

No.474603-II

THE COURT OF APPEALS
OF THE STATE OF WASHINGTON -
Division II

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STATE OF WASHINGTON
BY _____
DEPUTY

DEBRA KOSHELNIK and GLEN TURNER
individually and the marital community consisting
thereof, and Estate of Evelyn Koshelnic, through Debra Koshelnic
Personal Administrator

Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND
HEALTH SERVICES, SUSAN N. DREYFUS, Secretary of Social
and Health Services, LINDA ROLFE, Director, Division of
Developmental Disabilities of DSHS, CONNIE WASMUNDT,
EVELYN CANTRELL, LOREN JUHNKE, and BARBARA UEHARA,
employees of DSHS and unknown Supervisors

Appellees.

Appellant's Opening Brief

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TABLE OF CONTENTS

Koshelnik v. State et al.

Court of Appeals Division II
No. 474603

Table of Contents.....	i
Table of Authorities.....	iii
I INTRODUCTION.....	1
II ASSIGNMENTS OF ERROR.....	4
III QUESTIONS PRESENTED.....	5
IV STATEMENT OF THE CASE.....	7
IV ARGUMENT.....	15
A) <u>Standard of review</u>.....	15
B) <u>Judicial Facts are Facts</u>.....	16
C) <u>We have pleaded and shown individual and State Liability</u>.....	17
1. Barb Uehara.....	19
2. Linda Rolfe.....	20
3. Evelyn Cantrell.....	21
4. Corrine Wasmundt.....	21
5. Susan Dreyfus.....	22
i	

D)	<u>Due Process</u>	22
1.	Process Is Not Always Due Process.....	22
2.	<u>Bad Faith Is the Enemy of “Due Process”</u>	28
E)	<u>Privileges and Immunities</u>	33
F)	<u>Defamation</u>	35
G)	<u>Due Process and Equal Protection for Evelyn</u>	37
H)	<u>Conspiracy</u>	38
I)	<u>Negligent Training</u>	40
J)	<u>Holding the State Liable for Lack of Training and Supervision Furtheres the Public Interest and Does Not Compromise Any Legitimate State Purpose</u>	45
K)	<u>Causation</u>	46
V	CONCLUSION	49

TABLE OF AUTHORITIES

Koshelnik v. State et al.

**Court of Appeals Division II
No. 474603**

Federal Authority

Statute

42 USC §1983

Federal Case Law

<i>Coniston Corp. v. Hoffman Estates</i> , 844 F.2d 461, 467 (7th Cir. 1988); <i>Abbiss</i> , 712 F. Supp. at 1164.....	30
<i>Hafer v. Melo</i> , 502 U.S. 21, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991).....	18
<i>Harding v. County of Door</i> , 870 F.2d 430, 431 (7th Cir. 1989).....	30
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254, 279-80, 84 S. Ct. 710, 11 L.Ed. 2d 686 (1964)	36
<i>Mark-Garner Assocs., Inc. v. Bensalem Township</i> , 450 U.S. 1029, 68 L. Ed. 2d 223, 101 S. Ct. 1737 (1981).....	28
<i>Midnight Sessions, Ltd. v. City of Phila.</i> , 945 F.2d 667, 683 (3d Cir. 1991), cert. denied, 118 L. Ed. 2d 389, 112 S. Ct. 1668 (1992).....	28
<i>Parkway Garage, Inc. v. City of Philadelphia</i> , 5 F.3d 685 (3d Cir., 1993).....	29
<i>Rogin v. Bensalem Township</i> , 616 F.2d 680, 689 (3d Cir. 1980).....	28
<i>Silverman v. Barry</i> , 845 F.2d 1072, 1080 (D.C. Cir.), cert. denied, 488 U.S. 956 (1988).....	30

<i>The T.J. Hooper</i> 60 F.2d 737 (2d Cir. 1932).....	46
<i>Will v. Michigan Department of State Police, et al.</i> 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989).....	5,17,18

Washington Authority	Page #
<i>Amunrud v. Bd. of Appeals</i> , 158 Wn.2d 208, 143 P.3d 571 (2006).....	29
<i>Bishop v. Miche</i> , 137 Wn.2d 518, 973 P.2d 465 (1999).....	47
<i>Boring v. Alaska Airlines, Inc.</i> , 123 Wn.App.187, 97 P.3d 51 (2004).....	37
<i>Corbally v. Kennewick School District</i> , 94 Wn. App. 736, 973 P.2d 1074 (1999).....	36
<i>Doe v. Gonzaga Univ.</i> , 143 Wn.2d 687, 24 P.3d 390 (2001), rev'd on other grounds, 536 U.S. 273, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002).....	35
<i>Enns v. Board of Regents of University of Washington</i> , 32 Wn. App. 898, P.2d 1113 (1982).....	29
<i>Hardee v. DSHS</i> , 172 Wn.2d 1, 256 P.3d 339 (2011).....	17
<i>Harris v. Groth</i> , 99 Wn. 2d 438, 663 P.2d 113 (1983).....	47
<i>Helling v. Carey</i> , 83 Wn. 2d 514, 519 P.2d 981 (1974).....	45-46
<i>Herron v. King Broadcasting Co.</i> , 109 Wn.2d 514, 746 P.2d 295 (1987).....	36
<i>Janaszak v. State</i> , 173 Wn. App. 703, 297 P.3d 723 (2013).....	1,27,33,34,37,38
<i>Jenkins v. Department of Social and Health Services</i> , 160 Wn.2d 287, 157 P.3d 388 (2007).....	20
<i>Lutheran Day Care v. Snohomish County</i> , 119 Wn. 2d 91, 829 P.2d 746 (1992).....	30-31

<i>Mark v. Seattle Times</i> , 96 Wn. 2d 473, 486, 635 P.2d 1081 (1981).....	35
<i>Moran v. State</i> , 88 Wn. 2d 867, 568 P.2d 758 (1977).....	43
<i>M.W. v. Department of Social and Health Services</i> , 149 Wn.2d 589, 70 P.3d 954 (2003).....	1, 38
<i>R/L Assocs., Inc. v. Seattle</i> , 113 Wn. 2d 402, 780 P.2d 838 (1989).....	30
<i>Sintra Inc. v. City of Seattle</i> , 119 Wn 2d 1, 829 P.2d 765 (1992).....	30
<i>Spencer v. King County</i> , 39 Wn.App. 201,, 692 P.2d 874 (1984).....	28,33,38
<i>Stuewe v. Dep't of Revenue</i> , 98 Wn. App. 947, 991 P.2d 634 (2000).....	16
<i>Twelker v. Shannon & Wilson, Inc.</i> , 88 Wn.2d 473, 478-480, 564 P.2d 1131 (1977).....	36
<i>Wilson v. Steinbach</i> , 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).....	16
<i>Young v. Key Pharmaceuticals Inc.</i> , 112 Wn. 2d 216, 770 P.2d 182 (1989).....	47

Washington Statutes

RCW 4.92.090.....	18
RCW 18.32.0357.....	34
RCW 34.05.46.....	31
RCW 43.20A.050.....	44
RCW 43.43.830.....	25
RCW 43.43.842.....	25

v.

RCW 49.60.....40

RCW 71.05.120.....33

Washington Regulations

WAC 388-02-0220.....27

WAC 388-825-380.....24

I INTRODUCTION:

This case arises as a result of three orders, one of dismissal of the claims of the Estate of Evelyn Koshelnik for failure to state a claim and affirmation on motion for reconsideration, and the second for summary judgement for all claims.

Defendants first filed a Summary Judgment/motion to dismiss against the estate of Evelyn Koshelnik claiming, *inter alia*, that *Janaszak v. State*, 173 Wn. App. 703, 297 P.3d 723 (2013), and *M.W. v. Department of Social and Health Services*, 149 Wn.2d 589, 70 P.3d 954 (2003), had completely put to rest the issue of negligent investigation as a tort in Washington. CP 33 et seq. The Estate countered that no one died in either of those cases, CP 294, which converted this to a constitutional Claim, 7/12/2013, RP 8, as well as arguing that the APS statutes imposed very specific duties on Mr Juhnke which he neglected. CP 292 et seq.)

