

2014 WL 2905784 (Mo.App. W.D.) (Appellate Brief)  
Missouri Court of Appeals, Western District.

Sheryl L. MORRIS, Respondent,

v.

MISSOURI DEPARTMENT OF HEALTH AND SENIOR SERVICES, Appellant.

No. WD77196.

June 12, 2014.

Appeal from the Circuit Court of Cole County Honorable Patricia Joyce  
Filed pursuant to Rule 84.05(e)

**Appellant's Brief Filed as Respondent**

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### \*1 JURISDICTIONAL STATEMENT

This appeal is from a decision by the Missouri Department of Health and Senior Services (the “Department”) placing Sheryl Morris (“Morris”) on the Employee Disqualification List (“EDL”) pursuant to Chapter 198, RSMo. Cum. Supp. 2012, as amended due to a finding that she engaged in conduct constituting abuse or **neglect**. Morris sought review of this decision in the Circuit Court of Cole County. The Circuit Court overturned the decision of the Department.

This appeal does not involve any of the categories reserved for the exclusive appellate jurisdiction for the Supreme Court of Missouri. Therefore, jurisdiction lies in the Missouri Court of Appeals, Western District, pursuant to [Article V, Section 3 of the Missouri Constitution](#) and [§ 536.140.6, RSMo. Cum. Supp. 2014](#).

## \*2 STATEMENT OF FACTS

Sheryl Morris<sup>1</sup> (“Morris”) was employed as a Restorative Nurse's Aide (“RNA”) and a Certified Nursing Aide (“CNA”) at Sylvia G. Thompson Residence Center (the “Residence Center”), a skilled nursing facility located in Sedalia, Missouri. (L.F. 143, 209). Morris had been a CNA for approximately seventeen years and was not new to caring for Residents. (L.F. 143, 209, 210). At the time of the August 20, 2011 incident giving rise to a complaint against Morris, Morris worked as an RNA and CNA at the Residence Center. (L.F. 143). As part of her employment, Morris received annual training on abuse and **neglect** of residents. (L.F. 163). The Residence Center has a policy that prohibits **neglect** and emotional and physical abuse of residents. (L.F. 163).

The Residence Center also had individualized care plans for its residents. (L.F. 158). The care plans alert staff to restrictions, conditions, or concerns that should be addressed when caring for specific residents. (L.F. 157-158). Staff, including those employed as CNAs like Morris, were required to know and follow the individual care plans of the residents. (L.F. \*3 159, 160). The care plans were accessible to Morris; they were located in the halls where the CNAs would be assigned and where the residents the CNAs were working with were housed. (L.F. 158). The Residence Center also maintained a facility guide for duties and responsibilities for staff, including CNAs, which was accessible to Morris and housed at the facility. (L.F. 158, 160, 196).

One specific resident, A.B., resided for several years at the Residence Center. (L.F. 146). Morris had worked with and provided care for A.B. for approximately seven to ten years at the time of the incident on August 20, 2011. (L.F. 210). A.B. was eighty-eight years old at the time of the August 20, 2011 incident. (L.F. 145). A.B. was diagnosed with various conditions, including **osteoarthritis**, **senile dementia**, and was prescribed **Coumadin** as a daily medication. (L.F. 145).

As part of her duties, Morris was required to provide assistance and physical transfer of residents; sometimes from their bed to a wheelchair or vice versa, and sometimes to other modes of transport. (L.F. 180). A.B. was unable to bear her own weight, and at 195-215 pounds required assistance to be transferred. (L.F. 148, 158). The individual care plan for A.B. noted that she had to be transferred with two people using a gait belt to assist in the transfer. (L.F. 160). The gait belt is a device used to assist two people lift a resident during transfers. (L.F. 157, 158). At the time of the August 20, 2011 \*4 incident Morris was aware of the two person and gait belt restriction on any transfer of A.B. (L.F. 218).

Morris was employed and performing her duties on August 20, 2011 when the incident with A.B. occurred. (L.F. 211). Morris admitted that around 1:00p.m. to 1:30p.m. she transferred A.B. to A.B.'s bed without assistance and without use of a gait belt. (L.F. 213, 218). Morris informed her co-worker, Emily Hahn, that when Morris put A.B. down in bed that A.B.'s arm got caught behind her, and Morris stated she gently pulled the arm out from under her and placed it on her chest. (L.F. 189, 190). Morris testified at the hearing that A.B.'s arm looked fine or else she would have told the charge nurse. (L.F. 215). A.B. was later observed that same day to have redness and swelling in her right arm. (L.F. 174, 275). The following morning, different staff at the Residence Center attempted to move A.B.'s right arm and noticed it to be red, swollen, and A.B. expressed discomfort. (L.F. 192-193). A.B. was transported to the emergency room of Bothwell Regional Hospital and was diagnosed with a broken arm. (L.F. 150, 275-276).

