IN THE SUPREME COURT FOR THE STATE OF ALASKA

ROSLYN WETHERHORN, Appellant, vs. ALASKA PSYCHIATRIC INSTITUTE, Appellee.	)	Supreme Court No. S-12249 Trial Court Case No. 3AN 05-459 PR

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE PATRICK J. McKAY, PRESIDING

BRIEF OF APPELLANT

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Filed in the Supreme Court of
the State of Alaska, this 12th
day of July, 2006

Marilyn May, Clerk

By: /s/ Peggy Vigoren
Deputy Clerk

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AK CONST. ART. IV, § 15

The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by two-thirds vote of the members elected to each house.

AS 09.60.010

Sec. 09.60.010 Costs and attorney fees allowed prevailing party.

(a) The supreme court shall determine by rule or order the costs, if any, that may be allowed a prevailing party in a civil action. Unless specifically authorized by statute or by agreement between the parties, attorney fees may not be awarded to a party in a civil action for personal injury, death, or property damage related to or arising out of fault, as defined in AS 09.17.900, unless the civil action is contested without trial, or fully contested as determined by the court.

(b) Except as otherwise provided by statute, a court in this state may not discriminate in the award of attorney fees and costs to or against a party in a civil action or appeal based on the nature of the policy or interest advocated by the party, the number of persons affected by the outcome of the case, whether a governmental entity could be expected to bring or participate in the case, the extent of the party's economic incentive to bring the case, or any combination of these factors.

(c) In a civil action or appeal concerning the establishment, protection, or enforcement of a right under the United States Constitution or the Constitution of the State of Alaska, the court

(1) shall award, subject to (d) and (e) of this section, full reasonable attorney fees and costs to a claimant, who, as plaintiff, counterclaimant, cross claimant, or third-party plaintiff in the action or on appeal, has prevailed in asserting the right;

(2) may not order a claimant to pay the attorney fees of the opposing party devoted to claims concerning constitutional rights if the claimant as plaintiff, counterclaimant, cross claimant, or third-party plaintiff in the action or appeal did not prevail in asserting the right, the action or appeal asserting the right was not frivolous, and the claimant did

not have sufficient economic incentive to bring the action or appeal regardless of the constitutional claims involved.

(d) In calculating an award of attorney fees and costs under (c)(1) of this section,

(1) the court shall include in the award only that portion of the services of claimant's attorney fees and associated costs that were devoted to claims concerning rights under the United States Constitution or the Constitution of the State of Alaska upon which the claimant ultimately prevailed; and

(2) the court shall make an award only if the claimant did not have sufficient economic incentive to bring the suit, regardless of the constitutional claims involved.

(e) The court, in its discretion, may abate, in full or in part, an award of attorney fees and costs otherwise payable under (c) and (d) of this section if the court finds, based upon sworn affidavits or testimony, that the full imposition of the award would inflict a substantial and undue hardship upon the party ordered to pay the fees and costs or, if the party is a public entity, upon the taxpaying constituents of the public entity.

AS 22.05.010(a)&(b)

Sec. 22.05.010 Jurisdiction.

(a) The supreme court has final appellate jurisdiction in all actions and proceedings. However, a party has only one appeal as a matter of right from an action or proceeding commenced in either the district court or the superior court.

(b) Appeal to the supreme court is a matter of right only in those actions and proceedings from which there is no right of appeal to the court of appeals under AS 22.07.020 or to the superior court under AS 22.10.020 or AS 22.15.240.

AS 47.30.700 Initiation of involuntary commitment procedures.

(a) Upon petition of any adult, a judge shall immediately conduct a screening investigation or direct a local mental health professional employed by the department or by a local mental health program that receives money from the department under AS 47.30.520 - 47.30.620 or another mental health professional designated by the judge, to conduct a screening investigation of the person alleged to be mentally ill and, as a result of that condition, alleged to be gravely disabled or to present a likelihood of serious harm to self or others. Within 48 hours after the completion of the screening investigation, a judge may issue an *ex parte* order orally or in writing, stating that there is probable cause to believe the respondent is mentally ill and that condition causes the respondent to be gravely disabled or to present a likelihood of serious harm to self or others. The court shall provide findings on which the conclusion is based, appoint an attorney to represent the respondent, and may direct that a peace officer take the respondent into custody and

deliver the respondent to the nearest appropriate facility for emergency examination or treatment. The *ex parte* order shall be provided to the respondent and made a part of the respondent's clinical record. The court shall confirm an oral order in writing within 24 hours after it is issued.

(b) The petition required in (a) of this section must allege that the respondent is reasonably believed to present a likelihood of serious harm to self or others or is gravely disabled as a result of mental illness and must specify the factual information on which that belief is based including the names and addresses of all persons known to the petitioner who have knowledge of those facts through personal observation.

AS 47.30.705 Emergency detention for evaluation.

(a) A peace officer, a psychiatrist or physician who is licensed to practice in this state or employed by the federal government, or a clinical psychologist licensed by the state Board of Psychologist and Psychological Associate Examiners who has probable cause to believe that a person is gravely disabled or is suffering from mental illness and is likely to cause serious harm to self or others of such immediate nature that considerations of safety do not allow initiation of involuntary commitment procedures set out in AS 47.30.700, may cause the person to be taken into custody and delivered to the nearest evaluation facility. A person taken into custody for emergency evaluation may not be placed in a jail or other correctional facility except for protective custody purposes and only while awaiting transportation to a treatment facility. However, emergency protective custody under this section may not include placement of a minor in a jail or secure facility. The peace officer or mental health professional shall complete an application for examination of the person in custody and be interviewed by a mental health professional at the facility.

AS 47.30.710 Examination.

(a) A respondent who is delivered under AS 47.30.700 - 47.30.705 to an evaluation facility for emergency examination and treatment shall be examined and evaluated as to mental and physical condition by a mental health professional and by a physician within 24 hours after arrival at the facility.

(b) If the mental health professional who performs the emergency examination has reason to believe that the respondent is (1) mentally ill and that condition causes the respondent to be gravely disabled or to present a likelihood of serious harm to self or others, and (2) is in need of care or treatment, the mental health professional may hospitalize the respondent, or arrange for hospitalization, on an emergency basis. If a judicial order has not been obtained under AS 47.30.700, the mental health professional shall apply for an *ex parte* order authorizing hospitalization for evaluation.

AS 47.30.715 Acceptance of order.

When a facility receives a proper order for evaluation, it shall accept the order and the respondent for an evaluation period not to exceed 72 hours. The facility shall promptly notify the court of the date and time of the respondent's arrival. The court shall set a date, time and place for a 30-day commitment hearing, to be held if needed within 72 hours after the respondent's arrival, and the court shall notify the facility, the respondent, the respondent's attorney, and the prosecuting attorney of the hearing arrangements. Evaluation personnel, when used, shall similarly notify the court of the date and time when they first met with the respondent.

AS 47.30.725 Commitment proceeding rights; notification.

(a) When a respondent is detained for evaluation under AS 47.30.660 - 47.30.915, the respondent shall be immediately notified orally and in writing of the rights under this section. Notification must be in a language understood by the respondent. The respondent's guardian, if any, and if the respondent requests, an adult designated by the respondent, shall also be notified of the respondent's rights under this section.

(b) Unless a respondent is released or voluntarily admitted for treatment within 72 hours of arrival at the facility or, if the respondent is evaluated by evaluation personnel, within 72 hours from the beginning of the respondent's meeting with evaluation personnel, the respondent is entitled to a court hearing to be set for not later than the end of that 72-hour period to determine whether there is cause for detention after the 72 hours have expired for up to an additional 30 days on the grounds that the respondent is mentally ill, and as a result presents a likelihood of serious harm to the respondent or others, or is gravely disabled. The facility or evaluation personnel shall give notice to the court of the releases and voluntary admissions under AS 47.30.700 - 47.30.815.

(c) The respondent has a right to communicate immediately, at the department's expense, with the respondent's guardian, if any, or an adult designated by the respondent and the attorney designated in the *ex parte* order, or an attorney of the respondent's choice.

(d) The respondent has the right to be represented by an attorney, to present evidence, and to cross-examine witnesses who testify against the respondent at the hearing.

(e) The respondent has the right to be free of the effects of medication and other forms of treatment to the maximum extent possible before the 30-day commitment hearing; however, the facility or evaluation personnel may treat the respondent with medication under prescription by a licensed physician or by a less restrictive alternative of the respondent's preference if, in the opinion of a licensed physician in the case of

medication, or of a mental health professional in the case of alternative treatment, the treatment is necessary to

(1) prevent bodily harm to the respondent or others;

(2) prevent such deterioration of the respondent's mental condition that subsequent treatment might not enable the respondent to recover; or

(3) allow the respondent to prepare for and participate in the proceedings.

(f) A respondent, if represented by counsel, may waive, orally or in writing, the 72-hour time limit on the 30-day commitment hearing and have the hearing set for a date no more than seven calendar days after arrival at the facility. The respondent's counsel shall immediately notify the court of the waiver.

AS 47.30.730 Procedure for 30-day commitment; petition for commitment.

