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No. 70892-9-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION I

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

Plaintiff/Appellant,

v.

ALPHA NURSING & SERVICES, INC., and CHRISTINE THOMAS,

Defendants/Respondents/Cross-Appellants.

BRIEF OF RESPONDENTS/CROSS-APPELLANTS ALPHA NURSING & SERVICES, INC. AND CHRISTINE THOMAS, R.N.

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I. INTRODUCTION

This case involves the tragic death of Appellant's mother, Ho Im Bae, an 84-year-old victim of a homicide at the hands of her caregiver while she was a resident at the Lakeside Adult Family Home ("Lakeside"). The caregiver has since fled the country and evaded criminal prosecution, while the caregiver's employer and the owner of the home faced and settled a civil lawsuit brought by the Appellants, as well as a criminal and DSHS investigation into her actions.

Respondent Alpha Nursing & Services ("Alpha") provides in-home nursing care to patients throughout the Pacific Northwest. Alpha had two clients residing at Lakeside, and had two nurses, Marian Binondo and Respondent/Cross-Appellant Christine Thomas, who were providing care to those clients in the three days leading up to Ms. Bae's death. Ms. Bae was not a client of Alpha, and Alpha's nurses were not monitoring or assisting in any way with her care.

As a matter of law, a nurse does not have an obligation to contact law enforcement when she observes potential neglect of an elder, pursuant to the terms of Washington's Vulnerable Adult Protection Act. As a matter of fact, Nurse Binondo did not observe any abuse or neglect of Ms. Bae by her caretaker in the three days before Ms. Bae's death. Appellant produced no evidence to the contrary. On the day of Ms. Bae's death,

Nurse Thomas observed what she believed was possible neglect of Ms. Bae, and immediately called the DSHS hotline to report same, pursuant to her duty as a mandatory reporter under Washington's Vulnerable Adult Protection Act. She met her reporting requirements, under the statute.

As to Nurse Thomas' cross-appeal, Appellants never obtained personal jurisdiction over Respondent/Cross-Appellant Thomas, a citizen of Norway who resides in her home nation, before the statute of limitations ran. On May 1, 2013, the trial court improperly denied Nurse Thomas' Motion to Dismiss on this basis, even though Nurse Thomas was never served in compliance with the Hague Convention. Moreover, the trial court (Judge Okrent) validated a "Waiver of Affirmative Defenses" that Appellants forced Nurse Thomas to sign, via ex parte contact with Nurse Thomas at her home in Norway, which purported to waive her affirmative defenses. Notably, fellow Snohomish County Superior Court Judge Ellis certified for immediate appellate review pursuant to RAP 2.3(b)(4) Judge Okrent's decision on Thomas's Motion to Dismiss .

II. COUNTER ASSIGNMENTS OF ERROR

A. Appellant's Assignment Of Error

1. The trial court properly granted Respondents' motion for summary judgment. July 7, 2013 Order, at CP 57-59.

B. Respondent/Cross-Appellant's Cross-Assignment Of Error

1. The trial court erred in denying Respondent/Cross-Appellant Christine Thomas's Motion to Dismiss. May 1, 2012 Order at CP 674-675.

2. The trial court erred in enforcing a waiver of affirmative defenses executed by Respondent/Cross-Appellant Thomas, when said waiver was extracted from Respondent/Cross-Appellant Thomas via ex parte communication. May 1, 2012 Order at CP 674-675.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Issues Pertaining to Appellant's Assignment Of Error

1. Was summary judgment dismissal of Appellant's claims against Respondents appropriate when Appellants failed to present admissible evidence to create a genuine issue of material fact on the essential elements of their claim, including duty, breach of duty and causation.

B. Issues Pertaining to Respondent/Cross-Appellant's Cross-Assignment Of Error

1. May an Appellant seek and obtain a waiver of affirmative defenses via ex parte contact with a Respondent, who is at the time represented by counsel?

2. The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Hague

Convention") governs service of process on a foreign citizen in a foreign country in a civil matter, as to signatory countries to the Hague Convention. Can a Norwegian citizen be served in Norway under Washington's Long Arm Statute, or must the Norwegian citizen be served in accordance with the provisions of the Hague Convention in order for the trial court to have jurisdiction over her person?

3. The statute of limitations for Appellant's claims against Respondents is three years. Is the statute of limitations tolled in perpetuity as to a Respondent when another Co-Respondent was timely served?

IV. COUNTER STATEMENT OF THE CASE

A. Facts Relevant to Appellant's Assignment Of Error

The following facts are relevant to appellant's assignment of error and are undisputed.

Respondent Alpha Nursing and Services, Inc. is a home health agency that is headquartered in Everett, Washington. Alpha employs registered nurses who in turn provide healthcare services to Alpha's clients wherever they reside, whether in a single family home or a healthcare facility. CP 885-888. As with most nursing agencies, almost all Alpha nurses assist in providing care to each patient wherever the patient resides (a private home, a group home, nursing facility, etc.), depending

upon which nurse is "on-duty" on the date and time that the client requests care. Id.

Lakeside Family Adult Home ("Lakeside") is a licensed facility that provides residential care to its in-patient, elderly residents. CP 849-853. It is owned and operated by defendant Gretchen Dhaliwal, a Registered Nurse. Id. Ho Im Bae was admitted to Lakeside on January 23, 2009, and was at that time suffering from Parkinson's, arthritis, dementia and spinal stenosis, and was under the care of Bong Sup Kim, MD. Dr. Kim saw her regularly from 1999 to February 2008, and again in March 2009 while she was a resident of Lakeside, including March 5, 2009 and again on March 26, 2009. CP 835. During both visits, Dr. Kim examined Ms. Bae, and noted that Ms. Bae had lost weight since entering Lakeside. CP 837. Dr. Kim also noted that Ms. Bae was failing to thrive at Lakeside, and was suffering from cognitive spells and dementia. Id.

