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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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KATHY ARLENE TURNER, individually and as the  
Personal Representative of the ESTATE OF  
KENT ALLEN TURNER, Deceased,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF SOCIAL &  
HEALTH SERVICES; LEWIS MASON THURSTON AREA AGENCY  
ON AGING,

Respondents,

RES-CARE WASHINGTON, INC., a  
Delaware corporation; and LIFE THERAPEUTIC WORKS, LLC, a  
Washington Limited Liability Corporation,

Defendants.

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities .....	iii - vii
A. INTRODUCTION .....	1
B. ASSIGNMENTS OF ERROR .....	2
(1) <u>Assignments of Error</u> .....	2
(2) <u>Issues Pertaining to Assignments of Error</u> .....	2
C. STATEMENT OF THE CASE.....	3
D. SUMMARY OF ARGUMENT .....	16
E. ARGUMENT .....	18
(1) <u>Standard of Review on Summary Judgment</u> .....	18
(2) <u>DSHS/LMTAAA Owed Kent a Common Law Duty of Care</u> .....	19
(a) <u>DSHS/LMTAAA Owed Kent What the Trial Court Described as a Duty of “Ordinary Care”</u> .....	19
(b) <u>DSHS/LMTAAA Owed Kent a Special Protective Duty under <i>Restatement (Second) of Torts</i> § 315</u> .....	21
(3) <u>DSHS/LMTAAA Owed a Duty to Kent Under RCW 74.39A</u> .....	28
(a) <u>Kent Was Within the Class of Persons Protected by RCW 74.39A</u> .....	30
(b) <u>The Legislature Intended to Create a Private Remedy</u> .....	33

(c)	<u>A Private Right of Action Is Consistent with the Purpose of RCW 74.39A</u> .....	35
(4)	<u>LMTAAA Owed Kent a Duty of Care Under the AVAA, RCW 74.34</u> .....	36
(5)	<u>The Public Duty Doctrine Is Inapplicable Here</u> .....	39
(6)	<u>The Trial Court Erred in Ruling on Breach of Duty and Proximate Cause as a Matter of Law</u> .....	45
(7)	<u>Turner Is Entitled to Her Fees at Trial and on Appeal</u> .....	48
F.	CONCLUSION.....	49
	Appendix	

## TABLE OF AUTHORITIES

	<u>Page</u>
<u>Table of Cases</u>	
<u>Washington Cases</u>	
<i>Amend v. Bell</i> , 89 Wn.2d 124, 570 P.2d 138 (1977).....	18
<i>Bailey v. Town of Forks</i> , 108 Wn.2d 262, 737 P.2d 1257 (1987).....	43, 44
<i>Beal for Martinez v. City of Seattle</i> , 134 Wn.2d 769, 954 P.2d 237 (1998).....	44
<i>Beltran-Serrano v. City of Tacoma</i> , 193 Wn.2d 537, 442 P.3d 608 (2019).....	42, 43
<i>Bennett v. Hardy</i> , 113 Wn.2d 912, 784 P.2d 1258 (1990).....	<i>passim</i>
<i>Bishop v. Miche</i> , 137 Wn.2d 518, 973 P.2d 465 (1999).....	32
<i>Bond v. Dep't of Soc. &amp; Health Servs.</i> , 111 Wn. App. 566, 45 P.3d 1087 (2002).....	38
<i>Bowers v. Marzano</i> , 170 Wn. App. 498, 290 P.3d 134 (2012).....	45
<i>Brown v. MacPherson's, Inc.</i> , 86 Wn.2d 293, 545 P.2d 13 (1975).....	44
<i>Burg v. Shannon &amp; Wilson, Inc.</i> , 110 Wn. App. 798, 43 P.3d 526 (2002).....	20
<i>Butler v. Thomsen</i> , 7 Wn. App. 1001, 2018 WL 6918832 (2018).....	45
<i>C.J.C. v. Corp. of the Catholic Bishop of Yakima</i> , 138 Wn.2d 699, 985 P.2d 262 (1999).....	23
<i>Campbell v. City of Bellevue</i> , 85 Wn.2d 1, 530 P.2d 234 (1975).....	44
<i>Caulfield v. Kitsap County</i> , 108 Wn. App. 242, 29 P.3d 738 (2001).....	<i>passim</i>
<i>Chambers-Castanes v. King County</i> , 100 Wn.2d 275, 669 P.2d 451 (1983).....	44
<i>City of Federal Way v. Koenig</i> , 167 Wn.2d 341, 217 P.3d 1172 (2009).....	35
<i>Conrad v. Alderwood Manor</i> , 119 Wn. App. 275, 78 P.3d 177 (2003).....	38
<i>Cummings v. Guardianship Servs. of Seattle</i> , 128 Wn. App. 742, 110 P.3d 796 (2005), <i>review denied</i> , 157 Wn.2d 1006 (2006).....	37
<i>Cummins v. Lewis County</i> , 156 Wn.2d 844, 133 P.3d 458 (2006).....	43
<i>Dep't of Labor &amp; Indus. v. Shirley</i> , 171 Wn. App. 870, 288 P.3d 20 (2012), <i>review denied</i> , 177 Wn.2d 1006, 300 P.3d 415 (2013).....	46
<i>Davidson v. Henson</i> , 135 Wn.2d 112, 954 P.2d 1327 (1998).....	41

<i>Dowler v. Clover Park Sch. Dist. No. 400</i> , 172 Wn.2d 471, 258 P.3d 676 (2011).....	19
<i>Goldsmith v. State, Dep't of Soc. &amp; Health Servs.</i> , 169 Wn. App. 573, 280 P.3d 1173 (2012).....	37
<i>Gregoire v. City of Oak Harbor</i> , 170 Wn.2d 628, 244 P.3d 924 (2010).....	23
<i>Halvorson v. Dahl</i> , 89 Wn.2d 673, 574 P.2d 1190 (1978) .....	44
<i>Hartley v. State</i> , 103 Wn.2d 768, 698 P.2d 77 (1985).....	46
<i>H.B.H. v. State</i> , 192 Wn.2d 154, 429 P.3d 484 (2018).....	23, 24, 28
<i>Hertog, ex rel. S.A.H. v. City of Seattle</i> ; 138 Wn.2d 265, 979 P.2d 400 (1999).....	43, 45
<i>Hosea v. City of Seattle</i> , 64 Wn.2d 678, 393 P.2d 967 (1964) .....	40
<i>Hunt v. King County</i> , 4 Wn. App. 14, 481 P.2d 593, review denied, 79 Wn.2d 1001 (1971).....	26
<i>Hutchins v. 1001 Fourth Ave. Assocs.</i> , 116 Wn.2d 217, 802 P.2d 1360 (1991).....	26
<i>Joyce v. State, Dep't of Corr.</i> , 155 Wn.2d 306, 119 P.3d 825 (2005).....	32, 43
<i>Kelley v. State</i> , 104 Wn. App. 328, 17 P.3d 1189 (2000), review granted, 144 Wn.2d 1021 (2001).....	33
<i>Kelso v. City of Tacoma</i> , 63 Wn.2d 913, 390 P.2d 2 (1964) .....	40
<i>Keodalah v. Allstate Ins. Co.</i> , __ Wn.2d __, __ P.3d __, 2019 WL 4877438 (2019).....	30
<i>Kim v. Lakeside Adult Family Home</i> , 185 Wn.2d 532, 374 P.3d 121 (2016).....	29, 39
<i>Kittitas County v. Allphin</i> , 190 Wn.2d 691, 416 P.3d 1232 (2018).....	18
<i>Lucas Flour Co. v. Local 174, Teamsters Chaffeurs, and Helpers of America</i> , 57 Wn.2d 95, 356 P.2d 1 (1960).....	33
<i>Mancini v. City of Tacoma</i> , 188 Wn. App. 1006, 2015 WL 3562229 (2015).....	42
<i>Martini v. Post</i> , 178 Wn. App. 153, 313 P.3d 473 (2013).....	46, 47
<i>McCarthy v. County of Clark</i> , 193 Wn. App. 314, 376 P.3d 1127, review denied, 186 Wn.2d 1018 (2016).....	45
<i>McLeod v. Grant Cty. Sch. Dist. No. 128</i> , 42 Wn.2d 316, 255 P.2d 360 (1953).....	23
<i>Michaels v. CH2M Hill, Inc.</i> , 171 Wn.2d 587, 257 P.3d 532 (2011).....	46
<i>Mita v. Guardsmark, LLC</i> , 182 Wn. App. 76, 328 P.3d 962 (2014).....	20, 42

<i>Munich v. Skagit Emergency Comm. Ctr.</i> , 175 Wn.2d 871, 288 P.3d 328 (2012).....	41
<i>N.K. v. Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints</i> , 175 Wn. App. 517, 307 P.3d 730, review denied, 179 Wn.2d 1005 (2013).....	22, 23
<i>N.L. v. Bethel Sch. Dist.</i> , 186 Wn.2d 422, 378 P.3d 162 (2016).....	24
<i>Niece v. Elmview Group Home</i> , 131 Wn.2d 39, 929 P.2d 420 (1997).....	23
<i>Nivens v. 7-11 Hoagy's Corner</i> , 133 Wn.2d 192, 943 P.2d 286 (1997).....	25
<i>Osborn v. Mason County</i> , 157 Wn.2d 18, 134 P.3d 197 (2006).....	41
<i>Petersen v. State</i> , 100 Wn.2d 421, 671 P.2d 230 (1983).....	22
<i>Powell v. Viking Ins. Co.</i> , 44 Wn. App. 495, 722 P.2d 1343 (1986).....	18
<i>Ranger Ins. Co. v. Pierce Cty.</i> , 164 Wn.2d 545, 192 P.3d 886 (2008).....	18
<i>Savage v. State</i> , 127 Wn.2d 434, 899 P.2d 1270 (1995).....	40
<i>Schooley v. Pinch's Deli Market, Inc.</i> , 134 Wn.2d 468, 951 P.2d 749 (1998).....	46
<i>Soproni v. Polygon Apartment Partners</i> , 137 Wn.2d 319, 971 P.2d 500 (1999).....	35
<i>Sorenson v. City of Bellingham</i> , 80 Wn.2d 547, 496 P.2d 512 (1972).....	34
<i>Swank v. Valley Christian Sch.</i> , 188 Wn.2d 663, 398 P.3d 1108 (2017).....	29, 30
<i>Taylor v. Stevens County</i> , 111 Wn.2d 159, 759 P.2d 447 (1988).....	41
<i>Taggart v. State</i> , 118 Wn.2d 195, 822 P.2d 243 (1992).....	43
<i>Tyner v. Dep't of Soc. &amp; Health Servs.</i> , 141 Wn.2d 68, 1 P.3d 1148 (2000).....	33
<i>Volk v. DeMeerleer</i> , 187 Wn.2d 241, 386 P.3d 254 (2016).....	24
<i>Warner v. Regent Assisted Living</i> , 132 Wn. App. 126, 130 P.3d 865 (2006).....	38
<i>Washburn v. City of Federal Way</i> , 178 Wn.2d 732, 310 P.3d 1275 (2013).....	25, 40, 44
<i>Webstad v. Stortini</i> , 83 Wn. App. 857, 924 P.2d 940 (1996).....	25
<i>Wheeler v. Ronald Sewer Dist.</i> , 58 Wn.2d 444, 364 P.2d 30 (1961).....	18

