

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 SEIU HEALTHCARE 775NW
AND CINDY WEENS**

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INTRODUCTION

Individual Providers (“IPs”) deliver community-based personal care services to the state’s most vulnerable elderly and disabled residents under public assistance programs administered by the Washington State Department of Social and Health Services (“DSHS”). IPs assist clients with tasks such as toileting, bathing, meal preparation and household chores, allowing clients to live in the community instead of in costly state-run institutions.

In 2003, DSHS promulgated a regulation known as the Shared Living Rule (“SLR”). The SLR eliminated payment for certain personal care services that DSHS directed the IPs to perform via Service Contracts with the IPs and that the IPs in fact performed. DSHS used the SLR as part of a needs-assessment tool applied to recipients of personal care services to reduce the number of hours for which an IP would be paid if the client lived with his or her IP. This Court invalidated the SLR because it violated Medicaid comparability requirements. *Jenkins v. Dep’t of Social & Health Servs.*, 160 Wn.2d 287, 157 P.3d 388 (2007).

A class of IPs and a class of Medicaid beneficiaries impacted by the SLR sued for damages. The jury found that DSHS, in applying the SLR, breached the duty of good faith and fair dealing inherent in the IPs’ Service Contracts and awarded the Provider Class over \$57 million.

DSHS seeks direct review of the Provider Class judgment. Plaintiffs cross-appealed. This Brief of Respondents SEIU Healthcare 775NW and Cindy Weens timely follows.

STATEMENT OF THE ISSUES¹

A. Issues Presented on DSHS Appeal Relating to DSHS Assignment of Error 1.

1. Should the Court affirm the trial court's judgment in favor of the Provider Class, where the jury found that the Department breached the implied duty of good faith and fair dealing in its performance of a specific term or terms in the individual provider contracts, given that the Department performed its contractual obligations in a manner that frustrated the IPs' reasonable expectations under the contracts and that the Department retained discretion, but not unconditional authority, to set a contract term?

2. Should the Court affirm the trial court's judgment in favor of the IPs, because a breach of an express or implied contract term is not a prerequisite to a breach of the implied duty of good faith and fair dealing?

¹ To avoid redundancy, Respondents address only certain issues on appeal. However, Respondents support the arguments made and authority cited by counsel for the Client Class and the Provider Class ("*Rekhter* Respondents") as to the issues on appeal relating to the claims of the Provider Class, including DSHS's appeal of the trial court's award of pre-judgment interest, which should be affirmed.

3. Should the Court affirm the trial court's judgment in favor of the Provider Class, where the jury's verdict finding that the Department breached the implied duty of good faith and fair dealing was supported by sufficient evidence?

B. Issues Presented on DSHS Appeal Relating to DSHS Assignments of Error 2.1 and 2.2.

1. Should the Court affirm the trial court's judgment in favor of the Provider Class, given that offering Jury Instructions 18 and 19 but not DSHS's proposed instructions 25A, 35 and 35A correctly instructed the jury on the law, allowed counsel to argue their theory of the case, and was not misleading?

2. Should the Court affirm the trial court's judgment in favor of the Provider Class, given that DSHS failed to preserve its appeal of the trial court's decisions to give Instructions 18 and 19 and to not give Proposed Instructions 25A, 35 and 25A?

C. Issue Presented on Plaintiffs' Cross-Appeal

1. If the Court reverses the trial court judgment in favor of the IPs for any reason and remands for a new trial, should the Court also reverse the trial court's dismissal of the IPs' unjust enrichment claims and remand for trial on that cause of action?

STATEMENT OF THE CASE

The State of Washington contracts with individual providers (“IPs”) to provide community-based long-term care services to disabled clients who are eligible for such services through programs administered by the Department of Social and Health Services (“DSHS”). In exchange for wages and benefits, IPs assist clients with tasks such as toileting, bathing, dressing, ambulating, meal preparation, and household chores. *See, e.g.*, WAC 388-106-0130; Exs. 1-2, 116. The federal government funds in part these services under the Medicaid Act, Title XIX of the Social Security Act. CP 3467. The IPs are represented by SEIU Healthcare 775NW (“SEIU 775NW” or “Union”) for purposes of collective bargaining. RCW 74.39A.270 and Chapter 41.56 RCW.

DSHS uses an assessment tool called the Comprehensive Assessment Reporting Evaluation or “CARE tool” to determine an individual’s eligibility for in-home care under one of four programs. CP 3467-68.² This Court has previously explained:

In a CARE evaluation, the individual is scored on factors such as an individual’s ability to perform daily activities

² DSHS administers publicly-funded long-term care programs that provide a range of personal and home-care assistance to give low-income disabled individuals the opportunity to reside in their own homes instead of nursing homes or other facilities. *See* WAC 388-106-0015 (listing long-term care services provided through DSHS to assist clients remain in the community as opposed to in nursing home care). Several programs are funded in part by the federal government under the Medicaid Act. The CARE tool is also used to assess client needs under the Chore program. CP 3467-68. *Jenkins*, 160 Wn.2d at 291, n. 2.

and an individual's mental status. The resulting numerical scores are put into a formula that calculates the individual's base assistance level in hours of care and places the individual into one of 14 residential classification groups. CARE classification groups range from "Group A Low" (level 1, requiring the least amount of assistance) to "Group E High" (level 14, requiring the most assistance).

Jenkins v. Dep't of Social & Health Servs., 160 Wn.2d 287, 291, 157 P.3d 388 (2007). "Once the individual qualifies as a beneficiary, the department determines whether informal supports, like friends or family members, are helping the beneficiary meet certain needs." *Jenkins*, 160 Wn.2d at 292. The CARE tool assessment determines the base amount of long-term personal care services to be authorized in the form of paid hours-per-month of in-home care, and it reduces the number of base hours when informal supports are present. *See, e.g.*, WAC 388-106-0125, -0130.

When individuals receiving personal care services through the State's Medicaid programs are authorized to receive personal care hours from an IP and have chosen an IP qualified for payment, DSHS contracts with the IP who agrees to provide all services called for in the Service Plan in exchange for compensation. *See, e.g.*, Exs. 1, 7, 28, 66 (IP contracts).³ The IP Contract explicitly incorporates by reference the Service Plan, as well as the statutes and regulations related to IPs. *See, id.*

³ Although the contract form changed from time to time and as a result there is some variation in the language of the IP Contracts, each IP Contract includes an agreement that the IP will provide all services called for in the Service Plan. *See, id.* A Service Plan is also referred to as a Service Summary. *See, e.g.*, Exs. 11, 15.

DSHS regulations also require IPs to provide the services defined by a client's Service Plan. *See*, WAC 388-71-0515.

In April 2003, DSHS implemented what it called the “Shared Living Rule,” (“SLR”) under which it automatically authorized approximately 15 percent less in in-home care benefits to those clients who had a care provider living with them than to those clients whose care provider did not live with them.⁴ CP 3468-69. Although the IP Contract and the clients’ Service Plans required IPs to perform housekeeping, laundry, shopping, meal preparation, and wood supply services to clients, under the Shared Living Rule, DSHS no longer compensated live-in providers for the time spent performing those services. DSHS applied the Shared Living Rule “as an irrebutable presumption.” *Jenkins*, 160 Wn.2d at 292. Application of the Shared Living Rule was embedded in the CARE tool algorithm when the Department phased in the CARE tool in April 2003. RP 2632. For those clients who DSHS determined needed assistance with shopping, laundry, housekeeping, meal preparation or wood supply from their live-in providers, DSHS essentially required that the IPs provide those services for free.

⁴ The Shared Living Rule was originally promulgated in Chapter 388-71 WAC as part of the CARE tool payment methodology. *See*, WAC 388-71-0460(3) (“The Department will not pay for shopping, housekeeping, laundry, meal preparation, or wood supply when you and your individual provider, agency provider, or personal aide live in the same household.”). It was later promulgated in Chapter 388-72A WAC. In 2005, DSHS consolidated the rules into one section at WAC 388-106-0130. *See*, Exs. 47-49.

In May 2007, the Washington Supreme Court held the Shared Living Rule was invalid, because it violated federal Medicaid comparability requirements. *Jenkins*, 160 Wn.2d 287. Shortly after the *Jenkins* decision issued, three class action lawsuits were filed seeking to recover benefits reduced under the SLR.⁵ After a variety of issues were addressed in both state and federal court,⁶ the IP claims were eventually tried before a jury in a trial lasting three weeks. The jury found that DSHS breached an implied duty of good faith and fair dealing in the Department's performance of a specific term in the IP Contracts and awarded the IPs \$57,123,794.50 in damages. Appendix 14-15.⁷ The jury found for the Defendant on the breach of contract claim. A-14. DSHS appealed, and the Class Plaintiffs cross-appealed.

Respondents respectfully request that this Court grant direct review and affirm the trial court's judgment in favor of the Provider Class.

⁵ The original case numbers are: *Pfaff v. Arnold-Williams*, Thurston County Cause No. 07-2-00911-3, *Rekhter et al. v. State of Washington, et al.*, Thurston County Cause No. 07-2-00895-8, and *Service Employees Int'l Union 775 v. Arnold-Williams, et al.*, King County Cause No. 07-2-17710-8 SEA. CP 3465.

⁶ Two of the complaints were removed to federal court, which consolidated the removed cases, certified the classes, dismissed the federal claims and remanded the cases back to the trial court. *See, generally, Pfaff v. State*, 2008 WL 5142805 (W.D. Wash. 2008) (unpublished). During that time period, at the request of the State, the King County case, in which SEIU Healthcare 775NW and Cindy Weens were plaintiffs, was stayed. *Id.* Upon remand, the King County case was transferred to Thurston County and the three cases were consolidated under *Rekhter et al. v. State of Washington, et al.*, Thurston County Cause No. 07-2-00895-8. *See*, A-2. The trial court certified a class of clients and a class of providers impacted by application of the SLR and appointed counsel for the Rekhter plaintiffs to represent both the Provider Class and the Client Class ("Class Counsel"). A-2-3; RP 96.

