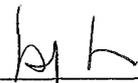


No. 91536-9


RECEIVED BY E-MAIL

SUPREME COURT
OF THE STATE OF WASHINGTON

ESTHER KIM, as Personal Representative of the Estate of HO IM BAE
on behalf of Mi-Soon Kim, Jae C. Kim, Chang Soon Kim, Jae Hong Kim,
and Kyoung Soon Kim, surviving family members, and the ESTATE OF
HO IM BAE,

Petitioner,

v.

LAKESIDE ADULT FAMILY HOME, GRETCHEN DHALI WAL
INCORPORATION, (G.D. INC.) a Washington Corporation d/b/a
LAKESIDE AFH, GRETCHEN DHALI WAL, individually, ALPHA
NURSING AND SERVICES INCORPORATED, a Washington
Corporation, CHRISTINE THOMAS, individually, and "JANE AND
JOHN DOES" I-V, individually,

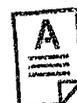
Respondents.

SUPPLEMENTAL BRIEF OF PETITIONER

Scott F. Lundberg, WSBA #16178
Alex French, WSBA #40168
Graham Lundberg Peschel, P.S., Inc.
2601 Fourth Ave., Floor 6
Seattle, WA 98121
(206) 448-1992

Sidney Tribe, WSBA #33160
Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick/Tribe
2775 Harbor Ave. SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Attorneys for Esther Kim and the Estate of Ho Im Bae



ORIGINAL

FILED AS
ATTACHMENT TO EMAIL

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	iii-iv
A. INTRODUCTION	1
B. STATEMENT OF THE CASE.....	2
C. ARGUMENT	2
(1) <u>Mandatory Reporters of Abuse and Neglect Under the AVAA Have a Duty to Vulnerable Adults</u>	2
(a) <u>The Lower Courts Here Conflated Duty With Breach, Resulting in Improper Summary Judgment Resolution of a Fact Question</u>	3
(b) <u>In the Alternative, Duty Can Be Fact Question for the Jury, Particularly When the Duty Is Predicated Upon a “Reasonable” Belief or Suspicion</u>	8
(c) <u>Allowing Caregivers to Ignore or Downplay Signs of Abuse Frustrates the Public Policy Expressed in the AVAA of Protecting Vulnerable People</u>	10
(2) <u>Service on Thomas Was Effectuated in Accordance with the Hague Convention and the Statute of Limitations Was Tolloed While Kim Pursued Thomas in Norway Because Another Defendant Was Served</u>	11
(a) <u>The Hague Convention Issue Is Moot, Thomas Was Served through the Norwegian Central Authority</u>	12

(b) Tolling of the Statute of Limitations Was Proper Under *Sidis* Because One Defendant Was Timely Served and Kim Took All Necessary Steps to Locate and Serve Thomas in Norway, Despite Obstruction by Her and Her Counsel.....13

(c) Personal Service Should Not Be Held to Violate the Hague Convention.....17

D. CONCLUSION20

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

Afoa v. Port of Seattle, 160 Wn. App. 234,
247 P.3d 482 (2011) *aff'd*, 176 Wn.2d 460,
296 P.3d 800 (2013).....8, 9

Beal for Martinez v. City of Seattle, 134 Wn.2d 769,
954 P.2d 237 (1998).....9

Bosteder v. City of Renton, 155 Wn.2d 18,
117 P.3d 316 (2005) *superseded by statute on other
grounds as stated in Wright v. Terrell*,
162 Wn.2d 192, 170 P.3d 570 (2007).....15, 16

Hartley v. State, 103 Wn.2d 768, 698 P.2d 77 (1985).....5

In re Knight, 178 Wn. App. 929, 317 P.3d 1068 (2014)10

Martin v. Dematic, 182 Wn.2d 281, 340 P.3d 834 (2014)15

Martini ex rel. Dussault v. State, 121 Wn. App. 150,
89 P.3d 250 (2004), *review denied*,
153 Wn.2d 1023 (2005)5

McKown v. Simon Prop. Group, Inc., 182 Wn.2d 752,
344 P.3d 661 (2015).....3

Munich v. Skagit Emergency Commc'n Ctr., 175 Wn.2d 871,
288 P.3d 328 (2012).....3

Osborn v. Mason Cnty., 157 Wn.2d 18, 134 P.3d 197 (2006).....4

Powers v. W.B. Mobile Servs., Inc., 182 Wn.2d 159,
339 P.3d 173 (2014).....14

Sidis v. Brodie/Dohrmann, Inc., 117 Wn.2d 325,
815 P.2d 781 (1991)..... 13-14, 15, 16

