

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 SUBSTITUTE BRIEF PER
SUPREME COURT RULE 84.05(e)**

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JURISDICTIONAL STATEMENT

This is an appeal by the Missouri Department of Health and Senior Services (DHSS) from an adverse judgment rendered originally on November 4, 2009 by the Circuit Court of Cole County in a proceeding for judicial review pursuant to § 660.315.7 and §§ 536.100 through 536.140, RSMo.(L.F. 96-97). The circuit court's judgment reversed the Department's decision dated October 28, 2008 to place Catherine Stone's (Respondent) name on the Employee Disqualification list (EDL) for a period of eighteen months. (L.F. 103-108).

The Department then filed its notice of appeal on December 8, 2009 with the Western District Court of Appeals. (L.F. 98-101). On August 17, 2010, the Western District Court of Appeals upheld the circuit court's judgment reversing the Department's decision finding that that DHSS did not have substantial evidence to support placing Stone's name on the EDL. On November 16, 2010, this Court sustained DHSS's Application of Appellant to 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.

Pursuant to Supreme Court Rule 84.05(e), Respondent Stone is treated as the appellant because she contests DHSS's October 28, 2008 decision placing her name on the EDL and she is required to file the substitute opening brief as if she were the appellant even though she is the respondent.

STATEMENT OF FACTS

The case arises out of the decision dated October 28, 2008 by the Department of Health Senior Services, Administrative Hearing Unit, to list Catherine Stone's name on the "Employee Disqualification List" (EDL) for having "abused" K.S. (L.F. 14). Sections 198.070 and 660.315, RSMo, establishes the EDL which is a central registry maintained by the Department of persons who have been found to have "abused" or "neglected" nursing home residents. Section 198.070, RSMo. and Section 660.315, RSMo. Further, Missouri law prohibits entities licensed by the State or subject to the Department's authority from knowingly employing any person whose name is on the state EDL. Section 660.315, RSMo.

In its February 19, 2008 "Notice of Violation", the Department accused Stone:

The complaint alleged that on or about November 3, 2007, while employed as the charge nurse at the facility, you attempted to make a fifty-one year old resident in the facility's dining room take medication by holding her head against the back of her wheelchair and forcing a spoon in her mouth. You directed another staff member to hold the resident's arm down. The resident was yelling and spitting out her medication. You then directed a staff member to take the resident to her room although she had not eaten her meal. (L.F. 124).

The “Notice of Violation” letter cited to Section 198.070, RSMo, which requires persons who have “recklessly or knowingly abused or neglected a resident” be placed on the EDL.(L.F. 124). Following receipt of the “Notice of Violation” letter, Stone requested a hearing and said hearing took place before the administrative law judge Thomas Townsend and his October 28, 2008 decision that Stone should be placed on the EDL is at issue in this appeal.

Stone worked at Maries Manor in Vienna , Missouri as a charge nurse during all times relevant. (L.F. 10). Stone received her Licensed Practical Nurse (LPN) license on August 3, 2007.(L.F. 228). She had been trained with one evening shift prior to the date of the incident at issue and then she was put directly on the night shift, which was from 10:45 p.m. to 7:15 a.m. at Maries Manor. (L.F. 228).

K.S.¹ was a resident at Maries Manor throughout Stone’s employment with the facility.(L.F. 10). K.S. was diagnosed with dementia and mental retardation and was widely known to be combative.(L.F. 10). Everyone knew it was particularly difficult to get K.S. to swallow medications. (L.F. 11) When K.S. became extremely agitated during attempted medication administration, her care plan required health care providers to walk away or have K.S. removed and taken to her room until she calmed down.(L.F.11)

¹ Respondent refers to the resident by her initials in order to respect her rights of privacy.

On November 2, 2007, Stone was working the evening shift and administering care to a different resident than the one at issue in this matter. (L.F. 229). On that evening, Stone requested additional food from the dietary aide Andrea Delinger for treatment of another diabetic patient who was suffering from low blood sugar at dinner time. (L.F. 229). Ms. Delinger refused the additional food request by LPN Stone.(L.F. 235 and L.F.11). Stone had Ms. Delinger written up for refusing her request for additional food for a patient.(L.F. 235 and L.F.11)

On November 3, 2007, Stone was working the evening shift for her second time and was preparing to administer medication to resident K.S.(L.F.230 and L.F. 11). Stone approached K.S. with her medication on a wooden medication spoon and unprovoked K.S. knocked the spoon away.(L.F. 11). Stone again approached K.S. and K.S. swung her right hand and arm at Stone hitting Stone in her left shoulder(L.F. 230 and 231). Stone instructed Ms. Foster to hold K.S.'s arm so that K.S. would stop hitting Stone and Stone attempted to coax K.S. to take her medication.(L.F. 233). Stone suffered a torn rotator cuff injury to her left shoulder from K.S.'s strikes to Stone's left arm. (L.F. 231-232).

