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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ROBERT LISLE HALE, Personal Representative of the ESTATE OF
LISLE HALE, deceased; CLARA HALE, surviving spouse of LISLE
HALE; ROBERT L. HALE; DONALD HALE; and TRICIA HALE,

Appellants,

vs.

BRIDGE BUILDERS, LTD.; MINDI R. BLANCHARD and John Doe
Blanchard; BRENDA CARPENTER and John Doe Carpenter; JANET
WATRAL and John Doe Watral,

Respondents.

BRIEF OF APPELLANTS

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I. INTRODUCTION

This case is about how families care for their elderly members and the protection of rights of the family in providing the care.

This case seeks to establish the wrongs and negligence of Defendants regarding the Hale Family and the care of Lisle and Clara Hale. The damages resulting from the injuries may not be great, but they indeed exist, even if nominally so.

Plaintiffs, individually, and in association with each other as a family, over the years planned and provided for the care of the elderly members of the family, the parents, Lisle and Clara Hale, as they progressed into old age and became progressively dependent on 24-hour care from others. Part of the plan was to move Lisle and Clara Hale to Sherwood Assisted Living so that they could receive and be assured of the additional care they were in need of. Lisle Hale was first moved to Sherwood in April 2008. As Clara Hale's health deteriorated and her needs increased, she too was moved to Sherwood in June 2008.

The family's efforts were put asunder by Defendants. The family saw what was going on and acted to protect Lisle and Clara Hale and the family.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error.

Plaintiffs assign error to:

1. The trial court's improper treatment of Failure to State a Claim Motions as Motions for Summary Judgment when such motions should have been treated as Failure to State a Claim Motions under CR 12(b)(6).
2. Dismissal of Count 1 and Count 2.
3. Dismissal of Count 3.
4. Dismissal of Count 4.
5. Dismissal of Count 5.
6. Dismissal of Count 6.
7. The dismissal, and failure to create, a new or revised cause of action for interference with family relationships and, in conjunction therewith, the Dismissal or failure to transform Counts 7, 8 and 9 into such new causes of action, or in the alternative, the dismissal of Counts 7, 8 and 9.
8. The denial of Plaintiffs' Motion for Discovery.
9. The granting of Defendants' Motion for Protective Order regarding discovery.

B. Issues Pertaining to Assignments of Error.

1. Do the Plaintiffs have standing under the Uniform Declaratory Judgments Act, RCW Ch. 7.24, to pursue their claims for the declaratory relief sought in Counts One and Two of the Amended Complaint?
 - a.* Whether Defendants are required to be licensed under the In Home Care Services Act, RCW 70.127?
 - b.* Whether the powers of attorney held by Defendants were illegal under RCW 70.127.150?
2. Whether it was proper for the Court to deny Plaintiffs' Motion for Discovery and for the Court to grant Defendant's Motion for Protective Order when the information sought by the discovery of Plaintiffs had a direct bearing on whether Defendants should have been licensed under the In Home Care Services Act, RCW 70.127.
3. Do the allegations in Plaintiffs' Amended Complaint, if proven, support a finding of abandonment, abuse, financial exploitation or neglect under the Vulnerable Adult Act, RCW 74.34?

4. Do the Plaintiffs have standing to pursue the claim in Count 4 for violation of the Washington Consumer Protection Act, RCW 19.86?
5. Does Washington law recognize a standard of care owed by providers of elder care case management services that would form the basis for Plaintiffs' malpractice claim in Count Six?
6. Should the court fashion a new cause of action for the protection of families who as families work out care plans for elderly members of the family?
7. Do Counts 7, 8, and 9 or any of them Fail to State a Claim under the requirements of CR 12(b)(6)?

III. STATEMENT OF THE CASE

A. Facts.

On April 4, 2008, Lisle Hale, then age 86, became a resident of Sherwood Assisted Living in Sequim, Washington (Sherwood). On June 3, 2008, Clara Hale, his wife, then age 90, became a resident of Sherwood. The Hales were not able to care for themselves in their home and needed 24-hour care consisting of “home care” and “home health care” seven days a week. Declaration of Tricia Hale in Support of Plaintiffs’ Motions for Partial Summary Judgment (Tricia Hale Declaration). CP22 at 123 and ff.

The next day, June 4, 2008, Lisle and Clara Hale came into contact with attorney Michael R. Hastings. On June 4, 2008, the Hales met with Mindi Blanchard of Bridge Builders, Ltd. *Id.* 125.

On June 6, 2008, the Hales signed a number of documents – (a) Revocations of Durable Powers of Attorney they had previously signed, (b) Revocations of Durable Powers of Attorney for Health Care they had previously signed, and (c) Durable Powers of Attorney for each. All of these documents were presented to them by the attorney they had just met on June 4, 2008, Michael R. Hastings. Declaration of Robert Hale in Support of Plaintiffs’ Motion for Partial Summary Judgement (Robt. Hale Declaration) 7, Attachments 22-39. CP 317 and 346 - 363.

Each of the new Durable Powers of Attorney named “Mindi Blanchard, of Bridge Builders” as attorney-in-fact and “Brenda Carpenter, of Bridge Builders” as alternate attorney-in-fact. *Id.* Each of the powers gave “Mindi Blanchard, of Bridge Builders” and “Brenda Carpenter, of Bridge Builders” (as alternate), broad powers to act on behalf of the principal of each of the powers: (1) they were given the power to act as attorney-in-fact for the principal for all purposes (the powers not limited, they were not special powers); they were nominated as the guardian of the person and property of the principal; and, they were given power to make health care decisions for the principal. *Id.*

As soon as these powers were signed, Bridge Builders, Blanchard and Carpenter and others under their control commenced to make arrangements to physically move Lisle and Clara Hale from Sherwood back to their home in Sequim. They changed the locks on doors in the Hale residence so as to keep the Hale's daughter and live-in caregiver from access, changed bank accounts which allowed them to have power over the Hale finances, wrote checks to Bridge Builders and Michael Hastings, had the Hales sign them and delivered them, began making arrangements for people to come to the Hale residence to provide home care services, and actually commenced to take the Hales from Sherwood back to their home in Sequim. Robt. Hale Declaration, CP 322 - 23.

At the time and thereafter, Bridge Builders, Blanchard and Carpenter advertised and held themselves out providing a host of "home care" services as an in-home care agency; that is, an entity which provided services so that people in need of care could stay in their homes as long as possible. Declaration of Robt. Hale, CP 318 - 321; CP 325 - 341.

Bridge Builders advertised itself next to an advertisement of Michael R. Hastings. Robt. Hale Declaration, CP 364. The advertisement included reference to the Bridge Builders Internet website – www.bridgebldrs.com and also provided an email address, info@bridgebldrs.com. *Id.*

On the website, Bridge Builders provided information about the services it provided. The Internet information identified Bridge Builders as “Providing Assisted Living Services in the Home.” *Id.*, CP 325 - 41. The home page of the website also said that Bridge Builders provided “Supported Independence” and that it was “Licensed, Insured and Bonded.” CP 325. The site included a “Menu of Services” (CP 320) and “Specialty Services.” *Id.* In the Fees section, Bridge Builders said its “Mission” was as follows: “We bridge the gaps in resources, and provide the framework for individuals to be able to maintain their personal independence for as long as possible.” *Id.* A 331. *Id.*, Attachments at 7.

The Menu of Services provided that there were two types of services: (a.) services to Members and non-Members and (b) services to Bridge Builders, Ltd. members only. Appendix A, attached hereto. In the Specialty Services section, Bridge Builders advertised these services: (a) Power of Attorney – services as attorney-in-fact under power of attorney; (b) Certified Professional Guardian; (c) “Representative of the Estate.” *Id.*

Bridge Builders also touted its “Educational Workshops” and its annual “Continuing Education Conference.” *Id.*, Attachments at 17.

All of the specific services advertised and held out as being or to be provided are described in the Declaration of Robert Hale and restated in Appendix A, attached hereto.

While the Hales were still at Sherwood Assisted Living, Bridge Builders, Blanchard and Carpenter provided a number of services. The services are set forth in the Declaration of Robert Hale at 6 - 7 and in Attachments thereto, 18 - 21.

Things which should have been done – Semingson.

After the Hales had been moved back to their home, Bridge Builders, Blanchard and Carpenter planned to provide, and/or would have had to provide, complete extensive home care and home health services and related services so that the Hales would be taken care of in the home. These services included, but were not limited to, those described in the Declaration of Tricia Hale, CP 314 - 316. They are:

- Arrange 24-hour a day, seven-day a week care along with a nurse to monitor and administer their medications and check on them during the night.
- They would have had to be able to get them to and from their doctor appointments and to the hospital, if necessary, as we had to many times in the previous several years.
- Get them to and from Church every Saturday evening.
- They would have had to have someone come in and clean the house, do the laundry, get them up and help them get dressed, help them get to and from the bathroom and clean up after them when they had accidents, including helping them change their underwear and clothes.
- They also needed help with all of their personal things such as showering, teeth brushing, hair care (they couldn't remember to do many of these things any more without being reminded on a regular basis), preparation of all meals and cleanup afterwards, shopping for and acquiring all food, beverage, snacks, and personal

care items that they may need. Clara could no longer remember how to brush her teeth, didn't know how to answer the phone and was using the phone (backwards) to try to change channels on the TV.

- Arrange to acquire all of their medications at the least possible cost.
- Fill out and file all paper work for medical related reimbursements from the insurance companies and pay all bills.
- Arrange for the care and upkeep of the house and property.
- Deal with their investment portfolio making decisions as to investments and moving investments around.
- Handle federal and state tax reporting and payments.
- Answer personal correspondence (even if not initiated by Lisle or Clara - there is a need to keep people informed of what is going on in their lives).
- Provide company and human interaction apart from the basic services to them and to and for the property.

B. Procedural Status.

The case was commenced in May 2009. Plaintiffs' Amended Complaint was filed on May 18, 2009. Defendants Bridge Builders¹ filed their Answer on June 2, 2009. Defendant Watral filed her Answer on June 30, 2009.

1. Motions for Summary Judgment.

First Motion. Defendants Bridge Builders brought a Motion for Partial Summary Judgment regarding the In-Home Services Act (RCW

¹“ Defendants Bridge Builders” means Defendant Bridge Builders, Mindi Blanchard and Brenda Carpenter.

Ch. 70.127) on July 31, 2009. Defendant Janet Watral (Defendant Watral) joined in the motion on August 4, 2009.

Defendants filed two Declarations in support of their Motion for Partial Summary Judgment. One Declaration was by Mindi Blanchard dated July 24, 2009. CP 452. The second Declaration was by Alan Millet dated July 23, 2009.

The Blanchard Declaration set forth the services provided in the Clallam County area, attached as Attachment A. Ms. Blanchard also said that she relied on Alan Millet for his opinion regarding the proper licensing of her business. She also referred to information which can be found on the Internet at www.bridgebldrs.com. In conjunction with statements of all the services Bridge Builders provided, the statement indicated that they acted so as to keep their clients in their homes. The advertising said "Our goal is to ensure you receive those services you need (and only those you need) to stay independent and in the comfort of your home." CP 452 - 456.

The Alan Millet Declaration asserts that Bridge Builders is not required to be licensed under RCW 70.127 and that there is an exemption in paragraph 14 of RCW 70.1 7.040 relating to "case management."²

² This Declaration will be added to the Clerk's Papers at the behest of Plaintiffs or provided to the court if not added to the Clerk's Papers.

Thus, the Motion for Summary Judgment and the Affidavits in support thereof was a partial motion dealing specifically and only with the applicability of RCW 70.127 to the work of Defendants.

Judge Verser granted the motion. Plaintiffs filed a Motion for Reconsideration.

On September 18, 2009, an Order Granting Defendants Bridge Builders Motion for Partial Summary Judgment was granted. CP 420.

On September 28, 2009, Plaintiffs brought a Motion for Reconsideration of the Order Granting Partial Summary Judgment. On October 21, 2009, the court entered an Order Granting the Motion and denying Defendants' Motion for Partial Summary Judgment. CP 402. Appendix A.

Second Motion. In the spring of 2011, Plaintiffs moved for partial summary judgment regarding the In-Home Services Act.

In response, Defendants Bridge Builders filed a Counter-Motion for Summary Judgment on May 11, 2011.

The Counter Motion for Summary Judgment again was limited to the application of RCW 70.127 and whether Defendants' service as attorney-in-fact for Lisle and Clara Hale violated RCW 70.127.150. Another question was whether Defendants Bridge Builders violated the Washington Consumer Protection Act.

In support of their counter motion they utilize the Declaration of Mindi Blanchard dated July 24, 2009, which was given in support of Motion for Production of Records. In addition, they relied on the Declaration of Matthew Boyle concerning a letter from the Department of Health dated April 23, 2009 (CP 39) and the Declaration Robert Hale, presumably the Declaration of Robert Hale filed in support of the Motion for Summary Judgment. CP 317.

On June 22, 2011, Judge Craddock Verser signed and entered his Memorandum Opinion and Order on Motion for Summary Judgment denying Plaintiffs' motion, and in essence denying Defendants' counter-motion. CP 252. Appendix B.

Third Motion. On December 5, 2011, Defendants filed their third Motion for Summary Judgment. Defendants asserted "in view of the Court's ruling in its June 22, 2011 Order, defendants move the court pursuant to CR 56 for summary judgment on new grounds based on lack of standing and failure to state a claim." CP 218. The Motion for Summary Judgment related specifically to the applicability of RCW 70.127. The standing which was referred to was standing with respect of that claim. They also sought a decision on "failure to state a claim."

The evidence relied on for Plaintiffs' claim was the Declaration of Mindi Blanchard in Support of Defendant's Motion for Summary

Judgment and attachments thereto dated December 5, 2011 (CP 239 - 247), as well as the evidence previously submitted into the record in Plaintiffs' and Defendants' prior Motions for Summary Judgment. That is, the declaration referred to above. The court entered it. Amended Memorandum Opinion and Order, CP 15 - 28. *See* Attachment C.

