2010 WL 2992448 (Alaska) (Appellate Brief)
Supreme Court of Alaska.

Mary HILL d/b/a, Wild Rose Gardens Assisted Living Home, Appellant,

v.

Linda GIANI, State of Alaska Department of Health and Social Services, and Staci Collier, Appellee.

No. S-13693.
May 21, 2010.

Trial Court Case #3PA-07-1658 CI
Appeal from the Superior Court for the State of Alaska, Third Judicial District, Hon. Vanessa H. White, Judge

Appellant's Brief

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***ii I. TABLE OF AUTHORITIES**

***Alaska Cases*:**

*V II. STATUTES AND REGULATIONS

Alaska Appellate Rule 202(a):

> An appeal may be taken to the supreme court from a final judgment entered by the superior court, in the circumstances specified in AS 22.05.010, or from a final decision entered by the Alaska Workers' Compensation Appeals Commission in the circumstances specified in AS 23.30.129.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

AS 09.50.250(3):
A person or corporation having a contract, quasi-contract, or tort claim against the state may bring an action ***vi** against the state in a state court that has jurisdiction over the claim. A person who may present the claim under AS 44.77 may not bring an action under this section except as set out in *AS 44.77.040* (c). A person who may bring an action under *AS 36.30.560* 36.30.695 may not bring an action under this section except as set out in *AS 36.30.685*. However, an action may not be brought if the claim

(3) arises out of assault, battery, false imprisonment, false arrest, malicious prosecution, **abuse** of process, libel, slander, misrepresentation, deceit, or interference with contract rights;

AS 09.65.070(d)(2):
Suits against incorporated units of local government.

(d) An action for damages may not be brought against a municipality or any of its agents, officers, or employees if the claim

(2) is based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty by a municipality or its agents, officers, or employees, whether or not the discretion involved is **abused**;

AS 22.05.010(a):
Jurisdiction.

(a) The supreme court has final appellate jurisdiction in all actions and proceedings. However, a party has only one appeal as a matter of right from an action or proceeding commenced in either the district court or the superior court.

***vii** AS 47.24.010:
Reports of harm.

Except as provided in (e) and (f) of this section, the following persons who, in the performance of their professional duties, have reasonable cause to believe that a vulnerable adult suffers from abandonment, exploitation, **abuse**, neglect, or self-neglect shall, not later than 24 hours after first having cause for the belief, report the belief to the department's central information and referral service for vulnerable adults:

AS 47.24.120(a):

A person who in good faith makes a report under AS 47.24.010, regardless of whether the person is required to do so, is immune from civil or criminal liability that might otherwise be incurred or imposed for making the report.

AS 47.24.900:
Definitions.

In this chapter,

(1) “abandonment” means desertion of a vulnerable adult by a caregiver;

(2) “**abuse**” means

(A) the wilful, intentional, or reckless nonaccidental, and nontherapeutic infliction of physical pain, injury, or mental distress; or

(B) sexual assault under *AS 11.41.410* or 11.41.420;

(3) “caregiver” means

(A) a person who is providing care ***viii** to a vulnerable adult as a result of a family relationship, or who has assumed responsibility for the care of a vulnerable adult voluntarily, by contract, or by court order; or

(B) an employee of an out-of-home care facility who provides care to one or more vulnerable adults;

(4) “decision making capacity” means the ability to understand and appreciate the nature and consequences of a decision and the ability to reach and communicate an informed decision;

(5) “department” means the Department of Health and Social Services;
(6) “designee” means another state agency or a community-based program, individual, or provider of supportive services that has been licensed, or authorized by agreement with the department, to provide one or more services to vulnerable adults;
(7) “exploitation” means unjust or improper use of another person or another person's resources for one's own profit or advantage;

(8) “incapacitated person” means a person whose ability to receive and evaluate information or to communicate decisions is impaired to the extent that the person lacks the ability to provide or arrange for the essential requirements for the person's physical health or safety without court-ordered assistance;
(9) “neglect” means the intentional failure by a caregiver to provide essential care or services necessary to maintain the physical and mental health of the vulnerable adult;

***ix** (10) “police officer” has the meaning given in *AS 18.65.290*;

(12) “protective services” means services that are intended to prevent or alleviate harm resulting from abandonment, exploitation, **abuse**, neglect, or self-neglect and that are provided to a vulnerable adult in need of protection; “protective services” includes protective placement;

(12) “public home care provider” has the meaning given in AS 47.05.017(c);

(13) “self-neglect” means an act or omission by a vulnerable adult that results, or could result in the deprivation of essential services necessary to maintain minimal mental, emotional, or physical health and safety;

(14) “supportive services” means the range of services delivered by public and private organizations and individuals that assist the **elderly** and vulnerable adults with their social, health, educational, recreational, transportation, housing, nutritional, **financial**, legal, or other needs;

(15) “unable to consent” means refusal to, or inability to, accept services because

(A) the person is an incapacitated person or apparently is an incapacitated person;

(B) of coercion by or fear of reprisal from the perpetrator of abandonment, exploitation, **abuse**, or neglect;

(C) of dependency on the perpetrator of abandonment, exploitation, **abuse**, or neglect for services, care, or support; or

*1 III. JURISDICTIONAL STATEMENT

The Superior Court entered Final Judgment in favor of Appellee Linda Giani on October 16, 2009, and in favor of the State of Alaska, Department of Health and Social Services and Staci Collier on December 2, 2009. Appellant filed a timely Notice of Appeal.

This court *has* jurisdiction pursuant to AS 22.05.010(a) and Alaska Appellate Rule 202(a).

IV. PARTIES

The parties in the trial court consisted of appellant Mary Hill d/b/a, Wild Rose Gardens Assisted Living Home; appellee State of Alaska, Department of Health and Social Services and Staci Collier; and appellee Linda Giani.

V. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. The trial court erred in granting Appellee Linda Giani's Motion for Summary Judgment.

2. The trial court erred in granting Appellee State of Alaska, Department of Health and Social Service's and Staci Collier's Motion for Summary Judgment.

VI. STATEMENT OF THE CASE

A. Introduction.

Appellant Mary Hill (“Ms. Hill”) operates an assisted living home in Palmer, Alaska. J.H., one of her former female residents, has mental and emotional handicaps. Ms. Hill was ***2** intimately involved in J.H.'s care for over 20 years, first as her special education teacher, and then as an assisted-living home resident. On August 2, 2005, the Independent Care Coordinator, appellee Linda Giani (“Ms. Giani”), filed a false report of harm, stormed into Wild Rose Gardens on August 11, 2005, when she thought Ms. Hill was on vacation, and removed J.H. Appellee State of Alaska, Department of Health and Social Services (“the state”), investigated Ms. Giani's accusations against Ms. Hill. With no due process, Appellee Staci Collier (“Ms. Collier”) forced Ms.

Hill not to take any new residents. The investigation, and the state's subsequent dismissal of the three accusations substantiated, exonerated Ms. Hill, but her business was damaged. The trial court granted summary judgment to all appellees on all causes of action, but the record reveals factual issues.

B. Facts.

Plaintiff Mary Hill has a B.A. degree from the University of Iowa, and a Masters Degree in special education from the University of Hawaii, with an emphasis on moderate to severe mental retardation and emotional disturbance. Exc. 77-79. She was certified in 1984 as a special education teacher, specializing in moderate to severe mental retardation. Exc. 78. She taught special education in Palmer Middle School, then Wasilla High School, but was diagnosed with lupus and had to ***3** medically retire in 1990. Exc. 79-80. She opened an assisted living home in Palmer, licensed for two residents in her "A" home where she resides, and two in a separate "B" home for more independent residents. Exc. 87-88.

J.H. had been in 10-15 residential placements before her father and guardian, Larry Havins, placed her in Ms. Hill's assisted living home. Exc. 149. J.H. had been in Ms. Hill's special education class. Exc. 89. Ms. Hill placed J.H. in house "A," so she could watch her closely. Exc. 91. J.H. has moderate mental retardation, a 50 IQ, autism, Asperger's Syndrome, oppositional defiant behavior, grand mal seizures, B thalassemia trait, and Raynauds; she also has a significant secondary diagnosis of emotional disturbance. Exc. 93-94. J.H. has some ability to act independently (i.e. dress and shower herself, fix some of her meals), and hold a job. Exc. 95-98.

J.H. had a "team" consisting of her father Larry Havins and step-mother Janice, court-appointed guardians; the Ready-Care agency, which does care coordination, pays the independent care coordinator, and supplies aides who help Ms. Hill with care during the day; the independent care coordinator, who coordinates the various agencies and secures funding; and the assisted living home administrator. Exc. 114-117, 155-156. In 1999, Ms. Giani became J.H.'s independent care coordinator. Exc. ***4** 154. J.H. lived in the community on a "Medicaid waiver" program. [1] Exc. 156.

