ORIGINAL

No. 43265-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ROBERT LISLE HALE, Personal Representative of the ESTATE OF LISLE HALE, deceased; CLARA HALE, surviving spouse of LISLE HALE; ROBERT L. HALE; DONALD HALE; and TRICIA HALE,

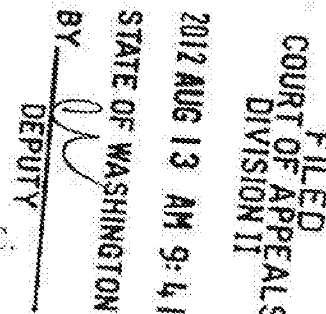
Appellants,

vs.

BRIDGE BUILDERS, LTD.; MINDI R. BLANCHARD and John Doe Blanchard; BRENDA CARPENTER and John Doe Carpenter; JANET WATRAL and John Doe Watral,

Respondents.

REPLY OF APPELLANTS



Stephen K. Eugster
WSBA No. 2003
Eugster Law Office, P.S.C.
Attorney for Appellants

2418 West First Avenue
Spokane, Washington 99201-6422
(509) 624-5566 / Fax (866) 565-2341
Mobile (509) 990-9115
eugster@eugsterlaw.com

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I. INTRODUCTION

In the coming years, more and more of us will need care in our old age. In most every situation the family will be involved in decisions regarding elder care. This case is important because it addresses laws and standards of care elderly persons are entitled to. Especially, it addresses the need of the family to be involved in the care of elderly family.

Plaintiffs assert that Defendants are required to be licensed by the state of Washington pursuant to the terms of the In Home Care Services Act, RCW Ch. 70.127 (Act).

This licensure is a critical or ultimate fact with respect of some of Plaintiffs' claims in the case. If Defendants are required to be licensed under the Act (1), they would have had to comply with certain rules including certain standards of care with respect of Lisle and Clara Hale and the Hale Family, RCW Ch. 70.127 and WAC 246-335 In-home Services Agencies; (2) the powers of attorney they held from Lisle Hale and Clara Hale would have been illegal, RCW 70.127.150; (3) they would have engaged in *per se* violations of the Washington Consumer Protection Act, RCW 70.127.216; and, (4) they would be potentially liable under the Vulnerable Adults Statutes RCW 74.34.200.

The discovery sought by Plaintiffs and denied by the court would

establish for the trier of fact that Defendants were, indeed, are, required to be licensed under the In-Home Care Services Act. It would answer the question posed by the judge as to what Bridge Builders business was when Defendants came into contact with Lisle and Clara Hale. *See* discussion *infra* at 15.

II. DEFENDANTS MIS-STATE PLAINTIFFS' ASSIGNMENT OF ERROR

Defendants mislead the court as to Plaintiffs' Assignments of Error. Defendants say they brought only one motion on January 13, 2012, and they described the "motion as one for summary judgment as opposed to a motion to dismiss." Response at 1.

This is not correct. Defendants brought three motions for summary judgment and four motions for dismissal of various counts for failure to state a claim under CR 12(b)(6).[1] As to the summary judgment motion, Defendants filed a single declaration of Defendant Mindi R. Blanchard which was attached to the motion. CP 239.

No affidavits were filed as to the CR 12(b)(6) motions. No past declarations of Defendants previously filed addressed or were said to have addressed any of CR12(b)(6) motions or were referred to in their CR12(b)(6) motions.

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[1] Defendants' Motion for Summary Judgment, CP 218 lines 3 - 4.

III. ISSUES PERTAINING TO ASSIGNMENT [SIC] OF ERROR

The issues presented pertaining to Plaintiffs' Assignments of Error are set forth in Plaintiffs' Brief at pages 3 - 4. Again, Defendants did clarify that motions regarding Plaintiffs' Counts 7 - 9 were CR 12(b)(6) motions. Response 1 - 3.

IV. STATEMENT OF THE CASE[2]

The Hale Family, consisting of the mother and father and their children, had for years been working together to ensure that Lisle and Clara Hale received the care they needed as they progressed further and further into old age. The family determined that Lisle Hale, then 87, needed more care than could be provided at home. He moved to Sherwood Assisted Living in Sequim on April 4, 2008. As time passed, the family determined that Clara Hale, then age 91, also needed more care than could be provided at home and was in need of proximity to emergency health care services. She also moved to Sherwood Assisted Living to be with Lisle on June 3, 2008.[3]

The very next day, for some reason the Hales were made aware

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[2] A much more elaborate statement of facts is be found in Plaintiffs Opening Brief commencing at Brief 4.

