

IN THE SUPREME COURT FOR THE STATE OF ALASKA

MARY HILL dba WILD ROSE GARDENS )  
ASSISTED LIVING HOME, )

Appellant, )

vs. )

LINDA GIANI, STATE OF ALASKA, )  
DEPARTMENT OF HEALTH AND SOCIAL )  
SERVICES, and STACI COLLIER, )

Appellees. )

Supreme Court No. S-13693  
Trial Court No. 3PA-07-1658CI

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LINDA GIANI, )

Cross-Appellant, )

vs. )

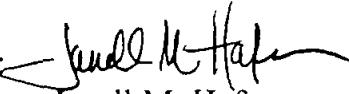
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FOR THE STATE OF ALASKA, THIRD JUDICIAL DISTRICT  
VANESSA H. WHITE, SUPERIOR COURT JUDGE

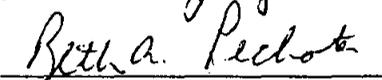
BRIEF OF APPELLEES STACI COLLIER AND STATE OF ALASKA

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FILED in the Supreme Court on  
the 20 day of July, 2010.

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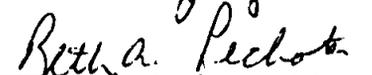
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### Sec. 09.50.250. Actionable claims against the state.

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

(1) is an action for tort, and is based upon an act or omission of an employee of the state, exercising due care, in the execution of a statute or regulation, whether or not the statute or regulation is valid; or is an action for tort, and based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion involved is abused;

(2) is for damages caused by the imposition or establishment of, or the failure to impose or establish, a quarantine or isolation, or by other actions, by the state or its agents, officers, or employees under AS 18.15.355 - 18.15.395, except for damages caused by negligent medical treatment provided under AS 18.15.355 - 18.15.395 by a state employee, or except that, if a state employee quarantines or isolates a person with gross negligence or in intentional violation of AS 18.15.385, the state shall pay to the person who was quarantined or isolated a penalty of \$500 for each day of the improper quarantine;

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

(4) arises out of the use of an ignition interlock device certified under AS 33.05.020 (c); or

(5) arises out of injury, illness, or death of a seaman that occurs or manifests itself during or in the course of, or arises out of, employment with the state; AS 23.30 provides the exclusive remedy for such a claim, and no action may be brought against the state, its vessels, or its employees under the Jones Act (46 U.S.C. 30104 - 30105), in admiralty, or under the general maritime law.

**Sec. 22.05.010. Jurisdiction.**

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

(b) Appeal to the supreme court is a matter of right only in those actions and proceedings from which there is no right of appeal to the court of appeals under AS 22.07.020 or to the superior court under AS 22.10.020 or AS 22.15.240.

(c) A decision of the superior court on an appeal from an administrative agency decision may be appealed to the supreme court as a matter of right.

(d) The supreme court may in its discretion review a final decision of the court of appeals on application of a party under AS 22.07.030. The supreme court may in its discretion review a final decision of the superior court on an appeal of a civil case commenced in the district court. In this subsection, "final decision" means a decision or order, other than a dismissal by consent of all parties, that closes a matter in the court of appeals or the superior court, as applicable.

(e) The supreme court may issue injunctions, writs, and all other process necessary to the complete exercise of its jurisdiction.

**Chapter 47.32. CENTRALIZED LICENSING AND RELATED ADMINISTRATIVE PROCEDURES**

**Sec. 47.32.010. Purpose and applicability.**

(a) The purpose of this chapter is to establish centralized licensing and related administrative procedures for the delivery of services in this state by the entities listed in (b) of this section. These procedures are intended to promote safe and appropriate services by setting standards for licensure that will reduce predictable risk; improve quality of care; foster individual and patient rights; and otherwise advance public health, safety, and welfare.

(b) This chapter and regulations adopted under this chapter apply to the following entities:

- (1) ambulatory surgical centers;
- (2) assisted living homes;
- (3) child care facilities;

- (4) child placement agencies;
- (5) foster homes;
- (6) free-standing birth centers;
- (7) home health agencies;
- (8) hospices, or agencies providing hospice services or operating hospice programs;
- (9) hospitals;
- (10) intermediate care facilities for the mentally retarded;
- (11) maternity homes;
- (12) nursing facilities;
- (13) residential child care facilities;
- (14) residential psychiatric treatment centers;
- (15) rural health clinics;
- (16) runaway shelters.

(c) The provisions of AS 47.05.300 - 47.05.390, regarding criminal history, criminal history checks, criminal history use standards, and a centralized registry, apply to entities listed in (b) of this section, as provided in AS 47.05.300 .

**Sec. 47.32.020. Requirement to obtain a license.**

(a) An entity may not operate a facility described in AS 47.32.010(b) without first obtaining a license under this chapter unless the entity is exempt under regulations adopted under AS 47.32.030.

(b) If an entity encompasses more than one type of activity listed in AS 47.32.010 (b), the entity shall apply for and receive a separate license under this chapter before operating that type of activity unless exempt under regulations adopted under AS 47.32.030 .

**Sec. 47.32.030. Powers of the department; delegation to municipality.**

(a) The department may

(1) administer and enforce the provisions of this chapter;

(2) coordinate and develop policies, programs, and planning related to licensure and operation of entities listed in AS 47.32.010 (b) as defined by regulation;

(3) adopt regulations necessary to carry out the purposes of this chapter, including regulations that

(A) establish fees for licensing of each type of entity listed in AS 47.32.010(b);

(B) impose requirements for licensure, including standards for license renewal, that are in addition to the requirements of this chapter or of any other applicable state or federal statute or regulation;

(C) impose requirements and standards on licensed entities that are in addition to those imposed by this chapter or by any other applicable state or federal statute or regulation, including

(i) requirements and standards necessary for an entity or the state to receive money from the department from any source, including federal money;

(ii) record-keeping requirements;

(iii) reporting requirements; and

(iv) requirements and standards regarding health, safety, and sanitation;

(D) provide for waivers, variances, and exemptions from the requirements of this chapter, including the requirement to obtain a license, if the department finds it necessary for the efficient administration of this chapter; and

(E) establish requirements for the operation of entities licensed under this chapter;

(4) investigate

(A) entities described in AS 47.32.010 (b);

(B) applicants for licensure, including individuals named in an application; and

(C) other persons that the department has reason to believe are operating an entity required to be licensed under this chapter, or are residing or working in an entity for which licensure has been sought under this chapter; this subparagraph does not apply to persons receiving services from an entity for which licensure has been sought under this chapter;

(5) inspect and monitor licensed entities for compliance with this chapter, regulations adopted under this chapter, and any other applicable statutes or regulations;

(6) enter into contracts and agreements necessary to carry out the functions, powers, and duties of the department under this chapter;

(7) enter into agreements with private entities, municipalities, and individuals to investigate and make recommendations to the department regarding the licensure and monitoring of entities under this chapter;

(8) require an individual who is or will be operating an entity to complete training related to the operation of the entity;

(9) waive the application requirements for an entity seeking licensure if the entity submits documentation verifying that it

(A) has a license issued by an organization or other agency that has licensing authority under state or federal law if the standards for that licensure are approved by the department under this chapter or regulations adopted under this chapter;

(B) has accreditation from a nationally recognized organization if the standards for that accreditation are equal to or more stringent than the standards for licensure under this chapter or regulations adopted under this chapter; or

(C) is an entity that federal law does not require to be licensed.

(b) The department shall delegate the department's authority to regulate child care facilities to a municipality that has adopted an ordinance providing for child care licensing under home rule powers under AS 29.10.010 or as authorized under AS 29.35.200 - 29.35.210. The department shall make the delegation described in this subsection within 90 days after receiving a written request from the municipality to delegate the authority. A municipality receiving a delegation under this subsection may adopt additional requirements for child care facilities operating within the boundaries of the municipality if the requirements meet or exceed the requirements under state law.

(c) The issuance of a license by the department does not obligate the department to place or maintain an individual in an entity or through an entity, or to provide financial support to an entity.

**Sec. 47.32.040. Application for license.**

A person shall apply to the department for a license under this chapter. The application must be made to the department on a form provided by the department or in a format approved by the department, and must be accompanied by

- (1) any fee established by regulation; and
- (2) documents and information required by regulation.

**Sec. 47.32.050. Provisional license; biennial license.**

(a) The department may issue a provisional license to an entity for which application is made under AS 47.32.040 if, after inspection and investigation, the department determines that the application and the entity meet the requirements of this chapter, regulations adopted under this chapter, and any other applicable statutes or regulations. A provisional license is valid for a period not to exceed one year, except that the department may extend a provisional license for one additional period not to exceed one year.

(b) Before expiration of a provisional license issued under (a) of this section, the department shall inspect and investigate the entity to determine whether the entity is operating in compliance with this chapter, regulations adopted under this chapter, and any other applicable statutes or regulations. After inspection and investigation under this subsection and before expiration of a provisional license, the department shall issue a biennial license for the entity if the department finds that

- (1) the entity meets the requirements for biennial licensure established in this chapter, regulations adopted under this chapter, and other applicable statutes and regulations;

(2) a ground for nonrenewal of a license does not exist; and

(3) any applicable fee has been paid.

(c) The department may place one or more conditions on a provisional or biennial license issued under this section in order to further the purposes of this chapter.

**Sec. 47.32.060. License renewal.**

(a) At least 90 days before expiration of a biennial license, a licensed entity that intends to remain licensed shall submit an application for renewal of the license on a form provided by the department or in a format approved by the department, accompanied by

(1) all documents and information identified in regulation as being required for renewal of the license; and

(2) any fee established by regulation.

(b) Before expiration of a biennial license, the department or its representative may inspect an entity that is the subject of a renewal application to determine whether the entity is operating in compliance with this chapter, regulations adopted under this chapter, and other applicable statutes or regulations. After any inspection and investigation under this subsection and before expiration of the biennial license, the department shall renew a biennial license if the department finds that

(1) the licensed entity meets the requirements for renewal;

(2) a ground for nonrenewal of a license does not exist; and

(3) any applicable fee has been paid.

(c) If an application for renewal of a license is submitted but the department is unable to complete its review of the application before the expiration of the biennial license, the license is automatically extended for six months or until the department completes its review and either approves or denies the application, whichever occurs earlier.

(d) The department may place one or more conditions on a renewed license issued under this section to further the purposes of this section.

(e) The department shall adopt regulations establishing the grounds for nonrenewal of a license for purposes of AS 47.32.050 and this section.

**Sec. 47.32.070. Notice of denial or conditions; appeal.**

(a) If the department denies an application for or places conditions on a provisional or biennial license or license renewal, the department shall provide the applicant or entity with a notice of the action by certified mail. The notice must contain a written statement of the reason for the action and information about requesting a hearing under (b) of this section.

(b) An applicant or entity that receives a notice of action under (a) of this section may appeal the department's decision by requesting a hearing within 15 days after receipt of the notice. The appeal must be on a form provided by the department or in a format approved by the department.

**Sec. 47.32.080. Posting; license not transferable.**

(a) A license issued under this chapter shall be posted in a conspicuous place on the licensed premises. Any notice of a variance issued by the department shall be posted near the license.

(b) A license issued under this chapter is not transferable unless authorized by the department.

**Sec. 47.32.090. Complaints; investigation; retaliation.**

(a) A person who believes that an entity has violated an applicable statute or regulation or a condition of a license issued under this chapter may file a verbal or written complaint with the department.

(b) The department may investigate a complaint filed under this section. The department may decline to investigate a complaint if the department reasonably concludes and documents that the complaint is without merit based on information available to the department at the time of the complaint. The department may consolidate complaints if the department concludes that a single investigation would further the efficient administration of this chapter.

(c) A licensed entity may not take retaliatory action against a person who files a complaint. Except as provided in AS 47.05.350 and AS 47.32.160, a complainant against whom a retaliatory action has been taken may recover treble damages in a civil action upon a showing that the action was taken in retaliation for the filing of a complaint.

**Sec. 47.32.100. Cooperation with investigation.**

An entity shall cooperate with an investigation initiated by the department. An investigated entity shall

- (1) permit representatives of the department to inspect the entity; review records, including files of individuals who received services from the entity; interview staff; and interview individuals receiving services from the entity; and
- (2) upon request, provide the department with information and documentation regarding compliance with applicable statutes and regulations.

**Sec. 47.32.110. Right of access and inspection.**

(a) A designated agent or employee of the department shall have right of access to an entity

- (1) to determine whether an application for licensure or renewal is appropriate;
- (2) to conduct a complaint investigation;
- (3) to conduct a standard inspection;
- (4) to inspect documents, including personnel records, accounts, the building, or the premises;
- (5) to interview staff or residents; or
- (6) if the department has reasonable cause to believe that the entity is operating in violation of this chapter or the regulations adopted under this chapter.

(b) If an entity denies access, the department may petition the court for an order permitting access, or the department may seek to revoke the entity's license under AS 47.32.140 .

(c) Upon petition of the department and after a hearing held upon reasonable notice to the entity, the court shall issue an order to an officer or employee of the department authorizing the officer or employee to enter for any of the purposes described in (a) of this section.

**Sec. 47.32.120. Report.**

(a) Within 10 working days after completing an investigation or inspection under AS 47.32.090 - 47.32.110, the department shall prepare a report of the results of the investigation or inspection and mail a copy of the report to the entity. The report shall include a description of

(1) any violation, including a citation to each statute or regulation that has been violated; and

(2) any enforcement action the department intends to take under AS 47.32.130 or 47.32.140.

