

NO. 44743-6

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

Babysalome T. Gamble,

Appellant,

v.

Washington State, Department of Social and Health Services,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Babysalome Gamble (Ms. Gamble) seeks to re-litigate an issue that has already been decided by the superior court and affirmed by this Court.

Jessica¹, a vulnerable adult, is the developmentally disabled daughter of Ms. Gamble. In September 2010, the Department of Social and Health Services, Adult Protective Services Program (the Department) received reports that Jessica was being sexually abused by Ms. Gamble's husband, Tyrone Gamble (Mr. Gamble).

As a result of the allegations against Mr. Gamble, the Department moved for and was granted a Vulnerable Adult Protection Order (VAPO) against Ms. Gamble. The VAPO restrained Ms. Gamble from seeing Jessica except in a supervised capacity and included a finding that Ms. Gamble had neglected Jessica. Ms. Gamble sought revision of the VAPO, but that motion was denied. Ms. Gamble then sought review of the VAPO by this Court. This Court upheld the VAPO, finding that Ms. Gamble had neglected Jessica pursuant to Chapter 74.34 RCW.

While litigation regarding the VAPO was still pending at the Court of Appeals, the Department also made a civil, administrative finding of neglect against Ms. Gamble pursuant to the Department's investigative authority in Chapter 74.34 RCW. Ms. Gamble appealed the finding

¹ Only Jessica's first name is used to protect her confidentiality.

administratively, and the Initial Order issued by the Office of Administrative Hearings held that Ms. Gamble neglected Jessica as defined in Chapter 74.34 RCW. Ms. Gamble appealed to the Department's Board of Appeals, by which time this Court had upheld the finding in the VAPO litigation that Ms. Gamble neglected Jessica. In light of this Court's opinion in the VAPO litigation, the Board of Appeals concluded that Ms. Gamble was collaterally estopped from challenging the administrative finding of neglect. Ms. Gamble then petitioned for judicial review of the administrative finding at superior court. The Department filed a summary judgment motion based on collateral estoppel and the court granted the Department's motion. Ms. Gamble appeals.

The Department's finding is supported by substantial evidence and does not constitute an error of law. Further, because this Court previously upheld a neglect finding against Ms. Gamble, the Department's application of collateral estoppel also does not constitute an error of law. Whether summary judgment was a proper procedure in Superior Court is irrelevant because this Court reviews the Department's decision *de novo* under the Administrative Procedure Act's standards of review. Therefore, the Department respectfully requests that this Court affirm the Department's finding of neglect against Ms. Gamble.

II. COUNTERSTATEMENT OF THE ISSUES

1. The Department made a finding of neglect against Ms. Gamble based on her failure to protect Jessica from sexual abuse perpetrated by her husband who had already been convicted of sexually abusing Jessica. Is the Department's finding of neglect supported by substantial evidence and did the Department properly interpret and apply the law to Jessica's situation?
2. Did the Department properly apply collateral estoppel based on this Court's prior decision upholding a finding of neglect against Ms. Gamble based on the same set of facts?
3. Is the question of whether summary judgment was a proper procedure in superior court irrelevant because this court reviews the Department's decision *de novo* under the Administrative Procedure Act's standards of review?

III. COUNTERSTATEMENT OF THE CASE

A. Statutory Background

The Washington legislature has determined that vulnerable adults may be in particular need of protection from abuse, neglect, abandonment, or exploitation. *Kraft v. Dep't of Social and Health Services*, 145 Wn. App. 708, 717, 187 P.3d 798 (2008). The Department is mandated to

investigate allegations of abandonment, abuse, exploitation, or neglect of vulnerable adults and make civil findings when the evidence supports them. RCW 74.34.063-.068. If the Department concludes that the allegation is founded on a more likely than not basis, the Department notifies the alleged perpetrator of an initial finding and the right to contest the finding in an administrative hearing. *See* WAC 388-71-0100-01280. The Department uses substantiated findings to review the qualifications of persons applying for licenses or contracts to care for, or be employed in positions requiring unsupervised access to, the Department's vulnerable child, elderly, or disabled clients. RCW 74.39A.051.

In addition to an administrative response, the Department has the discretion to seek protective action on behalf of the vulnerable adult in the form of a guardianship or a VAPO. RCW 74.34.067(5);150. A VAPO can be granted only where there is evidence of neglect. RCW 74.34.110(1). The petition for a VAPO must be accompanied by a sworn statement that alleges that the person on whose behalf the petition is brought is a vulnerable adult and has been neglected or is threatened with neglect by the respondent. RCW 74.34.110(2); (3). Then, the respondent is entitled to an "evidentiary hearing on the issue of whether the vulnerable adult is unable, due to incapacity, undue influence, or duress, to

protect his or her person or estate in connection with the issues raised in the petition or order.” RCW 74.34.135(2); (3).

