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COURT OF APPEALS

STATE OF NEW YORK

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MATTER OF ANONYMOUS,

Respondent,

-against-

No. 77

MOLIK,

Appellant.

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20 Eagle Street  
Albany, New York  
June 7, 2018

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Appeal number 77, Matter of  
2 Anonymous v. Molik.

3 Good afternoon, counsel.

4 MS. TREASURE: Good afternoon, Your Honors. May  
5 it please the court, Kathleen Treasure for the Justice  
6 Center for the Protection of People With Special Needs.  
7 Your Honor, with the court's permission, I'd like to  
8 reserve two minutes of rebuttal time.

9 CHIEF JUDGE DIFIORE: You may.

10 MS. TREASURE: Thank you. The Third Department  
11 here has misconstrued the statute in a way that creates a  
12 substantial gap in the Justice Center's authority to order  
13 remediation of conditions known to have created an incident  
14 of neglect - - -

15 JUDGE GARCIA: Counsel, can the Center bring - -  
16 - can the facility itself be the subject of a report?

17 MS. TREASURE: Yes, Your Honor.

18 JUDGE GARCIA: It can?

19 MS. TREASURE: We know that in two ways here. We  
20 know that first of all in that both the Third Department  
21 and the petitioner have acknowledged that under 3(a)(i) a  
22 facility can be the subject of a report when the subject is  
23 unknown or unidentified - - -

24 JUDGE GARCIA: No, I - - - I understand that.  
25 But just in terms of the initial investigation, can you



1 designate the facility as a subject?

2 MS. TREASURE: Well, I - - - in terms of - - -  
3 it's a little - - - it's a little bit more nuanced than  
4 that, Your Honor, because what happens is the report comes  
5 into the hotline, and it alleges an incident of neglect and  
6 usually - - - I would say probably in almost all of the  
7 cases it's identifying an employee or a staff member at the  
8 facility as the potential subject.

9 JUDGE GARCIA: Or perhaps just a victim, right?

10 MS. TREASURE: Pardon?

11 JUDGE GARCIA: Perhaps just a victim at the  
12 facility.

13 MS. TREASURE: It might be, and in that case, if  
14 they identify just a victim without a subject, then it - -  
15 - and we later find in the investigation stages that the  
16 facility is responsible then - - -

17 CHIEF JUDGE DIFIORE: So then can the facility be  
18 - - - can there be a finding of neglect be substantiated  
19 against the facility?

20 MS. TREASURE: Absolutely, Your Honor. And that  
21 - - - that follows under if you look at 3(a) and 3(b)  
22 reading them together, what you - - -

23 JUDGE GARCIA: But I guess the question is  
24 reading 3(a) alone, and it seems to me the only way reading  
25 3(a) alone would be is if you - - - if you can't identify a



1 perpetrator, right?

2 MS. TREASURE: Or if you can't - - - if you  
3 cannot identify a perpetrator. You read 3(a) and 3(b)  
4 together and they cover all the possible - - -

5 JUDGE GARCIA: And I under - - - I understand  
6 that issue - - -

7 MS. TREASURE: Sorry.

8 JUDGE GARCIA: - - - and I'm actually kind of - -  
9 -

10 MS. TREASURE: I'm sorry.

11 JUDGE GARCIA: - - - agreeing with you here on  
12 one point, or it seems to me your argument has force. Is  
13 under (a) to me, (a)(i) it seems the only way you really  
14 can get a facility responsible isn't because of the  
15 facility's failings, it's because you can't identify a  
16 perpetrator. And in that case, the facility almost stands  
17 in as the responsible party for the act itself, and the  
18 other way is because of failures on the facility's part  
19 itself.

20 MS. TREASURE: That's correct, Your Honor.  
21 That's correct. And that's where 3(b) comes in and it's  
22 very plain.

23 JUDGE RIVERA: But - - - but here's the problem  
24 I'm having with - - - with some of the language in this  
25 statute - - - and you can help me, I hope. It seems that



1 interchangeably the term "substantiated" and  
2 "unsubstantiated" refers to the reports of abuse as well as  
3 to the actual abuse.

4 MS. TREASURE: Yes - - - yes, the - - - yes, I'm  
5 sorry, Your Honor?

6 JUDGE RIVERA: The reports versus the finding in  
7 the abuse, these terms are used interchangeably.

8 MS. TREASURE: They are. They are. The statute  
9 - - -

10 JUDGE RIVERA: So what is it that's being  
11 substantiated or unsubstantiated? That's what I'm having a  
12 problem with.

13 MS. TREASURE: You have an incident reported  
14 that's alleged to be abuse or neglect. If they find that  
15 that incident is substantiated, it occurred, then we have  
16 an incident of - - - a finding that abuse and neglect - - -  
17 or neglect has occurred.

