CAUSE No. 43265-0-II

IN THE 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,

v.

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

Respondents.

BRIEF OF RESPONDENTS BRIDGE BUILDERS, BLANCHARD, AND CARPENTER

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I. INTRODUCTION

This appeal arises out of claims for declaratory and other relief respecting the services Bridge Builders, Ltd. and its employees Mindi Blanchard and Brenda Carpenter provided to Lisle and Clara Hale over the course of nine days in June 2008[1]. Bridge Builders assisted Lisle and Clara Hale with their stated wish to move back home to their residence from the assisted living facility where they had recently moved and ceased providing services once the couple changed their minds and decided not to move.

II. ASSIGNMENT OF ERROR

The Hales contend the trial court erred in granting summary judgment in favor of Bridge Builders and contend the court erred in treating the motion as one for summary judgment as opposed to a motion to dismiss pursuant to Civil Rule 12(b)(6).

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Did the trial court correctly conclude it lacks subject matter jurisdiction over the Hales' Uniform Declaratory Judgment Act ("UDJA") claims?

[1] Respondents Bridge Builders, Ltd., Mindi Blanchard and Brendan Carpenter will be referred to collectively as "Bridge Builders" and appellants will be referred to collectively as "the Hales."

2. Did the trial court err in granting Bridge Builders' motion for protective order and denying the Hales' motion for discovery?
3. Did the trial court err in concluding the Hales failed to set forth sufficient facts and establish the elements necessary to proceed with their Vulnerable Adult Act, RCW 74.34, claims?
4. Did the trial court err in concluding the Hales lacked standing to proceed with their claim for violation of the Washington Consumer Protection Act, RCW 19.86, and failed to set forth sufficient facts and establish the elements necessary to proceed with that claim?
5. Did the trial court err in concluding the Hales failed to set forth sufficient facts and establish the elements necessary to proceed with their claim for malpractice?
6. Did the trial court err in concluding the Hales failed to set forth sufficient facts and establish the elements necessary to proceed with their claim for interference with family relationship?
7. Did the trial court err in concluding the Hales failed to set forth sufficient facts and establish the elements necessary to proceed with their claim for malpractice?

8. Did the trial court err in concluding the Hales failed to set forth sufficient facts and establish the elements necessary to proceed with their claim for negligent infliction of emotional distress?
9. Did the trial court err in concluding as a matter of law that Bridge Builders' conduct was not sufficiently extreme and outrageous to support the Hales' claim for intentional infliction of emotional distress?

IV. STATEMENT OF THE CASE

This matter is before the Court of Appeals on review by appellants Robert Hale, personally and as personal representative of the estate of his father Lisle Hale, Clara Hale, Donald Hale, and Tricia Hale. The Hales seek to reverse the trial court's April 6, 2012 order granting summary judgment in favor of respondents Bridge Builders. The trial court found the Hales lacked standing to proceed with their claims for declaratory relief and had not set forth specific facts sufficient to establish the elements necessary to proceed with their remaining claims.

This case arises out of the services provided by Bridge Builders to Lisle and Clara Hale over the course of nine days, from Thursday, June 5, 2008, through Friday, June 13, 2008. Bridge Builders is a Sequim, Washington business owned by Mindi Blanchard that provides care management and certified professional guardian services in the Sequim

and Port Angeles Community. (CP 239.) Brenda Carpenter is an employee of Bridge Builders. *Id.*

Lisle and Clara Hale were a married couple with a home in Sequim who had recently been moved to an assisted living facility, Sherwood Assisted Living. At the time, Lisle Hale was 86-years-old and Clara Hale was 90-years-old. (CP 503 ¶¶ 22-24.) The Hales' three adult children, Robert, Donald and Tricia, believed their parents should reside in the nursing facility due to their health care needs and moved Lisle Hale there in April 2008, and Clara Hale on June 3, 2008. (CP 503 ¶¶ 23-25.) The Hale children did not tell their parents they were moving to the facility ahead of time and anticipated that they would be upset about the move. (CP 123 ¶ 10; CP 124-25 ¶¶ 31,34.) On the day of her move, Clara was told she was going to Sherwood to visit Lisle for lunch. (CP 124-25 ¶¶ 28-34.) The couple was very unhappy about being "put" in assisted living, strongly desired to move back to their home, and expressed that desire to staff at Sherwood. (CP 123 ¶ 9; CP 125 ¶ 40; CP 240 ¶ 3.)

On June 5, 2008, Lisle and Clara Hale met with an attorney, Michael Hastings, to discuss their desire to return home and how it could be accomplished. (CP 125 ¶ 46; CP 240 ¶ 3.) Mr. Hastings recommended Bridge Builders and Mindi Blanchard to assist the Hales in facilitating the move. (CP 240 ¶ 3.) After being contacted by Mr. Hastings, Ms.

Blanchard met with Lisle and Clara later that day at Sherwood. *Id.* They told her they had been tricked into moving to Sherwood, were concerned that their children were accessing their money, and wanted to move back into their home. (CP 240 ¶ 3; CP 243.) Ms. Blanchard met with them for an hour and discussed at length their care needs and plans to move them home. *Id.* She agreed to serve as their attorney-in-fact to help plan and coordinate Lisle and Clara's move back home and the care they would require once there. *Id.*

Ms. Blanchard began making arrangements for their move and subsequent care. On June 9, she met with them again at Sherwood to discuss their planned June 12 move home. (CP 240-241 ¶ 5.) Because Lisle and Clara did not have keys to their home, Ms. Blanchard contacted first Trisha Hale and then Robert Hale to request a key to the house. (CP 241 ¶ 5; CP 243.) Later she visited Washington Mutual Bank in Sequim to find out about the couple's bank accounts. (CP 241 ¶ 5; CP 244.) Lisle Hale had expressed concern about his children accessing the couple's money and wanted to change their accounts. (CP 240 ¶ 4.) At the bank, Ms. Blanchard learned the accounts had been set up as joint ownership accounts with the Hales' children and made an appointment for the Hales at the bank the next day. (CP 241 ¶ 5; CP 244.) On June 10, she brought them to the bank for their appointment and they changed their accounts.

(CP 241 ¶ 6; CP 244.) Later that day, Ms. Blanchard met with them back at Sherwood for an hour to discuss the upcoming move and helped them pay a few outstanding bills. *Id.*

Lisle Hale had also repeated concerns about his children's access to the couple's living space at the house, and Ms. Blanchard agreed to arrange for a locksmith to come to Hales' home. *Id.* After her meeting with Lisle and Clara, Ms. Blanchard met with a locksmith at their home to have locks installed on the doors accessing Lisle and Clara's upstairs living quarters. (CP 241 ¶ 6; CP 245.) She notified Michael Hastings, the Sheriff's Department and the Adult Protective Services case worker assigned to the Hales' pre-existing case about what was happening with the locks. (CP 241 ¶ 6.)

