

NO. 86822-1

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.

---

BRIEF OF RESPONDENTS LEYA REKHTER, *et al.*

---

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## I. INTRODUCTION

Washington administers community-based care programs for low income and disabled individuals through the Department of Social and Health Services (“DSHS”) as an alternative to institutional care. These programs provide important benefits to both the State and the individuals they serve. The State achieves substantial savings by avoiding much more expensive institutional care, and program beneficiaries continue to live in their own homes, retaining a greater measure of personal dignity.

This case arose because DSHS began to treat some program beneficiaries differently from others. It adopted the Shared Living Rule (“SLR”) which eliminated about 15% of paid care benefits if beneficiary and care provider shared the same household, regardless of the beneficiary’s actual need. Former WAC 388-106-130(3)(b). In *Jenkins v. Dep’t of Social & Health Servs.*, 160 Wn.2d 287, 157 P.3d 388 (2007), this Court concluded that the SLR’s automatic, irrebuttable reduction in paid care benefits violated Medicaid comparability law and remanded for calculation of damages.

Here, individuals who provided services (the “Provider Class” or “Providers”) and the Medicaid beneficiaries themselves (the “Client Class” or “Clients”) sued to recover money wrongfully withheld by DSHS under the SLR, both before and after this Court’s *Jenkins* decision.

Similar to *Jenkins*, the trial court found DSHS liable for damages to the Clients under the long-term care statute and Washington's Administrative Procedure Act. After a three week trial, a jury also found DSHS liable to the Providers for breach of contract and awarded damages.

## **II. ASSIGNMENTS OF ERROR**

### **A. Restatement of issues pertaining to DSHS assignments of error.**

#### **1. Relating to DSHS Assignment of Error 1:**

1.1 Where DSHS failed to give the trial court an opportunity to correct its claimed errors by filing post-verdict CR 50(b) or CR 59 motions, may it still challenge the evidentiary basis for the jury's verdict?

1.2 Where the contracts required DSHS to determine the services needed to meet its Clients' basic living needs and required the Providers to render those services, did DSHS breach its duty of good faith and fair dealing by eliminating payment for a portion of the required services?

#### **2. Relating to DSHS Assignment of Error 2:**

2.1 May DSHS challenge jury instructions based on its stated preference for its own, less complete instructions when it failed to specifically identify any errors in the instructions used by the trial court?

2.2 May DSHS assert error in an instruction which it represented to the trial court both correctly stated the law and reflected the

evidence or for failure to give an instruction on a claim not presented to the jury?

**3. Relating to DSHS Assignment of Error 3:**

Where both DSHS and the Providers presented detailed evidence calculating the SLR's elimination of paid hours, and the measure of damages under the contract was the unpaid hours multiplied by the applicable rate, did the court abuse its discretion in awarding prejudgment interest?

**4. Relating to DSHS Assignments of Error 4 and 5:**

4.1 Is the trial court's unchallenged conclusion of law that the Clients may recover wrongfully withheld benefits under RCW 34.05.570(2) and RCW 74.08.080(3) grounds to uphold its decision for the Client Class?

4.2 Where the undisputed facts show that DSHS erected every possible barrier to recover wrongfully withheld benefits, did the trial court properly apply equitable tolling and the administrative futility doctrine as additional grounds to uphold the Client Claims?

**B. Assignments of Error and Issues Presented on Cross-Appeal.**

**1. Assignment of Error 1.** The trial court erred by not entering a money judgment for the Client Class.

**Issue Presented:** Should the court have entered judgment for the Clients after finding they suffered \$57,123,794.50 in damages,<sup>1</sup> or is DSHS's liability to the Providers grounds to deny judgment to the Clients?

**2. Assignment of Error 2.** The trial court erred by not awarding attorneys' fees and costs to the Clients under RCW 74.08.080(3).

**Issue Presented:** Where the Clients proved DSHS's liability and damages for wrongfully withheld benefits, should DSHS pay attorneys' fees to fulfill RCW 74.08.080's punitive and deterrent purposes either as a percentage of recovery or on an hourly basis and credit the amount awarded against the fees paid from the common fund?

**3. Assignment of Error 3:** The trial court erred both in failing to grant summary judgment to the Providers against DSHS and in granting DSHS's summary judgment against the Providers on the Providers' wage claim under Chapters 49.46 and 49.52 RCW.

**Issue Presented:** Did DSHS's elimination of all compensation for required services, as the admitted fiscal agent of an employer, violate Washington's protective wage and hour laws and render DSHS liable for the unpaid wages, exemplary damages and attorneys' fees?

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<sup>1</sup> As discussed below in Part VI.A, no double recovery is being sought or has ever been sought.

<sup>2</sup> See, e.g., VRP 586; Exs. 1 (Judy Alberts, 2003 to 2007); 7 (Alberts, 2007 to 2011);

### III. STATEMENT OF THE CASE

Washington's long-term care laws and regulations govern the administration of long-term care services. The legislature enacted Chapter 74.39A RCW, *inter alia*, to "promote individual choice, dignity, and the highest practicable level of independence." RCW 74.39A.007(1). The legislature recognized the need for in-home services "to maximize effective use of limited resources," RCW 74.39A.007(2), and understood that "many recipients of in-home services are vulnerable and their health and well-being are dependent on their caregivers." RCW 74.39A.005.

The legislature's directive to expand in-home care created a win/win: low income, disabled clients may continue living in their homes, and the State avoids high-cost, institutionalized care. RCW 74.39.001 & .005; RCW 74.39A.005 & .007. In support of this policy, the legislature directed DSHS to take advantage of programs with federal financial participation. RCW 74.39A.030(2).

To qualify for federal financial participation, the legislature commanded DSHS to comply with state and federal laws in administering the jointly-funded programs. RCW 74.39A.901 ("The rules under this chapter shall meet federal requirements that are a necessary condition to the receipt of federal funds by the state."); RCW 74.05.050 ("The state hereby accepts and assents to all the present provisions of the federal law

under which federal grants or funds . . . are extended to the state for the support of programs . . . . The provisions of this title shall be so administered as to conform with federal requirements . . . .”).

Federal law requires DSHS to provide comparable benefits to Medicaid beneficiaries. In 2003, DSHS adopted the SLR, which automatically eliminated about 15% of paid care benefits if a Client and Provider shared the same household, regardless of the Client’s actual need. Former WAC 388-106-130(3)(b). In *Jenkins*, this Court concluded that the SLR’s automatic, irrebuttable reduction in benefits violated the Medicaid comparability requirement.

The Clients are low income and severely disabled individuals who participated in the Medicaid home services programs. *See, e.g.*, VRP 1740-50, 1792-98, 1801-03, 1823 (Natasha Pfaff); VRP 690-92, 696-99, 739, 841-55 (Lisa Fuchser); CP 3713-15, 4098-99 (Leya Rekhter); CP 4110-111, 5119 (Mildred Schock); VRP 1135-49, 1164-71, 1180-83, 1192-97 (Clayton Bayer and Opal Bayer). These individuals were dependent on their paid Providers to meet their basic daily needs, including meal preparation, essential shopping, laundry and housekeeping, which DSHS characterized as “shared living” tasks. *See, e.g.*, VRP 1796-98, 1801, 1823 (Pfaff); VRP 841-55 (Fuchser); Ex. 29 at 15-16 (Bayer); Exs. 35 at 20-23, 36 at 20-23, 37 at 20-23 (Schock).

DSHS had a written contract with Providers to be “able to draw down Medicaid dollars for the services that [the Providers] are providing on behalf of the beneficiary.” VRP 2015. Both before and after the SLR, DSHS executed contracts with the Providers, which covered a period of 3 or 4 years.<sup>2</sup> For many years, DSHS has used a uniform set of basic terms for Provider contracts throughout the State. VRP 1028, 1034. The basic contract was identical for live-in and live-out providers. VRP 2017.

The Provider contracts, at several points, expressly incorporated the Client’s Service Plan. *See, e.g.*, Ex. 1 (§§ 1.c, 1.s, 1.t, 2, 4.a(2), 4.b) (Appendix at App. 4 – App. 5). A “Service Plan” is “a written plan for long term care service delivery which identifies ways to meet the client’s need with the most appropriate services.” Ex. 1 (§ 1.t) (Appendix at App. 4); *see also* VRP 601-02. By incorporating the Service Plan, created after a contract was executed, DSHS could avoid having to update the contract. In addition to the annual assessments, DSHS was “required to reassess clients based on significant changes that might occur in their condition.” VRP 2015-16. For example, a hospitalized client might need to be reassessed “for more hours” of paid care before the client “can come back

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<sup>2</sup> *See, e.g.*, VRP 586; Exs. 1 (Judy Alberts, 2003 to 2007); 7 (Alberts, 2007 to 2011); 9 (Alex Zimmerman, 2001 to 2005); 13 (Zimmerman, 2005 to 2009); 21 (Cathy Bayer, 2005 to 2007); 27 (Belinda Morris, 2003 to 2005); 28 (Belinda Morris, 2006 to 2008); 31 (Cheryl Eckhart, 2002 to 2006); 34 (Cheryl Eckhart, 2005 to 2009); 41 (Maureen Pfaff, 2006 to 2009).

home.” VRP 2016.

Providers agreed to perform the “authorized household tasks . . . identified in the client’s Service Plan.” Ex. 1 (§ 2) (Appendix at App. 4). DSHS agreed to pay the Providers “the established rate for services per client [which] will apply to all services authorized and provided under this Contract.” Ex. 1 (§ 4.b) (Appendix at App. 5). The term “authorized” meant “the [Provider’s] services are included in the client’s DSHS approved Service Plan.” Ex. 1 (§ 1.c) (Appendix at App. 4). Providers began performing services upon execution of the contracts, before DSHS completed the Service Plans – each contacting period generally included multiple Service Plans over the contract term. VRP 749-50, 1034; Exs. 41, 44.

DSHS assigned “shared living” tasks to Providers in the Service Plans, both before and after adopting the SLR. VRP 1283-84; Exs. 2 at 2 (Fuchser); 11 at 2, 15 at 2, 16 at 2, 17 at 2, 18 at 2 (Rekhter); 29 at 15-16 (Opal Bayer); 32 at 2, 33 at 2, 35 at 2, 36 at 2, 37 at 2, 39 at 2 (Schock); 44 at 2, 45 at 2 (Natasha Pfaff).<sup>3</sup> Under the SLR, DSHS eliminated payment for these assigned tasks, *in toto*, for the Providers. VRP 1276-77. In contrast, DSHS continued to pay live-out providers and substitute live-in

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<sup>3</sup> While the SLR was in effect, DSHS’s Client Service Plans designated housework, laundry, shopping, and meal preparation as “Agreed Upon Tasks” (*see, e.g.*, Ex. 30 at 2) or “Assigned Tasks” (*see, e.g.*, Ex. 2 at 2).

providers for “shared living” tasks (meal preparation, laundry, housekeeping, and shopping). VRP 565, 661, 754-55, 1828-29, 1835-36.

The Service Plans included no specific provision that DSHS was not paying the Providers for the “shared living” tasks,<sup>4</sup> and DSHS never told the Providers that it had discontinued paying for these “shared living” tasks. VRP 1191, 1280-81. The Providers understood they were being paid based on the Client’s assessed need for services, VRP 751-52, 758-59, 1157-59, 1855, and trusted DSHS to accurately determine the “hours” authorized under the Service Plans to perform the required services. VRP 760, 1220-21; 1831, 1835-36.

DSHS personnel understood that accepting federal funds required the agency to perform the Provider contracts in compliance with federal law. VRP 1051-53, 1110, 1296-97, 2362. “[DSHS] . . . must comply with state and federal regulations for assessing clients and providing service plans.” Ex. 216 at I-1; *see also* Ex. 57 at 5-5 (the Statement of Work “should be consistent with state and federal laws, regulations and the components of the contract”).

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<sup>4</sup> Even after DSHS’s elimination of payment under the SLR, many of the service plans indicated that DSHS was paying for the “shared living” tasks by expressly identifying them as formal supports (or “paid” care services). *See, e.g.*, VRP 1280, 1324; Exs. 2 at 2; 3 at 2; 4 at 3; 5 at 2; 11 at 2; 15 at 2; and 16 at 2.

Under the previous “Legacy” method, DSHS performed individualized analysis to identify shared living-type tasks that benefited the household generally. VRP 768-69, 1274, 1282-83. Under the Legacy method, live-in Providers could be and were paid for meal preparation, laundry, shopping and housekeeping tasks assigned to them. VRP 768-69; former WAC 388-15-203 (2001). The Legacy method was an individualized determination of “exactly what [the Client’s] needs were.” VRP 768. In late 2003, DSHS issued a Management Bulletin to its staff, announcing the new method for assessing Client needs, Ex. 219, under which it would no longer “pay for shopping, housework, laundry, meal preparation, or wood supply when [client] and [ ] individual provider . . . live in the same household.” VRP 1276-77.

DSHS exercised control over the Providers’ wages by making the final determination of the services the Providers must perform.<sup>5</sup> DSHS admitted that it “acts as the *fiscal agent* on behalf of the consumer and pays individual providers for hours worked.” CP 4277 (emphasis added). DSHS approved payment of wages using information the Providers submitted, CP 3905-06, 3950, and paid an hourly rate. CP 3818-23, 3954-

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<sup>5</sup> For example, DSHS gave providers specific instructions for “Ordinary Housework”: “Clean kitchen after each meal, Change/wash linens weekly, Dust weekly, Separate cleaning items from food, Clean bathroom weekly, Sweep/mop floors as needed, Take out garbage.” CP 3983.

60, 3962, 3991-92, 4000-07. DSHS retained authority to suspend payments if it had a reasonable belief that “the Client’s health, safety, or well-being is in imminent jeopardy,” CP 3995, and held the power to determine whether a Provider had been overpaid. CP 3994. DSHS maintained the Providers’ employment records. CP 3814. DSHS also issued W-2 forms to the Providers, using its federal tax identification number as the “employer,” and withheld federal taxes from the Providers’ wages. CP 3954-60, 4000-07.

This lawsuit was filed in Thurston County Superior Court on May 4, 2007, immediately following the *Jenkins* decision, seeking to enjoin DSHS from continuing to apply the SLR and obtain retroactive payment of the wrongfully withheld paid care benefits.<sup>6</sup> Natasha Pfaff filed a similar lawsuit in Thurston County on May 8, 2007, seeking to represent the Client Class. SEIU and Cindy Weens filed a lawsuit in King County Superior Court on May 29, 2007, seeking to represent the Provider Class.

