

No. SC91219

MISSOURI SUPREME COURT

CATHERINE ANN STONE,

Respondent

v.

MISSOURI DEPARTMENT OF HEALTH AND SENIOR SERVICES,

Appellant

**Transferred from the Western District Court of Appeals
The Honorable Judges Thomas H. Newton, P.J. Howard and J. Witt**

**APPELLANT-DEPARTMENT'S SUBSTITUTE BRIEF
PER SUPREME COURT RULE 84.05(e)**

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TABLE OF CONTENTS

Jurisdictional Statement.....	1
Statement of Facts	2
Argument.....	4
I. The decision of the Department of Health and Senior Services to place Stone on the EDL was supported by substantial evidence of record and should be upheld. The Department correctly applied the definition of “abuse” in Section 198.006(1), as Stone acted intentionally to use force and restraint to compel resident K.S. to take medications against her will, and the evidence offered, without expert testimony, was sufficient to support a finding by a lay hearing examiner that Stone’s use of force represented physical and emotional injury or harm to K.S.	4
Standard of Review.....	4
A. The decision of the Department that the conduct of Stone meets the definition of abuse in Section 190.006(1) is supported by substantial evidence..	5
B. Expert testimony was not required to prove that K.S. suffered harm.....	9
C. The standard of conduct by which Stone’s resort to force should be judged is not a general standard of care in the nursing profession, but the specific care plan adopted by the facility with regard to the client in question, which Stone violated.....	14

D. Stone acted “knowingly” in the sense that she intended to use force to overcome K.S.’s resistance to taking her medications, in violation of a care plan of which Stone was fully aware..... 19

II. The decision of the Missouri Department of Health and Senior Services did not violate Stone’s due process rights, as the decision to place Stone on the EDL was based entirely upon statutory language which was alleged in the original notice. 21

Conclusion..... 24

TABLE OF AUTHORITIES

Cases

<i>Kuykendall v. Gates Rubber Co.</i> , 207 SW3d 694 (Mo. App. SD 2006)	10, 13
<i>Oakes v. Missouri Department of Mental Health</i> , 254 S.W.3d 153 (Mo. App. E.D. 2008)	16, 17, 18, 19, 20
<i>Psychcare Mgmt., Inc. v. Dep't of Soc. Servs., Div. of Med. Servs.</i> , 980 S.W.2d 311 (Mo. banc 1998).....	4, 5
<i>Ross v. Director of Revenue</i> , 311 S.W.3d 732 (Mo. banc, 2010)	6
<i>Sander v. Missouri Real Estate Com'n</i> , 710 S.W.2d 896 (Mo. App. E.D. 1986)	22, 23
<i>State Board of Registration for the Healing Arts v. McDonagh</i> , 123 S.W.3d 146 (Mo. banc 2003).....	4, 5
<i>State ex rel. Dean v. Cunningham</i> , 182 SW 3d 561 (Mo. banc, 2006)	10
<i>Stone v. Missouri Dept. of Health And Senior Services</i> , 2010 WL 3218912 (Mo. App. W.D., 2010).....	10, 11
<i>Tate v. Department of Social Services</i> , 18 SW 3d 3 (Mo. App. E.D., 2000)	8, 9

Statutes

Section 198.006(1), RSMo	2, 4, 6, 7, 8, 18, 19, 21, 22, 23
Section 198.070.13, RSMo.....	2, 5, 6, 19, 21, 22
Section 339.100.2(1) and (3), RSMo.....	23
Section 339.105(2), RSMo	23
Section 536.140.2, RSMo.	3, 4, 5

Section 660.315.7, RSMo..... 1, 5, 6

Other Authorities

Article V, Section 3 of the Constitution of Missouri 1

Rules

Supreme Court Rule 84.05(e)..... 1

Regulations

4 CSR. 250-2.080(9)..... 23

9 CSR 10-5.200(1)(E)..... 18

19 CSR 30-88.010 (13) and (21) 23

Jurisdictional Statement

In this proceeding, Catherine Stone (“Stone”) seeks review of the Missouri Department of Health and Senior Services (“Department”) decision dated October 28, 2008 to place Stone on the Employee Disqualification list (EDL) for a period of eighteen months. (L.F. 103-108). In a proceeding for judicial review pursuant to Section 660.315.7 and Section 536.100 through 536.140, RSMo¹, the Circuit Court of Cole County, in a judgment rendered originally on November 4, 2009, reversed the Department’s decision (L.F. 96-97).

