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 REPLY BRIEF
Per Supreme Court Rule 84.05(e)

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JURISDICTIONAL STATEMENT – CLARIFICATION

Transfer Improvidently Granted. As noted in Respondent's opening brief this Court having ordered transfer has jurisdiction pursuant to Article V, §10 of the Missouri Constitution. However, after examining the Appellant's brief, it is clear. Transfer was improvidently granted. Accordingly, retransfer should now be ordered.

Contrary to the Department's assertions this case simply does not present a novel or case of general interest/importance. Thus, the Department erroneously claims: "No reported case law in Missouri, prior to this case, explored what constitutes 'physical, sexual, or emotional injury or harm,' though this abuse statute has been at issue." (App.Sub.Br. 12). Not so.

No Novel Issue Presented Which Warrants Transfer

This case does **not** involve a novel issue of general interest or importance. *See* Missouri Supreme Court Rule 83.02. Contrary to the Department's assertions, this Court several times itself has addressed issues of abuse/neglect - whether to a child or to a senior citizen. *See,* ***Stiffelman v. Abrams,*** 655 S.W.2d 522, 533 (Mo. banc. 1983) - cited by the Department only – pages later- where this Court upheld the constitutionality of §198.006 RSMo against claims of being void for vagueness; ***State v. Brown,*** 140 S.W.3d 51, 55 (Mo. banc 2004) - a case similar to ***Stiffelman*** – where this Court upheld the constitutionality of §210.115 RSMo – from the child abuse similar to §198.006 – against claims that it too was unconstitutional; ***Rombach v. Rombach***, 867 S.W.2d 500, 502-504 (Mo.banc 1993) – allegations that a trial court had wrongfully refused to appoint a GAL

despite allegedly clear instances where child abuse occurred; and only recently in ***Jamison v. Department of Social Services, Division of Family Services***, __ S.W.3d __, WL755406 (Mo. banc 2007) where this Court addressed the constitutionality of the child abuse EDL law similar to the law at issue here against a backdrop that the acts and events that occurred in ***Jamison*** did not arise to the level of abuse. In addition, this Court has also addressed the issue of what constitutes neglect/abuse against a challenge that the statutes §578.009 and §578.012, RSMo were void for vagueness. ***State ex rel. Zobel v. Burrell***, 167 S.W.3d 688 (Mo.banc 2005).

And even more often, each district of the Missouri Court of Appeals addresses abuse whether it be child abuse or senior citizen abuse on a regular basis. *See* ***Holmes v. Holmes***, 878 S.W.2d 906, 911-912 (Mo. App. E.D. 1994) (*Court refused to appoint GAL despite evidence of repeated episodes by father of physical striking, pushing and hitting, where there was no evidence that the children had actually been harmed*); ***In re Marriage of Murphey***, 207 S.W.3d 679 (Mo.App. S.D. 2006) (*modification of child custody based on abuse*); ***In re I.Q.S.***, 200 S.W.3d 599 (Mo.App. W.D. 2006) (*termination of parental rights predicated on neglect*). In fact, although DHSS attempts to distinguish ***Stiffelman*** and ***Brown*** as cases where the abuse caused death and the issue was neglect, this Court still addressed the provisions of not only §198.006 (1), but also the provisions of §562.016, RSMo, with respect to the *mens rea* requirements which DHSS also has to establish here. ***Johnson v. Missouri Department of Health and Senior Services***, 174 S.W.3d 568, (Mo.App. W.D. 2004) (*cited* by DHSS at page 18 of its brief); ***Tate v. Department of Social Services***, 18 S.W.3d 3

(Mo. App. E.D. 2000).

And the circuit courts, as this court is aware, address issues of abuse, whether it be against a child or other person on an almost daily basis.

Not Case of General Applicability Due to Change in Law

Nor has DHSS offered a compelling reason to reexamine existing Missouri law. This case is not one of general applicability. Due to the peculiar timing of the events in this case, Ms. Klein is subject to the requirements of §198.070 (12), RSMo 2000. However, §198.070, RSMo, was amended in 2003 and the old subsection (12) was moved to subsection (13) of the new statute.[1] *See* §198.070(13), RSMo 2006. Under the new text , a person is liable for "abuse" as a result of reckless behavior only where there is a substantial and unjustifiable risk of *serious* physical injury to a client. Thus, under the new statute, Ms. Klein's behavior would not even have been chargeable.

DHSS Shift in Basis for Legal Claim – Grounds for Transfer.

This case followed an unusual progression of changing legal theories and factual emphasis at each level of litigation. One of the more remarkable shifts on the part of the Department concerned the applicability of the federal regulations to this case.

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[1]DHSS itself noted this fact in its brief. *See* App.Sub.Br. 17, fn. 4.

