

**FILED**

**MAR 04 2013**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 312704

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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ELSIE FLEMMER

Plaintiff/Appellant,

v.

REGENCY PACIFIC, INC., a Washington corporation, dba REGENCY  
AT THE PARK; and JONATHAN OWENS, an individual

Defendant/Respondent

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BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. INTRODUCTION .....1

II. ASSIGNMENTS OF ERROR

    A. Assignments of Error .....1

    B. Issues Pertaining to Assignments of Error .....2

III. STATEMENT OF THE CASE..... 3

IV. SUMMARY OF THE ARGUMENT.....12

V. ARGUMENT.....12

    A. Genuine Issues of Material Fact Preclude Summary Judgment.....13

    B. Affidavits Submitted in Support of the Motion for Summary Judgment Are Not Adequate.....15

    C. The Contract Requires a Reasonably Accurate Bill Before Payment Must be Made.....18

    D. Under the Circumstances of This Case, the Trial Judge Abused His Discretion by Denying Flemmer’s Motion to Amend Her Complaint.....21

VI. CONCLUSION.....23

**TABLE OF AUTHORITIES**

**Cases**

*Adler v Fred Lind Manor*, 153 Wn.2d 331, 103 P.3d 773 (2004).....19

*Allard v. First Interstate Bank of Wash., N.A.*, 112 Wn.2d 145, 768 P.2d 998 (1989).....21

*Badgett v. Sec. State Bank*, 116 Wn.2d 563, 807 P.2d 356 (1991).....20

*Barrett v. Weyerhaeuser Co. Severance Pay Plan*, 40 Wn. App. 630, 700 P.2d 338 (1985).....20

*Felton v. Menan Starch Co.*, 66 Wn.2d 792, 405 P.2d 585 (1965).....19

*Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 785, 719 P.2d 531 (1986) .....15

*Haselwood v. Bremerton*, 137 Wn.App 872, 155 p.3D 952 (2007).....22

*Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 115 P.3d 262 (2005).....18

*Indoor Billboard Washington, Inc. v. Integra*, 162 Wn.2d 59, 170 P.3d 10 (2007).....13

*Language Connection, LLC v. Employment Sec. Dep't*, 149 Wn. App. 575, 205 P.3d 924 (2009).....18

*Olver v. Fowler*, 161 Wn.2d 655, 168 P.3d 348 (2007).....21

*Richards v. Brown, et al*, 157 Wn.App. 803, 239 P.3d 602 (2010).....16

*Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 230 P.3d 583 (2010).....22

*Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 721 P.2d 1 (1986).....15

*Stephens v. Omni Ins. Co.*, 138 Wn.App. 151, 166, 159 P.3d 10 (2007) ..15

*Vallandigham v. Clover Park Sch. Dist.* No. 400, 154 Wn.2d 16, 109 P.3d 805 (2005).....12

*Wagner v. Wagner*, 95 Wn.2d 94, 621 P.2d 1279 (1980).....19

## **I. INTRODUCTION**

Plaintiff Elsie Flemmer (Flemmer) appeals from a summary judgment granted to Defendants Regency Pacific, Inc. (Regency) and Jonathan Owens (Owens) on Regency's counterclaim and dismissing Plaintiff's claims. The lower court also denied Plaintiff's motion to amend the complaint. Regency is a skilled nursing facility in College Place, Washington. Owens is a former administrator of Regency. Flemmer resided at Regency for a year and a half from August 2008 to February 2010. A dispute arose over billing irregularities. It took Regency a year to present what they claimed was the correct bill. Flemmer tried again and again to resolve the matter before filing this case.

## **II. ASSIGNMENTS OF ERROR**

### **A. Assignments of Error**

1. The trial court erred in entering the order of August 27, 2012 granting Regency's motion for summary judgment on all counts.
2. The trial court erred on August 27, 2012 in denying Flemmer's motion to amend the complaint.
3. The trial court erred in entering the order of October 22, 2012 denying Flemmer's motion for reconsideration.