[3] The content of the Statement of Facts comes from Plaintiffs' Amended Complaint, CP 496. The Complaint has been verified by the Declarations of Tricia Hale, CP 122 - 23, and Robert Hale, CP 131 - 122.

they could move back to their home. This would be by a local person. That very next day the Hales found themselves in the law office of attorney Michael Hastings who has offices across the street for Sherwood Assisted Living. The next day they were visited by Mindi R. Blanchard, who told them she would move them back to their home if they would give her power of attorney. *Id.*

V. REPLIES TO RESPONDENTS' ARGUMENT

A. Standard of Review.

Defendants' "standard of review" is a generalized standard which looks a bit like the standard of review for summary judgment motions and like (more like?) the standard for review of failure to state a claim decisions under CR 12(b)(6). Response 8. Appellants Brief properly states the standards for each such motion. Response 15 and 16.

Recently, this Court summarized the distinction between a CR12(b)(6) motion and a CR 56 motion. *Stiles v. Kearney*, 41289-6-II (Wash. App. 5-22-2012). "Dismissal of a claim under CR 12(b)(6) is appropriate 'only if it can be said that there is no state of facts which the plaintiff could prove in support of entitling him to relief under his claim.'"[4]

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[4] Citing *Barnum v. State*, 72 Wn.2d 928, 929, 435 P.2d 678 (1967) (quoting *Gold Seal Chinchillas, Inc. v. State*, 69 Wn.2d 828, 830, 420 P.2d 698 (1966)).

"In contrast, a CR 56(c) summary judgment motion allows a trial court to consider "pleadings, depositions, answers to interrogatories, and admissions on file" to evaluate whether any genuine issue of fact exists." *Id.*

B. The Court Did Not Lack Subject Matter Jurisdiction Uniform Declaratory Judgment Act.

The court had subject matter jurisdiction under the Uniform Declaratory Judgments Act (UDJA). RCW 7.24.010 provides "courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed."

The UDJA is remedial: "its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered." [Emphasis added.] *Id. And, see, Coalition for the Homeless v. DSHS*, 133 Wn.2d 894, 916, 949 P.2d 1291 (1997).

Such liberal construction to serve remedial purposes are also found in the common law of Washington. *See Go2Net, Inc. v. Freeyellow.com, Inc.*, 158 Wn.2d 247, 253, 143 P.3d 590 (2006):

> The Act "is remedial in nature and has as its purpose broad protection of the public." *McClellan v. Sundholm*, 89 Wn.2d 527, 533, 574 P.2d 371 (1978) (emphasis added).

> When interpreting this "remedial legislation," the court is "guided by the principle that `remedial statutes are liberally construed to suppress the evil and advance the remedy.'" *Kittilson v. Ford*, 23 Wn. App. 402, 407, 595 P.2d 944 (1979) (*quoting* 3 C. DALLAS SANDS, STATUTES AND STATUTORY CONSTRUCTION § 60.01 (4th ed. 1973)), *aff'd*, 93 Wn.2d 223, 608 P.2d 264 (1980).

1. The Question of Standing Can and Has Been Determined and Waived.

Defendants say jurisdiction with respect of standing can be raised at any time. That is true, but is it true in this case? In this case there have been several summary judgment motions dealing the application of Ch. RCW 70.127. The standing issue has never been raised before either by the court or the Defendants. Standing in this context has factual aspects which must be determined. It must be assumed that the facts determined by the court and counsel dictated that Plaintiffs had standing. The issue was waived by such previous actions. If not waived, the Defendants and the court are estopped to raise standing as a jurisdiction matter.

2. The Hales Have Standing Under the Uniform Declaratory Judgments Act Because They Are the Very People the Act in Question Was Intended to Protect.

a. Zone of Interest.

Defendants assert the Hales were not in the "zone of interest" of RCW 70.127. Their entire argument is based on the unwarranted assertion

that the Hales were not residing in their home when Defendants began providing services to them. Defendants spend many pages of their Response trying to convince a reader of this. Response, 15 - 20.

