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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

**NO. 304582-III**

**COURT OF APPEALS**

**OF THE STATE OF WASHINGTON**

**DIVISION III**

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**KATHRYN RYAN**

Appellant

v.

**STATE OF WASHINGTON  
DEPARTMENT OF SOCIAL AND HEALTH SERVICES**

Respondent

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**APPELLANT'S REPLY BRIEF**

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## I. ARGUMENT

### A. THE DEPARTMENT'S INTERPRETATION OF WAC 388-71-01210 RENDERS PARTS OF THE REGULATION MEANINGLESS AND SUPERFLUOUS AND IS INCONSISTENT WITH THE AGENCY'S INTENT.

The Department argues that WAC 388-71-01210 is clear and unambiguous because it allows the Department to serve notice by certified and regular mail to the last known place of residence as long as the Department has made a reasonable, good faith effort to find the address of the alleged perpetrator's last known place of residence. Respondent's Brief, p. 11. It further argues that the Department is not required to actually find Ms. Ryan but rather it must make ". . . an effort, subject to its ability, to locate her by making a reasonable, good faith effort to determine the address of her last known place of residence." Respondent's Brief, p. 13. As established in Ms. Ryan's opening brief, the Department's argument is not supported by law.

#### 1. The regulation is ambiguous.

A regulation is ambiguous when there is more than one reasonable interpretation. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 12, 43 P.3d 4 (2002). Here, the regulation has more than one reasonable interpretation and is, therefore, ambiguous.

**2. The Department's interpretation of the notice regulation renders parts of the regulation meaningless and superfluous and frustrates the agency's intent to provide due process protections.**

Regulations should not be interpreted in a manner "that renders any portion thereof meaningless or superfluous" and should be "interpreted consistently with its underlying policy." *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 809, 16 P.3d 583 (2001); *Sunnyside v. Fernandez*, 59 Wn. App. 578, 582, 799 P.2d 753 (1990). The Department's interpretation of WAC 388-71-01210(1) renders parts of the notice provision meaningless and superfluous and frustrates the agency's intent to provide due process safeguards.

The Department, once again, ignores portions of WAC 388-71-01210(1) by stating, "[t]he duty imposed by this regulation is that the Department made an effort, *subject to its ability*, to locate her [Ms. Ryan] by making a reasonable, good faith effort to determine the address of her last known place of residence." Respondent's Brief, p. 13. This interpretation ignores the part of the regulation that states, "[t]he duty of notification created by this section is subject to the ability of the department to ascertain the location of the alleged perpetrator." As such, the Department's interpretation renders this portion of the regulation meaningless.

The Department's interpretation also renders WAC 388-71-01210(2) superfluous. If there were no duty to ascertain the location of the alleged perpetrator and the regulation allowed the Department to send notice to a location where it knew the alleged perpetrator did not reside, a regulation mandating personal service would be superfluous.

Finally, the Department's interpretation frustrates the regulatory scheme that provides multiple due process safeguards to allow alleged perpetrators to challenge initial findings of abuse. An elementary and fundamental requirement of due process in any proceeding is notice and an opportunity to be heard. *Robinson v. Hanrahan*, 409 U.S. 38, 39-40, 93 S. Ct. 30, 34 L. Ed. 2d 47 (1972). Without adequate notice, the remaining due process safeguards are of no value.

This court should not condone an interpretation of the regulation that would render parts of it meaningless and superfluous or against the agency's intent to provide due process protections.

**B. THE DEPARTMENT DID NOT EXERCISE REASONABLE GOOD FAITH TO ASCERTAIN MS. RYAN'S LOCATION WHERE THE STEPS THE DEPARTMENT TOOK WERE MERE GESTURES AND OCCURRED NEARLY ONE MONTH PRIOR TO MAILING THE NOTICE.**

The Department argues that it exercised good faith when it "twice contacted her [Ms. Ryan's] mother at the residence she shared with Ms.

