



**TABLE OF CONTENTS**

I. INTRODUCTION..... - 1 -

II. BECAUSE THERE WAS NEVER A LIEN, THE TRIAL COURT  
ERRED IN FINDING IN FAVOR OF UNITED FINANCIAL ..... - 2 -

    A. Ms. Docter was only obligated to ensure that all  
    known liens and subrogated claims were paid from  
    the settlement funds – she did not agree to any other  
    obligations. .... - 2 -

        1. Lincoln Hospital did not have a lien..... - 2 -

        2. Lincoln Hospital did not have a subrogated claim. .... - 3 -

III. UNITED FINANCIAL’S OCTOBER 10, 2008 LETTER DID  
NOT ADD TO DOCTER’S LEGAL DUTIES..... - 4 -

IV. THE DUTY OF GOOD FAITH AND FAIR DEALING DOES NOT  
ALLOW A COURT TO IMPOSE ADDITIONAL CONTRACTUAL  
OBLIGATIONS UPON EITHER PARTY.....- 11 -

CONCLUSION.....- 13 -

TABLE OF AUTHORITIES

*Badgett v. Security State Bank*, 116 Wn.2d 563, 807 P.2d 356  
(1991)..... 11, 12

*Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990)..... 5

*Denny's v. Security Union title Ins.*, 71 Wn. App. 194, 859 P.2d  
619 (1993)..... 5, 8

*Livingston v. Shelton*, 85 Wn.2d 615, 537 P.2d 774 (1975)..... 3

*Mahler v Szucs*, 135 Wn.2d 398, 957 P.2d, amended 966 P.2d  
305 (1998)..... 3

I.  
INTRODUCTION

One fact was clearly established through United Financial's opening brief: Lincoln Hospital **never** had a lien for its medical bills. Ms. Docter, as opposed to her client, was only obligated to have known liens and subrogation claims paid from the settlement funds. Ms. Docter<sup>1</sup> ensured that the one known lien, the DSHS lien, was paid from the settlement funds. While Ms. Docter knew about Lincoln Hospital's claim for medical bills for medical treatment given to her client, she was not obligated to see that claimed medical expenses were paid from the settlement funds.

The trial court erred in ruling that Ms. Docter breached a contractual duty owed to United Financial and erred that Ms. Docter breached the duty of good faith and fair dealing. Accordingly, the trial court's judgment should be reversed with directions to enter judgment in favor of Ms. Docter.

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<sup>1</sup> As in the opening brief, both Marie Docter and the law firm of Briggs & Briggs will be referred to as "Ms. Docter" for purposes of this brief.

II.  
**BECAUSE THERE WAS NEVER A LIEN, THE TRIAL COURT ERRED IN  
FINDING IN FAVOR OF UNITED FINANCIAL**

While United Financial never comes right out and states it, the fact that there was never a lien by Lincoln Hospital is undisputed. Because there never was a lien by Lincoln Hospital, the trial court erred because Ms. Docter was only obligated to ensure that “known liens” were paid from the settlement proceeds.

**A. Ms. Docter was only obligated to ensure that all known liens and subrogated claims were paid from the settlement funds – she did not agree to any other obligations.**

**1. Lincoln Hospital did not have a lien.**

The record before the trial court supported only one conclusion: Lincoln Hospital did not have a lien. United Financial cites to portions of the record where there was apparently an intent by Lincoln Hospital to file a lien in the future and also that a “Notice of Claim and Health Care Provider Lien” was filed but United Financial cannot point to anything in the record, because nothing exists, that demonstrates the lien ever came into existence.

As noted in her opening brief, Ms. Docter only agreed that she would ensure that all known liens and subrogated claims would be paid out of the settlement funds. Because Lincoln Hospital never had

a lien, Ms. Docter did not have any obligation to ensure that any funds from the settlement proceeds were disbursed to it.

