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No. 689762

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION I

HU YAN, individually and as Personal
Representative of the Estate of GUIZHEN YAO,
Deceased,
Plaintiff/Appellant

vs.

PLEASANT DAY ADULT FAMILY HOME, INC.
P.S., a Domestic Corporation, YU CHEN YIN and
Unknown JOHN DOES,
Defendants/Respondents

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING
CAUSE No: 10-2-35293-7 SEA
HONORABLE JOHN ERLICK, Trial Judge

REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT

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I. ARGUMENT

B. The Trial Court Erred In Denying Plaintiff's Motion to Strike Defendants' "Empty Chair" and Affirmative Defenses.

Maria Yin and Pleasant Day Adult Family Home, Inc., P.S. (Yin or Pleasant Day) contend that the Department of Social and Health Services (DSHS) owed a duty to provide accurate and reliable information to Yao's care-giver and to protect Yao's safety, and to accurately assess and report Yao's medical condition and needs. Resp. Brief at 22-23, 27. Yin cites the trial court's ruling as authority for her position.¹ *Id.* However, there was no duty of care owed by DSHS to protect and/or keep Yao safe nor any other duty of care owed by DSHS to Yao.²

A duty is created by common law, statute or regulation. *Linville v. State*, 137 Wash.App. 201, 151 P. 3d 1073 (2007). Under common law a governmental entity may be liable for its negligent acts. *Donohoe v. State*, 135 Wash.App. 824, 142 P. 3d 654 (2006). However, under the "public duty doctrine," for any actions against a government entity to be actionable, the government must owe a duty to the injured plaintiff, and not to the public in general. *Cummins v. Lewis County*, 156 Wash.2d 844,

¹ It should be noted the trial court did not address "express assurance" in its ruling. RP. Vol. II, 94:10-95:18.

² The parties agree that whether DSHS and Yao's family owed a duty of care to Yao is a question of law to be reviewed *de novo*. See Brief of Resp. at 20-21.

133 P.3d 458 (2006).³ There are four exceptions to the public duty doctrine. *Id.* The alleged applicable exception in our case is the “special relationship” exception. *Id.* In order to prove a special relationship exception, a plaintiff must show: 1) direct contact, 2) express assurances, and 3) justifiable reliance.⁴

In the instant case, just as in *Cummins*, Yin cannot establish there were “express assurances” by the government employee. DSHS did not make any express assurances here, and no one can claim it did. Per *Cummins*, neither “inherent assurance” nor “implied assurance” meet the “express assurance” requirement necessary to establish a special relationship exception to the public duty doctrine. *Id.* Yin’s claim of a duty owed by DSHS fails for a lack of any arguable evidence to prove that DSHS expressly assured Yao and/or Yao’s family of anything, except paying the bills.

Since DSHS did not owe a duty, none of Yin’s other claims and complaints about DSHS are relevant or germane to this appeal. However,

³ In *Cummins*, our Supreme Court held that, in absence of express assurance by a 911 dispatcher that medical aid would be dispatched, the special relationship exception to the public duty doctrine did not extend to a widow and her husband.

⁴ Our Supreme Court has held, to prove a special relationship, a plaintiff must show: (1) there is a direct contact or privity between the public official and the injured plaintiff which sets the latter apart from the general public, and (2) there are express assurances given by a public official, which (3) gives rise to the justifiable reliance on the part of the plaintiff. *Cummins*, at 854-858.

Yan will briefly address some of Yin's claims under her sections B (1) (2) (3) and (4).

1. Yao's Family Were Not Proper Empty Chair Defendant's Because They had No Duty.

Yin claims that Yao's family members were Yao's "healthcare agents" and authorized to make medical decisions for her. Resp. Brief at 23-24. This is not true. Yan and Gwo were "persons authorized to provide informed consent to healthcare" for Yao's medical treatment per RCW 7.70.065. However, the relevant issue is whether Yan and Gwo had a duty to act on Yao's behalf and to protect her. Yin has not cited any case nor statute to support her position that a person authorized to provide informed consent for an incompetent person under RCW 7.70.065 has a duty to protect the incompetent person. By its own terms RCW 7.70.065 is limited to decisions as to whether to authorize or consent to medical treatment. See RCW 7.70.065. The statute automatically makes certain individuals authorized "informed consent providers" without their consent. See RCW 7.70.065. If the statute is construed as Yin construes it, this would mean that a person by nature of their relationship to an incompetent person assumes duties, obligations and liability that he or she did not consent to nor have knowledge of.

Yan submits no duty was owed. See e.g. *Webstad v. Stortini*, 83 Wash.App. 857, 924 P.2d (1996); *Cox v. Malcolm*, 60 Wash.App. 894, 808 P.2d 758 (1991); *Lauritzen v. Lauritzen*, 74 Wash.App. 432, 438, 874 P.2d 861 (1982).

2. The Trial Court Erred in Admitting Evidence of Yao's Family's Alleged Fault.

Yin contends that even if the trial court erred in failing to exclude evidence as to the alleged fault of Yao's family members, the evidence of the family members' acts or inaction was admissible to show the reasonableness of Yin's acts. Resp. Brief at 31-33. Yin is wrong. The evidence, argument and jury instructions claiming fault of Yao's family members would still be inadmissible under ER 401 and 402. If there is no duty owed by Yao's family then any evidence claiming the same is not relevant. ER 401 and 402.

Yin also claims that Yan did not contest the trial court instructing the jury on contributory negligence. Resp. Brief at 26. This is not true. Yan did object to the same. RP Vol. X, 1126:13-1127:16; 1138:17-21. Yin also claims that the jury made an adjudication of no negligence by any party. This is not true either. The jury only answered two questions on the verdict form. One was whether the defendants were negligent and the other was whether defendants' conduct constituted neglect. See CP 2232-

2235; and Appendix C attached hereto. The completed jury verdict form does not reveal the jury's thinking with respect to liability of the empty chairs. A question posed to DSHS investigator Ander suggested that the jury was leaning toward placing blame on one or all of the empty chair defendants. See RP Vol. V, 660:9-662:6; Appellant Brief at 22-23.⁵

3. The Trial Court Erred in Admitting Evidence and Permitting Argument on DSHS' Alleged Negligence.

See previous argument under section B.

4. Yan was Prejudiced by Admission of Evidence and Argument Alleging Empty Chairs.

Yin contends that DSHS and Yao family's acts were admissible and relevant to show Yin acted reasonably. This is not an issue properly before the Court. Yan's motion to the trial court was to exclude all evidence, comments and arguments claiming that DSHS and Yao's family were at fault. Yan was prejudiced by Yin's evidence and claims of fault of DSHS and Yao's family.

An error is reversible error where it prejudices a party. *Cox v. Spangler*, 141 Wash.2d 431, 442, 5 P.3d 1265 (2000). An error is prejudicial if it affects the outcome of the trial. *State v. Wanrow*, 88

⁵ Yin claims the error in admitting the evidence is harmless error. Contrary to Yin's assertion, the jury did not find the empty chair defendants negligence free. In addition, the amount of evidence and argument claiming the empty chair defendants were at-fault is overwhelming. Yin started with her opening statement and continued throughout the trial, and concluded her closing argument claiming fault on the empty chair defendants. See RP.

Wash.2d 221, 237, 559 P.2d 548 (1977). A harmless error is an error which is trivial or formal or merely academic, and not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the trial. *Id.*

In the instant case, plaintiff called eleven witnesses. The defendants only called two witnesses, Yin and her expert. Throughout her testimony Yin claimed that the empty chair defendants were at fault for the accident. Yin's expert, registered nurse Elizabeth Johnston, claimed that the empty chair defendants were responsible for the injury to Yao. RP Vol. VIII, 903:22-906:21; 912:25; 921:13-92:5:18; 953:8-25; 971:19-972:21. Without placing fault on the empty chair defendants, Yin did not have a defense. In a slipup, she admitted fault/responsibility for Yao's injury. RP VIII, 878:11-13. In addition, she admitted that from the very first day Yao stayed at Pleasant Day, she realized she could not keep Yao safe. The law does not permit Yin to keep Yao at Pleasant Day if she could not safely provide for Yao. Yao was aware of this law.

The jury deliberated for approximately one and one half days. RP Vol. X, 1260:16-17, Vol. XI, 1275:25. The jury verdict was 10 to 2, indicating not all jurors were in favor of the verdict. RP 1275:23-1277:25. Without the erroneously admitted evidence there is a high probability that

the jury verdict would have been different.⁶ The err was not harmless. Yan was prejudiced by the erroneously admitted evidence, statements and arguments in question.