4. The trial court erred in entering the judgment on October 29, 2012.

**B. Issues Pertaining to Assignments of Error**

1. Does Flemmer's showing of specific facts that Regency's final statement of account is not in accord with the contract overcome Regency's general assertion, without supporting evidence, that it has corrected all errors in the account, thereby precluding summary judgment? Does the record show genuine issues of material fact that preclude summary judgment on all counts? (Assignments of Error 1, 3, 4)
2. Under the circumstances of this case, did the judge abuse his discretion in denying Flemmer's motion to amend her complaint? (Assignment of Error 2)
3. Did the judge abuse his discretion in denying Flemmer's motion for reconsideration? (Assignment of Error 3)
4. Did the judge commit reversible error in entering a judgment when there exist genuine issues of material fact that must be submitted to the jury? (Assignment of Error 4)
5. Did the contract for skilled nursing care in this case require Regency to provide accurate billing statements to its resident, Flemmer? (Assignments of Error 1, 4)
6. Do billing entries contrary to the Admission Agreement constitute a breach of contract which precludes summary judgment? Does

Regency's accounting system which bifurcates resident billing and insurance billing, where the resident is not told what has been billed to insurance and cannot possibly reconcile a billing, breach the contract? (Assignments of Error 1, 4)

### **III. STATEMENT OF THE CASE**

#### **A. FACTS**

In August 2008, Elsie Flemmer moved into Regency at the Park in College Place, Washington. CP 121. She was in very poor health at the time. She thought she was going there to die. Although very sick for much of her tenure, she eventually recovered, had her right foot amputated, and was discharged for good in February 2010. CP 121-122. Regency provides nursing and rehabilitative care. During the relevant time periods, Flemmer was in need of the services provided by Regency. She provided health insurance information to Regency and understood that Regency would bill insurance for payment on her account. CP 122. Her insurance would also have paid for hospice care. She was not told about duplicate billing systems for insurance and for patients. CP 122.

The contract between the parties here is the Admission Agreement which is at CP 16 through 57. Paragraph 2.1 of the Admission Agreement states that the facility (Regency) will provide the resident with room and board, nursing care, dietary services, an activity program and related personal and social services, which is all included in the facility's basic daily rate. CP 16. Paragraph 3.1 of the admission agreement states that

when rates change, the resident will be given 30 days advance notice. CP 19. Flemmer was not given 30 days' notice of the increase from \$225 per day to \$240 per day. CP 125. Paragraph 3.1 also states that the resident is responsible for payment of all fees and charges except for fees and charges covered by Medicare and Medicaid. Paragraph 3.2 of the agreement states that Medicare co-insurance may be pre-billed to the residents. This is the only mention of "co-insurance" in the contract. CP 19. The contract states that the Medicare co-insurance rate is \$124 per day. CP 25. This rate is far lower than the "co-insurance" billed to Flemmer on Mr. Krise's manual statement. CP 93.

Contrary to assertions by Regency at CP 104, lines 19-20, the Admission Agreement states "If the resident has supplemental insurance, the facility will assist in billing the insurance company." CP 25.

Furthermore, the admission agreement shows a verification and assignment of insurance benefits for supplemental insurance. CP 29. This is a form signed by Flemmer that authorizes Regence Blue Shield to make payments to Regency at the Park, contrary to the argument of Regency to the trial court that they did not agree to bill insurance. CP 104.

Regency's Notice of Privacy Information Practices states that Regency may disclose Flemmer's health information so that they may bill and collect payment from an insurance company. CP 51. "For example, we may need to give information from your health plan regarding the

services you received from our facility so that your health plan will pay us or reimburse you.” CP 51 paragraph 1.b.

During her stay at Regency, Flemmer noticed discrepancies in the bills submitted to her by Regency. She performed a self audit of her account, and determined that Regency owed her a refund. Defendant Jonathan Owens, while acting as administrator of Regency at the Park in January 2010, angrily confronted Flemmer to demand that she make an immediate payment of \$45,000. CP 125. On January 14, 2010, Flemmer paid \$45,000 to Regency and paid another \$10,600 on her credit card, even though Regency still had not been able or willing to explain her bill. CP 125.