Again, the declarations were limited to the issue of whether RCW 70.127 applies to the conduct of Defendants. The declarations did not address any other issues as to whether the Plaintiffs had failed to state a claim.

Plaintiffs' evidence with respect of the motions was as follows:

First Motion – Pleadings.

Second Motion. Declaration of Robert Hale in Support of Plaintiffs' Motion for Partial Summary Judgment (CP 317) and Declaration of Tricia Hale Support of Plaintiffs' Motion for Partial Summary Judgment. CP 314.

Third Motion. Declaration of Alice Semingson dated 12/27/11 (CP 102); Declaration of Tricia Hale in Response to Defendants' Motions for Partial Summary Judgment (12/23/2011), (CP 122); Declaration of Robert Hale in Response to Motions for Summary Judgment dated 12/22/11, with attached exhibits (CP 131); and Declaration of Stephen K. Eugster dated 12/29/11. CP 274.

2. Discovery.

Depositions of Plaintiffs were taken in January 2011. In the fall of 2011, depositions of Bridge Builders, Blanchard, Carpenter, Watral, and an employee of Sherwood Assisted-Living, Rena Keith, were taken.

Various Interrogatories and Requests for Production have been sought and had by the parties.

3. Dismissal of Hastings.

Defendants Hastings were dismissed from the case in the spring of 2011.

C. Questions Presented by Defendants' Motion for Summary Judgment and Failure to State Claims.

Defendants' Motion for Summary Judgment presented the following Questions:³

1. Do the Plaintiffs have standing under the Uniform Declaratory Judgment Act, RCW § 7.24, to pursue their claims for the declaratory relief sought in Counts One and Two of the Amended Complaint?

2. Do the allegations in Plaintiffs' Amended Complaint, if proven, support a finding of abandonment, abuse, financial exploitation or neglect under the Vulnerable Adult Act, RCW 74.34?

3. Do the Plaintiffs have standing to pursue the claim in Count Four, for violation of the Washington Consumer Protection Act, RCW 19.86?

4. Does Washington law recognize a standard of care owed by providers of elder care case management services that would form the

³ Defendants Motion for Summary Judgment, CP 217, 221 - 22.

basis for Plaintiffs' malpractice claim in Count Six?

5. Does Washington law recognize a cause of action for malicious interference with family relationships, and if so, do Plaintiffs' allegations, if proven, support such a claim?

6. Can Plaintiffs meet the objective symptomology element necessary to maintain their claim in Count Eight for negligent infliction of emotional distress?

7. Can Plaintiffs meet the extreme and outrageous element necessary to support their claim in Count Nine for intentional infliction of emotional distress?

IV. SUMMARY OF ARGUMENT

The Hale Family had a plan for the care of the elderly parents of the family who went to Sherwood Assisted Living where they received more care than could be provided at their home. Defendants put that plan asunder causing injury to the members of the family. This would not have happened had the Defendants been licensed under the In Home Care Act, RCW Ch. 70.127. This would not have happened if Defendants knew as they should that the powers of attorney they had obtained were illegal under the Act. This would not have happened had Defendants adhered to the standards of care they should have adhered to as professional geriatric caregivers.

V. ARGUMENT

A. Synopsis of Applicable Laws.

1. Summary Judgment.

In making a summary judgment decision, the court must determine

whether, after reviewing all relevant pleadings and affidavits in favor of the nonmoving party, any genuine issue of material fact exists that prevents the moving party from being entitled to judgment as a matter of law. *Stuart v. American States Ins. Co.*, 134 Wn.2d 814, 818, 953 P.2d 462 (1998) (citing CR 56(c)).

A summary judgment may only be had if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

All facts and reasonable inferences are reviewed in the light most favorable to the nonmoving party. *Steinbach*, 98 Wn.2d at 437. Judgment as a matter of law is appropriate where there is no legally sufficient basis for a reasonable jury to find for a party with respect to the issue. CR 50; *see also, Schmidt v. Coogan*, 162 Wn.2d 488, 493, 173 P.3d 273 (2007) (per curiam) (an order granting judgment as a matter of law should be limited to circumstances in which there is no doubt as to the proper verdict).

2. *Failure to State A Claim, CR 12(b)(6).*

A CR 12(b)(6) motion is only granted when it appears from the face of the complaint that the plaintiff would not be entitled to relief even if he proves all the alleged facts supporting the claim. A trial court's ruling

on a CR 12(b)(6) motion presents a question of law that the appellate court reviews *de novo*. *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007) (citing *Tenore v. AT & T Wireless Servs.*, 136 Wn.2d 322, 329-30, 962 P.2d 104 (1998)).

When factual discrepancies exist, the court must resolve them in the plaintiff's favor because no dismissal for failure to state a claim under CR 12(b)(6) should be granted unless it appears, beyond doubt, that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *See, Berge v. Gorton*, 88 Wn.2d 756, 759, 567 P.2d 187 (1977).

In *Lightner v. Balow*, 59 Wn.2d 856, 370 P.2d 982 (1962), the court recognized that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Lightner*, 59 Wn.2d at 858 (quoting *Sherwood v. Moxee Sch. Dist. No. 90*, 58 Wn.2d 351, 353, 363 P.2d 138 (1961) (quoting *Conley v. Gibson*, 355 U.S. 41, 45, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)). (Emphasis added.)

Under CR 12(b)(6) a plaintiff states a claim upon which relief can be granted if it is possible that facts could be established to support the allegations in the complaint. *See Halvorson v. Dahl*, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978) ("On a [CR] 12(b)(6) motion, a challenge to the

legal sufficiency of the plaintiff's allegations must be denied unless no state of facts which plaintiff could prove, consistent with the complaint, would entitle the plaintiff to relief on the claim."); *see also*, *Christensen v. Swedish Hosp.*, 59 Wn.2d 545, 548, 368 P.2d 897 (1962) (citing *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)).

And, importantly, under CR12(b)(6) the motion is not made pursuant to or in compliance with the summary judgment rule: the court, in ruling on the motion, cannot consider any evidentiary matter outside the pleadings. *Lightner v. Balow*, *supra* at 859.

3. *Affirmative Defenses: Impact of Failure to Assert.*

An affirmative defense must be timely made by the defendant in order for the court to consider it, or else it is considered waived by the defendant's failure to assert it. *Haslund v. Seattle*, 86 Wn.2d 607, 617, 547 P.2d 1221 (1976). *And see*, *Winans v. W.A.A., Inc.*, 52 Wn. App. 89, 108, 758 P.2d 503 (1988).⁴

Defendants did not raise lack of jurisdiction or lack of standing in their affirmative defenses. CP 494 - 95.

4. *Notice Pleading or Fact Pleading.*

⁴ CR 8(c) provides that "[i]n pleading to a preceding pleading, a party shall set forth affirmatively . . . waiver, and any other matter constituting an avoidance or affirmative defense."

The application of a CR 12(b)(6) motion must include an understanding of the necessities of pleading in Washington. A claim is adequately pleaded if it contains a short, plain statement showing that the pleader is entitled to relief, and a demand for judgment based thereon. *Sherwood v. Moxee School Dist. No. 90*, 58 Wn.2d 351, 363 P.2d 138 (1961). A complaint should apprise the defendant of what the plaintiff's claim is and the legal grounds upon which it rests, and should not be dismissed unless it appears beyond doubt that proof of no set of facts would entitle the plaintiff to relief. *Conley v. Gibson*, 355 U.S. 41 (1957).

Washington has specifically rejected the notion that the grounds noticed in the complaint must each be subjected to a plausibility analysis such as that found in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). Washington has specifically rejected the plausibility test. *McCurry v. Chevy Chase Bank*, 169 Wn.2d 96, 103 (2010).

B. The Plaintiffs.

It may be helpful for the court to have an understanding as to the identity of the Plaintiffs. Two of the Plaintiffs are two very elderly people, Lisle and Clara Hale, who at the time of the wrongs committed by defendants were in their 80's and 90's. Amended Complaint, CP 496 and CP 503. They are individually named. Three of the Plaintiffs are the

children of Lisle and Clara Hale – Donald Hale, Tricia Hale and Robert Hale, all of these members of the family are past 50 years of age. Declaration of Stephen K. Eugster dated December 29, 2011 (Eugster Declaration). CP 110.

The Plaintiffs constitute a family, a unit of parents and their children. The Plaintiffs, with respect of the matters contained herein, were acting as a family. They were acting as an association of individuals with a common purpose. The common purpose was the care of the elderly members of the family, Lisle and Clara Hale, and their actions regarding their residence at Sherwood Assisted Living.

An association is the “act of a number of persons in uniting together for some special purpose or business.” BLACK’S LAW DICTIONARY 121 (6th Ed., 1990). Here, the defendants were an association united together for the common purpose of caring for the elderly members of the family.

Did the family members have a right to associate amongst themselves for this special purpose? Of course they did. There is no law which prohibits this. Do the family members individually and as an association have a right to protect and ensure their right to act together for the common purpose of the family? Again, of course they do.

The term family “most commonly refers to a group of persons

consisting of parents and children; father, mother and their children; immediate kindred.” BLACK’S LAW DICTIONARY 604 (6th Ed., 1990).

There can be no doubt that the Hale’s were and are a family.

Associations have standing to assert the common purpose of the members of the association. In *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977), the United States Supreme Court held that an association has standing to sue on behalf of its members when (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. Cited with approval in *Teamsters No. 117 v. State*, 60073-7-I (Wash. App. 7-21-2008) No. 60073-7-I Filed: July 21, 2008 at 5.

C. Injury In Fact, Damages, Nominal Damages.

From time to time, the trial court attempts to say that plaintiff does not have a cause of action because there has been no "injury in fact." It is believed that the trial court has a misunderstanding of the term "injury in fact" and that it is confusing the term with the notion of damages. This case is not a case involving significant damages, it is a case involving injury to the rights of the plaintiff, injury in fact, and damages, though they may be of minor consequence. It is believed that it would be helpful if

there were a discussion of these legal rules.

1. Injury.

Injury means "any wrong or caring done another, either in his person, rights, reputation, or property." It is "the invasion of any legally protected interest of another." RESTATEMENT (SECOND) OF TORTS, § 7; BLACK'S LAW DICTIONARY 785 (6th Ed., 1990).

2. Injury In Fact.

Injury in fact is "such as is required to give a plaintiff standing to sue means concrete and certain harm to warrant granting of standing, there must also be reason to think that the harm can be redressed by relief the court can grant." *Id.*

3. Damages.

Damages are a pecuniary compensation or indemnity, which may be recovered in the courts any person who has suffered loss, detriment, or injury, whether to his person, property, or rights through the unlawful act or omission or negligence of another." *Id.* at 389.

4. Nominal Damages.

Washington is a nominal damages state. Nominal damages are "either those damages recoverable where a legal right is to be vindicated against an invasion that has produced no actual present loss of any kind or where, from the nature of the case, some compensable injury has been

shown that the amount of that injury has not been proved.” *Damages*, 22 AM. JUR. 2d 38 (1988). The law infers some damage from the breach of an agreement for the invasion of a right and a substantial damage is not established or no evidence is given of any particular amount of loss, it declares the right by awarding “nominal damages.” *Id.*

Liability for nominal damages is sufficient to sustain a cause of action and the possibility of an award precludes the grant of a motion for summary judgment. *Id.*

C. MCCORMICK, DAMAGES § 91 (1935): "It is repeatedly announced by the courts that, where the plaintiff establishes the fact of loss, but not its amount, he may recover nominal damages."

As a general rule, the problem of proof of damages is solved by the principle that certainty as to damages applies to the fact of damage and not to the amount; that once damage has been proved, uncertainty or difficulty in determining the amount of damages will not preclude a recovery for the plaintiff. *Frazier v. Bowmar*, 42 Wn.2d 383, 385, 255 P.2d 906 (1953):

The burden is upon respondent to prove, with reasonable certainty, his damages resulting from appellant's act. The proof must be sufficient to remove it from the realm of speculation, but it is not necessary that it be susceptible of exact calculation. *National School Studios v. Superior School Photo Service*, 40 Wn.2d 263, 242 P.2d 756; see 4 Restatement, Torts, § 912, comment (d).

See also, Note, *Damages*, 29 WASH. L. REV. & ST. B. J. 110, 111 (1954) and additional cases cited therein;⁵ *Miles v. F.E.R.M. Enterprises, Inc.*, 29 Wn. App. 61, 68, 627 P.2d 564 (1981) (“If the plaintiff proves a wrong, he may recover nominal damages. C. MCCORMICK, DAMAGES §§ 23, 24 (1935); D. DOBBS, REMEDIES § 3.8, at 192 (1973).”)

5. *Instances of Injury in Fact.*

The declarations are replete with instances where Defendants committed injuries in fact of the rights of the Plaintiffs.

From the Declaration of Mindi Blanchard in Support of Defendants Motion for Summary Judgment (Blanchard II, CP 239) we learn of a number of actions on the part Defendants which injured Lisle and Clara Hale and the family. Powers of attorney were sought by Defendants when the powers were illegal under the In Home Care Services Act. The family home was intruded upon and locks were changed. This was without the consent of Tricia Hale, one of the inhabitants of part of the home. Bank accounts were changed and Social Security deposits were redirected. Defendants took control of the finances of the Hales. Blanchard had convinced the Hales to move back to the family home without conducting

⁵ *Gaasland v. Hyak Lumber*, 42 Wn.2d 705, 255 P.2d 784 (1953); *Dunseath v. Hallauer*, 41 Wn.2d 895, 253 P.2d 408 (1953); *Gray v. McDonald*, 46 Wn.2d 574, 580 - 81, 283 P.2d 135 (1955).

a study as to the resources of the Hales to pay for a planned in-home nursing home. No studies of the mental capacity of the Hales was undertaken. No medical records were considered or viewed. No contact was made with the other family members concerning the plan Blanchard had initiated. Family members were excluded. Blanchard caused plans which were in place to change. Blanchard's efforts were to bring an end to the agreements of the Hales with Sherwood Assisted Living. The Hales were billed for these undertakings. *Id.* and generally at CP 241 - 246 with respect of the foregoing.