Federal Cases

*Preston v. Boyer*, 2018 WL 3416383 (W.D. Wash 2018) .....42

Statutes

RCW 4.92.090 .....40, 41  
RCW 4.92.090(2).....40  
RCW 4.96.010 .....40, 41  
RCW 5.40.050 .....28  
RCW 28A.600.190.....29  
RCW 28A.600.190(2).....29  
RCW 28A.600.190(3).....29  
RCW 28A.600.190(4).....29  
RCW 48.01.030 .....30  
RCW 70.127.005 .....35  
RCW 74.34 .....36  
RCW 74.34.020(2).....38, 39  
RCW 74.34.020(11).....38  
RCW 74.34.020(14).....39  
RCW 74.34.020(16).....38, 39  
RCW 74.34.020(22).....37  
RCW 74.34.035 .....39  
RCW 74.34.200 .....1, 2, 49  
RCW 74.34.200(1).....37, 38  
RCW 74.39A..... *passim*  
RCW 74.39A.010 .....30  
RCW 74.39A.020.....30  
RCW 74.39A.090.....30, 31, 35  
RCW 74.39A.090(4)(a) .....31  
RCW 74.39A.090(5).....31  
RCW 74.39A.095.....31  
RCW 74.39A.095(1)(b) .....31  
RCW 74.39A.095(1)(c) .....32  
RCW 74.39A.095(1)(e) .....32  
RCW 74.39A.095(2).....31  
RCW 74.39A.095(4).....31  
RCW 74.39A.095(7).....32  
RCW 79.34A.040.....30

Codes, Rules and Regulations

CR 56(c).....18  
RAP 18.1.....49  
WAC 182-513-1235(2).....31  
WAC 388-101D-0170.....33  
WAC 388-106-0015.....31  
WAC 388-106-0250 to -0265 .....31  
WAC 388-106-1980.....32  
WAC 388-106-1980(2)(b) .....32

Other Authorities

Laws of 1999, ch. 175, § 1 .....34  
*Prosser and Keeton on the Law of Torts* § 56 (5th ed. 1984).....26  
*Restatement (Second) of Torts* § 281 .....25  
*Restatement (Second) of Torts* § 314A .....22  
*Restatement (Second) of Torts* § 315 ..... *passim*  
*Restatement (Second) of Torts* § 320 .....22, 23  
*Restatement (Second) of Torts* § 323 .....19, 21  
*Restatement (Second) of Torts* § 324 .....19, 21

## A. INTRODUCTION

Kent Turner, a veteran and former law enforcement officer who contracted multiple sclerosis (“MS”), died in a horrific fire in his apartment. The Department of Social and Health Services (“DSHS”) and its case management contractor, Lewis-Mason Thurston Area Agency on Aging (“LMTAAA”), owed Kent a duty under the common law and applicable statutes. Given the extent of his physical disabilities, Kent was entrusted to the care of DSHS/LMTAAA with respect to his residential placement. They had “case management” responsibilities for Kent, requiring them to ensure that his placement was appropriate and safe for his level of disability.

Because Kent was wheelchair-bound, could not take care of his basic needs, and was subject to DSHS/LMTAAA’s funding and residential placement decision-making, they owed him a duty of care as to his placement under the common law pursuant to “take charge” liability principles of the *Restatement (Second) of Torts* § 315, under an implied right of action pursuant to RCW 74.39A, the statute regulating case management services, and under the Abuse of Vulnerable Adults statute (“AVAA”), in particular, RCW 74.34.200.

As a proximate result of their breach of those duties, Kent could not evacuate his apartment. He could not physically open his door to leave his apartment when the fire started.

The trial court erred in prematurely dismissing Kent's Estate's claims for his wrongful death. This Court should reverse the trial court's decision to afford the Estate its day in court before a jury to vindicate Kent's rights.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred in entering its orders on summary judgment on April 19, 2019.

(2) Issues Pertaining to Assignments of Error

1. Did DSHS/LMTAAA owe a common law duty of care to Kent where they negligently provided services to him necessary for his protection and enhanced his risk of harm? (Assignment of Error Number 1)

2. Did DSHS/LMTAAA owe Kent a duty of care where they exerted control over Kent's residential placement and case management services, thereby owing him a "take charge" duty of care under the *Restatement (Second) of Torts* § 315 where he was disabled and could not care for himself and he died in a fire in a residential placement that was inappropriate for his extensive needs? (Assignment of Error Number 1)

3. Did DSHS/LMTAAA owe Kent a duty of care under statutes pertaining to the provision of case management services, RCW 74.39A? (Assignment of Error Number 1)

4. Did DSHS/LMTAAA owe Kent a duty of care under the AVAA, RCW 74.34.200, for their neglect of him? (Assignment of Error Number 1)

5. Did the trial court err in ruling on breach of duty and proximate cause as a matter of law where DSHS/LMTAAA, placed

him in an unsafe living setting that proximately caused his death?  
(Assignment of Error Number 1)

6. Is the Estate entitled to an award of reasonable attorney fees at trial and on appeal?

C. STATEMENT OF THE CASE

Kent Turner was a military veteran who transitioned to a career in law enforcement, becoming an officer with the City of Tenino. CP 1629-31. He completed the police academy and worked as an officer for Tenino from 1986 to 1989, and then worked with the police in Pacific County and McCleary until 1995. CP 1631-34. Until his disability retirement in 2010, Kent worked as a corrections officer at the prison in Shelton for more than 16 years. CP 1634-36.

Kent was initially diagnosed with MS in 2007, and the disease progressed to the point where he had to retire from law enforcement early in 2010 at age 48. CP 1635-36. Kent did not deal well with the diagnosis and progression of his disease; he was at first in denial and continued to do things or try to do the things he had always done. CP 1638-39. As time went on it got more difficult for him physically. *Id.* He had a hard time walking soon after diagnosis. *Id.* The disease progressed rapidly and he was forced to use a cane in November of 2007, a walker in February 2008, and a battery-operated scooter shortly after that. CP 1642. By 2010, he was confined to a wheelchair. *Id.* He was also diagnosed with depression

because he lost his ability to be active and do what he loved to do. CP 1639. He would sometimes snap at people in frustration. CP 1640. After the diagnosis, Kent went from being outgoing and jovial to being more withdrawn, more isolated from friends, and generally more grumpy. CP 1640, 1645-46.

Between 2010 and 2013, Kent's functionality declined considerably. He often fell out of his wheelchair, as his disease progressed. CP 1652. By 2013, Kent could not cook for himself, bathe himself, dress himself, or transfer himself from his wheelchair to use the toilet or get in bed. CP 1652-53, 1670-71, 1681. Because of a progressive loss of dexterity, he had trouble holding a spoon or a fork, or drinking his own cup of coffee. *Id.* He slurred his speech, and his eyesight became impaired. CP 1652. He could not care for himself without assistance in many routine activities of daily living. CP 1652-53. Near the end of his life, he had difficulty even handling or operating a phone. CP 1667-68.

Kent's wife, Kathy, was his caregiver in their home until 2013, but her ability to care for Kent changed dramatically in July 2013 when she was diagnosed with cancer. CP 1653. The cancer diagnosis required Kathy to undergo surgery first at the University of Washington, followed by radiation and chemotherapy treatments, and a time of rest thereafter to recover. CP 1662-63. Kathy was not able to work at all between August and October

2013, and was only able to work part time until about February 2014. CP 1663-64. She had significant side effects from the chemotherapy and radiation, including fatigue, diarrhea, rashes, and a compromised immune system. CP 1665-66. In March 2014 she was hospitalized with fever, severe shaking, and muscle spasm. *Id.* Because she had to focus on her cancer treatment and her own health and recovery, Kathy could not care for Kent. CP 1683-84, 1694-96, 1891. This, together with the financial stress from her lost income, led her to apply to DSHS for assistance for Kent's care during her time of surgery, treatment and recuperation. *Id.*

On July 31, 2013, DSHS performed an initial in-home evaluation of Kent to assess his needs. CP 364-406, 822-50. DSHS's evaluation, known as a CARE assessment, indicated that Kent needed assistance with bathing, toileting, dressing and routine activities of daily living, and 24-hour per day care, seven days per week. *Id.* As a result of this assessment, DSHS deemed Kent to need a "nursing facility" level of care. CP 1441, 1552.

DSHS determined that Kent qualified for assistance and arrangements were made for him to be admitted at the Puget Sound Health Care facility ("Puget Sound"), a local skilled nursing facility where Kent had caregivers to assist him on a 24-hour basis. *Id.* On August 5, 2013, Kent left his apartment with his wife Kathy and moved into Puget Sound. CP 435, 861-62, 1191, 1193. Puget Sound's intake reported, "he is glad to

be here so that his wife can get better as quickly as possible.” CP 861. Puget Sound’s formal evaluation of Kent, completed just four days after he arrived, noted that his goal was to return home when Kathy’s cancer treatments concluded. CP 862.

In hopes of Kent returning to their home, Kathy spoke with Assured Home Care and DSHS about in-home caregiving for Kent. CP 1694-96. She was told that if Kent lived with her, her income would count towards DSHS’s determination for Kent’s eligibility for DSHS-provided services. CP 1695. The Turners would have had to pay for services themselves. *Id.* If Kent continued to live apart from her, however, Kent qualified for DSHS-provided in-home care services. *Id.* So, when Kathy was still undergoing cancer treatments, Kent did not return home because the Turners could not pay for the necessary caregiving. CP 1702-03. Her cancer treatment was also ongoing.

Over Kathy’s objection, CP 1702-03, DSHS allowed Kent to move from the institutional setting at Puget Sound to a community setting, Capitol House Apartments, under its “Roads to Community Living” program (“RCL”). CP 889-890.<sup>1</sup> Indeed, DSHS encouraged Kent to make such a

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<sup>1</sup> This program was also known as the “money follows the person” program, according to DSHS’s Jennifer Karlson. CP 1570. There was no change in Kent’s CARE assessment during this time that justified or otherwise precipitated the move. Kent did not improve in his ability to perform any activities of daily living nor did he otherwise exhibit

move, largely for financial reasons.<sup>2</sup> The goal of the program was to assist individuals with significant care needs in transitioning from an institutional setting to a community setting. CP 1408, 1410-11. DSHS case managers specifically determined client eligibility for the RCL program, assessing such clients. CP 390, 2049, 2053-54.

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an ability to care for himself alone in a manner superior to his abilities as documented in his initial July 2013 CARE assessment. CP 772-98, 822-50.

