No. 91536-9

SUPREME COURT OF
THE STATE OF WASHINGTON

ESTHER KIM, as Personal Representative of the Estate of HO IM BAE on behalf of Mi-Soon Kim, Jae C. Kim, Chang Soon Kim, Jae Hong Kim, and Kyoung Soon Kim, surviving family members, and the ESTATE OF HO IM BAE,

Petitioners,

v.

ALPHA NURSING & SERVICES, INC.,

Respondent,

and CHRISTINE THOMAS,

Respondent/Cross-Petitioner.

ANSWER TO KIM'S PETITION FOR REVIEW AND NURSE THOMAS' PETITION FOR REVIEW

(Cross-petition)

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I. WHY KIM'S PETITION FOR REVIEW SHOULD BE DENIED

The Court of Appeals' affirmance of the summary judgment dismissal of claims filed by plaintiffs Esther Kim, as Personal Representative of the Estate of Ho Im Bae, and the other surviving family members (referred to collectively as "Kim") as required under a standard negligence analysis does not satisfy any of the criteria in RAP 13.4(b). As the analysis is in line with well-established law governing duty and breach in negligence claims, does not conflict with a decision of this Court or any other decision of the Court of Appeals, does not present any question of law under the Washington State Constitution, and does not address any issue of substantial public interest, Kim's Petition is properly denied.

A. This Case Involves a Standard Negligence Analysis – It is Not Novel Nor Does It Raise an Issue of Public Importance.

Kim's Petition is based on a premise that the interpretation of a statute is always an issue of public importance warranting review because this Court has not had the opportunity to expressly consider that statute. That rationale is, of course, incorrect. In this case, the Court of Appeals utilized a standard negligence analysis that was neither unique nor improper to determine whether a duty existed under the Abuse of Vulnerable Adult Act ("AVAA"), RCW 74.34.035. It then reviewed the

record and properly determined that Kim failed to establish a duty to report under the AVAA. A-2, A-10.

The Court of Appeals did not confuse or conflate the issue of duty or breach, nor did the language contained in RCW 74.34.035 cause any conflict in the Court's analysis. Likewise, the Court of Appeals' Opinion did not create a loophole in the AVAA. Therefore, Kim fails to meet her high burden of establishing why her Petition for Review should be granted.

B. There is No Conflict – The Court of Appeals Utilized a Standard Negligence Analysis in Determining the Lack of Duty.

To prove negligence, a plaintiff must establish: (1) the existence of a duty owed to the complaining party; (2) a breach of that duty; (3) a resulting injury; and (4) that the claimed breach was the proximate cause of the injury. Hansen v. Friend, 118 Wn.2d 476, 479, 824 P.2d 483 (1992). The existence of a duty is a threshold question. Folsom v. Burger King, 135 Wn.2d 658, 671, 958 P.2d 301 (1998). If there is no duty, there is no claim. Id. The plaintiff has the burden of establishing the existence of a duty. Lake Wash. Sch. Dist. No. 414 v. Schuck's Auto Supply, Inc., 26 Wn. App. 618, 621, 613 P.2d 561 (1980).

Here, the Court of Appeals held that Kim failed to meet her burden in establishing a duty and thus affirmed the summary judgment dismissal

of her claims. Kim's Petition characterizes the Court of Appeals' holding as being in conflict because it stated that no duty existed and thereafter stated the opposite, *i.e.*, that a duty existed (but was not breached). A close reading of the Opinion, however, discredits Kim's interpretation of the analysis. The Court of Appeals found that Marion Binondo, R.N. ("Nurse Binondo") and Christine Thomas, R.N. ("Nurse Thomas") were mandatory reporters under the AVAA. A-9. It did not, as asserted by Kim, "ostensibly" find that each had a duty because the AVAA applied to them. See Kim Petition for Review, at 14.

The Court of Appeals then analyzed whether Nurses Binondo and Thomas, as mandatory reporters under the AVAA, each had a duty to report to DSHS and/or law enforcement. As to Nurse Binondo, the Court of Appeals concluded that there was no duty to report because she did not observe any injury, abuse or distress on the day she observed Ms. Bae fall from the bed. A-11 to A-12, A-17. As to Nurse Thomas, the Court of Appeals held that she met her mandatory reporting duty by contacting DSHS, but had no additional duty to also file a report with law enforcement. A-12, A-14 to A-15, A-17. Thus, the Court of Appeals concluded that Kim failed to establish duty. A-2, A-10, A-17. Without duty, Kim's claim failed as a matter of law and the Court of Appeals concluded that summary judgment was appropriate.

The Court of Appeals' analysis was not unique or out of line with well-established law governing duty and breach in negligence claims. See Folsom, 135 Wn.2d at 671. Duty is a threshold question in any negligence case upon which the plaintiff has the burden of proof. Kim failed to meet that burden and her claims were accordingly dismissed. Given the standard negligence analysis utilized by the Court of Appeals, there is no conflict sufficient to warrant review by this Court.

C. There is No Conflict – The Court of Appeals' Decision Does Not Create a Loophole in AVAA Cases.

A motion for summary judgment should be granted if there is no genuine issue of material fact or if reasonable minds could reach only one conclusion based upon the evidence construed in the light most favorable to the nonmoving party. CR 56(c); Sea-Pac Co., v. United Food and Comm'l Workers Local Union 44, 103 Wn.2d 800, 802, 699 P.2d 217 (1985). Conclusory statements, argumentative assertions, and allegations of unanswered questions will not defeat a motion for summary judgment. Vacova Co. v. Farrell, 62 Wn. App. 386, 395, 814 P.2d 255 (1991). Summary judgment is appropriate "if, from all evidence, reasonable persons could reach but one conclusion." Sea-Pac, 103 Wn.2d at 802.

Kim argues that the Court of Appeals' Opinion creates a loophole in AVAA cases because it relies "solely on the statements of the

mandatory reporters in determining whether they had a duty (or breached that duty) rather than the entire record." See Kim Petition, at 15-16. There is, however, no indication in the Opinion that the three judge panel in any way limited the evidence it relied upon. The only reasonable presumption that can be made is to the contrary, *i.e.*, that the Court of Appeals considered the entirety of the record in the light most favorable to Kim as warranted in its review of a summary judgment order. Given that Kim failed to present sufficient admissible evidence to create a genuine issue of material fact, it is not surprising or improper that the Court of Appeals' Opinion focuses on the declarations of Nurses Binondo and Thomas.

It is undisputed that Nurse Binondo did not observe any abuse toward Ms. Bae. It is further undisputed that Nurse Binondo did not become aware of any possible abuse until she was made aware of Nurse Thomas' experience. Kim's Petition fails to identify what specific evidence relating to Nurse Binondo was ignored, and offers only conclusory statements without any citation to specific evidence in the record. Even viewed in the light most favorable to Kim, the undisputed facts support one conclusion – there was no duty. The fact that Kim failed to meet her burden of proof does not support an inference that there was a defect in the Court of Appeals' analysis.

