

No. SC88138

IN THE SUPREME COURT OF MISSOURI

ALICE LOUISE KLEIN,

Respondent

v.

MISSOURI DEPARTMENT OF HEALTH AND SENIOR SERVICES,

Appellant

APPELLANT'S SUBSTITUTE BRIEF
Filed pursuant to Rule 84.05(e)

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JURISDICTIONAL STATEMENT

The Court has jurisdiction to hear this case pursuant to Article V, Section 10 of the Missouri Constitution in that the Court has ordered review after opinion by the Western District Court of Appeals. In addition, the Court has jurisdiction pursuant to Article V, Section 18 that authorizes judicial review of administrative decisions.

STANDARD OF REVIEW

This Court reviews the decision of the agency, Missouri Department of Health and Senior Services (the “Department”), and not the decision of the Circuit Court. *State Board of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146, 152 (Mo. banc 2003); *Cade v. State*, 990 S.W.2d 32, 37 (Mo. App. W.D. 1999). The Court reviews the entire record made before the agency to determine whether there is substantial and competent evidence to support the decision of the Department. *Lagud v. Kansas City Board of Police Commissioners*, 136 S.W.3d 786 (Mo. banc 2004). The Court defers to the agency as to findings of fact and applies these facts to the law, *de novo*. *Tendai v. Missouri State Board of Registration for the Healing Arts*, 161 S.W.3d 358, 365 (Mo. banc 2005). The decision of the agency is presumed to be correct and the burden in challenging the decision is heavy. *Bollinger v. Wartman*, 24 S.W.3d 731, 733 (Mo. App. E.D. 2000). The reviewing court may not substitute its judgment for that of the agency even if the evidence might support findings of fact different from those found by the agency. *Percy Kent Bag Company v. Missouri Commission on Human Rights*,

632 S.W.2d 480, 487 (Mo. banc 1982); *Prokopf v. Whaley*, 592 S.W.2d 819, 823 (Mo. banc 1980). The reviewing court must “defer to the agency’s determinations on the weight of evidence and the credibility of the witnesses.” *Moses v. Carnahan*, 186 S.W.3d 889 (Mo. App. W.D.2006), citing *Roorda v. City of Arnold*, 142 S.W.3d 786 (Mo. App. W.D. 2004). “The record is reviewed in the light most favorable to the commission’s factual findings.” *Tendai v. Missouri State Board of Registration for the Healing Arts*, 161 S.W.3d 358, 365 (Mo. banc 2005). An agency’s decision is unsupported by competent and substantial evidence only in the rare case when the decision is contrary to the overwhelming weight of the evidence. *Hampton v. Big Boy Steel Erection*, 121 S.W. 3d 220, 223 (Mo. banc 2003).

Section 536.140.2, RSMo, sets forth the limits of judicial review and states, in relevant part:

2. The inquiry may extend to a determination of whether the action of the agency
 - (1) Is in violation of constitutional provisions;
 - (2) Is in excess of the statutory authority or jurisdiction of the agency;
 - (3) Is unsupported by competent and substantial evidence upon the whole record;
 - (4) Is, for any other reason, unauthorized by law;
 - (5) Is made upon unlawful procedure or without a fair trial;

(6) Is arbitrary, capricious or unreasonable;

(7) Involves an abuse of discretion.

While the agency had the burden of proof at the hearing, now, on review, Klein has the burden to prove that the decision of the Department was erroneous. *Johnson v. Missouri Department of Health and Senior Services*, 174 S.W.3d 568, 579 (Mo. App. W.D. 2005). Klein fails to meet that burden as the decision of the Department is well supported and survives review pursuant to Section 536.140.2, RSMo.

