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SUPREME COURT  
OF THE STATE OF WASHINGTON

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NO. 90619-0

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PAVEL ALEKSENTSEV,

Petitioner,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent.

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**ANSWER TO MOTION FOR DISCRETIONARY REVIEW**

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ROBERT W. FERGUSON  
Attorney General

LISA L. LYDON  
Assistant Attorney General/Senior  
Counsel  
WSBA # 19238  
Office Id. #91106  
1116 W. Riverside Avenue  
Spokane, Washington 99201  
(509) 456-3123

ORIGINAL

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## **I. INTRODUCTION**

This case arises from an administrative finding that Pavel Aleksentsev, a caregiver, mentally abused a vulnerable adult who was entrusted to his care. Substantial evidence supports the finding that a vulnerable adult was harmed when Mr. Aleksentsev willfully and repeatedly subjected her to profane, offensive language and refused to return her to her home, despite her multiple requests to be taken home after a doctor's appointment. The administrative law judge observed the witnesses' demeanor, including both the vulnerable adult and Mr. Aleksentsev, at a hearing and concluded that Mr. Aleksentsev's testimony was not credible. Thus, the existence of conflicting testimony in the record is not material. The finding of mental abuse was reviewed and affirmed by an administrative appeals body, the Superior Court, and the Court of Appeals. Review should be denied as the Court of Appeals decision is correct and does not present any issues meriting the Court's review.

## **II. COUNTER STATEMENT OF THE FACTS**

On March 19, 2009, Adult Protective Services (APS) received a referral alleging Mr. Aleksentsev mentally and sexually abused a

vulnerable adult, Connie.<sup>1</sup> Hearing Record (HR) 9, 146. Connie has multiple sclerosis, needs a wheel chair to ambulate, and receives in-home care assistance through Medicaid. Administrative Hearing, Verbatim Report of Proceedings (RP) 46. Mr. Aleksentsev was Connie's in-home caregiver during the events in question.

The referent made the following claims against Mr. Aleksentsev: he "accuses AV [alleged victim] and hollers at her; he sees women as bitches, and has called this before; had video on his phone of a child using vulgar and racist words and when told by AV to keep this to himself he did not listen and kept playing the video; AP [alleged perpetrator] brought another male to the house and told the AV the man was a male escort and said the AV was lonely and has needs." (HR) 143.

This referral was assigned for investigation to Curt Crusch, an Adult Protective Services investigator. RP 67. The investigation revealed primarily three incidents. The first involved Mr. Aleksentsev's use of indecent language to describe women. Peggy Biggs, Connie's mother, stated Mr. Aleksentsev used words like "bitch" to describe women. HR 161. Mr. Aleksentsev admitted using the word "bitch", but said it was accidental. RP 77. Connie confirmed he used this language and she found

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<sup>1</sup> The victim is identified only as Connie in the record to protect her identity.

it offensive. RP 50. Both women indicated this language stopped when Mr. Aleksentsev was told it was offensive. HR 161, RP 50.

The second incident involved Mr. Aleksentsev playing an indecent, offensive recording in Connie's presence after he was asked to stop using offensive language in her presence. HR 161. On March 26, 2009, Mr. Crusch interviewed Connie. During that interview, Connie confirmed Mr. Aleksentsev played an audio/video in her presence on his phone that contained nasty, offensive language after being asked three times to stop. RP 47, 73; HR 162-63. Mr. Aleksentsev admitted to playing the recording, but indicated it was accidental. RP 76. A copy of the offensive audio/video message was obtained. The message contained the following language:

CHILD: You're a damn ho, (inaudible) fat ass bitch. Because I don't like you (inaudible) fucking bitch –fucking bitch asshole. Bitch. Because you're a bitch. Shit. Something's fucked up. Shit. That's why I'm gonna kill your ass with your fat ass, bitch. Shit. That's how you call – that's why you (inaudible) your baby's daddy (inaudible) and I'm gonna make, you bitch. And I'm gonna shoot your head off, bitch. Shit. (inaudible) fucked up. HR 180

The third incident occurred when Mr. Aleksentsev refused to take Connie home after an outing. Following an eye doctor appointment, Connie wanted to return home and had to argue with Mr. Aleksentsev about this, telling him at least three times she wanted to return home. RP 73-74.

Connie described Mr. Aleksentsev's behavior as "emotional abuse." RP 51. She testified the behavior was stressful and that she was afraid that stress would negatively affect her multiple sclerosis. RP 49, 62. Connie reported to Mr. Crusch, "I shouldn't have to tell him (Mr. Aleksentsev) three times to take me home. He is supposed to be there to help me, not make things worse for me. I am just worn out after being around him sometimes." HR 149. She later testified, "I was feeling mentally and physically exhausted, and maybe I—I am more vulnerable with MS and stress." RP 63.