18 JUDGE RIVERA: Okay.

19 MS. TREASURE: So you have that.

20 JUDGE RIVERA: And that is substantiated - - -

21 MS. TREASURE: That - - -

22 JUDGE RIVERA: - - - or the incident of abuse is  
23 substantiated?

24 MS. TREASURE: The - - - well, the incident is  
25 reported, yeah, the - - - that the abuse or the neglect



1 that's been alleged has actually occurred. That's what's  
2 being substantiated as well as if we have a responsible  
3 party then that's also being substantiated.

4 JUDGE RIVERA: But let me ask you this, under I  
5 think it's number one, "Within sixty days of the Vulnerable  
6 Person's Central Register accepting a report of an  
7 allegation" - - - okay, so that's someone who calls the  
8 hotline?

9 MS. TREASURE: Right, yes. That's correct, Your  
10 Honor.

11 JUDGE RIVERA: Okay. Okay. So the report then -  
12 - - your position is this report that we're talking about  
13 under Section 493 is eventually the one that's either  
14 sealed or goes on the register is this final report after  
15 the investigation? Is that what we're talking about?

16 MS. TREASURE: There - - - well, there can be  
17 multiple reports following an investigation. The hotline  
18 report is what triggers the investigation.

19 JUDGE RIVERA: Yes.

20 MS. TREASURE: So then the investigation goes - -  
21 - and it can do - - - it can come out a number of ways. It  
22 can find the incident never occurred at all in which case  
23 then the report's unsubstantiated. It can find the  
24 incident occurred and that the person alleged to have been  
25 responsible is responsible for it. It could be that person



1 - - -

2 JUDGE RIVERA: That's substantiated.

3 MS. TREASURE: That's substantiated.

4 JUDGE RIVERA: Okay.

5 MS. TREASURE: The person could have been  
6 misidentified and another person during the investigation  
7 identified as the responsible party.

8 JUDGE RIVERA: Substantiated?

9 MS. TREASURE: There is going to be one  
10 unsubstantiated against the person who wasn't responsible  
11 and a substantiated report against the person who was.  
12 That's what the substantiated reports are following the  
13 investigation.

14 JUDGE RIVERA: So the substantiated report  
15 against the person who's now correctly identified as having  
16 been the person who's responsible for the alleged abuse and  
17 so forth, that goes on the register?

18 MS. TREASURE: That will go on the register.

19 JUDGE RIVERA: It's not going to be sealed but  
20 the - - -

21 MS. TREASURE: Well, it doesn't go on the - - -

22 JUDGE RIVERA: But the other - - - but the - - -

23 MS. TREASURE: I want to just say there's - - -  
24 there's a register for the category one, and that's -  
25 that's different. Then there's a database for the lesser



1 categories. And so the - - - the substantiated report will  
2 go into the database. The unsubstantiated report will be  
3 sealed.

4 JUDGE FAHEY: And that's because it's category  
5 four?

6 MS. TREASURE: I'm sorry?

7 JUDGE FAHEY: Is that because it's category four  
8 so because it's not category one the provider doesn't go on  
9 the category one registered list, right?

10 MS. TREASURE: That's correct.

11 JUDGE FAHEY: But they could go on - - - is there  
12 a list for the category four which we're really arguing  
13 about here, right?

14 MS. TREASURE: There's a database that the - - -

15 JUDGE FAHEY: There's a database, but there's not  
16 a - - -

17 MS. TREASURE: There's a database.

18 JUDGE FAHEY: - - - register - - - there's not a  
19 - - -

20 MS. TREASURE: There's not a registry.

21 JUDGE FAHEY: Right.

22 MS. TREASURE: The registry is only for category  
23 one.

24 CHIEF JUDGE DIFIORE: Is that for individuals?

25 MS. TREASURE: That's individuals.





1 CHIEF JUDGE DIFIORE: The registry? Okay.

2 MS. TREASURE: In order so that they're not  
3 employed by the facilities.

4 CHIEF JUDGE DIFIORE: So under 3(b) with the  
5 lead-off language, "In conjunction with possible findings,"  
6 whether they're substantiated or unsubstantiated, does that  
7 allow you to have an unsubstantiated complaint against an  
8 individual and still have a concurrent finding of neglect  
9 against a facility?

10 MS. TREASURE: That's correct, Your Honor. It  
11 does because it's the only logical way, really, to read  
12 this section. The whole section is devoted to abuse and  
13 neglect findings, and the findings in 3(a) are findings of  
14 either unsubstantiated or substantiated reports of neglect  
15 and abuse, and it's logical to read that the possible  
16 findings in - - - in 3(b) are actually findings of abuse  
17 and neglect.