<sup>2</sup> Less than two weeks after Kent moved to Puget Sound, a DSHS specialist had visited him to talk about services other than the skilled nursing facility. CP 1549, 1897. The DSHS specialist, Kaya Wilcox, worked to move DSHS clients to “a lesser level of care or something that could meet their needs, because it’s very expensive to live in a nursing home.” CP 1549. Kent’s care cost the State about \$10,000 per month. *Id.* As Wilcox explained, “if the State is able to assist people in discharging and getting set up with services in the community, that’s what my job is.” CP 1549-50. Accordingly, Wilcox described her job as “to meet with people who are at nursing facilities and see if they want to continue to stay at the nursing facility, if they meet nursing facility level of care and need to be there or if they want to go.” CP 1551. During that initial visit, however, Wilcox noted that Kent “intends to stay at the SNF [skilled nursing facility] and to return home with his wife when she is able to assist him again.” CP 1897. She noted also that DSHS staff “will continue to check in with him to see if a lesser level of care in the future is needed.” *Id.*

Two months later, DSHS’s Wilcox met with Kent again. CP 1898. As part of DSHS’s evaluation of Kent’s care needs, the DSHS case manager had just met with Kathy while Kathy was at the hospital for cancer treatments. *Id.* Kathy had expressed concern about her inability to care for Kent at the time, and she explained that his condition had been worsening even before her cancer diagnosis. *Id.* DSHS’s Wilcox spoke with Kent about his care and noted:

Kent agreed that going to an AL [assisted living] from the SNF [skilled nursing facility] with an ultimate goal of going home or possibly getting his own apartment would be a plan he could support. Kent would like to discharge from the facility but expressed he is doing okay and is independent around the facility and surrounding area of the SNF.

*Id.* At this same meeting, DSHS’s Wilcox performed a new CARE assessment. CP 495-513, 1898. DSHS’s Wilcox listed DSHS’s “Recommending Living Situation” as “In Home.” CP 495.

As part of DSHS's own RCL policies, every transition plan for a client such as Kent had to include an evacuation plan: "Every plan of care *must* include an evacuation plan." CP 1471, 1783 (emphasis added). But there was no written plan for Kent's evacuation at the Capitol House Apartments when a caregiver was not present. CP 1452-53.

When asked about the evacuation plan in this case, DSHS stated (through its CR 30(b)(6) deposition representative) that the plan was for Kent to have his caregivers assist him in the event of an emergency at the apartment:

- Q: Well, I guess there's—let me break it down into separate questions just to be clear. In Mr. Turner's case, did his plan of care include an evacuation plan?
- A: In that section of the locomotion it said in an event the caregiver would assist.
- Q: Okay.
- A: That was the extent.
- Q: And that's—in your judgment that's an evacuation plan for Mr. Turner?
- A: That is what we assessed.
- Q: Okay. Is there anything you're aware of other than that locomotion portion of his CARE assessment that in your judgment constitutes Mr. Turner's evacuation plan?
- A: There's nothing else.

CP 1452-53. When asked if anyone from DSHS discussed with Kent the issue of evacuation of his apartment and risks associated with it, DSHS stated flatly "I cannot say that that happened." CP 1454. DSHS conceded there is no documentation of plans regarding evacuation in an emergency in

any of the Service Episode Reports (“SERs”), which are the computerized logs documenting Kent’s care, despite the clear directive that such a plan was mandatory, as noted *supra*. CP 1495. The “plan” for Kent to evacuate his apartment, to the extent that DSHS and other defendants in this case have articulated a plan at all, was to have Kent’s caregivers assist him in evacuating the apartment. CP 782.

To facilitate Kent’s move, DSHS hired an RCL contractor, Life Therapeutic Works (“LTW”), to assist in finding community housing for Kent. CP 1285, 1482-87. LTW, owned by Noelle Seaunier, was initially authorized to assist Kent with finding suitable living in an adult family home or assisted living facility. CP 1285-86, 1484-87. Seaunier did not know why there was a change from this to an effort to find Kent an apartment, but she had discussions with Kent’s DSHS case manager about it. *Id.* DSHS social service specialist, Kaya Wilcox, suggested that an adult family home or an assisted living facility would be more appropriate for Kent. CP 1488. Seaunier questioned whether an apartment actually made sense for Kent. CP 1486-87.<sup>3</sup> Ultimately, the decision was made to lease a unit at the Capitol House Apartments. CP 894. He left Puget Sound on February 18, 2014. CP 1287.

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<sup>3</sup> Two adult family homes would not accept Kent because of his extensive care needs. CP 1907.

LTW assisted Kent in the transition by helping move personal items, helping secure furniture, and assisting as a liaison with building management and with the transition in his case. Seaunier testified that she did not perform any assessment or evaluation of Kent's ability to use the apartment or its ergonomics and their fitness for use by a man with Kent's physical limitations. CP 1507-08. The only assessment she was aware of was the DSHS case manager's assessment. *Id.* When asked whether she made any evaluation of Kent's ability to evacuate his apartment in an emergency she replied "I don't do those assessments." CP 1493. She was aware of a complaint from Kent shortly after he moved into the apartments that his caregivers had not shown up, and she related the complaint to DSHS. CP 1490.

Because he was moving from an "institutional" to a "community" setting as part of the RCL program, LMTAAA took over case management responsibilities for Kent from DSHS, a month later. CP 929, 1516.

Prior to that transition, however, DSHS's Kaya Wilcox revised Kent's CARE assessment to indicate that his "goal" was to find independent living. CP 355, 497. Although Kent's initial CARE assessment found that he needed 24-hour care, she reevaluated him and found him fit to live on his own. CP 1560-61, 353-55, 772-98. When she first asked Kent what his plan was with respect to discharging from Puget Sound, he indicated that he

wanted to return home to his wife. CP 1551. Wilcox then had a discussion with him about his discharge plans and Kent was told he could come home at that time (Kathy was still undergoing cancer treatment). CP 1551-52. The updated assessment cleared Kent for independent living. Wilcox stated that this was a result of Kent demonstrating his independence to her. CP 1318. There were, however, no noted improvements in his ability to perform activities of daily living in the updated assessments, and Kent continued to exhibit the same limitations and challenges that were noted in the original Robinson care assessment. CP 772-98, 364-406, 822-50. Relevant to his ability to call 911 or quickly open his front door to evacuate in an emergency, his DSHS assessment still noted, “General weakness, Poor hand/eye coordination, Weak grip, [and] Limited fine motor control.” CP 781.

ResCare, LMTAAA’s theoretical eyes and ears, furnished Kent twice daily services for two hours, once in the morning and once in the evening. CP 1593. ResCare performed a safety assessment as part of its work as Kent’s caretaker, but as part of that assessment ResCare did not assess whether Kent could “safely evacuate his apartment.” CP 1598-1602. Instead, that determination was made by his “case manager,” according to ResCare. CP 1601-02. ResCare never did its own assessment of Kent’s

fitness to live on his own, and relied instead on the DSHS assessment. CP 602.

During the brief time that Kent lived alone at the Capitol House Apartments, he had regular visits from Tony Inglett, one of his best friends. Tony would come by the apartment to visit often. CP 1358. Inglett testified that Kent wanted to live in the Capitol House apartments because Kathy had cancer, and Kent did not want to “burden” her with his care needs while she was undergoing treatment and recover. CP 1386. He observed that Kent had trouble opening the heavy door to the apartment, and that it was a significant enough issue for Kent that he tied a scarf around the doorknob on the inside of the apartment to assist with reaching and opening the door. CP 1375-77. Inglett did not know how Kent managed to get the door open and also get the wheelchair around the door given how heavy the door to his apartment was. CP 1376-77. He observed that Kent could not bathe himself, nor could he use the toilet without assistance; during visits Inglett would have to lift Kent onto the toilet and off. CP 1359. He observed that they did not use adult diapers or similar products. CP 1364. Inglett testified that Kent had soiled himself when he had bowel movements and caregivers were not present and he had to just lay in it until someone showed up to assist him. CP 1364.

The ResCare caregivers noted their activities in handwritten logs that documented their work. One such note documents that a caregiver called in and gave her notice after she showed up to find Kent covered in dried-on feces and that she had difficulty cleaning him. CP 1604. On a different day, a different caregiver noted that the fire department was there when she showed up; Kent had fallen and called 911 and was stuck halfway under his bed. CP 1607. There is no indication that either incident was reported to Kent's caseworker or anyone at DSHS. Kent may have fallen as many as four times the first month he was at the Capitol House Apartments, requiring emergency responders to restore him to his wheelchair. CP 1955.

Once LMTAAA took over Kent's case management from DSHS, responsibility for his in-home care rested with LMTAAA. CP 1392. LMTAAA assigned a case manager, Heidi Hildebrandt, to Kent. CP 1389-91. Hildebrandt visited Kent one time; she did not recall if she observed whether Kent had any difficulty opening the door to his apartment. CP 1396. She testified that when she did her own CARE assessments, she developed an emergency plan with the client. CP 1401-03. This did not occur in Kent's case, because his CARE assessment was already done by DSHS. CP 1516. After the initial visit with Kent on March 24, 2014, no one from LMTAAA ever visited Kent at his apartment; LMTAAA had no

further contact with Kent. CP 1519, 1525. LMTAAA never did its own evaluation of Kent's ability to safely evacuate his apartment in the case of an emergency. LMTAAA never did a fire drill or similar exercise to ensure Kent could quickly exit his building in an emergency, nor did it revisit Kent's CARE assessment in light of his new living situation in the Capitol House Apartments with caregivers present only four hours per day instead of the 24 hours per day that Kent had when he was at Puget Sound. CP 1531. Although Kent had a personal emergency response device ("Life Alert") to call the fire department when he lived with Kathy, DSHS/LMTAAA did not provide him one at Capital House Apartments. CP 1359, 1374, 1381, 1576. The apartment did not have sprinklers. CP 1398, 1971.

On April 30, 2014, Kent died alone in his apartment in a fire of unknown origin. CP 2031. He was found in his wheelchair directly in front of the door to his apartment. CP 2074-75. Because of the lack of any evidence of fire such as burnt material anywhere else in the apartment, Olympia Fire Department Lieutenant Brian Schenk, the chief investigator for this fire, testified that Kent and his wheelchair appeared to not have moved at all once the fire started. CP 2088-89. While Lt. Schenk was unable to determine where the fire started, he was able to say that it either started at or on the wheelchair itself or in the area of Kent's lap. CP 2115-

18. He could not identify the ignition source of the fire, but he was able to state that a “significant” amount of the fire was underneath Kent given how the wheelchair beneath him had burned. CP 2116. There was no lighter or remnants of a lighter found at or on Kent, which one would expect given Kent’s habit of using a “Zippo” type lighter which is a metallic lighter. CP 2104-06.

Samples of clothing and wheelchair seat fabric were sent to the lab after the fire to test for the presence of accelerants such as lighter fluid as part of the investigation. CP 2104. All but one came back negative, which is inconsistent with the fire being started that way. CP 2105-06. The coroner’s report noted the presence of soot in Kent’s lungs, indicating that he was alive when the fire was burning. CP 1948, 2114. In his autopsy, Thurston County Coroner Emmanuel Lacsina, M.D., determined that the cause of Kent’s death was accidental. CP 1950.

After his death, nobody from DSHS or LMTAAA contacted Kathy to advise her of the death of her husband. She learned of the death of her husband on Facebook. CP 1690.

Kent’s Estate brought the present action in the Thurston County Superior Court on October 14, 2015. CP 1-9. The complaint was amended twice. CP 10-26, 148-62. The case was assigned to the Honorable Carol Murphy. DSHS and LMTAAA filed motions for summary judgment. CP

178-200, 722-59. The Estate opposed the motions. CP 1308-48. The trial court granted the motions on April 19, 2019. RP 69-73; CP 2276-81.<sup>4</sup> The trial court generally rejected the Estate’s duty arguments, but found DSHS owed what it termed an ordinary duty of care to Kent. RP 71-72. But it ruled as a matter of law that no duty was breached. *Id.* Similarly, it ruled as a matter of law on proximate cause. RP 72-73. This timely appeal followed. CP 2292-2316.

