

1 EXPEDITE
2 No Hearing Set
3 Hearing is Set:
4 Date: 5/5/2017
5 Time: 1:30 PM
6 Judge: Carol A. Murphy

7 **IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON**
8 **IN AND FOR THURSTON COUNTY**

9 JENNIFER E. ROACH

10 Petitioner,

11 v.

12 DEPARTMENT OF SOCIAL &
13 HEALTH SERVICES

NO. 16-2-02391-34

**DEPARTMENT'S RESPONSE TO
PETITION FOR REVIEW**

14 **I. INTRODUCTION**

15 The facts supporting the findings against Jennifer Roach, of neglect, mental abuse,
16 financial exploitation, and personal exploitation of a vulnerable adult, were established by the
17 Kitsap County Superior Court, by clear and convincing evidence, and then affirmed by the Court
18 of Appeals of Washington, Division II. Both courts also concluded that these facts met the legal
19 definitions of neglect, mental abuse, and financial exploitation. For these reasons, the Board of
20 Appeals properly concluded that summary judgment was appropriate based on collateral estoppel.

21 **II. FACTS**

22 On August 11, 2015, the Court of Appeals, Division II, issued an unpublished decision in
23 the matter of Larry¹ v. Jennifer Roach, affirming a Vulnerable Adult Protection Order issued by
24 the Kitsap County Superior Court. AR 1284-98. The court found that Ms. Roach committed acts

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26 ¹ Out of an abundance of caution for the protection of the privacy of the vulnerable adult victim in this
litigation, his last name will be omitted from this briefing. No disrespect is intended.

1 of financial exploitation, neglect, and emotional abuse. AR 1289. The trial court based the
2 finding of financial exploitation on six months of uncharacteristic bank account withdrawals by
3 Ms. Roach (AR 1289, 904-08), and withdrawals of nearly \$2,500 from Larry's bank account
4 while he was hospitalized. AR 1286. In addition, the Court determined that Ms. Roach moved
5 into Larry's house, and was paid \$100 per day to clean and organize the home, a rate which was
6 unreasonable. AR 1285, 1289, 906.

7 On September 24, 2012, Larry tripped over a box left on a staircase and fell, suffering
8 injuries that required hospitalization. AR 1286. Larry was hospitalized again, two weeks after
9 being discharged, which may have been necessitated by lack of sleep and exhaustion from over
10 exercise. *Id.* Ms. Roach considered getting Larry to exercise as one of her duties. *Id.* The trial
11 court found that Ms. Roach committed acts constituting neglect based on her failure to keep
12 Larry's home clean and orderly (despite being paid to do so), including the failure to keep his
13 stairs free of tripping hazards, which led to Larry's fall and hospitalization. AR 1289, 909-13. In
14 addition, it found that Ms. Roach withheld medicine from, and over-exercised, Larry. *Id.*

15 At least three people heard Ms. Roach yelling at Larry, and one witness heard at least four
16 occasions of yelling and a slap on one occasion. AR 1286. When confronted about the
17 withdrawals and other issues by third parties, Ms. Roach screamed repeatedly at Larry, saying she
18 loved him. AR 1287. She then took Larry into a bedroom, and upon his return Larry asked about
19 his will and who was in charge. *Id.* The trial court found that Ms. Roach emotionally abused
20 Larry based on the Ms. Roach's yelling at him, and the court's own observations of how her
21 crying upset Larry. AR 913-14. The trial court entered a written order, finding that Ms. Roach
22 committed acts of abandonment, abuse, neglect, and/or financial exploitation of Larry, a
23 vulnerable adult. AR 1289. The Court of Appeals affirmed the trial court, finding that substantial
24 evidence exists to support the findings of financial exploitation and neglect, and that the emotional
25 abuse finding is a verity on appeal. AR 1291-92.

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1 On November 25, 2014, the Department of Social and Health Services (Department)
2 issued an Amended Substantiation Letter, stating that Ms. Roach neglected, mentally abused, and
3 financially exploited a vulnerable adult. AR 860. These findings are supported by circumstances
4 which include the facts found in the VAPO proceedings. AR 860-62. Specifically, the neglect
5 finding is based on the conditions of the home, the box on the staircase which Larry tripped over
6 (and the resulting injury), the withholding of medications, and the over-exercise. AR 860-61.
7 The mental abuse finding is based on the observations of Ms. Roach yelling at Larry. AR 861.
8 The financial exploitation finding is based on the withdrawals of approximately \$2,000 from
9 Larry's bank account between September 23 and October 3, 2012. AR 862.

