

No. 38247-4-II

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

2006 DEC 19 AM 11:59

COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION II

WASHINGTON IMAGING SERVICES, LLC,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF REVENUE,

Respondent.

AMENDED APPELLANT'S REPLY BRIEF

MILLER NASH LLP  
GREG MONTGOMERY  
MONICA LANGFELDT  
4400 Two Union Square  
601 Union Street  
Seattle, Washington 98101-2352  
(206) 622-8484

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STATE OF WASHINGTON  
BY  
DEPT. OF REVENUE

COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION II

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1. The Taxing Statutes and Administrative Rule at Issue Must be Construed Against the Taxing Power.

The two statutes most relevant to resolving the issue in the case, RCW 82.04.220, imposing a tax at prescribed rates against gross income, and RCW 82.04.080, defining gross income for purposes of the rate imposed under RCW 82.04.220, are taxing statutes. As such, if there is any doubt as to the meaning of these statutes, these statutes must be construed against the taxing power. *Duwamish Warehouse Co. v. Hoppe*, 102 Wn.2d 249, 254, 684 P.2d 249 (1984).

Furthermore, as the DOR concedes, administrative agency regulations, such as Rule 111, are subject to the same rules of interpretation as statutes. (Respondent's Brief, p. 11) Since Rule 111 is valid only if consistent with RCW 82.04.080 and must be treated as if read into the statute, it also must be construed against the taxing power. RCW 82.32.300; *Filmworks, Inc. v. Department of Revenue*, 106 Wn. App. 448, 453, 24 P.3d 460 (2001)(Generally, court must construe ambiguous taxing statutes or regulations in taxpayer's favor.).<sup>1</sup>

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<sup>1</sup> The DOR appears to suggest that these taxing statutes and Rule 111 should be construed in the same manner as statutes and administrative rules that create exemptions and deductions from taxation. Respondent's Brief, p. 22, n.5. The DOR cites *Group Health Corp. v. Washington State Tax Comm'n*, 72 Wn.2d 422,

The DOR acknowledges that, while the concept of gross income under RCW 82.04.080 and Rule 111 seems simple, there are often disagreements between the DOR and taxpayers as to the proper application of this concept. (Respondent's Brief, p. 1) This tax dispute, in which the DOR advocates a change in the law regarding the application of RCW 82.04.080 and Rule 111, illustrates one reason why the DOR and taxpayers often disagree about the application of the gross income concept. In this disagreement, WIS is entitled to have RCW 82.04.080 and Rule 111 construed in its favor and against the DOR.

2. The Court Should Reject The DOR's New Interpretation of RCW 82.04.080 and Rule 111.

Washington's appellate courts have been consistent in their decisions on whether income received by a taxpayer is included in a taxpayer's gross income, as that term is defined in RCW 82.04.080, for

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429, 433 P.2d 201 (1967) as support for this argument. There, the court noted that whether the term used is "exemption" or "deduction" both begin with a taxable status and then carve out exceptions to that status for the benefit of qualifying taxpayers. The *Group Health* decision dealt with RCW 82.04.430 that creates deductions from the measure of a tax.

None of the statutes relevant to this case create a deduction or exemption from the measure of the tax. To the contrary, the funds at issue in this appeal were never intended to be included in the gross income of WIS because WIS did not render the service for which these funds were paid. *Walthew v. Department of Revenue*, 103 Wn.2d 183, 187, 697 P.2d 559 (1984)(consideration for the service is the basis of the tax).

purposes of the tax imposed under RCW 82.04.220. In six decisions issued by Washington's appellate courts over the last twenty-six years, whether consideration received by a taxpayer for services rendered to the taxpayer's customer is gross income to the taxpayer has turned on the answers to three fundamental questions: (1) what was the service for which the consideration at issue was paid; (2) did the taxpayer render that specific service; and, (3) who was liable to pay for that service.

With respect to liability to pay for the service at issue, Washington's appellate courts essentially have concluded that, if the taxpayer did not actually perform the service that generated the consideration at issue, but is either primarily or secondarily liable for paying those who did perform the service, then the consideration for the service is included in the taxpayer's gross income. On the other hand, if the taxpayer did not render the service and the taxpayer has no responsibility to pay for the service other than to pass-through payment from the customer, then the income attributable to that service is not included in the taxpayer's gross income.