Ms. Delinger was not physically in the dining room during Stone's attempt to administer the medication to K.S.(L.F. 232-233). Delinger was in the kitchen which is separated from the dining room by a wall without glass. It was physically impossible for Andrea Delinger to witness Stone attempt to provide K.S. her medication. Upon hearing K.S.'s outburst, Andrea Delinger entered the dining room and demanded that she provide

care to K.S. (L.F. 234). Delinger is not trained or licensed in any way to provide health care to a resident or to administer medication. She is simply kitchen personnel. (L.F. 10).

Director of Nursing Joy Gunter testified that she interviewed K.S. after the alleged incident and stated that K.S. could not remember what occurred and that K.S. did not have any injuries from the incident. (L.F. 203). All agree that K.S. did not suffer any physical injury on the evening of November 3, 2007.(L.F.10).

STANDARD OF REVIEW

This appeal arises from a contested case proceeding for judicial review that was instituted by Stone with respect to the DHSS's decision dated October 9, 2008 to place Stone's name on the state EDL list for a period of eighteen months. Section 536.140 RSMo. On November 4, 2009, the Circuit Court of Cole County reversed the DHSS's decision. On August 17, 2010, the Western District Court of Appeals upheld the Circuit Court's reversal of the DHSS's decision to place Stone's name on the EDL finding that DHSS's decision was not supported by competent and substantial evidence upon the whole record and was otherwise authorized by law.

The scope of judicial review in such cases requires the court to determine whether the underlying agency actions were:

(A) in excess of statutory authority and/or jurisdiction of the agency;

(B) unsupported by competent and substantial evidence from the whole records;

(C) unauthorized by law;

(D) arbitrary, capricious and unreasonable;

(E) an abuse of agency discretion; or

(F) otherwise contrary to law.

The lawfulness of an agency's order is determined by whether statutory authority for the order exists. State ex rel AG Processing, Inc. v. Pub. Serve. Comm., 120 S.W.3d 732, 734 (Mo. banc 2003). Where the agency decision involves interpretation of the law and the application of the law, review is de novo and the Appellate Court must form its own independent conclusions – the court is not bound by the interpretation of the agency. Collins v. Department of Social Services, 141 S.W.3d 501, 504 (Mo. banc App. S.D. 2004). The court has a duty to correct erroneous interpretations of law. HTH Companies, *Supra* at 361.

The court “must look at the whole record in reviewing the agency’s decision, not merely the evidence that supports the decision.” Hampton v. Big Boy Steel Erection, 121 S.W.3d 220, 222 (Mo. banc 2003).

If an agency's order is lawful, the court must determine if it is reasonable. State ex rel. Koffman v. Public Service Commission, 154 S.W.3d 316, 320 (Mo. App. W.D. 2004). Reasonableness depends on whether the order is supported by competent and substantial evidence on the whole record; whether the decision was arbitrary, capricious or unreasonable; or whether the agency abused its discretion. Id.

POINTS RELIED ON

I.

THE MISSOURI DEPARTMENT OF HEALTH AND SENIOR SERVICES ERRED IN FINDING THAT CATHERINE STONE SHOULD BE LISTED ON THE “EDL” BECAUSE THE DEPARTMENT ERRONEOUSLY DECLARED AND APPLIED THE LAW WITH RESPECT TO WHAT CONSTITUTES ‘ABUSE’ UNDER § 198.006(1) IN THAT WHAT IS REQUIRED TO SHOW THAT A PERSON ACTED ‘KNOWINGLY’ IS THAT THERE MUST BE (1) ACTUAL INFLICTION OF EMOTIONAL INJURY OR HARM (2) AFFIRMATIVE EVIDENCE WITH RESPECT TO WHAT CONSTITUTES THE APPLICABLE STANDARD OF CARE AND (3) AFFIRMATIVE EVIDENCE THAT A PERSON HAS ACTED ‘KNOWINGLY’.

Cases:

Hearst v. Director of Revenue, 779 S.W.2d 557 (Mo. banc 1989)

Klein v. Missouri Department of Health and Senior Services, 226 S.W.3d 163, 164 (Mo banc 2007)

Oakes v. Missouri Department of Mental Health, 254 S.W.3d 153 (Mo. App. E.D. 2008).

Stone v. Missouri Department of Health and Senior Services, 2010 Mo. App. LEXIS

1054 (App. W.D. 2010)

Statutes:

Section 198.006 (1), RSMo.

