STATE OF MICHIGAN

COURT OF APPEALS

BEACON SPECIALIZED LIVING SERVICES, INC., COTTAGE III, Petitioner-Appellee,	UNPUBLISHED July 29, 2014
v BUREAU OF CHILDREN & ADULT LICENSING and DEPARTMENT OF HUMAN SERVICES DIRECTOR, Respondents-Appellants.	No. 310895 Van Buren Circuit Court LC No. 11-061003-AA
BEACON SPECIALIZED LIVING SERVICES, INC., COTTAGE II, Petitioner-Appellee,	
v BUREAU OF CHILDREN & ADULT LICENSING and DEPARTMENT OF HUMAN SERVICES DIRECTOR, Respondents-Appellants.	No. 313030 Van Buren Circuit Court LC No. 11-061265-AA

Before: FITZGERALD, P.J., and SAWYER and SHAPIRO, JJ.

PER CURIAM.

Petitioner Beacon Specialized Living Services, Inc. operates several adult foster care (AFC) homes in the state of Michigan. Its AFC homes include Cottage I, Cottage II, and Cottage III, which are located on the same campus in Lawrence, Michigan. In Docket No. 310895, respondents appeal by leave granted the May 8, 2012, order of the circuit court reversing the decision of the Director of the Department of Human Services (DHS) to revoke the license for Cottage III. In Docket No. 313030, respondents appeal by leave granted the circuit court's order reversing the Director's decision to revoke the license for Cottage II. We affirm.

Following investigations by Susan Gamber, a licensing consultant for the Bureau of Children and Adult Licensing (BCAL), DHS moved to revoke the licenses for Cottage II and Cottage III. Regarding Cottage II, DHS alleged violations of Mich Admin Code, R 400.14201(2), R 400.14301(2)(a), (c), and R 400.14305(3). The alleged rules violations concerned "Resident A" and "Resident B," residents named Betty and Alicia, and their acts of aggressive behavior, and "Resident C," a resident named Michelle, and her acts of self-harm. Regarding Cottage III, the DHS alleged violations of R 400.14201(2), R 400.14301(2)(a), (c), R 400.14305(3), and R 400.14309(1). The alleged rule violations concerned "Resident A," a resident named Melissa, and her acts of physical aggression. Trials were held before hearing referees and, after the referees filed proposals for decision, the Director revoked the licenses for Cottage II and Cottage III. The circuit court reversed the decisions of the Director and reinstated the licenses. For Cottage II, the circuit court found that the competent, material, and substantial evidence did not support any rule violation. It also found that the DHS decision to seek revocation of the license, rather than a provisional license, which was Gamber's initial recommendation, was arbitrary, capricious, and clearly an abuse or unwarranted exercise of discretion. For Cottage III, the circuit court found that the competent, material, and substantial information did not establish any rule violation.

I

In Docket No. 310895 and Docket No. 313030, respondents argue that the circuit court erred in reviewing the Director's decisions de novo, rather than limiting its review to the substantial evidence test. The determination of the proper standard of review is a question of law that we review de novo. *Arthur Land Co, LLC v Otsego Co*, 249 Mich App 650, 661-662; 645 NW2d 50 (2002).

Pursuant to the Adult Foster Care Licensing Act, MCL 400.701 *et seq*., "[a] person, partnership, corporation . . . shall not establish or maintain an adult foster care facility unless licensed by the department." MCL 400.713(1). DHS may revoke a license for an AFC home if the licensee "willfully and substantially" violates the Act, the rules promulgated under the Act, or the terms of the license. MCL 400.722(1). However, a license may not be revoked unless the DHS gives the licensee written notice of the grounds of the proposed action. MCL 400.722(3). If the licensee appeals the proposed action, the Director, or the Director's designated representative, shall conduct a hearing at which the licensee may present testimony and confront witnesses. *Id.*

Under the Administrative Procedures Act (APA), MCL 24.201 *et seq.*, when a person has exhausted all available administrative procedures within an agency and is aggrieved by a final decision, the decision is subject to direct review by the courts as provided by law. MCL 24.301. MCL 24.306 provides:

> *Except when a statute or the constitution provides for a different scope of review*, the court shall hold unlawful and set aside a decision or order of an agency if substantial rights of the petitioner have been prejudiced because the decision or order is any of the following:
>
> * * *

(d) Not supported by competent, material and substantial evidence on the whole record.

(e) Arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion.

(f) Affected by other substantial and material error of law. [Emphasis added.]

