NO. 337189

COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION III

VERDA CROSSWHITE

Appellant

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES

Respondent

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

The Department argues that Ms. Crosswhite mentally abused a vulnerable adult without a showing of intent to harm. If the Department is correct, this single incident becomes the basis for banning a highly qualified, 26-year caregiver from her chosen employment for the rest of her life.

The Department's assertion that deference must be given to its interpretation of the statutory definition of "abuse" is incorrect. Ms. Crosswhite does not challenge the validity of a Department regulation. Rather, she challenges the Department's failure to accurately apply the unambiguous statutory definition – one that requires narrow not expansive interpretation. This case requires the Court to directly apply the statute to the facts without deference to the Department's interpretation. Upon its *de novo* review, this Court should find that the facts do not support a legal conclusion that Ms. Crosswhite's actions constitute mental abuse.

II. ARGUMENT

A. STATUTORY INTERPRETATION IS A QUESTION OF LAW THAT COURTS REVIEW *DE NOVO.*

Contrary to the Department's assertion, Ms. Crosswhite's appeal is not a rule challenge under RCW 34.05.570(2). Response Br., p. 9. Rather, as outlined in her opening brief, Ms. Crosswhite

challenges the Department's *order* issued in her case as erroneous because it: (1) impermissibly expanded the definition of "mental abuse" from the plain language of the statute; (2) erroneously applied elements not found in the statute to the facts of the case; e.g. "non-accidental," "improper," "negative outcome" and "knew or should have known"; and (3) is not supported by substantial evidence where the Department failed to show that Ms. Crosswhite's actions were willful, that her conduct amounted to a verbal assault, or that Jodi sustained an injury, unreasonable confinement, punishment, or abandonment. Opening Br., pp. 1-2.

Statutory interpretation is a question of law that courts review *de novo*. *W. Telepage, Inc. v. City of Tacoma,* 140 Wn.2d 599, 607, 998 P.2d 884 (2000). While courts may grant deference to an agency's findings of fact, the application of law to facts is a question of law which courts review *de novo*. *Mader v. Health Care Auth.*, 149 Wn.2d 458, 470, 70 P.3d 931 (2003). *See also Franklin County Sheriff's Office v. Sellers*, 97 Wn.2d 317, 330, 646 P.2d 113, 119 (1982) (We have invoked our inherent power to review *de novo*, mixed questions of law and fact).

1. The Department is Not Entitled to Deference Because RCW 74.34.020 (2013) is Not Ambiguous.

When reviewing an agency's interpretation or application of a statute, the court uses the error of law standard and "may substitute its interpretation of the law for the agency's." *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 77, 11 P.3d 726 (2000). The Department's interpretation is only afforded deference where the statute is ambiguous.[1] *Id.* Where the statute is unambiguous, the court gives no deference to the agency interpretation because "it is emphatically the province and duty of the judicial branch to say what the law is." *Overton v. Washington State Econ. Assistance Auth.*, 96 Wn.2d 552, 555, 637 P.2d 652 (1981).

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[1] The Department claims that this Court should give it deference "because of its expertise" in the field. Response Br., p. 10. The Department improperly truncated its quotation of authority. The full citation shows that appellate courts apply *de novo* review to questions of law:

> Where an administrative agency is charged with administering a special field of law and endowed with quasi-judicial functions because of its expertise in that field, the agency's construction of statutory words and phrases and legislative intent should be accorded substantial weight when undergoing judicial review. *We also recognize the countervailing principle that it is ultimately for the court to determine the purpose and meaning of statutes, even when the court's interpretation is contrary to that of the agency charged with carrying out the law.* . . . both history and uncontradicted authority make clear that it is emphatically the province and duty of the judiciary branch to say what the law is.

Overton v. Washington State Econ. Assistance Auth., 96 Wn.2d 552, 555, 637 P.2d 652 (1981) (emphasis added).

