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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_ No. 328813

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

SARAH'S CARE ADULT FAMILY HOME  
Petitioners,

VS

DEPARTMENT OF SOCIAL AND HEALTH SERVICES,  
Adult Protective Services,  
Respondent.

**BRIEF OF APPELLANTS**

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I. Assignments of Error

1. The administrative Initial

Decision<sup>1,2</sup> dated June 18, 2013

affirmed in the Review Decision and

Final Order<sup>3</sup> dated December 20, 2013

erred in finding Sarah Evert and

Stephen Evert abused vulnerable

adults placed in their Adult Family

Home as that finding is not

supported by substantial evidence in

the record when the record is

considered as a whole.

2. The Initial Decision, Review

Decision and Final Order regarding

Mr. Evert's website and the request

said web page be removed or altered

violated the Evert's constitutional

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<sup>1</sup> This is an appeal of an Department of Social and Health Services (DSHS) administrative hearing. The record consists of the adjudicative record which is Bates numbered and will be cited by AR and the Bates number. The clerks papers (CP) shall be numbered by the sub. number and the page number.

<sup>2</sup> AR 34-47.

<sup>3</sup> AR 1-17.

free speech rights under the United States constitution Bill of Rights Amendment 1<sup>4</sup> and the Washington State Constitution Article I section 5, Freedom of Speech<sup>5</sup>.

3. The Initial Decision, Review

Decision and Final Order assessing a fine of Three thousand dollars a day<sup>6</sup> violates the Constitution of the United States Bill of Rights Amendment 8<sup>7</sup> and the Constitution of the State of Washington Article I section 14<sup>8</sup> as the fine is excessive.

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<sup>4</sup> "Congress shall make no law. . . . or abridging the freedom of speech. . . ."

<sup>5</sup> "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right."

<sup>6</sup> The Initial Order Conclusion of Law approved the DSHS imposition of a \$3,000.00 a day fine. AR 49. The final order by DSHS extended the initial fine to "at least 147 days." AR 25-26. The fine in the final decision is \$441,000.00. AR 26. The Superior Court Judge reduced the fine to \$21,000.00 for 7 days of the website. CP 21 pages 2-3.

<sup>7</sup> "Excessive bail shall not be required nor excessive fines imposed, . . . ."

<sup>8</sup> "Excessive bail shall not be required, excessive fines imposed. . . ."

4. Sarah Evert is harmed by the finding of abuse/neglect of a vulnerable adult as it can impact her ability to pursue her profession as an occupational therapist<sup>9</sup>.

#### Issues Pertaining to Assignments of Error

1. Does the action of DSHS requesting the Everts to remove or modify a website violate the Everts' First Amendment rights under the U.S. Constitution or the Washington State Constitution Article I section 5?
2. Does the DSHS imposition of a \$3,000.00 a day fine constitute an excessive fine in violation of the U.S. Constitution Bill of Rights Amendment 8 or the Constitution of

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<sup>9</sup> At this time Ms. Evert is scheduled for a hearing 3/6/15 before the State of Washington Board of Health regarding Ms. Evert's Occupational Therapy license. The hearing before the Board of Health is a result of the findings in Sarah's Care Adult Family Home and the subsequent case involving RCW 74.34.020(17)(d) and WAC 388-78A-3390-3480. The subsequent case was decided on summary judgment based on the evidence and testimony from this case.

the State of Washington Article I section  
14?

3. Does substantial evidence support a finding Sarah Evert committed abuse and neglect when the record is reviewed as a whole?

## II. Statement of the Case

Appellant Sarah's Care Adult Family Home (AFH) (Sarah and Stephen Evert), through counsel, appeal the Initial Decision and the Review Decision and Final Order of DSHS reasserting their objections to the Findings of Fact and Conclusions of Law as noted in their petition to the DSHS Board of Appeals (AR 31-36) and in Appellant's Brief in Support of Their Appeal to Spokane County Superior Court<sup>10</sup>. CP 16 pages 1-3. The items start with the Findings and Conclusions from the initial decision (AR 37-49 as stated in the petition for review by the DSHS Board of Appeals) and continue through the appeal to Spokane County Superior Court. CP 16 pages 1-3.

This case involves an adult family home (AFH) which was closed by the Department of Social and Health Services (DSHS) September 26, 2012 alleging abuse of two residents, Deborah and

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<sup>10</sup> These objections are appended to this Brief as an appendix as well as included in the AR and CPs.

Greg<sup>11</sup> by Sarah and Stephen Evert (husband and wife and owners of the AFH). AR 98-106.

Subsequent to the closure of the AFH then the suspension and revocation (AR 38 finding of fact 8; AR 9 finding of fact 33 and AR 21 conclusion of law 15) of the AFH license, DSHS fined the Everts based on a website they had published on the internet. AR 74-78; 80-86. The findings state the website was designed to demean the residents Debbie and Greg. AR 43, finding of fact 39; 23, conclusion of law 18; CP 18 page 15 lines 2-3. The assertions the website was designed to be "disparaging, critical and demeaning<sup>12</sup>" (AR 43) of the residents are belied by a reading of the website as a whole. Such a reading shows what Mr. Evert is attacking is DSHS with the residents merely examples of problems.

