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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

LEYA REKHTER, *et al.*,

Respondents,

v.

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

Appellants.

REPLY BRIEF OF RESPONDENTS LEYA REKHTER, *et al.*
ON CROSS APPEAL

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I. INTRODUCTION

The issues presented by this cross appeal are both limited and straightforward. The trial court found that DSHS had wrongfully withheld over \$57 million in paid care benefits and that the Client Class was entitled to bring its action for money damages either as a rules challenge (Conclusion of Law 1) or because the statute of limitations should be equitably tolled. Concerned about the potential for a “double recovery,” however, the court declined to enter money judgment for the proven damages. No double recovery is sought, and the claims administration process can avoid any risk to DSHS in paying what it owes more than once. The failure to enter the money judgment for the proven damages was error. The Client Class is entitled to judgment for the damages, and its reasonable attorneys’ fees.

DSHS seeks to complicate the cross-appeal. In its combined Response/Reply, it now asserts that Conclusion of Law 1 was error. Its failure to assign or argue error in its opening brief to Conclusion of Law 1 makes it law of the case, and dispositive of the Client Class’s entitlement to the proven money damages.

The wage claim issues are also straightforward. DSHS controlled every facet of the wage payment process to the Provider Class, and knowingly failed to pay wages for hours it required the Providers to work.

Washington's Minimum Wage Act applies with equal force to all employers and agents acting on their behalf. DSHS's actions make it liable to the Providers under the wage statutes as an agent acting in respect of an employer (nominally DSHS's severely disabled clients). If DSHS, with complete control over wage payment, is not the sort of agent that can be liable for failing to pay a minimum wage, no agent in Washington can. The trial court should have granted summary judgment to the Providers on their wage claims. The question of exemplary damages and attorneys' fees may require a remand.

II. ARGUMENT

A. The Client Class is entitled to comparable benefits under the Medicaid statute, *Jenkins* and the proven facts. The trial court should have entered judgment for the proven damages.

1. The trial court's unchallenged Conclusion of Law 1 that relief is allowed under RCW 34.05.570(2) and RCW 74.08.080(3) and unchallenged Finding of Fact 25 on proven damages warrants the entry of a money judgment.

The standard of review for a rules challenge is governed by the APA. *Wash. Pub. Ports Ass'n v. Dep't of Revenue*, 148 Wn.2d 637, 646, 62 P.3d 462 (2003). The burden of demonstrating the invalidity of an agency rule is on the party asserting the invalidity. *Id.*

Here, after unsuccessfully arguing that the federal court should disregard *Jenkins v. Dep't of Social & Health Servs.*, 160 Wn.2d 287, 157

P.3d 388 (2007), DSHS finally conceded *in May 2009* that the Shared Living Rule was invalid. Pretrial VRP 179:17-20. After hearing the evidence, the trial court concluded that retroactive relief is allowed under RCW 34.05.570(2) and RCW 74.08.080(3). CP 3474 (Conclusion of Law 1). DSHS neither assigned error to Conclusion 1 nor provided argument on it – it is thus the law of the case. *Detonics “.45” Assocs. v. Bank of Cal.*, 97 Wn.2d 351, 353, 644 P.2d 1170 (1982).

DSHS characterized the trial court’s conclusion as a “passing reference.” Appellants’ Reply at 37. It is not. CP 3474. The conclusion expressly incorporates the trial court’s determination that relief is allowed to the disabled clients under RCW 34.05.570(2) and RCW 74.08.080(3).¹ It is an independent basis warranting relief, stated in both the trial court’s conclusion and its earlier ruling. CP 457:11-14).² The plain language of RCW 34.05.542(1) permits a rules challenge to be brought “at any time.”

DSHS was either negligent or tactical in omitting the issue from its opening brief. Although extensively briefed and argued in open court, CP 797-98 and CP 3439-41 (orders identifying briefing and argument),

¹ The complaint challenged the application of the SLR as a rules challenge because, when it was filed in May 2007, DSHS was still withholding paid care benefits under the SLR and, in fact, continued to do so all the way through June 2008.

² DSHS incorporates its “response” into its reply, challenging Conclusion of Law 1. The Court should reject the new challenge. *In re Marriage of Sacco*, 114 Wn.2d 1, 5, 784 P.2d 1266 (1990) (“This [C]ourt does not consider issues raised for the first time in a reply brief.”).

nothing in DSHS's opening brief challenged Conclusion of Law 1. Specifically, DSHS argued below that in addition to relief being unavailable under RCW 34.05.570(2) and RCW 74.08.080(3), relief was also unavailable under RCW 34.05.570(3) & (4) and RCW 74.08.080(3). Supp. VRP 27-40 (dated May 22, 2009). The trial court rejected DSHS's arguments and entered separate conclusions for both legal rights for relief. CP 457, 3474-75 (Conclusions 1 & 2).

