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No. 91536-9

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SUPREME COURT  
OF THE STATE OF WASHINGTON

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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,

Appellants,

v.

LAKESIDE ADULT FAMILY HOME, GRETCHEN DHALIWAL  
INCORPORATION, (G.D. INC.) a Washington Corporation d/b/a  
LAKESIDE AFH, GRETCHEN DHALIWAL, individually, ALPHA  
NURSING AND SERVICES INCORPORATED, a Washington  
Corporation, CHRISTINE THOMAS, individually, and "JANE AND  
JOHN DOES" I-V, individually,

Respondents.

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ANSWER TO MEMORANDUM OF AMICUS CURIAE  
LEGAL LANGUAGE SERVICES

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ORIGINAL

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## A. INTRODUCTION

Esther Kim has sought to hold Christine Thomas and others accountable for the homicide by morphine of the elderly and vulnerable Ho Im Bae, who was killed by a nurse who was supposed to be caring for her. Thomas was also a nurse in the facility where Bae resided, and suspected that Bae was being given unprescribed morphine. However, Thomas's only action to protect Bae was to leave a non-emergent voicemail hours later with DSHS. The Court of Appeals concluded Thomas had no duty to Bae or that she fulfilled any duty; Kim has petitioned this Court for review.

After Bae's death, Thomas left her home in Washington after 26 years and moved to her birthplace of Norway without leaving a forwarding address. After finally receiving her Norway address from her Washington counsel, Kim served Thomas both personally and through an agency sanctioned by Norway for international service of process. Service took quite some time, but Thomas's co-defendants had been timely served.

In its *amicus curiae* memorandum, Legal Language Services ("LLS") urges this Court to take review and reverse the trial court and Court of Appeals rulings regarding service of process. It argues the personal service on Thomas violated an international treaty, and thus this Court should take review.

LLS has not raised an issue worthy of review. First, the issue is moot because in addition to personal service, Kim effected service on Thomas via the treaty method LLS demands. Also, review is not warranted because both the trial court and the Court of Appeals correctly analyzed and applied the law.

B. STATEMENT OF THE CASE

Thomas resided in the Seattle area for 26 years from 1984 until 2010. CP 168. She now resides in Nannestad, Norway. CP 777. Although she was born in Norway, Thomas speaks fluent English. CP 166-89. She worked for Alpha and was present at the facility on the day of Bae's death. CP 178. After reviewing DSHS investigation documents regarding Thomas and Alpha, Kim filed her first amended complaint, adding Thomas and Alpha as named defendants in this case. CP 867-71, 934-43. Service of the first amended summons and complaint was made on Alpha and some of the other defendants on the same day that the complaint was filed, March 20, 2012. *Id.* Kim could not, however, locate Thomas. CP 877.

Thomas and Alpha are represented by the same attorneys. CP 594. Alpha and Thomas filed a joint Answer to Kim's amended complaint on April 20, 2012. CP 909. In August, 2012, after Kim was unable to locate Thomas through her own efforts, Kim served an interrogatory on Alpha asking for Thomas's address. CP 593. Unbeknownst to Kim, Alpha and

Thomas's attorney had been in contact with Thomas since April 2012. CP 556.

On October 25, 2012, Alpha responded to Kim's request for Thomas's address with the address of its counsel. CP 594. On November 16, Kim asked Alpha's and Thomas's counsel to accept service of Kim's first amended complaint as well as a deposition notice for Thomas. CP 599, 605. Counsel for Thomas and Alpha declined Kim's request and on November 26 represented that "upon information and belief," Thomas resided in Norway. CP 605.

In Alpha's attorneys' letter, counsel for Thomas and Alpha apparently inadvertently included a copy of their "bcc" designation,<sup>1</sup> which showed that Thomas was being provided with a copy of the letter via email. CP 607. On December 3, Kim demanded that counsel for Alpha and Thomas provide Thomas's address. CP 609.

