor grants DSHS or the AAA the right to enter upon the Contractor's premises for the sole purpose of recovering any DSHS or AAA property that the Contractor fails to return within ten (10) calendar days of termination or expiration of this Contract. Upon failure to return DSHS or AAA property within ten (10) calendar days, the Contractor shall be charged with all reasonable costs of recovery, including transportation. The Contractor shall protect and preserve any property of DSHS or the AAA that is in the possession of the Contractor pending return to DSHS or the AAA.
  - c. DSHS may withhold a sum from the final payment to the Contractor that DSHS determines necessary to protect DSHS against loss or additional liability.
  - d. The rights and remedies provided to DSHS in this paragraph are in addition to any other rights and remedies provided at law, in equity, and/or under this Contract, including consequential damages and incidental damages.
32. **Treatment of Assets Purchased by Contractor.** All assets (property) purchased or furnished by the Contractor are owned by the Contractor, and DSHS and the AAA waive all claim of ownership to such property.
33. **Treatment of Client Assets.** Any client receiving services under this Contract will have unrestricted access to their personal property. The Contractor agrees not to interfere with any adult client's ownership, possession, or use of the client's personal property. Upon termination of this Contract, the Contractor agrees to immediately release to the client and/or the client's guardian or custodian all of the client's personal property.
34. **Treatment of DSHS/AAA Assets.** Any assets (property) purchased or furnished by DSHS or the AAA for use by the Contractor during this Contract term shall be owned by DSHS or the AAA. The Contractor shall protect, maintain, and insure all DSHS or AAA property in the Contractor's possession against loss or damage and shall return DSHS or AAA property to DSHS or the AAA upon Contract termination or expiration.
35. **Waiver of Default.** Waiver of any breach or default on any occasion will not be considered to be a waiver of any later breach or default and will not be interpreted as a modification of the terms and conditions of this Contract.

APPROVED AS TO FORM BY THE OFFICE OF THE ATTORNEY GENERAL.