A statute's meaning is ambiguous if it is subject to two or more reasonable interpretations, but it is not ambiguous "merely because different interpretations are conceivable." *State v. Villanueva*, 177 Wn. App. 251, 254, 311 P.3d 79, 81 (2013) *citing State v. Fonotagg*, 139 Wn.2d 107, 985 P.2d 365 (1999). Where "a statute is clear on its face, its meaning [should] be derived from the language of the statute alone." *Kilian v. Atkinson,* 147 Wn.2d 16, 20, 50 P.3d 638 (2002). "Courts should assume the legislature means exactly what it says" in a statute and apply it as written. *State v. Keller,* 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). "Plain language that is not ambiguous does not require construction." *State v. Evans*, 177 Wn.2d 186, 192, 298 P.3d 724 (2013).

The definition of mental abuse is not ambiguous. RCW 74.34.020(2)(c) (2013). The word "willful" is not ambiguous. *State v. Spino*, 61 Wn.2d 246, 249, 377 P.2d 868 (1963). The Department does not argue the statute is ambiguous, and no cases applying the definition of mental abuse have struggled with ambiguity. *Goldsmith v. Dep't of Soc. & Health Servs.,* 169 Wn. App. 573, 280 P.3d 1172 (2012); *Kraft v. Dept. of Soc.& Health Servs.,* 145 Wn. App. 708, 187 P.3d 798 (2008). The Department's effort to broaden the statutory definition does not provide a basis to

defer to its interpretation. *Marcum v. Dep't of Soc. & Health Servs.*, 172 Wn. App. 546, 558-559, 290 P.3d 1045 (2012) (courts have *de novo* review over whether an agency's rules are broader than its enabling legislation). As such, the Department's interpretation is not entitled to deference because RCW 74.34.020(2)(c) (2013) is not ambiguous.

2. The Statute Should Not be Liberally Construed Because, as Applied to Ms. Crosswhite, it is Punitive.

The Department argues that Abuse of Vulnerable Adult Act (AVAA) is a remedial statute and therefore it should be liberally construed. Response Br., p. 10. However, liberal construction is not appropriate for every statute that purports to prevent harm and promote the general welfare. See, e.g. *Stomper v. Amalgamated Transit Union, Local 241*, 27 F.3d 316, 320 (7th Cir. 1994) (every statute is remedial in the sense that it alters the law or favors one group over another, and applying principles of liberal construction does not resolve statutory questions because a court must determine not only the direction in which a law points but also how far to go in that direction).

Some statutes, like the AVAA, have both beneficial and punitive purposes. RCW 74.34.005(6); RCW 74.34.068; RCW

74.34.120. When a statute has punitive consequences separate and apart from civil liability, the statute must be strictly construed. *Brown v. Dep't of Soc. & Health Servs.*, 190 Wn. App. 572, 591, 360 P.3d 875 (2015). As applied to Ms. Crosswhite, the statute is punitive and results in devastating and lifelong adverse consequences including prohibiting her from working in her chosen occupation as well as prohibiting her from obtaining a myriad of licenses from the state. RCW 74.39A.056(2).[2]

This Court has recognized the devastating impact and the corresponding limits to the Department's ability to enforce abuse statutes. *Brown*, 190 Wn. App. at 591. In *Brown*, like the AVAA, the Abuse of Children Act (ACA) is intended to serve a beneficial purpose. RCW 26.44.010. Despite this, the Court found that due to the punitive nature of the statute, it was to be strictly, not liberally construed. *Brown*, 190 Wn. App. at 591-592. Specifically, the Court reasoned that while the ACA is not a licensing scheme, a finding of neglect can preclude a person from obtaining a child care license, and therefore it must be strictly construed. *Id.*

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[2] The Department attempts to bootstrap RCW 74.34.030(2) into a remedial statute by reference to a separate statute in the same chapter that provides for other remedies, including a cause of action to the vulnerable adult for damages for actual injuries from abuse. However, a cause of action is expressly identified as "in addition to other remedies" and is only applicable if the abuse is substantiated and only if there are in fact actual compensable damages. RCW 74.34.200(3).

