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NO. 65939-1

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

WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH
SERVICES,

Appellant,

v.

JOEL ROSS,

Respondent.

RECEIVED
JUL 12 2011
COURT OF APPEALS
DIVISION I
SEATTLE, WA

REPLY BRIEF

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I. INTRODUCTION

When reviewed as a whole, there is substantial evidence in the record to show that I.G. had the functional, mental and physical inability to care for herself and that she therefore met the definition of a vulnerable adult pursuant to the Abuse of Vulnerable Adults Act, chapter 74.34 RCW during the period of time she was personally and financially exploited by Joel Ross. Given his nursing experience and training, Mr. Ross's claims that he was unaware of I.G.'s limitations and vulnerability are not credible. The Abuse of Vulnerable Adults Act clearly defines exploitation and financial exploitation. Joel Ross committed exploitation of a vulnerable adult when he took \$80,000 from I.G., and used that money for his personal benefit at a time when I.G. was facing foreclosure on her home, unable to pay her taxes, and unable to meet her own needs.

II. ARGUMENT

A. **I.G. Is A Vulnerable Adult As Defined In RCW 74.34.020 and 74.34.021.**

In his brief, Mr. Ross argues that the Department's claims are "false", that his actions were not improper, that the Department is estopped from finding I.G. was a vulnerable adult, that he was "unaware" of I.G.'s status, and he also questions the credibility of the witnesses. Brief of Respondent (BOR) at 6, 8, 11. Mr. Ross does not assign error to

any of the findings made below. Those findings are therefore verities on appeal. *Kitsap Cy. v. Central Puget Sound Growth Mgmt. Hrgs. Bd.*, 138 Wn. App. 863, 872, 158 P.3d 638 (2007); *Regan v. State Dept. of Licensing*, 130 Wn. App. 39, 121 P.3d 731 (2005) (If a party fails to assign error to the findings of an administrative agency, they become verities on appeal.).

In his brief, Mr. Ross implies that the victim in this case, I.G., testified at the hearing when he argues that I.G. was “on the record stating that it was she who purposed to give [money] to me and that I never asked for it.” BOR at 6. Mr. Ross further argues, “It is my understanding that legal court will not listen to testimony from anyone who has been on mind altering medication.” *Id.* at 12. I.G. did not testify at the administrative hearing below, and the record of those proceedings does not contain any depositions or other sworn statements from I.G. By implying that I.G. either testified or made her version of the exploitation known, Mr. Ross misstates the record and asks this Court to infer evidence that does not exist.

Mr. Ross also attempts to raise questions as to I.G.’s credibility when he cautions against “listening to testimony” from persons on mind altering drugs. *Id.* Assessment of the credibility of evidence is reserved for the fact-finder, in this case the administrative law judge, and this Court

will not disturb such assessments on appeal.¹ Regardless, there is no evidence in the record to suggest that I.G. was taking mind-altering drugs or was otherwise impaired when she was interviewed by the DSHS investigator. The investigator, Rhodora Mann, was questioned by Mr. Ross's attorney during the hearing whether I.G. was taking any "mind altering" medications. 1 RP at 177. She responded that she was not aware of what specific medications I.G. was taking. 1 RP at 178. If, as implied by Mr. Ross, I.G. was taking "mind altering" medications, that fact would only support the finding that she was a vulnerable adult. However, there is no evidence in the record to support Mr. Ross's assertions that I.G. was taking any mind altering drugs and therefore was not a reliable reporter.

Mr. Ross further argues that Ms. Mann testified that DSHS concluded that I.G. was not a vulnerable adult during the time he was exploiting and taking advantage of her. BOR at Brief 8, 11. He mischaracterizes both the record and the investigator's testimony. Ms. Mann testified that, after receiving all the information she obtained during the course of her third investigation, she concluded that I.G. met the

¹ *Affordable Cabs, Inc. v. Department of Employment Sec.*, 124 Wn. App. 361, 101 P.3d 440 (2004)(On review of administrative findings of fact, the court will not substitute its judgment for that of the agency regarding witness credibility or the weight of evidence.); *Alpha Kappa Lambda Fraternity v. Washington State University*, 152 Wn. App. 401, 216 P.3d 451 (2009) (Appellate court accepts the agency fact finder's determinations of witness credibility and the weight to be given reasonable but competing inferences, and, just as appellate court does not weigh credibility, it does not substitute its judgment for that of the agency.)

