IN THE SUPREME COURT FOR THE STATE OF ALASKA

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

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
HONORABLE PATRICK J. MCKAY, JUDGE

BRIEF OF APPELLEE

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of the State of Alaska
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ALASKA 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 47.30.730 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 47.30.780 Early discharge.

The professional person in charge shall at any time discharge a respondent on the ground that the respondent is no longer gravely disabled or likely to cause serious harm as a result of mental illness. A certificate to this effect shall be sent to the court which shall enter an order officially terminating the involuntary commitment.

AS 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.

RULES:

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:

(i) Attorneys for biological parents in adoption cases to the extent required by the Indian Child Welfare Act (25 USC 1901 et seq.),

(ii) Attorneys for minor children and indigent parents or custodians of minor children in minor guardianship cases brought pursuant to AS 13.26.060(d),

(iii) Attorneys for respondents in protective proceedings brought pursuant to AS 13.26 in which appointment of the office of public advocacy is not mandated by statute,

(iv) Attorneys for minor children or incompetents who are heirs or devisees of estates in cases in which the attorneys' fees cannot be paid as a cost of administration from the proceeds of the estate,

(v) Attorneys for indigent putative fathers in actions to establish paternity in which the state of Alaska provides representation for mothers,

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

(vii) Attorneys for indigent parents who are defending against a claim that their consent to adoption is not required under AS 25.23.050(a).

(B) In all other cases, the court shall inform the administrative director of the specific reasons why an appointment is required prior to making the appointment.

(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.

(6) *Recovery of Costs.*

When counsel is appointed for a person in a case described in subparagraph 12(e)(1), the court shall order the person, or if the person is a child, the person's parents, guardian or custodian, to pay the costs incurred by the court in providing representation. Before appointing counsel, the court shall advise the person that the person will be ordered to repay the state for the cost of appointed counsel and shall advise the person of the maximum amount that the person will be required to repay. The court shall order the person to apply for permanent fund dividends every year in which the person qualifies for a dividend until the cost is paid in full. The clerk shall determine the cost of representation, and shall mail to the person's address of record a notice informing the

person that judgment will be entered against the person for the actual cost of representation or for $500, whichever is less. The person may oppose entry of the judgment by filing a written opposition within 10 days after the date shown in the clerk's certificate of distribution on the notice. The opposition shall specifically set out the grounds for opposing entry of judgment. The clerk shall enter judgment against the person for the amount shown in the notice if the person does not oppose entry of the judgment within the 10 days. If the person files a timely opposition, the court may set the matter for a hearing and shall have authority to enter the judgment. Criminal Rule 39(c)(1)(D) and (c)(2) shall apply to judgments entered under this section.

Child In Need of Aid Rule 1(f)

(f) Situations Not Covered by These Rules. Where no specific procedure is prescribed by these rules, the court may proceed in any lawful manner, including application of the Civil Rules, applicable statutes, the Alaska and United States Constitutions or the 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 child in need of aid proceedings.

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(e)

(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.

STATEMENT OF ISSUES PRESENTED

1. Does Alaska Rule of Civil Procedure 82 apply to involuntary commitment proceedings, considering their unique character and purpose?

2. Did the court err in finding Wetherhorn was not the prevailing party when she was discharged by the hospital and any pending petitions dismissed because she no longer met the commitment criteria?

3. Is Wetherhorn entitled to attorney's fees as a penalty under Alaska Rules of Civil Procedure 95(a) and 11 because she disputes the Alaska Psychiatric Institute's recitation of the facts and interpretation of relevant caselaw?

STATEMENT OF THE CASE

I. DESCRIPTION OF THE CASE

Roslyn Wetherhorn was involuntarily committed to the Alaska Psychiatric Institute (API) after a hearing on a Petition for 30-day Commitment and a Petition for Court Approval of Administration of Psychotropic Medication (meds petition).[1] Exc. 14-18. API filed a petition for a 90-day commitment and another meds petition, but before the case could be heard, Ms. Wetherhorn was released from API because her condition had improved and she no longer met the commitment criteria. Exc. 19-21, 29. The 90-day petition was dismissed without prejudice (as to further 30-day petitions). Exc. 33. Following the dismissal, Wetherhorn's attorney filed a motion for attorney's fees which API opposed. Exc. 34-39, 40-45. After significant briefing, the Superior

[1] The propriety of this commitment is being challenged by Wetherhorn in a separate appeal, Supreme Court Case No. S-11939.

Court denied the motion. Exc. 112. Ms. Wetherhorn appeals this order and is now also actively pursuing a claim for attorney's fees pursuant to Civil Rule 95.

II. COURSE OF THE PROCEEDINGS

Ms. Wetherhorn suffers from Bipolar Disorder, Exc. 15, and was brought to API's attention through a Mental Health Professional's Application for Examination, dated April 4, 2005. Exc. 1. A Petition for Initiation of Involuntary Commitment was filed the next day based on Ms. Wetherhorn's manic state, homelessness, and being non-medication compliant for 3 months. Exc. 2-3.