Similarly, a finding of mental abuse entered against a person under the AVAA results in the individual being placed on a lifelong public abuse registry. RCW 74.34.068; WAC 388-06-0710. Like the ACA, a finding of mental abuse under the AVAA permanently precludes a person from working or volunteering in positions where they may have unsupervised access to vulnerable adults or children. RCW 74.39A.056(2); WAC 388-113-0030; 388-06A-0110; WAC 388-145-1330. It also disqualifies individuals from obtaining a number of licenses including a license for an adult family home, home health care agency, hospice, home care services, assisted living, a nursing home, a daycare or any other group care facility for children. RCW 70.127.170(2); WAC 388-76-10120(3)(d); WAC 388-78A-3190; WAC 388-97-4220(3); WAC 388-145-1330. A substantiated finding is also a basis for denying any license issued by the Department of Health. RCW 18.130.055(b); RCW 18.130.180(24).[3]

The punitive nature of a finding of mental abuse mandates that the Court strictly construe the statutory definition.

[3] The devastating consequences of single incidents of error, mistakes or wrongdoing has also been the subject of recent media attention, giving visibility to the social harms resulting from such collateral consequences. http://www.seattletimes.com/opinion/in-america-these-days-you-can-never-be-punished-enough/

3. There is No Basis to Assert that RCW 74.34.020 (2013) was Intended to Capture All Conceivable Conduct that has a Negative Outcome on a Vulnerable Adult.

The Department alleges that the legislature intended the definition of "abuse" to be as broad as possible to capture all conceivably abusive conduct. Response Br., p. 21. It cites no authority for this assertion. *Id.* "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

Actually, AVAA was enacted to combine different definitions for abandonment, abuse, exploitation and neglect into a single, cohesive chapter and provide the Department and law enforcement agencies with the authority to investigate complaints of abandonment, abuse, financial exploitation or neglect of vulnerable adults and to provide protective services and legal remedies. RCW 74.34.005(5)-(6); LAWS 1999 c 176 § 1.

The legislative history and intent are void of any indication that the statute was intended to capture as much conduct as possible. Rather, the stated intent is consistent with the unambiguous definition of mental abuse which requires proof of a

willful action that inflicts specific harm: injury, unreasonable confinement, intimidation, or punishment. RCW 74.34.020(2)(c) (2013). There is no basis for the assertion that the statute was intended to create strict liability for any and all conduct that may have a negative outcome on a vulnerable adult. RCW 74.34.005; RCW 74.34.020(2)(c) (2013).

B. "WILLFUL" IS MORE THAN NON-ACCIDENTAL OR IMPROPER ACTION WHERE THE PLAIN MEANING OF THE STATUTE REQUIRES INTENT TO INFLICT INJURY, UNREASONABLE CONFINEMENT, INTIMIDATION OR PUNISHMENT.

Determining mental abuse is a three part test: (1) there must be a willful action or inaction; (2) that constitutes mental abuse; and (3) inflicts injury, unreasonable confinement, intimidation, or punishment. These terms do not apply in isolation, but all three elements must be met before a finding of mental abuse can be substantiated.

The legislature defined "abuse" as "the willful action or inaction that inflicts injury, unreasonable confinement, intimidation, or punishment . . . ." RCW 74.34.020 (2013). "Willful" is not defined in the statute. RCW 74.34.020 (2013). Therefore, it is given its ordinary, everyday meaning. *Garrison v. Washington State Nursing Bd.*, 87 Wn.2d 195, 196, 550 P.2d 7 (1976). If the

legislature uses a term well known to the common law, it is presumed that the legislature intended it to mean what was understood at common law. *New York Life Ins. Co. v. Jones*, 86 Wn.2d 44, 47, 541 P.2d 989, 991 (1975). Furthermore, the Department may not apply statutes in a manner that fundamentally changes the standard set out by the legislature and Department action that extends the "statute's punitive reach are an invalid exercise of agency power." *Brown,* 190 Wn. App. at 592; *Marcum,* 172 Wn. App. at 558-559.

