

No. 44743-6 II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

BABYSALOME GAMBLE,
Appellant

V.

STATE OF WASHINGTON
DEPARTMENT OF
HEALTH AND SOCIAL SERVICES,
Respondent

AMENDED BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

Assignments of Error

1. The Superior Court erred by deciding this case on summary judgment.
2. The Superior Court erred by concluding the doctrine of collateral estoppel applies.
3. Finding of Fact 58 is not based upon substantial evidence.
4. Insufficient evidence exists to establish by a preponderance of the evidence that Ms. Gamble neglected Jessica.

Issues Pertaining to Assignments of Error

1. Although the Superior Court should not have decided this case on summary judgment, this Court should reach the merits of Ms. Gamble's appeal.
2. a. Did the Superior Court err by concluding the doctrine of collateral estoppel applies when the Department did not raise the issue at the agency hearing?

b. Did the Superior Court err by concluding the doctrine of collateral estoppel applies when the issue decided in the prior adjudication was not identical, the parties were not identical, and the application of the doctrine would work an injustice?

3. Is Finding of Fact 58 based upon substantial evidence?
4. Did the Department produce sufficient evidence to establish by a preponderance of the evidence that Ms. Gamble, who had no knowledge that her daughter was being sexually assaulted by her husband, neglected Jessica?

B STATEMENT OF THE CASE

This is a very sad case involving a mother, Appellant Babysalome Gamble, and her daughter, Jessica¹, a vulnerable adult whose birthday is March 24, 1990. CP, 107. Unbeknownst to Ms. Gamble, Jessica was repeatedly sexually assaulted in 2004 by her step-father, Tyrone Gamble. This first came to light in 2005, when the Pierce County Prosecutor's Office filed an Information charging Mr. Gamble. CP, 104. On May 5, 2005, Mr. Gamble pleaded guilty to an amended information alleging third degree assault against Jessica. The amended information alleged Mr. Gamble caused bodily harm to Jessica by means of "criminal negligence." CP, 182, Finding of Fact 4. The criminal conviction resulted in a court-ordered no contact order. CP, 132. There is no evidence Ms. Gamble ever allowed Mr. Gamble to have contact with her daughter in violation of the Order. CP, 54 (Finding of Fact 46).

¹ Consistent with the order in the proceedings below, and in order to protect the privacy of the vulnerable adult, Jessica is referred to by her first name only.

The Court also ordered a psycho-sexual evaluation CP, 107 Mr Gamble obtained a “Mental Health/Sexual Assessment” from Ruth Currah, Ph D. on August 15, 2005 CP, 135 On the recommendation of Dr Currah, the no contact order was modified several times, first to allow contact in a family counseling setting. CP, 139 Eventually, again on the recommendation of Dr Currah, the no contact order was rescinded by the Court and the family reunited CP, 141-43. Dr Currah judged Mr Gamble to be a “low to moderate” risk to reoffend, checking the lowest category possible on her preprinted form. CP, 146 Mr. Gamble was successfully terminated from court supervision on October 9, 2006 CP, 148.

Unfortunately, the abuse resumed, probably starting in 2007 CP, 186 (Finding of Fact 35). Jessica did not disclose the abuse to her mother CP, 186 (Finding of Fact 35) Ms Gamble was unaware of any improper touching between 2005 and September 30, 2010 CP, 187 (Finding of Fact 45)

On September 30, 2010, social worker Lisa Gilman of Adult Protective Services (APS) interviewed Jessica CP, 123. Ms. Gilman asked Jessica if “Tyrone had done anything that makes her feel uncomfortable.” Jessica answered, “No ” CP, 123 She further stated that things are good at home. CP 123 After the interview, Jessica became very upset. She told her school teacher “it was continuing to happen.” CP, 124

On October 1, 2010, Ms. Gilman re-interviewed Jessica CP, 125. During this interview, Jessica revealed that Mr. Gamble was repeatedly putting his “dick” inside her vagina and mouth. She stated her mom was unaware of the abuse. CP, 125. She further stated her mother “would always ask if anything inappropriate was going on ” CP, 125.