DSHS removed this case and the Pfaff lawsuit to U.S. District Court in Tacoma in June 2007. On December 2007, King County Superior Court stayed the SEIU lawsuit pending the resolution of the Pfaff lawsuit

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<sup>6</sup> DSHS has not provided relief to anyone other than the three recipients in *Jenkins*. CP 3471, 3574. It inaccurately contends that “client class members did not seek relief until this post-*Jenkins* decision.” Br. at 14. Other recipients who sought relief at the agency level received the same treatment as the plaintiffs in *Jenkins*, dismissal. *See, e.g.*, CP 3532-43 (Fuchser), 3575-76 & 3722-24 (Rekhter).

and this case. The federal court consolidated the cases and certified the Client Class and the Provider Class for the purpose of determining liability. After dismissing the federal law claims, the court remanded to state court for resolution of the state law claims.<sup>7</sup>

After remand, the SEIU case was transferred from King County to Thurston County and the trial court consolidated all three cases on April 21, 2009.<sup>8</sup> The court certified the Client Class and the Provider Class. CP 41-44, 1077-90 (Appendix at App. 3). The Clients moved for summary judgment, claiming that DSHS was liable under Chapter 34.05 RCW and RCW 74.08.080(3) for the elimination of paid benefits. CP 77-93, 1142-52, 3530-3790, 4371-4498, 4513-4766. DSHS argued that the Clients should have first filed for administrative hearings, which would have received the same treatment as the litigants in *Jenkins*, dismissal. Pretrial VRP 173. Then, according to DSHS, those litigants should have filed what the court characterized as “placeholder lawsuits” in superior court during the pendency of *Jenkins*. Pretrial VRP 183-84, 235-36.

The court found DSHS’s assertions inequitable. Pretrial VRP 247 (“To impose upon each of these 11,000 recipients the responsibility and

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<sup>7</sup> *Pfaff v. State of Washington*, Nos. C07-5280RJB & C07-5306RJB, 2008 U.S. Dist. LEXIS 122366 (W.D. Wash. May 29, 2008); *Pfaff*, 2008 U.S. Dist. LEXIS 98804 (W.D. Wash. Dec. 8, 2008).

<sup>8</sup> A summary of the relevant trial court proceedings is in the Appendix. App. 1.

expense to seek and pay for legal advice, and then to file a lawsuit in superior court merely as a placeholder would be a miscarriage of justice.”). The court granted partial summary judgment to the Clients on liability, ruled that the Clients could seek relief from the date DSHS began withholding paid care benefits from the class members, and reserved the issue of damages for trial. CP 451-59, 797-98, 1466-70, 3443-45; Pretrial VRP 232-60, 264-85. The court denied DSHS’s motion for reconsideration or partial summary judgment, where DSHS had argued that the court should substantially limit damages. CP 3439-42.

The Providers moved for partial summary judgment on their wage claims under Chapters 49.46 and 49.52 RCW. CP 3794-4009, 4262-84. The court granted DSHS cross-motion for partial summary judgment, dismissing the Providers’ wage and other state law claims, but ruled that the Providers’ claims for breach of contract, *quantum meruit*, and unjust enrichment must be resolved at trial. CP 1064-76, 1462-65.

The Providers’ breach of contract and *quantum meruit* claims were tried to a jury, and the Providers’ unjust enrichment and the Clients’ damages claims were tried to the court. At the close of the Providers’ case, DSHS moved for judgment as a matter of law under CR 50(a). VRP 1860-99. The court granted the motion on the unjust enrichment and

*quantum meruit* claims, but denied it on the breach of contract claim.

VRP 1901-05; CP 3446-48.

After a three-week trial, the jury determined that DSHS had breached the implied duty of good faith and fair dealing in its contracts with the Providers and awarded relief in the amount of \$57,123,794.50.<sup>9</sup> VRP 4985-86. Following the verdict, DSHS did not move for judgment as a matter of law or for a new trial under CR 50(b) or CR 59. VRP 2831-56.

The court entered a judgment on the jury's verdict on February 25, 2011 and subsequently awarded prejudgment interest. CP 3006-10, 3449-51; VRP (July 1, 2011) at 4-16. On December 2, 2011, the court entered the final judgments for the Providers and Clients, and the findings of fact and conclusions of law on the Clients' claims. CP 3459-79.

The court found that the Clients suffered the same damages as the Providers, \$57,123,794.50, CP 3473-74, but declined to enter a judgment for the Clients in this amount. The court reasoned that although *Jenkins* permits the Clients to claim damages, the Providers would be obtaining a judgment "and only one recovery can be permitted." CP 3475. "[T]he presence of a judgment entered in favor of the Provider Class precludes entry of a judgment in favor of the Client Class." *Id.*

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<sup>9</sup> On average, this amounts to \$2,783 per provider.

#### IV. SUMMARY OF ARGUMENT

The jury returned a verdict for the Providers and the court entered judgment on the verdict. DSHS assigns error to the entry of judgment, but provides no argument that the court erred in any of its decisions relating to the entry of judgment and has waived the issue. DSHS also waived any right to challenge the sufficiency of the evidence for the verdict because it failed to file a post-verdict motion under CR 50(b) or CR 59. Even had DSHS preserved the issue for appeal, there was sufficient evidence for the jury to find that DSHS breached the duty of good faith and fair dealing when determining the number of hours for which the Providers would be compensated. This Court may also affirm the judgment based on the invalidity of the SLR itself and a line of cases permitting recovery of underpayment caused by invalid rules.

DSHS waived the right to challenge the jury instructions by failing to specify the basis for its objection to the instructions in the trial court. In addition, DSHS affirmatively approved language in the instructions that it now argues was erroneous. The instruction properly instructed the Jury on the law. Even had DSHS preserved the right to challenge the instructions on appeal, the court's instructions allowed DSHS to argue its theories of the case, did not mislead the jury, and when taken as a whole properly informed the jury of the applicable law.

During trial, experts for both the plaintiffs and DSHS computed damages by multiplying the contractual pay rate by the number of paid hours eliminated by the SLR. While the parties disputed the number of hours affected by the SLR, once the jury determined the number of hours, the damages could be calculated with precision. The trial court properly found that the damages were liquidated and awarded prejudgment interest.

DSHS did not assign error to the trial court's conclusion that the Clients were entitled to relief under RCW 34.05.570(2) and RCW 74.08.080(3). The harm to the Clients is attributable directly to an invalid regulation, and the trial court correctly determined that the Clients could recover the back benefits. Even if the Clients' claim is evaluated as other than a rule challenge to the SLR's denial of comparable benefits, the trial court did not abuse its discretion in tolling the time limit to bring an action under RCW 74.08.080. DSHS eliminated paid benefits under the SLR, even where its notices advised Clients that the hours had been increased. DSHS failed to provide an opportunity for adjudicative proceeding as required by RCW 74.08.080. DSHS admitted it did not have the ability to hear the appeals in a timely manner. Even after *Jenkins*, DSHS kept applying the rule for more than a year. DSHS did not grant the appeal of anyone whose appeals were still pending when *Jenkins* was decided. A

clearer case for applying equitable tolling and the futility doctrine is hard to imagine.

The Clients' damages claim was tried simultaneously to the bench. The court found that the Clients suffered the same damages as the Providers, \$57,123,794.50. Nevertheless, the court erred by declining to enter a money judgment for the Clients simply because a judgment in the same amount was being entered for the Providers. While DSHS should not be required to pay twice for the same wrongful conduct, that is not a basis for refusing to enter judgment for proven damages. Alternative mechanisms, including the claims administration process for class actions, are ample to avoid a two-time recovery.

The court's error in failing to enter a money judgment for Clients led to a second error, failing to award fees under RCW 74.08.080(3) to the Clients. The statute's punitive and deterrent purpose is to place on DSHS the cost of correcting "mistakes" when administering public aid benefit to vulnerable citizens. The court correctly observed that DSHS had erected every possible obstacle to recovery and should have awarded fees.

Finally, the Providers also sought damages under Washington's wage statutes, which impose liability on employer's agents for failure to pay wages. DSHS was the fiscal agent responsible for paying the Providers and required the Providers to perform "shared living" tasks

without pay. DSHS's control over the payroll process, work requirements and the work itself make it liable for the unpaid wages as the employer's agent. The court erred by failing to grant summary judgment to the Providers and instead granting summary judgment to DSHS.

## V. ARGUMENT

### A. The trial court did not err in entering judgment for the Providers.

#### 1. DSHS waived review of the entry of judgment.

DSHS asserts that the trial court "erred by entering a judgment for the provider class," Br. at 4, but fails to address how the entry of judgment on the jury's verdict was error. Absent a post-verdict motion for judgment as a matter of law under CR 50(b) or new trial under CR 59, the Providers were entitled to entry of judgment upon proper notice of presentation under CR 54(e) and (f). Entry of judgment based on a jury verdict is not reversible error. *Exeter Co. v. Holland Corp.*, 172 Wash. 323, 354, 23 P.2d 864 (1933). Other than assigning error to the judgment, DSHS is unable to identify any erroneous trial court decision or ruling. An appellate court "is a court for the correction of errors, and that the purpose of appeal is to obtain a *review of the rulings and decisions* of the court below." *Duteau v. Seattle Elec. Co.*, 45 Wash. 418, 421, 88 P. 755 (1907) (emphasis added). DSHS provides no argument as to the judgment's form or presentation, waiving review of those issues. RAP 10.3(a)(6);

*Costanich v. Dep't of Soc. & Health Servs.*, 164 Wn.2d 925, 939, 194 P.3d 988 (2008). The trial court properly entered the judgment on the jury's verdict, and the judgment should be affirmed.

**2. DSHS waived any challenge to the sufficiency of the evidence supporting the jury's verdict by failing to bring a CR 50(b) or CR 59 motion.**

Rather than providing argument on the court's entry of judgment, DSHS directs its argument to "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." Br. at 29. This is no more than an attack on the jury verdict and a claim that the trial court should have overturned the verdict and directed judgment in DSHS's favor.

DSHS's arguments should not be considered, however, because DSHS waived the right to challenge the jury's verdict. DSHS moved for a directed verdict under CR 50(a) at the close of the Providers' case,<sup>10</sup> but did not renew its motion under CR 50(b) or move for a new trial under CR 59 after the verdict. Absent such a motion, a party seeking review may not challenge the jury's verdict. *Washburn v. City of Federal Way*, No. 66534-1-I, 2012 Wash. App. LEXIS 1736, slip op. at 26-32 (July 23, 2012); *Unitherm Food Sys. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 401-02,

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<sup>10</sup> VRP 1857-81. The court formally denied DSHS's CR 50(a) motion as to the Providers' breach of contract claims by written order dated September 30, 2011. CP 3446-48. DSHS has not assigned error to this decision.

126 S. Ct. 980, 163 L. Ed. 2d 974 (2006); *Ortiz v. Jordan*, 131 S. Ct. 884, 892, 178 L. Ed. 2d 703 (2011).

In *Washburn*, the court of appeals carefully examined the U.S. Supreme Court's interpretation of the virtually identical Fed. R. Civ. P. 50(b) in *Unitherm Food* and *Ortiz*. In *Unitherm*, the Supreme Court affirmed longstanding precedent and ruled that a post-verdict motion was necessary because "whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart." *Unitherm*, 546 U.S. at 401 (internal quotation marks and citation omitted). A post-verdict motion is an essential part of the Rule. *Id.*; accord *Washburn*, slip op. at 29 (quoting 4 KARL B. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE CR 50 author's cmt. 16, at 36 (5th ed. Supp. 2011)).

Strong policy grounds of judicial economy underpin the requirement of a CR 50(b) motion. *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 186 n.9, 23 P.3d 440 (2001) (quoting 9A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2533, at 319 (1995)). A CR 50(b) motion avoids the need for a new trial if the appellate court disagrees with the trial court's view of the evidence; the record for review is complete. *Unitherm*, 546 U.S. at 405-06.

Without a post-trial motion under CR 50(b) or CR 59, DSHS may not challenge the sufficiency of the evidence that it breached its duty of good faith and fair dealing. *See Unitherm*, 546 U.S. at 400-01 (“In the absence of such a motion an appellate court is without power to direct the District Court to enter judgment contrary to the one it had permitted to stand.” (alterations and internal quotation marks omitted)). Because DSHS failed to apprise the trial court of any error, it waived its challenge to “whether the facts meet the legal standards for an implied covenant of good faith and fair dealing claim under Washington law.” Br. at 29.

**3. Even had DSHS preserved the issue for appeal, sufficient evidence supports the jury’s verdict that DSHS breached its duty of good faith and fair dealing in performing specific contract terms.**

The linchpin of DSHS’s challenge to the Provider verdict is its assertion that somehow a “free-floating” duty of good faith and fair dealing has been created. Br. at 29-30, 46. The Special Verdict Form refutes DSHS’s argument:

**Question 2.** 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?*

**Answer:** Yes

CP 2985 (emphasis added). DSHS breached its duty of good faith in implementing the specific provisions of the contract governing the

services DSHS required and determination of “authorized hours” – the basis for paying the Providers – leaving the Providers without payment for required services. DSHS did not breach an express term. CP 2985 (Special Verdict Question 1). It did, in fact, perform the letter of the contract by determining the services required and the “authorized hours” for those services. DSHS abused its discretion and its duty of good faith, however, by eliminating payment for part of the required services.

**a. Standard of Review.**

A strong presumption is given to the adequacy of a jury’s verdict, *Cox v. Charles Wright Academy, Inc.*, 70 Wn.2d 173, 176, 422 P.2d 515 (1967), and courts review jury verdicts under the sufficiency of the evidence standard. *Winbun v. Moore*, 143 Wn.2d 206, 213, 18 P.3d 576 (2001). A challenger admits the truth of its opponent’s evidence, all reasonably drawn inferences, and the evidence is interpreted most strongly against the challenger. *Holland v. Columbia Irr. Dist.*, 75 Wn.2d 302, 304, 450 P.2d 488 (1969). If there are justifiable inferences from the evidence that could sustain a verdict, then the question is for the jury, not for the court. Only if neither evidence nor evidentiary inferences support the verdict can a challenge succeed. *Rasor v. Retail Credit Co.*, 87 Wn.2d 516, 534, 554 P.2d 1041 (1976).