In the criminal context, willful means intentional and designed. *New York Life Ins. Co.*, 86 Wn.2d at 47. In civil cases, the term willful means either intent to cause the harm, or acting with reckless disregard of the probable consequences. *Smith v. Shiflett*, 66 Wn.2d 462, 467, 403 P.2d 364 (1965) *citing Grays Harbor County v. Bay City Lbr. Co*, 47 Wn.2d 886, 289 P.2d 979.

In a case involving alleged physical abuse, this court has determined that RCW 74.34.020 requires intention to inflict injury. *Brown v. Dep't of Soc. & Health Servs.*, 145 Wn. App. 177, 183, 185 P.3d 1210 (2008). "Both the definition of "abuse" and "physical abuse" require a willful action to inflict injury." *Id.* In that case, this

court determined that there was no abuse because the alleged perpetrator had no intention to cause harm. *Id. at* 183.

Here, the Department expanded the definition of mental abuse by defining "willful" to include any non-accidental, improper action (including speech) that the speaker knew or should have known could cause harm, injury, or a negative outcome. CP 12-13. This is far broader than the statute's plain language and the common law understanding of the term "willful." Instead of actions that intentionally, deliberately or designedly cause injury, the Department seeks to include acts that are "non-accidental" and "improper." CP 12-13. The Department further seeks to expand the definition by suggesting that non-accidental actions amount to abuse if it *is possible* for harm or a negative outcome to occur. CP 12-13. The expanded definition captures any conduct that unwittingly results in a negative outcome to a vulnerable adult, regardless of the intent of the actor or actual harm incurred.[4] Such

[4] One can conceive of all manner of conduct that would be deemed "mental abuse" under the Department's interpretation. For example, if any of these instances could result in a negative outcome (crying, upset, depression, anger, emotional outbursts), they meet the Department's definition of mental abuse: an adult child confronts a parent who is also a vulnerable adult about past abusive conduct; or a caregiver who does not buy requested sweets; or a caregiver who intentionally throws away a box while cleaning, but does not realize photographs are in the box; or a caregiver tells a vulnerable adult's family members about over-medicating concerns. It conceivably punishes all arguments between an individual and vulnerable adult that involves yelling and

an application fundamentally changes the standard required to make a finding of mental abuse.

As demonstrated in this case, the Department's expansive definition, as applied to verbal "action or inaction," leads to an absurd result. The Department need only inquire whether the speaker said words non-accidentally (without regard to whether the speaker intended injury), whether the words were deemed to be improper (subjectively), and whether it is possible that harm could result. This does not account for any comment that may be impulsive, insensitive, or said in the heat of the moment. Instead, the Department's interpretation exposes every person who has had an unfortunate interaction with a vulnerable adult to a finding of mental abuse. The AAVA is not a legislative attempt to shield vulnerable adults from any unpleasant interactions or deprive them of rich and meaningful relationships, the best of which are full of ups and downs. The legislature did not intend for every honest expression or statement of opinion to be deemed mental abuse, no matter how upsetting it might be to a vulnerable adult.

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results in the vulnerable adult having a negative outcome – which is generally the outcome in all arguments.

C. MS. CROSSWHITE'S ACTIONS DID NOT AMOUNT TO VERBAL ASSAULT AS REQUIRED BY FORMER RCW 74.34.020 (2013) (2014).[5]

Former RCW 74.34.020 (2013) (2014) defined mental abuse as any willful action or inaction of mental or verbal abuse . . . [and] "includes, but is not limited to, coercion, harassment, inappropriately isolating a vulnerable adult from family friends, or regular activity, and verbal assault that includes ridiculing, intimidating, yelling, or swearing." RCW 74.34.020(2)(c) (2013). The only potential basis for mental abuse in this case is conduct that amounts to "verbal assault." In 2015, the legislature amended the statute and removed the words, "verbal assault." Because the acts in this case occurred prior to the amendments, the term "verbal assault" is the relevant standard in this case.