(a) In the course of the 72-hour evaluation period, a petition for commitment to a treatment facility may be filed in court. The petition must be signed by two mental health professionals who have examined the respondent, one of whom is a physician. The petition must

(1) allege that the respondent is mentally ill and as a result is likely to cause harm to self or others or is gravely disabled;

(2) allege that the evaluation staff has considered but has not found that there are any less restrictive alternatives available that would adequately protect the respondent or others; or, if a less restrictive involuntary form of treatment is sought, specify the treatment and the basis for supporting it;

(3) allege with respect to a gravely disabled respondent that there is reason to believe that the respondent's mental condition could be improved by the course of treatment sought;

(4) allege that a specified treatment facility or less restrictive alternative that is appropriate to the respondent's condition has agreed to accept the respondent;

(5) allege that the respondent has been advised of the need for, but has not accepted, voluntary treatment, and request that the court commit the respondent to the specified treatment facility or less restrictive alternative for a period not to exceed 30 days;

(6) list the prospective witnesses who will testify in support of commitment or involuntary treatment; and

(7) list the facts and specific behavior of the respondent supporting the allegation in (1) of this subsection.

(b) A copy of the petition shall be served on the respondent, the respondent's attorney, and the respondent's guardian, if any, before the 30-day commitment hearing.

AS 47.30.735 30-day commitment.

(a) Upon receipt of a proper petition for commitment, the court shall hold a hearing at the date and time previously specified according to procedures set out in AS 47.30.715.

(b) The hearing shall be conducted in a physical setting least likely to have a harmful effect on the mental or physical health of the respondent, within practical limits. At the hearing, in addition to other rights specified in AS 47.30.660 - 47.30.915, the respondent has the right:

(1) to be present at the hearing; this right may be waived only with the respondent's informed consent; if the respondent is incapable of giving informed consent, the respondent may be excluded from the hearing only if the court, after hearing, finds that the incapacity exists and that there is a substantial likelihood that the respondent's presence at the hearing would be severely injurious to the respondent's mental or physical health;

(2) to view and copy all petitions and reports in the court file of the respondent's case;

(3) to have the hearing open or closed to the public as the respondent elects;

(4) to have the rules of evidence and civil procedure applied so as to provide for the informal but efficient presentation of evidence;

(5) to have an interpreter if the respondent does not understand English;

(6) to present evidence on the respondent's behalf;

(7) to cross-examine witnesses who testify against the respondent;

(8) to remain silent;

(9) to call experts and other witnesses to testify on the respondent's behalf.

(c) At the conclusion of the hearing the court may commit the respondent to a treatment facility for not more than 30 days if it finds, by clear and convincing evidence, that the respondent is mentally ill and as a result is likely to cause harm to the respondent or others or is gravely disabled.

(d) If the court finds that there is a viable less restrictive alternative available and that the respondent has been advised of and refused voluntary treatment through the alternative, the court may order the less restrictive alternative treatment for not more than 30 days if the program accepts the respondent.

(e) The court shall specifically state to the respondent, and give the respondent written notice, that if commitment or other involuntary treatment beyond the 30 days is to be sought, the respondent has the right to a full hearing or jury trial.

AS 47.30.740

(a) At any time during the respondent's 30-day commitment, the professional person in charge, or that person's professional designee, may file with the court a petition for a 90-day commitment of that respondent. The petition must include all material required under AS 47.30.730(a) except that references to "30 days" shall be read as "90 days"; and

(1) allege that the respondent has attempted to inflict or has inflicted serious bodily harm upon the respondent or another since the respondent's acceptance for evaluation, or that the respondent was committed initially as a result of conduct in which the respondent attempted or inflicted serious bodily harm upon the respondent or another, or that the respondent continues to be gravely disabled, or that the respondent demonstrates a current intent to carry out plans of serious harm to the respondent or another;

(2) allege that the respondent has received appropriate and adequate care and treatment during the respondent's 30-day commitment;

(3) be verified by the professional person in charge, or that person's professional designee, during the 30-day commitment.

(b) The court shall have copies of the petition for 90-day commitment served upon the respondent, the respondent's attorney, and the respondent's guardian, if any. The petition for 90-day commitment and proofs of service shall be filed with the clerk of the court, and a date for hearing shall be set, by the end of the next judicial day, for not later than five judicial days from the date of filing of the petition. The clerk shall notify the respondent, the respondent's attorney, and the petitioner of the hearing date at least three judicial days in advance of the hearing.

(c) Findings of fact relating to the respondent's behavior made at a 30-day commitment hearing under AS 47.30.735 shall be admitted as evidence and may not be rebutted except that newly discovered evidence may be used for the purpose of rebutting the findings.

AS 47.30.745 90-day commitment hearing rights.

(a) A respondent subject to a petition for 90-day commitment has, in addition to the rights specified elsewhere in this chapter, or otherwise applicable, the rights enumerated in this section. Written notice of these rights shall be served on the respondent and the respondent's attorney and guardian, if any, and may be served on an adult designated by the respondent at the time the petition for 90-day commitment is served. An attempt shall be made by oral explanation to ensure that the respondent understands the rights enumerated in the notice. If the respondent does not understand English, the explanation shall be given in a language the respondent understands.

(b) Unless the respondent is released or is admitted voluntarily following the filing of a petition and before the hearing, the respondent is entitled to a judicial hearing within five judicial days of the filing of the petition as set out in AS 47.30.740(b) to determine if the respondent is mentally ill and as a result is likely to cause harm to self or others, or if the respondent is gravely disabled. If the respondent is admitted voluntarily following the filing of the petition, the voluntary admission constitutes a waiver of any hearing rights under AS 47.30.740 or under AS 47.30.685. If at any time during the respondent's voluntary admission under this subsection, the respondent submits to the facility a written request to leave, the professional person in charge may file with the court a petition for a 180-day commitment of the respondent under AS 47.30.770. The 180-day commitment hearing shall be scheduled for a date not later than 90 days after the respondent's voluntary admission.

(c) The respondent is entitled to a jury trial upon request filed with the court if the request is made at least two judicial days before the hearing. If the respondent requests a jury trial, the hearing may be continued for no more than 10 calendar days. The jury shall consist of six persons.

(d) If a jury trial is not requested, the court may still continue the hearing at the respondent's request for no more than 10 calendar days.

(e) The respondent has a right to retain an independent licensed physician or other mental health professional to examine the respondent and to testify on the respondent's behalf. Upon request by an indigent respondent, the court shall appoint an independent licensed physician or other mental health professional to examine the respondent and testify on the respondent's behalf. The court shall consider an indigent respondent's request for a specific physician or mental health professional. A motion for the appointment may be filed in court at any reasonable time before the hearing and shall be acted upon promptly. Reasonable fees and expenses for expert examiners shall be determined by the rules of court.

(f) The proceeding shall in all respects be in accord with constitutional guarantees of due process and, except as otherwise specifically provided in AS 47.30.700 - 47.30.915, the rules of evidence and procedure in civil proceedings.

(g) Until the court issues a final decision, the respondent shall continue to be treated at the treatment facility unless the petition for 90-day commitment is withdrawn. If a decision has not been made within 20 days of filing of the petition, not including extensions of time due to jury trial or other requests by the respondent, the respondent shall be released.

AS 47.30.815

Sec. 47.30.815 Limitation of liability; bad faith application a felony.

(a) A person acting in good faith upon either actual knowledge or reliable information who makes application for evaluation or treatment of another person under AS 47.30.700 -- 47.30.915 is not subject to civil or criminal liability.

(b) The following persons may not be held civilly or criminally liable for detaining a person under AS 47.30.700 -- 47.30.915 or for releasing a person under AS 47.30.700 -- 47.30.915 at or before the end of the period for which the person was admitted or committed for evaluation or treatment if the persons have performed their duties in good faith and without gross negligence:

(1) an officer of a public or private agency;

(2) the superintendent, the professional person in charge, the professional designee of the professional person in charge, and the attending staff of a public or private agency;

(3) a public official performing functions necessary to the administration of AS 47.30.700 -- 47.30.915;

(4) a peace officer or mental health professional responsible for detaining or transporting a person under AS 47.30.700 -- 47.30.915.

(c) A person who wilfully initiates an involuntary commitment procedure under AS 47.30.700 without having good cause to believe that the other person is suffering from a mental illness and as a result is gravely disabled or likely to cause serious harm to self or others, is guilty of a felony.

AS 47.30.837(c)

(c) If an evaluation facility or designated treatment facility has provided to the patient the information necessary for the patient's consent to be informed and

the patient voluntarily consents, the facility may administer psychotropic medication to the patient unless the facility has reason to believe that the patient is not competent to make medical or mental health treatment decisions. If the facility has reason to believe that the patient is not competent to make medical or mental health treatment decisions and the facility wishes to administer psychotropic medication to the patient, the facility shall follow the procedures of AS 47.30.839.

AS 47.30.839 Court-ordered administration of medication.

(a) An evaluation facility or designated treatment facility may use the procedures described in this section to obtain court approval of administration of psychotropic medication if

(1) there have been, or it appears that there will be, repeated crisis situations as described in AS 47.30.838(a)(1) and the facility wishes to use psychotropic medication in future crisis situations; or

(2) the facility wishes to use psychotropic medication in a noncrisis situation and has reason to believe the patient is incapable of giving informed consent.

(b) An evaluation facility or designated treatment facility may seek court approval for administration of psychotropic medication to a patient by filing a petition with the court, requesting a hearing on the capacity of the person to give informed consent.

(c) A patient who is the subject of a petition under (b) of this section is entitled to an attorney to represent the patient at the hearing. If the patient cannot afford an attorney, the court shall direct the Public Defender Agency to provide an attorney. The court may, upon request of the patient's attorney, direct the office of public advocacy to provide a guardian ad litem for the patient.

