

IN THE SUPREME COURT FOR THE STATE OF ALASKA

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

BRIEF OF APPELLANT

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the State of Alaska, this _____
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Table of Contents

Table of Contents	i
Table of Cases, Statutes and Other Authorities	ii
Constitutional Provisions, Statutes, Court Rules, Ordinances and Regulations Principally Relied Upon	iii
Jurisdictional Statement	1
Parties	1
Statement of Issues Presented	1
Statement of the Case.....	1
I. Brief Description of Case.....	1
II. Course of Proceedings.....	3
III. Facts	4
Standard of Review	4
Argument	4
I. Summary of Argument.....	4
II. The Court Erred in Dismissing the Complaint for Lack of a Case or Controversy.....	5
A. The Alaska Declaratory Judgment Act is to Be Construed Liberally to Achieve the Act's Remedial Purposes.	5
B. The Superior Court's Mistake of Law Mandates Reversal.....	7
C. This Case Presents an Important Matter of Public Policy that Should be Decided.....	15
III. Summary Judgment Should Be Granted	16
Conclusion	19

Table of Cases, Statutes and Other Authorities

CASES

<i>Alaska Community Colleges' Federation Of Teachers v. University Of Alaska</i> , 677 P.2d 886, 889 (Alaska 1984)	15
<i>Brause v. State of Alaska</i> , 21 P.3d 357 (Alaska 2001)	4, 6
<i>Central Bering Sea Fishermen's Ass'n. v. Anderson</i> , 54 P.3d 271 (Alaska,2002).....	18
<i>City of Kenai v. Ferguson</i> , 732 P.2d 184 (Alaska 1987)	18
<i>Electronics for Imaging, Inc., v. Coyle</i> , 394 F.3d 1341 (CA Fed 2005).....	7
<i>Ford v. Ford</i> , 68 P.3d 1258 (Alaska 2003)	14, 17
<i>Hawken Northwest, Inc., v. Alaska Dep't of Administration</i> , 76 P.3d 371, 381 (Alaska 2003)	17
<i>Holderness v. State Farm Fire & Casualty Company</i> , 24 P.3d 1235 (Alaska 2001)	4
<i>Jefferson v. Asplund</i> , 458 P.2d 995 (Alaska 1969)	5, 6
<i>Kodiak Island Borough v. Exxon Corp.</i> , 991 P.2d 757 (Alaska 1999)	4
<i>Thomas v. Anchorage Equal Rights Commission</i> , 102 P.3d 937 (Alaska 2004).....	6
<i>Treacy v. Municipality of Anchorage</i> , 91 P.3d 252 (Alaska 2004).....	4, 17
<i>United Services Automobile Association v. Pruitt</i> , 38 P.3d 528 (Alaska 2001)	17
<i>Verizon Communications, Inc., v. Inverizon International, Inc.</i> , 295 F.3d 870 (CA8 2002)	7, 15
<i>Weiss v. State</i> , 939 P.2d 380 (Alaska 1997).....	passim

STATUTES

AS 22.05.010(a)	1
AS 22.10.020(g)	passim
AS 44.21.230.....	9
AS 44.29.140.....	11
AS 47.30.036.....	12, 13
AS 47.30.660.....	11
Chapter 1, SSSLA 1994	9
Chapter 181 SLA 1978.....	16
Chapter 182 SLA 1978.....	16
Chapter 2, SSSLA 1994	9
Chapter 5 FSSLA 1994	9, 11, 12
Chapter 6 FSSLA 1994	9
Pub. L. No. 84-830, 70 Stat. 709 (1956), Section 202(e)	1

RULES

Civil Rule 56(c).....	17
Civil Rule 60(b).....	15
Civil Rule 60(b)(6).....	15, 16

**Constitutional Provisions, Statutes, Court Rules, Ordinances and
Regulations Principally Relied Upon**

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.

AS 44.21.230

- (a) The [Alaska C]ommission [on Aging] shall
- (1) approve a comprehensive statewide plan that identifies the concerns and needs of older Alaskans and, with reference to the approved plan, prepare and submit to the governor and legislature an annual analysis and evaluation of the services that are provided to older Alaskans;
 - (2) make recommendations directly to the governor and the legislature with respect to legislation, regulations, and appropriations for programs or services that benefit older Alaskans;
 - (3) encourage the development of municipal commissions serving older Alaskans and community-oriented programs and services for the benefit of older Alaskans;
 - (4) employ an executive director who serves at the pleasure of the commission;
 - (5) help older Alaskans lead dignified, independent, and useful lives;
 - (6) request and receive reports and audits from state agencies and local institutions concerned with the conditions and needs of older Alaskans;
 - (7) with the approval of the commissioner of administration, set policy for the administration of federal programs subject to state control as provided under 42 U.S.C. 3001 - 3058ee (Older Americans Act), as amended, and evaluate grant applicants and make grant awards under those programs;
 - (8) with the approval of the commissioner of administration, set policy for the administration of state programs as provided under AS 47.65 and evaluate grant applicants and award grants under those programs;
 - (9) give assistance, on request, to the senior housing office in the Alaska Housing Finance Corporation in administration of the senior housing loan program under AS 18.56.710 - 18.56.799 and in the performance of the office's other duties under AS 18.56.700 ; and

(10) provide to the Alaska Mental Health Trust Authority, for its review and consideration, recommendations concerning the integrated comprehensive mental health program for persons who are described in (d) of this section and the use of the money in the mental health trust settlement income account in a manner consistent with regulations adopted under AS 47.30.031.