Here is their argument: "[The zone of interest the statute protects is that of individuals receiving care in there home that allows them to remain residing in their homes." Response at 15. Next, they contend that the Hales never received services in their home from Defendants. Response at 15 - 20. Finally they contend that there could be no standing because of the power of attorney the Hales had given them was not prohibited because they did not provide in-home care to the Hales. Response at 20.

Defendants are in error regarding each of the above assertions. First, licensing under the Act is "required for a person to advertise, operate, manage, conduct, open, or maintain an in-home services agency." RCW 70.127.020(1). The facts are abundantly clear that Defendants advertised that they managed, conducted, were opening, or maintained an in-home services agency. *See* Declaration of Robert Hale filed 4/29/11, CP 317 and following pages. This declaration details the services of Bridge Builders in such a way that they can be easily grasped *See also,* Declaration of Mindi R. Blanchard, CP 239 - 247.

During the period of Defendants conduct with the Hales at

Sherwood, Defendants advertised that they would provide in-home services to the Hales. In her declaration, Defendant Blanchard says on June 5, 2008: "[Primarily], [the Hales] wanted to move back home. I told them that we could assist them with this. I asked them if they would be willing to have me be their power of attorney. They agreed and I told them that I would let Michael Hastings [the attorney] know." *Id.* at 244.

There can be no question that Defendants advertised in-home care services and advertised power of attorney services in order to secure a relationship with the Hales whereby they, Defendants, would provide them with in-home care services in their home. Nothing at all was said that they were going to only provide those services which allowed them to assert an exemption under the Act - care management services. *Id.*

The statute also requires licensing for a "person that functions as a home health, hospice, hospice care center, or home care agency." In the process of getting the Hales' business, Defendants were going to be functioning as a "home care agency." RCW 70.127.020(2).

Defendants did not fit within any of the exemptions from licensing.

There can also be no doubt that after they met the Hales they were advertising their "home care" services, that they had commenced upon such services (e.g., changed the locks on the Brigadoon home), had taken

control of the Hale social security and some accounts and had written checks for them. *Id.*

The Hales would have received a number of protections had Defendants been licensed. First, Defendants would not have been able to serve under powers of attorney granted to them by the Hales. RCW 70.127.150.

Lisle and Clara Hale and the Hale family would have benefitted from many of the requirements of the Washington Administrative Code prescribes of home care service providers. WAC 246-335. Plaintiffs would have benefitted, as would the entire process, if the WAC requirements been used and followed. Some of these are WAC 246-335-090 Home care plan of care; WAC 246-335-055 Plan of operation; WAC 246-335-060 Delivery of services, "The applicant or licensee must establish and implement policies and procedures that describe . . . (5) Actions to address patient or client, or family communication needs."

Clearly, the Hale Family, father, mother and children, were within the zone of interest of the In Home Care Services Act, RCW Ch 70.127.[5]

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[5] They were also within the zone of interest of the Vulnerable Adult Act because Defendants were subject to the Act and were proscribed from engaging abuse (RCW 74.34.020(2)) of Lisle and Clara Hale, both of whom were "vulnerable adults" (RCW 74.34.020(16)) under the VAA.

b. Hales Family Suffered Injuries in Fact.

Plaintiffs' pleadings, declarations and affidavits are replete with facts showing they suffered injuries in fact at the hands of the Defendants.

First, let's be clear as to what an "injury in fact" is – how is the term used, defined. West's Law Dictionary defines injury in fact as "such as is required to give a plaintiff standing to sue means concrete and certain harm and to warrant granting of standing, there must also be reason to think that the harm can be redressed by relief the court can grant." BLACK'S LAW DICTIONARY 786 (6th ed. 1990). The term injury is "any wrong or damage done to another, either in his person, writes, reputation, or property. The invasion of any legally protected interest of another." *Id.* at 785.

Without citation of any kind, Defendants assert that Hales failed to demonstrate any injury in fact because they are of the view that no one could find an injury in fact from the pleadings consisting of the Complaint of Plaintiffs, the Complaint of Plaintiffs verified, and the Declarations of Robert Hale and Tricia Hale.

