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No. 68976-2-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

HU YAN, individually and as Personal Representative of the Estate of GUIZHEN YAO, deceased,

Appellant,

v.

PLEASANT DAY ADULT FAMILY HOME, INC., P.S., a Domestic Corporation, YU CHEN YIN and unknown JOHN DOES,

Respondents/Cross-Appellants,

AMENDED BRIEF OF RESPONDENTS/CROSS-APPELLANTS

King County Superior Court Cause No. 10-2-35293-7 SEA

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ORIGINAL

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I. IDENTIFICATION OF RESPONDENT

This Brief of Respondent and Cross-Appellant is filed by Respondent/Cross-Appellant Pleasant Day Adult Family Home, Inc. and Yu Chen Yin, the defendants in the underlying case.

II. INTRODUCTION

The trial court correctly denied Appellant Hu Yan's motion to strike defendants' "empty chair" and affirmative defenses; motion to exclude statements and evidence alleging fault, liability, and/or responsibility of the Yao family, Ms. Yao's healthcare providers, and the Department of Social and Health Services for Ms. Yao's injury and death. The trial court also properly denied Appellant's motion to exclude DSHS investigator Katherine Ander's opinion that Maria Yin's conduct did not constitute neglect and properly admitted her testimony that she conducted an investigation into, but did not find, neglect of Ms. Yao. The trial court properly denied Appellant's motion to prohibit all defense experts from testifying that Maria Yin's conduct did not constitute neglect and Appellant's motion to exclude evidence that Ms. Yao's healthcare providers did not report neglect. The trial court also properly denied Appellant's motion to preclude testimony that Ms. Yao's healthcare providers and DSHS did not report neglect and as such Maria Yin's

conduct and care was not neglect. Lastly, the trial court properly granted Respondents' motion to dismiss Appellant's breach of contract claim.

Respondents do submit that the trial court erred in misapplying RCW 4.84.010 and Civil Rule 68 to Respondents' cost bill.

Ms. Yao's husband, Hu Yan, and daughter, Janney Gwo, placed Ms. Yao at Pleasant Day Adult Family Home on July 7, 2008. Yu Chen ("Maria") Yin owns and operates Pleasant Day. Prior to her admission to Pleasant Day, Ms. Yao was seen by her primary care provider and geriatric medicine physician, ARNP Lee and Dr. Borson, respectively. Ms. Yao suffered from Parkinson's disease and Lewy body dementia. Ms. Yao's providers determined that given her symptoms, Ms. Yao was best suited for a skilled nursing home or specialized adult family home that could provide her with sufficient care given her dementia and associated behaviors, including exit behavior. Instead of a skilled nursing facility, Ms. Yao's healthcare agents – her husband (Mr. Yan) and daughter (Janney Gwo) – selected Pleasant Day, an adult family home. In doing so, Mr. Yan and Ms. Gwo failed to provide Maria Yin with sufficient information regarding Ms. Yao's medical condition or the recommendations of her primary care provider, ARNP Lee.

Prior to moving to Pleasant Day, Ms. Yao and her healthcare agents met with Debbie Ho to discuss Ms. Yao's condition and needs.

Ms. Ho filled out an assessment that abbreviated the extent of Ms. Yao's medical condition and needs and failed to provide ARNP Lee's detailed evaluation and recommendations. Ms. Ho sent the abbreviated assessment to Maria Yin, who relied on it in accepting Ms. Yao into Pleasant Day.

Maria Yin had difficulty with Ms. Yao from the very start. Ms. Yin contacted Ms. Gwo and Mr. Yan multiple times to discuss re-homing Ms. Yao in a facility better able to control her exit-seeking behavior. Ms. Yin contacted ARNP Lee numerous times to discuss Ms. Yao's care and express her concern that Ms. Yao should be placed in a more secure facility. ARNP Lee asked Maria Yin to continue to care for Ms. Yao, even after Ms. Yao had fallen while at Pleasant Day. On August 30, 2008, Ms. Yao fell after running out of Pleasant Day. She suffered a broken jaw and was transferred to Harborview. Ms. Yao passed away 14 days later.

The wrongful death action was filed by Mr. Yan as the personal representative of Ms. Yao's estate. After multiple amendments to the Complaint, and dismissal of his breach of contract claim, Mr. Yan ultimately pursued causes of action for negligence and neglect of a vulnerable adult.

The trial court addressed multiple motions in limine seeking to limit the testimony of DSHS investigator Katherine Ander and Respondents' experts regarding neglect and to exclude testimony

regarding contributory negligence/fault of third parties, including DSHS. The trial court properly denied these motions, putting the testimony and ultimate decision regarding negligence and neglect to the jury.

On April 25, 2012, the jury returned a defense verdict on both the negligence and neglect claims; no fault was attributed to Respondents or Ms. Yao's healthcare agents, physicians and DSHS.

On January 25, 2012, Respondents properly served an offer of judgment in the amount of $250,000. Because that offer was not accepted and instead, a defense verdict was entered, Respondents were the prevailing party. As the prevailing party, both by virtue of obtaining a verdict that was better than the amount of the offer of judgment and by obtaining a defense verdict, Respondents sought an award of costs based both on Civil Rule 68 and RCW 4.84.010. However, the trial court ruled that Rule 68 did not entitle Respondents to recover statutory costs from the time of the rejection of the offer of judgment, as provided for in CR 68, and therefore entered judgment for Respondents for $2,256.49, which represented only prevailing party costs permitted under RCW 4.84.010.

Respondents seek affirmation of the trial court's evidentiary rulings and dismissal of breach of contract claim and also seek reversal of the trial court's order that limited on Respondents' recoverable costs and excluded additional costs permitted under CR 68.

III. ASSIGMENTS OF ERROR

1. Did the trial court properly exercise its discretion to deny Appellant Hu Yan's motion to strike defendants' "empty chair" and affirmative defenses where Ms. Yao's healthcare agents and DSHS owed her a duty relative to her own safety?

2. Did the trial court properly exercise its discretion to permit evidence at trial related to Ms. Yao's healthcare agents and DSHS's actions relative to Ms. Yao's placement and care at Pleasant Day?

3. Did the trial court properly exercise its discretion to permit evidence at trial by both Appellant and Respondents' experts relating to the issue of neglect and their conclusions as to whether neglect occurred?

4. Should the jury verdict in favor of the defense be affirmed when any evidentiary errors relating to issues of contributory negligence or comparative fault were harmless as the evidence relating to the circumstances of Ms. Yao's placement at Pleasant Day were relevant to the issue of Respondents' negligence and there was no adjudication of negligence by Ms. Gwo, Mr. Yan or DSHS?

5. Did the trial court properly exercise its discretion to permit DSHS investigator Katherine Ander testify regarding her investigation and conclusions when Ms. Ander was called by Appellant as a witness and permitted to testify regarding all of her findings in her investigation?

6. Did the trial court properly exercise its discretion to permit testimony by Ms. Yao's healthcare providers—who are mandatory reporters by law—regarding their lack of reporting of neglect of Ms. Yao?

7. Did the trial court err in dismissing Appellant's breach of contract claim where there was no legal basis for Appellant to recover damages for a purported breach of contract?

8. Did the trial court err as a matter of law in construing and applying RCW 4.84.010 and Civil Rule 68 to find Respondent was entitled only to costs as the prevailing party pursuant to RCW 4.84.010 after an Offer of Judgment had been served and rejected by Appellants?

9. Should Civil Rule 68 and RCW 4.84.010 be harmonized to provide for recovery of costs to the prevailing party in addition to the statutory costs identified in RCW 4.84.010?

IV. COUNTERSTATEMENT OF THE CASE

A. Ms. Yao's Medical Condition and History at Pleasant Day.

In the summer of 2008, Guizhen Yao's physicians recommended that she be placed in a skilled nursing facility with a locked dementia unit. CP 1901; RP IV 10:7-20, 20:10-14; IV-B 10:7-20, 20:2-14; Ex 108 at 13-17. Her caregivers at the time, husband Mr. Yan and daughter Janney Gwo, met with Ms. Yao's primary care provider, ARNP Lee, to discuss placement options for Ms. Yao. RP III-A 7:1-25; Ex 107 at 10-11.

Although ARNP Lee felt that Ms. Yao required a level of care which could only be provided at a skilled nursing facility[1], Mr. Yan and Ms. Gwo did not heed her suggestion. RP VI-A 41:2-19; Ex 107 at 10-11; CP 2815. Instead, they moved her to Pleasant Day adult family home. RP VI-A 14:19-15:6; 41:2-13. The family chose Pleasant Day based not on Ms. Yao's medical needs, but because caregivers at the home spoke Chinese. RP III-A 8:17-9:8; RP V-B 9-12; RP VI-A 15:2-6; CP 2816-17, CP 2662. Pleasant Day is owned and operated by Maria Yin. RP VI-C 7:13-16.

