Supreme Court No. 92028-1

SUPREME COURT
OF THE STATE OF WASHINGTON

THE ESTATE OF CONCEPCION WHITTENBURGE
Plaintiff –Petitioner,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES

Defendant-Respondent,

PETITIONER'S REPLY BRIEF

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I. REPLY BRIEF

A. MS. WHITTENBURGE NEVER SUSPENDED OR TERMINATED THE CONTRACT BETWEEN HER DAUGHTER AND HERSELF.[1]

If our Supreme Court accepts what DSHS asserts that it was Ms. Whittenburge that terminated the contract with Ms. Bryant - then why would Ms. Whittenburge fight so hard and appeal its decision every step of the way to have her daughter as her paid care provider? Respondent brief (Resp.) at 9-10. Simply put, she would not. CP 11-13; 14-19; 60-91; 68; 12-15. Ms. Whittenburge never fired her personal care provider, Antonia Bryant. It was DSHS that suspended the contract, and after that terminated the contract between Ms. Whittenburge and Ms. Bryant based on a flawed investigation completed by Adult Protective Services. CP 60-

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[1] This is a new issue, not properly before this Court. The only issue(s) on appeal is whether the trial court had jurisdiction to rule against a deceased person when it lacked jurisdictional authority. Whether the COA erred when it decided the standing issue as a sword against the Estate when the standing issue was never raised below, and whether the COA erred when it denied the Estate to substitute, as a party. Pursuant to RAP 13.4(d) a reply is warranted if a new issue has been presented in opposing party's answer. The Estate objects to this new issue as it is not properly before this Court. *See* RAP 2.5(a). It has always been argued that this case was mooted upon Ms. Whittenburge death; however, the trial court abused its power when it proceeded on the merits of the case. Here, DSHS has raised a new issue – A hypothetical with respect of this appeal not being moot.

91. Fact, Ms. Whittenburge's daughter quickly appealed the baseless substantiated findings of neglect only to be told that DSHS cannot prove their case and instead of moving forward on the merits of the case, DSHS, blocked Ms. Whittenburge's daughter (an heir to her estate) from going to hearing when DSHS changed its finding from "substantiated" to "inconclusive". Thus, there was never a finding of neglect against Ms. Whittenburge's daughter. CP 69; 3-7, 74; 18. DSHS lacked any authority to deny payment of Ms. Whittenburge's choice of Individual Provider because Ms. Bryant never had a contract terminated for noncompliance of any state or federal Law and/or regulations. *See* WAC 388-71-0540 (mandatory denial and disqualifying crimes), WAC 388-71-0546 (discretionary rejection of IP), and WAC 388-71 -0556 (termination of IP). WAC 388-71-0540(4), (5) or (6); WAC 388-71-0546 or WAC 388-71-0556. None of the above WAC's applied to Ms. Whittenburge's choice of provider, Antonia Bryant. She is not a foster parent, she has not been convicted of any crime involving children or vulnerable adults and she has not had a contract or license suspended or terminated for noncompliance with a state or federal regulation. Therefore, WAC 388-71-0510 provides no authority for denying Ms. Bryant as Ms. Whittenburge's independent provider of choice. Nor is there any basis under this provision to deny Ms. Bryant's Individual Provider contract.

To be clear, this was one of many issues that Ms. Whittenburge appealed, but sadly she passed away on October 18, 2014, before her voice could be heard. However, her passing did not stop the trial court and the Court of Appeals from ruling against a defenseless, voiceless appellant. CP 20-22. In fact, the lower courts could have granted Ms. Whittenburge's motion to vacate the order but refused to do so. CP 1; 11-19. This court should accept review to vacate the judgment entered against a defenseless, voiceless deceased person. *United States v. Munsingwear*, 340 U.S. 36, 41, 71 S.Ct. 104, 95 L.ed. 36 (1950); *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 418 (1957); CP 20-22.

B. THE TRIAL COURT AND THE COURT OF APPEALS VIOLATED MS. WHITTENBURGE'S DUE PROCESS RIGHTS WHEN THEY CONCLUDED THAT THE LACK OF NOTICE PROVIDED TO MS. WHITTENBURGE BY DSHS DID NOT VIOLATE MS. WHITTENBURGE'S DUE PROCESS RIGHTS AND RULING AGAINST A DECEASED PERSON.

Ms. Whittenburge was never afforded due process protection on DSHS' decision to suspend and terminate her choice of Individual Provider. In fact, the lower courts violated Ms. Whittenburge's due process right when they issued its judgment on the merits of the case – knowing Ms. Whittenburge would not be able to defend its action. CP 1, 20-22. It is undisputed that DSHS failed to provide Ms. Whittenburge

