NO. 33718-9-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

VERDA LEE CROSSWHITE,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF SOCIAL & HEALTH SERVICES,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Verda Crosswhite accompanied a vulnerable adult in her care, Jodi,[1] to a doctor's appointment. When Jodi came out of the examination room Ms. Crosswhite immediately began loudly berating Jodi in a crowded doctor's office, causing Jodi to cry and hang her head, until the doctor's assistant told Ms. Crosswhite to stop. Ms. Crosswhite did not stop even though both Jodi and a doctor's assistant asked her to. The Department of Social and Health Services Board of Appeals (Board) properly found that Ms. Crosswhite mentally abused Jodi. Mental abuse as defined in former RCW 74.34.020(2)[2] requires intentional conduct that the abuser knew or should have known could cause a mental injury. Because the Department of Social and Health Services, Adult Protective Services (Department or APS) properly applied its validly enacted rule, WAC 388-71-0105, to find that Ms. Crosswhite mentally abused Jodi, the Department's final order should be affirmed. The Department's final order was also supported by substantial evidence when viewed in light of

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[1] Only the first names of vulnerable adults involved in this matter are used to protect their identities. *See* RCW 74.34.095. No disrespect is intended.

[2] Because the incident at issue here occurred prior to the amendment made to the statute in 2015, the 2014 version of the Revised Code of Washington is applicable. *See* Vulnerable Adults, Ch. 268, 64th Leg. (2015). The amendment redefined "mental abuse" as "a willful verbal or nonverbal action that threatens, humiliates, harasses, coerces, intimidates, isolates, unreasonably confines, or punishes a vulnerable adult. Mental abuse may include ridiculing, yelling, or swearing." *Id.* The 2015 amendment did not define "willful." *Id.*

the whole record—the record contains more than adequate evidence that Ms. Crosswhite mentally abused Jodi. For these reasons, this Court should affirm the Department's action and decline to award Ms. Crosswhite attorney's fees.

II. COUNTER STATEMENT OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Whether the definition of "willful" in WAC 388-71-0105 is consistent with RCW 74.34.020(2) where the rule is designed to implement the intent of chapter 74.34 RCW to protect vulnerable adults.

B. Whether the Department properly applied the law when it found that Ms. Crosswhite mentally abused a vulnerable adult where Ms. Crosswhite yelled at a vulnerable adult in a crowded doctor's office, causing her to cry, even after being asked to stop.

C. Whether substantial evidence supports the Review Decision and Final Order's findings of fact where each challenged finding of fact is supported by eye-witness testimony.

III. COUNTER STATEMENT OF THE CASE

A. Substantive Facts

Jodi is a vulnerable adult who has several medical and psychological conditions, including chronic obstructive pulmonary disease, arthritis, obesity, and diabetes. CP 68, 102, 140. Jodi uses a wheelchair, requires extensive assistance with activities of daily living,[3]

[3] "Activities of daily living" is a term of art and means the sorts of things that the Medicaid program will pay a caregiver to do if a Medicaid eligible individual is

and has frequent falls. CP 130. Verda Crosswhite worked for Jodi as a caregiver for a short period of time, between six weeks to two months. CP 97, 130. In the three years prior to hiring Ms. Crosswhite, Jodi had two caregivers. The first caregiver provided care to Jodi for several years, and the second caregiver had to leave her position after a few months because of her own medical condition. CP 134. Other than Ms. Crosswhite, Jodi did not have any problems with any of her caregivers. *Id.*

On August 1, 2013, Jodi had an appointment with Dr. Lundgren at Apple Valley Family Medicine. CP 68. Prior to going back to the examining room, Jodi told Ms. Crosswhite that there was no need for her to go with her. *Id.* Ms. Crosswhite was upset that she was not going with Jodi to see the doctor and became angry. *Id.* According to Jodi, Ms. Crosswhite's "facial expression of anger said it all." *Id.*

Guillermina Gonzalez is a medical assistant at the clinic. CP 117. After Jodi was finished with her appointment with Dr. Lundgren, Ms. Gonzalez wheeled Jodi to the front desk to check out and to schedule a follow-up appointment. CP 118. Ms. Crosswhite knew that Jodi was being referred to mental health counseling. CP 88. Immediately, Ms. Crosswhite began to berate Jodi in a loud and rude voice about

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unable to do them him or herself. Activities of daily living include bathing, dressing, eating and locomotion. *See* WAC 388-106-0010.

whether the doctor was told about the "junk food [Jodi] kept on her window sill," her "bad" eating habits, and how Jodi was not controlling her diabetes. CP 69, 118-119. Ms. Crosswhite further injected Jodi's personal relationship with her husband, yelling out at Jodi, "did you tell him [the doctor] your husband doesn't come around you because you yell at him all the time about your medications?" CP 74. Ms. Crosswhite's yelling caused Jodi to become upset and cry.

Jodi's obvious distress did not stop Ms. Crosswhite from continuing her rant. When a crying Jodi, with her head hung in embarrassment, asked Ms. Crosswhite to stop, Ms. Crosswhite continued to yell at Jodi about her not controlling her diabetes. CP 69. Jodi, visibly shaken and embarrassed, kept asking Ms. Crosswhite to stop. CP 105. Ms. Crosswhite's response was, "I don't care, it needs to be said." CP 74, 105. Ms. Crosswhite then added that she was going to quit being Jodi's caregiver and leave Jodi (who was in a wheelchair) at the doctor's office. CP 69. Jodi responded by saying, "You can't leave me here. That's abandonment." CP 152. Ms. Crosswhite continued to publicly berate Jodi until Ms. Gonzalez stepped in and told Ms. Crosswhite that she needed to stop. CP 119. After being told to stop by Ms. Gonzalez, Ms. Crosswhite gave her a "nasty" look. CP 70.

Contrary to Ms. Crosswhite's assertions, witnesses present during Ms. Crosswhite's tirade did not hear Jodi yell back at Ms. Crosswhite. CP 119. Furthermore, the waiting room was full of other patients who heard the yelling and saw Jodi crying. CP 126. Medical assistant Melanie Provasco commented, "Caregivers are not supposed to treat people like that." CP 105. Jodi called her case manager, Susi Munoz, immediately after the August 1, 2013 incident. CP 69. Jodi was extremely upset and crying, to the point that she could not talk. *Id.*; CP 131.