Lisle Hale gave Ms. Blanchard the names and telephone numbers of private caregivers the Hales had used in the past (CP 241 ¶ 5, CP 243.) She contacted one of the private caregivers, Kathie Stepp, as well as two in-home care agencies, Rainshadow Home Services, Inc. and KWA Home Care, to coordinate in-home care for the Hales. (CP 243-245.) On June 11, Ms. Blanchard met with the Hales to discuss the next day's move along with Kathie Stepp and the caregivers from KWA who would be providing the Hales' care. (CP 245.)

On the morning of June 12, the day of the scheduled move, Brenda

Carpenter went to visit the Hales as Sherwood. (CP 242.) Their son, Donald Hale, was in their room with them and informed Ms. Carpenter that Lisle and Clara Hale would not be moving back home. *Id.* Ms. Carpenter called Ms. Blanchard with the information and then cancelled the arrangements that had been made for the Hales' move and care. *Id.* At 8:30 p.m., Lisle Hale called Ms. Blanchard and requested the keys to his home and she agreed to deliver them to Sherwood first thing the next morning. *Id.* She delivered the keys at 6:30 a.m. on June 13, 2008, and Bridge Builders provided no further services to the Hales.

The Hales commenced this litigation on April 27, 2009 and filed an amended complaint on May 15, 2009. The amended complaint contains claims seeking declaratory relief under RCW § 70.127.020 and RCW § 70.127.150; claims for violations of the Vulnerable Adult Act, RCW § 74.34, and the Washington Consumer Protection Act, RCW § 19.86; and claims for malpractice, malicious interference with family relationship, negligent infliction of emotional distress, and intentional infliction of emotional distress.

V. ARGUMENT

A. Standard of Review

The Court of Appeals reviews summary judgment de novo. *Campbell v. Reed*, 134 Wn.App. 349, 356, 139 P.3d 419 (2006). Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). The court must determine whether the "affidavits, facts, and record have created an issue of fact" that is "material to the cause of action." *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 12, 721 P.2d 1,7 (1986). Once the moving party has met its burden of showing the absence of an issue of material fact, the burden shifts to the non-moving party to make a showing sufficient to establish the existence of the elements essential to that party's claims. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

While the evidence is viewed in the light most favorable to the non-moving party, the adverse party must set forth specific facts and may not rely on "speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value." *Seven Gables Corp.*, 106 Wn.2d at 12. That is, the nonmoving party must present

specific facts sufficient to rebut the moving party's contentions and demonstrate a genuine issue for trial. *Id.* A material fact is one on which the outcome of the litigation depends, in whole or in part. *Morris v. McNicol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974). Bare allegations are insufficient to meet plaintiffs' burden. *Young*, 112 Wn.2d at 225-26. Per Civil Rule 56, supporting and opposing affidavits shall be made on personal knowledge and shall set forth facts that would be admissible at trial. CR 56(e). Where the plaintiff fails "'to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,' then the trial court should grant the motion." *Id* at 225 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548 (1986)). As the United States Supreme Court explained, "there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id* at 225 (citing 477 U.S. at 322-23, 106 S.Ct. at 2552-53).

The trial court did not err in determining the Hales have not met this burden. They have not set forth specific facts creating a genuine issue of fact, let alone one that is material to the outcome of the litigation, and have failed to establish elements essential to their claims. The parties do not dispute the facts of this case; they disagree regarding the legal

conclusions to draw from the facts. Summary judgment was properly granted and Bridge Builders respectfully request the Court of Appeals affirm the trial court.

The Hales' efforts to lower their burden by construing Bridge Builder's motion for summary judgment as a CR 12(b)(6) motion to dismiss, requiring only the existence of a set of facts that could support their claim, is misguided and unpersuasive. Bridge Builders submitted a declaration from Mindi Blanchard with its motion and relied on it and the ample record in this case in moving for summary judgment. As the trial court noted in its memorandum and order, in granting Bridge Builders' motion it considered not only Ms. Blanchard's declaration but the extensive, complete record in this matter including declarations proffered by the Hales from Robert Hale, Tricia Hale, Stephen K. Eugster, the Hales' counsel, and Alice Semingson, their expert witness. (CP 59.)

Civil Rule 12(b) explicitly provides that a motion under that rule will be construed as one for summary judgment "where matters outside the pleading are presented." There is no corollary mechanism for construing a motion for summary judgment as one to dismiss under CR 12(b)(6). The Hales misstate this rule when they state that on a motion to dismiss the court "cannot consider any evidentiary matter outside the pleadings." (Br. 18.) The court can consider matters outside the pleadings

when presented, the effect being that when such matters are presented and considered the motion becomes one for summary judgment. That is not the case here. Bridge Builders' motion is and has always been one for summary judgment and the trial court properly treated it as such.

The Hales' argument that Bridge Builders only relied on Ms. Blanchard's declaration and the record in moving for summary judgment on some of the claims is without merit. Contrary to the Hales' assertion, Bridge Builders offered the declaration in support of its entire motion and relied on the declaration and the complete, ample record in this matter in moving for summary judgment as to each and every one of the Hales' claims. The Hales therefore may not, pursuant to CR 56(e), rely on their pleadings alone as they suggest. (Br. 27.) And in fact, they did not. In opposing Bridge Builders' motion, the Hales offered and relied on the declarations of Robert Hale, Tricia Hale, Stephen K. Eugster and Alice Semingson. As such, the court properly treated the whole of Bridge Builders' motion as one for summary judgment and did not err in applying that legal standard.

The declarations of Bridge Builders, Robert Hale and Tricia Hale detail the complete extent of the relationship and interactions between Bridge Builders and the Hales. There are absolutely no material facts in dispute respecting the services Bridge Builders provided to Lisle and Clara

Hale and the interactions between the parties over the course of June 5, 2008 through June 13, 2008, the entirety of their association.[2] Construing the facts, the extensive case record and all of the evidence before it in the light most favorable to the Hales, the trial court did not err in concluding the Hales lack standing to pursue their claims pursuant to the UDJA and the CPA and do not set forth specific facts creating an issue of material fact or establishing the existence of elements essential to their remaining claims.

B. The Court Lacks Subject Matter Jurisdiction Over the Hales' Uniform Declaratory Judgment Act Claims

The trial court did not err in concluding it does not have subject matter jurisdiction over the Hales' UDJA claims because the Hales lack standing to bring those claims and the claims do not present a justiciable controversy. Contrary to the Hales' assertion that the "only basis for the court's conclusion of lack of standing is the court's position on injury in fact," (Br. 28), the court found it lacked jurisdiction not only because the Hales failed to demonstrate the injury in fact essential to standing but also because a decision by the court would not be final and conclusive. (CP 63.)