Defendants isolated Lisle and Clara Hale from the family. Defendants had contacts with the Hales during the isolation. Declaration of Tricia Hale in Response to Defendant's Motion for Partial Summary Judgment. CP 122. Defendants stopped Donald Hale and the other family members from having contact with Lisle and Clara Hale. CP 126. Defendants did not contact Tricia Hale, who had been the primary caregiver to Lisle and Clara Hale, what might be needed to move the parents back to the home and whether it was wise to do so. *Id.* Defendants advertised to Lisle and Clara Hale that they could move them back to the home and undertake a host of in-home care services when in fact, they were licensed to do so and when in fact, the powers of attorney given to them were illegal. CP 127 - 128.

In the Declaration of Robert L. Hale in Response to Motions for Summary Judgment (CP 131), Defendant did not make Lisle and Clara Hale aware of the fees and costs which would be imposed when the Hales were moved back to the home. CP 135. Lisle Hale said he could not afford what it would cost, yet this was looked into by Defendants. CP 135. It was not the desire of Lisle and Clara Hale for Defendants to have control their assets. *Id.*

The Defendants did not conduct any evaluations of the Hales or of their assets, nor did they discuss other alternatives to moving back to the home. *Id.* Tricia understood that she was going to have to move out of the house because of the Defendants taking control of the house. *Id.* Defendants did not discuss with Lisle and Clara Hale how much it would cost to stay in the home, how much care would be needed, the need to move Tricia from the home, the money and resources the Hales had to make the move, and did not discuss matters with the family. CP 137 - 150.

D. Court Erred When it Regarded All Motions as Summary Judgment Motions.

The court said "plaintiffs have repeatedly invited the court to treat Defendants Bridge Builders' motions for summary judgment as motions for dismissal under CR 12(b) (6), and thus the mere allegations of any

facts are sufficient to meet their burden demonstrate a genuine issue of material fact. The court denies that invitation and will hold both parties to the well-known standards for summary judgment." Opinion, CP 15 at 18 - 19.

This was in error. The effect of this understanding was to cause the court to dismiss claims when they should not be dismissed under the standards of CR 12(b)(6).

Furthermore, in various instances, the trial judge ignored the requirements of CR 56 even though he was applying CR 56 in making his decision regarding whether a count failed to state a claim. For example, under CR 56 a nonmoving party cannot rely on his pleadings without filing counter pleadings when opposing counsel files supporting affidavits or declarations. This is only true where there are supporting affidavits or declarations denying the allegations in the pleadings. If there are no supporting affidavits, the non-moving party can rely on his pleadings.

CR 56 says that only supporting affidavits beyond the pleadings are necessary if the moving party has brought his motion on the basis of supporting affidavits. CR 56(e), second to last sentence.⁶

⁶ CR 56(e) provides in part: "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth

E. In-Home Care Services Act, Count 1 and Count 2.

The trial court asserts that “Plaintiffs cannot show injury in fact arising from their brief relationship with the Bridge Builder defendants.” Opinion CP 20. And, that as a result they do not have standing. *Id.* As a result of this thinking, the court dismissed Counts 1 and 2. CP 21.

The only basis for the court’s conclusion of lack of standing is the court’s position on “injury in fact.” The court relies on *Lakewood Racquet Club v. Jensen*, 156 Wn. App. 215, 224, 232 P.3d 1147 (2010) for support for the contention Plaintiffs have not been injured in fact and thus do not have a declaratory judgment claim. CP 20. This case addressed the issue whether “even if it were to violate the covenants by subdividing the property or engaging in a nonpermitted use, Orr's heirs would suffer no ‘injury in fact’ because they would not incur ‘actual damages.’ Appellant's Brief at 13-14.” *Id.*

The case at hand is a far cry different from *Lakewood*. Here, the Plaintiffs did indeed suffer an injury in fact because the Defendants were acting as holders of powers of attorney when it was illegal for them to do so. RCW 70.127.150.

specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. [Emphasis added.]

Next, in its analysis, the court concluded that the Defendants did not provide “‘in home care services’ to the Plaintiffs.” CP 20. The court is wrong. The issue is not whether Plaintiffs received in home care services from the Defendants, the issue is whether or not the Defendants had to have been licensed prior to their dealings with Plaintiffs and whether the powers of attorney they were given by Lisle and Clara Hale were illegal.

Clearly, the Defendants were required to be licensed. Because the Defendants had to have been licensed, the Plaintiffs have standing. They have met the requirements of the cases cited by the court –

"(1) . . . an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive."

To-Ro Trade Shows v. Collins, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001).

1. Defendants were required to be licensed.

The facts of the conduct of Defendants establish (1) that Defendants were required to be licensed under the Act, (2) that they could not serve as holders of powers of attorney from Lisle and Clara Hale, and (3) their actions were *per se* violations of the Washington Consumer Protection Act (RCW Ch. 19.86).

Defendants were required to be licensed because they “advertise[d], operate[d], manage[d], conduct[ed], open[ed], or maintain[ed] an in-home services agency.” RCW 70.127.020 (1). An “in-home services agency” is “a person [who] administer[s] or provide[s] home health, home care, hospice services, or hospice care center services directly or through a contract arrangement to individuals in a place of temporary or permanent residence.” RCW 70.127.010 (14). Indeed, Defendant Blanchard was advertising in-home care services when she met with Hales at various times during June 2009. Declaration of Mindi Blanchard, CP 239 - 246.

Defendants were required to be licensed as an “in-home services agency “because they “function[ed] as a home health, hospice, hospice care center, or home care agency.” RCW 70.127.020 (2). Defendants functioned as a home care agency. A home care agency is “a person administering or providing home care services directly or through a contract arrangement to individuals in places of temporary or permanent residence.” RCW 70.127.020 (5). Home care services means “nonmedical services and assistance provided to ill, disabled, or vulnerable individuals that enable them to remain in their residences” which consists of a whole host of services and similar undelineated services. RCW 70.127.020 (6) (see page 2 above).

Because Defendants were required to be licensed under the Act, the power of attorney granted to them were illegal. RCW 70.127.150 “No licensee, contractee, or employee may hold a durable power of attorney on behalf of any individual who is receiving care from the licensee.”

In Count 2 of their Complaint, Plaintiffs assert that the powers of attorney held by Defendants were illegal under the provisions of the In-Home Services Act. RCW 70.127.150 says “[n]o licensee, contractee, or employee may hold a durable power of attorney on behalf of any individual who is receiving care from the licensee.”

The issue therefore is whether Defendants had to have been licensees under the Act. That is, whether the Act required that they be licensed. Were they to have been licensed, their powers of attorney in fact would be illegal.

Another point is that the court placed a roadblock on Plaintiffs’ efforts to show Defendants were engaged in in-home care services. The trial judge said in his June 27, 2011 decision: “On the other hand if employees of Bridge Builders actually provide services then the holding in *Cummings*, dictates that they should be licensed and plaintiffs’ are entitled

to the relief they seek in this motion.”⁷ CP 254. (Emphasis added.)

RCW 70.127.020 provides (1) that “a license is required for a person to advertise, operate, manage, conduct, open, or maintain an in-home services agency and (2) that [a]n in-home services agency license is required for a nursing home, hospital, or other person that functions as a home health, hospice, hospice care center, or home care agency.”

If one is required to be licensed, RCW 70.127.150 “[n]o licensee, contractee, or employee may hold a durable power of attorney on behalf of any individual who is receiving care from the licensee.”

An “in-home services agency” is defined as “(14) "In-home services agency" means a person licensed to administer or provide home health, home care, hospice services, or hospice care center services directly or through a contract arrangement to individuals in a place of temporary or permanent residence. RCW 70.127.010(14). “Home care services” is defined as

(6) "Home care services" means nonmedical services and assistance provided to ill, disabled, or vulnerable individuals that enable them to remain in their residences. Home care services include, but are not limited to: Personal care such as assistance with dressing, feeding, and personal hygiene to facilitate self-care; homemaker assistance with household tasks, such as housekeeping,

⁷ *Cummings* refers to *Cummings v. Guardianship Servs.*, 128 Wn. App. 742, 110 P.3d 796 (2005), *pet. review denied*, 157 Wn.2d 1006, 136 P.3d 759 (2006).

shopping, meal planning and preparation, and transportation; respite care assistance and support provided to the family; or other nonmedical services or delegated tasks of nursing under RCW 18.79.260(3)(e).”

Clearly from the advertising of Defendants, they were engaged in advertising “home care services.” Declaration of Tricia Hale In Support of Plaintiffs’ Motion Partial Summary Judgment CP 314 at 315.

Furthermore, the work Defendants were going to be doing once they had moved the Hales from Sherwood Assisted Living was work they in essence were advertising and was work which amounted to home care services.⁸ Thus, whether the services had yet to be provided did not change the fact that Defendants were advertising home care services which required licensing.⁹

F. Discovery Issues.

In order to answer the question as to what Defendants did, that is whether their work required them to be licensed under the In-Home

⁸ The Declaration of Mindi Blanchard In Support of Defendants’ Motion for Summary Judgment shows she advertised to the Hales that she could move them back their home if they would give powers of attorney. CP 243.

⁹ The court cites *Brown v. Vail*, 169 Wn.2d 318, 237 P.3d 263 (2010) (Opinion 6) for the proposition the court’s decision concerning RCW 70.127 and its applicability to Defendants would not be final and conclusive in that only the Department of Health has authority to make the determination. *Brown* provides no support for such proposition. The statutes regarding licensing are devoid of ambiguity.

Services Act, RCW Ch. 70.127, Plaintiffs sought discovery of the exact nature of the work of the Defendants. The court did not allow the discovery and thus Plaintiff was completely thwarted by the court, even though the court clearly knew the information was required. It must be remembered that the court in its decision regarding the Third Motion for Summary Judgment by Defendants said, “The court does not actually know exactly what services Bridge Builders provides with its employees.” CP 254. Further the court said: “On the other hand if employees of Bridge Builders actually provide services then the holding in *Cummings* [¹⁰], dictates that they should be licensed and plaintiffs are entitled to the relief they seek in this motion.” CP 254.

G. Vulnerable Adult Act, Count 3.

The trial court treated the claim as if it was subject to a summary judgment motion. The trial court dismissed this claim on the basis that Plaintiffs had not asserted facts which would “give rise to the conclusion that the elderly Hales were abused, financially exploited, or neglected as those terms are defined in RCW 74.34.020.” This statement could not be farther from the truth.

The Vulnerable Adult Act is applicable or implemented in this case

¹⁰ *Cummings v. Guardianship Servs.*, 128 Wn. App. 742, 110 P.3d 796 (2005), *pet. review denied*, 157 Wn.2d 1006, 136 P.3d 759 (2006).

because the Defendants were required to be licensed under RCW Ch.

70.127. RCW 74.34.200 (1) provides:

[i]n addition to other remedies available under the law, a vulnerable adult who has been subjected to abandonment, abuse, financial exploitation, or neglect either while residing in a facility or in the case of a person residing at home who receives care from a home health, hospice, or home care agency, or an individual provider, shall have a cause of action for damages on account of his or her injuries, pain and suffering, and loss of property sustained thereby. This action shall be available where the defendant is or was a . . . or home care agency licensed or required to be licensed under chapter 70.127 RCW, [Emphasis added.]

Defendants are proper parties under RCW 74.34.200 because they are a home care agency required to be licensed under RCW Ch. 70.127.

The Hales were subjected to "abuse" "financial exploitation" or "neglect" as those terms are defined in the Act and so it was alleged in Plaintiffs' Complaint.

RCW 74.34.200(1) provides that

vulnerable adult who has been subjected to abandonment, abuse, financial exploitation, or neglect either while residing in a facility or in the case of a person residing at home who receives care from a home health, hospice, or *home care agency*, or an individual provider, shall have a cause of action for damages on account of his or her injuries, pain and suffering, and loss of property sustained thereby.

This section goes on to provide that "[t]his action shall be available where the defendant is or was a . . . home care agency licensed or required

to be licensed under chapter 70.127 RCW, as now or subsequently designated. . . .” [Emphasis added.]

The Hales suffered “abuse” at the hands of the Defendants.

Under the Act, RCW 74.34.020(2), “abuse” “includes . . . mental abuse, . . . and exploitation of a vulnerable adult.” *Id.*

“ ‘Mental abuse’ means inappropriately isolating a vulnerable adult from family, friends, or regular activity, and verbal assault that includes ridiculing, intimidating, yelling, or swearing. RCW 74.34.200(2)(c).

[Emphasis added.] The Hales were isolated from their children.

Declaration of Tricia Hale CP 125 - 127.

Abuse includes "[e]xploitation" means an act of forcing, compelling, or exerting undue influence over a vulnerable adult causing the vulnerable adult to act in a way that is inconsistent with relevant past behavior. RCW 74.34.200(2)(d). Defendants acted to change the plans the Hales and their family had in place regarding the care of Lisle and Clara Hale. The Declaration of Mindi Blanchard in Support of Defendants’ Motion for Summary Judgment. CP 243.

Abuse means “financial exploitation” which means the “illegal or improper use, control over, or withholding of the property, income, resources, or trust funds of the vulnerable adult by any person or entity for any person's or entity's profit or advantage other than for the vulnerable

adult's profit or advantage.” RCW 74.34.200(6).