After the Court ruled in the State's favor specifically on that issue, we asked for reconsideration on the basis that the court had not considered the issue of the Department's and Secretary Dreyfus' individual responsibility for having no institutional training or protocols in place on how to interview the elderly deaf, especially women, without terrifying them. Our expert had pointed out that the

current practice as shown by this incident, of sending in an Adult Protective Services agent who was not himself American Sign Language fluent, would both gain no useful information and be terribly distressing to the interviewee. Reonsieration was denied without comment.

Defendant then moved to dismiss all claims on the basis that 1) defendants' administrative actions were no more than the state pursuing a legitimate investigation and affording plaintiffs due process and 2) there were not sufficient facts presented with respect to the individual plaintiffs were insufficient to hold the state liable. The court agreed.

The overriding problem with the decisions below in this case are that the State, and the courts have treated separately the sequence of events which began when treated as a whole bespeak a concerted effort with a common unlawful goal and aim, and that led to a tragic end. It began with 1) the bad faith campaign to wrongfully brand Debra Koshelnik an abuser in the face of all the evidence, with the stated goal of attempting to get her services in caring for her children without compensation saving the department money, continued with 2) A campaign of petty harassment with the object of saving the department money, carried out by Barb Uehara at the urging of Dee Couch and Kristin Jorgenson Dobson, (exhibit

14 (appendix)), documented to Linda Rolfe (CP 187, 191-193) and resulting in an addition to a significant false and defamatory record concerning Ms. Koshelnik in DSHS files; and 3) Culminated in the death of Evelyn Koshelnik as a result of Mr. Juhnke, an improperly trained APS investigator, being shown that intentionally defamatory record, CP 245, and rushing in to do a grossly improper interview, and so terrifying her that within minutes of its conclusion she suffered a massive hemorrhagic stroke and died the following day. CP 232-233.

This is one case against multiple actors who acted consistently in bad faith toward the common goal of saving the state money by either destruction of a family that included multiple disabled adults, or at least not having to pay for their care.

We do not charge the state actors with intentionally depriving Evelyn Koshelnik of her life; we do charge them with her wrongful death by setting up the framework that was its direct and proximate cause through the chain of wrongful events that set up the ill-fated interview, and for grossly negligent failure to have in place the basic protocols that would have prevented it.

The other major source of error in this case arose from the fact that neither of the courts that heard the state's motions recognized that the significant material facts as we have pled them come directly as unappealed findings of four separate

administrative tribunals after two exhaustive evidentiary hearings that were in all respects full trials.

The most significant of these facts is that not only did she never commit any act that could be considered abuse, but that she was a model parent and caregiver for persons with Down Syndrome schooled from a lifetime of providing such care (Ross Decision #1, Finding of fact #3 CP 79. Moore Decision, finding 4.28 CP 99; Conant decision (Bd. of Appeals), Conclusion #27, CP 172.)

The other important firmly established fact is that Judge Ross' second decision, on summary judgement, specifically includes a finding that the Department engaged in the second round of denial of contracting rights for Debra to take care of her children, before a second judge, forcing her to relitigate – with no new evidence whatsoever -- after not appealing any of the findings in her first decision. (Exhibit 3; Ross ALJ, Summary J Order, Conclusion ## 5.8, 5.9. CP 130). That decision was never appealed.

II ASSIGNMENTS OF ERROR

1. The Superior Court in all instances failed to afford proper factual weight to the unappealed findings and conclusions of the multiple administrative tribunals below,

which presented a clear pattern of bad faith prosecution.

2. The Superior Court in all instances failed to properly review and integrate the entire history of the multiple claims and give weight to the pattern of bad faith presented by that history, and the ultimate effect that it had on the actions that led to Evelyn Koshelnik's death.

3. The Superior Court in all instances erred in not finding evidence of bad faith sufficient negated Defendants' defenses, for purposes of summary judgment,

4. The Superior Court in the 2015 hearing erred in not finding sufficient evidence of wrongdoing on behalf of the individual defendants to maintain this action.

5. The Superior Court on motion for Reconsideration in 2014 erred in failing find Ms. Dreyfus and the Department liable for her Department's systemic failure to adopt protocols that accounted for the specific class-wide vulnerabilities of elderly deaf persons, especially women.

III QUESTIONS PRESENTED

1. Did Plaintiffs show sufficient individual wrongful acts by each of the named plaintiffs to overcome a challenge to the Constitutional claims under *Will v. Michigan Department of State Police, et al.* 491 U.S. 58, 109 S. Ct. 2304,

105 L. Ed. 2d 45 (1989)?

2. Can unappealed judicial findings and conclusions in State administrative tribunals constitute facts for the purpose of overcoming summary judgement, do those findings and conclusion do so here.
3. For purposes of Summary Judgment, does significant evidence of bad faith on the part of the state actors negate a defense that they were acting in a manner to afford Plaintiffs "due process."
4. For purposes of Summary Judgment, does significant evidence of bad faith on the part of the state actors negate a defense that they were acting, under privilege or with immunity?
5. For purposes of Summary Judgment can evidence that the state and those acting for it inserted into the public record a finding of "substantiated abuse," knowing that it was false or with reckless disregard for truth, for an improper purpose, constitute defamation, even if it is only published within the Department?
6. Is failure to have protocols for interviewing elderly deaf women that account for their particular vulnerabilities as a class, constitute 1) a denial of constitutional guarantees of equal protection of the law; and 2) violation of the Washington's law against Discrimination as it applied to persons with disabilities; and 3)

Constitute wrongful death if such lack causes death and 4) constitute a denial of constitutional guarantees of one's right to life without due process of law?

IV STATEMENT OF THE CASE

Here are the central documented facts of this case.

- A. Debra Koshelnik and Glen Turner have made it their lives' work to create a rich and productive environment for those with disabilities, especially Down Syndrome and Deafness,. Ross, ALJ, Findings ## 3&4, CP 79; Bd. of Appeals Decision (Conant), Conclusion #27, p. 34-35. CP 172.
- B. For about 25 years, first when they served as foster parents to children with disabilities and later, when they began adopting special needs children, their relationship with DSHS was excellent. There was no history of any allegations of abuse of the many children and adults they cared for over the years. Decl. Debra Koshelnik ¶¶ 7, 14 (CP 221-222); Ross, ALJ, Finding #10 (CP 81). Indeed, as Debra has observed, they do not ever use physical or other punishment as a tool with their children. They simply would not understand it. Debra's Declaration at ¶¶ 5 (CP220) and 19. (CP 222)

- C. During the years before 2007, just as in the years after 2007, Debra and Glen took care of Debra's brother with Down Syndrome, their three children with Down Syndrome, and Debra's parents. Nothing in the children's care and nurturing changed in any significant way in 2007.
- D. In 2007 the children began to age into medicaid personal care eligibility, and, with Danny and Parker, who were already eligible and receiving such care, would create a significant draw on the DSHS medicaid budget. The department in 2007 embarked on a campaign to find ways to limit the amount of assistance that they would have to pay to this family. *They actually documented this in emails.* Exhibit 14 to response brief on second Summary Judgement. A department supervisor, Dee Couch makes the point explicitly. She writes:

This is a family that includes 8 people- 4 children, 2 parents, one of whom is the paid provider **[Debra was at that time not being paid]** and 2 grandparents who are blind since birth
Children, ages and programs they are on are as follows:

Morgan- age 17- IFSP and MPC
Parker- 16 waiver PC and respite
Virginia- 18 waiver PC and respite
Daniel approx 44 yrs- Waiver PC and respite

Morgan's scores as a level 4 with \$6,000.00 respite. Family is receiving lots of money for personal care and respite assist. It is felt that they do not need this extra IFSP money. Do we have any way to disallow this?