The Department filed its notice of appeal on December 8, 2009 with the Court of Appeals, Western District (L.F. 98-101). On August 17, 2010, the Western District upheld the circuit court’s judgment reversing the Department’s decision. This Court sustained the Department’s Application for Transfer. This Court has jurisdiction pursuant to the general appellate jurisdiction of the Missouri Court of Appeals under Article V, Section 3 of the Constitution of Missouri.

Under the terms of Supreme Court Rule 84.05(e), Stone is characterized as the appellant because she contests the agency decision, although the Department brought this appeal from the decisions of the Circuit Court and the Court of Appeals. This brief will refer to the parties by name rather than as Appellant or Respondent.

¹ Statutory references are to RSMo, Cumulative Supplement 2009.

Statement of Facts

This case arises out of a decision by the Department of Health and Senior Services, Administrative Hearing Unit, upholding a determination to place Catherine Stone on the “Employee Disqualification List” (“EDL”), an abuse registry established under the authority of Section 198.070, RSMo. This determination was based on a finding that Stone committed abuse within the meaning of Section 198.006(1), RSMo, when she attempted to force-feed medication to a nursing home resident in violation of the resident’s care plan.

In November 2007, Catherine Ann Stone worked as a charge nurse at Maries Manor, a licensed, long-term care facility in Vienna, Missouri. L.F. 10; Appendix 2. One of the residents at Maries Manor, K.S., was fifty-one years old and had a diagnosis of dementia and mental retardation. L.F. 10; Appendix 2. The staff at Maries Manor knew that K.S. was combative, generally speaking. L.F. 10; Appendix 2.

In order to give K.S. her medication, staff members had to crush the medication and mix it with another food, like apple sauce. L.F. 11; Appendix 3. The staff member would then spoon the medicated mix into K.S.’s mouth. L.F. 11; Appendix 3. The care plan established by Maries Manor provided that if K.S. resisted and refused to take her medication, then the staff member was to walk away from K.S. and leave her alone for around 15 minutes, or place K.S. in her room for 15 minutes, until K.S. calmed down. L.F. 10, 11, 212-213, 226-27; Appendix 2-3. Stone knew that K.S. was to be left alone for around 15 minutes if she got upset or resisted. L.F. 241.

On November 3, 2007, Stone attempted to give K.S. her medication and K.S. resisted. L.F. 10; Appendix 2. Certified Nurse Assistant (“CNA”) Penny Foster, saw Stone place her hand on K.S.’s forehead while Stone tried to force K.S. to take her medication. L.F. 10, 166, 210; Appendix 2. K.S. vocally refused Stone’s conduct; she spat out the medication and attempted to fight off Stone. L.F. 14; Appendix 6. K.S. hit Stone and tried to “buck” herself out of her wheelchair. L.F. 10, 213, 234; Appendix 2. Stone instructed Ms. Foster to hold down K.S.’s one good arm. L.F. 217. K.S. was crying, visibly upset, and appeared scared. L.F. 211, 217, 236.

Andrea Delinger, a dietary assistant, was in the kitchen when she first heard K.S. “screaming.” L.F. 217. Although Delinger was accustomed to K.S. yelling or making noise, the disturbance seemed to be greater than usual, so Delinger left the kitchen to see what was wrong. L.F. 176, 191, 217. When she entered the dining room, Delinger, like Foster, saw Stone forcing medications into K.S.’s mouth with one hand while pushing forcefully with the other hand on K.S.’s head, pushing K.S.’s head back into K.S.’s wheelchair, while Foster held K.S.’s one good arm. L.F. 10, 217, 221; Appendix 2.

Stone then instructed staff members to take K.S. to her room, even though K.S. had not eaten her meal. L.F. 217. Instead of taking K.S. to her room, Ms. Delinger got K.S. calmed down and helped K.S. eat her meal. L.F. 166, 217. Stone “wrote up” Ms. Delinger for countering Stone’s order. L.F. 235.

Argument

I.

The decision of the Department of Health and Senior Services to place Stone on the EDL was supported by substantial evidence of record and should be upheld. The Department correctly applied the definition of “abuse” in Section 198.006(1), as Stone acted intentionally to use force and restraint to compel resident K.S. to take medications against her will, and the evidence offered, without expert testimony, was sufficient to support a finding by a lay hearing examiner that Stone’s use of force represented physical and emotional injury or harm to K.S.