MCL 400.725 provides:

A person aggrieved by the decision of the director following a hearing under [MCL 400.22 or MCL 400.23], within 10 days after receipt of decision, may appeal to the circuit court for the county in which the person resides by filing with the clerk of the court an affidavit setting forth the substance of the proceedings before the department and the errors of law upon which the person relies, and serving the director with a copy of the affidavit. *The circuit court shall have jurisdiction to hear and determine the questions of fact or law involved in the appeal*. If the department prevails, the circuit court shall affirm the decision of the department; if the licensee, or applicant prevails, the circuit court shall set aside the revocation or order the issuance or renewal of the license. [Emphasis added.]

In *Palo Group Foster Care, Inc v Dep't of Social Servs*, 228 Mich App 140, 145-146; 577 NW2d 200 (1998), this Court held that MCL 400.725 provides for a de novo standard of review.

Palo Group was binding on the circuit court, MCR 7.215(C)(2); *Dana Corp v Dep't of Treasury*, 267 Mich App 690, 698; 706 NW2d 204 (2005), and because *Palo Group* was decided in 1998, we are required to follow it, MCR 7.215(J)(1).[1] In reaching our conclusion, we reject respondent's argument that the relevant ruling from *Palo Group* that MCL 400.725 provides for a de novo standard of review is dicta. "A statement that is dictum does not constitute binding precedent under MCR 7.215(J)(1)." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 436-437; 751 NW2d 419 (2008). Likewise, "[s]tare decisis does not arise from a point addressed in obiter dictum." *Griswold Props, LLC v Lexington Ins Co*, 276 Mich App 551, 563; 741 NW2d 549 (2007). Obiter dictum is "a judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential . . . ." *People v Higuera*, 244 Mich App 429, 437; 625 NW2d 444 (2001). Even though the *Palo Group* Court's ruling regarding MCL 400.725 did not ultimately affect the outcome of the case, the holding is not dicta because it specifically answered one of the petitioner's arguments on appeal, see *Palo Group*, 228 Mich App at 143-146; therefore,

[1] The Supreme Court's denial of leave to appeal in *Palo Group*, *Palo Group Foster Care, Inc v Dep't of Social Servs*, 459 Mich 911; 589 NW2d 284 (1998), does not make *Palo Group* binding on this Court under the rule of stare decisis. A denial of leave to appeal by the Supreme Court is of no precedential value. *Nuculovic v Hill*, 287 Mich App 58, 68; 783 NW2d 124 (2010).

resolution of the issue was essential and necessary to the case, *Allison*, 481 Mich at 436-437; *Higuera*, 244 Mich App at 437. Further, we conclude that *Palo Group* was properly decided. Specifically, we agree that, because the circuit court has "jurisdiction to hear and determine the questions of fact or law involved in the appeal," MCL 400.725, the scope of review is de novo. *Palo Group*, 228 Mich at 145-146.

In sum, use of a de novo standard of review was required. We find, however, that contrary to respondents' argument, the circuit court did not review the Director's decisions de novo. Although the circuit court, in both of its opinions, referenced *Palo Group*'s de novo standard of review, it also cited MCL 24.306. And, based on the circuit court's opinions, the court obviously used the standard of review stated in MCL 24.306. In reversing the Director's decision to revoke the license for Cottage II, the court found that DHS' decision to seek revocation of the license was arbitrary, capricious, and clearly an abuse or unwarranted exercise of discretion.[2] In reversing the Director's decision to revoke the license for Cottage III, the court found that the Director's findings were not supported by competent, material, and substantial evidence. Thus, the circuit court used the standard of review that respondents claim it should have used. But, because the holding of *Palo Alto* was binding on the circuit court, MCR 7.215(C)(2); *Dana Corp*, 267 Mich App at 698, the circuit court erred when it failed to review de novo the Director's decisions to revoke the licenses for Cottage II and Cottage III. However, we decline to vacate the circuit court's opinions and remand for review de novo. Because the circuit court found that the Director's findings of rule violations were not supported by competent, material, and substantial evidence, the only logical conclusion is that the court, upon review de novo, would again reverse the Director's decisions. See *Hitchingham v Washtenaw Co Drain Comm'r*, 179 Mich App 154, 161; 445 NW2d 487 (1989) (stating that the substantial evidence test is more restrictive then review de novo). Thus, we review these decisions.

II

In Docket No. 310895, respondents argue that the circuit court erred in reversing the Director's decision to revoke the license for Cottage III. When an agency decision is reviewed de novo by the circuit court, we review the circuit court's decision for clear error. *Heindlmeyer v Ottawa Co Concealed Weapons Licensing Bd*, 268 Mich App 202, 214; 707 NW2d 353 (2005). "This Court will overturn the circuit court's decision only if left with the definite and firm conviction that a mistake has been committed." *Id*. We use this standard of review because it is clear that the circuit court would reach the same results on de novo review.

