

IN THE SUPREME COURT OF IOWA

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ROMOKE OLUTUNDE, )  
 )  
 Petitioner-Appellant, )  
 )  
 v. ) S.C. CASE NO. 17-1650  
 )  
 IOWA DEPT. OF HUMAN SERVICES, )  
 CHARLES M. PALMER, DIRECTOR )  
 )  
 Respondents-Appellees. )

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APPEAL FROM  
THE IOWA DISTRICT COURT FOR LINN COUNTY  
THE HONORABLE PATRICK R. GRADY, JUDGE

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APPELLANT'S BRIEF AND  
REQUEST FOR ORAL ARGUMENT

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## Statement of Issues Presented for Review

### 1. Standard of review.

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*Mosher v. Dep't of Inspections & Appeals, Health Facilities Div.*, 671 N.W.2d 501  
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*Stone Container Corp. v. Castle*, 657 N.W.2d 485, 488 (Iowa 2003)

Iowa Code § 17A (2018)

### 2. The district court erred by finding substantial evidence existed in the administrative record to support the Department's decision that Romoke committed dependent adult abuse against J.N. because the Department based their decision upon an irrational, illogical, or wholly unjustifiable application of law to fact, ultimately prejudicing the substantial rights of Romoke.

*Dunlavey v. Economy Fire & Casualty Co.*, 526 N.W.2d 845, 849 (Iowa 1995)

*Mosher v. Dep't of Inspections & Appeals, Health Facilities Div.*, 671 N.W.2d 501  
(Iowa 2003)

*University of Iowa Hospitals and Clinics v. Waters*, 674 N.W.2d 92, 95 (Iowa 2004)

Iowa Admin. Code r. 441-176.3 (2018)

Iowa Code § 17A (2018)

Iowa Code § 235B (2018)

- A. The Department incorrectly applied Iowa Administrative Code rule 441-176.3 and Iowa Code section 235B to the facts of this case.**

*Mosher v. Dep't of Inspections & Appeals, Health Facilities Div.*, 671 N.W.2d 501  
(Iowa 2003)

Iowa Admin. Code r. 441-176 (2018)

Iowa Code § 17A (2018)

Iowa Code § 235B (2018)

- B. The Department incorrectly applied Iowa Administrative Code rule 441-176.2 to the facts of this case.**

Iowa Admin. Code r. 441-176 (2018)

- 3. The District Court erred by agreeing with the Department's interpretation of the *Mosher* case because the Department's interpretation of the *Mosher* case was incorrect, and based their finding of dependent adult abuse on the Department's interpretation.**

*Mosher v. Dep't of Inspections & Appeals, Health Facilities Div.*, 671 N.W.2d 501  
(Iowa 2003)

Iowa Code § 235B (2018)

## **Routing Statement**

This case should be transferred to the Court of Appeals because no basis exists for the Supreme Court to retain this case for appellate review. *See* Iowa R. App. P. 6.1101. Further, this case should be transferred to the Court of Appeals because it involves questions that can be resolved by applying existing legal principles. *See* R. 6.1101(3)(b).

## **Statement of the Case**

### **Nature of the case**

This case is an appeal from the Iowa District Court for Linn County regarding judicial review of a Department of Human Services (hereinafter “Department”) agency action on a founded dependent adult abuse report for Romoke Olutunde (hereinafter “Romoke”) under Iowa Code Chapter 17A. Romoke appeals the decision of the district court which affirmed the decision of the Department regarding said report. This appeal is from a final order. Iowa R. App. P. 6.103(1) (2018).

### **Course of proceedings and disposition in district court**

The Department issued a Dependent Adult Abuse Report (“Report”) against Romoke on July 9, 2014. (App. at 1429-1455). All Ages Care Services, LLC (“All Ages Care”) is the organization to which Romoke and Soji Olutunde (hereinafter “Soji”) were associated. All Ages Care provided dependent adult

care services to individuals. J.N., age 56, is the dependent adult listed in the Report. (App. at 1429). The Report listed as founded an alleged denial of critical care, specifically physical care, of J.N. (App. at 1429). Roberta Fuchs prepared the Report which supervisor Amy Howell approved on July 16, 2014. (App. at 1430).

On July 16, 2014, the Department sent notice in the form of an Adult Protective Notification to Romoke that indicated Romoke was the alleged person responsible for dependent adult abuse of J.N. (App. at 1427-1428). The notification further indicated the allegation of denial of critical care was founded against Romoke. (*Id.*)

On July 22, 2014, Romoke appealed the Department's decision by providing proper notice. (App. at 1422-1426). The Iowa Department of Human Services Appeals Section ("Appeals Section") received Romoke's notice of appeal on July 28, 2014. (App. at 1422). The Appeals Section acknowledged receipt of Romoke's appeal on August 1, 2014. (App. at 1420-1421).

The Iowa Department of Inspections and Appeals Division of Administrative Hearings ("IDI&A") sent notice of a telephonic hearing to Romoke on August 5, 2014. (App. at 1418-1419). The IDI&A set the

telephonic hearing date for October 3, 2014, at 9:00 a.m. (*Id.*) Thereafter, the IDI&A issued a continuance of the telephonic hearing. (App. at 1415-1417).

The IDI&A administrative law judge (“ALJ”), Barbara Tabscott, consolidated three (3) appeals<sup>1</sup> into one telephone status conference set for October 3, 2014, at 8:30 a.m. (App. at 1415-1417).

On October 6, 2014, the ALJ set a hearing for the three (3) consolidated appeals for December 22-23, 2014, at 9:00 a.m. each day. (App. at 1413-1414). The Department moved to sever appeal number 14006546 from the consolidated appeals of 15000724 (on Founded Department Report No. 84153 on Soji dated July 8, 2014, regarding denial of physical care) and 15000727 (on Department Report No. 86143 on Romoke dated July 9, 2014 regarding denial of physical care). (App. at 1410-1412).