Standard of Review

This Court reviews the decision of the agency, rather than that of the Circuit Court or the Court of Appeals. *Psychcare Mgmt., Inc. v. Dep't of Soc. Servs., Div. of Med. Servs.*, 980 S.W.2d 311, 312 (Mo. banc 1998); *State Board of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146, 152 (Mo. banc 2003). Following the criteria set forth in Section 536.140.2, RSMo, the Court reviews whether the agency action:

- (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.

McDonagh, 123 S.W.3d at 152; Section 536.140.2, RSMo. 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. *Tendai v. Missouri State Board of Registration for the Healing Arts*, 161 S.W.3d 358, 365 (Mo. banc 2005). Appellate courts may not determine the weight of the evidence or substitute their discretion for that of the administrative body; the court's function is to determine primarily whether competent and substantial evidence upon the whole record supports the decision, whether the decision is arbitrary, capricious, or unreasonable, and whether the commission abused its discretion. *Psychcare Mgmt., Inc. v. Dep't of Soc. Servs., Div. of Med. Servs.*, 980 S.W.2d at 312.

A. The decision of the Department that the conduct of Stone meets the definition of abuse in Section 190.006(1) is supported by substantial evidence.

Under the terms of Section 198.070.13, RSMo, the Department maintains the Employee Disqualification List (“EDL”), a list of persons who have been employed in any facility and who have been finally determined by the department to have knowingly or recklessly abused or neglected a resident. The procedure for such listing is set forth in Section 660.315, RSMo.

The definition of “abuse” for purposes of placement on the EDL is set forth in Section 198.006(1), RSMo: “the infliction of physical, sexual, or emotional injury or harm.”

The legislation creating the EDL and defining abuse for its purposes are remedial in nature. Statutes that are remedial, because they are intended to protect the public, are construed so they provide the public protection intended by the legislature. *Ross v. Director of Revenue*, 311 S.W.3d 732, 735 (Mo. banc, 2010).

Nursing home residents are a vulnerable population. They are heavily dependent on caregivers for their basic needs, and they often suffer from mental and physical conditions that set major limits on their ability to understand what is happening to them, to guard or defend themselves against abusive conduct, and to express themselves either to protest such conduct or describe what happened to them after the fact. The statutory scheme created by Sections 198.070.13, 660.315, and 198.006(1), RSMo, is intended to protect these residents by creating a system to keep individuals with a demonstrated record of abusive conduct out of positions of power over such residents. This is a resident protection statute, not an employee protection statute. Therefore, it should be construed in a way that assures that it will provide the most vulnerable residents with protection against employees who treat them with force.

The statute does not elaborate on the definition of “harm.” The most detailed statement of how this definition is applied to facts is that provided by this Court in *Klein v. Missouri Department of Health and Senior Services*, 226 S.W.3d 162 (Mo. banc. 2007). In *Klein*, the testimony established that Klein was attempting to lower the resident

on a wheelchair lift on the van when the resident, who appeared upset, tried to get away from Klein. The witnesses testified that Klein pursued the resident, struck her on the crown of the head with her open hand, and spoke to her disdainfully. The testimony established that the resident attempted to get away from Klein by rolling her wheelchair toward the back of the van.

This Court found that this fact pattern was sufficient to establish that Klein had committed “abuse” within the meaning of Section 198.006(1), RSMo. Klein argued that there was no proof of abuse because there was no evidence of physical injury. The Court stated:

Although the statute does not define "injury or harm," the significance of these common terms is evident by their plain meaning. Striking a nursing home resident necessarily involves physical injury or harm. At the least, there is injury or harm in the nature of physical pain. The statute does not require a physical manifestation of injury or harm. Given this low threshold for establishing the infliction of physical injury or harm, the decision of the DHSS was supported by competent and substantial evidence upon the whole record and was authorized by law.

Klein, 226 S.W. 3d at 164. Although the discussion in *Klein* is brief, it sets forth three important principles, all of which are essential to proper evaluation of this case.

First, this Court noted that the meaning of the terms used in the legislation are to be understood in their plain, everyday meaning. The existence of injury or harm is not a

medically complex determination that requires expert medical testimony; a lay finder of fact can determine the issue by applying the ordinary, every day usage of those terms.

Second, this Court held that proof of “injury or harm” does not require physical manifestation of injury or harm. Harm can be either physical or emotional, and the existence of harm can be inferred from the reaction of the resident who is subject to the treatment. In *Klein*, no evidence was cited other than that the caregiver used force against the resident, and the resident reacted by attempting to escape the situation. There was no medical testimony, and there was no need to conduct a detailed presentation on the resident’s mental state and history. The fact that she reacted with fear and attempted to get out of the situation was found to be competent and substantial evidence supporting the conclusion that she had suffered harm.