Similarly, as to Nurse Thomas, the Court of Appeals considered the entirety of the evidence, including both the declaration of Salzbrun, and the evidence of bruising by Ms. Bae at the time of her autopsy. A-14 to A-15. Salzbrun declared that Ms. Bae was being given morphine without any reasonable basis for that belief. A-15. This was considered along with the following undisputed facts: (1) that Nurse Thomas had a treating relationship with Salzbrun and had concerns regarding Salzbrun's credibility, (2) that Salzbrun was under the influence of narcotics and (3) that Nurse Thomas "did not witness the event later determined to be an assault." A-14. Even in the light most favorable to Kim, these undisputed facts support summary judgment. As such, the Court of Appeals held that Kim failed to "counteract this evidence of unreliability." Id. Moreover, bruising at the time of Ms. Bae's autopsy fails to prove that such bruising was present prior to her death or that such bruising was actually caused by abuse. The bruising obviously could have resulted at any time and for any number of reasons.

Finally, Kim asserts that the Court of Appeals' analysis opens a "dangerous and improper" loophole in the AVAA by "suggest[ing] that any mandatory reporter who wants to escape responsibility for ignoring warnings of abuse may simply state that they found the warnings 'unreliable.'" See Kim Petition, at 16. In no way does the Court of

Appeals' Opinion create such a loophole, nor does it "suggest" such an outcome. More importantly, it is only necessary to reach this part of the analysis if Kim had presented admissible evidence sufficient to raise an issue of fact regarding whether Nurses Binondo or Thomas had a reason to believe abuse was occurring. She failed to do so and, therefore, the analysis necessarily stops here. On these facts, it is simply not reasonable to speculate about how the analysis might end if a hypothetical mandatory reporter had reason to believe abuse was occurring. The fact that Kim did not get the result she hoped for does not create a conflict in case law.

D. Kim's Petition Must be Denied.

As set forth above, Kim failed to meet her high burden of proving that this is one of the rare cases warranting review by this Court. A standard negligence analysis dictated by well-established law compels summary judgment dismissal of Kim's claims. As there is no conflict with a decision of this Court or any other decision of the Court of Appeals, there is no question of law under the Washington State Constitution, and the decision does not address any issue of substantial public interest, there is no basis under RAP 13.4(b) on which to grant review. Therefore, Kim's Petition must be denied.

II. NURSE THOMAS' CROSS-PETITION FOR REVIEW

A. Identity of Cross-Petitioner

The Cross-Petitioner is Christine Thomas, R.N. (referred to as "Nurse Thomas"), a defendant in the Superior Court.

B. Citation to Court of Appeals Decision

The Court of Appeals, Division I, issued its decision in a published opinion captioned, Kim v. Lakeside Adult Family Home, et al., No. 70892-9-I, ---P.3d. ---, 2015 WL 1205008 (Wn. App. Mar. 16, 2015), and is set forth in the Appendix at pages A-1 through A-17.[1]

III. ISSUES PRESENTED IN CROSS-PETITION

1. Whether plaintiffs in multi-defendant actions should enjoy unlimited tolling of the statute of limitations as to unserved defendants after completing service against one defendant in light of this Court's decision in Sidis v. Brodie/Dohrmann, Inc., 117 Wn.2d 325, 815 P.3d 781 (1991) (addressing tolling of the statute of limitations against unserved defendants)?

2. Whether service of process on a foreign national in his or her native county is deemed to have complied with the Hague Convention and CR 4(i)(1), where plaintiffs circumvent standard service of process

[1] This Opinion substituted the original published opinion, dated February 17, 2015, which was withdrawn by the Court of Appeals.

procedures thorough the foreign country's designated Central Authority, and instead attempt personal service through a private process server, without consideration as to the foreign country's objections to specific articles under the Hague Convention, whether the foreign country's internal service of process rules were meant to apply to the service of process of documents from abroad, and where the documents served are written strictly in English, despite the foreign country's written translation requirements under the Hague Convention?

IV. STATEMENT OF THE CASE[2]

Nurse Thomas is a Norwegian citizen who lives in Nannestad, Norway. Her employer, Alpha Nursing & Services, Inc. ("Alpha"), was served on March 26, 2012, by Kim for damages arising out of Ho Im Bae's death that occurred at the Lakeside Adult Family Home on March 30, 2009.[3] CP 924-933.

Nurse Thomas expressly and repeatedly contested service beginning shorty after claims were first asserted against her on March 21, 2012, CP 924-933, and continuing throughout 2012. On April 4, 2012,

[2] For the purposes of this Cross-Petition only, Nurse Thomas incorporates by reference the Statement of Facts as recited by the Court of Appeals in its Opinion. A-2-A-5. In addition, Nurse Thomas relies upon the Clerk's Papers for those facts regarding the service of process facts not addressed by the Court of Appeals.

[3] Thus, the statute of limitations on Kim's claims against Nurse Thomas and Alpha expired no later than March 30, 2012.

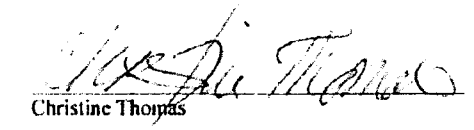
defense counsel for Alpha and Nurse Thomas filed and served their Notice of Appearance, which was entered expressly without waiving the questions of: (1) Lack of jurisdiction over subject matter; (2) Lack of jurisdiction over person; ...(4) Insufficiency of service of process; [and] (5) Insufficiency of process..." CP 1281-1283. On April 20, 2012, Alpha filed an Answer to the Amended Complaint, on behalf of itself and Nurse Thomas asserting the affirmative defense of the failure of and lack of service of process on Nurse Thomas. CP 909-915.

On April 30, 2012, Kim sent Requests for Admissions to Alpha, in which Alpha explicitly responded that Nurse Thomas had not been properly served with a summons and/or complaint. CP 1164-1168. After nearly five months, on September 25, 2012, Kim served Alpha with broad discovery requests requesting the contact information for all former and current Alpha employees who ever treated an Alpha patient residing at the Lakeside Adult Family Home. CP 1170-1174. In November 2012, Nurse Thomas advised Kim that she was a Norwegian citizen, and as such, was entitled to the protection of the *Hague Convention on Service Abroad of Judicial and Extra-judicial Documents in Civil or Commercial Matters*, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638 (the "Hague Convention"). CP 1091-1092. On December 11, 2012, Alpha provided

the current contact information for Nurse Thomas: Gullbekken 3c, 2030 Nannestad, Norway. CP 1099-1102.

Instead of pursuing service through Norway's designated Central Authority, and after waiting another four months, on March 21, 2013, Kim had copies of the First Amended Summons and First Amended Complaint, which were in English and untranslated contrary to Norwegian translation requirements under the Hague Convention, handed to Nurse Thomas by a private investigator, Gard Westbye, at her home in Nannestad, Norway. CP 1236-1254.

While at Nurse Thomas' residence, and without notice to Nurse Thomas' attorney, Mr. Westbye, at the request of Kim's counsel, also presented to Nurse Thomas, and demanded she sign, a document drafted by Kim's counsel titled "Acceptance of Service of Summons and Complaint," which was in English and untranslated. CP 1236-1254. Nurse Thomas signed the document. The following is an excerpt from that document, drafted by Kim's counsel:

> I hereby waive the following affirmative defenses:
>
> 1. Lack of jurisdiction over my person;
>
> 2. Insufficiency of Process;
>
> 3. Insufficiency of Service of Process.
>
> I declare, under penalty of perjury under the laws of the State of Washington and the country of Norway, that the foregoing is true and correct to the best of my knowledge and belief.
>
> DATED this 21 day of March, 2013.
>
> 
>
> Christine Thomas

CP 1110-1111. Nurse Thomas was not provided with this document (unsigned or signed). CP 1236-1254. Upon notice, Nurse Thomas' counsel immediately objected to the improper contact Kim's agent had with Nurse Thomas, a represented party, and contested the validity of the waiver. CP 798-807. Kim refused to withdraw the attempted service of process, acceptance and waiver. CP 798-807.

