70354-4

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NO. 70354-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
Department Of Social And Health Services,

Respondent,

v.

YEVGENY SEMENENKO and NATALYA SEMENENKO,

Appellants.

BRIEF OF RESPONDENT

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I. INTRODUCTION

This case is about two people who received notice of an agency finding and did not follow the listed steps to obtain review of that finding. Any consequences which followed from that decision, while potentially devastating on an individual level, flowed from the choice not to follow written directions to seek review. Because notice and the opportunity to be heard were provided and not utilized, the appellants here have no further right to review. Summary judgment was properly granted at each level of review to date, and should be granted by this Court.

II. COUNTER STATEMENT OF ISSUES

A. Was Appellants' Untimely Hearing Request Properly Dismissed As Required By RCW 26.44.125(2) When They Failed To Take Advantage Of Administrative Remedies Available To Them

B. Is The Definition Of "Good Cause" To Delay DSHS Administrative Adjudications Irrelevant To The Determination Of Whether Appellants Ever Invoked Their Right To Have Such Adjudication

C. Does Equitable Estoppel Apply To An Alleged Anonymous Comment By An Unnamed Agency Employee To A Third Party

D. Do Unresolved Child Abuse/Neglect Allegations Cease To Exist 90 Days After Reported To The Agency In The Absence Of A Statutory Requirement To That Effect

E. Is Review Of The Agency Record Required Where The Superior Court Is Fully Informed Of The Contents Of That Record And Dismissal Is Mandated By Operation Of Applicable Law

III. COUNTER STATEMENT OF CASE

On November 10, 2009, parents Yevgeny and Natalya Semenenko chose to use physical force on their teenage child to remove her from a bathroom. AR 5, 11.[1] According to their own description, they used both hands and feet to push, pull, and kick the girl from the room. AR 5. Their actions took place at a licensed facility for drug alcohol treatment and were captured on video. AR 5, 37, 41.

The November 2009 incident was reported to the Department of Social and Health Services (DSHS) as potential physical abuse. AR 36, 40. The case was complex, and involved a Family Voluntary Services (FVS) response by Child Protective Services (CPS) as well as the DSHS Division of Licensed Resources/Child Protective Services (DLR/CPS)[2]. AR 32, 36-45. The final report on DLR/CPS investigation came out more than 90 days after the investigation was opened. AR 36-45. DLR/CPS made a founded finding of physical abuse based on the parents using multiple means of physical force on their daughter. *Id.*

Mr. and Ms. Semenenko were each sent a letter, received on April 22 and 29, 2010 respectively, informing them that founded findings of physical

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[1] The Administrative Record is noted on review as CP 19. This brief will cite to the Bates number stamping within the record as "AR_____".

[2] DLR/CPS was involved in this case because the abuse took place at a licensed facility. Typically, alleged abuse by natural parents would be investigated by CPS. WAC 388-15-005.

abuse had been made. The letters gave explicit instructions on how to seek review, including the 20 day deadline for making a review request. AR 11, 36-45. The Semenenkos understood that the letters said "we were guilty". AR 19. They did not follow the letters' instructions, but instead allegedly allowed their daughter to call a nameless DSHS employee who supposedly told the daughter not to worry about the findings.[3] AR 6, 19, 30. The Semenenkos did not speak to, and are unable to name, the employee involved. *Id.*

There was no request for any type of review of the findings until nearly a year later, when DSHS acknowledged receiving some type of review request on March 25, 2011. AR 50-51. This request came several months after Natalya Semenenko discovered in November 2010, consistent with the notice received in April 2010, that the Department's records showed her as an individual found to have committed child abuse.[4] AR 19. After DSHS rejected the Semenenkos untimely review request, the Sememenkos sent a written review request that was received by the Office of

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[3] The Semenenkos have claimed that, as English is their second language, they could not be expected to understand the nuances of the letter. Not only is it clear from their factual recitation and admissions that they were aware a negative action was laid out in the letters, but it is worth noting that Natalia Semenenko worked as an interpreter, which would presumably give her much more than a rudimentary understanding of English. AR 9, 12, 19.