Finally, on December 11, 2012, counsel for Alpha and Thomas provided an address for Thomas in Nannestad, Norway. CP 616. Alpha's and Thomas's counsel continued to assert that Kim needed personally to serve Thomas with her first amended complaint. CP 620. In accordance with Alpha's and Thomas's counsel's demand, Kim undertook the process

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<sup>1</sup> "Bcc" is a designation the author of a letter or memorandum will use when that author wants the identity of one recipient of the document to be kept secret from the other recipients. <http://email.about.com/od/emailbehindthescenes/g/bcc.htm>.

of researching international service options and, on March 21, 2013, Thomas was personally served with a copy of the Summons and Complaint along with a Subpoena Duces Tecum and Notice of Deposition. CP 625. Thomas executed an acceptance of service form from the process server. *Id.*

Furthermore, since Kim had anticipated that Alpha and Thomas might continue to dispute that service on Thomas was effective, Kim also began the long and arduous process of serving Thomas through the Norwegian Authority pursuant to the Hague convention. CP 558, 631.

On March 26, 2013, counsel for Kim was instructed by the Norwegian Authority on how properly to transmit documents to the Authority. CP 633. On April 3, 2013, Kim's first amended complaint and all other necessary documents were transmitted to, and accepted by, the Norwegian Authority. CP 632. Kim was told that the documents would be sent out to a local district court for service on Thomas. CP 631.

Thomas moved to dismiss the complaint against her under CR 12(b)(4), (5), and (6), arguing that service upon her was improper, or in the alternative, had not been made timely and the statute of limitations had expired. CP 674-75. The trial court denied the motion. *Id.* Thomas's deposition took place in Oslo, Norway, on June 14, 2013. CP 166.

The trial court eventually dismissed Kim's claims on behalf of Bae, on the grounds that neither Thomas nor Alpha owed a duty to Bae. Kim appealed the trial court's dismissal, and Thomas cross-appealed on the service issue. The Court of Appeals affirmed the trial court's dismissal of Kim's claims on duty grounds. However, the Court also affirmed that Thomas was properly served.

### C. ARGUMENT

After she was implicated in a wrongful death action in her Washington home of 26 years, Thomas departed to return to her birthplace of Norway. Despite her local attorneys' uncooperative behavior, attempts to locate her in Norway were finally successful, and she was personally served there. She was also served by means of a treaty-created Norwegian agency, in compliance with the Hague Convention, just as LLS now advocates.

LLS memorandum does not demonstrate that personal service on Thomas at her residence in Norway and through Hague Convention methods raises issues of sufficient magnitude to concern this Court. Having departed the jurisdiction and thereby avoided timely local service, no Washington authority mandates that Thomas be dismissed from participation in this action. Nor does allowing personal service on her in



Norway threaten any future defendants who avail themselves of Washington's jurisdiction.

(1) The Issue Raised in LLS' Memorandum Is Moot; This Court Would Be Offering at Most an Advisory Opinion

LLS claims that this Court should take review because the Court of Appeals approved personal service on Thomas in Norway. Memo. at 6. It argues that personal service on Thomas at her place of residence in Norway was prohibited by the Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters, 20 U.S. 361, T.I.A.S. 6633, 658 U.N.T.S. 163, entered into force, February 10, 1969 (the "Hague Convention"). *Id.* The Hague Convention is a multilateral treaty which creates a uniform method for service of documents between nationals of different countries. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 702-03, 708 S. Ct. 2104, 100 L.Ed.2d 722 (1988).

It is a general rule that, where only moot questions or abstract propositions are involved, the appeal should be dismissed. *Sorenson v. Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972). A recognized exception to this general rule lies within the court's discretion when "matters of continuing and substantial public interest are involved." *Id.* at 558.

In 1972, this Court adopted criteria to consider in deciding whether a matter, though moot, is of continuing and substantial public interest and thus reviewable. *See Sorenson, supra* (constitutional challenge to ordinance requiring property ownership as a qualification for certain elected offices). The three factors considered essential are: (1) whether the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public officers; and (3) whether the issue is likely to recur. *Sorenson*, 80 Wn.2d at 558.