Ryan,<sup>1</sup> contacted her employer, and left a message with a client for who she is working.”<sup>2</sup> Respondent’s Brief, p. 14. The Department further argued that “there was no other address the Department could have discovered since she purposefully did not change her mailing address . . . .” Respondent’s Brief, p. 15. However, these actions do not constitute good faith.

Substantial evidence exists where there is a “sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.” *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hr’gs Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998). While the WAC does not define “reasonable, good faith,” courts have examined whether the party “made an honest and reasonable” effort to locate the defendant before seeking to serve by publication or mail. *Dobbins v. Mendoza*, 88 Wn. App. 862, 872-873, 947 P.2d 1229 (1997); *Rodriguez v. James-Jackson*, 127 Wn. App. 139, 145, 111 P.3d 271 (2005). In these cases, the court overturned judgments entered by default after it found that the plaintiffs

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<sup>1</sup> The Department incorrectly states that it contacted Ms. Ryan’s mother at the residence she shared with Ms. Ryan. Respondent’s Brief, p. 14. The Department knew at the time of the second contact that Ms. Ryan no longer resided with her mother. AR 69-70.

<sup>2</sup> The Department incorrectly states that it “left a message with a client for who she [Ms. Ryan] was working.” Respondent’s Brief, p. 14. There is no indication in the record that a message with a client was ever left. The only telephone message made by the APS investigator was to an unknown message phone number provided to her by someone at Ms. Ryan’s employer. AR 70.

failed to make an “honest and reasonable effort” to locate the defendant prior to seeking service by publication or mail. *Id.*

In *Dobbins*, the court concluded that the plaintiff did not make an honest and reasonable effort to find the defendant before resorting to service by publication even though the plaintiff had sent someone to the property on three occasions, attempted service twice but served the wrong person, initiated calls to various government agencies in an attempt to locate the defendants, obtained a contact number for the defendant’s property manager and attempted to contact him on numerous occasions, and obtained an address for the property manager. *Dobbins*, 88 Wn. App. at 873. The court found that an honest and reasonable effort would have included attempting personal service or service by mail to the defendant’s last known address, researching prior judgments taken against the defendant for possible leads as to the defendant’s location, and contacting the defendant’s brother who was also the conveyor of the defendant’s property interest in an attempt to ascertain the location of the defendant before seeking service by publication. *Id.* at 874.

Similarly, in *Rodriguez*, the court found that the plaintiff failed to make an honest and reasonable effort to find the defendant prior to serving by mail to the defendant’s last known address. *Rodriguez*, 127 Wn. App. at 144-145. Here, the plaintiff tried to locate the defendant by attempting

to serve the defendant at the last known address, calling a disconnected number, searching for contact information via internet and local phone directories, and speaking with the current resident of the defendant's former address who notified the plaintiff that the defendant no longer resided at the address and had moved out of state. *Id.* The court found that "simply mailing to what they believe is to be the last known address does not fully satisfy due process." *Id.* at 145.

Similar to *Dobbins* and *Rodriguez*, the Department failed to make an honest and reasonable effort to locate Ms. Ryan. In all, the Department made three phone calls and talked to the alleged victim twice in an attempt to contact Ms. Ryan. AR 68-71. Of these three phone calls, one was to the alleged victim's COPES manager who, except for managing Ms. Ryan's mother's COPES hours, had no relationship with Ms. Ryan. AR 68-71. Another of the phone calls was to Ms. Ryan's employer. AR 70. Except for discovering that Ms. Ryan's employer did not have a contact number for Ms. Ryan, there is no indication of the content of the call or the message APS asked the employer to pass onto Ms. Ryan. AR 70. Finally, the Department left one message<sup>3</sup> on a message number<sup>4</sup> provided

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<sup>3</sup> The Department incorrectly states that "Ms. Ryan failed to return calls or messages left by the investigator." Respondent's Brief, p. 17. However, referencing calls or messages is an inaccurate statement of the facts. The APS investigator left one message on an unknown message number. AR 70.

by someone at Ms. Ryan's employer.<sup>5</sup> AR 70. There is no indication from the record to whom the number belonged, what type of message was left, whether the message even requested Ms. Ryan's new residential address for purposes of notice, or whether the owner of this number conveyed the message to Ms. Ryan. AR 68-71. All of these contacts could not have taken more than ten minutes, and all of these contacts relied on third parties to provide Ms. Ryan with verbal notice that the Department was trying to reach her for some unknown purpose. AR 68-71.