The term "financial exploitation" includes, but is not limited to:

(a) The use of deception, intimidation, or undue influence by a person or entity in a position of trust and confidence with a vulnerable adult to obtain or use the property, income, resources, or trust funds of the vulnerable adult for the benefit of a person or entity other than the vulnerable adult;

(b) The breach of a fiduciary duty, including, but not limited to, the misuse of a power of attorney, trust, or a guardianship appointment, that results in the unauthorized appropriation, sale, or transfer of the property, income, resources, or trust funds of the vulnerable adult for the benefit of a person or entity other than the vulnerable adult;

RCW 74.34.200(6)(a) and (c). [Emphasis added.]

Defendants were going to act as holders of powers of attorney yet they were going to provide the services they advertised to keep the Hales in their home. There were acting in a conflict situation, a self dealing situation in violation of the power of attorney position. *See, e.g., Bryant v. Bryant*, 125 Wn.2d 113, 118 - 119, 882 P.2d 169 (1994).

Plaintiffs’ Vulnerable Adult Claim (Count 3) sets forth specific factual allegations within the body of the count. These include all of the previous allegations in the Complaint and some additional allegations. The allegations, if proved, will establish that the Hales suffered abuse, financial exploitation and neglect as those terms are defined in RCW 74.34.200. These are also reiterated in the Declarations of the Plaintiffs.

Declaration of Tricia Hale, CP 122. Declaration of Robert Hale, CP 131 - 134.

Defendants Bridge Builders would have the court dismiss the Complaint because of certain factual statements they make in their brief. *See* Defendant Bridge Builders Motion at page 10, line 10 and line 20. That this turns the motion into a summary judgment motion obviously must be denied because the facts are not presented by affidavit and the facts if they are, are contradicted by the Declarations of Tricia Hale and Robert Hale.

Also, the court must “deny the challenge to the legal sufficiency of the plaintiff’s allegations” because it cannot say there is “no state of facts which plaintiff could prove, consistent with the complaint, would entitle the plaintiff to relief on the claim.” *Halvorson v. Dahl*, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978).

H. Consumer Protection Act, Count 4.

The court dismissed Count 4 reasoning that Plaintiffs have no *per se* cause of action because of the Court’s dismissal of Counts 1 and 2.

Further, the Court dismissed the Count because “Plaintiffs have not shown an injury to their business or property as a result of the brief association with the Bridge Builder defendants.” CP 22.

As has been established, the court was in error regarding the

dismissal of Counts 1 and 2. The Plaintiffs do have a *per se* violation of the Consumer Protection Act. RCW 70.127.216.

Second, Plaintiffs have shown an injury to their business or property as a result of the brief association with the Bridge Builder defendants. *See* the topics “Injury in Fact” and “Nominal Damages” set forth above at 21.

Third, the allegations in Count 4 must be taken as true for this motion. So taken, there is no basis upon which the court can dismiss the count. *See* Plaintiffs’ Amended Complaint at paragraph 221 and paragraphs 224 through 230.

I. Claim for Malpractice, Count 6.

Defendants assert Count 6 should be dismissed for failure to state a claim. The court rejected the claim that the count should be dismissed: The court found that the Declaration of Alice Semingson demonstrated a special duty of care and arguably that the Defendants breached that duty of care. CP 102.

Alice Semingson, plaintiffs’ expert witness in these matters, testified as to many breaches of the duty of care Defendants owed to Plaintiffs and especially Lisle and Clara Hale. Based upon her experience as a Geriatric Care Manager for Honoring Elders in Spokane, as well as her review of the Standards of Care (NAPGCM) and Western Region

Geriatric Care Management (WRGCM) Pledge of Ethics, Defendants

failed in their management of Lisle and Clara. She said:

- The decision to obtain a Power of Attorney without any investigation of their needs or diagnoses was reckless. To promise to facilitate the move within three days is not reasonable. It takes much more time than that to coordinate care needs,
- Had Ms. Blanchard reviewed the records, or had an assessment done, she would have known that Lisle had developed open areas on his skin which can be life-threatening. This requires the care of a Licensed Nurse. She would also have discovered that he had needed numerous medication adjustments to control painful gout of his wrist.
- Ms. Blanchard failed to provide and/or coordinate an assessment of care needs for the couple. This was promised by Mr. Hastings, and is accepted Standard of Care for discharge planning, It is also promised on her website: "This starts with assessing your situation so that we can tailor the information and services we provide."
- The Western Region Geriatric Care Managements has a Pledge of Ethics, which Ms. Blanchard has testified that she adheres to. The FIRST item in the pledge states "I will provide ongoing service to you only after I have assessed your needs..." Ms. Blanchard and Ms. Carpenter failed to do this.
- Ms. Blanchard promised to provide "assisted living services in the home" as her website indicated. This is misleading, as she has testified that she does not provide this service.
- WRGCM's Pledge of Ethics directs that the Care Manager "must provide services based on your best interest." This was clearly never done by Ms. Blanchard's failure to determine their care needs.
- Standard 2 of the National Association of Professional Geriatric Care Managers states in subsection (5), that the client's decisional capacity should be evaluated. This was not done – another breach in standards.

- Standard 5 of the National Association of Professional Geriatric Care Managers states that the GCM should refrain from entering into a dual relationship if the relationship could reasonably be expected to impair the care manager's competence or effectiveness or may put the client at risk of financial exploitation. A dual relationship is defined as one in which multiple roles exist between provider and client. This standard recognizes the complexity of making financial and other decisions for a client and is a caution against it.
- Standard 7 of the National Association of Professional Geriatric Care Managers states that "The GCM should strive to provide quality care using a flexible care plan developed in conjunction with the older person and/or client system." Ms. Blanchard testified that she does not do this, but merely leaves it up to whatever agency she brings in.
- It is disturbing that Ms. Blanchard felt that there was no conflict in being a POA for healthcare decision-making as well as for finances. There clearly is a conflict when her company is providing the services to keep a client in the home, and billing them for it. She made this determination without any exploration of their need. In my experience, Geriatric Care Managers will accept a power of attorney for healthcare only when there is an outstanding need that cannot be met by anyone else. It is forbidden by some companies to seek or accept a power of attorney for finances. There is too much potential for impropriety in that scenario.
- It is also astonishing that this would be undertaken so close to a weekend (Thursday). This is usually avoided by responsible discharge planners, as there are limited resources available on weekends. For example, their usual physician may not have been available in an emergency.
- As Geriatric Care Managers, they have an obligation to assist in managing the assets in a good steward fashion; the cost for twenty-four hour care, seems ill thought out. At a conservative rate of \$20/hr, the cost would have been \$14,600 per month for one of them. A second person fee would have added more to that rate. As their dementia progressed, and their needs accelerated, more fees would have been added.

Appendix D.

**J. Interference with Family Relationship: (New Cause of Action),
Count 7.**

Defendants' motion with regard to this claim is a failure to state a claim motion. It must be tested as such. This claim relates tangentially to principles found in Counts 8 and 9.

First, Defendants assert the claim for family interference does not exist with respect of adult child-parent relationships. That there may not be Washington case law on the issue does not mean that claim cannot be made.

Next, that the interference if there is a claim must be "malicious" and there are no allegations of malicious interference. This is wrong. The allegations in the Complaint are replete with actions a jury or trier of fact might find to be intentional and malicious – Defendants were acting illegally; they could not hold a power of attorney; within a day the Hales were directed to an attorney who caused Mindi Blanchard and Brenda Carpenter to be holders of the Hales power of attorney; the family members were kept away from the parents; Defendants, without any knowledge of the details of the Hale situation and the health care needs of the Hales, were going to move the Hales back into their home and set up a nursing home in the home and block the family from the home. And, they do all of this within a matter of eight days.

I. New Cause of Action.

From time immemorial, families have undertaken to care for and protect the members of the family who are aged, vulnerable, confused, and/or in need of care by other members of the family. Families act as a group or associations of family members for the purpose of a common object. Individually, and as a group or an association, they should have rights regarding this endeavor, this joint action.

In part, this case is about the rights of the family and its members in these regards and the duties others have toward the family and its members in the context of this case. It might be said there is no such “cause of action.” Plaintiffs think there is. Plaintiffs believe this case establishes this cause of action.

Whether there is or is not, Plaintiffs assert there should be such a cause of action. And, they have good reason for doing so. In *Strode v. Gleason*, 9 Wn. App. 13, 17, 510 P.2d 250 (1973), the court said:

The novelty of an asserted right and the lack of precedent are not valid reasons for denying relief to one who has been injured by the conduct of another. The common law has been determined by the needs of society and must recognize and be adaptable to contemporary conditions and relationships. *Funk v. United States*, 290 U.S. 371, 78 L. Ed. 369, 54 S. Ct. 212, 93 A.L.R. 1136 (1933); *Russick v. Hicks*, 85 F. Supp. 281 (W.D. Mich. 1949); *Miller v. Monsen*, 228 Minn. 400, 37 N.W.2d 543 (1949).

[S]tability should not to be confused with perpetuity. If the law is to have a current

relevance, courts must have and exert the capacity to change a rule of law when reason so requires.

In re Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970).

The thinking of the court in *In re Stranger Creek* can be found in this:

The trend of the law as we perceive it would recognize a cause of action in a parent for the alienation of the affections of a child. *Daily v. Parker*, 152 F.2d 174, 162 A.L.R. 819 (7th Cir. 1945), reversed the dismissal of a complaint initiated by a minor child for the alienation of its father's affections. The issue was stated as follows at page 176: Is the family relationship and the rights of the different members therein, arising therefrom, sufficient to support a cause of action in each, the father, mother, or children, against one who breaks it up and destroys rights of the said individual members?

. . . . Relativity of rights and duties marks the rights and the obligations of the group and relativity is determined in each case by the situation of the family. But relativity does not eliminate or destroy the rights of any member.

. . . . The conclusion that all members of a family have a right to protect the family relationship and that a minor child may bring suit against a third person who wrongfully induced a parent to desert the child has also been reached in *Russick v. Hicks*, supra; *Johnson v. Luhman*, 330 Ill. App. 598, 71 N.E.2d 810 (1947); and *Miller v. Monsen*, supra.

“The foundation of liability is that where there has been an injury, there is a remedy.” *Mills v. Orcas Power & Light Co.*, 56 Wn.2d 807, 821, 355 P.2d 781(1960). For this statement of the law the court provided the following citations, SHIPMAN ON COMMON LAW PLEADING 54 (3d ed.), (“There ought indeed to be a remedy for every wrong (ubi jus, ibi

remedium) . . ."); 2 HOLDSWORTH'S HISTORY OF ENGLISH LAW 50 (4th ed.); Wigmore, *Responsibility for Tortious Acts: Its History*, 7 HARVARD L. REV. 315, 383, 441; 2 HARPER & JAMES, THE LAW OF TORTS, 785, § 14.1.

Along these lines of thinking the RESTATEMENT (SECOND) OF TORTS, § 874A provides that legislative protections of a class of persons can provide the basis for a new cause of action:

When a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision, accord to an injured member of the class a right of action, using a suitable existing tort action or a new cause of action analogous to an existing tort action.

RESTATEMENT (SECOND) OF TORTS § 874A (1979).

What do we know in the state of Washington today? What does the law say about the care of elderly and/or vulnerable members of Washington families? We know that the Legislature has taken steps to protect the elderly and their families. A person is required to be licensed under the In-Home Care Services Act if they provide home care services or if they advertise home care service. Defendants are obligated by law to take the family into consideration under regulations adopted pursuant to such Act. WAC 246-335-090 (home care plan of care).

The family is brought into consideration under Washington's Professional Guardian Program, *see* Standards of Practice 401.9, "The guardian shall cooperate with and carefully consider the views and opinions of professionals, relatives, and friends who are knowledgeable about the incapacitated person."

Professionals like Mindi Blanchard and Brenda Carpenter as members of the National Association of Professional Geriatric Care Managers¹¹ subscribe to the Standards of Care and Ethics of the NAPGCM. These standards require consideration of the family in providing for the care of an elderly family member. Standards provide in part as follows:

- (1) [t]he primary client's care needs take place within the context of their family system and physical and social environments.
- (2) The primary client may not necessarily be the person who makes the initial contact or the person responsible for payment for services rendered.
- (3) All others affected by or have an impact on the client's care needs should be considered part of the 'client system' and may include . . . a family member within or outside of the primary client's household
- (4) The care plan guides the work of the care manager by

¹¹Defendant Mindi Blanchard is a member of the National Association of Professional Geriatric Care Managers and says she abided by the NAPGCM Standards of Practice. Declaration of Stephen K. Eugster dated December 29, 2011. CP 110 at 111 and following pages.

addressing the immediate and long-term needs, wishes and preferences of the client and the client system, and clarifies the expectations of the care management role.

The Hale Family have a right in association and individually to act to plan, care for and protect the elderly members of the family. They have a right to protect that right.

K. Interference with Family Relationships, Count 7.

With respect of Count 7, interference with family relationships, Defendants sought dismissal on the basis of failure. The question the Defendants presented was “[d]oes Washington law recognize a cause of action for malicious interference with family relationships, and if so, do plaintiffs' allegations, if proven, support such a claim?”

Defendants submitted no affidavits or declarations with respect of their claim. The motion must be regarded as a CR 12(b)(6) motion and tested as such.

L. Negligent Infliction of Emotional Distress, Count 8.

With respect of Count 8, negligent infliction of emotional distress, Defendants sought dismissal on the basis of failure to state a claim. The question the Defendants presented was “[c]an plaintiffs meet the objective symptomology element necessary to maintain their claim in Count Eight for negligent infliction of emotional distress?”

Defendants submitted no affidavits or declarations with respect of

their claim. The motion must be regarded as a CR 12(b)(6) motion and tested as such.

It is helpful to understand the special circumstances an elderly adult may be in concerning “objective symptomology.” In RCW 74.34.020(2), it is said: “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.”

