Supreme Court No. 941378

Court of Appeals No. 33718-9 - III

SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON STATE
DEPARTMENT OF SOCIAL AND HEALTH SERVICES

Appellant

v.

VERDA LEE CROSSWHITE

Respondent

ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION

Verda Crosswhite worked as an exemplary caregiver for nearly 20 years. However, in November 2013, she was barred from her chosen profession after the Department of Social and Health Services (the Department) Adult Protective Services (APS), made a finding of mental abuse against her. The Administrative Law Judge (ALJ), who observed the testimony of multiple witnesses, reversed the finding. After the Board of Appeals (BOA) and Superior Court affirmed the finding, the Court of Appeals reversed it, finding the Department exceeded its statutory authority by expanding the definition of "willful" and "harm," and that there was not substantial evidence to support a finding of mental abuse. The Department now seeks review alleging, without any substantiation, that calamity will occur if the decision stands.

At the heart of this case is a superseded statute, and a regulation the Department now concedes is beyond its statutory authority. The decision also does not impede the Department's ability to investigate and make findings of abuse, provide protective services to vulnerable adults, or dismiss protections under the Abuse of Vulnerable Adults Act (AVAA). Ultimately, the Court should not

accept review as this case does not present an issue of significant public interest and does not conflict with other published cases.

II. ISSUES PRESENTED FOR REVIEW

A. This case does not implicate an issue of substantial public interest because:

1. The Department's concession that the term "negative outcome" exceeds its statutory authority is dispositive;

2. The statute has been superseded;

3. The decision does not make vulnerable adults less safe;

4. A decision from this Court is not required to avoid unnecessary confusion;

5. The court had discretion to reverse this fact specific finding; and

6. The decision does not change the substantial evidence rule.

B. This decision does not conflict with *Goldsmith v. Dep't of Soc. & Health Serv.*, 169 Wn. App. 573, 280 P.3d 1173 (2012).

C. Ms. Crosswhite is entitled to attorney fees under the Equal Access to Justice Act because the Department's actions were not substantially justified.

III. STATEMENT OF THE CASE

For purposes of the Answer to the Petition for Discretionary Review, Ms. Crosswhite adopts and incorporates the facts as recited

in the Court of Appeals decision.[1]

IV. ARGUMENT

This Court should not accept review as it does not present a matter of substantial public interest, it does not conflict with any published decision, and the Court of Appeals applied the correct standard of review when it determined substantial evidence does not support the Department Review Judge's finding of fact.

A. THIS CASE DOES NOT INVOLVE AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST

The Court should deny review as this case does not involve a substantial public interest or impair the State's interest in protecting vulnerable adults. In particular, the Court of Appeals' decision does not implicate a substantial public interest because: (1) the Department conceded a case dispositive element; (2) the statute in question has been superseded; (3) vulnerable adults are not less protected because of the decision; (4) a decision from this Court is not required to avoid unnecessary confusion; (5) the court had wide discretion to reverse or remand the case, and did not abuse such discretion; and (6) the court correctly applied the substantial evidence test.

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[1] The Court of Appeals decision outlines the facts of this case in both the "Facts and Procedural Background" section and Section II, p. 24-33 of the decision.

1. The Court Should Deny Review Because the Department's Concession, that the Term "Negative Outcome" Exceeds its Statutory Authority is Dispositive.

In its Petition for Discretionary Review, the Department concedes that the term "negative outcome" exceeds its statutory authority. Petition for Review, p. 14, fn. 6. Since this concession is case dispositive, this Court should deny review.

Whether the victim was harmed, is an essential element in a finding of abuse against an alleged perpetrator. RCW 74.34.020(2) (2014). As defined in the AVAA, harm exists where the Department can show injury, unreasonable confinement, intimidation, or punishment. RCW 74.34.020(2) (2014). Without a finding of harm, there is no basis for a finding of mental abuse. RCW 74.34.020(2) (2014).

