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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By SO

NO. 31255-1-III

90619-0

SUPREME COURT
OF THE STATE OF WASHINGTON

PAVEL ALEKSENTSEV

Petitioner/Defendant,

v.

DEPARTMENT OF SOCIAL and HEALTH SERVICES; ADULT
PROTECTIVE SERVICES,

Respondent.

PETITION FOR DISCRETIONARY REVIEW of DECISION
TERMINATING REVIEW

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IDENTITY OF PETITIONER

Petitioner is Pavel Aleksentsev, a Russian immigrant living in Spokane, Washington. This petition is being filed on his behalf by Drew D. Dalton WSBA 39306, of Ford Law Offices, PS. 320 S. Sullivan Rd., Spokane Valley, WA 99037.

CITATION TO COURT OF APPEALS DECISION

Review is requested of case no. 31255-1-III. In re: Pavel Aleksentsev, Court of Appeals Division Three. The original decision was filed May 8, 2014. A motion to publish was filed by a non-party on May 19, 2014. The court of appeals issued an ORDER denying Petitioner's on June 3, 2014. The court then

informed petitioner's counsel, and an appeal could not be filed until the motion to publish had been decided. RAP 13.4 The court of appeals filed an order denying the motion to publish on June 26, 2014.

ISSUES PRESENTED FOR REVIEW

Issue No. 1

A. The court did not address Connie's testimony that there was no harm from the events. Hr. Tr. 50:3 & 14

Issues pertaining to Issue of Fact No.1

1. If the vulnerable person does not believe she was harassed, how can the court make a finding of abuse?
2. If Connie testified it was "comical", how is Mr. Aleksentsev to know what he was doing would cause harm.

Issue No. 2 Definition of Harassment/Abuse

B. The Court did not apply the law to the facts.

Issues pertaining to Assignment of Error No.2

1. Intent to harm, control, abuse is required by the petitioner even if willfulness is not.
2. The Court did not address the legislative intent as expressed in RCW 74.34.200(2) and its application to this and all other cases.

Issue of Law Discrimination/Due Process

C. The Court should not allow a finding of fact to stand when it could be the basis for a due process violation in a case.

Issues pertaining to Assignment of Error No.3

1. The issue is; did the court's finding of fact, regarding the lack of an interpreter during the investigation, potentially quell Mr. Aleksentsev's right to due process and discriminate against him based on his origins?

APPLICABLE LAW

The burden of proof, in this matter, is this matter before the Board was the preponderance of the evidence. Despite the burden of proof, ALJ proceedings proceed under the same civil and/or criminal rules that would apply to those proceedings. See WAC 388-02-0485 & 388-71-02155.

The primary issues in this case center on the department's definitions of Mental Abuse. These definitions are found in RCW 74.34.020(2)(c) & WAC 388-71-0105:

RCW 74.34.020(2)(c) states:

(c) "Mental abuse" means any willful action or inaction of mental or verbal abuse. Mental abuse includes, but is not limited to, coercion, harassment, inappropriately isolating a vulnerable adult from family, friends, or regular activity, and verbal assault

that includes ridiculing, intimidating, yelling or swearing.

WAC 388-71-0105 states: Willful means "the non-accidental action or inaction by an alleged perpetrator that he/she knew or reasonably should have known would cause harm, injury or a negative outcome."

The court of appeals reviews an agency order under RCW 34.05.570(3), which provides, in part, that we must grant relief if the agency has erroneously interpreted or applied the law...or is not supported by substantial evidence. Brown v. DSHS, 145 Wn. App. 177,187 (2003). The factual review is confined to the record before the administrative law judge and board. RCW 34.05.558; Port of Seattle v. Pollution Control Hearings Bd., 151 Wn. 2d 568, 587 (2004).

We apply de novo review to statutory interpretation questions. W. Telepage, Inc. v. City of Tacoma, 140 Wash.2d 599, 607 (2000). Our primary goal is "to ascertain and give effect to legislative intent."State v. Pac. Health Ctr., Inc., 135 Wash.App. 149, 158-59 (2006) . Legislative intent is determined primarily from the statutory language, viewed "in the context of the overall legislative scheme."
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v. McConnachie, 106 Wash.App. 738, 741, (2001). If the statute's meaning is plain on its face, we give effect to that plain meaning. Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wash.2d 1, 9-10, (2002).

The legislative intent/scheme is found in RCW 74.34.200(2).

(2) It is the intent of the legislature, however, that where there is a dispute about the care or treatment of a vulnerable adult, the parties should **use the least formal means available to try to resolve the dispute**. Where feasible, parties are encouraged but not mandated to employ direct discussion with the health care provider, use of the long-term care ombuds or other intermediaries, and, when necessary, recourse through licensing or other regulatory authorities. (emphasis added).

There is no evidence the Department tried any less formal means to resolve this case when they were clearly available.

STATEMENT OF THE CASE

The relevant facts are as follows: In October 2008 Appellant was hired to work with Connie. Connie is classified as a vulnerable adult as she receives home care under RCW 74.34.020(15). Certified Appellate Board Record (CAB) at 24. No one disputes that Appellant was a good care worker for the first five or so months of his work with Connie. At about the five month mark Mr. Aleksentsev gave a one month notice that he would not work for Connie any more. Hr. Tr. 96-97. Mr. Aleksentsev testified he was injured in December 2008. Hr. Tr. pg 102. He testified working for Connie was hard and he tried to get her to get another caregiver. Id. Shortly after, he told them he was leaving, on March 19, 2009, a complaint was filed against Appellant regarding his conduct with Connie. CAB at 4. This was after his injury and one month notice he was leaving.

The transcripts to the first hearing were lost. A second hearing was held on February 15, 2011. There were three main issues discussed at hearing. One issue was an

audio recording on his phone that had curse words. He testified he did not play the tape for her. 2/15/11 Hr. Tr. (TR) 20:11-13. Connie's testimony corroborates Appellant's in that she states she was in the same room, but never had he actually played it for her. Tr. 47:9-10 & 53:21-25.