A trier of fact will have to determine whether the facts alleged to have harmed Plaintiffs are such they meet the standard despite the fact of the absence of Lisle Hale and lack of ability of Clara Hale.

The claim cannot be dismissed under the standards applicable to motions for failure to state a claim, CR 12(b)(6).

M. Intentional Infliction of Emotional Distress Count 9.

With respect of Count 9, outrage, Defendants sought dismissal on the basis of failure to state a claim. The question Defendants presented was [c]an plaintiffs meet the extreme and outrageous element necessary to support their claim in Count Nine for intentional infliction of emotional distress?”

Defendants submitted no affidavits or declarations with respect of their claim. The motion must be regarded as a CR 12(b)(6) motion and

tested as such.

They assert that the claim must be dismissed because "plaintiffs allege no conduct by defendants that rises to the level of that discussed in *Saldivar* or *Spurrell*. At this point, Defendants again attempt to put factual matters into the record in order to make their claim.

However, is apparent from the pleadings that the conduct here does rise above the conduct level in *Sadlivar* or *Spurrell*. In *Saldivar v. Momah*, 145 Wn. App. 365, 390, 186 P.3d 1117 (2008) "Filing suit alleging sexual abuse by a physician, even with malicious intent (as the Momah brothers alleged but did not show), is not "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency" and to be "utterly intolerable in a civilized community" *Grimsby v. Samson*, 85 Wn.2d 52, 59, 530 P.2d 291 (1975) (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. d at 73).

In *Spurrell v. Block*, 40 Wn. App. 854, 862, 701 P.2d 529 (1985), the court said the question whether certain conduct is sufficiently outrageous is ordinarily a question for the trier of fact. *See also, Brower v. Ackerley*, 88 Wn. App. 87, 101 - 102, 943 P.2d 1141 (1997).

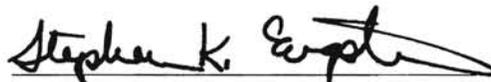
The claim cannot be dismissed under the standards applicable to motions for failure to state a claim, CR 12(b)(6).

VI. CONCLUSION

For the reasons set forth above, Plaintiffs request that the court overrule the trial court's decisions in their entirety.

Respectfully submitted this 25th day of June, 2012.

EUGSTER LAW OFFICE, PSC

A handwritten signature in black ink, appearing to read "Stephen K. Eugster", with a long, sweeping horizontal stroke extending to the right.

Stephen K. Eugster, WSBA # 2003

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BARBARA CHRISTENSEN

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLALLAM

ROBERT HALE, as personal
representative of
The estate of Lisle Hale, deceased;
et. al.,

Plaintiffs,

vs.

BRIDGE BUILDERS, LTD., et. al.,

Defendants.

Case No.: 09-2-00447-4

OPINION AND ORDER ON
MOTION FOR RECONSIDERATION

This matter came before the undersigned to consider Plaintiffs' Motion for Reconsideration of the Court's September 18, 2009 oral opinion granting Defendants' Motion for Partial Summary Judgment.

The court considered the amended complaint filed herein on May 18, 2009 [CP 9]; Defendants' Motion for Partial Summary Judgment filed 7/31/09 [CP 29]; the declaration of Mindi Blanchard with attached exhibits A and B filed 7/31/09 [CP 30]; the declaration of Alan Millet filed 7/31/09 [CP 31]; Plaintiffs' Memorandum in Opposition to the motion filed 8/17/09 [CP 40]; Defendants' Reply Brief filed 9/11/09 [CP 43]; Plaintiffs' Motion to Reconsider and Memorandum in Support of that motion filed 9/28/09 [CP 48 & 49]; and Defendants' Response to the Motion for Reconsideration dated 10/14/09.

CRADDOCK D. VERSER
JUDGE
Jefferson County Superior Court
P.O. Box 1220
Port Townsend, WA 98368

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ISSUE

Is there a genuine issue of material fact as to whether Bridge Builders, LTD., is an "in home services agency" required to be licensed by RCW 70.127.020.

DECISION SUBJECT TO RECONSIDERATION

Plaintiffs allege, among other claims, that defendants Bridge Builders, Ltd., Mindi R. Blanchard, et. ux., and Brenda S. Carpenter, et. ux., jointly referred to in this opinion as "Bridge Builders" are an in home services agency which failed to comply with the licensing requirements of RCW 70.127.020 et. seq.

Bridge Builders assert that they are exempt from that statute by RCW 70.127.040(14) as they provide only "case management services" as defined by that statute.

The court granted Bridge Builders' motion for partial summary judgment ruling as a matter of law that Bridge Builders was not required to be licensed as an in home services agency. That ruling is subject to this motion for reconsideration.

ANALYSIS

In support of their opposition to partial summary judgment, Plaintiffs demonstrated, and Bridge Builders did not dispute, that in the course of their brief relationship with the elder Hales, Bridge Builders: (1) transported the Hales to Washington Mutual Bank to make changes in their bank accounts (2) assisted Lisle Hale with payment of bills (3) arranged for and met with a locksmith at the Hale's home to change the locks on the home and (4) assisted the Hales in preparation for moving them from an assisted living situation back into their home. Plaintiffs contend that these activities are more than "case management services". In addition, Plaintiffs cite to Bridge Builders' advertising for other examples of how Bridge Builders actually provides "home care services" as that term is used by RCW 70.127.010(6).

Chapter 70.127 RCW was enacted in 1988 to protect the ill, disabled and elderly who need assistance with personal care. The legislature was concerned about the virtual invisibility of home care providers, and the attendant risks to their vulnerable clients. The legislature addressed this problem by establishing minimum standards for care, and by requiring that homecare agencies serving these vulnerable populations be licensed to ensure compliance with these standards.

CRADDOCK D. VERSER
JUDGE

Jefferson County Superior Court
P.O. Box 1220
Port Townsend, WA 98368

1 Cummings v. Guardianship Services of Seattle, 128 Wn. App.
2 742, 750, 110 P.3d 796 (Div. I, 2005).
3

4 An agency that administers or provides either directly or through a
5 contract arrangement "home care services" must comply with the RCW 70.127
6 licensing requirements and restrictions. RCW 70.127.010(5). "Home Care
7 Services" are defined by RCW 70.127.010(6) as:
8

9 ...nonmedical services and assistance provided to ill, disabled,
10 or vulnerable individuals that enable them to remain in their
11 residences. Home care services include, but are not limited
12 to: homemaker assistance with household tasks, such as
13 shopping, meal planning and preparation and transportation;
14 ...or other nonmedical services...
15

16 Bridge Builders submits the declarations of Mindi Blanchard and Allen
17 Millet in support of their position that they provide only "case management
18 services" and thus are exempt from licensing requirements by RCW
19 70.127.040(14). That statute defines "case management services" as:
20

21 ...the assessment, coordination, authorization, planning,
22 training, and monitoring of home health, hospice, and home
23 care and does not include the direct provision of care to an
24 individual.
25

26 Some of the services offered by home builders, as shown in attachment
27 A to the Mindi Blanchard declaration, are: (1) daily reminders to take
28 medication (2) calling daily and if necessary tracking a person down to
29 insure their "day-to-day safety" (3) responding to an emergency room or home
30 in the event of a medical emergency and maintaining a copy of "emergency
31 documents" to be provided to a medical provider (4) providing a monthly
32 financial report, assisting if the individual cannot write checks and
33 providing monthly checkbook reconciliation (5) providing transportation and
34 accompanying the individual to medical appointments (6) transporting pets to
35 the groomer and providing daily walks for a pet (7) coordinating trips to
36 local events and restaurants (8) all shopping for the individual (9) in
37 home notary service (10) picking up prescriptions, stocking refrigerator,
38 picking up mail, ordering and delivering hot meals.
39

40 CONCLUSION
41

42 The services provided by Bridge Builders appear to be more than "case
43 management services". After careful consideration, the court concludes that
44 there is a genuine issue of material fact as to whether Bridge Builders is
45 an agency required to be licensed under chapter 70.127 RCW.
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CRADDOCK D. VERSER
JUDGE

Jefferson County Superior Court
P.O. Box 1220
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ORDER

Plaintiffs Motion for Reconsideration is GRANTED. Defendants' motion for partial summary judgment is DENIED.

Dated this 21 day of October, 2009.


CRADDOCK D. VERSER, JUDGE

CRADDOCK D. VERSER
JUDGE
Jefferson County Superior Court
P.O. Box 1220
Port Townsend, WA 98368

405

1 SUPERIOR COURT OF THE STATE OF WASHINGTON
2 IN AND FOR THE COUNTY OF CLALLAM
3
4

5 ROBERT LISLE HALE, Personal
6 Representative of the ESTATE OF LISLE
7 HALE, deceased; CLARA HALE, surviving
8 spouse of LISLE HALE; ROBERT L. HALE;
9 DONALD HALE; and TRICIA HALE,

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12 Plaintiffs,

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14 vs.

15
16 BRIDGE BUILDERS, LTD.; MINDI R.
17 BLANCHARD and John Doe Blanchard;
18 BRENDA CARPENTER and John Doe
19 Carpenter; JANET WATRAL and John Doe
20 Watral; MICHAEL R. HASTINGS and Jane
21 Doe Hastings; and MICHAEL R. HASTINGS,
22 P.S.,

23
24 Defendants.
25
26

Case No.: 09-2-00447-4

MEMORANDUM OPINION AND ORDER
ON MOTION FOR SUMMARY JUDGMENT

27 This matter came before the undersigned on June 8, 2011 to consider
28 Plaintiffs' Motion for Summary Judgment and Defendants' Motion for Summary
29 Judgment on three causes of action alleged in the complaint. Plaintiffs
30 appeared through their attorney, Stephen K. Eugster of Eugster Law Offices,
31 PSC. Defendants, Bridge Builders, LTD, and Ms. Carpenter and Ms. Blanchard,
32 (Bridge Builders herein) appeared through their attorney, Matthew T. Boyle
33 of the Law Offices of Matthew T. Boyle, P.S.
34
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38 CRADDOCK D. VERSER
39 JUDGE

40 Jefferson County Superior Court
41 P.O. Box 1220
42 Port Townsend, WA 98368
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Handwritten signature

1 The court considered the complete file in this matter including the
2 Declaration of Robert Hale, Declaration of Stephen Eugster, and the
3 Declaration of Tricia Hale and the exhibits annexed to those declarations.
4 The Court considered Defendants' response including the Declarations of
5 Matthew T. Boyle as well as the complete file in this matter including all
6 previously filed declarations and exhibits submitted in support of
7 Defendant's earlier motion for summary judgment. The court thanks both
8 counsel for their well prepared and reasoned memoranda provided in support
9 of their positions.

10
11 FACTS
12

13 The essential facts are set out in the memoranda provided by the
14 parties. Bridge Builders, Mindi R. Blanchard and Brenda Carpenter operate a
15 business that they feel provides "case management" services to elderly
16 adults wishing to remain in their homes, but in need of assistance. Their
17 advertising is annexed as exhibits to the Declaration of Robert Hale, CP 81,
18 filed on April 29, 2011. Plaintiffs' elderly parents were briefly contacted
19 by the defendants in June, 2008 when they were living in an assisted living
20 home. Defendants' agreed to assist plaintiffs' parents in returning to
21 their home, and obtained a power of attorney from them.

22
23 Plaintiffs have moved for summary judgment on three issues. First, that
24 Bridge Builders is an "in-home services agency" which must be licensed under
25 RCW 70.127.020. Second that Bridge Builders obtained the power of attorney
26 from the elderly Hales in violation of RCW 70.127.150. Third that Bridge
27 Builders was operating an in home services agency without a license and
28 therefore in violation of the Washington State Consumer Protection Act 19.86
29 RCW, as set forth in RCW 70.127.216. If Bridge Builders is an unlicensed
30 Home Care Agency then the second and third issues are resolved as a matter
31 of law favorably to the plaintiffs.

32
33 Defendants submit that they are not a home care agency required to be
34 licensed under RCW 70.127.020. While they acknowledge that they offer
35 services to vulnerable elderly adults they assert that the services they
36 offer are "case management" services exempt from any licensing requirement
37 under RCW 70.127.040(14).

38
39 ISSUE
40

41 Is Bridge Builders an "in home services agency" which must be licensed
42 under RCW 70.127.020?

43
44 The answer is obvious: It depends on what services they provide.
45

46 Bridge Builders does provide home care services to disabled or
47 vulnerable individuals that enable them to remain in their residences. RCW
48

49
50 CRADDOCK D. VERSER
JUDGE

Jefferson County Superior Court
P.O. Box 1220
Port Townsend, WA 98368

237

1 70.127.010(6). While Home Builders advertises the list of services it can
2 arrange [pages 2 through 5 of Robert Hale Declaration 4/29/11 CP 81] in so
3 doing it does not use any of the descriptive phrases that trigger the
4 licensing requirement. RCW 70.127.030. [Attachment A to 7/31/09 Declaration
5 of Mindi Blanchard, CP 30]. The home care services it advertises that it
6 can arrange include "...homemaker assistance with household tasks, such as...
7 shopping, meal planning and preparation, and transportation;" RCW
8 70.127.010(6). However Bridge Builders asserts it only provides "case
9 management" services and thus is exempt from the licensing requirement.
10 Case management services as provided by Bridge Builders consist of
11 coordinating, planning and monitoring the home care services necessary for
12 vulnerable or disabled individuals to remain at home.

13
14 The court agrees with defendants' application of the holding in *Cummings*
15 v. *Guardianship Services*, 128 Wn. App. 742, 110 P.3d 796 (2003) to the facts
16 of this case. There the court held that because employees of Guardianship
17 Services actually provided the services to vulnerable individuals the
18 company had to be licensed. In so holding the court stated: "In many
19 circumstances, guardians will not be subject to the licensing requirements
20 because they do not themselves provide home care. Rather, they arrange for
21 the ward to receive care from home service agencies." [128 Wn. App. 751].

