70892-9

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No. 70892-9

COURT OF APPEALS, DIVISION I,
FOR THE STATE OF WASHINGTON

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

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.

REPLY/CROSS-RESPONSE BRIEF OF APPELLANTS ESTHER KIM AND THE ESTATE OF HO IM BAE

Scott F. Lundberg, WSBA #16178
Alex French, WSBA #40168
Graham Lundberg Peschel, P.S., Inc.
2601 Fourth Ave., Floor 6
Seattle, WA 98121
(206) 448-1992

Philip A. Talmadge, WSBA #6973
Sidney Tribe, WSBA #33160
Talmadge/Fitzpatrick
2775 Harbor Avenue SW
3rd Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Attorneys for Esther Kim and the Estate of Ho Im Bae

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A. INTRODUCTION

At the heart of this appeal is a factual question of whether Alpha Nursing Services, Inc. ("Alpha") employees Christine Thomas ("Thomas") and Marion Binondo ("Binondo") had reason to suspect that Hoe Im Bae ("Bae") was being abused by her caregiver, Fanny Irwati.

Esther Kim and the Estate of Ho Im Bae (collectively, "Kim") have argued that, given the high risk of elder abuse and the unique ability of caregivers to witness potentially abusive acts, it is for a jury to decide in this case whether Thomas and Binondo breached their statutory and common law duties to immediately report serious abuse to law enforcement and other authorities.

In response, Alpha and Thomas do not argue about the law, but about the facts. They ask this Court to ignore evidence favorable to Kim's position. They claim that there is no evidence that Thomas and Binondo "knew" Irwati was assaulting Bae.

It is not up to this Court to weigh or ignore evidence, nor is it this Court's task to determine what Thomas and Binondo "knew." Instead, this Court must decide, based upon all of the evidence presented below in the light most favorable to Kim, whether a jury could conclude that Thomas and Binondo had a reason to suspect abuse was occurring and act immediately to intervene.

The trial court erred in deciding this case as a matter of law. Kim is entitled to have a jury decide whether Alpha and Thomas are culpable in Bae's death.

B. STATEMENT OF THE CASE

(1) Reply on Statement of the Case on Appeal

Alpha and Thomas do not dispute any fact in Kim's statement of the case.[1] Br. of Resp'ts/Cross-Appellants at 4-15. They simply state their own version of the facts, in the light most favorable to their position. *Id.*

Although Alpha and Thomas's characterization of the facts is irrelevant to this appeal from their successful motion for summary judgment, one portion of their "Counterstatement of the Case" invites reply. Alpha and Thomas argue that certain evidence Kim produced – evidence upon which the trial court relied – is "inadmissible" and should be disregarded by this Court in its *de novo* review. Br. of Resp'ts/Cross-Appellants at 13-15.

As this Court is well aware, the inclusion of argument in Alpha and Thomas's statement of the case is prohibited by the Rules of Appellate Procedure. RAP 10.3(a)(5). Kim will comply and refrain from asserting

[1] Alpha and Thomas claim that three declarations contain "inadmissible" facts, an argument which is addressed below.

counterarguments here, reserving discussion for the argument section *infra*.

However, it is permissible to observe as a procedural matter that the trial court considered the evidence at issue and did not strike it. CP 58. Alpha and Thomas have not cross-appealed from the trial court's decision to consider this evidence, nor offered any authority in support of their claims of the specific inadmissibility of any evidence. CP 1-6.

(2) Statement of the Case on Cross-Appeal

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 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 included a copy of their "bcc" page, 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, undertook the process 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.* Counsel for Alpha and Thomas later argued that having the process server present Thomas with an acceptance of service form constituted *ex parte* contact with Thomas. CP 804.

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.

C. SUMMARY OF ARGUMENT

Kim has appealed the trial court's determination that based on the record below, no jury could find that Alpha and Thomas negligently contributed to the death of Ho Im Bae at the hands of her abusive caregiver.

In response, Alpha and Thomas invite this Court not to examine the record below, but to ignore it. They concede most of the legal issues in this appeal, and instead argue that the "admissible" evidence favors their position on summary judgment.