Use of the public interest exception began to increase greatly in the 1980's without rigorous examination and application of the *Sorenson* criteria to the facts of each case to justify the exception. *See, e.g., Hartman v. State Game Comm'n*, 85 Wn.2d 176, 178, 532 P.2d 614 (1975); *Department of Ecology v. Adsit*, 103 Wn.2d 698, 705, 694 P.2d 1065 (1985); *Bresolin v. Morris*, 88 Wn.2d 167, 169, 558 P.2d 1350 (1977); *Seattle v. State*, 100 Wn.2d 232, 237, 668 P.2d 1266 (1983). This Court warned that increased use of the exception threatened "to swallow the basic rule of not issuing decisions in moot cases." *Hart v. Dep't of Soc. & Health Servs.*, 111 Wn.2d 445, 450, 759 P.2d 1206 (1988). This Court reinstated rigorous application of the *Sorenson* criteria to each case where the exception is urged is necessary "to ensure that an actual benefit

to the public interest in reviewing a moot case outweighs the harm from an essentially advisory opinion.” *Id.*

The Hague Convention issue LLS raises is moot because Kim also served Thomas through the Norwegian Central Authority. CP 558, 631-33. This is the agency Norway has established under the Hague Convention for service of process that Thomas insisted was the only proper method below. CP 803. Despite having undertaken the arduous and expensive task of locating and personally serving Thomas, Kim also undertook to serve her through the Norwegian Central Authority because Thomas insisted personal service was improper. CP 558, 631-33.

Also if this Court denies Kim’s petition for review, the service issue is moot twice over. The Court of Appeals upheld dismissal of Kim’s claims in their entirety on the grounds that Thomas had no duty. This Court’s opinion would truly be advisory in nature.

This case does not raise an issue of substantial public interest that passes the rigorous *Sorenson/Hart* test. The issue LLS raises is unique to the facts of this case, an unlikely to be repeated. Review is not warranted.

(2) The Court of Appeals Opinion Does Not Nullify the Hague Convention Simply Because It Affirms that Personal Service Was Acceptable in Thomas’s Instance

Even assuming the issue were not moot, the Court of Appeals analyzed the Hague Convention issue correctly. “One of the two stated

objectives of the Hague Convention is to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time.” *Volkswagenwerk*, 486 U.S. at 703. “The Convention “was intended to provide a simpler way to serve process abroad, to assure that defendants sued in foreign jurisdictions would receive actual and timely notice of suit, and to facilitate proof of service abroad.” *Id.* at 698.

The permissible methods for serving documents abroad can be broken down into three categories. First, every signatory nation must designate a “Central Authority” through which foreign litigants can *always* serve process. Hague Convention art. 2. Second, the Convention provides a number of other service methods (for example mail, consular or diplomatic) which litigants may employ unless the receiving nation specifically objects to their use. *Id.* at 8-10. Third, the Convention authorizes litigants to use any other method of service which the receiving nation has expressly permitted, as evidenced by prior international agreements or as reflected in the internal law of the foreign nation. *Id.* at 11, 19, 24, 25.

Contrary to LLS’ suggestion, the Hague Convention does not prohibit service in a manner deemed acceptable under the internal law of the nation where service is sought:

To the extent that the internal law of a contracting State permits methods of transmission, other than those provided for in the preceding articles, of documents coming from abroad, for service within its territory, the present Convention shall not affect such provisions.

*Id.* at 19.

Norwegian internal law permits the service of civil legal documents by a process server at the subject's place of residence:

“§ 165. Service of process by other than postal means pursuant to § 163<sup>2</sup> a may always be performed by a process server. ...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.