Thus, in those situations in which the taxpayer contracted with an independent third party to provide a service for the taxpayer's customer that the taxpayer did not, or could not, provide, and the taxpayer was not

required to pay the third-party for the service unless the customer paid the taxpayer for the service, amounts paid to the taxpayer for the third party service have not been included in the taxpayer's gross income.

*Christensen v. Department of Revenue*, 97 Wn.2d 764, 649 P.2d 839 (1982); *Walthew v. Department of Revenue*, 103 Wn.2d 183, 691 P.2d 559 (1984); *Medical Consultants v. State*, 89 Wn. App. 39, 947 P.2d 784 (1997). On the other hand, where the taxpayer could, and did, render the service for which compensation was paid, and/or the taxpayer was responsible for paying those who rendered the service even if the customer did not pay, the taxpayer was not permitted to exclude from its gross income any portion of the compensation it received for the service, even if it used some portion to pay those who assisted the taxpayer in furnishing the service. *Pilcher v. Department of Revenue*, 112 Wn. App. 428, 49 P.3d 947 (2002); *The City of Tacoma v. The William Rogers Co.*, 148 Wn.2d 169, 60 P.2d 79 (2002).

The sixth case, *Rho Co. v. Department of Revenue*, 113 Wn.2d 561, 782 P.2d 986 (1989) resulted in a remand to the Board of Tax Appeals for further consideration. However, the fundamental distinction between the two lines of cases was again made in the decision remanding the case. "If Rho is the employer, then Rho is liable in its own right for

the payment [of temporary staff provided to clients], and Rule 111 does not apply.” *Rho* at 569.

In this case, the DOR advances a new interpretation of “gross income” under which amounts paid to a taxpayer by a customer for a service the taxpayer did not, and could not, render, but rather obtained for the customer from a third party, would be included in the taxpayer’s gross income, even though the taxpayer was not obligated to pay the third party service provider unless the customer paid the taxpayer for that third party service. The DOR seeks to persuade the court to adopt its new interpretation of “gross income” by arguing primarily:

(1) the facts of *Medical Consultants v. State*, 89 Wn. App. 39, 947 P.2d 784 (1997) are “materially different” from this case and, therefore, that decision does not control the outcome of this case;

(2) the professional medical services provided by the OIA radiologists are part of the “complete package” of services rendered by WIS and, therefore, a “cost of doing business;” and,

(3) there is insufficient evidence of consent and control in the patient-WIS relation to establish a principal-agent relation.

The DOR’s arguments are legally and/or factually deficient. This court should continue to apply the same analysis that has been applied for

the past twenty-six years in determining whether funds received by a taxpayer are gross income to that taxpayer. Under the consistent analysis employed by Washington's appellate courts, the funds collected by WIS and paid to OIA as consideration for its professional medical services are not gross income to WIS.

3. *Medical Consultants v. State*, 89 Wn. App. 39, 947 P.2d 784 (1997) is not "materially different" from this dispute.

The DOR repeatedly states that the facts of *Medical Consultants* are "materially different" from the facts of this case. (Respondent's Brief, pp. 22-24) By using the phrase "materially different", the DOR intends to convey that the factual differences between *Medical Consultants* and the present case are of such significance that the reasoning and decision of this court in *Medical Consultants* do not apply here.

Simply stating the facts are "materially different" does not make them so and they are not. For example, one of the "material differences" the DOR emphasizes is the court's reference to MCN as being in the consulting business and working to facilitate the examining physician's service as a medical consultant for the client.<sup>2</sup> The DOR also points out

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<sup>2</sup> WIS has set out the factual similarities between its business and MCN's in its Appellant's Brief, pp. 17-20 and will not repeat them here. There is no material difference in the product of these two companies or the manner in which it is

that if the client wished to have the consulting physician testify, the client would need to arrange for this directly with the consulting physician. The DOR observes on this basis that the “key business relationship” was between the client and the consulting physician. (Respondent’s Brief, pp. 22-23) Even assuming the DOR is correct and that this “key business relationship” is a difference, it is not a “material difference.”

The car dealership illustration in Rule 111 is a “classic example” of when money received by a taxpayer, in this case the car dealership, is not to be included in the taxpayer’s gross income. (Respondent’s Brief, p. 10) In this illustration, the car purchaser gives the salesperson money for the price of the car, plus license fee and tax. By this act, the car dealership becomes the agent of the purchaser, for purpose of paying the license fee and tax to the appropriate governmental agency. Certainly, the agency relation in the car dealership illustration does not turn on the existence of a “key business relation” between the principal, the car purchaser, and the third party service provider, the governmental agencies.

