

**IN THE SUPREME COURT OF THE STATE OF OREGON**

**LARISA'S HOME CARE, LLC,**  
an Oregon limited liability company,  
*Plaintiff-Respondent*  
*Petitioner on Review,*

v.

**KAREN NICHOLS-SHIELDS,** the  
duly appointed Personal  
Representative of the Estate of  
Isabell Prichard, Deceased  
*Defendant-Appellant*  
*Respondent on Review.*

SC Case No. S064120

Court of Appeals Case No.  
A154950

Washington County Circuit Court  
Case No. C124865CV

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**RESPONDENT'S ANSWERING BRIEF  
ON THE MERITS ON REVIEW**

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Petition for Review of the Decision of the Oregon Court of Appeals  
On appeal from the Judgment of the Circuit Court for Washington County  
The Honorable Janelle F. Wipper, Judge

Opinion Filed: April 27, 2016

***Reversed***

Opinion by the Hon. Erika L. Hadlock, C.J.  
Before Judges Hadlock, Sercombe and Tookey

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## **RESPONDENT'S ANSWERING BRIEF**

### **I. CITATION STANDARD**

Defendant-Appellant-Respondent on Review, KAREN NICHOLS-SHIELDS ("Respondent") hereby adopts the Citation Standard used by Plaintiff-Respondent-Petitioner on Review, LARISA'S HOME CARE, LLC, ("Petitioner" or "LHC") in its Brief on the Merits.

### **II. RESPONSE TO CONCISE STATEMENT OF THE LEGAL QUESTION PRESENTED AND THE RULE OF LAW PETITION PROPOSES TO ESTABLISH.**

ORAP 9.17(3)(b) provides that items required by ORAP 9.17(2) need not be included in Respondent's Answering Brief on the Merits on Review, unless Respondent is dissatisfied with their presentation in Petitioner's Brief on the Merits on Review. Respondent is dissatisfied with LHC's Concise Statement of the Legal Questions Presented and Rule of Law Petitioner Proposes to Establish, and believes the questions presented to this Court are more appropriately states as follows:

#### ***First Question Presented.***

In cases where the State of Oregon, through the Department of Human Services' ("DHS") office of Services to Seniors and People with Disabilities ("SPD") has determined an individual to be eligible to receive needs-based aid such as Medicaid, can a third-party challenge SPD's eligibility

determination via a direct private action against the recipient of the Medicaid benefits?

***Proposed Rule of Law***

No. This Court should affirm SPD's statutory rights under ORS chapter 401 *et seq.*, and specifically under ORS 410.070, which includes the exclusive right to created rules and regulations to address eligibility and the manner in which program funds are disbursed in needs-based programs such as Medicaid, unless those rules are deemed unconstitutional or unlawfully created.

***Second Question Presented***

Should this Court create new law authorizing SPD service providers, such as LHC, to directly challenge or to unilaterally negate SPD's needs-based program eligibility determinations, outside of the procedures outlined under current Oregon law?

***Proposed Rule of Law***

No. This Court should hold that absent clear legislative intent to the contrary, SPD service providers such as LHC do not have a private right of action to challenge SPD program eligibility determinations, including Medicaid, especially when SPD is not a party in such proceedings.

Furthermore, this Court should make it clear that any person who disagrees

with any SPD decision, including any eligibility determination related to any of SPD's needs-based programs, must employ the procedures outlined in the applicable chapters of the Oregon Revised Statutes (*e.g.* ORS chapters 183, 409, 410 and 443 *et seq.*), and Oregon Administrative Rules (*e.g.* OAR chapter 411), in order to challenge SPD's actions.

***Third Question Presented***

Should LHC be allowed to disregard Oregon Statutes, Oregon Administrative Rules and its own contract, in order to recover sums that are not owed to it and to which it has no rights?

***Proposed Rule of Law***

No. Oregon Revised Statutes, Oregon Administrative Rules and LHC's contract with SPD already provide that payment of the SPD-determined rate is deemed payment in full. SPD service providers like LHC do not have the right to recover any additional sums for services SPD has already paid for, or to demand payment for SPD approved services directly from SPD clients.

