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No. 53369-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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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A. INTRODUCTION

The briefs submitted by respondents Department of Social and Health Services ("DSHS") and Lewis Mason Thurston Area Agency for the Aging ("LMTAAA") are remarkable for their substitution of a fantasy world for the real world actually inhabited by Kent Turner. Both turn a blind eye to their duties in tort to a paraplegic like Kent.

While LMTAAA at least admits that "it owed some duty to Kent," LMTAAA br. at 25, both LMTAAA and DSHS downplay their culpability by portraying Kent as "independent" while ignoring their role in deciding where Kent could live. That is a false narrative. In reality, both agencies had a *major role* in Kent's placement. A truly "independent" person does not have a CARE assessment or a "care plan" for long term services to allow them to survive. For that matter, an "independent" person does not have their housing paid for in the fashion DSHS paid for Kent's housing at the Capitol House Apartments. Both agencies were entrusted with, and exerted considerable control over, Kent's placement.

Even more troubling is the respondent agencies' effort to shirk their responsibility for Kent by claiming that his placement was appropriate. That fantasy world argument is belied by the reality of Kent's paraplegia from his multiple sclerosis ("MS"). Kent was wheelchair-bound and could not dress, bathe, get out of bed, or go to the bathroom without assistance.

DSHS/LMTAAA *knew* his physical vulnerability and his need for the care of a skilled nursing facility ("SNF"). In fact, DSHS itself had initially *recommended* that he reside in an SNF. Still, DSHS focused on saving money, and both agencies disregarded the risks of Kent's placement—risks that became acute when DSHS/LMTAAA did not develop an evacuation plan for Kent despite the apartment having no sprinklers, Kent being unable to easily open the door to the apartment, and Kent being left without a Life Alert device. Kent died as a result of that unsafe, inappropriate placement.

The trial court erred in dismissing the Estate's claims. This Court should reject the respondents' fantasy world.

B. REPLY TO RESPONDENTS' STATEMENTS OF THE CASE

The self-serving statements of the case offered by both DSHS and LMTAAA violate a cardinal principle of appellate review. This Court reviews summary judgement orders *de novo* and construes the facts, and reasonable inferences from those facts, *in the light most favorable to the nonmoving party*, *here*, *the Estate*. Instead of addressing the facts and inferences that support the Estate's position, the respondents create a false narrative of a man who was fully capable of living on his own, who wanted to leave the SNF so he could drink and smoke, and who insisted, over DSHS's objection, on getting his own apartment so he could be free from his marriage. That one-sided factual argument diverts attention from the

actual facts and from the respondents' legal duties to disabled people in nursing facilities, and it unfairly demonizes Kent as a person undeserving of the law's protection. This Court should disregard such a shoddy tactic.

When the record and the reasonable inferences are viewed in the proper light, they show that DSHS/LMTAAA play a crucial role in determining the placement of disabled clients such as Kent in long-term care services. DSHS does not passively implement its clients' choices. Rather, for every DSHS client, a DSHS case manager "develops the plan of care," with input from the client. CP 1820. As DSHS has admitted, DSHS actively makes recommendations to clients based on DSHS's assessments and on DSHS's case managers' professional judgment. CP 1425-26, 1434-35. For example, DSHS's long-term care clients receive a DSHS report with a "Recommended Living Situation" in writing. CP 353, 852, 930. DSHS case managers also provide oral recommendations when discussing care plans with DSHS clients. CP 1426. DSHS followed these practices in Kent's case. CP 353, 852, 930, 1421, 1423. LMTAAA has identical responsibilities when it takes over case management. RCW 74.39A.095(1).

When the record and the reasonable inferences are viewed in the proper light, they show that DSHS *actively* recruited people with disabilities to leave SNFs, facilities that are more expensive than placements like the Capitol House Apartments, in order to cut costs. When Kent was in DSHS's

care, DSHS ran a cost-cutting program called "Roads to Community Living" ("RCL"). CP 902, 1721-1852. RCL was a pilot project designed to save money by moving residents out of nursing facilities and into alternative living arrangements. CP 902. DSHS paid $10,000 per month for clients who resided in SNFs. CP 901. To cut costs, DSHS adopted "policies and procedures" and "strategies" for "recruitment" and "enrollment" in RCL. CP 1743. DSHS acknowledged that it would receive "self-referrals" into RCL, but DSHS emphasized that active "targeting and recruitment" would be the cornerstone of its cost-cutting "strategy." *Id.*

DSHS worked towards its "targeting and recruitment" goals by aggressively approaching new admittees to SNFs. As DSHS explained, "Washington takes a proactive stance, seeing each newly admitted Medicaid eligible individual within the first seven days of admission." CP 1743. In other words, DSHS did not merely seek to be responsive to disabled persons who approached DSHS about a change. Even though a DSHS case manager would have just reviewed the placement options with DSHS's disabled client, and even though the disabled client would have just made an informed decision to accept placement in an SNF, DSHS promptly dispatched special staff to approach that same client within seven days in an attempt to "recruit" the client to leave the SNF. CP 1743. The DSHS

staff who implemented this cost-cutting strategy were called "nursing facility case managers" ("NFCMs"). CP 901-02, 1730.