The rules of statutory construction apply to administrative rules. *Great Wolf Lodge of Traverse City, LLC v Pub Serv Comm*, 489 Mich 27, 37; 799 NW2d 155 (2011). Thus, an administrative rule is to be interpreted according to its plain language. *Danse Corp v Madison Heights*, 466 Mich 175, 184; 644 NW2d 721 (2002). The administrative rules relevant to this case include:

[2] In addition, in denying respondents' motion for reconsideration, the circuit court specifically stated that it did not conduct a review de novo.

R 400.14201(2), which provides:

> A licensee shall have the financial and administrative capability to operate a home to provide the level of care and program stipulated in the application.

R 400.14301(2), which provides:

> A licensee shall not accept or retain a resident for care unless and until the licensee has completed a written assessment of the resident and determined that the resident is suitable pursuant to all of the following provisions:
>
> (a) The amount of personal care, supervision, and protection that is required by the resident is available in the home.
>
> * * *
>
> (c) The resident appears to be compatible with other residents and members of the household.

R 400.14305(3), which provides:

> A resident shall be treated with dignity and his or her personal needs, including protection and safety, shall be attended to at all times in accordance with the provisions of the act.

R 400.14309(1), which provides:

> Crisis intervention procedures may be utilized only when a person has not previously exhibited the behavior creating the crisis or there has been insufficient time to develop a specialized intervention plan to reduce the behavior causing the crisis. If the resident requires the repeated or prolonged use of crisis intervention procedures, the licensee shall contact the resident's designated representative and the responsible agency or, in the absence of a responsible agency, a professional who is licensed or certified in the appropriate scope of practice to initiate a review process to evaluate positive alternatives or the need for a specialized intervention plan.

As already stated, the DHS may revoke a license for an AFC home if the licensee "willfully and substantially violates" the Act, the rules promulgated under the Act, or the terms of the license. MCL 400.722(1). Mich Admin Code, R 400.16001(1), defines "substantial noncompliance" and "willful noncompliance":

> (d) "Substantial noncompliance" means repeated violations of the act or act 218 or an administrative rule promulgated under the act or act 218, or noncompliance with the act or act 218, or a rule promulgated under the act or act 218, or the terms of a license or a certificate of registration that jeopardizes the health, safety, care, treatment, maintenance, or supervision of individuals receiving services . . . .

> (e) "Willful noncompliance" means, after receiving a copy of the act or act 218, the rules promulgated under the act or act 218 and, for a license, a copy of the terms of a license or a certificate of registration, an applicant or licensee knew or had reason to know that his or her conduct was a violation of the act or act 218, rules promulgated under the act or act 218, or the terms of a license or a certificate of registration.[3]

Respondents argue that the circuit court erred when, in addition to citing R 400.16001 for the definition of "willful noncompliance," it cited case law for the proposition that "[t]he plain meaning of willful is an intentional violation of the rules" and that it also "has been defined as a conscious, intentional, deliberate, voluntary decision." Rules adopted by an agency in accordance with the APA have the force and effect of law. *Clonlara, Inc v State Bd of Ed*, 442 Mich 230, 239; 501 NW2d 99 (1993). The publication of a rule in the administrative code creates a rebuttable presumption that "[a]ll requirements of [the APA] relative to the rule have been complied with." MCL 24.261(1)(c). Petitioner failed to rebut this presumption with regard to R 400.16001 and, therefore, we conclude that the rule has the force and effect of law. Because the parties do not dispute that the definitions of "substantial noncompliance" and "willful noncompliance" apply to MCL 400.722(1), we further conclude that the circuit court erred when it looked to case law to define "willful." See *Psychosocial Serv Assoc, PC v State Farm Mut Auto Ins Co*, 279 Mich App 334, 340; 761 NW2d 716 (2008) (stating that it is appropriate to consult dictionary definitions for the meaning of statutory words when the words are not defined in the statutes or administrative rules).

However, the circuit court's error does not require reversal of the court's decision. See MCR 2.613(A) (stating that an error done in anything by the trial court is not grounds for disturbing a judgment unless refusal to take the action appears inconsistent with substantial justice). The definition of "willful noncompliance" in R 400.16001 contains a knowledge requirement and, on appeal, respondents do not explain how the circuit court's reference to case law defining "willful" as intentional and deliberate conduct heightened the "willful noncompliance" standard of R 400.16001 or how it affected any of the court's findings.

