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No. 689762

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IN THE WASHINGTON STATE COURT OF APPEALS  
DIVISION I

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HU YAN, individually and as Personal  
Representative of the Estate of GUIZHEN YAO,  
Deceased,  
Plaintiff/Appellant

vs.

PLEASANT DAY ADULT FAMILY HOME, INC.  
P.S., a Domestic Corporation, YU CHEN YIN and  
Unknown JOHN DOES,  
Defendants/Respondents

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APPEAL FROM THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON  
IN AND FOR THE COUNTY OF KING  
CAUSE No: 689762  
HONORABLE JOHN ERLICK, Trial Judge

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BRIEF OF APPELLANT

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## I. INTRODUCTION

On July 7, 2008, Guizhen Yao (Yao) was admitted to Pleasant Day Adult Family Home (Pleasant Day) because she could no longer care for herself. She suffered from Parkinson's disease and dementia, and had symptoms of daily random panic attacks, hallucinations, delusions, irritability, aggravation, stumbling, wandering and exit seeking, fear of falling and a need for one-on-one care while walking. Yao sustained several falls and multiple injuries within two months after she was admitted to Pleasant Day, which was solely owned by Yu Chen Yin (Yin) who was the only caregiver at Pleasant Day at the time. In less than two months, Yao fell on her face outside Pleasant Day and fractured her chin which resulted in her death.

Yao's widow and personal representative, Hu Yan (Yan), sued Pleasant Day and Yin, alleging they were negligent and committed neglect of a vulnerable adult and breached a contract (Yao's family paid Yin an extra \$500.00 per month for Yin to provide an extra caregiver for Yao which Yin did not do). The government was paying Yin approximately \$3,000.00 per month to take care of Yao. The law prohibits an adult family home from charging a vulnerable adult and/or her family extra money for care and from accepting and/or retaining a resident that he or she cannot provide for safely. See WAC 388-78-A244. The Washington

State Legislature recently created a cause of action to protect vulnerable adults from neglect. *See* RCW 74.34.200 (1). RCW 74.34.020 (9) defines neglect in relevant part as:

(a) a pattern of conduct or inaction by a person or entity with a duty of care...that fails to avoid or prevent physical or mental harm or pain to a vulnerable adult;...

## **II. ASSIGNMENTS OF ERROR**

### **A. Assignments of Error**

1. The trial court erred in entering the order of April 11, 2012, denying plaintiff's motion to strike defendants' "empty chair" and affirmative defenses.

2. The trial court erred in denying plaintiff's motion to exclude all statements and evidence alleging fault, liability and/or responsibility of Yao's family, healthcare providers and/or the Department of Social and Health Services (DSHS) for Yao's injury and death.

3. The trial court erred in denying plaintiff's motion to exclude Katherine Ander's (Ander) opinion that Yin's conduct did not constitute neglect.

4. The trial court erred in entering the order of April 10, 2012, denying plaintiff's motion to prohibit all experts from testifying that Yin's conduct did not constitute neglect.



5. The trial court erred in admitting DSHS investigator Ander's testimony that she conducted an investigation into the alleged neglect of Yao by Yin and that she did not find neglect.

6. The trial court erred in denying plaintiff's motion to exclude evidence and allegations that Yao's healthcare providers did not report neglect.

7. The trial court erred in entering the order of April 10, 2012, denying plaintiff's motions to exclude all allegations of and that no mention be made that Yao's healthcare providers and doctors and the Department of Social and Health Services (DSHS) did not report neglect and as such, Yin's conduct and care provided to Yao was not neglect.

8. The trial court erred in entering the order of April 11, 2012, granting defendants' motion to dismiss plaintiff's breach of contract claim.

**B. Issues Pertaining to Assignments of Error**

1. Did the trial court err in its failure to strike Yin's "empty chair" defenses and in admitting evidence that Yao's family, healthcare providers and DSHS were at fault for Yao's injury and death when the alleged "empty chair" parties did not have a duty to protect Yao from the neglect and negligent acts of Yin and where evidence and statements alleging fault and responsibility by said parties is irrelevant and highly prejudicial under ER 402 and 403? (Assignments of Error Number 1 and Number 2).

2. Did the trial court err in admitting DSHS investigator Katherine Ander's and Yin's expert Elizabeth Johnston's opinions that Yin's conduct and the care she provided or failed to provide to Yao did not constitute neglect when neglect of a vulnerable adult was one of plaintiff's cause of action? (Assignments of Error Number 3 and 4).

3. Did the trial court err in admitting the testimony of DSHS investigator Katherine Ander that she conducted an investigation and did not find neglect of Yao by Yin? (Assignment of Error Number 5).

4. Did the trial court err in admitting evidence that Yao's healthcare providers did not report neglect and that the failure to report neglect means there was no neglect? (Assignments of Error Numbers 6 and 7).

5. Did the trial court err in dismissing plaintiff's cause of action for breach of contract? (Assignment of Error Number 8).

### **III. STATEMENT OF THE CASE**

#### **A. NATURE OF THE CASE**

This is an appeal from the jury verdict and judgment entered by the King County Superior Court in favor of respondents/defendants Pleasant Day and Yin and against appellant/plaintiff Yan.

#### **B. PLEADINGS AND PROCEEDINGS BELOW**

On October 6, 2010, Yan filed a Summons and Complaint against Pleasant Day Adult Family Home and Yu Chen Yin (hereinafter Yin) in King County Superior Court. CP 1-5, 15-18.

On October 26, 2010, Yan filed a 13-page Civil Rule 15 permissible amended complaint against Yin alleging claims for “damages for personal injury, wrongful death, RCW 4.20 et seq; neglect of a vulnerable adult, RCW 74.34 et seq; long-term care resident rights violations, RCW 70.129 et seq; and breach of contract.” CP 20-32. On December 16, 2010, Yin filed an answer and affirmative defenses to Yan’s amended complaint. CP 33-42.

On March 15, 2012, Yan filed a motion to amend his complaint. CP 724-728. On March 30, 2012, Yan filed another motion to amend his second amended complaint. CP 1521-1527. On April 10, 2012, the trial court entered an order granting Yan’s motion to amend his complaint. CP 1823.

