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COURT OF APPEALS
OF THE STATE OF
WASHINGTON

NO. 327612

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

Ashley Brown,

Appellant,

v.

Department of Social and Health Services,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

This appeal by Ashley Brown arises under the Administrative Procedures Act (APA), RCW 34.05. The Department of Social and Health Services (“Department”), prevailed before the Department Board of Appeals (“Board”) and the superior court below and is the answering party in this appeal.

Ms. Brown challenges the validity of the Department’s action in issuing a founded finding of negligent treatment and/or maltreatment of a child. The Department requests this Court affirm the Board’s review decision and final order, which affirmed the founded finding.

The APA standard of review governs this appeal. RCW 34.05.510, 570. *Kraft v. Department of Social and Health Services*, 145 Wn. App. 708, 187 P.2d 708 (2008). The burden is on Ms. Brown to show that the final agency action is invalid. *See* RCW 34.05.570(1)(a).

This Court directly reviews final agency action, giving deference to agency findings of fact, affirming the findings where there is substantial evidence, and applying de novo review to questions of law. *E.g. Heinmiller v. Dept. of Health*, 127 Wn.2d 595, 601, 903 P.2d 433 (1995). The final agency decision is the Review Decision and Final Order of January 2, 2014. *See Heinmiller*, 127 Wn.2d at 601 (where there are

changes in an ALJ's findings and conclusions, "the review judge's findings and conclusions are relevant on appeal."); *see also* RCW 34.05.464(2) and (7) (authorizing "final orders" by reviewing officers);

Relief may be granted "only if [the court] determines that a person seeking judicial relief has been substantially prejudiced by the action complained of." RCW 34.05.570(1)(a)(d).

II. COUNTER STATEMENT OF THE CASE

Ms. Brown is the mother of K.D., the child involved in this case. CP at 125. K.D. was two years-old in December 2012. CP at 252. On December 7, 2012, K.D. presented at Holy Family Hospital with significant burns on his buttocks, penis, and scrotum area. CP at 84, Ex. 1. Because of the severity of the infection of the burns, and K.D.'s age, he was transferred to Sacred Heart Hospital by ambulance. CP at 203. The infection had reached K.D.'s bloodstream. CP at 203.

Ms. Brown reported K.D. had been burned in a bathtub. CP at 81, 88. According to Ms. Brown and her paramour, Joshua Brink, the burns had occurred one week earlier. CP at 86. K.D. was treated with burn cream for a week, and then Ms. Brown took him to the hospital. CP at 87.

While at the hospital, K.D. was evaluated by Dr. Michelle Messer. CP at 82. Dr. Messer is a specialist in the field of child abuse and neglect with extensive training and experience related to that focus. CP at 70-75. She is recognized as a child abuse expert. CP at 75, 78. Dr. Messer found K.D. to have second and third degree burns. CP at 113. Dr. Messer opined

K.D. had to have been in considerable pain. CP at 114. Because of the location and the severity of the burns, K.D. was at risk of long-term disability. CP at 93, 114. K.D. was admitted to the hospital and given Oxycodone for the pain. CP at 258. K.D. had to remain in the hospital for care of the burns from December 7 to December 12. CP at 135.

Ms. Brown reported she talked to a pharmacist at Wal-Mart about the burn, and he advised a specific cream to use. CP at 87. However, the pharmacist did not see the burns on K.D.. CP at 129, 198. Ms. Brown also stated she looked online and found advice to bring child to doctor if burns did not change in a week. CP at 194.

When asked why she did not take K.D. to his doctor or the hospital the day the burns occurred, Ms. Brown replied the burns did not look as bad as they did the day K.D. was admitted to the hospital and that K.D. was not acting like he was in pain. CP at 197, 200. She could not remember during her testimony whether she saw the skin peeling the night the injury occurred. CP at 241.

Josh Brink reported that immediately after learning K.D. was burned he placed K.D.'s buttocks in cold water for 10-15 minutes. CP at 238. When removed from the cold water K.D.'s skin peeled off. CP at 238.

Medical records were reviewed as part of the Child Protective Services ("CPS") investigation. CP at 136-137. Ms. Brown regularly took K.D. to the hospital for simple illnesses such as colds symptoms and diarrhea. CP at 137.