Regency was repeatedly difficult to work with, and refused to assist Flemmer in correcting the billing errors. When Flemmer noticed on her bills that there were no insurance payments recorded, she spoke to Donnell Bouslaugh, the Regency accountant, and called her attention to that. Bouslaugh replied that she could not bill because she had no preauthorization. However, Flemmer had already spoken with her insurance company and confirmed that no preauthorization was needed. Bouslaugh refused to bill Flemmer’s insurance, and Flemmer was too sick at that time to continually follow through the matter. CP 122.

Flemmer’s left knee was replaced in May or June 2009 and she received an amputation of her right foot in August 2009. She did not get adequate therapy and her muscles grew to the bone and caused muscle

attachment problems. In February 2010 she received a prosthesis for her right foot. As a result, she now uses a wheelchair. Due to these medical circumstances, Flemmer was on pain medication which made it difficult for her to handle her financial affairs. CP 122.

When she was able to review her account, she saw serious errors in the way she was billed. Regency was told that her insurance covered her hospice care. Regency refused to bill insurance and put the entire amount on Elsie's bill. CP 122. Then she noticed that there were no insurance payments being applied to her bill and sometimes the bills had odd amounts added to the balance as "room and board." When she asked for explanation, no one could ever come up with an answer. CP 124.

Finally, the accountant for Regency told Defendant Owens that she believed Regency owed a refund to Flemmer. At this comment, defendant Owens became angry and verbally abusive regarding Flemmer. By his words and actions, defendant Owens demonstrated an intent to harm Flemmer financially. CP 125.

Flemmer repeatedly asked for up-to-date, accurate statements of her account. Regency and Owens repeatedly refused to provide accurate monthly statements. When statements were provided to Flemmer, they contained billings for services which she never received and also billed Flemmer for amounts that should have been submitted to insurance or hospice. Due to Regency's shadow accounting system, Flemmer was not able to review all transactions made on her behalf.

Regency and then Owens repeatedly refused to provide up-to-date monthly bills. Flemmer also repeatedly requested Regency to bill her insurance and, as appropriate, hospice for the amount due on her account. Regency repeatedly refused to bill insurance or hospice, until it was too late and they were denied as the time limit had expired, for amounts that would have been paid by insurance. CP 124.

Flemmer was eligible for Medicare assistance in October 2009 but Regency did not submit any bills to Medicare until April 2010, two months after she had left Regency. CP 123. Her records show that Regency claimed she owed them over \$10,000 and they received over \$10,000 from insurance after she left. CP 123. Now they claim that they run separate billing systems for insurance claims and do not provide patients with any information about services billed to insurance. Yet the bills submitted to Flemmer contain no information that allows any type of meaningful review or reconciliation. Furthermore, the amounts shown on her Explanation of Benefits from her insurance company do not match the amounts she was billed during her stay at Regency. Regency also incorrectly billed the insurance companies, resulting in large sums of money to be “disallowed” and therefore Flemmer’s liability. CP 124.

The constantly changing amounts and lack of reasonable explanation has caused substantial undue stress on Elsie. She has been made more ill because Regency uses a billing system that causes confusion and is not accurate. It does not follow their contract. CP 126.

As shown by their file notes, Regency was told by Flemmer's brother that her insurance covered her hospice care. CP 127. This note is dated August 15, 2008, when Flemmer was first admitted to Regency.

A letter from Dr. Felt, Flemmer's physician, notes that she is suffering "severe ongoing stress" due to her ongoing litigation with a local nursing home. CP 128. This stress has caused heart palpitations and irregular rhythms which required medical attention. CP 126.