The Superior Court granted an order for examination and temporary custody on April 5, 2005. Exc. 4. API filed a Petition for 30-day Commitment that same day based on Ms. Wetherhorn's "manic state, homelessness, [having] no insight, and [being] non-med[ication] compliant [for] 3 months." Exc. 5-6. She was appointed counsel, advised of her rights, and scheduled for hearing on April 8, 2005. Exc. 8-9,10. The matter was continued and on April 15, 2005, API filed a Petition for Court-Ordered Medication, which was set for hearing that same day. Exc. 12, 13.

At the hearing, API psychiatrist Dr. Kiele, who had been treating Ms. Wetherhorn, offered expert testimony in support of both of API's petitions. Exc. 15, 17. At the close of the hearing, the court granted both the petitions for 30-day commitment and for court-ordered medication. Exc. 14-18.

Ms. Wetherhorn subsequently chose to retain private counsel, and on April 26, 2005, the Public Defender Agency and the Law Project for Psychiatric Rights,

Inc. (PsychRights), filed a stipulation for substitution of counsel for Ms. Wetherhorn. Exc. 28. On April 27, 2005, API filed petitions for 90-day commitment and court-ordered medication. Exc. 19-21. On May 3, 2005, the probate court calendared the hearings for that afternoon. Exc. 22-23. At that hearing, the public defender informed the court that she was no longer representing Ms. Wetherhorn and that now Mr. Gottstein was, and the master continued the matter until May 6, 2005. Exc. 26. At the hearing, Mr. Gottstein asked for a brief continuance to prepare for trial as Ms. Wetherhorn had elected to have a jury trial. Exc. 108. The case was referred to the assigned Superior Court Judge John Suddock. *Id.*.

Ms. Wetherhorn was released from API on May 9, 2005 because her condition improved with her course of treatment and she no longer met the commitment criteria. Exc. 29. The pending petitions were dismissed. Exc. 33.

Wetherhorn moved for attorney's fees under Civil Rule 82. Exc. 34-39. API opposed because Civil Rule 82 is not applicable to involuntary commitment proceedings because they are probate proceedings, and there is a controlling statute under AS 47.30. Exc. 40-45.

Wetherhorn took 32 pages, and over 400 pages of exhibits, to reply to this opposition. At. Br. at 8, Exc. 46-77. She also argued for enhanced or full attorney's fees based on her disagreement with API's interpretation of *Crittell v. Bingo*, 83 P.3d 532

(Alaska 2004).[2] Exc. 49. Much of Wetherhorn's exhaustive reply attacked the validity of the initial involuntary commitment and medication administration, issues which she had not raised while the 90-day and meds petitions were pending or before her discharge. As noted above, such issues are the focus of her other case on appeal, Supreme Court Case No. S-11939.

API successfully moved to file a supplemental opposition, which Wetherhorn did not oppose. Exc. 78-79. The court granted leave to do so on December 23, 2005.[3] Exc. 86. In its briefing, API brought the question back to that of attorney's fees, and argued that under *Cooper v. State*, 638 P.2d 174 (Alaska 1981), the court lacks the authority to award attorney's fees in this case. Exc. 81-83. In the alternative, API argued that Wetherhorn is not the prevailing party, and therefore not entitled to attorney's fees under Civil Rule 82. Exc. 83-85.

In her supplemental reply, Wetherhorn argued that she should be granted fees pursuant to Civil Rule 95 based on API's "mischaracterization of cases and especially the facts surrounding the dismissal." Exc. 88, n.1.

On February 6, 2006, Superior Court Judge Patrick McKay denied requested relief. He found that Civil Rule 82 does not apply to involuntary commitment hearings, that a ruling otherwise would be inconsistent with the Rules of Probate, that an

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[2] On appeal, Ms. Wetherhorn has shifted focus and now advances an argument for rule 95 fees on enhanced fees on API's interpretation of *Cooper v. State*, 638 P.2d 174 (Alaska 1981). At. Br. 27-28.

[3] API had already filed the supplemental brief with its motion for leave on August 4, 2005. Exc. 80-85.

award of attorney's fees under Civil Rule 82 would violate AS 47.30.815, and finally, that Wetherhorn was not the "prevailing party." Exc. 112.

Wetherhorn challenges the court's order.

ARGUMENT

I. CIVIL RULE 82 DOES NOT APPLY TO INVOLUNTARY COMMITMENT AND MEDICATION PROCEEDINGS UNDER AS 47.30.

A. Standard of Review

The Supreme Court reviews lower courts' decisions regarding the application of court rules and statutes using the *de novo* standard of review.[4] Under this standard, the court "adopt[s] the rule of law that is most persuasive in light of precedent, reason, and policy."[5]

B. Consistent with the Court's Ruling in *Cooper v. State*, Civil Rule 82 Should Not Apply to Civil Commitment Proceedings

Civil commitments are different than typical civil litigation. There is a strong public interest component to these proceedings which is not at play in traditional suits.[6] Thus, the recovery of attorney's fees by either side is incongruous to the very nature of the proceedings in much the same way it is in Children In Need of Aid (CINA) proceedings.[7]

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4 *Frank E. v. State*, 77 P.3d 715, 717 (Alaska 2003).

