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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

SARAH'S CARE ADULT FAMILY HOME,

Petitioners,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES,
ADULT PROTECTIVE SERVICES,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Sarah and Stephen Everts' Adult Family Home (AFH) license was suspended and revoked by the Department of Social and Health Services (Department) because the Everts verbally and mentally abused two residents. After the AFH was closed, Stephen Evert launched a public website on which he posted confidential medical and personal identifying information of four residents obtained from the records maintained by the AFH. The text of the website was disparaging, critical, and demeaning, particularly of the two residents who were the victims of the Everts' abuse. The Department fined the Everts \$3,000 per day, the maximum daily penalty authorized for recurring serious harm violations, until the confidential information was removed from the website. The administrative law judge, the Department Board of Appeals (Board), and the superior court all upheld the license revocation, finding of abuse, and the daily penalty for posting confidential information. The superior court reduced the number of days for which the penalty was assessed, but that reduction is not challenged on appeal.

This court should affirm. Sufficient evidence supports the Board's findings and conclusions. Stephen Evert's internet posting of the residents' confidential medical and personal information is not protected free speech. And it was not excessive to impose the maximum daily fine available under

the circumstances for the period that Mr. Evert willfully refused to remove the private and medical information from his website.

II. STATEMENT OF FACTS

Sarah and Stephen Evert co-owned and operated Sarah's Care Adult Family Home, which the Department licensed as an AFH on February 29, 2012. RP I, 71¹. In August and September 2012, there were four residents at the AFH. RP I, 72; RP II, 77, 80-81. Two residents, Resident G and Resident D,² had recently moved into the Everts' AFH after their former facility was shut down on short notice, and they were anticipated to be short-term placements. RP II, 77, 80-81. Ms. Evert testified that she did not want to have Resident D at her AFH for very long because the reimbursement rate for her care was not very high. RP I, 77.

Following an unannounced inspection, the Department's investigator, Melissa Axtell, notified the Everts on September 26, 2012, that the Department was immediately suspending and revoking their AFH license and that they were prohibited from admitting any additional residents. AR 94-97; Findings of Fact 7 and 8.³ The license was

¹ Each volume of the Report of Proceedings (RP) is separately paginated and is cited using the RP volume followed by the applicable page number.

² The residents are identified in this manner to protect their privacy.

³ The Findings of Fact and Conclusions of Law cited in this brief are those found in the Board's Review Decision and Final Order dated December 20, 2013. *See* CP 16 -41. As explained below, this Order is the agency's final order for purposes of judicial review under the Administrative Procedure Act, RCW 34.05.

immediately suspended and revoked because the violations of adult family home licensing requirements—including failing to protect residents from abuse/neglect—constituted serious deficiencies which were an imminent danger to the resident’s health, safety or welfare. *Id.*, RP I, 159-160. The Everts also were provided with a Statement of Deficiencies (SOD) that detailed the violations of the licensing laws and regulations. Administrative Record (AR) 98-107.⁴

Melissa Axtell’s inspection was conducted in response to three complaints the Department had received, alleging (1) noncompliance in screening a caregiver for appropriate background checks, (2) inappropriate treatment of the residents by a caregiver, and (3) inappropriate treatment of residents by the AFH. RP I, 26. After interviewing the complainants, residents, caregivers and the Everts, the Department found the Everts’ treatment of two residents, Resident G and Resident D, constituted abuse within the meaning of WAC 388-76-10000. RP I, 28, 155-159; AR 98-107.

A. Facts Relating to Everts’ Treatment of Resident G

Prior to accepting Resident G as a resident, the Everts received all the documentation related to his care. RP I, 81. Specifically, the Everts had Resident G’s current Assessment Details, which provided in writing his medical diagnosis, cognitive details, and care needs; and the negotiated care

⁴ The Administrative Record contains all the documents filed at the Office of Administrative Hearings, including the Exhibits admitted at the hearing.

plan from the former facility, which set forth the care the prior facility agreed to provide for Resident G. AR 450-452, 464-487; RP I, 40. The Everts also negotiated their own care plan with Resident G. AR 488-490.

Resident G is wheelchair-bound and suffers from a traumatic brain injury. AR 464; RP I, 41. He requires assistance with transfers, bathing and other activities of daily living. Due to his traumatic brain injury, he has cognitive impairments, and the Assessment Details reported that his behaviors included yelling and screaming, that he can become angry very quickly, and that this behavior can be easily altered with suggested strategies (including the caregiver encouraging alternatives, such as going outside until calm, typing on a computer, petting or holding his cat, playing computer games, and calling friends or family). AR 473; RP I, 41.

Two AFH staff members said they were fearful and intimidated by Resident G, because he attempted to be inappropriate with them sexually. RPI, 124-125, RP II, 164. RP I, 124-125. But three other AFH staff members, including Ms. Evert, found they were able to redirect or alter Resident G's behavior most of the time. RP II, 27, 1342, 196, 203-204.