On October 27, 2003, the superior court in Palmer, Hon. Beverly W. Cutler, appointed as J.H.'s guardians J.H.'s father Larry and step-mother Janice. *In the Matter of the Guardianship of Jennifer Havins*, Case No. 3PA-03-90 PR. Exc. 191. Ms. Hill attended the proceedings, helped Mr. Havins with the process, and as one intimately familiar with J.H.'s issues, testified in support of the guardianship. Exc. 118-120. Paragraph 6 of the *Findings and Order Appointing Permanent Co-Guardians and Conservators*, states: "No change in respondent's residence with Mary Hill shall be made without first being reviewed by this court." Exc. 194.

In February 2005, Ms. Hill told Mr. Havins that they should start looking for another placement for J.H.:

In February, 2005 plaintiff [Ms. Hill] informed JH's father and legal guardian that for the first time in eleven years we were not making progress with JH and that we should take our time (even if it took up to a year) to look for a new placement for her. Plaintiff was unable to provide a consistent intervention protocol with the staff plaintiff was provided (although plaintiff spent months trying to do so). Plaintiff felt perhaps a married couple with a strong father figure who would provide consistency of care might help. Since the fall of 2004, JH's behaviors were becoming more and more ***5** difficult. Her neurologist Dr. Sponsler and her psychiatrist Dr. Halverson, both expressed concern that JH risked progressive organic brain damage with increased age (Dr. Halverson) and with each seizure (Dr. Sponsler). Since JH's behaviors were increasing across all environments (home, work, parents, community, friends), plaintiff didn't know if a change of residence with both care providers "on the same page" so to speak, would help JH. But plaintiff felt they should explore this option as well as carry through on Dr. Sponsler's extensive medical protocol, that was to culminate August 29, 2005 with her admission to the Swedish Neuroscience Center in Seattle for a final video EEG test, which would determine JH's viability for neurosurgery that would have a 70% chance of reducing her seizures or even possibly eliminate them. Dr. Sponsler wanted her admitted ASAP following months of preliminary tests as he said her brain injury could worsen with each seizure. Portions of JH's monies had "disappeared" (CPSI had not received portions of JH's Medicaid waiver since August, 2004). This had previously been brought up numerous times with Linda' Giani

and Ready Care but neither could or would look into this with any depth. Therefore, plaintiff was concerned about **financing** the transportation to Seattle for JH and her aide (Sharlene Johnson). Plaintiff asked Dr. Sponsler if we could wait until the October, 2005 Permanent Fund Dividends and he said no - she needed to get there as soon as possible.

Exc. 253; see also Exc. 122.

On May 12, 2005, defendant Linda Giani submitted an Alaska MRDD [Mental Retardation and Developmental Disability] Plan of Care for J.H., covering 6/1/05 to 5/31/06, which she testified she drafted personally (Exc. 155):

***6** Jennifer is a 29 year old, pleasant, friendly woman with diagnosis or mental retardation, a severe psychomotor seizure disorder, Raynaud's Syndrome, B-Thalassemia, Oppositional/Defiant Disorder, and symptoms associated with Asperger's Syndrome. Jennifer is extremely prone to sinus infections, bronchitis, and mild pneumonia. There is a family history of glaucoma.

* * *

Although Jennifer does not have a formal diagnosis of Asperger syndrome, she meets the following criteria for diagnosis...difficulties with transitions or changes - preferences for sameness...

* * *

Jennifer's test results [from Dr. Jeffrey Sponsler] and other information have been sent to Swedish Neuroscience Center in Seattle and Jennifer has been accepted as a patient. With the approval of her legal guardian, Jennifer will fly to Seattle for a 4-7 day VEEG [Video EEG]...When the results of the VEEG have been evaluated, a surgical solution will be considered.

* * *

Jennifer's current placement is at risk, placing her at significant risk for institutionalization at a significantly higher cost.

* * *

Her care providers encourage her to take walks outdoors and to participate more frequently in outdoor activities around her home.

* * *

***7** As a result of negative behaviors over the past year, Jennifer has been unable to participate in some arts and crafts in her community.

* * *

Jennifer's team care very deeply about her health, safety, and welfare. They want her to be as aware as possible of all the joy and wonder in all of her environments and to experience life to the fullest.

* * *

Jennifer loves her home environment and all of her care providers and she often expresses that she never wants to leave Mary Hill's Assisted Living Home. Jennifer has known her current residential habilitation provider for over 17 years. However, as a result of increases in oppositional/defiant behaviors, increases in violent behaviors, and regression in activities of daily living

skills during the past Waiver year, Jennifer has required a significant increase in verbal and non-verbal cuing, prompts and modeling, physical assistance, and supervision and monitoring [to] meet her needs and insure her health and safety, and the safety of others. This has placed considerable strain on Jennifer's primary care provider. Moreover, Jennifer will be undergoing brain surgery in the near future as it has been determined that she is a good candidate for surgery to alleviate atypical seizures. Jennifer will require an escort to Seattle; an escort to remain with her during testing, assessments, and surgery; and considerably more one-to-one assistance and monitoring throughout the post-operative period.

To insure that Jennifer is able to remain in her current placement, Jennifer's primary care provider will require an increase in hourly respite services this year to assure ***8** that she is able to meet Jennifer's health and safety needs, while insuring that she has the breaks required to get a sufficient amount of sleep and to have periods of time to meet her own needs. Without additional respite, Jennifer's current placement is in jeopardy and she is at high risk for institutionalization.

* * *

After VEEG results have been evaluated, surgical intervention at Swedish will be considered. It has been related that Jennifer may have 70% chanced of eliminating her atypical seizures.

Exc. 198-214. Ms. Giani testified that everything she wrote was true (Exc. 157).

Ms. Hill describes what happened next:

By July, 2005, the preliminary tests had all been completed and her application for admission to the Swedish Neuroscience Center completed and mailed. Shortly thereafter the admissions staff of the Swedish Neuroscience Center approved her application for treatment as a viable candidate for Video EEG and possible surgery. The first week of July, 2005, plaintiff asked Linda Giani for the phone number for Medicaid (as she was trying to get two round trip tickets to Seattle for JH and her aide). Linda Giani said, “I'll call and handle it.” A little over a week later on 7/13/05, Linda Giani and Kristi Mingo (Ready Care) were doing their monthly visit and plaintiff asked in front of Kristi if she'd gotten the tickets for them yet and Linda Giani looked a little flustered, and said no, she hadn't, but she would take care of it. By the end of July, 2005 plaintiff still didn't have the tickets and my two week vacation was beginning August 2, 2005.

***9** Exc. 253.

On August 1, 2005, Ms. Giani unexpectedly told Ms. Hill that she was moving J.H. Ms. Hill states:

[O]n August 1, 2005, hours before plaintiff's vacation, Linda Giani came by unannounced as plaintiff was on the walkway to her car...She said...she was taking JH out of our home while I was on vacation. Plaintiff was totally shocked. Why wasn't plaintiff part of the plan, who were the new foster parents? How could plaintiff participate in a transition team meeting since I was hours away from leaving on vacation? They needed to access doctors to see if the move would be best now or after Seattle and possible surgery... [P]laintiff convinced Linda Giani to at least begin the transition process with a few overnights on weekends with the new family. That evening plaintiff called Linda Giani - no answer - and left the message that we could not move JH until I got back. Tuesday 8/16/05 or Wednesday 8/17/05 would be good days for the meeting. Plaintiff also called Ready Care - Kristi [Mingo] and related the same.

Exc. 254; see also Exc. 124-126

On August 2, 2005, Ms. Giani submitted a Report of Harm to Adult Protective Services, alleging “The following are some examples of incidents observed by the Care Coordinator and staff employed by Ready Care Wasilla over the past six months (incidents have increased over the past 90 days):”

• Mary Hill yelling at Jennifer and calling her stupid.

• Mary Hill repeatedly telling Jennifer that she doesn't deserve to live in the Hill Assisted Living Home.

***10** • Mary Hill repeatedly taking away ‘privileges' as a result of perceived bad behavior.

• Mary Hill repeatedly insisting that Jennifer demand “negative” attention and deliberately exhibits bad behavior to get ‘negative’ attention (consultation with a Psychologist indicates that this type of behavior is indicative of a total lack of any attention, especially positive reinforcement).

• According to Judy Dearman, a direct care staff, Jennifer was confined to her bedroom of her apartment most of the winter of 04-05 as a result of perceived bad behavior.

• According to Jennifer's father and guardian, Jennifer was denied visitation with her father on Sundays as she had lost privileges.

• Jennifer was denied the opportunity to participate in Special Olympics as a result of losing ‘recreational privileges'.

• Direct Care Staff (Cindy Dutton) reported that during one particularly long confinement, she ‘snuck’ Jennifer out of the house for a break

• Jennifer is required to complete a full week of ‘good’ behavior prior to privileges being restored - a near impossible task for Jennifer due to her disabilities.

• On a recent home visit, Jennifer was being made to shower four times within a 30 minute period because she was unable to rinse all of the soap out of her hair - this and other incidents have occurred frequently.