D. SUMMARY OF ARGUMENT

The trial court erred in dismissing the Estate’s claims against DSHS/LMTAAA on duty grounds where there were multiple bases for finding that those entities owed Kent a duty of care.

DSHS/LMTAAA owed Kent a common law duty of care, both an “ordinary” duty of care, as the trial court recognized, and a duty under the principles of the *Restatement (Second) of Torts* § 315 where a special relationship was present because Kent was entrusted to DSHS/LMTAAA’s care due to his extensive physical limitations. They were his “case managers,” exerting control over his residential care and attendant services. This “take charge” duty is well-recognized in Washington law.

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<sup>4</sup> The trial court previously granted the unopposed summary judgment motions of Curtis Instruments, Pride Mobility Products Corporation, CP 123-33, and granted the contested motions of ResCare Washington, Inc. and Life Therapeutic Works, LLC, at the same time it granted the motions of DSHS and LMTAAA. CP 2282-87. The Estate is not pursuing an appeal as to those entities.

DSHS/LMTAAA owed Kent a common law duty under the statutory residential care provisions of RCW 74.39A. Although the Legislature did not expressly create a private cause of action in that statute for its violation, the trial court failed to properly analyze an implied right of action under the Supreme Court's *Bennett* decision and its progeny. Had it done so, it is clear that a duty was owed to Kent.

Finally, LMTAAA owed Kent a statutory duty under the AVAA. That statute provides a private right of action for abused adults. Kent was protected by the AVAA's broad provisions prohibiting neglect of vulnerable adults.

The trial court erroneously intruded upon the jury's role when it ruled on breach or proximate cause as a matter of law. Simply put, both DSHS/LMTAAA failed to properly evaluate Kent's placement in light of his disabilities and placed him in an apartment without sprinklers where he had no evacuation plan or no personal emergency response device, and he could not even open the door to avoid an emergency like the fire that killed him.

The trial court's orders on summary judgment should be reversed, allowing the Estate the opportunity to present its claims to a jury.

E. ARGUMENT

(1) Standard of Review on Summary Judgment

Summary judgment is a drastic remedy “appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” *Kittitas County v. Allphin*, 190 Wn.2d 691, 700, 416 P.3d 1232 (2018); CR 56(c). It is appropriate only where a trial would truly be “useless.” *Wheeler v. Ronald Sewer Dist.*, 58 Wn.2d 444, 446, 364 P.2d 30 (1961). DSHS/LMTAAA, as the moving parties, bore the burden of establishing their right to judgment as a matter of law.

In addressing whether a genuine issue of material fact is present, a court must construe the facts, and reasonable inferences from the facts in a light most favorable to the non-moving party, here, Turner. *Ranger Ins. Co. v. Pierce Cty.*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). Where there are significant witness credibility issues present in a case, it has long been the rule in Washington that summary judgment is inappropriate. *Amend v. Bell*, 89 Wn.2d 124, 129, 570 P.2d 138 (1977); *Powell v. Viking Ins. Co.*, 44 Wn. App. 495, 503, 722 P.2d 1343 (1986) (“Credibility issues involving more than collateral matters may preclude summary judgment.”).

This Court reviews decisions on summary judgment *de novo*. *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011).

(2) DSHS/LMTAAA Owed Kent a Common Law Duty of Care

In addressing the common law duty owed by DSHS/LMTAAA to Kent, the trial court differentiated between what was obviously a *Restatement* § 315 “take charge” duty and something it described as a duty of “ordinary care.” CP 71-73. Each is addressed.

(a) DSHS/LMTAAA Owed Kent What the Trial Court Described as a Duty of “Ordinary Care”

The trial court’s analysis of what it described as a duty of “ordinary care” is not a picture of clarity, CP 71-72, but it did believe that DSHS/LMTAAA owed such a duty to Kent. *Id.* In fact, LMTAAA admitted that it “owed some duty to Turner.” CP 193. But LMTAAA characterized its duty as “limited,” and DSHS denied entirely that it owed any duty of care to Kent. CP 193, 739-44.

DSHS/LMTAAA owed a common law duty of care to Kent. Under the common law, as expressed in *Restatement (Second) of Torts* §§ 323/324 where an entity undertakes to provide services to another that are necessary for that person’s protection, a defendant may be liable for the negligent provision of such services resulting in an increase in a risk of harm to the

person or the person suffers harm in reliance on such services. *See Mita v. Guardsmark, LLC*, 182 Wn. App. 76, 328 P.3d 962 (2014) (county liable to estate of potential juror who froze to death awaiting access to courthouse).

While DSHS faults Kent for his participation in an independent living setting, DSHS offered him participation in the RCL program. DSHS case managers performed client assessments and determined eligibility for that program. CP 390, 2049, 2053-54. DSHS clients such as Kent had no right to waive these aspects of DSHS case managers' services. CP 390. As admitted by DSHS's specialist assigned to Kent's case, she would not have allowed Kent to simply leave the nursing home. CP 1557. Instead, she would determine whether he was eligible for services to transition into community living. CP 1558. Even if Kent went against DSHS's "medical advice," then "[t]he State still has the duty to follow up with that person to see if they can be assisted in the community," as stated by one of the DSHS employees who assessed Kent. CP 1558. DSHS produced no evidence below that Kent went against advice given to him by DSHS. As this Court recognized, "if someone gratuitously undertakes to perform a duty, they can be held liable for performing it negligently." *Burg v. Shannon & Wilson, Inc.*, 110 Wn. App. 798, 808, 43 P.3d 526 (2002).

Here, Kent required a "nursing facility" level of care with caregivers present on a 24-hour basis. DSHS's own initial CARE assessment

performed in July 2013 so found. Kent did not “improve” or “get better” in any way once he was admitted to Puget Sound for skilled nursing facility care during his wife’s cancer treatment. Such a level of services was still necessary when he was placed at the Capital House Apartments. DSHS’s own RCL protocol required that an emergency evacuation plan be developed when transitioning a client from an institutional to residential setting. None was present. DSHS owed Kent a duty under *Restatement* §§ 323/324 to take reasonable care in making the transition to ensure that Kent’s new living situation was reasonable for him, given his physical limitations and challenges with activities of daily living. It failed to do so.

(b) DSHS/LMTAAA Owed Kent a Special Protective Duty under *Restatement (Second) of Torts* § 315

The trial court here concluded that no duty was owed by DSHS/LMTAAA to Kent because no special relationship was present, although the court acknowledged it was a close question as to DSHS. RP 71-72. The trial court erred, particularly in light of recent Supreme Court authority.

At its core, this is a case addressing DSHS’s duty to protect Kent where it had a special relationship with him. Washington law is clear on the existence of such a duty. Under the *Restatement (Second) of Torts*, DSHS owed Turner a broad protective duty of care relationship to protect a

person with whom he/she has a special relationship from harm caused by a third person. *Restatement (Second) of Torts* § 315.<sup>5</sup> *Petersen v. State*, 100 Wn.2d 421, 425-26, 671 P.2d 230 (1983). The necessary special relationship is discussed in *Restatement (Second) of Torts* §§ 314(A)<sup>6</sup> and 320.<sup>7</sup> Indeed, this duty requires the actor to *anticipate danger*.<sup>8</sup>

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<sup>5</sup> § 315 states:

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless

(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or

(b) a special relation exists between the actor and the other which gives to the other a right to protection.

<sup>6</sup> § 314(A) states:

One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other.

<sup>7</sup> § 320 states:

One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is under a duty to exercise reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him, if the actor

(a) knows or has reason to know that he has the ability to control the conduct of the third persons, and

(b) knows or should know of the necessity and opportunity for exercising such control.

<sup>8</sup> The scope of any special protective relationship duty is determined by the foreseeability of the harm. As the Court of Appeals noted in *N.K. v. Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*, 175 Wn. App. 517, 307 P.3d

One who has taken custody of another may not only be required to exercise reasonable care for the other's protection when he knows or has reason to know that the other is in immediate need of it, but also to make careful preparations to enable him to give effective protection when the need arises, and to exercise reasonable vigilance to ascertain the need of giving it.

Cmt. d to § 320. While this protective duty has arisen most often in the school setting,<sup>9</sup> it has arisen in other settings as well.<sup>10</sup>

The Estate anticipates that DSHS will contend that Kent had the right to decide his own placement as an excuse for the harm that befell

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730, *review denied*, 179 Wn.2d 1005 (2013) the existence of a duty based on take charge liability requires only that the harm be in the *general field of danger*. 175 Wn. App. at 526 (citing *McLeod*, 42 Wn.2d at 322). Foreseeability limits the scope of duty. *Id.* at 530. Foreseeability is a *question of fact* for a jury. *Id.* See also, *Niece v. Elmview Group Home*, 131 Wn.2d 39, 50, 929 P.2d 420 (1997).

<sup>9</sup> *E.g.*, *McLeod v. Grant Cty. Sch. Dist. No. 128*, 42 Wn.2d 316, 255 P.2d 360 (1953) (school child under the care and custody of school district). There, our Supreme Court made clear that the district's duty was to *anticipate* dangers that were reasonably foreseeable and to take steps to address them. *Id.* at 320. That students might sexually assault other students in a dark, unsupervised area under bleachers in a gym was reasonably foreseeable. *Id.* at 322.

<sup>10</sup> Washington has made clear that a church has a duty to children under its care who are sexually abused. *C.J.C. v. Corp. of the Catholic Bishop of Yakima*, 138 Wn.2d 699, 985 P.2d 262 (1999). A nursing home has a duty to its residents who are sexually abused by its staff. *Niece*, 131 Wn.2d 39. A church has a duty to children when a Boy Scout Scoutmaster for a troop it sponsored sexually abused them, *N.K.*, 175 Wn. App. 517. The State itself has a duty to children it places in foster care or adoption, once it has terminated any parental rights as to those children, to protect them from sexual abuse at the hands of their foster or adoptive parents. *H.B.H. v. State*, 192 Wn.2d 154, 429 P.3d 484 (2018). A special relationship may even require protection of the plaintiff from the custodian or himself/herself. *E.g.*, *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 244 P.3d 924 (2010) (inmate's special relationship with jailer requires jailer to ensure inmate's "health, welfare, and safety" so that church was liable for inmate's suicide).

him.<sup>11</sup> But DSHS, in its blind adherence to transition of disabled persons to community settings in the guise of “client choice,” CP 1421-22, washed its hands of any real responsibility for Kent’s placement in a facility that jeopardized him, given his known physical limitations. DSHS’s argument is belied here both by the law and the facts in this case. DSHS/LMTAAA mistake the nature of the necessary “control” they had to exert over Kent for a special relationship to exist.

