91536-9

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.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONERS

Esther Kim, 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, petition this Court for review of the decision designated in part B.

B. COURT OF APPEALS DECISION

The Court of Appeals' published opinion was issued on March 16, 2015, and is included at Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. In this case of first impression, did the Court of Appeals misinterpret provisions imposing mandatory reporting duties under the Abuse of Vulnerable Adults Act RCW ch. 74.34 ("AVAA"), a statute with critical public policy implications?

2. Does the Court of Appeals opinion conflict with opinions of this Court and the Court of Appeals regarding questions of duty and breach addressed on summary judgment, and could that conflict cause confusion in the lower courts addressing claims under the AVAA?

3. Does the Court of Appeals opinion conflict with opinions from this Court and the Court of Appeals regarding weighing evidence and making credibility determinations on summary judgment, and create an easy loophole for defendants to avoid a jury in AVAA cases?

D. STATEMENT OF THE CASE

This is an adult family home negligence and vulnerable adult abuse case. Bae was an eighty-three-year-old woman residing at Lakeside Adult

Family Home ("the home") since January, 2009.[1] CP 174. The home is a small house with four resident beds. It consists of a living room area, a kitchen area, and two bedrooms next to each other that shared a single bathroom. CP 169. The rooms each house two residents. CP 174.

Defendant Alpha provided nursing services at the four bedroom home and its employees were in the home almost every day. CP 886, 936. Christine Thomas and Marion Binondo[2] were Alpha employees that provided nursing services to two of the four residents of the home during the term of Ms. Bae's residency. CP 171, 320. Binondo is a Licensed Practical Nurse ("LPN"). CP 317. Binondo began working for Alpha in 2006. CP 318. Prior to that, she had worked as a Certified Nursing Assistant ("CNA"). CP 317. Prior to working for Alpha, Binondo worked full time in skilled nursing care at two nursing homes and had supervised CNAs. CP 318. Binondo had received training from Alpha on elder abuse and neglect, and knew that her reporting requirement included a requirement to report abuse of non-client residents of a facility. CP 321.

Binondo testified that as part of her training she received a handout on what constitutes "abuse" and what the signs of abuse are:

Q. Can you tell me as best you recall what they were?

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[1] Lakeside was owed and operated by defendants Gretchen Dhaliwal and Gretchen Dhaliwal, Inc. Dhaliwal and Lakeside are not parties to this appeal. CP 395.

[2] Binondo is also not a named party. CP 934.

> A. I would -- it's -- *if you see any bruising*, I guess, and if you see somebody hitting somebody *or failing to give proper medication* that they need, then that would be.
>
> Q. Those would be things that you would need to report as a mandatory report, agreed?
>
> A. Yes.

Id. (emphasis added).

Binondo worked in the facility on March 28 and March 29, 2009. CP 328. Binondo testified that only a CNA, "Fannie Irwati,"[3] was working in the facility on these dates. CP 329. Binondo knew that Fannie was not a nurse. CP 325. Binondo agreed that she knew she had more education and background and training in nursing than Fannie and that she had a better ability to determine what an abusive or neglectful situation was. CP 325-26.

On either March 28 or 29, Binondo heard Bae fall to the ground. CP 328. Binondo heard a thud and found Bae lying on the floor. *Id.* Bae was face down. *Id.* 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.* Irwati responded that Bae "falls a lot." CP 369, 758

Binondo watched Irwati drag Bae back into her bed. CP 332. Binondo told Irwati that she should not pick Bae up because "she may

[3] Irwati allegedly fled the country, and also was working under false identification information. CP 851, 891. She was not a named defendant.

have broken something." *Id.* Irwati did not examine or assess Bae, except to see if she was breathing. CP 329. Binondo stated that Irwati "was doing something with another patient and wanted to get back." CP 333. Binondo stated that she noticed Bae was "passed out." CP 332. Irwati told Binondo Bae "is always like" that. *Id.* Lakeside resident Kerri Salzbrun told Binondo that Irwati was giving Bae crushed up pills and that Bae was "doped up." CP 333. Binondo left the facility seven minutes after she heard Bae fall. She did not call 9-1-1, law enforcement, or DSHS. CP 329. She did not even report these events to her employer (Alpha).