Kristen Twenter, Director of Nursing, was informed of A.B.'s condition by telephone on August 21, 2011 and began an investigation. (L.F. 144). Twenter could not interview A.B. because A.B.'s **senile dementia** prevented her from being able to speak. (L.F. 145-146,194). Twenter performed various duties, including care plans for the Residence Center. (L.F. 141). Twenter \*5 testified that A.B. was to be moved by two person transfer with a gait belt. (L.F. 157).

Also testifying at the hearing was staff member Carla Summers. (L.F. 176). Summers had been Morris' work partner the weekend of August 20-21, 2011. (L.F. 148, 177). Summers testified that when she entered A.B.'s room on August 20, 2011 around 1:15p.m., Morris was present with A.B. (L.F. 179). Summers believes that when she entered the room, Morris had just transferred A.B. into the bed by herself because A.B. was in the bed. (L.F. 179). When Summers asked Morris why she did not

wait for Summers to arrive, Morris said nothing and just smiled at Summers. (L.F. 179, 182). Morris had not removed A.B.'s shoes or any other articles of A.B.'s clothing to prepare A.B. for bed. (L.F. 179).

The Department investigator, Mary Sumpter, stated that Summers had informed Sumpter during the investigation that Morris "said when she came in on Sunday morning and saw [A.B.'s] arm she said she knew it was broken and that she knew that [A.B.] was a two-person transfer and knew better than to transfer [A.B.] by herself." (L.F. 137). When Hahn asked Morris about any incident with A.B.'s arm, Morris told her "that there was no incident, that she was transferred with another aide, and that there was no incident that she knew of." (L.F. 187). Hahn spoke to Morris again, and in their second conversation Hahn testified that "she [Morris] came back to me \*6 again and told me that she had in fact transferred her [A.B.] alone." (L.F. 189). Morris, who was represented by counsel, testified that she transferred A.B. into bed by herself on August 20, 2011 after lunch. (L.F. 218). Morris knew at that time that A.B. was required to have a two person transfer. (L.F. 218).

#### Procedural History

On August 21, 2011, the Department received a complaint regarding Sheryl Morris' interaction with A.B. (L.F. 144). The Department completed its investigation of the allegations on January 26, 2012 and concluded that Morris acted in a manner constituting **neglect** of A.B. on or about August 20, 2011. (L.F. 15-16, 17-18). The Department issued its Notice of Violation by letter dated January 30, 2012. (L.F. 15-16, 17-18). The Notice stated the intent to place Morris' name on the EDL for a period of three years, absent Morris' request for a hearing. (L.F. 15-18).

The Tribunal received Morris' written appeal on February 24, 2012. (L.F. 8, 230). The hearing was originally set for May 14, 2012, but was continued upon motion filed by Morris. The matter was heard on July 6, 2012 by an administrative hearing officer of the Department standing in for the Director. (L.F. 230). Morris waived her right to a hearing and the hearing record within one hundred twenty days from the date of request for a hearing. (L.F. 230).

\*7 On September 11, 2012, the administrative hearing officer issued a decision that affirmed the Department's proposal to place Morris on the EDL. (L.F. 230-236). The administrative hearing officer found that Morris' actions in transferring A.B. without a two person assist or use of a gait belt constituted action where Morris had knowingly **neglected** the resident under the statute, thus supporting the determination to place Morris on the EDL. (L.F. 232-236). However, the administrative hearing officer did not find by a preponderance of the evidence that Morris had caused the broken arm to the resident. (L.F. 235).

On October 10, 2012, Morris filed a petition for review of that decision in the Cole County Circuit Court on the basis that the administrative hearing officer's Decision and Order was contrary to law, arbitrary, capricious, and not supported by substantial and competent evidence upon the full record and that the evidence presented did not meet the requirements for **neglect** as defined in § 198.070, RSMo. Cum. Supp. 2012. (L.F. 4-7).

On December 12, 2013, the circuit court issued its decision reversing the Department's decision and directed that Morris' name should not be placed upon the EDL. (L.F. 81-86). On January 17, 2014, the Department filed a Notice of Appeal to the Court of Appeals, Western District. (L.F. 88-99). The Department will not place Morris on the EDL until all judicial review of its decision is final.

#### \*8 SUMMARY OF THE ARGUMENT

Morris has failed to preserve any issue for appellate review or carry her burden of persuading the Court that the Missouri Department of Health and Senior Services' decision to place her name upon an Employee Disqualification List was in error because Morris has failed to file a brief regarding this appeal. Should the Court review the agency decision, the Department's decision was not error based on three factors.