B. Procedural History

Jessica is the developmentally disabled, vulnerable adult daughter of Ms. Gamble. Administrative Record (AR) at 6, 7, Finding of Fact (FF) 30. The Department paid Ms. Gamble to provide care services for Jessica. AR at 7, FF 31.

In 2004, the Department’s Child Protective Services made conclusive findings that Jessica had been sexually assaulted by Mr. Gamble. AR at 10, FF 58(4). Mr. Gamble was charged with child rape of Jessica and ultimately pled guilty to Assault in the 3rd Degree in May 2005. *See* AR at 3.

An order prohibiting contact between Mr. Gamble and Jessica was entered in May 2005 as a condition of Mr. Gamble’s criminal sentence. *Id.* But, in June 2006, an order terminating the no-contact provisions of the May 2005 order was filed. AR at 4. In the middle of 2007, Ms. Gamble and Mr. Gamble purchased a home together. AR at 9, FF 25. Mr. Gamble moved into the home with Ms. Gamble, Jessica, and Jessica’s younger sister. *Id.* In August 2007, Ms. Gamble married Mr. Gamble. AR at 9, FF 50.

On September 29, 2010, the Department received a report alleging that Ms. Gamble had neglected Jessica. AR at 4, FF 17. The allegations concerned sexual abuse of Jessica in the home by Mr. Gamble. *Id.* On September 30, 2010, Jessica further disclosed to a school staff member that she had been sexually abused by Mr. Gamble and this disclosure resulted in Jessica moving into an adult family home. AR at 4-5, FF 18-19.

The Department responded to the allegations by seeking a VAPO and making a civil finding of neglect. First, the Department petitioned for a VAPO to restrict contact between Ms. Gamble and Jessica. AR at 5, 86. The superior court granted the Department's petition and issued a VAPO. AR at 5. The VAPO restrained Ms. Gamble from seeing Jessica except in a supervised setting. *Id.* The superior court affirmatively found that Ms. Gamble "...committed acts of abandonment, abuse, neglect, and/or financial exploitation..." of Jessica. AR at 137. Ms. Gamble sought revision of the VAPO but her motion was denied. AR at 140. Ms. Gamble then sought review of the VAPO at the Court of Appeals. She argued in part that the affirmative finding of neglect was unnecessary to support the VAPO and should be stricken. *See Appendix A, In re Ramos*, 2011 WL 2639940, at *2 (Wn. App. Div. 2), *noted at* 162 Wn. App. 1038 (2011); Clerk's Papers (CP) at 32. This Court declined the invitation to

strike the finding, instead ruling that the finding was supported by sufficient evidence. *Id.* This Court issued its unpublished decision on July 6, 2011, and its mandate terminating review of the case on August 10, 2011.² Although the VAPO has been modified several times, visitation between Ms. Gamble and Jessica remains supervised and the finding of neglect, upheld by this Court, remains. CP at 74 ¶ 1.8-1.9; CP at 76.

In addition to the VAPO proceeding, the Department notified Ms. Gamble that a civil finding of neglect was made against her because she allowed Jessica to have unsupervised contact with a man who had previously assaulted Jessica, and that Jessica was repeatedly vaginally and orally assaulted by Mr. Gamble during the times he was allowed unsupervised access to her. AR at 5, 86. Ms. Gamble appealed and the Office of Administrative Hearings held an evidentiary hearing. AR at 1. The facts presented at the hearing were largely undisputed³.

The administrative law judge upheld the finding of neglect. AR at 24. Ms. Gamble appealed to the Department's Review Judge who independently reviewed the record and entered her own findings of fact.

² It does not appear that the mandate was designated for inclusion in the appellate record. However, Ms. Gamble provides the date in her opening brief and the Department agrees it is the correct date. Opening Br. at 9.

³ In his opening statement at the administrative hearing, Ms. Gamble's attorney stated "I think the dispute in this case is the conclusion of law and not the facts." CP at 396. He also stated "I think the facts are largely undisputed" during closing argument. CP at 464.

CP 2-14, FF 1-58; CP 16, CL 3. The Review Judge adopted the administrative law judge's conclusions of law that led to the finding of neglect against Ms. Gamble. CP 18, CL 10. The Review Judge also applied collateral estoppel based on this Court's decision in the VAPO appeal. AR at 18-19. Ms. Gamble appealed the Review Judge's decision (Final Order) to superior court. CP at 1. The Department moved for summary judgment on collateral estoppel grounds and the court granted the Department's motion. CP at 175. Ms. Gamble now appeals to this Court.

