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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/CROSS-APPELLANTS SEIU
HEALTHCARE 775NW AND CINDY WEENS**

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 ORIGINAL

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INTRODUCTION

Respondents/Cross-appellants SEIU Healthcare 775NW (“SEIU 775NW” or “Union”) and Cindy Weens submit this Reply Brief in support of their alternative argument on cross-appeal, to wit, that if this Court reverses the trial court’s judgment on behalf of the Provider Class, it should then reverse the trial court’s dismissal of the contract implied in law – or unjust enrichment – theory and remand for further proceedings consistent with that ruling.¹

Quite simply, the Individual Provider (“IP”) Contract governs the Department’s obligations to (1) determine the amount of authorized hours in the DSHS client’s Service Plan for which IPs will be paid, and (2) determine the authorized services IPs are required to perform, or it does not. If it does, an implied duty of good faith and fair dealing attaches to those obligations, as set forth previously by Respondents in this matter. If it does *not*, then the IP Contract does not cover those subjects and the existence of that contract does not bar the IPs’ unjust enrichment claim. For that reason, and as set forth further below, Appellants’ argument in this matter lacks merit.

¹ Respondents/Cross-appellants herein inadvertently and erroneously referred to this legal theory, in a heading in their initial brief, as being “quantum meruit.” Defendants/Appellants are correct that the legal theory relied upon by Respondents/Cross-appellants herein is solely “unjust enrichment.”

ARGUMENT

I. APPELLANTS ERR IN CLAIMING THAT THE PROVIDERS' UNJUST ENRICHMENT CLAIM IS BARRED BECAUSE THE PROVIDERS HAD CONTRACTS WITH THE DEPARTMENT.

Appellants contend in this case that IPs were not contractually required “to do any work beyond the unambiguous number of hours awarded to a client.” DSHS Response Br. at 19. The basis for this assertion is simply that providers were informed of the maximum hours for which they were eligible for payment. *Id.* Thus, DSHS itself claims that the shared living tasks performed by the IPs, but not paid for by DSHS, are outside of and not governed by the IP Contract. See also, DSHS Opening Br. at 37 (“The implied covenant claim would require DSHS to pay for hours never authorized, contradicting the contract terms.”)

For this Court to reverse the judgment for the Provider Class, the Court must necessarily agree with DSHS and determine that the IP Contracts do not obligate DSHS to pay for the specific personal care services specified in the client’s Service Plan, where the provision of those services necessarily exceeds the number of authorized hours.

Should this Court reach that conclusion, however, then the fundamental premise of the Appellants' "contract bar" argument with regard to the unjust enrichment cause of action necessarily fails.

That is because it is well established that unjust enrichment claims may proceed despite the existence of an express agreement among the parties, where the express contract does not cover the conduct at issue. *See, e.g., Pierce County v. State*, 144 Wn. App. 783, 830, 185 P.3d 594 (2008), *as amended on denial of reconsideration*, (July 15, 2008).

In *Pierce County*, the Court held that the State was liable under a quasi-contract theory for damages to reimburse the County for expenses incurred in caring for long-term patients who were wait-listed for admission to a state-run mental health institution; the parties' express contract did not bar recovery, because the express contract did not address the County's responsibility to provide long-term care. 144 Wn. App. at 830 ("Because the contracts did not explicitly cover the County's responsibility for long-term care, they do not bar the County's claim based on quasi-contract principles."). The County paid for care of patients who were the State's responsibility, thereby reducing the State's costs of long-term care for people with mental disabilities. It would have been unjust, the Court held, to refuse reimbursement to the County that provided such care. *Id.* at 831.

The IPs' provision of personal care services above and beyond those encompassed within the "amount [of] authorized" hours is precisely analogous to the situation where one party overpays another party to a contract. Washington courts recognize that "[w]here a party receives an overpayment on a written contract, his liability to repay such overpayment does not arise out of the contract under which the overpayment is made...but it arises from a duty imposed by law to repay an unjust and unmerited enrichment." *Kazman v. Land Title Co.*, No. C11-1210 RSM, 2012 WL 4336727 (W.D. Wa. Sept. 21, 2012).