1. Ms. Bae Was Not a Patient of Alpha.

Alpha had two clients residing in the Lakeside Adult Family Home. CP 885-888. Ms. Bae was not a client of Alpha, and Alpha was in no way affiliated with Lakeside. CP 885-888. Neither of Alpha's clients resided in the same room with Ms. Bae, who was primarily bed-ridden. No Alpha nurse maintained an office at Lakeside, nor did Alpha store any equipment or records at the facility. Alpha's nurses would simply arrive

at the facility when summoned by their clients, or when scheduled by Alpha to provide routine care to the client, then provide the requisite treatment to that client, ensuring that the patient's needs were addressed, and then depart. CP 885-888.

Appellant's claims against Alpha allege that two Alpha Nurses, Ms. Binondo and Ms. Thomas, observed, yet failed to report abuse and neglect of Ms. Bae while they were at Lakeside. However, the trial court properly dismissed Appellant's claims because there was no admissible evidence in the record to establish those claims.

2. Alpha Nurse Marian Binondo Did Not Witness Neglect or Abuse of Ms. Bae, and Had No Knowledge Regarding the Improper Administration of Morphine to Ms. Bae.

In late March, 2009, Nurse Binondo,[1] was visiting an Alpha patient, Kerri Salzbrun, at Lakeside. CP 756-764, ¶ 4. While meeting with Ms. Salzbrun in the Lakeside kitchen, Nurse Binondo heard a "thud" from an adjacent room. Id. No one aside from Ms. Bae was in the room when the "thud" occurred. Ms. Salzbrun followed the sound, exited the kitchen and walked to an adjacent room. Id. Nurse Binondo followed Ms. Salzbrun, entered the room, and saw a small, elderly Asian woman (later identified as Ms. Bae), being helped back into bed by Fannie Irawati, a caretaker in the home. Id., ¶ 5. Ms. Bae did not appear to Nurse Binondo

[1] Nurse Binondo is not a named party to this action.

to be injured. Id., ¶ 6. Ms. Bae was conscious and ambulatory, and did not have visible bruising or marks. Id.

Nurse Binondo told Ms. Irawati that Ms. Bae would need to be assessed by her nurse or medical provider as a result of the incident. Id, ¶ 5. Ms. Irawati told Nurse Binondo that she was going to call Gretchen Dhaliwal, RN, Ms. Bae's nurse, to report the incident. Id, ¶ 6. Nurse Binondo observed Ms. Irawati on the phone as Nurse Binondo departed the facility. Id. Nurse Binondo concluded, based on Ms. Irawati's statement and her observations, that Ms. Dhaliwal would assess Ms. Bae's condition that day. CP 756-764. Records from Lakeside Adult Family Home indicate that Nurse Dhaliwal did in fact assess Ms. Bae's condition shortly after the incident. CP 844.

At no time did Nurse Binondo have any reason to believe that Ms. Bae was receiving non-prescribed morphine from her caregiver. Nurse Binondo was not familiar with Ms. Bae's course of treatment or diagnoses, because she was not an Alpha patient. Moreover, Ms. Salzbrun neither notified Nurse Binondo that she believed Ms. Bae was receiving morphine, nor that she believed it was not prescribed to Ms. Bae.

3. Alpha Nurse Christine Thomas Observed Possible Neglect of Ms. Bae and Met Her Reporting Duties.

On March 30, 2009, Nurse Thomas conducted a scheduled home health care visit with Ms. Salzbrun at Lakeside from approximately 9 AM to 10 AM. CP 765-772, ¶ 5. During the visit, Ms. Salzbrun told Nurse Thomas that she believed one of the Lakeside caregivers was sedating Ms. Bae with morphine, and Ms. Bae would sleep all day without eating. CP 765-772. Shortly thereafter (during that same visit) Nurse Thomas observed a small Korean female resident (later identified as Ms. Bae) being taken to the bathroom by Ms. Irawati. Id, ¶ 6.) Ms. Bae appeared to be very drowsy, and was unable to walk to the bathroom on her own. Ms. Irawati held Ms. Bae under the arms, sliding/dragging her along backwards towards the bathroom, while Ms. Bae's heels dragged on the floor. CP 765-772.

Within minutes of leaving Lakeside on March 30, 2009, Nurse Thomas called the DSHS Complaint Resolution Unit, at 1-800-562-6078, to report what she had observed at Lakeside, and to report the concerns that Ms. Salzbrun had expressed about Ms. Bae. CP 765-772, ¶ 7. After first receiving a busy signal, Nurse Thomas called back and was instructed to leave a voice-message for the Complaint Resolution Unit. CP 765-772, ¶ 7-9. The message was left by Nurse Thomas at 11:30 AM, and was

transcribed by DSHS in an Intake Information/Allegation form by DSHS Complaint Resolution Unit Worker "FIS." CP 765-772. Nurse Thomas specifically relayed Ms. Salzbrun's concerns regarding the administration of morphine to Ms. Bae, and her personal observations that Ms. Bae appeared medicated. CP 765-772.

As the Complaint Intake and Routing Form states, obtained from DSHS via a public records request, DSHS Complaint Resolution Unit Worker "FIS" immediately assigned a low priority to the complaint, and assigned the complaint for an initial investigation within 10 working days. CP 765-772. It is not believed that DSHS investigated Lakeside before Ms. Bae passed away later that day, March 30, 2009.

4. To Aid in DSHS's Investigation of Ms. Bae's Death, Nurse Binondo Reported her Observations, After Learning of Nurse Thomas's Observations.

On April 1, 2009, both Nurse Binondo and Nurse Thomas were at Alpha's Office in Everett, Washington. CP 756-764, ¶ 7; CP 765-772, ¶ 10. Nurse Thomas told Nurse Binondo about her observations of Ms. Bae at Lakeside on March 30, 2009. CP 756-764, ¶ 7; CP 765-772, ¶ 10. Nurse Binondo then approached her supervisor, Susan Gange, RN, to discuss the "thud" incident that had occurred at Lakeside in late March, 2009. CP 756-764,¶ 8; CP 885-888, ¶ 7. Nurse Binondo thought that Ms. Bae may have been the woman who was on the bedroom floor. CP 756-

764,¶ 8; CP 885-888,¶ 7. Both Nurse Gange and Nurse Binondo, given their training as medical professionals, did not believe that what Nurse Binondo observed, in isolation, warranted a report to DSHS. CP 756-764,¶ 8; CP 885-888,¶ 8. Again, Ms. Bae did not appear injured to Nurse Binondo, and Nurse Binondo believed that Ms. Bae was assessed by Nurse Dhaliwal shortly after the incident. CP 756-764, ¶ 6.