After the public display in the waiting area, Ms. Crosswhite took Jodi out to the parking lot, where she continued to yell at Jodi, who was "crying her eyes out." CP 126. Debra Madill, the clinic's receptionist, saw Ms. Crosswhite continue to yell at Jodi through the windows that cover the front of the clinic. *Id.* She was so concerned that she asked other clinic staff to check on Jodi. *Id.* When Ms. Gonzalez and another co-worker checked on Jodi several minutes later, Jodi was still crying. CP 120.

Jodi was "emotionally destroyed" by Ms. Crosswhite's rant. CP 69. According to Jodi, if Ms. Crosswhite had issues with her, she should have sat down with her and her case manager to privately discuss them rather than "publicly humiliate her." *Id.*

If Ms. Crosswhite's intent was to inform Jodi's medical care providers about her "concerns," she knew how to do so privately and discretely. Indeed, on two prior occasions, she spoke with Ms. Gonzalez about Jodi. The first time, Ms. Crosswhite spoke to Ms. Gonzalez about Jodi's medications when Jodi was getting lab work done. CP 121. The second time, Ms. Crosswhite actually came to the clinic by herself to talk to Ms. Gonzalez about Jodi. CP 121-123. Ms. Crosswhite's prior actions at the clinic contrast dramatically with her deliberate denigration of Jodi on August 1, 2013.

Subsequent to the August 1, 2013 incident, Jodi attempted to see if she could nevertheless work with Ms. Crosswhite. However, Ms. Crosswhite continued to intrude upon Jodi's privacy. On August 2, 2013, Jodi learned that Ms. Crosswhite called Memorial Hospital's pain clinic without Jodi's knowledge and reported that Jodi slept too much, she was not eating right, and was taking too many narcotics. CP 69. A few days later on August 5, 2013, Ms. Crosswhite asked Jodi how she slept and Jodi said she was restless. *Id.* Ms. Crosswhite was not satisfied with Jodi's answer and began questioning Jodi's husband about Jodi's night. *Id.* At that point, with Ms. Crosswhite's continuing intrusion into Jodi's privacy, Jodi terminated Ms. Crosswhite as her caregiver. *Id.*

Rebecca Withrow is an APS investigator who was assigned to investigate the August 1, 2013 incident involving Ms. Crosswhite and Jodi. CP 99. Ms. Withrow interviewed Jodi, Susi Munoz, Ms. Crosswhite, and several staff members at Apple Valley Family Medicine. When Ms. Withrow interviewed Jodi, her account of what happened was similar to the clinic staff. Jodi told Ms. Withrow that she did not want Ms. Crosswhite to do this to anyone else. CP 69.

B. Procedural Facts

Based on Ms. Withrow's investigation, APS sent notice to Ms. Crosswhite of its finding that she mentally abused a vulnerable adult as defined in former RCW 74.34.020. CP 60-62. Ms. Crosswhite timely requested an administrative hearing, which was held before Administrative Law Judge (ALJ) Stephen Leavell. ALJ Leavell issued an Order on February 20, 2014, in which he reversed the Department's substantiated finding of mental abuse.

The Department filed a Petition for Review to the Board, in which the Board reversed the ALJ and upheld the substantiation of mental abuse. CP 4-14, 25-34.

Ms. Crosswhite requested judicial review and Yakima County Superior Court Judge Gayle Harthcock affirmed the findings of mental

abuse against Ms. Crosswhite. CP 223-37. The Superior Court made one amendment to the Final Order, reversing the Board's finding that Ms. Crosswhite yelled at Jodi in the parking lot for 30 to 45 minutes. *Id.*

IV. ARGUMENT

In this matter, the Department is due deference from this Court, both as to its findings of fact and in its interpretation of law. The Department validly exercised its discretion in enacting and following WAC 388-71-0105. The rule is consistent with the intent and terms of chapter 74.34 RCW. The Department properly applied WAC 388-71-0105 and former RCW 74.34.020(2)(c) to Ms. Crosswhite's case, finding that she mentally abused Jodi because she yelled at her in a crowded doctor's office even after Jodi asked her to stop. The Department's order was also supported by substantial evidence—eye witness testimony at hearing on this matter established most of the facts that the Board based its findings on. Finally, Ms. Crosswhite is not entitled to attorney's fees. She should not prevail in her appeal and, in the event that she does prevail, the Department's finding against her was substantially justified.

A. Standard of Review

This is a petition for judicial review of a final agency order under RCW 34.05.570(3). The Court reviews only the final agency action, here

the Final Order issued by the Board on July 20, 2014. CP 4-14. There are limited grounds upon which an appellant can challenge a final agency order. RCW 34.05.570(3). Here, Ms. Crosswhite is challenging the Final Order on the grounds that the Department exceeded its statutory authority, erroneously interpreted the law and that a lack of substantial evidence supports the Board's findings. Petitioner's Opening Brief ("Opening Brief") at 2. It is the Petitioner's burden to prove these grounds. RCW 34.05.570(3). The Court can affirm the agency action on any theory adequately supported by the administrative record. *Heidgerken v. Dep't of Nat. Res.*, 99 Wn. App. 380, 388, 993 P.2d 934 (2000).

1. Ms. Crosswhite Has The Burden To Prove That The Department's Rule Conflicts With Legislative Intent

Ms. Crosswhite's allegation that the Department exceeded its statutory authority rests on the argument that one of its rules, the definition of "willful" in WAC 388-71-0105, conflicts with former RCW 74.34.020. As the appellant, Ms. Crosswhite has the burden to prove the rule is invalid. RCW 34.05.570(1)(a); *Ass'n of Wash. Bus. v. Dep't of Revenue*, 155 Wn.2d 430, 437, 120 P.3d 46 (2005). A court may declare an agency rule invalid if it: "(1) violates constitutional provisions; (2) exceeds statutory authority of the agency; (3) was adopted without compliance to statutory rule-making procedures; or (4) is arbitrary and capricious."

