

**FILED**

2014 JUN 25<sup>24</sup> A 9:2  
VAC

**STATE OF WASHINGTON  
BEFORE THE WASHINGTON STATE  
OFFICE OF THE INSURANCE COMMISSIONER**

In the Matter of:

**Seattle Children's Hospital Appeal of OIC's  
Approvals of HBE Plan Filings.**

**Docket No. 13-0293**

**SEATTLE CHILDREN'S  
HOSPITAL'S MOTION TO STRIKE  
BRIDGESPAN'S REPLY IN  
SUPPORT OF MOTION TO VACATE  
CHIEF PRESIDING OFFICER  
PETERSEN'S ORDERS**

**I. RELIEF REQUESTED**

Seattle Children's Hospital ("SCH") requests that "BridgeSpan's Reply in Support of Motion to Vacate Chief Presiding Petersen's Orders" be stricken from the record. BridgeSpan's counsel offers no basis for making arguments in its reply relying upon new authority that could have been offered in its original motion/joinder in the motion to vacate, and that was available at the time of the original briefing on its summary judgment motion, but which it failed to cite. This use of BridgeSpan's reply is highly inappropriate under Washington law.

**II. BACKGROUND**

Intervenor Premera filed a Motion to Vacate Chief Presiding Officer Petersen's Orders on June 11, 2014. Intervenor BridgeSpan filed a 5-page "Joinder" the following day. The orders that Premera and BridgeSpan seek to vacate apparently include the February 20, 2014 orders denying the OIC Staff's Motion to Dismiss and the Intervenor's Motion for Summary Judgment.

As ordered by the June 12, 2014 Order on Pre-Hearing Conference, SCH filed its Response on June 17, 2014. On June 23, 2014, BridgeSpan filed a “Reply” in support of Premera’s motion.<sup>1</sup> BridgeSpan’s Reply discusses, and attaches, a New Hampshire administrative decision filed on December 11, 2013, and a later decision from the same proceeding, dated March 28, 2014. BridgeSpan failed to cite or discuss these out-of-state decisions in its summary judgment pleadings, or in its June 12, 2014 Joinder. SCH now brings this motion to strike BridgeSpan’s Reply.

### III. ISSUE PRESENTED

Is SCH entitled to have the Hearings Unit strike “BridgeSpan’s Reply in Support of Motion to Vacate Chief Presiding Petersen’s Orders” because it: (1) raises new arguments and authority in a reply; (2) constitutes an untimely pleading on the merits in support of the Intervenor’s Motion for Summary Judgment, which was fully briefed prior to the February 2, 2014 hearing, and (3) it relies upon authorities that were available at the time of its summary judgment briefing and at the time it filed its joinder?

### IV. EVIDENCE RELIED UPON

SCH relies upon the records and files herein.

### V. ANALYSIS

#### A. A Party May Not Raise New Authority in a Reply.

It is error for a court to consider an issue first raised in a reply memorandum and to rely on that issue as a basis for granting the motion. *Tucker v. Hayford*, 118 Wn. App. 246, 258, 75 P.3d 980 (2003); *Truck Ins. Exch. v. Century Indem. Co.*, 76 Wn. App. 527, 525 n.4, 887 P.2d 455 (1995); *White v. Kent Med. Ctr.*, 61 Wn. App. 163, 169, 810 P.2d 4 (1991). BridgeSpan cannot assert new arguments in a reply as to which the non-moving parties do not have the opportunity to respond. If BridgeSpan had raised these new arguments in its original joinder,

---

<sup>1</sup> Premera does not appear to have filed or served a reply in support of its own motion.

SCH would have then had reasonable opportunity to rebut these inaccurate new arguments. The absence of this opportunity for SCH makes it inappropriate to rely on new arguments raised in the Reply.