On March 26, 2012, Yan and Yin filed several motions in limine. CP 970-1029, 1052-1056, 1066-1070, 1158-1165, 1168-1179, 1278-1283, and 852-859. On April 10, 2012, the trial court entered orders on most of the parties’ motions in limine. CP 1837-1829 and 1830-1832. Yan’s No. 2 special motion in limine was a motion to exclude evidence and statements concerning fault, liability and responsibility of Yao’s family, healthcare

providers and DSHS. CP 1168-1179, RP 94:12-96:12. The trial court orally denied the motion on April 10, 2012. RP Vol. II, 94:10-96:12.

On March 30, 2012, Yan filed a motion to strike Yin's "empty chair" and affirmative defenses. CP 1506-1516. On April 11, 2012 the trial court denied Yan's motion to strike. CP 1837-1838.

On March 28, 2012, Yin filed a motion to strike Yan's claims for breach of contract and for neglect of a vulnerable adult. CP 1417-1428. On April 11, 2012, the trial court granted Yin's motion to dismiss Yan's breach of contract claim but denied her motion to dismiss Yan's neglect of a vulnerable adult claim. CP 1842-1843.

On April 5, 2012 the court convened for pretrial matters and the trial judge discussed procedures and expectations in his court, i.e. no "speaking objections," only one attorney speaks on the same issue, sidebars are mic'ed and recorded, etc. Hearing on motions in limine pp. 1-144.

On April 9, 2012, the court reconvened for trial and for additional oral argument on the pretrial motions and motions in limine. RP Vol I, 3-85.

On April 23, 2012, after all of the evidence was presented and the jury was instructed by the trial court and the parties made closing arguments, the case was submitted to the jury for deliberation. RP Vol X, 1191:15-1260:16.

On April 25, 2012, the jury returned a defense verdict. RP Vol XI, 1274-1276.

### **C. STATEMENT OF FACTS**

On July 7, 2008, Yao was admitted to Pleasant Day<sup>1</sup> as a full time resident. RP Vol. III, 245:1-12; Vol. VI-C, 31:19-24. Yao suffered from Parkinson's disease and dementia. RP Vol. V, 529:14-25. Yao was incapable of caring for herself when admitted to Pleasant Day family home facility. *Id.* Yao required significant medication and treatment for her illness. Vol. V, 530: 24-536:25. Yao's diagnosed symptoms included daily random recurring panic attacks, hallucinations, delusions, irritability, aggravation, stumbling, fear of falling and a need of one-on-one care while walking. RP Vol. V, 531:2-534:11.

Prior to being admitted to Pleasant Day, Yao's primary caregiver was Hu Yan, her 81 year old husband. RP Vol. II, 180:7-8; 193:10-196:7. The Department of Social and Health Services (DSHS) was providing an in-home caregiver for approximately three hours per day. RP Vol. III, 239:23-240:1. Due to Yao's husband's age and health concerns, Yao's doctors and healthcare providers and family felt it was best to place Yao in an adult family home or a nursing home. RP Vol. III-A, 7:5-24.

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<sup>1</sup> Pleasant Day is an adult home which provide in-home care services to live-in adults who needs assistance.

During late June 2008, respondent Yu Chen Yin (hereinafter Yin), the owner of Pleasant Day and primary caregiver for the facility, met with Yao and her husband, daughter and son to decide whether she would accept Yao as a resident of Pleasant Day. RP Vol. VI-C, 33:17-36:22. Prior to Yao becoming a resident of Pleasant Day, Yin received and read a copy of the DSHS assessment for Yao. RP Vol. VI-C, 36:4-22. The assessment contained, inter alia, information about Yao's medical condition and limitations and the care and services Yao needed. RP Vol. III, 271:10-279:23. Yin entered into a contract with DSHS to provide the services listed in the assessment. RP Vol. III-C, 24:1-26:5. DSHS paid Yin approximately \$3,000.00 per month to provide Yao the care and services listed in the assessment. RP Vol. III, 279:10-23. Yin was required by law to provide the services agreed to in the contract. RP VI-C, 24:1-26:5.

On July 7, 2008, Yao moved into Pleasant Day. RP Vol. VI-C, 31:19-24. After one day of providing care to Yao, Yin wrote in Yao's chart notes that she could not keep Yao safe. RP Vol. VII-A, 4:7-5:9, 27:12-16. Yin was required by law to discharge Yao out of Pleasant Day if she could not keep her safe. RP Vol. III, 283:7-16, Vol. V, 634:6-9, 641:18-642:18. Yin was aware of this legal requirement. RP Vol. VII, 741:13-17. Yin could have discharged Yao immediately by calling 911 and sending Yao to an emergency room at a hospital. RP Vol. III, 284:16-

285:2. Yin's other option was to give the family a 30-day move out notice. RP Vol. VII-A, 68:5-71:19. Yin had successfully used the 30-day move out notice process "not too long before Yao became a resident" of Pleasant Day. RP Vol. VII, 749:18-23. Yao's family agreed to pay Yin \$500 per month for Yin to hire an extra caregiver for Yao. RP Vol. VI-B, 16:13-18.

In addition to the payment by the government, On July 7, 2008, Yao's family paid \$500 for the month of July 2008. RP Vol. VI-B, 6:22-7:12; Vol. VI-C, 50:3-15. The family also paid Yin \$500 for the month of August 2008. *Id.* Yin did not hire an extra caregiver for Yao. RP Vol. V, 647:5-11. Yin told DSHS investigator Katherine Ander that the \$500 she received from Yao's family was for an extra caregiver and that she tried but was unable to find an extra caregiver for Yao. RP Vol. V, 620:12-622:10. This required \$500 extra payment violated the law per Ander. RP Vol. V, 6:41-642:23; 623:5-24.

On July 19, 2008, July 20, 2008; August 1, 2008, August 15, 2008, August 16, 2008, August 20, 2008, and August 30, 2008, Yao sustained falls outside and inside Yin's facility. RP Vol. VI-C, 60:10-20; Vol. VII-A, 40:15-42:5; 54:11-55; 58:1-25; 67:21-62:1, 65:7-67:8. Yao sustained multiple injury from these falls, including back, ribs, hip, and facial injuries. *Id.* Yao made repeated attempts to escape from Pleasant Day. RP

Vol. VII-A, 58:14-60:2. Yao was on several medications for her Parkinson's and dementia conditions. RP Vol. VI-C, 44:4-46:6.

