

No. 458811-II
Thurston County Superior Court No. 12-2-02441-1

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

COMMUNITY HEALTH PLAN OF WASHINGTON, a Washington
Health Plan, and MOLINA HEALTHCARE OF WASHINGTON, INC., a
Washington corporation,

Respondents,

v.

MARYANNE LINDEBLAD, in her official capacity as Director of
Washington State Health Care Authority, and WASHINGTON STATE
HEALTH CARE AUTHORITY,

Petitioners,

COORDINATED CARE CORP., UNITED HEALTHCARE
WASHINGTON, INC., and AMERIGROUP WASHINGTON, INC.,

Petitioner-Intervenors.

FILED
COURT OF APPEALS
DIVISION II
2015 FEB -9 PM 3:24
STATE OF WASHINGTON
DEPUTY

REPLY BRIEF OF PETITIONER-INTERVENORS

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I. INTRODUCTION

Respondent Community Health Plan of Washington (“CHPW”) attempts to portray this case as a two-party contractual dispute between itself and the Health Care Authority (“Authority”) in which only CHPW’s self-serving interpretation of the Contract matters.¹ But each of the five Plans—the two Legacy Plans (CHPW and Molina) and the three New Plans (Coordinated Care, United Healthcare, and Amerigroup)—have identical contracts with the Authority, and those contracts are interdependent on each other in relevant part. Thus, each Plan has an equal interest in the crux of the issue subject to discretionary review, *i.e.*, whether Family Connects and Plan Reconnects count against its proportional share of assignments under the Contract. Here, the trial court adopted an interpretation of the Contract contrary to the understanding of at least² four of the six parties (the Authority and the three New Plans), allowed the Legacy Plans to bind the New Plans to a draft recommendation from an informal dispute resolution process in which the New Plans were not allowed to participate, and relieved CHPW of its burden to prove proximate causation. Accordingly, the New Plans join the

¹ The defined terms in this Reply Brief are the same as used in the Petitioner-Intervenors’ Opening Brief.

² Additional evidence of record also at least warrants the inference that all six plans shared core understandings about the contract, including how the assignment methodology would, by design, favor the New Plans. Petitioner-Intervenors’ Opening Br. at 4-7, 16-18.

Authority in requesting that this Court reverse the trial court's grant of summary judgment.³

II. ARGUMENT

A. **CHPW Ignores the Plain Language, Objective, and Intent of the Contract.**

As its brief confirms, CHPW cannot demonstrate that its understanding of the Contract is the only reasonable interpretation, particularly when the evidence is viewed in the light most favorable to the Authority and the New Plans. As noted by the Authority, CHPW's interpretation of the Assignment Methodology conflicts with the Contract's plain language and the Authority's regulations governing assignment of enrollees. Moreover, CHPW's urging of this Court to view its agreement with the Authority in isolation cannot be reconciled with the undisputed impact of the resolution of this dispute on the New Plans' contractual rights. Nor is it consistent with the Authority's objective in designing the Assignment Methodology to favor the New Plans. Accordingly, the trial court's summary judgment ruling on the breach of contract claim should be reversed. *See Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 85, 60 P.3d 1245 (2003) (“[S]ummary judgment is proper if

³ The New Plans join, and incorporate by reference, the Authority's argument on reply, except to the extent the Authority suggests that the Plans provide medical services to the state's Medicaid beneficiaries. *See* Appellants' Reply Br. at 6. As managed care organizations, the Plans arrange for the provision of managed care services to beneficiaries.

the parties' written contract, viewed in light of the parties' other objective manifestations, has only one reasonable meaning.”) (quotation omitted); *Bank of Am., N.A. v. Owens*, 173 Wn.2d 40, 49, 266 P.3d 211 (2011) (court must view “the facts and all reasonable inferences in the light most favorable to the nonmoving parties” on summary judgment) (quotation omitted).

1. *CHPW's “plain language” interpretation of the Assignment Methodology conflicts with the Contract's terms and the Authority's regulations.*

The plain language of the Contract does not exclude Family Connects and Plan Reconnects from the assignment pool, as CHPW suggests. *See* CHPW's Br. at 22-25. To the contrary, the Assignment Methodology does not even mention Family Connects and Plan Reconnects. CP 2537-38 (Section D of the RFP); CP 2594 (Contract, Section 5.14). Instead, the Contract provides that all “Potential HO Enrollees who do not select a HO plan” are included in the assignment pool. CP 2594 (Contract, Section 5.14.1) (emphasis added); *see also* CP 2559 (Contract, Section 1.70) (defining “Potential Enrollee” as “any individual eligible for enrollment in Healthy Options under this Contract who is not enrolled with a health care plan having a contract with [the Authority]” (emphasis added)). By definition, Family Connects and Plan Reconnects do not select a plan. *See* WAC 182-538-060(8).

