

FILED
Court of Appeals
Division II
State of Washington
12/19/2019 4:32 PM

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.

**CORRECTED BRIEF OF RESPONDENT WASHINGTON STATE
DEPARTMENT OF SOCIAL & HEALTH SERVICES**

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TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	COUNTERSTATEMENT OF THE ISSUES	2
III.	COUNTERSTATEMENT OF THE CASE	3
	A. Kent Turner, a Competent Adult with Multiple Sclerosis, Received Assistance From His Wife Until Her Cancer Diagnosis.....	3
	B. DSHS Assessed Kent Turner for Care Services, and He Elected Admission to a Skilled Nursing Facility While His Wife Underwent Treatment.....	4
	C. Kent Turner Changed His Plans and Sought to Live on His Own By Participating in the Roads to Community Living Project.....	6
	D. Kent Turner Moved Into His Own Apartment and Accepted Only Minimal Caregiver Assistance.....	8
	E. DSHS Received a Single APS Report About Mr. Turner, Which Was Screened Out, and His Health Remained Unchanged	12
	F. An Unexplained Fire Causes Kent Turner’s Death	14
	G. Procedural History	15
IV.	ARGUMENT	17
	A. The Trial Court’s Decision to Grant DSHS’s Motion for Summary Judgment Is Reviewed De Novo	18
	B. DSHS Did Not Owe Kent Turner a Common Law Duty Under the Circumstances Present in This Case	19

1.	DSHS did not have a special relationship with Kent Turner or owe him a duty under § 315 of the <i>Restatement</i>	20
2.	Plaintiff did not preserve her argument about, and DSHS did not owe Kent Turner, any duty under §§ 323 or 324 of the <i>Restatement</i>	24
C.	DSHS Did Not Owe an Actionable Tort Duty to Kent Turner Under RCW 74.34 or RCW 74.39A	28
1.	The public duty doctrine bars any negligence claim premised on RCW 74.34 or 74.39A	29
a.	The special relationship exception is inapplicable	30
b.	The legislative intent exception is inapplicable	32
2.	Any argument by Plaintiff that RCW 74.34.200(1) provides a cause of action against DSHS is misplaced.....	37
3.	Plaintiff did not preserve her argument that an implied cause of action exists under RCW 74.39A, nor can she establish such a claim under <i>Bennett v. Hardy</i>	39
a.	Kent Turner was not within an identifiable class of persons protected by RCW 74.39A	41
b.	No legislative intent, explicitly or implicitly, supports creating a remedy in this case.....	41
c.	Implying a private cause of action would be inconsistent with the purpose of RCW 74.39A.....	42
D.	The Trial Court Did Not Err in Ruling on Breach of Duty and Proximate Cause as a Matter of Law	43

1. Plaintiff failed to create a genuine question of material fact as to breach.....	43
2. Plaintiff failed to create a genuine question of material fact as to proximate cause	44
a. There is no non-speculative evidence supporting cause in fact.....	45
b. Legal causation is lacking in this case	48
E. Plaintiff Has Abandoned Her Loss of Consortium Claim on Appeal and Summary Judgment	49
F. Plaintiff Is Not Entitled to Any Award of Attorney Fees Against DSHS Under RCW 74.34.....	49
V. CONCLUSION	50

TABLE OF AUTHORITIES

Cases

<i>Babcock v. Mason Cty. Fire Dist. No. 6</i> , 144 Wn.2d 774, 30 P.3d 1261 (2001).....	31
<i>Bankston v. Pierce Cty.</i> , 174 Wn. App. 932, 301 P.3d 495 (2013)	24, 25, 30, 39
<i>Behla v. R.J. Jung, LLC</i> , 2019 WL 6482585 (Dec. 3, 2019)	46-47
<i>Beltran-Serrano v. City of Tacoma</i> , 193 Wn.2d 537, 442 P.3d 608 (2019).....	29
<i>Bennett v. Hardy</i> , 113 Wn.2d 912, 784 P.2d 1258 (1990).....	2, 28, 39, 40, 41, 42
<i>Boone v. DSHS</i> , 200 Wn. App. 723, 403 P.3d 873 (2017)	33, 36
<i>Braam v. State</i> , 150 Wn.2d 689, 81 P.3d 851 (2003).....	40, 42
<i>Brown v. MacPherson's, Inc.</i> , 86 Wn.2d 293, 545 P.2d 13 (1975).....	20
<i>Calhoun v. State</i> , 146 Wn. App. 877, 193 P.3d 188 (2008).....	38
<i>Caulfield v. Kitsap Cty.</i> , 108 Wn. App. 242, 29 P.3d 738 (2001).....	passim
<i>Cazzanigi v. General Elec. Credit Corp.</i> , 132 Wn.2d 433, 938 P.2d 819 (1997).....	42
<i>Christensen v. Grant Cty. Hosp. Dist. No. 1</i> , 152 Wn.2d 299, 96 P.3d 957 (2004).....	18

<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 828 P.2d 549 (1992).....	25, 49
<i>Cummings v. Guardianship Services of Seattle</i> , 128 Wn. App. 742, 110 P.3d 796 (2005).....	49
<i>Cummins v. Lewis Cty.</i> , 156 Wn.2d 844, 133 P.3d 458 (2006).....	30
<i>Donohoe v. DSHS</i> , 135 Wn. App. 824, 142 P.3d 654 (2006).....	passim
<i>Estate of Bordon v. Dep't of Corr.</i> , 122 Wn. App. 227, 95 P.3d 764 (2004).....	45, 46, 47
<i>Fisk v. City of Kirkland</i> , 164 Wn.2d 891, 194 P.3d 984 (2008).....	41
<i>Folsom v. Burger King</i> , 135 Wn.2d 658, 958 P.2d 301 (1998).....	20, 26, 27
<i>Halleran v. Nu W., Inc.</i> , 123 Wn. App. 701, 98 P.3d 52 (2004).....	32
<i>Hansen v. Washington Natural Gas Co.</i> , 95 Wn.2d 773, 632 P.2d 504 (1981).....	44
<i>Hartley v. State</i> , 103 Wn.2d 768, 698 P.2d 77 (1985).....	45
<i>Hungerford v. Dep't of Corr.</i> , 135 Wn. App. 240, 139 P.3d 1131 (2006).....	45, 48
<i>Keely v. State</i> , No. 51639-0-II, 2019 WL 5960666 (Nov. 13, 2019).....	46
<i>Koshelnik v. State</i> , 194 Wn. App. 1037, 2016 WL 3456866 (2016).....	38
<i>Linville v. State</i> , 137 Wn. App. 201, 151 P.3d 1073 (2007).....	40

<i>Lunsford v. Saberhagen Holdings, Inc.</i> , 139 Wn. App. 334, 160 P.3d 1089 (2007).....	25
<i>McBride v. Walla Walla Cty.</i> , 95 Wn. App. 33, 975 P.2d 1029 (1999).....	19
<i>Munich v. Skagit Emergency Commc 'n Ctr.</i> , 175 Wn.2d 871, 288 P.3d 328 (2012).....	29
<i>Murphy v. State</i> , 115 Wn. App. 297, 62 P.3d 533 (2003).....	38
<i>Niece v. Elmview Grp. Home</i> , 131 Wn.2d 39, 929 P.2d 420 (1997).....	19
<i>Osborn v. Mason Cty.</i> , 157 Wn.2d 18, 134 P.3d 197 (2006).....	29
<i>Pettis v. State</i> , 98 Wn. App. 553, 900 P.2d 453 (1999).....	40
<i>Sacco v. Sacco</i> , 114 Wn.2d 1, 784 P.2d 1266 (1990).....	25
<i>Schooley v Pinch's Deli Market Inc.</i> , 134 Wn.2d 468, 951 P.2d 749 (1998).....	45
<i>Aba Sheikh v. Choe</i> , 156 Wn.2d 441, 128 P.3d 574 (2006).....	40
<i>Smith v. State</i> , 135 Wn. App. 259, 144 P.3d 331 (2006).....	32
<i>State v. Granath</i> , 190 Wn.2d 548, 415 P.3d 1179 (2018).....	33, 35, 38
<i>State v. Nelson</i> , 195 Wn. App. 261, 381 P.3d 84 (2016).....	35, 38
<i>Taylor v. Bell</i> , 185 Wn. App. 270, 340 P.3d 951 (2014).....	45

<i>Taylor v. Stevens Cty.</i> , 111 Wn.2d 159, 759 P.2d 447 (1988).....	29, 32
<i>Terrell C. v. DSHS</i> , 120 Wn. App. 20, 84 P.3d 899 (2004).....	40
<i>Tyner v. Dep't of Soc. & Health Servs.</i> , 141 Wn.2d 68, 1 P.3d 1148 (2000).....	44, 45, 48
<i>Walston v. The Boeing Co.</i> , 181 Wn.2d 391, 334 P.3d 519 (2014).....	18
<i>Wascisin v. Olsen</i> , 90 Wn. App. 440, 953 P.2d 467 (1997).....	49
<i>Webstad v. Stortini</i> , 83 Wn. App. 857, 924 P.2d 940 (1996).....	19, 26
<i>Westar Funding, Inc. v. Sorrels</i> , 157 Wn. App. 777, 239 P.3d 1109 (2010).....	26, 40
<i>Yan v. Pleasant Day Adult Family Home, Inc.</i> , 178 Wn. App. 1018, 2013 WL 6633440 (2013).....	21, 22, 23
<i>Youker v. Douglas Cty.</i> , 178 Wn. App. 793, 327 P.3d 1243 (2014).....	19

Constitutional Provisions

Const. art. II, § 26	38
----------------------------	----

Statutes

Pub. L. 109-171.....	7
RCW 18.51	33
RCW 70.127	37, 49
RCW 70.127.020	49
RCW 71.05	48

RCW Title 74.....	40
RCW 74.08.090	7
RCW 74.09.520	5, 7
RCW 74.09.520(5).....	9
RCW 74.13.250	40
RCW 74.13.280	40
RCW 74.14A.050.....	40
RCW 74.15.010	33
RCW 74.34	passim
RCW 74.34.005	34
RCW 74.34.110-140	38, 48
RCW 74.34.150, 74.34.200(1).....	34, 35, 36
RCW 74.34.200	2, 3, 49
RCW 74.34.200(1).....	34, 35, 36
RCW 74.34.200(3).....	49
RCW 74.39A.005.....	35, 36, 42
RCW 74.39A.007.....	35, 36, 42
RCW 74.39A.040.....	37
RCW 74.39A.051(6).....	41, 42
RCW 74.39A.090.....	36

RCW 74.39A.095(7)-(8).....	42
RCW 74.39A.515(1)(j), (3)	42

Rules

CR 56(c).....	18
CR 56(e).....	19
GR 14.1(a).....	21, 39, 46
RAP 2.5(a)	18, 24, 25, 30, 39
RAP 9.12.....	18, 24, 25, 30, 39
RAP 18.1.....	3, 50

Regulations

WAC 388-71-0115.....	12
WAC 388-106-0250 to - 0265	5, 7

Other Authorities

<i>Restatement (Second) of Torts</i> § 314 (1965).....	24
<i>Restatement (Second) of Torts</i> § 315 (1965).....	passim
<i>Restatement (Second) of Torts</i> § 320 (1965).....	24
<i>Restatement (Second) of Torts</i> § 323 (1965).....	passim
<i>Restatement (Second) of Torts</i> § 324 (1965).....	passim
WPI 15.01.01 (6th ed.).....	45

I. INTRODUCTION

Kent Turner was a competent adult man confined to a wheelchair as a result of multiple sclerosis. In July 2013, when his wife Kathy was diagnosed with cancer, Mr. Turner requested that DSHS assesses his eligibility for respite care services while Kathy underwent, and recovered from, surgery. Following the assessment, DSHS determined the level of care he qualified for under Medicaid. Because Mr. Turner was a competent individual, who was not a ward of the State, he could choose to accept or deny the level of care he was eligible for. While DSHS determined that Mr. Turner was qualified for 24-hour nursing facility services, he rejected that level of care. For a short period of time, while he waited for Kathy to recover, he lived in a skilled nursing facility. After he believed his marriage was falling apart, he chose to leave the facility and move into his own apartment, rather than return to reside with his wife. Mr. Turner regularly left his apartment and independently traveled around town on the transit system.

