

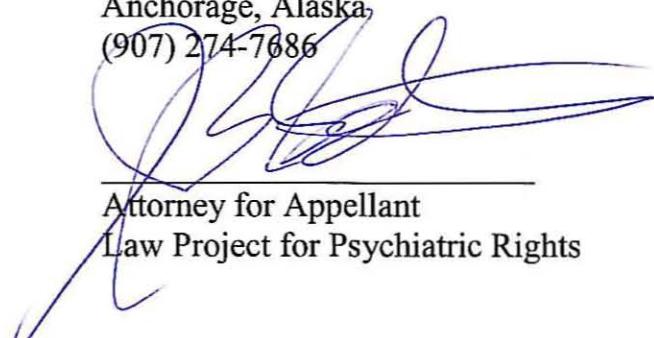
IN THE SUPREME COURT FOR THE STATE OF ALASKA

LAW PROJECT FOR PSYCHIATRIC)
RIGHTS, Inc., an Alaskan non-profit)
corporation,)
) Supreme Court No. S-13558
Appellant,)
vs.) Superior Court No. 3AN 08-10115CI
)
STATE OF ALASKA, et al.,)
)
Appellees.)
)

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE JACK W. SMITH, PRESIDING

BRIEF OF APPELLANT

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Filed in the Supreme Court of
the State of Alaska, this 23rd
day of November, 2009

Marilyn May, Clerk
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CONSTITUTIONAL PROVISIONS, STATUTES, COURT RULES, AND OTHER AUTHORITIES PRINCIPALLY RELIED UPON

CONSTITUTIONAL PROVISIONS

United States Constitution, Fifth Amendment (Due Process)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Eighth Amendment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Alaska Const., Article 1, § 7. Due Process

No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed.

STATUTES

AS 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 47.10.084

Legal custody, guardianship, and residual parental rights and responsibilities

(a) When a child is committed under AS 47.10.080(c)(1) to the department, released under AS 47.10.080(c)(2) to the child's parents, guardian, or other suitable person, or committed to the department or to a legally appointed guardian of the person of the child under AS 47.10.080(c)(3), a relationship of legal custody exists. This relationship imposes on the department and its authorized agents or the parents, guardian, or other suitable person the responsibility of physical care and control of the child, the determination of where and with whom the child shall live, the right and duty to protect, nurture, train, and discipline the child, the duty of providing the child with food, shelter,

education, and medical care, and the right and responsibility to make decisions of financial significance concerning the child. These obligations are subject to any residual parental rights and responsibilities and rights and responsibilities of a guardian if one has been appointed. When a child is committed to the department and the department places the child with the child's parent, the parent has the responsibility to provide and pay for food, shelter, education, and medical care for the child. When parental rights have been terminated, or there are no living parents and no guardian has been appointed, the responsibilities of legal custody include those in (b) and (c) of this section. The department or person having legal custody of the child may delegate any of the responsibilities under this section, except authority to consent to marriage, adoption, and military enlistment may not be delegated. For purposes of this chapter, a person in charge of a placement setting is an agent of the department.

(b) When a guardian is appointed for the child, the court shall specify in its order the rights and responsibilities of the guardian. The guardian may be removed only by court order. The rights and responsibilities may include, but are not limited to, having the right and responsibility of reasonable visitation, consenting to marriage, consenting to military enlistment, consenting to major medical treatment, obtaining representation for the child in legal actions, and making decisions of legal or financial significance concerning the child.

(c) When there has been transfer of legal custody or appointment of a guardian and parental rights have not been terminated by court decree, the parents shall have residual rights and responsibilities. These residual rights and responsibilities of the parent include, but are not limited to, the right and responsibility of reasonable visitation, consent to adoption, consent to marriage, consent to military enlistment, consent to major medical treatment except in cases of emergency or cases falling under AS 25.20.025, and the responsibility for support, except if by court order any residual right and responsibility has been delegated to a guardian under (b) of this section. In this subsection, "major medical treatment" includes the administration of medication used to treat a mental health disorder.

COURT RULES

Civil Rule 12(c)

(c) **Motion for Judgment on the Pleadings.** After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. A decision granting a motion for judgment on the pleadings is not a final judgment under Civil Rule 58. When the decision adjudicates all unresolved claims as to all parties,

the judge shall direct the appropriate party to file a proposed final judgment. The proposed judgment must be filed within 20 days of service of the decision, on a separate document distinct from any opinion, memorandum or order that the court may issue.

JURISDICTIONAL STATEMENT

Appeal is brought by Law Project for Psychiatric Rights, Inc., an Alaska Non-profit corporation (PsychRights®), Plaintiff below in Case No. 3AN 08-10115CI, seeking declaratory and injunctive relief. Appellant appeals to the Alaska Supreme Court from :

1. March 31, 2009, Order Granting State of Alaska's Motion to Stay Discovery;
2. May 27, 2009, Oral Decision granting the Defendants' motion for judgment on the pleadings and dismiss the Amended Complaint in this matter;
3. May 27, 2009, Order Granting State of Alaska's Motion for Judgment on the Pleadings;
4. June 16, 2009, Final Judgment dismissing the action with prejudice; and
5. July 29, 2009 Order Granting Defendant's Motion for Attorney's Fees.

1 through 4 became final on June 16, 2009 and Notice of Appeal therefor was timely filed June 30, 2009. This Court allowed Number 5 to be added to the Points on Appeal pursuant to Appellate Rule 204(a)(5)(A) by Order dated October 8, 2009. This court has jurisdiction under AS 22.05.010(a)&(b).

PARTIES

The parties to this appeal are

Appellant: Law Project For Psychiatric Rights, Inc., an Alaskan non-profit corporation.

Appellees: State of Alaska,

Sean Parnell, Governor of the State of Alaska, automatically substituted in for Sarah Palin, pursuant to Civil Rule 25(d), incorporated by reference into Appellate Rule 517(a).

Alaska Department of Health and Social Services,

William Hogan, Commissioner, Alaska Department of Health and Social Services,

Tammy Sandoval, Director of the Alaska Office of Children's Services,

Steve Mccomb, Director of the Alaska Division of Juvenile Justice,

Melissa Witzler Stone, Director of the Alaska Division of Behavioral Health,

Ron Adler, Director/CEO of the Alaska Psychiatric Institute, and

William Streur, Deputy Commissioner of the Alaska Department of Health and Social Services, and Director of the Alaska Division of Health Care Services (Medicaid).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Superior Court erred in concluding PsychRights lacked standing without making the requisite finding that there was a more appropriate plaintiff that had or was likely to sue.
2. To the extent the Superior Court implicitly made the finding there was a more appropriate plaintiff that had sued or was likely to sue, such finding was in error.
3. Whether the Superior Court erred in granting the State of Alaska's motion to stay discovery pending determination of its motion for judgment on the pleadings necessary for PsychRights to gather facts in order to defend against the motion.
4. Whether the Superior Court's Order granting the State of Alaska's motion for attorney's fees violated Civil Rule 82(b)(3)(I) because it is likely to deter litigants from the voluntary use of the courts.

STATEMENT OF THE CASE

I. Brief Description of Case

Based on children and youth's own rights not to be harmed, as opposed to their parents' and guardians' responsibility to protect them, PsychRights brought suit against the State of Alaska and responsible officials (State) seeking declaratory and injunctive relief that Alaskan children not be administered psychotropic drugs unless and until

- (i) evidence-based psychosocial interventions have been exhausted,
- (ii) rationally anticipated benefits of psychotropic drug treatment outweigh the risks,
- (iii) the person or entity authorizing administration of the drug(s) is fully informed of the risks and potential benefits, and
- (iv) close monitoring of, and appropriate means of responding to, treatment emergent effects are in place,

and for a court order

- (v) requiring an independent reassessment of each Alaskan child or youth currently being administered psychotropic drugs, and immediate remedial action where needed.¹

The State's response was that "those matters are not within [the State's] meaningful control,"² parents, guardians or the courts authorize such medication, not the State,³ the

¹ Exc. 1-54.

² Exc. 134.