The ALJ granted the Department’s motion to sever. The ALJ then ordered appeals 15000724 and 15000727 proceed on the dates of December 22, 2014, and December 23, 2014, respectively, beginning at 9:00 a.m. each day. The ALJ issued her Order on the December 18, 2014. (App. at 1410-1412).

On Monday, December 22 and Tuesday, December 23, 2014, the parties gave several hours of testimony on the matter. (App at 323 (Tr. 1: all), 428 (Tr.

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<sup>1</sup> Two of the three appeals were related to Soji and are *not* at issue in this appeal.

106: all)). The parties agreed that further testimony and introduction of additional exhibits was necessary. The parties further agreed to a continuance to allow time for submission of additional documents. The ALJ ordered the Department's attorney to submit the documents identified to her by Wednesday, January 14, 2015 by 5:00 p.m. (App. at 520 (Tr. 198:11-13); App. at 320-322). The December 23, 2014 hearing was scheduled to reconvene via telephone at 10:00 a.m., on Tuesday, January 27, 2015. (App. at 520 (Tr. 198:1-10); App. at 320-322).

After several issues arose between the parties and the ALJ regarding additional exhibits and testimony related thereto, the telephonic hearing scheduled for January 27, 2015, at 10:00 a.m., was ordered by the ALJ to convene in person on Tuesday, March 31, 2015, at 9:30 a.m. (App. at 271-272, 316-317 (Tr. 245:2-246:10)).

Following additional testimony and introduction of exhibits from the parties at the Tuesday, March 31, 2015 hearing, the ALJ submitted a Proposed Decision. (App. at 62-240; 44-58). The issue that the ALJ identified with the Department's Report was whether the "Department correctly classified reported incidents of dependent adult abuse as "Founded" naming the Appellants as the perpetrators of abuse by an act or acts of denial of critical care/lack of physical care." Ultimately, the ALJ reversed the Department's Report's "Founded"

determinations as to Romoke in its Proposed Decision and were found to be incorrect by the ALJ. (App. at 58).

Specifically, within the Proposed Decision, the ALJ found that the “Department’s decision does not comport with the statute or the Iowa Supreme Court’s interpretation of the statute.” (App. at 55). The ALJ then ordered in her Proposed Decision on July 30, 2015, that the Department’s decision be reversed and the Department issue reports changing its “Founded” determinations to “Unfounded.” (App. at 58).

On August 6, 2015, the Department issued a Memorandum to the Appeals Advisory Committee and requested review of the ALJ’s Proposed Decision. (App. at 41-43). The Appeals Advisory Committee received said Memorandum from the Department on August 7, 2015. (*Id.*) On August 7, 2015, the Appeals Advisory Committee requested that the Proposed Decision and the matter be reviewed. (App. at 40). The representative for the Appeals Advisory Committee, Tracey Parker, signed the Appeals Advisory Committee sign-off slip on August 7, 2015. (*Id.*)

The Appeals Advisory Committee submitted a review request to the Appeals Section on August 7, 2015. Charles M. Palmer, the director of the Department at the time, wrote a letter, dated August 10, 2015, to Romoke

indicating that he would issue a written Final Decision to her and all parties to the appeal. (App. at 39).

Counsel for Soji and Romoke submitted a resistance to the request for review on August 20, 2015. (App. at 37-38). On August 21, 2015, Rhonda Johnson, Appeals Liaison for the Appeals Section, responded to Romoke indicating receipt of her attorney's response to the AAC's request for review. (App. at 36). Ms. Johnson then indicated to Romoke that a final decision would be issued by the Director of the Department in appeal number 15000727. (*Id.*)

On March 3, 2016, a Final Decision was issued by the Director of the Iowa Department of Human Services, Charles M. Palmer. (App. at 31-35). Director Palmer reversed the decision of the ALJ and affirmed the action of the Department classifying the Report of dependent adult abuse as "Founded" against Romoke. (*Id.*)

Within the Director's Final Decision, Romoke was instructed to file within thirty days of the date of the Final Decision in the District Court in Polk County for judicial review of the Department Director's decision. (App. at 35). On April 5, 2016, Romoke electronically filed a Petition for Judicial Review of the Department's Final Decision in the Iowa District Court for Linn County pursuant to Iowa Code Section 17A.19. (App. at 6-7).

The Department filed a Motion to Dismiss Romoke's Petition on April 18, 2016. (App. at 8-10). The Department moved that the Petition be dismissed for lack of subject matter jurisdiction due to an allegation of failure to file within the thirty (30) days of final agency action required by Iowa Code Section 17A.19(3). (*Id.*) On April 20, 2016, Romoke submitted a resistance to the Department's Motion to Dismiss. (App. at 11-14). The Department submitted an Unresisted Motion for Enlargement of Time to submit and to seal the Administrative Record on May 2, 2016. (App. at 15-17). The Department requested forty-five (45) days from the ruling on the Motion to Dismiss to accomplish submission of the Administrative Record to the District Court and to seal the Administrative Record following submission to the District Court. (*Id.*)

On May 2, 2016, the Court granted the Department's Motion for Enlargement of Time to submit and seal the Administrative Record and provided the Department forty-five (45) days from the Court's ruling on the Motion to Dismiss to do so. (App. at 18-19). On June 23, 2016, the Court denied the Department's Motion to Dismiss and directed the Department to file an answer within ten (10) days of its ruling. (App. at 20-23).

The Department filed its Answer on July 22, 2016. (App. at 24-25). Romoke moved to enlarge the time required to file its Brief, which was unresisted

by the Department. (App. at 1457-1458). The Court granted Petitioner's application and granted an additional fifteen (15) days to file its Brief. (App. at 1459-1460).

On August 1, 2016, the Department submitted an unresisted motion to enlarge time and adjust briefing schedule to allow an additional ten (10) days to file their reply brief. (App. at 1461-1462). The Court ordered the time be enlarged, the Respondent be allowed accommodation, and Petitioner be allowed a ten (10) day extension beyond the Respondent's briefing timeline to submit their reply brief. (App. at 1463-1464).

