Kenneth Covell
LAW OFFICE OF KENNETH COVELL
712 Eighth Avenue
Fairbanks, AK 99701
Phone: (907) 452-4377
Fax: (907) 451-7802
E-mail: kcovell@gci.net

Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA AT FAIRBANKS

ROBERT PROBERT; LORETTA E. PROBERT; GENE GRISSOM; SANDRA GRISSOM; JOHN GRIMES; DONNA GRIMES; KENNETH MCDANIELS; LEONA MCDANIELS; ERIC CLONINGER, and DEBRA CLONINGER, Plaintiffs, vs. FAMILY CENTERED SERVICES OF ALASKA, INC.; JOHN W. REGITANO; KATHY CANNONE; SUSZAN DALE; LONNIE HOVDE; DEBORAH L. COXON, and additional DOES I to X, Managerial Employers, Jointly Liable, Defendants.	**Case No. 4:07-CV-000030 RRB**

OPPOSITION TO MOTION FOR INTERLOCULATORY APPEAL

Defendant's moved the court to authorize an interloculatory appeal. Interloculatory appeals are only taken in an exceptional case. It is not exceptional for a court to find that an entity is subject to the FLSA. This is not some far reaching decision that affects the procedure concerning an abortion for every sixteen-year-old, nationwide or statewide, or district wide. This is not a decision that concerns admissibility to college for every applicant to the University of Alaska, and the application deadline's fast

approach. This is not a decision that affects every residential home in the nation, circuit or district. This decision only concerns one non-profit and whether or not the FLSA applies to it. It does not have moment necessary for an immediate review. The Ninth Circuit is only going to want to hear this case once. It will do so when any and all issues that arise in this case, are put before it.

Plaintiffs Proberts', *et. al.* (hereafter Probert), and each of them, oppose Defendants Family Centered Services of Alaska, Inc., *et. al.*'s (hereafter FCSA) Motion for Certification for Appeal by Permission at Dkt 95 (hereafter Motion), for the following reasons:

SYNOPSIS

This case is about the following decision:

> In any event**, the Court is not persuaded that the diagnoses listed by John Regitano do not qualify as "sick" or "mentally ill or defective"** as required by the FLSA. The 26 children identified by Regitano suffer from a number of "disorders," many of which are identified in the DSM-IV. Defendants engage in an unsuccessful semantics argument by trying to state that the disorders do not fall under "sick" or "mentally ill or defective" under the FLSA.
>
> **The Court finds that Defendant**, through its Therapeutic Family Homes, is **clearly "engaged in the operation of . . . an institution primarily engaged in the care of the sick…mentally ill or defective" who reside on the premises** of such institution." 29 U.S.C. §203(r). Accordingly, **Defendant is subject** to the **overtime provisions** of the Fair Labor Standards Act.[1]

1 Order Re Motion for Reconsideration at Docket 68 and Motion to Strike at Docket 72, Dkt 84, p. 8 (emphasis added).

FCSA begins by telling us that it will have to close the Therapeutic Family Homes (TFH) if this Court´s ruling stands. **The reality is that FCSA has already changed its wage scheme to comport with the FLSA.** (Declaration of Eric Cloninger, Exh. 1) Why FCSA did not inform its counsel (or counsel the Court) of the facts in order to avoid the misstatement is a mystery.

After summary judgment was issued and reconsideration was denied, FCSA moved to certify this case to the Ninth Circuit.[2] Whether to so certify is discretionary with this court.

FCSA claims that the case presently involves a **controlling issue of law**. Probert suggests that the law in this case is clear. The application of the law to these facts is what FCSA complains about.

FCSA claims that there are **substantial grounds for differing opinions**. In doing so, FCSA cited non-precedential sources, including an Alaska Superior Court case and seven (7) U.S. District Court cases from districts other than Alaska, most all of which are distinguishable without stretching their facts. FCSA also fails to advise the Court that one of these cases agrees with this Court´s decision.[3]

Finally, FCSA claims that immediate appeal will **materially advance ultimate termination of the litigation**. This is a summary judgment. If this Court is reversed, the result will be that the case will continue just like it would have if the Court had denied

2 Without the district court's certification, the appellate court has no jurisdiction to hear an interlocutory appeal. FRAP 5(A)(3).