⁷ Citations to the Appendix will hereafter use the abbreviation "A-__".

SUMMARY OF ARGUMENT

As a matter of law, because the parties' contractual relationship reserved to DSHS's discretion the number of authorized hours and the authorized services for which the IPs would be paid, an implied duty of good faith and fair dealing inhered in the terms of the IP Contracts. The Department was required to, but did not, set these contract terms in good faith, because it frustrated the IPs' reasonable expectations under the contracts and ensured the IPs would not receive the benefit of their bargain. A breach of an express term of the contract is not a prerequisite to a claim for breach of the implied covenant, and DSHS's argument to the contrary contravenes settled law.

The jury's verdict that DSHS breached the implied covenant of good faith and fair dealing was supported by sufficient evidence. The evidence taken in the light most favorable to the IPs established that DSHS performed its contractual obligations to determine the amount of authorized hours in the client's Service Plan and to determine the authorized services the IPs were required to perform in a manner that frustrated the IPs' justified expectations under their contracts. Stated simply, the IPs reasonably expected that they would be paid for time spent providing the housekeeping, laundry, meal preparation, essential shopping and wood supply services that the IP Contracts and the Service Plans

directed them to perform. Because DSHS's application of the SLR ensured that IPs would perform those services expecting to be paid, but that they would not in fact be paid, DSHS denied the IPs the full benefit of their performance in contravention of the implied covenant of good faith.

Additionally, the trial court correctly instructed the jury on the applicable law in a manner that was not misleading and which allowed the parties to argue their theories of the case. DSHS failed to preserve its objections to the jury instructions for appeal.

In the alternative, to the extent that this Court holds the IP Contract did not impose or DSHS did not breach a duty of good faith and fair dealing, this Court should reverse the trial court's dismissal of the Class Plaintiffs' unjust enrichment claim and remand that cause of action to the trial court for adjudication because the IPs conferred a benefit on DSHS under circumstances in which it would be unjust for the State to keep the benefit without paying.

ARGUMENT

I. THE TRIAL COURT JUDGMENT IN FAVOR OF THE PROVIDER CLASS ON THE BREACH OF GOOD FAITH AND FAIR DEALING CLAIM SUFFERS FROM NO ERROR OF LAW.

A. Standard of Review.

Whether DSHS owed the IPs a duty of good faith and fair dealing in the performance of the terms of the IP Contract is a question of law reviewed de novo. See, *Badgett v. Security State Bank*, 116 Wn.2d 563, 568-69, 807 P.2d 356 (1991); *Johnson v. Yousoofian*, 84 Wn. App. 755, 760, 930 P.2d 921 (1996).

B. The IP Contract Imposed Upon DSHS A Duty Of Good Faith And Fair Dealing In Its Performance Of All Obligations Established By The Contract Terms.

There is inherent in every contract an “implied duty of good faith and fair dealing” which “obligates the parties to cooperate with each other so that each may obtain the full benefit of performance.” *Badgett*, 116 Wn.2d at 569; see also, *Metropolitan Park Dist. v. Griffith*, 106 Wn.2d 425, 437, 723 P.2d 1093 (1986). The goal of the implied covenant is to ensure that each of the parties to the contract obtains the full benefit of performance. “The duty of good faith requires ‘faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.’” *Edmonson v. Popchoi*, 172 Wn.2d 272, 280, 256 P.3d 1223 (2011) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 205, cmt. a (1981)); *Scribner v. Worldcom, Inc.*, 249 F.3d 902, 910 (9th Cir. 2001) (same); *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 498 (Colo. 1995) (“The good faith performance doctrine is generally used to effectuate the intentions of the parties or to honor their reasonable expectations.”).

Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified... [Bad faith includes] evasion of the spirit of the bargain...

RESTATEMENT (SECOND) OF CONTRACTS, § 205 cmt. d (1981). Where one party retains discretion to determine certain terms of a contract, a party can breach the duty of good faith and fair dealing simply by disregarding the other party's justified expectations under the contract. *Scribner*, 249 F.3d at 909; *see also*, *Edmonson*, 172 Wn.2d at 280-81 (holding that contract's warranty to defend against a claim to title was subject to the duty of good faith, requiring more of grantor than indifference to the dispute and a concession of the claim without consideration of the merits motivated by economic self-interest); *Frank Coluccio Const. Co., Inc. v. King County*, 136 Wn. App. 751, 766, 150 P.3d 1147 (2007).

DSHS correctly asserts on appeal that the implied duty arises only in connection with the contract terms agreed to by the parties. *See, e.g.*, *Badgett*, 116 Wn.2d at 569-70. However, as to the obligations imposed by a contract, the duty requires that the parties perform those obligations in good faith. *See, e.g.*, *Frank Coluccio Const. Co., Inc.*, 136 Wn. App. at 764-66 (holding conduct intended only to protect County's position and interests to the detriment of plaintiffs violated the implied duty of good

faith attached to “at least three pertinent contractual obligations” owed under a public works project contract).⁸

The IPs firmly root their claim for breach of the implied duty of good faith in the express obligations conferred by the IP contracts. Specifically, the IPs contend that DSHS breached the implied covenant in its performance of Section 4(b) of the IP Contract, which obligates DSHS to determine the amount of authorized services a client will receive, and for which the IP will be paid, in the client’s Service Plan; and in its performance of Section 5(b) of the IP Contract, which obligates DSHS to pay for authorized services provided under the IP Contract. A-29; RP 2639 (Jury Instruction 11); *see also, e.g.*, Ex. 66 (IP Contract). The Department breached the implied duty of good faith and fair dealing inherent in these portions of the IP Contract when it reduced authorized hours and IP compensation via application of the Shared Living Rule. *Id.*

That the IPs ground their claim for breach of the implied covenant in express contract terms and that the Court’s judgment does not impose upon the Department a free floating duty of good faith is clear from the Special Verdict Form on the good faith claim, which read, in its entirety:

⁸ DSHS’ heavy reliance on *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 177 (2004) is inapposite to the issues in this dispute. While discussing *Badgett*’s holding in dicta, *Keystone* stands only for the proposition that in the absence of an enforceable contract binding parties to specific standards of negotiating conduct for the formation of a separate substantive contract, no implied duty of good faith and fair dealing could exist. *Id.* at 179.

Question No. 2: Do you find that 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.

A-14 (emphasis added).

C. The Covenant Of Good Faith Applies Where, As Here, The Contract Gives One Party The Discretion, But Not Unconditional Authority, To Set A Contract Term.

The viability of an independent claim for breach of the duty of good faith and fair dealing despite literal performance is particularly important in the case of contracts that afford one party discretion to set a future contract term, because of the potential that one party will exercise that discretion in bad faith, performing its contractual obligations in a manner that undermines or precludes the other party's reasonable expectations. *See, Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc.*, 2 Cal.4th 342, 372, 826 P.2d 710 (1992). Where one party has the power after contract formation to set or control the terms of performance, requiring good faith in the performance of contract obligations protects the weaker or dependent party from abuse of discretion in setting the contract terms by the party to whom control of that contract term is conferred. *Amoco Oil Co., supra*, 908 P.2d at 498-99.

Accordingly, settled Washington law applies the duty of good faith and fair dealing to contracts that “give[] one party discretionary authority to determine a contract term.” *See, Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 86 Wn. App. 732, 738, 935 P.2d 628 (1997). If the contract expressly confers an unconditional right upon on a party, the implied duty will not serve to directly contradict that term by taking away that right. *Id.* at 741 (where contract established Goodyear’s *express, unrestricted and unconditional* right to sell tires in plaintiff’s trade area, court found the contract did not “call for the exercise of discretion” and dismissed the implied covenant of good faith claim); *Johnson*, 84 Wn. App. at 762-63 (where landlord had an “absolute privilege” to refuse to consent to a tenant’s lease assignment, there was no contractual duty to which the duty of good faith attached); *Badgett*, 116 Wn.2d at 567-68 (holding contract did not require bank to renegotiate a prior loan, so no duty required the bank to negotiate in good faith).

However, where a party retains discretion to exercise performance of a material contract term, the implied duty of good faith and fair dealing imposes a requirement that such discretion be exercised reasonably. *See, Scribner, supra*, 249 F.3d at 910-11 (applying Washington law and holding that even where corporation had broad discretion to interpret stock option contract, it violated the implied duty of good faith and fair dealing

when it interpreted a contract term in a way that undermined the employee's justified expectations). "We do not dispute that the Committee had broad discretion to construe the Plan, but note that it nonetheless had a duty to exercise its interpretive authority in good faith." *Scribner*, 249 F.3d at 909. *Accord*, *Hubbard Chevrolet Co. v. Gen. Motors Corp.*, 873 F.2d 873, 876-77 (5th Cir. 1989) ("The implied covenant of good faith and fair dealing essentially serves to supply limits on the parties' conduct when their contract defers a decision on a particular term, omits terms or provides ambiguous terms").

The IP Contracts indisputably grant DSHS the discretion to set future contract terms, namely to determine the amount of authorized hours for which it will compensate a provider and to determine the authorized services the IPs are required to provide. *See, e.g.*, Exs. 1, 7, 13, 66 (IP Contracts, §§ 4(b) and 5(b)). This Court should therefore hold, as a matter of law, that the implied covenant of good faith and fair dealing could apply to DSHS's performance of those contract terms. In accordance with the distinction under Washington law between contracts that grant one party unconditional authority to set a contract term, to which no implied covenant applies, *e.g.*, *Goodyear* and *Johnson*, and those contracts that grant one party only discretion to set a contract term, which must be

performed in good faith, *e.g.*, *Scribner and Amoco Oil*, the jury was instructed, at DSHS's urging, as follows:

If the contract grants one party unconditional authority to later set the term, the duty does not apply. On the other hand, if the contract is silent on how the term will be set, the party acting to set the term has the duty of good faith and fair dealing with respect to setting that term.

