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E. FREDERICK CARPENTER

No. ~~87084-5~~

094601-8

SUPREME COURT  
OF THE STATE OF WASHINGTON

WASHINGTON STATE HOSPITAL ASSOCIATION,

Appellant,

v.

STATE OF WASHINGTON, SUSAN N. DREYFUS, in her official  
capacity as SECRETARY OF SOCIAL & HEALTH SERVICES, DOUG  
PORTER, in his official capacity as DIRECTOR OF THE  
WASHINGTON STATE HEALTH CARE AUTHORITY, and JAMES L.  
MCINTIRE, in his official capacity as TREASURER OF THE STATE  
OF WASHINGTON,

Respondents.

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BRIEF OF APPELLANT

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original

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A. INTRODUCTION

In 2009, the Legislature adopted a budget for the 2009-11 biennium that drastically reduced funding for hospital services under the state's Medicaid program. Similar cuts in California and other states were enjoined after courts determined that they violated federal law. Washington hospitals, nearly all of which are members of the Washington State Hospital Association ("WSHA"), elected not to sue, however. Instead, they proposed the unusual step of taxing themselves and to use those revenues, together with the additional federal matching funds that the new tax would generate, to restore the rate cuts and, in some cases, to provide for rate enhancements for hospitals serving poor people.

The Legislature and the Executive embraced WSHA's proposal, which was enacted into law in 2010 as the Hospital Safety Net Act, RCW 74.60, ("the Act"). The Act imposes an assessment ("Safety Net tax"), which met the definition in federal law of a "health care related tax," to generate federal Medicaid matching funds in addition to what the State was receiving from existing appropriations.

The Act has multiple built-in protections which render it void if funds generated from the Act's Safety Net tax are not used for this exclusive purpose, *i.e.*, the Act is expressly conditioned on maintenance of the same rates for state Medicaid funding for hospitals that were in place

on July 1, 2009, and it expressly prohibits the use of Safety Net tax revenues to substitute for, or supplant, other funding for Medicaid hospital services.

One year after the Act's enactment, without amending the Act's purpose or the prohibition on other uses of Safety Net tax monies, the Legislature passed an operating budget for 2011-13 (Laws of 2011, 1<sup>st</sup> ex. sess., ch. 50), which reduced General Fund appropriations for hospital Medicaid services below the level necessary to continue the rates in effect on July 1, 2009. It also enacted HB 2069 (Laws of 2011, 1<sup>st</sup> ex. sess., ch. 35), which amended the Act to authorize use of \$150 million in Safety Net tax revenues to substitute for General Fund appropriations and reduced hospital rates to make up the shortfall. The undisputed impact of these measures is that Safety Net tax monies used to substitute for General Fund appropriations will not generate any additional federal matching funds.

WSHA filed this action against the State and its officers responsible for administering the Act, asserting that HB 2069 violates article VII, § 5 of the Washington Constitution by diverting Safety Net tax monies for other purposes. Alternatively, WSHA alleged that the effect of HB 2069 in combination with the 2011-13 operating budget renders the Act invalid pursuant to RCW 74.60.150(2), the so-called "poison pill" provision in the Act. The trial court granted summary judgment to the

State on both claims, holding that the assessment is not a “tax” for purpose of article VII, § 5, and the poison pill was not triggered because the 2011 legislation did not reduce hospital “rates” below 2009 levels.

This Court should determine that the assessment is a “tax” for purposes of article VII, § 5 and that, under the anti-diversionary policy of article VII, § 5, the State cannot divert the revenues generated by the Safety Net tax from the specified purpose of generating federal funds in addition to what would be produced by the existing level of General Fund appropriations. This is an important public policy, holding the Legislature to its word when it enacts a tax measure. Alternatively, this Court should hold that legislative action, which reduced the July 1, 2009 floor level of funding and utilized Safety Net tax monies instead of General Fund appropriations, triggered the “poison pill” provision of RCW 74.60.150(2), thereby invalidating the Act on a prospective basis.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred in entering its November 9, 2011 order granting the State’s partial summary judgment motion and denying WSHA’s on article VII, § 5.

2. The trial court erred in entering its February 8, 2012 order granting the State's summary judgment motion and denying WSHA's on the poison pill provisions of RCW 74.60.150.

(2) Issues Pertaining to the Assignments of Error

1. Did the trial court err in concluding that article VII, § 5 of the Washington Constitution, which prevents the diversion of tax revenues to purposes other than those established by the Legislature, does not apply because the Safety Net tax is a fee rather than a tax? (Assignments of Error Numbers 1, 2)

2. Did the trial court err in concluding that the poison pill provision of RCW 74.60.150(2) is inapplicable although it is clear the Legislature's enactment of HB 2069 and the diversion of \$150 million from the Safety Net fund to the General Fund resulted in a supplanting or substitution of Safety Net tax revenues? (Assignments of Error Numbers 1, 2)

3. Did the trial court err in concluding that WSHA's claims were not ripe where HB 2069 and the 2011-13 operating budget were effective as to the collection and expenditure of Act assessment revenue even though federal authorities had not yet approved the State's proposed reductions in hospital rates? (Assignments of Error Numbers 1, 2)

C. STATEMENT OF THE CASE

(1) The Medicaid Program

Title XIX of the Social Security Act, 42 U.S.C. §§ 1396a, *et seq.*, commonly known as Medicaid, establishes a joint federal-state program to provide health care coverage to persons who meet specified eligibility requirements, most often low-income status. If a state wishes to participate in Medicaid and thereby receive federal funds, it must receive federal approval for its Title XIX plan and agree to comply with all federal statutes and regulations governing the program. 42 U.S.C. § 1396(b-d); 42 C.F.R. § 430.10; *Harris v. McRae*, 448 U.S. 297, 301, 100 S. Ct. 2671, 65 L.Ed.2d 784, *r'hrq denied*, 448 U.S. 917 (1980); *Pottgieser v. Kizer*, 906 F.2d 1319, 1321-22 (9th Cir. 1990). The federal government administers Medicaid through the Centers for Medicare and Medicaid Services (“CMS”). 42 C.F.R. § 400.200.<sup>1</sup>

Washington’s Medicaid system covers approximately 1.25 million individuals, or about 18% of the state’s population. CP 65. This number has grown from 860,000 individuals in 2008. CP 17. Approximately 54% of those covered are children. *Id.*

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<sup>1</sup> Until July 1, 2011, Washington’s Medicaid program was managed by the Department of Social and Health Services (“DSHS”), at which point the Health Care Authority (“HCA”) became the responsible agency. RCW 74.04.050; Laws of 2011, ch. 15, § 64. Although the 2011 legislation shifting responsibility for the state’s Medicaid system to the HCA is otherwise comprehensive, it did not amend the Act or otherwise expressly transfer responsibility for its administration from DSHS to HCA. Accordingly, the Secretary of the Department of Social & Health Services is named as a party.

The federal government's financial support for Medicaid is referred to as federal financial participation ("FFP"), or federal match. 42 U.S.C. § 1396(a). In Washington, federal match generally amounts to about 50 percent of Medicaid expenses, but was temporarily increased to 60.2 percent under the American Recovery and Reinvestment Act of 2009. ARRA, Pub. L. No. 111-5, § 5001 (2009); 74 Fed. Reg. 18235, 18237 (April 21, 2009).

States generally have discretion as to how to pay their share of Medicaid costs, so long as public funds are utilized. 42 U.S.C. §1396b(w). Before the Act became law, Washington paid its share of Medicaid expenses primarily from tax monies appropriated to the state General Fund. Federal law also allows states to pay their share of Medicaid expenses by use of taxes of "health care related tax[es]," as defined by 42 U.S.C. § 1903(w)(3).

(2) The Act

The 2009-11 Washington State operating budget, adopted in 2009 (Laws of 2009, ch. 564) reduced total payments to hospitals for Medicaid services by roughly \$220 million, effective July 1, 2009. CP 18. Around the time that these cuts were being implemented, similar hospital rate reductions in other states had been enjoined by federal courts because they violated a provision of the federal Medicaid Act, 42 U.S.C. §

1396(a)(30)(A) (“Section 30(A)”)<sup>2</sup> Rate reductions for Washington pharmacies and nursing homes, mandated by the 2009-11 budget, also were enjoined based on failure to comply with Section 30(A).<sup>3</sup>

Section 30(A) requires that reimbursement rates must be “consistent with efficiency, economy, and quality of care” and “sufficient to enlist enough providers so that such care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area.” Under Ninth Circuit precedent, states are required to demonstrate compliance with the requirements based on reliable cost studies showing that their rates bear a reasonable relationship to the cost of delivering a service. *Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1496 (9<sup>th</sup> Cir. 1997), *cert. denied*, 522 U.S. 1044 (1998).<sup>4</sup>

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<sup>2</sup> *Independent Living Ctr. of Southern California v. Shewry*, 543 F.3d 1050 (9<sup>th</sup> Cir. 2008); *California Pharmacists Ass’n v. Maxwell-Jolly*, 563 F.3d 847 (9<sup>th</sup> Cir. 2009); *Managed Pharmacy Care v. Maxwell-Jolly*, 603 F.Supp.2d 1230 (C.D. Cal. 2009); *Affiliates, Inc. v. Armstrong*, 2009 WL 1197341 (D. Idaho 2009).

<sup>3</sup> *Washington State Pharmacy Ass’n v. Gregoire*, 2009 WL 1259632 (W.D. Wash. 2009); *Washington Health Care Ass’n v. Dreyfus*, 2009 WL 2432005 (W.D. Wash. 2009).