On June 4, 2008, case manager Debbie Ho of the Chinese Information & Service Center prepared a Significant Change Assessment for Ms. Yao's transfer to Pleasant Day. Ex 94. That assessment failed to reference that Ms. Yao had been discharged from adult day care for behavioral issues; failed to disclose that another skilled nursing facility had rejected Ms. Yao; and failed to advise that all of her medical providers had recommended that Ms. Yao be placed in a skilled nursing facility. *Id.*

On June 8, 2008, ARNP Lee wrote a letter outlining Ms. Yao's treatment and care needs intending for the same to be delivered to the facility selected by the family. Ex 107 at 10-11; RP VI-A 40:2-17, 53:4-6; CP 2663, 2847. In the letter ARNP Lee emphasized the complexity of Ms. Yao's medical condition and the behavioral issues that the facility

[1] Unlike a skilled nursing facility, by law an adult family home such as Pleasant Day cannot be a locked facility.

would have to address. Ex 107 at 10-11. In her conclusion, she recommended that Ms. Yao be placed in a very skillful adult family home that is comfortable managing dementia with extremely difficult behaviors, or a skilled nursing facility with plenty of experienced staff. *Id. See also* RP VI 42:14-20. This letter was faxed to Debbie Ho on June 11, 2008. CP 2897-99. Neither the family nor Ms. Ho provided that letter to Pleasant Day. RP VI-A 39:7 -17; RP VI-C 36:23-37:24; RP III-A 22:21-23:10; RP 864; CP 2694, 2699, 2847, 2887.

Ms. Yao moved in to the Pleasant Day Adult Family home on July 7, 2008. RP VI-C 31:16-18. Before agreeing to accept Ms. Yao as a resident, no one—not Ms. Yao's family, not Ms. Yao's doctors, and not Ms. Yao's DSHS case manager—fully communicated Ms. Yao's medical condition to Maria Yin at Pleasant Day. RP 310-12, 322, 865-66. No one communicated Ms. Yao's exit-seeking behaviors and no one provided Pleasant Day with ARNP Lee's letter outlining Ms. Yao's medical condition. RP VI-C 36:23-37:24; RP III-A 22:21-23:10; RP 864; CP 2847, 2881-82; RP VI-A 40:14-17. At no time did the family tell Pleasant Day that Ms. Yao's doctors recommended a skilled nursing facility for Ms. Yao; that the medical team opposed Ms. Yao's placement in an adult family home or that at least one skilled nursing facility had rejected Ms. Yao as a resident because her care needs were too great for it to handle as

they did not have a locked dementia unit. RP 870-73; Ex 107 at 10-11; RP VI-A 40:2-17, 41:2-10, 42:2-9, 44:12-45:8, 53:4-6; CP 2699, 2701, 2704; CP 2847, 2890-91; Ex 108 at 13-16; RP VI-B 10:7-20. Had Ms. Gwo or Mr. Yan fully communicated Ms. Yao's medical needs to Ms. Yin at Pleasant Day, she would have declined to accept Ms. Yao into her adult family home. RP 870-73.

Ms. Gwo completed and signed the required admission forms for her mother at Pleasant Day. RP VI-C 32:22. In those papers, she affirmed that she was Ms. Yao's "guardian" and/or "representative." CP 1365-68. Further, both Mr. Yan and Ms. Gwo were listed as "The Person I Choose As My Health Care Agent" on intake forms. CP 1368. That form specified that the health care agent should be "someone who knows you very well, cares about you, and who can make difficult decisions." *Id.*

Immediately after she entered the facility, Ms. Yao had a severe panic attack different and more severe than that described by the family or the Assessment Summary. RP VI-C 30:22-31:11, 75:1-11; Ex 94; RP 927. ARNP Lee visited Ms. Yao at Pleasant Day the next day on July 8, 2008. RP VI-C 54:12-55:21; RP 779-81; RP VII-A 20:18-24. She and Maria Yin discussed ways to handle Ms. Yao's panic attacks. RP VI-C 54:5-23. Ms. Yin expressed concern that the placement was not a good fit and that Ms. Yao's condition was too severe for her to be in an adult family home

setting. RP VI-C 74:12-75:15. ARNP Lee told Ms. Yin that Ms. Yao may need "two weeks" to become acquainted with the new environment and attributed her behaviors to transfer trauma. RP 787-88; RP VI-A 51:5-19; RP VII-A 4:23-7:8, 20:25-21:7, 27:17-27:4.

Maria Yin immediately requested that Ms. Yao's family move her to another facility, but the family did not do so. RPC 495; RP VI-C 75:1-8; RP VII-A 23:8-16. Maria Yin also requested that Ms. Yao's primary healthcare provider, ARNP Lee, assist in re-placing Ms. Yao out of Pleasant Day. *Id.* ARNP Lee did not do so. RP VI-A 52:1-5. Pleasant Day contacted Ms. Yao's case manager, who had prepared the Assessment recommending placement in an adult family home and requested her assistance but was told the file was being transferred to another DSHS case manager so there was nothing she could do to help. RP 750-51, 862.

Ms. Yao's behavior and mental state continued to deteriorate. She continued to have panic attacks, was not sleeping, and was therefore not allowing Maria Yin to sleep. She required constant, 24-hour supervision, which Ms. Yin provided. RP VI-A 39:1-11; RP VII-A 23:23-24:6, 34:19-36:1. On July 19, 2008, ARNP Lee made a second visit to Pleasant Day. RP 797; Ex 108 at 33; VI-C 37:1-11; RP VII-A 42:9-24. During this visit, Ms. Yin informed ARNP Lee that Ms. Yao's medical conditions were beyond Pleasant Day's capabilities, and requested to have her transferred

to another facility. RP VII-A 27:17-21, 44:14-25. ARNP Lee again told Maria Yin that Ms. Yao needed more time, maybe an additional two weeks, to adjust to the new environment. *Id.* RP VI-A 51:5-19.

Ms. Yao fell for the first time in the morning of July 19 or 20th, 2008, in her room. RP VI-C 60:10-61:4, 62:13-16. It was reported to ARNP Lee and Mr. Yan. *Id.*; RP 257-59. Later that day, she ran out of the house and fell outside. RP VII-A 41:24-42:18. It was again reported to ARNP Lee and Mr. Yan as well as to Ms. Gwo. RP 257-59; Ex 109 at 196; CP 2778. ARNP Lee visited on July 21. RP VI-A 18:2-4; Ex 107 at 4-5; Ex 109 at 195; CP 2666, 2777. It was during this meeting that ARNP Lee first provided Maria Yin with a copy of ARNP Lee's June 8, 2008 letter and a medication log. RP VI-C 36:23-37:19. Once again, Maria Yin stressed to ARNP Lee that Ms. Yao needed more supervision and care than Pleasant Day could provide. RP VII-A 44:14-46:6. She had a similar conversation with Ms. Gwo. *Id.* *See also* RP VI-B 24:19-26:19. However, Ms. Yao's family refused to remove her, and Ms. Yao fell again on August 1, 2008 on the steps outside the home. RP VII-A 54:11-55:9. The fall was reported to ARNP Lee and Mr. Yan. *Id.* RP VI-A 55:2-6; RP 257-59. ARNP Lee visited later that day. RP 782-83; RP VI-A 20:14-15; Ex 107 at 3. Maria Yin again requested that Ms. Yao's family and ARNP Lee transfer Ms. Yao to another facility. RP VII-A 56:19-57:18,

58:9-59:10, 60:5-12. ARNP Lee acknowledged Ms. Yao should be transferred to a skilled nursing facility, but did nothing to help. RP VI-A 49:12-25

On August 5, 2008, Maria Yin called Ms. Gwo and asked her to request help from Ms. Yao's doctors in transferring Ms. Yao to another facility. RP VI-B 25:5-19; RP VII-A 60:13–61:20. That day, Mrs. Yao's medical team, which included ARNP Lee, discussed Ms. Yao's care and among themselves, and voiced concern about her complex and actively deteriorating medical condition. RP VI-A 21:12-23:10; RP IV-B 14:11-24; Ex 108 at 13-16. The records from that visit clearly state that the medical team thought the adult family home placement was inappropriate for Ms. Yao's condition and that they shared their concerns with Ms. Yao's family, yet they were unwilling to place her in the hospital until a bed became available in a skilled nursing facility. *Id. See also* RP VI-B 25:20-27:15. No one: not Mr. Yan, Janney Gwo or ARNP Lee, told Maria Yin of these concerns. RP VI-A 23:5-24:13, 37:9-16; Ex 108 at 13-16. Instead they told her only that Ms. Yao was on the wait list for a skilled nursing facility and that Ms. Yao needed to stay at Pleasant Day until a bed opened. RP VI-A 55:18-21; RP VI-B 27:16-20.