5 *Id.*

6 *Goetz v. Crosson*, 967 F.2d 29, 34-35 (2d Cir. 1992). *See also, Addington v. Texas*, 441 U.S. 418, 426 (1979).

7 *See Cooper v. State*, 638 P.2d 174 (Alaska 1981), discussed below.

Traditionally, "[t]he common law does not permit the recovery of attorney's fees, as costs, from the opposing party."[8] The right to attorney's fees in Alaska is derived by AS 09.60.010.[9] That statute states, in relevant part,

> (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.

The probate rules do not provide for the award of fees from the opposing party. In the absence of a specific rule, Probate Rule 1(e) directs the court to proceed lawfully under any other sources of law so long as it is consistent with the unique character and purposes of probate proceedings:

> 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.
> (emphasis added)[10]

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

9 *Id. See also, Stepanov v. Gavrilovich*, 594 P.2d 30, 37 (Alaska 1979) (holding that the authority for awards pursuant to Civil Rule 82 comes from AS 09.60.010).

10 This same language appears in CINA Rule 1(f).

An award of Civil Rule 82 attorney's fees in this case would interfere with the unique character and purposes of civil commitments.[11] The special nature of civil commitment proceedings is widely recognized. For instance, the Second Circuit Court of Appeals distinguishes such proceedings from other proceedings based on their unique character and purpose:

> Unlike civil or criminal proceedings, the interests of the parties to a civil commitment proceeding are not entirely adverse. The state's concerns are to provide care to those whose mental disorders render them unable to care for themselves and to protect both the community and the individuals themselves from dangerous manifestations of their mental illness.[12]

Similarly, the State of Alaska's goal in these proceedings, as stated in AS 47.30.655, is "protecting society from persons who are dangerous to others and protecting persons who are dangerous to themselves." There are of course, due process protections (such as the right to an attorney) built into the statutes because fundamental liberties are being curtailed.[13] However, the overarching goals of civil commitments are 1) that people who are mentally ill are treated in the least restrictive alternative available, 2) that treatment occurs as promptly as possible, and 3) that treatment improves the

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[11] The Alaska Supreme Court has awarded attorney's fees in certain probate proceedings in the event of fraud. *See Crittell v. Bingo*, 83 P.3d 532, 533, 536 (Alaska 2004). But that situation is readily distinguishable from that presented here in the civil commitment context, where the unique character and purpose of the proceedings dictate that Rule 82 fee awards are not appropriate. The inapplicability of *Crittell* is discussed more in the next subsection.

[12] *Goetz v. Crosson*, 967 F.2d 29, 34-35 (2d Cir. 1992).

[13] *Addington v. Texas*, 441 U.S. 418, 425 (1979); *Goetz*, 967 F.2d at 33; *Rappaport v. G.M.*, 657 N.Y.S. 2d 748, 749 (NY App. Div. 1997).

respondent's mental condition so that her liberty is curtailed to the least extent possible.[14] To award attorney's fees in civil commitments is simply "inconsistent with...the unique character and purpose of probate proceedings."[15]

In the closely analogous situation of CINA proceedings,[16] this Court, in *Cooper v. State*,[17] addressed the question of whether to award fees under Civil Rule 82. This Court found the party's claim to an award of Rule 82 fees (to pay her privately retained counsel) inconsistent with the important purposes underlying children's proceedings:

> Children in need of aid proceedings are intended to promote an important public interest: the welfare of children. Exposing the state to costs and attorney's fees when a child is ultimately determined not to be in need of aid would significantly chill the state's willingness to commence protective proceedings for children. Such a result is inconsistent with the purposes underlying children's proceedings.

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[14] AS 47.30.655.

[15] Alaska Rules of Probate Procedure 1(e). Wetherhorn spends much of her Brief essentially arguing an ineffective assistance of counsel claim not only on her behalf, but on behalf of "thousands" of people who have been involuntarily committed to API. At. Br. at 21. This appeal is *not* an ineffective assistance of counsel claim, nor is it a class-action suit, nor is it an appropriate forum in which to challenge the validity of the entirety of AS 47.30, *et seq*. Rather, this is merely an appeal of a decision not to grant attorney's fees. That is the only issue before the Court.

[16] As noted above, the CINA rules use the same language as the probate rules to address situations not covered by its rules. *See* CINA Rule 1(f), Probate Rule 1(e).

[17] 638 P.2d 174 (Alaska 1981).

> Accordingly, we reject [the mother]'s argument that the court erred in denying recompense for her costs and fees.[18]

The same sort of strong public policy considerations apply to civil commitments and under Probate Rule 1(e), justify the conclusion that Civil Rule 82 does not apply.