Section 198.006(8), RSMo.

Section 198.070 (13), RSMo.

Section 298.006(1), RSMo.

Section 490.065, RSMo.

Section 660.315, RSMo.

Rules and Regulations:

19 CSR 30-88.010 (13) and (20)

II.

THE MISSOURI DEPARTMENT OF HEALTH AND SENIOR SERVICES ERRED IN FINDING THAT CATHERINE STONE SHOULD BE LISTED ON THE “EDL” BECAUSE THE DEPARTMENT VIOLATED STONE’S DUE PROCESS RIGHTS BY FAILING TO PROVIDE NOTICE OF THE ALLEGED VIOLATION OF 19 CSR 30-88.010; IN THAT DHSS NEVER ALLEGED VIOLATION OF 19 CSR 30-88.010 (13) AND (21) IN ITS ORIGINAL COMPLAINT AND SUCH FINDING EXCEEDS THE SCOPE OF THE PLEADINGS.

Cases:

Belton v. Board of Police Com’rs of Kansas City , 708 S.W.2d 131 (Mo. Banc 1986)

Moore, Jr. v. Board of Education of Fulton Public School No. 58, 836 S.W.2d 943 (Mo. 1992).

Statutes:

Section 198.006(1), RSMo.

Rules and Regulations:

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

Constitution:

Article I, Section 10

ARGUMENT

I.

THE MISSOURI DEPARTMENT OF HEALTH AND SENIOR SERVICES ERRED IN FINDING THAT CATHERINE STONE SHOULD BE LISTED ON THE “EDL” BECAUSE THE DEPARTMENT ERRONEOUSLY DECLARED AND APPLIED THE LAW WITH RESPECT TO WHAT CONSTITUTES ‘ABUSE’ UNDER § 198.006(1) IN THAT WHAT IS REQUIRED TO SHOW THAT A PERSON ACTED ‘KNOWINGLY’ IS THAT THERE MUST BE (1) ACTUAL INFLICTION OF EMOTIONAL INJURY OR HARM (2) AFFIRMATIVE EVIDENCE WITH RESPECT TO WHAT CONSTITUTES THE APPLICABLE STANDARD OF CARE AND (3) AFFIRMATIVE EVIDENCE THAT A PERSON HAS ACTED ‘KNOWINGLY’.

Standard of Review:

Whether the Department correctly interpreted and applied Section 198.006, RSMo, remains a question of law, which this Court is to independently determine. *Psychare Mgmt., Inc. v. Dept. of Social Services, Division of Medical Services*, 980 S.W.2d 311, 312 (Mo. Banc 1998). Review is de novo, and this Court has a duty to correct erroneous interpretations of law. *Miller v. Dunn*, 184 S.W.3d 122, 124-125 (Mo. App. E.D. 2006). The Department’s decision exceeds its statutory authority and the legal

analysis of the Department in determining that K.S. suffered an emotional harm is incorrect and the Department's decision should be overturned.

Further, the Department's decision is arbitrary and capricious and is not supported by a preponderance of substantial evidence on the record. No witness testified that K.S. suffered emotional harm or injury; therefore, such a finding exceeds the evidence before the Department and must be overruled.

The Department's Decision that Stone violated §198.006(1), RSMo, is contrary to the administrative record. Department's Decision states that "[A] determination of witness credibility by the tribunal is discretionary. When there is a direct conflict in the testimony of witnesses presented, a choice must be made between the conflicting testimony." *Harrington v. Smarr*, 844 S.W.2d 16, 19 (Mo. App., W.D. 1992). The Court "must look at the whole record in reviewing the agency's decision, not merely the evidence that supports its decision." *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 222(Mo. Banc 2003).

A. ABUSE

§198.006(1) defines abuse as,

*the infliction of physical, sexual, or **emotional** injury or **harm**.(emphasis added).*

The administrative record does not support a finding that Stone violated §198.006(1), specifically, that she caused any physical or emotional injury to resident K.S. "The

statutes do not define emotional harm. Nor is the phrase as used in Section 198.006 interpreted in our case law.” Stone v. Mo. Dept. of Health and Senior Services, 2010 Mo. App. LEXIS 1054, 7 (Mo. App.W.D. 2010). There was no finding of physical or sexual injury to K.S. so emotional harm is the only possible finding of injury. As a matter of fact, all agree that K.S. did not suffer any physical injury. (L.F. 10 and 13).

