IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

CHRISTOPHER ALT, *Appellant*,

v.

MICHAEL WISEHART, *Appellee*.

No. 1 CA-CV 21-0541
FILED 10-25-2022

Appeal from the Superior Court in Maricopa County
No. LC2020-000300-001
The Honorable Daniel J. Kiley, Judge

AFFIRMED

COUNSEL

Lewis Brisbois Bisgaard & Smith LLP, Phoenix
By Kevin C. Nicholas, Bruce C. Smith
Counsel for Appellant

Arizona Attorney General's Office, Tucson
By Jennifer R. Blum
Counsel for Appellee

MEMORANDUM DECISION

Presiding Judge Samuel A. Thumma delivered the decision of the Court, in which Judge Cynthia J. Bailey and Vice Chief Judge David B. Gass joined.

T H U M M A, Judge:

¶1 Christopher Alt appeals from a judgment affirming a decision by the Arizona Department of Economic Security (Department) placing him on the Adult Protective Services Registry. Because Alt has shown no reversible error, the judgment is affirmed.

FACTS AND PROCEDURAL HISTORY

¶2 Alt's Father suffers from dementia, seizures and a language disorder called aphasia. Father has had at least two brain surgeries, the more recent of which in late 2019 was described as "serious." Alt has cared for his Father since 2016.

¶3 In January 2019, Father had a seizure and was admitted to a hospital. Father, who was then 74-years old, was a "vulnerable adult" at that time. *See* Ariz. Rev. Stat. (A.R.S.) § 46-451(A)(12) (2022) ("'Vulnerable adult' means an [adult] . . . who is unable to protect himself from abuse, neglect or exploitation by others because of a physical or mental impairment.").[1] While in the hospital, Father was not fully cooperative and became agitated. As a result, hospital staff applied restraints to his arms and hands and his chest/abdomen. Hospital staff also gave Father an antipsychotic drug.

¶4 At about this same time, Alt visited Father. Resulting hospital progress notes report the following: "The room was closed and yelling was heard from outside the room. Security was called, and the son [Alt] admitted to slapping the patient [Father] because he was treating the nurses poorly." Alt later testified he and his Father were arguing, and the argument escalated, with Alt becoming "upset" and "emotional." Alt admitted he "slapped" Father's face with an open hand in an attempt to "disengage from the conflict." Alt later testified that Father "got aggressive

[1] Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

and tried to grab the phone. I wasn't thinking, and I'm sure he wasn't thinking clearly either and that's what led to me slapping him. I was trying to diffuse the situation." Father, however, was restrained and medicated, and did not pose a physical danger to Alt.

¶5 Reacting to Alt's slap, Father "was heard yelling for help." Upon entering Father's room, nurses saw Alt standing over Father, who was yelling "he slapped me." Alt recalled Father telling the nurses "'[h]e hit me, he hit me.' And I said, 'I slapped him.' I freely admitted I slapped him."

¶6 Phoenix Police were called, and arrested Alt, who was charged with one count of misdemeanor assault, a domestic violence offense. *See* A.R.S. § 13-1203(A)(3) ("A person commits assault by . . . knowingly touching another person with the intent to injure, insult or provoke such person."). The Adult Protective Services (APS) division of the Department also opened an investigation. In April 2019, while the criminal charge was pending, APS sent Alt a letter stating that it "completed its investigation," which "did not substantiate the allegations of abuse." The letter added "[t]his case was closed."

¶7 In May 2019, Alt agreed to a domestic violence diversion program plea agreement in the criminal case. In a written plea agreement, Alt pled guilty to assault by touch with intent to injure, insult or provoke, a Class 3 misdemeanor. *See* A.R.S. § 13-1203(A)(3). Alt agreed, among other consequences, to be placed on probation for one year and to complete a domestic violence counseling program. The plea agreement stated that it did "not preclude any other remedies authorized by law," but that it precluded Alt "from denying in any civil proceeding the essential allegations of the criminal offense for which the defendant is convicted." The plea also provided that the court would suspend entry of judgment and imposition of sentence if Alt completed diversion requirements.

¶8 In May 2019, after a colloquy with Alt, the municipal court accepted the plea agreement, noting it was "voluntary and not the result of force or threat, or promises other than those contained in the plea agreement." In September 2019, after Alt successfully completed the diversion requirements, the State moved to set aside the plea agreement and dismiss the charges without prejudice. The court granted the State's motion two days later.

¶9 Meanwhile, for reasons that are unclear, APS reopened its investigation in early June 2019, later claiming the April 2019 closure letter was sent by mistake. APS apparently did not inform Alt of the reopening. In early August 2019, APS then sent Alt a "Substantiation Report" concluding that, in January 2019,

> Alt abused a vulnerable adult [Father], through the intention[al] infliction of physical harm. A preponderance of the evidence supports such a finding. As a result, this substantiated finding should be placed on the Adult Protective Services Registry pursuant to A.R.S. §§ 46-458 and 46-459.

Alt requested an administrative hearing so he could challenge the finding. *See* A.R.S. § 46-458(A)(2), (B) & (C).