In addition, all these minimal actions occurred nearly one month prior to the date the notice was sent. AR 70-71. Then, without doing anything more or making any effort to renew any of the prior contacts to determine if circumstances had changed, the Department mailed the notice to an address it knew Ms. Ryan did not reside, the alleged victim did reside, and that the alleged victim, even if she wanted to provide Ms. Ryan with notice, did not know where Ms. Ryan resided. AR 69-70.

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<sup>4</sup> The Department incorrectly states that it obtained "a telephone number for Ms. Ryan." Appellant's Brief, p. 6. This is an inaccurate statement of the facts. The record reflects that the APS investigator obtained a message number for Ms. Ryan but there is no indication in the record that the number belonged to Ms. Ryan. AR 68-71.

<sup>5</sup> The Department incorrectly states that it "left a message with a client for who she [Ms. Ryan] was working." Respondent's Brief, p. 14. There is no indication in the record that a message with a client was ever left. The only telephone message left by the APS investigator was to an unknown message phone number provided to her by someone at Ms. Ryan's employer. AR 70.

The Department states “that there was no other address the Department could have discovered since she purposefully did not change her mailing address . . . .” Respondent’s Brief, p. 15. This argument is without merit.

The APS notice provision requires the Department to send notice to the alleged perpetrator’s last known place of residence, not mailing address. WAC 388-71-01210(1). Mailing to the last known mailing address is insufficient to effect service under WAC 388-71-01210(1). Second, Ms. Ryan did have a residence at the time the notice was mailed. CP 19. As reflected in the record, Ms. Ryan resided with her friend, Paul Wood, and there is no evidence that Ms. Ryan was prevented from being served at this residential address. CP 19.

Finally, the Department alleges that Ms. Ryan concealed herself in an effort to evade notice. Respondent’s Brief, p. 13. However, there is no evidence or factual basis for this claim. Uncontroverted evidence establishes that Ms. Ryan did not know about the investigation until she was terminated from her job of nine years in August 2010. AR 60, 62. None of the evidence presented by the Department shows that Ms. Ryan knew about the investigation, and the Department’s records show that it never interviewed Ms. Ryan prior to making the substantiated finding. AR 68.

The Department did not exercise good faith in attempting to locate Ms. Ryan.

**C. NOTICE WAS NOT REASONABLY CALCULATED TO INFORM MS. RYAN OF THE SUBSTANTIATED FINDING WHERE THE DEPARTMENT HAD ACTUAL KNOWLEDGE THAT MS. RYAN DID NOT LIVE AT THE ADDRESS TO WHICH IT SENT NOTICE.**

The Department argues that once it learned that notice to Ms. Ryan's mother's home would be problematic it ". . . took additional reasonable steps to provide her [Ms. Ryan] notice." Respondent's Brief, p. 17. It also alleges that it exhausted all reasonable methods to provide notice. These arguments are without merit.

The question of the adequacy of notice is a mixed question of law and fact that is reviewed *de novo*. *Speelman v. Bellingham/Whatcom County Housing Auth.*, \_\_\_ Wn. App. \_\_\_, 273 P.3d 1035 (2012). Notice is adequate if it is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Dusenbery v. U.S.*, 534 U.S. 161, 167-168, 122 S. Ct. 694, 151 L. Ed 2d 597 (2002).