Yin owns Pleasant Day, an adult family home providing care to paying residents who are unable to care for themselves. RP Vol. VI-C, 7:13-19. Yin had residents whom live-in care charges were paid for by the government. RP Vol. VI-C, 19:1-8. Yin had a total of five residents when Yao was a resident at Pleasant Day. Vol. II, 738:12-25. Yin has been married for approximately 25 years. RP Vol. VI-C, 5:7-8. She has three daughters, ages 24, 22, and 20. *Id* at 5:12-19. She graduated from Central Washington University in 1986 with a degree in marketing and minor in computer and data processing. *Id* at 5:23-6:3.

Yin opened Pleasant Day in 2005. RP Vol. VI-C, 22:8-16. The business is licensed as an adult family home by the state of Washington. RP Vol. VI-C, 7:20-25. Yin is licensed by the state as a certified nurse assistant (CNA). She received training to become a CNA. RP Vol. VI-C, 6:22-25. Yin is certified by the state of Washington to provide care to residents with dementia. RP Vol. VII-A, 53:22-25; Vol. VII, 740:21-741:4.

Yin's mother developed dementia and suffered from cancer for approximately 12 years. RP Vol. VI-C, 8:4-8. Yin provided care to her mother. Yin used the Chinese Information Services and Counseling



(CISC) to help her with obtaining a contract with DSHS to get paid for providing care to her mother who suffered from dementia. RP Vol. VI-C, 12:12-17. CISC is the same service business that helped Yao's family obtain a DSHS assessment and financial assistant. *Id* at 35:24-36:3.

Yin was aware that Yao suffered from Parkinson's disease and dementia prior to accepting her as a new resident of Pleasant Day. *Id* at 32:16-20. She studied computer science in college and knew how to do research on a computer. RP Vol. VI-C, 6:2-9. She wrote in her chart notes on Yao for July 7, 2008 that she "can't keep Yao's safety." RP Vol. VI-C, 70:7-16. Yet she continued to keep Yao as a resident of Pleasant Day. Yao would look for ways out of Pleasant Day facility almost daily from when she first became a resident per Yin. RP Vol. VI-C, 71:19-72:17.

On August 30, 2008, 75 year old Yao, sustained injury when she fell and fractured her mandible and sustained related head injuries while she was a resident of Pleasant Day's facility. RP Vol. VII-A, 65:7-67:18. On September 14, 2008, Yao died as a result of the injuries she sustained in said fall. RP Vol. III, 365:12-25. The death certificate listed mandible fracture and blunt force injury to the head as a cause of death. *Id* at 365:12-366:8.

Yao was married to Yan for over 50 years at the time of death. Yan and Yao have two adult children, a son who lives in California, and a

daughter who lives in Washington State with her own two children. RP Vol. III-A, 4:15-22. The daughter was caring for her husband who was suffering from cancer during the time period her mother was a resident of Pleasant Day. RP Vol. VI-B, 10:15-25. She took her husband to Taiwan for cancer treatment in July 2008 for two to three weeks while her mother was at Pleasant Day. RP *Id.* Her husband subsequently died from cancer.

Yao and Yan met in China while she was a senior in college in 1956. RP Vol. II, 181:4-21. Yao developed Parkinson's disease and dementia in approximately 2005. RP Vol. II, 189:10-11; 191:3-4. She was a vulnerable adult per RCW 74.34.020 during her stay at Pleasant Day. *See* RCW 74.34.020 et. seq.

On August 30, 2008, Yao left Pleasant Day through the front door and went outside unsupervised. RP Vol. VII 839:1-849:18. Yin then followed Yao outside and saw Yao fall on the roadway. *Id.* Yao was then taken back to Pleasant day. *Id.* Yin did not call 911 but called Yao's husband. *Id.* Yan came to Pleasant Day and took his wife to Overlake Hospital. *Id.* Yao was later transferred to Harborview Hospital. *Id.*

On February 10, 2009, DSHS investigator, Katherine Ander (Ander), conducted an unannounced on-site investigation of Pleasant Day. RP Vol. V, 617:17-618:1. She reviewed records and interviewed Yin and

at least one other resident who lived at Pleasant Day when Yao was there.  
*Id.* at 618:2-15.

#### IV. ARGUMENT

##### A. Standard of Review

This court reviews the trial court's rulings on admissibility of evidence under the abuse of discretion standard. *Equitable Life Leasing Corp v. Cedar Brook, Inc.*, 52 Wash.App. 497, 761 P. 2d 77 (1988). A trial court abuses its discretion when its ruling is based on untenable grounds or for untenable reasons. *Havens v. C+D Plastics, Inc.*, 876 P. 2d 435 (1994).

However, questions of law are reviewed *de novo*. *Berger v. Sonneland*, 144 Wash.2d 91, 26 P.3d 257 (2001).

##### B. The trial court erred in denying plaintiff's motion to dismiss defendants' "empty chair" and affirmative defenses, and in failing to exclude said evidence.

On March 30, 2012, Yan filed a motion to dismiss defendant's "empty chair" and affirmative defenses. CP 1506-1516. The trial court denied the motion. The burden of proving an affirmative defense is on the defendant. *Robertson v. Club Ephrata*, 48 Wash. 2d 285, 293 P. 2d 752 (1956). Yan now seeks review and a reversal of said decision under the *de novo* review standard. The legal question presented to the trial court was whether the two alleged "empty chair" entities owed a duty of care to the

plaintiff. Whether a duty exists is a question of law. *Webstad v. Stortini*, 83 Wash. App 857, 924. P. 2d940 (1996). The question posed is whether Yao's family and DSHS owed Yao a duty to protect her from the negligent and neglectful acts of Pleasant Day and Yin, even though they had no control over Pleasant Day and Yin, nor custody and control over Yao while she was a resident of Pleasant Day.