CHPW incorrectly contends that its interpretation of the Assignment Methodology is dictated by the Authority's use of the terms "assignment" and "enrollment" in the assignment regulation, WAC 182-538-060(8). See CHPW's Br. at 23-24 (citing WAC). As CHPW notes, the Contract provides that a Potential HO Enrollee is an individual who is not "enrolled" with a plan and must be "assigned" by the Authority. CP 2559 (Contract, Section 1.70). But the opening sentence of WAC 182-538-060(8) provides that the Authority "assigns a client who does not choose a [plan]" based on the Family Connect or Plan Reconnect rules. WAC 182-538-060(8) (emphasis added). Then, if the client cannot be assigned as a Family Connect or Plan Reconnect, the Authority "assigns the client to [a plan] available in the area where the client reside." WAC 182-538-060(8)(c)(ii) (emphasis added). In other words, Family Connects and Plan Reconnects do not "choose"/"select"/"enroll" with a plan; they are "assigned" by the Authority and, thus, should be included in the assignment pool under CHPW's own logic.

2. *CHPW improperly relies on the Legacy Plans' prior dealings with the Authority.*

In light of the above, CHPW must rely on extrinsic evidence to support its proposed interpretation. In so doing, CHPW does not dispute that "course of dealing" only applies where the prior dealings involved the

same parties, purpose, and intent. CHPW, nevertheless relies on its prior dealings with the Authority to interpret the “plain language” of the new Assignment Methodology—even though the new Contract was executed by different parties, for different purposes, and under a wholly new paradigm for healthcare created by the ACA. The Legacy Plans’ historic Medicaid contracts have no bearing on the meaning of the new Contract.

In defense of its reliance on prior dealings to which the New Plans were not a party, CHPW contends that the dispute in this case is limited to the CHPW-Authority contract. *See* CHPW’s Br. at 39 n.13. But there is no question that the contracts are all the result of a single RFP process, are identical in all relevant terms, and contain a single Assignment Methodology applicable to every Plan. Any interpretation of the Assignment Methodology directly impacts the assignment of enrollees to each of the Plans because the number of enrollees a Plan receives is defined relative to the number of enrollees the other Plans receive, rather than as an absolute entitlement. In fact, CHPW concedes that exclusion of Family Connects and Plan Reconnects would result in “shifting” enrollees from the New Plans to the Legacy Plans. *See* CHPW’s Br. at 60-61.⁴

⁴ CHPW’s argument is also belied by the fact that the Authority did not assess each Plan’s contract individually to determine whether the Assignment Methodology had initially been implemented incorrectly. Only one determination was required because that determination applied equally to each of the contracts.

Moreover, the new Contract “completely changed” the assignment process. CP 3030 (CHPW document). The Legacy Plans’ prior contracts provided for assignment of clients who did not select a plan based solely on the capacity of an MCO to take on enrollees. CP 2824-25 and CP 2959-60. The new Contract’s Assignment Methodology is not based on capacity. The Authority established a new process designed to award the New Plans significantly higher percentages of enrollees to increase competition and build capacity in Washington to meet the anticipated influx of new Medicaid enrollees under the ACA.

For these reasons, CHPW’s prior dealings with the Authority do not establish a common basis of understanding among all five Plans and the Authority about how enrollees would be assigned under the new Contract. *See Spradlin Rock Prods., Inc. v. Pub. Util. Dist. No. 1 of Grays Harbor Cnty.*, 164 Wn. App. 641, 661, 266 P.3d 229 (2011) (“A ‘course of dealing’ refers to dealings between the same parties...that establish a common basis of understanding[.]”); *see also Kennedy v. Silas Mason Co.*, 334 U.S. 249, 255, 68 S. Ct. 1031, 92 L. Ed. 1347 (1948) (rejecting reliance on prior dealings that did not involve the same parties).

