CASE NO. 13-15413

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEANNA SMITH,

Plaintiff – Appellant

vs.

BANNER HEALTH SYSTEM; SCOTT ELTON; STATE OF ARIZONA; ARIZONA DEPARTMENT OF ECONOMIC SECURITY; ARIZONA CHILD PROTECTIVE SERVICES; BONNIE BROWN; LAURA PEDERSON; and TAMMY MACALPINE,

Defendants - Appellees.

APPEAL FROM THE UNITED STATED DISTRICT COURT
DISTRICT OF ARIZONA

APPELLANT'S OPENING BRIEF

UNDER SEAL

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JURISDICTION STATEMENT

This Court has federal question jurisdiction under 28 U.S.C. § 1331. This Court also has jurisdiction to adjudicate the related state law pendent claim pursuant to 28 U.S.C. § 1367(a).

INTRODUCTORY STATEMENT

This case involves the malicious reporting to Arizona Child Protective Services ("CPS") by medical personnel and the conspiracy/joint venture between the hospitals and doctors involved and CPS to thereafter to maliciously remove Appellant Leanna Smith's ("Leanna") fourteen year old daughter (referred to hereafter as "CR") from her custody and home. The initial report came from Dr. White at St. Joseph's Hospital while CR was being treated at Banner Desert Hospital and that same day a second report was made by Amira El-Ahmadiyyah and Dr. Oppenheim, a Psychiatrist at Banner Health Hospital. At the time of Discharge of CR from Banner Desert Hospital, Dr. Scott Elton, the treating neurosurgeon and other doctors at Banner Desert Hospital, in writing, made a recommendation to CPS (hereafter referred to as "Subsequent Recommendation) that it was not safe for CR to go home to her mother. CR was released from the hospital directly into CPS Custody as a result of the Subsequent Recommendation.

Civil liability for the malicious report and Subsequent Recommendation is governed by A.R.S. § 13-3620 et. seq. and A.R.S. § 8-805 (immunity for participating in a dependency action). The Banner Health Defendants have a mandatory obligation to report abuse as defined by A.R.S. § 8-201 to CPS (A.R.S. § 13-3620(A)) if, and only if, they have a **reasonable belief** abuse occurred. Ramsey v. Yavapai Family Adv. Ctr., 225 Ariz. 132, 136-9, 235 P.3d 285, 289-2 (App. 2010)(Immunity for Mandatory Reporting if belief of abuse reported was reasonable). The "reasonably believes" requirement does not provide immunity

for individuals who participate in a judicial or administrative proceeding or **investigation** resulting from a report. Id; A.R.S. § 13-3620(J). This includes juvenile court dependency proceedings. A.R.S. §§8-805 and 13-3620(K)(1 to 3) and.

There is no immunity for a reporter, mandatory or otherwise, or a person who participates in a judicial or administrative proceeding (including dependency) or investigation resulting from a report if the "person acted with malice." A.R.S. § 8-805(A); [1] Ramsey, 225 Ariz. at p. 137, 235 P.3d at 291 and A.R.S. § 13-3620(J). Malice is "a wish to vex, annoy or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law." A.R.S. § 1-215(20); Ramsey, 225 Ariz. at 139, 235 P.3d at 292. By statute, a person acts with malice if the person knowingly and intentionally makes a false report of abuse to CPS. A.R.S. § 13-3620.01. A person who knowingly and intentionally makes a false report is also subject to criminal liability.

STATEMENT OF ISSUES

I. BANNER HEALTH DEFENDANTS:

1. The Trial Court violated Rule 56(f), FRCP in granting the Banner Health Defendants Motion for Summary Judgment ("Motion") on grounds not raised and/or requested by the Banner Health Defendants and without giving notice and a reasonable opportunity to respond.

2. Alternatively, material issues of fact regarding the reasonableness and malicious nature of the Banner Health Defendants initial report and/or subsequent recommendation to CPS preclude the granting of summary judgment.

[1] "Any person making a complaint, or providing information or otherwise participating in the program authorized by this article shall be immune from any civil or criminal liability by reason of such action, unless such person acted with malice ..."

3. The Trial Court erred as a matter of law in ruling that Leanna was collaterally estopped (issue preclusion) from asserting that the Banner Defendants initial report and subsequent recommendation to CPS was not reasonable because the Juvenile Court's granted the initial Dependency Petition and even though the Dependency Petition was ultimately dismissed by the Juvenile Court.

II. STATE DEFENDANTS

1. The Trial Court erred in granting the State Defendants Motion for Summary Judgment because CPS (especially investigator Laura Pederson) have a statutory duty and obligation to fully investigate allegations of abuse, and that includes exculpatory information and that obligation does not disappear because they have some information indicating abuse.

2. Further, there are issues of fact that preclude the granting of summary judgment in the State Defendants favor.

STATEMENT OF THE CASE

This is an appeal of the Trial Court's July 31, 2012 Order granting Defendants Banner Health and Dr. Scott Elton's (collectively referred to hereafter as "Banner Health Defendants") Motion for Summary Judgment ("Summary Judgment Order")**(Excerpt to Record, p. 3,** hereafter referred to as **"ER"),** the January 18, 2013 Order denying Plaintiff's Motion for Reconsideration, Motion for New Trial and Motion for Rule 60 Relief from the Court's Order Granting the Banner Health Defendants Motion for Summary Judgment **(ER p. 19),** the February 12, 2013 Order granting Defendants State of Arizona, Arizona Department of Economic Security, Arizona Child Protective Services, Bonnie Brown, Laura Pederson and Tammy Macalpine's (hereafter referred to collectively as the "State Defendants") Motion for Summary Judgment **(ER p. 12)** and the February 12, 2013final Judgment based thereon **(ER p. 22).** The Notice of Appeal was filed on March 3, 2013. **ER p. 1.**

Appellant incorporates herein by this reference, as though fully set forth herein, Appellant's Response to the Banner Health Defendants Motion for Summary Judgment (**ER p.22),** Appellant's detailed Controverting Statement of Facts filed in Response to the Banner Health Defendants' Motion for Summary Judgment with attached exhibits (**ER p.587),** Appellant's Response to the State Defendants Motion for Summary Judgment (**ER p.27),** Appellant's detailed Controverting Statement of Facts filed in Response to the State Defendants Motion for Summary Judgment with the attached exhibits (**ER p.1050**), and Appellant's Motion for Reconsideration, Motion for New Trial and Motion for Rule 60 Relief and the exhibits attached thereto **(ER p. 1440)** and Plaintiff's Reply filed in support thereof. **ER p. 1472.**

STATEMENT OF FACTS

A. EVIDENCE FROM WHICH A JURY COULD FIND THE DOCTORS ACTED TO VEX AND HARM PLAINTIFF.

1. Leanna witnessed her daughter having high blood pressure, a fast heart rate and Cheyne Stokes breathing at Banner Desert Hospital with Dr. Haddad and Dr. Cook present. **ER p. 576.** She believed from her experience as respiratory therapists that she witnessed her daughter have a stroke. **ER p. 111.** Dr. Cook wrote in the medical record at the time that the hospital should avoid any further "strokes," although he later changed the language to remove the word "stroke." **Id.**

2. CR then became unresponsive and "lethargic to the point where she was not opening her eyes, not answering commands, responding only to deep stimuli." **ER pp. 576 and 597, ¶ 46** The assessment from the medical doctors at the time was that CR "received Lortab just before change in mental status " and that her condition was "most compatible with a drug encephalopathy but we cannot prove

that." **Id**. The working diagnosis was that her condition resulted from medication she received at the hospital. **Id, and p. 578.**

3. One same day the Lortab medication was given and CR slipped into a Coma, Plaintiff confronted Dr. Haddad and Dr. Cook about the stroke. Dr. Haddad and Dr. Cook denied any type of stroke took place. **ER pp. 111, 112 and 599, ¶ 50.** Plaintiff accused Dr. Haddad and Dr. Cook of covering up the stroke. **ER p. 579.**

4. CR woke up from the first coma only to be found unresponsive in the PICU at Banner Desert that night. She then slipped into the Second Coma. **ERpg.112, ER p. 576.**

5. CR was taken to the MRI/MRA scanner and another event took place. CR came out the MRI/MRA scanner with Bilateral Pneumothoraces (both lungs blown out) and Chest Tubes had to be inserted in both lungs for her to breath. **ER pp. 112, 113 and 1092.**

6. At this time Dr. Mark Eikenberry at Banner Desert ordered a urine test to determine what drugs where in CR's system. CSOF ¶ 48. **Dr. Fiorito informed Plaintiff that all drugs in CR's system were administered by the hospital.** Id; **ER pp. 577, 599 at ¶ 50, 606 at ¶¶ 6-7 and 1092..**

7. While CR was in this second coma, Leanna accused Dr. Cook, Dr. Oppenheim, Dr. Fiorito and Dr. Erskine of not knowing what they were doing and that if they did not transfer CR to another hospital they were going to kill CR. Dr. Fiorito then transferred CR from Banner Desert to St. Josephs Hospital. See **ER pp. 113, 579, 1092,¶ 283 and pp, 606 and 1393 at ¶8**.

8. After recovering from the second coma, a third episode occurred at St. Joseph's Hospital after CR went through an EDG (endoscopy) with biopsy procedure. **ER p. 599, ¶ 49**. "Upon returning from the procedure, she developed

respiratory distress and required intubation for **Code Blue**. She was transferred to the Pediatric Intensive Care Unit for further care." Id, (emphasis added).