DSHS's claim that *de novo* review applies, Br. at 29, is wrong. "[T]he reviewing court will not substitute its judgment for that of the jury, so long as there was evidence which, if believed, would support the verdict rendered." *State v. O'Connell*, 83 Wn.2d 797, 839, 523 P.2d 872 (1974). DSHS's reliance on *Trimble v. Wash. State Univ.*, 140 Wn.2d 88, 97, 993 P.2d 259 (2000) and a lower California court decision is misplaced. Br. at 29. *Trimble* reviewed a summary judgment, not a jury verdict. As with Washington, California has long held that the sufficiency of the evidence standard applies to challenges to a jury's verdict. *Campbell v. S. Pac. Co.*, 22 Cal. 3d 51, 60, 583 P.2d 121 (1978).

**b. The jury's verdict is supported by sufficient evidence.**

The judgment should be affirmed because the jury's verdict that DSHS breached its duty of good faith and fair dealing in its "performance of a specific term" in the contracts is supported by sufficient evidence. Every contract includes an implied duty of good faith and fair dealing. *Edmonson v. Popchoi*, 172 Wn.2d 272, 280, 256 P.3d 1223 (2011). "Whether a party acted in good faith is a question of fact," depending on the parties' "reasonable expectations under the contract." *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 499 (Colo. 1995); *see also Edmonson*, 172 Wn.2d at 280; *Poulsbo Grp., LLC v. Talon Dev., LLC*, 155 Wn. App. 339, 347, 229 P.3d 906 (2010).

Good faith and fair dealing neither changes nor adds terms to the contract, but requires that the parties perform their specific obligations in good faith so that each may obtain the full benefit of performance. *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356 (1991). “The duty to perform the contract in good faith cannot, by definition, be waived by either party to the agreement.” *Beck v. Farmers Ins. Exch.*, 701 P.2d 795, 801 n.4 (Utah 1985).

“The duty of good faith and fair dealing applies when one party has discretionary authority to determine certain terms of the contract, such as quantity, price, or time.” *Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 86 Wn. App. 732, 739, 935 P.2d 628 (1997) (quoting *Amoco Oil*, 908 P.2d at 498).<sup>11</sup> Bad faith can manifest itself in myriad ways, including “abuse of a power to specify terms.” RESTATEMENT § 205 cmt. d (1981).

The basic, form contracts for live-in providers and live-out providers were identical. VRP 1028, 1034, 2017. The contracts were not modified when DSHS implemented the SLR or after it was repealed. *See, e.g.*, Ex. 9 at 1; VRP 2347, 2399.

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<sup>11</sup> See also *Miller v. Othello Packers*, 67 Wn.2d 842, 844, 410 P.2d 33 (1966) (duty of good faith applies to a lima bean grower who relied upon the future acts of a processor to obtain the full benefit of performance); *Scribner v. Worldcom, Inc.*, 249 F.3d 902, 909 (9th Cir. 2001) (duty of good faith arises when one party has discretion to determine the terms of the contract).

When executing the contracts, the parties did not know what services would be needed by the Clients and thus how much would be paid to the Providers. VRP 759-60, 2333-34. DSHS prepared the Service Plans after contract execution, and after the Providers began performing services. VRP 749-50, 862, 1034; Exs. 41, 44. The contracts required DSHS to determine the “authorized services” and to pay the Providers for those services. Ex. 1 (§§ 4.b, 5.b). The term “authorized” meant “the [Provider’s] services are included in the client’s DSHS approved Service Plan.” Ex. 1 (§ 1.c). Each Provider was required to perform the services that DSHS identified in its Service Plan for the Client. Ex. 1 (§§ 1.s, 1.t, 2). DSHS developed the Service Plan for each Client by using the CARE tool, which incorporated the SLR. VRP 612-14, 680-81. DSHS acknowledged that the contracts vested it with discretion:

. . . [T]he contracts between the providers and the Department *vest in the Department the authority and discretion, frankly, to determine what the maximum hours of payment are going to be under the contract.*

It is true that there is a relationship between the assessment process and between the determination of the maximum authorized hours of care for the recipient that will translate over – *the exercise of that discretion will translate over into the Department’s exercise of discretion under the contract.*

VRP at 1868-69 (emphasis added).

DSHS’s discretion, however, was not unlimited. Both the legislature and DSHS’s contracting manuals required DSHS to comply with federal

law in assessing Client need and preparing the Service Plans. RCW 74.39A.901; RCW 74.05.050; Ex. 216; VRP 631, 1296-97. At trial, DSHS acknowledged that it had to follow both state and federal law, including Medicaid law, in contracting. VRP 1110-11, 1067, 2361. That was also the expectation of the social workers in the field and the Providers. VRP 630-31, 653, 863, 1197, 1222.

The duty of good faith and fair dealing applies to the exercise of discretion in implementing payment formulas. In *Aventa Learning, Inc. v. K12, Inc.*, 830 F. Supp. 2d 1083 (W.D. Wash. 2011), the buyer of a business agreed to pay a portion of the price based on future Earnings Before Income Taxes, Depreciation and Amortization (“EBITDA”). After executing the contract, the buyer adopted accounting policy changes that suppressed EBITDA, thereby reducing the money due to the seller. The buyer’s conduct presented an issue for trial about whether the buyer violated its duty of good faith and fair dealing in implementing the formula payment clause. Rejecting the buyer’s contention that this imposed a new term, the court noted that the issue “is not the injection of a substantive term into the [agreement], but rather whether [the buyer] exercised its discretion with regard to accounting methods and other factors affecting the calculation of EBITDA following execution of the [agreement] in good faith.” *Id.* at 1101.

Determining “EBITDA” is like determining “authorized hours.” Good faith and fair dealing obligated DSHS to exercise its right to determine authorized hours in accordance with the Providers’ reasonable expectations. *See also Craig v. Pillsbury Non-Qualified Pension Plan*, 458 F.3d 748, 752 (8th Cir. 2006) (prohibiting party with discretion from redefining “compensation,” and relying on *Goodyear Tire*). In *Tymshare, Inc. v. Covell*, 727 F.2d 1145 (D.C. Cir. 1984), a case relied upon by the *Goodyear* court, a commission agreement gave the employer the right to change the commission’s calculation “at any time during the quota year within [its] sole discretion.” *Id.* at 1154 (emphasis added). The *Tymshare* court recognized that even this did not mean unconditional discretion to set the term; depriving an employee of the benefit of his labor was outside the employer’s discretionary limits. *Id.* at 1154.

Another recent case involving the universal applicability, and importance, of the duty of good faith and fair dealing has parallels to this case. In *Edmonson v. Popchoi*, a buyer under a statutory warranty deed tendered defense of title to the seller. 172 Wn.2d at 276. The deed did not expressly require good faith in defending the buyer’s title or incorporate the applicable statute. This Court looked to the underlying statute in evaluating whether the duty was met. The seller undertook the defense, but “conditioned his acceptance of the tender on his right to control the

defense, including settling the case without putting on any defense.” *Id.* at 280. The seller then immediately conceded the case. That may have been “most cost effective for him,” but did not meet the duty of good faith. *Id.* at 281. Similarly, it was “cost-effective” for DSHS to require Providers to perform the “shared living” tasks without payment, but it did not meet DSHS’s duty to determine the “authorized hours” for serving the Clients’ assessed needs in good faith.

In sum, there was sufficient evidence for the jury to determine that DSHS failed to administer its payment methodology in good faith. DSHS identified Client meal preparation, essential shopping, and housework as services required from the Providers in the Service Plans. Although the contracts of the live-out and live-in providers were the same, DSHS paid only live-out providers for those services. The jury was entitled to find that DSHS abused its discretionary power to determine the number of hours of paid services and defeated the Providers’ reasonable expectation to be paid for the work required of them.

**c. DSHS still misunderstands its duty of good faith and fair dealing and misconstrues the authorities.**

DSHS’s arguments reveal its ongoing misunderstanding of its duty of good faith and fair dealing under the Provider contracts. Its arguments are counterfactual, asserting there were no contract terms to which the

duty applied. It ignores the repeated incorporation in the contracts of the later-developed DSHS Service Plans and their assignment of duties and determination of paid hours for the Providers. It misstates the law, treating the breach of the duty of good faith and fair dealing as another form of express breach, not an independent duty under all contracts. DSHS misconstrues the cases it cites. There is no reason for the Court to abandon Washington's clear law requiring parties to conduct themselves in good faith in carrying out their contractual duties.

DSHS claims that the duty of good faith and fair dealing does not arise because there are no contract terms to which the duty attaches. Br. at 29-31. DSHS is wrong. The Provider contracts are replete with terms incorporating the DSHS-prepared Service Plans, which assigned work and calculated hours.

DSHS's reliance on the "no term in the contract" line of cases is misplaced. Unlike here, in *Badgett, Johnson v. Yousoofian*, 84 Wn. App. 755, 930 P.2d 921 (1996), *State v. Trask*, 91 Wn. App. 253, 957 P.2d 781 (1998), and *Seattle-First Nat'l Bank v. Westwood Lumber, Inc.*, 65 Wn. App. 811, 829 P.2d 1152 (1992), there was no discretionary term in the contracts.<sup>12</sup> For example, in *Badgett*, the farmer debtor was attempting to

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<sup>12</sup> In *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 94 P.3d 945 (2004), this Court held that no enforceable contract had been formed in an "agreement to agree."

renegotiate a prior loan with the bank. 116 Wn.2d at 567-68. It was undisputed that no contract term required the bank to renegotiate. *Id.* at 569. Nevertheless, the farmer claimed the bank had an implied obligation to renegotiate the loan. *Id.* at 567 & 569. The Court disagreed, holding that the implied duty of good faith was not meant to add terms to the contract. *Id.* at 570. Here, the contracts required DSHS to determine the authorized services and authorized paid care hours at a future date and the Providers to perform the identified services.

DSHS argues that “[b]y 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.” Br. at 32. DSHS asks the Court to speculate about the jury’s thought processes. “Appellate courts will generally not inquire into the internal process by which the jury reaches its verdict. The individual or collective thought processes leading to a verdict inhere in the verdict and cannot be used to impeach a jury verdict.” *Breckenridge v. Valley Gen. Hosp.*, 150 Wn.2d 197, 204-05, 75 P.3d 944 (2003) (internal quotation marks and citations omitted). Like the buyer’s abuse of its discretion to calculate EBITDA in *Aventa Learning*, while DSHS did not breach an express term of the contract because it did determine hours, it did so in a manner that deprived the Providers of the benefit of the bargain.

DSHS's reliance on *Monotype Corp. v. Int'l Typeface Corp.*, 43 F.3d 443 (9th Cir. 1994) is misplaced. The *Monotype* court evaluated whether the trial court erred in refusing to give ITC's instruction on good faith. *Id.* at 452. The parties entered into a subscriber agreement governing typefaces provided by the ITC. *Id.* at 447. ITC argued that the contractual prohibition on marketing any "version" of ITC's typefaces should be interpreted broadly to prohibit the marketing of a "similar" typeface or "commercial substitutes." *Id.* at 448, 552. Monotype disagreed with ITC's interpretation. *Id.* at 448. "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." *Id.* at 452. Because the verdict found that Monotype's conduct was not contrary to the parties' intent, the court held that the jury had already decided the issue raised by ITC and the implied covenant could not be used to add terms to the agreement. *Id.* at 452.

Unlike *Monotype*, however, here the jury's finding of no express breach did not determine whether DSHS performed its obligation to set the authorized services and authorized paid care hours in good faith. The jury's verdict that DSHS breached its duty of good faith and fair dealing in performing specific terms does. CP 2985.

Reduced to its essence, DSHS's argument is that there can never be a breach of the duty of good faith and fair dealing unless there is also a breach of an express contract term. "The opposite is true: a breach of the implied covenant, by itself, will support a contract action. Were it otherwise, the covenant would have no practical meaning, for any breach thereof would necessarily involve breach of some other term of the contract." *Storek & Storek, Inc. v. Citicorp Real Estate*, 100 Cal. App. 4th 44, 63 n.15, 122 Cal. Rptr. 2d 267 (2002) (internal quotation marks and citation omitted). The duty of good faith and fair dealing is a separate and independent term implied in every contract to ensure that a party that has no control over the performance of a term of the contract receives the full benefit of performance. *Frank Coluccio Constr. v. King Cnty.*, 136 Wn. App. 751, 764, 150 P.3d 1147 (2007).

Further, contrary to DSHS's argument, a contract term need not incorporate how the other party will perform his or her duty in good faith. It is incumbent upon the party who has the delegated discretionary duty to perform the obligation in good faith. *See Aventa Learning, Inc.*, 830 F. Supp. 2d at 1101; *Tymshare, Inc.*, 727 F.2d at 1154.

DSHS contends that the Providers' good faith claim depends on adding terms to the contract, such as imposing obligations that DSHS "not adopt rules that will be determined invalid in the future" and "disclos[e]

details of how Service Plans and hours are calculated for clients.” Br. at 37-38. DSHS misunderstands what its duty of good faith and fair dealing required. Did its acts of assigning “shared living” tasks to the Providers while not paying for the work frustrate the Providers’ reasonable expectations? What inferences might a jury draw from DSHS’s failure to disclose that it had eliminated pay to the Providers for “shared living” tasks?<sup>13</sup> Its actions are probative to the issue of whether it breached its duty of good faith. Many factors can weigh upon whether a party breached its duty of good faith, and that determination is left to the jury. *Poulsbo Group*, 155 Wn. App. at 347. Based on the evidence, the jury properly concluded that DSHS acted in bad faith.

DSHS similarly argues that the implied duty depends on enforcing other duties “outside the contract.” Br. at 38. It is wrong. When a party has discretionary authority under an express term in a contract, by definition *how* the party performs that express term will not be included in the contract – otherwise it would not be a discretionary term. DSHS conflates the existence of an implied duty of good faith with how a party’s conduct breaches the implied duty. DSHS’s argument is contrary to its

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<sup>13</sup> Even after DSHS’s elimination of payment under the SLR, many service plans still indicated DSHS was paying for the “shared living” tasks by expressly identifying them as formal supports (or “paid” care services). *See, e.g.*, VRP 1280, 1324; Exs. 2 at 2; 3 at 2; 4 at 3; 5 at 2; 11 at 2; 15 at 2; and 16 at 2.

own employees' testimony that it was required to follow state and federal law in all aspects of contracting with the Providers, including determining authorized services and authorized paid care hours. VRP 631, 1067, 1110-11, 1296-97; Ex. 216 at I-1. Even if DSHS's obligation to determine services and hours could be construed as running only to the Clients rather than the Providers, an obligation to a third party, if breached, may also constitute a breach of the implied covenant of good faith and fair dealing. *Lonsdale v. Chesterfield*, 99 Wn.2d 353, 358, 662 P.2d 385 (1983).