The Department's regulation inappropriately expanded the definition of harm to include "negative outcome." WAC 388-71-0105. The Court of Appeals found that the term "is not only outside the unambiguous scope of the statute but is hopelessly vague." *Crosswhite v. Dep't of Soc. & Health Serv.*, No. 33718-9-III, slip op. at 19 (Div. III, 2017) (published). The Department has conceded the term exceeds its statutory authority. Petition for Review, p. 14, fn. 6.

At no point in Ms. Crosswhite's case has there been a finding of harm under the controlling statute. Neither the ALJ, nor the Review Judge, made a finding that Ms. Crosswhite committed injury, unreasonable confinement, intimidation, or punishment toward the vulnerable adult, and the record does not support such a finding. CP 4-14, 35-42. Rather, the Review Judge entered only a finding that Ms. Crosswhite's behavior caused Jodi to suffer a "negative outcome," a finding the Department concedes exceeds its statutory authority. CP 13.

Since the harm element is essential to entering a finding of mental abuse, any decision in this case will not affect the outcome of the facts presented – in short, no statutorily defined mental abuse occurred. As such, the case does not pose an issue of significant public interest.

2. The Court Should Deny Review Because the Legislature has Superseded the Statute in Question.

The Court of Appeals' decision in this case interprets a statute that has been superseded, and reviewing such a decision does not constitute a significant public interest. In 2015, the Legislature significantly amended the AVAA, including the definition of mental abuse. RCW 74.34.020(2)(c) (2015); Laws of 2015, ch. 268. This is

particularly pertinent to the Department's challenge that the decision "ignores a panoply of abusive harms" addressed in subsection 4 below. Petition for Review, p. 14.

If the Department seeks to change the statutory definition, its remedy is with the Legislature. It serves no public interest for this Court to review a Court of Appeals' decision interpreting a superseded statute.

3. The Court Should Deny Review Because the *Crosswhite* Decision Does Not Make Vulnerable Adults Less Safe.

Despite the Department's hyperbolic claims that the *Crosswhite* decision will cause immeasurable harm, a correct reading of the AVAA does not make vulnerable adults less safe. The Court of Appeals correctly ruled that the statute requires proof of intent to harm, before the Department can impose a finding of abuse, which carries significant, permanent penalties.

The Legislature's intent in enacting the AVAA was to recognize there are vulnerable adults who are subjected to abuse, neglect, financial exploitation, and abandonment, and are unable to protect themselves due to being homebound or mentally or physically incapacitated. RCW 74.34.005. The purpose of the AVAA was to organize in one chapter, the various provisions dealing with

vulnerable adults, and empower the Department and law enforcement agencies to receive reports of abuse, neglect, financial exploitation, and abandonment, and to provide protective services in the least restrictive environment. RCW 74.34.005. The *Crosswhite* decision does nothing to alter the intent of the Legislature, or impair the Department from receiving and investigating reports, and providing protective services to vulnerable adults.

The Department's list of potential, horrible impacts the *Crosswhite* decision will have on the safety of vulnerable adults is exaggerated and patently false. Rather, it appears as if the Department simply rejects the idea that the statute allows individuals to mount a defense before a lifetime finding of abuse can be entered against them.[2] Whether the potential defense has merit, is a factual determination left to the trier of fact.

The Department further states, without support, that, "[t]his refuge for the accused abuser is created at the expense of the safety of vulnerable adults." Petition for Review, p. 10. It opines this might result in lesser protection in two situations: (1) a petition for a Vulnerable Adult Protection Order (VAPO); and (2) a civil action

[2] The Department argues that requiring specific intent "endangers vulnerable adults by allowing an accuser to mount a defense that he or she was acting out of 'concern and frustration.'" Petition for Review, p. 10.

against a mandatory reporter for failure to report. The Department wholly fails to explain or demonstrate how applying the correct statutory definition of abuse diminishes protection in those, or any other, contexts.