3 Bowrin v. Catholic Guardian Society, 417 F.Supp. 449 (DNY 2006).

summary judgment. FCSA´s claim that reversal might "completely terminate"[4] this case is unsupportable.[5]

The purpose of 28 U.S.C. § 1292(b) is to avoid protracted and expensive litigation.[6] Nothing FCSA presents justifies departure from the Congressional mandate and Ninth Circuit precedent commanding that **interlocutory appeal is to be applied sparingly only in exceptional circumstances.**[7]

FCSA has had two chances, three if one counts the first summary judgment motion, to convince this court that it is just a glorified foster home which is exempt from the FLSA.

> ". . . [T]he legislative history of 1292(b) indicates that this section was to be used only in exceptional situations in which allowing an interlocutory appeal would avoid protracted and expensive litigation."

Nothing in this particular case justifies departure from the Congressional mandate that interlocutory appeal is to be applied sparingly only in exceptional circumstances.

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4 Motion at 8, para. 1.

5 *United States Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966) (per curiam); Milbert v. Bison Laboratories, 260 F.2d 431, 433-35 (3d Cir. 1958).

6 Id.

7 See, e.g., In re Cement Antitrust Litigation, 673 F.2d 1020, 1026 (9th Cir. Ariz. 1982), Robbins Co. v. Lawrence Mfg. Co., 482 F.2d 426, 429 (9th Cir. 1973).

The motion to amend the decision: to append the certification language required, to permit FCSA to seek the appellate court's permission to appeal, should be denied.

DISCUSSION

WOLF! WOLF!! THERE IS A WOLF!!!

FCSA has already instituted a new wage scheme for its TFH's despite its claim that it will have to close if required to pay the house parents in the TFH's in accord with the requirements of the FLSA. (Declaration of Eric Cloninger, Exh. 1).

In almost the entire first three pages of its brief, FCSA cries "wolf."[8] According to FCSA, if the FLSA is applied to them there will be devastating, "catastrophic", consequences affecting individual children and the fabric of Alaskan society as a whole. According to FCSA, the Fairbanks TFH's may close and others may not open.[9]

The FLSA talks about wages. FCSA calculates some "compensation package" presumably in order to increase the size of the numbers it presents.[10] Neither Probert,

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8 The Boy Who Cried Wolf, also known as The Shepherd Boy and the Wolf, is a fable attributed to Aesop. (210 in Perry's numbering system). The protagonist of the fable is a bored shepherd boy who entertained himself by calling out "Wolf!". Nearby villagers who came to his rescue found that the alarms were false and that they had wasted their time. When the boy was actually confronted by a wolf, the villagers did not believe his cries for help and the wolf ate the flock (and in some versions the boy). The moral is stated at the end of the fable as:

> Even when liars tell the truth, they are never believed. The liar will lie once, twice, and then perish when he tells the truth.

In reference to this tale, the phrase to "cry wolf" has long been a common idiom in English, described in Brewer's Dictionary of Phrase and Fable, and modern English dictionaries. The phrase "boy who cried wolf" has also become somewhat of a figure of speech, meaning that one is calling for help when he or she does not really need it. Also in common English there goes the saying: "Never cry wolf" to say that you never should lie, as in the above phrases.

http://en.wikipedia.org/wiki/The_Boy_Who_Cried_Wolf [citations omitted]

9 Motion at 3.

10 Motion at 3.

nor this Court, can divine what is included in this "compensation package." Since the FLSA sections here at issue address only hourly wages, this approach inherently misleads.

FCSA repeatedly says that "if the overtime is paid to Proberts'", it will cost FCSA a lot of money.[11] Will FCSA have to pay a lot of money now that they have lost? Yes, this is true. That is precisely what Congress intended. Had FCSA followed the law and complied with the FLSA, it would not have this problem because FCSA would have already paid their employees what they were lawfully due.

According to the FCSA, if it must pay overtime, the family homes will close.[12] The fact is, they changed the base pay and are operating as usual. If they are now underpaying their house parents, they will have to raise their pay. The cost of operating the TFH's should not be borne on the backs of the hard working men and women of our community.

FCSA makes another questionable assertion. FCSA says it receives no grant funds.[13] A primary exhibit throughout motion practice in this case has been FCSA's grant request to the State of Alaska for a quarter million dollars. (Exh. 2). On information and belief, FCSA has received substantial grant funds. How they can claim otherwise before this court?

None of the facts propounded require that this court certify this decision to the Ninth Circuit so that the appellate court can consider if it will hear this appeal.

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11 Motion at 3, para. 1, 2.