Similarly, it is unlikely that a “key business relationship” existed between the principal, the clients of the law firm, and the process servers

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produced. Stating that MCN is in the consulting business does not create a material difference.

or court reporters hired by the law firm to provide services to these clients in *Walthew*, 103 Wn.2d 183. This did not prevent the law firm from being the agent of the clients for purposes of retaining and paying the process servers and court reporters. Even if the relation between a WIS patient and the OIA radiologists is different from the assumed relation between an MCN client and the physician who performs the medical exam, this difference is not material.

Another “material difference” identified by the DOR is the trial court’s finding of fact that only the client had liability for paying the physician. (Respondent’s Brief, pp. 23-24) The DOR does not mention the basis for this trial court finding. When the trial court’s reasoning for its finding is considered, there is no “material difference.”

The trial court buttressed its finding that only the client had liability for paying the physician with the following explanation:

The Department stipulates to the fact that if MCN is unable to collect the fee from the client for the medical examination then MCN is not obligated to pay the physician for their services. That is, they admit the fact that only the client has liability for paying the physician and if the client does not pay the physician then the physician understands that MCN has no liability either primarily or secondarily for the payment. To the extent they do have liability, i.e., when the client does pay, it is liability to forward the payment to the physician.

*Medical Consultants* at 45

Here the DOR also agrees that WIS is not obligated to pay OIA unless the patient pays WIS.

The Department does not dispute that WIS paid Overlake a percentage of net amounts actually collected from patients. CP 50, at ¶¶ 6.2, 6.4. Thus, WIS was not obligated under the Medical Imaging Agreement to pay Overlake for its professional fees unless WIS had received payment from patients.

Respondent's Brief, p. 40

In *Medical Consultants*, based on the DOR's stipulation that MCN was not obligated to pay the physicians for their services if it was unable to collect the fee from its clients, the trial court concluded: (1) only the client has liability for paying the physician; (2) if the client does not pay, MCN has neither primary nor secondary liability for the payment; and, (3) if the client does pay, the liability is only to forward payment to the physician. Unless this court is willing to change the law as the DOR urges, these same conclusions must flow from the DOR's agreement that WIS has no obligation to pay for the professional medical services rendered by OIA unless the patient pays WIS.

The next "material difference" the DOR identifies is the fact that the record in *Medical Consultants* ". . . apparently demonstrated that the

money MCN collected for the medical examination was not for MCN's rendition of services. . . ." (Respondent's Brief, p. 23) Once again, however, the DOR fails to mention the factual basis on which the court came to that conclusion. With respect to this conclusion, the court stated:

The second prong of the test is supported by the undisputed fact that MCN does not have a medical license and therefore cannot perform the medical examinations. The monies MCN collects for medical exams are not for MCN's "rendition of services," but rather are passed through to the actual renderers of the medical examination services, i.e. the physicians.

*Medical Consultants* at 48

There is no "material difference" between MCN and WIS in terms of ability to provide professional medical services. It is undisputed that WIS can not provide these services. (RP at 36) The DOR correctly points out that MCN's inability to perform the medical examinations supported the court's conclusion that fees paid to MCN for the professional medical services were not part of MCN's gross income. (Respondent's Brief, p. 23) For the same reason, fees paid to WIS for the professional medical services rendered by OIA are not part of WIS' gross income.

The facts of *Medical Consultants* are not materially different from the facts of this case. The reasoning and the conclusions of this court in

*Medical Consultants* confirm that money received by WIS from patients to pay OIA for its professional fees is not gross income to WIS.

4. The DOR's "Complete Package/Cost Of Doing Business" Argument Already Has Been Rejected.

The DOR repeatedly returns to the assertion that WIS provides an inseparable, complete package of services that includes the OIA professional medical services. Therefore, the OIA professional fee is a WIS "cost of doing business." (Respondent's Brief, p. 14).<sup>3</sup> For example, the DOR concludes its argument that WIS' gross income includes the amounts WIS collects and pays to OIA as follows:

Under arrangements WIS entered into with patients to provide complete medical imaging services, WIS was compensated for the services it rendered, with the assistance of its independent contractor Overlake. WIS billed patients for the complete service and was paid for the complete service. The total amount of funds it collected constituted "gross income of the business."

