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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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IN RE  
RHONDA CROCKETT  
Appellant  
and  
STATE OF WASHINGTON,  
Respondent.

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REPLY BRIEF OF APPELLANT

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**1. No authority exists showing Ms. Crockett unprotective.**

Citing to no authority, the Department states, Brief of Respondent (RBrief) at 1, that “Ms. Crockett failed to respond with appropriate protective action to protect M.L.’s physical safety.” The Department followed the Review Judge (RJ) in this regard, whose only authority was use of the word “clearly”. CL 18, BR 012. This matter is thoroughly addressed in the Appellant Brief (ABrief) at 41–43. And no authority does exist. There is no statute or WAC that required Ms. Crockett to do any specific thing, only to avoid “negligent treatment or maltreatment,” RCW 26.44.020(16) [former], which she did.<sup>1</sup>

Ms. Crockett took immediate, active, strict—and successful—steps to protect both her daughters. Neither child was ever abused by James

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<sup>1</sup> Lurking in the State’s reasoning, RBrief, 2, 6, 15, 16, 17, 20, 21, 22, is the subtle suggestion that Mr. Crockett’s conviction is proof of Ms. Crockett’s neglect. (The state couldn’t say it often enough.) Similarly the RJ made that fact one part of the proof Ms. Crockett was not credible—as proof that she knew in 2008 that James had sexually touched M-L. AR 008, CL 20(3).

Though it probably goes without saying, and though it was never a part of this case at any point, the doctrine of collateral estoppel, *World Wide Video of Washington, Inc. v. City of Spokane*, 125 Wn. App. 289, 305, 103 P.3d 1265 (2005), must be clearly rejected as proof of negligent treatment or maltreatment by Ms. Crockett. The court must scrupulously avoid any reliance on the conviction as any part of the proof of the state’s case. Apart from final judgment on the merits, none of the elements of collateral estoppel are met in this case. Nor does any exception apply because no legal interest of Ms. Crockett was part of Mr. Crockett’s criminal trial. Finally, the founded letter notified Ms. Crockett of her appeal rights, AR 136, and in reliance she availed herself of those rights. AR 076.

Crockett after Ms. Crockett instituted her strict safety plan. And M-L rejected her adopted mother's offer of counseling. Even if Ms. Crockett believed James had molested M-L, how could the identical safety plan "clearly" fail to protect M-L yet *not* "clearly" fail to protect her sister LW who also resided in the home? The word capricious comes to mind.

**2. The record does not support the RJ's credibility determination.**

The State cites *City of Univ. Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001) in support of the claim that reviewing courts accept the fact-finder's determinations of witness credibility and the weight given to reasonable but competing inferences. Only reasonable inferences must be given weight by the reviewing court. *Univ. Place, supra*. In this case, as pointed out at ABrief, 9-37, the RJ's inferences are not reasonable and the RJ's disregard of the many inconsistencies is arbitrary and capricious. RCW 34.05.461(3) states in relevant part: "Any findings based substantially on credibility of evidence or demeanor of witnesses shall be so identified."

The Final Order made no findings based on the demeanor of witnesses. Rather, as noted in ABrief, 9-37, the credibility findings were based on incorrect review of parts of the record, disregarding virtually wholesale Ms. Crockett's testimony and that of her witnesses, while disregarding the many inconsistencies in M-L's testimony and between the testimony of others and M-L. See, CL 20, AR 005-006. Since the credibility

findings are based not on demeanor but on facts and inferences from the record, the court must avoid a talismanic refusal to review the so-called credibility findings of CL 20 because they go not to credibility but to competing testimony. *See*, ABrief, 45–48.

The legislative intent of the APA is found in RCW 34.05.001:

The legislature also intends that the courts should interpret provisions of this chapter consistently with decisions of other courts interpreting similar provisions of other states, the federal government, and model acts.

The Oregon case of *Tew v. Driver & Motor Vehicle Servs. Branch (DMV)*, 179 Or. App. 443, 40 P.3d 551 (2002), cited by Appellant, ABrief, 47,<sup>2</sup> addressed the Oregon APA provision ORS 183.482(8(c)) a provision similar to chapter 34.05.570(3)(e), both of which address the substantial evidence standard. Immediately before the language from *Tew* quoted at Brief 47, the *Tew* court stated, 179 Or. App. at 449:

A determination of credibility is one kind of fact finding, subject to review both for substantial evidence to support the finding of underlying facts and for substantial reason to explain how those facts lead to the ultimate conclusion of credibility. *See Dennis v. Employment Div.*, 302 Or. 160, 168–69, 728 P.2d 12 (1986) (discussing credibility findings); *Portland Assn. Teachers v. Mult. Sch. Dist. No. 1*, 171 Or.App. 616, 627, 16 P.3d 1189 (2000) (explaining

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<sup>2</sup> In reviewing the Appellant Brief, the undersigned became aware that several significant cases were inadvertently omitted (most likely deleted in the process of formatting). One was the *Tew* case, ABrief, 47. The other was the *Brown* case at ABrief, 43, addressed herein at page 8.

substantial reason and substantial evidence tests); *Koskela v. Willamette Industries, Inc.*, 159 Or.App. 229, 247–49, 978 P.2d 1018 (1999), *rev'd on other grounds*, 331 Or. 362, 15 P.3d 548 (2000) (treating credibility as a factual determination).