• On one occasion, Mary Hill called the Care Coordinator at home on a Friday night to report that she waas calling the State Troopers to take Jennifer to API - The Troopers responded but saw no reason to remove Jennifer from her home. Mary called Jennifer's father and insisted that he admit Jennifer to API - API interviewed Jennifer and her father and found no reason to admit her - she was referred to Providence Psychiatric who also interviewed Jennifer and her father and released her. Mary refused to allow Jennifer back in her home for 72 hours - she spent that time with Cindy Dutton, one of her care providers.

***11** • The behavior that triggered the aforementioned incident was that Jennifer didn't want to empty her dishwasher because she was ready to go on an outing - when the care provider kept insisting, reprimanded her repeatedly, Jennifer became frustrated and hit the care provider lightly in the stomach area. The care provider involved resigned following this incident, as she strongly disagreed with Mary's methods of implementing behavior modification.

• During a recent home visit, the Care Coordinator and Habilitation Coordinator tried talking to Jennifer and asking her questions about her activities - when asked a question, Jennifer immediately made direct eye contact with Mary Hill and wouldn't talk. When Mary tried to bait Jennifer into talking about her bad behaviors, Jennifer put her arm up to cover her face and announced that she only wanted to ‘talk about appropriate things.’ When Mary tried to press further for Jennifer to discuss ‘hitting’ behaviors, Jennifer accused another provider of hitting her and again went into the defensive posture of covering her face. Mary then told Jennifer that she didn't deserve to live in a ‘place like this.’

• Within the past two weeks, Jennifer has been observed on several occasions huddled in the back seat of her care providers vehicles, head down and arms folded defensively. When staff tried to talk to her she covered her face with her arms. Yesterday, when staff again found her huddled in the back of the car and tried to talk with her, she covered her face and said that she couldn't ‘talk to strangers - you're strangers.’ This was immediately following Mary Hill being notified that Jennifer was being removed from her home at the request of the guardian.

Exc. 216.

A narrative portion states:

About six weeks ago, Mary had notified the Care Coordinator and the Guardian that she was no longer able to provide for Jennifer's care as her behaviors were out of control. The Care Coordinator identified a potential new placement and requested Mary's cooperation in assisting in introducing Jennifer to this couple. Mary then informed ***12** the Care Coordinator that she changed her mind and wanted to keep Jennifer - the Guardian consented. From that point to the present, Ready Care staff, the Care Coordinator, and Jennifer's guardian have noticed a significant change in Jennifer and believe that she may be experiencing mental and verbal **abuse** in her current environment and that the **abuse** may have been occurring over a period of several years. Jennifer has experienced regression in her skills over the past two years. Recent conversations with Jennifer are indicative of 'brainwashing.'

In addition, Mary Hill's health is declining and the Care Coordinator believes that Jennifer is not getting the attention and assistance that she requires to meet her needs. There is also concern that Jennifer is not getting proper nutrition with the exception of times when she eats out in restaurants.

Mary Hill left on vacation on Tuesday August 2nd and will be gone for two weeks. She requested that Jennifer not be removed from the home until she returns on the 17th and that a transition be set up and implemented.

The Care Coordinator believes that Jennifer should be removed from the home immediately and that the current behavior modification plan be stopped. To avoid legal issues, the assistance of Adult Protective Services is being requested to determine if Jennifer is being subjected to mental and verbal **abuse** (whether intended or unintended). In as much as Jennifer's recent behaviors are indicative of **abuse**, immediate attention and assistance is being requested to remove Jennifer from the Hill home to a new placement (that has been identified and approved by the guardian).

Exc. 216-217. Ms. Hill describes what happened:

***13** Upon calling home during plaintiff's vacation, plaintiff's substitute home care provider told me Linda Giani told her she was moving JH out on Thursday, August 11, 2005. Plaintiff interrupted her vacation and came home. Plaintiff called Linda Giani on Tuesday night, August 9, 2005 and left the message that plaintiff needed the full 30 days for transitioning and reminded her of the court order signed by Judge Zwink and Judge Cutler that JH was not to be removed from plaintiff's home "without it being reviewed by the court." Wednesday, August 10, 2005 plaintiff called Kristi [Mingo, from Ready Care] and told her the same thing. Kristi called plaintiff back and asked that plaintiff fax the court order to her at Ready Care. This plaintiff did (neither Kristi nor any RC staff assisted JH's move on August 11, 2005. [)] After faxing it to RC, plaintiff drove to Dr. Rudolph's office to see if they should transfer JH now or after Seattle. His office was closed (on vacation). Plaintiff drove too Dr. Sponsler's office - same thing. Dr. Halverson's office was closed as well. The next day, Thursday, August 11, 2005 (early afternoon), plaintiff again tried Dr. Rudolph and Dr. Sponsler - but both offices were closed. Dr. Halverson's office was open but Dr. Halverson was not there. Her nurse practitioner told plaintiff they should not hurriedly transfer JH, and violate the court order. She said if they came to take JH, plaintiff should call the troopers. Upon arriving home, at 3:00 p.m. Linda Giani called and stated she was coming over to get JH. Plaintiff told her that she'd need to wait the full 30 days, as this had to go before the court. (Plaintiff had no reason to dispute the move as long as plaintiff felt transitioning protocols were satisfactorily addressed and implemented.) JH's August 29, 2005 admission to Swedish Neurological Center with Dr. Lisa Caylor was also within this 30 day time frame. Linda Giani said she *was* coming to get JH.

***14** Plaintiff told her that Dr. Halverson's office said plaintiff should call the troopers. Linda Giani became noticeably agitated. He voice was quaking and she said there had been an accusation of **abuse** made against plaintiff. Plaintiff was stunned. Plaintiff asked what it was and she said JH flinched in my presence and looked at me when asked a question. Plaintiff couldn't believe

it. Linda Giani repeated at least four times that she would make things very “ugly” for plaintiff if plaintiff refused to let them move JH. Plaintiff told her this didn't worry plaintiff; she welcomed scrutiny. Plaintiff continued to make her case, explaining that they hadn't had time to review the new parents at the very least, and relevant health and safety factors. Linda Giani said “they'd find out for themselves” and again threatened plaintiff with getting “ugly.” Plaintiff asked about the advisability of moving JH prior to the stress of travel and Swedish Neurological Center admission (JH not too keen on travel). Plaintiff felt JH's doctor should offer input on this. Linda Giani *again* reiterated that she would make things “ugly” for plaintiff if she didn't let JH leave. (Little did plaintiff know, Linda Giani was the one who trumped up the charges to Licensing, on August 8, 2005 no less, and had already made things “ugly.”) Plaintiff hesitated at length. Plaintiff wasn't really cowed by her threats of “ugly,” as plaintiff felt she could stand up to any type of scrutiny, but plaintiff had to weigh the two options: (a) relent the 30 day notice, try to brief the new parents as much as possible as to the most important health and safety factors, medical needs, Swedish Neurological Center. Plaintiff didn't know if it was legal to let JH move re: the court order, (b) obey the court order, call the troopers and with the latter option, JH would most likely have to see her father in confrontation with the troopers, and I didn't want that. Basically, it came down ***15** to what's more important to JH, her health/safety, medical appointments or her family relationships. Upon debating this in plaintiff's mind, Linda Giani asked if plaintiff was still on the line, plaintiff said yes. Linda Giani for the fourth time threatened plaintiff with “ugly.” Plaintiff asked her if it was legal (considering the court order). Linda Giani didn't respond. Finally, plaintiff decided to allow Linda Giani to transfer JH if she would promise to get her to her 8/29/05 appointment in Seattle. Before plaintiff could finish the last syllable Linda Giani said “yes,” she'd promise. Plaintiff figured she would relate the most important medical and safety considerations to the new parents as they moved JH out. This plaintiff tried to do, when they arrived at 4:00 p.m. [on August 11, 2005].

Exc. 254-255; 126-127. On August 11, 2005, Linda Giani and a big entourage showed up on one hour's notice, and removed J.H. Ms. Hill describes the scene:

It was absolute chaos, Larry Havins, his son Jeremy, Linda Giani, the new care provider Cynthia Novel, and Tom Hill and son coming into the home en masse without the intervention list (submitted yearly) to know what [property] was plaintiff's and what was JH's. It was next to impossible to convey relevant information while they constantly entered, exited, and reentered, numerous times. Plaintiff had to intervene to prevent the removal of plaintiff's cross-stitches ...my large TV, my lingerie chest...If plaintiff hadn't been there (as was intended, since this was her vacation), bedding, pillows, throws, many items of her own including several hundred dollars in Hubbard cast iron lamps, would have been taken. Despite plaintiff's attempt to rescue personal items, they did end up taking the lingerie chest - plaintiff rescued it once, ***16** but while she was upstairs helping Sharleen [Johnson, Ms. Hill's aide] with her med sheet, someone else took it out. Plaintiff let several items go that she had purchased and had not been reimbursed for. JH's Sonicare (over $100) toothbrush, SAD light (over $100) and little items that she wanted, hand painted cast iron bugs, bulletin board, etc.