**2. Lincoln Hospital did not have a subrogated claim.**

United Financial, in a fallback position, is attempting to argue that Lincoln Hospital's medical bills constituted a subrogated claim. That is simply incorrect. "Subrogation" occurs only when a party, under a legal or moral duty, pays to a third party the debt of another. *Livingston v. Shelton*, 85 Wn.2d 615, 619, 537 P.2d 774 (1975). That is the essence of a subrogated claim. Indeed, United Financial cites to *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632, amended 966 P.2d 305 (1998), where the issue was State Farm's ability to avoid paying its share of attorney fees and costs when the insured recovered both general and special damages against the tortfeasors. State Farm had a subrogated claim because it paid its insured's debt that the insured had incurred for medical expenses.

Here, Lincoln Hospital did not pay to a third-party the debts of another. Instead, it simply had a claim for medical expenses. Lincoln Hospital did not have a subrogated claim.

United Financial's argument that Lincoln Hospital had a subrogated claim is disingenuous at best. In any case, it is incorrect.

It is clear that Ms. Docter did not breach the terms of the settlement agreement because Lincoln Hospital did not have a lien and did not have a subrogated claim.

III.  
**UNITED FINANCIAL'S OCTOBER 10, 2008 LETTER DID NOT ADD TO  
DOCTER'S LEGAL DUTIES.**

In recognition that Ms. Docter did not breach the obligations she agreed to in the settlement agreement, United Financial is claiming that Mr. Edwards' October 10, 2008 letter somehow expanded her legal obligations. Its argument is incorrect.

There were three parties to the settlement agreement: (1) United Financial, (2) Mr. Coleman, and (3) Ms. Docter. Mr. Coleman agreed to release all claims and indemnify and hold United Financial harmless "as to any and all medical expense, liens and/or subrogated claims." (CP 10.) In contrast, Ms. Docter did not agree that she would be responsible for the payment of all medical bills; instead, her obligation was limited to the payment of "all known liens or subrogation claims" before the settlement proceeds were disbursed to Mr. Coleman. (CP 10.) If it had been the parties' intent that Ms. Docter would be responsible for the payment of medical bills before disbursement, then the language used for her obligations would have

mirrored the language used for Mr. Coleman's responsibilities – it did not.

The settlement agreement expressed the terms upon which the parties agreed – in other words, there is no evidence in the record that the parties had reached agreement on some terms that were not documented in the settlement agreement. If that were the case, then the settlement agreement would be a partially integrated agreement. *Berg v. Hudesman*, 115 Wn.2d 657, 662, 801 P.2d 222 (1990) (partially integrated contract is a writing that is a final expression of those terms which it contains, but not a complete expression of all terms agreed upon). An agreement is not completely integrated if the writing omits a consistent additional agreed terms which is:

- (a) Agreed to for separate consideration, or
- (b) Such a term as in the circumstances might naturally be omitted from the writing.

*Denny's v. Security Union Title Ins.*, 71 Wn. App. 194, 202, 859 P.2d 619 (1993).

United Financial is arguing that the settlement agreement was not an integrated contract. United Financial, however, does not attempt to explain why it wasn't integrated. In other words, United Financial does not explain what it means by using the term "integrated" contract. Does United Financial contend that Ms. Docter

agreed that, in consideration of United Financial listing her as a co-payee on the settlement check, she would agree that all medical bills, whether reduced to a lien, would be paid? That can't be the case because that contradicts the terms of the settlement agreement as to the limited scope of her responsibilities. Does United Financial contend that the issue of whether Ms. Docter would guarantee that all medical bills were paid from the settlement proceeds was an issue that was left unresolved at the mediation? That can't be the case as well because the language used in the settlement agreement specified the scope of Ms. Docter's responsibilities.

United Financial does note that the following provision is found in the settlement agreement: "3. The parties will work together to formalize this agreement with appropriate documentation." United Financial argues that this somehow demonstrates that the agreement was not an integrated agreement - in other words, that an agreed-upon term was left out or that an additional term was added for additional consideration. But neither is supported by anything within the record. As noted above, it cannot be argued that Ms. Docter agreed to guarantee that medical bills would be disbursed from the settlement proceeds when the language used in the agreement limited her responsibility to known liens and subrogated interests. In addition,

it cannot be argued that Ms. Docter agreed to such an additional responsibility in exchange for additional consideration because there was no additional consideration.