(d) Upon the filing of a petition under (b) of this section, the court shall direct the office of public advocacy to provide a visitor to assist the court in investigating the issue of whether the patient has the capacity to give or withhold informed consent to the administration of psychotropic medication. The visitor shall gather pertinent information and present it to the court in written or oral form at the hearing. The information must include documentation of the following:

(1) the patient's responses to a capacity assessment instrument administered at the request of the visitor;

(2) any expressed wishes of the patient regarding medication, including wishes that may have been expressed in a power of attorney, a living will, an advance health care directive under AS 13.52, or oral statements of the patient, including conversations with relatives and friends that are significant persons in

the patient's life as those conversations are remembered by the relatives and friends; oral statements of the patient should be accompanied by a description of the circumstances under which the patient made the statements, when possible.

(e) Within 72 hours after the filing of a petition under (b) of this section, the court shall hold a hearing to determine the patient's capacity to give or withhold informed consent as described in AS 47.30.837 and the patient's capacity to give or withhold informed consent at the time of previously expressed wishes regarding medication if previously expressed wishes are documented under (d)(2) of this section. The court shall consider all evidence presented at the hearing, including evidence presented by the guardian ad litem, the petitioner, the visitor, and the patient. The patient's attorney may cross-examine any witness, including the guardian ad litem and the visitor.

(f) If the court determines that the patient is competent to provide informed consent, the court shall order the facility to honor the patient's decision about the use of psychotropic medication.

(g) If the court determines that the patient is not competent to provide informed consent and, by clear and convincing evidence, was not competent to provide informed consent at the time of previously expressed wishes documented under (d)(2) of this section, the court shall approve the facility's proposed use of psychotropic medication. The court's approval under this subsection applies to the patient's initial period of commitment if the decision is made during that time period. If the decision is made during a period for which the initial commitment has been extended, the court's approval under this subsection applies to the period for which commitment is extended.

(h) If an evaluation facility or designated treatment facility wishes to continue the use of psychotropic medication without the patient's consent during a period of commitment that occurs after the period in which the court's approval was obtained, the facility shall file a request to continue the medication when it files the petition to continue the patient's commitment. The court that determines whether commitment shall continue shall also determine whether the patient continues to lack the capacity to give or withhold informed consent by following the procedures described in (b) - (e) of this section. The reports prepared for a previous hearing under (e) of this section are admissible in the hearing held for purposes of this subsection, except that they must be updated by the visitor and the guardian ad litem.

(i) If a patient for whom a court has approved medication under this section regains competency at any time during the period of the patient's commitment and gives informed consent to the continuation of medication, the evaluation facility or designated treatment facility shall document the patient's consent in the patient's file in writing.

AS 47.30.905

Sec. 47.30.905 Fees and expenses for judicial proceedings.

(a) The witnesses, expert witnesses, and the jury in commitment proceedings under AS 47.30.660 -- 47.30.915 are entitled to the fees, compensation, and mileage established by the administrative rules of court for other jurors and witnesses. Compensation, mileage, fees, transportation expenses for a respondent, and other expenses arising from evaluation and commitment proceedings shall be audited and allowed by the superior court of the judicial district in which the proceedings are held. To the extent that services of a peace officer are used to carry out the provisions of AS 47.30.660 -- 47.30.915, the officer is entitled to fees and actual expenses from the same source and in the same manner as for the officer's other official duties.

(b) An attorney appointed for a person under AS 47.30.660 -- 47.30.915 shall be compensated for services as follows:

(1) the person for whom an attorney is appointed shall, if the person is financially able under standards as to financial capability and indigency set by the court, pay the costs of the legal services;

(2) if the person is indigent under those standards, the costs of the services shall be paid by the state.

AS 47.30.915 Definitions.

In AS 47.30.660 - 47.30.915

* * *

(7) "gravely disabled" means a condition in which a person as a result of mental illness

(A) is in danger of physical harm arising from such complete neglect of basic needs for food, clothing, shelter, or personal safety as to render serious accident, illness, or death highly probable if care by another is not taken; or

(B) will, if not treated, suffer or continue to suffer severe and abnormal mental, emotional, or physical distress, and this distress is associated with significant impairment of judgment, reason, or behavior causing a substantial deterioration of the person's previous ability to function independently;

(10) "likely to cause serious harm" means a person who

(A) poses a substantial risk of bodily harm to that person's self, as manifested by recent behavior causing, attempting, or threatening that harm;

(B) poses a substantial risk of harm to others as manifested by recent behavior causing, attempting, or threatening harm, and is likely in the near future to cause physical injury, physical abuse, or substantial property damage to another person; or

(C) manifests a current intent to carry out plans of serious harm to that person's self or another;

(11) "mental health professional" means a psychiatrist or physician who is licensed by the State Medical Board to practice in this state or is employed by the federal government; a clinical psychologist licensed by the state Board of Psychologist and Psychological Associate Examiners; a psychological associate trained in clinical psychology and licensed by the Board of Psychologist and Psychological Associate Examiners; a registered nurse with a master's degree in psychiatric nursing, licensed by the State Board of Nursing; a marital and family therapist licensed by the Board of Marital and Family Therapy; a professional counselor licensed by the Board of Professional Counselors; a clinical social worker licensed by the Board of Social Work Examiners; and a person who

(A) has a master's degree in the field of mental health;

(B) has at least 12 months of post-masters working experience in the field of mental illness; and

(C) is working under the supervision of a type of licensee listed in this paragraph;

(17) "screening investigation" means the investigation and review of facts that have been alleged to warrant emergency examination or treatment, including interviews with the persons making the allegations, any other significant witnesses who can readily be contacted for interviews, and, if possible, the respondent, and an investigation and evaluation of the reliability and credibility of persons providing information or making allegations;

Civil Rule 11

Rule 11. Signing of Pleadings, Motions, and Other Papers; Sanctions.

Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless expense in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant.

Civil Rule 82

(a) **Allowance to Prevailing Party.** Except as otherwise provided by law or agreed to by the parties, the prevailing party in a civil case shall be awarded attorney's fees calculated under this rule.

(b) **Amount of Award.**

(1) The court shall adhere to the following schedule in fixing the award of attorney's fees to a party recovering a money judgment in a case:

Judgment and, if awarded, Prejudgment Interest	**Contested With Trial**	**Contested Without Trial**	**Non-Contested**
First $ 25,000	20%	18%	10%
Next $ 75,000	10%	8%	3%
Next $400,000	10%	6%	2%
Over $500,000	10%	2%	1%

(2) In cases in which the prevailing party recovers no money judgment, the court shall award the prevailing party in a case which goes to trial 30 percent of the prevailing party's reasonable actual attorney's fees which were necessarily incurred, and shall award the prevailing party in a case resolved without trial 20 percent of its actual attorney's fees which were necessarily incurred. The actual fees shall include fees for legal work customarily performed by an attorney but which was delegated to and performed by an investigator, paralegal or law clerk.

(3) The court may vary an attorney's fee award calculated under subparagraph (b)(1) or (2) of this rule if, upon consideration of the factors listed below, the court determines a variation is warranted:

(A) the complexity of the litigation;

(B) the length of trial;

(C) the reasonableness of the attorneys' hourly rates and the number of hours expended;

(D) the reasonableness of the number of attorneys used;

(E) the attorneys' efforts to minimize fees;

(F) the reasonableness of the claims and defenses pursued by each side;

(G) vexatious or bad faith conduct;

(H) the relationship between the amount of work performed and the significance of the matters at stake;

(I) the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts;

(J) the extent to which the fees incurred by the prevailing party suggest that they had been influenced by considerations apart from the case at bar, such as a desire to discourage claims by others against the prevailing party or its insurer; and

(K) other equitable factors deemed relevant. If the court varies an award, the court shall explain the reasons for the variation.

(4) Upon entry of judgment by default, the plaintiff may recover an award calculated under subparagraph (b)(1) or its reasonable actual fees which were necessarily incurred, whichever is less. Actual fees include fees for

legal work performed by an investigator, paralegal, or law clerk, as provided in subparagraph (b)(2).

(c) **Motions for Attorney's Fees.** A motion is required for an award of attorney's fees under this rule or pursuant to contract, statute, regulation, or law. The motion must be filed within 10 days after the date shown in the clerk's certificate of distribution on the judgment as defined by Civil Rule 58.1. Failure to move for attorney's fees within 10 days, or such additional time as the court may allow, shall be construed as a waiver of the party's right to recover attorney's fees. A motion for attorney's fees in a default case must specify actual fees.

(d) **Determination of Award.** Attorney's fees upon entry of judgment by default may be determined by the clerk. In all other matters the court shall determine attorney's fees.

(e) **Equitable Apportionment Under AS 09.17.080.** In a case in which damages are apportioned among the parties under AS 09.17.080, the fees awarded to the plaintiff under (b)(1) of this rule must also be apportioned among the parties according to their respective percentages of fault. If the plaintiff did not assert a direct claim against a third-party defendant brought into the action under Civil Rule 14(c), then

(1) the plaintiff is not entitled to recover the portion of the fee award apportioned to that party; and

(2) the court shall award attorney's fees between the third-party plaintiff and the third-party defendant as follows:

(A) if no fault was apportioned to the third-party defendant, the third-party defendant is entitled to recover attorney's fees calculated under (b)(2) of this rule;

(B) if fault was apportioned to the third-party defendant, the third-party plaintiff is entitled to recover under (b)(2) of this rule 30 or 20 percent of that party's actual attorney's fees incurred in asserting the claim against the third-party defendant.