A-36 (Instruction No. 18). As explained below, sufficient evidence supported the finding inherent in the jury verdict that the Department's discretion was not unlimited and that it breached the implied covenant of good faith and fair dealing in the performance of its contractual duties.

D. A Claim For Breach Of The Duty Of Good Faith And Fair Dealing Exists Independently Of, And Does Not Rely Upon, A Breach Of An Express Contract Term.

In Washington, the duty of good faith and fair dealing sounds in contract, giving rise to an affirmative claim for breach of contract even when the adverse party has complied with the express terms of an agreement. *See, Metropolitan Park Dist. of Tacoma v. Griffith*, 106 Wn.2d 425, 437 (1986).⁹ The law implies the covenant to supplement the express contractual terms, to prevent a contracting party from engaging in conduct which, while not technically transgressing the express promises, frustrates

⁹ In *Griffith*, this Court found that, where the contract did not obligate the District to allow the concessionaire to serve liquor and make improvements, and was not in breach of the contract for denying requests to do so, under the implied covenant of good faith, the District nevertheless may have had an implicit obligation to consider the concessionaire's proposals.

the other party's rights to the benefit of the contract. In other words, the implied covenant dictates that it is not enough to do what the contract says you must do – you must do it in good faith.

In arguing on appeal that the breach of the duty of good faith claim must fail because the jury found that DSHS did not breach a term in the IP Contracts, DSHS asks this Court re-write the law on the duty of good faith and fair dealing to preclude a claim for the implied covenant unless there has also been a breach of the contract's express terms. The Court should reject this argument, which would render the longstanding duty of good faith both superfluous and obsolete. The Seventh Circuit put it plainly: "It is, of course, possible to breach the implied duty of good faith even while fulfilling all of the terms of the written contract. *Metavante Corp. v. Emigrant Sav. Bank*, 619 F.3d 748, 766 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 1784, 179 L. Ed. 2d 653 (2011).

The ability to assert a stand-alone breach of the duty of good faith and fair dealing in the absence of an express breach of a contractual term is logical, as the Supreme Court of California explained in *Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc.*, 2 Cal.4th 342, 826 P.2d 710 (1992): "[B]reach of a specific provision of the contract is not a necessary prerequisite. 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.” 2 Cal.4th at 373. In fact, a federal district court in California recently noted that breach of the implied duty of good faith and fair dealing *only* arises where the contract’s literal terms have been followed. *McNeary-Calloway v. JP Morgan Chase Bank, N.A.*, C-11-03058 JCS, ---F.Supp.2d---, 2012 WL 1029502, *22 (N.D. Cal. 2012).¹⁰

Recognizing a potential claim for breach of the duty of good faith and fair dealing despite the absence of “technical breach,” the United States District Court for the Southern District of New York reasoned that the implied covenant of good faith and fair dealing requires that no party do anything to “destroy or injure the right of another party to receive the benefits of the contract.” *Chase Manhattan Bank, N.A.*, 873 F. Supp. at 815. This rationale comports with the discussion of the duty of good faith and fair dealing in Washington case law which emphasizes a “faithfulness

¹⁰ Numerous other jurisdictions, including Arizona, California, Delaware, Nevada, New Jersey, New York, Oregon, Wisconsin and South Dakota, have also concluded that a breach of the duty of good faith and fair dealing can occur even where the literal terms of the contract have been followed. *See, e.g., Wells Fargo Bank v. Arizona Laborers, Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 491-92, 38 P.3d 12 (2002); *McNeary-Calloway*, 2012 WL 1029502 at *21; *Pami-Lemb Inc. v. EMB-NHC, LLC*, 857 A.2d 998, 1016 (Del. Ch. Ct. 2004); *Hilton Hotels Corp. v. Butch Lewis Productions, Inc.*, 107 Nev. 226, 232, 808 P.2d 919 (1991); *Sons of Thunder, Inc. v. Borden, Inc.*, 148 N.J. 396, 420-23, 690 A.2d 575 (1997); *Chase Manhattan Bank, N.A. v. Keystone Distributors Inc.*, 873 F. Supp. 808, 815-16 (S.D.N.Y. 1994); *Klamath Off-Project Water Users, Inc. v. Pacificorp*, 237 Or.App. 434, 445, 240 P.3d 94 (2010); *Garrett v. BankWest Inc.*, 459 N.W.2d 833, 841 (S.D. 1990); *Foseid v. State Bank of Cross Plains*, 197 Wis.2d 772, 797, 541 N.W.2d 203 (1995).

to an agreed common purpose and consistency with the justified expectations of the other party.” *Edmonson, supra*, 172 Wn.2d at 280.

Several other courts upholding independent violations of the duty of good faith and fair dealing in the absence of breach of an express contractual provision have similarly emphasized preventing the party acting in bad faith from depriving the other party of the benefit of the bargain. *See, Wells Fargo*, 201 Ariz. at 491-92 (duty is breached in absence of breach of express provision when one party denies the other party the reasonably expected benefits of the agreement); *Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Associates*, 182 N.J. 210, 226-27, 864 A.2d 387 (2005) (duty of good faith breached despite no “literal” breach of express terms because defendant acted “selfishly” and “with the purpose of exploiting the terms of the contract without regard to the harm caused to plaintiff”); *Elmhurst Dairy, Inc. v. Bartlett Dairy, Inc.*, ---N.Y.S.2d---, 97 A.D.3d 781, 784 (N.Y. App. Div. 2012) (implied duty may be breached even in absence of violation of express term when a party exercises a contractual right as part of a “scheme to realize gains that the contract implicitly denies or to deprive the other party of the fruit of its bargain”); *Pami-Lemb Inc.*, 857 A.2d at 1016 (duty is designed to protect “spirit” of agreement when “without violating an express term of the agreement, one side uses oppressive or underhanded tactics to deny the

other side the fruits of the parties' bargain."); *Hilton Hotels Corp.*, 107 Nev. at 232 (duty breached when despite literal compliance one party "deliberately countervenes the intention and spirit of the contract").

Relying solely on one Ninth Circuit case applying New York law, *Monotype Corp., PLC v. Int'l Typeface Corp.*, 43 F.3d 443 (9th Cir. 1994), the Department asserts that there cannot be a breach of the duty of good faith and fair dealing where there is not also a breach of contract. However, the overwhelming legal authority cited above rejects this proposition, and for sound reasons. Moreover, *Monotype* is easily distinguishable on its facts. The Ninth Circuit held that the trial court did not err in refusing to instruct on an implied covenant of good faith and fair dealing where the jury found the contract did not prohibit the marketing of commercial substitutes. *Id.* at 453. The contract at issue was a subscription agreement; the Court held that, where the contract expressly and specifically defined prohibited conduct, the duty of good faith could not be used to imply broader language, essentially supplying additional terms for which the parties have not bargained. *Id.* at 452-53.

By contrast, the IP Contract here contained at least two express provisions to which the duty of good faith attached. The jury could and did find that DSHS breached the implied duty of good faith in determining the amount of authorized hours and in failing to compensate the IPs for

authorized services provided under the contract even while finding the Department followed the literal terms of the written contract, e.g., paying the providers for the number of hours authorized after it reduced the maximum base hours through application of the SLR.¹¹

In light of the foregoing substantial authority, this Court should reject DSHS's argument on appeal that the implied covenant claim must fail because the jury found that DSHS did not breach a term in the IP Contract. Rather, as Washington courts and courts in many other jurisdictions have long recognized, a party to a contract may breach the implied duty of good faith and fair dealing inherent in the contract while not technically breaching the contract terms. The judgment entered for the Provider Class based on the jury's verdict finding breach of the implied duty of good faith and fair dealing as to the Department's performance of a specific term in the IP Contracts should be affirmed.

II. THE JURY'S VERDICT FINDING THAT DSHS BREACHED THE IMPLIED DUTY OF GOOD FAITH AND

¹¹ DSHS claims that the jury, in finding no breach of contract, necessarily rejected the providers' claims that the agreements incorporated by reference the care plan and assessment process, including the algorithm for determining the maximum number of authorized hours, that the algorithm was invalid because it did not comply with Medicaid comparability law and that the contracts included an implied term for the Department to comply with Medicaid law. Appellant's Brief ("App. Br.") at 34. *See also* App. Br. at 31-32 (contending that because the jury found "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"). Transparently, however, the fact that the jury did not find an express breach of a contract does not mean that the jury rejected the IPs' argument that the process for *determining client hours* using the CARE tool was a term of the contract regarding which DSHS had an obligation to act in good faith.

FAIR DEALING WAS SUPPORTED BY SUFFICIENT EVIDENCE.

A. A Sufficiency Of The Evidence Standard Applies To The Jury Verdict.

DSHS asks the Court to decide, as a matter of law, whether use of the Shared Living Rule violated the implied covenant of good faith and fair dealing inherent in the IP Contracts; however, throughout its appeal brief, DSHS also improperly asks the Court to look behind the jury verdict and to make assumptions about what the jury did and did not find. *See* App. Br. at 29-41. Respondents herein for that reason address DSHS's implicit argument that the verdict was not supported by sufficient evidence.

Washington courts review a jury verdict under the sufficiency of the evidence standard. "The record must contain a sufficient quantity of evidence to persuade a rational, fair-minded person of the truth of the premise in question." *Winbun v. Moore*, 143 Wn.2d 206, 213, 18 P.3d 576, 579 (2001) (quoting *Canron v. Fed. Ins. Co.*, 82 Wn. App. 480, 486, 918 P.2d 937 (1996)).