[bracketed text added]

At the time, they enlisted Barb Uehara, who was doing the CARE assessments for the family, who agreed to look for ways in the assessment process to limit assistance (Attachment A).

E. On or about February, 2007, When Ginny went to school seeming upset, and her teachers asked her why, she said “mommy hit me.” Moore decision, finding 4.6 (CP 93). Because Ginny had just turned 18, striking her as punishment would now be considered abuse.

F. The only evidence the state ever had was a statement -- from a childlike, barely 18 year old girl with significant developmental disabilities, including cognitive and emotional impairments and behaviors similar to an 8-9 year old (Ross, ALJ, Finding #5 (CP 79). Against this testimony there was the mother’s detailed explanation of what actually happened, which was neither abuse, nor assault, but incidental contact when she flicked her hand and instructed Ginny that sticking out her tongue was not acceptable behavior. These are all facts that all three judges the State forced Debra to repeatedly face – understood. (See, Moore, ALJ, finding #4 as fortified by Bd of Appeals) CP 152-153. It is important to note that no one, least of all Debra, ever asserted that Ginny lied, just that she mis-interpreted her

mother's contact.

- G. The Departments's motive was never to protect the adult children from an abuser, but only to allow the state to stop contracting with Debra to provide services. We know this because, a) APS found that she was not a danger to the children and allowed her to continue in the home providing for their needs during the pendency of the proceedings. Finding of Fact #15, Ross decision 1, CP 82. b) The State got a negative judicial finding of abuse, refiled under the heading of "substantiated abuse" *with no new evidence* (Ross, ALJ, Summary J Order, Conclusions 5.8, 5.9, CP 130) after the Judge Ross had found as fact that there was no abuse, were rebuffed again, CP 92 et seq., appealed, were rebuffed again CP 137 et seq. All of this on the single fact of an upset, cognitively impaired developmentally disabled girl's statement, when there was no danger to that girl as the State had already admitted. c) The State repeatedly revealed its motive in arguments by unsuccessfully claiming that it should be allowed to defeat the contract regardless of the tribunal's findings, on "breach of contract." Exhibit 3, Ross ALJ, Summary J Order, CP 131 - 132. Thereafter, the Department attempted to cut off support for the her

dependents on the theory that their care was being provided by Debra as a volunteer, since they refused to contract with her. CP 176 et seq. In other words, there was no reason, by fear of abuse or otherwise, that Debra was not an excellent qualified care giver, so long as they did not have to pay her.

H. In August of 2007, while these actions were pending, supervisors enlisted the assistance of Barb Uehara in their ongoing quest to find ways to limit the amount of assistance going to the Koshelnik Turner family by reviewing the assessment process. Emails. Appendix #1

I. During the course of the second hearing before Judge Moore, the State called as witness Defendant Uehara, the case worker who was doing the assessments of the children at the time in order to determine the level of services needed and that medicaid would pay for. Until that time relations between her and Debra had been cordial and professional. Declaration of Koshelnik at ¶ 14, CP 222. At the hearing Ms Uehara testified that she believed that Debra and Glen had too many persons in their care to properly care for them all. Declaration of Koshelnik, ¶ 28, p. 7. CP 225. Because that number had not changed in ten years without objection or

concern expressed by DSHS this testimony was curious.

J. After Debra was reinstated, Barb Uehara's relations with Debra changed from cordial and professional to abusive, as detailed in Debra's Declaration. ¶ 38, A-E. CP 227 - 229. Debra pleaded with the agency to send someone else but was refused. CP 229. And see CP 187-195. documenting the behavior contemporaneously. This is in line with what Barb had earlier promised her supervisors she would do in reviewing the assessment process with an eye toward saving the Department money. Attachment A.

K. The list of defendant Uehara's behaviors ranging from petty harassments, such as lecturing Debra on her choice of dentist (about which she later apologized, but only to the dentist), Debra's Declaration. ¶ 38 B, CP 227; to major misbehavior (Such as changing true answers to false ones on the CARE assessment and demanding that Debra lie on responses. Debra's Declaration. ¶ 38 A,C, CP 227, 228, was documented to Counsel for the Department and Defendant Linda Rolfe, the Director of the Division of Developmental Disabilities who oversaw Barb and her supervisors. CP 187, 191-193. Counsel responded that he was instructed that his client

declined representation on the matter and Ms Rolfe did not respond at all.

CP 189, 195. No action was taken.

- L. Among the manifestations of Ms Uehara's animus was that she filed a formal report of neglect against Debra for not having a non-skid surface on 3 ½ inch high wheelchair ramp in front of the house after hearing that Gini had tripped when running on the ramp. Ms Uehara filed this complaint even though Debra agreed to have the surface applied immediately and it was done within 24 hours, and, as Debra explained, Gini fell because she ran on the ramp – even though repeatedly instructed not to – which is by definition an uneven surface. She continued to fall on the ramp when she ran on it. Declaration of Debra Koshelnik ¶ 38(E) CP 228.
- M. This last incident is important because Mr. Juhnke discovered it in the file, CP 245, as another report of abuse and neglect against Debra, creating the inference that it at least cumulatively contributed to his pushing forward on an ill-advised interview with Evelyn that caused her death.
- N. Debra's youngest sister, Darlene, in Walla Walla, went to her mental health counselor also in Walla Walla and disclosed that she thought her mother's care in Olympia was abusive because she wasn't able to go out

as much as Darlene thought she should be able to, that she, Darlene, could do a better job, and that she didn't have good access to the home in Olympia, and that the home was a mess. The mental health counselor, Mr. Pritchard, CP 242, believing he was a mandatory reporter passed the disclosure on.

- O. The Department assigned Loren Juhnke to investigate, whose investigation in the circumstances could not help to cause Evelyn extreme distress, according to plaintiff's expert, whose qualifications to make that assessment are impeccable (Declaration of Allie Joiner, CP 249 et seq., Resume attached thereto CP 255). And the questioning did, in fact cause her death by a massive stroke which occurred within minutes of his ending an ill-conceived interview, the dangers of which he was clearly warned. Koshelnik Declaration pp. 11-12, CP 229-230.
- P. Here is what Mr. Juhnke was aware of when he went into the room with only a strange (to Evelyn) interpreter and so terrified her that she had a massive stroke within minutes of the conclusion of the interview:
 - 1. The actual person who made allegations of abuse was a sister of Debra Koshelnik in Walla Walla, Darlene, whose major complaint was that she

did not have good access to her mother -- raising obvious questions about the accuracy of the complaint. APS file, CP 236.

2. The complainant, through the reporter, reported that the house was a complete disaster and looked like a "hoarder house." In fact when Mr Juhnke arrived unannounced, he saw a house that was "neat and tidy and the home common areas were clean and free of clutter" raising further questions about the veracity of the complaint. CP 235.
3. Debra explained to Mr. Juhnke that Evelyn had just lost her husband of 60+ years and was both emotionally and physically in an extremely fragile condition. Declaration of Debra, CP 229-30.
4. Debra explained to Mr. Juhnke that his presence in itself would confuse and frighten her and questions about the quality of her care would be seen as a threat to remove Evelyn and would be extremely frightening and stressful and very dangerous to her. Declaration of Debra, CP 229-30.