While DSHS had the responsibility to assess Mr. Turner's eligibility for services, it had no ability to require or decide what services he chose to accept or reject. Tragically, Kent Turner died in his apartment from the inhalation of toxic smoke from a fire of unknown cause or source. Kathy Turner sued the State as the personal representative of Kent Turner's estate alleging that, because the State had control over him, it had a special

relationship giving rise to a duty to protect him. The trial court properly found that, because Mr. Turner was a competent, independent person, no such control existed and, accordingly, there was no special relationship duty. The decision of the trial court in granting summary judgment based on the Estate's failure to raise a genuine issue of material fact on the issues of duty, breach, and causation should be affirmed.

II. COUNTERSTATEMENT OF THE ISSUES

1. Did the trial court properly grant summary judgment when Kent Turner was an independent, competent individual who was free to make his own decisions as to what services he chose to accept or reject from DSHS and, in the absence of such control or custody, there was no special relationship that imposed a duty to control and/or protect Mr. Turner? (Counterstatement to Plaintiff's Issue No. 2.)
2. Should this Court reject the Estate's attempt to argue a voluntary rescue theory of liability against DSHS on appeal, based on *Restatement (Second) of Torts* §§ 323 and 324, when that argument was not raised in the trial court, and is not supported by the record? (Counterstatement to Plaintiff's Issue No. 1.)
3. Did the trial court properly grant summary judgment when the Estate's statutory liability theory that is based on RCW 74.34.200 and RCW 74.39A is barred by the public duty doctrine? (Counterstatement to Plaintiff's Issue Nos. 3 and 4.)
4. Should this Court reject the Estate's attempt to argue the existence of an implied cause of action under RCW 74.39A against DSHS on appeal, when that argument was not argued in the trial court, and the Estate fails to satisfy the requirements of the test in *Bennett v. Hardy*, 113 Wn.2d 912, 920-21, 784 P.2d 1258 (1990)? (Counterstatement to Plaintiff's Issue No. 3.)
5. Did the trial court properly grant summary judgment when the Estate failed to create a genuine issue of material fact as to whether DSHS breached any duty owed to Kent Turner? (Counterstatement to Plaintiff's Issue No. 5.)

6. Did the trial court properly grant summary judgment when the Estate failed to create a genuine issue of fact as to whether the conduct of DSHS proximately caused Kent Turner's death, when his death was caused by a fire of unknown origin? (Counterstatement to Plaintiff's Issue No. 5.)
7. Should this Court deny the Estate's request for award of attorney's fees against DSHS pursuant to RCW 74.34.200 when the Estate has not "prevailed" in this lawsuit under RAP 18.1, and that statute does not afford the Estate a cause of action against DSHS? (Counterstatement to Plaintiff's Issue No. 6.)

III. COUNTERSTATEMENT OF THE CASE

A. Kent Turner, a Competent Adult with Multiple Sclerosis, Received Assistance From His Wife Until Her Cancer Diagnosis

Kent Turner was born in 1963 and married Kathy Turner in 1984. CP 1119, 1628. He was diagnosed with Multiple Sclerosis (MS) in 2007. CP 3, 13, 150, 470, 669, 1612-1613, 1635, 2140, 2172-2173. At the time of diagnosis, Mr. Turner was a correctional officer with the State of Washington. CP 1634-1635. He separated from state employment about three years later with a disability retirement. CP 1635-1636.

In February 2013, Kent Turner's primary care physician, Dr. Paul Knouff, MD, noted that he used urinals, and could go to the bathroom and bathe himself. CP 1015. Neurologically, Mr. Turner could only wiggle his legs and had decreased reflexes. CP 1015. His upper body reflexes, however, were brisk with good strength. CP 1015. Dr. Knouff noted that Mr. Turner had about five alcoholic drinks per day and did not plan to stop. CP 1016. In June 2013, Dr. Knouff also noted that Mr. Turner, who had

dropped out of alcohol treatment, had been drinking ten drinks per day but had cut way back. CP 1035.

Prior to August 2013, Mr. Turner lived with his wife Kathy Turner in Olympia. In July 2013, Kathy was diagnosed with squamous cell carcinoma and was scheduled for surgical treatment in early August. CP 3, 13, 150, 208, 724, 861, 1660-1663. While residing together, Kathy assisted her husband with activities of daily life. CP 1196, 1313. However, Kathy worked full time outside of the home, so Mr. Turner was left alone while she was at work. CP 1196, 1199, 1313. He received occasional in-home nursing care through Assured Home Health. CP 828, 1199. Mr. Turner utilized assistance when toileting for bowel movements, getting in and out of his bed or wheelchair, bathing, and getting dressed. CP 444, 834-836, 887, 1051-1052, 1064. After Kathy's diagnosis, the Turners looked for alternative resources for respite care for Mr. Turner while Kathy underwent cancer treatment. CP 301, 304, 431, 433, 437, 822, 852-859, 861-862.

B. DSHS Assessed Kent Turner for Care Services, and He Elected Admission to a Skilled Nursing Facility While His Wife Underwent Treatment

On July 31, 2013, DSHS assessed Mr. Turner for care services and. Social worker Robinson noted that Mr. Turner smoked a pack of cigarettes a day and that he declined a referral for alcohol abuse treatment. CP 843, 847. The assessment indicated that Mr. Turner qualified for services,

including in-patient services at a skilled nursing facility (SNF). CP 822-850. Payment would be made through a combination of sources, including private payments from Mr. Turner, Medicaid payments through DSHS Aging & Disability Services Administration (ADSA), and Medicare Part B. CP 433, 437, 725; *See* RCW 74.09.520; WAC 388-106-0250 to -0265 (effective 9/29/2008). Both Kent and Kathy Turner acknowledged that he was eligible for care at a SNF. CP 852-859. The ADSA Service Summaries executed by them stated the following above the signature block:

I am aware of all alternatives available to me and I understand that access to 24-hours care is available only in residential settings, including community residential settings. I agree with the above services outlined on this summary.

- I understand that participation in all ADSA/LTC paid services is voluntary and I have a right to decline or terminate services at any time.
- I understand that I must notify my case manager if I have a change in my living situation.

CP 855, 859 (bold in original).

On August 5, 2013, Puget Sound Healthcare Center (PSHC), a SNF in Olympia, admitted Mr. Turner for respite care. He made it known to his caregivers there that he was in the facility only on a short-term basis and would be returning home with his wife upon her recovery. CP 861–862. On August 16, Kaya Wilcox, Mr. Turner’s DSHS Nursing Facility Case

Manager, also noted that he was in the SNF only for a short term and intended to return home with his wife. CP 864.

C. Kent Turner Changed His Plans and Sought to Live on His Own By Participating in the Roads to Community Living Project

By mid-October 2013, however, Mr. Turner began making alternative plans to move out of the nursing facility to be closer to Kathy. On October 16, Ms. Wilcox performed a CARE assessment of Mr. Turner, during which she discussed with him assisted living and adult family home options. CP 864-65, 908-09, 2138-64. Ms. Wilcox also followed DSHS's normal process for evacuation planning. CP 1412-1417. Mr. Turner's evacuation plan indicated that a caregiver would assist him, keep the walkways clear, and recharge his wheelchair's batteries daily. CP 2148.

Regarding Mr. Turner's original assessment and the SNF level of care, Ms. Wilcox testified that "Kent Turner has the right to decline all and any services that are provided by the State." CP 904-905. She further testified that, if a client declines services, DSHS would not simply "leave them on the street," but instead would "do an assessment and see what it takes to get them safely into the community" and then "follow up with that person to see if they can be assisted in the community." CP 904-905.

DSHS expressly advised Mr. Turner that, if he wanted more personal care and assistance under the state program, he could not reside in his own home. CP 1422-1423, 2166-68. He acknowledged he had been

advised that (1) DSHS/ADSA does not provide paid 24 hour/day personal care services in a person's own home, (2) he had been told about all of the services he could receive and that he could make choices about services he wanted and did not want, and (3) he could refuse all services. CP 934-935, 2166-2168. He also signed a waiver of nursing home care services in order to be eligible for in-home care. CP 2168.

Also on October 16, Mr. Turner signed a Participant Information Form to participate in a special program known as the Roads to Community Living (RCL) project. CP 867-868. He qualified for services through RCL, which was a demonstration project authorized under federal law. *See* Pub. L. 109-171; RCW 74.08.090, 74.09.520; WAC 388-106-0250. The RCL project allowed participants to live in their own home, if they wished, while receiving services through contracted caregivers. However, in Mr. Turner's case, Kathy did not want him returning home upon his discharge from the nursing facility. Under the RCL, DSHS was able to contract with Life Therapeutic Works to be his Community Choice Guide (CCG) and assist him in locating an alternative place to live, e.g., an adult family home, assisted living, or his own residence. CP 1565.

As time progressed, Kent Turner's frustrations concerning his marriage and his plan to leave the nursing facility came to light. These frustrations are seen in a number of PSHC records from November 2013.

CP 870-876. On November 22, he advised that he had been admitted to PSHC for respite care with plans to return to his home when his wife was able to care for him, but that his plans had changed as his marital relationship ended and he wanted to be discharged to his own apartment with caregiver assistance. CP 880-881. Mr. Turner claimed that Mrs. Turner had stopped calling or visiting him and was seeking a divorce. CP 880-881.

On December 4, 2013, he met with Ms. Wilcox, the facility social worker, and his CCG to discuss his transition out of the facility. CP 887. Mr. Turner reiterated that he wanted to be independent in the community and executed a second RCL Participant Information Form. CP 887, 889-90. The facility assessed Mr. Turner's capabilities to live independently. CP 997. He underwent a variety of physical capability assessments conducted by therapists at the facility, and had meetings with the center's social worker, the DSHS case manager, and his CCG. CP 214-15, 223-34, 885, 1220-21, 1223, 1226, 1228, 1234, 2198-99, 2201-03, 2205-07, 2209-10. Mr. Turner demonstrated the ability to cook his own meals and his proficiency in handling his motorized wheelchair; he met the expectations of the facility therapists and achieved the goals set by its physician. CP 887, 1889-90, 2198-99, 2201-03, 2205-07, 2209-10.

D. Kent Turner Moved Into His Own Apartment and Accepted Only Minimal Caregiver Assistance

On January 8, 2014, Kent Turner submitted a rental application for

a one bedroom apartment at the Capitol House Apartments. CP 892-893. On January 24, Mr. Turner advised his CCG he could leave and sign himself out of the nursing facility whenever he wanted. CP 233. Indeed, while at PSHC, he was frequently gone from the facility. CP 907. On January 30, Capitol House Apartments notified Mr. Turner's CCG that he had been approved for an apartment. CP 894.

As Mr. Turner's discharge from PSHC neared, he continued to meet with counselors concerning his transition. On February 6, 2014, he met with Erika Marshall of Community Allied Behavioral Health and expressed excitement about living on his own. CP 896. On February 18, he moved into his own apartment at Capital House Apartments. CP 235.

Personal care services administered by ADSA are contracted to area agencies on aging. RCW 74.09.520(5). Here, DSHS contracted with Lewis Mason Thurston Area Agency on Aging (LMTAAA) to provide case management services. CP 998-999. LMTAAA then contracted with ResCare, which provided Mr. Turner with in-home care twice daily for two hours in the morning and two hours in the evening. CP 946-948, 1000-1002. The day after he moved in to his apartment, he met with a ResCare supervisor to discuss his care plan and a safety checklist. CP 949-950, 1124-1126, 1595-1601. As a recipient of caregiving services, Mr. Turner was free to specify the type and amount of care he wanted. CP 926-927.

Both before and after he moved into his apartment, Mr. Turner's providers assessed and evaluated his ability to maneuver in his new environment. CP 227, 231-32, 953-85, 987-93, 1419-20. Then, on February 20, 2014, just after he had moved into his apartment, Michael Korbuszewski, a wheelchair service technician, observed Mr. Turner during a service and maintenance call. CP 799. Mr. Turner met Mr. Korbuszewski at the entrance to the apartment building and escorted him up to his apartment. CP 799. Mr. Korbuszewski observed Mr. Turner navigate the common area hallways and the elevator system and open the door to his apartment without difficulty. CP 800. Inside, Mr. Turner freely maneuvered around his apartment and transferred himself from his wheelchair to another chair. CP 800. After Mr. Korbuszewski completed his work, Mr. Turner transferred back into the wheelchair without assistance. CP 800. He opened his apartment door to show Mr. Korbuszewski out, steered his wheelchair down the hallway and into the elevator again without difficulty, and exited the apartment building as Mr. Korbuszewski left the premises. CP 800.