In *Speelman*, the court found that notice sent to the recipient's home was not reasonably calculated to apprise Ms. Speelman of the action where the Housing Authority knew at the time the notice was sent that the recipient was incarcerated. *Speelman*, 273 P.3d at 1040. The court noted

that “[w]hile this notice conformed to BHA policy, the government must ‘consider unique information about an intended recipient regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case.’” *Id. citing, Jones v. Flowers*, 547 U.S. 220, 230, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006).

The Department attempts to distinguish *Speelman* by stating that unlike in *Speelman*, the Department did not have actual knowledge of Ms. Ryan’s whereabouts.<sup>6</sup> Respondent’s Brief, p. 18, fn. 1. However, Ms. Ryan has never argued that the Department was required to know her actual whereabouts. Rather, Ms. Ryan contends that sending notice to a residence where it knew she did not reside was not reasonably calculated to provide her with actual notice. She also argues that the Department was required to take additional reasonable steps based on the unique circumstances of her case in an attempt to serve her in a manner that was reasonably calculated to provide her with notice.

Here, similar to *Speelman*, notice was not reasonably calculated to reach Ms. Ryan. Sending notice to an address where it knew Ms. Ryan did not reside, the alleged victim, from whom the Ms. Ryan was

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<sup>6</sup> The Department also argues that unlike in *Speelman*, Ms. Ryan was not in the custody or control of the Department. Respondent’s Brief, p. 18, fn. 1. This is a misstatement of the facts in *Speelman*. Ms. Speelman was not in the care and control of the Housing Authority at the time the notice was sent. *Speelman*, 273 P.3d at 1040. Rather, she was incarcerated at the time notice was sent. *Id.*

estranged, did reside, and where the alleged victim did not know how to reach Ms. Ryan, is not reasonable calculated to provide Ms. Ryan with notice. AR 69-71. In addition, prior to placing Ms. Ryan on the abuse registry, the Department knew that the certified notice had been returned as “unclaimed” and “unable to forward.” AR 70, 85. Despite receiving this information, the Department took no other steps to serve notice in a manner reasonably calculated to provide Ms. Ryan with actual notice.

The Department argues that its obligation to provide notice was not unlimited and that it had “exhausted all reasonable methods to provide” Ms. Ryan with notice. Respondent’s Brief, p. 17. Ms. Ryan agrees that the Department’s obligation is not limitless. However, the Department did not exhaust all reasonable methods to provide Ms. Ryan with notice. Reasonable steps to provide notice could have included contacting Ms. Ryan’s employer again (it believed the employer knew how to contact Ms. Ryan); mailing notice to Ms. Ryan in care of her employer; leaving a second message on the message number and inquiring whether Ms. Ryan had received the message; or contacting the phone company to see if Ms. Ryan had a phone number in her name. All of these actions are reasonable and inexpensive actions the Department could have and should have taken to ascertain Ms. Ryan’s location. Moreover, when weighed against the drastic consequences of a lifetime ban on many work activities resulting

from an abuse finding, the Department should have made efforts to actually locate Ms. Ryan and serve her, e.g. hire a process server, or ask a sheriff's department to locate her. If not at the time the notice was sent, then at least when the certified mail was returned unclaimed prior to the appeal period passing, the Department knew that mailing the notice to Ms. Ryan's mother's home was not reasonably calculated to provide Ms. Ryan with notice.

**D. GOOD CAUSE EXISTS TO GRANT MS. RYAN'S LATE HEARING REQUEST WHERE SHE PRESENTS A STRONG DEFENSE TO THE ALLEGATION OF ABUSE AND HER FAILURE TO FILE A TIMELY HEARING REQUEST CONSTITUTES INADVERTENCE OR EXCUSABLE NEGLIGENCE.**

The Department does not dispute that Ms. Ryan properly raised the issue of whether there was good cause to request a late hearing under WAC 388-02-0020. Nor does the Department dispute that BOA was required to rule on the issue of good cause in order to determine whether a late hearing request should be granted. Indeed, the Department affirmatively misled the hearing judge about the need to rule on good cause. CP 17. Thus, under RCW 34.05.570(3)(f), this Court should, at a minimum, remand to the BOA to decide this necessary issue. However, the Court is well within the bounds of law to directly find that there was good cause to grant Ms. Ryan a late hearing.