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<sup>11</sup> The first names of the resident's will be used as that is how they have been identified in the briefing and records. No disrespect is intended.

<sup>12</sup> The Board of Appeal used the same language while the DSHS brief stated (CP 18 page 15): "Mr. Evert's intent is very clear from a reading of the website - it's to vindicate he and Ms. Evert's abusive treatment of these residents to the public at large and to have others view these vulnerable adults in a negative and derogatory manner."

AR 118-217. As noted Mr. Evert had "scrubbed" the web site of last names of Debbie and Greg and further changed additional names after the first contact by DSHS about the website. CP 8 page 280-281; CP 285 page 285 (note footnote 2 in CP 16 page 3). With the additional changes noted, DSHS through Ms. Madrid decided "enough" changes had been made by December 12 or 13 2012 the department stopped the fine. CP 7 pages 171-172.

DSHS's assertion the website provided material which easily identified Debbie and Greg<sup>13</sup> is questionable and Ms. Madrid testified she had to go to another DSHS employee to ascertain who was being described: "Melissa look through it since she was more familiar with the specific residents of the home to say is this more - is this- is what I'm seeing consistent with what you

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<sup>13</sup> DSHS at CP 18 page 17 Debbie and Greg "lack the ability to sue or take action against Mr. Evert" which is questionable as Greg has a guardian and Debbie has demonstrated over time the ability to get herself to a doctor or hospital when she deemed it necessary. CP19 pages 3-4.

know of the residents and she did tell me, 'yes, that was'". CP 7 page 167.

The issue of the civil fine assessed because of the website and the license suspension were consolidated for hearing January 24, 2013. AR 55-57; 74-87.

Ms. Evert testified she did not use the website though she did write some of the material which was included in the website. CP 8 pages 141-142. Mr. Evert authored and owned the website; he noted he "scrubbed" the material on the website for names. CP 8 pages 279-284.

The underlying facts leading to the website follow. The Everts turned their home into an AFH which home was licensed by DSHS February 24, 2012. CP. 8 page 70. At that time they had been caring for Ms. Evert's sister's husband's grandmother for 2 years though she died 2 days prior to the licensing. CP 8 page 70. March

2012 Ms. Evert's mother<sup>14</sup> started staying with them. The first "resident" of the AFH who came May 9, 2012 was a private placement; the second resident came 6/11/12, a state placement. CP 8 pages 72-73. With the first resident, the Everts hired the first staff - Lexie and soon after they hired Renee. CP 8 page 73. Following the initial hires several potential staff did not work out with Annette and Vickie and Autumn hired over time. CP 8 pages 73-74.

Ms. Evert testified to the requirements which had to be met to be licensed<sup>15</sup>. CP pages 75-76. In August, after several calls from DSHS, the Everts agreed to accept two additional residents who were emergency placements as they were in a placement which was being closed precipitously. CP 8 pages 76-77, 80-81. Ms. Evert understood both these placements were

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<sup>14</sup> The case involving Ms. Evert's mother is on appeal with Division III of the Washington State Court of Appeals Docket no: 324559 - Sarah Evert and Stephen Evert vs DSHS, APS which case is to be decided without oral argument.

<sup>15</sup> Mr. and Ms. Evert are not contesting the loss of the AFH license nor are they trying to regain such license.

emergency placement and would be moved soon. CP 8 pages 81.

The first August placement, Deborah, had numerous medications and an assessment (AR 188-217) done 12/14/11 for which assessment Deborah was the primary source of information. AR 188. The assessment required assistance for self administration of medication. AR 197. This requirement became an issue because of the number of medications and Ms. Evert contacted Deborah's treating doctor, receiving a note from the doctor allowing Deborah to give herself the non-narcotic medications. AR 515; CP 8 page 84. An updated assessment was requested and begun but was rescinded though Ms. Evert testified she only learned the new assessment was rescinded at the administrative hearing. CP 8 pages 83; CP 7 pages 81, 106-107.

The other issues regarding Deborah are Ms. Evert's taking Deborah<sup>16</sup> to the emergency room at Sacred Heart Medical Center<sup>17</sup> September 4, 2012 and Mr. Evert's requesting Deborah pay her share of the cost of her care. CP 8 pages 144-145; 240-241; 271-273.

The issues regarding Greg are his treatment of staff; marijuana request; discharge note and Mr. Evert's comment to Greg. AR 105-106; 445; CP 8 pages 194-198; 277; 288; 302-303. Of note Greg was still at the home when it was closed September 26, 2012 and did not want to leave. CP 7 page 79; CP 8 page 279.

Regarding Greg, the testimony of witnesses is the best evidence and is as follows: Lexie Riggan<sup>18</sup> testified to being fearful of him (CP 7 page 124), of his wanting to hug her (CP 7

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<sup>16</sup> Deborah wanted to be in her own apartment but had refused at least 2 apartments by 9/4/12. CP 8 pages 91; 131-132.

<sup>17</sup> Ms. Evert testified Ken Yancy of DSHS told her to take Deborah to an emergency room as she became too much to handle though Ms. Axtell stated he denied saying that. CP8 page 220; CP 7 page. 103.