State has "no meaningful ability to remedy the conduct alleged or administer the relief requested,"⁴ that the real target of the lawsuit should be the pharmaceutical companies, rather than the State,⁵ and moved for judgment on the pleadings on the grounds that PsychRights lacked standing.⁶

The State did not dispute, and the Superior Court found that this case is of public importance⁷ and PsychRights is capable of competently pursuing this litigation,⁸ but granted the State's motion for judgment on the pleadings and dismissed the action on the grounds that "the affected children, their parents or guardians or even the state wold make a more appropriate plaintiff if a legitimate grievance existed."⁹ The Superior Court came to this conclusion without considering that such plaintiffs would not have interest-injury standing to obtain the systemic relief sought, and after granting the State's motion for stay of discovery preventing PsychRights from conducting discovery to establish that such potential plaintiffs were unlikely to bring suit because of lack of resources and fear of retaliation.¹⁰

PsychRights asserts it has standing based on the facts before the Superior Court. In the alternative, PsychRights asserts it was error for the Superior Court to stay discovery

(Continued footnote)-----

³ Exc. 119, 577.

⁴ Exc. 134.

⁵ Exc. 578.]

⁶ Exc. 113.

⁷ Exc. 130, 585.

⁸ Exc. 130, 586.

⁹ Exc. 587.

¹⁰ Exc. 561.

that could have produced evidence to defeat the motion for judgment on the pleadings. In particular, the Superior Court assumed there would be a more appropriate plaintiff if a legitimate grievance existed,¹¹ after it had prohibited discovery designed to establish that no such plaintiffs were likely to bring a suit because they lack the resources to do so and fear retaliation by the State.

PsychRights also appeals the Superior Court's award of attorney's fees on the grounds that the Superior Court erred by not considering that the award was likely to deter litigants from the voluntary use of the courts under Civil Rule 82(b)(3)(I).

II. Course of Proceedings

The Complaint was filed September 2, 2008.¹²

An Amended Complaint was filed as of right on September 29, 2009, to insert a claim, as Paragraph 22, that it is unlawful for the State to use Medicaid to pay for outpatient drug prescriptions except for indications approved by the Food and Drug Administration (FDA) or included in at least one of three specified compendia.¹³

The State filed its Answer to the Amended Complaint on October 13 or 14, 2008.¹⁴

On December 5, 2008, PsychRights filed a motion to amend Paragraph 22 of the complaint by inserting "when medically necessary and" before "for indications approved by the FDA . . ."¹⁵, which was granted, without opposition¹⁶ on December 17, 2008.¹⁷

¹¹ Exc. 587.

¹² R. 683-756.

¹³ Exc. 1.

¹⁴ Exc. 74.

In mid-January, 2009, PsychRights started trying to arrange to conduct orderly discovery with the State through the deposition of David Campana, who was in charge of the State's Medicaid database.¹⁸ After agreeing to the date and time for the deposition of Mr. Campana, at the last minute, on February 24, 2009, the State requested it be put off until the Superior Court decided an as yet unfiled motion for judgment on the pleadings.¹⁹ PsychRights could not agree to such an open-ended delay in discovery but agreed to postpone it for three weeks.²⁰ On March 16, 2009, filed a Motion to Stay Discovery,²¹ a Motion for Expedited Consideration (of Motion to Stay Discovery),²² and a Motion for Judgment on the Pleadings.²³

PsychRights filed its Opposition to the Motion for Expedited Consideration on March 17, 2009.²⁴ The Superior Court granted the Motion for Expedited Consideration of the Motion to Stay Discovery on March 18, 2009.²⁵

PsychRights filed its Opposition to the Stay of Discovery on March 24, 2009,²⁶ the State filed its Reply to PsychRights Opposition to Stay of Discovery on March 27,

(Continued footnote)-----

¹⁵ Exc. 96.

¹⁶ Exc. 101.

¹⁷ Exc. 103.

¹⁸ Exc. 189.

¹⁹ Exc. 136-139.

²⁰ *Id.*

²¹ Exc. 104.

²² Exc. 108.

²³ Exc. 113.

²⁴ Exc. 136.

²⁵ Exc. 144.

²⁶ Exc. 145.

2009,²⁷ and the Superior Court granted the Motion for Stay of Discovery on March 31, 2009.²⁸

On March 31, 2009, PsychRights filed its Opposition to Motion for Judgment on the Pleadings.²⁹

On April 3, 2009, PsychRights filed a Motion for Leave to Amend Complaint (Citizen-Taxpayer Standing/Medicaid Injunction).³⁰

On April 10, 2009, the State filed a Conditional Non-Opposition to Motion for Leave to Amend Complaint.³¹

On or around April 10, 2009, the State filed its Reply to Plaintiff's Opposition to Motion for Judgment on the Pleadings.³²

On April 14, 2009, the Superior Court granted PsychRights Motion for Leave to Amend Complaint (Citizen-Taxpayer Standing/Medicaid Injunction).³³

On May 27, 2009, the Superior Court rendered an oral decision on the Motion for Judgment on the Pleadings to an empty courtroom without notice,³⁴ and issued an Order Granting State of Alaska's Motion for Judgment on the Pleadings.³⁵

²⁷ Exc. 366.

²⁸ Exc. 561

²⁹ Exc. 372.

³⁰ Exc. 562.

³¹ Exc. 568.

³² Exc. 570.

³³ Exc. 581.

³⁴ Exc. 582-587.

³⁵ Exc. 589.

On June 16, 2009, the Superior Court issued a final judgment with prejudice in favor of the State and against PsychRights.³⁶

On June 22, 2009, the State filed a Motion for Attorney's Fees.³⁷

On June 29, 2009, PsychRights filed its Opposition to Motion for Attorney's Fees.³⁸

On July 10, 2009, the State filed a Reply to Opposition to Motion for Award of Attorney's Fees.³⁹

On July 29, 2009, the Superior Court granted the State's Motion for Attorney's Fees.⁴⁰

III. Statement of Facts

A. The Massive Increase In Psychiatric Drugging of Children and Youth in State Custody and Through Medicaid Is Causing Great Harm to Them

The legal availability of a psychotropic drug and its approval by the United States Food and Drug Administration (FDA) for prescription by medical practitioners does not, in itself, signify that it is safe or effective for use with children and youth diagnosed with a mental illness.⁴¹

³⁶ Exc. 590.

³⁷ Exc. 592.

³⁸ Exc. 605.

³⁹ Exc. 606.

⁴⁰ Exc. 609.

⁴¹ Exc. 14, Exc. 435, citing to Strom, B. L. (2006), How the US drug safety system should be changed, *Journal of the American Medical Association*, 295(17), 2072-2075.

Drug companies target physicians to prescribe drugs to children and youth through (a) free meals, (b) free drug samples, (c) providing free continuing medical education, (d) payments for lecturing, consulting and research, (e) publishing misleading articles in medical journals, (f) funding their professional organizations' activities, (g) advertising in professional journals, (h) paying doctors to serve on "expert committees" that create and promote guidelines for drug treatments used by other doctors, and (i) promotion of mental health screening programs in state and federal policy, including for children and youth in foster care that have very high false positive rates and that lead to over diagnosis and over use of these dangerous and ineffective medications.⁴²

Mainstream mental health practice supports medicating children and youth with little or no evidence of the drugs' safety or efficacy.⁴³

Prescriptions of psychotropic drugs to youths tripled in the 1990s and are still rising.⁴⁴

⁴² Exc. 19-20, Exc. 440.

⁴³ Exc. 21, Exc. 402.

⁴⁴ Exc. 21, Exc. 415, citing to Olfson, M., Marcus, S.C., Weissman, M.M., & Jensen, P.S. (2002), National trends in the use of psychotropic medications by children, *Journal of the American Academy of Child and Adolescent Psychiatry*, 41(5), 514-21; Olfson, M., Blanco, C., Liu, L., Moreno, C., & Laje, G. (2006), National trends in the outpatient treatment of children and adolescents with antipsychotic drugs, *Archives of General Psychiatry*, 63(6), 679-685; Thomas, C. P., Conrad, P., Casler, R., & Goodman, E. (2006), Trends in the use of psychotropic medications among adolescents, 1994 to 2001, *Psychiatric Services*, 57(1), 63-69; Zito, J. M., Safer, D. J., dosReis, S., Gardner, J. F., Boles, M., & Lynch, F. (2000), Trends in the prescribing of psychotropic medications to preschoolers. *Journal of the American Medical Association*, 283(8), 1025-1030; Zito, ----- (footnote continued)

The proportion of children and youth prescribed psychiatric drugs is 2 to 20 times higher in the United States, Canada, and Australia than in any other developed nations;⁴⁵ 75 percent of all medication administered to children and youth is prescribed for uses not approved by the FDA,⁴⁶ at least 40 percent of all psychiatric drug treatments today involve polypharmacy,⁴⁷ and most psychotropic medication classes lack scientific evidence of their efficacy or safety in children and youth.⁴⁸

No studies have established the safety and efficacy of polypharmacy (giving multiple psychotropic drugs at the same time) in children and youth.⁴⁹

(Continued footnote)-----

Safer, dosReis et al. (2003), Psychotropic practice patterns for youth: a 10-year perspective, *Archives of Pediatrics & Adolescent Medicine*, 157(1), 17-25.