IV ARGUMENT

A) Standard of review

This case reviews a summary judgment. All facts and inferences must be

considered in the light most favorable to the nonmoving party, in this case the Koshelniks. Only if there are no material disputed issues of fact and defendant is entitled to judgment as a matter of law can the trial court be affirmed. The review is on the record and is de novo. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

B) Judicial Facts are Facts

The state claimed in both of its dispositive motions that we have presented no facts to support our claims. This is false. As set forth above, we presented the most compelling and indisputable facts: the judicial findings of two administrative law judges after two full evidentiary hearings, which were either not appealed, or affirmed on appeal and never further challenged— all within the administrative process. These facts cannot now be denied. *Stuewe v. Dep't of Revenue*, 98 Wn. App. 947, 950, 991 P.2d 634 (2000) (administrative finding of fact not assigned error is verity on appeal).

In a similar situation the Washington Supreme Court pointed out that one of the few times the court does not give the ultimate deference to the fact finding of an Administrative Law Judge is where those findings are overturned by the

agency's appellate body. *Hardee v. DSHS*, 172 Wn.2d 1, 256 P.3d 339 (2011).

Here we have the Agency's own appellate body in lock step with the two Administrative Judges who found facts – and none of those findings were further appealed by any defendant here.

The judicial facts cited are facts; the actors named by those decisions, who are named herein as defendants, performed as recorded.

Those facts and inferences drawn from them, added to the emails from and between Dee Couch, Barb Uehara, and Kris Dobson (exhibit 14, Appendix ___); the subsequent behavior of Barb Uehara and the contemporaneous documentation of that behavior to Linda Rolfe, the director of the Division of Developmental Disabilities, put together, create a strong enough inference of an unlawful collusion to deny Debra the means by which to care for her family, in bad faith and therefore without due process of law.

C) We have pleaded and shown individual and State Liability

The Department argued and Judge Murphy decided that we had not sufficiently detailed the personally tortious roles played by the named defendants to survive summary judgment in a constitutional claim under *Will v. Michigan*

Department of State Police, et al. 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989).

We need to make two points here. This principle only applies to federal claims, and we made a number of plain tort claims under which the state has waived sovereign immunity. RCW 4.92.090.

Second, the only application of *Will* and similar cases is that the State cannot be sued *qua* state for Federal claims, and naming an official solely in her official capacity is tantamount to naming the state. *Will*, 491 U.S., at 71, 109 S.Ct., at 2311.

The Supreme Court in *Hafer v. Melo*, 502 U.S. 21, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991) pointed out that this does not mean officers acting within the scope of their official duties, but tortiously violate the rights of the Constitutional plaintiff have immunity. In response to such a reading of *Will*, the *Hafer* Court's announced its essential holding:

We reject this reading of *Will* and hold that state officials sued in their individual capacities are "persons" for purposes of § 1983.

Hafer v. Melo, 502 U.S. at 25.

Our claims are against the specific misbehavior of individual persons.

1) Barb Uehara,

Before the events of 2007 the caseworker for Debra who did assessments of her brother and one of her children was defendant Barb Uehara, who was always cordial and professional as all the caseworkers had been. She was familiar with the family and all the persons that Debra and Glen Cared for. Koshelnik decl #14, CP 222.

When she was called as a witness at hearing, Barb Uehara, gave an opinion that there were too many people in the house needing assistance for Glen and Debra to do this competently. This surprised Debra because she had never expressed any of this to me in the past, nor had any of the many caseworkers who worked with us over the many years we were taking care of Danny and the children. Koshelnik decl #28, CP 225.

Unbeknownst to Debra, at about this time, a Department Supervisor, Dee Couch, queried the staff of the Department complaining that the family was getting too much support and asked for suggestions whereby they could legally reduce that support. See Appendix A, and briefing quoting that materials at CP 333. In response to this query and following emails, Ms. Uehara agreed to use the assessment process to achieve this end. This is strictly contrary to the essential

nature of the that process in which honest answers to very specific questions are designed to achieve the appropriate result in support level. *See, e.g., Jenkins v. Department of Social & Health Services*, 160 Wn.2d 287, 157 P.3d 388 (2007)

Ms. Uehara took her role of skewing the assessment process to save the Department money seriously. CP 227 - 229. Ms Uehara's bizarre behavior was documented long before this action was filed, and Plaintiffs knew about her "assignment" from Kris Jorgenson Dobson and Dee Couch to help save the Department money using the assessment process.

It can also be inferred that Ms Uehara embarked on a campaign of abuse toward Debra to reinforce the strain that she noted the repeated legal process was having on her. Appendix A.

2) Linda Rolfe:

Ms Uehara's behaviors were documented in detail, by copies of letters Division Counsel, Mr. Bashford, CP 187, 191-193) sent to the director of the Division of Developmental Disabilities, Defendant Rolfe. She was the division head charged with overall management and control over the of personnel such as Ms.

Uehara and the assessment function she was tasked to carry out. Ms Rolfe took no action, and counsel to whom we wrote was instructed by his client not to intervene. Exhibit CP 195. Ms. Rolfe was clearly on notice of allegations that the Assessment process was being perverted in the case of someone whom the Department and her Division of it had repeatedly and unsuccessfully targeted for prosecution. Her failure to take action was either intentional misfeasance or studied ignorance. In either case it is culpable in this action.

3) Evelyn Cantrell

Ms. Cantrell was the Department's designated representative before two of the four administrative proceedings we have outlined. CP 92, CP 137; She re-prosecuted the "substantiated abuse" claim without any new evidence after ALJ Ross found no abuse at all after a full evidentiary hearing. CP 92. Her participation in all the major decision making was well documented in the judicial findings and conclusions, including her actual frivolous arguments on appeal. See Appeals Judge Conant's Finding CP164 and Cantrells argument at CP149.

4) Corrine Wasmundt

Ms Wasmundt was the lead investigator as documented in the judicial decisions. CP 92, 93, It was thus her decision to reclassify the interaction, with no new evidence, from suspected abuse to substantiated abuse. It also appears that she intentionally exaggerated the actual demonstrated interaction between Debra and Gini. Compare the judge's findings with respect to her testimony to that of Officer Dawson who was present at the same interview. compare Findings 4.12, and findings 4.13 (CP 94).

5) Susan Dreyfus

See Section ___ infra.

D) Due Process

1. Process Is Not Always Due Process.

The State Defendants have continuously defended this action on two bases. The false contention that our claims came down to a complaint that the Department did an investigation of Ginny's original complaint. The record shows that the initial investigation was completely supported by Debra, and she participated completely. See, e.g. Moore finding 4.13 (CP 94). Debra even commended the Department for its diligence. Finding 4.16 (CP 95).

The second major basis for the State defendants' defense is that the

process provided to Debra were “by the book;” i.e. according to the administrative appeal process as set out in codes and statutes, and were therefore no more than “due process.” But this was not “due” process at all; but intentionally and irrationally abusive process.

If, after the first findings exonerating Debra of any abuse -- and instead the ALJ noting that she was a paragon with no hint of abusive behavior over a lifetime of caring for multiple persons with disabilities – the Department had restored the status quo ante it would have fulfilled any possible duty it might have had under every statute under which it operates, we would have no case for bad faith or conspiracy or denial of constitutionally protected rights.

If after the first evidentiary hearing and conclusions, the Department had legally challenged any of Judge Ross’s findings or conclusions, assuming there were something in the record that gave them a handle on which to do so, we would be hard pressed to allege bad faith or any cause of action.

But they did not do that. Instead – with no new evidence at all – they simply changed their designation of Debra’s behavior from suspected to “substantiated” abuse, and made her start all over fighting to clear her name and be able to provide paid care to her special needs family.

From the first unappealed findings and conclusions Judge Ross (excerpted below), in the first decision after the first full evidentiary hearing, and thereafter it becomes increasingly clear that the Department never made a pretense that their intent was to protect any adult or child. The Department's sole intention was to find a bureaucratic means to get Debra's care for free, and that they were fully aware that she would be forced by circumstances to continue to take care of her children without pay.¹

[Findings]

15. There is no evidence that the Appellants' case workers believe that Ms. Koshelnik will be unable to appropriately meet their needs. Other than the incident with Ginny, the Department has not argued that there is any evidence that Ms. Koshelnik is unable to meet the Appellants' needs.