<sup>18</sup> Ms. Riggan's testimony is at CP 7. pages 120-148.

page125); Renee McDougall<sup>19</sup> testified regarding Greg "he was coming onto us, um, in a sexual way, um wanting to kiss us and hug us and that kind of thing. And - and, kind of, overpowering us and we felt threatened by that." (CP 8 page 164); she continued to feel threatened by Greg for the time she was there and noted the caregivers did their best to redirect him (CP 8 page 165); Autumn Ashdown (CP 8 pages 191-107) testified to Greg's inappropriate sexual touching (CP 8 page202); to his frightening the other residents (CP 8 page 198-199; 205).

Greg continued living in the AFH until it was summarily closed 9/26/12 with no evidence of any retaliation against him or any indication he was in "immanent danger" of abuse. See CP 7 pages 182-183. As he continued to reside in the home for several weeks after the unacceptable 30 day notice, it is difficult to understand how he was not accommodated or abused.

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<sup>19</sup> Ms. McDougall's testimony is at CP 8 pages 149-179.

### III. Argument

#### 1. Standard of Review

This case is on appeal from a final agency order in an adjudicative proceeding under the Administrative Procedures Act (APA) RCW 34.05. Review is limited to review of the agency's Review decision and Final Order dated December 20, 2013, AT 1-26. *Tapper v. Empl. Sec. Dep't.*, 122 Wn.2d 397, 403-404 (1993). The APA standards of review are applied directly to the record made before the administrative agency. RCW 34.05.558; *Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 601 (1995); cert. denied 518 U.S. 1006 (1996). With exceptions not applicable here, review is limited to the record made before the administrative agency, new evidence may not consider new evidence. RCW 34.05.558-562. Relief may be granted from an agency order in an adjudicative proceeding only on the grounds provided in RCW 34.05.570(3): (a) the order or rule on which it

is based is unconstitutional; (b) the order exceeds the agency's statutory authority; (c) the decision-making process was unlawful; (d) the agency erroneously interpreted or applied the law; (e) the order is not supported by substantial evidence in light of the whole record before the court; (f) the agency has not decided all issues requiring resolution by the agency; (g) a motion for disqualification should have been granted; (h) the order is inconsistent with the agency's rules; or (i) the order is arbitrary or capricious.

Constitutional challenges are questions of law subject to de novo review. *Amunrud v. Bd. Of Appeals*, 158 Wn.2d 208, 215 (2006), cert. denied 549 U.S. 1282 (2007). Relief shall be granted from an agency order if it is determined "[t]he order or the statute or rule on which the order is based is in violation of constitutional provisions on its face or as applied." RCW 34.05.570(3)(a).

The appellants have the burden on appeal of demonstrating the findings are unsupported by substantial evidence. *Donahue v. Central Washington University*, 140 Wn.App. 17, 23 (2007). Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the matter. *Heinmiller*, *ibid* at 607. If enough evidence supports the finding it does not matter there are conflicting facts in the record or other interpretations of those facts. The determination is only if the evidence most favorable to the prevailing party reasonably supports the challenged finding. *Dep't of Rev. v. Sec. Pacific Bank*, 109 Wn.App. 795, 803 (2002). The agency's own witness testified she consulted a third person to ascertain the website referred to Debbie and Greg, residents of the AFH. If the agency itself cannot determine who the person described is a fair-minded or reasonable person would not be able to determine who is described. Greg continued in the AFH

until the home was precipitously closed September 26, 2012 by DSHS and his actions at the time of the closure indicate he did not wish to be moved. CP 7 page 79.

Both the agency's conclusions of law and its application of the law to the facts are reviewed *de novo*. *Tapper*, *ibid* at 402-403. The conclusion of law can be modified if the agency review judge "erroneously interpreted or applied the law." RCW 34.05.570(3)(d); *Heinmiller*; *ibid* at 601. The reviewing court may substitute its judgment for that of the reviewing office, but it accords "substantial weight" to the agency's interpretations of the law within its area of expertise. *Macey v. Empl. Sec. Dep't*, 110 Wn.2d, 308, 313 (1988).

Appellants have the burden to show the invalidity of the order. RCW 34.05.570(1)(a). Relief may be granted only if it is determined the appellant has been "substantially prejudiced" by the agency's actions. RCW 34.05.570(1)(d);

*Peacock v. Public Disclosure Comm'n*, 84 Wn.App. 282, 286 (1996).

2. DSHS Violated the Everts' Rights of Free Speech In Requesting The Everts Remove/Amend Their Website.

The issue of freedom of speech comes under both the U.S. Constitution Amendment 1 Freedom of religion, of speech, and of the press<sup>20</sup> or the Constitution of the State of Washington Article I section 5 Freedom of Speech<sup>21</sup>.

As noted above Stephen Evert "scrubbed" the website prior to publishing it so there were only first names of residents on the website. While DSHS insists the residents were identifiable by the first names alone, this assertion is belied in the testimony of Ms. Madrid (see above) as, even with the statement of deficiencies to review she needed verification from Ms. Axtell regarding

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<sup>20</sup> Congress shall make no law . . . or abridging the freedom of speech. . . .