10 On August 17, 2015, the Department filed a Motion for Summary Judgment in Ms.
11 Roach's administrative appeal of the findings of neglect, mental abuse, and financial exploitation.
12 AR 337-62. On December 21, 2015, The Office of Administrative Hearings, in its Initial Order,
13 granted the Department's motion. AR 138-63. This Order followed five days of hearings on the
14 motion, which consisted of 18 witnesses, 26 exhibits submitted by the Department, and 16
15 exhibits submitted by Ms. Roach. AR 141. Numerous findings made in the Final Order rely on
16 the oral rulings made by the trial court in the VAPO proceeding. *See* AR 94-97, *see also* AR 901-
17 14. On January 7, 2016, Ms. Roach filed a Petition for Review. AR 121-36. On January 12,
18 2016, the Department responded by letter. AR 114-19. On January 19, 2016, Ms. Roach filed an
19 addendum to her Petition for Review. AR 106-12. On May 9, 2016, the Board of Appeals issued
20 its Review Decision and Final Order, affirming the Initial Order of OAH. AR 88-105. On
21 May 19, 2016, Ms. Roach filed her Petition for Reconsideration of the Review Decision. AR 6-
22 87. On May 31, 2016, the Board of Appeals issued its Order on Reconsideration, holding that the
23 Review Decision and Final Order remain the Department's Final Order in this matter. AR 1. The
24 Department incorporates by reference all findings of the Final Order not previously detailed.
25 AR 89-99.

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III. STANDARD OF REVIEW

Ms. Roach is seeking judicial review of a final agency order under RCW 34.05.570(3). The final agency action is the final order issued by the DSHS Board of Appeals. *See Olympic Healthcare Serv's II LLC v. Dep't of Social & Health Serv.'s*, 175 Wn. App. 174, 181, 304 P.3d 491, 494 (2013). Ms. Roach has the burden of demonstrating the invalidity of the agency action. RCW 34.05.570(1). The Court can affirm the agency action on any theory adequately supported by the administrative record. *Heidgerken v. Dep't of Nat. Res.*, 99 Wn. App. 380, 388, 993 P.2d 934 (2000). The court only grants relief if the agency's decision "is not supported by evidence that is substantial when viewed in light of the whole record before the court." RCW 34.05.570(3)(e). Questions of law are reviewed de novo, except that agency interpretations of law are given deference where the agency has expertise. *City of Redmond v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998). However, issues not raised before the agency may not be raised on appeal. RCW 34.05.554.

IV. ARGUMENT

The findings of fact and conclusions of law made by the Kitsap County Superior Court, and affirmed by the Court of Appeals, Division II, have resolved the factual and legal issues in this case. The issues are identical, the prior judgment is final, Ms. Roach was a party, and barring re-litigation will not work an injustice on Ms. Roach. For this reason, collateral estoppel is appropriate and the Department's Final Order granting summary judgment should be affirmed.

A. Collateral Estoppel Is Appropriate

All facts and issues relevant to the Department's findings of mental abuse, neglect, and financial exploitation have been previously adjudicated, therefore collateral estoppel is appropriate.

Before the doctrine of collateral estoppel may be applied, the party asserting the doctrine must prove: (1) the issue decided in the prior adjudication is identical with the one presented in the second action; (2) the prior adjudication must have

1 ended in a final judgment on the merits; (3) the party against whom the plea is
2 asserted was a party or in privity with the party to the prior adjudication; and (4)
application of the doctrine does not work an injustice.

3 *Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wash.2d 255, 262-63, 956 P.2d 312, 316,
4 (1998).

5 The issues and facts here are identical to those previously adjudicated. In this case, the
6 Department was tasked with proving (by a preponderance of the evidence) that Ms. Roach
7 committed acts which meet the definitions of mental abuse, neglect, and financial exploitation of a
8 vulnerable adult. See WAC 388-71-01255. Similarly, a Vulnerable Adult Protective Order
9 petition shall allege that the petitioner, or person on whose behalf the petition is brought, is a
10 vulnerable adult and has been the subject (or is under threat) of abuse, financial exploitation, or
11 neglect, by respondent. See RCW 74.34.110(2). Both of these actions utilize the definitions
12 vulnerable adult, abuse, neglect, and financial exploitation found in RCW 74.34.020. See
13 WAC 388-71-01245, see also RCW 74.34.020. In this case, the state court proceedings and the
14 administrative action found that Ms. Roach committed mental abuse, neglect, and financial
15 exploitation based on the same circumstances. All found neglect based on the conditions of the
16 home, the box on the staircase which Larry tripped over (and the resulting injury), the withholding
17 of medications, and the over-exercise. AR 860-61, 909-13, 1289. All found mental abuse
18 findings based on the observations of Ms. Roach yelling at Larry. AR 861, 913-14, 1291-92. All
19 found financial exploitation findings based on the withdrawals of approximately \$2,000 from
20 Larry's bank account between September 23 and October 3, 2012. AR 862, 904-08, 1289. All
21 found that Larry was a vulnerable adult under RCW 74.34.020. AR 860, 902.