statutory definition of a vulnerable adult between 2004 and 2007, the entire period of time DSHS had received reports of exploitation and self-neglect. 1 RP at 72, 73, 76-77, 239-247. Moreover, the administrative law judge found that I.G. “met the definition of a vulnerable adult *not later than the beginning of 2006* and has been a vulnerable adult continuously since that time.” CP at 44 [emphasis added]. Any argument whether DSHS found I.G. was a vulnerable adult *prior* to 2006 is not relevant to Mr. Ross’s matter.

Mr. Ross next appears to argue that DSHS is estopped from concluding I.G. was a vulnerable adult in its 2007 investigation because it did not find she was a vulnerable adult in its earlier investigations. BOR at 8-11. He cites no authority to support his argument. Regardless, the argument is without merit. The record shows that during the third investigation in 2007, Ms. Mann had additional information she did not have access to during her first two investigations, including I.G.’s medical records dating back to 2004. 1 RP at 76-77. Based on this new information that was previously unavailable to DSHS, the investigator was able to conclude that I.G. was a vulnerable adult.

In Mr. Ross’s brief it is not clear whether or not he is claiming that I.G. does not meet the statutory definition of a vulnerable adult, but he does claim that he was *unaware* that she met that definition. BOR at 11.

His argument is without merit. First, no authority supports Mr. Ross's theory that the statute requires the perpetrator have knowledge of a victim's status as a vulnerable adult before a finding of exploitation can be made. Second, Mr. Ross either knew or should have known that I.G. was vulnerable.

Mr. Ross argues that, "if the state, as well as [I.G.'s] own daughter did not notice cognitive changes, how then am I liable for being unaware of them as well." BOR at 11. Again, Mr. Ross mischaracterizes the record. There is no evidence in the record to support his claim that neither DSHS nor I.G.'s daughter saw cognitive changes in I.G.. As stated above, DSHS concluded that I.G. had the functional, mental, and physical inability to care for herself. She had been diagnosed with dementia as of 2004. CP 163. I.G.'s daughter testified that I.G. *was* having cognitive difficulties. 1 RP at 282.

Mr. Ross, according to his own testimony, interacted with I.G. much more often than her daughters and certainly more than DSHS or its investigator did. He testified that he visited her between several times a week and several times per month. 1 RP at 26. He knew, or should have known, that she struggled to adequately meet her needs and provide for her own care. He worked as a certified nursing assistant in nursing homes between 2004 and 2007. 1 RP at 22-23, 37. He had experience working

with residents with dementia and cognitive deficits. 1 RP at 23. He testified that during his licensed practical nurse education, he was trained in how to recognize cognitive disorders including Alzheimer's and dementia. 1 RP at 36.

Mr. Ross knew I.G. was isolated and that her daughters lived out of town. 1 RP at 26. He knew she was a widow living on a fixed income. 1 RP at 28-29. He testified she needed help with her errands and groceries and he would oblige. 1 RP at 31-31. He testified he helped I.G. with cleaning her house. 1 RP at 27-28. He testified he knew I.G. wanted him to move into her home to help provide for her care.² 1 RP at 52.

Mr. Ross either knew, or should have known, that I.G. was vulnerable due to her social isolation, advanced age, cognitive issues, and physical and mental health issues. In any case, substantial evidence in the record shows that I.G. was a vulnerable adult, and Mr. Ross exploited that status.

B. The Statutory Definition Of Financial Exploitation Is Not Ambiguous.

Joel Ross was found to have personally and financially exploited I.G.. "Exploitation" means an act of forcing, compelling, or exerting

² Mr. Ross first denies that he told I.G. he would consider moving into her home. 1 RP at 28. He later states that "Um, again, [I.G.] expressed interest in me living in there, um, and I said, um, you know, we could realistically consider it, um, upon completion of my degree." 1 RP at 52.

undue influence over a vulnerable adult causing the vulnerable adult to act in a way that is inconsistent with relevant past behavior, or causing the vulnerable adult to perform services for the benefit of another. RCW 74.34.020(2)(d). "Financial exploitation" means the illegal or improper use of the property, income, resources, or trust funds of the vulnerable adult by any person for any person's profit or advantage other than for the vulnerable adult's profit or advantage. RCW 13.34.202(6). The facts that support the findings that Joel Ross exploited and financially exploited I.G. are detailed in DSHS's opening brief.