<sup>21</sup> Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

the identities of the residents on the website. Persons accessing the website without the information available to either Ms. Axtell or Ms. Madrid would be unable to identify the residents. Further DSHS asserts they appeal the website based on the interests of both Debbie and Greg even though there is no evidence in the record Debbie or Greg could not, if they choose, either by themselves or through their relatives<sup>22</sup>. Neither Debbie or Greg sought redress from the Everts for the website.

*Demers v. Austin et al*, 729 F.3d 1011 (9<sup>th</sup> Cir. 2013 ) is instructive regarding current First Amendment law though it deals primarily with the first amendment rights of a university professor regarding his distribution of a short pamphlet regarding which the district court had ruled was related to his employment and did not address a matter of public concern. *Ibid*. The court in *Demers*, *ibid* at 1022, addresses the

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<sup>22</sup> Greg's father is his guardian and Debbie has relatives who could assist them if requested.

issue of public concern stating: "Speech involves a matter of public concern when it can fairly be considered to relate 'to any matter of political, social, or other concern to the community.'" (citations omitted).

What Evert published on the internet raises the question for freedom of speech if the internet is a public forum. *Bradburn v. Reg'l. Library Dist.*, 168 Wn.2d 769 (2010) discusses the issue of public forum. *Bradburn*, *ibid* at 815 states: "For purposes of article I, section 5, we agree with the Court in *A.L.A.*<sup>23</sup>. that Internet access in a public library - in terms of what may be offered and what may be blocked by Internet Filtering - is not subject to public forum analysis and the strict scrutiny that accompanies such a classification, whether as a traditional, designated or limited public forum." *Hopper v. City of Pasco*, 241 F.3d 1067 (9<sup>th</sup> Cir. 2001) discusses at length the public forum

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<sup>23</sup> *United States v. American Library Ass'n.*, 539 U.S. 194; 123 S.Ct. 2297; 156 L.Ed. 2d 221 (2003).

created when the Pasco Arts council created art displays and then limited the showing of some art works. The Court in *Hopper*, *ibid* at 1081, determined the forum created by the city was a public forum and thereby subject to strict scrutiny in reviewing the limitation on the artists. *Hopper*, *ibid*, states: "for the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end (citations omitted)."

Considering the discussions of public forum in the above noted cases, the internet as used by Stephen Evert is a public forum as he does not charge for access to the content nor does he limit the availability of access by requiring passwords etc. CP 8 pages 296; 299; 307-308. As he states several times, anything on the internet is "obtainable". CP 8 page 307.

The second part of the determination regarding freedom of speech is if the speech is a

matter of public concern. This has come up in employment cases. See *Demers v. Austin et al*, 729 F.3d 1011 (9<sup>th</sup> Cir. 2013) which dealt with a Washington State University (WSU) tenured associate professor who distributed a short pamphlet and drafts of a book in progress which the believed violated his employment duties. *Ibid. Demers*, *ibid* at 1022-1024, discusses public concern finding the professors issuance of the material was of public concern even though the public might be a very limited number of persons noting the material was sent to numerous persons and posted on "his website, making it available to the public." *Ibid* 1024.

Evert posted the material in question on the website which site was publically available. He also stated it was specifically sent to a law firm in Ohio, the media and everybody. CP 8 pages 298-299. From Evert's report of the number of "hits" the various pages of the website had,

there appears to be at least some public interest in the site<sup>24</sup>. CP 8 pages 293-294.

Evert created a website from which he removed the last names of the residents (except for his mother-in-law who was not a state resident) to make the residents unidentifiable to the general public. The website was on the internet and did not require specific passwords or payment to access. Based on the number of hits it was of public concern. DSHS violated the Everts rights to freedom of speech by demanding the website be taken down or altered and then fining the Everts for speaking out.

DSHS addressed in Spokane County Superior Court (CP 18 pages 9-13) the free speech noting it was not compromised because identifiable medical and personal information was posted. However, the medical/personal information was not DSHS personal information, the information (which the Everts assert is not easily identifiable

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<sup>24</sup> The undersigned does not know and it was not asked if there is a way to tell who or what accesses a website.

pursuant to Ms. Madrid's testimony discussed above) belongs to Debbie and Greg who are not raising this issue. As stated above, Debbie or Greg could arguably sue Evert because of the website but they have not.

Based on the foregoing DSHS must be barred from demanding the website be removed or amended and the fine rescinded.

3. The Fine Imposed on the Everts by DSHS is Excessive in Violation of the 8<sup>th</sup> Amendment.

Regardless of the decision on the Everts' free speech, the fine of \$3,000.00 a day, whether for the 7 days used by the Spokane County Superior Court (CP 21 page 3); the 147 days found by the Board of Appeals judge (AR 25); or the initial decision which simply stated the amount but did not state the number of days (AR 43, 49), the fine of \$3,000.00 a day is excessive.

*United States v. Bajakajian*<sup>25</sup>, 524 U.S. 321 (1998) addresses civil fines under the U.S. Constitution Bill of Rights amendment 8 stating: "This Court has had little occasion to interpret, and has never actually applied, the Excessive Fines Clause. We have, however, explained that at the time the Constitution was adopted, "the word 'fine' was understood to mean a payment to a sovereign as punishment for some offense." *Browning-Ferris Industries of Vt, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989). The Excessive fines Clause thus "limits the government's power to extract payments, whether cash or in kind, as punishment for some offense.'" *Austin v. United States*, 492 U.S. 257, 265 (1989). (emphasis deleted)." Ibid at 327-328.