Statutes should be interpreted to give effect to every word in a statute. *State v. Roggenkamp*, 153 Wn.2d 614, 624, 106 P.3d 196, 201 (2005). Verbal assault is not defined in the statute, thus the common law definition applies. *State v. Evans*, 177 Wn.2d, 186, 192, 298 P.3d 724, 728 (2013).

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[5] The Department confuses Ms. Crosswhite's argument that her conduct does not amount to a verbal assault with whether there is a requirement to show intent to harm in the definition of willful. As stated above, for an action to constitute mental abuse the Department must prove three elements: (1) willful action or nonaction; (2) of mental abuse (here verbal assault); (3) that inflicts injury, unreasonable confinement, punishment, or abandonment. Whether or not Ms. Crosswhite's action were willful is separate from whether her actions constituted a verbal assault.

At common law, an assault is an intentional act that creates an apprehension in another of an imminent harmful or offensive contact. It is both a crime and a tort. In Washington, there are three common law definitions of criminal assault: "(1) an attempt, with unlawful force, to inflict bodily injury upon another; (2) an unlawful touching with criminal intent;[6] and (3) putting another in apprehension of harm whether or not the actor intends to inflict or is incapable of inflicting harm . . . ." *State v. Walden*, 67 Wn. App. 891, 893-894, 841 P.2d 81 (1992). A civil assault action requires "the victim's apprehension of imminent physical violence caused by an actor's action or threat." *Brower v. Ackerley*, 88 Wn. App. 87, 92, 943 P.2d 1141 (1997) *citing, St. Michelle v. Robinson*, 52 Wn. App. 309, 313, 759 P.2d 467 (1988). Courts have used the term "verbal assault" to describe incidents involving intent to threaten physical harm or offensive contact. See, e.g. *State v. Hanson*, 126 Wn. App. 276, 279, 108 P.3d 177, 178 (2005) (Threatening harm and calling derogatory names was verbal assault). Thus the definition of a verbal assault requires intent to threaten physical harm or offensive contact.

[6] There is no allegation that Ms. Crosswhite's actions involved touching so this standard will not be addressed.

Accordingly, in order for Ms. Crosswhite's actions to constitute verbal assault, the actions must have either intended to cause Jodi harm or to be in fear of imminent offensive contact. As with mental abuse, intent is a critical component of verbal assault.

The Review Judge did not make any findings or conclusion that Ms. Crosswhite's conduct amounted to "verbal assault." The Department's counsel cannot revise the Review Judge's decision to create an entirely different basis for finding "mental abuse" than what was relied on at the administrative hearing. There is no evidence that Ms. Crosswhite's actions were intended to cause Jodi physical harm, or fear of offensive contact. Again, not every action or inaction that has a negative impact on a vulnerable adult can be deemed mental abuse. The action must willfully be aimed at producing this impact. As such, even if Ms. Crosswhite's actions were inappropriate, they did not constitute a verbal assault.

D. THERE IS NOT SUBSTANTIAL EVIDENCE TO SUPPORT A FINDING THAT MS. CROSSWHITE CONTINUED TO YELL AT JODI IN THE PARKING LOT, THAT SHE ENGAGED IN A CAMPAIGN TO SHAME JODI OR THAT HER BEHAVIOR AMOUNTED TO MENTAL ABUSE.