**B. The Reply is an Untimely Pleading on the Merits in Support of Intervenors' Motion for Summary Judgment.**

BridgeSpan attempts to use its Reply to add new arguments to those already in the record regarding the Intervenors' summary judgment motion. The Intervenors' summary judgment motion, submitted from the office of BridgeSpan's counsel on behalf of all Intervenors, was filed on January 17, 2014. Nothing prohibited BridgeSpan or other Intervenors from submitting a reply in support of that motion for summary judgment, or from raising other authorities during the oral argument on that motion on February 3, 2014. BridgeSpan had three opportunities at the time of the summary judgment proceedings (original motion, optional reply, and oral argument) to raise its arguments regarding this December 2013 New Hampshire decision, but BridgeSpan did not choose to do so. BridgeSpan offers no explanation why it failed to cite this existing decision at or prior to the February 3, 2014 hearing.

**C. BridgeSpan's Inappropriate Use of its Reply is Fundamentally Unfair to SCH.**

BridgeSpan's inappropriate use of its Reply has deprived SCH of the opportunity to rebut BridgeSpan's new arguments, other than by way of this motion to strike. The December 2013 New Hampshire order, arising in a case involving different facts, very different legal arguments, and different controlling law than in the present action, fails to offer relevant support for BridgeSpan's action.<sup>2</sup> The second, March 2014 New Hampshire order that BridgeSpan cites and

---

<sup>2</sup> Despite BridgeSpan's assertions, Washington's expansive definition of standing, particularly in an administrative proceeding, and particularly in light of the protected interests identified under Washington state insurance law, is quite different than that identified by the New Hampshire decision. *See* SCH's Opposition to Intervenors' Motion for Summary Judgment, at 8-13; SCH's Opposition to OIC Staff's Motion to Dismiss, at 2-5. Unlike SCH, the New Hampshire hospital (Frisbie Memorial Hospital) was not a pediatric hospital, and made no argument other than loss of revenue and competitive disadvantage in support of its claim of standing. The hospital further did not appear to raise the arguments at issue here regarding a hospital and physicians' standing to assert the rights of their patient, nor the ACA's essential community provider and essential health benefit arguments that apply here to a non-profit pediatric hospital such as SCH. The patient in the New Hampshire action did not assert that the care she sought was

attaches offers no additional support for BridgeSpan's arguments, but instead specifically concluded that the plaintiff had standing to challenge in an adjudicative hearing the issue of network adequacy. The fact that this second document was issued after the February 3, 2014 hearing fails to support BridgeSpan's underlying argument, or its failure to raise these arguments earlier.

## VI. PROPOSED ORDER

SCH has attached a proposed order granting this motion to strike BridgeSpan's Reply.

## VII. CONCLUSION

BridgeSpan's effort to raise new arguments and authorities in its Reply should be rejected by granting this motion to strike.

DATED this 24<sup>th</sup> day of June, 2014.

BENNETT BIGELOW & LEEDOM, P.S.

By   
Michael Madden, WSBA # 8747  
Carol Sue Janes, WSBA # 16557  
Attorneys for Seattle Children's Hospital  
[mmadden@bblaw.com](mailto:mmadden@bblaw.com)  
[csjanes@bblaw.com](mailto:csjanes@bblaw.com)  
601 Union Street, Suite 1500  
Seattle, WA 98101  
Telephone: (206) 622-5511  
Facsimile: (206) 622-8986

---

unavailable from other providers, but only that she would have to terminate existing relationships with Frisbie's providers. Here, by contrast, the evidence regarding the availability of care outside SCH is quite different. Even under the more limited facts in support of the patient's standing, the New Hampshire commissioner ruled in his March 28, 2014 decision in favor of the patient's standing.

**CERTIFICATE OF SERVICE**

I certify that I served a true and correct copy of this document on all parties or their counsel of record on the date below by the method of delivery specified below on today's date addressed to the following:

**Presiding Officer**

Hon. George A. Finkle (ret.)  
[gfinkle@jdrllc.com](mailto:gfinkle@jdrllc.com)  
[forbes@jdrllc.com](mailto:forbes@jdrllc.com)

- Legal Messenger
- Facsimile
- Email
- U.S. Mail

**Hearings Unit**

Attn: Kelly Cairns  
[KellyC@oic.wa.gov](mailto:KellyC@oic.wa.gov)  
Office of the Insurance Commissioner  
Hearings Unit  
5000 Capitol Boulevard  
Tumwater, WA 98501