Next, respondents argue that, because the court was supposed to give deference to the Director's decision, the circuit court erred when it gave considerable weight to the hearing referee's proposal for decision. There is no merit to the argument. Because the Director's decision to revoke the license for Cottage III was subject to review de novo by the circuit court, *Palo Group*, 228 Mich App at 145-146, the circuit court was not required to give deference to the Director's decision. See *In re Contempt of Auto Club Ins Ass'n*, 243 Mich App 697, 714 n 33; 624 NW2d 443 (2000); *Mich Ed Ass'n v Secretary of State*, 280 Mich App 510, 511; 761 NW2d 234 (2008), aff'd 489 Mich 194 (2001) (WHITBECK, J., dissenting).

Regarding R 400.14201(2), respondents claim that Beacon's failure to consider Melissa's past in its decision to admit her to Cottage III and "to deal" with her aggressive behaviors in an

[3] The "act" is the child care organizations act, MCL 722.111 *et seq.*, while "act 218" is the Act. R 400.16001(1)(a), (b).

appropriate manner, coupled with the fact that Beacon was warned of similar problems in 2006, showed a "systematic failure" by Beacon. Respondents assert this "systematic failure" showed that Beacon lacked the administrative capacity to operate Cottage III. The circuit court's decision to the contrary was not clearly erroneous.

When Melissa was admitted to Cottage III, Beacon was aware of her history. North Pointe Community Mental Health Agency, the Community Mental Health agency that provided her services, completed the "Referral Placement Screening" that Gene Hamilton, who coordinated placements for Beacon, had sent. Beacon also had the "Assessment Plan for AFC Residents." Cottage III was an AFC home for women who suffered from persistent mental illness, and Hamilton had been told by North Pointe that a change in Melissa's location might help with her behavior. Gamber acknowledged that Beacon had trained its staff members in techniques for dealing with difficult behaviors and that staff members responded appropriately to all incidents of Melissa's aggressive behavior. North Pointe received every incident report on Melissa. It was satisfied with the care that Melissa received.[4] Hamilton wrote a behavior plan for Melissa, and Beacon remained in contact with North Pointe with regard to getting the plan approved. Although Gamber cited Beacon and Cottage III for rule violations in 2006, Beacon submitted a corrective action plan (CAP) and the CAP was accepted for the cottage. There was no evidence that Beacon subsequently violated the CAP. In addition, staff members wrote daily progress notes and filled out weekly charts to document behaviors of the residents. Under these circumstances, we are not left with a definite and firm conviction that the circuit court made a mistake when it found that Beacon had the administrative capability to operate Cottage III. *Heindlmeyer*, 268 Mich App at 214.

In reaching this conclusion, we are not persuaded by respondents' argument, based on the testimony of Amanda Rhoades, a former employee of Beacon, that Beacon failed to provide adequate training to the staff members and failed to provide adequate staffing for Cottage III. In the notice of intent, DHS did not claim that the staff at Cottage III was inadequately trained or that Beacon failed to provide adequate staff. In addition, Gamber never testified that Beacon failed to adequately train its staff members. Gamber testified that DHS was aware of the module that Beacon used to train its staff and that its staff was highly trained. Gamber also never testified that the staffing levels at any time were inadequate in Cottage III. We affirm the circuit court's finding that there was no violation of R 400.14201(2).

[4] We disagree with respondents' assertion that it was irrelevant that Cottage III routinely admitted individuals who had failed in other placements, that the staff at Cottage III implemented its behavioral program and training in repose to Melissa's behaviors, and that North Pointe was satisfied with the care Melissa received at Cottage III. Relevant evidence, which is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence," is generally admissible. MRE 401; MRE 402. These facts make it more probable that Cottage III could provide the amount of personal care, supervision, and protection that Melissa required and that it did so.

Respondents also claim that Beacon violated R 400.14301(2) because it admitted Melissa to Cottage III without a behavior plan in place. Although the rule speaks of a "written assessment," we disagree with respondents' assumption that a "written assessment" is equivalent to a behavior plan. Hamilton testified that not every resident of Cottage III has a behavior plan, and there was never any suggestion that Beacon's failure to have a behavior plan in place for each resident was a violation of the rule. In addition, Gamber testified that if a resident "needs a behavior plan," the plan must be approved by the behavior treatment committee. This testimony suggested that a behavior plan is not required for every resident of an AFC home.