(f) **Effect of Rule**. The allowance of attorney's fees by the court in conformance with this rule shall not be construed as fixing the fees between attorney and client.

Civil Rule 95(a)

(a) For any infraction of these rules, the court may withhold or assess costs or attorney's fees as the circumstances of the case and discouragement

of like conduct in the future may require; and such costs and attorney's fees may be imposed upon offending attorneys or parties.

Probate Rule 1(b)&(e)

(b) Scope. These rules govern practice and procedure in the trial courts in all phases of proceedings brought under Title 13 of the Alaska Statutes, proceedings related to the release of personal property under AS 12.65.105 and AS 22.15.110(a)(3), mental commitments under AS 47.30, and proceedings to bypass parental consent to an abortion under AS 18.16.030.

(e) Situations Not Covered by the Rules. Where no specific procedure is prescribed by these rules, the court may proceed in any lawful manner, including application of the Civil and Evidence Rules, applicable statutes, the Alaska and United States Constitutions or common law. Such a procedure may not be inconsistent with these rules and may not unduly delay or otherwise interfere with the unique character and purpose of probate proceedings.

Administrative Rule 12

Rule 12. Procedure For Counsel And Guardian Ad Litem Appointments At Public Expense

(a) Intent. The court shall appoint counsel or a guardian ad litem only when the court specifically determines that the appointment is clearly authorized by law or rule, and that the person for whom the appointment is made is financially eligible for an appointment at public expense.

* * *

(e) Other Appointments at Public Expense.

(1) Constitutionally Required Appointments. If the court determines that counsel, or a guardian ad litem, or other representative should be appointed for an indigent person, and further determines that the appointment is not authorized by AS 18.85.100(a) or AS 44.21.410, but in the opinion of the court is required by law or rule, the court shall appoint an attorney who is a member of the Alaska Bar Association to provide the required services. Other persons may be appointed to provide required services to the extent permissible by law.

(A) Appointments may be made in the following types of cases without prior approval of the administrative director, but only in cases in which the required services would not otherwise be provided by a public agency:

* * *

(vi) Attorneys to represent indigent respondents in involuntary alcohol commitments brought pursuant to AS 47.37,

* * *

(5) Compensation.

(A) All claims for compensation must be submitted on forms provided by the court within 30 days following the disposition of a case. Claims will be submitted to the assigned trial judge or master, who shall make a recommendation regarding approval and forward the recommendation to the administrative director. The administrative director shall approve or disapprove the claim.

(B) Attorneys will be compensated at the rate of $40.00 per hour; provided, that total compensation for any case will not exceed $500.00 without prior approval of the administrative director.

(C) A person other than an attorney appointed to provide services will receive compensation if the court deems it appropriate not to exceed $25.00 per hour; provided, that total compensation for any case will not exceed $300.00 without prior approval of the administrative director.

(D) Extraordinary expenses will be reimbursed only if prior authority has been obtained from the administrative director, upon recommendation by the assigned trial judge or the presiding judge. The assigned trial judge may recommend extraordinary expenses up to a total amount not to exceed $1,000.00 and the presiding judge may recommend an amount not to exceed an additional $1,500.00. Extraordinary expenses exceeding $2,500.00 may be authorized only in extremely complex cases by the administrative director upon the recommendation of the presiding judge. In this paragraph, "extraordinary expenses" are limited to expenses for:

(i) Investigation;

(ii) Expert witnesses; and

(iii) Necessary travel and per diem expenses. Travel and per diem may not exceed the rate authorized for state employees.

(E) If necessary to prevent manifest injustice, the administrative director may authorize payment of compensation or expenses in excess of the amounts allowed under this rule.

* * *

JURISDICTIONAL STATEMENT

This appeal is brought by Roslyn Wetherhorn, Respondent below, before the Superior Court, Third Judicial District at Anchorage, under Case No. 3AN 05-459 PR, on Motion for Attorney's Fees. Appellant appeals to the Alaska Supreme Court from Order Denying Respondent's Motion for Attorney's Fees, dated February 6, 2006 (Order), and distributed February 8, 2006. Notice of Appeal was timely filed on March 2, 2006. This court has jurisdiction over this appeal pursuant to AS 22.05.010(a)&(b).

PARTIES

All of the parties are listed in the caption.

STATEMENT OF ISSUES PRESENTED

1. Does Civil Rule 82 apply to involuntary commitment and involuntary medication proceedings under AS 47.30.700--915 when a psychiatric respondent is the prevailing party?

2. Should the Superior Court have granted all or part of the attorney's fees requested?

3. Is the Respondent, who obtained a dismissal of the petitions for involuntary commitment and involuntary medication, the prevailing party under Civil Rule 82?

4. Should Civil Rule 95(a) fees have been awarded for violation of Civil Rule 11's requirement that pleadings be well-grounded in fact and warranted by existing law?

STATEMENT OF THE CASE

I. Brief Description of Case

Appellant, Roslyn Wetherhorn, initially sought partial attorney's fees of $525, representing 20% of actual attorney's fees, under Civil Rule 82 upon obtaining dismissal of 90-day involuntary commitment and involuntary medication petitions filed against her by Appellee Alaska Psychiatric Institute(API).[1] Footnote five, however, noted Ms. Wetherhorn believed full fees were justified, but the amount at stake did not warrant the effort in briefing the issue "at this time."[2] API opposed, making a number of arguments, including that Civil Rule 82 did not apply.[3] In her reply, Ms. Wetherhorn fully briefed the Civil Rule 82 and other issues raised by API, including why she believed full fees should be awarded.[4] The State responded to this by, among other things, asserting the Superior Court had no statutory authority to award attorney's fees and Ms. Wetherhorn was not the prevailing party.[5] In response, Ms. Wetherhorn sought Civil Rule 95(a) penalties for what she viewed as blatant violations of Civil Rule 11.[6] The Superior Court denied the motion for attorney's fees, finding Civil Rule 82 inapplicable and Ms. Wetherhorn was not the prevailing party.[7]

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[1] Exc 34.
[2] Exc. 35-7.
[3] Exc. 40-45.
[4] Exc. 46-77. The copious Exhibits to this motion have not been included in the Excerpt of Record here. They were numbered rather bizarrely for this appeal, with Exhibits A through N being at R457-511 and O through W at R1-385.
[5] Exc. 80-85.
[6] Exc. 87-97.
[7] Exc. 112.

In this appeal, Ms. Wetherhorn seeks rulings that Civil Rule 82 applies and fees should be awarded to her as the prevailing party. She also seeks a ruling that, as a policy matter and for the proper administration of justice in Alaska's courts, full fees should ordinarily be awarded to a psychiatric respondent who prevails in involuntary commitment and involuntary medication proceedings. Finally, she seeks Civil Rule 95(a) attorney's fees as compensation for the effort expended responding to API's supplemental opposition because it violated Civil Rule 11.

II. Course of Proceedings

On April 4, 2005, Ms. Wetherhorn was hauled into API, without any court intervention, under AS 47.30.705, upon the application of Dr. M. Lee, stating that because Ms. Wetherhorn was experiencing "flight of ideas" there was probable cause to believe she was mentally ill and gravely disabled, which was of such immediate nature that considerations of safety did not allow even an *ex parte* application under AS 47.30.700.[8]

On April 5, 2005, API filed a Petition for Initiation of Involuntary Commitment under AS 47.30.700 seeking an *ex parte* order to continue holding Ms. Wetherhorn at API for evaluation, with the stated facts supporting the petition, being "manic state homeless and non medications compliant x 3 months."[9] An *ex parte* order granting the

[8] Exc. 1.
[9] Exc. 2-3.

petition was granted the same day without any hearing or other presentation of evidence.[10]

Also, the same day, April 5, 2005, API filed a Petition for 30-Day [Involuntary] Commitment under AS 47.30.730, with the "facts and specific behavior" alleged to justify the commitment being, "manic state homeless and no insight and non med compliant x 3 months."[11] No witnesses were listed.[12]

A Petition for involuntary medication under AS 47.30.839 was subsequently filed on April 15, 2005.[13]

On April 15, 2005, a hearing on both these motions was held, with Ms. Wetherhorn represented by the Alaska Public Defender Agency.[14] The Alaska Public Defender Agency filed no papers, called no witnesses, and made no arguments why either petition should be denied. Both petitions were granted after a very short hearing.[15]

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[10] Exc. 4.
[11] Exc. 5-6.
[12] Exc. 6.
[13] Exc. 12.
[14] Tr., Exc. 8, 13. The place where the Public Defender Agency would normally be appointed for the involuntary commitment is blank. Exc. 8. However, the Public Defender Agency was clearly appointed with respect to the involuntary medication petition. Exc. 13. In any event, as indicated, the Alaska Public Defender Agency did purport to represent Ms. Wetherhorn at the hearing.
[15] Transcript. As noted below, the written orders were not issued until April 27, 2005, however.