9. Dr. Rekate, the Pediatric Neurosurgeon at St. Joseph's Hospital who took over CR's care, witnessed the episode and wrote " I was present near end of arrest situation last night and have discussed situation at length with CR's mother last night and today. Plan would be to decide on what medications she will need as outpatient and make certain she does not react to them here. She should not undergo sedated procedures except in ICU or anesthesia setting." **Id, and pp. 113 and 577.**

10. After these events, Leanna met with Dr. Alfano, a vice President at St. Joseph's Hospital and told him she felt her daughter had a stroke at Banner Desert Hospital, that it was being covered up and requested "they come clean and provide medical care for CR." **Id, at pp. 599, 560, 1092, ¶ 283 and pp, 606 and 1393 at ¶ 9.**

11. Dr. Rekate documented that the doctors at St. Josephs had reviewed the medical records and found CR suffered a left transverse sinus occlusion, which is recanalizing.[2] However he documented St. Joseph's Hospital will no longer do any forensic work to document the stroke that occurred at Banner Desert Hospital and that if she did not trust him she needed to find another neurosurgeon. **ER pp. ER pp. 599, 560, 600, 1093, ¶ 284 and 1395.**

12. Dr. Rekate then discharged CR from St. Joseph's Hospital and Dr. Bruce White sent CR home by ambulance. **ER p. 126, ¶ 191.** Dr. Rekate stated in writing he would no longer work on the case and resigned as CR's neurosurgeon. **Id, also p. 1093, ¶288 and p. 1400.**

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[2] Dr. Newberger, a pediatric child abuse expert testified before the Juvenile Court that this was evidence CR had a stroke. **ER pp.599, ¶51 and 752-759.**

13. Within weeks of being sent home without a neurosurgeon, CR's brain started herniating. Id, p. 126, ¶ 193. Plaintiff took her daughter to Scottsdale Healthcare Osborn Hospital at the direction of the family physician Dr. Mario Islas. **ER pp. 126, 574.**

14. Dr. Rekate agreed to come back on the case and had CR transferred to St. Joseph's Hospital. **Id, at p. 126, ¶ 194.** The Doctors at Scottsdale Healthcare Osborn documented that the reason Dr. Rekate agreed to treat CR and have CR transferred to St. Joseph's Hospital was to accuse her Mother of having Munchausen Syndrome by Proxy ("MSBP"):

> "I discussed the case with Donna, the nurse practioner of the patient's neurosurgeon, Dr. Cates' team. Donna, at this time, voiced much frustration over the patient's recent hospitalization and concerns for possible Munchausen or Munchausen by proxy from the mother. Donna does understand my concerns and felt that the patient should only be evaluated by their team and agree that we should not attempt a shunt tape or further evaluation at our facility. She did request that I speak with the Neurosurgery resident who will see the patient in the emergency Department at St. Joseph's Hospital. Scottsdale Healthcare Osborn medical report at **ER pp. 1093, ¶285 and 1396-97.**

15. While CR was undergoing brain pressure monitoring at St. Joseph's Hospital, Dr. Alfano and Dr. Harold Rekate came together to CR's room and asked that Leanna meet privately with Dr. Alfano. **ER pp. 1092, ¶ 283, 607 and 1394 at par. 10.** Smith left her daughter and went into another room with Dr. Alfano. **ER p. 1054.**

16. Leanna stated to Dr. Alfano she was upset because the hospital sent CR home by ambulance, with no neurosurgeon assigned to the case, with a lumbar-peritoneal shunt in her head and as a result CR's brain herniated. Smith was angry because St. Joseph's abandoned care of CR. Dr. Alfano took this personally and

told Leanna that this was not about CR, but was personal between them. He then told Leanna, she "**would not like what we are going to do to you next.**" **Id; ER pp. 126-27, ¶ 195, 1054.**

17. After the meeting with Dr. Alfano, Plaintiff met with Dr. Rekate in CR's room. Dr. Rekate immediately stated he wanted to remove the intracranial pressure monitor. When Leanna asked him why, Dr. Rekate suddenly raised his hand in the air and said "[y]ou are impossible to work with." He left the room and resigned as CR's neurosurgeon a second time. Id; **ER pp. 127,¶ 197 and 1054.**

18. On August 22, 2008, CR was transferred from St. Joseph's Hospital to Dr. Elton at Banner Desert Hospital who had agreed to treat CR as her neurosurgeon. **Id; ER pp. 128, 1093, ¶ 294 and Donna Wallace Note at 1427.**

19. On August 27, 2008, in the morning, Dr. White from St. Joseph's Hospital called the CPS hotline and made a report against Plaintiff. **ER p. 1055**, ¶21. On the same day in the afternoon, Amira El-Ahmadiyyah's ("Amira"), a social worker at Banner Desert and Dr. Oppenheim called the CPS hotline regarding Leanna, which CPS refers to as the second source. **ER pp. 1065-66, ¶¶ 108 -111 and 1089-90, ¶¶262 -268.**

B. BANNER HEALTH DEFENDANTS FIRST REPORT OF ABUSE AND SUBSEQUENT RECOMMENDATION THAT CR BE TAKEN INTO CPS CUSTODY.

20. Banner Health Defendants report to CPS regarding Leanna is located at Exhibit "C" to **ER pp. 588, ¶6 and 379-80**. Detective Page interviewed Dr. Oppenheim, Dr. Albuquerque, Dr. Cook and Dr. Elton at Banner Health (the doctors behind the report and the Subsequent Recommendation) and they informed Detective Page that they alleged medical abuse because from their review of the medical history, there was no medical explanation for CR's current medical condition (headaches) and no medical explanation for CR's comas (incident of

reduced levels of consciousness) that she had in the 2006. **ER pp. 595-97, ¶ 44, 1058 ¶ 44 and 1174-75.**

21. Dr. Elton then determined that the reasons for CR's current medical problems was the result of high brain pressures caused by psuedotumer cerebri. Dr. Elton told Detective Page that even though his diagnoses explained her current medical condition and for her current hospitalization, it did not explain the causes of the prior comas. **Id, and pp. 575, 576 and 1057-8.**

22. Dr. Elton diagnosed CR with psuedotumer cerebri and surgically implanted a Ventricular Peritoneal Shunt in CR's brain. **ER pp. 128, 1059, ¶ 57 and 1177.** A "staff meeting" was then held at Banner Desert Hospital where Dr. Oppenheim, Dr. Albuquerque, Dr. Elton and the CPS investigator Laura Pederson discussed whether CR should be released to her Mother that day when Dr. Elton was going to discharge CR from the hospital. **ER pp. 1067-8, ¶¶ 121-129.** Dr. Albuquerque, Dr. Oppenheim and Dr. Elton recommended to CPS that it was not medically safe for CR to go home to her mother ("Subsequent Recommendation"). **Id.** They wrote:

> "We feel that our concern for medical and psychological recover, [CR] would benefit from an independent recovery plan and care. Returning home to Mother's care will impede [CR]'s recovery and be further psychologically and medically harmful to [CR]." **ER pp. 332¶7 and 381-382.**

23. Dr. Elton stated to Detective Page and later confirmed at his deposition that the medically unexplained comas that happened years ago was his sole basis for signing the Medical Note recommending CR be taken by CPS from her Leanna. **ER pp. 595-97, ¶ 44, 1057 ¶ 44, 1059¶ 57, 1160 ¶15, 1085 ¶ 229 and 1086-7 ¶¶ 236, 238.**

C. FALSE STATEMENT IN DEPENDENCY PETITION.

24. Laura Pederson ("Pederson") was the CPS investigator assigned to the case. Pederson prepared the factual information contained in the Dependency Petition filed with the Juvenile Court and her supervisor Dana Markusen ("Dana"), verified under oath, the factual allegations set forth in the Dependency Petition. **ER pp. 1075, ¶ 159 and 1083 ¶ 210-212.** The factual allegations in the Dependency Petition signed under oath were not accurate and were materially misleading. **ER p. 588-90 ¶11, p. 331-33 ¶ 11 and p. 595-97 ¶44.**

25. The Dependency petition states that Leanna refused "most medical intervention with the exception of narcotic medications." **Id.** Laura Pederson testified this statement came from Dr. White. **ER p. 1078, ¶ 174.** The narcotic medications were prescribed by Dr. Islas, the family physician, Dr. White and Dr. Rekate. **ER p. 588-90 ¶11.** More importantly, after meeting with the pain management staff at St. Joseph's Hospital, Leanna agreed to and authorized the doctors to wean CR off the narcotic drugs. **Id.**

26. Regarding prescription of narcotic drugs, Dr. Islas told Detective Page when she investigated this allegation that "he prescribed her methadone and he said that he did for pain management. He said that he started her off with Oxycodon but he wanted her to get steady with the medications so he switched her to methadone and started to wean her off Oxycodone. He said that after she got off of Oxycodone he was going to start to wean her off of the methadone also." **ER pp. 1060 ¶ 63.**

27. The Dependency Petition further alleged that Leanna in the "**past week**" requested a "Do Not Resuscitate" ("DNR") and a referral to hospice. "The requests were denied by the hospital as the physicians have indicated that the child is not terminally ill and should be able to participate in school and normal daily

activities with appropriate pain management." **ER p. 1057 ¶ 34, pp. 1078-79 ¶ 175 and p. 588-90 ¶11.**

28. Laura Pederson testified that this statement came from Amira, a social worker at Banner Desert. **ER pp. 1075 ¶ 160 and 1078-79 ¶175.** Amira admits telling Pederson about a request for hospice but denies making a statement about a DNR. **ER p 1091, ¶¶ 273-274 and. p. 1092 ¶ 281.**

29. There is no medical record that indicates that within the "**past week**" Leanna made a request for hospice or a requested a DNR. The request for a referral to hospice and a request for a DNR took place in October of 2007. The medical records establish that this request was made more than ten months before the reports to CPS and the request for the DNR was agreed to and signed off on by the treating physician Dr. Rosenberg. Doctor Rosenberg's Do Note Resuscitate Order are attached as Exhibit "C" to **ER pp. 589-90 ¶11 and p. 617-619.**

30. Further, based on Dr. White's Statements (**ER p. 1055 ¶ 21**), the Dependency Petition asserts that Mother refused to allow a doctor to remove a needle (brain pressure monitor) for "three days, exposing CR to an increase risk of infection. **ER p. 1057 ¶ 34, pp. 1077-78 ¶¶172-73 and pp. 588-90 ¶11**. Plaintiff denies this. **ER pp. 607 and 1394 at ¶10**. However, St. Joseph's medical records show that the plan was to run the brain pressure monitor for 48 hours. **ER p. 1093 ¶289 and pp. 1401-18**. The brain pressure monitor was inserted on 8/20/08 at 15:30 hours and removed on 8/22/08 at 17:00 hours. The monitor was in place for just over 48 hours consistent with the plan. **Id**.