Exc. 255, 126-129. Ms. Giani and Mr. Havins hugged her and told her they knew she had never **abused** J.H. Exc. 129. Ms. Giani's quick agreement to take J.H. to Seattle for tests was purely for expediency. No one took J.H. to Swedish Hospital, which was never even notified that she would not be coming for her appointments. Exc. 145. Nor were any of J.H.'s doctors notified, including her primary care physician Dr. Rudolph; her psychiatrist Dr. Halverson; her neurologist Dr. Sponsler. Exc. 146-147. Nor was mandatory Superior Court review and approval for the move obtained or even sought. Exc. 148. On August 26, 2005, Ms. Giani simply handed a letter about the move to attorney J. Randall Luffberry. Exc. 189, 284-287 (letter).

This Report of Harm that led to this fiasco was false and easily refuted:

• *Mary Hill “yelling at Jennifer and calling her stupid” and “repeatedly telling Jennifer that she doesn't deserve to live in the Hill Assisted Living Home.*”

• Mary *Hill repeatedly taking away ‘privileges' as a result of perceived bad behavior*.

***17** Cindy Dutton, an aide at Wild Rose Gardens, in an affidavit stated that worked three five-hour shifts per week there for 11 years, giving direct care to J.H., among other residents. She never saw Ms. Hill yell at, threaten, brainwash, verbally **abuse**, deprive of food, isolate, restrict, inappropriately punish, use negative reinforcement, or otherwise conduct herself inappropriately as regards J.H. Exc. 323-324. [2]

• *Mary Hill repeatedly insisting that Jennifer demand "negative" attention and deliberately exhibits bad behavior to get 'negative' attention (consultation with a Psychologist indicates that this type of behavior is indicative of a total lack of any attention, especially positive reinforcement).*

In her 5/12/05 MRDD Plan of Care Ms. Giani wrote, "Jennifer will receive positive feedback and incentives for appropriate social interactions" (Exc. 212). She described her "consultation with a Psychologist" as follows:

Q [by Mr. Pharr]: ...Consultation with a psychologist indicates that this type of behavior is indicative of a total lack of any attention, especially positive reinforcement. What psychologist did you consult with?

A: Honestly I don't remember his name. It was a very long time ago.

Q: You did consult with a psychologist?

A: Yes, I did.

***18** Q: And what did the consultation consist of?

A: It consisted of me asking the question (ph).

Q: You called the psychologist on the phone?

A: No, I talked to the psychologist in person.

Q: Where was this?

A: I don't remember.

Q: You don't remember whether it was Wasilla or Anchorage?

A: It would have been Wasilla most likely, but I don't remember. I'm sorry.

Q: It was a male psychologist in Wasilla?

A: I don't remember.

Q: How much information did you give the psychologist?

A: Very little.

Exc. 165-166. After a break, Ms. Giani suddenly remembered who the psychologist was:

Q: Do you have any notes on who the psychologist was?

A: Yes, actually I do remember his name.

Q: Who was it?

A: His name was John McEachin.

Q: John what?

A: McEachin. M-c-E-a-c-h-i-n. And he was a psychologist that flew up from California and provided autism workshops for one of my ***19** clients so I attended two day workshops with him two or three times a year on autism. And in the course of a break I just asked him an offhand question, no names, just said what do you think of this.

Exc. 168-169.

• *According to Judy Dearman, a direct care staff, Jennifer was confined to her bedroom of her apartment most of the winter of 04-05 as a result of perceived bad behavior*.

In her affidavit, Cindy Dutton stated that no one confined J.H to her room in the winter of '04 to '05. Exc. 324. In her deposition Ms. Giani was vague on this point. Exc. 168.

• *According to Jennifer's father and guardian, Jennifer was denied visitation with her father on Sundays as she had lost privileges*.

Ms. Hill responded, “Never! From day one 11 years ago until the present, Larry Havins ([J.H.]'s father and legal guardian) has stated that if [J.H.] had ‘bad behaviors that week’ she was not to visit them on Sunday. I often felt awkward about this but this was Larry's choice and he consistently enforced his directive. Larry attentively called every Sunday and if he felt [R.H.]'s behaviors were significant, he would state then that he wouldn't be picking her up and he often, at this time, asked for [J.H.] to get on the line and he would reiterate to her why she wouldn't be coming over. Even when [J.H.]'s behavior had been good that week, he often opted out of seeing her...As the years have progressed, Larry's Sunday visits have diminished...” Exc. 257-258.

***20** • *Jennifer was denied the opportunity to participate in Special Olympics as a result of losing ‘recreational privileges'*.

• *Jennifer is required to complete a full week of ‘good’ behavior prior to privileges being restored - a near impossible task for Jennifer due to her disabilities*.

Ms. Hill's response was, “[J.H.] has always (whether at school, in a group home or ALH) needed a ‘tight’ (consistently applied across all environments) behavioral management program. Replete within this program are incentives for appropriate behavior and a graduated system of social (positive) and tangible rewards as well as corrective cuing/reminders and, if necessary, withdrawal of attention, or temporary loss of preferred activities [2005-2006 Plan of Care, Page 14]. If [J.H.] had been violent or assaultive (as in purposely ramming her shopping cart into a stranger at the store), for her own safety, as well as the public's, [J.H.] would be restricted from accessing public places for one week...” Exc. 259, 95-97.

J.H. “would not participate in Special Olympics (for her safety and the safety of others) if she had been violent that week. According to Special Olympics rules, if an athlete missed too many practices, then he/she would not qualify for local or state games. With this in mind, we would usually encourage her to attend practice the following week, emphasizing her obligation to ‘the team.’ If, however, as noted [above], [J.H.] ***21** chose not to be ready on time, then that again was her choice.” Exc. 260, 100-101.

• *Direct Care Staff (Cindy Dutton) reported that during one particularly long confinement, she 'snuck' Jennifer out of the house for a break.*

In her affidavit, Cindy Dutton stated that she never "snuck" Jennifer out of the home, and never told Ms. Giani that she did. Exc. 324, ¶7.

• *On a recent home visit, Jennifer was being made to shower four times within a 30 minute period because she was unable to rinse all of the soap out of her hair - this and other incidents have occurred frequently.*

Ms. Hill stated, "[J.H.J is perfectly capable of washing/rinsing her own hair. Over the last 11 years, [J.H.] would occasionally regress to old habits (very common with autism) whereby after a few days of needing to re-rinse her hair, she'd get back on track and independently wash/rinse her hair correctly for days, months, even years before regressing to baseline again." Exc. 264.

• *On one occasion, Mary Hill called the Care Coordinator at home on a Friday night to report that she was calling the State Troopers to take Jennifer to API - The Troopers responded but saw no reason to remove Jennifer from her home. Mary called Jennifer's father and insisted that he admit Jennifer to API - API interviewed Jennifer and her father and found no reason to admit her - she was referred to Providence Psychiatric who also interviewed Jennifer and her father and released her. Mary refused to allow Jennifer back in her home for 12 hours - she spent that time with Cindy Dutton, one of her care providers.*

• *The behavior that triggered the aforementioned incident was that Jennifer didn't want to empty her dishwasher because* ***22** *she was ready to go on an outing - when the care provider kept insisting, reprimanded her repeatedly, Jennifer became frustrated and hit the care provider lightly in the stomach area. The care provider involved resigned following this incident, as she strongly disagreed with Mary's methods of implementing behavior modification.*

Ms. Hill states that on March 24, 2005, J.H. "struck our aide hard (I believe it was in the stomach) ... [T] his incident was an escalation of behavior when [J.H.] refused to load the dishwasher. I was not at home when these events happened (our aide was on duty at the time). Prior to this incident, [J.H.] had been warned that if she hit one more person, the Troopers would be called and she would have to leave our residence for a period of time. So, indeed, when [J.H.] hit our aide on March 24, 2005, the Troopers were called. We wanted to impress on [J.H.] the seriousness of assaultive behavior and asked the Trooper if API would be a safe place for her medically (with regards to her seizures) and he said it would need to be [J.H.]'s father/legal guardian who would need to accompany her for possible admission. I called [J.H.]'s father (Larry Havins) and he agreed to take her there. I also called our independent care coordinator, Linda Giani, and apprised her of the situation. Fortunately, API would not accept [J.H.]... [J.H.]'s dad called me later and we decided our aide, Cindy Dutton, might provide temporary quarters for her (safe yet not too reinforcing) and Cindy agreed. [J.H.] left our house the evening of March 24, 2005, and returned before noon on March 27, 2005... [T]his action ***23** ...was mutually agreed upon by myself and [J.H.]'s legal guardian...I felt we needed to make the firm statement that assaultive behavior would not be condoned...By temporarily removing [J.H.] from her comfort zone (her room), this action made a strong impression where a strong impression was needed." Exc. 263.

It should be noted that in the ROH, Ms. Giani accused Ms. Hill of **abusing** J.H. throughout this period, but there was "no reason to admit her" to either API or Providence Psychiatric.

