

IN THE SUPREME COURT OF MISSOURI

EN BANC

Case No. SC88138

ALICE LOUISE KLEIN,
Respondent

v.

MISSOURI DEPARTMENT OF HEALTH AND SENIOR SERVICES,
Appellant

Appeal from the Cooper County Circuit Court
on Petition for Judicial Review
The Honorable Robert Koffman, Judge

On Transfer - After Opinion - Rule 83.04

RESPONDENT'S SUBSTITUTE OPENING BRIEF
Per Supreme Court Rule 84.05(e)

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TABLE OF CONTENTS

JURISDICTIONAL STATEMENT 7

STATEMENT OF FACTS 9

Nature of the Case 9

 *DHSS’s charges against Alice and DHSS’s Decision.* 10

 *Summary of the Evidence* 12

STANDARD OF REVIEW – IN GENERAL 16

POINTS RELIED ON..... 18

 I. [Definitions/application of terms

 “physical injury and/or harm” and “recklessly.”] 18

 II. [DHSS’ decision – not supported by competent and substantial

 evidenc

ARGUMENT 22

 I. [DHSS

 *Introduction* 22

 *Standards*

 *Argument*

 *Abuse*

 *Evidence*

Table of Contents – Continued

Argument - Point I - Cont'd

.....	<i>Evidence – Emotional Abuse</i>	30
.....	<i>Federal Interpretive Guidelines</i>	33
.....	<i>Evidence Adduced – Culpable Mental State</i>	39
.....	<i>Summary</i>	
II.	[DHSS’ decision – not supported by competent and substantial	
.....evidence – whole record]	43
.....	<i>Introduction and Standard of Review</i>	43
.....	<i>No Evidence of Physical Injury and/or Harm</i>	44
.....	<i>Failure to Prove Emotional Injury and/or Harm</i>	45
.....	<i>Failure to Prove Reckless Conduct</i>	47
CONCLUSION		50
CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 84.06		51
CERTIFICATE OF SERVICE		52

TABLE OF AUTHORITIES

Cases:

<i>Abrams v. Ohio Pacific Exp.</i> , 819 S.W.2d 338 (Mo.banc 1991)	26
<i>Alumax Foils, Inc. v. City of St. Louis</i> , 959 S.W.2d 836 (Mo.App. E.D. 1997)	26
<i>Asbury v. Lombardi</i> , 846 S.W.2d 196, 201 (Mo. banc 1993)	27
<i>BHA Group Holding, Inc. v. Pendergast</i> , 173 S.W.3d 373 (Mo. App. W.D. 2005)	27
<i>Collins v. Dept. of Social Services</i> , 141 S.W.3d 501 (Mo.App. S.D. 2004)	16
786 S.W.2d 217 (Mo.App. W.D. 1990)	
<i>Duncan v. Mo. Bd. For Architects, Professional Engineers and Land Surveyors</i> , 744 S.W.2d 524 (Mo. App. E.D. 1988).....	39
<i>Hampton v. Big Boy Steel Erection</i> , 121 S.W.3d 220 (Mo. banc 2003)	17
<i>Holmes v. Holmes</i> , 878 S.W.2d 906 (Mo. App. E.D. 1994)	30
<i>HTH Companies, Inc. v. Mo. Dept. Of Labor and Industrial Relations</i> , 154 S.W.3d 358 (Mo.App. E.D. 2004).....	6,25
<i>In re Marriage of Heirigs</i> , 34 S.W.3d 835 (Mo. App. S.D. 2000).....	33
<i>In re Marriage of Richards</i> , 188 S.W.3d 478 (Mo. App. S.D. 2006).....	32
<i>Jake C. Byers, Inc. v. J.B.C. Investments</i> , 834 S.W.2d 806 (Mo.App. E.D. 1992)	39
<i>Johnson v. Missouri Dept. of Health and Senior Services</i> ,	

Table of Authorities - Continued

174 S.W.3d 568 (Mo.App. W.D. 2005) **36,37,39**

Lagud v. Kansas City Bd. of Police Com'rs, 136 S.W.3d 786
 (Mo. banc 2004) 17,41,43.

Lewis v. Department of Social Services, 61 S.W.3d 248 (Mo. App. W.D. 2001) 16

Marmon v. City of Columbia, 129 S.W.3d 921 (Mo. App. W.D. 2004)..... 17

Miller v. Dunn, 184 S.W.3d 122 (Mo. App. E.D. 2006) 25

Missouri Coalition for the Environment v. Herrmann, 142 S.W.3d 700
 (Mo. banc 2004) 16

Overstreet v. Kixmiller, 120 S.W.3d 257 (Mo. App. E.D. 2003) 24

Psychcare Mgmt., Inc. v. Dept. of Social Services, Division of Medical Services, 980
 S.W.2d 311 (Mo. banc 1998) 26

Remspecher v. Jacobi, 941 S.W.2d 701 (Mo.App. E.D. 1997)..... 30

Rombach v. Rombach, 867 S.W.2d 500 (Mo. banc 1993)..... 30

Sermchief v. Gonzales, 660 S.W.2d 683 (Mo. banc 1983) 26

State v. Belton, 153 S.W.3d 307 (Mo. banc 2005) 37

State v. Brown, 140 S.W.3d 51 (Mo. banc 2004) 16

State v. Craig, 33 S.W.3d 597 (Mo. App. E.D. 2000) 37

State ex rel. AG Processing, Inc. v. Pub. Serv. Common, 120 S.W.3d 732
 (Mo. banc 2003) 16

State ex rel. Coffman v. Public Service Commission, 154 S.W.3d 316
(Mo.App. W.D. 2004) 16,17

State ex rel. Nixon v. QuikTrip Corp., 133 S.W.3d 33 (Mo. banc 2004)..... **26**

State ex rel. Sprint Spectrum L.P. v. Mo. Pub. Serv. Common, 112 S.W.3d 20
(Mo. App. W.D. 2003) 16

Table of Authorities - Continued

State ex rel. Womack v. Rolf, 173 S.W.3d 634 (Mo. banc 2005) 27

State Tax Commission v. Administrative Hearing Commission,
641 S.W.2d 69 (Mo. banc 1982)

Stiffelman v. Abrams, 655 S.W.2d 522 (Mo. banc 1983) 24

Tate v. Dept. of Social Services, 18 S.W.3d 3 (Mo. App. E.D. 2000)..... 34

Tonnar v. Missouri State Highway and Transportation Commission,
640 S.W.2d 527 (Mo.App. W.D. 1982) 34

Wallace v. Grasso, 119 S.W.3d 567 (Mo. App. E.D. 2003)..... 26

Wolff Shoe Co. v. Dir. of Revenue, 762 S.W.2d 29 (Mo. banc 1988) 26

Missouri Constitution

Article V, §18 16

Statutes:

§198.006 RSMo. 2000 10, 25, 26, 27,32, 44

§198.070 RSMo. 2000 33,41

§198.070 RSMo. 2006..... 24,43

§210.110 RSMo 2006..... 29

§210.115, RSMo 2004..... 30

§452.423, RSMo 2004..... 35

§536.021 RSMo. 2004 16,24

Table of Authorities - Continued

§536.140 RSMo. 2000 16,, 24
§562.016 RSMo. 2000 10,24,36,46
§660.315 RSMo. 2004 23

Federal Regulations:

42 C.F.R. §483.13 33,34
42 C.F.R. §483.156 23
42 C.F.R. §488.301 25
42 C.F.R. §488.335 35

Other Authority:

Black’s Law Dictionary, (5th Ed.)..... 11
Black’s Law Dictionary (8th Ed.) 27,46
CMS State Operations Manual Appendix 7A 34

JURISDICTIONAL STATEMENT

This is an appeal by the Missouri Department of Health and Senior Services (DHSS) from an adverse judgment rendered October 18, 2005 by the Circuit Court of Cooper County in a proceeding for judicial review pursuant to §660.315.7 RSMo and §§536.100 through-536.140 RSMo (L.F. 475-479; RS Append. A17). The circuit court's judgment reversed the Department's decision dated April 19, 2004 to place Alice Klein's (Respondent) name on: 1) the State Employment Disqualification List ("EDL") pursuant to §198.070 and §660.315. RSMo for a period of one (1) year (L.F. 104-105; RS Append. A45); and 2) the Federal "Nurse Aide Registry" ("NAR") pursuant to 42 C.F.R. §483.156, 42 C.F.R. §488.301, and 42 C.F.R. §488.335 for life for allegedly physically "abusing" a resident of the Lakeview Health & Rehabilitation Center - one A.V. (L.F. 106-107; RS Append. A47).

