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FINDINGS OF FACT AND CONCLUSIONS OF LAW

BEFORE THE HONORABLE NIESJE J. STEINKRUGER
Superior Court Judge

Fairbanks, Alaska
August 8, 2006
12:00 o'clock noon

APPEARANCES:

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PROCEEDINGS

CD-4FA-4406-52

12:00:26

THE COURT: We're back on the record in 4FA-06-1377 Civil. All the parties and counsel that were present before are present. Ladies and gentlemen, it's always more eloquent to write a decision but as a trial judge with a full calendar, that means that you would get it some many months from now and so I'm going to deliver it orally. It won't be as eloquent but I also appreciate that in many ways, I'm a stop along the way to the Supreme Court and so the sooner I can give you a decision, the sooner you can move on to where you want to go. So I will make some findings and conclusions here and issue an order.

The primary issue below -- before this court is the validity of 7 AAC 07.012, a state regulation promulgated by the Department of Health and Social Services, and whether or not it is consistent with HB 511 promulgated by the Alaska Legislature which amended Alaska Statute 18.07.111. It is this issue that the court will direct itself to. Alaska is a certificate of needs state which means that our legislature has chosen to have a regulatory scheme related to some health care facilities that require certificates of need issued by state government. It's not the -- for this court to judge whether that's a good system or a bad system or a system that

expenditure was a million dollars or more for construction of a health care facility. This could be avoided or there was a loophole, as we like to call it, by leasing space or equipment.

The second goal of HB 511 related to psychiatric treatment for Alaska children and is not relevant to this case. In working on the part of the bill and 18.07.031 defining expenditure, the legislature also took up the definition or the use of the wording of health care facility. HB 511 amended the definition of health care facility -- that's in Alaska Statute 18.07.111 -- to include independent diagnostic testing facility and residential psychiatric treatment center. We're here today about the portion that deals with independent diagnostic testing facility.

There was extensive testimony during the legislative committee hearings regarding the certificate of need application process and the inclusion of leases in the definition of expenditures and whether or not to include independent diagnostic testing facilities in the certificate of need requirements. These are all set forth in the legislative history that is attached both to the plaintiff's pleadings and the defendants' pleadings. There are many references in the -- when you read through the legislative testimony about leveling the playing field. Sometimes we're talking -- the legislators are talking about leveling the

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works or doesn't work for Alaska. That is entirely up to the legislative process. So this decision today is not about the certificate of need program and whether it's public policy and who's making money or not making money or who's serving the underprivileged or who isn't serving the underprivileged but a much more narrow question of whether or not the regulation complies with the intent of the statute.

Banner Health operates Fairbanks Memorial Hospital, a non-profit community hospital in Fairbanks. Alaska Open Imaging Center is a self-described independently-owned diagnostic imaging facility. In 2005, Alaska Open Imaging had facilities in Anchorage, Soldotna and Wasilla and moved forward with plans to open an imaging facility in Fairbanks. In looking at HB 511, this court has considered the legislative history. One of the sponsors of HB 511, Representative Ralph Samuels, told members of the House Health, Education and Social Services Committee that HB 511 closed some loopholes in the certificate of need program statutes. These loopholes related to two main areas and these were the goals of the legislation. The first was to define expenditure to include leased space and equipment. So to make the certificate of need program fair to all players, it didn't just turn on whether or not you purchased or leased the space or equipment.

Prior to HB 511, the required certificate of need for

playing field on the leasing issue, sometimes they're talking about leveling the playing field with relation to the independent diagnostic treatment facilities and whether or not a certificate of need is required but it was the goal in both instances of the legislature to require certificate of need applications in both situations, both the leasing situation and for independent diagnostic treatment facilities.