⁴⁵ Exc. 21, Exc. 415, citing to Wong, I. C. K., Murray, M. L., Camilleri-Novak, D., & Stephens, P. (2004), Increased prescribing trends of paediatric psychotropic medications; *Archives of Disease in Childhood*, 89(12), 1131-1132.

⁴⁶ Exc. 416, citing to Vitiello, B. (2001), Psychopharmacology for young children: Clinical needs and research opportunities, *Pediatrics*, 108(4), 983-989; Zito, et al. (2003).

⁴⁷ Exc. 416, citing to Bhatara, V., Feil, M., Hoagwood, K., Vitiello, B., & Zima, B. (2004), National trends in concomitant psychotropic medication with stimulants in pediatric visits: Practice versus knowledge, *Journal of Attention Disorders*, 7(4), 217-226; Olfson, et al. (2002); Safer, D. J., Zito, J. M., & dosReis, S. (2003), Concomitant psychotropic medication for youths, *American Journal of Psychiatry*, 160(3), 438-449.

⁴⁸ Exc. 416, citing to Bhatara, et al. (2004); Jensen, P.S., Bhatara, V.S., Vitiello, B., Hoagwood, K., Feil, M., and Burke, L.B. (1999), Psychoactive medication prescribing practices for U.S. children: Gaps between research and clinical practice, *Journal of the Academy of Child and Adolescent Psychiatry*, 38(5), 557-565; Martin, A., Sherwin, T., Stubbe, D., Van Hoof, T., Scahill, L., & Leslie, D. (2002), Use of multiple psychotropic drugs by Medicaid-insured and privately insured children, *Psychiatric Services*, 53(12), 1508; Vitiello (2001).

⁴⁹ Exc. 22, Exc. 416, citing to Bhatara, et al. (2004); Jensen, et al. (1999); Martin, et al. (2002); Vitiello (2001).

Almost all psychiatric drugs have been shown to cause brain damage in the form of abnormal cell growth, cell death and other detrimental effects, which is especially harmful for growing and developing children and youth.⁵⁰

Psychotropic drugs given to children and youth cause "behavioral toxicity."⁵¹ Psychotropic drugs given to children and youth suppress learning and cognition and produce cognitive neurotoxicity, interfering with the basic mental development of the child, for whom adverse effects often do not go away after the drugs are withdrawn.⁵² No studies show that the administration of psychotropic drugs to children and youth increases learning or academic performance in the long term.⁵³ Adverse drug effects are often confused with symptoms of disorders, leading to the addition of inappropriate diagnoses, increased doses of current medications, and even more complex drug regimens.⁵⁴

⁵⁰ Exc. 22.

⁵¹ Exc. 22, Exc. 417, citing to Zito, *et al.* (2003).

⁵² Exc. 22.

⁵³ Exc. 22, Exc. 456, citing to APA Working Group on Psychoactive Medications for Children and Adolescents (2006), Report of the Working Group on Psychoactive Medications for Children and Adolescents, Psychopharmacological, psychosocial, and combined interventions for childhood disorders: Evidence-base, contextual factors, and future directions, *American Psychological Association*; National Institute of Mental Health Multimodal Treatment Study of ADHD Follow-up: 24-Month Outcomes of Treatment Strategies for Attention-Deficit/Hyperactivity Disorder, MTA Cooperative Group, *American Academy of Pediatrics*, 113;754-761 (2004).

⁵⁴ Exc. 22, Exc. 417, citing to Zito, *et al.* (2003).

Children and youth in child welfare settings are two and three times more likely to be medicated than children and youth in the general community.⁵⁵ Medicaid-enrolled children and youth are more likely to receive psychotropic medication, be treated with multiple medications, and receive medications as sole treatment for psychiatric diagnoses than other children and youth.⁵⁶

Between 1993 and 2002, the number of non-institutionalized 6 to 18 year olds on neuroleptics, also misleadingly called "antipsychotics," increased from 50,000 to 532,000,⁵⁷ with 77 to 86 percent of youths taking neuroleptics doing so with other prescribed psychotropic drugs.⁵⁸

In the 1996-2001 time period, neuroleptic use in children increased the most dramatically in Medicaid populations, with prescriptions increasing 61 percent for

⁵⁵ Exc. 23, Exc. 419, citing to Breland-Noble, A.M., Elbogen, E.B., Farmer, E.M.Z., Dubs, M.S., Wagner, H.R., & Burns, B.J. (2004), Use of psychotropic medications by youths in therapeutic foster care and group homes, *Psychiatric Services*, 55(6), 706-708; Raghavan, R., Zima, B. T., Andersen, R. M., Leibowitz, A. A., Schuster, M. A., & Landsverk, J. (2005), Psychotropic medication use in a national probability sample of children in the child welfare system, *Journal of Child and Adolescent Psychopharmacology*, Special Issue on Psychopharmacoepidemiology, 15(1), 97-106.

⁵⁶ Exc. 23, Exc. 423, citing to Goodwin, R., Gould, M.S., Blanco, C., & Olfson, M. (2001), Prescription of psychotropic medications to youths in office-based practice, *Psychiatric Services*, 52(8), 1081-1087.

⁵⁷ Exc. 24, Exc. 421, citing to Olfson, *et al.* (2006).

⁵⁸ Exc. 24, Exc. 422, citing to Medco Health Solutions (2006), 2006 Drug Trend Report, Retrieved from <http://medco.mediaroom.com/index.php?s=64&cat=5>; Olfson, *et al.* (2006).

preschool children, 93 percent for children aged 6 to 12, and 116 percent for youth aged 13 to 18 years.⁵⁹

There is little or no empirical evidence to support the use of drug interventions in traumatized children and youth,⁶⁰ fewer than ten percent of psychotropic drugs are FDA-approved for any psychiatric use in children,⁶¹ and the use of psychiatric drugs in children and youth far exceeds the evidence of safety and effectiveness.⁶²

All studies of life expectancy on neuroleptics show a doubling of mortality rates on treatment compared to the non-treated state and this doubling increases again for every additional neuroleptic the patient takes.⁶³ Patients taking these drugs show a reduction of life expectancy of up to 20 years compared to population norms.⁶⁴ When all placebo-controlled studies of Depakote, Zyprexa and Risperdal in the prophylaxis of bipolar disorder are combined they show a doubling of the risk of suicidal acts on active

⁵⁹ Exc. 25, Exc., 423, citing to Cooper, W.O., Hickson, G.B., Fuchs, C., Arbogast, P.G., & Ray, W.A. (2004), New users of antipsychotic medications among children enrolled in TennCare, *Archives of Pediatrics & Adolescent Medicine*, 158: 753-759; Olfsen, *et al.* (2006); Patel, N.C., Crismon, M.L., Hoagwood, K., & Jensen, P.S. (2005), Unanswered questions regarding antipsychotic use in aggressive children and adolescents, *Journal of Adolescent and Child Psychopharmacology*, 15(2), 270-284.

⁶⁰ Exc. 25, Exc. 426.

⁶¹ Exc. 25, Exc. 456.

⁶² Exc. 25, Exc. 465, citing to Farley, R (2007), The 'atypical' dilemma: Skyrocketing numbers of kids are prescribed powerful antipsychotic drugs. Is it safe? Nobody knows, *St. Petersburg Times*, July 29, 2007, quoting Ronald Brown, Chair, 2006 American Psychological Association Task Force on Psychotropic Drug Use in Children.

⁶³ Exc. 208.