**III. RESPONSE TO CONCISE STATEMENT OF THE NATURE OF THE PROCEEDING, THE RELIEF SOUGHT IN THE TRIAL COURT AND THE NATURE OF THE JUDGMENT RENDERED BY THE TRIAL COURT**

Respondent accepts LHC's Statement of the Nature of the Proceeding, the Relief sought in the Trial Court and the Nature of the Judgment Rendered by the Trial Court.

**IV. FACTS MATERIAL TO THE DETERMINATION OF THE REVIEW**

Respondent rejects LHC's Summary of the Material Facts as argumentative and because LHC has omitted relevant facts. Respondent restates the Summary of Facts Material to the Determination of the Review as follows:

On February 23, 2004, decedent Isabell Prichard executed a Power of Attorney whereby she named her son, Richard Gardner, as her Agent in Fact. [ER. 1-2]. An attorney hired by Gardner drafted this Power of Attorney. [Tr: 273].

On April 17, 2007, Gardner applied for Medicaid benefits for Prichard. [Tr: 257]. At the time Gardner obtained Medicaid benefits for Prichard, she was suffering from significant cognitive deficits caused by dementia and/or Alzheimer's. [Tr: 279-280].

After SPD determined that Prichard was Medicaid eligible, Gardner moved her to LHC's adult foster care location in Hillsboro, Oregon. [Tr: 68].

As an adult foster care provider, LHC had the sole discretion to decide if it wanted to become a Medicaid-eligible service provider to SPD. [Tr:

239]. LHC's CEO, Larisa Louka, testified that in order to become a Medicaid-eligible service provider, LHC had to submit an application to SPD, satisfy certain requirements and obtain appropriate State licensing. [Tr: 163-164]. In addition, once licensed, LHC was required to execute an annual contract with SPD. [Tr: 215-216, ER: 3-6].

Each annual contract with SPD contained the following terms and conditions in the section labeled, "STATEMENT OF WORK":

"The CONTRACTOR agrees to provide housing, food, care and agreed-upon services in a home-like setting for SPD Clients.... CONTRACTOR agrees to maintain standards as outlined in SPD Administrative Rules 411-50-400 through 490, as applicable, and to comply with Oregon Revised Statutes 443.705 through 443.825."

And, in the section entitled "CONSIDERATION and PAYMENT PROCEDURES," the contract provided that:

"Payment authorized by SPD on form 512 will establish the rate for service for each client. The room and board payment is the responsibility of the client and is not covered by this contract.



Nevertheless, the amount of payment that a CONTRACTOR may charge SPD clients for room and board costs will be established by SPD annually. CONTRACTOR agrees to accept the rate authorized by SPD plus the established room and board payment **as payment in full**, and will not charge the client any additional amounts for these services. . . .” [ER: 3,5]; (Emphasis Added).

Ms. Prichard moved into LHC’s facility sometime in April, 2007 and lived there until her death on November 1, 2008. [Tr: 107-110]. During her residency in LHC’s facility, the monthly rate established by SPD for all of her care (room, board and all services) was approximately \$2,000, of which SPD paid \$1,200 and Mr. Prichard paid \$800. [Tr: 206-207].

At the time of Prichard’s death, LHC had been paid 100% of the SPD established amounts, including that portion of the SPD-rate Ms. Prichard was required to pay to LHC directly, a fact confirmed by Louka’s testimony [Tr: 221]. Louka further testified that LHC did not have a signed private-pay contract with Gardner. [Tr: 201]. Indeed, it was LHC’s usual practice not to ask Medicaid clients to sign LHC’s private-pay contract. [Tr: 201-202].

During the 18-month period Prichard lived in LHC's Hillsboro facility, non-Medicaid residents (those who paid for services out of their own pocket) paid LHC in excess of \$5,000 per month. [Tr: 210]. Other than the substantial difference in the monthly rates it charged non-Medicaid residents, there were no differences in the quality or quantity of care LHC provided to its residents, irrespective of whether those residents were private-pay or Medicaid qualified. [Tr: 210-211].