The Department appealed the Circuit Court's judgment to the Missouri Court of Appeals, Western District. DHSS filed its Notice of Appeal on November 17, 2005. (L.F. 492). The Western District issued its Opinion on September 26, 2006; and likewise reversed. (RS Append. A48-A59). The Department filed on October 6, 2006 its Motion for Rehearing and Alternative for Transfer which were denied on October 31, 2006.

The Department subsequently filed directly with this Court, pursuant to Supreme Court Rule 83.04, an Application to Transfer on November 15, 2006. This Court sustained DHSS's Application on December 19, 2006.

This Court now has jurisdiction pursuant to Article V, §10 of the Missouri Constitution the same as if on an original appeal.

Because Alice is contesting the Department's April 19, 2004, decision, she is required to file, pursuant to Supreme Court Rule 84.05(e), the substitute opening brief as if she were the appellant even though she is the respondent.

STATEMENT OF FACTS

A. *Nature of the Case* . The case arises out of the decision dated April 19, 2004, following a “contested case” hearing, issued by the Department of Health and Senior Services (DHSS) to list Alice Klein’s name on both the state “Employee Disqualification List” (EDL) and the federal “Nurse Aide Registry” (NAR) for having “abused” A.V. – a resident of the Lakeview Health & Rehabilitation Center.¹ (L.F. 280-294; RS Append A1-A16).

The EDL is a central registry maintained by the Department pursuant to §198.070 and §660.315 RSMo of persons who have been found to have “abused” or “neglected” a nursing home’s patient(s) (RS Append.A32); 42 C.F.R. §483.156 (RS Append. A41). Missouri law prohibits persons or corporations licensed by the State or subject to the Department’s authority from knowingly employing any person whose name is on the state EDL. §660.315.12 RSMo (RS Append. A39). A person’s name is generally listed on the EDL for a period of one year. §660.315 RSMo. (RS Append. A39).

The NAR is a central registry similar to the EDL; is required by federal law; is administered in Missouri by DHSS; applies to long-term care facilities that receive medicare and/or medicaid payments; and prohibits such facilities from employing any

¹Respondent refers to the patient by her initials so as to respect her rights of privacy.

person who has been found to have committed acts of “abuse, neglect or misappropriation of property”. 42 C.F.R. §483.156. (RS Append. A41). But, unlike the EDL, under federal law, a person whose name is on the NAR is permanently barred and is forever prohibited from working or being employed by any long-term care facility which receives Medicare/Medicaid payments. 42 C.F.R. §483.13(c)(1)(ii)(B). (RS Append. A40-A-42).

DHSS’s charges against Alice and DHSS’s Decision. DHSS in its charging letters accused Alice:

The complaint alleged that on or about May 27, 2003, while employed in a long term care facility, you transported three residents from a facility to a hospital in Columbia, Missouri. While assisting a confused, eighty five [sic] year old female resident in a wheelchair get back in the van at the hospital, you yelled at her and hit her on the head. (L.F. 104-105, Ex. 1(a); L.F. 106-107, Ex. 1(b)).

This was the Department’s sole accusation. DHSS never alleged nor charged Alice with neglect or emotional abuse. After summarizing the evidence and other evidence DHSS found:

[Alice] was reckless in her treatment of A.V. and her recklessness resulted in the infliction of physical injury to resident. (L.F. 288; RS Append. A49).

DHSS then quoted and set forth verbatim §198.006(1) RSMo. which defines the terms “physical and/or emotional harm and/or injury” and §562.016 RSMo. which in turn defines the requisite *mens rea*, or “culpable mental state” which the Department must establish.

DHSS went on to find:

.... The testimony of the McDonalds provides inextricable evidence of an abusive act perpetrated by Applicant against [A.V.]. **Black’s Law Dictionary** defines “injury wrong or damage done to another, either in his person, rights, reputation or property”. **Black’s Law Dictionary**, 706 (5th ed. 1979). Black’s in turn defines “wrong”, as “[a] violation of the legal rights of another.” A demonstrative example given within Black’s definition references an individual’s “right to live in personal security” and the “... wrong on the part of him who commits personal violence” against that individual. ***Id.*** Applicant’s physical actions against, and scolding of, [A.V.], as witnessed by the McDonalds, were clearly wrongs perpetrated against the rights and person of [A.V.]. The eyewitnesses’ observation that A.V. was up set [sic] by Applicant’s actions is further, demonstrative, evidence of abuse. (L.F. 293; RS Append. A14-15)

and to further find:

Applicant [Alice Klein] was reckless in her abuse of [A.V.], in her conscious disregard of the substantial and unjustifiable risk that injury and/or harm would result from her actions. Applicant's [Alice Klein] actions against [A.V.] constituted a gross deviation from the standard of care (L.F. 293; RS Append. A14-A15).

But, in contrast to the manner by which the Department defined and set forth the legal standard by which it, DHSS, would evaluate and determine whether there had been the requisite "physical" injury and/ or ""physical harm" DHSS did not, correspondently, do so with respect the term "emotional abuse." Similarly DHSS, also in contrast to the manner by which it addressed the term "physical abuse" never identified nor discussed the facts upon which it was relying or to show how and in what way Alice had within the meaning of §562.016 RSMo acted "recklessly, purposely, or knowingly" or, how and in what way Alice's conduct constituted a "gross deviation" from the applicable standard of care.

Summary of the Evidence. Respondent, Alice Klein, is a certified nurse's aide and certified medication technician (L.F. 222; Tr. 217). On May 27, 2003, Alice was employed as the activity director at Lakeview Health and Rehabilitation Center, a nursing home facility in Booneville, Missouri (L.F. 222; Tr. 218). On that day, she drove one of Lakeview's vans to take three patients to various doctors' appointments at University Hospital in Columbia, Missouri (L.F. 212, 223; Tr. 180, 221, 224). The van carried three

passengers – including A.V.; Wendell Hanson; and another resident, Mary Collins – to various doctor’s appointments at the hospital (L.F. 223, 224; Tr. 223-226).

A.V. resisted being loaded into the van at the nursing home, including waving her arms at Alice and trying to reach back at her (L.F. 172, 223; Tr. 18-19, 222). A.V. had a history of physical violence against the nursing home staff, and had to be physically subdued to get her into the van (L.F. 38-39, 172; Tr. 18-19).

Alice parked the van in the University Hospital parking garage at about 3:15 (L.F. 222; Tr. 225). A.V. went to her doctor’s appointment, during which Alice was required to help hold A.V. down for treatment (L.F. 224; Tr. 225-226).

After the appointment, Alice got A.V. into her wheelchair and took her out to the van (L.F. 224; Tr. 226-228). As Alice attempted to work the wheelchair lift at the passenger side door of the van – a job that requires two hands – A.V. turned her wheelchair away from Alice and rolled away to the end of the van under her own power (L.F. 224-225; Tr. 228-229). Alice told A.V. she had to come back and then retrieved her to the side door of the van (L.F. 225; Tr. 229).

Alice set the wheel locks on A.V.’s wheelchair and resumed working the lift (L.F. 225; Tr. 229). A.V. released the wheel locks and again rolled to the back of the van (L.F. 225; Tr. 229). Alice said loudly, “[A.V.], you’re going to get hit” (L.F. 225; Tr. 229-230). She attempted to retrieve A.V. again, but A.V. resisted (L.F. 225; Tr. 230). A.V. put her feet flat on the concrete floor and began swing her arms above her head (L.F. 225;

Tr. 230). Alice was standing behind A.V.'s wheelchair at the end of the van, and tried to turn the chair around to be in front of A.V. (L.F. 225; Tr. 231).

Alice attempted to control and protect A.V. from harm by holding onto the wheelchair with one hand and using the other hand to hold A.V.'s swinging arms down (L.F. 225; Tr. 231). Alice finally calmed A.V. by telling her that they were going home to eat supper (L.F. 225; Tr. 231-232). Alice was then able to load A.V. into the van, pick up the other residents and return to the nursing home (L.F. 225-226; Tr. 232-233).