After an incident on September 3, 2012, when Resident G became agitated with a female staff member, screamed and swore at her, and raised his fist in a threatening manner, the police and mental health professionals were called. RP I, 36. The police did not arrest Resident G,

but Ms. Evert requested that a mental health professional assess Resident G for an involuntary commitment. RP I, 37. The mental health professional determined that Resident G was not a danger to himself or others. RP I, 36-39.

That day, the Everts gave Resident G a discharge notice, which the Department subsequently determined was deficient under WAC 388-76-10615. RP I, 36; AR 99-101, 445. The Everts made no attempts at a reasonable accommodation to work with Resident G to avoid the transfer or discharge before issuing the notice, as required by WAC 388-76-10615. AR 99, RPI, 39.

The Everts also failed to consider the recent stressful events in Resident G's life as possible reasons for his outburst on September 3, 2012, such as the abrupt move from his former residence when the facility suddenly closed, the loss of his cat, or an increase in pain. RP I, 43, 45, 47-48. *See* RP I, 37-38 (Resident G told the mental health professional on September 3, 2102, that he used to smoke marijuana for pain, but did not do so anymore and was in pain 24 hours a day; and that he missed his cat, which he described as his best friend). When Ms. Axtell reviewed the AFH records she noted there were no other "violent" incidents with Resident G. RP I, 41-42, 47. The AFH daily notes on August 22 and 25, 2012, reflect that he had good days, was happy about such things as

getting his transfer pole up and that the TV in his room was working, was glad when more of his belongings were found, and was generally settling in to his new home. AR 455-456. The notes for August 24, 2012, state: “He is quite pleasant to be around. Difficult to understand but he works with us. (SE).” AR 455. The daily notes for September 3, 2012, the day of the incident, reflect that “he has been calm this afternoon and kept to himself in his bedroom.” AR 457. On September 6, 2012, the daily notes state: “He told me he regretted when he lifted his hand at Annette the other day. He said he shouldn’t do that in front of all the ladies. Had a good talk about it. (LR)”. AR 458.

The discharge notice also referenced marijuana—stating that Resident G could not “smoke pot or use illicit drugs of any kind, or invite your drug providers to the premises,” RP I, 44, even though Resident G did not possess or use marijuana while at the AFH. RP I, 43- 44. (The AFH documentation reflected only one item about marijuana use while at the Everts’ AFH. On August 27, 2012, it was noted that Resident G was very pleasant and in the mood to talk. He wanted to talk about his medical marijuana care. When asked if he was hinting to be able to use it at the AFH, he said “no.” He also said it was more effective than the medication for his tone. AR 455; *see also* RP I, 43.) And the only visitors recorded in

the AFH logs to visit Resident G were his parents, Sherry from DSHS, and a physical therapist. AR 455-56, 458.

Resident G's discharge notice did not include the location where the resident was being transferred or discharged. AR 445. Nor did it contain any information as to how to contact the state long-term care ombudsman, whose role it is to advocate for the resident. AR 445, RPI, 48-49. Both pieces of information are required. WAC 388-76-10615. Mr. Evert told Resident G, "I'm tired of putting up with your crap. If I need to, I'll tie your chair to my tractor with a rope, pull you somewhere and leave you there." RP I, 51, 127. This behavior was cited as one of the findings for the determination that the AFH had failed to ensure that Resident G was free from abuse. AR 103, 105. Ms. Axtell testified that it is intimidating and threatening to tell somebody in a wheelchair that you are going to tie his wheelchair to a tractor with a rope, and take him somewhere and leave him there. RP I, 75.

B. Facts Relating to Everts' Treatment of Resident D

Resident D has multiple diagnoses, including a history of stroke, blindness, fibromyalgia, chronic pain and mental health issues. RP I, 52; AR 563-575. She is also classified as legally blind with memory problems. RP I, 52, 55. When the Everts accepted Resident D into their AFH, she had a multitude of caregiving needs, including medication assistance, as she forgot to take the medicine and could not read the labels; bathing

assistance; and other assistance as needed depending on her pain and level of mental weakness. RP I, 53. Initially the Everts did not have all of Resident D's records. RP II, 77. After Ms. Evert saw the amount of medication that Resident D was taking and her complete care needs assessment, she did not want to accept her as a resident. RP II, 78. Ms. Evert testified that she accepted Resident D as a resident because she did not know she could refuse to accept Resident D. RP II, 78. According to Resident D's assessment, she was manipulative with staff and the system of care, especially related to her medications, but she also had a history of overdosing and mental health issues and had made suicide attempts in the past. RP II, 85, 184, 217, 238; AR 515-516, 563-575.