Sjogren v. Props. of the Pac. N.W., LLC, 118 Wn. App. 144,
75 P.3d 592 (2003).....9

Snyder v. Med. Serv. Corp. of E. Wash., 145 Wn.2d 233,
35 P.3d 1158 (2001).....7

Federal Cases

Burda Media, Inc. v. Viertel, 417 F.3d 292 (2d Cir. 2005).....12

<i>Garg v. Winterthur</i> , 525 F. Supp. 2d 315 (E.D.N.Y. 2007).....	12
<i>In re S. African Apartheid Litig.</i> , 643 F. Supp. 2d 423 (S.D.N.Y. 2009).....	13
<i>Volkswagenwerk Aktiengesellschaft v. Schlunk</i> , 486 U.S. 694, 708 S. Ct. 2104, 100 L.Ed.2d 722 (1988).....	11

Other Cases

<i>Marshall v. Burger King Corp.</i> , 222 Ill. 2d 422, 856 N.E.2d 1048 (2006).....	6
--	---

Statutes

RCW 4.28.100	13
RCW 74.34.005(1).....	2, 10
RCW 74.34.035(1).....	3, 9, 10
RCW 74.34.035(3).....	3, 10

Other Authorities

Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters, 20 U.S. 361, T.I.A.S. 6633, 658 U.N.T.S. 163	11, 12, 13, 20
1 D. Dobbs, <i>Torts</i> § 226 (2001)	4
H. Perlman, <i>The Restatement Process</i> , 10 Kan. J.L. & Pub. Pol’y 2 (2000)	4
http://www.domstol.no/en/National-Courts-Administration /Publications/.....	19
J. Goldberg, <i>Introduction to the Restatement (Third) of Torts: General Principles and the John W. Wade Conference</i> , 54 Vand. L. Rev. 639 (2001).....	4
J. Goldberg & B. Zipursky, <i>The Restatement (Third) and the Place of Duty in Negligence Law</i> , 54 Vand. L. Rev. 657 (2001)	4
Norwegian Courts of Justice Act ch. 9 §§ 165, 167 (2005).....	19, 20
W. Powers, <i>Judge and Jury in the Texas Supreme Court</i> , 75 Tex. L. Rev. 1699 (1997).....	4

A. INTRODUCTION

Those who attend to vulnerable adults every day are the first line of defense against the abuse, exploitation, assault, and neglect that can result from such adults' helpless state. The Legislature has tasked caregivers employed by agencies such as Alpha Nursing and Services, Inc. ("Alpha") with "immediately" reporting abuse and neglect where there is reasonable cause to believe such abuse has occurred.

When two such caregivers, Marion Binondo and Christine Thomas, failed to immediately report evidence of Fanny Irwati's abuse, neglect, and assault of Ho Im Bae, a vulnerable adult, Irwati killed Bae with an overdose of unprescribed morphine.

This Court should hold that mandatory reporters have a duty of reasonable care towards vulnerable adults with which they come in contact. It should hold that determining reasonableness is a matter for the jury.

Despite her decision to depart the jurisdiction after 26 years of residence and conceal her Norway address from the personal representative of Bae's estate, service was properly effectuated on Thomas in the form of personal service and service under a foreign treaty that Thomas now invokes as a shield. Service was proper, and Thomas has no grounds to dismiss the action against her.

B. STATEMENT OF THE CASE

The Court of Appeals' opinion contains only a partial recitation of the facts of this case, mostly those facts that favor Alpha and Thomas. Op. at 2-4.

Given space constraints and in an effort to avoid repetition, Kim will not reproduce her statements of the case in briefing below. However, Kim respectfully requests that this Court review the statements of the case from Kim's opening brief and reply brief below, to understand the full factual context of this case. It is of particular importance where, as here, this case was dismissed on summary judgment.

C. ARGUMENT

(1) Mandatory Reporters of Abuse and Neglect Under the AVAA Have a Duty to Vulnerable Adults

The Legislature enacted the AVAA based upon its finding that "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." RCW 74.34.005(1).

The Legislature has identified professional caregivers of vulnerable adults as mandatory reporters of abuse and neglect: "When there is reasonable cause to believe that abandonment, abuse, financial

exploitation, or neglect of a vulnerable adult has occurred, mandated reporters shall *immediately* report to [DSHS].” RCW 74.34.035(1) (emphasis added). When the mandatory reporter has reasonable cause to believe harm to the vulnerable person is imminent, they must also report that fact “*immediately*” to a law enforcement agency. RCW 74.34.035(3).