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[2] Those are the only facts material to plaintiffs' claims. Contrary to plaintiffs' continuing assertions, facts respecting defendants' services to any of their other, third-party clients are not material to this litigation and do not assist plaintiffs in establishing any of the elements of their claims.

1. Standing Is Not an Affirmative Defense and May Be Raised at Any Time.

The Hales' argument that subject matter jurisdiction and standing are affirmative defenses Bridge Builders waived by not asserting in its answer is incorrect and they provide no case law to support the proposition. "The question of Superior Court subject matter jurisdiction may be raised at any time." *Matter of Saltis*, 94 Wn.2d 889, 893, 621 P.2d 716, 718 (1980). As a jurisdictional question, standing challenges may therefore be raised at any time. *Diehl v. W. Wash. Growth Mgmt. Hearings Bd.*, 118 Wn.App. 212, 75 P.3d 975 (2003).

Bridge Builders raised the Hales' lack of standing in the context of considering the requirements for subject matter jurisdiction under the UDJA. The Washington Supreme Court has said that standing is inherent in the four requirements for a justiciable controversy, that is, for subject matter jurisdiction under the UDJA. *To-Ro Trade Shows v. Collins*, 144 Wash.2d 403, 411, 27 P.3d 1149 (2001); *See Branson v. Port of Seattle*, 152 Wn.2d 862, 877, 101 P.3d 67 (2004) ("Inherent in the justiciability determination is the traditional limiting doctrine of standing."). Without standing, the court lacks subject matter jurisdiction over the plaintiffs' claims. *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 556-57, 958 P.2d 962 (1998). Lack of subject matter

jurisdiction cannot be waived and can be raised at any time. CR 12(h)(3). *See Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 11 P.3d 762 (2000) (relying on *Washington Beauty College, Inc. v. Huse*, 195 Wash. 160, 166, 80 P.2d 403 (1938)); *Spokane Airports v. RMA, Inc.*, 149 Wn.App. 930, 943, 939, 206 P.3d 364 (2009), review denied, 167 Wn.2d 1017, 224 P.3d 773 (2010). Pursuant to Civil Rule 12(h)(3), "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

2. The Hales Lack Standing Under the UDJA.

Jurisdiction under the Uniform Declaratory Judgment Act ("UDJA"), RCW 7.24, is limited to justiciable controversies, which involve

> (1) ... an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.

Lakewood Racquet Club, Inc. v. Jensen, 156 Wn.App. 215, 223, 232 P.3d 1147 (2010) (quoting *Branson v. Port of Seattle*, 152 Wn.2d 862, 877, 101 P.3d 67 (2004)). Inherent in these four requirements is the

traditional limiting doctrine of standing, to ensure that the court renders "a final judgment on an actual dispute between opposing parties that have a genuine stake in the resolution. *Id.* (quoting *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001)). The issue of standing is jurisdictional and may be raised at any time. *International Ass'n of Firefighters, Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 212 n.3, 45 P.3d 186 (2002).

The Hales only have standing under the UDJA if they "fall within the zone of interest that the statute in question protects or regulates and (2) have suffered an 'injury in fact.'" *Id.* at 224. They satisfy neither of these requirements. They have not presented facts demonstrating any injury in fact as a result of Bridge Builders' alleged violation of RCW 70.127 and they do not fall within the zone of interest the statute protects. Each element is necessary to establish standing and the Hales fail as to both.

a. The Hales are not within the zone of interest of RCW 70.127.

The statute provides that home care services consist of "assistance provided to . . . vulnerable individuals that enable them to remain in their residences," RCW 70.127.010 (6). It was enacted to address the concern that "the delivery of [home care] services brings risks because the in-home location of services makes their actual delivery virtually invisible," RCW

70.127.005. Therefore, the zone of interest the statute protects is that of individuals receiving care in their homes that allows them to remain residing in their homes.

The Hales do not fall within that zone of interest. During the nine-day association Lisle and Clara Hale had with Bridge Builders they resided in a nursing home, not in their residence, and received care from nursing home staff. The trial court properly found that the services provided to the Hales were insufficient to subject defendants to licensing. (CP 254.) Since Lisle and Clara Hale did not receive home care services from the defendants, they do not fall within the statute's zone of interest.

Likewise their children, who received no in-home care or any type of service at all from Bridge Builders, fall outside the zone of interest protected by the statute and lack standing to pursue these claims. The parties do not dispute that the only services Bridge Builders provided to Lisle and Clara consisted of meeting with them several times to discuss moving them back home, making arrangements with third-party, in-home care providers for their care once they moved home, arranging for a locksmith at Lisle Hale's request to place locks on Lisle and Clara's living quarters, a trip to the Hales' bank respecting their bank accounts, and assisting Lisle Hale in paying some bills. (CP 240-42.)

In their December 29, 2011 declarations, neither Robert Hale nor Tricia Hale set forth any specific facts to contradict or create an issue of fact regarding the services Bridge Builders actually provided the Hales. "When a non-moving party fails to controvert relevant facts supporting a summary judgment motion, those facts are considered to have been established." *Lipscomb v. Farmers Ins. Co. of Washington*, 142 Wn.App. 20, 174 P.3d 1182 (2007) (citing *Central Wash. Bank v. Mendelson-Zeller, Inc.*, 113 Wn.2d 346, 354, 779 P.2d 697 (1989)). Tricia Hale's discussion of the services she asserts Bridge Builders "would have had to" provide to her parents once they moved home is not material. (CP 127-28.) Her speculation on potential future events that never occurred does not satisfy the Hales' burden of setting forth specific facts to demonstrate a genuine issue for trial, notwithstanding the fact that Bridge Builders was arranging for third-parties to provide the Hales' in-home care once they moved home and never intended to provide the care itself. (CP 245.)

All of the services Bridge Builders actually provided to Lisle and Clara Hale are either case management services, permitted pursuant to RCW 70.127.040(14), or services in the capacity as power of attorney. RCW 70.127.040(14) provides that persons providing case management services are not subject to regulation under the Act, and defines case management services as "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." These are precisely the type of services Bridge Builders provided the Hales – meeting with Lisle and Clara Hale and assessing their needs, planning with them for their in-home care once they had moved back home and coordinating with KWA Home Care, the agency that was to provide the Hales' in-home care. (CP 243-45.)

The assistance Bridge Builders provided Lisle and Clara Hale with their banking and with bill paying was done pursuant to the valid powers of attorney and likewise was not in-home care. An attorney-in-fact's services such as banking and bill paying cannot be in-home care under the Act otherwise every attorney-in-fact would also be an in-home care provider, an impossibility given the prohibition in section 70.127.150. That section provides that "No licensee, contractee, or employee may hold a durable power of attorney on behalf of any individual who is receiving care from the licensee." Finally, the Hales do not dispute that Lisle and Clara Hale resided in a nursing home for the entire time in question and received care from nursing home staff. They could not have received in-home care from Bridge Builders as they had yet to return home.