18 JUDGE FAHEY: But that's not what the Appellate  
19 Division said, right?

20 MS. TREASURE: That's exactly right, Your Honor,  
21 but - - -

22 JUDGE FAHEY: The Appellate Division said that  
23 you can only find neglect against a facility where the  
24 subject cannot be identified.

25 MS. TREASURE: That's correct.



1 JUDGE RIVERA: So then is your position on  
2 Section 493 that subsection 4 should read substantiated  
3 findings as opposed to substantiated reports?

4 MS. TREASURE: No, Your Honor, I - - -

5 JUDGE RIVERA: Is that the problem?

6 MS. TREASURE: Well, I think it - - - I think  
7 what you can - - - if you read - - - if you read (b) as  
8 being findings of neglect or abuse, I realize neglect or  
9 abuse are not specifically put there, but it is logical to  
10 - - - to imply those there since that's what - - -

11 JUDGE RIVERA: Okay. But if I - - - that's fine  
12 but - - -

13 MS. TREASURE: But that's - - - so that's - - -

14 JUDGE RIVERA: - - - that's not my question. My  
15 question about number 4, it says substantiated reports.  
16 Are you saying that we should interpret that to mean  
17 findings?

18 MS. TREASURE: I'm saying that once we find  
19 findings of neglect or abuse under 3(b) that's a  
20 substantiated report under 4.

21 JUDGE RIVERA: Because it's the finding in the  
22 report?

23 MS. TREASURE: It's the finding of the report at  
24 the end of - - -

25 JUDGE RIVERA: But I thought your - - -



1 MS. TREASURE: - - - the investigation.

2 JUDGE RIVERA: I thought your position was a  
3 report might contain findings that substantiate and also  
4 unsubstantiate.

5 MS. TREASURE: Yes, there can be two separate  
6 reports following an investigation.

7 JUDGE RIVERA: But then what does this mean in 4,  
8 "Only the substantiated report"?

9 MS. TREASURE: Yes, will be categorized.

10 JUDGE RIVERA: So it's not the report?

11 MS. TREASURE: It's - - - it's the - - -

12 JUDGE RIVERA: It's not one report - - -

13 MS. TREASURE: It's not necessarily - - -

14 JUDGE RIVERA: - - - with findings?

15 MS. TREASURE: It's not necessarily one report  
16 with findings. It's a - - -

17 JUDGE RIVERA: Where would I figure that out from  
18 this statute? How would I know that?

19 MS. TREASURE: I think you know that because you  
20 have in 3 - - - you have potential findings under 3 - - -

21 JUDGE RIVERA: Okay.

22 MS. TREASURE: - - - that can either be under  
23 3(a) the findings that they describe there or in  
24 conjunction with the possible findings of 3(a) under 3(b).  
25 It can be a concurrent finding that a systemic problem



1           caused or contributed to the incident, and the incident is  
2           one of abuse or neglect because that's what we're dealing  
3           with here. So when you have a concurrent finding that a  
4           systemic condition caused the abuse or neglect incident,  
5           you have a substantiated report of neglect.

6                    JUDGE RIVERA: Okay. But I'm having - - -

7                    MS. TREASURE: And that - - -

8                    JUDGE RIVERA: - - - a lot of problems with that  
9           because 3(c) seems to me to be only about an individual. I  
10          don't even know how they have standing.

11                   MS. TREASURE: 3 - - -

12                   JUDGE RIVERA: 3(c) seems to me to be about  
13          individuals as the subject of the report.

14                   MS. TREASURE: That - - -

15                   JUDGE RIVERA: They are the ones who can seek to  
16          amend the report because it's talking about his or her  
17          rights, not its rights.

18                   MS. TREASURE: Well, the - - - I understand that  
19          my adversary's position is that the subject of a report  
20          can't be a facility. But if you look at the definition of  
21          custodian, which they point to as support for that  
22          definition, you'll see under 488, Your Honor, that's (2) -  
23          - -

24                   JUDGE RIVERA: Yes, I - - - I appreciate that  
25          argument too. But (c), which is what we're dealing with



1 now is - - - I think cannot be read to apply to anything  
2 other than an individual because that's - - - that's all  
3 the focus is of (c), and it seems to make sense to me  
4 because they're the ones who are going to want it sealed.