Ms. Evert did not believe Resident D was blind, told her she was not blind, and called her a "prescription drug addict." RP I, 62, RP II, 89. She instructed her caregivers not to provide Resident D shower assistance, not to dial the phone for her, and not to provide her medications (except narcotics). RP I, 55-57, 59, 130-131, RP II 159, 236. For example, Renee, a caregiver, saw that Resident D dropped a pill and could not find it. Ms. Evert refused to help, instead badgering Resident D about the pill, asking her "what would happen if another resident or one of the dogs got the pill?" RP I, 57; RP II, 160. Resident D ended up on her hands and knees searching for the pill and when she found it, Ms. Evert said, "I knew you could see."

RP I, 57; RP II, 160. Ms. Evert acknowledged that Resident D dropped pills, but “if you gave her enough time she’d find them herself.” RP I, 58. Ms. Evert testified that she told staff not to rush to pick up the pills because Resident D was being manipulative about dropping them. RP II, 228-229. Ms. Evert told staff she hoped Resident D would “overdose on her medications” or “blow up” then she could take her to the emergency room and get rid of her. RP I, 59-60. *See also* RP I, 128.

There was also an issue between Resident D and the Everts regarding payment of a co-pay. RP I, 131-132; RP II, 303-304. On September 4, 2012, Mr. Evert approached Resident D at lunchtime in front of the other residents and demanded that she pay; he yelled at her and he told her he was going to “send her off in a taxi.” RP I, 63, 132. His behavior was very upsetting to the other residents. RP I, 132. Resident D believed she did not owe any money and tried to contact her Medicaid case worker. RP I, 64; RP II, 304.

Ms. Evert told Ms. Axtell that when she (Ms. Evert) came home from work, “she was aware there was some kind of brouhaha had occurred.” RP I, 66. Ms. Evert told Resident D, “let’s get in the car” and that she was taking Resident D “somewhere to get help.” RP I, 66. She then took Resident D to the Sacred Heart Hospital emergency room, gave

them all her pills, and told the staff she thought Resident D had taken too many pills. RP I, 67.

Ms. Evert had no basis for believing that Resident D had taken an overdose of pills. RP I, 67-68; RP II, 22. Ms. Evert had no intention of taking Resident D back to the AFH when she left her at the emergency room, effectively dumping her there. RP I, 68. The hospital's assessment was abandonment and stress by the AFH. RP I, 69. AR 109-116.

Emergency room hospital staff called the police, who contacted Ms. Evert. RP I, 71. Ms. Evert then called the emergency room and told them that she "dropped the resident off because the resident had aggressive, disruptive behavior." RP I, 71. But Ms. Evert told law enforcement her original story that she dropped Resident D at the hospital because she thought she overdosed. RP I, 72. Then Ms. Evert later told Ms. Axtell that she took Resident D to the emergency room because she thought Resident D was causing too much stress for the other residents. RP I, 67.

The Department ultimately determined the AFH's deficiencies were an imminent danger to the residents' health, safety, or welfare, and on September 26, 2012, the Department immediately suspended the AFH's license, placed a stop placement order on the home, and arranged for the removal of all Department-placed residents. AR 94-97.

C. Mr. Evert's Posting of Residents' Confidential Medical and Personal Identifying Information on His Website

Disputing the allegations as to both Resident G and Resident D—but also stating that they did not seek to continue to be licensed as an AFH—the Everts requested an administrative hearing pursuant to WAC 388-76-10995. AR 108. While their administrative appeal was pending, Stephen Evert launched a website, accessible by anyone without a password, on which he posted detailed and unique personal and medical information regarding four of the previous AFH residents. AR 231-315, RP II, 279-280. Ms. Evert testified that she wrote all the information that was posted on the website for the patients' records. RP I, 142, 234.

The Department determined Mr. Evert's posting of this type of information was a violation of legal requirements that an AFH maintain the confidentiality of residents' medical treatment and records, that it protect residents' personal and confidential information from unauthorized use, and that it protect the residents' right to privacy. AR 74-87. RCW 70.129.050; WAC 388-76-10315 and 388-76-10575.

Elena Madrid, the Department's field manager, called Mr. Evert in an attempt to have him remove the personal and confidential information of the prior residents from the website; she was not successful. RP 1, 163,

179.⁵ The Department then imposed a civil fine on the Everts' AFH of \$3,000 per day until such time as the violations were remedied. AR 74–76. The Department also imposed a condition on their license that “the provider must immediately remove from its online website all confidential resident record information.” AR 83.

D. Administrative Proceedings and Judicial Review by the Superior Court

After receiving the notice of the fines for the website, the Everts again requested an administrative hearing. AR 61. The two matters were consolidated for hearing. The administrative law judge (ALJ) affirmed the Department's suspension and revocation of the Everts' AFH license, the findings of improper discharge and abuse, and the \$3,000 daily fine without specifying a period of time that the fine was to apply. AR 37-49, CP 3-15.