(b) An entity that receives a copy of a report under this section may submit a written response to the report to the department. The department may require an entity to submit a response to a report received under this section.

(c) Within 14 days after the entity receives a copy of the report under this section, upon request of the complainant, the department shall provide a copy of the report to the complainant.

**Sec. 47.32.130. Enforcement action: immediate revocation or suspension.**

(a) If the department's report of investigation or inspection under AS 47.32.120 concludes that the department has reasonable cause to believe that a violation of an applicable statute or regulation has occurred that presents an immediate danger to the health, safety, or welfare of an individual receiving services from the entity, the department, without an administrative hearing and without providing an opportunity to cure or correct the violation, may immediately revoke or suspend the entity's license or, if the entity is not licensed under this chapter, may revoke the entity's ability to become licensed under this chapter or to provide services as an entity exempted under this chapter. A suspension or revocation under this subsection takes effect immediately upon initial notice to the entity from the department, is in addition to any enforcement action under AS 47.32.140, and continues until a final determination under (c) of this section or AS 47.32.150 .

(b) Notice under this section shall be provided as follows:

(1) the department shall provide initial notice to the entity at the time the department determines that an immediate suspension or revocation is required; initial notice may be oral, except that, if an entity representative is not present at the entity, the department shall post written notice on the front door of the entity; the initial notice must provide information regarding the entity's appeal rights;

(2) the department shall provide formal written notice to the entity within 14 working days after the immediate revocation or suspension decision; formal written notice must include

(A) a copy of the department's report under AS 47.32.120 , a statement of the entity's right to submit a written response to the report, and any department requirement that the entity submit a written response to the report;

(B) a description of any enforcement action the department intends to take under AS 47.32.140 (d) or (f); and

(C) information regarding the entity's appeal rights.

(c) An entity to which a notice has been provided under this section may appeal the department's decision to impose the enforcement action, including an enforcement action the department intends to take under AS 47.32.140 (d) or (f), by filing a written request for a hearing, on a form provided by the department, within 15 days after receipt of the notice. If a hearing is not timely requested under this subsection, the department's notice constitutes a final administrative order for which the department may seek the court's assistance in enforcing.

**Sec. 47.32.140. Enforcement actions.**

(a) If the department's report of investigation or inspection under AS 47.32.120 concludes that the department has reasonable cause to believe that a violation of an applicable statute or regulation has occurred, the department shall provide notice to the entity of the violation and an opportunity to cure the violation within a reasonable time specified by the department. The notice must include a copy of the department's report under AS 47.32.120 , a statement that the entity may submit a written response to the report, any department requirement that the entity submit a written response to the report, a description of any enforcement action the department intends to take under (d) or (f) of this section, and information regarding the entity's appeal rights.

(b) An entity receiving a notice under (a) of this section, or a notice under AS 47.32.130 (b)(2) that contains the information specified in AS 47.32.130 (b)(2)(B), shall submit a plan of correction to the department for approval. Once it has cured its violations, the entity shall submit to the department an allegation of compliance. Upon receipt of the allegation of compliance, the department may conduct a follow-up investigation or inspection to determine compliance. The department may take one or more enforcement actions under (d) and (f) of this section regardless of whether the entity achieves compliance under this subsection.

(c) If the department believes that an entity has not voluntarily corrected the violation or entered into a plan of correction with the approval of the department, the department may require that the entity participate in a plan of correction under regulations of the department. Once the entity has cured its violations, it shall submit to the department an allegation of compliance. Upon receipt of the allegation of compliance, the department may conduct a follow-up investigation or inspection to determine compliance. The department may take one or more enforcement actions under (d) and (f) of this section regardless of whether the entity achieves compliance under this subsection.

(d) The department may take one or more of the following enforcement actions under this section:

(1) delivery of a warning notice to the licensed entity and to any additional person who was the subject of the investigation or inspection;

(2) modification of the term or scope of the entity's existing license, including changing a biennial license to a provisional license or adding a condition to the license;

(3) suspension of the entity's operations for a period of time set by the department;

(4) suspension of or a ban on the entity's provision of services to individuals not already receiving services from the entity for a period of time set by the department;

(5) nonrenewal of the entity's license;

(6) revocation of the entity's license or, if the entity is not licensed under this chapter, revocation of the entity's ability to become licensed under this chapter;

(7) issuance of an order requiring closure, immediate or otherwise, of the entity regardless of whether the entity is licensed or unlicensed;

(8) denial of payments under AS 47.07 for the entity's provision of services to an individual not already receiving services from the entity;

(9) assumption of either temporary or permanent management of the entity or pursuit of a court-ordered receiver for the entity;

(10) reduction of the number of individuals receiving services from the entity under the license;

(11) imposition of a penalty authorized under law;

(12) inclusion in the registry established under AS 47.05.330 ;

(13) requirement that the entity prepare and submit a plan of correction.

(e) The department may not take action under (d)(9) of this section unless the commissioner has reasonable cause to believe that continued management by the entity while the entity is attempting to cure a violation would be injurious to the health, safety, or welfare of an individual who is receiving a service from the entity.

(f) In addition to any other enforcement actions the department may take under this section, the department may assess a civil fine against an entity for a violation of an applicable statute or regulation, taking into account the type and size of the entity and the type and severity of the violation. A fine assessed under this subsection may not exceed \$2,500 a day for each day of violation for a continuing violation or \$25,000 for a single violation.

(g) An entity to which a notice has been provided under this section regarding an enforcement action under (d) or (f) of this section may appeal the department's decision to impose the enforcement action by filing a written request for a hearing, on a form provided by the department, within 15 days after receipt of the notice of the enforcement action.

(h) An enforcement action under (d) or (f) of this section may not be imposed until

(1) the time period for requesting a hearing under AS 47.32.130 (c) or under (g) of this section, as applicable, has passed without a hearing being requested; or

(2) a final agency decision has been issued following a hearing requested under AS 47.32.130 (c) or under (g) of this section, as applicable.

(i) If a hearing is not timely requested under AS 47.32.130 (c) or under (g) of this section, as applicable, the department's notice regarding an enforcement action under (d) or (f) of this section constitutes a final administrative order. The department may seek the court's assistance in enforcing the final administrative order.

(j) An entity against which an enforcement action under (d) or (f) of this section has been taken may not apply for a license or license renewal until after the time period

set by the department in its final administrative order under AS 47.32.130 (c), this section, or AS 47.32.150 , as applicable. If a time period has not been set, a final administrative order against the entity has the effect of a permanent revocation, and the entity may not apply for a license or license renewal. If the ownership, control, or management of an entity changes, the department may allow the entity to seek licensure if the entity submits documents showing the change.

(k) Assessment of a civil fine under this section does not preclude imposition of a criminal penalty under AS 47.32.170 .

#### **Sec. 47.32.150. Hearings.**

(a) Upon receipt of a timely request for a hearing by an entity regarding an enforcement action under AS 47.32.130 (a) or 47.32.140(d)(3), (5), (6), (7), or (9), the department shall request the chief administrative law judge appointed under AS 44.64.020 to appoint an administrative law judge employed or retained by the office of administrative hearings to preside over a hearing conducted under this section. AS 44.62.330 - 44.62.630 and AS 44.64.060 apply to the hearing.

(b) Upon receipt of a timely request for a hearing by an entity regarding an enforcement action under AS 47.32.070 or 47.32.140(d)(1), (2), (4), (8), (10), (11), (12), or (13), the department shall conduct a hearing in front of an officer appointed by the commissioner. A hearing under this subsection may be conducted on the record, in an informal manner, and may not be conducted under AS 44.62 or AS 44.64. The appointed hearing officer may be a state employee.

(c) The decision following a hearing conducted under (a) or (b) of this section constitutes a final agency administrative order.

(d) A hearing conducted under this section shall take place within 120 days after the department's receipt of the request for hearing. A hearing may be held on an expedited basis upon a showing of good cause. An expedited hearing shall be held within 60 days after the department's receipt of the request for a hearing.

#### **Sec. 47.32.160. Immunity.**

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

(b) A volunteer who works for a hospice program licensed under this chapter is not liable for damages for personal injury, wrongful death, or property damage for an act

or omission committed in the course of hospice-related duties unless the act or omission constitutes gross negligence, recklessness, or intentional misconduct.

**Sec. 47.32.170. Criminal penalty.**

A person who intentionally or with criminal negligence violates a provision of this chapter or a regulation adopted under this chapter related to the health and safety of persons served by an entity required to comply with this chapter is guilty of a class B misdemeanor.

**Sec. 47.32.180. Confidentiality; release of certain information.**

(a) Except as otherwise provided by law, the following are confidential and may not be disclosed to the public without a court order: complaints; investigations; inspections; records related to a complaint, investigation, or inspection; and the identity of a complainant and of individuals receiving services from an entity.

(b) With the exception of information that identifies a complainant or a recipient of services from an entity, a copy of the department's report of investigation or inspection under AS 47.32.120 , an entity's written response to the report, and information regarding any department imposition of an enforcement action under AS 47.32.130 or 47.32.140 are public records under AS 40.25. The department shall make this information available to the public for inspection and copying within timeframes specified in AS 40.25 or regulations adopted under AS 40.25 after the

(1) entity receives its copy of the report of investigation under AS 47.32.120, if the department has determined that an enforcement action under AS 47.32.130 or 47.32.140 will not be taken regarding the entity;

(2) department's notice of enforcement action under AS 47.32.130 or 47.32.140 becomes a final administrative order without a hearing under AS 47.32.130 (c) or 47.32.140(i); or

(3) issuance of a decision following a hearing under AS 47.32.150 .

**Sec. 47.32.190. Access to information.**

Notwithstanding any contrary provision of law, the divisions of the department assigned public health and public assistance functions shall have access to any information compiled or retained by other divisions within the department, regardless of the nature of the information or whether the information is considered confidential, in order to assist in administering the provisions of this chapter.

**Sec. 47.32.200. Notices required of entities.**

(a) An entity shall provide the department with written notice of a change of mailing address at least 14 days before the effective date of the change.

(b) An entity shall notify the department within 24 hours after having knowledge that an administrator, employee, volunteer, or household member, as required by the type of entity under department regulations, has been

(1) convicted of, has been charged by information or complaint with, or is under indictment or presentment for an offense listed in regulations adopted under AS 47.05.310 or a law or ordinance of this or another jurisdiction with similar elements; or

(2) found to have neglected or abused a child as described in AS 47.10.

(c) An entity shall notify the department within 24 hours after having knowledge of any allegation or suspicion of abuse, neglect, or misappropriation of money or other property of an individual receiving services from the entity. The entity shall conduct an investigation and make a written report to the department within five days following notification to the department under this subsection.

(d) Not less than 20 days before the effective date of a decision to relinquish the entity's license, the entity shall notify the department of the decision.

(e) Not more than one day after signing a contract for sale of the licensed entity, the entity shall notify the department of the sale.

(f) Not less than 30 days before an entity wishes to change the location of the entity, the entity shall notify the department of the change.

**Sec. 47.32.900. Definitions.**

In this chapter,

(1) "ambulatory surgical center" means a facility that

(A) is not a part of a hospital or a physician's general medical practice; and

(B) operates primarily for the purpose of providing surgical services to patients who do not require hospitalization;

(2) "assisted living home"

(A) means a residential facility that serves three or more adults who are not related to the owner by blood or marriage, or that receives state or federal payment for services regardless of the number of adults served; the department shall consider a facility to be an assisted living home if the facility

(i) provides housing and food services to its residents;

(ii) offers to provide or obtain for its residents assistance with activities of daily living;

(iii) offers personal assistance as defined in AS 47.33.990 ; or

(iv) provides or offers any combination of these services;

(B) does not include

(i) a correctional facility;

(ii) an emergency shelter;

(iii) a program licensed under AS 47.10.310 for runaway minors;

(iv) a type of entity listed in AS 47.32.010 (b)(5), (8), (9), (10), (11), or (12);

(3) "child placement agency" means an agency that arranges for placement of a child

(A) in a foster home, residential child care facility, or adoptive home; or

(B) for guardianship purposes;

(4) "commissioner" means the commissioner of health and social services;

(5) "department" means the Department of Health and Social Services;

(6) "entity" means an entity listed in AS 47.32.010 (b);

(7) "foster home" means a place where the adult head of household provides 24-hour care on a continuing basis to one or more children who are apart from their parents;

(8) "free-standing birth center" means a facility that is not a part of a hospital and that provides a birth service to maternal clients;

(9) "frontier extended stay clinic" means a rural health clinic that is authorized to provide 24-hour care to one or more individuals;

(10) "home health agency" means a public agency or private organization, or a subdivision of a public agency or private organization, that primarily engages in providing skilled nursing services in combination with physical therapy, occupational therapy, speech therapy, or services provided by a home health aide to an individual in the individual's home, an assisted living home, or another residential setting; in this paragraph,

(A) "public agency" means an agency operated by the state or a local government;

(B) "subdivision" means a component of a multi-function facility or home health agency, such as the home health care division of a hospital or the division of a public agency, that independently meets the requirements for licensure as a home health agency;

(11) "hospice" or "agency providing hospice services or operating hospice programs" means a program that provides hospice services;

(12) "hospice services" means a range of interdisciplinary palliative and supportive services

(A) provided in a home or at an inpatient facility to persons who are terminally ill and to those persons' families in order to meet their physical, psychological, social, emotional, and spiritual needs; and

(B) based on hospice philosophy; for purposes of this subparagraph, "hospice philosophy" means a philosophy that is life affirming, recognizes dying as a normal process of living, focuses on maintaining the quality of remaining life, neither hastens nor postpones death, strengthens the client's role in making informed decisions about care, and stresses the delivery of services in the least restrictive setting possible and with the least amount of technology necessary by volunteers and professionals who are trained to help a client with the physical, social, psychological, spiritual, and emotional issues related to terminal illness so that the client can feel better prepared for the death that is to come;

(13) "hospital" means a public or private institution or establishment devoted primarily to providing diagnosis, treatment, or care over a continuous period of 24 hours

each day for two or more unrelated individuals suffering from illness, physical or mental disease, injury or deformity, or any other condition for which medical or surgical services would be appropriate; "hospital" does not include a frontier extended stay clinic;

(14) "intermediate care facility for the mentally retarded" has the meaning given in 42 C.F.R. 440.150;

(15) "licensed entity" means an entity that has a license issued under this chapter;

(16) "maternity home" means a place of residence the primary function of which is to give care, with or without compensation, to pregnant individuals, regardless of age, or that provides care, as needed, to mothers and their newborn infants;

(17) "nursing facility" means a facility that is primarily engaged in providing skilled nursing care or rehabilitative services and related services for those who, because of their mental or physical condition, require care and services above the level of room and board; "nursing facility" does not include a facility that is primarily for the care and treatment of mental diseases;

(18) "residential child care facility" means a place, staffed by employees, where one or more children who are apart from their parents receive 24-hour care on a continuing basis;

(19) "residential psychiatric treatment center" means a secure or semi-secure facility, or an inpatient program in another facility, that provides, under the direction of a physician, psychiatric diagnostic, evaluation, and treatment services on a 24-hour-a-day basis to children with severe emotional or behavioral disorders;

(20) "runaway shelter" means a facility housing a runaway child;

(21) "rural health clinic"

(A) means a facility or clinic that is authorized to provide health care services and is located in a rural area;

(B) includes a frontier extended stay clinic;

(C) does not include a rehabilitation agency or a facility primarily for the care and treatment of mental diseases.