DSHS also has not challenged the trial court's finding that "the Client Class suffered the same damages as the Provider Class, \$57,123,794.50." CP 3473-74 (Finding of Fact 25). It is a verity on appeal. *State v. Rankin*, 151 Wn.2d 689, 709, 92 P.3d 202 (2004). The trial court conclusively established liability and damages. It should have entered a money judgment for the client class with either an offset provision to prevent double recovery or preventing double recovery in the claims administration process. Either way, the Clients were entitled to receive a judgment for the value of *paid* care benefits DSHS withheld.

- 2. The trial court's further conclusion that relief is also allowed under RCW 34.05.570(3) or (4) and RCW 74.08.080(3) is an additional basis warranting the entry of a judgment for the proven damages.**

DSHS did challenge Conclusion of Law 2, but the Court should affirm the Conclusion and the trial court's rejection of DSHS's contention

that relief is barred by failure to exhaust administrative remedies or the statute of limitations. This Conclusion is consistent the trial court's earlier rulings. CP 457; Pretrial VRP 246-47. Conclusion 2 expressly states that it is a "*further*" ruling. As the trial court stated, "[i]t is hard to imagine a case more appropriate for the application of the doctrine equitable tolling." Pretrial VRP 246.

The trial court correctly rejected DSHS's contention that to obtain any relief, each of the 16,000 disabled Clients should have filed agency appeals right after the three trial court decisions in *Jenkins*. DSHS conceded each would have been dismissed for lack of jurisdiction under WAC 388-02-0225. The court correctly rejected DSHS's contention that the Clients should thereafter have filed petitions to review the dismissals in superior court and waited for the outcome of *Jenkins*. DSHS now claims it would have provided relief to these individuals. Supp. VRP 28-32 (dated May 22, 2009). The record is clear – DSHS provided no relief *to anyone other than the three litigants in Jenkins*, including those who had filed agency appeals. CP 453.³

DSHS incorrectly states that the trial court "found and concluded that the client class was not harmed." Appellants' Reply at 50. The trial

³ See also VRP 1300; 2421, 2425-27 (DSHS testimony that "numerous" SLR appeals occurred in 2004 and that it disregarded requests in 2004 from advocate groups to repeal the unlawful Rule).

court's unchallenged Finding 25 expressly states that "the Client Class suffered the same damages as the Provider Class, \$57,123,794.50." CP 3473-74. Just as an unchallenged conclusion becomes the law of the case, *Detonics*, 97 Wn.2d at 353, an unchallenged finding becomes a verity on appeal. *Rankin*, 151 Wn.2d at 709.

The portions of its opening brief cited by DSHS as preserving its challenge are unrelated to the issue. On page 36 of its reply (Part V.A), DSHS cites to pages 4-5 & 59 of its opening brief. The former assigns error to the jury's verdict for the Providers on their breach of contract claim. The latter begins DSHS's argument for appeals of administrative decisions under RCW 34.05.570(3). Neither relates to Conclusion of Law 1.

DSHS attempts to distract the Court by asserting the trial court treated the matter as moot. The trial court determined that the Clients' requests to invalidate the rule and for injunctive relief were rendered moot by DSHS's belated repeal, but not the Clients' action for damages arising from the invalid rule. CP 3476 (Conclusion of Law 8). Damages remained a live controversy. DSHS continued to apply the SLR to new benefits determination after *Jenkins* and to benefits provided for up to year after DSHS's repeal. CP 3470. "[A]ll recipients continued to receive only SLR-

reduced services and benefits significantly beyond the date of the *Jenkins* decision, some for more than a year.” CP 453-54.

3. Even had DSHS appealed Conclusion of Law 1, the trial court was right.

While DSHS’s failure to appeal the trial court’s conclusion that money damages were available is sufficient to enter money judgment for the Client Class, there is no resulting injustice to the people of Washington. Established precedent supports the Conclusion.

Multiple Washington decisions, most involving DSHS, recognize the availability of money damages in a rules challenge. DSHS’s dismissal of this Court’s decision in *Berry v. Burdman*, 93 Wn.2d 17, 604 P.2d 1288 (1980) ignores the basic dispute in that case – DSHS had reduced benefits to a class of beneficiaries through a regulation that violated of federal law. The trial court’s judgment allowed recovery of retroactive benefits wrongfully withheld under the invalid regulation. CP 3675-76. This Court “affirm[ed] the trial court and remand[ed] only for the purpose of fixing fees for respondents’ counsel on . . . appeal.” *Id.* at 24. It is this Court’s holding that is key – affirming retroactive benefits in a rules challenge.