This standard of review is highly deferential to the jury's verdict. *Bott v. Rockwell Int'l*, 80 Wn. App. 326, 328, 908 P.2d 909, 910 (1996). The Court must admit the truth of Respondents' evidence and all inferences reasonably flowing from that evidence. *Id.* (citing *Holland v.*

Columbia Irr. Dist., 75 Wn.2d 302, 304, 450 P.2d 488 (1969)). The evidence must be interpreted most strongly against the party challenging the sufficiency of the evidence and in the light most favorable to the party for whom the verdict was entered. *Id.* “[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). “[T]he court will not willingly assume that the jury did not fairly and objectively consider the evidence and the contentions of the parties relative to the issues before it.” *Id.*

B. The Jury Heard Sufficient Evidence That The IPs Reasonably Expected Under the IP Contract That They Would Be Paid For Performing Services Required By The Contract, Including The Housekeeping, Laundry, Shopping, Meal Preparation And Wood Supply Services Required By The Service Plans.

When a Washington resident eligible to receive community-based personal care services through a DSHS-administered long-term care program selects a qualified IP to perform those services, DSHS enters into an IP Contract which sets forth, among other terms, a statement of work and provisions on billing and payment. Although the IP Contracts differed somewhat depending on the date of execution, the basic terms of the IP Contracts were the same for the IPs throughout Washington during the

years 2003 to 2008. RP 1028-29, 1034. The basic IP Contract terms did not differ based on whether an IP shared the same household as the beneficiary for whom s/he provided personal care services. RP 2017 (“There is not a different contract for a live-in versus a live-out provider”).

In Section 2 of the IP Contract (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 include in the client’s Service Plan. *See, e.g.,* Exs. 1, 21, 66 (IP Contracts). The Service Plan or Summary establishes the services that the particular IP will perform for a particular Medicaid recipient. RP 2017. A Service Plan is “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.” *See, e.g.,* Exs. 1, 7, 13, 34, 66 (IP Contracts).

Section 4 of the IP Contracts set forth the terms for billing and payment of the IPs. The IPs “accept[] the DSHS payment amount, together with any client participation amount, as sole and complete payment for services provided under this Contract.” *See, e.g.,* Exs. 1, 7, 13, 34, 66 (IP Contracts). As to the “payment amount,” Section 4(b) of the IP Contracts provides, in part:

DSHS will pay the Contractor the established rate for services per client in the geographic area where services are provided within Washington State. Rates will apply to all services **authorized and provided** under this Contract no matter what the payment source. The monthly payment for all services provided to any client will not exceed the **amount authorized in the client's Service Plan**.

Id. (emphasis added). By definition in Section 1 of the IP contract:

“Authorization and Authorized” means **the Contractor's services are included in the client's DSHS approved Service Plan** and the service payment is submitted for payment as directed by the DSHS payment system.

“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**.

Id. (emphasis added).

In the Section of the IP Contract entitled Advance Payment and Billing Limitations, Section 5(b) provides in part: “DSHS will pay the Contractor only for **authorized services provided under this Contract**.”

Id. (emphasis added). Again, authorized is defined with reference to those services included in the Service Plan. *Id.* Elsewhere, the IP Contracts required the Providers to perform all services required by the client's Service Plan. *See, id* (Section 10(a) of the IP Contract: “The Contractor...agrees to comply with the requirements of the Service Plan, and with all supplemental, or replacement requirements.”).

Shopping, housework, laundry, meal preparation and wood supply services were tasks that the clients' Service Plans assigned the IPs to perform. *See, e.g.*, Ex. 3 at 2, 22-24, 26-27; Ex. 4 at 3, 20, 24-26; Ex. 5 at 2, 24-26; Ex. 11 at 2, 15-16, 28; Ex. 15 at 2, 22-25; Ex. 32 at 2, 20-22; Ex. 35 at 2-3, 20-22, 24-25; Ex. 44 at 2, 26, 32-34; Ex. 45 at 2, 30-32, 34 (Service Plans).¹² These tasks were listed as tasks to be done by the Formal Providers listed, which DSHS representatives testified meant they were paid tasks. *See, e.g.*, Ex. 4 at 2-3, 26; Ex. 35 at 2-3, 25; Ex. 45 at 2-3, 28 (Service Plans); RP 1280 (Susan Engels stating "formal" supports means paid care services).

Thus, through form contracts provided by DSHS on a take-it-or-leave-it basis that established the statement of work and terms under which the IPs would be paid for authorized services in authorized hours, and with explicit reference to Service Plans that directed the IPs to perform shopping, housework, laundry, meal preparation and wood supply

¹² For example, Judith Alberts was directed by the Service Summary and Assessment Details for Lisa Fuchser to prepare breakfast, lunch and dinner, clean after each meal, dust, sweep/mop, vacuum, do all shopping for the client, and pick up medication. *E.g.*, Ex. 3 at 2, 18-20, 22-23. The Service Summary and Assessment Details for Mildred Schock included preparing breakfast, lunch and dinner, and cleaning the kitchen after each meal, changing/washing linens, dusting and vacuuming weekly, separating cleaning items from food, cleaning bathroom weekly, taking out garbage, taking her client to the store and pick up medications. *E.g.*, Ex. 35 at 2-3, 20-22, 24-25. Ms. Schock's need was identified as extensive assistance, great difficulty or total dependence for these tasks. *Id.* Maureen and Donald Pfaff were likewise directed to do perform shopping, meal preparation and housework for Natasha Pfaff, whose need for help in these areas was "total dependence, great difficulty." *E.g.*, Ex. 45 at 2, 30-32, 34.

services, the IPs reasonably expected under the IP Contracts that they would be paid for performing the services set out in the Service Plans. *See, Amoco Oil Co., supra*, 908 P.2d at 499 (finding retail service station dealers were justified in expecting that Amoco, in exercising its discretion to determine the appropriate rent, would not charge them twice for the same space).

The IPs were also aware that DSHS was compensating them for services provided to clients within a complex regulatory scheme, also explicitly referenced in the IP Contracts and which the IPs agreed to abide by. *See, e.g.*, Exs. 1, 7, 13, 34, 66 (IP Contracts defining Service Plan with reference to WACs and RCWs, and Section 8 “Compliance with Applicable Law” which states “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.”). Thus, the IPs were also justified in expecting that, in determine the amount of authorized hours for which the IPs would be paid, DSHS would not reduce the maximum base hours through application of a rule that violated federal or state law.¹³

¹³ Cases cited by DSHS to support its contention that the providers’ implied covenant claim fails because it depends on enforcing duties originating from outside the contract, App. Br. at 38, are inapposite. In *Boguch v. Landover Corp.*, 153 Wn. App. 595, 615-16,

To the contrary, substantial evidence established that the IPs reasonably expected that DSHS would set the amount of “authorized” hours in a way that not only ensured that the IPs would be paid for all the services specified in or identified in the client’s Service Plan, which the IPs were required to and did perform, but also in a way that complied with DSHS’s obligations under state and federal law. The duty of good faith and fair dealing attached to DSHS’s performance of its express contractual obligations both to determine the amount of hours authorized in the client’s Service Plan,” *e.g.*, Ex. 66 at 4(b) and to pay the IP for the services authorized under the contract. *Id.* at 5(b). Sufficient evidence established that the very benefit of the IPs’ bargain was that they would be paid for personal care services rendered as directed in the Service Plans.¹⁴

C. The Jury Heard Sufficient Evidence That DSHS Retained Discretion, But Not Unconditional Authority, To Set A Term Of The IP Contract.

In accordance with Washington law, *see, Goodyear Tire & Rubber Co., supra.*, 86 Wn. App. at 738; *Scribner, supra.*, 249 F.3d at 910-11, the

224 P.3d 795 (2009), the Court held the plaintiff’s entitlement to attorney’s fees under a contractual fee-shifting provision was limited to his contract claims, and did not include his tort or statutory claims. DSHS cannot reasonably contend that the providers here did not assert claims grounded in the contract, where the jury specifically found that DSHS breached its duty of good faith and fair dealing with the providers as to the Department’s performance “*of a specific term in the individual provider contract,*” A-14, even if external law serves to limit DSHS’s discretion in setting contract terms and relates to whether DSHS exercised that discretion in bad faith.

¹⁴ DSHS conceded that the mutually intended benefit of the bargain between DSHS and the IPs is that for a certain number of hours worked by the IPs, the Department will pay the IPs at a certain rate. RP 2731 (State’s closing argument).

jury was instructed that the party acting to set a term where the contract is silent on how the term will be set has a duty of good faith and fair dealing with respect to setting that term, but if it found “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.” A-36-37 (Instructions No. 18, 19). In finding that the Department breached its duty of good faith and fair dealing, the jury necessarily found that DSHS had the discretion, but not the unconditional authority to set an unstated term at a later date. This finding was supported by sufficient evidence.

The IP Contracts covered multi-year periods, and during those periods, clients were assessed multiple times, with multiple Service Plans. RP 2015, 2017. DSHS completed the Service Plans subsequent to execution of the IP Contracts. *See, e.g.*, Exs. 1-8, 21-25. Payment to care providers is controlled by the “amount authorized” in the contract, which is determined by a formula or methodology embodied in the CARE tool. *See, e.g.*, Ex. 66 (IP Contract at Section 4(b)); Ex. 89 (CARE Assessor Manual at 10). The evidence at trial demonstrated that DSHS had discretion to set the amount of hours authorized in the client’s Service Plan – and therefore the number of hours of services provided by the IP for which DSHS will pay. That DSHS had discretion to set the amount of

authorized hours is most clearly evidenced by the CARE assessment process itself. Case managers use the CARE tool to assess the needs of clients for assistance with a variety of activities of daily living, determine eligibility, develop service plans, and assign a maximum number of hours DSHS will pay for based on client need and application of DSHS's program rules. *See, e.g.,* Ex 60 (DSHS Information Memorandum to Managers dated September 2003, stating "published rates and program rules establish [the] total hours and how much the department pays toward the cost of [the] services."); Ex. 89 at 7, 10 (CARE tool assessor's manual); Ex. 216 at III-1 (2003 eligibility and rates manual). DSHS relied on the use of the CARE assessment to determine the number of authorized hours. RP 1080-81; RP 612.