3. *CHPW Improperly Disregards the Purpose and Intent of the Contract.*

CHPW's interpretation also cannot be squared with one of the core underlying reasons these new contracts were entered into in the first place. Uncontroverted evidence establishes the Authority designed the new Assignment Methodology to substantially favor the New Plans, and that Family Connects and Plan Reconnects must be included in the assignment pool to achieve this objective. *See* Appellants' Opening Br. at 9-14; Appellant-Intervenors' Opening Br. at 4-7. Rather than addressing these indisputable facts, CHPW summarily states that the Authority's objective is "not relevant" to interpretation of the Assignment Methodology. *See* CHPW's Br. at 26. This argument violates well-settled rules of contractual interpretation. Washington courts apply the "context rule," which provides that a contract must be interpreted "as a whole, including the subject matter and objective of the contract." *Tjart v. Smith Barney Inc.*, 107 Wn. App. 885, 895, 28 P.3d 823 (2001) (*Berg v. Hudesman*, 115 Wn.2d 657, 667-69, 801 P.2d 222 (1990)). Extrinsic evidence is admissible to show the "entire circumstances under which the contract was made, as an aid in ascertaining the parties' intent." *Berg*, 115 Wn.2d at 667. Moreover, the consideration of such extrinsic evidence is a task for the jury, and not the court. *Go2Net, Inc.*, 115 Wn. App. at 85.

Here, the Authority's objective to greatly favor the New Plans in the assignment process was hardly a "silent belief." *See* CHPW's Br. at 27. The record shows that before executing the Contract, the Legacy Plans fully understood that the Assignment Methodology would favor the New Plans. Indeed, CHPW itself recognized that the Assignment Methodology was designed to "quickly bolster[] the enrollment" of the New Plans. CP 3064; *see also* CP 3067 ("The state is using the [Assignment Methodology] to help the new plans grow membership more quickly"); CP 3070 (a Legacy Plan FAQ stating that the Legacy Plans "will receive a lower number of assignments" than the New Plans); CP 3072 (A Legacy Plan's request that the Authority reconsider the Assignment Methodology's design to "help new plans grow membership more quickly").

CHPW cherry picks a few of the Authority's internal staff communications to imply that the Authority initially believed that Family Connects and Plan Reconnects would be excluded from the assignment pool. *See* CHPW's Br. at 33-38. CHPW overplays the staff comments contained in these records. For example, the Position Paper cited by CHPW does not state that rectifying the mistaken exclusion of Connects and Reconnects from the pool would constitute a change to the Contract's Assignment Methodology. CP 1422-24. Instead, the Position Paper notes

that the Legacy Plans might “perceive[]” that there was a change.

CP 1423 (noting potential for “perceived change in process”). Even if, as CHPW contends, a few documents conflict with the Authority’s testimony and other evidence in the record, this merely raises a triable issue of fact that cannot be resolved on summary judgment.⁵

Regardless, the Legacy Plans concede none of the Authority’s communications with the Plans indicated that Family Connects and Plan Reconnects would be excluded from the assignment pool, *see, e.g.*, CP 3057 at 139:8-16 (CR 30(b)(6) Dep. of CHPW) (CHPW is “not aware” of the Authority ever communicating such an exclusion); CP 2746-47 at 72:7-73:1 (CR 30(b)(6) Dep. of Molina) (Molina simply “assumed” (incorrectly) that such an exclusion existed). More to the point, the Authority testified that it always intended to include Family Connects and Plan Reconnects:

The intent was always was to *include* [Family Connects and Plan Reconnects] in the Assignment Methodology. The Assignment Methodology was developed to provide higher enrollment for New Plans entering the Washington marketplace. The purpose was to attract New Plans to the marketplace, increase choices for clients, increase access to care for clients, and ensure New Plans receive adequate

⁵ CHPW offers no support for its assertion that the assignment percentages must be reconciled on a monthly basis, rather than over the term of the Contract. In fact, the Authority’s testimony on this point was entirely to the contrary. CP 1477 at 227:1-11. Moreover, CHPW posits a hypothetical absurdity that the number of Family Connects and Plan Reconnects could exceed its assignment percentage on a monthly basis without pointing to any evidence that this actually would or could occur.

enrollment for long-term viability in Washington. Excluding Plan Reconnect and Family Connect clients from the Assignment Methodology would be contrary to those goals.

CP 2505 at ¶ 21 (Declaration of Assistant Director Preston Cody)

(emphasis in original).

Viewed in the light most favorable to the Authority and the New Plans, it cannot be said that CHPW's understanding of the Assignment Methodology is the only reasonable interpretation of the Contract.

Go2Net, Inc., 115 Wn. App. at 85; *Bank of Am., N.A.*, 173 Wn.2d at 49.

Accordingly, the trial court's ruling on the breach of contract claim should be reversed.

B. Adoption of Mr. King's Draft Recommendation Would Alter the New Plans' Contractual Rights Without Any Notion of Due Process.