Thomas worked as a certified nursing assistant in a nursing home in the 1980's and 1990's. CP 168. In 1996 Thomas became a registered nurse and worked as a registered nurse from 1998 through the date of Ms. Bae's death on March 30, 2009. CP 168-69. Thomas was hired by Alpha as a full-time nurse in 2007. CP 169.

Thomas knew that abuse or neglect could occur in adult family homes. CP 170. Thomas testified that bruising, reports of abuse, and unaccounted injuries were signs of abuse. CP 171.

On the morning of March 30, 2009, Thomas provided care to Salzbrun from 8:50 a.m. to 9:20 a.m. CP 176. While Thomas was at the home, resident Salzbrun told Thomas that Bae was being given morphine.

Thomas testified that she was "alarmed" by what Salzbrun had told her. CP 177. While still at the home, Thomas then confirmed by reviewing medical records that Bae was not prescribed morphine. CP 178. Also, while at the home, Thomas saw Irwati dragging Bae to the bathroom and said that Bae appeared to be heavily sedated. CP 179, 767. Thomas knew that giving a resident morphine that was not prescribed to that resident was illegal. CP 180.

Thomas testified that while still at the home there was nothing that prevented her from immediately intervening in the abuse she witnessed, immediately calling law enforcement, or immediately contacting Bae's family. CP 182. "Of course I could have called, yes." *Id.* 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 claims to have 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.*

On March 30, 2009, Salzbrun found Bae deceased in her bed. CP 184. The Snohomish County Medical Examiner performed an autopsy and discovered that the cause of death was "Acute Morphine Intoxication" caused by the "Administration of medication." CP 294. Bae had severe

bruising over the entire left side of her face.[4] She also had a raised knot on her forehead that appeared immediately after the fall. Salzbrun Declaration at ¶ 6.

Bae's estate and family filed negligence claims against several parties, including Alpha and Thomas individually. CP 934. Alpha and Thomas moved for summary judgment, arguing that as a matter of law Alpha and Thomas owed no duty to Bae, and that insufficient evidence existed of breach or causation. CP 889.

In addition to the factual record recited above, Bae presented testimony from several fact and expert witnesses in response to Alpha and Thomas' summary judgment motion.

Susan Gange ("Gange"), the Director of Nursing at Alpha, was Binondo's and Thomas' supervisor. CP 412. Gange was responsible for providing training regarding reporting duties and compliance with the AVAA. CP 413. The AVAA requires not only that employees such as Thomas and Binondo immediately report suspected abuse to state agencies, but that suspected assaults must immediately be reported to law enforcement. RCW 74.34.035(1), (3). Gange agreed that Thomas and Binondo had a duty to report suspected abuse or neglect of even those patients Alpha did not serve, such as Bae. CP 422. However, Gange

[4] A photograph of Bae's face showing bruising is included with this petition at Appendix B.

incorrectly believed that a report to law enforcement was only necessary if DSHS asked them to contact law enforcement:

> Q. ...And hypothetically if a nurse in 2009 saw a type of abuse that, for example, was a crime, they may have had to report that to law enforcement?
>
> A. We report to the State hotline or to Adult Protective Services and then they may based on the report ask us to report to a local agency, law enforcement, or they may not, but it is reported to a State agency.

CP 422.

Gange confirmed that Alpha nurses would have a duty to stop any adult family home resident from being assaulted:

> Q. ... So, for example, hypothetically, if an Alpha nurse in 2009 had come across a resident who was being sexually assaulted, they would have had an obligation not only to report that, but probably stop that, right?
>
> A. If it was happening right then and there?
>
> Q. ... Yes, ma'am.
>
> A. Yes, sir.

CP 422. Gange agreed that giving a patient the wrong medication would be considered abuse or neglect. CP 426.