Based upon these disclosures, the Department of Social and Health Services, Adult Protective Services, responded in two ways. First, the Department alleged Ms. Gamble had acted with neglect towards her daughter. Second, the Department sought a Vulnerable Adult Protection Order (VAPO).

The allegation of neglect was promptly appealed and is the subject of this appeal. The neglect finding was the subject of a full day evidentiary hearing on July 25, 2011. CP, 154. At the hearing, the hearing examiner heard from witnesses Lisa Gilman and Babysalome Gamble. CP, 153-54. Both witnesses were cross-examined. Multiple exhibits were introduced by both parties. CP, 233, 249. Importantly, the Department did not argue that the issues were precluded by the doctrine of collateral estoppel. Nor did the hearing examiner make any findings concerning collateral estoppel. The hearing examiner upheld the finding of neglect in a written decision on September 21, 2011. CP, 153. Between July 25, 2011 and September 21, 2011, neither the Department nor the appellant submitted supplemental briefing raising the issue of collateral estoppel. Ms. Gamble appealed the finding and it was further

reviewed by the Department. The Review Decision and Final Agency Order affirming the Finding of Neglect was entered on April 18, 2012 CP, 180.

Ms. Gamble timely appealed to the Pierce County Superior Court. CP, 1. The Department filed a motion for summary judgment. CP, 23. Ms. Gamble objected to the Court deciding the case on summary judgment. CP, 39. The Superior Court ruled that it had authority to decide the case on summary judgment and set over the case for further briefing. CP, 78. In response, both parties filed cross-motions for summary judgment. CP, 84. The Superior Court granted the Department's motion for summary judgment. CP, 175. This is the Order currently being appealed.

The Department also sought and obtained a Vulnerable Adult Protection Order (VAPO) prohibiting Ms. Gamble from having contact with her daughter. CP, 316. A hearing was held on October 20, 2010 on the petition. CP, 150. At the hearing, the Department was represented by Assistant Attorney General Margaret Kennedy. Ms. Gamble was represented by Sean Devlin. CP, 150. The Department's position was that Ms. Gamble had acted with neglect in three ways: (1) In 2005, Ms. Gamble had allowed her daughter to have contact with her husband in violation of the no contact order; (2) Ms. Gamble did not believe the allegations of sexual abuse; (3) Ms. Gamble had "repeatedly left her daughter alone with" her husband. CP, 153, 156. Regarding the first

allegation of neglect, the Department said, “Um, there are allegations that the no contact order entered in the criminal case in 2005 was violated, that, um, Tyrone Gamble moved into the home prior to the expiration date of that We do not have, um, additional evidence regarding that, those allegations at this point ” CP, 153.

At the hearing in 2011, Mr Devlin, speaking on behalf of Ms. Gamble, stated, “[T]he mother would like to, would like to have contact and would like to have it supervised for both her daughter’s protection as well as her own, um, in the, in the sense that there have been possible allegations regarding the mother influencing this ” CP, 154. The Court entered the Order.

Ms. Gamble filed a notice of appeal. On appeal, Ms Gamble did not object to the entry of the Order, but rather the finding of neglect. Cause number 41685-9-II. This Court decided the appeal on July 6, 2011 and affirmed the Order in an unpublished decision. The mandate was issued on August 10, 2011.

The Order prohibits contact between Ms. Gamble and Jessica except that Ms. Gamble was permitted to have contact with her “at the adult family home where Jessica currently resides provided the AFH is able to supervise the visitation ” CP, 317. The Order has been modified several times since October 20, 2010.

C ARGUMENT

1 The trial court erred by deciding this case on summary judgment.

Preliminarily, it is worth commenting on the procedural posture of this case. When Ms. Gamble filed her notice of appeal to the Superior Court, the Department filed a motion for summary judgment. Ms. Gamble objected, arguing that summary judgment is an inappropriate avenue for resolving an administrative appeal of this nature. Ms. Gamble's position is that appeals of this nature should be resolved in accordance with the RALJ rules. Normally in a RALJ appeal the Superior Court will set up a briefing schedule and then an oral argument date. The confusion caused by the argument over summary judgment or RALJ caused unnecessary delay and confusion in the Superior Court. It would be helpful to have some guidance from this Court for future cases.