Ms. Yao's behaviors remained problematic. On August 15 Ms. Yao eloped from the house and fell. RP VII-A 61:21-62:10. Both Mr.

Yan and ARNP Lee were notified yet they did nothing about moving Ms. Yao out of Pleasant Day. RP VI-C 58:1-59:8; RP VII-A 61:21-24. She fell again on August 20, this time inside the home but still the family and ARNP Lee did nothing to help Maria Yin transfer Ms. Yao out of Pleasant Day to another facility. RP VII-A 62:18-64:4.

On August 30, 2008, Ms. Yao fell once again, and this time fractured her jaw. RP VII-A 65:6-66:4. She was transferred to Harborview Medical Center where she developed pneumonia and died on September 15, 2008. RP VI-A 27:24-28:7; CP 770.

B. Procedural Issues.

The wrongful death action was filed by Mr. Yan as the personal representative of Ms. Yao's estate. In the initial Complaint, filed October 6, 2010, Mr. Yan asserted a wrongful death claim and a loss of consortium claim. CP 1-5. On October 26, 2010, Mr. Yan filed an Amended Complaint abandoning his loss of consortium claim and purported to assert a claim for neglect under RCW 74.34 *et seq.* and a breach of contract claim. CP 20-32. On December 16, 2010, Respondents filed their Answer to Amended Complaint for Damages and Affirmative Defenses, CP 33-42, asserting affirmative defenses for contributory negligence and comparative fault of third parties, including but not limited to Ms. Yao's family members and medical care providers "who failed to provide full

and accurate information regarding Plaintiff's condition and needs." CP 40.

On March 15, 2012, less than a month before trial, Mr. Yan moved to amend the operative Complaint to assert claims for negligence, breach of contract, and neglect under Washington's Vulnerable Adults Act (RCW 74.34 *et seq.*). CP 724-73. The trial court granted Mr. Yan's motion and permitted the amendment. CP 1303-04. Two weeks later, Mr. Yan filed another motion to amend seeking to "add clarity to plaintiff's loss of consortium." CP 1521-27. Respondents opposed both motions, noting the futility of Appellant's breach of contract claim and prejudice to Appellants based on the untimely filing. CP 774-814, 1616-1622. On March 27, 2012, just prior to the start of trial, the trial court granted Ms. Yan's motion and permitted the amendment. CP 1303-4.

The trial court addressed Maria Yin's assertion of fault by other parties in Ms. Yan's motion in limine to exclude evidence and statements concerning fault, liability, and responsibility, of Ms. Yao's family, healthcare providers, and DSHS and in Maria Yin's motion to strike. CP 1168-79, CP 1506-16; RP 94:12-96:12; RP 1 at 5-42. The parties briefed the issue and the trial court heard days of argument regarding the duties owed to Ms. Yao by her healthcare providers, healthcare agents (her husband and daughter), and DSHS. *Id.* The trial court considered the

arguments of the parties and Washington law on the imposition of duties for protecting vulnerable adults and correctly concluded that there were duties on each of them and Respondents were permitted to argue their defenses to the jury. RP 94-95.

On March 26, 2012, Pleasant Day filed a motion to dismiss Mr. Yan's neglect and breach of contract claims. CP 1417-28. After considering the parties' briefing and oral arguments, the court dismissed Mr. Yan's breach of contract claim noting the general rule is that emotional distress damages were not recoverable for breach of contract, the damages articulated by counsel for the breach were "almost precisely duplicative of the tort claims," a belated amendment to add the claims resulted in a lack of discovery, failure to plead wanton or reckless conduct permitting recovery of emotional distress damages under a contract, and the legislature articulated a specific tort-based scheme to recover for wrongful death. RP 98:10-99:18; CP 1842-43. The trial court denied Pleasant Day's motion to dismiss the neglect claim and the issue of neglect went to the jury. CP 1842-43.

During trial, Mr. Yan presented numerous witnesses, either in person or via deposition testimony, addressing the standard of care and neglect. Included in these witnesses was Wendy Thomason, a certified hospice and palliative care nurse and life care planner. RP 264: 24-25,

265:1. Ms. Thomason testified that in her opinion, Respondents fell below the standard of care in accepting Ms. Yao and failing to do a thorough assessment before accepting her. RP 267: 9-20; 268-282. In addition, Ms. Thomason opined that neither the family nor Ms. Yao's medical providers had any duty to keep Ms. Yao safe at Pleasant Day. RP 286:7-287:19.

Similarly, Mr. Yan called Dr. Sabine von Preyss-Friedman, an internist specializing in geriatric medicine and certified medical director for long-term care. RP 523:5-13. Dr. von Preyss-Friedman also testified that Respondents' acceptance of Ms. Yao into Pleasant Day should have been met with caution because of the DSHS evaluation. RP 546:15-22. In addition, Dr. von Preyss-Friedman testified that Respondents should have discharged Ms. Yao when they felt that they could not keep Ms. Yao safe. RP 547:16-21; 554:15-25. Dr. von Preyss-Friedman also testified that Respondents failed to meet the standard of care in failing to have a negotiated care plan and failed to meet Washington regulations for adult family homes. RP 548:14-25. Lastly, Dr. von Preyss-Friedman testified that Respondents' conduct in allegedly failing to keep Ms. Yao safe from falls or to discharge her constituted neglect or that Ms. Yao was "neglectfully treated." RP 553:13-22.[2]

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[2] On cross-examination, Dr. von Preyss-Friedman testified regarding the standards of care and responsibilities for ARNP Lee, Ms. Yao's primary care provider, and Dr. Borson, Ms. Yao's physician. RP 572-601; 655-56.

Mr. Yan also called Katherine Ander, a DSHS investigator who investigated Pleasant Day after Ms. Yao's fall on August 30, 2008. Ms. Ander testified regarding her investigation of Pleasant Day, the deficiencies she found, and her conclusion that there was insufficient evidence to warrant a finding of neglect. RP 616-65.

Respondents submitted opposing expert witness testimony from Elizabeth Johnston regarding the issues of whether there was neglect and whether Pleasant Day breached the standard of care. Ms. Johnston also opined regarding the obligations of Ms. Yao's treatment providers and family members as respects Ms. Yao's continued stay at Pleasant Day and opined they failed to meet their respective obligations to her. RP 930.

At the close of evidence, Mr. Yan sought a directed verdict on the negligence and neglect issues, which the trial court properly denied as there was sufficient evidence before the jury of conflicting opinions on whether there was a breach of duty or evidence of neglect. RP 1006-20.

The parties agreed to a set of jury instructions, of which Appellants have no objection. Instruction No. 9 addressed the affirmative defenses of negligence of Janney Gwo and/or Hu Yan, as Ms. Yao's healthcare agents; ARNP Lee's negligence, and DSHS's negligence. CP 2201-2. Subsequent instructions correctly set forth standards for proximate cause

and contributory negligence. CP 2208-13. Furthermore, the jury was instructed on the issue of neglect and provided the legal definition of neglect. CP 2214-19.

On April 25, 2012, the jury returned a defense verdict on both the negligence and neglect claim attributing no negligence to Respondents or Ms. Yao's healthcare agents, physicians or DSHS. CP 1274-76.

C. Post-Trial Motions

Appellants filed a motion for new trial seeking reversal of the jury's verdict. CP 2613-30. That motion was properly denied by the trial court as there was ample evidence to support the jury's verdict. CP 2930-34.

On May 1, 2012, Respondents filed a Cost Bill and Statement of Costs and Disbursements to be Taxed against Plaintiffs Pursuant to CR 68. CP 2238-68. On January 20, 2012, prior to trial, Cross-Appellants served an Offer of Judgment on plaintiff Yao. CP 2244-45. The Offer of Judgment was for $250,000 and stated in pertinent part:

> Defendant Pleasant Day Adult Family Home, Inc. hereby offers to allow judgment to be entered against it, on behalf of itself for all claims asserted against it as well as for all claims asserted against Yu Chen Yin in this matter, pursuant to CR 68. This offer is inclusive of all claims plaintiff has asserted against the defendants in the above-captioned matter and is hereby made in the total sum of Two Hundred Fifty Thousand Dollars ($250,000), inclusive of all costs and fees potentially recoverable in this case

> which have been incurred to date. If the judgment finally obtained, exclusive of fees and costs incurred after this date, is not more favorable than this offer, the plaintiff shall be responsible for the costs incurred by defendant from the date of the offer through trial.