5 MS. TREASURE: Well, they'll want it sealed, but  
6 again, if the - - - if the report under (b) can  
7 substantiate that it's the - - - the systemic conditions  
8 that caused or contributed to the incident, that's the  
9 facility. And it matches up again, Your Honor, with 4 - -  
10 -

11 JUDGE RIVERA: But then wouldn't (c), saying  
12 subject of the report, say his, her, or its?

13 MS. TREASURE: It - - - not necessarily, Your  
14 Honor. I think (b) covers the situation where the facility  
15 is ultimately responsible for the abuse or neglect that's  
16 occurred because of the systemic conditions.

17 JUDGE RIVERA: Well, it may be. I think that the  
18 case really turns on who's got the authority to deal with  
19 whatever this concurrent finding is, and I'm not really  
20 clear that that's the Justice Center or the Office of  
21 People with Disabilities.

22 MS. TREASURE: Well, I - - - it - - -

23 JUDGE RIVERA: Developmental Disabilities because  
24 I - - - I agree to the extent that your argument is it  
25 cannot be that the legislature would set up a mechanism



1           whereby there would be findings that the facility has done  
2           something wrong that's contributed to this abuse and  
3           there's no consequences, there's no way to have oversight  
4           of that. There's nothing we can do about that. I agree  
5           with you about that. For me the question is does this  
6           provision mean the - - - the Justice Center deals with that  
7           or some other entity deals with that?

8                       MS. TREASURE: It's the Justice Center, Your  
9           Honor, and what makes that clear is 5(c) of this statute as  
10          well because what 5(c) says is when there's a category four  
11          report that has been made - - - and the category four deals  
12          with conditions at the facility that have caused or  
13          contributed to the incident, then the Justice Center shall  
14          require the facility to submit a plan to remediate the  
15          conditions that led to the incident.

16                      JUDGE GARCIA: But didn't the facility here come  
17          in and challenge the findings and actually ultimately win,  
18          but didn't they have a proceeding before an ALJ?

19                      MS. TREASURE: They did, Your Honor. They were  
20          given the opportunity to be heard, and the Justice Center  
21          found - - - it substantiated - - - or refused to amend the  
22          report to unfounded.

23                      JUDGE GARCIA: And would that be the same  
24          procedure you would follow with an individual?

25                      MS. TREASURE: That's exactly right. They - - -



1 JUDGE GARCIA: So they did apply (c) to the  
2 facility here?

3 MS. TREASURE: They did. They applied it. They  
4 gave them the right to be heard, and then we went to the  
5 Article 78 proceeding here. And the substantial evidence  
6 question isn't - - -

7 JUDGE RIVERA: Well, let me ask you about that  
8 5(c). I read it as saying the Justice Center or the state  
9 oversight agency as appropriate. But doesn't that get us  
10 back to legally appropriate and what entity is the one that  
11 5(c) is referring to? Or did I misread it? Is there  
12 something I'm missing in that provision?

13 MS. TREASURE: Well, as appropriate, I think  
14 that's for the Justice Center to determine whether or not  
15 that's - - -

16 JUDGE RIVERA: Well, why - - - why would that be  
17 the Justice Center? It's in the statute as - - - it's in -  
18 - -

19 MS. TREASURE: Because as appropriate, the  
20 Justice Center is the single state agency charged with  
21 overseeing the investigations of abuse and neglect, and  
22 that's consistent with this - - -

23 JUDGE RIVERA: So the Office for People With  
24 Developmental Disabilities has absolutely no authority, no  
25 oversight?

1 MS. TREASURE: No, they do have oversight  
2 authority, Your Honor. They share that with the Justice  
3 Center.

4 JUDGE RIVERA: Okay.

5 MS. TREASURE: And the Justice Center has the  
6 final oversight authority over this particular - - -

7 JUDGE RIVERA: Where does - - - where does it say  
8 the final oversight? Where could I find that?

9 MS. TREASURE: Well, it doesn't say final, Your  
10 Honor. But in the Justice Center's - - - in the Executive  
11 Law governing the Justice Center under - - - I'm sorry, I  
12 think it's 553(7), they are given the review power over  
13 matters that come before them. They have also been granted  
14 the powers and authority that were formerly given to the  
15 Commission on Quality of Care, so they have the authority  
16 to also inspect the facilities at any time, to monitor the  
17 facilities if they find that there's safety issues  
18 involved. They have extensive oversight authority over  
19 these facilities. They also have independent oversight  
20 authority, and that means that if you read this statute the  
21 way the Third Department has read the statute, meaning that  
22 they don't have authorization to require remediation when  
23 it's systemic conditions, they have that independent  
24 oversight authority over OPW, OMH facilities, and OASAS  
25 operated facilities so that those facilities - - -





1 JUDGE RIVERA: The JC has oversight authority  
2 over the Office for People with Disabilities - - -  
3 Developmental Disabilities?