The authority of the Superior Court to review the Department's order is pursuant to WAC 388-02-0640 and RCW 34.05.510 et. seq. There is no mention of summary judgment in either chapter 388-02 WAC or chapter 34.05 RCW. Neither party could cite a case determining whether summary judgment is or is not an appropriate method for resolving appeals of this nature. Summary judgment is an inappropriate avenue for resolution of this case.

Having said that, it is clear from the Superior Court's Order, regardless of whether the case was decided on summary judgment or in

accordance with RALJ rules, the result would have been the same in the court below. The Superior Court believed the resolution of this case to be dictated by the doctrine of collateral estoppel. Ms. Gamble is interested in having the finding of neglect reversed and is asking this Court to reach the merits of both the collateral estoppel issue and the ultimate determination of neglect.

2. The Superior Court erred by concluding the doctrine of collateral estoppel applies.

The Superior Court agreed with the Department that the doctrine of collateral estoppel applies and granted the Department's Motion for Summary Judgment. Generally, the Department's position is that this Court sustained a finding of neglect in the VAPO proceeding on July 6, 2011 and Ms. Gamble is precluded from re-litigating the finding of neglect. The Superior Court erred in two ways. First, the Superior Court should not have considered the merits of the collateral estoppel doctrine at all because the issue was not raised by the Department until it reached the Superior Court. Second, the doctrine does not apply to Ms. Gamble's situation.

First, the Department raised the doctrine of collateral estoppel for the first time on appeal. RCW 34.05.554 states that "issues not raised before the agency may not be raised on appeal." RCW 34.05.558 states the record must be "confined to the agency record for judicial review." By

failing to raise the issue of collateral estoppel, the Department is precluded from raising the issue on appeal.

The record on appeal was generated on July 25, 2011. At the hearing, the hearing examiner heard from two live witnesses Lisa Gilman and Babysalome Gamble, who were both cross-examined, and considered multiple exhibits from both parties. The Department did not raise the doctrine of collateral estoppel even though this Court decided the VAPO appeal on July 6, 2011, nineteen days earlier. The failure to raise the doctrine of collateral estoppel at the July 25, 2011 hearing precludes any argument at a later date of collateral estoppel.

In the Superior Court, the Department argued that the mandate was not issued until August 10, 2011, sixteen days after the July 25, 2011 hearing and, potentially, Ms. Gamble could have filed a petition for review. But there was nothing to preclude the Department from raising the doctrine of collateral estoppel between August 10, 2011 and September 21, 2011, the date of the Initial Order from the hearing examiner.

Additionally, the Department failed to raise the issue of collateral estoppel between September 21, 2011 and April 18, 2012, the date of the Final Order. Instead, the Review Judge raised the doctrine of collateral estoppel *sua sponte*. CP, 197. It is improper for a review judge to raise an issue not briefed by the parties and not argued by the Department. In

sum, the doctrine of collateral estoppel was not properly before the Superior Court and the Court erred by concluding otherwise

Second, reaching the merits of the collateral estoppel issue, the motion should have been denied. Collateral estoppel “means that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.” State v. Williams, 132 Wn.2d 248, 937 P.2d 1052 (1997). It requires four things: (1) The issue decided in the prior adjudication must be identical with the one presented in the second; (2) The prior adjudication must have ended in a final judgment on the merits; (3) The party against whom the plea of collateral estoppel is asserted must have been a party or in privity with a party to the prior litigation; (4) Application of the doctrine must not work an injustice. State v Williams.

The Department argues that all four elements of collateral estoppel are present here. Ms. Gamble disagrees. First, the issue in the Vulnerable Adult Protection Order (VAPO) proceedings was whether an order should be entered protecting Jessica and prohibiting her mother from contacting her. The issue in the present action is whether the Department properly found the allegation of neglect was “founded.” The issues are not the same. Second, in the VAPO proceeding, one of the essential parties was Jessica whereas she is not a party in the present action.