The law regarding vacation of defaults, as applied to undisputed facts in this case, establishes that as a matter of law, Ms. Ryan had good cause for allowing a late administrative hearing. Abuse of discretion includes exercise of discretion for untenable reasons, which includes errors of law. *Noble v. Safe Harbor Family Pres. Trust*, 167 Wn.2d 11, 17, 216 P.3d 1007 (2009). The BOA abused its discretion by failing to find good cause. This Court should vacate the default finding of mental abuse and order the Department to provide Ms. Ryan a hearing.

On the issue of good cause, the Department only argues that Ms. Ryan failed to establish excusable neglect and, thus, the court was not required to consider the three other factors for vacating a judgment, including whether Ms. Ryan proffered a strong or prima facie defense against the allegation of abuse. The Department misstates the law.

- 1. Ms. Ryan has a strong defense, and her failure to appear was not willful, requiring that the default be vacated.**

Default judgments are not favored because “[i]t is the policy of the law that controversies be determined on the merits.” *Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 581, 599 P.2d 1289 (1979). “The fundamental guiding principle has been thus stated: ‘(T)he overriding reason should be whether or not justice is being done’. . . .” *Id.* at 581-582, citing *Widucus v. Southwestern Elec. Coop., Inc.*, 26 Ill. App. 2d at 109, 167 N.E.2d at

803 (Ill. App. 1960). In deciding a motion to vacate, the court addresses four factors: (1) that there is substantial evidence to support at least a prima facie defense to the claim; (2) that the failure to timely appear and answer was due to mistake, inadvertence, surprise, or excusable neglect; (3) that the moving party acted with due diligence after notice of the default judgment; and (4) that the opposing party will not suffer substantial hardship if the default judgment is vacated. *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968). The first two factors are primary. *Id.*

Crucially, the Department does not contest that Ms. Ryan has a strong defense to the finding of mental abuse. In contrast to the Department's desire that the court focus solely on the factor of whether neglect was excusable, "[i]t is well settled that '[i]f a 'strong or virtually conclusive defense' is demonstrated, the court will spend little time inquiring into the reasons for the failure to appear and answer, provided the moving party timely moved to vacate and the failure to appear was not willful." *Johnson v. Cash Store*, 116 Wn. App. 833, 841, 68 P.3d 1099, quoting *White*, 73 Wn.2d at 352. The court determines whether substantial evidence exists for a prima facie defense by reviewing the moving party's evidence and reasonable inferences in the light most favorable to the

movant. *Pfaff v. State Farm Mut. Auto. Ins. Co.*, 103 Wn. App. 829, 834, 14 P.3d 837 (2000).

Ms. Ryan proffered a strong or virtually conclusive defense to the Department's finding of substantiated mental abuse. The totality of the Department's evidence to establish a finding of mental abuse was that Ms. Ryan allegedly called her mother a "bitch" and told her, "I'm going to cause trouble for you." AR 82. Ms. Ryan emphatically denies that she said those words to her mother but, even if true, this does not constitute mental abuse as defined by RCW 74.34.020(2).

Abuse is defined as willful action or inaction that inflicts injury, unreasonable confinement, intimidation, or punishment on a vulnerable adult, including mental abuse. RCW 74.34.020(2). Mental abuse is further defined as including, but not limited to, coercion, harassment, inappropriate isolation, and verbal assault that includes ridiculing, intimidating, yelling, or swearing. RCW 74.34.020(2)(c). Thus, the statutory definition of mental abuse requires two elements be met: first, that the alleged perpetrator engaged in an act such as harassment, ridiculing, swearing or yelling; and second, that the act resulted in a particular harm: the infliction of injury, confinement, intimidation or punishment upon the vulnerable adult. RCW 74.34.020(2). For example, if a passing pedestrian swears at a wheelchair-bound elderly woman for

crossing slowly in a crosswalk, saying the swear word may meet the act element of mental abuse but, absent more evidence, likely does not meet the harm element of inflicting injury, confinement, intimidation or punishment. To swear at her is reprehensible but, without evidence of the stated types of harmful impact on the woman, is not “abuse” under RCW 74.34 such that the State may impose the lifelong adverse consequences flowing from that finding.