On September 29, 2008, the day that Melissa was admitted to Cottage III, an "Assessment Plan for AFC Residents" was completed for her. Gamber testified that the assessment form was a "BCAL form," which is used to evaluate the appropriateness of a resident's placement in adult foster care and "satisfies the requirement to have a written assessment plan upon admission." R 400.14301(4) states, in part, that "[a]t the time of admission, and at least annually, a written assessment plan shall be completed with the resident or the resident's designated representative, the responsible agency, if applicable, and the licensee." If Beacon had the required "written assessment plan" for Melissa when it admitted her to Cottage III, it seems that Beacon also had the required "written assessment" for her.

Referencing Melissa's diagnoses listed in the "Referral Placement Screening," respondents also claim that Melissa required higher levels of supervision than other residents in Cottage III. However, respondents do not provide any citation to the record to support this assertion.

In sum, the circuit court's finding that Beacon did not violate R 400.14301(2) was not clearly erroneous, *Heindlmeyer*, 268 Mich App at 214, because Beacon had a "written assessment plan" for Melissa when it admitted her to Cottage III and because Cottage III was designed to care for individuals who suffer from persistent mental illness. We affirm the circuit court's finding.

Regarding R 400.14305(3), respondents claim that the circuit court erred in faulting the hearing referee and the Director for stating that Beacon failed to "insure" the safety of the residents. According to them, it was proper for the hearing referee to use the word "insure" because the word appears in the statutory definition of "protection." MCL 400.706(4) defines "protection" as "the continual responsibility of the licensee to take reasonable action to insure the health, safety, and well-being of a resident, including protection from physical harm, humiliation, intimidation . . . ."

According to the circuit court, the use of the word "insure" created a strict liability standard, which was contrary to the Act and the licensing rules. Strict liability is "[l]iability that does not depend on actual negligence or intent to harm, but that is based on the breach of an absolute duty to make something safe." *Black's Law Dictionary* (7th ed). The statutory definition of "protection" does not support respondents' argument that the circuit court erred when it concluded that a licensee is not held to a strict liability standard for the safety of its residents. The definition only requires a licensee to take reasonable action; a licensee does not have an absolute responsibility to insure the safety of its residents.

According to respondents, Beacon violated R 400.14305(3) because it allowed Melissa to "repeatedly and violently" attack other residents "for months without taking appropriate action to either stop it or discharge" Melissa. Melissa engaged in aggressive behavior on 18 occasions while a resident in Cottage III. On six occasions, Melissa acted aggressively toward another resident. First aid was offered to the resident attacked by Melissa on two occasions, although there was no evidence regarding the injuries suffered by those two residents. On three occasions, Melissa acted in a manner of self-harm, such as punching a wall. There was no evidence, however, that Melissa inflicted any injury to herself. Gamber testified that Beacon's staff was highly trained in specialized techniques to deal with very difficult behaviors and that the actions of the staff on each occasion where Melissa displayed aggressive behavior were appropriate. Hamilton completed a behavior plan for Melissa on November 10, 2008, which was after Melissa's second incident of aggressive behavior, but before her third incident. Although North Pointe never approved the behavior plan, Gamber had no evidence that the actions taken by Beacon's staff were not in compliance with the plan. North Pointe received the incident reports regarding Melissa, and there was no evidence that North Pointe ever expressed any concerns about Melissa's safety.

The record refutes that Melissa engaged in aggressive behavior toward the other residents "for months." She first displayed aggressive behavior toward other residents on December 6, 2008, and she was discharged approximately a month and a half later on January 16, 2009. The circuit court's finding that Beacon did not violate R 400.14305(3) was not clearly erroneous, *Heindlmeyer*, 268 Mich App at 214, because the evidence showed that Melissa's aggressive behavior did not result in any injury to herself or to other residents, staff members responded appropriately to Melissa's aggressive behaviors, and staff members followed the behavior plan that Hamilton had written. We are not left with a definite and firm conviction that Beacon, by failing to discharge Melissa or take other unidentified "appropriate action," violated R 400.14305(3). *Id*.

Respondents next claim that Beacon violated R 400.14309(1) because the rule requires that a behavior plan be in place when crisis intervention techniques are continually used on a resident, and Beacon repeatedly used such techniques on Melissa without having a behavior plan in place. Hamilton wrote a behavior plan for Melissa on November 10, 2008. At that time, Melissa had only had two incidents of aggressive behavior, and only one of those incidents required the use of a crisis intervention technique. Hamilton submitted the behavior plan to North Pointe for approval by the behavior treatment committee. Thus, even before Melissa required the repeated or prolonged use of crisis intervention techniques at Cottage III, Beacon had written a behavior plan for Melissa and submitted it to North Pointe for approval. Thereafter, Beacon remained in contact with North Pointe regarding the behavior plan. Hamilton testified that he had email correspondence and several telephone conversations with the "contact person" at North Pointe, and that incident reports from December 8, 2008, and January 4, 2009, state that a behavior plan was requested. Gamber acknowledged that Beacon, through Hamilton and other employees, tried to get approval from North Pointe for the behavior plan. Under these circumstances, we are not left with a definite and firm conviction that the circuit court made a mistake when it found that there was no violation of R 400.14309(1). *Heindlmeyer*, 268 Mich App at 214.