<sup>4</sup> As explained in a 2008 report by the Congressional Budget Office, the requirement to cover costs is not often met, in that Medicaid rates are generally based on federal Medicare rates. Theoretically, Medicare rates are supposed to cover the anticipated costs an efficient provider will incur in delivering a service. Medicaid rates are significantly lower than Medicare, however. CP 19. In order to cover unreimbursed Medicaid costs, providers must shift the burden to private insured individuals through higher rates. Such cost-shifting is difficult to impossible for providers who serve a high percentage of Medicaid, Medicare and charity patients, however. *Id.*

Based on these events, the 2009 hospital rate cuts were very likely to be enjoined if challenged. CP 62, 79-90. Rather than sue, WSHA approached state leaders with a proposal for a provider tax to be used to reduce the state's level of non-compliance with Section 30(A) requirements. CP 19. Under WSHA's proposal, a qualified health care tax would be levied against hospitals to be used for the sole purpose of generating additional FFP sufficient to restore some of the 2009 payment reductions and to provide for enhanced hospital rates in the future. *See* RCW 74.60.005(2)(a) ("Washington hospitals, working with the department of social and health services, have proposed a hospital safety net assessment to generate additional state and federal funding for the medicaid program."). Before and during the 2010 legislative session, WSHA and its members worked with DSHS, the Governor and legislative leadership to develop a law that would reverse major components of the July 2009 budget cuts and also increase some Medicaid payments to hospitals above June 2009 levels. Their work eventually led to the passage of the Act.

The purpose of the Act is set forth in its preamble; to provide for an assessment, "which will be used solely to augment funding from all other sources and, thereby, obtain additional funds to restore recent reductions and to support additional payments to hospitals for Medicaid

services.” RCW 74.60.005(1).<sup>5</sup> To this end, the Act further provides that “funds generated by the assessment shall be used solely to augment all other funding sources and not as a substitute for any other funds.” RCW 74.60.005(2)(b). At the bill signing ceremony in 2010, Governor Gregoire read from a letter sent to her by the leadership of the House and Senate, urging approval of the Act and stating, “This bill provides a creative way to avoid what would be devastating cuts to our hospitals, which serve as a key component of our health care safety net.” CP 20.

Implementation and continuation of the Act are conditioned on “federal approval for receipt of additional federal financial participation and continuation of other funding sufficient to maintain hospital inpatient and outpatient reimbursement rates ... at least at the levels in effect on July 1, 2009.” RCW 74.06.005(3); RCW 74.60.150. In other words, in order for the Act to be effective, two things had to happen: (1) the federal government had to approve the Safety Net tax in the Act as a “health care related tax” under 42 U.S.C. § 1903(w)(3), which would generate federal match; and (2) the State had to continue funding at the level provided for in the 2009-11 operating budget. In this way, Safety Net tax revenues

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<sup>5</sup> This purpose was restated in the fiscal note accompanying the Act, which explained that the Act had *no* “fiscal impact” for the state because it “creates the hospital safety net assessment that allows the state to generate additional federal financial participation for the Medicaid program and sustain a marginal ‘safety net’ increase in rates for hospitals that participate in the State Medicaid programs.” CP 100.

would be used solely to generate funding in addition to what the 2009-2011 budgeted level of state funding would produce.

In 2010, when the Act was passed, increased Medicaid enrollment and costs left the State short of money to maintain the July 1, 2009 floor level of hospital payments. In order to makeup that shortfall without increasing General Fund appropriations, RCW 74.60.020(3)(e) authorized the use of \$49.3 million per biennium in Safety Net tax monies in lieu of increased General Fund appropriations. The Act also contemplated that, if the federal government continued the enhanced federal match under the American Recovery and Reinvestment Act, the State was authorized to use an additional \$17.5 million of Safety Net tax revenues during the 2009-11 biennium to obtain the enhanced level of federal match. RCW 74.60.020(3)(e). But, the Act also specified that, in order for those revenues to be accessed, other state expenditures for Medicaid hospital services had to remain at July 2009 levels. RCW 74.60.005(3)(d) (assessment conditioned on “continuation of other funding sufficient to maintain hospital ... rates at least at the levels in effect on July 1, 2009.”).

Under the Act as originally passed, all funds generated by the assessment were to be used in combination with federal matching funds solely to: (a) restore the July 1, 2009 4% across-the-board cut in hospital

rates for Medicaid patients required under the 2009-11 budget;<sup>6</sup> (b) increase hospital rates for Medicaid patients by specified percentages effective February 10, 2010;<sup>7</sup> and provide for additional payments to critical access and small rural disproportionate share hospitals.<sup>8</sup> Together, these uses of revenues served the purpose of the Act to “support additional payments to hospitals for medicaid services.” RCW 74.60.005(1).

In order to insure that revenues were not diverted for other purposes, the Act further requires that all monies collected from hospitals be deposited into a dedicated fund maintained by the state treasurer. RCW 74.60.020(1) (“Moneys in the fund, including interest earned, shall not be used or disbursed for any purposes other than those specified in this chapter.”). And, as a final guarantee against abuse, the Act is rendered prospectively invalid by RCW 74.60.150(2)(d)-(e) and RCW 74.60.900, if “[o]ther funding available for the Medicaid program is not sufficient to

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<sup>6</sup> RCW 74.60.080; RCW 74.60.120(2).

<sup>7</sup> RCW 74.60.090; RCW 74.60.120(3). Notably, a March 2011 study commissioned by the state in anticipation of hospitals rate reductions concluded that, on the average, 2011 Medicaid rates (after implementation of the Act) only cover about 92% of hospital costs for inpatient care and 66% of outpatient care cost. The study further indicated 50% of studied hospitals were being paid less than 90% of their inpatient costs while 86% of studied hospitals were recovering less than 90% of their outpatient costs. CP 21.

<sup>8</sup> RCW 74.60.100; RCW 74.60.110. Critical access hospitals are those located in rural communities, more than 35 driving miles from any other hospital, having no more than 25 beds. RCW 74.09.5225. Small rural disproportionate share hospitals are those with fewer than 75 beds, located in communities with fewer than 17,806 population, that serve a “disproportionate share” of Medicaid patients. WAC 388-50-5200.

maintain Medicaid inpatient and outpatient reimbursement rates at the levels” specified in the Act, or if “[t]he fund is used as a substitute for or to supplant other funds, except as authorized by RCW 74.60.020(3)(e).”

According to its fiscal note, over the life of the Act,<sup>9</sup> payments by hospitals would generate \$683 million in additional state funding, including approximately \$420 million during the period from July 2011 to June 2013. CP 106. With the federal matching funds, the additional payments to hospitals would total approximately \$1.25 billion over the 4-year life of the Act, including approximately \$725 million from July 2011 to June 2013. *Id.*

(3) The 2011 Operating Budget and Amendments to the Act

The 2011-13 operating budget reduced General Fund appropriations for Medicaid hospital services by \$110.5 million as compared to 2009-11 levels and, with the corresponding loss of federal matching funds, will result in a \$221 million total reduction in funding for hospital services. CP 57, 66. As a result, the amount appropriated to the General Fund is not sufficient to maintain Medicaid inpatient and outpatient hospital rates at July 2009 levels. *Id.* The Legislature passed HB 2069 in order to patch this hole.

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<sup>9</sup> The Act expires on July 1, 2013. RCW 74.60.901.

HB 2069 (1) authorizes the use of \$110.5 million from the Safety Net fund to be used as a substitute for the reduced General Fund appropriation; (2) authorizes use of an additional \$40 million in Safety Net revenues, representing the balance in the Safety Net fund, as a substitute for General Fund appropriations, thereby freeing up those monies for other uses; and (3) because those Safety Net funds will no longer be able to generate the additional federal matching monies necessary to support the rates originally specified by the Act, reduced the rates specified in RCW 74.60.090 by about nine percent for most hospitals, effective July 1, 2011. CP 38-42, 57, 66.

What this means for the Medicaid system, and hospitals in particular, is that the Safety Net tax is no longer being used solely to generate “additional payments” for hospital services. Because \$110.5 million in Safety Net tax revenues will be used as a substitute for reduced General Fund appropriations, no *additional* federal matching funds will be generated by those monies. Similarly, because the \$40 million balance in the Safety Net account will be used in lieu of reduced appropriations to the General Fund, those “surplus” funds also will not generate any *additional* federal matching funds. CP 57-59. *See* Appendix.<sup>10</sup>

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<sup>10</sup> Because the diversion of Safety Net tax monies requires reduction in payment rates, under HB 2069, hospitals as a whole will receive only about 91 cents in

Consequently, while the Act continues to require that the Safety Net tax revenues must be used solely to generate additional federal funds for hospital services for poor people and prohibits using Safety Net revenues to substitute for other funds, HB 2069 uses \$150 million to supplant previous General Fund appropriations. As a result, no additional federal funding will be generated by those Safety Net funds.

(4) Proceedings Below

WSHA commenced its present action in the King County Superior Court on July 18, 2011. CP 1-6. The case was assigned to the Honorable Teresa Doyle. WSHA moved for summary judgment on its article VII, § 5 argument, CP 14-55, and the State responded, seeking summary judgment as well. CP 131-54. The trial court denied WSHA's motion and granted the State's cross-motion on November 9, 2011. CP 252-56. The court determined that WSHA's action was not ripe, CP 253, but then it proceeded to rule on the merits that article VII, § 5 did not apply because the Safety Net tax was not a tax, but was rather a fee. *Id.*

WSHA then filed a motion for summary judgment on its poison pill statutory argument. CP 257-82. Again, the State responded, submitting a cross-motion for summary judgment. CP 283-305. The trial court granted the State's motion and denied WSHA's by an order entered

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reimbursement for every dollar in tax paid, whereas under the Act, they would have received about \$1.42 for every dollar paid in tax. CP 58-59. *See* Appendix.

on February 8, 2012. CP 329-32. The court again determined WSHA's action was not ripe, CP 330, but nevertheless proceeded to address the poison pill issue on the merits. CP 330-31. This timely appeal followed. CP 333-44.

D. SUMMARY OF ARGUMENT

HB 2069 violates the anti-diversionary policy of article VII, § 5 of the Washington Constitution because it utilizes Safety Net tax revenues to benefit the General Fund rather than to serve the Act's purpose articulated in RCW 74.60.005 – to maximize the capture of federal matching dollars to sustain hospital rates for hospitals serving poor people.

In the event the Court does not invalidate HB 2069 on constitutional grounds, then the Act is invalid because the reduction in funding from 2009-11 levels and the use of Safety Net fund monies to reduce or supplant General Fund appropriations triggers the poison pill provisions of RCW 74.60.150.