Respondent's Brief, p. 21

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<sup>3</sup> The DOR "cost of doing business" argument ignores the fact that the OIA professional services cost WIS nothing. The OIA services are certainly a cost to the patient that, if paid, is passed through to OIA. However, if the patient does not pay this cost then the OIA services are without cost to WIS. This is in sharp contrast to the facts of *Pilcher* and *City of Tacoma* in which the services of those assisting the taxpayer were a true cost of the business payable regardless of whether the customer paid the taxpayer.

This “complete package” of services, “cost of doing business” argument is exactly the argument the court rejected in *Walthew*. The services in *Walthew* that the DOR argued were within the “complete package” of services provided by the law firm and, therefore, a “cost of doing business” included services provided by court reporters, process servers, and medical experts. The law firm did not provide these services but retained independent service providers for the benefit of its client because these services were essential to the prosecution of the client’s case. The DOR argued, as it does here, that these services were essential to the taxpayer and, therefore, a cost of doing business.

In rejecting the “complete package/cost of doing business” argument, the court in *Walthew* stated:

Compensation or consideration for the service is thus the basis for the tax.” (Emphasis Added)

...

The language in Rule 111 is consistent with the statute if it is read to reflect the statute’s obvious intent to tax only gross income which is “compensation for the rendition of services” (RCW 82.04.080) . . .” (Emphasis Added)

*Walthew* at 187-88

Here, the service is the professional medical interpretation of WIS images by OIA radiologists for the benefit of the patient. As a matter of

fact, WIS does not render this service. (CP 31; 146)(RP 36) As a matter of law, WIS cannot be deemed to render this service simply because it is an essential service WIS obtains for its patients through an independent third party.

Similarly, in support of its contention that the funds received by WIS that WIS pays to OIA for its professional medical services are not an advance, the DOR uses its “complete package” argument as the first step in a two step argument.

Likewise, the payments from patients to WIS were neither advancements nor reimbursements to WIS for money it paid Overlake. Rather, the payments from patients to WIS were payments for medical imaging services as a whole, which included production of the medical image, interpretation of the images, and a report. *See* CP 33, at ¶ 7.

Respondent’s Brief, p. 30

Then, according to the DOR, when WIS passes through payment to OIA for the professional medical service that payment is the fulfillment of a WIS contract obligation, not a payment on behalf of a customer.

The only person with an obligation to pay Overlake is WIS. When WIS makes payments of the “agreed percentages” to Overlake, WIS is not making those payments “for the customer or client” as Rule 111 requires. WIS makes those payments for itself, to satisfy its own contract obligations to Overlake.

Respondent's Brief, p. 31

What the DOR ignores in this argument is the undisputed fact that WIS is not obligated to pay anything to OIA unless the patient or his/her insurance carrier pays WIS. When the patient assigns his or her health insurance benefits to WIS to pay for medical imaging services, these financial benefits are intended to, and expected to, be used by WIS to pay for the technical services provided by WIS and the medical professional service provided by OIA. (CP 95-96) In other words, when WIS receives these payments, it receives money assigned to it by the patient to be used to pay the third party provider. As the DOR notes “. . . WIS must make the payments to the third party, Overlake, solely as the paymaster” (Respondent's Brief, p. 5, n.2) This is exactly what WIS does. WIS receives money from its “customer” with which WIS is to pay the OIA medical professional fee for that customer. By definition, such money is an advance.<sup>4</sup>

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<sup>4</sup> The DOR appears to suggest that, if the agent only pays the third party after it is paid by the principal, the money paid by the principal may not constitute an advance. (Respondent's Brief, p. 29) There is no such sequence limitation in Rule 111. It defines advance as money received by a taxpayer with which the taxpayer is to pay costs for the principal. Once again illustrative is the car dealership example in which the dealership pays nothing to licensing or taxing agencies until it has been paid by the car purchaser.

The DOR returns again to its “complete package/cost of doing business” argument to support its contention under Rule 111 that WIS actually does render the professional medical services provided by OIA.

This is not a situation in which patients “contract” with WIS to take the image and “contract” separately with Overlake to interpret the image. WIS sells the complete package: image, interpretation, and written report. Accordingly, the payments WIS received were for services WIS can and did render.