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<sup>25</sup> *Bajakajian* involved money seized from Mr. Bajakajian and his family as they attempted to leave the U.S. and a search revealed they had over \$357,000. The money was legally the *Bajakajians* and the only fault was a failure to report the money. *Bajakajian*, *ibid* at 324, and at 338.

*Bajakaljian* continued stating: "The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish.

*Bajakaljian*, *ibid* at 324. The court continued stating: ". . . we therefore adopt the standard of gross disproportionality articulated in a Cruel and Unusual Punishments Clause precedents." (citations omitted) *Bajakaljian* *ibid* at 326.

In this case it is unknown if the fine is "grossly disproportionate" to Evert's website as the issue of the fine as excessive is not addressed by the appeals board or by the Superior Court Judge<sup>26</sup> nor is any proportionality discussed. The decisions only order the fine.

This claim is not explicitly raised

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<sup>26</sup> As the Spokane County Superior Court reduced the days of the fine to 7 from 147 arguably the court found the 147 excessive or beyond the evidence in the case.

earlier though the initial hearing decisions finding on the fine are disputed (see appendix page 10 conclusion of law 17 and 18). In closing the Everts stated the fine should not have started at the high end of the table of fines (WAC 388-76-10976; AR48). CP 9 page 32.

As it is not explicitly raised, the requirements of *State v. WWJ Corporation*, 138 Wn.2d 595 (1999) regarding consideration in a civil case of constitutional claims not raised below. Ibid at 1260. *WWJ Corporation* cites RAP 2.5(a)(3) which states: "The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: . . . .(3)manifest error affecting a constitutional right. . . ." *WWJ*, ibid at 1261, continues (citations are omitted in the following) stating: "Because RAP 2.5(a)(3) is an exception to the general rule that parties cannot raise new arguments on

appeal, we construe the exception narrowly by requiring the asserted error to be (1) manifest and (2) 'truly of constitutional magnitude' ". . . . RAP 2.5(a)(3) was not designed to allow parties 'a means for obtaining new trials whenever they can identify a constitutional issue not litigated below.' . . . If the record from the trial court is insufficient to determine the merits of the constitutional claim, then the claimed error is not manifest and review is not warranted." *WTT*, at 1261.

The imposition of the fine of \$3,000.00 a day from the initial hearing and expanded at the DSHS Board of Appeals (AR 11-12 and 21-24) is not related to the offense of the website<sup>27</sup> or the alleged harm the website may have caused. The fine imposed by the DSHS Board of Appeals which with interest is over a half million dollars is excessive is not given an explanation which

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<sup>27</sup> There is no actual showing in the record of any actual harm to either Debbie or Greg nor have they or their relatives sought recompense from the Everts through filing suit against the Everts.

relates the fine to any alleged harm by the website nor is it shown to be proportional to that alleged harm. The failure by the Board of Appeals<sup>28</sup> to demonstrate how the fine is proportional to the alleged offense of the website is required by *Bajakajian* necessitates the matter be considered as a violation of the 8<sup>th</sup> amendment of the U.S. Constitution and of Article 1 section 14 of the Washington State Constitution.

4. Substantial Evidence When the Record as a Whole is Considered does not Support DSHS Finding Sarah Evert Abused or Neglected a Vulnerable Adult.

DSHS stated Ms. Evert violated WACs and mentally abused Greg by not providing a "proper" discharge notice to Greg after he had yelled at and grabbed caregivers and by not finding her

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<sup>28</sup> From the decision by the Board of Appeals, there seems to be either a misunderstanding or lack of knowledge about websites.

husbands comments to Greg (regarding towing him away) abusive. DSHS stated Ms. Evert violated WACs and abused Deborah by "abandoning" her at the Sacred Heart Hospital Emergency Room September 2012 and by not following her assessment regarding assistance with medication after Ms. Evert received a note from Deborah's treating physician allowing Deborah to control her own medications except for the narcotics.

Greg was given on September 3, 2012 a notice discharging him because of unacceptable behavior. AR 445. Greg stayed at the home without additional problems until DSHS closed the AFH September 26, 2012. CP 8 pages 277-279. Greg at the time of the closure tried to leave the area as he apparently did not want to be moved. Mr. Evert stopped him from leaving assuring him it would be all right. CP 8 pages 279. Ms. Evert gave Greg the notice after incidents with caregivers. CP 8 page 232. Ms. Evert understood the WAC did not require a discharge notice if the resident had not been in the home for 30 days which Greg had not on September 3, 2012. CP 8 pages 232-233. Just prior to the notice both the police and the mental health professionals had been called and came out. CP 8 page 231. The Sheriff's deputy arrived first and apparently did not file a complaint as Greg is wheelchair bound

while the mental health professions believed it was a police matter. CP 8 page 231.

DSHS insisted, as Greg's care assessment said he could be "de-escalated" that is what should have been done. CP 8 page 230. Ms. Evert noted it is hard to employ de-escalation methods when a person is beyond being spoken to. CP 8 page 230.