It is undeniable that the Hales, both the elderly Hales and the Hale children, suffered injuries in fact, which injuries were specifically identified in the testimony. For example, Defendants wrongfully isolated

the Hale children from their parents. The Defendants advertise themselves as persons capable of holding powers of attorney in the area of the provision of in-home care services when in fact it was illegal for them to do so. Defendants took it upon themselves to create a nursing home in the Brigadoon home of Plaintiffs without being licensed to do so and without undertaking any kind of investigation as to the rectitude of doing so — Defendants knew nothing about the health and welfare of Lisle and Clara Hale. They knew nothing, other than the fact that the Hales had an extensive home, about their financial circumstances and whether those circumstances were such that an in-home care services situation could be created or for how long it could be created. They knew nothing of the medical emergencies suffered by Clara Hale. They did not involve the children of the Hales in the processes by which they were going to re-create an in-home care services situation. Utilizing a locksmith and without obtaining any sort of court authority, they entered the Hale Brigadoon residence and secured it with their own locking system. They failed to appreciate or even think about the very tenuous and stressful circumstances Lisle and Clara Hale were in at Sherwood Assisted Living at the time Clara Hale came to Sherwood. Defendants were utterly self-

serving in each and every dealing with Lisle and Clara Hale.[6]

Is it not for a jury to determine the damages the Hale Family suffered? There is no law this writer can find in Washington which allows the judge to arrogate onto himself this damages issue when a jury has been demanded and not waived.[7] In this case, a jury has been demanded. *See* Jury Demand docketed on April 27, 2008. CP ___.[8] A plaintiff in a civil action has a right under Const. art. 1, § 21 to have the jury determine the factual issue of the amount of damages sustained. The Legislature has no authority to intrude upon the constitutional jury function of determining the amount of a plaintiff's damages. *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 661-665, 771 P.2d 711, 780 P.2d 260(1989).

In this case, the jury has a right to determine the injuries in fact and to assess damages for their violation, even if the damages be nominal. *Id.*

Defendants have not submitted any declaration or affidavit which

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[6] Declaration of Mindi R, Blanchard CP 239; Declaration of Alice Semingson CP 102.

[7] Defendants assert they are not subject to the Act because the Act provides an exemption for "case management services." RCW 70.127.040 (14) A person providing case management services. For the purposes of this subsection, "case management" means the assessment, coordination, authorization, planning, training, and monitoring of home health, hospice, and home care, and does not include the direct provision of care to an individual.

[8] The Jury Demand will be added to the Clerk's Papers.

contradicts the statements of the Plaintiffs.

Defendants say Plaintiffs' statements are argumentative and conclusory. The fact is they are not. And yes, some of the facts are stated in a fashion which lend themselves to the conclusion that from the facts there was injury in fact. However, of foremost importance here the court will find that Defendants filed no contradictory declarations or affidavits.

Second, Appellants have established injury in fact. Their rights as a family engaging in family responsibilities were crudely infringed. The contracts they had engaged in were simply terminated. They did not gain the benefit of any professional care incident to elderly people under such circumstances. Their house had been possessed and invaded. They were subjected to the powers of attorney held by people who were prohibited from holding them. The Hales' relationship with their children had been infringed. And much, much more. *See, e.g., Washington Association for Substance Abuse v. Gruss, Inc.*, 87188-4, 12, 278 P.3d 632 (Wash. 5-31-2012). Declarations of Tricia Hale at CP 317, 132 and CP 122; Declarations of Robt. Hale CP 131 and CP 317.

3. *The Court's Ruling Would Be Final and Conclusive in the Context of the Litigation.*

Defendants say the courts UDJA claims to not present "justiciable controversies" because "a" ruling by the court would not be final and

conclusive. This is wrong. Rulings by the court on the claims would be final and conclusive as to the parties. For example, a ruling on the Act would make Defendants defendants under the VAA, RCW 74.34.200, make their powers of attorney illegal, RCW 70.127.150, and establish a *per se* violation of the CPA. RCW 70.127.216.

If the court finds Defendants were not licensed under the In Home Care Service Act, a number of home care services could not have been provided. They would not have been authorized to have any dealings with the Hales. They would not have been able hold any powers of attorney signed by the Hales. They would not have been able to secure the Brigadoon home by changing the locks. Furthermore, they would have been subject to the requirements all home care persons are subject to under the Washington Administrative Code.

Defendants say the court lacked jurisdiction because "a decision by the court would not be final and conclusive" with the court saying only the Department of Health could render such a decision. CP 61. This is not true – the court interprets and applies the law. The fact that the Department of Health does not do what it is supposed to do under the Act does not deprive the court of jurisdiction, and, it certainly does not deprive Plaintiffs of the rights the statutory law provides.