12 Motion at 4, para. 2, last sentence.

13 Motion at 4, para. 2.

PROCEDURAL DEFECT – RELIEF NECESSARY

The jurisdiction of this court is ordinarily limited to appeals from "final decisions of the district courts."[14] The relief required in order to authorize a motion to the appellate court to consider whether to hear an interlocutory appeal is a modification of the decisions granting partial summary judgment. 28 U.S.C. § 1292(b) requires that where the district court believes that immediate appeal would be advantageous, and that the certification requirements are met, the judge must say so in the decision. The inclusion of this language is what triggers appellate court discretionary jurisdiction to hear the appeal. Otherwise, the appellate court is without jurisdiction to hear an interlocutory appeal because it is not a final decision.

FRAP 5(a) addresses the problem.

> If a party cannot petition for appeal unless the district court first enters an order granting permission to do so or stating that the necessary conditions are met, the district court may amend its order, either on its own or in response to a party's motion, to include the required permission or statement. In that event, the time to petition runs from entry of the amended order.[15]

If this court agrees, and so amends its decisions; then, and only then, can FCSA petition the Ninth Circuit to exercise its discretion to hear the interlocutory appeal. Even if the district judge certifies the order under § 1292(b), the appellant still "has the burden of persuading the court of appeals that exceptional circumstances justify a departure

14 28 U.S.C. § 1291; Stanley v. Woodford, 449 F.3d 1060, 1063 (9th Cir. Cal. 2006).

15 FRAP 5(a)(3)(*emphasis added*).

from the basic policy of postponing appellate review until after the entry of a final judgment."[16]

So, this is really a motion to amend the Orders Granting Proberts' Second Motion for Summary Judgment and Denying FCSA's Motion to Reconsider. The relief actually required by FCSA is a written decision containing the language in 28 U.S.C. § 1292(b) and explaining the basis of that conclusion.

LEGAL DISCUSSION

CONTROLLING QUESTION OF LAW

The question presented for appeal is whether the admissible material facts presented to the court prove, or fail to prove, that the FCSA house parents were entitled to coverage pursuant to the FLSA. This is a question of fact. Once the lack of conflicting evidence is demonstrated, the entitlement to judgment as a matter of law must be addressed. This is a question of law. There can be no dispute but that employees of institutions engaged in the residential care of "individuals . . . suffering from physical or mental infirmity or sickness **of any kind**, . . ." are entitled to overtime because Congress specifically included them.[17]

The issue is whether FCSA is such an institution and this is fact driven. The decision is based upon application of facts propounded by Proberts' and admitted by

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16 Coopers & Lybrand v. Livesay, 437 U.S. 463, 475 (U.S. 1978); (*superseded* with respect to class certifications).

17 The Department of Labor Field Operations Handbook (FOH), §12g02, says that 29 U.S.C. § 203 applies to . . . "individuals who reside on the premises and who, if suffering from physical or mental infirmity or sickness of any kind, will require only general treatment and observations of a less critical nature than that provided by a hospital. Such institutions are not limited to nursing homes, . . . but include those institutions generally known as nursing homes, rest homes, convalescent homes, homes for the elderly and infirm, and the like." (FOH § 12g02)(*emphasis added*).

FCSA. This is a question of facts and not law, and thus does not involve a controlling question of law.

DIFFERENCE OF OPINION

FCSA claims that there is room for differing opinions and supports the claim by citing to an Alaska Superior Court case with no precedential effect at all; and to a number of cases factually distinguishable. Of greatest interest to Proberts' is a cite to a district court case that agrees with this Court´s decision, *i.e., Bowrin.*[18]

In *Bowrin,* two types of residential foster care group homes were at issue. The "hard-to-place" homes were "specifically geared to care for children with severe mental illness." A child's mental health status was a significant factor in his or her referral to the program, and these homes employed additional clinical staff to monitor the residents' mental health status.The *Bowrin* court found that these "hard to place" homes were "primarily engaged" in providing residential care to the mentally ill residing on the premises, and thus were enterprises under the FLSA.[19]

FCSA´s other cited cases are distinguishable without stretching their facts.

Powell: In *Powell v. FCSA,* 4FA-06-2438-CI (28 February 2008), the superior court granted summary judgment to FCSA. One way to lose a summary judgment motion is to offer no material evidence to demonstrate a question of fact. The *Powell* court pointed to the lack of evidence to support Powell.[20] Powell introduced no evidence to support a finding that FCSA was an institution engaged in the care of the mentally

18 *Bowrin*, 417 F.Supp.2d 449.

19 *Bowrin*, 417 F.Supp.2d at 460-64.