External sources limit DSHS's authority to determine the number of hours it will authorize, and DSHS's authority is therefore not unconditional. DSHS is required to comply with federal and state regulations in administering the long-term care programs including client assessments. *See, Ex. 216 at I-1* (DSHS's CARE Eligibility and Rates for Long Term Care Services Manual, published shortly after DSHS implemented the Shared Living Rule, stating that DSHS "must comply with state and federal regulations for assessing clients and providing long term care services"); RP 631 (Ann Peterson, Olympic Area Agency on

Aging); RP 1296-97 (Susan Engels, Aging and Disability Services Administration); RP 1110-11 (Brent Apt, DSHS Program Manager for the State Unit on Aging); RP 1067 (DSHS Contract Specialist April Bose-Hasslett); *see also, Jenkins, supra*, 160 Wn.2d at 296-300 (summarizing Medicaid comparability requirements and rejecting DSHS's request that the Court defer to its interpretation of the statute's comparability provision vis-à-vis its promulgated rule based on its purported expertise in administering the law). "DSHS may use the CARE assessment program to initially classify, rate, and determine a recipient's level of need because this process is consistent with the Medicaid program's purpose. DSHS violates the comparability requirement when it reduces a recipient's benefits based on a consideration other than the recipient's actual need." *Jenkins*, 160 Wn.2d at 299.

A party to a contract only has unconditional authority to set a contract term when that party can act only in its own interest, not taking into consideration whether his or her actions will frustrate or impede the other party's ability to receive the benefit of their bargain. *See, e.g., Goodyear*, 86 Wn. App. 732 (express and unconditional right to sell tires in plaintiff's trade area); *Johnson*, 84 Wn. App. 755 ("absolute privilege" to refuse to consent to a tenant's lease assignment).

The IP Contracts at issue here do not grant DSHS unconditional authority or the express, unrestricted right to reduce the amount of authorized hours, like the contracts evaluated in *Goodyear* and *Johnson* did. Rather, they grant the Department the discretion to set a future contract term, and that is exactly the kind of discretionary contractual obligation to which the duty of good faith and fair dealing attaches. *See, Scribner, supra*, 249 F.3d at 912 (ample evidence of failure to exercise discretion in good faith where “the Committee chose its desired result, and then applied the label [to the contract term] necessary to bring that result about. Nothing more is required to show a lack of good faith.”)

Because the parties deferred the determination of a particular term of the IP Contract to the Department’s discretion, the IPs necessarily relied on the good faith of DSHS, the party in control, to set that term. DSHS chose its desired result – to refuse to pay IPs for certain personal care tasks – and then applied the label “amount authorized” to reduce by 15% the IPs compensation for work performed. The Department’s discretion is limited by the IP Contract itself and by external law, and thus its authority is not unconditional.

D. The Jury Heard Sufficient Evidence That DSHS Breached Its Duty Of Good Faith And Fair Dealing In Performing Its Specific Contractual Obligations To Determine A Client’s Authorized Hours And To Pay

**The IP For All Authorized Services Provided Under
The IP Contract.**

DSHS's application of the Shared Living Rule reduced the compensation that DSHS paid to live-in IPs by approximately 15 percent, because it established an irrebuttable presumption that a client's need for assistance is met for meal preparation, housekeeping, shopping and wood supply; after making an initial assessment of each client's hours of need, DSHS reduced each recipient's hours of care by 15 percent after applying a mathematical formula. Exs. 47-49; *see also, Jenkins*, 160 Wn.2d at 295-96.¹⁵ Although the contract terms were the same for live-in and live-out providers, RP 2017, and live-in as well as live-out formal providers were directed in the Service Plans to perform shopping, laundry, housekeeping and meal preparation services, *see, e.g.* Exs. 3-5, 11, 15, 32, 35, 44, 45, (Service Plans) DSHS compensated live-out providers for such assigned tasks while withholding wages from the live-in providers who were assigned to perform and who did in fact perform those identical services. All the evidence showing that DSHS did not authorize hours needed or spent on those five activities when the client lived in the same household

¹⁵ The CARE Assessor Manual defines a "met" need as a "Non-ADSA paid resource." Ex. 89 at 114. Under the Shared Living Rule, the CARE tool automatically deducted the hours attributed to the shared living tasks from the "amount authorized" while still assigning those tasks to the paid provider.

as his or her care provider demonstrated that the Department performed its contractual duties in bad faith. RP 2634.

Sufficient evidence likewise established that DSHS knew that the Shared Living Rule was invalid as early as March 2005, *see*, A-6, yet DSHS did not repeal the rule until June 29, 2007, and the authorized hours continued to be reduced pursuant to the SLR until June of 2008, when all members of the client class had been reassessed without application of the SLR. A-7. Even after this Court in *Jenkins* affirmed the lower court decisions striking down the rule, DSHS continued to apply the rule for another year. *Id.* All of the evidence cited in §II.B above shows that the IPs signed contracts directing them to perform work as stated in the Service Plans, and that the Service Plans listed the shared living tasks as tasks assigned to formal providers – the IPs. These same Service Plans described in detail the varying levels of dependence – often total dependence – that vulnerable disabled clients had on their IPs for meeting the very basic needs of cooking food, laundering soiled clothing and purchasing essential provisions. Ex. 3 at 2, 22-24, 26-27; Ex. 4 at 3, 20, 24-26; Ex. 5 at 2, 24-26; Ex. 11 at 2, 15-16, 28; Ex. 15 at 2, 22-25; Ex. 32 at 2, 20-22; Ex. 35 at 2-3, 20-22, 24-25; Ex. 44 at 2, 26, 32-34; Ex. 45 at 2, 30-32, 34 (Service Plans). It was these basic, essential tasks the Service Plans directed the formal providers to perform, and it was exactly these

tasks that the SLR guaranteed would go unpaid, the contracts notwithstanding.

This evidence was sufficient to support the jury's conclusion that the Department violated its duty of good faith and fair dealing when, without notice to the IPs, e.g. RP 1191, 1825, and after having been told by the Courts that its application of the Shared Living Rule was unlawful, A-6-7, it set contract terms in a manner that precluded the IPs from receiving the benefit of their bargain. This finding should therefore not be disturbed by this Court. *See, Scribner*, 249 F.3d at 908 (“We cannot allow one party’s “double-secret” interpretation of a word to undermine the other party’s justified expectations as to what that word means.”).

Considering the evidence in the light most favorable to the IPs, and drawing all reasonable inferences therefrom, this Court should find that sufficient evidence supports the jury’s finding that the Department breached its duty of good faith and fair dealing in its performance of specific contract terms and affirm the trial court’s judgment based on that jury verdict.

III. THE COURT SHOULD AFFIRM THE TRIAL COURT’S JUDGMENT IN FAVOR OF THE PROVIDER CLASS, BECAUSE THE CHALLENGED JURY INSTRUCTIONS, READ AS A WHOLE, CORRECTLY STATE THE LAW ON THE IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING AND ARE NOT MISLEADING.

A. Standard of Review.

This Court reviews jury instructions de novo for errors of law. *Anfinson v. FedEx Ground Package System, Inc.*, 174 Wn.2d 851, 281 P.3d 289, 294 (2012); *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). “Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law.” *Id.* (quoting *Bodin v. City of Stanwood*, 130 Wn.2d 726, 732, 927 P.2d 240 (1996)); *Gammon v. Clark Equipment Co.*, 104 Wn.2d 613, 617, 707 P.2d 685 (1985). “When the instructions read as an entirety properly convey the law applicable to the case and are not misleading, they are sufficient.” *Malarkey Asphalt Co. v. Wyborney*, 62 Wn. App. 495, 508, 814 P.2d 1219 (1991), as corrected 821 P.2d 1235. An erroneous instruction is reversible error only if it prejudices a party. *Anfinson*, 281 P.3d at 294; *Joyce v. State DOC*, 155 Wn.2d 306, 323, 119 P.3d 825 (2005). “Prejudice is presumed if the instruction contains a clear misstatement of law; prejudice must be demonstrated if the instruction is merely misleading.” *Anfinson*, 281 P.3d at 294.

The Court first must determine the appropriate legal standard for the implied duty of good faith and fair dealing. Then, the Court must determine whether the jury instructions, read as a whole, properly stated

the standard and, if not, whether the error was prejudicial. *Anfinson*, 281 P.3d at 297.

The Court reviews a trial court's refusal to give a proposed jury instruction only for abuse of discretion. *Stiley v. Block*, 130 Wn.2d 486, 498, 925 P.2d 194 (1996); *Chunyk & Conley/Quad-C v. Bray*, 156 Wn. App. 246, 252, 232 P.3d 564, as amended (June 2, 2010), *rev. denied*, 169 Wn.2d 1031, 241 P.3d 786 (2010). The trial court is given considerable discretion in deciding how the instructions will be worded. *Gammon*, 104 Wn.2d at 617. If a party's theory of the case can be argued under the instructions given as a whole, then a trial court's refusal to give a requested instruction is not reversible error. *E.g.*, *Gammon*, 104 Wn.2d at 618.