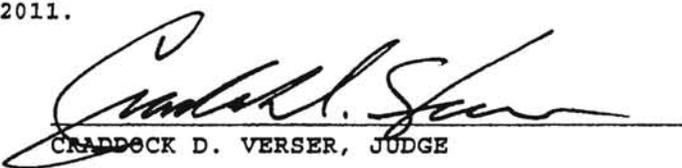
22
23 CONCLUSION

24
25 The court does not actually know exactly what "services" Bridge Builders
26 provides with its employees. While Ms. Blanchard did take the Hales to the
27 bank, unless this is a service Bridge Builders intends to offer through its
28 employees, in the opinion of this court, this one trip to the bank would not
29 trigger a licensing requirement. Nor would one meeting with a locksmith at
30 the home. If Bridge Builders simply "coordinates", "plans", or "monitors"
31 the services provided to a vulnerable or disabled home resident then the RCW
32 70.127.040(14) exemption applies. On the other hand if employees of Bridge
33 Builders actually provide services then the holding in *Cummings*, dictates
34 that they should be licensed and plaintiffs' are entitled to the relief they
35 seek in this motion.

36
37 ORDER

38
39 There are genuine issues of material fact that remain unresolved thus
40 the motion for summary judgment is DENIED.

41
42 Dated this 22nd day of June, 2011.

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46 CRADDOCK D. VERSER, JUDGE

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49 CRADDOCK D. VERSER
50 JUDGE
Jefferson County Superior Court
P.O. Box 1220
Port Townsend, WA 98368

6 signed by SK

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BARBARA CHRISTENSEN

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLALLAM

SCANNED-19

ROBERT LISLE HALE, Personal)
Representative of the ESTATE OF)
LISLE HALE, deceased; CLARA)
HALE, surviving spouse of LISLE)
HALE; ROBERT L. HALE; DONALD)
HALE; and TRICIA HALE,)

Plaintiffs,)

vs.)

BRIDGE BUILDERS, LTD.; MINDI R.)
BLANCHARD and John Doe)
Blanchard; BRENDA CARPENTER and)
John Doe Carpenter; JANET WATRAL)
and John Doe Watral; MICHAEL R.)
HASTINGS and Jane Doe Hastings;)
and MICHAEL R. HASTINGS, P.S.,)

Defendants.)

Case No.: 09-2-00447-4

AMENDED MEMORANDUM OPINION AND
ORDER ON MOTION FOR SUMMARY
JUDGMENT AND FINDINGS AND
DETERMINATION THERE IS NO
REASON FOR DELAY UNDER
CR 54(b) and RAP 2.2(d), AND
JUDGMENT IN FAVOR OF
DEFENDANTS BRIDGE BUILDERS,
LTD., MINDI R. BLANCHARD AND
BRENDA CARPENTER AND JOHN DOE
CARPENTER

[PROPOSED BY PLAINTIFFS]

This matter came on for oral argument on February 10, 2012 and April 6, 2012 to consider the issues raised by Defendants' Bridge Builders, Mindi Blanchard and Brenda Carpenter Motion for Summary Judgment. ["Bridge Builders" hereinafter] The moving defendants appeared through their

AMENDED MEMORANDUM OPINION AND ORDER - 1

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attorney, Matthew T. Boyle. Plaintiffs appeared through their attorney, Stephen K. Eugster.

In addition there were two motions dealing with discovery. Plaintiffs moved for certain discovery, Defendants moved to protect from certain discovery. The general topic of the discovery sought was the services Defendants Bridge Builders performed for clients including those clients who had given them powers of attorney which had been recorded. The court denied Plaintiffs' motion and granted Defendants' "Bridge Builders motion. No discovery by Plaintiff was allowed.

The court considered the complete file in this matter including the following:

1. Defendants' Motion for Summary Judgment dated 12/05/11;
2. Plaintiffs' Memorandum in Response to Motions for Summary Judgment dated 12/29/11;
3. Defendants' Reply in Support of Motion for Summary Judgment dated 2/1/12;
4. Declaration of Alice Semingson dated 12/27/11;
5. Declaration of Tricia Hale in Response to Defendants' Motions for Partial Summary Judgment (12/23/2011);
6. Declaration of Robert Hale in Response to Motions for Summary Judgment dated 12/22/11, with attached exhibits;
7. Declaration of Stephen K. Eugster dated 12/29/11;
8. Plaintiff's Amended complaint dated 5/14/11;
9. The 4/21/11 Declaration of Tricia Hale;
10. The 4/20/11 Declaration of Robert Hale.

In addition the Court considered the declarations previously filed in this matter in support of and in response to previous motions for summary judgment or partial summary judgment.

The court also considered the arguments of counsel.

FACTS

The facts are virtually undisputed and are set forth in previous motions for summary judgment (Defendants' May 11, 2011 Cross Motion for Summary Judgment; and Plaintiffs' Motion for Summary Judgment dated April 29, 2011).

The case arises out of contacts between the defendants Bridge Builders acting through Mindi Blanchard and Brenda Carpenter with Lisle Hale and Clara Kale from June 5, 2008 through June 13, 2008. At that time Lisle Hale was 86 years old and Clara Hale was 90 years old. The contact occurred at the Sherwood Assisted Living facility in Sequim, WA.

The court accepts the facts as set forth in the declaration of Mindi Blanchard as to what Bridge Builders did with reference to the elderly Hales between June 5 and June 13, 2008. The court accepts the declaration of Tricia Hale as to what actions the Hale children took between June 5 and June 13, 2008.

Plaintiffs' amended complaint sets forth nine causes of action, referred to in the amended complaint as "Counts", relating to defendants Bridge Builders. Defendants Bridge Builders have moved for summary judgment dismissing all nine causes of action.

ISSUES

ISSUE NO. 1: Are Plaintiffs entitled to maintain a cause of action for a

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declamatory judgment that Defendants Bridge Builders must be licensed as an in home services agency under RCW 70.127?

ISSUE NO. 2: Have Plaintiffs set forth a cause of action based upon the Vulnerable Adult Act, RCW 74.34?

ISSUE NO. 3: Do Plaintiffs have standing to pursue a claim for violation of the Washington State Consumer Protection Act?

ISSUE NO. 4: Can Plaintiffs demonstrate the elements necessary to proceed with a malpractice claim?

ISSUE NO. 5: Does Washington recognize a cause of action for malicious interference with family relationship and if so, do Plaintiffs' allegations support such a claim?

ISSUE NO. 6: Can Plaintiffs show the elements necessary to proceed with a claim of negligent infliction of emotional distress?

ISSUE NO. 7: Is the conduct alleged on behalf of Bridge Builders sufficient to constitute extreme and outrageous conduct necessary to prove intentional infliction of emotional distress?

ANALYSIS

Plaintiffs have repeatedly invited the court to treat Defendants' Bridge Builders motions for summary judgment as motions for dismissal under CR 12(b)(6), and thus the mere allegations of any facts are sufficient to meet their burden to demonstrate a genuine issue of material fact. The court declines that invitation and will hold both parties to the well known standards for summary judgment motions.

In considering a motion for summary judgment, the court must consider all facts and all reasonable inferences from them in the light most favorable

to the nonmoving party. Berrocal v. Fernandez, 155 Wn. 2d 585, 590, 121 P.3d 82 (2005). Summary Judgment can only be granted if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. CR 56 (c) .

After the moving party has submitted its proof in support of the motion, the burden shifts to the nonmoving party to set forth specific facts sufficient to rebut the moving party's contentions and to demonstrate that there are material issues of fact. Seven Gables Co. v. MGM/UA Entertainment Co., 106 Wn.2d. 1, 13, 721 P.2d 1 (1986). The nonmoving party "...may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value." Seven Gables, at 106 Wn. 2d 13. The court should grant the motion only if reasonable persons could reach only one conclusion. Wilson v. Steinbach, 98 Wn. 2d 434, 437, 656 P.2d 1030 (1982).

Issue No. 1: Declaratory Judgment Action (counts 1 and 2)

This court's jurisdiction under the UDJA is limited to justiciable controversies which involve (1) an actual, present and existing dispute (2) between parties who have genuine and opposing interests, (3) which involved direct and substantial interests rather than potential, theoretical, abstract or academic interests and where (4) a judicial determination will be final and conclusive. Bronson v. Port of Seattle, 152 Wn. 3d 862, 877, 101 P.3d 67 (2004) . These four requirements overlap with the requirements of standing under the UDJA. To-Ro Trade Shows v. Collins, 144 Wn. 2d 403, 411, 27 P.3d 1149 (2001) . In order to have standing to invoke the relief provided by the

Uniform Declaratory Judgment Act, RCW 7.24, the Plaintiffs must (1) fall within the zone of interest that the statute, here RCW 70.127, protects or regulates and (2) they must have suffered an injury in fact. Lakewood Racquet Club v. Jensen, 156 Wn. App. 215, 224, 232 P.3d 1147 (Div. II, 2010). While Plaintiffs argue that defendants waived the challenge to their standing by not raising standing as an affirmative defense, Washington courts hold that standing is a jurisdictional requirement which may be raised at any time during the proceedings. Firefighters v. Spokane Airports, 146 Wn. 2d 207, 212, n.3, 45 P.3d 186 (2002).

Defendant Bridge Builders did not provide "in home care services" to Plaintiffs. During the brief relationship between Bridge Builders and the Hales the elderly Hales lived in an assisted living facility. Defendants assert that Plaintiffs lack standing to pursue their declaratory judgment causes of action. (Counts 1 and 2). RCW 70.127 is designed to protect those receiving in home care services from exploitation as the in-home location of services provided brings risk to those receiving the services. RCW 70.127.005. Even if the court interpreted the fact that Bridge Builders wanted to move the elderly Hales to their home and thus they deserved protection under RCW 70.127, Plaintiffs cannot show an "injury in fact" arising from their brief relationship with the Bridge Builder defendants. Nor can any decision by this court as to whether the Bridge Builder defendants need a RCW 70.127 license be final and conclusive as the Department of Health, not this court, is the agency required to make that determination. Brown v. Vail, 169 Wn.2d 318, 237 P.2d 263 2010).

For the foregoing reasons the Plaintiffs lack standing to request a

declaratory judgment as to whether the Bridge Builder defendants need to be licensed under RCW 70.127. Defendant Bridge Builders' Motion for Summary Judgment dismissing counts 1 and 2 of Plaintiffs' amended complaint must be GRANTED.

Issue No. 2: Vulnerable Adult Protection Act cause of action.

Bridge Builder defendants allege that Plaintiffs cannot show that they were subjected to "abuse", "financial exploitation" or "neglect" as those terms are defined in the Vulnerable Adult Protection Act. Plaintiffs' respond by citing the court to the allegations in their complaint. However when faced with a summary judgment motion the nonmoving party, here the Plaintiffs, must set forth specific facts showing there is a genuine issue for trial and cannot rely on speculation or argumentative assertions that unresolved factual issues remain. Seven Gables Corp. v. MGM/UA Entertainment Co., 106 Wn.2d. 1, 12, 721 P.2d 1 (1986). Plaintiffs here do not set forth any specific facts that give rise to the conclusion that the elderly Hales were abused, financially exploited, or neglected as those terms are defined in RCW 74.34.020. The declarations of Robert and Tricia Hale opine as to what could have possibly happened if the Bridge Builder defendants had moved the elderly Hales from the assisted living quarters back to their home. Those declarations, like the amended complaint, fail to set forth specific facts which if believed would constitute a cause of action as authorized by RCW 74.34.200. Young v. Key Pharmaceuticals, Inc., 112 Wn.2d. 216, 226-26, 770 P.2d 82 (1989).

For the foregoing reasons Defendants Bridge Builders Motion for Summary Judgment dismissing Plaintiffs' claim, count 3 based upon RCW 74.34,

is GRANTED.

Issue No. 3: Consumer Protection Act cause of action.

RCW 19.86 the Washington State Consumer Protection Act provides that a person injured in his or her business or property by a violation of the Act has a cause of action under the act. As the court has dismissed the counts based upon violation of RCW 70.127 and RCW 74.34, the Plaintiffs have no per se cause of action against the Bridge Builder defendants. Additionally Plaintiffs have not shown an injury to their business or property as a result of the brief association with the Bridge Builder defendants. In absence of any damage to their business or property Plaintiffs do not have standing to bring a claim under the Consumer Protection Act. Panau v. Farmers Ins. Co. of Washington, 66 Wn. 2d 27, 39, 204 P.2d 885 (2009).

Defendants' motion for Summary Judgment dismissing count 4, violation of the Washington State Consumer Protection Act, is GRANTED.

Issue No. 4: Malpractice.

To prove a malpractice claim, a plaintiff must show the existence of a special relationship which gives rise to a duty of care, breach of that duty, proximately causing damage. Falkner v. Foshaug, 108 Wn. App. 113, 118, 20 P. 3d 771 (2001). Here only the elderly Hales had a special relationship with the Bridge Builder defendants which could give rise to a duty of care. Arguably the declaration of Alice Semingson satisfies the obligation to demonstrate a duty of care, and arguably the declaration demonstrated that the Bridge Builder defendants breached that duty of care. However, Plaintiffs fail to show how the alleged breaches set forth in the Semingson declaration proximately caused damage to the elderly Hales. While Plaintiffs allege "The

facts show that Plaintiffs were injured as a result of the failure of Defendants to meet the standards of care they are subject to." [Plaintiffs memorandum in response to motion for summary judgment, p. 28, line 13-14] As cited earlier, mere allegations of injury are insufficient to meet the burden in response to a motion for summary judgment.

Defendants' motion for Summary judgment of dismissal of count 6, malpractice, is GRANTED.

Issue No. 5: Interference with family relationship.

