

FILED

APR 03 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 312704

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

ELSIE FLEMMER

Plaintiff/Appellant

v.

REGENCY PACIFIC, INC., a Washington corporation, d/b/a REGENCY

AT THE PARK; and JOHNATHAN OWENS, an individual,

Defendants/Respondents

RESPONDENTS' BRIEF

KRISTIAN E. HEDINE, WSBA No. 12668

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Attorneys for Respondents

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I. INTRODUCTION

This action was brought by plaintiff against defendants regarding plaintiff's residency at Regency at the Park ("Regency"), a skilled nursing facility in College Place, Washington. Plaintiff alleged in her complaint that: (a) Regency billed plaintiff improperly, leading to plaintiff overpaying Regency; (b) defendants violated the Consumer Protection Act; (c) defendants breached an implied covenant of good faith and fair dealing; (d) defendants violated the Nursing Home Reform Act, 42 U.S.C. §§ 13595i-3, 1396r, et seq., and 42 C.F.R. § 483; and (e) defendants' negligence caused plaintiff to suffer emotional distress. Defendants in turn claimed that plaintiff breached her contract with defendants by failing to pay costs and expenses when due.

II. STATEMENT OF THE ISSUES

1. Did the trial court appropriately conclude that there was no genuine issue of material fact and appropriately grant defendants' motion for summary judgment? [Plaintiff/appellant's assignments of error 1, 3, 4]
2. Did the trial court correctly apply the law and weigh the appropriate factors in denying plaintiff's motion to amend her complaint? [Plaintiff/appellant's assignment of error 2]
3. Did the trial court appropriately apply CR 59 in the court's decision to deny plaintiff's motion for reconsideration? [Plaintiff/appellant's assignment of error 3]
4. Did the trial court enter an appropriate judgment upon finding that there existed no issues of material fact and defendants were entitled to

judgment as a matter of law? [Plaintiff/appellant's assignment of error 4]

5. Did defendant Regency fulfill its duties under the Admission Agreement by researching billing errors and then dedicating numerous accounting personnel to resolve the billing problems? [Plaintiff/appellant's assignments of error 1, 4]

6. Did Regency comply with the Admission Agreement by billing plaintiff for her room and board when due and billing plaintiff for those medical expenses incurred by her and not paid by her insurance provider? [Plaintiff/appellant's assignments of error 1, 4]

III. STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

Regency at the Park is a skilled nursing facility located in College Place, Washington. On August 8, 2008, plaintiff signed an admission agreement ("the Admission Agreement"). (CP at 16.) The Admission Agreement described in detail the care to be provided (section 2) and payment terms (section 3). (See CP at 16-19.) In particular, plaintiff agreed to make payment each month on or before the 10th of each month. (CP at 19, ¶ 3.1.) The Admission Agreement also provided that the plaintiff, as a resident, was "responsible for prompt and full payment of all fees and charges, except for fees and charges covered by Medicare or Medicaid." (CP at 19, ¶ 3.1.)

Room rates varied at Regency based on the type of room and the services provided in that room. (See CP at 26.) The Admission

Agreement contemplated rate changes to the daily room and board rate. (CP at 19, ¶ 3.1.) Plaintiff acknowledges that Regency's billed room rate for certain rooms was \$225 per day from August 2008 to January 2009, \$240 per day from February 2009 to December 2009, and \$252 per day commencing in January 2010. (CP at 125.) Services available at Regency but not included in the daily rate include: medical supplies; physical and occupational therapy; professional services; and medication. (CP at 26.)

Pursuant to the Admission Agreement, Regency was allowed to pre-bill Medicare co-insurance but "[o]ther charges not covered by Medicare or Medicaid are billed after the end of the month in which those charges are incurred." (CP at 4, ¶ 3.2.) Furthermore, all physicians and health professionals furnishing services to plaintiff were "considered as independent contractors to the [plaintiff] and the expenses incurred thereby [were] those of [plaintiff]." (CP at 4, ¶ 3.4.) In cases where residents were covered by Medicare, the Admission Agreement provided that Regency would assist the resident in billing supplemental insurance companies. (CP at 25.) Plaintiff also signed an Authorization for Assignment of Benefits to allow Regency to receive payments directly from Regence Blue Shield. (CP at 29.)

Regency provided room and board and other services to plaintiff from August 8, 2008, until February 25, 2010. (CP at 86.) Plaintiff spent

approximately 34 days during that period (in March, May, June, and August 2009) in the hospital (rather than at Regency). (CP at 122, 173.) Despite her promise to do so in the Admission Agreement, plaintiff did not make payments each month on or before the 10th of each month. (CP at 86.) In particular, plaintiff made multiple partial payments and made late payments in October 2008, March 2009, June 2009, September 2009, December 2009, and January 2010. Plaintiff made no payment at all in November 2008, January 2009, February 2009, May 2009, July 2009, August 2009, October 2009, November 2009, and February 2010. (CP at 86.) In total, plaintiff failed to pay Regency \$10,367.79 for unpaid room and board, co-insurance payments, and other expenses. (CP at 88.) Regency wrote off some expenses disputed by plaintiff in order to give her the benefit of the doubt. (CP at 88.)