B. The Trial Court Did Not Err In Entering A Judgment For The Provider Class Or In Giving Instructions 18 and 19 On The Implied Covenant Of Good Faith And Fair Dealing.

i. When Read as a Whole, Instructions 18 and 19 Properly Stated The Law And Were Not Misleading

Consistent with applicable legal standards, the jury was specifically instructed that a breach of the duty of good faith and fair dealing arises only in connection with agreed contract terms and must be rooted in, and must not contradict, the parties' obligations as set forth in the contract. *See*, A-36 (Instruction No. 18, which reads, in part: A duty of good faith "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.”); A-37 (Instruction No. 19, which reads, in part, “To establish breach of the implied duty of good faith and fair dealing, providers must prove that in reducing a client’s authorized hours by application of the SLR, the department acted in a manner that prevented the provider from attaining his or her reasonable expectations *under the contract.*”) (emphasis added); A-29 (Instruction No. 11). Instruction No. 11 reads, in part:

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

A-29 (emphasis added).

Jury Instructions 18 and 19 also instructed the jury that the duty of good faith and fair dealing does not apply if the contract grants DSHS unconditional authority to later set the authorized hours in the client’s service summary. A-36-37. “On the other hand, if the contract is silent on how the term will be set, the party acting to set the term has the duty of good faith and fair dealing with respect to setting that term.” A-36.

The instructions were therefore completely consistent with controlling authority as to both the relationship of the implied duty of good faith and fair dealing with express terms of the contract and the applicability of the implied covenant when one party retains discretion or unconditional authority to set a contract term. *See, Badgett, supra*, 116 Wn.2d at 569; 25 Wash. Prac., *Contract Law and Practice* §18-302.11 (2011). This case stands in sharp contrast to those cases cited by DSHS for the proposition, uncontested here, that Washington law does not impose a “free-floating duty of good faith and fair dealing” apart from the terms of an existing contract. App. Br. at 29-31; *Badgett, supra*, 116 Wn.2d at 570; *Johnson, supra*, 84 Wn. App. at 762.

The jury’s finding that DSHS did not breach an express or implied term of the contract does not mean, as DSHS contends, that the jury determined that DSHS’s application of the shared living rule to determine client hours did not involve *performance* of a contract term. To the contrary, the jury was specifically instructed that the duty of good faith and fair dealing exists only in relation to the performance of specific contract terms, cannot be used to contradict contract terms and cannot impose on a party new or different contract obligations. A-36 (Instruction 18). The jury was instructed that if it found “the reduction of authorized hours by application of the Shared Living Rule was not a part of the

provider contract” e.g., the CARE assessment process was not an express or implied term, then the jury “must consider the claim that the department violated the duty of good faith and fair dealing” with regard to a specific contract term “in applying the SLR.” A-37 (Instruction 19). In other words, even if the hours reduction pursuant to the SLR was not itself a contract term that the Department either breached or did not breach, the jury could still find that the Department’s application of the SLR violated another contract term. Rather than “disconnecting the implied covenant claim from a required element of the claim – performance of a contract term,” App. Br. at 45, Instructions 11, 18 and 19 read together, as they must be, repeatedly directed the jury only to find a breach of the implied covenant in DSHS’s performance of obligations created by express contract terms. *See*, A-29 (Instruction 11); A-36 (Instruction 18); A-37 (Instruction 19).

Read as a whole, Instructions 18 and 19 properly instructed the jury and were not misleading on the critical aspects of an implied covenant claim: that a claim for breach of the implied covenant could be found if the jury found the evidence established that the Department performed its duties under a specific contract term prevented the IPs from attaining their reasonable expectations under the IP contract or from obtaining the full benefit of their performance; and that a breach could be found if DSHS

retained discretion, but not unconditional authority to later set a contract term. Finally, the instructions were consistent with Washington law because they allowed the jury to find a breach of the implied covenant independent of its finding on the breach of contract claim. The judgment for the Provider Class should be affirmed.

ii. Counsel For DSHS Was Permitted To Argue Their Theory of the Case.

Instructions 18 and 19 permitted both sides to argue their theory of the case. In closing, DSHS presented every aspect of its theory in defense of Plaintiffs' claim for breach of the implied duty of good faith and fair dealing, including those aspects central to the issues on appeal: 1) generally, that the duty of good faith and fair dealing exists only in relation to the performance of specific terms in the contract, RP 2750,¹⁶ and specifically that the CARE tool assessment process is not a term of the contract, only the Service Plan is incorporated by reference, so the duty of good faith and fair dealing does not apply to the assessment process, RP 2736-39, 2750-51, 2761-62;¹⁷ 2) that Plaintiffs' argument that a duty of good faith and fair dealing attaches to Articles 5(b), 4(b) and 4(c) of the IP contract is wrong and why DSHS believes that argument is flawed, RP

¹⁶ This point was generally the subject of DSHS's Proposed Instruction No. 35, and some of this proposed language was included in Instruction No. 18. *See*, CP 2903, A-36.

¹⁷ This topic was generally the subject of DSHS's Proposed Instruction No. 25A. *See*, CP 2892.

2754-55; 3) that DSHS has the sole, unconditional authority to set the amount of authorized hours RP 2751-54; RP 2756-57; RP 2786; and 4) that the contract does not require the Department to inform providers about reductions in authorized hours. RP 2754.¹⁸

Because DSHS was able to argue its theory of the case, including the topics contained in DSHS's proposed jury instructions, the jury instructions were sufficient and not erroneous, and the court's refusal to give DSHS's proposed instructions was not reversible error.

C. DSHS Failed To Preserve Its Appeal Of The Trial Court's Decisions To Give Instructions 18 and 19 And To Not Give Proposed Instructions 25A, 35 and 25A, And For This Additional Reason, DSHS's Appeal Must Fail.

This Court has no basis for reviewing DSHS's assignments of Error 2.1 and 2.2, because DSHS's exceptions to Jury Instructions 18 and 19 lacked the requisite specificity to constitute compliance with Washington State Superior Court Civil Rule ("CR") 51(f). CR 51(f) ("The objector shall 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."); *Reed v. Pennwalt Corp.*, 93 Wn.2d 5, 6, 604 P.2d 164 (1979);

¹⁸ This issue was the general subject of DSHS Proposed Instruction No. 35A. *See*, CP 2904.

Stuart v. Consolidated Foods Corp., 6 Wn. App. 841, 846, 496 P.2d 527 (1972).

An objection to an instruction which does not include the specificity required by CR 51(f) is considered a general objection. *Bitzen v. Parisi*, 88 Wn.2d 116, 124, 558 P.2d 775 (1977). A general objection will not be upheld unless every part of the challenged instruction is invalid. *Id.*; accord, *Goehle v. Fred Hutchinson Cancer Research Center*, 100 Wn. App. 609, 615-16, 1 P.3d 579 (2000), *rev. denied* 142 Wn.2d 1010, 16 P.3d 1263. “The trial court must have been sufficiently apprised of any alleged error to have been afforded an opportunity to correct the matter if that was necessary.” *Van Hout v. Celotex Corp.*, 121 Wn.2d 697, 702-03, 853 P.2d 908 (1993); *see also*, *Roumel v. Fude*, 62 Wn.2d 397, 399-400, 383 P.2d 283 (1963) (“[t]he purpose is to enable the trial court to correct any mistakes in the instructions in time to prevent the unnecessary expense of a second trial.”).

CR 51(f) requires counsel to state distinctly the matter to which he objects and the grounds of his objection. The objection must be sufficiently explicit to apprise the trial court of the alleged error and review is impossible unless the record reflects the context of the objection. We are unable to tell whether the trial court had an opportunity to understand the reason for the objection and correct any omission. A mere general objection is insufficient.

Stuart, 6 Wn. App. at 846.

Appellate review of an error assigned to an instruction is limited to the specific issues raised by exceptions made at trial. *Galvan v. Prosser Packers, Inc.*, 83 Wn.2d 690, 692, 521 P.2d 929 (1974). The Supreme Court will not consider a new or different basis for a challenge to an instruction, than that urged at trial. *State v. Leevans*, 70 Wn.2d 681, 683-84, 424 P.2d 1016 (1967).

At trial, Plaintiffs urged the court to excise the sentence in the middle of the second paragraph of Instruction No. 18, stating “If the contract grants one party unconditional authority to later set the term, the duty does not apply.” RP 2592. Plaintiffs also urged the court to remove reference to unconditional authority from Instruction 19, as not supported by the evidence. RP 2592-93. When asked for the State’s position, Mr. Clark stated that the language regarding unconditional authority “is consistent with the law...[A]nd so we would urge you to retain it as is.” RP 2594.

DSHS raised none of the alleged misstatements of the law when it took its exceptions at the trial court. DSHS stated:

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 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.

RP 2605. A more general objection would be hard to imagine.

DSHS argues that the instructions “compelled the jury to decide if DSHS’s application of the shared living rule to reduce client hours violated good faith, regardless of whether DSHS’s application of the shared living rule to determine client hours involved performance of a contract term.” App. Br. at 42. Not only did DSHS fail to raise that concern before the trial court, this allegation is completely contradicted by both Instructions 18 and 19 and by the Special Verdict Form. The Special Verdict Form could not be more clear on this point. The answer provided by the jury on the special verdict form as to Question No. 2 was as follows:¹⁹

Question No. 2: Do you find that 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.

A-14.

DSHS also took exception to the trial court’s refusal to give DSHS’s proposed Instructions 35, 35-A and 62.

¹⁹ Defendants did not object or take any exceptions to the special verdict form. RP 2656, 2722.

We believe that each of those instructions should be given, because collectively, they embrace not only all the principles that go into that legal proposition, they also embrace all of the evidentiary scenarios that the plaintiffs have put forward. And they do not comment on the evidence. They simply address particular points that we believe the plaintiffs were raising with regard to the implied duty of good faith and fair dealing. The jury should receive instruction on that in order to guide them on how to decide that that aspect of the – of the Plaintiffs' claims.

RP 2613.

Because DSHS on appeal makes arguments not within the scope of the exception made at trial, this Court must not consider them. *Horwath v. Washington Water Power Co.*, 68 Wn.2d 835, 842, 416 P.2d 92 (1966).