STATEMENT OF FACTS

On May 28, 2003, Kerry McDonald, a licensed practical nurse (LPN), was in the parking lot with her husband and son and saw Klein hit an elderly lady, A.V., in a wheelchair. Mrs. McDonald had worked in nursing homes for many years. LF Vol II, p. 204, Tr. p. 145. Mrs. McDonald observed that the elderly woman appeared upset and tried to get away from Klein. Mrs. McDonald saw that AV “turned her wheelchair and went out into traffic . . . the truck was coming up, but I believe the truck saw her, so, yeah, I guess she was in moving traffic.” L. F. Vol. II, Tr. 128, lines 5-14. Mrs. McDonald heard Klein yell “Amy, I said to get back here. Amy, I can’t stand you anyway.” LF Vol. II, p. 198, Tr. pp. 121-122. Klein yelled at the victim at least twice. LF Vol. II, p. 203, Tr. p. 144, lines 2-8. Mrs. McDonald knew neither Klein or A.V. LF Vol. II, p. 198, Tr. p. 122, lines 12-25. As a nurse, Mrs. McDonald was trained and experienced on how to recognize abuse. To her, Klein’s actions did not appear to be someone just trying to get an older person into a van. LF Vol. II, p. 199, Tr. pp. 126-128.

Marcus McDonald, Kerry’s husband, also observed Klein with an elderly woman in a wheelchair and saw Klein hit the elderly woman on the head five or six times. L.F. Vol II, p. 205, Tr. p. 152, Vol II, p. 208, Tr. p. 163, lines 4-8. Mr. McDonald knew neither Klein nor the victim. LF Vol II, p. 206, Tr. p. 153. Mr. McDonald testified that he was worried about the woman in the wheelchair. LF Vol. II, p. 209, Tr. p. 166, lines 18-19.

Klein also testified at hearing. Klein is a certified nurse's aid and a certified medication technician. LF, Vol. II, p. 222, Tr. p. 217, lines 2-6. She admitted that she was in the hospital parking lot that day and was responsible for transporting the victim to a doctor appointment that day. LF Vol II, p. 223, Tr. pp. 221-224. She admitted that she was employed at Lakeview for 26 years. LF Vol II, Tr. p. 216, lines 20-23. Klein also admitted that she had an altercation with the victim in the parking lot at the hospital. LF Vol II, p. 225, Tr. pp. 231-232. The Department concluded that the MacDonalds' testimony, to the extent it conflicted with Klein's, was credible and more believable than Klein's testimony. LF Vol. III, pp. 415-417.

Klein raises as an issue that Klein's placement on the EDL also results in her placement on what Klein calls the NAR. Pursuant to 42 CFR Sections 483.156, and 488.335, DHSS maintains a Certified Nurse Aid Registry (the "Registry" -- what Klein calls the NAR). Any nurse aid placed on the EDL must be placed on the Registry pursuant to federal law. Placement on the Registry bars future employment only in nursing homes that receive Medicare or Medicaid funds. *See* 42 CFR 483.156, 488.301 and 488.335 (applies only to "Centers for Medicare and Medicaid Services"). Rick Jury, Facility Surveyor III, employed by the Department testified that about 500 out of 1200 licensed facilities in Missouri would fall into this category. L.F. Vol. II, p. 176, Tr. p. 33. However, placement on the Registry is outside the scope of this appeal as Missouri law requires the

Department to make determinations only about the EDL; placement on the Registry is merely a reporting requirement. 42 CFR Section 483.156.

Procedural History

On November 25, 2003, after investigating the incident, the Department notified Klein of its intent to place her on the Employee Disqualification List (the “EDL”) pursuant to Section 198.070.12, RSMo. This notification included notice to Klein of her right to request a hearing to challenge this placement. LF, Vol. II, p. 305. Klein requested such a hearing. On March 4, 2004, Klein appeared at the hearing before a hearing office of the Department. LF Vol. II, pp. 167-279, Transcript.¹ At this hearing, both Klein and the Department presented evidence consisting of live testimony and documents, both had the opportunity to cross-examine witnesses, and both had the opportunity to make legal arguments in support of their respective positions. Following this hearing, the Department issued its decision affirming Klein's placement on the EDL. LF Vol. II, pp. 280-294.

¹A “mini” transcript is included in the legal file as the original full page transcript was submitted to the Circuit Court of Cooper County as part of the legal file in the judicial review proceedings. The Circuit Court of Cooper County did not retain this legal file in its records, but rather returned the legal file to counsel for plaintiff. Therefore, for the purposes of this appeal, the Department provided a new certified record of the administrative proceedings.