IV. ARGUMENT

A. Standard of Review

This matter is before the Court on appeal from a final agency order in an adjudicative proceeding under the Administrative Procedure Act (APA), Chapter 34.05 RCW. This Court's review is limited to a review of the agency's final order. *Tapper v. Empl. Sec. Dep't*, 122 Wn.2d 397, 403-04, 858 P.2d 494 (1993); *Northwest Steelhead & Salmon Coun. Of Trout Unlimited v. Dep't of Fisheries*, 78 Wn. App. 778, 896 P.2d 1292 (1995). Therefore, the order for the Court to review is the Department's April 12, 2012, Final Order. AR at 1.

This Court generally applies the APA standards of review directly to the record made before the administrative agency. RCW 34.05.558;

Heinmeiller v. Dep't of Health, 127 Wn.2d 595, 601, 903 P.2d 433 (1995), *cert. denied*, 518 U.S. 1006 (1996). The Court may grant relief from an agency order in an adjudicative proceeding only on the grounds provided under RCW 34.05.570(3).⁴ *Tapper*, 122 Wn.2d at 402.

Ms. Gamble challenges only Finding of Fact 58 and the legal conclusion that her conduct meets the definition of neglect. Opening Br. at 14. Unchallenged findings of fact are verities on appeal. *Kitsap Cnty. v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 138 Wn. App. 863, 872, 158 P.3d 638 (2007).

The Court reviews de novo both the agency's conclusions of law and its application of the law to the facts. *Tapper*, 122 Wn.2d at 402-03. It can modify conclusions of law if the agency's review judge "erroneously interpreted or applied the law." RCW 34.05.570(3)(d); *Heinmiller*, 127 Wn.2d at 601. The Court may also substitute its legal judgment for that of the reviewing officer, so long as it accords "substantial weight" to the agency's interpretations of law within its area

⁴ Relief may be granted only if (a) the order or rule on which it is based is unconstitutional; (b) the order exceeds the agency's statutory authority; (c) the decision-making process was unlawful; (d) the agency erroneously interpreted or applied the law; (e) the order is not supported by substantial evidence in light of the whole record before the court; (f) the agency has not decided all issues requiring resolution by the agency; (g) a motion for disqualification should have been granted; (h) the order is inconsistent with the agency's rules; or (i) the order is arbitrary or capricious. RCW 34.05.570(3).

of expertise. *Macey v. Empl. Sec. Dep't*, 110 Wn.2d 308, 313, 752 P.2d 372 (1988).

Ms. Gamble has the burden of showing the invalidity of the Final Order. RCW 34.05.570(1)(a); *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 381, 932 P.2d 139 (1997). Here, Ms. Gamble has not satisfied her burden of showing that the Final Order is unsupported by substantial evidence or constitutes an error of law.

B. The Department's Finding Of Neglect Is Supported By Substantial Evidence And Does Not Constitute An Error Of Law

1. Ms. Gamble's Actions Constitute Neglect Of A Vulnerable Adult

RCW 74.34.020(12) defines "neglect" as "(a) a pattern of conduct or inaction by a person or entity with a duty of care that fails to provide the goods and services that maintain physical or mental health of a vulnerable adult, or that fails to avoid or prevent physical or mental harm or pain to a vulnerable adult; or (b) an act or omission that demonstrates a serious disregard of consequences of such a magnitude as to constitute a clear and present danger to the vulnerable adult's health, welfare, or safety, including but not limited to conduct prohibited under RCW 9A.42.100."

Jessica is a low functioning adult with a low IQ. AR at 7, FF 34. She needs assistance with safety, caring for herself, support in community

activities, and direct support in protection and advocacy. AR at 7, FF, 33. Ms. Gamble is aware of Jessica's need for assistance with protection and advocacy because that need is identified in Jessica's caretaking plan. AR at 6, FF 28.

Jessica disclosed in 2010 that Mr. Gamble had ongoing sexual contact with her from 2007 to 2010, when she lived in the same home as Mr. Gamble and Ms. Gamble. AR at 7, FF 35, 37. Ms. Gamble acknowledged that from March 2007 through March 2008, there were allegations that sexual contact had occurred between Mr. Gamble and Jessica. AR at 9, FF 52. Despite these allegations and Mr. Gamble's 2005 criminal conviction, once or twice a month Ms. Gamble allowed Mr. Gamble to pick up Jessica from school. *Id.*, FF 52. Ms. Gamble did not believe that Jessica had been assaulted in 2004 and did not believe Jessica's 2010 allegations because her younger daughter, who was six years old at the time, was home with Mr. Gamble and Jessica. AR at 8, FF 44. Although Ms. Gamble believes that Jessica is a habitual liar, she knew that her daughter was vulnerable, developmentally disabled, and unable to protect herself. AR at 7, FF 38.