Failor’s Pharmacy v. Dep’t of Social & Health Servs., 125 Wn.2d 488, 886 P.2d 147 (1994) also directly involved recovery of money damages (for a period of nine years) in a challenge to a DSHS rule. DSHS

tries to distinguish the case because the money damages were calculated on a *quantum meruit* basis. Whether relief is available under RCW 74.08.080(3) or under the doctrine of *quantum meruit* is a distinction without a difference.⁴ The calculation under *quantum meruit* for what would have been received absent the invalid rule does not undercut the availability of money damages under a contract.

In fact, in *Failor's Pharmacy*, the *quantum meruit* calculation could never have occurred if money damages were not available in the first place. DSHS's interpretation is at odds with the court of appeals' interpretation that the measure of recovery in *Failor's Pharmacy* was the difference between what was paid under the invalid rule and what was due applying federal law. *McGee Guest Home, Inc. v. Dep't of Social & Health Servs.*, 96 Wn. App. 804, 810, 981 P.2d 459 (1999), *affirmed*, 142 Wn.2d 316, 12 P.3d 144 (2000).⁵ This is the same measure of relief found by the trial court (Finding 25).

⁴ This Court ruled in *Jenkins*, 160 Wn.2d at 301-02 that the other provision of law is RCW 74.08.080(3), which DSHS has conceded in this lawsuit. CP 1098 ("Here, the other provision of law that allows the recipient class to obtain some level of retroactive monetary relief is RCW 74.08.080.").

⁵ Other supporting cases are provided at CP 4717-18. The result here is also consistent with the federal APA, where the federal courts apply a six-year limitations period to substantive rule challenges. *Wong v. Doar*, 571 F.3d 247, 263 (2nd Cir. 2009); *Wind River Mining Corp. v. United States*, 946 F.2d 710, 715 (9th Cir. 1991); *P&V Enters. v. U.S. Army Corps of Eng'rs*, 466 F. Supp. 2d 134, 140-44 (D.D.C. 2006). In some circumstances, federal courts have held that the statute of limitations begins to run when "facts which would support a cause of action are apparent or should be apparent to a person with reasonable prudent regard for his rights." *Rozar v. Mullis*, 85 F.3d 556, 561-62 (11th Cir. 1996).

4. DSHS denied relief to all Client Class members, whether they sought a “fair hearing” or not. DSHS cannot simultaneously strip its ALJs of jurisdiction over an appeal and interpose its jurisdiction-less process as a bar.

DSHS’s argument that the Client Class is not entitled to relief for alleged failure to pursue timely administrative appeals is fatally flawed. Representative plaintiffs did timely appeal benefits decisions, but DSHS had rigged the game, rendering all rights to administrative appeal or relief illusory. An illusory administrative appeal process cannot preclude judicial relief for disabled DSHS beneficiaries.

The extensive trial court record refutes DSHS’s claim that the trial court abused its discretion in determining that relief is *also* allowed under RCW 34.05.570(3) or (4) and RCW 74.08.080(3) without exhaustion of administrative remedies and that the doctrine of equitable tolling applies. CP 451-59, 797-80, 1466-71, 3439-45; Supp. VRP 1-15 (dated October 5, 2010); Pretrial VRP 143-61, 232-54. The abuse of discretion standard requires a determination that no reasonable person would take the position adopted by the trial court. *State v. Nelson*, 108 Wn.2d 491, 504-05, 740 P.2d 835 (1987).⁶

⁶ DSHS incorrectly argues that the *de novo* standard for summary judgment rulings should apply. Appellants’ Reply at 42. DSHS did not appeal summary judgment rulings; it appealed the trial court’s findings of fact and conclusions of law, which were entered after a trial on the merits. DSHS also inaccurately contends that the circumstances justifying equitable tolling were not disputed. *Id.* The record demonstrates otherwise. Pretrial VRP 170-260.

Here, as in *Berry v. Burdman*, representative plaintiffs had exhausted administrative remedies, but never received any relief. Judy Alberts, on behalf of her disabled daughter Lisa Fuchser, appealed the application of the SLR from the time it was initially applied in 2004. CP 3532. On May 4, 2006, an administrative law judge ruled that the SLR barred any relief. *Id.* A petition for review to superior court followed, but even after *Jenkins*, Ms. Fuchser never received any redress. *Id.*; *see also* CP 3530-64.

