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IN THE SUPREME COURT FOR THE STATE OF ALASKA

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W.S.B.)
)
 Appellant,)
)
 v.)
)
 ALASKA PSYCHIATRIC INSTITUTE,)
)
 Appellee.)

Supreme Court No. S-13116

Trial Court Case No. 3AN-08-493 PR

OPPOSITION TO UPDATED EMERGENCY MOTION FOR STAY PENDING APPEAL

The State of Alaska, Department of Health and Social Services, Division of Behavioral Health, Alaska Psychiatric Institute (API), by and through the Office of the Attorney General, opposes the Appellant's Updated Emergency Motion for Stay Pending Appeal.¹ Whether to grant a stay is committed to this Court's sound discretion.² In *Powell*, the Court suggested that the criteria for a stay should be much the same as for determining whether to grant a preliminary injunction.³

In *State, Division of Elections v. Metcalfe*, the Court set forth the test for a preliminary injunction:

The showing required to obtain a preliminary injunction depends on the nature of the threatened

¹ API has agreed to delay administration of medication to the Appellant until after 12:00 noon on Friday, May 23, 2008, so that this opposition could be prepared with consideration of the Appellant amended motion, served on May 21, 2008. API also objects and moves to strike the new affidavit of Grace E. Jackson, M.D. prepared after the trial court has considered this matter and which purports to encapsulate "testimony." The trial court heard and considered the testimony of Grace E. Jackson, M.D. during the hearing and there is no basis for offering this late-created "evidence" of what transpired at the hearing to bolster the instant request for emergency relief.

² *Powell v. City of Anchorage*, 536 P.2d 1228 (Alaska 1975).

³ *Id.*

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2 injury. If the plaintiff faces the danger of
3 "irreparable harm" and if the opposing party is
4 adequately protected, then we apply a "balance of
5 hardships" approach in which the plaintiff "must
6 raise 'serious' and substantial questions going to the
7 merits of the case; that is, the issues raised cannot be
8 'frivolous or obviously without merit.'" If, however,
9 the plaintiff's threatened harm is less than irreparable
10 or if the opposing party cannot be adequately
11 protected, then we demand of the plaintiff the
12 heightened standard of a "clear showing of probable
13 success on the merits."⁴

14 In this case the Appellant overstates his case for irreparable harm and fails to
15 address the fact that API's significant interests, including its interest in the Appellant's
16 well being and proper treatment, would not be adequately protected should a stay be
17 granted. He also fails to make a clear showing of probable success on appeal. Instead, a
18 stay in this matter would deprive the Appellant of treatment for his mental illness
19 without any real showing that the superior court's conclusion was wrong, only that it is
20 different from the position that the Appellant's experts support. Because the Appellant
21 does not meet the standard to justify a stay, his motion should be denied.

22 **I. The Appellant Does Not Establish The Necessity For Emergency Action
23 Based On Irreparable Harm**

24 Because some individuals perceive that the risks associated with
25 psychotropic medication outweigh its benefits, the Appellant contends that irreparable
26 harm will result should he receive such treatment at API. However, the Appellant fails to
address the fact that the superior court rejected these same arguments that psychotropic
medications "do more harm than good" after considering *all* of the evidence, not just that
presented by the experts advocating the Appellant position. Here, the trial court carefully
considered both sides of the issue and the Appellant simply does not accept the result⁵.

⁴ 110 P.3d 976, 978 -979 (Alaska 2005) (footnotes and citations omitted).

⁵ The 30-day commitment proceeding pursuant to AS 47.30.735 was conducted on
April 30, 2008 and involved five witnesses presenting live testimony. The subsequent
hearing on API's petition for court-ordered administration of medication pursuant to AS
OPPOSITION TO UPDATED EMERGENCY MOTION FOR STAY

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The superior court determined that clear and convincing evidence was presented that treatment with medication is in the Appellant's best interest notwithstanding its recognition that the Appellant presented evidence of the potential side effects or perceived dangers of medication.⁶ The superior court recognized that no evidence was presented by the Appellant of a viable alternative to medication,⁷ discussed evidence pertaining to the Appellant specific prior experience with medication,⁸ and narrowly tailored its order, specifying the medicine to be administered as well as permitted dosage.⁹

The Appellant suggests that testimony was "unrebutted" that the drug prescribed will harm him. That contention misstates the evidence and presents a distorted view of the superior court's decision. The superior court did not ignore the Appellant's evidence, but simply was not convinced that the Appellant's position should prevail after hearing all of the evidence. Significantly, the Appellant fails to explain how the administration of psychotropic medicine can remain within the standard of care in the medical community for treatment of the Appellant's mental illness if the drugs are going to "kill" the Appellant and not provide any benefit.¹⁰ the Appellant fails to address the fact that he has not experienced many of the possible side effects when he has previously

47.30.839 was conducted on May 12, 14 and 15, 2008 and involved testimony from 7 live witnesses as well as written testimony offered on behalf of Mr. Bigley's position.