The parties are not in dispute as to the services Bridge Builders provided to Lisle and Clara Hale and it is those services alone that must

form the basis of the Hales' claims for declaratory relief. Services provided to other individuals have no bearing on the Hales' case and cannot establish the elements of their claims. Assuming arguendo that Bridge Builders provided in-home care to some third-party then that individual might have a claim against it, but that does nothing to bring the Hales within the zone of interest of the statute. The doctrine of standing prohibits a party from asserting another's legal right. *Grant County Fire Protection Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 803, 83 P.3d 419 (2004). "The kernel of the standing doctrine is that one who is not adversely affected by a statute may not question its validity." *Id.*

The Hales assert in their brief that the trial court was wrong to conclude they lack standing because they did not receive in-home care from Bridge Builders. (Br. 29.) They argue the issue is not whether they received in-home services but rather whether Bridge Builders had to be licensed, making the circular argument that because Bridge Builders had to be licensed the Hales have standing. *Id.* It is the Hales, not the trial court, who are wrong. They must first establish they have standing before reaching the substantive issue of their claim – whether Bridge Builders is required to be licensed. They did not receive in-home care from Bridge Builders. They are therefore not within the statutes' zone of interest and

not impacted by any alleged violation of the statute by Bridge Builders in its service to a third party.

The Hales likewise do not have standing based on allegedly "illegal" powers of attorney. The prohibition in RCW 70.127.150 that "[n]o licensee, contractee, or employee may hold a durable power of attorney on behalf of any individual who is receiving care from the licensee" is limited by its plain language to instances where the power of attorney is held on behalf of the same individual who is being provided with in-home care. Any in-home care Bridge Builders allegedly provided to any persons other than Lisle and Clara Hale has no effect on the legitimacy of powers of attorney held on behalf of Lisle and Clara Hale. The statute only prohibits an in-home care provider from serving on behalf of individuals for whom one provides in-home care. Since Bridge Builders did not provide in-home care to Lisle and Clara Hale, the powers of attorney on their behalf are not prohibited by the statute and do no bring the Hales within its zone of interest.

b. The Hales failed to demonstrate any injury in fact.

Apart from the bare allegation that they suffered an injury, the Hales have offered no specific facts demonstrating any injury caused by Bridge Builders alleged lack of license under RCW 70.127. They did not

discuss the injury-in-fact element of standing at all in their opposition to Bridge Builders' motion. (Pls.' Opp. 18-21.) For the first time in their appellate brief, the Hales discuss injury in fact but again fail to set forth any specific facts demonstrating any injury to person or property or any right invaded by Bridge Builders' alleged violation of RCW 70.127.

The discussion of injury in the Hales' brief, "injuries in fact of the rights of the Plaintiffs," (Br. 24), consists of argumentative assertions and conclusory allegations unsupported by specific facts from which a trier of fact could find injury. Plaintiffs have not met their burden of setting forth specific facts and have failed to establish a necessary element of standing. They are therefore unable to establish subject matter jurisdiction under the UDJA.

3. The Hales' UDJA claims do not present a justiciable controversy because a ruling by the court would not be final and conclusive.

The Hales do not address in their brief and did not address in their opposition to Bridge Builders' motion the separate basis for the Court's lack of subject matter jurisdiction – that the fourth requirement for justiciability, a final and conclusive determination, is not met in this case. They have assigned no error to the trial court's correct determination that it lacks subject matter jurisdiction over their UDJA claims because a ruling on those claims would not be final and conclusive. Courts decline to

issue declaratory judgment where it will not produce a final and conclusive determination. *Brown v. Vail*, 169 Wn.2d 318, 334, 237 P.3d 263 (2010).

In *Brown*, the Washington State Supreme Court declined to issue a declaratory judgment based on alleged violations of RCW 69.50, Washington's Uniform Controlled Substances Act (UCSA), and 21 U.S.C. §§ 801-971, the federal Drug Abuse Prevention and Control Act (DAPCA). *Id.* at 333. The Supreme Court focused its reasoning on the fourth element necessary for a justiciable controversy, that a judicial determination be final and conclusive. The court noted that a declaratory judgment has no direct, coercive effect and that the decision to enforce provisions of a statute is left to the discretion of the agency overseeing the statute. *Id.* at 334. The court declined to exercise its authority to render a judgment "that would look very much like an advisory opinion," as it would not terminate the uncertainty or controversy giving rise to the proceeding. In doing so, it stated that it could "not see what purpose a judgment declaring a violation would serve when enforcement of the alleged violations remains in the discretion of the agency, and no party is bound to act in accord with such judgment." *Id.*

As in *Brown*, a judicial determination here would not be final and conclusive as enforcement of the statute in question, RCW 70.127, is left

to the discretion of the Department of Health. The Hales brought this matter before the department and it investigated and found no violation. (CP 295.) Because a judicial determination on the Hales' UDJA claims will not be final and conclusive, the elements for a justiciable controversy are not met.

The court lacks subject matter jurisdiction over the Hales' UDJA claims because they are not within the zone of interest of RCW 70.127, they have not proffered any specific facts to demonstrate an injury in fact, and a determination in this matter would not be final and conclusive. Their failure to meet any one of these elements is sufficient to deprive the court of subject matter jurisdiction, and they fail on all three. The trial court therefore properly granted summary judgment in favor of Bridge Builders on those claims.

C. The Trial Court Properly Granted Bridge Builders' Motion For Protective Order

The trial court did not err in granting Bridge Builders' motion for protective order and denying the Hales' motion for discovery. The Hales seek copies of invoices, contracts, accountings and financial records for clients of Bridge Builders who are not party to this litigation. They are not entitled to the discovery sought because it is not relevant to their claims and not reasonably calculated to lead to admissible materials.

Bridge Builders' services to its other clients have no bearing on the Hales' case and do not help them establish the elements of any of their claims. The Hales' standing to pursue their claims must be based on their interactions with Bridge Builders, the services they received, and injury to them. They cannot establish standing, or the elements of their claims based on Bridge Builders' services to its other clients. The traditional limiting doctrine of standing exists to prohibit a party from asserting another's legal right. *Grant County Fire Protection Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 803, 83 P.3d 419 (2004). Bridge Builders' services to its other clients do not render the powers of attorney held on behalf of the Hales "illegal." They do not assist the Hales in demonstrating injury to their person or property under the Consumer Protection Act, in establishing violation of the Vulnerable Adult Act, or in demonstrating standing to pursue their claims under the Uniform Declaratory Judgment Act because any services provided to third-parties do not bring the Hales within the zone of interest of RCW 70.127.