Respondent’s Brief, pp. 32-33

In addition to the reasons stated above, the court should reject this application of the DOR’s “complete package” argument because it is specious in the context of these tax disputes. The issue of what is gross income to the taxpayer comes up in these cases only because the taxpayer bills and collects for its service as well as one or more additional services provided by independent third parties essential to accomplishing the purpose for which the customer hired the taxpayer.<sup>5</sup> WIS and OIA certainly could bill each patient separately and directly for the distinct

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<sup>5</sup> Similarly, in each of these cases, the taxpayer will have a written or working agreement with the third party provider that, if the taxpayer is paid by the customer for the third party service, the taxpayer will pay the third party service provider. See e.g., *Medical Consultants*, 89 Wn. App. at 43. The DOR’s argument (Respondent’s Brief, pp. 40-45) that such an agreement precludes any agency relation for purposes of RCW 82.04.080 and Rule 111 is simply another argument to change the law in this area.

services they provide, just as MCN and the independent contractor physicians in *Medical Consultants* could bill separately and directly to the clients.<sup>6</sup> However, this would double the billing and payment paperwork for the medical imaging service for both patients and insurers and potentially delay claim payment since health insurers will not pay any claim for medical imaging services until they have been billed for both the technical component and the professional component. (CP 97) To accommodate the preference of the health care insurance companies for the efficiency of a single bill for both services, WIS and OIA agreed that WIS could issue a single global bill combining the charges for both services. (CP 60-62; 95; 147) Under existing law, the tax consequences of the decision to issue a single global bill for both services are the same as if WIS and OIA had issued separate bills – amounts collected by WIS and paid to OIA for its professional services are not taxed as gross income to WIS. The court should reject the DOR’s request, through its “complete package” argument, to change the law.

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<sup>6</sup> The total charge of such separate and direct bills from WIS and OIA would still be subject to insurance reimbursement limits for the medical imaging service. (CP 143; 147-49)

5. There Is More Than Adequate Evidence To Satisfy The Consent And Control Elements Of Agency.

The DOR argues that patients of WIS did not consent to have WIS act as their agent for purposes of obtaining the professional medical services of OIA, that the patients did not have the right to control WIS, and that WIS did not consent to act as the agent of the patient.

(Respondent's Brief, pp. 34-40) The Rule 111 examples are instructive as to the extent of evidence needed to satisfy the consent and control elements of agency. When a Washington resident goes to a car dealership, negotiates a car purchase with a salesperson, and pays the dealership the purchase price plus tax and license fees, this transaction has all the necessary elements of consent and control to satisfy the agency requirements of Rule 111. According to the DOR, the car dealership illustration is a "classic example" of a Rule 111 pass through.

(Respondent's Brief, p. 10)

The DOR provides a realistic observation to consider in the context of the DOR consent and control arguments. Speaking of the patients who come to WIS for medical imaging services, the DOR appropriately comments:

Many of them probably never knew, or cared to know, the name of the professional service corporation that employed the radiologist who interpreted their MRI or other medical image.

Respondent's Brief, p. 44.

The patient referred to WIS by his or her treating physician simply wants to get done everything that needs to get done to accomplish the purpose of the referral. WIS patients are told there are two steps in the process, the production of the requested image, followed by physician review of the image with the results reported to the patient's treating physician within 24 to 48 hours. (CP 33; 133-34) The patients are willing to have WIS take care of both steps regardless of whether the patient knows that WIS contracts with OIA for this professional medical service needed to accomplish the purpose of the referral. This is the reason that upon registration, patients give permission for all appropriate care and assign to WIS all insurance benefits to which they are entitled for the care rendered. (CP 141)

a. Patients Have Rights Of Control Of WIS Sufficient For Agency Purposes.

The DOR introduces the agency "right of control" element in an effort to include amounts paid to OIA in WIS' gross income.

(Respondent's Brief, pp. 34-39)<sup>7</sup> This agency element has not been expressly addressed by any of the six decisions dealing with RCW 82.04.080 and Rule 111.

Exercise of control by the principal over the agent is not required for an agency relation. All that is required is simply the right of the principal to exercise control. *Baxter v. Morningside, Inc.*, 10 Wn. App. 893, 896, 521 P.2d 946 (1974); *ITT Rayonier v. Puget Sound Freight*, 44 Wn. App. 368, 376, 722 P.2d 1310 (1986).