CP 2244-45. During the trial, nine witnesses were called; eight witnesses for the plaintiff and one witness for the defense. CP 2236-37. Included in the Cost Bill were costs for service of process for witness Eleanor Lee, costs for deposition transcripts used at trial, costs of depositions conducted after January 20, 2012, statutory attorneys' fees pursuant to RCW 4.84.080 and 4.84.010, cost of retrieval of medical records used at trial, and the cost for collection of medical records after January 20, 2012. CP 2238-40. The total taxable costs sought were $12,296.30. CP 2239.

Mr. Yan objected to the cost bill, citing RCW 4.84.010, and arguing that recoverable deposition expenses were limited to those depositions used at trial and only for a pro rata share of the costs reflecting the testimony introduced into evidence or used for purposes of impeachment. CP 2270-75. Similarly, Mr. Yan relied on RCW 4.84.010(5), arguing the costs for medical records admitted into evidence were the only medical record costs recoverable as taxable costs. CP 2273. Moreover, he asserted that Civil Rule 68 costs are no different than

prevailing party costs under RCW 4.84.010, CP 2274, and that Cross-Appellants were entitled only to $2,256.49 in taxable costs. CP 2275.

Pleasant Day filed a Reply in support of its Cost Bill, modifying the costs to reflect the pro rata share of records and deposition testimony used at trial but reasserting their position that CR 68 entitles them to recovery of additional deposition and medical records retrieval costs incurred after the Offer of Judgment on January 20, 2012. CP 2318-20. Consequently, Cross-Appellant's modified Cost Bill totaled $10,976.95. CP 2321-23. On May 10, 2012, the trial court entered judgment for Cross-Appellant for $2,256.49 at a statutory interest rate of 5.25 percent per annum. CP 2332-33.

V. ARGUMENT

A. Standards of Review.

This appeal involves both *de novo* and abuse of discretion standards. The question of whether Ms. Gwo, Mr. Yan, and DSHS owed a duty of care to Ms. Yao is a question of law. "[T]he existence of a duty is a question of law and depends on mixed considerations of logic, common sense, justice, policy, and precedent." *Eastwood v. Horse Harbor Found., Inc.,* 170 Wn.2d 380, 389 (2010) (quotation omitted). However, a trial court's denial of a motion to strike an affirmative defense is a discretionary ruling that is reviewed for abuse of discretion. *Oltman v.*

Holland Am. Line USA, Inc., 163 Wn.2d 236, 244 (2008). An abuse of discretion occurs when the trial court's decision is based on untenable grounds or untenable reasons. *Kappelman v. Lutz*, 167 Wn.2d 1, 6 (2009). If the trial court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law, there may be an abuse of discretion. *Gildon v. Simon Prop. Group, Inc*, 158 Wn.2d 483, 494 (2006).

The standard of review for an award of costs implicates two inquiries. *Hickok-Knight v. Wal-Mart Stores, Inc.*, 170 Wn. App. 279, 325 (2012). First, whether a statute, contract, or equitable theory authorizes an award of costs is reviewed de novo. *Id.* Second, the amount of award is subject to an abuse of discretion standard. *Id.* Statutory construction is a matter of law reviewed de novo. *State v. Keller,* 143 Wn.2d 267, 276 (2001). The goal of statutory interpretation is to carry out the intent of the legislature and the statute's clear language. *Seven Gables Corp. v. MGM/UA Ent. Co.,* 106 Wn.2d 1, 6 (1986); *Postema v. Postema Enters., Inc.*, 118 Wn. App. 185, 196 (2003). Absent a statutory definition, the term is generally accorded its plain and ordinary meaning unless there is a contrary legislative intent. *Postema*, 118 Wn. App at 196. A court should avoid construing a statute in a manner which renders a provision meaningless. *Id.* When the statutory language is unclear and ambiguous,

the court may review legislative history to determine the scope and purpose of the statute. *Wash. Fed'n of State Employees v. State,* 98 Wn.2d 677, 684-85 (1983).

B. Decision to Permit Empty Chair Defense and Theory of Contributory Negligence to Be Presented to Jury Was Proper.

Appellant challenges the trial court's denial of his motion to strike Respondents' affirmative defenses regarding an "empty chair" and contributory negligence. App. Br. at 13-21. In his Motion to Strike, Appellant argued that the question was whether DSHS and members of Ms. Yao's family, who were her healthcare agents, had a duty to "protect her from the negligence and neglect of defendants." CP 1511. This is not the proper inquiry. The issue is whether DSHS and Ms. Yao's family members who were her healthcare agents owed a duty to Ms. Yao relative to her safety. As the trial court recognized, as healthcare agents, Mr. Yan and Ms. Gwo owed a duty to provide accurate and reliable information regarding Ms. Yao and Ms. Yao's healthcare assessments for purpose of her placement in an appropriate care facility. RP 95-96. Moreover, after protracted oral argument, the trial court considered and properly rejected Appellant's arguments, concluding that the level of involvement by DSHS created a special relationship and there was sufficient evidence for the matter to present DSHS's actions to the trier of fact. RP 5-30, 94-95. The trial court

did not abuse its discretion under either ruling regarding defendants' affirmative defenses.

1. Trial Court Properly Exercised Its Discretion in Denying the Motion to Strike Defendants' Empty Chair Defense.

Ms. Yao was an incompetent adult.[3] As such, she appointed her husband, Mr. Yan, and daughter, Ms. Gwo, as the persons who were to make medical decisions on her behalf. In doing so, Ms. Yao authorized Mr. Yan and Ms. Gwo to act on her behalf with respect to medical decisions. CP 1365-68; RCW 7.70.065(1)(a)(ii). As her mother's healthcare **agent**, any decision Ms. Gwo made on her mother's behalf had "the same effect and inure to ... bind the principal ... as if the principal were alive, competent, and not disabled." RCW 11.94.010. Mr. Yan, as Ms. Yao's husband, was also authorized to give or withdraw consent for Ms. Yao's medical treatment. CP 1368; *see also* RCW 7.70.065(1)(a)(iii).

As such, Mr. Yan and Ms. Gwo owed duties to Ms. Yao and also acted on behalf of Ms. Yao: they stepped into Ms. Yao's shoes, and were solely responsible for medical decisions made on her behalf. Therefore, these family members can be deemed at-fault entities or their actions can be imputed to constitute contributory negligence.

[3] Defendant's affirmative defense that Ms. Yao was responsible for her own injuries relates to the decisions made by her medical agents, Ms. Gwo and Mr. Yan.

WPI 11.01[4] defines Contributory Negligence as:

> ... negligence on the part of a person claiming injury or damage that is a proximate cause of the injury or damage claimed.

RCW 4.22.015 states that "fault" includes breach of warranty, unreasonable assumption of risk, and unreasonable failure to avoid an injury or to mitigate damages. A comparison of fault must consider both the nature of the conduct of the parties to the action and the extent of the causal relation between such conduct and the damages. *Id.*

To determine whether a person was contributorily negligent, the trier of fact asks whether that person exercised that reasonable care for his or her own safety that a reasonable person would have used under the existing facts or circumstances, and, if not, whether such conduct was a legally contributing cause of the injury. *See Rosendahl v. Lesourd Methodist Church*, 68 Wn.2d 180, 182 (1966); *Huston v. First Church of God, of Vancouver*, 46 Wn. App. 740, 747 (1987). Here, where Mr. Yan and Ms. Gwo had duties as Ms. Yao's health care agents and were also acting as Ms. Yao's medical decision-makers, the question is whether they acted reasonably to care for her safety and to avoid injury.