While plaintiff resided at Regency, the building housing Regency at the Park went through a change in ownership (in January 2010), but was still managed by Regency. (CP at 86.) Due to the change in ownership, the accounting systems changed such that the amounts owed by residents under old accounts were not carried over to new accounts. Plaintiff's old account number was #178000309. Plaintiff's new account number, created in January 2010, was #17900042. Outstanding balances (debts to Regency) on accounts were not carried over to new accounts. (CP at 86.)

The account numbers were listed on billing statements provided to plaintiff and there was no secret as to why the account numbers had changed. (CP at 86.)

A combination of the change in accounts and some accounting mistakes (*e.g.*, an inadvertent posting of insurance payor expenses to the private payor portion of plaintiff's account by accounting personnel) has led to some confusion as to the amount plaintiff owed Regency. (*See e.g.*, CP at 87, 136; Appellant's Br. at 11.) For example, plaintiff has asserted that Regency should have billed her insurance company for the cost of hospice care (from August 2008 to January 2009), rather than her. (Appellant's Br. at 3; CP at 123.) However, Regency's final accounting shows that plaintiff was ultimately only billed for room and board expenses during this time period (CP at 93) whereas Hospice care typically does not include costs for room and board. (CP at 87.)

Within each account, the Regency accounting department tracks each resident's private payments separate from each resident's insurance payments (payments made by the resident's insurance carriers). Amounts owed by residents for room and board, co-insurance payments, and other expenses not covered by insurance are considered private payor expenses. Amounts billed to a resident's insurance carrier would be considered insurance payor expenses. Insurance payor expenses and credits do not

show up on plaintiff's monthly statement (because those amounts are not billed to plaintiff), only the amount of co-pay that plaintiff's insurance companies indicated was owed by plaintiff. (CP at 87.)

Plaintiff has asserted that defendants' actions have had a substantial detrimental effect on her psychological well-being and has caused her severe emotional distress. (CP at 8.) When expounding upon symptoms of the detrimental effect on her psychological well-being and the date those symptoms were first exhibited, plaintiff explained that a doctor (Dr. Felt) documented her high blood pressure and difficulty sleeping in her medical file in 2011. (CP at 114.) She also indicated that she was diagnosed with atrial fibrillation in August 2011. (CP at 114.) Plaintiff moved out of Regency on February 25, 2010. (CP at 86.)

When plaintiff brought her billing concerns to defendants' attention, Regency staff, including the Director (Johnathan Owens), met with her and attempted to resolve her concerns. (CP at 94.) Regency assigned accounting personnel to research and evaluate plaintiff's contentions and then correct inaccuracies. (CP at 88, 95.) In particular, Regency staff members submitted (or re-submitted) claims (including Hospice claims) to insurance companies on plaintiff's behalf to ensure the insurance payor side of her account was accurate. While no excess currently exists on plaintiff's insurance payor side of her account, if there

were such a surplus it would be owed to the insurance carrier and not to plaintiff. (CP at 88.) Plaintiff was not qualified to receive coverage under Medicare or Medicaid at the time that she moved into Regency. (CP at 39-40, 87.)

Mr. John Krise, Field Accounting Supervisor, also reviewed the private payor side of plaintiff's account to ensure accuracy. Through reconciling room and board costs and co-insurance payments owed by plaintiff with payments made by plaintiff to Regency, Mr. Krise calculated an amount of \$10,367.79 owing on plaintiff's private payor side of the account. He also created a detailed spreadsheet in order to provide the calculations to plaintiff. (CP at 88, 93, 130.) Plaintiff received a final accounting of her debt upon moving out of Regency in February 2010, and she received the summarized manual statement in approximately February 2011. (CP at 88, 93.) Despite Regency providing this manual spreadsheet to plaintiff she did not remit payment. (CP at 88.)

B. PROCEDURAL BACKGROUND

Plaintiff filed the underlying action against defendants on July 15, 2011. (CP at 3.) Defendants filed their Answer and Counter-Claim on August 12, 2011. (CP at 9.) Plaintiff did not file an Answer to defendant's Counterclaim. (CP at 150.) Defendants served plaintiff's counsel on October 24, 2011, with interrogatories and requests for

production of documents. (CP at 151.) Plaintiff did not respond to those requests until February 1, 2012. The response provided answers to defendants' interrogatories but did not respond to defendants' requests for production. Plaintiff first provided responsive documents on August 16, 2012. Plaintiff has yet to provide a written response to defendants' request for production. Defendants served plaintiff's counsel on November 15, 2011, with requests for admission. Plaintiff did not respond to these requests until February 1, 2012. Plaintiff's counsel served defendants with interrogatories and requests for production on February 2, 2012. Defendants provided responsive answers and responsive documents on March 5, 2012. (CP at 151.)

To expedite the case's resolution, on July 16, 2012, defendants moved for summary judgment against all of plaintiff's claims and in favor of defendant's counterclaim. Defendants expended considerable time and expense in preparing and filing their motion for summary judgment believing that such would successfully bring the matter to a more speedy resolution. Considering that both parties had exchanged discovery and a year had passed since plaintiff filed her complaint, defendants' believed the timing of the summary judgment motion to be appropriate for consideration of all issues. (CP at 151.)