This Court should not, as Alpha and Thomas suggest, reject, ignore, or otherwise weigh evidence in Kim's appeal from summary judgment. The evidence that Alpha and Thomas complain of was considered by the trial court, and is properly part of the record on appeal. Summary judgment should be reversed, and this case set for trial.

Regarding Thomas's cross-appeal, Kim achieved the highest possible standard of service of process: personal service by a process server at Thomas's place of residence. Thomas not only accepted the documents, but signed an affidavit of service. This method of service is permissible under both jurisdictions – Washington and Norway – and is

not prohibited by any treaty. Thus, the trial court properly concluded that service was effective and denied the motion to dismiss for lack of service. The trial court also correctly concluded that under controlling Supreme Court precedent, the statute of limitations was tolled as to Thomas by the filing and service of the summons and complaint upon Thomas's co-defendants.

D. ARGUMENT IN REPLY

(1) Alpha and Thomas's Characterization of the Facts Is Irrelevant; on Summary Judgment This Court Must View them in the Light Most Favorable to Kim, Which Alpha and Thomas Do Not Dispute

In her opening brief, Kim argued that, based on the factual record before the trial court, a reasonable juror could conclude that Alpha and Thomas should be held liable for negligence. Br. of Appellants at 13-30. Kim argued that both Alpha and Thomas owed both common law and statutory duties to Bae. Br. of Appellants at 13-23. She argued that genuine issues of material fact exist regarding whether they breached this duty by failing to intervene on Bae's behalf, and whether Alpha and Thomas's negligence contributed to Bae's death. *Id.* at 23-30. Kim maintained that, taking all of the evidence in the light most favorable to her, summary judgment was inappropriate. *Id.*

Alpha and Thomas do not respond to the legal arguments Kim raised regarding the statutory and common law duties owed to Kim. Br. of Resp'ts/Cross-Appellants at 22-30. Presumably, they concede these duty issues, which are the only questions of law in this appeal.

Alpha and Thomas's response is purely fact-based: they defend the summary judgment order by insisting that their version of the facts controls, and that Kim's evidence is mere "speculation" that this Court should disregard. Br. of Resp'ts/Cross-Appellants at 22-30. Notably, they do not contend that any factual statement contained in Kim's brief is not supported by the record that the trial court considered. Instead, they invite this Court to view the facts in the light most favorable to their position. *Id.*

An appellate court's role in reviewing an order of summary judgment is to examine the record before the trial court in the light most favorable to the non-moving party, and decide whether reasonable minds could reach but one conclusion. *Magula v. Benton Franklin Title Co.,* 131 Wn.2d 171, 930 P.2d 307 (1997). The burden on Kim in opposing Alpha and Thomas's summary judgment motion is one of production, not persuasion. *Carle v. McChord Credit Union,* 65 Wn. App. 93, 98–102, 827 P.2d 1070 (1992).

This Court's task is not, as Alpha and Thomas suggest, to evaluate the weight or persuasiveness of various statements: "Our job is to pass upon whether a burden of production has been met, not whether the evidence produced is persuasive. That is the jury's role, once a burden of production has been met." *Barker v. Advanced Silicon Materials, LLC,* (*ASIMI*), 131 Wn. App. 616, 624, 128 P.3d 633, 637 (2006), *quoting Renz v. Spokane Eye Clinic, P.S.,* 114 Wn. App. 611, 623, 60 P.3d 106 (2002).

(2) What Thomas and Binondo "Knew" Is Irrelevant, the Evidence Is Sufficient to Persuade a Reasonable Juror That Thomas and Binondo Had Reasonable Cause to Believe Abuse or Neglect Occurred

Kim argued in her opening brief that one of the sources of Thomas and Binondo's duty to Bae is the Abuse of Vulnerable Adults Act ("AVAA"). Br. of Appellants at 19. Kim argued that she presented sufficient evidence that Thomas and Binondo had reasonable cause to believe abuse, neglect, or assault was occurring, and that a jury must decide whether they breached their duty to contact law enforcement. *Id.* at 20.