Even if taken as true, Ms. Ryan saying the alleged words does not, without other threatening or damaging context, rise to a level of conduct that reasonably meets the harm element of abuse. APS’ own investigation showed that Ms. Ryan’s mother did not, in fact, suffer any injury, feel intimidated or otherwise experience any of the statutory harms from Ms. Ryan’s words, whatever those words were. The Department’s November 4, 2009, Adult Protective Services Outcome Report stated: “AV [alleged Victim] told reporter she was not afraid of AP [appellant herein] and didn’t feel she was going to follow through with anything.”<sup>7</sup> AR 25. The fact that Ms. Ryan’s mother told the Department at the time it

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<sup>7</sup> While neither the Department nor Ms. Ryan, who was unrepresented at hearing, submitted this section of the APS Outcome Report into evidence, a court examining the nature of proffered defense for purposes of a motion to vacate a default may consider the entire record, including facts referenced in pleadings and memoranda because “the rules are to be construed to secure the just determination of every action.” *Griggs v. Averbek Realty, Inc.*, 92 Wn.2d 576, 583-584, 599 P.2d 1289 (1979). Ms. Ryan referenced this evidence in her Petition for Review of Initial Decision which was included in the record. AR 24-29.

was investigating that she was not afraid of Ms. Ryan by itself is a virtually conclusive defense to finding “abuse” as defined by RCW 74.34. APS itself rated the case as a “low” priority. AR 68.

Ms. Ryan’s other evidence also shows that none of the stated types of harm--injury, confinement, intimidation or punishment--were inflicted by her words. Ms. Ryan’s mother stated that she and her daughter just had a family disagreement over a dog that should not have been put on her daughter’s record. AR 59. The history of the relationship between Ms. Ryan and her mother further shows an absence of context that would render the mother uniquely intimidated or injured by a harsh word from her daughter. CP 19. Ms. Ryan had never physically assaulted her mother; instead, the two women had a long pattern of similar verbal disagreements that after a time blew over. CP 19.

An adult grandson who was the mother’s paid caretaker also lived in the home so the mother was not isolated, nor reliant on Ms. Ryan for her daily well-being or under her control. AR 68. In fact, when her mother’s case manager demanded that Ms. Ryan do something about the dog, she moved out with the dog. AR 69. This was consistent with the pattern that Ms. Ryan moved out after each argument. AR 69; CP 19.

Ms. Ryan has proffered a strong defense to the claim of abuse. Thus, this court should determine whether Ms. Ryan’s failure to timely

appear was willful, and, if not, should find she has met the two primary factors for granting a motion to vacate a default. *Johnson*, 116 Wn. App. at 841, *quoting White*, 73 Wn.2d at 352. There is no evidence in the record that Ms. Ryan's late hearing request was willful. AR 1-86; CP 1-27. Instead, uncontroverted evidence establishes that Ms. Ryan never received the notice. AR 60, 62. Uncontroverted evidence also establishes that when Ms. Ryan was informed of the finding in August 2010, she immediately filed a hearing request. AR 86. Thus, Ms. Ryan meets the two primary factors for granting a motion to vacate a default.