⁶⁴ *Id.*

treatment compared to placebo.⁶⁵ An increasing number of children and infants are being put on cocktails of potent drugs without any evidence of benefit.⁶⁶

In their 2008 Policy Agenda, Facing Foster Care in Alaska (FFCA), a statewide organization composed of foster youth and alumni called for decreased use of psychotropic medication for Alaska's foster youth.⁶⁷ Many of Alaska's youth and alumni complain about being prescribed psychotropic medications after entering the foster care system for symptoms of depression, anxiety, trauma, attachment issues, and misbehavior.⁶⁸ The youth and alumni of FFCA feel that these are all normal symptoms of the maltreatment they suffered that brought them into foster care and the problems arising from being placed in foster care.⁶⁹ FFCA members have complained about negative effects caused by these medications resulting in a decreased ability to focus on their education as well as function in everyday society.⁷⁰

B. Psychosocial Interventions Are Far More Helpful to Children and Youth than Psychotropic Drugs Without the Harm

Trauma, abuse and neglect disrupt a child's ability to form secure attachments, impair brain development and regulation, make self-control difficult and alter the child's

⁶⁵ *Id.*

⁶⁶ Exc. 216.

⁶⁷ Exc. 549.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

identity and sense of self.⁷¹ The ability to function well despite living or having lived in such adversity rests mainly on normal cognitive development and involvement from a caring, competent adult.⁷² Risk and protective factors in the foster child, foster families, agencies, and birth family all interact to produce positive or negative spirals of development.⁷³ Understanding children's and youth's resilience helps create interventions that produce positive turning points in children's and youth's lives.⁷⁴

Three key elements in positive outcomes for children and youth in foster care settings are (a) having a secure base where the child or youth has a strengthening sense of security and is able to use his or her foster parents as a secure base, (b) having a sense of permanence where the foster placement is stable and foster parents offer family membership, and (c) positive social functioning in which the child or youth is

⁷¹ Exc. 41, Exc. 504, citing Bowlby, J. (1988), *A secure base: Parent-child attachment and healthy human development*. New York: Basic Books; Cook, A., Spinazzola, J., Ford, J., Lanktree, C., Blaustein, M., Cloitre, M., DeRosa, R., et al. (2005), Complex trauma in children and adolescents, *Psychiatric Annals*, 33(5), 390-398; Courtois, C. A. (2004), Complex trauma, complex reactions: Assessment and treatment, *Psychotherapy: Theory, Research, Practice, Training. Special Issue: The Psychological Impact of Trauma: Theory, Research, Assessment, and Intervention*, 41(4), 412-425; Jones Harden, B. (2004), Safety and stability for foster children: A developmental perspective, *The Future of Children*, 14(1), 30-47; and van der Kolk, B.A., & Fisler, R. (1994), Childhood abuse and neglect and loss of selfregulation, *Bulletin of the Menninger Clinic*, 58(2), 145-168.

⁷² Exc. 41, Exc. 504, citing Agaibi, C.E., & Wilson, J.P. (2005), Trauma, PTSD, and resilience: A review of the literature, *Trauma, Violence, & Abuse*, 6(3), 195-216; and Schofield, G., & Beek, M. (2005), Risk and resilience in long-term foster care, *British Journal of Social Work*, 35, 1283-1301.

⁷³ Exc. 42, Exc. 504, citing Schofield & Beek (2005).

⁷⁴ *Id.*

functioning well in school and with peers.⁷⁵ Treatment goals for children and youth in state custody who are presenting emotional and/or behavioral problems should be to (a) enhance their sense of personal control and self-efficacy, (b) maintain an adequate level of functioning, and (c) increase their ability to master, rather than avoid, experiences that trigger intrusive re-experiencing, numbing, or hyper-arousal sensations.⁷⁶

Proven effective alternatives to psychotropic medication for children's emotional and/or behavioral problems include (a) consistent, structured, supportive adult supervision, (b) opportunities for self-expression and physical activity to give them a sense of mastery over their minds and bodies, and (c) a stable academic environment where they master both academic basics and more complicated academic material.⁷⁷

Activities that have been proven helpful for children's emotional and/or behavioral problems include (a) teaching problem solving and pro-social skills, (b)

⁷⁵ *Id.*

⁷⁶ Exc. 42, Exc. 505, citing Ford, J. D., Courtois, C. A., Steele, K., van der Hart, O., & Nijenhuis, E. R. S. (2005), Treatment of complex posttraumatic self-dysregulation, *Journal of Traumatic Stress*, 18(5), 437-447; Kinniburgh, K., Blaustein, M., Spinazzola, J. & van der Kolk, B. (2005), Attachment, self-regulation and competency: A comprehensive framework for intervention with childhood complex trauma, *Psychiatric Annals*, 35(5), 424-430.

⁷⁷ Exc. 42, Exc. 505, citing DeGangi, G. (2000), Pediatric disorders of regulation in affect and behavior: A therapist's guide to assessment and treatment, *Academic Press*, San Diego, California; Faust, J., & Katchen, L. B. (2004), Treatment of children with complicated posttraumatic stress reactions, *Psychotherapy: Theory, Research, Practice, Training* (Special Issue: The Psychological Impact of Trauma: Theory, Research, Assessment, and Intervention) 41(4), 426-437.

modeling appropriate behaviors, (c) teaching self-management, and (d) helping them learn to comply and follow rules.⁷⁸

Interactions that have been shown to be helpful for children's emotional and/or behavioral problems include (a) desensitizing hyper-reactivity, (b) promoting self-calming and modulation of arousal states, (c) organizing sustained attention, and (d) facilitating organized, purposeful activity.⁷⁹ Interventions that have been shown helpful for children's and youth's emotional and/or behavioral problems include (a) Cognitive-Behavioral Therapy (CBT), (b) Interpersonal Psychotherapy, (c) Psychodynamic Psychotherapy, (d) Exposure-Based Contingency Management, and (e) Problem-Solving and Coping-Skills Training.⁸⁰

In addition to the foregoing, family-based behavioral interventions are effective for children and youth diagnosed with disruptive and conduct disorders.⁸¹ Effective

⁷⁸ Exc. 42-43, Exc. 506, citing DeGangi (2000); Faust & Katchen (2004).

⁷⁹ Exc. 43, Exc. 506, citing DeGangi (2000).

⁸⁰ Exc. 43, Exc. 507, citing APA Working Group Report (2006); Roth, A., & Fonagy, P. (1996), What works for whom? A critical review of psychotherapy research, *The Guilford Press*, New York; Velting, O. N., Setzer, N. J., & Albano, A. M. (2004), Update on and advances in assessment and cognitive-behavioral treatment of anxiety disorders in children and adolescents, *Professional Psychology: Research and Practice*, 35(1), 42-54.

⁸¹ Exc. 43, Exc. 508, citing Birmaher, B., & Axelson, D. (2006), Course and outcome of bipolar spectrum disorder in children and adolescents: A review of the existing literature, *Development and Psychopathology*, Special Issue: Developmental approaches to bipolar disorder, 18(4), 1023-1035; Cepeda, C. (2007), Psychotic symptoms in children and adolescents: Assessment, differential diagnosis, and treatment, *Routledge*, New York; Correll, C., & Carlson, H. (2006), Endocrine and metabolic adverse effects of psychotropic medications in children and adolescents, *Journal of the American Academy of Child and Adolescent Psychiatry*, 45(7), 771-791; Danielson, C. K., Feeny, N. C., Findling, R. L., & Youngstrom, E. A. (2004), Psychosocial treatment of bipolar disorders

(footnote continued)

parenting is the most powerful way to reduce child and youth problem behaviors.⁸²

Maltreatment is consistently linked to aggressive behavior in children and youth, with a history of trauma being virtually universal in youth diagnosed with conduct disorders.

Coercive interactions, including the administration of psychotropic drugs, result in escalation of aggressive behaviors.⁸³

Medicalizing children and youth's distress and disability is part of mainstream mental health practice, defining their distress and disability as disorders or diseases, and managing them with medical means, pathologizing their behavior and ignoring the context of their experiences leading to the problem behavior.⁸⁴ Understanding children's and youth's behavior within the context in which it occurs, rather than diagnosing it, changes the meaning of distressing behaviors and can lead practitioners to adopt less harmful and more helpful interventions.⁸⁵

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in adolescents: A proposed cognitive-behavioral intervention, *Cognitive and Behavioral Practice*, 11(3), 283-297; Findling, R.L., Boorady, R.J., & Sporn, A.L. (2007), The treatment of bipolar disorder and schizophrenia in children and adolescents, Medscape CME, retrieved from <http://www.medscape.com/viewarticle/563314>; Irwin, M. (2004), Treatment of schizophrenia without neuroleptics: psychosocial interventions versus neuroleptic treatment. *Ethical Human Psychology and Psychiatry*, 6(2), 99-110; Roth & Fonagy (1996).