E. ARGUMENT

(1) Standard of Review on Summary Judgment

The trial court resolved all of the issues in this case on summary judgment. This Court reviews a summary judgment de novo. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Under CR 56(c), all facts and reasonable inferences from the facts are reviewed in a light

most favorable to WSHA as the nonmoving party. *Id.* Issues of statutory and constitutional interpretation are also reviewed de novo. *Sleasman v. City of Lacey*, 159 Wn.2d 639, 642, 647, 151 P.3d 990 (2007).

Below, the trial court applied the beyond a reasonable doubt test to the constitutional issue. But courts too often confuse the precise nature of that interpretive principle. It is *not* a burden of proof, as in the criminal context. Rather, as this Court explained in *Island County v. State*, 135 Wn.2d 141, 147, 955 P.2d 377 (1998), the standard is one of deference to a co-equal branch of government:

The “beyond a reasonable doubt” standard used when a statute is challenged as unconstitutional refers to the fact that one challenging a statute must, by argument and research, convince the court that there is no reasonable doubt that the statute violates the constitution. The reason for this high standard is based on our respect for the legislative branch of government as a co-equal branch of government, which, like the court, is sworn to uphold the constitution. We assume the Legislature considered the constitutionality of its enactments and afford some deference to that judgment.

That standard does not prevent this Court from exercising its prime constitutional role of declaring what our Constitution means and finding a statute wanting, as this Court did in *Island County, id.*, and in many other instances too numerous to recite.

(2) Diversion of Safety Net Revenues for Purposes Not Specified in the Act Violates Article VII, § 5 of the Washington Constitution<sup>11</sup>

Article VII, § 5 of the Washington Constitution provides, “No tax shall be levied except in pursuance of law; and every law imposing a tax shall state distinctly the object of same to which only it shall be applied.” By its plain text, article VII, § 5 imposes three core requirements: (1) taxes must be authorized by law (*Hillis Homes, Inc. v. Snohomish County*, 97 Wn.2d 804, 809, 650 P.2d 193 (1982)); (*Okeson v. City of Seattle*, 150 Wn.2d at 558; *Lane v. City of Seattle*, 164 Wn.2d 875, 881-84, 194 P.3d 977 (2008)); (2) the Legislature must specify the purpose for the enactment of a tax (*Okeson*, 150 Wn.2d at 556); and (3) tax revenues must not be expended for other purposes (*State ex rel. Latimer v. Henry*, 28 Wash. 38, 45-46, 68 P. 368 (1902)).

The first two of these requirements were met when the Act originally was passed in 2010. The law was entitled, “An Act relating to a hospital safety net assessment for increased hospital payments to improve health care access for the citizens of Washington.” Laws of 2010, 1<sup>st</sup> ex.

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<sup>11</sup> Although this Court ordinarily looks to avoid constitutional issues by first addressing statutory provisions, *Sleasman*, 159 Wn.2d at 647, this case presents a somewhat unusual situation. It is necessary to first interpret article VII, § 5 and its application in light of HB 2069 to uphold the Act. If the Court upholds HB 2069 from WSHA’s constitutional challenge, it is only then necessary to address the Act’s complete invalidation under RCW 74.60.150’s poison pill.

sess., ch. 30. The Act also specifies the precise purpose for which the tax was imposed; *i.e.*, “solely to augment funding from all other sources and thereby obtain additional funds to restore recent reductions and to support additional payments to hospitals for medicaid services” by “generat[ing] additional federal financial participation.” RCW 74.60.005(1)-(2).

However, the State appears to be obtuse to the *third criterion* of article VII, § 5. In its answer to the statement of grounds for direct review at 4, it continues to misunderstand the thrust of WSHA’s constitutional argument under article VII, § 5. *HB 2069 is unconstitutional because it diverts Safety Net tax revenues from the Act’s unambiguously stated purpose in RCW 74.60.005.* Notwithstanding the clear statement of purpose contained in the Act, and its equally clear prohibitions on diversion of funds, HB 2069 takes \$150 million from the Safety Net fund and uses that sum as a substitute for General Fund monies previously appropriated to pay for Medicaid hospital services. Those funds will be used as a substitute for General Fund monies and therefore cannot draw down additional federal matching funds, which is the sole intended purpose for the Safety Net tax. While it is not surprising that in these tough budget times the Legislature would seek revenue from every conceivable source, nevertheless, it may not casually disregard the anti-diversionary policy of article VII, § 5, as it has done here.

(a) The assessment is a tax

In order for article VII, § 5 to apply, the threshold question is whether the assessment under RCW 74.60 constitutes a “tax,” because this constitutional provision applies to taxes, but not fees. *State v. Sheppard*, 79 Wash. 328, 140 Pac. 332 (1914). The question of whether a revenue source is a fee or a tax is ultimately one for the courts. The trial court concluded the assessment was not a tax. CP 253.

The State contends in its answer to WSHA’s statement of grounds for direct review at 8 that the trial court properly “gave weight” to the Legislature’s description of the tax. This is a puzzling assertion because, although the trial court’s order recites that “the Legislature did not treat the Assessment as a tax,” CP 253, the only basis for this purported finding is a brief assertion to that effect in the State’s summary judgment brief. CP 145. If the State meant to imply that use of the word “assessment,” rather than “tax,” has significance in this context, a quick reference to the dictionary refutes that proposition.<sup>12</sup> And, if it meant to suggest that the absence of a two thirds majority vote in the Legislature means something, it is similarly mistaken.<sup>13</sup>

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<sup>12</sup> A “tax” is a synonym for an “assessment.” Webster’s Online Dictionary, available at <http://www.merriam-webster.com/dictionary/assessment>.

<sup>13</sup> The two-thirds majority requirement imposed by Initiative 960 in 2007 was repealed by the 2010 Legislature (c. 4, § 2, I. 2010) and re-imposed by Initiative 1053 in

In any event, the Legislature’s characterization of the Safety Net tax as an “assessment” does not insulate it from this Court’s scrutiny. This Court has historically rejected legislative efforts to recharacterize the nature of a tax. In the 1930s, the Court found a graduated personal net income tax to be unconstitutional. The Legislature reenacted the tax as a tax on the possession of income to try to convert what the Court held was a property tax subject to certain constitutional limits into an excise tax that was not so restricted. In *Jensen v. Henneford*, 185 Wash. 209, 217, 53 P.2d 607 (1936), this Court rejected that effort, stating:

But the legislative body cannot change the real nature and purpose of an act by giving it a different title or by declaring its nature and purpose to be otherwise, any more than a man can transform his character by changing his attire or assuming a different name. The Legislature may declare its intended purpose in an act, but it is for the courts to declare the nature and effect of the act. The character of a tax is determined by its incidents, not by its name.

Thus, it is for our courts to declare whether an exaction is a fee or a tax. Courts determine the character of the tax by its characteristics, not by its name. *Harbour Village Apartments v. City of Mukilteo*, 139 Wn.2d 604, 989 P.2d 542 (1999) (court declared city’s residential dwelling unit fee to be a property tax). As the Supreme Court stated in *Samis Land Co. v. City of Soap Lake*, 143 Wn.2d 798, 806, 23 P.2d 477 (2001): “Courts

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November, 2010 (RCW 43.135.034), after the Act was passed. HB 2069 did not trigger Initiative 1053 because it did not “increase[ ] state tax revenue deposited in any fund.” Rather, it redistributed tax revenues between funds.

must ... look beyond a charge's official designation and analyze its core nature by focusing on its purpose, design and function in the real world." The *Samis Land* court further observed: "There is ... an inherent danger that legislative bodies might circumvent constitutional constraints ... by levying charges that, while officially labeled 'regulatory fees,' in fact possess all the basis attributes of a tax." *Id.* at 805. How the Legislature characterizes a tax or a fee is not relevant.

Washington cases arising under state constitutional limits on taxes have differentiated between fees and taxes. Beginning in *Covell v. City of Seattle*, 127 Wn.2d 874, 879, 905 P.2d 324 (1995), this Court articulated a three-part test to distinguish a fee from a tax; that test looks: (1) to whether the purpose of the measure is to raise revenue or to regulate;<sup>14</sup> (2) whether the funds generated are dedicated to a regulatory purpose; and (3) if there is a direct relationship between the assessment and the service received burden created by the payor. There, this Court held that Seattle's residential street utility charge was a tax not a fee.

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<sup>14</sup> This first criterion initially appeared in *Hillis Homes, supra*, and was further illustrated in *San Telmo Assocs. v. City of Seattle*, 108 Wn.2d 20, 735 P.2d 673 (1983), where this Court struck down Seattle's requirement that owners of apartment buildings with low-income tenants must replace the low-income units or pay substantial amounts into a housing fund upon the conversion of the structures to condominiums or other uses. The *San Telmo* court held that low-income housing was a general responsibility of the community at large. The City was "shifting the public responsibility of providing such housing to a limited segment of the population," thus effectively imposing an unauthorized tax on the apartment owners. *Id.* at 24. The lesson of these cases is that when legislative bodies impose so-called "fees" to shift governmental costs for services that should be borne by the public at large (typically paid by taxes), those "fees" will be held to be what they really are: *taxes*.