Ms. Gamble, as Jessica's paid caregiver and mother, had a duty of care to Jessica. AR 17, Conclusion of Law (CL) 7. Ms. Gamble's failure to ensure that Jessica was appropriately supervised while in the presence

of Mr. Gamble demonstrated a serious disregard of the consequences of such a magnitude as to constitute a clear and present danger to Jessica. AR 17, CL 10 (adopting the Initial Order's Conclusions of Law 10, 11, 12, and 13 at AR 34-35). Ms. Gamble's actions constitute neglect of a vulnerable adult.

Ms. Gamble contends that, while she did have a duty of care to Jessica, her actions do not amount to "neglect" because she had no direct knowledge that Jessica was being sexually abused. Opening Br. at 14. Ms. Gamble also argues that "the Department must point to something in the record to indicate Ms. Gamble was on actual notice of the abuse." Opening Br. at 16. This is incorrect.

Whether or not Ms. Gamble had actual knowledge of the abuse is not the relevant inquiry. Ms. Gamble had actual notice of a felony-assault in 2004 of Jessica by Mr. Gamble. Ms. Gamble 'acknowledged that from March 2007, through March 2008, there were allegations that sexual contact occurred between Mr. Gamble and Jessica." AR at 9, FF 52. Ms. Gamble admitted that Mr. Gamble picked Jessica up from school "once or twice a month." AR 9, FF 52. Ms. Gamble admits she was on notice that Mr. Gamble posed a threat to Jessica because Ms. Gamble "asked Jessica questions, 'a number of times' during the day in order to

determine if there was any inappropriate contact between Mr. Gamble and Jessica. AR at 10, FF 57.

The felony-assault provided sufficient notice to Ms. Gamble that it was necessary for her, as caregiver, to implement sufficient safeguards to protect Jessica, who is incapable of protecting herself. Ms. Gamble exposed Jessica to the supervision of Mr. Gamble and failed to take any meaningful actions to ensure Jessica's safety.

2. Finding Of Fact 58⁵ Is Supported By Substantial Evidence

Finding of Fact 58 is a credibility finding that "the totality of the evidence supports a finding that the Appellant's statements that she believes that the 2004 assault did not occur, and that Mr. Gamble's sexual contact with Jessica, did not happen, are not credible." AR at 12. A reviewing court should not substitute its own judgment regarding witness credibility for that of the agency. *Premera v. Kreidler*, 133 Wn. App. 23, 31, 131 P.3d 930 (2006).

However, even if the finding was subject to review, it is supported by substantial evidence. The finding lists the evidence supporting it,

⁵ The Review Decision and Final Order contains two Findings of Fact labeled number 58. AR at 10; AR at 12. Ms. Gamble's argument indicates that she disputes the second Finding of Fact 58 at AR 12 in which the Review Judge found "Ms. Gamble's denial of knowledge that the abuse had resumed to be unbelievable." Opening Br at 14; *see also* AR at 12.

including the testimony of the witnesses presented by both sides⁶, the exhibits admitted in the record⁷, the no-contact orders⁸, Dr. Currah's report and letter⁹, the 2004 conviction¹⁰, the 2010 Information and Declaration of Probable Cause¹¹, the March 4, 2011 Order of Dependency¹², and the social worker's investigative report¹³. AR at 12. The Review Judge explained that both she and the ALJ found Ms. Gamble's statement that "she did not believe that Mr. Gamble assaulted Jessica in 2004 or that Mr. Gamble engaged in sexual contact with Jessica from 2007 through 2010" was not credible because:

"First, Mr. Gamble was convicted of assaulting Jessica in 2004, and [Ms. Gamble] failed to address the incident with Jessica, and relied on Mr. Gamble's denial. Second, [Ms. Gamble]'s questioning of her daughter on a repeated basis did not sufficiently or directly probe whether Mr. Gamble was involved in any activities with Jessica. Here, Ms. Gamble knew that her daughter was vulnerable, developmentally disabled and unable to protect herself. Her repeated inquiry was indicative of someone who thought that there might have been a problem."

AR at 13, Finding of Fact 58. Ms. Gamble does not contest the fact that she "was aware that Mr. Gamble's original criminal charge in 2004 'was

⁶ The testimony of Lisa Gilman begins at CP 401. The testimony of Babysalome Gamble begins at CP 437.

⁷ AR at 54-67, 70-185.

⁸ AR at 57, 62.

⁹ AR at 59, 63, 65.

¹⁰ AR at 100-112.

¹¹ AR at 113, 114.

¹² AR at 116.

