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NO. 66304-6-I

**COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON**

KING COUNTY PUBLIC HOSPITAL DISTRICT NO. 2, d/b/a
EVERGREEN HEALTHCARE, a Washington public hospital district,
SWEDISH HEALTH SERVICES, d/b/a SWEDISH VISITING NURSE
SERVICES, a Washington non-profit corporation, PROVIDENCE
HOSPICE AND HOME CARE OF SNOHOMISH COUNTY, a
Washington non-profit corporation, and HOSPICE OF SEATTLE, a
Washington non-profit corporation,

Respondents

v.

WASHINGTON STATE DEPARTMENT OF HEALTH, a Washington
governmental agency, SECRETARY MARY SELECKY, Secretary of
Washington's Department of Health in her official and individual capacity,
ODYSSEY HEALTHCARE OPERATING B, LP, a Delaware corporation,
and ODYSSEY HEALTHCARE, INC., a Delaware corporation,

Appellants.

BRIEF OF APPELLANTS ODYSSEY HEALTHCARE

JEFFREY A.O. FREIMUND, WSBA No. 17384
Freimund Jackson Tardif & Benedict Garratt, PLLC
711 Capitol Way South, Suite 602
Olympia, WA 98501
(360) 534-9960
Attorneys for Appellants Odyssey Healthcare
Operating B, LP and Odyssey Healthcare, Inc.

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I. INTRODUCTION

This appeal requires statutory interpretation of RCW 70.38.115(10)(c). This statute authorizes the Department of Health (“the Department”) to settle adjudicative proceedings challenging the denial of a Certificate of Need (“CN”) license “prior to the conclusion of the adjudicative proceeding.” However, the Department must first give the CN applicant’s competitors notice and “an opportunity to comment, in advance, on the proposed settlement.” RCW 70.38.115(10)(c).

Here, the Department proposed settling an adjudicative proceeding and a federal civil rights action brought by appellant Odyssey Healthcare Operating B, LP and Odyssey Healthcare, Inc. (“Odyssey”) challenging the Department’s initial denial of Odyssey’s CN applications. The Department notified respondents King County Public Hospital District No. 2, Swedish Health Services, Providence Hospice and Home Care of Snohomish County, and Hospice of Seattle (“the intervening competitors”) of the proposed settlement and the opportunity to submit written evidence and argument opposing the settlement of the adjudicative proceeding. After considering the intervening competitors’ evidence and argument, the Department decided Odyssey’s CN application met the criteria for issuance of a CN. The Department then requested a Health Law Judge (“HLJ”) to approve the proposed settlement. After giving the

intervening competitors a second opportunity to submit written evidence and argument opposing the settlement, the HLJ independently determined Odyssey's application met all CN criteria and approved the settlement.

The intervening competitors sought judicial review of the HLJ's order approving the settlement of the adjudicative proceeding. The trial court reversed the HLJ's order approving the settlement, reversed the related federal court settlement in part, remanded the previously settled administrative case for a full hearing on the merits, and limited the evidence the HLJ has discretion to consider at the remand hearing. Without finding RCW 70.38.115(10)(c) ambiguous, the trial court concluded the Legislature intended to prohibit settlements where the Department modifies its initial decision denying a CN. According to the trial court's construction of the statute, the Legislature intended that intervening competitors can force the parties to conduct a full adjudicative proceeding with oral testimony if they fail to convince the Department and an HLJ to reject a proposed settlement based on their written evidence and argument opposing a proposed settlement.

Odyssey respectfully asks the Court to affirm the HLJ's final order approving the settlement of the adjudicative proceeding. The HLJ's decision approving the settlement was not the result of willful and unreasoning disregard of facts or circumstances, nor contrary to law. The

settlement of the adjudicative proceeding fully complied with RCW 70.38.115(10)(c) and the settlement of the federal action fully complied with RCW 4.92.150. The trial court erred by concluding otherwise. The trial court also erred by reversing the federal settlement in part and by limiting the evidence the HLJ has discretion to consider if the adjudicative proceeding is remanded.

II. ASSIGNMENTS OF ERROR

A. The trial court erred in entering the October 29, 2010 Findings of Fact, Conclusions of Law and Judgment (“the Conclusions of Law”) by construing RCW 70.38.115(10)(c) as barring an HLJ from approving a settlement after considering written evidence and arguments from all concerned, but without conducting a full adjudicative hearing on the case being settled [Conclusion of Law Nos. 1, 4-6].

B. The trial court erred in entering the Conclusions of Law by ruling the Department’s decision to settle the federal civil rights lawsuit was arbitrary and capricious because the Department partly relied on updated, corrected data showing need for an additional hospice agency. [Conclusion of Law No. 2].

C. The trial court erred in entering the Conclusions of Law by ruling the HLJ’s approval of the settlement, allegedly without finding that Odyssey met the four criteria for issuance of a CN, was arbitrary and

capricious, and contrary to law [Conclusion of Law No. 3].

D. The trial court erred in entering the Conclusions of Law by reversing the HLJ's order approving the settlement of the adjudicative proceeding [Conclusion of Law No. 4].

E. The trial court erred in entering the Conclusions of Law by revoking the Department's issuance of a CN to Odyssey for a hospice agency in King County [Conclusion of Law No. 5].

F. The trial court erred in entering the Conclusions of Law by remanding the case to the HLJ for another determination of whether Odyssey's CN application met all of the criteria for issuance of a CN and limiting the evidence the HLJ could consider on remand to "relevant evidence available at the time the record was open" [Conclusion of Law No. 6].

III. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

A. RCW 70.38.115(10)(c) plainly permits settlement of CN applicants' adjudicative proceedings challenging the denial of a CN prior to a full hearing on the merits of a case so long as intervening competitors are provided an opportunity to submit written evidence and argument opposing the proposed settlement. Did the trial court err by construing RCW 70.38.115(10)(c) as requiring a full adjudicative hearing on the

merits, and precluding the parties from settling even though the intervening competitors were given two opportunities to submit written evidence and arguments opposing the settlement? (Assignments of Error A through F.)

B. The trial court reversed in part the settlement of Odyssey's federal lawsuit on the grounds the Department's decision to settle the federal action was arbitrary and capricious. Did the trial court err by reversing the settlement of Odyssey's federal lawsuit because the federal action was not before the state court, was not governed by RCW 70.38.115(10)(c), and, pursuant to RCW 4.92.150, the decision to settle the federal court lawsuit was not made by the Department, nor approved by the HLJ? (Assignments of Error B, E and F.)

C. Did the trial court err by applying the arbitrary and capricious standard of review, rather than the abuse of discretion standard applicable to evidentiary rulings, and ruling the HLJ had no discretion to consider relevant updated and corrected data showing need existed for additional hospice agencies when reviewing the proposed settlement of the adjudicative proceeding? (Assignments of Error A, C through F.)

D. Did the trial err in reversing the settlement of the adjudicative proceeding on the mistaken grounds that the HLJ did not find Odyssey met all four criteria for issuance of a CN when the record shows the HLJ

expressly made such findings? (Assignments of Error A through F.)

IV. STATEMENT OF THE CASE

A. Overview of Regulatory Framework

Under Washington law, certain health care services, including hospice care, can be offered only by holders of a CN. *See* chap. 70.38 RCW; chap. 246-310 WAC. A CN is a “nonexclusive license” issued by the Department. *St. Joseph Hosp. v. Dept. of Health*, 125 Wn.2d 733, 736, 887 P.2d 891 (1995).

