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No. 70892-9

COURT OF APPEALS, DIVISION I,
FOR THE STATE OF WASHINGTON

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

Appellants,

v.

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

Respondents.

BRIEF OF APPELLANTS ESTHER KIM AND THE ESTATE OF HO IM BAE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

Statutes

Rules and Regulations

Other Authorities

A. INTRODUCTION

Those in society who are most at risk need witnesses of abuse and neglect to act, and act immediately. That is why the Legislature has imposed mandatory immediate reporting requirements on those who work with vulnerable adults and witness improper actions by others.

When two employees of Alpha Nursing ("Alpha") witnessed the severe facial bruising, unconsciousness, dragging, and illegal drugging of Ho Im Bae, a helpless patient, they failed to act with urgency. They did not call law enforcement or emergency services. They did not even call the owner of the facility in whose care Bae[1] was. One simply went home without taking action, the other belatedly left a voice mail message for DSHS. Had the employees acted immediately, as they had a duty to do under the law, the life of an innocent and vulnerable woman could have been saved.

The trial court here concluded that no jury could reasonably believe that Alpha or its employees were in any way culpable in the death of Bae, and dismissed the claims of her family on summary judgment. That order should be reversed, and this case set for trial.

B. ASSIGNMENTS OF ERROR

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[1] Although Korean names are ordered with the family name first, Ho Im Bae was referred to as "Ms. Bae" in the documents below. Counsel has retained that appellation to avoid confusion.

(1) Assignments of Error

1. The trial court erred when it denied reconsideration of summary judgment in its order dated August 2, 2013.

2. The trial court erred when it granted summary judgment dismissal of Bae's claims in its order dated July 16, 2013.

(2) Issues Related to Assignments of Error

1. Was summary judgment inappropriate because the Abuse of Vulnerable Adults Act, RCW ch. 74.34, implies a statutory civil cause of action against mandatory reporters who breach their duties under the law?

2. Was summary judgment inappropriate because the Abuse of Vulnerable Adults Act, RCW ch. 74.34, establishes a duty as to Alpha's employees under *Restatement (Second) of Torts* § 286, because the Act was created to protect persons like Bae against the precise harm alleged here by requiring mandatory reporting of possible abuse, neglect, and assault? (Assignments of Error Nos. 1, 2)

3. Was summary judgment inappropriate because Alpha's employees had a duty to Bae under the rescue doctrine after they intervened on Bae's behalf, but failed to follow through by contacting emergency services or law enforcement, and a third party – who would otherwise would have called 9-1-1 in time to save Bae – believed that

Alpha's employees would act and thus took no action herself? (Assignments of Error Nos. 1, 2)

4. Was summary judgment inappropriate because sufficient evidence exists that Alpha's employees breached their duties to Bae by failing to act immediately to prevent further harm to Bae from her abusive, neglectful caregiver? (Assignments of Error Nos. 1, 2)

5. Was summary judgment in inappropriate because sufficient evidence exists that, had Alpha's employees acted immediately, Bae might not have been given a fatal dose of morphine, a drug which Alpha's employees had reason to know she was not prescribed? (Assignments of Error Nos. 1, 2)

C. STATEMENT OF THE CASE

This is an adult family home negligence and vulnerable adult abuse case. Bae was an eighty three year old woman residing at Lakeside Adult Family Home ("the home") since January, 2009.[2] CP 174. The home is a small house with four resident beds. It consists of a living room area, a kitchen area, and two bedrooms next to each other that shared a single bathroom. CP 169. The rooms each house two residents. CP 174.

Defendant Alpha provided nursing services at the four bedroom home and its employees were in the home almost every day. CP 886, 936.

[2] Lakeside was owed and operated by defendants Gretchen Dhaliwal and Gretchen Dhaliwal, Inc. Dhaliwal and Lakeside are not parties to this appeal. CP 395.

Christine Thomas and Marion Binondo[3] were Alpha employees that provided nursing services to two of the four residents of the home during the term of Ms. Bae's residency. CP 171, 320. Binondo is a Licensed Practical Nurse ("LPN"). CP 317. Binondo began working for Alpha in 2006. CP 318. Prior to that, she had worked as a Certified Nursing Assistant ("CNA"). CP 317. Prior to working for Alpha, Binondo worked full time in skilled nursing care at two nursing homes and had supervised CNAs. CP 318. Binondo had received training from Alpha on elder abuse and neglect, and knew that her reporting requirement included a requirement to report abuse of non-client residents of a facility. CP 321.

Binondo testified that as part of her training she received a handout on what constitutes "abuse" and what the signs of abuse are:

> Q. Can you tell me as best you recall what they were?
>
> A. I would -- it's -- *if you see any bruising*, I guess, and if you see somebody hitting somebody *or failing to give proper medication* that they need, then that would be.
>
> Q. Those would be things that you would need to report as a mandatory report, agreed?
>
> A. Yes.