Mr. Ross argues that the word 'improper' as used in RCW 74.34.020(6) is not defined in the statute or in DSHS's administrative rules. BOR at 6. He contends, "Constitutionally, if a person can be found liable for improper conduct, then there has to be some guidelines as to what is 'improper'." *Id.* It appears he is arguing that the statutory definition is unconstitutionally vague, although he does not support his argument with citation to any legal authority. Regardless, Mr. Ross's argument is without merit.

The meaning of a statute is a question of law reviewed de novo. *Washington Public Ports Ass'n v. Dep't of Revenue*, 148 Wn.2d 637, 645, 62 P.3d 462 (2003); *Dep't of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). The court's fundamental objective is to ascertain

and carry out the intent of the Legislature. *Campbell & Gwinn*, 146 Wn.2d at 9; *see also State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). The courts have adopted a “plain meaning” rule, requiring examination of the statute in which the provision at issue is found, as well as related statutes or other provisions of the same act in which the provision is found, to determine whether a plain meaning can be ascertained. *See, C.J.C. v. Corp. of the Catholic Bishop of Yakima*, 138 Wn.2d 699, 708-09, 985 P.2d 262 (1999) (holding that a court construes an act as a whole, giving effect to all the language used, with related statutory provisions interpreted in relation to one another); *ITT Rayonier, Inc. v. Dalman*, 122 Wn.2d 801, 807, 863 P.2d 64 (1993) (holding that statutory provisions must be read in their entirety and construed together, not by piecemeal).

In addition to the rules set forth above, courts are also governed by more general rules in regards to statutory construction. Two cardinal rules of statutory construction are that the statutes should be read reasonably and as a whole. *Jones v. Sisters of Providence in Washington, Inc.*, 140 Wn.2d 112, 116, 994 P.2d 838 (2000); *See Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 133, 814 P.2d 629 (1991) (construe statutes as a whole); *Draper Mach. Works, Inc. v. Dep’t of Natural Resources*, 117 Wn.2d 306, 315, 815 P.2d 770 (1991) (construe statutes reasonably). Moreover, the

court's interpretation must make the statute purposeful and effective. *Beeler v. Hickman*, 50 Wn. App. 746, 751, 750 P.2d 1282 (1988); J.P., 149 Wn.2d at 450 *citing Davis v. Dep't of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999) (statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous). As a final check, the court must ensure that its interpretation of the statute does not produce an absurd result. *J.P.*, 149 Wn.2d at 450 (a reading that results in absurd results must be avoided because it will not be presumed that the legislature intended absurd results).

If Mr. Ross is arguing that the definition is unconstitutionally vague, then he must show that it is unconstitutional as applied to the facts of this case and that the conclusion he financially exploited I.G. was arbitrary. *State v. Carver*, 113 Wn.2d 591, 599, 781 P.2d 1308 (1989); *In re Aschauer's Welfare*, 93 Wn.2d 689, 611, P.2d 1245 (1980). *See also U.S. v. Mazurie*, 419 U.S. 544, 550, 95 S.Ct. 710 (1975). However, he does not even argue—let alone prove—that the administrative law judge's findings were arbitrary in light of the record and the facts.

Further, the vagueness doctrine does not demand rigid standards of specificity or absolute agreement as to the meaning of a statute. *A.W.R. Construction*, 152 Wn. App. 479, 489, 217 P.3d 349 (2009), (*citing City of Spokane v. Douglass*, 115 Wn.2d 171, 179, 795 P.2d 693 (1990)). If

persons of ordinary intelligence can understand a statute's meaning, even though there may be some disagreement, the statute is sufficiently definite.

Id.