In order to obtain a VAPO, the vulnerable adult must show that he or she has "been abandoned, abused, financially exploited or neglected *or is threatened* with abandonment, abuse, financial exploitation, or neglect by the respondent." RCW 74.34.110(2) (emphasis added). Unlike a finding of abuse or neglect, a VAPO can be entered *prior* to any harm from abuse occurring.[3] RCW 74.34.110(2). Simply stated, the legal standard for a VAPO is substantially different than the standard for a finding of mental abuse. Because of the different legal standards, the *Crosswhite* decision will not impair a person's ability to obtain protection through a VAPO.

The Department's extraordinary speculation that the *Crosswhite* decision will endanger vulnerable adults by making mandatory reporters less likely to report suspected abuse is not supported or persuasive. First, and foremost, the Department has failed to show any correlation between the *Crosswhite* decision and

[3] Such prevention of harm is consistent with the Domestic Violence Prevention Act. RCW 26.50.

a defense to a civil action for failing to report abuse.

Second, the *Crosswhite* decision does not affect the standard under which mandatory reporters must make reports. RCW 74.34.035. Mandatory reporters must make reports where they have "reasonable cause to believe" or "reason to suspect" abuse has occurred. RCW 74.34.035. This standard remains consistent with the statutory immunity from liability afforded to mandatory reporters who make reports in good faith. RCW 74.34.050.

A mandatory reporter does not have to determine intent before reporting. RCW 74.34.035. Mandatory reporters do not make legal determinations as to whether the basis for their reasonable belief in fact meets the legal definition of abuse. RCW 74.34.050. That determination is made only after the Department investigates a report and makes a decision that the facts meet the legal standard for a finding of abuse. RCW 74.34.067(7), (10).

Finally, mandatory reporters are individuals who have dedicated their lives to caring for and protecting vulnerable adults and children, including employees of the Department, police officers, health care providers, and school personnel. RCW 74.34.020(13). To allege that such individuals would fail to speak up if they perceived an abusive situation, particularly given their immunity, is

an unwarranted affront to the people we entrust to protect vulnerable adults.

The Department has failed to show how the *Crosswhite* decision will make vulnerable adults less safe. It has not shown how punishing individuals for unintentional behavior will prevent future abuse. Although the State has an interest in protecting vulnerable adults, review of the *Crosswhite* decision is not a matter of substantial public interest where there is no correlation between the decision and protections available for vulnerable adults or the Department's ability to receive and investigate reports of abuse and provide protective services to vulnerable adults.

4. The Court Should Deny Review Because a Decision on the Issue is Unnecessary to Avoid Confusion.[4]

This Court should deny review because the *Crosswhite* decision clarifies, rather than confuses, the issues. *In re Flippo*, 185 Wn.2d 1032, 380 P.3d 413 (2016). The Department's misinterpretation of the statute leads it to mistakenly believe that *Crosswhite* ignores "a panoply of abusive harms" in the statute.

[4] The Department also argues that a decision from this Court has the potential to affect a number of proceedings in the lower courts and administrative tribunals. However, it cites to two decisions that have already been decided, and one case, *Dep't of Soc. & Health Serv. v. Karanjah*, No. 48666-1-II, where oral argument occurred on January 26, 2017, and a decision is forthcoming.

Petition for Review, p. 14. The Department's reliance on the subcategories of abuse as evidence of the "panoply of harms" is misplaced.

Under the statute, before a finding of abuse can be entered, the Department must prove three things: (1) willfulness to harm (intent); (2) that the action constitutes physical, mental, or sexual abuse or exploitation (action); and (3) that the action results in injury, unreasonable confinement, intimidation, or punishment (harm) [5] [6]. RCW 74.34.020 (2014); *Crosswhite*, slip op., p. 9. The subcategories of abuse, such as physical abuse, mental abuse, sexual abuse and exploitation, all set out a non-exhaustive list of *actions* that constitute the basis for each subcategory. RCW 74.34.020(2) (2014). For instance, the subcategory of physical abuse is defined as "... inflicting bodily injury or physical mistreatment" and includes, but is not limited to "striking with or without an object, slapping, pinching, choking, kicking, shoving,

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[5] Only when the vulnerable adult is unable to express physical harm, pain, or mental anguish is harm presumed. RCW 74.34.020(2) (2014).