Finally, this Court held that there is a “low threshold” of proof that the conduct of a caregiver amounts to abuse. This is a natural consequence of the remedial nature of the statutory scheme under which the EDL system was created. The Legislature provided for the creation of an EDL in order to protect vulnerable residents from abuse by caregivers, not to protect the employment rights of caregivers. The legislature did not intend to erect high barriers of proof in the way of getting caregivers shown to have engaged in improper conduct toward residents onto the list and out of a position where residents would be exposed to risk.

“Abuse” is not limited to striking or acts of aggressive violence against a resident. A finding by the Department that a caregiver committed abuse by the act of force-feeding

a resident against her will was upheld in *Tate v. Department of Social Services*, 18 SW 3d 3 (Mo. App. E.D., 2000).

In this case, the decision of the hearing officer was supported as much as or more evidence than was available to the Court in *Klein*. While Stone did not strike K.S. as the caregiver in *Klein* did, she did use force and restraint to override the resident's will. Both cases involve the use of physical force by a caregiver to overcome or intimidate the resident from resisting the imposition of the caregiver's will. In this case, as in *Klein*, the resident reacted by struggling and attempting to get away; indeed, there is more evidence of the resident's discomfort and resistance in this record than there was in the record on *Klein*. It is clear that the evidence here exceeds the "low threshold" of evidence discussed in *Klein*.

B. Expert testimony was not required to prove that K.S. suffered harm.

Stone argues that expert testimony was required to prove that there was a change in K.S.'s mental, psychiatric, physical, or emotional wellbeing in order to show "harm" [Stone's Substitute Brief at 20]. There is absolutely no authority for this proposition either in the statute or in the case law. In fact, the proposition flies in the face of this court's holding in *Klein* that the words of the statute are to be construed in their everyday meaning, and that there is a "low threshold for establishing the infliction of physical injury or harm." *Klein*, 226 S.W. 3d at 164.

As both the Court of Appeals, Western District and Stone acknowledge, under Missouri law the existence of harm is a question of fact well within the province of the

lay finder of fact to determine. *Stone v. Missouri Dept. of Health And Senior Services*, 2010 WL 3218912, 3 (Mo. App. W.D., 2010).

This Court has noted a general rule that “no medical testimony is needed to show mental or emotional distress.” *State ex rel. Dean v. Cunningham*, 182 SW 3d 561 (Mo. banc, 2006). The Court of Appeals conceded below that emotional harm may be established merely from evidence of one’s reaction to a situation. *Stone v. Missouri Dept. of Health And Senior Services*, 2010 WL 3218912 at 3.

Stone argues and the Court of Appeals held that this general principle does not apply when a resident is severely disabled. The Court of Appeals stated, without citation to any authority, that “Determining whether a mentally disabled resident with dementia sustained emotional harm from the feeding incident was beyond the common experience of the fact finder.” *Stone v. Missouri Dept. of Health And Senior Services*, 2010 WL 3218912 at 4.

The only authority Stone puts forward in support of this departure from the principles stated in *Cunningham* and *Klein* is *Kuykendall v. Gates Rubber Co.*, 207 SW3d 694 (Mo. App. SD 2006). The facts in *Kuykendall* are not remotely related to the facts of this case. *Kuykendall* was a worker’s compensation disability case, in which the issues before the court were complex issues of causation of the claimant’s medical condition. The excerpt Stone cites arises from a discussion of whether an administrative law judge needed expert testimony to ascertain whether the condition *Kuykendall* claimed to be disabling arose from his work-related injury or from other accidents that *Kuykendall* had sustained off the job. This was a complex medical question for which medical expert

testimony is generally required. The fact that Stone had to reach so far afield to find a case to cite in support of her argument highlights the unprecedented nature of her claim that expert testimony is required to prove abuse of a subset of the population protected by the EDL legislation.

The establishment of harm under the definition of Section 198.006(1), RSMo, is not such a medically complex question. Stone reads into the definition of harm for EDL purposes a distinction between cognitively normal and severely disabled individuals that is not suggested or supported anywhere in the statute or case law. This distinction between residents of different levels of impairment is completely original in this case. The theory that expert testimony is required to show harm to some, but not all residents moves in the opposite direction from the holding in *Klein* that the meaning of the term “harm” in the statute is to be determined from the everyday meaning of the words.