On August 20, 2012 (seven calendar days prior to the hearing of defendants' motion), plaintiff served defendants with her motion to amend complaint. (CP at 151.) On August 27, 2012, the trial court heard defendant's motion for summary judgment and plaintiff's motion to amend her complaint and found for defendants. (RP at 1, 12-13.) In regards to plaintiff's motion to amend her complaint, the trial court found that the motion was untimely and noted that "after the Court has had an opportunity to look at the summary judgment motion, you can't come in and then claim, well, if the court is thinking about doing that or because we maybe didn't allege the correct cause of action, we now move to amend the complaint." (RP at 12.)

On September 6, 2012, plaintiff filed a motion for reconsideration of the court's decision on defendant's motion for summary judgment and defendant's motion to amend her complaint. (CP at 164.) The trial court denied the motion based on the reasoning set forth in defendant's memorandum in opposition to the motion. (CP at 186-188.) The trial court subsequently entered judgment for defendant Regency in the amount alleged in its counterclaim (*i.e.*, \$10,367.79) and awarded Regency its costs and attorney fees. (CP at 189-191.)

IV. ARGUMENT

A. THE TRIAL COURT APPROPRIATELY GRANTED DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BECAUSE THERE ARE NO GENUINE ISSUES OF MATERIAL FACT AND DEFENDANTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW

Summary judgment is appropriately granted if the evidence presented shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). One who moves for summary judgment has the initial burden of showing the absence of an issue of material fact, irrespective of which party, at the time of trial, will have the burden of proof on the issue concerned. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). Any doubt as to the existence of a genuine issue of material fact will be resolved against the movant. *See id.* at 226. A material fact is one upon which the outcome of the case depends, in whole or in part. *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993).

“A party may move for summary judgment by setting out its own version of the facts or by alleging that the nonmoving party failed to present sufficient evidence to support its case.” *Pacific Northwest Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 350, 144 P.3d 276 (2006)(“*Shooting Park Ass'n*”). “Once the moving party has met its

burden, the burden shifts to the nonmoving party to present admissible evidence demonstrating the existence of a genuine issue of material fact.” *Id.* at 351. “If the nonmoving party cannot meet that burden, summary judgment is appropriate.” *Id.*; *Indoor Billboard/Washington, Inc. v. Integra*, 162 Wn.2d 59, 70, 170 P.3d 10 (2007).

1. The Trial Court Appropriately Concluded that Plaintiff’s Breach of Contract Claim Raised No Genuine Issues of Material Fact

Plaintiff contests that she was overbilled and that there are competing versions of the facts. (Appellant’s Br. at 13.) However, plaintiff has failed to present evidence that raises a genuine issue of material fact. To the contrary, the examples presented by plaintiff illustrate the inadvertent mistakes that defendant found in its accounting system which led Regency’s accountants to review plaintiff’s account in detail and subsequently create a manual bill for plaintiff’s benefit.

As Mr. Krise explained, there were some accounting difficulties that arose due to the change in ownership of the building and some inadvertent accounting errors. Following the change in ownership plaintiff had two accounts. When plaintiff brought what she believed to be accounting errors to Regency’s attention, Regency staff (including the director) met with her and attempted to resolve her concerns. Regency accountants reviewed plaintiff’s accounts, corrected inaccuracies, and

submitted (or re-submitted) claims to insurance companies on plaintiff's behalf to ensure the insurance payor side of her account was accurate. No excess currently exists on plaintiff's insurance payor side of her account.

Mr. Krise also reviewed the private payor side of plaintiff's account to ensure accuracy. Through reconciling room and board costs and co-insurance payments owed by plaintiff with payments made by plaintiff, Mr. Krise calculated an amount of \$10,367.79 owing on plaintiff's private payor side of the account. He also created a detailed spreadsheet in order to provide the calculations to plaintiff. (*See* CP at 93.) On appeal plaintiff continues to point to old bills¹ to question Mr. Krise's statement, however those bills merely confirm Regency's position that there were inadvertent mistakes in the accounting system (e.g., insurance payments were posted to the private payor accounts instead of the insurance payor accounts), which led to inaccurate bills. However, by reviewing Mr. Krise's statement both parties can see what expenses or costs plaintiff incurred at Regency compared with what payments she made (and compare these costs and payments with the documents provided in discovery). While some initial bills contained errors, Regency rectified those errors by doing multiple audits and by creating a manual

¹ For example, plaintiff identifies an account statement from January 2011 from plaintiff's old account (closed in January 2010) that shows a credit balance and assumes that it must be correct. (Appellant's Br. at 11.)

statement to show the status of plaintiff's accounts. Plaintiff has not presented any evidence to show that the amount charged for room and board or for co-insurance was inaccurately calculated by Regency or her insurance providers.²

Plaintiff appears to now be arguing that the co-insurance payments listed on the manual statement (*see* CP at 93) are inappropriate because they are in essence an effort by Regency to charge plaintiff twice for room and board (*see e.g.*, Appellant's Br. at 9-10, 13.) Plaintiff also apparently argues that the only permissible co-insurance under the agreement is that billed in conjunction with Medicare and that any other billings of co-insurance are "not in accordance with" or "do not follow" the contract. (*See e.g.*, CP at 8-9, 18.)