Klein then sought review of the agency decision from the circuit court. On October 18, 2005, after oral argument, the circuit court issued its decision reversing the Department's decision and remanding the matter to the Department instructing it to remove Klein's name from the EDL and the NAR. On November 9, 2005, the Department filed a post trial motion, seeking amendment of the judgment to have it declared final because it left no issues to be decided or findings to be made by the Department. The circuit court responded with a November 14, 2005 docket entry indicating that the decision was final.

The Department sought review in the Court of Appeals, Western District, and on October 26, 2006, the Court of Appeals reversed the decision of the Department. This Court accepted transfer on November 15, 2006. The Department will not place Klein on the EDL until all judicial review of its decision is final.

ARGUMENT

This is a case of first impression in the State of Missouri. Missouri courts have defined what constitutes abuse under other statutes and other situations, but this court never addressed what conduct constitutes abuse of the elderly under Section 198.006, RSMo, as it relates to placement of nursing home workers on the Employee Disqualification List. Klein asks the Court to say that a nursing home worker may engage in any conduct with a patient, so long she doesn't leave a mark. This standard puts every vulnerable person in Missouri nursing homes at risk. Many of these patients, such as A.V. in this case, are unable to protect themselves and because of their medical conditions, lack competence to testify on their own behalf. However, in this case, even though Klein may have left no marks visible for an investigator to observe two days after the incident, there were two eye-witnesses who observed Klein physically abusing A.V., one of whom was a nurse trained to recognize abuse and trained in the care of the elderly. These witnesses who came forward and testified at the hearing had nothing to gain. Klein, in her brief, cites to the contrary only her own testimony. The Department found the third party testimony to be credible and found the testimony of Klein to lack credibility.

**I. THE AGENCY APPLIED THE PROPER STANDARD TO
DETERMINE WHETHER KLEIN’S CONDUCT TOWARDS A.V.
CONSTITUTED “ABUSE” PER SECTION 198.006, RSMO
(Responds to Point I)**

The Department properly found that Klein engaged in “abuse” as that term is used in Section 198.006, RSMo. Klein fails to meet her burden to show that the Department’s finding that she engaged in abuse lacks support or should be reversed applying the criteria of Section 536.140.2, RSMo.

“Abuse” is defined in Section 198.006(1), RSMo, as simply “the infliction of physical, sexual, or emotional injury or harm.” No reported case law in Missouri, prior to this case, explored what constitutes “physical, sexual or emotional injury or harm,” though this abuse statute has been at issue. For example, in the case of *Tate v. Department of Social Services*, 18 S.W.3d 3 (Mo. App. E.D. 2000), a medical technician appealed the decision of the Department of Social Services placing her on the EDL when a patient died after Tate gave her a liquid feeding. In *Tate*, as in this case, there was conflicting testimony with regard to the cause of death, but the court cited *Weber v. Firemen’s Retirement System*, 899 S.W.2d 948, 950-951 (Mo. App. E.D. 1995), stating, “‘The fact that the record also contained evidence in conflict with the finding of the [administrative agency] is not grounds for reversal on appeal’ . . . The determination of a witnesses’ credibility is the function of the administrative tribunal.” The court did not discuss a definition of “abuse;” it simply found that the agency decision was supported by competent and substantial evidence.

In *Johnson v. Missouri Department of Health and Senior Services*, 174 S.W.3d 568 (Mo. App. W.D. 2005), the Western District looked at the definition of “neglect” rather than abuse and affirmed that the Department properly applied the definition of “recklessly” as found in Section 562.016.4, RSMo, in determining whether to place Johnson on the EDL.

In both *Johnson* and in *Tate*, patients died. Death provides an extreme example of what would constitute abuse or neglect. The conduct at issue here did not have such an extreme result, but no provision of Chapter 198, RSMo requires death to show that abuse has occurred. Rather, this case presents an opportunity for the Court to identify what conduct constitutes abuse when there is a physical altercation between a nursing home worker and a patient. There is little Missouri law to assist with the interpretation of this statute, but federal guidelines are on point. Klein asserts that these guidelines have no probative value because they have not been formally adopted by Missouri and because these guidelines are not part of the record of the hearing. However, neither of these positions bars this Court from looking at these guidelines.