Mr. Yan and Ms. Gwo had a duty to act reasonably with respect to

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[4] WPI 15.04 governs negligence of a defendant concurring with other causes. However, this instruction is inapplicable where "the third person was acting as an agent of either the plaintiff or defendant." Here, Mr. Yan and Ms. Gwo were acting as Ms. Yao's medical agent and decision maker, and thus WPI 11.01 is appropriate.

medical decisions on Ms. Yao's behalf, both as her family members and as her healthcare agents, in seeking and continuing her placement in an adult family home. They did not do so. The evidence presented to the trial court and during trial established that Ms. Gwo and Mr. Yan withheld key information which would have prevented Pleasant Day from accepting Ms. Yao as a resident. They ignored medical advice and placed Ms. Yao in an unsecured adult family home rather than a skilled nursing facility, as recommended by doctors. RP III-A 8:17-9:1; V-B 9-12. When Maria Yin repeatedly expressed concerns for Ms. Yao's safety, Mr. Yan and Ms. Gwo ignored her pleas and refused to move Ms. Yao to a facility which could properly care for her. Mr. Yan and Ms. Gwo had the power to move Ms. Yao to safety, and they repeatedly refused to do so.

The trial court's decision that there was sufficient evidence to submit the question of whether Mr. Yan and Ms. Gwo's actions constituted negligence, or in the alternative, their actions may be imputed to the plaintiff for her own contributory negligence was based on reasoned application of Washington law. The trial court's denial of Appellant's motion to strike should be affirmed.

2. Trial Court Properly Exercised Its Discretion in Admitting Evidence of Mr. Yan and Ms. Gwo's Involvement in Ms. Yao's Placement at Pleasant Day and Maria Yin's Efforts to Remove Ms. Yao from Pleasant Day.

Because introduction of evidence addressing the duty of care owed by Mr. Yan and Ms. Gwo as Ms. Yao's healthcare agents was warranted by Washington law and relevant to the issue of whether Maria Yin acted reasonably in her care of Ms. Yao, the trial court properly exercised its discretion in admitting evidence of Mr. Yan and Ms. Gwo's actions relative to Ms. Yao's care and placement at Pleasant Day. Contributory negligence is a question of fact and should be for the jury to decide. *Young v. Caravan Corp.*, 99 Wn.2d 655 (1983); *Clements v. Blue Cross of Wash. & Alaska*, 37 Wn. App. 544 (1984). As Appellants do not contest, the trial court properly instructed the jury on the issue of contributory negligence and the theory of negligence by Ms. Gwo and Mr. Yan alleged by the Respondents. CP 2201-3, 2209-13.

As such, Respondents were entitled to present evidence of Mr. Yan's and Ms. Gwo's actions (or non-actions) to the jury. The jury considered the evidence and made an adjudication of no negligence by any party. Its judgment should not be disturbed. Moreover, as discussed in *infra*, the jury made no adjudication of negligence in this case. Any error in admitting the evidence was harmless.

3. Trial Court Properly Exercised Its Discretion in Finding Sufficient Evidence to Permit the Issue of DSHS's Negligence to the Jury.

Appellant asserts that there was no special relationship between

DSHS and Maria Yin of Pleasant Day. App. Br. 17. Appellant again misstates the pertinent inquiry. The inquiry before the trial court was whether DSHS and Ms. Yao had a "special relationship" and whether DSHS owed Ms. Yao a duty to protect her safety and accurately assess and report her medical condition and needs.

The trial court did not abuse its discretion or err in finding there to be sufficient evidence to establish comparative negligence against DSHS. RP 95. "Under the public duty doctrine, the plaintiff seeking recovery from a municipal corporation in tort must show that 'the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general (i.e., a duty to all is a duty to no one).'" *Taylor v. Stevens County*, 111 Wn.2d at 163 (1988). One exception to the doctrine is where a special relationship exists. *Caulfield v. Kitsap County*, 108 Wn. App. 242, 251 (2001). A special relationship exists when:

> (1) there is direct contact or privity between the public official and the injured plaintiff which sets the latter apart from the general public, and (2) there are express assurances given by a public official, which (3) give[ ] rise to justifiable reliance on the part of the plaintiff.

Donohoe v. State, 135 Wn. App. 824, 835 (2006) (citation omitted). All three criteria were addressed by the trial court and were met here.

Appellant's reliance on *Donohoe v. State* is misplaced.[5] The negligence alleged therein was not in evaluating the plaintiff. Rather, the negligence asserted in that case related to DSHS's alleged failure to evaluate and monitor the nursing home adequately. *Id.* at 657 ("[t]he thrust of the plaintiff's claim against the State [was] 'negligent investigation'"). Although DSHS also performed an assessment of the *Donohoe* plaintiff, the *Donohoe* court did not address the propriety of the individual assessment and recommendations. The *Donohoe* court concluded that DSHS does not have a special relationship to individuals in monitoring skilled nursing facilities, an issue not presented to the trial court or at issue in this appeal.

In contrast, the issue regarding Ms. Yao's assessment and recommendations does implicate a special relationship. First, there was direct contact between Ms. Yao and Ms. Ho. Ms. Ho was Ms. Yao's case manager and met with Ms. Yao and her family, including her healthcare agents, to interview them and assess the level of care required. Ms. Ho's assessment was part of the DSHS records. CP 1396. This was DSHS's

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[5] Similarly, Appellant's reliance on RCW 74.34.150 is also misplaced. The statute provides that DSHS cannot be liable for seeking or failing to seek a protective order on behalf of or with the consent of a vulnerable adult. RCW 74.34.150. The issue of DSHS's actions in this case is not with reference to obtaining or not obtaining a protective order. The issue of DSHS's negligence is relative to its preparation of a deficient assessment and failure to communicate information to the family and Respondent Yin regarding a vulnerable adult's medical condition and needs.

responsibility to Ms. Yao personally, not to the public in general.

Second, Ms. Ho received ARNP Lee's evaluation and recommendation but failed to advise Maria Yin of the specifics of ARNP Lee's recommendations or incorporate the extent of Ms. Yao's condition and recommended treatment into her assessment. Although Ms. Ho received ARNP Lee's letter about Ms. Yao's medical condition on June 23, 2008, Ms. Ho's assessment was incomplete when she sent it to Maria Yin later on June 23, 2008, and she failed to state that Ms. Yao was rejected by a skilled nursing facility due to her acuity level, was discharged from adult daycare because of her behavior, or identified her type of Parkinson's or dementia that is known for aggressive behavior and exit seeking. Ex 94. Furthermore, Respondents submitted the deposition testimony of their expert, Elizabeth Johnston, who opined that the information that Ms. Ho failed to communicate was "important information" for the operator of an adult family home to know prior to admitting a resident. CP 1397. Ms. Johnston testified consistently at trial noting that DSHS plays a role in the placement and clearly communicating to the family and the residence the needs of the patient. RP 921-22. Moreover, Appellant's expert testified that "DSHS evaluations ... are very important to placement in an adult family home. They are done by DSHS because DSHS pays for the adult family home stay. And they are there so

that the adult family home has a very exact picture of what the needs of that patient are." RP 535:4-11.

Lastly, Ms. Ho undeniably made express assurances to Ms. Yao, through her agents, and to Maria Yin regarding the type of care Ms. Yao required and Ms. Yao's medical condition in the assessment. "An 'express assurance' occurs where 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 does rely on it 'to his detriment.'" *Donohoe v. State*, 135 Wn. App. at 835. Here, Ms. Ho's assessment amounted to an "express assurance" of Ms. Yao's medical condition, and it was incomplete and inaccurate. As the proprietor of an adult family home, Maria Yin justifiably relied upon these assurances in determining whether to admit a patient. By failing to fully outline Ms. Yao's medical conditions and failing to mention key information such as that Ms. Yao had been previously rejected from both an adult family home and an adult daycare due to acuity and behavioral issues, Ms. Ho breached her duty to issue an accurate assessment and ensure the safe placement of Ms. Yao.

DSHS later breached its duty to Ms. Yao by failing to assist Maria Yin in re-placing Ms. Yao in a more suitable facility. The evidence was uncontroverted that Ms. Yin contacted DSHS to have Ms. Yao placed in

facility that could properly address her medical condition. DSHS essentially abandoned Ms. Yao (and Maria Yin) when its employees failed to work with Ms. Yin or acknowledge her requests to re-home Ms. Yao.

Because the trial court's decision was based on sound interpretation of Washington law and was supported by the factual record, its decision regarding putting the issue of DSHS's negligence before the jury and admission of evidence related thereto should be affirmed.

4. Trial Court Properly Exercised Its Discretion in Admitting Evidence of DSHS's Involvement and Actions of Ms. Yao's Healthcare Agents as It Was Admissible to Show Maria Yin Acted Reasonably under the Circumstances.

Even if the trial court abused its discretion in denying Appellant's motion to strike affirmative defenses, the aforementioned evidence regarding Ms. Gwo and Mr. Yan's actions as healthcare agents or DSHS's actions was admissible and relevant to establish that Maria Yin acted reasonably given the circumstances and information provided to her. Thus, the court's error, if any, was harmless.