On December 14, 2013, the Department issued a letter noting CPS found more likely than not that negligent treatment and/or maltreatment occurred and issued a founded finding based on Ms. Brown's failure to timely seek medical care. Ex. 7. Ms. Brown appealed this finding to the Department Area Administrator then to the Office of Administrative Hearings. Administrative Law Judge Debra Pierce upheld the Department's founded finding by a decision mailed on October 15, 2013. Review Judge James Conant upheld the decision in a review decision and final order dated January 2, 2014.

III. SUMMARY OF THE ARGUMENT

Ms. Brown contends that the review decision and final order should be reversed under one or more of the enumerated grounds for review listed in RCW 34.05.570(3). The Review Judge and Superior Court's findings and conclusions are well supported and correct. The decision below should be affirmed.

IV. ARGUMENT

A. The Challenged Findings Are Supported By Substantial Evidence

Review of findings of fact is confined to whether they are supported by substantial evidence. RCW 34.05.570(3)(e). "[Appellate courts] will sustain findings of fact if substantial evidence supports them, i.e. evidence sufficient to persuade a fair-minded person the finding is

true.” *Goldsmith v. Department of Social and Health Services*, 169 Wn. App. 573, 280 P.3d 1173 (2012). . The statute does direct the court, however, to make its assessment of substantiality on the basis of the “whole record” - i.e., to ask the question simply of whether there are sufficient facts in the record from which a reasonable person could make the same finding as the agency. RCW 34.05.570(3)(e). The court may not "engage in re-weighing evidence of credibility and demeanor." *Franklin County v. Sellers*, 97 Wn.2d 317, 330, 646 P.2d 113 (1982). “[Appellate courts] do not weigh witness credibility or substitute [their] judgment for the agency’s findings of fact.” *Goldsmith*, 169 Wn. App. at 584. .

Substantial evidence is "evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises." *In re Electric Lightwave, Inc.*, 123 Wn.2d 530, 542-43, 869 P.2d 1045 (1994). The question is whether there are sufficient facts in the record from which a reasonable person could make the same finding as the agency. *Id.* Under the “substantial evidence” standard, an agency finding of fact will be upheld if supported by “evidence that is substantial when viewed in light of the whole record before the court.” RCW 34.05.570(3)(e).

RCW 26.44.020(1) defines abuse or neglect as “sexual abuse, sexual exploitation, or injury of a child by any person under circumstances which cause harm to the child’s health, welfare, or safety, excluding conduct permitted under RCW 9A.16.100; or the negligent treatment or maltreatment of a child by a person responsible for or providing care to the child. An abused child is a child who has been subjected to child abuse or

neglect as defined in this section.” RCW 26.44.020(14) defines negligent treatment or maltreatment as “an act or a failure to act, or the cumulative effects of a pattern of conduct, behavior, or inaction, that evidences a serious disregard of consequences of such magnitude as to constitute a clear and present danger to a child’s health, welfare, or safety, including but not limited to conduct prohibited under RCW 9A.42.100.”

The facts show K.D. suffered second and third degree burns on his buttocks, penis and scrotum. CP at 113. Ms. Brown did not seek medical attention for these burns for over one week. CP at 86. When K.D. was finally taken to the hospital, he was put on an intravenous drip for medications including Oxycodone for pain and was admitted for further treatment. CP at 258. A medical professional who actually observed the burns, opined failure to seek medical care immediately presented a danger to K.D.’s health. CP at 93, 114. Dr. Messer testified that waiting to treat this type of burn puts an individual at risk for scarring and disability. CP at 93, 114. Dr. Messer testified that any reasonable person would seek immediate medical attention for a burn this large, this severe, and in this location, for themselves or for a child in their care. CP at 94.

The CPS investigator testified that Ms. Brown regularly took K.D. to the doctor for minor issues (like a cold), and so it was an immediate red flag that Ms. Brown did not take K.D. to the doctor for such a serious burn. CP at 137. The record indicates that Ms. Brown asked others for advice, but chose not to call a doctor. CP at 87, 194, 197.