**1. DSHS did not owe a duty to protect Yao from negligent and neglectful acts of the defendants.**

The Legislature has the power to determine the scope of governmental immunity from lawsuits. The Legislature removed Washington's shield of absolute sovereign immunity. *See* RCW 4.96.010. However, under the "public duty doctrine" which modified the traditional concept of sovereign immunity:

The threshold determination in a negligence action is whether a duty of care is owed by the defendant to the plaintiff. **Whether the defendant is a governmental entity or a person, to be actionable, the duty must be one owed to the injured plaintiff**, and not one owed to the public in general. This basic principle of negligence law is expressed in the 'public duty doctrine'."

*Babcock v. Mason County Fire District No. 6*, 144 Wash.2d. 774, 30 P.3d 1261 (2001) citing *Taylor v. Stevens County*, 111 Wash. 2d 159, 759 P. 2d 447 (1988). *Emphasis added*. The policy behind the public duty doctrine

is that legislation for the public benefit should not be discouraged by subjecting the government to unlimited liability for individual damages. *Taylor v. Stevens County*, 111 Wash.2d 159, 163, 759 P.2d 447 (1988).

The issue presented here is controlled on all points by this Court's holding in *Donohoe*, this Court's most recent and definitive explanation of DSHS' duty and liability when it has done an assessment and is paying for a vulnerable adult's care at a nursing home or an adult family home. *Donohoe v. State of Washington*, 135 Wash.App. 824, 142 P.3d 654 (2006) (where a resident accepted into a nursing home after a DSHS assessment was done and where the home was paid by DSHS and Medicaid, and where the family twice complained to DSHS that the resident was being neglected, and the resident lost 10 pounds during a two week period and allegedly was left lying in feces-soiled linens, and DSHS conducted two on-site inspections, the Court held no duty existed under the public duty doctrine). The *Donohoe* Court stated at 841:

Pacific Care was solely responsible for hiring and supervising Mrs. Donohoe's daily, private, nursing home caregivers. It was Pacific Care that breached this duty of care and compensated her Estate for its tortious, inadequate care and negligent supervision. As the trial court noted,

Although, there was some direct contact between DSHS and Mrs. Donohoe in order to do assessments to determine the level of care benefits DSHS would pay,

there were no express assurances that she could justifiably rely on in order to complete the requirements for the special relationship exception ...

*Donohoe*, 135 Wash. App at 841. The *Donohoe* Court further state:

Even if the State could be said to have waived sovereign immunity so as to be potentially susceptible to the Estate's lawsuit here, we hold that: (1) Chapter 18.51 RCW, the nursing home regulation statute, does not create an actionable duty that DSHS owes to an individual nursing home resident; (2) any duty that RCW 18.51 imposes on DSHS to oversee nursing homes' regulatory compliance is a duty owed to the public generally, not to individual residents such as Mrs. Donohoe; and (3) any alleged breach of that duty is not actionable by the Estate because Mrs. Donohoe's relationship with DSHS does not fall within any exception to the public duty doctrine. In short, the Estate has no actionable claim under either the common law or statute. Accordingly, we affirm the trial court's summary judgment dismissal of the Estate's action against the State.

*Donohoe*, at 853.

In the instant case, DSHS did not owe Yao a duty of care to protect her from negligence and the neglectful acts of Pleasant Day and its owner. As such, Yin could not use DSHS as an "empty chair" entity. Furthermore, Yin did not have any evidence to show liability by DSHS as is required by law. *See Adcox v. Children's Orthopedic Hospital and Medical Center*, 123 Wn.2d 15, 864 P.2d 921 (1993). It is uncontested that DSHS only involvement with Yao's family as to the placement of Yao at Pleasant Day was to do an assessment to determine the amount of

payment to be paid to the caregiver for Yao based upon Yao's needs as determined by DSHS. RP Vol. III, 279:24-280:25. DSHS did not assist the family in deciding where to place Yao nor was there any reliance by the family. Yao's daughter, Janney Gwo, did the calling to locate an adult family home for her mother. RP Vol. V-B, 4:9-7:7. After visiting Pleasant Day the family decided to go with Pleasant Day. *Id.* It was error for the trial court to deny plaintiff's motion to strike defendants' "empty chair" defenses claiming DSHS was responsible and at fault for Yao's death and plaintiff's damages.

There was no special relationship nor any other relationship between Yin and DSHS. According to Yin's testimony, Yin had no contact with DSHS prior to Yao becoming a resident at Pleasant Day. *RP Vol. VII-A, 71:20-22.* DSHS' only involvement with Yin was when Yin called Debbie Ho, the preparer of the assessment and asked her for suggestions to which Ms. Ho advised Yao that she needed to talk to the case manager. *Id.* at 71:23-72:10. Yin claims that she then called the case manager who told her she had not received the file yet. *Id.* All of this took place after Yao had become a resident of Pleasant Day per Yin. *Id.* Yin's testimony on these issue was:

Q. Did you talk to Debbie Ho at any time before Mrs. Yao was admitted to Pleasant Day?

A. No.

Q. Have you talked to Debbie Ho at any time other than what was indicated in your notes?

A. No.

Q. You talked to her after Mrs. Yao was injured and had been taken to the hospital, but not before that; am I correct?

A. Before that.

Q. You talked to her before that?

A. Yes.

Q. Do you know approximately when that was?

A. I can't remember. And she suggest me call my case manager, DSHS case manager. So I called my case manager, and then she say she haven't received, she cannot give me a suggestion.

Q. The question is still: Did you contact any of these doctors before you accepted Mrs. Yao as a resident?

A. No.

*Id.* at 71:20-72:13

Furthermore, RCW 74.34.110 through 74.34.140 allows DSHS to petition the Superior Court for an order of protection from neglect and to seek to remove a vulnerable adult from a neglectful environment. *See* RCW 74.34.110 through 74.34.140. However, the statute provides that “neither the Department of Social and Health Services nor the state of Washington shall be liable for seeking or *failing to seek relief on behalf of any person* under this action.” RCW 74.34.150. (*Emphasis added.*) Just



like in *Donohoe*, DSHS did not owe a duty of care to Yao since there was no special relationship between DSHS and Yao. Since DSHS did not owe Yao a duty of care it was not liable and responsible for Yao care or lack thereof. Therefore, the trial court abused its discretion in allowing argument and evidence to be introduced at trial claiming that DSHS was at fault for Yao's injury and death. The trial court's discretion was exercised on untenable grounds and for untenable reasons. The trial court erred as a matter of law in ruling that DSHS owed a duty of care to Yao and therefore created an empty chair. Duty is a question of law and is reviewed *de novo*.