Wash. Pub. Ports Ass'n v. Dep't of Revenue, 148 Wn.2d 637, 645, 62 P.3d 462 (2003). Where an interpretive rule is challenged, as here, the inquiry is not into the validity of the rule but its "correctness or propriety"—i.e., whether it conflicts with the legislative intent underlying the statute it interprets. *Id.* at 466; *Hegwine v. Longview Fiber Co., Inc.*, 162 Wn.2d 340, 349, 172 P.3d 688 (2007).

2. This Court Should Give Discretion To The Department's Interpretation of RCW 74.34.020

Questions of law are reviewed *de novo*, except that agency interpretations of law are given deference where the agency has expertise. *City of Redmond v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998). "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." *Overton v. Econ. Assistance Auth.*, 96 Wn.2d 552, 555, 637 P.2d 652 (1981). In this matter, the Department is due deference from the Court. The legislature has given the Department primary responsibility for protecting vulnerable adults. *See* Chapter 74.34 RCW. The Department has quasi-judicial functions in this capacity. *See* Chapter 388-71 WAC.

The Department is the expert on vulnerable adults, and how to protect them, and in that regard, should be given substantial deference in its interpretation of the law. *See Goldsmith v. Dep't of Soc. and Health Servs.*, 169 Wn. App. 573, 584, 280 P.3d 1173 (2012).

3. The Department Is Due Great Deference In Its Determinations Of Fact

The substantial evidence standard is "highly deferential to the agency fact finder." *Beatty v. Wash. Fish and Wildlife Comm'n*, 185 Wn. App. 426, 449, 341 P.3d 291 (2015). On judicial review, the Court does not substitute its judgment for the agency as to the credibility of witnesses or the relative weight of conflicting evidence. *Id.* Rather, the court only grants relief if the agency's decision "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).

B. The Abuse of Vulnerable Adults Act Is A Remedial Statute And Should Be Interpreted Liberally To Effect The Intent Of The Legislature

Chapter 74.34 RCW is intended to protect vulnerable adults, sometimes against abuse and exploitation by people very closely related to them. Because it is a remedial statute, it should be liberally construed to ensure that the intent of the legislature is accomplished.

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The Washington legislature has determined that vulnerable adults "may be subjected to abuse, neglect, financial exploitation or abandonment by a family member, care provider, or other person who has a relationship with the vulnerable adult." RCW 74.34.005(1). The Department of Social and Health Services (Department) is required under the Abuse of Vulnerable Adults Act, chapter 74.34 RCW, to investigate such allegations to protect vulnerable adults. *Id.* In order to fulfill the government's "sacred duty" of protecting vulnerable people, the Department must prioritize the interests of vulnerable adults above those of even well-meaning caregivers. *Bond v. Dep't of Soc. & Health Servs.*, 111 Wn. App. 566, 575, 45 P.3d 1087 (2002).

"Vulnerable adult" is defined in former RCW 74.34.020(17). It is not contested that Jodi was a vulnerable adult at all times relevant here because she was receiving in-home care from an agency licensed to do so.

The legislature has mandated that people with findings of abuse of a vulnerable adult have limited opportunities to work with this population.

> No provider, or its staff, or long-term care worker, or prospective provider or long-term care worker, with a stipulated finding of fact, conclusion of law, an agreed order, or finding of fact, conclusion of law, or final order issued by a disciplining authority or a court of law or entered into a state registry with a final substantiated finding of abuse, neglect, exploitation, or abandonment of a minor or a vulnerable adult as defined in chapter 74.34

> RCW shall be employed in the care of and have unsupervised access to vulnerable adults.

RCW 74.39A.056(2).

Chapter 74.34 RCW is a remedial statute, meant to give special protections to a vulnerable population that cannot protect itself. *See* RCW 74.34.005. The chapter is replete with evidence of this legislative intent. *See, e.g.*, RCW 74.34.035 (caregivers and others are mandatory reporters of suspected abuse); *see also* RCW 74.34.180 (whistleblowers protected from retaliation for good faith reports of abuse); *see also* RCW 74.34.200 (vulnerable adults have cause of action to collect damages for abuse). Chapter 74.34 RCW should be construed liberally to give effect to the stated legislative intent. *See Naches Valley Sch. Dist. No. JT3 v. Cruzen*, 54 Wn. App. 388, 399, 775 P.2d 960 (1989) (remedial statutes to be construed liberally to give effect to the intent of the legislature).

C. WAC 388-71-0105 Is A Lawful Exercise Of The Department's Legislative Authority Under The Plain Meaning Of The Statute, The Case Law Of Abuse Of Vulnerable Adults And Analogous Law On The Word "Willful"

The Department found that Ms. Crosswhite mentally abused Jodi because her words were not accidents and she had every reason to know that by berating Jodi in a crowded doctor's office Jodi would be

humiliated, particularly where Ms. Crosswhite refused to stop despite repeated and tearful requests by Jodi. Ms. Crosswhite erroneously contends that in order to meet the definition of "mental abuse" she must have specifically intended to harm Jodi and, she argues, because she was ultimately concerned for Jodi's health, the ends justified the means.

Former RCW 74.34.020 defines "abuse" and "mental abuse" as:

> "Abuse" means the willful action or inaction that inflicts injury, unreasonable confinement, intimidation, or punishment on a vulnerable adult. In instances of abuse of a vulnerable adult who is unable to express or demonstrate physical harm, pain, or mental anguish, the abuse is presumed to cause physical harm, pain, or mental anguish. Abuse includes . . . mental abuse . . . which [has] the following meaning:[]
> . . .
> "Mental abuse" means any willful action or inaction of mental or verbal abuse. Mental abuse 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.

The Department has exercised its legislative authority to define "willful" as "the nonaccidental action or inaction by an alleged perpetrator that he/she knew or reasonably should have known could cause harm, injury or a negative outcome." WAC 388-71-0105; *see* RCW 74.08.090 (The Department has specific statutory authority to make rules and regulations "not inconsistent with the provisions of [Title 74 RCW]").

This was the definition used to find that Ms. Crosswhite mentally abused Jodi. CP at 13. This definition is a legitimate exercise of the Department's legislatively granted authority and is consistent with the intent of chapter 74.34 RCW.