The overriding purpose of the CN law is the “promotion and maintenance of access to health care services for all citizens.” *Overlake Hosp. Assn. v. Dept. of Health*, __ Wn.2d __, __, 239 P.3d 1095, 1101 (2010). Of secondary significance is “controlling the costs of medical care and promoting prevention.” *Id.*

In deciding whether to grant a CN application, the Department considers four factors: (1) need; (2) financial feasibility; (3) structure and process of care; and (4) cost containment. WAC 246-310-210 through -240. To obtain a CN, a hospice agency must submit an application showing there will be a need for additional hospice services in a particular county where the agency wants to provide hospice care. *Odyssey v. Dept. of Health*, 145 Wn. App. 131, 138, 185 P.3d 652 (2008); WAC 246-310-290(1)(f), (g), and (7)(g). In March 2003, the Department amended its CN

rules and added a section codified in WAC 246-310-290 that governs how the Department forecasts need for new hospice agencies.

Procedurally, after receiving a CN application, the Department must notify certain interested parties (including competitors) an application has been filed, take public comment on the application and, if requested, hold a public hearing. RCW 70.38.115(9); WAC 246-310-160 and -180. If the CN application is denied, the applicant may seek administrative review before an HLJ and, after exhausting that remedy, judicial review of the HLJ's ruling. RCW 70.38.115(10)(a); WAC 246-310-610(1). The adjudicative proceeding and judicial review are governed by RCW 70.38.115(10) and chapter 34.05 RCW, the Administrative Procedure Act ("APA"). *Id.*

RCW 70.38.115(10) has three subsections. RCW 70.38.115(10)(a) provides that an applicant denied a CN has the right to an adjudicative proceeding. RCW 70.38.115(10)(b) states that a competitor who provides services similar to the services provided by the applicant, is located within the applicant's health service area, and testified or submitted evidence at a public hearing "shall be provided an opportunity to present oral or written testimony and argument" at an applicant's adjudicative proceeding challenging the denial of a CN. RCW 70.38.115(10)(b) (emphasis added). RCW 70.38.115(10)(c) then addresses the procedure for settling an

applicant's adjudicative proceeding challenging the denial of a CN, stating in its entirety as follows:

If the department desires to settle with the applicant prior to the conclusion of the adjudicative proceeding, the department shall so inform the health care facility or health maintenance organization and afford them an opportunity to comment, in advance, on the proposed settlement.

RCW 70.38.115(10)(c). *See also* WAC 246-310-610(4)(c) (in accord).

B. Brief History of Odyssey's Exclusion from Providing Hospice Care in Washington

Odyssey has sought to provide hospice care to terminally ill people in Washington for over seven years. In October 2003, Odyssey applied for CNs to establish Medicare certified/Medicaid eligible hospice agencies to serve the residents of King, Pierce, and Snohomish Counties. AR 1559;¹ CP 967. The October 2003 application period was the first opportunity for hospice providers to seek CNs following the Department's 2003 implementation of new hospice rules using a need forecasting methodology ("Methodology"). *See* WAC 246-310-290; AR 1554-59.

The new rules expressly required the data source for the

¹ The Administrative Record was sent as an original with the Clerk's Papers and is cited herein as "AR," followed by the page numbers, as paginated in the Court below. The AR partly consists of Odyssey's summary judgment brief in its federal civil rights action against the Department (AR 1552-76, with the supporting evidence found at AR 1579-1681). The Department admitted most of the facts alleged in Odyssey's federal Complaint. Odyssey's Complaint in the federal action is found at AR 1059-80. The Department's Answer to this Complaint is at AR 1081-89. In this brief, Odyssey occasionally cites to its summary judgment brief for ease of reference to the corresponding citations to the Department's Answer where the Department's admissions are found, rather than citing to both the federal Complaint and the Answer thereto.

Methodology to be federal Center for Medicare and Medicaid Services (“CMS”) data, but the Department decided CMS data was not readily available in the format they preferred. AR 1555. The Department therefore decided to send survey forms to the existing providers to determine current capacity, and patient use of hospices, but did not take the next steps of requiring the existing providers to return the surveys, or checking the accuracy or completeness of the data submitted by those providers who did return the surveys. AR 1555-58.

The Department did not test the Methodology to see if its measurement of need was statistically valid and later found it did not accurately measure need. *See* AR 1554-59. Consequently, in reviewing Odyssey’s 2003 applications, the Department changed the Methodology “by interpretation,” which resulted in a finding of no need for additional hospice services. *Odyssey*, 145 Wn. App. at 135. The Department denied all three of Odyssey’s applications on January 21, 2005, based on its Methodology calculation. AR 1559; CP 967.

Odyssey appealed the denial of its 2003 CN applications, and existing hospice providers intervened. AR 1562. The case was eventually reviewed by the Court of Appeals, which deferred to the Department’s interpretation of the Methodology and affirmed denial of the CN applications, but stated in a footnote:

Odyssey's contention that the WAC 246-310-290(7) methodology contains significant flaws is not without merit. But because the methodology is ambiguous, we must defer to the interpretation of the Department as the agency responsible for the methodology's administration and enforcement. . . . The judicial appeal process is not the appropriate venue for addressing Odyssey's arguments about the inherent defects in WAC 246-310-290(7)'s methodology. Instead, Odyssey should raise its concerns through administrative rulemaking avenues.

Odyssey, 145 Wn. App. at 145 n. 6.

As directed by the Court of Appeals, Odyssey filed a petition for rulemaking on October 20, 2008, asking the Department to correct flaws in the Methodology. AR 1563-64. On December 4, 2008, the Department denied Odyssey's rulemaking petition asserting it was unnecessary to amend its hospice rules because the Court of Appeals had ruled in its favor. *Id.*; CP 968.

In October 2006, while Odyssey's appeals of its first applications were pending, Odyssey filed a second group of CN applications after determining there would be a need for new hospice agencies in King, Pierce and Snohomish Counties even under the flawed Methodology based on the Department's then existing survey data. AR 1560, 1562-63; CP 967. After receiving Odyssey's second group of applications, the Department again sent all the hospice providers in the state another survey requesting the data necessary to calculate the Methodology. AR 1560.

When the Methodology was calculated based on the competitors' latest survey responses the Department found no need for additional hospice agencies and Odyssey's applications were again denied. *Id.*; CP 967. On September 13, 2007, Odyssey requested adjudicative proceedings appealing the denial of its second group of CN applications. AR 1-119, 1563; CP 967-68.

While Odyssey's administrative appeals of the 2006 applications were pending, Odyssey filed a federal lawsuit against the Department seeking damages and injunctive relief for commerce clause and anti-trust violations. AR 1059-80; CP 968. Odyssey filed a motion for summary judgment based on admitted allegations in Odyssey's complaint and favorable case law from other jurisdictions. AR 1552-76.

The undisputed evidence in federal court was that after the Department amended its rules in 2003 and began relying on surveys completed (or not) by existing providers to determine need for new hospice agencies, the Department did not find a need for any new hospice agency in any county for which a CN application was submitted until 2009, after Odyssey filed its federal lawsuit.² AR 1558-62. Although

² A CN was recently granted to the Franciscans who, along with Heartland Hospice, applied for CNs for hospice services in Kitsap County in October 2008 and need was found based on a 2008 survey of existing providers. The CN Program issued the CN to the established local provider, the Franciscans, and not Heartland, the national company. *See* <http://www.doh.wa.gov/hsqa/FSL/CertNeed/archive2009.htm>.

need had on occasion been found to exist in counties other than those for which CN applications were submitted, the need consistently vanished by the following year when a new Department survey was conducted because the existing hospice agencies quickly expanded their staff to absorb the need. *Id.* For example, based on the Department's own survey data, there were 1,535 new patients absorbed by the existing hospice providers in King County during this period of time (4,758 patients in 2009 subtracted by 3,223 patients in 2005). *Id.* Under the Department's rule that a hospice agency must have an average daily census of 35 patients (WAC 246-310-290(6)), this growth would have justified several new hospice agencies, but the intervening competitors and other King County hospice providers were allowed to absorb all those patients. *Id.*

The hospice agencies operating in Washington are well-established, mostly locally owned agencies. AR 1555-56. Those existing agencies are not required to obtain a CN when they expand their staff to absorb the need that arises with growing populations. *Id.* See also RCW 70.38.105. These existing agencies' failure to respond to the Department's surveys, or submission of inconsistent or partial data, skews the outcome of the Department's calculation of the Methodology by understating need. AR 1556-57.