When the record and the reasonable inferences are viewed in the correct light, they show that Kent was a victim of this DSHS "targeting and recruitment" plan to cut costs. CP 1743. After DSHS's initial assessment of Kent in his own home, a regular DSHS case manager, Elizabeth Robinson, recommended that he receive care in an SNF. CP 208, 364-87, 393-423, 432, 852-59, 1708. DSHS's assessment showed Kent needed care 24 hours per day. CP 1708. Kent's doctor agreed that he needed care in "a full nursing facility." CP 1584. Kent accepted the recommendation, checked in to the SNF, and told facility staff that he was "glad to be here." CP 861, 1895. But a week after he checked in, right on cue, a DSHS NFCM visited Kent to implement DSHS's "proactive" approach to cost cutting. CP 1549, 1551, 1897. Kent told this cost-cutting NFCM that he "intends to stay at the SNF" until his wife could care for him. CP 864. But the NFCM was undeterred—her case notes say her plan was to "continue to check in with him." CP 864.

Nothing in DSHS's records show that Kent took the initiative of contacting DSHS to ask to leave the SNF. Instead, true to the DSHS recruitment strategy for RCL, the NFCM met with Kent two months later. When the record and the reasonable inferences are viewed in the correct light, they show that DSHS then arbitrarily changed its placement

recommendation from an SNF to independent living in his own home. A new CARE assessment was to be done only annually or, if sooner than that, if there was "a significant change" in the client's "condition that occurred before their annual date." CP 1390, 1555. But DSHS has not pointed to *anything* in the record showing a "significant change" in Kent's condition. In fact, there was no significant change other than DSHS's desire to save money through the RCL program. Kent had been in DSHS's care for only two months, and the NFCM knew that Robinson's assessment was that Kent "needed to have full-time care in the nursing facility." CP 1552. Yet DSHS performed a new CARE assessment and "informed" Kent about living alternatives outside the SNF. CP 214. Far from Kent "beating down DSHS's door" to leave the SNF, Kent simply acceded to the NFCM's suggestion to leave for an assisted living facility. CP 865. That is the reasonable inference, which is further supported by the rest of the NFCM's notes from her follow-up visit: "Kent would like to discharge from the facility *but expressed he is doing okay* …." CP 865 (emphasis added). While DSHS/LMTAAA repeatedly blame Kent for agreeing to live by himself in an apartment, they neglect DSHS's role in ushering him out of the SNF into an inappropriate, unsafe setting and care plan that did not meet his needs.

When the record and the reasonable inferences are viewed in the correct light, they show Kent would have lived, but for DSHS/LMTAAA's

failures. Kent's body was not found in the bathroom or the kitchen or the bedroom. Rather, firefighters found his dead body sitting in his wheelchair just 4" to 12" from the door. CP 814. The reasonable inference from this evidence is that Kent died while trying to unsuccessfully escape out the door. Placed in a home alone without an evacuation plan in place or a Life Alert device at his disposal, this paraplegic man could not avoid harm. Indeed, Kent's friend testified that Kent could not open his front door well and needed to use a scarf to pull the door open. CP 1377-78. While he had some residual physical abilities, he was too disabled to get himself out of his apartment in an emergency where swift action was necessary. That is what is established by the evidence and the reasonable inferences therefrom.

DSHS/LMTAAA's statements of the case offer a starkly different view of the facts on these and other matters. The respondents' narratives only underscore that a jury should decide between the competing versions of event. The trial court erred in deciding this case as a matter of law.

C. ARGUMENT IN REPLY

(1) DSHS/LMTAAA Owed a Common Law Duty of Care to Kent for Their Acts and Omissions as a Result of Their Own Undertakings

(a) The Estate Preserved Its Argument that DSHS/LMTAAA Had a Duty of Reasonable Care to Kent Turner

LMTAAA argues incorrectly that Kent has waived the argument

that LMTAAA owed Kent a duty of reasonable care under §§ 323/324 of the *Restatement (Second) of Torts*. But in the trial court, LMTAAA *admitted* that it owed a common law duty of care to Kent, albeit a limited one. CP 193. The trial court then concluded that both respondents owed a duty of ordinary care to Kent. RP 71-72. The respondents' common law duty of reasonable care was plainly before the trial court.

Restatement (Second) of Torts §§ 323/324 are simply additional authorities establishing the respondents' duty of care. The common law duty of reasonable care takes on many permutations, and the several sections of the *Restatement (Second) of Torts* may help a court analyze the duty in a given context. *See, e.g.*, *Washburn v. City of Fed. Way*, 178 Wn.2d 732, 757, 310 P.3d 1275 (2013) (employing § 281 of the *Restatement (Second) of Torts* to define the general contours of the duty and § 302B to analyze the specific features of the duty in that case's circumstances). By citing more legal authority to this Court and expanding the discussion of their argument, the Estate has acted consistently with accepted appellate practice. *See Walla Walla County Fire Protection Dist. No. 5 v. Wash. Auto Carriage, Inc.*, 50 Wn. App. 355, 358 n.1, 745 P.2d 1332, 1334 (1987) ("There is no rule preventing an appellate court from considering case law not presented at the trial court level."). Indeed, this Court should *expect* that parties conduct more legal research and refine their arguments. Even when

an appellant fails to cite "the crucial case law and treatises" in the trial court, an issue is preserved for appellate review if the "basic reasoning" is presented below. *State Farm Mut. Auto. Ins. Co. v. Amirpanahi*, 50 Wn. App. 869, 872, 751 P.2d 329, 330, *review denied*, 111 Wn.2d 1013 (1988).

The Estate adequately presented its theory that DSHS/LMTAAA's duty of care arose from their acceptance of Kent's case and their gratuitous undertaking to provide health care and placement services for him. As the Estate argued, DSHS/LMTAAA had a duty because they assumed responsibility for assessing Kent's care needs, for placing and keeping Kent at the Capitol House Apartments, for determining his eligibility for DSHS programs, for funding his health care services, and for developing an evaluation plan. CP 1326, 1328, 1329, 1339, 1343-44. The Estate especially argued that DSHS owed "the duty 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." CP 1329. This duty arose also from the risk of harm that was created and increased from DSHS's actions in prompting and helping Kent to move out.