1. "Willful" As Used In Former RCW 74.34.020(2) Requires That The Action Which Inflicts Injury Be Nonaccidental, But Does Not Require Specific Intent To Injure

Former RCW 74.34.020 defines abuse as "the willful action or inaction *that* inflicts injury" it does not require "the willful action *to inflict* injury." *See* Former RCW 74.34.020 (emphasis added). The plain language here says that the action must be willful, but the consequence of that action—namely the infliction of injury—need not be. This is exactly what WAC 388-71-0105 requires by defining "willful" as a "nonaccidental action."

WAC 388-71-0105 is also consistent with the ordinary dictionary definition of the word "willful." Dictionary definitions of "willful" include "done deliberately: not accidental or without purpose." *E.g.,* Webster's Third New International Dictionary 2617 (Merriam-Webster 2002).

The statutory scheme would fall into disarray if specific intent to cause harm were required for abuse. For instance, sexual abuse includes

sexual contact between a vulnerable adult and a caregiver even if that sexual contact is consensual. Former RCW 74.34.020(2)(a). If willfulness requires a specific intent to injure, then caregivers who sexually exploit vulnerable adults have a defense whenever they believe the sex was desired by both parties. As another example, physical abuse requires a "willful action of inflicting bodily injury" and includes "slapping." Former RCW 74.34.020(2)(b). If Ms. Crosswhite's interpretation of willfulness is correct, then a caregiver could slap a vulnerable as a kind of aversive therapy (to get the vulnerable adult to stop smoking for instance) so long as the caregiver believed that, ultimately, it was in the vulnerable adult's best interest.

Case law also establishes that motivation is irrelevant in a case of mental abuse under Chapter 74.34 RCW. *Goldsmith*, 169 Wn. App.at 586. In *Goldsmith*, a son had repeated and contentious verbal arguments with his father about his father's estate, and the court upheld a Department finding of mental abuse. *Id.* at 578, 587. The court held that the son "knew or should have known" that these fights caused his father "considerable stress." *Id.* at 585. In response to the son's defense that the son was his father's financial advisor and only intended to protect his father's estate, the court found that the son's status as financial advisor

was "irrelevant." *Id.* at 586 (citing *Brown v. Dep't of Social and HealthSrvcs.*, 145 Wn. App. 177, 183, 185 P.3d 1210 (2008)). "Regardless of his motives, Goldsmith's conduct was improper, and the Board did not err in concluding it constituted mental abuse." *Id.*

The *Brown* case, which held that a caregiver did not commit physical abuse when she prevented a vulnerable adult's violent attack, did not hold that specific intent to cause harm is necessary for a finding of abuse. First, *Goldsmith* actually cited *Brown* in holding that specific intent was not required for a finding of mental abuse. *Goldsmith*, 169 Wn. App. at 586. Second the *Brown* court was primarily concerned with what behavior would constitute physical abuse in situations with exigent circumstances. *See Brown* 145 Wn. App. at 181. That is, in *Brown* the court found that the conduct was not "improper" because the caregiver "intervened in the presence of danger," and her protective actions were proportional to that danger. *Brown*, 145 Wn. App. at 183. The court explained that even in the context of such an intervention, conduct can be improper—i.e., would constitute abuse—if it was "injurious or ill-intended." *See id. Brown* did not hold that specific intent to cause harm is necessary for a finding of abuse of a vulnerable adult. Instead, during its analysis the *Brown* court paraphrased the language of

the statute, writing, "Both the definition of 'abuse' and 'physical abuse' require a willful action to inflict injury." *Id.* However, the statute actually reads, "'[a]buse' means the willful action or inaction *that* inflicts injury . . ." and "'[p]hysical abuse' means the willful action *of* inflicting bodily injury or physical mistreatment." Former RCW 74.34.020(2) (emphasis added). The *Brown* court's paraphrase of the statutory language was not necessary to its holding. *Brown* cannot be reasonably read to conflict with the subsequent *Goldsmith* holding that a specific intent to injure is not required by the definition of abuse.

Defining "willful" as "nonaccidental" is also consistent with long-standing Washington case law construing the word "willful" in other contexts. In *State v. Oyen*, 78 Wn.2d 909, 917, 480 P.2d 766 (1971), the Washington State Supreme Court interpreted the word "willful" to mean "an act committed intentionally, deliberately and/or designedly as distinguished from one done accidently, inadvertently, innocently and/or with lawful excuse" within the context of an anti-loitering statute. In the context of interpreting an insurance policy, the court in *Hall v. State Farm Fire & Cas. Co.*, 109 Wn. App. 614, 36 P.3d 582 (2001), interpreted the word "willful" to "apply to some unintended and accidental injuries." The

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Washington State Supreme Court also interpreted the word "wilful"[4] in the context of a penal prohibition on the failure to provide child support, holding that the word meant "knowing conduct and lack of excuse." *State v. Bauer*, 92 Wn.2d 162, 168, 595 P.2d 544 (1979).

The plain meaning of the statute, dictionary definitions, case law interpreting former RCW 74.34.020(2) and case law in other areas construing the word "willful" all point to the conclusion that "willful" means "nonaccidental action." The Department's rule implementing this definition does not exceed its legislative authority.

2. Willful Conduct Includes Conduct That A Reasonable Person Would Know Could Cause Injury

Chapter 74.34 RCW forbids conduct that a reasonable person would know could cause harm to a vulnerable adult. Former RCW 74.34.020(2) forbids conduct that causes "injury, unreasonable confinement, intimidation or punishment on a vulnerable adult." In cases where a vulnerable adult is unable to express these negative outcomes, the statute *presumes* them. Former RCW 74.34.020(2). The statute forbids conduct that could cause injury to a vulnerable adult even in the absence of any objective signs of such injury. The only way to accomplish that

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[4] Presumably, this spelling is an anachronism.

legislative intent is to forbid conduct that a reasonable person would know could cause injury. WAC 388-71-0105 does exactly that.

The *Goldsmith* court already held that WAC 388-71-0105's "know or should have known" component is in accord with former RCW 74.34.020(2). The court there held that a non-accidental action which the alleged abuser "knew or should have known" would cause a vulnerable adult mental injury satisfied the definition of mental abuse in former RCW 74.34.020(2)(c). *Goldsmith*, 169 Wn. App. at 585.