(b) To accomplish its duties, the commission may

- (1) review, evaluate, and comment upon state programs concerned with the problems and the needs of older Alaskans;
- (2) collect facts and statistics, and make studies of conditions and problems pertaining to the employment, health, housing, financial security, social welfare, and other concerns that bear upon the well-being of older Alaskans;
- (3) provide information about public programs that would be of interest or benefit to older Alaskans;
- (4) appoint special committees, which may include persons who are not members of the commission, to complete necessary studies;
- (5) promote community education efforts regarding the problems and concerns of older Alaskans;
- (6) contract for necessary services;
- (7) consult and cooperate with persons, organizations, and groups interested in or concerned with programs of assistance to older Alaskans;
- (8) advocate improved programs of benefit to older Alaskans;
- (9) set standards for levels of services for older Alaskans for programs administered by the commission; and
- (10) adopt regulations necessary for the administration of AS 44.21.200 - 44.21.240 and to comply with federal law.

(c) The commission may not investigate, review, or undertake any responsibility for the longevity bonus program under AS 47.45 or the Alaska Pioneers' Homes under AS 47.55.

(d) When the commission formulates a comprehensive statewide plan under (a) of this section, it shall include within the plan specific reference to the concerns and needs of older Alaskans who have a disorder described in AS 47.30.056 (b)(4).

AS 44.29.140

(a) The [Advisory Board On Alcoholism and Drug Abuse] shall

(1) act in an advisory capacity to the legislature, the governor, and state agencies in the following matters:

(A) special problems affecting mental health that alcoholism or drug abuse may present;

(B) educational research and public informational activities in respect to the problems presented by alcoholism or drug abuse;

(C) social problems that affect rehabilitation of alcoholics and drug abusers;

(D) legal processes that affect the treatment and rehabilitation of alcoholics and drug abusers;

(E) development of programs of prevention, treatment, and rehabilitation for alcoholics and drug abusers; and

(F) evaluation of effectiveness of alcoholism and drug abuse programs in the state;

(2) provide to the Alaska Mental Health Trust Authority for its review and consideration recommendations concerning the integrated comprehensive mental health program for the people who are described in AS 47.30.056(b)(3), and concerning the use of money in the mental health trust settlement income account in a manner consistent with regulations adopted under AS 47.30.031.

(b) The board is the planning and coordinating body for purposes of federal and state laws relating to alcohol, drug, and other substance abuse prevention and treatment services.

(c) The board shall prepare and maintain a comprehensive plan of services

(1) for the prevention and treatment of alcohol, drug, and other substance abuse; and

(2) for persons described in AS 47.30.056(b)(3).

AS 47.30.660

The [Alaska Mental Health Board] is the state planning and coordinating body for the purpose of federal and state laws relating to mental health services for persons with mental disorders identified in AS 47.30.056

(b)(1). On behalf of those persons, the board shall

(1) prepare and maintain a comprehensive plan of treatment and rehabilitation services;

(2) propose an annual implementation plan consistent with the comprehensive plan and with due regard for the findings from evaluation of existing programs;

(3) provide a public forum for the discussion of issues related to the mental health services for which the board has planning and coordinating responsibility;

- (4) advocate the needs of persons with mental disorders before the governor, executive agencies, the legislature, and the public;
- (5) advise the legislature, the governor, the Alaska Mental Health Trust Authority, and other state agencies in matters affecting persons with mental disorders, including, but not limited to,
 - (A) development of necessary services for diagnosis, treatment, and rehabilitation;
 - (B) evaluation of the effectiveness of programs in the state for diagnosis, treatment, and rehabilitation;
 - (C) legal processes that affect screening, diagnosis, treatment, and rehabilitation;
- (6) provide to the Alaska Mental Health Trust Authority for its review and consideration recommendations concerning the integrated comprehensive mental health program for those persons who are described in AS 47.30.056 (b)(1) and the use of money in the mental health trust settlement income account in a manner consistent with regulations adopted under AS 47.30.031; and
- (7) submit periodic reports regarding its planning, evaluation, advocacy, and other activities.