In light of what Nurse Thomas had observed on March 30, 2009, Nurse Gange recommended to Nurse Binondo that she contact DSHS to report her observations from late March, 2009. CP 756-764, ¶ 8; CP 885-888, ¶ 8. Nurse Binondo placed a call to DSHS, and left a voice-message describing in detail her observations from late March, 2009. CP 756-764, ¶ 9.

5. Unbeknownst to Alpha and its Employees, DSHS Failed to Properly License and Monitor Lakeside Adult Family Home During Ms. Bae's Residency.

Ms. Bae was found, unresponsive in her bed, by Ms. Salzbrun on March 30, 2009. CP 765-772. The Snohomish County Police investigated the death, and an autopsy of Ms. Bae's body was performed. CP 855-862. The Snohomish County Coroner ruled Ms. Bae's death a homicide, and identified it as the result of acute morphine intoxication. Id. Police focused the investigation on Ms. Bae's caregiver, Fanny Irawati, and Lakeside's owner/operator, Gretchen Dahliwal, R.N. Upon information

and belief, Ms. Irawati fled Washington State and has not been criminally charged as a result of Ms. Bae's death.

DSHS did not investigate Nurse Thomas's complaint regarding the overmedicating of Ms. Bae within 24 hours, as is required under RCW 74.34.063. Instead, as a result of Ms. Bae's death, DSHS finally inspected Lakeside on the afternoon of April 1, 2009, and again on April 17, 2009, and May 6, 2009. On May 20, 2009, DSHS issued a "Stop Placement Order Prohibition Admissions and Imposition of Conditions on License to Lakeside." CP 867-873. The Order cites violations by Ms. Dhaliwal of more than eight rules governing adult family homes in the state of Washington, including but not limited to a failure to ensure the home had a safe medication system. Id.

6. Appellant Filed Suit Against Lakeside and Dhaliwa; and then Alpha and Nurse Thomas.

In late 2011, Appellant (the children of Ms. Bae) filed a civil action against Lakeside and Nurse Dhaliwal. CP 958-67. Months later, in March 2012, Appellant added Alpha and Nurse Thomas to the lawsuit, alleging that Alpha's employees had knowledge relevant to Ms. Bae's death, and failed to report same, pursuant to their reporting duties under Washington's Vulnerable Adult Protection Act. CP 924-933. However, after more than two years of litigation and repeated attempts by

Respondents to discover the factual basis for Appellant's assertions, Appellant failed to produce evidence showing that any Alpha nurse observed abuse and/or neglect of Ms. Bae leading up to her death, and, where warranted, failed to report those observations to DSHS.

In March 2013, Alpha and Nurse Thomas moved for summary judgment, supported by Declarations from Nurse Binondo, Nurse Thomas, and Nurse Gange, and relevant records from DSHS. CP 889-908. The motion was continued several months at the request of Appellants. While the motion was pending, Appellants deposed Nurse Thomas in Oslo, Norway. CP 166. The undisputed evidence established that Nurse Binondo did not observe neglect and had no knowledge that Ms. Bae was allegedly receiving non-prescribed morphine, and as a result, was under no duty to report Ms. Bae being on the floor to DSHS or law enforcement. Similarly, the record established that Nurse Thomas immediately reported her observations to DSHS, and met her reporting duties.

More importantly, Alpha and Nurse Thomas established that all admissible evidence showed that Alpha (through Binondo or Thomas) was not a proximate cause of Ms. Bae's homicide, and DSHS's failure to act on the timely report of Nurse Thomas was a superseding cause of Ms. Bae's death.

7. Appellant Produced No Admissible Evidence to Establish Proximate Cause In Response to Alpha and Thomas' Motion for Summary Judgment.

In response to Alpha and Thomas' Motion for Summary Judgment, Appellant contended that a Declaration of Kerri Salzbrun (CP122-124), and Declarations by two "experts" (CP 60-64; CP 106-121) created an issue of fact as to their allegations. However, these Declarations did not assist the Appellants in meeting their burden. Ms. Salzbrun's declaration contained inadmissible hearsay, unsupported conclusory statements, supposition, and opinion. More importantly, Ms. Salzbrun did not provide any fact based testimony relevant to Appellant's allegations. Although Appellant's response to the motion for summary judgment claimed otherwise, nowhere in Ms. Salzbrun's Declaration did she state that she told Nurse Binondo that she believed Ms. Bae was receiving non-prescribed morphine. CP 124, ¶6. Similarly, Ms. Salzbrun never testified that she observed immediate bruising on Ms. Bae after she was found on her bedroom floor; rather she said bruising appeared days later. Id.

Equally fatal to Appellant's claims were the two "expert" declarations submitted in an attempt to establish the requisite elements of their claim. A review of the Declaration of Mark Lachs, MD, a professor of medicine in upstate New York, revealed that his "opinions" were inadmissible because he was not qualified and he relied on "facts" not in

the record. CP 106-121. By one example, despite no evidence in the record to support this asserted fact, Dr. Lach claimed the following as to Ms. Bae:

> During the last three days of her life (March 28, 29, and 30, 2009), she was observed being dragged both into her bed and across the kitchen in an unconscious or minimally conscious state.

CP 107, ¶5.

Neither Ms. Salzbrun nor Nurse Binondo testified that Ms. Bae lost consciousness after she was found on the floor, and, similarly, both Ms. Salzbrun and Nurse Thomas testified that Ms. Bae was being taken to the bathroom (not across the kitchen) for daily bathroom care, and neither woman testified that that Ms. Bae was "unconscious" or "minimally conscious." CP 122-124; CP 765-772; CP 654-673.

Dr. Lachs was not qualified to testify as to the standard of care for Washington state and Snohomish County based in-home nursing professionals, and emergency medical technicians. He further offered conclusory statements unsupported by facts, and improper opinions regarding whether Alpha or its employees had a legal duty to contact law enforcement.

