

IN THE SUPREME COURT FOR THE STATE OF ALASKA

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| KATSUMI KENASTON, |) |
| |) |
| Appellant, |) |
| |) Supreme Court No. S-11600 |
| vs. |) |
| |) Trial Court Case No. 3AN-04-3485 CI |
| |) |
| STATE OF ALASKA, |) |
| |) |
| Appellee. |) |
| _____ |) |

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE JOHN REESE, PRESIDING

REPLY BRIEF OF APPELLANT

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Alaska Declaratory Judgment Act, AS 22.10.020(g)

(g) In case of an actual controversy in the state, the superior court, upon the filing of an appropriate pleading, may declare the rights and legal relations of an interested party seeking the declaration, whether or not further relief is or could be sought. The declaration has the force and effect of a final judgment or decree and is reviewable as such. Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against an adverse party whose rights have been determined by the judgment.

Alaska Rule of Civil Procedure 60(b)

(b) Mistakes--Inadvertence--Excusable Neglect--Newly Discovered Evidence-- Fraud-- etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise or excusable neglect;
- (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
- (6) any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the date of notice of the judgment or orders as defined in Civil Rule 58.1(c). A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to grant relief to a defendant not personally served, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis and audita querela are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Argument

I. Adequate Four Board Funding and Opportunity to Perform Their Settlement Mandated Duties is Not a Political Question.

At page 3 of its brief, the State restates its position below that "the Board's funding is a political question best left to the executive and legislative branches." The Superior Court agreed:

I don't think there's anything in the Constitution that says the Mental Health boards are going to be funded at a certain level. . . . Highways may be more important, in the eyes of the Legislature and the Governor next year, or a gas line permit, or who knows what, than funding of Mental Health boards.¹

Elsewhere, the State acknowledges that the Trust Beneficiaries have contractual rights under the Settlement² -- and indeed acknowledged below that adequate funding and opportunity to perform their Settlement mandated duties are contractual rights,³ but the fact remains, the Superior Court erroneously held whether to fund the Four Boards adequately to perform their Settlement mandated duties is a political question. This is the essence of the controversy. Appellant seeks a declaratory judgment that regardless of political judgments, the beneficiaries of the Trust have the contractual right under the Settlement Agreement that the Four Boards be adequately funded and given adequate opportunity to perform their Settlement Mandated duties.

As set forth in Appellant's Opening brief, the Superior Court's conclusion that it is a political question whether or not to fund the Four Boards adequately to perform their

¹ Tr. 26-27.

² See, Brief at 16.

Settlement mandated duties⁴ is a mistake of law and an exercise of discretion may not properly be based on such mistake of law.⁵ Thus, the Superior Court's dismissal should be reversed on this ground alone.

II. No Alleged Breach Is Required Under the Alaska Declaratory Judgment Act.

The State and the Superior Court rely heavily on the lack of an alleged breach as being fatal to Appellant's complaint.⁶ However, the Alaska Declaratory Judgment Act, AS 22.10.020(g), clearly does not require any such breach (the court "may declare the rights and legal relations of an interested party seeking the declaration, whether or not further relief is or could be sought").⁷ Emphasis added.

With respect to ripeness, in *Brause v. State of Alaska*, 21 P.3d 357, 359 (Alaska 2001), this Court held ("the more practical formulation is said to be:") that ultimately the issue of

(Continued footnote)-----

³ Tr. 12-13.

⁴ The State argues the Superior Court recognized the contractual nature of the Trust Beneficiaries' rights, but it is very clear it considered the funding level to be a political determination. Tr. 25-27.

⁵ Opening Brief at 6-7, citing *Verizon Communications, Inc., v. Inverizon International, Inc.*, 295 F.3d 870, 872-3 (CA8 2002) and *Electronics for Imaging, Inc., v. Coyle*, 394 F.3d 1341, 1345 (CA Fed 2005).

⁶ See, p. 7 of the State's Brief. See, also p. 16 of the State's Brief ("she needed to show some sort of breach or violation of the Settlement in order to have her case go forward.")

⁷ The State's reliance on *Principal Life Insurance Co. v. Robinson*, 394 F. 3d 665 (CA 9 2005) is misplaced. There, the Ninth Circuit reversed a dismissal of a declaratory judgment action because the trial court failed to explain its decision. While saying the trial court should be given an opportunity to explain its decision, the Ninth Circuit indicated it believed declaratory judgment to define a contractual term should be granted in that case even in the absence of any alleged breach. 394 F.3d at 674.

"[R]ipeness turns on 'the fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration.' "

As stated in Appellants' Opening Brief, there is a compelling reason for a declaratory judgment to be issued in this case⁸ -- the avoidance of the *en terrorem* Civil Rule 60(b) remedy for a material breach.⁹ In other words, in this case, waiting until a breach occurs is too late.