It is undisputed that at the time Bae was killed, Thomas and Binondo were both mandatory reporters of abuse or neglect under the AVAA. CP 885-86; Op. at 9.

(a) The Lower Courts Here Conflated Duty With Breach, Resulting in Improper Summary Judgment Resolution of a Fact Question

The seemingly straightforward language of the mandatory reporter statute created somewhat of a conundrum in legal analysis below. The Court of Appeals’ opinion states at different pages that Thomas and Binondo had *no* duty as a matter of law, op. at 2, and that they *had* a duty, but it was not breached, op. at 10, 12, 15.

Typically, whether or not a duty exists is a question of law for the court, not a question of fact for the jury. *McKown v. Simon Prop. Group, Inc.*, 182 Wn.2d 752, 762, 344 P.3d 661 (2015). This Court has been careful to delineate between the two inquiries, repeatedly reaffirming that the duty question is for courts, not juries. *Id.*; *Munich v. Skagit Emergency Comm’n Ctr.*, 175 Wn.2d 871, 894, 288 P.3d 328 (2012) (Chambers, J.,

concurring joined by four justices); *Osborn v. Mason Cnty.*, 157 Wn.2d 18, 22, 134 P.3d 197, 200 (2006).

Courts and scholars have long struggled to draw clean analytical distinctions between duty and breach in analyzing negligence claims. *See, e.g.*, W. Powers, *Judge and Jury in the Texas Supreme Court*, 75 Tex. L. Rev. 1699, 1701–04 (1997); J. Goldberg, *Introduction to the Restatement (Third) of Torts: General Principles and the John W. Wade Conference*, 54 Vand. L. Rev. 639, 639–40 (2001); H. Perlman, *The Restatement Process*, 10 Kan. J.L. & Pub. Pol’y 2, 2–7 (2000)). Confusion over duty stems from courts’ tendency to attribute a variety of different meanings to the term. *See, e.g.*, 1 D. Dobbs, *Torts* § 226, at 577 (2001). Dobbs points out that in negligence cases, the duty question often turns on whether the court describes a general duty to a person, or describes a specific duty to engage in or refrain from some certain act:

[L]awyers and judges use the term “duty” in a variety of different ways, not always with the same meaning. Sometimes they use duty to refer to a general standard or obligation. At other times they use duty as a conclusion about whether the defendant’s particular act or omission should be actionable, irrespective of any general standard....

Id. *See also*, J. Goldberg & B. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 Vand. L. Rev. 657, 698–723 (2001) (distinguishing between four different “senses” in which duty is used in

negligence law, including duty as obligation, duty as nexus between breach and duty, duty as breach as a matter of law, and duty as exemption from the operation of negligence law).

This Court has identified that the “historical imprecision in terminology” has led to analysis that “combines aspects of causation, intervening events, duty, foreseeability, reliance, remoteness, and privity.” *Hartley v. State*, 103 Wn.2d 768, 780, 698 P.2d 77 (1985).

This “imprecision” can occasionally lead to faulty legal analysis. An illustrative example is recited by the Court of Appeals in *Martini ex rel. Dussault v. State*, 121 Wn. App. 150, 162, 89 P.3d 250, 256 (2004), *review denied*, 153 Wn.2d 1023 (2005). In *Martini*, a driver was injured in a rear-end collision with a truck that had slowed near a construction project but failed to turn on flashing hazard lights. *Martini*, 121 Wn. App. at 158. The injured driver sued the trucking company, and presented evidence that commercial vehicle guidelines suggest turning on flashing lights in such a situation. The trial court dismissed the driver’s claim on summary judgment, stating that “there is no duty for a trucker in a situation such as this to absolutely have their flashers on.” *Id.* at 159. The Court of Appeals reversed, pointing out that the question is not whether there was a duty to use flashers, but whether there was a “duty of ordinary care to other drivers.” *Id.* at 160.

The core analytical flaw identified by the Court of Appeals in *Martini* is defining “duty” as a duty to take a *particular action*, rather than as a general duty of *care* to the plaintiff. As the Illinois Supreme Court has posited: “The touchstone of...duty analysis is to ask whether a plaintiff and a defendant stood in such a relationship to one another that the law imposed upon the defendant an obligation of reasonable conduct for the benefit of the plaintiff.” *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 436, 856 N.E.2d 1048, 1057 (2006).