Alice testified that she did not hurt A.V. or intend to hurt A.V. (L.F. 226; Tr. 233-234). A.V. never said anything to Alice to indicate Alice was hurting her (L.F. 226; Tr. 233-234). A.V. had no marks or bruising after the incident (L.F. 226; Tr. 234). A.V. did not shy away from or refuse to be with Alice (L.F. 226; Tr. 234).

Over objection, the Department admitted testimony regarding the initiation of its investigation (L.F. 182; Tr. 57). On May 28, 2003, the Department received a hotline call regarding an incident in the hospital garage the day before (L.F. 182; Tr. 57). The caller reported seeing a woman yell at and hit an elderly lady in a wheelchair while trying to load her in an unmarked white van (L.F. 182; Tr. 57). The caller heard the woman call the elderly woman by her name and noted the license plate number on the van (L.F. 1, 182; Tr. 57). At the hearing, the Department presented two eyewitnesses to the events in the hospital garage. The first, Kerry McDonald, said she saw Alice hit A.V. on the crown of her head after Alice retrieved A.V. from the traffic lane behind the van (L.F.

198; Tr. 122-123). McDonald testified Alice said, “I can’t stand you” at least twice (L.F. 198; Tr. 122); she could not hear what A.V. was saying (L.F. 204; Tr. 146). Kerry McDonald testified that A.V. had her hands down during the incident; she couldn’t see them (L.F. 201-202; Tr. 136-137). Kerry McDonald did not see A.V.’s head move when she was “hit” (L.F. 204; Tr. 145-146). Nor did she see A.V. evidence any sign of pain. (L.F. 204; Tr. 146).

The second eyewitness, Marcus McDonald, saw A.V. with her arms up and swinging (L.F. 207-208, 210; Tr. 160-161, 169). He did not hear any yelling (L.F. 206; Tr. 154). Marcus McDonald testified he saw Alice hit the front of A.V.’s head four or five times with an open hand (L.F. 207-209; Tr. 160, 162-163, 167-168). It was not a fist (L.F. 209-210; Tr. 168-169).

No witness testified they saw any symptoms of pain, bruising, marks, or physical damage to A.V.; A.V.’s head did not even move during the alleged hitting (L.F. 204; Tr. 145-146). No medical record indicates A.V. incurred any injuries consistent with the alleged hitting.

Two days after the alleged hitting, the Department’s investigator, Laura Smith, saw no bruises or blood (L.F. 185; Tr. 70-71). Smith physically assessed A.V. and saw no evidence that A.V. had been physically injured (L.F. 196; Tr. 115). She saw no evidence of sexual abuse. (L.F. 196; Tr. 115). Smith then testified:

Q. Did you see any evidence that she'd [A.V.] had been emotionally injured?

A. I don't know how you would determine that. (L.F. 196; Tr. 115).

STANDARD OF REVIEW – IN GENERAL

This appeal arises from “contested case” proceedings for judicial review instituted by Respondent, Alice Klein, with respect to the Department’s decision dated April 19, 2004 to place Alice’s name on the state EDL list and on the federal NAR list. See, **Article V, §18 of the Missouri Constitution and §536.100 through §536.140 RSMo.**

As such, this Court is to review the decision of the administrative agency - not the decision of the circuit Court. ***HTH Companies, Inc. v. Mo. Dept. of Labor and Industrial Relations***, 154 S.W.3d 358, 361 (Mo. App. E.D. 2004); and ***Lewis v. Department of Social Services***, 61 S.W.3d 248, 252 (Mo. App. W.D. 2001). Review by this Court is governed by the well-known and oft-cited provisions of §536.140.2 RSMo.

The lawfulness of an agency order is determined by whether statutory authority for the order exists. ***State ex rel. AG Processing, Inc. v. Pub. Serv. Common***, 120 S.W.3d 732, 734 (Mo. banc 2003). Where the agency decision involves the interpretation of the law and the application of the law, review is *de novo* and the appellate court must form its own independent conclusions – the court is not bound by the interpretation of the agency. ***Collins v. Dept. of Social Services***, 141 S.W.3d 501, 504 (Mo. App. S.D. 2004); ***Missouri Coalition for the Environment v. Herrmann***, 142 S.W.3d 700, 701 (Mo. banc 2004). The court has a duty to correct erroneous interpretations of law. ***HTH Companies, supra***, at 361.

If an agency order is lawful, the Court must then determine if it is reasonable.

State ex rel. Coffman v. Public Service Commission, 154 S.W.3d 316, 320 (Mo.App. W.D. 2004); *State ex rel. Sprint Spectrum L.P. v. Mo. Pub. Serv. Common*, 112 S.W.3d 20, 24 (Mo.App. W.D. 2003). Reasonableness depends on whether the order is supported by competent and substantial evidence on the whole record; whether the decision was arbitrary, capricious, or unreasonable; or whether the agency abused its discretion. *Id.*

The decision of the agency on factual issues is presumed to be correct until the contrary is shown and the court is obliged to sustain the Commission's order if it is supported by substantial evidence on the record as a whole. *Coffman, supra* at 320; *Lagud v. Kansas City Bd. of Police Com'rs*, 136 S.W.3d 786, 791 (Mo. banc 2004). The Court must look to the whole record in reviewing the Board's decision, not merely the evidence that supports its decision. *Lagud* at 791; *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 222 (Mo. banc 2003).

Once a reviewing court has determined that competent and substantial evidence supports the agency's decision, it may, nevertheless, "set aside decisions clearly contrary to the overwhelming weight of the evidence." *Marmon v. City of Columbia*, 129 S.W.3d 921, 924 (Mo. App. W.D. 2004).

POINTS RELIED ON

I.

[Legal Standard – Definition of Abuse - Standard of Care]

The Department of Health and Senior Services erred in finding that Respondent should be listed on the “EDL” and the “NAR” because the Department erroneously declared and applied the law with respect to what constitutes “abuse” under §198.006(1); what constitutes and what must be established under §562.016 RSMo vis-a-vis the applicable “standard of care;” what is required in order to show that a person acted “knowingly”, “purposely”, “recklessly,” in “conscious disregard;” and/or to show there has been a “gross deviation” from the applicable standard of care in that: (1) a “legal wrong” is not the same as “physical injury and/or emotional injury and/or harm;” (2) there must be actual infliction of “physical injury or harm;” (3) there must be affirmative evidence with respect to what constitutes the applicable standard of care and affirmative evidence – as opposed to merely assuming, by quantum leap, and without any analysis – to show that a person has, *ipso facto*, acted “knowingly, “purposely”, and/or “recklessly.”

Cases:

Alumax Foils, Inc. v. City of St. Louis, 959 S.W.2d 836 (Mo.App. E.D. 1997)

Johnson v. Missouri Dept. of Health and Senior Services, 174 S.W.3d 568 (Mo.App. W.D. 2005)

Rombach v. Rombach, 867 S.W.2d 500 (Mo. banc 1993)

Stiffelman v. Abrams, 655 S.W.2d 522 (Mo. banc 1983)

Statutes:

§198.006 RSMo. 2000

§198.070 RSMo. 2000

§198.070 RSMo. 2006

§210.110 RSMo. 2006

§562.016 RSMo. 2000

Court Rules and Other Authority:

Black's Law Dictionary (8th Ed.)

II.

[Lack of Competent and Substantial Evidence – Upon the Whole Record]

The Department of Health and Senior Services erred in finding that Alice should be listed on the “EDL” and the “NAR” because it failed to establish by competent and substantial evidence on the whole record that her conduct inflicted actual “physical injury and/or harm;” because the Department never charged Alice with emotionally abusing A.V. having committed emotional injury, and/or sexual injury”; that Respondent had acted “purposefully, knowingly, and/or recklessly;” and that Respondent had failed to establish that Respondent acts constituted a “gross deviation” from the applicable standard in that, *even assuming arguendo*, the Department employed and utilized the correct legal standard when evaluating Respondent’s acts in that the Department failed to meet its burden by competent and substantial evidence on the whole record.

Cases:

Hampton v. Big Boy Steel Erection, 121 S.W.3d 220 (Mo. banc 2003)

Lagud v. Kansas City Bd. of Police Com'rs, 136 S.W.3d 786
(Mo. banc 2004)

Statutes:

§198.006, RSMo 2004

§198.070, RSMo 2000

§562.016, RSMo 2000

Court Rules and Other Authority:

Black's Law Dictionary (8th Ed.)