Alpha and Thomas argue that to survive summary judgment, Kim must show that Thomas and Binondo "knew" that Irwati was assaulting Bae. Br. of Resp'ts/Cross-Appellants at 30. They claim that unless Kim

can establish such knowledge, Thomas and Binondo had no duty to report as a matter of law under the "Elder Abuse Act."[2] *Id.*

Alpha and Thomas misread the statute at issue. Kim was not required to "establish" that Thomas or Binondo "knew an assault was occurring." Br. of Resp'ts/Cross-Appellants at 30. Instead, the question is whether sufficient evidence was produced to suggest that Binondo and Thomas "had reason to suspect that physical assault...occurred *or* had reasonable cause to believe that an act...caused fear of imminent harm." RCW 74.34.035.

Alpha and Thomas focus Binondo's failure to call law enforcement or 9-1-1, and insist that even if Binondo had called DSHS after witnessing Bae's injuries and speaking to Salzbrun, DSHS would not have saved Bae. Br. of Respondent/Cross-Appellant at 24-25. However, this argument goes to causation, not duty, and causation is a question of fact that must be left to the jury. *Tyner v. State Dep't of Soc. & Health Servs., Child Protective Servs.*, 141 Wn.2d 68, 86, 1 P.3d 1148, 1158 (2000). Alpha and Thomas also ignore the possibility that if Thomas and Binondo had both called DSHS on successive days expressing concerns about Bae, they might have placed a higher priority on the matter.

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[2] It is clear from the context that Thomas and Alpha are referring to the AVAA.

Thomas also cannot claim that she fulfilled her duty as a matter of law by leaving a voice-mail for DSHS 90 minutes after leaving the facility. Br. of Resp'ts/Cross-Appellants at 28. If she had reasonable cause to believe harm to Bae was imminent, she was required to report that fact "immediately" to a law enforcement agency. RCW 74.34.035(3).

Kim met her burden of production on summary judgment, producing evidence that Thomas and Binondo had reasonable cause to believe harm to Bae was imminent, and reasonable cause to believe law enforcement should be contacted. Among all of the evidence presented, Kim adduced evidence of the following facts:

- Alpha improperly believed that mandatory reporters were not required to report suspected abuse to police unless DSHS ordered it. CP 422.
- One or two days before Bae's death, Binondo heard a thud and found Bae lying on the floor face down. CP 328. Binondo told Irwati she "might" want to call 911, but Irwati did not do so, nor did she say she would. CP 329, 758. Neither did Binondo. *Id.*
- Binondo told Irwati that Bae might have broken something in the fall, but nevertheless watched Irwati drag Bae back into her bed. CP 332. Irwati did not examine or assess Bae, except to see if she

was breathing, because she said she wanted to get back to another patient. CP 329, 333.

- Binondo was informed by Kerri Salzbrun, an eyewitness, that Bae was "doped up" and that Irwati was giving Bae "crushed up pills." CP 333.
- Despite witnessing Irwati's callous attitude and abusive behavior, Binondo did nothing. She simply left without calling 9-1-1, law enforcement, or DSHS.
- On the day Bae died, Salzbrun told Thomas that Bae was being given morphine, which "alarmed" Thomas. CP 177. Thomas confirmed by reviewing medical records that Bae was not prescribed morphine. CP 178.
- Thomas saw Irwati dragging Bae to the bathroom and said that Bae appeared to be heavily sedated. CP 179, 767.
- Thomas admitted that nothing prevented her from immediately intervening in the abuse she witnessed, calling law enforcement, or contacting Bae's family. CP 182.
- Thomas did not intervene, or make any of the calls she acknowledges could have been made while still at Lakeside. Instead, she left the home at 9:55 a.m., leaving Bae "in the hands of the woman who [Thomas was] told was giving her morphine."

Id. At 10:00 a.m., she called the DSHS hotline but said the "number was busy." CP 767. An hour and a half later, at 11:30 a.m., she left a voice-mail message. *Id.*

- Kim's expert declarations established that Binondo and Thomas's failure to act led to Bae's death. CP 62, 108.
- At the time of Bae's autopsy, Bae had obvious and severe bruising on her face. CP 292.

Despite these facts, Alpha and Thomas argue that Binondo and Thomas did not know that any of Irwati's actions met the statutory definition of "assault." Br. of Resp'ts/Cross-Appellants at 29-30. They acknowledge that Kim produced expert testimony stating that Binondo and Thomas should have intervened, but claim that the trial court "aptly ignored the 'expert' testimony…." Br. of Resp'ts/Cross-Appellants at 30.