Similarly, class representative Alex Zimmerman, on behalf of DSHS's client Leya Rekhter, also exhausted administrative remedies from the outset in 2004, but never received any redress from DSHS. CP 3722-24. DSHS has never challenged the commonality or typicality of any class representatives or argued that their experiences with the Shared Living Rule were not typical of the class.

DSHS attacks the trial court's findings and conclusion that equitable tolling applied to the Client Class and defends its conduct on three grounds: (1) it provided adequate notice of the right to a fair hearing; (2) there was nothing wrong with DSHS stripping its ALJs of jurisdiction to hear an appeal from the "adequate notice," and (3) no facts warrant tolling.⁷

⁷ DSHS also asserts that the Clients "have not disputed" DSHS's arguments that the trial court "relied on a number of unsound reasons for tolling." Appellants' Reply at 43. DSHS is wrong, as the Clients addressed each of the arguments (except for those for

DSHS misses a fundamental point. Public benefits law mandates that DSHS provide its clients with the opportunity for a hearing before reducing benefits. RCW 74.08.080(1)(a) & .080(2)(f). The opportunity to be heard must be “meaningful.” *Downey v. Pierce Cnty.*, 165 Wn. App. 152, 164, 267 P.3d 445 (2011). DSHS notices advised of the right to a “fair hearing.” But, DSHS never provided any opportunity for a fair or meaningful hearing for anyone subject to the SLR. “It is axiomatic that, whenever the law requires a hearing of any sort as a condition precedent to the power to proceed, it means a fair hearing, a hearing not only fair in substance, but fair in appearance as well.” *Raynes v. Leavenworth*, 118 Wn.2d 237, 246, 821 P.2d 1204 (1992).

The “hearing” available to Clients aggrieved by the SLR fails both essential elements. It was substantively unfair because no relief could be granted. DSHS had stripped its ALJs of jurisdiction over the subject matter. It lacked even an appearance of fairness because only after Clients went through the charade of presenting evidence showing the Client need

which DSHS provided no legal authority). *See* Resp’ts Br. at 63-68. DSHS’s “most important” argument is a bald assertion (without citation to any authority in the opening brief or its response) that when weighing “competing” equities, the large-scale damages inflicted weigh against exercising equitable powers in favor of the injured because of the cost to the wrongdoer of being called to account. No response is required to DSHS’s unsupported assertion. RAP 10.3(a)(6); *Henderson Homes, Inc. v. City of Bothell*, 124 Wn.2d 240, 244, 877 P.2d 176 (1994).

for the benefits did DSHS tell them the whole proceeding had been pointless. CP 3546-49, 3596-3601, 3722-24.

The “fair hearing” process has been an integral part of Washington’s public assistance laws since being adopted by initiative in 1941. *Tarver v. Smith*, 78 Wn.2d 152, 156, 470 P.2d 172 (1970). Due to the “great need for and the great number of persons vitally affected by the administration of the public assistance laws,” the fair hearing process was designed to get benefits to those who need them while minimizing areas of dispute. *Id.* at 159. In contrast here, the trial court found, DSHS erected every possible barrier to recovery (Pretrial VRP 246), subverting the very purpose for which the fair hearing process had been created.

DSHS asserts its notices were adequate, but ignores evidence that the notices were affirmatively misleading. Resp’ts Br. at 66-67 & CP 859, 1133, 3598, 3600-01, 3700, 3724, 3755-56. Even the exhibits DSHS cites are materially misleading. Tr. Exs. 99-110. Each represents that the Client has the right to a “fair hearing,” but none actually discloses that the ALJ will have no jurisdiction to consider the merits or that there is any alternative to the futile appeal. DSHS also never sent notices to any of the providers or clients concerning any decisions in *Jenkins*. VRP 2434.

DSHS represents that it would have been reversible error for an ALJ to have rendered a decision that was inconsistent with the SLR, citing

RCW 34.05.570(3)(h). Appellants' Reply at 45-46. What the statute actually says is that a court shall grant relief from an agency order if "[t]he order is inconsistent with a rule of the agency *unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency.*" (emphasis added). An ALJ decision that relied on controlling statute (or this Court's *Jenkins* decision) over an inconsistent regulation would be upheld because agencies may not alter statutes through regulation, nor disregard this Court's decisions. DSHS's contention that an ALJ's invalidation of its regulation would usurp rulemaking authority is no more true than an assertion that the judicial invalidation of a regulation usurps an agency's authority to make rules. More significant, however, is the fundamental unfairness of DSHS's preclusion of administrative relief under its "fair hearing" process while simultaneously invoking its "fair hearing" process as a talisman against judicial relief.