The discussion of a proposed amendment to HB 511 arose to delete independent diagnostic treatment facilities from the definition of health care facility. Among others, Alaska Open Imaging testified strongly in favor of deleting an amendment that would delete independent diagnostic treatment facilities which would, in fact, by their testimony, clearly have deleted Alaska Open Imaging from the certificate of need requirement but Representative Ralph Samuels explained that it was the intent of HB 511 to require application of the certificate of need programs to all health care entities including independent diagnostic treatment facilities. This was dealt with because the amendment failed on a three to eight vote in the financing committee so independent diagnostic treatment facilities which Alaska Open Imaging defined itself as before the legislature were not deleted from HB 511 and, in fact, were included as requiring a certificate of need.

It's unclear to me and I did not go back and look at the time line but either while the legislative hearings were being

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1 held or sometime after that, Alaska Open Imaging went to the
2 federal government to an entity called the Center for Medicaid
3 and Medicare Services because they are the people who give
4 billing codes and Alaska Open Imaging Center asked to have
5 their billing code designation changed from independent
6 diagnostic testing facility to group practice, physician
7 practice. At around the same time, the Health and Social
8 Services moved forward on doing regulations.

9 House Bill -- and that reclassification by the feds
10 occurred. House Bill 511 took effect on June 5th, 2004. The
11 bill itself does not -- or the statute itself does not provide
12 a definition of the term independent diagnostic testing
13 facility. Health and Social Services adopted a definition by
14 regulation in 7 AAC 07.012. In assessing the validity of
15 administrative regulations, the courts apply a three-part
16 analysis as set forth in *Mechanical Contractors versus State*,
17 91 P.3d 240, 244. The first step is whether the agency has
18 the statutory authority to promulgate the regulation. If so,
19 the second step considers whether the regulation is consistent
20 with and reasonably necessary to implement the statute
21 authorizing its adoption and whether it is reasonable and not
22 arbitrary and so the second step amounts to a determination of
23 whether the regulation is consistent with the statute. If it
24 is consistent, a separate showing of reasonable necessity is
25 generally not required.

1 independent judgement when making a consistency determination.
2 *Shelovich versus State Natural Resources*, 104 P.3d 25. Alaska
3 Legislature did not define independent diagnostic treatment
4 facility. There is no evidence they were using it as a term
5 of art in the same manner as the federal government is or
6 Medicaid and Medicare billing purposes. Health and Social
7 Services was charged with the difficult job of setting up
8 regulations that were to carry out this statute. The Alaska
9 Supreme Court has recognized that statements made by
10 legislators during legislative deliberations may be relevant
11 evidence when a court is trying to determine the meaning of
12 terms. *Halo versus Anchorage*, 927 P.2d 728. Statements made
13 by the bill's sponsor during deliberations may be relevant to
14 a determination of legislative intent when determining whether
15 a regulation is consistent with the authorizing statute.
16 *Madison versus Fish and Game*, 696 P.2d 168.

17 One of these sponsors of HB 511, Representative Ralph
18 Samuels, told the members of House Health, Education and
19 Social Services Committee that HB 511 -- let me back up.
20 Testimony by non-legislators does not -- does little to
21 ascertain the legislative intent regarding a definition to see
22 if the regulation complies with the legislative intent. The
23 legislature's vote to include independent diagnostic treatment
24 facilities in the certificate of need program indicates that
25 the legislature expected that AOI -- Alaska Open Imaging and

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1 Inquiry into the regula -- whether the regulation is
2 necessary in this particular instance would mire the court in
3 questions of public policy beyond the authority and the
4 expertise of the courts. Here the intent comes from the
5 statute and the third step which is also not relevant here
6 considers whether the regulation conflicts with any other
7 statutes. The court finds that the Department of Health and
8 Social Services had the authority to promulgate regulations as
9 they did in this case. The letter of intent accompanying
10 HB 511 had the legislature telling them to do it as fast as
11 possible and as right as possible. The Administrative
12 Procedure Act states that each regulation adopted must be
13 within the scope of authority conferred and in accordance with
14 the standards prescribed by a provision of law.