4 MS. TREASURE: They - - - they have independent  
5 oversight authority over these - - - over facilities  
6 operated by these - - -

7 JUDGE RIVERA: Oh.

8 MS. TREASURE: - - - overstate - - - these  
9 agencies.

10 CHIEF JUDGE DIFIORE: Thank you, counsel.

11 JUDGE STEIN: That was the purpose of the Center,  
12 right?

13 MS. TREASURE: Pardon?

14 JUDGE STEIN: Wasn't that one of the purposes of  
15 the Center to - - -

16 MS. TREASURE: Yes, exactly. So you would be  
17 saying that those oversight agencies would be in charge of  
18 correcting their own systemic conditions without having the  
19 Justice Center oversight.

20 CHIEF JUDGE DIFIORE: Thank you, counsel.

21 MS. TREASURE: Thank you, Your Honor.

22 CHIEF JUDGE DIFIORE: Counsel.

23 MS. CASWELL: May it please the court - - -

24 JUDGE STEIN: Counsel, is the facility a subject  
25 under - - - a subject under the - - - under the statute?



1 MS. CASWELL: In - - - with the facts specific to  
2 this case, no, but - - -

3 JUDGE STEIN: Well, in general.

4 MS. CASWELL: - - - in a general sense, I would  
5 say no as well.

6 JUDGE FAHEY: Well, what about 488(2), subject of  
7 a report means custodian, custodian is defined as - - -  
8 could be defined as an operator of provider agency.

9 MS. CASWELL: I believe that - - - I'm sorry.  
10 Yes, well, it refers to a custodian, and then - - -

11 JUDGE FAHEY: Right, and that - - -

12 MS. CASWELL: - - - if you go to the term for  
13 custodian - - -

14 JUDGE FAHEY: - - - custodian could be a subject  
15 and so the operators can be a custodian. And if they can  
16 be a custodian then they could be a subject of a report,  
17 right?

18 MS. CASWELL: Well, it's the operator of a  
19 facility or provider agency so - - -

20 JUDGE FAHEY: Right.

21 MS. CASWELL: - - - that's an individual, not the  
22 facility itself.

23 JUDGE FAHEY: Well - - - well, we've got to say  
24 that an operator is an individual?

25 MS. CASWELL: Yes.



1 JUDGE FAHEY: We couldn't see that as a - - - as  
2 a corporation?

3 MS. CASWELL: According to the terms of what's in  
4 the definitions of 488(2), the director, operator,  
5 employee, volunteer of a facility, those are all  
6 individuals of the facility.

7 JUDGE FAHEY: I - - - I see.

8 JUDGE STEIN: So who was it that made the request  
9 here to amend the report?

10 MS. CASWELL: It was the - - - the facility that  
11 made the request to - - -

12 JUDGE STEIN: Okay. So how do they have - - -  
13 how does the facility have the right to make that request  
14 if it's not a subject?

15 MS. CASWELL: Because the Justice Center had  
16 taken upon themselves to have - - - they - - - and this  
17 goes towards what's at issue in this case. The Justice  
18 Center believes that these concurrent findings equate - - -  
19 or allow them to make a category four finding of abuse and  
20 neglect against the facility. And - - -

21 JUDGE STEIN: Right, but - - - but under the  
22 statute, only certain people can seek to amend the report.  
23 So if - - - there may be a procedural means for you to  
24 challenge that but - - - but it's hard for me to understand  
25 how you can say on the one hand the facility is not a

1 subject but on the other hand the facility has the right as  
2 a subject to do certain things.

3 MS. CASWELL: Right.

4 JUDGE STEIN: They - - - that seems inconsistent  
5 to me.

6 MS. CASWELL: And I - - - I understand your  
7 point. The - - - the facility maintained that they were  
8 not supposed to be a subject. However, the Justice Center  
9 was carrying on that they were a subject, so they requested  
10 to amend. And there was an administrative hearing which is  
11 in the report, and there was also - - - and where there had  
12 to be a reconstruction hearing as well because some of the  
13 testimony got lost.

14 JUDGE RIVERA: So was the basis for the hearing  
15 under 3(c) even though that only refers to individuals - -  
16 - or at least that's the way I read the provision?

17 MS. CASWELL: Yes, and the facility did that to  
18 preserve their issue to go - - - to get to this point.

19 JUDGE RIVERA: So - - - so if the facility had  
20 not done that as an entity - - - forget the individual for  
21 one moment - - - as an entity had not pursued this  
22 administrative process that seems to be laid out in 3(c),  
23 you're saying it could not have gone to an Article 78? It  
24 had no other way to challenge?

25 MS. CASWELL: Correct. And - - -



1 JUDGE RIVERA: So you concede that - - - that the  
2 - - - even though 3(c), as I say, I read it as referring to  
3 individuals, you concede that this does also apply to a  
4 facility - - - to an entity?