United States District Court Judge Ricardo Martinez's extremely recent (September 21, 2012) decision in *Kazman* is both directly on point and compelling. He wrote:

Defendant contends that Plaintiff's claim for unjust enrichment must be dismissed because Plaintiff's claim cannot stand given the existence of a contractual relationship between the parties. Dkt. # 26, 15.

In Washington, "unjust enrichment is the method of recovery for the value of the benefit retained absent any contractual relationship because notions of fairness and justice require it." *Young v. Young*, 164 Wash.2d 477, 484, 191 P.3d 1258 (2008). If a claim for liability arises out of the terms expressed in a written contract between the parties then the claim is contractual in nature and a claim of unjust enrichment is unavailable. *See Chandler v. Wash. Toll Bridge Auth.*, 17 Wash.2d 591, 604, 137 P.2d 97 (1943); *Halver v. Welle*, 44 Wash.2d 288, 290-93, 266 P.2d 1053 (1954). **But, if the liability arises outside of the express terms of the contract a "quasi contract" is said**

to exist and the plaintiff may recover under a theory of unjust enrichment. *Young*, 164 Wash.2d at 484, 191 P.3d 1258.

....

Washington courts recognize that where a payment is made in “violation of the terms of the written contract ... the implied liability to repay does not arise out of a written instrument,” rather, the “law in such cases [will imply] a liability to refund the illegal payment, and, if not refunded, an action will lie to recover the amount unjustly retained.” *Halver*, 44 Wash.2d at 292–93, 266 P.2d 1053 (quoting *City of Seattle v. Walker*, 87 Wash. 609, 611, 152 P. 330 (1915)) (internal quotations omitted). Thus, “[w]here a party receives an overpayment on a written contract, his liability to repay such overpayment does not arise out of the contract under which the overpayment is made ... but it arises from a duty imposed by law to repay an unjust and unmerited enrichment.” *Id.* at 295, 266 P.2d 1053.

2012 WL 4336727 at *6-7.

Here, similarly, DSHS received more than it obtained the right to receive through its written contract with the IPs, through the imposition on IPs of obligations that, by definition, the Court herein must have concluded did not inhere in the IP Contract. Its liability to pay an additional sum of money to the IPs therefore “does not arise out of the contract under which the overpayment is made ... but it arises from a duty imposed by law to repay an unjust and unmerited enrichment,” and that obligation is not barred by the existence of the written contract that provides neither a right nor a remedy related to this duty.

II. APPELLANTS ALSO ERR IN CLAIMING THAT DSHS WAS NOT UNJUSTLY ENRICHED.

Appellants' single paragraph addressing the actual elements of the Provider Class' unjust enrichment claim consists of Appellants' assertion that because DSHS "paid each provider the amount authorized," DSHS was not unjustly enriched by operation of the Shared Living Rule. DSHS Response Br. at 53.

This is risible. When DSHS reduced the number of hours a client was eligible to receive, without reducing the corresponding services to which that client was entitled, it fell to the IPs to provide the necessary services that DSHS was obligated to provide. When DSHS failed to pay the IPs for the hours spent providing the necessary services outlined in the clients' Service Plans, the IPs conferred a benefit upon DSHS. DSHS was therefore enriched by obtaining services it was legally obligated to provide to the clients without properly compensating the providers of the service, the IPs.

Moreover, this enrichment was clearly "unjust." Despite the application of the Shared Living Rule, the IPs were under a legal and contractual duty to DSHS to continue to provide the personal care services specified in the clients' Service Plans. *See* WAC § 388-71-0515 ("An individual provider or home care agency provider must, *inter alia*...(2)

Provide the services as outlined on the client's plan of care..."); *e.g.* Ex. 66 at 4.² The Service Plans had not been altered in terms of the clients' actual need for personal care services; rather, DSHS simply eliminated a portion of the authorized hours so that the IPs would perform the work without getting paid.³

The only rationale provided by DSHS for deeming DSHS's behavior not "unjust" is, in essence, that by cheating the IPs out of the money they should have been earning, DSHS was able to allocate those funds to other needs, which made DSHS's actions an appropriate (and therefore purportedly not "unjust") public policy.

