

EMERGENCY



Law Project for Psychiatric Rights
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IN THE SUPREME COURT FOR THE STATE OF ALASKA

WILLIAM BIGLEY,)	
Appellant,)	Supreme Court No. S-13116
)	
vs.)	
)	
ALASKA PSYCHIATRIC INSTITUTE)	
Appellee.)	
_____)	Trial Court Case No. 3AN 08-493 P/R

**EMERGENCY MOTION TO ENFORCE STAY
and
NON-EMERGENCY MOTION FOR SANCTIONS**

Appellant hereby moves, pursuant to Appellate Rules 504 and 205 on an emergency basis,

- (1) for an order enforcing the stay pending appeal issued in this case on May 23, 2008, full court reconsideration denied June 25, 2008 (Stay Order)¹ by (a) striking the forced drugging petition filed October 27, 2008, in *In re: Bigley*, 3AN 08-1252PR (3AN 08-1252PR), and (b) vacating that portion of the November 25, 2008, order therein authorizing Appellant to be drugged with Risperdal Consta against his will (Offending Forced Drugging Order),

¹ Exhibit A.

and on a non-emergency basis,

- (2) for contempt sanctions against the Alaska Psychiatric Institute and/or Dr. Khanaz Khari for violation of the Stay Order issued in this appeal.

Because there are two parts to this motion and only one of them requires expedited action, two separate proposed orders are being lodged herewith.

I. Appellate Rule 504 Emergency Motion Application

A. Telephone Numbers and Addresses of Counsel.

Counsel for Appellant's telephone number is 274-7686 and his office address is 406 G Street, Suite 206, Anchorage, Alaska 99501. Timothy Twomey is counsel for Appellee Alaska Psychiatric Institute (API) in this appeal, his phone number is 269-5168, and his office at 1031 West 4th Avenue, Suite 200, Anchorage, Alaska 99501.

B. Nature of Emergency and the Date and Hour Before Which a Decision is Needed.

On October 25, 2008, the Superior Court issued the Offending Forced Drugging Order, but in light of the Stay Order issued by this Court in this appeal, stayed its effectiveness until December 15, 2008 or until further order of the Superior Court or this Court.² In doing so, the Superior Court stated it was staying the Offending Forced Drugging Order until December 15, 2008, to "give API an opportunity to allow the Supreme Court to review its stay in light of the briefing and oral argument in [this appeal] as supplemented by [the Superior] Court's findings."³

However, oral argument is not scheduled until December 16, 2008, the day after

² Exhibit B, page 34.

the Superior Court's stay of the Offending Forced Drugging Order is scheduled to terminate without further order by this Court or the Superior Court. Therefore, Appellant essentially had no choice but to seek emergency relief here.⁴ Appellant has moved the Superior Court to extend its stay,⁵ but if the Superior Court fails to do so before Friday, December 12, 2008, a decision on the emergency motion is needed by the end of the day, Friday, December 12, 2008, in order for the stay to remain effective.

However, frankly, it would be desirable from Appellant's point of view, and perhaps this Court's as well, if the Superior Court fails to extend the stay contained within the Offending Forced Drugging Order by the end of the day, Thursday, December 4, 2008, as Appellant has requested,⁶ for this Court to issue its decision by the end of the day, Friday, December 5, 2008, because failing that, Appellant will have to file an emergency motion for stay pending appeal of the Offending Forced Drugging Order in S-13353, which he would expect to do Monday, December 8, 2008.⁷

C. Grounds Submitted to Superior Court

Appellant advised the Superior Court, Probate Master Lack presiding, at a hearing held on October 21, 2008, that he believed the forced drugging petition filed the previous day in 3AN 08-1252PR was a violation of this Court's Stay Order and that if API thought

³ Exhibit B, page 33.

⁴ While the Superior Court indicated it was granting the limited stay to allow API to give this Court an opportunity to review its Stay Order in this appeal, API has no incentive to seek enforcement of this Court's Stay Order.

⁵ Exhibit C.