D. APPELLANT'S PEDIATRIC CHILD ABUSE EXPERT'S REPORT AND TESTIMONY.

31. Plaintiff's pediatric child abuse expert, Dr. Eli Newberger expressed his opinion in his report that the allegations made by the Banner Defendants to CPS were based on "multiple misrepresentations of [CR's] medical history and clinical

status." **ER pp. 600-03 ¶¶54- 56 and Exhibit "DD " at p. 829 and 224**. He found that "[s]o numerous were the falsehoods, and so unsubstantial the attention to the knowledge base readily available to [CR's] treating physicians, that they raise serious questions not simply about their honesty, but of their motives." **Id.**

32. Dr. Newberger has been a pediatrician for 40 years with experience in the diagnosis, treatment and prevention of child abuse and neglect. He has personally diagnosed and treated over 300 cases of Munchausen Syndrome by Proxy. For three decades he has been the medical director of the child protection team at the Children's Hospital Boston and he currently is on the Harvard Medical School faculty. **Id, at ¶56; Exhibit "DD" at pp.771-775, 169-173 and pp. 151- 168.**

33. It is Dr. Newberger's opinion that Plaintiff, CR and her family are the victims of "careless, intellectually dishonest, and harmful medical practice." Dr. Newberger states as follows:

> "The Banner Desert Medical Center reports of her mother's alleged abuse of her to Arizona's child protection agency contained multiple misrepresentations of [CR]'s medical history and clinical status. So numerous were these falsehoods, and so insubstantial the attention to the knowledge base readily available to [CR]'s treating physicians, that they raise serious questions not simply about their honesty, but of their motives.
>
> The reports appear to have been made in bad faith…." "In virtually every perturbing event, clinical symptom, behavior, or complaint since the initial allegations were received by CPS, there was a consistent intellectual explanatory defaulting to Munchausen Syndrome by Proxy, by CPS, mental health, and medical personnel. There was, and it appears, remains, an astounding paucity of critical perspective and differential diagnostic knowledge. The CPS investigation and follow-on service plans were a mockery of good practice. Only confirmatory opinions from outside evaluators were sought. Psychologists were asked to propound with testing, interview, and superficial analysis the underpinning assumptions of maternal fault and pathology. At no time, contrary to accepted current practice, was

> there sought and conducted an independent child abuse expert pediatric review of the medical records, nor corresponding interviews with [CR]'s mother, step-father, treaters, and above all, interview and examination of [CR] herself. Consequently, [CR], and subsequently her sister, [JS], languished in care without contact with their beloved family."

Newberger's Report at ER pp. 224- 229 and pp. 826- 831.

34. In his report, Dr. Newberger's bolded the portions of the medical records that "reflects salient clinical events that were subsequently mischaracterized or misrepresented by Defendants and Arizona Child Protection Services staff." Dr. Newberger laid out in his report with specificity the mischaracterized and misrepresented portions of the medical history all of which are incorporated herein by this reference. **Id, pp. 176 and 778.**

35. In his comments starting on page 56 of his Report, Dr. Newberger summarized:

> "A careful review of the medical, hospital, and available legal and investigative records indicated that all of [CR]'s medications, diagnostic studies, and therapeutic interventions were prescribed by her physicians. No intrusions by Ms. Leanne Smith into [CR]'s intravenous lines, clinical measurement instruments, medications, and documentary records were documented or discerned.
>
> Virtually every excursion into a comatose state occurred in a closely monitored clinical environment. Indeed, Ms. Smith was documented by hospital and medical staff to be keenly engaged as an ally with them since [CR]'s hospital encounters began in 2003. Ms. Smith said she was being frequently confused by notations in the written records, especially when unfamiliar terms appeared to bear no relationship to [CR]'s clinical course, on laboratory reports or billing statements, and by the frequently shifting diagnostic labels that were given to [CR]. In reviewing these records and discussing the medical history with her, my impression is of a mother who was dedicated to her daughter, pre-occupied with keeping her alive and allaying her pain, and, without question, traumatized by [CR]'s multiple

crises, the emergency procedures to keep her alive, and in recent years, by the sense of hostility by medical and child protection staff.

At times, Ms. Smith reported she was "desperate" for more information, particularly when [CR] would experience sudden episodes of coma or severe distress. Notwithstanding many hundreds of nursing observations of her presence at her daughter's side, no concerns emerged until recently about the appropriateness of her behavior. Careful review of the record yields **inescapably to the conclusion that was when Ms. Smith challenged the neurosurgical staff at St. Joseph's Hospital and at Banner Desert Medical Center that they took umbrage and began what appears to be a systematic effort to disempowered her**. It is also evident that [CR] was harmed by professionals' actions. When Dr. Rekate withdrew from her care the first time, sending her home in an ambulance without neurosurgical follow-up on 2 opiates for pain relief, it was only a matter of time before she would bounce back to the hospital with new, still more severe symptoms. When subsequently, a precipitous discharge with an unmonitored new shunt led to too much CSF drainage, [CR] developed a potentially catastrophic low-pressure syndrome, manifested in brain shrinkage and the herniation of her cerebellar peduncles into her foramen magnum (emphasis added).

***

"The D.E.S. Child Protection Personnel appear to have swallowed uncritically the assertion by the Banner Desert Medical Center staff that [CR]'s entire illness history was factitious, that hers was a "non-organic" illness, and they set up for [CR] a confusing and hurtful program of substitute care. She was discouraged at every turn from expressing symptoms of pain. She was warned that if she talked about her distress, she would never see her mother again. Her mother was demeaned as an abuser to her by social workers and foster parents alike. [CR] was encouraged to read Dr. Bursch's report and to deduce from it what her mother had done to her. As damaging as this appeared on my interview with [CR], who could not recount with specificity any single action by her mother that hurt her, other than giving her prescribed medications that made her drowsy, this discounting of her medical complaints, especially her headaches, undoubtedly played a role in the delay before her meningitis in her first foster home was diagnosed."

***

"The inaccurate and sometimes false representations of [CR]'s medical

records by the neurosurgical and critical care staff at Banner Desert Medical Center could easily have been discerned by a cold-eyed review of all of the records. (It should be obvious from the compendium of summaries that I have listed above after approximately 25 hours of review.) The St. Joseph's Hospital in-house child abuse "expert," Dr. Coffman, conducted a quick and superficial evaluation that was devoid of systematic and critical summarizing and review. Neither did she conduct parental and child interviews and physical examination. This, in my opinion, along with its associated uncritical embrace of an MSBP formulation and her sworn testimony on her medical opinion, fell beneath the standard of care for child abuse physicians and further propounded the empty and damaging diagnostic theory of her neurosurgery colleagues." **ER pp. 224-229 and pp. 826- 831**.

36. Further, Dr. Newberger testified at the Juvenile Court severance trial:

Q. Do you agree or disagree with the statement of Dr. Coffman that – that the fact mother was around [CR] when she was having these incidences that we referred to as comas, that she could – you can't rule out that she had something to do with that?

A. I disagree strongly for three reasons.

Q. What are those reasons?

A. First, in one of these incidents, the mother was not present. The child went spontaneously into a comatose state. That was the second episode. For another reason, there are no data to suggest that there was anything in this closely observed clinical environment that suggested that mother's behavior endangered the child. And, third, there is here a classic error of logic that is called post hoc ergo propter hoc. That indicates, or that stipulates in this accident of logic, that just because something happened subsequent to something else, the antecedent event caused this subsequent event. The mother's presence does not logically lead to this speculated outcome, and there's no reason for it in any of the observations of the mother and of the child in medical records that I reviewed.

Q. Is there any evidence in the medical records that you reviewed that indicates that Leanna in any way induced these episodes that she experienced?

A. No.... Dr. Newberger's Trial Testimony, Afternoon Proceedings **(Transcript located at ER pp. 1460-1467) ER p. 1461, lns. 17-25 to p.**

1462 lns. 1-18.

Q. Do you think it's irresponsible for a child support, pediatrician child support expert to infer that she can't rule something out without supporting evidence that it actually occurred?

* * *

A. To refer back to this morning's discussion with regard to the Academy of Pediatrics standards can statements, there has got to be come energizing data that informs a hypothesis of Munchausen Syndrome by Proxy, in this case a perform where a parent does something specifically to harm a child. As I read this letter, this is inappropriately unanchored speculation. **Id, at p. 1463, lns. 11-25.**

* * *

Q. Do you have an opinion to a reasonable degree of medical probability that there was no medical child abuse of [CR]?

A. I do.

Q. What is that opinion?

A. My opinion is that there was no evidence that Leanna Smith perpetrated any injury whatever on this child; that there's no evidence that she misrepresented to doctors in the search for inappropriate or intrusive diagnostic studies or therapeutic inventions – interventions on this child; that there is a welter of speculations of purported associations as both Bursch and Coffman would put it, possibilities that don't cohere in any useful way. And that furthermore, the mandated reports of suspected abuse re based on, in the case of the first report to CPS, misrepresented or falsified medical data made, in my opinion, in bad faith. **Id, at p. 1465, lns. 8-24.**

* * *

Q. As to Munchausen Syndrome by Proxy, pediatric condition falsification and her medical child abuse, any risk as of the date of Coffman's letter?

A. No.

Q. Why not?

* * *

A. I could find nothing in the record that signified any risk. **Id, at p. 1465, lns. 8-12 and lns. 22-23.**

Q. Now, you found nothing in the record regarding Leanna, that she exaggerated the medical condition of [CR], in the medical records you reviewed?

A. None whatever.... **Id, at p.1465, lns. 24-25 to p. 1466, lns. 1-2.**

* * *

Q. And did you find anything in the record that she fabricated [CR]'s medical condition up to the present time?

A. Never. I found nothing.

Q. And – or that she induced any symptoms of a medical condition?

A. None whatever.

Q. And have you found that Laura – Leanna caused any harm to her daughter in – in her involvement in the medical condition and providing – in her involvement in the medical treatment of her daughter?