Stone and the Court of Appeals acknowledge the holding in *Klein* that normally expert testimony is not required to prove harm, but attempt to distinguish the *Klein* holding because it did not address the need for expert testimony. *Stone v. Missouri Dept. of Health And Senior Services*, 2010 WL 3218912 at 4. In *Klein*, the evidence consisted entirely of eyewitness testimony that the caregiver struck the resident, and the resident appeared agitated and attempted to get away. The position of Stone, adopted by the Court of Appeals, seems based on the assumption that there is a critical difference between the cognitive level of the victim in *Klein* and that of K.S. in this case, which forms a basis to distinguish the case. However, there was no indication in that opinion as to the cognitive capability of the victim. The victim in *Klein* could have been just as

severely disabled as K.S. in this case; the opinion is silent on the subject. The fact that this Court did not discuss the condition or cognitive level of the victim in *Klein* points toward a conclusion that such a consideration is not relevant, rather than that the holdings of that case are not applicable.

Indeed, the distinction requiring a higher level of proof of harm to severely disabled residents compared to higher functioning ones drawn by the Court of Appeals is inconsistent with the policy goal of protecting residents from exposure to staff who have a demonstrated record of using force against residents the legislature adopted in the EDL legislation. The decision of the Court of Appeals raises the bar of proof for abuse of the class of residents who are least able to express or protect themselves. It will result in fewer EDL placements, a greater margin of opportunity for staff to use force on more severely disabled residents, and diminished effectiveness of the EDL in preventing abuse.

The decision of the Court of Appeals raises a considerable amount of uncertainty that will hamper the Department in the preparation and presentation of EDL cases. The decision of the Court of Appeals in this case to set a higher bar for proof of abuse to the most vulnerable of this protected population forces the Department to guess in the preparation of every case at the level of proof required to meet the standard laid out by the Court of Appeals. In each EDL case it considers, the Court of Appeals decision forces the Department to speculate as to how a court is likely to rule in the future on a number of questions which are not raised within the language of the statute.

By suggesting that there is a point where a resident is so disabled that harm can no longer be inferred from her screams, her struggling, and her resistance without medical

interpretation, Stone seeks to force the Department to speculate in every case whether it may rely on the testimony of eyewitnesses, as was found sufficient in *Klein*, or whether it must bring in a medical expert to examine the statements after the fact and opine as to whether the resident was upset and afraid. Stone posits no guideline for how severely disabled a resident must be before such a requirement arises, so the Department will be required to consult with medical experts on virtually every case.

The Court of Appeals decision provided no additional guidance as to what level of “expert testimony” is required. The Director of Nursing who testified in this matter would qualify as an expert on the standard of care in nursing, but the Court of Appeals suggested that psychiatric testimony delving into the resident’s cognitive state may be required.

The approach adopted in the Court of Appeals decision would essentially make the cognitive level of the resident an element of proof of harm. This could result in different decisions and different levels of protection between higher-functioning and more severely disabled residents.

It is questionable whether a medical expert, examining the statements of witnesses or interviewing the resident after the fact, can speak with any more authority than a lay finder of fact on the question of whether a disturbing situation represented “harm” to the resident. An expert can testify with some confidence as to the causation of a medical condition, as was required in *Kuykendall*, but there is no clear medical standard for what constitutes “harm” in a statute that is meant to be construed in everyday terms.

Ultimately, if the requirement of expert testimony proposed by Stone and imposed by the decision of the Court of Appeals stands, fewer Employee Disqualification List cases will be brought, fewer will be proven, and more residents will be at risk of abuse. There is no basis in either the statute or the case law, however, to conclude that the General Assembly intended to set a higher threshold for severely disabled residents in the protection of the EDL statute.

C. The standard of conduct by which Stone’s resort to force should be judged is not a general standard of care in the nursing profession, but the specific care plan adopted by the facility with regard to the client in question, which Stone violated.

Stone argues beginning at Page 26 of her Substitute Brief that expert testimony was necessary, not just to prove harm or injury, but also to establish the “standard of care” under which her use of force is to be assessed. She argues that the Department’s decision is “arbitrary and capricious because the hearing officer applied his own standard of care to Stone’s actions without any expert testimony regarding the same.” [Stone’s Substitute Brief at 26]. Stone proposes that proof of an abuse case requires two different kinds of expert testimony – a medical expert to testify as to the resident’s cognitive state for purposes of showing harm, and a nursing expert to testify as to the standard of care for nursing. There is no mention of any standard of care set forth in the statute.