On August 15, 2016 and August 17, 2016, the parties alerted the District Court that a technical error had occurred with the Iowa Department of Inspection and Appeals electronic record. (App. at 1465-1466, 1467-1468). A half-day portion of the electronically-recorded administrative proceedings was lost. Both Romoke and the Department requested additional time to evaluate the error in transcription. (*Id.*) The Court ordered on August 29, 2016, that additional time was granted to the Petitioner for the technical difficulties related to the record, and the Department's deadline was extended accordingly. (App. at 1469-1470).

The Department then filed an unresisted Motion to Remand back to the Department of Inspections and Appeals to allow the ALJ to prepare a statement

of the missing testimony as presented to the Court. (App. at 1471-1472). The Department submitted their unresisted Motion to Remand on September 30, 2016. (*Id.*) The Court ordered, on October 5, 2016, the case be remanded back to the Department so that the ALJ could provide a statement to recreate the missing portion of the record. (App. at 1473-1474). The ALJ then provided said statement of the missing testimony for the record. (App. at 1475-1488).

On April 13, 2017, the Department submitted an un-resisted application to supplement the administrative record and for a revised briefing schedule following receipt of the ALJ's statement as to the missing testimony from the electronic record. (App. at 1489-1491). The Department then supplemented the District Court's confidential record with the ALJ's statement on the missing electronic testimony with the permission of the Petitioner, as identified in the Department's un-resisted application to supplement the administrative record and for revised briefing schedule. (*Id.*) Also on April 13, 2017, the Court ordered a revised briefing schedule after remand. (App. at 1492-1493).

On May 26, 2017, Romoke submitted her brief to the Iowa District Court for Linn County. (App. at 1494-1507). On June 30, 2017, the Department submitted an Answer to Romoke's Petition. (App. at 1508-1509). On July 14, 2017, Romoke filed a Motion for Summary Judgment indicating the Respondent

and the Department failed to comply with court orders. (App. at 1510-1511). The Court responded to Romoke's Motion for Summary Judgment and indicated to the parties that if no resistance was filed within fifteen (15) days from the time Romoke filed her motion that summary judgment may be granted without further notice of the parties. (App. at 1512-1513).

The Department filed its brief on July 14, 2017. (App. at 1514-1526). Shortly thereafter, on July 14, 2017, Romoke filed a Motion to Strike Respondent's brief due to untimely filing. (App. at 1527-1528). On July 20, 2017, the Department submitted a resistance to Romoke's Motion for Summary Judgment and Motion to Strike. (App. at 1529-1534). In said resistance, the Department conceded that its briefs in both cases, one in Romoke's case and one in Soji's case, were due on June 30, 2017. (*Id.*) The Department further conceded that the Department prepared the proposed order that identified the briefing schedule for the Court's approval. (*Id.*)

The Respondent indicated they attempted to file both briefs, one for Soji's case and the other for Romoke's case, on June 30, 2017. (App. at 1508-1509). The PDF document filed in Romoke's case on June 30, 2017 was not a brief. (*Id.*) The document filed in Romoke's case on June 30, 2017 was a refile of the Respondent's Answer. (*Id.*)

The Department stated in their Resistance that the Department “apologizes for the error and requests an enlargement of time be granted to accept the late brief. The time frame for filing the brief was not jurisdictional.” (App. at 1530). The Department further requested in their Resistance that its Motion for Enlargement of Time be granted, its brief submitted on July 14, 2017 be accepted as timely, and that the Motion for Summary Judgment submitted by Romoke and Motion to Strike submitted by Romoke be denied. (App. at 1531).

On August 4, 2017, the Court concluded that Romoke’s Motion for Summary Judgment and Romoke’s Motion to Strike were denied and the Court also indicated the briefs filed by both parties would be considered by the Court. (App. at 1535-1536). The Court further advised on August 4, 2017 that a written ruling would be issued as soon as practical without oral argument. (*Id.*)

On September 20, 2017, the Iowa District Court for Linn County issued a ruling on Romoke’s Petition for Judicial Review. (App. at 1537-1555). The Court denied Romoke’s request for relief on judicial review and affirmed the Department’s Final Decision. (*Id.*) Romoke timely appealed thereafter to this Court for additional review. (App. at 1556).

## **Statement of the Facts**

The statement of the facts as indicated herein were first found by the ALJ in her Proposed Decision and adopted as written by the director of the

Department in his Final Decision. The facts listed herein are not all inclusive of every fact cited by the ALJ in her Proposed Decision but refer to relevant facts of the ALJ's Proposed Decision for purposes of this appeal and also cite to the transcript associated with the telephonic and in-person proceedings referenced above.

The alleged victim of dependent adult abuse in this case was a 56-year old female at the time of the Report. (App. at 1429). The initials of the alleged victim are J.N. (*Id.*) J.N. had been diagnosed with severe mental retardation, dementia, depression, Down Syndrome, and has a history of psychosis and seizures. (App. at 45). J.N. was described by her brother as "Child-like," and was unable to read, write, or handle her own medications. (*Id.*)

In December 2013, J.N. moved into a residence at 6051 Eastview Ave., SW, Cedar Rapids, Iowa. (App. at 33, 45). Soji and Romoke owned and operated this residence via All Ages Care Services, LLC.<sup>2</sup> (App. at 45.) When J.N. moved into the residence, the staff at 6051 Eastview Ave., SW, knew they

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<sup>2</sup> According to testimony by Soji, All Ages Care was a sole proprietorship owned by Romoke; Soji was the administrator of All Ages Care. (App. at 432-433 (Tr. 110:24-111:25)).

were expected to locate a new family physician for J.N. and ensure that her prescriptions were filled. (*Id.*)

Dr. Timothy Volk saw J.N. once on March 18, 2014 for a general medical visit to help establish care, examine medical issues, and to help with her prescriptions and medications. (App. at 372 (Tr. 50:8-24)). Dr. Volk gave J.A. two weeks' worth of refills at the appointment – he was trying to bridge the medication gap between running out of medication and getting J.A. into a psychiatrist or a neurologist. (App. at 381 (Tr. 59:13-19)). Dr. Volk did not see J.A. again after the March 18, 2014 office visit. (App. at 372 (Tr. 50:22-24)).