Cooper's reasoning that the state's ability to promote the welfare of children through CINA proceedings would be threatened by the imposition of Rule 82 fee liability[19] applies just as well to the state's role in civil commitment proceedings where the purpose is "protecting society from persons who are dangerous to others and protecting persons who are dangerous to themselves."[20] In either case, an award of fees under Civil Rule 82 against the "losing" party is inconsistent with the achievement of the public purposes of the proceedings.

In her brief, Wetherhorn does not address this aspect (or others) of the *Cooper* analysis. But *Cooper*, more than any other authority, provides the most insight into how to address the question of whether Civil Rule 82 fees are available in commitment proceedings. The nature of CINA proceedings is closely analogous to civil commitments. Both involve fundamental rights and liberties and countervailing strong public interests. That public interest, like the interest served in CINA proceedings, is

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18 *Cooper*, 638 P.2d at 178. The Court had also noted that there were no statutes specifically authorizing awards of attorney's fees in CINA proceedings, and that the Court itself had not promulgated any rules providing for such awards. *Id.* The *Cooper* Court further found that Civil Rule 82 did not apply to actions governed by the children's rules. *Id.* Finding that there was no applicable authorization for an award of fees, the Court found them properly denied. *Id.*

19 *Id.*

20 AS 47.30.655.

threatened by exposing the state to costs and attorneys fees. This exposure could have the same chilling effect that the court was concerned with in *Cooper* on the State's willingness to bring such actions. A system of shifting fees is ill-adapted to either setting. If Wetherhorn is correct that attorney's fees are permissible in civil commitments, then the state would be free to seek them from respondents who unsuccessfully challenge their commitment. Such a state of affairs would plainly not be compatible with the unique nature or purposes of the proceedings.[21]

C. *Crittell v. Bingo* Is Distinguishable from this Case

Wetherhorn relies heavily on the Supreme Court's decision in *Crittell v. Bingo*[22] upholding an award of Rule 82 fees in a matter governed by the Probate Rules to justify an award of such fees to her here. *See, e.g.*, At. Br. at 11. However, Wetherhorn's position ignores several critical differences between *Crittell* and this matter.

In *Crittell,* this Court properly concluded that "Rule 82 fees may be awarded under the probate code in cases of fraudulently brought claims."[23] In that case, it was well-established that the Crittells had acted fraudulently in claiming to represent the estate in a will contest.[24] In the usual case, where there are legitimate personal representatives involved in a good-faith will contest, a statute (AS 13.16.435) provides

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21 See Probate Rule 1(e).

22 83 P.3d 532 (Alaska 2004).

23 *Id.* at 533.

24 *Id.* at 536.

that reasonably necessary attorney's fees may be collected from the estate.[25] Because the Crittells' fraudulent conduct put them outside the scope of that statute, the Court concluded that Civil Rule 82 could be applied to charge fees to the Crittells.[26]

In reaching this conclusion, the Court relied on Probate Rule 1(e) which invites resort to the civil rules where the probate rules are silent.[27] But the Court never explicitly addressed the second sentence of the rule, which limits the use of such procedures to those that don't "interfere with the unique character and purpose of probate proceedings."[28] It probably did not mention that sentence because it was so plainly inapplicable. No reasonable court would find it necessary to protect those actors seeking to perpetrate a fraud in a will contest from the perils of a fee award. Such a case is the opposite of *Cooper*, as there is every reason to try to chill or deter such bad actors as the Crittells from the pursuit of fraudulent claims.[29] Such deterrence, rather than interfere with the purposes of the probate proceeding, would advance them. Thus it is no surprise

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25 *Id.*

26 *Id.*

27 As noted above, the text of Probate Rule 1(e) provides:

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.

28 *Id.*, *see also Crittell*, 83 P.3d at 535-36.

29 *See Cooper*, 638 P.2d at 178.

that the Court found Civil Rule 82 could be applied against the Crittells under Probate Rule 1(e).

The result in *Crittell* does not translate to the civil commitment setting, however. While there is no public policy reason to protect bad actors' unfettered opportunity to launch fraudulent will contests, there is a strong public interest in not chilling the state as it acts to protect those who are a danger to themselves or others through civil commitment proceedings. *See* discussion *supra I.B.*. The only thing *Crittell* has in common with this matter is that *Crittell* too fell under the probate rules. But even the nature of the action at issue in *Crittell* sets it apart, as a will contest is more akin to a traditional, private civil action. As demonstrated in the previous subsection, the obvious comparison for civil commitments is to CINA proceedings. For the same reasons that the Court found Civil Rule 82 fee awards are not appropriate in CINA cases, they are not appropriate in civil commitment proceedings.[30]

D. Applying Civil Rule 82's Fee Shifting Is Inconsistent With The Statutory Scheme For Payment of Appointed Counsel

Had Wetherhorn retained her appointed counsel, there would be no question that Civil Rule 82 did not apply because there is a statute that clearly governs

