IN THE SUPREME COURT OF THE STATE OF ALASKA

ITMO the Necessity of the Hospitalization of:	)	
	)	Supreme Court No.: **S-16393**
L.M.	)	

Trial Court Case # **3AN-16-01656 PR**

STATE'S OPPOSITION TO EMERGENCY MOTION TO VACATE SUPERIOR COURT ORDER APPROVING THE ADMINISTRATION OF MEDICATION

The State opposes the emergency motion to vacate the Superior Court's order granting the petition to medicate API patient L.M. In this appeal, the Court will consider whether the superior court erred in ordering medication. Because it is an appellate court, it will limit its review to the evidence that was presented to the superior court. But L.M. asks the Court to vacate the superior court order based on a new affidavit that the superior court never saw. The Court should deny the motion.

An appellate court is not the proper forum for presenting new evidence that was not presented to the superior court. L.M. maintains that because the medication order is on appeal, the Superior Court no longer has jurisdiction to consider new evidence, so she must present her request to this Court. Motion at 3. She does not oppose a remand to the Superior Court, however. Motion at 3. The proper legal framework for attacking a court order based on evidence that was not presented during the original proceeding is Alaska Civil Rule 60(b). Thus, L.M. essentially requests a limited remand for the Superior Court's consideration of whether to grant relief from the medication order based on new evidence under the standards of Alaska Civil Rule 60(b).

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L.M.'s request for a remand is premature, however. Under this Court's ruling in *Duriron Co. v. Bakke*, 431 P.2d 499, 500 (Alaska 1967), while a civil appeal is perfected and pending in the supreme court, the superior court has jurisdiction to deny a Civil Rule 60(b) motion. "Upon application by the movant, all appellate proceedings in this court will be stayed pending the superior court's resolution of the Civil Rule 60(b) motion." *Id.* If the superior court indicates that it will grant the motion, the appellant then requests a remand from the supreme court. *See id.* at 501 n.6.

If the Court instead wishes to consider a limited remand at this point, it should first consider whether L.M. has shown that she might meet the standards of Rule 60(b). Because she does not meet those standards, the Court should deny her request.

The subsection that allows relief based on newly discovered evidence—Rule 60(b)(2)—refers to "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b) [ten days after the date of the judgment]." The new evidence L.M. presents here is the affidavit of Ben Saylor, which states that L.M. told him that she did not wish to be treated with psychotropic medication.[1] But L.M. has not shown that Ben Saylor's affidavit could not have been "discovered" within ten days of July 25, 2016, when the superior court distributed its order approving the magistrate judge's recommendations.[2] In fact, it appears that by due diligence this information could have been discovered. Ben Saylor's

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[1] *See* Affidavit of Ben Saylor at 1 [Exhibit B to L.M.'s emergency motion].

[2] *See* Exhibit E to Emergency Motion for Stay of Forced Drugging, dated July 26, 2015.

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affidavit states that he has known L.M. since she was an infant, as her parents and his parents were friends when she was born.[3] He appears to be the son of Dr. Brian Saylor, who submitted an affidavit with L.M.'s objections to the magistrate judge's recommendations, dated July 21 and filed July 22.[4] In that affidavit, Dr. Saylor stated that he knows L.M., "being a friend of her family since she was a baby."[5] He stated that L.M. had previously "made statements . . . that expressed a desire to refuse future treatment with psychotropic medication."[6] He "believe[d] that she has made such statements" to her mother, Dr. Saylor's daughter, and "other friends."[7] While Dr. Saylor was not certain to whom L.M. had made such statements, L.M. gives no explanation as to why, with due diligence, Dr. Saylor's son could have been identified until now.

Rule 60(b)(6) also provides a broad catch-all provision that allows the superior court to vacate a judgment for "any other reason justifying relief from the operation of the judgment." L.M. has not provided any explanation for why she meets this standard either.

The Court therefore should deny the motion to vacate the medication order, and unless L.M. can show that she might meet the standards of Rule 60(b), should decline to grant a limited remand.

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3 Affidavit of Ben Saylor at 1 [Exhibit B to L.M.'s emergency motion].

4 *See* Exhibit D to Emergency Motion for Stay of Forced Drugging, dated July 26, 2015.

5 Exhibit D to Emergency Motion for Stay of Forced Drugging, dated July 26, 2015, at 47.

6 *Id.* at 48.

7 *Id.*

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ITMO the Necessity of the Hospitalization of L.M. Appellant(s), v. Alaska Psychiatric Institute Appellee(s).	)	Supreme Court No.: S-16393

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CERTIFICATE OF SERVICE AND TYPEFACE

I certify that on August 15, 2016 a true and correct copy of the **State's Opposition to Emergency Motion to Vacate Superior Court Order Approving the Administration of Medication** and this **Certificate of Service** were served by U.S. Mail to the following:

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