Phenobarbital was prescribed for J.N. to control her seizures; this medication was to be taken three (3) times a day. (App. at 45). Specifically, J.N. was to take Phenobarbital in the morning, afternoon, and evening pursuant to doctor's orders. (*Id.*) At the time of the administrative hearing in front of the ALJ, Dr. Volk identified potential side effects of failure to take Phenobarbital regularly (if prescribed) could cause an individual to suffer convulsions, hallucinations, agitation, and irritability. (App. at 45, 377-378 (Tr. 55:15-56:9)).

J.N. was also prescribed Omeprazole for controlling her acid reflux and was to take Omeprazole at 3:00 p.m. daily. (App. at 45, 1104). The ALJ's findings of fact reflected that All Ages Care administered Omeprazole to J.N. at 2:00 p.m. daily. (App. at 45.) According to the Proposed Decision's findings

of fact, if J.N. did not take the Omeprazole as prescribed, “she was at risk for weight loss, muscle tremors and sweating (Volk Testimony).” (App. at 45-46). This fact as stated by the ALJ was not entirely correct. Dr. Volk testified that the only side effect J.N. would suffer if she did not receive her Omeprazole on time was that she could possibly lose weight. (See App. at 376-377 (Tr. 54:9-55:11)).

As a rule, J.N. was not to administer or even carry her own medications; All Ages Care staff was aware of this fact. (App. at 46, 1152, 1251, 1256). Specifically, the ALJ found that “staff administers all medications to her [J.N.] because she is not able to tell time and would not know what medications to take and when to take them.” (App. at 46).

The following incident reports were described in the findings of fact by the ALJ prior to J.N.’s attendance at REM:

1. On January 11, 2014, J.N.’s Case Manager Angela Albers received an incident report from All Ages Care indicating that J.N. was hospitalized with diagnosis of Colitis and Pneumonia;
2. An incident report on January 31, 2014 indicated that J.N. had blacked out; and
3. An incident report indicated that on February 24, 2014, J.N. was transported by ambulance to the hospital after throwing up and shaking badly.

(App. at 46).

On March 6, 2014, a day program operated by REM Iowa-Developmental Services, admitted J.N. to their program. (App. at 46). The REM program

was located in Hiawatha, Iowa. (*Id.*) An REM program admission meeting was held on March 6, 2014 for J.N. (*Id.*) REM program manager Stephanie Bawek, Case Manager Angela Albers, and All Ages Care representative Jennifer Rasmussen were in attendance at said REM program admission meeting. (*Id.*)

During the admission meeting, Ms. Bawek, Ms. Albers, and Ms. Rasmussen established that J.N. was to be at the REM facility from 8:45 AM to about 2:30 PM. and a transportation service called “To The Rescue” would pick up J.N. from the All Ages house and drop her off at the REM site at approximately 9:00 AM. (App. at 46). Further discussion was had regarding J.N.’s need to be administered her anti-seizure and acid reflux medications while at the REM site, and prior to REM receiving a doctor’s authorization to pass medication. (*Id.*)

REM staff reported that J.N. had her medications in her lunchbox when she was dropped off the morning of March 6, 2014, her first day at REM, at approximately 9:00 AM. (App. at 46). At that time, REM program manager Stephanie Bawek and case manager Angela Albers emphasized to Stephanie Rasmussen of All Ages Care that J.N. was not to carry the medication in her lunchbox or backpack. (*Id.*)

The parties coordinated a plan for the medications to be given to the bus driver, who would then give the medication to the REM medication manager.

(App. at 46). All parties understood that until REM officials were authorized to actually administer J.N.'s medications, someone from All Ages Care was to come to the facility to give J.N. her afternoon medications, until REM received doctor's orders allowing them to administer the afternoon medications.<sup>3</sup> (*Id.*)

The following incident reports were described in the findings of fact by the ALJ during J.N.'s attendance at REM:

1. An incident report on March 16, 2014 reflected that J.N. was transported to an urgent care center where she was diagnosed with a virus.
2. An incident report, on March 28, 2014, was provided to case manager Albers which described J.N. being observed vomiting as she was diagnosed with dehydration.

Several issues with All Ages Care administering J.N.'s afternoon medications while she was at the REM day program were documented in detail in the ALJ's proposed ruling. (App. at 47-50). During J.N.'s tenure at REM, Stephanie Bawek coordinated with Eric Spencer, Jennifer Rassmussen, and then Soji. (App. at 350 (Tr. 28:4-16)). Furthermore, during J.N.'s tenure at REM, Stephanie Bawek testified that she never spoke with Romoke. (App. at 354 (Tr.

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<sup>3</sup> REM could not administer medication to J.N. from March 6, 2014 to March 27, 2014, because they did not have doctors' orders in place. (App. at 356(Tr. 34:14-19)).

32:6-7)). J.N. was transferred May 1, 2014 from REM to a program in Mt. Vernon, Iowa. (App. at 353 (Tr. 31:5-6); App. at 49).

On or about March 28, 2014, the Department received a report alleging dependent adult abuse against Soji and Romoke, asserting that they denied critical care to J.N. by failing to ensure she was getting her seizure and acid reflux medications as prescribed. (App. at 50). Department worker Roberta Fuchs was assigned by the department to investigate the allegations contained in the report. (*Id.*)

Fuchs interviewed several individuals, including Soji and Romoke, as part of her investigation. (App. at 50). Fuchs testified that she met with Eric Spencer face-to-face during her investigation. (App. at 400 (Tr. 78:13-17)). Fuchs indicated to the court in her testimony that Eric Spencer made it sound as if someone else was responsible for administering J.N. her medications at the residence, but he followed the rules while J.N. was in his care. (App. at 401 (Tr. 79:5-11)). Fuchs also collected and reviewed J.N.'s medications and prescription records, All Ages medication administration records, All Ages Care staffing and training information, information from Eastview Avenue neighbors, police reports related to calls to the Eastview Avenue residence, and All Ages Care residents. (App. at 50-51).