Findings of fact must be supported by substantial evidence. *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 46, 959 P. 2d 1091 (1998). Substantial

evidence is the quantum of evidence sufficient to persuade a rational fair-minded person the premise is true. *Wenatchee Sportsmen Ass'n v. Chelan County,* 141 Wn.2d 169, 176, 4 P.3d 123 (2000). This court shall 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 whole record before the court. RCW 34.05.570(3)(e).

1. The Record as a Whole Does Not Support a Finding that Ms. Crosswhite Yelled at Jodi in the Parking Lot.

The Department argues that there is substantial evidence to support a finding that Ms. Crosswhite continued to yell at Jodi in the parking lot because Ms. Madill's testimony was "eye witness" testimony. The Department makes this claim even though it concedes that there is no evidence that the yelling occurred for 30 to 45 minutes. Response Br., pp. 30-31, fn. 5. A review of the whole record, including Ms. Madill's prior contrary declaration, establishes that there is not sufficient evidence "to persuade a fair-minded person of the truth or correctness" of the finding. *Callecod v. Washington State Patrol*, 84 Wn. App. 663, 673, 929 P.2d 510 (1997) *rev. denied* 132 Wn. 2d 1004 (1997).

The Review Judge found that "the Appellant continued to yell at her for 30 to 45 minutes in the parking lot." CP 11-12. This finding relies exclusively on Ms. Madill's testimony that "they went out to the car, and I noticed they were still out there. She [Ms. Crosswhite] was really yelling at the patient . . . ." CP 126.

The intrinsic problem with Ms. Madill's testimony, given six months after the incident, is that it is not consistent with the declaration she provided after the incident, Jodi's statement about what actually happened in the parking lot, Ms. Gonzalez's statement or testimony, or Ms. Pabasco's statement. Jodi, who besides Ms. Crosswhite, was the only true eye witness to the events in the parking lot, never stated that Ms. Crosswhite continued to yell at her. Instead, Jodi stated that Ms. Crosswhite ". . . took her out side [sic] and sat down on a bench." CP 69. As told to the APS investigator by Jodi, "they sat down on the bench and she [Jodi] said AP [Ms. Crosswhite] trie[d] to calm her down, and told her that she cared about her and that she was worried about her health and her poor eating habits." CP 69. Jodi also reported that she continued to cry but when the medical staff came out to check on her she told them that she was okay. CP 69.

Jodi's account of the events was consistent with Ms. Madill's earlier declaration in which she stated "[t]hey left and were outside by their car and were there for ½ [sic] to 45 minutes. Guille [Ms. Gonzalez] when out to see if pt [Jodi] was okay . . . ." CP 74.

It was also consistent with Ms. Gonzalez's and Ms. Pabasco's statements that they went out to the parking lot to check on Jodi because it was "very hot that day." CP 70. There is no evidence that the medical staff checked on Jodi because Ms. Crosswhite was yelling in the parking lot. Neither witness stated they heard Ms. Crosswhite yelling at Jodi in the parking lot and that when they approached Jodi and Ms. Crosswhite, Jodi and Ms. Crosswhite indicated that they were okay. CP 69-70, 120. Ms. Madill herself stated that she did not go outside and could not hear what was being said. CP 127-128. Not one witness who provided statements at the time of the incident, including Ms. Madill and Jodi, stated that Ms. Crosswhite continued to yell at Jodi in the parking lot. Ms. Madill's testimony at the hearing was inconsistent with the overwhelming evidence to the contrary. Unreasonably, the Review Judge chose to only focus on that short, inconsistent statement provided by Ms. Madill as the basis for the finding of fact. This contradictory, inflammatory statement is not a sufficient quantity of

evidence, particularly when viewed in light of the whole record, to persuade a fair-minded person that Ms. Crosswhite continued to yell at Jodi in the parking lot at all, let alone for 30 to 45 minutes.