Kim's counsel James Gooding then filed an affidavit pursuant to RCW 4.28.185, Washington's Long Arm Statute, stating that he caused the process server to serve Nurse Thomas with documents, including the "Acceptance of Service." CP 1246-1254. Of note, the process server's "Affidavit of Service" states: "The documents was served at Christine Thomas living residence Gullbekken 3c, 2030 Nannestad. It was no sign on door/doorbell and the door was opened by daughter. The documents was served and acceptance signed." CP 1250-1252. Nurse Thomas' daughter's name or age is not listed. Id.

On April 2, 2013, Nurse Thomas moved to dismiss the claims against her on the basis that the statute of limitations had expired, and the Court did not yet have personal jurisdiction over her because she had not been served in accordance with the Hague Convention. CP 798-807. Nurse Thomas also requested that the Court strike the ex parte waiver of

affirmative defenses. Id. The trial court denied Nurse Thomas' motion, CP 674-675, and issued an oral ruling that:

(1) Thomas waived her affirmative defenses by signing the "Acceptance of Service" document;

(2) Thomas had been properly served on March 21, 2013 by the private investigator; but, regardless,

(3) The statute of limitations was tolled into the future (until Plaintiffs' could serve Thomas through the Norwegian Ministry) by Plaintiffs' timely service on Thomas' co-defendant Alpha.

Soon after the trial court issued an Amended Order certifying for immediate appeal the following issues which required appellate guidance:

(1) the potential tolling of the statute of limitations, indefinitely, as to one defendant where another co-defendant was timely served;

(2) whether a Norwegian citizen must be served in accordance with the *Hague Convention*; and

(3) whether a plaintiff may seek and obtain a waiver of affirmative defenses via ex parte with a defendant who is represented by counsel.

CP 532-534. The trial court specifically identified that these issues were "significant public policy issues critical to a defendant's right to adequate process and protection of international laws." Id.

On March 16, 2015, Division I of the Court of Appeals affirmed the trial court decision. A-1-A-17. In affirming, the Court of Appeals held that Nurse Thomas was properly and timely served in accordance

with the superior court's civil rules, Norway's rules on services of process and the Hague Convention. Id. Nurse Thomas seeks review of the Court of Appeals' decision regarding service of process.

V. WHY THE CROSS-PETITION SHOULD BE GRANTED

Nurse Thomas respectfully requests that this Cross-Petition be granted under RAP 13.4(b)(1), because the decision of the Court of Appeals is in direct conflict with the previous decision of this Court in Sidis v. Brodie/Dohrmann, Inc., 117 Wn.2d 325, 815 P.3d 781 (1991), relating to the tolling of the statute of limitations against unserved defendants and timely service of process. The Court of Appeal's decision holds that service on one or more co-defendants tolls the statues of limitations as to unserved defendants without any discussion or reference to this Court's guidance on the limits of such tolling, providing a basis for plaintiffs to assert that tolling of the statute of limitations is infinite. This has led to confusion by the lower courts and demands the Court's guidance and intervention.

Further, the Court should grant this Cross-Petition because the decision by the Court of Appeals' Opinion substantially broadens the scope and process by which service of process can be accomplished against foreign defendants under the Hague Convention and CR 4(i)(1). The concern for uniform and objective requirements and standards in

services of process against foreign defendants under CR 4(i)(1) and the Hague Convention are "issue[s] of substantial public interest that should be determined by the Supreme Court" under RAP 13.4(b)(4), because the requirements and standards for service of process affects every civil action filed in Washington.[4] If the Court of Appeals' Opinion regarding service is allowed to stand, plaintiffs will be encouraged to avoid the standards and procedures set in place under the Hague Convention and personally serve untranslated documents against foreign defendants in their native country without any consideration of the country's internal service of process laws and translation requirements for foreign process. As a direct consequence, longstanding procedures set forth in the Hague Convention will be rendered essentially useless.

A. The Court of Appeals' Decision on Tolling of the Statute of Limitations and Timely Service of Process Conflicts with the Supreme Court's Decision in Sidis v. Brodie/Dohrmann, Inc.

The Court of Appeals' decision in this case is in direct conflict with the decision of the Supreme Court in Sidis v. Brodie/Dohrmann, Inc.,

[4] Indeed, this Court has recently accepted two other Petitions for Review involving issues of service of process. See Petition for Review, Nina Martin v. Dematic d/b/a Rapistan, Inc. et al., 180 Wn.2d 1009, 325 P.3d 914 (2014) (No. 89924-0); Petition for Review, Theresa Scanlan v. Karlin Townsend, et ux., 181 Wn.2d 838, 336 P.3d 1155 (2014) (No. 89853-7). The importance, substantial interest and need to provide uniform guidelines on service of process is implicitly recognized by the Court's acceptance of these Petitions.

117 Wn.2d 325, 815 P.3d 781 (1991). In Sidis, this Court held that under RCW 4.16.170, service of process on one defendant tolled the statute of limitations as to unserved defendants. Sidis, 117 Wn.2d at 329. However, the tolling is not indefinite. Id. "Plaintiffs must proceed with their cases in a timely manner as required by court rules, and must serve each defendant in order to proceed with the action against that defendant." Id. See also Bosteder v. City of Renton, 155 Wn.2d 18, 48-49, 117 P.3d 316, 331 (2005) (reaffirming that the period of time the statute of limitations is tolled is not infinite and plaintiffs must proceed in a timely manner). This Court recognized the balance between timely service and tolling.

The Court of Appeal's decision, however, holds that service on "one or two or more co-defendants tolls the statues of limitations as to unserved defendants," without any discussion or reference to this Court's guidance on the limits of such tolling. A-5. This holding provides a basis for plaintiffs to assert that tolling of the statute of limitations is infinitely open. This grants plaintiffs in multi-defendant actions unlimited protection from the statute of limitations and upsets the balance maintained between timely service and tolling. Such a result is in direct conflict with this Court's holding in Sidis.[5]

[5] The Court of Appeal's citation to Powers v. W.B. Mobile Services, Inc., 182 Wn.2d 159, 339 P.3d 173 (2014) is distinguishable because Powers

Further, the Court of Appeals' decision summarily concludes that Nurse Thomas was timely served, thus implicitly condoning the actions taken by Kim. A-5. Specifically, that waiting a full year to attempt service on Nurse Thomas despite having specifically named her in the amended complaint, waiting six months to request her address, and then, after being provided with that information, waiting another three and a half months to attempt service, can be considered "timely" service under Sidis.