C. Settlement Negotiations between Odyssey and the Department

Within days of Odyssey's summary judgment motion being filed in federal court, the Department contacted Odyssey to discuss settlement. Although the Department asserted defenses to Odyssey's federal claims, the risks and expenses of continued litigation in federal court were significant for the Department. *See* AR 1059-80, 1552-76. Additionally, the Department's 2008 calculation of need for an unrelated CN application showed an unmet need for at least one additional hospice agency in King County during the year that Odyssey's 2006 application projected starting hospice services and showed that need increasing in ensuing years. AR 1561-62, 1564. The Department discovered the data used in calculating the 2007 hospice Methodology, which was applied to Odyssey's 2006 applications, contained significant errors understating need that became apparent to the Department in calculating the 2008 Methodology. *See id.* and AR 1094. The 2008 data showed Odyssey's need projections in its 2006 King County application were accurate. *See id.*

After weeks of negotiation, the Department and Odyssey entered into a proposed settlement resolving both the federal case and Odyssey's administrative appeals of its three 2006 CN applications. CP 969-70. The settlement was contained in two documents; one addressed the federal litigation and one addressed the adjudicative proceeding. AR 1091-95.

1. Settlement of Odyssey's Federal Civil Rights Action

The settlement agreement in the federal case included, as its first provision, "Approval of King County Application" and referenced the "attached" proposed settlement agreement for the adjudicative proceeding. AR 1091. The proposed settlement of the adjudicative proceeding required the Department to approve Odyssey's King County CN application if, after considering written evidence and arguments from competitors, the Department decided the CN should have been issued. AR 1095. The federal settlement agreement also required Odyssey to dismiss its federal lawsuit; required the Department to initiate rulemaking by May 2010 to amend its hospice rules; allowed Odyssey to participate in any committee the Department appointed for the hospice rulemaking; and required the Department to pay Odyssey \$10,000 in damages. AR 1091-92. Finally, the federal settlement provided that if the Department did not forward the proposed settlement to the HLJ, or the HLJ did not approve the settlement of the adjudicative proceeding, and the CN for King County was not issued, Odyssey could re-file its federal action but damages would commence anew with the re-filing. AR 1092; CP 969. As agreed, Odyssey promptly dismissed its federal lawsuit after the federal settlement was signed. *See* AR 1091.

2. Settlement of Odyssey’s Adjudicative Proceeding

The proposed settlement of the adjudicative proceeding states the “parties propose settlement under RCW 70.38.115(10)(c) approving Odyssey’s application to establish a new hospice agency in King County” AR 1094. The agreement further states “[t]his proposed settlement of the adjudicative proceeding is part of the settlement between the parties resolving the federal lawsuit.” *Id.* The agreement references and attaches the 2008 Methodology, which showed a need for two additional providers in King County, including in years relevant to Odyssey’s application. *Id.*; AR 1096-1101. As in the federal settlement, a key component for settling the adjudicative proceeding was granting Odyssey a CN for a hospice agency in King County. AR 1091-94; CP 970. If the HLJ approved the proposed settlement, Odyssey agreed to withdraw its appeals of the denied Snohomish and Pierce County CN applications. AR 1094.

D. Intervening Competitors’ First Opportunity to Submit Written Evidence and Argument Opposing the Proposed Settlement of Odyssey’s Adjudicative Proceeding

Consistent with RCW 70.38.115(10)(c), the Department notified the intervening competitors of the proposed settlement of Odyssey’s adjudicative proceeding and the opportunity to submit written evidence and argument to the Department regarding the settlement. AR 1095; CP 970. *See also* AR 297-99, 348-51, 515-17. The intervening competitors

each submitted written comments to the Department claiming they should be allowed to continue to absorb all new patients, complaining about the Department's use of the 2008 corrected Methodology, and insisting the Department should use the inaccurate 2007 Methodology to deny Odyssey a CN for King County. AR 1104-29; CP 970-71. The Department considered these comments and decided the intervening competitors' arguments for rejecting the proposed settlement of Odyssey's adjudicative proceeding lacked merit. AR 1018-90.

The intervening competitors' submissions were included in the record the Department forwarded to the HLJ along with a motion seeking the HLJ's approval of the proposed settlement of the adjudicative proceeding. AR 1033-1158. In presenting the proposed settlement to the HLJ, the Department stated "[t]he notice and opportunity to comment [to the Department on the proposed settlement of the adjudicative proceeding] satisfied the Intervenors' due process rights." AR 1027 (citing *St. Joseph Hosp.*, 125 Wn.2d 733). The Department further advised the HLJ that because the intervening competitors already had their RCW 70.38.115(10)(c) opportunity to submit written evidence and argument opposing the settlement, "the HLJ may now approve the settlement without further comment from Intervenors." AR 1028.

E. Intervening Competitors' Second Opportunity to Submit Written Evidence and Argument Opposing the Proposed Settlement of Odyssey's Adjudicative Proceeding

Shortly before the Department submitted the proposed settlement of the adjudicative proceeding for HLJ approval, the intervening competitors filed motions to intervene in Odyssey's adjudicative proceeding (except Evergreen which had previously intervened) in case the Department recommended approval of the proposed settlement. AR 151-53, 201-23, 328-46, 501-75; CP 971.

Citing RCW 70.38.115(10)(c), which restricts intervenors to commenting on proposed settlements, the HLJ issued orders limiting intervention to submitting "written evidence" on the proposed settlement agreement and making legal arguments. AR 994-1009. *See also* RCW 34.05.443 (authorizing HLJs to limit intervention, including intervenor's ability to conduct discovery and cross-examine witnesses). The HLJ's orders granting limited intervention state:

The facts are not in dispute. ... The only issue currently before the Presiding Officer is whether to accept the Proposed Settlement in the event it is offered by the Program. There are no issues regarding discovery, cross-examination, or other participation in the adjudicative proceeding at this time. Limiting intervention to the submission of comments and argument on the September 2009 Proposed Settlement is appropriate at this time. The plain language of RCW 70.38.115(10)(c) requires nothing more.

. . . Intervention in this matter is limited to the submission of written evidence and argument if the September 2009 Proposed Settlement is presented to the Presiding Officer for approval.

AR 1001-02, 1008-09 (emphasis added). The HLJ's orders limiting intervention became the Department's final order and position. *Davita v. Dept. of Health*, 137 Wn. App. 174, 183, 151 P.3d 1095 (2007) ("Although the HLJ is an administrative law judge, she is also the agency's final decision maker on CON applications. And, in that position, it is within her discretion to apply the agency's expertise").

The limited intervention order allowed the intervening competitors a second opportunity to submit written evidence and argument opposing the proposed settlement, this time to an independent HLJ. CP 971. The intervening competitors all submitted similar, cross-referenced evidence and legal arguments to the HLJ urging rejection of the settlement. AR 1179-1203, 1231-35, 1242-1306, 1377-1451; CP 972. The intervening competitors did not challenge the HLJ's limited intervention order at that time. *See id.*

The Department filed a brief refuting the intervening competitors' written evidence and arguments, showed how Odyssey met all four criteria for issuance of a CN, and continued to request HLJ approval of the settlement. AR 1682-89; CP 972. Odyssey also filed a brief with the HLJ

refuting the intervening competitors' evidence and arguments, and explaining the reasonableness of the settlements. AR 1528-50; CP 972.