After Prichard's death, it was discovered that Gardner had stolen a substantial amount of money from his mother. Respondent contacted law enforcement and turned in her own brother. Gardner was charged criminally and ultimately pleaded guilty to three counts of Criminal Mistreatment in the First Degree (Class C Felony). [ER: 7-9]. As part of the disposition of the criminal charges against him, Gardner was ordered to pay a compensatory fine to Prichard's estate in the amount of \$195,710.11. [ER: 9]. The amount of Gardner's compensatory fine was taken from the "Property Damage or Loss Worksheet" supplied to the Washington County District Attorney's office by Respondent. [ER: 11-19]. The Property Damage or Loss Worksheet from the Gardner's criminal matter contains nine total pages. The first page is a summary of the total amounts sought. [ER: 11]. The next eight pages contain the specific description of the claimed losses together

with the corresponding dollar amount of each line item. [ER: 12-20]. While putting the total damages amount together, Respondent asked for and received information from LHC establishing the difference between LHC's Medicaid rate and Private Pay rate, had Prichard been a private pay client. [Tr: 186]. Respondent then asked the Washington County District Attorney to include this amount (\$48,477) as part of the compensatory fine Gardner should pay back. [Tr: 117-118]. The Washington County District Attorney, however, did not include the \$48,477 as part of the Compensatory Fine Richard Gardner was ordered to pay. [Compare ER: 10<sup>1</sup> with ER: 11].

After Gardner paid his compensatory fine, and after Prichard's estate was admitted to Probate, SPD made a claim under ORS 416.310 (Recovery from Estates) for reimbursement of the Medicaid benefits it had paid on Prichard's behalf. [ER: 20-21]. SPD's claim was settled and Respondent agreed to pay SPD \$37,412.77. [ER: 20].

#### **A. PROCEDURAL HISTORY**

Respondent accepts LHC's procedural history of this case and the timeliness of its appeal.

#### **V. SUMMARY OF RESPONDENT'S ARGUMENTS**

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<sup>1</sup> ER 10 is the damages calculation prepared by LHC and admitted as Plaintiff's Exhibit 22 at trial.

The rules defining who is eligible to receive needs-based assistance, what happens if someone receives needs-based assistance for which he/she is not eligible, and the relationship between (a) SPD and its service providers and (b) SPD and its clients, are well established and well regulated.

This Court should decline LHC's invitation to create new law because the "slippery slope" LHC fears, does not exist. DHS and SPD already have laws and procedures in place to resolve circumstances where benefits are mistakenly or fraudulently obtained.

## **VI. RESPONDENT'S ARGUMENTS**

### **A. MEDICAID IS A FEDERAL PROGRAM, ADMINISTERED BY THE STATE. IN THE EVENT OF ANY CONFLICT, FEDERAL LAW CONTROLS THE DISPOSITION OF MEDICAID FUNDS.**

Medicaid is a joint federal and state program created under Title XIX of the Social Security Act of 1965. It provides a source of funding for long-term care to those aged, blind and disabled individuals who qualify financially. 42 USC §1369 *et seq.*; *see also Harris v. McRae*, 448 US 297, 100 S Ct 2671, 65 L Ed 2d 784 (1980).

In Oregon, the task of establishing a uniform statewide system for regulating, administering, managing and ultimately approving or revoking access to needs-based financial and medical assistance, including Medicaid

benefits, is placed exclusively in the hands of the Oregon Department of Human Services. *See generally* ORS 411.010-411.075.

Whether an individual is eligible for public assistance is dependent on criteria established exclusively by DHS. *See generally* ORS 411.081-411.093. An individual who is denied assistance, and/or has public assistance benefits reduced or revoked, is entitled to notice and an opportunity to be heard, before such benefits are reduced or revoked. *See generally* ORS 411.095-411.103 *et seq.*

Additionally, in circumstances where public assistance was wrongfully obtained, DHS has the power to investigate individuals who have wrongfully received benefits including employing the subpoena power of Circuit Court. DHS has the power to file a civil action to recover any benefits mistakenly or fraudulently obtained. And, when appropriate, DHS can enter into a repayment agreement or issue a warrant to recipients of improperly obtained benefits, to recovery those funds. *See generally* ORS 411.593-411.703.