Mr. Crusch interviewed Mr. Aleksentsev on March 31, 2009. RP 74. Mr. Aleksentsev was advised he could bring someone to the meeting, but he arrived alone. RP 75. Mr. Aleksentsev did not request an interpreter. RP 75, HR 7. Mr. Crusch advised Mr. Aleksentsev he was being interviewed because of a report from the community alleging mental abuse and read the definitions of a vulnerable adult, abuse, and mental abuse. HR 150. Mr. Aleksentsev stated he did not understand these definitions due to a language barrier, but he did not request an interpreter. HR 150, HR 7. Mr. Crusch explained the definitions to Mr. Aleksentsev again, and after the second explanation, Mr. Aleksentsev agreed he understood them. RP 75.

In Mr. Aleksentsev's other interactions with the Department there were no language barrier issues. For example, Pakou Lee, Connie's case manager, indicated in her meetings with Mr. Aleksentsev, he never requested an interpreter and at no point did it appear to her Mr. Aleksentsev could not understand her. RP 33, 37. Mr. Aleksentsev also had met with Ms. Lee's supervisor and appeared to comprehend their conversations. Mr. Aleksentsev "had questions and asked questions". RP 367. Neither Connie nor Mr. Aleksentsev ever reported to anyone there was a language barrier between them and Connie believed they communicated extremely well. RP 55.

Based upon his investigation, Mr. Crusch, with input from additional APS investigators and supervisors, determined that the allegation of mental abuse was founded. HR 155. On June 24, 2009, Adult Protective Services (APS) issued a letter to Mr. Aleksentsev informing him the finding of mental abuse was substantiated. HR 138-140.

Mr. Aleksentsev timely requested an administrative hearing to review the Department's findings. HR 168. Following the initial hearing, an administrative law judge issued a decision upholding the finding of mental abuse. HR 100. Mr. Aleksentsev requested review by the Board of Appeals, but an audio recording of the initial hearing was unavailable. HR 81. Thus, the case was remanded for a second hearing. Again, the

Administrative Law Judge affirmed the Department's finding of mental abuse and Mr. Aleksentsev appealed. The Administrative Law Judge found the testimony of Connie to be credible and the testimony of Mr. Aleksentsev "not credible in any material respect." RP 39-40. Mr. Aleksentsev timely requested judicial review of the administrative decisions. The Superior Court upheld the finding of mental abuse. Mr. Aleksentsev then appealed to Division III of the Court of Appeals. On May 8, 2014, the Court of Appeals issued a decision affirming the administrative finding that Mr. Aleksentsev mentally abused a vulnerable adult. Mr. Aleksentsev now seeks discretionary review of this decision.

### **III. ARGUMENT**

Adult Protective Services found that Mr. Aleksentsev mentally abused Connie. This finding was supported by substantial evidence in the record. This case is not in conflict with another Court of Appeals or Supreme Court decision and presents no significant question of constitutional law or issue of substantial public interest. Mr. Aleksentsev's petition for discretionary review should be denied.

#### **A. Grounds for Review**

This Court accepts review of decisions terminating review pursuant to a petition for discretionary review under RAP 13.4 (b). Mr.

Aleksentsev's petition does not meet any of RAP 13.4(b)'s bases for Supreme Court review.

The Court of Appeals decision does not conflict with other decisions of this court or the Court of Appeals, nor does this case involve an issue of substantial public interest. Mr. Aleksentsev's due process argument appears to be an attempt to invoke RAP 13.4(b)(3), which permits review if a significant question of law under the state or federal constitution is at issue. That argument is unfounded and does not warrant further review. His remaining arguments do not meet the requirements of RAP 13.4(b) and so his petition must be denied.

**B. The Court of Appeals Decision Is Not in Conflict with a Decision of the Court of Appeals or the Supreme Court.**

Mr. Aleksentsev argues the appellate decision here is in conflict with *Brown v. DSHS*, 145 Wn. App. 177, 185 P.3d 1210 (2008). Petition for Discretionary Review at 4. The Court of Appeals decision is not in conflict with *Brown v. DSHS* and so the petition must be denied.