• During a recent *home visit, the Care Coordinator and Habilitation Coordinator tried talking to Jennifer and asking her questions about her activities - when asked a question, Jennifer immediately made direct eye contact with Mary Hill and wouldn't talk. When Mary tried to bait Jennifer into talking about her bad behaviors, Jennifer put her arm up to cover her face and announced that she only wanted to 'talk* about appropriate things.' When Mary tried to press *further for Jennifer to discuss 'hitting' behaviors, Jennifer accused another provider of hitting her and again went into the defensive posture of covering her face. Mary then told Jennifer that she didn't deserve to live in a 'place like this'*

• *Within the past two weeks, Jennifer has been observed on several occasions huddled in the back seat of her care providers vehicles, head down and arms folded defensively. When staff tried to talk to her she covered her face with her arms. Yesterday, when staff again found her huddled in the back of the car and tried to talk with her, she covered her face and said that she couldn't 'talk to strangers - you're strangers.' This was immediately following Mary Hill being notified that Jennifer was being removed from her home at the request of the guardian.*

As noted above, Cindy Dutton, who had a much greater opportunity to observe, never saw Ms. Hill "yell at, threaten, brainwash, verbally **abuse**, deprive of food, isolate, restrict, ***24** inappropriately punish, use negative reinforcement, or otherwise conduct herself inappropriately as regards J.H." Exc. 324. Ms. Hill states, "This is ridiculous. I've ***never*** touched [J.H.]... This allegation was made by Linda Giani...based on her last visit of July 13, 2005 in the presence of Kristi Mingo (Ready Care coordinator) and myself. [J.H.] was most likely raising her fingers to her ears (a recently resurrected past behavior) indicative of the regressive nature of organic brain deterioration as noted by Dr. Sponsler ([J.H.]'s neurologist) and Dr. Halverson ([J.H.]'s psychiatrist). As per our behavioral methodology, attached to the current Plan of Care...I verbally told [J.H.] to 'stop' before she completed the act and redirected her... I didn't raise my voice and the 'reprimand' was purely a passionless, corrective intervention as prescribed by the current Plan of Care...If Linda [Giani] spent more time with us, she'd see that [J.H.] does this [look to Ms. Hill for approval before answering a question] a lot, and to other people (aides and family) as well. It's her way of maintaining the prolonged eye contact and extended situation she desires..." Exc. 256-257.

Further, "[I] think it's important to realize that the yearly Plan of Care (POC) has clearly indicated the methodologies for [J.H.] goals/objectives...Our behavioral protocols have been basically the same for [J.H.] for over 10 ***25** years. At no time, *ever*, has anyone ever asked to review, discuss, clarify or alter these interventions within the annual POC multi-disciplinary meetings, monthly supervisory visits from the independent care coordinator or agency supervisor, nor even via a phone call or casual 'drop-in.' Any of the above would have been an appropriate venue in which to voice any concerns or request clarifications." Exc. 261.

Cindy Dutton states that the state removed J.H. from Wild Rose Gardens without any input from either Ms. Hill or Ms. Dutton, "the people who know J.H. best, other than her parents." Exc. 324, ¶11.

In her deposition, Ms. Giani dodged questions by claiming, "I'm not a professional." Exc. 167. Then she began to fall'back on her "professional opinion." Exc. 175, 176, 178, 189. (Ms. Giani has no professional qualifications or credentials. Exc. 153-154.) Finally, she claimed she was merely carrying out the wishes of Larry Havins, Jennifer's guardian:

Q [by Mr. Pharr]: And you wanted to remove Jennifer while Mary was gone on vacation?

A: It was not my decision to remove Jennifer from the home. That was the decision of the guardian.

Exc. 183. But according to the APS Intake Summary, "Reporter, client's CC [Care Coordinator], called to report that she will be moving the client from 'Mary J. Hill's ALH' because she feels ***26** that the client is exhibiting marked behavior changes since her admittance to the home. Reporter states that the client behaves as a person suffering Verbal and Emotional **abuse** would behave." Exc. 230. The ROH concludes, "In as much [sic] as Jennifer's recent behaviors are indicative of **abuse**, immediate attention and assistance is being requested to remove [J.H.] from the Hill home to a new placement..." Exc. 217.

Ms. Giani's testimony was almost comically evasive:

Q: And my question was you wanted to remove her while Mary was on vacation, correct?

A: I didn't want to remove her at any time. It was the guardian's request not mine.

Q: What about what you wanted to do?

A: I don't have an opinion here. I did what the guardian asked me to do. It had nothing to do with what I wanted to do.

Q: Well, you obviously had an opinion, you submitted this Report of Harm, right?

A: I submitted the Report of Harm after discussions with other parties who provided information that went into this report.

Q: And you submitted it the very day that Mary Hill left on vacation, correct?

A: I don't know...

Q: That was just purely coincidental that it was on the same day Mary left on vacation, right?

A: Absolutely it was.

Exc. 56-57.

***27** Q: Okay. When a resident is removed from an assisted living home what procedures are required to be followed?

A: If the guardian chooses to remove there's no procedure. The guardian can remove someone from a home at any time with no notice.

Q: Okay. Well, what was the point of this Report of Harm then if you...

A: Because it was the right thing to do.

Q: Well, if she was being removed what was the - you know, why submit it?

A: Because I was doing my job and my job requires me to be a mandatory reporter if I suspect or see what could be harmful to a vulnerable adult. If I don't report I'm subject to being charged with a misdemeanor.

Exc. 184.

She testified that Mr. Havins initiated the transfer. Exc. 183. Counsel tried to elicit what procedures would be followed if the guardian or parent does not initiate the transfer, Ms. Giani refused to answer the question. Exc. 184-185. Despite her noble desire to report potential harm to vulnerable adults even though it is no longer necessary, Ms. Giani testified that she had been quietly "accumulating data" regarding Ms. Hill's **abuse** for years, and standing by while J.H. was **abused** in her presence - without reporting any of it, or even mentioning it, to anyone. R. 158.

***28** On August 16, 2005, Ms. Giani emailed Staci Collier, "This is a tough case for me as there is little that is really definitive... I have been tracking behaviors of both Mary and Jennifer for over a year, and in January [2005] tried to keep more detailed notes...Ready Care and myself met with Larry [Havins] to express our concerns. His response was that Mary started the process when she first notified Larry that she wanted him to find another placement - that was a red flag for him that [J.H.]'s level of care than Mary was able to provide." Exc. 279. Ms. Giani was unable to explain what she meant by "little that is really definitive." Exc. 187.

Ms. Giani testified that she did a transition before moving J.H. Exc. 62. But in her 8/31/05 email, Ms. Giani said, "Maybe we can transition on the first [September 1, 2005], if that is possible at this late date..." Exc. 280.

APS turned the ROH over to DHSS Licensing, which assigned Staci Collier to investigate. Exc. 289-290. Ms. Collier first interviewed the complainant, Ms. Giani. Exc. 291-292. Then she interviewed Ms. Hill, who told her she was not upset by J.H.'s removal, just the timing and method; there should have been a gradual "transition" to a new home. Exc. 293-295. Mr. Havins told Ms. Collier that there were never any restrictions on his visiting his daughter or vice-versa - only what was in J.H.'s best interests. He said Ms. Hill never **abused** his daughter, and ***29** that in fact he appreciated her services. Exc. 295-296.[3] Ms. Collier visited Wild Rose Gardens; visited J.H. at her new home; spoke to Dr. Halverson; and spoke to Dr. Sponsler who according to Ms. Collier's 10/26/05 notes, said, "No concerns about pts care (Exc. 300);" and interviewed several others. Exc. 296-297.

On September 14, 2005, Ms. Collier called Ms. Hill and told her that she wanted Ms. Hill to "show her cooperation with the investigation" by not taking new clients. Exc. 130. Ms. Hill did not believe she had any choice, so she agreed. Id. Ms. Collier told her to write, "Due to present circumstances, I will not receive any new clients" and fax it to Ms. Collier, so that's what Ms. Hill did. Exc. 133-134, 301. She did not know, she was not told, that she was committing herself to not taking any new clients indefinitely. Exc. 132. Ten days later, Dr. Halverson called to refer a new "seizure client" that would be "perfect for you," but the state refused to let Ms. Hill take the client. Exc. 130. Ms. Collier would give her no information. Exc. 130-131. Ms. Hill bombarded the state with phone calls, but no one returned her calls. Exc. 135-136, 302. On October 28, 2005, her attorney objected to the lack of due process. xc. 303.

Ms. Collier served a Notice of Violation on November 5, 2005. Exc. 305. She found "no evidence" that Ms. Hill ever ***30** **abused** J.H., and all the serious accusations unsubstantiated. Exc. 312-313. She found three accusations substantiated: that Ms. Hill had not given a different resident a full 30-day notice; that she had restricted J.H.'s family visits; and that she administered medications inappropriately. Exc. 311-312. Ms. Hill requested a hearing (Exc. 317-318). But on February 10, 2006, the state withdrew the Notice of Administrative Sanction, mooting the appeal. Exc. 319-321. Ms. Hill was now free to take clients, but the accusations and investigation "devastated" her reputation in the relevant community, and she got no new word-of-mouth referrals. Exc. 140-141.