**2. Yao's family did not owe a duty to protect her from defendants' negligence and neglect.**

Yao's family did not have a duty to provide care to Yao once she was placed with Pleasant Day. See *Webstad v. Stortini*, 83 Wash.App. 857, 924 P.2d 940 (1996) (social host owed no duty to prevent victim from committing suicide); *Cox v. Malcolm*, 60 Wash.App. 894, 808 P.2d 758 (1991) (where 5-year old child's grandfather who assumed responsibility of supervising grandchild while working in the yard, did not assume responsibility for making decisions for grandchild. Grandfather did not have duty to decide whether the child could ride in an automobile with father's girlfriend, even though the child's father's girlfriend had

been drinking. The court held there is no duty to prevent a third party from causing physical injury to another, citing *Peterson v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983)). When no duty of care exists, a defendant cannot be liable for negligent conduct. *Webstad v. Stortini*, *supra* at 865, citing *Lauritzen v. Lauritzen*, 74 Wash. App. 432, 438, 874 P.2d 861 (1982) (held that husband driver had no special relationship with his passenger wife and no duty to protect her from the criminal acts of a third party):

The threshold determination in any negligence case, ... is whether the defendant owed a duty of care to the plaintiff. (authority omitted). “Whether a defendant owes a duty of care to a plaintiff is a question of law. (authority omitted). When no duty of care exists, a defendant cannot be subject to liability for negligent conduct. (authority omitted).

*Webstad*, at 865. An individual has no duty to protect another person from the negligence of third parties unless a special relationship exists or there is a duty owed by statute or common law. *See Webstad v. Stortini, supra*.

In the instant case, plaintiff has found no statute nor Washington case that provides that family members must protect another adult family member from the negligence and neglectful acts of a third party. There is a duty imposed upon entities based upon a special relationship, such as group home-resident, employer-employee, hospital-patient, school-

student. See generally, *Niece v. Elmview Group Home*, 131 Wash.2d 39, 929 P.2d 420 (1997) and cases cited therein. However, there are limits to even this duty. *Id.* As the court stated in *Niece*:

When we are unable to determine the public policy merit of a proposed significant change in the tort law, caution dictates that we defer to the legislature rejecting the imposition of vicarious liability for a teacher's sexual relationship with a student, the *Bratton* court wrote:

...  
\*58 [O]ur imposition of vicarious liability on the school district would be "far-reaching and ... would rearrange, across the state, \*\*431 the responsibility of employers for the conduct of their employees." ... Any needed redirection of social policy is more appropriately the function of the Legislature.

*Niece* at 57-58. Likewise, to impose a duty upon every family and its members who place an adult family member in a nursing home and/or adult family home is far-reaching and should be left to the legislature.

Plaintiff submits the trial court committed error in denying plaintiff's motion to strike defendants' "empty chair" defense that claims fault and/or responsibility on Yao's family.

**C. The trial court erred in admitting Ander's and Johnston's opinions that Yin's conduct and care provided to Yao was not neglect.**

Prior to trial, Yan filed a motion in limine to exclude all experts from testifying that Yin's conduct and care provided to Yao did not constitute neglect. CP. 1158-1165. The basis for Yan's motion was that such testimony would constitute conclusions of law and opinions on whether defendant followed the law, and therefore not admissible under ER 704. *Id.* The court denied the motion on April 10, 2010. CP. 1830-1832. DSHS investigator Ander testified that the care Yin provided to Yao was not neglectful. *RP Vol. V, 626:9-627:15.* In addition, she gave the jury an erroneous legal definition of neglect. *RP Vol V, 660:9-662:6.* She changed the neglect standard to a gross negligence standard. *Id.* Ander, in answering a juror's question and explaining to the jury why she found no neglect, responded:

The first question is: Did you make your finding of no neglect based on the fact that the health care providers and the family did not take action to repeat—I'm sorry—to report the lack of needed care to keep Ms. Yao safe or seek to move her? Can you please explain again how you came to this decision?

THE WITNESS: So when I look at that *definition of neglect* for the RCW, you first establish does the person have a duty to care. In this case, yes, the provider did have a duty to care. And then you look, is there a pattern of action or inaction *that failed to maintain the resident's well-being* or an omission that was just *grossly negligent* of their welfare.

When I looked at what her actions were and the pattern of her action, *even though she didn't act in the way that would have benefitted this resident*, I couldn't find—make a

*finding of negligent because she did do a lot of things.* In fact, I listed them in my statement of deficiency. I listed all the things she did. She did, you know, try to stop her from going out the door. She was calling Eleanor Lee on a regular basis. She did talk to the family. She did try to contact the DSHS case worker. So *in order to find neglect, I'd have to say that there was inaction.* So she had action, it just wasn't enough and it wasn't the right kind of things that's—for what her—and so I think the other part of that question was about the healthcare providers?

...

THE WITNESS: I think of reporting as a really significant and important piece of it, but it's really beyond that. It's not reporting, it's doing the care, it's doing what needs to be done. And I think that each of those parties had a part here.

The adult family home provider has the ultimate responsibility. She not only accepted her into care. And I think she told me she read the assessment the day she came in. She assumed it was a regular kind of dementia when it was a very specialized kind of dementia that required very special care. And then *once she knew that her needs were not being met, she failed to act to discharge her* or to—it's just – it's tragic, but basically, *she failed to meet the requirement of the regulation and Ms. Yao was harmed.* But does it rise to the level of neglect? And that charge, as I said—you could argue the case either way. But she wasn't not doing things; she was doing things.