A trial court's ruling on an evidentiary issue is "harmless unless it was reasonably probable that it changed the outcome" of the case. *Brundridge v. Fluor Fed. Servs.*, 164 Wn.2d 432, 452 (2008). Moreover, a jury verdict will not be reversed based on an evidentiary error unless the error was prejudicial. *Brown v. Spokane County Fire Prot. Dist. No. 1,*

100 Wn.2d 188, 196 (1983). "An error is not prejudicial unless it affects, or presumptively affects, the outcome of the trial." *Id.*

Here, the jury found no one to be negligent. There was no adjudication of negligence against Ms. Gwo, Mr. Yan, or DSHS. Ms. Yao had an accident for which no one person bore fault. There is no evidence to support that it is reasonably probable that the above-described evidence affected the outcome of the trial.

Moreover, the evidence as to the information Maria Yin had (or did not have) was relevant and admissible to show she acted reasonably given the circumstances and took reasonable steps to ensure Ms. Yao's safety when confronted with family resistance and receipt of incomplete information on Ms. Yao's medical condition and needs. Respondents were entitled to tell their story and have their side of the story heard. The evidence at issue regarding ARNP Lee's June 2008 letter, the fact that it was not communicated to Maria Yin prior to Ms. Yao's moving into Pleasant Day but was known by DSHS and the family prior to Ms. Yao's move-in date, and the decisions the family made with regard to placement and continued residency at Pleasant Day are all relevant to whether Maria Yin acted reasonably given the circumstances.

While the trial court properly exercised its discretion regarding the motion to strike, Respondents submit that it also properly exercised its

discretion regarding the admissibility of the evidence relating to DSHS and Ms. Gwo and Mr. Yan as it was relevant and admissible to show the circumstances under which Maria Yin was acting. Regardless, the decision to admit the evidence as it related to contributory negligence was harmless as there was no ultimate adjudication of negligence entered against Ms. Gwo, Mr. Yan, or DSHS. The trial court's order denying the motion to strike as to DSHS and to permit argument and evidence regarding DSHS's actions should be affirmed.

C. The Trial Court Did Not Err in Dismissing Appellant's Breach of Contract Claim Where Damages Sought for the Breach Were Not Recoverable.

Appellant's assertion that he had a viable breach of contract claim is baseless. Appellant could not show entitlement to any damages from any purported contract. The evidence presented on summary judgment established as a matter of law that Appellant could not prevail on his breach of contract claim, and it was properly dismissed by the trial court.

Appellant asserted that there was an oral contract for $500 per month between Ms. Gwo and Maria Yin to provide Ms. Yao with an extra care provider. CP 2176-89. The terms of this purported oral contract were not agreed upon by the parties or established at trial. Despite Appellant's assertions, there was no evidence that the contract was for an extra caregiver. Rather, there was testimony that the additional payment

was to provide Ms. Yao with a private room or for meals for Ms. Yao's husband. RP VI-C 49:9-16. Regardless, it was uncontroverted that Maria Yin returned $1,000 for the two $500 payments to Ms. Gwo.

Mr. Yan argues that Restatement (Second) of Contracts § 353 permits recovery of "general damages" for a breach of contract claim when the breach is "particularly likely to cause serious emotional disturbance." App. Br. at 36. However, at summary judgment, Mr. Yan could not articulate what emotional disturbance damages, arising from the purported breach, he sought other than the general wrongful death and emotional distress damages covered by his tort-based wrongful death claims. RP 126:11-14. As such, the trial court properly dismissed his breach of contract claim.

First, the economic loss rule prohibits recovery of contractual damages under a tort theory and vice versa. *Berschauer/Phillips Const. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816 (1994); *Carlson v. Sharp*, 99 Wn. App. 324, 325 (1999). The economic loss rule observes the "fundamental boundary between the law of contracts, which is designed to enforce expectations created by agreement, and the law of torts, which is designed to protect citizens and their property by imposing a duty of reasonable care on others." *Berschauer/Phillips*, 124 Wn.2d at 821. The rule "prohibits plaintiffs from recovering in tort economic losses to which

their entitlement flows only from contract" because "tort law is not intended to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement." *Alejandre v. Bull*, 159 Wn.2d 674, 681-82 (2007), (internal quotations omitted).

The Supreme Court recently articulated the theory underlying the separate nature of tort and contract damages. *Eastwood v. Horse Harbor Found., Inc.*, 170 Wn.2d 380, 393-94 (2010). In *Eastwood*, the Supreme Court noted that the question before any court addressing contract and tort remedies is to look to ordinary tort principles. *Id.* at 389. "An injury is remediable in tort if it traces back to the breach of a tort duty arising independently of the terms of the contract." *Id.* In this case, Appellant had a statutory remedy for their asserted wrongful death damages. The damages asserted to have arisen from the purported contract were simply the statutory tort damages for wrongful death. The assertion that the purported oral contract also encompassed emotional distress damages is unsupported by Washington law, especially when such damages are contemplated by other statutory causes of action.

Second, no court in Washington has held that general wrongful death and emotional distress damages are recoverable under a breach of contract theory. *See Gaglidari v. Denny's Rests., Inc.* 117 Wn.2d 426 (1991). The court in *Gaglidari* articulated the reasons why emotional

distress damages are not recoverable under a breach of contract theory: "by allowing emotional damages whenever they are a foreseeable result of the breach, the traditional predictability and economic efficiency associated with contract damages would be destroyed." *Id.* at 446. Moreover, this is not a case in which there was an insufficient means to recover compensation relating to Ms. Yao's care. The damages sought by Mr. Yan relating to the emotional distress resulting from the purported contract are fully compensable under his wrongful death claim.

Moreover, in the summary judgment briefing, Mr. Yan provided no evidence of any damage suffered by the Ms. Gwo or Ms. Yao as a purported third-party beneficiary specific to the breach of contract claim.[6] *See* CP 1574-78. Summary judgment was proper when there was no question of material fact, or admissible evidence before the trial court, that there was any compensable damage resulting from the purported breach.[7] The trial court did not err in dismissing Appellant's breach of contract claim when Mr. Yan failed to establish the existence of the contract and had no compensable damages under a breach of contract theory.

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[6] Appellant erroneously refers to a contract between Ms. Yao and Pleasant Day. As a matter of law, Ms. Yao did not have the capacity to enter into a binding contract. If it existed, the purported contract was made between Ms. Gwo and Pleasant Day.

[7] Notwithstanding the unavailability of damages, Appellant failed to establish the essential terms of this purported contract, a fact addressed by the trial court at oral argument. RP 68:12-71:9.

D. Trial Court Did Not Err in Permitting Testimony Regarding Statutory Neglect.

Interpretation of evidentiary rules is a question of law but the decision to admit or exclude evidence is reviewed for abuse of discretion. *Diaz v. State*, 175 Wn.2d 457, 462 (2012). Appellant moved in limine to preclude defendants' experts from testifying on the issue of neglect; as proposed, the motion in limine was not mutual. CP 1163. The trial court properly exercised its discretion in denying the motion and permitting both parties to elicit testimony from their experts regarding the facts of the case and whether, in their expert opinions, those facts constituted neglect.

By the plain language of ER 704, "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." It is well-established in Washington that expert opinions that help establish the elements of a claim – like negligence – are admissible. *Davis v. Baugh Indus. Contractors, Inc.,* 159 Wn.2d 413, 420-21 (2007). "Proper expert opinion is based on scientific, technical, or specialized knowledge." *State v. Dolan*, 118 Wn. App. 323, 329 (2003). "Washington law favors resolution of issues on the merits. It should not be fatal to a party's claim or defense that an expert used legal jargon, so long as an appropriate foundation for the conclusion can be gleaned from the testimony." *Davis,*

159 Wn.2d at 420-21. Appellant's citation to authority addressing the impropriety of admitting testimony regarding a criminal defendant's guilt is inapposite. As noted in Appellant's cited case, "a witness may not give, directly or by inference, an opinion on a defendant's guilt. To do so is to violate the defendant's constitutional right to a jury trial and invade the fact-finding province of the jury." *Dolan*, 118 Wn. App. at 329. In contrast, this is not a criminal case and the constitutional right to a jury trial is not implicated by the introduction of expert testimony on the issue of statutory neglect.[8]

There is no question that the persons presented to testify on the topic of neglect were experts in their field. Appellants did not object to the expert designation of their own experts—who presented testimony that Maria Yin's conduct constituted neglect – or Ms. Johnston, Respondent's expert. RP 522-664; 897-981.