15 44.62.030 states that where a state agency has authority
16 to adopt regulations, to implement, interpret or make specific
17 or otherwise carry out the provisions of a statute, a
18 regulation is not valid or effective unless consistent with
19 the statute and reasonably necessary to carry out the purpose
20 of the statute. Here in August of '05, Health and Social
21 Services gave notice of the proposed changes. The court finds
22 that they acted within their authority in promulgating new
23 regulations for the certificate of need program. The next
24 question then is whether the regulation is consistent with the
25 statute authorizing its adoption. The court applies its

1 similar entities to be classified as independent diagnostic
2 treatment facilities for the purposes of the certificate of
3 need program. This is clearly obvious from the vote that did
4 not adopt the amendment.

5 During the legislative deliberations, Alaska Open Imaging
6 was classified as an independent diagnostic treatment facility
7 under federal guidelines and even Alaska Open Imaging assumed
8 it would be an independent diagnostic treatment facility under
9 state law by its own testimony. Legislators clearly viewed
10 Alaska Open Imaging as an example of the kind of independent
11 diagnostic treatment facility that would be included in the
12 certificate of need program when HB 511 was passed.

13 Statements by the bill's sponsor during legislative
14 deliberations may also be considered as relevant in
15 determining if it is consistent. Representative Ralph Samuels
16 explained that the intent of HB 511 was to require application
17 of the certificate of need program to all health care
18 entities. Clearly, the legislature expected Alaska Open
19 Imaging and similar imaging facilities to be included in the
20 certificate of need requirements. Therefore, the legislative
21 history establishes that it was the intent of the legislature
22 when HB 511 was passed to include Alaska Open Imaging Center
23 and similar imaging centers in the definition of health care
24 entities under independent diagnostic treatment facilities for
25 purposes of the certificate of need program.

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1 Health and Social Services is required to adopt
2 regulations in accordance with the Administrative Procedure
3 Act. In this case, Health and Social Services decided to
4 incorporate the federal classification of definition of
5 independent diagnostic treatment facilities and make it the
6 state definition. This made the state classification use the
7 same words and titles as the federal classification but did
8 not necessarily make it consistent with the state's
9 certificate of need statute.

10 The Medicare, Medicaid designation and definition
11 independent diagnostic treatment facility is set out for
12 billing purposes, not for what the Alaska Legislature intended
13 for application for a certificate of need. It -- the
14 Medicare, Medicaid billing classification has a different
15 purpose from the classification of a facility to determine
16 whether or not they must obtain a certificate of need under
17 Alaska law. The certificate of need program is designed to
18 plan efficient use of health care facilities, prevent
19 increased costs that may result from under-utilization of
20 available facilities and provide high-quality care by insuring
21 a sufficiently high volume that the practitioner is proficient
22 in performing the procedure. This is set forth in the
23 purposes of the certificate of need program.

24 The -- there is -- there has been no evidence that the
25 Medicare, Medicaid billing classification meets the same needs

1 relief, that there's a presumption that there is irreparable
2 harm. This court finds it was not the intent of the
3 legislature for the court to skip the equity steps, one of
4 which is irreparable harm, in this kind of instance. It is a
5 discretionary function of the court and not a mandatory
6 function to determine whether or not irreparable harm exists.

7 I do find in this case irreparable harm exists. It
8 became -- it is now clear to me that it appears highly
9 unlikely that the plaintiff would obtain economic damages from
10 either the state or Alaska Open Imaging Company. Alaska Open
11 Imaging has complied -- has not acted illegally. They have
12 acted under an invalid regulation but they have not acted
13 illegally and it's hard to imagine a cause of action although
14 in Alaska, I'm sure someone will think of a way to put it
15 together, that would make them liable to Fairbanks Memorial
16 Hospital.

17 Likewise, the Department of Health and Social Services
18 appears to have acted in good faith in trying to quickly put
19 together an regulatory package to deal with the changes that
20 the legislature set out and it seems unlikely that the
21 economic loss that Fairbanks Memorial Hospital may have
22 suffered would be compensated by the state. However, I find
23 there is irreparable harm in that if the regulation had been
24 consistent with the statute, Alaska Open Imaging Company would
25 have had to apply for a certificate of need and Fairbanks

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1 and, in fact, it is clear that the purpose of H -- or HB 511
2 was to meet these needs and that the regulation does not.
3 They have different purposes.