The importance of this issue and the need for guidance on the outer limits of tolling was immediately recognized by the trial court in its order certifying these issues for immediate appellate review: "the potential tolling of the statute of limitations, indefinitely, as to one defendant where another co-defendant was timely served." CP 532-534. Failure to address the outer limits of tolling under Sidis will only lead to further confusion by the lower courts as to what can be considered "timely." Accordingly, this Court should grant review to resolve the conflict in the Court of Appeals regarding the outer limits of tolling under Sidis and to clarify the

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involved tolling of the statute of limitations against unnamed defendants whose identity was not known and thus substituted as "John Doe." That is not the case here. Kim specifically identified Nurse Thomas in her Amended Complaint but waited 12 months before attempting service on her. CP 924-933.

circumstances under which the statute of limitations is tolled as to unnamed defendants.[6]

B. The Court of Appeals' Expansion of Service of Process on Foreign Defendants under CR 4(i)(1) and the Hague Convention is of Substantial Public Interest Because it Imposes Hardships on Foreign Parties in all Lawsuits.

The Court of Appeals' Opinion greatly broadens the scope and methods by which plaintiffs can serve foreign defendants with process under the Hague Convention. Article 5 of the Hague Convention sets forth the mechanism for effecting service of process through the foreign country's designated "Central Authority." See Broad v. Mannesmann Anlagenbau AG, 196 F.3d 1075, 1077 (9th Cir. 1999) (stating that under Article 5 the designated central authority is "solely responsible for serving the document"); Brockmeyer v. May, 383 F.3d 798, 801 (9th Cir. 2004) (stating that Article 5 affirmatively requires the Central Authority to effect service). Article 5 does not address service of process methods other than through the designated Central Authority.

However, based on its interpretation of Article 5 of the Hague Convention, (1) plaintiffs who serve process on foreign nationals in their native country, and circumvent the country's designated Central

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[6] A similar issue was also raised in the Petition for Review filed in Nina Martin v. Dematic d/b/a Rapistan, Inc. et al., 180 Wn.2d 1009, 325 P.3d 914 (2014) (No. 89924-0), which was granted review by the Court on April 30, 2014.

Authority, are deemed to have complied with the Hague Convention and the foreign country's internal service of process rules, without consideration as to the foreign country's objections to the Hague and whether the foreign country's internal service of process rules were meant to apply to service of process of documents from abroad, and (2) plaintiffs can now serve a foreign national in their native country with process written strictly in English, regardless of the foreign country's language, or the foreign country's requirements on translation of documents from abroad.

The Court of Appeals' Opinion summarily concludes that Kim's attempted service on Nurse Thomas was "due and proper service under the laws of Norway," without analysis of Article 19[7] of the Hague Convention, Norway's objection to Article 10, Norwegian law, or the actual method of service used by Kim. A-6. The Opinion offers no citation or analysis of the Norwegian statutes or laws that Kim's attempted service is supposed to have had complied with. If the Court of Appeals did indeed rely on Norwegian Courts of Justice Act, ch. 9 § 168 (2005)[8],

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[7] Instead, the Opinion relies upon Article 5 in its analysis, despite the fact that Article 5 deals strictly with service of process through the designated Central Authority. Service of process by methods other than through the Central Authority is encompassed within Article 19. Brockmeyer v. May, 383 F.3d 798, 801-02 (9th Cir. 2004).

[8] Section 168, translated from Norwegian, states in full:

which authorizes service of process within the country, to come to its conclusion, such reliance is unreliable because Section 168 lacks any explicit language indicating that it was meant to apply to "documents coming from abroad."[9] The Court of Appeals offers no analysis as to whether the Norwegian government indeed permitted such internal process rules to apply to foreign service of process outside of the process already set forth in the Hague Convention.

Without any analysis or guidance from the Court of Appeals, it allows plaintiffs to interpret its decision as permitting circumvention of the Hague Convention as long as the country has some form of service of process rule on its books. Such an outcome encourages plaintiffs to avoid

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> § 168. Service of process by a process server shall to the greatest possible extent take place in person, preferably at the recipient's place of residence or regular workplace. Where he/she is personally served, the service is valid regardless of where the encounter takes place.

An unofficial translation of the Norwegian Court rules can be located at: http://www.domstol.no/en/National-Courts-Administration/Publications/.

[9] Article 19 of the Hague Convention provides that service of documents from abroad may be made by any method permitted by the internal law of the receiving state. Brockmeyer v. May, 383 F.3d 798, 801-02 (9th Cir. 2004). Courts have repeatedly held that Article 19 authorizes only those methods of service that explicitly allow the service of documents coming from outside the country in question. GMA Accessories, Inc. v. BOP, LLC, No. 07-civ-3219-PKC-DCF, 2009 WL 2856230 (S.D.N.Y. Aug. 28, 2009); ePlus Technology, Inc. v. Aboud, 155 F.Supp.2d 692, 700 (E.D. Va. 2001); Banco Latino, S.A.C.A. v. Gomez Lopez, 53 F.Supp.2d 1273, 1279–80 (S.D. Fla. 1999); EOI Corp. v. Med. Mkt. Ltd., 172 F.R.D. 133, 136 (D.N.J. 1997); In re Mak Petroleum, Inc., 424 B.R. 912, 920 (Bankr. M.D. Fla. 2010).

the Hague Convention and the country's designated Central Authority altogether, with little regard or consideration to the internal laws of the country. This result greatly perverts the original intent of Articles 5 and 19 of the Hague Convention and must be addressed by the Washington Supreme Court.

Further, the Court of Appeals' conclusion that Kim's attempted service complied with Norwegian law, implicitly sanctions service to be made on foreign nationals, in their native county, with process written strictly in English without regard to the foreign country's language, or the foreign country's requirements on translation of documents from abroad. In the underlying matter, Kim served papers upon Nurse Thomas written in English, despite Nurse Thomas being a Norwegian citizen, residing in Norway. The Court of Appeal's Opinion ignores this distinction and concludes that because Norway "has not objected to personal service," service was valid. A-6. Norway, however, has objected to Kim's method of personal service upon Nurse Thomas. Specifically, the Norwegian government has objected to Article 10 (relating to methods of service other than through the Central Authority) and placed translation requirements on service of foreign process pursuant to the Hague Convention:

> Under the regulations adopted by Royal Decree on 12 September 1969, requests for service will only be complied with when the document to be served is written in *Norwegian, Danish or Swedish, or if the request is accompanied by a translation into one of these languages*, unless the document is meant to be delivered only to an addressee who accepts it voluntarily.

See Norway – Central Authority & Practical Information, Hague Conference on Private International Law, http://www.hcch.net/index_en.php?act=authorities.details&aid=246 (emphasis added). Moreover, Norwegian Courts of Justice Act, ch. 9 § 136 (2005) makes clear that all court pleadings must be written in Norwegian or accompanied by a translation. Again, without any analysis or citation to Norwegian law in the Court of Appeals' Opinion, it is impossible to discern whether the Court of Appeals did or did not consider Norway's objection to Article 10 as well as the external and internal translation requirements by the Norwegian government. It does however, give plaintiffs a basis to argue that such objections and translation requirements (asserted by many signatories to the Hague Convention) do not need to be complied with. Such a result completely eviscerates the requirements for translation and unfairly prejudices foreign defendants by failing to provide them with proper notice.