(a) A person may not begin residency in an assisted living home unless a representative of the home and either the person or the person's representative sign a residential services contract that complies with the

provisions of this section. Upon the signing of the contract, the home shall give the resident and the resident's representative, if any, a copy of the contract and place a copy of the contract in the resident's file.

(b) A residential services contract must

(1) specifically describe the services and accommodations to be provided by the assisted living home;

(2) set out the rates charged by the home;

(3) specifically describe the rights, duties, and obligations of the resident, other than those specified in this chapter;

(4) set out the policies and procedures for termination of the contract as provided for in this chapter;

(5) state the amount and purpose of any advance payments required by the home; and

(6) set out the home's policy for refund of advance payments in the event of termination of the contract or death of the resident.

**Sec. 47.33.220. Assisted living plan required.**

An assisted living home shall ensure that an assisted living plan for a resident of the home is developed, and approved by the resident or the resident's representative, within 30 days after the resident was admitted to the home. The assisted living plan must be developed by the resident or the resident's representative with participation from

(1) the resident's service coordinator, if any;

(2) representatives of providers of services to the resident; and

(3) the administrator of the home.

**Sec. 47.33.230. Assisted living plan contents; distribution.**

(a) An assisted living plan for a resident of an assisted living home must

(1) promote the resident's participation in the community and increased independence through training and support, in order to provide the resident with an environment suited to the resident's needs and best interests;

(2) recognize the responsibility and right of the resident or the resident's representative to evaluate and choose, after discussion with all relevant parties, including the home, the risks associated with each option when making decisions pertaining to the resident's abilities, preferences, and service needs; and

(3) recognize the right of the home to evaluate and to either consent or refuse to accept the resident's choice of risks under (2) of this subsection.

(b) An assisted living plan for a resident must identify and describe

(1) the resident's specific strengths and limitations in performing the activities of daily living;

(2) any physical disabilities and impairments, and the aspects of the resident's medical condition, general health, emotional health, mental health, or other conditions or problems that are relevant to the services needed by the resident;

(3) the resident's preference in roommates, living environment, food, recreational activities, religious affiliation, and relationships and visitation with friends, family members, and others;

(4) specific activities of daily living with which the resident needs assistance;

(5) how assistance with the activities of daily living will be provided or arranged for by the home or the resident;

(6) the frequency of the resident's training for independent living, if habilitation is part of the plan;

(7) the resident's need for personal assistance and how those needs will be met by home staff or another service provider from the community;

(8) the resident's need for health-related services and how that need will be met;

(9) the resident's reasonable wants and the services that will be used to meet those wants.

(c) If the assisted living home provides or arranges for the provision of health-related services to a resident, the home shall ensure that a

(1) registered nurse licensed under AS 08.68 reviews the portion of an assisted living plan that describes how the resident's need for health-related services will be met; and

(2) physician's statement about the resident is included in the plan.

(d) A resident's assisted living plan must be in writing, in language that can be understood by the resident.

(e) If a person's reasonable wants and needs can be met by a particular assisted living home and a decision is made to enter into a residential services contract between the person and the home, the resident's assisted living plan shall be approved, dated, and signed by the administrator of that home and either the resident or the resident's representative.

(f) The assisted living plan shall be retained by the home in the resident's file. The home shall provide a copy of the plan to the resident and to the resident's representative, if any.

### **Chapter 47.33. ASSISTED LIVING HOMES**

#### **Sec. 47.33.005. Purpose.**

The purpose of this chapter is to

(1) contribute to the development of a system of care by encouraging the establishment of assisted living homes that provide a homelike environment for elderly persons and persons with a mental or physical disability who need assistance with the activities of daily living;

(2) promote the establishment of homes that help

(A) the elderly to age in place; and

(B) adults with a physical or mental disability to become integrated into the community and to reach their highest level of functioning;

(3) establish standards that will protect residents of assisted living homes, while at the same time promoting an environment that will encourage resident growth and independence, without discouraging the establishment and continued operation of those homes;

(4) require that a resident of an assisted living home have an assisted living plan that identifies the services that will be used to meet the resident's reasonable wants and needs; and

(5) provide a resident of an assisted living home, or the resident's representative, with the opportunity to participate to the fullest extent possible in the design and implementation of the resident's assisted living plan and in any decisions involving the resident's care.

**Sec. 47.33.010. Applicability.**

(a) Except as provided in (b) of this section, this chapter applies to assisted living homes, as defined in AS 47.32.900 .

(b) Notwithstanding (a) of this section, this chapter does not apply to

- (1) a correctional facility;
- (2) a facility for treatment of alcoholism that is regulated under AS 47.37;
- (3) an emergency shelter;
- (4) a medical facility, including a nursing home, licensed under AS 47.32;
- (5) a program for runaway minors licensed under AS 47.10.310; or
- (6) a maternity home licensed under AS 47.32.

**Sec. 47.33.020. Health-related services allowed in assisted living homes.**

(a) This chapter does not prohibit the resident of an assisted living home from self-administering the resident's own medications, unless the resident's assisted living plan specifically provides otherwise.

(b) An assisted living home may provide, obtain, or offer to provide or obtain the health-related services described in (c) - (i) of this section. A service under (c) - (i) of this section may only be provided or obtained in addition to, and as a supplemental service to, the long-term provision by the home to the resident of assistance with the activities of daily living or personal assistance.

(c) If self-administration of medications is included in a resident's assisted living plan, the assisted living home may supervise the resident's self-administration of medications, notwithstanding a limitation imposed by AS 08 or by a regulation adopted

under AS 08. The supervision may be performed by any home staff person and may include

- (1) reminding a resident to take medication;
- (2) opening a medication container or prepackaged medication for a resident;
- (3) reading a medication label to a resident;
- (4) observing a resident while the resident takes medication;
- (5) checking a resident's self-administered dosage against the label of the medication container;
- (6) reassuring a resident that the resident is taking the dosage as prescribed;  
and
- (7) directing or guiding, at the request of the resident, the hand of a resident who is administering the resident's own medications.

(d) An assisted living home may provide intermittent nursing services to a resident who does not require 24-hour nursing services and supervision. Intermittent nursing services may be provided only by a nurse licensed under AS 08.68 or by a person to whom a nursing task has been delegated under (e) of this section.

(e) A person who is on the staff of an assisted living home and who is not a nurse licensed under AS 08.68 may perform a nursing task in that home if

- (1) the authority to perform that nursing task is delegated to that person by a nurse licensed under AS 08.68; and
- (2) that nursing task is specified in regulations adopted by the Board of Nursing as a task that may be delegated.

(f) A resident who needs skilled nursing care may, with the consent of the assisted living home, arrange for that care to be provided in the home by a nurse licensed under AS 08.68 if that arrangement does not interfere with the services provided to other residents.

(g) As part of a plan to avoid transfer of a resident from the home for medical reasons, the home may provide, through the services of a nurse who is licensed under

AS 08.68, 24-hour skilled nursing care to the resident for not more than 45 consecutive days.

(h) If a resident has received 24-hour skilled nursing care for the 45-day limit set by (g) of this section, the resident or the resident's representative may elect to have the resident remain in the home without continuation of 24-hour skilled nursing care if the home agrees to retain the resident after

(1) the home and either the resident or the resident's representative have consulted with the resident's physician;

(2) the home and either the resident or the resident's representative have discussed the consequences and risks involved in the election to remain in the home; and

(3) the portion of the resident's assisted living plan that relates to health-related services has been revised to provide for the resident's health-related needs without the use of 24-hour skilled nursing care, and the revised plan has been reviewed by a registered nurse licensed under AS 08.68 or by the resident's attending physician.

(i) A terminally ill resident may remain in the home if (1) the home and either the resident or the resident's representative agree that the resident may remain in the home; and (2) the resident is under the care of a physician who certifies that the needs of the resident are being met in the home. The time limitation of (g) of this section does not apply in the case of a terminally ill resident.

**Sec. 47.33.030. Advance payments.**

(a) An assisted living home may not require a resident or prospective resident of the home or a resident or prospective resident's representative, to make an advance payment to the home except as security for performance of the contract or as advance rent for the immediately following rental period as the rental period is defined in the contract. If a home requires a resident or prospective resident to make an advance payment for security or as advance rent,

(1) the home shall promptly deposit the money in a designated trust account in a financial institution, separate from other money and property of the home;

(2) the home may not represent on a financial statement that the advance payment money is part of the assets of the home;

(3) the advance payment money may be used only for the account of the resident;

(4) the home shall notify the resident or the resident's representative, in writing, of the name and address of the depository in which the advance payment money is being held; and

(5) the home shall provide to the resident or the resident's representative the terms and conditions under which the advance payment money may be withheld by the home.

(b) An assisted living home shall establish a written policy for the refund of unused advance payments in the event of termination of a residential services contract or death of a resident. The policy must provide that a resident is entitled to a prorated refund of the unused portion of an advance payment, less reasonable charges for damages to the home resulting from other than normal use.

**Sec. 47.33.040. Residents' money.**

(a) Except for advance payments under AS 47.33.030, an assisted living home may not require a resident of the home to deposit with the home money that belongs to the resident. The provisions of (b) of this section do not apply to money that constitutes an advance payment under AS 47.33.030.

(b) An assisted living home may accept, for safekeeping and management, money that belongs to a resident. The home shall establish a written policy for the management of such money and shall act in a fiduciary capacity with respect to that money, in accordance with regulations adopted by the licensing agency. A home is not required to accept money that belongs to a resident.

**Sec. 47.33.050. Temporary absence.**

(a) An assisted living home may agree to reserve space for a resident of the home who is temporarily absent from the home and plans to return to the home. The absent resident, or the resident's representative, shall notify the home in writing if the resident's plan to return to the home changes.

(b) Until the assisted living home receives written notice that an absent resident does not intend to return to the home, the home may charge the resident an agreed-upon daily rate during the resident's absence from the home.

**Sec. 47.33.060. House rules.**

(a) An assisted living home may establish house rules, subject to the limitations provided for under this chapter.

(b) An assisted living home shall give a copy of the house rules to a prospective resident or the prospective resident's representative before the prospective resident enters into a residential services contract with the home, and shall post the house rules in a conspicuous place in the home.

(c) House rules may address various issues, including

(1) times and frequency of use of the telephone;

(2) hours for viewing and volume for listening to television, radio, and other electronic equipment that could disturb other residents;

(3) visitors;

(4) movement of residents in and out of the home;

(5) use of personal property;

(6) use of tobacco and alcohol; and

(7) physical, verbal, or other abuse of other residents or staff.

(d) An assisted living home may not adopt a house rule that unreasonably restricts a right of a resident provided for under this chapter or under any other provision of law.

**Sec. 47.33.070. Resident files.**

(a) An assisted living home shall maintain, for each resident of the home, a file that includes

(1) the name and birth date, and, if provided by the resident, the social security number of the resident;

(2) the name, address, and telephone number of the resident's closest relative, service coordinator, if any, and representative, if any;

(3) a statement of what actions, if any, the resident's representative is authorized to take on the resident's behalf;

(4) a copy of the resident's assisted living plan;

(5) a copy of the residential services contract between the home and the resident;

(6) a notice, as required under AS 47.33.030 , regarding the depository in which the resident's advance payment money is being held;

(7) written acknowledgment by the resident or the resident's representative that the resident has received a copy of and has read, or has been read the

(A) resident's rights under AS 47.33.300 ;

(B) resident's right to pursue a grievance under AS 47.33.340;

(C) resident's right to protection from retaliation under AS 47.33.350;

(D) provisions of AS 47.32.160, regarding immunity; and

(E) home's house rules;

(8) an acknowledgment and agreement relating to home safekeeping and management of the resident's money, as required by AS 47.33.040;

(9) a copy of the resident's living will, if any, or an advance health care directive made under AS 13.52, if any; and

(10) a copy of a power of attorney or other written designation, including an advance health care directive made under AS 13.52, of an agent, representative, or surrogate by the resident.