[4] The Semenenkos assert that they are on a "central registry of abusers". Appellant's Brief (AB) at 19 (citations will be to the Corrected Opening Brief filed October 24, 2013). However, Washington does not have a central registry system. Instead, records of child abuse/neglect findings are confidential, and available only to certain organizations performing background checks for employment or volunteering with children. These organizations obtain permission from applicants to access the information, consistent with RCW 13.50.100.

Administrative Hearings (OAH) on May 12, 2011. AR 12, 22, 24, 30, 49-51.

At each level of review to date, appellants' claims have been dismissed for the failure to timely file a hearing request as instructed by their notices and consistent with RCW 26.44.125(3). AR 10-14, 21-27, CP 1, 39. In lieu of meeting jurisdictional prerequisites for judicial review under the APA, appellants now assert that the findings are void, or that in the alternative, they have a right to a hearing on the findings despite their lack of timely appeal. Appellants' Brief (AB) at 3 (citations will be to the Corrected Opening Brief filed October 24, 2013).

IV. STANDARD OF REVIEW

RCW Chapter 34.05, the APA, provides the exclusive means of judicial review of agency action. RCW 34.05.510. "An appeal from an administrative tribunal invokes the appellate, rather than the general, jurisdiction of the superior court." *Skagit Surveyors v. Friends of Skagit County*, 135 Wn.2d 542, 555, 958 P.2d 962 (1998). Under the judicial review provisions of the APA, "[t]he burden of demonstrating the invalidity of agency action is on the party asserting invalidity." RCW 34.05.570(1)(a).

Washington State case law has interpreted the requirements for judicial review of adjudicative agency proceedings to mean that a

reviewing court may reverse an agency decision when "(1) the administrative decision is based on an error of law; (2) the decision is not based on substantial evidence; or (3) the decision is arbitrary or capricious." *Scheeler v. Dep't of Emp't Sec.*, 122 Wn. App. 484, 488, 93 P.3d 965 (2004) (*citing Tapper v. Emp't. Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993) (*citing* RCW 34.05.570(3)).

Conclusions of law are reviewed under the error of law standard. *Safeco Ins. Co. v. Meyering,* 102 Wn.2d 385, 687 P.2d 195 (1984). This standard calls for "de novo" judicial review of the administrative decisions and allows the reviewing court to essentially substitute its judgment for that of the administrative determination, but substantial weight is accorded the agency's view. *Id.* A reviewing court accords substantial deference to an agency's interpretation, particularly in regard to the law involving the agency's special knowledge and expertise. *Univ. of Wash. Med. Ctr. v. Wash. State Dep't of Health*, 164 Wn.2d 95, 102, 187 P.3d 243 (2008). Further, the challenger carries the burden of showing that the Department misunderstood or violated the law. *Id.* at 103. This court's review is de novo, given the disposition of the case on summary judgment at all levels of review to date. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). AR 10-14, 21-27, CP 1, 39.

Mr. and Ms. Semenenko cite four different provisions of RCW 34.05.570(1) to support their request for judicial review. AB at 12-13.

They do not make their case that review should be granted under any of the cited provisions, as set forth below.

V. ARGUMENT

A. RCW 26.44.125(2) Requires Dismissal Of This Case

Appellants have, at each stage of review, attempted to argue the timing and underlying facts of the founded findings against them, while the only issue of import in this case is whether the passage of more than 21 days since they received their notice without a review request precludes all further efforts at review in any forum, as stated in RCW 26.44.125(2).