4 Health care policy is a matter for the legislature, not
5 the courts. This court can only determine whether the
6 regulation is consistent with the statute that authorizes it
7 but cannot evaluate the underlying public policy. This -- the
8 plaintiff has shown likely -- clear and convincing evidence of
9 likely success on the merits, that the definition of
10 independent diagnostic testing facility in the regulation is
11 inconsistent with the legislative intent behind HB 511's
12 addition of independent diagnostic treatment facilities to the
13 definition of health care facility.

14 The state argues that the Commissioner's application of
15 the regulation is the proper issue in this case. However, the
16 issue is moot since the court has found the regulation is
17 invalid. Health and Social Services must re-write the
18 regulation so that the definition of independent diagnostic
19 treatment facility is consistent with the legislature's intent
20 when passing and defining health care facilities in HB 511

21 Having started at the end, I'll go back to the beginning
22 which is whether or not the plaintiff has established
23 irreparable harm. I found this to be a difficult issue. I do
24 not find persuasive the plaintiff's argument that by the
25 existence of Alaska Statute 18.07.091 allowing for injunctive

1 Memorial Hospital could participate in either a
2 reclassification or in a certificate of need process as well
3 as other members of the community would have been able to
4 participate. Given the application of the regulation in this
5 case, no one in the community including Fairbanks Memorial
6 Hospital had the opportunity to participate in a determination
7 by Health and Social Services as to whether or not Alaska Open
8 Imaging should be classified as an independent diagnostic
9 treatment facility and whether or not they required an
10 application for a certificate of need and there is no way to
11 -- and that results in irreparable harm to Fairbanks Memorial
12 Hospital.

13 The second issue is whether or not Alaska Open Imaging
14 can be adequately protected. We have bantered around here the
15 various ways that AOIC would not be protected, that they would
16 have possible financial loss, that there would be a possible
17 disruption of the patient medical facility relationship, that
18 people in Fairbanks might have certain diagnostic testing
19 unavailable to them. A large security bond, while it helps
20 with the financial issues related to AOIC, does not address
21 the more difficult issues which are the community issues and I
22 find appropriate in this particular case to balance the
23 hardships and, rather than require a bond, do a delayed
24 injunction and attempt to adequately protect the community and
25 AOIC, give Health and Social Services an opportunity to work

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1 through its regulation procedure or the parties to seek remedy
2 on appeal by a delayed injunction and, therefore, in this
3 particular case, it will be effective 180 days from today
4 against the plaintiffs -- injunction will be granted to the
5 plaintiffs today. It will be effective 180 days from today.

6 Questions, Mr. Gruenstein?

7 MR. GRUENSTEIN: No, Your Honor. The only -- except
8 there are several times the court said independent diagnostic
9 treatment facilities several times. That was...

10 THE COURT: I meant testing facilities.

11 MR. GRUENSTEIN: Yeah, and if the record just -- could
12 just reflect that.

13 THE COURT: The record should reflect any time I said
14 treatment, I meant testing, IDTF, independent diagnostic
15 testing facility.

16 MR. GRUENSTEIN: Okay. Thank you, Your Honor.

17 THE COURT: Thank you. Ms. Kraly, any questions?

18 MS. KRALY: No, Your Honor.

19 THE COURT: Mr. Gunther, any questions?

20 MR. GUNTHER: No, Your Honor.

21 THE COURT: All right. Folks, you have been very patient
22 with me today as I tried to get you worked in and get to the
23 end of this. I really appreciate that. It helps me a great
24 deal when I can do it at one time and so I appreciate that.
25 In light of the court's ruling, the motion for an amicus brief

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1 is moot. We'll be in recess. Mr. Gruenstein, if you would
2 lodge findings and an order within 10 days?