The standard of care, if any exists, is set not by some external body of knowledge to which an expert could refer, but by the care plan developed for the individual resident,

K.S. Joy Gunter, the Director of Nursing at the facility, testified that the facility had developed a Care Plan for the resident, K.S, which set forth specifically how the staff was to handle K.S.'s individual needs [L.F. 204]. This plan was in writing and was posted close to the nurse's station [L.F. 204]. Because K.S. had a history of refusing to take her medications, the plan contained specific directions for how that situation was to be handled. Ms. Gunter testified that the plan provided that if K.S. refused her medications, the caregiver was to "Just leave her alone, attempt later or ask someone else to attempt giving the meds." [L.F. 204]. Stone acknowledged her awareness of this policy in her own testimony: "I was told that if she was extremely upset to disassociate her for 15 minutes. If she could be taken to her room or a quiet place to calm down." [L.F. 241].

The care plan, from the testimony of all witnesses, provided that if K.S. resisted taking her medications, she was to be left alone or isolated from the group for a period of time until she could calm down. L.F. 204. Stone violated this plan. When K.S. resisted taking her medications, instead of isolating her or allowing her to calm down, Stone attempted to force K.S. to take the medications by placing her hand on K.S.'s forehead, directing the nurse assistant to hold down her one good arm, and attempting to force the medication into K.S.'s mouth against her will. L.F. 10, 217, 221; Appendix 2. In so doing, Stone seriously aggravated the situation. K.S. reacted more violently, struggling and attempting to knock the medicine away. L.F. 10, 213, 234; Appendix 2. Only when Delinger, the dietary assistant, entered on the scene and told Stone to stop her force-feeding was the situation defused. Stone directed that K.S. be removed from the room, but Delinger countermanded that order, and was able to get K.S. calmed down and assist

her in finishing her meal. L.F. 166, 217. To the extent that there was a “standard of care,” Delinger carried it out more faithfully than Stone did, and with much better results. It is clear from the accounts of the witnesses that rather than waiting for K.S. to calm down as her care plan required, Stone attempted to override K.S.’s will and force her to take her medicines against her will. The hearing officer had competent and substantial evidence that Stone’s conduct in using force and restraint to get K.S. to do what Stone wanted, despite the agitation it caused to K.S., fit within the definition of “abuse.”

Stone attempts to justify her conduct by citing the case of *Oakes v. Missouri Department of Mental Health*, 254 S.W.3d 153 (Mo. App. E.D. 2008). The differences between *Oakes* and this case are stark.

There are significant factual differences between this case and *Oakes*. The “victim” in the *Oakes* presented very different problems than K.S. in this case:

C.K. is a fifteen-year-old female patient of the DMH who was a resident at the ISL in Mexico. C.K. had several failed placements at other facilities before being placed at the ISL in Mexico. C.K. is roughly the same height as *Oakes*, but has a stocky build and weighs 50-60 pounds more than *Oakes*. Prior to the incident at issue, C.K. had physically assaulted *Oakes* five or six times, including occasions in which C.K. hit *Oakes*, kicked *Oakes*, and dragged *Oakes* off a couch by her hair.

Oakes, 254 S.W.3d at 155. C.K. left the facility and stood in the middle of a public street, throwing rocks at *Oakes*, another resident, and *Oakes*’s car. *Oakes* followed C.K. into the street, attempting to get her off the street and out of risk of oncoming traffic. A

struggle then ensued, in which C.K. grabbed Oakes's hair, bit her, drawing blood, kicked her, screamed at her, and spat in her face, upon which Oakes spat back. Oakes and another staff person wrestled C.K. to the ground and summoned a police officer, whom C.K. also kicked before he was finally able to handcuff her. C.K. was unhurt, but Oakes suffered a bleeding wound to her right shoulder, a softball-seized bruise on her shin and a deep scratch on her forearm. *Oakes*, 254 S.W.3d at 155. On these facts, the Department found that Oakes had committed "brutal and inhumane treatment" of C.K., apparently because of the spitting.

The situation involved in *Oakes* was both more urgent and more challenging than anything Stone had to deal with regarding K.S. Oakes was defending herself against a much larger and stronger resident, but she was also trying to get the resident out of a public street, out of harm's way. The court stated:

The evidence is clear that Oakes was not the attacker; rather she was the victim and was simply trying to protect herself without injuring her mentally disabled attacker. In the process of doing this, she reflexively spit back when she was spit upon. This puerile behavior does not rise to the level of being brutal or inhumane.