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30 *Id.*

attorney payment: AS 47.30.905(b).[31] Respondents in civil commitments are automatically appointed counsel.[32] Exc. 8. A financially able respondent is responsible for payment of her attorney regardless of the outcome of any proceedings.[33] If she cannot afford counsel, then the attorney's payment is dictated by Administrative Rule 12.[34]

Wetherhorn was appointed counsel in this proceeding, the Public Defender Agency. Exc. 13. Its payment is contemplated by AS 47.30.905(b) and Administrative Rule 12. If PsychRights, Wetherhorn's current counsel, were court-appointed, it would similarly be entitled to payment of attorney's fees under AS 47.30.905. However, Wetherhorn retained PsychRights on her own when she chose to substitute it for her

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[31] Civil Rule 82 applies "[e]xcept as otherwise provided by law." Civil Rule 82(a). *See also Enders v. Parker*, 66 P.3d 11, 17 (Alaska 2003) (If there is a specific statutory scheme for attorney's fees, Civil Rule 82 does not apply.); *Interior Cabaret, Hotel, Restaurant & Retailers Ass'n v. Fairbanks North Star Borough*, 135 P.3d 1000, 1002 (Alaska 2006). In the case of appointed counsel, there is clearly another law: AS 47.30.905. AS 47.30.905(b) states,

> 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 services shall be paid by the state.

Of course, as discussed above, there are other good reasons why Civil Rule 82 does not apply in civil commitment proceedings.

[32] Exc. 8. API is unaware of any situation in which the court makes an eligibility determination *before* the appointment of counsel. It seems to be the practice of the court to ensure a respondent has proper representation and then determine eligibility.

[33] AS 47.30.905(b)(1).

[34] *See also* AS 47.30.905(b)(2).

court-appointed counsel. Because Wetherhorn chose to have alternative counsel, she should remain responsible for payment.[35]

Though AS 47.30.905(b) is no longer technically applicable to Wetherhorn, there is no good public policy reason why the decision to substitute private counsel for appointed counsel should change her responsibility or trigger the fee shifting provisions of Civil Rule 82.[36] It should neither advantage nor disadvantage her (or the state) with regard to entitlement or exposure to a Rule 82 fee award.[37] The public policy expressed in AS 47.30.905(b), that all respondents have counsel but are responsible for their payment regardless of outcome (if financially able), should not be circumvented by the retention of private counsel. The mere existence of AS 47.30.905 is yet another indication that Civil Rule 82 is not consistent with civil commitment proceedings.

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[35] Similarly, even if acquitted of all charges, criminal defendants are responsible for paying their privately retained counsel.

[36] This situation is different from that in *Crittell,* where the Crittells were outside the reach of the fee statute due to their fraudulent conduct. *See* 83 P.2d at 536. In this case, there is no meaningful distinction between the respondents who keep their appointed counsel and those who, for reasons of their own, chose to retain substitute counsel.

[37] As discussed above, if a respondent can theoretically collect attorney's fees under Rule 82, she can also theoretically be liable for them if she does not prevail. Such a result does not make sense in the civil commitment context.

II. MS. WETHERHORN IS NOT THE PREVAILING PARTY IN THIS MATTER AND WOULD NOT BE ENTITLED TO CIVIL RULE 82 FEES—LET ALONE ENHANCED OR FULL FEES—EVEN IF THEY WERE AVAILABLE

A. Standard of Review

This Court reviews for abuse of discretion the superior court's finding of which party is the prevailing party for the purposes of an attorney's fee award.[38] Further, this Court has advised that "[p]revailing party determinations will ordinarily be overturned only if they are manifestly unreasonable."[39] More broadly, this Court "will overturn a superior court's award of attorney's fees only upon a showing of abuse of discretion or a showing that the award is manifestly unreasonable."[40]

B. Ms. Wetherhorn Did Not Prevail at Any Stage of This Proceeding

The superior court did not abuse its discretion in finding that even if Civil Rule 82 fees were available in the civil commitment setting (which they are not), Wetherhorn was not the prevailing party and thus would not be entitled to a fee award. *See* Exc. 112. Simply put, the 90-day petition was not dismissed because of anything that her attorney did to advance her case, but rather the petition was dismissed because Ms. Wetherhorn's condition had improved and she no longer met the commitment

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38 *Interior Cabaret, Hotel, Restaurant & Retailers Ass'n v. Fairbanks North Star Borough*, 135 P.3d 1000, 1002 (Alaska 2006).

39 *Id.*

40 *Int'l Seafoods of Alaska, Inc. v. Bissonette*, No. S-11568, 2006 WL 2522393, at *5 (Alaska September 1, 2006).

criteria.[41] Exc. 29. There is nothing manifestly unreasonable about the superior court's finding that Wetherhorn was not the prevailing party in that context.