The Department's legal position at the hearing was 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). And, DHSS clearly stated its interpretation of those applicable Missouri statutes in its Decision and Order, invoking not federal law, but Black's Law Dictionary to explain its interpretation (L.F. 416-417).

Now DHSS has shifted its position and wishes to invoke the federal regulations and certain "interpretive guidelines" to justify its deviation from the clear language of the applicable statutes (App.Sub.Br. 15-16). It predicates this shift in position on the federal requirement that each state maintain a registry of nurse's aides pursuant to the requirements of 42 CFR 483.156[2] (App.Sub.Br. 16). But, this regulation contains no legislative direction apart from the requirement that such a registry be established and maintained. It does not dictate what Missouri law must require in defining abuse or neglect. That remains the exclusive prerogative of the Missouri General Assembly.

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[2]The department misidentifies this regulation in footnote 3 of its brief as 42 CFR 483.56. (R. Br. 16).

The Department has not clearly articulated why it has changed its interpretation of the applicability of the federal regulations in this case nor explained why this Court should give this new position any deference. *See* ***United Pharmacal Company of Missouri, Inc. v. Missouri Board of Pharmacy***, 298 S.W.3d 907, 912 (Mo.banc 2006). As an administrative agency, the Department does not have the power to broaden the scope of it's statutory authority. ***Id.*** Yet, that is exactly what the Department seeks to do. The authority given to the Department by the General Assembly requires a showing of "physical, sexual or emotional injury or harm" to prove abuse. §198.006(1), RSMo 2004. The Department now asks this court to modify and expand its authority to claim "abuse" in the absence of injury based on certain interpretive guidelines which even the federal government has not promulgated as rules with the force of law.[3]

However, the first mention of these federal guidelines so vociferously advocated by the Department in its brief was in the motion for transfer to this Court. These guidelines which have now become so important to the Department were not important enough to be mentioned in its letters charging Ms. Klein with "abuse." The guidelines were not significant enough to be mentioned in the Department hearing

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[3]*See* discussion of the applicability of the federal interpretive guidelines, *CMS State Operations Manual Appendix 7A,* in Respondent's Substitute Opening Brief pp.33-36.

officer's decision interpreting the requirement for physical injury as a "legal wrong." The federal guidelines were not even important enough to bear mention before the Western District Court of Appeals, despite the fact that the issue of the clear statutory requirement for an actual physical injury was squarely before the Court. No, the first invocation of the guidelines is here before the Missouri Supreme Court.

But, Missouri Supreme Court Rule 83.08(b) provides that the substitute brief shall not alter the basis of any claim that was raised in the court of appeals brief. ***State ex rel. Zobel v. Burrell***, 167 S.W.3d 688, 697 (Mo.banc 2005). Thus, in ***Burrell*** this Court noted:

> ..... Zobel's argument in the circuit court and the court of appeals was that section 578.018 did not vest the circuit court with jurisdiction to order disposition of the horses. .... and, instead, presents this Court with two fundamentally different points. Arguably, Zobel's brief could be stricken under Rule 83.08(b), which provides that the substitute brief before this Court "shall not alter the basis of any claim that was raised in the court of appeals brief" and that any material "in the court of appeals brief that is not included in the substitute brief is abandoned." ... While this unique situation may save Zobel's points on appeal from the application of Rule 83.08(b), the decision to abandon the arguments presented to the circuit court and the court of appeals nonetheless runs afoul of the premise of orderly litigation that underlies the rule. ***Id.*** at

697.

The basis of the Department's "abuse" claim in its decision was a "legal wrong" standard predicated on certain language taken from Black's Law Dictionary (5th Ed. 1979) (L.F. 365). Before the Circuit Court of Cooper County on judicial review, the Department reasserted its belief in the "legal wrong" standard developed from Black's Law Dictionary as it was stated in the Department's decision after hearing (L.F. 446-447). On appeal to the Western District of the Missouri Court of Appeals, the Department abandoned it's original "legal wrong" definition based on Black's 5th Edition (App.Br. 17-18). In its place, the Department argued for a "physical pain...or impairment" standard using the 8th Edition of Black's Law Dictionary (App.Br. 18). Nowhere – until now before this Court – , however, has the Department ever claimed it based its finding of abuse upon, or invoked, or even referred to, the federal interpretive guidelines found in the CMS State Operations Manual. This is clearly an alteration of the basis of the Department's claim and the application of these guidelines has not been litigated before any of the courts previously involved in the review of Ms. Klein's case. This is exactly the sort of abusive litigation practice that Missouri Supreme Court Rule 83.08(b) is meant to prevent.