This Court has adhered to the three-part test in subsequent decisions. *See Harbour Village Apartments, supra* (fee imposed on every dwelling leases or rented was tax); *Samis Land Co., supra* ("standby charge" for utilities imposed on vacant, unimproved land was property tax); *Okeson v. City of Seattle*, 150 Wn.2d 540, 78 P.3d 1279 (2003) (city shifted responsibility for street lights from its general fund to its utility and raised utility rates to handle added costs; Court held tax was imposed); *Arborwood Idaho LLC v. City of Kennewick*, 151 Wn.2d 359, 89 P.3d 217 (2004) (ambulance charge on every household and business was a tax); *Lane*, 164 Wn.2d 875 (city shifted responsibility for hydrants to city utility paid for by hydrant fees, but, after *Okeson*, paid for hydrants out of general fund and raised taxes on utility, forcing utility to increase rates; Court held city hydrant fee was a tax); *New Castle Investments v. City of LaCenter*, 98 Wn. App. 224, 989 P.2d 569 (1999), *review denied*, 140 Wn.2d 1019 (2000) (transportation impact fees imposed as a permit condition resemble taxes); *Carrillo v. City of Ocean Shores*, 122 Wn. App. 592, 94 P.3d 961 (2004) ("availability charge" for sewer/water service was a tax).<sup>15</sup>

Under this test, the assessment is a "tax." It is imposed for the purpose of providing additional funding for medical assistance to the needy, which the State had previously done exclusively through general

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<sup>15</sup> The State makes the claim in its answer to the statement of grounds for direct review at 9 that WSHA cannot cite a case in which Washington courts have invalidated a legislatively-enacted fee. These cases obviously belie that assertion. *The same principle* applies to legislatively-enacted fees whether at the state or local level.

tax revenues. In order to make sure that this purpose is served, the assessment is conditioned upon obtaining a determination that the funds it generates can be used to obtain federal match. RCW 74.60.150(1). In order for this purpose and condition to be accomplished, the Act was written to fit within the definition of a “health care related tax,” as defined by 42 U.S.C. § 1903(w)(3).<sup>16</sup> Federal regulations require that, in order to qualify for federal matching funds, such taxes must be “broad-based” and “uniformly imposed.” 42 C.F.R. § 433.68. Thus, the applicable

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<sup>16</sup> That statute provides:

In this subsection (except as provided in paragraph (6)), the term “health care related tax” means a tax (as defined in paragraph (7)(F)) that—

(i) is related to health care items or services, or to the provision of, the authority to provide, or payment for, such items or services, or

(ii) is not limited to such items or services but provides for treatment of individuals or entities that are providing or paying for such items or services that is different from the treatment provided to other individuals or entities.

In applying clause (i), a tax is considered to relate to health care items or services if at least 85 percent of the burden of such tax falls on health care providers.

(B) In this subsection, the term “broad-based health care related tax” means a health care related tax which is imposed with respect to a class of health care items or services (as described in paragraph (7)(A)) or with respect to providers of such items or services and which, except as provided in subparagraphs (D), (E), and (F)—

(i) is imposed at least with respect to all items or services in the class furnished by all non-Federal, nonpublic providers in the State (or, in the case of a tax imposed by a unit of local government, the area over which the unit has jurisdiction) or is imposed with respect to all non-Federal, nonpublic providers in the class; and

(ii) is imposed uniformly (in accordance with subparagraph (C)).

Federal Medicaid law is unambiguous. To qualify for federal Medicaid funds, the revenue-producing mechanism *must* be a *tax*, broad-based and uniform. *Id.*

Here, the State sought and obtained a determination that funds generated by the Act constitute a “health care related tax.” CP 225-26. In the two letters with CMS, DSHS Secretary Dreyfus herself *repeatedly* referred to the assessments as a tax. *Id.* See Appendix. The State fully understood the assessments *had to be a tax*, uniform and broad-based (unless waived), in order for the revenues derived from the assessments to qualify for the federal Medicaid dollar match. If the State now claims the assessments were not a tax, it could jeopardize its federal waiver.<sup>17</sup>

The Safety Net tax serves to raise revenue to provide public benefits in the form of medical assistance. It serves no regulatory purpose whatsoever, and there is (and can be) no relationship between the amount of the assessment and the burden produced by the paying hospital.<sup>18</sup> The amounts paid by various hospitals bear no relationship whatsoever to services they receive or burdens to which they contribute. In fact, facilities that represent the “problem” and “burden” on the community (i.e., those

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<sup>17</sup> It is utterly unconscionable that the State would risk the federal Medicaid dollars it has received because of the assessments since the enactment of RCW 79.60 in 2010 in order to gain an advantage in this litigation.

<sup>18</sup> Even where, as happened here, CMS grants a limited waiver of the uniformity and broad-based requirements, the tax still must be “generally redistributive.” 42 C.F.R. § 433.68. This requirement is meant to insure that the tax is not designed to return a fixed percentage of the amount paid by any particular taxpayer/healthcare provider.

with more low-income Medicaid patients) pay a much lower assessment; facilities that do not burden the system pay into a fund without receiving the proportionate benefits or services that are the hallmark of a legal “fee” mechanism in Washington.<sup>19</sup>

Finally, another important characteristic of fees was identified in *Covell*, a characteristic embodied in the third criterion. Fees are “akin to charges for services rendered,” and must be individually determined (based on services received or impacts created). Most critically, they must be *avoidable*. The inability of the payer to avoid a charge (by not purchasing a service or not creating impacts) suggests that the charge is actually a tax. *Covell*, 127 Wn.2d 884-58. Here, the Legislature imposed the Safety Net tax upon hospitals in a flat amount per day per non-Medicare patient. RCW 74.60.030. It is imposed on all hospitals except public hospitals. RCW 79.60.040. Monies are distributed without regard to how much an individual hospital paid in taxes. In sum, under the *Covell* test, the Act was intended to and does impose a “tax,” which is subject to article VII, § 5.

(b) Article VII, § 5 prohibits diversion of tax revenues for other purposes

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<sup>19</sup> The Act exempts publicly-owned hospitals from the Safety Net tax. RCW 74.60.040(1-2). The fact that governmental providers are exempt is a further indication that the assessment is a tax. Governmental entities are rarely exempt from user fees and burden offset charges, while they are routinely exempted from taxes. See *King County Fire Protection Dists. No. 16, No. 36 & No. 40 v. King County Housing Authority*, 123 Wn.2d 819, 872 P.2d 516 (1994) (upholding non-tax fire “benefit charges” against a housing authority). See also, Wash. Const. art. VII, § 1, grants a blanket property tax exemption for Washington governments.

The third criterion of article VII, § 5, which the trial court did not reach, is the essential issue here. Under *Sheehan v. Central Puget Sound Regional Transit Authority*, 155 Wn.2d 790, 804, 123 P.3d 88 (2005), “actions taken to divert taxes assessed for [the statutory] purposes into some wholly unrelated project or fund” are unconstitutional. In numerous cases, Washington courts have held that diversion of tax revenues to purposes other than those for which the tax was intended violates the Constitution. See, e.g., *Sheldon v. Purdy*, 17 Wash. 135, 49 Pac. 228 (1897) (statute requiring county treasurers to pay interest on bonds from revenues of a special tax dedicated to support of schools held unconstitutional); *State ex rel. Latimer*, 28 Wash. 38 (revenues from tax for general county purposes could not be applied to payment of assessment against school lands in a local assessment district). The constitutional provision is expressive of a general rule in municipal law forbidding the diversion of revenues to purposes other than those for which the revenue was originally earmarked. *Thompson v. Pierce County*, 113 Wash. 237, 193 Pac. 706 (1920); *Burbank Irr. Dist. No. 4 v. Douglass*, 143 Wash. 385, 255 Pac. 360 (1927) (reaffirming general rule).

In a number of Attorney General opinions,<sup>20</sup> that office has affirmed the viability of the general anti-diversionary rule for municipalities, as well as the anti-diversionary principles of article VII, § 5. *See, e.g.*, AGO 1951-53 No. 487, 1953 WL 45200 (county could not transfer funds from current expense fund to the road or river improvement funds to address flood emergency); AGO 1957-58 No. 51, 1957 WL 53942 (under constitution, no transfer of funds derived from tax levy for a specific purpose was possible); AGO 1957-58 No. 78, 1957 WL 53969 (county commissioners could not transfer funds from tuberculosis hospitalization fund to aid assessor to carry out property revaluation); AGO 1961 No. 59, 1961 WL 62893 (where school district voters approved levy for building purposes and district board desired to use funds from levy for general fund purposes, revote was required); AGO 1991 No. 7, 1991 WL 521702 (re-affirms anti-diversionary purpose of article VII, § 5, stating state school levy revenues generated for support of schools could not be used for property tax assistance payments).

Article VII, § 5's anti-diversionary policy finds expression in the law of Washington's sister states. For example, constitutional provisions

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<sup>20</sup> Though not binding on the courts, Attorney General's opinions are entitled to deference by the courts. *Seattle Bldg. & Constr. Trades Council v. Apprenticeship & Training Council*, 129 Wn.2d 787, 803, 920 P.2d 581 (1996), *cert. denied*, 520 U.S. 1210 (1997); *Belas v. Kiga*, 135 Wn.2d 913, 928, 959 P.2d 1037 (1998).

in Arizona (article 9, § 3), Kansas (article II, § 5), South Dakota (article II, § 8), and Wyoming (article 15, § 13), just to name a few, mirror the language of our own article VII, § 5. Cases from each state bar the diversion of revenues for other purposes. *See, e.g., Carr v. Frohmler*, 56 P.2d 644 (Ariz. 1936) (revenues collected for pension and burial expenses of old age pensioners could not be diverted to general fund); *Panhandle Eastern Pipe Line Co. v. Fadely*, 332 P.2d 568 (Kan. 1958) (diversion of funds from State Corporation Commission's natural gas conversion fund to general fund was void); *In re Opinion of the Judges*, 240 N.W. 600 (S.D. 1932) (money in sinking fund could not be diverted to making feed loans); *School Dist. No. 2 in Teton Cy. v. Jackson-Wilson High School Dist. in Teton Cy.*, 52 P.2d 673 (Wy. 1935) (constitution forbids transfer of funds to other school district).

In sum, the authorities referenced above demonstrate that article VII, § 5 of the Washington Constitution expresses a powerful anti-diversionary policy in connection with the power to tax. Bluntly stated, the framers did not trust the Legislature and other legislative bodies not to divert the revenues ostensibly raised for one purpose to another, just as the 2011 Legislature did here.

(c) HB 2069 violates the anti-diversionary policy of article VII, § 5

The Act, even as amended by HB 2069, is not a General Fund revenue measure. Rather, as the Act clearly expresses in multiple ways, revenues generated by the Safety Net tax on hospitals are to be used for only one purpose, and then only so long as the specified conditions are met. HB 2069 diverts \$150 million in Safety Net revenues to the benefit of the General Fund. Those Safety Net revenues are not available to capture added federal Medicaid dollars. In dollar terms, the use of \$150 million in Safety Net revenues in lieu of General Fund appropriations means that approximately \$151.5 million in additional federal matching funds will not be available to pay for hospital services for poor people. CP 57-59.