C. The Court Erred When it Dismissed Plaintiff's Breach Of Contract Claim.

The plaintiff claimed both tort and contract theories of recovery, as allowed under Washington law. 1560- 1561; CR 8 (a); *Noble v. Ogborn* 43 Wash. App. 387, 717 P.2d 285 (1986) (alternative theories not barred by election of remedies doctrine). The court erred when it dismissed the contract theory of recovery.

1. The Terms of the Contract were Proven.

Yin's assertion that the terms of the contract were not proven is meritless. It was uncontested the defendant Yin contracted to provide Yao care, comfort, room and board in her adult family home. It was inherently implied that as a caretaker, Yin would look after Yao's safety. And contrary to the top of p. 34 of the respondent's brief, there was plenty of evidence that the extra \$500 payment per month was to hire an additional caregiver. In fact, the defendant Yin admitted as much to the DSHS

⁶ It is highly likely that the jury did find Yin at fault for Yao's injury and death, but excused her fault due to DSHS alleged acts of not providing accurate and adequate information and/or refusing to help Yin. The jury instructions permitted the jury to do so. See CP 2190-2231. However, without DSHS being blamed for Yao's injury and demise, Yin would not have been excused for her negligent and neglectful acts.

investigator.⁷ RP Vol. V at p. 621: 21-22, p. 622: 10. And Yao's daughter testified the additional monthly fee was because her mother was "hard to take care of, so [Yin] needed to hire additional staff." RP Vol. VI B at p. 10: 2-3; *see also* RP Vol. VI B at p. 7: 6-12 and RP Vol. VI B at p. 9:23-24.

Yin also argues that Yan could not "articulate" any "emotional disturbance damages" to defeat summary dismissal of the breach of contract claim. *See p. 34 and p. 36 of respondent's brief.* First, no such "articulation" was required because the defendant conceded "damages" in its motion. *See CP 1421: 4-5.* Second, the plaintiff is entitled to all damages within the contemplation of the parties at the time the personal services contract was entered, not just "emotional disturbance damages." *Gagliardi v. Denny's*, 117 Wn. 2d at p. 445-446, 815 P.2d at p. 1373 (1991). Third, Yao's death constitutes damages as a matter of law.⁸

2. All Damages, Including Emotional Ones, Are Recoverable For Breach of a Personal Services Contract Like The One in Our Case.

Yin fails to cite a single case dealing with the issue now before this court: are emotional damages available for breach of a personal services

⁷ The jury was entitled to consider that admission pursuant to ER 801 (d) (2) (i).

⁸ Judicial notice that the family suffered grief from Ms. Yao's death was appropriate, ER 201; further, mental damages "necessarily result" from a breach of a contract entered for the purpose of securing mental solicitude. *Lane v. KinderCare*, 231 Mich. App. at pp.693-694, 588 N.W. 2d at pp. 717-718 (1998); *Avery v. Arnold* 17 Mich. App. at p. 243, 169 N.W. 2d at p. 136 (1969).

contract to care for an elderly woman? Rather, *Gagliardi v. Denny's*, 117 Wn. 2d 426, 815 P.2d 1362 (1991) was a case for wrongful discharge of a bartender; *Berschauer/Phillips v. Seattle School District*, 124 Wn. 2d 816, 881 P.2d 986 (1994) was a case for economic loss to a general contractor caused by construction delays; *Carlson v. Sharp*, 99 Wn. App. 324, 994 P.2d 851 (2000) was a case against a geotechnical engineering firm for economic losses caused when homes placed on lots they deemed suitable for development began to sink; *Allejandre v. Bull*, 159 Wn. 2d 674, 153 P.3d 864 (2007) was a case brought by a purchaser of a home against the seller for losses caused by a defective septic system; and *Eastwood v. Horse Harbor Foundation*, 170 Wn. 2d 380, 241 P.3d 1256 (2010) was a case brought by the landlord of a horse farm against the tenant because the tenant failed to maintain the farm in good condition.

Even *Gagliardi* recognized that emotional damages are recoverable when, as in our case, the purpose of the contract is personal in nature, and therefore entered into to prevent those types of losses. In doing so, the *Gagliardi* court distinguished its facts, recognizing the firing of a bartender did not involve a contract primarily designed “to secure the protection of personal interests.” *Gagliardi*, 117 Wn. 2d at p. 441. Specifically, the court approved of a Michigan case, stating:

[The Michigan Court] limits emotional damages to contracts which are not primarily commercial or pecuniary, but **instead involve personal rights of dignity and are incapable of adequate compensation by reference to the terms of the contract. ...**

... [B]ecause an employment contract is not entered into **primarily to secure the protection of personal interests** and pecuniary damages can be estimated with reasonable certainty, ... a person discharged in breach of an employment contract may not recover mental distress damages.

Gagliardi, 117 Wn. 2d at p. 440-441, *quoting Valentine v. General Am. Credit, Inc.*, 420 Mich. 256, 362 N.W. 2d 628 (1984); emphasis supplied.

The *Gagliardi* court also cited Restatement (Second) of Contracts § 353 (1981) with approval, stating:

Recovery for emotional disturbance will be excluded unless the breach also caused bodily harm or the contract or **the breach is of such a kind that serious emotional disturbance was a particularly likely result.**

Gagliardi, 117 Wn. 2d at p. 443 (1991) (emphasis supplied).

Certainly, “the primary purpose” of the type of contract entered into in our case, i.e., one which required special additional personal care of an elderly adult, was not to derive some pure “economic” benefit; rather, it was to “derive personal rights of dignity” and to “secure the protection of personal interests.” As such, the breach would likely cause “serious emotional disturbance.” Moreover, reimbursement of the \$1,000 paid for

additional personal care was inadequate to compensate the plaintiff for the breach which led to Ms. Yao's death.

As noted above, the Washington Supreme Court in *Gagliardi* relied and approved of the analysis set out in a Michigan case, *Valentine v. General AM Credit*. But a later Michigan case, *Lane v. KinderCare Learning Centers, Inc.*, 231 Mich. App. 689, 588 N.W.2d 715 (1998), is directly on point. In *Lane*, a woman contracted to leave her daughter in the defendant's day care. The defendant's employees forgot the child was asleep when they locked the doors and went home. In holding the trial court's dismissal of the plaintiff's claim for mental damages from breach of contract was reversible error, the Michigan Court of Appeals stated:

When we have a contract concerned not with trade and commerce but with life and death, not with profit but with elements of personality, not with pecuniary aggrandizement but with matters of mental concern and solicitude, then a breach of duty with respect to such contracts will inevitably and necessarily result in mental anguish, pain and suffering. In such cases the parties may reasonably be said to have contracted with reference to the payment of damages therefor in event of breach. Far from being outside the contemplation of the parties they are an integral and inseparable part of it.

Examples of personal contracts include a contract to perform a cesarean section, a contract for the care and burial of a dead body, a **contract to care for the plaintiff's elderly mother** and to notify the

plaintiff in the event of the mother's illness, and a promise to marry.

We believe that a contract to care for one's child is a matter of "mental concern and solicitude," rather than "pecuniary aggrandizement." Therefore, like the contract to care for the plaintiff's elderly mother in Avery, supra, the contract involved in the instant case was personal in nature, rather than commercial. At the time the contract was executed, it was foreseeable that a breach of the contract would result in mental distress damages to plaintiff, which would extend beyond the mere "annoyance and vexation" that normally accompanies the breach of a contract. Such damages are clearly within the contemplation of the parties to such a contract.

Lane v. Kindercare, 231 Mich. App. at p. 693-694, 588 N.W. 2d at p. 717-718 (1998) (citations deleted; emphasis supplied).

Avery v. Arnold Home, Inc., 17 Mich. App. 240, 169 N.W. 2d 135 (1969) also involved the breach of a contract to provide care, room and board to the plaintiff's elderly mother. The care provider failed to inform the plaintiff that his mother's condition had deteriorated and, as a result, the plaintiff suffered emotional damages because he was not present when his mother died. Once again, the Michigan Court of Appeals held the trial court wrongfully dismissed a claim for mental damages due to a breach of contract. The court rightfully reasoned that unlike most contracts, "contracts personal in nature" involve terms that if breached, will

“inevitably and necessarily result in mental anguish, pain and suffering.”
Avery, 17 Mich. App. at p. 243, 169 N.W.2d at p. 136 (1969).

The rationale of *Lane v. KinderCare* and *Avery v. Arnold Homes* was recently discussed and approved in a New York case regarding a contract for care of plaintiff’s elderly father, *Cianciotto v. Hospice Care Network*, 32 Misc. 3d 916, 927 N.Y.S. 2d 779 (2011). The New York Court of Appeals, relying on the Michigan line of cases, also held that mental damages are recoverable for breaching a contract that required personal care of an elderly adult, stating:

The decision in *Lane* is not an aberrational one. As *Williston on Contracts* recognizes, “numerous cases allowing the recovery of emotional distress damages exist, invariably dealing with what might be called peculiarly sensitive subject matter ...” 24 *Williston on Contracts* (4th Ed.), § 64:7.