As Greg spent the rest of the time the AFH was open with less or no problems, in fact apparently not wanting to be moved from the home on September 26, 2012, the discharge notice apparently worked to ameliorate his behavior. This is not abuse.

Regarding Mr. Evert's comment about towing Greg away, the record has several versions of that incident and it is really unknown what happened. See CP 8 pages 300-302. Ms. Evert was not there at the time of this incident.

Regarding Deborah's medications, DSHS insists the care assessment (AR 188-217) requires assistance with medications. AR 197. Of note Loganhurst in a re-assessment dated June 1, 2012, notes how difficult Deborah could be, i.e. throwing medications at staff if they disagree, manipulation of the system regarding medication. AR 515-516. At the AFH Ms. Evert received the note from Deborah's doctor (AR 514) allowing

Deborah to manage her own medications. Ms. Evert testified a doctor's order "overrides everything else." CP 8 page 214.

Ms. Evert testified further Deborah's medications were managed though perhaps differently than Ms. Axtell understood. CP 8 pages 215-216; 228. The medications were managed, the staff was allowed to help though not to immediately go to Deborah's aid if she dropped a pill. CP 8 pages 228-229.

The other issue regarding Deborah is Ms. Evert's leaving her at the Sacred Heart Emergency room. Ms. Evert testified Ken Yancy of DSHS told her to take Deborah to an emergency room if Deborah became too much. CP 8 pages 220-221. He also assured Ms. Evert her would move Deborah quickly (first 5 days then 14). CP 8 page 79. When Ms. Evert took Deborah to the emergency room she had been at the home barely over 14 days. She had refused at least 2 apartments offered her (CP 8 page 222) though she is believed to be in her own apartment at the time of hearing. CP 8 pages 131-132.

Ms. Evert's following the direction of Deborah's treating physician and the direction of Ken Yancy as she understood it is not abuse nor is it neglect. DSHS is not supported by substantial evidence in its decision to find Ms.

Evert neglected or abused either Greg or Debbie. This finding should be reversed as it is not supported.

Ms. Evert is harmed by these findings as they imperil her occupational therapy license.

#### IV. CONCLUSION

The Everts respectfully request the founded findings in the October 15, 2012 letters (AR 75-81) and in the letters dated December 7, 2012 and December 13, 2012 (AR 74-83) be vacated and these matters be dismissed for the abuse and neglect findings against Ms. Evert not being supported by substantial evidence.

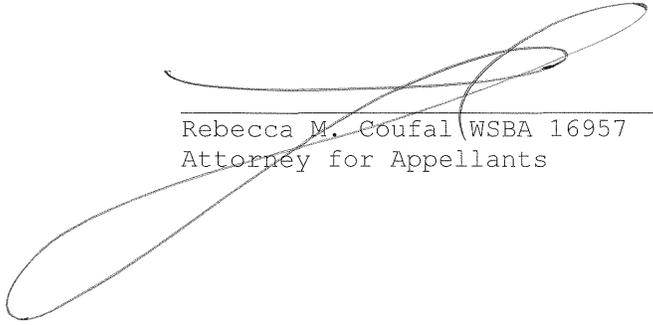
Further they request the order to remove/amend the website be stricken as against the first amendment of the United States Constitution amendment 1 Freedom of religion, of speech, and of the press or the Constitution of the State of Washington Article I section 5 Freedom of Speech.

They request the excessive fine constitutional argument be accepted for review and the fine of \$3,000.00 a day be found to be grossly unporportional to the alleged offense.

The Everts are harmed by the findings of  
abuse and neglect and by the imposed fine.

Dated this 22nd of January 2015.

Respectfully submitted,



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Rebecca M. Coufal (WSBA 16957)  
Attorney for Appellants

## APPENDIX

## APPENDIX

### Initial Decision

Finding 1: Appellants assert Steve Evert was not a caregiver in the AFH even though he is/was co-owner.

Finding 4 and 5: Ms. Axtell as one resident (Betty) refused to speak with Ms. Axtell; another resident did not talk (she has expressive aphasia) and Ms. Axtell reportedly spent only 10 minutes with Greg which is not enough time to understand him without more familiarity than Ms. Axtell had with him. One of the caregivers (Annette) stated Ms. Axtell never interviewed her.

Finding 8: Of note Ms. Axtell testified on cross examination that there was no immanent danger evident to the residents any of the times she visited the AFH. There is no evidence she failed 2 step TB test of one employee (this employee had worked and continues to work as a caregiver) endangered

anyone. The one resident had not been in the home 30 days and did not need a discharge notice regardless of whether or not the notice contained all the elements. As to the discharge noticed resident and the resident taken to the emergency room (ER), both these residents were emergency placements, neither were placements suitable for the AFH. The one taken to the ER had already been taken off residential services and her process from the ER was to a friends then to her own apartment. The resident provided the discharge notice was attempting to find another placement at the time AFH was summarily shut down with little notice - a process that certainly traumatized the residents.

Finding 10: As noted above there is no evidence anyone was in immanent danger for the second step in a TB test (as noted

above, Ms. Bundy had previously worked in caregiving and continues to do so.