A. I can't answer this yes or no because it was the conflicts with Miss Smith that was associated with the doctors doing harm to her, to the extent that she may have participated conversations which were irritating to the physician, she may have contributed to that. But in my view, their precipitous, immature and punitive actions were not in any way justified by the questions, difficult as they were, that she posed to questions that were very, very – to issues that were very, very difficult to explain. **Id, at p.1466, ln. 25 to p. 1467, lns.1-19.**

E. FACTS SHOWING DEFENDANTS CONSPIRACY AND JOINT VENTURE (STATE ACTORS) .

37. The Department of Economic Security ("ADES") contracted with St. Joseph's Hospital to use St. Joseph's medical personnel to do forensic medical examinations and medical record review for CPS cases. [3] **ER p. 1057, ¶ 41 and p. 1081, ¶¶ 189-91.**

38. There is also a written Memorandum of Understanding between ChildHelp Children's Center of Arizona, the Phoenix Police Department, Arizona Department of Economic Security, Child Protective Services, Maricopa County Attorney's Office and St. Joseph's Hospital to establish a "cooperative effort" between these entities. **ER p. 1057, ¶ 42 and p. 1080, ¶¶ 187-188.** As part of this Memorandum of Understanding, St. Joseph Doctors would do medical record reviews not only

[3] Than named "Catholic Healthcare West dba St. Joseph's Hospital & Medical Center, Child Abuse Assessment Center."

for CPS, but the Phoenix Police Department and the Maricopa County Attorney's office as well. **Id.**

39. Laura Pederson, the investigator for CPS called Dr. White at St. Josephs and questioned him about his report. **ER pp. 1065-66, ¶¶ 108-11**. She then called Amira at Banner and agreed not to come to the hospital and conduct an interview of mother or CR until CR was ready for discharge. **ER p. 1066, ¶112**. Laura Pederson did not take any further action, other than learning the results of Detective Page's investigation, until she was informed CR was being discharged on 9/3/2008. **Id. at ¶117**.

40. Laura Pederson testified at her deposition that she did not make the decision to take CR into Custody until September 3, 2008 when CR was being discharged. **ER p. 1067, ¶ 120**. However, she told Detective Page on 8/28/2008 that "she would not allow CR to return to her mother when she was released from the hospital." **ER p. 1060, ¶59**.

41. Laura Pederson testified she immediately believed the doctors and therefore did not believe Leanna or investigate what Leanna told her. **ER pp. 1066,-67, 1069 and 1071, ¶¶ 115-120, 134 and 141.** The facts set forth above regarding the coma's and Leanna's dispute with the doctors were all provided to Pederson by Leanna. **ER p. 1069, ¶ 134.**

42. Dr. Coffman works for St. Joseph's Hospital at the Crisis Center located at ChildHelp. **ER pp. 1074-75, ¶¶154- 157**. Dr. Coffman's first known appearance in this matter occurred on 9/5/2008 when she staffed a meeting at Banner Desert Hospital, then met with Dr. Oppenheim and then consulted with Laura Pederson at CPS. **ER p. 1093, ¶ 290.**

43. Dr. Coffman did the medical record review for CPS and Detective Page of the Tempe Police Department regarding the allegations of abuse against Leanna. **ER pp. 1074 and 1079, ¶¶152, 178.**

44. Dr. Coffman testified at the dependency hearing on behalf of CPS. **ER p. 1057, ¶ ¶ 36 and 38.**

45. Dr. Coffman worked for the very entity that made the initial complaint to CPS (St. Joseph's Hospital) and was supervised by the same doctor (Dr. White) that made the complaint. **ER p. 1221.**

46. Before completing her medical record review and her report to Detective Page, Dr. Coffman tells Pederson that JS needs to be removed because the "mother (no M word being used), have serial victims." **ER pp. 1080 and 1093, ¶ ¶181-82, 292.** She further requested CPS have Detective Page search Leanna's home to find potential drugs that Leanna could have used to cause the comas. **Id.**

47. Pederson admits CPS did not find Munchausen Syndrome by Proxy in this case. **ER p. 1065, ¶ ¶ 104, 106.** Dr. Coffman advocated for MSBP in the October 30, 2008 conversation and her January 9, 2009 report (**ER pp. 1080 and 1093, ¶ ¶181-82, 292 and p. 1221**).

48. Laura Pederson documented and testified that all the doctors were making the same allegations against Leanna. **ER p. 1079, ¶ 177.**

49. Both Pederson and Detective Page testify that they conducted a joint investigation and that they shared the information they received with each other. **ER pp. 1059, 1068, ¶ ¶ 54,130.**

50. Pederson at first testified she did not take CR into custody before she interviewed Plaintiff on September 3, 2008 and took what Plaintiff had to say into account. **ER p. 1070, ¶137.** Later in the deposition she admitted she did not take

anything Leanna had to say into account and that she had made the decision to take CR into custody before interviewing Leanna. **ER p. 1071, ¶ ¶ 140-141.**

51. Dr. Elton testified he had no problems with Leanna and she acted appropriate around him. **ER pp. 1084-85, ¶ ¶ 223-224**. Pederson testified that Dr. Elton was the doctor that was most concerned about Leanna and did not share with Pederson that he had no problems with Leanna. **ER p. 1065, ¶149**.

52. Finally, CR in an e-mail to her brother (**ER p. 1093, ¶293**) dated 9/3/2008, the day she was taken into custody by CPS stated:

> "[T]hey think mom is doing this, but they say that when i was here two years ago that there were no medical reason I was in all of those comas and that mom caused it."

53. Pederson admits talking to CR on September 3, 2008 but denies making this statement to CR. **ER p. 1071, ¶144**. However, this statement is consistent with the opinions expressed by Dr. Coffman to Pederson and in her Report to Detective Page. **ER p. 1093, ¶ 292 and p. 1221**.

F. <u>DETECTIVE PAGE'S INVESTIGATION,</u>

54. Detective Page is a "police officer with the Tempe Police Department." **ER p. 1057 ¶43 and p. 1159, ¶1**. She conducted the investigation into the abuse allegations made against Leanna and states the following in her affidavit:

55. On August 28, 2008, "I interviewed the social worker Amira El-Ahmadiyyah, Dr. Maria Alberquerque, the PICU Physician , Dr. Oppenheim, the Psychiatrist , Dr. Elton the Neurosurgeon and Dr. Cook from Banner Desert Hospital." **ER p. 1058 and p. 1159** (citations to her report omitted). "I interviewed Dr. White, the Chief Pediatric Officer for St. Joseph's Hospital. Dr. White said he was a lawyer as well as a pharmacist ." **<u>Id</u>**. "Dr. Rekate refused to be interviewed because Dr. White had told him not to talk to me." **<u>Id</u>**. "I also interviewed, Dr. Mancuso, Dr. Van <u>Hoosear</u> , Dr. Islas (**ER pp. 1170-1173 and p.**

1178) and later interviewed [CR] and her brother Samuel Roberson." **Id. at pp. 1058 and 1160.**

56. "On September 15, 2008, I contacted Dr. Coffman at Child Help to see if she could review [CR]'s medical records. She stated she was already involved in the case and that I could drop the medical records off for her review when I received them all." **Id.** "We usually use Dr. Coffman at Child Help to review medical records which is why I called her." **Id.**

57. On October 21, 2008, I was told by Dr. Coffman that there would be a meeting on October 29, 2008 at St. Joseph's Hospital. On October 29, 2008, I attended a staffing meeting with Dr. Coffman, Dr. Erskin, an intensivist at St. Joseph's Hospital, Dr. Rekate, Dr. White, Dr. Pero, a doctor at St. Joseph's Hospital, Laura Peterson of CPS and Stephanie Willison of the Maricopa County Attorney's Office. At this stage we were waiting for the medical records from PCH and Dr. Coffman's report regarding her medical record review." **Id. at pp. 1060 and 1160**.

58. "Laura Peterson was the investigator for CPS. I provided her with the information I obtained on a regular basis so that she knew what I knew. Further, she attended the staffing meeting on October 29, 2012." **Id, at pp. 1059 and 1160.**

59. "On January 27, 2009, I received Dr. Coffman's report which is attached hereto as Exhibit '9.'" **Id. (Exhibit "9" is located at ER p. 1212)**. "After a review of the findings, I spoke with County Attorney Stephanie Willison and Dr. Coffman. Based on the information available at the time, there "was no charges that could be filed in the case." This finding was provided not only to Dr. Coffman but to **Tammy Hamilton (MacAlpine) of CPS**." **Id.**

60. "When [CR] was diagnosed with pseudo-tumer cerebri and a shunt put in to relieve pressure on [CR]'s brain, that explained the current symptoms that [CR]

was experiencing but, as was asserted by those at Banner Desert Hospital, it did not explain the prior medical history or respiratory arrests" **(Police Report located at ER p. 1175, fifth paragraph down and p. 1177, fourth paragraph down). Id. .**

61. "Dr. Cook informed me that he was involved with [CR] at Banner Desert Hospital the first time she had trouble with breathing. He stated he watched her arrest once. He said it seemed to be real and she needed to be intubated at that time. He said they stumbled on elevated ESF pressures by accident that caused them to look at pseudo-tumer. **He further indicated that at that time, he and they questioned whether this was a Munchausen's case for the first time, 'but there was no evidence for it.'" Id. at pp. 1059 and 1161.**

62. "On August 28, 2008, I spoke with Laura Peterson of CPS. At that time she told me she would not allow [CR] to return to her mother when she was released from the hospital." **Id. at pp. 1060 and 1161.** "At that same time, she further explained she had talked to Dr. White at St. Joseph's Hospital on August 27, 2008 he "explained to her that the only treatment that Leanna would allow on [CR] is if it included heavy narcotic drugs. She said that Dr. White told her that Leanna would refuse any other treatments for her and that she had also asked about Hospice for Chaunell." **ER p. 1175, second paragraph down; and Id. at pp. 1060 and 1161.**

63. "On September 11, 2008, I talked to Dr. White. In that meeting he stated . . . that Leanna refused the assistance of a pain control nurse at St. Joseph's Hospital to take her off narcotics. **I asked him where she is getting narcotics from and he said that she has several sources but he doesn't know where she is getting them filled or who is prescribing them.** He further said that someone prescribed

methadone for her and he doesn't know where that came from. **He said that he doesn't treat Chaunell." ER pp. 1191-92 and pp. 1060, 1161.**

64. "Dr. White stated that Leanna 'has been threatening a lawsuit and she wants a movie made of all this.'" **ER pp. 1193 and pp. 1060, 1161.**

65. "On September 18, 2008, I confirmed with Dr. Islas that "he prescribed her methadone and he said that he did for pain management. He said that he started her off with Oxycodone but he wanted her to get steady with the medications so he switched her to methadone and started to wean her off Oxycodone He said that after she got off of that he was going to start to wean her off of the methadone also." I asked him how long this will take to wean her off methadone and he said a month." **ER p. 1194, fourth paragraph down and Id. at pp. 1060, 1161.**

G. JUVENILE COURT RULINGS

66. The Juvenile Court held the initial dependency hearing on September 11, 2008. **ER p. 332, ¶8.** The Dependency hearing itself took place in March and April of 2009. **ER p. 333, ¶13.** The Juvenile Court entered dependency on April 7, 2009. **Id.**

67. The dependency petition was dismissed after a month long trial in August and September of 2011, on January 23, 2012. **ER p. 337, ¶ 30, p. 377 and p. 592, ¶30.**

STANDARD OF REVIEW

The grant of summary judgment is reviewed de novo. Oliver v. Keller, 289 F.3d 623, 626 (9th Cir. 2002). The Court's review is governed by the same standard used by the trial court under Federal Rule of Civil Procedure, Rule 56. Far Out Prods. Inc. v. Oscar, 247 F.3d 986, 992 (9th Cir. 2001). The Court must view the evidence in the light most favorable to the nonmoving party and

determine whether there are any genuine issues of material fact and whether the trial court correctly applied the relevant substantive law. Oliver, 289 F.3d at 626.