⁶ Exhibit G.

otherwise, it should obtain permission from this Court before being allowed to proceed under it. At that hearing, API's counsel stated it had theretofore interpreted this Court's Stay Order as precluding the filing of a new forced drugging petition pending determination of this appeal, but because of Appellant's continuing difficulties in the community, had decided to file a new forced drugging petition anyway⁸ At that hearing Master Lack stated whether or not the Stay Order issued by this Court applies to a new petition was not ripe for decision,⁹ and that whether or not the Stay Order issued by this Court applied to emergency medication should be taken to this Court.¹⁰ API's counsel then stated she was going to recommend to API that it not drug Appellant under any circumstances "until there is further litigation on the matter."¹¹

API dismissed that forced drugging petition on October 24, 2008,¹² but then, without seeking clarification from this Court as to whether this Court's Stay Order precluded it, filed another forced drugging petition on October 27, 2008.¹³ The Superior Court, Judge Morris presiding, held a status conference on October 28, 2008, where

⁷ Appellant's counsel has an out of town trip scheduled for December 7-14, 2008, that is personally very important to him, and would expect to prepare the Emergency Motion for Stay prior to his departure, to be filed December 8, 2008.

⁸ Recording of October 21, 2008, hearing at 3:58.

⁹ Recording of October 21, 2008, hearing at 4:01.

¹⁰ Recording of October 21, 2008, hearing at 4:02.

¹¹ In spite of this API went ahead and forcibly drugged Appellant again, purportedly as an emergency. Exhibit B, page 4.

¹² Exhibit B, page 4.

¹³ Exhibit B, page 4.

Appellant again raised that this Court's Stay Order precluded proceeding under the new forced drugging petition and should not occur without permission of this Court.¹⁴

Also, this same date, December 1, 2008, Appellant filed a motion to modify the stay contained within the Offending Forced Drugging Order.¹⁵ If the Superior Court grants Appellant's motion to modify the stay contained within the Offending Forced Drugging Order by the end of the day, Thursday, December 4, 2008, the emergency nature of this motion becomes moot, but the relief requested does not.¹⁶

D. Notification of Opposing Counsel

On November 28, 2008, Appellant e-mailed counsel for API in both this appeal and in 3AN 08-1252PR requesting they stipulate to extend the stay contained within the Offending Forced Drugging Order pending a determination by this Court and advising them that this motion would be filed on this date if no agreement was reached.¹⁷ A copy of this motion was hand delivered to API's counsel in both this appeal and 3AN 08-1252PR prior to filing here.

II. Emergency Motion to Enforce Stay Order

Appellant has moved on an emergency basis for an order to enforce the Stay Order issued in this appeal by striking the forced drugging petition filed October 27, 2008, in 3AN 08-1252PR, and vacate the Offending Forced Drugging Order. As will be set forth

¹⁴ Appellant does not yet have a recording of this hearing.

¹⁵ Exhibit C.

¹⁶ Because of the short time frames, Appellant believes he needs to file this motion now to allow at least a reasonable time for opposition and consideration, if necessary.

¹⁷ Exhibit D.

more fully below, merely extending the stay contained in the Offending Forced Drugging Order pending determination of this Appeal is an insufficient remedy.

A. The Stay Order Issued in This Appeal

On May 23, 2008, this Court, at the direction of a single justice, issued the Stay Order in this appeal, staying pending determination of this appeal, the Superior Court's findings and order of May 19, 2008, granting API's then extant forced drugging petition.¹⁸ On May 28, 2008, API filed for full court reconsideration, one of the grounds being, that the Stay Order, "effectively precludes API from administering medication for Mr. Bigley during this, or any future, commitment periods."¹⁹

By the time of Appellant's opposition to the motion for reconsideration, Appellant had been discharged from API, and Appellant raised the issue of whether the Stay Order had become moot as a result, arguing it had not because of the likelihood of new forced drugging petitions being filed.²⁰ This Court then denied reconsideration of its Stay Order.²¹

Appellant respectfully suggests this Court's Stay Order applies to all efforts to force Appellant to take psychotropic drugs against his will during the pendency of this appeal, including 3AN 08-1252PR. Since Appellant had been discharged prior to this Court's Order denying reconsideration of its Stay Order, at that time, the Stay Order issued in this appeal could only apply to future Superior Court cases, such as 3AN 08-

¹⁸ Exhibit A.