Criminal law also holds a defendant charged with willful conduct to the standard of a reasonable person in the defendant's situation. RCW 9A.08.010 defines "willfulness" as "knowingly." "Knowledge" in RCW 9A.08.010 requires that the defendant be "aware of a fact, facts, or circumstances or result described by a statute defining an offense" or "he or she has information which would lead a reasonable person in the same situation to believe the facts exist which facts are described by a statute defining an offense." WAC 388-71-0105 requires that an alleged perpetrator know or "reasonably should have known" that his or her conduct could cause harm. This standard is very similar to the criminal standard, is a reasonable application of the statutory term "willful" and is perfectly consistent with the statute's terms and intent.

The Department has not exceeded its legislative authority by defining "willful" as an action that a reasonable person knew or should have known could cause injury.

3. Former RCW 74.34.020 Was Drafted To Capture As Much Abusive Conduct As Possible And WAC 388-71-0105's Reference To A "Negative Outcome" Is Consistent With That Intent

WAC 388-71-0105 is drafted to implement the legislative intent that the definition of "abuse" be as broad as possible to capture all conceivably abusive conduct. The statute is essentially a list of bad things used as examples to illustrate what abuse is. The definition of "willful" as conduct that a person knows or should know could cause a "negative outcome" is consistent with the law.

For example, "abuse" requires the infliction of "injury, unreasonable confinement, intimidation, or punishment." But if a vulnerable adult is unable to express "physical harm, pain, or mental anguish" then "physical harm, pain, or mental anguish" is presumed. Former RCW 74.34.020(2). The only reasonable reading of these two passages is that willful conduct which causes "physical harm, pain, or mental anguish" is abuse, even though these are not the same words as "injury, unreasonable confinement, intimidation or punishment."

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The statute regarding mental abuse especially evidences intent to broadly define abuse. "Mental abuse includes *but is not limited to*" a whole host of bad things a caregiver might do to a vulnerable adult. *Id.* (emphasis added). This same structure appears in the definitions of "physical abuse" and "sexual abuse." *Id.* The Department's choice to encapsulate those bad things in the phrase "negative outcome" is consistent with the legislative intent to avoid narrowly defining abuse.

Ms. Crosswhite cites the *Goldsmith* opinion for the assertion that the Department's inclusion of the phrase "negative outcome" in the definition of willful goes beyond the statute. Opening Brief at 18. The *Goldsmith* court, however, did not hold that by including the phrase "negative outcome" WAC 388-71-0105 was overbroad; its footnote on the subject is *dicta*. *See Goldsmith*, 169 Wn. App. at 585 n.1. Because the court held that the son in that case knew or should have known that he could cause his father "considerable stress," and such conduct was "willful" under the statute, the court did not address whether "negative outcome" was overly broad. *Id.* The court's holding, however, that "repeated yelling matches with a 98-year-old in declining health . . . could cause harm or injury" actually illustrates the need for a flexible test like that of "negative outcome." *See id.* Vulnerable adults have special

protections from the legislature because they are fragile in body or in mind. *See* RCW 74.34.005. It might not be clear when a shouting match begins with a 98-year-old what the consequences are going to be. But when someone is living what may be the last days of his or her life "considerable stress" can be dangerous. The Department's rule takes these realities into account and prohibits conduct that a person knows or reasonably should know could cause a negative outcome. The Department's rule does not exceed its legislative authority.

D. Because Ms. Crosswhite Yelled At And Humiliated Jodi In A Public Doctor's Office, Even After Jodi Asked Her To Stop, The Department Correctly Applied The Law In Finding That Ms. Crosswhite Mentally Abused Jodi

As discussed above, the Department's Board of Appeals properly applied the law, which requires a nonaccidental action that Ms. Crosswhite knew or should have known would cause Jodi a mental injury. Even if, however, the Department is wrong and mental abuse requires specific intent to injure, the Department's finding of mental abuse should still be upheld.

1. Ms. Crosswhite Willfully Mentally Abused Jodi Because She Knew Or Should Have Known That Her Conduct Caused Jodi Mental Distress

Ms. Crosswhite berated Jodi in a crowded doctor's office. CP at 126. Jodi asked Ms. Crosswhite to stop. CP at 119. Ms. Crosswhite said

that she did not care and that she would persist in lecturing Jodi because what she had to say needed to be said. CP at 72, 74. This continued until staff employed by Jodi's doctor told Ms. Crosswhite to stop. CP at 119. Ms. Crosswhite then continued to yell at Jodi in the parking lot of the doctor's office. CP at 126. Under the established case law of mental abuse of vulnerable adults, Ms. Crosswhite mentally abused Jodi.

When caregivers deliberately use hard tones and mean words, causing vulnerable adults to become emotionally upset, courts uphold Department findings of mental abuse. In *Kraft v. Dept. of Social and HealthSrvcs.*, 145 Wn. App. 708, 717-18, 187 P.3d 798 (2008), the court affirmed a Department finding where a caregiver told a vulnerable adult a number of mean things and entered into an agreement with the vulnerable adult that she could only get up once per night to use the bathroom. The court in *Kraft* did not discuss the issue of intent for a finding of mental abuse of a vulnerable adult, but the court did list the findings of fact that "amply support a finding." *Id.* Nowhere in that list is a finding of fact that the caregiver intended to cause harm. *Id.* Similarly, as already discussed, the *Goldsmith* court upheld a finding of mental abuse where the stated defense was that there was no intent to cause injury. *Goldsmith*, 169 Wn. App. at 586. The son in *Goldsmith* argued that he was trying to

help his father by keeping him from financial ruin. *Id.* "The subject or subjects being addressed during the verbal assault do not provide a defense to the proscribed behavior." *Id.* (quoting the Board's decision) (internal quotation marks omitted).