Norwegian Courts of Justice Act, ch. 9 §§ 165, 167 (2005).<sup>3</sup>

LLS suggests that the internal law of Norway cannot be applied under Article 19 of the Hague Convention. Memo. at 5. It admits that Article 19 of the Hague Convention permits service in a manner required by the destination country, but claims that it only applies to methods not specifically enumerated in the Hague Convention. *Id.* It claims that

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<sup>2</sup> § 163 refers to service of certain public documents in types of cases brought in Norwegian court and not at issue here.

<sup>3</sup> The text of this Act was taken from an unofficial translation published by the Norwegian government, the link to which can be located online at <http://www.domstol.no/en/National-Courts-Administration/Publications/>. Relevant portions are attached hereto at Appendix A.

Norway has objected to personal service by process servers, which it describes as “other competent persons” under the Convention. *Id.*

Personal service of process – where a document is hand delivered by a process server – is considered the “best possible notice” that a plaintiff can give to a defendant in legal proceedings. 14 Wash. Prac., Civil Procedure § 5:10 (2d ed.).

Article 10 of the Hague Convention does not specifically enumerate process servers as a method to be accepted or rejected by signatory countries. If objected to, Article 10(c) prohibits effecting service through “competent persons.” If the Convention were intended to prohibit personal service of process by process servers – one of the most commonly used methods and the “best possible notice” – that method should be specifically listed.

Thus, under Article 19, the internal law of the State governs. Chapter 9 of the Norwegian Courts of Justice Act does not preclude service of documents from abroad by personal service. It states: “Service of process and notifications, *issued in connection with legal proceedings*, shall be performed in accordance with the rules contained in this chapter, unless otherwise determined by law or indicated by specific circumstances.” Norwegian Courts of Justice Act, ch. 9 §§ 165, 167 (2005).

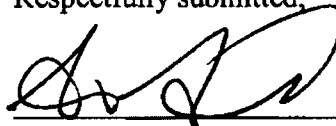
Thomas was served personally at her place of residence by a process server in accordance with Norwegian law. CP 793-95. She received service voluntarily and signed an acceptance of service. CP 624-25. She was also served in accordance with the Hague Convention, through Norway's Central Authority. Nothing in the Court of Appeals opinion opens the door for future litigants to argue that the Hague Convention or laws of the destination country do not apply.

D. CONCLUSION

LLS has not raised an issue that merits this Court's review. The Court of Appeals applied the law appropriately, and its opinion does not sanction future behavior that contravenes this Court's authority or any other. It is also moot because Thomas was served in the manner LLS suggests was mandatory. Review should be denied.

DATED this 23<sup>rd</sup> day of June, 2015.

Respectfully submitted,



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# APPENDIX A



**Act relating to the Courts of Justice of 13  
August 1915 No . 5**

**(Courts of Justice Act)**

**Norway**

**(Unofficial translation)**

**§ 163a.** Those documents to be served by the public authorities stated in the second paragraph, shall be sent directly by postal operator to the parties being served, either in the form of an ordinary letter with attached delivery confirmation notice, or by registered letter. Conciliation Board documents may also be served via ordinary letter without a delivery confirmation notice.

The following authorities undertake postal service of process pursuant to the rules contained in these provisions: Ordinary courts of law, the land consolidation courts, the Consumer Disputes Commission, the county social welfare boards for child protection and social issues, the prosecuting authority, district sheriffs, the Execution and Enforcement Commissioner, police stations with administration of civil justice duties and county governors.

A court may order a complainant or a plaintiff to obtain the opposing party's address.

Lawyers summoning witnesses pursuant to the Disputes Act, § 13-3 by service of subpoena, may serve subpoenas by post, either in the form of an ordinary letter with attached delivery confirmation notice or by registered letter.

The King may provide more detailed regulations regarding postal service of subpoenas.