Actual physical control, however, is *not* required for a special relationship to be present. Our Supreme Court squarely rejected the argument that the location of the victim’s injury controlled. *N.L. v. Bethel Sch. Dist.*, 186 Wn.2d 422, 378 P.3d 162 (2016) (special relationship existed as to student–district even though student was raped far away from campus by another student who was a registered sex offender). It has also rejected the notion that a special relationship is confined to situations of physical control over the defendant in cases like *Volk v. DeMeerleer*, 187 Wn.2d 241, 386 P.3d 254 (2016) (recognizing that a professional takes charge over an outpatient who harms others). In fact, in *H.B.H.*, the Court made clear that custody meant “entrustment.” 192 Wn.2d at 173 (“...our

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<sup>11</sup> To the extent that Kent’s influence over his own placement is at all relevant to a jury’s determination of liability, it might bear on Kent’s comparative fault. But his desire to move from a skilled nursing facility does not negate DSHS/LMTAAA’s common law protective duty of care.

case law confirms that entrustment for the protection of a vulnerable victim, not physical custody, is the foundation of a special protective relationship.”)<sup>12</sup>

The facts in *Caulfield v. Kitsap County*, 108 Wn. App. 242, 29 P.3d 738 (2001) are virtually indistinguishable from those present here. Like the situation here where DSHS/LMTAAA had “case management” responsibilities as to Kent, this Court there noted that a duty based on a special relationship involves an element of entrustment where one party was entrusted with the well-being of the other party. *Id.* at 253 (*citing Webstad v. Stortini*, 83 Wn. App. 857, 869, 924 P.2d 940 (1996)). Caulfield sued Kitsap County for mismanaging his care through the COPES (Community Options Program Entry System) program resulting in personal injuries. *Id.* at 245. Like Kent in this case, Caulfield suffered from MS and needed 24 hour care. Like Kent, he only had limited use of his hands and needed assistance with eating, transferring, body positioning, and personal hygiene. As with Kent, DSHS authorized Caulfield to receive personal care in his own apartment from an in-home caregiver. Caulfield’s DSHS caseworker

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<sup>12</sup> The Court has also determined that a special relationship duty exists even when there is no “custodial” relationship at all. *E.g.*, *Nivens v. 7-11 Hoagy’s Corner*, 133 Wn.2d 192, 943 P.2d 286 (1997) (business has special relationship with customers invited to premises); *Washburn v. City of Federal Way*, 178 Wn.2d 732, 310 P.3d 1275 (2013) (city has *Restatement* § 281 duty to protect harassment victim who made complaint from her harasser).

managed his care and was aware of his vulnerable condition when she placed him in the COPES program. Like Kent, Caulfield left a nursing facility and received in-home care.

The DSHS caseworker failed to reassess Caulfield until October 23, 1995, more than a month after he left the nursing facility. The next day, she transferred his case to a Kitsap County social worker, and despite discussing that Caulfield needed more intensive case management, did not follow up until November 1, 1995. The next day, Caulfield was admitted to the emergency room in critical condition. *Id.* at 247.

This Court found that there was also a special relationship between Caulfield and the placing/residential care agencies under § 315 of the *Restatement (Second) of Torts*. That duty is “protective in nature, historically involving an affirmative duty to render aid.” *Id.* at 253 (quoting *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 228, 802 P.2d 1360 (1991) (citing W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 56 at 383 (5th ed. 1984)). This includes a “duty to safeguard a patient from the reasonably foreseeable risk of self-inflicted harm.” *See Hunt v. King County*, 4 Wn. App. 14, 481 P.2d 593, review denied, 79 Wn.2d 1001 (1971).

In rejecting the notion that a “custodial relationship” was a requisite basis for the § 315 “take charge” duty, this Court emphasized Caulfield’s vulnerability in terms that apply with equal force here:

As noted, these special tort duties are based on the liable party’s assumption of responsibility for the safety of another. Passengers and hotel guests are merely away from familiar surroundings and relying on their hosts to take the same reasonable precautions that they would take at home. Profoundly disabled persons are totally unable to protect themselves and are thus completely dependent not only on their caregivers but also their case managers for their personal safety.

Caulfield’s relationship with his County case manager involved an element of “entrustment” by virtue of the dependent and protective nature of the relationship. Caulfield’s case file showed he could not get out of bed and could not reach the telephone for assistance. Given Caulfield’s inability to take care of himself, the case manager’s responsibility for establishing and monitoring his in-home service care plan took on great significance. COPES case managers were responsible for establishing Caulfield’s service plans, monitoring his care, and providing crisis management, including terminating in-home care if it was inadequate to meet his needs. And the case managers were required to make assessment visits. This responsibility gave rise to a duty to protect Caulfield and other similarly vulnerable clients from the tortious acts of others, especially when a case manager knows or should know that serious neglect is occurring.

*Id.* at 255-56 (internal citations omitted).

This Court’s analysis in *Caulfield* has never been overturned by the Legislature in the 18 years since it was filed, evidencing acquiescence in this Court’s interpretation of duty articulated there. Moreover, our Supreme

Court in *H.B.H.* expressly approved this Court's duty analysis in *Caulfield*. 192 Wn.2d at 174.

DSHS/LMTAAA owed Kent a duty of care where he was entrusted to their safe-keeping. As in *Caulfield*, there was a failure to assess an MS client's placement after the transition from institutional to residential care. *Caulfield* is factually indistinguishable in any meaningful way from the situation here. The trial court erred in finding no duty was owed to Kent.

(3) DSHS/LMTAAA Owed a Duty to Kent Under RCW 74.39A

The Estate here had an implied cause of action against DSHS/LMTAAA arising out of RCW 74.39A. The trial court erred when it did not address this theory for recovery. RP 69-73.

Washington law recognizes that statutes may create a duty of care in tort. Although Washington has abolished the concept of negligence *per se*, RCW 5.40.050, a violation of a statute can be negligence. *Id.* Our Supreme Court established the protocol for an implied cause of action in *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990). There, a statute made it an "unfair employment practice to discriminate against an employee who is between the ages of 40 and 70 based upon [his or her] age" yet it provided "no express method of redress against an employer who has engaged in such an unfair practice." 113 Wn.2d at 921. Our Supreme Court found that the statute created an implied cause of action because "[w]ithout

an implicit creation of a remedy, the statute is meaningless.” *Id.* at 920. In so concluding, the Court established a three-part protocol, in which courts must ask “first, whether the plaintiff is within the class for whose ‘especial’ benefit the statute was enacted; second, whether legislative intent, explicitly or implicitly, supports creating or denying a remedy; and third, whether implying a remedy is consistent with the underlying purpose of the legislation.” *Id.* at 920-21.

Our Supreme Court has applied the *Bennett* protocol in numerous recent decisions to find an implied statutory cause of action. For example, in *Kim v. Lakeside Adult Family Home*, 185 Wn.2d 532, 374 P.3d 121 (2016), the Court found that the AVAA creates an implied cause of action against mandated reporters of abuse who fail to report. Similarly, the Court found an implied cause of action in the “Lystedt law,” RCW 28A.600.190, a law aimed at protecting youth athletes from concussions. *Swank v. Valley Christian Sch.*, 188 Wn.2d 663, 680, 398 P.3d 1108 (2017). That law required school districts to develop guidelines and inform coaches, parents, and youth athletes about concussions. RCW 28A.600.190(2). It also required that youth athletes be removed from practices or games when they exhibit signs of a concussion and may not be returned until cleared by a medical professional. RCW 28A.600.190(3), (4). The Court found that this law created an implied cause of action for parents whose child died after

suffering a head injury during a football game and was not removed from play. *Swank*, 188 Wn.2d at 675-81.<sup>13</sup>

Under the *Bennett* protocol, the Estate had a cause of action against DSHS/LMTAAA arising out of their violations of their obligation under RCW 74.39A to establish an appropriate care plan for a disabled individual like Kent.

(a) Kent Was Within the Class of Persons Protected by RCW 74.39A

Once a vulnerable person leaves the in-patient setting for needed services, RCW 74.39A establishes the basis upon which that person receives needed long-term care services funded by the State from a variety of sources. RCW 79.34A.040. *See* Appendix. DSHS may contract with providers for assisted living services, or adult residential care. RCW 74.39A.010-020.

In funding these services, the Legislature established DSHS's case management responsibilities in RCW 74.39A.090.<sup>14</sup> It directed DSHS to

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<sup>13</sup> By contrast, in the recent case of *Keodalah v. Allstate Ins. Co.*, \_\_ Wn.2d \_\_, \_\_ P.3d \_\_, 2019 WL 4877438 (2019), the Court declined to imply a cause of action for breach of the general statutory duty of good faith applicable to the insurance industry in RCW 48.01.030 because the statute generally articulated a "public interest," rather than a duty to identifiable individuals, there were other specific remedies available, and the breadth of the public policy articulated in the statute would allow insurers to sue insureds, something the Court concluded the Legislature never intended. *None* of those same kinds of concerns apply here.

<sup>14</sup> RCL is an "alternative to nursing home care" program that is provided and

regulate such long-term care options by assessing, administering, and monitoring long term care programs under chapter 388-106 WAC. RCW 74.39A.090 mandated that DSHS contract with area agencies on aging (“AAAs”) like LMTAAA to deliver case management services to disabled persons like Kent. *See Appendix.*

The statute also mandated that DSHS, in its oversight and monitoring of AAAs’ performance, must assess case management undertaken by AAAs. RCW 74.39A.090(4)(a). RCW 74.39A.090(5) directs AAAs to assess the quality of the in-home care services provided to consumers who are receiving services under programs authorized through the medicaid state plan, medicaid waiver authorities, or similar state-funded in-home care programs through an individual provider or home care agency.

The responsibilities of DSHS and AAAs regarding case management services are *extensive*. RCW 74.39A.095.<sup>15</sup> *See Appendix.* LMTAAA had the responsibility of providing oversight to the care Kent received. It was obliged to have a care plan for Kent. RCW 74.39A.095(2). Specifically, it was obligated to monitor Kent’s care plan to ensure that it

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administered by DSHS. WAC 388-106-0015. DSHS authorized RCL services. WAC 182-513-1235(2); WAC 388-106-0250 to -0265.

<sup>15</sup> The Legislature amended the statute in 2018; the present version of the statute still makes clear that LMTAAA had an ongoing duty to monitor the client’s care plan and address any problems they experienced. RCW 74.39A.095(1)(b). DSHS/LMTAAA retained authority to address inadequate service providers. RCW 74.39A.095(4).

adequately met his needs by engaging in home visits, telephone contacts, or responding to specific issues involving his care. RCW 74.39A.095(1)(c). It was mandated to monitor the propriety of Kent's placement at Capitol House Apartments. RCW 74.39A.095(1)(e). If that placement jeopardized Kent's health, safety or well-being, DSHS/LMTAAA had the authority to terminate Capitol House's contract. RCW 74.39A.095(7) (2015). Moreover, and more critically, DSHS had the authority to contest an unsafe placement under its challenging case protocol. WAC 388-106-1980. *See* Appendix. That protocol makes it completely clear that even if a client wanted a particular residential placement, DSHS could prevent such a placement if the client "demonstrates behaviors that are substantially likely to cause serious harm" to that client. WAC 388-106-1980(2)(b). Kent's placement at Capitol House Apartments fell within that directive, but DSHS/LMTAAA failed to act.