The daily room rate at Regency was \$225 from August 2008 to January 2009. CP 125. The rate went up to \$240 per day for February 2009 through December 2009. It then increased to \$252 in January 2010. CP 125. Flemmer's first account with Regency was account number 178000309. A ledger for that account, provided by Regency to Flemmer, shows a charge on 3/27/2009 for room and board SNF(skilled nursing facility) for \$3,372.12. CP 130. This same amount is shown as "co-insurance" for 3/27/2009 through 3/31/2009, and charged to Flemmer on the manual Statement of Account made up by Mr. Krise. CP 93. The only reference in the admission agreement to "co-insurance" is Paragraph 3.2, which mentions Medicare co-insurance may be pre-billed to the resident. CP 19. Flemmer was not eligible for Medicare until October 2009. CP 123. Moreover, Regency did not submit any bills to Medicare until April 2010, two months after Flemmer had left Regency. CP 123.

Mr. Krise's manual statement dated 2/23/2011, created a year after Flemmer left Regency, lists five amounts for "co-insurance" billed to

Flemmer before she was eligible for Medicare assistance. CP 93. These billings are not according to the admission agreement.

Mr. Krise's declaration shows a Statement of Account dated January 29, 2010, one month before Flemmer moved out, which shows a "room and board" adjustment for 8/19/2009 in the amount of \$4,599.84. CP 91. This same dollar amount is shown on his manual statement as services from 8/19/2009 through 8/31/2009 billed as "co-insurance" with no number of days given. CP 93.

A Statement of Account dated September 25, 2009 shows a billing for room and board for 6/29/2009 and 6/30/2009 in the amount of \$251.27. CP 131. This does not match any daily rate for Regency. That statement also shows a billing on 6/30/2009 for "Pharmacy" in the amount of \$13,677.10 and medical supplies of \$19.12. These three amounts add up to \$13,947.49 which appears on Mr. Krise's manual statement for services from 6/11/2009 through 6/30/2009 billed as "co-insurance." CP 93. These "co-insurance" billings are not in accordance with the contract.

A statement in a different format for 4/1/2009 through 4/30/2009, which appears to be a billing to Regence Blue Shield Insurance in Seattle, shows a room and board for twenty days at \$375.00, which is \$7,500, and room and board for 10 days at \$240 (the correct rate) for \$2,400. CP 132. Mr. Krise's manual statement for this same time period shows no billing for "room and board," but only \$9,038.52 for "co-insurance." CP 93. Therefore, insurance was billed \$9,900 for room and board in April of

2009, more than the contract rate, and Flemmer was billed just over \$9,000 for “co-insurance.” This is one example of double billing which Flemmer has been complaining about. A proper billing for Flemmer’s room and board would have been \$240 for thirty days for \$7,200. The twenty days at \$375 is actually an over-billing of \$2,700.

The manual statement created by Mr. Krise shows nothing but room and board charged to Ms. Flemmer until March 2009 when the odd co-insurance amounts start showing up. There is no room and board again until July 2009. According to the admissions agreement, all of her services from March 2009 through July 2009 should have been covered by the daily room rate the same as they were covered from August 2008 until March 2009. CP 16. A statement of account dated February 25, 2009 shows a \$700 credit for medical supplies from November 2008 and a charge of \$137.56 for medical supplies on January 31, 2009. CP 133. However, Mr. Krise’s manual statement shows no billing for medical supplies for January 2009 but only room and board billings until March of 2009.

A Statement of Account dated August 25, 2009 shows room and board billings for August 2009 of \$2,640 for 11 days, \$700 bed hold for 7 days and \$3,120 for 13 days. This covers the entire month of August and bills a total of \$6,460. CP 136. Then the Statement of Account dated January 29, 2010 shows an additional room and board adjustment of \$4,599.84 for August 19, 2009. CP 137. This shows a grand total of

\$11,059.84 for the month of August room and board, a daily rate of \$356.77, far beyond the daily rate in effect at the time, and far beyond any daily rate in effect during Flemmer's residency. Mr. Krise's manual statement shows the 11 days in August 2009 at \$2,640 and the room and board adjustment as co-insurance of \$4,599.84, giving a total of \$7,239.84 for August. CP 93. For the 24 days that Flemmer was at Regency in August 2009 this shows she is still being billed at \$301.66 per day, despite Regency's daily rate of \$240.