API had successfully petitioned for a 30-day commitment and an order for medication. Exc. 14-18. It next filed a 90-day commitment petition. But before that petition could be heard, API discharged Ms. Wetherhorn. Exc. 29. She offers nothing but speculation to support the notion that anything other than her improved condition explains her early release.[42]

Certainly if API had gone forward with a jury trial when it no longer felt Ms. Wetherhorn met the commitment criteria, it would guilty of an unwarranted

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[41] *See* AS 47.30.780 (providing for early discharge if the respondent is no longer gravely disabled.) As discussed below, Wetherhorn continues to dispute that API no longer found she met commitment criteria. *See* At. Br. at 28. Instead, she believes that her attorney's appearance in the case and her demand for a jury trial were the seminal events that secured her release. In fact, this is part of the basis for her claim for fees under Civil Rule 95(a).

Contrary to Wetherhorn's suggestion, *See* At.Br. at 14, n.57, API did not argue that she was not the prevailing party simply because there was no court hearing on the 90-day petition, but because of the reason why there was no hearing: Ms. Wetherhorn's condition had improved enough to permit her release. Exc. 84.

[42] Wetherhorn claims that a doctor's note in her medical record indicating she has requested a jury trial is indicative of the fact that API was concerned about the strength of its case. At. Br. at 12. The note, at Exc. 109 and discussed in more detail below, in subsection III.B.2, is indicative of nothing beyond the fact that she requested a jury trial.

Wetherhorn's suggestion that she should be entitled to an evidentiary hearing on the question of her status as prevailing party should be rejected. *See* At. Br. at 13. Wetherhorn had the opportunity to make her case for attorney's fees below and provided substantial briefing, including over 400 pages of exhibits to support her claim. Exc. 34-39, 46-77, and 87-111; At. Br. at 8. The Superior Court did not abuse its discretion in concluding it had adequate information to make its decision and in rejecting Wetherhorn's request for an evidentiary hearing. Exc. 112.

infringement on her civil liberties. That did not happen. Thankfully, Ms. Wetherhorn's situation improved and API discharged her. Exc. 29.

Her discharge before the trial does not mean that API had improperly filed a petition for 90-day commitment, it only means that her condition improved to the point where API felt she no longer met commitment criteria. This turn of events does not make her a "prevailing" party. If anything, this can be considered a "win" for both sides, as Ms. Wetherhorn improved and the state no longer had concern for her well-being. Thus, even if Civil Rule 82 fees were applicable to the situation, which they are not for the reasons stated above in section I, Wetherhorn cannot claim them. Rule 82 fees are only available to a prevailing party, which Wetherhorn is not.

C. Because Civil Rule 82 Does Not Apply, Wetherhorn is Not Entitled to Enhanced Fees Under Civil Rule 82(b)(3)(E),(G),(H),(I), or (K), or Any Combination Thereof

The superior court did not abuse its discretion in refusing to consider Wetherhorn's claims to full or enhanced fees under Civil Rule 82.[43] Exc. 112. While Wetherhorn contends that the Superior Court's failure to address her argument for enhanced fees under Rule 82 was, "arbitrary, capricious, and manifestly unreasonable," At. Br. at 15, this is simply not true. The Superior Court properly found that Civil Rule 82 did not apply to involuntary commitments, and that in any event, Ms. Wetherhorn was not a prevailing party. Exc. 112. Therefore there was no reason for the court to address

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[43] Civil Rule 82 b(3) et seq. states,

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

the matter further: Wetherhorn was entitled to no fees, let alone enhanced or full fees.[44] However, the state will address each of Wetherhorn's arguments for enhanced fees under Civil Rule 82 briefly in turn.

1. Alaska Statue 82(b)(3)(E)- the attorney's efforts. Wetherhorn provided no information other than her counsel's entry of appearance and demand for a jury trial as justification for attorney's fees under this subsection. At. Br. at 16. Certainly, the time and effort PsychRights initially expended in this matter was minimal as it was Ms. Wetherhorn's own improvement that lead to her discharge from API and not the filing of paperwork by her attorney. Exc. 29. Wetherhorn speculates that the 90-day and medication petitions would have been granted at the originally scheduled hearing on May 3 had PsychRights not entered the case, thereby proving that it was PsychRights' efforts which secured her discharge. At. Br. at 13. This is pure conjecture on Wetherhorn's part and has no basis in fact. If anything, the facts indicate that had the hearing taken place on May 3, the petitions would have been granted because Ms. Wetherhorn still met the commitment criteria at that time, regardless of who represented her. Dr. Kiele's note written on May 6 indicates that while improving, she still met the commitment criteria on that day. Exc. 109. It was not until May 9 that API felt she no longer met the commitment criteria and released her. Exc. 29. But in any event, to

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[44] "An award of full attorney's fees is manifestly unjust in the absence of a finding of bad faith or vexatious conduct." *Crittell*, 83 P.3d at 537, fn. 20, citing *Marathon Oil Co. v. ARCO Alaska, Inc.*, 972 P.2d 595, 605 (Alaska 1999). There have been no such findings in this case.

suggest that a court should order enhanced fees based on conjecture over what *might* have happened at a hearing, had it been held on a particular day, is absurd.