DSHS even seeks to avoid liability for benefits reductions within the 90-day window before the lawsuit was filed, and for the year after *Jenkins*. The trial court found on an extensive record that pursuit of administrative remedies would have been futile. DSHS took nearly two months to repeal the SLR after *Jenkins*. Until then, its field directive to apply the SLR notwithstanding contrary court decisions remained in place. CP 4484,

4762. DSHS's rule stripping ALJs of jurisdiction over the validity of the rule remained in place. DSHS's admitted institutional inability to process appeals remained unchanged, as the trial court recognized. CP 457; Pretrial VRP 79.

Although DSHS argues it would have done things differently (Appellants' Reply at 46-49), it points to nothing in the record that administrative appeals after *Jenkins* were treated any differently, or that even after *Jenkins*, it provided relief to any disabled beneficiaries with pending appeals or administrative challenges. That's because they weren't and it didn't. "[W]here there is no possible remedy at all there can scarcely be a failure to exhaust remedies." *Smoke v. City of Seattle*, 132 Wn.2d 214, 225-26, 937 P.2d 186 (1997) (quoting *Stevedoring Serv. of Am. v. Eggert*, 129 Wn.2d 17, 43, 914 P.2d 737 (1996)) (party did not fail to exhaust administrative remedies where the ALJ lacked authority to order reimbursement under the applicable statute).

DSHS represents that *Hyatt v. Dep't of Labor & Indus.*, 132 Wn. App. 387, 132 P.3d 148 (2006) is inconsistent with the trial court's decision and is "on all-fours." It is not, and to the extent relevant, the case undercuts DSHS's position. It involved application of *res judicata* after a full hearing on the merits before the administrative body. Here, DSHS precluded any administrative consideration of the merits that the SLR was

invalid. DSHS does not even attempt to address its dismissal of every administrative appeal for lack of jurisdiction. As noted above, DSHS notices of the reduction in benefits from the SLR were demonstrably misleading and incomplete. Resp'ts Br. at 66-67. *Hyatt* is no support for DSHS on this record. However, *Hyatt* expressly recognized that equitable principles apply when determining whether to grant preclusive status to administrative proceedings. *Id.* at 398.

DSHS's contention that the 90-day period in RCW 74.08.080 precludes tolling on equitable grounds would read the doctrine out of existence. Equitable tolling of a statute of limitations recognizes the general applicability of limitations periods, but carves out a limited exception where equity requires. The failure to request an adjudicative proceeding is a "default." RCW 34.05.440.⁸ "Default" can be waived when equity requires. *Roth v. Nash*, 19 Wn.2d 731, 144 P.2d 271 (1943).

5. **Withholding \$57 million in paid care benefits from over 16,000 disabled clients is harm, which the money judgment would remedy. Until DSHS has paid a single recovery, there can be no "double recovery."**

DSHS incorrectly asserts that the trial court found that the Client Class was not harmed by DSHS's conduct. Appellants' Reply at 50. The

⁸ DSHS does not contend that a request for an adjudicative proceeding could have resulted in a favorable decision. Instead, it asserts that there was nothing wrong with depriving its ALJs of jurisdiction. No decision on the merits could ever be entered. DSHS failed in its duty to afford an opportunity for an adjudicative proceeding.

opposite is true: “The Court finds that the Client Class suffered the same damages as the Provider Class, \$57,123,794.50.” CP 3473-74 (Finding 25). The Client Class was damaged because “DSHS’s program . . . to reduce benefits to eligible disabled recipients, violate[d] federal comparability requirements.” *Jenkins*, 160 Wn.2d at 290-91. The trial court declined to enter judgment because “only one recovery can be permitted.” CP 3475 (Conclusion of Law 4). In the context of avoiding double recoveries under CERCLA, the court of appeals recently noted that once a claimant recovers all that it is entitled to, it may not seek additional recovery. *PacifiCorp Env’tl. Remediation Co. v. Dep’t of Transp.*, 162 Wn. App. 627, 673 & n.138, 259 P.3d 1115 (2011). The key element is recovery of the damages, not a potential recovery. The Client Class has not recovered the comparable benefits to which it is entitled, nor have the Providers been paid for their labor. The *PacifiCorp* court upheld the trial court’s award because the lower court had not required the DOT to pay amounts that had actually been recovered elsewhere. The same principal should have been applied here.