First, the Department acted as authorized under [Sections 198.070, RSMo.](#) and [660.315, RSMo.](#) Cum. Supp. 2012 and was not outside of its statutory authority or jurisdiction. Second, the decision to place Morris' name on the Employee Disqualification List was supported by competent and substantial evidence on the record as a whole. Third, the decision was not arbitrary, capricious, unreasonable or an abuse of discretion because there is no requirement under [Sections 198.006\(17\)](#) or [Section 198.070, RSMo.](#) Cum. Supp. 2012, for the Department to prove causation of injury to support a finding that a care provider knowingly **neglected** their charge.

## **\*9 ARGUMENT**

**I. The Court should affirm the agency decision as Morris has failed to preserve any issue for appellate review or carry her burden of persuading the Court that the Department's decision to place Morris' name upon an Employee Disqualification List was in error because Morris has failed to file a brief regarding this appeal.**

### **Standard of Review**

This Court reviews the decision of the agency, the Department of Health and Senior Services, and not the decision of the circuit court. [State Bd. of Registration for the Healing Arts v. McDonagh, 123 S.W.3d 146, 152 \(Mo. banc 2003\)](#); [Cade v. State, 990 S.W.2d 32, 37 \(Mo. App. W.D. 1999\)](#). The Department decided to place Sheryl Morris' ("Morris") name upon on the Employee Disqualification List ("EDL") as authorized under [Section 198.070, RSMo.](#) Cum. Supp. 2012. (L.F. 15-16, 17-18). Morris subsequently filed a Petition for Review in the Circuit Court of Cole County and the Department's decision was reversed. (L.F. 4-7, 81-85). The Department filed a notice of appeal of the decision of the circuit court. (L.F. 88-99).

## **\*10 Argument**

Pursuant to [Rule 84.05\(e\)](#), this case was on a briefing schedule whereby Morris, the party claiming error in the agency decision being reviewed, was designated to file the opening brief. (Letters of March 28 and March 31, 2014 to the parties.) [Rule 84.05\(e\)](#) provides:

If the circuit court reverses a decision of an administrative agency and the appellate court reviews the decision of the agency rather than of the circuit court, the party aggrieved by the agency decision shall file the appellant's brief and reply brief,... The party aggrieved by the circuit court decision shall prepare the respondent's brief... (Emphasis supplied).

[Mo.R.Civ.P. 84.05\(e\)](#) (App. 23). Morris is required to bear the burden of persuasion to this Court in support of a position that the Department's decision should not be affirmed. [McCleney v. Neese, 288 S.W.3d 326 \(Mo. App. S.D. 2009\)](#).

The appellate courts in Missouri have dealt with this scenario before where a party has, by failing to file a brief, abandoned their petition for review while the opposing party moves to confirm the action of the administrative court. In the case of **\*11** [McCleney v. Neese, 288 S.W.3d 326 \(Mo. App. S.D. 2009\)](#), the Children's Division of the Department of Social Services recommended revocation of the "foster/adoptive home license" of William McCleney. McCleney requested an administrative hearing and the Director of the Children's Division affirmed the revocation of McCleney's license. McCleney filed a petition for review in the Circuit Court of Douglas County and that court reversed the Director's decision. The Director filed a notice of appeal to the Southern District. McCleney failed to file a brief. The Court held: "Because Claimant [McCleney] has failed to provide this Court with any indication that the Director's decision was erroneous, we reverse the judgment of the circuit court and order the Director's decision reinstated." [288 S.W.3d at 326](#). Likewise, the Western District in [Ringer v. Missouri Department of Health and Senior Services, 306 S.W.3d 113 \(Mo.App. W.D. 2010\)](#), determined that a nursing home worker who appealed the decision of the Department of Health and Senior Services to place her name on the Employee Disqualification List and who prevailed on her appeal before circuit court had failed to preserve any issue for appellate review in the Court of

Appeals because she failed to file a brief; therefore, the Court of Appeals was required to affirm the original agency decision. [Ringer](#), 306 S.W.3d at 114, 115 (citing [McCleney v. Neese](#), 288 S.W.3d 326 (Mo.App.2009)).