Fuchs testified to the ALJ that she did not know when REM received authorization to pass medicine, but that prior testimony of witnesses prior to her indicated that REM must have received authorization between March 25 and March 27, 2017. (App. at 394 (Tr. 72:4-18)). Fuchs further testified that she did not know who gave the authorization to pass medication to J.A. and that she never saw documentation of said medication authorization during the course of her investigation. (*Id.*) Fuchs further testified that she neither saw the “bubble packs” of medication at issue prior to preparing her report, nor had medical records of J.N.’s weight on the date J.N. was transferred to All Ages Care. (App. at 394-395 (Tr. 72:19-73:2)).

The ALJ identified what Fuchs learned and concluded from her investigation. (App. at 51-52). Fuchs included in her July 8 and July 9, 2014 dependent adult abuse reports against Soji and Romoke, respectively, that both Soji and Romoke engaged in dependent adult abuse, specifically denial of critical care/failure to provide adequate medical care, based on the following factors:

- (1) J.M. [sic] was a dependent adult because of her diagnoses, requirement for 24-hour supervision and assistance with all daily living activities.
- (2) Appellants Soji and Romoke were caregivers at the March 2014 time period as [sic] issue because Romoke admitted to worker Fuchs she was a caretaker and they owned All Ages Care at the time, and provided training to staff on medication administration, among other tasks.
- (3) J.N. was not being given all of her medication at the prescribed time, as reflected in unused medications in J.N.’s bubble packs, All

Ages' confusing and inconsistent March 2014 medication records, and reports from REM staff that All Ages staff failed to come to administer the medications.

(4) Failure to take her medications as prescribed put J.N. at risk for seizures and the need for frequent emergency medical care.

(App. at 53).

Romoke and Soji did not challenge that J.N. was a dependent adult. Specifically, they challenged that Romoke and Soji were J.N.'s actual caretakers in March 2014, stating they had trained staff to ensure J.N. would get her medications. (App. at 399 (Tr. 77:19-23)). Assertions were made by Soji that J.N. was getting all her medications as prescribed, as he was assured by his staff of this fact. Soji did most, if not all, of the hiring for All Ages Care. (App. at 128-129 (Tr. 318:23-319:2)). Romoke testified that she never passed prescription medication to J.N. (App. at 162-163 (Tr. 352:20-353:1)).

Romoke was a CNA at a nursing home, assisting with All Ages Care, and going to school at Kirkwood Community College all at the same time. (App. at 127-129 (Tr. 317:1-319:4)). Romoke did not go into All Ages from Monday through Friday on a typical week because she was going to school in the morning and taking care of her children in the afternoon or studying in the afternoon or evening. (App. at 132-133 (Tr. 322:20-323:12)). In fact, Romoke was not even on the All Ages Care work schedule and only went into work at All Ages Care on her days off or if a staff member called her to come in and work. (App. at

133-134 (Tr. 323:12-324:14)). In April of 2014, Romoke was working at another job, thirty-two hours per week from 10:00 p.m. to 6:00 a.m., and would sometimes sleep during the day, sometimes she would not sleep at all. (App. at 145-146 (Tr. 335:16-336:18)).

Gwen Avant and Jennifer Rasmussen were the primary supervisors for J.N.'s residence and after Gwen left, Rachelle Smith supervised the residence. Rachelle was responsible for administering the medication to J.A. at the house; Rachelle claimed that she never worked in the home, even though police reports listed her name as being there. (App. at 401-402 (Tr. 79:12-80:4)). Soji indicated to the ALJ that Rachelle was "lying" when she told department worker Fuchs that she was not responsible for making sure medications were distributed at the All Ages residence where J.N. lived. (App. at 53).

Soji also asserted to the ALJ that he was only told once by REM that an issue existed with J.N.'s medication distribution or passing, referring to a March 31, 2014 e-mail from REM manager Stephanie Bawek to Erik Spencer. (App. at 53, 354 (Tr. 32:11-20)). Soji indicated that he answered the email and indicated J.N. came to REM with her medications in her backpack. (App. at 53). Romoke similarly asserted that the problem was with how the medications were sent up to REM, not that they were not administered to J.N. (App. at 54).

Romoke and Soji asserted to the ALJ that the only problem with J.N. not getting her medications was caused by case manager Albers. (*Id.*)

Soji and Romoke maintained to the ALJ that all staff were provided medication administration training in the form of a video. (App. at 54). Further, Soji and Sam Blackford<sup>4</sup> were working with staff to ensure staff all marked medication logs in a consistent format. (*Id.*) Soji indicated to the ALJ that he stopped being involved in the All Ages Care business in April 2014, and his wife, Romoke, was “running the office” as of that date. (*Id.*) (App. at 442 (Tr. 120:3-9)).

In its final decision, the Department and Department Director Charles M. Palmer adopted the ALJ’s Findings of Fact in its proposed decision as written, but disagreed and overruled the ALJ’s conclusions of law and restored the dependent adult abuse report against Romoke as a “Founded” report. (App at 31). The District Court also specifically referenced ALJ Tapscott’s findings of fact and eliminated references to testimony/exhibits in their factual and procedural background. (App. at 1537-1544). Ultimately, the District Court

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<sup>4</sup> Sam Blackford was hired on March 4, 2014 as a staff member and within three or four weeks became an Administrator for All Ages Care. (App. at 434 (Tr.112:9-13) 180 (Tr. 370:10-20); *see also* App. at 689.

denied Romoke's request for relief on judicial review and affirmed the Department's decision. (App. at 1537-1544).

## **Argument**

### **1. Standard of review.**

The appellate court reviews district court decisions on judicial review of agency action under the standards of the Administrative Procedure Act. *See* Iowa Code ch. 17A (2018); *see also Locate.Plus.Com, Inc. v. Iowa Dep't of Transp.*, 650 N.W.2d 609, 612 (Iowa 2002). In the present action, this court should apply the standards of Chapter 17A to determine whether this Court reaches the same conclusions as the district court in their review of agency action. (*Id.*) The agency decision itself is reviewed under the standards as set forth in Iowa Code section 17A.19(10). *See Stone Container Corp. v. Castle*, 657 N.W.2d 485, 488 (Iowa 2003).