A party asserting double recovery has the burden of proving that there is a double recovery. *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 673-74, 15 P.3d 115 (2011). DSHS does not suggest

it has paid the Provider judgment, or even placed the funds in the court registry. DSHS cannot meet its burden of proof.

B. DSHS controlled every facet of wage payment to the Providers, and is liable as agent for its failure to pay required wages. To excuse DSHS from liability would represent a giant step backwards for protection of worker wages.

DSHS asserts that the Providers' wage claim cross appeal "relies solely on RCW 49.52.070" and that the Providers "abandon[ed] any claim under the WMWA." Appellants' Reply at 54 & 55 n.21. It is wrong. The Providers clearly argued in their cross-appeal that DSHS's mandated off-the-clock work violated the Minimum Wage Act ("MWA"), Chapter 49.46 RCW. Resp'ts Br. at 4 (Assignment of Error 3) & 77-78. By failing to respond, DSHS concedes the argument that it violated the MWA. *See State v. Lundy*, 162 Wn. App. 865, 873, 256 P.3d 466 (2011); *State v. Ward*, 125 Wn. App. 138, 144, 104 P.3d 61 (2005); *accord Vukusich v. Comprehensive Accounting Corp.*, 150 Ill. App. 3d 634, 644, 501 N.E.2d 1332 (Ill. App. 1986); *Charolais Breeding Ranches v. FPC Sec. Corp.*, 279 N.W.2d 493, 499 (Wis. App. 1979).

The reason for DSHS's desire to avoid the Providers' MWA argument is clear, given DSHS's admission that live-in providers were paid less for the same work than live-out providers. CP 4336 (the service plans for two identical Clients "should also be identical, except that the

service plan for the [Client] with the live-in provider would authorize fewer paid hours for the provider to perform the services”); VRP 2017.

There is no dispute that DSHS required the Providers to perform specific services without compensation. For example, DSHS’s Service Plan for Leya Rekhter stated that her need for help with meal preparation was “Total dependence, Great difficulty” because she “Cannot lift pans, Cannot plan meals, Cannot reach stove, Cannot reheat items, Cannot reach lower shelves, Cannot cut/peel/chop, Cannot reach upper shelves.” CP 3982. Her Provider was required to “Make food accessible to client, Prepare soft diet, Throw out spoiled food.” CP 3983. Nonetheless, DSHS eliminated payment for meal preparation. *Id.* Similarly, the Service Plan stated that Ms. Rekhter’s need for shopping assistance was “Total dependence, Great difficulty” because “Client cannot budget money, Client cannot carry heavy items, Client cannot reach items, Client cannot read labels, Client cannot write checks.” CP 3984. Although the Service Plan directed her provider to “Do all shopping for client,” DSHS likewise eliminated payment for all shopping services. *Id.*

An “employer” under the MWA is defined broadly to include anyone “acting directly or indirectly in the interest of an employer in relation to an employee.” RCW 49.46.010(4). As the admitted “fiscal agent” for the Clients, CP 4277 & VRP 2332, DSHS meets the statutory

definition of an employer – it acted “directly or indirectly” in the interest of the Clients.⁹ DSHS controlled payment and services rendered. The disabled Clients provided no direction or control, as their disabilities include both physical and cognitive impairments, often affecting speech and memory. *See, e.g.*, CP 4596, 5122-23.

Under the MWA, the hourly rate applicable to the uncompensated work is the statutory minimum wage. *Seattle Prof'l Eng'g Emp. Ass'n v. Boeing Co.*, 139 Wn.2d 824, 831, 991 P.2d 1126 (2000). DSHS is also liable under RCW 49.46.090(1) for reasonable attorneys' fees and costs.

Regardless of DSHS's willfulness in failing to pay the Providers' wages, it is liable under the MWA. If, however, its failure to pay was willful, DSHS is further liable for exemplary damages. *SPEEA*, 139 Wn.2d at 831.¹⁰

⁹ DSHS argues that it cannot be considered an “employer” because RCW 74.39A.270(3) limits the State's role as a public employer to collective bargaining. The limiting language in RCW 74.39A.270 means that the Providers are not “public employees” under Title 41 RCW, the State's civil service laws, except for the purposes of collective bargaining. Collective bargaining includes determination of wages of covered employees. Under the collective bargaining agreement, DSHS pays hourly wages to the Providers, CP 3818, and is thus the employer with respect to the payment of wages. The fact that the Providers are not “public employees” entitled to the statutory benefits of public employment does not foreclose them from pursuing a MWA claim.