CP 82.

* * *

18. Ms. Koshelnik has continued to provide personal care to the Appellants although she is not being paid. The Appellants remain eligible for services. Although the Department has offered that the Appellants may use another provider, they have chosen not to do so. It would be disruptive to the household to bring in another person to provide care.

CP 83.

* * *

[Conclusions]

4. WAC 388-825-380 provides:

When can the department reject the client's choice of an individual respite care, attendant care or personal care provider?

The Department's representatives never fought one fight to prevent Debra from providing any care to her children or brother because they thought she was abusive. They fought repeatedly only to evade the obligation to pay her.

The department may reject a client's request to have a family member or other person serve as his or her individual respite care, attendant care or personal care provider if the case manager has a reasonable, good faith belief that the person will be unable to appropriately meet the client's needs. Examples of circumstances indicating an inability to meet the client's needs could include, without limitation:

* * *

- (2) A reported history of domestic Violence, no-contact orders, or criminal conduct (whether or not the conduct is disqualifying under RCW 43.43.830 and 43.43.842);

In this case, the Department argues that the Appellants should be denied their choice of provider under subsection (2), an alleged "reported history of domestic violence". CP 84.

5. The evidence does not support the Department's contention. First, the Department must show there is a "reasonable, good faith belief that the person will be unable to appropriately meet the client's needs". A reported history of domestic violence could be one reason for having a good faith belief that the provider would be unable to appropriately meet a client's needs. However, there would have to be at least some basis for believing that the provider might be inclined to subject the client to domestic violence. The single isolated event at issue in this case could not reasonably be considered a "history" of domestic violence, and certainly not a history that could cause a reasonable person to have a reasonable, good faith belief that Ms. Koshelnik is unable to appropriately meet the Appellants' needs. CP 85.

This fight to prevent paying her, continued even in the face of Judge Ross' initial unappealed decision that there was no abuse within the meaning of the statutes and regulations and Debra was a model care giver; Judge Moore's second finding that there was no "substantiated" abuse within the meaning of the statutes and regulations, and Debra was a model care giver. Conclusion 4.28, 4.29 CP 98; and Judge Ross' unappealed finding that they had refiled the substantiated abuse case without new evidence. Conclusion 5.9, CP 124. Judge Ross characterized other arguments the Department made to deny Debra payment for her work as "absurd." Conclusion 5.11 (CP 125). We also note that Judge Ross' second decision on summary judgment at Conclusion 5.17 (CP 127) points out that if the Department had actually had a "reasonable good faith belief" that Debra was in some way unable and unqualified to take care of her children, including for the fact that she was abusive to one or more of them, then they *could* withhold contracting ability with them. This finding assumes that they did not have such a "reasonable, good faith belief."

The Department even argued, falsely, that they were not paying Debra pending the investigation because they *were required* to stop such payment.

Judge Ross pointed out that that was false.² After all that, The Department went back to the hearing office requesting that they be allowed to reduce payments *to the family* because Debra was not being paid (because of their triply found illegitimate action), and therefore she was meeting care needs *as a volunteer*, and so they could reduce payments to the family members in need. Not until the review judge upheld Judge Moore's decision with only trivial modification (and specifically finding that Debra was a model care giver³), did the Department concede that her family was entitled to paid care by this mother.

The sequence of events as documented repeatedly by the administrative law

2

The Department argues that it had no discretion to terminate payment to Ms. Koshelnik in light of the on-going APS investigation. However, the Department has not cited any regulation supporting that argument. The regulations it has cited discussed above, do not support the Department's position that an on-going APS investigation could, in *itself*, be a basis for denying the client's choice of provider. Accordingly, I reject the argument. I am required to apply the regulations of the Department as the first source of law governing an issue. WAC 388-02-0220(1). July 1 decision, Judge Ross, Conclusion # 13 CP 88.

3

However, the evidence in the hearing record supports the findings that the Appellant has been a loving, caring, and knowledgeable provider for her Down Syndrome children. Further, she has taken an active role in preparing herself to meet the special needs of Gini who is now an adult, Gini's minor siblings, and Gini's adult uncle. Conclusion # 27, Conant (Board of Appeals). CP 172.

system is the essence of bad faith, which is the enemy of both “due” process, *Parkway Garage, Inc. v. City of Philadelphia*, 5 F.3d 685 (3d Cir.,1993) at 692 – as well as the immunity the State also claims. *Spencer v. King County*, 39 Wn.App. 201, 205, 692 P.2d 874 (1984) (Overruled in part on other grounds, *Frost v. City of Walla Walla*, 106 Wn.2d 669, 673, 724 P.2d 1017 (1986); and see *Janaszak v. State* , 173 Wn. App. 703, 297 P.3d 723 (2013).

2. Bad Faith Is the Enemy of “Due Process”

In order for “due process” to be a defense to the actions complained of, it must meet minimum procedural and substantive requirements. These two are paramount: 1) The action must not be arbitrary, capricious, or irrational – which is another way of saying it must be rationally related to a legitimate government end; and 2) The action must be taken in good faith, not motivated by bias or other improper motive:

Substantive due process protects citizens from arbitrary and irrational acts of government. *Rogin v. Bensalem Township*, 616 F.2d 680, 689 (3d Cir. 1980), cert. denied sub nom. *Mark-Garner Assocs., Inc. v. Bensalem Township*, 450 U.S. 1029, 68 L. Ed. 2d 223, 101 S. Ct. 1737 (1981). ***A violation of substantive due process rights is proven: (1) if the government's actions were not rationally related to a legitimate government interest; or (2) "if the government's actions in a particular case were in fact motivated by bias, bad faith or improper motive"*** *Midnight Sessions, Ltd. v. City of Phila.*, 945 F.2d 667, 683 (3d Cir. 1991), cert. denied, 118 L. Ed. 2d

389, 112 S. Ct. 1668 (1992).

Parkway Garage, Inc. v. City of Philadelphia, 5 F.3d 685 (3rd Cir. 1993) at 692 (*emphasis added*)

The State has provided us with no rational relationship between the denial of rights and any legitimate state end. The attempt, along with the purpose, to force Debra to provide services without compensation to the great disruption and likely destruction of the family (Deb declaration at ¶ 37), is the essence of a bad faith “improper motive.”

Washington has repeatedly endorsed the same fundamental due process principles as the *Parkway* court quoted above:

The decision not to award a degree is one uniquely within the expertise of the faculty most familiar with the student's abilities. Courts should not interfere ***unless the action is arbitrary and capricious or taken in bad faith.***

Enns v. Board of Regents of University of Washington, 32 Wn. App. 898, 900-901, 650 P.2d 1113 (1982)

Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures.

Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 218-19, 143 P.3d 571 (2006).

In discussing the availability of § 1983, we have said that "a land use

decision 'denies substantive due process only if it is invidious or irrational.'" *R/L Assocs., Inc. v. Seattle*, 113 Wn. 2d 402, 412, 780 P.2d 838 (1989) (quoting *Harding v. County of Door*, 870 F.2d 430, 431 (7th Cir. 1989)). Other courts have expressed the test differently, but conveyed essentially the same test. Relief is said to be available for § 1983 claims involving substantive due process only where there is a substantial infringement of state law prompted by animus directed at an individual or a group, or a "deliberate flouting of the law that trammels significant personal or property rights". *Silverman v. Barry*, 845 F.2d 1072, 1080 (D.C. Cir.), cert. denied, 488 U.S. 956 (1988). Arbitrary, irrational action on the part of regulators is sufficient to sustain a substantive due process claim under § 1983. *Coniston Corp. v. Hoffman Estates*, 844 F.2d 461, 467 (7th Cir. 1988); *Abbiss*, 712 F. Supp. at 1164.