SUMMARY OF THE ARGUMENT

The Banner Defendants Motion for Summary Judgment was based solely on the legal issue of collateral estoppels. The Trial Court stated in his ruling that he was granting Banner Health Defendants relief they did not request in the Motion and rejected Plaintiff's written request in her Response to be able to provide additional information if the Court considered any relief not requested in the pleadings. The Trial Court thereafter entered an Order precluding Plaintiff from conducting any discovery whatsoever (discovery was ongoing regarding the State of Arizona Defendants) that could be used in a Motion for Reconsideration, Motion for New Trial or Rule 60(c) Motion for Relief from Judgment regarding Plaintiff's claims against Banner Health.

Leanna's pediatric child abuse expert, Dr. Newberger's Report and Juvenile Court trial Testimony raise material issues of fact that preclude the Trial Court from ruling the report and Subsequent Recommendation was reasonable and not maliciously made. Resolution of these issues is for a jury to determine after hearing the expert testimony regarding the reasonableness and malicious nature of the initial report and Subsequent Recommendation to CPS. Further, from the bad blood that existed between Plaintiff and the reporting doctors at St. Joseph's Hospital and Banner Desert Hospital and the close relationship between St. Joseph's Hospital and CPS, there is sufficient evidence from which a jury could conclude the report was not based on reasonable belief , the report and Subsequent Recommendation were maliciously made and that CPS and the medical doctors and staff involved acted jointly to pursue the taking of CR from Leanna by the Juvenile Court.

Collateral Estoppel does not apply to the Dependency Ruling out of Juvenile Court because the Dependency Petition was dismissed; the Dependency Ruling is not a final order for collateral estoppel purposes; and a claim for malicious report, investigation and Subsequent Recommendation to CPS under A.R.S. § 13-3620 and § 8-805 is not barred by the initial finding of Dependency by the Juvenile Court. The dismissal of the dependency petition is the only final appealable order from which collateral estoppel (issue preclusion) could apply and that ruling was in Leanna's favor.

The Trial Court's ruling regarding probable cause violates public policy. Arizona Statutes require CPS to conduct a thorough investigation of any allegation of abuse, and that obligation includes investigating exculpatory information. The duty does not end if CPS takes a child into temporary custody out of an abundance of caution and at a minimum that duty extends until the Court determines dependency. In this case, the Court did not determine dependency until April of 2009 and CR was taken into custody in September of 2008. The CPS Defendants had all the information obtained by Detective Page (who conducted a thorough investigation) long before the dependency hearing yet did nothing to correct material factual misrepresentations contained in the Dependency Petition. **ER pp. 332 to 333.**

Reversal of the Trial Courts ruling regarding the State of Arizona Defendants is essential to confirm the public policy in Arizona, to preserve the integrity of the Juvenile Court system in Arizona and to protect parents and children's Constitutional rights, including Leanna, who are caught up in that system.

ARGUMENT

I. TRIAL COURT VIOLATED RULE 56(f) FRCP IN GRANTING SUMMARY JUDGMENT ON THE ISSUES OF REASONABLENESS, MALICEAND JOINT VENTURE.

The Trial Court violated Rule 56(f) FRCP in putting "Plaintiff to her burden" when such relief was not requested and without providing Plaintiff with notice and an opportunity to respond. Rule 56(f) requires the Trial Court to give Plaintiff a reasonable amount of time to respond where the Trial Court grants "the motion on grounds not raised by a party" or the Trial Court considers "summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute."

The relief requested on summary judgment by the Banner Health Defendants based on collaterally estoppels application to the finding of dependency by the juvenile court. Simply put, because the Juvenile Court found abuse for Dependency, so that allegations of abuse by the doctors must have been reasonable. **ER p. 7.** Banner Health did not request a finding by the court that their report and Subsequent Recommendation were reasonable and not maliciously made. [4] That is exactly what the Trial Court did. **ER p. 6-11.**

The Trial Court noted that the Banner Health Defendants "appear to rely only on collateral estoppels" as a basis for summary judgment, "this we do not understand…" and "defendants inexplicably fail to put plaintiff to her burden." [5] **ER p. 8**. The Trial Court decided to "put plaintiff to her burden" without giving

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[4] Defendants also asked the Trial Court to dismiss the state tort claim arguing there was no duty, no proximate causation, no reasonable jury would award damages to Plaintiff under the circumstances of the case (dependency being found) and public policy disqualifies Plaintiff from recovering damages for her own bad acts. **ER p.313, lns. 13-20**. The trial court did not grant summary judgment on these grounds. **ER pp. 3-11.**

[5] The Trial Court was discussing Court II, based on 42 U.S.C. § 1983. However, the same statement applies to the Court ruling on the State Tort claim under Count I.

her notice and an opportunity to respond. Id. Plaintiff specifically requested in the Response to Motion for Summary Judgment and in the Controverting Statement of Facts, that if the Court was going to address reasonableness, malice and joint venture, that Plaintiff be allowed to respond by providing additional evidence. The Court denied that request. **ER p. 3, p.585, lns. 11-21 and p. 588, lns. 8-20.**

The Trial Court further compounded the prejudice to Plaintiff when the Trial Court entered a protective order that precluded Plaintiff from conducting any discovery into the issues dismissed on the Motion for Summary Judgment. **ER p. 268, lns. 9-12**. Plaintiff was at that time taking the Depositions of Amira and Dr. Elton. **ER p. 260.** This ruling stopped Plaintiff from obtaining additional facts to present to the Trial Court on a Motion for Reconsideration, a Motion for New Trial or a Motion for Relief from Judgment of the Trial Court's ruling on Banner Health's Motion for Summary Judgment.

Based on this error, Appellant requests this Court reverse the Trial Court ruling on Counts I (State Tort) and II (42 U.S.C. § 1983), regarding reasonable belief, malice and state actors (joint venture). The Trial Court's ruling on reasonableness, malice and joint venture cannot be allowed to stand because of the serious due process violation and the fact that Plaintiff was precluded from obtaining any additional evidence from which to provide the Court to seek relief from that judgment.

II. ALTERNATIVELY, ISSUES OF FACT PRECLUDE THE GRANTING OF SUMMARYJUDGMENT.

A. DR. NEWBERGER'S EXPERT REPORT AND TESTIMONY

Dr. Newberger's opinions and the factual basis for those opinion raise material issue of fact that preclude the granting of summary judgment in the Banner Health Defendants favor regarding reasonable belief and malice. **ER p. 169**

(Exhibit "B") and p. 770, (Exhibit DD). Plaintiff provided the Court with expert report and trial testimony (**ER p. 599 ¶51, p. 1458 and 1460)** that challenges whether the Banner Health Defendants report and/or the Subsequent Recommendation was based on a reasonable belief and/or was maliciously made. The number of misrepresentations is so numerous that a reasonable physician would have known of their falsity and a jury therefore should decide if the allegations were based on knowing misrepresentations of the medical history and decide the motives of the Banner Health Defendants for making so numerous false statements to CPS.

The Trial Court did not address the factual basis for Dr. Newberger's opinions. Instead, the Trail Court held "[t]here is no need for an expert's knowledge to help a fact finder determine defendants' motivation.... He cannot help determine defendants' state of mind." **ER p. 8, lns. 6-7**. Further, the Trial Court, did not strike Dr. Newberger as Plaintiff's expert in this case or strike his report. The Court stated: "Dr. Newberger's report will not be stricken, but the court's reliance on it will of course be limited to what is relevant, reliable, and helpful in understanding the evidence or determining a fact in issue." **Supplement to Excerpt of Record pp.1480-81**.

This is exactly what Plaintiff is asking the Ninth Circuit Court of Appeals to do at this time. Dr. Newberger reviewed the medical records and the allegations made by the Banner Defendants and found that they mischaracterized and misrepresented the medical records and that the medical records do not support the allegations made. Rule 702, Fed. R. Evid., provides that an expert witness may testify in the form of an opinion if "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to

determine a fact in issue[.]" Dr, Newberger's opinions regarding the medical records is the kind of specialized knowledge that will help the trier of facts understand the issue of fact. This is not speculation and is based on Dr. Newberger's scientific, technical and specialized knowledge as an experienced pediatric child abuse expert. **ER p. 151 (CV).**

B. BELIEF MOTHER CAUSED COMAS IS NOT REASONABLE ON ITS FACE.

The Banner Health Defendants' factual basis for the Subsequent Recommendation that it was not safe for CR to go home to her mother, because of the alleged unexplained comas in the past, is not reasonable on its face. There is no medical evidence to support such a contention and it is raw speculation to assert that Mother had anything to do with the cause these comas (loss of consciousness). The working diagnosis from the medical doctors involved in treating the comas was that the cause of the comas was the result of medications provided by the hospitals themselves. From the medical history and records themselves, a jury can easily find that this allegation was not reasonable and did not justify asserting Plaintiff constituted an ongoing risk to CR's recovery. "The fundamental liberty interest of the natural parents in the care, custody and management of their child does not evaporate simply because they have not been model parents." Santosky v. Kramer, 455 U.S. 745, 102 S.Ct. 1388, 1395 (1982).