Id. (emphasis added).

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[3] Binondo is also not a named party. CP 934.

Binondo worked in the facility on March 28 and March 29, 2009. CP 328. Binondo testified that only a CNA, "Fannie Irwati,"[4] was working in the facility on these dates. CP 329. Binondo knew that Fannie was not a nurse. CP 325. Binondo agreed that she knew she had more education and background and training in nursing than Fannie and that she had a better ability to determine what an abusive or neglectful situation was. CP 325-26.

On either March 28 or 29, Binondo heard Bae fall to the ground. CP 328. Binondo heard a thud and found Bae lying on the floor. *Id.* Bae was face down. *Id.* Binondo told Irwati she "might" want to call 911, but Irwati did not do so, nor did she say she would. CP 329, 758. Neither did Binondo. *Id.* Irwati responded that Bae "falls a lot." CP 369, 758. Bae had severe bruising over the entire left side of her face.[5]

Binondo watched Irwati drag Bae back into her bed. CP 332. Binondo told Irwati that she should not pick Bae up because "she may have broken something." *Id.* Irwati did not examine or assess Bae, except to see if she was breathing. CP 329. Binondo stated that Irwati "was doing something with another patient and wanted to get back." CP 333.

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[4] Irwati allegedly fled the country, and also was working under false identification information. CP 851, 891. She was not a named defendant.

[5] A photograph of Bae's face showing bruising is included with this brief at Appendix A.

Binondo stated that she noticed Bae was "passed out." CP 332. Irwati told Binondo Bae "is always like" that. *Id.* Lakeside resident Kerri Salzbrun told Binondo that Irwati was giving Bae crushed up pills and that Bae was "doped up." CP 333. Binondo left the facility seven minutes after she heard Bae fall. She did not call 9-1-1, law enforcement, or DSHS. CP 329.

Thomas worked as a certified nursing assistant in a nursing home in the 1980's and 1990's. CP 168. In 1996 Thomas became a registered nurse and worked as a registered nurse from 1998 through the date of Ms. Bae's death on March 30, 2009. CP 168-69. Thomas was hired by Alpha as a full time nurse in 2007. CP 169.

Thomas knew that abuse or neglect could occur in adult family homes. CP 170. Thomas testified that bruising, reports of abuse, and unaccounted injuries were signs of abuse. CP 171.

On the morning of March 30, 2009, Thomas provided care to Salzbrun from 8:50 a.m. to 9:20 a.m. CP 176. While Thomas was at the home, resident Salzbrun told Thomas that Bae was being given morphine. Thomas testified that she was "alarmed" by what Salzbrun had told her. CP 177. While still at the home, Thomas then confirmed by reviewing medical records that Bae was not prescribed morphine. CP 178. Also, while at the home, Thomas saw Irwati dragging Bae to the bathroom and

said that Bae appeared to be heavily sedated. CP 179, 767. Thomas knew that giving a resident morphine that was not prescribed to that resident was illegal. CP 180.

Thomas testified that while still at the home there was nothing that prevented her from immediately intervening in the abuse she witnessed, immediately calling law enforcement, or immediately contacting Bae's family. CP 182. "Of course I could have called, yes." *Id.* Thomas did not intervene, or make any of the calls she acknowledges could have been made while still at Lakeside. Instead, she left the home at 9:55 a.m., leaving Bae "in the hands of the woman who [Thomas was] told was giving her morphine." *Id.* At 10:00 a.m., she called the DSHS hotline but said the "number was busy." CP 767. An hour and a half later, at 11:30 a.m., she left a voice-mail message. *Id.*

On March 30, 2009, Salzbrun found Bae deceased in her bed. CP 184. The Snohomish County Medical Examiner performed an autopsy and discovered that the cause of death was "Acute Morphine Intoxication" caused by the "Administration of medication." CP 294.

Bae's estate and family filed negligence claims against several parties, including Alpha and Thomas individually. CP 934. Alpha and Thomas moved for summary judgment, arguing that as a matter of law

Alpha and Thomas owed no duty to Bae, and that insufficient evidence existed of breach or causation. CP 889.

In addition to the factual record recited above, Bae presented testimony from several fact and expert witnesses in response to Alpha and Thomas' summary judgment motion.

Susan Gange ("Gange"), the Director of Nursing at Alpha, was Binondo's and Thomas' supervisor. CP 412. Gange was responsible for providing training regarding reporting duties and compliance with Abuse of Vulnerable Adults Act, chapter 74.34 RCW ("AVAA"). CP 413. The AVAA requires not only that employees such as Thomas and Binondo immediately report suspected abuse to state agencies, but that suspected assaults must immediately be reported to law enforcement. RCW 74.34.035(1), (3). Gange agreed that Thomas and Binondo had a duty to report suspected abuse or neglect of even those patients Alpha did not serve, such as Bae. CP 422. However, Gange incorrectly believed that a report to law enforcement was only necessary if DSHS asked them to contact law enforcement:

> Q. …And hypothetically if a nurse in 2009 saw a type of abuse that, for example, was a crime, they may have had to report that to law enforcement?
>
> A. We report to the State hotline or to Adult Protective Services and then they may based on the report ask us to

> report to a local agency, law enforcement, or they may not, but it is reported to a State agency.