Appellant now complains that Ms. Ander's testimony, who was identified and called by Appellant as an expert,[9] was unfairly prejudicial

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[8] In the only civil case cited by Appellant, the court addressed reliance on attorney opinions in considering whether discovery sanctions should be imposed. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 344 (1993). The *Fisons* court noted that legal opinions on the issue of whether sanctions should be imposed were not permitted. *Fisons* is inapplicable as the issue of sanctions is not one that goes to the jury but rests solely in the discretion of the court. Here, the issue of neglect went to and was decided by the jury.

[9] CP 673.

because of her experience.[10] Appellant elicited the testimony regarding her experience in direct examination. RP 617. Moreover, Ms. Ander testified in her direct examination as to her investigation of Pleasant Day and the areas of inquiry: allegations of inappropriate supervision and care and unauthorized payments. RP 617-23. On cross-examination, Ms. Ander was asked to explain her investigation and her conclusions, one of which was she did not find neglect in the care of Ms. Yao.[11] RP 626. Moreover, Ms. Ander testified in detail regarding her qualifications and experience, without objection from Appellant.[12] RP 627. In answering questions from the jury, Ms. Ander explained that Maria Yin took action but, in her opinion, it may not have been the ideal action. RP 660-61.

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[10] For purposes of efficiency, Ms. Ander was only called once despite being designated by both parties. Appellant's implication that Ms. Ander's cross-examination was somehow improper is baseless. As counsel recognized, the calling of Ms. Ander once would entail a different approach. RP V-A (sidebar).

[11] Ms. Ander also testified favorably for the Appellant. Ms. Ander testified on re-direct that her conclusion was that Ms. Yao's "needs were not met," which resulted in harm to Ms. Yao. RP 644. Appellant attempted to have Ms. Ander testify regarding WAC provisions but Ms. Ander testified that she was not familiar with those laws. RP 651-52. This was consistent with the trial court's ruling that Ms. Ander would be permitted to testify as follows, "With regard to the WAC violations, Ms. Anders may testify as to her knowledge of WAC provisions and what her findings were with regard to those WAC provisions." RP 126:5-7. Thus, the trial court applied the law equally to both parties and permitted testimony regarding all of Ms. Anders' findings with proper foundation.

[12] It should be noted that Ms. Ander's job responsibilities as a complaint investigator for DSHS to investigate care, abuse, and neglect complaints. RP 616, 626. Appellant called Ms. Ander as a witness and knew that her responsibilities included investigating issues of neglect and applying the statutory criteria of neglect in making findings. Appellant elicited testimony from Ms. Ander regarding investigating the $500 charge and potential violation. RP 623. In essence, Appellant relied on Ms. Ander's expertise in evaluating potential violations of regulations but wanted to deny Respondents the ability to question Ms. Ander regarding any conclusions favorable to Respondents. Such an evidentiary limitation would have been prejudicial and misleading to the jury and was rejected by the trial court. *See, supra,* fn. 7.

However, in her opinion, while Ms. Yin may have "failed to meet the requirement of the regulation," her actions did not rise to the level of neglect. RP 662.

In addition to presenting testimony by Ms. Ander, Appellants also presented Dr. von Preyss-Friedman who testified that in her opinion, Maria Yin failed in her duty to protect a vulnerable adult and Ms. Yao was "neglectfully treated." RP 553. Appellants, by presenting the testimony of Dr. von Preyss-Friedman, opened the door to the issue of neglect. In contrast, Respondents' experts testified that Maria Yin's conduct did not meet the statutory requirement for neglect and explained why Maria Yin's action did not constitute negligence. Contrary to Appellant's assertions, the testimony by Ms. Ander (witness called and identified by both parties), RN Johnston (Respondents' expert), and Dr. von Preyss-Friedman (Appellant's expert) was based on their interpretation of the facts, understanding of the statute, and experience and expertise in evaluating neglect. The issue of neglect went to the jury, who was properly instructed and agreed with Respondents that there was no neglect.

Lastly, Appellant's arguments regarding Ms. Ander's testimony and assertions that she testified as to an erroneous standard is irrelevant. Appellant did not object to her testimony at trial and has not asserted that the jury instructions setting forth the standard for neglect claims was

erroneous. The jury was properly instructed on the neglect claim, and in Washington, courts "firmly presume that jurors follow the court's instructions." *Diaz v. State*, 175 Wn.2d 457, 475 (2012). Appellant presents no evidence that the jury did not follow the court's instruction or gave "undue weight" to Ms. Ander's opinion, and there is no presumption to permit such conclusions.

The trial court properly exercised its discretion in letting the witnesses, all of whom testified based on their experience and expertise regarding geriatric care issues generally and neglect specifically, testify regarding their conclusions regarding neglect. There was disagreement between the experts and the jury was tasked with weighing the credibility and conclusions of those experts and coming to their own conclusion. This is precisely the form and function of the jury system. The trial court's ruling should be affirmed.

1. Trial Court Properly Exercised Its Discretion Regarding Ms. Ander's Testimony.

As noted in Section C, *supra*, the trial court properly exercised its discretion in permitting testimony regarding the issues of neglect. Appellant takes issue with Ms. Ander's testimony and curiously asserts that only Ms. Ander's conclusions regarding neglect were not admissible. App. Br. 30. This is a baseless assertion. Ms. Ander was called to testify

regarding her investigation for DSHS and testified based on her years of experience and expertise in investigating geriatric residential care and allegations of neglect. RP 616-18, 624-26. Moreover, her opinions and conclusions, based on her investigation of the care received at Pleasant Day, assisted the jury in evaluating the elements of a neglect claim and whether the elements of a claim for neglect were met. Appellant cannot rely on Ms. Ander's expertise in investigating Ms. Yao's care and finding violations and deny Respondents the opportunity to obtain favorable testimony from the same witness to support their defenses.[13]

Moreover, Appellant's reliance on *Simonson v. Huff*, 124 Wn. 549 (1923) is misplaced. In *Simonson*, the court concluded that a lay witness's testimony on whether a stage driver applied the brakes in a timely fashion was improper. *Id.* at 554. In contrast, Ms. Ander provided testimony on an issue on which she was tasked to investigate and competent to draw conclusions based on her experience. Similarly, "neglect" is statutorily defined and not based on what a reasonable person would do, making it a different inquiry than negligence.[14] The trial court did not abuse its discretion in permitting Ms. Ander to testify as to her entire investigation

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[13] Appellant stated as much in his argument regarding the issue of neglect: "And if they are allowed to hear one conclusion without hearing the other conclusions, then it's not fair, because it's letting in certain evidence and not letting in the other." RP 121:4-6.

[14] Any error made by Ms. Ander regarding the standard for neglect is harmless and was corrected in the jury instructions provided setting forth the standard for neglect.

and conclusions, some of which was favorable to Appellant and some of which was favorable to Respondents. There was no apparent or real unfair prejudice to Appellant in the trial court's ruling or application.

E. Trial Court Properly Permitted Evidence Relating to Ms. Yao's Healthcare Providers Not Reporting Neglect.

Appellant's argument that Ms. Yao's healthcare providers' testimony that they did not report neglect and had no suspicions that Ms. Yao was being neglected at Pleasant Day is irrelevant is baseless. Appellant draws on inapposite case law addressing traffic citations, which utilize a different standard than what is required of a jury in a negligence case and is quite unlike the statutory neglect claim at issue here. Moreover, cases regarding the admissibility of a traffic citation do not implicate mandatory reporters like ARNP Lee and Dr. Borson. Ms. Yao's healthcare providers, as mandatory reporters, have a legal obligation to report suspected neglect or abuse and are subject to criminal penalties for their failure to do so. RP VI:61:19-25-62:1-25; RP 624-25. The failure of ARNP Lee to report neglect meant that she did not see any signs that Ms. Yao was being neglected and saw no signs that Ms. Yao was being abused. RP VI-A: 62:5-17. Similarly, Dr. Borson testified that she did not have any reason to report Pleasant Day to the State or have any supposition or suspicion of neglect of Ms. Yao. RP IV: 25:11-22. Both

ARNP Lee and Dr. Borson also testified to their contacts with Ms. Yao and treatment of her. Both were competent to testify regarding her medical condition and recommended treatment. RP IV-B, VI-A; CP 2647-929.