The trial court's decision regarding CHPW's "procedural claim" should also be reversed. According to CHPW, Mr. King's unsigned, draft recommendation to Director Lindeblad, following informal dispute conferences with the Legacy Plans, but not the New Plans, finally resolved the proper assignment of enrollees among the five Plans. Notably, CHPW's theory that Director Lindeblad lacked discretion to delegate a portion of the dispute resolution tasks but retain decision-making authority is based solely on the Contract's use of the term "and" in the following

sentence in the dispute resolution provision: “The Director may appoint a designee to hear and determine the matter.” CP 2566 (Contract, Section 2.9.2). CHPW ignores the permissive term “may” in the same sentence, *id.*; the Authority’s past practice for dispute conferences, CP 2298-99 at ¶¶ 7-10; and the “established principal that “[t]he word ‘or’ is frequently construed to mean ‘and,’ and vice versa, in order to carry out the evident intent of the parties,”” *Black v. Nat’l Merit Ins. Co.*, 154 Wn. App. 674, 688 n.41, 226 P.3d 175 (2010) (quoting *Noell v. Am. Design, Inc., Profit Sharing Plan*, 764 F.2d 827, 833 (11th Cir. 1985) (quoting *Dumont v. United States*, 98 U.S. (8 Otto) 142, 143, 25 L.Ed. 65 (1878))).

More importantly, CHPW sidesteps the due process problems raised by wholesale adoption of Mr. King’s draft recommendation, which would have the effect of determining the contractual rights of the New Plans in an informal setting where the New Plans were not allowed to participate. While it is true that “each plan has a separate contract with [the Authority] under which each plan may request a dispute resolution hearing with [the Authority] if a dispute arises,” CHPW’s Br. at 55, the resolution of CHPW’s dispute about the interpretation of the Assignment Methodology directly impacts the New Plans’ interrelated rights. *See supra* 5-6. Giving legal effect to Mr. King’s draft recommendation would

determine all of the Plans' rights under the Contract without providing every Plan the right to be heard.

Further, even if Mr. King's draft recommendation was the Authority's final determination in the informal dispute resolution process, Mr. King's recommendation would not have "been given effect" as CHPW contends. *See* CHPW's Br. at 60 ("[The Authority] would have needed to 'reverse' and 'change back' its modification to the enrollee assignments that further benefitted the New Plans."). Instead, the New Plans would have protected their contractual rights by challenging Mr. King's recommendation in administrative proceedings and/or court and this exact same dispute would be before the court but through a different procedural path. *See Seattle Bldg. & Const. Trades Council v. Apprenticeship & Training Council*, 129 Wn.2d 787, 795, 920 P.2d 581 (1996). In sum, CHPW's "procedural claim" is not an alternative basis to sustain the grant of summary judgment.

C. CHPW's Assumption that It Received Fewer Enrollees Does Not Demonstrate the Authority's Breach (if any) Caused Monetary Damages.

Finally, the trial court should be reversed on both grounds because CHPW does not identify any evidence in the record showing that it suffered damages or that the Authority's alleged breach caused those damages. *See* CHPW's Br. at 59. CHPW merely reiterates that the

alleged breach “reduc[ed] the number of Potential Enrollees assigned to CHPW and Molina[.]” *Id.* at 60. Like the trial court, CHPW erroneously conflates whether the Authority caused the alleged breach with whether the alleged breach caused any damages. *See* VRP, Jan. 15, 2014, at 63:9-16 (oral decision) (“I can’t think of any way that there wouldn’t be causation under the facts here, and that is, that this breach was caused by the state by drafting something in an imprecise way”); *see also* *Nw. Indep. Forest Mfrs. v. Dep’t of Labor & Indus.*, 78 Wn. App. 707, 712, 899 P.2d 6 (1995) (“A breach of contract is actionable only if the contract imposes a duty, the duty is breached, and the breach proximately causes damage to the claimant.”). Because the trial court improperly relieved CHPW of its burden to prove causation, the trial court’s causation determination should be reversed.

III. CONCLUSION

The Court should reverse the trial court’s rulings granting summary judgment on the breach of contract and procedural claims, and remand this matter for trial.

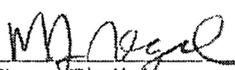
RESPECTFULLY SUBMITTED this 9th day of February, 2015.

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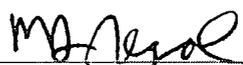
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CERTIFICATE OF SERVICE

Katie Dillon declares as follows:

I am and at all times hereinafter mentioned was a citizen of the United States, a resident of the State of Washington, over the age of 21 years, competent to be a witness in the above action, and not a party thereto; that on the 9th day of February, 2015 I caused to be served a true copy of the foregoing document (per stipulated agreement by all parties) upon:

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

DATED this 9th day of February, 2015.

By 
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