¹⁰ If the Court affirms the judgment for the Providers, the case need not be remanded for trial on the amount of damages under the MWA because the Providers' contractual rate of pay was slightly higher than the statutory minimum wage (and the MWA claim is subject to a three-year limitations period), unless the Court agrees that the failure to pay was willful. The only remaining task for the trial court would be to determine reasonable attorneys' fees and costs to be paid by DSHS for its violation of the MWA. If the Court reverses the judgment for the Providers or determines that there are material issues of fact

DSHS attempts to escape liability under RCW 49.52.070 by arguing that (a) no employer was obligated under RCW 49.52.050(2) to pay wages to the Providers; (b) it was not an “agent” of an employer; (c) the Providers are not seeking unpaid “wages”; and (d) its withholding of wages was not willful. It is wrong on each count.

First, the basis for liability under RCW 49.52.050(2) is the MWA, which imposes an obligation to pay at least minimum wage for each hour worked. The Clients were obligated to pay as the nominal employers, but DSHS controlled payment to the Providers and acted in the interest of the Clients. CP 3957. As a result, it was an “employer” under the MWA and an agent of the employer under Chapter 49.52 RCW.

Second, DSHS acted as the agent for the Clients in the payment of wages and withholding of taxes as conceded at trial. VRP 2332. DSHS approved payment of wages based on information submitted to it. CP 3905-06, 3950. DSHS issued the checks to the Providers, prepared the W-2 forms, and had overall authority over the entire payment system for the Providers. CP 3818-23, 3957, 4003. DSHS retained the authority to suspend payments to the Providers if it had a reasonable belief that “the Client’s health, safety, or well-being is in imminent jeopardy.” CP 3995

on willfulness (entitling the Providers to exemplary damages), the case must be remanded for trial on the amount of unpaid wages.

(¶ 27). DSHS held the power to determine whether the Provider had been overpaid. CP 3994 (¶ 20). DSHS described the Clients as its “clients” in the Provider contracts. CP 3994 (¶ 21). In *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wn.2d 514, 522, 22 P.3d 795 (2001), this Court approved the reasoning of the court of appeals that “[t]he ‘agency’ contemplated by the statute requires some power and/or authority of the alleged agent to make decisions regarding wages, or the payment or withholding of wages before the possibility of personal liability can attach.”¹¹ DSHS had such power and/or authority and was thus the payroll agent for the Clients. VRP 2332.

Third, it is clear that the Providers seek unpaid *wages* under the MWA. Their right to payment cannot be waived by agreement. RCW 49.46.090(1); *Pillatos v. Hyde*, 11 Wn.2d 403, 407, 119 P.2d 323 (1941); RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981).

Finally, DSHS willfully withheld wages. Its conduct following this Court’s *Jenkins* decision belies its argument that the basis for its failure to pay the Providers was a debatable legal issue – it continued to withhold payments from the Providers for up to a year after *Jenkins* was decided. From the beginning, public interest groups told DSHS that the SLR was

¹¹ See also *Durand v. HIMC Corp.*, 151 Wn. App. 818, 835, 214 P.3d 189 (2009) (a person is a “vice principal” and liable under RCW 49.52.070 when “that person exercises control over the payment of funds and acts under that authority”).

unlawful, but DSHS regularly computed its savings. Tr. Ex. 165; VRP 2327, 2425. Contrary to DSHS's contention, Appellants' Reply at 60, *Jenkins* did not deal with claims under the MWA. Regardless of whether the Shared Living Rule's violation of Medicaid comparability requirements was "fairly debatable," there is no debatable question that requiring individuals to perform work without pay violates the MWA.¹²

The extraordinary level of control that DSHS exercised over the services performed and the wages paid (or not paid) makes it liable as an agent with control over the payment of wages. If DSHS avoids liability given its level of control, it is unclear whether any employer-agent could be liable under the statute. A major portion of Washington's wage protection system would be read out of the law.

C. Although not mentioned in its opening brief, DSHS now asserts its Provider arguments are based on RAP 2.5(a).

In reply, DSHS abandons its sufficiency of the evidence argument as to the Providers' breach of contract verdict. Instead, it now asserts that its appeal was based on RAP 2.5(a)'s narrow exception, under which a new