This argument proves too much. It implies, and requires the conclusion, that no conduct by any governmental entity, no matter how dishonest, outrageous, confiscatory, or otherwise patently "unjust," could give rise to a claim for unjust enrichment, because by definition the money thereby seized or retained by the government would have ended up being

² The regulations governing the IPs' responsibilities provide that "[a]n individual provider or home care agency provider must, *inter alia*...(2) Provide the services as outlined on the client's plan of care, as defined in WAC § 388-106-0010; [and] (4) Contact the client's representative and case manager when there are changes which affect the personal care and other tasks listed on the plan of care..." WAC § 388-71-0515. That regulation in turn defines "plan of care" as the "assessment details and service summary generated by CARE." WAC § 388-106-0010. The plan of care must include "[a] statement by the individual provider that he or she has the ability and willingness to carry out his or her responsibilities relative to the plan of care." RCW 74.39A.095(2)(g).

³ Nor is there any dispute in this case about the fact that the IPs did, in reality, continue to provide those personal care services, notwithstanding the fact that they were no longer being paid for this work.

used for other, presumptively worthy, purposes.

To the contrary, under any normal interpretation of the words, DSHS placing IPs in a situation where they were obligated to perform difficult, back-breaking labor for persons who DSHS was under a special obligation to make sure received that care, while refusing to pay IPs for that work based on an unlawful rule it adopted precisely to accomplish this goal, is certainly fairly characterized as “unjust,” and DSHS thereby unjustly enriched itself at the IPs’ expense.

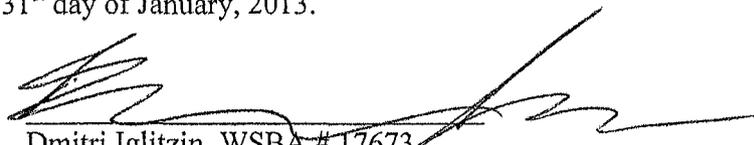
For this reason, Respondents/Cross-appellants reiterate their request, as previously articulated, that should this Court hold that the IP Contract did not impose a duty of good faith and fair dealing on DSHS in setting the number of authorized hours for which an IP would be paid, it should then hold that the IPs stated a valid cause of action for unjust enrichment for having conferred a benefit on the Department under circumstances in which it would be unjust for the defendant to keep the benefit without paying, and remand for further proceedings consistent therewith. *See, Norcon Builders, LLC v. GMP Homes VG, LLC*, 161 Wn. App. 474, 490, 254 P.3d 835 (2011).

CONCLUSION

Respondents/Cross-appellants SEIU Healthcare 775NW and Cindy Weens have asked that this Court affirm the judgment of the trial court

and jury below for breach of the implied covenant of good faith and fair dealing. In the alternative, to the extent that this Court holds the IP Contract did not impose or DSHS did not breach a duty of good faith and fair dealing with regard to setting the number of authorized hours for which an IP would be paid, this Court should reverse the trial court's dismissal of the Class Plaintiffs' unjust enrichment claim and remand that cause of action to the trial court for adjudication.

Respectfully submitted this 31st day of January, 2013.



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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of January, 2013, I caused the foregoing Reply Brief of Respondents/Cross Appellants SEIU Healthcare 775NW and Cindy Weens to be filed with the Supreme Court via electronic mail, and true and correct copies of the same to be sent in the following manner:

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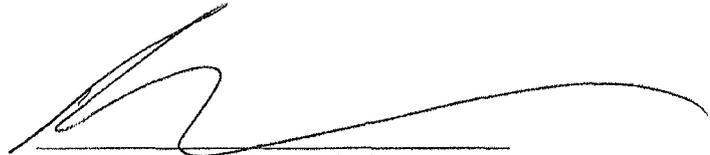
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Please find attached the Reply Brief of Respondents/Cross-Appellants SEIU Healthcare 775NW and Cindy Weens.

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