There is a question of fact in this record as to whether Thomas and Binondo violated their duties to Bae. Alpha and Thomas may not wish away this evidence by falsely claiming that the trial court "ignored" it, or by downplaying its weight or persuasiveness. Summary judgment was inappropriate.

(3) Because Alpha and Thomas Have Not Cross-Appealed the Trial Court's Decision to Consider the Declarations of Kerri Salzbrun, Mark Lachs, and Elizabeth Henneke, This Court Cannot Weigh or "Ignore" Them as Alpha and Thomas Suggest

Alpha and Thomas contend that this Court should disregard three declarations considered by the trial court because they contain various "inadmissible" statements. Br. of Resp'ts/Cross-Appellants at 13-15, 24-26. They also repeatedly make reference to the "admissible" evidence in the record, as if admissibility were at issue in this appeal. Br. of Resp'ts/Cross-Appellants at 24, 27, 28. They claim that the "trial court properly disregarded the 'expert' testimony" when rendering summary judgment. *Id.* at 26. Notably, they do not cite to the Clerk's Papers when making this assertion.

On the contrary, the trial court did rely on the declarations in question. CP 58. The court did not strike them, and their consideration is not the subject of any cross-appeal or substantive argument by Alpha and Thomas. At most, they "incorporate[] by reference" their objections below. Br. of Resp'ts/Cross-Appellants at 15. They complain that certain statements by experts are inadmissible "speculation" about the events in question. *Id.* at 25-26. However, they offer no argument or authority to support their assertion that particular statements were "inadmissible" and thus should be disregarded by this Court.

This Court considers "the same evidence that the trial court considered on summary judgment." *Lybbert v. Grant County,* 141 Wn.2d

29, 34, 1 P.3d 1124 (2000). This Court also presumes that the trial court disregarded any inadmissible evidence. *See State v. Melton,* 63 Wn. App. 63, 68, 817 P.2d 413 (1991); *Cano-Garcia v. King Cnty.*, 168 Wn. App. 223, 249, 277 P.3d 34, 49, *review denied*, 175 Wn.2d 1010, 287 P.3d 594 (2012).

A claim that expert testimony is "speculation" goes to the weight of the evidence, not its admissibility. *State v. Anderson*, 41 Wn. App. 85, 99, 702 P.2d 481, 492 (1985), *rev'd on other grounds,* 107 Wn.2d 745, 733 P.2d 517 (1987). Also, such a claim to disregard expert evidence should not be raised for the first time on appeal. *Id.*

Alpha and Thomas cannot wish away adverse evidence by baldly claiming that it is inadmissible. They did not move to strike any of the declarations in question at the trial court level, and offer no argument or authority as to why this Court should reject the presumption that the trial court found the evidence to be admissible. They do not assign error to the trial court's consideration of Kim's evidence on summary judgment.

The evidence that was before the trial court establishes that a genuine issue of material fact exists and that summary judgment was inappropriate.

E. ARGUMENT IN CROSS-RESPONSE

(1) Standard of Review

The standard of review for a dismissal of a claim on statute of limitations grounds is de novo. *Reid v. Pierce Cy.,* 136 Wn.2d 195, 200–01, 961 P.2d 333 (1998); *In re Parentage of Q.A.L.*, 146 Wn. App. 631, 635, 191 P.3d 934, 936 (2008). Where, as here, a motion to dismiss is based on evidence outside the pleadings, this Court views the decision according to the same standard applied to motions for summary judgment. *Sea-Pac Co., Inc. v. United Food & Commercial Workers Local Union 44*, 103 Wn.2d 800, 802, 699 P.2d 217, 218 (1985). The motion must be denied unless it appears beyond doubt that plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief. *Corrigal v. Ball & Dodd Funeral Home, Inc.,* 89 Wn.2d 959, 577 P.2d 580 (1978).