It is undisputed that Mr. and Ms. Semenenko received their findings letters and understood that the letters contained negative assertions against them. AR 6, 12, 19, 36-45; AB at 1-2. It is also undisputed that they did not file a request for hearing regarding these founded findings within 20 days of receipt. *Id.*

The essential facts that require dismissal on summary judgment are not and cannot be disputed: both of the appellants have founded findings of negligent treatment/maltreatment not timely responded to and now final. AR 6, 12, 19, 36-45, 49-51; RCW 26.44.125(3). Once those facts are ascertained, the result is inevitable. RCW 26.44.125(3); WAC 388-15-0089(1). No material facts are in dispute here. The disagreements Mr.

and Ms. Semenenko have with the timing of and reasons for their founded findings are not material facts, and do not require judicial review or remand for further hearing.

B. "Good Cause" Does Not Apply To Securing Rights To Administrative Adjudication Under RCW 26.44.125.

RCW 26.44.125(3)(1998)[5] specifically states that if the alleged perpetrator does not request review of the founded finding of child abuse and neglect within twenty days of the department providing notice of the finding, the alleged perpetrator "may not further challenge the finding and shall have no right to agency review or to an adjudicative hearing or judicial review of the finding." WAC 388-15-089, consistent with RCW 26.44.125, states that if the alleged perpetrator does not submit a timely written request for CPS to review the founded finding, "no further review or challenge of the finding may occur." There is no provision for waiver of these requirements even if "good cause" is shown.

Appellants appear to have plucked the good cause definition from WAC 388-02-0020 and presumed it applied to these proceedings. AB at 22-24. Appellants have not and cannot show that this definition has any bearing on whether or not a party has secured a right to hearing through

[5] The statute was amended in 2012 to change the time limit for a hearing request to 30 days and to allow an exception if the Department did not comply with notice requirements. Neither amendment is at issue here, when receipt of the notice is not contested and there was no hearing request for far longer than even 30 days after receipt. Appellants attempt to incorporate the 90 day investigation timeline into notice, but have no legal basis for doing so. AB at 23.

the DSHS administrative process, having done nothing more than cite the definitional section of a WAC chapter that relates to administrative hearings held for those who have successfully obtained a right to hearing. In this case, the only potentially applicable section of WAC Chapter 388-02 is WAC 388-02-0085, which explains when a person may have a right to hearing through DSHS process. The regulation clearly explains that:

> (1) **You have a right to a hearing only if a law or DSHS rule gives you that right**. If you are not sure, you should request a hearing to protect your right.
>
> (2) Some DSHS programs may require you to go through an informal administrative process before you can request or have a hearing. The notice of DSHS action sent to you should include information about this requirement if it applies.
>
> (3) **You have a limited time to request a hearing**. The deadline for your request varies by the DSHS program involved. You should submit your request right away to protect your right to a hearing, even if you are also trying to resolve your dispute informally. ...
>
> WAC 388-02-0085(1)-(3) (emphasis added)

As can be readily observed, this regulation makes no exception for "good cause," which is used in other regulations to give participants in an administrative hearing certain rights to proceed even when a mistake in process has been made, *e.g.* WAC 388-02-0305(2) (appellants may have a hearing that was dismissed for failure to appear reinstated if they show good cause for not appearing).

Nowhere in the entirety of WAC Chapter 388-02 does it state that a person who does not successfully comply with the requirements of

RCW 26.44.125 and WAC 388-15-089 may obtain a hearing by showing good cause for delay. In fact, as shown by WAC 388-02-0085, appellants are specifically warned by the regulations that deadlines for requesting a hearing can impact hearing rights, that they vary by program, and that any uncertainty should be resolved in favor of timely requesting a hearing.

Mr. and Ms. Semenenko chose to not request a hearing, based on third hand information from an unknown source. This does not meet the requirements of RCW 26.44.125 and WAC 388-15-089. They have no right to a hearing whether or not their reliance on this third hand information could be considered good cause not to follow the directions in their notices of founded finding. The agency was correct in concluding that there was no specific statutory authority or a department rule that would allow it to find that there was good cause for filing a late request for an administrative hearing.