2. There is No Evidence to Establish that Ms. Crosswhite Embarked on a Campaign of Verbal Abuse to Shame Jodi Into an Alternate Course of Action.[7]

In an effort to conjure up evidence that Ms. Crosswhite's actions were intentional, the Department alleges that there is substantial evidence to support a finding that Ms. Crosswhite "embarked on a campaign of verbal abuse to shame Jodi into an alternate course of action." Response Br., pp. 25-26. The record is void of any evidence to support this allegation, indeed there is no finding by the Review Judge to this effect.

Instead, the record is filled with examples of Ms. Crosswhite's kind and encouraging support of Jodi and Jodi's own goals to take better care of her health and be more active. CP 94. As indicated in the Appellant's Opening Brief, in order to help Jodi achieve these goals, Ms. Crosswhite arranged to have Jodi's carpets professionally cleaned, arranged to have volunteers paint the inside of Jodi's home, and spruced up her yard, trimming trees

[7] It should be noted that the Department's original explanation for Ms. Crosswhite's behavior was that Ms. Crosswhite was angry because Jodi would not allow her to go into the medical appointment with her. CP 60.

and bushes so Jodi could see out the window. CP 141-143. Ms. Crosswhite also used her own money to purchase Jodi new clothes, brought in new curtains from her own home, and supplemented the grocery shopping with new, healthy foods and menus. CP 143-145. Ms. Crosswhite not only told Jodi that she cared for her and her health but showed her that she did by these kind actions. There is nothing in the record to indicate that Ms. Crosswhite intended to shame Jodi into taking better care of herself. To the contrary, the record reflects that the only "campaign" Ms. Crosswhite was on was one that Jodi set for herself to improve her overall health and quality of living.

3. Even if Ms. Crosswhite's Behavior was Improper, There is Not Substantial Evidence to Uphold a Finding of Mental Abuse.

The record lacks substantial evidence to show that this single incident amounted to mental abuse, even if Ms. Crosswhite's conduct is deemed to be improper. In other cases involving allegations of mental abuse, the court found a pattern of conduct. *Goldsmith,* 169 Wn. App. at 573; *Kraft,* 145 Wn. App. at 708. *Goldsmith* involved a repeated pattern of behavior where the alleged perpetrator was accused of fighting with his father over finances over a period of years and that this fighting continued

despite the father's repeated requests to stop. *Id.* at 578-579. At times the fighting would continue for hours at a time. *Id.* In affirming a finding of mental abuse, the ALJ found that:

> Mr. Goldsmith's stridency and perseverance over hours, days, weeks, and months elevated his genuine concern for Thomas, Sr.'s estate plan to the level of harassment. As part of the harassment, Mr. Goldsmith repeatedly yelled at Thomas, Sr. As manifested in Thomas, Sr.'s tone of voice, body language, and behavior, Mr. Goldsmith's pattern of harassment induced anger, frustration, resignation, depressed mood, and self-neglect in Thomas, Sr.
>
> *Goldsmith*, 169 Wn. App. at 579.

Similarly, in *Kraft*, the alleged mental abuse occurred over the course of months. *Kraft*, 145 Wn. App. at 712-713. The harsh and hurtful statements made to the vulnerable adult began almost five months prior to the finding of mental abuse. *Id.*

These cases are vastly different from the isolated incident involving Ms. Crosswhite and Jodi. There may be circumstances where a single incident could rise to the level of mental abuse, but such an instance would presumably need to be so egregious as to demonstrate clear intent to harm. That is simply not the case here. Rather, in the context of the relatively short relationship between Ms. Crosswhite and Jodi, the single, unfortunate incident does not rise to the level of mental abuse.

Jodi, despite originally asking Ms. Crosswhite to help her improve her health, came to the point where she did not appreciate Ms. Crosswhite's style of caregiving. However, Jodi never discussed these issues with Ms. Crosswhite, and Ms. Crosswhite did not know about Jodi's concerns. The relationship deteriorated, and Jodi exercised her right to fire Ms. Crosswhite as her caregiver.