RP Vol V, 660:9-662:6, *Emphasis added.*

Yin's expert Elizabeth Johnston also testified that the care Yin provided to Yao was not neglect. RP Vol. VIII, 905:14-906:21. ER 704 provides:

Testimony in the form of an opinion or inferences **otherwise admissible** is not objectionable because it

embraces an ultimate issue to be decided by the trier of fact.

*ER 704. Emphasis supplied.* The key words are “otherwise admissible,” which indicates that for opinion testimony to be admissible under ER 704 it must be admissible under some other court rule or legal principle.

It has long been the rule in the state of Washington that an expert witness may not testify that a party’s action was negligent, and to similar conclusions of law. *See Simonson et al v. Huff*, 124 Wash. 549, 215 P.49 (1923) (held that expert opinion as to whether a party was negligent was inadmissible, the jury was capable of forming its own conclusions from the facts shown). There are many cases where the court have reached the same or similar conclusions on similar issues. *See e.g. State v. Dolan*, 118 Wn. App. 323, 73 P.3d 1011 (2003) (improper for a police officer to express his opinion to the jury on a defendant’s guilt and it is particularly prejudicial for a government official to do so); *State v. Garrison*, 71 Wn. 2d 312, 427 P.2d 1012 (1967) (question of whether defendant participated in burglary was solely for the jury and was not proper subject of either lay or expert witness testimony); *Washington State Physicians Insurance Exchange &*

*Association v. Fisons Corp.*, 122 Wn. 2d 299, 858 P.2d 1054 (1993) (held legal opinions on questions on the ultimate legal issues before the court are not properly considered under the guise of expert testimony); *State v. Thompson*, 90 Wn. App 41, 960 P.2d 977 (1993) (a police officer should not have described the defendant as “reckless” where recklessness was an element of the crime charged); *State v. Ohmedo*, 112 Wn. App 525: 49 P.3d 960 (2002) (trial court erred in allowing a crop expert to testify that the container used by the defendant was not approved by DOT even though expert was well qualified to give the opinion. The appellate court said expert’s testimony should have been limited to the characteristics of defendant’s container, and the jury alone should have decided whether the container complied with the DOT requirement).

In the instant case, both witnesses were allowed to give their opinions about whether Yin’s conduct was neglect of a vulnerable adult. This was the exact issue put before the jury for the jury to decide. *CP 2190-2231*. There was nothing complicated about the issue for the jury. It was a simple matter of taking the legal definition of neglect from the trial judge and applying the law to the facts the jury felt were proven and for the jury to decide

whether Yin's acts were neglectful or not. The instructions from the court advised the jury that Yao was a vulnerable adult by law. *CP 2190-2231*. The opinion testimony of DSHS investigator Ander was especially unfairly prejudicial and damaging because she was a government official who testified that she had investigated at least 150 neglect cases per year for 13 years. So with 1950+ neglect cases investigated, the jury automatically believed Ander as opposed to their own opinion of Yin's acts since this was their first neglect case. In addition, she gave the jury an erroneous statement of the law as to neglect. Plaintiff has to wonder which definition of neglect did the jury apply, Ander's or the trial court's?

The admission of the opinions in question into evidence did not comply with ER 702 requirement of "will assist the trier of fact to understand the evidence or to determine a fact in issue." The opinion statements by Ander and Johnston were bare statements that Yin's conduct was not neglectful. There was no special training or knowledge needed to understand what neglect means under the statute. The trial judge gave the jury the statutory definition of neglect which is extremely simple and understandable to a lay juror. The jury should have been allowed to reach their



own conclusions without interjection of the witnesses' own opinions. ER 702 required the expert opinions be based on "scientific, technical or other specific knowledge." ER 702. Ander's and Johnston's opinions as to whether Yin's conduct constituted neglect was not based on scientific, technical or specialized knowledge. They were simply lay opinions that they did not think it was neglect. Under ER 701 a lay witness' opinion must be helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and rationally based on the perception of the witness. ER 701. What these opinions amounted to were Ander and Johnston becoming the 13<sup>th</sup> and 14<sup>th</sup> jurors on this case. This is not fair nor permissible under our system of justice. The trial court erred in not excluding the opinions in question.

**D. The trial court erred in its failure to exclude the testimony of DSHS investigator Katherine Ander that she conducted an investigation and did not find neglect of Yao by Yin.**

Prior to trial, plaintiff moved the court for an order excluding all experts opinion as to whether Yin's conduct and care provided to Yao was negligent and/or neglectful. CP. 1158-1165. The court granted the motion as to negligence but denied the

motion as to neglect. CP. 1830-1832. At trial, DSHS investigator Katherine Ander was called by Yan as a witness. *RP Vol. V 615:10*. Yan mainly called Ander as a witness to testify to her conversation with Yin during her February 10, 2009 visit to Pleasant Day to investigate a complaint made by Yan. His complaint was that Yao had been a resident of Pleasant Day and that she did not receive appropriate supervision and care and had run out of the adult family home and fell down and sustained a fatal injury. *RP Vol V, 619:5-620:2*. The second complaint was that the family had paid \$500 per month for an extra caregiver but the extra caregiver had not been provided. *Id.* These two issues pretty much were the only matters covered in Yan's direct examination except for the witness' education and background information. *RP Vol. V, 616:12-623:25*. However, on cross-examination by Yin, Ander covered many things including her opinion as to whether Yin's action constituted neglect. *RP Vol. V, 624:8-6:39:16*. On this issue, Ander testified over objection at 626:3-20:

Q. And in this case it is part of your duty and responsibility when you conducted your investigation...part of your job responsibilities are to investigate care, abuse and neglect complaints, correct?

A. Yes

Q. In this instance, did you investigate as to whether or not there was neglect in the Pleasant Day Home?

A. Yes.

Q. And what was your conclusion?

Ms. Buckley: Objection, prior ruling.

The Court: Alright, counsel side-bar please.