The Defendants rely on *Brown v. Vail*, 169 Wn.2d 318, 332, 335 - 36, 237 P.3d 263 (2010) as the basis for their argument. They are in error; *Brown* is not apposite. In that case, the court held that it could not render a decision on a matter as to how the death penalty is to be carried out because the authority as to such protocols was delegated by the legislature and that the court had no power or jurisdiction over the matter.
("We hold that the Department's authorship of the protocol governing lethal injection is permitted by a legislative delegation of powers arising from RCW 10.95.180(1) and related provisions."). *Id.* at 169 Wn.2d 332.

The court also said Plaintiffs had failed to show any "injury in fact." There is no basis for this statement. In fact, there were multiple injuries in fact. Appellant's Brief at 21 - 24. And, it should again be emphasized that Washington recognizes the legal and damage-related status of "nominal damages." Perhaps stated another way, the civil wrongs law of Washington is not just based on money damages for injuries. The law, the court implementing the law is a forum for making decisions concerning right and wrong even though the wrong produces only nominal damages. *See, Olympic Pipe Line Co. v. Thoeny*, 124 Wn. App. 381, 394, 101 P.3d 430 V (2004). ("Nominal damages may also be available.") Citing *Keesling v. City of Seattle*, 52 Wn.2d 247, 254, 324

P.2d 806 (1958).

C. The Trial Court Improperly Protected Defendant From Valuable Discovery.

On June 22, 2011, Judge Verser said "[o]n the other hand if employees of Bridge Builders actually provide services [home care services] then the holding in *Cummings*,[9] dictates that [Defendants] should be licensed and Plaintiffs' are entitled to the relief they seek in this motion."

The information, the discovery, Plaintiffs sought will enable them to further develop and establish that Defendants were and are engaging in conduct and holding themselves out as providing conduct which causes them to be subject to the licensing requirements of the In Home Care Services Act. Further, this information will establish that Defendants illegally held powers of attorney from many of their customers including Plaintiffs Lisle Hale and Clara Hale. Declaration of Stephen K. Eugster, CP 176 and following.

Parties may obtain discovery regarding any matter, not privileged, relevant to the subject matter of the pending action. CR 26(b)(1); 4 L. ORLAND, WASH. PRAC., RULES PRACTICE § 5305 (3d ed. 1983).

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[9] *Cummings v. Guardianship Servs.*, 128 Wn. App. 742, 110 P.3d 796 (2005) *pet. rev. denied*, 157 Wn.2d 1006, 136 P.3d 759 (2006).

"Privilege, within the meaning of the Rule, is privilege as it exists in the law of evidence." 4 L. ORLAND, at 23, quoted in *Barfield v. Seattle*, 100 Wn.2d 878, 883, 676 P.2d 438 (1984).

Defendants advertise and provide a host of services needed by elderly and vulnerable people which enable them to reside where they desire to reside. Declaration of Robert Hale, CP 317 and following (also look carefully at the table starting at CP 317). Defendants have no basis for claiming customer confidentiality. They are not doctors or health care providers, they are not providing nursing services, they are not providing counseling services, they are not engaging in any sort of conduct the knowledge of which would violate a privilege such as the privilege of an attorney at law, priest penitent, doctor-patient. They are providing simple ordinary commonplace support services to customers who desire to remain or move to residences which give them a higher degree of independence than another sort of living circumstance. *See also*, *State v. Post*, 118 Wn.2d 596, 612, 826 P.2d 172, 837 P.2d 599 (1992).

Further, if there is legitimate concern about the disclosure of names it would perhaps be possible to allow a redaction of the names with respect of the information sought.

D. The Hales Have Established the Propriety of the Vulnerable Adults Act Claim.

What is the purpose of the Vulnerable Adults Act, RCW Ch. 74.34? The findings of the legislature are found in RCW 74.34.005:

> (1) Some adults are vulnerable and may be subjected to abuse, neglect, financial exploitation, or abandonment by a family member, care provider, or other person who has a relationship with the vulnerable adult; (2) A vulnerable adult may be home bound or otherwise unable to represent himself or herself in court or to retain legal counsel in order to obtain the relief available under this chapter or other protections offered through the courts; (3) A vulnerable adult may lack the ability to perform or obtain those services necessary to maintain his or her well-being because he or she lacks the capacity for consent; (4) A vulnerable adult may have health problems that place him or her in a dependent position."