This Court reviews *de novo* the decision of the agency and therefore, may review any legal authorities relevant to deciding whether the agency decision was appropriate, as a matter of law. The position of the Department throughout these proceedings has been that Klein engaged in abuse and thus, citations to the federal regulations are relevant to assist the Court in understanding how the federal law,

which requires the state to maintain the EDL, interprets the words used in the Missouri statutes. Moreover, federal law is the source of the Missouri standard.

Federal regulations which require Missouri to maintain the EDL (42 CFR Sections 483.156 and 488.335) also provide that a resident at a long term care facility “has the right to be free of abuse, corporal punishment and involuntary seclusion. Residents must not be subjected to abuse by anyone, including, but not limited to, facility staff . . .” 42 CFR Section 483.13(b). Missouri statutes use similar language, requiring that nursing home residents be “free from mental and physical abuse and free from chemical and physical restraints. . .” Section 198.088(6)(g), RSMo.

The federal regulations impose a different mens rea than state law, but the definition of abuse is similar for both state and federal purposes. The federal law, at 42 CFR Section 488.301, defines “abuse” as “the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish. As part of the administration of this regulation, the U.S. Department of Health and Senior Services has issued a State Operations Manual² to provide guidance to the States in regulating long term care facilities. Section 483.13(b), F223 of this State Operations Manual provides additional explanation of the definition of abuse:

This also includes the deprivation by an individual, including a caretaker, of goods or services that are necessary to attain or

maintain physical, mental, and psychosocial well-being. This presumes that instances of abuse of all residents, even those in a coma, cause physical harm, or pain or mental anguish.

Id. These interpretive guidelines go on to define “verbal abuse” to be: the use of oral, written or gestured language that willfully includes disparaging and derogatory terms to residents or their families, or within their hearing distance, regardless of their age, ability to comprehend, or disability. Examples of verbal abuse include, but are not limited to: threats of harm; saying things to frighten a resident, such as telling a resident that he/she will never be able to see his/her family again.

Id. The State Operations Manual says that “physical abuse” “includes hitting, slapping, pinching and kicking. State Operations Manual, Section 483.13(b). F223. It also includes controlling behavior through corporal punishment.” *Id.* The term “mental abuse” is defined as “includes, but is not limited to, humiliation, harassment, threats of punishment or deprivation.” State Operations Manual, Section 483.13(b), F223.

The words of section 198.006(1), RSMo, should be interpreted consistent with the federal law, despite the federal law’s different mens rea requirement. The federal law requires “willful infliction” of abuse whereas the Missouri statute requires a mens rea of “recklessly, knowingly or

² http://www.cms.hhs.gov/manuals/Downloads/som107ap_pp_guidelines_ltcf.pdf

purposely” engaging in abuse. Section 198.070.12, RSMo. This change in the level of intent for the conduct to be an offense, changes only the proof required to show intent, but it does not change the relevancy of the definition of the words describing the conduct.

In addition, the Court should look to the federal standard in applying Missouri law because both laws seek a similar goal, namely, protection of vulnerable members of society who can’t fight back and lack competence to testify on their own behalf and because the state EDL exists because of the mandates of the federal law.³ In this case, two eye-witnesses observed Klein strike A.V. on the forehead multiple times and also saw her yell disparaging and derogatory terms to her. That conduct by Klein constituted abuse, as that term is used in Chapter 198 and as that term is used in the federal regulations. The purpose of the EDL and the provisions of Chapter 198, RSMo, are to protect the elderly, like A.V., who lack the capacity to defend themselves and lack the capacity to communicate whether they suffer physical and emotional injury or harm.

To refuse to consider the federal regulations, as Klein demands, would not change the result. Applying the other statutory and dictionary definitions of the

³ The EDL satisfies the requirement of 42 CFR 483.56(1) (c) (iv), which requires the state to have a process to identify any nurse aids who have engaged in abuse or neglect.

words used in the statute leads to the same conclusion. *Wolff Shoe Co. v. Director of Revenue*, 762 S.W.2d 29, 31 (Mo. banc 1988).