(b) An assisted living home shall retain a resident's file for at least one year after the resident terminates residency at the home.

**Sec. 47.33.080. Closure or relocation; change of mailing address.**

(a) Not later than 90 days before the voluntary closing or relocation of an assisted living home, the home shall provide written notice of the closure or relocation to the licensing agency, each resident of the home, all representatives of residents, and all service coordinators for residents.

(b) Not later than 14 days before a change of an assisted living home's mailing address, the home shall provide written notice of the change to the licensing agency, each resident of the home, all representatives of residents, and all service coordinators for residents.

**Sec. 47.33.090. Rate increase.**

An assisted living home may not increase the rate charged for services provided by the home unless the home notifies each resident or the resident's representative of the increase at least 30 days before the increase is to take effect.

**Sec. 47.33.100. Criminal background check for employees.**  
[Repealed, Sec. 49 ch 57 SLA 2005].

**Sec. 47.33.200. Commencement of residency.**

A person may not begin to reside in an assisted living home without that person's consent, or, if the person is not competent, the consent of the person's representative.

**Sec. 47.33.210. Residential services contracts.**

(a) A person may not begin residency in an assisted living home unless a representative of the home and either the person or the person's representative sign a residential services contract that complies with the provisions of this section. Upon the signing of the contract, the home shall give the resident and the resident's representative, if any, a copy of the contract and place a copy of the contract in the resident's file.

(b) A residential services contract must

(1) specifically describe the services and accommodations to be provided by the assisted living home;

(2) set out the rates charged by the home;

(3) specifically describe the rights, duties, and obligations of the resident, other than those specified in this chapter;

(4) set out the policies and procedures for termination of the contract as provided for in this chapter;

(5) state the amount and purpose of any advance payments required by the home; and

(6) set out the home's policy for refund of advance payments in the event of termination of the contract or death of the resident.

**Sec. 47.33.220. Assisted living plan required.**

An assisted living home shall ensure that an assisted living plan for a resident of the home is developed, and approved by the resident or the resident's representative, within 30 days after the resident was admitted to the home. The assisted living plan must be developed by the resident or the resident's representative with participation from

- (1) the resident's service coordinator, if any;
- (2) representatives of providers of services to the resident; and
- (3) the administrator of the home.

**Sec. 47.33.230. Assisted living plan contents; distribution.**

(a) An assisted living plan for a resident of an assisted living home must

(1) promote the resident's participation in the community and increased independence through training and support, in order to provide the resident with an environment suited to the resident's needs and best interests;

(2) recognize the responsibility and right of the resident or the resident's representative to evaluate and choose, after discussion with all relevant parties, including the home, the risks associated with each option when making decisions pertaining to the resident's abilities, preferences, and service needs; and

(3) recognize the right of the home to evaluate and to either consent or refuse to accept the resident's choice of risks under (2) of this subsection.

(b) An assisted living plan for a resident must identify and describe

(1) the resident's specific strengths and limitations in performing the activities of daily living;

(2) any physical disabilities and impairments, and the aspects of the resident's medical condition, general health, emotional health, mental health, or other conditions or problems that are relevant to the services needed by the resident;

(3) the resident's preference in roommates, living environment, food, recreational activities, religious affiliation, and relationships and visitation with friends, family members, and others;

(4) specific activities of daily living with which the resident needs assistance;

(5) how assistance with the activities of daily living will be provided or arranged for by the home or the resident;

(6) the frequency of the resident's training for independent living, if habilitation is part of the plan;

(7) the resident's need for personal assistance and how those needs will be met by home staff or another service provider from the community;

(8) the resident's need for health-related services and how that need will be met;

(9) the resident's reasonable wants and the services that will be used to meet those wants.

(c) If the assisted living home provides or arranges for the provision of health-related services to a resident, the home shall ensure that a

(1) registered nurse licensed under AS 08.68 reviews the portion of an assisted living plan that describes how the resident's need for health-related services will be met; and

(2) physician's statement about the resident is included in the plan.

(d) A resident's assisted living plan must be in writing, in language that can be understood by the resident.

(e) If a person's reasonable wants and needs can be met by a particular assisted living home and a decision is made to enter into a residential services contract between the person and the home, the resident's assisted living plan shall be approved, dated, and signed by the administrator of that home and either the resident or the resident's representative.

(f) The assisted living plan shall be retained by the home in the resident's file. The home shall provide a copy of the plan to the resident and to the resident's representative, if any.

**Sec. 47.33.240. Evaluation of assisted living plan.**

(a) An assisted living home resident or the resident's representative, and the home administrator or the administrator's designee, shall evaluate the resident's assisted living plan, determine whether the plan is meeting the resident's reasonable wants and needs, and revise the plan if necessary. At the request of the resident or the resident's representative, the resident's service coordinator, if any, and family members may participate in the evaluation. If the assisted living home provides or arranges for the provision of health-related services to a resident, the resident's evaluation shall be done at three-month intervals. If the assisted living home does not provide or arrange to provide health-related services to a resident, the resident's evaluation shall be done at least at one-year intervals.

(b) The administrator or the administrator's designee shall

- (1) document the results of the evaluation in the resident's record;
- (2) sign and date any revisions to the resident's assisted living plan;
- (3) place a copy of the revisions in the resident's file; and
- (4) provide the resident and the resident's representative, if any, with a copy of the revisions.

**Sec. 47.33.300. Residents' rights.**

(a) Subject to (c) of this section, a resident of an assisted living home has the right to

- (1) live in a safe and sanitary environment;
- (2) be treated with consideration and respect for personal dignity, individuality, and the need for privacy, including privacy in
  - (A) a medical examination or health-related consultation;
  - (B) the resident's room or portion of a room;
  - (C) bathing and toileting, except for any assistance in those activities that is specified in the resident's assisted living plan; and

(D) the maintenance of personal possessions and the right to keep at least one cabinet or drawer locked;

(3) possess and use personal clothing and other personal property, unless the home can demonstrate that the possession or use of certain personal property would be unsafe or an infringement of the rights of other residents;

(4) engage in private communications, including

(A) receiving and sending unopened correspondence;

(B) having access to a telephone, or having a private telephone at the resident's own expense; and

(C) visiting with persons of the resident's choice, subject to visiting hours established by the home;

(5) close the door of the resident's room at any time, including during visits in the room with guests or other residents;

(6) at the resident's own expense unless otherwise provided in the residential services contract, participate in and benefit from community services and activities to achieve the highest possible level of independence, autonomy, and interaction with the community;

(7) manage the resident's own money;

(8) participate in the development of the resident's assisted living plan;

(9) share a room with a spouse if both are residents of the home;

(10) have a reasonable opportunity to exercise and to go outdoors at regular and frequent intervals, when weather permits;

(11) exercise civil and religious liberties;

(12) have access to adequate and appropriate health care and health care providers of the resident's own choosing, consistent with established and recognized standards within the community;

(13) self-administer the resident's own medications, unless specifically provided otherwise in the resident's assisted living plan;

(14) receive meals that are consistent with religious or health-related restrictions;

(15) receive the prior notice of relocation of the home or the home's intent to terminate the residential services contract of the resident required by AS 47.33.080 and 47.33.360, respectively;

(16) present to the home grievances and recommendations for change in the policies, procedures, or services of the home;

(17) at the resident's own expense unless otherwise provided in the residential services contract, have access to and participate in advocacy or special interest groups;

(18) at the resident's own expense unless otherwise provided in the residential services contract, intervene or participate in, or refrain from participating in, adjudicatory proceedings held under this chapter, unless provided otherwise by other law; and

(19) reasonable access to home files relating to the resident, subject to the constitutional right of privacy of other residents of the home.

(b) An assisted living home may not establish or apply a policy, procedure, or rule that is inconsistent with or contrary to a right provided by this section or by other law.

(c) The rights set out in (a)(3), (4), (7), (12), and (14) of this section do not create an obligation for an assisted living home to expend money for the specified rights unless otherwise provided in the residential services contract.

**Sec. 47.33.310. Notice of rights.**

(a) At the time a person begins residency in an assisted living home, the home shall provide the resident and the resident's representative, if any, with a copy of the rights set out in AS 47.33.300. The home shall obtain from the resident or the resident's representative a signed and dated acknowledgement stating that the resident has read or been read the rights, understands the rights, and has had any questions about the rights answered by the home.

(b) An assisted living home shall post in a prominent place in the home

(1) a copy of the rights set out in AS 47.33.300;

(2) the name, address, and phone number of the long term care ombudsman hired under AS 47.62.010 and, if relevant to residents, of the advocacy agency for persons with a developmental disability or mental illness;

(3) the telephone number of an information or referral service for vulnerable adults; and

(4) a copy of the grievance procedure established under AS 47.33.340.

**Sec. 47.33.320. Access to assisted living home.**

An assisted living home shall allow advocates and the representatives of community legal services programs access to the home at reasonable times to, subject to the resident's consent,

(1) visit with a resident of the home and make personal, social, and legal services available to the resident;

(2) distribute educational and informational materials to advise a resident or resident's representative of applicable rights; and

(3) assist a resident or a resident's representative in asserting legal rights or claims.

**Sec. 47.33.330. Prohibitions.**

(a) An assisted living home, including staff of the home, may not

(1) deprive a resident of the home of the rights, benefits, or privileges guaranteed to the resident by law;

(2) enter a resident's room without first obtaining permission, except

(A) during regular, previously announced, fire, sanitation, or other licensing inspections;

(B) when a condition or situation presents an imminent danger;

(C) as required by the resident's assisted living plan to provide services specified in the residential services contract; or

(D) for other vital health or safety reasons;

(3) impose religious beliefs or practices upon a resident or require a resident to attend religious services;

(4) place a resident under physical restraint unless the resident's own actions present an imminent danger to the resident or others;

(5) place a resident under chemical restraint; this paragraph does not prevent a resident from voluntarily taking tranquilizers, or other medication, prescribed by a licensed physician;

(6) compel a resident to perform services for the home, except as contracted for by the resident and the home or as provided for in the resident's assisted living plan; or

(7) restrain, interfere with, coerce, discriminate against, or retaliate against a resident for asserting a right specified by this chapter or by other law.

(b) An assisted living home may not physically restrain a resident unless the home has a written physical restraint procedure that has been approved by the licensing agency. The home shall terminate the physical restraint as soon as the resident no longer presents an imminent danger.

(c) An owner, administrator, employee, or agent of an assisted living home may not act as a representative of a resident.

**Sec. 47.33.340. Resident grievance procedure.**

(a) An assisted living home shall establish a written grievance procedure for handling complaints of residents of the home. At the time a person begins residency in an assisted living home, the home shall give a copy of the grievance procedure to the resident and the resident's representative, if any.

(b) The grievance procedure established under this section must provide that a resident and the resident's representative have the right to

(1) present both a written and an oral explanation of the resident's grievance;

(2) have an advocate of the resident's choice, and the resident's representative, if any, attend meetings concerning the resident's grievance; and

(3) be notified in writing, within 30 days after the filing of the grievance, of the final decision of the home regarding the grievance.

**Sec. 47.33.350. Retaliation against home resident.**

(a) An assisted living home may not take retaliatory action against a resident of that home if the resident or the resident's representative

(1) exercises a right provided by this chapter or by other law;

(2) appears as a witness, or refuses to appear as a witness, in an adjudicatory proceeding regarding the home;

(3) files a civil action alleging a violation of this chapter; or

(4) claims a violation of this chapter before a state or federal agency having jurisdiction over the home or its employees.

(b) Termination of a resident's residential services contract by an assisted living home within 60 days after the resident engages in an activity described in (a) of this section creates a rebuttable presumption that the termination was retaliatory.

(c) At the time, or before, a person begins residency in an assisted living home, the home shall give the resident and the resident's representative, if any, written notice of the protection from retaliation provided under this section.

**Sec. 47.33.360. Involuntary termination of contract.**

(a) An assisted living home may not terminate a residential services contract with a resident of the home against the resident's will, except

(1) for medical reasons;

(2) for engaging in a documented pattern of conduct that is harmful to the resident, other residents, or staff of the home;

(3) for violation of the terms of the residential services contract, including failure to pay costs incurred under the contract;

(4) when emergency transfer out of the home is ordered by the resident's physician;

(5) when the home is closing; or

(6) when the home can no longer provide or arrange for services in accordance with the resident's needs and the resident's assisted living plan.

(b) At least 30 days before terminating the residential services contract with a resident under (a)(2), (3), (5), or (6) of this section, the assisted living home shall provide written notice of the proposed contract termination to the resident or the resident's representative, and to the resident's service coordinator, if any. The notice must state the

(1) basis for the termination; and

(2) resident's right to contest the termination in the manner provided in the contract, which must include an offer by the home to participate in a case conference as described in (c) of this section.

(c) Before terminating the residential services contract with a resident under (a)(2), (3), (5), or (6) of this section, the assisted living home shall participate in a case conference if requested by the resident or the resident's representative. The case conference must include the resident, the resident's representative, if any, the resident's advocate, if any, the resident's service coordinator, if any, the home administrator, and appropriate care providers who may discuss the appropriateness of the contract termination.