*Tew* is instructive when, as here, the credibility findings are all factual.

Finally, the reviewing court is not bound by the RJ Final Order as to the issue of physical abuse because the RJ failed to make any credibility findings as to that issue in disregard of RCW 34.05.461(3).

### **3. Facts are reviewed on the substantial evidence standard.**

Findings of fact from the agency's final order are reviewed under the substantial evidence test and will be upheld if supported by a sufficient quantity of evidence to persuade a fair-minded person of the order's truth or correctness. *Raven v. Dep't of Soc. & Health Servs.*, 177 Wn.2d 804, 817, 306 P.3d 920 (2013).

*Crosswhite v. Washington State Dep't of Soc. & Health Servs.*, 197 Wn. App. 539, 548, 389 P.3d 731 (2017), *review denied*, 188 Wn.2d 1009, 394 P.3d 1016 (2017). *Crosswhite* then clarified how that standard was to be applied:

The APA's directive that we review whether an order is supported “by evidence that is substantial when viewed in light of the whole record before the court” requires us to look beyond whether there is merely some evidence that supports the agency order. RCW 34.05.570(3)(e) (emphasis added). As the United States Supreme Court observed in construing like language in the federal administrative procedure act, “The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement ... [in APA § 706] that courts consider the \*549 whole record.” *Universal Camera Corp. v. Nat'l Labor Relations Bd.*, 340 U.S. 474, 488, 71 S.Ct. 456,

95 L.Ed. 456 (1951). “[E]vidence in support of an agency finding must be sufficient to support the conclusion of a reasonable person after considering all of the evidence in the record as a whole, not just the evidence that is consistent with the agency's finding.” 2 Richard J. Pierce, Jr., *Administrative Law Treatise* § 11.2, at 979 (5th ed. 2010).

*Id.* at 548–549. The burden is on the appellant, *id.* at 549, and Ms. Crockett has met that burden in ABrief, 9–37, as to neglect and 37–41 as to abuse.

**4. The Department twists Ms. Crockett’s testimony to claim she testified Mr. Crockett admitted to “sexually” touching M-L.**

DSHS/DCYF made the following statement:

Ms. Crockett testified that during a family meeting in 2008, Mr. Crockett admitted to *touching* M-L and offered to turn himself in to the police. RP2, at 218. Ms. Crockett testified that Mr. Crockett picked up the phone to call the police before Ms. Crockett prevented him from doing so. *Id.* Ms. Crockett testified that she instated safety measures to ensure that Mr. Crockett would never be alone with her daughters. *Id.* at 225-26. She testified that she maintained these safety measures for a period of five years. *Id.* at 222-24. This testimony, and Ms. Crockett's actions, directly contradict her assertion that M.L. had failed to disclose *sexual touching* by Mr. Crockett at that time, and they undermine her argument that M.L. should not have been found credible.

RBrief, 18–19 (emphasis added). Notice that the state conflates “touching” with “sexual touching” By making the foregoing claim, the State has overlooked the actual record. At VRP 2:214 Ms. Crockett clearly testified that when she asked M-L where she had been touched, the “touching” M-L said had happened (side of body at stomach area and inside of knee) was not sexual touching. She subsequently asked M-L leading questions regarding

different types of sexual touching and M-L said Mr. Crockett had not done those things. VRP 2:217.

**5. The Department misreads M-L’s testimony to claim Mr. Crockett in 2008 admitted to “sexually” touching her.**

The State again misreads the record, RBrief, 20, stating that: “Mr. Crockett . . . admitted to sexually abusing M-L . . . AR at 170; RP1 at 47.” First, nowhere does Ms. Crockett testify that Mr. Crockett admitted to “sexually touching” M-L. He admitted to “touching” M-L but not to “sexually” touching. VRP 2:217. After questioning M-L, Ms. Crockett clarified the distinction for M-L by telling her, “[B]ut what have (sic) you have given me he just touched you.”