In sum, the Estate raised—and the trial court decided—the question whether the respondents owed Kent a common law duty of ordinary care. RAP 2.5 does not limit this Court from considering additional legal authorities regarding that duty, including the *Restatement (Second) of Torts*.

(b) DSHS/LMTAAA Owed a Tort Law Duty Arising from Their Acts

DSHS/LMTAAA had a common law duty to Kent to use reasonable care to avoid creating or increasing the risk of harm to him and also to provide case management and care planning services. In the respondents' fantasy world, however, they had no responsibility for the risks of physical harm that they unleashed or failed to stop despite accepting responsibility for their clients' care. They are wrong. Most fundamentally, DSHS/LMTAAA's responses fail to appreciate that "*every* actor whose conduct involves an unreasonable risk of harm to another 'is under a duty to exercise reasonable care to prevent the risk from taking effect.'" *Minahan v. W. Wash. Fair Ass'n*, 117 Wn. App. 881, 897, 73 P.3d 1019 (2003), *review denied*, 151 Wn.2d 1007 (2004) (quoting *Restatement (Second) of Torts* § 321 (1965)) (emphasis added). Government employees have a duty not to "affirmatively create a new risk." *Robb v. City of Seattle*, 176 Wn.2d 427, 437-38, 295 P.3d 212 (2013).

Even where government officials perform critical and quintessentially governmental functions, a common law duty of reasonable care may arise independently from the statute that authorizes or obligates that government program.[1] For example, police officers who patrol streets

[1] In the government liability statutes waiving sovereign immunity, the Legislature

have an incidental common law duty of care to operate their patrol vehicles with reasonable care. *Kelso*, 63 Wn.2d at 914, 919. An officer serving an anti-harassment order pursuant to statutory duties to the public under RCW 10.14 also has an actionable common law duty of care "to avoid the foreseeable consequences of their acts," including service of the order in such a manner that "expos[es] another to harm from the foreseeable conduct of a third party." *Washburn*, 178 Wn.2d at 757. DSHS has both a statutory duty to investigate child abuse under RCW 26.44.050 *and* a "common law duty of care not to negligently harm children." *M.W.*, 149 Wn.2d at 600-01. DSHS acts both under a "comprehensive statutory framework" for the benefit of foster children *and* under a common law duty to exercise reasonable care for foster children's protection. *H.B.H. v. State*, 192 Wn.2d 154, 164, 169-70, 183, 429 P.3d 484 (2018). The beneficial purpose and statutory basis for DSHS/LMTAAA's activities do not absolve them of their common law duty to act with reasonable care.

Here, DSHS/LMTAAA's tort duty to avoid creating or increasing the risk of harm to Kent attached at three junctures, at least. First, this duty

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stipulated that government entities will be liable under common law duties where their private counterparts would be. *See* RCW 4.92.090; 4.96.010; *Kelso v. City of Tacoma*, 63 Wn.2d 913, 918-19, 390 P.2d 2 (1964); *Hosea v. City of Seattle*, 64 Wn.2d 678, 681, 393 P.2d 967 (1964). State agencies are now "held to the same general duty of care to which private individuals are held—that of a reasonable person under the circumstances." *M.W. v. Dep't of Soc. & Health Servs.*, 149 Wn.2d 589, 601, 70 P.3d 954, 960 (2003).

arose when DSHS approached Kent to recruit him into the RCL cost-cutting program. Before the RCL-affiliated staff opted to perform a new CARE assessment and kept "informing" Kent of his other options, the record shows that DSHS had recommended the SNF and Kent had expressed satisfaction with the arrangement. CP 861, 864. DSHS's "recruitment" strategy for its cost-cutting program increased or created the risk of harm to Kent; DSHS has not cited any page in the record showing that Kent, as opposed to DSHS, set in motion his discharge from the SNF. Second, this duty arose when making a new recommendation to Kent during the care planning process and when developing an evacuation plan for Kent. CP 1425-26, 1434-35. Third, the duty arose when DSHS/LMTAAA both assessed Kent's care plan during his initial weeks at Capitol House Apartments and yet continued to fund that unsafe placement despite the dangers that had become obvious.

DSHS/LMTAAA's agreements to provide services to Kent also triggered a duty of reasonable care. Where a person engages in an "affirmative act" or makes a "promise to gratuitously undertake the duty," the common law imposes a duty of reasonable care. *Burg v. Shannon & Wilson, Inc.*, 110 Wn. App. 798, 809, 43 P.3d 526 (2002). For example, an engineer's duty of care "extends at least as far as the duties assumed by him in the contract with the owner" and also "by affirmative conduct." *Seattle*

W. Indus., Inc. v. David A. Mowat Co., 110 Wn.2d 1, 10, 750 P.2d 245 (1988); *accord Donatelli v. D.R. Strong Consulting Engineers, Inc.*, 179 Wn.2d 84, 93, 312 P.3d 620, 624 (2013). DSHS undertakes to provide "discharge planning" and case management services for long-term care clients such as Kent. WAC 388-106-0015. In fact, when Kent and Kathy signed DSHS's care plan, they were expressly informed that the they could not waive DSHS's case management and care planning functions. CP 854, 859. When LMTAAA accepted Kent's case, it, too, undertook these case management and care planning services. *See* RCW 74.39A.090(2), .095(1). Thus, the respondents owed a duty in providing these services to Kent because, as this Court has recognized, "if someone gratuitously undertakes to perform a duty, they can be held liable for performing it negligently." *Burg*, 110 Wn. App. at 808; *accord Restatement (Second) of Torts* § 323.