Cianciotto, 32 Misc. at pp. 924-925, 927 N.Y.S. 2d at p. 786 (2011).

It is an inescapable conclusion that the contract in our case was not entered to protect a monetary interest; rather, it was to obtain safety of an elderly frail adult and to protect the “mental solicitude” of the plaintiff. Therefore, like *Lane*, *Avery*, *Cianciotto* and the cases discussed in *Gagliardi* as well as in the official notes to the Restatement (Second) of Contracts § 353 (1981), the emotional damage suffered was the integral part of the equation that the contract was meant to prevent. Under these

facts, the court erred when it precluded the plaintiff from obtaining those damages under the breach of contract theory asserted.

D. The Trial Court Erred in Admitting Ander's and Johnston's Opinions That There Was No Neglect.

Yan made a motion in limine to exclude Yin's experts from testifying that Yin was not negligent or Yin was not neglectful. CP 1158-1165. The trial court granted Yan's motion in limine as to negligence but denied it as to neglect. RP 62:9-25. For the same reasons the trial court excluded all experts from testifying as to whether defendant was negligent, it should have also excluded testimony as to whether defendant was neglectful. The opinion testimony of the DSHS investigator, Katherine Ander, and Yin's expert witness, Elizabeth Johnston, constituted opinions on the ultimate issue before the jury – whether or not Yin was liable for neglect. ER 704 allows such testimony only if it is otherwise admissible; in this case, it was not admissible for several reasons.

The testimony in question is inadmissible because it is not helpful to the trier of fact in determining a fact in issue and the question of whether Yin was neglectful did not require specialized training or experience to answer. ER 702. “Mere legal conclusions, such that an act was or was not “negligent” or a “proximate cause” of an injury is not

likely to be helpful to the meaningful evaluation of the facts...” *Davis v. Baugh Industrial Contractors Inc.*, 159 Wash.2d 413, 420, 150 P.3d 545 (2007).⁹ Furthermore,

It is not proper to permit a witness to give his opinion on questions of fact requiring no expert knowledge, when the opinion involves the very matter to be determined by the jury, and the facts on which the witness founds his opinion are capable of being presented to the jury.

Warren v. Hart, 71 Wash.2d 512, 514, 429 P.2d 873 (1967), citing *Johnson v. Caughren*, 55 Wash. 125, 104 P.170; *Bruenn v. North Yakima School District*, 101 Wash. 314, 172 P. 569. In this case, the facts regarding Yao’s care at Pleasant Day were presented to the jury through several lay witnesses and treating providers and the daily log kept by Yin. These are among the same things Ander and Johnston considered in making their conclusions. RP Vol. V, 618:10-15; Vol. VIII, 901:15-18. For Ander and Johnston to testify that there was no neglect was a legal opinion on the very issue before the jury and “not properly considered under the guise of expert testimony.” *Washington State Physicians Ins. Exchange & Ass’n v. Fisons Corp.*, 122 Wash.2d 299, 344, 858 P.2d 1054

⁹ In *Davis*, the trial court struck portions of an expert’s declaration which stated that part of a construction project created a hazardous condition and a zone of danger. The Supreme Court reversed the trial court’s decision and held that while these were similar to an exception to the completion and acceptance doctrine they were not legal conclusions in the way that saying someone was negligent is a mere legal conclusion.

(1993) citing: Comment, ER 704; 5A K. Tegland, Wash.Prac., *Evidence* § 309, at 479 (3d ed. 1989); *Orion Corp. v. State*, 103 Wash.2d 441, 461, 693 P.2d 1369 (1985); *Hiskey v. Seattle*, 44 Wash. App. 110, 113, 720 P. 2d 867, *review denied*, 107 Wash.2d 1001 (1986).

The testimony also constituted inadmissible conclusions of law regarding whether defendant complied with the law. RP Vol. VIII, 905:10-20. *Hyatt v. Sellen Const. Co., Inc.* 40 Wash.App. 893, 700 P. 2d 1164 (1985)¹⁰. Similarly, in criminal trials, a witness cannot testify as to a defendant's guilt because it "invades the fact-finding province of the jury." *State v. Dolan*, 118 Wash.App. 323, 329, 73 P. 3d 1011 (2003). In the present case, Mr. Yan made a request for a jury trial, paid the jury demand fee, and was entitled to have his case decided by a jury – not by expert witnesses commenting on the evidence and coming up with their own conclusions on neglect.

Yin argues that Yan opened the door on the issue of neglect by calling his own expert witness, Dr. Von-Preyss Freidman, to testify. This argument fails because by the time Yan's expert took the stand, the trial court had already ruled that experts would be allowed to testify on their conclusions of whether there was neglect. Once the trial court made a

¹⁰ Trial court did not err in granting motion in limine prohibiting retired Labor and Industries employee from testifying, "that his interpretation of the regulations and statutes show that defendant violated the regulations and/or statutes." *Hyatt v. Sellen Const. Co., Inc.*, 40 Wash.App. 893, 899, 700 P.2d 1164 (1985).

final ruling on the record denying Yan's motion in limine excluding Ander and Johnston from testifying that there was no neglect, there was no need for Yan to object at trial to preserve the issue for appeal and Yan was entitled to offer the evidence himself. *Garcia v. Providence Medical Center*, 60 Wash.App. 635, 806 P. 2d 766 (1991).

1. It Was Err For The Trial Court to Admit Testimony Concerning DSHS's Investigation Finding No Neglect

The issuance of a citation is inadmissible in a subsequent civil proceeding. *Billington v. Schaal*, 42 Wash.2d 878, 259 P. 2d 634 (1953). Likewise, the non-issuance of a citation is inadmissible in a subsequent civil proceeding. *Warren v. Hart*, 71 Wash.2d 512, 429 P. 2d 873 (1967). The trial court likened the DSHS investigation to a highway patrol investigation. RP Vol. II, 116:10-14. Based on that analogy, the DSHS investigator was prohibited from testifying at trial that there was a deficiency investigation, or that there was a violation, or that there was a finding of a deficiency. RP Vol. II, 117:20-24; 126:1-17. However, she was permitted to testify that there was insufficient evidence to make a finding of neglect. RP Vol. II, 126:1-4. Yan argues that this distinction is substantially prejudicial and that the case law does not support allowing witnesses to testify regarding the conclusions or findings of a previous investigation as evidence of neglect or lack of neglect. *Billington v.*

Schaal, 42 Wash.2d 878, 259 P. 2d 634 (1953); *Warren v. Hart*, 71 Wash.2d 512, 429 P. 2d 873 (1967).

By allowing the DSHS investigator to testify that she did not find that Yao's care met the standard of neglect, Yan was deprived of his right to have his case decided by the jury. *State v. Dolan*, 118 Wash.App. 323, 73 P. 3d 1011 (2003). "The right of trial by jury shall remain inviolate..." WASH. CONST. art. I, § 21. Yao and her family were not represented in the DSHS investigation, yet they essentially were bound by the determinations made in that previous investigation when the jury was allowed to substitute DSHS judgment for their own. The fact that Ander did not find neglect was not lost on the jury, judging by the juror question to Ander asking why she made her finding of no neglect. RP Vol. V, 659:9-14. In essence, the admission of the testimony on the DSHS finding of no neglect had the effect of collateral estoppel on the issue of neglect.

At trial, Yin argued to keep out the fact that DSHS cited Pleasant Day for several deficiencies because a different standard is used in the investigation than in the civil trial. RP Vol. II, 117:1-8. Because a different standard of proof was used the court did not permit evidence of the DSHS adjudication. RP Vol. V-A 4:25-5:2. At trial, Ander testified that in order to make a finding of neglect, she would have to say that there was inaction. RP Vol. V, 661:5-6. But the applicable statute and

corresponding jury instruction does not define neglect in the way Ander did while testifying. RCW 74.34.020(9). Yin states in her response that it is irrelevant that Ander used the incorrect definition of neglect. This is relevant, however, because the court's stated reason for allowing Ander to testify on her finding of no neglect was because Ander was supposed to apply the same neglect statute as the jury was given. However, it is clear from her testimony that Ander was not applying the same definition of neglect as the jury was to apply because she falsely believed neglect required inaction. RP Vol. V, 661:5-6.

Ander's testimony regarding neglect was also inadmissible under ER 403 as it was unfairly prejudicial. *State v. Dolan*, 118 Wash.App. 323, 329, 73 P. 3d 1011 (2003). As a government investigator, a jury is likely to give deference to the testimony of Ander, just as they would a police officer. In *State v. Dolan*, the court quoting *State v. Carlin* writes:

Particularly where such an opinion is expressed by a government official, such as a sheriff or a police officer, the opinion may influence the fact finder and thereby deny the defendant of a fair and impartial trial.