The foregoing quotation from the State, however, refers not to Ms. Crockett’s testimony but M-L’s at VRP 1:47. But a careful reading of the record shows only that M-L testified to “touching,” *id.*, not giving any details or specifics. (*See also*, hearsay at AR 170, “touching”.) In fact, as noted at ABrief, 20–21, M-L claimed to have told Ms. Crockett very little. And on redirect, she added “he had touched me, um, over my clothes. And that’s it. That’s all I said.” VRP1:56.<sup>3</sup>

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<sup>3</sup> In reviewing the record, the undersigned noticed another item in the record that should have been included in the listing of M-L’s different stories at ABrief, 20–21. After (1) should have been added the following:

The AAG then immediately asked M-L if she had “additional conversations with your mom about James and the molestation?” M-

The AAG then asked M-L, if her mother had asked her any questions and M-L said Ms. Crockett had asked where James had “touched” her. But then, rather than asking M-L what M-L had told Ms. *Crockett*, the AAG asked M-L, “And what did you tell *me*?” (Emphasis added.) M-L then told the AAG, “I just said that, um, he touched me, um, on my breasts and in my private area.” *Id.* The AAG had obviously had contact with M-L prior to the hearing, VRP1 50–53, and part of that communication must have been M-L telling the AAG about Thanksgiving 2008. It was obviously not from prior testimony that day on direct or redirect because M-L was the first witness and she had not previously testified about “breasts” or “privates” prior to the AAG asking, “What did you tell me?”

We thus know what M-L told the *AAG* before the hearing, perhaps that morning, VRP1:51:17, but the only specific testimony from M-L as to what she told Ms. Crockett in 2008 was that James “had touched me, um, over my clothes.” VRP 1:66:11–14. This is entirely consistent with Ms. Crockett’s testimony that M-L told her James had touched her on her side (below her chest and above her waist) and the inside of her knee. VRP 2:214. There was no testimony as to what M-L was wearing on Thanksgiving 2008.

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L responded, “*Um, once a -- a few years later. Um, I think ninth or tenth grade in high school she just asked me if, um, he had -- if he was touching me again? And I said ‘No.’*”

**6. Presumption by Department and RJ that “touching” means “sexual touching” is not proof of sexual misconduct.**

Issue 18 at ABrief, 5, states: “Whether “touching” necessarily means “sexual touching”?” The state has heard and seen what it wants to hear and see, but the record makes a clear distinction between “touching” and “sexual touching”. Unfortunately, the state attempts to impose its misreading or disregard of the record upon Ms. Crockett. One wonders how many founded letters or child removals have occurred because social workers hear “sexual” when only the word “touching” has been uttered and no further inquiry—unlike the record here—has been made.

**7. Correct standard for negligent treatment or maltreatment.**

Ms. Crockett has already addressed in her Appellant Brief and hereinabove whether the RJ applied the correct standard for negligent treatment or maltreatment. ABrief, 41–44. *Brown v. DSHS*, 190 Wn. App. 572, 360 P.3d 875 (2015).

**8. Correct standard for physical abuse.**

Ms. Crockett has already addressed the issue of physical abuse and the RJ’s error of law, ABrief, 44–45, and his distortion of the record, ABrief, 37–39, as to use of the word “throw”. Overlooked in the State’s analysis is that M-L was a healthy 17-year-old girl at the time of the physical altercation who was four months shy of her 18<sup>th</sup> birthday. The RJ completely

disregarded the language of RCW 9A.16.100 which stated, “The age, size, and condition of the child and the location of the injury shall be considered when determining whether the bodily harm is reasonable or moderate.” It is only by presumption that the RJ determined that taking down a 17-year-old child (or a child of any age for that matter) is abuse. Any bodily harm to M-L from being taken down was reasonable and certainly moderate. The RJ’s approach treated fingernail indentations and soreness on M-L by almost a strict liability standard rather than a reasonable and moderate injury standard.

The reviewing court is not bound by an agency’s interpretation of a statute, *Quadrant Corp. v. State Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 233, 110 P.3d 1132 (2005), unless the agency has specialized knowledge in dealing with issues. Unlike the State Growth Management Hearings Bd., or other specialized agencies such as a building department, DSHS/DCYF has no specialized expertise either in determining whether a certain allegation is more probable than not, chapter 26.44 RCW, or in understanding abuse and neglect. Juvenile courts deal regularly with the determination of the existence of abuse and neglect, including RCW 9A.16.100. *See*, RCW 13.34.030(6)(b), RCW 26.44.020(1). And superior courts also deal with RCW 9A.16.100 in criminal cases. The finding of abuse and neglect, RCW 26.44.100, depends upon the definition in RCW 26.44.020(1). “The definitions in this section apply throughout this chapter unless the context

clearly requires otherwise.” RCW 26.44.020. Construction of RCW 26.44.020 is certainly no more within the expertise of DSHS/DCYF than within the purview of Superior Court (and the Court of Appeals), and it is likely less so.

**9. Request for reversal and attorney fees.**

Ms. Crockett renews her request for attorneys fees and request this court to reverse the trial court (and Review Judge).

Respectfully submitted this 27<sup>th</sup> day of January, 2019.

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**PREBLE LAW FIRM, P.S.**

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