

No. SC91219

MISSOURI SUPREME COURT

CATHERINE ANN STONE,

Respondent

v.

MISSOURI DEPARTMENT OF HEALTH AND SENIOR SERVICES,

Appellant

Appeal from the Western District Court of Appeals

The Honorable Judges Thomas H. Newton, P.J. Howard and J. Witt

**RESPONDENT'S REPLY BRIEF PURSUANT TO
SUPREME COURT RULE 84.05(e)**

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I. ARGUMENT

Standard of Review

In the Department's first Point Relied On, the Department erroneously states the standard of review as "The Court defers to the agency as to findings of fact and applies these facts to the law, de novo, and the record is reviewed in the light most favorable to the agency's factual findings." and cites to *Tendai v. Missouri State Board of Registration for the Healing Arts*, 161 S.W.3d 358, 365 (Mo. banc 2005). A more recent Missouri Supreme Court decision in *Albanna* overruled *Tendai* regarding the court's standard of review. *Albanna v. State Board of Registration for the Healing Art*, 293 S.W.3d 423 (2009). In *Albanna*, the Missouri Supreme Court states,

The correct standard of review for administrative decisions governed by Article V, section 18 of the Missouri Constitution -- which includes healing arts cases-- is 'whether, considering the whole record, there is sufficient competence and substantial evidence to support the agency's fine decision. This standard would not be met in the rare case when the [agency's decision] is contrary to the overwhelming weight of the evidence.' *Lagud*, 136 S.W.3d at 791 (citing Hampton, 121 S.W.3d at 223). When the agency's decision involves a question of law, the court

reviews the question de novo. State Board of Registration for Healing Arts v. McDonough, 123 S.W.3d 146, 152 (Mo. banc 2003).

Albanna v. State Board of Registration for the Healing Arts, 293 S.W.3d 423, 428 (2009).

The record must be evaluated as a whole and not in the light most favorable to the agency's findings.

A) Abuse

(1) Whether the EDL statute is remedial is irrelevant.

The Department argues that the EDL statute is remedial and its purpose is to protect the public. The Department cites the Missouri Supreme Court decision in Ross v. Director of Revenue, 311 S.W.3d 732 (Mo. banc 2010), which pertains to Missouri driving while intoxicated(DWI) statutes. Specifically, the Ross decision only pertains to DWI statutes and analyzes the purpose of criminal and civil laws in prohibiting and preventing individuals from driving while intoxicated. The Ross case cited by the Department has no bearing on the case before the Court as Ross did not pertain to a healthcare provider, a patient or the EDL. Further, no case is cited by the Department that the EDL statute is remedial and nor is such an argument pertinent in determining whether there is substantial evidence that Stone "abused" K.S. and warrants placement of Stone's name on the EDL. Ross is not applicable and Department's argument should be disregarded.

(2) Tate is distinguishable to the case before the Court.

The Department argues that abuse is not limited to striking or acts of aggressive violence against a resident and cites to an Eastern District Court of Appeals decision involving a caregiver who force-fed a resident a liquid supplement and that resident subsequently died. *Tate v. Department of Social Services*, 18 S.W.3d 3 (Mo. App. E.D. 2000). There is no allegation that Stone “force-fed” the resident. The allegation is that Stone “forced” K.S. to take her medication. *Tate* is distinguishable from the facts before the Court and should not be considered as it pertains to a healthcare provider, Tate, who was feeding a resident a liquid supplement of ENSURE through her mouth. *Id.* at 4. The resident said to Tate that she could not eat anymore and did not want anymore. *Id.* Tate then continued to feed the resident and then left the patient. *Id.* Approximately fifteen minutes later the resident died and it was discovered during the autopsy that a thick liquid similar to what was in her stomach was in her pulmonary airway. *Id.* at 5.

Stone did not cause physical injury or harm as she was simply attempting to administer necessary medication to “a known combative and noncompliant patient”. (L.F. 10). Stone followed procedure and practice by crushing the medication and attempting to administer the medication to K.S. in a food mixture with a wooden spoon. (L.F. 11). In *Stone*, K.S. was known to be combative when being administered medications. All of the testimony supports the fact that K.S. was acting as she always does when receiving medication. (L.F. 10 and 11). These facts are distinguishable from *Tate* as no “force-

feeding” or abuse occurred. Additionally, the *Tate* court did not establish a standard or determine that any alleged “force-feeding” is abuse, rather, the Court evaluates the facts for each case separately and determines whether the moving party has met its burden of proof to warrant a finding of abuse and placement on the EDL.

(3) Expert Testimony is necessary to determine whether K.S. was harmed.