Lisle and Clara Hale were, without question, vulnerable adults. Their vulnerability was aggravated and compounded by the change of circumstances on June 4, 2008. *See* the Declaration of Alice Semingson, CP 104 and following pages.

The VAA "[i]n addition to other remedies available under the law" provides a cause of action for "a vulnerable adult who has been subjected to abandonment, abuse, financial exploitation, or neglect either while residing in a facility or in the case of a person residing at home who receives care from a home health, hospice, or home care agency, or an individual provider." The "cause of action [can be] for damages on account of his or her injuries, pain and suffering, and loss of property

sustained thereby." RCW 74.34.200.

This action shall be available where the defendant is or was a . . . or home care agency licensed or required to be licensed under chapter 70.127 RCW, as now or subsequently designated, or an individual provider. RCW 74.34.200.

Defendants, because they were "home care agency licensed or required to be licensed under chapter 70.127 RCW," *Id.*, are proper defendants under a cause of action under the VAA, RCW 74.34.200, if other elements are present. *See, Cummings v. Guardianship Servs.*, 128 Wn. App. 742, 110 P.3d 796 (2005) *pet. rev. denied*, 157 Wn.2d 1006, 136 P.3d 759 (2006) (professional guardianship services company required to be licensed under RCW Ch. 70.34 thus making the company a proper defendant in an action under RCW 70.34.200.)

Defendants Blanchard and Defendant Watral undertook a number of present actions which, under the definitional section of the VAA, establish that they were engaging or were taking to engage in "abandonment, abuse, financial exploitation or neglect. RCW 74.34.200.

All defendants acted to isolate the Hales from their children. This is mental abuse as defined by RCW 74.34.020(2)(c). This is set forth in the Complaint and it is set forth in the Declaration of Tricia Hale, CP 122

and especially commencing at CP 123. Nowhere in any of the affidavits filed by Defendants is any of this denied.

The Defendants engaged in exploitation in that during the course of their relationship with the Hale family Defendants had begun forcing, compelling, or exerting undue influence over them as vulnerable adults to act in a way which was inconsistent with relevant past behavior. RCW 74.34.020(2)(d). Nowhere in any of Defendants' declarations or affidavits is there any denial of the assertions made by Plaintiffs, especially Tricia Hale. At Response 27, Defendants assert that Bridge Builders did nothing which constituted illegality or improperly us[ed] any property, income or resources from the Hales for any purpose. *Id.* at 27. This is not correct.

Bridge Builders engaged in a number of financial transactions including check writing, acting as holders of powers of attorney from Mr. and Mrs. Hale. The fact of the matter is, Bridge Builders was required to be licensed under RCW 70.127 and could not hold a power of attorney from either Mr. or Mrs. Hale. Such power of attorney was illegal under RCW 70.127.150.

In Tricia Hale's Declaration (CP 414) set forth each of the major things Defendant Bridge Builders would have to do if Lisle and Clara Hale went back to their home on Brigadoon. There is nothing in the record in

any declaration or affidavit of the Defendants which deny what Tricia Hale states would have to be done were Defendant Bridge Builders successful in removing Lisle and Clara Hale from Sherwood Assisted Living. Any ordinary reasonable person would have to conclude that Defendants fully intended to act as persons subject to the provisions of the In Home Care Services Act, RCW Ch. 70.127.

E. Consumer Protection Act Claim.

Defendants asked the court to dismiss Plaintiff's Consumer Protection Act claim (Count 4). They make two arguments: First, because "plaintiffs do not have standing to pursue their claims under RCW 70.127. As has been shown, Plaintiffs do have standing and the court made no decision taking their standing from them.

Second, they argue none of the Plaintiffs received services from any of the Defendants. But the fact of the matter is, Plaintiffs did receive services from Defendants. Certainly, Judge Verser thought so. Also, the invoices of Defendant Bridge Builders contained in the declaration herein of Mindi Blanchard clearly so provide. Blanchard Declaration CP 239 - 247. That an invoice attached to the declaration has not been paid does not mean the services were not provided, and does not establish lack of damages.