Dr. Borson's and ARNP Lee's testimony was relevant to the issue of neglect. The testimony made the absence of neglect (or neglectful treatment) more probable than it would be without the evidence and was of some consequence to the applicable substantive law. ER 401, 402. As discussed in Section C, *supra*, testimony regarding the issue of neglect was relevant and admissible. Dr. Borson and ARNP Lee, as Ms. Yao's treatment providers, had first-hand knowledge of her medical condition and treatment. In particular, ARNP Lee met with Maria Yin and was aware of Maria Yin's difficulties in taking care of Ms. Yao. Appellant does not assert that Dr. Borson and ARNP Lee were not competent to opine on the issue of neglect but rather only that they should not have been allowed to testify on that issue. Appellant did not object to this line of questioning by Respondents' counsel and had the opportunity to examine Dr. Borson and ARNP Lee regarding what they knew or did not know regarding Ms. Yao's treatment at Pleasant Day; this failure to inquire does not make the admission of the testimony error.

Furthermore, Appellant's citation to case law addressing the admissibility of traffic citations is misplaced. Washington courts have articulated that a traffic citation evidences an "on-the-spot opinion of the traffic officer as to respondent's negligence." *Warren v. Hart*, 71 Wn.2d 512, 514 (1967). As discussed above, expert opinion testimony on the issue of neglect, a statutorily defined cause of action, is proper. The statutory requirements necessary for a finding of neglect by DSHS, the agency tasked with investigating neglect, is the same standard was what the jury must address. Moreover, it is a standard that does require expert knowledge, unlike common law negligence. Whether neglect occurred is a more complex inquiry than whether someone made a proper left turn. Lastly, "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." ER 704. Here, testimony by Ms. Yao's treatment providers that they saw no evidence of neglect, which they would have been legally required to report, was an admissible inference regarding the claim of neglect. The trial court properly exercised its discretion to permit this testimony

F. The Trial Court Abused Its Discretion in Awarding Costs Pursuant to RCW 4.84.010 and Civil Rule 68.

Respondents submit that CR 68 provides for recovery of post-offer costs independent of RCW 4.84.010. As such, the trial court abused its discretion in limiting Respondents' recoverable costs to only those enumerated in RCW 4.84.010.

Civil Rule 68 provides in relevant part:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the court shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. *If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.* [Emphasis supplied.]

CR 68 has been interpreted as providing for "an award of costs to a defendant in cases where the defendant has made an offer of judgment to the plaintiff which was *larger* than the judgment ultimately obtained." *Tippie v. Delisle,* 55 Wn. App. 417, 420 (1989) (emphasis in original). The purpose of an offer of judgment is to encourage settlements and avoid lengthy litigation. *Dussault v. Seattle Pub. Sch.,* 69 Wn. App. 728, 732 (1993). "The policy favoring fair settlements under CR 68 is promoted by certainty and the elimination of unintended results." *Hodge v. Dev.*

Services of Am., 65 Wn. App. 576, 584 (1992). The rule achieves this objective by shifting any post-offer of judgment costs of litigation to a plaintiff who rejects a defendant's CR 68 offer and does not achieve a more favorable result at trial. *Lietz v. Hansen Law Offices, P.S.C.*, 166 Wn. App. 571, 581 (2012) (citing *Seaborn Pile Driving Co. v. Glew,* 132 Wn. App. 261, 267 (2006), *review denied,* 158 Wn.2d 1027 (2007)). In short, CR 68 is a tool of litigation and a mechanism by which a defendant may shift the cost of continued litigation onto the plaintiff.

The language of Rule 68 is clear and unambiguous. It permits the recovery of "the costs incurred after the making of the offer." There is no reference to RCW 4.84.010; there is no limitation on the word "costs." The only limitation in the Rule is with respect to the timing of the offer itself, an issue that is not relevant to this appeal. As such, Respondents submit that the trial court committed error as a matter of law in limiting Respondents' recoverable costs under Rule 68 to those authorized by RCW 4.84.010. RCW 4.84.010 provides in pertinent part:

> The measure and mode of compensation of attorneys and counselors, shall be left to the agreement, expressed or implied, of the parties, but there shall be allowed to the prevailing party upon the judgment certain sums for the prevailing party's expenses in the action, which allowances are termed costs, including, in addition to costs otherwise authorized by law, the following expense ...

> (2) Fees for the service of process by a public officer, registered process server, or other means, as follows:
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> ***
>
> (b) If service is by a process server registered pursuant to chapter 18.180 RCW or a person exempt from registration, the recoverable cost is the amount actually charged and incurred in effecting service;
>
> ***
>
> (5) Reasonable expenses, exclusive of attorneys' fees, incurred in obtaining reports and records, which are admitted into evidence at trial or in mandatory arbitration in superior or district court, including but not limited to medical records, tax records, personnel records, insurance reports, employment and wage records, police reports, school records, bank records, and legal files;
>
> (6) Statutory attorney and witness fees; and
>
> (7) To the extent that the court or arbitrator finds that it was necessary to achieve the successful result, the reasonable expense of the transcription of depositions used at trial or at the mandatory arbitration hearing: PROVIDED, That the expenses of depositions shall be allowed on a pro rata basis for those portions of the depositions introduced into evidence or used for purposes of impeachment.

RCW 4.84.010 (emphasis added.)

Appellant did not contest the costs incurred for service of process, statutory attorney fees, or the reasonable expenses for obtaining depositions and records admitted into evidence at trial, all costs governed by RCW 4.84.010. CP 2269-75. Appellant contested the additional costs of obtaining medical records and deposition testimony that were not admitted into evidence or used at trial but were incurred after the Offer of

Judgment was rejected. CP 2274. However, RCW 4.84.010 specifically permits the recovery of additional "costs otherwise authorized by law." Respondents are not seeking the recovery of attorney fees or expert witness fees but rather seeks recovery of costs addressed in RCW 4.84.010 and consistent with the purpose and language of Rule 68. Respondents submit that RCW 4.84.010 is unambiguous in permitting recovery of costs in addition to those set forth in the body of the statute.

Civil Rule 81(b) provides: "Subject to the provisions of section (a) of this rule, these rules supersede all procedural statutes and other rules that may be in conflict." While the legislature may adopt rules governing court procedures, "[i]f a statute appears to conflict with a court rule, this court will first attempt to harmonize them and give effect to both." *Putman v. Wenatchee Valley Med. Ctr., PS,* 166 Wn.2d 974, 980 (2009).

Respondents submit that the statute and the rule can, and should, be harmonized. In pertinent part, RCW 4.84.010 creates the universe of recoverable costs to a prevailing party and Rule 68 addresses the timing in which those costs are incurred and can be recovered. As the *Lietz* court noted, the purpose of the Rule is to shift the burden of post-offer litigation costs to the plaintiff when he does not obtain a more favorable result. To find that RCW 4.84.010 is the sole legal authority controlling the issue of costs recoverable to a prevailing party would vitiate the import of the use

and purpose of offers of judgment. As such, Respondents submit that the trial court erred in interpreting RCW 4.84.010 and abused its discretion in applying RCW 4.84.010 and CR 68 in addressing Respondents' cost bill.

V. CONCLUSION

The trial court should be affirmed as to its evidentiary rulings regarding introduction of evidence relating to Appellant's claim of neglect and the testimony of Ms. Ander and Ms. Yao's healthcare providers. Furthermore, the trial court did not err in its application of the law regarding Respondents' affirmative defenses relating to other parties' negligence or Appellant's futile breach of contract claim. However, the trial court did err in assessing the recovery of costs to Respondents as the prevailing party when an Offer of Judgment had been submitted and rejected. Respondents respectfully request that the Court affirm the trial court verdict and remand only the issue of the scope of the costs recoverable by Respondents as both the prevailing party under RCW 4.84.010 and as defendant who served an offer of judgment "which was larger [$250,000] than the judgment ultimately obtained [$0]."

This amended brief respectfully submitted April 2nd 2013.

ANDREWS SKINNER, P.S.

By _____
PAMELA ANDREWS, WSBA #14248
Attorneys for Respondents

DECLARATION OF SERVICE

I, LIZ CURTIS, hereby declare as follows:

1. That I am a citizen of the United States and of the State of Washington, living and residing in King County, in said State, I am over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness therein.

2. On the ~~2nd~~ 3rd (LC) day of April, 2013, I caused a copy of the attached **Amended Brief of Respondent/Cross-Appellant** to be served upon the following in the manner noted:

Attorneys for appellant Hu Yan:

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675 S. Lane Street, Suite 300
Seattle, WA 98104-2942

Via Legal Messenger

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

DATED this ~~2nd~~ 3rd (LC) day of April, 2013 at Seattle, Washington.

LIZ CURTIS