

FILED

APR 23 2015

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
No. 328813-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

SARAH'S CARE ADULT FAMILY HOME
Petitioners,

VS

DEPARTMENT OF SOCIAL AND HEALTH SERVICES,
Adult Protective Services,
Respondent.

REPLY BRIEF OF PETITIONERS

Rebecca M. Coufal
Attorney for Petitioners
2131 W. Ohio
Spokane WA 99201
(509) 328-5789
FAX (509) 328-5805
rmcoufal@sisna.com
WSBA #16957

TABLE OF CONTENTS

Reply. p.1

Table of Authorities

Table of Cases

Washington State Supreme Court

State v. Blazina, _____ Wn.2d _____ (filed
3/12/15 docket no. 89028-5). p.ii

Petitioners reply to respondent's response as follows:

Petitioners reassert their original brief.

In regards to page 1 and 2 of respondent's brief, the period of time Mr. Evert refused to remove the information to which the state objected from the website: Ms. Madrid testified ". . . .I believe, they fined through the 12th or 13th. That it was by that time the, um - enough changes had been made that the resident information was not identifiable, uh, so the Department stopped the fine." RP¹ Vol.II pp.171-172. Ms. Madrid did not know why the fine started out at the top of the fine scale. RP Vol.I pp. 185. The Evert's believe there is no explanation for the top of the scale fine which is part of what make's said fine excessive.

Further on page 2, Ms. Evert not only said what is reported but this does not provide the whole story as Ms. Evert as early as August 19,

¹ RP is report of proceedings followed by the volume number and page number.

2012 said she did not want to take Debbie² as a resident because of the amount of medications she was taking. RP Vol. II pp. 242.

Still on page 2, Ms. Axtell testified ". . . . "site visits are unannounced." RP Vol.I pp.29. Ms. Axtell's visit being unannounced is not noteworthy. Ms. Axtell made 4 visits to the Evert's Adult Family Home (AFH), 9/3/12, 9/11/12, 9/14/12 and the 9/26/12 closure of the home. RP Vol.I pp.89, 95. Ms. Axtell did close the AFH 9/26/12 and the Statement of Deficiencies did state the "deficiencies were an imminent danger to the resident's health, safety or welfare." Response Brief page 3. However Ms. Axtell³ testified no resident was in any imminent danger on 9/11/12, 9/14/12 or in fact on 9/26/12. RP Vol. I pp. 95. Regarding the allegations of imminent danger, following the last "incident" on 9/4/12 (taking Deborah to the emergency room),

² As noted in footnote 11 in the opening brief no disrespect is intended in the use of first names.

³ The question of any imminent danger on 9/3/12 was not asked of Ms. Axtell.

the Department did nothing until precipitously removing the residents⁴ and Ms. Evert's mother on 9/26/12.

Evert's take exception to the characterization of any failure to consider Greg's "stress" on 9/3/12 as, from Ms. Axtell's testimony, she did not seem to be aware of his personal history, did not know where his cat was, did not know how frequently he had been moved, was not aware of what happened to him following the precipitous move from the Evert's AFH 9/26/12. RP Vol.I pp.92-96. It is difficult to understand how the Evert's did not consider Greg's situation, did not accommodate him as Greg continued to reside in the AFH until the Department closed the home and, in fact, did not want to leave the AFH 9/26/12.

Regarding the web site, Mr. Evert never included any last names of residents on the web site and, as noted in the Evert's original brief,

⁴ The one private pay resident was not removed.

Ms. Madrid consulted Ms. Axtell as Ms. Madrid was not certain if the web site referred to the Evert's AFH residents.

At page 20 of respondent's brief regarding the danger to Ms. Evert's occupational therapy license being imperiled the Evert's note that this is material as it was because of the findings stating Ms. Evert was abusive. This finding is the "harm" Ms. Evert⁵ suffers from the department's actions as it does in fact imperial her occupational therapy license.

Regarding the Evert's free speech rights⁶, the Evert's reassert their original argument again noting resident's last names were not used, Ms. Madrid requested input from Ms. Axtell to ascertain the persons referenced were resident's of the Evert's AFH, and the Department decided ". . . I believe, they fined through the 12th or

⁵ At this time, Ms. Evert has not lost her occupational license but the license is on probation for 2 years. This is the result of a stipulated agreement between Ms. Evert and the Occupational therapy branch of the Washington State Department of Health.

⁶ This begins at page 20 of respondent's brief.

13th⁷. That it was by that time the, um --enough changes had been made that the resident information was not identifiable." Rp Vol.I pp. 171.

Regarding the response to the "excessive fines⁸" the Department does not directly address the issue of the \$3,000.00 a day fine as excessive in itself. There appears to be no guidance regarding the imposition of civil fines other than the fine table included at page 28 in respondent's brief. The Department argues the fine is imposed at \$3,000.00 a day because there was "IMMINENT DANGER and/or IMMEDIATE THREAT". Emphasis in the original. However, below the level of harm that section state "Civil fine of

⁷ This is reference to December 2012 as regards the web site in Ms. Madrid's testimony. The amended, acceptable web site is not believed to be included in the record.

⁸ The Evert's reference *State v. Blazina*, _____ Wn.2d _____ (filed 3/12/15 docket no. 89028-5), decided after their opening brief was filed, as instructive of the requirements in imposing legal financial obligations on defendants in criminal cases. The requirements include determining a defendant's ability to pay, the defendant's other financial obligations. While this is not a criminal case, the case is instructive as to an inquiry when imposing a fine. No inquiry as to the Evert's financial situation was made.

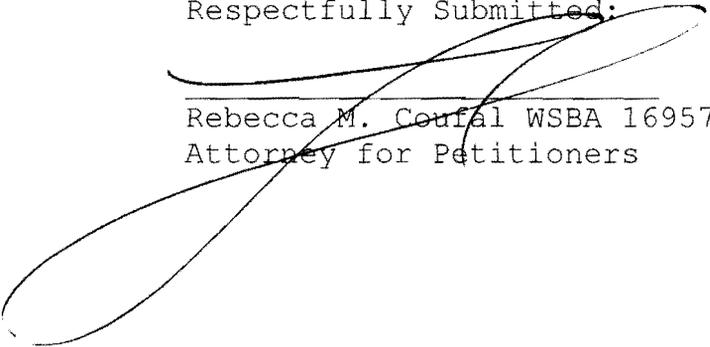
\$3,000 or daily civil fine of at least \$1,000 per day. The Department imposed the \$3,000 as a daily fine for 7 days as determined by the Spokane County Superior Court. In its response the Department states the Evert's posting of the resident's information was a "serious violation which potentially threatened the health and safety of [Resident D and Resident G⁹]. . . ." Respondent's response brief page 28. It is unclear if a serious violation equates to serious harm under the fine table, a serious harm has a different fine protocol than the imminent danger harm. Regardless there is no basis to begin the fine at the \$3,000 a day.

⁹ While the Department insists the residents of the Evert's AFH were or were potentially harmed by the web site, any fine goes to the state not the residents.

The Evert's reassert the conclusion of their original brief.

Dated this 23rd day of April 2015.

Respectfully Submitted:



Rebecca M. Coufal WSBA 16957
Attorney for Petitioners