This shell game runs afoul of article VII, § 5 because the \$150 million in Safety Net monies will not be used to obtain additional federal financial participation to serve the statutorily specified purpose of “augment[ing] funding from all other sources and thereby obtain[ing] additional funds to restore recent reductions and to support additional payments to hospitals for medicaid services.” The use of Safety Net monies in this manner also violates statutory prescription “[t]hat funds generated by the assessment shall be used solely to augment all other funding sources and not as a substitute for any other funds.” RCW 74.60.005(1) and (3)(b). HB 2069 not only hinders the ability of hospitals

to serve Medicaid patients, it also violates the core anti-diversionary rationale of article VII, § 5.

(3) HB 2069 Invalidated the Act

(a) Statutory construction principles

In analyzing the Legislature's intent in enacting RCW 74.60.150, the trial court lost sight of this Court's clear articulation of statutory construction principles. The primary goal of statutory interpretation is to carry out legislative intent. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001). In Washington, this analysis begins by looking at the words of the statute. "If a statute is plain and unambiguous, its meaning must be primarily derived from the language itself." *Id.* Courts look to the statute as a whole, giving effect to all of its language. *Dot Foods, Inc. v. Wash. Dep't of Revenue*, 166 Wn.2d 912, 919, 215 P.3d 185 (2009). Courts must look to what the Legislature said in the statute and related statutes to determine if the Legislature's intent is plain. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). If the language of the statute is plain, that ends the courts' role. *Cerrillo v. Esparza*, 158 Wn.2d 194, 205-06, 142 P.3d 155 (2006).

If, however, the language of the statute is ambiguous, courts must then construe the statutory language. A statute is ambiguous if it is subject to two or more reasonable interpretations. *State v. McGee*, 122 Wn.2d

783, 864 P.2d 912 (1993). Merely because two interpretations of a statute are conceivable, that does not render a statute ambiguous. *Tesoro Refining & Marketing Co. v. State, Dep't of Revenue*, 164 Wn.2d 310, 318, 190 P.3d 28 (2008). The object of statutory construction is still how best to effectuate the Legislature's intent. *Dep't of Ecology*, 146 Wn.2d at 9-10, 11-12; *State ex rel. Royal v. Bd. of Yakima County Comm'rs*, 123 Wn.2d 451, 459, 869 P.2d 56 (1994). But courts do not read language into a statute even if they believe the Legislature *might* have intended it. *Kilian v. Atkinson*, 147 Wn.2d 16, 20, 50 P.3d 638 (2002). Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous. *Stone v. Chelan County Sheriff's Dep't*, 110 Wn.2d 806, 810, 756 P.2d 736 (1988); *Taylor v. City of Redmond*, 89 Wn.2d 315, 319, 571 P.2d 1388 (1977). "A statute must be read as a whole giving effect to all of the language used," and each provision must be harmonized with other provisions to "insure proper construction of every provision." *State v. Young*, 125 Wn.2d 688, 696, 888 P.2d 142 (1995) quoting *Addleman v. Bd. of Prison Terms & Paroles*, 107 Wn.2d 503, 509, 730 P.2d 1327 (1986).

In this case, the Legislature's intent in enacting RCW 74.60.150's poison pill provisions was plain. It did not want to allow diversion of the Safety Net tax revenues to purposes other than those articulated in RCW

74.60.005. This was also designed to assure supporters of the Act like WSHA that these revenues would remain committed to the Act's stated purposes.

(b) The poison pill provisions apply

Consistent with the clear legislative intent to employ the Safety Net revenues as a true safety net for hospital rates for poor patients,<sup>21</sup> maximizing the capture of federal Medicaid dollars, the Act evidences in multiple ways that the continued validity of the assessment is conditioned upon concrete and specific protections against substituting Safety Net revenues for other state appropriations, or otherwise redirecting such revenues.

The Act's poison pill provisions condition its continued validity on three things: (1) use of the funds solely to generate federal match. RCW 74.60.150(2)(c); (2) "continuation of other funding sufficient to maintain hospital inpatient and outpatient reimbursement rates ... at least at the levels in effect on July 1, 2009." RCW 74.60.005(3)(d); and (3) no use of Safety Net monies as a substitute for or to supplant other appropriations.

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<sup>21</sup> The Legislature's intent in adopting the Act is articulated with unusual thoroughness in RCW 74.60.005. It is intended to provide for an assessment, "which will be used solely to augment funding from all other sources and, thereby, obtain additional funds to restore recent reductions and to support additional payments to hospital for Medicaid services." RCW 74.60.005(1). To this end, the Act provides that "funds generated by the assessment shall be used solely to augment all other funding sources and not as a substitute for any other funds." RCW 74.60.005(2)(b).

RCW 74.60.150(2)(e). If these conditions are violated, the Act, “ceases to be imposed, and any moneys remaining in the fund shall be refunded to hospitals.” RCW 74.60.150(2). These provisions were not altered by HB 2069.

RCW 74.60.900(1) reinforces the impact of the Act’s poison pill provisions when it states:

The provisions of this chapter are not severable: If the conditions set forth in RCW 74.60.150(1) are not satisfied or if any of the circumstances set forth in RCW 74.60.150(2) should occur, this entire chapter shall have no effect from that point forward, except that if the payment under RCW 74.60.100, or the application thereof to any hospital or circumstances does not receive approval by the centers for medicare and medicaid services as described in RCW 74.60.150(1)(b) or is determined to be unconstitutional or otherwise invalid, the other provisions of this chapter or its application to hospitals or circumstances other than those to which it is held invalid shall not be affected thereby.

HB 2069 violated all of the conditions in RCW 74.60.150(2) by reducing appropriations for hospital funding below the level needed to support the prior biennium’s rates, while using Safety Net monies to substitute for or supplant General Fund appropriations. This prevented those monies from generating additional federal match. Specifically, the report of the Senate Ways & Means Committee, explained that the 2011-13 Medicaid budget was eight percent less than the amount needed “to maintain current service and payment policies through 2013.” CP 65.

WSHA's undisputed analysis of the 2009-11 and 2011-13 budgets shows that General Fund appropriations for Medicaid hospital payments were reduced by 9 percent—\$110.5 million—for 2011-13. CP 57, 66. And, there is no dispute that the Legislature used \$110.5 million in Safety Net monies to substitute for the reduced General Fund appropriations. As a result, no additional federal matching funds will be generated by these Safety Net dollars. CP 57-58, 66.

In addition, the 2011 legislation expropriated \$40 million in “surplus” Safety Net monies, thereby freeing up General Fund money for other uses. CP 66. As the Senate Ways & Means Committee succinctly explained, “A portion of the state's expenditures on hospitals that would otherwise be paid from the state general fund will instead be covered with funds available in the Hospital Safety Net Assessment Fund.” *Id.* Not only does this expropriation violate RCW 74.60.020(1)(a)-(b), which requires that surplus funds be used to reduce future assessments or returned to hospitals, but the State's plan to take the surplus at the conclusion of 2011-13 biennium, CP 300-01, means that the funds cannot be used to draw additional federal match to support enhanced rates under the Act.

The State articulated three purported reasons why the Legislature's actions in 2011 did not trigger the poison pill: (1) the Legislature did not

intend to “repeal” the Act, only to amend it; (2) the expropriation of Safety Net monies does not constitute substitution or supplantation because it is authorized under RCW 74.60.020(3)(e), as amended by HB 2069; and (3) there no evidence that the Legislature reduced the 2009 floor level of funding. CP 283-85. These arguments are meritless.

WSHA is not asking the Court to limit the Legislature’s authority to amend statutes. Here, although the Legislature might have amended the Act’s purpose or the conditions placed on its continued validity, it did not do so. Having left those provisions intact, there is no disconnect between legislative actions reducing the floor level of funding or using Safety Net funds as a substitute for other funds, and a declaration of invalidity under RCW 74.60.150. To the contrary, that is exactly how the poison pill was intended to work.

The State’s additional claim that RCW 74.60.150’s poison pill provision is not triggered because amended RCW 74.60.020(3)(e) authorizes the use of an additional \$150 million in lieu of General Fund appropriations also misses the mark. As noted *supra*, statutes must be interpreted as a whole and consistent with legislative intent. The State’s arguments fails to take account of the Act’s overriding purpose and limitation, which is that Safety Net monies must be used to draw federal

matching dollars in addition to what the 2009-11 floor level of funding would produce.

Before the 2011 budget cuts and amendments to the Act, this purpose was served because the \$49.3 million in Safety Net monies that RCW 74.60.020(3)(e) authorized to be used in lieu of General Fund appropriations<sup>22</sup> generated federal match that was in addition to what the 2009-11 General Fund appropriation produced, all of which would be used to support enhanced hospital rates for Medicaid patients under the Act.

But, when the 2011 Legislature substituted Safety Net monies for \$110.5 million in reduced General Fund appropriations, it cost the State—and WSHA’s members—federal matching funds that should have been used to pay for hospital care for poor people. Further, the expropriation of \$40 million in “surplus” monies at the time when the Act will expire frees up General Fund money for other purposes. This is precisely what the poison pill provision was intended to prevent.

Realizing that it has no good answer to these points, the State’s final argument is that there is no competent proof that the 2011 legislation actually reduced the level of funding for hospital rates below what is needed to support the July 1, 2009 rates. CP 297-98. But, as explained

---

<sup>22</sup> The Act also contemplated that, if the federal government continued enhanced FFP under the American Recovery and Reinvestment Act, the State was authorized to use \$17.5 million of Safety Net revenues during the 2009-11 biennium in order to obtain the enhanced level of federal match. *Id.*

above, there is uncontroverted proof that the Legislature did exactly that; it reduced total appropriations for Medicaid to a level nine percent below what was necessary to sustain current service levels, cut appropriations for hospitals by a little more than eight percent, and cut hospital rates by approximately nine percent.

Recognizing as much, the State offers a variation on its theme, asserting that the prohibition on reducing the floor level of funding is not triggered so long the combination of General Fund and Safety Net money is enough to maintain hospital rates at July 1, 2009 levels. CP 324-26. This construction of RCW 74.60.150(2)(d) cannot be harmonized with the condition imposed by RCW 74.60.005(3)(d); “It is the intent of legislature ... [t]o condition the assessment ... on continuation of other funding sufficient to maintain hospital ... rates ... at the levels in effect on July 1, 2009.” It would also serve to defeat the entire purpose of Act, by allowing the Legislature to reduce rates for hospitals serving needy patients to the inadequate—and legally vulnerable—levels in effect before the Act was passed while diverting all of the funds generated by the assessment to other purposes.