Additionally, the Department erroneously defines abuse as a violation of 19 CSR 30-88.010(13) and (20). Attempting to expand the definition of an already statutorily defined term exceeds the authority of the department. Hearst v. Director of Revenue, 779 S.W.2d 557 (En banc 1989). As the Honorable Richard Callahan ruled in the appeal of this matter in Cole County Circuit Court,

Section 198.006, RSMo, defines “abuse” as the infliction of physical, sexual, or emotional injury or harm”. Section 198.009, RSMo, provides rulemaking for the Department for purposes of ‘administering sections 198.003 to 198.186, RSMo”, not changing statutory definitions.

(L.F. 101). The regulation is inconsistent with the statutory definition of abuse and exceeds the authority delegated to the Department. (LF 97). A finding of abuse based upon violation of 19 CSR 30-88.010 (13) and (20) is erroneous, a question of law, exceeds the Department’s statutory authority, and must be overruled.

B. No Expert Testimony

There is absolutely no evidence that K.S. was harmed. There is no expert testimony that there was a change in her mental, psychiatric, physical or emotional wellbeing. Therefore, there can be no substantial evidence of harm as a result of the November 3, 2007 incident and no evidence to support placing Stone on the EDL. In Stone, the Western District Court of Appeals addresses DHSS's argument that expert testimony is not needed in this case. Specifically, the Court determined that DHSS's argument that Klein applies and imposes "[a] low threshold for establishing infliction of 'emotional injury or harm' such that a layperson's opinion could substantiate a finding the resident suffered 'emotional injury or harm'" is not appropriate. Stone at 7.

In Klein, the health care provider transported several nursing home residents from their nursing home to the hospital. Klein v. Missouri Department of Health and Senior Services, 226 S.W.3d 163. While in the parking lot of the hospital, Klein, a certified nurse's aid and certified medication technician was observed yelling at one of the residents and hitting the resident on the crown of her head. Id. The resident had not provoked Klein aside from trying to get away from Klein. Id. A witness telephoned DHSS and reported the incident. Id. DHSS investigated and placed Klein's name on the Section 198.070, RSMo, EDL for a period of one year. Id. The main issue in the Klein case was whether "[K]lein's conduct in **striking** A.V. (the resident) rose to the level of 'abuse,' which is defined as 'the infliction of physical, sexual, or emotional injury or harm,' under section 198.006, RSMo 2000." (emphasis added), Id. at 164. The Appellate

Court held that “[s]triking a nursing home resident necessarily involves physical injury or harm.” Id.

The Klein case is not applicable to the case before the court as there was no striking of the patient by Stone and no physical abuse found by the Department’s hearing officer. (L.F. 14). Most importantly, the Appellate court in Stone did not overturn Klein; rather, the court determined Klein did not apply because the Klien court “did not address whether expert testimony is required where the existence of harm or injury may not be within common experience of the fact finder.” Stone v. DHSS, 2010 Mo. App. LEXIS 1054, 8 (Mo. App. W.D. 2010).

The Missouri case law typically supports a finding of emotional harm through the reaction of the person. Stone v. DHSS, 2010 Mo. App. LEXIS 1054, 8 (Mo. App. W.D. 2010), See State ex rel. Dean v. Cunningham, 182 S.W.3d 561, 568 (Mo. banc 2006). Further, “emotional harm of an ordinary person is usually in the fact finder’s common experience.” Id., See Cunningham, 182 S.W.3d at 568.

However, K.S. cannot express herself in usual and ordinary ways. She is under constant psychiatric care and takes numerous medications for abnormal mental and emotional state. She is congenitally mentally and emotionally retarded and suffers from dementia. Section 198.006(8) defines dementia as “a general term for the loss of thinking, remembering, and reasoning so severe that it interferes with an individual’s daily functioning, and may cause symptoms that include changes in personality, mood, and

behavior.” Contrary to DHSS’s argument, K.S. is not an “ordinary” person where the fact finder can apply normal “layperson’s experiences” to determine whether K.S. was emotionally harm or injured. K.S. has extraordinary mental disabilities that require constant expert care and evaluation and it is not within the ability of a lay person to diagnose or determine if her mental thoughts or emotional well being were affected. As the Western District Court of Appeals held, “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, at 10.

As a matter of law “(w)hen the condition presented is a sophisticated **injury** that requires . . . highly scientific technique for diagnosis . . . the proof of **causation** is not within the realm of lay understanding nor-in the absence of **expert** opinion-is the finding of **causation** within the competency of the administrative tribunal.” Kuykendall v. Gates Rubber Co., 207 SW3d 694 (Mo. App. SD 2006) citing Knipp v. Nordyne, Inc., 969 S.W.2d 236, 240 (Mo.App. 1998); (quoting Silman, 891 S.W.2d at 175-76; see Irving v. Missouri State Treasurer, 35 S.W.3d 441, 445 (Mo.App. 2000). Missouri’s expert statute requires that,

In any civil action, if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or

education may testify thereto in the form of an opinion or otherwise.