Section 198.070.12, RSMo (2000)⁴ provides the mandate for the Department to maintain the EDL and sets forth who shall be placed on the EDL and states:

12. The department shall maintain the employee disqualification list and place on the employee disqualification list the names of any persons who have been finally determined by the department pursuant to section 660.315 RSMo, to have recklessly, knowingly or purposely abused or neglected a resident while employed in any facility.

(Emphasis added)

Section 198.006, RSMo (2000) further defines the terms “abuse” and “neglect” as follows:

⁴Section 198.070, RSMo (2000) was amended with an effective date of August 28, 2003. The contents of those amendments, however, have no bearing on this appeal as they were not in effect at the time of the incident. All statutory references in this brief are to the Revised Statutes of Missouri 2000, unless otherwise indicated.

(1) "Abuse," the infliction of physical, sexual, or emotional injury or harm;

* * *

(11) "Neglect," the failure to provide, by those responsible for the care, custody, and control of a resident in a facility, the services which are reasonable and necessary to maintain the physical and mental health of the resident, when such failure presents either an imminent danger to the health, safety or welfare of the resident or a substantial probability that death or serious physical harm would result,

The Department properly looked to Section 562.016, RSMo for definitions of "purposely," "knowingly," and "reckless" as used in Section 198.006, RSMo. *Johnson v. Missouri Department of Health and Senior Services*, 174 S.W.3d 568 (Mo. App. 2005). Section 562.016.4, RSMo, states:

4. A person "acts recklessly" or is reckless when he consciously disregards a substantial and justifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.

The first rule of statutory construction is to read statutes in their plain and ordinary meaning and to read statutes not in isolation, but together with other

relevant statutes in such a way to make sense and give effect to the legislative intent *Wolff Shoe Co. v. Director of Revenue*, 762 S.W.2d at 31. In interpreting statutes, a court must “both strive to implement the policy of the legislature and also harmonize all provisions of the statute.” *In re Schottel*, 159 S.W.3d 836, 842 (Mo. banc 2005). Also, all consistent statutes relating to the same subject should be read together, in pari materia, to be consistent and harmonious. *State ex rel. Rothermich v. Gallagher*, 816 S.W.2d 194, 200 (Mo. banc 1991). Lastly, “the legislature is presumed to intend a logical and reasonable result.” *Wilson v. McNeal*, 575 S.W.2d 802, 811 (Mo. App. St. Louis Dist. 1978). Applying these principles of statutory construction supports the reading of Section 198.070.12, RSMo, together with Sections 198.006 and 562.016, RSMo, to determine the appropriate standard to apply.

We agree with Klein that if the Court goes beyond the statutes in its search for the definition of “physical injury or harm,” it is appropriate to look to Black’s Dictionary for these definitions. But, Klein’s reference to Black’s is incomplete. The statute defines abuse to include both injury and harm. If the legislature had meant abuse to include only “injury”, as Klein asserts, it would not also have included the word “harm.” And, Black’s Law Dictionary provides separate definitions for physical harm.

“Physical harm” is defined to mean “[a]ny physical impairment of land, chattels, or the human body.” BLACKS LAW DICTIONARY (7th ed. 1999) at p. 722. “Bodily harm” is defined as “physical pain, illness or impairment of the body.” *Id.*

Black's then defines "impairment" to mean "the fact or state of being damaged, weakened, or diminished." *Id.* at 754.

Applying these definitions, physical injury or harm can occur, whether there is a mark left two days later or whether medical attention is required or not. Pain, damage, and being weakened or diminished all fall within the definitions of physical injury or harm. Any conduct that causes pain, part of the definition of bodily harm, would be abuse. Pain may or may not leave a mark. Other types of serious injury can occur without leaving a mark. Strikes on the head that leave no marks can later be causative of strokes or head injuries, neither of which require immediate medical treatment, but would no doubt be abuse. A sharp blow to the chest may "knock the wind" out of a person, but leave no external mark and yet, there is no doubt that such a sharp blow would be physical injury or harm. A slap on a forehead might leave a red mark visible for only a short time, not long enough to be documented by any supervisor or state agency.