Thus, this court should decline to review the Department's claim to the extent it is based on the federal interpretive guidelines. *See* ***Zobel***, *supra* at 697, fn.2. *See also* ***Linzenni v. Hoffman***, 937 S.W.2d 723, 727 (Mo.banc 1997) (*Court declines to address issues not raised before the Court of Appeals citing Rule 83.08*).

<u>Placement on NAR - Constitutional Right to Judicial Review</u>

Appellant, the ***Department of Health and Senior Services (DHSS),*** asserts in its Statement of Facts that the propriety of its Decision and Order with respect to the placement of Respondent's name, ***Alice L. Klein,*** on the "Employment Disqualification List" under §198.070.12, RSMo 2000, is the only matter for decision by this Court and that its separate, but additional, decision to also place Ms. Klein's name on the federal Certified Nurse Aid Register (referred to by Respondent in her brief as the "NAR") is not before this Court as part of the appeal herein; and, concomitantly, that Respondent's challenges, as part of her Petition for Judicial Review as filed with the Circuit Court of Cooper County, to that portion of the Department's Decision and Order is 'merely a reporting requirement. 42 CFR 483.156." (App. Sub. Br. 8-9). Appellant, in so claiming, is simply incorrect.

Contrary to DHSS's claims with respect to what is or is not a matter before this Court, which claims the Department makes with no citation of authority, the propriety of the Agency's additional decision to place her name on the federal registry (the NAR) is before this Court.

DHSS ignores the procedural history of this case, including its own notices to Alice Klein. DHSS sent two notices, not one, wherein it advised her that her name would be placed on registries – specifically one for the EDL and one for the NAR (L.F. 104-107). Alice Klein specifically included an allegation in her Petition for Judicial Review that DHSS improperly placed her name on the NAR (L.F. 344). This issue is also addressed by the Western District in its decision. ***Klein v. Missouri Dept. of Health and Senior Services***, – S.W.3d –, 2006 WL 2728002 (Mo.App. W.D. 2006).

Moreover, if DHSS be correct, only it has and would have the authority to place on or to remove from the NAR a person's name. And further, if it be correct, the Department's decision would place it beyond the pale or scrutiny of anyone, including the right of a person to "judicial review" as guaranteed by Article V, §18 of the Missouri constitution. ***Dabin v. Director of Revenue,*** 9 S.W.3d 610, 614-615 (Mo. banc 2000); ***Asbury v. Lombardi,*** 846 S.W.2d 196, 200 (Mo. banc 1993).

Moreover, DHSS's assertion, given this Court's recent decision in ***Jamison v. Department of Social Services, Division of Family Services***, __ S.W.3d __, WL755406 (Mo. banc 2007) would violate the rights of Alice Klein, as well as all persons in this state, to life, liberty, and property as more particularly guaranteed by the 14th Amendment to the U.S. Constitution and by Article I, §10 of the Missouri Constitution.

SUPPLEMENTAL STATEMENT

STANDARDS GOVERNING THIS COURT'S REVIEW

Respondent respectfully submits: The Department overstates and would have this Court accord its April 19, 2004 Decision and Order undue deference. It correctly cites ***Hampton v. Big Boy Steel Erection,*** 121 S.W.3d 220, 223 (Mo.banc 2003) and ***Lagud v. Kansas City Board of Police Commissioners,*** 136 S.W.3d 786, 791 (Mo.banc 2004) for the proposition that the reviewing court is to review the entire record made before the agency to determine whether the agency's decision is

supported by competent and substantial evidence. (App. Sub. Br. 4-5).

The Department then cites ***Percy Kent Bag Company v. Missouri Commission on Human Rights,*** 632 S.W.2d 480, 487 (Mo. banc 1980) and ***Prokopf v. Whaley***, 592 S.W.2d 819, 823 (Mo. banc 1980) and claims that "the reviewing court may not substitute its judgment for that of the agency even if the evidence might support findings of fact different from those found by the agency". The Department goes on to claim – citing to the Western District's decision in ***Moses v Carnahan,*** 186 S.W.3d 889 (Mo. App. W.D. 2006) – that the reviewing court "*must* 'defer to the agency's determination on the weight of the evidence and the credibility of witnesses." (App. Sub. Br. 4-5).

But, in so doing the Department ignores the intent of this court when deciding both ***Hampton*** and ***Lagud.*** Hence, in each of those cases this court expressly overruled a long history of of well-settled precedent. And, in each case, this court expressly stated that the reviewing court no longer must " view the evidence and all reasonable inferences drawn therefrom in the light most favorable to the [agency]." Instead, the court must review the agency decision in the context of the "entire" record. ***Hampton,*** *supra* at 222. ***Lagud***, *supra* at 791.

