STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0002

Michael McCabe,
Appellant,

vs.

Emily Johnson Piper, Commissioner of Human Services,
Respondent,

Hennepin County Human Services,
Respondent.

Filed September 5, 2017
Affirmed
Reilly, Judge

Hennepin County District Court
File No. 27-CV-15-7422

Jonathan Geffen, Arneson & Geffen, PLLC, Minneapolis, Minnesota (for appellant)

Lori Swanson, Attorney General, Ali P. Afsharjavan, Assistant Attorney General, St. Paul, Minnesota (for respondent Commissioner of Human Services)

Michael O. Freeman, Hennepin County Attorney, Carolyn A. Peterson, Assistant County Attorney, Minneapolis, Minnesota (for respondent Hennepin County Human Services)

Considered and decided by Reilly, Presiding Judge; Johnson, Judge; and Bratvold, Judge.

U N P U B L I S H E D O P I N I O N

REILLY, Judge

Appellant Michael McCabe challenges the district court order affirming the determination of respondent commissioner of human services that appellant neglected and emotionally abused E.M., a vulnerable adult. Appellant asserts that (1) he is not a caregiver within the meaning of Minn. Stat. § 626.5572, subd. 4 (2016), (2) he did not emotionally abuse or neglect E.M., and (3) respondent's failure to issue a Tennessen warning requires exclusion of the data collected. We affirm.

FACTS

E.M. is 85 years old and the mother of appellant. She is a vulnerable adult who suffers from dementia, significant hearing loss, dizziness, and problems with balance. From 2008 to 2013, E.M. lived at Summit Place, an independent-living facility for seniors who require minimal care and assistance in their daily living activities. Appellant secured and maintained E.M.'s housing at Summit Place; hired supervised care for E.M.; assisted E.M. with daily living activities, including laundry, cleaning, and transportation; and often attended E.M.'s doctor and physical therapy appointments. While residing at Summit Place, E.M. experienced numerous falls, several of which required hospitalization; staff reported that E.M. became increasingly confused and disorientated, which led to an increased number of falls and caused E.M. to require more assistance than the facility offered. In May 2012, E.M. underwent a physical therapy evaluation, the results of which indicated that E.M.'s frequent falls were due to her dementia and impulsivity. As a result, the physical therapist reported that E.M. required 24-hour supervision.

On September 12, 2013, appellant visited E.M. at Summit Place and forced E.M. down to the ground in front of her part-time personal care assistant (PCA) to prove to the PCA that E.M. was capable of getting up without assistance if she fell. Appellant continued to push E.M. down when he thought that she did not get close enough to the floor, even though E.M. asked him "please don't make me." Appellant then ordered E.M. to get up on her own in an effort to prove to the PCA that E.M. did not require additional assistance. Appellant's actions were against the recommendation of physical therapist Kimberly Sheppard, who previously informed appellant that training E.M. to get up from a fall was "futile" because E.M. was unable to get up by herself or to remember the techniques necessary to do so. After appellant left E.M.'s residence, E.M. told her PCA that appellant's conduct "made her feel like a dog."

On October 31, 2013, E.M. was admitted to Methodist Hospital after experiencing another serious fall while residing at Summit Place; this was the sixth time E.M. was hospitalized in 15 months. The clinical nurse specialist determined that E.M. could not continue to safely live at Summit Place and therefore started to work on a commitment petition. When the nurse met with E.M. to discuss the hospital's decision to pursue civil commitment, appellant acted in a manner intended to frighten E.M. into checking herself out of the hospital. The nurse reported:

> [Appellant] continues to sit quite close to [E.M.], firing questions that are paraphrased in a manner that adds to [the patient's] anxiety and alarm. He repeats questions and makes interpretations that are [intended to] provoke the patient and appear to threaten her wishes and well-being. The following are examples of [appellant's] questions and statements: "Do you want to go home, mother?" "When do you want to go

> home?" "These people want to keep you here for 72 hours, they do not want you to go home, what do you think about that?" "They want to limit your rights, they want to make decisions about where you live. What do you think about that?" "As your 'legal power of attorney,' I would advise you to leave the hospital right now." He repeats the last statement a number of times. He does not offer his mother reassurance and instead continues to question her despite the patient's stress and her statements that she doesn't understand what is happening.
>
> I directed my final comments to [appellant]. I once again reviewed that the patient lacks . . . decisional capacity regarding her discharge needs and safety needs. I added that this has been discussed with [appellant] and his wife in the past on a number of occasions.

