IN THE COURT OF APPEALS OF IOWA

No. 3-797 / 12-2007
Filed September 18, 2013

MERIA BURRAGE,
Petitioner-Appellant,

vs.

IOWA DEPARTMENT OF INSPECTIONS AND APPEALS, HEALTH INSPECTIONS DIVISION,
Respondent-Appellee.

Appeal from the Iowa District Court for Scott County, Thomas G. Reidel, Judge.

Meria Burrage appeals the district court's ruling on judicial review upholding a finding of dependent adult abuse. **REVERSED AND REMANDED WITH DIRECTIONS.**

Tomas J. Rodriguez, Moline, Illinois, for appellant.

Thomas J. Miller, Attorney General, and Jeanie Kunkle Vaudt, Assistant Attorney General, for appellee.

Considered by Vogel, P.J., and Danilson and Tabor, JJ.

DANILSON, J.

The Iowa Department of Inspections and Appeals (DIA) concluded that Meria Burrage committed dependent adult abuse on a dependent adult by negligently causing the victim physical injury in grabbing the victim's arm with sufficient force to cause a large bruise. The district court upheld that conclusion and Burrage appeals. We conclude the agency erred in interpreting Iowa Code section 235B.2(5)(a) (2007), and we therefore reverse and remand with directions.

Iowa Code section 235B.2(5)(a) provides:

> "Dependent adult abuse" means: (1) Any of the following 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.

"Determination of the statutory requirements for dependent adult abuse has not been explicitly vested in the agency's discretion. As a result, our review is for corrections of errors at law." *Wyatt v. Iowa Dep't of Human Servs.*, 744 N.W.2d 89, 93 (Iowa 2008) (citation omitted); *see also* Iowa Code § 17A.19(10)(c).

In *Wyatt*, 744 N.W.2d at 94, the supreme court rejected the State's argument that "negligent assault" was sufficient for purposes of Iowa Code section 235B.2(5). The court wrote:

> The State argues that the introduction to the provision plainly states that dependent adult abuse may be committed by the "willful or negligent acts or omissions of a caretaker." Iowa Code § 235B.2(5)(a)(1).
>
> We disagree. This prefatory language does not recognize "negligent assault." Instead, we interpret the preface as providing

> general introductory language that is broad enough to cover the intent requirement of all categories of dependent abuse. Some of the categories, such as abuse arising out of sexual acts or assault, require willful or intentional acts, while other types of abuse, such as deprivation of food, shelter, and clothing, may arise from negligent acts or omissions. We further note that the theory of "negligent assault" is inconsistent with DHS's own rule, which incorporates the definition of assault in Iowa Code section 708.1. We, therefore, hold that the elements of assault as described in *State v. Bedard*[, 668 N.W.2d 598, 601(Iowa 2003),] and *State v. Keeton*[, 710 N.W.2d 531, 533-34 (Iowa 2006),] are applicable to this case.

Wyatt, 744 N.W.2d at 94. Because there had been no finding of intent to harm or to offensively contact the dependent adult, the supreme court ordered the care worker's name be expunged from the adult abuse registry. *See id.* at 95.

While attempting to distinguish its rationale from that propounded in *Wyatt*, the State is essentially arguing—as it did in *Wyatt*—that negligent assault is sufficient for a finding of dependent adult abuse.[1] The *Wyatt* court disagreed, and we are bound by that precedent. *See State v. Eichler*, 83 N.W.2d 576, 578 (Iowa 1957) ("If our previous holdings are to be overruled, we should ordinarily prefer to do it ourselves."). We are unable to view the charge against Burrage—that she grabbed the patient causing injury—as anything but a charge of assault, which to be considered adult abuse requires a finding of specific intent to harm or offensively contact.

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[1] The State argues that negligent physical contact that results in physical injury is adult abuse. The *Wyatt* court stated, "Some of the categories, such as abuse arising out of sexual acts or assault, require willful or intentional acts, *while other types of abuse, such as deprivation of food, shelter, and clothing, may arise from negligent acts or omissions*." 744 N.W.2d at 94. The physical contact asserted here does not fall within the category of actions that "may arise from negligent acts of omissions." In any event, it is clear that the agency viewed this as an assault case and the attempt to justify its findings after *Wyatt* are unsatisfactory.

We do not dispute that the claimed dependent abuse was "physical injury" rather than "assault."[2] We also recognize the State is not advocating for a finding of "negligent assault," as they did unsuccessfully in *Wyatt*.

Yet, the agency originally assessed this as an assault case, and its post hoc finding—as noted by the dissent, "that L.R. suffered a physical injury in the form of a 'significant bruise' as a result of intentional or negligent acts or omissions"—provides an unconvincing distinction. The agency first found no intentional act on Burrage's part. On remand the agency found,

> The record supports the allegation of physical injury whether [Burrage's] conduct was negligent or intentional. Regarding the intent element, appellant knew from LR's care plan that she was a 95 year old woman who was at risk for skin breakdown. The weight of the evidence shows that appellant voluntarily grabbed LR by the arm after responding to her alarm. Appellant is thus responsible for the natural and probable consequences that ordinarily follow from that act.