A Statement of Account dated January 25, 2011, 11 months after Flemmer moved out of Regency, for account number 178000309 shows a credit balance of \$26,616.33. CP 138. This is due to internal review by Regency and making corrections. This shows the gross over-billing on her account. A Statement of Account dated January 25, 2011 for Flemmer's new account number 179000042 shows a balance forward of \$14,112. CP 140.

## **B. PROCEDURE**

The complaint was filed July 15, 2011. The Answer and Counterclaim were filed August 12, 2011. Discovery was served in October and November 2011 and February 2012. A CR16 conference was held April 11, 2012. Defendants filed their motion for summary judgment on July 16, 2012. Plaintiff filed a motion to amend the complaint on August 20, 2012. An order granting summary judgment was entered

August 27, 2012. An order denying reconsideration of both motions was entered October 22, 2012. A judgment was entered October 29, 2012.

#### IV. SUMMARY OF ARGUMENT

Genuine issues of material fact preclude summary judgment.

Regency's exceedingly sloppy bookkeeping affects more than just Flemmer's account. A resident should be able to reconcile the billing received from a skilled nursing facility. Moreover, Regency's use of dual bookkeeping systems which are not available for review has resulted in financial harm to Flemmer and probably many other residents.

There is no substantial prejudice to Regency by allowing Flemmer to amend her complaint. The proof of this case lies largely with Regency's documents. It took Regency a year to go through Flemmer's account and make adjustments. Then, because the result showed that she had been overbilled, which a Regency bookkeeper knew a year earlier, Regency made up a "manual bill" to show a balance due very close to the balance claimed initially.

#### V. ARGUMENT

This court reviews summary judgment de novo. *Vallandigham v. Clover Park Sch. Dist.* No. 400, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). Summary judgment is affirmed when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Id.* (quoting CR 56(c)). All facts and reasonable inferences are considered in

the light most favorable to the nonmoving party, and summary judgment is appropriate only if, from all the evidence, reasonable persons could reach but one conclusion. *Id.* The moving party must show that there is no genuine issue as to any material fact. If this burden is met, the nonmoving party must present evidence demonstrating that material facts are in dispute. *Id.*

After the court considers all facts in the light most favorable to Flemmer, summary judgment is appropriate “only if [the court] determine[s], based on all of the evidence, reasonable persons could reach but one conclusion.” *Indoor Billboard Washington, Inc. v. Integra*, 162 Wn.2d 59, 70, 170 P.3d 10 (2007).

#### **Genuine Issues of Material Fact Preclude Summary Judgment**

The parties here present competing versions of the facts. Flemmer claims she was overbilled. She reviewed her Explanation of Benefits received from her insurance company. They did not match what she saw on bills from Regency. CP 124. After reviewing her records she saw that her billings did not match the services she had received and she was billed for items that should have been billed to insurance. CP 123 paragraph 10.

Mr. Krise’s manual statement shows the 11 days in August 2009 at \$2,640 and the room and board adjustment as co-insurance for \$4,599.84, giving a total of \$7,239.84 for August. CP 93. For the 24 days that Flemmer was at Regency in August 2009 this shows she is still being billed at \$301.66 per day, despite Regency’s daily rate of \$240. The

amounts on his statement as “co-insurance” are unexplained. This same \$4,599.84 was first billed as room and board. CP 91. The contract mentions billing for Medicare co-insurance, but Flemmer was not yet on Medicare. CP 19, 123. This shows that Mr. Krise’s manual statement does not follow the contract and Regency is not entitled to summary judgment.

The constantly changing amounts and lack of reasonable explanation has caused substantial undue stress on Elsie. She has been made more ill because Regency uses a billing system that causes confusion and is not accurate. CP 126. She has had to seek medical help for heart palpitations. These are potentially fatal, depending on the cause of the irregular rhythm. Her physician confirms that she has been treated for severe stress. CP 128. The documents submitted to the court show very negligent billing practices by Regency. Flemmer was the patient and, as such, Regency owes Flemmer the duty of properly prepared bills, including billing insurance as they agreed to do. CP 25.