Added by Act no. 56 of 7 June 1985, amended by Acts no. 83 of 11 June 1993, no. 5 of 9 January 1998, no. 34 of 28 April 2000 (effective 1 July 2000 pursuant to resolution no. 366 of 28 April 2000), no. 67 of 30 August 2002 (effective 1 January 2003 pursuant to resolution no. 938 of 30 August 2002), no. 53 of 25 June 2004 (effective 1 January 2008 pursuant to resolution no. 901 of 19 August 2005) as amended by Act no. 84 of 17 June 2005, no. 90 of 17 June 2005 (effective 1 January 2000 pursuant to resolution no. 88 of 26 January 2007) as amended by Act no. 3 of 26 January 2007, no. 65 of 1 December 2006 (effective 1 January 2008 pursuant to resolution no. 1348 of 30 November 2007).

**§ 164.** The King may decide that the party to be served may be notified by fax or other mode of communication than the one used by the process server, and may stipulate more detailed rules concerning this. It may also be decided that notification may be sent via another authority. The first and second sentences also apply to documents originating from foreign authorities that shall be served in Norway.

Amended by Acts no. 8 of 21 June 1935, no. 9 of 14 February 1969, no. 52 of 22 June 2012 (effective 1 January 2013 pursuant to resolution no. 1208 of 14 December 2012).

**§ 165.** Service of process by other than postal means pursuant to § 163 a may always be performed by a process server.

Instead of a process server, public authorities may use a police or probation services employee for service of process in criminal cases. Service of process in relation to currently serving military personnel in criminal cases may also be

performed by officers or military police. Where it is necessary to save time, public authorities may allow service to be performed in other cases by a party authorised by the court to do so. To those parties thus performing service of process, the provisions relating to process servers apply.

Amended by Acts no. 2 of 13 February 1976, no. 56 of 7 June 1985, no. 68 of 16 June 1989, no. 36 of 24 June 1994 (effective 1 July 1997), no. 21 of 18 May 2001 (effective 1 March 2002 pursuant to resolution no. 181 of 22 February 2002).

**§ 166.** Process servers are obligated to perform service of process when required by a public authority. Where delays can be avoided, they are also obligated to perform service of process outside their district.

Upon a party's submission of a petition, process servers are obligated to perform service of process within their district, where the service of process is necessary pursuant to legislation and the petitioned service of process is in the prescribed form. Where other communication, which does not contravene the law or decency, is requested served by a process server, the latter may not refuse to perform service unless so doing would be obstructive to other undertakings, or the communication is plainly bereft of legal significance. Where a process server refuses to perform a service of process, the issue may be brought before the local District Court or the court that is hearing the case.

Amended by Act no. 98 of 14 December 2001 (effective 1 January 2002 pursuant to resolution no. 1416 of 14 December 2001).

**§ 167.** Service of process should not take place on public holidays or outside normal daytime hours, unless this is unavoidable.

**§ 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.

Amended by Act no. 58 of 7 June 1985.

**§ 169.** Where the party to be served is not to be found at his/her place of abode or regular workplace, process may be served on an adult person from the same household who is present there.

At said abode, process may also be served on a person with whom the party to be served is staying, or an adult person from the latter's household. Similarly, process may be served on the owner of the property or a person who is taking care of the property on the owner's behalf, provided they are resident there.

Similarly, at the workplace, process may be served on an employer or a supervisor, or, if it is an office workplace, on an employee.

DECLARATION OF SERVICE

On said day below, I emailed a courtesy copy and deposited in the U.S. Mail for service a true and accurate copy of the Answer to Memorandum of Amicus Curiae Legal Language Services in Supreme Court Cause No. 91536-9 to the following parties:

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

DATED: June 23<sup>rd</sup>, 2015, at Seattle, Washington.



\_\_\_\_\_  
Roya Kolahi, Legal Assistant  
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## OFFICE RECEPTIONIST, CLERK

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Rec'd 6/23/2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

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**Subject:** Esther Kim v. Lakeside Adult Family Home Cause No. 91536-9

Good Afternoon:

Attached please find the Answer to Memorandum of Amicus Curiae Legal Language Services in Supreme Court Cause No. 91536-9 for today's filing. Thank you.

Sincerely,

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