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COURT OF APPEALS

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STATE OF WASHINGTON

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NO. 40474-5-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

CARLA SMITH,
Appellant,

and

WASHINGTON STATE DEPARTMENT OF SOCIAL
AND HEALTH SERVICES,
Respondent,

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

The trial court erred when it failed to reverse an administrative finding of abuse pursuant to RCW 26.44.020 and held that unintended consequences are not accidents pursuant to the definition of abuse contained in WAC 388-15-009.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

Can abuse be founded on an unintentional injury, when physical abuse is defined, pursuant to WAC 388-15-009, as the “nonaccidental infliction of physical injury?”

C. STATEMENT OF THE CASE

1. Procedure.

This appeal derives from the Department of Social and Health Services' (DSHS) interpretation and application of its own administrative definition of child abuse, pursuant to WAC 388-15-009. In approximately June 2008 Carla Smith was the subject of a DSHS Child Protective Services (CPS) investigation because her son came to school with a mark on his face. A CPS investigator made a finding of child abuse pursuant to RCW 26.44.020. (*Transcript of Original Agency Record (hereinafter "Record")*, pp. 76-77). Ms. Smith appealed that decision and requested administrative review. (*Record*, p. 45). The matter was submitted to an Administrative Law Judge (ALJ) without hearing, upon the parties' Stipulation and Agreed

Request for Issuance of a Decision on the Pleadings. (*Record*, pp. 46-49). The parties agreed to a stipulated set of facts and agreed "to submit declarations in lieu of live testimony and waive the right to cross-examination as to these declarations." *Id.*

The ALJ upheld the finding of child abuse, (*Record*, pp. 23-28), as did DSHS' Board of Appeals, upon secondary review. (*Record*, pp. 1-14). Ms. Smith appealed these findings to Superior Court, asserting that the stipulated facts and uncontroverted testimony by declaration established that the injury to her son's face was accidental. CP 4. Upon briefing and oral argument, Thurston County Superior Court Judge Gary Tabor issued a final Order Denying Petition for Judicial Review. CP 50. Ms. Smith filed a timely Notice of Appeal, and seeks appellate review by this court. CP 54.

2. Substantive Facts.

Pursuant to stipulation by the parties, there are no disputed facts in this matter. (*Record*, pp. 46-49). Ms. Smith intended to spank her son on the bottom with a belt. *Id.* She did not intend to do so in a manner which would have left a mark. (*Record*, pp. 50-52). When her son moved away unexpectedly, she accidentally caused the belt to contact her son's face. *Id.* This left a temporary red mark that did not require medical attention and healed without permanent mark within a week. (*Record*, p. 48). The parties

stipulated that Ms. Smith did not "intend to cause the injuries" to her son's face. *Id.*

Petitioner was charged with a finding of abuse under RCW 26.44.020, which provides that "[a]n abused child is a child who has been subjected to child abuse or neglect as defined in this section." The applicable definition at issue is found under WAC 388-15-009, which provides:

Child abuse or neglect means the injury, sexual abuse, or sexual exploitation of a child by any person under circumstances which indicate that the child's health, welfare, or safety is harmed, or the negligent treatment or maltreatment of a child by a person responsible for or providing care to the child. An abused child is a child who has been subjected to child abuse or neglect as defined in this section.

(1) Physical abuse means the **nonaccidental** infliction of physical injury or physical mistreatment on a child. Physical abuse includes, but is not limited to, such actions as:

(a) Throwing, kicking, burning, or cutting a child;

(b) Striking a child with a closed fist;

(c) Shaking a child under age three;

(d) Interfering with a child's breathing;

(e) Threatening a child with a deadly weapon;

(f) Doing any other act that is likely to cause and which does cause bodily harm greater than transient pain or minor temporary marks or which is injurious to the child's health, welfare or safety.

(Emphasis Added).