Mark Lachs, M.D. ("Dr. Lachs") is a tenured professor of medicine at the Weill Medical College of Cornell University and an adjunct Professor of Nursing at NYU. CP 107. He has extensive knowledge in elder abuse and neglect and nursing care and is familiar with the nursing

standards in the state of Washington. *Id.* According to Dr. Lachs, based on what they witnessed, Binondo and Thomas had an "absolute duty, independent of statute, to take action in the form of basic nursing assessment and calling 911." CP 108. Dr. Lachs found their inaction "especially compelling because had they intervened, Ms. Bae would have lived." *Id.* He explained that the effects of morphine overdose are quickly reversed with medication that is carried by every EMT in the country and that is routinely administered when a patient is encountered unconscious without explanation. *Id.* According to Dr. Lachs, "[t]he failures of ...Binondo [and] Thomas directly led to the death of Bae." *Id.*

Elizabeth Henneke ("Henneke") is an expert in Public Safety and Communications and 9-1-1 dispatch operations. CP 61. According to Henneke, had Binondo contacted 9-1-1 on the date that Bae fell (March 28 or 29) and reported the fall, head trauma and severe facial bruising, and loss of consciousness, EMTs and paramedics would have immediately been sent to the home to care for Ms. Bae. *Id.* Henneke stated that had Binondo or Thomas immediately reported that Bae was being given morphine and it was not one of her prescribed medications, law enforcement would also have been immediately sent to the home. CP 62.

Henneke also opined that if Thomas would have contacted 9-1-1 on March 30, 2009 and reported that Ms. Bae appeared "sedated," had to

be dragged, that a fellow resident reported that Bae was being given morphine, and that according to Thomas' own investigation, Bae was not prescribed morphine that EMTs, paramedics, and law enforcement would have immediately been sent to the home. *Id.*

The trial court granted Alpha and Thomas' summary judgment as to all of Bae's claims, and denied Bae's motion for reconsideration. CP 25, 57. Kim's family and representative appealed. CP 7.

The Court of Appeals upheld summary judgment. Slip op. at 2. The Court held that Thomas and Binondo had no duty to Bae:

> There was no duty to call law enforcement about someone else's patient when the information came from a person with whom the defendant was familiar and whose reliability was questionable.
>
> Nor did the plaintiff establish that a second nurse had a duty to call authorities....
>
> Because the plaintiff has failed to establish any duty, a necessary element of a negligence action, summary judgment dismissal was appropriate.

Slip. op. at 2. However, the Court's later analysis suggested that they had a duty, but that it was not breached:

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

Slip. op. at 15 n.10. In looking at Thomas and Binondo's actions, the Court concluded that they had a mandatory duty to report suspected abuse, but they had no reason to suspect abuse as a matter of law. *Id.* at 9, 11, 15.

In the context of deciding this case on summary judgment, the Court of Appeals weighed evidence and assessed credibility. *Id.* at 10-15. Regarding Thomas, the Court of Appeals concluded that as a matter of law she did not breach her reporting duty (or, depending on the reading of the opinion, held Thomas did not have a duty) because Thomas considered Salzbrun to be "less than reliable" when she reported that Irwati was giving Bae unprescribed morphine. Slip. op. at 15. The Court concluded that, as matter of law, Thomas did not receive a "credible" oral report alleging abuse because *Thomas stated* that she did not find Salzbrun reliable. In fact, the Court of Appeals faulted Kim for failing to "counteract this evidence of unreliability." Slip op. at 14.

Ironically, while simultaneously crediting Thomas' statements that Salzbrun was an unreliable witness, the Court of Appeals *relied on Salzbrun's statement* that Bae had a large knot on her forehead immediately after the fall. Slip op. at 15. There is also a direct inference to be drawn from Salzbrun's declaration that Thomas would have seen the horrific bruising on Bae's face. *Id.*

Likewise, in analyzing the evidence that Binondo had reason to suspect abuse had occurred, the Court of Appeals focused solely on Binondo's declaration, to the exclusion of all of the other testimonial, expert, and circumstantial evidence. Slip op. at 10-11. For example, the Court of Appeals ignored the fact that in her deposition, Binondo described Irwati's attitude toward Bae as dismissive and unconcerned after her fall, in which her head was injured. CP 329-33. Although Binondo believed the injuries were serious enough to warrant a call to 9-1-1, she did nothing after Irwati ignored those concerns and expressed a desire to attend to other work. *Id.*

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

(1) This Case Raises Issues of Public Importance and First Impression Regarding the Duties of Those Charged with the Care of Vulnerable Adults, and the Remedies for the Abused or Neglected