Oakes, 254 S.W.3d at 158.

Factually, the *Oakes* case provides no support to Stone. The court did not address any "standard of care" in *Oakes*, nor did it establish a broad self-defense privilege under which a caregiver may respond to a resident's physical aggressions in kind.

Unlike Oakes, Stone was dealing with a wheelchair-bound resident with one good arm. This occurred in a calm situation at the dinner table, where the only goals were to get K.S.'s dinner and medications into her under no particular time pressure. In such situations, the care plan provided that K.S. be given some time to calm down, and there is no indication in the record of any reason why Stone could not have given her that time. But Stone made her own decision to force K.S.'s medications into her mouth, whether she wanted them or not. Stone did not need two people to restrain K.S. in order to defend herself; she could have accomplished that by walking a few steps away, as K.S.'s care plan directed her to do. She needed two people to restrain K.S. so she could force her will on K.S. over K.S.'s objection. That is controlling a resident by force, and when, as here, it results in emotional and physical harm to the resident, it falls within the definition of "abuse" in Section 198.006(1).

There are also significant legal distinctions between this case and *Oakes*. *Oakes* was decided on a different definition of "physical abuse" with different elements. The definition at issue in *Oakes*, found in 9 CSR 10-5.200(1)(E), contained the language "[p]hysical abuse includes handling a consumer with any more force than is reasonable for a consumer's proper control, treatment or management." In order to find abuse pursuant to 9 CSR 10-5.200(1)(E), the finder of fact had to know what force would have been reasonable for a consumer's proper control, treatment, or management.

In contrast, the definition of abuse in Section 198.006(1), RSMo, does not contain the language about force that 9 CSR 10-5.200(1)(E) does, nor does it refer in any way to the level of force necessary for the situation. Indeed, the focus of the definition before the

Court here is entirely different in construction than the one applied in *Oakes*. Section 198.006(1), RSMo, focuses on the effect of the conduct rather than the nature of the conduct. Therefore, there is no standard of force that Stone could have applied in administering medication to K.S.; the only question is whether her method of doing so caused K.S. harm. *Klein*, not *Oakes*, is the case that defines the standard for determining harm in a caregiver's resort to force in such a situation.

D. Stone acted “knowingly” in the sense that she intended to use force to overcome K.S.’s resistance to taking her medications, in violation of a care plan of which Stone was fully aware.

Stone claims that the Department failed to prove that she had “knowingly or recklessly” committed abuse, as is required by Section 198.070.13 for placement on the EDL. Under Section 198.070.13, RSMo, “[a] person acts ‘knowingly’ with respect to the person’s conduct when a reasonable person should be aware of the result caused by his or her conduct.”

Stone acted knowingly when she made a conscious decision to ignore what K.S.’s care plan said about how her refusals to take medicine were to be handled, and to force the medicine into K.S.’s mouth against her will. A reasonable person would be aware that pushing a resident’s head back into a wheelchair in order to force a resident to take medication would cause physical or emotional harm or injury. A reasonable person would know that if someone is struggling and hitting, further pursuit of a physical

confrontation with that person may result in physical injury or emotional harm. A reasonable person would know that if his or her conduct causes another to scream and struggle, that person is undergoing mental agitation and emotional harm. It does not matter whether one feels justified in doing what one intends, or that the other person's resistance is unreasonable or unjustified. If an actor knows that his or her conduct is producing such a reaction in another, and goes ahead with it, the actor is acting knowingly.

Stone knew that K.S. did not want to take her medicine, and she knew that the standard established by the facility was that when this happened, the caregiver was not to force her to do so, but to go away or to isolate her for a while and allow her to calm down. Stone made a knowing and intentional decision to disregard this policy and attempt to force K.S. to take her medication against her will, even summoning and ordering a nurse assistant to restrain K.S. from her struggles.

Stone might have a valid defense that her actions amounting to abuse were not "knowing" if, like the caregiver in the *Oakes* case, she was in a highly volatile situation and the injury caused was accidental or unavoidable given the fast pace of events. But K.S.'s disruptive behavior and her refusal to take her medications were not unusual or unpredictable; in fact, her care plan provided for just such situations. Stone made a conscious decision to ignore the guidance of the plan and the risks of going forward. She was determined to get that medication into K.S.'s mouth on her schedule, whether K.S. wanted it or not. That was a decision she made knowingly, and her conduct is knowing as a result.

