

IN THE SUPREME COURT OF IOWA

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

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

APPELLANT'S APPLICATION FOR FURTHER REVIEW
OF THE COURT OF APPEALS' RULING,
FILED DECEMBER 5, 2018

Andrew B. Howie, AT0003716
howie@sagwlaw.com
James R. Hinchliff, AT0012296
hinchliff@sagwlaw.com
Shindler, Anderson, Goplerud
& Weese, P.C.
5015 Grand Ridge Drive, Suite 100
West Des Moines, Iowa 50265
515-223-4567; Fax: 515-223-8887
ATTORNEYS FOR APPLICANT

Question Presented

1. Whether the Court of Appeals erred in finding that an owner and supervisor of a dependent adult care facility can be deemed a “caretaker” for purposes of a dependent adult abuse finding when the requisite elements of denial of critical care underlying the dependent adult abuse finding were not present at the time of the specific act(s) alleged as to that owner and supervisor.

Table of Contents

Page

Question Presented	2
Table of Contents	3
Table of Authorities	4
Application for Further Review	5
Statement of the Facts.....	7
Argument.....	12
1. The District Court erred by agreeing with the Department’s interpretation of the <i>Mosher</i> case because the Department’s interpretation of the <i>Mosher</i> case was incorrect and based their finding of dependent adult abuse on the Department’s interpretation.....	12
2. The Court of Appeals erred in 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.	16
Request for Oral Argument.....	18
Certificate of Service	19
Certificate of Compliance with Typeface Requirements and Type-Volume Limitation	19

Table of Authorities

<i>Cases</i>	<i>Page</i>
<i>Dunlavy v. Economy Fire & Casualty Co.</i> , 526 N.W.2d 845 (Iowa 1995).....	16
<i>Mosher v. Dep't of Inspections & Appeals, Health Facilities Div.</i> , 671 N.W.2d 501 (Iowa 2003).....	12, 13, 14, 15, 16
<i>University of Iowa Hospitals and Clinics v. Waters</i> , 674 N.W.2d 92 (Iowa 2004)	16

Statutes

Iowa Code § 17A.19 (2018).....	16
Iowa Code § 235B (2018)	15, 16, 17, 18

Administrative Code

Iowa Admin. Code r. 441-176 (2018).....	17
---	----

Application for Further Review

COMES NOW Applicant/Appellant, Romoke Olutunde (hereinafter “Romoke”), and in support of her application for further review of the Court of Appeals Ruling, filed December 5, 2018, states:

The opinion issued by the Iowa Court of Appeals in this matter conflicts with a decision of this Court, *Mosher v. Dep't of Inspections & Appeals, Health Facilities Div.*, 671 N.W.2d 501 (Iowa 2003), in that Iowa Code Section 235B.2(5)(a)(1)(c) requires that a person qualify as a “caretaker” at the time of each specific act of abuse. Romoke was an owner of All Ages Care LLC and supervised and trained employees. Romoke testified that she did not administer prescription medication to J.N. (the dependent adult in this case), did not work in the residences on a regular basis, and did not regularly work at All Ages Care.

The interpretation by the Department of Human Service (hereinafter the “Department”) of 235B.2, that Romoke was a “caretaker” is irrational, illogical, or wholly unjustifiable as to the finding of dependent adult abuse in this case; Romoke’s substantial rights have been prejudiced as a result. The founded dependent adult abuse report in this case is bilateral, listing J.N. as the “Dependent Adult” and Romoke as the “Person Determined to be Responsible for Abuse” as the “Service Provider” without listing a “Date Abuse Occurred”

or “Where Abuse Occurred”. (App. at 1035). The requisite elements of denial of critical care by Romoke were not established by the Department of Human Services as present at the time each specific act(s) of dependent abuse were alleged to have been committed by Romoke.

The opinion issued by the Iowa Court of Appeals in this matter presents an issue of broad public importance that this Supreme Court should ultimately determine, as the ability for the Department of Human Services to deem owners and supervisors of dependent care facilities as “caretakers” for dependent adult abuse purposes based upon the alleged acts or omissions of others within their facility creates potential issues for all owners or supervisors of dependent care facilities.

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’s interpretation of the definition of “caretaker” would be arbitrary and capricious with the potential for abuse. Therefore, this Court should grant further review to address the substantial injustice to Romoke in this case and to further clarify the scope of the Department’s power to deem owners and/or supervisors of dependent adult care facilities as dependent adult abusers.

Statement of the Facts

The Department issued a Dependent Adult Abuse Report (“Report”) against Romoke on July 9, 2014. (App. at 1429-1455). All Ages Care LLC provided dependent adult care services. 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).

On July 22, 2014, Romoke appealed the Department’s decision by providing proper notice. (App. at 1422-1426). The parties proceeded through the appeal process and eventually the Administrative Law Judge (“ALJ”) who heard the case identified the issue with the Department’s Report was whether the “Department correctly classified reported incidents of dependent adult abuse as “Founded” naming the Appellants [Romoke] 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. (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). 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.*) 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).

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 for additional review. (App. at 1556).

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).

In December 2013, J.N. moved into a residence at 6051 Eastview Ave., SW, Cedar Rapids, Iowa. (App. at 33, 45). Soji and Romoke Olutunde owned and operated this residence via All Ages Care Services, LLC. (App. at 45.) During her tenure at All Ages Care, J.N. attended day-hab at REM. 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). 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 Department 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. (*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.

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 both 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 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.

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)). Romoke was not 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)).

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.*)

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

Argument

- 1. 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, the District Court, and the Court of Appeals 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, District Court's,

and Court of Appeals' 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." (App. at 1554). The Court of Appeals does not address the timing issue identified in *Mosher* related to each

specific act of abuse alleged against Romoke, other than “affirm[ing] DHS’s decision [Romoke] Olutunde was a caretaker of J.N. during the relevant time period.” (Court of Appeals Ruling, p. 10).

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. Therefore, this Court should reverse the Court of Appeals decision affirming the decision of the Department.

2. The Court of Appeals erred in 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 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 was a caretaker and therefore “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, District Court, and Court of Appeals had substantial evidence of the same. Romoke maintains neither the Department nor the District Court nor the Court of Appeals 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.

Request for Oral Argument

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

Respectfully submitted,

/s/ Andrew B. Howie

Andrew B. Howie, AT0003716

howie@sagwlaw.com

/s/ James R. Hinchliff

James R. Hinchliff, AT0012296

hinchliff@sagwlaw.com

SHINDLER, ANDERSON, GOPLERUD

& WEESE, P.C.

5015 Grand Ridge Drive, Suite 100

West Des Moines, Iowa 50265

515-223-4567; Fax: 515-223-8887

Certificate of Service

Pursuant to Iowa Appellate Procedure 6.701 and 6.901, the undersigned hereby certifies that on the 26th day of December 2018, the Application for Further Review 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:

this brief has been prepared in a proportionally spaced typeface using Garamond in 14 point font and contains 3,211 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1) or

this brief has been prepared in a monospaced typeface using Garamond in 14 point font and contains _____ lines of text, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(2) .

/s/ Andrew B. Howie

Signature

December 26, 2018

Date