AS 47.30.036(3)

The [Mental Health Trust Authority] shall

* * *

- (3) review and consider the recommendations submitted under AS 44.21.230(a)(10), AS 44.29.140 (2), AS 47.30.666 (6), and AS 47.80.090(13);

Jurisdictional Statement

This appeal is brought by Katsumi Kenaston, plaintiff below before the Superior Court, Third Judicial District at Anchorage, under Case No. 04-3485 CI, on a complaint for declaratory judgment under the Alaska Declaratory Judgment Act, AS 22.10.020(g). Appellants appeal to the Alaska Supreme Court from that certain Order Dismissing Amended [sic] Complaint,¹ reconsideration denied July 19, 2004. [Exc. 353]. Notice of Appeal was timely filed on August 11, 2004. This court has jurisdiction over this appeal pursuant to AS 22.05.010(a)&(b).

Parties

All of the parties are listed in the caption

Statement of Issues Presented

1. Did the Superior Court err in dismissing this case for lack of a case or controversy?
2. Did the Superior Court err in failing to grant Appellant's motion for summary judgment?

Statement of the Case

I. Brief Description of Case.

Appellant, Katsumi Kenaston, is a beneficiary of the trust (Trust) created under the Alaska Mental Health Enabling Act (AMHEA), Pub. L. No. 84-830, 70 Stat. 709 (1956), Section 202(e), and the settlement of litigation arising therefrom (Settlement). The Settlement arose out of the class action lawsuit filed in 1982, *Weiss et. al, v. State of*

Alaska, 4FA 82-2208 Civil, approved by the Superior Court in 1994, and upheld on appeal by this Court in *Weiss v. State*, 939 P.2d 380 (Alaska 1997).

The mental health trust lands litigation was massive and disruptive to the state, including the issuance of a preliminary injunction against the state from further disposals of Trust land without further order of the court and casting a cloud upon the title of land conveyed to thousands of Alaskans in breach of trust. [Exc. 101-111, 108].

During the course of that litigation, four groups of Trust beneficiaries were defined, to wit residents of Alaska who are:

1. mentally ill;
2. mentally defective or retarded;
3. chronically alcoholic suffering from psychoses; or
4. senile and as a result of such senility suffer major mental illness.

[Exc. 196].²

Among the terms of the Settlement, four state boards, to wit: (1) the Alaska Mental Health Board, (2) the Governor's Council on Disabilities and Special Education, (3) the Advisory Board on Alcohol and Drug Abuse, and (4) the Alaska Commission on Aging (Four Boards) are mandated to perform certain functions and fulfill certain duties as material terms of the Settlement. [Exc. 91-6].

(Continued footnote)-----

¹ [Exc. 1-4].

² In addition, the definition includes, "such other persons needing mental health services as the legislature may determine." *Id.*

During 2003, due to funding cuts to the Four Boards' budgets and a hiring freeze that prevented the hiring of an Executive Director for one of the Four Boards, the question arose whether or not adequate funding and adequate opportunity to perform their settlement mandated duties are implied material terms of the Settlement. [Exc. 3].

This lawsuit was commenced under the Alaska Declaratory Judgment Act, AS 22.10.020(g), seeking such a determination. [Exc. 1-4]. The State argued there was no case or controversy because it is a political decision how much to fund the Four Boards and no breach was alleged. [Exc. 5-19, 301-309]. The Superior Court dismissed on that basis. [Tr. 25-27, Exc. 350, 353].

II. Course of Proceedings.

The Complaint in this matter was filed January 12, 2004. [Exc. 1-4]. The State moved to dismiss on February 23, 2004. [Exc. 5-19]. Ms. Kenaston opposed the motion to dismiss and filed a motion for summary judgment on February 25, 2004. [Exc. 84-87, 88-98, respectively]. The State filed a cross motion for summary judgment on March 11, 2004. [Exc. 301-309].

Oral Argument was held June 21, 2004, at the conclusion of which the Superior Court announced its ruling that the case would be dismissed for lack of a case or controversy. [Tr. 25-27]. This was followed by an Order Dismissing Amended [sic]³ Complaint on July 7, 2004. [Exc. 350]. Reconsideration was sought on July 19, 2004, and denied on July 21, 2004. [Exc. 351-2 & 353, respectively]. This appeal followed.

³ The Complaint was never amended.

III. Facts

This case completely involves the interpretation of the Settlement as a matter of law, and there are no other "facts" involved in the sense of testimony, etc., disputed or otherwise. In addition to the facts recited above, any additional relevant facts are contained in the appropriate argument sections pursuant to Appellate Rule 212(c)(1)(G).

Standard of Review

This Court exercises its independent judgment with respect to issues of statutory construction and contract interpretation. *Holderness v. State Farm Fire & Casualty Company*, 24 P.3d 1235, 1237-8 (Alaska 2001). In answering questions of law, this Court applies its independent judgment and adopts "the rule of law that is most persuasive in light of precedent, reason, and policy." *Kodiak Island Borough v. Exxon Corp.*, 991 P.2d 757, 759 (Alaska 1999). This Court reviews a dismissal of a declaratory judgment action for abuse of discretion. *Brause v. State of Alaska*, 21 P.3d 357, 358 (Alaska 2001). This Court reviews grants and denials of motions for summary judgment *de novo*. *Treacy v. Municipality of Anchorage*, 91 P.3d 252 (Alaska 2004).