[6] The Department is correct in its example that an owner of an adult family home exerting influence over a vulnerable adult in order to obtain free janitorial services does not constitute a finding of abuse without a showing of injury, unreasonable confinement, intimidation, or punishment. That does not mean that the action is not immoral, violates other laws, or could be a basis for a protection order. It simply means that a lifetime finding of abuse cannot be entered without a finding of harm.

prodding, or use of chemical restraints or physical restraints ...." RCW 74.34.020(2)(b) (2014). While these actions are presumptively harmful, simply finding that the action occurred without the intent to harm, or actual harm, is not sufficient under the statute to support a finding of physical abuse.

The *Crosswhite* decision does not confuse this issue or ignore a "panoply of harms" but rather clarifies the intent and harm elements. Therefore, it does not constitute a substantial public interest.

5. The Court Should Deny Review Because Whether a Court, in its Discretion, Reverses or Remands a Case, Particularly in a Fact Intensive Case, is Not an Issue of Substantial Public Interest.

When the appellant court considers a case under the Administrative Proceeding Act (APA), they may, among other options, set aside an agency action. RCW 35.05.574(1). Similarly, under the Rules of Appellate Procedure, the court "may reverse, affirm, or modify the decision being reviewed and take any action as the merits of the case and the interest of justice may require." RAP 12.2. Despite this wide discretion, the Department argues that the Court was *required* to remand the case because, as the Department alleges, the Court issued "a new standard." Petition for Review, p.

19. The Department cites no authority for this proposition.[7] Petition for Review, p. 19.

First, the Court of Appeals did not articulate a new standard but rather interpreted an existing standard. Second, the Court's decision to reverse, instead of remand, the case was within its authority under the APA and broad appellate discretion. Petitioner exhausted her administrative remedies, including a full fact-finding hearing at which both parties had the opportunity to present evidence, confront witnesses, and argue their positions. The Court did not abuse its discretion when it determined that the record and findings by the ALJ and Review Judge were sufficient to provide a meaningful direct review of Ms. Crosswhite's substantial evidence challenge. *Crosswhite* slip op., at 20. The APA specifically mandates a reviewing court "to grant relief from an agency order in an adjudicative proceeding" if it determines that "the order is not supported by evidence that is substantial when viewed in light of the

[7] The Department relies on *Jenkins v. Dep't of Soc. & Health Serv.*, 160 Wn.2d 287, 302-303, 157 P.3d 388 (2007). However, *Jenkins* does not stand for the proposition that when the court articulates a new standard the case must be remanded. Rather, *Jenkins* found that the shared living rule violated the federal comparability law and remanded the case "for determination of the amount of care hours DSHS wrongfully withheld ...." *Jenkins*, 160 Wn.2d at 300, 303. Additional factual findings were required in order to provide the petitioners with the appropriate remedy.

whole record before the court...." RCW 34.05.570(3)(e).

Third, and most importantly, the Department has failed to establish how the decision to reverse, instead of remand, which only impacts Ms. Crosswhite, involves an issue of substantial public interest. It does not.

6. The Court Should Deny Review Because the *Crosswhite* Decision Did Not Change the Substantial Evidence Test.

The Court of Appeals appropriately applied the substantial evidence test to Ms. Crosswhite's challenged findings of fact and properly relied on federal law to interpret the APA. The Department argues that the Court improperly changed the substantial evidence test to require "a more searching review" of an agency review judge's factual findings where they conflict with the ALJ's findings of fact. This is not correct.