F. The HLJ's Ruling Approving the Settlement

The HLJ approved the proposed settlement after considering the entire record, including the intervening competitors' written evidence and arguments. AR 1721-22; CP 972. The HLJ held: (1) there was proper notice and opportunity to comment on the proposed settlement and the proposed settlement was properly presented to the HLJ; (2) Odyssey's hospice application met all four of the statutorily required criteria for the issuance of a CN under RCW 70.38.115(2) and corresponding WAC 246-310-210 through -240, including the need criterion; (3) the Department, in an "exercise of discretion," could use the Department's 2008 calculation of the Methodology to assist "in deciding that need exists for Odyssey's proposed hospice agency in King County"; and (4) Odyssey's requests for adjudicative proceedings to challenge the denial of its 2006 applications for Pierce County and Snohomish County hospices would be voluntarily dismissed. *Id.* The HLJ then ordered that "with the stated conditions in the proposed settlement," Odyssey's CN application for a King County hospice agency was approved. *Id.* On January 13, 2010, the Department issued Odyssey a CN to open a hospice in King County. CP 972.

G. The Trial Court's Ruling Reversing the Settlements and Remanding the Adjudicative Proceeding for a Hearing

The propriety of the HLJ's final order approving the settlement is the only order the intervening competitors challenged on judicial review. CP 7-8. They did not appeal the HLJ's limited intervention order. *See id.*

On October 29, 2010, the trial court issued its Findings of Fact, Conclusions of Law and Judgment. CP 966-76. The trial court's six conclusions of law are challenged in this appeal. CP 973-74, 978.

First, the trial court concluded that, although RCW 70.38.115(10)(c) authorizes the Department to settle with a CN applicant prior to the conclusion of an adjudicative proceeding, "it is clear that the intent of the Legislature in enacting this provision was not to allow a 'settlement' to circumvent established evaluation procedures or to modify a decision of the Department without an adjudicative hearing, especially if the primary settlement arose from an entirely separate lawsuit and proceeding." CP 973.

Second, even though the HLJ's decision approving the settlement of the adjudicative proceeding was the basis for judicial review (not the settlement of the federal court lawsuit, which was not before the HLJ), the trial court concluded the "Department's decision to settle the Federal Lawsuit by granting Odyssey a CN in King County under the guise of

‘special circumstance’ and based upon its 2009 methodology³ long after the record was closed on a 2006 application, was arbitrary and capricious.” CP 973.

Third, the trial court concluded “[t]he Health Law Judge’s subsequent summary adoption of the settlement agreement without an adjudication or finding that Odyssey had actually met all four of the CN criteria was similarly arbitrary and capricious and thus, error as a matter of law.” CP 973.

Fourth, the trial court concluded “[t]he request on judicial review to reverse the Final Order Approving Settlement and Granting Odyssey’s King County Hospice Application, dated December 8, 2010 (the ‘Final Order’) should be granted.” CP 973.

Fifth, the trial court concluded “[t]he Department’s issuance of Certificate of Need #1416 to Odyssey for establishing a hospice agency in King County based upon the Final Order and the Department’s settlement should be revoked.” CP 974.

Sixth, the trial court concluded “[t]he matter should be remanded to the Department’s Health Law Judge for a determination, based on the

³ The trial court’s Findings of Fact, Conclusions of Law and Judgment repeatedly refer to “2009” data or the “2009 methodology.” The data referred to actually is the Department’s 2008 calculation of the Methodology that is attached to the settlement agreement entered in the adjudicative proceeding (which is found at AR 1096-1101). *See* CP 969.

applicable law and the relevant evidence available at the time the record was open, whether or not Odyssey's CN application satisfied all of the applicable criteria for approval of its 2006 application." CP 974.

In summary, the trial court concluded: (1) the HLJ's approval of the settlement of the adjudicative proceeding was contrary to law because legislative intent underlying RCW 70.38.115(10)(c) is "clear" that the Department can not settle a CN applicant's challenge to the denial of a CN by modifying its decision denying the CN, and instead must conduct a full hearing on the merits, in addition to considering written evidence and argument opposing the settlement; (2) even though the HLJ played no role regarding settlement of Odyssey's federal civil rights lawsuit, the federal settlement should be reversed in part because the Department arbitrarily and capriciously considered updated, corrected 2008 data showing need existed for additional hospice agencies in King County when deciding to settle the federal case; (3) even though the HLJ's "Final Order" expressly found all four CN criteria were met after considering written evidence and argument (*see* AR 1722; CP 972), the HLJ's alleged failure to make such a finding following a full hearing on the merits was arbitrary and capricious, and contrary to law; and (4) the HLJ's "Final Order" should be reversed and remanded with instructions that the HLJ must conduct a full hearing on the merits, in addition to considering the intervening competitors'

written evidence and argument, and the HLJ has no discretion on remand to consider the updated, corrected 2008 data showing need exists. CP 973-74.

Odyssey timely appealed the trial court's six Conclusions of Law and Judgment. CP 977-78. The Department joins in Odyssey's appeal of the trial court's rulings.

V. ARGUMENT

A. Standard of Review

The intervening competitors challenge the agency decision to settle Odyssey's cases. "The standard of review in CN cases is that the agency decision is presumed correct and that the challengers have the burden of overcoming that presumption." *Overlake Hosp. Assn.*, ___ Wn.2d at ___, 239 P.3d at 1098. Courts are to "accord substantial deference to the agency's interpretation of law in matters involving the agency's special knowledge and expertise." *Id.* Challengers must show the agency decision was arbitrary and capricious, or contrary to law. *Id.*

The scope of review under the arbitrary and capricious standard "is very narrow," "highly deferential" to the agency and the party challenging an agency decision carries "a heavy burden." *Alpha Kappa Lambda Fraternity v. Washington St. Univ.*, 152 Wn. App. 401, 418, 422, 216 P.3d 451 (2009). "An agency's decision is arbitrary and capricious if the

decision is the result of willful and unreasoning disregard of the facts and circumstances.” *Overlake Hosp. Assn.*, ___ Wn.2d at ___, 239 P.3d at 1098. “Where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous.” *Washington Independent Telephone Ass’n v. Washington Utilities and Transportation Comm’n*, 148 Wn.2d 887, 904, 64 P.3d 606 (2003).

Here, the intervening competitors claim the HLJ’s ruling approving the settlement of the adjudicative proceeding was arbitrary and capricious, and contrary to RCW 70.38.115(10)(c). There was room for two opinions on whether the settlement of the adjudicative proceeding should have been approved, but after due consideration of the Department’s, Odyssey’s and the intervening competitors’ written evidence and arguments, the HLJ decided to approve the settlement as he was authorized to do by RCW 70.38.115(10)(c). The HLJ did not willfully and unreasonably disregard the intervening competitors’ arguments; the HLJ merely disagreed. Therefore, the HLJ’s decision approving the settlement was not arbitrary and capricious, nor contrary to RCW 70.38.115(10)(c). The trial court erred by concluding otherwise.

B. RCW 70.38.115(10)(c) Permits Settlement of Adjudicative Proceedings After Consideration of Written Evidence and Argument Opposing a Proposed Settlement. The Trial Court Erred by Construing the Statute as Prohibiting Settlement and Requiring a Full Adjudicative Hearing in Addition to Consideration of Written Evidence and Argument Opposing a Proposed Settlement.