**2. Ms. Ryan's failure to appear and respond was without fault on her part, and was the result of inadvertence or excusable neglect.**

Even if this court finds that Ms. Ryan's proffered evidence only establishes a prima facie defense, the court should find she failed to respond timely due to inadvertence or excusable neglect in not receiving the notice mailed to an address where the Department knew she did not reside. The Department argues that Ms. Ryan committed inexcusable neglect because she did not leave a forwarding address with the post office or her mother. Respondent's Brief, p. 20.

However, Washington law does not impose a general legal obligation upon its citizens to provide either the post office or their mothers with notification of a new address upon moving. Instead, the law

recognizes that parties cannot always be found for personal service and allows alternative service by publication and mail. At the same time, Washington law provides a lowered threshold for vacating defaults obtained by constructive service by publication or mail. See, CR 60(b)(7) and RCW 4.28.200. Thus, Washington law regarding defaults does not punish a party served by publication because that party was difficult to serve, but rather it protects such parties from unwitting default. RCW 4.28.200.

Contrary to the Department's implication that Ms. Ryan sought to conceal herself to avoid the Department's service by not providing the post office with a change of address form, Ms. Ryan did not know she was being investigated by APS, nor is there any evidence she did know. AR 1-86; CP 1-27. To the contrary, the APS investigation did not begin until after Ms. Ryan had moved out of her mother's home. AR 69. Ms. Ryan was not in contact with her mother during the relevant time period, and Ms. Ryan never spoke with the investigator. AR 68-70.

Similarly, the Department argues that it was neglectful of Ms. Ryan not to provide her residential address to her employer. Again, she had no general legal obligation to do so.

There is no evidence to support the Department's argument that Ms. Ryan committed inexcusable neglect by not responding to a telephone

message the Department left with a person who worked for her employer. Respondent's Brief, p. 20. There is no evidence that Ms. Ryan received such a message, nor was there any evidence as to the content of the message. AR 70.

The Department further argues that Washington courts generally have found no excusable neglect where "notice was sent to the proper location," but the person to be notified did not receive the notice because of the actions or inactions of a third party. Respondent's Brief, p. 19. In fact, none of the cases cited by the Department involved an alternative method of service of process such as mailing, the service herein. All involved personal service.

Thus, the Department ignores the lowered threshold to vacate a default obtained following constructive service by publication under RCW 4.28.200 and CR 60(b)(7), because that form of service is implicitly considered less reliable. Additionally, Ms. Ryan specifically asserts improper service, a factor to be considered in determining inadvertence or excusable neglect. *See, Johnson*, 116 Wn. App. at 848-849. The Department does not dispute that the lower standard for vacating default following service by publication or mail applies here.

Additionally, the Department errs in characterizing Washington courts as "generally" finding neglect was not excusable where failure to

respond resulted when a third party failed to act and thus deprived the person of notice. Respondent's Brief, p. 19. Instead, "[e]xcusable neglect is determined on a case by case basis." *Gutz v. Johnson*, 128 Wn. App. 901, 918-919, 117 P.3d 390 (2005). A third party's actions or inactions resulting in a failure to appear may be deemed excusable neglect or mistake. *Griggs*, 92 Wn.2d at 581-582 (1979) (excusable neglect where the defendant reasonably relied on husband to defend litigation); *Calhoun v. Merritt*, 46 Wn. App. 616, 621, 731 P.2d 1094 (1986) (mistake found where defendant did not answer because his insurer advised him to expect service, but not what to do once service occurred). *See also, Norton v. Brown*, 99 Wn. App. 118, 124, 992 P.2d 1019 (1999); *Pfaff*, 103 Wn. App. at 836.

Notably, these courts held that mistake or excusable neglect occurred even though the party seeking to set aside the default received actual notice of the action but third parties with a work-related duty to facilitate response bungled it. Here, the Department is arguing that Ms. Ryan should be held to a higher standard where she was not personally served with the finding, nor even provided actual notice of it, and the third party, Ms. Ryan's mother, not only had no work-related duty to facilitate her response, she was then adverse to her.