The Everts appealed the ALJ's initial decision to the Department's Board of Appeals, as authorized in WAC 388-02, challenging numerous findings of fact and the imposition of the fine. The Everts reaffirmed on appeal that did not seek to continue to be licensed as an AFH. AR 31. The Board's review judge affirmed the Department's decision to suspend and

⁵ Finding 43 in the final order, CP 16-41, erroneously states that Ms. Madrid instructed Mr. Evert to take down the website. The actual testimony and evidence in the record shows that Ms. Madrid instructed Mr. Evert to remove the confidential information from the website, not to take down the website in its entirety. In the superior court, the Department conceded this erroneous finding, and the superior court amended finding of fact 43 to correspond to the evidence in the record.

revoke the AFH license and stop placement at the AFH, determining sufficient evidence supported the findings of fact and conclusions of abuse. The review judge expanded the findings of fact regarding the website and fine based on Mr. Evert's testimony, and determined the time period that the fine applied to be from November 20, 2012, the day the website was posted, to April 16, 2012, the day Mr. Evert testified, for a total of 147 days. Conclusion of Law 22 (CP 40). The Board's Review Decision and Final Order was entered on December 20, 2013. Since the Everts did not move for reconsideration, the Board's Review Decision and Final Order is the final agency action under the Administrative Procedure Act (APA), RCW 34.05.⁶

The Everts obtained judicial review in the superior court under the APA, challenging the sufficiency of the evidence supporting the findings of abuse and neglect against Sarah Evert, and asserting that the Department's instruction to remove the residents' confidential information from the website and fine for not doing so violated their constitutional right to free speech. The superior court determined there was sufficient evidence to

⁶ See *Verizon Nw., Inc. v. Empl. Sec. Dep't*, 164 Wn.2d 909, 915, 194 P.3d 255 (2008) (under the APA, court reviews the findings and conclusions of the final decision-maker for the agency, not the initial decision-maker) (citing *Tapper v. Empl. Sec. Dep't*, 122 Wn.2d 397, 404, 858 P.2d 494 (1993)); *DaVita, Inc. v. Wash. State Dep't of Health*, 137 Wn. App. 174, 181, 151 P.3d 1095 (2007) (under the APA, court reviews the order entered by the agency entity with authority to "finally determine" the matter) (citing *Tapper*, 122 Wn.2d at 405-06); RCW 34.05.010(11)(a) (defining "order" as a "written statement of particular applicability that finally determines the legal rights, duties, privileges, immunities, or other legal interests of a specific person or persons"). See also WAC 388-02-0217, 600, -605 (specifying who has authority to enter final order).

support the allegations of abuse and neglect (Findings of Fact 1-34), amended Finding of Fact 43 to correspond to the evidence (see note 5, above), and ruled that the posting of patient private information was not constitutionally-protected speech. The superior court found insufficient evidence to support the review judge's finding that the residents' confidential information was posted on the website for 147 days, and found instead that the fine should have been assessed for a period of seven days. CP 88-91. The Department has not appealed the reduction of time.

The Everts appealed to this Court, adding a new claim: that the daily fine is excessive under the Eighth Amendment of the United States Constitution.

III. ARGUMENT

A. **Standards of Review Under the Administrative Procedure Act, RCW 34.05**

The Administrative Procedure Act ("APA"), chapter 34.05 RCW, governs the Everts' appeal before this Court. *Conway v. Wash. State Dep't of Soc. & Health Servs.*, 131 Wn. App. 406, 414, 120 P.3d 130 (2005). The Everts, as the party challenging the Board's decision, bear the burden of proving the decision is invalid. RCW 34.05.570(1)(a).

The APA provides nine grounds for invalidating a final order in an adjudicative proceeding. RCW 34.05.570(3). The Everts rely on three:

(a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;

(d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;

RCW 34.05.570(3)(a), (d), (e).

Substantial evidence. RCW 34.05.570(3)(e). Factual findings in a final order “are sustained if they are supported by evidence that is substantial in light of the whole record.” *Kraft v. Dep't of Soc. & Health Servs.*, 145 Wn. App. 708, 717, 187 P.3d 798 (2008). Substantial evidence is “a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.” *Hardee v. Dep't of Soc. & Health Servs.*, 172 Wn.2d 1, 19, 256 P. 3d 339 (2011) (internal quotation marks and citation omitted). The substantial evidence standard is “highly deferential” to the agency factfinder. *ARCO Prods. Co. v. Wash. Utils. & Transp. Comm'n*, 125 Wn.2d 805, 812, 888 P.2d 728 (1995). The Court will view the evidence in the light most favorable to the party who prevailed in the highest administrative forum to exercise fact-finding authority (in the case, the Board of Appeals). *City of Univ. Place v. McGuire*, 144 Wn.2d 640,

652, 30 P.3d 453 (2001). The court will accept the fact-finder's determinations of witness credibility and the weight to be given to reasonable but competing inferences. *Id.* Unchallenged findings of fact are treated as verities on appeal. *Mills v. W. Wash. Univ.*, 170 Wn.2d 903, 906 n.1, 246 P.3d 1254 (2011).