RCW 70.38.115(10)(c) plainly authorizes pre-trial settlements “prior to the conclusion of the adjudicative proceeding” so long as competitors are given prior notice and an opportunity to submit written evidence and argument opposing a proposed settlement. The trial court erred by construing the plain language of the statute as precluding settlement and requiring that a full adjudicative proceeding must occur, in addition to opportunities to present written evidence and argument opposing a settlement.

Without expressly finding RCW 70.38.115(10)(c) is ambiguous, the trial court erroneously construed the statute as follows:

RCW 70.38.115(10)(c) authorizes the Department to settle with an applicant prior to the conclusion of the adjudicative proceeding. However, it is clear that the intent of the Legislature in enacting this provision was not to allow a “settlement” to circumvent established evaluation procedures or to modify a decision of the Department without an adjudicative hearing, especially if the primary settlement arose from an entirely separate lawsuit and proceeding.

CP 973 (emphasis added). Where this alleged intent was gleaned is unexplained.

In granting settlement authority, the Legislature did not limit the authority the Department has, as a governmental licensing agency, to modify an initial decision denying a license in the course of settling an applicant's adjudicative proceeding challenging the denial of a license. There is no language in RCW 70.38.115(10)(c) limiting the circumstances in which the Department may settle adjudicative proceedings initiated by CN applicants whose applications are denied. RCW 70.38.115(10)(c) gives the Department broad authority "to settle with the applicant prior to the conclusion of the adjudicative proceeding," with the only condition being that intervening competitors must receive prior notice and opportunity to comment on a proposed settlement. The trial court erred by construing an unambiguous statute to judicially insert prohibitions and limitations on the Department's broad authority to settle adjudicative proceedings brought by CN applicants.

1. RCW 70.38.115(10)(c) Is Not Ambiguous. The Trial Court Erred by Failing to Give Effect to the Statute's Plain Language Broadly Authorizing Settlements Prior to the Conclusion of Adjudicative Proceedings after Consideration of Comments Opposing the Settlement.

Under the rules of statutory interpretation, if the meaning of a statute is plain and unambiguous, courts are to give effect to that plain meaning and should not construe an unambiguous statute. *Overlake Hosp. Assn.*, ___ Wn.2d at ___, 239 P.3d at 1099. An ambiguity exists if there is

more than one reasonable interpretation of the statute. *Id.*

RCW 70.38.115(10)(c) unambiguously gives the Department authority to settle adjudicative proceedings “prior to the conclusion of the adjudicative proceeding” Plainly, the Legislature intended to give the Department broad authority to settle CN adjudicative proceedings before a full evidentiary hearing on the merits is conducted. The only limitation the Legislature imposed is that intervening competitors must receive advance notice and opportunity to comment on a proposed settlement. An opportunity to comment is the process the Legislature deemed intervening competitors were due when a settlement of a CN applicant’s adjudicative proceeding is proposed; not a right to thwart settlement by forcing the parties to go through a full adjudicative proceeding when intervenors dislike the settlement. The Legislature did not intend to make the Department’s licensing decisions subservient to existing licensees’ demands.

The trial court did not suggest the opportunity to comment on proposed settlements provided in RCW 70.38.115(10)(c) is an unconstitutional deprivation of the intervening competitors’ due process rights. Instead, the trial court’s ruling overturning the settlements and requiring a full adjudicative hearing was based solely on the trial court’s

statutory construction of RCW 70.38.115(10)(c).⁴ See CP 973.

According to the trial court, the Legislature's intent when enacting RCW 70.38.115(10)(c) was to require a full hearing on the merits with oral testimony, in addition to an opportunity to submit written evidence and argument, and to prohibit settlement of cases challenging the denial of a CN if the Department modifies its initial decision denying a CN. CP 973. The trial court erred by concluding RCW 70.38.115(10)(c) was intended by the Legislature to authorize the Department to settle cases challenging the denial of a CN only where the Department essentially is not settling at all - - *i.e.*, where the Department is not modifying its initial decision denying a CN.

The trial court's interpretation of RCW 70.38.115(10)(c) as prohibiting any settlement of CN litigation that results in changing the

⁴ One of the intervening competitors argued in a footnote in one of their briefs to the trial court that it was denied procedural due process because it was not given an opportunity to comment before the proposed settlement became a final order. CP 743. However, there is no genuine dispute all intervening competitors were given prior notice and two opportunities to comment before the proposed settlement was approved by the HLJ pursuant to RCW 70.38.115(10)(c). AR 1104-29, 1179-1203, 1231-35, 1242-1306, 1377-1451. The intervening competitors received all the process they were due, and then some. They can not prove beyond a reasonable doubt that RCW 70.38.115(10)(c) or the HLJ's order approving the settlement are unconstitutional, nor did they cite any relevant authority supporting this footnoted argument. See CP 743. A court can resolve a case under CR 56 based solely on written evidence and argument without violating due process even though a full trial on the merits is circumvented. HLJs also have authority to resolve adjudicative proceedings on summary judgment or through "brief adjudicative proceedings" limited to written evidence and argument. RCW 34.05.437; RCW 34.05.482-494; WAC 246-10-403; WAC 246-10-501 through -503. Approval of settlements based on written evidence and argument, but without a full trial, similarly comports with due process.

Department's initial decision denying the CN is an unreasonable reading of an unambiguous statute. Almost by definition, any settlement of a proceeding challenging the denial of a CN application will modify the Department's initial decision denying the CN application. Similarly, a settlement in which the Department modifies a decision denying a CN does not "circumvent established evaluation procedures" (CP 973) because the Department still must determine whether all CN criteria have been met, even in a settlement.

The trial court incorrectly ruled the Legislature intended an applicant's appeal of a denied CN could not be settled "prior to the conclusion of the adjudicative proceeding" by modifying the denial decision. The plain language of RCW 70.38.115(10)(c) does not afford intervening competitors a right to a full hearing on the merits of a settled case, in addition to opportunities to submit written evidence and argument opposing a proposed settlement. The trial court's strained reading of RCW 70.38.115(10)(c) leads to the absurd result that no adjudicative proceeding challenging the denial of a CN application can be settled unless the Department and the applicant agree the application was properly denied, so no modification of the initial denial decision occurs.

Settlements typically involve modification of the parties' positions through compromise, not unconditional surrender to an opposing party's

position. A strained reading of RCW 70.38.115(10)(c) limiting the Department's authority to only settle cases where the Department does not modify the decision denying a CN would render meaningless and superfluous the Department's broad authority to settle litigation challenging the denial of a CN.

The trial court erred by not giving effect to the unambiguous language in RCW 70.38.115(10)(c) broadly permitting settlements of cases challenging the denial of a CN, without requiring a full trial on the merits. The Legislature intended that intervening competitors are only entitled to receive advance notice and opportunity to comment on proposed settlements, but did not intend to allow intervenors to force the parties to go through a full hearing on a case the parties desire to settle.⁵

As the HLJ correctly stated in his order limiting the intervening competitors to submitting written evidence and arguments regarding the proposed settlement, but not affording them a full adjudicative hearing on

⁵ In other administrative licensing contexts, existing licensees typically have no right to comment, let alone a right to a full adjudicative hearing, when a licensing agency issues a license as part of a settlement. See RCW 34.05.060. Similarly, in non-administrative contexts where settlements are subject to judicial review, an opportunity to comment on the reasonableness of a proposed settlement is all that is typically allowed; other interested parties are not allowed to force a full trial on the merits. See, e.g., *Chausee v. Maryland Casualty Co.*, 60 Wn. App. 504, 512, 803 P.2d 1339, review denied, 117 Wn.2d 1018 (1991) (settlements in multi-party tort cases); *Pickett v. Holland American Line-Westours, Inc.*, 145 Wn.2d 178, 188, 191-92, 35 P.3d 351 (2001) (class action settlements). See also *Besel v. Viking Ins. Co.*, 146 Wn.2d 730, 738-39, 49 P.3d 887 (2002) (applying *Chausee* factors); *Red Oaks Condominium Owners Assoc. v. Sundquist Holdings, Inc.*, 128 Wn. App.317, 322, 116 P.3d 404 (2005) (discussing *Chausee* with approval in a case involving an intervenor insurer, and citing other cases applying the *Chausee* factors).

the merits, “[t]he plain language of RCW 70.38.115(10)(c) requires nothing more.” AR 1001-02, 1008-09. This interpretation of the law is entitled to substantial deference. *Overlake Hosp. Assn.*, ___ Wn.2d at ___, 239 P.3d at 1098. Accordingly, the HLJ’s ruling approving the settlement should be affirmed. The trial court’s ruling undoing the settlement and misconstruing RCW 70.38.115(10)(c) as requiring a full hearing on the merits, in addition to two opportunities to submit written evidence and argument, should be reversed.