Given the protective nature of these services, DSHS/LMTAAA's duty of care arose also because these agencies agreed to "take charge" of these 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); *Restatement (Second) of Torts* § 325.

(c) <u>DSHS/LMTAAA Owed a Tort Law Duty Because It Had a Special Relationship with Kent</u>

Based on their special relationship with Kent, DSHS/LMTAAA also

owed him a tort law duty to exercise reasonable care to affirmatively protect him from harm, even if the risk of harm was not DSHS/LMTAAA's own creation. This protective duty arises if either (1) the criteria for the "special relationship" exception to the public duty doctrine are met,[2] or (2) there was a special relationship under *Restatement (Second) of Torts* § 315. *Caulfield v. Kitsap County*, 108 Wn. App. 242, 252-53, 29 P.3d 738 (2001). The prerequisite special relationship occurs where "one party was, in some way, entrusted with the well-being of the other party," or the relationship was "custodial or supervisory." *Id.* at 255; *see also*, *H.B.H.*, 192 Wn.2d at 173 ("[E]ntrustment for the protection of a vulnerable victim, not physical custody, is the foundation of a special protective relationship.").

DSHS/LMTAAA cannot distinguish this case from *Caulfield*, which held a special relationship arose between DSHS and a local case management agency, on the one hand, and a paraplegic client with MS in long-term care, on the other. LMTAAA argues that *Caulfield* involved danger from a third person, not a fire. LMTAAA br. at 33. But the protective duty of care requires the defendant to protect the plaintiff from danger from any other source, including third persons and "the reasonably foreseeable

[2] Those criteria are: "(1) there is direct contact or privity between the governmental agency and the plaintiff 'which sets the latter apart from the general public, and (2) there are express assurances given by a public official [or agency], which (3) gives rise to justifiable reliance on the part of the plaintiff.'" *Caulfield*, 108 Wn. App. at 251-52 (quoting *Taylor v. Stevens Cty.*, 111 Wn.2d 159, 166, 759 P.2d 447 (1988)).

risk of self-inflicted harm." *Id.* at 254 (quoting *Hunt v. King County*, 4 Wn. App. 14, 481 P.2d 593, *review denied*, 79 Wn.2d 1001 (1971)). This duty required DSHS/LMTAAA to act affirmatively to "render aid." *Id.* (quotation omitted). LMTAAA also argues that, unlike in *Caulfield*, "there was no evidence LMTAAA breached its case management duties." LMTAAA br. at 33. But evidence of breach is irrelevant to the question of whether LMTAAA had a duty of care. *See Kim v. Lakeside Adult Family Home*, 185 Wn.2d 532, 549, 374 P.3d 121 (2016).

DSHS/LMTAAA's analysis of *Donohoe v. DSHS*, 135 Wn. App. 824, 142 P.3d 654 (2006), is misplaced because the record and reasonable inferences here are different. When viewed in the light most favorable to Kent, the evidence shows that DSHS (by making recommendations to Kent on a plan of care) and LMTAAA (by monitoring that plan and electing not to reassess it) offered specialized professional advice to Kent. Both times, Kent relied on the advice, moving into an SNF when DSHS initially recommended it, CP 856, and later moving into his own home when DSHS arbitrarily changed its recommendation to "In Home" to recruit Kent into the RCL program and cut costs, CP 353, 495. Kent's individual freedom of choice does not dissolve the special relationship that had been created. Other settings provide helpful guidance. In the physician-patient relationship, the patient has sovereignty and has the ultimate authority to

select a treatment option. But the physician still owes a professional duty of care to the patient to recommend an appropriate option. Similarly, when a consumer seeks the specialized advice of an insurance agent on insurance coverage and relies on that advice, a special relationship supporting a duty of care may arise even though the consumer makes the ultimate decision. *Junfang He v. Norris*, 3 Wn. App. 2d 235, 239, 415 P.3d 1219 (2018). The same must be true here.

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

(a) The Estate Properly Raised RCW 74.39A on Appeal

The respondents are incorrect that RAP 2.5(a) bars the Estate's argument that RCW 74.39A implies a cause of action under *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990). In *Bennett* itself, the Court rejected a similar argument. There, the defendant argued that the plaintiffs failed to preserve their argument that RCW 49.44.090 created an implied cause of action for age discrimination. 113 Wn.2d at 918-19. The Court decided the issue, notwithstanding RAP 2.5(a). The Court confirmed that "a statute not addressed below but pertinent to the substantive issues which were raised below may be considered for the first time on appeal." *Bennett*, 113 Wn.2d at 918. Even though the plaintiffs had not cited RCW 49.44.090 in the trial court, and they had not argued that the statute implied a cause of action, the Court considered the statute together with a separate statute

which included an express cause of action and which *had* been argued below. As the Court explained, the statutes were "related" and both were relevant in "determining whether the plaintiffs' cause of action exists." *Id.* at 918. The Court reached the issue also on the separate ground that it concerned "plaintiffs' right to maintain their action." *Id.*

The same analysis applies here. RCW 74.39A was discussed at length below in the Estate's opposition memorandum. The Estate cited it to discuss the respondents' organizational structure, CP 1324-25, as a basis for a special relationship between DSHS and Kent, CP 1330-31, and as support for applying the "legislative intent" exception to the public duty doctrine, CP 1337-38. As in *Bennett*, RCW 74.39A was highly "pertinent to the substantive issues which were raised below." *Bennett*, 113 Wn.2d at 918. While the Estate did not argue RCW 74.39A implied a cause of action under the *Bennett* protocol, *Bennett* itself shows that the statute may be newly considered in this way on appeal. RCW 74.39A also determines whether the Estate's cause of action exists, just as RCW 49.44.090 did in *Bennett*. *Bennett* controls and this Court must consider this issue.