Issues of law. RCW 34.05.570(3)(d). Issues of law, including questions of statutory construction, are reviewed de novo. *Ryan v. Dep't of Soc. & Health Servs.*, 171 Wn. App. 454, 465, 287 P. 3d 629 (2012); *Quadrant Corp. v. Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 233, 110 P.3d 1132 (2005). Under this standard, however, courts accord "substantial weight to an agency's interpretation of a statute within its expertise." *Verizon Nw., Inc. v. Wash. Empl. Sec. Dep't*, 164 Wn.2d 909, 915, 194 P.3d 255 (2008); *Quadrant*, 154 Wn.2d at 233. Courts also give deference to the agency's interpretations of its own regulations. *McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d 96, 112, 233 P.3d 861 (2010).

Constitutional issues. RCW 34.05.570(3)(a). Constitutional challenges are questions of law subject to de novo review. *Hardee*, 172 Wn. 2d at 7.

B. Substantial Evidence Supports the Findings and Conclusion That Ms. Evert Committed Abuse

The Everts challenge only the conclusion of law that Ms. Evert committed abuse. That conclusion is set out in Conclusion of Law 14 in the Board's Review Decision and Final Order. CP 35. The Everts purport to identify in their appendix the specific findings they are challenging, but they reference the initial order entered by the ALJ, rather than the final order entered by the Board. It is the final order that is reviewed by the Court, not the initial order. *See* footnote 6, above. The Department identifies Findings of Fact 24 through 32 in the Board's Order (CP 22-24) as supporting the Board's Conclusion of Law 14 addressing Ms. Evert's conduct.⁷

The Everts' appendix, to the extent it can be matched up with the Board's Findings of Fact, lacks any citation to the record. It therefore provides no support for their claim that Conclusion of Law 14 is not supported by substantial evidence. "RAP 10.3 requires [an] appellant to present argument to the reviewing court as to why specific findings of fact are in error and to support those arguments with citation to relevant

⁷ AFH providers must ensure its residents are free from verbal and mental abuse. WAC 388-76-10670(2). The provider is required to ensure that abuse does not occur in her home. WAC 388-76-10670. Although Ms. Evert may not have engaged in the abusive conduct towards Resident G that her husband did (*see* Findings of Fact 16, 17, 18, 20, 21, and 23 in the Board's Order), she abandoned the duty she owes to the residents to take steps to prevent abuse in her AFH. Her primary factual allegation is that she did not know a discharge notice was required. It is. WAC 388-76-10615. *See* Conclusion of Law 10 in the Board's order.

portions of the record.” *In re Whitney*, 155 Wn.2d 451, 466, 120 P.3d 550 (2005).

Even in the body of the Everts’ brief, their substantial evidence argument consists only of scattergun assertions of conflicting evidence in the record or alternative interpretations of the facts, not that there is an absence of substantial evidence to support the challenged findings. Br. of Petitioners at 28-32. They make only two arguments that address the pertinent findings and that are supported by citations to the record: that Ms. Evert had received a note from Resident D’s physician allowing Resident D to manage her own medications, except narcotics; and that Ms. Evert acted with the Department’s approval when she took Resident D to the emergency room and left her there. Br. of Petitioners at 29-31. The Board acknowledged the doctor’s note (Finding of Fact 26), but did not find that Ms. Evert acted with the Department’s approval when abandoning Resident D at the emergency room.

The Board did find that Ms. Evert did not believe Resident D needed the assistance required in her care plan, did not believe the medical diagnoses made of Resident D, allowed Resident D to take medications without supervision even though Resident D was known to have a history of overdose, told others that she hoped Resident D would overdose so she could take Resident D to the emergency room, and ultimately took her to

the emergency room with no evidence of an overdose simply to remove her from the AFH. Findings of Fact 25-31. These findings are supported by Resident D's report to Investigator Axtell (RP I, 55-56), by Ms. Evert's statements to Investigator Axtell (RP I, 62, 67), by the testimony of caregiver Lexie Riggans (RP I, 128, 130-131), by the testimony of caregiver Renee McDougall (RP II, 157-161), and by Ms. Evert's own testimony (RP II, 219, 227-229).

There is no evidence that Ms. Evert contacted the Department to report having taken Resident D to the emergency room—it was caregiver Lexie Riggans who discovered Resident D had been taken there—and the emergency room staff reasonably concluded that Resident D had been abandoned there. Finding of Fact 32. This finding is supported by Ms. Evert's statements to Investigator Axtell (RP I, 62, 66-67), by the testimony of caregiver Lexie Riggans (RP I, 133-135), and by the police reports (AR 109-116).