We acknowledge that Gamber testified that a behavior plan is to be written as soon as an individual's behaviors become known and, therefore, if an individual with known behaviors moves into Cottage III, a behavior plan must accompany the resident. Gamber believed that Beacon violated the licensing rules on September 30, 2008, the date of Melissa's first act of aggressive behavior in Cottage III that required the use of a crisis intervention technique, because Melissa's aggressive behaviors were known by Beacon when she moved into Cottage III and Beacon had no behavior plan for her. However, respondents offer no explanation how the plain language of R 400.14309(1) supports Gamber's testimony. The rule speaks of when crisis intervention techniques may be used and what a licensee must do when the resident requires the repeated or prolonged use of crisis intervention techniques. The rule does not concern the admission of an individual into an AFC home. We affirm the circuit court's finding that there was no violation of the rule.

III

Also, in Docket No. 310895, respondents argue that the circuit court erred when it granted Beacon's motion to stay the Director's decision and when it denied their subsequent motion to rescind the stay when, following an investigation of a June 23, 2011, incident, Gamber concluded that a crisis intervention technique was used without justification and done improperly on a resident of Cottage III. An issue is moot when an event occurs that renders it impossible for the reviewing court to grant relief. *C D Barnes Assoc, Inc v Star Heaven, LLC*, 300 Mich App 389, 406; 834 NW2d 878 (2013). The stay was terminated when the circuit court reversed the Director's decision and reinstated the license for Cottage III. Because the stay was terminated, the issue is moot. *Id.* We are not obligated to consider moot questions, *Driver v Naini*, 287 Mich App 339, 355; 788 NW2d 848 (2010), rev'd in part on other grounds 490 Mich 239 (2011), and we refuse respondents' request that this Court address the moot issue. We do so because respondents have abandoned their argument by cursory treatment without citation to authority. See *Peterson Novelties, Inc v Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003).

IV

In Docket No. 313030, respondents argue that the circuit court erred in reversing the Director's decision to revoke the license for Cottage II. We review the circuit court's decision for clear error. *Heindlmeyer*, 268 Mich App at 214.[5]

Respondents argue that Beacon violated R 400.14201(2) because it lacked the administrative capability to operate Cottage II, as demonstrated by its inability to comply with the licensing rules as far back as 2006. However, the 2006 investigation by Gamber led to the CAP, which addressed the rule violations that Gamber found in the investigation. There was no

[5] As they did in Docket No. 310895, respondents argue that the circuit court erred when it looked beyond the definition of "willful noncompliance" in R 400.16001 to define a willful violation of the Act or the licensing rules. We incorporate our previous analysis and conclude that the trial court erred when it looked at case law to define the term "willful." However, we again conclude that the circuit court's error does not require reversal of the court's opinion. See MCR 2.613(A).

testimony that Beacon failed to comply with the CAP. And, in 2008, Gamber concluded upon an investigation that there were no rule violations. Moreover, as will be discussed, *infra*, the circuit court's findings that there was no violation of R 400.14301(2) or R 400.14305(3) were not clearly erroneous.

Since Beacon received a license for Cottage II in 2001, Ken Ratzlaff has served as the administrator for Cottage II. An "administrator" is "the person who is designated by the licensee to be responsible for the daily operation and management of the adult foster care small group home." R 400.14102(1)(b). The licensing rules contain provisions for the competence and qualifications of an administrator. See R 400.14201(4), (9). Gamber admitted that in 2001, and for each renewal of the license for Cottage II, the DHS approved the competency and qualifications of Ratzlaff.