Paragraph three does not, in contrast to United Financial's blanket assertion, demonstrate that the parties agreed that additional terms would be added to the agreement and this is particularly true as to any additional responsibilities that Ms. Docter would assume. Instead, paragraph three is simply a term that recognizes that a more formal document may be needed to document the terms that had been agreed upon. In fact, that is what subsequently occurred: additional formal documentation was executed pursuant to this agreement by Mr. Coleman executing a release and hold harmless agreement. (C.P. 8-9.)

Here, there was no evidence that the settlement agreement omitted any agreed upon terms and certainly there was no evidence that United Financial provided additional consideration for any obligation it is now claiming arose from Mr. Edward's letter. Moreover, attempting to hold Ms. Docter liable for the payment of medical bills not reduced to a lien or paid for by a third-party is not a term that might naturally be omitted from the writing. Indeed, the payment of medical

bills was specifically made an obligation upon Mr. Coleman but not Ms. Docter.

The general rule is that whether an agreement is integrated is a question of fact. *Denny's*, 71 Wn. App. at 203. Here, the trial court erred by holding that it was undisputed that this was not an integrated contract. Just the opposite is true: there are no facts demonstrating that the parties had not documented their agreement in the settlement agreement and no facts demonstrating that Ms. Docter had agreed to expand her responsibilities in exchange for extra consideration.

Furthermore, even assuming, for argument's sake, that the contract was not integrated, the term now being urged by United Financial is inconsistent with the obligations set forth in the settlement agreement. Even in a non-integrated agreement, any additional writing is not admissible if it contradicts the written terms. *Denny's*, 71 Wn. App. at 202. As noted above, United Financial's argument that Ms. Docter agreed to be responsible for the payment of medical bills not reduced to a lien or not paid for by a third-party is contradicted by the written settlement agreement which limits her responsibility under the contract to disburse funds to pay known liens or subrogated interests. As such, the trial court erred in considering the letter.

In addition to the trial court erring by (1) failing to rule that the settlement agreement was integrated and especially so with respect to the obligations of Ms. Docter, (2) ruling that paragraph three is evidence that would support a trier of fact finding that this was not an integrated contract, (3) considering the Edward's letter when it contradicted the limited scope of Ms. Docter's obligations without providing any additional consideration to her, the trial court erred in a fourth way: construing the letter in a light most favorable to United Financial.

The Edward's letter, at least the operative paragraph, appears to be written by an insurance company that is attempting to broaden the scope of the plaintiff's responsibilities beyond the terms of the settlement agreement and yet does not just come right out and say so.

The operative paragraph is as follows:

This is a gross settlement of all special and general damages. Special damages include, but are not limited to, wage loss, outstanding bills, liens or subrogated interests. Any subrogated interest shall be handled by you, per the Mahler decision. You agree to satisfy and/or handle all of these special damage interests as part of our settlement agreement.

(C.P. 64.)

As an initial matter, this letter could never expand upon Ms. Docter's obligations that are documented in the settlement

agreement. (C.P 54.) As noted before, the settlement agreement very specifically limited Ms. Docter's obligations. But the trial court erred further by construing this letter against Ms. Docter, the non-moving party, and construing it in favor of United Financial. The Edwards letter does not state that Ms. Docter "has agreed" to "satisfy and/or handle" certain matters. Instead, it is written in a way that appears that Mr. Edwards is attempting, in a veiled manner, to have Ms. Docter take on a new obligation. Moreover, the trial court construed this letter as somehow memorializing that Ms. Docter agreed to "pay" all medical bills - but the letter doesn't even say that - it says "satisfy and/or handle." Ms. Docter, on behalf of her client, handled Lincoln's Hospital's claimed bill - she, pursuant to her client's directions, offered to pay \$25,000 to satisfy Lincoln Hospital's demands. If for some reason this letter could be considered (which it could not for the reasons set forth above) it was error for the trial court to construe it in favor of United Financial instead of ruling that it created a factual issue for the trier of fact.

IV.  
THE DUTY OF GOOD FAITH AND FAIR DEALING DOES NOT ALLOW A  
COURT TO IMPOSE ADDITIONAL CONTRACTUAL OBLIGATIONS UPON  
EITHER PARTY.

United Financial is claiming that the duty of good faith and fair dealing somehow imposed additional contractual requirements upon Ms. Docter than those set forth in the settlement agreement. That argument is invalid.