The AVAA is a statute whose interpretation has an impact on a critical matter of public policy. RCW 74.34.005. The Legislature crafted a statute that holds accountable not only those who actually abuse, neglect, or exploit a vulnerable population, but others in the sensitive business of caring for the helpless, who might witness such abuse but be inclined to look away. *Id.*

This Court has never interpreted the mandatory reporting provision of the AVAA, RCW 74.34.035. The Court of Appeals here interpreted the duties imposed by RCW 74.34.035 provisions for the first time.[5] Given the increasing role that long-term care facilities play in caring for vulnerable adults, the issues of duty and breach under this statute will undoubtedly resurface. Peter Waldman, "For-Profit Nursing Homes Lead in Overcharging While Care Suffers," December 31, 2012, http://www.bloomberg.com/news/articles/2012-12-31/for-profit-nursing-homes-lead-in-overcharging-while-care-suffers.

As explained in more detail *infra*, the Court of Appeals' analysis here reflects that guidance is needed on this important statute. The opinion conflates issues of duty and breach, allowing trial courts to resolve disputed issues of material fact – including credibility questions – on summary judgment. It also creates a loophole whereby mandatory reporters can avoid responsibility simply by claiming that they did not find other witnesses to abuse credible.

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[5] Division II considered whether the statute imposed a duty of care on the State, a proposition that Court rejected. *Donohoe v. State*, 135 Wn. App. 824, 848, 142 P.3d 654 (2006). The other two published opinions mentioning the mandatory reporting provision do so only in passing, and do not analyze the duty issue. *Calhoun v. State*, 146 Wn. App. 877, 883, 193 P.3d 188 (2008), *as amended* (Oct. 28, 2008); *Goldsmith v. State, Dep't of Soc. & Health Servs.*, 169 Wn. App. 573, 582, 280 P.3d 1173 (2012).

(2) The Court of Appeals Opinion Conflicts With Many Opinions from this Court and the Court of Appeals Regarding Questions of Duty and Breach on Summary Judgment; Its Analysis Could Confuse Lower Courts Analyzing the AVAA

The existence of a duty is a question of law for the court, the question of breach is usually a fact question for the jury. *Hertog, ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400, 406 (1999). It is black letter law in Washington that a defendant may obtain summary judgment on the issue of breach *only* if reasonable minds could not differ. *Hertog*, 138 Wn.2d at 274; *Owen v. Burlington N. & Santa Fe R.R. Co.*, 153 Wn.2d 780, 788, 108 P.3d 1220 (2005); *Clark Cnty. Fire Dist. No. 5 v. Bullivant Houser Bailey P.C.*, 180 Wn. App. 689, 705, 324 P.3d 743, *review denied sub nom. Am. Alternative Ins. Corp. v. Bullivant Houser Bailey, P.C.*, 181 Wn.2d 1008 (2014); *Bowers v. Marzano*, 170 Wn. App. 498, 506, 290 P.3d 134 (2012); *Bayman v. Clearwater Power Co.*, 15 Wn. App. 566, 569, 550 P.2d 554, 557 (1976).

The AVAA establishes a duty to all mandatory reporters to "immediately report" to DSHS when there is "reasonable cause to believe" that abuse or neglect of a vulnerable adult has occurred. RCW 74.34.035(1). It also establishes a duty to "immediately report" to DSHS and law enforcement 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." *Id.*

Here, the Court of Appeals held that these statutes both applied to Binondo and Thomas, thus ostensibly finding that each had a duty. Slip op. at 9. However, the Court held: "Because the plaintiff has failed to establish any duty, a necessary element of a negligence action, summary judgment dismissal was appropriate." Slip. op. at 2. The Court also stated that, given the facts each defendant knew, each had "no duty" to call DSHS or law enforcement to report possible abuse and assault. *Id.*

Making the legal analysis more confusing, later in the opinion, the Court of Appeals states that Binondo and Thomas *had* a duty, but that their duty was not breached. Slip op. at 10.