Pursuant to Iowa Code section 17A.19(10), a court must reverse agency action when any one of several enumerated circumstances exists and “substantial rights of the person seeking judicial relief have been prejudiced” by agency action as a result. *See* Iowa Code § 17A.19(10) (2018). The enumerated circumstances warranting reversal of agency action listed in Iowa Code section 17A.19(10) are:

- (a) Unconstitutional on its face or as applied or is based upon a provision of law that is unconstitutional on its face or as applied;
- (b) Beyond the authority delegated to the agency by any provision of law or in violation of any provision of law;
- (c) Based upon an

erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency; (d) Based upon a procedure or decision-making process prohibited by law or was taken without following the prescribed procedure or decision-making process; (e) The product of decision making undertaken by persons who were improperly constituted as a decision-making body, were motivated by an improper purpose, or were subject to disqualification; (f) Based upon a determination of fact clearly vested by a provision of law in the discretion of the agency that is not supported by substantial evidence in the record before the court when that record is viewed as a whole; (g) Action other than a rule that is inconsistent with a rule of the agency; (h) Action other than a rule that is inconsistent with the agency's prior practice or precedents, unless the agency has justified that inconsistency by stating credible reasons sufficient to indicate a fair and rational basis for the inconsistency; (i) The product of reasoning that is so illogical as to render it wholly irrational; (j) The product of a decision-making process in which the agency did not consider a relevant and important matter relating to the propriety or desirability of the action in question that a rational decision maker in similar circumstances would have considered prior to taking that action; (k) Not required by law and its negative impact on the private rights affected is so grossly disproportionate to the benefits accruing to the public interest from that action that it must necessarily be deemed to lack any foundation in rational agency policy; (l) Based upon an irrational, illogical, or wholly unjustifiable interpretation of a provision of law whose interpretation has clearly been vested by a provision of law in the discretion of the agency; (m) Based upon an irrational, illogical, or wholly unjustifiable application of law to fact that has clearly been vested by a provision of law in the discretion of the agency; (n) Otherwise unreasonable, arbitrary, capricious, or an abuse of discretion.

Iowa Code § 17A.19(10)(a)-(n) (2018).

If any of the aforementioned circumstances exist, coupled with a determination by this Court that the substantial rights of Romoke have been

prejudiced, this Court must reverse, modify, or grant other appropriate relief from agency action, equitable or legal and including declaratory relief. *Mosher v. Dep't of Inspections & Appeals, Health Facilities Div.*, 671 N.W.2d 501, 508 (Iowa 2003). This court should reverse, modify, or grant other relief from the Department's action, as the substantial rights of Romoke have been prejudiced.

**2. The district court erred by finding substantial evidence existed in the administrative record to support the Department's decision that Romoke committed dependent adult abuse against J.N. because the Department based their decision upon an irrational, illogical, or wholly unjustifiable application of law to fact, ultimately prejudicing the substantial rights of Romoke.**

Substantial evidence did not exist in the Administrative Record to support the Department's decision in finding Romoke committed dependent adult abuse against J.N. "Substantial evidence is 'the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance.'" *University of Iowa Hospitals and Clinics v. Waters*, 674 N.W.2d 92, 95 (Iowa 2004). "Evidence is substantial if a reasonable mind would find it adequate to reach the same conclusion. *Dunlavy v. Economy Fire & Casualty Co.*, 526 N.W.2d 845, 849 (Iowa 1995). The adequacy of the evidence must, however, be viewed "in light of all the relevant evidence in the record cited by any party that detracts from

that finding as well as all of the relevant evidence in the record cited by any party that supports it.” Iowa Code § 17A.19(10)(f)(3) (2018), *Mosher v. Dep't of Inspections & Appeals, Health Facilities Div.*, 671 N.W.2d 501, 508 (Iowa 2003).

Iowa Code chapter 235B governs Dependent Adult Abuse Services. The Department is required to operate the established dependent adult abuse registry as contemplated by Iowa Code chapter 235B in order to collect, maintain, and disseminate adult abuse information. *See generally* Iowa Code § 235B (2018). Together with the operation of the registry, the Department is required to adopt administrative rules to operate the registry and analyze dependent adult abuse allegations. *See* Iowa Code §§ 235B.3, 235B.5 (2018). *See also* Iowa Admin. Code r. 441-176.

A dependent adult is a “person eighteen years of age or older who is unable to protect the person’s own interests or unable to adequately perform or obtain services necessary to meet essential human needs, as a result of a physical or mental condition which requires assistance from another, or as defined by departmental rule.” Iowa Code § 235B.2(4) (2018).

Dependent adult abuse is defined as any of the following conditions as a result of the “willful or negligent acts or omissions” of a caretaker:

- (a) Physical injury to, or injury which is at a variance with the history given of the injury, or unreasonable confinement, unreasonable punishment, or assault of a dependent adult;

(b) The commission of a sexual offense under chapter 709 or section 726.2 with or against a dependent adult.;

(c) Exploitation of a dependent adult which means the act or process of taking unfair advantage of a dependent adult or the adult's physical or financial resources for one's own personal or pecuniary profit, without the informed consent of the dependent adult, including theft, by the use of undue influence, harassment, duress, deception, false representation, or false pretenses; or

(d) The deprivation of the minimum food, shelter, clothing, supervision, physical or mental health care, or other care necessary to maintain a dependent adult's life or health.

Iowa Code § 235B.2(5)(a)(1)(a)-(d) (2018).

The legislature additionally defined dependent adult abuse within Iowa Code § 235B.2(5) as:

(2) The deprivation of the minimum food, shelter, clothing, supervision, physical or mental health care, and other care necessary to maintain a dependent adult's life or health as a result of the acts or omissions of the dependent adult; or

(3) Sexual exploitation of a dependent adult by a caretaker.