CP 422.

Gange confirmed that Alpha nurses would have a duty to stop any adult family home resident from being assaulted:

> Q. … So, for example, hypothetically, if an Alpha nurse in 2009 had come across a resident who was being sexually assaulted, they would have had an obligation not only to report that, but probably stop that, right?
>
> A. If it was happening right then and there?
>
> Q. … Yes, ma'am.
>
> A. Yes, sir.

CP 422. Gange agreed that giving a patient the wrong medication would be considered abuse or neglect. CP 426.

Mark Lachs, M.D. ("Dr. Lachs") is a tenured professor of medicine at the Weill Medical College of Cornell University and an adjunct Professor of Nursing at NYU. CP 107. He has extensive knowledge in elder abuse and neglect and nursing care and is familiar with the nursing standards in the state of Washington. *Id.* According to Dr. Lachs, based on what they witnessed Binondo and Thomas had an "absolute duty, independent of statute, to take action in the form of basic nursing assessment and calling 911." CP 108. Dr. Lachs found their inaction "especially compelling because had they intervened, Ms. Bae would have

lived." *Id.* He explained that the effects of morphine overdose are quickly reversed with medication that is carried by every EMT in the country and that is routinely administered when a patient is encountered unconscious without explanation. *Id.* According to Dr. Lachs, "[t]he failures of …Binondo [and] Thomas directly led to the death of Bae." *Id.*

Elizabeth Henneke ("Henneke") is an expert in Public Safety and Communications and 9-1-1 dispatch operations. CP 61. According to Henneke, had Binondo contacted 9-1-1 on the date that Bae fell (March 28 or 29) and reported the fall, head trauma and severe facial bruising, and loss of consciousness, EMTs and paramedics would have immediately been sent to the home to care for Ms. Bae. *Id.* Henneke stated that had Binondo or Thomas immediately reported that Bae was being given morphine and it was not one of her prescribed medications, law enforcement would also have been immediately sent to the home. CP 62.

Henneke also opined that if Thomas would have contacted 9-1-1 on March 30, 2009 and reported that Ms. Bae appeared "sedated," had to be dragged, that a fellow resident reported that Bae was being given morphine, and that according to Thomas' own investigation, Bae was not prescribed morphine that EMTs, paramedics, and law enforcement would have immediately been sent to the home. *Id.*

The trial court granted Alpha and Thomas' summary judgment as to all of Bae's claims, and denied Bae's motion for reconsideration. CP 25, 57. This timely appeal followed. CP 7.

D. SUMMARY OF ARGUMENT

Under Washington law, a statute enacted to protect a particular class of persons from a particular alleged harm establishes a tort duty of care. The AVAA is such a statute, and as a matter of law, Alpha's employees had a duty to Bae to immediately report even the abuse, neglect, and assault of Bae by Irwati.

Alpha's employees also had a duty to Bae under the rescue doctrine. They initially intervened on Bae's behalf, leading Lakeside resident Salzbrun to believe that they would call emergency services or otherwise act to rescue Bae. When they did not, Salzbrun finally took action herself by calling 9-1-1, but it was too late. Had Salzbrun immediately reported Irwati's abuse, as Alpha and Thomas should have done and as Salzbrun was lead to believe they would do, Irwati would not have been in a position to kill Bae with morphine.

The question of whether Alpha's employees breached their duties rests upon the factual question of whether they acted immediately and with appropriate urgency to save Bae. Summary judgment on breach was inappropriate, because this Court has held that "immediately" is "as soon

as is practicable." Binondo never acted, and Thomas acted belatedly and insufficiently.

The question of whether Alpha's employees caused Bae's death is also a fact question for the jury. There is sufficient evidence in the record, from both fact and expert witnesses, to demonstrate that had Thomas or Binondo immediately called law enforcement, and made sure that Irwati was not allowed to continue assaulting Bae, Irwati would not have been in a position to kill Bae with morphine.