Next, the Department ignores the requirement that where, as here, the case turns on the interpretation of law and the application of the law to the facts, review is *de novo* and the court must form its own independent conclusions. ***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 is not bound by interpretations used by the Department and, in fact, has an affirmative duty to correct erroneous interpretations of the law. ***Collins v. DSS***, *supra*; ***HTH Companies, Inc. v. Mo. Dept. of Labor and Industrial Relations***, 154 S.W.3d 358, 361, (Mo. App. E.D. 2004).

It is apparent that the Department seeks to reinstate the pre-***Hampton*** and ***Lagud*** standard to insulate it's decision from meaningful review. But, here there was no opportunity for Ms. Klein's complaint to be heard in a meaningful manner. Employees of the Department – hired, paid and evaluated by senior Department administrators – sat in judgment to determine if those same administrator's decisions were correct. There was no opportunity presented for a neutral decision maker to determine the validity of the Department's claims until two separate courts reversed the Department's decision. And, because Missouri's system of judicial review requires this Court to review the Department's decision, rather than the lower court's opinion, those two court opinions are now without effect. Yet, here, above all, given the significant and substantial constitutional interests at issue – stigma, loss of employment opportunities, etc. – which this Court so recently enunciated in ***Jamison v. Department of Social Services, Division of Family Services,*** *supra* at 4-6, this Court is obligated under the circumstances to strictly enforce the new direction of ***Hampton*** and ***Lagud*** and should cast a cold eye on both the Department's determination of the weight of the evidence and credibility of witnesses and its

declaration and application of the law to the facts.

SUPPLEMENTAL STATEMENT OF FACTS

Respondent, ***Alice Klein,*** respectfully suggests: certain statements and assertions of fact which Appellant, ***the Department of Health and Senior Services,*** claims in its brief are by the way phrased, words inserted, words omitted, words and/or phrases taken out of context are inaccurate or misleading so as to require correction, clarification, amendment, and/or supplementation.

Kerry McDonald Not Qualified as an Expert on "Abuse"

In this regard, DHSS asserts – because she is a nurse – that its witness Kerry McDonald, "was trained and experienced on how to recognize abuse." (App. Sub. Br. 7). The Department, however, did not qualify or offer Ms. McDonald to be an expert. Ms. McDonald was only an LPC (L.F. 199; Tr. 126). She was not an RN (with either a B.S in Nursing or an RN certificate. (L.F. 199; Tr. 26). Her entire training as a nurse was completed in less than a year. (L.F. 199; Tr. 126-127). The Department neither adduced nor presented any evidence to show that Ms. McDonald had any legal and/or other training with respect to the statutory definition as to what constitutes "abuse" of the elderly or residents of long term health care facilities. The Department presented no evidence that suggested, implied, or inferred that Ms. McDonald had received any extraordinary nursing training in care for the elderly or for Alzheimer's patients such as A.V. Neither did the Department adduce or present – by Ms. McDonald or any other witness – any evidence with respect to what constitutes or what does the standard of care require in a case such as the

case at bar.

Misquoting and Mischaracterization of Alice Klein's Testimony

Appellant claims that Respondent admitted she had an "altercation" with the "victim" in the parking lot at the hospital (App.Sub.Br. 8). Respondent made no such admission, nor used the words "altercation" nor "victim" in her testimony as cited by Appellant.

The situation described by Respondent in her testimony was that of A.V. resisting being loaded into the van for transportation back to the nursing home. A.V. released the wheel locks on her wheelchair and propelled herself toward the traffic lanes (L.F. 224-225, Tr. 228-230). After Respondent brought her back to the van, A.V. further resisted by putting her feet flat on the concrete floor so that Respondent could not push the wheelchair (L.F. 225, Tr. 230). A.V. was also swinging her arms above her head to prevent Respondent from moving the wheelchair and loading A.V. into the van (L.F. 225, Tr. 230-231). Respondent attempted to control and protect A.V. from harm by holding onto the wheelchair with one hand and trying to grab hold of A.V.'s arms with the other (L.F. 225-231).

Effects of State EDL and Federal NAR Listing

With respect to the applicability of the employment bar provided by the State EDL and the Federal NAR, DHSS asserts that only those facilities receiving Medicare or Medicaid funds are implicated in the employment bar (App.Sub.Br. 8). This is substantially correct with respect to the NAR; but, the EDL covers all state

licensed facilities. However, Respondent was more than simply a nurse's aide. She was the activities director for a substantial sized facility (L.F. 222; Tr. 218). Comparable jobs are not found in small facilities, but only in the larger facilities which receive Medicare and Medicaid funds. No evidence suggested that any non-Medicare/Medicaid funded facilities were located in or near Boonville where Respondent resides or that Respondent could find substantially similar employment in another sort of facility.