Whether or not Plaintiffs can secure a *per se* violation of the CPA under RCW 70.127.216, it remains that all of the requirements for a CPA claim have been met. There has been no failure to state a claim. The allegations in Count 4 must be taken as true for this motion. Plaintiffs have properly plead the elements necessary for a Consumer Protection Act Claim. *Hangman Ridge v. Safeco Title*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). *See* Plaintiffs' Amended Complaint at paragraph 221 and paragraphs 224 through 230, verified by Plaintiff Tricia and Robert Hale.[10]

F. Malpractice Claim.

Malpractice is a form or type of negligence. BLACK'S LAW DICTIONARY 959 (6th ed. 1990) defines the term, "malpractice," as follows: "failure of one rendering professional services to exercise that degree of skill and learning commonly applied under all circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss or damage to the recipient of those services are those entitled to rely upon them."

Defendants make the unsupported statement that there can be no

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[10] The Hales were damaged by the consumer protection violations which were the proximate cause of their injuries – isolation from the family, use of an illegal power of attorney to change locks and gain access to fund and social security benefits, increased confusion and distress at what Defendants were doing to remove them to their home, breach of care contracts with Sherwood Assisted Living, etc.

professional malpractice claim because the court has yet to recognize malpractice time for geriatric service providers or providers of specialty care of vulnerable.[11]

Defendants hold themselves out as having specialized skills relative to the care of vulnerable people. Those having special needs because of their age, mental capacity, skills, mobility, etc. For example, Defendants hold themselves out as professional providers of power of attorney services. They hold themselves out as geriatric care providers; that is, individuals with specialized skills dealing with geriatric patients and their families. Eugster Declaration, CP 110.

Defendants held themselves out as holders of powers of attorney. Such persons have heightened standards of care regarding fiduciary responsibilities and responsibilities not to engage in actions which are contrary to the best interests of the principal, and especially not to engage in actions of self-dealing.

G. New Cause of Action – Interference with Family Relations in Family Care and Old Age Situations.

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[11] Declaration of Alice Semingson, CP 102. The declaration abundantly establishes that Defendants were engaged in professional services and that they failed in numerous ways to fulfill the standards of their profession. Defendants filed no counter declarations to the declaration of Ms. Semingson. CP 102. Defendants filed no counter declarations or affidavits to the declaration of Ms. Semingson and the matter contained therein.

Plaintiffs have asked the court to create a new cause of action in negligence which would protect the rights of families to be intimately involved in the care of an elderly family member and to prevent unwarranted and negligent interference with that care. The argument and source material can be found in Plaintiffs' Opening Brief at 43 and following.

I. Other Claims: Interference with Family Relations in Family, Negligent Infliction of Emotional Distress, and Intentional Infliction of Emotional Distress.

The new cause of action has its genesis in part in Plaintiffs' Counts 7, 8 and 9. These essences of the spirits of these three counts animate and provide some of the filial sense for the new cause of action. Nevertheless, the review of these counts must be reviewed as failures to state a claim under CR 12(b)(6). In any event, whether the degree of the Defendants' conduct is such that it is intentional, malicious or outrageous is, and should be, left for the jury to decide.

VI. CONCLUSION

For the reasons set forth above, Plaintiffs request that the court overrule the trial court's decisions in their entirety.

Respectfully submitted this 9th day of August, 2012.

EUGSTER LAW OFFICE, PSC

Stephen K. Eugster

Stephen K. Eugster, WSBA # 2003

Certificate of Service

I hereby certify that on August 9, 2012 I caused the foregoing document to be served upon the following individuals by the method(s) indicated:

Ketia B. Wick Johnson, Graffe, Keay, Moniz & Wick, LLP 925 Fourth Avenue, Ste. 2300 Seattle, WA 98104 ketia@jgkmw.com autumn@jgkmw.com lacys@jgkmw.com	x x	Via First Class Mail Via Next Day Air Via Facsimile Via E-Mail
Matthew T. Boyle Law Office of Matthew T. Boyle, P.S. 1001 Fourth Ave., Ste. 3200 Seattle, WA 98154-1003 mboyle@mboylelaw.com ssaldana@mboylelaw.com	x x	Via First Class Mail Via Next Day Air Via Facsimile Via E-Mail

Note – the parties, by their attorneys, have a written agreement that service of pleadings is to be or may be by e-mail as provided in the agreement.

Stephen K. Eugster

Stephen K. Eugster, WSBA #2003

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