¹² DSHS uses the wrong standard for determining whether its failure to pay was willful, importing the standard under 28 U.S.C. § 1983 for imposing personal liability on a public official for violating federal law. Establishing personal liability under § 1983 is difficult, whereas the test for willful failure to pay wages under RCW 49.52.050 & .070 is not. *Compare Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2085, 179 L. Ed. 2d 1149 (2011) ("When properly applied, [qualified immunity] protects all but the plainly incompetent or those who knowingly violate the law." (internal quotation marks omitted)) with *Schilling v. Radto Holdings, Inc.*, 136 Wn.2d 152, 159-60, 961 P.2d 371 (1998) ("Willful means merely that the person knows what he is doing, intends to do what he is doing, and is a free agent." (internal quotation marks and citations omitted)).

issue can be raised on appeal when the question raised affects the right to maintain an action. The standard under RAP 2.5(a) is equivalent to a CR 12(b)(6) motion. *Roberson v. Perez*, 156 Wn.2d 33, 40, 123 P.3d 844 (2005) (“For purposes of RAP 2.5(a), the terms ‘failure to establish facts upon which relief can be granted’ and ‘failure to state a claim’ are largely interchangeable.”). In addition, this Court “treat[s] a CR 12(c) motion for judgment on the pleadings identically to a CR 12(b)(6) motion to dismiss for failure to state a claim.” *P.E. Sys., LLC v. CPI Corp.*, No. 86936-7, 2012 Wash. LEXIS 800 at *4-5 (Dec. 6, 2012). Under CR 12(c), an action may be dismissed if “it appears beyond doubt that the plaintiff cannot prove any set of facts which would justify recovery.” *Tenore v. AT & T Wireless Servs.*, 136 Wn.2d 322, 330, 962 P.2d 104 (1998); *Parmalee v. O’Neel*, 145 Wn. App. 223, 248, 186 P.3d 1094 (2008). Dismissal should be granted only when the plaintiff’s allegations “‘show on the face of the complaint that there is some insuperable bar to relief.’” *Tenore*, 136 Wn.2d at 330 (*quoting Hoffer v. State*, 110 Wn.2d 415, 420, 755 P.2d 781 (1988)). The Providers alleged a breach of DSHS’s obligations under a contract – a well-recognized, provable cause of action.

The circumstances of the Providers’ breach of contract claim are in no way similar to those in *Gross v. City of Lynnwood*, 90 Wn.2d 395, 400, 583 P.2d 1197 (1978), where the plaintiff did not meet the statutory age

requirements for an age discrimination claim, or those in *Roberson*, where there was no DSHS placement decision to bring the claim within the scope of a negligent investigation claim. *Roberson*, 156 Wn.2d at 38-39. Here, the Providers had contracts with DSHS and had the right to assert that DSHS breached its duties under the contracts, as the jury found. There is nothing on the face of the Providers' complaint against DSHS that shows "an insuperable bar to relief." RAP 2.5(a) does not apply to preserve DSHS's argument, which was (until its reply brief) a sufficiency of the evidence argument.

The Providers alleged and proved (1) a contract with DSHS and (2) a breach by DSHS of its duty of good faith and fair dealing. DSHS's dissatisfaction with the jury's verdict does not transform the case into one under which no set of facts would have warranted relief.

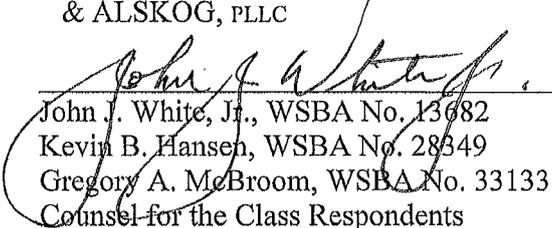
III. CONCLUSION

The Client Class established liability and proved over \$57 million in damages from DSHS's conduct, which remain unpaid. They are entitled to a judgment against DSHS for that money, and for the reasonable attorneys' fees and costs incurred to obtain relief. No double recovery is being sought and any such concern can be easily controlled with an offset provision in the judgment itself, or with oversight in the claims administration process.

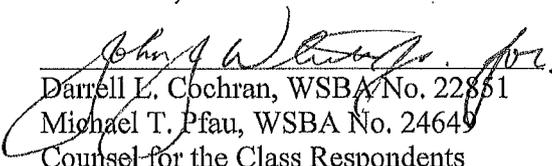
DSHS is liable for the unpaid wages which resulted from its affirmative, *willful* conduct. The Court should award exemplary damages and attorneys' fees for DSHS's knowing failure to pay for all the work it required the Providers to perform.

DATED this 30th day of January, 2013

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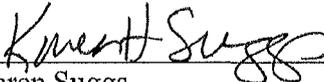

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I certify under penalty of perjury under the laws of the United States of America and the State of Washington that on the date specified below, I filed and served the foregoing as follows:

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DATED: January 30, 2013 at Kirkland, Washington



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