¶10 At an August 2020 hearing, an Administrative Law Judge (ALJ) received exhibits, including the police report and the plea agreement. Alt and some APS employees testified. Alt admitted slapping Father, adding he did not intend to "injure or harm" him but, instead, was attempting "to get his attention" and "wasn't thinking" clearly. Alt further testified that, through subsequent counseling, he recognized he had "burnout" and was "suffering from what happens to caregivers." Alt noted the benefits of counseling, adding he "should've reached out for help sooner." The lead APS investigator testified that the April 2019 letter was sent by an "administrative assistant of some sort" and was a "mistake" attributable to a lack of care in handling cases.

¶11 After considering the evidence and argument, in August 2020, the ALJ concluded that "the preponderance of the evidence supports a finding of 'abuse' by [Alt] and that the Department's proposed findings should be substantiated and entered into the APS Registry." On review, the Department accepted the ALJ's findings in a September 2020 Decision and Order (Decision). Although making seven pages of "modifications" to the ALJ's findings, the Department concluded that the finding of abuse was substantiated "and shall be entered on the Adult Protective Services Registry."

¶12 Alt timely appealed the Decision. In a detailed 19-page ruling, the superior court affirmed, finding that the Decision was supported by "substantial evidence in the record" and was "not contrary to law." This court has jurisdiction over Alt's timely appeal pursuant to Article 6, Section 9, of the Arizona Constitution, A.R.S. §§ 12-913, -120.21(A)(1) and -2101(A)(1) and Ariz. R. Jud. Rev. Admin. Dec. 13(a).

DISCUSSION

¶13 Alt argues the Decision: (1) is barred by equitable estoppel and (2) is not supported by substantial evidence. This court will affirm an agency's decision unless it is "contrary to law, is not supported by substantial evidence, is arbitrary and capricious or is an abuse of discretion." A.R.S. § 12-910(F). Legal conclusions are reviewed de novo, *Cooke v. Ariz. Dep't of Econ. Sec.*, 232 Ariz. 141, 144 ¶ 13 (App. 2013), without deference "to any previous determination" of law by the agency, A.R.S. § 12-910(F).

I. Alt Has Failed to Show that Equitable Estoppel Bars the Decision.

¶14 In general, equitable estoppel requires a showing that "(1) the party to be estopped commits acts inconsistent with a position it later adopts; (2) reliance by the other party; and (3) injury to the latter resulting from the former's repudiation of its prior conduct." *Gorman v. Pima Cnty.*, 230 Ariz. 506, 510–11 ¶ 21 (App. 2012) (quoting *Valencia Energy Co. v. Ariz. Dep't of Rev.*, 191 Ariz. 565, 576–77 ¶ 35 (1998)).[2] A party seeking to apply equitable estoppel against the government must also show that "'the public interest will not be unduly damaged and [that] its application will not substantially and adversely affect the exercise of governmental powers.'" *City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, 191 ¶ 67 (App. 2008) (citations omitted). The party asserting equitable estoppel has the burden of proving each element. *Lowe v. Pima Cnty.*, 217 Ariz. 642, 650 ¶ 34 (App. 2008). "If any of the elements is lacking there can be no estoppel." *Hall v. Motorist Ins. Corp.*, 109 Ariz. 334, 336 (1973).

[2] Alt advocates the four-element equitable estoppel test noted in *Carlson v. Ariz. Dep't of Econ Sec.*, 184 Ariz. 4, 6 (App. 1995), but disavowed by the Arizona Supreme Court in *Valencia Energy*, 191 Ariz. at 577 n.16. This court applies the three-element test approved in *Valencia Energy*, *id.* at 576–77, although noting the test Alt advocates "is, in substance, no different than the three-prong test traditionally applied in Arizona," *id.* at 577 n.16.

¶15 The April 2019 letter closing the case as unsubstantiated, compared with the August 2019 "Substantiation Report," prove the inconsistency required by the first element of equitable estoppel. *Gorman*, 230 Ariz. at 510 ¶ 21. Alt, however, has failed to show he relied on the April 2019 letter to his detriment.

¶16 Alt asserts that he pled guilty to his detriment in reliance on the April 2019 letter. "[E]quitable estoppel not only requires that a person show he or she relied upon another's conduct but that, as a result of such reliance, the person changed his or her 'position for the worse.'" *Sherman v. First Am. Title Ins. Co.*, 201 Ariz. 564, 570 ¶ 19 (App. 2002). On the record, Alt showed no reliance on the April 2019 letter to his detriment.

¶17 Alt's written plea agreement expressly stated that it did "not preclude any other remedies authorized by law," but that it did preclude Alt "from denying in any civil proceeding the essential allegations of the criminal offense for which the defendant is convicted." Significantly, the plea agreement did not reference the April 2019 letter or the Department's investigation. The plea agreement also made no promises or assurances regarding the Department's investigation. The court's resulting order found the plea was "voluntary and not the result of force or threat, or promises other than those contained in the plea agreement." *Cf.* Ariz. R. Crim. P. 17.3(a)(2) (requiring, before accepting plea, the court to determine, that it "is voluntary and not the result of force, threats or promises (other than that which is included in the plea agreement)"). On this record, Alt has not shown that he relied on the April 2019 letter to his detriment. Because Alt failed to establish essential elements, his equitable estoppel argument fails. *See Sherman*, 201 Ariz. at 570 ¶ 19.[3]

II. Sufficient Evidence Supports the Abuse Finding.

¶18 Alt next argues the Decision "is not supported by substantial evidence." To the extent that Alt challenges the sufficiency of the evidence, the proper inquiry is whether a preponderance of the evidence allowed the Department to conclude that Alt committed "abuse" of Father, who admittedly was a "vulnerable adult." *See* A.R.S. § 46-451(A)(12).