Both RCW 26.44.125 and WAC 388-15-089 promote the preference for finality of agency decisions and orders. The Department would be unduly prejudiced and burdened if it were required to prove, four years later, that the finding of child abuse was in fact a founded finding. This would be a reasonable and justified requirement if the Department had ignored its statutory obligation to provide notice of the finding and an opportunity for review. That is not the case here. Mr. and Ms. Semenenko had all the tools necessary within the notices they received to successfully challenge their founded findings. They did not,

and by operation of RCW 26.44.125 and WAC 388-15-089, their findings are final.

C. Equitable Estoppel Cannot Be Applied To Alleged Anonymous Statements To Third Parties

Appellants claim that they were told by DSHS that they should not worry about the notice of founded finding they had each received because their case with the Department had been previously closed. AB at 20. They assert that this statement was sufficient to induce reasonable reliance on their part and thus implicate the doctrine of equitable estoppel. Appellants mischaracterize the alleged Department statement in a number of ways such that their attempt to invoke equitable estoppel must fail.

> When equitable estoppel is asserted against the government, the party asserting estoppel must establish five elements by clear, cogent, and convincing evidence: (1) a statement, admission, or act by the party to be estopped, which is inconsistent with its later claims, (2) the asserting party acted in reliance upon the statement or action, (3) injury would result to the asserting party if the other party were allowed to repudiate its prior statement or action, (4) estoppel is "necessary to prevent a manifest injustice," and (5) estoppel will not impair governmental functions.

Silverstreak v. Dep't of Labor & Ind., 159 Wn.2d 868, 887, 154 P.3d 891 (2007) (citing *Kramarevcky v. Dep't of Soc. & Health Servs.*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993).

1. There Is No Statement By DSHS On Which The Semenenkos Could Have Relied To Trigger Equitable Estoppel

In this case, appellants can meet none of the five elements required to show equitable estoppel against the state. First, they are unable to even show a statement by DSHS inconsistent with a later position. Their assertion that someone at the agency told their daughter not to worry about the founded findings issued is, even if taken at face value, far too vague to support an equitable estoppel claim. Appellants have no information as to who the speaker was or whether they had authority to speak on behalf of DSHS in the matter of the founded findings. Calling a random DSHS employee, through a third party, and getting their opinion is not the same as obtaining a binding statement from a speaking agent. Without information appellants do not possess, there can be no showing of a statement from DSHS upon which to rely, and the equitable estoppel claim is finished. *Silverstreak*, 159 Wn.2d at 887.

2. Even If There Was A Properly Attributed DSHS Statement, The Semenenkos Did Not Justifiably Rely On What Their Daughter Told Them The Department Said

Appellants are equally challenged in meeting the second part of the equitable estoppel test, which is that they justifiably relied on a statement by DSHS. *Id.* Even if the words of a nameless DSHS employee to their

daughter could be considered a binding statement to the appellants themselves, any reliance by the Semenenkos on this statement was not justified.

As admitted in appellants' briefing, the earlier case closure notice they received from DSHS made no statement about any finding on investigation, and thus had no bearing on a later investigative conclusion. AB at 7. When the Semenenkos did receive their founded finding letters, they received clear instructions on how to challenge those findings. Instead, they had another individual place a call and then went with that person's suggestions, supposedly relayed from the unknown DSHS employee who answered the phone. AB at 9-10. This is not reasonable in the face of a written notice with explicit instructions for challenge that were not followed.

Appellants would not be entitled to the protections of equitable estoppel even if a DSHS speaking agent could be confirmed to have given them this questionable advice. They did not justifiably rely on unattributed hearsay from their daughter.