(d) If a home terminates the residential services contract with a resident under this section, the home shall cooperate with the resident, the resident's service coordinator, if any, and the resident's representative, if any, in making arrangements to relocate the resident.

**Sec. 47.33.400., 47.33.410 License required; Licensing agency.**

[Repealed, Sec. 49 ch 57 SLA 2005].

**Sec. 47.33.420. Standard forms.**

The Department of Health and Social Services shall develop standard forms that assisted living homes may use to comply with the requirements of this chapter.

**Sec. 47.33.430. Authority of state agencies to impose additional requirements.**

[Repealed, Sec. 49 ch 57 SLA 2005].

**Sec. 47.33.500. - 47.33.570. Complaint; Immunity; Investigation; Notice of violation; Report of compliance; Administrative sanctions; Administrative procedures; Criminal penalty.**

[Repealed, Sec. 49 ch 57 SLA 2005].

**Sec. 47.33.910. , 47.33.920l Fees; Regulations.**

[Repealed, Sec. 49 ch 57 SLA 2005].

**Sec. 47.33.990. Definitions.**

In this chapter,

(1) "activities of daily living" means walking, eating, dressing, bathing, toileting, and transfer between a bed and a chair;

(2) "administrator" means an person who has general administrative charge and oversight of an assisted living home;

(3) "adult" means a person 18 years of age or older who is not a ward of the state under AS 47.10.080 (f) or AS 47.12.120 (d);

(4) "advocate" means a public or private officer, agency, or organization designated by federal or state statute, or a state plan developed under a federal or state statute, to represent the interests of and speak on behalf of a resident of an assisted living home;

(5) "aging in place" means choosing to remain in a familiar living environment and manage the risks associated with the physical or mental decline that can occur with increasing age;

(6) "assisted living home" means a residential facility to which this chapter applies, as described in AS 47.33.010 ;

(7) "assisted living plan" means a written description of

(A) a person's functional capabilities;

(B) the person's needs and preferences for assistance with the activities of daily living; and

(C) the services to be provided to meet the person's reasonable wants and needs;

(8) "health-related services" means services described in AS 47.33.020(c) - (i);

(9) "home" means an assisted living home;

(10) "imminent danger" means a danger that could reasonably be expected to cause death or serious physical harm to the resident's self, to the staff of a home, or to others;

(11) "instrumental activities of daily living" means doing laundry, cleaning of living areas, food preparation, managing money and conducting business affairs, using public transportation, writing letters, obtaining appointments, using the telephone, and engaging in recreational or leisure activities;

(12) "person with a developmental disability" has the meaning given in AS 47.80.900 ;

(13) "personal assistance" means the provision by an assisted living home of one or more of the following personal services to a resident of the home:

(A) assisting a resident in obtaining supportive services as provided for in the resident's assisted living plan;

(B) assisting a resident in obtaining instrumental activities of daily living, as provided for in the resident's assisted living plan;

(C) being aware of a resident's general whereabouts while the resident is traveling independently in the community;

(D) monitoring a resident's activities while on the home premises to provide for the resident's and others' safety and well-being;

(14) "physician's statement" means a written statement by a person's primary physician that includes a

(A) medical history and physical, not older than six months, of the person;

(B) listing of the person's complete current medicine regimen; and

(C) statement of current therapy regimen necessary to maintain or increase the person's functioning, mobility, or independence;

(15) "representative" means a guardian, conservator, attorney in fact, or other person designated by a court, or in writing by a legally competent person, to act on behalf of that person;

(16) "resident" means an adult who has signed a residential services contract with and resides in an assisted living home;

(17) "service coordinator" means a person who is responsible for

(A) coordinating the services of community agencies that provide services to a resident of an assisted living home;

(B) participating in inter-agency case management for a resident; or

(C) planning for the placement of a person in an assisted living home;

(18) "supportive services" means recreational and leisure activities, transportation, social services, legal services, financial management services, educational and vocational services, medical, dental, and other health care services, habilitation or rehabilitation services, respite services, case management, day care, and other services required to meet a resident's needs;

(19) "terminally ill resident" means an ill resident who has a medical prognosis, certified in writing by the resident's attending physician, that the life expectancy of the resident is no more than six months if the illness runs its normal course.

## **I. STATEMENT OF JURISDICTION**

This is an appeal from a Final Judgment dated December 2, 2009, granting summary judgment to defendants Staci Collier and the State of Alaska. [Appellant's Exc. at 335-36] This Court has jurisdiction under AS 22.05.010(a) and Alaska Appellate Rule 202(a).

## **II. ISSUES PRESENTED FOR REVIEW**

After the state investigated two complaints involving appellant Mary Hill's assisted living home, the state took enforcement action against the home's license. Ms. Hill commenced an administrative appeal to contest the state's actions; she later abandoned that appeal. Ms. Hill then attempted to sue the state in tort for its allegedly flawed licensing investigation and enforcement action and filed a §1983 claim against one individually named licensing employee on the grounds that her due process rights had been violated. This appeal presents two issues.

- (1) AS 47.32.160(a) provides broad immunity for state licensing actions regarding assisted living homes. All of Ms. Hill's state law tort claims are based on the state's licensing investigation, notice of violation, and on the state's decision to take enforcement action against Ms. Hill's assisted living home license. Does AS 47.32.160(a) bar Ms. Hill's claims?
- (2) The state determined that Ms. Hill's home had violated a number of licensing provisions and took enforcement action against the home's license. Ms. Hill sought but then abandoned an administrative appeal to contest the state's actions; she then filed a complaint alleging that she was denied due process. In light of the state's interest in taking swift enforcement action to ensure resident safety and Ms. Hill's failure to pursue available remedies, can she state a due process claim under 42 U.S.C. §1983?

### III. STATEMENT OF THE CASE

#### A. INTRODUCTION

In August 2005, the Department of Health and Social Services (“the department”) received a complaint regarding the quality of care provided at appellant Mary Hill’s assisted living home. [Exc. at 305] Shortly thereafter, the father of one of the home’s residents, J.H., removed her from the home. [Giani Exc. at 384-385; Appellees’ Exc. at 385] The department and state licensing specialist Staci Collier (collectively “the state”) investigated the complaint. The state issued a report of its investigation and initiated enforcement action against the home license. [Exc. at 305-313] Ms. Hill then filed an administrative appeal to contest the state’s actions. But after the state sought to withdraw the sanctions placed on the home’s license, Ms. Hill relinquished her appeal and the Office of Administrative Hearings (OAH) dismissed the matter. [Appellees’ Exc. at 392, 400-401]

Months later, Ms. Hill filed a complaint in superior court against the department, Staci Collier, and Linda Giani, J.H.’s independent care coordinator.<sup>1</sup> [Exc. 1-8; 21-29] Ms. Hill claimed that the state had conducted a flawed licensing investigation, wrongfully removed a home resident, and issued an inaccurate report of investigation. [*Id.*] Her complaint included claims of intentional infliction of emotional distress, intentional interference with contractual relations and prospective economic

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<sup>1</sup> The claims against Ms. Giani are addressed in co-appellee’s brief and are not considered here.

opportunity, and negligent supervision; she also claimed that Ms. Collier had violated her due process rights under 42 U.S.C. § 1983. [*Id.*]

The state sought summary judgment on the grounds that Ms. Hill's state law tort claims were barred by AS 47.32.160(a), which provides statutory immunity for licensing-related conduct, and on the grounds that Ms. Hill had failed to state the necessary elements of a §1983 due process claim. [Appellees' Exc. at 337-340] The superior court granted the state's motion. [*Id.* at 470] The state moved for and was awarded 20% of its reasonable attorney's fees. [Exc. at 334] Ms. Hill appealed. This appeal asks whether Ms. Hill's state law tort claims are barred by AS 47.32.160(a) and whether Ms. Hill established the necessary elements of a federal constitutional tort under § 1983.

**B. STATE LICENSING AUTHORITY REGARDING ASSISTED LIVING HOMES**

The State of Alaska maintains a centralized licensing system for a number of entities, including assisted living homes.<sup>2</sup> The Department of Health and Social Services is the agency charged with administering and enforcing the state's licensing system under chapter thirty-two of Title 47 of the Alaska Statutes.<sup>3</sup> The department is vested with broad authority to establish licensing standards, conduct inspections, monitor

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<sup>2</sup> See AS 47.32.010(a),(b)(2). Senate Bill 125 (codified as AS 47.32 et seq.), effective July 2, 2005, established a single comprehensive licensing scheme for all state licensed entities. See § 52, ch. 57, SLA 2005. Prior to the enactment of AS 47.32, the department's authority over licensing, investigation, monitoring, and enforcement actions was set forth in chapter thirty three of Title 47 and accompanying regulations. See former AS 47.33.005-.990(2004).

<sup>3</sup> AS 47.32.030(a) (Powers of the department); AS 47.32.900(5) (definitions).

licensed entities for compliance with statutory and regulatory provisions, investigate licensed entities and applicants, issue reports of investigation, and impose sanctions.<sup>4</sup>

After the department is notified of a complaint against a licensed entity, the department's licensing section is authorized to conduct an investigation, issue a report, and initiate enforcement action against the license.<sup>5</sup> Within the scope of that authority, the department may revoke or modify a home's license, suspend home operations, and/or require a licensed home to submit a plan of correction.<sup>6</sup>

**C. RELEVANT FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

Appellant Mary Hill is the owner and administrator of Wild Rose Gardens Assisted Living Home. [Appellees' Exc. at 363-364] J.H., a mentally retarded woman, was a resident in 2005. [*Id.*] On August 8, 2005, the department received a complaint regarding the quality of care being provided to J.H. [*Id.* at 372] Three days later, J.H.'s father and legal guardian decided to remove his daughter from the home and transfer her to a new residence. [Appellee Giani Exc. at 384-85] On August 17, 2005, after the complaint was referred to the department's licensing section, state licensing specialist

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<sup>4</sup> AS 47.32.030(a)(1) (Powers of department); AS 47.32.030 (a)(B) (licensure requirements); AS 47.32.030 (a)(4) (investigate); AS 47.32.030(a)(5) (inspection and monitoring); AS 47.32.090 (investigation of complaints); AS 47.32.110 (right of access and inspection); AS 47.32.120(a) (reports); AS 47.32.130-.140 (enforcement actions).

<sup>5</sup> *See id.*

<sup>6</sup> AS 47.32.130(a) ("The department . . . may immediately revoke or suspend the entity's license"); AS 47.32.140(d) ("The department may take one or more of the following enforcement actions. . . ."). *See also* (former) AS 47.33.550 (Administrative sanctions) ("A licensing agency may revoke an assisted living home license, deny renewal of an assisted living home license, suspend operations . . . . [and] suspend the ability of an assisted living home to take in new residents . . . .") (2004).

Staci Collier visited the home and commenced a licensing investigation on the department's behalf. [Appellees' Exc. at 372-377] In September 2005, while that investigation was still underway, the department received a second complaint concerning the home. [*Id.* at 374]

Over the course of the next seven and a half weeks, the state investigated both complaints. [*Id.*] On November 7, 2005, the state issued a Report of Investigation, Notice of Violation, and Notice of Administrative Sanctions.<sup>7</sup> [*Id.* at 371-384] The state pursued enforcement action against the home, including imposing a number of sanctions on the home's license. The state temporarily reduced the home's license to probationary status, prohibited the home from accepting residents requiring 24-hour care, and reduced the home's license capacity by one through the probationary period. [*Id.* at 382-383]

Ms. Hill commenced an administrative appeal and requested a hearing to contest the state's sanctions and the findings outlined in the Notice of Violation. [*Id.* at 387] The department referred the matter to the Office of Administrative Hearings, which scheduled a hearing for February 2006. [*Id.* at 388-390] But as a result of comprehensive statutory changes to the state's licensing scheme that affected the utility of the department's sanctions, the department decided to withdraw the Notice of Administrative Sanctions. [*Id.* at 391-393] The department offered to dismiss the appeal, Ms. Hill's attorney filed a non-opposition, and OAH dismissed the matter. [*Id.* at 374,

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<sup>7</sup> The Notice of Violation outlined a number of findings concluding that appellant had violated various provisions of AS 47.33. [Appellees' Exc. at 378-380]

400] Ms. Hill took no other action until filing a complaint against the state in August 2007. [*Id.* at 400-401; Appellant's Exc. at 1-8]

#### IV. STANDARD OF REVIEW

The parties agree that this Court reviews orders granting summary judgment *de novo*, and will affirm grants of summary judgment where there are no genuine issues of material fact and the prevailing party is entitled to judgment as a matter of law.<sup>8</sup> Questions regarding interpretation and application of a statute similarly present questions of law to which this Court applies its independent judgment.<sup>9</sup>

The interpretation of 42 U.S.C. § 1983 is a question of federal law.<sup>10</sup>

#### V. ARGUMENT

Ms. Hill devotes only six pages of her brief to the state appellees and limits her arguments on two issues to no more than perfunctory challenges to the superior court's decision. She contends that her state law claims are not barred by AS 47.32.160 and that there are genuine issues of material fact related to her §1983 claim against Staci Collier that preclude summary judgment.<sup>11</sup> [Appellant's Br. at 45-49]

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<sup>8</sup> *Bradshaw v. State, Dep't of Admin., Div. of Motor Vehicles*, 224 P.3d 118, 121-22 (Alaska 2010).

<sup>9</sup> *Id.* (quoting *State v. Jeffery*, 170 P.3d 226, 229 (Alaska 2007)).