¹⁹ Exhibit E, p.2.

²⁰ Exhibit F.

²¹ Exhibit E.

1252PR. In other words, unless the Stay Order issued in this case applies to future cases, such as 3AN 08-1252PR, it was a nullity when reconsideration was denied. Since this issue was specifically raised by Appellant in connection with reconsideration,²² it seems fair to assume this Court did not reaffirm the Stay Order to be a nullity and must have intended it to apply to future cases, including 3AN 08-1252PR.

B. Merely Extending the Stay of the Offending Forced Drugging Order Effectively Precludes this Court from Granting Relief In This Appeal.

If this Court agrees its Stay Order applies to 3AN 08-1252PR, the forced drugging petition in 3AN 08-1252PR should be stricken and the Offending Forced Drugging Order vacated.²³ Since filing the forced drugging petition in 3AN 08-1252PR was a violation of the stay, it was an illegal act and should be stricken. Vacating the Offending Forced Drugging Order naturally follows.

Moreover, merely extending the stay of the Offending Forced Drugging Order pending determination of this appeal is an insufficient remedy. The very existence of the Offending Forced Drugging Order precludes this Court from effectively requiring API to provide a less intrusive alternative, which is the primary relief sought by Appellant in this appeal. More specifically, the Offending Forced Drugging Order purports to supersede any such relief granted by this Court by creating a "new" finding that no such less intrusive alternative is available, which in turn has already resulted in yet another

²² Exhibit F, pp 2-4.

²³ In the same order, the Superior Court granted API's petition for 90-day commitment. Appellant is not suggesting this portion of the order be vacated. The proposed order lodged herewith is consistent with this.

appeal.²⁴

The Offending Forced Drugging Order has already been appealed because Appellant had to file a motion to the Superior Court for a stay pending appeal of the Offending Forced Drugging Order as a protective matter,²⁵ and if the Superior Court denies that motion, which it has indicated it will,²⁶ unless the Offending Forced Drugging Order is stricken before December 6, 2008, there will have to be yet another emergency motion for a stay pending appeal before this Court, on virtually the same facts upon which this Court granted the Stay Order here. Unless the Stay Order issued in this appeal applies to all future forced drugging efforts, including 3AN 08-1252PR, and the Offending Forced Drugging Order is vacated, this Court will never be in a position to effectively order API to provide Appellant with a less intrusive alternative.²⁷ Surely API may not divest this court of authority to order appropriate relief by obtaining new forced drugging orders that supersede not yet issued decisions by this Court. The whole purpose of a stay pending appeal is to preserve the *status quo* in order to allow the reviewing court to be able to provide meaningful relief. Logically, the new forced drugging petition should be stricken and the Offending Forced Drugging Order vacated.

III. Non-Emergency Motion for Sanctions

Appellant has also moved on a non-emergency basis for an order imposing contempt sanctions against API and/or Dr. Khari for violating the Stay Order issued in

²⁴ S-13353, filed this same date.

²⁵ Exhibit C.

²⁶ Exhibit B, page 32.

²⁷ There are similar concerns with respect to a best interests finding.

this appeal.²⁸ The attorney's fees billed by Appellant's counsel,²⁹ and the Law Project for Psychiatric Rights' costs, in defending 3AN 08-1252 are as follows:³⁰

Description	Amount
Attorney's Fees	\$ 61,458.57
Costs	\$ 2,986.10
Total	\$ 64,444.67

Appellant believes API's violation of this Court's Stay Order constitutes contempt and, at a minimum, payment of Appellant's costs and attorney's fees should be awarded therefor. In *L.A.M. v. State*, 547 P.2d 827, 831 (Alaska 1976), more recently reiterated in *Anchorage Police & Fire Retirement System v. Gallion*, 65 P.3d 876, n. 18 (Alaska 2003), this Court explained the four elements of criminal contempt are:

- (1) the existence of a valid order directing the alleged contemnor to do or refrain from doing something and the court's jurisdiction to enter that order;
- (2) the contemnor's notice of the order within sufficient time to comply with it; ... (3) the contemnor's ability to comply with the order; and (4) the contemnor's willful failure to comply with the order.