On April 26, 2005, James B. Gottstein, Esq., through the public interest law firm, Law Project for Psychiatric Rights (PsychRights), entered this case on behalf of Ms. Wetherhorn.[16]

On April 27, 2005, the Superior Court, Judge John Sudduck, issued written orders granting the 30 day involuntary commitment and involuntary medication petitions, which were distributed on May 3, 2005.[17]

Also on April 27, 2005, API filed petitions for 90-day involuntary commitment and involuntary medication orders.[18]

On May 3, 2005, the Probate Court issued a Notice of 90-Day Commitment Hearing and Notice of Hearing and Order for Appointment of Court Visitor, both of which were to be held later that same day at 1:30 p.m.[19] These were served on Ms. Wetherhorn that day, at what appears to be 11:10 a.m., but not on Mr. Gottstein.[20] Instead, as with the Notice for the 30-Day Hearing,[21] the Notice of 90-Day Commitment hearing has a blank for who is appointed counsel,[22] but the Hearing and Order for Appointment of Court Visitor appoints the Public Defender Agency.[23]

At the May 3, 2005 hearing, the Assistant Public Defender indicated she had signed a substitution of counsel on April 25, 2005, that Mr. Gottstein was now

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[16] Exc. 13A.
[17] Exc. 14-18.
[18] Exc. 19-21.
[19] Exc. 22-24.
[20] Exc. 25.
[21] Exc. 8, 13.
[22] Exc.22.

representing Ms. Wetherhorn.[24] The hearing was continued to May 6, 2005, at 1:30 p.m.[25]

On May 5, 2005, Ms. Wetherhorn filed elections to:

> (1) have the hearing in a real court room pursuant to AS 47.30.735(b),
> (2) have the hearing open to the public pursuant to AS 47.30.735(b)(3),
> (3) have a jury trial pursuant to AS 47.30.745(c), and
> (4) to be free of the effects of medication, pursuant to AS 47.30.725(e).[26]

On May 6, 2005, a hearing was held at which Ms. Wetherhorn's counsel stated he needed a brief period of time to prepare for the trial, but he hoped and was working towards having the matter resolved before then.[27] At the conclusion of the hearing the Probate Master referred the matter to Superior Court Judge Suddock.[28]

On May 9, 2005, during Mr. Gottstein's ongoing efforts to achieve her release,[29] API released Ms. Wetherhorn.[30]

On May 12, 2005, Mr. Gottstein e-mailed counsel for API that since Ms. Wetherhorn had been released a dismissal of the petitions should be filed.[31]

On May 17, 2005, API moved to dismiss the involuntary commitment and involuntary medication petitions without prejudice.[32]

(Continued footnote)----------

[23] Exc. 24.
[24] Exc. 26.
[25] Exc. 26.
[26] Exc. 26A.
[27] Exc.27.
[28] Exc.27.
[29] Exc. 95.
[30] Exc. 29. This was not served on counsel for Ms. Wetherhorn.
[31] Exc. 39, which is the billing entry noting the e-mail.

On June 3, 2005, Ms. Wetherhorn filed a response to the Motion to Dismiss that dismissal without prejudice made no sense because if something were to happen that would make API want to re-file, API would need to file a new 30-day commitment petition under AS 47.30.730, rather than a 90-day continuation petition under AS 47.30.740.[33]

On June 16, 2005, the Superior Court dismissed the petition "without prejudice against a new petition pursuant to AS 47.30.730."[34] This was distributed to counsel on June 30, 2005.[35]

On July 11, 2006, Ms. Wetherhorn moved for $525 in partial attorney's fees under Civil Rule 82 as the prevailing party (Motion).[36] Footnote 5 states:

> [5] For various reasons, Ms. Wetherhorn believes it is appropriate to award full attorney's fees under Civil Rule 82(b)(3) (E), (G),(H) or (K), or any combination thereof, but since the effort in demonstrating both that full fees should be awarded under such subsections and that §2, Ch. 86 SLA 2003, potentially prohibiting such an award, is invalid for failure to be approved by a two-thirds majority (or otherwise), would likely greatly exceed the amount at stake, has elected not to move for full fees at this time. However, the court may take into account these factors and award more than 20%.[37]

On July 25, 2005, through Assistant Attorney Generals, Holly Chari and Stacie Kraly, API opposed the motion (Opposition), asserting:

(Continued footnote)----------
[32] Exc. 30, emphasis added.
[33] Exc. 31-2.
[34] Exc. 33, emphasis is the handwritten addition by Judge Sudduck to API's proposed Order.
[35] Exc. 33.
[36] Exc. 34-39.
[37] Exc. 37. Emphasis added.

A. AS 47.30.905(b),
B. *Crittel v. Bingo*, 83 P.3d 532 (Alaska 2004),
C. Probate Rule 1(b) & (e), and
D. Administrative Rule 12(e)(1)(A)(vi) & (5),

precluded the requested award.[38]

On August 1, 2005, Ms. Wetherhorn filed a 30 page reply (Reply), with over 400 pages of supporting exhibits, addressing these contentions and making the case for enhanced or full fees foreshadowed in footnote 5 of the Motion.[39] In the Reply, Ms. Wetherhorn indicated she would not object to allowing a response by API.[40]

On August 4, 2005, through Assistant Attorney General Dan Branch, API filed a motion to accept its supplemental opposition along with such opposition (Supplemental Opposition).[41] The Supplemental Opposition asserted:

A. The Court lacks statutory authority to award attorney's fees, and
B. Ms. Wetherhorn was not the prevailing party.[42]

On December 23, 2005, the Superior Court, Judge Donald D. Hopwood, granted API's motion to file the Supplemental Opposition and gave Ms. Wetherhorn 7 days to file a response thereto.[43]

On January 6, 2006, Ms. Wetherhorn filed her response (Supplemental Reply), noting API had essentially abandoned all of its previous arguments except for whether

[38] Exc. 40-45.
[39] Exc. 46-77, R457-511, R1-385.
[40] Exc. 74-5.
[41] Exc. 78-85.
[42] Exc. 80-85.
[43] Exc. 86.

Ms. Wetherhorn was the prevailing party, addressing the new arguments, and moving for Civil Rule 95(a) fees for violation of Civil Rule 11.[44]

On February 6, 2006, the Superior Court, Judge Patrick J. McKay, issued its decision, which in its entirety states:

> Respondent seeks to recover $10,746 in actual attorney's fees resulting from a involuntary commitment proceeding. This court finds that A.R.C.P. 82 does not apply to this proceeding. Application of A.R.C.P. 82 to an involuntary commitment proceeding would be inconsistent with Probate Rules and would interfere with the unique character and purpose of probate proceedings. See Probate Rule 1(e).
>
> This court further finds that an award of A.R.C.P. 82 fees against the State would interfere with the protective nature of the proceedings contained in AS 47.30.700 et seq. and would violate AS 47.30.815.
>
> Finally, this court finds that respondent is not the "prevailing party" under A.R.C.P. 82.[45]

On March 2, 2006, this appeal was timely filed.[46]

III. Facts

Facts relevant to each issue not set forth above are contained in the appropriate argument sections pursuant to Appellate Rule 212(c)(1)(G).

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[44] Exc. 87-111 (including Exhibits). Prior to moving for the Civil Rule 95(a) fees, counsel for Ms. Wetherhorn called API's new attorney Dan Branch advising Mr. Branch that because he thought the arguments made were so specious and facts asserted had no basis, it justified Civil Rule 95(a) penalties and he wanted to give Mr. Branch an opportunity to withdraw them before requesting them. Mr. Branch declined. These telephone conversations, but not the substance, are noted in Mr. Gottstein's billings attached to the Supplemental Reply. Exc. 111.

[45] Exc. 112.

[46] *See* Notice of Appeal in this case.

Standards Of Review

Each issue will be proceeded by a discussion of the applicable standard(s) of review pursuant to Appellate Rule 212(c)(1)(H).

Argument

I. Civil Rule 82 Applies to AS 47.30 Involuntary Commitment and Medication Proceedings.

This court reviews a trial court's interpretation of statutes and court rules under the independent judgment standard. *Crittell v. Bingo*, 83 P.3d 532, n.10 (Alaska 2004).

In ruling Civil Rule 82 does not apply to this proceeding, the Superior Court stated only:

> This court finds that A.R.C.P. 82 does not apply to this proceeding. Application of A.R.C.P. 82 to an involuntary commitment proceeding would be inconsistent with Probate Rules and would interfere with the unique character and purpose of probate proceedings. See Probate Rule 1(e).
>
> This court further finds that an award of A.R.C.P. 82 fees against the State would interfere with the protective nature of the proceedings contained in AS 47.30.700 et seq. and would violate AS 47.30.815.

First, AS 47.30.745(f)[47] provides for the general application of the Civil Rules:

> (f) The proceeding shall in all respects be in accord with . . . , except as otherwise specifically provided in AS 47.30.700 -- 47.30.915, the rules of evidence and procedure in civil proceedings. [48]

With respect to the Superior Court's citation of AS 47.30.815, immunizing state officials from good faith actions under AS 47.30.700-.915 from civil or criminal liability,

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[47] AS 47.30.745, is the provision under which the 90-day commitment was sought here.
[48] Further, AS 47.30.735(b)(4), made applicable by AS 47.30.745(a), provides, "the respondent has the right . . . (4) to have the rules of evidence and civil procedure applied so as to provide for the informal but efficient presentation of evidence."

(a) this does not apply to Civil Rule 95(a) fees for violation of Civil Rule 11, because a violation of Civil Rule 11 involves bad faith, and (b) Ms. Wetherhorn did not seek fees from any official; she sought an order for fees from API to compensate for the time spent in responding to pleadings filed in violation of Civil Rule 11.

With respect to whether AS 47.30 involuntary commitment and medication proceedings are subject to Civil Rule 82, *Crittell*, at 535, holds Civil Rule 82 does apply to probate court proceedings:[49]

> The Crittells argue that the trial court erred by awarding Civil Rule 82 attorney's fees because the civil rules do not apply to probate proceedings. They further contend that awards under Rule 82 are barred by AS 13.16.435, a provision of the probate code. Neither argument is persuasive.