5 MS. CASWELL: No, I - - - I do not. The - - -  
6 and I - - -

7 JUDGE RIVERA: So what were you doing in this  
8 hearing?

9 MS. CASWELL: The facility - - - let me back up.  
10 This was one of the first reports that came through once  
11 the Justice Center was established. And so when this  
12 report that it was going to be substantiated, that the  
13 facility was going to be found for the category four  
14 findings, what the facility did is they wanted to, you know  
15 - - - you know, either amend or repeal the findings. So  
16 when - - - according to the statute didn't agree that they  
17 should be a subject to the report, however, still wanted to  
18 preserve their issue and take the opportunity, and so  
19 that's why they did the - - -

20 JUDGE GARCIA: So what's the remedy if you win  
21 here and this happens again and the Justice Center can't do  
22 anything because they're not going to be able to identify a  
23 subject who's responsible, because you haven't changed your  
24 policies, and nobody's forcing you to change your policies  
25 because they can't come in and say you have to make these



1 changes so this just keeps happening?

2 MS. CASWELL: Well, I - - - I disagree that it  
3 would - - - she - - -

4 JUDGE GARCIA: Well, it's happened three times  
5 now, right?

6 MS. CASWELL: Sorry?

7 JUDGE GARCIA: It happened - - - this is the  
8 third incident, right?

9 MS. CASWELL: With - - - with this individual - -  
10 -

11 JUDGE GARCIA: Right.

12 MS. CASWELL: - - - it - - - yes.

13 JUDGE GARCIA: So what's the remedy? If you win,  
14 Justice Center is powerless against a facility because  
15 every time they come in no individual is going to be  
16 responsible, no recourse against the facility, what  
17 happens?

18 MS. CASWELL: Well, the Justice Center isn't the  
19 end-all-be-all. That, as we've stated prior, there is the  
20 Office for People With Developmental Disabilities where  
21 each year they do a yearly review. And they can also  
22 impose penalties such as fines.

23 JUDGE GARCIA: So when did the first incident  
24 occur here? What year?

25 MS. CASWELL: I believe the first incident



1 occurred back in 2012 if I remember correctly from the  
2 record.

3 JUDGE GARCIA: And - - - and these yearly reviews  
4 of - - - they obviously had to have no effect on changing  
5 your policies, right, since it happened again?

6 MS. CASWELL: From - - - from the record, they  
7 did make note of this individual having tendencies to do  
8 what he did, but they couldn't say for certain about how to  
9 handle it. And that's - - -

10 JUDGE GARCIA: So that was ineffectual, those  
11 reviews?

12 MS. CASWELL: Well, not necessarily. I mean the  
13 resident - - -

14 JUDGE GARCIA: Well, if you - - - if you look at  
15 effectual in terms of stopped the next assault it was  
16 ineffectual.

17 MS. CASWELL: Well, the resident - - - the  
18 resident's dad recited these ICFs, these intermediate care  
19 facilities. They're not - - - they're supposed to be  
20 allowed free will to be able to live their life, you know,  
21 in a way that society would hope that - - - that they would  
22 live. And so just an allegation or an incident of him - -  
23 - or of an individual acting in a certain manner, take note  
24 is - - - which is what they did and then they assess of  
25 what to do. And they have people who work at the facility

1 who, you know, sit and have a background in education of  
2 how to deal with this sort of thing.

3 JUDGE WILSON: Doesn't the - - - the result  
4 you're advocating give an incentive to the Justice Center  
5 to find an individual responsible just so they can get to  
6 the facility?

7 MS. CASWELL: No, I - - - I wouldn't - - - I  
8 wouldn't say - - - I would hope that the Justice Center  
9 wouldn't do that, and that's - - - and that's because the  
10 Justice Center should recognize that it - - - the Justice  
11 Center isn't the only one that, you know, has some sort of  
12 influence on the facilities and keep note that - - -

13 JUDGE STEIN: But that's the purpose of the  
14 Justice Center, isn't it, to - - - to be - - - to sort of  
15 coordinate all of this, to streamline it, to - - - to - - -  
16 I mean OPWDD has a lot of responsibilities, and the Justice  
17 Center has a much narrower set of responsibilities.

18 MS. CASWELL: Right, dealing with the  
19 adjudication side of things, and it's my position that it's  
20 OPWDD deals with the - - -

21 JUDGE FAHEY: You know, the problem is is that  
22 that isn't really clearly sent out. It - - - it seems that  
23 we go through about seven levels of analysis to get down to  
24 whether or not there is a custodian/operator is a - - - can  
25 be a person or can be an entity. Doesn't that - - -





1 doesn't that force us to look at the statute as it may be  
2 ambiguous?