In *Brown v. DSHS*, the Court of Appeals overturned a finding of abuse of a vulnerable adult, but that case involved facts very different from those at issue here. 145 Wn. App. at 185. In that case, the finding of abuse was based on an incident when a caregiver intervened when a resident became agitated and violent. The caregiver pushed the resident to

the ground and held her down until the resident became calm. *Id.* at 181. The court determined such actions did not constitute abuse because “[h]ere, no improper action is shown. Ms. Brown properly intervened in the presence of danger to herself, her co-workers, and another vulnerable adult resident.” *Id.* at 185. Here, Mr. Aleksentsev’s actions were not motivated by a need to protect others, nor were they otherwise justified.

Mr. Aleksentsev does not offer a justification for his use of vulgar terms to describe women or his repeated replaying of a recording he knew was upsetting to Connie. RP 50, HR 155, 161, 180. He asserted that his repeated refusal to take Connie home after a doctor’s appointment, forcing her to “almost have a fit, uh, to get to go home,” as motivated by a desire to avoid low blood sugar, RP 48, but his repeated refusal to take her home was not solely because he was looking out for her best interests. Mr. Aleksentsev admits he took Connie to both Arby’s and Lowe’s. HR 99. While stopping for food could be related to a concern about low blood sugar, Mr. Aleksentsev provides no legitimate justification for stopping at Lowe’s. Furthermore, Connie stated she asked to remain in the van but Mr. Aleksentsev, “got me out and did what *he* wanted.” HR 113 (emphasis added). Connie stated Mr. Aleksentsev’s behavior as “unacceptable and offensive.” RP 62.

Mr. Aleksentsev's testimony directly conflicted with Connie's. Because of inconsistencies between Mr. Aleksentsev's statements to Mr. Crusch and his testimony, combined with Mr. Aleksentsev's evasive testimony at the administrative hearing, the Administrative Law Judge found him to be "not credible in any material respect." HR 40. The review judge upheld this finding. HR 12-13. Evidence of credibility should not be reevaluated on appeal. *Kraft v. Dep't of Soc. & Health Servs.*, 145 Wn. App. 708, 717, 187 P.2d 708 (2008).

Connie described Mr. Aleksentsev's behavior as "emotional abuse." RP 51. Connie testified the behavior of Mr. Aleksentsev was stressful and that she was afraid that stress would negatively affect her multiple sclerosis. RP 49, 62. Connie reported to Mr. Crusch, "I shouldn't have to tell him (Mr. Aleksentsev) three times to take me home. He is supposed to be there to help me, not make things worse for me. I am just worn out after being around him sometimes." HR 149. Connie testified, "I was feeling mentally and physically exhausted. And maybe I—I am more vulnerable with MS and stress." RP 63.

As the Court of Appeals observed, Mr. Aleksentsev's use of profane language, playing of the vulgar message, and "dragging" Connie along extra stops over her objection were not "necessary to the

performance of Mr. Aleksentsev's job and did not serve a higher purpose" unlike the caregiver in *Brown*. Slip Op. at 8.

None of the behaviors described above were to serve a higher purpose such as protecting the client or others. Nor were they necessary in the performance of Mr. Aleksentsev's duties. As found by the ALJ, the Board of Appeals, the Superior Court and by the Court of Appeals, Mr. Aleksentsev behavior was improper and resulted in mental abuse of Connie. No conflict with *Brown v. Department of Social and Health Services* exists.

**C. No Issue of Substantial Public Interest Exists Because Substantial Evidence Supports the Finding of Intent to Harm and Actual Harm to Connie**

When an appellate court reviews an administrative decision or action, the procedures and standards for review are governed by the Administrative Procedures Act (APA). RCW 34.05.510, 570; *Kraft v. Department of Social and Health Services*, 145 Wn. App. 708, 187 P.2d 708 (2008). The burden of establishing the invalidity of the agency action is on the appellant and 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).

Review of findings of fact is confined to whether they are supported by substantial evidence. RCW 34.05.570(3)(e). "We 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), citing *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hrg’s Bd.*, 136 Wn.2d 38, 959 P.2d 1091(1988). 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. 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), *cert. denied*, 495 U.S. 1106 (1983). “We do not weigh witness credibility or substitute our judgment for the agency’s findings of fact.” *Goldsmith* at 584, citing *Brown v. Dep’t of Soc. & Health Servs.*, 145 Wn. App. 177, 182, 185 P.3d 1210 (2008). Substantial evidence supports the finding that Mr. Aleksentsev knew his improper behavior could cause harm and that such actions harmed Connie.