Similarly, the Declaration of Elizabeth Henneke was deficient and failed to establish a genuine issue of material fact. CP 60-64. Like Dr. Lachs, Ms. Henneke based her conclusory statements on non-existent

facts and pure speculation. Moreover, Ms. Henneke's conclusions where meaningless, where even DSHS did not believe immediate action was warranted in response to Nurse Thomas' report.

Alpha and Nurse Thomas asserted multiple objections to the proffered evidence, and those are incorporated by this reference. CP 67-87.

On July 16, 2013, after hearing oral argument, Judge Appel granted Alpha and Thomas' Motion for Summary Judgment of Dismissal. CP 12-14.

B. Facts Relevant to Respondent/Cross-Appellant Thomas' Cross-Assignment Of Error

The following facts are relevant to Thomas' cross-appeal, and are undisputed.

1. Thomas, a Norwegian Citizen Living in Norway, is an Improper Defendant to this Action.

Christine Thomas is a Norwegian citizen who lives in Nannestad, Norway. On March 20, 2012, Appellant filed an Amended Complaint and asserted claims for the first time against Alpha and Nurse Thomas. CP 924-933. Alpha was served with process on March 26, 2012. Nurse Thomas was never properly served before summary judgment. The statute of limitations as to appellant's claims against Alpha and Nurse Thomas expired no later than March 30, 2012.

On April 4, 2012, defense counsel for Alpha and Thomas filed and served their Notice of Appearance. CP 1281-1283. The appearance was entered expressly "without waiving the questions of: (1) Lack of jurisdiction over subject matter; (2) Lack of jurisdiction over person; ...(4) Insufficiency of service of process; [and] (5) Insufficiency of process..."

On April 20, 2012, Alpha filed an Answer to appellant's Amended Complaint, on behalf of itself and Nurse Thomas. CP 909-915. The Answer asserted affirmative defenses, including:

> 1. Failure of, and Lack of Service of Process on Thomas
>
> Plaintiffs have failed to timely serve Thomas with a summons and/or complaint.

On April 30, 2012, Appellant sent Requests for Admission to Alpha. CP 1164-1168. The Requests for Admission were not addressed to Nurse Thomas. Id. Alpha responded to the requests on May 3, 2012. Id. In those responses, Alpha explicitly stated as follows:

> These answers are made on behalf of defendant Alpha Nursing and Services Incorporated only. It is the defendant's position that Nurse Christine Thomas has not been served with a summons and/or a complaint, that service has been improper and non-existent.

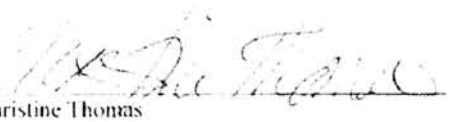
Four and one-half months later, on September 25, 2012, appellant served upon Alpha broad discovery requests that requested the current contact information for all former and current Alpha employees who ever treated an Alpha patient who resided at Lakeside. CP 1170-1174. After

counsel reached an agreement regarding Alpha's objections to this overbroad request, Alpha provided the current contact information for all of Alpha's former employees, including Thomas, to appellant on December 11, 2012. CP 1192-1195. As to Thomas, Appellant was told she resided at: Gulbekken 3c, 2030 Nannestad, Norway. CP 1101-1102. Two and one-half months later, on February 27, 2013, appellant's counsel sent an email to Alpha and Thomas' counsel and again, asked for Thomas' contact information, so that they could serve her with a subpoena. Respondent's counsel reminded appellant's counsel that Thomas' contact information had been provided more than two months earlier.

C. Appellant Ignores the *Hague Convention*, and Sends a Private Investigator to Nannestad, Norway to Obtain an Ex Parte Waiver of Thomas' Affirmative Defenses.

In November 2012, appellant was advised that Thomas was a Norwegian citizen, and as such, was entitled to the protection of the Hague Convention on Service Abroad of Judicial and Extra-judicial Documents in Civil or Commercial Matters, including service of process through the Norwegian Ministry. CP 1255-1264. Instead of pursuing service through the Norwegian Ministry, and after waiting another four months, on March 21, 2013, appellant had copies of the First Amended Summons and First Amended Complaint handed to Thomas by a private investigator, Gard Westbye, at her home in Nannestad, Norway. CP 1236-1254.

Mr. Westbye, at the request of appellant's counsel, also presented to Thomas, and demanded she sign, a pleading titled "Acceptance of Service of Summons and Complaint." CP 1236-1254. Ms. Thomas signed the waiver. The following is an excerpt from that document, drafted by appellant's counsel:

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

CP 1110-1111. Thomas was not given a copy of this document (unsigned or signed). Thomas' counsel first received a copy of the signed document from appellant's counsel via email in the afternoon of March 21, 2013. CP 1236-1254. Thomas' counsel immediately objected to the ex-parte contact plaintiffs' agent had with Thomas, and the waiver. CP 798-807. Appellants' counsel refused to withdraw the attempted service of process, acceptance and waiver. CP 798-807. Appellant counsel James Gooding then filed an affidavit pursuant to R.C.W. 4.28.185, Washington's Long

Arm Statute, stating that he caused the process server to serve Nurse Thomas with documents, including the "Acceptance of Service." CP 1246-1254. The Court should take note of the process server's "Affidavit of Service" in which the affiant states in his own handwriting: "The documents was served at Christine Thomas living residence Gullekken 3c, 2030 Nannested. It was no sign on door/doorbell and the door was opened by daughter. The documents was served and acceptance signed." CP 1250-1252.

D. Thomas Filed a Motion to Dismiss.

On April 2, 2013, Nurse Thomas moved to dismiss the claims against her on the basis that the statute of limitations had expired on March 21, 2012, and the Court did not yet have personal jurisdiction over her because she had not been served in accordance with the terms of the Hague Convention. CP 798-807. Thomas also asked that the Court strike the ex parte wavier of affirmative defenses. Id.