E. ARGUMENT

(1) Standard of Review

This Court reviews an order granting summary dismissal of a plaintiff's claims *de novo. Twelker v. Shannon & Wilson, Inc.*, 88 Wn.2d 473, 564 P.2d 1131 (1977). The defendants bear the burden of establishing there are no genuine issues of material fact, and they are held to a strict standard. *Scott v. Pac. W. Mountain Resort,* 119 Wn.2d 484, 502-03, 834 P.2d 6 (1992). Any doubt as to the existence of a genuine issue of material fact will be resolved against the movant, and all inferences from the evidence must be construed in the light most favorable to the nonmoving party. *Magula v. Benton Franklin Title Co.,* 131 Wn.2d 171, 930 P.2d 307 (1997). The moving party bears the burden of showing that the plaintiff may not recover, as a matter of law, as to any of the

claims or causes of action brought and that there is no genuine issue for trial on any such claims. *Young v. Key Pharm., Inc.,* 112 Wn.2d 216, 225, 77 P.2d 182 (1989).

(2) Bae Has Sufficiently Stated Statutory Claims Against Alpha and Thomas Such that Summary Judgment Was Inappropriate

Alpha and Thomas argued below that Bae has no statutory claim against Alpha's employees, because Bae was not in their care. CP 901-03. Alpha claimed that its employees had no "special relationship" with Bae, and thus were not liable under the statute. *Id.*

(a) Our Supreme Court Has Determined that Abuse of Children Act – a Virtually Identical Law to the AVAA -- Provides an Implied Statutory Cause of Action Against Mandatory Reporters Who Violate their Reporting Duties

Our Supreme Court has determined when a cause of action will be implied from a statute:

> Borrowing from the test used by federal courts in determining whether to imply a cause of action, we must resolve the following issues: first, whether the plaintiff is within the class for whose "especial" benefit the statute was enacted; second, whether the legislative intent, explicitly or implicitly, supports creating or denying a remedy; and third, whether implying a remedy is consistent with the underlying purpose of the legislation.

Bennett v. Hardy, 113 Wn.2d 912, 920–21, 784 P.2d 1258 (1990).

Applying the *Bennett* test, the Supreme Court concluded that RCW 26.44.030, a statute that requires mandatory reporting when a named professional "has reasonable cause to believe" that a child has suffered abuse or neglect, implies a cause of action against a mandatory reporter who fails to report suspected abuse. *Beggs v. State, Dep't of Soc. & Health Servs.*, 171 Wn.2d 69, 78, 247 P.3d 421, 426 (2011).

The *Beggs* Court first noted that victims of child abuse are certainly within the class for whose "especial" benefit the legislature enacted the reporting statute. *Id.* at 77. Second, the Court concluded that the statute implicitly supports a civil remedy, because it provided immunity from liability to those who did in fact fulfill their mandatory reporting duties. *Id.* at 78. The Court stated" "A grant of immunity from liability clearly implies that civil liability can exist in the first place." *Id.* Third, the *Beggs* Court held that an implied cause of action was consistent with the underlying purpose of the statute, which was to prevent child abuse. The Court held, "Implying a civil remedy as a means of enforcing the mandatory reporting duty is consistent with this intent." *Id.*

There is no daylight between the Supreme Court's analysis of the Abuse of Children Act and the statutory structure of the AVAA. First, there is no question that the AVAA was enacted for the "especial benefit" of vulnerable elderly adults like Bae, who cannot care for themselves.

Second, like RCW 26.44.060(5), RCW 74.34.050 provides civil immunity for mandatory reporters who fulfill their duties under the statute, implying that a cause of action otherwise exists. "The purpose of chapter 74.34 RCW is to provide the department and law enforcement agencies with the authority to investigate complaints of abandonment, abuse, financial exploitation, or neglect of vulnerable adults and to provide protective services *and legal remedies* to protect these vulnerable adults." Laws of 1999, ch. 176, § 1; emphasis added. Implying a civil remedy as a means of enforcing the mandatory reporting duty is consistent with this intent.

RCW ch. 74.34 implies a statutory cause of action against Alpha and its employees for their violations of the mandatory reporting requirements. Summary judgment was inappropriate.

(b) Evidence that Alpha's Employees Failed to Intervene to Protect Bae Constitutes "Neglect" Under RCW 74.34.020(12)

The VAS establishes a separate cause of action for "neglect" with its own standards of proof which are different from common law negligence. *Warner v. Regent Assisted Living*, 132 Wn. App. 126, 134, 130 P.3d 865, 870 (2006). This statutory cause of action entitles vulnerable adults to remedies resulting from neglect:

> In addition to other remedies available under the law, a vulnerable adult who has been subjected to...neglect...shall have a cause of action for damages on account of his or her

> injuries, pain and suffering, and loss of property sustained thereby.

RCW 74.34.200. "Neglect" is defined in relevant part as: "an act or omission by a person or entity with a duty of care that demonstrates a serious disregard of consequences of such a magnitude as to constitute a clear and present danger to the vulnerable adult's health, welfare, or safety, including but not limited to conduct prohibited under RCW 9A.42.100." RCW 74.34.020(12).