¹³ AR at 79-89.

accusing [him] of rape' of Jessica.” AR at 8, FF 41. Ms. Gamble does not contest the fact she “was aware that Mr. Gamble was convicted of a felony because of the assault against Jessica.” AR at 8, FF 42. Ms. Gamble does not contest the fact she knew Jessica was a vulnerable adult. AR at 7, FF 38. Ms. Gamble does not contest the fact that she questioned Jessica about her safety. AR at 10, FF 57. These uncontested facts, which are verities on appeal, constitute substantial evidence to support Finding of Fact 58.

C. Because This Court Previously Upheld A Neglect Finding Against Ms. Gamble, The Department's Application of Collateral Estoppel Also Does Not Constitute An Error Of Law

1. The Doctrine Of Collateral Estoppel Is Properly Applied When This Court Has Already Made A Determination That Ms. Gamble Neglected Jessica

The doctrine of collateral estoppel prevents a second litigation of issues between the parties, even though a different claim or cause of action is asserted. *Rains v. State*, 100 Wn.2d 660, 665, 674 P.2d 165 (1983). The purpose of the doctrine is to promote the policy of ending disputes. *McDaniels v. Carlson*, 108 Wn.2d 299, 303, 738 P.2d 254 (1987). When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim. *Nielson v. Spanaway General*

Med. Clinic, Inc., 135 Wn.2d 255, 262, 956 P.2d 312 (1998) (quoting Restatement (Second) of Judgments § 27 (1982)).

In Washington, the doctrine of collateral estoppel applies where (1) the issues presented in both cases are identical; (2) there was a final judgment on the merits in the first action; (3) the party against whom the doctrine is asserted was a party to or in privity with a party to a prior action; and (4) the application of the doctrine does not work an injustice against the party to whom it is applied. *Hanson v. City of Snohomish*, 121 Wn.2d 552, 562, 852 P.2d 295 (1993). In this case, collateral estoppel applies because all four factors are present. First of all, the issues presented in this case are identical to the issues previously decided by this Court in *Ramos*. Whether Ms. Gamble neglected her vulnerable adult daughter has already been decided in the affirmative by Pierce County Superior Court, and upheld by this Court. *In re Ramos*, 2011 2639940, at *1; CP at 31. This Court upheld the superior court's civil finding that Ms. Gamble neglected Jessica by leaving her exposed to sexual assaults by her husband. *Id.* The Court stated,

“[Ms. Gamble] contends that her opinion, that she does not believe [Jessica]’s allegations, is not evidence of neglect. But the court had evidence that [Jessica] was very vulnerable to undue influence and was extremely reluctant to tell [Ms. Gamble] anything that would disrupt her relationship with [Mr. Gamble]. Adding this evidence to [Mr. Gamble]’s prior assault of [Jessica], which had

originally been pleaded as third degree rape of a child, [Ms. Gamble]'s act of allowing Tyrone to live with her and [Jessica] was sufficient evidence of neglect..."

Id. It concluded, "we decline [Ms. Gamble]'s invitation to strike the finding of neglect..." *In re Ramos*, 2011 2639940, at *2; CP at 32. Circumstances have not changed since that VAPO was granted, and the Department is entitled to rely on this Court's finding of neglect of the prior proceeding as conclusive.

The requirements of the second and third factors, that there be a final judgment on the merits and that the parties in both actions be the same, have also been met. There was a final judgment on the merits in the prior VAPO litigation. *In re Ramos*, 2011 2639940, at *1; CP at 31. The superior court and this Court found Ms. Gamble to have neglected her vulnerable adult daughter. *Id.* The decision was final on August 10, 2011, the date this Court issued its mandate terminating review. And, just as in this case, the parties in the *Ramos* case were the Department and Ms. Gamble.

With regards to the final factor, Ms. Gamble argues that an injustice would occur if the VAPO hearing is given collateral estoppel effect because the hearing on the VAPO was a limited hearing and resolved on relaxed rules of evidence. Opening Br. at 13. However, Ms. Gamble had an unencumbered, full and fair opportunity to litigate

during the VAPO proceeding. *See Nielson*, 135 Wn.2d at 265. There is no injustice in applying the doctrine of collateral estoppel to a finding of neglect that has already been fully and fairly litigated.

The respondent in a VAPO matter is entitled to a full evidentiary hearing and the Court “shall give the vulnerable adult, the respondent, [and] the petitioner...the opportunity to testify and submit relevant evidence.” RCW 74.34.135(2); RCW 74.34.135(3). Ms. Gamble was granted a full evidentiary hearing on the VAPO petition, in which she was represented by counsel who opposed the VAPO and the finding of neglect. *See CP* at 150, 156. Furthermore, since the rules of evidence are relaxed in *both* VAPO litigation and administrative hearings, the relaxed standards do not lead to procedural injustice. ER 1101; WAC 388-02-0475.