Finding 12: Steve and Sarah Evert were the owners of the AFH and were not thereby staff. Ms. McDougall quit working for the AFH the last day of August 2012 and was not present at the time "Greg" blew up as stated in Ms. Axtell's letter. While the initial order implicitly finds Ms. McDougall a credible witness Ms. McDougall did not know when she started work (the AFH was not licensed until the end of February 2012 and she quit as noted above not in late August 2012).

Finding 13: Both of these residents had been residents of Logenhurst an assisted living facility whose actual licensing is questioned by appellants.

Finding 14: Sarah did not know she could refuse to take either of these persons as residents and was told she had no choice.

Finding 15: While the needs assessment stated Greg was easily redirected does not mean that was actually the case particularly as he did not have marijuana at the AFH which the same care plan stated was used to "mellow" him out. He was a threat not only to staff but to the other residents which is not mentioned.

Finding 16: Greg, as the testimony and records noted, was difficult for everyone; his behavior included grabbing female staff, throwing things etc.

Finding 17: Sarah did not request the mental health evaluation of Greg to have him committed. This finding leaves out the statement of the mental health that Greg's behavior was criminal (note the sheriff's deputies came but did not charge Greg).

Finding 18: As the testimony as to what was said to Greg is varied, Sarah's explanation is as credible as any of the testimony (much of which is second hand) regarding what was said.

Finding 20: As Greg had not been in the facility for 30 days and no discharge notice was required per WAC because of that, what was or was not included in the notice putting him on notice regarding his behavior is superfluous. In the time between the discharge notice and the AFH shutdown, Greg was being assisted in finding other residence.

Finding 21: There is evidence in the record of Greg's behavior including ex. AB4 (which includes his notes regarding his wanting to use marijuana) and as to his temper on 8/29/12; 8/28/12 and 9/14/12. There was also testimony as to his violence. As noted above there is a real question as to whether

or not Ms. Axtell spoke with the other residents. Darlene does not talk beyond a word or two; Betty refused to speak with her and Debbie was gone.

Finding 22: The other behavior by Greg is well documented. Sarah appears to be credible only when her statement agrees with the conclusion desired.

Finding 23: This is taken out of context and, as only a partial statement of the problems, is irrelevant.

Finding 24: Sarah was assured Debbie would only be at the AFH for few days. Sarah was also told to take Debbie to the ER if she became too difficult.

Finding 25: The complete medical history of Debbie was not available to the AFH. Most of what is in the record is from her statements alone. There was much evidence she was not blind.

Finding 26: Most of this is statement of fact. Sarah denies ever stating she hoped Debbie would overdose. The doctor ordered Debbie handle her own medications other than the narcotics (not just a note) without Sarah's advocating that.

Finding 27: The "tool box" (a four compartment locked box allowing the meds to be segregated as to type and times taken) in which Debbie's meds were placed was in the well lit dining room where she had supervision. Debbie, as is allowable, had control of the key to the "tool box". As noted she is now living on her own.

Finding 28: As noted earlier in the findings, Debbie is manipulative which is well documented in the record. Sarah denies every badgering her though notes that after

being required to pick up the pills she dropped she quit dropping them.

Finding 29: The record shows Debbie had a history of "blowing." Sarah denies often saying she hoped Debbie would blow though admits she said same in private (not in front of residents) to staff.

Finding 30: Debbie's care was partially paid for by the state and she was required to pay for the rest herself (she had not guardian or anyone else who handled her funds). Neither Debbie nor her case manager testified regarding any calls regarding her need to pay.

Finding 31: Again, Sarah had been told both Debbie would be at the AFH for only a few days and to take her to the ER if she became too much to handle. Debbie had refused to

pay her share of the payment (note the state had stopped paying as she no longer met the requirements for that kind of care.)

Finding 32: Ms. Riggans testimony needs to be reviewed regarding what happened. She found Debbie (perhaps because Debbie called her?), Debbie was outside the ER calling friends to find a place to stay. Debbie was not abandoned, she was taken to an ER, a safe place.

Finding 33: This order states immanent danger. Ms. Axtell testified there was no immanent danger for any resident on September 26, 2012 or any other time she came to the AFH.

Finding 34: It is unknown as it did not come out at the hearing (Mr. Yancy did not testify) who alerted Mr. Yancy about the

web site. No residents full names (only first names) were on the web site. There was no showing the full names could be "googled" or otherwise located from the first names alone.

Finding 35: The Evert's deny any personal identifying information was on the web site the name of which was sarah scare.com.

Finding 36: Ms. Madrid could certainly identify the residents because she had the statement of deficiencies by Ms. Axtell not otherwise and there is no showing she could have identified the residents without the statement.

Finding 37: The Evert's dispute Ms. Madrid told Mr. Evert to take the web site down.

Finding 38: Which day is it December 12, 2012 or December 13, 2012 if the testimony

did not include the actual date which the department must have a record of that date. The web site was changed day 8 after the notification the department intended to fine them. Ms. Melchiori did call but spoke to Sarah as Mr. Evert was not home.

Finding 39: The Evert's deny any disparaging or demeaning statements regarding any publically identifiable residents.

Conclusion 8: Noting the WAC, the Evert's state Greg posed a threat to the other residents (he could have injured someone with this wheelchair) as well as assaulting staff. (1)(b). Debbie certainly met the requirements of (1)(a) and (2)(c). Greg's father was notified of his need to move and as noted earlier Debbie had no one else to notify. Debbie move was orderly (much more

so than the removal of the other residents on September 26, 2012.)