DSHS misconstrues *Boguch v. Landover Corp.*, 153 Wn. App. 595, 615, 224 P.3d 795 (2009). *Boguch* dealt with whether fees incurred in defense of a negligence claim could be awarded under an attorney fees provision in a contract. The court of appeals determined that the prevailing party on a negligence claim was not entitled to contractual fees. The court did not address whether a violation of statutory duties could be part of the basis for a breach of the duty of good faith and fair dealing.

Finally, DSHS argues that a ruling in the Providers' favor will lead to a slippery slope and that the Court should arbitrarily impose a 90-day restriction on their breach of contract claim. However, DSHS argued to the trial court and the jury instructions reflected that "[t]he law treats all parties equally whether they are government entities or individuals. This means that government entities and individuals are to be treated in the

same fair and unprejudiced manner.” Instruction 4. DSHS’s request for the Court to disregard the law of contracts should be rejected. There is no slippery slope in requiring DSHS to pay for the work that it directed the Providers to perform and should have paid for under the law.

**4. This Court’s decision in *Failor’s Pharmacy* is an alternative basis to affirm the judgment.**

Even if this Court were to determine that the trial court erred in entering judgment as argued by DSHS, the Court may still affirm the judgment because there are alternative grounds presented by the pleadings and record. *Bock v. State*, 91 Wn.2d 94, 95, 586 P.2d 1173 (1978). DSHS conceded in open court that the SLR was invalid as to all of the Clients. Pretrial VRP 179:17-20.

A party contracting with the State is entitled to recover underpayments resulting from an invalid regulation. *Failor’s Pharmacy v. Dep’t of Social & Health Servs.*, 125 Wn.2d 488, 886 P.2d 147 (1994). In *Failor’s Pharmacy*, this Court upheld the availability of retroactive damages to pharmacists who were underpaid as a result of an invalid rule. That the rule was incorporated in agency contracts did not alter the nature of the agency action being challenged. The agency action was the rule setting the rates, not the entry into the contracts, which merely incorporated the rates set by the rule: “[T]he inclusion of the

reimbursement schedules in a unilateral contract does not preclude their status as a rule.” *Id.* at 497.<sup>14</sup> DSHS’s use of an invalid rule as the basis for its discretionary acts under the Provider contracts was an abuse of its discretion.

The *Failor’s Pharmacy* remedy has been applied expressly to other DSHS failures to follow federal law. “Prescription providers could recover the difference between the invalid amount DSHS paid and the amount DSHS should have paid according to the federally mandated methodology.” *McGee Guest Home v. Dep’t of Social & Health Servs.*, 96 Wn. App. 804, 810, 981 P.2d 459 (1999). The Providers are entitled to recover the difference between the invalid amount DSHS paid under the SLR and the amount DSHS should have paid under federal Medicaid law – the amount determined by both the court and the jury.<sup>15</sup>

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<sup>14</sup> The Court remanded for trial on determination of damages under the contracts, with the invalid rule stricken. Here, trial has already occurred, establishing the amount of damages suffered by the Providers from the rule’s illegal elimination of payment for “shared living” services needed by DSHS clients. CP 3473-74.

<sup>15</sup> Respondents SEIU 775NW and Cindy Weens provide another alternative ground for affirming the judgment based on unjust enrichment. This would be an appropriate ground if the Court were to determine that no contract existed for the services. Here, the record establishes that DSHS directed the Providers to perform the “shared living” services through the Service Plans, but did not pay for the services due to the SLR.

**B. The trial court's jury instructions, taken directly from controlling precedent, were no abuse of discretion.**

The trial court drew its jury instructions directly from controlling Washington precedent on the duty of good faith and fair dealing. The court chose different words from DSHS's preferred language to express the law, but this is no error. The specific language of jury instructions is left to the trial court's discretion. Even were the instructions erroneous, however, DSHS failed to preserve its challenge for appeal.

Jury instructions, while reviewed *de novo* for errors of law, "are sufficient if they allow the parties to argue their theories of the case, do not mislead the jury, and when taken as a whole properly inform the jury of the law to be applied." *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 635, 244 P.3d 924 (2010) (internal quotation marks and citation omitted). Even if an instruction may be misleading, it will not be reversed unless the complaining party shows prejudice. *State v. Aguirre*, 168 Wn.2d 350, 363-64, 229 P.3d 669 (2010). "If . . . a jury instruction correctly states the law, the trial court's decision to give the instruction will not be disturbed absent an abuse of discretion." *Aguirre*, 168 Wn.2d at 364. A court's decision whether to give a particular instruction is reviewed for abuse of discretion. *State v. Chase*, 134 Wn. App. 792, 803, 142 P.3d 630 (2006). "The number and specific language of jury

instructions is a matter within the trial court's discretion." *Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158, 165, 876 P.2d 435 (1994).

- 1. DSHS did not preserve its objections regarding Instructions 18 and 19; generalized objections and an expressed preference for other instructions neither meet a party's obligation to the trial court nor preserve the objection for review.**

Rule 51(f) provides the means to object to proposed jury instructions and requires a party to "state distinctly the matter to which he objects and the grounds of his objection, specifying the number, paragraph or particular part of the instruction to be given or refused and to which objection is made." CR 51(f). "The purpose of this rule is to clarify, at the time when the trial court has before it all the evidence and legal arguments, the exact points of law and reasons upon which counsel argues the court is committing error about a particular instruction." *Stewart v. State*, 92 Wn.2d 285, 298, 597 P.2d 101 (1979). This would "enable the trial court to correct any mistakes in the instructions in time to prevent the unnecessary expense of a second trial." *Van Hout v. Celotex Corp.*, 121 Wn.2d 697, 702, 853 P.2d 908 (1993) (quoting *Roumel v. Fude*, 62 Wn.2d 397, 400, 383 P.2d 283 (1963)).

"The pertinent inquiry on review is whether the exception was sufficient to apprise the trial judge of the nature and substance of the objection." *Crossen v. Skagit Cnty.*, 100 Wn.2d 355, 358, 669 P.2d 1244

(1983). If the objection does not “apprise the trial judge of the precise points of law involved . . . , those points will not be considered on appeal.” *Stewart*, 92 Wn.2d at 298; *see also Walker v. State*, 121 Wn.2d 214, 217, 848 P.2d 721 (1993).<sup>16</sup>

DSHS now argues that Instructions 18 and 19 misstated the law because the instructions (1) “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”; (2) told the jury “that a good faith duty applied unless DSHS had ‘unconditional authority’ to determine *a client’s* hours”; and (3) “gave the jury unbounded discretion to decide what breached the implied covenant.” DSHS argues that the court should have used DSHS’s proposed Instructions 25A and 35A instead. Br. at 42-43, 49-51.

DSHS’s exceptions to Instructions 18 and 19 at trial, however, completely failed to identify the errors that DSHS now asserts:

**Mr. Clark:** . . . We take exception to the Court’s Instructions 18 and 19, because we believe our instructions, rather, 35, 35-A, and 62 provide the full gamut of the law or legal principles that go into the implied duty of good faith and fair dealing and are particularly apt . . . in light of the arguments and the evidence of

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<sup>16</sup> In *Walker*, an objection that the instruction “unduly emphasizes the other side’s case” was insufficient to preserve a claim that the instruction misstated the law. 121 Wn.2d at 217, 219.

counsel throughout the trial.

So for those reasons we take exception to 18 and 19. And I will reiterate that we think in lieu of it, we should – the court should have proposed – should have given our Proposed Instructions 35, 35-A, and 62.

VRP 2605.<sup>17</sup> DSHS’s objection was similar to the appellant’s objection in *Stewart* that a given instruction was “overly general and incomplete” and that appellant’s instruction should have been given instead. *Stewart*, 92 Wn.2d at 297 & n.1, 298. This Court rejected the argument because “[n]either theory nor authority was cited to the court as required by the rules.” *Id.* at 298-99.

DSHS also waived any argument that its proposed Instruction 25A should have been given in relation to the duty of good faith and fair dealing. It never proposed the instruction for that purpose. VRP 2604-05.

Under the law of the case doctrine, “instructions given to the jury by the trial court, if not objected to, shall be treated as the properly applicable law.” *Lutheran Day Care v. Snohomish Cnty.*, 119 Wn.2d 91, 113 (1992) (quotation marks & citation omitted); *see also State v. Trask*, 91 Wn. App. 253, 264 n.15 (1998). DSHS failed to object to Instructions 18 and 19 on the grounds it now urges were erroneous. This Court should not consider

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<sup>17</sup> DSHS identifies only this portion of the record where it “argued against and formally objected to Instructions 18 and 19.” Br. at 49. In later proceedings, the trial court remarked on DSHS’s failure to object to these instructions. VRP (Feb. 18, 2011) at 65.

these arguments on appeal.<sup>18</sup>

- 2. Instructions 18 and 19 properly informed the jury of the applicable law on the duty of good faith and fair dealing; the court did not abuse its discretion in choosing those instructions over proposed Instructions 25A, 35, and 35A.**

The trial court's Instructions 18 and 19 are consistent with controlling authority:

There is in every contract an implied duty of good faith and fair dealing. This duty obligates the parties to cooperate with each other so that each may obtain the full benefit of performance. However, the duty of good faith does not extend to obligate a party to accept a material change in the terms of its contract. Nor does it inject substantive terms into the parties' contract. Rather, it requires only that the parties perform in good faith the obligations imposed by their agreement.

*Badgett*, 116 Wn.2d at 569 (internal quotation marks and citations omitted).

The first paragraph of Instruction 18 also addresses all of the concepts put forward in DSHS's proposed Instruction 35:

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<sup>18</sup> Not only did DSHS fail to identify the specific alleged errors in Instructions 18 and 19, it affirmatively told the trial court that Instructions 18 and 19 were correct. VRP 2594.

<b>Instruction 18 (CP 2979)</b>	<b>Proposed Instruction 35 (CP 2903)</b>
“A duty of good faith and fair dealing is implied in every contract.”	“While every contract has an implied duty of good faith and fair dealing . . . .”
“It exists only in relation to the performance of specific terms in the contract . . . .”	“. . . that implied duty 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.”	“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.”
“This duty requires the parties to cooperate with each other so that each may obtain the full benefit of contract performance.”	“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 remaining language in DSHS’s proposed Instruction 35 merely repeats or restates its preceding language:

- “[T]he duty of good faith does not inject or create substantive terms into the parties’ contract” restates the second sentence: “The duty of good faith . . . does not require a party to accept new or different contract obligations.”
- “It only requires that parties perform the obligations imposed by their contract in good faith” restates the first sentence: “. . . that implied duty exists only in relation to the performance of specific terms in the contract.”
- “There is no ‘free floating’ duty of good faith and fair dealing; the duty exists only in relation to performing a specific contract term” restates the first two sentences: “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.”

CP 2903.

DSHS's proposed instruction says nothing about the duty of good faith and fair dealing not applying where one party has unconditional authority, as provided in the second paragraph of Instruction 18 and the third and fourth paragraphs of Instruction 19. These paragraphs correctly informed the jury of the applicable law, based on *Goodyear Tire*: "The duty of good faith and fair dealing applies when one party has discretionary authority to determine certain terms of the contract, such as quantity, price, or time." 86 Wn. App. at 739 (*quoting Amoco Oil*, 908 P.2d at 498). In *Goodyear Tire*, the contract term was "unconditional and d[id] not call for the exercise of discretion and the consequent implied covenant to exercise that discretion in good faith." *Id.* at 741. DSHS ignores *Goodyear Tire* in its challenge to the instructions. Br. at 46-48.

Contrary to its argument on appeal, DSHS advised the trial court that the "unconditional authority" portions of Instructions 18 and 19 were correct. After the Providers objected to the "unconditional authority" language on the basis that there was no evidence that DSHS had unconditional authority, VRP 2593, the court asked, "What say the defendants as to that issue raised by Mr. Cochran?" DSHS responded:

**Mr. Clark:** We say that what you have in there . . . is what we think is consistent with the law. And if we are going to comment on the evidence, it's consistent with the evidence, as well. And

so we would urge you to retain it as is.

VRP 2594.<sup>19</sup> Even were the instructions erroneous, DSHS waived the error.<sup>20</sup> The invited error doctrine prohibits DSHS from setting up an error and later complaining of it. *Nania v. Pac. Nw. Bell Tel. Co.*, 60 Wn. App. 706, 709, 806 P.2d 787 (1991). “The doctrine was designed in part to prevent parties from misleading trial courts and receiving a windfall by doing so.” *State v. Momah*, 167 Wn.2d 140, 153, 217 P.3d 321 (2009).

Not only did DSHS “urge [the court] to retain [the language] as is,” VRP 2594, it relied heavily on the “unconditional authority” language in Instructions 18 and 19 to argue in closing that there was no duty of good faith and fair dealing with respect to its determination of the amount to pay the Providers:

**Ms. Bashaw:** . . . Here’s another important part of this instruction that I want you to keep in mind, which is the second paragraph.

“If the contract grants one party unconditional authority to later set the term, the duty does not apply.”

So there can be no finding of violation of good faith and fair dealing if the contract already contemplates the very term unconditionally to one side. . . . But this is very important. “If . . . the contract grants one party unconditional authority to later set the term,” this duty of good faith and fair dealing is not violated, and the duty does not apply.

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<sup>19</sup> Before trial, DSHS argued that “[t]he contract left calculation of the maximum authorized payment amount entirely to the Department’s discretion.” CP 621.

<sup>20</sup> See, e.g., *Ward v. J.C. Penney Co.*, 67 Wn.2d 858, 861, 410 P.2d 614 (1966); *McGovern v. Greyhound Corp.*, 53 Wn.2d 773, 780, 337 P.2d 290 (1959).

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And if you remember back, I identified that if the contract leaves to one party the sole authority to set a term, then you can find no implied violation of good faith and fair dealing. And this leaves with the Department the sole authority to set the term. And the terms in this case are the authorized hours that are the limit for which the Department will pay a provider to perform any of the services under those contracts, any of the services in the Service Plan.

VRP 2751-52, 2156. Instructions 18 and 19 clearly allowed DSHS to argue its theory of the case to the jury. That the jury viewed the evidence differently from DSHS does render the instruction faulty.