Argument

I. Summary of Argument

The Superior Court's dismissal of the complaint for failure to satisfy the case or controversy requirement was based on the flawed premise that the rights of the beneficiaries of the Trust under the Settlement are subject to political whim. They are not; they are contractual rights and the complaint sought a declaratory judgment as to the extent of those rights. The Superior Court clearly erred on this as a matter of law. In

addition, the Superior Court failed to properly consider the benefit (or avoidance of harm) that issuing a declaratory judgment can provide.

If the Court determines the dismissal of this action should be reversed, because there are no disputed facts or even legal issues, this Court should rule on the merits.

II. The Court Erred in Dismissing the Complaint for Lack of a Case or Controversy.

A. The Alaska Declaratory Judgment Act is to Be Construed Liberally to Achieve the Act's Remedial Purposes.

The Alaska Declaratory Judgment Act, currently codified at AS 22.10.020(g), provides:

(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.

This Court extensively discussed the history, source, purpose and administration of the Alaska Declaratory Judgment Act in *Jefferson v. Asplund*, 458 P.2d 995 (Alaska 1969).⁴

This Court held that because the Alaska Declaratory Judgment Act states the Superior Court may declare the parties' rights, "judicial discretion was intended to play a significant role" in its administration. *Id.*, at 997 This Court also cited the following passage from J. Moore, *Federal Practice* with approval:

⁴ The Alaska Declaratory Judgment Act was codified at AS 22.10.020(b) at that time.

[T]he exercise of this discretion is to be in accordance with established principles, and is to be liberally exercised in achieving the Act's remedial objectives.

Id., 458 P.2d at 999.

This Court also stated that while it was making no comment on it, "that in Professor Moore's view:"

in reviewing the trial court's exercise of discretion to grant or refuse declaratory relief, a sound position is that the appellate court may substitute its judgment for that of the lower court. The determination of the trial court may, therefore, be reversed where, though not arbitrary or capricious, it was nevertheless erroneous. This view of the appellate court's power to review and reverse the action of the trial court in respect to its discretionary power to grant or refuse declaratory relief permits greater uniformity than would otherwise be possible

Jefferson, 458 P.2d at 998. This Court then reversed the dismissal of the complaint.

In *Brause*, *supra.*, and most recently, in *Thomas v. Anchorage Equal Rights Commission*, 102 P.3d 937, n3 (Alaska 2004), this Court stated the standard of review regarding whether to dismiss a declaratory judgment action on justiciability grounds was abuse of discretion. Counsel has not, however, found a case from this Court where the general parameters of such discretion are discussed other than in *Jefferson*, *supra.*, quoted above that, "the exercise of this discretion is to be in accordance with established principles, and is to be liberally exercised in achieving the Act's remedial objectives."

Thus, perhaps, this Court may find useful the Eighth Circuit Court of Appeals formulation, which it recently had occasion to describe with respect to the abuse of discretion standard in a declaratory judgment action:

[W]hen we say that a decision is discretionary, or that a district court has discretion to grant or deny a motion, we do not mean that the district

court may do whatever pleases it. The phrase means instead that the court has a range of choice, and that its decision will not be disturbed as long as it stays within that range and is not influenced by any mistake of law. An abuse of discretion, on the other hand, can occur in three principal ways: when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment.

Verizon Communications, Inc., v. Inverizon International, Inc., 295 F.3d 870, 872-3 (CA8 2002).

In the Eighth Circuit's formulation, a threshold issue is whether the exercise of discretion was "not influenced by any mistake of law." *Id.* In other words, any exercise of discretion must be reversed if it is based on a mistake of law. Accord: *Electronics for Imaging, Inc., v. Coyle*, 2005 WL 17854, 394 F.3d 1341 (CA Fed 2005). In *Verizon*, such a mistake of law is a threshold question before the issue of discretion is even reached, while in *Electronics for Imaging*, such a mistake establishes an abuse of discretion. In both cases, however, a dismissal of a declaratory judgment action based on a mistake of law mandates reversal.

Such a mistake of law unquestionably occurred here.

B. The Superior Court's Mistake of Law Mandates Reversal.

This litigation was commenced to obtain a declaratory judgment that adequate funding and opportunity for the Four Boards to perform the functions and duties mandated by the Settlement are implied material terms of the Settlement.

The provisions of the Settlement are contained not only in the June 10, 1994, settlement agreement (Settlement Agreement),⁵ but also the Superior Court's Preliminary and Final Approval decisions, the Superior Court's December 13, 1994, Order dismissing 4FA 82-2208 Civil with prejudice (Dismissal Order),⁶ and this Court's decision in *Weiss v. Alaska*, (939 P.2d 380 (Alaska 1997)) (*Weiss II*).⁷

Article VI, Section 5, of the Settlement Agreement specifically provides that the provisions of Sections 2 through 9, 12 through 40 (a) and (b), 41, 43, 46, 47, 49, 50 and

⁵ [Exc. 28-62].