When Binondo and Thomas had reasonable cause to believe that Irwati was giving Bae morphine illegally, thus assaulting her and endangering her health and welfare, they left Bae alone with Irwati and failed to immediately report that incredibly dangerous and illegal behavior. A jury could reasonably conclude that they acted with serious disregard for the clear and present danger Irwati posed to Bae.

Bae's evidence stated a statutory cause of action under the AVAA. Summary judgment dismissing her statutory claims was inappropriate.

(3) In Addition to Providing an Implied Statutory Cause of Action, the AVAA's Requirements Also Create a Common Law Tort Duty under *Restatement (Second) of Torts* § 286

The threshold question in this negligence action is whether the defendant owed a duty of care to the injured plaintiff. *Kelly v. Falin,* 127 Wn.2d 31, 36, 896 P.2d 1245 (1995). The existence of a legal duty is a

question of law. *Hansen v. Friend,* 118 Wn.2d 476, 479, 824 P.2d 483 (1992). Kim's dismissed claims allege negligence on the part of Thomas individually, and Alpha under theory of respondeat superior. CP 939-40. Alpha and Thomas argued below that they had no duty to Bae. CP 900.

In order to survive summary judgment on a negligence claim, a plaintiff must establish the existence of a duty, which is a legal question, and raise sufficient evidence of breach, resulting injury, and proximate causation. *Pedroza v. Bryant,* 101 Wn.2d 226, 228, 677 P.2d 166 (1984); *Schooley v. Pinch's Deli Mkt., Inc.*, 134 Wn.2d 468, 474, 951 P.2d 749 (1998).

(a) Alpha's Employees Had a Duty to Bae Under RCW 74.34.035 and *Restatement (Second) of Torts* § 286 as Mandatory Reporters of Elder Abuse

The duty required of a reasonable person may be prescribed by legislative enactment. *Id.* at 479. Thus, evidence indicating that a party violated a statute is evidence of negligence, although it is no longer generally considered to be negligence *per se*. RCW 5.40.050. Our Supreme Court has adopted the *Restatement (Second) of Torts* § 286 test to determine whether a duty of care exists based upon a statutory violation. *Id.* The Restatement test examines the statute to determine whether it establishes a duty to:

> (a) protect a class of persons which includes the one whose interest is invaded, and
>
> (b) protect the particular interest which is invaded, and
>
> (c) protect that interest against the kind of harm which has resulted, and
>
> (d) protect that interest against the particular hazard from which the harm results.

Hansen, 118 Wn.2d at 480-81; *Restatement (Second) of Torts* § 286 (1965).

In *Hansen,* a private host supplied alcohol to a minor, who later drowned after falling into a lake while intoxicated. 118 Wn.2d at 477-78. Washington law provided in part that "[i]t is unlawful for any person to sell, give, or otherwise supply liquor to any person under the age of twenty-one years." RCW 66.44.270(1). Our Supreme Court concluded that the statute, which was intended to protect minors from the dangerous effects of alcohol, imposed a duty of care on social hosts not to serve liquor to minors. *Id.* at 482.

The Legislature enacted the AVAA based upon its finding that "some adults are vulnerable and may be subjected to abuse, neglect, financial exploitation, or abandonment by a family member, care provider, or other person who has a relationship with the vulnerable adult." RCW 74.34.005(1). "When there is reasonable cause to believe that

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

The AVAA does not expressly prohibit private actions based upon violations of its provisions. In fact, where substandard care injures a resident, the Legislature has expressly *provided* a cause of action against nursing homes for damages for breaches of their RCW 74.42.140 and 74.42.160 duties. *Donohoe v. State*, 135 Wn. App. 824, 845, 142 P.3d 654, 664 (2006); RCW 74.34.200(1).

Applying the § 286 test to the AVAA, Binondo and Thomas had a duty to Bae. The AVAA was enacted to protect persons such as Bae, a vulnerable elderly woman in need of constant care. RCW 74.34.005(1); The Act protects the interest invaded, which is the health and well being of vulnerable adults who may be subject to abuse or neglect. RCW 74.34.005(1). The resulting harm – Bae's death – is of the kind the AVAA was intended to prevent. *Id.* The hazard that caused the harm – the abuse of Bae by a caregiver, is the particular hazard the AVAA protects against. *Id.*

Alpha argued below that the AVAA did not create a duty of care as to the Alpha nurses because they were not Bae's caregivers, but only witnessed abuse by Bae's actual caregiver, Irwati. CP 901-02. They claim that the Act only mandates reporting of abuse and neglect by those "acting in their professional capacity," i.e., those who are actually giving care to the abuse victim. *Id.*

Alpha and Thomas' argument is unsupported by the language of the AVAA. The Act provides: "When there is reasonable cause to believe that abandonment, abuse, financial exploitation, or neglect of a vulnerable adult has occurred, mandated reporters shall immediately report to the department." RCW 74.34.035(1). A "mandated reporter" includes "an employee of a social service, welfare, mental health, adult day health, adult day care, home health, home care, or hospice agency…." RCW 74.34.020(11).