The Court of Appeals correctly applied the substantial evidence test to the challenged findings of fact. It did not change this standard but rather closely scrutinized the Review Judge's findings of fact, which differed in material ways from the ALJ's findings, particularly findings the ALJ could have only made based on witness testimony. This complies with explicit APA requirement, "[i]n reviewing findings of fact by presiding officers, the reviewing officers

shall give due regard to the presiding officer's opportunity to observe the witnesses." RCW 34.05.464(4); WAC 388-02-0600(1).

In this scrutiny, the Court of Appeals correctly relied upon federal case law to guide how to analyze discrepancies between the ALJ's and Review Judge's findings. Considering federal case law when analyzing the APA is Washington policy and practice. RCW 34.05.001; S*ee, e.g., Allan v. University of Washington*, 140 Wn.2d 323, 327, 997 P.2d 360, 362 (2000) (relying upon federal case law to determine standing under the APA); *Tapper v. Employment Sec. Dep't*, 122 Wn.2d 397, 405, 858 P.2d 494 (1993). The Court of Appeals did not err in looking to federal law for guidance in its substantial evidence review.

Finally, once again the Department has failed to establish how the Court's analysis of the Review Judge's findings of fact and correct application of the substantial evidence test to this case implicates a substantial public interest. It simply does not.

B. THE COURT SHOULD DENY REVIEW BECAUSE *CROSSWHITE* DOES NOT CONFLICT WITH *GOLDSMITH*.

The Department misinterprets *Goldsmith v. Dep't of Soc. & Health Serv.*, 169 Wn. App. 573, 585, 280 P.3d 1173 (2012) in an effort to create a conflict with *Crosswhite*. However, the cases are factually and legally distinguishable and harmonized.

First, unlike in *Crosswhite*, *Goldsmith* did not challenge whether the Department's definition of "willful" exceeded its statutory authority. *Goldsmith*, 169 Wn. App. at 583. As such, the *Goldsmith* court applied the regulation as written, including a factual analysis of whether Mr. Goldsmith "knew or should have known" that his actions caused injury. *Id.* *Crosswhite,* on the other hand, challenged the regulation as exceeding the statutory authority and therefore did not apply the regulation to the facts of the case. *Crosswhite*, slip op., p. 14. Given the differing legal issues under review in *Goldsmith*, the Court of Appeals' decision in this case creates no conflict.

Second, the facts of *Goldsmith*, when the *Crosswhite* decision is applied, could still lead to a finding of mental abuse. The *Goldsmith* case, unlike *Crosswhite*, involved repeated patterns of behavior such as frequent, long telephone calls and visits with a 98-year-old father that resulted in shouting and yelling. *Goldsmith,* 169 Wn. App. at 585. There was ample testimony that Mr. Goldsmith's father, who was ordinarily calm, would become angry and upset after these exchanges. *Id.* Such repeated, lengthy yelling matches with a 98-year-old could be evidence that the trier of fact relied on to find an intent to harm.

The fact that the *Crosswhite* decision allows the respondent a defense or explanation of her behavior does not prevent a trier of fact from determining that the behavior still constitues an intent to harm. *Crosswhite* does not say that subject or subjects being addressed provide a defense to the proscribed behavior. Rather, the *Crosswhite* court disagreed with the Department's overly broad interpretation of the statute, and interpreted "willful" to mean, knowing infliction of statutory harm. *Crosswhite*, slip op. at 15. The *Goldsmith* court was presented with a different legal question than presented in this case and, therefore, focused on whether harm resulted from improper action. *Goldsmith*, 169 Wn. App. at 586. The Court of Appeals correctly harmonized its decision in *Crosswhite* with *Goldsmith*.

Third, the *Goldsmith* court did not blindly rely on a the BOA's finding that was unsupported by substantial evidence. Petition for Review at 16. A reviewing court reviews the whole record, and may not rely on the Department's factual finding unless it is supported by substantial evidence when looking at the record as a whole. *Raven v. Dep't of Soc. & Health Serv.,* 177 Wn.2d 804, 829, 306 P.3d 920 (2013). While the *Goldsmith* court ultimately did agree with the BOA, it independently compared the evidence in the record to the Board of Appeals' findings. *Goldsmith*, 169 Wn. App. at 585. The *Crosswhite*

court similarly reviewed the evidence to analyze whether the Review Judge's decision was supported by the record.