The Court of Appeals' Opinion encourages plaintiffs to serve foreign nationals in their native county with process written strictly in English. The consequences of such a ruling can easily be anticipated. Ignoring the obvious issue of a country's explicit objection to service methods outside the Central Authority and to untranslated documents, plaintiffs can now serve process, written entirely in English, against a foreign citizen in their native county without any regard to their home country's language. For example, a Washington plaintiff can now serve a Chinese citizen in Beijing with a summons and complaint written entirely in English, and, as was in the case of Nurse Thomas, force the recipient, through improper ex parte contact, to sign a waiver of affirmative defenses without regard to whether the recipient could understand what was being served. Again, this result greatly perverts the original intent of procedures set forth under the Hague Convention and must be addressed by the Washington Supreme Court. See Hague Convention, preamble 20 U.S.T. 361, 362 T.I.A.S. No. 6638 (stating that the purpose of the Hague Convention is to "create appropriate means to ensure that judicial and extrajudicial documents are served abroad and *brought to the attention of the addressee* in sufficient time...") (emphasis added).

Both outcomes are incredibly disruptive to the rights and duties of plaintiffs and defendants in Washington and abroad and have a far

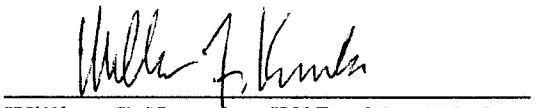
reaching impact on well-established service of process standards under the Hague Convention. The Court of Appeal's Opinion encourages plaintiffs to serve process abroad without adherence to the principles of the Hague Convention and/or the foreign county's internal service of process laws which were set in place to provide recipients with sufficient notice of the action. Indeed, that appears to be precisely what happened in this instance. In order to provide concrete guidelines for litigants and to prevent these two outcomes, this Court should grant review of this issue of public importance.

VI. CONCLUSION

For the reasons set forth above, Nurse Thomas respectfully requests that this Court deny Kim's Petition for Review because it does not present any issue of substantial public interest or conflict with a decision of this Court or the Court of Appeals under RAP 13.4(b). This Court should grant Nurse Thomas' Cross-Petition for Review under RAP 13.4(b)(1) and/or (4) in order to address the Court of Appeals' conflicting decision regarding the outer limits of tolling of the statute of limitations under Sidis, and the expanded scope and methodology of service of process of foreign defendants under the Hague Convention because it is an issue of substantial public interest.

RESPECTFULLY SUBMITTED this 15th day of April, 2015.

COZEN O'CONNOR



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DECLARATION OF SERVICE

The undersigned states:

I am a citizen of the United States of America and a resident of the State of Washington, I am over the age of 18 years, I am not a party to this action, and I am competent to be a witness herein.

On this 15th day of April, 2015, I caused to be filed the foregoing *Answer to Kim's Petition for Review and Nurse Thomas' Petition for Review* by e-mail to the Supreme Court for the State of Washington. I also served a copy of said document on the following parties as indicated below:

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

Executed at Seattle, Washington, this 15th day of April, 2015.

Bonnie L. Buckner, Legal Assistant

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ESTHER KIM, as Personal Representative of the Estate of HO JM BAE on behalf of Mi-Soon Kim, Jae C. Kim, Chang Soon Kim, Jae Hong Kim, and Kyoung Soon Kim, surviving family members, and the ESTATE OF HO IM BAE, Appellants/Cross-Respondents, v. LAKESIDE ADULT FAMILY HOME, GRETCHEN DHALIWAL INCORPORATION (G.D., INC.), a Washington Corporation d/b/a LAKESIDE AFH, GRETCHEN DHALIWAL, individually, Defendants, ALPHA NURSING AND SERVICES INCORPORATED, a Washington Corporation; Respondent, CHRISTINE THOMAS, individually, Respondent/Cross-Appellant, and "JANE AND JOHN DOES" I-V, individually, Defendants.	No. 70892-9-I DIVISION ONE PUBLISHED OPINION FILED: March 16, 2015

TRICKEY, J. — The Washington vulnerable adult protection act, chapter 74.34 RCW, requires mandated reporters to notify the Department of Social and Health Services (DSHS) where there is "reasonable cause to believe" that abuse has occurred. RCW 74.34.035(1). The act also requires a report to law

enforcement when one has "reason to suspect" that a physical assault has taken place. RCW 74.34.035(3). Here, the defendant, a nurse, informed DSHS about a report that she had received regarding potential abuse at the adult family home. There was no duty to call law enforcement about someone else's patient when the information came from a person with whom the defendant was familiar and whose reliability was questionable.

Nor did the plaintiff establish that a second nurse had a duty to call authorities when she observed the patient back in bed, with her eyes open, and able to move her legs, after a fall on the floor the day before.

Because the plaintiff has failed to establish any duty, a necessary element of a negligence action, summary judgment dismissal was appropriate.

We affirm the trial court.

FACTS

Ho Im Bae was one of four inpatient residents at Lakeside Adult Family Home. Lakeside was owned and operated by Gretchen Dhaliwal Inc.

Bae was admitted to Lakeside on January 23, 2009, suffering from Parkinson's, arthritis, dementia, hypertension, hyperlipidemia, and spinal stenosis. She died less than three months later on March 30 from acute morphine intoxication. Morphine was not a prescribed drug for Bae. Her death was ruled a homicide.

Lakeside employed Fannie Irawati as a caregiver for Bae during this time. Two employees of Alpha Nursing and Services Inc., Christine Thomas, registered nurse (RN), and Marian Binondo, licensed practical nurse, provided nursing care to two of the four residents at Lakeside, but did not provide nursing services for

Bae. Binondo filled in for the regularly assigned Thomas on weekends and vacation days in March 2009.[1]

Binondo was in the kitchen at Lakeside with Kerri Salzbrun, her patient, when she heard a thud from the adjacent room. Salzbrun entered the adjacent room and Binondo followed. Binondo saw Bae lying on the floor near her bed. Binondo told Irawati that Irawati might need to call 911 and that Bae might need further assessment by her nurse. Irawati returned Bae to her bed and told Binondo that Bae falls a lot, but that she would call Dhaliwal, an RN and the owner of Lakeside, who lived across the street from the home. Binondo saw that Bae's eyes were open and she was able to move her legs. She did not observe any bruising at the time. As she left the facility, Binondo saw Irawati on the telephone.

Salzbrun asserted in her declaration that she observed a knot on Bae's head. Over the next day or two, the knot appeared larger and Bae's face was covered in a large bruise.

On March 30, the morning of Bae's death, Thomas resumed her regular rounds at Lakeside, visiting her patients. Salzbrun told Thomas that Bae was being given morphine. Thomas checked the medical records located in the kitchen. From there, she saw Bae, unable to walk, being taken to the bathroom to be washed. Irawati "held her under her arms and walked backwards pulling her

[1] There appears to be a discrepancy regarding the date of the fall with Esther Kim stating it occurred on March 28 and Alpha contending March 21. Appellants' Br. at 5; Resp't's Br. at 6-7. The respondent's brief indicates late March, but cites to an assessment by Lakeside's owner occurring on March 21. 1 Clerk's Papers (CP) at 844. Binondo's time sheet does not have the patient written in for the March 21 date, but does for the March 28 and 29 dates. 3 CP at 972. Binondo's deposition shows her agreeing with counsel that the date could be March 28 as does Salzbrun's declaration. 1 CP at 123, 127, 328-29.

while her feet were sliding on the floor."[2] Thomas did not observe any bruising or injuries.