It is undisputed that Mr. Aleksentsev was on notice that vulgar language disturbed Connie. He admitted Connie asked him to stop using vulgar terms such as “bitches” and he stopped saying that word around her. HR 161, RP 50. Despite his awareness of her sensitivity to profanity, Mr. Aleksentsev repeatedly played an audio/video recording containing

even more profane and disturbing language in Connie's presence. HR 161. As to the doctor's visit incident, Connie told him not once, but three times that she wanted to return home after the appointment. Mr. Aleksentsev knew his refusal to take her home was causing her distress.

Mr. Aleksentsev selectively quotes testimony that support his arguments while ignoring the findings of the administrative law judge and affirmed on judicial review. Connie herself described Mr. Aleksentsev's behavior as "emotional abuse." RP 51. Connie testified his behavior was stressful and that she was afraid that stress would negatively affect her health. RP 49, 62. The court considered all of the testimony of the witnesses and agreed evidence supported a finding that Mr. Aleksentsev both intended to and did harm Connie. Connie's testimony alone clearly shows she was harmed by his behavior. Again, simply because contrary testimony exists, it does not mean the findings are unsupported or that the judge "put words in someone mouth", as argued by Mr. Aleksentsev. Pet. 7. The court did not engage in inappropriate behavior and no issue of substantial public interest exists in this case.

**D. The Department Did Not Refuse to Provide Interpreter Services to Mr. Aleksentsev, Nor was He Denied Due Process or Discriminated Against**

When Mr. Crusch interviewed Mr. Aleksentsev, he arrived alone, but he had previously been advised he could bring someone with him.

RP 75. Mr. Aleksentsev was told he was being interviewed because of a report from the community alleging mental abuse. HR 150. Mr. Aleksentsev was read the definition of a vulnerable adult, abuse and mental abuse. RP 75, HR 150. Mr. Aleksentsev told Mr. Crusch he did not understand the definitions due to having a language barrier. RP 75, HR 150. Despite reporting this “language barrier”, Mr. Aleksentsev did not request an interpreter. HR 150, RP 75. Mr. Crusch restated the meanings and gave examples. Mr. Aleksentsev then reported he understood the meanings. HR 150, RP 75.

At no time after this interview or prior to the administrative hearing did Mr. Aleksentsev request another interview with an interpreter or complain to the Department he did not understand the interview process due to a lack of an interpreter. Mr. Aleksentsev even had an attorney contact the Department on April 1, 2009, and the attorney did not object to the interview process because of the lack of an interpreter. HR 151.

Mr. Aleksentsev understood the questions posed by Mr. Crusch as he had explanations for each allegation. HR 150-151. Mr. Crusch testified, “at no time did I (sic) appear as there was a language barrier where we couldn’t communicate. And it had never been stated to me that he needed an interpreter while working with Connie and talking with her and her mother or Pakou.” RP 75.

Pakou Lee, Connie's case manager, testified she met with Mr. Aleksentsev a few times at the Department prior to the allegation of mental abuse. RP 36-37. Mr. Aleksentsev did not request an interpreter during any of those meetings. HR 37. It did not appear to Ms. Lee that Mr. Aleksentsev had trouble understanding what was being communicated to him. RP 37. Mr. Aleksentsev also met with Ms. Lee's supervisor and appeared to understand the supervisor as well. Mr. Aleksentsev "had questions and asked questions." RP 37.

Neither Connie nor Mr. Aleksentsev ever reported to Ms. Lee there was a language barrier between them. RP 37. Connie stated in her testimony when asked if she could communicate clearly with Mr. Aleksentsev she thought they could communicate extremely well. RP 55.

Although Mr. Aleksentsev testified in the administrative hearing he requested an interpreter at the interview with Mr. Crusch, the Administrative Law Judge and Board of Appeals found otherwise. RP 17, HR 7. This finding is supported by substantial evidence and relates to an issue of credibility. Mr. Crusch did not refuse to provide an interpreter. Rather, Mr. Aleksentsev simply did not request one and Mr. Crusch had no reason to believe at the time of the interview Mr. Aleksentsev needed one.

Mr. Aleksentsev argues because he had an interpreter at the administrative hearing then it was obvious he needed one for the interview. Pet. 14. He claims he “could communicate generally with co-workers, but not understand in depth conversations.” Pet. 15. There is no evidence in the record supporting this statement. The evidence shows Ms. Lee, her supervisor, Connie, and Mr. Crusch all believed Mr. Aleksentsev clearly understood their conversations. RP 36-37, 55, 75.