In response, appellant showed the treating nurse a document signed by E.M. and titled Durable Power of Attorney for Health Care, which appellant claimed authorized him to act on behalf of E.M., if she lacked decisional capacity. Hospital staff refused to recognize the validity of this document, noting that E.M. lacked decisional capacity on the day that she signed it.

Following a lengthy investigation, Hennepin County Adult Protection notified appellant of its determination that appellant committed emotional abuse and caregiver neglect against E.M., a vulnerable adult. Appellant requested reconsideration, and the agency affirmed its decision. Appellant then filed an appeal, and, after a two-day evidentiary hearing, a human-services judge issued an order recommending that the commissioner affirm Hennepin County's maltreatment determination.[1] Relying on the

[1] The county filed a petition for guardianship and conservatorship on November 7, 2013, which temporarily stayed the maltreatment proceedings. The county later withdrew this petition. The record presented on appeal indicates that a second petition for guardianship or conservatorship has not yet been filed.

incidents that occurred in September and October 2013, the human-services judge determined that appellant neglected and emotionally abused E.M. The commissioner adopted the recommendations of the human-services judge and issued an order upholding the determinations. Appellant later appealed to the district court, and the district court affirmed the commissioner's order.

This appeal follows.

D E C I S I O N

> On certiorari appeal from a quasi-judicial agency decision not subject to the [Minnesota] Administrative Procedure Act, we examine the record to review questions affecting the jurisdiction of the [agency], the regularity of its proceedings, and, as to the merits of the controversy, whether the order or determination in a particular case was arbitrary, oppressive, unreasonable, fraudulent, under an erroneous theory of law, or without any evidence to support it.

Anderson v. Comm'r of Health, 811 N.W.2d 162, 165 (Minn. App. 2012) (quotation omitted), *review denied* (Minn. Apr. 17, 2012); *see also Staeheli v. City of St. Paul*, 732 N.W.2d 298, 304 n.1 (Minn. App. 2007) (noting that the scope of common law review on certiorari is similar to the scope of review applied in cases that arise under the Minnesota Administrative Procedure Act).

I. Appellant is a caregiver as the term is defined in Minn. Stat. § 626.5572, subd. 4.

Appellant first argues that he does not satisfy the definition of a caregiver as the term is defined in Minn. Stat. § 626.5572, subd. 4, because he had no legal obligation to care for E.M. The statute defines caregiver as "an individual or facility who has responsibility for the care of a vulnerable adult as a result of a family relationship, or who

has assumed responsibility for all or a portion of the care of a vulnerable adult voluntarily, by contract, or by agreement." Minn. Stat. § 626.5572, subd. 4. Substantial evidence must support a determination that an individual or facility is a caregiver. *In re O'Boyle*, 655 N.W.2d 331, 334 (Minn. App. 2002). Substantial evidence is generally defined as: (1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; and (3) more than some or any evidence. *Cable Commc'ns Bd. v. Nor-west Cable Commc'ns P'ship*, 356 N.W.2d 658, 668 (Minn. 1984).

In this case, the human-services judge specifically found that appellant satisfied the definition of caregiver because "he was [E.M.'s] only child and he assumed responsibility for her housing arrangements and arrangements for her care." Appellant, however, argues that the district court's conclusion treats all adult children of vulnerable adults as caregivers, and that doing so is contrary to public policy. This argument is flawed for two reasons.