ARGUMENT

I.

[Legal Standard – Definition of Abuse - Standard of Care]

The Department of Health and Senior Services erred in finding that Respondent should be listed on the “EDL” and the “NAR” because the Department erroneously declared and applied the law with respect to what constitutes “abuse” under §198.006(1); what constitutes and what must be established under §562.016 RSMo vis-a-vis the applicable “standard of care;” what is required in order to show that a person acted “knowingly”, “purposely”, “recklessly,” in “conscious disregard;” and/or to show there has been a “gross deviation” from the applicable standard of care in that: (1) a “legal wrong” is not the same as “physical injury and/or emotional injury and/or harm;” (2) there must be actual infliction of “physical injury or harm;” (3) there must be affirmative evidence with respect to what constitutes the applicable standard of care and affirmative evidence – as opposed to merely assuming, by quantum leap, and without any analysis – to show that a person has, *ipso facto*, acted “knowingly, “purposely”, and/or “recklessly.”

Introduction. The Department in its April 19, 2004 decision found that Alice “abused” – one A.V. - a nursing home resident at the Lakeview Health and Rehabilitation Center. (L.F. 280-294; RS Append. A1 – A16) As a result, the Department asserts that it not only had the duty, but the right to place Alice’s name on the EDL and on the NAR

pursuant to §198.070², §660.315 RSMo., and, 42 C.F.R. §483.156.

But, in order to do so, the Department had two separate and distinct burdens it first had to satisfy. First, the Department had to establish and prove, by a preponderance of the evidence, that Alice had committed one or more of the three types of abuse listed in §198.006(1) RSMo. – either physical, emotional, and/or sexual.³ See, 42 C.F.R. §483.13(c)(1). To prove physical “abuse” as was charged by the Department, DHSS was required to prove that Alice’s acts and conduct actually inflicted actual physical harm and/or injury – such as bruising, cuts, bleeding, etc. upon A.V. Second, the Department had to establish and prove, also by a preponderance of the evidence, that Alice had, in so acting, exhibited the requisite *mens rea* as required by §562.016 RSMo.

With respect to the *mens rea* requirement, the Department was required to prove and establish, even if Alice had engaged in acts of abuse, that she acted “knowingly, purposefully, and/or recklessly,” had done so in “conscious disregard” of the fact that her acts might substantially harm A.V.; and further that Alice in so doing had “grossly deviated” from the “standard of care” which a reasonable person would exercise in the situation. (RS Append. A29-A30, A37-A38, and A35).

The Department, however, took the position that it did not have to prove either physical or emotional abuse. Instead, the Department took the position that there was

²Section 198.070 was amended in 2003 becoming effective on August 28, 2003. Subsection 12 was moved to subsection 13.

³There is no allegation or claim of neglect in this case.

abuse, whether denominated as physical and/or emotional injury so long as a “legal wrong” had been committed. (292-293; RS Append. A14-15). The Department also claimed that there could be physical abuse even if the alleged abuser’s actions did not result in some type of injury - such as bruising, marks, cutting, bleeding, etc.

Respondent submits that in so doing the Department erroneously declared and applied the law. As a result, the Department’s decision is contrary to law; and, must now be reversed. See, §536.140.2(3) and (4) RSMo.

Standard of Review. The Department, not the Respondent, Alice Klein, has the burden of proof and the burden of persuasion. *Tate v. Dept. of Social Services*, 18 S.W.3d 3, 8 (Mo. App. E.D. 2000). Hence, it is the Department’s burden to prove and persuade the hearing officer that Klein abused A.V.⁴ Whether the Department correctly interpreted and applied Sections 198.006 and 562.016 remains a question of law, which this Court is to independently determine. *Psychcare Mgmt., Inc. v. Dept. of Social Services, Division of Medical Services*, 980 S.W.2d 311, 312 (Mo. banc 1998). Review is *de novo*; and this Court has a duty to correct erroneous interpretations of law. *Miller v.*

⁴The Department in its Decision states in this regard: “The Department has the burden of proof in establishing that the Applicant recklessly, knowingly or purposely abused a resident of a licensed facility, while employed at that facility. The Department carries the burden of proof, in affirmatively establishing its case. (L.F. 290-291; RS Append. A11-A12).

Dunn, 184 S.W.3d 122, 124-125 (Mo. App. E.D. 2006); and *HTH Companies, Inc., v. Mo. Dept. Of Labor and Industrial Relations*, 154 S.W.3d 358, 361 (Mo. App. E.D. 2004). *See also, Standard of Review* at 15.

Argument. The Department’s “legal wrong” analysis, as previously noted in the SOF *supra* at ____, is simply incorrect! The question now before this Court is two-fold. First, what is required to show physical abuse? Second, what is required to show there has been an infliction of emotional abuse? Third, what is required to prove the requisite *mens rea* for abuse as mandated by §562.016, RSMo.

Abuse is not a “Legal Wrong.” Contrary to the Department’s position as articulated in its Hearing Officer’s April 19, 2004, decision, DHSS is not entitled to and may not place a person’s name on the on either the EDL and NAR merely because it, the Department, believes a “legal wrong” has been committed. The Department’s use of the “legal wrong” standard is simply incorrect!

The Department’s reliance on *Black*’s definition of the term “injury” with respect to whether the resident has suffered the requisite “abuse” as defined in §198.006(1) is irrelevant – especially when read in isolation and without considering the existence of other statutory terms. Here, §198.006(1) RSMo. defines – for purposes of determining whether a person’s name should be placed on the EDL list – the term “abuse” as being:

(1) “Abuse”, the infliction of physical, sexual or emotional injury or harm.

(L.F. 288; RS Append. A26).

The words, “injury” or “harm” in the statute, §198.006(1) RSMo, do not, contrary to the Department’s interpretation, stand alone, or in isolation from one another. Instead, these terms are preceded and specifically modified by the words “physical”, “emotional,” and “sexual.” A cardinal rule, or precept, or statutory construction is to ascertain the intent of the legislature from the language used and to give effect to that intent if possible. *State ex rel. Nixon v. QuikTrip Corp.*, 133 S.W.3d 33, 37 (Mo. banc 2004) (quoting *Wolff Shoe Co. v. Dir. of Revenue*, 762 S.W.2d 29, 31 (Mo. banc 1988)).

But, here the Department has completely ignored the General Assembly’s use of modifiers. Moreover, the Department further ignored the General Assembly’s use of the terms “injury” and “harm” in the disjunctive. The Department, in essence, would have this Court write out from §198.006(1) the words “physical”, “emotional,” and “sexual.” But, as the Western District noted, the rules of statutory construction require that every word of the statute be given meaning and effect, and no words are treated as surplusage unless necessary to avoid discrepancies or inconsistencies. *Wallace v. Grasso*, 119 S.W.3d 567, 579 (Mo. App. E.D. 2003); *Sermchief v. Gonzales*, 660 S.W.2d 683, 688-689 (Mo. banc 1983). (RS Append. A55).

Likewise, a court (or in this case an administrative agency) may not when interpreting a statute ignore the placement of words or ignore the use of modifying adjectives. *Alumax Foils, Inc. v. City of St. Louis*, 959 S.W.2d 836, 838 (Mo. App. E.D. 1997); *Abrams v. Ohio Pacific Exp.*, 819 S.W.2d 338, 346 (Mo. banc 1991). *See also*,

Remspecher v. Jacobi, 941 S.W.2d 701, 704 (Mo. App. E.D. 1997). Hence, “courts will [are to] reject an interpretation of a statute that requires ignoring the very words of the statute.” *State ex rel. Womack v. Rolf*, 173 S.W.3d 634, 638 (Mo. banc 2005).

Consequently, the term “abuse” as defined in section 198.006(1) RSMo means the infliction of physical injury or harm, emotional injury or harm, or sexual injury or harm – not merely the infliction of a “legal wrong” as the Department would have this Court so hold. *See*, Department decision, pp. 14-15. (L.F. 416–417; RS Append.A14-A15). For this reason alone the Department’s decision is erroneous and must now be reversed.

Evidence – Actual Physical Injury or Harm. But, DHSS further erred when it went on in its decision to conclude that, as a matter of law, it need not find that as a result of the “abuse” the resident with respect to whether there has been “physical abuse” has suffered or that there has been an actual infliction of physical injury.