State v. Dolan, 118 Wash.App. 323, 329, 73 P. 3d 1011 (2003), quoting *State v. Carlin*, 40 Wash.App. 698, 703, 700 P. 2d 323 (1985). The very fact that Ms. Ander was a DSHS investigator who investigates nursing homes and adult family homes for a living made her testimony more

influential than any of the other experts. Yin even agrees with this statement and wrote in her motions in limine seeking to exclude the DSHS investigation materials: “The potential for factfinder confusion may be compounded by the “official” nature of the investigation and citation, which may lead the factfinder to assign undue weight to the DSHS reports. This potential with prejudice, by itself, is sufficient to exclude evidence under ER 403.” CP 970-1029.

E. The Trial Court Erred When it Permitted Yao’s Healthcare Providers to Testify There was No “Neglect” Because Said Testimony Constituted an Inadmissible Legal Conclusion.

Over the plaintiff’s objection,¹¹ the court permitted Dr. Borson and ARNP Lee to testify they found no evidence the defendant engaged in “neglect” under the vulnerable abuse statute. RP Vol. IV-B at p. 25:16-22; RP Vol. VI A at p. 62:3-25. Yin asserts, at p. 45 of her brief, that such testimony was allowed because ER 704 allows experts to “embrace” ultimate issues to be decided by the jury. But “embracement” of an ultimate issue pursuant to ER 704 does not subvert the court’s responsibility to exclude legal conclusions:

... while expert testimony is admissible even if it embraces an ultimate issue to be decided by the trier of fact if it will assist the trier of fact to understand the evidence or determine a fact in issue, ER 702 and 704, **experts are not to state opinions of law**

¹¹ CP 1158-65 and CP 1830-32.

or mixed fact and law, such as whether X was negligent.

Charlton v. Day, 46 Wn. App. 784, 787-788, 732 P.2d 1008 (1987); *emphasis supplied; citations omitted; see also* Official Comment #8 to ER 704 (2011-2012 Edition) (noting that courts exclude any expert opinion as to whether a party complied with a statutory standard of law); *Eriks v. Denver*, 118 Wn.2d 451, 824 P. 2d 1207 (1992) and *Everett v. Diamond*, 30 Wn.App. 787, 791, 638 P. 2d 605 (1981) (testimony of retired safety inspector for Department of Labor & Industries that defendants' corporation violated safe place standards constituted impermissible conclusion of law); *Hyatt v. Sellen Constr. Co., Inc.*, 40 Wn.App. 893, 700 P. 2d 1164 (1985); *see also Davis v. Baugh Indus. Contractors, Inc.*, 159 Wash.2d 413, 420 150 P. 3d 545 (2007), wherein the court stated:

Expert testimony must assist the trier of fact. Mere legal conclusions, such that an act was or was not “negligent” or a “proximate cause” of an injury is not likely to be helpful to the meaningful evaluation of the facts, as it runs the risk of substituting the expert's judgment for the fact finder's.

Emphasis supplied.

In our case, the respondent admits that the “statutory requirements necessary for a finding of neglect by DSHS”, which the court permitted Ms.Lee and Dr. Borson to testify about, was “the same standard” the jury

was required to address. *See p. 45 of Respondent's brief.* As such, the respondent concedes that Ms. Lee and Dr. Borson were simply testifying to legal conclusions.

Moreover, given their status as expert witnesses, Dr. Borson and Ms. Lee retained “an aura of special reliability and trustworthiness” which likely played a significant role in the juror’s decision that indeed, there was no neglect. *Carlton v. Vancouver Care LLC*, 155 Wash. App. 151, 163, 231 P. 3d 1241 (2010). Under ER 702, said testimony was not helpful to the trier and the court committed prejudicial error when it failed to exclude it.

F. The Trial Court Did Not Abuse its Discretion in Awarding Costs Pursuant to RCW 4.84.010 and Civil Rule 68.

Yin appeals the trial court’s award of costs pursuant to CR 68 and RCW 4.84.010. Yin argues that she is entitled to costs specifically addressed in RCW 4.84.010 but that the limitations on costs in RCW 4.84.010, such as only allowing recovery of the pro rata share of depositions actually used at trial, should not apply when awarding costs under CR 68. Yan argues that the trial court did not err in awarding costs prescribed by RCW 4.84.010.

The standard of review for an award of costs is a two-step process: first, whether a statute authorizes the award is reviewed de novo and

second, the amount of the award is subject to an abuse of discretion standard. *Estep v. Hamilton*, 148 Wash.App. 246, 259, 201 P. 3d 331, 338 (2009), (citing: *Mehlenbacher v. DeMont*, 103 Wash.App. 240, 244, 11 P. 3d 871 (2000); *Tradewell Group, Inc. v. Mavis*, 71 Wash.App. 120, 126, 857 P. 2d 1053 (1993)). There is no question that CR 68 and RCW 4.84.010 apply and that Yin was entitled to an award of costs. The question left is whether the trial court erred in limiting those costs pursuant to RCW 4.84.010 and the answer is no.

There is plenty of case law explaining that CR 68 costs are limited to those covered by RCW 4.84.010. See *Jordan v. Berkey*, 26 Wash.App. 242, 611 P. 2d 1382 (1980):

Prior to trial, Berkey made an offer of judgment for \$5,000 pursuant to **CR 68**. Although Berkey is entitled to costs because his offer exceeded the judgment actually awarded, the costs awarded are limited to those prescribed in **RCW 4.84.030** and **RCW 4.84.080**. *Sims v. KIRO, Inc.*, 20 Wash.App. 229, 580 P.2d 642 (1978). In this case, the trial court erred in awarding Berkey costs for expert witness fees which are not allowed under RCW 4.84; the remainder of the award was proper.

26 Wash.App. at 245. (emphasis added). Also, in *Estep v. Hamilton*, one issue on appeal was whether the party who prevailed in obtaining the summary judgment, who had already made a CR 68 offer of judgment,

was entitled to costs for the entirety of depositions that were not used by the trial court in granting summary judgment just because those costs were incurred after making the offer of judgment. *Estep v. Hamilton*, 148 Wash.App. 246, 259, 201 P. 3d 331, 338 (2009). The Court said no, only those depositions that were actually considered by the court were recoverable costs under CR 68 and RCW 4.84.010. *Id.* Which was the same approach used by the trial judge in this case.

Yin argues that the purpose of CR 68 is not achieved by allowing only those costs proscribed by RCW 4.84.010. CR 68 is a cost-shifting device. *Magnussen v. Tawney*, 109 Wash.App. 272, 275, 34 P. 3d 899 (2001) (citing *Eagle Point Condo. Owners Ass'n v. Coy*, 102 Wash.App. 697, 706, 9 P. 3d 898 (2000)). CR 68 serves to shift who is considered the prevailing party and RCW 4.84.010 proscribes what costs that prevailing party is entitled to. Without making an offer of judgment, plaintiffs are the prevailing party if there is any judgment in their favor. By making an offer of judgment, a defendant sets the bar higher for what judgment plaintiff must obtain in order to become the prevailing party. Only in the limited case of a defense verdict will the defendant be the prevailing party (and thus entitled to costs under RCW 4.84.010) absent a pre-judgment offer of compromise. What Yin seems to be requesting here is for the Court to award extra costs, beyond those allowed by statute, but he's

failed to identify any authority for awarding costs for portions on depositions and records not used at trial.

Finally, Yan requests fees under RAP 18.1 because Yin's cross appeal is frivolous. "An appeal is "frivolous," as basis for award of appellate attorney fees, if there are no debatable issues on which reasonable minds can differ and the appeal is so totally devoid of merit that there was no reasonable possibility of reversal." *Wright v. Dave Johnson Ins. Inc.*, 167 Wash.App. 758, 275 P. 3d 339, (2012). In this case, based upon the cases cited above, there are no reasonable grounds to overturn the trial court's award of fees. The amount of fees awarded is reviewed on an abuse of discretion standard and not only did the trial court not abuse its discretion, it followed applicable statutes and made the proper ruling. There is no statutory or common law to support Yin's cross appeal and no grounds to overturn the trial court's ruling on the issue of costs. Therefore, Yan is entitled to costs under RAP 18.1.