Section 490.065, RSMo.

Missouri law requires that expert testimony be provided when the subject matter before the Court is such that a lay person cannot determine and evaluate complicated issues of causation based on their own common experience. *See also Kuykendall v. Gates Rubber Co.*, 207 SW3d 694 (Mo. App. SD 2006).

Expert testimony is absolutely necessary as a matter of law to diagnose any emotional injury to K.S. as her mental and emotional condition is so extraordinary that a lay person, even a hearing officer, cannot determine if injury occurred as a result of Stone's action without direct expert testimony on causation. Stone is a licensed practical nurse ("LPN") and was providing care to K.S. in her professional capacity as an LPN. (L.F. 228). Without that expert testimony, both the propriety of Stone's actions and the causation issue are left to pure speculation and the burden of proof was not met. It would be an abuse of discretion for a lay person to make a determination that "emotional" harm occurred without expert testimony on the issue under these very unusual and unnatural circumstances.

There is no evidence in the record to support that K.S. experienced emotional harm and distress on November 3, 2007 as a result of Stone's actions. The Department's own investigator and witness Mary Garvin states, "I don't believe there was any harm"

relating to Stone's actions toward K.S. (L.F. 196). The DON Joy Gunter testified that K.S. did not have any injuries from the incident nor did K.S. remember the incident. (L.F. 203, 218). Even Ms. Delinger stated K.S. did not have any injuries (L.F. 193). Ms. Foster was the only testifying witness in the room the whole time that Stone was in the dining room with K.S. and attempting to administer medications. Ms. Delinger is not a qualified healthcare provider (kitchen worker), and she was not in the dining room at the time of the alleged incident. Additionally, Ms. Delinger had a disagreement with Stone the night before about providing food to a diabetic patient and Stone had reported Ms. Delinger's conduct to the administration. Finally, Ms. Delinger was not in the dining room at the time of the incident. She was in the kitchen which is physically separated by a wall. Ms. Delinger came into the dining room after the medication refusal and did not see the interaction before that time.

The Department's Decision is contrary to Ms. Foster's testimony about Stone's actions in administering K.S. her medication on November 3, 2007. The Department's Finding of Fact states that Stone "tried to 'force' the resident to take her medication." (L.F. 10). This is contrary to Ms. Foster's testimony as she never stated that Stone "forced" K.S. to take her medication. (L.F. 208 – 215). Rather, Stone was attempting to administer medication to a known combative, uncooperative, incompetent resident who then attacked Stone at the time. Stone followed the care plan and after attempting to administer K.S. the medication and defending herself from K.S.'s assault, requested that K.S. be removed from the dining room and returned to her room. The

Department's Decision to place Stone's name on the EDL is arbitrary and capricious as it is not supported by the evidence; therefore, the decision should be overruled.

On the evening of the incident, Stone testified that she was attempting to administer K.S.'s medications.(L.F. 232). Stone testified that she had the assistance of two other staff members in administering K.S.'s medication because K.S. was repeatedly hitting Stone with her fist.(L.F. 233 and 234). After attempting to administer said medications, pursuant to K.S.'s care plan, Stone requested that K.S. be returned to her room to calm down.(L.F. 234). K.S. had frequent outbursts and returning her to her room to calm down was general practice. Without evidence of some kind of harm, there can be no violation of the statute and, therefore, the Department cannot place Stone on the EDL. The Department's decision is not supported by the record or law and should be overturned.

The Department determined that emotional harm had occurred to K.S. but the finding was not based on any expert testimony or witness testimony that affirmatively stated that K.S. suffered emotional harm let alone any testimony to a reasonable degree of medical certainty on the issue of causation. The administrative hearing record does not support a finding that K.S. experienced emotional harm and distress because of K.S.'s "elevated yelling and voiced refusal; and her spitting and attempt to fight off the Petitioner[Stone] and CNA Foster".(L.F. 14). The Department's finding that "Stovall's response, her elevated yelling and voice refusal" demonstrates that she had emotional harm is contrary to the evidence and not supported by the administrative record. (L.F.

14). If anything, K.S. was acting "normally" for her. K.S. was known to be combative and to be moody as a routine part of her everyday interaction with others.(L.F.10). She frequently acted out when staff attempted to give her medically necessary medications and reacted with verbal outbursts and hitting. She lacked any understanding of the medical need for the treatment and her reaction, while in an ordinary individual could be seen as a "refusal", KS was not capable of that type of decision making. The behavior identified in the Department's Decision as evidence of harm is the very same behavior that K.S. exhibits regularly without provocation and without a causative factor, except her congenital abnormal mental state. The finding of emotional injury in this case under these unique circumstances is simply a finding unsupported by the facts or evidence and beyond the hearing officer's expertise and the Department's decision should be overruled.