Sintra Inc. v. City of Seattle, 119 Wn 2d 1, 23, 829 P.2d 765 (1992)

It is no longer a debatable, at least in this state, that when the state and those that act in its name abuse the established processes and procedures to deny public goods and relationships to which the Plaintiff is lawfully entitled -- *in the exact manner that the State did here* -- it violates the Constitutional proscriptions quoted above.

In *Lutheran Day Care v. Snohomish County*, 119 Wn. 2d 91, 829 P.2d 746 (1992), the plaintiff applied for a conditional use permit to build a "rest home" on its property. After denial of its first application by the hearing examiner, appellant submitted a second application correcting the alleged infirmities found in the first application. After denial of the second application by the hearing

examiner, affirmed by the Snohomish County Council, the Snohomish County Superior Court held the denial was erroneous as a matter of law. On appeal, Division One of the Court of Appeals affirmed. The third application that was then filed, was again denied, ostensibly on other grounds, after which the due process claim was filed. *Lutheran Day Care* 119 Wn.2d at 96-97.

Where the county repeatedly demanded that the plaintiff re-engage the process over and over again, each time on the same facts, and each time the county would deny the public benefit (of a conditional use permit) on a different justification, the superior court held -- and the supreme court affirmed -- that a constitutional violation had occurred. By the third denial of rights, after a judicial finding that previous justifications for denial of the permit were unsupportable in law, the court held that the hearing examiner and through him the county had acted in a manner "that constituted willful and unreasonable action and thus were arbitrary, capricious and unlawful." *Lutheran Day Care*, 119 Wn.2d at 97-98.

Our case is in many respects a more potent indictment of the defendants than *Lutheran Day Care* for a number of reasons:

1. The Agency acting through its authorized representative in the two pertinent of Administrative actions (CP 92 et seq., and CP 137 et seq.), Ms Cantrell, and its

lead investigator, Ms. Wasmundt, who controlled the investigation and made the finding of “substantiated abuse” after the Judge had already heard all the evidence they had, and found no abuse at all, was – “rebuked” is not too strong a term – by *its own* administrative judicial structure under which it receives every possible advantage and deference in its interpretation of its regulations and laws, RCW 34.05.461(5), not three but four times, before three different judges.

2. The agency never appealed the first adverse ruling or any of its findings of fact, including the facts that Debra had a “calling” to assist children and adults with disabilities to enjoy full, rich and rewarding lives and did so very well, and that no abuse had occurred. Instead of challenging these facts they simply repackaged their allegations from “suspected” abuse to “substantiated” abuse.

3. The arguments made by Ms Cantrell to the Board of Appeals judge when the State finally did appeal the denial of the State’s claim of “substantiated abuse” to the agency’s own board of appeals, bordered on absurd. For example, She actually argued that the documented developmental deficits that Gini suffered under, including significant cognitive and behavioral retardation, should not have been considered when evaluating the accuracy of her account of the facts because that would be discriminatory. (Appeals decision quoting Cantrell brief, CP149

and, Appeal Conclusion #13 CP 164)

4. Unlike *Lutheran Day Care*, the agency's motive here was both transparent and unlawful. It was not to protect children or vulnerable adults as is its actual mandate. They never made any move to do so. It was to end Ms. Koshelnik's contract with the agency to save money, by whatever means necessary, regardless of the actual facts and circumstances, and regardless of any damage this conduct would cause to Debra and to her family.

We know this last because the Department unsuccessfully argued to Judge Ross that they should be able to end their contract with Debra regardless of any negative finding on abuse on "breach of contract grounds," when the ALJ's found against them in the first instance; Ross ALJ, Summary J Order, 131-132, and then while waiting for the Board of Appeals decision the Department actually tried to implement its strategy of forcing Debra to "volunteer" her care rather than be paid for it. They cut Parker's paid care hours claiming his needs were met by Debra as a "volunteer." CP 176 et seq.

E) Privileges and Immunities

The other defense Defendants offer is investigatory and other immunities.

The law is equally clear that in nearly all instances where immunities apply in law for a state officer, there is an exception for bad faith.

Spencer first argues that under the proviso appearing at the end of the [involuntary commitment] statute, *immunity is negated by a showing that the individual defendants acted either with gross negligence or in bad faith*. We agree. The statute sets forth a general rule of immunity, conditioned on the mental health professional performing his duties "in good faith and without gross negligence." (Italics ours.) RCW 71.05.120. Since the immunity depends upon the absence of both gross negligence and bad faith, the immunity is lost upon a showing that either exists. [footnote omitted]

Spencer v. King County, 39 Wn.App. 201, 205, 692 P.2d 874 (1984):

Janaszak v. DSHS, 173 Wn. App. 703, 297 P.3d 723 (2013) in which defendants placed so much stock in the first summary judgement action, also makes clear that bad faith negates immunity:

... Janaszak asserts RCW 18.32.0357 does not immunize the Commission or its members because they did not act in good faith. He contends that the Commission's failure to restrict his dental license immediately upon receiving a complaint provides evidence of its bad faith. Again, we disagree.

"The standard definition of good faith is a state of mind indicating honesty and lawfulness of purpose." A plaintiff alleging that a defendant has lost qualified immunity by acting in bad faith fails to raise a genuine issue of material fact by showing only that the defendant acted negligently..."

Janaszak at 715.

In every case where bad faith was not shown, such as *Janaszak*, it is

because the plaintiff never provided facts that set forth any specific purpose or motive for that action that was improper. That is not the case here. The improper motive here is to deny Debra the ability to provide paid service to her special needs family regardless of the lack any misbehavior on her part thereby saving the department money by getting her services for free. That is specifically what the department tried to do. CP 176 et seq.

F) Defamation

A defamation plaintiff must prove the following elements: a defamatory and false statement, an unprivileged communication, fault, and damages. *Mark v. Seattle Times*, 96 Wn. 2d 473, 486, 635 P.2d 1081 (1981), cert. denied, 457 U.S. 1124 (1982). Defendants claim infirmity in these elements and further claim that its communication or publication was privileged and was solely within the agency and thus cannot constitute defamation under law.

The privileged and interagency defense are defeated by showing actual malice on the part of the defendants.

The privilege for intra agency communication among employees of the agency is only a qualified privilege. *Doe v. Gonzaga Univ.*, 143 Wn.2d 687, 702-03, 24 P.3d 390 (2001), rev'd on other grounds, 536 U.S. 273, 122 S. Ct.

2268,153 L. Ed. 2d 309 (2002). A qualified privilege can be abused if the communications are made with actual malice or with an absence of good faith. See, e.g., *Twelker v. Shannon & Wilson, Inc.*, 88 Wn.2d 473, 478-480, 564 P.2d 1131 (1977) *Corbally v. Kennewick Sch. Dist.*, 94 Wn. App. 736, 742, 973 P.2d 1074 (1999). Actual malice is shown when a statement is made 'with knowledge of its falsity or with reckless disregard for its truth or falsity.' *Herron v. King Broadcasting Co.*, 109 Wn.2d 514, 523, 746 P.2d 295 (1987) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964)). 'Reckless disregard' means a high degree of awareness of probable falsity or that the publisher of the statements entertained serious doubts as to the statement's truth. *Herron*, 109 Wn.2d at 523.

Placing in the public record an interagency communication as "substantiated" a finding that Debra had abused her vulnerable adult daughter after 1) an *unappealed* finding by an administrative tribunal that she had not, and 2) with no new evidence, with the malicious *intent* to damage her ability to ever be employed for compensation at her calling such that the agency could continue to receive her services for free, defeats any possible qualified privilege or immunity and establishes all of the elements.

And the damage is continuing. Although the Department has informed Debra that she has the right to fill out the background check information replying “no” to whether a substantiated abuse finding has been entered, any employer who finds out about the “substantiated finding” on its own can still refuse to hire her or fire her on that ground. That is precisely what happened in *Boring v. Alaska Airlines, Inc.*, 123 Wn.App.187, 97 P.3d 51 (2004).