The Court of Appeals' conflicting statements may be a result of the language of RCW 74.34.035, which contains elements of both duty and breach in its language. It imposes a duty report if the reporter has "reasonable cause to believe" or "reason to suspect" abuse. RCW 74.34.035. However, whether a party "believes" something is "reasonable" is an inherently fact-driven inquiry that is typically an issue for the jury. *Harrell v. Washington State ex rel. Dep't of Soc. Health Servs.*, 170 Wn. App. 386, 409, 285 P.3d 159 (2012); *Scott v. Pacific Power & Light Co.*, 178 Wash. 647, 35 P.2d 749 (1934); *Spahn v. Pierce*

Cnty. Med. Bureau, Inc., 7 Wn. App. 718, 723, 502 P.2d 1029 (1972); *Gordon v. Deer Park Sch. Dist. No. 414*, 71 Wn.2d 119, 122, 426 P.2d 824 (1967).

However, the fact that the Legislature introduced concepts of both duty and breach into RCW 74.34.035 does not mean that the courts are obliged to conflate the two concepts in interpreting the statute. This Court's interpretation can be helpful in assisting trial courts in the proper reading of the statute going forward.

(3) The Court of Appeals Opinion Conflicts With Many Opinions from this Court and the Court of Appeals Regarding Weighing of Evidence and Making Credibility Determinations, and Creates an Easy Loophole for Defendants to Avoid a Jury in AVAA Cases

Courts reviewing summary judgment are not empowered to weigh evidence, and must view all of the evidence in the light most favorable to the non-moving party, in this case Kim. *Highline Sch. Dist. No. 401 v. Port of Seattle,* 87 Wn.2d 6, 15, 548 P.2d 1085 (1976); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). In upholding summary judgment here, the Court of Appeals breached all of these black letter principles of law and created a dangerous loophole in the AVAA's mandatory reporting provisions.

Specifically, the Court of Appeals relied solely on the statements of the mandatory reporters in determining whether they had a duty (or

breached that duty) rather than the entire record. Slip op. at 10-15. Also, the Court of Appeals gave weight and credence to the defendants' statements, while questioning the credibility of a key witness and discarding other circumstantial evidence. *Id.*

The Court of Appeals' analysis opens a dangerous and improper loophole in a statutory regime that was written to protect helpless people from abuse and neglect. It strongly suggests that any mandatory reporter who wants to escape responsibility for ignoring warnings of abuse may simply state that they found the warnings "unreliable."[6] It also suggests that the mandatory reporter's version of events will be accepted as credible even when circumstantial evidence differs. According to the Court of Appeals' analysis, such a statement by a defendant will always defeat a claim of a failure to report, because a plaintiff can *never* offer evidence on summary judgment to refute the question of whether one person considered another person "credible."

Whether Thomas or Binondo actually found Salzbrun's reports of abuse and assault reliable, or whether a reasonable person would have given them credence, is a question of fact for the jury. Courts are not tasked with making those kinds of determinations.

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[6] Given that many vulnerable adults are living in group facilities, it is easy to imagine such a claim being made frequently.

Finally, the Court of Appeals' opinion contains a statement regarding Thomas' knowledge that suggests a misreading of RCW 74.34.035. The Court states that "Thomas did not observe the event later determined to be an assault. She only had suspicions expressed by patient Salzbrun. ...Thomas did not witness the caregiver administering any morphine...." Slip op. at 14.

RCW 74.34.035 does not require reporting to law enforcement only when a person witnesses abuse. "Reasonable cause to believe" and "reason to suspect" are objective inquiries that are not based solely on what the defendant actually knows, but also what that defendant should have known. If the Legislature intended that only those who personally witnessed abuse firsthand should report to DSHS or law enforcement, then it would have written RCW 74.34.035 to require reporting of "known" abuse, not "suspected" abuse.

Only this Court can accept review to examine these issues in the context of the AVAA and prevent future tortfeasors from exploiting a court-created liability loophole.

F. CONCLUSION

Alpha and its employees violated both statutory and common law duties of care to Bae, and the direct result of those violations was Bae's

death at the hands of her purported caregiver. It is precisely this kind of sad and horrifying consequence that the AVAA was enacted to prevent.

This Court should accept review to establish both the duties of mandated reporters under the AVAA, and also to reestablish the analytical framework separating duty from breach, to prevent trial courts from invading the province of the jury under the guise of resolving the duty question.

DATED this 18th day of March, 2015.

Respectfully submitted,

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APPENDIX

A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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

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

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

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

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

We affirm the trial court.

FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[2] 1 CP at 178.

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

ANALYSIS

I. Service on Thomas

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

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

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

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

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

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

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

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

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

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

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

II. Summary Judgment

Standard of Review

A motion for summary judgment may be granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). When a defendant moves for summary judgment, it bears the initial burden of showing the absence of an issue of material fact. Young v. Key Pharm., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). The burden then moves to the plaintiff to "make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden

of proof at trial." Young, 112 Wn.2d at 225 (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). In meeting his burden, the plaintiff cannot rely solely on allegations made in his pleadings but must set forth specific facts showing that there is a genuine issue for trial. Young, 112 Wn.2d at 225-26. If the plaintiff does not meet his burden, "'there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.'" Young, 112 Wn.2d at 225 (internal quotation marks omitted) (quoting Celotex Corp., 477 U.S. at 322-23).

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

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

Legal Duty

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

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

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

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

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

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

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

RCW 74.34.020(11) (emphasis added).

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

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

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

Binondo

Binondo's declaration states:

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

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

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

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

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

Thomas

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

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

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

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

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

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

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

[4] 3 CP at 999.

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

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

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

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

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

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

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

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

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

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

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

[8] 3 CP at 999.

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

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

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

Voluntary Rescue Doctrine

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

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[9] 1 CP at 124.

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

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

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

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

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

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

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[11] 1 CP at 124.

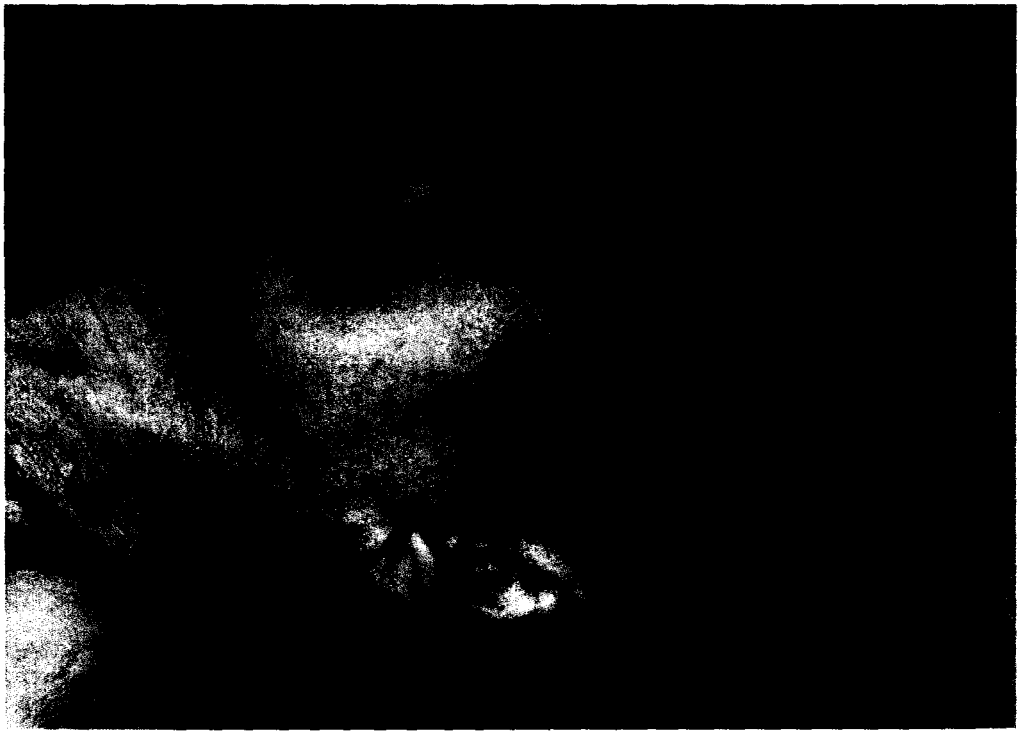
CONCLUSION

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

Trickey, J

WE CONCUR:

B



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 Petition for Review in Court of Appeals Cause No. 70892-9-I to the following parties:

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

DATED: March 18th, 2015, at Seattle, Washington.

Matt J. Albers

Matt J. Albers, Legal Assistant
Talmadge/Fitzpatrick/Tribe