⁶ Even Mr. Bigley's experts acknowledged that their views on the "dangers" of medication are not commonly accepted in the medical or psychiatric community and that the administration of psychotropic medicine is accepted practice and prevalent in this country. Transcript at pages 152-153 Further, Mr. Bigley's own expert admitted that she has continued patients on Risperidone and that she could not really quantify the likelihood of side effects in Mr. Bigley's case. See Transcript at pages 155-160.

⁷ Findings and Order Concerning Court-Ordered Administration of Medication dated May 19, 2008 ("Order"), at page 4.

⁸ Order at pages 3-4.

⁹ Order at page 5.

¹⁰ Appellant's brief at page 7.

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2 received medication.¹¹ The Appellant cannot meet his burden of showing irreparable harm
3 merely by contending that the trial court should have agreed only with his experts' view,
4 without showing error or presenting the other side of the equation.

5 The superior court has determined, consistent with the evidence, that the
6 administration of medication to the Appellant is within the standard of care for psychiatry,
7 is appropriate for the Appellant and further, that no less restrictive alternative treatment is
8 available. The court recognized the high risk to the Appellant associated with the
9 "no treatment" alternative and supported the authorization of medication, in part upon
10 evidence of the Appellant's own successful history while on medication¹². The court
11 weighed the evidence and found the administration of medication not an agent of harm,
12 but in the Appellant's best interest.

11 **II. There is No Clear Showing of Probable Success On the Merits**

12 Even if the Appellant could establish irreparable harm would ensue from
13 the administration of medication, API's interests must still be considered before any
14 stay is entered. the Appellant does not give fair consideration to API's interests and
15 instead demeans them as no more than a desire for a more compliant patient¹³. As
16 discussed below, API's interests are far more compelling than the Appellant allows and
17 cannot be protected if a stay is entered.

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24 ¹¹ Order at pages 3-4. Transcript at pages 49-52.

25 ¹² Order at pages 4-5.

26 ¹³ Appellant's brief at page 8.

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2 API has the mission of providing acute care to the mentally ill¹⁴. A stay
3 pending appeal in the context of court-ordered administration of medication has the
4 practical effect of preventing API from administering treatment and fulfilling its
5 mission. Indeed, permitting a stay here denies the Appellant any treatment, contrary to
6 the superior court's finding that the no-treatment alternative was not viable or in the
7 Appellant's best interest.

8 As the superior court explained, the administration of medication will permit
9 the Appellant to function in the community.¹⁵ The goal of the medication is not to make
10 API's life easier by making the Appellant a more compliant and pleasant patient. The
11 court's clear aim in finding medication to be in the Appellant's best interest was that it
12 would permit him to function outside API, and get housing and necessary services, a
13 capacity that un-medicated, the Appellant lacked.¹⁶

14 A stay would result in the untenable position of API having committed the
15 Appellant but being left without the ability to carry out its mission of providing acute care
16 to the mentally ill. API is an acute-care psychiatric hospital. It is not a home for the
17 mentally ill. One of the purposes of civil commitment is that the commitment has, "a
18 reasonable expectation of improving [the patient's] mental condition."¹⁷ API practices
19 an evidence-based medical approach to treating psychiatric illness. Housing someone at
20 API is not treatment. The stay requested by the Appellant forces API into the untenable
21 position of potentially housing him during commitment, without providing necessary
22 treatment. The trial court recognized that such an outcome would be inconsistent with

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24 ¹⁴ Transcript at pages 213-214.

25 ¹⁵ Order at 3, 4.

26 ¹⁶ See, Order at 3; Transcript at pages 230-232.

¹⁷ AS 47.30.655(6).

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2 API's mission as an acute care facility for individuals throughout the state that are in
3 need of acute mental health care.¹⁸ API has an interest in improving the Appellant's
4 condition by providing psychiatric treatment for his mental illness. That interest cannot
5 be protected unless proper treatment can be provided in a timely manner.

6 Further, if the Appellant obtains a stay pending appeal based on no more
7 than the perceived harm resulting from the medication itself, the statutory scheme for
8 administration of psychotropic medication, AS 47.30.839 could be "undone" by any
9 litigant unhappy with the outcome in their case. It is likely that the period of
10 commitment under AS 47.30.735 et seq. would expire before the appeal was resolved
11 and any medication could be administered. In the event the person was still committed,
12 and the order was upheld, API would not be able to implement it because any new
13 medication order would probably need to be based on the current situation. That would
14 require a new hearing. The findings from any new hearing could be appealed again, and
15 new stay sought, starting the cycle again.