As well, although it is unclear whether any agency that performs backgrounds checks has access to the false “finding,” the agency itself maintains the record and disseminates it freely within the agency. It shows up in the defendant Juhnke’s report (CP 245), and a jury would have the right to decide that it contributed to his “grossly negligent” rush to interview Evelyn resulting in her death. Similarly as this instance illustrates, the continued distribution of this malicious falsehood within the agency constitutes a continual threat to Debra.

G) Due Process and Equal Protection for Evelyn.

The Department has argued that Mr. Juhnke cannot be held liable for his grossly negligent acts in barging into the Koshelnik home, and cross-examining her about Debra, and literally scaring her to death, because negligent investigation is no longer a tort in Washington after *Janaszak, Supra*. Although we do not agree,

and we pointed out in briefing that neither the defendants in *Janaszak* nor in *M.W. v. Department of Social and Health Services*, 149 Wash.2d 589, 70 P.3d 954 (2003) caused the grossly negligent death of either Dr. Janazak or M.W. Junke's actions did, and his sole legitimate task under statute was to protect her. That is negligent investigation.

When the consequences of what our expert has called "gross negligence" is the death of the interviewee, there is no immunity against liability for the constitutional violation of her right to life, as we pointed out to Judge Wickham at hearing. RP. See, *Spencer v. King County*, *supra*, 39 Wn.App. 201, 205 (1984).

H) Conspiracy

The elements of civil conspiracy are as follows

(1) two or more people combined to accomplish an unlawful purpose or to accomplish an unlawful purpose by lawful means, and (2) the conspirators entered into an agreement to accomplish the conspiracy.

Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Group, Inc 114 Wn. App. 151, 160, 52 P.3d 30 (2002) (quoting *All-star Gas, Inc. v. Bechard*, 100 Wn. App. 732, 740, 998 P.2d 367 (2000)

The unlawful purpose here was to deny Debra the right to contract with

the Department to provide paid services to her family – and incidentally depriving her of the ability to earn a living at her calling outside the family – by wrongfully branding her an abuser in order to save the department money; and secondarily depriving her family members the right to have paid services provided by their chosen qualified provider as required by federal medicaid law. 42 U.S.C. § 1396a(a)(23); *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 785 (1980) (the freedom of choice law "gives recipients the right to choose among a range of qualified providers, without government interference.")

Conspiracies are generally shown by circumstantial evidence, not direct evidence. The State is not going to admit a conspiracy. The courts have long recognized that a conspiracy may be, and usually must be, proved by acts and circumstances sufficient to warrant an inference that the defendants have reached an agreement to act together for the wrongful purpose alleged. *Baun v. Lumber and Sawmill Workers Union*, 46 Wn. 2d 645, 656-657, 284 P.2d 275 (1955). The test of sufficiency of the evidence is that the facts and circumstances relied upon to establish the conspiracy must be inconsistent with a lawful or honest purpose and reasonably consistent only with the existence of the conspiracy. *Id.*

Here, the circumstantial and some direct evidence in the public record and

in the records produced in discovery is extraordinarily strong as documented above. Email exchange between Couch, Dobson and Uehara, (appendix 1) Repeated legal process having no relationship to protection of individuals and only aimed at finding ways to not pay Debra.

D) Negligent Training.

No one in the chain of command seemed to know that it is always dangerous practice to send an official investigator without ASL skill to interview an elderly deaf woman, especially if the questions could imply that such an interview might result in a change in her living situation. This ignorance led to Evelyn's death. This is an equal protection claim and a denial of life without due process, chargeable, under statute, to the Department head at the time, defendant Susan Dreyfus, who failed to use the resources of her own agency to assist in developing procedures for such interviews; and it is a discrimination claim under RCW 49.60, for which the state has waived sovereign immunity, and it is negligence on the part of the agency that led directly to the wrongful death of Evelyn, for which the state is has also waived sovereign immunity. RCW 4.92.090.

This is a Departmental tort; not necessarily negligence by the individual APS agent. As such the Director is the responsible person under law and we have

so pled it. Our expert, whose expertise is both unquestionable and unquestioned, has stated under oath that it is *always inappropriate* for a non-ASL-fluent (American Sign Language) investigator, even with an interpreter, to “drop in” on an elderly deaf woman who is the alleged victim of abuse (Declaration of Allie Joiner at ¶¶ 11-12, quoted *infra*). She gives explicit and cogent reasons for this conclusion based on her own life, her 50 year work experience and her training advocating for deaf persons, the last 15 years of which she have been specifically advocating for abused elderly deaf women. (Joiner Declaration, CP 246, et seq., and resume attached CP 252 et seq.). The court below may have failed to recognize the significance of the following in her declaration:

11. There are several points which every APS worker who may be called upon to investigate alleged abuse of older women with deafness should be aware, both because an interview by a stranger who presents himself as an official will likely get limited reliable information, and because such an interview will often cause great anxiety:
 - A) American Sign Language (ASL) is the primary language of most older American deaf persons, and English is a second language and the language for reading, with which they may not have great facility. ASL is not “signed English,” it is an entirely different language that is visual rather than verbal and has its own syntax and grammar. Those who do not speak (i.e. sign) ASL are frequently – especially among the elderly – seen as “foreigners,” who do not understand deaf culture and society. ASL is a conceptual language so more often it is relayed in concrete form because English and ASL cultures clash.

B) The fact of the foreignness of the non-deaf and especially the non-signing-non-deaf when combined with the authority and power represented by official state agents usually, in my experience, creates great anxiety among an older deaf population, especially an older female population. This is likely because this population has experience of being forced into unpleasant life placements and situations by well meaning hearing persons who do not understand their needs. The more official and imposing the official person seems, the more likely this negative reaction is likely to be.

C) The presence of an interpreter, no matter how skilled, while necessary for communication, will usually not mitigate the sense of anxiety described above. Indeed, the fact that the official needs an interpreter will often increase anxiety. Anxiety may increase when the interpreter is not following expressed ASL well. (It appears according to the declaration of Debra Koshelnik that her mother suffered from macular degeneration, which would certainly aggravate her anxiety level, especially if she were visually oriented all her life. This becomes frustrating when the only avenue of communication is through the eyes)

12. *As a result of these factors, an APS investigator who is not also fluent in ASL should never unexpectedly “drop in” on an elderly deaf woman and expect to be seen as anything other than a dangerous and threatening presence.*

Emphasis added. CP 248-249.

The State has offered no answer to Ms. Joiner. Indeed, since she is one of the founders of the DSHS office which could and should have been consulted (Joiner declaration at ¶¶ 2, 13; CP 247, 249) before such an ill fated interview

was performed, no answer is really possible.

Given the particular vulnerabilities of an entire class of adults, elderly deaf women, the very fact that Adult Protective Services, whose legislative mandate is the protection of vulnerable adults, has no training or protocols in place to prevent what happened here, is negligence. It also raises both due process and equal protection issues under the Fourteenth Amendment, which states:

...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Equal protection requires that persons in the same class must be treated alike and that reasonable grounds must exist for making a distinction between those within and those without the class. *Moran v. State*, 88 Wn. 2d 867, 874, 568 P.2d 758 (1977). The fact that elderly vulnerable *deaf women*, as a class, are by DSHS negligence, solely as a result of their type of vulnerability subject to “dangerous and threatening” interviews by APS agents – and in this case deprived of life – and other vulnerable adults are not, is a plain violation of both due process and equal protection guarantees.