Appellant successfully opposed the motion by relying on Sidis v. Brodie/Dohrmann, Inc., 117 Wn.2d 325, 815 P.2d 781 (1991) to argue that the statute of limitations against Thomas was tolled and continued to be tolled into the future until she was properly served because Alpha had been served within the limitations period. CP 743-755. Appellant also argued that Thomas was adequately served on March 21, 2013 by the

private investigator and that Thomas had waived all affirmative defenses. Id. Appellant additionally argued they had "researched" how to serve Nurse Thomas from the date they learned she lived in Norway (December 11, 2012) to the date of "personal service" (March 21, 2013). Id. Yet, in response to the Motion, Appellants' counsel attached to his declaration his research of the Hague Convention. That research is dated April 4, 2013, two days after Nurse Thomas filed her CR 12 Motion to Dismiss. CP 1066-1067.

At the hearing on Thomas' Motion to Dismiss, Snohomish County Superior Court Judge Okrent denied Thomas' motion (CP 674-675), and issued an oral ruling that:

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

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

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

Thomas timely filed a Notice for Discretionary Review, seeking review of the Order Denying her Motion to Dismiss. CP 639-650. Over appellant's opposition, on June 18, 2013 Snohomish County Superior Court Judge Ellis entered an Amended Order Certifying Judge Okrent's

Order for immediate appeal, identifying the issues for which the trial court would benefit from appellate guidance as follows:

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

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

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

CP 532-534.

V. SUMMARY OF ARGUMENT

The court did not err when it granted summary judgment because Appellants failed to present admissible evidence of each element of their claims against Alpha and Nurse Thomas. The court did err when it refused to grant Nurse Thomas' Motion to Dismiss, found that service of process was proper and that Nurse Thomas had waived her affirmative defenses via a waiver extracted ex parte by Appellants' counsel's process server. Nurse Thomas is entitled to recovery of her attorneys fees pursuant to Washington's Long Arm Statute and as a sanction against Appellants for their violations of the Rules of Professional Conduct.

VI. ARGUMENT ON ISSUES ON APPEAL

A. The Summary Judgment Standard.

A motion for summary judgment is properly granted where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." CR 56(c); Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545, 552, 192 P.3d 886 (2008); see also RAP 9.12. To avoid summary judgment, the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue as to a material fact. Ranger Ins. Co., 164 Wn.2d at 552. Speculation or argumentative assertions that unresolved factual issues remain cannot defeat summary judgment. See Id.; see also Unifund CCR Partners v. Sunde, 163 Wn. App. 473, 483 n.1, 260 P.3d 915 (2011). "A fact is an event, an occurrence, or something that exists in reality. . . . It is what took place, an act, an incident, a reality as distinguished from supposition or opinion." Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 359, 753 P.2d 517 (1988) (emphasis added). The trial court properly adhered to these principles when it granted Alpha and Nurse Thomas' motion for summary judgment.

B. Appellant Failed to Present Admissible Evidence that Alpha or Nurse Thomas was a Proximate Cause of Ms. Bae's Death.

For legal responsibility to attach to the conduct alleged, the claim of breach of duty must be a proximate cause of the resulting injury. Pratt

v. Thomas, 80 Wn.2d 117, 119, 491 P.2d 1285 (1971). A finding of proximate cause is premised upon both proof of cause in fact as well as a legal determination that liability should exist. Bernethy v. Walt Failor's, Inc., 97 Wn.2d 929, 935, 653 P.2d 280 (1982); see also King v. Seattle, 84 Wn.2d 239, 248-49, 525 P.2d 228 (1974). Cause in fact refers to the "but for" consequences of an act; the physical connection between an act and an injury. Hartley v. State, 103 Wn.2d 768, 778, 698 P.2d 77 (1985). Stated differently, establishing cause in fact involves a determination of what actually occurred. Schooley v. Pinch's Deli Market, 134 Wn.2d 468, 478, 951 P.2d 749 (1998). When the facts are undisputed and the inferences therefrom are plain and incapable of reasonable doubt or difference of opinion, the question of proximate cause is a question of law for the court. Bernethy, 97 Wn.2d at 935 (citing Mathers v. Stephens, 22 Wn.2d 364, 370, 156 P.2d 227 (1945)).

Appellant did not assert that any Alpha nurse ever harmed Ms. Bae, or even contributed directly to her death. Instead, Appellant speculated that an Alpha nurse could have somehow prevented Ms. Bae's death by homicide, and that their failure to do so constitutes compensable negligence. As such, Appellant bore the burden of proving that the actions of Nurse Binondo's, and the timing of Nurse Thomas' call to DSHS, was a cause in fact and legal cause of Ms. Bae's death. Appellant failed to

present any admissible evidence of proximate cause, and as a result, the trial court properly dismissed her claims. A cause is "proximate" only if it is *both* a cause in fact and a legal cause. Hartley v. State,, 103 Wn.2d 768, 777-81, 698 P.2d 77 (1985). Therefore, if the event complained of would have occurred regardless of the defendant's conduct, the conduct is not the proximate cause of injury. Where the facts do not admit of reasonable differences of opinion, proximate cause is a question of law to be decided by the court. Pratt v. Thomas, 80 Wn.2d 117, 119, 491 P.2d 1285 (1971).

Appellant failed to present admissible evidence that, had Nurse Binondo called 911 after finding Ms. Bae on the floor days before her death, Ms. Bae's death could have been prevented days later. Nurse Binondo knew nothing about the morphine that Ms. Bae was allegedly receiving, nor did she see any indication Ms. Bae was pushed from her bed, or showed any signs of abuse. She could not have reported what she did not know to either law enforcement or DSHS. She understood that Ms. Bae's nurse, Nurse Dahliwal, who was knowledgeable with Ms. Bae's diagnoses and course of treatment, had been summoned to provide Ms. Bae with any necessary treatment after her incident. Ms. Bae was ambulatory and conscious when Nurse Binondo left the home, and it is unclear what, if anything, the police would have done in response to a call reporting same.

Similarly, what DSHS would have done had Nurse Binondo called immediately after leaving the home on March 28 or 29 is clear. When Nurse Thomas called DSHS and reported her observations (including that Ms. Bae appeared sedated and may have been receiving non-prescribed morphine), DSHS assigned a low priority to that report, and scheduled an investigator to follow-up within 10 days. These undisputed facts fail to establish proximate cause as a matter of law.