The courts in both [Ringer](#) and [McCleney](#) looked to the reasoning found in \*[12 Versatile Mgmt. Group v. Finke](#), 252 S.W.3d 227, 231-32 (Mo. App. E.D. 2008). In [McCleney](#), the Court set forth its reasoning by citing [Versatile](#) and stating that when a court reviews the agency decision,

[w]e presume that the agency's decision is correct. And, as is the general rule when a judgment is presumed correct, the burden to show otherwise falls on the party challenging the decision. If a party... prevails in his position at the agency level, but then is later unsuccessful at the circuit-court level, it is not his burden to claim error in an appellant's brief before this Court because, to put it simply, he prevailed at the agency level, which is the decision to be reviewed by this Court... As a result, it is the party who contests the agency decision who bears the burden of persuading this Court that the agency decision was in error, even though that party did not appeal to this court.

[288 S.W.3d at 326](#). In [McCleney](#), the Court also noted: “As a result, Claimant has failed to preserve any issue for appellate review and has failed to carry his burden of persuading this Court that the Director's decision was in error. Under these circumstances, we have no alternative but to affirm the agency decision.” *Id.*

\*[13](#) This Court is faced with the identical situation faced by the Southern District and Western District in [McCleney](#) and [Ringer](#), respectively. Because [Morris](#) did not file a brief in this case she has abandoned her petition for review, failed to preserve any issue for appellate review, and failed to carry her burden to show that the Department's decision was in error. This Court should reverse the judgment of the Circuit Court of Cole County and remand to the Department with directions to reinstate the decision of the Department and place [Morris](#)' name on the EDL.

## **II. If this Court should review the agency decision, then the Department did not err in its decision to place [Morris](#)' name on the Employee Disqualification List.**

### **A. The Department of Health and Senior Services acted as authorized under [Section 198.070, RSMo. Cum. Supp. 2012](#).**

#### **Standard of Review**

This Court reviews the entire record made before the agency to determine whether there is substantial and competent evidence to support the decision of the Department. [Lagud v. Kansas City Bd. of Police Comm'rs](#), 136 S.W.3d 786 (Mo. banc 2004); [Albanna v. State Bd. of Registration for Healing Arts](#), 293 S.W.3d 423, 428 (Mo. banc 2009); § 536.140.2, RSMo. Cum.

\*[14](#) Supp. 2012. The evidence is not viewed in the light most favorable to the agency's decision. [Hampton v. Big Boy Steel Erection](#), 121 S.W.3d 220, 223 (Mo. banc 2003) (emphasis added). A decision that “is contrary to the overwhelming weight of the evidence is, in context, not supported by competent and substantial evidence.” [Hampton](#), 121 S.W.3d at 223. Under Section 536.140.2, the appellate court reviews whether the agency action:

- (1) is in violation of constitutional provisions;
- (2) is in excess of the statutory authority or jurisdiction of the agency;
- (3) is unsupported by competent and substantial evidence upon the whole record;
- (4) is, for any other reason, unauthorized by law;
- (5) is made upon unlawful procedure or without a fair trial;

(6) is arbitrary, capricious or unreasonable;

(7) involves an abuse of discretion.

[Section 536.140.2, RSMo](#). Cum. Supp. 2012 (App. 16). The Court defers to the agency as to findings of fact and applies these facts to the law, de novo. [Tendai v. Missouri State Bd. of Registration for the Healing Arts](#), 161 S.W.3d 358, 365 (Mo. banc 2005). The decision of the agency is presumed to be correct and the burden in challenging the decision is heavy. [Bollinger v. Wartman](#), 24 S.W.3d 731, 733 (Mo. App. E.D. 2000).

### \*15 Argument

Should the Court determine that it will review the record on appeal, the determination to place Morris' name upon the Employee Disqualification List should be affirmed. The ability of the Department to determine to place anyone's name on the EDL and maintain the listing is provided by statutory authority under [Section 198.070, RSMo](#). Cum. Supp. 2012. (App. 13-14). The EDL disqualifies employees from working in nursing homes and other facilities when it has been found by the Department that an employee has abused or **neglected** a resident while employed at a facility. [Sections 198.006.17 and 198.070, RSMo, 2012](#). (App. 10, 13-14). The Department had ample authority to investigate and make its decision to place Morris on the EDL under [Sections 198.006 and 198.070, RSMo](#). Cum. Supp. 2012.