(2) The Hague Convention Does Not Prohibit Personal Service in Norway, Nor Does It Mandate Only Article 2 Service Methods

In her cross-appeal, Thomas claims that the trial court should have granted her 12(b)(6) motion to dismiss her from the action on statute of limitations grounds. She argues that personal service at her place of residence in Norway was ineffectual, because 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 ("Hague Convention") and the laws of Norway prohibited personal service upon her at her place of residence in Norway. *Id.* at 32-33.

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), attached hereto at Appendix A. "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." *Id.* "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. 63. 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. 63. *Id.* arts. 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.* arts. 11, 19, 24, 25.

Contrary to Thomas's suggestion, the Hague Convention does not interfere with service of process upon an individual who accepts delivery of the documents voluntarily:

> Subject to sub-paragraph (b) of the first paragraph of this article, the document may always be served by delivery to an addressee who accepts it voluntarily.

Hague Convention art. 5. It also 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. art. 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[3] a may always be performed by a process

[3] § 163 refers to service of certain public documents in types of cases brought in Norwegian court and not at issue here.

> 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).[4]

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. The Hague Convention does not mandate one method of service in Norway. It authorizes many agreed-upon methods of service, including personal service effected here. Thomas has offered nothing but bald assertions that such service violated the Hague Convention and Norwegian law. Br. of Resp'ts/Cross-Appellants at 33. The relevant sources of law here cited make clear that service on Thomas was proper.

(3) Thomas Has No Valid Statute of Limitations Defense, the Statute Was Tolled Under Controlling Supreme Court Precedent by Proper Filing and Service of the Summons and Complaint on Alpha

Thomas also argues that even if service on her was properly effected, it was not within the 90-day time period permitted under RCW 4.16.170, and that the 90-day period was not tolled by service on other

[4] 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 B.

defendants. Br. of Resp'ts/Cross-Appellants at 34. Thomas admits that under *Sidis v. Brodie/Dohrmann, Inc.*, 117 Wn.2d 325, 815 P.2d 781 (1991), service of one defendant within the 90-day period tolls the statute of limitations as to all other defendants for a reasonable time. However, Thomas argues that the delay in service to her in Norway was unreasonable as a matter of law.

In *Sidis*, our Supreme Court held that the language of RCW 4.16.170 expressly permits perfection of commencement by "service on one or more of the defendants, or by publication." *Sidis,* 117 Wn.2d at 329. Accordingly, timely service on any one defendant tolls the running of the statute for all defendants in a multiple defendant case. *Id.*

There is no specific period during which the plaintiff must complete service on the remaining defendant. *Id.* at 329. The *Sidis* court made clear that plaintiffs should proceed with their cases "in a timely manner as required by the court rules...." *Id.* However, plaintiffs in multi-defendant cases must be allowed some latitude, as the Supreme Court explained:

> It is arguably unfair to require a plaintiff to serve all defendants within a set limitation period, when it may be difficult or impossible to determine the actual location of some defendants before discovery is under way.

Id.

The *Sidis* rule has been generously applied to allow plaintiffs time to complete service on all other defendants, provided there is no prejudice to those defendants. *Bosteder v. City of Renton*, 155 Wn.2d 18, 49-50, 117 P.3d 316 (2005) *superseded by statute on other grounds as stated in Wright v. Terrell*, 162 Wn.2d 192, 195, 170 P.3d 570, 571 (2007). In *Bosteder,* the Court applied the *Sidis* rule and denied defendant's motion for summary judgment dismissal for lack of service even where 11 months elapsed between the date of filing and the date of service on the last defendant. *Bosteder*, 155 Wn.2d at 49. Unlike this case where the defendant lives in a distant foreign country, the defendant in *Bosteder* lived in state. *Id.* Also unlike this case, in *Bosteder* the plaintiff offered *no explanation* for the long delay. *Id.* Nonetheless, because the defendant failed to show that plaintiff had violated a court rule or caused any prejudice or harm, the service was deemed timely and the plaintiff was allowed to proceed. *Id.*

The *Sidis* rule applies here to toll the statute of limitations with regard to Thomas, a defendant in a multiparty case, especially where Kim exercised diligence in trying to locate and serve her. CP 684-755. Kim was hampered by several factors, including: (1) Thomas did not make herself available for service, (2) she left the United States to reside in a foreign country, (3) defense counsel withheld Thomas's address, (4) Kim

sought information regarding Thomas's whereabouts, and (5) once locating Thomas, Kim made every effort to comply with the laws of Washington, the laws of Norway, and the Hague Convention to effect proper service. *Id.*

In short, the delay in service was caused by Thomas and her attorneys, and not by any lack of diligence on Kim's part. Thomas's attorneys withheld her address until December 11, 2012. Kim did not violate any court rule. Thomas cannot show any real prejudice because she had been adequately represented by her own counsel and Alpha's counsel during the course of the proceedings. Under *Sidis* and *Bosteder,* the statute of limitations was tolled until Thomas was served.