The Court of Appeals here fell prey to the same analytical flaw that the trial court in *Martini* committed: it found that Thomas and Binondo had no duty to take a particular action: reporting suspected abuse and neglect. Op. at 2. It did not determine that Thomas and Binondo had not duty of reasonable *care* to Bae, in fact it concluded that they were mandatory reporters under the AVAA. Op at 9. But the Court concluded that they had no duty “to call” anyone. Op. at 2.¹

However, the question of whether Binondo or Thomas should have called someone is a factual question of breach, not duty. The “duty” is a duty of reasonable care. The “breach” is failing to “immediately” report

¹ Even the Court of Appeals seemed to struggle with the duty/breach conflation, stating later that it had determined “no duty *was breached*.” Op. at 15 n.10.

what they knew, if a reasonable person would believe or suspect abuse or neglect.

In analyzing breach as if it were duty, the Court of Appeals also resolved as a matter of law factual disputes and credibility determinations that must be reserved for the trier of fact. For example, the Court of Appeals concluded that as a matter of law Thomas did not have a duty because Thomas considered Salzbrun to be “less than reliable” when she reported that Irwati was giving Bae unprescribed morphine. Op. at 15. The Court concluded that, as matter of law, Thomas did not receive a “credible” oral report alleging abuse because *Thomas stated* that she did not find Salzbrun reliable. In fact, the Court of Appeals faulted Kim for failing to “counteract this evidence of unreliability.” Op. at 14.

Credibility determinations have no place in duty analysis. A refrain – familiar in Washington negligence jurisprudence – says determining duty is a question of law that involves “mixed considerations of logic, common sense, justice, policy, and precedent.” *Snyder v. Med. Serv. Corp. of E. Wash.*, 145 Wn.2d 233, 243, 35 P.3d 1158 (2001) (internal quotations omitted).

Seen in the proper analytical light, there is no question that Thomas and Binondo owed a duty of care to Bae. There is a public policy, expressed in the AVAA, to prevent the abuse and neglect of

vulnerable adults. As mandatory reporters of abuse and neglect who worked in a facility where Bae resided, they had a duty of ordinary, reasonable care to prevent harm from coming to her. Whether they *breached* that duty by failing to report abuse or neglect is a question for the jury.

There is disputed evidence that they had reasonable cause to believe neglect or abuse were occurring and failed to “immediately” report it to DSHS. There is also reason to suspect that Bae had been the victim of an assault with morphine and, that Thomas failed to “immediately report” her suspicions it to DSHS and law enforcement. Both the trial court and the Court of Appeals erred in dismissing this case on summary judgment.

(b) In the Alternative, Duty Can Be Fact Question for the Jury, Particularly When the Duty Is Predicated Upon a “Reasonable” Belief or Suspicion

Even if this Court believes that the “duty” here is a duty to report, rather than a duty of care, the rule that duty is also question of law is not absolute. When a defendant only has a duty if a factual predicate first obtains, then disputes over that factual predicate must be resolved. For example, in *Afoa v. Port of Seattle*, 176 Wn.2d 460, 474, 296 P.3d 800 (2013), this Court held that whether a landowner maintained sufficient control of its property such that it had a duty to maintain a safe workplace

was a question of fact. This Court reversed summary judgment and remanded for resolution of the factual dispute of the issue of control. *Id.*

Another context in which disputed factual predicates to duty may exist is public duty doctrine analysis. For example, in this Court's jurisprudence regarding the special relationship exception, litigants sometimes dispute whether the plaintiff relied on particular assurances from the government agency. *See Beal for Martinez v. City of Seattle*, 134 Wn.2d 769, 786, 954 P.2d 237 (1998). Whether those assurances were made, and whether the plaintiff reasonable relied on them, determines whether the agency owes a specific duty to the plaintiff, as opposed to a general public duty (which is not actionable). *Id.*

When the Courts of Appeal have found the existence of a duty is predicated on a disputed factual determination, they have also held summary judgment is inappropriate. *See, e.g., Sjogren v. Props. of the Pac. N.W., LLC*, 118 Wn. App. 144, 148, 75 P.3d 592 (2003). *Afoa v. Port of Seattle*, 160 Wn. App. 234, 238, 247 P.3d 482, 485 (2011) *aff'd*, 176 Wn.2d 460, 296 P.3d 800 (2013).