ORS 411.070(1) provides that DHS shall adopt by rule, uniform statewide standards for all public assistance programs. In response to this mandate, DHS has enacted administrative rules, including Oregon Administrative Rules, chapter 461—rules related to its self-sufficiency

programs. This chapter establishes the basic framework for determining the eligibility criteria applicable to needs-based public assistance. More specifically, OAR 461-140-0001 to 461-140-0300 outline the general financial eligibility requirements for DHS's needs-based assistance.

Ultimately, the uncontroverted evidence at trial established that only the State, not a private party, is authorized to determine Medicaid eligibility. [Opinion<sup>2</sup> at 816].

**B. LHC'S ARGUMENT THAT PRICHARD COMMITTED FRAUD UPON SPD IS WITHOUT MERIT.**

LHC argued before the Trial Court and before the Court of Appeals that but for her fraud, Prichard would not have qualified for Medicaid benefits. LHC argued that Prichard had substantial assets that were fraudulently transferred to others. Had those assets not been transferred, Prichard would not have disqualified to receive needs-based assistance through SPD and would have had the funds to pay the private-pay rate to LHC.<sup>3</sup>

This argument is without merit.

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<sup>2</sup> Per LHC's citation standards, adopted by Respondent, "Opinion" refers to the Court of Appeals' opinion in *Larisa's Home Care, LLC v. Nichols-Shields*, 277 Or App 811 (2016).

<sup>3</sup> In its Brief on the Merits, LHC goes so far as to suggest that Respondent was part of the fraud committed on DHS, despite the Trial Court and the Court of Appeals reaching a contrary conclusion. [Tr: 339; Opinion at 818, FN 7].

First, the Trial Court expressly concluded that Respondent had **nothing to do** with the alleged fraud Gardner committed on SPD. [Tr: 339].

Second, the uncontroverted Trial Court record established that SPD had approved Prichard to receive Medicaid benefits. [Opinion at 816]. Put another way, LHC did not present any evidence at trial—because no such evidence exists—to establish that SPD had revoked Prichard's Medicaid eligibility.

Third, LHC's argument that Prichard's eligibility should be posthumously changed by the Trial Court, is contrary to Oregon law—again, only SPD can resolve questions of Medicaid eligibility; a point LHC conceded at trial. [Tr: 214-215].

Finally, LHC's entire fraud argument is nothing more than a collateral attack on SPD's eligibility determination—an argument that violates ORS 183.400. If LHC believed SPD's Medicaid eligibility rules, or the manner in which those rules were applied to Prichard, were incorrect or contrary to law, its **exclusive remedy** was to petition the Court of Appeals for review of SPD's decision. The Administrative Procedures Act (ORS chapter 183 *et seq.*) does not create a private right of action authorizing LHC to step into the shoes of SPD or to enforce SPD's rules and regulations in matters related to recipients of needs-based assistance, including Medicaid.

**C. THE COURT OF APPEALS DID NOT ERR WHEN IT CONCLUDED THAT THE THIRD ELEMENT OF AN UNJUST ENRICHMENT CLAIM—THAT IT WOULD BE UNJUST TO ALLOW A RECIPIENT TO RETAIN A BENEFIT WITHOUT PAYING FOR IT—WAS NOT SATISFIED AS A MATTER OF LAW BECAUSE PRICHARD DID NOT RECEIVE A BENEFIT WITHOUT PAYING FOR IT.**

The Court of Appeals carefully analyzed the elements of an unjust enrichment claim. [Opinion at 814]. Relying on *Cron v. Zimmer*, 255 Or App 114, 130, 296 P3d 567 (2013), the Court identified the three elements of an unjust enrichment claim: (1) a benefit conferred, (2) awareness by the recipient that she has received the benefit, and (3) it would be unjust to allow the recipient to retain the benefit without requiring her to pay for it. [Opinion at 814].