Finally, Appellant's "experts" offered unqualified, speculative, and conclusory opinions based on facts not in the record to combat the testimony of Nurse Binondo and Ms. Salzbrun. In fact, the "experts" cited to "facts" that were not in the record to support these "opinions" because the actual facts do not support the opinions. Ms. Henneke opined that, had Nurse Binondo contacted 911 and reported that she "observed that Ms. Bae had fallen onto the floor and hit her head, resulting in a loss of consciousness," and that Ms. Bae had been administered non-prescribed morphine, they would have dispatched an EMT and the police who could have prevented Ms. Bae's death. But this argument fails because there are no facts in the record to establish that anyone, including Nurse Binondo, observed Ms. Bae fall, that Ms. Bae hit her head and suffered a loss of conscious, much less that Nurse Binondo knew and could report to law

enforcement that Ms. Bae was receiving non-prescribed morphine. Ms. Henneke's opinions were based on fiction, not fact.

Dr. Lach reached a similar conclusion, unsupported by the record and outside the scope of his qualifications as a medical professor in upstate New York. Dr. Lach's opinions, like Ms. Henneke, are founded on facts not in the record. Dr. Lach assumes that Nurse Binondo was told that Ms. Bae was given morphine (not true); Nurse Thomas observed Ms. Bae being dragged across the kitchen and her bedroom (not true); Ms. Bae was under the influence of morphine when observed by either Nurse Binondo or Nurse Thomas (not true); Snohomish County EMT's, if dispatched to Lakeside, would have been able to determine Ms. Bae was under the influence of morphine (not true); the EMT's, relying on this ability to extract this information from Ms. Bae (who is unconscious and does not speak English), would then administer some undisclosed concoction that each Snohomish County EMT carries; and the mysterious concoction would be able to counter-act the unknown and undisclosed quantity of morphine in Ms. Bae's body such that she would have survived. The trial court properly disregarded the "expert" testimony.

C. Appellant Failed to Offer Any Admissible Evidence to Establish that Either Nurse Binondo or Nurse Thomas Owed and Breached a Duty to Call 911 or Contact Law Enforcement.

Negligence is "conduct which falls below the standard established by law for the protection of others against unreasonable risk." Hunsley v. Giard, 87 Wn.2d 424, 435, 553 P.2d 1096 (1976). The standard of conduct can arise from common law principles or legislative enactment. Hansen v. Friend, 118 Wn.2d 476, 479, 824 P.2d 483 (1992). The applicable standard of care, or duty, is a question of law for the courts." Id. Appellant offered no admissible evidence to establish duty or a breach thereof, as a matter of law.

Washington's Abuse of Vulnerable Adults law, Chapter 74.34 RCW, in relevant part, states:

> When there is reasonable cause to believe that abandonment, abuse, financial exploitation, or neglect of a vulnerable adult has occurred, mandated reporters shall immediately report to the department.

RCW § 74.34.035(1). Appellant offered no evidence that Nurse Binondo observed abuse or neglect of Ms. Bae, nor that Nurse Thomas failed to meet her reporting obligation under the statute when she reported to the department.

1. Nurse Binondo Owed No Duty to Contact DSHS After Finding Ms. Bae on the Floor.

Appellant presented no evidence that Nurse Binondo knew Ms. Bae was receiving non-prescribed morphine, let alone any proof that Ms. Bae was actually administered morphine on or before Nurse Binondo saw Ms. Bae on her bedroom floor. The admissible evidence established, at best, that Ms. Bae was on the floor of her bedroom, alone, on March 28 or 29. The admissible evidence also establishes that Ms. Bae was conscious and ambulatory after the incident (CP 88-100, Exhibit A), and was to be attended to by her nurse, Ms. Dhaliwal, shortly after the fall. CP 654-673, ¶ 6. Appellant offered no evidence that Ms. Bae being on the floor, nor the response thereto constitutes abuse, warranting a report to DSHS under the applicable statute.

2. Nurse Thomas Met Her Reporting Obligation By Contacting DSHS.

Nurse Thomas called the DSHS hotline as she was leaving Lakeside (at 9:55 a.m.), a few minutes after observing Ms. Bae and talking with Ms. Salzbrun. CP 765-772, Exhibit C. The hotline was busy. Id. She then tried the number again, an hour later, and was put through to voicemail. CP 765-772. Nurse Thomas cannot be faulted for the inability of DSHS to (1) maintain sufficient capacity to receive all incoming calls; and (2) maintain staff sufficient to personally answer each call. Nurse

Thomas called the required hotline, and left a specific, detailed message, in accordance with her reporting requirements. Nurse Thomas met her reporting obligation.

3. Neither Nurse Binondo Nor Nurse Thomas Owed A Duty to Call 911 or Law Enforcement.

Appellant responded to Alpha and Thomas' Motion for Summary Judgment by arguing, for the first time, that Nurse Binondo and Nurse Thomas had a statutory obligation to contact 911 and/or law enforcement, and failed to do so. Appellant relied upon RCW 74.34.035(3)(a) and (b), which states:

> (3) When there is reason to suspect that physical assault has occurred or there is reasonable cause to believe that an act has caused fear of imminent harm:
>
> (a) Mandated reporters shall immediately report to the department; and
>
> (b) Mandated reporters shall immediately report to the appropriate law enforcement agency.

Appellant then claimed that, under RCW 9A.36.021, the administration of morphine may constitute an assault. However, Appellant ignored the language of RCW 9A.36.021(1)(d), which sets out the requirements for establishing assault, as "[w]ith intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance."