These positions are however contrary to plaintiff's position regarding the billing of her insurance providers. Specifically, plaintiff asserts that defendant Regency had a duty to bill her insurance company (*see* Appellant's Br. at 4; CP at 123), but yet when Regency did just that to assist her (*see e.g.*, CP. 132), she now argues that the medical expenses

² Plaintiff also argues that the manual statement is not accurate because it does not list certain medical supplies and does not list daily room rates for certain periods of time. (*See* Appellant's Br. at 10). However, the absence of those items merely shows that plaintiff was not ultimately held responsible for those items (either because they were written off, they were covered by insurance providers, or a co-insurance payment covers the period in question).

that the insurance did not pay should not be billed to her. In essence, the co-insurance listed on the manual statement is clearly plaintiff's share (*i.e.*, co-pay or patient responsibility)³ of her expenses incurred at Regency (including medical expenses) that her insurance provider did not pay and that she is thereby responsible to pay.⁴ Including the costs of medical expenses (consistent with plaintiff's desire that Regency bill her insurance provider) in the amount listed as co-insurance explains why the amounts charged exceed the daily room rate (for the days during the covered period). The fact that the co-insurance entries do not overlap with periods for which plaintiff was charged room and board at normal rates (*see* CP at 93), supports the fact that the co-insurance entries on the manual statement represent plaintiff's share of expenses not paid by her insurance company (consisting of room and board, medical supplies, pharmacy, and therapeutic care) and that the co-insurance entries are not "double bills."

Related to plaintiff's "double billing" argument is her contention that her room rate was incorrectly billed at \$375 per day for 20 days in

³ In her declaration, plaintiff indicates her understanding that she may have a responsibility to pay those expenses her insurance does not. (CP at 124.)

⁴ Defendant provided plaintiff over 900 documents in discovery (CP at 176; RP at 7), many of which reference expenses other than room and board expenses (*i.e.*, medical supplies, pharmacy expenses, and rehabilitative expenses) and which plaintiff used to prepare her case (*see e.g.*, CP at 130-132, 175). Had plaintiff argued more specifically to the trial court what she argues here (*i.e.*, that she believes the co-insurance entries on her bill are an effort to double bill her) defendants could have added to the record the explanation of benefits (EOBs) and other documents which explain those co-insurance payments.

April 2009, and should have been billed at \$240 per day. (See Appellant's Br. at 8-10, 14.) What plaintiff fails to consider however is that Regency's room rates differ depending on the room in which a resident resides. As apparent from the record (*see e.g.*, CP at 26), Regency had different types of rooms with different daily rates that increased periodically after plaintiff moved into the facility in 2008. It is discernible from the record that plaintiff spent 14 days in the hospital in March 2009, resuming her residency at Regency on March 27, 2009.⁵ Following her stay in the hospital it is also discernable from the record⁶ that she resided in a more expensive room for four days in March and for 20 days in April where she could receive the additional care needed for someone having recently returned from the hospital.⁷

⁵ Plaintiff spent approximately 34 total days in the hospital while residing at Regency, some of which occurred in March. (CP at 173.) The manual statement provided by Mr. Krise shows that plaintiff was charged room and board for 12 days in March (from March 1 – March 12) and then was later charged co-insurance for four days at the end of March (March 27 – March 31). (CP at 93.) It naturally follows from the record that plaintiff resided in the hospital from March 13 – March 26.

⁶ A close examination of Mr. Krise's manual sheet (CP at 93) shows that the periods during which co-insurance is charged all follow a gap in plaintiff's residency at Regency. Specifically, gaps in residency occurred in March, May, June, and August. (CP at 93.) The gaps correspond with the months that plaintiff was reportedly in the hospital or undergoing surgery. (CP at 122, 173.) It naturally follows that the co-insurance was charged to cover those increased room and board and medical expenses necessary for her care (that were not covered by plaintiff's insurance provider) following her return from her stays in the hospital.

⁷ Unfortunately, the documents which would confirm these conclusions are not in the record.

Plaintiff further contends (closely related to the argument discussed above) that defendants' billing practices violate the Admission Agreement. Specifically, plaintiff argues that the manual statement does not "follow the contract" because the manual statement lists amounts for co-insurance billed to plaintiff before she was eligible for Medicare assistance. (Appellant's Br. at 2, 8-9, 18.) Plaintiff also argues that Regency's accounting system violates the contract by bifurcating private party billing and insurance billing. (Appellant's Br. at 2.) However, plaintiff is incorrect. First, the costs listed in the manual statement are not inconsistent with the Admission Agreement. The admission agreement clearly allows Regency to bill its residents for daily room rates as well as other fees and charges for which the resident is responsible. The daily room rate does not include medical supplies, therapeutic services, or medication. When Regency agreed to assist⁸ plaintiff by billing plaintiff's insurance company at her request it was appropriate and consistent with the Admission Agreement to add plaintiff's share of expenses (*e.g.*, the