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APPENDIX- A

DSHS/ADSA

Assessment Details Pending Significant Change

Client Information

Client Name: Yao, Guizhen
Worker Name: Ho, Debbie
Primary CM at Assessment Creation: Ho, Debbie (Hod0)
Office: Chinese Information & Service Center/Seattle **Assessment date:** 06/04/2008

Reason For Assessment

It is a significant change assessment of 75-year old Guizhen Yao to update her situation for AFH arrangement. Her chief complaint is deteriorated dementia with random and recurrent panic attack resulting tremors, short of breath and numbness at lower limbs. Her MD problems prevent her from taking care of herself independently. Her spouse, Hu Yan, in his 80s can no longer provide care for clt. Therefore, clt and her family would like her to move to AFH to help with her ADLs and IADLs.

Was client the primary source of information? Yes

Other sources of information:

Guo, Jianhey ; Yan, Hu ; Lee, Eleanor.

Collateral Contacts

Name: Guo, Jianhey
Relationship: Child
Role:
Emergency Contact
Phone:
 (425)785-1719, (425)452-6190

Name: Sami, Ali
Relationship: Not related
Role:
 Physician
Phone:
 (206)764-2021

Name: Swanson, Philip
Relationship: Not related
Role:

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Physician

Name: Yan, Hu

Relationship: Spouse

Role:

Emergency Contact, Informal caregiver

Phone:

(425)785-2815

Name: Lee, Eleanor

Relationship: Not related

Role:

Mental Health

Phone:

(206)954-0075

Name: Borson, Soo

Relationship: Not related

Role:

Mental Health



Making self understood expressing information content however able:

Sometimes Understood

Modes of expression:

Speech

Ability to understand others however able: Sometimes Understood

Progression Rate: No Change

Hearing Progression Rate: No Change

Hearing: Minimal difficulty in noisy setting

Equipment:

Equipment	Status	Supplier
Cordless phone	Has, uses	

Due to deteriorated dementia she showed deteriorating language skills and has limited ability to express her basic needs. She also has difficulty in understanding others questions

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but she is able to follow simple and one step instructions.

Telephone Use

How telephone calls are made or received (with assistive devices such as large numbers on telephone, amplification as needed)

Client Needs:

Extensive assistance, Great difficulty

Client Limitations:

Client needs an interpreter, Not easily understood

Caregiver Instructions:

Answer phone for client, Make calls for client, Take messages for client

Provider

PLEASANT DAY AFH INC

Due to dementia, she is unable to use phone. Caregiver will help ctt to use the phone when needed.

Vision

Ability to See: Adequate

Limitations:

None of these

Equipment:

Equipment	Status	Supplier
Glasses	Has, uses	

Mental/Physical Data

Perinent History

Parkinson's - starting from 2001
2005- hospitalization & panic attack start

Diagnosis

1. Parkinson's
2. Depression

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3. CONSTIPATION NOS

4. Anxiety disorder
With panic attack

5. PANIC DIS W/O AGORPHOBIA
random panic attack daily

6. Allergies
hay fever

7. Dementia other than Alzheimer's disease
Frontal lobe dementia

Indicators:

Short of breath/at rest, Dizziness/vertigo, Physical/mental function fluctuates
Is client comatose? No

Medications

This list of medications was obtained from medical record/client/caregiver on the date of this assessment. Do not use this list as the basis for assistance with or administration of medications.

1. Azilect

Dose Qty: 1 mg

Route: Oral

Frequency: QD (once daily)

Rx: Yes

2. Calcium Tab

Dose Qty: 500 mg

Route: Oral

Frequency: BID (2 x day)

Rx: NO

3. CARBIDOPA AND LEVODOPA TABLETS EXTENDED RELEASE

Dose Qty: 5 Tablet

Route: Oral

Frequency: 5 or more/24 hr

Rx: Yes

4. COMTAN TABLETS

Dose Qty: 200 mg

Route: Oral

Frequency: 5 or more/24 hr

Rx: Yes

5. Docusate

Dose Qty: 250 mg

Route: Oral

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Frequency: BID (2 x day)

Rx: Yes

6. Exelon patch

Dose Qty: 4.6 mg

Route: Topical

Frequency: QD (once daily)

Rx: Yes

7. LEXAPRO TABLETS

Dose Qty: 20 mg

Route: Oral

Frequency: QD (once daily)

Rx: Yes

8. LORAZEPAM TABLETS

Dose Qty: .5 mg

Route: Oral

Frequency: PRN (as needed)

Rx: Yes

9. Miralax

Dose Qty: 17 Grams

Route: Oral

Frequency: BID (2 x day)

Rx: NO

10. Seroquel

Dose Qty: 75 mg

Route: Oral

Frequency: QD (once daily)

Rx: Yes

Medication Management

Self Administration: Assistance required

Frequency of need: Daily

Client Strengths:

Able to put medications in mouth

Client Limitations:

Ability fluctuates, Forgets to take medications

Client Preferences:

Keep medications in room

Caregiver Instructions:

Hand medication in cup or bowl, Remind client to take medications, Report adverse reactions, Cue to swallow medications

Provider

PLEASANT DAY AFH INC

Cl's daughter helps in re-ordering and picking up medication.

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When clt was too pain, she is unable to intake medication. After the pain, she will be ok with it. Caregiver will hand and remind clt to take medication when needed.

Pain

Pain Site:

Pain Site	Score
Soft tissue (eg muscle)	5
Leg	4

Frequency with which client complains or shows evidence of pain:

Pain daily

Pain Management: Treated, partial control

Impact:

Anxiety, Fatigue

#1: tummy pain

When clt has painic attack daily and randomly, she will say that she has tummy pain or lower limb numbness and sore and rolled on the floor or bed. Clt refused any pain management referral when CM suggested.

Indicators

Height: 5 feet 5 inches

Weight: 115 pounds

Body Mass Index: 19.1349 Normal

Weight loss: 5% or more in last 30 days; or 10% in last 180 days: No

Weight gain: 5% or more in last 30 days; or 10% in last 180 days: No

In general, how would you rate your health?: Poor

Date of last doctor visit: 05/15/2008

Doctor name: Samii, Ali

Allergy

Substance: pollen

Reaction:

Mouth/face/eyes swell or itch, Sneezing

Treatments/Programs/Interventions

Self Directed Care: Individuals who have a functional impairment may direct their

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Individual Provider to perform a health related task that they would normally be able to perform themselves if they did not have a functional impairment that prevents them from doing so.

Nurse Delegation: In private homes, Adult Family Homes, and in Boarding Homes a Registered Nurse may delegate specific health related tasks to a qualified provider. The tasks are performed as instructed and supervised by the delegating nurse.

Type: Treatments

Name: Routine lab work

Providers:

Provider	Frequency
Clinic/practitioner's office	Other

Clt will have routine lab work at Dr. Borson's office monthly and Dr. Samil's office once per 3 months.

Type: Programs

Name: Mental health therapy/program

Providers:

Provider	Frequency
Mental Health	Monthly

Clt has mental health service from Eleanor Lee at home PRN and Dr. Borson monthly.

Type: Treatments

Name: Vital signs

Providers:

Provider	Frequency
Mental health	Monthly

Clt receives blood pressure measurement when she has MD visits.

Sleep

Can provider get 5 hours of sleep during an 8 hour period? Yes

Strengths:

Can return to sleep after waking

Limitations:

Leg cramps

Preferences:

Prefers to have door open, Prefers to have the light off, Likes to have TV or radio off

Patterns:

Regular

Is client satisfied with sleep quality? No

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Clt normally sleeps from 10pm to 9am and uses her bedside commode twice per night by the help of spouse. Clt does not take naps at day time.

Memory

Recent memory : Recent Memory Problem

Long Term memory: Long term memory problem

Assist Type:

Ask clear and simple questions; Give simple, one step directions

Preferences:

Like to have same daily routine, Would like one caregiver

Is Individual oriented to person? No

Progression Rate: Deteriorated

Clt recalled 0 items in MMSE. She is diagnosed of having frontal lobe dementia. She is unable to name the fruit's name or her spouse's name and forget the place of birth when CM asked her. She has short and long term memory problems.

Decision Making

Rate how client makes decisions:

Poor decisions/unaware of consequences - Decisions are poor, requires reminders, cues, and supervision in planning, organizing daily routines.

Is client always able to supervise paid care provider? No

If no, is there someone who can supervise paid care provider? Yes

If yes, who: Yan, Hu

Clt has panic attack randomly and daily. Due to deteriorated dementia, she always makes poor decision and requires caregiver to provide supervision and reminder to her.

Behavior

Current Behaviors (occurred in the past 7 days)

Name: Hallucinations

Frequency: Daily

Alterability: Easily altered

According clt and clt's spouse, clt sometimes has visual and audio hallucination. She saw someone outside her window when nobody was there, saw a baby sleeping next to her and someone vacuum her apartment at night. Dr. Lee and Dr. Borson will monitor her mental health situation and caregiver will provide a calm and supportive environment for clt.