2. Alaska Statute 82(b)(3)(G)- vexatious or bad faith conduct. Wetherhorn fails to point to any specific act on the part of API, which exhibits "vexatious or bad faith conduct." Rather, her argument is one challenging the validity of her entire stay at API. She charges API with a cavalier attitude towards civil commitments, but does not cite any specific examples other than challenging some wording in API's supplemental briefing. At. Br. at 16. Again, her argument for attorney's fees devolves into one challenging her commitment. At. Br. at 16-19. API is fully cognizant of the fundamental liberty interests at stake in civil commitments and nothing in the proceedings or pleadings below evidence any "vexatious or bad faith conduct."

3. Alaska Statute 82(b)(3)(H)-relationship between amount of work and the significance of the matters at stake. While civil commitments are serious matters, there is no relationship between the work PsychRights performed and Ms. Wetherhorn's discharge because her discharge was based on the fact she no longer met the commitment criteria. Exc. 29.

4. Alaska Statute 82(b)(3)(I)-extent to which fee may be onerous. The award of a fee would deter API from bringing petitions for the hundreds of patients it commits every year. It often happens that commitment petitions are filed, but the person regains sufficient health so they are discharged before the scheduled hearing.

Wetherhorn's situation is not unique in that regard. To award attorney's fees in all such cases would place a large and unwarranted burden on the State.[45]

5. Alaska Statue 82(b)(3)(K)-other equitable factors. Again, Wetherhorn's argument in support of an award under this subsection is based on her ineffective assistance of counsel claim. At. Br. at 21-25. However, it is unclear how this applies to the specific case at bar when she is clearly arguing throughout her brief that it was solely the work of her counsel that procured her release. She argues for attorney's fees under this subsection as a prospective incentive for better legal representation for other patients at API. *Id.* Dissatisfaction with the Public Defender is not a reason to justify enhanced attorney's fees.[46]

III. MS. WETHERHORN IS NOT ENTITLED TO FEES UNDER CIVIL RULE 95

A. Standard of Review

The Supreme Court reviews lower courts' decisions regarding the imposition of penalty fee awards under Civil Rule 95(a) for an abuse of discretion.[47]

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45 *Cf. Cooper*, 638 P.2d at 178.

46 Wetherhorn requests this Court award attorney's fees to all respondents not represented by the Public Defender Agency on the theory that they are public interest litigants. Exc. 22. As she admits, it is unlikely that individually, the majority of respondents would meet the criteria for public interest litigants. *Id.* To make the state liable for such fees based on one person's dissatisfaction with the Public Defender Agency is unreasonable and if granted, would certainly hamper its willingness to petition for involuntary commitments. *See Cooper*, 638 P.2d at 178.

47 *In Re Schmidt*, 114 P.3d 816, 819-20 (Alaska 2005).

B. Ms. Wetherhorn fails to demonstrate any violation of court rules that would justify the award of attorney's fees as a penalty

In addition to requesting fees pursuant to Civil Rule 82, Ms. Wetherhorn moved for attorney's fees under Civil Rule 95(a). Civil Rule 95(a) only allows fees if there has been an "infraction of these rules."[48] Ms. Wetherhorn argues that API violated Civil Rule 11 by misrepresenting the law and misstating facts. At. Br. at 26. As the superior court properly found, Exc. 112, and as demonstrated below, this is not the case.

1. API's reasonable interpretation of the Supreme Court's decision in *Cooper* did not amount to a violation of Civil Rule 11 or warrant the award Rule 95 fees.

Ms. Wetherhorn argues "API violated Civil Rule 11's requirement that signing a pleading constitutes a certificate that its Supplemental Reply was warranted by existing law." At. Br. at 27. But there was no rule violation because API's supplemental briefing was warranted by existing law, as discussed below. The purported rule violation Wetherhorn complains of is no more than a disagreement between the parties over the interpretation of a case. More specifically, Wetherhorn contends that API violated Civil Rule 11 when it stated,

> 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.

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[48] *See also, In Re Schmidt*, 114 P.3d at 820.

At. Br. at 27, Exc.81.[49] But this statement was a reasonable distillation of the court's analysis.

Under AS 09.06.010, fees could be awarded only if allowed by statute or court rule. The Court in *Cooper* found neither of those statutory conditions were satisfied and that the superior court thus lacked authority to award fees.[50] Accordingly, there is nothing objectionable about the statement quoted.

Wetherhorn's disagreement with API's interpretation of *Cooper* in the briefing below does not justify a penalty fee award. If such fees were awarded every time there was a disagreement between parties regarding the interpretation and application of statutes and case law, litigation would be prohibitively expensive.[51] It is ridiculous to suggest that this sort of disagreement regarding the interpretation of caselaw is of such an egregious nature that it warrants sanctions. The superior court did not abuse its discretion in refusing to find such conduct sanctionable.[52] *See* Exc. 112.

