

NO. A09-371

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State of Minnesota  
**In Court of Appeals**

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Christine Strecker,

*Relator,*

vs.

Minnesota Department of Human Services,

*Respondent,*

Ramsey County Community Human Services,

*Respondent.*

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**REPLY BRIEF OF RELATOR CHRISTINE STRECKER**

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## ARGUMENT

**I. It is not the policy of this state to allow the Department of Human Services to make errors of law in the name of protecting children.**

It is the policy of this state to protect children. It is also the policy of this state to require the proper application of law and to review, de novo, those errors of law committed by DHS when rendering its licensing decisions. *State v. Lee*, 585 N.W.2d 378, 382-83 (Minn. 1998); *In re Burke*, 666 N.W.2d 724, 726 (Minn. App. 2003).

It is not the policy of this state, as advocated by DHS throughout its brief, to protect children at the expense of a licensee. To the contrary, the very cases cited by DHS, *Obara v. Minnesota Department of Health*, 758 N.W.2d 873 (Minn. App. 2008) and *Sweet v. Commissioner of Human Services*, 702 N.W.2d 314, 321 (Minn. App. 2005), establish that in licensing cases there are two equal and competing interests—that of protecting children and that of the licensee in her employment and a good name.

If DHS takes adverse licensing action, then it must show that when all evidence is considered there is substantial evidence<sup>1</sup> in the record showing that reasonable cause exists to believe that the actions of the day care provider pose an imminent risk of harm to the health, safety, or rights of the children in her care. *See all cases and statutes cited by both parties in this case; there is no disagreement in this regard.* The public and the

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<sup>1</sup> At page 12 of DHS' brief it appears to cite to *In re Meuleners*, 725 N.W.2d 121 (Minn. App. 2006) for the proposition that the meaning of substantial evidence is something other than (1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence considered in its entirety. *Meuleners* does not alter the well-established case law cited by the parties which defines substantial evidence as outlined above.

law demands that DHS properly wield its power and abide by the law; it cannot claim as it does at page 6 of its brief that “close” is good enough. There must be something more than mere suspicion for abuse. *Musgjerd v. Commissioner of Public Safety*, 384 N.W.2d 571, 574 (Minn. App. 1986).

### ***Medical evidence***

DHS “recognizes that it is not possible to pinpoint the date and time of the child’s injury”, *Resp. Brief P. 13*, but asserts that “it might have occurred” between September 10 and September 16, 2008 citing only evidence from Dr. Hudson and Dr. Ford. *Id.* In order to make this argument and to reach this conclusion, DHS necessarily ignores the credible, admissible, and undisputed evidence, from J.H.’s pediatrician that there was no indication of injury at J.H.’s well-child check at or about 2:00 p.m. on September 12, 2008.

A governmental entity, when rendering a decision, is not at leisure to ignore undisputed expert testimony. *In re application of Orr*, 396 N.W.2d 657, 662 (Minn. App. 1986). The ALJ made a finding of fact (which was adopted by the DHS) that there was no evidence of injury at the time of the well-child check. Therefore, when all medical evidence is considered, it establishes a timeline for injury in this matter that places J.H. solely in the care of the parents, not Strecker.

Even if the medical evidence is viewed so as to make Strecker one of the three adults whom may have injured J.H., there is no other evidence in the record that allows for the implication of Strecker. The mere fact that J.H. had an injury and that Strecker had him in her care at one point does not implicate Strecker without something more

indicating that she caused the injury. DHS has never advanced any additional evidence implicating Strecker.

DHS reports that less than 2% of child abuse offenders are the daycare providers. <http://edocs.dhs.state.mn.us/lfserver/Legacy/DHS-4735-ENG>. In the vast majority of the cases, it is the parents. *Id.* The totality evidence in this case does not put Strecker in that 2% of daycare-provider-offenders.

### ***Strecker & eyewitness evidence***

DHS does not dispute that the evidence in the record provided by Strecker and eye witnesses is probative and that it absolved Strecker of any wrongdoing. Accordingly, DHS has no witness testimony tying Strecker to the injury.

Instead, DHS attempts to downplay the favorable witness testimony by criticizing Strecker for not producing herself for a polygraph test, it did not do so during the investigation or at the hearing. In fact, DHS testified that it found Strecker to be credible in her statements that she did not do anything to cause harm. Furthermore, any benefit of the polygraph test was met at the time of the hearing when the ALJ determined that Strecker was credible (which DHS does not dispute).

### ***Evidence of character, habit and routine***

DHS does not dispute that evidence of habit and character of Strecker is probative here. And, DHS does not advance any character evidence implicating Strecker for the injury.

Instead, DHS attempts to downplay the favorable character evidence, claiming that Sergeant Koenig testified that he would have been ‘nervous’ about Strecker continuing to

provide care. *Resp. Brief p.9 citing A.508-509.* DHS' portrayal of Koenig's testimony is out of context and inconsistent with the findings of fact made by the ALJ that found "he does not believe children in Respondent's care are at imminent risk for their health or safety." DHS adopted the findings of the ALJ and its attempt to now reverse its position only further evidences the ends to which DHS will go in order to zealously advance its political will.

***Evidence related to parents and failure to investigate parents***

DHS no longer disputes that adverse evidence regarding the parents and the Department's failure to completely investigate them is probative. That evidence further removed any indicia that Strecker caused the injury.

***Evidence related to Department's post-hearing actions***

DHS does not dispute that its post-hearing actions in this matter evidence a clear impertinence by the Department regarding the hearing process and judicial renderings of an Administrative Law Judge. To the contrary, DHS asks this Court to adopt its position as a reasonable reflection of the policy of this state which it claims subjugates the interests of the licensee to the political will of DHS in furtherance of its protection of children. As set forth above, and in any of the cases cited to this Court in this matter, it is the policy of this state to afford protections to those accused of wrongdoing and to require DHS to meet its requisite burden of proof.

**CONCLUSION**

The evidence in this case is not disputed in the manner claimed by Respondent at page 14 of its brief. Findings of Fact were made by an ALJ and accepted by both parties.

DHS, however, in order to reach a different legal conclusion than that of the ALJ, ignored Findings of Fact and concluded that the mere fact that Strecker was present was "close" enough to make her a "plausible" candidate for harm and that such was "close" enough to meet its burden of proof. DHS' method here is not a proper application of the law or policy of this state and mandates reversal.

Dated: 7-9-09

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**CERTIFICATION OF BRIEF LENGTH**

I hereby certify that this Brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a Brief produced with a proportional font. The length of the Brief is 1,222 words. This Brief was prepared using Microsoft Word 2003.

Dated: 7-9-09

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