The Department did not act beyond its statutory authority of jurisdiction; nor was Morris subject to unlawful procedure or an unfair hearing. [Section 198.070.13, RSMo](#). Cum. Supp. 2012 states:

The department shall maintain the employee disqualification list and place on the employee disqualification list the names of any persons who are or have been employed in any facility and who have been finally determined by the department pursuant to [section 660.315](#) to have knowingly or recklessly abused or \*16 **neglected** a resident. For purposes of this section only, “knowingly” and “recklessly” shall have the meanings that are ascribed to them in this section. A person acts “knowingly” with respect to the person's conduct when a reasonable person should be aware of the result caused by his or her conduct. A person acts “recklessly” when the 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](#). Cum. Supp. 2012. (App. 14). To substantiate a finding of knowingly or recklessly abusing or **neglecting** a resident on the part of the care giver, there is no requirement within the statute to show that the abuse or **neglect** caused injury, nor is there a requirement that injury or harm actually occur to the resident. [Section 198.006\(17\), RSMo](#). Cum. Supp. 2012 (App. 10). “**Neglect**” as defined in [Section 198.006\(17\), RSMo](#). Cum. Supp. 2012 is “the failure to provide, by those responsible for the care, custody, and control of a resident in a facility, the services which are reasonable and necessary to maintain the physical and mental health of the resident, when such failure presents either an imminent danger to the \*17 health, safety or welfare of the resident or a substantial probability that death or serious physical harm would result[.]”

In determining that Morris should be placed on the EDL, the Department had the burden to affirmatively establish its case at the administrative hearing by a preponderance of the evidence. For purposes of the administrative hearing, a preponderance of the evidence is defined as “the degree of evidence that is of greater weight or more convincing that the evidence offered in opposition to it, in other words, evidence which, as a whole, shows the fact to be proven more probable than not.” [Vaught v. Vaught Inc., Southern Missouri Construction](#), 938 S.W.2d 931, 941 (Mo.App.S.D. 1997). The administrative hearing officer found that a

“preponderance of the evidence submitted indicates that [Morris] acted knowingly in her **neglect** of resident [A.B.]” (L.F. 234); see also [Tate v. Missouri Department of Social Services](#), 18 S.W. 3d 3 (Mo. App. E.D. 2000).

The Department investigated as authorized under statute. [Section 198.070, RSMo. 2012](#) (App. 13-14). The investigation began on August 21, 2011, after confirmation that resident A.B. had suffered a broken right arm. (L.F. 136, 144). The investigation included Morris' input and notice was provided to her. (L.F. 15-18, 233). The statute authorizes investigations to place names upon the EDL. [Section 198.070, RSMo. Cum. Supp. 2012](#) (L.F. \*18 232, 236, App. 14). Further, Morris was aware of and utilized her right to have the administrative hearing tribunal review her claim. (L.F. 4-7).

The record reflects that Morris had full opportunity to present her case at the hearing in front of the administrative hearing officer. (L.F. 121). Morris was represented by counsel. Id. Morris placed exhibits into the record. (L.F. 415-416). Morris testified at the hearing. (L.F. 209-221). Morris' counsel cross examined the Department's witnesses. Finally, Morris availed herself of her right to appeal the administrative hearing officer's decision and filed a petition for judicial review with the Cole County Circuit Court. (L.F. 4-8). There is no evidence in the record that the Department took any action in violation of constitutional provisions, in excess of its statutory authority or the jurisdiction of the agency, or, for any other reason, that the Department's action was unauthorized by law under sections (1), (2), or (4) of [Section 536.140.2. Cum. Supp. 2012](#).

The Department did not act in excess of its statutory authority or jurisdiction. Further, the Department did not render a decision unauthorized by law or made by unlawful procedure or without a fair trial to Morris. Morris now has the burden to prove that the decision of the Department was erroneous. [Johnson v. Missouri Department of Health and Senior Services](#), 174 S.W.3d 568, 579 (Mo. App. W.D. 2005). Morris fails to meet that burden not only because she did not file a brief in this Court, but also because the \*19 decision of the Department is well supported under [§ 198.070](#) and [198.006, RSMo.](#) and survives review pursuant to [§ 536.140.2, RSMo. Cum. Supp. 2012](#). (App. 10, 14, 16). Based on these reasons, this Court need only determine under [Section 536.140.2, RSMo. Cum. Supp. 2012](#) if the decision reached by the Department and reviewed by the administrative hearing officer was arbitrary, capricious, unreasonable, or involved an abuse of discretion; or whether the decision was unsupported by competent and substantial evidence in the record as a whole.

## **B. The Department of Health and Senior Services' decision is supported by competent and substantial evidence on the record as a whole.**

### **Standard of Review**

The Court must determine whether competent and substantial evidence on the record as a whole supports the agency's decision and whether the agency's decision was arbitrary, capricious, or unreasonable, or whether the agency abused its discretion. [Clark v. School District of Kansas City](#), 915 S.W.2d 766, 733 (Mo.App. W.D. 1996). This Court will not substitute its judgment for that of the administrative law judge on factual matters. [State Bd. of Registration for the Healing Arts v. McDonagh](#), 123 S.W.3d 146, 152 (Mo. banc 2003). Where evidence could support a finding either way, an \*20 appellate court is bound to uphold the decision of the agency. [Weber v. Firemen's Retirement System](#), 899 S.W.2d 948, 951 (Mo.App. E.D. 1995). “The fact that the record also contains evidence in conflict with the finding of the [administrative agency] is not grounds for reversal on appeal.” [Id. at 950](#).