3. Any Injury To Appellants In This Case Is From Their Failure To Timely Request Review, Not From The Department's Alleged Statements

Mr. and Ms. Semenenko would have a potential injury from the founded finding, but not from allowing DSHS to repudiate a former statement. As noted above, the written statements in this case were consistent in requiring the Semenenkos to appeal if they wanted to challenge the founded finding. The alleged oral statement from an unknown DSHS employee is not properly before this court and cannot be considered without more information that is not available. Mr. and Ms. Semenenko cannot meet the third element of equitable estoppel and are not entitled to relief from the filing requirements of RCW 26.44.125(3) on that basis.

4. There Is No Manifest Injustice To Appellants In Expecting Them To Comply With Reasonable Written Instructions For Requesting Review Of A Founded Finding

As appellants are unable to meet the general requirements of equitable estoppel, they are likewise unable to meet the specific requirements of the doctrine when it is sought against a governmental entity. There is no manifest injustice to Mr. and Ms. Semenenko in DSHS's reliance on their practice, correct per statute, of serving notice and requiring a hearing request within a time set by statute to afford review. RCW 26.44.125(3). While it may be frustrating to appellants that they have lost their opportunity to challenge the founded finding through their own inaction, they have no right to a waiver of jurisdictional

requirements, but only the right to seek a hearing. That was not done here, and the Semenenkos can show no manifest injustice based on the standard procedure followed by DSHS.

5. A Finding Of Equitable Estoppel Against DSHS For Anonymous Statements Attributed To The Agency Through The Assertions Of Third Parties Would Impair Governmental Functions

Finally, Mr. and Ms. Semenenko are unable to show that applying equitable estoppel, were it appropriate to do so on these facts, would not impair the exercise of governmental functions. DSHS relies on RCW 26.44.125 to provide for closure in the large number of cases which do not result in a request for review, and to provide procedural guidance and jurisdiction for review in those cases where there is a request for review. Application of equitable estoppel would apply to a large number of cases handled by DSHS and would impede the ability of that agency to reliably know when an agency action is complete and to act accordingly. This element of collateral estoppel has not been met.

Because appellants have not proven the elements of the doctrine, their request for relief under this theory should be denied. The summary judgment granted to the Department at every level of review to date should not be reversed by this court on an equitable estoppel theory with no basis in law or fact.

D. Child Abuse/Neglect Allegations Do Not Have An Expiration Date Based On The Legislative Goal Of Completing Investigations Within 90 Days

In 2007, RCW 26.44.030 was amended to require CPS investigations to be conducted in timeframes established by the department in rule. RCW 26.44.030(11)(a). The CPS investigation is not to extend beyond ninety (90) days. *Id.* WAC 388-15-021 was amended in 2009 to establish that CPS attempts to complete investigations within forty-five (45) days and that the investigation shall not extend beyond 90 days. WAC 388-021(7). However, neither the statute nor the rule provides authority for the request to dismiss the founded finding because CPS concluded its investigation after 90 days. Even where a CPS investigation exceeds 90 days, the relief available to the subject of a founded finding is notice and an opportunity to be heard. Appellants in this case were provided notice of the founded finding pursuant to RCW 26.44.100, and they had every opportunity granted to any subject to challenge their findings. That they did not do so has profound implications for them personally, but it does not trigger any theoretical opportunity to void founded findings based on a limit in statute with no corresponding remedy beyond the typical hearing rights provided in the same statutory scheme.

1. The 90 Day Limit On Investigation Is Directory, Not Mandatory, Because There Is No Mechanism For Enforcement

While the 90 day requirement of RCW 26.44.030(11)(a) is couched in terms that are often considered mandatory, "in no case shall the investigation extend longer than ninety days from the date the report is received...,"[6] case law indicates that the word "shall" is not always mandatory, especially where there is no enforcement mechanism for agency non-compliance. In *State v. Rice*, 174 Wn.2d 884, 896-897, 279 P.3d 849 (2012), the court set forth a helpful summary of statutory analysis regarding the use of mandatory versus directive language:

> This court recognized long ago that "[t]he words 'may' and 'shall' [are] used according to the context and intent found in the statute, and are frequently construed interchangeably." *Clancy v. McElroy*, 30 Wash. 567, 568-69, 70 P. 1095 (1902); *see also Niichel*, 97 Wn.2d at 625, 627 (use of "shall" in specifying the timing of assessment procedures found to be directory); *Spokane County ex rel. Sullivan v. Glover*, 2 Wn.2d 162, 169, 97 P.2d 628 (1940) ("In our own tax code, the word 'shall' is used in almost every section, and it is apparent that it is employed indiscriminately in both the imperative and the permissive sense."). In determining whether "shall" is mandatory, directory, or simply permissive in any given instance, we consider "'all the terms and provisions of the act in relation to the subject of the legislation, the nature of the act, the general object to be accomplished and consequences that would result from construing the particular statute in one way or another.'" *Krall*, 125 Wn.2d at 148 (quoting *State v. Huntzinger*, 92 Wn.2d 128, 133, 594 P.2d 917 (1979)). The

[6] There are some exceptions that do not apply in this case, but they involve the needs of other agencies who might work with DSHS on an investigation.

> "prime consideration" remains "the intent of the legislature as reflected in its general, as well as its specific, legislation upon the particular subject." *Glover*, 2 Wn.2d at 170.

In *Rice*, the court went on to find that statutory language indicating a prosecutor "shall" file particular charges in particular circumstances was "directory" rather than mandatory, noting that there was no enforcement mechanism for non-compliance with the provision. *Rice* 174 Wn.2d at 897. The court pointed out that:

> [T]he legislature sometimes intends to direct the actions of public officers, stating what they "shall" do in certain circumstances, without intending to impose any enforceable, legal obligations upon them.

Rice, 174 Wn.2d at 897.

As the *Rice* court concluded:

> That the legislature did not identify any consequences resulting from a prosecutor's noncompliance with the challenged charging statutes supports reading those statutes as directory.

Rice, 174 Wn.2d at 897.

This case is very similar to *Rice*, in that the legislature is directing what "shall" be done, but is not providing for enforcement of that pronouncement, or giving any consequences if an investigation goes more than 90 days. As in *Rice*, this supports a conclusion that the "shall" in RCW 26.44.030(11)(a) is directory, not mandatory.

2. The 90 Day Limit On Investigation, If Strictly Construed, Interferes With The Intent Of RCW Chapter 26.44 To Protect Child Welfare

An additional reason to read the "shall" in RCW 26.44.030(11)(a) as directory is the grave harm that could befall children if abuse allegations were to cease to exist 91 days after made. Administrative delays should not result in a loss of protection for potential abuse victims. One level of protection in Washington's child welfare system is a founded finding, which has consequences not only for the subject child, but also for other children who might be placed into contact with a perpetrator of abuse or neglect. *See, e.g.* RCW Chapter 13.34; WAC 170-06-0040; WAC 388-148-0095.

The intent of RCW Chapter 26.44 as a whole is to protect children:

> The Washington state legislature finds and declares: The bond between a child and his or her parent, custodian, or guardian is of paramount importance, and any intervention into the life of a child is also an intervention into the life of the parent, custodian, or guardian; however, instances of nonaccidental injury, neglect, death, sexual abuse and cruelty to children by their parents, custodians or guardians have occurred, and in the instance where a child is deprived of his or her right to conditions of minimal nurture, health, and safety, the state is justified in emergency intervention based upon verified information; and therefore the Washington state legislature hereby provides for the reporting of such cases to the appropriate public authorities. It is the intent of the legislature that, as a result of such reports, protective services shall be made available in an effort to prevent further abuses, and to safeguard the general welfare of such children. When the child's physical

> or mental health is jeopardized, or the safety of the child conflicts with the legal rights of a parent, custodian, or guardian, the health and safety interests of the child should prevail.