⁸ Plaintiff asserts that defendants had a duty to bill her insurance. (*See e.g.*, Appellant's Br. at 4, 18). While the Admission Agreement puts the onus of responsibility on the resident to pay all expenses incurred by the resident (*see* CR at 19), Regency will "assist" its residents covered by Medicare with billing of supplemental insurance (CP at 25) and (as Regency did for plaintiff) will in other circumstance assist non-Medicare residents in the billing of the resident's insurance companies on the resident's behalf, even though not required by the Admission Agreement. Contrary to plaintiff's contention, her authorization for Regency to receive payment for medical benefits directly from her insurance company (CP at 29) did not create a requirement for defendants to bill her insurance company.

portion of medical expenses her insurance did not pay) to Mr. Krise's manual statement. Nothing in the Admission Agreement prevented that. Second, while plaintiff may dislike Regency's bifurcated accounting system, plaintiff has pointed to no language within the Admission Agreement or to any legal authority that prohibits Regency from using such an accounting system.

Defendants met their burden of showing that no material issue of fact exists. Specifically, defendants provided in their initial briefing to the trial court an explanation that while certain employees made some accounting mistakes on plaintiff's account, all such errors have since been researched and rectified. Nothing that plaintiff has provided in response, at the trial court or now on appeal, calls that evidence into question or otherwise raises a genuine issue of *material* fact. There is no competing version of the facts—plaintiff merely insists on focusing on erroneous bills before they were corrected and discounts the reconciliation that Regency conducted for her benefit. Because plaintiff has failed to meet her burden in response (as stated in *Shooting Park Ass'n*), summary judgment in favor of the defendants regarding plaintiff's claim of breach of contract (and defendants counterclaim) was appropriate. Similarly, the trial court's

entry of judgment on October 29, 2012, in favor of Regency Pacific, Inc., was appropriate.⁹

2. The Trial Court Appropriately Relied on Affidavits and Evidence provided by Defendants

Plaintiff contends that defendants have not submitted adequate affidavits and have failed to provide sufficient supporting documentation. (Appellant's Br. at 16.) Contrary to plaintiff's assertions, the evidence does support the trial court's order granting defendants' motion for summary judgment. At the time of his declaration Mr. Krise was a 4-year employee at Regency and had worked in the skilled nursing industry for 15 years. He provided a detailed declaration with supportive attachments. His declaration described defendant Regency's accounting system, the errors that were discovered, and how Regency staff worked to correct those errors and provide an accurate accounting to plaintiff. (*See generally* CP at 85-88.)

Plaintiff alleges that Mr. Krise's work was not reviewable. To the contrary, defendants provided hundreds of pages of discovery to plaintiff. (*See e.g.*, CP at 119, 124, 129-140, 151.) That discovery, including documents provided by plaintiff to the court (*see e.g.*, CP at 130), shows

⁹ Plaintiff does not appear to contest specifically on appeal the trial court's granting of defendants' counterclaim (and in fact acknowledges that she breached the Admission Agreement (*see* Appellant's Br. at 23)).

charges and credits covering the time that plaintiff resided at Regency. Plaintiff is able to review the account documents provided by defendants to her, compare them to Mr. Krise's statement, and check off each expense and credit, just as Regency personnel did (*see* CP at 130).

Plaintiff cites to the case of *Brown v. Brown*, 157 Wn. App. 803, 816, 239 P.2d 602 (2010), and asserts that the burden of proof lies predominantly with Regency and that as a result, this case should go to trial. (Appellant's Br. at 16-17.) In *Brown*, the court considered claims by Dottie Brown against her son (Barry Brown), his girl-friend (Beverly Hogg),¹⁰ and Wells Fargo Bank for actions taken by Barry and Beverly under the guise of a power of attorney signed by Dottie. *Id.* at 807. In particular, the appellate court considered the trial court's dismissal of Dottie's claim for conversion against Beverly. *Id.* at 817-820. The court concluded, based on the specific facts of that case, that Dottie had raised an issue of material fact (*i.e.*, Hogg's liability for conversion) and that the case should therefore go to trial. *Id.* at 818-820. The court noted that an additional consideration in its decision was Hogg's credibility. *Id.* at 820.

The present matter is distinguishable from *Brown*. The court in *Brown* made its decision to remand after determining that a genuine issue

¹⁰ First names will be used here briefly to avoid confusion.

of material fact existed. While the court referenced the credibility of the witnesses and the knowledge of the moving party, the court did so only after first determining that an issue of material fact existed. Here, as discussed at length above, there are no genuine issues of material fact and thus no need to evaluate credibility through cross examination.

Furthermore, as evident throughout the record, defendants have provided plaintiff with extensive discovery and an explanation of the misc. bills and statements, which plaintiff in turn has used and cited to many times (so there is no need to overturn the trial court's decision merely because the burden of proof allegedly lies predominately with Regency). The trial court appropriately relied on the memorandum, affidavits, and supporting documentation in granting defendants motion for summary judgment.

3. The Trial Court Appropriately Determined that Defendants did not Breach an Implied Covenant of Good Faith and Fair Dealing

“There is an implied covenant of good faith and fair dealing in every contract [which] obligates the parties to cooperate with one another so that each may obtain the full benefit of performance under the contract. *Frank Coluccio Const. Co., Inc., v. King County*, 136 Wn. App. 751, 764, 150 P.3d 1147 (2007).