Plaintiffs' claim that the Bridge Builder defendants interfered with the relationship the Hale children Plaintiffs had with their parents, Lisle and Clara Hale. While Washington has not recognized a cause of action for interference with a family relationship, Plaintiffs argue that they are entitled to pursue such a claim.

The elements of such a cause of action would at least require the following: (1) an existing family relationship; (2) a malicious interference with the relationship; (3) an intention on the part of the interfering person that the malicious interference results in a loss of affection or family association; (4) a causal connection between the acts of the interfering party and the loss of affection; and (5) resulting damages. Babcock v. State, 112 Wn. 2d 83, 107-108, 768 P.2d 481 (1989); citing Strode v. Gleason, 9 Wn. App. 13, 510 P.2d 250 (1973).

Plaintiffs' cause of action fails in that the Plaintiffs cannot show a "loss of affection" nor can Plaintiffs show any resulting damages, even if they could demonstrate the other three elements of the tort.

Defendants Bridge Builders Motion for Summary Judgment dismissing count

7, interference with family relationship, is GRANTED.

Issue No. 6: Negligent infliction of emotional distress.

As in all negligence cases, in proving negligent infliction of emotional distress, the plaintiff must prove a duty with a breach of duty which proximately causes damage or injury to the plaintiff. In order to prove the damage aspect of intentional infliction of emotional distress a plaintiff demonstrate objective symptomology susceptible to medical diagnosis and proved through medical evidence. Kloepfel v. Bokor, 149 Wn. 2d 192, 66 JP.3d 630 (2003).

Plaintiffs here argue, again, that the court should treat defendants' motion as a CR 12(b)(6) motion rather than a motion for summary judgment. Plaintiffs do not offer any medical evidence to support their contention that the Bridge Builder defendants negligently inflicted emotional distress.

Defendants Bridge Builders Motion for Summary Judgment dismissing count 8, negligent infliction of emotional distress, is GRANTED.

Issue No. 7: Intentional infliction of emotional distress.

While the Hale children may have felt outraged that an organization would interfere with their plan to move their parents into the assisting living environment, as a matter of law, their outrage is not such that no reasonable person could be expected to endure. Saldivar v Momah, 145 Wn. App. 365, 390, 186 P.3d 1117 (2008).

As a matter of law, Plaintiffs have failed to show any conduct on behalf of the Bridge Builder defendants which could possibly be found by any reasonable person to be "...so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be utterly

intolerable in a civilized community." Saldivar, supra, at 145 Wn. App. 390, citing Grimsby v. Samson, 85 Wn.2d 52, 59, 530 P.2d 291 (1975).

Defendants Bridge Builders Motion for Summary Judgment dismissing count 9, intentional infliction of emotional distress, is GRANTED.

FINDINGS AND DETERMINATION THERE IS NO JUST REASON FOR DELAY UNDER CR 54(b) and RAP 2.2(d)

The decisions and orders herein above should be regarded as final. There is no just reason for any delay as to determination of appeals from the orders. The court heard argument with respect of the foregoing and considered evidence relevant to whether there was any reason for delay as to appeals.

Based on the argument of counsel, the foregoing evidence presented and decisions made herein above, the Court finds there is no just reason for delay in entering judgments

1. Plaintiffs' amended complaint sets out ten counts. The tenth count is merely a claim for attorneys' fees as might be awarded under some of the counts - consumer protection act claim, vulnerable adults act claim, etc.
2. Count 5 is a count specific as to defendants Michael R. Hastings and Michael R. Hastings, P.S. Because defendants Hastings were dismissed, Count 5 is no longer extant.
3. Counts 1, 2, 3, 4, 6, 7, 8, and 9 are to be dismissed on the motions of Defendants Bridge Builders.
4. Here, the final judgment disposes of all counts as in the case. It would not make sense to separately try the counts as they apply to Defendant Watral.

5. All of the counts should be tried at the same time in that they include common questions of law and fact as to Defendants Bridge Builders and Defendant Watral.
6. Indeed, the counts as decided regarding Defendants Bridge Builders might even be considered a non-binding variant of the principal of "law of the case." It certainly would not seem reasonable to think that once a judge has decided a legal question during the conduct of a lawsuit, he/she would be likely to change his/her views.
7. All of the issues of the case are dealt with in the Memorandum Opinion and Order on Motion for Summary Judgment. Thus, in a sense, there are no issues which have not been addressed by the Memorandum.
8. Immediate appeal would alleviate hardship, cost, delay, and enhance judicial economy. *Doerflinger v. New York Life*, 88 Wn.2d 878, 881, 567 P.2d 230 (1977).
9. It would be undesirable for there to be more than one appeal in a single action: The need for making review available in multiple-party or multiple-claim situations at a time that best serves the needs of the litigants. *Id.*, 88 Wn.2d at 880; see also *Fox v. Sunmaster Prods., Inc.*, 115 Wn.2d 498, 503-04, 798 P.2d 808 (1990).

JUDGMENT

In light of the foregoing and the findings immediately above, the court concludes that there is no just reason for delay in expressly entering judgment regarding the foregoing.

NOW, THEREFORE, IT IS ORDERED AS FOLLOWS:

1. Counts 1, 2, 3, 4, 6, 7, 8, and 9 be, and they are, hereby dismissed in

their entirety.

- 2. Plaintiffs' motion for discovery is hereby denied.
- 3. Defendants' Bridge Builders motion for protective order is hereby granted.
- 4. Plaintiffs shall pay statutory attorneys fees in the sum of \$200 to Defendants Bridge Builders.
- 5. The foregoing shall be entered as final judgment of the court.

April 6, 2011.



Craddock D. Venter
Judge

Presented by:

Eugster Law Office, P.S.C.

Stephen K. Eugster
Stephen K. Eugster WSBA #2003
Attorney for Plaintiffs

Approved and Notice of Presentation Waived:

Johnson, Graffe, Keay, Moniz & Wick, LLP

Ketia B. Wick WSBA #27219
Attorneys for Defendant Watral

Approved and Notice of Presentation Waived:

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Law Offices of Matthew T. Boyle, P.S.

Matthew T. Boyle WSBA #6919
Attorneys for Defendants Bridge Builders

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attorney, Matthew T. Boyle. Plaintiffs appeared through their attorney, Stephen K. Eugster.

In addition there were two motions dealing with discovery. Plaintiffs moved for certain discovery, Defendants moved to protect from certain discovery. The general topic of the discovery sought was the services Defendants Bridge Builders performed for clients including those clients who had given them powers of attorney which had been recorded. The court denied Plaintiffs' motion and granted Defendants' "Bridge Builders motion. No discovery by Plaintiff was allowed.

The court considered the complete file in this matter including the following:

1. Defendants' Motion for Summary Judgment dated 12/05/11;
2. Plaintiffs' Memorandum in Response to Motions for Summary Judgment dated 12/29/11;
3. Defendants' Reply in Support of Motion for Summary Judgment dated 2/1/12;
4. Declaration of Alice Semingson dated 12/27/11;
5. Declaration of Tricia Hale in Response to Defendants' Motions for Partial Summary Judgment (12/23/2011);
6. Declaration of Robert Hale in Response to Motions for Summary Judgment dated 12/22/11, with attached exhibits;
7. Declaration of Stephen K. Eugster dated 12/29/11;
8. Plaintiff's Amended complaint dated 5/14/11;
9. The 4/21/11 Declaration of Tricia Hale;
10. The 4/20/11 Declaration of Robert Hale.

In addition the Court considered the declarations previously filed in this matter in support of and in response to previous motions for summary judgment or partial summary judgment.

The court also considered the arguments of counsel.

FACTS

The facts are virtually undisputed and are set forth in previous motions for summary judgment (Defendants' May 11, 2011 Cross Motion for Summary Judgment; and Plaintiffs' Motion for Summary Judgment dated April 29, 2011).

The case arises out of contacts between the defendants Bridge Builders acting through Mindi Blanchard and Brenda Carpenter with Lisle Hale and Clara Kale from June 5, 2008 through June 13, 2008. At that time Lisle Hale was 86 years old and Clara Hale was 90 years old. The contact occurred at the Sherwood Assisted Living facility in Sequim, WA.

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ANALYSIS

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Issue No. 1: Declaratory Judgment Action (counts 1 and 2)

This court's jurisdiction under the UDJA is limited to justiciable controversies which involve (1) an actual, present and existing dispute (2) between parties who have genuine and opposing interests, (3) which involved direct and substantial interests rather than potential, theoretical, abstract or academic interests and where (4) a judicial determination will be final and conclusive. Bronson v. Port of Seattle, 152 Wn. 3d 862, 877, 101 P.3d 67 (2004) . These four requirements overlap with the requirements of standing under the UDJA. To-Ro Trade Shows v. Collins, 144 Wn. 2d 403, 411, 27 P.3d 1149 (2001) . In order to have standing to invoke the relief provided by the

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For the foregoing reasons the Plaintiffs lack standing to request a

declaratory judgment as to whether the Bridge Builder defendants need to be licensed under RCW 70.127. Defendant Bridge Builders' Motion for Summary Judgment dismissing counts 1 and 2 of Plaintiffs' amended complaint must be GRANTED.

Issue No. 2: Vulnerable Adult Protection Act cause of action.

Bridge Builder defendants allege that Plaintiffs cannot show that they were subjected to "abuse", "financial exploitation" or "neglect" as those terms are defined in the Vulnerable Adult Protection Act. Plaintiffs' respond by citing the court to the allegations in their complaint. However when faced with a summary judgment motion the nonmoving party, here the Plaintiffs, must set forth specific facts showing there is a genuine issue for trial and cannot rely on speculation or argumentative assertions that unresolved factual issues remain. Seven Gables Corp. V. MGM/UA Entertainment Co., 106 Wn.2d. 1, 12, 721 P.2d 1 (1986). Plaintiffs here do not set forth any specific facts that give rise to the conclusion that the elderly Hales were abused, financially exploited, or neglected as those terms are defined in RCW 74.34.020. The declarations of Robert and Tricia Hale opine as to what could have possibly happened if the Bridge Builder defendants had moved the elderly Hales from the assisted living quarters back to their home. Those declarations, like the amended complaint, fail to set forth specific facts which if believed would constitute a cause of action as authorized by RCW 74.34.200. Young v. Key Pharmaceuticals, Inc., 112 Wn.2d. 216, 226-26, 770 P.2d 82 (1989).

For the foregoing reasons Defendants Bridge Builders Motion for Summary Judgment dismissing Plaintiffs' claim, count 3 based upon RCW 74.34,

is GRANTED.

Issue No. 3; Consumer Protection Act cause of action.

RCW 19.86 the Washington State Consumer Protection Act provides that a person injured in his or her business or property by a violation of the Act has a cause of action under the act. As the court has dismissed the counts based upon violation of RCW 70.127 and RCW 74.34, the Plaintiffs have no per se cause of action against the Bridge Builder defendants. Additionally Plaintiffs have not shown an injury to their business or property as a result of the brief association with the Bridge Builder defendants. In absence of any damage to their business or property Plaintiffs do not have standing to bring a claim under the Consumer Protection Act. Panaq v. Farmers Ins. Co. of Washington, 66 Wn. 2d 27, 39, 204 P.2d 885 (2009).

Defendants' motion for Summary Judgment dismissing count 4, violation of the Washington State Consumer Protection Act, is GRANTED.

Issue No. 4: Malpractice.

To prove a malpractice claim, a plaintiff must show the existence of a special relationship which gives rise to a duty of care, breach of that duty, proximately causing damage. Falkner v. Foshauq, 108 Wn. App. 113, 118, 20 P. 3d 771 (2001). Here only the elderly Hales had a special relationship with the Bridge Builder defendants which could give rise to a duty of care. Arguably the declaration of Alice Semingson satisfies the obligation to demonstrate a duty of care, and arguably the declaration demonstrated that the Bridge Builder defendants breached that duty of care. However, Plaintiffs fail to show how the alleged breaches set forth in the Semingson declaration proximately caused damage to the elderly Hales. While Plaintiffs allege "The

facts show that Plaintiffs were injured as a result of the failure of Defendants to meet the standards of care they are subject to." [Plaintiffs memorandum in response to motion for summary judgment, p. 28, line 13-14] As cited earlier, mere allegations of injury are insufficient to meet the burden in response to a motion for summary judgment.

Defendants' motion for Summary judgment of dismissal of count 6, malpractice, is GRANTED.

Issue No. 5: Interference with family relationship.

Plaintiffs' claim that the Bridge Builder defendants interfered with the relationship the Hale children Plaintiffs had with their parents, Lisle and Clara Hale. While Washington has not recognized a cause of action for interference with a family relationship, Plaintiffs argue that they are entitled to pursue such a claim.

The elements of such a cause of action would at least require the following: (1) an existing family relationship; (2) a malicious interference with the relationship; (3) an intention on the part of the interfering person that the malicious interference results in a loss of affection or family association; (4) a causal connection between the acts of the interfering party and the loss of affection; and (5) resulting damages. Babcock v. State, 112 Wn. 2d 83, 107-108, 768 P.2d 481 (1989); citing Strode v. Gleason, 9 Wn. App. 13, 510 P.2d 250 (1973).

Plaintiffs' cause of action fails in that the Plaintiffs cannot show a "loss of affection" nor can Plaintiffs show any resulting damages, even if they could demonstrate the other three elements of the tort.

Defendants Bridge Builders Motion for Summary Judgment dismissing count

7, interference with family relationship, is GRANTED.

Issue No. 6: Negligent infliction of emotional distress.

As in all negligence cases, in proving negligent infliction of emotional distress, the plaintiff must prove a duty with a breach of duty which proximately causes damage or injury to the plaintiff. In order to prove the damage aspect of intentional infliction of emotional distress a plaintiff demonstrate objective symptomology susceptible to medical diagnosis and proved through medical evidence. Kloepfel v. Bokor, 149 Wn. 2d 192, 66 JP.3d 630 (2003).