16 More than a merely non-frivolous argument against the order should be
17 required to deprive the Appellant of treatment both his doctors and the court finds to be
18 in his best interest. A stay in this setting should be reserved for those exceptional cases
19 where there is a clear showing of probable success on the merits.¹⁹ If the Court were to
20 merely assume that API is protected and that the Appellant will suffer irreparable harm if
21 he received the approved treatment (based on general effects of psychotropic drugs), the
22 Appellant could indefinitely postpone the implementation of a medication order because
23 the order would, as noted above, always become moot.

24 As discussed more fully below, this is not a case where a stay should be
25 entered as the Appellant makes no clear showing of probable success. Instead

26 ¹⁸ Order at page 3.

¹⁹ *Powell v. Anchorage*, 536 P.2d 1228 (Alaska 1975) at 1272 (quoting *A.J. Indus., Inc. v. Alaska Pub. Serv. Comm'n*, 470 P.2d 537, 540 (Alaska 1970), modified in other respects, 483 P.2d 198 (Alaska 1971)). See also *State, Division of Elections v. Metcalfe*, 110 P.3d 976, 978 -979 (Alaska 2005).

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2 the Appellant simply argues that the trial court was wrong because it did not accept
3 the Appellant position that drugs do more harm than good. the Appellant's position was
4 considered but API presented evidence that the proposed medication was not going to
5 "kill" the Appellant, but was the appropriate course of treatment²⁰.

6 **III. Mr. Bigley Fails to Make A Clear Showing of Probable Success On the
7 Merits.**

8 Because API's interests cannot adequately be protected if a stay is
9 entered, the Appellant needs to make a clear showing of probable success on the
10 merits.²¹ the Appellant has failed to meet that burden. He has not established that the
11 superior court was wrong in its assessment of the Appellant's best interest, only that the
12 court's conclusion differs from that of his experts. That should not be sufficient to
13 deprive the Appellant of the treatment deemed in his best interest or to deprive API of
14 its ability to provide medical care to the mentally ill.

15 The superior court fully explained why treatment with the proposed medication
16 was in the Appellant's best interest. The treatment authorized is within the standard of
17 care and without treatment, the Appellant cannot function²². The court supported the
18 use of the medication so that the Appellant may regain his ability to function outside of
19 an institutional setting, not for the purpose of making the Appellant a more compliant or
20 less disruptive patient while at API. Indeed, the trial court fully explained the risks of
21 no treatment as being very high and concluded that the Appellant will continue to be
22 unable to function in the community without the only treatment available, the
23 administration of medication, medication that the Appellant has received in the past and
24 which, according to evidence presented by API made his condition better, not worse as

25 ²⁰ Transcript at pages 205-206; 208-209; 231-232

26 ²¹ See, *State, Division of Elections v. Metcalfe*, 110 P.3d at 978 -979; *Powell v. Anchorage*, 536 P.2d at 1272 (quoting *A.J. Indus., Inc. v. Alaska Pub. Serv. Comm'n*, 470 P.2d 537, 540 (Alaska 1970).

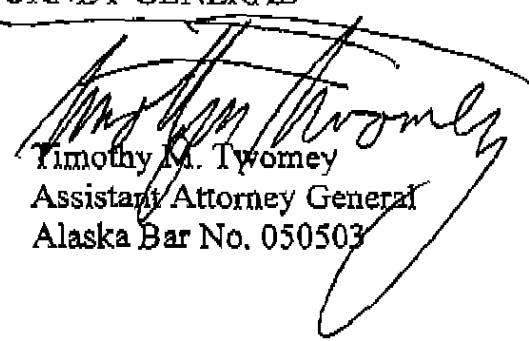
²² Transcript at pages 53-57; 230-234.

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the Appellant would suggest²³. API requests that the Appellant's Emergency Motion for Stay be denied so that necessary mental health treatment may be provided to the Appellant without further delay.

DATED: 5/22/08

TALIS J. COLBERG
ATTORNEY GENERAL

By: 
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Assistant Attorney General
Alaska Bar No. 050503

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²³ Transcript at pages 55-57; 230-232.

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Appellant,)	
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v.)	
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ALASKA PSYCHIATRIC INSTITUTE,)	
)	
Appellee.)	Trial Court Case No. 3AN-08 493 PR

ORDER

The appellant's Opposition To Updated Emergency Motion For Stay Pending Appeal is DENIED/GRANTED.

DATED: _____

SUPREME COURT JUSTICE

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CERTIFICATE OF SERVICE

I hereby certify that on this day, correct copies of the **OPPOSITION TO UPDATED EMERGENCY MOTION FOR STAY PENDING APPEAL** and **ORDER** in this proceeding were hand delivered to:

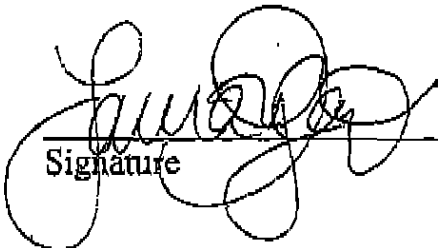
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Beth Russo, OPA

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