Beacon had a chain of command in which Ratzlaff delegated duties to employees. Ratzlaff was not present at Cottage II on a daily basis. However, he was not required to be at Cottage II every day and he was permitted to delegate duties. Indeed, although an administrator is "responsible for the daily operation and management" of an AFC home, R 400.14102(1)(d), nothing in this rule states that the administrator must perform all day-to-day duties that are required to run the AFC home. And, Gamber acknowledged that the individuals to whom Ratzlaff delegated duties were qualified. There was evidence that Ratzlaff was kept apprised of what was happening at Cottage II. Although he did not read every incident report, Ratzlaff received a summary or synopsis of the incident reports. He also met every two weeks with an interdisciplinary team to discuss any problem situations. Under these circumstances, we are not left with a definite and firm conviction that the circuit court made a mistake when it found that Beacon had the administrative capability to operate Cottage II. *Heindlmeyer*, 268 Mich App at 214. We affirm the circuit court's finding that there was no violation of R 400.14201(2).

In reaching our conclusion, we are not persuaded by respondents' arguments that Beacon lacked the administrative capability to operate Cottage II because of certain practices or occurrences in Cottage II, such as not communicating the portion of the incident reports outlining the corrective measures taken to staff members, taking away the observation logs and requiring staff members to verbally communicate during shift changes, and having very similar behavior plans for residents. First, there was no testimony that staff members, because they were not informed of what was written in the incident reports regarding the corrective measures taken, were not able to give proper care to the residents. Second, there remained written records that recorded the problems arising in Cottage II, such as incident reports and daily progress notes. Third, Hamilton explained that the behavior plans for Betty and Alicia were similar because treatment that is known and effective is used on individuals with different disorders. There was no testimony that the behavior plan for either Betty or Alicia, when written, was inadequate.[6]

[6] In addition, we are not persuaded by respondents' argument concerning R 400.14206(5), as respondents do not explain how or why they believe the rule was violated. Further, respondents' argument that Beacon tried to pass its responsibility for complying with the licensing rules to convenient scapegoats, such as BCAL and case managers at Community Mental Health agencies

Regarding R 400.14301(2), respondents claim that the circuit court erred when it referred to Hamilton and Mark Magin, Betty's case manager, as expert witnesses. Because Magin and Hamilton were never offered or qualified as expert witnesses under MRE 702, we agree. However, the circuit court's error does not require reversal. See MCR 2.613(A). First, although the hearing referee did not find the testimony of Magin and Hamilton helpful, an evaluation accepted by the Director, the circuit court was not bound by this evaluation of the evidence because its review was de novo. See *In re Contempt of Auto Club Ins Ass'n*, 243 Mich App at 714 n 33; *Mich Ed Ass'n*, 280 Mich App at 511 (WHITBECK, J., dissenting). Second, it is not apparent that the circuit court's characterization of Magin and Hamilton as expert witnesses affected its findings. The circuit court did not compare the testimony of Magin and Hamilton with the testimony from other witnesses. Rather, no witness contradicted their testimony that Cottage II was an appropriate placement for Betty and Alicia.

Respondents argue that Beacon violated R 400.14301(2) because Betty and Alicia were not compatible with each other, where there was evidence that aggressive behavior by Betty or Alicia triggered similar behavior by the other, and because they were not compatible with Georgia, another resident, where there was evidence that Georgia was the victim of aggressive behavior by Betty and Alicia on 10 occasions during a two-week period in October 2008. By focusing on the actual incompatibility between Betty and Alicia and between them and Georgia, respondents fail to establish that the circuit court clearly erred in finding that there was no violation of Rule 400.14301(2). *Heindlmeyer*, 268 Mich App at 214. Under R 400.14301, a licensee shall not "accept or retain a resident for care unless and until" the licensee has done two things: (1) completed a written assessment of the resident and (2) determined that the resident is suitable pursuant to three provisions, including that "[t]he resident appears to be compatible with other residents and members of the household." Thus, regarding compatibility, a licensee only needs to determine that the resident "appears to be compatible" with the other residents and members of the AFC home before it accepts or retains the resident for care. The rule does not require any action by a licensee in response to a resident's incompatibility with other residents after the resident has been accepted or retained for care.

Cottage II provides care for women who suffer from mental illness. The residents of Cottage II are challenging individuals, and many have a history of self-harm, criminal assault, or domestic violence. The DHS knew that residents of Cottage II could assault and injure one another. There was no evidence presented that Beacon, when it admitted or retained Betty or Alicia for care in Cottage II, failed to determine that either woman appeared to be compatible with the other residents. Nor was any evidence presented that it was apparent that either woman, when admitted or retained for care in Cottage II, was incompatible with the residents already there. In fact, respondents concede that the incompatibilities may not have been apparent upon

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is not persuasive. The argument appears to be focused on questions asked of Gamber regarding why she waited until November 2008 to begin the investigation and whether any Community Mental Health agency expressed any concerns about the care of any resident at Cottage II. We see no improper purpose in these questions, as Gamber's reason for initiating the investigation and her conclusions regarding the rule violations were relevant to whether there were willful and substantial violations of the licensing rules.

the admission of the women to Cottage II. Accordingly, we affirm the circuit court's finding that there was no violation of R 400.14301(2).