Appellant lacked any evidence to support her assertion that Nurse Binondo and Nurse Thomas had a duty to call 911 because their observations of Ms. Bae on March 28 or 29, and March 30, respectively, triggered the "physical assault" provision of the Elder Abuse Act. There was no evidence that Nurse Binondo knew Ms. Bae was receiving non-prescribed morphine, let alone any proof that Ms. Bae was actually administered morphine on or before March 28 or 29. Moreover, the undisputed record established that, at the time Nurse Thomas was at the home, she had no knowledge that anyone had given Ms. Bae morphine with the intent to harm Ms. Bae, nor whether Ms. Bae was, in fact, suffering bodily harm as a result of the morphine in her system. And like Nurse Binondo, there was no proof that any morphine had been given to Ms. Bae before Nurse Thomas' visit. Appellant lacked evidence establishing that either Nurse Thomas or Nurse Binondo knew an assault was occurring, assuming arguendo one was occurring. The trial court aptly ignored the "expert" testimony offered by Dr. Lachs and Ms. Henneke on this issue, as neither was qualified to testify as to the legal duty owed by Alpha or Thomas to Ms. Bae. WASH. R. EVID. 704; King County Fire Prot. Dist. No. 16 v. Hous. Auth. of King County, 123 Wn.2d 819, 826, 872 P.2d 516 (1994)) (experts may not offer opinions of law in

the guise of expert testimony); Terrell C. v. State Dept. of Social and Health Services, 120 Wn. App. 20, 84 P.3d 899 (2004) .

VII. ARGUMENT ON ISSUES ON CROSS-APPEAL

A. CR 12(b)(6) Standard.

An Appellate Court reviews a CR 12(b)(6) order de novo, engaging in the same inquiry as the trial court. Cutler v. Phillips Petroleum Co., 124 Wn.2d 749, 881 P.2d 216 (1994); see also Yurtis v. Phipps, 143 Wn. App. 680, 689, 181 P.3d 849 (2008) (decision to grant CR 12(b)(6) motion is question of law).

Under Washington law, a claim is subject to dismissal under CR 12(b)(6) if no set of facts, consistent with the complaint, could exist that would entitle the plaintiff to relief. CR 12(b)(6). A limitations defense may be raised by a CR 12(b)(6) motion to dismiss when the statute's running is apparent on the complaint's face. Eastwood v. Cascade Broad. Co., 106 Wn.2d 466, 473, 722 P.2d 1295 (1986); Hipple v. McFadden, 161 Wn. App. 550, 556-558, 255 P.3d 730 (2011). The litigation of stale claims is unfair to the defending party and undesirable to society as a whole. Young v. Estate of Snell, 134 Wn.2d 267, 279, 948 P.2d 1291 (1997).

Here, the trial court erred when it denied Thomas's Motion to Dismiss, because the Appellant failed to timely and appropriately serve

Thomas in this matter. Additionally, the court committed obvious error in finding enforceable the ex parte waiver of affirmative defenses.

1. Appellant Never Properly Served Thomas, a Norwegian Citizen.

A superior court does not have jurisdiction over a defendant until the plaintiff satisfies the applicable service requirements. CR 4; Painter v. Olney, 37 Wn. App. 424, 427, 680 P.2d 1066, review denied, 102 Wn.2d 1002 (1984). A court cannot adjudicate a claim against a party without personal jurisdiction over that party. Vanderbilt v. Vanderbilt, 354 U.S. 416, 418, 77 S.Ct. 1360 (1957);

Compliance with the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, is mandatory in all cases to which it applies. Brockmeyer v. May, 383 F.3d 798, 801-02 (9th Cir. 2004); Broad v. Mannesmann, 141 Wn.2d 670, 679, 10 P.3d 371 (2000). The 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. Brockmeyer, 383 F.3d at 802; Broad, 141 Wn.2d at 678.

Nurse Thomas is a citizen of Norway. The United States and Norway are both parties to the Hague Convention. Pursuant to Article 2 of the Hague Convention, service of process is to be through a Central

Authority designated by each contracting state to receive documents in conformity with all Articles of the Hague Convention.

Appellant ignored the provisions of the Hague Convention, and instead hired a private investigator to locate Nurse Thomas and attempt personal service via Washington's Long Arm Statute by handing her a copy of the Complaint and Summons at her home in Norway. There is no provision of the Hague Convention or Norwegian law that authorizes Appellants' conduct.

The trial court found that personal delivery of the Summons and Complaint to Nurse Thomas at her home by a private investigator–a practice not permitted by either the Hague Convention or applicable Norwegian law–was sufficient for the purposes of service. The trial court's ruling is not based in law and should be reversed.

2. Appellant Never Timely Served Thomas, a Norwegian Citizen.

The statute of limitations for personal injury actions is three years. RCW 4.16.080(2). Proper, timely service of the summons and complaint is a prerequisite to a court obtaining jurisdiction over a party. Woodruff v. Spence, 76 Wn. App. 207, 209, 883 P.2d 936 (1995). The three-year statute of limitations began to run from the date of Ms. Bae's death, March 30, 2009, and expired on March 30, 2012. Appellant commenced this

action as to Nurse Thomas on March 20, 2012, and, pursuant to the 90-day tolling provisions under RCW 4.16.170, plaintiffs needed to personally serve Nurse Thomas prior to June 20, 2012. They did not do so. In fact, the undisputed record established that Nurse Thomas had not yet been served by the time Alpha and Nurse Thomas' Motion for Summary Judgment was granted on July 16, 2013.

Appellant attempted to circumvent the service requirements in multiple ways. First, Appellant argued that Sidis applied, and permitted them an unlimited amount of time to serve Nurse Thomas because they had timely served Alpha. In Sidis, the Court held that under RCW 4.16.170 service on one defendant tolls the statute of limitations as to all defendants. 117 Wn.2d at 329. The trial court denied Nurse Thomas's Motion to Dismiss on this basis, but by doing so, improperly extended Sidis beyond all possible comprehension.

At the hearing on Nurse Thomas' Motion to Dismiss in May 2013, Appellant successfully argued that Nurse Thomas had been served on March 21, 2013 and, if not, then Nurse Thomas would be served in the next few months. The trial court (Judge Okrent) denied the motion to dismiss even though the Statute of Limitation had run and Nurse Thomas had not been properly served. In fact, Nurse Thomas was not served before the July 16, 2013 summary judgment order. The trial court

effectively applied Sidis to prospectively toll the statute of limitations for an indefinite and unbounded time period. No Washington Court has held that Sidis permits the prospective (i.e., for an indefinite period of time into the future) tolling of the statute of limitations as to the unserved defendants. See Sidis, 117 Wn.2d at 330 (quoting Summerrise v. Stephens, 75 Wn.2d 808, 812, 454 P.2d 224 (1969) "[t]he purpose of the statute of limitations is to compel actions to be commenced within what the legislature deemed to be a reasonable time, and not postponed indefinitely.")