The final paragraph of Instruction 18 also correctly states the law:

The duty of good faith requires “faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.” RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981); *see id.* cmt. d (“[B]ad faith may be overt or may consist of inaction.”).

*Edmonson*, 172 Wn.2d at 280; *see also Amoco Oil*, 908 P.2d at 499 (approving jury instruction “that the law requires each party to a contract to act in such a manner that each party will attain their reasonable expectations under the contract.”). The court did not abuse its discretion in refusing to give DSHS’s proposed Instruction 35, which included redundancies but still did not fully state applicable law. The instructions should not be disturbed on appeal. *See Aguirre*, 168 Wn.2d at 364.

The remainder of Instruction 19 correctly states the law. DSHS asserts that the first sentence constitutes error because it required the jury

to apply the duty of good faith to the use of the SLR when it had already determined that the “reduction of authorized hours by application of the Shared Living Rule was not part of the provider contract.” Br. at 44. This is entirely consistent with DSHS’s position that no “outside” documents except the Service Plan were incorporated into the contract. CP 2973.

DSHS misreads the instructions and the Providers’ contention. As stated in Instruction 11, the Providers claimed that “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.” CP 2972. The contract term to which the duty of good faith and fair dealing applied was DSHS’s determination of the number of hours for which it would compensate the Providers. Instruction 19 clearly identified the contract term: “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.”<sup>21</sup> CP 2980 (emphasis added). DSHS performed that term by using the SLR.

DSHS argues that Instruction 19 “eliminated the jury’s obligation to

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<sup>21</sup> The service summary and assessment details together comprise the Service Plan. VRP 646. The service summary identifies the “authorized hours.”

limit the implied covenant claim to the performance of a contract term.” Br. at 45. DSHS improperly reads Instruction 19 in isolation, ignoring Instruction 18. “[I]ndividual instructions may not be singled out for consideration without reference to the entire set of instructions which were given.” *Nelson v. Mueller*, 85 Wn.2d 234, 238, 533 P.2d 383 (1975). Read together with Instruction 18, the jury was properly instructed that the duty of good faith “exists only in relation to the performance of specific terms in the contract.” CP 2979.

The trial court did not abuse its discretion by rejecting DSHS’s proposed Instruction 35A. DSHS asked the court to give the instruction if the Providers were making a specific contention. CP 2904. The factual predicate that DSHS set for giving the instruction was absent, so the court did not abuse its discretion. Instruction 11 set out the Providers’ contentions, but did not include the contention to which proposed Instruction 35A related. CP 2971-73.

Finally, the court did not abuse its discretion by rejecting DSHS’s proposed Instruction 25A. DSHS cites to nothing in the record to show where it complied with CR 51 for this proposed instruction. DSHS can point to no harm. The jury rejected the express breach claim.

**C. The trial court properly awarded prejudgment interest to the Providers for the unpaid work.**

The trial court properly awarded prejudgment interest to the Providers. The Providers' contracts provided for a rate of pay based on the number of hours DSHS required. The issue before the jury was how many hours of required services the Providers performed for which DSHS did not pay. Once the number of unpaid hours was determined, based on the testimony, the amount due was easily calculated. Like the workers in *Stevens v. Brinks Home Security, Inc.*, 162 Wn.2d 42, 169 P.3d 473 (2007), the Providers are entitled to prejudgment interest. DSHS confuses the jury's fact-finding with making an award based on equity or discretion.

**1. The standard of review of the trial court's decision on prejudgment interest is abuse of discretion.**

A prejudgment interest award is reviewed for abuse of discretion. *Scoccolo Constr. v. City of Renton*, 158 Wn.2d 506, 519, 145 P.3d 371 (2006). DSHS's contention that *Dep't of Corr. v. Fluor Daniel, Inc.*, 160 Wn.2d 786, 161 P.3d 372 (2007) requires *de novo* review is wrong. Br. at 51. The only issue in *Fluor Daniel* was whether an arbitration award transformed an unliquidated claim into a liquidated one. 160 Wn.2d at 791. *Fluor Daniel* neither addressed whether the underlying claim was liquidated nor overruled the litany of Washington cases holding that the standard of review is abuse of discretion.

**2. The trial court correctly applied Washington's long-standing rules and policy in awarding prejudgment interest on the contractual damages.**

“Washington courts generally favor prejudgment interest based on the premise that a party that retains money it should have paid to another should be charged interest.” *Pierce Cnty. v. State*, 144 Wn. App. 783, 855, 185 P.3d 594 (2008). Prejudgment interest promotes justice. *Seattle-First Nat'l Bank v. Wash. Ins. Guar. Ass'n*, 94 Wn. App. 744, 760, 972 P.2d 1282 (1999). It “compels a party that wrongfully holds money to disgorge the benefit.” *Mahler v. Szucs*, 135 Wn.2d 398, 429, 957 P.2d 632 (1998).

Prejudgment interest is awarded when the amount claimed is liquidated or, although unliquidated, can be determined by computation with reference to a fixed standard in a contract without reliance on opinion or discretion. *Prier v. Refrigeration Eng'g Co.*, 74 Wn.2d 25, 32, 442 P.2d 621 (1968). The nature of the claim determines availability of prejudgment interest. *Hansen v. Rothaus*, 107 Wn.2d 468, 472, 730 P.2d 662 (1986). A claim is liquidated where “the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance on opinion or discretion.” *Prier*, 74 Wn.2d at 32. A claim is unliquidated “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.” *Prier*, 74 Wn.2d at 33 (quoting CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 54 (1935)).

As this Court has noted:

*[T]he existence of a dispute over the whole or part of the claim should not change the character of the claim from one for a liquidated, to one for an unliquidated, sum . . . and even though the adversary successfully challenges the amount and succeeds in reducing it.*

*. . . In short, it is the character of the claim and not of the defense that is determinative of the question whether an amount of money sued for is a “liquidated sum.”*

*Prier*, 74 Wn.2d at 33-34 (quoting MCCORMICK, § 54) (second emphasis added). Difference of opinion as to amount is no more reason to excuse a party from interest than a difference of opinion whether a party ought to pay at all, “which has never been held an excuse.” *Prier*, 74 Wn.2d at 34 (quoting *Laycock v. Parker*, 79 N.W. 327, 334 (Wis. 1899)); *see also Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 723, 153 P.3d 846 (2007).

After considering the parties’ damages calculations presented at trial, post-trial briefing, and oral argument, the trial court properly applied these legal standards:

I conclude that the damage awarded to the provider class by the jury was based upon breach of the provider contract and was determinable by computation with reference to a fixed standard contained in the contract without reliance on opinion or

discretion to determine the correct measure of damages.

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In this case the appropriate measure of damages was not disputed. The measure of damages was the difference between what the providers should have been paid without the breach of contract and what they were actually paid. Both parties used this equation, and both sides of the equation were based on an hours times hourly rate calculation.

VRP (July 1, 2011) at 4, 8); *see also* CP \_\_\_\_ (Op. Re Attorney Fees, July 10, 2012, at 7) (“This case permitted a rather precise calculation of damage for each class member . . .”). The Providers’ claim was a liquidated, sum certain amount mathematically calculated by the parties. The DSHS Rate Methodology is a mathematical formula, within which the SLR was hard-coded. Exs. 47-49, 216.

**3. Sufficient evidence supports the trial court’s award of prejudgment interest.**

Shortly before trial, DSHS stated that “[b]oth parties have retained experts to make this *sum certain calculation*” of the Providers’ damages. CP 1763 (emphasis added).<sup>22</sup> DSHS’s experts testified that the amount due the Providers was capable of precise computation once the disputed facts were determined through objective, statistical evidence of informal supports, based on data collected after the SLR was no longer applied.

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<sup>22</sup> DSHS’s statement was in its motion in limine to exclude evidence of “financial approximations of potential damages contained in documents relating to 2009 legislation, which was proposed but not enacted, [which] are not relevant to making this sum certain calculation.” CP 1763. DSHS later told the court that it had not intended to concede that the case “involves damages that are a sum certain.” VRP 298.

VRP 2047:21-25, 2071:16-23, 2236:4-10.

At trial, the factual dispute was over the number of hours that would have been authorized for paid services had DSHS not applied the SLR. The Providers sought compensation for the tasks they performed without any reduction in hours for informal supports. Their statistician expert, Dr. Nayak Polissar, calculated “what should have been paid, as opposed to what was paid, just based on the CARE algebraic formula.” VRP 1424.<sup>23</sup>

Dr. Polissar testified:

A. . . . [T]hrough that equation, we could run through all the clients, all the months of service for this case, and we can calculate the loss per person per month of hours. . . .

Q. . . . [E]ven though they are varied over the 17,000 disabled people, . . . you had the data . . . to tell us what the amount was for every single one?

A. For every single person for every single month. . . . That wasn't guessing. That was just using those equations and using the data that was supplied by DSHS . . . . We applied the equation with the Shared Living Rule absent. . . .

VRP 1435-36. The Providers' accounting expert calculated damages of \$91,653,511 by multiplying the number of paid hours eliminated through the SLR by the applicable hourly rates of the Providers. VRP 1633-37,

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<sup>23</sup> The formula was derived from DSHS's Eligibility and Rates Manual and DSHS's regulations. Ex. 216; VRP 1427-28. DSHS eliminated paid care benefits by applying a simple algebraic equation. *See* former WAC 388-71-0460(3) (repealed May 17, 2005), WAC 388-72A-0095(3)(b) (repealed May 17, 2005), and WAC 388-106-0130(3)(b) (repealed June 29, 2007). This algebraic equation was embodied in the CARE tool and formed the basic understanding of how DSHS would determine the amount of authorized hours under the Providers' contracts. Ex. 216; Exs. 47-49.

1664-66; Exs. 289-A, 292.

DSHS's calculations of the amount due took into account "informal support and shared benefit" in order to put the Providers on the same footing as otherwise similarly-situated, live-out providers. VRP 2057; *see also* VRP 1511-14. In closing argument, DSHS acknowledged that the amount of damages could be reliably computed once the underlying factual dispute was resolved by the jury:

Neither side, neither party has questioned the degree and reliability of the statistical analyses. . . . That isn't what the dispute is. The dispute is, how do you get to your particular numbers and which criteria do you use. Do you flip it around and do it as totally unmet, or do you take into account informal supports and shared benefit? That's where the dispute is.

VRP 2779. DSHS's accounting expert relied on the percentages determined by its statistician to calculate the amount owed. VRP 2142-44; CP 1931, 1940-42 (Appendix at App. 6). The core financial data used by both sides at trial was identical. VRP 2139-40, 2172. DSHS presented different damage calculations based on different factual assumptions. Its counsel argued:

So these are independent numbers. And what this means is that *if you accept the testimony* around multiple providers but don't accept it for billed, the number is 53.3. *If you accept the testimony* around providers who billed for less than their authorized hours but don't accept the multiple testimony, the number is 60.9. *If you agree with both principles that have been testified to by the State's experts*, then the number is 52.7.

VRP 2778 (emphasis added). DSHS did not suggest that there was any

element of juror discretion after the jury determined the facts. The jury awarded \$57,123,794.50, which was within the range of the damage calculations of the parties' experts. VRP 2833. DSHS's argument that damages were unliquidated because the jury awarded an amount not specified by the parties ignores the applicable legal authority.

**4. The trial court's exercise of discretion in awarding prejudgment interest is supported by Washington law.**

The trial court's conclusion that the damages are liquidated is supported by several Washington cases. In *Dautel v. Heritage Home Ctr.*, 89 Wn. App. 148, 948 P.2d 397 (1997), an employee sued her former employer for lost wages. The parties disputed the percentage to be applied to unpaid commissions – the employee argued it should be 20% and the employer argued it should be 10%. *Id.* at 151, 155. Despite the dispute, the amount was a liquidated sum because it “could be computed with exactness once the trial court determined that [the employee] was entitled to her full commission rate of 20 percent,” and no discretion or opinion was involved. *Id.* at 155. Here, once the jury determined which factual predicates it accepted, the Provider claim could also be computed with exactness.

*Egerer v. CSR West, LLC*, 116 Wn. App. 645, 67 P.3d 1128 (2003) also supports the trial court. In *Egerer*, an excavation contractor agreed to

deposit fill on the landowner's property. The contractor found a more profitable way to dispose of the fill and refused to perform. The claim for damages was governed by statute, which set the measure of damages as the difference between the market price and contract price at the time of breach. *Id.* at 649-50. The parties presented conflicting evidence of market price ranging from \$1.10 to \$46.80 per cubic yard. The trial court determined the market price was \$8.25 per cubic yard, based on the lower of two price quotes obtained by the landowner six months after the breach. *Id.* The landowner's damages were liquidated:

Like *Dautel*, where the trial court exercised discretion only to find the appropriate commission percentage, the trial court here exercised discretion only to find the appropriate market price. The amount . . . actually owed could be computed with exactness once the trial court found that \$8.25 per cubic yard was the market price . . . .

*Id.* at 654. The fact that the contractor "proposed a lower market price does not render the claim unliquidated. The fact finder believed evidence showing that \$8.25 was the market price, and that evidence made it possible to compute exact damages . . . ." *Id.* at 655.

The jury's determination of a damage figure other than the exact figures suggested by the parties does not render the claim unliquidated. In *Scoccolo Construction*, the plaintiff requested damages of \$935,433.27, the defendant argued that damages were \$364,904.00, and the jury found

damages of \$425,533.00. 158 Wn.2d at 519. The defendant argued that because the jury found an amount not argued by any of the parties, the jury exercised discretion making the claim unliquidated. This Court disagreed: “[T]he sum is still liquidated even though the adversary successfully challenges the amount and succeeds in reducing it.” *Id.* at 520 (internal citations, quotation marks, and ellipsis omitted).

Prejudgment interest is also available in class actions where expert testimony is presented and the calculations summarized. In *Stevens v. Brinks Home Security, Inc.*, 162 Wn.2d 42, 169 P.3d 473 (2007), the jury relied on expert testimony to determine the number of hours spent traveling to the first appointment of the day, for which the employees had neither kept time nor been paid. The expert calculated drive times using a software program. *Id.* at 50. Brinks contended that the use of program data was insufficient to constitute a liquidated claim. *Id.* This Court disagreed, holding that prejudgment interest was appropriate when there is objective data for the damages and a basis for the calculations. *Id.* Regardless of Brinks’ challenge to the data’s sufficiency, the damages were liquidated and subject to prejudgment interest because the jury could believe the data for determining drive times and use it along with established wage rates to calculate damages. *Id.* at 50-51.