Mr. Turner also met with several healthcare professionals and caregiving providers after moving into his apartment. On February 21, a registered nurse, a physical therapist, and an occupational therapist from Assured Home Health visited him. CP 953-985. The nurse noted that no structural barriers, safety hazards, or sanitary issues existed. CP 971. The

therapists noted that no additional therapy was indicated, and deemed Mr. Turner independent with his home exercise program. CP 956, 964.

A week later, Ms. Wilcox completed an interim assessment on Mr. Turner. CP 2170-96. She confirmed that he was eligible for 158 hours per month of caregiving services. CP 907, 912. Mr. Turner declined that level of care; he wanted to be on his own with minimal caregiving assistance. CP 930-935. Ms. Wilcox's assessment included details from the PSHC occupational therapy assessments completed on him before his discharge. CP 1889-1890, 2198-2199, 2201-2203, 2205-2207, 2209-2210. It also outlined the services to be performed by his caregivers, including evacuation instructions. CP 2170-96. The evacuation plan, as outlined in the interim assessment, provided that his caregiver would assist him, keep the walkways clear, and recharge his wheelchair batteries daily. CP 2180.

On March 17, 2014, DSHS formally transferred Mr. Turner's case management to LMTAAA. CP 929. Mr. Turner's case manager with LMTAAA was Heidi Hildebrandt. CP 917-919. After the transfer, DSHS remained responsible for determining Mr. Turner's Medicaid eligibility and assessing the level of caregiving he was entitled to through the RCL program. CP 901-902, 906-909.

On March 26, Ms. Hildebrandt met face to face with Mr. Turner at his apartment. She reviewed the services being provided to him and

completed a Service Summary, which both of them signed. CP 920-922, 930-935. The Service Summary enumerated that participation in all ADSA/LTC paid services was voluntary and that he, as the client, had a right to decline or terminate services at any time. He could also request more personal care service hours if he felt they were needed. CP 934.

E. DSHS Received a Single APS Report About Mr. Turner, Which Was Screened Out, and His Health Remained Unchanged

On March 31, 2014, DSHS Adult Protective Services (APS) received a telephone report concerning Mr. Turner. Another resident of the Capitol House Apartments made the report. CP 763-764, 767-770. The caller claimed that Mr. Turner appeared to be losing weight, that his wheelchair battery was not staying charged as long as it should and was inhibiting his ability to go grocery shopping, and that it appeared that he had not showered since moving into the apartment. CP 768. The referral was not assigned for an investigation. A decision not to investigate, i.e., to “screen out” the report, was made once the APS worker who received the call spoke with Mr. Turner’s case manager, Ms. Hildebrandt, about the details of the referral and, only then, after consulting with an APS Intake Team. CP 767, 770, 1009. DSHS/APS determines when an investigation is required and conducted. *See* WAC 388-71-0115.

While Ms. Hildebrandt does not recall having any contact with APS, she handled the bathing issue mentioned in the referral. CP 923-925.

Ms. Hildebrandt's April 1, 2014, notes reflect that she received a phone call from Mr. Turner in regards to his bathing needs and a request for a hand held shower head. CP 938-939. He received the hand held shower head within days of the request. On April 9, Mr. Turner also advised Ms. Hildebrandt that his care plan was meeting his needs and the split caregiving shifts were working well. CP 939. APS received no further referrals regarding him beyond the March 31, 2014, referral. CP 764.

Mr. Turner also attended medical appointments with his private physicians during April 2014. On April 8, he saw his primary care physician Dr. Knouff, and, on April 22, he saw his neurologist Dr. Kevin Connolly. CP 1035-1048, 1050-1054. Dr. Knouff noted that he appeared well nourished, was in no distress, was living alone and separated from his wife, and had visiting nurses coming into his home in the morning and evening. CP 1064. As noted in February 2013, Mr. Turner still used urinals and could go to the bathroom and bathe himself. CP 1064. Dr. Knouff noted that Mr. Turner could not move his legs, his reflexes were decreased, but his upper body reflexes remained brisk with good strength. CP 1064. Dr. Knouff testified that he did not perceive Mr. Turner needing APS intervention. CP 1060. Dr. Connolly also noted Mr. Turner had been doing reasonably well and had had no major problems since his last visit. CP 1051-1052. Neither physician, nor their staff, noted any abuse or neglect issues during his

examinations. CP 1035-1048, 1050-1054.

Kent Turner's close friend, Tony Inglett, regularly visited with him at the apartment. Tony testified that Mr. Turner's health really did not change during the time in the apartment and definitely not as of his last visit just days prior to his death. CP 1070-1078, 1080-1082. Tony believed Mr. Turner had a sharp mind, knew what he wanted, and was mentally capable of communicating his needs with his caregivers. CP 1082-1083. While Kathy believed that Mr. Turner was not capable of living alone, she did not initiate a guardianship or competency proceeding nor did she ever visit with him at his apartment, even though it was located minutes away from her home. CP 1091, 1096-1098, 1100-1102.

F. An Unexplained Fire Causes Kent Turner's Death

On April 30, 2014, at approximately 6:57 p.m., the Olympia Fire Department received an alarm from the Capitol House Apartments. CP 812-820. Kent Turner was found dead from a fire that was primarily isolated to his person and his electric wheelchair. CP 814. At the time of his death, he was in his wheelchair in the living room of his apartment, just inside the apartment doorway threshold. CP 814. He was alone. CP 815.

The Thurston County Coroner's Office identified the cause of Mr. Turner's death as "Asphyxia, due to inhalation of toxic combustible materials," and listed it as an accident. CP 1119-1121. The Coroner's report

noted that Kathy stated Mr. Turner was a smoker, a heavy drinker, and very stubborn. CP 1120. She also reported that he was known to refill his lighter with lighter fluid and, more than once, had spilled fluid on himself and that a “poof” of flame would occur when the lighter was lit. CP 1120.

The Washington State Patrol Crime Laboratory analyzed evidence collected at Mr. Turner’s apartment and found that Item 10, identified as burned fabric, contained a low level of medium-range petroleum distillate (MPD). Examples of MPDs include some charcoal starters and some paint thinners. Other volatile compounds were also detected but were not conclusively identified. CP 1123.

G. Procedural History

In 2015, Kathy, as representative of Kent Turner’s estate and on her own behalf, sued a number of entities bringing claims related to his death. CP 1-9. In addition to DSHS, Kathy also originally sued three separate defendants related to the manufacture and maintenance of Mr. Turner’s electric wheelchair, claiming that the wheelchair malfunctioned and caused the fire that ultimately killed him. CP 1-26. She added LMTAAA, ResCare, and Life Therapeutic Works as defendants in her Amended Complaint. CP 10-26. By early 2018, the trial court had dismissed the three manufacture/retail and wheelchair maintenance defendants. CP 123-140.

Throughout this litigation, Kathy has alleged that DSHS had a duty

to appropriately assess and provide services to Mr. Turner, to place him in a safe environment, to ensure his protection as a vulnerable adult under RCW 74.34, and to investigate the March 31, 2014, APS referral concerning him under RCW 74.34. CP 153-155, 158. She alleged that DSHS negligently assessed and failed to provide competent case management services to him and that DSHS conducted a negligent investigation of the APS referral. CP 153-155. The only statute cited in the several complaints has been RCW 74.34. CP 153-155. Kathy also alleged a claim for loss of consortium. CP 158.

DSHS moved for summary judgment on all of the claims brought against it, arguing (1) RCW 74.34.200(1) did not apply to tort claims against the State or its agencies, (2) RCW 74.34 does not support a negligent investigation claim against the State or its agencies, (3) no actionable duties existed between Mr. Turner and DSHS, (4) Plaintiff's claims against DSHS fail for lack of breach and proximate cause, and (5) Kathy's claims against DSHS also fail. CP 736-46. Kathy opposed the motion, arguing that DSHS (1) owed an unspecified common law duty to Mr. Turner, (2) owed a special relationship duty to him under *Restatement (Second) of Torts* § 315, (3) owed a duty to him under RCW 74.34, and (4) breached the duties owed to him and that the breach was a proximate cause of his death. CP 1326-45.

The trial court heard all defendants' motions for summary judgment

on April 19, 2019. CP 2276-2287, RP 1-74. It first ruled as a matter of law that there was no cognizable claim of neglect or abuse of a vulnerable adult under RCW 74.34 and dismissed those claims. RP 71. It also specifically ruled that “no special relationship existed” between any of the defendants and Mr. Turner, RP 71, carefully distinguishing “the *Caulfield* case and other cases in which the plaintiff resided at some sort of facility or was under the care of another 24/7. That is not the situation here[.]” RP 73.

Although the trial court ruled that the defendants owed Mr. Turner a duty of ordinary care, without specifying the basis or scope of that duty, RP 71, it also ruled that “as a matter of law there has been no breach of duty” and that “causation cannot be established as a matter of law.” RP 72-73. The trial court ultimately granted summary judgment in favor of all defendants. RP 71-73, CP 2276-87. Kathy appeals only the summary judgment entered in favor of DSHS and LMTAAA. CP 2292-2316.

IV. ARGUMENT

In the trial court, in opposition to summary judgment, Plaintiff argued three theories of liability: a common-law special relationship under § 315(b) of the *Restatement (Second) of Torts*; the special relationship exception to the public duty doctrine; and the legislative intent exception to the public duty doctrine. CP 1323-45. Each of these three issues is addressed on the merits in this brief, as well as the issues of breach and causation. In

addition to these issues, Plaintiff raises three new issues for the first time on appeal: the voluntary rescue doctrine under the *Restatement (Second) of Torts* §§ 323 and 324; the voluntary rescue and failure to enforce exceptions to the public duty doctrine; and an implied statutory cause of action under RCW 74.39A. See Appellant (App.) Br. at 19-21, 28-36, 43-45. By not raising and arguing these three issues below, Plaintiff waived them and they are not properly before this Court on appeal. See RAP 9.12. Nonetheless, in the unlikely event this Court decides to consider the three new issues in this appeal, they too lack any legal merit or supporting evidence in the record. The trial court's order granting summary judgment should be affirmed.

A. The Trial Court's Decision to Grant DSHS's Motion for Summary Judgment Is Reviewed De Novo

Summary judgment is appropriate when “there is no genuine issue as to any material fact” and “the moving party is entitled to judgment as a matter of law.” *Walston v. The Boeing Co.*, 181 Wn.2d 391, 395, 334 P.3d 519 (2014); CR 56(c). “The appellate court engages in the same inquiry as the trial court, with questions of law reviewed de novo and the facts and all reasonable inferences from the facts viewed in the light most favorable to the nonmoving party.” *Christensen v. Grant Cty. Hosp. Dist. No. 1*, 152 Wn.2d 299, 305, 96 P.3d 957 (2004). This Court may affirm for any reason supported by the record. RAP 2.5(a).

The moving party must first show that there is no genuine issue of

material fact. If this burden is satisfied, the nonmoving party must present evidence demonstrating an issue of material fact. Summary judgment is appropriate if the nonmoving party fails to do so. *Walston*, 181 Wn.2d at 395-96. “A genuine issue is one upon [sic] which reasonable people may disagree; a material fact is one controlling the litigation’s outcome.” *Youker v. Douglas Cty.*, 178 Wn. App. 793, 796, 327 P.3d 1243 (2014). An adverse party may not rest upon mere allegations or denials, but must set forth specific facts showing the existence of a genuine issue for trial. CR 56(e); *McBride v. Walla Walla Cty.*, 95 Wn. App. 33, 36, 975 P.2d 1029 (1999).