Alpha and Thomas' claim that they had no duty under the Act because they did not directly care for Bae is contrary to their own admission below. Thomas and Binondo were employees of Alpha, and Alpha admits that they are mandatory reporters as defined in the Act. CP 885-86. They also stated that mandatory reporters are required to report abuse of those "in the care of another." *Id.*

Also, the notion that only those directly caring for a vulnerable adult are responsible for reporting abuse of that adult is nonsensical. Those directly caring for a person are those most likely to be perpetrating the abuse. Alpha and Thomas' interpretation would mean that the Legislature intended abusers to self-report, and was not concerned with reports from third party professionals who witnessed abuse.

Those who are caregiving professionals who witness abuse by other caregivers have a duty to immediately report that abuse. Under Washington law, that statutory duty applies to Alpha and Thomas. Summary judgment dismissal based on a lack of duty was improper, and must be reversed.

(b) Thomas and Binondo Had a Duty to Bae Under the Voluntary Rescue Doctrine

One who undertakes, albeit gratuitously, to render aid to or warn a person in danger is required by our law to exercise reasonable care in the process, however commendable. *Jay v. Walla Walla College*, 53 Wn.2d 590, 595, 335 P.2d 458 (1959); *French v. Chase*, 48 Wn.2d 825, 830, 297 P.2d 235 (1956). If a rescuer fails to exercise such care and consequently increases the risk of harm to those he is trying to assist, he is liable for any physical damages he causes. *Brown v. MacPherson's, Inc.*, 86 Wn.2d 293, 299, 545 P.2d 13, 18 (1975).

This doctrine applies equally to botched rescues and to abandoned rescues, where a defendant purports to undertake the rescue of a victim, causing a third party who could have acted to save the victim to refrain from doing so. *Chambers-Castanes v. King County*, 100 Wn.2d 275, 285, 669 P.2d 451, 457 (1983). If the defendant's sloppy or neglectful intervention causes others who may have otherwise aided the victim to stand down, an action for negligence will lie. *Id.*

In *Brown,* the plaintiffs sought to recover damages from the State after an avalanche in 1971. *Brown,* 86 Wn.2d at 298. A "noted avalanche expert" contacted a state agent and a real estate broker and warned them that the plaintiffs' property lay in a "high-risk avalanche area." *Id.* The State agent responded in a manner that led the expert to believe that the State would deal with the matter and convey his warning to the plaintiff. *Id.* The State's intervention caused the expert to refrain from taking further action to warn appellants himself." *Id.* The state agent then met with the broker and others and "led them to erroneously believe that his information indicated no avalanche danger existed...." *Id.*

Here, a third party stood ready to act on Bae's behalf: Lakeside resident Kerri Salzbrun. CP 124. Salzbrun recognized the immediate danger to Bae, but believed Thomas or Binondo, trained nurses who had intervened, would continue to take appropriate actions to save Bae:

> "I thought [Binondo] was going to get help, but none arrived. ... I thought Nurse Thomas would leave and call for help, but no help arrived."

Id. When Salzbrun realized neither Thomas nor Binondo was going to follow through on their obligations to Bae, Salzbrun eventually called 9-1-1 herself. *Id.* However, it was too late to save Bae. *Id.*

In addition to their statutory duties to Bae, Thomas and Binondo both purported to intervene on her behalf, but inexplicably abandoned their efforts before taking reasonable steps to secure Bae's safety. Their voluntary actions created a duty to undertake the rescue of Bae with reasonable care. Their botched attempt created reliance by the only party who otherwise would have acted, Salzbrun. Summary judgment on the issue of duty was erroneous.

(4) Sufficient Evidence Was Produced that Alpha's Employees Breached Their Statutory and Tort Duties, and that the Breaches Caused Bae's Death

Alpha and Thomas also argued below that there was insufficient evidence to warrant a trial on the issues of breach and causation. CP 903-05.[6] They claimed that both Binondo and Thomas fulfilled their obligations under the AVAA. *Id.* They also claimed that Thomas and

[6] Although the section of their motion refers only to causation, CP 903, Alpha and Thomas' argument refers to both nurses having fulfilled their reporting requirements under the AVAA. CP 904-05. Thus, the issue of breach was before the trial court.

Binondo's inactions were not the cause-in-fact of Bae's death, and any evidence to the contrary was merely speculative. *Id.*

Breach of duty and proximate cause are generally issues for the trier of fact. *Hertog, ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400, 406 (1999). Only if reasonable minds could not differ is summary judgment appropriate.

Taking the evidence in the light most favorable to Bae, issues of material fact exist as to whether Alpha, Thomas, and Binondo breached their duties to Bae, and whether that breach was a cause of Bae's death.