(footnotes omitted).

As initially assumed by Ms. Wetherhorn below and then fully developed through briefing when challenged, Civil Rule 82 does apply when a private attorney represents a prevailing psychiatric respondent under AS 47.30.700 -- 915.

II. Ms. Wetherhorn is the Prevailing Party

This Court reviews a trial court's decision regarding prevailing party status as well as the award of costs and attorney's fees for abuse of discretion; an abuse of discretion exists when an award is arbitrary, capricious, manifestly unreasonable, or improperly motivated; however this Court applies its independent judgment in interpreting court

[49] Just because AS 47.30 involuntary commitment and medication petitions have been assigned to the Probate Court does not convert them to "probate matters" as asserted by API below. Exc. 41.

rules. *Alaska Construction & Engineering v. Balzer Pacific Equipment Co.*, 130 P.3d 932, 935 (Alaska 2006).

The Superior Court gave no explanation for its ruling that Ms. Wetherhorn was not the prevailing party. As set forth above, following the Law Project for Psychiatric Rights' entry into the case, Ms. Wetherhorn filed elections to:

> (1) have the hearing in a real court room pursuant to AS 47.30.735(b),
>
> (2) have the hearing open to the public pursuant to AS 47.30.735(b)(3),
>
> (3) have a jury trial pursuant to AS 47.30.745(c), and
>
> (4) to be free of the effects of medication pursuant to AS 47.30.725(e).[50]

At the May 6, 2006 hearing, counsel for Ms. Wetherhorn indicated he was working towards and hoping to resolve the matter before the trial.[51] The psychiatrist's patient note for later that afternoon states:

> [Patient] is very pleasant and polite at times, but at times she abruptly changes tone and affect to anger or irrational opposition. . . . Patient's insight and judgment are still sufficiently impaired that I am very concerned that she have a clearly safe place to stay lined up before she is discharged. . . Her attorney has requested a jury trial regarding her ongoing commitment proceedings.

What followed is described in Ms. Wetherhorn's Supplemental Reply:

> Counsel here then began preparing for the trial, including immediately after the hearing, calling Diane Booth at API to obtain Ms. Wetherhorn's chart. When the chart still had not been provided by May 9, 2005, counsel here's assistant called Ms. Booth and advised her that if Ms. Wetherhorn was not being discharged the next day, she was to deliver us what she had managed to copy of the chart, but if she was discharged it was okay to wait until she had the entire chart copied.

[50] Exc. 26A.
[51] Exc. 27.

> As a result of all of this pressure, Ms. Wetherhorn was discharged that day, May 9, 2005, in spite of the State's position just 3 days before being that they were still seeking the 90-day involuntary commitment and forced drugging orders and Dr. Kiele's progress notes that Ms. Wetherhorn was still periodically irrationally angry and delusional.[52]

API's grounds for asserting Ms. Wetherhorn was not the prevailing party were:

> The Law Office [*sic* "Law Project for Psychiatric Rights"] presses its claim on the theory that the state moved to dismiss the 90 day petition because the Law Office requested a jury trial on the state's 90 day commitment petition. In fact, the state asked for dismissal of the 90 petition because the respondent had already been released from the Alaska Psychiatric Institute. She was released because she no longer required hospitalization. The respondent did not prevail in court. Therefore, neither she nor the Law Office is entitled to an attorney's fees award.[53]

Ms. Wetherhorn's Supplemental Reply notes that if the mere fact of the petitions' dismissal did not make Ms. Wetherhorn the prevailing party, the court should hold an evidentiary hearing to determine whether Ms. Wetherhorn's discharge was related to PsychRights' contesting the commitment and forced drugging, including the demand for a jury trial.[54] Earlier, the Supplemental Reply notes that if PsychRights had not entered the case, the 90-day petitions would almost certainly have been granted on May 3, 2005, which, by itself, means the dismissal was the result of PsychRights' representation.[55]

As below, Ms. Wetherhorn urges here that if a petition for involuntary commitment or involuntary medication, or both, is/are dismissed, the psychiatric respondent is the prevailing party.

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[52] Exc. 95, footnotes omitted.
[53] Exc. 84. API also asserts it was the prevailing party on whether the dismissal was with or without prejudice, which is a flat out misstatement.
[54] Exc. 95.

Below, API also asserted no fees should be awarded because Ms. Wetherhorn "did not prevail in court. Therefore, neither she nor the Law Office [sic, "Law Project for Psychiatric Rights"] is entitled to an attorney's fee award."[56] However, Civil Rule 82(b) specifically provides for 20% of reasonable actual fees in such a situation,[57] which is what PsychRights initially requested.

The Superior Court's finding that Ms. Wetherhorn is not the prevailing party is arbitrary, capricious and manifestly unreasonable, and should be reversed. If the fact of the dismissals and the chronology of events are insufficient to make Ms. Wetherhorn the prevailing party as a matter of law, this issue should be remanded for factual determination.[58]

III. Enhanced or Full Reasonable Attorney's Fees Should Be Awarded

This Court reviews a trial court's decision regarding the award of costs and attorney's fees for abuse of discretion; an abuse of discretion exists when an award is arbitrary, capricious, manifestly unreasonable, or improperly motivated; however this

(Continued footnote)----------
[55] Exc. 93.
[56] Exc. 84.
[57] While the assertion by API that Civil Rule 82 only applies if the parties have gone to trial also seems a clear violation of Civil Rule 11, Ms. Wetherhorn did not assert it as grounds for her motion for fees under Civil Rule 95(a).
[58] Here, any presumption against disturbing a trial court's factual determination because of its ability to observe demeanor, etc., is inapplicable for two reasons. First, there was no demeanor to observe since no hearing was ever held, and second, Judge McKay's only involvement in the case was to decide the motion for attorney's fees after all the papers had been filed.

Court applies its independent judgment in interpreting court rules. *Alaska Construction* at 935.

Here, Ms. Wetherhorn asserts the circumstances of API subjecting her to incarceration and the forcible ingestion of unwanted psychotropic medication through legally deficient papers and procedures justifies an award of enhanced or full fees under Civil Rule 82(b)(3) (E), (G),(H), (I) or (K), or any combination thereof and the Superior Court's failure to even address any of the contentions was arbitrary, capricious and manifestly unreasonable. However, Ms. Wetherhorn also urges this Court, as it did below,[59] to exercise its independent judgment to interpret Civil Rule 82 as providing full, reasonable attorney's fees when an AS 47.30 psychiatric respondent prevails in such cases.

Ms. Wetherhorn sought full reasonable attorney's fees under Civil Rule 82(b)(3) (E), (G),(H) and (K).[60] These provisions state:

> (3) The court may vary an attorney's fee award calculated under subparagraph (b)(1) or (2) of this rule if, upon consideration of the factors listed below, the court determines a variation is warranted: . . .
>
> (E) the attorneys' efforts to minimize fees; . . .
> (G) vexatious or bad faith conduct;
> (H) the relationship between the amount of work performed and the significance of the matters at stake;
> (I) the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts; . . . and
> (K) other equitable factors deemed relevant.

[59] Exc.50-71, 74.
[60] Exc. 37, n. 5, Exc. 49-74.

These will be discussed in turn.

A. Attorney's Efforts to Minimize Fees

With respect to Civil Rule 82(b)(3)(E), the attorney's efforts to minimize fees, there is no legitimate question but that the 90-day petitions were abandoned due to PsychRights entry into the case, including the demand for jury trial and counsel's specific efforts to resolve the case before trial. This was achieved with a minimum of fees.

B. Vexatious or Bad Faith Conduct

With respect to Civil Rule 82(b)(3)(G), vexatious or bad faith conduct, in response to Ms. Wetherhorn's reciting chapter and verse that her rights under the explicit statutory requirements of AS 47.30 had been cavalierly trampled upon,[61] API asserted they were merely "some technical requirements."[62] This itself demonstrates API's cavalier attitude towards these statutory requirements.

This Court's Conclusion in the recently issued Opinion in *Myers v. Alaska Psychiatric Institute*, Opinion No. 6021 --- P.3d ----, 2006 WL 1792231 (Alaska, June 30, 2006), explicitly required strict compliance with "all applicable statutory requirements," with respect to involuntary medication.

Non-compliance with statutory directions is also fatal in the involuntary commitment context. Statutes authorizing involuntary commitment to a mental hospital must be strictly interpreted. *Humphrey v. Cady*, 405 U.S. 504, 509, 92 S.Ct. 1048, 1052 (1972). See, e.g., *Covington v. Harris*, 419 F.2d 617, 623 (U.S.App.D.C. 1969) (statutes

[61] Exc. 50-60.

"sanctioning such a drastic curtailment of the rights of citizens must be narrowly, even grudgingly, construed in order to avoid deprivations of liberty without due process of law."); *In re Elkow*, 521 N.E.2d 290 (Ill.App. 1988) (any noncompliance with a statutory procedure for involuntary admission renders the judgment in the case erroneous and of no effect."); *In re Wahlquist*, 585 P.2d 437, 439 (Utah 1978) (full compliance with statutes required); *In re Morlock*, 862 P.2d 415 (Mont. 1993) (civil commitment laws are to be strictly followed); *In re Cross*, 662 P.2d 828 (Wash. 1983) (involuntary commitment statutes allow for deprivation of liberty interest so must be strictly construed.); *People in Interest of Dveirin*, 755 P.2d 1207, 1209 (Colo. 1988) ("because of the curtailment of personal liberty which results from certification of mental illness, strict adherence to the procedural requirements of the civil commitment statutes is required.").