Q. And what was your conclusion with respect to whether or not there was neglect at Pleasant Day involving Ms. Yao?

A. I did not find that it met the standard of neglect.

*RP Vol. V, 626:3-20.* Yan properly made an objection on prior ruling grounds, referring to the motion in limine to exclude. In addition, Ander made it sound like there was a DSHS adjudication and findings entered that there was no neglect. *RP Vol. V-A, 4:7-14.* The court overruled the objection. *Id* at 3-8. Ander then testified that she has 13 years as a complaint investigator with DSHS and she investigates about 150 complaints a year, minimum. *Vol. V, 627:1-14.* She testified that all her investigations involve neglect as part of the investigation. *Id.* She said 13 times 150 is the number of investigations she had conducted (1950 investigations). *Id.* Yet she testified that any other adult family home would have called 911 and had Yao removed from the home for her own safety. *RP Vol. V, 635:16-25; 644:11-24; 6:45:19-646:17.* Ander stated on this point:

A: What I found was that this was a tragic event and the difficulty was that the adult family home provider did not follow the regulations to protect the resident, she was responsible for that and she did not do that...The difficulty is that the family did not know the health care system and what they needed to do...And then the providers—I don't know what their thinking was in terms of not acting. And then, again, the adult family home provider, Maria, I can tell you in this circumstance in any other home a resident that's running out the raising, raising their fist, has hit another resident, they would call 911, they would have that person come and removed from the home. And that never happened.

*RP Vol. V-A, 634:16-635:25.*

In the instant case, Ander gave her opinion, over Yan's objection, that Yin's care and conduct did not constitute neglect of Yao, a vulnerable adult. Even though this issue is similar to the issue in section IV "C" of Yan's brief above, but it is more arduous because Ander is a government official with over 1950 investigations where she has to decide whether to file a statement of deficiency and name the alleged violations to be subjected to an administrative hearing. The jury gave undue weight to Ander's opinion which was not admissible under the law. e.g. *Simonson et al v. Huff*, 124 Wash. 549, 215 P. 49 (1923). The *Simonson* Court stated:

Special skill will not entitle a witness to give an expert opinion where the jury is capable of forming its own conclusion from the fact shown. In other words, whether the acts of the driver of the stage on the occasion were careful and prudent or were negligent were within the common knowledge of mankind and thus not a subject for expert opinion.

*Simonson, supra* at 555. In the case at bar, the same principle should apply since neglect and negligence are similar, and the causes of action the jury is called on to decide.

Furthermore, Ander gave an erroneous definition of neglect. Her attempt to advise the jury of the law and how to apply the law to the facts invades the province of the jury. She changed the standard from neglect to a gross negligence standard. *RP Vol. V 660:20*.

Yan's motion in limine was to exclude all experts' opinions, statements and allegations that Yin's conduct was not neglect. The trial court ruling was erroneous and resulted in unfair prejudice to Yan's case.

**E. The trial court erred in its failure to exclude evidence and statements that Yao's healthcare providers did not report neglect of Yao, and by implication did not think Yin's care and conduct was neglect.**

Prior to trial, Yan filed two motions in limine seeking to exclude Yin from making statements, allegations, and introducing evidence that Yao's healthcare providers did not report neglect. CP 1158-1165. The basis for the motions were relevancy under ER 402 and 403 and improper legal conclusions under ER 704 and 702. *Id.* The trial court denied the motion. CP 1830-1832. Yin questioned Yao's healthcare providers, Dr. Eleanor Lee and Dr. Soo Borson, and DSHS investigator Ander about not reporting neglect. RP Vol. VI-A, 61:19-62:25, Vol. IV-B, 25:11-22. Dr. Lee testified that she would report if she saw Yao was in danger, or abused, or neglected. RP Vol. VI-A, 61:19-62:25. She acknowledged she did not report Yao as being abused or neglected. *Id.* Dr. Borson said she would not have turned Pleasant Day in to the state based on what she knew as of August 5, 2008. Vol. IV-B, 25:11-22. She said she had no suspicion that Yin engaged in abuse or neglect of Yao. *Id.* In addition, Yin questioned DSHS investigator, Ander as to whether Yao's healthcare providers were mandated reporters. RP Vol. V, 624:9-625:2. Ander then testified that there were no reports in the file from any healthcare providers regarding neglect of Yao that she is aware of. *Id.*

Under ER 402 evidence which is not relevant is not admissible. ER 402. "Relevant evidence" means evidence having any tendency to make the existence of a fact that is of consequence to the determination of

the action more probable or less probable than it would be without the evidence. *ER 401*. Under ER 401, evidence is not considered relevant unless (1) it has a tendency to prove or disprove a fact, and (2) that fact is of some consequence in the context of the other facts and the applicable substantive law. *See Harris v. Drake*, 116 Wn.App. 261, 65 P.3d 350 (2003) (held, in a personal injury case, trial court properly refused to allow the defendant to present evidence that plaintiff had complained of pain to a chiropractor fourteen months before the accident. The court held the evidence was not relevant, because condition causing pain was dormant and asymptomatic, just prior to the current accident, and did not have any “tendency to prove a fact of consequence to the action.”).

Courts have held that evidence similar to the evidence at issue is not admissible. *See Warren v. Hart*, 71 Wn.2d 521, 429 P.2d 873 (1967); *Billington v. Schaal*, 42 Wash.2d 878, 259 P.2d 634 (1953) (which held that the fact of citation or noncitation of a driver by the investigating law enforcement officer is inadmissible in a subsequent civil proceeding for damages as proof of negligence). In addition, evidence relating to the fact that a defendant “forfeited bail” is not admissible to infer guilt or fault. *Reynolds, et al v. Donohoe*, 39 Wash.2d 451, 236 P.2d 552 (1951). The *Donohoe* court noted it is well known that a forfeit of bail is nothing but a

convenient method of concluding a traffic citation and the criminal charge. It is not an admission of fault or guilt. *Id.* at 456.

In the instant case, as in *Billington* and *Donohoe*, the failure to report neglect does not mean that a witness or doctor did not believe neglect had occurred. Furthermore, to imply no neglect is the same as giving an opinion that the defendants' care and conduct were not neglect. Such an opinion is not admissible. See authority cited in this brief in sections IV, C and D above.

Yan submits it was error to permit Yin to introduce evidence that Dr. Soo Boron and Dr. Eleanor Lee, Yao's healthcare providers, did not report neglect of Yao by Yin. This was nothing more than a backdoor way of getting their opinions that Yao was not neglected by Yin into evidence. Dr. Lee's and Dr. Borson's opinion as to whether Yao was neglected by Yin are inadmissible as discussed above in section IV, C and D of this brief.