By the time Ms. Brown took K.D. to the hospital, not only was the

burn infected, but the infection had reached K.D.'s bloodstream. CP at 203. Dr. Messer testified that burns of such magnitude and location would clearly need immediate medical attention. CP at 101. Those who witnessed the burn in the days leading up to his hospitalization described it as blistering, peeling, and bleeding. CP at 130, 148, 171, 197, 224,

Dr. Kablowi was K.D.'s primary care physician. CP at 216. Dr. Kablowi provided a declaration to the court speaking to K.D.'s injuries. Ex. B. The Review Judge explicitly stated the reasons that Dr. Kablowi's declaration was not given the same weight as the testimony of Dr. Messer. Dr. Kablowi observed K.D. much later than Dr. Messer. CP at 18. Dr. Messer is an expert in child abuse. CP at 18. Dr. Kablowi was not subject to cross-examination, leaving questions surrounding his declaration unanswered. CP at 18.

The record clearly contains substantial evidence which supports the Department's founded finding of negligent treatment and/or maltreatment as affirmed by the Review Judge.

B. The Agency Action Was Not Arbitrary and Capricious

The test for whether an agency action is "arbitrary and capricious" is a very narrow standard and so the person asserting it must carry a heavy burden. *Pierce County Sheriff Office v. Civil Serv. Comm'n*, 98 Wn.2d 690, 658 P.2d 648 (1983). "Arbitrary and capricious action has been defined as an action which is willful and unreasoning, in disregard of the facts and circumstances." *Heinmiller v. Dept of Health*, 127 Wn.2d 595,

609, 903 P.2d 433 (1995). “Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly upon due consideration, even though one may believe the conclusion was erroneous.” *Id.*

The Department performed a complete investigation of the situation surrounding K.D.’s injury. CP at 136-139. The CPS investigator conducted interviews of relevant witnesses. CP at 147. The Department’s conclusion that Ms. Brown had committed negligent treatment of her son was supported by the investigation, and was not arbitrary or capricious.

Further, in *Heinmiller*, the court found that the review judge made the ruling “after a fair hearing at which the facts were considered and Heinmiller had an opportunity to present her arguments. It cannot be said that those sanctions resulted from willful and unreasoning action.” *Heinmiller* at 610.

Here, Ms. Brown received a fair hearing and the Review Judge was able to make findings based on the evidence that was presented by the parties. Therefore, like in *Heinmiller*, the review judge’s order was not arbitrary or capricious.

C. The Court Should Disregard Ms. Brown’s Newly Raised Arguments

Ms. Brown asserts claims that were not raised previously before the superior court. Ms. Brown claims the Department exceeded its statutory authority, erroneously interpreted and applied the law by expanding the definition of child neglect to include a reasonable person

standard, and erroneously interpreted and applied the law by concluding that the Administrative Law Judge's ("ALJ") determination regarding the credibility of expert witnesses and the weight given to their opinions cannot be reversed on review.

An appeal from any final judgment of the superior court under the APA shall be secured in the same manner as other civil cases. RCW 34.05.526. Under RAP 2.5(a), "[t]he appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a) lists several bases for an appellant to raise claimed errors for the first time in the appellate court. None of which apply in this case.

The Court should decline to consider these arguments because Ms. Brown did not properly raise them as required by RAP 2.5(a). It would be improper and contrary to judicial efficiency to review Ms. Brown's alleged errors without the issues first being considered by a lower court.

RAP 2.5(a) "reflects a policy of encouraging the efficient use of judicial resources." *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). In *Scott*, the court agreed that failing to raise claimed errors at the lower court is grounds to not review these claims on appeal stating that, "The appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial." *Id.*

1. Ms. Brown should not prevail on her newly raised claims even if the Court considers them.

a. The Department acted within its statutory authority

In order to protect the safety and welfare of children, the Department has broad authority and responsibility to investigate complaints of abuse, neglect, and recent acts or failures to act that result in serious physical or emotional harm or present an imminent risk of such harm. *See* RCW 26.44.050; RCW 74.13.031. It also has implied authority to carry out these legislative mandates by making determinations in response to any such reports. *See, e.g., Tuerk v. State Dep't of Licensing*, 123 Wn.2d 120, 124-25, 864 P.2d 1382 (1994). The Department acted within its statutory authority when it issued a founded finding against Ms. Brown.