Shortly after leaving Lakeside, at approximately 10:00 a.m., concerned about the allegation of morphine, Thomas called the DSHS Complaint Resolution Unit (1-800-END-HARM hot line) to report her observations and the concerns Salzbrun had expressed to her about Bae. The phone was busy. She called again at 11:30 a.m. and left a voice mail message as instructed.

That same night, Salzbrun found Bae unresponsive and called 911. Bae's death from acute morphine intoxication was subsequently ruled a homicide.

On April 1, both Binondo and Thomas were at Alpha's office. Thomas related her concerns about Bae to Binondo. Binondo, recalling the fall that had occurred when she was there, thought the patient might well have been the same one. The supervisor recommended that Binondo report the incident to DSHS in light of Thomas's recent information. Binondo placed a call and left a voice mail message describing her observations.

Esther Kim, as personal representative of Bae's estate, brought this civil action for damages against Lakeside and Dhaliwal. In 2012, she added Alpha and Thomas, asserting a claim for negligence for failure to report Bae's abuse under Washington's vulnerable adult protection act, chapter 74.34 RCW.

The parties stipulated to dismissal of all claims against Lakeside and Dhaliwal individually. Thomas moved to dismiss the action against her for improper service. Alpha moved to dismiss the action on summary judgment. The trial court ruled service on Thomas was timely and proper and later dismissed the

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[2] 1 CP at 178.

suit on summary judgment. The trial court also denied Kim's motion for reconsideration. Kim appeals the summary judgment dismissal of her action. Thomas cross-appeals the trial court's ruling that service on her in Norway was proper.

ANALYSIS

I. Service on Thomas

Thomas first contends the trial court erred in not dismissing the action against her because such service was untimely. Service on one of two or more codefendants tolls the statutes of limitations as to unserved defendants. Powers v. W.B. Mobile Servs., Inc., 182 Wn.2d 159, 164, 339 P.3d 173 (2014); RCW 4.16.170. There is no dispute that Alpha, the codefendant, was timely served. Thus, service on Thomas was timely.

Thomas next argues that service was invalid because it failed to comply with the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20. U.S.T. 361, 658 U.N.T.S. 163 (hereinafter Hague Convention). Because Thomas was a Norwegian citizen living in Norway at the time of service, Kim was obligated to serve her under the requirements of the Hague Convention.

Under the supremacy clause, United States Constitution article VI, the "Hague Convention preempts inconsistent methods of service prescribed by state law in all cases to which [t]he Hague Convention applies." Broad v. Mannesmann Anlagenbau, AG, 141 Wn.2d 670, 674-75, 10 P.3d 371 (2000). Article 1 of the Hague Convention provides that it applies "'in all cases, in civil or commercial

matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.'" Broad, 141 Wn.2d at 678 (quoting Hague Convention art. 1).

The Hague Convention specifies that "the Central Authority of the State addressed shall itself serve the document or shall arrange to have it served by an appropriate agency . . . by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory." Hague Convention art. 5(a). Thus, service on Thomas would be effective if it was accomplished in accordance with Norwegian law.

Further, the Hague Convention "allows service to be effected without utilizing the Central Authority as long as the nation receiving service has not objected to the method used." DeJames v. Magnificence Carriers, Inc., 654 F.2d 280, 288 (3d Cir. 1981); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 471 cmt. e (1987) ("for states that have objected to all of the alternative methods, service through the Central Authority is in effect the exclusive means").

Here, Kim personally served Thomas. The record contains the affidavit of Thomas's process server, in which the process server swore that he personally served Thomas at her residence, which is considered due and proper service under the laws of Norway. Because Norway has not objected to personal service and, in fact, such service complied with its laws, there is no reason to invalidate service in this case.

Furthermore, such service was proper and accomplished in accordance with the superior court's civil rules of procedure in Washington State. CR 4(i)(1) provides for "Alternative Provisions for Service in a Foreign Country":

> *Manner.* When a statute or rule authorizes service upon a party not an inhabitant of or found within the state, and service is to be effected upon the party in a foreign country, it is also sufficient if service of the summons and complaint is made: (A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or (B) as directed by the foreign authority in response to a letter rogatory or a letter of request; or (C) upon an individual, by delivery to him personally, and upon a corporation or partnership or association, by delivery to an officer, a managing or general agent; or (D) by any form of mail, requiring a signed receipt, to be addressed and mailed to the party to be served; or (E) pursuant to the means and terms of any applicable treaty or convention; or (F) by diplomatic or consular officers when authorized by the United States Department of State; or (G) as directed by order of the court. Service under (C) or (G) above may be made by any person who is not a party and is not less than 21 years of age or who is designated by order of the court or by the foreign court. The method for service of process in a foreign country must comply with applicable treaties, if any, and must be reasonably calculated, under all the circumstances, to give actual notice.

Here, the service complied with both the Hague Convention and CR 4(i)(1), giving Thomas actual notice.

Because we hold that service was effective, we need not address whether Thomas waived her affirmative defense objection to such service of process.

II. Summary Judgment

Standard of Review

A motion for summary judgment may be granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). When a defendant moves for summary judgment, it bears the initial burden of showing the absence of an issue of material fact. Young v. Key Pharm., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). The burden then moves to the plaintiff 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." Young, 112 Wn.2d at 225 (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). In meeting his burden, the plaintiff cannot rely solely on allegations made in his pleadings but must set forth specific facts showing that there is a genuine issue for trial. Young, 112 Wn.2d at 225-26. If the plaintiff does not meet his burden, "'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.'" Young, 112 Wn.2d at 225 (internal quotation marks omitted) (quoting Celotex Corp., 477 U.S. at 322-23).

This court reviews summary judgment orders de novo, viewing the facts and reasonable inferences in the light most favorable to the nonmoving party. Lowman v. Wilbur, 178 Wn.2d 165, 168-69, 309 P.3d 387 (2013). Issues of negligence and causation in tort actions are questions of fact not usually susceptible to summary judgment, but a question of fact may be determined as a matter of law where reasonable minds can reach only one conclusion. Moore v. Hagge, 158 Wn. App. 137, 147-48, 241 P.3d 787 (2010).

The elements of a negligence claim are (1) a legal duty owed by the defendant to the plaintiff, (2) breach of that duty, (3) injury to the plaintiff proximately caused by the breach, and (4) damages. Schooley v. Pinch's Deli Mkt., Inc., 134 Wn.2d 468, 474, 951 P.2d 749 (1998). All four must be present to establish a claim.

Legal Duty

Kim argues that Binondo and Thomas failed to report suspected abuse to the appropriate governmental agency. She argues that both had a mandatory duty

to report the abuse and that their failure to do so constituted neglect under RCW 74.34.020(12).

RCW 74.34.020(12) defines "neglect" as follows:

> "Neglect" means (a) a pattern of conduct or inaction by a person or entity with a duty of care that fails to provide the goods and services that maintain physical or mental health of a vulnerable adult, or that fails to avoid or prevent physical or mental harm or pain to a vulnerable adult; or (b) an act or omission by a person or entity with a duty of care that demonstrates a serious disregard of consequences of such a magnitude as to constitute a clear and present danger to the vulnerable adult's health, welfare, or safety, including but not limited to conduct prohibited under RCW 9A.42.100.