B. DSHS Did Not Owe Kent Turner a Common Law Duty Under the Circumstances Present in This Case

As a general rule, there is no duty under the common law to protect an individual from the conduct of third parties or from self-inflicted harm. *Niece v. Elmview Grp. Home*, 131 Wn.2d 39, 43, 929 P.2d 420 (1997); *Webstad v. Stortini*, 83 Wn. App. 857, 866, 924 P.2d 940 (1996), *review denied*, 131 Wn.2d 1016, 936 P.2d 416 (1997). An exception to this general rule exists where there is a special relationship between the defendant and the individual that gives the individual a right to protection. *Niece*, 131 Wn.2d at 43; *Webstad*, 83 Wn. App. at 867; *Restatement (Second) of Torts* § 315(b) (1965).¹ A defendant can also be liable under the voluntary rescue

¹ See Appendix at 001.

doctrine for negligently rendering aid or warning an individual in danger such that there is an increased risk of harm to that person or when the promise to render aid induces reliance. *Folsom v. Burger King*, 135 Wn.2d 658, 676, 958 P.2d 301 (1998); *Brown v. MacPherson's, Inc.*, 86 Wn.2d 293, 299, 545 P.2d 13 (1975); *Restatement (Second) of Torts* § 323 (1965).

As the trial court correctly found, in this case, DSHS did not have a special relationship with Mr. Turner and owed him no duty of protection under *Restatement* § 315(b). See *Donohoe v. DSHS*, 135 Wn. App. 824, 844, 142 P.3d 654 (2006) (affirming summary judgment in favor of DSHS where no special relationship existed). Plaintiff's arguments to the contrary are misplaced. Moreover, Plaintiff failed to preserve her argument under the *Restatement (Second) of Torts* §§ 323 and 324, and, in any event, her contentions in that regard are inapplicable on these facts.

1. DSHS did not have a special relationship with Kent Turner or owe him a duty under § 315 of the *Restatement*

A special relationship did not exist where DSHS was not responsible for Mr. Turner's care and did not oversee his treatment within his home. Rather, Mr. Turner made his own decisions about his care, chose the extent of his care, and directed the caregivers handling his care. His DSHS caseworker, Ms. Wilcox, was responsible only for assessing the level of care he qualified for based on his medical conditions and determining his Medicaid eligibility and the funding for his care. Those facts are insufficient

to create a special relationship between DSHS and Mr. Turner. *See Donohoe*, 135 Wn. App. at 844.

The special relationship duty recognized in § 315 of the *Restatement (Second) of Torts* has been addressed on several occasions in the realm of DSHS long-term care assessments of vulnerable adults. *See Yan v. Pleasant Day Adult Family Home, Inc.*, 178 Wn. App. 1018, 2013 WL 6633440 (2013), *review denied*, 180 Wn.2d 1003 (2014) (unpublished);² *Donohoe*, 135 Wn. App. 824; *Caulfield v. Kitsap Cty.*, 108 Wn. App. 242, 29 P.3d 738 (2001). Those cases establish that merely completing a care assessment of a vulnerable adult does not give rise to a special relationship; more is required. *See Yan*, 2013 WL 6633440, at *5; *Donohoe*, 135 Wn. App. at 840-44; *Caulfield*, 108 Wn. App. at 252-56.

In *Caulfield*, the plaintiff, who was afflicted with MS, alleged that both DSHS and the defendant county had special relationships with him. The court, however, only addressed the applicability of § 315 to the *defendant county*.³ *Caulfield*, 108 Wn. App. at 255-57. In determining that the defendant county had a § 315 special relationship with the plaintiff, the court explained that the county case manager had a duty to use reasonable

² *See* GR 14.1(a). The decision has no precedential value, is not binding on any court, and is cited only for such persuasive value as the Court deems appropriate.

³ Rather than address § 315's applicability to DSHS, the court instead analyzed whether the special relationship exception to the public duty doctrine applied. *Caulfield*, 108 Wn. App. at 251-52. This exception is discussed below in Part IV.C.1.a.

care because the plaintiff's inability to care for himself left him completely dependent on his caregivers and case managers for his personal safety. *Id.* at 256-57. In particular, the court noted that the plaintiff could not get out of bed or reach the phone for assistance, and that the case managers had responsibility for establishing his service plans, monitoring his care, providing crisis management, and terminating in-home care if it was inadequate to meet his needs. *Id.* at 257.

In *Donohoe*, by contrast, the court held there was no special relationship under § 315 between DSHS and the decedent. *Donohoe*, 135 Wn. App. at 836-43. The court noted that DSHS did not employ, supervise, or otherwise oversee the decedent's care or treatment at a privately-owned nursing home. *Id.* at 840. Moreover, the record indicated that it was the decedent's family who placed her in the home and who ultimately removed her. *Id.* The DSHS case manager, by comparison, was responsible for determining her federal Medicaid eligibility, assessing the level of care or service to which she was entitled by virtue of her medical and health conditions, and assuring the necessary funding for that care. *Id.* at 842.

Finally, the *Yan* court's analysis of *Caulfield* and *Donohoe* is exceptionally instructive. In holding that there was no special relationship between the decedent Yao and DSHS, the court in *Yan* specifically distinguished *Caulfield* and relied instead on *Donohoe*. *Yan*, 2013 WL

6633440, at *5. The court stated, “[u]nder *Donohoe* . . . DSHS’s assessment of a vulnerable adult’s condition does not give rise to a special relationship.” *Id.* In *Yan*, as in *Donohoe*, DSHS did not directly oversee or assume responsibility for Yao’s daily care. *Id.* Rather, Yao’s family placed her in a private adult family home where Yin, who ran the home, oversaw her care. *Id.* For that reason, the court concluded, as a matter of law, that DSHS did not have a special relationship with Ms. Yao. *Id.*

As in *Yan* and *Donohoe*, the facts in this case do not support a special relationship between Mr. Turner and DSHS under the *Restatement*. Similar to *Yan*, DSHS’s case manager, Ms. Wilcox, assessed Mr. Turner’s medical condition. Ms. Wilcox followed the Medicaid assessment process and completed her first assessment of him after he indicated that he wanted to leave the nursing facility. CP 864-65, 2138-68. The same day, Mr. Turner also executed the RCL and the nursing service forms expressing his intent to relocate, which was his right. CP 867-68. Then, shortly after he moved into his own apartment at his own insistence, Ms. Wilcox completed an interim assessment outlining the services that Mr. Turner qualified for and the caregiving services to be performed. CP 2170-96. As in *Donohoe* and *Yan*, Mr. Turner, not DSHS, made the ultimate decision about where he would reside and, as in those cases, DSHS did not directly oversee his caregivers, nor was it responsible for his daily care. Mr. Turner relied on

himself and, for four hours a day, on his caregivers for his well-being.

Plaintiff incorrectly asserts that the facts in *Caulfield* are virtually indistinguishable from this case. App. Br. at 25. Although Kent Turner, like the plaintiff in *Caulfield*, suffered from MS, he did not require 24-hour care and was not completely dependent on his caregivers and case managers for his personal safety. Mr. Turner was not bed-ridden and, prior to his discharge from the nursing facility, he demonstrated his proficiency in handling his motorized wheelchair and cooking his own meals, and he also met the expectations of the facility and achieved the goals set by his occupational therapist and the facility physician. CP 887, 1889-90, 2198-99, 2201-03, 2205-07, 2209-10.

Based on all the foregoing, Plaintiff failed to establish that DSHS had a special relationship with Mr. Turner such that it had a duty to protect him from others or from himself. For that reason, the trial court appropriately dismissed Plaintiff's complaint on summary judgment.

2. Plaintiff did not preserve her argument about, and DSHS did not owe Kent Turner, any duty under §§ 323 or 324 of the Restatement

First, Plaintiff failed to preserve below any argument that the *Restatement (Second) of Torts* §§ 323 and 324 apply in this matter.⁴ “In

⁴ In addition, Plaintiff failed to preserve any argument below related to *Restatement* §§ 314 and 320, which she now cites in passing on appeal. See App. Br. at 22; RAP 2.5(a), 9.12; *Bankston v. Pierce Cty.*, 174 Wn. App. 932, 941, 301 P.3d 495 (2013).

general, a party is not entitled to raise an issue or argument for the first time on appeal.” *Bankston v. Pierce Cty.*, 174 Wn. App. 932, 941, 301 P.3d 495 (2013) (citing RAP 2.5(a); *Lunsford v. Saberhagen Holdings, Inc.*, 139 Wn. App. 334, 338, 160 P.3d 1089 (2007)). “Further, when reviewing an order granting or denying summary judgment, [this Court] consider[s] only ‘issues called to the attention of the trial court.’” *Bankston*, 174 Wn. App. at 941 (quoting RAP 9.12). Plaintiff did not cite §§ 323 or 324 in any of her complaints, she did not raise them in her opposition to summary judgment, and she did not address those sections at the summary judgment hearing. CP 1-26, 148-162, 1323-45; RP 1-74. Rather, the first time Plaintiff addresses those sections is on appeal. *See* App. Br. at 19-21. Plaintiff offers no argument as to why this Court should reach her unpreserved claim of error, and any argument she may proffer in her reply on appeal will come too late. *See Westar Funding, Inc. v. Sorrels*, 157 Wn. App. 777, 787, 239 P.3d 1109 (2010) (stating that “[a]n issue raised and argued for the first time in a reply brief is too late to warrant consideration,” and citing *In re Marriage of Sacco*, 114 Wn.2d 1, 5, 784 P.2d 1266 (1990)).

Second, even if this Court were to consider the applicability of

She has also failed to provide sufficient argument or authority on appeal related to those sections. Thus, this Court should not address Plaintiff’s contentions as to those sections. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808-09, 828 P.2d 549 (1992) (“[T]he three grounds argued are not supported by any reference to the record nor by any citation of authority; we do not consider them.”).

§§ 323 and 324, those *Restatement* sections simply do not apply here.

Restatement (Second) of Torts § 323 (1965) provides:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of such harm, or

(b) the harm is suffered because of the other's reliance upon the undertaking.

Restatement (Second) of Torts § 324 (1965) provides:

One who, being under no duty to do so, takes charge of another who is helpless adequately to aid or protect himself is subject to liability to the other for any bodily harm caused to him by

(a) the failure of the actor to exercise reasonable care to secure the safety of the other while within the actor's charge, or

(b) the actor's discontinuing his aid or protection, if by so doing he leaves the other in a worse position than when the actor took charge of him.

These sections of the *Restatement* come up in Washington cases when the voluntary rescue doctrine is discussed. *See, e.g., Folsom*, 135 Wn.2d at 676-77; *Brown*, 86 Wn.2d at 299. Moreover, while Washington has adopted § 323, it has not adopted § 324. *Folsom*, 135 Wn.2d at 676 (citing *Webstad*, 83 Wn. App. at 874). Nonetheless, as explained in *Folsom*,

Washington *does* recognize the voluntary rescue doctrine. *Folsom*, 135 Wn.2d at 676-77. But that doctrine does not apply in this case.

“A person who undertakes, albeit gratuitously, to render aid to or warn a person in danger is required by Washington law to exercise reasonable care in his or her efforts.” *Id.* at 676. If the rescuer increases the risk of harm to the individual the rescuer is trying to assist and induces reliance that causes the individual to refrain from seeking help elsewhere, the rescuer may be liable for damage caused by a failure to exercise such reasonable care. *Id.* “The duty to rescue arises when a rescuer knows a danger is present and takes steps to aid an individual in need.” *Id.* at 677 (citations omitted).

In *Folsom*, the estates of two Burger King employees killed during a robbery alleged that the defendant security company voluntarily agreed to rescue the employees when it left a security system in place and that, by failing to remove the system, the defendant had induced reliance and caused harm. *Id.* at 677. The court rejected that argument, noting that the act of leaving the system in place occurred *before* any danger existed and that the defendant had terminated its contract with the restaurant to render aid. *Id.*

Similarly, here, DSHS’s contact with Mr. Turner occurred when assessing and qualifying him to transition from a nursing care facility to his own residence, before any imminent danger to him existed from the

unexplained fire. In addition, Mr. Turner was fully aware of his purposed care plan and knew the limits of any caregiving services inherent in his choices; DSHS induced no reliance on his part. *See* CP 855, 859, 864-65, 867-68, 889-90, 1412-17, 1422-23, 2166-68. DSHS was not in control of Mr. Turner's caregiving at the time of his death, and DSHS had not made any implied or express assurances outside of the enumerated care plan that he approved. There was no special relationship between DSHS and Mr. Turner by virtue of the voluntary rescue doctrine.