Ms. Hill filed suit on August 7, 2007, against appellees Linda Giani, Staci Collier, and the state. Exc.1-4. She amended the complaint, on October 28, 2008 (Exc. 16, 28) and November 17, 2008 (Exc. 21, 29). The Second Amended Complaint included the following claims:

Count I: Negligent Supervision against DHSS.

Count II: Intentional Interference with Contract Rights against Staci Collier.

Count III: Intentional Interference with Contract Rights against Linda Giani.

Count IV: Intentional Interference with Prospective Economic Advantage against Staci Collier.

***31** Count V: Intentional Interference with Prospective Economic Advantage against Linda Giani.

Count VI: 42 U.S.C. §1983.

Count VII: Defamation against Linda Giani.

Count VIII: Intentional and Negligent Infliction of Emotional Distress against all defendants.

Exc. 21-27.

On February 26, 2009, DHSS and Ms. Collier moved for summary judgment. R. 100. On March 17, 2009, Ms. Giani moved for summary judgment. R. 32. Ms. Hill obtained Rule 56(f) continuances (R. 691), and on May 29, 2009, filed her Opposition to both motions. R. 405. Ms. Giani (R. 971) and Ms. Collier and the state (R. 936), filed reply briefs.

At oral argument, the state argued the points it had briefed, and added, "Finally, as a factual matter, there's simply no facts or evidence in support of any of plaintiff's claims, and that she's failed to show a material issue of fact exists on any of those claims... There's no evidence that the enforcement decisions were unwarranted or baseless, and simply no evidence of wrongdoing." Volume I, *Transcript of Proceedings*, July 20, 2009 (hereinafter "Tr."), p. 6.

Ms. Giani's counsel argued, "My greatest concern, Your Honor, is that the Court understand the facts...The case against Mrs. Giani turns on whether this Court finds that there is a ***32** factual issue as to the report of harm being made in good faith...I've tried to set forth the undisputed facts...The important thing is, I want to emphasize this was not an action -- the report of harm or the move that was taken by Linda Giani, it was taken by the guardian, and also involved in the decision were the other professionals from ReadyCare...She had no **financial** interest, ...no enmity or malice or improper attitude...We've shown corroboration [of that]...Nothing to suggest that Linda Giani made a statement that was false..." Tr. 7-12.

Ms. Hill's counsel responded that "She [Ms. Giani] can have multiple motivations...[T]he other attorneys have taken the approach of simply saying that there's no evidence, even though we presented 30 pages of evidence..." Tr. 18-19. Ms. Hill disputed Ms. Giani's contention that she "made no attempt to specifically identify factual statement of Giani as being knowingly false..." or that she never stated what actions on the part of Ms. Giani are evidence that the report of harm was not filed in good faith. Tr. 19-20. "The inferences have to be drawn in favor of the non-moving party...we're saying that this report of harm is false and fraudulent in every particular, and we've presented plenty of evidence with reasonable inferences showing that." Tr. 20-21. Further, the state made a purely legal ***33** argument in its motion for summary judgment, and only in its reply brier argued "no evidence." Tr. 29.

The state responded, "[T]here's simply no factual evidence -- there's no factual allegations and certainly no admissible evidence under Rule 56 to suggest the State in any way negligently supervised Ms. Collier." Tr. 36. Ms. Giani argued that the court's view of the evidence "is as much as a qualitative effort as it is a quantitative effort..." Tr. 36-37, "Is the plan of care[4] an assessment of Mary Hill? The answer to that is no" because the report is not "glowing." It states, "Jennifer's current placement is at risk."[5] Tr. 38. "There's no facts to show enmity, there's no facts to show **financial** gain, there's no facts to show that specific statements within the report of harm are in fact false, there's no facts, no evidence to show that she appreciated a false statement in there..." Tr. 39.

The court ruled from the bench:

• "Ms. Hill asserts that this Court cannot grant summary judgment unless Ms. Giani proves that her report was made in good faith. I disagree. I think that once the issue is framed in the following way that the burden shifts to Ms. Hill to provide some fact to support an inference of bad faith, and the way the issue was ***34** framed -- the way the issue needs to be framed is that Ms. Giani asserts in her motion that there is' no established factual basis to provide that -- to show that she had any kind of malicious motive, that there was anything suggesting a motive other than the care and protection of the disabled person in this case. The pla -- and then the burden shifts to Ms. Hill to establish some fact or facts that would suggest that the report of harm was not made in good faith." Tr. 40-41.

• "The plaintiff in this case has not presented any cogent fact that suggests an improper motive by Ms. Giani. She certainly is entitled to feel offended and wronged by the report of harm. She's entitled to believe her own -- to maintain her own belief system, which is probably largely accurate that she ran a fine facility, that she provided excellent care, but the statute isn't there

to protect her, it's there to protect the vulnerable individual, and the good faith requirement is a minimal requirement, and the immunity applies as long as that minimal requirement is met, and Ms. Giani met it." Tr. 42.

• "The argument that, well, there was this plan of care [6] that was generated in May and then in August there was a report of harm, how could that have happened in such a short period of time, is not persuasive. I don't see that as generating a genuine issue of material fact, because the purpose of the plan of care is very different from the report of harm, and that's clear from the way the plan of care is organized. It's on a preestablished form and the purpose is to address the ward's needs and what needs to happen, not to assess the care provider or the habilitation provider. So it wouldn't necessarily be the case that those issues would be raised in the plan of care." Tr. 42.

• "Furthermore, the report of harm indicated that many of the issues that cause Ms. Giani to have concern were of recent etiology, in the 90 days subsequent to the finalization of the plan of care. Even if that were not the case, and even if Ms. Giani had in her part in preparing the plan of care not addressed concerns that she had, but didn't report, that in and ***35** of itself would not be -- would not create any animus. To the contrary, it tends to show that Ms. Giani had a strong desire not to create conflict or cause concerns, but rather to problem-solve the issue as long as she could." Tr. 43.

• "There's nothing in any of the documentation that I've suggested that -- where anybody's suggesting it wasn't the guardian's decision." Tr. 43.

• "With respect to the State and Ms. Collier, ...The only assertion that has been made is that Ms. Collier encouraged Ms. Hill voluntarily to not take any additional clients on while the investigation was proceeding and Ms. Hill acquiesced, although she asserts that her acquiescence was not voluntary, that it was the result of coercion or duress, but it was within the authority of the agency to insist that she not take any new clients until the investigation had been completed. So the fact that she may have felt some duress in acquiescing legally is not material." Tr. 45.

• [T]hat period of months when Ms. Hill was not allowed to take in any new residents, that was a period of months' duration, and during that period that is an appropriate prophylactic measure to ensure the safety of these vulnerable individuals and is an appropriate balancing of that protective measure and authority that the agency has, as against the interest of persons situated such as Ms. Hill to make a living doing this work. That's an appropriate balance." Tr. 45.

• [T]he state's interest in protecting these individuals is sufficiently great that it justifies a relatively minor intrusion into the interest of Ms. Hill to earn a living, and I have not seen any authority that suggests to me that her right -- that her interest in maintaining a license to run an assisted living facility rises to constitutional levels, which gets us to the 1983 claim." Tr. 46.

• "And, again, I think this [1983] claim fails as a matter of law. Because there has not been a ***36** constitutionally protected interest identified. I don't think I need to go any further..." Tr. 46.

• "[M]s. Hill does not have standing to assert J.A.'s -- J.H.'s constitutionally protected rights." Tr. 46.

• Even if there were a constitutionally protected interest that I have failed to identify, I don't see where the plaintiff has shown that Ms. Collier violated that right by requiring that she not take on new residents for a relatively short period of time while the investigation was ongoing." Tr. 46-47, [7]

• "And, finally, I do not find that Ms. Hill was denied due process of law. The investigation was a transparent process. She was fully informed of the process, it's clear to me from the exhibits. She asserted her right to an administrative appeal. When the

department was prepared to dismiss that appeal because of changes in the regulations, she also agreed to dismiss the appeal and chose not to pursue that, which she could have done." Tr. 47.

• "The charges against the State legally are a bit more challenging...I do think the B.R. case muddies the waters a bit...I think the fairest reading of B.R. is that when you are talking about a direct supervisory responsibility going from the agency to Ms. Collier, who is the only individual identified as a state employee who engaged in inappropriate conduct, then I think the immunity does attach...I realize the negligent supervision theory can be a very broadly-applied theory..." Tr. 47-48.

The court granted summary judgment to all defendants on all counts. Tr. 48-49.