But the most important reason the collateral estoppel doctrine is inapplicable is that application of the doctrine would result in an injustice. When a litigant has little incentive to vigorously litigate the issues, the Court will not apply collateral estoppel. Hadley v. Maxwell, 144 Wn 2d 306, 308, 27 P 3d 600 (2001). In Hadley, the party was adjudicated for a traffic infraction for improper lane travel, which carried a \$93 fine. At the contested hearing on the infraction, she argued the officer's report was mistaken and she was not guilty. The court found the infraction committed. In a later civil suit, the trial court relied on the infraction to collaterally estop her from litigating her theory of how the infraction was committed. The Supreme Court reversed, saying, "Collateral estoppel is not a technical defense to prevent a fair and full hearing on the merits of the issues to be tried. Washington courts focus on whether the parties to the earlier proceeding had a full and fair hearing on the issue." Hadley at 311. In determining whether an injustice has been done, the test is "whether the party against whom the estoppel is asserted had interests at stake that would call for a full litigational effort." Hadley at 312.

In Thompson v. DOL, 138 Wn 2d 783, 982 P 2d 601 (1999), the petitioner was simultaneously cited criminally for DUI and administratively by the Department of Licensing (DOL). The criminal case was heard first and, after a full hearing with testimony, the trial court found no probable cause and dismissed. The Supreme Court ruled that the doctrine of collateral estoppel precluded the Department from proceeding.

Three years later, the Supreme Court revisited this issue, only with the reverse factual scenario. This time, it was the Department of Licensing that found no probable cause and dismissed and the petitioner was seeking to apply the collateral estoppel doctrine in the criminal proceeding. The criminal court declined to apply collateral estoppel, however, and the Supreme Court affirmed. State v. Valdez, 148 Wn.2d 303, 59 P.3d 648 (2002). The Supreme Court observed that administrative license suspension hearings are limited in scope and use relaxed rules of evidence whereas the criminal proceeding in Thompson involved a full adjudication on the merits with live witnesses. Although the Court noted that the first three elements of the collateral estoppel doctrine were met, the Court concluded it would result in an injustice to permit the results of an administrative hearing to dictate the result of a criminal case.

In this case, the parties appeared for a VAPO hearing on October 20, 2010. This was just 19 days after Jessica's first disclosure. At that time, the issues relating to Jessica's safety were emergent and dynamic. Ms. Gamble's husband had just been arrested for the second time for sexually assaulting Jessica and the criminal case was in its infancy. It was unclear at that time what was in Jessica's best interest. In light of this rapidly changing situation, although Ms. Gamble disagreed with the finding of neglect, she agreed that a period of separation from her daughter was prudent. According to her attorney, she wanted any contact to be "supervised for both her daughter's protection as well as her own."

Absent any opposition, the Court entered the VAPO order. As noted above, this Order has been modified several times in the past several years.

Ms. Gamble's situation is analogous to the situations in Hadley and Valdez. The VAPO hearing was a limited hearing and resolved on relaxed rules of evidence ER 1101. Because of the dynamic nature of the rapidly developing situation, the Court was forced to rely on incomplete and inaccurate information. Importantly, one of the three reasons cited by AAG Kennedy in support of the VAPO was completely erroneous. AAG Kennedy made the following representation, "[T]here are allegations that the no contact order that was entered in 2005 was violated, that, um, Tyrone Gamble moved into the home prior to the expiration date of that We do not have, um, additional information regarding that, those allegations at this point." Later investigation determined, after an exhaustive review by the Department, that Ms. Gamble "was aware of the no contact order, preventing contact between Mr. Gamble and Jessica [Ms. Gamble] abided by the no contact order." Finding of Fact 46.

