

**BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**DEBBIE PLUMLEY,**

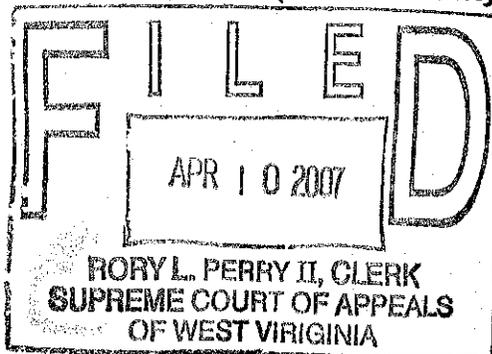
**Petitioner/Appellee,**

**v.**

**SUPREME COURT DOCKET NO. 33287  
CIVIL ACTION NO. 05-C-1066 (Cabell County)**

**WEST VIRGINIA DEPARTMENT OF  
HEALTH AND HUMAN RESOURCES/  
OFFICE OF HEALTH FACILITY  
LICENSURE AND CERTIFICATION,**

**Respondent/Appellant.**



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**APPELLANT'S REPLY BRIEF**

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**APPELLANT'S REPLY BRIEF**

**I. Statement of the Case**

Appellee Plumley's Response Brief contains a number of factual errors. Specific examples are as follows:

On page 4 of Appellee's Response Brief it stated that "Ms. Plumley actually worked for Mrs. Clark from 1992 to 1997". However, on page 32 of the Transcript of the Administrative Hearing, Ms. Plumley testified under oath, "I started doing this work in 1992. . . and I worked for her (Mrs. Clark) until 1999". Appellee goes on to state it is completely possible that Ms. Plumley knew nothing of the existence of the role of OHFLAC and its relationship to health care providers. Again, however, Ms. Plumley testified at the administrative hearing, "and the State did come in there (Mrs. Clark's) to do inspections and I was there when they came in ". (Administrative Hearing Transcript, Page 33). This testimony contradicts Ms. Plumley's contention that she was

unaware of OHFLAC's existence and function.

Throughout these proceedings, Appellee Plumley has referred to her "pristine (criminal) record". At one time, she implied that she had not had any criminal convictions after her incarceration for the incest conviction. As shown by the background check, this is not based in fact. Furthermore, felony forgery and uttering can be considered fraudulent criminal activity which may have disallowed Ms. Plumley's registration as a legally unlicensed service provider. Appellee cannot criticize OHFLAC for responding to an issue she originally raised.

Although Ms. Plumley states on numerous occasions that she was not required to have a fingerprint check while working at Ms. Clark's legally unlicensed facility, this Court should be advised that this requirement was not implemented until July, 1999 when a new rule went into effect for legally unlicensed homes. At that time, all legally unlicensed homes were notified and all employees and providers had to go through the background check process. Although it is unclear exactly when Ms. Plumley stopped working at the Clark home, it is possible that she was no longer employed there when that facility was notified of the requirement. Because OHFLAC was unaware that she was operating an illegal facility, Ms. Plumley would not have been notified directly of the fingerprint requirement.

## **II. Reply to Appellee Plumley's Arguments**

- A. The Circuit Court erred in its interpretation of 64 CSR §50 as well as in its decision that minors were not a dependent population.**

The Circuit Court of Cabell County ruled that this case turns on the construction and

punctuation of 64 CSR §50.4.4.

In the first part of this rule, it states:

"... in an unlicensed home administered by a service provider, the service provider, household members exclusive of residents, and all care givers shall have a personal history which is free of: evidence of abuse, neglect, fraud, or substantial and repeated violations of applicable laws and rules in the operation of any health or social care facility or service organization or in the care of dependant persons;..."

Again, OHFLAC believes that the personal criminal history of Ms. Plumley excludes her from registration as a service provider because her personal history shows evidence of abuse. This conviction in of itself is sufficient to deny Ms. Plumley's registration because the word "or" does not require that the repeated violations be in addition to a negative personal history. Also, there is no time frame in the rule to determine the length of the personal history.