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49 While on appeal Wetherhorn is focused on *Cooper*, below, Wetherhorn had disputed API's interpretation of *Crittell*. Exc. 49-50. Wetherhorn no longer characterizes API's interpretation of *Crittell* as a rule violation that requires enhanced fees under Rule 82. A failure to argue a point constitutes an abandonment of it. *See State v. O'Neil Investigations, Inc.*, 528 P.2d 520, 528 (Alaska 1980). *See also Kizel v. Discovery Drilling, Inc.*, 93 P.2d 427 (Alaska 2004) (issues not briefed on appeal are considered waived); *Great Divide Ins. Co. v. Carpenter ex rel. Reed*, 79 P.3d 599, 608 n. 3 (Alaska 1991).

50 *Cooper*, 638 P.2d at 178.

51 Of course one of the main reasons there is litigation is that parties disagree in their interpretation of the law. Even the members of this Court sometimes disagree as to the proper interpretation of the law.

52 *See In Re Schmidt*, 114 P.3d at 819-20.

2. API does not misrepresent facts when it asserts that Ms. Wetherhorn did not meet commitment criteria when she was discharged on May 9, 2005.

Additionally, Wetherhorn claims that API's statement that she no longer met the commitment criteria at the time of her discharge is a "blatant" misstatement of the facts. At. Br. at 28. Instead, she argues that it was a combination of her new attorney and her demand for a jury trial that caused API to release her before the trial could begin. *Id.* However, she presents no meaningful evidence to support her conclusion that it was her counsel's efforts which lead to her discharge.

Wetherhorn claims that Dr. Kiele's note in her record that she demanded a jury trial is indicative of these "efforts." Exc. 109; At. Br. at 26. However, as stated above, this notation is indicative of nothing beyond the fact that she requested a jury trial. In fact, Dr. Kiele's complete note gives the impression that Ms. Wetherhorn's condition was improving, although the doctor was concerned about finding a safe place for her to go after discharge as he still had concerns regarding her insight and judgment. Exc. 109. His note indicates that the plan for her care was to "Advance to level 3. Continue present care otherwise, while we work aggressively toward placement." Exc. 109. The note is in no way indicative that her attorney's "efforts" were the reason for her eventual discharge. If anything, it indicates that it was API's own efforts that promoted Ms. Wetherhorn's release. Wetherhorn cites no other facts to support her version of events.[53]

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[53] The superior court's finding that Wetherhorn was not the prevailing party was also by necessity a rejection of her version of the events surrounding her discharge. *See* Exc. 112.

After Ms. Wetherhorn's discharge, API filed a form "Notice of Release" on May 11, 2005. Exc. 29. On this form, there are three choices the hospital can elect: (1) "Release after Evaluation;" (2) "Release After Commitment Period;" or (3) "Certificate of Early Discharge." *Id.* While it is the third section that specifically mentions that the patient is no longer gravely disabled or likely to harm themselves or others, Ms. Wetherhorn was released pursuant to option (2) "Release After Commitment Period." *Id.*

This election does not mean that Ms. Wetherhorn was discharged for reasons other than no longer meeting commitment criteria, as the commitment criteria are more extensive than solely whether or not a person is gravely disabled or likely to harm themselves or others.[54] If a patient voluntarily accepts, a commitment can be avoided, or presumably ended, if there is a viable less restrictive alternative available.[55] As Dr. Kiele's record notation indicated, Ms. Wetherhorn's condition had improved enough to consider a less restrictive alternative which would permit her release. *See* Exc. 109. There is no reason to doubt that her prospects had continued to improve and resulted in her ultimate discharge.[56]

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[54] The commitment criteria are that the patient is 1) mentally ill and 2) as a result gravely disabled or likely to harm herself or others; 3) treatment is likely to be of benefit; and 4) there are no less restrictive alternative placements. See AS 47.30.730; 47.30.735.

[55] *Id.*

[56] Wetherhorn essentially challenges the integrity of the Assistant Attorney General who handled this case below by suggesting that he acted without a proper investigation of the facts. At. Br. at 28. This is wholly unwarranted. As shown throughout this pleading, API's position is grounded in fact. Wetherhorn is the one relying on no more than conjecture.

Moreover, the second choice on the form was the one most applicable to Ms. Wetherhorn's situation. On May 9, the date of discharge, Ms. Wetherhorn had been in the hospital longer than 30 days (even though she was not committed until April 15). Exc. 5, 14-15. The hospital noted on the Notice of Release that it had filed the 90-day and accompanying medication petitions on April 27, 2005. Exc. 29. Because there was an outstanding petition for commitment, the only logical reason why API would release Ms. Wetherhorn at the end of her 30-day commitment is that it felt she no longer met the commitment criteria. If it released her for any other reason, it could be liable if any ill befell her.

Thus, API's representation of the facts is well-grounded in the record and reason and does not constitute a violation of Rule 11 which would allow the superior court to order Rule 95(a) fees for the benefit of Wetherhorn.

CONCLUSION

For the foregoing reasons, API asks this Court to uphold the court's order denying any attorney's fees.

DATED at Anchorage, Alaska, this 13th day of October, 2006.

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