Appellant testified that when she told him not to do something, he stopped doing it. Connie corroborated this testimony. Hr. Tr. 50:14-16. Connie testified there was only one day he used the word "bitches." He was confronted, and he never said the word again to her. Hr. Tr. 57:9-25. She testified he was "not a foul mouthed man." *Id.*

The second issue was the baby talk audio. Appellant confirmed that Connie told him Katy (sic Cathy) had played it for her several times. Hr. Tr. 23:23-25. Appellant consistently denied playing the audio for Connie. He does not deny that the audio got sent to Cathy. Hr. Tr. 23:20-22. The third incident involved the optometrist.

Appellant took Connie from the Optometrist to Arby's for food before taking her home. Petitioner testified that he took her there because he saw she was shaking. Hr. Tr. 99.

He thought her blood sugar was low and he needed to act on his training. Id. Connie testified Appellant joked a lot, was immature and childish but that she never felt abused by him. Hr. Tr. 49 & 50. This is important as Mr. Crusch testified she had no cognitive difficulties. Hr. Tr. 69:20.

Ms. Pakou Lee testified that Connie was not threatened, frightened or concerned with Mr. Aleksentev's care. Hr. Tr. 43-44. She wanted him to remain her caregiver. Id. She told Ms. Lee that she thought all the differences were cultural issues, and Mr. Aleksentsev listened to her and she could handle him. Id. Connie also testified she was never more than annoyed by Mr. Aleksentsev's actions. Hr. Tr. 59.

Appellant is an immigrant from Russia. His native language is Russian. He has two weeks formal education in the English language. Hr. Tr. 103. He testified he asked for an interpreter with Curt Crusch and that he did not understand the gist of the meeting. Hr. Tr. 16-17. He still did not know the purpose of it at the Board hearing several years later. Id. He required an interpreter at both hearings

with Judge Stewart. Curt Crusch, the investigator, refused to provide an interpreter for Appellant. Appellant asked three times for an interpreter. Id. Mr. Crusch admitted Appellant had difficulty with at least one definition while talking to him during the investigation. Tr. 75: 6-7. When questioned about his investigative techniques Judge Stewart prevented counsel from confronting Mr. Crusch. Judge Stewart stated, "I am not going to put the APS investigator on trial here. They're supposed to find fault, that's what their job is...we are not talking about any defects in the investigation." Hr. Tr. 86:1-5. This is troubling, as in the previous hearing, it is clear there were issues with the investigative techniques of Mr. Crusch and Ms. Lee. CAB at 103-104.

ARGUMENT

Petitioner asserts three reasons why the court should review this decision. (1) The decision in this case is in conflict with current case law found at Brown v. DSHS, 145 Wn. App. at 182. This case uses facts where the caregiver, like Brown, was trying to help the protected person, yet, a finding of abuse was inappropriately made. (2) This case involves a substantial public interest in the application

of statutes to infringe on their rights to work with DSHS, and how the Department is expected to act with regards to its clients and caregivers, and (3) there is an important issue of law regarding whether Mr. Aleksentsev's denial of an interpreter at stages of the investigation violated his constitutional rights. Petitioner asks the court to reverse the Court of Appeals decision as it does not apply the law to the facts of the case to the law. These issues are addressed through the argument below.

I. Connie Testified There Was No Harm

Regarding the facts of this case Division III expressly noted

"Connie testified that she did not feel frightened or intimidated by Mr. Aleksentsev, but was annoyed by his actions. She did not believe he was trying to hurt her, but did state that the incidents caused her stress and wore her out emotionally." Court of Appeals Decision pg 3.

This statement of the facts is supported by the record.

Connie testified Mr. Aleksentsev used the word bitches one day when he came to work. Her recollection of the event was that "It was almost comical...a bit juvenile." Hr. Tr. 50:3 & 14. Her recollection of the event is that he came

into work, and she overheard him saying “those bitches— those bitches.” Hr. Tr. 50:16. When Connie overheard him, she told Mr. Aleksentsev not to say that word and he stopped. *Id.* In the transcript and in the exhibits, there is no other testimony that he willfully swore or directed the term bitches at Connie in order to harass, intimidate, harm or otherwise. In other words, there was no intent to harm. Without intent to harm, there can be no abuse finding.

Further, Connie said she overheard him using the language and he stopped immediately and never personally swore again. *Id.* This shows his desire to do what she asks. Connie also testified that she was never frightened annoyed or intimidated by Mr. Aleksentsev. *Id.* at 59. She said “annoyed pretty much covers it.” *Id.* She also told Mr. Crusch, L&I, investigator that there were no issues. She testified she did not disagree with that statement. *Id.*

This is consistent with Ms. Pakou Lee’s testimony. At the hearing Pakou Lee, case manager for Connie’s care, testified that Connie told her she wanted Mr. Aleksentsev to remain her caregiver. Connie believed that Mr.

Aleksentsev's issues were merely cultural differences, and she can tell him to behave and he will. Id. at 43-44. While the audio tape may have annoyed her it was not abusive or intended to cause harm. All the testimony is consistent in that she wanted him to return to work. There is also no abuse where there is no harm. Harm is more than testimony of merely being annoyed.

Connie wanted Mr. Aleksetsev to remain her caregiver. She told the manager that. She liked him and thought they were a good fit. There are no facts that find Mr. Aleksentsev actually caused Connie harm. This is of substantial public interest. Courts and finders of fact should not be allowed to put words in someone's mouth. If the testimony says there was no harm, there is no harm. The case must be reversed.

II. Definition of Harassment is not consistent with the Court's findings and Mr. Aleksentsev's Intent

We do not disagree that a willful action or inaction can be considered abuse. However, the statute says that said action is defined by specific words. These are:

Mental abuse includes, but is not limited to, coercion, harassment, inappropriately isolating a vulnerable adult from family, friends, or regular activity, and verbal assault that includes ridiculing, intimidating, yelling or swearing. **RCW 74.34.020(2)(c)**.

Applying the law, the Department must show that Mr. Aleksentsev tried to coerce, harass, verbally assault or isolate Connie consistent with RCW 74.34.020(c). Connie testified, Mr. Aleksentsev never swore at her. She told him not to use the word "bitches", and he did not. The testimony showed that, despite any differences, she wanted Mr. Aleksentsev to remain her caregiver. There is no evidence of abuse in this case.