In addition to not seeking relevant material, the Hales' overly broad discovery request violates the privacy rights protected by the Washington State Constitution of Bridge Builders' third-party clients. "A person who has a fiduciary relationship to an elderly person must safeguard that person's right to privacy." 26 Wash. Prac., Elder Law and

Practice § 5.21 (2d ed.). The release of a principal's information to an unnecessary degree might be a breach of an attorney-in-fact's duty to the principal, unless there is a clear necessity and authority, and the scope of the invasion is reasonably tailored. *Id.* The Hales' broad discovery requests are not reasonably tailored and given the tangential relationship of the material sought to their claims, the necessity for the records is far from clear.

The records of Bridge Builders' clients who are not party to this litigation are neither relevant, nor reasonably calculated to lead to the discovery of admissible material, and absent a showing of clear necessity, Bridge Builders' clients are entitled to their privacy. The trial court therefore did not err in granting Bridge Builders' motion.

D. The Hales Failed To Establish The Elements Of Their Vulnerable Adult Act Claim And Summary Judgment Was Proper

Summary Judgment is also appropriate as to the Hales' claim for violation of the Vulnerable Adult Act ("the VAA"), RCW 74.34. The VAA creates a cause of action for a vulnerable adult "who has been subjected to abandonment, abuse, financial exploitation, or neglect." RCW 74.34.200. It applies to individuals residing in a facility or to individuals "residing at home who receives care from a home health, hospice, or home care agency." *Id.* The Hales allege Bridge Builders is a home care agency

subject to licensing and therefore a proper party under the VAA. (Br. 35.) Notwithstanding the fact Bridge Builders is not subject to licensing under RCW 70.127, the Hales did not reside at home and receive home care from Bridge Builders and the record before the court is devoid of any facts to establish any of the elements for violation of the VAA.

Rather than offer specific facts to establish the elements for violation of the VAA, the Hales instead quote the statute at length and assert that count three of their complaint sets forth specific factual allegations. (Br 37.) This is insufficient to meet their burden on summary judgment. Bare allegations and argumentative assertions do not take the place of specific facts. *Young v. Key Pharms., Inc.*, 112 Wn.2d at 225-26. The Hales assert that Bridge Builders isolated Lisle and Clara from their children, "acted to change the plans the Hales and their family had in place," and claim Bridge Builders would have engaged in self-dealing by providing services to the Hales once they moved home. (Br. 37.) These are not specific facts that would establish any elements of their claim, they are more unsupported allegations and argumentative assertions the Hales have failed to support or establish with any facts.

Under the VAA, abuse includes "unreasonable confinement, intimidation, or punishment on a vulnerable adult" including coercion, harassment, or "inappropriately isolating a vulnerable adult from family,

friends, or regular activity." RCW 74.34.020 (2). The Hales have set forth no specific facts demonstrating abuse. During their nine-day association with Bridge Builders, Lisle and Clara resided at Sherwood Assisted Living and received care from Sherwood's staff. Bridge Builders visited the Hales only briefly over the course of the nine days and never prevented the Hale children from seeing or speaking with their parents or interfered with any efforts by the Hales to see one another. The Hale children were free at all times to visit and speak with their parents and indeed did visit with them. (CP 133.)

Financial exploitation is "the illegal or improper use of the property, income, resources, or trust funds of the vulnerable adult by any person for any person's profit or advantage other than for the vulnerable adult's profit or advantage." RCW 74.34.020 (6). The Hales have set forth no specific facts demonstrating that Bridge Builders illegally or improperly used any property, income or resources of the Hales for any purpose. Nor that they did anything in regard to the Hales for any purpose other than the Hales' own advantage and to effectuate Lisle and Clara Hales' stated wishes. As the Hales did not pay Bridge Builders for its services, notwithstanding the fact any fees charged were reasonable and appropriate for the services rendered, they were not financially exploited. Further, they cannot establish the elements of their claim based on alleged

self-dealing they assert Bridge Builders would have engaged in once the Hales moved back home. (Br. 37.)

While the Hales assert that Bridge Builders' facts are contradicted by the declarations of Tricia Hale and Robert Hale, they do so without stating which specific facts in those declarations contradict Bridge Buidlers or support their claim for violation of the VAA. Looking first to Tricia Hale's declaration, she begins by incorporating and then quoting each paragraph of the complaint. (CP 123-27.) She next expounds on the services Bridge Builders advertises generally, and on the services it "would have had to" provide to the Hales after they moved home. (CP 127.) The only part of her declaration that discusses Bridge Builders' actual interactions with the Hales, outside of quoting the complaints' allegations, is paragraph 63. *Id.* Her statements are in no way inconsistent with Bridge Builders' statement of facts and she does not offer any facts that create a question of fact or establish the elements of the VAA claim.

Likewise, in his declaration, Robert Hale does not set forth any facts that contradict Bridge Builders' facts or support the VAA claim. (CP 131-33.) To the extent his statements extend to information outside his personal knowledge, such as what his father or mother said to individuals outside his presence, they do not comport with the requirements of CR 56(e). He, too, incorporates the complaint in its entirety, and then includes

a transcript of a June 12, 2008 conversation between Lisle and Clara Hale and their children. (CP 132-33.) There are no specific facts in Robert Hale's declaration to establish a violation of any of the provisions of the VAA. While the transcript of the Hales' conversation may tend to show the Hale children were exerting influence over their parents, the content of the conversation does nothing to support any of the Hales' claims against Bridge Builders.

Construing all the facts in this case in the light most favorable to the Hales, they have not set forth specific facts from which a reasonable trier of fact could find a violation of any provision of the Vulnerable Adult Act. They have failed to controvert Bridge Builders' facts and have not created a genuine issue of fact for trial. On the undisputed facts of this case, Bridge Builders is entitled to judgment as a matter of law and the trial court properly granted summary judgment.

E. The Hales Failed To Establish The Elements Of Their Consumer Protection Act Claim And Summary Judgment Was Proper

The Consumer Protection Act ("CPA"), RCW 19.86, provides that "any person injured in his or her business or property by a violation" may bring a claim to enjoin further violation. RCW 19.86.090. Because the Hales do not have standing to pursue their claims under RCW 70.127, their CPA claim, predicated on those claims, necessarily must also fail.

The Hale children, who did not receive any services from Bridge Builders at all, let alone services subject to RCW 70.127, likewise cannot maintain a CPA claim predicated on violation of that act.[3]

Further, standing under the CPA requires actual damages to plaintiffs' business or property. Lisle and Clara Hale did not pay Bridge Builders for any services received and nothing in the record before the court demonstrates any injury to their business or property. None of the Hale children engaged in any consumer relationship or received or paid for any services from Bridge Builders, they do not allege any injury to their business or property resulting from any alleged CPA violation, and likewise are without standing to pursue a claim under the CPA. *See Panag v. Farmers Ins. Co. of Washington*, 166 Wn.2d 27, 39, 204 P.3d 885 (2009) (requiring that the CPA violation cause injury to plaintiff's business or property and "thus a connection between the wrongdoing (the wrongdoer) and the plaintiff").