The State has both a right and an obligation as *parens patriae* to intervene on behalf of children when the parents' actions or inactions endanger the child's welfare. *In re Dependency of A.V.D.*, 62 Wn. App. 562, 567, 815 P.2d 277 (1991). When a parent's actions "seriously conflict with the physical or mental health" of a child, the State has a right to intervene on behalf of the child. *In re Welfare of Sumey*, 94 Wn.2d 757, 762, 621 P.2d 108 (1980). The Department also has the duty to investigate complaints of any parent's act or failure to act that results in

serious physical or emotional harm, or presents an imminent risk of serious harm. RCW 74.13.031(3). The Department was notified of the K.D.'s injuries by hospital staff, and pursuant to its duty under RCW 74.13.031(3), the Department was required to investigate and make a finding.

b. The Department did not impose a higher standard on Ms. Brown than is required by law

While the Review Judge supports the ALJ's finding that any reasonable person would have sought medical care for K.D. right away, he also recognizes and references the appropriate standard for a finding of negligent treatment or maltreatment to include an act or failure to act that shows a serious disregard of the consequences to the child of such magnitude that it creates a clear and present danger to the child's health welfare, or safety. CP at 17, 20. In fact, the opinion specifically addresses the fact that the regulation does not require the Department to prove a "total" disregard for consequences. CP at 20. The Department did not impute a reasonable person standard on Ms. Brown through a finding regarding what a reasonable person would do in the same situation.

c. The Review Judge correctly interpreted and applied the law

Under RCW 34.05.464, the Review Judge has the same decision-making authority that the ALJ had while presiding over the initial hearing;

however, “the reviewing officers shall give due regard to the presiding officer’s opportunity to observe the witnesses.”

The Review Judge specifically and correctly stated that he had the authority to make credibility determinations, weigh the evidence, and charge or set aside the ALJ’s findings of fact. CP at 13, 14. The Review Judge gave due regard to the ALJ’s opportunity to observe witnesses in adopting the ALJ’s credibility determinations in this case. CP at 14. The Review Judge did not erroneously interpret his role or authority to substitute his judgment for that of the ALJ because his findings are consistent with the evidence admitted during the hearing and consistent with his statutorily-delegated authority

D. Ms. Brown Is Not Entitled To Attorney’s Fees As the Department’s Action Was Reasonable In Light Of The Facts Of The Case

Under RCW 4.84.350, a court shall not award fees and expenses to the prevailing party in a review of agency action if the agency action was substantially justified. “Substantially justified means justified to a degree that would satisfy a reasonable person.” *Silverstreak, Inc. v. Dep’t of Labor & Indus.*, 159 Wn.2d 868, 892, 154 P.3d 891 (2007) (quoting *Moen v. Spokane City Police Dep’t*, 110 Wn. App 714, 721, 42 P.2d 456 (2002)). It “requires the State to show that its position has a reasonable basis in law and fact.” *Cobra Roofing Serv., Inc. v. Dep’t of Labor & Indus.*, 122 Wn. App 402, 420, 97 P.3d 17 (2004) (quoting *Constr. Indus. Training Council*

v. Wash. State Apprenticeship & Training Council, 96 Wn. App. 59, 977 P.2d 655 (1999)). “The relevant factors in determining whether the Department was substantially justified are, therefore, the strength of the factual and legal basis for the action, not the manner of the investigation and the underlying legal decisions.” *Silverstreak*, 159 Wn.2d at 892.

Ms. Brown is not entitled to attorney’s fees because the Department’s action would satisfy a reasonable person. The Department relied on the opinions of child abuse medical experts. CP at 136. Ms. Brown’s inaction in failing to seek medical care put K.D. in danger of permanent scarring and disability. CP at 93. These facts, in addition to all the evidence before the court, show that the Department acted reasonably in finding that Ms. Brown displayed a serious disregard of consequences of such magnitude as to constitute a clear and present danger to K.D.’s health, welfare, or safety as required for a finding of negligent treatment and/or maltreatment under RCW 26.44.020(14).

V. CONCLUSION

For the foregoing reasons, the Department requests this Court affirm the Board’s review decision and final order, which affirmed the founded finding of negligent treatment and/or maltreatment of a child against Ms. Brown.

RESPECTFULLY SUBMITTED this 11 day of February,
2015.

ROBERT W. FERGUSON
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A handwritten signature in cursive script that reads "Chelsea Price". The signature is written in black ink and is positioned above a horizontal line.

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CERTIFICATE OF SERVICE

I certify that I served all parties, or their counsel of record, a true and correct copy of the Department of Social and Health Services' Brief of Respondent to the following addresses:

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

DATED this 11th day of February, 2015, at Spokane, Washington.



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