C. DSHS Did Not Owe an Actionable Tort Duty to Kent Turner Under RCW 74.34 or 74.39A

Having failed to establish that DSHS owed Mr. Turner a common law duty, Plaintiff also unsuccessfully seeks to establish a cause of action based on statute. To the extent that Plaintiff both preserved and now argues that RCW 74.34 or 74.39A creates an actionable duty of care, the public duty doctrine bars any such claim and its exceptions are inapplicable in this case. In addition, the private right of action explicitly set forth in RCW 74.34.200(1), related to abandonment, abuse, exploitation, or neglect of a vulnerable adult, does not apply to DSHS under the statute's plain language. Further, Plaintiff's argument that this Court should imply a cause of action under RCW 74.39A and *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990), comes too late, is unpreserved, and fails on the merits.

1. The public duty doctrine bars any negligence claim premised on RCW 74.34 or 74.39A

The public duty doctrine applies to duties mandated by statute or ordinance, as opposed to common law duties. *Beltran-Serrano v. City of Tacoma*, 193 Wn.2d 537, 549, 442 P.3d 608 (2019); *Munich v. Skagit Emergency Comm'n Ctr.*, 175 Wn.2d 871, 888-89, 288 P.3d 328 (2012) (Chambers, J. concurrence). “When the defendant in a negligence action is a governmental entity, the public duty doctrine provides that a plaintiff must show the duty breached was owed to him or her in particular, and was not the breach of an obligation owed to the public in general, i.e., a duty owed to all is duty owed to none.” *Munich*, 175 Wn.2d at 878. The doctrine is simply a tool used to narrow focus when determining “whether a defendant owed a duty to a ‘nebulous public’ or a particular individual.” *Id.* (quoting *Osborn v. Mason Cty.*, 157 Wn.2d 18, 27, 134 P.3d 197 (2006) (internal quotation marks omitted)). “The policy underlying the public duty doctrine is that legislative enactments for the public welfare should not be discouraged by subjecting a governmental entity to unlimited liability.” *Taylor v. Stevens Cty.*, 111 Wn.2d 159, 170, 759 P.2d 447 (1988).

There are four exceptions to the public duty doctrine: (1) special relationship, (2) legislative intent, (3) the rescue doctrine, and (4) failure to enforce. *Munich*, 175 Wn.2d at 879. If any exception applies, the governmental entity owes a duty to the plaintiff. *Id.*

Whether DSHS owed Mr. Turner an actionable tort duty turns on whether any exception to the public duty doctrine applies in this case. In particular, Plaintiff preserved only her arguments as to the special relationship and legislative intent exceptions. *See* CP 1329-31, 1337-38. Plaintiff's argument on appeal that any of the other exceptions to the public duty doctrine apply in this case is thus unpreserved and should not be addressed by this Court. *See* App. Br. at 43-45; RAP 2.5(a), 9.12; *Bankston*, 174 Wn. App. at 941.

a. The special relationship exception is inapplicable

The special relationship exception to the public duty doctrine allows tort actions for negligent performance of public duties "if the plaintiff can prove circumstances setting his or her relationship with the government apart from that of the general public." *Cummins v. Lewis Cty.*, 156 Wn.2d 844, 854, 133 P.3d 458 (2006). Such a special relationship arises when: (1) there is direct contact or privity between the public official and the injured plaintiff that sets the latter apart from the general public, and (2) there are express assurances given by the public official, which (3) give rise to the plaintiff's justifiable reliance on those assurances. *Id.* Express assurances occur only when an individual makes a direct inquiry and the government clearly sets forth incorrect information, the government intends that the individual rely on this information, and the individual relies on it to his or

her detriment. *Babcock v. Mason Cty. Fire Dist. No. 6*, 144 Wn.2d 774, 789, 30 P.3d 1261 (2001).

Both *Donohoe* and *Caulfield* discussed whether a special relationship of this type existed between the plaintiff and DSHS. In *Caulfield*, the court held that the exception applied to DSHS, because (1) there was direct contact between DSHS and the plaintiff, (2) the plaintiff's DSHS caseworker gave express assurances regarding case management and crisis intervention, which (3) gave rise to the plaintiff's justifiable reliance through his acceptance of the case manager's detailed duties. *Caulfield*, 108 Wn. App. at 252. In *Donohoe*, the exception did not apply because DSHS was not responsible for the plaintiff's care at the nursing home, did not oversee her treatment there, and was responsible only for determining her Medicaid eligibility, assessing the level of care she needed based on her medical conditions, and assuring the necessary funding for that care. *Donohoe*, 135 Wn. App. at 840, 842, 844.

Here, as in *Donohoe*, and in contrast with *Caulfield*, Plaintiff made no showing that DSHS expressly promised Mr. Turner that it would guarantee his safety at all hours of the day. Nor is there any evidence that he was induced to justifiably rely on any such promise. Rather, as reflected in the interim assessment, DSHS assessed Mr. Turner's need for services, assured the funding for that care, and outlined the plan for him to receive

multiple hours of caregiving services, during which the caregivers would assist him in evacuating his apartment, if such need arose. CP 864, 930-935, 1453, 2148. That is insufficient to give rise to a special relationship so as to create an exception to the public duty doctrine.

b. The legislative intent exception is inapplicable

The “legislative intent” exception applies in cases “where a regulatory statute contains a clear intent to identify and protect a particular and circumscribed class of persons.” *Halleran v. Nu W., Inc.*, 123 Wn. App. 701, 712, 98 P.3d 52, 57 (2004) (internal quotation marks and citation omitted). This is a stringent standard. *Id.* at 713 n.19.

“[T]he evidence of clear legislative intent necessary to create a duty must be created by a statute and not by regulations, manuals and directives purportedly authorized under [the] statute.” *Smith v. State*, 135 Wn. App. 259, 281, 144 P.3d 331 (2006) (internal quotation marks and citation omitted). Thus, courts will look to a legislative statement of purpose to determine whether or not the legislature intended to protect a particular and circumscribed class of persons. *See, e.g., Taylor*, 111 Wn.2d at 164-66 (looking at the purpose section of the State Building Code Act, and finding no legislative intent that the Act was intended to protect the class of building occupants in addition to the general public). The legislature’s codified declaration of intent, however, “cannot trump the plain language of the

statute.” *State v. Granath*, 190 Wn.2d 548, 556, 415 P.3d 1179 (2018) (internal quotation marks and citation omitted).

For example, in *Boone v. DSHS*, the plaintiffs relied on the general language in RCW 74.15.010 “to safeguard the health, safety, and well-being of children” to argue that the legislature intended to create a specific duty under the licensing statute. *Boone v. DSHS*, 200 Wn. App. 723, 743-44, 403 P.3d 873 (2017). The court rejected that argument because it ignored the more specific stated legislative purpose that DSHS’s licensing duty under RCW 74.15.010 was “owed equally to children, their parents, the community at large, and the agencies.” *Id.* at 744. The court concluded that, under that statement of purpose, the legislature had specifically provided that any duty DSHS may owe to a child and his or her parent was the same as the duty owed to the general public. *Id.* Accordingly, the legislative intent exception was inapplicable and the plaintiffs had no cognizable claim under the licensing statute. *Id.* See also *Donohoe*, 135 Wn. App. at 847-48 (holding that nothing in the declaration of purpose in RCW 18.51 expressed any legislative intent to create a DSHS duty to protect individual nursing home residents from inadequate private nursing home care or to indemnify residents for harm resulting from such care).

Here, Plaintiff seeks to rely on RCW 74.34 and 74.39A as sources of actionable tort duties DSHS allegedly owed to Kent Turner. See App. Br.

at 28-35. RCW 74.34 relates generally to the protection of vulnerable adults from abuse, neglect, exploitation, or abandonment. *See* RCW 74.34.005 (legislative findings).⁵ RCW 74.39A relates generally to the provision of long-term care services to support the growing number of persons who need such services as the population of Washington ages. *See* RCW 74.39A.005 (legislative findings).⁶ Both RCW chapters set forth obligations DSHS owes to the public in general.

There is no evidence that the legislature intended to protect a particular and circumscribed class of persons from DSHS, when it enacted RCW 74.34. First, as declared by the legislature, “The purpose of chapter 74.34 RCW is to provide [DSHS] and law enforcement agencies with the authority to investigate complaints of abandonment, abuse, financial exploitation, or neglect of vulnerable adults and to provide protective services and legal remedies to protect these vulnerable adults.” Laws of 1999, ch. 176 § 1. RCW 74.34 then explicitly and specifically sets forth remedies available for the protection of vulnerable adults, including private rights of action against certain enumerated entities that do not include the State or DSHS. *See infra* Part IV.C.2 (discussing RCW 74.34.150, and .200(1)). The legislature knows when it intends to provide a private remedy

⁵ *See* Appendix at 002-03.

⁶ *See* Appendix at 005.

to the public for actions taken by the government. The legislature expressly did not do so within the confines of RCW 74.34, and this Court should not read into the statutory scheme that which is not there. *See Granath*, 190 Wn.2d at 556; *State v. Nelson*, 195 Wn. App. 261, 266, 381 P.3d 84 (2016) (“We recognize that the legislature intends to use the words it uses and intends *not* to use words it does not use.” (Emphasis in original.)).

There is also no evidence in this case that the legislature intended to protect a particular and circumscribed class of persons from DSHS when it enacted RCW 74.39A. RCW 74.39A.005 sets forth multiple findings of the legislature supporting the enactment of the chapter, including “that *the aging of the population* and advanced medical technology have resulted in a growing number of persons who require assistance”; “that *the public interest* would best be served by a broad array of long-term care services that support *persons who need such services at home or in the community* whenever practicable and that promote individual autonomy, dignity, and choice”; “that nursing home care will continue to be a critical part of *the state’s long-term care options*, and that such services should promote individual dignity, autonomy, and a homelike environment”; and “that the need for well-trained caregivers is growing as *the state’s population ages* and clients’ needs increase.” (Emphases added.) RCW 74.39A.007 then expresses the legislature’s purpose and intent in enacting the chapter as:

- (1) Long-term care services administered by the department of social and health services include a balanced array of health, social, and supportive services *that promote individual choice, dignity, and the highest practicable level of independence*;
- (2) Home and community-based services be developed, expanded, or maintained *in order to meet the needs of consumers* and to maximize effective use of limited resources;
- (3) Long-term care services be responsive and appropriate to individual need and also cost-effective for the state;
- (4) Nursing home care is provided in such a manner and in such an environment as will *promote maintenance or enhancement of the quality of life of each resident and timely discharge to a less restrictive care setting when appropriate*; and
- (5) State health planning for nursing home bed supply take into account increased availability of other home and community-based service options.

(Emphases added.)

As evidenced by RCW 74.39A.005 and 74.39A.007, the obligations owed under the chapter are owed to the entire population of Washington, as it ages, and any duty DSHS may owe consumers of long-term care services is the same as the duty owed to the general public in all public assistance/welfare type statutes. This is not enough to meet the legislative intent exception. *See Boone*, 200 Wn. App. at 744. And, while RCW 74.39A.040 and .090 place DSHS in the position of assisting, coordinating, and advising on discharge planning, a focus remains on care options that are

in the best interest of consumers that promote individual choice. It would be inconsistent with that stated intent of the legislature to impose liability on DSHS for discharge and care planning that consumers can refuse or ignore, as is their statutory and constitutional right.

2. Any argument by Plaintiff that RCW 74.34.200(1) provides a cause of action against DSHS is misplaced

Plaintiff also appears to erroneously contend that RCW 74.34.200(1) explicitly provides her with a private right of action against DSHS for its alleged acts and omissions towards Kent Turner as a “vulnerable adult.” App. Br. at 2, 36-39. However, under its plain language, RCW 74.34.200(1) simply does not create a cause of action against DSHS. *See Donohoe*, 135 Wn. App. at 846. RCW 74.34.200(1) provides in relevant part that

“a vulnerable adult who has been subjected to abandonment, abuse, financial exploitation, or neglect . . . 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.*

(Emphasis added.)