As explained above, the Court views the evidence in the light most favorable to the Department, which prevailed in the proceeding before the Board of Appeals. *See McGuire*, 144 Wn.2d at 652. The Court accepts the Board's determinations of witness credibility. *Id.* And even if the Everts had offered reasonable alternative interpretations of the facts—and the Department contends they have not done so—the Court accepts the

Board's determination of the weight to be given to reasonable but competing inferences. *Id.*

Reviewing the record as a whole, sufficient evidence support the findings enumerated above, and those findings support the Board's conclusion that Ms. Evert did not ensure that Resident D was free from mental verbal and mental abuse and abandonment, that she was one of the perpetrators of the abuse and therefore violated WAC 388-76-10370(2).
Board's Conclusion of Law 14.

C. Any Adverse Effect on Another License Held by Ms. Evert Is Not Properly Before the Court

At the end of their argument addressing substantial evidence, the Everts add a single sentence stating that if the Board's findings are affirmed, her occupational therapy license is imperiled. Br. of Petitioners at 32. Assuming they are correct, the threat to Ms. Everts' occupational license is irrelevant to this Court's review of the Board's Order. The findings and conclusion that Ms. Evert failed to protect the residents from abuse and also committed abuse should be affirmed.

D. The Everts Do Not Have a Free Speech Right to Publish the Personal and Confidential Medical Information of Former AFH Residents

The evidence demonstrates that Stephen Evert posted detailed and unique personal and medical information regarding four previous residents

of the AFH on his website. Finding of Fact 39 and 42 (CP 25 and 26). The information included each resident's history, health and medical concerns, diagnoses, behaviors, medications and personal care needs. AR 232-314⁸; RP I, 164, 168-169. He used proper first names of each of the residents. The names and unique identifying information about each resident could easily be associated with particular residents. Examples of improperly released information can be found at AR 223-234, 239, 243, 244, 250, 251, 255-259, 260, 273, 274, 275, 279 (Evert's exhibit A-47), 291-293. Mr. Evert published the information on the website with the intention of having the materials readily accessible to the public at large. RP II, 299. Much of the information posted about the residents, particularly Resident G and Resident D, was demeaning and derogatory, for example, describing Resident D as having a "long history of drug OD and been to the ER numerous times," AR 257; describing both of them as "addicted to no-bar-code drugs" and "going into withdrawal," AR 257; describing Resident D as "doctor shopping" and "drug-seeking," AR 258; reporting that mental health was called and came out to evaluate Resident D AR 258; mental health professionals were called to evaluate Resident G, AR

⁸ The text of the website included in the record was provided by the Everts. AR 218, 224. The Everts objected to the Department's proposed exhibit 5 of the website, it's proposed exhibit was withdrawn and the Everts website exhibit was the one used for hearing. RP I, 14-15, 210.

259; and disclosing references to medical recommendations and mental health issues in Resident D's medical chart, AR 274, RP I, 169.⁹

Ms. Evert confirmed that she had written the information that was posted on the website, but that she had written it for the residents' personal chart notes. Mr. Evert claimed he took the information from Ms. Evert's computer and posted it on the website. RP II, 296-298.

The Board specifically found that Mr. Evert posted "detailed and unique personal and medical information" about four residents, including their names and their "history, health, medical concerns, diagnoses, behaviors, medications and personal care needs," and that Mr. Evert obtained the personal information he posted because of his ownership and association with the AFH. Findings of Fact 39, 42 (CP 25-26).¹⁰ The Board concluded that his posting of this information violated RCW 70.129.050, WAC 388-76-10315(1), and WAC 388-76-10575. Conclusion

⁹ The Everts imply in one sentence, in their discussion of the standards of review, that they may have intended to challenge the sufficiency of the evidence supporting one or more of the Board's findings related to the residents' confidential medical and personal information Mr. Evert posted his website (Findings of Fact 35 through 47). Br. of Petitioners at 15. But they did not make that argument and the Court need not consider it. Petitioners must present the Court with argument as to why specific findings are not supported by the evidence and to cite to the record to support that argument. *See* RAP 10.3; *Matter of Estate of Lint*, 135 Wn.2d 518, 531-32, 957 P.2d 755 (1998). They have not done so.

¹⁰ The Everts did not reference these findings in their substantial evidence challenge. *See* Part B, above. Under *Mills*, 170 Wn.2d at 906 n.1, these findings are verities on appeal.

of Law 18 (CP 38). The Department instructed Mr. Evert to remove the residents' confidential and personal information from his website.¹¹

The Everts have failed to provide supporting authority that is applicable to these facts. "It is well established that this court will not address constitutional issues without benefit of citation to appropriate supporting authority." *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 224, 5 P.3d 691 (2000) (internal quotation marks and citation omitted). "[Appellate courts] will not address constitutional arguments that are based upon conclusory statements." *Lund v. State Dep't of Ecology*, 93 Wn. App. 329, 340, 969 P.2d 1072 (1998) (citing *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 169, 876 P.2d 435 (1994)). "[N]aked castings into the constitutional seas are not sufficient to command judicial consideration and discussion." *Public Hosp. Dist. No. 1 of King Cy. v. Univ. of Wash.*, 182 Wn. App. 34, 49, 327 P.3d 1281, review denied, 337 P.3d 326 (2014) (quoting *State v. Johnson*, 179 Wn.2d 534, 558, 315 P.3d 1090 (2014)).