Here, Ms. Crosswhite had actual notice from Jodi that by yelling at her in a crowded doctor's office, Ms. Crosswhite was humiliating her. CP at 119. Jodi was crying and hanging her head. CP at 69 Ms. Crosswhite even had notice from Ms. Gonzalez that her actions were "inappropriate and disrespectful." CP at 119. Ms. Crosswhite persisted in berating Jodi, insisting that what she had to say needed to be said. CP at 72, 74. Her conduct easily meets the element of willful in RCW 74.34.020. It is on all-fours with *Kraft* and *Goldsmith* and the Department's finding of mental abuse should be upheld.

2. Ms. Crosswhite Intentionally Inflicted Mental Anguish On Jodi In An Effort To Change Jodi's Behavior

Even if the Department is wrong, and "willful" does require specific intent to cause injury, Ms. Crosswhite's conduct meets that standard here. The evidence shows that Ms. Crosswhite was concerned that Jodi was not telling Jodi's doctor everything the doctor needed to know for Jodi to get adequate medical care. *E.g.*, CP at 12, 70. So, on August 1, 2013, Ms. Crosswhite decided to pursue a campaign of public

verbal abuse to shame Jodi into an alternate course of action. CP at 68-70. She did not desist when Jodi began to cry. CP at 119. She did not desist when Jodi asked her to stop. *Id.* She did not desist even when Ms. Gonzalez told her to stop. CP at 126. The logical conclusion to be drawn is that Ms. Crosswhite wanted to cause Jodi sufficient mental anguish so that Jodi would do what Ms. Crosswhite wanted her to do. This Court applies the law to the facts as found by the Board *de novo* and can uphold the Department's action on any ground adequately supported by the record. *City of Redmond*, 136 Wn.2d at 46; *Heidgerken*, 99 Wn. App. at 388. Even if this Court finds that mental abuse requires specific intent to injure, Ms. Crosswhite mentally abused Jodi.

E. The Board's Order Is Supported By Substantial Evidence Because It Is Based On Eye-Witness Testimony

The substantial evidence standard is highly deferential to the agency factfinder. *Beatty*, 185 Wn. App. at 449. The Court on judicial review does not reweigh the evidence or examine its credibility. *Id.* Each finding of fact challenged by Ms. Crosswhite is supported by eye-witness testimony and should not be upset on judicial review.

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1. Eye-Witness Testimony Establishes That Ms. Crosswhite's Conduct Was Willful.

Ms. Crosswhite's conduct was willful because she did not stop despite knowing that she was causing Jodi mental distress. Jodi told her to stop and she did not. Ms. Gonzalez told her to stop and she did not. Persisting anyway meant her conduct was willful.

Ms. Crosswhite continued yelling at Jodi despite its obvious effect on Jodi and the fact that Jodi and others asked her to stop. Ms. Gonzalez testified at hearing that when Ms. Crosswhite began yelling at her "Jodi started crying." CP at 119. Ms. Gonzalez testified that Jodi asked Ms. Crosswhite to stop yelling at her. *Id.* Ms. Gonzalez asked Ms. Crosswhite to leave and told her that her conduct was not appropriate. *Id.*. Ms. Madill, the receptionist at the doctor's office, testified that she could see Ms. Crosswhite yelling at Jodi in the parking lot through a window. CP at 126. Ms. Madill acknowledged that she could not hear what they were saying, but testified specifically that she could tell that Ms. Crosswhite was yelling at Jodi. CP at 127-28. When Ms. Gonzalez went to check on Jodi in the parking lot, Ms. Gonzalez testified at hearing that Jodi was still crying. CP at 120.

Ms. Crosswhite incorrectly argues that the Board's finding of fact regarding a previous "altercation" is not supported by substantial

evidence. Opening Brief at 25. Ms. Crosswhite bases her argument on the fact that there is no evidence that Ms. Crosswhite was ever made aware that her conduct at the previous appointment upset Jodi. *See id.* at 26. But the Board never made any such finding. The Board's findings of fact regarding the altercation simply states that Jodi was uncomfortable and that Jodi came up with a plan with her case manager to work through the issue:

> At a [doctor visit previous to August 1, 2013], Jodi had allowed the Appellant to accompany her to the examination room. She felt that the Appellant kept asking the doctor questions and would not let Jodi speak. There was an altercation between the two and they were going to try to work through it. The cure that Jodi and her case manager decided to try was that Jodi would not take the Appellant with her to the examination room the next time she saw the doctor.

CP at 5. Susi Munoz, Jodi's case manager, testified to this occurrence at hearing. CP at 131. Ms. Munoz testified that Jodi became upset because Ms. Crosswhite was "asking the doctor questions" and "not allowing her to speak." *Id.* Ms. Munoz suggested that Jodi have Ms. Crosswhite take her to the doctor's office "but don't have her go in." *Id.* The testimony of Ms. Munoz adequately supports the Board's findings by substantial evidence.

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But regardless of whether the Board was correct that the evidence established an "altercation," Ms. Crosswhite is wrong when she argues that she must have been aware that she upset Jodi previously for her conduct to be willful. *See* Opening Brief at 26. Maybe asking Jodi in a loud, rude voice what Jodi told her doctor right after Jodi came out of the doctor's office would not have been willful. But when Jodi started crying and asked Ms. Crosswhite to stop, Ms. Crosswhite should have stopped. At that point she was on notice that she was hurting Jodi. Ms. Crosswhite especially should have stopped when an uninterested third party told her that her conduct was inappropriate. But still she persisted and continued to yell at Jodi in the parking lot.

Ms. Crosswhite attempts to justify her conduct on the basis that it was done out of concern for Jodi's health. *See* Opening Brief at 1. Such an argument infantilizes Jodi and negates her autonomy as an adult in charge of herself and her decisions. Besides, "[t]he subject or subjects being addressed during the verbal assault do not provide a defense to the proscribed behavior." *Goldsmith*, 169 Wn. App. at 586 (quoting the Board) (internal quotation marks omitted). There is substantial evidence that Ms. Crosswhite's conduct was willful mental abuse.

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2. Eye-Witness Testimony Establishes That Ms. Crosswhite Yelled At Jodi In the Parking Lot

The Board depended on the eye-witness testimony of Debra Madill in finding that Ms. Crosswhite continued to yell at Jodi in the parking lot. Ms. Crosswhite's arguments that the Board was incorrect in how it weighted conflicting evidence on this point does not establish that there is no substantial evidence for the Board's finding of fact.