Similarly, in *McConnell v. Mothers Work, Inc.*, 131 Wn. App. 525, 128 P.3d 128 (2006), a case *Brinks* relied on, the plaintiff class (sales associates and store managers) asserted a violation of the Minimum Wage Act. The experts *for both parties* testified that an exact computation of overtime worked by the managers *was impossible*. *Id.* Each side provided expert testimony as to a likely range, and the jury arrived at its own number. *Id.* at 536. The *McConnell* court rejected the employer's contention that the damage claims were unliquidated due to factual disputes over computation of damages. *Id.* The claim was liquidated because once the jury resolved the factual disputes over the number of hours worked, through its evaluation of the testimony provided by the experts, the jury could then compute the damages with precision. *Id.* at 536-37.

The trial court expressly relied on the legal standards set out in *Brinks* and *McConnell* to determine that the Providers' claim was liquidated. VRP (July 1, 2011) at 9-12. As in *Brinks* and *McConnell*, reliable mathematical calculations determined the amount DSHS wrongfully withheld. VRP 2056-82. As in *McConnell*, the parties' experts provided the jury with damages computations, and the jury found damages within that range. As in *McConnell*, the dispute here was the calculation of damages. No discretion was required to enable the jury to

determine how much should have been paid to the Providers had the SLR not been in effect. The fact that the jury accepted, and rejected, some of the parties' contentions over the number of hours does not render the claim unliquidated.

The "reasonableness" line of cases relied on by DSHS, concerning unliquidated damages, are distinguishable. Each involved the *reasonable* value of goods or services provided. In *Segall v. Ben's Truck Parts*, 5 Wn. App. 482, 488 P.2d 790 (1971), the parties disputed "the reasonable value of the services" where there was no agreement about compensation. *Id.* at 483. Similarly, in *Ski Acres Dev. Co. v. Gorman, Inc.*, 8 Wn. App. 775, 508 P.2d 1381 (1973), the jury resolved the *reasonableness of the cost* of repairing damage to a building. *Id.* at 781.

*Aker Verdal A/S v. Neil F. Lampson, Inc.*, 65 Wn. App. 177, 828 P.2d 610 (1992) involved a tort claim arising from a collapsed crane boom. The trial court denied prejudgment interest on a portion of the damage award. No contract provided an objective standard for valuing the damages. The court of appeals affirmed, noting that "when determining the *measure* of damages requires the exercise of discretion by the factfinder, the claim is unliquidated." *Id.* at 191 (emphasis in original). "Since it was within the jury's discretion to determine a reasonable hourly rate, the labor costs were unliquidated." *Id.* at 192.

Unlike *Aker*, *Segall* and *Ski Acres*, the Providers' contract set the hourly rates. The jury instructions contained no hint that the jury was to decide reasonable compensation. Instead, the jurors were asked to resolve a factual dispute over the impact of the SLR on the number of compensable hours worked by the Providers. The trial court properly concluded that "the appropriate measure of damages was not disputed[, which was] the difference between what the providers should have been paid without the breach of contract and what they were actually paid." VRP (July 1, 2011) at 8.

This Court should affirm the prejudgment interest award. The trial court heard the presentation of all evidence from the parties, considered post-trial briefing and arguments from the parties, applied the correct legal standard, and made an informed decision.

**D. DSHS failed to appeal the trial court's conclusion that the Clients are entitled to retroactive monetary relief for their rule challenge, but even had DSHS preserved the issue, retroactive monetary relief is available.**

A substantive challenge to a regulation may be brought at any time. RCW 34.05.542(1). From the outset, the Client Class has challenged the validity of the SLR and its economic harm to the Clients. CP 15, 16 ("The agency action at issue is the validity of the . . . Rule and the damages incurred through its application."). DSHS always recognized that the

SLR's validity is central to the Clients' claim, dismissing all administrative appeals to the paid benefits eliminated by the SLR *because* they were challenges to the rule. CP 3596-3601, 4692. Notwithstanding this Court's decision in *Jenkins*, DSHS defended the validity of the SLR against the Clients until May 2009, when it finally conceded its invalidity as to the Client Class in open court. *Compare* CP 4678-82 with Pretrial VRP 179:17-20.

In Conclusion of Law 1, the court ruled "that the Client Class may seek relief including money damages from the Department pursuant to RCW 34.05.570(2), which provides for judicial review of agency rules . . . [and] that relief would be allowed under RCW 74.08.080(3)." CP 3474. DSHS did not assign error to this conclusion or discuss it in its opening brief,<sup>24</sup> and the Court should reject DSHS's appeal because there is an unappealed basis to affirm. *Allen v. Am. Land Research*, 95 Wn.2d 841, 848, 631 P.2d 930 (1981).

The trial court also applied equitable tolling of the limitations period in RCW 74.08.080 and excused exhaustion of administrative remedies. CP 3474. DSHS assigned error to the court's exercise of its equitable powers. Br. at 7-8. Even were the decision an abuse of discretion,

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<sup>24</sup> DSHS raised and briefed this as an error in its motion for interlocutory review of the trial court's order on the statute of limitations. Mot. Supp. (July 2, 2012), App. A at 8-9, 16-18. DSHS described it as "[t]he class members' primary argument." *Id.* at 16.

however, the Clients' claim was timely as a rule challenge under RCW 34.05.570(2) and uncontested on appeal. DSHS is liable to the Clients for retroactive relief.

**1. Retroactive monetary relief is available in rules challenges.**

This Court has upheld retroactive compensatory relief for challenges to invalid DSHS rules where a rule impairs benefits conferred by law. *Failor's Pharmacy v. Dep't of Social & Health Servs.*, 125 Wn.2d 488, 886 P.2d 147 (1994). There is no error in applying those principles to the SLR.

Had DSHS properly preserved the issue, its argument is contrary to established precedent. Retroactive recovery of benefits denied by DSHS under invalid rules is a long-recognized remedy. *Berry v. Burdman*, 93 Wn.2d 17, 604 P.2d 1288 (1980). In *Berry*, public assistance recipients contended that DSHS rules violated the Social Security Act. As here, the class plaintiffs filed a "Petition for Review and Complaint for Declaratory and Injunctive Relief and Damages," seeking to invalidate DSHS regulations and obtain compensatory relief. CP 3659.<sup>25</sup> The *Berry* trial

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<sup>25</sup> In *Berry*, plaintiff Pierce exhausted administrative remedies and filed a timely petition for review. CP 3663. Plaintiff Gallow exhausted administrative remedies, but did not file a timely petition. CP 3664. Plaintiffs Poe, Berry, and Hadeen requested administrative hearings, but did not exhaust administrative remedies before filing the class action. CP 3665, 3667-68. Plaintiff Ferrill did not exhaust administrative remedies. CP 3666-67.

court invalidated the DSHS rules and awarded “retroactive reinstatement of public assistance benefits which have been denied or reduced because of the application of invalid practices or regulations” and attorneys’ fees. CP 3675-76. This Court affirmed the plaintiffs’ right to monetary relief under RCW 74.08.080. *Berry*, 93 Wn.2d at 23-24.

Awarding monetary relief to compensate for damage from invalid regulations applies beyond DSHS. If an agency’s rule is invalid, it is proper to recalculate amounts due to a challenger. *Pan Pac. Trading v. Dep’t of Labor & Indus.*, 88 Wn.2d 347, 560 P.2d 1141 (1977). In *Pan Pacific*, the agency adopted a rule reclassifying workers for industrial insurance premiums. An employer later challenged the rule. This Court awarded relief, retroactive to the invalid rule’s adoption. *Id.* at 353.

Nor is Washington alone in awarding monetary damages resulting from invalid rules. *See, e.g., Mission Hosp. Reg’l Med. Ctr. v. Shewry*, 168 Cal. App. 4th 460, 85 Cal. Rptr. 3d 639 (2008). *Failor’s Pharmacy* cited a Seventh Circuit decision, *Wis. Hosp. Ass’n v. Reivitz*, 820 F.2d 863, 869 (7th Cir. 1987), permitting recovery of damages based on rates in effect before the adoption of invalid rates. 125 Wn. 2d at 499.<sup>26</sup> Recovery

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<sup>26</sup> *See also Green v. Obledo*, 29 Cal. 3d 126, 141, 624 P.2d 256 (1981); *Bd. of Soc. Welfare v. Cnty. of L.A.*, 27 Cal. 2d 81, 86, 162 P.2d 630 (1945); *Toomey v. Blum*, 77 A.D.2d 802, 803, 430 N.Y.S.2d 749 (1980); *Crane v. Comm’r of Pub. Welfare*, 395 Mass. 435, 445, 480 N.E.2d 995 (1985).

of money due but unpaid as a result of invalid agency action is permitted in federal APA proceedings. *See Bowen v. Massachusetts*, 487 U.S. 879, 108 S. Ct. 2722, 101 L. Ed. 2d 749 (1988).

**2. DSHS cannot overcome the heavy burden to set aside the court’s ruling that the statute of limitations to file suit on the Clients’ claims was equitably tolled.**

“Equitable tolling” is an exercise of the court’s inherent power to do equity. The standard of review applicable to the exercise of inherent equitable powers is the highly deferential “abuse of discretion” standard. *In re Marriage of Farmer*, 172 Wn.2d 616, 625, 259 P.3d 256 (2011). A court’s decision is upheld if there is a reasoned basis for granting equitable relief. “When it takes a view no reasonable person would take, or applies the wrong legal standard to an issue, a trial court abuses its discretion.” *Cox v. Spangler*, 141 Wn.2d 431, 439, 5 P.3d 1265 (2000). A court’s power to do equity is very broad. “When the equitable jurisdiction of the court is invoked . . . whatever relief the facts warrant will be granted.” *Ronken v. Bd. of Cnty. Comm’rs*, 89 Wn.2d 304, 313, 572 P.2d 1 (1977) (quoting *Kreger v. Hall*, 70 Wn.2d 1002, 1008, 425 P.2d 638 (1967)).

DSHS’s brief relies on generalized expressions, but assiduously avoids applying those rules to its specific conduct here. The Client Class is made up of severely disabled individuals with limited means; they are among the “most vulnerable” citizens in society. Pretrial VRP 245. In

*Cook v. State*, 83 Wn.2d 599, 521 P.2d 725 (1974), this Court held that the non-claim statute could be equitably tolled based on the party's status. Even though the minor's guardian was not legally incapacitated, the Court held that it would be as unjust to apply the non-claim statute's bar to the injured minor's mother as to the hospitalized minor herself. *Id.* at 604-05.

DSHS's clients are no better able to navigate its complex maze than a minor. Lisa Fuchser is a severe epileptic. Her 2005 assessment states that she "has no short term memory and forgets what she is doing in the middle of doing it and needs to be supervised at all times." CP 3540. Mildred Schock suffered from dementia that "severely impair[ed] her decision-making ability." CP 4110. "Due to his disability [Clayton Bayer] is not able to decide anything for himself." CP 4116.

Courts also consider the purpose of the statute at issue when evaluating an equitable tolling claim. For a remedial statute, equitable tolling serves to further the statute's basic purpose. For example, deadlines for claims filed under the workers' compensation act may be equitably tolled because "[i]t is a humane law and founded on sound public policy, . . . and its beneficent provisions should not be limited or curtailed by a narrow construction." *Rabey v. Dep't of Labor & Indus.*, 101 Wn. App. 390, 396, 3 P.3d 217 (2000) (quoting *Hilding v. Dep't of Labor & Indus.*, 162 Wash. 168, 175, 298 P. 321 (1931)). RCW

74.08.080 is also remedial, designed to protect vulnerable citizens who rely on DSHS programs to assist them with “basic activities of daily living such as bathing, dressing, shopping, housekeeping and meal preparation.” *Jenkins*, 160 Wn.2d at 291.

Finally, courts also consider the conduct of the adverse party in deciding whether to equitably toll a statute. A review of DSHS’s conduct regarding the Client Class confirms the trial court’s observation that DSHS “created every possible barrier to recovery by all of these claimants.” Pretrial VRP 246. The most common applications involve fraud and misrepresentation, but that does not define the complete universe for application of the rule. *Millay v. Cam*, 135 Wn.2d 193, 206-07, 955 P.2d 791 (1998). This Court has upheld equitable tolling where one party “grossly exaggerated” facts.

DSHS had a statutory duty to provide adjudicative proceedings in which a beneficiary *can prevail* and obtain back benefits. RCW 74.08.080(1)(a) & .080(2)(f).<sup>27</sup> Adjudicative proceedings challenging the SLR, however, could never result in a ruling for a Client. CP 3596. WAC 388-02-0225(1) removed jurisdiction to review the SLR’s validity. Lack of

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<sup>27</sup> Federal regulations require states to provide a fair hearing to a Medicaid applicant or recipient whose claim was denied, given limited authorization, not acted upon promptly, or whose previous service is reduced, suspended, terminated, or denied. *See* 42 C.F.R. §§ 431.200 & .201.

jurisdiction prevented *any* Client from obtaining an “adjudicative order” from which to petition for judicial review. An “order” is “a written statement of particular applicability that *finally determines the legal rights* . . . of a specific person or persons.” RCW 34.05.010(11)(a) (emphasis added). Dismissal for lack of jurisdiction is the antithesis of a final determination of legal rights. *Skagit Surveyors & Eng’rs v. Friends of Skagit Cnty.*, 135 Wn.2d 542, 556, 958 P.2d 962 (1998).

DSHS notices to Clients during its operation of the SLR provided incorrect and affirmatively misleading information about the paid care for which the Clients were eligible and the SLR’s reduction of those benefits. DSHS regularly issued notices to Clients that their annual assessment had increased benefits but did not disclose that the assessment result had, in fact, been reduced by the SLR. For example, DSHS’s 2007 notice to Mildred Schock advised that her benefits had been “continued” and “increased” to the “full 155 hrs” for which she was “eligible.” CP 859. DSHS made no reference to an adjustment under the SLR. DSHS’s notices of reduced hours did not adequately explain the basis for the reduction. *See, e.g.*, CP 1133 (basis for the reduction was “WAC 388”). The notices advised Clients whose hours were reduced solely based on the SLR of their right to an administrative appeal, but did not disclose that the right was illusory because there was no jurisdiction over appeals of the

SLR.<sup>28</sup> CP 3598, 3600-01, 3700, 3724. DSHS cannot point to any evidence that it notified any Client of any right to bypass the futile administrative appeal.