(b) <u>RCW 74.39A Was Intended to Benefit Elderly and Disabled Adults Like Kent Who Receive Long-Term Care Services and Nursing Home Care</u>

DSHS/LMTAAA both make the mistake that DSHS (incorrectly) attributes to the Estate: the respondents focus singularly on the legislative

"declaration of intent" without considering "the plain language of the statute." *State v. Granath*, 190 Wn.2d 548, 556, 415 P.3d 1179, 1183 (2018) (quoting *State v. Reis*, 183 Wn.2d 197, 212, 351 P.3d 127 (2015)). Washington courts "look to the language of the statute to ascertain whether the plaintiff is a member of the protected class." *Swank v. Valley Christian Sch.*, 188 Wn.2d 663, 676, 398 P.3d 1108 (2017) (quoting *Schooley v. Pinch's Deli Mkt., Inc*., 134 Wn.2d 468, 475, 951 P.2d 749 (1998)). While DSHS/LMTAAA are correct that RCW 74.39A.005 and 74.39A.007 make generally applicable findings and set out broad public policy goals, those provisions hardly mean that there is "no evidence … that the legislature intended to protect a particular and circumscribed class of persons," as DSHS argues. DSHS br. at 35.

The chapter repeatedly shows the Legislature's intent to give "'especial' benefit" to vulnerable adults such Kent who needed long-term care services. The Legislature defined a "consumer" or "client" as "a person who is receiving or has applied for services under this chapter." RCW 74.39A.009(6). This class of persons was the clear intended beneficiary of the chapter. The Legislature intended for services to be "responsive and appropriate to *individual* need." RCW 74.39A.007(3) (emphasis added). The Legislature strived to regulate SNF care for the benefit of "*each resident*," and to develop home and community-based alternatives "to meet

the needs of *consumers*." RCW 74.39A.007(2), (4) (emphasis added). The Legislature may have had the public interest also in mind, but it plainly intended its legislation to benefit the class of persons who receive long-term services—people like Kent.

The operative sections of the chapter only reinforce this conclusion. RCW 74.39A.090(1) regulates discharge planning for clients in nursing facilities, with an emphasis on "care options that are in the best interest of *the patient or resident.*" (Emphasis added.) RCW 74.39A.090(2) requires DSHS to contract with LMTAAA for case management services for the "*consumers*" who receive long-term care services in home. (Emphasis added). RCW 74.39A.090(4) requires DSHS to oversee LMTAAA and other area agencies on aging that perform case management "for elderly and persons with disabilities in the community." RCW 74.39A.095(1) requires LMTAAA to "[w]ork with *each client* to develop a plan of care" and to "[m]onitor the implementation of *the consumer's* plan of care to verify that it adequately meets the needs of *the consumer*." In all these provisions, the Legislature repeatedly showed its intent to benefit people like Kent by mandating case management services, care planning, and oversight.

RCW 74.39A has nothing in common with the statute in *Keodalah v. Allstate Ins. Co.*, 194 Wn.2d 339, 449 P.3d 1040 (2019), which LMTAAA cites. In *Keodalah*, an insurance policy holder argued that RCW

48.01.030 implied a cause of action for policy holders against individual insurance claims adjusters. But unlike RCW 74.39A, RCW 48.01.030 never references the needs or interests of *individual policy holders*. Rather, the statute discusses "the public interest" and "the integrity of insurance." RCW 48.01.030. Such broad aims are very different from the tailored provisions in RCW 74.39A.090 and .095 that benefit elderly and disabled people in long-term care. *Keodalah* does not support the respondents' position.

(c) An Implied Remedy Under RCW 74.39A Is Consistent with the Legislature's Intent and with the Legislation's Purpose

DSHS does not contest the other parts of the *Bennett* test, but LMTAAA does. LMTAAA is incorrect. RCW 74.39A shows that "legislative intent, explicitly or implicitly, supports creating … a remedy," *Bennett*, 113 Wn.2d at 920, for negligent case management services and negligent care planning. While LMTAAA is correct that a client like Kent could seek a hearing to challenge an eligibility determination under former RCW 74.39A.095(7)-(8), those hearings are of little value where an eligibility determination is not the problem; here, the issues are quality of case management and care planning. For this same reason, LMTAAA's reliance on RCW 74.39A.051(6) (providing for DSHS enforcement actions against providers) and RCW 74.34.200(1) (expressing a cause of action for actual abuse) do not militate against an implied cause of action. In *Kim*, 185

Wn.2d at 546, the Supreme Court held that the express cause of action under RCW 74.34.200 did not foreclose an implied cause of action under a separate section of RCW 74.34. There is no reason why RCW 74.34.200 should foreclose an implied cause of action under an entirely separate statute. This is particularly true because the impliedly actionable duties set out in RCW 74.39A.090-.095 concern DSHS and LMTAAA, the entities that are best placed to make placements, develop care plans, and coordinate services in a manner to protect disabled and elderly adults in the first instance.

Recognizing an implied remedy under RCW 74.39A is also "consistent with the underlying purpose of the legislation," *Bennett*, 113 Wn.2d at 921, as discussed in the Estate's opening brief. That the respondents would believe otherwise only further demonstrates their detachment from the reality of Kent and other clients whom they serve. To obtain long-term care services from DSHS, clients must cut through a thicket of red tape and select among a dizzying set of choices. DSHS/LMTAAA's clients rely on their CARE assessments, their case managers' professional judgment, and their placement and care plan recommendations. As Kent's case demonstrates, the decisions about placement and care services will often be more important for a client's wellbeing than the choice of individual providers. It is fantasy to say that an

implied remedy for negligence in these matters would undermine the statute rather than advance the legislative purpose.