RCW 26.44.010.[7]

Protection of children should be accomplished if at all possible even in cases where the 91st day of a DLR/CPS investigation does not result in a report on the outcome.

In a case like this, where the delay is a matter of months, not years, there is no cause to find that an investigation resulting in a founded finding should be declared null and void. While DLR/CPS clearly did not meet the directory standard of 90 days, the investigation was completed reasonably, and the notice to Mr. and Ms. Semenenko allowed them full appeal rights, if only they had taken advantage of those rights. AR 36-45. Even with a longer delay, the remedy for a subject would be to challenge the finding through administrative and court processes, not to seek a declaration that the finding was void based on language that is no more than directory.

[7] Interestingly, in quoting this same purpose section, appellants omit statements that the rights of children remain paramount, to the point of bifurcating the first sentence to eliminate this consideration. AB at 15.

3. Parental Rights To Care And Custody Of Children Do Not Require A Reading Of The 90 Day Investigation Limit As Mandatory

Appellants imply in their argument that if the 90 day limit on child abuse/neglect investigations is not read as mandatory, the constitutional rights of parents to have care and custody of their children will be implicated, triggering strict scrutiny. AB at 15-16. Appellants attempt here to elevate a vague correlation between founded findings and a possible dependency action with possible removal from the home into a cause and effect that does not exist. While a founded finding may be made in a case that eventually ends in dependency of a child, such a finding is not required. RCW 13.34.030(6). Further, not every dependency action results in removal from the home, nor does a dependency action lead automatically to a permanent deprivation of parental rights. RCW 13.34.130(1); RCW 13.34.180.

Appellants cannot bootstrap the simple administrative finding of abuse against them into an action impairing their fundamental rights to parent.[8] Due process here requires no more than notice and opportunity to be heard, both of which were provided here. AR 36-45. Properly reading RCW 26.44.030(11)(a) as directing, but not mandating, that child

[8] Appellants cite a criminal case for the proposition that time limits must be strictly construed against the state when fundamental rights are at stake. Since none are at issue here, and this civil action was initiated with all requisite due process protections, appellants' citation to criminal authority is misplaced. AB at 16.

abuse/neglect investigations be complete within 90 days does not violate any due process rights of these parents. No child was ever removed from their home based on these findings, but even if that were the case, it would be through legal processes involved with removal, not through challenge to the founded finding, that relief could be sought. *compare* RCW 13.34.065; RCW 13.34.130; RCW 13.34.180; and RCW 13.34.190 with RCW 26.44.125.

Appellants have not made a case for the extinguishing of child abuse/neglect allegations 91 days after reported. The statutory language is more appropriately read as directory, not mandatory, and thus any challenge to founded findings here as void should be rejected.

E. The Superior Court Was Aware Of Relevant Administrative Adjudication When Affirming Summary Judgment

1. The Superior Court Was Adequately Informed Of Every Relevant Fact In The Agency Record, Necessarily Leading To Summary Judgment

It is uncontested that when the superior court reviewed this case, it was aware of the finding against appellants, the timing of receipt of the letter, and the timing of the eventual review request from appellants. CP 1-20. Nothing more was necessary to decide this case on summary judgment. Contrary to appellants' argument, it was not vital that the superior court read every line of the record or inquire into what the appellants thought about the

findings. The simple fact of proper notice and lack of timely response dictated the result of this case, as two levels of administrative tribunals below had already decided. AR 10-14, 21-27, CP 1, 39; RCW 26.44.125(3).

2. Remand Of This Case Is Not Necessary Even If The Agency Record Were Required, As This Court Sits In The Same Position As The Superior Court

Judicial review under the APA places the court in an appellate role conducting review of the final agency decision. RCW 34.05.534; RCW 34.05.574; *Tapper v. Employment Sec. Dep't.*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). Each stage of judicial review looks back on that agency decision, such that the rulings of lower courts are irrelevant to the ultimate determination. *Id.* In this case, even if this court were to find that the superior court should have had the full agency record before it when determining the matter on summary judgment, there is no need for remand. Instead, this court can and should directly review the final agency decision, just as the superior court did. *Id.* This is not only the most efficient use of judicial resources, but is also consistent with the statutory scheme under the APA. RCW 34.05.574; *Tapper* 122 Wn.2d at 402. Appellants are not entitled to remand based on the problems encountered in presenting the agency record to the superior court.