In determining if Kent was within the class of persons RCW 74.39A was designed to protect, courts may look to internal directives and department policies to provide evidence of the standard of care and therefore evidence of negligence. *See Joyce v. State, Dep't of Corr.*, 155 Wn.2d 306, 324, 119 P.3d 825, 834 (2005); *Bishop v. Miche*, 137 Wn.2d 518, 522, 973 P.2d 465 (1999) (court looked to a municipal probation department manual setting forth the probation officer's duty to report

violations to the court within a specific time frame); *Tyner v. Dep't of Soc. & Health Servs.*, 141 Wn.2d 68, 87–88 and note 8, 1 P.3d 1148 (2000) (jury was informed that CPS's own manual required it to contact key collateral sources in investigating child abuse allegations); *Kelley v. State*, 104 Wn. App. 328, 334–35, 17 P.3d 1189 (2000), *review granted*, 144 Wn.2d 1021 (2001) (violation of policy directives may be evidence of gross negligence).

DSHS internal policies supported the existence of a duty here. In providing long-term care services, DSHS service providers are generally mandated to meet physical and safety requirements for clients' residential placement, including an evacuation plan developed and practiced with the client. WAC 388-101D-0170. Moreover, the challenging care protocols referenced *supra* clearly delineate authority for DSHS and its contractors like LMTAAA to terminate a placement where the client is plainly at risk, as was true for Kent here.

(b) The Legislature Intended to Create a Private Remedy

That the Legislature intended to create a private remedy is documented by the sheer extent of the specific protective provisions in the statute and implementing regulations. It could hardly have created such rights without intending a remedy for their breach. Our Supreme Court has rejected the notion that rights can be created without necessary remedies. *Lucas Flour Co. v. Local 174, Teamsters Chaffeurs, and Helpers of*

*America*, 57 Wn.2d 95, 103, 356 P.2d 1 (1960). Indeed, in *Sorenson v. City of Bellingham*, 80 Wn.2d 547, 556, 496 P.2d 512 (1972), the Court quoted with approval a passage from a treatise on declaratory judgments that stated: “Rights are granted by or recognized by the state not as abstractions, but for the purpose of legal protection. In this sense, rights without remedies are inconceivable . . .”

In enacting an earlier version of RCW 74.39A in 1999, the Legislature expressed its intent to *protect* low-income elderly and disabled persons.<sup>16</sup> That protective intent is facilitated by an implied cause of action.

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<sup>16</sup> Laws of 1999, ch. 175, § 1 states:

(1) The legislature finds that the quality of long-term care services provided to, and protection of, Washington’s low-income elderly and disabled residents is of great importance to the state. The legislature further finds that revised in-home care policies are needed to more effectively address concerns about the quality of these services.

(2) The legislature finds that consumers of in-home care services frequently are in contact with multiple health and long-term care providers in the public and private sector. The legislature further finds that better coordination between these health and long-term care providers, and case managers, can increase the consumer’s understanding of their plan of care, maximize the health benefits of coordinated care, and facilitate cost efficiencies across health and long-term care systems.

This is also consistent with the protective intent of the Legislature in connection with in-home care:

The legislature finds that the availability of home health, hospice, and home care services has improved the quality of life for Washington’s citizens. However, the delivery of these services bring risks because the in-home location of services makes their actual delivery virtually invisible. Also, the complexity of products, services, and delivery

Moreover, the Legislature was aware of *Caulfield*, decided by this Court in 2001. RCW 74.39A.090, for example was enacted in 1995, and amended 3 times after 2001. Had the Legislature been dissatisfied with the outcome in *Caulfield*, it could have restricted the private right of action this Court discerned in *Caulfield*. It did not. The Legislature acquiesced in this Court's *Caulfield* decision. *City of Federal Way v. Koenig*, 167 Wn.2d 341, 348, 217 P.3d 1172 (2009); *Soproni v. Polygon Apartment Partners*, 137 Wn.2d 319, 327 n.3, 971 P.2d 500 (1999) (Legislature is presumed to be aware of judicial interpretation of its enactments and the failure to amend them after a judicial interpretation of them evidences legislative acquiescence in that interpretation).

(c) A Private Right of Action Is Consistent with the Purpose of RCW 74.39A

The trial court found no jury questions on breach for any duties. RP 72. But it erred. There were fact questions as to whether DSHS breached

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systems in today's health care delivery system challenges even informed and healthy individuals. The fact that these services are delivered to the state's most vulnerable population, the ill or disabled who are frequently also elderly, adds to these risks.

It is the intent of the legislature to protect the citizens of Washington state by licensing home health, hospice, and home care agencies. This legislation is not intended to unreasonably restrict entry into the in-home service marketplace. Standards established are intended to be the minimum necessary to ensure safe and competent care, and should be demonstrably related to patient safety and welfare.

RCW 70.127.005.

its common law duty of care in its case management for Kent. More to the point of the *Bennett* protocol, the Legislature did not intend that the requirements of RCW 74.39A could be freely breached without attendant consequences. As noted *supra*, DSHS knew Kent required a “nursing facility” level of care with caregivers present on a 24-hour basis. DSHS owed Kent a duty of care under the *Bennett* implied cause of action protocol to Kent to insure that there was an adequate care plan for him, consistent with his physical limitations, that maximized his health, safety, and well-being. Moreover, as DSHS’s contractor, LMTAAA had the further duty of providing case management services to monitor and ensure that Kent’s residence at Capitol House Apartments was consistent with his care plan and his ultimate health and safety. DSHS/LMTAAA failed in their duties to Kent. To fully implement the critical public policies of RCW 74.39A, a civil cause of action by the Estate against DSHS/LMTAAA is essential.

In sum, the trial court erred in failing to properly apply the *Bennett* protocol to determine that DSHS/LMTAAA owed a duty of care to Kent that was actionable.

(4) LMTAAA Owed Kent a Duty of Care Under the AVAA, RCW 74.34

The trial court here determined, without significant analysis, that the AVAA did not apply here to either DSHS or LMTAAA. RP 71. That was

error.

The AVAA was enacted in 1995 to provide protection and legal remedies to vulnerable adults living in the community but dependent on others for their care. There is a private right of action for its violation. RCW 74.34.200(1). *See* Appendix. The AVAA explicitly includes a new cause of action for vulnerable adults who have suffered abuse or neglect either while residing in a facility, or, for those residing at home, “who receive[ ] care from a home health, hospice, or home care agency, or an individual provider.” RCW 74.34.200(1). *Goldsmith v. State, Dep’t of Soc. & Health Servs.*, 169 Wn. App. 573, 580, 280 P.3d 1173 (2012). Kent was within this class of individuals. He was a “vulnerable adult” under the statute. RCW 74.34.020(22).<sup>17</sup> As such, he was within the class of persons the Legislature intended to benefit in enacting the legislation. In providing in-home care services to Kent, both DSHS and LMTAAA were subject to the AVAA. *Cummings v. Guardianship Servs. of Seattle*, 128 Wn. App. 742, 749-52, 110 P.3d 796 (2005), *review denied*, 157 Wn.2d 1006 (2006) (AVAA broadly applies to guardianship agency providing in-home care).

The AVAA establishes a separate cause of action with its own

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<sup>17</sup> It is undisputed that Kent had severe MS that confined him to his wheelchair and left him dependent on others for cooking, bathing, toileting, and transferring in and out of his wheelchair. A DSHS specialist who assessed Kent testified in her deposition that Kent was a vulnerable adult under the AVAA. CP 1559.

standards of proof distinct from common law negligence. *Warner v. Regent Assisted Living*, 132 Wn. App. 126, 130 P.3d 865 (2006); *Conrad v. Alderwood Manor*, 119 Wn. App. 275, 292, 78 P.3d 177 (2003). For neglect, the Estate only needed to prove a pattern of conduct depriving Kent of necessary care in order to recover. RCW 74.34.020(16); *Bond v. Dep't of Soc. & Health Servs.*, 111 Wn. App. 566, 577, 45 P.3d 1087 (2002).

For purposes of the private right of action in RCW 74.34.200(1), DSHS admitted Kent was a vulnerable adult. CP 764. As an individual provider, LMTAAA was subject to its provisions. RCW 74.34.020(11). Moreover, RCW 74.34.020(2) defines “abuse” encompasses “willful action or inaction that inflicts injury.” RCW 74.34.020(16) defines “neglect” as:

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

All the Estate had to show to state a claim under the AVAA is that LMTAAA “abused” or “neglected” Kent as that term is defined in the statute. The statute does not require expert testimony to establish “neglect,” “pain and suffering,” or resulting damages. *Warner*, 132 Wn. App. at 134.

Here, the inaction of LMTAAA meets the definition of “abuse” and “neglect” as set forth above. They left Kent in his apartment, alone, without caretakers, in a situation where he could not get out of his wheelchair or safely evacuate the apartment once the fire ignited. As a result, Kent died in a horrible fire in his apartment. This meets the statutory definition of abuse in RCW 74.34.020(2). Moreover, LMTAAA placed Kent in an apartment, alone, with caregivers only present for four hours per day (when DSHS’s own assessment justified 24 hour care), and without the development and implementation of a required emergency evacuation plan. That met the definition of neglect in RCW 74.34.020(16).

Further, under the AVAA, mandated reporters have a duty to report suspected abuse or neglect to DSHS and, in appropriate circumstances, directly to law enforcement. RCW 74.34.035 (*see* Appendix); *Kim*, 185 Wn.2d at 546. LMTAAA was a mandatory reporter under the statute and failed to report Kent’s abusive situation. RCW 74.34.020(14).

The Estate established a cause of action against LMTAAA under the AVAA. The trial court erred in dismissing their claim where a statutory duty existed.

(5) The Public Duty Doctrine Is Inapplicable Here

DSHS suggested below that the public duty doctrine applies here. CP 740-41, 2216-19. It does not.

Our Legislature abolished sovereign immunity. “The doctrine of governmental immunity springs from the archaic concept that ‘The King Can Do No Wrong.’” *Kelso v. City of Tacoma*, 63 Wn.2d 913, 914, 390 P.2d 2 (1964). In 1961, the Legislature enacted RCW 4.92.090 abolishing state sovereign immunity. That waiver quickly extended to municipalities in 1967. RCW 4.96.010; *Kelso*, 63 Wn.2d at 918-19; *Hosea v. City of Seattle*, 64 Wn.2d 678, 681, 393 P.2d 967 (1964). Local governments have since been “liable for damages arising out of their tortious conduct ... to the same extent as if they were a private person or corporation.” RCW 4.96.010. “[G]overnmental entities in Washington are liable for their ‘tortious conduct’ to the ‘same extent’ as a private person or corporation.” *Washburn*, 178 Wn.2d at 753 (citing RCW 4.92.090(2)). These statutes operate to make state and local government “presumptively liable in all instances in which the Legislature has *not* indicated otherwise.” *Savage v. State*, 127 Wn.2d 434, 445, 899 P.2d 1270 (1995) (emphasis in original). The County’s application of the public duty doctrine in this case is nothing more than a backdoor device to effectively restore sovereign immunity despite legislative abolition of that immunity.

The public duty doctrine does not apply here. The public duty doctrine is a “‘focusing tool’... to determine whether a public entity owed a duty to a ‘nebulous public’ or a particular individual.” *Osborn v. Mason*

*County*, 157 Wn.2d 18, 27, 134 P.3d 197 (2006) (quoting *Taylor v. Stevens County*, 111 Wn.2d 159, 166, 759 P.2d 447 (1988)) (internal quotations omitted). It is not an immunity – a surreptitious restoration of sovereign immunity abolished by RCW 4.92.090 and RCW 4.96.010 – as the City would have this Court believe.