<sup>10</sup> *Howlett v. Rose*, 496 U.S. 356, 375 (1990); *Vest v. Schafer*, 757 P.2d 588, 589 (Alaska 1988).

<sup>11</sup> Ms. Hill's brief notably omits reference to a number of arguments raised below and/or in her points on appeal: she offers no substantive argument regarding the superior court's decision to grant summary judgment on most of appellant's state law claims and fails to even reference the superior court's decision to award the state 20% of its

Because appellant's cursory briefing fails to adequately and substantively address these issues on appeal, Ms. Hill's arguments should be deemed waived.<sup>12</sup>

Regardless of whether this Court considers appellant's cursory arguments, the state is entitled to summary judgment because all of Ms. Hill's state law tort claims are based on the state's licensing actions for which the state is immune under AS 47.32.160. Because Ms. Hill can not avoid this immunity by attempting to establish liability for the identical conduct under the guise of an alternate tort theory, the superior court correctly found that the state is entitled to summary judgment on Ms. Hill's negligent supervision claim. [Appellees' Exc. at 468-469] Staci Collier is similarly entitled to summary judgment on appellant's § 1983 claim for a number of reasons. Ms. Hill fails to clearly identify any federally protected right or show that a federal constitutional violation occurred under the facts of this case. Even if she satisfied those requirements, Ms. Hill admittedly abandoned state administrative remedies and can not therefore establish a lack of process under § 1983.

**A. BECAUSE APPELLANT'S STATE LAW CLAIMS ARE BASED ON THE STATE'S LICENSING ACTIONS, THEY ARE BARRED BY AS 47.32.160.**

All of Ms. Hill's state law tort claims, including interference with contract and prospective economic advantage, intentional and negligent emotional distress, and

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reasonable attorney's fees. Because appellant failed to brief these arguments, they should be deemed waived. *See e.g., Wasserman v. Bartholomew*, 38 P.3d 1162, 1171 (Alaska 2002) (appellant who did not brief arguments regarding fee award waived issue on appeal); *Barios v. Brooks Range Supply, Inc.*, 26 P.3d 1082, 1088 (Alaska 2001) (party who made only sporadic comments in reference to fee award throughout brief waived argument). The state maintains, moreover, that the superior court's decision to award the state 20% of its reasonable attorney's fees as the prevailing party was proper.

<sup>12</sup> *See e.g., Wasserman*, 38 P.3d at 1171.

negligent supervision, are barred by AS 47.32.160(a). [Appellees' Exc. at 474-480] That provision provides "[t]he department, its employees, and its agents are not liable for civil damages as a result of an act or omission in the licensure process, the monitoring of a licensed entity, or any activities under this chapter." Ms. Hill's assisted living home is among the licensed entities covered under chapter thirty-two, which encompasses activities relating to the licensing processes, handling of complaints, and the department's enforcement authority.<sup>13</sup>

Ms. Hill's amended complaint alleged that state licensing specialist Staci Collier removed a home resident, "forced" Ms. Hill to stop taking further clients, conducted a flawed investigation, and issued an inaccurate Report of Investigation. [Id. at 474-485] All of these allegations concern the state's and/or Ms. Collier's response to complaints, including the licensing investigation, the report of investigation, and the decision to take enforcement action and impose sanctions on the home's license. All of this conduct falls squarely under AS 47.32.<sup>14</sup> [Id.] Because the language of AS 47.32.160(a) provides that the department and its employees are immune from liability for claims resulting from precisely these types of licensing activities, the superior court correctly recognized that state is entitled to summary judgment.<sup>15</sup>

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<sup>13</sup> AS 47.32.010(b)(2). *See, generally*, 47.32.010-.900.

<sup>14</sup> *See* AS 47.32.030(a); AS 47.32.060; AS 47.32.070; AS 47.32.090(b); AS 47.32.110; AS 47.32.120(a); AS 47.32.130-.140.

<sup>15</sup> The superior court's decision did not equivocally find that AS 47.32.160(a) barred Ms. Hill's intentional infliction of emotional distress claim. Rather, the court found that there was no factual basis for that claim and that summary judgment was proper.

**B. APPELLANT CAN NOT CIRCUMVENT THE STATE'S IMMUNITY FOR LICENSING RELATED CONDUCT UNDER AS 47.32.160(A) BY CLAIMING THAT THE STATE NEGLIGENTLY SUPERVISED STATE LICENSING EMPLOYEE STACI COLLIER.**

Ms. Hill attempts to bypass AS 47.32.160 and hold the department liable for Ms. Collier's immune licensing related conduct by suggesting that the state negligently supervised Ms. Collier. [*Id.* at 476] But the gravamen of Ms. Hill's negligent supervision claim is identical to her other claims, and allowing this claim to go forward would frustrate the purpose of AS 47.32.160 and circuitously subject the state to liability for squarely immune conduct.<sup>16</sup> The superior court thus properly found that the state is entitled to summary judgment. [*Id.* at 468-469]

This Court has previously rejected analogous attempts to circumvent immunity under the guise of a negligent supervision claim. In *Kinegak v. Department of Corrections*,<sup>17</sup> an inmate who was imprisoned seven days longer than scheduled filed a complaint for negligent record-keeping and negligent supervision on the grounds that DOC had miscalculated the length of his sentence.<sup>18</sup> On appeal, this Court held that he could not circumvent the state's immunity from false imprisonment claims under AS 09.50.250(3) by pleading that claim as one of negligent record-keeping, where the

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[Appellees' Exc. at 466] This court can affirm the court's decision on any ground that the record supports. *VanSickle v. McGraw*, 134 P.3d 338, 341 n.10 (Alaska 2008).

<sup>16</sup> See *Kinegak v. State, Dep't of Corrections*, 129 P.3d 887, 893 (Alaska 2006).

<sup>17</sup> *Id.* at 891.

<sup>18</sup> *Id.* at 888.

underlying facts in both claims were virtually identical.<sup>19</sup> *Kinegak* recognized that “because government almost inevitably acts through employees supervised or hired by others,” and negligent supervision could be alleged in most cases where a state employee committed one of the enumerated torts in AS 09.50.250(3), plaintiffs cannot generally establish liability for immune conduct through secondary tort theories.<sup>20</sup>

Ms. Hill’s negligent supervision claim attempts to establish liability for licensing related conduct that is squarely immune under AS 47.32.160(a). Nowhere in her complaint does Ms. Hill point to any independent conduct that constitutes a distinct and separate wrong. The sole basis for her claim concerns the state’s licensing and enforcement actions and its employment of Ms. Collier. [Exc. at 475-476; Appellant’s Br. at p.49] The facts underlying Ms. Hill’s negligent supervision claim are simply a “well-known predicate” for the [immune] tort of negligent licensing.<sup>21</sup> Like *Kinegak*, permitting Ms. Hill’s claim to go forward would run afoul of the legislature’s decision to immunize the department and its employees for licensing-related conduct under AS 47.32.160(a).<sup>22</sup>

Ms. Hill briefly references *B.R. v. State, Dep’t of Corrections*,<sup>23</sup> which provides that a negligent supervision claim may be pursued even where immunity

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<sup>19</sup> *Id.* at 892-893.

<sup>20</sup> *Id.* at 892.

<sup>21</sup> *Id.* at 893.

<sup>22</sup> *See Id.* at 891.

<sup>23</sup> 144 P.3d 431 (Alaska 2006).

attaches to a tortfeasor's underlying conduct, if a plaintiff bases her claim on a breach of a duty separate from the state's employment relationship with the individual tortfeasor. Appellant cites *B.R.* in conjunction with her perfunctory suggestion that the state has a duty to protect vulnerable persons and that "only an identifiable trifle" of an interest is required to establish standing. [Appellant's Br. at 49] While Ms. Hill's one-sentence reference to standing requirements is rather puzzling and will be addressed more fully below, her reliance on *B.R.* is legally misplaced.

In *B.R.*, an inmate sued the Department of Corrections after being sexually assaulted by an employee.<sup>24</sup> The inmate claimed that the state was vicariously liable for the assault and that the department had negligently hired and failed to train its employees. On appeal, this Court held that AS 09.50.250, the intentional tort immunity statute, precluded *B.R.*'s claims "to the extent that they merely assert breaches of the department's duty to exercise due care in hiring, training, and supervising the [tortfeasor.]"<sup>25</sup> But the court also cautioned that AS 09.50.250 did not bar *B.R.*'s negligent supervision claim to the extent that it encompassed a theory of liability based on a breach of the department's duty to supervise an employee *other than the tortfeasor*, or that it was based on a breach of some other independent protective duty to plaintiff.<sup>26</sup> Because the department had a clear duty to exercise reasonable care to protect inmates from foreseeable misconduct, because that duty was independent of the department's

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<sup>24</sup> *Id.* at 435-37.

<sup>25</sup> *Id.* at 435.

<sup>26</sup> *Id.* at 435-36.

employment relationship with the intentional tortfeasor, and because B.R.'s complaint included broader claims alleging that the department had negligently failed to supervise *other* employees, this Court determined that B.R.'s negligent supervision claim was not barred under AS 09.50.250.

Unlike *B.R.*, which considered a duty separate from the state's employment relationship with the defendant tortfeasor, appellant's claim is far more circumscribed. Ms. Hill's negligent supervision claim is based on the state's employment relationship with Ms. Collier alone. [Exc. at 476 ("Defendant State of Alaska. . . negligently supervised state agent and employee Staci Collier[.]")] Unlike *B.R.*, nowhere does Ms. Hill suggest that the state negligently supervised other department employees. Ms. Hill's negligent supervision claim could not support a finding of breach unless Ms. Collier had acted as a state employee; for this reason, it is barred by AS 47.32.160.

Any suggestion that Ms. Hill based her negligent supervision claim on a separate, independent duty to protect vulnerable persons is similarly unavailing. [Appellant's Br. at 50] Ms. Hill's brief posits that in failing to supervise employees, the state is "*potentially*" breaching its duty of care "to protect vulnerable persons, at least the ones whom it undertook to protect." [Appellant's Exc. at 75; Appellant's Br. at 49-50 (emphasis added)] But Ms. Hill's argument, while legally incongruous, is also so substantively inadequate that it is difficult for the state to meaningfully address: appellant makes no direct mention of who the vulnerable persons are, which ones the state undertook to protect, and whether or how that duty was allegedly breached. [*Id.*] In addition, Ms. Hill did not offer any support for her independent duty theory below,

never articulated a specific duty of care at issue, and does not now meaningfully brief the issue. [Appellant's Br. at 49-50]

To the extent that Ms. Hill's pleadings suggest that the state has an independent protective duty to assisted living home residents similar to that recognized in the child care licensing context in *R.E. v. State*, and further assuming that Ms. Hill clearly alleged that the state had somehow breached this independent duty, Ms. Hill's negligent supervision claim would still fail.<sup>27</sup> In *R.E.*, this Court held that because the state voluntarily undertook to license day care facilities pursuant to comprehensive state statutory and regulatory provisions, it owed a duty to exercise due care in performing those licensing functions.<sup>28</sup> But unlike *R.E.*, in this case the legislature has provided comprehensive statutory immunity for the underlying licensing conduct at issue. *R.E.* thus never considered nor addressed AS 47.32.160(a), which was enacted ten years after that decision and which explicitly precludes liability for civil damages for licensing related conduct.

More important still, even if the court held that the state owes a duty to protect vulnerable persons like J.H., and that the state somehow breached this duty here,

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<sup>27</sup> The caselaw cited in appellant's brief is inapposite to this case. See *Angnabooguk v. State, Department of Natural Resources*, 26 P.3d 447, 452-53 (Alaska 2001) (considering whether state owed common-law duty of care in context of firefighting operations).

<sup>28</sup> *R.E. v. State*, 878 P.2d 1341, 1347-48 (Alaska 1994).

Ms. Hill has not shown that she is the appropriate plaintiff to raise this claim.<sup>29</sup> Ms. Hill notes that “Alaska law only requires an ‘identifiable trifle’” of an interest before standing can be found. [Appellant’s Br. at p.50] But this single sentence constitutes the entire discussion of standing in Ms. Hill’s brief. Ms. Hill is correct to the extent that she notes that interest-injury standing can be established to assert the rights of another where a plaintiff can establish a sufficient personal stake in the outcome of a dispute.<sup>30</sup> [Appellant’s Br. at 50] But as the plaintiff below, Ms. Hill was also obligated to identify and articulate the “identifiable trifle” of the alleged interest at issue.<sup>31</sup> This she did not do.

While the court might now infer that Ms. Hill is attempting to raise a claim on J.H.’s behalf, she never clearly made this argument below.<sup>32</sup> The state cannot be expected to infer from Ms. Hill’s pleadings what particular interest she now claims to represent or determine how that interest was adversely affected. This deficiency, combined with the cryptic reference to standing in her pleadings, is material to the state’s ability to defend itself. Ms. Hill never identified her interest in the outcome of any

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<sup>29</sup> See *Keller v. French*, 205 P.3d 299, 304-05 (Alaska 2009) (discussing interest-injury standing); *Gilbert M. v. State*, 139 P.3d 581, 587 (Alaska 2006) (finding dependent child’s grandfather lacked standing to appeal termination of daughter’s parental rights to her own minor daughter).

<sup>30</sup> *Keller*, 205 P.3d at 304-05.