Ms. Madill testified that she could see Ms. Crosswhite yelling at Jodi and that Jodi continued to cry in the parking lot. CP at 126. She testified that she could not tell what was being said, but that because "it's all windows in front of our building" she could tell that Ms. Crosswhite was yelling at Jodi. CP at 127-28. Ms. Madill did not contradict herself on cross-examination. *Id.*

Second, contrary to Ms. Crosswhite's assertions, Ms. Madill's testimony is not inconsistent with other evidence in the record. Ms. Gonzalez did not testify that Ms. Crosswhite yelled at Jodi in the parking lot. CP at 120. Ms. Gonzalez had no vantage point to determine what Ms. Crosswhite and Jodi were doing in the parking lot, but she thought they were in the parking lot for fifteen to thirty minutes. *Id.* Near the end of that period, when asked by Ms. Madill to check on Jodi, she went out. CP at 120, 126. Ms. Crosswhite may not have been yelling at

Jodi for the entire duration of when they were in the parking lot, but that does not contradict Ms. Madill's sworn testimony as to what she saw. And, the uncontested fact that Jodi continued to cry outside of the doctor's office, is consistent with a finding that Ms. Crosswhite continued to yell at her.[5]

Regardless, even if Ms. Crosswhite did not yell at Jodi in the parking lot, the uncontradicted evidence is that Ms. Crosswhite did continue to yelling at Jodi in the doctor's office even after Jodi started crying and asked her to stop. That is sufficient notice such that Ms. Crosswhite should have stopped.

3. Ms. Crosswhite Did Verbally Assault Jodi, But Even If She Did Not, Verbal Assault Is Not The Only Kind Of Mental Abuse

Ms. Crosswhite's argument that there is no substantial evidence that she verbally assaulted Jodi is restatement of her argument that a finding of mental abuse requires specific intent to cause harm. The argument is recast in construction of the term "verbal assault" in former RCW 74.34.020(2)(c).

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[5] The Department concedes that there is no substantial evidence that Ms. Crosswhite yelled at Jodi for the entire 30 to 45 minutes that they were in the parking lot together. In fact, the Yakima County Superior Court struck this finding, and the Department did not appeal the court's ruling. *See* CP at 225.

First, Ms. Crosswhite is incorrect that "verbal assault" as used in former RCW 74.34.020(2) has the same meaning as "assault" as used in criminal or tort contexts. The ordinary meaning of "assault" includes "to attack violently by nonphysical means (as words, arguments, or unfriendly measures)." Webster's Third New International Dictionary 130 (Merriam-Webster 2002). And, as discussed above, former RCW 74.34.020(2) evidences legislative intent to capture all abusive conduct—not only that conduct that amounts to a crime or a tort. Chapter 74.34 RCW includes a right of action for victims of mental abuse of a vulnerable adult. RCW 74.34.200. Such a provision would not be necessary if every instance of mental abuse was also the tort of assault. The statute itself defines "[m]ental abuse" as inclusive of "verbal assault that includes ridiculing, intimidating *yelling*, or swearing." Former RCW 74.34.020(2)(c) (emphasis added). By yelling at Jodi in a crowded doctor's office lobby, Ms. Crosswhite verbally assaulted Jodi within the meaning of the statute.

Second, Ms. Crosswhite is incorrect that criminal assault requires specific intent to cause harm. *See State v. Jarvis*, 160 Wn. App. 111, 119, 246 P.3d 1280 (2011). In a case involving assault on a mentally disabled student, the court in *Jarvis* held that "the intent required for assault is

merely the intent to make physical contact with the victim, not the intent that the contact be a malicious or criminal act." *Jarvis*, 160 Wn. App. at 119 (citing *State v. Hall*, 104 Wn. App. 56, 14 P.3d 884 (2000)). In so doing, the court rejected the defendant's argument that assault "requires some element of malice or ill will." *Id.* Here, and as discussed above, the only intent required for verbal assault as it is meant in former RCW 74.34.020(2)(c) is the intent to act while knowing, or when the actor reasonably should have known, that the conduct would cause a vulnerable adult mental pain. The record more than adequately meets this standard.

Ms. Crosswhite continued to yell at Jodi, even after making her cry and even after Jodi asked her to stop. That is mental abuse under former RCW 74.34.020(2)(c).

4. Jodi Suffered Substantial Injury On Par With Other Upheld Cases Of Mental Abuse.

This Court should reject Ms. Crosswhite's claim that there is no evidence that Jodi suffered any injury. Jodi was "emotionally destroyed." CP at 69. She was yelled at and humiliated in a crowded doctor's office. CP at 119. She broke down and cried for some number of minutes. CP at 119-20. She had difficulty speaking with her case manager after the incident because she was crying too much. CP at 131. This is sufficient injury under *Kraft* and *Goldsmith* to sustain a finding of mental abuse.

First, Ms. Crosswhite is incorrect that the review judge only found that Jodi suffered a "negative outcome" and not an "injury." *See* Opening Brief at 33. The review decision and final order specifically included "injury" in the elements of mental abuse. CP at 12. The Review Decision and Final Order found several different varieties of emotional injury stemming from Ms. Crosswhite's conduct, "[Ms. Crosswhite's] actions hurt and upset Jodi. As a result of [Ms. Crosswhite] yelling at her, Jodi cried, felt embarrassed, and felt emotionally destroyed. She cried throughout the following weekend." CP at 13. The review judge referenced these findings specifically in finding that Ms. Crosswhite caused Jodi an "injury." *Id.* Moreover, these findings are supported by Jodi's own statements and the testimony of witnesses to the event. *See, e.g.*, CP at 69, 45.

Second, Ms. Crosswhite is incorrect that the Review Decision and Final Order's Finding of Fact 10 is not supported by substantial evidence. *See* Opening Brief at 33. The challenged finding of fact is that "[Ms. Crosswhite] was fired due to the incident." CP at 7. Jodi called her case manager the day the mental abuse took place in order to terminate Ms. Crosswhite, but ultimately decided to think about it over the weekend. CP at 69, 102. On August 5, 2013, four days after the incident, Jodi fired

Ms. Crosswhite when Ms. Crosswhite continued to intrude on Jodi's privacy. CP at 69. The Review Decision and Final Order's finding that Ms. Crosswhite was fired "due to" the incident, is supported by substantial evidence because it is clear from the record that the incident at the doctor's office was a major contributing factor to Jodi's decision.