It is a well-established principle of law that "[w]hen legislative intent is clear from the statute's plain and unambiguous language, [this court] interpret[s] the statute according to its plain meaning without resorting to other principles of statutory interpretation." *Vermillion State Bank v. State, Dep't of Transp.*, 895 N.W.2d 269, 272 (Minn. App. 2017) (quotation omitted). When the plain meaning of a statute is clear and unambiguous, "the letter of the law shall not be disregarded under the pretext of pursuing the spirit." Minn. Stat. § 645.16 (2016). The statute at issue here specifically limits the definition of caregiver to an individual "who has responsibility for the care of a vulnerable adult as a result of a family relationship" or "who has assumed responsibility for all or a portion of the care of

a vulnerable adult voluntarily, by contract, or by agreement." Minn. Stat. § 626.5572, subd. 4.

Appellant voluntarily assumed responsibility of at least "a portion of the care of [E.M.,] a vulnerable adult[,] voluntarily, by contract, or by agreement." *Id.* Appellant voluntarily (1) assumed responsibility for E.M.'s daily activities such as cleaning, laundry, and shopping; (2) attended doctor and physical therapy appointments with E.M.; (3) helped E.M. oppose her eviction order; (4) solicited, hired, and assumed responsibility for her PCA; (5) oversaw E.M.'s finances; (6) attempted to act as her "legal power of attorney"; and (7) participated in discharge planning at Methodist Hospital on at least one occasion. Substantial evidence supports the determination that appellant was a caregiver.[2]

II. The maltreatment determinations are supported by substantial evidence and are not erroneous.

Appellant next argues that (1) his statements to E.M. do not satisfy the statutory definition of maltreatment by neglect, (2) substantial evidence does not support the determination that appellant committed caregiver neglect by resisting recommendations for placement and increased services, (3) the determination that appellant emotionally abused E.M. when he forced her to lower herself to the floor to demonstrate that she could get up by herself is unsupported by substantial evidence, and (4) the determination that

[2] Appellant also suggests that E.M. does not satisfy the statutory definition of a vulnerable adult. The record, however, clearly establishes that E.M. suffers from physical and mental infirmities that impair her ability to adequately provide for her own care without services and protect herself from maltreatment. *See* Minn. Stat. § 626.5572, subd. 21 (2016) (defining vulnerable adult). Accordingly, the commissioner properly determined that E.M. is a vulnerable adult.

appellant emotionally abused E.M. during his interaction with the clinical nurse specialist is unsupported by substantial evidence and constitutes an error of law.

A. Caregiver Neglect

i. Appellant's interaction with E.M. while at Methodist Hospital satisfies the statutory definition of maltreatment by neglect.

Appellant first argues that his discussions with E.M. "during a clandestine commitment interview do not meet [the] statutory definition of maltreatment by neglect." The statements are as follows:

> "Do you want to go home, mother?" "When do you want to go home?" "These people want to keep you here for 72 hours, they do not want you to go home, what do you think about that?" "They want to limit your rights, they want to make decisions about where you live. What do you think about that?" "As your 'legal power of attorney' I would advise you to leave the hospital right now."

In essence, appellant contends that his statements are "at most" recommendations, and "[a] recommendation is not neglect." But appellant ignores the reasoning underlying the commissioner's maltreatment determination: "[A]ppellant's actions constitute neglect because he was actively thwarting the provision of health care and supervision that was reasonable and necessary to obtain or maintain [E.M.'s] physical or mental health or safety considering the physical or mental capacity or dysfunction of [E.M.]"

Caregiver neglect of a vulnerable adult is defined as:

> (a) The failure or omission by a caregiver to supply a vulnerable adult with care or services, including but not limited to, food, clothing, shelter, health care, or supervision which is:
>
> (1) reasonable and necessary to obtain or maintain the vulnerable adult's physical or mental health or safety,

> considering the physical and mental capacity or dysfunction of the vulnerable adult; and
>
> (2) which is not the result of an accident or therapeutic conduct.
>
> (b) The absence or likelihood of absence of care or services, including but not limited to, food, clothing, shelter, health care, or supervision necessary to maintain the physical or mental health of the vulnerable adult which a reasonable person would deem essential to obtain or maintain the vulnerable adult's health, safety, or comfort considering the physical or mental capacity or dysfunction of the vulnerable adult.