(3) LMTAAA Owed Kent an Actionable Duty Under the Abuse of Vulnerable Adults Act, ch. 74.34 RCW

LMTAAA argues incorrectly that they did not owe an actionable duty of care to Kent under the Abuse of Vulnerable Adults Act ("AVAA"), ch. 74.34 RCW. The Legislature enacted the AVAA out of concern for adults who are "vulnerable and may be subjected to abuse, neglect, financial exploitation, or abandonment." RCW 74.34.005(1). The Legislature intended to solve this problem with both "protective services" *and* new "legal remedies to protect these vulnerable adults." Laws of 1999, ch. 176, § 1. In accord with this legislative intent, this Court should remand for trial on the Estate's claims against LMTAAA under the AVAA.

LMTAAA does not dispute two critical points. First, the AVAA covered Kent because he was a "vulnerable adult" within the meaning of the statute. *See* RCW 74.34.020(22) (defining "vulnerable adult"); LMTAAA br. at 37 (conceding Kent was a "vulnerable adult"); CP 1515 (same). Second, LMTAAA has a duty under the AVAA to report "abandonment, abuse, financial exploitation, or neglect" of vulnerable adults. RCW 74.34.035(1); *see also*, LMTAAA br. at 39 (conceding that it was a mandatory reporter). Still, LMTAAA contends that it did not owe a

duty to Kent as a mandatory reporter because it lacked "reasonable cause" to make a report. LMTAAA is wrong.

(a) LMTAAA's Liability to Kent Under the AVAA Is a Jury Question Because LMTAAA Was a Mandatory Reporter

As the Estate argued in its opening brief, mandatory reporters such as LMTAAA are civilly liable under the AVAA to vulnerable adults. Br. of Appellant at 29, 39. The AVAA implies "a cause of action for a mandated reporter's failure to report suspected abuse or neglect." *Kim*, 185 Wn.2d at 546. The AVAA implies this cause of action even though the statute also includes an express cause of action in RCW 74.34.200 for "actual abuse." *Kim*, 185 Wn.2d at 546. LMTAAA concedes it was a mandatory reporter within the definition in RCW 74.34.020(14). LMTAAA br. at 38-39 n.7. LMTAAA therefore had an actionable duty under the AVAA's implied cause of action to report "immediately" to DSHS when it had "reasonable cause to believe that abandonment, abuse, financial exploitation, or neglect of a vulnerable adult has occurred." RCW 74.34.035(1).

LMTAAA argues that it lacked such "reasonable cause" here and thus had no duty to Kent. LMTAAA br. at 37, 39. But as the *Kim* court explained, "whether an individual has 'reasonable cause' … goes to the question of breach, not duty." 185 Wn.2d at 549.

(b) LMTAAA Owed an Actionable Duty to Kent Also Under the AVAA's Express Cause of Action

The AVAA's express cause of action is "[i]n addition to other remedies available under the law." RCW 73.34.200(1). The AVAA sets out four elements for this statutory claim: first, the plaintiff was a "vulnerable adult;" second, the plaintiff "has been subjected to abandonment, abuse, financial exploitation, or neglect;" third, these acts or omissions occurred while the plaintiff was either "residing in a facility" or "residing at home" and in the care of "a home health, hospice, or home care agency, or an individual provider;" and fourth, the plaintiff suffered "damages on account of his or her injuries, pain and suffering, and loss of property sustained thereby." *Id.* A plaintiff who prevails is entitled to "his or her actual damages, together with the costs of the suit, including a reasonable attorneys' fee." RCW 74.34.200(3).

LMTAAA argues that it was not subject to this cause of action. LMTAAA br. at 40.[3] LMTAAA is wrong. LMTAAA had a contract with DSHS to provide case management services for vulnerable adults such as Kent who received home services in their own home. RCW 74.39A.090(2); CP 1513-14. Thus, LMTAAA was a "home care agency" and an "individual

[3] LMTAAA does not argue that the record fails to show a genuine issue of material fact on the other elements of a claim under RCW 74.34.200(1). *See* LMTAAA br. at 39-40.

provider." RCW 74.34.200(1). LMTAAA's case manager insisted Kent was "[t]echnically" responsible for managing his care. CP 1400. But LMTAAA admits it became responsible for Kent's CARE assessment, including by monitoring him to determine whether "a significant change" warranted a re-assessment. CP 1518. LMTAAA also admits it was responsible for monitoring the care plan to confirm whether it was "meeting his needs." CP 1518, 1521-22. And LMTAAA admits it contracted for Kent's in-home services. CP 1525, 1527. Contractors did not control the assessment; LMTAAA did. CP 1596. LMTAAA had the right to collect caregivers' task sheets to monitor Kent's care, CP 1401, yet another fact showing LMTAAA's significant and direct role on Kent's care.

LMTAAA did not need to be subject to the licensing statute, RCW 70.127, to be subject to the AVAA's express cause of action. Of course, the AVAA defines a class of defendants that are subject to liability, including entities licensed under chapter 70.127 RCW. RCW 74.34.200(1). But the AVAA does not state that these defendants are the only defendants who may be considered a "home care agency" or "individual provider" for purposes of RCW 74.34.200(1). LMTAAA's narrow construction of RCW 74.34.200 undermines the AVAA's remedial purpose. *See, e.g.*, *Naches Valley Sch. Dist. No. JT3 v. Cruzen*, 54 Wn. App. 388, 399, 775 P.2d 960 (1989) (recognizing that courts should liberally construe remedial statutes).