22 The prior adjudication ended in a final judgment on the merits. The Kitsap County
23 Superior Court Judge found that that Ms. Roach mentally abused, neglected, and financially
24 exploited Larry, after hearing each party's case, considering the evidence, and observing the
25 parties. AR 903-22. The Judge considered not only argument by Appellant's counsel and the
26 petitioner, but also reviewed all evidence submitted by both parties before conducting the

1 hearing; including over 500 pages of documents (including some 50 sworn declarations)
2 submitted by the Appellant. AR 899. The Court of Appeals affirmed the trial court's entry
3 of the order of protection. AR 1298. There is no evidence that any further appeal
4 proceeded in this matter. In addition, Ms. Roach was a party in the prior adjudication, as
5 the Respondent in the VAPO petition and as the Appellant before the Court of Appeals. *Id.*

6 The application of the collateral estoppel doctrine in this case does not work an
7 injustice on the parties. "[Washington] law on this injustice element is most firmly rooted
8 in procedural unfairness. Washington courts look to whether the parties to the earlier
9 proceeding received a full and fair hearing on the issue in question." *Thompson v. State,*
10 *Dept. of Licensing*, 138 Wn.2d 783, 795-96, 982 P.2d 601, 608 (1999) (internal citation
11 omitted). In this case, Ms. Roach had a full and fair hearing on the abuse, neglect, and
12 financial exploitation allegations in the VAPO proceeding. Her evidentiary submissions
13 were considered by the Judge (AR 899), she was represented by counsel (AR 879), and the
14 Court of Appeals ruled that the hearing afforded Ms. Roach due process. AR 1292.
15 Finally, the burden of proof was greater in the VAPO proceeding (clear, cogent, and convincing)
16 than in the administrative appeal (a preponderance). *See* AR 1295, *see also* WAC 388-71-01255.
17 For these reasons, there was no procedural unfairness and collateral estoppel is appropriate in this
18 case.

19 **B. Summary Judgment Is Appropriate**

20 No issues of material fact remain, as the Department's findings are supported by the facts
21 and conclusions of the prior adjudications. Summary judgment is specifically allowed by the
22 model rules of procedure adopted by OAH. WAC 10-08-135. Although specific DSHS rules
23 prevail over general rules when they are in conflict (WAC 388-02-0220(3)), there is no such
24 conflicting rule here. *See generally* WAC 388-02. The OAH model rules provide that:

25 A motion for summary judgment may be granted and an order issued if the
26 written record shows that there is no genuine issue as to any material fact
and that the moving party is entitled to judgment as a matter of law.

1 WAC 10-08-135. This model rule is equivalent to Rule 56(c) of the Superior Court Civil
2 Rules. See CR 56(c). When applying this rule, the court must “consider all facts in the
3 light most favorable to the nonmoving party and affirm a grant of summary judgment
4 only if [it] determine[s], based on all of the evidence, reasonable persons could reach but
5 one conclusion. The moving party has the burden of showing that there is no genuine issue
6 as to any material fact.” *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*,
7 162 Wn.2d 59, 70, 170 P.3d 10, 15 (2007) (internal citation omitted). In addition, mere
8 denials do not create a genuine issue of fact: when a motion for summary judgment is
9 made and supported as provided in this rule, an adverse party may not rest upon the mere
10 allegations or denials of its pleading, but its response, by affidavits or as otherwise provided
11 in this rule, must set forth specific facts showing that there is a genuine issue for trial.
12 CR 56(c).

13 Here, the Department’s notice stated that Ms. Roach neglected, mentally abused,
14 financially exploited, and personally exploited a vulnerable adult. AR 860. The Department, and
15 the state courts, found that Larry was a vulnerable adult under RCW 74.34.020 (21). AR 860,
16 902. “Neglect” is² defined as:

17 (a) a pattern of conduct or inaction by a person or entity with a duty of care that
18 fails to provide the goods and services that maintain physical or mental health
19 of a vulnerable adult, or that fails to avoid or prevent physical or mental harm or
20 pain to a vulnerable adult; or (b) an act or omission by a person or entity with a
21 duty of care that demonstrates a serious disregard of consequences of such a
22 magnitude as to constitute a clear and present danger to the vulnerable adult’s
23 health, welfare, or safety, including but not limited to conduct prohibited under
24 RCW 9A.42.100.