Name: Delusions

Frequency: 1 to 3 Days

Alterability: Easily altered

DSHS/ADSA

Assessment Details

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During the homevisit, clt reported to CM that her bruises on her knee and forehead were resulted from two balls flying from the universe and hit on her. Her family reported that those bruises were from her recent fall. Mental health professional are monitoring clt's mental health. Clt's family and caregiver provide supervision, support and a calm environment to clt.

Name: Easily irritable/agitated

Frequency: 1 to 3 Days **Alterability:** Not easily altered

According to mental health professional, clt is easily get irritated due to language problem. Clt's family reported that clt throw things when she feels angry. Caregiver will provide care, support and calm environment to clt.

Name: Crying, tearfulness

Frequency: 1 to 3 Days **Alterability:** Easily altered

Clt's family reported that clt sometimes cries when she thinks of her mother and the Tongshan Earthquake. Mental health professional are monitoring clt's mental health. Clt's family and caregiver provide supervision, support and a calm environment to clt.

Name: Breaks, throws items

Frequency: 1 to 3 Days **Alterability:** Easily altered

Due to dementia problem, clt would break or throw the plastic cup when she does not want to take medication to her spouse. She will also uses the scissors to cut the blanket or toothpaste and zip bags when she cannot open them. Caregiver will hide those cutery from clt and provide supervision to clt.

Name: Wanders/exit seeking

Frequency: 1 to 3 Days **Alterability:** Not easily altered

In May 2008, when having a panic attack, clt did not know what to do and she went out of her apartment. She was found at the upper floor of her apartment and went into other's apartment. She also went out of her apartment once and got into others' car. Caregiver will provide supervision to prevent this behavior. Mental health professional are monitoring clt's mental health.

Name: Inappropriate toileting/menses activity

Frequency: 1 to 3 Days **Alterability:** Easily altered

Family reported that clt would sit on her tool box and showed her bowel movement. Once, she put on her daughter's bra outside of her blouse at her daughter's home. Caregiver will provide supervision to clt when needed.

Depression

Assessment Details

Pending Significant Change

Score on depression scale indicates possible depression.

Clt is on medication. Mental health professionals are providing service for clt in a regular basis.

ADL

The following are the clients functional limitations as they impact ADL functioning:

General weakness, Limited range of motion, Poor balance, Tremors, Unsteady gait,
Weak grip

Stairing

Number of days individual went out of the house or building in which individual lives (no matter for how short a perlo... One day/week

Overall self-sufficiency has changed significantly as compared to status of 90 days ago: Deteriorated

Potential for improved function in ADL's and/or IADL's:

None of these

Task segmentation ADL's: No

Task segmentation IADL's: No

Universal Precautions

The formal and informal caregiver will use latex/plastic gloves when in contact with any secretions to prevent spread of infection. Thorough hand washing with soap will be done before and after gloving. Gloves will be put on and discarded at the end of each task. If the primary care provider orders these gloves they can be paid for through the medical coupon.

Walk in Room, Hallway, and Rest of Immediate Living Environment

Client Needs:

Extensive assistance, One person physical assist

Client Strengths:

Aware of own safety, Client is cooperative with caregiver, Client uses environmental supports, Will ask for assistance

Client Limitations:

Ability fluctuates, Client may stumble when walking, Walking is painful, Activity limited, afraid of falling, Unable to exit in emergency

Client Preferences:

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Contact guard when walking

Caregiver Instructions:

Keep walkway clear of clutter, Encourage to walk daily, Provide assistance when walking

Equipment:

Type	Status	Supplier
Walker w/seat	Has, uses	

Provider
PLEASANT DAY AFH INC.

Caregiver will provide assistance when needed.

Locomotion in Room and Immediate Living Environments

How the individual moves to and returns from areas outside of their immediate living environment

Client Needs:

Extensive assistance, One person physical assist

Client Strengths:

Can reposition self in bed and chair, Client uses environmental supports, Will ask for assistance

Client Limitations:

Ability fluctuates, Activity limited: afraid of falling, Unable to exit in emergency

Caregiver Instructions:

Call 911 to evacuate client, Assist client over thresholds, Evacuation: Caregiver will assist, Keep walkways clear

Equipment:

Type	Status	Supplier
Walker w/Seat	Has, uses	

Provider
PLEASANT DAY AFH INC.

Due to random panic attacks, client has good and bad period from time to time. Caregiver will provide assistance when needed.

Locomotion Outside of Immediate Living Environments include Outdoors

DSHS/ADSA

Assessment Details

Pending Significant Change

How the individual moves to and returns from areas outside of their immediate living environment

Client Needs:

Extensive assistance, One person physical assist

Client Strengths:

Can perform task but slowly, Will ask for assistance

Client Limitations:

Ability fluctuates, Client may stumble when walking, Activity limited: afraid of falling,

Needs one person to evacuate

Client Preferences:

Prefers contact guard

Caregiver Instructions:

Call 911 to evacuate client, Assist with stairs, Evacuation: Caregiver will assist, Keep client within sight, Assist on uneven surfaces

Equipment:

Type	Status	Supplier
Walker w/seat	Has, uses	
Provider:		
PLEASANT DAY AFF INC		
Guo, Janley		
Yan, Hu		

Due to dementia and panic attack, client needs physical assistance when going to have MD appointments. Caregiver and family will provide assistance when needed.

Bed Mobility

How individual moves to and from lying position, turns side to side, and positions body while in bed

Client Needs:

Extensive assistance, One person physical assist

Client Strengths:

Able to elevate legs, Aware of need to reposition

Client Preferences:

Sleeps on back

Caregiver Instructions:

Assist client to sit up in bed, Keep sheets clean and smooth

DSHS/ADSA

Assessment Details Pending Significant Change

Provide

PLEASANT DAY AFF INO

Due to random panic attack, clt needs assistance to sit up or get up in bed or reposit self when having her bad time. Caregiver will provide help when needed.

Falls

Site: Outside

When: Last 30 days

Consequence:

Injury: Unable to rise

Transfer

How client moves between surfaces; to/from bed, chair, wheelchair, standing position, (exclude to/from bath/toilet)

Client Needs:

Extensive assistance, One person physical assist

Client Strengths:

Aware of safety, Transfers with some support

Client Limitations:

Ability fluctuates, is afraid of falling

Caregiver Instructions:

Maintain contact until steady, Transfer slowly

Provide

PLEASANT DAY AFF INO

Guo, Janney

Yan, Hu

Clit requires physical assistance during transfer at her bad times. Caregiver and family will provide assistance when needed.

Eating

How individual eats and drinks (regardless of skill). Includes intake of nourishment by other means (e.g., tube feeding, total parenteral nutrition)

Client Needs:

Supervision, One person physical assist

DSHS/ADSA

Assessment Details Pending Significant Change

Client Strengths:

Client has own teeth

Client Limitations:

Ability fluctuates, Current swallowing problem

Client Preferences:

Prefers small portions

Caregiver Instructions:

Bring food to client, Cut food into small pieces, Encourage liquids, Keep liquids available, Monitor for choking

PROMS
PLEASANT DAY AFLINC

Clt can feed self but needs setup help. She has swallowing problem at her bad time due to parkinson's. Caregiver will monitor for choking and provide supervision when needed.

Toilet Use

How individual uses the toilet room (or commode, bed pan, urinal); transfers on/off toilet, cleanses, changes incontinence pads, manages ostomy or catheter, adjusts clothes

Client Needs:

Extensive assistance, One person physical assist

Client Strengths:

Aware of need to use toilet, Can assist caregiver with transfer, Will ask for assistance

Client Limitations:

Ability fluctuates, Needs clothing adjustment

Client Preferences:

Bedside commode

Caregiver Instructions:

Empty/clean bedpan/urinal/commode, Assist with clothing adjustment, Transfer client on/off toilet

Equipment:

Item	Status	Supplier
Commode	Has, uses	

Provider
PLEASANT DAY AFLINC

Clt uses commode at night and in day time. She requires physical assistance from caregiver

DSHS/ADSA

Assessment Details Pending Significant Change

at her bad times.

Continence Issues

Bladder control (last 14 days): Continent
 Change in bladder continence (last 90 days): No Change
 Bowel control (last 14 days): Continent
 Change in bowel continence (last 90 days): No Change
 Bowel Pattern (last 14 days):
 Constipation

Appliances & Programs (last 14 days):
 None of these

Individual management (last 14 days): Does not need or use

Clt has good bladder and bowel control. She takes medication for treating constipation.

Dressing

How individual puts on, fastens, and takes off all items of street clothing, including donning/removing prosthesis

Client Needs:

Extensive assistance, One person physical assist

Client Strengths:

Can button clothing, Client is cooperative with caregiver, Dresses appropriately

Client Limitations:

Ability fluctuates

Client Preferences:

Prefers to change daily

Caregiver Instructions:

Dress client's lower body, Dress client's upper body, Put on/take off footwear

Provide

PLEASANT DAY AFF INC

When clt is at her bad time, she needs help with dressing her upper and lower body. Caregiver will provide assistance when available.