⁸² Exc. 43, Exc. 510, citing Caspe, M., & Lopez, M.A. (2006), Lessons from family-strengthening interventions: Learning from evidence-based practice. *Harvard Family Research Project* [Report], retrieved from <http://www.hfrp.org>

⁸³ *Id.*

⁸⁴ Exc. 45, Exc. 512.

⁸⁵ *Id.*

C. State Authorization of and Payment for Psychotropic Drugs to Children and Youth

From April 1, 2007, through June 30, 2007, at least 1,033 Alaskan children and youth under the age of 18 receiving Medicaid benefits were prescribed second-generation neuroleptics.⁸⁶ From April 1, 2007, through June 30, 2007, at least 1,578 Alaskan children and youth under the age of 18 receiving Medicaid benefits were prescribed stimulants.⁸⁷ From April 1, 2007, through June 30, 2007, at least 293 Alaskan children and youth under the age of 18 receiving Medicaid benefits were prescribed supposedly non-stimulant drugs such as atomoxetine hydrochloride (Strattera).⁸⁸ From April 1, 2007, through June 30, 2007, at least 871 Alaskan children and youth under the age of 18 receiving Medicaid benefits were prescribed antidepressants.⁸⁹ From April 1, 2007, through June 30, 2007, at least 15 Alaskan children and youth under the age of 18 receiving Medicaid benefits were prescribed first-generation neuroleptics.⁹⁰ From April 1, 2007, through June 30, 2007, at least 723 Alaskan children and youth under the age of 18 receiving Medicaid benefits were prescribed anticonvulsants marketed as mood stabilizers.⁹¹ From April 1, 2007, through June 30, 2007, at least 470 Alaskan children and youth under the age of 18 receiving

⁸⁶ Exc. 52, Exc. 94.

⁸⁷ *Id.*

⁸⁸ Exc. 53, Exc. 94.]

⁸⁹ *Id.*]

⁹⁰ *Id.*

⁹¹ *Id.*

Medicaid benefits were prescribed noradrenergic agonists, most likely Clonidine, to counteract problems caused by the administration of neuroleptics.⁹²

The State's practice of authorizing and paying for the administration of psychotropic drugs to children and youth far exceeds evidence of safety and effectiveness.⁹³ The State's authorization and payment for the administration of psychotropic drugs to Alaskan children and youth is not based on competent and knowledgeable decision making and informed consent.⁹⁴

The State's authorization and payment for the administration of psychotropic drugs to Alaskan children and youth is often to suppress their negative emotions leading to disruptive actions—especially under stressful conditions that tax the child's or youth's adaptive capacities.⁹⁵ Children and youth are commonly administered psychotropic medication to suppress impulsive aggression.⁹⁶ The State's authorization and payment for the administration of psychotropic drugs to Alaskan children and youth is often for the convenience of the adult or adults in the child's or youth's life.⁹⁷ The State's authorization and payment for the administration of psychotropic drugs to

⁹² *Id.*

⁹³ Exc. 50.

⁹⁴ Exc. 51.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Exc. 52.

Alaskan children and youth is rarely, if ever, based on a valid assessment of the potential benefits and risk of harm.⁹⁸

The State's authorization and payment for the administration of psychotropic drugs to Alaskan children and youth rarely, if ever, occurs after less intrusive evidence-based psychosocial interventions have been tried, let alone exhausted.⁹⁹ The State's authorization and payment for the administration of psychotropic drugs to Alaskan children and youth always, or almost always, occurs without close monitoring of, and appropriate means of responding to, treatment emergent adverse effects being in place.¹⁰⁰ The State disclaims any meaningful authority or control of these matters.¹⁰¹

D. Commencement of Action

On September 2, 2008, after failing from December, 2004, through June, 2008, in its attempts to get the State to address the problem without litigation,¹⁰² PsychRights commenced this action against the State of Alaska and responsible officials (State) seeking declaratory and injunctive relief that Alaskan children not be administered psychotropic drugs unless and until

- (i) evidence-based psychosocial interventions have been exhausted,
- (ii) rationally anticipated benefits of psychotropic drug treatment outweigh the risks,

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Exc. 116, 134.

(iii) the person or entity authorizing administration of the drug(s) is fully informed of the risks and potential benefits, and

(iv) close monitoring of, and appropriate means of responding to, treatment emergent effects are in place,

and for a court order

(v) requiring an independent reassessment of each Alaskan child or youth currently being administered psychotropic drugs, and immediate remedial action where needed.¹⁰³

E. Stay of Discovery & Motion for Judgment on the Pleadings

In mid-January, 2009, PsychRights started arranging to conduct orderly discovery beginning with the deposition of David Campana, who was in charge of the State's Medicaid database.¹⁰⁴

On February 24, 2009, after previously agreeing to Mr. Campana's deposition, just prior to its scheduled time, the State asked PsychRights to postpone it indefinitely pending an as-yet unfiled motion for judgment on the pleadings,¹⁰⁵ and then on March 12, 2009, filed a Motion for Judgment on the Pleadings along with an expedited Motion to Stay Discovery pending determination of the Motion for Judgment on the

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¹⁰² Exc. 55 - 72.

¹⁰³ R. 683-737, Exc. 1-54.

¹⁰⁴ Exc. 357.

¹⁰⁵ Exc. 136-139

Pleadings.¹⁰⁶ The grounds for the Motion for Stay of Discovery, was that if the Motion for Judgment on the Pleadings was granted, no discovery would be necessary.¹⁰⁷ The grounds for the Motion for Judgment on the Pleadings was PsychRights lacked both interest-injury standing and citizen-taxpayer standing.¹⁰⁸ With respect to citizen-taxpayer standing, the State asserted there was a more appropriate plaintiff,¹⁰⁹ including itself.¹¹⁰

The Motion for Judgment on the Pleadings also stated (1) the psychiatric drugging of children and youth complained of and the relief requested are not within the State's meaningful control,"¹¹¹ (2), "statutory mechanisms are already in place to ensure that psychotropic medications are administered to children in Alaska in a methodical, individualized, and constitutional manner,"¹¹² and (3) only the children's and youths' parents or guardians, or the court, authorize such medication.¹¹³

On March 24, 2009, PsychRights filed its Opposition to Stay of Discovery, in which it noted (1) the State has constitutional obligations to take care of children and youth once they have been taken into State custody,¹¹⁴ and (2) PsychRights needed to conduct discovery to, as relevant to this appeal, (a) rebut the State's assertion that the

¹⁰⁶ Exc. 104-135.

¹⁰⁷ Exc. 105-106.

¹⁰⁸ Exc. 113 -- 135.

¹⁰⁹ Exc. 133-134.

¹¹⁰ Exc. 128-129.

¹¹¹ Exc. 134

¹¹² Exc. 134

¹¹³ Exc. 119.

State has nothing to do with authorizing the administration of psychiatric drugs to children and youth in its custody,¹¹⁵ and (b) establish parents or guardians are coerced by the State into giving consent.¹¹⁶ Part of the discovery halted for the files of seven specific individuals who had consented to PsychRights reviewing their records.¹¹⁷

On March 31, 2009, the Superior Court granted the Motion to Stay Discovery.¹¹⁸

On March 31, 2009, PsychRights filed its Opposition to Motion for Judgment on the Pleadings, disclaiming interest-injury standing and asserting citizen-taxpayer standing because (a) individual affected persons may not be able to obtain the injunctive relief requested, which was one of the reasons PsychRights brought the action in its own name rather than specific affected individuals,¹¹⁹ (b) the State would not be a proper plaintiff,¹²⁰ (c) the State authorizes the administration of psychiatric drugs to children and youth in state custody when parental rights have been terminated,¹²¹ (d) under Alaska law as interpreted by this Court, just because parents may have the right to consent, does not eliminate the State's responsibility,¹²² (e) parental or guardian consents, or court orders, are virtually always obtained because the State seeks them,¹²³

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¹¹⁴ Exc. 149-150.

¹¹⁵ Exc. 151, 166.

¹¹⁶ Exc. 166-167.

¹¹⁷ Exc. 155-156.

¹¹⁸ Exc. 561.

¹¹⁹ Exc. 379.

¹²⁰ Exc. 379-380.

¹²¹ Exc. 382.

¹²² Exc. 382-3.

¹²³ Exc. 383.