⁶ [Exc. Exc. 99-157, 158-295, 296-299, respectively].

⁷ In its Preliminary Approval Decision, for example, the Superior Court identified a number of problems that it indicated could prevent final approval of the proposed settlement. [Exc. 156]. Subsequent to this, the settlement legislation was amended to address some of the Superior Court's concerns to wit: Chapters 1 and 2 of SSSLA 1994, and the State made certain representations to the Superior Court which were relied upon in granting settlement approval and incorporated into the Settlement. More specifically, and as relevant here, in its Final Approval Decision, the Superior Court in § V.c., Exc. 56-59, discussed how the problems with the proposed settlement had or had not been addressed, and at Exc. 282, n. 107, discussed the consequences if the State exercised its power to breach the Settlement.

[T]he State has specifically agreed in the Settlement Agreement not to oppose a new action brought by plaintiffs under Rule 60(b) for relief from judgment in the event of a material breach of the Agreement.

When the appellants pointed out in the appeal of the settlement's approval to this Court that this is not what the Settlement Agreement actually provides, this Court addressed this by specifically holding Civil Rule 60(b) is available to the beneficiaries of the Trust in the event of a material breach. *Weiss II* at 396-7.

There are other situations where the subsequent decisions of the Superior Court and this Court interpreted the Settlement Agreement and/or relied on the representations of the State regarding the Settlement in ways that are not encompassed by the language of the Settlement Agreement. Thus, the terms of the Settlement are contained not only in the June 10, 1994, Settlement Agreement (Settlement Agreement), but also in *Weiss II*, the Preliminary and Final Approval Decisions of the Superior Court and the December 13, 1994, Order dismissing 4FA 82-2008 Civil with prejudice.

51 of HB 201 (enacted as Chapter 5 FSSLA 1994) and Sections 1 and 2 of HB 371 (enacted as Chapter 6 FSSLA 1994) constitute material terms of the Settlement. [Exc. 41-42].

The Dismissal Order specifically provides, among other things that Sections 2 through 9, 12 through 40(a) and (b), 41, 43, 46, 49, 50, and 51 of Chapter 5, FSSLA 1994, as amended by Chapter 1, SSSLA 1994, are incorporated into and are material terms of the settlement and that Chapter 6, FSSLA 1994, as amended by Chapter 2, SSSLA 1994, is also a material term of the Settlement. [Exc. 296].

Sections 19 and 20 of Chapter 5, FSSLA 1994, which are specifically incorporated as material to the Settlement as set forth above, codified and amended AS 44.21.230 to provide:

- (a) The [Alaska C]ommission [on Aging] shall
 - (1) approve a comprehensive statewide plan that identifies the concerns and needs of older Alaskans and, with reference to the approved plan, prepare and submit to the governor and legislature an annual analysis and evaluation of the services that are provided to older Alaskans;
 - (2) make recommendations directly to the governor and the legislature with respect to legislation, regulations, and appropriations for programs or services that benefit older Alaskans;
 - (3) encourage the development of municipal commissions serving older Alaskans and community-oriented programs and services for the benefit of older Alaskans;
 - (4) employ an executive director who serves at the pleasure of the commission;
 - (5) help older Alaskans lead dignified, independent, and useful lives;
 - (6) request and receive reports and audits from state agencies and local institutions concerned with the conditions and needs of older Alaskans;
 - (7) with the approval of the commissioner of administration, set policy for the administration of federal programs subject to state control as provided under 42 U.S.C. 3001 - 3058ee (Older Americans Act), as amended, and evaluate grant applicants and make grant awards under those programs;

- (8) with the approval of the commissioner of administration, set policy for the administration of state programs as provided under AS 47.65 and evaluate grant applicants and award grants under those programs;
- (9) give assistance, on request, to the senior housing office in the Alaska Housing Finance Corporation in administration of the senior housing loan program under AS 18.56.710 - 18.56.799 and in the performance of the office's other duties under AS 18.56.700; and
- (10) provide to the Alaska Mental Health Trust Authority, for its review and consideration, recommendations concerning the integrated comprehensive mental health program for persons who are described in (d) of this section and the use of the money in the mental health trust settlement income account in a manner consistent with regulations adopted under AS 47.30.031 .

(b) To accomplish its duties, the commission may

- (1) review, evaluate, and comment upon state programs concerned with the problems and the needs of older Alaskans;
- (2) collect facts and statistics, and make studies of conditions and problems pertaining to the employment, health, housing, financial security, social welfare, and other concerns that bear upon the well-being of older Alaskans;
- (3) provide information about public programs that would be of interest or benefit to older Alaskans;
- (4) appoint special committees, which may include persons who are not members of the commission, to complete necessary studies;
- (5) promote community education efforts regarding the problems and concerns of older Alaskans;
- (6) contract for necessary services;
- (7) consult and cooperate with persons, organizations, and groups interested in or concerned with programs of assistance to older Alaskans;
- (8) advocate improved programs of benefit to older Alaskans;
- (9) set standards for levels of services for older Alaskans for programs administered by the commission; and
- (10) adopt regulations necessary for the administration of AS 44.21.200 - 44.21.240 and to comply with federal law.