The alleged injuries the Hales do discuss in their brief, "injuries in fact of the rights of the Plaintiffs," (Br. 24), are not injuries to business or property necessary for standing under the CPA. They reiterate the claim that the powers of attorney were illegal. (Br. 24.) As already discussed at

[3] Assuming for purposes of argument that some third person was the recipient of unlicensed, in-home care services provided by Bridge Builders, that person might have standing to pursue a claim for violations of the CPA but the Hales do not.

length, the powers of attorney were valid and in no way "illegal." They argue the Hales' "home was intruded upon" and their bank accounts changed and social security "redirected." *Id.* Both actions were taken at the request of and with the consent of Lisle and Clara Hale, done pursuant to valid powers of attorney, and neither did any injury to their business or property. (CP 240-41.) There is no evidence in the record to suggest that at any time Lisle and Clara Hale's control over their property was usurped or in any way interfered with by Bridge Builders. The Hales' claim that Ms. Blanchard convinced Lisle and Clara to move back home, (Br. 24), is uncited, unsupported by the record, and likewise demonstrates no injury to business or property. Both the amended complaint and Tricia Hale's declaration incorporating the complaint make clear Lisle and Clara's strong desire to move back home; no convincing by anyone was required or undertaken. (CP 123-25, 505-07.)

The Hales' further claim that Bridge Builders did not evaluate Lisle and Clara Hales' capacity, their ability to pay for their care or their medical records, and did not make contact with their family members. (Br. 25). These allegations are not cited to a source and not supported by the record. Nor do they demonstrate injury to business or property. Ms. Blanchard met and spoke with Lisle and Clara at length on multiple occasions. (CP 240-42.) She also called and attempted to speak with both

Tricia Hale and Robert Hale. (CP 241.) The Hales cite no source supporting the allegation they were billed for the services Bridge Builders provided them[4]. The record before the court is devoid of any evidence to show the Hales paid for any of the services. Notwithstanding that fact, reasonable payment for services received does not demonstrate injury to business or property.

The Hales lack standing to proceed with their CPA claim because they have not set forth any specific facts demonstrating injury to their business or property from Bridge Builders' alleged violation of the CPA. Moreover, because they lack standing to proceed with their claims for violation of RCW 70.127, they cannot establish a per se violation of the CPA premised on violation of RCW 70.127. The trial court therefore did not err in granting summary judgment in favor of Bridge Builders.

F. The Hales Failed to Establish The Elements of Their Malpractice Claim And Summary Judgment Was Proper

Contrary to the assertion in the Hales' brief, the trial court did not "reject the claim that the [malpractice claim] should be dismissed." (Br. 39.) The trial court granted Bridge Builders motion as to the claim for

[4] While the Hales claim in their statement of facts that a check was written to Bridge Builders, (Br. 6.), that allegation is cited to a portion of Robert Hale's declaration in which he is quoting Bridge Builders' invoice. Nowhere in the invoice does it state that a check was written to Bridge Builders. Further, CR 56(e) provides that supporting and opposing affidavits "shall be made on personal knowledge." To the extent Robert Hale's statements are not based on his personal knowledge they do not comply with CR 56(e).

malpractice and dismissed the claim, finding the Hales "failed to show how the alleged breaches set forth in the Semingson declaration proximately caused damage to the elderly Hales." (CP 65.) While the court stated that arguably the Semingson declaration demonstrated a duty of care and breach of the duty, it properly dismissed the malpractice claim as the Hales failed to set forth specific facts demonstrating injury.

To maintain their claim for malpractice, the Hales must establish the existence of a special relationship giving rise to a duty of care, breach of that duty, damage, and proximate cause. *Falkner v. Foshaug*, 108 Wn.App. 113, 118, 29 P.3d 771 (2001). None of the Hale children had a professional relationship giving rise to a duty with Bridge Builders so they have no claim. Lisle and Clara Hale did have a relationship, but they cannot maintain a claim for malpractice because Washington law does not recognize a standard of care for elder care case management service providers that would form the basis for such a claim. The burden is on the plaintiff to establish the existence of the duty owed. *Jackson v. City of Seattle*, 244 P.3d 425, 428 (Wash. 2010).

The Hales cannot maintain their claim for malpractice because they have not established the existence of any duty. The existence of a duty is a threshold question and if there is no duty there is no claim. *Burg v. Shannon & Wilson, Inc.*, 110 Wn.App. 798, 804, 43 P.3d 526 (2002)

(quoting *Folsom v. Burger King*, 135 Wn.2d 658, 671, 958 P.2d 301 (1998)). Washington law recognizes professional negligence for lawyers, healthcare providers, engineers, architects, accountants, real estate professionals, and insurance brokers. *See* 16 Wash. Prac., Tort Law and Practice § 15.1 et. seq. (3d ed.). Such negligence is either based on statutes, as with healthcare providers and real estate professional, *see e.g.* RCW 7.70 et. seq., RCW 18.85 et. seq., or based on case law, as with insurance brokers. The Hales cite no case law or statute to support imposition of a duty in circumstances such as these and Bridge Builders is therefore entitled to judgment as a matter of law. *See Hutchins v. 1001 Fourth Ave. Associates*, 116 Wn.2d 217, 234, 802 P.2d 1360, 1369 (1991) (granting summary judgment where "not a single viable case" was cited to support a duty being imposed in similar circumstances).

The Hales proffer the opinion of Alice Semingson as an expert witness and she opines that Bridge Builders breached duties it had under the Western Region Geriatric Care Management Pledge of Ethics and the National Association of Professional Care Managers Standards. (CP 104.) However, the Hales cite no case law for the proposition that either is the basis for a legal duty under Washington law. They also attempt to pursue their claim for malpractice by asserting a new cause of action based on the rights of the Hale family members "to purse the family association." (Pls.'

Opp. at 26.) They cite no case law supporting that position either and their argument is unpersuasive. The Hale children had no professional relationship with Bridge Builders and therefore have no malpractice claim against it. *See Falkner v. Foshaug*, 108 Wn.App. 113, 118, 29 P.3d 771 (2001) (dismissing claim where parties had no professional relationship giving rise to a duty). Their attempt to overcome their individual lack of a claim against Bridge Builders by proceeding collectively is not supported by law, and the Hale children should be dismissed from this lawsuit.