Directing vulnerable Clients to an administrative appeals process that could provide no remedy, alone, constitutes an affirmative misrepresentation by DSHS that warrants equitable tolling. After one futile appeal, an offer of further appeal rights is distinctly unappealing. Advising Clients that their benefits had been increased (but not that they had also been decreased from their actual level of need) is a material misrepresentation by DSHS that warrants equitable tolling. In *Millay*, the defendant's course of conduct sowed confusion and frustrated the exercise of the plaintiff's rights. 135 Wn.2d at 206-07. DSHS engaged in a pattern of conduct against the Clients designed to defeat their rights to federally guaranteed benefits. The trial court was correct: "It is hard to imagine a case more appropriate for the application of the doctrine of equitable tolling of the restriction on recovery." Pretrial VRP 246.

DSHS's reliance on *Marley v. Dep't. of Labor & Indus.*, 125 Wn.2d 533, 886 P.2d 189 (1994) is misplaced. In contrast to DSHS's notices, the notice to Marley explicitly identified the reason for the denial, providing

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<sup>28</sup> Before the U.S. District Court, DSHS admitted that there was no administrative remedy to those denied benefits under the SLR. CP 3755-56.

specific facts and the specific statutory basis. 125 Wn.2d at 536. Further, an internal appeal to Labor & Industries could have resulted in relief to Marley. *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 173-74, 937 P.2d 565 (1997), also cited by DSHS, recognized that the time limit for industrial insurance appeals is subject to equitable tolling.<sup>29</sup>

*Lacey Nursing v. Dep't of Revenue*, 128 Wn.2d 40, 905 P.2d 338 (1995) is no basis to set aside the court's application of equitable tolling or excusing exhaustion of administrative remedies. The issue in *Lacey* was whether it was error to certify a class seeking excise tax refunds. *Id.* at 55-56.<sup>30</sup> In contrast, class actions are appropriate under RCW 74.08.080, including challenges to DSHS rules. *Berry*, 93 Wn.2d at 23-24.

### **3. Exhaustion of administrative remedies is excused where an agency cannot or will not grant effective relief.**

Exhaustion of administrative remedies presupposes the existence of an adequate administrative remedy. *Orion Corp. v. State*, 103 Wn.2d 441,

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<sup>29</sup> DSHS suggests that there is “no good reason” why L&I matters should be treated differently from the DSHS decisions here. Of course there is. Washington’s worker’s compensation system was expressly designed to remove courts from the process of providing benefits to injured workers, except in very limited review capacity. Even there, however, this Court has recognized that equitable tolling can and does apply to preserve court review.

<sup>30</sup> Tax refund statutes are also different in kind from remedial statutes such as RCW 74.08.080. As noted in *Lacey*, “This court strictly construes tax statutes . . . . ‘The policy reason for construing a tax statute narrowly . . . is . . . to protect the State from unanticipated losses.’” 128 Wn.2d at 49-50 (*quoting Puget Sound Nat'l Bank v. Dep't of Revenue*, 123 Wn.2d 284, 290, 868 P.2d 127 (1994)). In contrast, the purpose of RCW 74.08.080 is to ensure that DSHS’s errors, even unintentional errors, do not fall on the vulnerable individuals the agency serves.

456-57, 693 P.2d 1369 (1985). The record here demonstrates beyond cavil that such a remedy never existed. None of the policy grounds for the exhaustion doctrine is present.

DSHS barred review at the agency level. CP 3596. No factual background was developed and no agency expertise was ever applied. The SLR's mere existence barred relief. *Id.* DSHS continued to apply the rule in the face of consistent lower court rulings that it violated federal law. Pursuit of administrative relief with DSHS on the SLR was futile from adoption to repeal.

Without citation to any evidence from the record, DSHS now asserts that an adequate administrative remedy existed after *Jenkins*. Br. at 73. DSHS's prior briefing in this case directly contradicts its assertion. Before the trial court, DSHS argued that this Court's decision in *Jenkins* was not of general applicability: "The Washington Supreme Court ruled, *as to three individual recipients*, that the shared living rule was invalid because it was inconsistent with a provision of federal Medicaid law." CP 131 (emphasis added). DSHS explicitly asked the U.S. District Court to disregard *Jenkins* and hold that the SLR was valid. CP 4678-82. DSHS represented to the federal court that the SLR became ineffective, not upon this Court's decision in *Jenkins*, but only upon DSHS's repeal nearly two months later. CP 155.

DSHS's undisputed conduct toward Clients who timely filed appeals also contradicts DSHS's assertion. Lisa Fuchser timely appealed and sought judicial relief. CP 3532-34. Yet, even after *Jenkins*, "DSHS [ ] refused to provide retroactive compensatory relief." CP 3534.

Internal DSHS directives contradict its assertion. In 2006, after the court of appeals affirmed the SLR's invalidity, DSHS instructed, "*Until further notice*, inform clients and ALJs that the Department will continue to apply the shared living rule." CP 4484 (emphasis added). DSHS provided no further notice until June 28, 2007. CP 4762. DSHS repealed the rule effective June 29, 2007. WSR 07-14-070.

The presence or absence of an administrative appeal would not change DSHS's factual inability to act. "[F]utility goes beyond legal adequacy and addresses factual adequacy" and "courts will not require vain and useless acts." *Orion Corp.*, 103 Wn.2d at 458. DSHS's factual inability to provide relief is a verity on appeal. It assigned no error to the finding that DSHS lacked capacity to handle Client administrative appeals. CP 3471 (Finding of Fact 14); *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004).

## VI. ARGUMENT ON CROSS-APPEAL

### A. DSHS's liability to the Providers is no basis to withhold entry of a money judgment to the Client Class on its proven claim.

In *Jenkins*, this Court affirmed the retroactive award of unpaid benefits to a Medicaid beneficiary. 160 Wn.2d at 302. Here, the Clients proved that DSHS wrongfully withheld \$57,123,794.50 in paid benefits. CP 3473-74 (Finding of Fact 25). However, the trial court did not enter a money judgment for those damages because it did not want to expose the State to the possibility of double recovery. CP 3475. The court erred by failing to enter judgment for the Clients' damages. "[I]f one prevails, he is entitled to that relief demanded by the proof. . . . [T]hose who have committed the wrong must be held responsible." *Exeter Co. v. Holland Corp.*, 172 Wash. 323, 354, 23 P.2d 864 (1933).

The failure to enter judgment is inconsistent with the court's Conclusion of Law 1 that the Clients may recover damages under RCW 34.05.570(2) and RCW 74.08.080, and Conclusion of Law 2 that the Clients "shall be permitted to seek compensatory relief . . . back to April 2003." CP 3474. The Clients' damages are the same as in *Jenkins* – the "amount of personal care hours DSHS wrongfully withheld from the respondents for their unmet need for assistance with housekeeping, shopping, meal preparation services, and wood supply, retroactive to the

date the shared living rule was applied to their cases.” *Jenkins*, 160 Wn.2d at 302-03. The trial court could have taken other steps to protect DSHS from paying twice by providing a credit to the Client Class judgment for payments made to the Providers under their judgment. It is within a court’s power to structure payment of a judgment to avoid unjust enrichment. *Nat’l Bank of Wash. v. Equity Investors*, 86 Wn.2d 545, 561, 546 P.2d 440 (1976). The claims administration process could also be structured to ensure that DSHS pays only once.

**B. The Client Class is entitled to attorneys’ fees under RCW 74.08.080, both at the trial court level and for this appeal.**

As in *Jenkins*, the punitive and deterrent policy underlying RCW 74.08.080(3) applies here. The statute’s purpose is to shift to DSHS the cost of correcting its mistakes. *Whitehead v. Dep’t of Soc. & Health Servs.*, 92 Wn.2d 265, 269-70, 595 P.2d 926 (1978). Beginning with *Tofte v. Dep’t of Soc. & Health Servs.*, 85 Wn.2d 161, 531 P.2d 808 (1975), this Court has recognized that when DSHS clients must come to court to obtain benefits to which they are entitled, it is fundamentally unfair to require those needy persons to bear the burden of vindicating their rights. Therefore, when DSHS clients prevail, DSHS must pay reasonable attorneys’ fees. The Client Class was compelled to seek legal redress because DSHS asserted the SLR was valid against all but the *Jenkins*

plaintiffs. DSHS's eventual concession that the SLR was invalid as to all members of the class took more than two years.<sup>31</sup>

“[T]he fundamental underpinning of the fee award provision is a policy at once punitive and deterrent – a corrective policy which would discipline respondent for violations of Title 74 RCW or of its own regulations, by shifting to the respondent the costs of righting its mistakes.” *Berry*, 93 Wn.2d at 24 (quoting *Tofte*, 85 Wn.2d at 165). To fulfill the statute's dual purposes, the trial court should have imposed fees on DSHS under RCW 74.08.080(3) using a percentage of the recovery.

In *Allard v. First Interstate Bank*, 112 Wn.2d 145, 768 P.2d 998 (1989) (*Allard II*), the Court held that a contingent fee can constitute reasonable attorneys' fees when shifting fees. The case involved the bank's breach of fiduciary duties in managing two trusts, and the trial court awarded about \$2.5 million in damages and \$1 million in fees, including a contingent fee of \$596,646 to plaintiffs' counsel. In awarding fees, the trial court considered (1) the factors set forth in RPC 1.5(a); (2)

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<sup>31</sup> DSHS defended the validity of the SLR against the Client Class until the May 2009 summary judgment proceedings. CP 4678-82; Pretrial VRP 179:17-20. There is no question that the validity of the rule as to the Client Class was at issue in the case until DSHS conceded. At a later hearing, the Court summarized its September 15, 2009 ruling: “In the motion, I make three rulings. One of those was that I granted summary judgment in favor of the plaintiffs' motion for a ruling that the SLR was invalid. I made that ruling because that was conceded by the Department.” Pretrial VRP 145. Thus in addition to prevailing on the underlying damage claim, the Client Class also prevailed on the invalidity of the SLR as to all members of the Client Class.

the contingent fee agreement; and (3) its belief that the plaintiffs should be made whole. This Court affirmed the fee award, holding that “[a] trial court may consider the existence of a contingent fee agreement in making its award of attorneys’ fees, but should not rely solely on the terms of such an agreement in determining the amount.” *Id.* at 150. Previously, the Court had determined that the bank’s breach of fiduciary duties warranted fee shifting. *Allard v. Pac. Nat’l Bank*, 99 Wn.2d 394, 407-08, 663 P.2d 104 (1983) (*Allard I*). The Court upheld the contingent fee against the trustee so that the beneficiaries would be made whole for the breach of duty. *Allard II*, 112 Wn.2d at 151-52. Unless DSHS is required to bear the burden of fees, the effect is that a portion of the benefits wrongfully withheld will be used to pay attorneys’ fees. This does not make the Client Class whole.

DSHS should have provided the Client Class over \$57 million in paid benefits. It did not. It erected barriers to recovery at every stage – from advising Clients that they had received their full benefits, to directing aggrieved Clients to undertake futile administrative appeals, to continuing to apply the SLR to reduce benefits after this Court’s decision in *Jenkins*,<sup>32</sup>

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<sup>32</sup> It bears repeating that DSHS could have repealed the SLR immediately and directed its staff to complete the “CARE tool” for all clients by checking the box that caregivers did not reside with the client, and conduct the same individualized assessment DSHS already was performing for clients with live-out providers.

to two years of continued contest over the validity of the rule against the Clients. DSHS should bear the cost of its mistakes.<sup>33</sup> Under RAP 18.1, the Clients also request fees on appeal.

**C. The trial court should have granted summary judgment to the Providers on their wage claim because DSHS was the payroll agent and wrongfully withheld wages due. It was error to grant summary judgment to DSHS.**

On cross-motions for summary judgment, the trial court granted summary judgment to DSHS on the Providers' wage claim under Chapters 49.46 and 49.52 RCW. CP 1462-65, 5303-12. This Court reviews summary judgments and statutes' meaning *de novo*. *Columbia Physical Therapy v. Benton Franklin Orthopedic Assocs.*, 168 Wn.2d 421, 429, 228 P.3d 1260 (2010). Summary judgment is appropriate when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. CR 56(c). "All facts and reasonable inferences therefrom must be viewed in the light most favorable to the nonmoving party." *Columbia Physical Therapy*, 168 Wn.2d at 429.

Washington has a "long and proud history of being a pioneer in the protection of employee rights." *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 300, 996 P.2d 582 (2000). Washington statutes

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<sup>33</sup> The statutory fees awarded should be applied to reduce, dollar for dollar, amounts due from the common fund fees awarded.

implement its long-standing public policy through “a comprehensive scheme to ensure payment of wages.” *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 157, 961 P.2d 371 (1998). These statutes grant employees “nonnegotiable, substantive rights regarding minimum standards for working conditions, wages, and the payment of wages.” *Schilling*, 136 Wn.2d at 157.

**1. As payroll agent for the Clients, DSHS is liable for its violation of Washington’s wage laws.**

Liability under RCW 49.52.050 and .070 attaches to any employer and/or “agent of any employer” who willfully fails to pay wages to the employee or who willfully pays a lower wage than required by any statute, ordinance, or contract. (Emphasis added) The use of the conjunctive “and” in RCW 49.52.070 “establishes the statutory directive to hold personally liable the party responsible for paying wages who willfully failed to pay wages owed.” *Morgan v. Kingen*, 166 Wn.2d 526, 536, 210 P.3d 995 (2009). An employer’s agent is liable to workers for failure to pay wages, if the agent has control over the funds or the decision to pay. *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wn.2d 514, 522, 22 P.3d 795 (2001).

DSHS is liable under the wage statutes because it is the admitted “fiscal agent” for the employer, CP 4277, and clearly “had some control

over the payment of wages” to the Providers. *Ellerman*, 143 Wn.2d at 523. DSHS described the Clients as its “clients” in the Provider contracts. CP 3909-48. DSHS’s “control over the purse strings” was also clearly demonstrated by its power to reduce the Providers’ wages under the SLR.