The Everts rely on two First Amendment cases, neither of which addresses the unauthorized posting of a vulnerable adult's confidential medical information and other personal information on a website. Mr. Evert is not a publicly employed university professor posting materials "in

¹¹ See footnote 5, above (Department did not demand that Mr. Evert take down his website).

connection with his official duties as a faculty member” that were “related to scholarship or teaching,” as were at issue in *Demers v. Austin*, 746 F.3d 402, 414 (9th Cir. 2014).¹² Nor does this case involve limits on access to the internet on public computers, as was alleged in *Bradburn v. North Central Regional Library District*, 168 Wn.2d 789, 231 P.3d 166 (2010). And although the Everts claim a violation of article I, section 5 of the Washington Constitution, they make no argument at all about its applicability.

The nature of the Everts’ purported Free Speech challenge is not clear from their briefing. To the extent they are targeting RCW 70.129.050, the statute that protects residents’ confidential information from the kind of disclosure Mr. Evert undertook, they have not succeeded. A statute is presumed constitutional and the party challenging a statute bears the heavy burden of establishing its unconstitutionality. *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 215, 143 P.3d 571 (2006) (citing cases). The standard is met only if the challenger demonstrates by argument and research that there is no reasonable doubt that the statute violates the constitution. *Id.* The Everts have not overcome that presumption of constitutionality here.

¹² Petitioners cite *Demers v. Austin*, 729 F.3d 1011 (9th Cir. 2013), which was withdrawn as superseded on denial of rehearing by the opinion at 746 F.3d 402.

Even if they had articulated a cognizable Free Speech claim, the public interest in protecting the private information of AFH residents is sufficient to withstand constitutional scrutiny. RCW 70.129.050 directly protects several important interests: preventing disclosure of health care records containing some of the most personal of information; protecting individual autonomy in decision-making on important personal matters; and maintaining confidentiality of communications between patients and their health providers. *See Whalen v. Roe*, 429 U.S. 589, 599-600, 97 S.Ct. 869, 51 L.Ed. 2d 64 (1977); *Youngs v. Peacehealth*, 179 Wn.2d 645, 651, 316 P.3d 1035 (2014). Confidentiality encourages patients to seek the most accurate, and therefore best possible, care by promoting a trusting and frank relationship between patient and provider. Anita Allen, “Privacy and Medicine,” § 1.1 Confidentiality, *The Stanford Encyclopedia of Philosophy* (2011) (available at <http://plato.stanford.edu/entries/privacy-medicine/>). Medical records, in particular, contain incredibly intimate details of personal life, and patients thus have a strong privacy interest in avoiding their disclosure “[e]ven if there were no possibility that a patient’s identity might be learned.” *Northwestern Mem’l Hosp. v. Ashcroft*, 362 F.3d 923, 929 (7th Cir. 2004). The statute and the rules implementing it are no broader than necessary to protect these interests.

The Everts have not presented a cognizable Free Speech claim under either the First Amendment or the Washington Constitution. This Court need not address it.

E. The Everts Have Not Shown That the Fines Imposed Were Excessive Under the Eighth Amendment

Finally, the Everts claim that the fine imposed by the Department is excessive under the Eighth Amendment. Br. of Petitioner 23. This claim was not raised in the superior court.

Under the Eighth Amendment, a fine is excessive if it is grossly disproportional to the gravity of the defendant's offense. *United States v. Bajakajian*, 524 U.S. 321, 336, 118 S.Ct. 2028, 141 L.Ed. 2d 314 (1998).¹³ The Court gives strong consideration to legislative judgments about penalty amounts. *Id.* Here, the Legislature specifically authorized the daily penalty that was imposed. RCW 70.128.160. The Everts do not mention the statute. The sum total of their argument addressing proportionality is that the fine "is not related" to the harm that was caused and that the Board did not demonstrate how a half-million-dollar fine is proportional to the offense. Br. of Petitioner at 27-28.

But a half-million dollar fine no longer is at issue. As explained above, the superior court found insufficient evidence to support the review

¹³ As noted in the dissenting opinion in *Bajakajian*, the case marked the first time in the Court's history that it struck down a fine as excessive under the Eighth Amendment. 524 U.S. at 344. It has not done so since.

judge's finding that the residents' confidential information was posted on the website for 147 days, and found instead that the fine should have been assessed for a period of seven (7) days. CP 88-91. The Department has not appealed the reduction of time. The total fine imposed is \$21,000.