The general basis for the circuit court's finding that Beacon did not violate R 400.14305(3) was its compliance with the CAP. But, according to respondents, the CAP did not absolve Beacon from following the Act and the licensing rules. They rely on *Neal v Dep't of Corrections*, 297 Mich App 518, 527-528; 824 NW2d 585 (2012), where this Court held that a stipulated protected order was invalid because it relieved or precluded the Department of Corrections from fulfilling its statutory obligations. *Id*. at 527-528. However, the stipulated order in *Neal* is distinguishable from the CAP because the CAP did not preclude Beacon from complying with the Act or the licensing rules. In fact, the CAP, which was approved in 2007 after Gamber found that Beacon violated several licensing rules, contained provisions that were intended to aid Beacon in complying with the licensing rules.

The circuit court's finding, based on the CAP, that there was no violation of R 400.14305(3), at least in regard to the aggressive behaviors of Betty and Alicia, was not clearly erroneous. *Heindlmeyer*, 268 Mich App at 214. The CAP contained a new protocol for handling aggressive behavior by residents. It was undisputed that the trigger for the protocol was never triggered by either Betty or Alicia. In addition, the incidents of aggressive behavior by Betty and Alicia that led to the Gamber's investigation were of the same type of behaviors that had led to the prior 2008 investigation, in which Gamber concluded that there was no violation of the licensing rules. In addition, although Rhoades testified that she was concerned about her ability to maintain order in Cottage II, two other employees of Beacon, Linda Rodriguez and Angela Cuttino, did not share her concerns. Rodriguez testified that she never had any concerns for her safety or for the safety of the residents. Cuttino testified that she never feared for her safety. According to Cuttino, Betty could have had as many as 10 times more incidents if the staff had not been properly trained. Similarly, staff members were able to avert many incidents between Alicia and Georgia. We are not left with a definite and firm conviction that the circuit court made a mistake when it found that there was no violation of R 400.14305(3) or, if there was a violation, the violation was not willful. *Id*. A willful violation required that Beacon knew or had reason to know that its conduct violated R 400.14305(3). Based on Beacon's compliance with the CAP and the fact Gamber found no violation of any licensing rule in the 2008 investigation, the evidence supports the circuit court's finding that Beacon did not willfully violate the rule.

We believe, however, the circuit court's reliance on the CAP to find that R 400.14305(3) was not violated regarding the protection of Michelle was misplaced. The CAP contained a new protocol for handling aggressive behavior by residents, but Michelle did not engage in aggressive behavior. She engaged in acts of self-harm. Nonetheless, the circuit court's finding that Beacon did not violate R 400.14305(3) with regard to Michelle was not clearly erroneous. *Heindlmeyer*, 268 Mich App at 214. There was no testimony by Gamber that the actions of the staff members after any of the five incidents were inappropriate. Beacon took Michelle to the hospital after the incident on December 26, 2008, the first incident on December 28, 2008, and the incident on January 1, 2009. None of the incidents resulted in serious harm to Michelle. Michelle was under one-to-one observation for 12 hours after the second incident on December 28, 2008, and then after the January 1, 2009 incident. When Michelle was not under one-to-one observation, staff members did a visual check on her every 5 to 15 minutes. In addition, Beacon took Michelle for a psychiatric evaluation on January 2, 2009. The psychiatric hospital did not admit Michelle,

which told Hamilton that she was not a danger to herself. Even though the hospital did not change Michelle's medications, Beacon attempted to get a medication change for Michelle from its psychiatrist. In addition, Beacon requested a behavior plan for Michelle from Hiawatha Behavioral Health, her Community Mental Health agency, and it had agreed to let Hamilton write one. Under these circumstances, as well as the fact that Hamilton never concluded that it was necessary to take any possessions from Michelle and the fact that Hiawatha Behavioral Health, which received all the incident reports, never gave Beacon any special instructions for the care of Michelle, we are not left with a definite and firm conviction that the circuit court made a mistake in finding that there was no violation of R 400.14305(3) with regard to Michelle. *Heindlmeyer*, 268 Mich App at 214.

Because we affirm the circuit court's findings that there were no violations of the licensing rules, we need not address the circuit court's finding that the DHS's decision to seek revocation of the license for Cottage II was arbitrary, capricious, and clearly an abuse or unwarranted exercise of discretion.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ David H. Sawyer
/s/ Douglas B. Shapiro