IV. IN THE ALTERNATIVE, IF THIS COURT REVERSES THE TRIAL COURT JUDGMENT ON BEHALF OF THE PROVIDER CLASS, THEN THE COURT SHOULD REVERSE THE TRIAL COURT'S DISMISSAL OF THE PROVIDERS' QUANTUM MERUIT CLAIM.

On December 9, 2010, after the Plaintiffs rested their case in chief, the court granted the Department's motion to dismiss the providers' claims brought on the theory of contract implied in fact and contract implied in law. RP 1901; CP 3446-3448. Class Plaintiffs cross-appealed the judge's order dismissing these claims. Plaintiff's Notice of Cross-Appeal to the Washington Supreme Court (Dec. 28, 2011). If this Court reverses the trial court's judgment on behalf of the Provider Class, then, in the alternative, and only if the breach of contract and breach of implied

covenant of good faith and fair dealing claims are no longer viable, then Respondents request that this Court reverse the trial court's dismissal of the contract implied in law – or unjust enrichment – theory.

Based on principles of equity, Washington law imposes a contract implied in law upon a person when the circumstances between the parties are such as to render it just that one should have a right and the other a corresponding liability like that which would have arisen from a contract between them. *Dragt v. Dragt/DeTray, LLC*, 139 Wn. App. 560, 161 P.3d 473 (2007), *rev. denied*, 163 Wn.2d 1042 (2008). This obligation, described as a quasi-contract, is a non-contractual obligation that is treated procedurally as if it were a contract. *Young v. Young*, 164 Wn.2d 477, 191 P.3d 1258 (2008). It exists mainly to prevent unjust enrichment. *Dragt*, 139 Wn. App. at 576; *Young*, 164 Wn.2d at 484 (“Unjust enrichment is the method of recovery for the value of the benefit retained absent any contractual relationship because notions of fairness and justice require it.”).

The party seeking restitution must establish that the party was not acting as a volunteer, *Young*, 164 Wn.2d at 484 and that it would be unjust to permit the beneficiary to retain the benefit. *Pierce County v. State*, 144 Wn. App. 783, 185 P.3d 594 (2008), *as amended on denial of reconsideration* (July 15, 2008) (because the State was required to provide

long-term care, it would be unjust to refuse reimbursement to County that provided such care). The enrichment must be unjust both under the circumstances and as between the two parties to the transaction. *First American Title Ins. Co. v. Liberty Capital Starpoint Equity for Fund, LLC*, 161 Wn. App. 474, 264 P.3d 835 (2011).

A plaintiff must establish all three elements of an unjust enrichment claim, which are “(1) the defendant receives a benefit, (2) the received benefit is at the plaintiff’s expense, and (3) the circumstances make it unjust for the defendant to retain the benefit without payment.” *Young*, 164 Wn.2d at 484-85.²⁰ Where the defendant has been unjustly enriched, courts have “tremendous discretion” to do substantial justice to the parties. *Id.* at 487-88. Where, as here, a quasi contract claim seeks only monetary damages, it is a legal claim triggering the right to a jury trial. *See, Auburn Mechanical, Inc. v. Lydig Constr., Inc.*, 89 Wn. App. 893, 905, 951 P.2d 311 (1998).

When DSHS reduced the number of hours a client was eligible to receive, without reducing the corresponding services to which that client

²⁰ Additionally, the plaintiff cannot have been a volunteer. *Young*, 164 Wn.2d at 484. A court determines whether a plaintiff has acted as a volunteer by reviewing all surrounding circumstances, including (1) whether the benefits were conferred at the request of the party benefited, (2) whether the party benefited knew of the payment, but stood back and let the party make the payment, and (3) whether the benefits were necessary to protect the interests of the party who conferred the benefit or the party who benefited thereby. *Ellenburg v. Larson Fruit Co., Inc.*, 66 Wn. App. 246, 251-52, 835 P.2d 225 (1992) (internal citations omitted).

was entitled, it fell to the IPs to provide the necessary services that DSHS was obligated to provide. When DSHS failed to pay the IPs for the hours spent providing the necessary services outlined in the clients' Service Plans, the IPs conferred a benefit upon DSHS. DSHS was therefore enriched by obtaining services it was legally obligated to provide to the clients without properly compensating the providers of the service, the IPs.

Moreover, this enrichment was clearly "unjust." Despite the application of the Shared Living Rule, the IPs were under a legal and contractual duty to DSHS to continue to provide the personal care services specified in the clients' Service Plans. *See* WAC § 388-71-0515 ("An individual provider or home care agency provider must, *inter alia*...(2) Provide the services as outlined on the client's plan of care..."); *e.g.* Ex. 66 at 4. The Service Plans had not been altered in terms of the clients' actual need for personal care services; rather DSHS simply eliminated a portion of the authorized hours so that the IPs would perform the work without getting paid.

Thus, should this Court hold the IP Contract did not impose a duty of good faith and fair dealing on DSHS in setting the number of authorized hours for which an IP would be paid, it should also hold that the IPs state a valid cause of action for unjust enrichment, *i.e.*, for having conferred a benefit on the Department under circumstances in which it

would be unjust for the defendant to keep the benefit without paying. *See, Norcon Builders, LLC v. GMP Homes VG, LLC*, 161 Wn. App. 474, 490, 254 P.3d 835 (2011).

CONCLUSION

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

Respectfully submitted this 17th day of September, 2012.



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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of September, 2012, I caused the foregoing Brief of Respondents SEIU Healthcare 775NW and Cindy Weens to be filed with the Supreme Court via legal messenger, and true and correct copies of the same to be sent in the following manner:

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APPENDIX

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

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

NO. 07-2-00895-8
FINDINGS OF FACT AND
CONCLUSIONS OF LAW

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

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

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

ORIGINAL

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

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

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

8 **D. Eighth Cause of Action: Washington Wage Laws, RCW Ch. 49.52 and 49.46.**
9 All claims brought under this section, including claims brought under RCW 49.52 and
10 49.46, were dismissed by Order entered on May 7, 2010.

11 **E. Petition for Review of Agency Decisions On Hours and Shared Living Rule.** The
12 Client Class sought (1) judicial review of the shared living rule, (2) injunctive relief and (3)
13 monetary relief under the Administrative Procedures Act RCW 34.05 and RCW
14 74.08.080(3), and based on the decision of the state supreme court in *Jenkins v. DSHS*, 160
15 Wn.2d 287, 129 P.3d 849 (2007), which concluded that automatic deduction of hours
16 without conducting an individualized assessment part of the Shared Living Rule violated
17 Medicaid comparability laws. The Client Class claims under the APA, *Jenkins*, and RCW
18 74.08.080 have been addressed in part by opinion of the Court dated September 15, 2009,
19 oral opinion dated May 7, 2010 and by previous Orders of the Court entered on October 30,
20 2009, June 4, 2010 and September 30, 2011, identified below. The Client Class claims under
the APA, *Jenkins*, and RCW 74.08.080 are now resolved by these findings of fact,
conclusions of law, and order, which the Court enters pursuant RCW 34.05.574.

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

- 22 1. The Defendants' Motion Requiring Plaintiffs to Notify the Classes was granted in
23 part by Order November 12, 2010.
24

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2
3 **III. CONCLUSIONS OF LAW**

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

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

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

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

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

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

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

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

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

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

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

23 DATED: December 2, 2011

24 

HONORABLE THOMAS MCPHEE
THURSTON COUNTY SUPERIOR COURT JUDGE

FILED
SUPERIOR COURT
THURSTON COUNTY, WA

2010 DEC 20 PM 3: 12.

BETTY J. GOULD, CLERK.

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

LEYA REKHTER et al.,)	
)	
Plaintiffs,)	
vs.)	NO. 07-2-00895-8
)	
STATE OF WASHINGTON,)	SPECIAL VERDICT FORM
DEPARTMENT OF SOCIAL AND)	
HEALTH SERVICES, et al.,)	
Defendants.)	
_____)	

We the jury answer the questions submitted by the Court as follows based upon the preponderance of the evidence standard:

Question 1. Do you find that the Department breached a term in the Individual Provider Contracts?

Answer: ~~Yes~~ No
(Write "Yes" or "No")

Court's direction: Answer Question 1 "Yes" or "No", then proceed to Question 2.

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
(Write "Yes" or "No")

Court's direction: Answer Question 2 "Yes" or "No". If you answered "yes" to either Question 1 or Question 2, proceed to Question 3 on page 2. If you answered "No" to both Question 1 and Question 2, do not answer Question 3; instead the verdict form should be signed by the presiding juror and returned to the Court.

0-000002985

Special Verdict Form, page 2.

Question 3. For the period of April 1, 2003 to June 30, 2008, what is the total amount of the damages incurred by the Providers?

Answer: \$ 57,123,794.50

Court's direction: If you are directed to answer Question 3, write in amount of your verdict. Then the verdict form should be signed by the presiding juror and returned to the Court.

Jane Mohr
Presiding Juror

0-000002986

FILED
SUPERIOR COURT
THURSTON COUNTY, WA

2010 DEC 20 PM 3:11

BETTY J. GOULD, CLERK

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

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

NO. 07-2-00895-8

COURT'S INSTRUCTIONS
TO THE JURY
(Original Set)

Dated December 16, 2010



Thomas McPhee, Judge

Instruction No. 1

Here are my instructions. The order of these instructions has no significance as to their relative importance. They are all equally important. In closing arguments, the lawyers may properly discuss specific instructions, but during your deliberations, you must consider the instructions as a whole.

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts you decide have been proved, and in this way decide the case.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, and the exhibits that I have admitted during the trial. If evidence was not admitted or was stricken from the record then you are not to consider it in reaching your verdict.