During the second incident, he was listening to a file sent to his phone. Once he heard her ask him to stop, he did. Again, we have separate incidents, not related, and separated by weeks if not more. The intent of Mr. Aleksentsev was not to abuse or cause harm. In fact, as soon as he knew it was a problem he stopped both times. This is directly contrary to a finding that he "knew or should have known" the actions would cause harm component of the statute. This was not addressed by the court. Petitioner should not be deprived of his ability to work just because of a

disagreement. Also Connie testified she was nothing more than "annoyed" with his conduct. Annoyance is not defined as abuse.

It is concerning that a protected person can say they had no problem, yet, the Department can find improper conduct. This is a stretch of the powers the DSHS was given by the legislature.

Finally, the third event was when he drove her home from the optometrist. Mr. Aleksentsev testified that he took her to get food because she was shaking. That he had been trained by DSHS that was a bad sign for elderly people. It was a sign of low blood sugar and they needed to eat immediately. So, despite her protests he took her to Arby's to get food. *Hr. Tr.* at 99-100. Should he have taken her home? **NO**. His training told him otherwise. He was trying as quickly as possible to get her food. Despite her protests, he did the right thing. Using this event against him is not consistent with Brown v. Department of Social & Health Services., 145 Wn. App. 177, 183 (2008). The court held willful action must be "improper action." The court should

have applied its own case law as here it was not improper to treat her low blood sugar level despite her protest. This event cannot be used against him. He even paid for the food because he was worried about her. Hr. Tr. at 99-100. It defies reason to call acts of kindness and compassion abuse. Where do we stop if that is the case?

His acts in this instance are consistent with the Brown case. He was acting for the welfare of his client. One cannot be abusive if he was following his training. The client may not like the act, but if it was done to stabilize her health it was in her best interest. The Court of Appeals did not address this fact or aspect of the case. Thus, the decision should be overturned.

A. INTENT TO HARM

The court also disregarded the definitions of mental/emotional abuse provided from the psychological literature. While an expert may not be required, there has to be more than just a misunderstanding to constitute abuse. These experts establish that mental abuse requires repetitive acts of control.

Furthermore, in the psychological field, Mental abuse is defined by leading experts Tomison and Tucci: as "characterized by a climate or pattern of behavior(s) occurring over time [...] Thus, 'sustained' and 'repetitive' are the crucial components of any definition of emotional abuse." Tucci. 1997. Emotional Abuse: The Hidden Form of Maltreatment. Issues in Child Abuse Prevention Number 8 Spring 1997. Another expert, Andrew Vachss, an author, attorney and former sex crimes investigator, defines emotional abuse as "the systematic diminishment of another. It may be intentional or subconscious (or both), but it is always a course of conduct, not a single event." Vachss, Andrew. 1994. "*You carry the Cure In your Own Heart.*" Parade, 28 August 1994. See page 1.

To establish a finding of mental abuse, it requires both intent on the part of the actor and a pattern of behavior. This did not exist in this case. At best we have one incident regarding the baby talk audio. The first instance was personal swearing which he discontinued. The third was for her health and so cannot be abuse. As there is no pattern of

abuse, only a pattern of listening, caring and trying to do what is best, the law requires a finding in his favor.

The court should not adjudicate the law in a way that is not consistent with the statute as written. That voids the intent of the legislature as stated in RCW 74.34.200(2). The legislature intended to protect vulnerable adults, not have every complaint end up in court with an abuse finding. RCW 74.34.200(2) states that the legislature's intent is for the least formal means available to be used. This means, if two parties do not get along, don't have them work together. It does not require a court case to change the situation. DSHS did not try a less formal means to resolve the issues between client and provider. In a business situation, there would simply been a discussion and possibly a reassignment, so they did not continue to interact. Termination and prohibition from ever working again are not likely out comes in the business world. Mr. Aleksentsev and Connie would have likely agreed to part ways. There were so many ways to resolve this without litigation. Yet, the Department failed in its obligation to resolve these cases as easily as possible.

Unfortunately, the case law is usurping the legislature's intent, and each and every time an employee disagrees with a vulnerable adult or says something they do not like, we end up with an abuse finding. There is no case law interpreting RCW 74.34.200(2). The result is costly and frankly absurd. This is not what was intended. The legislature put the means here for DSHS to protect, but not to overreach. Every disagreement between people does not constitute reason to terminate an employee.

Ultimately, if the courts do not tie the required requisite intent for the harm to a specific pattern of behavior, we create a system that ends up with absurd results, i.e. everyone can be fired for any action regardless of the intent behind the action. To protect vulnerable adults, we do not need every willful action to be prosecuted. Only the actions that have the requisite intent to harm and a pattern of behavior that supports the finding. Mr. Aleksentsev had no intent to harm. His behavior, in one of the incidents, was to help because of what he perceived as low blood sugar. Connie, the vulnerable adult, wanted him to stay her caregiver. She testified, she was never more than annoyed

with him. The evidence also showed, she believed that any differences in understanding were cultural or language based. The abuse finding is not supported by the facts or the law.

III. Mr. Aleksentsev Was Denied Due Process by the Department Failing to Provide him an Interpreter

For this court, it does not matter if the Judge found Mr. Aleksentsev can understand some English. The finding of fact is suspect. The Judge stated that it is the investigator's job to find fault. If it is his job to find fault, then he cannot be trusted to interview someone without an interpreter to ensure communication is happening properly. Further, the actions by DSHS seem to indicate they were looking for blood. Mr. Aleksentsev testified he was hurt in December at work. That he could not do the job. So, he gave his one month notice. About the time he was suppose to leave, they hit him with an abuse complaint. Then, they did not provide him with an interpreter when he said he did not understand what the investigation was for. Even at the hearing, he still did not know.

The Judge should have found that an interpreter was needed. Mr. Aleksentsev could communicate generally with co-workers, but not understand in-depth conversations. This is not a basis to find Mr. Aleksentsev could understand English, and it is fatally flawed. Understanding basic day to day communications, which he had with his supervisors, is different than being interrogated on specific issues and events. Just because a person can "get by" does not mean they "understand" the nuances of the language. Article I Section III of the Washington Constitution guarantees due process. Due process requires a fair proceeding at every stage. If we deny a foreign speaking citizen, with no proven education in the English language, an interpreter, have we given him the required due process.