Regency argued to the trial court that any surplus in Flemmer’s account would be due to the insurance carrier, not Flemmer. CP 101. Flemmer purchased insurance for her benefit, not Regency’s. It is disingenuous of Regency to not show Flemmer the “insurance side” of her account. A possible reason is overbilling to her insurance. Regency billed for room and board at \$375 per day when the true rate was \$240 per day. CP 132. They have been overcompensated for Flemmer’s stay. This ordeal is

entirely unreasonable and Flemmer has a legitimate claim for breach of contract and negligent infliction of emotional distress.

Regarding the consumer protection act, the plaintiff must show that the alleged acts had the capacity to deceive a substantial portion of the public. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 785, 719 P.2d 531 (1986). Whether a particular action is deceptive is reviewed as a matter of law. *Stephens v. Omni Ins. Co.*, 138 Wn.App. 151, 166, 159 P.3d 10 (2007). Regency's own witnesses describe their accounting system for all patients. This is not just how Flemmer's account was handled. All patients were subjected to periodic statements that did not reflect all charges, did not reflect insurance payments, did not explain the balance due. Flemmer did not receive the full benefit of her insurance proceeds due to double billing. She had some ability to recognize that a problem existed, many other patients do not.

**Affidavits Submitted in Support of the Motion for Summary  
Judgment Are Not Adequate**

After the moving party submits *adequate affidavits*, the nonmoving party must set forth specific facts rebutting the moving party's contentions and disclosing that a genuine issue of material fact exists. *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 12-13, 721 P.2d 1 (1986). Regency, as the moving party, has not submitted "adequate

affidavits” to shift the burden to Flemmer. Nevertheless, Flemmer has set forth specific facts rebutting Regency’s contentions.

The primary evidence submitted by Regency is the Declaration of John Krise, an accounting supervisor employed by Regency Pacific. CP 85-93. Mr. Krise claims that he reviewed the file and made all necessary corrections when errors were discovered. CP 88. There is no documentation of what errors were found, what corrections were made, and what procedures were used to ensure that no more errors exist. There is no opportunity to cross examine the witness. We are expected to believe that the billing is correct just because he said so. Yet his manual statement does not follow the Admission Agreement. Regency has the records, yet there are no supporting documents to prove his reconstruction.

“[W]here material facts are particularly within the knowledge of the moving party ... ' ' it is advisable that the cause proceed to trial in order that the opponent may be allowed to disprove such facts by cross-examination and by the demeanor of the moving party while testifying.” *Richards v. Brown, et al*, 157 Wn.App. 803, 820, 239 P.3d 602 (2010). In the *Richards* case, a guardian brought a case against her ward’s son for misappropriation while acting as her attorney-in-fact. When the court granted the Defendant’s motion for summary judgment, Richards submitted a motion for reconsideration on the grounds that a material issue of fact existed as to whether the son’s girlfriend was liable for conversion

of funds. On appeal the Court held that the plaintiff should be given a trial where the material facts lie predominantly with one party.

Regency's reconstruction showing \$10,367.79 due was done on February 23, 2011, a year after Flemmer was discharged. CP 93. Mr. Krise claims that amounts challenged by Flemmer were written off. CP 88. He does not itemize one single write off. His work is not reviewable. This is the same problem and same treatment that Flemmer has been dealing with for over two years. Regency refuses to explain why the billing is different than their accounting records. They just say it is correct and, therefore, must be paid. Accountants prepare reconciliations to show why a schedule differs from underlying records. There is no reconciliation, just a demand for payment.

Here, the proof lies predominantly with Regency. After trying to get Regency's cooperation on her account, going to the ombudsman and state agencies, Flemmer finally had to sue Regency and request documents that they previously refused to provide. Now Flemmer should be allowed to present her case.