II. The decision of the Missouri Department of Health and Senior Services did not violate Stone’s due process rights, as the decision to place Stone on the EDL was based entirely upon statutory language which was alleged in the original notice.

Stone asserts that the Department violated her due process rights, based on a claim that the Department found a violation of 19 CSR 30-88.010 (13) and (21), which was not cited in the notice.

The claim in Stone’s substitute brief that “[t]he Department’s Decision states that Stone violated 19 CSR 30-88.010 (13) and (21) and as a result of such violation, Stone “abused” K.S.(L.F.13 and 14)” [Substitute Brief for Stone at 35], is factually inaccurate. There is no such finding in the hearing decision.

In the hearing decision, 19 CSR 30-88.010 (13) and (21) was cited in passing in the discussion, in support of the proposition that K.S. had a right to refuse the administration of medicine and to be free of restraint and coercion. The hearing officer did not base the placement of Stone on the EDL on her refusal to honor K.S.’s right to refuse her medicines, but on her use of forcible restraint in doing so. The hearing officer adopted eight conclusions of law in which he set forth the law governing the case, which included citations to Sections 198.006(1) and 198.070.13, RSMo, but which did not mention 19 CSR 30-88.010 (13) or (21). The hearing officer recited the applicable standard in the first paragraph of the decision; “The Respondent can meet its burden of proof by establishing, pursuant to the preponderance of the evidence, that the petitioner

knowingly or recklessly abused residents of a licensed facility while employed at that facility.” [L.F. 13]. The bulk of the decision analysis turned on the question of whether the restraint used by Stone amounted to force. The decision quotes the *Klein* case on the manifestation of harm, and notes the evidence that:

[K.S.]’s response, her elevated yelling and voiced refusal; and her spitting and attempt to fight off the Petitioner and CNA Foster, are clear indications that [K.S.] **was experiencing emotional harm and distress because of the staff’s actions.**

[L.F. 14]. Clearly, the focus of the hearing officer was correctly on whether the restraint used by Stone amounted to harm within the definition of Section 198.006(1), RSMo, justifying her placement on the EDL under the terms of Section 198.070.13, RSMo. Stone’s claim that she did not have notice of the charges against her is devoid of merit.

Even if this Court found that the Department improperly based its action upon a regulation not cited in the notice, its decision should still stand as it is supported by the statutory provisions cited. This Court makes an independent analysis of the legal applicability of the statute to the facts found, and the administrative decision should stand where there is substantial evidence based on the whole record to impose discipline on at least one properly cited ground. *Sander v. Missouri Real Estate Com’n*, 710 S.W.2d 896, 900-01 (Mo. App. E.D. 1986).

In *Sander*, the Missouri Administrative Hearing Commission found that a licensee violated 4 C.S.R. 250-2.080(9), Section 339.100.2(1) and (3), and Section 339.105(2), RSMo. The Complaint in the case, which is akin to the Department’s Notice of Violation

in this matter, only listed a violation of Section 339.100, RSMo. *Sander*, 710 S.W.2d at 900-901. The Missouri Court of Appeals, Eastern District, found that the Administrative Hearing Commission's decision violated Sander's due process by finding cause to discipline for violations of 4 C.S.R. 250-2.080(9), and Section 339.105(2), RSMo, because they were not listed in the Complaint. *Id.*

However, the Court of Appeals held that it did not need to reverse the agency decision because the agency had cause to discipline Sander based on a violation of Section 339.100.2(1) and (3), RSMo, which was cited in the Complaint:

Violation of either of those provisions alone would have been sufficient to justify disciplinary action on the part of the Commission. The Hearing Commissioner's finding that Sander violated Regulation 4 C.S.R. 250-2.080(9) and Section 339.105(2) was mere surplusage.

Sander, 710 S.W.2d at 901.

Similarly, if this Court determines that the Department found that Stone violated 19 CSR 30-88.010(13) and (21), such finding was mere surplusage. Because the Department found that grounds exist to conclude that Stone had committed abuse within the definition in Section 198.006(1), RSMo, this Court should uphold this decision regardless of the hearing officer's passing reference to 19 CSR 30-88.010(13) and (21).

Conclusion

The decision of the Department to place Catherine A. Stone on the Employee Disqualification List should be upheld.

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

The undersigned hereby certifies that on this 13th day of January, 2011, 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 6,810 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.

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