In this case, the allegation and finding of physical abuse was based solely on the mark to Ms. Smith's son's face. (*Record*, p. 77). The allegation of abuse was catalogued as Referral ID #1909399, and the document apprising Ms. Smith of the findings against her stated:

The allegation of Physical Abuse is founded based on: . . . [Ms. Smith's son] had a mark on his face that was approximately four inches long and a half inch wide that fades into his hair line. Both the mother and the child report that this mark was as a result of the mother hitting her son with a belt and the belt slipping hitting him in the face and causing the mark.

DSHS did not allege or attempt to prove that Ms. Smith was spanking her son in a manner which would have inevitably caused injury or was inherently reckless or unsafe. There is nothing to suggest or prove that, but for the unexpected movement of her son and accidental slipping of the belt, Ms. Smith would have physically contacted her son in a manner which violated the law.

D. ARGUMENT

1. Standard of Review.

As the party asserting invalidity of an administrative action, Ms. Smith bears the burden of demonstrating that the finding of abuse was erroneous. *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 381, 932 P.2d 139 (1997). Conclusions of law are reviewed de novo. *Heidgerken v. Dep't of*

Natural Resources, 99 Wn. App. 380, 384, 993 P.2d 934 (2000) (citing *Terry v. Employment Security Dep't*, 82 Wn. App. 745, 748-49, 919 P.2d 111 (1996)). "The construction of a statute is a question of law subject to de novo review." *Id.* at 385 (citing *Rettkowski v. Department of Ecology*, 128 Wn.2d 508, 515, 910 P.2d 462 (1996)).

2. The Plain Language of the Administrative Code Excludes Those Inflictions of Injury That Are Accidental from the Definition of Abuse.

In its Review Decision and Final Order, DSHS' Board of Appeals accurately finds that the "only issue in this proceeding is whether the Appellant's conduct meets the definition of physical abuse of a child." (*Record*, p. 10). The Board also correctly holds that determination must stem from a review of WAC 388-15-009(1). *Id.* The Board then goes on to hold, with almost no analysis or discussion, that section (1)(f) justified a finding of physical abuse, because "If a person causes bodily harm to a child that consists of more than minor temporary marks, then that person has abused a child pursuant to subsection (1)(f)." (*Record*, p. 11). The Board entirely glosses over the importance of the term "nonaccidental," except to note that a finding of abuse is appropriately based upon "Appellant's non-accidental act." (*Record*, p. 11, ¶ 13).

Thus, although not adequately explored or explained by the Board, the Board has fashioned a definition of abuse which allows for unintentional

injury if based upon an intentional act. Ms. Smith argues that this finding expands the definition of physical abuse beyond the plain language of the administrative code. The Board jumps straight to section (1)(f) and makes its determination based upon whether or not marks were inflicted that were more than minor or temporary. This finding ignores the fact that all of the subsections, (a) through (f), are modified and constrained by the opening section of WAC 388-15-009(1), which provides that "[p]hysical abuse means the nonaccidental infliction of physical injury."

Sections (a) through (f) are examples of actions which may constitute physical abuse, but none of these provisions alter the overarching requirement that the "infliction of physical injury" be "nonaccidental." This concept is reiterated in the parent Statute's Declaration of Purpose, RCW 26.44.010, which also states that intervention into the relationship between parent and child is justified upon "nonaccidental injury." Thus, the term "nonaccidental" modifies "injury" or the "infliction of injury." It does not modify the "act" or "action" causing the injury.

There is nothing ambiguous about the language contained in this administrative code provision. If the drafters had wanted the code to read: "intentional acts which are likely to cause, and do cause, injury" as defining physical abuse, they could easily have included this language. A question of statutory construction begins by reading the text of the statute, and if "the

language is unambiguous, a reviewing court is to rely solely on the statutory language." *State v. Roggenkamp*, 153 Wn.2d 614, 621, 106 P.3d 196 (2005) (citing *State v. Avery*, 103 Wn. App. 527, 532, 13 P.3d 226 (2000)).