None of the specifically enumerated defendants in RCW

74.34.200(1) include the State or its agencies and this Court should not insert what has been omitted. *See Calhoun v. State*, 146 Wn. App. 877, 888-89, 193 P.3d 188 (2008); *see also Granath*, 190 Wn.2d at 556; *Nelson*, 195 Wn. App. at 266. The role of creating new legal duties and obligations owed by government agencies is constitutionally delegated to the legislature, not the courts. *Murphy v. State*, 115 Wn. App. 297, 317, 62 P.3d 533, *review denied*, 149 Wn.2d 1035 (2003). *See also* Const. art. II, § 26. Here, the legislature did not expressly create a new cause of action against DSHS when enacting RCW 74.34.200(1). In addition, under RCW 74.34.150, DSHS *may* seek an order of protection for a vulnerable adult under certain circumstances. However, consistent with RCW 74.34.200(1), that statute also prevents liability from being imposed on DSHS for not seeking a protection order on behalf of any person.⁷ This Court should reject Plaintiff's argument that she has a cause of action under RCW 74.34.200(1) against DSHS.⁸

⁷ RCW 74.34.150 provides in pertinent part:

The department of social and health services, in its discretion, may seek relief under RCW 74.34.110 through 74.34.140 on behalf of and with the consent of any vulnerable adult. . . . Neither the department of social and health services nor the state of Washington shall be liable for seeking or failing to seek relief on behalf of any persons under this section.

⁸ Plaintiff below conceded that she was not bringing an implied cause of action for "negligent investigation" against DSHS under RCW 74.34. CP 1335. She also does not appear to assert such a claim on appeal, nor could she. *See Koshelnik v. State*, 194 Wn. App. 1037, 2016 WL 3456866 *6 (2016) (unpublished) ("Nothing in the act [RCW 74.34] hints at a purpose of protecting vulnerable adults from the Department [of Social and

3. Plaintiff did not preserve her argument that an implied cause of action exists under RCW 74.39A, nor can she establish such a claim under *Bennett v. Hardy*

Finally, Plaintiff's argument that this Court should imply a cause of action under RCW 74.39A, pursuant to the test announced in *Bennett v. Hardy*, 113 Wn.2d 912, 920-21, 784 P.2d 1258 (1990), is both unpreserved and lacks merit. *See* App. Br. at 28-36. Initially, as with her new argument related to §§ 323 and 324 of the *Restatement*, Plaintiff did not argue her new theory of an implied cause of action under RCW 74.39A to the trial court. *See* CP 1323-45; RP 1-74. Thus, she failed to preserve this as an issue for this Court. *See* RAP 2.5(a), 9.12; *Bankston*, 174 Wn. App. at 941. Plaintiff also offers no argument as to why this Court should reach this unpreserved issue on appeal, and any argument she may proffer in her reply brief will come too late to warrant consideration by this Court. *See Westar Funding, Inc.*, 157 Wn. App. at 787.

Should this Court reach the merits of this issue, the Plaintiff must establish that three elements are met: (1) that the plaintiff is within the class for whose "especial" benefit the statute was enacted; (2) that legislative intent, explicitly or implicitly, supports creating or denying a remedy; and

Health Services] or creating a cause of action in tort against the Department for the manner in which its personnel carry out the statutory mandate."); GR 14.1(a) (cited unpublished opinion has no precedential value, is not binding on any court, and is cited only for such persuasive value as the Court deems appropriate).

(3) that implying a remedy is consistent with the underlying purpose of the legislation. *Bennett*, 113 Wn.2d at 920-21. This she cannot do.

Washington appellate courts have previously addressed the State's obligations under RCW Title 74, related to public assistance, and have uniformly refused to imply tort duties from those welfare statutes. *See e.g.*, *Braam v. State*, 150 Wn.2d 689, 711-12, 81 P.3d 851 (2003) (no private cause of action can be implied from RCW 74.14A.050, 74.13.250, or 74.13.280, because there is "no evidence of legislative intent to create a private cause of action, and implying one is inconsistent with the broad power vested in DSHS to administer these statutes."); *see also Aba Sheikh v. Choe*, 156 Wn.2d 441, 457-58, n.5, 128 P.3d 574 (2006) (no private cause of action can be implied from three WAC regulations pertaining to dependent children, citing *Braam*); *Linville v. State*, 137 Wn. App. 201, 211-13, 151 P.3d 1073 (2007) (no implied legislative intent in daycare insurance statutes to create a remedy against the State for child sexual abuse victims who allegedly were abused in licensed daycare facilities); *Terrell C. v. DSHS*, 120 Wn. App. 20, 26, 84 P.3d 899 (2004) (explaining that statutes governing social workers do not give rise to an obligation to protect the general public from harm inflicted by client-children of DSHS social workers); *Pettis v. State*, 98 Wn. App. 553, 558, 900 P.2d 453 (1999) (stating that "a claim for negligent investigation does not exist under the

common law of Washington” and explaining that the exception for child abuse investigations does not apply in the day care licensing setting.). This Court should reach a similar conclusion here and hold that RCW 74.39A also fails to create an implied cause of action.

a. Kent Turner was not within an identifiable class of persons protected by RCW 74.39A

First, as discussed above, Plaintiff cannot show that RCW 74.39A was enacted to protect a special class of people, rather than the consuming public at large. *See supra* Part IV.C.1.b. Where a statute does not provide a right to anyone, there is no reason to apply *Bennett*. That is because there can be no question of whether a cause of action must be implied to provide a remedy for the violation of a non-existent right. *See Fisk v. City of Kirkland*, 164 Wn.2d 891, 899, 194 P.3d 984 (2008) (Madsen, J., concurring).

b. No legislative intent, explicitly or implicitly, supports creating a remedy in this case

Second, there is no evidence, either explicit or implicit, that the legislature, in promulgating RCW 74.39A, contemplated creating a remedy against DSHS for consumers of long-term care services injured while living independently. Rather, in *former* RCW 74.39A.051(6) (2013),⁹ the legislature provides that, “for providers found to have delivered care or

⁹ *See* Appendix at 006-09.

failed to deliver care resulting in problems that are serious, recurring, or uncorrected, or that create a hazard that is causing or likely to cause death or serious harm to one or more residents,” DSHS shall implement prompt and specific enforcement remedies. The enforcement remedies available to DSHS include, when appropriate, reasonable conditions on a contract or license. Former RCW 74.39A.051(6) (2013). In addition, RCW 74.39A has provided a consumer with a fair hearing remedy to contest decisions of the case manager. Former RCW 74.39A.095(7)-(8) (2013).¹⁰ Given that the legislature has specified the remedies available under the act, this Court should not imply a new one. *See Cazzanigi v. General Elec. Credit Corp.*, 132 Wn.2d 433, 445, 938 P.2d 819 (1997) (“No cause of action should be implied when the Legislature has provided an adequate remedy in the statute.” (Citing *Bennett*, 113 Wn.2d at 920)).

c. Implying a private cause of action would be inconsistent with the purpose of RCW 74.39A

Finally, RCW 74.39A is legislation enacted for the general welfare. As such, implying a private cause of action would be inconsistent with the broad power vested in DSHS to administer such statutes. *See Braam*, 150 Wn.2d at 711-12. In addition, as clearly enumerated by RCW 74.39A.007, the legislature’s intent is to promote individual choice and the highest

¹⁰ *See* Appendix at 010-13. Recent amendments to the act now provide for an alternative dispute resolution process. RCW 74.39A.515(1)(j), (3) (2018).

practicable level of independence by providing services to meet the needs of consumers in less restrictive care settings that are cost-effective. As noted above, it would be inconsistent with that stated intent of the legislature to impose liability on DSHS for discharge and care planning that the consumer can refuse or ignore, as is their statutory and constitutional right. For all these reasons, no new cause of action should be implied by this Court under RCW 74.39A.

D. The Trial Court Did Not Err in Ruling on Breach of Duty and Proximate Cause as a Matter of Law

Assuming *arguendo* that Plaintiff could establish that DSHS owed Mr. Turner an actionable duty, Plaintiff must still show that DSHS breached the duty owed him and that its negligence proximately caused his death. *See Donohue*, 135 Wn. App. at 837. Here, there is no evidence that DSHS failed to meet any obligation it owed Mr. Turner; rather, DSHS worked with him and others to assess his needs, assure there was funding in place to meet those needs, and implement his choices. CP 353-58, 2170-96. In addition, there is insufficient, non-speculative evidence establishing causation when DSHS's conduct is both too remote and insubstantial and when Mr. Turner died alone from a fire of unknown origin.

1. Plaintiff failed to create a genuine question of material fact as to breach

In this case, the undisputed evidence established that DSHS made

Kent Turner fully aware of his decision-making choices as to the caregiving services available to him. *See supra* Part III.C-D. It is further undisputed that Mr. Turner was aware and acknowledged throughout his interactions with DSHS that the role of Ms. Wilcox was as an assessor to (1) determine program eligibility and complete assessments identifying his preferences; (2) assist in developing a plan of care that documented his choice of services; (3) authorize payment for services; and (4) monitor that services were provided. CP 356. There is no evidence that Ms. Wilcox failed to do so. In addition, Mr. Turner knew the limits of his choices and expressly decided to reside independently with caregiving services provided only on a limited daily basis. CP 357-58, 1124-26. As there is no evidence of breach, and negligence cannot be inferred from the mere fact that an injury occurred, summary judgment was appropriate. *See Hansen v. Washington Natural Gas Co.*, 95 Wn.2d 773, 778, 632 P.2d 504 (1981) (occurrence of injury is insufficient to prove dangerous condition establishing liability).

2. Plaintiff failed to create a genuine question of material fact as to proximate cause

Proximate cause includes two elements: cause in fact and legal cause. *Tyner v. DSHS*, 141 Wn.2d 68, 82, 1 P.3d 1148 (2000). For cause in fact, there must be evidence that some act or omission of the defendant produced injury to the plaintiff in a direct, unbroken sequence under circumstances where the injury would not have occurred “but for” the

defendant's act or omission. See *Hartley v. State*, 103 Wn.2d 768, 778, 698 P.2d 77 (1985); WPI 15.01.01 (6th ed.). Legal causation is an inquiry dependent on “mixed considerations of logic, common sense, justice, policy, and precedent,” and considers “whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability.” *Tyner*, 141 Wn.2d at 82 (internal quotation marks omitted) (quoting *Schooley v Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 478-79, 951 P.2d 749 (1998)). Legal causation is a question of law. *Taylor v. Bell*, 185 Wn. App. 270, 287, 340 P.3d 951 (2014), *review denied*, 183 Wn.2d 1012 (2015). Both cause in fact and legal cause are absent in this case.

a. There is no non-speculative evidence supporting cause in fact

Cause in fact “does not exist if the connection between an act and the later injury is indirect and speculative.” *Estate of Bordon v. Dep't of Corr.*, 122 Wn. App. 227, 240, 95 P.3d 764 (2004), *review denied*, 154 Wn.2d 1003 (2005); *see also Hungerford v. Dep't of Corr.*, 135 Wn. App. 240, 251, 139 P.3d 1131 (2006) (wrongful death case where the plaintiff speculated that the Department of Correction's alleged negligence proximately caused the death). This Court, in a recent unpublished opinion in a negligent investigation case against DSHS, held that future abuse of a child unrelated to the prior investigation was too speculative to establish

proximate cause. *Keely v. State*, No. 51639-0-II, 2019 WL 5960666, at *6 (Nov. 13, 2019).¹¹ In *Keely*, the Court relied, at least in part, on the proximate cause analysis from *Hungerford*. *Keely*, at *6. Here, as in *Bordon*, *Hungerford*, and *Keely*, the evidence presented to the trial court in this case left gaps in the chain of causation, inviting speculation. *See, e.g., Bordon*, 122 Wn. App. at 241.

The cause of the fire that resulted in Kent Turner's death is unknown. It is speculation to say that any act or omission on the part of DSHS, or any other entity for that matter, proximately caused his death. While Kathy acknowledges that the cause of the fire is unknown, she argues that Mr. Turner's death would not have happened if he had been living in a 24-hour care facility such as an adult family home or skilled nursing facility, or if back home with her. CP 108, 136, 138, 1343. This is pure speculation. There is no direct evidence that, had DSHS done something any differently, his death would have been prevented. Neither DSHS nor any other defendant had the authority to prevent Mr. Turner, a competent adult who demonstrated his independence and made informed choices, from moving into his own apartment.