For these reasons, if HB 2069 is constitutional, it operated in combination with the 2011-13 operating budget to invalidate the Act on a prospective basis pursuant to RCW 74.60.150(2) and RCW 74.60.900(1).

(4) The Trial Court Erred in Concluding the Present Action Was Not Ripe

The trial court determined that WSHA's action was not ripe. CP 253, 341. Ripeness is a prudential doctrine by which courts choose not to resolve certain issues that are not fully ready for adjudication. *Nolette v. Christianson*, 115 Wn.2d 594, 598, 800 P.2d 359 (1990). Ordinarily, in the context of a declaratory judgment action, "a claim is ripe for judicial determination if the issues raised are primarily legal and do not require further factual development, and the challenged action is final." *Grandmaster Sheng-Yen Lu v. King County*, 110 Wn. App. 92, 98, 38 P.3d 1040 (2002) (citations omitted).

The State contended below that WSHA's claims were not ripe because CMS had not specifically approved the Medicaid rate cuts for Washington hospitals established in HB 2069 and the 2011-13 operating budget. In its answer to the State of Grounds for Direct Review at 4 n.4, the State now *concedes* that WSHA's claims are ripe because CMS approved the hospital rate reductions in HB 2069 on March 21, 2012. The trial court's orders were plainly in error on this point.

F. CONCLUSION

The actions of the 2011 Legislature in enacting HB 2069 and the 2011-13 operating budget violate article VII, § 5 of our Constitution. The

trial court's determination that the Safety Net assessments were a fee rather than a tax is plainly contrary to this Court's *Covell* decision and its progeny. The Safety Net tax revenues were diverted from the Legislature's specifically-stated purpose for them in 2010 in violation of the anti-diversionary policy of article VII, § 5. Alternatively, if HB 2069 is not unconstitutional, the trial court erred in neglecting to apply the poison pill provisions of RCW 74.60.150.

This Court should reverse the trial court's summary judgment orders with direction to the trial court to enter an injunction in favor of WSHA under article VII, § 5, barring the enforcement of HB 2069. Alternatively, the Court should direct the trial court to enter an order mandating the application of the poison pill provision of RCW 74.60.150.<sup>23</sup> Costs on appeal should be awarded to WSHA.

---

<sup>23</sup> The State makes the strange argument in its answer to the statement of grounds for direct review at 13-14 that WSHA did not "move" for an injunction or mandamus. It obviously confuses the relief sought by WSHA's complaint with the decision on summary judgment. WSHA sought an injunction in connection with its argument on the effect of HB 2069, and an injunction and mandamus on its poison pill contention in its complaint. CP 5, 6.

DATED this 7<sup>th</sup> day of May, 2012.

Respectfully submitted,



Philip A. Talmadge, WSBA #6973

Talmadge/Fitzpatrick

18010 Southcenter Parkway

Tukwila, WA 98188

(206) 574-6661

Michael F. Madden, WSBA #8747

Bennett Bigelow & Leedom, P.S.