C. ADDITIONAL ISSUES OF FACT REGARDING MALICE.

There are significant material issues of fact from which a jury could conclude the report and Subsequent Recommendation were made to "vex" or "injure" Leanna. Plaintiff accused the Doctors at Banner Desert (including Dr. Oppenheim who called in the initial report by Banner Desert to CPS) of

incompetence and that they were going to kill CR. **ER p.1992 ¶¶**282 and 283. She also accused them of causing CR to have a stroke. **ER p. 599 at ¶50**. The St. Joseph Defendants thereafter directly threatened Leanna that she would not like what they were going to do to her next after they were already considering making Munchausen Syndrome by Proxy allegations against her. **ER p. 1092¶ 283 at Affidavit par. 10 and p. 599 at P 50**.

The Banner Defendants accused Plaintiff of abuse and told CPS that it would not be safe for CR to recover in her mother's home solely because of the prior comas (once CR was diagnosed and treated for psuedotumer cerebri and it explained the reason for her current hospitalization). **ER p. 1059, ¶ 57 and p. 1086, ¶ 236.** The Banner Defendants could not present any evidence to CPS and the Tempe Police Department that mother caused, exacerbated or misrepresented CR's medical condition during any of these events, including the comas (**ER p. 1059-60, ¶ 58,p. 1084,¶ 223 and p. 1086, ¶236**) and Dr. Newberger stated and testified (as set forth above) that the Banner Defendants "misrepresented or falsified medical data" in making this allegation.

Dr. Elton testified he had no problems with Leanna and at all times she acted appropriate around him. **ER p. 1084-85, ¶ ¶ 223-224**. He further testified he has no evidence, then or now that mother caused, exacerbated or misrepresented any symptoms or medical conditions of CR. Id.

Additionally, you have the false information presented by CPS in the Dependency Petition to get the Juvenile Court to hold CR in custody, the use of Dr. Coffman (who had an obvious conflict of interest) to do the medical record review and the fact that CPS did not inform the Juvenile Court of Detective Page's factual findings that were contrary to what was asserted in the Dependency Petition.

III. A FINDING OF DEPENDENCY AS A MATTER OF LAW DOES NOT PROTECT A PERSON FOR MALICIOUSLY MAKING A COMPLAINT OR PARTICIPATING IN THE DEPENDENCY PROCESS.

The Trial Court's simple conclusion that the finding of dependency under A.R.S. § 8-821 et seq. precludes liability for making a malicious complaint or otherwise maliciously participating in the dependency process violates the clear language of A.R.S. § 8-805(A). This section specifically provides for civil and criminal liability for a person making a complaint, providing information or otherwise participating in the dependency process if the person acted with malice. Id. This section specifically applies to actions taken in a dependency proceeding See A.R.S. § 8-841 et seq. The key premise of the Trial Court's ruling that "Defendants' reasonableness in making the report is supported by the subsequent actions of the juvenile court" (**ER p. 7, lns 1-2**) is therefore clear error. The statute does not provide immunity for a malicious act because the juvenile court found dependency and the finding of dependency does not preclude liability for a malicious act in that process.

IV. THE DEPENDENCY RULING IS NOT A FINAL ORDER THAT WOULD SUBJECT PLAINTIFF TO ISSUE PRECLUSION.

Collateral Estoppel, or issue preclusion, applies only when an issue was actually litigated in a previous proceeding, there was a full and fair opportunity and motive to litigate the issue, resolution of the issue was essential to the decision, a valid and final decision on the merits was entered, and there is common identity of parties (emphasis added). Campbell v. Szl Props., 204 Ariz. 221, 223, 62 P.3d 966 (App. 2003). Whether a judgment should be considered final for the purposes of collateral estoppel "turns upon such factors as the nature of the decision (i.e., that it was not avowedly tentative), the adequacy of the hearing, and the opportunity for

review." Lummus Co. v. Commonwealth Refining Co., 297 F.2d 80, 89 (2d Cir.1961), cert. denied, 368 U.S. 986, 82 S. Ct. 601 (1962). The Restatement (Second) of Judgments (1982) as set forth in section 13 stated that "for purposes of issue preclusion (as distinguished from merger and bar), 'final judgment' includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect." As explained in comment (a) to section 13, to be given preclusive effect, a judgment must be "a firm and stable one, the 'last word' of the rendering court--a 'final' judgment" as opposed to one that is considered "**merely tentative** in the very action in which it was rendered." Elia v. Pifer, 194 Ariz. 74, 80-81 977 P.2d 796, 802-03 (App. 1998) (emphasis added).

However, even in cases where the technical requirements for the application of collateral estoppel are met, courts do not preclude issues when special circumstances exist. See Ferris v. Hawkins, 135 Ariz. 329, 331, 660 P.2d 1256, 1258 (App. 1983). "Principles of issue preclusion should not be applied, however, where 'there is some overriding consideration of fairness to a litigant, which the circumstances of the particular case would dictate.'" Id.

A. AS A MATTER OF LAW, DEPENDENCY RULINGS IN ARIZONA ARE NOT FINAL ORDERS FOR COLLATERAL ESTOPPEL PURPOSES.

The rulings and findings in a dependency proceeding are not the final word on the issue for collateral estoppels purposes in a separate civil litigation. The Arizona Court of Appeals in Mara M. v. Ariz. Dep't of Econ. Sec., 201 Ariz. 503; 38 P.3d 41 (App. 2002), held that a dependency ruling is an "interim, albeit appeallable order." The Arizona Court of Appeals looked closely at the unique nature of Juvenile Court proceedings and recognized that even though a dependency ruling and other rulings are appealable for Juvenile Court purposes,

those same rulings are interim orders only and therefore can be litigated again and again in the Juvenile Court process up to termination. The Arizona Court of Appeals stated:

> "The State delivered to Mara's counsel the motion to terminate Mara's parental rights to Jonna. The juvenile court found that compliance with Rule 5(c)(1) comported with due process, and it is this ruling of which Mara complains. She contends that, if A.R.S. § 8-863 permits Rule 5(c)(1) service on her attorney, it is unconstitutional. The constitutionality of the statute is pre served, she maintains, only by construing it to require that the motion be served as prescribed by Rule 5(c)(2), that is by requiring service upon her personally or by publication. By her invocation of Rule 5(c)(2), the premise for Mara's argument is that the adjudication of dependency was a final judgment.
>
> ADES responds that dependency is not a final judgment for this purpose. Rather, it argues, once the child is declared dependent and a ward of the juvenile court, the court retains jurisdiction until there is a permanent disposition. See A.R.S. § 8-532 (A)(1999); see also A.R.S. § 8-202(G)(Supp. 2000); ARIZ. R. P. JUV. CT. 88(F); Yavapai County Juv. Action No. J-8545, 140 Ariz. 10, 14, 680 P.2d 146, 150 (1984). Because the declaration of dependency is only an interim, albeit appealable, order, service on the parent's attorney as provided in Rule 5(c)(1) is proper. We agree.
>
> An order declaring a child dependent is 'final' to the extent that it is an appealable order. Juv. Action No. J-8545, 140 Ariz. at 15, 680 P.2d at 151; Rita J. v. Arizona Dep't of Economic Sec., 196 Ariz. 512, 513, 1 P.3d 155, 156 (App. 2000). It is not 'final' in the sense that it terminates the proceedings. As the court said in No. J-8545, 140 Ariz. at 14, 680 P.2d at 150, a finding of dependency, while constituting an appealable order, simply 'triggers' a future, conclusive determination of the child's fate. There is not then in these proceedings 'one and only one 'final' order.' Id. Rather than disposing of all matters, a determination of dependency is 'only the first step in an effort to provide for minor children who are not being adequately cared for.' Id. Instead, the court retains jurisdiction until there is an ultimate adjudication. See Id. at 15, 680 P.2d at 151. As the resolution of an interim

> proceeding, the determination of dependency closes a chapter in the child's life; it does not conclude the book, which is a final disposition in the best interests of the child. Therefore, a motion to terminate a parent's rights, being in furtherance of the exercise of the juvenile court's continuing authority, A.R.S. § 8-202(G)(Supp. 2000); ARIZ. R. P. JUV. CT. 88(F)(3), need not be served personally on the parent or by publication, as Rule 5(c)(2) requires of post-judgment motions, but may be served on the parent's attorney as provided by Rule 5(c)(1). In other words, while A.R.S. § 8-863 requires that a motion to terminate parental rights be served pursuant to Rule 5(c), subsection 1 applies because such a motion does not seek to modify, vacate or enforce a final judgment."

The Book in a Juvenile Court case starts with the temporary finding of dependency and ends with either dismissal of the dependency petition, return of the child through reunification or termination of the parental rights. The finding of dependency is appealable in the juvenile court system because such a ruling affects rights of children and parents before the Juvenile Court. However, each of these rulings is not a final adjudication until you have either a dismissal of the dependency petition or the termination of parental rights. It is dismissal of the dependency petition or the termination of parental rights that is the final adjudication that would have collateral estoppel application in a subsequent civil proceeding regarding malicious reporting to CPS.

B. THE UNIQUENESS OF THE JUVENILE COURT PROCESS (BEST INTEREST OF THE CHILD AND DUTY TO REUNIFY THE FAMILY) MAKE IT UNJUST TO APPLY COLLATERAL ESTOPPEL BASED ON THE DEPENDENCY FINDINGS TO BAR AN ACTION FOR MALICIOUS REPORTING .

The juvenile court system is unique, having its own purposes and procedure. A juvenile proceeding is neither criminal nor penal and its objective is to protect the child. Arizona State Department of Public Welfare v. Barlow, 80 Ariz. 249, 296 P.2d 298 (1956). It is the welfare of the child that is the prime consideration of the juvenile court (Best Interest of the Child). In Re Pima County Juvenile

Action No. J-31853, 18 Ariz. App. 219, 501 P.2d 395 (1972). The Arizona Department of Economic Security has an affirmative duty to make all reasonable efforts to preserve the family relationship." Mary Ellen C. v. Ariz. Dep't of Econ. Sec., 193 Ariz. 185, 186, ¶ 1, 971 P.2d 1046, 1047 (App. 1999).

In this case, there is no question that at the time of the dependency petition, the Plan was reunification of CR with Leanna. The obligation of the Juvenile Court to act with caution to protect a child, to ultimately reunify the child with the parent and the fact the plan was reunification, are special circumstances that make it unjust to apply Collateral Estoppel to prohibit a parent from asserting the report to CPS was not based on reasonable belief and/or was maliciously made.