Further, Appellant suggests that its role in maintaining the NAR is purely ministerial (App.Sub.Br. 10). However, this not entirely correct. Appellant was fully aware of the permanent consequences of an NAR listing based on abuse and spelled them out in its "finding" letter to Respondent (L.F. 349-350). Further, Appellant controls who is placed on the NAR by determining who is placed on the State EDL – particularly with regard to findings of abuse. *See* 42 CFR §483.156.

ARGUMENT

I.

[Responds to Appellant's Point I]

DHSS fails to quote the federal regulations properly. It is important to note that 42 CFR 488.301 defines "abuse" as the "willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish." Thus, even the federal regulations 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.

The federal regulation cited by DHSS – 42 CFR 483.13(b) – is not directly applicable to this case. The regulation applies only to *facilities* and states, "The resident has the right to be free from verbal, sexual, physical, and mental abuse, corporal punishment, and involuntary seclusion." It discusses the need for the facility to develop policies and procedures to prevent the listed abuses. "Abuse" is not defined by 42 CFR 483.13(b). This regulation also *does not* require state agency action, nor grant enforcement authority to any state agency. Further, no part of 42 CFR 483.13(b) states -- as is quoted by DHSS -- "Residents must not be subjected to abuse by anyone, including …facility staff." (App.Sub.Br. 14). That statement is taken from certain federal interpretive guidelines for this section (App.Sub.Br. 14-15).

These guidelines don't carry the force of law and are in fact written as a guide for Long-Term Care Ombudsmen and other nursing facility investigators. The

guidelines contain a definition of "abuse" identical to that contained in 42 CFR 488.301 which requires "***injury ... with resulting physical harm***, pain or mental anguish." The guidelines become internally inconsistent and depart from 42 CFR 488.301, however, in adding an unrebuttable presumption that instances of "abuse" by their very nature cause physical harm, or pain or mental anguish (*See* App.Sub.Br. 15). Such a presumption is contrary to 42 CFR 488.301 and grossly exceeds the boundaries of §198.006, RSMo, but it is this unrebuttable presumption that lies at the heart of the Department's invocation of these guidelines (App.Sub.Br. 21).

While DHSS was arguably able to show an unconsented touching, it completely failed to offer any evidence of injury of any kind to A.V. Hence, DHSS argues that injury must be presumed in accordance with the federal interpretive guidelines – an adaptation of the "legal wrong" theory posited by the hearing officer – because DHSS implicitly admits it can't prove any injury as required by Missouri law (or even the federal regulations) (App.Sub.Br. 21).

Shifting Definitions – No Change in Requirement Actual Injury

In the course of this case, DHSS repeatedly altered its definition of what constitutes "abuse." Missouri law defines abuse as the "infliction of physical, sexual or emotional harm." §198.006, RSMo 2000. In its decision placing Respondent's name on the EDL and NAR, DHSS found that abuse had occurred – not because of any actual physical damage or harm, but because Respondent allegedly violated the

"legal rights" of A.V. (L.F. 416-417). Now, DHSS seeks to redefine "injury" by resorting to a different set of dictionaries (App.Sub.Br. 19-20). Now, DHSS wants to define "injury" as "physical pain, illness or impairment" (App.Sub.Br. 19). And, DHSS wants impairment to mean "damaged, weakened or diminished." (App.Sub.Br. 20). However, DHSS is bound on appeal by the position it took in the trial court; no deference should be accorded the Department's shifting interpretations of the statute. *See* ***In re Marriage of Heirigs***, 34 S.W.3d 835, 840 (Mo. App. S.D. 2000); ***United Pharmacal v. Mo. Bd. of Pharmacy***, *supra*.

Here, DHSS makes the same mistake it made before. DHSS neglects the modifier "physical" in its own set of definitions. Even assuming *arguendo* that "physical injury ... or harm" implicates "physical pain, illness or impairment," the Department's own definition requires some *physical* manifestation of the pain, illness or impairment. No such evidence was presented. The Department's own "star" witness, Kerry McDonald testified that she saw no evidence of pain. No evidence of *physical* impairment was offered. At no point in the hearing or decision of this matter did the Department state, much less offer even a *scintilla* of evidence, that A.V. was *physically* "damaged, weakened or diminished." On the contrary, the evidence showed that A.V. suffered no physical damage at all – not even a bruise.

The same goes for emotional harm. Even the Department's own investigator was stymied on the question of emotional harm. When asked if she'd seen evidence that A.V. was emotionally injured, the investigator testified. "I don't know how you

would determine that." (L.F. 196; Tr. 115).

DHSS invokes the holding by the Supreme Court in ***Stiffelman***, *supra* at 533. ***Stiffelman*** involved serial violent attacks resulting in the extreme physical injury and eventual death of a facility resident. ***Id***. In considering a vagueness challenge to the definition of abuse found in §198.006(1), this Court held the statutory language was not vague and required no further explication of the term "physical injury" to be commonly understood. ***Id***. The court did **not**, however, find that there was ***no*** requirement to prove an actual ***physical*** injury.