Here, the statute is unambiguous and the plain language of the statute does not require construction or interpretation. The plain meaning of "improper" within the context of the Abuse of Vulnerable Adults Act is the use of the vulnerable adult's assets for any person's profit or advantage other than for the vulnerable adult's profit or advantage and in a manner that is inconsistent with vulnerable adult's best interests such that they require the protection afforded to them by the Act.

Additionally, when looking at the definition of Financial Exploitation in RCW 74.34.020(6) in the context of other definitions in the chapter, including personal exploitation of which Mr. Ross is also found to have committed, it is even more clear that "improper" means the use of the vulnerable adult's property inconsistent with the vulnerable adults best interest and for the benefit of another. RCW 74.34.020(2)(d) provides, in relevant part:

Abuse includes sexual abuse, mental abuse, physical abuse, and exploitation of a vulnerable adult, which have the following meanings:

(d) "Exploitation" means an act of forcing, compelling, or exerting *undue influence* over a vulnerable adult *causing the vulnerable adult to act in a way that is inconsistent with*

relevant past behavior, or causing the vulnerable adult to perform services for the benefit of another.

RCW 74.34.020(2)(d) [emphasis added].

When reading the provisions of chapter 74.34 RCW together as a whole, the plain meaning of “improper” is the use of a vulnerable adult’s property or assets to the detriment of the vulnerable adult and for the benefit of another.

Finally, the legislature clearly intended the Abuse of Vulnerable Adults Act to provide protection and a remedy for one of our most vulnerable populations. RCW 74.34.005. The Legislature adopted the Vulnerable Adult Act to protect vulnerable adults from abuse, financial exploitation and neglect. *Kabbae v. Dep’t of Social and Health Services*, 144 Wn. App. 432, 443, 192 P.3d 903 (2008); *Schumacher v. Williams*, 107 Wn. App. 793, 795, 28 P.3d 792 (2001).

The statute is unambiguous and its use of the term “improper” is clearly in the context of whether the use of the vulnerable adult’s property or assets was for the benefit of another and inconsistent with the best interests of the vulnerable adult. There does not need to be any additional “guidelines,” as Mr. Ross argues, to put perpetrators of elder abuse on notice as to what conduct they may not engage in. Moreover, it would lead to an absurd result if the term “improper” was somehow construed to

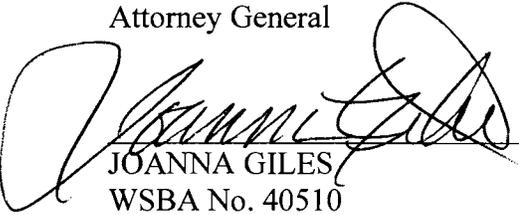
exclude using a vulnerable adult's assets for more worthy or justifiable causes such as Mr. Ross's "rent, school, gas, groceries" as Mr. Ross argues. BOR at 6. The record as a whole supports a finding that Mr. Ross improperly used I.G.'s assets for his own profit or advantage to the exclusion of I.G.'s profit or advantage, meeting the definition of financial exploitation.

III. CONCLUSION

For the reasons stated above and in the Department's opening brief, DSHS asks this Court to reverse the Superior Court and affirm its Final Order finding that Joel Ross financially exploited and personally exploited a vulnerable adult.

RESPECTFULLY SUBMITTED this  day of February, 2011.

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**COURT OF APPEALS FOR DIVISION I
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WASHINGTON STATE
DEPARTMENT OF SOCIAL AND
HEALTH SERVICES,

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v.

JOEL ROSS,

Respondent.

DECLARATION OF
SERVICE

I affirm under penalty of perjury of the laws of the State of Washington that the following is true and correct to my best knowledge and belief:

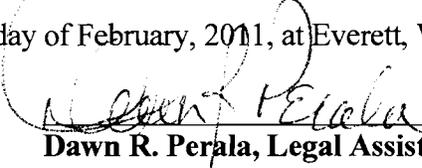
1. My name is Dawn R. Perala and I am employed as a legal assistant for counsel for respondent.

2. On **February 22, 2011**, I sent via legal messenger a true and accurate copy of the Appellant's Reply Brief to the following persons:

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DATED this 22 day of February, 2011, at Everett, Washington.


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