C. THE DEPENDENCY PETITION WAS DISMISSED.

The only ruling from which collateral estoppels (issue preclusion) could attach to is the final ruling by the Juvenile Court dismissing the dependency petition and denying the severance petition. It is well established that a judgment ceases to be final if it is in fact set aside by the trial Court. Campbell v. Szl Prop., 204 Ariz. 221, 224, 62 P.2d 966, 969 (App. 2003) (see case authorities cited therein). The final order dismissing the dependency petition incorporated within it all other prior rulings regarding dependency. It is the dismissal of the dependency petition that is the final appealable order regarding the matter. Rita J. v. Arizona Dep', 196 Ariz. 514, 1 P.3d 157 (App. 2000) (dismissal of dependency petition is the final order regarding dependency). There is nothing for collateral estoppel to attach to in this case.

V. STATE OF ARIZONA

A. THE TRIAL COURT APPLIED THE WRONG DUTY TO INVESTIGATE STANDARD TO CPS.

The Trial Court erred as a matter of law in holding that "once probable cause is found CPS is under no duty to investigate further or to look for additional evidence which may exculpate the accused." **ER p. 18, lns. 6-10** (Citing Tsao v. Desert Palace, Inc., 698 F.3d 1128, 1147 (9th Cir. 2012)). CPS's duties and obligations owed to the child and the parent's does not end at the probable cause stage but is an ongoing duty and obligation throughout the juvenile court case.

CPS has the duty (because of the fundamental parental constitutional rights impacted) to conduct a prompt and thorough investigation of the nature, extent and cause of any condition that would tend to support or refute the allegation of abuse. **ER p. 1063, ¶¶ 82-89 and p. 1081, ¶¶194- 197**; A.R.S. § 8-802 (B)(5)(b); See Mammo v. State, 138 Ariz. 528, 675 P. 2d 1347 (App. 1983)(After receipt and initial screening, CPS must make a prompt and **thorough** investigation). Defendant Pederson and her supervisor Dana admitted during their depositions that this duty to investigate requires CPS to not only investigate the evidence that supports the claim, but also to investigate the evidence that refutes the claim. **ER p. 1082, ¶¶201 and 204**.

Parents have a constitutional right to the care and custody of their children. Santosky v. Kramer, 455 U.S. 745, 102 S.Ct. 1388 (1982); Myers v. Morris, 810 F.2d 1437 (8th Cir.1987), cert. denied, 484 U.S. 828, 108 S.Ct. 97 (1987); Caldwell v. LeFaver, 928 F.2d 331 (9th Cir.1991). The state may remove a child from the parents' custody only if the child is subject to immediate or apparent harm or danger. Baker v. Racansky, 887 F.2d 183, 187-88 (9th Cir.1989).

The very statutory purpose of CPS is to protect children and to strengthen the family by investigating allegations of abuse and providing services based on their investigation. A.R.S. § 8-800; see Mary Ellen C. v. Ariz. Dep't of Econ. Sec., 193 Ariz. 185, 186 ¶1, 971 P. 2d 1047(App. 1999)(ADES "has an affirmative duty to make all reasonable efforts to preserve the family relationship."). Further, once dependency is adjudicated and the disposition hearing is held (See A.R.S. § 8-844(C) and (E) and §8-845) the Juvenile Court is to hold periodic review hearings (once every six months) regarding all issues, including ongoing dependency. A.R.S. § 8-847(A) and (F). The Juvenile Court can determine at the periodic review hearing that the "child is no longer dependent" and can dismiss the dependency petition. Id, at § 8-847(F).

CPS's duty to investigate, including investigating exculpatory evidence, continues not only up the dependency hearing, but is ongoing through each and every review hearing until the child is either returned to the parent and the family reunified or the parents rights are severed and the child placed in foster care or adoption. A.R.S. § 8-845(C). CPS investigators and case workers have a higher obligation to continue to investigate to get it right than police officers do. Is there any question that if CPS investigators and case workers obtain information that the allegations of abuse are not correct, even if that evidence is obtained after the dependency petition is filed, that they have an ongoing duty and obligation to the child, the family and then to the Juvenile Court to provide that information to the Juvenile Court and the participants and to modify their plan for the child accordingly. The Trial Court's ruling eviscerates this obligation and allows CPS investigators and case workers to take no action to investigate exculpatory information once the dependency petition is filed.

B. MATERIAL ISSUES OF FACT PRECLUDE THE GRANTING OF SUMMARY JUDGMENT IN FAVOR OF THE STATE OF ARIZONA DEFENDANTS.

It is undisputed that Pederson and CPS (authorized by Pederson's supervisor Dana) did not investigate the allegations of abuse made by Dr. White and Amira and that CPS and Pederson rejected out of hand all the information and evidence that Plaintiff provided her to refute the allegations. **ER p. 1067, ¶ 118 and 1069 ¶ 134**. It is further undisputed that Detective Page of the Tempe Police Department conducted a thorough investigation regarding the abuse allegations and provided that information to Pederson (**ER p. 1068, ¶ 130**) and the case worker MacAlpine. **ER p. 1059, ¶ 56.** CPS, through Pederson the initial investigator, through Brown the supervisor and MacAlpine, the case worker, did not act on that information to correct the inaccuracies in the Dependency Petition. Detective Page specifically informed Pederson on the 18th of September that Dr. Islas had ordered the methadone and he already had a plan in place to take CR off the narcotic pain killers yet Pederson took no action to correct the allegation in the Dependency Petition that was before the Juvenile Court, under oath that Mother would accept no treatment that did not include methadone and narcotic pain killers. **ER p. 1060, ¶ 63 and ER p. 1193-4**.

Is there any doubt that this information provided to Pederson by Detective Page directly indicated to Pederson that Dr. White was not being honest when he said he did not know who was ordering the narcotic drugs and that Mother would accept no treatment that would not include giving CR the narcotic drugs. Is there any question that Pederson should have taken action to correct the Dependency Petition that was before the Juvenile Court either before or after the initial dependency hearing took place. Is there any question that this information, i.e, that

Dr. White had not been truthful would have impacted any other allegations made by Dr. White regarding the alleged abuse and the Juvenile Court should have learned of it from Pederson and CPS.

Detective Page further informed Pederson that the diagnosis of pseudotumer cerebra explained the medical condition CR was experiencing in the hospital and that the only basis for the Banner Health Defendants to assert risk to CR was the prior coma allegation. Page informed Pederson that neither Dr. Coffman in her report (she stated she could not prove the allegations), nor any of the other doctors involved, including the Banner Health Defendants could say with any degree of reasonable possibility that Mother had anything to do with those comas. The bottom line is that no reasonable person could conclude from that Mother posed an immediate or apparent harm or danger to CR.

To safeguard the rights of parents and children CPS at a minimum must have a reasonable belief that a child is in imminent danger of abuse or neglect or is suffering serious physical or emotional injury **diagnosed by a medical doctor** or psychologist to take custody of the child. A.R.S. §8-821(B); (CSOF ¶103). By the 16th of September, based on the evidence provided by Detective Page, it was not reasonable for CPS and especially Pederson to conclude Mother had been diagnosed by a medical doctor or psychologist as having caused a serious physical or emotional injury to MSBP or that Mother was any risk to her daughter's medical recovery.

What is further obvious is that Laura Pederson and CPS have a contractual and long standing business relationship with St. Josephs Hospital and Dr. Coffman which infers that Pederson, upon talking to Dr. White, made the decision to take CR into Custody without conducting a prompt and thorough investigation based on

this existing relationship with St. Josephs Hospital. There is a factual issue as to whether Pederson made up her mind to take CR on August 28, 2008 after the telephone conversation with Dr. White and Amira or whether she did not make the decision until she went over to Banner on September 3, 2008 and received the Subsequent Recommendation. There is a factual issue about the bad blood between Plaintiff and the doctors at St Joseph's and Banner Desert and its impact upon CPS's investigation and actions taken in this case. These factual issues are compounded by the fact that CPS hired Dr. Coffman, who had a clear conflict and desire to pursue the medical doctors' claims against Plaintiff to do the medical record review in this case.

"[I]n a § 1983 action the factual matters underlying the judgment of reasonableness generally means that probable cause is a question for the jury." Middy v. Varney, 665 F.2d 261, 265 (9th Cir. 1981), cert. denied, 459 U.S. 829, 103 S. Ct. 65 (1982); cited for the same proposition in McKenzie v. Lamb, 738 F.2d 1005 (9th Cir. 1984). "In general, the existence of probable cause in a § 1983 action presents a jury question, unless there is only one reasonable determination possible." Piles v. Raiser, 60 F.3d 1211, 1215 (6th Cir. 1995). At a minimum, based on the facts of this case, there is not only a reasonable determination regarding reasonableness and a jury must decide if the Arizona State Defendants had a reasonable belief that CR was in imminent danger of abuse or neglect and whether Pederson and CPS knew of the false statements in the Dependency Petition and allowed those to proceed because of their relationship with St. Joseph's hospital.

C. REVERSAL OF THE COURT'S RULING IN FAVOR OF BANNER HEALTH REQUIRES REVERSAL OF THE RULING IN FAVOR OF THE STATE OF ARIZONA.

The Trial Court's ruling in favor of Banner Health, that the doctors and hospitals reports to CPS were based on reasonable belief (**ER pp. 6-7**) such that Pederson could rely solely on them and conduct no further investigation and that the Juvenile Court's finding of dependency (**ER p.18**) supports the conclusion that Pederson's actions were reasonable. Reversal of the Order granting Banner Health's Motion for Summary Judgment, especially regarding the reasonableness of the reports and Subsequent Recommendation or that collateral estoppels does not apply requires the reversal of the Order granting the State Defendants Motion for Summary Judgment. Pederson had a duty to continue to investigate and it was not reasonable for her to do nothing, especially after receiving the reports from Detective Page with information directly refuting the allegations made by Dr. White and the other medical practitioners.

D. BROWN AND MACALPINE OWED PLAINTIFF THE DUTY TO CORRECT THE RECORD IN THE JUVENILE COURT BASED ON INFORMATION THEY RECEIVED FROM DETECTIVE PAGE.