Iowa Code § 235B.2(5)(a)(2)-(3) (2018). A caretaker is “a related or nonrelated person who has the responsibility for the protection, care, or custody of a dependent adult as a result of assuming the responsibility voluntarily, by contract, through employment, or by order of the court.” *Id.* § 235B.2(1).

The Department’s irrational, illogical, and unjustifiable application of fact to law found that Romoke “deprived J.N. of the minimum level of medical care to the extent that there was an immediate or potential danger to R.O [Romoke]. A reasonable and prudent person would have ensured that she had adequate

medical care, was getting the proper medications, and staff were properly trained.” (App. at 34). The Department Director, in its Final Decision, affirmed the action of the Department to “correctly classify the dependent abuse as ‘Founded’ against the appellant by an act of denial of critical care – failure to provide physical care . . .” (App. at 35).

The issue raised by this section is whether Romoke, willfully or negligently, deprived J.N. of the minimum food, shelter, clothing, supervision, physical or mental health care, or other care necessary to maintain J.N.’s life or health as defined in Iowa Code section 235B.2(5)(a)(1)(d) and whether the Department and District Court had substantial evidence of the same. Romoke maintains neither the Department nor the District Court had sufficient evidence to make such a finding and based their decision upon an irrational, illogical, or wholly unjustifiable application of law to fact, ultimately prejudicing the substantial rights of Romoke.

**B. The Department incorrectly applied Iowa Administrative Code rule 441-176.3 and Iowa Code section 235B to the facts of this case.**

The Department incorrectly applied Iowa Administrative Code rule 441-176.3 to the facts of this case because dependent adult abuse did not exist as defined in Iowa Code section 235B.2, and Romoke was not a caretaker under the statute.

Rule 441-176.3 defines an “appropriate evaluation” by a Department worker of a dependent adult abuse allegation. Specifically, dependent adult abuse reports shall be evaluated by Department workers when *all* of the following criteria are alleged to be met: (a) The person is a dependent adult; (b) dependent adult abuse exists as defined in Iowa Code section 235B.2; and (c) a caretaker exists in reports of physical injury to or unreasonable confinement or cruel punishment of a dependent adult; commission of a sexual offense; exploitation; and deprivation by another person of food, shelter, clothing, supervision, physical and mental health care and other care necessary to maintain life or health. Iowa Admin. Code r. 441-176.3 (2018).

Neither Romoke nor the Department dispute that J.N. is a dependent adult under the statute. However, the Department’s investigation by Roberta Fuchs of whether dependent adult abuse existed at the time of the investigation was lacking. Fuchs testified to the ALJ that she neither saw the “bubble packs” of medication at issue prior to preparing her report, nor had medical records of J.N.’s weight on the date J.N. was transferred to All Ages Care. (App. at 394-395 (Tr. 72:19-73:2)).

The ALJ found, in her proposed decision that Fuchs’ investigation and subsequent report stated: “(3) J.N. was not being given all of her medication at the prescribed time, as reflected in unused medications in J.N.’s bubble packs,

All Ages' confusing and inconsistent March 2014 medication records, and reports from REM staff that All Ages staff failed to come to administer the medications." *All* of the information related to the bubble packs and whether the medication was administered accurately arose not from Department worker Fuchs' first-hand knowledge and investigation, but from hearsay from Director Bawek and others at REM regarding the bubble-packs and passed or unpassed medication. As a result, Fuchs' investigation and subsequent report was insufficient to find a denial of critical care, specifically medical care, related to the administration of medication at specific times.

In turn, a finding of dependent adult abuse could not be found by the Department. This Court should review the Department's interpretation of chapter 235B for correction of errors of law and not under the more deferential standard permitting reversal only where the agency's interpretation is "irrational, illogical, or wholly unjustifiable" under Iowa Code section 17A.19(10)(c)(1). See *Mosher v. Dep't of Inspections & Appeals, Health Facilities Div.*, 671 N.W.2d 501, 510 (Iowa 2003).

Romoke, the alleged perpetrator of the dependent adult abuse against J.N., testified that she did not administer prescription medication to J.N., did not work in the residences on a regular basis, and did not regularly work at All Ages Care. The Department provided no evidence to the contrary, nor provided a specific

date and time where Romoke committed dependent adult abuse by depriving “the minimum food, shelter, clothing, supervision, physical or mental health care, or other care necessary to maintain a dependent adult's life or health” due to her “willful or negligent acts or omissions” as a caretaker of J.N. Therefore, the Department incorrectly applied Rule 441-176.3 and chapter 235B to the facts of this case and substantially prejudiced the rights of Romoke as a result.

**C. The Department incorrectly applied Iowa Administrative Code rule 441-176.2 to the facts of this case.**

The Department incorrectly applied Iowa Administrative Code rule 441-176.2 to the facts of this case because J.N. was not denied critical care under the rule by Romoke because All Ages Care provided minimum care necessary for J.N.’s health and welfare, and Romoke was not a caretaker of J.N. Rule 441-176.2 defines “denial of critical care” for purposes of dependent adult abuse investigations by the Department. Specifically, the Iowa Administrative Code defines “denial of critical care” as:

The failure on the part of the caretaker or dependent adult to provide for minimum food, shelter, clothing, supervision, physical or mental care, and other care necessary for the dependent adult’s health and welfare when financially able to do so or when offered financial and other reasonable means to do so shall constitute denial of critical care to that dependent adult.

Iowa Admin. Code r. 441-176.2 (2018).

As the ALJ stated in her Proposed Decision, she found one (1) date where J.N.'s medications were not given as prescribed. (App. at 57). The Department did not prove that Romoke failed to provide minimum care for J.N.'s welfare. Specifically, All Ages Care produced records indicating that J.N. was provided with her medications for the month of March 2014. (App. at 694-697). The allegations related to the denial of critical care by the Department were related to the administration of medications to J.N. during the month of March 2014. Therefore, the Department incorrectly applied Iowa Administrative Code r. 441-176.2 to the facts of this case because J.N. was not denied critical care under the rule by Romoke and substantially prejudiced her rights.