Even if personal service of a Norwegian citizen residing in Norway under the Washington Long Arm Statute is legal, it still must be timely to preserve the claims. Here, Appellants amended their Complaint to add Nurse Thomas as a defendant on March 20, 2012, just nine days before the Statute of Limitations ran. Appellants then waited exactly one (1) year before attempting to serve Nurse Thomas. During that year, Appellants were told that Nurse Thomas had not been served; was not waiving service of process; and resided in Nannestad, Norway. Appellants knew in late 2012 that Nurse Thomas needed to be served in Norway. Yet, they inexplicably waited several more months before attempting improper personal service.

In Martin v. Triol, the Court permitted the application of Sidis tolling where Plaintiff acted in good faith and with due diligence by attempting personal service of process daily for 25 days within the limitations period, before resorting to service on the Secretary of State, just outside the period. 121 Wn.2d 135, 150-51, 847 P.2d 135 (1993). In Wakeman v. Lommers, the Court of Appeals permitted tolling as to defendant that was served just a week outside the 90 day period, after numerous attempts. 67 Wn. App. 819, 840 P.2d 232 (1992). In Bosteder v. City of Renton, the Court excused an 11-month delay in service because Plaintiff had incorrectly identified the defendant as an employee of co-defendant City of Renton, and believed he had properly served her when he served the City. 155 Wn.2d 18, 49-50, 117 P.3d 316 (2005).

Here, there is no reasonable explanation for never properly serving Nurse Thomas before summary judgment was granted. The trial court erred when it denied Nurse Thomas' Motion to Dismiss.

B. Cross-Appellant Thomas is Entitled to Her Attorneys' Fees and Costs Under the Long Arm Statute

Nurse Thomas is entitled to recover her attorneys' fees and costs under this state's long arm statute. RCW 4.28.185(5). That statute provides in part:

> **§ 4.28.185. Personal service out of state -- Acts submitting person to jurisdiction of courts – Saving.**

(1) Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:

* * *

(b) The commission of a tortious act within the state;

* * *

(2) Service of process upon any person who is subject to the jurisdiction of the courts of this state, as provided in this section, may be made by personally serving the defendant outside this state, as provided in RCW 4.28.180, with the same force and effect as though personally served within this state.

* * *

(4) Personal service outside the state shall be valid only when an affidavit is made and filed to the effect that service cannot be made within the state.

(5) In the event the defendant is personally served outside the state on causes of action enumerated in this section, and prevails in the action, there may be taxed and allowed to the defendant as part of the costs of defending the action a reasonable amount to be fixed by the court as attorneys' fees.

* * *

While it is certainly unclear why Appellants ignored the Hague Convention requirements, it is undisputed Appellants' and their process server were attempting service in Norway under RCW 4.28.185. Nurse Thomas was compelled to defend herself in a case in which she was not

properly served. Under a plain reading of the Long Arm Statute, Nurse Thomas is entitled to recover her attorneys' fees and costs. See In Re Marriage of Yokum, 73 Wn.App. 699, 707, 870 P.2d 1033, 1037 (1994), and RAP 18.1.

C. The Acceptance of Service / Waiver of Affirmative Defenses is Invalid as the Product of Unethical Ex Parte Contact

Appellants' counsel, through their process server, engaged in improper ex-parte contact when the process server demanded represented defendant Nurse Thomas sign the Acceptance of Service and Waiver of Affirmative Defenses. Appellants' counsel did this even though they knew Nurse Thomas was represented by counsel.

Appellants' counsel perpetuated the unethical conduct, and indeed endorsed the process server's ex-parte contact, when counsel refused to acknowledge the violation and insisted on enforcing the waiver of affirmative defenses. When Nurse Thomas' counsel alerted Appellants' counsel of the ethics violation, Appellants' counsel denied the violation although he did not contest the process server's tactics. When Nurse Thomas filed the CR 12(b) motion, Appellants' counsel continued to endorse the unethical conduct by arguing that Nurse Thomas had accepted service and waived defenses, even though that document was signed

outside the presence of her attorney in order to remove the process server from her house.

The Rules of Professional Conduct prohibit counsel, or his agents, from engaging in ex-parte contact with a represented party. RPC 4.2. The applicable rule prohibits the very conduct Appellants engaged in, and the very conduct Appellants' counsel continues to deny is an ethics violation. The rule provides:

> RPC RULE 4.2: COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL
>
> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

It is no doubt troubling that the trial court initially endorsed Appellants' counsel's conduct. Fortunately, that same trial court, through a different judge, saw the serious issues raised by this conduct and granted Alpha and Nurse Thomas' Motion for Discretionary Review. Among the three issues certified for immediate appellate review was:

> (3) Whether a plaintiff may seek and obtain a waiver of affirmative defenses via ex-parte contact with a defendant who was represented by counsel.

The Court of Appeals Court Commissioner never ruled on the request for discretionary review because the trial court granted summary judgment in favor of Alpha and Nurse Thomas.

The trial court's initial endorsement of the unethical conduct is an error of law and must be reversed. The appropriate remedy is to strike the Acceptance of Service and Waiver of Affirmative Defenses. Engstrom v. Goodman, 166 Wash.App. 905, 271 P3d. 959 (2012), review denied, 175 Wash.2d. 1004 (2012). In addition, the Court should refer this conduct to the Washington State Bar Association for further investigation.

VIII. CONCLUSION

Alpha and Nurse Thomas request that the trial court's grant of summary judgment be affirmed. In addition, Nurse Thomas asks this Court to reverse the trial court's denial of the CR 12(b) Motion and award fees and costs to Nurse Thomas pursuant to RCW 4.28.185(5) and RAP 18.1.

RESPECTFULLY SUBMITTED this 24th day of March, 2014.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on March 24, 2014, I caused copies of the foregoing document to be served on the following parties as indicated below:

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SIGNED AND DATED at Seattle, Washington, this 24th day of March, 2014.

Bonnie L. Enera, Legal Assistant

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