(4) The Issue of the Acceptance of Service Form Is Moot

Thomas accuses Kim of "unethical *ex parte* contact" because Kim hired a process server in Norway to serve Thomas the summons and complaint. Br. of Resp'ts/Cross-Appellants at 38-40. Thomas claims that the process server's presentation of the acceptance of service form violated RPC 4.2.

Regardless, this issue is irrelevant to the issues on appeal and is moot. Service of process was effected by the affidavit of service, and Kim has previously waived any argument regarding the legal efficacy of the acceptance of service form.

F. CONCLUSION

There was ample evidence that Alpha and its employees ignored serious warning signs of abuse and neglect that led directly to Bae's death. Despite what Alpha and Thomas might wish, this Court cannot simply "ignore" or weigh evidence that was before the trial court. Summary judgment should be reversed, and this case should be remanded for trial.

Thomas was diligently and timely served, and makes absolutely no argument that any delay in service prejudiced her in any way. Thomas's cross-appeal should be rejected, and the trial court's CR 12(b)(6) order should be affirmed.

DATED this 22d day of May, 2014.

Respectfully submitted,

Philip A. Talmadge, WSBA #6973
Sidney Tribe, WSBA #33160
Talmadge/Fitzpatrick
2775 Harbor Avenue SW
3rd Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Scott F. Lundberg, WSBA #16178
J. Alex French, WSBA #40168
Graham Lundberg Peschel, P.S., Inc.
2601 Fourth Ave., Floor 6
Seattle, WA 98121
(206) 448-1992
Attorneys for Esther Kim and
the Estate of Ho Im Bae

APPENDIX

A

HccH
HAGUE CONFERENCE ON
PRIVATE INTERNATIONAL LAW
CONFÉRENCE DE LA HAYE
DE DROIT INTERNATIONAL PRIVÉ

14. CONVENTION ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS[1]

(Concluded 15 November 1965)

The States signatory to the present Convention,
Desiring 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,
Desiring to improve the organisation of mutual judicial assistance for that purpose by simplifying and expediting the procedure,
Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

Article 1

The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.
This Convention shall not apply where the address of the person to be served with the document is not known.

CHAPTER I – JUDICIAL DOCUMENTS

Article 2

Each Contracting State shall designate a Central Authority which will undertake to receive requests for service coming from other Contracting States and to proceed in conformity with the provisions of Articles 3 to 6.
Each State shall organise the Central Authority in conformity with its own law.

Article 3

The authority or judicial officer competent under the law of the State in which the documents originate shall forward to the Central Authority of the State addressed a request conforming to the model annexed to the present Convention, without any requirement of legalisation or other equivalent formality.
The document to be served or a copy thereof shall be annexed to the request. The request and the document shall both be furnished in duplicate.

Article 4

If the Central Authority considers that the request does not comply with the provisions of the present Convention it shall promptly inform the applicant and specify its objections to the request.

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[1] This Convention, including related materials, is accessible on the website of the Hague Conference on Private International Law (www.hcch.net), under "Conventions" or under the "Service Section". For the full history of the Convention, see Hague Conference on Private International Law, *Actes et documents de la Dixième session (1964)*, Tome III, *Notification* (391 pp.).

Article 5

The Central Authority of the State addressed shall itself serve the document or shall arrange to have it served by an appropriate agency, either –

a) by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory, or

b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed.

Subject to sub-paragraph *(b)* of the first paragraph of this Article, the document may always be served by delivery to an addressee who accepts it voluntarily.

If the document is to be served under the first paragraph above, the Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed.