Ms. Gamble attempts to equate her situation to that of the cases of *Hadley v. Maxwell*, 144 Wn.2d 306, 27 P.3d 600 (2001) and *State v. Vasquez*¹⁴, 148 Wn.2d 303, 59 P.3d 648 (2002), in which collateral estoppel was deemed not applicable under the injustice prong because the interests at stake in the first proceeding did not call for a full and vigorous litigation to the same extent the subsequent litigation required. Opening Br. at 13. In *Hadley*, the court held that collateral estoppel should not bar a litigant who lost a contested hearing over a \$95 fine for a lane change

¹⁴ Ms. Gamble incorrectly cites to this case as *State v. Valdez*.

violation from later pursuing a personal injury claim. *Hadley v. Maxwell* at 601. Similarly, in *Vasquez*, the court held that a probable cause determination in an administrative license revocation hearing did not bar relitigation in a criminal prosecution. *State v. Vasquez* at 313.

In *Hadley*, there was a large economic difference between a \$95 fine and a potentially much larger personal injury claim. In *Vasquez*, there was a significant difference between the right to a license and the loss of liberty. Here, the incentive to litigate was the same as either a VAPO or a civil finding could result in the termination of a caregiver's contract with the Department. RCW 74.39A.051; RCW 74.34.056(2); WAC 388-825-385. Ms. Gamble's incentive to litigate the VAPO may have even been stronger as it had the added consequence of restricting her contact with her daughter.

Ms. Gamble's incentive to challenge the finding of neglect within the VAPO litigation was high, and she was represented by counsel in actually doing so. CP at 150. Thus, the Department's application of collateral estoppel does not constitute an error of law. However, even if this Court disagrees, the Final Order should still be upheld because the Review Judge independently reviewed the record and concluded that Ms. Gamble committed neglect.

2. The Department's Review Judge Properly Raised and Applied Collateral Estoppel After This Court Affirmed the Superior Court's Finding of Neglect

Ms. Gamble argues that because the Department failed to raise the issue of collateral estoppel at the administrative level, it has waived this argument on appeal. Opening Br. at 8. This argument is misplaced. It is true that collateral estoppel cannot be challenged for the first time on appeal. *Spokane Cy. v. City of Spokane*, 148 Wn. App. 120, 124, 197, P.3d 1228 (2009). But, collateral estoppel was raised at the final level of administrative review, not on appeal. AR at 18.

In this case, there was not a final judgment on the merits in the *Ramos* case at the time the Office of Administrative Hearings held the initial hearing. The initial hearing was held on July 25, 2011. AR at 1. The Court of Appeals issued its decision affirming the VAPO on July 6, 2011. Because the Court of Appeals had issued its decision only 19 days earlier, it had not yet issued its mandate terminating review and the decision could not be considered a final judgment. RAP 12.5(a)-(b). Either party still had the opportunity to file a motion for reconsideration. RAP 12.4(b). Either party still had the right to appeal for discretionary review with the Supreme Court. RAP 13.4(a). The Department representative informed the Administrative Law Judge that the VAPO was under review by this Court and the VAPO was admitted as an exhibit at

hearing. CP at 385-386; AR at 137. The Department was correct to not raise collateral estoppel at the hearing because the VAPO was still in the appeal process.

However, this Court had issued its mandate by the time the Review Judge issued her April 18, 2012, Final Order. Thus, the Review Judge properly applied collateral estoppel in addition to reaching the merits of the case. AR at 17-18, CL 10-12. The Review Judge is the final level of administrative review by the Department. WAC 388-02-0605(2). Therefore, collateral estoppel was properly raised during the administrative process and not on appeal.

Furthermore, regardless of whether the Department's representative raised the issue explicitly at hearing, the Review Judge had the authority to raise collateral estoppel once this court issued its mandate terminating review of the VAPO litigation. Administrative law judges and review judges are authorized to resolve issues by "utilizing the best legal authority and reasoning available." WAC 388-02-0220(2). A review judge considers the whole record or any parts of it cited by the parties. RCW 34.05.464(5).

The Review Judge considered the VAPO litigation and appropriately raised the issue of collateral estoppel as the best legal reasoning available in light of the fact Ms. Gamble had already litigated

the same exact issue in court. In doing so, the Review Judge did not commit an error of law.

D. Whether Summary Judgment Was A Proper Procedure In Superior Court Is Irrelevant Because This Court Reviews The Department's Decision *De Novo* Under the Administrative Procedure Act's Standards of Review

Summary judgment is proper if, “after viewing all facts and reasonable inferences in the light most favorable to the nonmoving party, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.” *Fairway Estates Ass'n of Apartment Owners v. Unknown Heirs, Devisees of Young*, 172 Wn. App. 168, 175, 289 P.3d 675 (2012) (citing CR 56(c)). Appellate courts review summary judgment orders de novo. *Harris v. Ski Park Farms, Inc.*, 120 Wn.2d 727, 737, 844 P.2d 1006 (1993).