Personal Hygiene

How individual maintains personal hygiene, including combing hair, brushing teeth, shaving, applying makeup, washing/drying face, hands, and perineum

DSHS/ADSA

Assessment Details Pending Significant Change

Client Needs:

Limited assistance, One person physical assist

Client Strengths:

Able to brush/comb hair, Can brush teeth, Able to wash face/hands

Client Limitations:

Ability fluctuates

Caregiver Instructions:

Cue client to comb hair, Cue client to brush teeth, Provide setup for personal hygiene tasks, Trim fingernails as needed, Cue client to wash face and hands

Provider:
PLEASANT DAY AFH INC

Due to dementia, cli needs supervision and sometimes assistance in personal hygiene takes. Caregiver will provide assistance when needed.

Bathing

How individual takes full-body shower, sponge bath, and transfer in/out of Tub/Show er

Client Needs:

Physical help/part of bathing, One person physical assist

Client Strengths:

Enjoys bathing

Client Limitations:

Cannot be left unattended, Unable to stand alone

Client Preferences:

Likes to bathe daily, Would prefer a female caregiver, Would prefer to take a shower

Caregiver Instructions:

Apply lotion after bath, Wash back, legs, feet, Standby while client bathes, Assist with drying and dressing, Transfer in/out of tub/shower

Equipment:

TYPE	STATUS	SUPPLIER
Hand held shower	Has, uses	
Grab bars	Has, uses	
Show er chair	Has, uses	

Provider:
PLEASANT DAY AFH INC

DSHS/ADSA

Assessment Details Pending Significant Change

Caregiver will wash cli's back legs and feet. Caregiver will put the shampoo on cli's hand and she would shampoo her hair.

Foot Care

Foot Care Needs:

Foot Care	Status
Nails trimmed in last 90 days	Received/Needs
Application ointment/lotion	Received/Needs

Caregiver helps in trimming cli's toenails and applies non-medicated lotion to her feet.



Skin Care

Skin Problems:

Problem	Status
Dry skin	Healing
Bruises	Healing

Skin Care (Other than feet)

Skin Care	Status
Application ointments/lotions	Received/Needs

Pressure ulcers:

Skin intact over all pressure points

Number of current pressure ulcers: 0

Client had skin ulcer that was resolved or cured in the last year: No

cli has dry skin and caregiver will apply non-medicated lotion to cli's dry skin when needed.

Her knee and forehead ha bruises because of a recent fall.



Skin Observation

Skin Protocol-Photographs and Description of Pressure Ulcers was shown and explained by CM. Cli and family reported that she has no such pressure ulcer.

ADL

Meal Preparation

How meals are prepared (e.g. planning meals, cooking, assembling ingredients, setting

DSHS/ADSA

Assessment Details Pending Significant Change

out food and utensils

Client Needs:

Total dependence, Great difficulty

Client Strengths:

Has accessible kitchen

Client Limitations:

Cannot reheat items, Cannot reach lower shelves, Cannot cut/peel/chop, Cannot reach upper shelves

Client Preferences:

Eats 3 meals/day, Fresh fruit and vegetables, Prefers home cooked meals

Caregiver Instructions:

Make food accessible to client, Prepare dinner, Prepare lunch, Ask for client's choices

PLEASANT DAY AFTERNOON

Caregiver will prepare meals for client when needed.

Nutritional Data

Nutritional Problems:

None of these

Oral hygiene and dental problems:

None of these

Nutritional Approaches:

None of these

Ordinary/Housework

How ordinary work around the house is performed (e.g., doing dishes, dusting, making bed, tidying up, laundry)

Client Needs:

Total dependence, Great difficulty

Client Strengths:

Can instruct caregiver

Client Limitations:

Cannot take out garbage, Cannot use vacuum cleaner, Cannot make bed

Client Preferences:

DSHS/ADSA

Assessment Details

Pending Significant Change

Likes neat house

Caregiver Instructions:

Clean kitchen after each meal, Change/wash linens weekly, Clean bathroom weekly, Keep walkway clear of clutter, Make bed, Sweep/mop floors as needed, Take out garbage, Use gloves when cleaning, Vacuum weekly

Provider:
PLEASANT DAY AFH INC.

Caregiver will provide help when available.

Managing finances

How bills are paid; checkbooks balanced, household expenses are managed

Client Needs:

Extensive assistance, Great difficulty

Provider:
Yan, Hu

Cl's spouse helps with cl's finances.

Shopping

How shopping is performed for food and household items (e.g., selecting items, managing money). Limited to brief, occasional trips in the local area to shop for food, medical necessities, and household items required specifically for the health and maintenance of the client

Client Needs:

Total dependence, Great difficulty

Client Limitations:

Client cannot carry heavy items, Client cannot budget money

Caregiver Instructions:

Do all shopping for client

Provider:
PLEASANT DAY AFH INC.
Guo, Jannley
Yan, Hu

DSHS/ADSA

Assessment Details Pending Significant Change

Clt is unable to do her shopping. Clt's family and caregiver will help in shopping for clt when needed.

Transportation

How client travels by vehicle for medical needs (e.g., gets to places beyond walking distance). Includes accompanying or transporting client to physician's office or clinic in the local area to obtain a diagnosis or treatment

Client Needs:

Extensive assistance, Great difficulty

Client Limitations:

Assist w/transfer in/out of vehicle, Will not ride a bus

Client Preferences:

Would like to use own car, Private car

Caregiver Instructions:

Accompany client to appointment

Provider:
Guo, Jianey
Yan, Hu

Family will take clt to have MD appointments when needed.

Wood Stove

How client gets wood for heat (this must be only source of heat)

Is wood only source of heat? No

Social

Social/Cultural considerations, traditions, or preferences:

75-year-old Mrs Yan Yao, Guizhen lives with her spouse in a condo in Bellevue. She was born in Tangshan, China and her relatives passed away because of the Tangshan earthquake. Majoring in civil engineering, she got her degree in Jiaotong University and worked in the engineering sector in China. In 57, she got married and she has 1 son and 1 daughter who also live in Seattle. In 87, her family immigrated to US and she had worked for Eastside Adult Day Services. Her family and Mrs Yan have good relationships.

DSHS/ADSA

Assessment Details Pending Significant Change

Client Interests

Interest/Activities:

Interest/Activity	Status	Preferred Time
Walking	Current	Day time
TV	Past	Varies
Helping with household activities	Past	Day time
Exercise	Past	Day time
Talking/conversing	Current	Varies

Average time involved in activities: Less than 1/3 of the time

Relationships

Close relationship with family/friends? Yes

Openly expressed conflict/anger with family/friends/roommate/caregiver? No

Had a recent loss of close family/friend? No

Does adjust easily to change in routine? No

Provide Information

Provider Information

Informal Providers

Provider: Guo, Jianyue

Phone: (425)785-1719

Assigned Tasks:

Locomotion Outside Room, Essential Shopping, Transportation, Transfers

Provider Hours: 0

Schedule:

Day	Time Period	Start Time	End Time
Varies	Day	00:00 AM	00:00 AM

Provider: Yan, Hu

Phone: (425)785-2815

Assigned Tasks:

Finances, Locomotion Outside Room, Essential Shopping, Transportation, Transfers

Provider Hours: 0

Schedule:

DSHS/ADSA

Assessment Details Pending Significant Change

Day	Time Period	Start Time	End Time
Varies	Day	00:00 AM	00:00 AM

Provider: Borson, Soo

Phone: ()

Assigned Tasks:

Mental health therapy/program, Routine lab work, Vital signs

Provider Hours: 0

Schedule:

Day	Time Period	Start Time	End Time
Monthly	Day	00:00 AM	00:00 AM

Provider: Lee, Eleanor

Phone: (206)954-0075

Assigned Tasks:

Mental health therapy/program

Provider Hours: 0

Schedule:

Day	Time Period	Start Time	End Time
Varies	Day	00:00 AM	00:00 AM

Provider: Saml, All

Phone: (206)764-2021

Assigned Tasks:

Routine lab work, Vital signs

Provider Hours: 0

Schedule:

Day	Time Period	Start Time	End Time
Varies	Day	00:00 AM	00:00 AM

Provider: PLEASANT DAY AFH, INC

Phone: (425)649-8893

Assigned Tasks:

Bathing, Bed Mobility, Dressing, Eating, Housework, Locomotion Outside Room, Locomotion In Room, Med. Mgmt., Meal Preparation, Personal Hygiene, Essential Shopping, Telephone, Transfers, Toilet Use, Walk In Room, Application ointment/lotion, Nails trimmed in last 90 days, Application ointments/lotions

Provider Hours: 0

Schedule:

Day	Time Period	Start Time	End Time
Daily	24 hour	00:00 AM	00:00 AM

DSHS/ADSA

Assessment Details Pending Significant Change

ADL Self-Performance Codes/Definitions

Independent:

No help or oversight OR help/oversight only 1 or 2 times

Supervision:

Oversight (monitoring, standby) encouragement or cueing provided 3 or more times OR supervision 3 or more times PLUS physical assistance provided only 1-2 times

Limited Assistance:

Client highly involved in activity; received physical help in guided maneuvering of limbs or other non-weight bearing assist 3 or more times OR more help provided only 1-2 times

Extensive Assistance:

While client performed part of activity, help of the following type(s) provided 3 or more times: Weight bearing or full Caregiver performance during part

Total:

Full Caregiver performance

Activity did not occur/No provider:

Activity did not occur in entire 7 days because there was no provider available to assist client with task.