1700 Seventh Avenue, Suite 1900

Seattle, WA 98101-1355

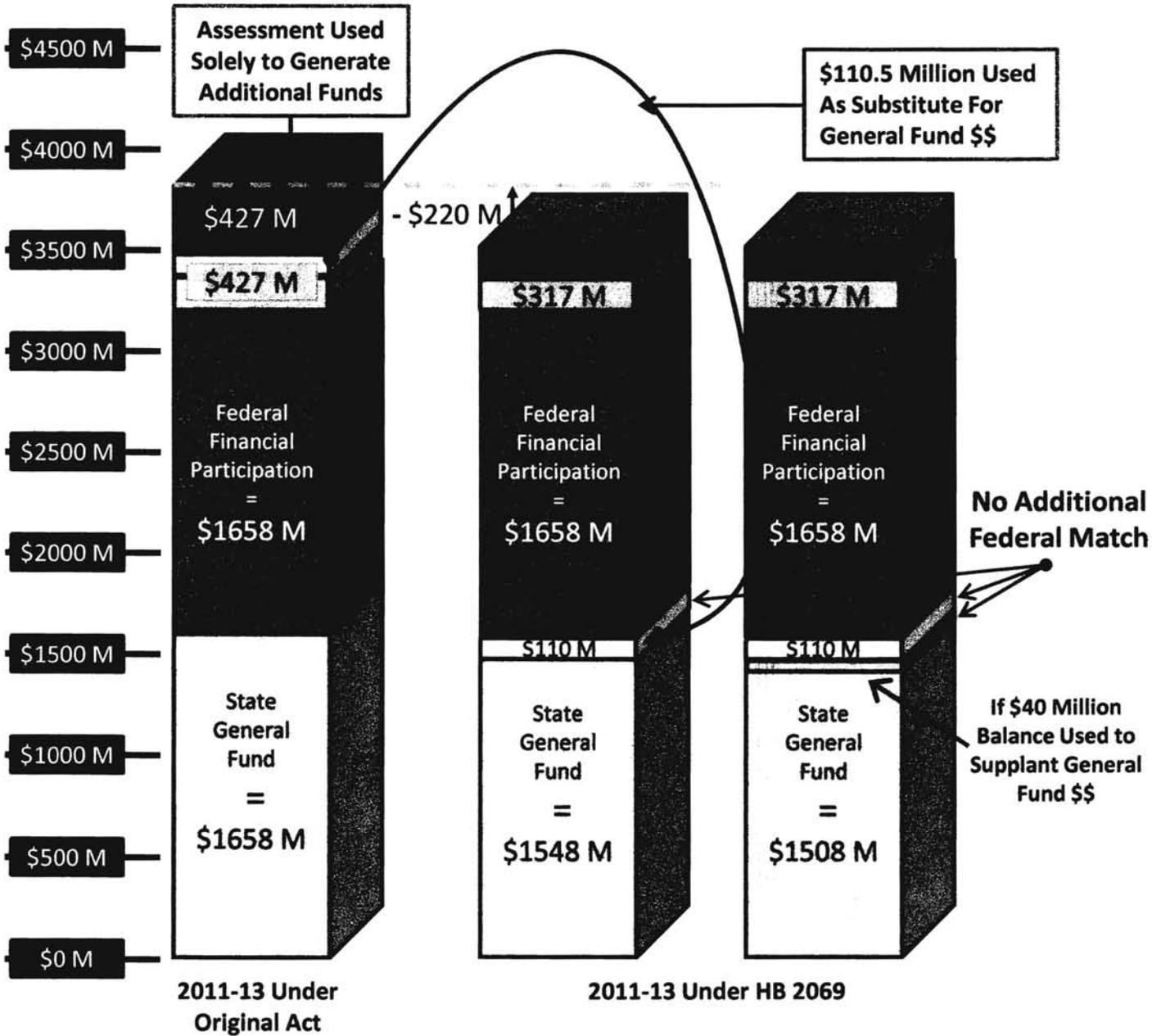
(206) 622-5511

Attorneys for Appellant

Washington State Hospital Association

# APPENDIX

A-1



\$1.42 Benefit per  
\$1.00 in Taxes Paid

\$.91 Benefit per  
\$1.00 in Taxes Paid

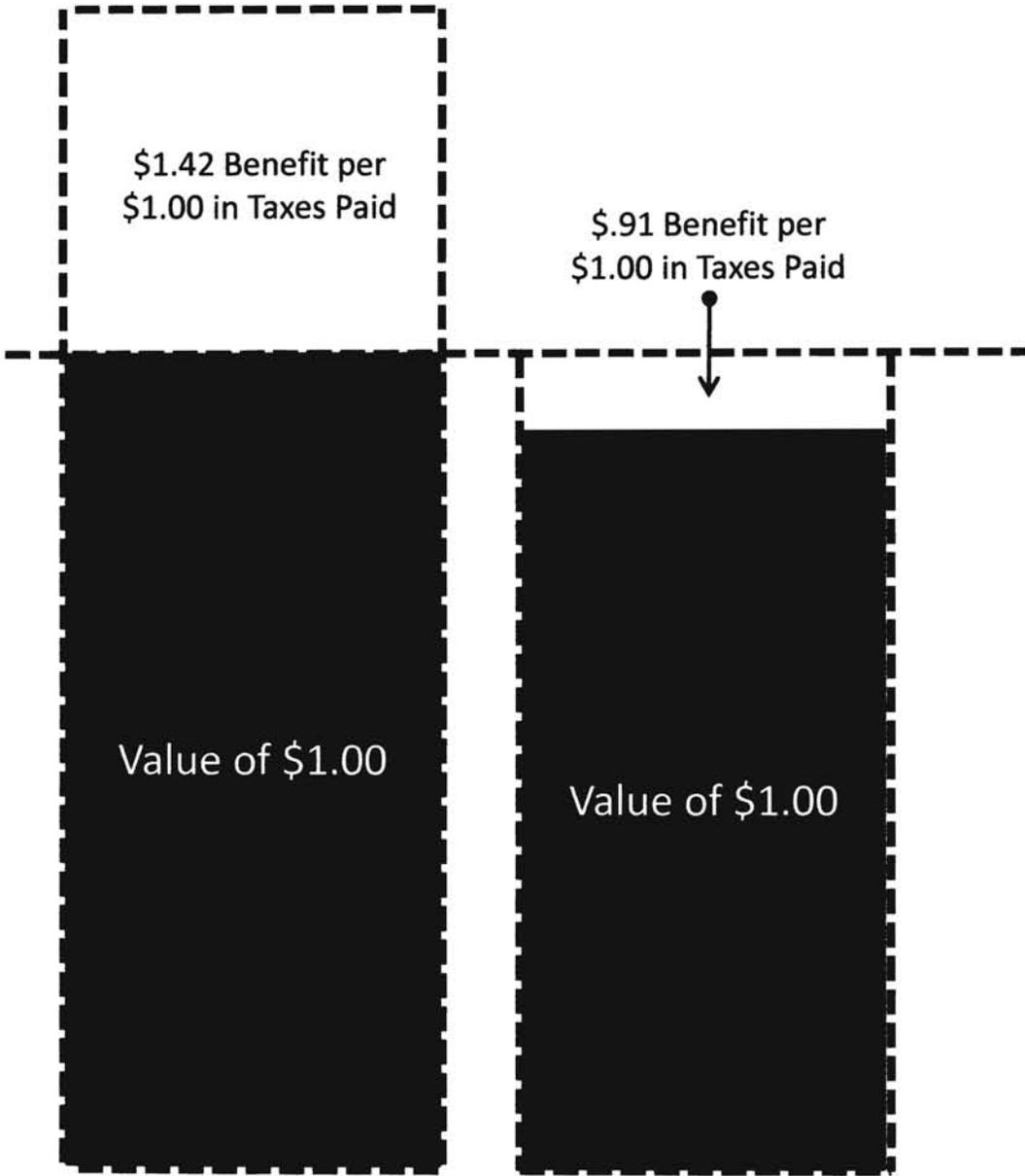
Value of \$1.00

Value of \$1.00

Assessment as  
Passed by 2010  
Legislature

HB 2069 as  
Passed by 2011  
Legislature

A-2



**FILED**  
KING COUNTY, WASHINGTON  
NOV 14 2011

DEPARTMENT OF  
JUDICIAL ADMINISTRATION

**FILED**  
KING COUNTY, WASHINGTON

NOV 14 2011

SUPERIOR COURT CLERK  
BY DAVID J. ROBERTS  
DEPUTY

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STATE OF WASHINGTON  
KING COUNTY SUPERIOR COURT

WASHINGTON STATE HOSPITAL  
ASSOCIATION,

Plaintiff/Petitioner,

v.

STATE OF WASHINGTON, et al.,

Defendants/Respondents.

NO. 11-2-24507-1 SEA

~~PROPOSED~~

ORDER DENYING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT AND GRANTING  
DEFENDANTS' CROSS-MOTION  
FOR SUMMARY JUDGMENT

THIS MATTER came before the undersigned Judge of the above-entitled Court upon the Plaintiff's Motion for Summary Judgment, filed on September 2, 2011 ("Motion") by the plaintiff/petitioner, the Washington State Hospital Association ("Association"), and upon the Cross-Motion for Summary Judgment filed on September 19, 2011 ("Cross-Motion") by the defendants/respondents, the State of Washington, et al. ("State").

On September 30, 2011, the Court heard oral argument of counsel for the Association and counsel for the State. The Court considered the arguments of counsel, the evidentiary record, and all the pleadings filed in this action, including the following:

1. The Motion (and all declarations, exhibits, and appendices);
2. The Cross-Motion (and all declarations, exhibits, and appendices); and
3. All of the replies and responses from the Association and the State with respect to the Motion and the Cross-Motion (and all declarations, exhibits, and appendices).

~~PROPOSED~~ ORDER DENYING PLAINTIFF'S  
MOTION FOR SUMMARY JUDGMENT AND  
GRANTING DEFENDANTS' CROSS-MOTION  
FOR SUMMARY JUDGMENT

1

ATTORNEY GENERAL OF WASHINGTON  
7141 Cleanwater Dr SW  
PO Box 40124  
Olympia, WA 98504-0124  
(360) 586-6565

1 Based on the arguments of counsel and the evidence presented, and being otherwise fully  
2 advised in the premises, the Court **denies** the Association's Motion and **grants** the State's  
3 Cross-Motion. The Court concludes as follows:

4 1. Under Rule 56, there is no genuine issue of material fact.

5 2. With respect to the Motion, the Association has failed to establish that it is  
6 entitled to judgment as a matter of law.

7 (a) The issues raised by the Association are not ripe for judicial review  
8 under the Uniform Declaratory Judgments Act, chapter 7.24 RCW, because the State will not  
9 implement the changes required by House Bill ("HB") 2069 until the federal government  
10 approves them.

11 ~~(b) The Association has not proven that it has standing to represent the~~  
12 ~~interests of all of its members, some of whom are not affected by HB 2069.~~

13 (b) The Assessment is a "fee," not a "tax." Therefore, the Association's  
14 argument regarding article VII, section 5 of the Washington Constitution fails as a matter of  
15 law. The Assessment is a fee because (i) the Legislature did not treat the Assessment as a tax  
16 in 2010 when it created the program or in 2011 when it amended the program, and the Court  
17 gives weight to the Legislature's judgment; ~~(ii) the Association itself testified to the~~  
18 ~~Legislature in 2010 that the Assessment is not a tax, and the underlying rationale remains~~  
19 ~~true in 2011, and (iii) the Assessment satisfies the three-factor test from the Washington~~  
20 ~~Supreme Court<sup>1</sup> for determining whether a government charge is a fee.~~

21 ~~(d) Even if the Assessment is a tax, the State prevails, because (i) Article~~  
22 ~~VII, section 5 applies only to certain types of taxes, and the Association has not shown that~~  
23 ~~the Assessment is a tax to which article VII applies; and (ii) even if article VII, section 5~~  
24

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26 <sup>1</sup> *Covell v. City of Seattle*, 127 Wn.2d 874, 879, 905 P.2d 324 (1995).

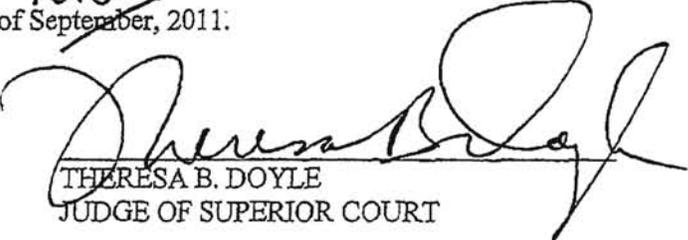
1 applies, the Legislature met its requirements because the "object" of the program was explicit  
2 in both the 2010 bill (HB 2956) and 2011 bill (HB 2069).

3 (e) In this facial challenge, the Association has not met its heavy burden of  
4 showing, beyond a reasonable doubt, that HB 2069 is unconstitutional.<sup>2</sup> The statutes must be  
5 construed as a whole, rather than piecemeal.<sup>3</sup> When considered in this proper manner, it is  
6 clear that the Legislature constructed an appropriate mechanism for securing additional  
7 federal Medicaid funding and increasing payment rates to hospitals.

8 3. With respect to the Cross-Motion, the State has established that it is entitled to  
9 judgment as a matter of law, for the reasons listed above.

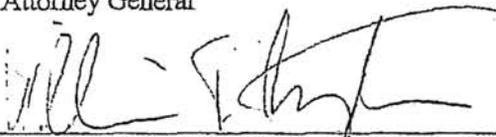
10 NOW, THEREFORE, IT IS HEREBY ORDERED that the Association's Motion is  
11 DENIED and the State's Cross-Motion is GRANTED.

12 DATED this 9 day of September, 2011.

13  
14   
15 THERESA B. DOYLE  
16 JUDGE OF SUPERIOR COURT

17 Presented by:

18 ROBERT M. MCKENNA  
19 Attorney General

20   
21 WILLIAM T. STEPHENS, WSBA No. 24254  
22 ANGELA COATS MCCARTHY, WSBA No. 35547  
23 Assistant Attorneys General  
24 Attorneys for Defendants/Respondents

25 <sup>2</sup> *Carlisle v. Columbia Irrig. Dist.*, 168 Wn.2d 555, 567 n.2, 229 P.3d 761 (2010); *Amunrud v. Board of Appeals*, 158 Wn.2d 208, 215, 143 P.3d 571 (2006), cert. denied, 549 U.S. 1282 (2007).

26 <sup>3</sup> *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005).

1 Approved for Entry:

2 BENNETT BIGELOW & LEEDOM, P.S.

3

4

5 MICHAEL MADDEN, WSBA No. 8747  
Attorneys for Petitioner

6 TALMADGE FITZPATRICK

7

8 PHILIP A. TALMADGE, WSBA No. 6973  
Attorneys for Petitioner

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[PROPOSED] ORDER DENYING PLAINTIFF'S  
MOTION FOR SUMMARY JUDGMENT AND  
GRANTING DEFENDANTS' CROSS-MOTION  
FOR SUMMARY JUDGMENT

ATTORNEY GENERAL OF WASHINGTON  
7141 Cleanwater Dr SW  
PO Box 40124  
Olympia, WA 98504-0124  
(360) 586-6565

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PROOF OF SERVICE

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

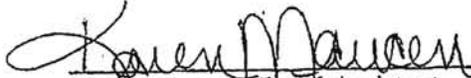
ABC Legal Services

PHILIP A. TALMADGE  
ATTORNEY AT LAW  
18010 SOUTHCENTER PKWY.  
TUKWILA, WA 98188-4630

MICHAEL F. MADDEN  
ATTORNEY AT LAW  
1700 SEVENTH AVENUE, STE. 1900  
SEATTLE, WA 98101-1355

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 19th day of September, 2011, at Tumwater, WA.

  
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Karen Mauceri, Legal Assistant

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**FILED**  
KING COUNTY, WASHINGTON  
FEB 09 2012  
DEPARTMENT OF  
JUDICIAL ADMINISTRATION

**FILED**  
KING COUNTY WASHINGTON  
FEB 09 2012  
SUPERIOR COURT CLERK  
BY DAWN TUBBS  
DEPUTY

STATE OF WASHINGTON  
KING COUNTY SUPERIOR COURT

WASHINGTON STATE HOSPITAL  
ASSOCIATION,  
  
Plaintiff/Petitioner,  
  
v.  
  
STATE OF WASHINGTON, et al.,  
  
Defendants/Respondents.

NO. 11-2-24507-1 SEA

**ORDER DENYING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT AND GRANTING  
DEFENDANTS' CROSS-MOTION  
FOR SUMMARY JUDGMENT**

THIS MATTER came before the undersigned Judge of the above-entitled Court upon the Plaintiff's Motion for Summary Judgment ("Motion"), filed on December 30, 2011, by the plaintiff/petitioner, the Washington State Hospital Association ("Association"), and upon the Cross-Motion for Summary Judgment ("Cross-Motion") filed on January 20, 2012, by the defendants/respondents, the State of Washington, et al. ("State").