Defendants Brown and MacAlpine are involved in this case because they took over for the investigators in October of 2008, before the contested dependency petition went to trial. Brown is MacAlpine's supervisor. They both received Detective Pages findings and factual information from her investigation yet Tammy MacAlpine testified at the Dependency Hearing and did not refute the false factual allegations in the Dependency hearing. She had the facts and information from Plaintiff and Detective Page showing the falsity of the allegations and knew there was no evidence of Munchausen Syndrome by Proxy, yet they pursued that claim not only during the Dependency hearing, but also at the termination trial. These Defendants acted at the behest of the investigators and had

the knowledge and opportunity to correct the false allegations contained in the Dependency Petition and did not.

E. THE TRIAL COURT ERRED IN DISMISSING THE STATE TORT CLAIMS AGAINST THE STATE OF ARIZONA.

The Trial Court granted Summary Judgment for the State of Arizona and its entities ADES and CPS on the state tort claim (Count 1) based solely on the fact that the State of Arizona is not a person subject to liability pursuant to 42 U.S.C. § 1983. While that is true for the 42 U.S.C. § 1983 claim (Count 2), the State of Arizona is respondeat superior liable for the tortuous acts of its employees and or agents that occurred in the course and scope of employment. State v. Superior Court, 111 Ariz. 130, 524 P.2d 951 (Ariz. 1974). Therefore, the Trial Court committed reversible error in granting Summary Judgment for the State of Arizona on Count 1.

VI. ISSUES OF FACT THAT PRECLUDE THE TRIAL COURT FROM GRANTING ANY SUMMARY JUDGMENT MOTION REGARDING THE ISSUE OF STATE ACTORS – JOINT VENTURE.

Although 42 U.S.C. § 1983 applies only to those who act under color of state law, "even a private entity can, in certain circumstances, be subject to liability under section 1983." Villegas v. Gilroy Garlic Festival Ass'n, 541 F.3d 950, 954 (9th Cir. 2008). "The Supreme Court has articulated four tests for determining whether a private [party's] actions amount to state action: (1) the public function test; (2) the joint action test; (3) the state compulsion test; and (4) the governmental nexus test." Franklin v. Fox, 312 F.3d 423, 444-45 (9th Cir. 2002). The joint action test asks "'whether state officials and private parties have acted in concert in effecting a particular deprivation of constitutional rights.'" Id. at 445 (quoting Gallagher v. Neil Young Freedom Concert, 49 F.3d 1442, 1453 (10th Cir. 1995)).

This requirement can be satisfied either "by proving the existence of a conspiracy or by showing that the private party was 'a willful participant in joint action with the State or its agents.'" Id. (quoting Collins v. Womancare, 878 F.2d 1145, 1154 (9th Cir. 1989)). Ultimately, joint action exists when the state has "'so far insinuated itself into a position of interdependence with [the private entity] that it must be recognized as a joint participant in the challenged activity.'" Gorenc v. Salt River Project Agric. Improvement & Power Dist., 869 F.2d 503, 507 (9th Cir. 1989). "Particularly relevant here is the maxim that 'if the state 'knowingly accepts the benefits derived from unconstitutional behavior', . . . then the conduct can be treated as state action.'" Id. (quoting Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 192, 109 S. Ct. 454 (1988)). Taken from Tsao v. Desert Palace, Inc., 698 F.3d 1128, 1139-1140 (9th Cir. Nev. 2012).

"When a plaintiff alleges conspiracy between private and public actors to violate federal civil rights, for example, the plaintiff must factually allege that there was an agreement to violate constitutional rights". Crowe v. County of San Diego, 608 F.3d 406, 440 (9th Cir. 2010) (quoting Mendocino Envtl. Ctr. v. Mendocino County, 192 F.3d 1283, 1301 (9th Cir. 1999)). "Such an agreement need not be overt, and may be inferred on the basis of circumstantial evidence such as the actions of the defendants. . . . To be liable, each participant in the conspiracy need not know the exact details of the plan, but each participant must at least share the common objective of the conspiracy." Id. (internal quotation marks omitted). **ER p. 105**.

There is sufficient circumstantial evidence and factual disputes as set forth in Plaintiff's Response to the State Defendants Motion for Summary Judgment and Plantiff's Motion for New Trial to require the issue of conspiracy and/or joint venture to be resolved by a jury and not the Court. The evidence shows that there

was not only a personal relationship between the reporting hospitals and the medical doctors, but a contractual relationship as well. **ER p. 1057, ¶¶41- 42, p. 1080, ¶¶ 187-88 and p. 1081, ¶¶189-91.** There was a direct contract and a separate Memorandum of Understanding between DES (CPS) and St. Joseph's hospital to do forensic interviews and/or medical record reviews for CPS regarding children. Id. On September 3, 2008, Laura Pederson, the CPS Investigator met with the Banner Defendants in person and conferred directly with them regarding Leanna and CR before the Doctors wrote the infamous medical note. **ER pp. 1066-67, ¶¶ 117 – 119 and ¶¶122-124**. CPS had already decided to take CR prior to that meeting and proceeded to dependency solely on the initial reports to CPS and conducted no investigation into the truthfulness of those allegations. **ER p. 1075, ¶159 and p. 1083, ¶¶ 210-12**.

When Leanna challenged dependency, CPS had Dr. Coffman of St. Josephs, pursuant to the Contract (who had an obvious conflict of interest because it was her supervisor at St. Josephs (Dr. White) who filed the initial report with CPS for St. Joseph's Hospital) do a medical record review of the allegations made against Plaintiff. **ER p. 1039, lns. 1-24**. These long standing interrelationships (contractual and working together over time) between St. Josephs and CPS, the fact that St. Joseph's doctors refused to forensically investigate Plaintiff's claims against the Banner Doctors regarding the stroke and the fact that all the doctors raised the same concerns, including Munchausen Syndrome by Proxy, the fact CPS did not investigate the medical claims of abuse and decided to take CR into temporary custody based solely on conversations with Dr. White at St. Josephs and Amira at Banner on August 28, 2008 and the fact that Dr. Coffman was tasked by CPS and the Tempe Police Department to conduct the medical record review(**ER**

p. 1058, ¶¶51-52 and p. 1093, ¶ 291 and **ER p. 1039, lns. 1-24**) even though she worked for St. Josephs and was a pediatrician under Dr. White, the complaining doctor from St. Josephs, is sufficient circumstantial evidence that requires the issue of conspiracy and/or joint venture go to a jury.

There is no question that the State of Arizona (ADES and CPS) have a close contractual and working relationship with St. Joseph's Hospital to provide medical record review in child abuse cases and that Dr. Coffman, an employee of St. Joseph's Hospital is the go to person for CPS and law enforcement for medical record review in child abuse cases. There is no question that CPS did not conduct an investigation and that both the Tempe Police Department and CPS requested Dr. Coffman to do the medical record review of both St. Josephs and Banner Desert Hospitals reports to CPS. Dr. Coffman was knowingly asked to investigate the allegations made by her employer. A jury could find from the evidence that Dr. Coffman acted as both the advocate for the doctors and hospitals (both St. Joseph's and Banner Desert Hospitals and staff) allegations against Leanna and as the expert for the State of Arizona in its prosecution of dependency and termination of Leanna's parental rights in CR. CPS turned over the investigation of the allegations of medical abuse to the very entities that made the allegations in the first place. There is more than sufficient evidence from which a jury could find the State of Arizona Defendants acted in a conspiracy and/or joint venture with Dr. White and St. Joseph's Hospital and the Banner Health Defendants regarding their allegations of abuse against Leanna.

CONCLUSION

WHEREFORE, based on the above, Plaintiff respectfully requests the Court reverse the granting of Banner Health Defendants and the State of Arizona Defendants separate Motions for Summary Judgment and denial of Plaintiff's Motion for New Trial and for Rule 60 Relief from Judgment.

RESPECTFULLY SUBMITTED this 11th day of July, 2013.

KEITH M. KNOWLTON, L.L.C.

Keith M. Knowlton
Attorney for Appellant

CERTIFICATION OF RELATED CASES

The undersigned certifies that the following are known related cases and appeals:

There are no related appeals at this time. Plaintiff will be filing another Notice of Appeal in this case involving subsequent Court orders that occurred after the Judgment was entered in this case.

There are related cases in the United States District Court of Arizona. The case numbers for these cases are Case No. 12-cv-00905 ROS and 13-cv-00332-SRB .

DATED this 11th day of July, 2013.

KEITH M. KNOWLTON, L.L.C.

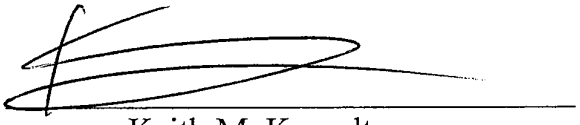
By: _____
Keith M. Knowlton
Attorney for Appellant

CERTIFICATION OF COMPLIANCE

Pursuant to FRCAP 32(a)(7)(B), I certify that the attached Opening Brief uses proportionately spaced type of 14 points or more, is double spaced using a roman font and contains 13990 words and 1243 lines as calculated by the Microsoft Word-processing system. This word count excludes the portions exempted by Fed. R. App. P.32(a)(7)(B)(iii).

DATED this 11th day of July, 2013.

KEITH M. KNOWLTON, L.L.C.

By: 

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CERTIFICATE OF SERVICE

The original and seven copies of the foregoing Appellants Opening Brief and four (4) copies of the Excerpts of Record were filed pursuant to Rule 25(a) (2)(B) and 30-1.3 by depositing the same this date with the U.S. Postal Service, Postage prepaid, addressed to:

OFFICE OF THE CLERK
JAMES R. BROWNING COURTHOUSE
U.S. COURT OF APPEALS
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and two (2) copies of said Opening Brief and one (1) copy of the Excerpts of Record, both volumes were served by hand delivery this date to:

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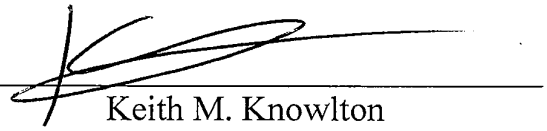
CERTIFICATION ATTACHED OPENING BRIEF IS IDENTICAL TO THE VERSION SUBMITTED ELECTRONICALLY

The undersigned certifies that the above Opening Brief was not filed electronically because Appellant is filing the Opening Brief under seal.

DATED this 11th day of July, 2013.

KEITH M. KNOWLTON, L.L.C.

By: 

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