The court does not assess the veracity of a witness on summary judgment the same as is done by the factfinder at trial. The court does not weigh credibility in deciding a motion for summary judgment. That is, the court must not weigh the veracity of a witness simply because a statement is self-serving. *Jones v. State, Dept. of Health*, 170 Wn.2d 338, 242 P.3d 825 (2010). Credibility is an issue for trial. The parties have presented

irreconcilable statements in their respective declarations. Credibility of both sides is an issue that must go to trial.

Moreover, Regency's story changes with time. When Flemmer first noticed a problem on her bills, she brought it to the attention of Ms. Bouslaugh, the Regency accountant. CP 122 paragraph 9. There was no mention by Ms. Bouslaugh of parallel billing systems. That explanation surfaced a year after Flemmer left Regency. CP 123 paragraph 13.

The final, manual statement created by Regency's Mr. Krise does not follow the contract. The basic daily rate includes room and board, nursing care, dietary services, an activity program and related personal and social services, which are all included in the facility's basic daily rate. CP 16. His statement does not reflect this.

The court interprets the meaning of unambiguous contract terms as a matter of law. *Language Connection, LLC v. Employment Sec. Dep't*, 149 Wn. App. 575, 585, 205 P.3d 924 (2009). Under these circumstances, the court will consider only what the parties wrote, giving words in a contract their ordinary, usual, and popular meaning unless the agreement as a whole clearly demonstrates a contrary intent. *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 504, 115 P.3d 262 (2005).

Here the unambiguous contract terms state that Regency will assist in billing insurance and will bill a basic daily rate. The evidence clearly

shows numerous occasions where they did not do this. Therefore, this summary judgment should be reversed.

**The Contract Requires a Reasonably Accurate Bill Before Payment Must be Made**

In construing a written contract, the basic principles require that (1) the intent of the parties controls; (2) the court ascertains the intent from reading the contract as a whole; and (3) a court will not read an ambiguity into a contract that is otherwise clear and unambiguous." *Mayer v. Pierce County Med. Bureau, Inc.*, 80 Wn. App. 416, 421, 909 P.2d 1323 (1995)Mayer, 80 Wn. App. at 420. "An interpretation of a writing which gives effect to all of its provisions is favored over one which renders some of the language meaningless or ineffective." *Wagner v. Wagner*, 95 Wn.2d 94, 101, 621 P.2d 1279 (1980). In harmonizing contract terms, we give greater weight to specific terms than general terms. *Adler v Fred Lind Manor*, 153 Wn.2d 331, 354-55, 103 P.3d 773 (2004). "If the contract is ambiguous, the doubt created by the ambiguity will be resolved against the one who prepared the contract." *Felton v. Menan Starch Co.*, 66 Wn.2d 792, 797, 405 P.2d 585 (1965).

An analysis of CP 130, 134, and 135 shows this billing for

February 2009:

|                    |                |
|--------------------|----------------|
| February Pre-bill- | \$6,720        |
| March Credit-      | (\$6,300)      |
| March Re-bill-     | \$6,675        |
| April Credit-      | (\$6,675)      |
| April Re-bill-     | <u>\$6,720</u> |

Final charge- \$7,140

Now it could be that the original pre-bill was \$6,300 so the last charge was the correct amount of \$6,720. But this billing activity for February was done on the February, March, and April 2009 bills, and Regency expects Flemmer to just pay whatever balance they give her each month. Now Regency presents the reconstruction showing a February 2009 bill of \$9,038.52. CP 93. These billing errors are not likely limited to Flemmer's account. A resident should be able to raise legitimate disputes and get legitimate adjustments. It took Regency, the party with all the records, a year and their statement is still not in accord with the contract.