This issue is disturbing. We are saying that we would rather not ensure communication and understanding in a Department investigation. Not ensuring understanding, leads to an abuse of power and potential miscarriage of justice. This is contrary to the intent of the legislature, to ensue the least formidable process is used to resolve issues. The legislature's intent is communication between parties. That did not happen here. If there is to be an

error, it should be to an error in favor of communication, not against it.

The court of appeals decision implies that language ability is not an issue in investigations. That a court can find an "investigator thought he could speak English well enough ergo, he didn't need an interpreter." Then, the use of that investigator's testimony could be damning when the information communicated between parties was not accurate. The legal process uses prior inconsistent statements as a means of impeachment. If there is no interpreter how can we know the statements are inconsistent?

We know Mr. Aleksentsev is not a native English speaker, regardless of his ability, we know there are misunderstandings when someone is not a native speaker, and often even when they are. How can we deny someone the right to an interpreter, as it may well have changed the outcome of the investigator's report? While the Board made a factual finding, he did not need one, it was flawed as he still had an interpreter at the Board hearing. How can he need one at the hearing but not with the investigator? Does this not color the decisions? Make it appear that we are discriminating

against petitioner because of his nationality. It appears to defy common sense.

Conclusion

Mr. Aleksentsev did not have the requisite intent required by the law to abuse Connie. The Division III decision is contrary to its own case law in Brown v. DSHS. The testimony shows that Mr. Aleksentsev was trying to help Connie. That he changed his behavior when asked. There is no pattern of behavior that showed intent to abuse or harm Connie. The only time he did not listen was when she was shaking because of low blood sugar, and he wanted to help her. This is not abuse.

The only abuse is to Mr. Aleksentsev's rights to be understood and to be heard. He was denied an interpreter, which led to misquoting and a misunderstanding between the investigator and Mr. Aleksentsev. This created impeaching evidence that probably had no validity if he had understood the conversation to begin with. Connie testified

he had issues with the language. Mr. Aleksentsev was discriminated against because of his race and origins.

Connie also testified she did not have an issue with him. Curt Crusch testified she had no mental deficiencies and could take care of herself. Pakou Lee testified Connie wanted him to remain her care giver. Where is the abuse? The testimony and facts do not support a finding of abuse under the statute or under Brown. We ask the court to reconsider these points, and reverse the decision to be consistent with the law, constitution and to define the specific boundaries within DSHS should act so as to protect employees and clients of the system. We request a finding that Mr. Aleksentsev did not abuse Connie.

Date: July 23, 2014

Respectfully Submitted



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The second incident involved Mr. Aleksentsev repeatedly playing an audio/video clip on his telephone of a child demeaning women with vulgar language and threats of violence. Connie several times told him to stop playing the clip.

The final incident involved Mr. Aleksentsev driving Connie to an optometrist appointment. At the conclusion of the appointment, Connie wanted to go home because she was hungry and exhausted. Instead, he drove her to Arby's and then wanted to go buy flowers. Connie "almost had to have a fit" to get him to return her home. Clerk's Papers (CP) at 57

Adult Protective Services (APS) received a referral alleging mental and sexual abuse in March 2009. Investigator Curt Crusch interviewed Connie, her mother, and Mr. Aleksentsev. After that investigation, APS concluded that more likely than not Mr. Aleksentsev had abused a vulnerable adult. It issued a letter determination to that effect.

Department of Social and Health Services (DSHS) notified Mr. Aleksentsev that the APS determination would result in listing him on the registry of those who have abused vulnerable adults, an action that would preclude further employment serving the vulnerable community. He challenged the APS ruling and an initial hearing was held before an administrative law judge (ALJ) on February 25, 2010. The ALJ issued an initial order March 16, 2010, determining that Mr. Aleksentsev had abused a vulnerable adult. He filed a request for review. The audio record of proceedings, however, was not available. The Board of Appeals remanded the case to the ALJ for a second hearing.

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In order to shorten the length of the second hearing, the parties stipulated to the first seven factual findings and the first seven conclusions of the March 16 order. Connie testified that she did not feel frightened or intimidated by Mr. Aleksentsev, but was annoyed by his actions. She did not believe he was trying to hurt her, but did state that the incidents caused her stress and wore her out emotionally. The second hearing reached the same result as the first. Mr. Aleksentsev then appealed to the Board of Appeals which affirmed the ALJ.

Mr. Aleksentsev next appealed to superior court. The superior court also affirmed the ALJ. Mr. Aleksentsev then appealed to this court.

ANALYSIS

Mr. Aleksentsev challenges several factual findings. He also argues that he did not abuse Connie, that expert testimony was necessary to establish abuse, that he was unable to cross-examine investigator Crusch properly, and that he was denied the opportunity to have an interpreter during his interview with Crusch. We address the claims in that order.

Factual Findings

Mr. Aleksentsev assigns error to eight of the findings of fact entered by the superior court. We review factual findings for "substantial evidence," which in turn means evidence that "is sufficient to persuade a rational, fair-minded person that the finding is true." *Cantu v. Dep't of Labor & Indus.*, 168 Wn. App. 14, 21, 277 P.3d 685

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(2012). The legal conclusions that flow from the findings are reviewed de novo. *Id.*

Credibility determinations will not be reconsidered on appeal. *Id.* at 22. When a factual finding is misidentified as a legal conclusion, we will treat it as a conclusion. *Life Care Ctrs. of Am., Inc. v. Dep't of Soc. & Health Servs.*, 162 Wn. App. 370, 384 n.42, 254 P.3d 919 (2011).

Not all of the witnesses testified at the second hearing. Instead, the court without objection considered statements made to Mr. Crusch at the first hearing. Among other claims, Mr. Aleksentsev claims that the findings are invalid because they are based, in part, on hearsay. However, none of the hearsay evidence was objected to at the hearing. Accordingly, Mr. Aleksentsev cannot make that claim now. *E.g., State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986).

The first challenge is to finding of fact 1.3:

Mr. Aleksentsev willfully played a recording that Connie found vulgar and nasty. This was a recording of a baby using rude, nasty and racist language. Mr. Aleksentsev played this recording several times in the same room as Connie despite being asked repeatedly to stop playing the recording. Connie also advised this recording was offensive to her.

CP at 2.