Minn. Stat. § 626.5572, subd. 17 (2016).

In this case, the commissioner reasoned that appellant neglected E.M. when he encouraged her to leave the hospital and refused to cooperate with plans to move E.M. to a nursing facility, despite knowing that E.M. was mentally and physically incapable of residing in an independent-living facility. But this determination was not based solely on appellant's last encounter with hospital staff. As the district court noted, appellant's actions established "a cumulative effect and pattern of continually refusing to follow the hospital staff's recommendations[;]" appellant "failed as a caregiver to supply [E.M.] with the care services of a nursing home or assisted living facility," even though these services "were reasonable and necessary to obtain or maintain [E.M.'s] physical or mental health." Medical personnel at Methodist Hospital and staff at Summit Place repeatedly informed appellant that E.M. required substantially more care than she was receiving; but appellant continually refused to provide E.M. with the care or services necessary to maintain her physical and mental health and safety.

ii. Substantial evidence supports the determination that appellant committed caregiver neglect by resisting recommendations for placement and increased services for E.M.

Appellant also argues that the caregiver neglect finding is not supported by substantial evidence because there is evidence in the record that (1) E.M. did not wish to reside in assisted living; (2) appellant was not authorized to move E.M. to assisted living; (3) E.M.'s treating neurologist reported that E.M. was able to independently decide her required level of care; and (4) E.M.'s treating physicians opined that E.M. did not require additional assistance. We disagree.

Substantial evidence supports the determination that appellant failed to provide the care and supervision that was reasonable and necessary to maintain E.M.'s condition given her mental and physical condition. From 2008 to 2013, E.M.'s physical and mental condition steadily declined, and the care that she received while living at Summit Place became inadequate. E.M. was repeatedly hospitalized in 2013 due to a worsening pattern of falls and mental illness. After each of the hospitalizations, medical staff informed appellant that E.M. required additional care and supervision, and the medical records support the repeated recommendations. The multi-disciplinary team at Methodist Hospital repeatedly informed appellant that E.M. needed to move to an assisted-living facility. Summit Place staff also noted the need for increased services, citing E.M.'s repeated falls, confusion, and concerns regarding her ability to independently complete routine tasks.

Moreover, we note that the commissioner—as the agency with the medical and scientific expertise necessary to determine matters involving health care—is entitled to determine the level of care necessary to maintain the physical and mental health of

vulnerable adults. *See in re Excess Surplus Status of Blue Cross and Blue Shield of Minn.*, 624 N.W.2d 264, 278 (Minn. 2001) ("[A]dministrative agencies enjoy a presumption of correctness, and deference should be shown by courts to agencies' expertise and their special knowledge in the field of their technical training, education, and expertise." (quotation omitted)). Given that this court defers to the commissioner's expertise and special knowledge in these matters, and that there is substantial evidence in the record to support the neglect determination, appellant's argument with regard to the finding of caregiver neglect is unpersuasive.

Appellant also argues that this court must apply the "treating physician rule" articulated in the Code of Federal Regulations and applied when evaluating opinion evidence in matters involving federal old-age, survivor, and disability insurance benefits, which he argues would require this court to give greater weight to the opinions of E.M.'s treating physicians. *See* 20 C.F.R. § 404.1527 (c)(1), (2) ("Generally, [courts] give more weight to medical opinions from [an individual's] treating sources, since these sources are likely to be the medical professionals most able to provide a detailed, longitudinal picture of [the] medical impairment."). But appellant has cited no authority requiring this court to apply this rule in maltreatment matters. We therefore decline to do so.

B. Emotional Abuse

i. Substantial evidence supports the commissioner's determination that ordering E.M. to get on the floor and pull herself up could reasonably be expected to cause E.M. emotional distress.