Plaintiffs here argue, again, that the court should treat defendants' motion as a CR 12(b) (6) motion rather than a motion for summary judgment. Plaintiffs do not offer any medical evidence to support their contention that the Bridge Builder defendants negligently inflicted emotional distress.

Defendants Bridge Builders Motion for Summary Judgment dismissing count 8, negligent infliction of emotional distress, is GRANTED.

Issue No. 7: Intentional infliction of emotional distress.

While the Hale children may have felt outraged that an organization would interfere with their plan to move their parents into the assisting living environment, as a matter of law, their outrage is not such that no reasonable person could be expected to endure. Saldivar v Momah, 145 Wn. App. 365, 390, 186 P.3d 1117 (2008).

As a matter of law, Plaintiffs have failed to show any conduct on behalf of the Bridge Builder defendants which could possibly be found by any reasonable person to be "...so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be utterly

intolerable in a civilized community." Saldivar, supra, at 145 Wn. App. 390, citing Grimsby v. Samson, 85 Wn.2d 52, 59, 530 P.2d 291 (1975).

Defendants Bridge Builders Motion for Summary Judgment dismissing count 9, intentional infliction of emotional distress, is GRANTED.

FINDINGS AND DETERMINATION THERE IS NO JUST REASON FOR DELAY UNDER CR 54(b) and RAP 2.2(d)

The decisions and orders herein above should be regarded as final. There is no just reason for any delay as to determination of appeals from the orders. The court heard argument with respect of the foregoing and considered evidence relevant to whether there was any reason for delay as to appeals.

Based on the argument of counsel, the foregoing evidence presented and decisions made herein above, the Court finds there is no just reason for delay in entering judgments

1. Plaintiffs' amended complaint sets out ten counts. The tenth count is merely a claim for attorneys' fees as might be awarded under some of the counts - consumer protection act claim, vulnerable adults act claim, etc.
2. Count 5 is a count specific as to defendants Michael R. Hastings and Michael R. Hastings, P.S. Because defendants Hastings were dismissed, Count 5 is no longer extant.
3. Counts 1, 2, 3, 4, 6, 7, 8, and 9 are to be dismissed on the motions of Defendants Bridge Builders.
4. Here, the final judgment disposes of all counts as in the case. It would not make sense to separately try the counts as they apply to Defendant Watral.

5. All of the counts should be tried at the same time in that they include common questions of law and fact as to Defendants Bridge Builders and Defendant Watral.
6. Indeed, the counts as decided regarding Defendants Bridge Builders might even be considered a non-binding variant of the principal of "law of the case." It certainly would not seem reasonable to think that once a judge has decided a legal question during the conduct of a lawsuit, he/she would be likely to change his/her views.
7. All of the issues of the case are dealt with in the Memorandum Opinion and Order on Motion for Summary Judgment. Thus, in a sense, there are no issues which have not been addressed by the Memorandum.
8. Immediate appeal would alleviate hardship, cost, delay, and enhance judicial economy. *Doerflinger v. New York Life*, 88 Wn.2d 878, 881, 567 P.2d 230 (1977).
9. It would be undesirable for there to be more than one appeal in a single action: The need for making review available in multiple-party or multiple-claim situations at a time that best serves the needs of the litigants. *Id.*, 88 Wn.2d at 880; see also *Fox v. Sunmaster Prods., Inc.*, 115 Wn.2d 498, 503-04, 798 P.2d 808 (1990).

JUDGMENT

In light of the foregoing and the findings immediately above, the court concludes that there is no just reason for delay in expressly entering judgment regarding the foregoing.

NOW, THEREFORE, IT IS ORDERED AS FOLLOWS:

1. Counts 1, 2, 3, 4, 6, 7, 8, and 9 be, and they are, hereby dismissed in

their entirety.

2. Plaintiffs' motion for discovery is hereby denied.
3. Defendants' Bridge Builders motion for protective order is hereby granted.
4. Plaintiffs shall pay statutory attorneys fees in the sum of \$200 to Defendants Bridge Builders.
5. The foregoing shall be entered ~~has~~ final judgment of the court.

April __, 2011.

Craddock D. Verser
Judge

Presented by:

Eugster Law Office, P.S.C.

Stephen K. Eugster
Stephen K. Eugster WSBA #2003
Attorney for Plaintiffs

Approved and Notice of Presentation Waived:

Johnson, Graffe, Keay, Moniz & Wick, LLP

Ketia B. Wick WSBA #27219
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Approved and Notice of Presentation Waived:

Law Offices of Matthew T. Boyle, P.S.

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SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLALLAM

ROBERT LISLE HALE, Personal)
Representative of the ESTATE OF LISLE)
HALE, deceased; CLARA HALE, surviving)
spouse of LISLE HALE; ROBERT L. HALE;)
DONALD HALE; and TRICIA HALE,)

No. 09 2 00447 4

DECLARATION OF ALICE
SEMINGTON

Plaintiffs,

vs.

BRIDGE BUILDERS, LTD.; MINDI R.)
BLANCHARD and John Doe Blanchard;)
BRENDA CARPENTER and John Doe)
Carpenter; JANET WATRAL and John Doe)
Watral,)

Defendants.)

Alice Semington, under penalty of perjury under the laws of the state of Washington,
declares as follows:

1. I am competent to be a witness in Washington court proceedings.
2. I make the statements herein based upon my own personal knowledge.
3. Attached as Exhibit A is my letter to Stephen K. Eugster of December 26, 2011. This exhibit is incorporated herein by this reference and consists of 5 pages. The matters contained therein are true and correct.

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Signed at Deer Park, Washington on December 27, 2011.


Alice Semington

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December 26, 2011

Stephen Eugster

2418 W. Pacific Ave.

Spokane, WA 99201

Re: Robert Lisle Hale, Personal Representative of the Estate of Lisle Hale, deceased, Clara Hale, surviving spouse of Lisle Hale, Robert K. Hale, Donald Hale, and Tricia Hale vs. Bridge Builders Ltd., Mindi Blanchard, Brenda Carpenter, and Janet Watral.

Draft opinion re: Lisle and Clara Hale

To date I have reviewed the following records:

- Notebook entitled Hale V. Bridge Builders Depositions
- Notebook entitled Hale v. Bridge Builders Pleadings
- Amended Complaint Number 1
- WRGCM (Western Region Geriatric Care Management) Pledge of Ethics
- NAPGCM National Association of Professional Care Managers Standards
- Notebook entitled Hale v. Bridge Builders, Interrogatories

I have formulated my opinion based on my review of these records, as well as my training and experience. I reserve the right to alter and/or revise my opinion should further records be provided to me.

I am a Board-Certified Gerontological Registered Nurse with over twenty-five years experience in long-term care, both in "floor" nursing and as a supervisor.

The decision to admit a loved one to a facility can be painful and difficult for the family. It can be emotionally devastating to relinquish care of a parent to strangers. There are often financial worries as well, with children attempting to maximize assets left to provide care. Many family members who admit a loved one to a facility are filled with fear and uncertainty because, most likely, they have never done this before. They may suffer feelings of guilt because they are unable to care for their loved ones, as well as fear of news stories regarding abuse in long-term care. Family members look to the experts—the people who are managing the facility for guidance on how to manage the admission process. They must trust the people they are working with to act in the best interests of their parents and the family.

The people who were trusted to act in the best interests of Lisle and Clara betrayed the trust of the children, as well as the family.

Mindi Blanchard/Brenda Carpenter/Bridge Builders:

Based upon my experience as a Geriatric Care Manager for Honoring Elders in Spokane, as well as my review of the Standards of Care (NAPGCM) and WRCGM Pledge of Ethics, Ms. Blanchard and Ms. Carpenter failed in their management of Lisle and Clara.

The decision to obtain a Power of Attorney without any investigation of their needs or diagnoses was reckless. To promise to facilitate the move within three days is not reasonable. It takes much more time than that to coordinate care needs.

Had Ms. Blanchard reviewed the records, or had an assessment done, she would have known that Lisle had developed open areas on his skin which can be life-threatening. This requires the care of a Licensed Nurse. She would also have discovered that he had needed numerous medication adjustments to control painful gout of his wrist.

- Ms. Blanchard failed to provide and/or coordinate an assessment of care needs for the couple. This was promised by Mr. Hasting, and is accepted Standard of Care for discharge planning, It is also promised on her website: "This starts with assessing your situation so that we can tailor the information and services we provide".
- The Western Region Geriatric Care Managements has a Pledge of Ethics, which Ms. Blanchard has testified that she adheres to. The FIRST item in the pledge states "I will provide ongoing service to you only after I have assessed your needs..." MS. Blanchard and Ms. Carpenter failed to do this.
- Ms. Blanchard promised to provide "assisted living services in the home" as her website indicated. This is misleading, as she has testified that she does not provide this service.
- WRGCM's Pledge of Ethics directs that the Care Manager "must provide services based on your best interest". This was clearly never done by Ms.' Blanchard's failure to determine their care needs.
- Standard 2 of the National Association of Professional Geriatric Care Managers states in subsection (5), that the client's decisional capacity should be evaluated. This was not done- another breach in standards.
- Standard 5 of the National Association of Professional Geriatric Care Managers states that the GCM should refrain from entering into a dual relationship if the relationship could reasonably be expected to impair the care manager's competence of effectiveness or may put the client at risk of financial exploitation. A dual relationship is defined as one in which multiple roles exist between provider and client. This standard recognizes the complexity of making financial and other decisions for a client and is a caution against it.
- Standard 7 of the National Association of Professional Geriatric Care Managers states that "The GCM should strive to provide quality care using a flexible care plan developed in conjunction

- with the older person and/or client system". Ms. Blanchard testified that she does not do this, but merely leaves it up to whatever agency she brings in.
- It is disturbing that Ms. Blanchard felt that there was no conflict in being a POA for healthcare decision-making as well as for finances. There clearly is a conflict when her company is providing the services to keep a client in the home, and billing them for it. She made this determination without any exploration of their need. In my experience, Geriatric Care Managers will accept a power of attorney for *healthcare* only when there is an outstanding need that cannot be met by anyone else. It is forbidden by some companies to seek or accept a power of attorney for finances. There is too much potential for impropriety in that scenario.
 - It is also astonishing that this would be undertaken so close to a week-end (Thursday). This is usually avoided by responsible discharge planners, as there are limited resources available on week-ends. For example, their usual physician may not have been available in an emergency.
 - As Geriatric Care Managers, they have an obligation to assist in managing the assets in a good steward fashion; the cost for twenty-four hour care, seems ill- thought out. At a conservative rate of \$20/hr, the cost would have been \$14,600 per month for one of them. A second person fee would have added more to that rate. As their dementia progressed, and their needs accelerated, more fees would have been added.

Janet Watral:

- It appears that there is no admission assessment completed for either resident. This is required by WAC 388-78A-2060, licensing rules for Boarding Homes. According to her own testimony, she did not perform an MMSE (Mini-mental status examination). There is no limitation on scope of practice regarding a Registered Nurse performing this test, and in fact, it is commonly done upon admission to a facility, especially when there is a diagnosis of memory loss or dementia. This provides a baseline for the staff to monitor a decline in cognitive abilities. Ms. Watral thinks that doctors only do this. This is incorrect.
- Janet Watral knows, or most certainly should have known that "transfer trauma" is very common when a person with dementia is moved into a facility. There is no indication that this was addressed (per progress notes).
- It is also widely known that people with dementia often have suspicious/paranoid type behaviors. This commonly is centered upon people stealing their things and money. This is covered in DSHS' Specialty Training for Dementia, which Ms. Watral is required to have attended as part of Boarding Home regulations.
- It is also not uncommon for a resident with dementia, particularly when they are under stress (transfer trauma), to become delusional. These are fixed false beliefs that they cannot be talked out of. Standard of Care dictates that the staff provides comfort, reassurance, redirection, and perform an investigation to determine the truth of the delusion. (Children stealing their money).. Regulations do dictate that if a mandated reporter has a reasonable belief that financial exploitation has occurred; they are required to report it. However, the facility has 24

hours to investigate the validity of the allegation. It does not appear that this was done. Per Ms. Keith's testimony, she seems to think that as a mandated reporter, she is to call the Washington Department of Health. This is incorrect. DSHS (the Department of Social and Health Services) is called.

- Clearly Clara was experiencing some delusional type of behavior when she reported that Lisle was having intense chest pain. Lisle denied that it was intense or appeared to have a cardiac component.
- There are indications from the family that they were told to not come visit their parent for a while to allow them to settle down. While this was common practice several years ago, this is no longer recommended. The family is the main support system and their attention and support can help ease the transition. The facility, under the leadership of Ms. Watral, failed to support the family and the residents properly during this time.
- It is not clear that the physician's order was followed to obtain a Social Services consult after the allegation. This is easily done through many home health agencies, and sometimes even through the local hospital.
- Ms. Watral, when she was advised that the Hale's were leaving, did not notify the physician to assist in the coordination of care. She was the person who should have had the most information regarding their care needs, and should have intervened at this point to assure their health and safety.
- As part of a pattern of disregard for the well-being of Clara and Lisle, there are numerous examples in the parts of the chart that I have that physician-ordered medications and treatments were not administered/assisted with as ordered.
- Ms. Watral knew, or should have known that Lisle needed ongoing monitoring of his severe lower extremity edema (the fluid was seeping out of his legs).
- Ms. Watral knew, or should have known that Lisle needed skilled nursing monitoring of his medications, as well as his bowels. This is why families move their loved ones into assisted living facilities.

It is my opinion that Ms. Blanchard, Ms. Carpenter, and Ms. Watral breached accepted standards of care in their care of Lisle and Clara Hale.

Alice Semingson, RN-BC, BS, CALA, CLNC