Ms. Gamble argues that there is no authority supporting the use of summary judgment motions in judicial review hearings held under 34.05 RCW, the APA. Opening Br. at 7. But, as Ms. Gamble concedes, there is no authority prohibiting this practice. *Id.* Generally, the civil rules, including CR 56 regarding summary judgment, do not apply to administrative appeals. *Vasquez v. Labor and Indus.*, 44 Wn. App. 379, 383, 722 P.2d 854 (1986). However, the Supreme Court has permitted the use of summary judgment at the agency level even though the APA does

not explicitly allow for the practice. *Verizon Northwest, Inc. v. Wash. Emp't Sec. Dept.*, 164 Wn.2d 909, 916, 194, P.3d 255 (2008). In doing so, the Court recognized the compatibility of the APA's error of law standard and the summary judgment de novo standard of review. *Id.*

Here, the Department's motion to superior court was based on a pure issue of law: whether the Department properly applied collateral estoppel. Since the issue was purely one of law, the APA's error of law standard is compatible with the standard for resolving legal questions on summary judgment. Therefore, there was no prejudice to Ms. Gamble based on the Department's use of summary judgment to resolve this legal issue.

Moreover, regardless of whether summary judgment was appropriate at the superior court level, this Court is in the same position as the superior court. It is reviewing the final agency decision; not the order granting summary judgment. *Tapper*, 122 Wn.2d at 403-04. Therefore, the superior court's ruling on a summary judgment basis is not before this court and should have no impact on this Court's analysis of the Department's Final Decision under the APA.

Finally, Ms. Gamble incorrectly argues that the Rules for Appeal of Courts of Limited Jurisdiction (RALJ) apply to this case. Opening Brief (Opening Br.) at 7. But, the RALJ govern the procedure for review

of a final decision of a court of limited jurisdiction. RALJ 1.1. Department findings of neglect, as in this case, are governed exclusively by the APA. RCW 34.05.510. Ms. Gamble's arguments to the contrary lack merit.

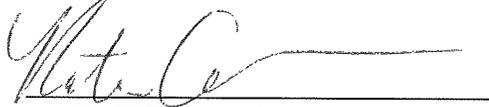
V. CONCLUSION

The Department's Review Decision and Final Order is supported by substantial evidence that Ms. Gamble's act, allowing Mr. Gamble unsupervised contact with Jessica, knowing of Mr. Gamble's prior assault conviction and that Jessica was very vulnerable to undue influence, is sufficient evidence to support the finding of neglect. Further, the Department's application of collateral estoppel does not constitute an error of law because this Court previously upheld a finding of neglect against Ms. Gamble based on the same set of facts.

This Court should uphold the Review Decision and Final Order affirming the Department's determination that Ms. Gamble neglected a vulnerable adult.

RESPECTFULLY SUBMITTED this 22nd day of October, 2013.

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APPENDIX TO BRIEF

Westlaw

Not Reported in P.3d, 162 Wash.App. 1038, 2011 WL 2639940 (Wash.App. Div. 2)
(Cite as: 2011 WL 2639940 (Wash.App. Div. 2))

Only the Westlaw citation is currently available.

of that conviction, but the order was rescinded in 2006.

NOTE: UNPUBLISHED OPINION, SEE RCWA 2.06.040

On September 27, 2010, Adult Protective Services (APS) received a referral alleging that Ramos was being sexually abused by her step-father, Tyrone. Ramos was living with the Gambles at the time of the referral. When APS initially contacted Ramos about the referral on September 30, 2010, she denied any abuse. But the next day, she reported the abuse to her job coach. During a second interview on October 1, 2010, Ramos reported that Tyrone had been sexually abusing her since she was 17 years old, with the last abuse occurring in June 2010. She said that the abuse only occurred when Babysalome was not at home and that she had not told her about the abuse. Ramos moved to an adult family home after the second interview.

Court of Appeals of Washington,
Division 2.

In re the Matter of Jessica RAMOS, A Vulnerable Adult.

No. 41685-9-II,
July 6, 2011.

Appeal from Pierce County Superior Court; Honorable Susan K. Serko, J.
Thomas E. Weaver Jr., Attorney at Law, Bremer-ton, WA, for Appellant.

Margaret M. Kennedy, Assistant Attorney General, Olympia, WA, for Respondent.

UNPUBLISHED OPINION

QUINN-BRINTNALL, J.

