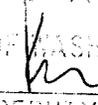


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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY  \_\_\_\_\_  
DEPUTY

NO. 40474-5-II

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION TWO

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CARLA SMITH,  
Appellant,

and

WASHINGTON STATE DEPARTMENT OF SOCIAL  
AND HEALTH SERVICES,  
Respondent.

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REPLY BRIEF OF APPELLANT

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## A. INTRODUCTION

To begin, the Appellant takes umbrage with the final sentence of Respondent's Brief which characterizes the Appellant as having "beaten" her son. (*Respondent's Brief, p. 10.*) The evidence does not support this conflagration of the facts. The Appellant provided uncontested testimony through declaration that had she made contact with her son's bottom in the manner intended, there would have been no lasting marks or permanent injury. (*Record, p. 51.*) One of the more salient points associated with this appeal is that the Department of Social and Health Services (DSHS) did not prove, or attempt to prove, that Appellant was engaging in an act that was "likely to cause . . . bodily harm greater than transient pain or minor temporary marks," pursuant to WAC 388-15-009.

After review of Respondent's Brief, there is very little that Appellant disagrees with, except for the ultimate conclusion. Appellant agrees with the majority of statements about the law contained in the Brief—including the fact that abuse clearly can be found even when an injury is unintentional. Appellant disagrees solely with the fact that the Respondent's statements of law are appropriately applied to the facts herein to justify a finding of abuse pursuant to the definition mandated by WAC 388-15-009. This will be explained, *infra*.

## **B. ARGUMENT IN REPLY**

The Respondent proposes that the issue in this appeal is: Whether a finding of abuse requires a finding of intent to cause injury? (*Respondent's Brief*, p. 3.) This does not differ substantially from the Appellant's proposed issue statement: Can abuse be founded on an unintentional injury? (*Appellant's Opening Brief*, p. 1.) The Respondent answers this question by stating that the intent to injure is not required, as long as the act causing injury is intentional. The Respondent states: "Her act of hitting the child was intentional and not accidental. Therefore, the infliction of the injury was nonaccidental . . . ." (*Respondent's Brief*, p. 4.) This broad leap of reasoning, made by both the Agency and the trial court, ignores the plain language of the Administrative Code and the common sense interpretation that the word "accidental" would and should be given by the average human being.

The Respondent goes on to make several statements in the course of their argument that the Appellant wholeheartedly agrees with. First, Respondent states: "The rule's definition of physical abuse requires the *infliction* of injury to be nonaccidental; it does not require that the parent intend the resulting harm of her actions." (*Respondent's Brief*, p. 6-7.) Second, Respondent states: "The express language of the regulation in question requires that the *infliction* of the injury—the act that resulted in

the injury—must not be accidental in order to find abuse." (*Respondent's Brief, p. 9.*)

Both parties agree that it is the "infliction of injury" that must be "nonaccidental." The Respondent refuses to acknowledge, however, that any inquiry is necessary beyond the swinging of a belt. The Appellant argues that to assess the cause of the "infliction of injury," a more thorough analysis of the entire chain of events is mandated. There were intervening, unexpected events—the squirming of the child, the slipping of the belt—in between the swinging of the belt and the infliction of injury. These unforeseen and unexpected events rendered the "infliction of injury" an accident, in the purest connotation of that term. The Agency stipulated that this was true.

The Respondent makes an extremely cogent and compelling argument for the fact that the Administrative Code does not "require intent to cause specific harm." (*Respondent's Brief, p. 9.*) For instance, Respondent argues, a "parent who shakes an infant in rage does not intend to cause brain damage." (*Respondent's Brief, p. 9-10.*) Once again, Appellant agrees absolutely with this statement—the Department should not have to prove that a parent intended a specific level or degree of harm in order to establish "abuse," where the intended contact with the child is what causes injury. This is exemplified by the *Schlichtman* case, where

the parent intended to spank the child's bottom, and caused extreme bruising to that area of the body. *State v. Schlichtmann*, 114 Wn. App. 162, 168-69, 58 P.3d 901 (2001).

It is irrelevant that the parent did not intend to hit the child's bottom that hard—they still intended to hit the child on the bottom and cause a slight injury; instead they caused a great injury. The infliction of injury was not accidental, just the severity of injury. The same is true in the case of the shaken baby. The parent may have intended to slightly "rattle" the child into being quiet, but they ended up causing brain damage. They did not pick the child up to put it to bed and then "accidentally" begin shaking the child.

The infliction of injury must be nonaccidental, not merely the act that set in motion the infliction of injury. Where a parent intends a result—hitting a child on the bottom or shaking the child—the "infliction" of the injury is certainly not an accident because the act causing the injury was the precise act intended. Respondent is correct that, under those scenarios, it should not matter that the severity of the injury was unintended.

Where the action intended and the action causing injury are wildly divergent, however, then the infliction of injury is correctly deemed accidental. The Appellant intended to contact the belt with her son's

bottom in a manner that would not have caused a mark of any kind. This is uncontested in the record before this Court and a verity on appeal. Instead, through squirming son and slipping belt, the belt made contact with the son's face in an accidental fashion. These events are analogous to the parent who places a child over their knee to administer a spanking, and the child slips, hitting their head on a tile floor, much to the parent's shock, causing a concussion. The initial acts may have been intentional, but when an intervening, unforeseen event or series of events causes the resulting contact to differ from the intended contact, then very few people would hesitate to label the "infliction of injury" as accidental. The parent did not intend to make contact with the child in the manner which caused injury.

This is the distinction that separates Respondent's and Appellant's interpretations. The Appellant concedes that when the contact is exactly as intended, a parent cannot plead accident by stating that the severity of contact was not intended. If someone punches someone in the nose and then says that they didn't mean to break the person's nose and it was therefore an accident, very few individuals stopped on the street and presented with that scenario would label it as an "accident." However, when a child squirms and a belt slips out of someone's hand, hitting a child's face, when the parent did not intend to make contact with the child

anywhere near that part of the body, the common person on the street would not hesitate to say that it was an "accident." Something that happened in a manner that was not intended is an "accident" by anyone's definition. The plain language of the Administrative Code exempts accidental injury from the definition of abuse.

**C. CONCLUSION**

For the foregoing reasons, Appellant respectfully requests that this Court, as a matter of law, reverse the Administrative finding of child abuse made by DSHS in this matter.

RESPECTFULLY SUBMITTED this 19<sup>th</sup> day of November, 2010.

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Attorney for Appellant

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CARLA SMITH,  Appellant.  v.  WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES,  Respondents.

NO. 40474-5-II

CERTIFICATE OF SERVICE

**CERTIFICATE OF SERVICE**

I certify that on the 19th day of November, 2010, I caused a true and correct copy of the Reply Brief of Appellant and this Certificate to be served on the following in the manner indicated below.

Washington State Court of Appeals  
Division Two  
950 Broadway, Suite 300  
Tacoma WA 98402-4454

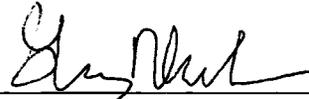
- U.S. Mail
- Hand Delivery
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- ABC Legal Services

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

Dated this 19th day of November, 2010, at Olympia, Washington.



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