Plaintiff contends on appeal that a reasonably accurate bill must be a prerequisite for payment. (Appellant's Br. at 20.) Even assuming that

position to be true for the sake of argument, defendants have complied with that requirement. As stated in detail above, when plaintiff expressed her concerns about the inaccuracy of her bills defendants heeded plaintiff's concerns and conducted a number of audits of her account.¹¹ In fact, the evidence shows that defendants made significant efforts to address plaintiff's concerns and did not act maliciously, fraudulently, or with wanton or willful disregard of the accuracy of plaintiff's accounts. Even if some bills initially provided were inaccurate, defendants combed through their records and created a manual bill to present a simple, straight-forward, and accurate summary of plaintiff's charges and payments. Despite receiving the summarized and accurate bill in 2011 plaintiff still refused to pay the amount due. Therefore, even if a reasonably accurate bill is required before payment must be made (as plaintiff asserts), defendants have complied with that requirement. The facts show that there is no genuine issue of material fact and the trial court correctly determined that respondents were entitled to judgment as a matter of law on this claim.

¹¹ However, even if audits hadn't occurred and plaintiff was treated with disrespect (which didn't happen) that does not necessarily constitute a violation of an implied covenant of fair dealing.

4. The Trial Court Appropriately Concluded that Plaintiff Failed to Provide Evidence Supporting her Claim of Negligent Infliction of Emotional Distress

In order to recover for negligent infliction of emotional distress the plaintiff must prove the four elements of negligence (*i.e.*, duty, breach, causation, and damages) and objective symptomatology. *Segaline v. State, Dep't of Labor & Indust.*, 144 Wn. App. 312, 327, 182 P.2d 480 (2008), *rev'd on other grounds*, 169 Wn.2d 467, 238 P.3d 1107 (2010). Courts generally require an intentional or willful tort to be proven before damages for emotional distress are recoverable. *See e.g., Pickford v. Mason*, 124 Wn. App. 257, 259-261, 98 P.3d 1232 (2004). "To satisfy objective symptomatology, a plaintiff's emotional distress must be susceptible to medical diagnosis and proved through medical evidence." *Hawkins v. Diel*, 166 Wn. App. 1, 14, 269 P.23d 1049 (2011)(quoting *Hegel v. McMahon*, 136 Wn.2d 122,132, 960 P.2d 424 (1998)).

Plaintiff argues in her brief that defendants owed plaintiff a duty to properly prepare bills, defendants were negligent in their billing practices and in billing insurance companies, and that the constantly changing amounts and lack of reasonable explanation have caused undue stress on plaintiff and caused her to become more ill. (Appellant's Br. at 14.) However, plaintiff has failed to show that the trial court erred in granting summary judgment related to plaintiff's claim of negligent infliction of

emotional distress. Specifically, plaintiff has not provided evidence that defendants treated plaintiff unlawfully or in anyway violated a duty owed to plaintiff. Plaintiff has failed to provide any evidence tending to show that defendants have committed an intentional or willful tort against plaintiff. Plaintiff has also failed to show that the defendants' actions were the proximate cause of her alleged emotional distress. Notably the doctor's note does not identify defendant Regency as the cause of her stress but rather connects the stress to a legal issue she "is dealing with." (CP at 128). Even assuming that this court case is the legal issue referenced by Dr. Felt, this case was initiated by plaintiff after she moved out of Regency (meaning that if this case is causing her stress, plaintiff at least contributed to that stress by filing suit and the stress began after she moved out). Even if plaintiff could show that defendants' actions were the proximate cause of some injury, she has failed to provide any medical evidence of a diagnosable emotional disorder (without which she cannot prevail on this claim). As such, the trial court correctly granted summary judgment for defendants.

5. The Trial Court Appropriately Concluded that Plaintiff Failed to Make out a Claim under the Consumer Protection Act

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of a trade or commerce are unlawful. RCW

19.86.020. "In a private action in which an unfair or deceptive act or practice is alleged under RCW 19.86.020, a claimant may establish that the act or practice is injurious to the public interest because it: (1) Violates a statute that incorporates this chapter; (2) Violates a statute that contains a specific legislative declaration of public interest impact; or (3)(a) Injured other persons; (b) had the capacity to injure other persons; or (c) has the capacity to injure other persons." RCW 19.86.093. Summary judgment is appropriate for a defendant when the plaintiff fails to show that she can meet all of the elements of that specific claim. *See Brown*, 157 Wn. App. at 816.