2. Even if RCW 70.38.115(10)(c) Is Deemed Ambiguous, the Rules of Statutory Construction Support Reading the Statute as Permitting the Department to Settle Adjudicative Proceedings by Issuing a CN after Considering Written Evidence and Argument Opposing a Proposed Settlement.

Even if the broad authority in RCW 70.38.115(10)(c) to settle cases “prior to the conclusion of the adjudicative proceeding” is deemed ambiguous, the trial court erred by construing the statute as precluding settlement whenever the Department decides to modify a decision denying a CN. If a statute is ambiguous, courts may resort to the rules of statutory construction, legislative history, and relevant case law to resolve the ambiguity. *Overlake Hosp. Assn.*, ___ Wn.2d at ___, 239 P.3d at 1099.

Under the rules of statutory construction, statutes should not be construed in a manner that is strained or leads to absurd results. *Id.*

Statutes should be read within the context of the statutory and regulatory scheme as a whole, not in isolation, so all the language used is given effect and no portion rendered meaningless or superfluous. *Id.*; *Davis v. Dept. of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999).

As discussed above, the trial court's strained reading of RCW 70.38.115(10)(c) limiting the Department's authority to only settle cases where the Department adheres to a decision denying a CN renders meaningless and superfluous the Department's statutory authority to settle litigation challenging the denial of a CN. This strained reading leads to the absurd result that an adjudicative proceeding challenging the denial of a CN can only be settled if the Department adheres to its decision denying the CN, which is no settlement at all. Thus, even if RCW 70.38.115(10)(c) is deemed ambiguous, the trial court's construction of the statute should be reversed.

Legislative history and relevant case law support the HLJ's interpretation of RCW 70.38.115(10)(c). Subsection (c) establishing the procedure for settling CN appeals was not haphazardly added to RCW 70.38.115(10). The Legislature amended RCW 70.38.115(10) to add subsections (b) and (c) as a direct result of the Washington Supreme Court's decision in *St. Joseph Hosp. v. Dept. of Health*, 125 Wn.2d. 733, 887 P. 2d 891 (1995).

The issue before the *St. Joseph* court was whether a competing health care provider had standing to contest a CN the Department issued to an applicant following a remand and settlement. Before the *St. Joseph* decision, RCW 70.38.115(10) did not include the three subsections that are contained in the statute today. RCW 70.38.115(10) merely stated that “[a]ny applicant denied a certificate of need or whose certificate of need has been suspended or revoked has the right to an adjudicative proceeding” and “[t]he proceeding is governed by chapter 34.05 RCW, the Administrative Procedure Act.” Laws of 1993 c 508 §6 (emphasis added). The *St. Joseph* court’s ruling, however, compelled the Legislature to amend RCW 70.38.115(10) to incorporate the standing rights of competitors in CN proceedings initiated by CN applicants.

The *St. Joseph* case involved a dialysis company, Medical Ambulatory Care, Inc. (“Care, Inc.”), which was denied an application for a kidney dialysis center following a public hearing and the Department’s review of the application. Care, Inc. requested an adjudicative proceeding to appeal the CN denial. The appeal was subsequently resolved by a stipulated remand and settlement that resulted in Care, Inc. being granted the CN. A competitor, St. Joseph Hospital (“St. Joseph”), asked for reconsideration, which the Department denied as untimely and inappropriate. St. Joseph appealed that decision to the superior court. The

Department moved to dismiss the appeal arguing St. Joseph lacked standing because chapter 70.38 RCW was not intended to allow competitors' interests to be considered in making CN decisions. *St. Joseph*, 125 Wn.2d at 736-38.

The *St. Joseph* court held competitors were within the statutory zone of interest to confer standing, but their standing to challenge the grant of a CN was limited. The court itemized St. Joseph's three claimed procedural errors as follows: (1) St. Joseph was not notified of Care, Inc.'s request for an adjudicative proceeding; (2) it was not notified of the stipulation remanding the application to the Department for further review; and (3) it was not afforded a hearing when its request for reconsideration was denied and the CN was issued to Care, Inc. *Id.* at 742. The court held: "Of these three alleged procedural problems, we find only the second violates the statutory procedures governing the issuance of a CN." *Id.* (emphasis added). Thus, the court rejected the third argument that competitors were entitled to an adjudicative proceeding when the Department denied their request for a hearing and granted the applicant a CN as part of a settlement. *Id.* at 742-44.

Instead of a right to an adjudicative proceeding, the *St. Joseph* court held competitors were only entitled to notice of the Department's modification of a decision denying a CN and "an opportunity for a public

hearing.” *Id.* at 742-43 (citing RCW 70.38.115(9)), and 744 (emphasis added). The case was remanded to afford the competitors notice and an opportunity to comment on the settlement at a public hearing pursuant to RCW 70.38.115(9) (the public hearing statute). *Id.* at 744.

The public hearing under RCW 70.38.115(9) ordered by the *St. Joseph* court is not equivalent to an adjudicative hearing on the merits. A CN public hearing is a non-judicial proceeding in which anyone may submit comments on a CN application during the Department’s review of the application. RCW 70.38.115(9); WAC 246-310-180. The public hearing is not an adjudicative proceeding with an HLJ, parties, witnesses, exhibits, and sworn testimony. *See id.*

Thus, in specifically holding that competitors were only entitled to a public hearing pursuant to RCW 70.38.115(9), the *St. Joseph* court recognized that while competitors were in the zone of interest, they were not entitled to an adjudicative proceeding to undo a settlement between the Department and a CN applicant. *St. Joseph*, 125 Wn.2d at 742-44. They were limited to notice and opportunity to submit written evidence and arguments opposing the proposed settlement akin to the opportunities opponents have to comment at the public hearing level of a CN application’s review. *Id.* The *St. Joseph* court squarely rejected the argument that competitors were entitled to a full adjudicative proceeding

on the merits, in addition to an opportunity to submit written evidence and arguments, if the Department desires to settle an applicant's challenge to the denial of a CN. *Id.* at 742.

Immediately following the Supreme Court's decision in *St. Joseph*, the 1995 Legislature made an addition to E2SHB 1908 (a nursing home bill) amending RCW 70.38.115(10) to conform to the *St. Joseph* decision limiting competitors' standing in CN matters. Laws of 1995, 1st sp.s. c 18 § 72. The amendments expanded the language of RCW 70.38.115(10), which previously only addressed an applicant's right to appeal a denied CN, and recodified that existing language into a new subsection (a). The Legislature then added subsection (b) establishing the standing requirements for competitors seeking to intervene in applicants' appeals of denied CNs. A final subsection (c), dealing solely with settlements of CN applicants' appeals, was added limiting competitors (who meet the standing criteria in subsection (b)) to notice and "an opportunity to comment in advance on the proposed settlement." RCW 70.38.115(10)(c). The limited standing to comment provided competitors under RCW 70.38.115(10)(c) is consistent with the limited "zone of interest" and correspondingly limited due process right recognized by the *St. Joseph* court.