Lisle and Clara Hale likewise cannot establish their malpractice claim against Bridge Builders because they have cited no case law to support the existence of any duty of care owed to them by Bridge Builders giving rise to such a claim. To establish liability a plaintiff must prove duty, breach, factual and legal causation, and damages. *See Hansen v. Friend*, 118 Wn.2d 476, 479, 824 P.2d 483 (1992); 16 Wash. Prac., Tort Law and Practice § 15.53 (3d ed.). Even assuming a duty, the Hales set forth no specific facts to demonstrate any injury to them proximately caused by Bridge Builders' alleged breach. They argue they had "been affected" by Bridge Builders failure to meet a standard of care and that the family's "course of action was violated by the failure of defendants to exercise proper care as geriatric care providers and as professional holders of powers of attorney." (Pls.' Opp. 28.) These statements are conclusory

allegations, not facts, and do not meet the Hales' burden to set forth specific facts. Having cited no case law for the existence of such a duty and failing to set forth any specific facts demonstrating breach or injury, the Hales cannot establish the elements necessary to maintain their claim.

G. The Hales Failed To Establish The Elements Of Their Interference With Family Relationship Claim And Summary Judgment Was Proper

The Washington State Supreme Court has not recognized a cause of action for malicious interference with the family relationship. *See Babcock v. State*, 112 Wn.2d 83, 108, 786 P.2d 481 (1989); 16 Wash. Prac., Tort Law and Practice § 13.22 (3d ed.). A survey of Washington cases discussing the tort, interchangeably referred to as malicious interference with the family relationship or alienation of affection, reveals the cases address the rights of parents and minor children. *See Babcock*, 112 Wn.2d 83; *Snyder v. State*, 19 Wn.App. 631, 577 P.2d 160 (1978); *Spurrell v. Bloch*, 40 Wn.App. 854, 701 P.2d 529 (1985). *Strode v. Gleason*, a division one case discussing alienation of affection of a minor child, identifies the following elements of the tort:

> 1. An existing family relationship;
>
> 2. A malicious interference with the relationship by a third person;
>
> 3. An intention on the part of the third person that such malicious

> interference results in the loss of affection or family association;
>
> 4. A causal connection between the third parties' conduct and the loss of affection; and
>
> 5. Resulting damages.

Babcock, 112 Wn.2d at 107 (citing *Strode v. Gleason*, 9 Wn.App 13, 510 P.2d 250 (1973)). The lack of case law on point suggests the cause of action, if it exists in Washington at all, does not lie in the context of adult child-parent relationships.

Assuming for purposes of argument that Washington law does recognize such a cause of action, the Hales allege insufficient facts to support their claim. Only the first element, existence of a family relationship, is present on the facts of this case. "'Malicious interference' refers to unjustifiable interference." *Id.* at 108. The Hales have set forth no specific facts demonstrating malicious, unjustifiable interference by Bridge Builders, nor any intent to interfere and cause loss of affection or association, no lost affection, no causation, and no damages. Bridge Builders only met with and provided services to the Lisle and Clara Hale over the course of nine days to help them make arrangements to move back home. All services provided were reasonable and justifiable efforts to carry out Lisle and Clara's stated wishes. During that brief association, all of the Hale family members were entirely free to associate, communicate

and engage in affection with one another, and the Hale children did in fact visit with their parents. (CP 133.) There is no evidence in the record that Bridge Builders took any actions or had any intent to maliciously interfere with, disrupt or influence the family relationships in any way.

Furthermore, the Hales have failed to set forth any specific facts demonstrating any injury or any loss of affection from such alleged interference. "Central to *Strode* is the holding that alienation of affections of a family member takes place gradually and 'cannot be said to have occurred until some overt act takes place which shows a want of affection.' In other words, the action accrues only when the loss of affection is sustained." *Spurrell v. Bloch*, 40 Wn.App. 854, 867, 701 P.2d 529 (1985) (quoting *Strode*). Relying on *Strode*, the court in *Spurrell* dismissed the claim, finding there could be no recovery where "there has been no allegation of malice, alienation, or lost affection." Id. at 867-68. Likewise here, the record before the court is devoid of any overt act demonstrating a loss of affection.

Accordingly, even if Washington law recognizes malicious interference with a family relationship, the Hales have not set forth specific facts to establish the elements of the claim. They make the unfounded allegation in their opposition that Bridge Builders was "going to set up a nursing home in the home" and "block the family from the

home." (Pls.' Opp. at 29.) They further assert that "family members were kept away from the Hales," though they do not specify by whom. *Id.* Nor do they cite to any source for these allegations or set forth specific facts to support their claims. The transcript of the June 12, 2008 conversation, submitted with Robert Hale's December 22, 2011 declaration, demonstrates that the Hale children were not kept away from their parents. (CP 133.) To the contrary, they met with their parents and succeeded in reversing their parents' course of action with respect to moving back home.

If anything, the record in this case demonstrates that the Hale children themselves were responsible for any isolation from their parents. Donald and Tricia Hale were allegedly asked on one occasion not to visit their parents "because they were unhappy and it would be best to leave them alone *for the time being*." (CP 511.) (emphasis added.) Following that request from Sherwood Assisted Living on June 4, the Hale children did not try to contact their parents until June 12. (R. Hale Decl. 226.) Tricia Hale apparently saw her parents in downtown Sequim when they were going to the bank on June 10, but did not approach them. (CP 412.)

The request not to visit Lisle and Clara was not made by Bridge Builders and there is no evidence in the record to suggest Bridge Builders ever took any action to prevent the Hale children from visiting with their

parents. It was the Hale children themselves who chose not to call or visit their parents. Any isolation was entirely of their own making and in no way the result of any conduct by Bridge Builders, let alone the result of any malicious, unjustifiable interference.

The Hales have set forth no facts demonstrating malicious interference, intent to interfere, or alienation of affection and for those reasons, the trial court properly granted summary judgment in favor of Bridge Builders. In arguing that the court should recognize a new cause of action, the Hales cite *Strode* for the proposition that "the novelty of an asserted right and the lack of precedent are not valid reasons for denying relief to *one who has been injured by the conduct of another*." (Br. 43) (emphasis added). The crucial element lacking from the Hales' case is injury. The Hales seek to establish a new cause of action to protect the family relationship so that "where there has been an injury, there is a remedy" (Br. 44) but have failed to establish any injury to remedy. Bridge Builders did not interfere with the Hales' family relationship and any loss of affection or association was the result, not of Bridge Builders' conduct, but of the Hale children's own decisions not to go see their parents or talk to them. Accordingly, the trial court did not err in granting summary judgment.