Most patently, the doctrine does not apply to a common law cause of action. *Munich v. Skagit Emergency Comm. Ctr.*, 175 Wn.2d 871, 288 P.3d 328 (2012). The Supreme Court has clearly limited the doctrine’s application to legal obligations imposed by a statute, ordinance, or regulation:

Since its inception, the “public duty” analysis has remained largely confined to cases in which the plaintiff claims that a particular statute has created an actionable duty to the “nebulous public.” Although we could have been clearer in our analyses, the only governmental duties we have limited by application of the public duty doctrine are duties imposed by a statute, ordinance, or regulation. *This court has never held that a government did not have a common law duty solely because of the public duty doctrine.*

*Id.* at 886-87 (citations omitted, emphasis added).<sup>18</sup>

Division I agreed with that principle in *Mancini v. City of Tacoma*, 188 Wn. App. 1006, 2015 WL 3562229 (2015), holding that the doctrine

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<sup>18</sup> This statement is taken from Justice Chambers’ concurrence, joined by a majority of the Court. The holding of the Court is the position taken by a majority of justices concurring on the narrowest grounds. *Davidson v. Henson*, 135 Wn.2d 112, 128, 954 P.2d 1327 (1998). Justice Chambers’ concurring opinion on the public duty doctrine constitutes the Court’s holding in *Munich*.

does not apply to common law claims that exist independent of any statutory duty.

The public duty doctrine is not a judicially-created immunity. It does not bar a common law claim brought by the person to whom the breached duty was owed. The trial court erred in dismissing Mancini's negligence claim.

*Id.* at \*8. The court permitted Mancini's claim of common law negligence against the City for its nonconsensual invasion of her home. *Id.* See also, *Mita*, 182 Wn. App. at 84 (Division III holds that public duty doctrine inapplicable to common law claims); *Preston v. Boyer*, 2018 WL 3416383 (W.D. Wash 2018) at \*3 (same).

In *Beltran-Serrano v. City of Tacoma*, 193 Wn.2d 537, 442 P.3d 608 (2019), our Supreme Court yet again reaffirmed that the doctrine is inapplicable as to common law theories of recovery, noting that to "apply the doctrine so broadly would inappropriately lead to a partial restoration of immunity by carving out an exception to ordinary tort liability for governmental entities. This would undermine the value of tort liability to protect victims, deter dangerous conduct and provide a fair distribution of risk of loss." *Id.* at 550 (citations omitted).

Washington courts have routinely rejected the doctrine's application in the "take charge" setting; our Supreme Court has had little difficulty in concluding that governments owe a duty of care to victims harmed by

persons who are subject to custody in the criminal justice system and are improperly supervised. *Taggart v. State*, 118 Wn.2d 195, 822 P.2d 243 (1992) (parolees); *Hertog, ex rel. S.A.H. v. City of Seattle*; 138 Wn.2d 265, 979 P.2d 400 (1999) (probationers); *Joyce*, 155 Wn.2d at 306 (offender on community supervision).

Even if the doctrine is applicable here, it has exceptions. *Cummins v. Lewis County*, 156 Wn.2d 844, 853, 133 P.3d 458 (2006). “Saying an exception applies is simply shorthand for saying the governmental entity owes a duty to the plaintiff.” *Id.* (citing *Taggart*, 118 Wn.2d at 218). As this Court aptly stated, “As with any defendant, the true question in a negligence suit against a governmental entity is whether the entity owed a duty to the plaintiff, not whether an exception to the public duty doctrine applies it.” *Id.* at 754. At least four exceptions to that doctrine were recognized in *Bailey v. Town of Forks*, 108 Wn.2d 262, 268, 737 P.2d 1257 (1987). Several apply here. Moreover, “an enumerated exception is not always necessary to find that a duty is owed to an individual and not to the public at large.” *Beltran-Serrano*, 193 Wn.2d at 549.

For example, the failure to enforce exception is well-recognized where a government is aware of a statutory violation but fails to take corrective action when it has an obligation to do so. *Campbell v. City of Bellevue*, 85 Wn.2d 1, 530 P.2d 234 (1975); *Bailey, supra*.

If the Legislature has evidenced an intent to protect a particular and circumscribed class of persons, that, too, is an exception. *Halvorson v. Dahl*, 89 Wn.2d 673, 574 P.2d 1190 (1978); *Washburn, supra*.

Further, if the government assumes a duty to warn or come to the aid of a particular person, that is an exception. *Brown v. MacPherson's, Inc.*, 86 Wn.2d 293, 545 P.2d 13 (1975).

Finally, the special relationship exception applies where the government defendant and the plaintiff have a special relationship that sets the plaintiff apart from the public generally. Such a relationship exists wherever (1) there is direct contact between the public official and the injured plaintiff which sets the latter apart from the general public, (2) there are assurances given, and (3) the contact gives rise to justifiable reliance on the part of the plaintiff. *Beal for Martinez v. City of Seattle*, 134 Wn.2d 769, 785, 954 P.2d 237 (1998). “As to the second element, the assurances need not always be specifically averred, as some relationships carry the implicit character of assurance.” *Chambers-Castanes v. King County*, 100 Wn.2d 275, 286, 669 P.2d 451 (1983).

Here, the issue is not one of a duty owed by DSHS to the nebulous public, but specifically to Kent Turner, a disabled person entrusted to its care. Virtually any of the public duty doctrine exceptions apply.

In sum, to the extent the public duty doctrine even applied, as a discussion of the exceptions to the doctrine demonstrates, DSHS/LMTAAA had a duty to the Estate specifically, not to a nebulous public. The public duty doctrine does not apply.

(6) The Trial Court Erred in Ruling on Breach of Duty and Proximate Cause as a Matter of Law

The trial court here concluded that no duties were breached by DSHS/LMTAAA, CP 71-72, and that proximate cause was lacking as a matter of law. RP 72-73. That was error because the court aggressively intruded upon the jury's function as to those elements of a negligence action.

As this Court observed in *Bowers v. Marzano*, 170 Wn. App. 498, 505, 290 P.3d 134 (2012), the elements of a negligence action are well-established in Washington law. Duty is a question of law, while breach and causation are generally questions of fact. *Hertog*, 138 Wn.2d at 275; *McCarthy v. County of Clark*, 193 Wn. App. 314, 330, 376 P.3d 1127, review denied, 186 Wn.2d 1018 (2016) (“Whether an officer has fulfilled the duty to investigate is a question of fact.”); *Butler v. Thomsen*, 7 Wn. App. 1001, 2018 WL 6918832 (2018) (Division I reverses summary judgment where expert testimony raised question of fact as is to breach).

Proximate cause in Washington has two elements: legal cause<sup>19</sup> and cause-in-fact. *Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77 (1985). “Cause in fact” refers to the actual, “but for,” cause of the injury, *i.e.*, “but for” the defendant’s actions the plaintiff would not be injured. *Id.* Because there can be more than one cause of a harm, causation is often referred to as a “chain” of events without which a harm would not have happened. *See, e.g., Dep’t of Labor & Indus. v. Shirley*, 171 Wn. App. 870, 884, 288 P.3d 20 (2012), *review denied*, 177 Wn.2d 1006, 300 P.3d 415 (2013). In Washington, proximate cause is classically a *question of fact*. *Martini v. Post*, 178 Wn. App. 153, 164, 313 P.3d 473 (2013) (“Cause in fact is usually a jury question and is generally not susceptible to summary judgment”); *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 611, 257 P.3d 532 (2011) (where the evidence is conflicting, cause in fact is to be resolved by the trier of fact). The evidence of proximate cause need not prove cause in fact “to an absolute certainty.”<sup>20</sup>

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<sup>19</sup> The legal causation analysis focuses on whether, as a matter of policy, the connection between the ultimate result and the defendant’s act is too remote or insubstantial to impose liability. *Schooley v. Pinch’s Deli Market, Inc.*, 134 Wn.2d 468, 951 P.2d 749 (1998).

<sup>20</sup> The *Martini* court stated:

The plaintiff, however, need not prove cause in fact to an absolute certainty. *Gardner v. Seymour*, 27 Wn.2d 802, 808, 180 P.2d 564 (1947). It is sufficient if the plaintiff presents evidence that “allow[s] a reasonable person to conclude that the harm more probably than not

The Estate adduced ample evidence that DSHS/LMTAAA's breaches of their duty to Kent caused his death. They failed to protect Kent from an emergency such as this fire combined with the fortuity of the fire itself, leading to his death.

Without Kathy Turner's consent and over her objection, DSHS chose to move Kent out of a skilled nursing facility and into his own small apartment. It facilitated an unsafe placement for him. He went from an environment with 24-hour nursing care, as DSHS's own CARE assessment noted he required, to an environment where in-home caretakers were present in his apartment for only four hours per day. During the other 20 hours, Kent Turner was alone in his apartment and needed more help, where he was unable to feed himself, use the toilet, bathe himself, or get in and out of his bed or wheelchair. He fell from his wheelchair. He could not open the door to his apartment or use a phone to summon help. He died in his

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happened in such a way that the moving party should be held liable.” *Little [v. Countrywood Homes, Inc.]*, 132 Wn. App. 777, 781, 133 P.3d 944 (2006)] (citing *Gardner [v. Seymour]*, 27 Wn.2d 802, 808-09, 180 P.2d 564 (1947)]. The evidence presented may be circumstantial as long as it affords room for “reasonable minds to conclude that there is a greater probability that the conduct relied upon was the [cause in fact] of the injury than there is that it was not.” *Hernandez v. W. Farmers Ass’n*, 76 Wn.2d 422, 426, 456 P.2d 1020 (1969) (quoting *Wise v. Hayes*, 58 Wn.2d 106, 108-09, 361 P.2d 171 (1961)).

*Martini*, 178 Wn. App. at 165.

wheelchair in a horrific fire, apparently unable to escape due to his paraplegia.<sup>21</sup>

Given these obvious physical constraints, DSHS/LMTAAA, nevertheless, placed Kent in an apartment without sprinklers where there was no evacuation plan by which he could safely exit the apartment in an emergency, although DSHS's placement protocol mandated such a plan. He had no personal emergency response device.

Bluntly stated, but for the negligence of DSHS/LMTAAA in placing him at Capitol House Apartments without safety precautions or an evacuation plan, Kent would not have died in the fire. The issue of whether DSHS/LMTAAA's breach of duty proximately resulted in Kent's death was a question of fact for the jury.

(7) Turner Is Entitled to Her Fees at Trial and on Appeal

A prevailing party on appeal is entitled to an award of attorney fees if allowed by contract, statute, or common law. RAP 18.1. The AVAA provides that:

In an action brought under this section, a prevailing plaintiff shall be awarded his or her actual damages, together with the

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<sup>21</sup> Indeed, Kent's wheelchair was found after the fire directly in front of the heavy door that Kent's best friend Tony Inglett described as so difficult for Kent to open that he had to tie a scarf to the doorknob to be able to open the door from his wheelchair. CP 1376-77. Given that the door was this difficult to open for Kent in a stress-free environment when he had time to manipulate the door with the scarf, a reasonable jury could conclude that Kent's failure to escape from the apartment was proximately caused by DSHS/LMTAAA's conduct.

costs of the suit, including a reasonable attorneys' fee. The term "costs" includes, but is not limited to, the reasonable fees for a guardian, guardian ad litem, and experts, if any, that may be necessary to the litigation of a claim brought under this section.