C. No breach of the standard of care by Stone

The Department's decision should be overruled because it 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. The Department's Decision cites to the Klein case which holds that "Section 198.006, RSMo, 'does not require a physical manifestation of injury or harm.'". The Klein case is previously summarized in this brief and the Stone court appropriately held that Klein does not apply in Stone as Klein did not address expert testimony which is also necessary for standard of care.

However, the Missouri Court of Appeals decision in Oakes v. Missouri Department of Mental Health is on point with the facts involving Stone's alleged violation of Section 198.006. 254 S.W.3d 153 (Mo. App. E.D. 2008). Specifically, in Oakes, the defendant health care provider was placed on the Department of Mental Health's (DMH) disqualification Registry pursuant to Section 630.170, RSMo, and 9 CSR 10-5.200(11), mental health statutes. Id. at 155. In the case, Oakes was the health care provider who worked at an Independent Supported Living facility where a fifteen year old female patient was a resident. Id. at 155. This resident had a history of physically assaulting care providers and "had physically assaulted Oakes five to six times". Id. On the particular day at issue, the resident C.K. had left the facility and had walked to the center of the street and began throwing rocks at staff that had followed her. Id. C.K. attacked Oakes by grabbing her hair, biting her right shoulder, and pulling Oakes' hair, and spit into Oakes' face. "Instinctively, Oakes spit back." Id. at 155. "C.K. suffered no injuries during her assault of Oakes or the police officer, Oakes, however, suffered a bleeding wound to her right shoulder, softball-sized bruise on her shin and deep scratch on her forearm." Id.

In Oakes at the hearing before the DMH's hearing officer, no evidence was presented identifying "what level of force that was necessary" in the situation. Id. The Court found that there was no defined standard for the healthcare provider's conduct and, in fact, the commissioner used her own standard which was arbitrary, untrained and, therefore, unreasonable. In Oakes, the defendant healthcare provider was protecting

herself (which is identical to the present case) and there was no physical harm to the patient which is identical to the present case.

Klein is distinguishable from the facts before the court as Stone did not strike or physically abuse this patient even though K.S. was slapping and hitting Stone.(L.F. 210 and 230 – 231). Any actions taken by Stone to manage or control K.S.'s body were defensive and an attempt to protect K.S. from injuring herself or injuring Stone. In Klein, the defendant healthcare provider initiated the confrontation and the physical abuse with no provocation by the patient at all. In contrast, K.S. initiated the assaultive behavior against Stone by slapping and hitting in response to being offered needed medically necessary medication and, in fact, did hurt Stone's shoulder. This is directly opposite of the facts in Klein where the actions by the healthcare provider were unprovoked. K.S. initiated the assault on Stone which resulted in injuring Stone's shoulder such that she has lost full range of motion in her shoulder and at no time did Stone react by injuring or retaliating against K.S.

In Oakes, because there was no expert testimony and no indication of any change whatsoever in the patient then there was no evidence of harm. Like Oakes, there was no evidence of standard of care of the method or manner used by the licensed healthcare provider Stone, and, therefore, no way for the hearing officer to judge Stone's actions because there was no expert testimony to establish the applicable standard. DHSS did not produce any evidence as to the standard of care that Stone breached when providing

care to K.S., therefore, DHSS's finding that Stone abused K.S. is not supported by the evidence in the record and arbitrary and capricious and must be overruled.

D. The Department fails to prove that Stone acted "Knowingly"

The Department has to prove by a preponderance of the evidence that Stone committed one or more of the three types of abuse listed in Section 198.006(1), RSMo. – either physical, emotional, and/or sexual. To prove emotional harm as was charged by the Department, it was required to prove that Stone's acts and conduct actually inflicted actual harm and /or injury. Such was not the case. Further, the Department was required to prove and establish, even if Stone had engaged in acts of abuse, that she acted "knowingly" or recklessly". Knowingly is defined as "the person's conduct when a reasonable person should be aware of the result caused by his or her conduct." Section 198.070(13), RSMo. "Recklessly" is defined as "when a person consciously disregards a substantial and unjustifiable risk that the person's conduct will result in serious physical injury and such disregard constitutes a gross deviation from the standard of care that a reasonable person would exercise in the situation." Section 198.070(13), RSMo. The Department determined that Stone acted "knowingly".