As the Western District noted in its opinion (RS Append. A56), §198.006 does not define the term “physical injury;” and, that as a result the term “physical abuse” is to be accorded its plain and ordinary dictionary definition. ***BHA Group Holding, Inc. v. Pendergast***, 173 S.W.3d 373, 379 (Mo. App. W.D. 2005)(*quoting Asbury v. Lombardi*, 846 S.W.2d 196, 201 (Mo. banc 1993)). Black’s Law Dictionary directs one to the definition of “bodily injury” in defining “physical injury.” **BLACK’S LAW DICTIONARY 1184 (8th ed. 2004)**. According to the dictionary, “bodily injury” is “[p]hysical damage to a person’s body.” **Id.** at 801. “Physical harm” is defined as “[a]ny physical

impairment of land, chattels, or the human body.” *Id.* at 734. (RS Append. A56).

Of particular note in this regard is this Court’s decision in *Stiffelman v. Abrams*, 655 S.W.2d 522, 533 (Mo. banc 1983). *Stiffelman* involved a claim for wrongful death made against the owners and operator of a nursing home based on the abuse of a resident which included:

....blows, kicks, kneeings and bodily throwings done intentionally, viciously, and murderously by the nursing home staff over a period of several weeks, producing thirteen rib fractures, subpleural hemorrhaging, with marked lesions over most of his body and extremities, together with leaving decedent to suffer unattended and unaided for several weeks. *Id.* at 533.

This Court, after taking note of the severe injury inflicted on the resident, rejected an argument that the definition of abuse in §198.006(1) RSMo was not unconstitutionally void for vagueness. The Court noted the similarity between §198.006 and the definition of the child protection term “abuse” in §210.110 RSMo and went on to comment:

.... "There is probably little dispute that the term 'physical injury' is one of common understanding. It would include such things as bruises, lacerations, abrasions, welts, choke marks, burns, bites, and fractures."

Krause, *Child Abuse and Neglect Reporting Legislation in Missouri*, 42

Mo.L.Rev. 207, 224 (1977). *Id.* at 533.⁵

More recently, in *State v. Brown*, 140 S.W. 3d 51, 55 (Mo. banc 2004), this Court ratified its earlier holding in *Stiffelman*. In *Brown*, following the death of Dominic James, a two year old child, the prosecuting attorney of Greene County criminally charged Brown, a nurse at the Cox South Medical Hospital, with failing to report as required by §210.115 RSMo., a situation where there was probable cause to believe that Dominic had been physically abused.

In rejecting Brown's challenge to the constitutionality of §210.115 on the grounds that the statute was void for vagueness, this Court stated:

..... Nevertheless, Ms. Brown attempts to avoid this rule by postulating several hypothetical situations: "Does every bruise lead to the supposition that it was caused by abuse or neglect? Does the presence of a scintilla of evidence mandate a call to the child abuse hotline? Should the mandated reporter's decision to call be based on upon a preponderance of the evidence

⁵ Section §210.110 RSMo. defines child abuse as being:

(1) "Abuse", any physical injury, sexual abuse, or emotional abuse inflicted on a child other than by accidental means by those responsible for the child's care, custody, and control, except that discipline including spanking, administered in a reasonable manner, shall not be construed to be abuse;....

with which he or she is confronted?" While it is possible that these or similar situations may arise in the future, they have not arisen in this case. Here, according to the probable cause statement, Dominic was found unconscious, not breathing, posturing, and he had "dime to quarter sized bruises" running along his spine and a red bruise under his eye. ... The statute is not unconstitutionally vague as applied to these facts. *Id.* at 55.

Thus, contrary to the Department's assertion, Missouri law requires – in order for an act to constitute physical abuse – a showing of actual physical injury. *Rombach v. Rombach*, 867 S.W.2d 500, 502-504 (Mo. banc 1993).

In *Rombach*, this Court rejected a claim that the divorce court erred when rejecting a request for the appointment of a GAL pursuant to §452.423 RSMo. even though there was, as the Western District noted, evidence that Husband called his daughter a "fat little pig"; poured a glass of water on one of his sons; resorted to grabbing, pushing, shoving, and talking harshly when he attempted to get the children into his car; and aimed his car at one son and began to back up in order to convey the impression he would run the boy over if he did not get in...." (RS Append. at A57).

Similarly, the Eastern District in *Holmes v. Holmes*, 878 S.W.2d 906, 911-912 (Mo. App. E.D. 1994), rejected a claim that the trial court erred when it refused to appoint a GAL even though there was evidence of repeated episodes where Father had

engaged in acts of physical striking, pushing, and hitting, because there was no showing that the children had actually been harmed.

Evidence – Emotional Abuse. Secondly, as noted, a person who has committed acts of “emotional abuse” is also subject to the potential that the Department will list his/her name on the EDL and/or the NAR even where there has been no physical abuse. But, the question of what constitutes and is required so as to support a finding that the resident has suffered “emotional abuse” is not and should not be an issue here. The Department never charged Respondent with having committed “emotional abuse.” True, there was a finding that Respondent ‘yelled at’ A.V. But, the Department’s finding that Respondent yelled – or scolded – was only noted and discussed in context with the alleged physical abuse inflicted on A.V. (L.F. 293; RS Append. 15).

The question as to whether A.V. suffered emotional abuse or what is required to establish emotional abuse was not an issue litigated during the hearing. Despite a discussion of Respondent’s alleged yelling, the Department did not specifically discuss or decide this question.

In fact, the only finding made involving “injury or harm” as required by §198.006(1), RSMo 2000, concerned physical injury (*see* Finding #7, L.F. 359; RS Append.A9). The first time the Department raised the question of “emotional” injury or harm as an issue in this case was before the Western District Court of Appeals which

held:

Next, the DHSS Deputy Director found, “The eyewitnesses’ observation that [A.V.] was upset by [Ms. Klein’s] actions is further demonstrative evidence of abuse.” This finding is unclear, however, regarding whether the Deputy Director meant that A.V. suffered physical or emotional injury. Regardless, the record is devoid of competent and substantial evidence of emotional injury or harm.

Section 198.006 does not define the term “emotional injury or harm.” Black’s Law Dictionary refers to the term “emotional distress” in defining “emotional harm.” BLACK’S LAW DICTIONARY 563 (8th ed. 2004). “Emotional distress” is “[a] highly unpleasant mental reaction (such as anguish, grief, fright, humiliation, or fury) that results from another person’s conduct; emotional pain and suffering.” *Id.* While the eyewitnesses testified that A.V. appeared “upset” in the parking garage, they did not elaborate beyond that general description. Without more, it cannot be said that A.V. suffered a “highly unpleasant mental reaction.” *Id.* at 10.

(RS Append. A58).

Respondent does not disagree with the Western District’s analysis, especially as to the complete lack of competent and substantial evidence on the subject of emotional injury or harm. *See* Argument under Point II, *infra*. She would, however, emphasize that not every act of yelling, screaming, or scolding a resident arises to the level of or

constitutes “emotional abuse.” *See, In re Marriage of Richards*, 188 S.W.3d 478, 482 (Mo. App. S.D. 2006) (verbal confrontations and heated arguments not emotional abuse); *Overstreet v. Kixmiller*, 120 S.W.3d 257, 259 (Mo. App. E.D. 2003) (single act of “yelling, screaming, harassing” conduct insufficient to support order of protection under Adult Abuse Act).

As the Department again raises the issue of emotional “abuse” in its Motion for Transfer (*see* DHSS M. Tr. 6-7), Respondent is obligated to address it. Proving “abuse” on emotional grounds, Section 198.006(1), RSMo 2000, requires a showing of “emotional” injury or harm. But, the term “emotional” injury or harm is not defined within the statute. As noted in the opinion of Western District Court of Appeals, Black’s Law Dictionary defines “emotional harm” by reference to the term “emotional distress.” “Emotional distress” is defined as “[a] highly unpleasant mental reaction (such as anguish, grief, fright, humiliation, or fury) that results from another person’s conduct; emotional pain and suffering.” *Id.*; (RS Append. A57).