The Department's point in invoking ***Stiffelman*** is unclear. DHSS admits its position is questionable given the utter lack of injury (App.Sub.Br. 21). However, DHSS demands this Court find "abuse" predicated on "physical injury" because of conduct which could *potentially* cause pain or some future injury – even in the face of clear evidence to the contrary (App.Sub.Br. 20). In so doing, DHSS basically asks this Court to presume evidence of "physical injury"despite the Department's failure to produce any. At its core, DHSS asks this Court to ignore the explicit requirements of the law and give DHSS the remedy it seeks despite its acknowledged failure to produce any evidence supporting its position.

DHSS argues the Court may do so because of the special vulnerability of elderly patients and because the federal guidelines allow such a presumption (despite the fact that such a presumption conflicts with federal and state law) (App.Sub.Br. 21). But, what DHSS suggests shakes the very foundation of the

justice system. DHSS would have this Court cast off its role as guardian and protector of the individual against the unlimited power of the State simply because DHSS finds the statutory protections for health care workers inconvenient in this case.

This Court recently considered a similar issue in ***Jamison v. DSS***, *supra*. ***Jamison***, concerned the constitutional due process requirements associated with listing individuals on the child care Central Registry in advance of a hearing on the issue. This Court held the child care workers had "the right to hold specific private employment and to follow a chosen profession free from unreasonable government interference." ***Id***. at 5. Thus, the workers had constitutionally protected interest in preventing the registry listing because the preclusive effect of the registry listing on future employment satisfied the requirements of the "stigma plus" test, triggering certain due process protections.

The effects of listing on the state EDL – and more particularly the federal NAR – are similar to the effects of listing on the child care registry and should trigger similar protections. Like the Central Registry, the NAR listing is for life and effectively precludes employment by any facility that receives Medicaid or Medicare funds. Collaterally, the list is available to all health care employers and realistically precludes employment as a nurse's aide as a liability issue. Thus, the lifetime ban associated with being listed on the federal NAR should trigger constitutional protections similar to those in ***Jamison***. At the very least, the severity of the

discipline should require DHSS to scrupulously enforce the provisions of the governing statute as they are written, not as DHSS wishes they were written, and certainly not subject to the vagaries of which dictionary the Department's counsel happens to possess on any given day.

II.

[Responds to Appellant's Point II]

DHSS states its point addresses both Respondent's Points I and II and speciously characterizes Ms. Klein's claims on appeal as concerning the sole issue of the Department's abject failure to produce competent and substantial evidence on the whole record in support of its decision under §536.140.2(3), RSMo 2004 (App.Sub.Br. 22). Not so! While the fact that the Department's decision is utterly unsupported by the evidence is clearly significant, Respondent also vigorously asserted that DHSS erroneously declared and applied the law rendering its decision: 1) contrary to Missouri law – §536.140.2(4), RSMo 2004; 2) in excess of the Department's statutory authority – §536.140.2(2), RSMo 2004; and 3) arbitrary, capricious and unreasonable – §536.140.2(6), RSMo 2004. Respondent also asserts DHSS grossly abused its discretion – §536.140.2(7), RSMo 2004 – given the Department's admission of the questionable nature of this case, its curious inability to stick to the original charges, and its constantly shifting legal position with respect to the statutory definition of abuse.

Uncharged Allegations of Neglect

DHSS spends a portion of its brief discussing "neglect" (App.Sub.Br. 25). But "neglect" is not at issue in this case as no finding of neglect has ever been made or even alleged by DHSS. The discussion of neglect is therefore wholly irrelevant to the issues to be decided by this Court. It is, however, indicative of the ever-shifting

positions of DHSS to now include charges upon which no finding has ever been made.

<u>The Original Charge</u>

On November 25, 2003, DHSS sent Klein a notice of violation and a notice of finding which stated that DHSS completed an investigation which tended to substantiate an allegation that Klein "abused" a "confused, eighty-five year old female resident in a wheelchair" by yelling at her and hitting her on the head (L.F. 104; Appendix A-45). It is important to note what is missing from the "charging" language in the original notices. The action is predicated on "abuse". There is no mention of "neglect" here. Moreover, there is no mention of the wheelchair rolling into traffic at all (much less an allegation that Klein either negligently or intentionally allowed A.V. to roll the chair), despite the fact that DHSS was aware A.V. tried to roll away from the van (and Klein) from the time of the original hotline report (L.F. 1-2, 7, 11, 15). Further, this original language does not make any finding of either physical or emotional injury to A.V.

<u>The Agency Decision</u>

The Department's decision also contains no finding with respect to "neglect". "Neglect" is not mentioned in the Decision and Order and A.V.'s mobilization of her wheelchair in the parking garage is not identified as a fact underpinning the decision to characterize Klein's actions as "abuse."