Most importantly, the injuries that Jodi suffered are strikingly similar to injuries in other cases of mental abuse upheld by the courts. In *Goldsmith* the vulnerable adult at issue was "visibly shaken", was caused "significant stress," and he would cry and become noncompliant with his caregivers' instructions. *Goldsmith*, 169 Wn. App. at 577-78, 585. The vulnerable adult himself said he had no problems with his son. *Id.* at 577. This evidence of injury was sufficient to uphold a Department finding of mental abuse. *Id.* at 587. Similarly, in *Kraft*, the vulnerable adult's caregivers testified that she was "visibly hurt" and she would become "extremely behavioral." *Kraft*, 145 Wn. App. at 712 (internal quotation marks omitted). When the vulnerable adult talked about the incidents after the fact she cried. *Id.* at 713. Again, this evidence of injury was sufficient to uphold a Department finding of mental abuse.

Here, it is uncontested that Ms. Crosswhite's verbal assault made Jodi cry. Jodi's statement after the fact was that she was "emotionally

destroyed." CP at 69. As stated above, this case is on all fours with *Kraft* and *Goldsmith* and the Department's finding should be upheld.

F. Ms. Crosswhite Is Not Entitled To Attorney's Fees And Costs

In order for this Court to award Ms. Crosswhite attorney's fees and costs associated with bringing this appeal pursuant to RCW 4.84.350, the Equal Access to Justice Act (EAJA), this Court must find:

1. Ms. Crosswhite is a qualified party;
2. Ms. Crosswhite prevailed on her appeal; and
3. DSHS was not substantially justified in its actions.

For the reasons given in this brief, Ms. Crosswhite should not prevail on her appeal. In any event, the Department had a reasonable basis in both law and fact to find Ms. Crosswhite mentally abused Jodi, in violation of former RCW 74.34.020(2)(c). The agency properly adopted a rule interpreting a statute it enforces and implements. The Review Judge relied on that rule, as well as the statute and relevant case law in affirming the mental abuse finding. Substantial evidence supported the conclusion that Ms. Crosswhite's actions on August 1, 2013, constituted mental abuse. Because the Department's decision had a reasonable basis in fact and law, sufficient to satisfy a reasonable person, the agency was substantially justified in its actions. *Silverstreak, Inc. v. Dep't of Labor &*

Indus., 159 Wn.2d 868, 892, 154 P.3d 891 (2007); *H&H P'ship v. State*, 115 Wn. App. 164, 171, 62 P.3d 510 (2003).

This case is very similar to the *Silverstreak* case, in which the Washington State Supreme Court did not award fees under the EAJA. *Silverstreak*, 159 Wn.2d at 892. The action there involved a finding against a construction company that it violated the prevailing wage rules. *Id.* at 877. While the Court upheld the agency's interpretation of its rule, it also held that the agency was equitably estopped from enforcing the rule in that particular case. *Id.* at 891. There the court held that four factors established that the agency was nonetheless substantially justified: 1) the agency received a complaint that it 2) had a statutory duty to investigate where 3) it had a duty to liberally construe the statute in favor of workers and 4) the agency relied heavily on favorable Washington case law. Here, all these same factors go to show that the Department's action was substantially justified. First, APS only investigated Ms. Crosswhite once it received a complaint. CP at 99. Second, APS has a statutory duty to investigate such complaints. RCW 74.34.063. Third, the Department has a duty to put the interests of vulnerable adults above the interests of care givers in order to protect vulnerable adults. *Bond*, 111 Wn. App. at 575. Fourth, the Department has relied on favorable Washington case law in

finding that Ms. Crosswhite's actions constitute mental abuse of a vulnerable adult. *See Goldsmith*, 169 Wn. App. at 577-78, 585; *see also Kraft*, 145 Wn. App. at 712; CP at 30 (The Department cited to the *Goldsmith* case in its petition for review to the Board).

Further, even if the Department's actions are found ultimately to be erroneous, the Department should not be chilled from investigating incidents like this in the future by awarded attorney's fees. *See Raven v. Dep't of Social and Health Services*, 177 Wn.2d 804, 833, 306 P.3d 920 (2013). "When balancing the needs of vulnerable adults entrusted to state care and the interests of even well-meaning caregivers who fail to provide necessary and adequate supervision over their charges, DSHS must give priority to the safety of these vulnerable adults." *Bond*, 111 Wn. App. at 575. Awarding attorney's fees in this case will make the Department less likely to aggressively pursue cases where caregivers yell at their charges, causing them emotional distress.

The Court should deny Ms. Crosswhite's request for an award of attorney's fees and costs under RCW 4.84.350.

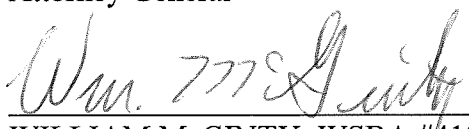
V. CONCLUSION

The Department's rule, WAC 388-71-0105, implements the legislative intent expressed in chapter 74.34 RCW that as much abusive

conduct is proscribed as possible in order to protect vulnerable adults as much as possible. It does not exceed the Department's legislative authority. By implementing the rule, the Department did not misapply the law. Every finding of fact made by the Board in this matter was supported by substantial evidence when viewed in light of the whole record. Finally, Ms. Crosswhite should not prevail, and so should not be awarded attorney's fees. Even if she does prevail, however, the Department's action was substantially justified and attorney's fees should not be awarded under the EAJA.

RESPECTFULLY SUBMITTED this 26th day of February, 2016.

ROBERT W. FERGUSON
Attorney General



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CERTIFICATE OF SERVICE

I certify that on the date indicated below, I served a true and correct copy of the foregoing document on all parties or their counsel of record as follows:

- ☒ US Mail Postage Prepaid
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

EXECUTED this 26th day of February, 2016 at Olympia, WA.

Dawn Walker

DAWN WALKER