It is useful to look at the analogous standard for abuse under the child abuse statutes. *Stiffleman v. Abrams*, 655 S.W.2d 522, 533 (Mo. *banc* 1983). In *Stiffleman*, the Court held that there was no need to adopt any further definition of "abuse" as set forth in Section 198.006(1), RSMo (2000), because "'society knows what abuse is, even without specific definitions.' (citations omitted) . . . 'There is probably little dispute that the term 'physical injury' is one of common understanding.'" *Id.* The Court went on to list physical signs of physical abuse, but also stated, "Questionable cases can await presentation at a future time on their

particular facts and need not be speculated upon here. *Id.* This is a questionable case.

In support of the position that a physical mark must be left to support a finding of abuse, the Court of Appeals and Klein cite cases involving child custody. These child custody cases are distinguishable because the issue here is not custody; the issue here is protection of the elderly who, even more so than children, lack the ability to protect themselves or to communicate their need for protection and because the law allows parents to exercise corporal punishment to discipline their children. It is because of this special vulnerability of the elderly that the federal guidelines go so far as to include a presumption that any physical abuse causes pain, even if the person is in a coma. Section F223, State Operations Manual.

The Department urges this Court to adopt the standard as set forth in the federal guidelines for nursing homes so as to protect the vulnerable residents of Missouri nursing homes. The standard that the Court of Appeals adopted and that Klein urges this Court to adopt is one that protects the jobs of the health care worker. But the legislative intent was to protect the nursing home residents and not the jobs of the nursing home workers. No other regulatory action exists to ensure that Klein does not repeat this type of conduct as certified nurse aids are not subject to discipline by any professional licensing board; placement on the EDL is the only mechanism to protect Missouri's elderly. The Department

applied the proper standards to determine that Klein should be placed on the EDL for one year.

**II. COMPETENT AND SUBSTANTIAL EVIDENCE SUPPORTS
PLACEMENT OF KLEIN ON THE EDL**
(Responds to Point I and II)

While the Department had the burden to show by a preponderance of the evidence that Klein should be placed on the EDL, Klein now has the burden to show that the decision of the Department fails to meet the standards set forth in Section 536.140, RSMo. *Johnson v. Missouri Department of Health and Senior Services*, 174 S.W.3d 563 (Mo. App. WD 2005). Klein fails to meet this burden because the decision of the Department is supported by competent and substantial evidence (the only Section 536.140.2, RSMo, error asserted by Klein). The only evidence Klein presents to show that the Department erred in placing her on the EDL is the testimony of Klein herself, which the Department deemed to lack credibility. L.F. Vol. III, pp.415-417. This testimony does not raise to the level of showing that “the decision is contrary to the overwhelming weight of the evidence.” *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 223 (Mo. banc 2003). Klein just shows that there was evidence in the record which conflicted to the final findings of the Department. This, standing alone, does not provide grounds for reversal. *Tate v. Department of Social Services*, 18 S.W.3d 3 (Mo. App. E.D. 2000).

To determine whether Klein should be placed on the EDL, the Department first needed to determine whether Klein possessed the requisite mens rea. The

Department, applying the provisions of Section 562.016.4, RSMo, found that Klein behaved recklessly in that she “consciously disregard[ed] a substantial and unjustifiable risk that circumstances exist or that a result will follow and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.” Section 562.016.4, RSMo.

The first element in Section 562.016.4, RSMo, is conscious disregard. By looking at all the surrounding circumstances, no other conclusion can be reached than that Klein’s conduct showed conscious disregard. “Conscious” means “having an awareness or one’s environment” or “subjectively known or felt.” AMERICAN HERITAGE DICTIONARY (3d ed. 1992) at p. 400. “Disregard” means “to pay no attention or heed to; ignore.” *Id.* at 538. In common terms, “conscious disregard” means to know what is the right thing to do, but not do it. Klein is a certified nurse’s aid with 26 years of experience, by her own testimony. LF Vol. II, p. 222, Tr. p. 217 and LF Vol. II, Tr, p. 216, lines 20-23. This victim was elderly, tiny, and “pleasantly confused.” LF Vol II, p. 188, Tr. p. 83, lines 17-19. Rapping an elderly woman on the head five or six times, allowing her to wheel out in traffic and yelling derogatory remarks does not constitute conduct that has any therapeutic purpose, nor was it prescribed by any medical professional. Section 198.088(6)(g), RSMo (2000) requires that nursing home residents be “free from mental and physical abuse and free from chemical and physical restraints, except as follows” As a certified nurse’s aid, Klein knew the right thing to do; but she did not do it. Her conduct with A.V. showed conscious disregard.