There is no evidence that Stone's action of offering the medications was harmful, but it elicited the combative behavior that was common for this patient. Clearly this behavior was without provocation or cause and certainly not caused by Stone. When the refusal occurred then the patient physically attacked and harmed Stone. There was no

physical or emotional harm to K.S. and no action by Stone caused any known emotional distress or harm to this already combative patient. In fact, the opposite occurred. Stone backed away; the patient calmed down, eventually ate her dinner and returned to her room without a single documented emotional injury, upset or harm. There was no change in her behavior from her “usual” behavior which was so far outside normal boundaries that a lay person, such as this hearing officer, could not make a determination without expert testimony to a reasonable degree of medical certainty that any “emotional harm” occurred because of this incident. There was no record of any change in her medications, in her psychiatric visits, in her need for therapy or any other change made to address any sort of harm that allegedly occurred. It was literally as if nothing had happened. The department erroneously declared and applied the law as it is not supported by the record and its decision must be overruled.

There is no evidence in the record that Stone acted “knowingly” in a manner consistent with abuse. Stone exercised professional judgment in providing care to K.S. and there was no standard of care testimony to the contrary. In order to prevail, the Department was required to prove with substantial evidence via expert testimony that Stone actually acted outside the standard of care for an LPN and inflicted emotional injury. Without expert testimony on the causative link between Stone's reactions and any alleged injury the decision is based on mere speculation, conjecture and unsupported surmise. The Department determined that Stone had acted “knowingly” in her efforts to harm K.S. Stone was giving medically ordered and necessary medications and it is

ridiculous to find by performing that act Stone “knowingly” intended to inflict harm. Stone would have been guilty of neglect if she had failed to give the medication or not made a reasonable attempt to complete her assigned and medically necessary task. A lay person could not judge whether her actions were in fact reasonable without hearing expert testimony on the standard of care for an LPN in these circumstances. Stone was required by her position to treat K.S. and give the medication. K.S. could not reasonably refuse because she was not mentally competent to refuse. Stone exercised her professional nursing judgment in her approach to her duty in providing K.S. her medication and no evidence to the contrary exists in the record. There is absolutely no evidence in the record that Stone's approach or actions were hurtful in any manner. The contrary is true in that the medication was medically necessary for K.S.’s well being. K.S. routinely attempted to physically refuse treatment including medication administration by physically lashing out at her caregivers. The health care providers were necessarily required to overcome K.S.'s resistance by exercising professional judgment in the manner, method and persistence used to get K.S. to comply. The hearing officer does not have the necessary expertise to substitute his judgment for Stone's in these unusual circumstances. The evidence and the record does not support the finding of abuse and the law does not support placing Stone on the EDL.

E. The Western District Court of Appeals Decision should be upheld

The recent decision by the Western District Court of Appeals finding that DHSS’s decision to place Stone’s name on the EDL was not supported by competent and

substantial evidence upon the whole record and was otherwise authorized by law should be upheld. The Stone decision is not contrary to public policy or Missouri law as appellant DHSS would like this court to believe. Specifically, the Western District Court of Appeals made its ruling on the very specific and unique set of facts that were present in Stone. The appellate Court did not overrule Klein; rather, the court distinguished the facts in Klein which involved “abuse” of physical injury or harm from the facts in Stone which involved emotional injury or harm. The Stone court also distinguished Klein from Stone because Klein does not address whether expert testimony is “required where the existence of harm or injury may not be within the common experience of the fact-finder.” Stone at 8.

Additionally, the Stone court did not overrule Missouri law in regards to requiring expert testimony in all cases involving abuse based on emotional injury or harm. The Court evaluated the specific and unique set of facts in this case and made it’s decision based upon those facts. Specifically, the alleged victim in this case, K.S., was mentally disabled and suffered from dementia. The determination of whether she suffered emotional injury or harm exceeded the common experiences of a layperson as K.S. is not similarly situated to a normal ordinary person. Therefore, expert testimony was necessary to determine whether K.S. suffered any emotional injury from the encounter with Stone and the evidence in the record does not support any such finding. The Court did not establish a new burden of proof in EDL cases involving emotional harm in the

ordinary patient or person, nor did the court make a blanket requirement that all alleged emotional abuse findings require expert testimony. Stone at 10.