The duty of good faith and fair dealing requires that Regency do better. An implied duty of good faith and fair dealing exists in every contract. *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356 (1991). This duty "obligates the parties to cooperate with each other so that each may obtain the full benefit of performance." *Badgett*, 116 Wn.2d at 569. The duty of good faith and fair dealing requires only that the parties perform in good faith the obligations imposed by their agreement. See *Barrett v. Weyerhaeuser Co. Severance Pay Plan*, 40 Wn. App. 630, 635-36 n.6, 700 P.2d 338 (1985). The duty of good faith and fair dealing does not inject substantive terms into the parties' contract or create a free-floating duty of good faith unattached to the underlying legal document. *Badgett*, 116 Wn.2d at 569-70. But a reasonably accurate billing must be a prerequisite to payment. It is manifestly unreasonable and patently

unfair to expect payment of an erroneous amount, especially when the party recognizes that the billing is not correct and requests an explanation of the amount.

To this day Regency does not explain the amount except to say that Mr. Krise says so.

**Under the Circumstances of This Case, the Trial Judge Abused  
His Discretion by Denying Flemmer's Motion to Amend Her  
Complaint**

Discretion is abused when a court's decision is manifestly unreasonable or based on untenable grounds or reasons. *Olver v. Fowler*, 161 Wn.2d 655, 663, 168 P.3d 348 (2007). A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds. *Allard v. First Interstate Bank of Wash., N.A.*, 112 Wn.2d 145, 148, 768 P.2d 998 (1989).

Here Regency ran two sets of books, without telling Flemmer there were two sets of books. CP 122 paragraph 5. Billing entries were not accurate, causing Flemmer to be overbilled. It took Regency, the one with all the records, a year to claim they finally reconstructed the account. To now tell Flemmer that she took too long to figure out her case is manifestly unreasonable.

Flemmer could recognize that something was amiss in her bills. But she did not have the detailed daily records to determine the correct bill. Regency did have the detailed daily records to properly bill. It is an

untenable reason to deny Flemmer's motion to amend just because Regency filed a motion for summary judgment. Regency would not explain the basis for its bills to Flemmer. Long after she moved out, Regency told her that they maintained a shadow system and she was not given access to the bills sent to insurance. It is Regency that is playing hide the ball. Any impact on a party's interest in promptly resolving claims is caused by Regency's own actions.

When a party moved to amend the counterclaim after a year and a half, the court denied the motion stating that it was unduly prejudicial because the case had been pending a substantial amount of time. *Haselwood v. Bremerton*, 137 Wn.App 872, 889-890, 155 p.3D 952 (2007). Given this appeal, this case has now been pending as long as *Haselwood*. But when it takes the party with the records a year to review an account and respond to a resident, then still does not get it correct, they should not be heard to complain about prejudicial delay. It is Flemmer whose rights have been prejudiced here, not Regency.

Also, a trial court abuses its discretion when it applies the wrong legal standard, or when it relies on unsupported facts. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 669, 230 P.3d 583 (2010). Here the Court relied on unsupported facts when it relied on Mr. Krise's assertions that all the errors have been corrected. There is no supporting proof of his statements, despite the fact that the records lie with Regency. Moreover, the record shows that not all errors have been corrected.

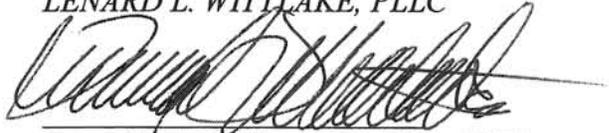
**VI. CONCLUSION**

Summary judgment is not appropriate in this case. Regency and Owens refused to substantiate their bill, coerced Flemmer into paying a large sum when she was sick and in a wheelchair, changed their story, did not bill insurance as they agreed in the Admission Agreement, then overbilled her insurance, double billed Flemmer and her insurance for the same services, billed at greater than the contract daily rate, maintain a shadow accounting system, did not provide regular bills, took a year to review her account, collected substantially more than they are entitled and still claim that Flemmer is the one that breached the contract. Her breach is excusable, theirs is not.

The summary judgment and denial of the motion to amend the complaint should be reversed and this case remanded for further proceedings.

Respectfully Submitted this 1<sup>st</sup> day of March, 2013.

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