*1 Jessica Ramos is a 20-year-old developmentally disabled adult who lived with Tyrone Gamble and his wife Babysalome.^{FN1} Babysalome appeals from an order of protection—vulnerable adult (VAPO) limiting her contact with Ramos, her daughter. We affirm.^{FN2}

APS filed a petition for a VAPO on Ramos's behalf as to both Tyrone and Babysalome. At a hearing on the petition, APS asked that contact between Babysalome and Ramos be supervised because Ramos is very susceptible to undue influence and because Babysalome has previously said that Ramos's allegations of sexual abuse by Tyrone should not be believed. Babysalome opposed the entry of a VAPO because there was no evidence that she was aware of Tyrone's alleged abuse of Ramos. The court commissioner found that Ramos is a vulnerable adult and that Babysalome had neglected her. The commissioner entered a VAPO limiting Babysalome's contact with Ramos to supervised visits at the adult family home where Ramos was living.^{FN3} The VAPO form used in the order states that the court had found that Babysalome had "committed acts of abandonment, abuse, neglect and/or financial exploitation" of Ramos. Clerk's Papers (CP) at 7. Babysalome's motion to revise was denied.

FN1. We use the Gambles' first names for clarity and intend no disrespect.

FN2. A commissioner of this court initially considered Babysalome's appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

In 2004, Tyrone was charged with third degree child rape against Ramos. Tyrone was convicted of the lesser offense of third degree assault against Ramos. A no-contact order prohibiting Tyrone from contacting Ramos was entered against him as part

FN3. The commissioner also entered a VAPO restraining Tyrone from any contact with Ramos. He is not a party to this ap-

Not Reported in P.3d, 162 Wash.App. 1038, 2011 WL 2639940 (Wash.App. Div. 2)
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peal.

First, Babysalome argues that the court erred in finding that she had "committed acts of abandonment, abuse, neglect and/or financial exploitation" of Ramos because there was no evidence that she had committed acts of abandonment, abuse, or financial exploitation, CP at 7. While that is true, the finding used the disjunctive "or" and therefore need not be stricken.

Second, Babysalome argues that the court erred in finding that she had committed acts of neglect of Ramos. She contends that because the no-contact order restricting Tyrone's contact with Ramos had been rescinded in 2006, and because Ramos had never told her about Tyrone's sexual abuse that allegedly began in 2007, there is no evidence that she neglected Ramos by allowing Tyrone to return to the family home. She also contends that her opinion, that she does not believe Ramos's allegations, is not evidence of neglect. But the court had evidence that Ramos was very vulnerable to undue influence and was extremely reluctant to tell Babysalome anything that would disrupt her relationship with Tyrone. Adding this evidence to Tyrone's prior assault of Ramos, which had originally been pleaded as third degree rape of a child, Babysalome's act of allowing Tyrone to live with her and Ramos was sufficient evidence of neglect to support the VAPO.

*2 Finally, Babysalome notes that she does not object to the order requiring supervised visitation. She objects only to the finding that she neglected Ramos. She suggests that the court need not make a finding of neglect in order to enter a VAPO and asks that the finding be stricken. But a petition for VAPO can be filed only when a vulnerable person seeks "relief from abandonment, abuse, financial exploitation, or neglect." RCW 74.34.110(1). While the statute defining the judicial relief that may be ordered in a VAPO, RCW 74.34.130, does not expressly require the court to make a finding of abandonment, abuse, financial exploitation, or neglect involving the vulnerable adult, a requirement for

such a finding is fairly implied by RCW 74.34.110(1). Thus, we decline Babysalome's invitation to strike the finding of neglect but leave the remainder of the VAPO intact.

We affirm the entry of the VAPO restricting Babysalome to supervised visits with Ramos.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

We concur: ARMSTRONG, P.J., and JOHANSON, J.

Wash.App. Div. 2, 2011.

In re Ramos

Not Reported in P.3d, 162 Wash.App. 1038, 2011 WL 2639940 (Wash.App. Div. 2)

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Attorney for AIP

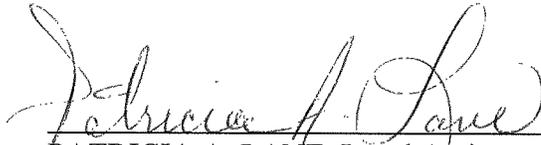
Thomas Weaver
PO Box 1056
Bemerton, WA 98337

Guardian ad Litem

Thomas Deutsch
100 Inglewood Park
Longview, WA 98632

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

DATED this 22nd day of October, 2013, at Tumwater, Washington.



PATRICIA A. LANE, Legal Assistant

WASHINGTON STATE ATTORNEY GENERAL

October 22, 2013 - 3:16 PM

Transmittal Letter

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