**F. The trial court erred in dismissing plaintiff's cause of action for breach of contract.**

On October 6, 2010, Yan filed a lawsuit against Yin. On October 27, 2010, Yan filed a 13-page Civil Rule 15 permissible "Amended Complaint for Damages for personal injury; wrongful death, RCW 4.20 et seq.; neglect of a vulnerable adult, RCW 74.34 et seq.; long-term care



resident rights violation, RCW 70.129 et seq.; Breach of Contract.” CP 33-42. On December 16, 2010, Yin filed an answer and affirmative defenses to Yan’s amended complaint. CP 33-42. On March 30, 2012, Yan filed a motion to amend his second amended complaint. On April 10, 2012, the trial court granted Yan’s motion to amend his second amended complaint. On March 28, 2012, Yin filed a motion to dismiss Yan’s breach of contract claim. CP 1417-1428. Yin alleged two bases in support of her motion to dismiss Yan’s breach of contract claim: 1) lack of standing to assert a breach of contract claim, 2) plaintiff cannot claim damages for personal injury or death under a breach of contract claim. CP 1417-1428. On April 11, 2012, the trial court granted Yin’s motion and dismissed Yan’s breach of contract claim. CP 1842-1843.

A plaintiff seeking recovery under a contract action must prove a valid contract between the parties, a breach, and resulting damage. *Northwest Independent Forest mfrs v. Dept. of Labor & Industries*, 78 Wash.App. 707, 712, 899 P.2d6 (1995). A contract consists of an offer, acceptance and consideration.

A breach of contract is the failure to perform fully a contractual duty when it is due. Restatement (second) of contracts §235(2). Damage from a breach of contract is the economic losses that were foreseeable as a probable result of a breach. *See generally, Gaglidari v. Denny’s*

*Restaurants*, 117 Wn 2d 426, 815 P.2d 1362 (1991). However, when general damages are involved the traditional rule is that a party cannot recover emotional distress and like damages in a breach of an ordinary contract, i.e. breach of employment contract and the likes. *See Gaglihari, supra.*, at 441-444. Nevertheless, under Restatement of Contracts §353 (1981), emotional and other general damages are recoverable in some breach of contract claims:

The Restatement (Second) now provides:

“Recovery for emotional disturbance will be excluded unless the breach also caused bodily harm or *the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result.*”

(Italics ours.) Restatement (Second) of Contracts § 353 (1981).

While at first glance section 353 might appear to support the creation of a new theory of recovery, the comments, illustrations and cases cited belie this reading. Comment *a* demonstrates a strong intent to maintain the traditional focus on types of contracts, not types of breaches. Comment *a* provides:

In the second exceptional situation, the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result. Common examples are contracts of carriers and innkeepers with passengers and guests, contracts for the carriage or proper disposition of dead bodies, and contracts for the delivery of messages concerning death. *Breach of such a contract is particularly likely to cause serious emotional disturbance. Breach of other types of contracts, resulting for example in sudden impoverishment or bankruptcy, may by chance cause even*

*more severe emotional disturbance, but, if the contract is not one where this was a particularly likely risk, there is no recovery for such disturbance.*

**\*\*1372** (Italics ours.) Restatement (Second) of Contracts § 353, at comment *a* (1981). The comment's clear focus is the nature of contract. The type of breach is not even discussed. Moreover, with the exception of omitting engagements to marry as a covered type of contract, comment *a* is substantially\*444 the same as its predecessor in the original Restatement which was consistently interpreted to limit emotional distress damages to specific types of contracts. Rather than a break with the traditional rule, Restatement (Second) of Contracts § 353 is more properly viewed as carrying forward the traditional focus on the character of the contract. We also note no jurisdiction has suggested there is a substantive difference between section 341 and section 353.

*Gaglidari, supra.*, at 443-444.

If general damages can be recovered when a contract involves carriers and innkeepers with passengers and guests, then the same should be recoverable when the contract is between an adult family home and a resident. There is no logical distinction between an innkeeper and its guests and an adult family home and its resident. If anything a contract between an adult family home and its resident verses an innkeeper and its guest, the contract should be more recognized by law since residents at an adult family home are vulnerable adults.

In the instant case, on or about July 7, 2008, Yin entered into an oral contract with Yao's family to provide an extra caregiver to Yao for

\$500 per month. *RP Vol. VI-B, 6:22-7:12; Vol. VI-C, 50:3-15.* Yin contested the oral contract at trial. However, when DSHS' investigator Ander questioned Yin in February 2009, Yao told Ander that the \$500 she received from Yao's daughter (Janney Gwo) was to hire an extra caregiver for Yao. *RP Vol. VI, 620:12-622:10.* It was a jury question as to whether there was an oral binding contract, and whether the same was breached, and damages sustained by Yao and her estate.

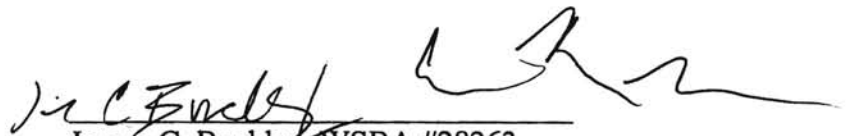
The trial court erred by dismissing Yan's breach of contract claim.

#### V. CONCLUSION

For the foregoing reasons, the trial court committed unfair prejudicial err. Yan seeks a reversal of the verdict and judgment and a new trial.

DATED this 26<sup>th</sup> day of NOV., 2012.

Respectfully submitted,



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IN THE WASHINGTON STATE COURT OF APPEALS  
DIVISION I

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

Plaintiff,

v.

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

No. 689762

**CERTIFICATE OF  
SERVICE**




The undersigned does hereby certify that on this 26<sup>th</sup> day of  
November, 2012, she caused a true and correct copy of the following  
document(s):

**1) BRIEF OF APPELLANT**

to be delivered via the method indicated below to the following parties:

Pamela Andrews	[ ]	U.S. Mail
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