When RCW 70.38.115(10)(c) is construed in conjunction with the

St. Joseph case that engendered the amendments to the statute, the Legislature’s intent to favor settlements by affording intervening competitors only a limited right to submit written evidence and argument on a proposed settlement, rather than a full adjudicative hearing on the merits, becomes clearer. *See also* RCW 34.05.060 (“informal settlement of matters that may make unnecessary more elaborate [adjudicative] proceedings . . . is strongly encouraged”).⁶

If there is an ambiguity in the statute, the ambiguity is resolved by resort to the rules of statutory construction discouraging absurd results and interpretations that render meaningless the statutory authority to settle. Further, any ambiguity is resolved by considering relevant case law and legislative history demonstrating the Legislature’s intent to limit intervening competitors to an opportunity to submit written evidence and argument opposing proposed settlements. Both the *St. Joseph* court and the Legislature rejected the argument that when the Department and an HLJ disagree with intervenors’ comments opposing settlement of a CN adjudicative proceeding, the intervenors are entitled to force a full

⁶ Like the Legislature, the courts also favor settlements. *E.g., Pickett*, 145 Wn.2d at 189-90 (“voluntary conciliation and settlement are the preferred means of dispute resolution;” it is neither the court’s “duty, nor place, to make sure that every party is content with the settlement. Indeed, this would contravene the very nature of consensual settlements.” A reviewing court is not “to reach any ultimate conclusions of the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements”).

adjudicative hearing on the merits of the case the parties desired to settle.

Again, the Department's interpretation of the statute and implementing regulation (WAC 246-310-610(4)(c)) are entitled to substantial deference. *Overlake Hosp. Assn.*, ___ Wn.2d at ___, 239 P.3d at 1098. The Department's interpretation is that "[t]he notice and opportunity to comment [on the Department's proposed settlement of the adjudicative proceeding] satisfied the Intervenors' due process rights." AR 1027 (citing the *St. Joseph* case). The HLJ, as the Department's final decision maker on CN applications, also interpreted RCW 70.38.115(10)(c) as limiting intervention to the submission of written evidence and argument regarding the settlement, not a full adjudicative hearing on the merits. AR 1001-02, 1008-09, 1721; *see also Davita*, 137 Wn. App. at 183 (stating "the HLJ is ... the agency's final decision maker on CON applications"). Therefore, even if RCW 70.38.115(10)(c) is deemed ambiguous, the HLJ's ruling approving the settlement following consideration of the intervening competitors' written evidence and arguments should be affirmed. The trial court's ruling undoing the settlement based on a misconstruction of RCW 70.38.115(10)(c) as requiring a full hearing in addition to an opportunity to comment should be reversed.

C. The Trial Court Erred by Reversing the Settlement of Odyssey’s Federal Court Lawsuit Because the Federal Court Case Was Not before the State Trial Court and, by Statute, Neither the HLJ Nor the Department Made the Decision to Settle the Federal Lawsuit for Damages and Equitable Relief.

The intervening competitors only sought judicial review of the HLJ’s ruling approving the settlement of the state adjudicative proceeding pursuant to RCW 70.38.115(10)(c). CP 7-8. The settlement of Odyssey’s federal civil rights lawsuit was not before the HLJ, nor the trial court on judicial review. *See id.* Nonetheless, the trial court ruled “[t]he Department’s decision to settle the Federal Lawsuit by granting Odyssey a CN in King County . . . was arbitrary and capricious.” CP 973.

The settlement of Odyssey’s federal claims was not the subject of judicial review under the APA because it was not before the HLJ. *See also* RCW 34.05.510(1) (judicial review under the APA does not extend to litigation involving claims for money damages). Thus, the trial court erred by extending its jurisdiction to include review and reversal in part of the federal court settlement, which was not properly before the trial court.

Putting aside issues of jurisdiction and comity arising from a state court overturning a settlement entered in federal court, the trial court also erred as matter of law by reversing the federal court settlement on the grounds the Department played a decisive role in the settlement of Odyssey’s 42 U.S.C. § 1983 claims for damages and equitable relief. The

applicable statute dealing with settlements of federal civil rights lawsuits for damages against state employees is RCW 4.92.150, not RCW 70.38.115(10)(c). RCW 4.92.150 provides that only “the attorney general, with the prior approval of the risk management division ... may compromise and settle” tort claims or claims brought pursuant to 42 U.S.C. § 1983 against state agencies or officials. The Department, like any client agency, does not have statutory authority to settle 42 U.S.C. § 1983 claims for damages; only the Attorney General’s office and the State Risk Management Division have that authority pursuant to RCW 4.92.150.

Odyssey’s federal lawsuit included claims for damages under 42 U.S.C. § 1983, as well as claims for declaratory and injunctive relief. *See, e.g.,* AR 1080. The settlement of the federal lawsuit included settlement of Odyssey’s § 1983 damages claim, with the State agreeing to pay Odyssey \$10,000, among other concessions. *See, e.g.,* AR 1091-92. Thus, pursuant to RCW 4.92.150, the decision to settle the federal lawsuit actually was made by the Attorney General’s office and the Risk Management Division, not the Department (although the Department undoubtedly was consulted).

The trial court erred as a matter of law by concluding the Department was the entity that decided to settle Odyssey’s federal lawsuit, and acted arbitrarily and capriciously in doing so. *See* CP 973. Adopting

the trial court's ruling would set a precedent that settlements of tort actions and federal civil rights actions against state employees pursuant to RCW 4.92.150 are subject to judicial review under the APA. Such precedent would conflict with RCW 4.92.150, 34.05.060 and 34.05.510(1), as well as public policies favoring non-judicial settlement of litigation (*see, e.g., Pickett v. Holland America Line-Westours, Inc.*, 145 Wn.2d 178, 189-90, 35 P.3d 351 (2001)). Thus, the trial court's ruling undoing the federal court settlement in part should be reversed as contrary to law.

D. The Trial Court Applied the Wrong Standard of Review and Was Incorrect in Concluding the Department and HLJ Improperly Considered Updated, Corrected 2008 Data Showing Need Existed for Additional Hospice Agencies in King County.

In reversing the federal court settlement in part, the trial court erroneously concluded it was arbitrary and capricious for the Department or the HLJ to consider evidence consisting of 2008 data showing need existed for additional hospice agencies in King County because "the record was closed" on Odyssey's 2006 application. CP 973. However, the correct standard of review for evidentiary rulings in CN cases is whether an abuse of discretion occurred, not whether the ruling was arbitrary and capricious. *Univ. of Wash. Med. Center v. Dept. of Health*, 164 Wn.2d 95, 104, 187 P.3d 243 (2008). The trial court erred by applying the wrong standard of review to an evidentiary ruling.

Applying the correct standard of review, the HLJ did not abuse his discretion by considering the 2008 data showing need existed. The HLJ expressly found need existed under WAC 246-310-210 (the need criterion) independent of the 2008 data. AR 1722; CP 972. Additionally, the HLJ ruled that “[i]n the exercise of discretion, the [CN] Program’s 2008 WAC 246-310-290 methodology – showing ‘need’ for an additional hospice agency in King County in 2009 – may be used in deciding that need exists for Odyssey’s proposed hospice in King County.” *Id.* (emphasis added).