with notice and the opportunity to be heard with regards to the suspension and termination of her choice of an Individual Provider on or about March 2011. CP 20-22. Furthermore, it is undisputed that Ms. Whittenburge never had the opportunity to a fair hearing with respect to the suspension and termination of the contract with Ms. Bryant on or about March 2011. CP 61; 71-91. At a bare minimum, procedural due process "requires notice and an opportunity to be heard." *Soundgarden v. Eikenberry,* 123 Wn.2d 750, 768, 871 P.2d 1050 (1994). This is the substantial public interest that warrants review of this appeal because the trial court and thereafter the Court of Appeals ruled against a helpless, voiceless deceased person stating "the lack of notice does not violate due process AS petitioner was aware of the actions being taken with respect to the suspension; therefore she had actual notice of the suspension. The court finds any further notice would not have been effective." CP 20-22. Again, this type of analysis goes against this Court's opinion in *Ryan v. Department of Social and Health Services* and the hallmark of our judicial system. 171 Wash. App. 454, 475, 287 P.3d 629, 638 (2012). Whether the department satisfies its regulatory obligation is determined in light of information known when the notice is attempted. *Jones v. Flowers*, 547 U.S. 220, 231, 126 S.Ct. 1708, 164 L.Ed.2d 415 (2006)(whether notice satisfies due process "is assessed ex ante, rather than post hoc "); *Weigner v. City of New York*, 852

F.2d 646, 649 (2d Cir.1988) ("The proper inquiry is whether the state acted reasonably in selecting means likely to inform persons affected, not whether each property owner actually received notice."). *Ryan v. State, Dep't of Soc. & Health Servs.*, 171 Wash. App. 454, 475, 287 P.3d 629, 638 (2012) Also *see* Washington State Constitution, Art. 1, § 3; U.S. Const. Amend. 5 and Amend. 14 §1. This is the significant issue implicating Ms. Whittenburge and other citizens of Washington State of their Constitutional Rights to due process of law. Likewise, the lower courts violated Ms. Whittenburge's due process right to be heard when it ruled against a deceased person because Ms. Whittenburge did not have the opportunity to be heard on November 3, 2014. *Soundgarden v. Eikenberry*, 123 Wn.2d 750, 768, 871 P.2d 1050 (1994). Thus, RAP 13.4(b)(3) demands review.

Even if our supreme court accepts the above ruling by the trial court to be true with respect to having knowledge of the suspension and termination – It is undisputed that Ms. Whittenburge never received any notices of her *hearing rights* to object to DSHS' determination to suspend and terminate the contract between Ms. Whittenburge and Ms. Bryant on or about March 2011. This is a substantial public issue that warrants review. No judicial branch should attempt to erode a person's Constitutional Rights to due process of law. RAP 13.4(b)(3)(4).

The unilateral decision by DSHS to terminate that contract has prohibited Ms. Bryant from obtaining employment with DSHS as an Individual Provider. Moreover, as it bears repeating, not only did DSHS violate Ms. Whittenburge's due process rights, DSHS disregarded its regulation with regards to giving Ms. Whittenburge notice of her hearing rights. *See* WAC 388-71-0560; RCW 74.08.080(1)(a)(2)(a). Furthermore, DSHS did not have the authority to deny payments to Ms. Whittenburge's choice of personal care because Ms. Whittenburge's choice of Indiviudal Provider never had a contract suspended or terminated for noncompliance of *any* state or federal regulations. To be clear, this was one of many issues that Ms. Whittenburge appealed, but sadly she passed away on October 18, 2014, before her voice could be heard. However, her passing did not stop the trial court from ruling against a helpless, voiceless appellant. CP 20-22. A violation of her due process right to be heard.

The Estate only asked the Court of Appeals to review the portion of the judgment that was entered against Ms. Whittenburge after her death, which substantially benefitted DSHS. That is also the portion of the judgment the Estate seeks review by this Court. This Court should accept review to vacate the judgment entered against a helpless, voiceless deceased person. But, in the alternative, if the judgment is allowed to stand the Estate should be permitted to appeal the judgment on the merits.

United States v. Munsingwear, 340 U.S. 36, 41, 71 S.Ct. 104, 95 L.ed. 36 (1950); *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 418 (1957); CP 20-22.

II. CONCLUSION

This Court should accept review for three reasons. First, the Court of Appeals' decision is in direct conflict with long and established precedent of this Court. Second, this petition involves an issue of substantial public interest. Third, the underlying case involves a federal constitutional question, namely due process.

Therefore, this Court should accept review, so the findings can be vacated and an order of dismissal with prejudice can be entered, so this unreviewable judgment does not spawn any new legal consequences and forever bar Ms. Whittenburge's daughter from being employed with DSHS as an Individual Provider. In the alternative, if this judment is allowed to stand, this Court should permit the case to be appealed on the merits.

Dated this 7th day of September, 2015.

Guidance to Justice Law Firm, PLLC

By: Mary C. Anderson
Mary C. Anderson, WSBA 44137
Attorney for Appellant Concepcion Whittenburge
and the Estate of Whittenburge

Certificate of Service

I, Mary C. Anderson, certify under penalty of perjury, under the laws of the State of Washington, that the following is true and correct: On October 7, 2015, I caused the APPELLANT'S REPLY BRIEF to be filed and served upon Washington State Supreme Court, Court of Appeals, Division I; and a copy to Respondent's attorney of record, Amanda M. Beard.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 7th day of September, 2015

Mary C. Anderson

Mary C. Anderson

OFFICE RECEPTIONIST, CLERK

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Attached please find Petitioner's Reply Brief.

Case: Whittenburge v. State of Wash., DSHS
COA case no.: 72914-4-I

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