(c) The commission may not investigate, review, or undertake any responsibility for the longevity bonus program under AS 47.45 or the Alaska Pioneers' Homes under AS 47.55.

(d) When the commission formulates a comprehensive statewide plan under (a) of this section, it shall include within the plan specific reference to the concerns and needs of older Alaskans who have a disorder described in AS 47.30.056 (b)(4).

Section 21 of Chapter 5, FSSLA 1994, amending Sections 24 and 25 of Chapter 66 SLA 1991, which is specifically incorporated as material to the settlement as set forth above, codified at AS 44.29.140 provides

- (a) The [Advisory Board On Alcoholism and Drug Abuse] shall
 - (1) act in an advisory capacity to the legislature, the governor, and state agencies in the following matters:
 - (A) special problems affecting mental health that alcoholism or drug abuse may present;
 - (B) educational research and public informational activities in respect to the problems presented by alcoholism or drug abuse;
 - (C) social problems that affect rehabilitation of alcoholics and drug abusers;
 - (D) legal processes that affect the treatment and rehabilitation of alcoholics and drug abusers;
 - (E) development of programs of prevention, treatment, and rehabilitation for alcoholics and drug abusers; and
 - (F) evaluation of effectiveness of alcoholism and drug abuse programs in the state;
 - (2) provide to the Alaska Mental Health Trust Authority for its review and consideration recommendations concerning the integrated comprehensive mental health program for the people who are described in AS 47.30.056(b)(3), and concerning the use of money in the mental health trust settlement income account in a manner consistent with regulations adopted under AS 47.30.031.
- (b) The board is the planning and coordinating body for purposes of federal and state laws relating to alcohol, drug, and other substance abuse prevention and treatment services.
- (c) The board shall prepare and maintain a comprehensive plan of services
 - (1) for the prevention and treatment of alcohol, drug, and other substance abuse; and
 - (2) for persons described in AS 47.30.056(b)(3).

Section 35 of Chapter 5, FSSLA 1994, which is specifically incorporated as material to the settlement as set forth above, codified at AS 47.30.660 provides:

The [Alaska Mental Health Board] is the state planning and coordinating body for the purpose of federal and state laws relating to mental health services for persons with mental disorders identified in AS 47.30.056

(b)(1). On behalf of those persons, the board shall

- (1) prepare and maintain a comprehensive plan of treatment and rehabilitation services;
- (2) propose an annual implementation plan consistent with the comprehensive plan and with due regard for the findings from evaluation of existing programs;
- (3) provide a public forum for the discussion of issues related to the mental health services for which the board has planning and coordinating responsibility;
- (4) advocate the needs of persons with mental disorders before the governor, executive agencies, the legislature, and the public;
- (5) advise the legislature, the governor, the Alaska Mental Health Trust Authority, and other state agencies in matters affecting persons with mental disorders, including, but not limited to,
 - (A) development of necessary services for diagnosis, treatment, and rehabilitation;
 - (B) evaluation of the effectiveness of programs in the state for diagnosis, treatment, and rehabilitation;
 - (C) legal processes that affect screening, diagnosis, treatment, and rehabilitation;
- (6) provide to the Alaska Mental Health Trust Authority for its review and consideration recommendations concerning the integrated comprehensive mental health program for those persons who are described in AS 47.30.056 (b)(1) and the use of money in the mental health trust settlement income account in a manner consistent with regulations adopted under AS 47.30.031; and
- (7) submit periodic reports regarding its planning, evaluation, advocacy, and other activities.

Section 26 of Chapter 5, FSSLA 1994, which is specifically incorporated as material to the settlement as set forth above, amended AS 47.30.036. AS 47.30.036 following such amendment provides:

The [Mental Health Trust Authority] shall

* * *

(3) review and consider the recommendations submitted under AS 44.21.230(a)(10), AS 44.29.140 (2), AS 47.30.666 (6), and AS 47.80.090(13);

AS 47.30.036 (subsection (3)) refers to the recommendations of the Four Boards.