There is no conflict between *Crosswhite* and *Goldsmith* where the issues presented to the courts were different and where *Crosswhite* is well harmonized with *Goldsmith*.

C. MS. CROSSWHITE IS ENTITLED TO ATTORNEY FEES UNDER THE EQUAL ACCESS TO JUSTICE ACT WHERE THE DEPARTMENT WAS NOT SUBSTANTIALLY JUSTIFIED IN ITS ACTION.

Only if the Court determines that this case merits review, Ms. Crosswhite seeks review of the Court of Appeals' decision regarding attorney fees under Washington's Equal Access to Justice Act (EAJA). RCW 4.84.355. The Court of Appeals' decision found that the Department's actions were substantially justified and denied attorney fees and costs.

The legislative intent of the EAJA was to "provide equal access to the courts to private litigants defending against government actions." *Costanich v. Dep't. of Soc. & Health Serv.*,164 Wn.2d 925, 931, 194 P.3d 988 (2008). Specifically, the Legislature found that:

> [c]ertain individuals . . . may be deterred from seeking review of or defending against an unreasonable agency action because of the expense involved in securing the vindication of their rights in administrative proceedings . . . . The legislature therefore adopts this equal access to justice act to ensure that these parties

> have a greater opportunity to defend themselves from inappropriate state agency actions and to protect their rights.

Costanich 164 Wn.2d at 931, citing Laws of 1995, ch. 403 § 901.

Contrary to the Court's decision, the agency action at issue when determining whether it was substantially justified is not the decision to investigate but rather the BOA's Review Decision and Final Order to uphold the finding. *Costanich v. Dep't. of Soc. & Health Serv.*,138 Wn. App. 547, 563-564, 156 P.3d 232 (2007), *rev. on other grounds,* 164 Wn.2d 925, 194 P.3d 988 (2008). Further, the Department has the burden of showing that fees should be denied. *Union Elevator & Warehouse Co., Inc. v. State ex rel. Dep't of Transp.*, 144 Wn. App. 593, 183 P.3d 1097 (2008). To meet this burden, the Department must demonstrate that its action "had a reasonable basis in law and fact." *Language Connection, LLC v. Employment Sec. Dep't*, 149 Wn. App. 575, 586, 205 P.3d 924 (2009); *Costanich*, 138 Wn. App. at 563.

Even where the Department is initially justified in its actions, the action becomes unjustified when the Department exceeds its statutory authority or erroneously interprets and applies the law. *Costanich*, 138 Wn. App. at 563. This is now the third case since 2012 that has rejected the Department's attempts to expand the

definition of abuse and neglect. *Marcum v. Dep't. of Soc. & Health Serv.*, 172 Wn. App. 546, 290 P.3d 1045 (2012); *Brown v. Dep't of Soc. & Health Serv.*, 190 Wn. App. 572, 587, 360 P.3d 875 (2015). The Department can no longer claim that it is substantially justified in exceeding its statutory authority.

Ms. Crosswhite has prevailed in this matter, and is a qualified party under the EAJA for an award of fees and costs. The Department was not substantially justified in disregarding the plain language of the statute and substantial evidence. As such, she requests that the Court grant her the requested attorney fees and costs.

V. CONCLUSION

Ms. Crosswhite respectfully requests that the Court deny the Department's Petition for Discretionary Review where the case does not involve an issue of substantial public interest and does not conflict with the *Goldsmith* case.

Respectfully submitted on March 20, 2017.

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CERTIFICATE OF SERVICE

I certify that on the 20th day of March 2017, I caused a true and correct copy of this Answer to Petition for Discretionary Review to be served on the Petitioner's Counsel via first class U.S. mail and electronic Mail:

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Signed this 20th day of March 2017.

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