The next element of “reckless” is whether Klein’s conduct created a substantial or unjustifiable risk that either caused physical, emotional or sexual injury or harm or created circumstances that either the harm or injury existed or would follow. Rapping an elderly, confused woman on the head is certain to cause physical and emotional pain which is existing physical and emotional injury. Allowing a confused, elderly woman to wheel out into oncoming traffic creates a substantial and unjustifiable risk that serious physical and emotional harm would follow. If the oncoming truck had not seen the victim, it could have struck her causing death or serious injury. By stopping, the truck prevented the injury, but not the risk. Klein testified that she was concerned that the victim would be hurt in this situation. L.F. Vol. II, p. 225, Tr. p.229-230, lines 25 and 1. Yelling derogatory remarks at an elderly confused woman would certainly cause emotional harm. No physical marks or medical records are needed to show these risks of harm. Klein presented no evidence and none exists that makes this conduct justifiable.

Competent and substantial evidence also exists to show the third element of reckless is met in that Klein’s conduct constituted a gross deviation from the standard of care which a reasonable person would exercise in this situation. Klein asserts this requires expert testimony. However, the statute sets forth a standard of care that any reasonable person can discern, without the need for expert testimony. Missouri law provides that when the standard of care is within the competence and understanding of lay persons, no expert testimony is required. *Tendai v. Missouri*

State Board of Registration for the Healing Arts, 161 S.W.3d 358, 367 (Mo. banc 2005). In *Stiffleman*, the Court stated that whether there is abuse is within the competence of understanding of common society. *Stiffleman*, 655 S.W.2d at 533. Klein's conduct shows abuse and neglect as those terms are within the competence and understanding of common society. Any reasonable person would find it to be abuse and neglect to rap an elderly woman on the head five or six times in an attempt to get her to cooperate or to allow an elderly, confused woman to wheel her wheelchair into the path of a moving truck or to yell derogatory comments to this woman. No part of this conduct serves any therapeutic purpose. Klein testified that she had to use physical restraint on this victim. But, rapping an elderly woman on the head five or six times and allowing her to wheel into traffic and yelling derogatory comments at her is not physical restraint; it's abuse. The witnesses in the parking lot thought it was abuse and one of those eye-witnesses was trained and educated to recognize abuse in nursing homes. Based on her training and observation, she concluded that the conduct of Klein fell outside of what would be acceptable.

After determining that this conduct was reckless, the next step to determine whether Klein should be placed on the EDL was to decide if Klein's conduct met the statutory definition of abuse or neglect. It does. Klein's conduct created a risk of, and in fact caused, physical and emotional injury and harm. This conduct constituted neglect in that Klein failed to provide the services required to protect this victim from imminent danger to her health, safety and welfare and there was a

substantial probability of death or serious physical injury or harm. To determine whether the standard of care was met requires review of all evidence with all surrounding circumstances. *Duncan v. Missouri Board for Architects, Professional Engineers and Land Surveyors*, 744 S.W.2d 524, 533 (Mo. App. E.D. 1988). In this case, all the evidence leads to the direct conclusion that Klein recklessly engaged in conduct that meets the definition of abuse and/or neglect as set forth in Chapter 198, RSMo.

Competent and substantial evidence was presented at hearing to support the decision by the Department to place Klein on the EDL.

CONCLUSION

The Decision by the Department to place Klein on the EDL should be upheld.

Respectfully submitted,

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Certificate of Service and Compliance with Rule 84.06(b) and (c)

The undersigned hereby certified that on this 16th day of March, 2007, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 5,871 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

Assistant Attorney General

APPENDIX

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United States Department of Health and Senior Services State Operations Manual, Section 483.13(b), F233	A-1
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