We decline to affirm the agency and the district court on the basis of a negligent act that results in physical injury where there are no facts to support a negligent act—and the agency did not make a finding of a negligent act. Here the facts reflect that L.R.'s arm had a bruise that resembled a handprint. L.R. herself stated, "I turned my [call] light on and the aide grabbed my arm." These facts alone do not constitute negligence. We note, "A horse by any other name is still a horse."[3] The DIA may not circumvent *Wyatt* by calling the horse by a

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[2] Negligent physical contact that results in physical injury constitutes dependent abuse. Iowa Code § 235B.2(5)(a)(1)(a).

[3] Jenny Hughes, *A Horse by Any Other Name* (Half Halt Press 1994). The phrase has also been stated as "a rose by any other name is still a rose." The latter phrase likely originates from William Shakespeare's *Romeo and Juliet*, "What's in a name? that which we call a rose By any other name would smell as sweet; . . ." (1600).

different name. We acknowledge that there are undoubtedly times when the DIA is uncertain whether it can prove a physical injury was caused by an assault or a negligent act. In those cases, we know of no reason why the DIA's disposition cannot identify the abuse in the alternate or by a specific statutory alternative.[4]

We reverse the judgment of the district court, and remand with directions to order Burrage's name be expunged from the dependent adult abuse registry and that DHS provide notice of expungement pursuant to Iowa Code section 235B.10. *See Wyatt*, 744 N.W.2d at 95.

REVERSED AND REMANDED WITH DIRECTIONS.

Vogel, P.J. concurs; Tabor, J., dissents.

[4] DIA's Comprehensive Abuse Memo notes that the abuse alleged is "Physical Injury 5.a(1)(a)" and does not cite the alternative on the form—"Assault 5.a(1)(a)".

TABOR, J. (dissenting)

I respectfully disagree with the majority's reading of *Wyatt v. Iowa Dep't of Human Servs.*, 744 N.W. 2d 89, 93 (Iowa 2008). I believe the agency and the district court correctly interpreted the dependent adult abuse statute[5] as applied to Burrage's conduct toward L.R., the ninety-five-year-old woman in her care. I would affirm.

Although the majority does not include the procedural history of this case, it is notable the Department of Inspections and Appeals (DIA) asked for a limited remand to clarify the legal standard the administrative law judge (ALJ) used in reaching his decision. Citing *Wyatt*, the agency's counsel wrote: "In an abundance of caution and in fairness to Ms. Burrage, and for the sake of judicial economy, IDIA believes that this cause should be remanded to the agency for the singular purpose of elucidating the governing legal standard." The district court wisely granted the limited remand motion.

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[5] Iowa Code section 235B.2(5)(a)(1) provides the meaning of "dependent adult abuse" as:

> (1) Any of the following 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.
>
> (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."

In the proposed order following limited remand, the ALJ acknowledged his initial decision mistakenly analyzed the case under the "assault" alternative in section 235B.2(5)(a)(1)(a). The DIA charged the abuse under the "physical injury" alternative in that code section.

The ALJ explained:

> The difference is important, because the physical injury category is not a specific intent offense. The categories of physical injury and assault appear similar, but they involve distinct conduct. If a caregiver left a resident in a precarious position contrary to a care plan and the resident was injured in a fall, the caregiver could be found to have committed physical injury through her acts or omissions, even though the conduct is not an assault. By comparison, a caregiver could commit an assault that does not result in an actual physical injury. There may be overlap between the two categories, but they meet different objectives. The types of conduct covered by the physical injury category is comparable to deprivations of food, shelter, and clothing, so a physical abuse allegation could be proved by intentional or negligent acts.

The ALJ concluded DIA established by a preponderance of the evidence that L.R. suffered a physical injury in the form of a "significant bruise" as a result of intentional or negligent acts or omissions of Burrage. The ALJ found Burrage knew from L.R.'s care plan L.R. was at risk for skin breakdown and also found the weight of the evidence showed Burrage voluntarily grabbed L.R. by the arm after responding to L.R.'s alarm for help with the use of a bed pan.

The DIA director adopted the ALJ's clarified legal analysis in its entirety. Burrage sought judicial review, asking the district court to "extend the holding of *Wyatt*" to require the DIA to prove dependent adult abuse by showing "Burrage's specific intent to injure the patient by a negligent act of care provided to the patient." The district court declined the invitation to "extend" the *Wyatt* holding,

observing *Wyatt* dealt with an assault where the patient suffered no physical injury, whereas the DIA accused Burrage of negligent infliction of an injury, characterized by failure to exercise the degree of care someone with ordinary prudence would have exercised in the same circumstance. The district court found the specific language of section 235B.2(5)(a)(1) allows for a negligent act to be the cause of the dependent adult's physical injury.