It is useful to briefly review the requirements for a 42 USC §1983 cause of action. The statute reads as follows:

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

We have identified in the complaint the *person*, the director of DSHS, at the time, who failed in her overall responsibility to ensure proper training and supervise APS investigators. Complaint ¶ 1.5⁴. And see RCW 43.20A.050. We alleged the lack of proper training and supervision. ¶¶ 3.2.20 - 3.2.23,⁵ and

⁴ 1.5 SUSAN N. DREYFUS is the Secretary of the DEPARTMENT OF SOCIAL AND HEALTH SERVICES, and is responsible for ensuring the proper training and supervision of its employees and staff.

⁵ 3.2.20 To this 85- year-old frail deaf woman they sent a poorly trained but imposing six foot tall man, Loren Juhnke, whose presence and the nature of his questioning literally terrified Mrs. Koshelnik to death.

3.2.21 Supervisors or APS agents with basic knowledge of, or adequate training concerning elder care of frail individuals with lifelong deafness would know that any threat, whether real or imagined, to remove a trusted interpreter and support person, would cause tremendous and possibly life threatening anxiety to that individual.

3.2.22 Supervisors or APS agents with basic knowledge of, or adequate training concerning elder care would know that sending a large male enforcement agent to question a frail 85 year old woman with lifelong deafness would cause tremendous and possibly life threatening anxiety to that individual.

3.2.23 Supervisors or APS agents with basic knowledge of, or adequate training concerning elder care would know that questioning a frail 85 year old woman with lifelong deafness without her trusted interpreter and support person present would cause tremendous and possibly life threatening anxiety to that individual.

alleged that these failings caused the death of Evelyn. Paragraph ¶ 3.2.8 We alleged that disability discrimination existed which is an equal protection claim. Paragraph ¶ 4.6.

J Holding the State Liable for Lack of Training and Supervision Furthers the Public Interest and Does Not Compromise Any Legitimate State Purpose

Nothing here prejudices the reasons why the actual investigators are provided with some immunity for negligent acts within the course of a legitimate investigation.

This claim is aimed squarely at the fault of the Department and its Secretary, and the state for its failure to train its employees in the special needs and vulnerabilities of a discrete population of vulnerable adults that they will in the course of their duties be called upon to serve. Failure to hold the state accountable simply perpetuates the danger with no countervailing social value served.

Imposing liability as an incentive to address such systemic negligence is what the tort law is designed to do. That is the explicit message of *Helling v. Carey*, 83 Wn. 2d 514, 519 P.2d 981 (1974), in which the Washington Supreme Court found that it was negligent to not offer a safe, non- invasive simple

glaucoma “puff” test to ophthalmic patients under forty, even though it was the general professional standard not to do so. And see, *The T.J. Hooper* 60 F.2d 737, at 740 (2d Cir. 1932) wherein Judge Learned Hand famously declared:

“Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. Courts must in the end say what is required. There are precautions so imperative that even their universal disregard will not excuse their omission.”

K) **Causation:**

The court, in its oral ruling that evidence of causation was lacking, failed to note the Declaration of Debra Koshelnik (exhibit 11 at ¶44), in which causation is quite clear.

44. Within minutes of their [APS agent Juhnke and his interpreter] departure, when I went to my mother she became very agitated. She repeated to me several times, “I’m staying! This is my home! this is my home!” and “I love you! I love my family! I’m staying right here!” as forcefully as she could. I tried to calm her down, but she was just becoming more agitated, Suddenly she slumped over and wet herself, and started moving her hands randomly with no actual meaning, and after a few moments I realized she was having a stroke and called 911. By the time we got to the emergency room she was unconscious. They confirmed in the emergency room that it was a stroke, and it had already done a lot of damage to her. Dr. Howard showed me the brain scans they had done which showed that half of her brain was flooded with blood from the hemorrhage.

At the stage of summary judgment, when the court must consider all of the

facts set forth in declarations *and the reasonable inferences from them* in the light most favorable to the Estate as the nonmoving party (*Bishop v. Miche*, 137 Wn.2d 518, 523, 973 P.2d 465 (1999)), this statement is straight down the center of prima facie causation.

We are aware of no or case that states that, at summary judgment, expert testimony is always required to establish causation. Obviously if we have a case where a witness sees the victim being shot in the head and falling down we don't need a doctor to testify that a bullet to the head caused death at summary judgment. Such a standard would be ludicrous. Given Ms. Koshelnik's sworn statement quoted above, this is an analogous situation.

In cases such as *Young v. Key Pharmaceuticals Inc.*, 112 Wn. 2d 216, 770 P.2d 182 (1989), which defendants have cited, where the issue is medical malpractice and standard of care, obviously no prima facie case of causation can be established without expert medical evidence.

Indeed, we have so far found no cases *other than* medical malpractice that required expert medical evidence of causation at summary judgment. Quite the contrary, the standard at summary judgment – even in malpractice cases – is whether the layperson describing objective observable signs and symptoms that

are describable without medical training can state facts, the reasonable inferences from which would constitute causation. *Harris v. Groth*, 99 Wn. 2d 438, 449, 663 P.2d 113 (1983). That precisely fits the situation here.

The knowledge that stroke, especially hemorrhagic stroke as in this case, is caused by extreme fear, panic, anger, or other extreme emotion is so integrated into our common culture and has been for so many decades that to deny a causal link would be error.

Indeed, over a century ago, Sir Arthur Conan Doyle, a physician, wrote two of his famous “Sherlock Holmes” mysteries [*The Gloria Scott* and *The Adventure of the Crooked Man*] wherein the victim succumbed to “apoplexy” as hemorrhagic stroke was then more commonly known, caused by extreme emotion. Dr. Doyle did not find it necessary to explain the causal link between the two; he understood that his 19th century readers would already know.

But the issue is put to rest with finality by our language where the term “apoplectic,” which literally means “characteristic of or leading to ‘apoplexy,’” has acquired the secondary definition of “greatly excited or angered.”⁶

⁶ <http://unabridged.merriamwebster.com/dictionary/apoplectic> :

Apoplectic

1: of, relating to, or causing stroke

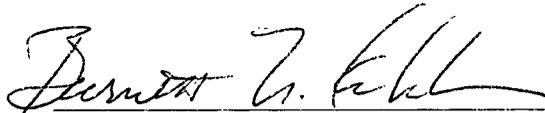
2: affected with, inclined to, or showing symptoms of stroke

V CONCLUSION

Appellants deserve their day in court. The State and its identified actors have tried their best to minimize costs by going after a family's integrity and destroying the life's work of a paragon of as care giver for persons with disabilities. We do not guess at this: The administrative record is clear and the facts and inferences as found by three judges and contained in the email record leave one with no other conclusion. Indeed, One thing the state has never done in this entire record is provide us with any legitimate lawful explanation of its agents' behavior.

September 8, 2015

KALIKOW LAW OFFICE



Barnett N. Kalikow, WSBA #16907
Attorney for Appellants

3: of a kind to cause or apparently cause stroke <an apoplectic rage>; also : greatly excited or angered <was apoplectic over the news>

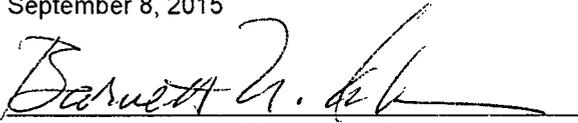
Examples

1. She was positively apoplectic with anger when she realized she had been cheated.
2. The coach was so apoplectic when the player missed the free throw that he threw his clipboard onto the court
3. Giuliani was apoplectic when the gangster fought off murder and racketeering charges and sauntered out of court in March 1987 after a sensational acquittal to bask in the TV lights. —Gail Sheehy, Vanity Fair, June 2000

Barnett N. Kalikow hereby declares under penalty of perjury according to the laws of the State of Washington that he is of legal age and competence and that on September 8, 2015 he placed in the U.S. mail, Postage prepaid, the Memorandum to which this declaration is affixed to:

Edward S, Winskill AAG
Office of the Attorney General
7141 Cleanwater Drive S.W.
Tumwater, Washington 98501

September 8, 2015



Barnett N. Kalikow, WSBA #16907

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