- Legal Messenger
- Facsimile
- Email
- U.S. Mail

**Office of the Insurance Commissioner**

Charles Brown  
[charlesb@oic.wa.gov](mailto:charlesb@oic.wa.gov)  
Office of the Insurance Commissioner  
5000 Capitol Boulevard  
Tumwater, WA 98501

- Legal Messenger
- Facsimile
- Email
- U.S. Mail

**Premcra Bluc Cross**

Gwendolyn C. Payton  
Lane Powell PC  
[Paytong@lanepowell.com](mailto:Paytong@lanepowell.com)  
1420 Fifth Avenue, Suite 4200  
Seattle, WA 98101-2375

- Legal Messenger
- Facsimile
- Email
- U.S. Mail

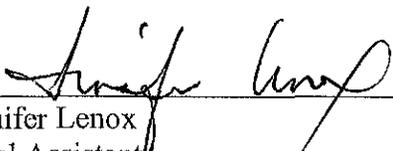
**BridgeSpan Health Company**

Timothy J. Parker  
Carney Badley Spellman, P.S.  
[parker@carneylaw.com](mailto:parker@carneylaw.com)  
701 Fifth Avenue, Suite 3600  
Seattle, WA 98104-7010

- Legal Messenger
- Facsimile
- Email
- U.S. Mail

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

Executed at Seattle, Washington, this 24<sup>th</sup> day of June, 2014.

  
\_\_\_\_\_  
Jennifer Lenox  
Legal Assistant

{0766.00018/M1055916.DOCX; 2}



## Jennifer K. Lenox

---

**From:** Jennifer K. Lenox  
**Sent:** Tuesday, June 24, 2014 12:19 PM  
**To:** 'gfinkle@jdrllc.com'; 'forbes@jdrllc.com'; 'KellyC@oic.wa.gov'; 'charlesb@oic.wa.gov'; 'Paytong@lanepowell.com'; 'parker@carneylaw.com'; Mike Madden; Carol Sue Janes  
**Cc:** Gerri E. Downs; Jennifer K. Lenox  
**Subject:** (13-0293 -- SCH / OIC ) Attaching for service and filing: 6-24-14 SCH Motion to Strike BridgeSpan's Reply ISO Motion to Vacate Chief Presiding Judge Petersen's Orders (and Proposed Order)  
**Attachments:** SCH's Motion to Strike BridgeSpan's Reply ISO Motion to Vacate Chief Presiding Judge Petersen's Orders (6-24-14) (M1056596).pdf; Proposed Order Granting SCH's Motion to Strike BridgeSpan's Reply (6-24-14) (M1056598).pdf  
**Follow Up Flag:** Copied to WORLDOX (BB&L - Client Files\0766\00018\EMAIL\M1056602.MSG)

**Re:** SCH Appeal of OIC's Approvals of HBE Plan Filings  
Docket No. 13-0293

Dear Judge Finkle: (copy Ms. Cairns and All Counsel)

Please find attached for filing and service today:

1. Seattle Children's Hospital's Motion to Strike BridgeSpan's Reply ISO Motion to Vacate Chief Presiding Judge Petersen's Orders;
2. Proposed Order Granting Seattle Children's Hospital's Motion to Strike.

The originals will be mailed today to Ms. Cairns for the file, and paper copies will be mailed to All Counsel.

We will e-mail the Proposed Order in Word format to Ms. Cairns.

Please let us know if anyone has difficulty accessing the attached. Thank you.

### JENNIFER LENOX

Legal Assistant to Carol Sue Janes, Amy DeLisa, and Robert Stevens, COO

**BENNETT BIGELOW & LEEDOM P.S. | [BBLLAW.COM](http://BBLLAW.COM)**

601 Union Street, Suite 1500  
Seattle, Washington 98101-1363  
T 206.622.5511 F 206.622.8986

**CONFIDENTIALITY NOTICE:** The contents of this message and any attachments may contain privileged and confidential information and/or protected health information (PHI) in accordance with state and federal law. If you are not the intended recipient, or the employee or agent responsible for delivering this message to the intended recipient, you are hereby notified that any review, dissemination, distribution, printing or copying of this email message and/or any attachments is strictly prohibited. If you believe you have received this transmission in error, please notify the sender immediately at (206) 622-5511 and permanently delete this email and any attachments.