3 MS. CASWELL: It does - - -

4 JUDGE FAHEY: Wouldn't - - - wouldn't you say  
5 that this statute, it - - - that we need to - - - if we're  
6 - - - in our analysis, we need to really step back behind  
7 and say, well, all right, what was the meaning of this,  
8 what did the legislature intend here?

9 MS. CASWELL: Right.

10 JUDGE FAHEY: And we're all almost forced into  
11 that analysis. And see, I'm wondering because if we're  
12 forced into that analysis then, when I look at the  
13 legislative history here there's that - - - the Sundram  
14 report, and it - - - that seems to support the Justice  
15 Center's position when I look at the underlying legislative  
16 history. So you see the problem, once we get to ambiguity  
17 - - -

18 MS. CASWELL: Right. But - - -

19 JUDGE FAHEY: - - - and it - - - if anything's  
20 ambiguous this seems to really scream out ambiguity.

21 MS. CASWELL: It - - -

22 JUDGE FAHEY: And so as a result of that, when  
23 we're looking at the legislative history then, we're - - -  
24 it doesn't seem to be favorable to your position that the  
25 provider could skate, so to speak, by saying that you - - -



1 because you knew the subject we - - - we can't be held  
2 responsible.

3 MS. CASWELL: Well, I - - - I'm sorry. But I  
4 would disagree with the facts specific to this case. I  
5 don't think the statute is ambiguous. I think that it's  
6 clear that if there's an unsubstantiated finding and then  
7 in conjunction they find a concurrent finding that there  
8 were systemic problems at the facility, that doesn't get to  
9 you putting it into a category because it has to be a  
10 substantiated finding to get you into a category with - - -

11 JUDGE GARCIA: Then it gets you nothing because  
12 if you can seal it, you can't use the provision about  
13 referring it to the Medicaid inspector because it's not  
14 substantiated. You can't take any remedial measures under  
15 Section 4. So what would the purpose of the concurrent  
16 finding be?

17 MS. CASWELL: Is to put the - - - the facility on  
18 notice of the issues.

19 JUDGE GARCIA: In a sealed record that has no  
20 effect on the facility?

21 MS. CASWELL: Well, the facility, as I stated,  
22 has OPWDD as the oversight, and OPWDD is - - - is working  
23 with the Justice Center and - - -

24 JUDGE RIVERA: So OPWDD gets a copy of the report  
25 regardless of whether or not it's sealed?



1 MS. CASWELL: That I - - - I am unsure of.

2 JUDGE RIVERA: So then what - - - how would they  
3 be involved?

4 MS. CASWELL: I - - -

5 JUDGE RIVERA: How did they inject themselves  
6 into this process according to you?

7 MS. CASWELL: Right, I'm purely speculating, but  
8 I - - - I would just assume that OPWDD gets a report.

9 CHIEF JUDGE DIFIORE: Counsel, if a proceeding's  
10 brought against an individual staff member, does the  
11 facility provide counsel for that individual?

12 MS. CASWELL: In some cases, yes.

13 CHIEF JUDGE DIFIORE: Thank you. Thank you,  
14 counsel.

15 Counsel.

16 MS. TREASURE: To answer your first question,  
17 Your Honor, an operator can be a business corporation as is  
18 the case here where United Helpers is the, for all intents  
19 and purposes, operator and the facility, so that does seem  
20 to undermine the idea that a facility cannot be the subject  
21 of the substantiated report. To - - -

22 CHIEF JUDGE DIFIORE: Your opponent seems to  
23 argue not to worry about the process because there are  
24 other regulatory bodies out there that will keep the  
25 facilities in check.



1 MS. TREASURE: Well, that was - - - that was the  
2 problem that led to the enactment of the statute in the  
3 first instance. There were six different oversight  
4 agencies that were applying different standards of abuse  
5 and neglect, conducting their own investigations or having  
6 the facilities do so, and reaching inconsistent results.  
7 As a - - - and as a result of that, what the Sundram report  
8 found was there were huge gaps in the protections that were  
9 supposed to be afforded to the individuals who were  
10 residing in these facilities. And for that reason, the  
11 Sundram report recommended the creation of the Justice  
12 Center so that they could both over - - - they could  
13 oversee and be the centralized authority for investigations  
14 into abuse and neglect.

15 JUDGE RIVERA: And now we're at the place - - -  
16 because you're new, now we're at the place where we're  
17 trying to understand based on, let's say, not the best-  
18 drafted statute, the - - - or the - - - I shouldn't be - -  
19 - that's not fair. There's some difficulty getting through  
20 the statute. Okay. So we're trying to figure out the  
21 authority. So again, I'm having difficulty understanding  
22 5(c)'s reference to the Justice Center or the state  
23 oversight agency as appropriate.