Instead, DHSS made a finding of "abuse" predicated specifically on

Respondent's allegedly reckless conduct in striking and yelling at A.V. which "resulted in the infliction of physical injury" – where the Department defined the injury in question as a "violation of the legal rights" of A.V.; no evidence of actual *physical* injury or damage was presented (L.F. 411, 416-417). It is important to note that Department's findings were limited to "physical" injury. No finding was made regarding "emotional" injury or harm.

Agency Decision Unsupported by Competent and Substantial Evidence

The Department attempts to shift its burden of proof onto Ms. Klein and argues that Alice fails to show that the Department's decision is contrary to the overwhelming weight of the evidence (App.Sub.Br. 22). But, the Department's argument shows a complete misunderstanding of the legal requirements in this case. Respondent has not argued that the decision is contrary to the weight of the evidence, not so! Respondent's point is that DHSS has not supplied sufficient evidence on the whole record to establish even a *prima facie* case of "abuse" under applicable Missouri law.

Here, DHSS, not 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 was the Department's burden to prove and persuade the hearing officer that Klein abused A.V.[4] Whether DHSS correctly interpreted and applied Sections

[4]DHSS in its Decision states in this regard: "The Department has the burden of

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. Dunn,*** 184 S.W.3d 122, 124-125 (Mo.App. E.D. 2006); and ***HTH Companies***, *supra*.

At the heart of its decision, DHSS found Respondent recklessly abused A.V. while employed by the Lakeview nursing home facility (L.F. 365). Therefore, under the law as it existed at the time of the incident in question, DHSS had two separate and distinct burdens it had to satisfy to list Respondent's name on the EDL and on the NAR pursuant to §198.070, §660.315 RSMo., and 42 C.F.R. §483.156. First, DHSS had to establish and prove, by competent and substantial 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. To prove physical "abuse" – as was charged by the Department – DHSS was required to prove that Alice's acts and conduct inflicted actual physical harm and/or injury – such as bruising, cuts,

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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).

bleeding, etc. upon A.V. But, no evidence of any actual injury – either physical or emotional – was adduced at the hearing.

Second, DHSS had to establish and prove Alice had, in so acting, exhibited the requisite ***mens rea*** – alleged by DHSS to be "reckless" – as required by §562.016 RSMo. DHSS failed to do so.

With respect to the ***mens rea*** requirement, DHSS was required to prove and establish, that even if Alice had engaged in acts of "abuse", that she did so "recklessly," to wit: 1) that some "substantial and unjustifiable risk" to A.V. actually existed; 2) that Alice's actions were done in "conscious disregard" of the fact that her acts might substantially harm A.V.; and 3) that Alice, in so doing, had "grossly deviated" from the "standard of care" which a reasonable person would exercise in the situation. §562.016.4, RSMo 2000 (RS Append. A29-A30, A37-A38, and A35).

No Substantial or Unjustifiable Risk

With respect to the element of substantial or unjustifiable risk, DHSS makes several misstatements in its brief and never identifies any legitimate risk of harm to A.V. resulting from Alice Klein's actions. First, DHSS assumes both physical pain and emotional injury. **No** evidence was presented suggesting that this was the case. Even the Department's own witnesses testified that A.V. was not injured and did not appear to be in pain (L.F. 185, 196, 204; Tr. 70-71, 115, 146). No finding of "emotional injury" has ever been made and the Department's own evidence of contradicted the existence of any such "emotional" injury (L.F. 196; Tr. 115).

Second, DHSS suggests that Alice "rapped" A.V. on the head (App.Sub.Br. 24-25). This is gross misstatement of the facts. At least one witness, Marcus McDonald, testified that Klein hit A.V. with an open hand (L.F. 207-209; Tr. 160, 162-163, 167-168). This is a far cry from the "rapping" stated above, which usually implies a closed fist, as in knocking (or rapping) on a door (*see* The American Heritage Dictionary, 2d College Edition, p. 1026). Moreover, the evidence is uncontested that A.V. did not appear to be in any pain and A.V.'s head did not even move during the alleged hitting (L.F. 204; Tr. 145-146).

Finally, DHSS failed to identify any substantial or unjustifiable risk to A.V. resulting from Ms. Klein's conduct. DHSS argues Alice Klein "allowed" A.V. to wheel into moving traffic. Ms. Klein did not encourage A.V. to wheel away from her, nor did she push A.V. into traffic. In the absence of such an affirmative act, this conduct does not even meet the "infliction" requirement to be considered "abuse" within the definition of §198.006(1), RSMo. Ms. Klein can only assume, therefore, that DHSS now raises this issue – which was not deemed important enough to be included in either the charging letters or the agency decision as a determinative factor – in hopes of showing some sort of neglect (App.Sub.Br. 24-25).