An agency's decision is unsupported by competent and substantial evidence only in the rare case when the decision is contrary to the overwhelming weight of the evidence. [Hampton v. Big Boy Steel Erection](#), 121 S.W.3d 220, 223 (Mo. banc 2003). “Substantial evidence is evidence which, if true, has probative force upon the issues, i.e., evidence favoring facts which are such that reasonable men may differ as to whether it establishes them; it is evidence from which the trier or triers of fact reasonably could find issues in harmony therewith; it is evidence of a character sufficiently substantial to warrant the trier of facts in finding from its facts, to establish which the evidence was introduced.” [Collins v. Division of Welfare](#), 364 Mo. 1032, 1037; 270 S.W.2d 817, 820 (Mo.banc 1954). When the agency's decision involves a question of law, the Court reviews the question de novo. [Albanna](#), 293 S.W.3d at 428. See also [Section 536.140.3](#).



### Argument

The administrative hearing officer's decision was based on substantial and competent evidence in the record to reach his decision. The Department had the burden in front of the administrative hearing officer to affirmatively \*21 establish its case in proposing that Morris' name should be placed on the EDL. (L.F. 35, 232, 233). The Department was able to meet this burden by a preponderance of the evidence submitted, that Morris knowingly or recklessly abused and/or **neglected** a resident of a licensed facility while employed at that facility. *Tate v. Missouri Department of Social Services*, 18 S.W. 3d 3 (Mo. App. E.D. 2000).

The administrative hearing officer determined that based on Morris' experience as a CNA and her experience in caring for A.B. that Morris should have been aware of the potential danger to A.B. in ignoring A.B.'s Care Plan instructions. (L.F. 232, 233). Morris acknowledged that she transferred A.B. contrary to both the A.B.'s Care Plan and the instructions in the facility's CNA book on multiple occasions prior to the incident of August 20, 2011. (L.F. 211, 232, 233). The decision reflects no indication that Morris had the authority to override A.B.'s Care Plan instructions. (L.F. 232). As a result, the administrative judge upheld the determination to place Morris' name upon the EDL. (L.F. 236).

The evidence at the hearing was sufficient to establish that Morris knowingly **neglected** A.B. as set forth supra. Such evidence included:

- Morris was employed at the Sylvia G. Thompson Residence Center at the time of the incident with A.B., and had seventeen years of experience as a CNA. (L.F. 143, 209, 210).

- \*22 ● Morris was familiar with A.B., and was responsible for A.B.'s care. (L.F. 210).

- At the time of the August 20, 2011 incident, A.B. was eighty -eight years old and diagnosed with, among other things, **peripheral vascular disease**, **osteoarthritis**, and **senile dementia**. (L.F. 145). A.B. was oriented only to herself, and could not communicate with others and was confused due to her medical diagnosis of **dementia**. (L.F. 145-146, 194).

- A.B. was a large woman at 195 pounds and unable to bear weight. (L.F. 148). Additionally, A.B. was at risk for falls (L.F. 160).

- A.B. was also predisposed to tissue trauma (injury and bleeding) because of her daily medication of **Coumadin**. (L.F. 145).

- A.B. required a two person transfer, with use of a gait belt because of her physical size, her inability to bear weight, and her contracted arms. (L.F. 148, 158, 160, 206, 381). The belt was used to assist two people in lifting a resident during transfers. (L.F. 157, 158).

- The two person restriction on transfer for A.B. requiring use of a gait belt was logged in A.B.'s care plan and was maintained in two locations, both accessible to Morris while she was employed at the Sylvia G. Thompson Residence Center. (L.F. 159, 160, 196).

- \*23 ● Morris acknowledged she was aware of the transfer restrictions for A.B. (L.F. 218).

- Morris had no authority to override or alter the transfer restrictions for A.B. at the time of her employment at the Sylvia G. Thompson Residence Center when the August 20, 2011 transfer incident occurred with A.B. (L.F. 232).

- Morris admitted that she had transferred A.B. from the A.B.'s geri-chair (a high chair for geriatrics) to A.B.'s bed without the assistance of a second facility staff member, and without using a gait belt. Id.