<sup>31</sup> *Id.*

<sup>32</sup> *State, By and Through Dep’ts of Transportation and Labor v. Enserch Alaska Constr., Inc.*, 787 P.2d 624, 630 n. 9 (Alaska 1989) (noting litigant generally lacks standing to raise rights of another).

dispute. Her second amended complaint, like her original two, was filed on her own behalf, and Ms. Hill only sought damages that she personally claimed to have incurred.<sup>33</sup>

[Appellees' Exc. at 476-479, ¶¶ 13, 16, 20, 28, 35, 44; 74-75]

Even if Ms. Hill had adequately raised this argument, it would still fail because a third person may not generally assert another's constitutional rights unless there is "a special relationship between the plaintiff and the third party."<sup>34</sup> Only in "rare cases" will courts permit a plaintiff to establish interest-injury standing "to protect the rights of third parties by acting in a representative capacity."<sup>35</sup> Ms. Hill did not clearly assert interest-injury standing, did not establish a special relationship to J.H, and did not demonstrate that J.H.'s father and legal guardian was incapable of protecting any of J.H.'s rights. [Appellees' Exc. at 474-479] As a result, she has no standing to bring any claim on J.H.'s behalf.<sup>36</sup>

Finally, even if this court concludes that there is an independent duty of care of the type that Ms. Hill suggests, and further finds that Ms. Hill has standing to bring a claim based on a breach of that duty, there is simply no underlying wrongful

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<sup>33</sup> Ms. Hill's opposition to the state's summary judgment motion was similarly directed to damages she claimed to personally have incurred. [See Exc. at 47]

<sup>34</sup> *Gilbert M.*, 139 P.3d at 587.

<sup>35</sup> *Foster v. State*, 752 P.2d 459, 466 (Alaska 1988) (noting court has "never held that standing can be created by wagering on whether someone else's injury will ultimately be vindicated").

<sup>36</sup> *See Moore v. State*, 553 P.2d 8, 23 n. 25 (Alaska 1976) (noting Alaska's standing requirement characterized as rule of judicial self-restraint).

conduct for which the state could be found liable.<sup>37</sup> Ms. Hill did not point to any underlying negligent act, provides no evidence of how or in what way the state negligently supervised Ms. Collier, and does not claim that the state was on notice of any allegedly improper conduct.<sup>38</sup> In sum, Ms. Hill's negligent supervision claim is functionally identical to her generalized negligence claims. The state's licensing investigation, monitoring, and enforcement actions form the basis of each allegation. [Appellees' Exc. at 474-475] Because Ms. Hill's negligent supervision claim is simply an attempt to establish liability for immune licensing conduct, the state is entitled to summary judgment under AS 47.32.160(a).<sup>39</sup>

**C. APPELLANT FAILS TO ESTABLISH EACH OF THE NECESSARY ELEMENTS OF A § 1983 CLAIM AGAINST STACI COLLIER.**

Ms. Hill next claims that the superior court erred in dismissing her § 1983 claim against state licensing employee Staci Collier because genuine issues of fact exist that preclude summary judgment. [Appellant's Br. at 46-49] She claims that Ms. Collier "violated 42 U.S.C. 1983" by depriving her of her "Fifth Amendment right of due

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<sup>37</sup> See fn, 15, *supra*; *University Federal Credit Union v. Grayson*, 878 So.2d 280, 291 (Ala. 2003) (no negligent supervision absent underlying wrongful conduct); *Haubry v. Snow*, 31 P.3d 1186, 1193 (Wash. App. 2001) (negligent supervision claim requires third person to have been injured by employee's wrongful act).

<sup>38</sup> See *Ayuluk v. Red Oaks Assisted Living, Inc., et al.*, 201 P.3d 1183, 1193-94 (Alaska 2009) (concluding trial court abused discretion in failing to consider evidence illustrating employer on notice that employee posed risk to home residents in context of negligent supervision claim). See *Jennings v. State*, 566 P.2d 1304 (Alaska 1977) (assertions of fact in unverified pleadings, memoranda, or oral argument fail to satisfy Rule 56(e) and cannot be relied on in ruling on summary judgment motion).

<sup>39</sup> See *Kinegak v. State, Dep't of Corrections*, 129 P.3d 887, 893 (Alaska 2006).

process of law.”<sup>40</sup> [Appellees’ Exc. at 478] On appeal, Ms. Hill essentially argues that she has a constitutional “right to make a living” and that Staci Collier denied her that right without due process of law. Appellant’s claim fails for a number of reasons.<sup>41</sup>

**1. Ms. Hill Fails to Establish that a Federal Constitutional Violation Occurred.**

§1983 is not a source of substantive rights, it “merely provides a method for vindicating federal rights elsewhere conferred.”<sup>42</sup> The provision creates a federal cause of action for deprivation of rights guaranteed under the U.S. Constitution carried out under color of state law.<sup>43</sup> In order to assert a §1983 due process claim Ms. Hill must therefore establish that (1) the conduct was committed by a person acting under color of state law and (2) it deprived her of a right or privilege protected by the

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<sup>40</sup> Ms. Hill claimed a violation of her Fifth Amendment due process rights, but the Fourteenth Amendment’s due process provisions apply to state action. *Johnson v. Barker*, 799 F.2d 1396, 1399 n.1 (9<sup>th</sup> Cir. 1986).

<sup>41</sup> Because courts often refrain from deciding immunity questions until a plaintiff establishes that her federally protected rights were violated, the state expressly reserved its argument that appellant’s claims against the state and/or Ms. Collier were alternatively barred on the basis of absolute and/or qualified immunity. [Appellees’ Exc. at 460]

<sup>42</sup> *Graham v. Connor*, 490 U.S. 386, 394-95 (1989).

<sup>43</sup> *San Bernadino Physicians Servs. Med. Group Inc. v. County of San Bernadino*, 825 F.2d 1404, 1407(9<sup>th</sup> Cir. 1987).

U.S. constitution.<sup>44</sup> Thus Ms. Hill must show that she was deprived of a constitutionally protected right.<sup>45</sup>

Despite the complaint's generalized assertions of wrongdoing, nowhere does Ms. Hill establish that she had a legitimate claim or entitlement protected by the due process clause of the U.S. constitution. Ms. Hill's §1983 claim below was based on her claim that (1) in September 2005 Staci Collier forced Wild Rose Gardens to stop taking further residents; and (2) in August 2005 Staci Collier wrongfully removed J.H. from the home in violation of a guardianship order. [Appellant's Exc. at 2; 22; 243] On appeal, Ms. Hill's briefing focuses on the former claim and contends that Ms. Collier deprived her of her constitutionally protected right to make a living. [Appellant's Br. at 44-48]

But in order to have a property interest within the ambit of the Fourteenth Amendment, Ms. Hill must have "more than an abstract need or desire for it and more than a unilateral expectation of it."<sup>46</sup> The Fourteenth Amendment "does not transform every tort committed by a state actor into a constitutional violation."<sup>47</sup> Similarly, "[i]t is

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<sup>44</sup> *Rinker v. Napa County*, 831 F.2d 829, 831 (9th Cir.1987); *Leer v. Murphy*, 844 F.2d 628, 632-633 (9th Cir.1988).

<sup>45</sup> *See, e.g., Bd. Of Regents of State Colleges v. Roth*, 408 U.S. 564, 569-70 (9<sup>th</sup> Cir. 1972).

<sup>46</sup> *Id.* at 577.

<sup>47</sup> *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 202 (1989). *See O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 784-85 (1980) (holding nursing home residents had no constitutional right or enforceable expectation of continued government benefits to pay for care in unqualified institution); *Portman v. County of Santa Clara*, 995 F.2d 898, 905 (9<sup>th</sup> Cir. 1993) (concluding

neither workable nor within the intent of section 1983 to convert every breach of contract claim against a state into a federal claim.”<sup>48</sup> Ms. Hill’s vague and conflicting allegations regarding Ms. Collier’s purported involvement in the denial of a due process right are insufficient to state a viable claim under the facts of this case.<sup>49</sup>

**a. Ms. Hill’s September 2005 Agreement to Stop Accepting Residents**

Ms. Hill contends that on September 14, 2005, Staci Collier forced her to stop accepting new residents into her home, thereby depriving her of “her constitutionally protected right to make a living.” [Appellant’s Br. at 46-47] Notably, Ms. Hill has never claimed that Staci Collier shut down Ms. Hill’s assisted living home altogether or otherwise revoked the home’s license to operate. [Appellees’ Exc. at 474-480] Rather, she argues only that during the course of a licensing investigation, state licensing specialist Staci Collier temporarily “forced” Ms. Hill to stop accepting new residents.<sup>50</sup> [Appellant’s Br. at 46-47] But this allegation still fails to state a viable §1983 claim.

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deprivation of benefit guaranteed under statute or contract does not automatically give rise to property interest protected by due process clause).

<sup>48</sup> *San Bernardino Physicians Serv. Med. Group, Inc. v. County of San Bernardino*, 825 F.2d 1404, 1408 (9th Cir. 1987).

<sup>49</sup> *See Ivey v. Board of Regents*, 673 F.2d 266, 268 (9th Cir. 1982) (dismissing complaint where plaintiff failed to show direct connection between municipality’s actions and discriminatory conduct); *Smith v. Stafford & Cox*, 189 P.3d 1065, 1077 (Alaska 2008) (“conclusory assertions without the leaven of confirming factual details” failed to allege constitutional violation).

<sup>50</sup> Ms. Hill conceded early in litigation that she in fact agreed to stop accepting new residents. [Appellees’ Exc. at 509] Because it is well established that a deprivation of property does not occur where an individual voluntarily relinquishes her rights, this

To begin, none of the cases appellant cites in support of her claim that she has a “constitutionally protected right to make a living” are remotely on point.<sup>51</sup> Even if this Court ignores Ms. Hill’s misplaced reliance on inapposite caselaw and concludes (1) that Ms. Hill had a protected property interest;<sup>52</sup> and (2) that Ms. Collier prevented Ms. Hill from temporarily exercising that right by forcing Ms. Hill to stop taking additional residents for a period of time, it is well established that such an incidental and/or temporary restriction does not violate due process.

This is because it is a well recognized principle that “where a State must act quickly, or where it would be impractical to provide pre-deprivation process, post-deprivation process satisfies the requirements of the Due Process Clause.”<sup>53</sup>

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concession negates Ms. Hill’s claim that there is a material factual dispute sufficient to defeat summary judgment on the §1983 claim. *See Ulrich v. City & County of San Francisco*, 308 F.3d 968, 974 (9<sup>th</sup> Cir. 2002) (plaintiff who voluntarily resigned failed to establish denial of property interest). But even if there is a factual dispute regarding the voluntariness of her decision, it is immaterial to Ms. Hill’s inability to state a viable due process claim.

<sup>51</sup> Those cases concerned the appropriateness of a fee award following a stipulation between the parties (*Fairbanks Correctional Ctr. Inmates v. Williamson*, 600 P.2d 743 (Alaska 1979)); the propriety of a fee award following a trial on the merits (*Moseley v. Beirne*, 626 P.2d 580 (Alaska 1981)); whether a state official was entitled to qualified immunity from suit (*Van Sandt v. Brown*, 944 P.2d 449 (Alaska 1997)); and whether a police chief should have been considered a “policymaker” in the context of a wrongful discharge case that alleged a first amendment violation (*Sitka v. Swanner*, 649 P.2d 940 (Alaska 1982)).

<sup>52</sup> *See Barry v. Barchi*, 443 U.S. 55, 64 (1979) (noting “[a]s a threshold matter . . . it is clear that [plaintiff] had a property interest in his license sufficient to invoke the protection of the Due Process Clause”).

<sup>53</sup> *Jones v. City of Modesto*, 408 F.Supp.2d 935 (E.D. Cal. 2005) (quoting *Gilbert v. Homar*, 520 U.S. 924, 930 (1997)). *See also, e.g., Mustafa v. Clark County*

Here, the State of Alaska has a manifest interest in taking swift prophylactic measures to ensure assisted living home resident safety and to promote public health.<sup>54</sup> The state is authorized to take immediate enforcement action against an assisted living home license, including suspending and/or temporarily restricting a home's license where there is reasonable cause to believe a violation of an applicable statute or regulation occurred that "presents an immediate danger to the health, safety, or welfare of an individual receiving services from the entity."<sup>55</sup> [See Appellees' Exc. at 495 ("The department may impose an administrative sanction prior to the hearing when there is an imminent danger to the health and safety of the residents."); 466] Because it would be impractical, if not impossible, for the state to effectuate those goals while simultaneously providing comprehensive pre-deprivation process, the state is authorized to temporarily suspend or reduce the resident capacity on a home license without a pre-suspension administrative hearing.<sup>56</sup>

To the extent Ms. Collier's conduct may even be considered to have deprived Ms. Hill of a constitutional right, it is undisputed that the state does, and did,

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*School Dist.*, 157 F.3d 1169 (9th Cir. 1998) (upholding suspension of public school teacher without pre-deprivation hearing based on allegations of misconduct).

<sup>54</sup> See AS 47.32.010(a) ("These [licensing related] procedures are intended to promote safe and appropriate services by setting standards for license that will reduce predictable risk; improve quality of care; foster individual and patient rights; and otherwise advance public health, safety, and welfare.").

<sup>55</sup> AS 47.32.140(a); See also AS 47.32.140 (Enforcement actions).