20 *Powell* Decision at 2, 4, 5, 6, and 8.

ill.[21] As the *Powell* court said, " . . . the defendant has met its burden and established the absence of a material issue of fact. The plaintiff has not produced competent evidence [to the contrary.]"[22]

Because Powell failed to produce evidence to meet his burden to demonstrate questions of fact; and because he introduced no evidence at all about the "mentally ill" issue, this case is irrelevant to the case at bar and the issue here presented.

Moreover, since this is an Alaska Superior Court case without precedential effect even in Alaska, it has no relevance here.

Kitchings: This employer was a religious, not-for-profit organization that provided residential care and treatment for abused, neglected, or emotionally damaged children. Unlike FCSA, the employer operated as a religion-based organization that worked with the residents in a variety of ways and provided more services than psychological or psychiatric treatment. Critically, unlike FCSA, that defendant even obtained a Department of Labor Opinion Letter supporting its determination that it was not subject to the FLSA.[23] Without the opinion letter, FCSA is not analogous to *Kitchings.*

***Murray*:** In *Murray*, the Defendant's function was to provide temporary housing to the victims of domestic violence and sexual abuse. The goal of the shelter is to provide a safe haven during which counseling is provided to help these individuals "get

21 *Powell* Decision at 6.

22 *Powell* Decision at 4.

23 Department of Labor Opinion Letter dated November 30, 2004 (2004 WL 3177888), *cited* in *Kitchings v. Fla. United Methodist Children's Home, Inc.*, 393 F.Supp.2d 1282, 1298 (M.D. Fla. 2005).

back on their feet." The shelter did have counselors who assisted in finding permanent housing and a psychologist to provide therapy on a contract basis. Plaintiff argued that this converted the shelter into an enterprise which "primarily engages in the care of the . . . mentally ill . . . who reside on the premises of such institution. . . ." 29 U.S.C. § 203(s)(1). The court found that the "indispensable prerequisite for the operation" of the shelter is the need for emergency sanctuary for these victims of domestic violence and sexual abuse.[24]

Joles: The *Joles* case discussed a home providing temporary shelter and care to troubled youths. The defendant did not qualify as any of the organizations or activities listed in 29 U.S.C. § 203(r)(2). No allegation was made, nor evidence introduced to such effect; and the fact was conceded by the plaintiff. The case does not enlighten us about the application of 29 U.S.C. § 203(r) and (s).[25]

Segali: This case is about schools. The Idaho Youth Ranch was not engaged in the operation of [an] "elementary or secondary school" within the meaning of 29 U.S.C. §§ 203(r)(1) or 203(s)(5); and the court so found. *Segali* is irrelevant to this case.

***Jacobs*:** The defendant was a "regular" foster boarding program, designed to care for abused or neglected children without special needs who have been removed from their biological families and placed with foster families. Neither the foster homes, nor the boarding home programs, are specifically geared toward caring for children with severe mental illness.

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24 *Murray v. R.E.A.C.H.,* 908 F.Supp. 337, 339-340 (W.D.N.C. 1995).

25 Joles v. Johnson County Service Bureau, 885 F.Supp. 1169 (S.D. Ind. 1995).

The parties did not dispute that the defendant was neither an institution primarily engaged in the care of the sick, mentally ill, nor the aged that reside on the premises, nor an actual municipal public agency. The plaintiff´s theory was that the defendant was an enterprise by operation of § 203(r)(2)(C) under which "the activities performed by any person or persons in connection with the activities of a public agency are entitled to FLSA coverage.[26] The court disagreed. This case is irrelevant to the Probert case and this motion.

A DIFFERENT OPINION

We are lawyers. Everything is subject to differing opinion. FCSA´s cited cases do not support its position because they are factually diverse, of minimal or no precedential effect; and in one case, support this Court's decision. The differing opinions can be taken up at the end of the case and there is no exceptional reason to do otherwise.

MATERIALLY ADVANCE END OF LITIGATION

Once again, FCSA engages in wishful thinking. Reversal will not "completely terminate" the action in FCSA´s favor.[27] The issue to be certified, if there is any, is whether the facts presented and admissions made demonstrate that Proberts' carried their burden and that FCSA did not refute it. FCSA filed a reconsideration motion; and there tried to add arguments and evidence not previously presented to the court. Could it be that they intend to do the same at the appellate level?

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26 *Jacobs v. N.Y. Foundling Hosp.*, 483 F. Supp. 2d 251, 263 (E.D.N.Y. 2007).