Conclusion 9: The conclusion Greg did not meet any of the requirements for discharge is refuted above. Greg had the time from the discharge notice (during which the AFH continued to provide for his care) until the department precipitously removed him on September 26, 2012 (at which time he did not want to leave.).

Conclusion 10: Debbie's discharge did not endanger her, she had been looking for an apartment at the time she was taken to the ER and was saving money for that apartment having already said no to some apartments suggested by her case manager. She certainly had notice and had already been taken off of residential services by Ms. Thomas.

Conclusion 11: No one in the AFH was abused by these definitions.

Conclusion 12: No one was abused in the AFH and the Evert's denying the statements in the conclusion and that the AFH violated the WAC.

Conclusion 13: Ms. Axtell testified she found no immanent danger any of the times she was in the AFH. The Everts deny any of the residents of the AFH were ever in danger either mentally or physically by them at the AFH.

Conclusion 14: The Everts deny they ever misused any information on any resident as no one could have identified anyone depicted on the web site without a good deal more information than was provided.

Conclusion 15: The Everts reassert their response to Conclusion 14 above denying they ever disparaged, demeaned an identifiable resident on the web site.

Conclusion 16: The Everts again reassert their response that no resident was identifiable from the information on the web site.

Conclusion 17 and 18: The Everts dispute the propriety of a civil find of \$3,000 a day as even the chart in the decision says under Imminent danger and/or immediate threat is \$3,000 or daily civil fine of at least \$1,000 a day. The fine levied against the Everts is unreasonable and above that the "guidance proposed in the grid.

Appeals Board Decision

Sarah Evert and Stephen Evert, husband and wife, appellants and co-owners of Sarah's Care Adult Family, renew their disputes with the findings of fact and conclusions of law in the initial administrative decision as noted in the petition for review of initial decision. AR<sup>1</sup>31-36; 37-49 (initial decision). The appellants extend their disputes to the Review Decision and Final Order noting particularly the following findings and conclusions:

Finding 42 which adds material to the initial decision's finding 36 is disputed. The original objection to initial order finding 36 is renewed and petitioners object to the remainder of the Board of Appeals (BOA) finding 42 particularly the

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<sup>1</sup> AR refers to administrative record with BATES numbers in the bottom right hand corner. TR will refer to the transcript of the hearing with the numbers on the top of the transcript preceded by a 1, 2 or 3 depending on which day of the hearing is referenced.

statement "Ms. Madrid was able to identify each of the residents of the AFH described on the website based on her review of the statement of deficiencies resulting from Ms. Axtell's investigation." (AR 11) Ms. Madrid actually testified on direct examination she had "Melissa look through it since she was more familiar with the specific residents of the home to say is this more - is this - is what I'm seeing consistent with what you know of the residents and she did tell me, 'yes, that was'." Tr.1 pp.167 ll.1-5. Ms. Madrid confirmed on cross examination she recognized the persons based on what she knew from the SOD (statement of deficiencies. See Tr.1 p.173 ll. 2-6.

Finding 44 is disputed as the quote is inaccurate and incomplete. Mr. Evert stated: I decided okay, this is something that I gotta be able to provide to the media and to the law firm in Ohio - in a timely,

easy manner hit send." Tr.2 p.280 ll. 9-12.  
Mr. Evert continues on that page and into  
the next about his removal of last names  
(scrubbed the whole thing) and had  
permission for the use of some of the names.

Finding 45 is disputed as DSHS does not  
include the complete quote and context are  
not included.

Finding 46 is disputed as first unclear  
(the objection to the exhibit is DSHS  
submitted the exhibit after the deadline and  
time for objection) and second DSHS  
presented no evidence other than Mr. Evert's  
statement (Mr. Evert is found not credible  
by both the ALJ and the BOA) though DSHS  
could have arguably accessed the sites and  
presented the printed out sites at the  
hearing which was several months after the  
12/7/12 date when Mr. Evert is told to  
remove the site.

Finding 47 is disputed as it does not note what all the changes were in the website as Mr. Evert testified he changed the names "The next day I changed the first names (just to get them<sup>2</sup>) off my ass so I could do my other work. Tr.2 p.285 11.5-6.

Finding 48 is not disputed though notes Ms. Madrid stated in testimony at the hearing: Um, and thenm I believe they find through the 12<sup>th</sup> or 13<sup>th</sup>. That it was by that time the, um-enough changes had been made that the resident information was not identifiable, uh, so the Department stopped the fine." Tr.1 pp.171-171 11.22-1.

Finding 49 which affirms the ALJ's credibility findings is disputed as the petitioners believe a thorough and open review of the entire record would change some of the credibility findings.

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<sup>2</sup> These words are placed in parentheses as the copy of the transcript proved these words and a word or two in line 6 of page 285 are somewhat obscured and this is what the undersigned makes out the words to be.

Conclusions of Law 16 through 24 are disputed as petitioners assert they residents of the AFH were not identifiable by the names used in the website (except for family member and anyone who had given permission) as is demonstrated by the testimony quoted above referencing BOA finding 42.