RCW 74.34.200.

In the event the Estate is the prevailing party upon remand, it is entitled to an award of attorney fees, both at trial and on appeal.

F. CONCLUSION

The trial court erred in dismissing Turner's individual claims and those brought for Kent's Estate where both DSHS and LMTAAA owed Kent a duty of care under the common law and applicable statutes. This Court should reverse the trial court's order on summary judgment and remand to afford Kathy Turner and the Estate their day in court before a jury on her claims. Costs on appeal, including reasonable attorney fees, should be awarded to the Estate.

DATED this 18th day of October, 2019.

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# APPENDIX

RCW 74.34.035:

(1) When there is reasonable cause to believe that abandonment, abuse, financial exploitation, or neglect of a vulnerable adult has occurred, mandated reporters shall immediately report to the department [of social and health services].

....

(3) When there is reason to suspect that physical assault has occurred or there is reasonable cause to believe that an act has caused fear of imminent harm:

(a) Mandated reporters shall immediately report to the department; and

(b) Mandated reporters shall immediately report to the appropriate law enforcement agency, except as provided in subsection (4) of this section.

RCW 74.34.200(1):

In 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 corporation, trust, unincorporated association, partnership, administrator, employee, agent, officer, partner, or director of a facility, or of a home health, hospice, or home care agency licensed or required to be licensed under chapter 70.127 RCW, as now or subsequently designated, or an individual provider.

RCW 74.34A.040:

The department shall work in partnership with hospitals in assisting patients and their families to find long-term care services of their choice. The department shall not delay hospital discharges but shall assist and support the activities of hospital discharge planners. The department also shall coordinate with home health and hospice agencies whenever appropriate. The role of the department is to assist the hospital and to assist patients and

their families in making informed choices by providing information regarding home and community options to individuals who are hospitalized and likely to need long-term care.

(1) To the extent of available funds, the department shall assess individuals who:

(a) Are medicaid clients, medicaid applicants, or eligible for both medicare and medicaid; and

(b) Apply or are likely to apply for admission to a nursing facility.

(2) For individuals who are reasonably expected to become medicaid recipients within one hundred eighty days of admission to a nursing facility, the department shall, to the extent of available funds, offer an assessment and information regarding appropriate in-home and community services.

(3) When the department finds, based on assessment, that the individual prefers and could live appropriately and cost-effectively at home or in some other community-based setting, the department shall:

(a) Advise the individual that an in-home or other community service is appropriate;

(b) Develop, with the individual or the individual's representative, a comprehensive community service plan;

(c) Inform the individual regarding the availability of services that could meet the applicant's needs as set forth in the community service plan and explain the cost to the applicant of the available in-home and community services relative to nursing facility care; and

(d) Discuss and evaluate the need for ongoing involvement with the individual or the individual's representative.

(4) When the department finds, based on assessment, that the individual prefers and needs nursing facility care, the department shall:

(a) Advise the individual that nursing facility care is appropriate and inform the individual of the available nursing facility vacancies;

(b) If appropriate, advise the individual that the stay in the nursing facility may be short term; and

(c) Describe the role of the department in providing nursing facility case management.

RCW 74.39A.090 (as it existed in 2015):

(1) The legislature intends that any staff reassigned by the department as a result of shifting of the reauthorization responsibilities by contract outlined in this section shall be dedicated for discharge planning and assisting with discharge planning and information on existing discharge planning cases. Discharge planning, as directed in this section, is intended for residents and patients identified for discharge to long-term care pursuant to RCW 70.41.320, 74.39A.040, and 74.42.058. The purpose of discharge planning is to protect residents and patients from the financial incentives inherent in keeping residents or patients in a more expensive higher level of care and shall focus on care options that are in the best interest of the patient or resident.

(2) The department shall contract with area agencies on aging:

(a) To provide case management services to consumers receiving home and community services in their own home; and

(b) To reassess and reauthorize home and community services in home or in other settings for consumers consistent with the intent of this section:

(i) Who have been initially authorized by the department to receive home and community services; and

(ii) Who, at the time of reassessment and reauthorization, are receiving home and community services in their own home.

(3) In the event that an area agency on aging is unwilling to enter into or satisfactorily fulfill a contract or an individual consumer's need for case management services will be met through an alternative delivery system, the department is authorized to:

(a) Obtain the services through competitive bid; and

(b) Provide the services directly until a qualified contractor can be found.

(4)(a) The department shall include, in its oversight and monitoring of area agency on aging performance, assessment of case management roles undertaken by area agencies on aging in this section. The scope of oversight and monitoring includes, but is not limited to, assessing the degree and quality of the case management performed by area agency on aging staff for elderly and persons with disabilities in the community.

(b) The department shall incorporate the expected outcomes and criteria to measure the performance of service coordination organizations into contracts with area agencies on aging as provided in chapter 70. – RCW (the new chapter created in section 11 of this act).

(5) Area agencies on aging shall assess the quality of the in-home care services provided to consumers who are receiving services under the medicaid personal care, community options programs entry system or chore services program through an individual provider or home care agency. Quality indicators may include, but are not limited to, home care consumers satisfaction surveys, how quickly home care consumers are linked with home care workers, and whether the plan of care under RCW 74.39A.095 has been honored by the agency or the individual provider.

(6) The department shall develop model language for the plan of care established in RCW 74.39A.095. The plan of care shall be in clear language, and written at a reading level that will ensure the ability of consumers to understand the rights and responsibilities expressed in the plan of care.

RCW 74.39A.095 (as it existed in 2015):

(1) In carrying out case management responsibilities established under RCW 74.39A.090 for consumers who are receiving services under the medicaid personal care, community options programs entry system or chore services program through an individual provider, each area agency on aging shall provide oversight of the care being provided to consumers receiving services under this section to the extent of available funding. Case management responsibilities incorporate this oversight, and include, but are not limited to:

(a) Verification that any individual provider has met any training requirements established by the department;

(b) Verification of a sample of worker time sheets until the state electronic payment system is available for individual providers to record their hours at which time a verification of worker time sheets may be done electronically;

(c) Monitoring the consumer's plan of care to verify that it adequately meets the needs of the consumer, through activities such as home visits, telephone contacts, and responses to information received by the area agency on aging indicating that a consumer may be experiencing problems relating to his or her home care;

(d) Reassessing and reauthorizing services;

(e) Monitoring of individual provider performance; and

(f) Conducting criminal background checks or verifying that criminal background checks have been conducted for any individual provider. Individual providers who are hired after January 7, 2012, are subject to background checks under RCW 74.39A.056.

(2) The area agency on aging case manager shall work with each consumer to develop a plan of care under this section that identifies and ensures coordination of health and long-term care services that meet the consumer's needs. In developing the plan, they shall utilize, and modify as needed, any comprehensive community service plan developed by the department as provided in RCW 74.39A.040. The plan of care shall include, at a minimum:

(a) The name and telephone number of the consumer's area agency on aging case manager, and a statement as to how the case manager can be contacted about any concerns related to the consumer's well-being or the adequacy of care provided;

(b) The name and telephone numbers of the consumer's primary health care provider, and other health or long-term care providers with whom the consumer has frequent contacts;

(c) A clear description of the roles and responsibilities of the area agency on aging case manager and the consumer receiving services under this section;

(d) The duties and tasks to be performed by the area agency on aging case manager and the consumer receiving services under this section;

(e) The type of in-home services authorized, and the number of hours of services to be provided;

(f) The terms of compensation of the individual provider;

(g) A statement by the individual provider that he or she has the ability and willingness to carry out his or her responsibilities relative to the plan of care; and

(h)(i) Except as provided in (h)(ii) of this subsection, a clear statement indicating that a consumer receiving services under this section has the right to waive any of the case management services offered by the area agency on aging under this section, and a clear indication of whether the consumer has, in fact, waived any of these services.

(ii) The consumer's right to waive case management services does not include the right to waive reassessment or reauthorization of services, or verification that services are being provided in accordance with the plan of care.

(3) Each area agency on aging shall retain a record of each waiver of services included in a plan of care under this section.

(4) Each consumer has the right to direct and participate in the development of their plan of care to the maximum extent practicable extent of their abilities and desires, and to be provided with the time and support necessary to facilitate that participation.

(5) A copy of the plan of care must be distributed to the consumer's primary care provider, individual provider, and other relevant providers with whom the consumer has frequent contact, as authorized by the consumer.

(6) The consumer's plan of care shall be an attachment to the contract between the department, or their designee, and the individual provider.

(7) If the department or area agency on aging case manager finds that an individual provider's inadequate performance or inability to deliver quality care is jeopardizing the health, safety, or well-being of a consumer receiving

service under this section, the department or the area agency on aging may take action to terminate the contract between the department and the individual provider. If the department or the area agency on aging has a reasonable, good faith belief that the health, safety, or well-being of a consumer is in imminent jeopardy, the department or area agency on aging may summarily suspend the contract pending a fair hearing. The consumer may request a fair hearing to contest the planned action of the case manager, as provided in chapter 34.05 RCW. The department may by rule adopt guidelines for implementing this subsection.

(8) The department or area agency on aging may reject a request by a consumer receiving services under this section to have a family member or other person serve as his or her individual provider if the case manager has a reasonable, good faith belief that the family member or other person will be unable to appropriately meet the care needs of the consumer. The consumer may request a fair hearing to contest the decision of the case manager, as provided in chapter 34.05 RCW. The department may by rule adopt guidelines for implementing this subsection.

WAC 388-106-1980(2)

(2) The department may deny or terminate your MAC or TSOA services if, after exhaustion of standard case management activities and the approaches delineated in the department's challenging cases protocol that must include an attempt to reasonably accommodate your disability or disabilities, one or more of the following conditions exist:

(a) Your rights and responsibilities as a client of the department are reviewed with you by a department representative under WAC 388-106-1300 and 388-106-1303, and you refuse to accept those services identified in your care plan that are vital to your health, welfare, or safety.

(b) You choose to receive services in your own home and you or others in your home demonstrate behaviors that are substantially likely to cause serious harm to you or your care provider.

(c) You choose to receive services in your own home and hazardous conditions in or immediately around your home jeopardize the health, safety, or welfare of you or your provider. Hazardous conditions include but are not limited to the following:

- (i) Threatening, uncontrolled animals (such as dogs);
- (ii) The manufacture, sale, or use of illegal drugs;
- (iii) The presence of hazardous materials (such as exposed sewage, evidence of a methamphetamine lab).

DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of the *Brief of Appellant* in Court of Appeals, Division II Cause No. 53369-3-II to the following:

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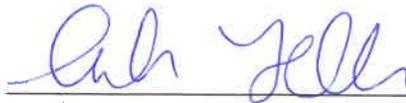
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Court of Appeals, Division II  
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: October 18, 2019, at Seattle, Washington.



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Sarah Yelle, Legal Assistant  
Talmadge/Fitzpatrick

# TALMADGE/FITZPATRICK

October 18, 2019 - 12:17 PM

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**Appellate Court Case Number:** 53369-3  
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**Superior Court Case Number:** 15-2-01939-0

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Brief of Appellant

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