(f) no affected child, youth, parent or guardian is likely to bring suit,¹²⁴ pointing out (i) none have,¹²⁵ (ii) they lack the resources to do so,¹²⁶ (iii) they are subject to severe retribution if they tried,¹²⁷ (iv) the potential of being subjected to attorney's fees for an adverse result is a powerful disincentive,¹²⁸ and (v) the State was almost certain to assert children and youth in state custody do not have the right to bring such suit on their own behalf,¹²⁹ (g) PsychRights did not name such plaintiffs because it did not want to subject such plaintiffs to the prospect of an attorney's fee award against them,¹³⁰ and (h) the motion was untimely.¹³¹

On April 3, 2009, PsychRights moved to amend the complaint to include a specific allegation that it has citizen-taxpayer standing to cure the previous failure to do so as a possible technical pleading defect,¹³² which was granted by order dated April 14, 2009.¹³³

On April 11, 2009, the State filed its Reply to PsychRights' Opposition to Motion for Judgment on the Pleadings,¹³⁴ asserting (a) parents and children are the best suited to

¹²⁴ Exc. 385.

¹²⁵ Exc. 385.

¹²⁶ Exc. 385.

¹²⁷ Exc. 385.

¹²⁸ Exc. 386.

¹²⁹ Exc. 386.

¹³⁰ Exc. 395.

¹³¹ Exc. 396.

¹³² Exc. 562.

¹³³ Exc. 581.

¹³⁴ Exc. 570.

address the issues on behalf of themselves,¹³⁵ (b) PsychRights is attempting to assert the rights of potential and imaginary third parties,¹³⁶ PsychRights is not an appropriate plaintiff,¹³⁷ (c) there are better and more directly affected individuals who should bring this case,¹³⁸ (d) the true target of the lawsuit should be the pharmaceutical industry, rather than the State,¹³⁹ and (e) the State would be a proper party to sue the pharmaceutical industry.¹⁴⁰

On May 27, 2009, without notice to the parties, the Superior Court read its decision to grant the motion for judgment on the pleadings into the record, concluding (a) there was no diversity of interest except as PsychRights created with its mission statement, (b) there appears to be a more directly affected party that would make a more appropriate plaintiff, those being, (i) the affected children, their parents or guardians, or (ii) the state,¹⁴¹ and signed an Order Granting State of Alaska's Motion for Judgment on the Pleadings.¹⁴²

On June 16, 2009, the Superior Court issued a Final Judgment dismissing the Complaint.¹⁴³

¹³⁵ Exc. 574.

¹³⁶ Exc. 575.

¹³⁷ Exc. 575-576.

¹³⁸ Exc. 576.

¹³⁹ Exc. 576.

¹⁴⁰ Exc. 576.

¹⁴¹ Exc. 587.

¹⁴² Exc. 589.

¹⁴³ Exc. 590.

On June 22, 2009, the State moved for attorney's fees as the prevailing party under Civil Rule 82(b)(2).¹⁴⁴

On June 29, 2009, PsychRights opposed the award of attorney's fees on the grounds that it would be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts.¹⁴⁵

On July 8, 2009, the State filed its reply regarding attorney's fees, stating that similarly situated plaintiffs should be deterred from the voluntary use of the courts.¹⁴⁶

On July 29, 2009, the Superior Court granted the State's motion for attorney's fees.

ARGUMENT

I. Summary of Argument

The crux of this appeal is whether there is "a more appropriate plaintiff who has or is likely to bring suit." The Superior Court erroneously concluded that "the affected children, their parents or guardians or even the state"¹⁴⁷ were such more appropriate plaintiffs. That the Superior Court considered the State of Alaska a more appropriate plaintiff, frankly, seems absurd. The State can't sue itself. With respect to whether the affected children, their parents or guardians were more appropriate plaintiffs, while they have interest-injury standing to assert remedies in their particular cases, under applicable Alaska law they do not have standing to seek the systemic remedy PsychRights is seeking

¹⁴⁴ Exc. 592.

¹⁴⁵ Exc. 605, incorporating 395-396.

¹⁴⁶ Exc. 607.

¹⁴⁷ Exc. 587.

here to end the improper and harmful psychiatric drugging of Alaskan children and youth in state custody and through Medicaid.

Even if the affected children, their parents or guardians have standing to assert a systemic remedy, (1) none have brought such a suit, (2) parents whose children have been seized by the State are subject to retaliation if they were to bring such a suit, (3) such potential plaintiffs are poor and unable to pay for legal representation, and (4) the prospect of being saddled with attorney's fees if they didn't prevail chills such suits.

To the extent that PsychRights may not have established citizen-taxpayer standing on the existing record, the Superior Court erred by issuing a stay of discovery designed to show that affected children, their parents or guardians fear retaliation should they assert the claims made here, and then without any testimony to support its conjecture, assumed such a plaintiff would come forward "if a legitimate grievance existed."

Finally, the Superior Court erred in granting the award of attorney's fees against PsychRights because the award violates Civil Rule 82(b)(3)(I) in that it will deter the voluntary use of the courts.

II. PsychRights has Citizen-Taxpayer Standing

A. Standard of Review

This Court reviews issues of standing *de novo*. *Keller v. French*, 205 P.3d 299, 302 (Alaska 2009). This Court reviews dismissals under Civil Rule 12(b)(6) *de novo*, "presum[ing] all factual allegations of the complaint to be true and mak[ing] all reasonable inferences in favor of the non-moving party." *Rathke v. Corrections Corp. of America, Inc.*, 153 P.3d 303, 308 (Alaska, 2007).

B. Requirements for Citizen-Taxpayer Standing

In *Trustees for Alaska v. State*, 736 P.2d 324, 327 (Alaska 1987), this Court held "The basic requirement for standing in Alaska is adversity," and then laid down the principles for citizen-taxpayer standing as follows:

First, the case in question must be one of public significance. . . . Second, the plaintiff must be appropriate in several respects. For example, standing may be denied if there is a plaintiff more directly affected by the challenged conduct in question who has or is likely to bring suit. The same is true if there is no true adversity of interest, such as a sham plaintiff whose intent is to lose the lawsuit and thus create judicial precedent upholding the challenged action. Further, standing may be denied if the plaintiff appears to be incapable, for economic or other reasons, of competently advocating the position it has asserted.¹⁴⁸

Three days after PsychRights filed its opposition to the State's motion for judgment on the pleadings, this court issued its decision in *Keller, supra.*, which was seized upon by the State and the Superior Court as a basis for denying standing here.

Keller reiterated the *Trustees for Alaska* standard as follows:

To establish citizen-taxpayer standing, plaintiffs must show that the case is of public significance and that they are appropriate plaintiffs. We have held that a plaintiff was not appropriate when the plaintiff was a "sham plaintiff" with no true adversity of interest; when the plaintiff was incapable of competently advocating his or her position; and when there was another potential plaintiff more directly affected by the challenged conduct who had sued or was likely to sue.¹⁴⁹

For the reasons that follow, PsychRights respectfully suggests the Superior Court erred in finding PsychRights lacked standing under *Keller* and the other decisions of this Court.

¹⁴⁸ *Id.*, 736 P.2d at 329-30.

¹⁴⁹ 18 P.3d at 302.

As an initial matter, the State and Superior Court both agree this case is of public significance,¹⁵⁰ and PsychRights is a legitimate advocacy organization, capable of competently advocating the position taken.¹⁵¹

C. There Is No Potential Plaintiff More Directly Affected By The Challenged Conduct In Question Who Has Or Is Likely To Bring Suit

The Superior Court found that PsychRights lacked standing because affected children, their parents or guardians, or even the State itself, were more appropriate plaintiffs, relying on this Court's denial of standing in *Ruckle v. Anchorage School District*, 85 P.3d 1030 (Alaska 2004), and *Keller*, as follows:

There is no adversity of interest with plaintiff except as they created with their mission statement. And just like in *Ruckle* and *Keller*, there appears to be a more directly affected party here that would make a more appropriate plaintiff than the Law Project. As defendant argues, the affected children, their parents or guardians or even the state would make a more appropriate plaintiff if a legitimate grievance existed.¹⁵²

First, the denigration of PsychRights' public interest mission as a reason for denying standing is misplaced. Just as the environmental public interest law firm Trustees for Alaska is allowed to claim citizen-taxpayer standing to sue with respect to environmental issues in accordance with its mission, PsychRights can claim citizen-taxpayer standing to sue with respect to forced drugging issues, including Alaskan children and youth, in accordance with its mission. The issue is not PsychRights' mission statement but, since both the State and Superior Court agree PsychRights is capable of

¹⁵⁰ Exc. 130 & 585.