If duty is a factual question in this case under the language of the AVAA, then the duty upon mandatory reporters to act begins when there is reasonable cause to believe or suspect abuse or neglect. RCW 74.34.035(1). Thus, the *legal* duty to report is predicated upon the *factual*

question of whether a “reasonable belief” exists. This issue can only be resolved by a jury.

(c) Allowing Caregivers to Ignore or Downplay Signs of Abuse Frustrates the Public Policy Expressed in the AVAA of Protecting Vulnerable People

In enacting the AVAA, the Legislature declared a public policy of protecting vulnerable adults. RCW 74.34.005(1); *In re Knight*, 178 Wn. App. 929, 938, 317 P.3d 1068, 1073 (2014). In order to enforce this public policy, the Legislature not only created the mandatory reporting requirement, it inserted an objective “reasonableness” standard into the statute. RCW 74.34.035(1), .035(3). A mandatory reporter may not escape liability by claiming a “good faith” or subjective belief that a vulnerable person was not in danger.

However, the Court of Appeals did just that, dismissing Kim’s claims based largely on the mandatory reporters’ opinion that they should give no credence to Salzbrun’s warnings about abuse, or that Irwati’s dismissive and rough treatment of Bae was no cause for concern. Op. at 15.²

² The Court of Appeals’ opinion gives incredibly short shrift to the body of evidence developed in this case on summary judgment. Op. at 2-4. The Court did not appear to adhere to the standard that the facts must be viewed in the light most favorable to Kim. Kim respectfully urges the Court to review the fact recitations from the briefing below, and not to rely on the Court of Appeals’ truncated view.

The subjective reasonableness rule that the Court of Appeals frustrates the public policy of protecting vulnerable adults. It allows mandatory reporters to wash their hands of suspected abuse by making the reporters themselves the sole arbiter of whether there is “reasonable” cause to believe abuse is occurring. The Court of Appeals allowed Thomas’ and Binondo’s opinions about Irwati’s actions to justify their own inactions.

It would be all too easy for mandatory reporters – who are in the best position to witness and report abuse and neglect – to close their eyes to questionable actions and then plead ignorance when the worst happens.

(2) Service on Thomas Was Effectuated in Accordance with the Hague Convention and the Statute of Limitations Was Tolloed While Kim Pursued Thomas in Norway Because Another Defendant Was Served

Thomas argued below that personal service at her place of residence in Norway was prohibited by the Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters, 20 U.S. 361, T.I.A.S. 6633, 658 U.N.T.S. 163, entered into force, February 10, 1969 (the “Hague Convention”).³ She claimed that allowing

³ The Hague Convention is a multilateral treaty which creates a uniform method for service of documents between nationals of different countries. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 702-03, 708 S. Ct. 2104, 100 L.Ed.2d 722 (1988).

personal service would thwart the purposes of the Hague Convention by allowing parties to circumvent Norway's designated Central Authority.

The Court of Appeals determined that personal service on Thomas in Norway was proper under the Hague Convention because personal service is an acceptable method of serving defendants in that country.

(a) The Hague Convention Issue Is Moot, Thomas Was Served through the Norwegian Central Authority

As a threshold matter, the Hague Convention issue is moot because Kim also served Thomas through the Norwegian Central Authority. CP 558, 631-33. After Thomas claimed that personal service was ineffective under the Hague Convention, Kim undertook to repeat service on Thomas via the Norwegian Central Authority, as she requested. *Id.*

Courts examining Hague Convention service stress “actual notice, not strict formalism.” *Garg v. Winterthur*, 525 F. Supp. 2d 315, 322 (E.D.N.Y. 2007). Although this action was dismissed in the trial court before the Norwegian Central Authority returned a formal service certificate, a good faith attempt to comply with the Hague Convention, combined with the undisputed fact that Thomas had notice of the action, is sufficient notice that no injustice results. *Burda Media, Inc. v. Viertel*, 417 F.3d 292, 301 (2d Cir. 2005); *Garg*, 525 F. Supp. 2d at 322.

When a defendant undertakes to obstruct service, a lack of strict compliance with the Hague Convention should not result in dismissal of the action with prejudice. *In re S. African Apartheid Litig.*, 643 F. Supp. 2d 423, 437 (S.D.N.Y. 2009). Having fled to Norway, Thomas cannot now be heard to fault Kim for the arduous and imperfect manner of service as grounds for dismissal from this suit.⁴

Whether or not this Court believes that the Court of Appeals misapplied the Hague Convention, the issue is not material to the outcome of this case. Thomas was properly served, and her motion to dismiss was correctly denied.