While the State states inconsistently both that (1) the Settlement Beneficiaries have a contractual right for adequate Four Board funding and opportunity to perform their Settlement Mandated duties, and (2) such funding and opportunity are political questions, the fact remains the former is an admission made in open court and the State should be held to it.¹⁰ It is also clearly correct. Since the State admits its contractual obligation, the hardship to the State from the issuance of the declaratory judgment is non-existent. The hardship to the Trust Beneficiaries, on the other hand, is extreme.

⁸ Also as set forth in Appellants' Opening brief, in *Jefferson v. Asplund*, 458 P.2d 995, 998 (Alaska 1969), this court cited, without endorsing, Professor Moore's view that "the appellate court may substitute its judgment for that of the lower court," in order to permit greater uniformity of results.

⁹ The availability of which is addressed below.

¹⁰ The State also acknowledges here it has the obligation to adequately fund and provide an adequate opportunity for the Four Boards to perform their Settlement Mandated duties at page 10 of its brief by stating "Appellant's contractual rights are undisputed" and at 13, "there is no dispute regarding the terms of the settlement." Yet, by arguing whether to fund the Four Boards adequately to perform their Settlement mandated duties is a political decision, the State is also essentially disputing these contractual rights. What is the State position? If there is no dispute, why is the State resisting judicial acknowledgement of its contractual obligations so vehemently?

III. The Civil Rule 60(b) Remedy is Available for any Material Breach of the Settlement .

The State argues at page 14 that the Civil Rule 60(b) remedy only applies to the Legislature materially altering or repealing a statute the Settlement identifies as a material term, citing to *Weiss v. State*, 939 P.2d 380, 396-7 (Alaska 1997) and the Superior Court's decision in the *Weiss* case. However, this Court in *Weiss II*, 939 P.2d at 397, in rejecting the Settlement opponents' objection that this Court had held Civil Rule 60(b) was not an appropriate enforcement mechanism, specifically held the 60(b) remedy is available for all material breaches:

This rule, however, does not contradict the well-established practice of using Rule 60(b)(6) "to return the parties to the status quo" after "one party fails to comply" with a settlement agreement.

This Court then went on to rule a material change of the settlement agreement by the legislature would present such a reason for granting relief under Civil Rule 60(b)(6), but this does not limit the availability of the Civil Rule 60(b) remedy for other material breaches.¹¹ In other words, this Court held Civil Rule 60(b) is available for material breaches of the Settlement apart from any settlement language so providing.

¹¹ The State, at 12 and 14, asserts other remedies would be available, but fails to identify how the Trust Beneficiaries could otherwise enforce this provision of the Settlement. Damages is not an adequate remedy and the availability of specific performance requiring the Legislature to appropriate adequate funding is problematic. This issue came up below, with the State asserting "appropriate relief" would be available for a breach (Exc. 302), but when Appellant stated it would be an acceptable resolution of this litigation if the State agreed specific performance was available (Exc. 330-1), the State declined to do so (Exc. 337-8).

Since this remedy involves the re-opening of the original litigation, Appellant respectfully suggests its avoidance is of great public importance and justifies issuance of the requested declaratory judgment.¹²

Conclusion

For the foregoing reasons, Appellant respectfully requests this Court:

1. Reverse the Superior Court's dismissal of the complaint, and
2. Hold that adequate funding and adequate opportunity for (a) the Alaska Mental Health Board, (b) the Governor's Council on Disabilities and Special Education, (c) the Advisory Board on Alcohol and Drug Abuse, and (c) the Alaska Commission on Aging to perform their settlement mandated duties are material terms of the settlement in *Weiss et. al, v. State of Alaska*, 4FA 82-2208 Civil, upheld on appeal by this Court in *Weiss v. State*, 939 P.2d 380 (Alaska 1997).

RESPECTFULLY SUBMITTED this 13th day of June, 2005.

LAW PROJECT FOR PSYCHIATRIC RIGHTS, INC.

By: 
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¹² The State asserts at page 13 of its Brief that Appellant failed to identify any issue of public importance or how a declaratory judgment will resolve any such issues, but this is clearly wrong. Appellant did both. To reiterate, the public importance of avoiding a material breach that provokes the re-opening of the mental health trust lands litigation is apparent. Issuing the requested declaratory judgment may not be able to prevent such a breach, but it prevents the state from inadvertently doing so. In other words, there should be no question in the Executive and Legislative branches' minds that failure to adequately fund and provide adequate opportunity for the Four Boards to perform their Settlement mandated duties is a material breach of the settlement and risks the reopening of the entire litigation. The Trust beneficiaries bargained for these rights and this Court should do what it can to have them honored without risking the unraveling of the entire Settlement and re-opening of the original litigation.