Activity did not occur/Client not able:

Activity did not occur in entire 7 days because client is not capable of performing or participating in task.

Activity did not occur/Client declined:

Activity did not occur in entire 7 days because client declined assistance with task.

ADL Self-Performance Codes/Definitions

Independent:

No help, set-up, or supervision

Set-up help/arrangements only:

On some occasions the client did their own set-up/arrangement; at other times the client received help from another person.

Limited Assistance:

On some occasions the client did not need any assistance but at other times in the last 30 days the client required some assistance

Extensive Assistance:

Individual involved but required cueing/supervision or partial assistance at all times

Total dependence:

DSHS/ADSA

Assessment Details Pending Significant Change

Activity occurred but with full performance by others.

Activity did not occur

IADL Difficulty Codes Definitions

IADL difficulty code:

How difficult it is (or would be) for client to do activity on own.

No difficulty:

Some difficulty:

The client needs some help, is very slow or fatigues easily

Great difficulty:

Little or no involvement in the activity is possible by the client.

APPENDIX- B

June 8, 2008

Re: Replacement plan for Yao, Gui Zhen (DOB 09/04/1932)

To Whom It May Concern:

Ms. Yao, Gui Zhen is a 75 years old Chinese Mandarin speaking woman who has been suffering from Parkinson's disease since 2001. She has an uncommon type of Parkinson's which has been responding poorly to typical Parkinson's treatment. In addition, she has frontal lobe dementia secondary to Parkinson's.

Frontal lobe dementia is different from commonly seen Alzheimer's with characters such as impulsive and rigid/stereotyped behaviors, which lack of social awareness of whether these behaviors are inappropriate (e.g., showing her own bowel movement in a box and telling people these are ghost, or putting bras outside of a blouse, lying on the floor). In addition, due to the atrophy of frontal lobe, dementia patients often have delusions and hallucinations, and significant deteriorating language skills (can not use language and feel frustrated). Patients have a tendency to pick up and manipulate any objects in the environment; these objects can be a knife, food, papers (e.g., keep cutting food or holding knife and play with it).

As if not complicated enough, Ms. Yao has a neurosis personality that she tends to be very nervous even panics, a life long constipation, and post traumatic depressive syndromes.

Due to extreme complexity of her condition, Ms. Yao has multiple specialists from University of Washington Medical Center including Neurology, Psychology, and psychiatry to address her problems. Her medical complexity was far beyond regular patients and countless time and effort have been put in to support her care. I have been involved in her care since 2006 because of my language background and medical training.

We have reached to a point that Ms. Yao can no longer living at home. Her husband is very frail and not able to take care of her. In addition, in home care from DSHS can no longer meet her extensive care needs. A replacement to adult family home or skilled nursing facility is necessary to ensure her safety and well beings.

However, due to the complexity and heavily behavioral issues mentioned above, the placement plan needs to be careful. I would highly recommend a very skillful adult family home who is comfortable managing dementia with extremely difficult behaviors, or a skilled nursing facility with plenty of experienced staff. Due to her

language ability, a place speaks Mandarin Chinese is important. In addition, it's better for Ms. Yao to have a smooth transition by going to a prepared place. In other words, if a place back off after sometime, it could cause more trauma and makes future placement even more difficult.

I would be available for consultation during this period. Your assistance is highly appreciated.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'Eleanor Lee', written in a cursive style.

Eleanor Lee, PhD, ARNP
LENOR HEALTHCARE CO.
PO BOX 2533, Renton, WA 98056-2533
Phone 206-954-0075
Fax 425-228-8976

APPENDIX- C

APR 25 2012

SUPERIOR COURT CLERK
BY ANNIE JOHNSON
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

HU YAN, as Personal Representative of the
Estate of GUIZHEN YAO, deceased,

Plaintiff,

v.

PLEASANT DAY ADULT FAMILY HOME,
INC., P.S. a Domestic Corporation; YU CHEN
YIN and unknown JOHN DOES,

Defendants.

NO. 10-2-35293-7 SEA

SPECIAL VERDICT FORM

We, the jury, answer the questions submitted by the court as follows:

Question No. 1: Were the Defendants negligent?

Answer: Yes

No

INSTRUCTION: If you answer "No" proceed to Question 10.

Question No. 2: Was such negligence a proximate cause of injury or damage to:

a) Guizhen Yao?

Answer: Yes

No

1 b) Hu Yan

2 Answer: Yes _____

3 No _____

4
5 **Question No. 3:** Were Janney Gwo and/or Hu Yan, as healthcare agents for
6 Guizhen Yao, negligent?

7 Answer: Yes _____

8 No _____

9 **INSTRUCTION: If you answer "No" proceed to Question 5.**

10
11 **Question No. 4:** Was such negligence a proximate cause of injury or damage to the
12 Plaintiff?

13 Answer: Yes _____

14 No _____

15 **Question No. 5:** Was Plaintiff's healthcare provider Eleanor Lee, ARNP
16 negligent?

17 Answer: Yes _____

18 No _____

19 **INSTRUCTION: If you answer "No" proceed to Question 7.**

20
21 **Question No. 6:** Was such negligence a proximate cause of injury or damage to the
22 Plaintiff?

Answer: Yes _____

No _____

1 **Question No. 7:** Was the Department of Social and Health Services (DSHS)
negligent?

2 Answer: Yes _____

3 No _____

4
5 **INSTRUCTION: If you answer "No" proceed to Question 9.**

6
7 **Question No. 8:** Was such negligence a proximate cause of injury or damage to the
8 Plaintiff?

9 Answer: Yes _____

10 No _____

11 **Question No. 9:** What percentage was each individual and/or entity at fault for the
12 damages to Plaintiff:

13 _____ Pleasant Day/Yu Chen

14 _____ Hu Yan/Janney Gwo as healthcare agents for Guizhen
Yao

15 _____ Eleanor Lee, ARNP

16 _____ DSHS

17 _____
100% TOTAL

18 **Question No. 10:** Did Defendants' conduct constitute neglect?

19 Answer: Yes _____

20 No X

21
22 **INSTRUCTION: If you answered "No" to both Question #1 and Question #10 answer
no other questions and sign the verdict form. If you answered "yes" to either or both
Question #1 and/or Question #10 proceed to answer the remaining Questions.**

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Question No. 11: What are Guizhen Yao's total damages?

Answer: a) Economic damages consisting of reasonable and necessary medical expenses: _____
b) Non-economic damages: _____

Question No. 12: What amount of the above damages is awarded solely for:

Neglect: _____

Negligence: _____

Question No. 13: What are Hu Yan's total damages for loss of consortium?

Answer: _____

DATED this 25 day of April, 2012.



Presiding Juror

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION I

HU YAN, individually and as Personal
Representative of the Estate of
GUIZHEN YAO, Deceased

Plaintiff,

v.

PLEASANT DAY ADULT FAMILY
HOME, INC. P.S., a Domestic
Corporation, YU CHEN YIN and
Unknown JOHN DOES,
Defendant.

No. 689762

**CERTIFICATE OF
SERVICE**

The undersigned does hereby certify that on this 8th day of April, 2012,

she caused a true and correct copy of the following document(s):

1) REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT

to be delivered via the method indicated below to the following parties:

Pamela Andrews [] U.S. Mail
645 Elliot Ave West, Suite 350 [] Email
Seattle, WA 98119 [] Facsimile
Counsel for Respondent/Defendant [X] ABC Legal Messenger

Court of Appeals Division I [] U.S. Mail
One Union Square [] Email
600 University Street [] Facsimile
Seattle, WA 98010 [X] ABC Legal Messenger



Peaches Park, Legal Assistant to Attorney Erica Buckley
BUCKLEY & ASSOCIATES
675 South Lane Street, Suite 300
Seattle, WA 98104