(b) Tolling of the Statute of Limitations Was Proper Under *Sidis* Because One Defendant Was Timely Served and Kim Took All Necessary Steps to Locate and Serve Thomas in Norway, Despite Obstruction by Her and Her Counsel

Regardless of whether the personal service or the Norwegian Central Authority Service is the benchmark, the Court of Appeals correctly held that the statute of limitations was tolled as to Thomas because one defendant was timely served. Op. at 5.

Thomas has maintained that even if service was properly effectuated, it was untimely under *Sidis v. Brodie/Dohrmann, Inc.*, 117

⁴ In fact, had Thomas' deception not been uncovered, Kim would have been within her rights to serve Thomas by publication under Washington law, bypassing the Hague Convention entirely. RCW 4.28.100.

Wn.2d 325, 815 P.2d 781 (1991). Answer at 15-18. Thomas claimed that the Court of Appeals here held service on one defendant tolls the statute of limitations “indefinitely.” *Id.* Thomas avers that *Sidis* requires the Court of Appeals to consider whether Kim waited too long before effectuating service on Thomas. In essence arguing that *Sidis* imposed a court-created “due diligence” or “inexcusable neglect” test for plaintiffs attempting to serve defendants. *Id.*

Thomas misreads *Sidis*. *Sidis* holds that service on one defendant tolls the statute of limitations as to other defendants, as long as plaintiffs “proceed with *their cases* in a timely manner as provided by the court rules.” *Sidis*, 117 Wn.2d at 330 (emphasis added). It does not hold that plaintiffs must proceed with *service* on some particular timeframe, nor does it impose a court-created “due diligence” test on RCW 4.16.170’s tolling provision.⁵ This Court in *Sidis* noted that if a plaintiff is proceeding with the case in a timely manner, that plaintiff will have an incentive to implead all defendants to avoid losing all right to proceed against them, for example if the other defendants are dismissed. *Id.*

⁵ In its recent follow-on to *Sidis*, *Powers v. W.B. Mobile Servs., Inc.*, 182 Wn.2d 159, 164, 339 P.3d 173, 176 (2014), this Court did note that in a case with a “John Doe” defendant, the plaintiff must make diligent efforts to identify that defendant given the available information. However, *Powers* does not alter the *Sidis* rule in cases such as this – where an identified, named defendant fled the jurisdiction before service – that the statute is tolled as long as the plaintiff proceeds with the case. In fact this Court in *Powers* also negated any need to engage in CR 15 “inexcusable neglect” analysis by stating that CR 15 no longer applies in “John Doe” service situations. *Id.* at 165 n.3.

In her answer to Kim's petition for review, Thomas references *Martin v. Dematic*, 182 Wn.2d 281, 288, 340 P.3d 834 (2014). Answer to petition for review at 18 n.6. It is apparent from Thomas' reference to *Martin* that she incorrectly believes diligence or neglect is at issue here. Thomas claims that *Martin* raises a "similar issue." *Id.* *Martin* is a CR 15 relation-back case. *Martin*, 182 Wn.2d at 288. This Court has held – unlike in RCW 4.16.170 cases – that inexcusable neglect is a factor in deciding whether relation back permits a plaintiff to add a new defendant after the statute of limitations has run.⁶

The *Sidis* rule has been generously applied to allow plaintiffs time to complete service on all other defendants, provided there is no prejudice to those defendants. *Bosteder v. City of Renton*, 155 Wn.2d 18, 49-50, 117 P.3d 316 (2005) *superseded by statute on other grounds as stated in Wright v. Terrell*, 162 Wn.2d 192, 195, 170 P.3d 570, 571 (2007). In *Bosteder*, the Court applied the *Sidis* rule and denied defendant's motion for summary judgment dismissal for lack of service even where 11 months elapsed between the date of filing and the date of service on the last defendant. *Bosteder*, 155 Wn.2d at 49. Unlike this case where the defendant lives in a distant foreign country, the defendant in *Bosteder* lived in state. *Id.* Also unlike this case, in *Bosteder* the plaintiff offered

⁶ Incidentally, this Court in *Martin* concluded that the neglect was excusable. *Id.* at 293.

no explanation for the long delay. *Id.* Nonetheless, because the defendant failed to show that plaintiff had violated a court rule or caused any prejudice or harm, the service was deemed timely and the plaintiff was allowed to proceed. *Id.*

Here, there was no dispute that Kim timely proceeded with her *case* as required by *Sidis*. The Court of Appeals was not required to apply a non-existent “due diligence” or “inexcusable neglect” test to decide whether Kim’s extensive efforts to serve Thomas in Norway were adequate before concluding the statute of limitations was tolled.