LMTAAA, as the entity responsible for managing care and contracting with providers, was in the best position to prevent or stop Kent's "abandonment, abuse, financial exploitation, or neglect." *Id*. A business that arranges care, like LMTAAA did, and employs caregivers is subject to RCW 74.34.200(1). *Cummings v. Guardianship Servs. of Seattle*, 128 Wn. App. 742, 750-52, 110 P.3d 796 (2005), *review denied*, 157 Wn.2d 1006 (2006). Formal employment of the caregivers need not be a prerequisite. Functionally, LMTAAA retained enough control over Kent's care and the contractors to be subject to the AVAA. *See*, *e.g.*, *Afoa v. Port of Seattle*, 126 Wn.2d 460, 475-76, 296 P.3d 800 (2013) (retained control); *Chicago Title Ins. Co. v. Wash. State Office of Ins. Comm'r*, 178 Wn.2d 120, 143, 309 P.3d 372 (2013) (right to control). Formality should not stand in the way of the Legislature's intended protections for vulnerable adults.

(4) The Trial Court Intruded Upon the Jury's Function in Addressing Breach of Duty and Causation as a Matter of Law

(a) The Question Was for the Jury Whether DSHS/LMTAAA Breached Their Duties to Kent

Summary judgment is rarely appropriate on breach because it "is quintessentially a question for the trier of fact." *Kim*, 185 Wn.2d at 549. Summary judgment on this factual question is appropriate only if "the material facts are undisputed and reasonable minds could not disagree on the question." *Id.* (citing *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979

P.2d 400 (1999)). In *Kim*, the Supreme Court decided whether a jury could find defendants breached their mandatory duty to report under RCW 74.34.035, the AVAA's mandatory reporting provision. The Court reversed Division I, which had upheld summary judgment for the defendant. *Kim*, 185 Wn.2d at 538, 549-51. The Court held that the question was for the jury whether the defendant had "reasonable cause." *Id.* at 549-50.

As in *Kim*, the record here shows a genuine issue of material fact for the jury on whether the defendant had "reasonable cause." After LMTAAA took over case management on March 17, CP 1516, it was not a passive bystander. LMTAAA was obligated to develop and monitor Kent's plan of care to ensure it met Kent's needs. RCW 74.39A.095(1), (1)(a)-(b). LMTAAA also had authority to "[r]eassess … services," RCW 74.39.095(1)(c). LMTAAA had authority to perform a new CARE assessment annually *and* if Kent experienced "a significant change." CP 1518. LMTAAA also had the obligation to "assess the quality of the in-home care services" provided by the company, ResCare, that employed the in-home workers caring for Kent. RCW 74.39A.090(5); CP 1526-27. A jury could determine what was "reasonable" for LMTAAA to believe in light of LMTAAA's broad and active role in managing Kent's care.

Another relevant consideration for the jury would be the wealth of information available to LMTAAA. DSHS case records, including the prior

CARE assessments, were available to LMTAAA electronically. CP 1516-17. These records informed LMTAAA that the plan of care called for only four hours per day of in-home care service, CP 1526, 1605, even though Kent (1) was eligible for 158 hours per month of in-home care, CP 1935, (2) had severely limited abilities to perform activities of daily living, and (3) had just recently been recommended to reside in a SNF with 24 hour care. ResCare's notes also showed that Kent was found covered in dried-on feces on one day. CP 1604. Consistent with these notes, Adult Protective Services informed LMTAAA's case manager for Kent about a complaint that Kent was not being bathed. CP 1936. ResCare's notes also showed that Kent was stuck on the floor out of his wheelchair on another day and had to call 911 for assistance. CP 1607. At the same time, the DSHS case records showed Kent's plan of care had a limited evacuation plan that relied solely on caregiver assistance, CP 2148, 2180, leaving Kent on his own for the other 20 hours per day. LMTAAA also visited Kent at Capitol House Apartments, allowing LMTAAA staff to see the facility and personally observe Kent there. CP 1517, 1531. A visitor to Kent's apartment observed that Kent took a long time to open the front door, could not open the door without jerry-rigging it with a scarf, and did not have a Life Alert personal emergency response system. CP 1377-78, 1381, 1576. Also, the apartment did not have sprinklers. CP 1398, 1971. The danger to Kent was evident.

LMTAAA knew the CARE assessments were supposed to evaluate Kent's "ability to safely evacuate his apartment," CP 1520, and LMTAAA was charged with ensuring the care plan met his "needs." RCW 74.39A.095(1)(b).

Because Kent lacked a real evacuation plan, had no personal emergency response device, had been falling out of his wheelchair, and was unable to maneuver out of his own feces-covered clothing and wheelchair, a jury could find that LMTAAA had reasonable cause to believe "a pattern of … inaction" was occurring, and that this pattern "fail[ed] to avoid or prevent physical or mental harm." RCW 74.34.020(16)(a). *See, e.g.*, *Warner v. Regent Assisted Living*, 132 Wn. App. 126, 134-35, 130 P.3d 865 (2006) (holding that a jury question was established on neglect where a man in an assisted living facility was found covered in feces). A jury could also find neglect because these circumstances showed "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." RCW 74.34.020(16)(b). A jury could also find "abuse." RCW 74.34.020(2). These matters are within the common understanding of the jury and do not require expert testimony. *Warner*, 132 Wn. App. at 134-35. On this record, then, a jury could reasonably find that LMTAAA, as a mandatory reporter, breached its duty to alert DSHS that the plan was not working and presented

a danger to Kent.