H. The Hales Failed To Establish The Elements Of Their Negligent Infliction Of Emotional Distress Claim And Summary Judgment Was Proper

To recover for negligent infliction of emotional distress ("NIED") a plaintiff must prove: "(1) negligence, i.e., duty, breach, proximate cause, and injury; and (2) the additional requirement of objective symptomatology." *Kloepfel v. Bokor*, 149 Wn.2d 192, 195, 66 P.3d 630 (2003). To prove emotional distress by objective symptomatology, plaintiff's "emotional distress must be susceptible to medical diagnosis and proved through medical evidence." *Id* at 196-97 (citing *Hegel v. McMahon*, 136 Wn.2d 122, 135, 960 P.2d 424 (1998)). The plaintiff's "symptoms of emotional distress must 'constitute a diagnosable emotional disorder'" in order to state a claim. *Id.* Additionally, a plaintiff "may not sue for NIED unless he or she was present when, or shortly after, the negligent conduct occurred." *Miles v. State, Child Protective Services Dept.*, 102 Wn.App. 142, 156-57, 6 P.3d 112 (2000) review denied 142 Wn.2d 1021, 16 P.3d 1266.

The Hales' claim for NIED fails because they have not set forth specific facts demonstrating any emotional distress suffered by any of the Hales and manifest by objective symptomatology. The record before the court is silent as to any diagnosable emotional disorder or distress susceptible to diagnosis suffered by any of the Hales and proximately

caused by any negligence of Bridge Builders. Additionally, their claim fails as to negligence because they have not established any duty owed by Bridge Builders, the breach of which caused injury to any of the Hales.

In *Spurrell v. Bloch*, the court held plaintiffs could not establish emotional distress or objective sympotomatology where the only allegations claimed were "one sleepless night, tears, loss of appetite, and anxiety." *Spurrell*, 40 Wn.App. at 863. The court noted that "[w]hile in some cases such transitory signs could be 'symptoms,' [it did] not see signs of distress above that level which is a fact of life." *Id.* The Hales have not set forth any specific facts demonstrating symptoms like those in *Spurrell*, nor any negligence by Bridge Builders to form the basis of their claim. They do not show that any of the Hales were present at or shortly after any alleged negligent conduct occurred. Finally, they do not set forth any specific facts demonstrating objective symptomatology. As such, they cannot establish the elements of their claim for negligent infliction of emotional distress.

The Hales' attempt to avoid the objective symptomatology element of NIED by referring to RCW 74.34.020(2), the definition section of the Vulnerable Adult Act. That statute's presumption of injury in instances of abuse of a vulnerable adult "who is unable to express or demonstrate physical harm, pain, or mental anguish" has no bearing on a claim for

NIED. The objective symptomatology necessary for the claim would have existed at the time of the emotional distress, so Clara Hale's present condition and Lisle Hale's absence are irrelevant to establishing the element. As the Hales set forth no specific facts to support this claim, demonstrate no issue of material fact, and failed to establish the elements of the claim, the trial court properly granted summary judgment.

I. Bridge Builders' Conduct Was Not Extreme And Outrageous As A Matter Of Law And Summary Judgment Was Proper On The Intentional Infliction of Emotional Distress Claim

To establish intentional infliction of emotional distress ("IIED"), the plaintiff must prove 1) extreme and outrageous conduct, 2) intentional or reckless infliction of emotional distress, and 3) that the plaintiff actually suffers emotional distress. *Saldivar v. Momah*, 145 Wn.App. 365, 390, 186 P.3d 1117 (2008). "The law intervenes only where the distress inflicted is so severe that no reasonable person could be expected to endure it." *Id.* (quoting Restatement (Second) of Torts § 46 cmt. j, at 77 (1965)). Mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities are insufficient to establish the tort. *Id.*

The court determines whether on the evidence severe emotional distress can be found, and it is the defendant's conduct rather than the degree of the plaintiff's distress that primarily limits claims. *Kloepfel*, 149

Wn.2d at 202. While the question of whether certain conduct is sufficiently outrageous is normally a question for the jury, the court must first determine "that reasonable minds could differ on whether the conduct has been sufficiently extreme and outrageous to result in liability." *Spurrell*, 40 Wn.App. at 862; *See Kirby v. City of Tacoma*, 124 Wn. App. 454, 98 P.3d 827 (2004); *Citoli v. City of Seattle*, 115 Wn. App. 459, 61 P.3d 1165 (2002); 16 Wash. Prac., Tort Law and Practice § 13.21 (3d ed.).

In *Saldivar*, the court held that filing a lawsuit alleging sexual abuse by a physician, even with malicious intent, did not rise to the level of extreme and outrageous conduct because it was not "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be utterly intolerable in a civilized community." *Id* (citations and quotations omitted). In *Spurrell*, the court determined that summary judgment was properly granted in favor of all defendants where plaintiffs alleged they returned home to find their children gone, not knowing the children had been removed from their custody by police and child protective services, without any attempt to contact them, and they did not regain custody for thirty hours. The court concluded that plaintiffs "simply [did] not put in issue material facts as to the elements of outrage" because the facts alleged did "not come anywhere near the elements of outrage." *Spurrell*, 40 Wn.App. at 863 (citations and quotations omitted).

The Hales set forth no specific facts demonstrating conduct by Bridge Builders that rises to the level of that discussed in *Sadlivar* or *Spurrell*, let alone conduct so outrageous that no person could be expected to endure it. Bridge Builders met with Lisle and Clara Hale several times and helped them make arrangements to move back home. The Hale children were opposed to the move, spoke to their parents and changed their mind. After Donald Hale told Bridge Builders that his parents would not be moving, Bridge Builders ceased to provide any services to the Hales. The record before the court is devoid of any allegations that would allow a reasonable mind to conclude that any conduct of Bridge Builders was sufficiently extreme and outrageous to support a claim for intentional infliction of emotional distress.

Rather than provide specific facts, the Hales again rely only on the allegations in the complaint. Even taking all of those allegations as true, none of Bridge Builders' conduct is sufficiently extreme and outrageous. The Hales' reliance on *Brower v. Ackerley*, 88 Wn.App. 87, 943 P.2d 1141 (1997), is not helpful because in *Brower* the defendant's telephone harassment of plaintiff created a question of fact for the jury as to whether it was sufficiently extreme and outrageous. Here, there is no conduct comparable to repeated, threatening, late-night phone calls that might lead reasonable minds to differ. *Saldivar* and *Spurrell* are on point and as in

those cases, the facts here simply do come anywhere near the element of outrage and the trial court properly granted summary judgment.

VII. CONCLUSION

The trial court did not err in granting summary judgment. Judge Verser's Memorandum Opinion demonstrates he thoroughly considered all of the arguments the Hales raise in this case. It was carefully reasoned and correctly decided. Bridge Builders respectfully requests that the Court of Appeals affirm the trial court.

July 24, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that that I delivered a copy of the foregoing Respondents' Brief via first class U.S. Mail to Stephen K. Eugster and Ketia B. Wick, on July 24, 2012.

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