All that remains of the Everts' Eighth Amendment claim is a challenge to the daily penalty assessed under RCW 70.128.160, which authorizes the Department to "[i]mpose civil penalties of up to three thousand dollars for each incident that violates adult family home licensing laws and rules," and provides that each day is a separate violation. RCW 70.128.160(2)(d). There is no indication in their brief that they are challenging the statute itself, so they must be challenging the specific penalty assessed against them.

In this case, the amount of the fine was determined by reference to a tiered sanction grid adopted in WAC 388-76-10976.¹⁴ That grid was developed through normal rule-making processes in response to legislation enacted in 2011, including ESHB 1277 (Laws of 2011, 1st. Sp. Sess., ch. 3), which amended RCW 70.128.160 to add civil penalty authority.

¹⁴ The Everts also have not challenged the validity of the rule. It is presumed valid, *Wash. Pub. Ports Ass'n v. Dep't of Rev.*, 148 Wn.2d 637, 646, 62 P.3d 462 (2003), and a party alleging the rule is unconstitutional must prove unconstitutionality beyond a reasonable doubt. *Longview Fibre Co. v. Dep't of Ecology*, 89 Wn. App. 627, 632-33, 949 P.2d 851 (1998) (citing *City of Spokane v. Douglass*, 115 Wn.2d 171, 179, 795 P.2d 693 (1990)). If a petitioner claims a rule is unconstitutional on its face (rather than as applied), that petitioner must prove there is no set of circumstances under which the rule would be constitutional. *Reno v. Flores*, 507 U.S. 292, 301, 113 S.Ct. 1439, 123 L.Ed. 2d 1 (1993).

See Wash. St. Reg. 12-01-004 (Dec. 7, 2011). It was designed to provide a minimum and maximum daily fine responsive to the type of harm and whether the harm occurred once or repeatedly. The table is reproduced here:

NO HARM	MINIMAL or MODERATE HARM		SERIOUS HARM		IMMINENT DANGER and/or IMMEDIATE THREAT
	Repeat/ Uncorrected	Initial	Repeat/ Uncorrected	Initial	
Civil fine of at least \$100 per violation	Civil fine up to \$500 per violation or a daily civil fine of at least \$250 per day	Civil fine up to \$1,000 per violation or a daily civil fine of at least \$500 per day	Civil fine up to \$2,000 per violation or a daily civil fine of at least \$1,000 per day	Civil fine up to \$3,000 per violation or a daily civil fine of at least \$1,500 per day	Any Violation Civil fine of \$3,000 or daily civil fine of at least \$1,000 per day

The Everts' primary argument appears to be that the residents were not harmed by his conduct, but they have not challenged the findings that support the Board's conclusions to the contrary. See Findings of Fact 35 through 37, 39, and 41 through 48 (CP 24-28). The Board concluded that posting the "private information and records of the residents, and ridiculing [Resident D and Resident G] with, and in part, about the private information, was a serious violation which potentially threatened the health and safety of [Resident D and Resident G], both of whom suffer mental and behavioral disorders." Conclusion of Law 19 (CP 38). The Everts' daily fine is proportionate to the harm, both mental and emotional,

that the website posed to the residents. Ms. Madrid testified that the website contained the residents' information from December 7, 2012, when the Department first began monitoring the website, until December 13, 2012, when she believed that Department headquarters had determined that sufficient changes had been made that the resident information was no longer identifiable. RP I, 171. The fine increased daily solely because Mr. Evert refused to remove the inappropriate information.

The Everts have not met their burden of showing that the fines were excessive.

IV. CONCLUSION

The findings and conclusions in the Board of Appeal's Review Decision and Final Order are supported by substantial evidence in the record.¹⁵ The findings of abuse by Sarah Evert are amply supported by the record and should be upheld. The Everts have not articulated any cognizable First Amendment right to post their residents' medical information and confidential personal information on the internet. The Everts have not demonstrated any basis to support their claim that the fine imposed was excessive. The Board's Review Decision and Final Order should be affirmed, except to the extent that the Board's conclusion that

¹⁵ With two exceptions, noted above at footnote 5 (Department directed only that personal and confidential resident information be removed from Mr. Evert's website, not that the website must be taken down) and at page 14 (Department does not appeal the superior court's finding that that the penalty should be imposed for only 7 days).

the fine should be imposed for 147 days was modified by the superior court to a period of 7 days. That determination by the superior court should be affirmed.

RESPECTFULLY SUBMITTED this 27th day of March, 2015.

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CERTIFICATE OF SERVICE

I certify that I served all parties, or their counsel of record, a true and correct copy of the Department of Social and Health Services' Brief of Respondent to the following addresses:

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- US Mail
- Legal Messenger
- Hand delivered
- E-mail:

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 27th day of March, 2015, at Spokane, Washington.

O. Kristofyer

Olga Kristofyer
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