DSHS anticipates that Plaintiff, in reply, may rely on *Behla v. R.J.*

¹¹ See GR 14.1(a). The decision has no precedential value, is not binding on any court, and is cited only for such persuasive value as the Court deems appropriate.

Jung, LLC, 2019 WL 6482585 (Dec. 3, 2019), a recent decision issued after the Plaintiff filed her opening brief. That case, however, is inapposite. In *Behla*, the court concluded that, where “some competent evidence of factual causation” exists to preclude jury speculation, the plaintiff may survive a motion to dismiss. *Behla*, at 9, citing *Borden*, 122 Wn. App. at 242. That is not the case here.

Even assuming a different evacuation plan for Mr. Turner had been outlined by DSHS in its interim assessment, it is pure speculation that any such plan would have prevented his death, and Plaintiff presented no competent evidence to establish otherwise. For example, the facts indicate that the fire started on Mr. Turner. CP 1264. Although his death has been ruled an accident by the coroner’s office, the fire department was unable to determine the cause of the fire. CP 1119-1121, 1268.

The undisputed evidence shows that, in fact, Mr. Turner had previously lit himself on fire when smoking. CP 1197, 1254. Mr. Turner smoked everywhere he went and he was not supervised when doing so. CP 843, 876, 1014, 1043, 1053. Thus, the fire could have started anywhere and killed him before he could have escaped at any location.

The facts of this case leave gaps in the chain of causation; such causation cannot be established as a matter of law. A jury should not be allowed to guess as to whether or not a different evacuation plan would have

prevented Mr. Turner's death. Summary judgment was appropriate.

b. Legal causation is lacking in this case

Even if there were sufficient competent evidence to establish a causal chain between DSHS's conduct and Mr. Turner's death, DSHS's conduct was so far removed from his death that liability should not be imposed on it. *See Tyner*, 141 Wn.2d 82; *Hungerford*, 135 Wn. App. at 251. In addition, based on considerations of logic, common sense, justice, and public policy, DSHS's conduct should not be determined to be a legal cause of Mr. Turner's death when he had an undisputed and fundamental right as a competent adult to self-determination and self-governance. *See Tyner*, 141 Wn.2d at 82.

At no time did DSHS determine that Mr. Turner was in need of protection as a vulnerable adult pursuant to RCW 74.34.110-.140. CP 763-64. Nor, for example, was this a case in which the State could intervene because an individual with a substance use disorder or a mental disorder is in imminent danger because of a grave disability or because the person presents an imminent likelihood of serious bodily harm. *See RCW 71.05*. Mr. Turner was entitled to make the informed choice that he made to live independently at the Capitol House Apartments, and DSHS should not be held responsible for the unfortunate consequences of that choice.

E. Plaintiff Has Abandoned Her Loss of Consortium Claim on Appeal and Summary Judgment

Plaintiff has not adequately raised or argued her loss of consortium claim on appeal. She mentions her individual claim only once in her brief, in her conclusion. *See* App. Br. at 49. The rest of Plaintiff's brief is focused solely on the claims of Kent Turner's estate. *See, e.g.*, App. Br. at 2-3, 16-17. Plaintiff has thus abandoned her loss of consortium claim on appeal. *See Cowiche Canyon Conservancy*, 118 Wn.2d at 808-09. For this additional reason, summary judgment as to it should be affirmed.

F. Plaintiff Is Not Entitled to Any Award of Attorney Fees Against DSHS Under RCW 74.34

As discussed above, RCW 74.34.200 does not apply to DSHS or its employees. While RCW 74.34.200(3)¹² does allow a prevailing plaintiff an award of actual damages, together with the costs of the suit and a reasonable attorneys' fee, that statute applies only to a defendant that is an organization (or an individual employed by an organization) required to be licensed as an in-home agency under RCW 70.127.020. *Cummings v. Guardianship Services of Seattle*, 128 Wn. App. 742, 749, 110 P.3d 796 (2005). Because RCW 74.34.200 does not apply to DSHS and Plaintiff has not yet prevailed, Plaintiff is not entitled to any award of fees against DSHS in this case. *See Wascisin v. Olsen*, 90 Wn. App. 440, 445, 953 P.2d 467 (1997) (Under RAP

¹² *See* Appendix at 004.

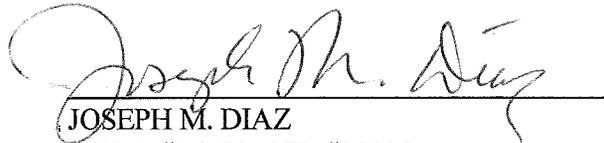
18.1, a prevailing party is one who receives judgment in that party's favor).

V. CONCLUSION

For all the above reasons, summary judgment in favor of DSHS should be affirmed.

RESPECTFULLY SUBMITTED this 19th day of December, 2019.

ROBERT W. FERGUSON
Attorney General

A handwritten signature in cursive script, appearing to read "Joseph M. Diaz", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury in accordance with the laws of the State of Washington that I arranged for the original of the preceding Corrected Brief of Respondent Washington State Department of Social & Health Services to be electronically filed in the Washington Court of Appeals, Division II, and electronically served on the following parties, according to the Court's protocols for electronic filing and service.

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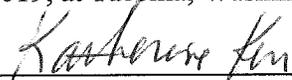
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APPENDIX

Turner v. Department of Social & Health Services, et al.
Court of Appeals No. 53369-3-II

Index to Appendix

Page No(s).	Document
001	<i>Restatement (Second) of Torts § 315</i>
002-03	RCW 74.34.005
004	RCW 74.34.200
005	RCW 74.39A.005
006-09	Former RCW 74.39A.051 (2013)
010-13	Former RCW 74.39A.095 (2013)

Restatement (Second) of Torts § 315 (1965)

Restatement of the Law - Torts | October 2019 Update

Restatement (Second) of Torts

Division Two. Negligence

Chapter 12. General Principles

Topic 7. Duties of Affirmative Action

Title A. Duty to Control Conduct of Third Persons

§ 315 General Principle

Comment:

Case Citations - by Jurisdiction

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.

Comment:

a. The rule stated in this Section is a special application of the general rule stated in § 314.

b. Distinction between duty to act for another's protection and duty to act for self-protection. In the absence of either one of the kinds of special relations described in this Section, the actor is not subject to liability if he fails, either intentionally or through inadvertence, to exercise his ability so to control the actions of third persons as to protect another from even the most serious harm. This is true although the actor realizes that he has the ability to control the conduct of a third person, and could do so with only the most trivial of efforts and without any inconvenience to himself. Thus if the actor is riding in a third person's car merely as a guest, he is not subject to liability to another run over by the car even though he knows of the other's danger and knows that the driver is not aware of it, and knows that by a mere word, recalling the driver's attention to the road, he would give the driver an opportunity to stop the car before the other is run over. On the other hand, under the rule stated in § 495, the actor is guilty of contributory negligence if he fails to exercise an ability which he in fact has to control the conduct of any third person, where a reasonable man would realize that the exercise of his control is necessary to his own safety. Thus if the actor, while riding merely as a guest, does not warn the driver of a danger of which he knows and of which he has every reason to believe that the driver is unaware, he becomes guilty of contributory negligence which precludes him from recovery against another driver whose negligent driving is also a cause of a collision in which the actor himself is injured.

Comment on Clauses (a) and (b):

c. The relations between the actor and a third person which require the actor to control the third person's conduct are stated in §§ 316- 319. The relations between the actor and the other which require the actor to control the conduct of third persons for the protection of the other are stated in §§ 314A and 320.

West's Revised Code of Washington Annotated
Title 74. Public Assistance (Refs & Annos)
Chapter 74.34. Abuse of Vulnerable Adults (Refs & Annos)

West's RCWA 74.34.005

74.34.005. Findings

Effective: June 12, 2014

Currentness

The legislature finds and declares that:

- (1) Some adults are vulnerable and may be subjected to abuse, neglect, financial exploitation, or abandonment by a family member, care provider, or other person who has a relationship with the vulnerable adult;
- (2) A vulnerable adult may be home bound or otherwise unable to represent himself or herself in court or to retain legal counsel in order to obtain the relief available under this chapter or other protections offered through the courts;
- (3) A vulnerable adult may lack the ability to perform or obtain those services necessary to maintain his or her well-being because he or she lacks the capacity for consent;
- (4) A vulnerable adult may have health problems that place him or her in a dependent position;
- (5) The department and appropriate agencies must be prepared to receive reports of abandonment, abuse, financial exploitation, or neglect of vulnerable adults;
- (6) The department must provide protective services in the least restrictive environment appropriate and available to the vulnerable adult.

Credits

[1999 c 176 § 2.]

OFFICIAL NOTES

Findings--Purpose--1999 c 176: "The legislature finds that the provisions for the protection of vulnerable adults found in chapters 26.44, 70.124, and 74.34 RCW contain different definitions for abandonment, abuse, exploitation, and neglect. The legislature finds that combining the sections of these chapters that pertain to the protection of vulnerable adults would better serve this state's population of vulnerable adults. The purpose of chapter 74.34 RCW is to provide the department and law enforcement agencies with the authority to investigate complaints of abandonment, abuse, financial exploitation, or neglect of vulnerable adults and to provide protective services and legal remedies to protect these vulnerable adults." [1999 c 176 § 1.]

Severability--1999 c 176: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1999 c 176 § 36.]

Conflict with federal requirements--1999 c 176: "If any part of this act is found to be in conflict with federal requirements that are a prescribed condition to the allocation of federal funds to the state, the conflicting part of this act is inoperative solely to the extent of the conflict and with respect to the agencies directly affected, and this finding does not affect the operation of the remainder of this act in its application to the agencies concerned. Rules adopted under this act must meet federal requirements that are a necessary condition to the receipt of federal funds by the state." [1999 c 176 § 37.]

West's RCWA 74.34.005, WA ST 74.34.005

Current with all legislation from the 2019 Regular Session of the Washington Legislature

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West's Revised Code of Washington Annotated
Title 74. Public Assistance (Refs & Annos)
Chapter 74.34. Abuse of Vulnerable Adults (Refs & Annos)

West's RCWA 74.34.200

74.34.200. Abandonment, abuse, financial exploitation, or neglect of
a vulnerable adult--Cause of action for damages--Legislative intent

Effective: July 28, 2013
Currentness

(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.

(2) It is the intent of the legislature, however, that where there is a dispute about the care or treatment of a vulnerable adult, the parties should use the least formal means available to try to resolve the dispute. Where feasible, parties are encouraged but not mandated to employ direct discussion with the health care provider, use of the long-term care ombuds or other intermediaries, and, when necessary, recourse through licensing or other regulatory authorities.

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

Credits

[2013 c 23 § 219, eff. July 28, 2013; 1999 c 176 § 15; 1995 1st sp.s. c 18 § 85.]

OFFICIAL NOTES

Findings--Purpose--Severability--Conflict with federal requirements--1999 c 176: See notes following RCW 74.34.005.

Conflict with federal requirements--Severability--Effective date--1995 1st sp.s. c 18: See notes following RCW 74.39A.030.

West's RCWA 74.34.200, WA ST 74.34.200

Current with all legislation from the 2019 Regular Session of the Washington Legislature

West's Revised Code of Washington Annotated
Title 74. Public Assistance (Refs & Annos)
Chapter 74.39A. Long-Term Care Services Options--Expansion (Refs & Annos)

West's RCWA 74.39A.005

74.39A.005. Findings

Currentness

The legislature finds that the aging of the population and advanced medical technology have resulted in a growing number of persons who require assistance. The primary resource for long-term care continues to be family and friends. However, these traditional caregivers are increasingly employed outside the home. There is a growing demand for improvement and expansion of home and community-based long-term care services to support and complement the services provided by these informal caregivers.

The legislature further finds that the public interest would best be served by a broad array of long-term care services that support persons who need such services at home or in the community whenever practicable and that promote individual autonomy, dignity, and choice.