In contrast, the majority opinion fails to recognize any distinction between the "physical injury" and the "assault" alternatives under section 235B.2(5)(a)(1)(a), despite the fact that section defines dependent adult abuse in the disjunctive: "physical injury to" *or* "injury which is at variance with the history given of the injury" *or* "unreasonable confinement" *or* "unreasonable punishment" *or* "assault." When the legislature uses the word "or" in a statute, we presume it to be disjunctive unless a contrary intent appears. *Iowa Erosion Control, Inc. v. Sanchez*, 599 N.W.2d 711, 714 (Iowa 1999). If the legislature intended to limit the definition of dependant adult abuse to assaults, it would not have specifically listed the various other means of harming a dependant adult. By viewing every violation of subsection (a) as a violation under the section 708.1 definition of assault, the majority's interpretation reads the other alternatives out of the statute. Such an interpretation runs counter to the accepted construction maxim of giving effect to each term of a statute so no single part is viewed as insignificant or superfluous. *See Miller v. Marshall Cnty*, 641 N.W.2d 742, 749 (Iowa 2002).

Moreover, in deciphering legislative intent, we consider the objects sought to be accomplished and the evils sought to be remedied, seeking to advance, rather than defeat, the statute's purpose. *Danker v. Wilimek*, 577 N.W.2d 634, 636 (Iowa 1998). The purpose of chapter 235B is to protect especially vulnerable members of our society from abuse. Construing section 235B.2(5)(a)(1)(a) to define dependent adult abuse more broadly than mere assaultive behavior and thereby shielding our vulnerable citizens from both willfully abusive and negligent caretakers advances the chapter's purpose.

As the district court correctly determined, *Wyatt* addressed only the assault alternative of section 235B. *See Wyatt*, 744 N.W.2d at 93 ("One category of dependent adult abuse includes 'assault of a dependent adult,' which is at issue in this case."). Our supreme court described the "central question" in the *Wyatt* appeal: "whether assault under Iowa Code section 708.1 requires that the actor have a specific intent to offend or insult the victim, as contended by Wyatt, or a lesser showing that the intended physical conduct could be objectively viewed as insulting or offensive, as found by the director." *Id*. at 94. Thus the fighting issue was not whether Wyatt's conduct was negligent, but whether assault required proof of specific or general intent after the 2002 legislative amendment to section 708.1. *See generally State v. Bedard*, 668 N.W.2d 598, 601 (Iowa 2003); *State v. Keeton*, 710 N.W.2d 531, 533 (Iowa 2006).

Here, the majority contends the State is trying to circumvent *Wyatt* by "essentially arguing—as it did in *Wyatt*—that negligent assault is sufficient for a finding of dependent adult abuse." I believe the majority mischaracterizes the

State's argument. The State is not advocating for a finding of "negligent assault." Instead, it argues the agency pursued a *different alternative* under section 235B.2(5)(a)(1)(a)—negligent infliction of a physical injury. Contrary to the majority's footnote, the agency did not view "this as an assault case." Rather, the agency expressly pursued a dependent adult abuse finding under the physical injury alternative. The DIA document, "Comprehensive Abuse Memo," includes a list of nine possible check boxes to indicate the abuse being alleged. In this case, the investigator checked the box for "Physical injury," but did not check the box for "Assault."

The majority asserts it is "unable to view the charge against Burrage—that she grabbed the patient causing injury—as anything but a charge of assault." In my view, it is not our role as an appellate court to second-guess the agency's charging decision. Even if Burrage's conduct could arguably have been an assault, because the statute provides for an alternative charge of physical injury resulting from a willful or negligent act or omission, it falls within the purview of the agency to decide the basis for its investigation. Where a single act may violate more than one statutory provision, appellate courts should conclude the legislature intended to give discretion to the enforcing agency to determine how to proceed. *Cf. State v. Perry*, 440 N.W.2d 389, 391-92 (Iowa 1989) (reiterating "[w]hen a single act violates more than one criminal statute, the prosecutor may exercise discretion in selecting which charge to file" and noting it "[i]s common for the same conduct to be subject to different criminal statutes").

The majority reads *Wyatt* as foreclosing the possibility of the DIA charging a caregiver with dependent adult abuse for a patient's physical injury resulting from a negligent act or omission—despite the plain language of section 235B.2(5)(a)(1)(a). But *Wyatt* does not speak to that question. *Wyatt* did not involve a physical injury. *Wyatt*, 744 N.W.2d at 91. Wyatt's act of muffling a patient's screams with a pillow caused no bruising or other injury. So the only option under section 235B.2(5)(a)(1)(a) was to charge Wyatt with an assault. *See* Iowa Code § 708.1. Here, the DIA had a second option under the dependent adult abuse statute, and we are not barred by precedent from affirming the agency and the district court.

Finally, even if the majority is correct in reading *Wyatt* to eliminate several alternative ways of committing dependent adult abuse, which I do not believe, the remedy employed by the majority is too harsh. Because the DIA did not charge Burrage with assault, the ALJ did not consider whether the evidence satisfied the assault definition of dependent adult abuse. Therefore, at a minimum, we should remand to the agency for it to make that determination initially.