²⁸ Under Civil Rule 90, an order to show cause and a hearing are contemplated with respect to an alleged contempt committed outside the presence of the court. No comparable rule appears in the Appellate Rules, although Appellate Rule 510(c) acknowledges this Court's inherent power to punish for contempt. It appears the show cause and hearing requirements in Civil Rule 90(b) are to satisfy due process requirements of notice and an opportunity to be heard, both requirements of which are met by this motion and API's opportunity to respond. Of course, this Court can always require further proceedings, but it is believed only this Court can determine the scope of its Stay Order and it would similarly be appropriate for any such additional proceedings, if deemed necessary, to only be conducted by this Court. Oral argument is scheduled in just two weeks (December 16, 2008), and perhaps this Court could inquire of API's counsel at that time regarding its decision to proceed with its efforts to obtain a forced drugging order in spite of the Stay Order issued in this appeal.

²⁹ Appellant's counsel's current billing rate is \$325 per hour, which he believes is a market rate considering his training, experience, and expertise in this area of the law.

³⁰ Exhibits H and I, respectively.

There is no question about the existence of the first three elements here.

There is also dicta in *L.A.M.*, requiring these same four elements, including willfulness for civil contempt. Appellant believes under the circumstances here, willfulness has been demonstrated, but also suggests that willfulness is only required in civil contempt in the context in which it was discussed in *L.A.M.*, which is to "coerce future conduct," by a recalcitrant party who refuses to comply with an order. Where, as here, contempt sanctions are sought for remedial purposes, Respondent respectfully suggests, willfulness is not required.

The recitation of the law regarding this subject in *Select Creations v. Paliافتو America*, 906 F. Supp. 1251, 1271 (E.D. Wis 1995) seems helpful:

6. The state of mind of a party to the underlying action is irrelevant in a civil contempt proceeding. See, e.g., *Commodity Futures Trading Comm'n v. Premex, Inc.*, 655 F.2d 779, 785 n. 11 (7th Cir.1981) ("[T]he fact that a prohibited act is done inadvertently does not preclude a contempt citation...."); *West Texas Utilities Co. v. NLRB*, 206 F.2d 442, 448 (D.C.Cir.1953) ("Adjudications for civil contempt to protect the benefits of a decree do not depend on the state of mind of the contemnors.") cert. denied, 346 U.S. 855, 74 S.Ct. 70, 98 L.Ed. 369 (1953); *NLRB v. Ralph Printing & Lithographing Co.*, 433 F.2d 1058, 1062 (8th Cir.1970) ("[C]ivil contempt ... is a sanction to enforce compliance with an order of the court and is not dependent on the state of mind of the respondent.") cert. denied, 401 U.S. 925, 91 S.Ct. 883, 27 L.Ed.2d 829 (1971); *NLRB v. Crown Laundry & Dry Cleaners*, 437 F.2d 290, 293 (5th Cir.1971) ("The crucial issue in civil contempt proceedings ... is not the employers state of mind but simply whether the Court's order was in fact violated.")

7. According to the Supreme Court, "[s]ince the purpose [of civil contempt] is remedial, it matters not with what intent the defendant did the prohibited act.... An act does not cease to be a violation of the law and of a decree merely because it may have been done innocently." *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191, 69 S.Ct. 497, 499, 93 L.Ed. 599 (1949).FN3

FN3. While this Court has previously stated in dicta that a party's conduct must be "deliberate and intentional" in order to support a finding of contempt, *Rototron Corp. v. Lake Shore Burial Vault*, 553 F.Supp. 691, 700 (E.D.Wis.1982), we conclude that a party need not intentionally violate the Court's order to be found in contempt.

Here, API's violation of the Stay Order issued in this case occasioned a considerable amount of costs and attorney's fees to defend. Costs and fees that would not have been required absent the failure to comply with the Stay Order. API and/or Dr. Khari should bear this expense³¹ regardless of whether its violation of the Stay Order was willful.