3 MR. GRUENSTEIN: May I just inquire of the court, when
4 you say -- since this is the first time I've appeared before
5 Your Honor, when you say lodge findings, what -- tell me what
6 it is that you would like since you've made, obviously,
7 extensive findings.

8 THE COURT: It can be just adopting what's on the record.
9 If you want something further than that, you can get a copy
10 and put it into written findings.

11 MR. GRUENSTEIN: And within 10 days?

12 THE COURT: Yes.

13 MR. GRUENSTEIN: Okay. Thank you very much.

14 THE COURT: We'll be in recess.

15 THE CLERK: Off record.

16 (Off record)

17 12:26:41

18 END OF REQUESTED PORTION
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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

BANNER HEALTH d/b/a FAIRBANKS)
MEMORIAL HOSPITAL/DENALI)
CENTER,)

Plaintiff,)

vs.)

KARLEEN JACKSON, in her capacity as)
COMMISSIONER OF HEALTH AND)
SOCIAL SERVICES, STATE OF)
ALASKA; and ALASKA OPEN IMAGING)
CENTER, LLC,)

Defendants.)

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ATTORNEY GENERALS OFFICE
JUNEAU

Case No. 4FA-06-1377 Civ.

**NOTICE OF FILING PROPOSED SUPPLEMENTAL FINDINGS OF FACT
AND CONCLUSIONS OF LAW, AND PROPOSED PRELIMINARY AND
PERMANENT CONDITIONAL INJUNCTION, AND DECLARATORY JUDGMENT**

Plaintiff Banner Health d/b/a Fairbanks Memorial Hospital/Denali Center hereby gives notice of the filing of the proposed Findings Of Fact And Conclusions Of Law, and Preliminary And Permanent Conditional Injunction, And Declaratory Judgment.

A transcript of the court's oral findings of fact and conclusions of law on August 8, 2006, is also filed herein.

DATED at Anchorage, Alaska, this 18th day of August, 2006.

GRUENSTEIN & HICKEY
Attorneys for Banner Health d/b/a
Fairbanks Memorial Hospital/Denali Center

By: [Signature]
Peter Gruenstein, #7910079

**NOTICE OF FILING PROPOSED SUPPLEMENTAL FINDINGS OF FACT
AND CONCLUSIONS OF LAW, AND PROPOSED PRELIMINARY
AND PERMANENT CONDITIONAL INJUNCTION,
AND DECLARATORY JUDGMENT**

Banner Health v. Karleen Jackson, et al.

Case No. 4FA-06-1377 Civ.

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Certificate of Service

The undersigned certifies that on the 18th day of August, 2006, a true and correct copy of this document was mailed, U. S. Mail, postage prepaid, to the following:

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**NOTICE OF FILING PROPOSED SUPPLEMENTAL FINDINGS OF FACT
AND CONCLUSIONS OF LAW, AND PROPOSED PRELIMINARY
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ALASKA; and ALASKA OPEN IMAGING)
CENTER, LLC,)

Defendants.)

Case No. 4FA-06-1377 Civ.

**PRELIMINARY AND PERMANENT CONDITIONAL INJUNCTION,
AND DECLARATORY JUDGMENT [Proposed]**

The court, after carefully considering the evidence, pleadings and arguments presented by the parties, and having issued its findings of facts and conclusions of law, hereby enters the following orders:

1. The Alaska Open Imaging Center ("AOIC") facility in Fairbanks is enjoined from operation after February 7, 2006, unless AOIC is operating pursuant to a lawful Certificate of Need granted by the Alaska State Department of Health and Social Services.

2. The court declares that 7 AAC 07.012 is inconsistent with AS 18.07.111, and therefore void to the extent it negates the legislature's intent to include AOIC and other like

**PRELIMINARY AND PERMANENT CONDITIONAL INJUNCTION,
AND DECLARATORY JUDGMENT [Proposed]**

Banner Health v. Karleen Jackson, et al.

Case No. 4FA-06-1377 Civ.

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independent diagnostic testing facilities within the definition of "health care facility," and thus subject to the requirements of the certificate of need program.