¹⁵¹ Exc. 130 & 586.

representing the claims asserted here, but whether there exists a plaintiff more directly affected by the challenged conduct in question who has or is likely to bring suit.

Under Alaska law, including *Trustees for Alaska, Kleven v. Yukon-Koyukuk School District*, 853 P.2d 518 (Alaska 1993), *Ruckle*, and *Keller*, the "more appropriate plaintiff" that would deny standing must be one "who had sued or was likely to sue."
Here, there is no such finding. Instead, the Superior Court dismissed the complaint on the grounds that there would be such a more appropriate plaintiff, "if a legitimate grievance existed," and "plaintiffs [sic] in this case have [sic] not established any legitimate claim has gone unpursued."¹⁵³ The "if a legitimate grievance existed" formulation comes from *Kleven* where this Court specifically held it had "no reason to believe that current YKSD employees would be indisposed to press legitimate grievances." *Id.* 853 P.2d at 526.

As a preliminary matter, it appears the "grievance" referred to in *Kleven* was to filing what is denominated a "grievance" in labor law, which is different than a "suit." This may or may not be significant, but it is ambiguous whether this Court was referring to a labor grievance and if so, the Superior Court's reliance on it is entirely misplaced.

(1) Potential Individual Plaintiffs Do Not Appear To Have Interest-Injury Standing to Seek the Systemic Relief Sought by PsychRights

In any event, any employee of the Yukon Koyukuk School District had the right to bring a formal "grievance" to challenge the same issue as Klevin. In stark contrast, here

(Continued footnote)-----
¹⁵² Exc. 587.

one of the reasons why PsychRights brought the lawsuit in its own name is that the injunctive relief requested on behalf of all Alaskan children seemed unattainable by individuals:

The State asserts "there is no reason to presume [a minor Medicaid recipient or child in state custody who has been prescribed or is taking psychotropic medication] would not sue." This fundamentally misconstrues the lawsuit by ignoring that individual affected persons may not be able to obtain the relief requested. Individuals can assert the right that they, or their child or ward, not be subjected to such inappropriate psychiatric drugging and perhaps even obtain a declaratory judgment to that effect. However, the most important relief requested is the injunction against the State improperly administering or paying for the administration of psychotropic drugs to any Alaskan children or youth. This was one of the reasons PsychRights brought this action in its own name, and did not name any other plaintiffs.¹⁵⁴

The Superior Court ignored this point in its decision.

In its Motion for Judgment on the Pleadings, the State actually makes this point without realizing it when it cites to (a) Justice Moore's concurring opinion in *Foster v. State*, 752 P.2d 459, 466 (Alaska 1988), for the proposition that "Only in 'rare cases' will the interest-injury test be read to allow standing 'to protect the rights of third parties by acting in a representative capacity,'"¹⁵⁵ and (b) *Gilbert M.*, 139 P.3d 581, 587 (Alaska 2006) for the proposition that a person has standing to assert another's rights only when a special relationship exists.

(Continued footnote)-----

¹⁵³ Exc. 586.

¹⁵⁴ Exc. 379, footnote omitted.

¹⁵⁵ Exc. 127-128.

In other words, when citizen-taxpayer standing is denied on the basis that "there is a plaintiff more directly affected by the challenged conduct,"¹⁵⁶ as it was here, "more directly affected" connotes interest-injury standing. PsychRights respectfully suggests standing can be denied on this basis only if the "more directly affected" potential plaintiff has standing to seek the relief requested. Here, PsychRights filed in its own name because it appears such a plaintiff(s) could not obtain the relief sought.

This relief is to stop the massive amount of harm inflicted on Alaskan children and youth in state custody and through Medicaid. The allegations of the Complaint, which this Court presumes are true for purposes of this appeal,¹⁵⁷ show that children and youth in state custody, and other poor, disadvantaged children and youth enrolled in Medicaid, are being greatly harmed through the profligate prescribing of psychiatric drugs to them. The State's response is that it has no responsibility:

The implication that the Department possesses meaningful authority and control over these matters-or is in any realistic position to administer the relief requested even if the court were to order it-is a fiction.¹⁵⁸

* * *

Insofar as plaintiff disagrees with the practice of pediatric psychiatry and the culture of pharmaceutical marketing and prescribing practices related to psychotropic medication, those matters are not within the Department's meaningful control.¹⁵⁹

¹⁵⁶ *Trustees for Alaska*, 736 P.2d at 327.

¹⁵⁷ *Rathke, supra*.

¹⁵⁸ Exc. 116.

¹⁵⁹ Exc. 134.

Frankly, PsychRights believes it is outrageous for the State to disclaim responsibility for children and youth in its care. It is also patently incorrect as a matter of law. First, constitutionally, under *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 200, 109 S.Ct. 998, 1005 (1989), The United States Supreme Court has held if a state,

fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.

Presumably the same is true under Alaska's Due Process Clause.¹⁶⁰ Second, under AS 47.10.084(a), the State has the "duty to protect, nurture, train, and discipline the child, [and] the duty of providing the child with food, shelter, education, and medical care."

This case represents exactly the scenario for which citizen-taxpayer standing is most appropriate; a case of great public significance involving tremendous harm to Alaskan children and youth due to state paralysis where citizen-taxpayer standing is the only viable approach to redress the systemic violation of rights.

(2) The State of Alaska Is Not an Appropriate Plaintiff to Sue Itself

One of the grounds upon which the Superior Court denied PsychRights standing was that "even the state would make a more appropriate plaintiff."¹⁶¹ Frankly, PsychRights has never heard of such a thing, and in fact, it smacks of exactly the sort of "sham" plaintiff this Court warned about in *Trustees for Alaska*. If the State was willing

¹⁶⁰ AK Const. art 1, §7.

¹⁶¹ Exc. 587.

to address the problem it could do so without the absurdity of suing itself. PsychRights tried for almost four years to get the Alaska Legislature and two administrations to address the problem to no avail.¹⁶² It is precisely because of this failure that PsychRights was compelled to resort to the courts. PsychRights respectfully suggests this is precisely the type of situation for which citizen-taxpayer standing is most appropriate.

(3) No More Directly Affected Plaintiff is Likely to Sue

Without making any finding that any affected child, parent or guardian was likely to sue, the Superior Court denied standing to PsychRights on the ground that, "as the defendant argues, the affected children, their parents or guardians . . . would make a more appropriate plaintiff if a legitimate grievance existed."¹⁶³

To reach this conclusion, the Superior dismissed PsychRights' contention that children would have no way to bring such a suit on their own behalf, and the parents whose children have been taken away from them are unlikely to bring such a suit because of three distinct reasons. First, parents whose children have been seized by the State, i.e., the parents of children in foster care, are subject to retaliation if they were to bring such a suit.¹⁶⁴ They are subject to threats that their children will never be returned to them if they rock the boat.¹⁶⁵ Second, virtually all of such potential plaintiffs are poor, with Medicaid

¹⁶² Exc. 55-72.

¹⁶³ Exc. 587.

¹⁶⁴ Exc. 385.

¹⁶⁵ Exc. 386.

recipients by definition being poor, and unable to pay for legal representation.¹⁶⁶ Third, the prospect of being saddled with attorney's fees if they didn't prevail is a disincentive.¹⁶⁷

The Superior Court ignored this, instead saying:

[P]laintiff argues parents or guardians are unlikely to sue, but that statement reflects plaintiff's opinion that parents and guardians are incapable of recognizing what plaintiffs identify as "forced," medication and treatment."¹⁶⁸

The Superior Court then cites to *Ruckle* and *Keller* for the proposition that the affected children, parents and guardians would make a more appropriate plaintiff if a legitimate grievance existed.

However, in both *Ruckle* and *Keller*, standing was denied because another more directly affected plaintiff had already brought suit in closely related claims.¹⁶⁹ In denying citizen-taxpayer standing in *Keller*, this Court held:

The Keller plaintiffs do not contend that the governor or any other potential plaintiffs were somehow limited in their ability to sue. That individuals who are more directly affected have chosen not to sue despite their ability to do so does not confer citizen-taxpayer standing on an inappropriate plaintiff.

Thus, in both *Ruckle* and *Keller* not only had other plaintiffs already brought suit in closely related claims, but the developed facts established that these plaintiffs could have asserted precisely the same claims if they had chosen to do so.

¹⁶⁶ Exc. 385.

¹⁶⁷ Exc. 386.