However, even if willfulness is required, Appellant respectfully suggests willfulness exists here. In *State v. Browder*, 486 P.2d 925, 943 (Alaska 1971), this Court defined "willfully" in the context of criminal contempt as an act "done voluntarily and intentionally, that is, with the intent to disobey or disregard the law." There is no doubt that API willfully filed the forced drugging petition in 3AN 08-1252PR in spite of this Court's Stay Order and after it had previously interpreted it to have been prohibited. As set forth above, Appellant does not believe there is any real ambiguity in this Court's Stay Order in light of the circumstances surrounding its issuance. Even if there is, however, Appellant respectfully suggests, under the circumstances, as Appellant repeatedly told API, API was obligated to seek clarification from this Court.

³¹ Dr. Khari who was also the treating psychiatrist below in this appeal and thus was directly subject to the Stay Order issued in this appeal, filed the offending forced drugging petitions in 3AN 08-1252PR and therefore is certainly a proper subject of such

As the 7th Circuit held in *United States v. Greyhound Corp.*, 508 F.2d 529, 532 (7th Cir.1974):³²

Willfulness, for the purpose of criminal contempt, does not exist where there is a "good faith pursuit of a plausible though mistaken alternative." To provide a defense to criminal contempt, the mistaken construction must be one which was adopted in good faith and which, given the background and purpose of the order, is plausible.

Since API's current interpretation renders the Stay Order issued in this case a nullity, it is not plausible.

The 7th Circuit went on to say a party who has doubts as to his obligations under an order, may petition the court for a clarification or construction of that order, and that while a party is not required to seek such clarification, the failure to do so when combined with an implausible interpretation of the order is strong evidence of willfulness sufficient to support criminal contempt sanctions.³³ The 7th Circuit then went on to add:

Similarly, while actions showing a good faith effort to comply with the order will tend to negate willfulness, . . . indifference to the order. . . will support a finding of willfulness.³⁴

Appellant respectfully suggests that even if willfulness is a requirement for a finding of contempt where the purpose is to vindicate the authority of this Court's order and provide a remedy to the party aggrieved by the violation of the court order, such willfulness has been established here.

sanctions. The order lodged herewith for sanctions, makes API and Dr. Khari jointly and severally liable for payment.

³² Citation omitted.

³³ *Id.*

³⁴ *Id.*, citation omitted.

IV. Conclusion

For the foregoing reasons, Appellant requests the Court grant his motion for

- (1) an order enforcing the stay pending appeal issued in this case on May 23, 2008, full court reconsideration denied June 25, 2008 (Stay Order) by (a) striking the forced drugging petition filed October 27, 2008, in *In re: Bigley*, 3AN 08-1252PR, and (b) vacating that portion of the November 25, 2008, order therein authorizing Appellant to be drugged with Risperdal Consta against his will (Offending Forced Drugging Order),

and on a non-emergency basis,

- (2) for contempt sanctions against the Alaska Psychiatric Institute and/or Dr. Khanaz Khari for violation of the Stay Order.

Dated this 1st day of December, 2008, at Anchorage, Alaska.

LAW PROJECT FOR PSYCHIATRIC RIGHTS

By: 

James B. Gottstein, Esq.
Alaska Bar No. 7811100

Exhibits

- A. Stay Order in this Appeal, May 23, 2008.
- B. Offending Forced Drugging Order, November 25, 2008.
- C. Motion To Modify Stay and For Stay Pending Appeal filed in 3AN 08-1252PR, December 1, 2008.
- D. E-mail exchange between Jim Gottstein and Laura Derry, November 28, 2008.
- E. API's Motion For Full Court Reconsideration, May 28, 2008.
- F. Appellants Opposition to Reconsideration, June 9, 2008.
- G. Order Denying Reconsideration., June 25, 2008.
- H. Attorney's Fees Invoice, November 29, 2008.
- I. Costs Invoice, November 30, 2008.
- J. Motion for Expedited Consideration, December 1, 2008.