The standard of care for A.B. was sufficiently set forth by testimony and documents concerning the nursing home resident's individualized care plan. [Stone v. Missouri Department of Health and Senior Services, 350 S.W.3d 14, 23 \(Mo.banc 2011\)](#). Morris has presented no argument concerning the standard of care with this appeal. A.B.'s care plan specifically stated that A.B. was at risk for falls (L.F. 160) and that she required the use of two people during transfers. (L.F. 309). This process of transferring A.B. with additional personnel and use of a gait belt was reasonable and necessary in order to maintain A.B.'s physical and mental health. The necessity of the transfer restrictions became even more evident when Morris told the Department's investigator, Mary Sumpter, that when Morris laid A.B. into \*24 bed by herself A.B.'s arm got caught behind her and Morris had gently pulled A.B.'s arm out from under her and placed it on A.B.'s chest. (L.F. 136, 137). Morris had also told Emily Hahn, a charge nurse on duty on August 20, 2011 at the Sylvia G. Thompson Residence Center that when Morris transferred A.B. by herself A.B.'s arm got caught behind her when Morris laid A.B. onto the bed. (L.F. 189). Morris told Ms. Hahn that she had to pull A.B.'s arm out from under A.B. when that occurred. *Id.* Although the administrative hearing officer did not find by a preponderance of the evidence that Morris was responsible for the broken right arm A.B. was discovered to have suffered less than twenty four hours after Morris had improperly transferred her; the injury evidences the frailty of A.B.'s condition and necessity of insuring she was not placed in harm's way. As a result, it was imperative for the staff at Sylvia G. Thompson Residence Center to use two people to transfer A.B. with a gait belt in order to successfully transfer A.B. in and out of bed, chairs and her wheelchair without her falling or being injured in some way during transfers. (L.F. 145). The requirement that A.B. be transferred by two people with a gait belt was for A.B.'s safety and to prevent injury, bruising, and falls as A.B. was dependent on others during such transfers.

[Section 198.006\(17\), RSMo.](#) Cum. Supp. 2012 does not require proof of causation of injury or even an injury to show **neglect** as defined within the statute. (App. 10). The Department only has to prove that Morris' conduct \*25 presented either an imminent danger to the health, safety or welfare of A.B. or a substantial probability that death or serious physical harm would result. The hearing officer determined that "resident [A.B.'s] health, safety and welfare were placed in imminent danger by the Petitioner's [Morris'] failure to transfer [A.B.] in accordance with the transfer requirements stated in the residents Care Plan and in accordance with the instructions outlined in the CNA book" based on the evidence (L.F. 233). The inappropriate transfer of A.B. by Morris without the required two people and use of a gait belt was sufficient to show that Morris' conduct created an imminent danger to A.B.'s health, safety or welfare even without the hearing officer finding that the fracture of A.B.'s right arm was attributable to Morris' conduct by a preponderance of the evidence. As a result, the decision of the Department should be affirmed as it was supported by competent and substantial evidence.

**C. The Department of Health and Senior Services decision to place Morris' name on the Employee Disqualification List was not arbitrary, capricious, or unreasonable or an abuse of discretion.**

**Standard of Review**

The Court must determine whether competent and substantial evidence on the record as a whole supports the agency's decision; and \*26 whether the agency's decision was arbitrary, capricious, or unreasonable, or whether the agency abused its discretion. [Clark v. School District of Kansas City, 915 S.W.2d 766, 733 \(Mo.App. W.D. 1996\)](#). "An administrative decision is arbitrary, capricious, or unreasonable only when it is not based on substantial evidence." [State of Missouri, ex rel. Baer v. Campbell, 794 S.W. 2d 690, 691 \(Mo.App. E.D. 1990\)](#) (citing [Edmonds v. McNeal, 596 S.W.2d 403, 407 \(Mo.banc 1980\)](#)). To evidence an abuse of discretion, the court must render "an erroneous finding and judgment which is clearly against and contrary to the facts or the logical deductions from the facts and circumstances before the court; which is untenable and clearly against reason which works in injustice, and not justified by the evidence." [Biggs v. Biggs, 397 S.W.2d 337, 342 \(Mo.App. 1965\)](#)(citing [Harriman v. Harriman, 281 S.W.2d 566, 566 \(Mo.App. 1955\)](#)). The agency decision is sufficiently supported if the administrative tribunal could have reasonably reached the challenged decision. [Stone, 350 S.W.3d at 20](#).

**Argument**

As to her claim that the decision was arbitrary and capricious, the crux of Morris' argument before the circuit court was that her conduct "did not present an imminent danger to A.B. such that [Morris] did not commit 'neglect' for purposes of placement on the EDL" and therefore the department's decision should not stand. (L.F. 26-29). In making that claim \*27 to the circuit court, Morris relied heavily on *State v. Peoples*, 962 S.W.2d 921(Mo.App.W.D.1998). Morris' argument at the circuit court level centered on whether or not Morris' action caused A.B. to suffer the broken arm that A.B. was subsequently diagnosed with after Morris transferred A.B. without assistance or use of the gait belt.