The Stone decision neither imposes a new burden or places a blanket requirement on DHSS to provide expert testimony in every abuse case to determine whether a health care provider's name should be placed on the EDL. The practical effect of the Stone decision for future DHSS decisions to place a healthcare provider's name on the EDL will only require expert testimony when trying to prove emotional injury or harm with similarly situated residents who are extraordinarily mentally disabled and suffer from severe dementia. Requiring expert testimony to determine whether harm occurred is not unduly burdensome on DHSS when balanced with the fact that placing a healthcare provider's name on the EDL takes away that provider's livelihood and means of making a living. DON Gunter testified that K.S. was not injured and did not even recall the event involving Stone. (L.F. 203). Further, K.S. is a resident of a long term care facility which has a medical director who would have been accessible to provide an opinion that K.S. suffered some emotional harm. K.S. also has a psychiatrist that manages her mental illness and medications. That individual could have easily been consulted to determine if K.S. in fact suffered emotional harm from the encounter. Therefore, the agency's decision is not supported by the evidence as a whole and must be overturned.

II.

**THE MISSOURI DEPARTMENT OF HEALTH AND SENIOR SERVICES
ERRED IN FINDING THAT CATHERINE STONE SHOULD BE LISTED ON
THE “EDL” BECAUSE THE DEPARTMENT VIOLATED STONE’S DUE
PROCESS RIGHTS BY FAILING TO PROVIDE NOTICE OF VIOLATION OF
19 CSR 30-88.010; IN THAT DHSS NEVER ALLEGED VIOLATION OF 19 CSR
30-88.010 (13) AND (21) IN ITS ORIGINAL COMPLAINT AND EXCEEDS THE
SCOPE OF THE PLEADINGS.**

Standard of Review:

The Department has the burden of proof. Whether the Department provided notice to Respondent of an alleged violation of 19 CSR 30-88.010 is a question of law, which this Court is to independently determine. *Psychcare Mgmt., Inc. V. dept. of Social Services, Division of Medcial Services*, 980 S.W. 2d 311 ,312 (Mo. Banc 1998); Missouri State Constitution, Article I, Section 10. Further finding a violation of a regulation never cited in the original complaint is arbitrary and capricious and unreasonable by the Department to now find violation of 19 CSR 30-88.010 without providing proper notice and due process. Failure to provide Stone an opportunity to respond to an allegation of violation of 19 CSR 30-88.010 violates her constitutional due process rights and the department’s decision is arbitrary and capricious and should be overruled.

Argument

The 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). "In order to invoke the mandates of procedural due process, one must have been deprived of a property interest recognized and protected by the Due Process Clauses." Moore, Jr. v. Board of Education of Fulton Public School No. 58, 836 S.W.2d 943, 947 (Mo. 1992) citing Belton v. Board of Police Com'rs of Kansas City, 708 S.W.2d 131 (Mo. Banc 1986). Stone has a property interest in her license as an LPN and continued employment with that license protected by both procedural and substantive due process. Moore at 947. "The Due Process Clause requires that in order to deprive a person of a property interest, he must receive notice and an opportunity for a hearing appropriate to the nature of the case." Moore at 947, citing Belton, 708 S.W.2d at 137.

The Department's Decision holding that Stone violated 19 CSR 30-88.010 (13) and (21) in regards to K.S. breached Stone's due process rights as she was not put on notice of these alleged violations and, therefore, did not have an opportunity to respond. Stone has a property right in her employment as an LPN and placement on the EDL would limit if not make it impossible for her to be employed as a licensed practical nurse in Missouri or any other state. Receipt of the "Notice of Violation" letter was the first time that Stone became aware that her name had been placed on the EDL. The "Notice of Violation" letter cited to Section 198.070, RSMo, which requires persons who have "recklessly or knowingly abused or neglected a resident" be placed on the EDL.(L.F.

124). The “Notice of Violation” letter did not reference or cite to 19 CSR 30-88.010 (13) and (21) nor did the letter identify what abuse Stone was found to have inflicted. (L.F. 124).

The first time Stone became aware of the allegation of violating 19 CSR 30-88.010 (13) and (21) was in the Department’s decision. No due process with prior notice was afforded to Stone to address these subsections in the administrative process. The Department’s decision that Stone violated 19 CSR 30-88.010 (13) and (21) without providing prior notice deprived Stone of an opportunity to appropriately defend herself against these allegations and was completely arbitrary and capricious. The Department’s decision to identify the reason for a finding of abuse without providing prior notice before the hearing denied Stone of due process, exceeded the scope of the Department’s authority, and exceeded the scope of the pleadings and the Decision should be overturned.

CONCLUSION

For the foregoing reasons, Katherine 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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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 December 22, 2010, she served two (2) copies of the foregoing SUBSTITUTE BRIEF PER SUPREME COURT RULE 84.05(e) and one (1) copy of the APPENDIX 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 brief complies with the Supreme Rule 84.06(b) and contains 7,099 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 _____, 2010
here in my office in Columbia, Missouri.

Notary Public

(seal)

My commission expires: _____