25 RCW 74.34.020(12) (2014). The Department substantiated neglect based on the same facts as
26 those found in the previous adjudications: the conditions of the home, the box on the staircase
which Larry tripped over (and the resulting injury), the withholding of medications, and the over-
exercise. AR 860-61, 909-13, 1289. Ms. Roach held a duty of care as a paid caregiver, and these

² Currently, the definition of neglect is found at 74.34.020(15). The text is unchanged.

1 acts meet either category of neglect as pattern of conduct, or as separate acts or omissions that
2 demonstrate a serious disregard of consequences.

3 "Mental abuse" at the time the Amended Notice was issued was defined as "any willful
4 action or inaction of mental or verbal abuse. Mental abuse includes, but is not limited to,
5 coercion, harassment, inappropriately isolating a vulnerable adult from family, friends, or
6 regular activity, and verbal assault that includes ridiculing, intimidating, yelling or swearing."
7 RCW 74.34.020(2)(c) (2014). The Department substantiated, and the state courts found, mental
8 abuse based on the observations of Ms. Roach yelling at Larry. AR 861, 913-14, 1291-92. The
9 verbal actions had the effect of coercing, intimidating, and isolating Larry. The Superior Court
10 specifically found that Ms. Roach's actions were emotionally abusive. AR 914.

11 "Financial exploitation" means³, in part, the illegal or improper use, control over, or
12 withholding of the resources of the vulnerable adult by any person or entity for any person's or
13 entity's profit or advantage other than for the vulnerable adult's profit or advantage. *See*
14 RCW 74.34.020(6) (2014). The Department substantiated, and the state courts found, financial
15 exploitation based on the withdrawals of approximately \$2,000, by Ms. Roach, from Larry's bank
16 account between September 23 and October 3, 2012. AR 862, 904-08, 1289. Mr. Roach
17 provided no credible evidence to suggest that the funds she withdrew were used for the benefit of
18 Larry. AR 907-08.

19 "Personal exploitation" means⁴ "an act of forcing, compelling, or exerting undue
20 influence over a vulnerable adult causing the vulnerable adult to act in a way that is
21 inconsistent with relevant past behavior, or causing the vulnerable adult to perform services for
22 the benefit of another." RCW 74.34.020(2)(d). This is evidenced by the combination of the
23 acts of Ms. Roach yelling at Larry (AR 861, 913-14, 1291-92) combined with her withdrawals of

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26 ³ This definition is identical to the current language of 74.34.020(7) RCW.

⁴ This definition is identical to the current language of 74.34.020(2)(d) RCW.

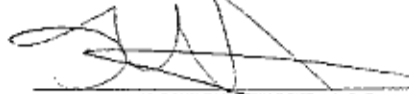
1 approximately \$2,000 from his bank account between September 23 and October 3, 2012.
2 AR 862, 904-08, 1289.

3 **V. CONCLUSION**

4 The Department respectfully requests that this Court affirm the Final Order of the Board
5 of Appeals, granting summary judgment based on the application of the doctrine of collateral
6 estoppel.

7 DATED this 6th day of April, 2017.

8 ROBERT W. FERGUSON
9 Attorney General

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11 SETH DICKEY, WSBA No. 47472
12 Assistant Attorney General
13 Attorneys for Department of Social & Health
14 Services

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CERTIFICATE OF SERVICE

I certify that on the date indicated below, I served a true and correct copy of the foregoing **DEPARTMENT'S RESPONSE TO PETITION FOR REVIEW** on all parties or their counsel of record as follows:

- US Mail Postage Prepaid
- Federal Express
- Via Personal Service
- Via Facsimile
- Via Certified Mail

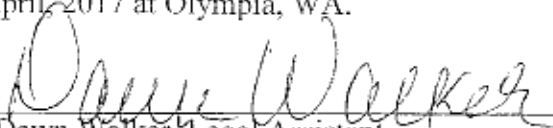
TO:

Jennifer Roach
9123 48th Ave S
Seattle, WA 98118

Petitioner

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

EXECUTED this 6th day of April, 2017 at Olympia, WA.


Dawn Walker, Legal Assistant