The Superior Court's December 6, 1994, Decision granting final approval to the Settlement Agreement, states in pertinent part:

Under Chapter 66 and HB 201, each of the four major beneficiary groups will be represented by their own advocacy group for purposes of planning services and making budget recommendations to the Trust Authority. See, e.g., Ch. 66 § 26 (to be codified as AS 47.30.036(2)-(3)) and § 39 (to be codified as AS 47.30.666), SLA 1991, as amended by Ch. 5 § 35, FSSLA 1994. The four advocacy groups are the Older Alaskans Commission, the Alaska Mental Health Board, the Governor's Council for the Handicapped and Gifted, and the Advisory Board on Alcoholism and Drug Abuse. See Ch. 5 § 24, FSSLA 1994, amending Ch. 66 § 26, SLA 1991 (to be codified as AS 47.30.016(b)(2)(A)-(D)). A member from each group also will be on the panel established to advise the governor regarding appointments to the board of trustees of the Trust Authority. The six-member panel will consist of one person selected by each of the following: (1) the Alaska Mental Health Board, (2) the Governor's Council on Disabilities and Special Education, (3) the Advisory Board on Alcoholism and Drug Abuse, (4) the Older Alaskans Commission, (5) the Alaska Native Health Board, and (6) the Trust Authority. Ch. 66 § 26, SLA 1991, as amended by Ch. 5 § 24, FSSLA 1994 (to be codified as AS 47.30.016(b)). The Trust Authority must consider the recommendations submitted by the four advocacy groups and coordinate the state agencies involved with the mental health program when forming budget recommendations for the state's comprehensive mental health program. Ch. 66 § 26, SLA 1991 (to be codified as AS 47.30.036(2)-(3)).

[Exc. 191-192, emphasis added].

Thus, there is no question but that the Four Boards and their fulfilling specific functions and duties are negotiated material terms of the Settlement. The State has conceded that under the Settlement the Four Boards must be funded to the point they are able to perform the functions that are mandated under the Settlement. [Tr. 11-12]. The

Superior Court also specifically acknowledged this in deciding to dismiss the complaint for lack of a case or controversy:

Everybody agrees that there was a settlement, everybody has a copy of it, they know what the terms are. The boards are in there, they have a function, an advisory function, but a real function, representing distinct interest groups. And to do that, they need some sort of funding, and there's funding language in there. So, everything is really agreed, so we can't really isolate the dispute. Now, it may very well be that the Governor and the Legislature come up with some number that's -- that the boards think is inadequate. But even if that happens, it's not up to the board to decide the level of funding. It's up to the Legislature and the Governor. And if the price of oil is 60 bucks a barrel, the level of funding that's going to be available and politically feasible, as determined by all the things that go into political decisions in Juneau. . . .

I don't think there's anything in the Constitution that says the Mental Health boards are going to be funded as 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. . . . [I]f and when a decision is made -- I'm sure they will make a decision, and if, at that point, the boards or one of the boards thinks that it is -- the political decision-making that goes into that decision is sufficiently arbitrary or sufficiently out to lunch, or destroys the function of the settlement, then you can come back down to court. But as it stands now, I think the complaint needs to be dismissed for lack of a case in controversy.

[Tr. 25-27].

However, in dismissing the complaint, the Superior Court made a fundamental legal error in failing to recognize the Beneficiaries have contractual rights,⁸ regardless of political whim. Contrary to the Superior Court's analysis, it is irrelevant that the Constitution does not mandate the Four Boards receive funding at any particular level --

⁸ Settlement agreements are to be interpreted as contracts. *Ford v. Ford*, 68 P.3d 1258 (Alaska 2003).

the Beneficiaries have contractual rights -- contractual rights that were specifically bargained for in settling the Mental Health Trust Lands Litigation. Looked at a slightly different way, if the Legislature decides to breach the Settlement by failing to provide adequate funding, that is indeed a political decision, but that doesn't change the Beneficiaries' contractual rights to adequate funding under the Settlement.

It was from this faulty legal premise that the Superior Court held there was no case or controversy. This mandates reversal under the rationales of *Verizon* and *Electronic Imaging*.

C. This Case Presents an Important Matter of Public Policy that Should be Decided.

Even should this Court determine that the Superior Court's dismissal of the complaint will not be reversed because it was influenced by its mistake of law, the Superior Court abused its discretion because this action raises issues of great public importance. One of the factors in deciding whether to accept a declaratory judgment action is whether it raises issues of sufficient public importance. *Alaska Community Colleges' Federation Of Teachers v. University Of Alaska*, 677 P.2d 886, 889 (Alaska 1984).

As set forth previously, this Court has held that in the event of a material breach of the settlement, Civil Rule 60(b) relief from judgment is available. ("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.") *Weiss II* at 397. In connection with this, in its decision granting final approval of the Settlement, the Superior Court said:

For as long as any legislators remember this lawsuit or have heard of its impact on state land, the threat of litigation alone will be a powerful deterrent.

[Exc. 283]. Less than a dozen years later the State is flirting with breaching the Settlement without any apparent concern for its Settlement obligations.