<sup>56</sup> AS 47.32.130(a).

provide Ms. Hill with post-deprivation process.<sup>57</sup> [Appellees' Exc. at 380, 384] The state sent Ms. Hill a Notice of Violation informing her of the factual basis for its enforcement actions, gave her notice of the sanctions it imposed against the home's license, and detailed the circumstances surrounding its licensing investigation. [Id. at 483-494] Ms. Hill had an opportunity to contest the state's enforcement action and challenge the factual basis for its decision to impose sanctions. [Id.] For this reason, the superior court aptly found that "even if there were a constitutionally protected interest . . . I don't see where the plaintiff has shown that Ms. Collier violated that right by requiring that [Ms. Hill] not take on new residents for a relatively short period of time while the investigation was ongoing," calling the decision an "appropriate prophylactic measure to ensure the safety of these vulnerable individuals." [Appellee's Exc. at 467-468] Because the state has an important interest in taking prompt action and because it provided Ms. Hill post-deprivation process, Ms. Hill fails to establish that any federal violation occurred.

**b. J.H.'s Removal from the Home in August 2005**

Appellant's brief abandons her prior claim that Staci Collier allegedly wrongfully removed JH from the home. [Appellant's Br. at 48-50] Even if she had briefed the issue, Ms. Hill's contention would still not support a §1983 claim. Ms. Hill never established that she had a viable property or liberty interest in J.H.'s continued placement in her home, nor can she establish the requisite causal connection between

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<sup>57</sup> See AS 47.33.520 (Hearings); 7 AAC 75.510 (Violation conference); See also (former) AS 47.33.560 (Administrative procedures) (2004).

Ms. Collier's alleged conduct and any resulting constitutional deprivation. For purposes of §1983, a person "subjects" another to the deprivation of a constitutional right if she "does an affirmative act, participates in another's affirmative acts or omits to perform an act which [she] is legally required to do that causes the deprivation of which complaint is made."<sup>58</sup> There must be an actual link between the defendant's actions and the alleged deprivation.<sup>59</sup> But because there is no genuine factual dispute that J.H.'s father, not Staci Collier, removed J.H. from the home,<sup>60</sup> Ms. Hill fails to show the necessary connection to establish a constitutional injury. Even if plaintiff had shown that Staci Collier removed J.H. under color of law and in violation of a state court order, this would fail to rise to the level of a federal constitutional violation because §1983 does not impose liability for violations of duties of care arising from state tort law.<sup>61</sup> Finally, while Ms. Hill's appellate brief might be read to suggest that J.H.'s removal caused Ms. Hill to suffer some reputational harm, she not only failed to adequately brief this claim on

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<sup>58</sup> *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988).

<sup>59</sup> *See Monell v. Department of Social Servs.*, 436 U.S. 658 (1978); *Rizzo v. Goode*, 423 U.S. 362 (1976).

<sup>60</sup> Ms. Hill conceded that Ms. Collier was not even present during J.H.'s removal and that she could not recall speaking with her about the incident until at least six days later. [Appellees' Exc. at 405-407]

<sup>61</sup> *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 940-41 (1982) (holding violation of state law not proper basis of constitutional tort); *Baker v. McCollan*, 443 U.S. 137, 146 (1979) (concluding §1983 not a remedy for alleged violation of tort law duty of care). *See also McCarthy v. Mayo*, 827 F.2d 1310 (9<sup>th</sup> Cir. 1987) (rejecting characterization of contract claim as civil rights claim where plaintiff merely attempted to "clothe state law claims with constitutional garment"); *Johnson v. Barker*, 799 F.2d 1396, 1399 (9<sup>th</sup> Cir. 1986).

appeal, she also waived this argument when she elected to abandon her administrative appeal.

**2. Because Ms. Hill Abandoned Her Administrative Appeal, She Cannot Establish that a Due Process Violation Occurred.**

Ms. Hill cannot claim that post-deprivation state procedures that she elected to forego were constitutionally flawed. This is because a procedural due process claim is not complete “unless and until the State fails to provide due process.”<sup>62</sup> For this reason, the superior court correctly concluded that the state provided Ms. Hill with post-deprivation process, that the process was “transparent,” that Ms. Hill was “fully informed,” and that Ms. Hill had “agreed to dismiss the appeal and chose not to pursue that, which she could have done.” [Appellee’s Exc. at 468] Nowhere in Ms. Hill’s brief does she challenge the court’s conclusions on this issue; such deafening silence rightfully operates as a clear and unequivocal waiver of this issue on appeal.<sup>63</sup> But even if Ms. Hill had briefed the argument, summary judgment would still be warranted because a failure to pursue available state remedies will defeat a due process claim on the merits.<sup>64</sup>

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<sup>62</sup> *Zinerman v. Burtch*, 494 U.S. 113, 125-26 (1990) (noting relevance of state procedures to §1983 procedural due process claim); *Raditch*, 929 F.2d at 480.

<sup>63</sup> *Hymes v. DeRamus*, 222 P.3d 874, 889 (Alaska 2010).

<sup>64</sup> *See Hudson v. Palmer*, 468 U.S. 517, 533 (1984) (holding official’s failure to abide by constitutionally adequate procedures will not give rise to §1983 claim where adequate state remedy available); *Raditch v. United States*, 929 F.2d 478, 480-81 (9<sup>th</sup> Cir. 1991) (rejecting due process claim where employee did not receive notice prior to termination of benefits in violation of state procedures in light of adequate post deprivation remedy); *Wax ‘n Works v. St. Paul*, 213 F.3d 1016 (8<sup>th</sup> Cir. 2000) (dismissing § 1983 for failure to utilize state remedies where plaintiff alleged city failed to provide him statutory benefits but plaintiff had failed to request appellate judicial review);

The Ninth Circuit has long affirmed this reasoning and held that “where adequate administrative procedures exist, a person can not state a claim for denial of procedural rights when he has elected to forego a complete hearing.”<sup>65</sup> In other words, while exhaustion of remedies is not generally required to pursue a §1983 claim,<sup>66</sup> “a state can not be held to have violated due process requirements when it has made procedural protections available and the plaintiff has simply refused to avail [herself] of them.”<sup>67</sup> The Ninth Circuit has thus routinely rejected claims where individuals did not take full advantage of available processes.<sup>68</sup>

The state notified Ms. Hill of the results of its licensing investigation, including its determination that her assisted living home had violated a number of licensing provisions and its decision to impose sanctions on the home’s license. [Appellees’ Exc. at 376-383] The state provided Ms. Hill an opportunity to pursue an administrative appeal. [Appellees’ Exc. at 483-488; 494-495] While she initially

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*Alvin v. Suzuki, et al.*, 227 F.3d 107, 116-17 (3<sup>rd</sup> Cir. 2000) (concluding professor who failed to invoke second part of grievance processes could not state claim of denial of procedural protection under § 1983).

<sup>65</sup> See, e.g., *Correa v. Nampa School Dist.No.131*, 645 F.2d 814, 816-17 (9<sup>th</sup> Cir. 1981) (curriculum supervisor who knew of district’s administrative process but chose not to pursue them precluded from bringing § 1983 claim).

<sup>66</sup> *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496, 514-15 (1982).

<sup>67</sup> *Dusanek v. Hannon*, 677 F.2d 538, 543 (7<sup>th</sup> Cir. 1982).

<sup>68</sup> See *Alvin*, 227 F.3d at 116; *Wax ‘n Works*, 213 F.3d at 1020; *Brogan v. San Mateo County*, 901 F.2d 762, 764 (9<sup>th</sup> Cir. 1990)(“When state remedies are adequate to protect an individual’s procedural due process rights, a section 1983 claim alleging a violation of those rights will not stand.”).

requested a hearing, Ms. Hill later chose to forego that process.<sup>69</sup> [*Id.* at 391-393, 400] Because Ms. Hill skipped available state procedures, she can not establish the lack of process required to state a federal constitutional tort.<sup>70</sup>

To the extent that Ms. Hill's briefing might suggest either that the state's post-deprivation processes were somehow flawed or that she had no inducement to pursue them, those arguments are unavailing. Ms. Hill did not even brief these claims below and failed to articulate how or in what way any state procedures were purportedly inadequate.<sup>71</sup> But even so, this claim should be rejected. Ms. Hill chose to contest both the administrative sanctions and the findings outlined in the state's Notice of Violation, which served as the basis for the state's enforcement actions. [*Id.* at 498] In February 2006, when the state offered to withdraw the Notice of Administrative Sanctions, the state clearly and explicitly informed Ms. Hill's attorney that its offer did not affect the factual basis for the state's enforcement decisions and thus did not invalidate the Notice of Violation and/or the Report of Investigation. [*Id.* at 502-504] The Notice of Violation clearly informed Ms. Hill that she could request a violation conference to discuss the violations it outlined. [*Id.* at 491] She was additionally authorized to submit

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<sup>69</sup> See *Hudson*, 486 U.S. at 535 (noting fact that available state remedy might be less than that provided under §1983 not determinative of adequacy of state remedy).

<sup>70</sup> See, e.g., *Correa*, 645 F.2d at 816-17; *Wax'n Works*, 213 F.3d at 1019-20; *Alvin*, 277 F.3d at 116.

<sup>71</sup> Any of Ms. Hill's unsupported and self-serving characterizations of the state process would be similarly insufficient to defeat summary judgment. *Brock v. Rogers & Babler, Inc.*, 536 P.2d 778 (Alaska 1975) (opposing party avoids summary judgment only by producing competent evidence showing issues of material fact to be tried).

a written response to the state's Report of Investigation to contest its conclusions.<sup>72</sup> Ms. Hill concedes that she failed to pursue these options and did not challenge the factual basis for the state's licensing actions. [*Id.* at 400-401] Even if the state's offer to withdraw the sanctions on the home's license diluted Ms. Hill's interest in pursuing an appeal, she was still entitled to challenge the state's Notice of Violation and could have availed herself of alternative means to contest the licensing determinations. Having failed to do so, Ms. Hill cannot now claim that the processes she refused to pursue were futile and/or contend that she was denied due process.<sup>73</sup>

Finally, contrary to Ms. Hill's suggestion, any alleged factual dispute regarding whether she "voluntarily" gave up her license is immaterial.<sup>74</sup> [Appellant's Br. at 46-48] As already established, the state has an important interest in taking expeditious enforcement action against licensed homes. Even if Staci Collier forced Ms. Hill to stop accepting additional residents, this discrete prophylactic measure furthers the state's legitimate interest in assisted living home safety and fails to rise to the level of a due process violation.<sup>75</sup> [Appellant's Exc. at 70-71] Ms. Hill cannot state a federal

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<sup>72</sup> AS 47.32.120(b).

<sup>73</sup> See AS 47.32.010; AS 47.32.130(a).

<sup>74</sup> See *Berg v. California Horse Racing, Bd.*, 419 F.Supp. 2d 1219 (E.D. Cal. 2006) (granting defendant summary judgment on §1983 due process claim where plaintiff failed to show genuine issue of material fact regarding alleged property interest); *Whaley v. State*, 438 P.2d 718 (Alaska 1968) (factual question material only if assuming factual situation as contended, fact would be basis for relief).

<sup>75</sup> See *Gilbert v. Homar*, 520 U.S. 924, 930 (1997) (finding no due process violation where state had legitimate interest in promptly suspending employee charged with felony

claim under § 1983;<sup>76</sup> the superior court correctly found that Staci Collier is entitled to judgment as a matter of law.<sup>77</sup>

### 3. Ms. Hill Has No Standing to Raise J.H.'s Due Process Interests.

Finally, to the extent that Ms. Hill might attempt to assert constitutional claims on J.H.'s behalf, she again has no standing to do so. As demonstrated above, Ms. Hill "cannot rest [her] claim to relief on the legal rights or interests of third parties."<sup>78</sup> Nor can she invoke the exception to this general limitation: she does not articulate what her interest in the outcome of any dispute might be, does not assert any type of "special relationship" to J.H., and does not contend that J.H.'s father is incapable of protecting his daughter's interests.<sup>79</sup> [See Appellees' Exc. at 474-486; 400-401] She thus lacks standing to raise constitutional claims on J.H.'s behalf.

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where employee occupied position of public trust); *Mustafa v. Clark County School Dist.*, 157 F.3d 1169 (9<sup>th</sup> Cir. 1998); *Jones v. City of Modesto*, 408 F.Supp. 2d 935 (E.D. Cal. 2005).

<sup>76</sup> See *Hudson v. Palmer*, 468 U.S. 517, 533 (1984) (official's failure to abide by constitutionally adequate procedures does not give rise to § 1983 claim where adequate state remedy available); *Raditch v. United States*, 929 F.2d 478, 480-81 (9<sup>th</sup> Cir. 1991) (employee failed to state due process violation regarding lack of notice before benefits termination where adequate post-deprivation remedy).

<sup>77</sup> See *Brown v. Ely*, 14 P.3d 257, 261 (Alaska 2000) (granting defendant summary judgment on § 1983 claim for failure to state cause of action).

<sup>78</sup> *Portman v. County of Santa Clara*, 995 F.2d 898, 902 (quoting *Warth v. Seldin*, 422 U.S. 490 (1975) (holding defense attorney had no standing to raise client's 6<sup>th</sup> Amendment rights)).

<sup>79</sup> See *Lumbreras v. Roberts*, 319 F.Supp. 2d 1191, 1201 (D.Or. 2004).

V. CONCLUSION

Because all of Ms. Hill's state law tort claims are based on the state's licensing related actions, they are barred by AS 47.32.160(a). Because Ms. Hill fails to establish that Staci Collier deprived her of a federally protected right or that she suffered from a lack of process, Ms. Hill fails to state a §1983 claim. As a result, the state requests that the decision of the superior court be AFFIRMED.

Dated this 13<sup>th</sup> day of July, 2010.

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