(Emphasis added.) To establish neglect, Kim must demonstrate that Alpha had a duty to report.

We agree that both Binondo and Thomas were mandatory reporters under the act:

> "Mandated reporter" is an employee of the department; law enforcement officer; social worker; professional school personnel; individual provider; an employee of a facility; an operator of a facility; an employee of a social service, welfare, mental health, adult day health, adult day care, home health, home care, or hospice agency; county coroner or medical examiner; Christian Science practitioner; or health care provider subject to chapter 18.130 RCW.

RCW 74.34.020(11) (emphasis added).

Both employees of Alpha fall within that definition as they are clearly employees of an agency that provides health care. The act does not limit a reporter to only those who provide services to a specific patient.

Kim argues that the statute creates an implied statutory cause against mandatory reporters who violate their reporting duties. Alpha argues that even if the employees are mandated reporters, Binondo was not required to make an

immediate report because she did not observe any abuse and Thomas did, in fact, report the suspected abuse to DSHS almost immediately after learning about it. Thus, neither breached their duty.

Binondo

Binondo's declaration states:

> 4. In mid-March.[sic] I made a nursing visit to one of Alpha's patient's at the Lakeside Adult Family Home because Christine Thomas, RN was off-duty. During my visit, at one point I was in the kitchen with my patient, when we both heard a "thud" in the adjacent room. My patient left the kitchen and entered the adjacent room where the "thud" had originated. I then followed my patient, and entered the room. A caregiver who I knew as "Fannie" entered the room at about that time. The room was a resident's bedroom, but I did not know the resident's name and I had never seen her prior to that date, as she was not a patient of Alpha.
>
> 5. When I entered the room, I saw a small elderly Asian woman, lying on floor near her bed. Aside from that woman, Fannie, myself and my patient, there was no one else in the room. I told Fannie that she might need to call 911 and [the woman] would probably need further assessment by her nurse. I did not know the resident's history, or health and mental status because she was not my patient.
>
> 6. Fannie told me that the resident "falls a lot." Fanny [sic] told me that she would call the owner of Lakeside Adult Family Home, Ms. Gretchen Dhaliwal, R.N., who lives just across the street from the home, and report the fall. It did not appear to me that the resident was injured in the un-witnessed fall. I did not witness any abuse of the resident. The resident did not seem to be in distress once she was placed in bed, and was moving her extremities without difficulty. I knew that Ms. Dhaliwal was the home's primary nurse, and concluded, based on Fanny's [sic] statement, that Ms. Dhaliwal would perform an assessment of the resident's condition. As I departed the home, I saw Fannie dialing the phone.[3]

The declaration further states that on the morning after Bae died, Binondo learned of Thomas's observations. Suspecting the patient might be the same one, she

[3] 2 CP at 655-56, 758-59.

reported her observations to her supervisor and then to the DSHS hot line on April 1, 2009.

Under the statute, Binondo met her mandatory reporting requirement. She did not learn of any possible abuse until she became aware of Thomas's experience the day following her observations. Without more, no reasonable person would assume that Binondo had an obligation to report her initial observations to DSHS or law enforcement at the time she observed Bae fallen by her bed.

Thomas

On March 30, Thomas visited her patients at Lakeside. Salzburn told Thomas that Bae was being given morphine and was sedated all the time. Thomas checked the book listing the patients' drugs and learned that morphine was not a prescribed drug for Bae.

Thomas was aware that, as a nurse, she was a mandatory reporter. Indeed upon leaving the home, Thomas immediately called DSHS but received a busy signal. At the next opportunity, one and a half hours later, she called and reported the possibility of suspected abuse to DSHS:

> I work as a visiting nurse for Alpha Nursing in Snohomish and I worked in an AFH [(Adult Family Home)] today, Lakeside AFH, 16011 Eastshort Dr., Lynnwood, WA 98037. I have a patient there, Carrie Salsbrun [sic] [(CS)]. She was telling me about thing [sic] she was concerned about, that she had seen with another resident in the home, so it wasn't me observing, it was kind of a second hand report here.
>
> CS was saying she believed that one of the staff members had sedated one of the residents and that she observed two purple morphine tablets sitting in a cup next to her bed. The person does not have an order for morphine and she said the resident was totally sedated, she wasn't able to wake up and eat all day. I think she was referring to yesterday. CS also said she has seen some old med

> sheets of some morphine in the closet. CS has a history of drug abuse. She is on narcotic medication so I can't say for sure that she's a reliable source. I thought it was rather concerning. She said she would call this in.
>
> When I was at the home today, the patient that CS thought was over medicated was very drowsy. She kind of had to be dragged to the bathroom. She wasn't able to walk to the bathroom. The caregiver pulled her to the bathroom, sat her down to wash her and clean her. Of course, I don't work with the patient so I don't know what was going on. The patient is one of two Korean ladies that live in the home. She's the smallest of the two.
>
> Like I said, CS is the one who reported this to me so she can give further details. The owner of the AFH is Gretchen and she is not in the home. The caregiver that CS said did this, her name . . . it just slipped my mind. She said it was the Asian lady who was working in the home today.
>
> CALLED THE COMPL 3/30/09:
>
> The Compl did not know the name of the resident effected. The Compl said Carrie Salsbrun [sic] may know but could not pronounce the name, as it was Korean.[4]

That report relayed her observations and the fact that it was based in part on information provided to her by a patient who she could not say was reliable. Thus, under the provisions of the act, Thomas met her mandatory reporting duty.

Kim contends that although Thomas reported the suspicion of abuse to DSHS, she failed to report the abuse to a law enforcement agency. RCW 74.34.020(2) defines "abuse" as follows:

> "Abuse" means the willful action or inaction that inflicts injury, unreasonable confinement, intimidation, or punishment on a vulnerable adult. In instances of abuse of a vulnerable adult who is unable to express or demonstrate physical harm, pain, or mental anguish, the abuse is presumed to cause physical harm, pain, or mental anguish. Abuse includes sexual abuse, mental abuse,

[4] 3 CP at 999.

> physical abuse, and exploitation of a vulnerable adult, which have the following meanings:
>
> . . . .
>
> (b) "Physical abuse" means the willful action of inflicting bodily injury or physical mistreatment. Physical abuse includes, but is not limited to, striking with or without an object, slapping, pinching, choking, kicking, shoving, prodding, or the use of chemical restraints or physical restraints unless the restraints are consistent with licensing requirements, and includes restraints that are otherwise being used inappropriately.