Federal Interpretive Guidelines. In its Motion for Transfer, the Department suggests that rather than a dictionary, this Court should turn to certain “interpretive guidelines” for 42 C.F.R. 483.13(b) which are raised for the first time in this appeal. Respondent opposes this suggestion and notes that this is a significant shift in the Department’s legal position from the time of the hearing that the federal regulations were inapplicable to this action, which in the Department’s opinion was solely limited to the

determination of placement on the EDL pursuant to Missouri statutes (*see* Prehearing Conf. Tr. at L.F. 131). Respondent notes that the Department is bound on appeal by the position it took in the trial court. *In re Marriage of Heirigs*, 34 S.W.3d 835, 840 (Mo. App. S.D. 2000).

Moreover, the regulation at issue, 42 CFR 483.13(b), does not define “abuse”. This regulation also does not require state agency action, nor grant any enforcement authority to any state agency. Moreover, the regulation confers no jurisdiction on the Department.

No part of 42 CFR 483.13(b) states - as is quoted by the Department - “Residents must not be subjected to abuse by anyone, including ...facility staff” (*see* Motion for Transfer p. 1-2). This statement is taken from certain interpretive guidelines – written as a guide for coding breaches of 42 CFR 483.13 by Long-Term Care Ombudsmen and other nursing facility investigators engaged by the U.S. Department of Health and Human Services (HHS). The particular division of HHS that deals with this subject is the Center for Medicare and Medicaid Services (known as CMS, this division of HHS was formerly the Health Care Financing Administration (HCFA)). CMS publishes the State Operations Manual (SOM), a book concerning nursing home regulation. Various appendices to the SOM contain discussions of the federal regulations variously entitled "Interpretive Guidelines" or "Guidance to Surveyors". CMS cautions its surveyors that:

"Guidelines do not replace or supersede the law or regulation, and therefore, may not be used as the basis for a citation." CMS State Operations Manual Appendix 7A.

Missouri has not adopted the federal "Interpretive Guidelines" by statute. Nor has the Department adopted the "Interpretive Guidelines" for 42 CFR 483.13 by formal promulgation as a rule. The CSR does not contain the text of the "Interpretive Guidelines" nor indicate that said text has been formally adopted pursuant to Chapter 536, RSMo. Any purported rule not formalized by observance of publication and filing requirements acquires no controlling force. *Tonnar v. Missouri State Highway and Transportation Commission*, 640 S.W.2d 527, 531(Mo.App. W.D. 1982) (interpreting an attempted application of federal rules to justify an administrative decision predicated on a state manual required by federal guidelines, but not properly promulgated as a rule under Chapter 536, RSMo); *see also* §536.021, subsections 7 and 9, RSMo. Thus, the federal "Interpretive Guidelines" for 42 CFR 483.13 do not have the force of law in Missouri.

However, even assuming that the interpretive guidelines have probative value, the Department still failed to quote them properly. First, the guidelines contain a definition of "abuse" which mirrors the definition in 42 C.F.R. §488.301:

"Abuse" means the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental

anguish.” (42 CFR§488.301)

“Verbal abuse” is defined by the guidelines as “the use of oral, written or gestured language that willfully includes disparaging and derogatory terms to residents or their families, or within their hearing distance, regardless of their age, ability to comprehend, or disability.” Examples of verbal abuse listed in the guidelines include: threats of harm; or saying things to frighten a resident, such as telling a resident that he/she will never be able to see his/her family again.

So, reading broadly, “abuse,” as defined by the federal regulations – even under the interpretive guidelines – requires the willful infliction of *injury...or punishment with resulting physical harm, pain or mental anguish*. Thus, even the federal guidelines require some proof of actual harm; actions which do not result in harm – while morally unpalatable – are simply not “abuse” as that term is defined as a term of art. Even for the alleged “verbal abuse” – as defined by the guidelines above, the derogatory statement must put the resident in some kind fear or anguish (either for harm or deprivation). Telling a patient “I can’t stand you anyway” (L.F. 198; Tr. 122), simply does not raise the specter of fear or cause the mental anguish required for verbal abuse. Thus, whether applying the Black’s Dictionary definition or the federal guidelines, the Department still failed to prove emotional “abuse”. ***Culpable Mental State - Standard of Care.***

The Department misdeclared and misapplied the law for determining a culpable mental

state. The Department made no finding that Respondent either knowingly or purposefully injured A.V. Instead, the Department specifically found in its Decision that Respondent's conduct with respect to A.V. was "reckless" (L.F. 288, 293; RS Append.A-9, A15).

Hence, the Department in order to prevail was required to not only prove Respondent had actually inflicted physical harm on A.V. but that in so doing Respondent possessed the culpable mental state of recklessness which under §562.016.4 RSMo consisted of four elements: 1) a "substantial and unjustifiable" risk, 2) conscious disregard of that risk, 3) the appropriate "standard of care", and 4) gross deviation from that standard. *See* §562.016.4 RSMo. 2000 (RS Append.A35); *see also Johnson v. Missouri Dept. of Health and Senior Services*, 174 S.W.3d 568, 581 (Mo.App. W.D. 2005).

Here, the Department found that Respondent acted recklessly without undertaking any analysis of the evidence, without analysis of what §562.016 RSMo requires by way of evidence and without evidence as to what is, or was, the applicable "standard of care." Instead, the Department simply made a quantum leap; and presumed that the acts done here, *ipso facto*, had been done knowingly, recklessly, and/or purposely and further presumed that Respondent's conduct, *ipso facto* was a "gross deviation" from the requisite "standard of care." Thus, the Department by the very nature of its silence and quantum leap conclusion erroneously declared and applied the law. But merely showing

that a person abused or neglected a patient is not enough.

The Department's entire discussion of the application of the statutory language concerning the *mens rea* of "recklessness" is as follows:

...Applicant was reckless in her abuse of [A.V.], in her conscious disregard of the substantial and unjustifiable risk that injury and/or harm would result from her actions. Applicant's actions against [A.V.] constituted a gross deviation from the standard of care which a reasonable person would have exercised in the situation. (See: Section 562.016(4), RSMO. (2000)).

In its Decision, DHSS never identified a substantial and unjustifiable risk to A.V. as a result of Respondent's behavior. Yet, identifying the risk of harm is a critical element for establishing a *mens rea* of recklessness under the statute – for it is the awareness of particular risk that is the defining element of reckless behavior. *Johnson v. MDHSS*, *supra* at 582; *see also State v. Craig*, 33 S.W.3d 597, 601 (Mo. App. E.D. 2000). The measure of recklessness is irresponsibility – conscious disregard – ignoring an identified risk regardless of the consequences. *See State v. Belton*, 153 S.W.3d 307, 309 (Mo. banc 2005) (*irresponsible use of firearm*).

But, the Department offered no evidence of Respondent's awareness of a substantial or unjustifiable risk of "physical" injury specifically to A.V. Thus, for the first time here on appeal, the Department attempts to overcome this issue by asserting

that Respondent “allow[ed] the elderly woman’s wheelchair to roll into oncoming traffic” – with the implication that such act was intentional; “neglect” never having been charged by the Department – as a factual underpinning for the abuse claim (*see* DHSS M. Tr. 4). It is notable that this allegation did not merit a mention in either the Department’s findings of fact or conclusions of law in its Decision as a reason for placing Respondent’s name on the EDL and NAR. Nor was the rolling wheelchair a cause for apparent concern before the Cooper County Circuit Court on judicial review (*see* L.F. 431-432 (*wheelchair rolling not even mentioned in the Statement of Facts*), 436, 445-447). Only now on appeal to the Supreme Court of Missouri has this once insignificant fact taken on new life as an allegedly salient fact to show irresponsibility justifying a finding of “abuse” (DHSS M. Tr. 4).

Contrary to the Department’s assertions that Respondent acted irresponsibly, however, the record shows Respondent actively seeking to reduce any risk to A.V. from A.V.’s self-propulsion. Respondent stopped A.V. – at least twice – from wheeling away from the transport van into the parking lot aisle (L.F. 224-225; Tr. 228-230). Additionally, Respondent set the wheel locks on A.V.’s chair to prevent her from moving her chair again into the aisle way for moving vehicles. (L.F. 224-225, Tr. 228-230).

Moreover, the Department also failed to identify or show Respondent’s awareness of a substantial or unjustifiable risk of “emotional” injury to A.V. And, the Department offered no evidence of any “emotional” injury. In fact, when questioned about how to

determine emotional injuries, DHSS' closest witness to an expert – its own investigator, Nurse Laura Smith – testified that she didn't even know how (L.F. 196; Tr. 115). In failing to offer evidence proving Respondent's awareness of a risk of physical or emotional injury, however, the Department failed to in establishing a *mens rea* of recklessness.