27 Motion at 8, para. 1.

This summary judgment and reversal has only one effect, to return the case to its posture before summary judgment. Discovery and litigation would continue and re-include liability. The case would not end. Discovery concerning this issue has a long way to go before trial. Further motion practice is a certainty.

Rogers**:** The question in *Rogers* was which statute of limitations applied. The question was one of law. Proberts´ case is one of facts. In *Rogers,* the plaintiff's did not oppose the motion to certify. Thus, the **court construed the motion to certify as a request for immediate appeal.** So, this case was not an adversarial motion for certification for appeal, as is Probert. This is essentially a stipulation by the parties.[28]

Frank**:** In this case, the plaintiff won. The issue was the good faith defense. Proberts' are confident that they will eventually address this issue; but it has not been raised yet. The key fact was that the employer was protected from back-pay liability as a result of an opinion letter from the Department of Labor; a fact glaringly absent from this case. [29]

Klem**:** In this case, the employee prevailed. There is no discussion of the procedural history leading to certification.

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28 *Rogers v. City of San Antonio*, 392 F.3d 758 (5th Cir. Tex. 2004).

29 *Frank v. McQuigg*, 950 F.2d 590 (9th Cir. Alaska 1991).

***Kouba*:** This was a sex discrimination case. This appeal resulted from a stipulation between the parties.[30]

ROUTINELY ACCEPTED IMMEDIATE APPEAL

If acceptance of interlocutory appeal becomes routine, then Congress and U.S. Supreme Court directives will be thwarted. The legislative history of § 1292(b) indicates that this section was to be used only in exceptional situations in which allowing an interlocutory appeal would avoid protracted and expensive litigation.[31] The Supreme Court has repeatedly stressed that the criteria in 28 U.S.C. § 1295 should not be construed in a way that would "swallow the general rule . . . that a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated."[32] The acceptance of interlocutory appeal is, and must be, an exceptional deviation from the general requirements of American law.[33]

FCSA cites numerous cases. In most of them, interlocutory appeal and something similar to our issue is discussed. However, some of these cases have no

30 *Kouba v. Allstate Ins. Co.*, 523 F.Supp. 148, 164 (E.D. Cal. 1981).

31 *United States Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966) (*per curiam*).

32 *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994).

33 FCSA "supports" this claim to the "routine" with a number of cases where interlocutory appeal was heard. Refusal to grant interlocutory appeal jurisdiction at the trial court level is unlikely to be appealed. Even more so, many do not even seek it, knowing that it is unreasonable. Because of this, Proberts' cannot provide contrary cases.

bearing on this case at all and must be called to the court's attention, if even only as a footnote, to keep the record straight.[34]

CONCLUSION

FCSA wants an interlocutory appeal. On one hand, FCSA argues that the TFH's will close if this Court's decision is not reversed. (Even so, that appeal would still be a year or more.) On the other hand, FCSA has already restructured its wage scale to comply with the FLSA and the decision and has kept the TFH's running. It appears that an immediate interlocutory appellate resolution is not so important as FCSA would have us believe.

This is not a controlling question of law. It is a question of fact at issue. Nor are there any more substantial grounds for differing opinion than in any other case. Finally, the eventual resolution of this case will be advanced by permitting the ruling to stand. To do otherwise will only cause delay and distraction in the case.

Interlocutory appeal is to be sparingly used and used only when exceptional circumstances exist. Such is the command of Congress, the U.S. Supreme Court and this Circuit. FCSA has failed to carry its burden.

34 *Thibodeaux v. Exec. Jet Int'l, Inc*., 328 F.3d 742, 745 (5th Cir. La. 2003), involves the Railway Labor Act, and only tangentially, the FLSA. *United Transp. Union Local 1745 v. City of Albuquerque,* 178 F.3d 1109, 1121 (10th Cir. N.M. 1999), was not an interloculatory appeal. A jury verdict preceded the appeal.

This motion should be denied and the case should proceed, as usual, and in due course.

RESPECTFULLY SUBMITTED, this 14th day of April, 2009, at Fairbanks, Alaska.

LAW OFFICE OF KENNETH L. COVELL

By: /s/ Kenneth L. Covell
ABA No. 8611103

CERTIFICATE OF SERVICE
This is to certify that a copy of the foregoing has been served electronically, by ECF, to the following attorney(s) and/or parties of record:

John Foster Wallace

Richard D. Monkman

Dated: April 14, 2009
By: /s/ Kenneth L. Covell