The agency issue of control is a flexible concept subject to practical considerations. For example, this court recognized that direct supervision of the conduct of an agent is not a necessary element of the right of control, particularly when it is not possible as a practical matter. *Baxter*, at 898. This court referred to *Swam v. Aetna Life Ins. Co.*, 155 Wash. 402, 284 P. 792 (1930) as another example of the situational specific nature of the agency element of control. *Swam* involved an

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<sup>7</sup> The DOR citations do not meaningfully illuminate the control issue. *Moss v. Vadman*, 77 Wn.2d 396, 462 P.2d 159 (1969) involved an individual who was working on his own behalf to sell an option he owned and, thus, was not an agent. *Blodgett v. Olympic Savings & Loan Ass'n*, 32 Wn. App. 116, 646, P.2d 139 (1982), *Nordstrom Credit v. Dep't of Revenue*, 120 Wn.2d 935, 845 P.2d 1331 (1993), and *Heath v. Uraga*, 106 Wn. App. 506, 24 P.2d 413 (2001) all involved contracts or covenants under which the purported principal had no rights of control over the purported agent.

individual who was hired to do a single, limited piece of work that the court described as being similar to changing the tires on a car. He was not supervised in the work. In concluding that the worker was an agent, the court in *Swam* emphasized that the employer could terminate the employment at any time, without regard to the result of the work itself, and that this factor was a strong circumstance showing the subserviency of the worker and his lack of status as an independent contractor. *Swam* at 408.

In finding a principal-agent relation, this court in *Baxter* emphasized that the principal made the initial contact, that the principal and agent then agreed on the time, destination, purpose and means of the work. This court observed that supervision of the transportation was impractical and was not necessary to establish a principal-agency relation.

In *ITT Rayonier v. Puget Sound Freight*, 44 Wn. App. 386, 722 P.2d 1310 (1986) this court found a fact question regarding agency relying on a single purchase agreement provision under which the purchaser could designate the transportation route and, therefore, could potentially control where the purchased goods were stored while in transit.

The undisputed facts in this case establish the right of control by the patient sufficient for this element of agency. The initial contact with

WIS regarding medical imaging comes from the patient through his or her treating physician. In response to this initial contact, WIS contacts the patient for scheduling. The patient and WIS confirm the nature of the medical imaging as requested by the patient's physician and agree on the date, time, and the WIS location at which the services will be provided.

(CP 145)

When the patient arrives at the WIS office, the patient completes a registration form through which WIS seeks the patient's permission for the performance of medical tests or procedures as deemed appropriate by WIS, its designees, or other persons caring for the patient. In addition, WIS seeks the patient's agreement to assign to WIS whatever health insurance benefits the patient might be entitled to for the health care services WIS is to provide. (CP 141; 145)

Finally, of course, the patient is necessarily present at the performance of the technical component of the medical imaging service, able to supervise that aspect in terms of the nature and placement of the image, and fully able to terminate the service at any time by simply leaving. The patient is told that the image will be reviewed by a doctor and the results of the review will be available within 24 to 48 hours.

(CP 33; 133-34) Although the patient may not be able to supervise the

physician review the image, such supervision would not be practically meaningful and, in any event, is not essential to the control element of agency. More importantly, however, the patient certainly has the right to control who interprets the image and could direct that the image be provided to a physician of the patient's choosing rather than an OIA radiologist.

Additionally, the patient agrees to pay WIS for all services rendered as part of the medical imaging requested.<sup>8</sup> (CP 141) Certainly, the patient has the right to control WIS in terms of insisting that all services provided, including those of the physician who interprets the image, be paid by WIS from the amounts paid to WIS by the patient. This is the same right of control the car purchaser has with respect to insisting that the car dealership pay the license fee and taxes from the funds provided by the purchaser.

b. Both WIS and the patient consent to the agency relation.

WIS clearly consents to provide medical imaging services for the benefit of and under the control of the patient. (CP 145) This is

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<sup>8</sup> The patient is fully informed at each step of the billing and payment process of the amount billed, the insurance company limitations on reimbursement for the services, the amount paid by the insurance company for the patient and the patient responsibility, if any. (CP 94; 143; 147-48)

evidenced by the fact that, following receipt of the physician referral call, WIS calls the patient directly to schedule the services mentioned by the referring physician. (CP 145) This scheduling call confirms WIS' consent to the patient's control over the date and time of the services as well as the place. Even after this scheduling agreement, the patient retains the right to unilaterally cancel the services for any reason or no reason.