Next, the Court of Appeals held that the first two elements of this claim are “questions of historic fact” that the Court reviews to determine if there was “legally sufficient evidence to support them.” [Opinion at 814]. The third element, presents a question of law that the Court of Appeals reviews for “legal error.” [Opinion at 814].

On Appeal, Respondent argued that LHC had not been unjustly enriched because it had been paid in full. [Opinion at 814-815]. LHC, in turn, argued that it would be unjust to allow the estate’s beneficiaries to



retain the benefit of Prichard having paid the lesser Medicaid rate because that would encourage Medicaid fraud by others. [Opinion at 815].

As a result of the arguments on appeal, the Court of Appeals focused on addressing circumstances where an “injustice” exists, in the context of this claim. [Opinion at 815]. Relying on *Jaqua v. Nike Inc.*, 125 Or App 294, 865 P2d 442 (1993), the Court stated that there were three instances of “injustice” within the context of an unjust enrichment claim: (1) plaintiff had a reasonable expectation of payment; (2) defendant should have reasonably expected to pay; or (3) society’s reasonable expectation of security of person and property would be defeated by non-payment. [Opinion at 815].

The Court disposed of the first instance of injustice by referencing the language of the SPD-LHC agreement, and concluding that the only way LHC could satisfy this first requirement was by providing some evidence that Prichard was not Medicaid eligible, something LHC failed to do at trial. [Opinion at 816; ER 3, 5]. As to the second instance of injustice, the Court of Appeals concluded that there was “no evidence in the record that would permit a conclusion that Prichard should have reasonably expected to pay the private-pay rate.” [Opinion at 817].

With respect to the third instance of injustice, LHC argued at trial, before the Court of Appeals, and now for a third time that an “injustice” exists because society’s reasonable expectation of security of person and property would be defeated by non-payment.

The Court of Appeals was not persuaded by LHC’s argument and neither should this court be persuaded by that same argument.

First, the uncontroverted evidence at Trial established that LHC was paid 100% of the SPD-determined monthly rate, as well as 100% of the monthly rate Prichard was obligated to pay it directly. [Tr: 221]. Put simply, LHC was paid in full for all of the services it provided to Prichard.

Second, LHC’s contract with SPD controls. Again, that contract provides that, “[LHC] agrees to accept the rate authorized by SPD plus the established room and board payment as payment in full, and will not charge the client any additional amounts for these services.” [ER: 3,5]. This point is also codified in OAR 411-050-0615(1)(d)<sup>4</sup>, which states that, “[t]he rate of compensation established by the Department is considered payment in full. The licensee may not request or accept additional funds or in-kind payment from any source.”

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<sup>4</sup> OAR 411-050-0615(1)(d) was renumbered from OAR 411-050-0435. The language in effect at the time Prichard resided with LHC contained nearly identical language. [Opinion: 818, FN 5].

Third, Respondent has repaid the needs-based assistance SPD provided to Prichard while she was alive. [ER: 20-21]. After Prichard's death, SPD filed a claim in Prichard's probate estate under ORS 416.310. That claim was resolved via a settlement agreement between SPD and Respondent. [ER: 20-21]. Despite filing a claim to recover the benefits it paid for Prichard's care, SPD never changed its determination that Prichard was eligible to receive Medicaid assistance.

Finally, as the Court of Appeals properly concluded, Prichard herself was not involved in the fraud that Gardner committed. [Opinion at 818].

Based on the above, the Court of Appeals went on to conclude that LHC had not satisfied the third instance where an injustice exists because "awarding a provider the difference between the Medicaid rate and the private-pay rate in a case where the resident has been deemed Medicaid eligible would defeat societal expectations, not further them." [Opinion at 818]. The Court further stated that society expects that crime victims, such as Prichard, will be protected—not penalized—for harm done to them." [Opinion at 819]. Gardner's illegal conduct resulted in his criminal conviction and in his waiving any claim he had to any portion of Prichard's estate. [ER: 7-9]. LHC was paid in full by SPD for Prichard's care. [Tr:

221]. SPD has been reimbursed for the assistance it provided to Prichard by her estate. [ER: 20-21].