The evidentiary standards that apply to adjudicative proceedings should not apply to the more deferential HLJ review of proposed settlements under RCW 70.38.115(10)(c), which is limited to considering intervening competitors’ written evidence and arguments opposing a proposed settlement. However, if the same evidentiary standards apply, the *Univ. of Wash. Med. Center* case is instructive. There, an intervening competitor challenged an HLJ’s evidentiary ruling in an adjudicative proceeding that barred admission of evidence that did not exist until after the CN public comment period ended. *Univ. of Wash. Med. Center*, 165 Wn.2d at 100-02. The court held “[i]t was within the sound discretion of the health law judge to admit, or not admit, evidence that came into existence after the close of the public comment period.” *Id.* at 104

(emphasis added).

The *Univ. of Wash. Med. Center* court reasoned that “[n]othing in the rules or the statutes specifically addresses the appropriate record before the health law judge. Instead, the law leaves that question to the department by rule or to the health law judge by rulings guided by the Rules of Evidence.” *Id.* at 103 (citing RCW 34.05.452 and 70.38.115). Further, “[t]he law gives considerable discretion to administrative law judges to determine the scope of admissible evidence.” *Id.* at 104. In light of this “considerable discretion,” the court held the HLJ had discretion to either admit, or not admit, later acquired evidence regarding need for an additional facility, and it was not an abuse of discretion to rule either way.

The *Univ. of Wash. Med. Center* court’s citation to the APA’s standard for admitting evidence in administrative cases, RCW 34.05.452, further supports this analysis. RCW 34.05.452 gives broad discretion to presiding officers to exclude evidence based on constitutional or statutory grounds, evidentiary privilege, or on the grounds the evidence is irrelevant, immaterial, or unduly repetitious. However, the general rule in adjudicative proceedings is “[e]vidence, including hearsay evidence, is admissible if in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs.” RCW 34.05.452(1). Here, reasonably

prudent people would rely on updated, corrected data demonstrating that past projections of future need turned out to be inaccurate, and that Odyssey's projections of future need in its CN application were accurate. Therefore, it was within the HLJ's discretion to admit the 2008 data.

The trial court erred by concluding the Department and the HLJ should have willfully disregarded updated, more accurate need projections showing current need existed when determining whether the settlement should be approved. Excluding such evidence would thwart the broad authority to settle under RCW 70.38.115(10)(c), improperly limit the discretion granted HLJs, circumvent the truth that the Department's prior projections of need were incorrect, and unfairly preclude Odyssey from presenting evidence showing its need projections were accurate. Parties to a settlement should be permitted to consider relevant information that may affect their exposure in the litigation being settled. Similarly, an HLJ reviewing the propriety of a settlement should be permitted to consider the same information the parties considered. The trial court erred by concluding otherwise.

At a minimum, even if this Court were to affirm the reversal and remand of the HLJ's decision approving the settlement, this Court should reverse the trial court's order limiting the evidence the HLJ may consider on remand. The trial court's remand order prohibits the HLJ from

exercising discretion to consider the 2008 data, and limits the HLJ's discretion to only considering "evidence available at the time the record was open." CP 974. This limit on the HLJ's discretion is reversible error because it could direct the outcome of any remand proceeding and is inconsistent with the *Univ. of Wash. Med. Center* court's holding. The HLJ should be accorded discretion "to admit, or not admit, evidence that came into existence after the close of the public comment period." *Univ. of Wash. Med. Center*, 164 Wn.2d at 104.

E. The Trial Court Erred in Reversing the Settlement on the Grounds the HLJ Did Not Find that Odyssey Had Met All Four of the Criteria for Issuance of a CN.

The trial court erroneously concluded the HLJ's approval of the settlement of the adjudicative proceeding "without an adjudication or finding that Odyssey had actually met all four of the CN criteria was similarly arbitrary and capricious and thus, error as a matter of law." CP 973. However, the HLJ actually did make a finding that "For reasons stated by the [CN] Program in its evaluation and settlement proposal ... Odyssey's hospice application for King County meets the requirements of WAC 246-310-210, 246-310-220, 246-310-230, and 246-310-240 [*i.e.*, all four of the CN criteria]." AR 1722; CP 972.

The Department's evaluation initially denied Odyssey's hospice application for King County only because the need criterion in WAC 246-

310-210 was not met. AR 23. Based solely on the finding of no need, the Department concluded the other three criteria were not met. AR 26, 30-31. After the Department concluded the need criterion actually was met based in part on corrected 2008 data, the Department determined the other three criteria also were met and explained this analysis in its request to the HLJ for approval of the settlement. AR 1021. After considering the intervening competitors' written evidence and arguments contending none of the four criteria were met, the HLJ found the reasons for approving Odyssey's CN as stated by the Department in its evaluation and request for approval of the settlement were sound, and similarly found all four CN criteria were met. AR 1722. Therefore, the trial court erred in reversing the HLJ's order approving the settlement based on the incorrect belief the HLJ had not made a finding that all four CN criteria were met.

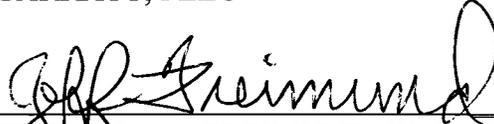
VI. CONCLUSION

Based on the foregoing reasons, the HLJ's decision approving the settlement between the Department and Odyssey should be affirmed. The trial court's ruling undoing the settlements of the federal case and Odyssey's adjudicative proceeding, and requiring a full adjudicative hearing on the merits of the settled case should be reversed. At a minimum, even if the trial court's reversal and remand of the settlements is upheld, the trial court's ruling prohibiting the HLJ from exercising

discretion to consider 2008 evidence showing need exists for another hospice agency in King County should be reversed.

RESPECTFULLY SUBMITTED this 10th day of February, 2011.

FREIMUND JACKSON TARDIF & BENEDICT
GARRATT, PLLC

A handwritten signature in black ink, appearing to read "Jeffrey A.O. Freimund", written over a horizontal line.

JEFFREY A.O. FREIMUND, WSBA No. 17384
Attorneys for Appellants Odyssey Healthcare
Operating B, LP and Odyssey Healthcare, Inc.

DECLARATION OF SERVICE

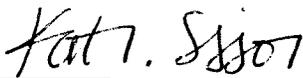
The undersigned declares under penalty of perjury, under the laws of the state of Washington, that the following is true and correct:

That on February 10th, 2011, I arranged for the service of the foregoing Brief of Appellant Odyssey Health Care, to all parties to this action as follows:

James S. Fitzgerald	<input checked="" type="checkbox"/>	U. S. Mail
Gregory A. McBroom	<input type="checkbox"/>	Hand Delivery
Livengood, Fitzgerald & Alskog	<input type="checkbox"/>	Facsimile
121 Third Avenue	<input checked="" type="checkbox"/>	E-Mail
P. O. Box 908	<input type="checkbox"/>	Legal Messenger
Kirkland, WA 98083-0908		
fitzgerald@lfa-law.com		
mcbroom@lfa-law.com		

Bruce W. Megard, Jr.	<input checked="" type="checkbox"/>	U. S. Mail
Brian W. Grimm	<input type="checkbox"/>	Hand Delivery
Bennett Bigelow & Leedom, P.S.	<input type="checkbox"/>	Facsimile
1700 Seventh Avenue, Suite 1900	<input checked="" type="checkbox"/>	E-Mail
Seattle, WA 98101-1397	<input type="checkbox"/>	Legal Messenger
bmegard@bblaw.com		
bgrimm@bblaw.com		

Richard A. McCartan	<input checked="" type="checkbox"/>	U. S. Mail
Assistant Attorney General	<input type="checkbox"/>	Hand Delivery
7141 Cleanwater Drive SW	<input type="checkbox"/>	Facsimile
P. O. Box 40109	<input checked="" type="checkbox"/>	E-Mail
Olympia, WA 98504-0109	<input type="checkbox"/>	Legal Messenger
richardm@atg.wa.gov		



 KATHRINE SISSON