However, no such neglect was charged nor implicated in the Department's decision. The testimony – even from the McDonald's – indicated quite the contrary; Ms. Klein stopped A.V. at least twice from wheeling away from the transport van and set the wheel lock on A.V.'s chair to prevent her from moving again (L.F. 198-199,

201-202, 207, 224-225; Tr. 122, 128, 135-137, 157-158, 228-230). In fact, it was Alice's attempts to prevent A.V. from wheeling into the traffic lane that prompted A.V. to begin waving her arms over her head and resulted in the incident at issue in this case (L.F. 224-225; Tr. 228-232).

No Evidence – Conscious Disregard – Substantial or Unjustifiable Risk

DHSS elevates the concept of "conscious disregard"to an independent misdeed in its own right. Once again, DHSS breaks out its remarkably versatile set of dictionaries to define commonly understood words. DHSS would have this Court believe that "conscious disregard" means "to know what is the right thing to do, but not do it" (App. Sub. Br. 23). This position is interesting, but blatantly incorrect.

The statute states, in relevant part, that a person is reckless when he "consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow..." §562.016.4, RSMo 2004. In this statutory language, "consciously" is simply an adverb that modifies the verb "disregard," the object of which is the noun risk (modified by the adjectives "substantial" and "unjustifiable"). The Department's definition simply ignores the effect of the object of the verb on the sentence construction, thus reaching an incorrect result. Under the statute it is ignoring a particular risk of which one is aware that is proscribed, not simply failing to do "the right thing."

But, DHSS has never identified any existing condition or result following from Ms. Klein's actions which involved a "substantial or unjustifiable" risk. Nor has

DHSS made any attempt to prove that Alice was aware of and ignored such an existing or resulting condition.

Failure to Identify Standard of Care or "Gross Deviation"

At no time has DHSS asserted an identifiable standard of care in this case. But, the determination of such a standard is a clear requirement of the statute which requires proof of "a gross deviation from the standard of care which a reasonable person would exercise in the situation." §562.016.4, RSMo 2004. DHSS asserts that no identification of, or testimony with respect to, the standard of care was necessary because it is within the competence and understanding of laypersons. Ms. Klein begs to differ.

Here, the standard of care issue glossed over by appellant is a critical element for a finding of physical abuse (App.Sub.Br. 24*). See* §562.016.4 RSMo 2000. This situation called for some expert testimony on the nursing standard of care as it concerns matters outside the ken of laymen. Ms. Klein was in a difficult situation trying to provide care for three mentally impaired individuals in at least two separate locations. A.V. was dangerously uncooperative. Alice 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). Clearly, if A.V. got hit at all, it was in the course of Alice's attempts to control A.V.'s flailing arms. Some testimony regarding the standard of care in dealing with a violently resisting Alzheimer's patient was necessary in this case, but DHSS failed to present it. Nor did DHSS present any evidence that if

Alice's conduct went outside of the standard of care, 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.

Summary

DHSS unjustifiably makes a number of egregious, logically inconsistent statements concerning the issue of "abuse." One the one hand, DHSS implicitly admits it has no evidence of physical or emotional injury while begging this Court to presume injury, but then makes the statement, "Klein's conduct created a risk of, and in fact caused, physical and emotional injury and harm." (App.Sub.Br. 25). DHSS never charged or pled "neglect", but it more than willing to state that Klein's "conduct constituted neglect..." (App.Sub.Br. 25). The Department makes a quantum leap to determine recklessness because it believes Klein failed to do "the right thing," but declines to enunciate what the right standard is (App.Sub.Br. 25-26). But, never does DHSS simply state what evidence it presented to comply with each requirement of the law because it can't.

This Court must ask the Department, "Where's the proof?" Where's the evidence of physical injury? DHSS says its implied. What's the substantial and unjustifiable risk? The Department says this Court must infer it (App. Br. 23). What's the standard of care? Again, DHSS says that this Court must infer it (App.Br. 24). Gross deviation? Again, it must be inferred (App.Br. 24). If DHSS had simply presented evidence on these critical elements, no such after-the-fact inferences

would be necessary. But, DHSS didn't and now the Department wants this Court to fill in the blanks.

In the interest of justice, this Court must decline to do so. The complete failure of DHSS to support the legally required elements of its claim of abuse with even a scintilla of evidence must lead this Court to find that the Department's decision is not supported by competent and substantial evidence. This Court must reverse the DHSS decision.

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 84.06

COMES 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 12, the word count is 7647; and

4. The diskette submitted to the court and to counsel of record have been scanned for viruses with CA Antivirus (current as of February13, 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 April, 2007, to:

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