While LMTAAA insists that Kent "chose" his dangerous living situation, LMTAAA cannot dispute that the care plan for which it was responsible under RCW 74.39A.095(1) *recommended* to Kent that he leave the SNF and live in his own home. CP 353. LMTAAA has also acknowledged that if the agency believed a client was making a choice that "imperils their own health and safety," LMTAAA "would follow up … with an APS [Adult Protective Services] referral." CP 1533-34. Because LMTAAA did not make a referral to APS, it plainly condoned Kent's choices. In any event, nothing in RCW 74.34.035 suggests that there is a contributory negligence defense to the AVAA's statutory duty to report. The statute makes plain that mandatory reporters must come forward "immediately" whenever they have "reasonable cause." RCW 74.34.035(1). It does not condition that duty on the vulnerable adult having nothing to do with the situation. If a mandatory reporter could escape its reporting responsibilities under the AVAA simply because a vulnerable adult's purported choices precipitated danger, the legislative purpose behind the AVAA would be undermined. After all, almost *any* abusive or neglectful situation could be spun as client choice. The very rationale for the AVAA is to provide protective services and legal remedies for vulnerable adults who cannot protect themselves. Laws of 1999, ch. 176, §

1. There is no ground in reality or in RCW 74.34 for LMTAAA to be excused as a matter of law for its failure to report.

These same facts and inferences also show there is a genuine issue for a jury trial on whether DSHS/LMTAAA breached their other duties to Kent.

(b) Causation

DSHS/LMTAAA contest both legal causation and cause in fact. *See* DSHS br. at 44-48; LMTAAA br. at 41-47.

(i) Legal Causation Is Satisfied if the Jury Finds Breach, for the Same Reasons that Underlie the Respondents' Duty of Care

This Court need not detain itself long with DSHS/LMTAAA's arguments on legal causation. The respondents spent only two paragraphs in each of their briefs on their arguments. DSHS br. at 48; LMTAAA br. at 41. If liability should not attach based on "considerations of logic, common sense, justice, policy, and precedent," *Tyner v. Dep't of Soc. & Health Servs.*, 141 Wn.2d 68, 82, 1 P.3d 1148 (2000), as DSHS/LMTAAA claim, presumably the respondents would have more to say about such weighty considerations.

This Court should follow the analysis of legal causation in *Meyers v. Ferndale Sch. Dist.*, __ Wn. App. 2d __, __ P.3d ___, 2020 WL 614329 at *6 (2020). As *Meyers* recognized, "Washington courts 'have long

recognized the interrelationship between questions of duty and legal cause.'" *Id.* at *6 (quoting *Lowman v. Wilbur*, 178 Wn.2d 165, 169, 309 P.3d 387 (2013)). The "policy considerations that support imposition of a duty will often compel the recognition of legal causation." *Id.* (quoting *Lowman*, 178 Wn.2d at 171). Based on these principles, *Meyers* rejected the defendant's legal causation argument. The defendant identified no policy rationale for negating the policies supporting a duty, and the defendant cited no precedent for barring liability on legal causation grounds in that case's context. *Id.* The same flaws are evident in DSHS/LMTAAA's legal causation argument. Here, a paraplegic was induced to leave a nursing facility with 24-hour care to move into an unsafe apartment by himself with no evacuation plan. This paraplegic dying in a fire was catastrophic and tightly connected to the rationales for the respondents' common law and statutory duties. The harm was not "too remote or insubstantial to impose liability." *Schooley*, 134 Wn.2d at 478-79.

(ii) A Jury May Find Cause in Fact if It Finds Any of DSHS/LMTAAA's Duties Were Breached

DSHS argues that "it is pure speculation that any [evacuation] plan would have prevented his death," and also argues that "the fire could have started anywhere and killed him before he could have escaped at any location." DSHS br. at 47. But the standard of review does not require the

Estate to show cause in fact "to an absolute certainty," *Martini v. Post,* 178 Wn. App. 153, 165, 313 P.3d 473 (2013), or disprove every possibility or "could have" scenario that DSHS/LMTAAA might imagine. DSHS/LMTAAA are not entitled to summary judgment simply because they have a jury argument that supports their position. Rather, the question is whether the facts and reasonable inferences, when viewed in the light most favorable to the Estate, support a reasonable jury finding for the Estate. They do, as discussed above in the reply on the statement of the case.

(5) Kathy Turner's Loss of Consortium Claim Necessarily Must Be Reinstated if the Trial Court's Dismissal of the Estate's Claims Is Reversed

DSHS argues incorrectly that Kathy Turner "has not adequately raised or argued her loss of consortium claim on appeal." DSHS br. at 49. Neither DSHS nor LMTAAA briefed Kathy's loss of consortium claim below. DSHS mentioned it only in passing in its summary judgment motion's request for relief. CP 722. Indeed, there was little point in briefing Kathy's claim in detail, because it hinges entirely on the respondents' liability to Kent. A loss of consortium claim may not be brought if the law does not allow a cause of action for the underlying injury. *See, e.g., Provost v. Puget Sound Power & Light Co.*, 103 Wn.2d 750, 755-56, 696 P.2d 1238 (1985) (holding that under the workers' compensation act a spouse could not sue an employer for loss of consortium as a result of a workplace injury).

Thus, no additional analysis of Kathy's claim was necessary. If the summary judgment is vacated, then Kathy's claim will necessarily be reinstated.

D. CONCLUSION

Nothing presented in the respondents' briefs should deter this Court from reversing the trial court's dismissal. In light of the record and the reasonable inferences, the Estate and Kathy Turner have the right for a jury to decide their claims against DSHS and LMTAAA. The trial court erred in deciding their claims as a matter of law. Costs on appeal, including reasonable attorney fees, should be awarded to the Estate.

DATED this 2d day of March, 2020.

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

DATED: March 2, 2020, at Seattle, Washington.

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Comments:

Motion for Leave to File Over-Length Reply Brief of Appellant; Reply Brief of Appellant

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