The legislature finds that as other long-term care options become more available, the relative need for nursing home beds is likely to decline. The legislature recognizes, however, that nursing home care will continue to be a critical part of the state's long-term care options, and that such services should promote individual dignity, autonomy, and a homelike environment.

The legislature finds that many recipients of in-home services are vulnerable and their health and well-being are dependent on their caregivers. The quality, skills, and knowledge of their caregivers are often the key to good care. The legislature finds that the need for well-trained caregivers is growing as the state's population ages and clients' needs increase. The legislature intends that current training standards be enhanced.

Credits

[2000 c 121 § 9; 1993 c 508 § 1.]

West's RCWA 74.39A.005, WA ST 74.39A.005

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Washington Statutes Annotated - 2013

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Title 74. Public Assistance (Refs & Annos)
Chapter 74.39A. Long-Term Care Services Options--Expansion (Refs & Annos)

West's RCWA 74.39A.051
Formerly cited as WAST74.39A.050

74.39A.051. Quality improvement principles

Currentness

The department's system of quality improvement for long-term care services shall use the following principles, consistent with applicable federal laws and regulations:

- (1) The system shall be client-centered and promote privacy, independence, dignity, choice, and a home or home-like environment for consumers consistent with chapter 392, Laws of 1997.
- (2) The goal of the system is continuous quality improvement with the focus on consumer satisfaction and outcomes for consumers. This includes that when conducting licensing or contract inspections, the department shall interview an appropriate percentage of residents, family members, resident case managers, and advocates in addition to interviewing providers and staff.
- (3) Providers should be supported in their efforts to improve quality and address identified problems initially through training, consultation, technical assistance, and case management.
- (4) The emphasis should be on problem prevention both in monitoring and in screening potential providers of service.
- (5) Monitoring should be outcome based and responsive to consumer complaints and based on a clear set of health, quality of care, and safety standards that are easily understandable and have been made available to providers, residents, and other interested parties.
- (6) Prompt and specific enforcement remedies shall also be implemented without delay, pursuant to RCW 74.39A.080 or 70.128.160, or chapter 18.51 or 74.42 RCW, for providers found to have delivered care or failed to deliver care resulting in problems that are serious, recurring, or uncorrected, or that create a hazard that is causing or likely to cause death or serious harm to one or more residents. These enforcement remedies may also include, when appropriate, reasonable conditions on a contract or license. In the selection of remedies, the safety, health, and well-being of residents shall be of paramount importance.
- (7) Background checks of long-term care workers must be conducted as provided in RCW 74.39A.056.

(8) Except as provided in RCW 74.39A.074 and 74.39A.076, individual providers and home care agency providers must satisfactorily complete department-approved orientation, basic training, and continuing education within the time period specified by the department in rule. The department shall adopt rules for the implementation of this section. The department shall deny payment to an individual provider or a home care provider who does not complete the training requirements within the time limit specified by the department by rule.

(9) Under existing funds the department shall establish internally a quality improvement standards committee to monitor the development of standards and to suggest modifications.

Credits

[2012 c 164 § 701, eff. March 29, 2012; 2012 c 1 § 106 (Initiative Measure No. 1163, approved November 8, 2011), eff. Jan. 7, 2012.]

HISTORICAL AND STATUTORY NOTES

Reviser's note: The language of this section, as enacted by 2012 c 1 § 106, was identical to RCW 74.39A.050 as amended by 2009 c 580 § 7, which was repealed by 2012 c 1 § 115. This section has since been amended by 2012 c 164 § 701.

Finding--Intent--Rules--Effective date--2012 c 164: See notes following RCW 18.88B.010.

Intent--Findings--Performance audits--Spending limits--Contingent effective dates--Application--Construction--Effective date--Short title--2012 c 1 (Initiative Measure No. 1163): See notes following RCW 74.39A.056.

2012 Legislation

Laws 2012, ch. 164, § 701, rewrote the section, which formerly read:

“The department's system of quality improvement for long-term care services shall use the following principles, consistent with applicable federal laws and regulations:

“(1) The system shall be client-centered and promote privacy, independence, dignity, choice, and a home or home-like environment for consumers consistent with chapter 392, Laws of 1997.

“(2) The goal of the system is continuous quality improvement with the focus on consumer satisfaction and outcomes for consumers. This includes that when conducting licensing or contract inspections, the department shall interview an appropriate percentage of residents, family members, resident case managers, and advocates in addition to interviewing providers and staff.

“(3) Providers should be supported in their efforts to improve quality and address identified problems initially through training, consultation, technical assistance, and case management.

“(4) The emphasis should be on problem prevention both in monitoring and in screening potential providers of service.

“(5) Monitoring should be outcome based and responsive to consumer complaints and based on a clear set of health, quality of care, and safety standards that are easily understandable and have been made available to providers, residents, and other interested parties.

“(6) Prompt and specific enforcement remedies shall also be implemented without delay, pursuant to RCW 74.39A.080, RCW 70.128.160, chapter 18.51 RCW, or chapter 74.42 RCW, for providers found to have delivered care or failed to deliver care

resulting in problems that are serious, recurring, or uncorrected, or that create a hazard that is causing or likely to cause death or serious harm to one or more residents. These enforcement remedies may also include, when appropriate, reasonable conditions on a contract or license. In the selection of remedies, the safety, health, and well-being of residents shall be of paramount importance.

“(7) All long-term care workers shall be screened through background checks in a uniform and timely manner to ensure that they do not have a criminal history that would disqualify them from working with vulnerable persons. Long-term care workers who are hired after January 1, 2012, are subject to background checks under RCW 74.39A.055. This information will be shared with the department of health in accordance with RCW 74.39A.055 to advance the purposes of chapter 2, Laws of 2009.

“(8) No provider, or its staff, or long-term care worker, or prospective provider or long-term care worker, with a stipulated finding of fact, conclusion of law, an agreed order, or finding of fact, conclusion of law, or final order issued by a disciplining authority, a court of law, or entered into a state registry finding him or her guilty of abuse, neglect, exploitation, or abandonment of a minor or a vulnerable adult as defined in chapter 74.34 RCW shall be employed in the care of and have unsupervised access to vulnerable adults.

“(9) The department shall establish, by rule, a state registry which contains identifying information about long-term care workers identified under this chapter who have substantiated findings of abuse, neglect, financial exploitation, or abandonment of a vulnerable adult as defined in RCW 74.34.020. The rule must include disclosure, disposition of findings, notification, findings of fact, appeal rights, and fair hearing requirements. The department shall disclose, upon request, substantiated findings of abuse, neglect, financial exploitation, or abandonment to any person so requesting this information. This information will also be shared with the department of health to advance the purposes of chapter 2, Laws of 2009.

“(10) Until December 31, 2010, individual providers and home care agency providers must satisfactorily complete department-approved orientation, basic training, and continuing education within the time period specified by the department in rule. The department shall adopt rules by March 1, 2002, for the implementation of this section. The department shall deny payment to an individual provider or a home care provider who does not complete the training requirements within the time limit specified by the department by rule.

“(11) Until December 31, 2010, in an effort to improve access to training and education and reduce costs, especially for rural communities, the coordinated system of long-term care training and education must include the use of innovative types of learning strategies such as internet resources, videotapes, and distance learning using satellite technology coordinated through community colleges or other entities, as defined by the department.

“(12) The department shall create an approval system by March 1, 2002, for those seeking to conduct department-approved training.

“(13) The department shall establish, by rule, background checks and other quality assurance requirements for long-term care workers who provide in-home services funded by medicaid personal care as described in RCW 74.09.520, community options program entry system waiver services as described in RCW 74.39A.030, or chore services as described in RCW 74.39A.110 that are equivalent to requirements for individual providers. Long-term care workers who are hired after January 1, 2012, are subject to background checks under RCW 74.39A.055.

“(14) Under existing funds the department shall establish internally a quality improvement standards committee to monitor the development of standards and to suggest modifications.

“(15) Within existing funds, the department shall design, develop, and implement a long-term care training program that is flexible, relevant, and qualifies towards the requirements for a nursing assistant certificate as established under chapter 18.88A RCW. This subsection does not require completion of the nursing assistant certificate training program by providers or their

74.39A.051. Quality improvement principles, West's RCWA 74.39A.051

staff. The long-term care teaching curriculum must consist of a fundamental module, or modules, and a range of other available relevant training modules that provide the caregiver with appropriate options that assist in meeting the resident's care needs. Some of the training modules may include, but are not limited to, specific training on the special care needs of persons with developmental disabilities, dementia, mental illness, and the care needs of the elderly. No less than one training module must be dedicated to workplace violence prevention. The nursing care quality assurance commission shall work together with the department to develop the curriculum modules. The nursing care quality assurance commission shall direct the nursing assistant training programs to accept some or all of the skills and competencies from the curriculum modules towards meeting the requirements for a nursing assistant certificate as defined in chapter 18.88A RCW. A process may be developed to test persons completing modules from a caregiver's class to verify that they have the transferable skills and competencies for entry into a nursing assistant training program. The department may review whether facilities can develop their own related long-term care training programs. The department may develop a review process for determining what previous experience and training may be used to waive some or all of the mandatory training. The department of social and health services and the nursing care quality assurance commission shall work together to develop an implementation plan by December 12, 1998."

West's RCWA 74.39A.051, WA ST 74.39A.051

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West's RCWA 74.39A.095

74.39A.095. Case management services--Agency on aging oversight--
Plan of care--Termination of contract--Rejection of individual provider

Currentness

(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;
 - (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 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.

Credits

[2012 c 164 § 507, eff. March 29, 2012. Prior: 2011 1st sp.s. c 31 § 14, eff. Aug. 24, 2011; 2011 1st sp.s. c 21 § 5, eff. July 1, 2011; 2009 c 580 § 8, eff. July 26, 2009; 2004 c 141 § 1, eff. June 10, 2004; 2002 c 3 § 11 (Initiative Measure No. 775, approved November 6, 2001); 2000 c 87 § 5; 1999 c 175 § 3.]

HISTORICAL AND STATUTORY NOTES

Finding--Intent--Rules--Effective date--2012 c 164: See notes following RCW 18.88B.010.

Effective date--2011 1st sp.s. c 21: See note following RCW 72.23.025.

Findings--Captions not law--Severability--2002 c 3 (Initiative Measure No. 775): See RCW 74.39A.220 and notes following.

Findings--1999 c 175: See note following RCW 74.39A.090.

Laws 2000, ch. 87, § 5, in subsec. (7), in the first sentence, inserted "department or", and added the fourth sentence; and, in subsec. (8), in the first sentence, inserted "department or" and twice inserted "or other person", and added the last sentence.

2002 Legislation

Laws 2002, ch. 3, § 11 rewrote subsec. (1); and, in subsec. (3), inserted the next-to-last sentence.

2004 Legislation

Laws 2004, ch. 141, § 1, in subsec. (1)(c), substituted "verify" for "ensure"; and, in subsec. (2)(g), substituted "by the individual provider that he or she" for "that the individual provider".

2009 Legislation

Laws 2009, ch. 580, § 8, in subsec. (1)(a), following "authority" deleted "established under chapter 3, Laws of 2002"; in subsec. (1)(d), substituted "Reassessing and reauthorizing" for "Reassessment and reauthorization of"; and in subsec. (1)(f), added the last sentence.

2011 Legislation

Laws 2011, 1st Sp.Sess. ch. 21, § 5, deleted provisions pertaining to "the authority".

Laws 2011, 1st Sp.Sess. ch. 31, § 14, in subsec. (1)(f), substituted "2014" for "2012".

2012 Legislation

Laws 2012, ch. 164, § 507, in subsec. (1)(f), substituted "January 7, 2012" for "January 1, 2014" and "74.39A.056" for "74.39A.055".

LIBRARY REFERENCES

Social Security and Public Welfare ~~§~~176.1, 178, 179.1, 181, 241.66, 241.91, 241.110.
States ~~§~~106.
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C.J.S. Social Security and Public Welfare §§ 96, 98, 102, 104 to 106, 134, 136 to 138.
C.J.S. States § 170.

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Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53369-3
Appellate Court Case Title: Kathy A Turner, et al, Appellants v WA State Dept DSHS, etal, Respondents
Superior Court Case Number: 15-2-01939-0

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