

Law Project for Psychiatric Rights
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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

ETTA BAVILLA,)
)
 Plaintiff,)
)
)
 ALASKA DEPARTMENT OF)
 CORRECTIONS,)
)
 Defendant.)
)

Case No. 3AN 04-5802 CI

MOTION FOR RECONSIDERATION

COMES NOW, Plaintiff Etta Bavilla, by and through her attorney and, pursuant to Civil Rule 77(k)(1)(i), (ii) & (iii), hereby moves for reconsideration of this Court's July 23, 2004, Order Granting the Alaska Department of Correction's (Corrections) Motion to Dismiss, which was distributed by mail on July 26, 2004. This motion is accompanied by a Contingent Motion for Injunctive Relief Pending Appeal.

In dismissing the complaint, the Court overlooked or misconceived the material fact¹ that, contrary to Corrections' assertion, this action is not one under 42 U.S.C. §1983. As pointed out in Ms. Bavilla's Opposition to the Motion to Dismiss (Opposition) this is an action for declaratory and injunctive relief under the United States and Alaska

Constitutions. Corrections said it was a 42 U.S.C. § 1983 action in order to make its argument for dismissal, but saying that doesn't make it so. This misrepresentation by Corrections was pointed out in the Opposition and since the Court failed to address it, it has been overlooked or misconceived.

The Court also overlooked, misapplied or failed to consider the directly controlling case² of *Vest v. Schafer*, 757 P.2d 588, 594 (Alaska 1988), in which the Alaska Supreme Court held, "When a court finds a statute unconstitutional, the traditional remedy is declaratory or injunctive relief." This was pointed out in the Opposition and since the Court failed to address it, it has been overlooked or misapplied or the Court failed to consider it.

The Court has also overlooked or misconceived the material question³ that a complaint should be dismissed only when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Guerrero v. Alaska Housing Finance Corporation*, 6 P.3d 250, 253-4 (Alaska 2000). This was pointed out in the Opposition and since the Court failed to address it, it was overlooked or misconceived. Perhaps there is some other reason for the dismissal than the clearly flawed one that the complaint was one under 42 U.S.C §1983. If so, the Court should identify it and give Ms. Bavilla a chance to address it through amendment or otherwise.

¹ Grounds for reconsideration under Civil Rule 77 (k)(1) (ii).

² Grounds for reconsideration under Civil Rule 77 (k)(1) (i).

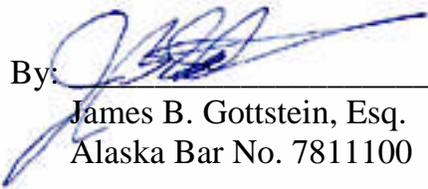
³ Grounds for reconsideration under Civil Rule 77 (k)(1) (iii).

C.f., Standard Alaska Production Co. v. Alaska Department of Revenue, 773 P.2d 201, 204-5 (Alaska 1989); and *Clary v. Stack Steel Co.*, 611 P.2d 80, 82 (Alaska 1980).

For the foregoing reasons, Ms. Bavilla respectfully urges the court to grant reconsideration and re-instate the complaint in this matter.

Dated this 28th day of July, 2004, at Anchorage, Alaska.

LAW PROJECT FOR PSYCHIATRIC RIGHTS

By: 

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