Some exhibits have been admitted for illustrative purposes only. This means that their status is different from that of other exhibits in the case. These exhibits are not evidence. Rather, they were offered to assist you in understanding and evaluating the evidence in the case. Because illustrative exhibits are not evidence, they will not go with you to the jury room when you deliberate. The lawyers may use these exhibits during closing argument.

[Instruction No. 1, page 2]

In order to decide whether any party's claim has been proved, you must consider all of the evidence that I have admitted that relates to that claim. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have directed you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

The law does not permit me to comment on the evidence in any way. It is improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. Although I have not intentionally done so, if it appears to you that I have indicated my personal opinion, either during trial or in giving these instructions, you must disregard it entirely.

The lawyers' statements during this trial are intended to help you understand the evidence and apply the law. However, it is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence or instructions. You should disregard any remark, statement, or argument that is not supported by the evidence or by these instructions.

During the trial, the lawyers may have objected to evidence offered by the other side. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so.

[Instruction No. 1, page 3]

These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Instruction No. 2

As jurors, you have a duty to consult with one another and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence with the other jurors. Listen to one another carefully. In the course of your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon the evidence. You should not surrender your honest convictions about the value or significance of evidence solely because of the opinions of the other jurors. Nor should you change your mind just for the purpose of obtaining enough votes for a verdict.

Instruction No. 3

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence given by a witness who has directly perceived something that is at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

Instruction No. 4

The 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 No. 5

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

However, you are not required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

Instruction No. 6

This is a class action. In a class action, a plaintiff class makes a single claim against a defendant encompassing the claims of all class members. Any recovery awarded at trial on the class claim is allotted to individual class members in a subsequent court proceeding.

In this case, the claims of two classes of plaintiffs against the defendant State of Washington, department of Social and Health Services, have been joined for trial. The definition for membership of each class has been approved by the court. Each class is represented by a small group of class members approved by the court as class representatives.

Client class. The client class is defined as persons who were determined eligible for Medicaid or state funded in-home personal care assistance and had their base hours adjusted by the Shared Living Rule. The claim of the client class will not be decided by the jury; that claim will be decided by the court.

Provider class. The provider class is defined as providers of Medicaid or state funded in-home personal care to members of the client class. At trial these providers were described in sub-categories of individual providers who contracted directly with the department and agency providers who were employed by home care agencies. Only the claim of the individual providers is submitted to the jury for your decision; the claim of the agency providers is not.

[Instruction No. 6, page 2]

The two classes assert their claims for relief in the alternative. This means that damages awarded for the claims, if any, will not be cumulative. There will be no double recovery for the damages. The jury must decide the claim of the provider class independently from the claim of the client class and must not speculate on how that claim will be decided.

In the instructions that follow I refer to the class of individual providers who contracted directly with the department as the providers and each member of that class as a provider or the provider, as context requires. The defendant department of Social and Health Services is referred to as the department.

Instruction No. 7.

The following is a summary chronology of events concerning the Shared Living Rule, presented here to assist your understanding of court challenges to the SLR that led up to its invalidation by the Washington State Supreme Court.

On April 1, 2003, the department began phasing in a new automated assessment tool, commonly referred to as the CARE tool. Application of the Shared Living Rule was embedded in the CARE tool algorithm at that time. For clients with live-in providers, the SLR required automatic elimination of hours authorized for payment for specified IADL tasks, without an individual assessment for informal support or shared benefit.

In 2004, three persons receiving Medicaid or state funded in-home personal care assistance filed separate administrative appeals contesting the department's reduction of authorized service hours under the Shared Living Rule. The administrative appeals were denied. In July 2004, two of these persons filed petitions for judicial review in Thurston County Superior Court challenging the validity of the SLR. In December 2004, the third person filed a similar petition in King County Superior Court.

In March 2005, a Thurston County Superior Court Judge ruled that the Shared Living Rule automatic deduction of authorized hours without an individualized assessment violated federal Medicaid comparability requirements and was invalid. In August 2005, a King

[Instruction No. 7, page 2]

County Superior Court Judge made a similar ruling. The department appealed both rulings before either became final.

In 2006, the Washington Court of Appeals affirmed the trial court rulings and invalidated the part of the Shared Living Rule that permitted automatic reduction of authorized hours without an individualized assessment. The department appealed the Court of Appeals decision before it became final.

On May 3, 2007, the Washington State Supreme Court affirmed each of the prior rulings. The Supreme Court determined that the Shared Living Rule violated the Medicaid comparability requirement and was invalid because it automatically reduced hours for the SLR tasks without an individualized assessment only for clients with live-in providers. The case is *Jenkins v. the Department of Social and Health Services*.

On May 4, 2007, this class action was filed.

Instruction No. 8

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

Instruction No. 9

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

Instruction No. 10

The Washington Administrative Code provides:

"Instrumental activities of daily living (IADL)" means routine activities performed around the home or in the community and includes the following:

"(a) Meal preparation: How meals are prepared (e.g., planning meals, cooking, assembling ingredients, setting out food, utensils, and cleaning up after meals). NOTE: The department will not authorize this IADL to plan meals or clean up after meals. The client must need assistance with actual meal preparation.

"(b) Ordinary housework: How ordinary work around the house is performed (e.g., doing dishes; dusting, making bed, tidying up, laundry).

"(c) Essential shopping: How shopping is completed to meet health and nutritional needs (e.g., selecting items). Shopping is limited to brief, occasional trips in the local area to shop for food, medical necessities, and household items required specifically for health, maintenance, or well-being. This includes shopping with or for the client.

"(d) Wood supply: How wood is supplied (e.g., splitting, stacking, or carrying wood) when the client uses wood as the sole source of fuel for heating and/or cooking."

Instruction No. 11

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

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

1. Required the provider to perform for the client identified in the contract all services determined by the department to be necessary in annual care plans prepared by the department for the client and stated in the service summary.

2. Required the department to pay the provider for services performed at an hourly rate fixed by law or collective bargaining agreement up to the maximum number of hours determined in the care plan and stated in the service summary.

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

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

[Instruction No. 11, page 2]

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

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

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

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

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

[Instruction No. 11, page 3]

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

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

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

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

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

[Instruction No. 11, page 4]

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

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

Instruction No. 12

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

- (1) That the department entered into a contract with the providers.
- (2) That the provider contract includes the terms that the providers contend the department breached.
- (3) That the department breached the provider contract in one or more ways claimed by the providers.
- (4) That the providers were damaged as a result of the department's breach.

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

Instruction No. 13

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case, that the proposition on which that party has the burden of proof is more probably true than not true.

Instruction No. 14

A contract is a legally enforceable promise or set of promises. In order for a promise or set of promises to be legally enforceable, there must be mutual assent.

In order for there to be mutual assent, the parties must agree on the essential terms of the contract, and must express to each other their agreement to the same essential terms.

Instruction No. 15

A contract is to be interpreted to give effect to the intent of the parties at the time they entered the contract.

You are to take into consideration all the language used in the contract, giving to the words their ordinary meaning, unless the parties intended a different meaning.

You are to determine the intent of the contracting parties by viewing the contract as a whole, considering the subject matter and apparent purpose of the contract, all the facts and circumstances leading up to and surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of the respective interpretations offered by the parties.

Instruction No. 16

If you find that all of the provisions of the provider contract are contained in a single written document, and that the document was intended by the parties as their final agreement on the subjects addressed in it, then you may not consider evidence outside the written document to add to, subtract from, vary, or contradict that written document.

However, if you find that such written document was not intended to be a complete expression of all of the terms agreed upon by those parties, that is, that the document does not contain all of the terms of their agreement, then you may also consider evidence of the circumstances surrounding the making of the agreement to supply additional terms of the agreement between the parties, but only if they are not inconsistent with the provisions of the written document.

Instruction No. 17

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

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

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

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

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

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

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

Instruction No. 18

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

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

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

Instruction No. 19

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

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

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

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

Instruction No. 20

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

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

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

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

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

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

The burden of proving damages rests with the providers and it is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence. You must be governed by your own judgment, by the evidence in the case, and by these instructions, rather than by speculation, guess, or conjecture.

Instruction No. 21.

When you begin to deliberate, your first duty is to select a presiding juror. The presiding juror's responsibility is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

You will be given the exhibits admitted in evidence and these instructions. You will also be given a special verdict form that consists of several questions for you to answer. You must answer the questions in the order in which they are written, and according to the directions on the form. It is important that you read all the questions before you begin answering, and that you follow the directions exactly. Your answer to some questions will determine whether you are to answer all, some, or none of the remaining questions.

In order to answer any question on the special verdict form, ten jurors must agree upon the answer. It is not necessary that the jurors who agree on the answer be the same jurors who agreed on the answer to any other question, so long as ten jurors agree to each answer.

When you have finished answering the questions according to the directions on the special verdict form, the presiding juror will sign the verdict form. The presiding juror must sign the verdict whether or

not the presiding juror agrees with the verdict. The presiding juror will then tell the bailiff that you have reached a verdict. The bailiff will bring you back into court where your verdict will be announced.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

REKHTER; ET AL.

Plaintiff/Petitioner

vs

No. 86822-1

DECLARATION OF
EMAILED DOCUMENT
(DCLR)

STATE OF WA DSHS; ET AL.

Defendant/Respondent

Pursuant to the provisions of GR 17, I declare as follows:

1. I am the party who received the foregoing facsimile transmission for filing.
2. My address is: 3400 CAPITOL BLVD S, SUITE 103, TUMWATER, WA 98501
3. My phone number is (360) 754-6595
4. The e-mail address where I received the document is: oly@abclegal.com.
5. I have examined the foregoing document, determined that it consists of 103 pages, including this Declaration page, and that it is complete and legible.

I certify under the penalty of perjury under the laws of the State of Washington that the above is true and correct.

Dated: September 17, 2012, at Olympia, Washington.

Signature: _____



Print Name: BECKY GOGAN