**3. The District Court erred by agreeing with the Department's interpretation of the *Mosher* case because the Department's interpretation of the *Mosher* case was incorrect, and based their finding of dependent adult abuse on the Department's interpretation.**

The Department and District Court misinterpreted the *Mosher* case. The ALJ cited to the *Mosher* case to reverse the Department's finding of dependent adult abuse against Romoke. *See Mosher v. Dep't of Inspections & Appeals, Health Facilities Div.*, 671 N.W.2d 501, 511–12 (Iowa 2003). Specifically, the ALJ cited to the *Mosher* decision in order to disqualify Romoke from a finding of dependent adult abuse due to her lack of direct acts related to the alleged dependent adult

abuse, rather than mere association with J.N. through the entity All Ages Care. While the Department and District Court’s analysis of the factual differences between this case and *Mosher* related to the definition of a “caretaker” are correct, both the Department and the District Court misinterpret the Supreme Court’s direct act requirement suggested by *Mosher*.

In misinterpreting the *Mosher* case, the District Court found the following:

The Court agrees with Respondent’s interpretation of the Mosher case. The level of dependency in J.N. far surpassed that described by the Iowa Supreme Court when it came to J.B.’s level of dependency in the Mosher case. The record reflects that J.N. could not read or write, could not handle her own medications, and was “child-like.” J.N. was at the facility when the abuse or neglect occurred, and was under the control of the facility’s practices. Under the facts of this case, where Petitioner is the owner and director of the facility where the abuse allegedly occurred, the Court finds that the holding of Mosher regarding a person qualifying as a caretaker at the time of each specific act of abuse is met. This is especially true in a situation where there appear to have been problems with the manner by which Petitioner’s facility was operated and in its high staff turnover. Respondent did not misinterpret the definition of caretaker, and did not reach an irrational, illogical or wholly unjustifiable decision in placing Petitioner on the dependent adult abuse registry.

(App. at 1554).

The District Court found that “Under the facts of this case, where *Petitioner is the owner and director of the facility where the abuse allegedly occurred*, the Court finds that the holding of *Mosher* regarding a person qualifying as a caretaker at the time of each specific act of abuse is met.” Emphasis added.

This logic flies in the face of the Supreme Court’s finding in *Mosher* that

the requisite elements of exploitation of a “dependent adult” by a “caretaker” must be present at the time of the specific act providing a basis for DIA’s determination that Mosher committed “dependent adult abuse.” See Iowa Code § 235B.2(5)(a )(1)(c ) (defining “dependent adult abuse,” in part, as the “[e]xploitation of a dependent adult” resulting from “the willful or negligent acts or omissions of a caretaker” (emphasis added)). Thus, to the extent DIA’s determination that Mosher committed dependent adult abuse rests on her actions after August 1998, there must be substantial evidence that Mosher continued to meet the definition of a “caretaker” after that date. As we have already discussed, such evidence is lacking here.

*Mosher*, 671 N.W.2d at 511–12.

Simply put, the record is clear that Romoke, whether sole owner of All Ages Care or not, was not present at the time of the specific act, namely, denial of critical care, providing a basis for the Department’s determination that Romoke committed dependent adult abuse. Numerous citations to the administrative record by the ALJ, Department Director, and the District Court established that neither Romoke nor Soji were present or directly responsible for J.N. at the time of the alleged act or acts of dependent adult abuse, specifically denial of medical care to J.N. All Ages Care was directly responsible, and their staff was trained and required to accommodate the medical needs of J.N.

Furthermore, the Department failed to show a specific act by Romoke that led to a finding of dependent adult abuse from the Administrative Record.

The Department, in its Final Decision, attempts to explain away the Supreme Court’s finding that “the requisite elements of exploitation of a “dependent adult” by a “caretaker” must be present at the time of the specific act providing a basis for DIA's determination that Mosher committed “dependent adult abuse.” *See Mosher*, 671 N.W.2d at 511–12. Specifically, the Department states Soji and Romoke “must be deemed to have been J.N.’s caretakers under Iowa Code 235B.2 because the appellants’ were responsible for J.N. being in their facility, for the care J.N. received in their facility, and for training J.N.’s caregivers.” (App. at 33).

The Department’s position, taken together with the District Court’s proclamation of “where *Petitioner is the owner and director of the facility where the abuse allegedly occurred*, the Court finds that the holding of *Mosher* regarding a person qualifying as a caretaker at the time of each specific act of abuse is met” provides a quandary for any owner of a dependent care facility. It is as if the Department and the District Court acknowledge that Romoke was not directly responsible for J.N.’s care, as the Department even cites to “J.N.’s caregivers” as someone other than Romoke, but still arbitrarily finds a denial of critical care, giving rise to a founded report of dependent adult abuse against Romoke. The result is simply illogical.

If the Department were permitted to extend the definition of “caretaker” to *any* individual in an ownership position within a dependent adult care system to ultimately affirm a founded dependent adult abuse report without direct proof of a specific act or omission by said individual, the result of Department interpretation of the definition of “caretaker” would be arbitrary and capricious with the potential for abuse by the Department.

## **Conclusion**

This court should overrule the district court’s judgement affirming the Department’s final decision and order the expungement of Romoke’s name from the dependent adult abuse registry as the Department’s final decision and District Court’s affirmation of said final decision was an illogical application of law to fact, ultimately prejudicing the substantial rights of Romoke Olutunde.

## **Request for Oral Argument**

Counsel for Appellant respectfully requests to be heard in oral argument upon submission of this case.

Respectfully submitted,

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## Certificate of Service

Pursuant to Iowa Appellate Procedure 6.701 and 6.901, the undersigned hereby certifies that on the 3<sup>rd</sup> day of April 2018, the Brief was filed with the Supreme Court via EDMS and electronically served on all parties of record.

/s/ Andrew B. Howie

Andrew B. Howie

## Certificate of Compliance with Typeface Requirements and Type-Volume Limitation

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

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/s/ Andrew B. Howie

Signature

April 3, 2018

Date