It is fundamentally unfair to preclude Ms. Gamble from appealing the Department's Order based upon a finding by an earlier Court in a limited and expedited hearing, where none of the interested parties were fully aware of the relevant facts, and the situation was rapidly evolving. In the language of Hadley, Ms. Gamble did not have "interests at stake that would call for a full litigational effort." The Superior Court erred by

deciding this case using the doctrine of collateral estoppel and this Court should reverse.

3 Finding of Fact 58 is not based upon substantial evidence.

When reviewing a disputed fact, an appellate Court must determine whether substantial evidence supports the lower court's findings and whether those findings support its conclusions of law. This Court considers any fact that is not objected to as a verity on appeal. Conclusions of law are reviewed de novo. State v. Cheatam, 112 Wn. App. 778, 51 P.3d 138 (2002). Regardless of whether a trial court labels something as a finding of fact or a conclusion of law, appellate courts will treat them as they really are. Stastny v. Board of Trustees, 32 Wn.App. 239, 647 P.2d 496 (1982).

Finding of Fact 58 finds that Ms. Gamble denial of knowledge that the abuse had resumed is not believable. This finding is not based upon substantial evidence. Ms. Gamble appreciates that the hearing examiner (and the Review Judge after listening to the tape) did not believe her. People are human and everyone is entitled to an opinion.

But in order for Finding of Fact 58 to be sustained, the Department must point to something in the record to indicate Ms. Gamble was on actual notice of the abuse. It is not enough simply to say, "But I don't believe you." In this case, it is undisputed Jessica never told her mother of the abuse and, until Jessica told the school staff person, no one was on

actual or constructive notice that the abuse had resumed. Additionally, Finding of Fact 58 contradicts Finding of Fact 45, which finds Ms. Gamble “was not aware of any improper touching between Mr. Gamble and Jessica” Finding of Fact 45 This Court should disregard Finding of Fact 58

4 Insufficient evidence exists to establish by a preponderance of the evidence that Ms. Gamble neglected Jessica.

The Department’s position in this case is simply stated: Ms. Gamble denies knowing her husband was sexually assaulting her daughter and we don’t believe her; therefore, she must have neglected her daughter’s safety. See Finding of Fact 58. Ultimately, this case comes down to determining who has the burden of proving Ms. Gamble’s knowledge. Must Ms. Gamble prove she did not know abuse was taking place, or is the burden more properly on the Department to prove affirmatively she did know. Because the Department clearly has the burden and presented no evidence showing Ms. Gamble knew her daughter was being assaulted, the Department’s action in affirming a finding of “founded” is arbitrary and capricious and should be reversed.

There is no credible testimony that Ms. Gamble knew her daughter was being molested from 2007 to 2010. The undisputed evidence is that Jessica did not tell her mother. Finding of Fact 35. The Review Judge found Ms. Gamble “was not aware of any improper touching between Mr.

Gamble and Jessica.” Finding of Fact 45. There was no evidence presented at the hearing that Ms. Gamble walked in on Jessica and her husband, that she observed changes in behavior, or that she observed any affirmative signs of abuse. To the contrary, she had written documentary evidence from Dr. Ruth Currah that her husband had completed treatment and was safe to return to the home. She complied with the criminal no contact order as long as it was in effect and only allowed her husband to come home after the Court rescinded the order.

There is a tendency, when a fact finder finds a witness not credible, to assume that the opposite must be true. But the Department still bears the burden of proving neglect. As the Washington Supreme Court recently said in a slightly different context, “The statement ‘I did not commit the crime’ cannot support a conviction for the crime without something more.” State v. Dow, 168 Wn.2d 243, 254, 227 P.3d 1278 (2010). The statement, “I did not neglect my daughter,” cannot sustain a finding of neglect without something more. There is no evidence, credible or otherwise, that Ms. Gamble knew her daughter was being assaulted by her husband. Absent some evidence of knowledge, the finding of neglect cannot be sustained.

D CONCLUSION

This Court should reverse the finding of neglect by the
Department.

Dated this 3rd day of October, 2013

A handwritten signature in black ink, appearing to read 'T. Weaver', written over a horizontal line.

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