¹⁶⁸ Exc. 587.

¹⁶⁹ *Ruckle*, 85 P.3d at 1036; *Keller*, 205 P.3d at 303.

Here, just exactly the opposite occurred. PsychRights did contend that other potential plaintiffs were limited in their ability to sue. The State asserted the opposite. The Superior Court allowed no discovery or showing on the point.

III. The Superior Court Erred By Staying Discovery and Preventing Factual Development That Potential Plaintiffs with Legitimate Grievances Are Unlikely to Sue

A. Standard of Review

This Court reviews discovery orders under an abuse of discretion standard. *Karen L. v. State Dept. of Health and Social Services, Div. of Family and Youth Services*, 953 P.2d 871, n. 12 (Alaska 1998).

B. The Superior Court Abused Its Discretion In Staying Discovery of Facts Necessary to Properly Consider the Motion to Dismiss

The Superior Court held PsychRights had "failed to establish any parent or guardian with a legitimate grievance on behalf of their juvenile or child has declined to sue,"¹⁷⁰ after staying discovery designed to develop just such facts.¹⁷¹

In its Opposition to Motion to Stay Discovery, PsychRights stated:

In its Motion for Judgment on the Pleadings the State asserts the administration of psychiatric drugs to children and youth in its custody "is left to the parent or legal guardian of the child, or to the superior court." This is disingenuous at best⁷⁶ and PsychRights intends to conduct focused discovery to show the State's true involvement. It is PsychRights understanding, the "consents" are virtually always obtained because one or more of the defendants seek such consent (or court order) and that parents are often subjected to extreme pressure to agree to the psychiatric drugging of their children. Thus, another aspect of PsychRights' discovery plan is to have the defendants disclose the sources and information it is

¹⁷⁰ Exc. 586.

¹⁷¹ Exc. 561.

(a) relying upon in deciding to seek, and
(b) providing in obtaining,
parental consent and court orders.

⁷⁶ It is also patently untrue because under AS 47.10.084, if parental rights have been terminated and there is no guardian, which is often the case, these residual parental rights accrue to the State.¹⁷²

PsychRights respectfully suggests it was error for the Superior Court to stay discovery into the true involvement of the State in psychiatrically drugging children and youth and then use the lack of such evidence as grounds for dismissing PsychRights' contentions that (a) the State is involved in such drugging (b) the State coerces parents into consenting, and (c) parents fear retaliation from the State for asserting their rights.

PsychRights has found no Alaska cases on point,¹⁷³ but in *Chavous v. District of Columbia Financial Responsibility and Management Assistance*, 201 F.R.D. 1, 3 (D.D.C., 2001) the federal district court held:

A trial court "ordinarily should not stay discovery which is necessary to gather facts in order to defend against [a] motion [to dismiss]." ("discovery should precede consideration of dispositive motions when the facts sought to be discovered are relevant to consideration of the particular motion at hand.").¹⁷⁴

In *Williamson v. U.S. Dept. of Agriculture*, 815 F.2d 368, 373 (C.A.5 1987) the Fifth Circuit held "if discovery could uncover one or more substantial fact issues, appellant

¹⁷² Exc. 166, internal citation omitted.

¹⁷³ *Karen L.*, 953 P.2d at 879, did allow a stay of discovery, but is inapposite because it involved whether government officials sued personally were immune from suit and such determination was not dependant upon any factual development.

¹⁷⁴ Citation omitted.

was entitled to reasonable discovery to do so," and that in such circumstances a stay of discovery would be an abuse of discretion.

Here, the Superior Court stayed discovery necessary to determine facts applicable to the question of whether a more directly affected plaintiff was likely to sue. This was the central question to be decided and PsychRights respectfully suggests it was an abuse of discretion. Thus, to the extent that this Court does not hold PsychRights has citizen-taxpayer on the current record for the reasons set forth above, PsychRights respectfully suggests this Court should reverse the Superior Court's decision that PsychRights lacks standing and vacate its order staying discovery and remand this case to allow PsychRights to conduct discovery.

IV. The Attorney Fee Award Should Be Vacated

A. Standard of Review

This Court reviews a Superior Court's award of attorney's fees under Rule 82 for an abuse of discretion; whether the Superior Court applied the appropriate legal standard in its consideration of a fee petition presents a question of law this Court reviews de novo. *Powell v. Powell*, 194 P.3d 364, 368 (Alaska 2008).

B. The Award of Attorney's Fees Violated Civil Rule 82(b)(3)(I)

In opposing the State's motion for an award of attorney's fees, PsychRights argued that granting an award of attorney's fees is likely to deter litigants from the voluntary use of the courts under Civil Rule 82(b)(3)(I), incorporating by reference the discussion of this issue at §IIB, of PsychRights' Opposition to Motion for Judgment on the

Pleadings.¹⁷⁵ The Superior Court's award of attorney's fees fails to even address whether and to what extent an award of attorney's fees was likely to deter litigants from the voluntary use of the courts, which PsychRights respectfully submits mandates, at a minimum, remand for proper consideration by the Superior Court.

PsychRights respectfully suggests rather than a remand, however, the award should be reversed because any award of attorney's fees under these circumstances would violate Civil Rule 82(b)(3)(I). As PsychRights advised the Superior Court,¹⁷⁶ prior to the 2003 amendments to AS 09.60.010 enacted through Ch. 86, § 2(b), SLA 2003, public interest litigants were exempt from an award of attorney's fees against them, but the 2003 amendments abolished the public interest exception from Rule 82 awards against non-prevailing parties.

In *Fuhs v. Gilbertson*, 186 P.3d 551, 557-58 (Alaska 2008), this Court recognized that Civil Rule 82(b)(3)(I) still applies to grant relief in appropriate circumstances after the 2003 amendments to AS 09.60.010. The prospect of an attorney's fee award against individual plaintiffs was, in fact, one of the reasons PsychRights did not bring this lawsuit in one or more individual plaintiffs' name(s).¹⁷⁷

¹⁷⁵ Exc. 605, 395-396.

¹⁷⁶ Exc. 395-396.

¹⁷⁷ Exc. 396.

An almost \$4,000 fee award against PsychRights, with its limited financial resources,¹⁷⁸ just to get through a motion to dismiss has to give anyone pause about taking cases of public importance in the public interest. It will deter litigants from the voluntary use of the courts. In fact, it will most likely deter PsychRights from taking such cases in the Alaska state courts.

PsychRights respectfully suggests that even if it prevails in this appeal and the attorney's fee award is vacated therefor, which technically renders this issue moot, this Court should consider the issue under the public interest exception to the mootness doctrine. In considering whether to decide moot questions, this Court weighs (1) whether the disputed issues are capable of repetition, (2) whether the mootness doctrine, if applied, may cause review of the issues to be repeatedly circumvented, and (3) whether the issues presented are so important to the public interest as to justify overriding the mootness doctrine. *Copeland v. Ballard*, 210 P.3d 1197, 1202 (Alaska 2009)

PsychRights respectfully suggests Prongs 1 & 3 are clearly present here because every potential public interest litigant has to consider whether to pursue the public interest litigation in the face of the potential for a substantial attorney's fee award, and that this issue is so important to the public interest as to justify overriding the mootness doctrine. PsychRights also respectfully suggests Prong 2 also exists, although perhaps in a slightly different form than it normally arises.

¹⁷⁸ PsychRights' finances are completely transparent and posted on the Internet at <http://psychrights.org/about.htm>.

Six years after the Alaska Legislature abolished the public interest exception to an attorney's fee award against a public interest litigant, this issue has yet to result in a decision by this Court.¹⁷⁹ The issue was raised in *Fuhs*, but this Court declined to consider it because it was not raised below. Thus, for whatever reason(s), review of the issue has not occurred. PsychRights respectfully suggests that at least one reason is the prospect of financially ruinous attorney's fee awards against potential public interest litigants is so chilling it has deterred voluntary access to the Alaska courts so much that important public interest cases are no longer being brought and the question is repeatedly evading review in this way.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests this Court

1. REVERSE the Superior Court's dismissal of this action for lack of citizen-taxpayer standing, and REMAND this case for further proceedings, and
2. REVERSE and VACATE the Attorney's Fee Award against PsychRights.

¹⁷⁹ It has been two years since this Court upheld the constitutionality of the 2003 abolition of the public interest litigant rule in *State v. Native Village of Nunapitchuk*, 156 P.3d 389, 405-06 (Alaska 2007).