***37** Ms. Hill filed a Motion for Reconsideration: "On a summary judgment motion, the court is required to draw all reasonable inferences in favor of the *non-moving party:* plaintiff Mary Hill...Instead, the court drew all reasonable inferences in favor of the *moving party:* defendant Linda Giani...It is clear that on a summary judgment motion, the court is not supposed to make those kinds of evidentiary calls..." As to the State,

What is stated above applies to the court's ruling on summary judgment for the State on claims against it. Plaintiff will address only one other aspect of the court's ruling on reconsideration: that the constitutional violation plaintiff accuses the State of was de *minimus*, since plaintiff's license was restored in February, 2006. In effect, the court ruled that plaintiff has not shown enough proof of damages. But that was not the issue; the court acknowledged as much in the 7/20/09 hearing. Even if plaintiff ends up being awarded nominal damages of $1.00 for the violation of her constitutional rights, liability will be upheld. It would not, at least, be reversed because, damages were nominal...

Exc. 328-329 (italics in original). Ms. Giani (R. 924), Ms. Collier, and the State opposed (R.920), and the court denied the motion. Exc. 331.

VII. STANDARD OF REVIEW

"We review de novo a superior court's order granting summary judgment. We must consider the entire record in the light most favorable to the non-moving party. We will uphold summary judgment only if the record presents no genuine issues ***38** of material fact and the moving party is entitled to judgment as a matter of law." *Willard v. Khotol Services Corp*., 171 P.3d 108, 113 (Alaska 2007).

VIII. ARGUMENT.

A. The Trial Court Erred in Granting Summary Judgment to Ms. Giani.

(1) There is a genuine issue of material fact as to whether defendant Linda Giani's report of harm was in "good faith."

AS 47.24.120(a) provides: "A person who *in good faith* makes a report under AS 47.24.010, regardless of whether the person is required to do so, is immune from civil or criminal liability that might otherwise be incurred or imposed for making the report" (emphasis added).

The report must be "in good faith." It is not defined in the statute (see Definitions, AS 47.24.900), nor has Ms. Hill been able to locate any meaningful legislative history. [8]

Issues of good faith in this context are routinely submitted to a fact-finder when there are genuine issues of material fact. "The existence or non-existence of good faith as an issue in a case is usually determined by the jury from the evidence given to establish or disprove good faith. A jury ***39** question is presented where, in any view of the testimony, good faith is questionable." 75A Am.Jur.2d *Trial*, §645. "The jury heard evidence that the officers relied on District Attorney Ousley's

advice. Though not conclusive, reliance on an attorney's advice is some evidence of good faith." *Dixon v. Wallowa County*, 336 F.3d 1013, 1019 (9th Cir. 2003) (jury verdict in favor of claimant affirmed).

The trial court questioned Ms. Hill's counsel whether "good faith" means "the reporter... has to "have a reasonable belief that the reports are accurate." Tr.15. Ms. Hill agreed with that formulation, but not with the court's statement, "I think Ms. Giani's motivation is entirely the issue on bad faith, isn't it?" Tr. 17. Ms. Hill disagreed: "She can have multiple motivations." Tr. 18.

Ms. Giani did not make a good faith ROH on August 2, 2005. She dissembled, exaggerated, and lied outright. Some of the accusations do not even make sense, and some are internally contradictory. None held up to the state's scrutiny except for three points found substantiated, one of which had nothing to do with J.H. The state dismissed its Notice of Sanctions after Ms. Hill appealed those allegations.

The evidence and inferences show that Ms. Giani filed false accusations, for some purpose other than protection of a vulnerable adult. She probably did it for the same reason she ***40** threatened Ms. Hill with "getting ugly:" to bypass meaningful resistance or input from Ms. Hill. If J.H.'s welfare was her motivation, she would have made sure that J.H. got to her previously-arranged appointments at the Swedish Hospital in Seattle - which she promised Ms. Hill she would do. Ms. Giani would have undertaken a meaningful transition from one assisted living home to another, for a vulnerable adult about whom she had just written has "difficulties with transitions or changes - preferences for sameness." She would have sought input from Mary Hill and Cindy Dutton, the caregivers most knowledgeable about her many serious health conditions.

In oral argument Ms. Giani argued the facts, expressly arguing not only their *quantity* but their *quality*. Tr. 36-37. Ms. Giani argued that "undisputed evidence" was in her favor and "no evidence" against her. Tr. 7-15. The record does not support that argument, but arguing that there were contrary inferences would concede that there were factual issues. In ruling on the good faith issue, the court engaged in factual weighing. The oral argument record shows that, as Ms. Hill complained at the oral argument and in the Motion for Reconsideration, the court drew all inferences in Ms. Giani's favor. This is forbidden: "The trial court's finding resulted from the master's choice between the parties' competing accounts of the facts. On summary judgment, such a choice was inappropriate and must be reversed." ***41** *In re Estate of Evans*, 901 P.2d 1138, 1143 (Alaska 1995). These inferences include:

• The court found that 5/12/05 MRDD plan of care was legally meaningless, because "the purpose of the plan of care is very different from the report of harm," which is "clear from the way it was organized" and "was on a preestablished form." [9]

• The court dismissed the importance of all the facts and inferences Ms. Hill adduced that Ms. Giani's report of harm was not sincere, but a means to an end. Tr. 42.

• The court found as a fact that abruptly removing J.H. was "the guardian's decision," dismissing Ms. Hill's evidence that the guardian was a bystander in actions orchestrated by Ms. Giani. Tr. 43.

In addition, the court did not correctly formulate the legal standard on summary judgment. The court ruled, "Ms. Hill asserts that this Court cannot grant summary judgment unless Ms. Giani proves that her report was made in good faith. I disagree." Tr. 40. That was not Ms. Hill's argument. Her argument was that there were factual issues: "[A]t this stage we're just creating inferences..." Tr. 24. "The party seeking ***42** summary judgment 'has the entire burden of proving that his opponent's case has no merit' " *Hikita v. Nichira Gyogyo Kaisha*, 12 P.3d 1169, 1179 & n. 33 (Alaska 2000). "[T]he evidentiary threshold to preclude the entry of summary judgment is low." *Eqner v. Talbot's, Inc.*, 214 P.3d 272, 277 & n. 7 (Alaska 2009). Further, "a party opposing summary judgment need not prove that it will prevail at trial, but only that there is a triable issue of fact." *Beal v. McGuire*, 216 P.3d 1154, 1161 (Alaska 2009).

The trial court employed a subjective good faith standard, which Ms. Hill agreed with and does not attack on appeal. Tr. 15. In *Harlow v. Fitzgerald*, 457 U.S. 800 (1981), the U.S. Supreme Court formulated an objective "good faith immunity" test which was designed to be harder to meet:

> Qualified or "good faith" immunity is an affirmative defense that must be pleaded by a defendant official. Decisions of this Court have established that the "good faith" defense has both an "objective" and a "subjective" aspect. The objective element involves a presumptive knowledge of and respect for "basic, unquestioned constitutional rights." *Wood v. Strickland*, 420 U.S. 308, 322 (1975). The subjective component refers to "permissible intentions"...We...hold that government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Id. at 815-817.

***43** Nevertheless, qualified immunity is routinely submitted to juries when there is a genuine issue of material fact. In *Pierce v. Multnomah County*, 76 F.3d 1032 (9th Cir. 1996), the circuit court reversed the trial court's directed verdict and remanded for a jury trial on qualified immunity: "The burden is on the defendant to establish the reasonableness of his or her actions." Id. at 1038. Since "foundational facts remain in dispute," the claim must be decided by a jury. Id. at 1038-39.

> Just as the granting of summary judgment is inappropriate when a genuine issue exists as to any material fact, a decision on qualified immunity will be premature when there are unresolved disputes of historical fact relevant to the immunity analysis.

Curley v. Klem, 298 F.3d 271, 278 (3d Cir. 2002).

> When the record shows an unresolved dispute of historical fact relevant to this immunity analysis, a motion for summary judgment based on qualified immunity should be "properly denied."

Olsen v. Layton Hills Mall, 312 F.3d 1304, 1312 (10th Cir. 2002); *see also Zimmerman v. Schaeffer*, 654 F.Supp.2d 226, 252 (M.D. Pa. 2009) ("[A] genuine issue of material fact may preclude summary judgment on qualified immunity"); *Putnam v. Gerloff*, 639 F.2d 415 (8th Cir. 1981) ("Reasonable minds might differ as to the reasonableness of Gerloffs conduct under these circumstances and Gerloff's good faith").

***44** If AS 47.24.120(a) does not apply, Ms. Hill would be free to pursue her other claims- against Ms. Giani, namely, interference with contract and prospective economic advantage, and intentional infliction of emotional distress.

(2) *There are no other privileges applicable to Ms. Giani's actions.*

Ms. Giani briefly argued two other privileges: to defame, and "joint business interests." The cases cited, *Briggs v. Newton*, 984 P.2d 1113, 1120-22 (Alaska 1999) and *Lull v. Wick Construction Company*, 614 P.2d 321, 324 (Alaska 1980), involve "joint business interests." These privileges are not remotely applicable, and even if they apply, there are factual issues whether it was **abused**. *See MacDonald v. Riggs*, 166 P. 3d 12 (Alaska 2007) (conditional privilege **abused**).