DHSS never identified and adduced no evidence at all concerning the appropriate “standard of care,” much less any evidence of “deviation” – gross or otherwise – from that standard. However, defining the standard of care and the deviation therefrom is a critical element for a finding of physical abuse predicated on recklessness. *See* §562.016.4 RSMo 2000. In the context of professional licensing, recklessness predicated on a “gross deviation” from the standard of care is akin to a finding of gross negligence. *Johnson v. MDHSS, supra* at 585. Gross negligence is “an act or course of conduct which demonstrates a conscious indifference to a professional duty.” *Id.* (quoting *Duncan v. Mo. Bd. For Architects, Professional Engineers and Land Surveyors*, 744 S.W.2d 524, 533 (Mo. App. E.D. 1988). In determining the existence of “gross negligence”, however, this case clearly called for some expert testimony on the nursing standard of care in dealing with combative Alzheimer's patients as it concerns matters outside the ken of laymen. *See Jake C. Byers, Inc. v. J.B.C. Investments*, 834 S.W.2d 806, 818 (Mo.App. E.D. 1992.)

Evidence Adduced – Culpable Mental State. A brief review of the facts is

appropriate. Alone, Respondent drove three elderly patients – all of whom have some level of mental impairment – to the hospital for treatment (L.F. 223-224; Tr. 223-226). A.V. had a history of violence against the nursing home staff and resisted being loaded into the van at the nursing home (L.F. 38-39, 172, 223; Tr. 18-19). A.V. had to be subdued even to load her into the van for transport (L.F. 172, TR. 18-19). At the hospital, Respondent had to hold A.V. down for treatment (L.F. 224; Tr. 225-226). When trying to return A.V. to the van, Respondent had to operate the wheelchair lift – a job which requires both hands (L.F. 224-225; Tr. 228-229).

At the van, A.V. repeatedly tried to roll herself away from the van and into the traffic lane (L.F. 225; Tr. 229-231). When Respondent tried to stop A.V., A.V. responded violently by swinging her arms around her head (L.F. 225; Tr. 230-231). Meanwhile, the other two residents – with limited faculties – were waiting on Respondent to pick them up with the van (L.F. 225-226; Tr. 232-233).

Clearly, Respondent was in a difficult situation trying singlehandedly to provide care for three mentally impaired individuals in at least two separate locations. A.V. was dangerously uncooperative. Respondent testified that she was not trying to hurt A.V., but was trying to control A.V. for A.V.'s own safety (L.F. 225-226; Tr. 230, 233-234). It is apparent that if A.V. got hit at all, it was in the course of Respondent's attempts to control A.V.'s flailing arms.

Thus, some expert testimony regarding the standard of care for nurse's aides in dealing with a violently resisting Alzheimer's patient was necessary in this case, but the Department failed to present it. Neither did the Department present any evidence that if Respondent's conduct went outside of the standard of care, was it so far out as to be a "gross deviation" given the lack of injury or even head movement when A.V. was allegedly being struck? In short, the evidence showed Respondent performing her professional duties – perhaps not perfectly under stressful circumstances – but, quite clearly not displaying "conscious indifference" either.

Summary. The Department was required at the hearing to prove by competent and substantial evidence the elements of both "abuse" and the scienter requirement of "recklessness" see *Lagud v. Kansas City Bd. of Police Com'rs*, 136 S.W.3d 786, 791 (Mo. banc 2004); §198.070, RSMo 2000. But, DHSS failed to properly declare and apply the law on both requirements. The statute requires proof of physical injury? The Department says it's implied as a "legal wrong". Emotional injury? The Department admits it can't quantify any emotional injury, so that's implied too. What's the substantial and unjustifiable risk? DHSS says this Court must infer it. Conscious disregard? That's implied, too. What's the standard of care? Again, DHSS says that this Court must infer it. Gross deviation? It must be inferred.

If the Department had simply made findings backed up by evidence on these critical elements, no such after-the-fact inferences would be necessary. But, the

Department didn't. The Department – without any analysis of the evidence, without analysis of what §562.016 RSMo requires in the way of evidence, and without evidence as to what is, or was, the applicable “standard of care” - instead made a quantum leap and simply presumed that the acts done here, *ipso facto*, had been done recklessly and were a “gross deviation” from the requisite “standard of care.” Thus, the Department by the very nature of its silence and quantum leap conclusion erroneously declared and applied the law.

II.

[Lack of Competent and Substantial Evidence – Whole Record]

The Department of Health and Senior Services erred in finding that Respondent, Alice Klein, should be put on the state “EDL” and the federal “NAR” pursuant to §198.070 RSMo. (2000) and 42 C.F.R. §483.156 because the Department’s decision was not supported by “competent and substantial evidence on the whole record” in that it failed to establish: (1) that Respondent had inflicted actual “physical injury, emotional injury, and/or sexual injury”; (2) that Respondent had acted “purposefully, knowingly, and/or recklessly”; and (3) what was “standard of care” and what did the “standard of care” require given the acts, conduct, and behavior of the Lakeview patient – A.V.

Introduction and Standard of Review. The Department’s claims are striking on the surface: Wheelchair-bound old lady abused by yelling care giver! But, like Potemkin’s village, the Department’s allegations are an empty reality behind an impressive facade.

On review, this court must look to the whole record in reviewing the Board's decision, not merely at that evidence that supports the agency’s decision. *Lagud, supra*; *Hampton v. Big Boy Steel Erection, supra*. To list Respondent on the EDL (and consequently the NAR) pursuant to §198.070, RSMo 2000, the Department was required

to present competent and substantial evidence to prove the elements of both “abuse” and the scienter requirement of “recklessness.” *See*, standard of review – generally, *supra* at 16-17; *Lagud v. Kansas City Bd. of Police Com'rs*, 136 S.W.3d 786, 791 (Mo. banc 2004).

But, the Department presented no evidence of abuse . It offered no evidence of physical injury or impairment. The Department never even charged Respondent with emotional injury. It presented no evidence of emotional injury or harm. The Department thus failed to prove “abuse”– defined by statute as “physical injury or harm” or “emotional injury or harm.” §198.006 (1), RSMo 2000; *See* analysis, Point I, *supra*.

Neither did the Department offer evidence to prove its allegation of “recklessness.” The Department never identified a risk of injury, nor showed Respondent consciously disregarded that risk. The Department presented no evidence regarding standard of care. Neither did the Department explain specifically how, or in what way, Respondent’s conduct deviated from that unidentified standard of care. In short, the Department failed to adduce evidence to show the required *mens rea* of recklessness.

No Evidence of Physical Injury and/or Harm. The Department’s decision here is *not* supported by competent and substantial evidence on the whole record. Despite all of its protestations, the record is clear; there simply is not a scintilla of evidence that Respondent’s acts – even if one accepts that all the factual findings are true – imposed or

resulted in there being any “abuse” as defined by the relevant statute.

The statute, §198.006(1) RSMo. 2000, in relevant part, defines “abuse” as “physical ... injury or harm.”(R.S. Append. A26). If this Court accepts Respondent’s premise that the terms “injury” and “harm” must be modified by the term “physical” so as to require some quantum of actual physical damage or impairment – as opposed to some damage to a legal right – then DHSS’ decision must be reversed for lack of competent and substantial evidence on the whole record.

The record is clear. There is no evidence that A.V. suffered any physical injury – actual physical damage – or physical impairment as required by §198.006(1) RSMo. 2000. There was no bruising. No marks were left on the skin. No medical care was required. No medical record indicates A.V. incurred any injuries consistent with the alleged hitting (*see* L.F. 47). Two days after the alleged hitting, DHSS’ investigator, Laura Smith saw no bruises or blood (L.F. 185; Tr. 70-71). Smith physically assessed A.V. and saw no evidence that A.V. had been physically injured (L.F. 196; Tr. 115). Even DHSS’ “star” witness, Kerry McDonald, testified that she did not see A.V.’s head move when she was “hit”, nor did she see any evidence of pain from A.V. while allegedly being hit (L.F. 204; Tr. 145-146). Further, Respondent testified that she did not intend to hurt A.V., and A.V. never said she was being hurt (L.F. 226; Tr. 233-234). Respondent also testified that A.V. suffered no marks or bruising after the incident (L.F. 226; Tr. 234). A.V. neither shied away from, nor refused to be with, Respondent after the

incident (L.F. 226; Tr. 234).