(a) There Is a Question of Fact as to Whether Thomas and/or Binondo Breached RCW 74.34. 035

The relevant statutory duty is to "immediately" report any abuse or neglect of a vulnerable adult when the reporter has reasonable causes to believe such abuse has occurred. RCW 74.34.035. In cases of general abuse or neglect, the duty is to immediately report the facts to DSHS. *Id.* In specific cases where assault may have occurred, there is a mandatory duty to report the alleged assault to law enforcement. *Id.*

"Neglect" includes "(a) a pattern of conduct or inaction...that fails to...avoid or prevent physical or mental harm or pain to a vulnerable adult; *or* (b) an act or omission that demonstrates a serious disregard of consequences...as to constitute a clear and present danger to the

vulnerable adult's health, welfare, or safety...." RCW 74.34.020(12) (emphasis added).

There is no dispute in the record that Alpha's employees had reasonable cause to believe that Irwati was neglecting, abusing and assaulting Bae. Salzbrun told both Thomas and Binondo that Irwati was drugging Bae. CP 124. Thomas actually verified that Irwati was giving Bae unprescribed morphine. CP 178. Administrating a "destructive" or "noxious" substance such as morphine to someone is considered a "physical assault" under Washington law. RCW 9A.36.011(1)(b); 9A.36.021(1)(d). Thomas and Binondo both witnessed Irwati dragging Bae around in an unconscious state. CP 179, 332, 767. They also both witnessed Irwati's callous indifference and dismissive attitude toward her patient. CP 179, 329, 333, 369.

Because there is no dispute that the Alpha employees had reasonable cause to believe Bae was a victim of abuse under RCW 74.34.035, the only question is whether sufficient evidence exists for a jury to conclude that they did not act "immediately" to report the abuse, as required by the statute.

No Washington court has addressed the meaning of the term "immediately" in this statute. This issue of statutory interpretation is thus a question of first impression.

The statute does not define "immediately." In the absence of a statutory definition, Washington courts will give a term its plain and ordinary meaning ascertained from a standard dictionary. *State v. Sullivan*, 143 Wn.2d 162, 175, 19 P.3d 1012, 1019 (2001).

The Merriam Webster dictionary defines "immediately" as "without interval of time straightway <I'll make that call *immediately*>." http://www.merriam-webster.com/dictionary. The Cambridge English dictionary defines the term as: "now or without waiting or thinking." http://dictionary.cambridge.org/us/dictionary/american-english.

Whether a defendant has acted "immediately" pursuant to a statutory command is a question of fact for the jury. *State v. Sherman*, 98 Wn.2d 53, 57, 653 P.2d 612, 615 (1982). In *Sherman,* defendant Sherman was driving his motorcycle at a high rate of speed. 98 Wn.2d at 55. A police patrol car passing in the opposite direction turned around and began pursuit with its lights and siren engaged. *Id.* Sherman looked back at the patrol car, and after continuing one mile for about 40 seconds, pulled onto a side road. *Id.* Sherman was charged with felony flight. The statute under which Sherman was prosecuted stated that drivers who have been given a visual or audible signal to stop must do so "immediately." *Id.* Our Supreme Court rejected Sherman's argument that the term "immediately" was vague, and defined the term to mean "as soon as is

reasonably possible." *Id.* at 57. The Court concluded that the trier of fact could, based on the evidence, conclude that Sherman did not stop immediately:

> Sherman estimates it took him 40 seconds to stop. If, as the officers testified, he turned to look at the patrol car a "couple of times", *the trier of fact could well have found* he did not meet the requirements of "immediately."

Id.

If, as in *Sherman,* a jury could conclude that acting within one minute was not "immediate," then failing to act for hours, days, or never surely qualifies. Here, Thomas admitted that she did not report the abuse of Bae to DSHS "immediately," or even "as soon as reasonably possible." CP 182. In fact, Thomas stated that she could have acted sooner, which means she did not act as soon as reasonably possible. CP 182. Thomas also did not *ever* call law enforcement, even though she had ample reason to believe Irwati was assaulting Bae by administering morphine illegally. CP 180. This failure violated her duty under RCW 74.34.035(3).

There is no question that Binondo did not act "immediately," in fact she did not act at all the day that she discovered evidence of abuse. CP 329. Only after Bae's death did Binondo belatedly report her observations about Irwati's abuse and neglect.

Alpha is not only responsible for Thomas and Binondo's actions under the doctrine of respondeat superior, Alpha negligently trained its nurses, instructing them that they were not obligated to call law enforcement, only DSHS, even in cases of assault. CP 422.

In short, ample evidence exists in this record to support a jury's finding that Alpha and its nurses breached their duties under RCW 74.34.035. Summary judgment on this ground must be reversed.