Additionally, Mr. Aleksentsev’s testimony that he requested an interpreter, not once but many times, before the interview with Mr. Crusch directly conflicts with the testimony of Mr. Crusch. The Administrative Law Judge found Mr. Aleksentsev to be “not credible in any material way.” Findings of credibility should not be disturbed on appeal. *Kraft*, at 717. Mr. Aleksentsev was not denied an interpreter because he did not request one. Further, the Department had no reason to believe Mr. Aleksentsev required an interpreter during the interview that occurred on March 31, 2009. Mr. Aleksentsev was not denied an accommodation due to a language barrier, and thus, he was not denied due process and was not discriminated against in any way.

**E. RCW 74.34.200(3) Does Not Apply to Adult Protective Services Abuse/Neglect Cases and Appellant Raises this Issue for the First Time in This Petition**

The purpose of APS is to investigate complaints of abuse, neglect, and financial exploitation of vulnerable adults and to provide legal remedies to protect vulnerable adults. RCW 74.34.005. The Court of Appeals noted: “Our public policy is to protect the vulnerable population from all forms of abuse.” *Aleksentsev v. DSHS*, Slip Op. at 13, No. 31255-I-III, 2014, WestLaw 1878459. Part of protecting vulnerable adults from abuse is ensuring those who have abused the vulnerable in the past are not allowed to provide care to vulnerable people in the future. WAC 388-71-0540(5)(3).

Mr. Aleksentsev claims the Department did not follow RCW 74.34.200(2). Pet. 12. However, Mr. Aleksentsev does not explain why failure to follow this statute should result in his petition being granted, and furthermore, he raises this argument for the first time on appeal. “An appellate court should refuse to consider a contention that is inadequately argued or is unsupported by citation to legal authority.” *State v. Lopez*, 107 Wn. App. 270, 278, 27 P.3d 237 (2001). Moreover, issues not raised at the trial court should not be considered by the appellate court. RAP 2.5(a). The policy behind this rule is to afford the trial court the

opportunity to correct errors as they are raised. This Court should not consider this issue.

Even if this issue were properly before the Court, however, RCW 74.34.200 does not apply to abuse or neglect investigations. RCW 74.34.200 provides a cause of action for a vulnerable adult who has been subjected to abuse, neglect, or financial exploitation to obtain damages for their injuries. RCW 74.34.200(1). Section 2 of this statute notes that where there is a dispute about care or treatment the parties should use “the least formal means available to resolve the dispute.” RCW 74.34.200.

Here, the dispute involves a finding of mental abuse of Connie, not a dispute about care or treatment. Nowhere in RCW 74.34 did the Legislature require APS to resolve findings of abuse, neglect, or financial exploitation by “the least formal means possible.” If APS followed Mr. Aleksentsev’s suggestion that the problem should have been resolved by discussion and reassignment, absurd results would follow. The perpetrator would be free to move on to other caretaking jobs and harm other vulnerable adults. APS is not and should be required to resolve allegations of abuse, neglect, or financial exploitation by any means other than a complete investigation as dictated by statute.

#### IV. CONCLUSION

This case presents no denial of due process, no conflict with appellate or supreme court case law, and no issues of substantial public interest. Mr. Aleksentsev cannot meet the requirements of RAP 13.4(b). Accordingly, the Petition for Discretionary Review should be denied.

RESPECTFULLY SUBMITTED this 26<sup>th</sup> day of September, 2014.

ROBERT W. FERGUSON  
Attorney General

 #26181fa

LISA L. LYDON  
Assistant Attorney General/Senior  
Counsel  
1116 W. Riverside  
Spokane, WA 99201  
(509-468-3527)

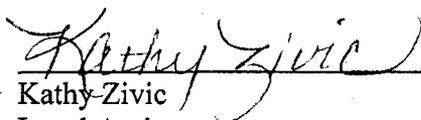
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I certify that I served all parties, or their counsel of record, a true and correct copy of the Department of Social and Health Services Answer to Motion for Discretionary Review to the following addresses:

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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 26<sup>th</sup> day of September, 2014, at Spokane, Washington.

  
\_\_\_\_\_  
Kathy Zivic  
Legal Assistant

## OFFICE RECEPTIONIST, CLERK

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Attached for filing in the above-reference case, please find the Department of Social and Health Services' Answer to Motion for Discretionary Review, Case No. 90619-0, being filed today by:

Lisa M. Lydon  
WSBA #19238  
(509) 456-3123  
OID: 91109

A copy is being provided to attorney Drew Dalton by U.S. Mail as indicated on the Certificate of Service.

*Pandy Thoorsell*  
*Paralegal 2*  
*SHS Spokane*  
*456-6395*  
*[pandyt@atg.wa.gov](mailto:pandyt@atg.wa.gov)*

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