As common in many employment relationships this was a bad match. But a bad match does not make Ms. Crosswhite a perpetrator of mental abuse. Even if Ms. Crosswhite's actions in the medical clinic were insensitive or improper, the incident was in contrast to all other evidence establishing Ms. Crosswhite's dutiful and considerate care of Jodi. The isolated action in the medical clinic[8] was not a part of a pattern of abusive behavior, and does not amount to mental abuse.

E. MS. CROSSWHITE IS ENTITLED TO ATTORNEY FEES WHERE THE DEPARTMENT'S ACTIONS WERE NOT SUBSTANTIALLY JUSTIFIED.

Under the Equal Access to Justice Act (EAJA), the court *shall* award attorney fees to a qualified prevailing party unless the court finds that the agency action was substantially justified. RCW 4.84.350(1) (emphasis added). An action is substantially

[8] It should be noted that not one of the medical staff made a report to APS about this incident.

justified when it has a reasonable basis in law and fact. *Costanich v. Dep't of Soc. & Health Serv.*, 138 Wn. App. 547, 563, 156 P.3d 232 (2007). 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).

The agency action being challenged in this case is the BOA Review Judge's Review Decision and Final Order. The question is not whether the Department was substantially justified in initiating an investigation or whether it was even substantially justified in entering an initial finding. Rather, the question is whether the Department was substantially justified in pursuing a finding against Ms. Crosswhite after the ALJ ruled in her favor and whether the BOA Review Judge was substantially justified in expanding the definition of mental abuse in a manner that fundamentally shifted the standard required to enter a finding of mental abuse against Ms. Crosswhite. Despite being on notice since at least 2010 that these statutes must be strictly construed, the Department continues to act outside it statutory authority by expanding definitions of abuse and neglect. *Morgan v. Dep't of Soc. & Health Serv.*, 99 Wn. App. 148, 992 P.2d 1023 (2000); *Marcum*, 172 Wn. App. at 559; *Brown*, 190 Wn. App. at 572.

The Department's argument that an award of attorney fees would chill its ability to investigate allegations of abuse and neglect is absurd. First, the Department's citation to *Raven* does not provide support for its position as *Raven* makes no such statement. *Raven v. Dep't of Soc. & Health Serv.*, 177 Wn.2d 804, 306 P.3d 920 (2013). Rather, in *Raven*, the court declined to award attorney fees because it found the Department's actions substantially justified under the facts of the case. *Id.* at 833. Second, EAJA does not preclude the Department from its reach. RCW 4.84.350. It simply cautions the Department against exercising its authority in ways that overreach and are inconsistent with applicable law.

III. CONCLUSION

Ms. Crosswhite asks this Court to find that the Department erroneously interpreted and applied the law when it determined that Ms. Crosswhite committed mental abuse without any evidence of harmful intent, based on its findings that her words in the medical clinic were nonaccidental, and its conclusion that Ms. Crosswhite knew or should have known that her words could cause a negative outcome. Such a fundamental shift in the legal standard is erroneous and must be reversed. Ms. Crosswhite also asks the Court to find that there is not substantial evidence to support a

finding of mental abuse even when the correct legal standard is applied. Finally, the Court should award Ms. Crosswhite attorney fees as the Department's position is not substantially justified.

Respectfully submitted this 28th day of March, 2016.

NORTHWEST JUSTICE PROJECT

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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

VERDA CROSSWHITE, **Appellant,** **v.** **DEPARTMENT OF SOCIAL AND HEALTH SERVICES,** **Respondent.**	**NO. 337189** **PROOF OF SERVICE**

PROOF OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington that on the 28th of March, 2016, I served William McGinty, Assistant Attorney General, with a true and correct copy of Appellant's Reply Brief by emailing the document to WilliamM1@atg.wa and also by depositing a true and correct copy in the mail of the United States Postal Service, with regular first-class postage prepaid, addressed to the same.

Signed this 28th day of March, 2016, within the county of Spokane, state of Washington.

Alice Crowder

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