Mr. Aleksentsev argues that this finding is not supported by the evidence because there were two versions of this event. However, the presence of conflicting evidence does not mean the fact finder's resolution of the conflict is unsupported. It is, after all, the job of the fact finder to determine credibility and decide whether or not to believe the

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evidence. Here, the challenged finding was supported by Connie's testimony. The fact that Mr. Aleksentsev gave a contrary version does not render Connie's evidence impotent. Her testimony supported the finding.

For similar reasons, Mr. Aleksentsev's challenges to findings of fact 1.5, 1.6, and 1.7 all fail. All were supported by Connie's testimony. While Mr. Aleksentsev denies that some of these incidents occurred (at least in the manner described by Connie), her testimony did allow the ALJ to find otherwise. Hence, the evidence was sufficient.

Mr. Aleksentsev also challenges findings 1.8, 1.9, 1.11, and 1.12. Findings 1.9 and 1.11 address the interpreter issue and the cross-examination issue, respectively, and will be addressed to the extent necessary in the discussion of those issues. Findings 1.8 and 1.12, however, are conclusions of law concerning the mental abuse ruling. We address those matters in the next section of this opinion.

Mental Abuse

Mr. Aleksentsev presents four arguments against the mental abuse determination. Three of his arguments address (in various forms) the mental element underlying the abuse ruling, while the fourth argument is a contention that only an expert can render an opinion on mental abuse. We treat his initial arguments as one question—what is the necessary mens rea for this statute? We first address that issue before turning to the contention that expert testimony was necessary.

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The statutes at issue are found in chapter 74.34 RCW, the Abuse of Vulnerable Adults Act (AVA). The purpose of the chapter is to protect vulnerable adults from abuse, financial exploitation, and neglect. RCW 74.34.110. As relevant here, the statute entitles the vulnerable adult or an interested person on her behalf to seek relief from abuse. RCW 74.34.110(1), (2). Various definitions in RCW 74.34.020 inform our discussion.

Subsection (2) defines "abuse" as "willful action or inaction that inflicts injury, unreasonable confinement, intimidation, or punishment on a vulnerable adult Abuse includes sexual abuse, mental abuse, physical abuse, and exploitation of a vulnerable adult." RCW 74.34.020(2). The statute then goes on to define each of those variations in turn. "Mental abuse" is defined as "any willful action or inaction of mental or verbal abuse. Mental abuse includes, but is not limited to, coercion, harassment, inappropriately isolating a vulnerable adult from family, friends, or regular activity, and verbal assault that includes ridiculing, intimidating, yelling, or swearing." RCW 74.34.020(2)(c). RCW 74.34.020 does not define "willful" but WAC 388-71-0105 does.¹ That section defines "willful" as "the nonaccidental action or inaction by an alleged perpetrator that he/she knew or reasonably should have known could cause harm, injury or a negative outcome." WAC 388-71-0105.

¹ WAC 388-71-0105 asserts "In addition to the definitions found in chapter 74.34 RCW, the following definitions apply."

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As relevant to the facts of this case, to establish abuse under chapter 74.34 RCW there needed to be proof that Mr. Aleksentsev had: (1) undertaken improper,² nonaccidental action or inaction³ of (2) mental or verbal abuse to include, but not limited to . . . harassment,⁴ (3) that he knew or reasonably should have known could cause harm, injury, or a negative outcome⁵ and (4) that did in fact inflict injury⁶ (5) on a vulnerable adult.

The first element of this action is found in our decision in *Brown v. Department of Social & Health Services.*, 145 Wn. App. 177, 183, 185 P.3d 1210 (2008). There we addressed the situation where a caregiver had to "take down" a client in order to protect others from violence. *Brown*, 145 Wn. App. 177. This court held that the willful action required under RCW 74.34.020(2) must be "improper action." *Id.* at 183. Finding no

² The "improper" element was added by our decision in *Brown v. Department of Social & Health Services.*, 145 Wn. App. 177, 183, 185 P.3d 1210 (2008).

³ WAC 388-71-0105: "[W]illful" means the nonaccidental action or inaction by an alleged perpetrator that he/she knew or reasonably should have known could cause harm, injury or a negative outcome."

⁴ "Abuse includes sexual abuse, mental abuse, physical abuse, and exploitation of a vulnerable adult." RCW 74.34.020(2). "'Mental abuse' means any willful action or inaction of mental or verbal abuse." RCW 74.34.020(2)(c). "Mental abuse includes, but is not limited to . . . harassment." RCW 74.34.020(2)(c).

⁵ See footnote 3.

⁶ "'Abuse' means the willful action or inaction that inflicts injury." RCW 74.34.020(2).

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improper action in protecting the other residents of the home, our court found Ms. Brown did not abuse a client by preventing violence against others. *Id.*

Mr. Aleksentsev argues that his actions also were not "improper" under *Brown*. We disagree. In *Brown*, we used "improper" in the sense of "not justified." It was appropriate for Ms. Brown to "take down" the agitated client who was attempting to attack others. Here, there was no need to repeatedly play a vulgar video that Mr. Aleksentsev knew was upsetting to Connie. Even more importantly, dragging Connie along to extra stops after her optometrist appointment over her objection also had no legitimate purpose. None of these actions was necessary to the performance of Mr. Aleksentsev's job and did not serve a higher purpose such as Ms. Brown's action in protecting a client. Under the facts of this case, we have no difficulty concluding that the challenged actions were "improper" under *Brown*.

In addition to being improper under our case law, the actions must be "willful" in accordance with RCW 74.34.020(2) and WAC 388-71-0105. In the context of this first element, willfulness simply requires the improper actions to be purposeful rather than accidental.⁷ The requirement was established here with both the video and the driving incidents.⁸ Neither of them was an accidental occurrence.

⁷ Foreseeability is discussed in the third element.

⁸ We agree that the initial ("those bitches") incident does not establish a willful action as there was no evidence that he knowingly communicated to Connie or had any

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The second element is proof that the actions constituted mental or verbal abuse. Although this is a close call, we agree with the ALJ that the actions did constitute abuse. The incident with the word "bitches" showed Mr. Aleksentsev that Connie was sensitive to crude language. To then repeatedly play a video of a young child using vulgar language and threatening women was something that Mr. Aleksentsev knew, or should have known, would upset Connie. He then upset her on a different occasion by extending her trip outside the home in order to conduct business of his own. Both of these later incidents did constitute abuse of a vulnerable adult.