The Department argues that *Klein* must be applied in this case because no expert testimony was required to determine that the resident suffered physical injury or harm from the healthcare provider’s slapping of the resident. *Klein v. Missouri Department of Health and Senior Services*, 226 S.W.3d 163, 164 (Mo. banc 2007). However, *Klein* does not address emotional abuse, which was the finding of the Department.

Further, *Klein* does not address the mental capabilities of the resident in that case. The agency had determined that a physical manifestation of physical injury through the act of striking the resident was enough for abuse to have occurred in *Klein* and did not need to further evaluate the resident’s mental status because no emotional harm was found. *Id.* Such is not the case before the Court as K.S. suffered from mental retardation and dementia.

No new burden is placed on state agency’s to prove abuse. *Klein* continues to be law. *Stone v. Mo. Dept. of Health and Senior Services*, 2010 Mo. App. LEXIS 1054, 7 (Mo. App. W.D. 2010). In cases that exceed what may be known or experienced by an ordinary layperson, expert testimony is required. This will not be a burden to the

Department as Department concedes that the director of nursing testified at the hearing and that the resident was treated regularly by a physician and psychiatrist. The treating physician for such a uniquely situated resident could easily testify as to whether such patient was emotionally harmed. No physician testified and the director of nursing testified that K.S. did not appear to be harmed and did not recall the event at all. (L.F. 203).

(4) Standard of Care is the standard to apply through testimony, not the Care Plan

Stone is a licensed nurse in the State of Missouri and as a licensee must provide care to her patients using the standard of care that a nurse with same or similar training would use in a same or similar situation of trying to get K.S. to take her medications. First, Stone followed K.S.'s care plan and attempted to administer the medications and then requested K.S. be removed from the dining room, only to have kitchen aide Andrea Delinger disobey the request. (L.F. 210 and 211). Second, no testimony about the standard of care that is needed to provide medications to a resident who is mentally retarded and suffering from dementia was provided. Therefore, the Department supplanted its own standard of care to determine Stone breached the standard of care and caused emotional harm to K.S.

Oakes is applicable because the court found that without standard of care testimony, there was no established standard of care to apply to the situation and the agency is left to speculate. A Department's hearing officer does not have the expertise

required to establish an appropriate standard of care for a healthcare provider when providing care. Further, *Klein* does not even speak to expert testimony and is not applicable in the matter before the Court.

B. DUE PROCESS

The Department argues that failure by the Department to include citation to 19 CSR 30-88.010(13) and (21) does not make the Order fail for failure to provide due process because Section 198.006(1) was cited in the original complaint letter and provides support for the Department's finding. Reference to 19 CSR 30-88.010(13) and (21) are explicitly referenced and identified in the "Decision" portion of the Department's Order and is cited as a reason for said Order. (L.F. 13). Stone was not on notice of said allegations and was not able to address the allegation appropriately in her defense because of the Department's failure to provide her notice and due process in the proceeding. Therefore, this matter should be dismissed and the Department's Order overturned.

C) CONCLUSION

For the foregoing reasons, Catherine Stone respectfully requests this court to enter its order reversing the department's decision, for an award of all costs incurred herein including attorney's fees, for an award of lost wages as a result of the department's actions herein and under such other and further relief the court deems just and proper under the circumstances.

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ATTORNEYS FOR RESPONDENT
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CERTIFICATE OF COMPLIANCE AND SERVICE

STATE OF MISSOURI)

)

COUNTY OF BOONE)

Julia Grus, of lawful age, first being duly sworn, states up her oath that on January 24, 2011, she served two (2) copies of the foregoing REPLY BRIEF PER SUPREME COURT RULE 84.05(e) on Appellant’s attorney by depositing the same in the United States mail, first class postage prepaid, at Columbia, Missouri in an envelope address to: Edwin Frownfelter, Assistant Attorney General, 615 East 13th St., Suite 401, Kansas City, MO 64106.

I also certify that the attached REPLY BRIEF complies with the Supreme Rule 84.06(b) and contains 1539 words, excluding the title page, appendix, certificate of service and compliance and signature page and that the brief contains words in 13-point Times New Roman and that a virus-free CD, scanned by Norton Anti-virus, has also been served on counsel and on the court.

Julia S. Grus, Attorney

Subscribed and sworn to before me this _____ day of _____, 2011 here in my office in Columbia, Missouri.

Notary Public

(seal)

My commission expires: _____

Missouri Supreme Court

Case No. SC91219

RESPONDENT’S REPLY BRIEF PURSUANT TO SUPREME COURT RULE

84.05(e)

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