The Superior Court below held that the beneficiaries had to allege a breach before it would entertain the issue of adequate funding of the Four Boards. [TR 27]. However, the Alaska Declaratory Judgment Act specifically does not require such a breach. AS 22.10.020(g). More importantly for the purposes here, waiting for such a breach is too late because the remedy for such a breach is very problematic. Ms. Kenaston respectfully suggests issuance of the declaratory judgment that adequate funding and adequate opportunity to the Four Boards to perform their settlement mandated duties are material terms of the Settlement can thus be very salutary.⁹

III. Summary Judgment Should Be Granted

The State concedes that adequate funding and adequate opportunity for the Four Boards to perform their settlement mandated duties is a material term of the

⁹ This litigation was very carefully crafted to attempt to try to prevent a breach of the Settlement without invoking the *en terroram* Civil Rule 60(b)(6) remedy. The Alaska Legislature didn't care that it was illegal in 1978 when it purported to "redesignate" Trust Land as General Grant Land in Chapters 181 and 182 SLA 1978 and as this court acknowledged in *Weiss II*, there is no way to prevent the Legislature from breaching the Settlement. 939 P.3d at 397. However, it is respectfully suggested here it is worthwhile for the Court to rule the State has the obligation under the Settlement to adequately fund the Four Boards.

Settlement.¹⁰ [Tr. 11-12]. That being so, Ms. Kenaston respectfully suggests she is entitled to a decision so holding. Even without relying on the State's admission, Ms. Kenaston is entitled to a grant of summary judgment should she get over the case or controversy hurdle. There is simply no dispute over any material fact and she is entitled to judgment as a matter of law pursuant to Civil Rule 56(c). In such circumstances, this Court will reverse the denial of a motion for summary judgment. *Treacy, supra.*, 91 P.3d at 260.¹¹

As noted above, settlement agreements are to be interpreted as contracts. *Ford, supra.* In Alaska,

The covenant of good faith and fair dealing is implied in every contract to give effect to the reasonable expectations of the parties, preventing each party from interfering with another party's right to receive the benefits of the agreement. The implied covenant has both a subjective and an objective prong. "The subjective prong prohibits one party from acting to deprive the other of the benefits of the contract." The objective prong requires both parties to act in a way that a reasonable person would consider fair.

Hawken Northwest, Inc., v. Alaska Dep't of Administration, 76 P.3d 371, 381 (Alaska 2003).

¹⁰ As pointed out in Ms. Kenaston's Motion for Reconsideration [Exc. 351-2], the State appears disingenuous about this because it refused to so stipulate, but regardless, it is bound by its admission at oral argument in this regard. *United Services Automobile Association v. Pruitt*, 38 P.3d 528, 532 (Alaska 2001). (Admission at oral argument preclusive).

¹¹ In *Treacy*, the trial court granted the plaintiffs' motion for summary judgment and denied the defendant's. This court reversed both the grant of summary judgment and the denial of the cross-motion for summary judgment. *Treacy* is thus very close to the -----(footnote continued)

Ms. Kenaston respectfully suggests one doesn't have to go beyond these basic principles to conclude sufficient funding and opportunity for the Four Boards to fulfill the duties the State agreed they would perform as part of the price of settling the contentious Mental Health Trust Lands Litigation are implied. Clearly the performance by the Four Boards of their Settlement mandated duties was the reasonable expectation of the beneficiaries of the Trust. This requires they have sufficient funding and opportunity to perform those duties.¹²

In *City of Kenai v. Ferguson*, 732 P.2d 184, 187 (Alaska 1987) this Court found that a "fair rent" would be implied in a lease contract that provided for a negotiation of a rent term when no agreement could be reached. There, this Court held that forcing the lessee to quit the property after his substantial reliance on a fifty-five year length of lease would be inequitable. *Id.* Here, it would be manifestly inequitable for the beneficiaries to lose their bargained-for material right to have the Four Boards perform certain duties by the mere artifice of failing to provide them with the resources to do so. Stated a slightly different way, the State agreed that the Four Boards would perform certain duties and this necessarily implies adequate funding and opportunities to do so. [TR 11-13]. Otherwise the agreement is illusory and as the court said in *Ferguson*, "if one party

(Continued footnote)-----
situation here because granting a motion to dismiss is very similar to granting a defendant's motion for summary judgment.

¹² See, e.g., *Central Bering Sea Fishermen's Ass'n. v. Anderson*, 54 P.3d 271, n20 (Alaska,2002) ("clearly implied contract terms").

had agreed to the clause only in the secret belief that it would prove unenforceable, he should be discouraged from such path." *Id.*, n.4.

Ms. Kenaston has demonstrated there is no dispute over any material fact and she is entitled to judgment as a matter of law. The State has admitted the same thing. Ms. Kenaston believes she has also demonstrated that the motion to dismiss was improperly granted. In these circumstances, she respectfully suggests this Court should reverse the Superior Court's failure to grant Ms. Kenaston's motion for summary judgment and hold that adequate funding and adequate opportunity for the Four Boards to perform their Settlement mandated duties are material terms of the Settlement.

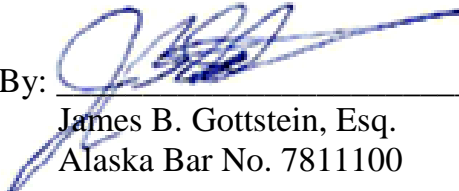
Conclusion

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 16th day of February, 2005.

LAW PROJECT FOR PSYCHIATRIC RIGHTS, INC.

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