Plaintiff is unable to set forth sufficient facts to support a violation of the Consumer Protection Act (*i.e.*, there exists no issue of material fact) and the trial court correctly determined that defendants were entitled to judgment as a matter of law. First, plaintiff will not be able to provide sufficient evidence to support a claim that defendants engaged in deceptive acts or practices. In fact, the evidence presented supports a conclusion that errors made on plaintiff's accounts at Regency were inadvertent (and not deceptive or unfair) and have long since been corrected. In particular, Mr. Krise and Mr. Owens described the numerous efforts and substantial amount of time defendant Regency put into reviewing plaintiff's accounts to ensure that all inadvertent errors were

found and rectified. Mr. Krise also explained that plaintiff was provided with an accurate accounting of her account status long ago. Second, plaintiff will not be able to provide evidence sufficient to meet the elements of RCW 19.86.093. Plaintiff argues on appeal that all of Regency's "patients" had the same accounting problems that plaintiff did but were unable to recognize that a problem existed. (Appellant's Br. at 15). However, plaintiff has presented no declarations, statements, or other evidence from any third party indicating that defendants acted in a deceptive or unfair way and that those actions had the capacity to harm that third party. Vague allegations that Regency's other residents also received bills from Regency fails to meet the elements required to make out a claim under the Consumer Protection Act.

As stated in *Shooting Park Ass'n*, when the moving party presents sufficient evidence to show that the nonmoving party has failed to present sufficient evidence to support its case, and the nonmoving party is unable to meet its burden in response, summary judgment in favor of the moving party is appropriate. Summary judgment against plaintiff in regards to her consumer protection act claim was therefore appropriate here.

**B. THE TRIAL COURT APPROPRIATELY DENIED
PLAINTIFF'S MOTION TO AMEND HER COMPLAINT**

A motion for leave to amend must state with particularity the grounds for the motion. CR 7(b); *Doyle v. Planned Parenthood*, 31 Wn. App. 126, 130, 639 P.2d 240(1982). The decision whether to grant leave to amend is fact-specific. *See e.g., Herron v. Tribune Publ'g Co.*, 108 Wn.2d 162, 165-66, 736 P.2d 249 (1987). Courts have denied motions to amend complaints after considering a number of factors including whether the proposed new claims: (a) are duplicative, futile, or of questionable merit (*see e.g., Nakata v. Blue Bird, Inc.*, 146 Wn. App. 267, 278, 191 P.3d 900 (2008) (where the court found that the proposed new causes of action were dependent upon the facts already developed, which did not support the new causes of action); *Doyle*, 31 Wn. App. at 130); (b) are untimely or brought after undue delay (*Doyle*, 31 Wn. App. at 131; *Del Guzzi Constr. v. Global Northwest*, 105 Wn.2d 878, 888-889, 719 P.2d 120 (1986); *Herron*, 108 Wn.2d at 165-66); or (c) would unduly prejudice the nonmoving party. *Haselwood v. Bremerton*, 137 Wn. App. 872, 889-890, 155 P.3d 952 (2007), *aff'd* 166 Wn.2d 489, 210 P.3d 308 (2009); *Herron*, 108 Wn.2d at 167-168. The “touchstone for denial of an amendment is the prejudice such amendment would cause the nonmoving party.” *Haselwood*, 137 Wn. App. at 889. “In determining prejudice, a

court may consider undue delay and unfair prejudice as well as the futility of the amendment.” *Id.* “The granting of a motion to amend a pleading is a discretionary act,” the denial of which “will not be disturbed unless the reviewing court concludes that the denial was a manifest abuse of discretion.” *In re Bonet*, 144 Wn.2d 502, 510, 29 P.3d 1242 (2001). “An abuse of discretion occurs only when no reasonable person would take the view adopted.” *Id.*

In *Del Guzzi Construction*, defendant Global moved to amend its answer, counterclaim, and third party complaint within 26 days after the third-party defendants moved for summary judgment. 105 Wn.2d at 881. On appeal the court upheld the trial court’s denial of Global’s motion to amend based on the trial court’s attempt to protect the nonmoving parties from an untimely and unfair amendment to the pleadings. *Id.* at 888-889. In *Herron*, 10 months after plaintiff filed his complaint and shortly after defendant Tribune Publishing Company filed a motion for summary judgment, plaintiff moved to amend his complaint to add new causes of action and an additional defendant. 108 Wn.2d at 164. The trial court denied the motion to amend concerned with “unfair surprise and prejudice to the defendants,” noting in particular that the lawsuit “had been pending for a substantial period of time” and that granting the motion would in effect “broaden the issues.” *Id.* at 168.

In *Haselwood*, defendant RV Associates moved for summary judgment against fellow defendant BIA. 137 Wn. App. at 879. When not entirely successful, RV Associates sought leave to file an amended counterclaim and cross-claim, adding five additional allegations against plaintiffs. The trial court denied the motion to amend. *Id.* at 880. On appeal, the appellate court identified legal insufficiencies with RV Associates' claims and noted that RV Associates had not alleged sufficient facts to support its additional claims. *Id.* at 889. As such, the court was satisfied that the trial court could have found the proposed amendments meritless, futile, or unfairly prejudicial and that RV Associates' delay in bringing the claim would be unfairly prejudicial. *Id.* at 890. In particular, the court noted that allowing RV Associates to proceed with its amended complaint with entirely new theories of liability at that particular time in the case (*i.e.*, one and one-half years after the filing of its counter claim and after suffering an adverse summary judgment ruling) "would prejudice the other parties' interests in promptly resolving the claims." *Id.*

The trial court in this case appropriately denied plaintiff's motion to amend her complaint. As set forth above, the trial court found that the motion was untimely and improper at that stage of the proceeding. The trial court's decision was reasonable and was not an abuse of discretion. First, plaintiff failed to provide any grounds for granting the motion,

despite requirement under CR 7(b) that she state those grounds with particularity. Second, the proposed additional claims (*see* CP at 141) appear duplicative, futile, and of questionable merit. Plaintiff failed to provide the trial court with evidence to create a genuine issue of material fact, let alone facts supportive of additional claims.