[3] Given this conclusion, this court need not (and expressly does not) address (1) the fact that the municipal court later vacated the plea agreement and dismissed the charges without prejudice or (2) the additional showings Alt was required to make in seeking to apply equitable estoppel to the government. *See Clear Channel Outdoor, Inc.*, 218 Ariz. at 191 ¶ 67.

¶19 The Department found Alt's conduct was abuse under A.R.S. § 46-451(A)(1)(a), which states "'Abuse' means . . . intentional infliction of physical harm." At the time of the January 2019 incident, Father was suffering from dementia, seizures and a language disorder, and had been sedated. Father was defenseless, restrained in his hospital bed "because of his mental state and both his hands and chest were secured so [that he] could not move." Father and Alt were arguing and, when admittedly "agitated" and not "thinking clearly," Alt slapped Father in the face with his open hand, causing Father to repeatedly yell "he hit me." Although regrettable, the slap was not accidental; Alt's own testimony indicated he intended to strike his defenseless Father, causing him pain. The record also shows Alt knew that his actions would have consequences.

¶20 Alt argues that the record does not show that he had an "intent to cause physical harm" to his Father. The Department correctly notes that intent is typically shown by circumstantial evidence. *See, e.g.*, *State v. Harm*, 236 Ariz. 402, 406 ¶ 13 (App. 2015) (noting criminal "intent may be proven by circumstantial evidence," adding that a person's state of mind "'is seldom, if ever, susceptible of proof by direct evidence.'"); *see also Mein ex. rel Mein v. Cook*, 219 Ariz. 96, 100 ¶ 17 (2008) (noting "[i]ntent" is not "limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result."). On the record presented, the Department properly could have found that Alt acted with the requisite intent.

¶21 Contrary to Alt's assertion, proof of physical injury is not a necessary element of abuse. As the superior court noted, A.R.S. § 46-451(A)(1)(a) defines "abuse" in terms of "physical harm," not "physical injury." When it wishes to do so, the Legislature has used "physical injury" in other statutory prohibitions. *See, e.g.*, A.R.S. §§ 13-3623(A) (criminal prohibition of conduct directed at child or vulnerable adult, inter alia, under "circumstances likely to produce . . . physical injury"); 12-721(D)(3) (in defining "negligent entrustment," referring to a product that, inter alia, could produce an "unreasonable risk of physical injury"); 5-395.01(C)(2) (in addressing consequences for impaired boating, referencing "substantial risk of physical injury"). By using different phrases in different contexts, this court will not read "physical harm" to mean "physical injury." *See P.F. West, Inc. v. Superior Court*, 139 Ariz. 31, 34 (App. 1984) (a statute "must be given effect according to its plain and obvious meaning" and "different consequences . . . flow from the use of different language"); *see also Walker v. City of Scottsdale*, 163 Ariz. 206, 210 (App. 1989) (statutes not to be read in a way that makes terms redundant).

¶22 Nor does the statute require "serious physical harm," as the Legislature has required in other statutes. *See, e.g.*, A.R.S. §§ 25-1061(A) (authorizing warrant to take physical custody of child, inter alia, "if the child is immediately likely to suffer serious physical harm"); 23-401(14) (defining, in the workplace, a "serious violation" as a condition that, inter alia, produces a substantial probability that "serious physical harm could result"); 3-361(9) (similar for pesticide control violation). Accordingly, any "physical harm" meets the statutory requirement set forth in A.R.S. § 46-451(A)(1)(a).[4]

¶23 As applied, Alt slapped Father's face hard enough to inflict physical pain causing Father to yell "[h]e hit me, he hit me." Alt's action and the physical pain suffered by Father -- however transitory -- qualifies as "physical harm" under A.R.S. § 46-451(A)(1)(a), even if Father did not sustain an observable injury. On the record presented, the Department could properly find that the abuse allegation was substantiated. A.R.S. § 46-458.[5]

CONCLUSION

¶24 The judgment is affirmed.

COURT OF APPEALS
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[4] Alt cites the Department's website for the proposition that the Department does not read A.R.S. § 46-451(A)(1) as applying to his conduct. The Decision, however, runs counter to Alt's argument. Moreover, Alt has not shown how this court is bound by the Department's view of the statute.

[5] Given this conclusion, this court need not (and expressly does not) address Alt's argument that his yelling at Father did not constitute abuse. Similarly, this court does not consider Alt's reliance on an unpublished decision from the California Court of Appeal decided in 2010. *See* Ariz. R. Sup. Ct. 111(d).