The third element is whether the actions were ones that Mr. Aleksentsev reasonably knew or should have known would cause harm or a "negative outcome" to Connie. Certainly he was on notice that Connie was offended by crude language, so repeatedly playing the video in her presence was something that he should have known would upset her. Connie also made her displeasure with the extended outing known to Mr. Aleksentsev, but he persisted in his travels until she had to act up to get his full attention. This, too, was a "negative outcome" for her. We believe that Mr. Aleksentsev knew or should have known these results would follow from his actions. This foreseeability element was satisfied.

reason to know that she would take offense.

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The fourth element is whether Connie suffered an injury in fact from these actions. As the discussion of the previous element showed, Connie did become upset on both of these occasions as a result of Mr. Aleksentsev's purposeful conduct. This "negative outcome" is a foreseeable result of mental abuse. The fourth element, too, was satisfied.

The final element is whether Connie was a vulnerable adult. The parties do not dispute the element. Indeed, it was her status as a vulnerable adult that brought Mr. Aleksentsev into her life.

All elements of the abuse of a vulnerable adult finding are supported in the record. In many respects, the facts of this case are similar to the mental abuse found in *Goldsmith v. Department of Social & Health Services*, 169 Wn. App. 573, 280 P.3d 1173 (2012). There a son had repeatedly yelled at his father over the telephone concerning the father's financial affairs. *Id.* at 576-78. The father had become upset due to the calls. *Id.* This court affirmed the determination of mental abuse.

Having concluded that the finding was supported by the evidence, we thus turn to Mr. Aleksentsev's related contention that an abuse finding must be supported by expert testimony. Largely seizing on the word "mental," he argues that an abuse finding must be based on information beyond the kin of ordinary triers of fact. We again disagree.

The word "mental" is used merely as an adjective. The statute prohibits physical, sexual, mental or verbal *abuse*. RCW 74.34.020(2). It does not require proof of infliction of mental illness nor any other type of sophisticated injury. Accordingly, an

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expert opinion is unnecessary. *See Goldsmith*, 169 Wn. App. at 585 (in a mental abuse case, this court determined that “the Department was not required to prove injury by expert medical testimony”). *Goldsmith* is dispositive of this argument.

We conclude that the mental abuse finding was supported by the evidence.

Cross-examination of Investigator Crusch

Mr. Aleksentsev next argues that he was not permitted to properly cross-examine Mr. Crusch. This argument overstates the situation and is without merit.

During the second hearing, the ALJ sustained a relevancy objection while Mr. Aleksentsev's counsel was cross-examining Mr. Crusch. Counsel asked if the investigator had also criticized one of Connie's earlier caregivers. Sustaining a relevancy objection, the ALJ stated that the investigator was not going to be put on trial. Mr. Aleksentsev's counsel then concluded his cross-examination without asking any further questions, stating that he was done.

The ALJ did not prohibit further cross-examination, and Mr. Aleksentsev did not indicate that there were other areas he wished to make inquiries of Mr. Crusch. There is no suggestion that important additional matters were not addressed. Instead, veteran counsel simply had reached the end of his examination. There was no more to do.

The record does not reflect that Mr. Aleksentsev's due process rights were violated in this circumstance.

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Interpreter During Investigation

Finally, Mr. Aleksentsev argues that he was denied an interpreter during his interview with Mr. Crusch. The ALJ found otherwise and we are not in a position to find to the contrary.

The record on this point is disputed. Mr. Aleksentsev testified that he did request an interpreter on three occasions; Mr. Crusch said there was never any request. Evidence was also presented that Mr. Aleksentsev, who used an interpreter during his hearings, had not used an interpreter to communicate with his work supervisor or at any other time during his employment. The ALJ ruled that there had not been a request for an interpreter.

Appeals courts do not find facts and cannot substitute their view of the facts in the record for those of the trial judge. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959); *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009). Whether the facts are as the parties allege is for the trial judge to determine, not this court. *Hesperian*, 54 Wn.2d at 575.

The ALJ determined that Mr. Aleksentsev did not request an interpreter. That determination is binding on this court. Accordingly, this issue cannot afford appellant any relief.

Although the outcome of this review is to affirm the finding, we do note that this was a close case. It is a harsh result to deprive Mr. Aleksentsev of work in his chosen

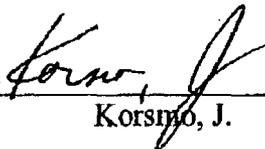
No. 31255-1-III

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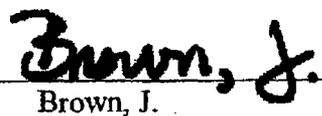
field on the basis of what may have been, in part, cultural misunderstanding. However, the trier of fact saw matters differently and was entitled to conclude on the evidence that Mr. Aleksentsev acted with the intent of upsetting Connie. Our public policy is to protect the vulnerable population from all forms of abuse. The ALJ determined that mental abuse occurred here. As in *Goldsmith*, the evidence was sufficient to support that determination and this court must therefore defer to that judgment.

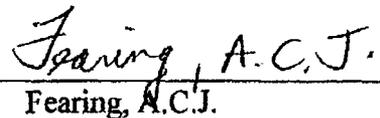
Affirmed.

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


Korsmo, J.

WE CONCUR:


Brown, J.


Fearing, A.C.J.

FILED
JUNE 03, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, STATE OF WASHINGTON, DIVISION III

In re: PAVEL ALEKSENTSEV)
) No. 31255-1-III
)
) ORDER DENYING MOTION
) FOR RECONSIDERATION
)

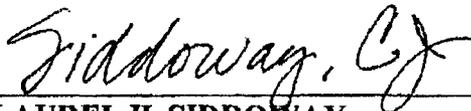
THE COURT has considered Pavel Aleksentsev's motion for reconsideration of this court's decision of May 08, 2014, and having reviewed the records and files herein, is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, motion for reconsideration is hereby denied.