In this case, however, Ms. Wetherhorn's rights during the 30-day involuntary commitment and medication proceedings were disregarded. The 30-day involuntary commitment petition fails to list any witnesses as required in AS 47.30.730.[63] With respect to the facts and specific behavior required by AS 47.30.730 of the respondent supporting the allegation that Ms. Wetherhorn is mentally ill and as a result is likely to cause harm to herself or others and gravely disabled, the 30-day involuntary commitment petition states only, "Manic state homeless and no insight and non med compliant [?] 3 months," which is insufficient to justify involuntary commitment.

(Continued footnote)----------

[62] Exc.84.

[63] Exc. 6.

Under AS 47.30.837(c) the State must seek a court order to administer psychotropic drugs to someone that is incompetent to provide informed consent whether or not the person agrees to take the medication. At the April 15, 2005 hearing, Dr. Kiele testified that sometimes Ms. Wetherhorn agreed to take the medication and sometimes she declined the medication.[64] If she was competent to accept the medication, then she was competent to decline it. Thus, API either violated the law by letting her decide to take the medication when she was incompetent, or was meretricious in asserting she was incompetent to decline the medication when she didn't want to take it.

The 90-day involuntary commitment petition,[65] just as the 30 day one, totally fails to set forth "facts and specific behavior" justifying commitment.

The foregoing demonstrates indifference to Ms. Wetherhorn's legal rights, through utilization of the courts, whereby the full force of the State has been brought to bear against her, including being incarcerated as an inmate at API[66] and forcibly injected with powerful mind-numbing, dangerous drugs of dubious, at best, efficacy.[67]

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[64] Tr. 6.

[65] Exc. 19-20.

[66] The American Heritage Dictionary, 4th Ed.'s definition of "incarcerate" includes " 2. To shut in; confine." Similarly, "inmate" is defined as "A resident of a dwelling that houses a number of occupants, especially a person confined to an institution, such as a prison or hospital." (emphasis added)

[67] These attributes of the drugs were set out in the copious exhibits to Ms. Wetherhorn's Reply to establish the importance of the interest involved. R457-511 and R1-385. They ended up not being essential to a decision in this appeal because this Court subsequently acknowledged the very problematic nature of these drugs in *Myers* at 6 ("Psychotropic drugs 'affect the mind, behavior, intellectual functions, perception, moods, and emotions' and are known to cause a number of potentially devastating side effects" and at 4, citing

----------(footnote continued)

The illegitimacy of the 30-day involuntary commitment and medication petitions is directly at issue in Ms. Wetherhorn's appeal of them in S-11939 and has not been fully discussed here. However, for purposes of Civil Rule 82, the cavalier attitude of API towards complying with the statutory predicates to involuntary commitment and medication militates for enhanced or full fees here.[68]

C. Relationship Between Work Performed and Interests at Stake

With respect to Civil Rule 82(b)(3)(H), the relationship between the amount of work performed and the significance of the matters at stake, the stakes for Ms. Wetherhorn were nothing less than the fundamental constitutional rights to be free of confinement and the forcible administration of unwanted, mind-altering and harmful drugs.

(Continued footnote)----------
to the Superior Court's finding that "a valid debate exists in the medical/psychiatric community as to the safety and effectiveness of the proposed treatment plan").

[68] S-11939 involves Ms. Wetherhorn's appeal of the 30-day involuntary commitment and medication proceedings, which are separate from the 90-day involuntary commitment and medication proceedings involved in this case. In S-11939, Ms. Wetherhorn directly challenges the validity of the 30-day involuntary commitment and medication orders for failure to comply with the relevant Alaska Statutes, as well as the constitutionality of the "B Prong" of Alaska's gravely disabled statute, AS 47.30.915(7)(B). In S-11939 Ms. Wetherhorn also seeks to establish the right to truly effective assistance of counsel in these proceedings. While these two appeals are completely separate, S-11939 is relevant here because it starkly demonstrates the abject failure of the Alaska Public Defender Agency to interpose any meaningful defense in these cases. This abject failure is the reason Ms. Wetherhorn seeks the ruling from this Court here that prevailing psychiatric respondents in AS 47.30 involuntary commitment and medication normally be awarded full reasonable attorney's fees as a means to encourage private counsel to take these cases.

It is well settled that involuntary civil commitment is a massive curtailment of liberty. *Vitek v. Jones*, 445 US 480, 491, 100 S.Ct. 1254, 1263 (1980)("commitment to a mental hospital produces 'a massive curtailment of liberty'"); *Humphrey v. Cady*, *supra*; *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804 (1979); *O'Connor v. Donaldson*, 422 U.S. 563, 580, 95 S.Ct. 2486, 2496, 45 L.Ed.2d 396 (1975). In *Myers*, at pp 18-19, after discussing the "potentially devastating impact of psychotropic medications," this Court held the right to be free from unwanted psychotropic drugs is a fundamental right:

> Because psychotropic medication can have profound and lasting negative effects on a patient's mind and body, we now similarly hold that Alaska's statutory provisions permitting nonconsensual treatment with psychotropic medications implicate fundamental liberty and privacy interests.

To have achieved Ms. Wetherhorn's freedom and stopped the forcible administration of unwanted psychotropic drugs for $2,623.50 is a bargain.

D. <u>Extent to Which Fee Would Deter Use of the Courts</u>

With respect to Civil Rule 82(b)(3)(I), the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts, normally the Court would view deterring voluntary use of the courts negatively. However, the rule does not say that and here it is suggested the State should be deterred from its voluntary use of the court because it has proven to be abusive. This Court acknowledged this possibility in *Myers*, at n.84, with respect to the use of psychotropic drugs for non-therapeutic purposes.

In other words, because of the complete abdication by the Public Defender Agency from any real defense of these cases, it has been so easy for the State to file and

obtain unwarranted involuntary commitment and forced drugging orders that it is doing so without legal justification and to the great detriment of people it is purporting to help.[69] Awarding enhanced or full fees can serve to discourage the State from filing petitions that are not warranted by the law and facts.

E. Other Factors

With respect to Civil Rule 82(b)(3)(K), other equitable factors deemed relevant, even if awarding enhanced or full fees to discourage the State from its pervasive practice of filing for unwarranted involuntary commitment and forced drugging petitions does not fit under Civil Rule 82(b)(3)(I), it certainly fits under this subsection. Moreover, if the State has the obligation to provide representation to indigent AS 47.30 psychiatric respondents, which it does, it has the obligation to provide adequate representation. In *Myers*, this Court held the right to be free from unwanted psychotropic drugs deserved the greatest constitutional protections. However, because the Alaska Public Defender Agency abjectly fails to interpose any meaningful defenses, as demonstrated in the appeal of 30-day involuntary commitment and medication proceedings currently submitted to this Court in S-11939, psychiatric respondents' rights are dishonored as a matter of course.

The Public Defender Agency has never prosecuted an appeal in this Court to any of the thousands of involuntary commitment and medication orders issued by the

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[69] These were laid out in Ms. Wetherhorn's Reply, at Exc. 60-71 and were also fully discussed in the briefing in the appeal of Ms. Wetherhorn's 30 day involuntary
----------(footnote continued)

Superior Court. This combination of feigned representation before the Superior Court and no appeals whatsoever being filed by the Public Defender Agency has resulted in realization of "the inherent risk of procedural unfairness that inevitably arises when a public treatment facility possesses unreviewable power" this Court expressed concern about in *Myers* at page 28. Awarding full fees can encourage other attorneys to take on AS 47.30 cases and bring these proceedings into line with statutory and constitutional requirements.

Ms. Wetherhorn asks this Court to hold, as a matter of policy and in this Court's interest of the proper administration of Alaska's courts, that prevailing psychiatric respondents under AS 47.30 involuntary commitment and medication petitions not represented by the Alaska Public Defender Agency be awarded full, reasonable attorney's fees under the same criteria as prevailing public interest litigants. While strictly speaking, each such psychiatric respondent might not satisfy the normal requirements for a public interest litigant,[70] this Court's interest in the fair administration of justice in Alaska's courts militates for this result in light of the current pervasive failure of the Alaska Public Defender Agency to effectively represent AS 47.30 psychiatric Respondents.

(Continued footnote)----------
commitment and medication orders, Case No. S-11939, which is currently ripe for decision.

[70] *See*, e.g., *Halloran v. Alaska Div. of Elections*, 115 P.3d 547, n.29 (Alaska 2005), citing to *Matanuska Elec. Ass'n v. Rewire the Bd.*, 36 P.3d 685, 696, 698 (Alaska 2001).

Unfortunately, this is not unique to Alaska. The situation has been aptly described by noted scholar Professor Michael Perlin[71] as follows:[72]

> The assumption that individuals facing involuntary civil commitment are globally represented by adequate counsel is an assumption of a fact not in evidence. The data suggests that, in many jurisdictions, such counsel is woefully inadequate—disinterested, uninformed, roleless, and often hostile. A model of "paternalism/best interests" is substituted for a traditional legal advocacy position, and this substitution is rarely questioned. (at 738, footnotes omitted)
>
> * * *
>
> The track record of lawyers representing persons with mental disabilities has ranged from indifferent to wretched; in one famous survey, lawyers were so bad that a patient had a better chance of being released at a commitment hearing if he appeared pro se. (at 743, footnote omitted)
>
> * * *
>
> A right without a remedy is no right at all; worse, a right without a remedy is meretricious and pretextual—it gives the illusion of a right without any legitimate expectation that the right will be honored. . . . "Empirical surveys consistently demonstrate that the quality of counsel 'remains the single most important factor in the disposition of involuntary civil commitment cases." (at 745-6, footnotes omitted)
>
> * * *
>
> Without such [adequate] counsel, it is likely that there will be no meaningful counterbalance to the hospital's "script," and the patient's articulated constitutional rights will evaporate. (at 749)[73]

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[71] See, *Martin v. Taft*, 222 F.Supp.2d 940, 965 (S.D. Ohio 2002), where the court referred to Prof. Perlin as such.