*Peoples* is distinguishable from this case. *Peoples* dealt with criminal liability for a Class D felony. *Id.* at 924. The *Peoples* Court noted that in criminalizing a care provider's neglect of a nursing home resident, "far more than ordinary negligence" was required. *Id.* at 926. In *Peoples* the State had to carry a burden of showing a substantial probability of death or physical harm to the resident to establish the criminal liability. *Id.* The appellate court in *Peoples* noted its confusion as to why the State only relied on one point of the neglect definition, specifically that the conduct in that case presented substantial probability that death or serious physical harm would result instead of also relying on the accused person's conduct presenting imminent danger to health, safety or welfare of the resident. 962 S.W.2d 924-925.

In Morris' case the Department faced a different burden of proof at the administrative level. The Department was required to overcome only a preponderance of the evidence in front of the administrative hearing officer to show that Morris knowingly neglected A.B. under Section 198.006 (17),

\*28 RSMo. Cum Supp. 2012. (L.F. 233). The current case is more in line with *Krupp v. Missouri Department of Health and Senior Services*, 394 S.W.3d 500 (Mo. App. W.D. 2013).<sup>2</sup> In the case at bar, substantial evidence supported the decision of the administrative hearing officer.

The record made before the administrative hearing officer showed that Morris' standard of care was defined by Morris' training on abuse and neglect annually, (L.F. 163), as well as the individualized care plan for A.B. and the transfer protocol found in the facility's CNA nurse's book. (L.F. 158-160, 196). Morris violated this standard by acknowledging that she knew the standard required for transfer of A.B., violated the standard, and did not have authority to override the standard. (L.F. 218). As set forth in the Statement of Facts and Section II. B, Morris failed to provide the services reasonable and necessary to maintain A.B.'s physical health which presented either an \*29 imminent danger to A.B.'s health, safety or welfare (as evident by A.B.'s arm being caught underneath her), or a substantial probability that death or serious physical harm would result. A.B. was elderly, infirm, frail, and utterly dependent on her caregiver to transfer her in a manner to insure her safety. (L.F. 145, 148, 157-158, 206, 381). The use of a two person transfer for A.B. with a gait belt was a reasonable and necessary requirement to maintain the safety and physical health of A.B. (L.F. 231, 232).

The Department did not have to prove Morris' conduct caused injury to prove neglect as defined by Section 198.006(17), RSMo. 2012. The Department had to prove less than causation; specifically, the Department had to show that Morris' conduct present[ed] either an imminent danger to the health, safety or welfare of the resident or a substantial probability that death or serious physical harm would result. *Krupp v. Missouri Department of Health and Senior Services*, 394 S.W.3d 500 (Mo. App. W.D. 2013); §198.006(17). The Department did this. (L.F. 230-236). The decision of an administrative agency on factual issues is presumed to be correct until the contrary is shown, and the reviewing court is obliged to sustain the agency's order if it is supported by substantial evidence on the record as a whole. *Baker v. Missouri Department of Mental Health*, 344 S.W.3d 751 (Mo.App.W.D. 2011) (motion for rehearing and/or transfer to Supreme Court denied).

\*30 Here, the Department's findings of fact and conclusions of law that Morris knowingly neglected A.B. are supported by competent and substantial evidence upon the whole record as chronicled in Section II. B and C above; were not arbitrary, capricious, or unreasonable; and did not involve an abuse of discretion. The facts before the administrative hearing officer showed beyond a preponderance of the evidence that Morris knowingly neglected to provide the necessary services to insure the health, safety and welfare of A.B. in contravention of Section 198.070 and evidenced neglect under Section 198.006, RSMo. Cum. Supp. 2012.

## CONCLUSION

For the above reasons, the Department did not err in concluding that Morris knowingly **neglected** A.B. in violation of [Section 198.070, RSMo. Cum. Supp. 2012](#) and placing her name on the Employee Disqualification List for three years. The decision of the Department should be affirmed.

**Appendix not available.**

### Footnotes

- 1 At the administrative hearing the spelling of Morris' first name was "Sheryal." In subsequent pleadings and at the circuit court level, however, Morris' first name is identified as "Sheryl."
- 2 Although the Memorandum in Support of the Western District's decision in *Krupp v. Missouri Department of Health and Senior Services* affirming the agency decision to place Krupp's name upon an EDL is not available for publication or presentment with the Department's brief, the Department believes that Morris' actions, like Krupp's, is sufficient to merit placement on the EDL and the requirement under *Peoples* to prove injury is not required for the current action.

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