Contrary to LHC's arguments, looking at the facts of this case, society cannot reasonably conclude that SPD's well-established rules and regulations in any way reward those who engage in Medicaid fraud.

**D. MISCELLANEOUS POINTS RELEVANT TO THE DISPOSITION OF THE ISSUES ON REVIEW**

**1. Prichard was in fact eligible to receive Medicaid benefits**

LHC continues to argue that because Prichard had illegally transferred her assets, she should not have been eligible to receive Medicaid benefits.

This argument is contrary to OAR 461-140-0220(8), which provides that:

**“A transfer of assets is not disqualifying if. . . one of the following sections are met:**

\*\*\*

- (8) The client was a victim of fraud, misrepresentation or coercion, and legal steps have been taken to recover the asset.”** (Emphasis Added).

The uncontroverted facts at trial established that when Respondent learned of Gardner's illegal conduct, she turned the matter over to law enforcement that ultimately resulted in the recovery of the funds Gardner had illegally taken from his mother. [ER: 7-9].

**2. Contrary to LHC's argument, Medicaid Planning is perfectly legal and commonly done**

Another of LHC's arguments is that Respondent and Gardner engaged in an illegal "spend down" scheme in order to defraud SPD.

At trial, LHC's own expert testified that Medicaid Planning, including spending down assets or transferring assets within the time frame allowed by the statutes, is a legitimate planning tool. [Tr: 154]. LHC argument on appeal and before this Court contradicts its own expert's trial.

**3. LHC's argument that Gardner's illegal conduct can be imputed to Prichard is legally incorrect**

LHC's suggestion that Gardner's illegal conduct is imputed to Prichard, is contrary to well established Oregon law. (*See e.g. Houck v. Feller Living Trust*, 191 Or App 39, 42, 79 P3d 1140 (2003) quoting *Beeson v. Hegsted*, 199 Or 325, 330, 261 P2d 381 (1953) ("one dealing with an agent cannot hold a principal liable for any act of the agent that does not come within the scope of the agent's real or apparent authority").

It is undisputed that when Gardner qualified his mother for Medicaid benefits, Prichard was cognitively compromised and unable to comprehend what was happening around her, who Gardner was, or even to assist in her own activities of daily living. [Tr: 166-167, 279]. It goes without saying

that Prichard lacked capacity to comprehend what Gardner was doing, much less to comprehend that Gardner's conduct was unlawful. Moreover, the plain language of the Power of Attorney [ER: 1-2] did not authorize Gardner to take his mother's resources for his own benefit, much less to complete a false application for state assistance with SPD.

Gardner's illegal conduct cannot be imputed to Prichard, or to Respondent as Prichard's personal representative, because Gardner not only exceeded the scope of his authority but also engaged in unlawful conduct.

## **VI. CONCLUSION**

LHC is asking this Court to make new law under the auspices of protecting society from would-be "Medicaid fraudsters." SPD has rules and procedures in place to protect society against potentially unscrupulous behavior. On review, this Court should affirm the decision of the Court of Appeals.

DATED this 4<sup>th</sup> day of January, 2017.

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## **CERTIFICATE OF COMPLIANCE**

### **Type Size**

I hereby certify that the size of the type in this brief is not smaller than 14 points for both the text of the brief and for any footnotes, as required by ORAP 5.05(4)(f).

### **Word Count**

I hereby certify that this brief complies with the word count limitation in ORAP 9.05(3)(a), and that the word count for this brief as described in ORAP 5.05(2)(a) is 4533.

DATED this 4<sup>th</sup> day of January, 2017.

/s/ Hafez Daraee  
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**CERTIFICATE OF SERVICE**

I hereby certify that I served the parties below with a true copy of  
**RESPONDENT'S ANSWERING BRIEF ON THE MERITS ON  
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