Appellant next challenges the determination that he emotionally abused E.M. when he ordered her to get on the floor and then pull herself up without assistance in front of her

PCA, arguing that his actions fall within the therapeutic-conduct exception. Emotional abuse is defined as

> [c]onduct which is not an accident or therapeutic conduct as defined in the section, which produces or could reasonably be expected to produce physical pain or injury or emotional distress including, but not limited to, . . . the treatment of a vulnerable adult which would be considered by a reasonable person to be disparaging, derogatory, humiliating, harassing, or threatening.

Minn. Stat. § 626.5572, subd. 2(b)(2) (2016). Therapeutic conduct includes health care or other personal care services performed "in good faith in the interests of the vulnerable adult by . . . a caregiver." *Id.*, subd. 20 (2016).

Relying on the notes of one of E.M.'s physical therapists, appellant argues that his actions did not rise "to the level of maltreatment by emotional abuse" because E.M. "would find herself on the floor sometimes and [would] need[] to learn how to get up" by herself. The physical therapist notes dated January 27, 2014, indicate that Dr. Neumann, PTA, "[i]nstructed patient in proper technique and sequencing for getting to hands and knees position, crawling to nearest piece of furniture, getting to one knee, and pulling self up into chair." But shortly before September 12, 2013—the date on which appellant forced E.M. to the ground—Dr. Sheppard, a physical therapist at Fairview Home Care, expressed concerns that E.M. "was not physically able to get up and would not remember the techniques she needed to use to get up." Dr. Sheppard explained that "she thought training [E.M.] to get up from a fall was futile . . . due to [E.M.'s] physical weakness and memory issues."

Appellant's argument fails for two reasons. First, Dr. Sheppard informed appellant that E.M. was unable to practice this skill safely and recommended that appellant not continue this practice. Second, even if this activity could be construed as therapeutic conduct, the way in which appellant instructed E.M. to practice this skill would be considered humiliating, harassing, or threatening to a reasonable person. Appellant asked E.M. to show her PCA how she would get up from the floor on her own if she fell, and E.M. responded "please don't make me." When E.M. refused to do so, appellant demanded that E.M. get on the ground and pushed E.M. further down when E.M. did not get close enough to the floor. E.M. later told her PCA that she did not want to do the activity and that it made her feel "like a dog." Substantial evidence supports the determination that appellant's conduct caused E.M. emotional distress.

ii. When viewed as a whole, appellant's conduct, including his statements to E.M. at Methodist Hospital, constitutes emotional abuse.

Appellant next argues that his statements to E.M. at Methodist Hospital cannot constitute emotional abuse because (1) his statements were true and necessary to prevent hospital staff from committing E.M. against her will, and (2) his actions do not amount to "repeated or malicious" oral or gestured language.

Emotional abuse may also be the result of conduct that is not an accident or therapeutic, which could reasonably be expected to produce emotional distress, including, but not limited to, the following actions: "use of repeated or malicious oral, written, or gestured language toward a vulnerable adult or the treatment of a vulnerable adult which would be considered by a reasonable person to be disparaging, derogatory, humiliating,

harassing, or threatening." Minn. Stat. § 626.5572, subd. 2(b)(2). In this case, there is no finding that appellant's statements were made with malicious intent. Instead, the commissioner determined that the repeated statements were harassing, and substantial evidence supports this determination.

At oral argument, appellant argued that his statements to E.M. at Methodist Hospital do not constitute "repeated" oral language necessary to support a finding of emotional abuse. We disagree. Appellant continually questioned E.M. in a manner that a reasonable person would consider harassing. Appellant did not offer reassurance or clarification when E.M. repeatedly expressed anxiety and confusion, and appellant communicated with E.M. in a manner that was intended to provoke E.M. and appeared to threaten her well-being. Hospital staff was forced to end the meeting and call security due to the abusive and harassing nature of appellant's statements, and security was "on alert" due to appellant's "temper and anger." His repeated statements to E.M. are sufficient to support a finding of emotional abuse, even though appellant made these statements during a single event. We therefore conclude that the term "repeated" does not require multiple incidents of harassing or derogatory language. Continual or recurring harassing, derogatory, disparaging, humiliating, or threatening language is sufficient to support a finding of emotional abuse.