The permissions requested by WIS through its patient registration form evidence WIS' consent to the fact that the patient controls who will provide healthcare service and the range of services to be provided, as well as the patient's control over the method and means of payment for the services. (CP 141) Even after arriving at one or the other of WIS' offices, the patient retains the right to effectively terminate the services by simply leaving the office from the waiting room or from the examination room.

Assuming the patient does not terminate the medical imaging service prior to completion, WIS' scheduling of the service with the patient, performance of the service with the patient, and payment for all components of the service from the funds paid or assigned by the patient, evidence its consent to perform the medical imaging services under the control of the patient. (CP 145-49)

For their part, the patients expressly and implicitly consent to obtaining medical professional services through WIS for purposes of obtaining the medical imaging services for which their treating physician sent them to WIS. They are aware that the medical imaging service provided by WIS has two components consisting of the creation of the image followed by physician review of the image. They are told at the time of the creation of the image that a physician will review and interpret the image and that this information will be available to their treating physician within 24 to 48 hours and they consent to WIS obtaining this professional medical service. (CP 33; 133-34) They consent to having WIS pay for this service from funds they pay or assign to WIS. (CP 141)

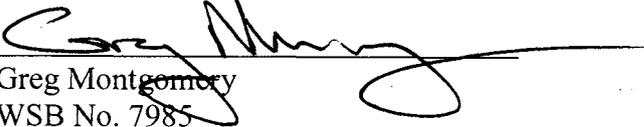
#### **CONCLUSION**

WIS can not render the professional medical services furnished by OIA. WIS is not liable to pay OIA for these services unless WIS is paid by its patients in which case WIS passes through to OIA payment for the service. WIS' patients expressly and implicitly consent to WIS' actions on their behalf to provide all necessary medical services to accomplish the purpose of the patient's appointment with WIS. WIS consents to work subject to the control of the patient. This court should reverse the trial court's decision and remand for entry of judgment in favor of WIS.

DATED this 19<sup>th</sup> day of December, 2008.

Respectfully submitted,

MILLER NASH LLP

  
Greg Montgomery  
WSB No. 7985  
Monica Langfeldt  
WSB No. 36072

Attorneys for Appellant  
Washington Imaging Services, LLC

No. 38247-4-II

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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WASHINGTON IMAGING SERVICES, LLC,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF REVENUE,

Respondent.

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AFFIDAVIT OF SERVICE

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MILLER NASH LLP  
GREG MONTGOMERY  
4400 Two Union Square  
601 Union Street  
Seattle, Washington 98101-2352  
(206) 622-8484

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BY *[Signature]*

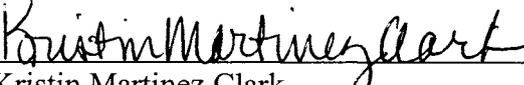
**ORIGINAL**

STATE OF WASHINGTON )  
 ) ss.  
COUNTY OF KING )

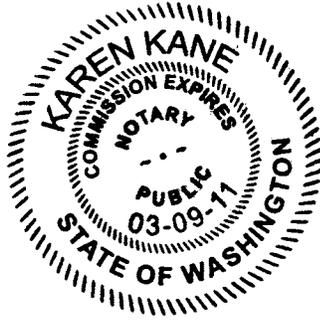
The undersigned, being first duly sworn on oath, deposes and says:

That she is a citizen of the United States of America; that she is over the age of 18 years, not a party to the above-entitled action and competent to be a witness therein; that on the date herein listed below, affiant had hand delivered the Amended Appellant's Reply Brief addressed to the following parties:

Peter B. Gonick, Assistant  
Attorney General  
Attorney General of Washington,  
Revenue Division  
7141 Cleanwater Drive S.W.  
P.O. Box 40123  
Olympia, Washington 98504-0123  
**(via hand delivery (12/22/08) and  
email (12/19/08)**

  
Kristin Martinez Clark

SIGNED AND SWORN to (or affirmed) before me on  
Dec. 19<sup>th</sup> 2008 by Kristin Martinez Clark.



Karen Kane  
Karen Kane Printed Name  
Notary Public Residing at Redmond, WA  
My appointment expires 3-9-11