[72] Perlin, "And My Best Friend, My Doctor/Won't Even Say What It Is I've Got: The Role and Significance of Counsel in Right to Refuse Treatment Cases," 42 San Diego Law Review 735 (2005).

[73] In a companion article, Professor Grant Morris, writes:

> Lawyers who represent mentally disabled clients in civil commitment cases and in right to refuse treatment cases, Michael tells us, are guilty of several crimes. They

----------(footnote continued)

This results in the situation where,

> [C]ourts accept . . . testimonial dishonesty . . . specifically where witnesses, especially expert witnesses, show a "high propensity to purposely distort their testimony in order to achieve desired ends." . . .
>
> Experts frequently . . . and openly subvert statutory and case law criteria that impose rigorous behavioral standards as predicates for commitment . . .
>
> This combination . . . helps define a system in which (1) dishonest testimony is often regularly (and unthinkingly) accepted; (2) statutory and case law standards are frequently subverted; and (3) insurmountable barriers are raised to insure that the allegedly "therapeutically correct" social end is met . . .. In short, the mental disability law system often deprives individuals of liberty disingenuously and upon bases that have no relationship to case law or to statutes.[74]

One way to address this problem with the administration of justice in the Alaska courts is to hold psychiatric respondents under AS 47.30 involuntary commitment and medication proceedings shall be treated the same as public interest litigants under Civil Rule 82. There is no doubt this Court has authority to do so Under Article IV, Section 15 of the Alaska Constitution.[75]

(Continued footnote)----------

> are inadequate. They are inept. They are ineffective. They are invisible. They are incompetent. And worst of all, they are indifferent. Is Michael right in his accusations? You bet he is!

Morris, Pursuing Justice for the Mentally Disabled, 42 San Diego Law Review, 757, 758 (2005).

[74] Perlin, "The ADA and Persons with Mental Disabilities: Can Sanist Attitudes Be Undone?" *Journal of Law and Health*, 8 JLHEALTH 15, 33-34 (1993/1994) (emphasis added).

[75] It is not clear this would be contrary to AS 09.60.010(b), which prohibits an award of full attorney's fees "based on the nature of the policy or interest advocated by the party, the number of persons affected by the outcome of the case, whether a governmental entity could be expected to bring or participate in the case, the extent of the party's economic incentive to bring the case, or any combination of these factors." Whether it applies or not, however, AS 09.60.010(b), enacted by §8, Ch. 109 SLA 1992, purports to ----------(footnote continued)

Should this Court grant the specific relief requested in Case No. S-11939 requiring the Alaska Public Defender Agency to provide effective assistance of counsel, and such decision were to be actually effectuated, the problem sought to be addressed by the ruling requested here would be largely ameliorated. Even so, there would seem to be little or no harm in adopting it and it would likely go a long ways towards ensuring that psychiatric respondents actually receive effective assistance of counsel.

IV. Civil Rule 95(a) Fees Should Be Awarded.

Counsel did not find any statement by this Court of the standard of review specifically for consideration of the award of fees under Civil Rule 95(a),[76] but presumably it is the same as set forth above with respect to Civil Rule 82 fees, *i.e.*, a trial court's decision regarding the award of costs and attorney's fees is reviewed for abuse of discretion; an abuse of discretion exists when an award is arbitrary, capricious, manifestly unreasonable, or improperly motivated; however this Court applies its independent judgment in interpreting court rules. *Alaska Construction* at 935.

In its Supplemental Opposition, the State argued the Superior Court could not award fees because it lacked statutory authority[77] and Ms. Wetherhorn was not the

(Continued footnote)----------
amend Civil Rule 82 as interpreted by this Court, and failed to garner the two-thirds vote of the members elected to each house required under Art. IV, § 15 of the Alaska Constitution to change court rules.

[76] In *Weidner v. State*, 764 P.2d 717, 721 (Alaska 1988), this Court discusses the trial court's "considerable discretion" with respect to setting the (then) required hearing, but not more generally as to the grant or denial of fees under Civil Rule 95.

[77] Exc. 80, *et seq*.

prevailing party because API decided on its own to release her.[78] Because the former so seriously misrepresented the law and the latter was an outright misstatement of fact,[79] in her Supplemental Reply, Ms. Wetherhorn requested Civil Rule 95(a) fees as compensation for having to respond to pleadings filed in violation of Civil Rule 11.[80]

In its Order denying the motion for fees, the Superior Court did not differentiate between the initial request for partial attorney's fees in the amount of $525,[81] the request for enhanced or full fees up to $2,623.50, contained in Ms. Wetherhorn's Reply,[82] and the Civil Rule 95(a) request for $10,746.[83] This makes the total fees requested $13,369.50, not the $10,746 recited in the Order.

> Civil Rule 11 provides in pertinent part:
>
> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law . . ..
>
> Civil Rule 95(a) provides:
>
> (a) For any infraction of these rules, the court may withhold or assess costs or attorney's fees as the circumstances of the case and discouragement of like conduct in the future may require; and such costs and attorney's fees may be imposed upon offending attorneys or parties.

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[78] Exc. 84.
[79] Exc. 91-5.
[80] Exc. 96.
[81] Exc. 34.
[82] Exc. 46-74.
[83] Exc. 96.

In its Supplemental Opposition, API asserted the Superior Court had no authority to award attorney's fees unless there was a specific statute authorizing it.[84] API cited to *Cooper v. State*, 638 P.2d 174 (Alaska 1981) for this proposition as follows.

> "In *Cooper v. State* the Alaska Supreme Court determined that, AS 09.60.010 did not give courts authority to order that attorneys' fees be awarded to the prevailing party in a Child in Need of Aid Proceeding."[85]

However, neither *Cooper* nor any other decision of this Court counsel has found has ever ruled anything of the sort. AS 09.60.010 doesn't give the courts authority to order fees in any type of cases; instead it authorizes the Supreme Court to promulgate such rules.[86] What this Court actually held was that since there was neither a statutory nor court rule provision authorizing such an award, the court did not have such authority.

Probate Rule 1(e) provides:

> (e) **Situations Not Covered by the Rules**. Where no specific procedure is prescribed by these rules, the court may proceed in any lawful manner, including application of the Civil and Evidence Rules, applicable statutes, the Alaska and United States Constitutions or common law. Such a procedure may not be inconsistent with these rules and may not unduly delay or otherwise interfere with the unique character and purpose of probate proceedings.

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[84] Exc. 85. At Exc. 81-2, API

[85] Exc. 81

[86] The State, at page Exc. 80, asserted that the authority to make such awards is derived from AS 09.60.010, but it is clear this Court also has independent authority from the Alaska Constitution:

> Since the attainment of statehood and the activation of the Alaska Court System, the award of attorney's fees as costs has been governed by the Rules of Civil Procedure which were promulgated by this court pursuant to its constitutional rule making authority

McDonough v. Lee, 420 P.2d 459 (Alaska 1966).

(underlining added). Thus, API violated Civil Rule 11's requirement that signing a pleading constitutes a certificate that its Supplemental Reply was warranted by existing law.

If that had been the only violation, however, Ms. Wetherhorn would not have moved for Civil Rule 95(a) fees. API's factual assertion that Ms. Wetherhorn's discharge had nothing to do with PsychRights' efforts was such a blatant misstatement of fact, violating Civil Rule 11's requirement that factual assertions be well-grounded, that she felt moving for Civil Rule 95(a) fees was warranted. Counsel here was there, but the Assistant Attorney General who submitted the Supplemental Opposition was not.[87] It seems highly likely the Assistant Attorney General never investigated the facts before making this palpably untrue representation to the Superior Court. Ms. Wetherhorn submits that if Civil Rule 11 is to have any meaning at all the attorney's fees occasioned by such gross violations should be subject to Civil Rule 95(a) penalties.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests this Court reverse and hold:

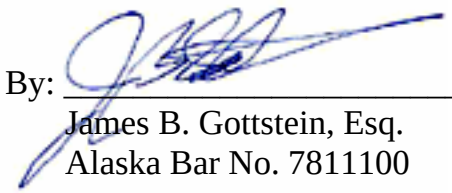
1. Ms. Wetherhorn was the prevailing party below,

[87] As set forth above, prior to moving for Civil Rule 95(a) fees, counsel here gave the Assistant Attorney General involved notice that he was going to move under Civil Rule 95(a) and an opportunity to withdraw the offending material.

2. Full reasonable attorneys fees in the amount of $2,623.50 be awarded to Ms. Wetherhorn,
3. Full reasonable attorneys fees should normally be awarded to prevailing AS 47.30 psychiatric respondents under Civil Rule 82; and
4. Ms. Wetherhorn be awarded $10,746 in Civil Rule 95(a) fees.

RESPECTFULLY SUBMITTED this 12th day of July, 2006.

LAW PROJECT FOR PSYCHIATRIC RIGHTS, INC.



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