Even assuming there is a diligence requirement implied in *Sidis*, Kim met it. After it became clear that there would be litigation over Kim’s death, Thomas fled the country after 26 years of residence. CP 790. Although she was secretly in communication with her lawyers, who were also Alpha’s lawyers, that fact was hidden from Kim in discovery, and Kim was told to direct any communications with Thomas to Alpha’s lawyers at Cozen O’Connor. CP 702. When Thomas’ lawyers mistakenly included a page from a letter that indicated Thomas was “blind copied” on it, the deception was uncovered. CP 715, 717. After Thomas’ lawyers were forced to reveal her Norway address, Kim undertook to *personally serve* Thomas in Norway. CP 722-23, 794. When Thomas objected, Kim

also undertook to serve Thomas via the Hague Convention's Norwegian Central Authority. CP 558, 631-33.

Kim was required to proceed with her case and she did. Whether or not she was required to use due diligence to affect service, she did. The statute of limitations was tolled, and Thomas was properly served.

(c) Personal Service Should Not Be Held to Violate the Hague Convention

Even assuming Thomas can still claim a right to dismissal for failure to comply with the Hague Convention, the Court of Appeals analyzed the issue correctly. "One of the two stated objectives of the Hague Convention is to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time." *Id.* "The Convention "was intended to provide a simpler way to serve process abroad, to assure that defendants sued in foreign jurisdictions would receive *actual and timely notice of suit*, and to facilitate proof of service abroad." *Id.* at 698 (emphasis added).

The permissible methods for serving documents abroad can be broken down into three categories. First, every signatory nation must designate a "Central Authority" through which foreign litigants can *always* serve process. Hague Convention art. 2. Second, the Convention

provides a number of other service methods (for example mail, consular or diplomatic) which litigants may employ unless the receiving nation specifically objects to their use. *Id.* at 8-10. Third, the Convention authorizes litigants to use any other method of service which the receiving nation has expressly permitted, as evidenced by prior international agreements or as reflected in the internal law of the foreign nation. *Id.* at 11, 19, 24, 25.

Contrary to Thomas's suggestion, the Hague Convention does not prohibit service in a manner deemed acceptable under the internal law of the nation where service is sought:

To the extent that the internal law of a contracting State permits methods of transmission, other than those provided for in the preceding articles, of documents coming from abroad, for service within its territory, the present Convention shall not affect such provisions.

Id. at 19.

Norwegian internal law permits the service of civil legal documents by a process server at the subject's place of residence:

“§ 165. Service of process by other than postal means pursuant to § 163⁷ a may always be performed by a process server. ...Service of process by a process server shall to the greatest possible extent take place in person, preferably at the recipient's place of residence or regular workplace.

⁷ § 163 refers to service of certain public documents in types of cases brought in Norwegian court and not at issue here.

Where he/she is personally served, the service is valid regardless of where the encounter takes place.

Norwegian Courts of Justice Act ch. 9 §§ 165, 167 (2005).⁸

Thomas has suggested that the Norwegian Courts of Justice Act cannot be applied under Article 19 of the Hague Convention. Answer at 19-20. She admitted that Article 19 of the Hague Convention permits service in a manner required by the destination country, but claims that the destination country's law must specifically state that it applies to documents coming from abroad. *Id.*

Article 19 of the Hague Convention does not say that the destination country's service requirements must explicitly state that they apply to documents coming from abroad. It simply says that if the destination country permits a method that applies to documents from abroad, that method may be used.

Chapter 9 of the Norwegian Courts of Justice Act does not preclude service of documents from abroad by personal service. It states: "Service of process and notifications, *issued in connection with legal proceedings*, shall be performed in accordance with the rules contained in this chapter, unless otherwise determined by law or indicated by specific

⁸ The text of this Act was taken from an unofficial translation published by the Norwegian government, the link to which can be located online at <http://www.domstol.no/en/National-Courts-Administration/Publications/>.

circumstances.” Norwegian Courts of Justice Act ch. 9 §§ 165, 167 (2005).