3. The court will retain jurisdiction of this matter through the pendency of the conditional injunction. Plaintiff will file a status report no later than February 15, 2007, after consultation with the other parties.

DATED at Fairbanks, Alaska, this _____ day of August, 2006.

SUPERIOR COURT JUDGE

Certificate of Service

The undersigned certifies that on the 15th day of August, 2006, a true and correct copy of this document was mailed, U. S. Mail, postage prepaid, to the following:

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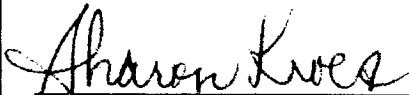
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**PRELIMINARY AND PERMANENT CONDITIONAL INJUNCTION,
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Banner Health v. Karleen Jackson, et al.
Case No. 4FA-06-1377 Civ.
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**PRELIMINARY AND PERMANENT CONDITIONAL INJUNCTION,
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Banner Health v. Karleen Jackson, et al.
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SOCIAL SERVICES, STATE OF)
ALASKA; and ALASKA OPEN IMAGING)
CENTER, LLC,)

Defendants.)

Case No. 4FA-06-1377 Civ.

SUPPLEMENTAL FINDINGS AND CONCLUSIONS OF LAW [PROPOSED]

1. The court incorporates its oral findings of fact and conclusions of law from August 8, 2006.

2. A number of courts have approved the use of conditional or delayed injunctions where appropriate to mitigate harm or due to other exigent circumstances. See, e.g., Prison Legal News v. Lehman, 272 F.Supp.2d 1151 (W.D.Wash. 2003) (injunction against prison's bulk-mail policies will take effect in 60 days); Polaroid Corp. v. Eastman Kodak Co., 691 F.Supp. 828 (D.Mass. 1985) (Kodak given 90 days to figure out how to stop actions found to be infringing on Polaroid's patent). Such a delayed injunction is particularly appropriate here because it will not only mitigate harm to one or more of the parties, but mitigate harm to AOIC

SUPPLEMENTAL FINDINGS AND CONCLUSIONS OF LAW [PROPOSED]

Banner Health v. Karleen Jackson, et al.

Case No. 4FA-06-1377 Civ.

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patients, as well as avoid the difficult and largely unnecessary exercise of determining the appropriate bond necessary to protect AOIC.

2. The parties have stated, and the court agrees, that the court is fully advised in the premises, and that the introduction of further evidence is unnecessary. Therefore, the court will issue its declaratory judgment concurrently with the conditional preliminary injunction.

3. Alaska Civil Rule 65(a)(2) provides that before or after commencement of a preliminary injunction, the court may consolidate the preliminary hearing with that of the action on the merits, and consider any evidence received at the preliminary hearing at the trial on the merits. The parties have stated, and the court agrees, that no further evidence will be helpful to the court. Therefore, there is no reason to delay entry of a conditional permanent injunction concurrent with the conditional preliminary injunction.

4. The Court's finding that 7 AAC 07.012 is invalid is limited to the extent that it is contrary to the clear intent of the legislature to include AOIC, and like independent diagnostic testing facilities, within the CON ambit. It is not the intention of the court to limit DHSS's authority to fashion reasonable guidelines by which the department can distinguish between independent diagnostic testing facilities and physicians' offices, as long as the intent of the legislature to include AOIC and other like facilities within its definition of "independent diagnostic testing facilities" is not defeated.

SUPPLEMENTAL FINDINGS AND CONCLUSIONS OF LAW [PROPOSED]

Banner Health v. Karleen Jackson, et al.

Case No. 4FA-06-1377 Civ.

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DATED at Fairbanks, Alaska, this _____ day of August, 2006.

SUPERIOR COURT JUDGE

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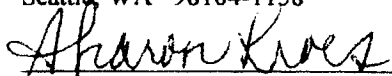
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SUPPLEMENTAL FINDINGS AND CONCLUSIONS OF LAW [PROPOSED]

Banner Health v. Karleen Jackson, et al.

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