That part of the request, in the form attached to the present Convention, which contains a summary of the document to be served, shall be served with the document.

Article 6

The Central Authority of the State addressed or any authority which it may have designated for that purpose, shall complete a certificate in the form of the model annexed to the present Convention.

The certificate shall state that the document has been served and shall include the method, the place and the date of service and the person to whom the document was delivered. If the document has not been served, the certificate shall set out the reasons which have prevented service.

The applicant may require that a certificate not completed by a Central Authority or by a judicial authority shall be countersigned by one of these authorities.

The certificate shall be forwarded directly to the applicant.

Article 7

The standard terms in the model annexed to the present Convention shall in all cases be written either in French or in English. They may also be written in the official language, or in one of the official languages, of the State in which the documents originate.

The corresponding blanks shall be completed either in the language of the State addressed or in French or in English.

Article 8

Each Contracting State shall be free to effect service of judicial documents upon persons abroad, without application of any compulsion, directly through its diplomatic or consular agents.

Any State may declare that it is opposed to such service within its territory, unless the document is to be served upon a national of the State in which the documents originate.

Article 9

Each Contracting State shall be free, in addition, to use consular channels to forward documents, for the purpose of service, to those authorities of another Contracting State which are designated by the latter for this purpose.

Each Contracting State may, if exceptional circumstances so require, use diplomatic channels for the same purpose.

Article 10

Provided the State of destination does not object, the present Convention shall not interfere with –

a) the freedom to send judicial documents, by postal channels, directly to persons abroad,

b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,

c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

Article 11

The present Convention shall not prevent two or more Contracting States from agreeing to permit, for the purpose of service of judicial documents, channels of transmission other than those provided for in the preceding Articles and, in particular, direct communication between their respective authorities.

Article 12

The service of judicial documents coming from a Contracting State shall not give rise to any payment or reimbursement of taxes or costs for the services rendered by the State addressed.

The applicant shall pay or reimburse the costs occasioned by —

a) the employment of a judicial officer or of a person competent under the law of the State of destination,

b) the use of a particular method of service.

Article 13

Where a request for service complies with the terms of the present Convention, the State addressed may refuse to comply therewith only if it deems that compliance would infringe its sovereignty or security.

It may not refuse to comply solely on the ground that, under its internal law, it claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not permit the action upon which the application is based.

The Central Authority shall, in case of refusal, promptly inform the applicant and state the reasons for the refusal.

Article 14

Difficulties which may arise in connection with the transmission of judicial documents for service shall be settled through diplomatic channels.

Article 15

Where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and the defendant has not appeared, judgment shall not be given until it is established that –

a) the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, or

b) the document was actually delivered to the defendant or to his residence by another method provided for by this Convention,

and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.

Each Contracting State shall be free to declare that the judge, notwithstanding the provisions of the first paragraph of this Article, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled –

a) the document was transmitted by one of the methods provided for in this Convention,

b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document,

c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.

Notwithstanding the provisions of the preceding paragraphs the judge may order, in case of urgency, any provisional or protective measures.

Article 16

When a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and a judgment has been entered against a defendant who has not appeared, the judge shall have the power to relieve the defendant from the effects of the expiration of the time for appeal from the judgment if the following conditions are fulfilled –

a) the defendant, without any fault on his part, did not have knowledge of the document in sufficient time to defend, or knowledge of the judgment in sufficient time to appeal, and

b) the defendant has disclosed a *prima facie* defence to the action on the merits.

An application for relief may be filed only within a reasonable time after the defendant has knowledge of the judgment.

Each Contracting State may declare that the application will not be entertained if it is filed after the expiration of a time to be stated in the declaration, but which shall in no case be less than one year following the date of the judgment.

This Article shall not apply to judgments concerning status or capacity of persons.

CHAPTER II – EXTRAJUDICIAL DOCUMENTS

Article 17

Extrajudicial documents emanating from authorities and judicial officers of a Contracting State may be transmitted for the purpose of service in another Contracting State by the methods and under the provisions of the present Convention.

CHAPTER III – GENERAL CLAUSES

Article 18

Each Contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence.

The applicant shall, however, in all cases, have the right to address a request directly to the Central Authority.

Federal States shall be free to designate more than one Central Authority.