The phrase "nonaccidental infliction of physical injury" does not create uncertainty or ambiguity. The "infliction of physical injury" must be "nonaccidental." In this matter, DSHS has made a finding of child abuse based upon the infliction of an injury that everyone has stipulated was accidental and unintended. The Department did not allege that the act of spanking Ms. Smith's son on the bottom with a belt constituted physical abuse, they alleged that the act of hitting her son's face with a belt constituted physical abuse. The Department cannot sustain this allegation when it also stipulates that hitting her son in the face with a belt was entirely accidental. DSHS attempts to fashion a strict liability standard of physical abuse, whereby any act that seems likely to and does cause injury is sufficient to warrant a finding of abuse. This ignores and/or stretches the term "nonaccidental" beyond its plain meaning, and requires reading into the code provision clarifying language that does not exist.

DSHS mistakenly relies on the *Schlichtmann* case to support its decision. (*Record*, pp. 13-14). In that case, a parent administered a spanking with a belt and left bruises to the area where the spanking was intentionally administered. *State v. Schlichtmann*, 114 Wn. App. 162, 168-

69, 58 P.3d 901 (2001). The matter before this court would only be analogous if the injuries at issue were those specifically caused by the intended spanking, i.e. hitting her son on the bottom with such force that it left bruising and marks. This is not the case. During the course of the spanking, while her son slipped away, Ms. Smith accidentally caused the belt to come into contact with her son's face. This physical contact was unintended and cannot, under the definition provided, support a finding of abuse.

The *Schlichtmann* case stands only for the principal that corporal punishment is always unreasonable if it leaves marks and bruises that are more than temporary or minor, when the punishment is carried out as intended. Thus, this case would appropriately be used if Ms. Smith had left marks on her son's bottom that were more than minor and temporary. The case does not address the situation before this court where, in the act of corporal punishment, Ms. Smith's result and intent were wildly divergent. If Ms. Smith's actions had mirrored her intent, there would have been no marks and bruises. This testimony is uncontroverted and should be taken as a verity on appeal. *Hilltop Terrace Homeowner's Ass'n v. Island County*, 126 Wn.2d 22, 30, 891 P.2d 29 (1995). Instead, an unforeseen circumstance caused Ms. Smith to accidentally make physical contact with her son in a manner and means that were not intended, inflicting accidental injury. This

circumstance cannot support a finding of physical abuse under WAC 388-15-009(1), where the "infliction of injury" must be "nonaccidental."

E. CONCLUSION

Because the injury to Ms. Smith's child was accidental, it was legal error for DSHS to consider either whether the injury consisted of more than minor temporary marks pursuant to WAC 388-15-009(1)(f), or whether corporal punishment in this situation was reasonable and moderate. Neither consideration is relevant under the circumstances. If the Department had alleged and proven that the *intentional* act of spanking her son with a belt on the bottom was inherently unreasonable or done in a fashion which could not help but cause more than minor temporary marks, then a finding of child abuse would be sanctioned and appropriate. The Department neither alleged nor proved such an assertion. Rather, the allegation of abuse *solely* concerned the contact the belt made with Ms. Smith's son's face, and the Department has conceded, under a stipulated set of facts, that this contact was unintended. Under the definition of physical abuse contained in WAC 388-15-009, a finding of abuse cannot legally be sustained by these facts.

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For all of the reasons stated herein, Ms. Smith respectfully requests that this Court reverse the administrative finding of child abuse made by the Department of Social and Health Services.

DATED this 22nd day of July, 2010.

Respectfully submitted,

YOUNGLOVE & COKER, P.L.L.C.



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CERTIFICATE OF SERVICE

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I certify that on the 22nd day of July, 2010, I caused a true and correct copy of the Opening Brief of Appellant and this Certificate to be served on the following in the manner indicated below.

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

Dated this 22nd day of July, 2010, at Olympia, Washington.



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