In *Badgett v. Security State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356 (1991), the Court set forth the scope of the implied duty of good faith and fair dealing:

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

In *Badgett*, the Badgetts alleged that the defendant bank breached the duty of good faith and fair dealing by refusing to cooperate in their efforts to restructure the loan they had with the bank. The trial court held in favor of the bank that it did not have an affirmative duty to cooperate in restructuring the loan. The court of

appeals reversed the trial court and held that there was sufficient evidence to support a reasonable inference that the parties' course of dealing had created a good faith obligation on the part of the bank to consider the Badgetts' proposal and that the existence of a course of dealing and good faith were issues of fact. *Id.* at 568.

The State Supreme Court reversed the court of appeals and reinstated the trial court's ruling. The Court explained:

By urging this court to find that the Bank had a good faith duty to affirmatively cooperate in their efforts to restructure the loan agreement, in effect the Badgetts ask us to expand the existing duty of good faith to create obligations on the parties in addition to those contained in the contract – a free-floating duty of good faith unattached to the underlying legal document. This we will not do. The duty to cooperate exists only in relation to performance of a specific contract term. [Citation omitted.] As a matter of law, there cannot be a breach of the duty of good faith when a party simply stands on its rights to require performance of a contract according to its terms.

*Id.* at 570.

As the State Supreme Court has explicitly held: there cannot be a breach of the duty of good faith when a party simply stands on its rights as set forth by the contract terms. The duty of good faith and fair dealing does not, and cannot, create new obligations upon a party. As demonstrated above, Ms. Docter did not breach any of the

contractual terms. As such, it was error for the trial court to find a breach of the duty of good faith and fair dealing.

Moreover, once again the trial court committed a double-error by not only by finding that the duty of good faith and fair dealing imposed additional obligations upon Ms. Docter, but then found, as a matter of law, that Ms. Docter breached the duty of good faith and fair dealing. Even if the duty of good faith and fair dealing came into the picture here (which it does not) at most the trial court should have held that a factual dispute existed that required a trial.

#### **CONCLUSION**

United Financial is attempting to hold Ms. Docter liable for her following her client's instructions to not pay any amount over \$25,000 to Lincoln Hospital from the settlement proceeds. If that were a term of the settlement agreement to which Ms. Docter was a party, then United Financial would have a valid claim. However, Ms. Docter did not agree to be responsible for seeing that all medical bills were paid before any disbursements were made of the settlement proceeds. Instead, she agreed to see to it that all known liens and subrogated claims were paid before making a disbursement. She did exactly that. Lincoln Hospital did not have a lien. Ms. Docter was not obligated to

United Financial to see to it that Lincoln Hospital was paid its claimed medical bills.

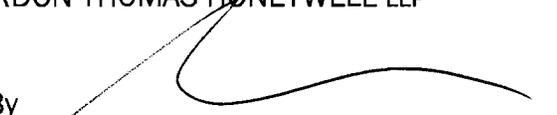
The trial court erred in multiple ways. Ms. Docter requests this Court to reverse the trial court and remand this case with direction for the trial court to enter judgment in favor of Ms. Docter requiring the repayment of the \$67,500 to Ms. Docter together with interest and statutory attorney fees and costs.

Dated this 28 day of December, 2011.

Respectfully submitted,

GORDON THOMAS HONEYWELL LLP

By

  
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I, Gina A. Mitchell, declare that on December 28, 2011, I caused the following pleadings:

1. Appellants' Reply Brief

together with this Declaration of Service, to be served on counsel for Plaintiff as follows:

Douglas F. Foley, WSBA No. 13119	<input type="checkbox"/> Via ABC-Legal Messenger
Douglas Foley & Associates	<input checked="" type="checkbox"/> Via U.S. Mail
13115 NE 4 <sup>th</sup> Street, Suite 260	<input type="checkbox"/> Via Facsimile:
Vancouver, WA 98684-5960	<input type="checkbox"/> Via E-filing
(360) 883-0636 phone	Notification/LINX
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I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

  
Gina A. Mitchell, Legal Assistant  
GORDON THOMAS HONEYWELL LLP

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