F. Appellant is not entitled to an EAJA award even if this case is remanded.

The EAJA requires that fees and costs be allowed to a "prevailing party" in certain circumstances. RCW 4.84.350. In this case, appellants

should not prevail on the merits, and thus should not be entitled to an EAJA award. Even if this court were to grant appellants relief by sending this case back to the agency for a merits hearing on their founded finding of physical abuse, or to Superior Court for review directly on the agency record, they would not yet have prevailed on anything. Reversing a judgment as a matter of law puts their case in a different posture, but does not resolve it. EAJA funds would not even be a consideration unless appellants were to fully prevail on the merits of their claims. As noted elsewhere in this briefing, the theory of appellants that could conceivably result in dismissal, the assertion that a child abuse/neglect allegation ceases to exist in 90 days, is not viable. There is no reason to consider EAJA relief in this case.

Even if appellants were to prevail on their dissipation theory, an EAJA award would be unwarranted. A decision that child abuse/neglect findings cannot be made beyond the 90th day after a report of abuse or neglect would be unprecedented and unexpected. The agency has had good cause to believe that while findings after 90 days are disfavored by the legislature, the overarching policy of RCW 26.44 to protect children by investigating and reaching conclusions on abuse allegations would prevail to allow such a finding. Thus, the element of the EAJA that would relieve the agency of fees where agency action is "substantially justified" would still preclude an award in this case. RCW 4.84.350(1).

Under RCW 4.84.350, "a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses,

including reasonable attorneys' fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust." RCW 4.84.350(1). "Substantially justified means justified to a degree that would satisfy a reasonable person." *Silverstreak,* 159 Wn.2d at 892 (quoting *Moen v. Spokane City Police Dep't*, 110 Wn. App. 714, 721, 42 P.3d 456 (2002)). And, an action is substantially justified if it had a reasonable basis in law and in fact. *Raven v. Dep't of Soc. & Health Servs.*, No. 87483-2, 2013 WL 3761521 (Wash. July 18, 2013); *Aponte v. Dep't of Soc. & Health Servs.*, 92 Wn. App. 604, 623, 965 P.2d 626 (1998) (quoting *Sneede v. Coye*, 856 F. Supp. 526, 530–31 (N.D.Cal.1994)). That is, it need not be correct, only reasonable. *Pierce v. Underwood*, 487 U.S. 552, 566 n.2, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988).

Therefore, appellants would only be entitled to attorney fees if they demonstrated that the Department was not substantially justified in its action. *Marcum v. Dep't of Soc. and Health Servs.*, 172 Wn. App. 546, 560, 290 P.3d 1045 (2012). Considering that the Department acted in conformance with RCW 26.44.100 and RCW 26.44.125, and that WAC 388-15-069 is valid, an award of attorney fees is not warranted or justified.

VI. CONCLUSION

Mr. and Ms. Semenenko participated in a physical altercation with their daughter that led to a founded finding for physical abuse. When they did not timely request administrative review of that finding, despite clear

written instructions on when and how to do so, that finding became final by operation of law. Summary judgment was appropriately granted to DSHS at every level of review based on the unambiguous legislative directive that lack of timely review completely removes any option of challenging the finding. Summary judgment should be upheld by this court, regardless of side arguments about the 90 day investigation limit or "good cause" definitions relating to other agency proceedings. DSHS should prevail without further litigation in this matter.

RESPECTFULLY SUBMITTED this 12th day of November, 2013.

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