Article 19

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.

Article 20

The present Convention shall not prevent an agreement between any two or more Contracting States to dispense with –

a) the necessity for duplicate copies of transmitted documents as required by the second paragraph of Article 3,

b) the language requirements of the third paragraph of Article 5 and Article 7,

c) the provisions of the fourth paragraph of Article 5,

d) the provisions of the second paragraph of Article 12.

Article 21

Each Contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the following –

a) the designation of authorities, pursuant to Articles 2 and 18,

b) the designation of the authority competent to complete the certificate pursuant to Article 6,

c) the designation of the authority competent to receive documents transmitted by consular channels, pursuant to Article 9.

Each Contracting State shall similarly inform the Ministry, where appropriate, of –

a) opposition to the use of methods of transmission pursuant to Articles 8 and 10,

b) declarations pursuant to the second paragraph of Article 15 and the third paragraph of Article 16,

c) all modifications of the above designations, oppositions and declarations.

Article 22

Where Parties to the present Convention are also Parties to one or both of the Conventions on civil procedure signed at The Hague on 17th July 1905, and on 1st March 1954, this Convention shall replace as between them Articles 1 to 7 of the earlier Conventions.

Article 23

The present Convention shall not affect the application of Article 23 of the Convention on civil procedure signed at The Hague on 17th July 1905, or of Article 24 of the Convention on civil procedure signed at The Hague on 1st March 1954.

These Articles shall, however, apply only if methods of communication, identical to those provided for in these Conventions, are used.

Article 24

Supplementary agreements between Parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention, unless the Parties have otherwise agreed.

Article 25

Without prejudice to the provisions of Articles 22 and 24, the present Convention shall not derogate from Conventions containing provisions on the matters governed by this Convention to which the Contracting States are, or shall become, Parties.

Article 26

The present Convention shall be open for signature by the States represented at the Tenth Session of the Hague Conference on Private International Law.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 27

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 26.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

Article 28

Any State not represented at the Tenth Session of the Hague Conference on Private International Law may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 27. The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for such a State in the absence of any objection from a State, which has ratified the Convention before such deposit, notified to the Ministry of Foreign Affairs of the Netherlands within a period of six months after the date on which the said Ministry has notified it of such accession.

In the absence of any such objection, the Convention shall enter into force for the acceding State on the first day of the month following the expiration of the last of the periods referred to in the preceding paragraph.

Article 29

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification referred to in the preceding paragraph.

Article 30

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 27, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 31

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 26, and to the States which have acceded in accordance with Article 28, of the following –

a) the signatures and ratifications referred to in Article 26;

b) the date on which the present Convention enters into force in accordance with the first paragraph of Article 27;

c) the accessions referred to in Article 28 and the dates on which they take effect;

d) the extensions referred to in Article 29 and the dates on which they take effect;

e) the designations, oppositions and declarations referred to in Article 21;

f) the denunciations referred to in the third paragraph of Article 30.

In witness whereof the undersigned, being duly authorised thereto, have signed the present Convention.

Done at The Hague, on the 15th day of November, 1965, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States represented at the Tenth Session of the Hague Conference on Private International Law.

B

DOMSTOL
ADMINISTRASJONEN

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 2006 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. 56 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 Reply/Cross-Response Brief of Appellants Esther Kim and the Estate of Ho Im Bae in Court of Appeals Cause No. 70892-9-I to the following parties:

David J. Corey
Justin P. Walsh
Floyd, Pflueger & Ringer P.S.
200 West Thomas Street, Suite 500
Seattle, WA 98119

John C. Vernsel III
Eric T. Duncan
Lawrence & Versnel PLLC
701 5th Avenue
Seattle, WA 98104
Phone: (206) 624-0200

William F. Knowles
Robert L. Bowman
Cozen O'Connor
1201 3rd Avenue, Suite 5200
Seattle, WA 98101
Phone: (206) 340-1000

Original and a copy delivered by ABC messenger:
Court of Appeals, Division I
Clerk's Office
600 University Street
Seattle, WA 98101-1176

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: May 23rd, 2014, at Seattle, Washington.

Roya Kolahi, Legal Assistant
Talmadge/Fitzpatrick