(b) A Question of Material Fact Exists as To Whether Alpha's Employees Proximately Caused Bae's Death

Again, the issue of proximate cause is generally not susceptible to summary judgment. *Owen v. Burlington N. & Santa Fe R.R.*, 153 Wn.2d 780, 788, 108 P.3d 1220 (2005). It is a question of fact for the jury. *Id.*

Alpha argued below that Thomas and Binondo's inaction was not the cause-in-fact of Bae's death. CP 904-05.[7] They stated that Irwati was solely responsible for the death, and that any connection between the inaction of Alpha's employees and Bae's death is "speculation." CP 904.

If evidence shows that one with a duty to act failed to control another who posed a risk of harm to a third party, a genuine issue of material fact exists as to whether the failure to act was the cause-in-fact of the resulting harm. *Hertog,* 138 Wn.2d at 283. In *Hertog,* a rape victim

[7] Alpha did not argue that legal causation was lacking here.

claimed negligence when a county probation officer failed to take appropriate steps to protect the public from the dangerous propensities of an individual on probation. *Id.* at 284. The County argued that proximate cause was lacking, claiming that "it is purely speculative whether any breach of conditions of pretrial release would result in court ordered incarceration" thus preventing further criminal conduct. *Id.* at 291. But the *Hertog* Court rejected this argument, concluding that it was a fact question for the jury and summary judgment is inappropriate simply because the plaintiff may have difficulty in proving her case. *Id.* The plaintiff had the right to present the evidence of causation to a jury. *Id.*

This case presents precisely the same causation questions as *Hertog,* and this Court should reverse summary judgment for the same reasons. The question of whether Thomas and Binondo's inaction contributed to Bae's death is more than speculation. A jury could conclude that had Binondo immediately reported Irwati's actions to DSHS or law enforcement, Irwati's homicide of Bae could have been prevented. Dr. Lachs opined that had Binondo or Thomas acted immediately, Bae would have lived because the effects of morphine overdose are quickly reversed with medication that is carried by every EMT in the country and that is routinely administered when a patient is encountered unconscious

without explanation. CP 108. According to Dr. Lachs, "[t]he failures of …Binondo [and] Thomas directly led to the death of Bae." *Id.*

DSHS was never contacted by Binondo, and was not contacted "immediately" by Thomas. Had Binondo complied with her reporting duties and contacted DSHS and law enforcement immediately on March 28 or 29 this would have given DSHS and law enforcement twenty-four to forty-eight hours to respond before Bae's death. Neither Thomas nor Binondo ever contacted law enforcement, which they were required to under RCW 74.34.035(3). DSHS was only contacted by Thomas via *voicemail message* an hour and thirty-five minutes after Thomas left the home. CP 767. Thomas left Bae at the home in the hands of Irwati, and Bae died within a few hours. Thomas knew or should have known that, per RCW 74.34.063, DSHS has 24 hours to respond to reports. In short, a jury could reasonably find that Binondo's total failure to report, to contact law enforcement, and to provide non-negligent care, and Thomas' failure immediately to contact DSHS or law enforcement, or to call emergency services such as paramedics, caused Bae's death.

The evidence exists that could persuade a reasonable jury that Thomas and Binondo's inaction caused Bae's death. Summary judgment was inappropriate.

(5) Attorney Fees on Appeal Should Be Awarded, Contingent Upon Bae's Success at Trial

A prevailing party on appeal is entitled to an award of attorney fees if allowed by contract, statute, or common law. RAP 18.1. The AVAA provides that:

> In an action brought under this section, a prevailing plaintiff shall be awarded his or her actual damages, together with the costs of the suit, including a reasonable attorneys' fee. The term "costs" includes, but is not limited to, the reasonable fees for a guardian, guardian ad litem, and experts, if any, that may be necessary to the litigation of a claim brought under this section.

RCW 74.34.200.

In the event Bae is the prevailing party upon remand, she is entitled to an award of attorney fees, both at trial and on appeal. Bae's estate respectfully requests that this Court so instruct the trial court in its opinion.

F. CONCLUSION

Alpha and its employees violated both statutory and common law duties of care to Bae, and the direct result of those violations was Bae's death at the hands of her purported caregiver. It is precisely this kind of sad and horrifying consequence that the AVAA was enacted to prevent. Alpha cannot wash its hands of Bae's death by claiming that they only owed duties to their own patients, and not to Bae.

Summary judgment should be reversed, and this case should be remanded for trial. Bae's attorney fees at trial and on appeal should be awarded, contingent upon her success on remand.

DATED this 6TH day of February, 2014.

Respectfully submitted,

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APPENDIX

DECLARATION OF SERVICE

On said day below, I emailed a courtesy copy and deposited in the U.S. Mail for service a true and accurate copy of the Brief of Appellants Esther Kim and the Estate of Ho Im Bae in Court of Appeals Cause No. 70892-9-I to the following parties:

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

DATED: February 7th, 2014, at Tukwila, Washington.

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