DATED: June 3, 2014

PANEL: Jj. Brown, Korsmo, Fearing

FOR THE COURT:



LAUREL H. SIDDOWAY
CHIEF JUDGE

FILED
JUNE 26, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, STATE OF WASHINGTON, DIVISION III

In re: PAVEL ALEKSENTSEV

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No. 31255-1-III

**ORDER DENYING MOTION
TO PUBLISH COURT'S
OPINION OF MAY 8, 2014**

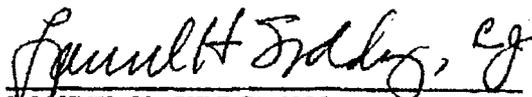
The court has considered Stuart C. Morgan's motion to publish the court's opinion of May 8, 2014, and the record and file herein, and is of the opinion the motion to publish should be denied. Therefore,

IT IS ORDERED the motion to publish be denied.

DATED: 6/26/14

PANEL: Jj. Korsmo, Brown, Fearing

FOR THE COURT:


LAUREL H. SIDDOWAY
CHIEF JUDGE

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RCW 34.05.558: Judicial review of facts confined to record.

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RCW 34.05.558

Judicial review of facts confined to record.

Judicial review of disputed issues of fact shall be conducted by the court without a jury and must be confined to the agency record for judicial review as defined by this chapter, supplemented by additional evidence taken pursuant to this chapter.

[1988 c 288 § 513.]

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RCW 74.34.020**Definitions.**

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Abandonment" means action or inaction by a person or entity with a duty of care for a vulnerable adult that leaves the vulnerable person without the means or ability to obtain necessary food, clothing, shelter, or health care.

(2) "Abuse" means the willful action or inaction that inflicts injury, unreasonable confinement, intimidation, or punishment on a vulnerable adult. In instances of abuse of a vulnerable adult who is unable to express or demonstrate physical harm, pain, or mental anguish, the abuse is presumed to cause physical harm, pain, or mental anguish. Abuse includes sexual abuse, mental abuse, physical abuse, and exploitation of a vulnerable adult, which have the following meanings:

(a) "Sexual abuse" means any form of nonconsensual sexual contact, including but not limited to unwanted or inappropriate touching, rape, sodomy, sexual coercion, sexually explicit photographing, and sexual harassment. Sexual abuse includes any sexual contact between a staff person, who is not also a resident or client, of a facility or a staff person of a program authorized under chapter 71A.12 RCW, and a vulnerable adult living in that facility or receiving service from a program authorized under chapter 71A.12 RCW, whether or not it is consensual.

(b) "Physical abuse" means the willful action of inflicting bodily injury or physical mistreatment. Physical abuse includes, but is not limited to, striking with or without an object, slapping, pinching, choking, kicking, shoving, prodding, or the use of chemical restraints or physical restraints unless the restraints are consistent with licensing requirements, and includes restraints that are otherwise being used inappropriately.

(c) "Mental abuse" means any willful action or inaction of mental or verbal abuse. Mental abuse includes, but is not limited to, coercion, harassment, inappropriately isolating a vulnerable adult from family, friends, or regular activity, and verbal assault that includes ridiculing, intimidating, yelling, or swearing.

(d) "Exploitation" means an act of forcing, compelling, or exerting undue influence over a vulnerable adult causing the vulnerable adult to act in a way that is inconsistent with relevant past behavior, or causing the vulnerable adult to perform services for the benefit of another.

(3) "Consent" means express written consent granted after the vulnerable adult or his or her legal representative has been fully informed of the nature of the services to be offered and that the receipt of services is voluntary.

(4) "Department" means the department of social and health services.

(5) "Facility" means a residence licensed or required to be licensed under chapter 18.20 RCW, assisted living facilities; chapter 18.51 RCW, nursing homes; chapter 70.128 RCW, adult family homes; chapter 72.36 RCW, soldiers' homes; or chapter 71A.20 RCW, residential habilitation centers; or any other facility licensed or certified by the department.

(6) "Financial exploitation" means the illegal or improper use, control over, or withholding of the property, income, resources, or trust funds of the vulnerable adult by any person or entity for any

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"Financial exploitation" includes, but is not limited to:

(a) The use of deception, intimidation, or undue influence by a person or entity in a position of trust and confidence with a vulnerable adult to obtain or use the property, income, resources, or trust funds of the vulnerable adult for the benefit of a person or entity other than the vulnerable adult;

(b) The breach of a fiduciary duty, including, but not limited to, the misuse of a power of attorney, trust, or a guardianship appointment, that results in the unauthorized appropriation, sale, or transfer of the property, income, resources, or trust funds of the vulnerable adult for the benefit of a person or entity other than the vulnerable adult; or

(c) Obtaining or using a vulnerable adult's property, income, resources, or trust funds without lawful authority, by a person or entity who knows or clearly should know that the vulnerable adult lacks the capacity to consent to the release or use of his or her property, income, resources, or trust funds.

(7) "Financial institution" has the same meaning as in *RCW 30.22.040 and 30.22.041. For purposes of this chapter only, "financial institution" also means a "broker-dealer" or "investment adviser" as defined in RCW 21.20.005.

(8) "Incapacitated person" means a person who is at a significant risk of personal or financial harm under RCW 11.88.010(1) (a), (b), (c), or (d).

(9) "Individual provider" means a person under contract with the department to provide services in the home under chapter 74.09 or 74.39A RCW.

(10) "Interested person" means a person who demonstrates to the court's satisfaction that the person is interested in the welfare of the vulnerable adult, that the person has a good faith belief that the court's intervention is necessary, and that the vulnerable adult is unable, due to incapacity, undue influence, or duress at the time the petition is filed, to protect his or her own interests.

(11) "Mandated reporter" is an employee of the department; law enforcement officer; social worker; professional school personnel; individual provider; an employee of a facility; an operator of a facility; an employee of a social service, welfare, mental health, adult day health, adult day care, home health, home care, or hospice agency; county coroner or medical examiner; Christian Science practitioner; or health care provider subject to chapter 18.130 RCW.

(12) "Neglect" means (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 by a person or entity with a duty of care 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.

(13) "Permissive reporter" means any person, including, but not limited to, an employee of a financial institution, attorney, or volunteer in a facility or program providing services for vulnerable adults.

(14) "Protective services" means any services provided by the department to a vulnerable adult with the consent of the vulnerable adult, or the legal representative of the vulnerable adult, who has been abandoned, abused, financially exploited, neglected, or in a state of self-neglect. These services may include, but are not limited to case management, social casework, home care, placement, arranging for medical evaluations, psychological evaluations, day care, or referral for legal assistance.