By stipulation of the parties, the Court considered this matter without oral argument. The Court considered the evidentiary record and all the pleadings filed in this action, including the following:

1. The Motion (and all declarations, exhibits, and appendices);
2. The Cross-Motion (and all declarations, exhibits, and appendices); and
3. All of the replies and responses from the Association and the State with respect to the Motion and the Cross-Motion (and all declarations, exhibits, and appendices).

1 Based on the arguments of counsel and the evidence presented, and being otherwise fully  
 2 advised in the premises, the Court **denies** the Association's Motion and **grants** the State's  
 3 Cross-Motion. The Court concludes as follows:

4 1. Under Rule 56, there is no genuine issue of material fact.

5 2. With respect to the Motion, the Association has failed to establish that it is  
 6 entitled to judgment as a matter of law.

7 3. The issues raised by the Association are not ripe for judicial review under the  
 8 Uniform Declaratory Judgments Act, chapter 7.24 RCW, because the State will not  
 9 implement the changes required by House Bill ("HB") 2069 until the federal government  
 10 approves them.

11 4. Even if the Court were to construe the issues raised by the Association as ripe  
 12 for judicial review, the Court would deny the Motion and grant the Cross-Motion.

13 (a) Chapter 74.60 RCW must be construed as a whole, rather than  
 14 piecemeal.<sup>1</sup> When considered in this proper manner, it is clear that the Legislature was well  
 15 within its authority in 2011 to enact HB 2069, regarding the Hospital Safety Net Assessment.<sup>2</sup>  
 16 Just as the Legislature had authority to create the Assessment in 2010 through HB 2956, it had  
 17 authority to amend the program in 2011 through HB 2069.<sup>3</sup>

18 (b) The statutes must be construed so as to avoid absurd conclusions, and it  
 19 would be absurd to hold that the Legislature took actions that invalidated the very chapter it  
 20 was merely amending.<sup>4</sup>

21  
 22 <sup>1</sup> See this Court's order dated November 9, 2011 ("November Order"), p. 3 (lines 4-5); *Lake v.*  
*Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010).

23 <sup>2</sup> See November Order, p. 3 (lines 5-7).

24 <sup>3</sup> *Brown v. Owen*, 165 Wn.2d 706, 722, 206 P.3d 310 (2009) (noting the Legislature's "plenary power" to  
 25 amend statutes); *Wash. State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 290, 174 P.3d 1142 (2007) ("It is a  
 26 fundamental principle of our system of government that the legislature has plenary power to enact laws, except as  
 limited by our state and federal constitutions.").

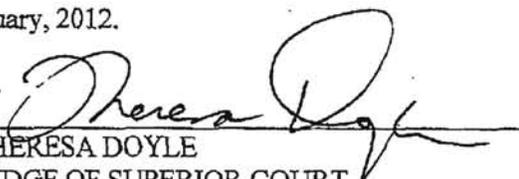
<sup>4</sup> *Glaubach v. Regence BlueShield*, 149 Wn.2d 827, 833, 74 P.3d 115 (2003) ("We avoid readings of  
 statutes that result in unlikely, absurd, or strained consequences.").

1 (c) The Motion contains no evidence to support the Association's argument  
 2 that, as a result of HB 2069, the Legislature no longer is appropriating the "floor level of  
 3 funding" for hospital rates from the General Fund that the Legislature allegedly established in  
 4 2010. See Motion, p. 10 (lines 7-14). There is no basis to grant summary judgment to the  
 5 Association when it has not offered any factual support for its contention. In any event, the  
 6 key test is not the level of *funding* but the level of *payment rates*. See RCW 74.60.005(3)(d).  
 7 Even under HB 2069, the rates for the fiscal year beginning July 1, 2011, will exceed the rates  
 8 that existed on July 1, 2009.<sup>5</sup> As a result, the State will remain in compliance with the statute.

9 5. With respect to the Cross-Motion, the State has established that it is entitled to  
 10 judgment as a matter of law, for the reasons listed above.

11 NOW, THEREFORE, IT IS HEREBY ORDERED that the Association's Motion is  
 12 DENIED and the State's Cross-Motion is GRANTED.

13 DATED this 8 day of February, 2012.

14   
 15 THERESA DOYLE  
 16 JUDGE OF SUPERIOR COURT

17 Presented by:  
 18 ROBERT M. MCKENNA  
 19 Attorney General

20  
 21 WILLIAM T. STEPHENS, WSBA No. 24254  
 22 ANGELA COATS MCCARTHY, WSBA No. 35547  
 23 Assistant Attorneys General  
 24 Attorneys for Defendants/Respondents

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 26 <sup>5</sup> See Declaration of Sandra Stith dated September 16, 2011, ¶ 10(c).

A-10

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Approved for Entry:

BENNETT BIGELOW & LEEDOM, P.S.

---

MICHAEL MADDEN, WSBA No. 8747  
Attorneys for Petitioner

TALMADGE FITZPATRICK

---

PHILIP A. TALMADGE, WSBA No. 6973  
Attorneys for Petitioner



STATE OF WASHINGTON  
DEPARTMENT OF SOCIAL AND HEALTH SERVICES  
P.O. Box 45010, Olympia, Washington 98504-5010

March 30, 2010

Dianne Heffron, Director  
Financial Management Group  
Center for Medicaid and State Operations  
Centers for Medicare and Medicaid Services  
7500 Security Boulevard  
Baltimore, MD 21244

Dear Ms. Heffron:

Pursuant to 42 C.F.R. § 433.72, we request a waiver of the uniformity requirements with respect to an assessment on inpatient and outpatient hospital services being enacted by the State of Washington, effective February 1, 2010. The purpose of the tax is to support **increases** in hospital payment rates.

The assessment is broad-based in that it is imposed on all hospitals paid under the prospective payment system. The only exemptions are for government-owned hospitals that are reimbursed through certified public expenditures and border hospitals located outside Washington State. The tax imposes different rates of tax on rehabilitation hospitals, psychiatric hospitals, critical access hospitals, and other taxed hospitals. We request a waiver of the uniformity requirements because the tax is generally redistributive. A copy of the regression analysis is enclosed, which shows that B1/B2 exceeds 1.0. A combined B1/B2 analysis was done that includes both the assessment for a hospital rate increase and the assessment for restoring funding cuts and is addressed in a separate letter.

The assessment is on non-Medicare inpatient days. The amount of tax collected is approximately \$83,291,213 of taxpayer revenues in FFY 2010. There is no hold harmless and no direct correlation to Medicaid payments; therefore, all of the qualifications in 42 C.F.R. § 433.68(d)(3) and § 433.72(b) for a waiver approval are met.

For your information, I am also enclosing copies of the state plan amendments that are also being submitted today for increases in inpatient and outpatient hospital reimbursement. Collection of the tax is contingent upon the Centers for Medicare and Medicaid Services (CMS) approval of this waiver request, and we appreciate your prompt response. Please contact Thuy Hua-Ly, Director, Division of Rates and Finance, at (360) 725-1855 or via e-mail at [hualytn@dshs.wa.gov](mailto:hualytn@dshs.wa.gov) for further information.

Sincerely,

Susan N. Dreyfus  
Secretary

Enclosure

cc: Doug Porter, Assistant Secretary, HRSA  
Thuy Hua-Ly, Director, DRF, HRSA

Exhibit S-2  
Page 1 of 1

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A-12



STATE OF WASHINGTON  
DEPARTMENT OF SOCIAL AND HEALTH SERVICES  
P.O. Box 45010, Olympia, Washington 98504-5010

March 30, 2010

Dianne Heffron, Director  
Financial Management Group  
Center for Medicaid and State Operations  
Centers for Medicare and Medicaid Services  
7500 Security Boulevard  
Baltimore, MD 21244

Dear Ms. Heffron:

Pursuant to 42 C.F.R. § 433.72, we request a waiver of the uniformity requirements with respect to an assessment on inpatient and outpatient hospital services that is being enacted by the State of Washington, effective February 1, 2010. The purpose of the tax is to help **restore** funding cuts that were made for services provided on June 30, 2010.

The tax is broad-based in that it is imposed on all hospitals paid under the prospective payment system. The only exemptions are for government-owned hospitals that are reimbursed through certified public expenditures and border hospitals located outside Washington State. The tax imposes different rates on rehabilitation hospitals, psychiatric hospitals, critical access hospitals, and other taxed hospitals. We request a waiver of the uniformity requirements because the tax is generally redistributive. A copy of the regression analysis, which shows that B1/B2 exceeds 1.0, is enclosed. A combined B1/B2 analysis was done that includes both the assessment for restoring funding cuts and an assessment for a hospital rate increase that is addressed in a separate letter.

The assessment is on non-Medicare inpatient days. The amount of tax expected to be collected is approximately \$42,071,367 of taxpayer revenues in FFY 2010. There is no hold harmless and no direct correlation to Medicaid payments; therefore, we meet all of the qualifications in 42 C.F.R. § 433.68(d)(3) and § 433.72(b) for a waiver approval.

Collection of the assessment and the restoration of the rates are contingent upon Centers for Medicare and Medicaid Services (CMS) approval of this waiver request, and we appreciate your prompt response. Please contact Thuy Hua-Ly, Director, Division of Rates and Finance, at (360) 725-1855 or via e-mail at [hualytn@dshs.wa.gov](mailto:hualytn@dshs.wa.gov) for further information.

Sincerely,

Susan N. Dreyfus  
Secretary

Enclosure

cc: Doug Porter, Assistant Secretary, HRSA  
Thuy Hua-Ly, Director, DRF, HRSA

Exhibit S-3  
Page 1 of 1

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DECLARATION OF SERVICE

On said day below I deposited with the U.S. Mail a true and accurate copy of: Brief of Appellant in Supreme Court Cause No. 87084-5 to the following parties:

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Original filed with:

Washington Supreme Court  
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: May 8, 2012, at Tukwila, Washington.

  
\_\_\_\_\_  
Christine Jones  
Talmadge/Fitzpatrick