Thomas was served personally at her place of residence by a process server in accordance with Norwegian law. CP 793-95. She received service voluntarily and signed an acceptance of service. CP 624-25. She was also served in accordance with the Hague Convention, through Norway’s Central Authority, despite the Court of Appeals’ failure to note this fact, so the issue is moot.⁹

D. CONCLUSION

This Court should clarify that duty is a legal issue, and that any factual issues, whether they go to breach or are a predicate to duty, must be decided by factfinders and not courts as a matter of law.

This Court should also determine that service was proper in this case, particularly given Thomas’ evasion and Kim’s tremendous efforts to locate and serve Thomas in a distant foreign country.

⁹ Thomas and amicus have also argued that because the documents here were not translated into Norwegian future plaintiffs will point to the Court of Appeals opinion and argue that they do not have to comply with other countries’ translation requirements. Thomas lived, went to high school and college, and worked in the United States for 26 years, and speaks fluent English. CP 166-89. Fears about this case impacting the Hague Convention’s document translation provisions are unfounded. Document translation was not an issue in this case.

The ruling of the trial court and the Court of Appeals dismissing this case on summary judgment should be reversed, and this matter should be remanded for trial.

DATED this 2^d day of October, 2015.

Respectfully submitted,



Sidney Tribe, WSBA #33160
Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick/Tribe
2775 Harbor Ave. SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Scott F. Lundberg, WSBA #16178
Alex French, WSBA #40168
Graham Lundberg Peschel, P.S., Inc.
2601 Fourth Ave., Floor 6
Seattle, WA 98121
(206) 448-1992

Attorneys for Esther Kim and
the Estate of Ho Im Bae

DECLARATION OF SERVICE

On said day below, I emailed a courtesy copy and deposited in the U.S. Mail for service a true and accurate copy of the Supplemental Brief of Petitioner in Supreme Court Cause No. 91536-9 to the following parties:

Scott F. Lundberg
Alex French
Graham Lundberg Peschel, P.S., Inc.
2601 Fourth Ave., Floor 6
Seattle, WA 98121

William F. Knowles
Robert L. Bowman
Cozen O'Connor
999 3rd Avenue, Suite 1900
Seattle, WA 98104

Curt H. Feig
Nicoll Black & Feig PLLC
1325 Fourth Ave., Suite 1650
Seattle, WA 98101

Aaron Lukken
Legal Services
8014 State Line Road, Suite 110
Leawood, KS 66208
*Sent by U.S. mail only

Original efiled with :
Washington Supreme Court
Clerk's Office
415 12th Street W
Olympia, WA 98504-0929

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

DATED: October 2nd, 2015, at Seattle, Washington.



Kelley Carroll, Legal Assistant
Talmadge/Fitzpatrick/Tribe

OFFICE RECEPTIONIST, CLERK

To: Roya Kolahi
Cc: sflundberg@glpattorneys.com; afrench@glpattorneys.com; cwilliams@glpattorneys.com; cfeig@nicollblack.com; wknowles@cozen.com; rbowman@cozen.com; Phil Talmadge; Sidney Tribe; Matt Albers
Subject: RE: Case Cause Number: 91536-9 Esther Kim, et al. v. Lakeside Adult Family Home, et al.

Received 10-2-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Roya Kolahi [mailto:Roya@tal-fitzlaw.com]
Sent: Friday, October 02, 2015 1:56 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: sflundberg@glpattorneys.com; afrench@glpattorneys.com; cwilliams@glpattorneys.com; cfeig@nicollblack.com; wknowles@cozen.com; rbowman@cozen.com; Phil Talmadge <phil@tal-fitzlaw.com>; Sidney Tribe <sidney@tal-fitzlaw.com>; Matt Albers <Matt@tal-fitzlaw.com>
Subject: Case Cause Number: 91536-9 Esther Kim, et al. v. Lakeside Adult Family Home, et al.

Documents to be filed: (1) Motion for Leave to File Overlength Supplemental Brief of Petitioner and (2) Supplemental Brief of Petitioner

Case Name: Esther Kim, et al. v. Lakeside Adult Family Home, et al.

Case Cause Number: 91536-9

Attorney Names and WSBA#s: Sidney Tribe, WSBA #33160 and Philip A. Talmadge, WSBA #6973

Contact information: Kelley Carroll, (206) 574-6661, roya@tal-fitzlaw.com

Hard copies to the parties will follow by U.S. Mail. Thank you.

Kelley Carroll
Legal Assistant
Talmadge/Fitzpatrick/Tribe
206-574-6661 (w)
206-575-1397 (f)
roya@tal-fitzlaw.com