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himself or herself the goods and services necessary for the vulnerable adult's physical or mental health, and the absence of which impairs or threatens the vulnerable adult's well-being. This definition may include a vulnerable adult who is receiving services through home health, hospice, or a home care agency, or an individual provider when the neglect is not a result of inaction by that agency or individual provider.

(16) "Social worker" means:

(a) A social worker as defined in RCW 18.320.010(2); or

(b) Anyone engaged in a professional capacity during the regular course of employment in encouraging or promoting the health, welfare, support, or education of vulnerable adults, or providing social services to vulnerable adults, whether in an individual capacity or as an employee or agent of any public or private organization or institution.

(17) "Vulnerable adult" includes a person:

(a) Sixty years of age or older who has the functional, mental, or physical inability to care for himself or herself; or

(b) Found incapacitated under chapter 11.88 RCW; or

(c) Who has a developmental disability as defined under RCW 71A.10.020; or

(d) Admitted to any facility; or

(e) Receiving services from home health, hospice, or home care agencies licensed or required to be licensed under chapter 70.127 RCW; or

(f) Receiving services from an individual provider; or

(g) Who self-directs his or her own care and receives services from a personal aide under chapter 74.39 RCW.

[2013 c 263 § 1; 2012 c 10 § 62. Prior: 2011 c 170 § 1; 2011 c 89 § 18; 2010 c 133 § 2; 2007 c 312 § 1; 2006 c 339 § 109; 2003 c 230 § 1; 1999 c 176 § 3; 1997 c 392 § 523; 1995 1st sp.s. c 18 § 84; 1984 c 97 § 8.]

Notes:

***Reviser's note:** RCW 30.22.040 and 30.22.041 were recodified as RCW 30A.22.040 and 30A.22.041, respectively, pursuant to 2014 c 37 § 4, effective January 5, 2015.

Application -- 2012 c 10: See note following RCW 18.20.010.

Effective date -- 2011 c 89: See note following RCW 18.320.005.

Findings -- 2011 c 89: See RCW 18.320.005.

Intent -- Part headings not law -- 2006 c 339: See notes following RCW 70.96A.325.

Effective date -- 2003 c 230: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [May 12, 2003]." [2003 c 230 § 3.]

RCW 74.34.200: Abandonment, abuse, financial exploitation, or neglect of a vulnerable a... Page 1 of 1

RCW 74.34.200

Abandonment, abuse, financial exploitation, or neglect of a vulnerable adult — Cause of action for damages — Legislative intent.

(1) In addition to other remedies available under the law, a vulnerable adult who has been subjected to abandonment, abuse, financial exploitation, or neglect either while residing in a facility or in the case of a person residing at home who receives care from a home health, hospice, or home care agency, or an individual provider, shall have a cause of action for damages on account of his or her injuries, pain and suffering, and loss of property sustained thereby. This action shall be available where the defendant is or was a corporation, trust, unincorporated association, partnership, administrator, employee, agent, officer, partner, or director of a facility, or of a home health, hospice, or home care agency licensed or required to be licensed under chapter 70.127 RCW, as now or subsequently designated, or an individual provider.

(2) It is the intent of the legislature, however, that where there is a dispute about the care or treatment of a vulnerable adult, the parties should use the least formal means available to try to resolve the dispute. Where feasible, parties are encouraged but not mandated to employ direct discussion with the health care provider, use of the long-term care ombuds or other intermediaries, and, when necessary, recourse through licensing or other regulatory authorities.

(3) In an action brought under this section, a prevailing plaintiff shall be awarded his or her actual damages, together with the costs of the suit, including a reasonable attorneys' fee. The term "costs" includes, but is not limited to, the reasonable fees for a guardian, guardian ad litem, and experts, if any, that may be necessary to the litigation of a claim brought under this section.

[2013 c 23 § 219; 1999 c 176 § 15; 1995 1st sp.s. c 18 § 85.]

Notes:

Findings -- Purpose -- Severability -- Conflict with federal requirements -- 1999 c 176: See notes following RCW 74.34.005.

Conflict with federal requirements -- Severability -- Effective date -- 1995 1st sp.s. c 18: See notes following RCW 74.39A.030.

APPENDIX C Constitutional Provisions

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APPENDIX C Constitutional Provisions

Washington State Constitution

PREAMBLE

We, the people of the State of Washington, grateful to the Supreme Ruler of the Universe for our liberties, do ordain this constitution.

ARTICLE I DECLARATION OF RIGHTS

SECTION 1 POLITICAL POWER. All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.

SECTION 2 SUPREME LAW OF THE LAND. The Constitution of the United States is the supreme law of the land.

SECTION 3 PERSONAL RIGHTS. No person shall be deprived of life, liberty, or property, without due process of law.

SECTION 4 RIGHT OF PETITION AND ASSEMBLAGE. The right of petition and of the people peaceably to assemble for the common good shall never be abridged.

SECTION 5 FREEDOM OF SPEECH. Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

SECTION 6 OATHS - MODE OF ADMINISTERING. The mode of administering an oath, or affirmation, shall be such as may be most consistent with and binding upon the conscience of the person to whom such oath, or affirmation, may be administered.

SECTION 7 INVASION OF PRIVATE AFFAIRS OR HOME PROHIBITED. No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

SECTION 8 IRREVOCABLE PRIVILEGE, FRANCHISE OR IMMUNITY PROHIBITED. No law granting irrevocably any privilege, franchise or immunity, shall be passed by the legislature.

SECTION 9 RIGHTS OF ACCUSED PERSONS. No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense.

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Articles Cited:

1. Vachss, Andrew. 1994. "You carry the Cure In your Own Heart." Parade, 28 August 1994 6 pages. Previously provided
2. Tomison, Adam M and Joe Tucci. 1997. Emotional Abuse: The Hidden Form of Maltreatment. Issues in Child Abuse Prevention Number 8 Spring 1997 25 pages. Previously provided.

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COURT OF APPEALS
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STATE OF WASHINGTON
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FAX #: 456-4286 TOTAL PAGES INCLUDING COVER: 49

RE: 31255-1-III

NOTES: Petition for Discretionary review of
Decision Terminating Review

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