Thus, after examining the evidence on the record, it's fair to say DHSS adduced *no* competent evidence of *any* physical damage or injury. There certainly was no evidence of physical impairment. And, the absence of competent evidence precludes the finding of any substantial evidence on this particular issue. The bottom line – it simply cannot be said that A.V. suffered a “physical injury” proved by competent and substantial evidence on the whole record such as would justify or warrant placing Respondent’s name on the State EDL or the Federal NAR.

Failure to Prove Emotional Injury or Harm. The Department likewise failed to plead or prove emotional “abuse,” though it now raises the issue on appeal. *See* DHSS M. Tr. 6-7. To prove such emotional “abuse,” however, Missouri law requires the terms “injury” and “harm” must be modified by the term “emotional” so as to require some quantum of actual emotional injury or harm (i.e. fear or mental anguish) – as opposed to some damage to a legal right. *See* §198.006(1) RSMo. 2000 (R.S. Append. A26).

Black’s Law Dictionary refers to the term “emotional distress” in defining “emotional harm.” BLACK’S LAW DICTIONARY 563 (8th ed. 2004). “Emotional distress” is “[a] highly unpleasant mental reaction (such as anguish, grief, fright, humiliation, or fury) that results from another person’s conduct; emotional pain and suffering.” ***Id.***

In the case at bar, the only evidence of A.V.’s state of mind at the time of the

incident comes from Kerry McDonald's testimony that A.V. appeared "upset" in the parking garage (L.F. 199; Tr. 127-128). Being mildly "upset" is not comparable to the deep, emotionally significant, reactions – anguish, grief, fright, humiliation, fury, pain or suffering – that define "emotional harm." See Black's Law Dictionary, *supra* at 563. No further characterization or description of A.V.'s emotional condition is found in the evidence. DHSS's own investigator, Laura Smith, testified that she saw no evidence of emotional injury to A.V. (L.F. 196; Tr. 115) (*emphasis added*). Smith was asked directly if she'd seen evidence that A.V. was emotionally injured and stated, "I don't know how you would determine that" (L.F. 196; Tr. 115).

Further, it is undisputed that the Kerry McDonald only witnessed the events *after* Ms. Klein was already trying to work the lift to load A.V. into the van (L.F. 201; Tr. 133). But, the testimony of Wendell Hanson shows that A.V. was upset and resisted being loaded at the Lakeview home by flailing her arms (L.F. 172, 174; Tr. 18-19, 25). A.V. continued her resistance at the hospital to the point that she had to be held down to receive her medical treatment (L.F. 224; Tr. 225-226). After Respondent wheeled A.V. to van for the return trip, A.V. again resisted by wheeling herself away from the van and swinging her arms over her head when Respondent brought her back (L.F. 224-225; Tr. 228-230). Thus, at the point Kerry McDonald viewed the interaction between A.V. and Respondent, the evidence quite clearly shows that A.V. had been "upset" for hours and such "upset" was part of a continuing pattern of behavior by A.V. rather than a specific

response to Respondent’s conduct as required by the definition of “emotional harm.” See Black’s Law Dictionary, *supra* at 563. Hence, the Department failed to present competent and substantial evidence of emotional injury or harm such as would justify placement on the EDL and NAR.

Failure to Prove Reckless Conduct. Even assuming, *arguendo*, that DHSS had in fact presented sufficient evidence of injury – either physical or emotional – to prove “abuse” under §198.006(1) RSMo. 2000, the Department was still required to present evidence that Respondent’s conduct toward A.V. was “reckless”. §198.070.12 RSMo. 2000 (R.S. Append. A29). Here, the Department engaged presented no evidence or analysis in making its determination of “recklessness,” instead, simply making a quantum leap to *assume* recklessness from Respondent’s conduct.

In 2000, “recklessness” was defined by §562.016.4 RSMo. 2000 (R.S. Append. A35), which states in relevant part:

“A person acts recklessly” or is reckless when he consciously disregards a substantial and unjustifiable risk that circumstances exist or a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.”

Here, however, the Department presented no evidence identifying a substantial and unjustifiable physical risk to A.V. as a result of Respondent’s behavior. There

simply was no evidence concerning a specific risk of “physical” injury to A.V. Similarly, the Department presented no evidence concerning a specific risk of “emotional” injury to A.V. In fact, when questioned about her assessment of A.V., the Department’s own investigator, Nurse Laura Smith – the closest the Department came to presenting “expert” testimony – testified that she didn’t know how to determine emotional injuries to A.V. (L.F. 196; Tr. 115).

Even if a risk of physical or emotional injury had been identified, however, the Department never adduced any evidence that Respondent was aware of or consciously disregarded any such a risk. Further, DHSS never identified what “circumstances” existed or what “result” would follow from disregarding such a risk. Yet, the identification of risk to A.V., proof of Respondent’s awareness of the risk, and evidence that despite her awareness of risk, Respondent consciously engaged in the charged conduct were all critical element in establishing a *mens rea* of recklessness, which the Department failed to do.

Even if the Department could prove Respondent’s awareness of a specific risk and even the conscious disregard of that risk, the Department was still required to show irresponsibility – that Respondent’s conduct was a “gross deviation” from the standard of care. But, the Department adduced no evidence at all concerning the appropriate “standard of care,” much less any evidence of “deviation” from that standard. And, even if Respondent’s conduct went outside of the standard of care, the Department failed to

present any evidence that it was so far out as to be a “gross deviation” – especially given the lack of injury or even head movement when A.V. was allegedly being struck.

Yet, defining the standard of care and gross deviation therefrom is a critical element for a finding of physical abuse predicated on recklessness. *See* §562.016.4 RSMo 2000. The Department offered no testimony concerning professional standards for nurse’s aides. It offered no expert testimony concerning treatment of Alzheimer’s patients. Clearly, however, A.V.’s mental degeneration as a result of Alzheimer’s disease clearly was a root cause of this incident. Determining the reasonableness of Respondent’s reaction to A.V.’s resistance in this case clearly called for some expert testimony on the nursing standard of care in dealing with a violently resisting Alzheimer’s patient, but the Department failed to present it. *See* analysis, Point I, *supra* at 37-39.

At the absolute minimum, DHSS was required to present evidence proving four elements to make a finding that Respondent possessed the culpable mental state: 1) a “substantial and unjustifiable” risk, 2) conscious disregard of that risk, 3) the appropriate “standard of care”, and 4) gross deviation from that standard. *See* §562.016.4 RSMo. 2000 (R.S. Append. A35). Here, the Department – without any analysis of the evidence, without analysis of what §562.016 RSMo requires in the way of evidence, and without evidence as to what is, or was, the applicable “standard of care” - instead made a quantum leap and simply presumed that the acts done here, *ipso facto*, had been done

recklessly and were a “gross deviation” from the requisite “standard of care.” Thus, the Department’s failure to present even a scintilla of evidence on any one of the four legally required elements of its claim of recklessness must lead this Court to find that the DHSS decision is not supported by competent and substantial evidence.

CONCLUSION

Accordingly, the Findings, Conclusions of Law and Decision of DHSS should be set aside and for naught held. The decision of DHSS is for the reasons stated contrary to law, is not supported by competent and substantial evidence on the whole record, is arbitrary, capricious, is unreasonable, and constitutes an abuse of discretion.

WHEREFORE, Respondent prays this court reverse the decision of the Department of Health and Senior Services and for such other and further relief as this court deems fair and just.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 84.06COMES

NOW Daniel P. Card, II, Attorney for Respondent, and pursuant to Supreme Court Rule 84.06 hereby certifies that:

1. The Respondent's Substitute Opening Brief submitted in the above-styled cause includes the information required by Rule 55.03;
2. The brief submitted complies with the limitations contained in Supreme Court Rule 84.06(b);
3. As reported by the undersigned's copy of Word Perfect X3, the word count is _____; and
4. The diskette submitted to the court and to counsel of record have been scanned for viruses with CA Antivirus (current as of February 13, 2007) and they are virus free.

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CERTIFICATE OF SERVICE

I hereby certify that two true and accurate copies of Respondent's Substitute Opening Brief, including the certificate of compliance and certificate of service, and one diskette containing Respondent's brief were served by mailing same via regular United States mail, postage prepaid, this _____ day of February, 2007, to:

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