B. The State of Alaska is not immune.

The State relies on AS 47.32.160(a), "The department, its employees, and its agents are not liable for civil damages as a result of an act or omission in the licensure process, the monitoring of a licensed entity, or any activities under this chapter." Plaintiff

has been unable to locate any meaningful legislative history for this section, which went into effect on July 2, 2005. See §55, ch 57, SLA 2005.

"Liability is the rule, immunity the exception." *Native Village of Eklutna v. ARR*, 87 P.3d 41, 49 (Alaska 2004). In ***45** *Gates v. City of Tenakee Springs*, 822 P.2d 455, 458-59 (Alaska 1991), the supreme court ruled that despite this seemingly-complete grant of municipal immunity, "AS 09.65.070(d)(2) would not immunize the city against a suit for damages caused by that negligence." Id. at 458-59.

C. There are genuine issues of material fact as to plaintiff's 42 U.S.C. §1983 claim.

42 U.S.C. 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

A 42 U.S.C. §1983 claim has two elements: (1) the conduct complained of was committed by a person acting under color of state law; and (2) that the conduct deprived plaintiff of a constitutional right. *Crawford v. Kemp*, 139 P.3d 1249, 1255 n. 10 (Alaska 2006); *State, DHSS, PCS v. Doherty*, 167 P.3d 64, 70 n. 18 (Alaska 2007).

Under color of state law. Ms. Collier, when she told Ms. Hill to stop taking new clients on September 14, 2005, was acting under color of state law. "[M]isuse of power, possessed ***46** by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of state law.' " *United States v. Classic*, 313 U.S. 299, 326 (1941).

Deprivation of a federal constitutional right. The deprivation of the right to make a living without due process is the deprivation of a constitutionally-protected right. See *Sitka v. Swanner*, 649 P.2d 940 (Alaska 1982) (police chief fired in violation of 1st amendment rights awarded damages under §1983); *Ferdinand v. Fairbanks*, 599 P.2d 122 (Alaska 1979) (successful §1983 action for deprivation of electrical service by municipal utility, without due process). Alaska inmates have vindicated constitutional rights under §1983 in *Fairbanks Correctional, Ctr. Inmates v. Williamson*, 600 P.2d 743 (Alaska 1979) and *Moseley v. Beirne*, 626 P.2d 580 (Alaska 1981).

There is at least a genuine issue of material fact whether plaintiff *voluntarily* gave up her right to due process before being deprived of her constitutionally-protected right to make a living. Plaintiff states that Ms. Collier forced her to agree not to take any new clients on September 14, 2005, the purpose, extent, and nature of which she misrepresented. Further, DHSS ***47** conditioned Ms. Hill's ability to make a living upon her acquiescence. [10]

The trial court characterized the evidence as follows: "Ms. Collier encouraged Ms. Hill voluntarily to not take any additional clients on while the investigation was proceeding and Ms. Hill acquiesced," and dismissed any evidence that Ms. Hill was forced. Tr. 45. Again, the court viewed the evidence in the light most favorable to Ms. Collier and the state. The record does not reflect that Ms. Hill was accorded due process. The accusations were investigated in secret, and her attorney protested specifically that she was being denied due process.

The court also found that "the right to make a living" is not protected by due process. This is not the law:
While this Court has not attempted to define with exactness the liberty . . . guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes

not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those ***48** privileges long recognized...as essential to the orderly pursuit of happiness by free men. "...In a Constitution for a free people, there can be no doubt that the meaning of "liberty" must be broad indeed.

Board of Regents v. Roth, 408 U.S. 564, 572 (1972).

Claims under §1983 are routinely submitted to a fact-finder when there are factual issues. In *Van Sandt v. Brown*, 944 P. 2d 449 (Alaska 1997), the plaintiff alleged under §1983 that he had been deprived of his Fourth Amendment right to be free from unreasonable searches and seizures by a trooper who entered his trailer without probable cause. Id. at 451. The supreme court reversed the trial court's grant of a directed verdict, ruling that there was a genuine issue of material fact whether the trooper could have reasonably believed he had probable cause to enter the residence. Id. at 453. In *Halcomb v. Washington Metro. Area Transit Auth.*, 526 F.Supp.2d 20 (D.D.C. 2007), the court ruled:

> Summary judgment must be denied on the Section 1983 claim because the parties' accounts of Officer Woods' and Ms. Halcomb's conduct differ in several material respects that make it impossible for the Court to determine, at this stage of the proceedings, whether Officer Woods violated Ms. Halcomb's constitutional rights or whether it was objectively reasonable for Officer Woods to believe that his conduct was lawful. But the question of *what actually transpired* between Officer Woods and Ms. Halcomb is unavoidably a question of fact -- and one that, at least here, prevents the Court from deciding the legal questions before trial.

***49** Id. at 22 (emphasis in original).

For these reasons plaintiff's §1983 claim should be remanded for a jury trial.

D. Ms. Hill's failure to supervise and train claim should not have been dismissed.

The failure to supervise and train count does not fall under the grant of immunity in AS 47.32.160(a). This count comes directly from *B.R. v. State, Department of Corrections*, 144 P.3d 431 (Alaska 2006). The supreme court reversed the trial court's grant of summary judgment on the basis of sovereign immunity, AS 09.50.250(3). Id. at 433. But a count for negligently breaching a duty separate from the employment relationship was remanded for trial: "If the department negligently failed to train or supervise these employees, then its negligence would have breached a supervisory duty that was separate from any duty stemming from its employment of Bullock, so the breach would not have depended on Bullock's status as a department employee." Id. at 435. The separate duty was to protect inmates, a duty that would exist no matter what the employment status of the alleged perpetrator. Id.

In the instant case, the state has a duty to protect the vulnerable persons, at least the ones whom it undertook to protect. *See* ***50** *R.E. v. State*, 878 P.2d 1341, 1345-48 (Alaska 1994)(duty to properly license daycare); *Estate of Logusak ex. rel. Logusak. v. City of Toqiak*, 185 P.2d 103 (Alaska 2008) (releasing detained minor to parents); *Angnabooguk v. State, DNR*, 26 P. 3d 447, 453 n. 24 (Alaska 2001) (state assumes duty if it undertakes to provide firefighting service). The state initially argued that there was no claim upon which relief could be granted (R. 77), but in its reply (R. 971) and in oral argument (Tr. 36) argued "no evidence." The trial court should have considered arguments in the reply brief waived. *Rush v. State, DNR*, 98 P.3d 551, 553 (Alaska 2004). The trial court ruled that the B.R. count must be dismissed, but that was not appropriate just on the pleadings.

The state argued briefly that Ms. Hill has no standing to vindicate wrongs done to J.H. Alaska law only requires an "identifiable trifle." *In re: Alaback & Hall*, 997 P.2d 1181, 1184-85 (Alaska 2000); *Simmons v. Insurance Company of North America*, 17 P. 3d 56, 60 (Alaska 2001) ("party need only demonstrate a sufficient 'personal stake' ").

IX. CONCLUSION

Ms. Hill requests that the all defendants and counts be remanded for a jury trial.

Footnotes

1 This program is described in *Hidden Heights Assisted Living Home v. State, DHSS*, 222 P.3d 258, 262 (Alaska 2009).

2 There were also supportive letters from Dr. Rudolph (Exc. 220), Dr. Halverson (Exc. 221), ANP Charlotte Nelson (Exc. 222), and many others familiar with Ms. Hill's care of her clients. Exc. 218-229.

3 In fact, Ms. Collier's notes of her conversation with Mr. Havins state, "Mary took her when no-one else would." Exc. 149.

4 Counsel was referring to Ms. Giani's 5/12/05 MRDD. Tr. 24.

5 This argument is not fair, in that the MRDD stated that unless certain measures were taken by Medicaid, J.H.'s placement with Ms. Hill, which it described in uniformly positive terms, would be at risk. The point was that J.H. should stay with Ms. Hill.

6 The court is referring to the 5/12/05 MRDD.

7 During the argument, the court questioned, "But how does Ms. Hill have damages because of the way it [the removal] was done?" (Tr. 27) and how Ms. Hill was damaged because the state told her she could not take any new residents. Tr. 27-29. Ms. Hill responded that Ms. Giani, the State and Ms. Collier caused her to lose business. Tr. 28-29.

8 AS 47.24.120(a), §3 ch 42, SLA 1988, was part of CSHB344 (HESS), effective 8/21/88. It was amended in 1994 as part of SB248 solely to change the statutory reference from AS 47.24.110 to AS 47.24.010. §6 ch 129, SLA 1994.

9 Actually, the Report of Harm was on a pre-printed DHSS form (Exc. 215-217).

10 A statement to police is involuntary *per se* if self-incrimination is conditioned against loss of another constitutionally-protected interest. *Webb v. State*, 756 P. 2d 293, 297 (Alaska 1988)(withholding driver's license); *Jones v. State*, 65 P.3d 903, 906-10 (Alaska App. 2003)(statement promised to be "off the record").

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