Even if appellant's repeated statements alone were insufficient to satisfy the statutory definition of emotional abuse, we conclude that the manner in which appellant treated E.M.—demonstrated by his anger, raised voice, and intimidating conduct—qualifies as conduct a reasonable person would consider harassing. *See* Minn. Stat. § 626.5572, subd. 2(b)(2) ("Conduct . . . which produces or could reasonably be expected

to produce . . . emotional distress includ[es] . . . use of repeated or malicious oral, written or gestured language toward a vulnerable adult *or* the treatment of a vulnerable adult which would be considered by a reasonable person to be disparaging, derogatory, humiliating, harassing or threatening." (emphasis added)).

III. The treating physician's failure to provide a Tennessen warning was harmless error.

Appellant next argues that he was entitled to a Tennessen warning[3] prior to his interview with the Hennepin County Human Services investigator and that failure to exclude all evidence obtained from the interview was an error of law. It is undisputed that the investigator was required to provide a Tennessen warning and failed to do so. A Tennessen warning requires that:

> An individual asked to supply private or confidential data concerning the individual shall be informed of: (a) the purpose and intended use of the requested data within the collecting government entity; (b) whether the individual may refuse or is legally required to supply the requested data; (c) any known consequence arising from supplying or refusing to supply private or confidential data; and (d) the identity of other persons or entities authorized by state or federal law to receive the data.

Minn. Stat. § 13.04, subd. 2 (2016). Relying on Minn. Stat. § 13.05, subd. 4 (2016), appellant argues that failure to provide a Tennessen warning results in the "absolute prohibition" of the agency's use of the information "for any purpose." With certain

[3] The Minnesota Government Data Practice Act, codified in Minn. Stat. § 13.04, subd. 2 (2016), requires that notice be given to all private individuals asked to provide confidential data to government agencies. The warning requires government officials to inform private citizens of their rights and responsibilities with respect to providing the requested information and is commonly referred to as a Tennessen warning. *Id.*

exceptions, subdivision 4 limits the collection and use of data gathered after a proper Tennessen warning is provided: "Private or confidential data on an individual shall not be collected, stored, used or disseminated by government entities for any purposes other than those stated to the individual at the time of collection." Minn. Stat. § 13.05, subd. 4. But subdivision 4 of section 13.05 does not prohibit the use of information collected without a Tennessen warning. *See In re Robb*, 622 N.W.2d 564, 575 (Minn. App. 2001) (noting that the exclusionary rule is not the proper remedy for violations of section 13.04, subdivision 2, *review denied* (Minn. Apr. 17, 2001). The civil remedies available for violations of any provision of chapter 13 are set forth in Minn. Stat. § 13.08 (2016).

Because the exclusionary rule does not apply to violations of section 13.04, subdivision 2, the investigator's failure to give a Tennessen warning does not require reversal of the commissioner's decision.

IV. Appellant failed to properly raise the issues addressed in his reply brief.

Appellant also argues that (1) the commissioner improperly relied on hearsay evidence, and (2) the district court erred by not accepting new evidence, which he alleges demonstrates that the Hennepin County Human Services investigator falsely testified at the hearing before the human-services judge. But appellant raised these arguments for the first time on appeal in his reply brief, and these arguments are outside the scope of appellant's principal brief. *See* Minn. R. Civ. App. P. 128.02, subd. 3 ("The appellant may file a brief in reply to the brief of the respondent. The reply brief must be confined to new matter raised in the brief of the respondent."); *see also McIntire v. State*, 458 N.W.2d 714, 717 n.2 (Minn. App. 1990) (declining to address issues first argued in reply brief that are outside

the scope of the principal brief), *review denied* (Minn. Sept. 28, 1990). We therefore decline to address these arguments.

Affirmed.