Third, similar to the moving parties in *Del Guzzi Construction* and *Herron* (and as emphasized by the trial court), plaintiff's request to amend her complaint was untimely, coming over one year after the filing of her initial complaint. Defendants have steadily sought to move this case forward to resolution (through their timely submission of their Answer and Counterclaim, discovery requests, and discovery responses) while plaintiff has not.

Plaintiff suggests on appeal that it was unfair to not grant her time to "figure out her case" when Regency needed time to "reconstruct her account." (Appellant's Br. at 21.) However, it's notable that plaintiff received a final accounting of her debt upon moving out of Regency in February 2010, and she received the summarized manual statement in approximately February 2011. While she may not have received all the documents (through discovery) that she wanted to perfect her case until March 5, 2012, she likewise waited from July 2011 until February 2012 to request such documents through discovery. Notably though, considering

the basis of her proposed additional claims (*see* CP at 141), she reasonably could have moved to amend her complaint without the discovery provided by defendants (rather than waiting until 30 days after defendants had moved for summary judgment). Denying plaintiff's motion was fair and reasonable as granting her motion would have lead to undue delay in the resolution of this matter.

Fourth, granting plaintiff's motion at this time in litigation would prejudice defendants. Similar to RV Associates in *Haselwood*, plaintiff sought to amend her complaint after defendants had expended considerable time, expense, and effort in seeking a timely resolution of their claims through defendants' summary judgment motion. Just as in *Haselwood*, to allow plaintiff to proceed with her amended complaint with entirely new theories of liability (*i.e.*, filed over one year after the filing of her claim and on the eve of suffering an adverse summary judgment ruling) would prejudice defendants' "interests in promptly resolving the claims." The trial court's refusal to grant plaintiff's motion to amend her complaint was not an abuse of discretion and should accordingly be affirmed.

**C. THE TRIAL COURT APPROPRIATELY DENIED
PLAINTIFF'S MOTION FOR RECONSIDERATION**

“On the motion of the party aggrieved, a verdict may be vacated . . . or any other decision or order may be vacated and reconsideration granted.” CR 59(a). Such motion may be granted for any of the listed causes materially affecting the substantial rights of the parties including the following: “(6) Error in the assessment of the amount of recovery whether too large or too small . . .;” “(7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;” and “(9) That substantial justice has not been done.” *Id.* “The moving party must identify “specific reasons in fact and law as to each ground upon which the motion is based.” CR 59(b).

A trial court’s denial of a motion for reconsideration is reviewed for a manifest abuse of discretion. *Lund v. Benham*, 109 Wn. App. 263, 266, 34 P.3d 902 (2001). “An abuse of discretion occurs only when no reasonable person would take the view adopted.” *In re Bonet*, 144 Wn.2d at 510.

Plaintiff asserts that the trial court erred in entering the order of October 22, 2012 denying plaintiff’s motion for reconsideration (Appellant’s Br. at 1-2.) but does not provide any argument specific to that

assertion. In so doing plaintiff has failed to overcome the arguments raised by defendants in their memorandum in opposition to plaintiff's motion (*see* CP at 177-184) adopted by the trial court in its October 9, 2012, letter opinion. (CP at 186.) Plaintiff has thus failed to show that the trial court abused its discretion in denying plaintiff's motion for reconsideration.

D. DEFENDANTS ARE ENTITLED TO RECOUP ATTORNEY FEES AND COSTS ON APPEAL

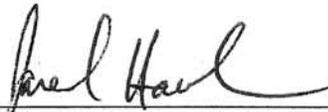
The Admission Agreement signed by the parties included a provision for the collection of attorney fees: "In the event that either party brings an action to enforce this Agreement, the prevailing party in such action shall be entitled to recover from the other costs and reasonable attorney's fees incurred in connection therewith, including all appeals." (CP at 23.) Plaintiff brought an action to enforce the Admission Agreement. Defendant also brought a counterclaim to enforce the agreement. If this court denies plaintiff's appeal, defendants should be considered the prevailing party and should be awarded their costs and reasonable attorney's fees incurred in connection with this appeal, as provided in the Admission Agreement and consistent with RAP 18.1.

V. CONCLUSION

The trial court appropriately granted summary judgment for the defendants and appropriately denied plaintiff's motion to amend her complaint and plaintiff's motion for reconsideration. The Court of Appeals should affirm the trial court's orders in all respects and should dismiss this appeal on its merits. The Court of Appeals should also award defendants their reasonable attorney fees and costs as provided under RAP 18.1.

Respectfully submitted this 2nd day of April, 2013.

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PROOF OF SERVICE

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

US Mail Postage Prepaid to:

Lenard L. Wittlake
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Walla Walla, WA 99362

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

DATED this 2nd day of April, 2013, at Walla Walla,

Washington.

Virtual In-House Counsel


Kjirsten Hedine
Legal Assistant