This rule goes on to state:

"... and convictions of crimes relevant for the provision of care to a dependant population as evidenced by a background check of the West Virginia State Police Central Abuse Registry..."

OHFLAC's position continues to be that because of the semi-colon, the above is a separate clause, which means that her conviction of the crime of incest with a minor is sufficient to prevent Ms. Plumley from providing care to incapacitated adults. Not only is there abuse, it is abuse of a dependant person, in this case, a minor child, her own daughter. Registration as a service provider is a privilege, not a right.

**B. The Circuit Court erred when it concluded that the West Virginia Central Abuse Registry and the Sex Offenders Registry were the same entity.**

As stated throughout Appellant OHFLAC's Petition and Brief, despite being identified

in West Virginia Code §15-2C-2, the Central Abuse Registry is a legal fiction at the present time. Again, the West Virginia State Police currently require service providers and all other health care workers to undergo a CIB fingerprint check *in lieu* of a formal Central Abuse Registry. At the time 64 CSR §50.4.4 was drafted, OHFLAC and the legislature that approved this rule, had every reason to believe that the state police would develop a formal, accessible Central Abuse Registry. However, to date, this has not occurred. Because revision of a state regulation takes significant time, the removal of the Central Abuse Registry terminology will also take time. OHFLAC should not have been taken to task by the Cabell County Circuit Court for following the procedures that the West Virginia State Police established.

**C. The Circuit Court erred when it ruled that the Secretary's Final Administrative Order violated Ms. Plumley's constitutional rights, was an abuse of discretion, and in excess of the agency's authority.**

In her response, Appellee Plumley states "that she did not have sexual contact with her child, but that she had been drinking and permitted her husband to have contact with her daughter while the three (3) were in the same bed". (Appellee Brief, Page 10.)

In actuality, Ms. Plumley testified, "I was young, foolish, and I was recently divorced. I was living by myself, I was on welfare". (Administrative Hearing Transcript, Page 37.)

There was no mention of Ms. Plumley being married at either the administrative hearing or the Circuit Court argument. When the Circuit Court stated that "she gets drunk, she doesn't commit the incest, she permits it to happen.", it totally ignored the fact that she was convicted of incest and sentenced to five (5) to ten (10) years at Huttonsville, a significant fact to ignore.

### **III. Conclusions**

Although the incident which required OHFLAC to deny Ms. Plumley registration as a service provider occurred twenty (20) years ago, under the law and rules of the State of West Virginia, it is sufficient to deny her registration as a health care provider. The Circuit Court of Cabell County erred in its construction and interpretation of 64 CSR §50.4.4., and overlooked the fact that the current laws of the State of West Virginia also prevent sex offenders (and other categories of convicted criminals) from working in nursing homes, hospitals, assisted living facilities and behavioral health settings. This Court would set a dangerous precedent in allowing a convicted sex offender such as Ms. Plumley to provide health care services because of limited state oversight and the fact that this could be used as precedent to allow other convicted sex offenders to work in health care settings.

### **IV. Prayer**

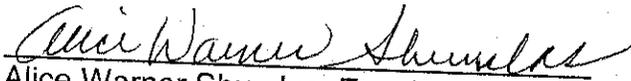
**WHEREFORE**, in consideration of the foregoing, Appellant OHFLAC prays that this Court enter an Order reversing the ruling of the Circuit Court of Cabell County, and for such other further and general relief as this Honorable deems just and proper.

Respectfully submitted,

Petitioner/Appellant

West Virginia Department of  
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CERTIFICATE OF SERVICE

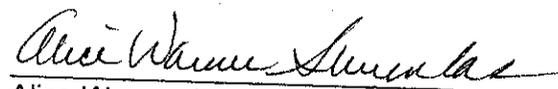
I, Alice Warner Shumlas, Esquire, counsel for the West Virginia Department of Health and Human Resources/Office of Health Facility Licensure and Certification, do hereby certify that a true and exact copy of the foregoing **Appellant's Reply Brief** was duly served on the following individuals via hand delivery and depositing same in the United States mail, postage paid on this 12<sup>th</sup> day of April, 2007, addressed as follows:

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