**3. Ms. Ryan meets the secondary factors for vacating a default, and equity favors allowing her a hearing.**

The Department does not dispute that Ms. Ryan meets the two secondary factors, including that she was diligent in requesting a hearing promptly after she became aware of the default abuse finding. AR 86. The Department does not dispute the remaining secondary factor, that it would not have been prejudiced by vacating the default order and allowing a hearing at the time Ms. Ryan requested one.

Perhaps most important, the Department does not dispute that equity favors allowing a hearing where a life-time ban on broad classes of employment would be imposed based on a default without any notice to Ms. Ryan. Based on the fundamental guiding principle that justice be done, the Court should find that failure to grant good cause for a late hearing was a clear error of law and abuse of discretion, and order that an administrative hearing be allowed.

**E. MS. RYAN IS ENTITLED TO ATTORNEY FEES UNDER RCW 4.84.350 AND RAP 18.1.**

The Department argues that Ms. Ryan is not entitled to attorney fees because the agency action was “substantially justified” because it sent notice to Ms. Ryan’s last known place of residence and Ms. Ryan failed to take any proactive steps to change her address or return the investigator’s call. Respondent’s Brief, p. 22.

Ms. Ryan, as a prevailing party, is automatically entitled to attorney fees under RCW 34.05.350(1) unless the Department can prove that its “actions were substantially justified or that circumstances would make that award unjust.” *Constr. Indus. Training Counsel v. Washington State Apprenticeship & Training Counsel*, 96 Wn. App. 59, 68, 977 P.2d 655 (1999). Actions are substantially justified where the Department’s actions “has a reasonable basis in fact and law.” *Id.*

The Department’s actions were not substantially justified. It sent notice to an address it knew Ms. Ryan did not reside and where it was highly unlikely that she would receive notice. It failed to exercise reasonable, good faith to locate Ms. Ryan as required by the WAC. Despite knowing that Ms. Ryan was unlikely to receive notice it failed to send notice in any other manner reasonably calculated to provide Ms. Ryan notice. Finally, it erroneously informed the administrative tribunal that “there is no good cause exception” for filing a late hearing request thus misleading the BOA Review Judge into failing to make a good faith determination. AR 1-14, 30-39; CP 17.

In addition, the Department misstates the facts when it alleges that “by Ms. Ryan’s own admission, there was no other address that could have been discovered by the Department to facilitate notice.” Respondent’s Brief, p. 23. There is no evidence in the record that Ms.

Ryan did not have an additional address where notice could have been sent or that she could not otherwise be located. To the contrary, the record reflects that Ms. Ryan was residing with her friend, Paul Wood, at the time the notice was sent. CP 19. There is no evidence in the record that Ms. Ryan was not able to receive mail or service at this address or at the place of employment. CP 1-27; AR 1-86.

Finally, the Department attempts to shift its burden to provide notice by blaming Ms. Ryan for failing to change her mailing address or returning the investigator's call. First, there is no requirement in the law that required Ms. Ryan to change her mailing address. Second, there is no evidence that Ms. Ryan received the investigator's one message. AR 70. Uncontroverted evidence shows that Ms. Ryan did not receive notice of the finding until August 2010. AR 60, 62.

If she prevails, Ms. Ryan is entitled to attorney fees.

### **CONCLUSION**

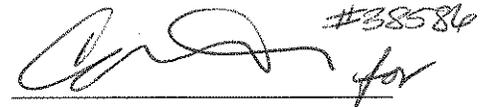
Ms. Ryan respectfully requests this court to find the following: (1) that the Department did not comply with the notice provisions in WAC 388-71-01210; (2) that the Department did not exercise reasonable, good faith in attempting to ascertain her location for the purpose of notice; (3) that under the unique circumstance of this case notice was not reasonably calculated to provide her with notice; (4) there is good cause to

request a late hearing request; and (5) as the prevailing party, Ms. Ryan is entitled to attorney fees.

Respectfully submitted this 18th day of May, 2012.

NORTHWEST JUSTICE PROJECT

  
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