24 MS. TREASURE: That's correct, Your Honor. But  
25 it's the "Justice Center shall require," that's 5(c). The



1 Justice Center shall require the facility to - - - I'm  
2 sorry. I'm going to find the language exactly here, "Shall  
3 require the facility or provider agency to develop and  
4 implement a plan of prevention and remediation" - - -

5 JUDGE RIVERA: Right, but I'm referring to the  
6 third sentence, "Such plan must be approved and by its  
7 implementation monitored by" - - - and it says, "the  
8 Justice Center or the state oversight." So you - - - you  
9 may have a "shall" up there, but I'm unclear as to whether  
10 or not you get to approve it to begin with.

11 MS. TREASURE: I think they can. I think they  
12 are supposed to by the fact that it says, "Such plan must  
13 be approved by" and its implementation monitored by the  
14 Justice Center or the state oversight agency, and I think  
15 it's the Justice Center that decides whether or not it's  
16 appropriate.

17 JUDGE RIVERA: Yes, but - - - so help me here.  
18 Why is it - - - why is it the JC and not whatever, whoever,  
19 whatever is the state oversight agency? How - - - how are  
20 we to know who is being referred to here?

21 MS. TREASURE: In the as appropriate language? I  
22 think - - - again, I think what we're looking at here is  
23 this also in connection with the legislative history, and  
24 the legislative - - -

25 JUDGE RIVERA: But then under your reading you -



1 - - you would not have "or the state oversight agency."

2 MS. TREASURE: No, I would - - -

3 JUDGE RIVERA: But there's always - - - the JC is  
4 always the one making every determination.

5 MS. TREASURE: No, the Justice Center, and the  
6 Justice Center can delegate to the - - - to the state  
7 oversight agency to do that. That's what it means by as  
8 appropriate. It's the Justice Center would make that  
9 determination - - -

10 JUDGE RIVERA: Okay. Where - - - where do I look  
11 for the delegatory power you're referring to?

12 MS. TREASURE: I - - - I wouldn't see it in the  
13 statute, Your Honor. I do understand that it's part - - -  
14 it's all part of the legislative history that supports the  
15 - - -

16 JUDGE RIVERA: So where in the legislative  
17 history do I see that the JC can delegate the kind of  
18 authority you're talking about?

19 MS. TREASURE: I think it's - - - it's at least  
20 implied in the Sundram report in the - - -

21 JUDGE RIVERA: But the Sundram report is - - - is  
22 not the statute, so we're working back from the statute.

23 MS. TREASURE: I would - - -

24 JUDGE RIVERA: And what other than the report - -  
25 - since there were recommendations in the report that never

1 made it to the statute.

2 MS. TREASURE: Well, look at the sponsor's  
3 memorandum and bill jacket at L-2012 Chapter 501 at pages  
4 14 to 15. This is the sponsor saying that the Justice  
5 Center would improve the state's response to allegations of  
6 abuse and neglect and it gives a laundry list of authority  
7 in things that the Justice Center would do. Among that  
8 was, "Requiring providers to implement corrective action  
9 plans to prevent future incidents of neglect." That's what  
10 the sponsor is saying is the Justice Center's authority  
11 under this statute.

12 JUDGE RIVERA: To require - - - to require the  
13 facilities to implement - - -

14 MS. TREASURE: Providers to implement corrective  
15 action plans - - -

16 JUDGE RIVERA: But to require them to - - -  
17 that's the language?

18 MS. TREASURE: Requiring - - - yes, I'm reading  
19 it exactly. It's a quote, "Requiring providers to  
20 implement corrective action plans to prevent future  
21 incidents of neglect."

22 JUDGE RIVERA: And does it also say those plans  
23 are the ones that are adopted and approved by the Justice  
24 Center?

25 MS. TREASURE: It's not as specific as that, Your



1 Honor, but this is - - -

2 JUDGE RIVERA: But is it the context?

3 MS. TREASURE: In - - - in the context it's going  
4 through all the things the Justice Center is supposed to  
5 do. It's supposed to exercise the central oversight of  
6 these investigations of abuse and neglect to - - - to  
7 implement a system that's going to further protect the  
8 people and the facilities.

9 CHIEF JUDGE DIFIORE: Thank you, counsel.

10 MS. TREASURE: Thank you.

11 (Court is adjourned)

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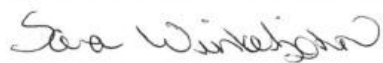




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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Anonymous v. Molik, No. 77 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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