**2. Employers are required to pay wage-earners for all hours worked, regardless of any agreement to the contrary.**

Even if the SLR were otherwise lawful, its effect was that DSHS required each Provider to perform services without payment for all hours worked. DSHS imposed the requirement of unpaid, off-the-clock work on behalf of its “clients,” violating Washington’s Minimum Wage Act (“MWA”).<sup>34</sup> DSHS calculated the number of hours necessary to perform the tasks required to meet the Clients’ needs under its Rates Methodology (WAC 388-72A-0095 and later promulgated in WAC 388-106-0130). Under the SLR, DSHS required the live-in Providers to perform specific services without compensation. DSHS has conceded that it required the Providers to perform work without compensation:

The [SLR] did not affect the development of the service plan, and there was no modification of the nature or level or service that a recipient was to receive . . . . In other words, if two eligible recipients were identical in all respects except that one chose a live-in provider and the other did not, their service plans should

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<sup>34</sup> Under the MWA, “ ‘Employer’ includes . . . any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee.” RCW 49.46.010(4). DSHS, by controlling payment to the Providers, was acting “in the interest of an employer” and thus was an “employer” for the purposes of the MWA.

also be identical, except that the service plan for the recipient with a live-in provider would authorize fewer paid hours for the provider to perform the services . . . .

CP 4336. Another term for mandatory, unpaid, hourly work is “off-the-clock” work, a violation of wage and hour laws. *Brock v. Big Bear Market*, 825 F.2d 1381, 1382 (9th Cir. 1987).

The MWA guarantees employees’ right to be paid for all hours worked, contract or no contract. *Seattle Prof’l Eng’g Employees Ass’n v. Boeing Co.*, 139 Wn.2d 824, 838, 991 P.2d 1126 (2000). This right is unwaivable. RCW 49.46.090; *Schilling*, 136 Wn.2d at 157.

**3. DSHS’s conduct was willful and it is liable for exemplary damages.**

RCW 49.52.070 establishes a remedy of exemplary damages if an agent of an employer willfully refuses to pay wages. The statute must be liberally construed to advance the legislature’s intent to protect employee wages and assure payment. *Schilling*, 136 Wn.2d at 159. DSHS is liable for the unpaid wages as the admitted fiscal agent of their employers.

Exemplary damages are available if the employer “willfully” fails to pay the wages due. A willful failure to pay occurs if it is volitional. “Willful means merely that the person knows what he is doing, intends to do what he is doing, and is a free agent.” *Schilling*, 136 Wn.2d at 159-60 (internal quotation marks and citation omitted). While willfulness is ordinarily a question of fact, where there are no disputed material facts,

the case can be resolved on summary judgment. *Id.* at 160. “There are two instances when an employer’s failure to pay wages is not willful: the employer was careless or erred in failing to pay, or a ‘bona fide’ dispute existed between the employer and employee regarding the payment of wages.” *Id.* at 160.

DSHS is liable for double damages. Its use of the SLR was volitional and neither exception negating willfulness applies. The lower court decisions in *Jenkins* and *Gasper* put it on notice that its practice was unlawful. DSHS persisted. Even after *Jenkins* invalidated the SLR, DSHS still paid no Providers for the work until nearly two months later, and then not until after it conducted the next annual assessments of the Clients. CP 3772. In other words, DSHS continued to underpay wages until June 2008, more than a year after *Jenkins*. Continued refusal to pay for services despite a Supreme Court decision is neither “careless” nor a “bona fide” dispute.

**4. The providers are entitled to reasonable attorneys’ fees and costs under RCW 49.52.070.**

RCW 49.52.070 shifts costs and attorneys’ fees to employers and others responsible for nonpayment of wages. *Hume v. Am. Disposal Co.*, 124 Wn.2d 656, 673, 880 P.2d 988 (1994). DSHS eliminated payment for a portion of the services it required the Providers to render, regardless of

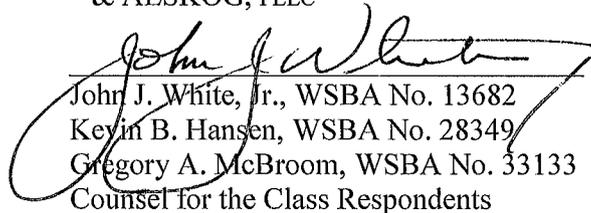
whether they were, in fact, for the exclusive benefit of the Clients. DSHS violated the statute and must, as any other violator, bear the fees and costs that the employees incurred to recover what was due. Under RAP 18.1, the Providers also request fees on appeal.

## VII. CONCLUSION

The Court should (1) affirm the trial court's entry of judgment for the Providers; (2) affirm the trial court's determination of liability and damages for the Clients and grant a money judgment, including statutory fee and costs; (3) reverse the court's summary judgment decision on the Provider wage claim; and (4) award fees and costs on appeal.

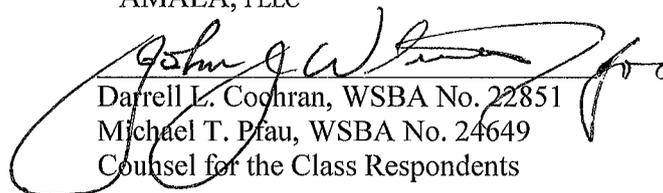
DATED this 17th day of September, 2012

LIVENGOOD, FITZGERALD  
& ALSKOG, PLLC



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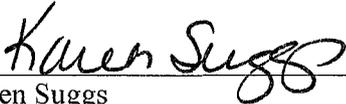
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Counsel for the Class Respondents

**CERTIFICATE OF SERVICE**

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:

The Supreme Court State of Washington Temple of Justice 415 12th Ave. SW P.O. Box 40929 Olympia, WA 98504-0929 Phone: (360) 357-2077	Messenger Service <input type="checkbox"/> First Class U.S. Mail <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> Facsimile <input type="checkbox"/>
Jay Douglas Geck Carrie L. Bashaw Michael M. Young Elizabeth C. Beusch P.O. Box 40100 Olympia, WA 98504-0100 Phone: (360) 586-2697	Messenger Service <input type="checkbox"/> First Class U.S. Mail <input checked="" type="checkbox"/> Electronic Mail <input checked="" type="checkbox"/> Facsimile <input type="checkbox"/>
Dmitri L. Igliztin Schwerin Campbell Bernard Iglitzin & Lavitt 18 W Mercer Street, Suite 400 Seattle WA 98119-3971 Phone: (206) 285-2828	Messenger Service <input type="checkbox"/> First Class U.S. Mail <input checked="" type="checkbox"/> Electronic Mail <input checked="" type="checkbox"/> Facsimile <input type="checkbox"/>

DATED: September 17, 2012 at Kirkland, Washington

  
 \_\_\_\_\_  
 Karen Suggs

# APPENDIX

**SUMMARY OF RELEVANT  
TRIAL COURT PROCEEDINGS**

**1. Clients' Summary Judgment Motion:**

May 22, 2009 – Oral argument on Clients' SJ motion.  
Pretrial VRP, dated May 22, 2009.

Sept. 15, 2009 – Court's ruling on Clients' SJ motion. CP 451-59.

Oct. 30, 2009 – Court enters order in favor of Client Class for liability.  
CP 797-80.

**2. Class Certification:**

Oct. 30, 2009 – Oral argument and court's ruling on Class  
Certification. Pretrial VRP, dated Oct. 30, 2009.

January 4, 2010 – Court enters order. CP 1077-90.

**3. DSHS's Motion for Reconsideration or Partial SJ:**

Jan. 29, 2010 – Oral argument and court's ruling on DSHS's motion.  
Pretrial VRP, dated January 29, 2010

Sept. 30, 2011 – Court enters order denying DSHS's motion.  
CP 3439-42

**4. Cross Motions for Summary Judgment on Relief Period:**

May 7, 2010 – Oral arguments and court's ruling on cross motions.  
Pretrial VRP, dated May 7, 2010.

June 4, 2010 – Court enters order. CP 1466-70.

Oct. 5, 2010 – Court's ruling on applicable period.  
Pretrial VRP, October 5, 2010.

Sept. 30, 2011 – Court enters order. CP 3443-45.

**5. Providers' Motion for Partial SJ:**

Oct. 30, 2009 – Oral arguments on Providers' motion.  
Pretrial VRP, dated Oct. 30, 2009.

Dec. 17, 2009 – Court's Opinion re motion. CP 1064-76.

May 7, 2010 – Court enters order. CP 1462-65.

**6. Trial:**

Nov. 29, 2010 – Jury trial commences. VRP 1 to 2857.

Dec. 16, 2010 – DSHS's exceptions to jury instructions.  
VRP 2604-05.

Dec. 20, 2010 – Court enters jury's verdict in favor of Providers.  
VRP 2985-86.

**7. Post-Trial:**

Feb. 25, 2011 – Court enters judgment on jury verdict. CP 3006-10.

April 6, 2011 – Oral argument on pre-judgment interest.  
VRP, dated April 6, 2011.

July 1, 2011 – Court issues ruling on pre-judgment interest.  
VRP, dated July 1, 2011.

Oct. 3, 2011 – Court issues ruling on amount of prejudgment interest.  
CP 3449-51.

Dec. 2, 2011 – Court enters final judgment for Providers. CP 3459-63.

Dec. 2, 2011 – Court enters final judgment for Clients. CP 3477-79.

Dec. 2, 2011 – Court enters findings of fact and conclusions of law.  
CP 3464-76.

June 26, 2012 – Court issues ruling on fee shifting and statutory costs.  
CP \_\_\_\_.

July 10, 2012 – Court issues ruling on common fund award and costs.  
CP \_\_\_\_.

\_\_\_\_\_, 2012 – Court to enter supplemental judgment common fund  
award / costs. CP \_\_\_\_.

**Class Definitions:**

The Client Class is defined as:

All persons who (1) were determined eligible for Medicaid or state funded inhome 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), 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.

The Provider Class is 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 inhome 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), 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 42.

**Excerpts from Judith Alberts' contract with DSHS from  
March 5, 2003 to March 4, 2007 (Trial Exhibit 1):**

- 1.c. "Authorization and Authorized" means the Contractor's services are included in the client's DSHS approved Service Plan . . . .

\* \* \*

- 1.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.

- 1.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.

\* \* \*

2. Statement of Work

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 identified in the Service Plan.

\* \* \*

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:

\* \* \*

(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

\* \* \*

- b. DSHS will pay the Contractor *the established* rates 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. (emphasis added)

\* \* \*

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.

\* \* \*

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 Plan of any additional clients who may also select the Contractor are incorporated into this Contract by reference.

**Summary Using Percentages from Mancuso Memo Dated 11/1/10 (14.03% and 6.67%) (Files 55 and 38 IP Providers Only)**

Date Range	April 1, 2003 to June 30, 2008	May 1, 2004 to June 30, 2008	February 1, 2007 to June 30, 2008	February 1, 2007 to June 30, 2008 with Planned Action Notice	May 1, 2007 to June 30, 2008	
All Providers	Lost Wages Regular	63,793,474	61,761,417	14,829,058	7,665,346	9,682,214
		<i>Attachment 1</i>	<i>Attachment 5</i>	<i>Attachment 9</i>	<i>Attachment 13</i>	<i>Attachment 17</i>
	Lost Vacation	563,387	563,387	327,655	172,656	224,718
		<i>Attachment 1</i>	<i>Attachment 5</i>	<i>Attachment 9</i>	<i>Attachment 13</i>	<i>Attachment 17</i>
	Lost Raises	1,055,537	1,055,537	320,276	176,587	208,287
	<i>Attachment 21</i>	<i>Attachment 21</i>	<i>Attachment 21</i>	<i>Attachment 21</i>	<i>Attachment 21</i>	
	<b>\$ 65,412,398</b>	<b>\$ 63,380,341</b>	<b>\$ 15,476,989</b>	<b>\$ 8,014,588</b>	<b>\$ 10,115,220</b>	
Eliminate Multiple Providers	Lost Wages Regular	55,304,789	53,582,716	12,813,302	6,541,394	8,345,424
		<i>Attachment 2</i>	<i>Attachment 6</i>	<i>Attachment 10</i>	<i>Attachment 14</i>	<i>Attachment 18</i>
	Lost Vacation	487,658	487,658	282,994	147,232	193,636
		<i>Attachment 2</i>	<i>Attachment 6</i>	<i>Attachment 10</i>	<i>Attachment 14</i>	<i>Attachment 18</i>
	Lost Raises	894,965	894,965	270,576	146,988	175,436
	<i>Attachment 21</i>	<i>Attachment 21</i>	<i>Attachment 21</i>	<i>Attachment 21</i>	<i>Attachment 21</i>	
	<b>\$ 56,687,412</b>	<b>\$ 54,965,338</b>	<b>\$ 13,366,872</b>	<b>\$ 6,835,614</b>	<b>\$ 8,714,497</b>	
Eliminate Authorized Hours in excess of Actual Hours	Lost Wages Regular	62,994,201	61,000,705	14,660,491	7,572,392	9,574,737
		<i>Attachment 3</i>	<i>Attachment 7</i>	<i>Attachment 11</i>	<i>Attachment 15</i>	<i>Attachment 19</i>
	Lost Vacation	556,826	556,826	323,944	170,581	222,229
		<i>Attachment 3</i>	<i>Attachment 7</i>	<i>Attachment 11</i>	<i>Attachment 15</i>	<i>Attachment 19</i>
	Lost Raises	1,036,221	1,036,221	314,620	173,706	204,617
	<i>Attachment 21</i>	<i>Attachment 21</i>	<i>Attachment 21</i>	<i>Attachment 21</i>	<i>Attachment 21</i>	
	<b>\$ 64,587,248</b>	<b>\$ 62,593,752</b>	<b>\$ 15,299,055</b>	<b>\$ 7,916,679</b>	<b>\$ 10,001,583</b>	
Eliminate Combined (Multiple Providers and Authorized Hours in excess of Actual Hours)	Lost Wages Regular	54,694,263	53,000,419	12,681,869	6,468,799	8,262,857
		<i>Attachment 4</i>	<i>Attachment 8</i>	<i>Attachment 12</i>	<i>Attachment 16</i>	<i>Attachment 20</i>
	Lost Vacation	482,574	482,574	280,115	145,624	191,734
		<i>Attachment 4</i>	<i>Attachment 8</i>	<i>Attachment 12</i>	<i>Attachment 16</i>	<i>Attachment 20</i>
	Lost Raises	881,423	881,423	266,534	144,914	172,811
	<i>Attachment 21</i>	<i>Attachment 21</i>	<i>Attachment 21</i>	<i>Attachment 21</i>	<i>Attachment 21</i>	
	<b>\$ 56,058,260</b>	<b>\$ 54,364,416</b>	<b>\$ 13,228,518</b>	<b>\$ 6,759,336</b>	<b>\$ 8,627,402</b>	

App. 6

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