RCW 74.34.035(1) provides that "[w]hen there is reasonable cause to believe that abandonment, abuse, financial exploitation, or neglect of a vulnerable adult has occurred, mandated reporters shall immediately report to the department."[5]

RCW 74.34.035(3) provides that "[w]hen there is reason to suspect that physical assault has occurred or there is reasonable cause to believe that an act has caused fear of imminent harm," mandated reporters are required to immediately report to DSHS and to the appropriate law enforcement agency.[6]

RCW 74.34.035(3) imposes an additional requirement to report to law enforcement. In analyzing whether Thomas had a "reason to suspect" a "physical assault" had occurred, it is helpful to compare the language of subsection (1) with subsection (3). A "reason to suspect an assault" mandating a report to law enforcement must require a higher showing than a mere "reasonable cause to

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[5] (Emphasis added.) Although this statute does not define the term "reasonable cause to believe," that term was recently defined by the legislature in 2013 in chapter 26.44 RCW, a statute dealing with child abuse and neglect. "'Reasonable cause'" means a person witnesses or receives a credible written or oral report alleging abuse, including sexual contact, or neglect of a child." RCW 26.44.0309(1)(b)(iii). That definition lends support to our holding here that Thomas, because her report to DSHS clearly stated that it was based on information provided to her by a patient whom she did not deem reliable, did not receive a "credible" oral report alleging abuse.

[6] RCW 74.34.035(3)(a), (b) (emphasis added).

believe" that abuse has occurred. The latter does not require a report to law enforcement while the former does. "When the legislature uses two different terms in the same statute, courts presume the legislature intends the terms to have different meanings." Densley v. Dep't of Ret. Sys., 162 Wn.2d 210, 219, 173 P.3d 885 (2007).

Thomas did not witness the event later determined to be an assault.[7] She only had the suspicions expressed by patient Salzbrun. Alpha established that Thomas had insufficient reason to believe that Salzbrun, under the influence of narcotics, was a reliable witness. Thomas had a relationship with Salzbrun, and she had concerns about Salzbrun's credibility. In her initial report to DSHS, Thomas's message clearly indicated that she did not think Salzbrun was reliable.

Kim fails to counteract this evidence of unreliability. The fact that Bae was murdered by an overdose of morphine became known after the fact. Thomas did not witness the caregiver administering any morphine, or any other medication for that matter.

Thomas observed a nonambulatory patient being taken to the bathroom to be cleaned. This is characterized as being "dragged" to the bathroom.[8] Thomas's deposition clearly showed that she observed Bae as having a decreased level of consciousness, which is consistent with several health factors. She only notified DSHS of a potential problem. In fact, DSHS assessed the report as not needing review for 10 days.

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[7] RCW 74.34.035(5) provides that when there is "reason to suspect" that the death of a vulnerable adult was caused by abuse or neglect, mandated reporters shall report the death to the medical examiner as well as DSHS and law enforcement as expeditiously as possible.

[8] 3 CP at 999.

Salzbrun's declaration in response to the motion for summary judgment merely states that she told Thomas that Bae was given someone else's morphine and was "doped up."[9] Salzbrun does not state how she knew this or on what basis she reached that conclusion, other than she saw two blue pills. All Thomas knew was that Salzbrun, a person whom Thomas felt to be less than reliable, declared that Bae was being given morphine.

Kim presented evidence of bruising being present at the time of the autopsy. However, neither Binondo nor Thomas saw any evidence of such bruising or injuries. Salzbrun testified that there was a knot when Bae fell, but that bruising developed later. But bruises in and of themselves would not have mandated a law enforcement call. Such bruises could be reasonably explained to be a result of the fall.

The basis of the abuse was asserted by another patient—a patient who was under narcotics and whose reliability was questioned by both her caregivers. While the suspicions espoused by the other patient may have raised a concern, that concern was passed to DSHS when Thomas made her call. Taking all the evidence in favor of Kim, there simply was not enough evidence of a physical assault to "mandate" Thomas calling law enforcement in these circumstances.[10]

Voluntary Rescue Doctrine

Finally, Kim argues that Alpha owed a duty of care under the voluntary rescue doctrine. Where the existence of a legal duty is dependent on disputed

[9] 1 CP at 124.

[10] Given our conclusion that no duty was breached under the circumstances of this case, we do not reach the issue of whether a breach of a mandatory duty to report under chapter 74.34 RCW would give rise to an implied cause of action.

material facts, summary judgment is inappropriate. Shizuko Mita v. Guardsmark, LLC, 182 Wn. App. 76, 83, 328 P.3d 962 (2014). Under this doctrine, a person owes a duty to one that he or she knows is in need if "(1) the actor voluntarily promises to aid or warn the person in need and (2) the person in need reasonably relies on the promise or a third person who reasonably relies on the promise." Shizuko Mita, 182 Wn. App. at 85.

> The person in need may reasonably rely on the promise if it induces him or her to "refrain from seeking help elsewhere." Folsom [v. Burger King], 135 Wn.2d [658,] 676, [958 P.2d 301 (1998)]; Brown [v. MacPherson's, Inc.], 86 Wn.2d [293,] 300, [545 P.2d 13 (1975)]. The person in need may reasonably rely on the third person if "privity of reliance" exists between them. Osborn [v. Mason County], 157 Wn.2d [18,] 26, [134 P.3d 197 (2006)]. The third person, in turn, may reasonably rely on the promise if it induces him or her to "refrain[ ] from acting on . . . behalf" of the person in need. Chambers-Castanes [v. King County], 100 Wn.2d [275,] 285 n.3, [669 P.2d 451 (1983)]; accord Brown, 86 Wn.2d at 299-300. "[Either] person may reasonably rely on explicit or implicit assurances." Osborn, 157 Wn.2d at 26; Brown, 86 Wn.2d at 301.

Shizuko Mita, 182 Wn. App. at 85 (some alterations in original). Kim argues that Salzbrun took no action because she relied on both Binondo and Thomas to take care of the problem. Salzbrun's declaration states:

> I thought [Binondo] was going to get help, but none arrived. . . .
>
> . . . I thought Nurse Thomas would leave and call for help, but no help arrived.[11]

Salzbrun's declaration does not assert that either nurse promised to make a call; rather, she states that she "thought" either one of them would do something. This is insufficient to create a duty under the rescue doctrine.

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[11] 1 CP at 124.

CONCLUSION

We hold that Thomas was properly and timely served in accordance with the superior court's civil rules, Norway's rules on service of process, and the Hague Convention. Binondo had no duty to report to either DSHS or law enforcement. Likewise, under the circumstances present here, Thomas did not have a duty to report to law enforcement. We affirm the trial court's summary judgment dismissal. Neither party is entitled to attorney fees.

Trickey, J

WE CONCUR:

OFFICE RECEPTIONIST, CLERK

To: Buckner, Bonnie
Cc: Knowles, William F.; White, Melissa; Lee, Robert D.; Bowzer, Dava Z.
Subject: RE: Case No. 91536-9: Esther Kim, et al. v. Alpha Nursing & Services, et al. - Answer to Kim's Petition for Review, and Nurse Thomas' Petition for Review; and Motion to File Overlength Answer

Received 4/15/15

From: Buckner, Bonnie [mailto:BBuckner@cozen.com]
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Subject: Case No. 91536-9: Esther Kim, et al. v. Alpha Nursing & Services, et al. - Answer to Kim's Petition for Review, and Nurse Thomas' Petition for Review; and Motion to File Overlength Answer

Case No. 91536-9 – Esther Kim, et al. v. Alpha Nursing & Services, Inc., et al.

Attached please find 1) *Answer to Petition for Review and Nurse Thomas' Petition for Review*; and 2) *Motion to File Overlength Answer*. These filings are at the request of William F. Knowles, phone: (206) 340-1000, WSBA No. 17212, e-mail: wknowles@cozen.com.

Thank you.

COZEN O'CONNOR

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