

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT AT ANCHORAGE



ALASKA BUILDING, INC., an Alaskan )  
corporation, )  
Plaintiff, )  
v. )  
716 WEST FOURTH AVENUE, LLC, )  
KOONCE PFEFFER BETTIS, INC., )  
D/B/A/ KP B ARCHITECTS, PFEFFER )  
DEVELOPMENT, LLC, LEGISLATIVE )  
AFFAIRS AGENCY, and CRITERION )  
GENERAL, INC., )  
Defendants. )

Case No. 3AN-15-05969 CI

**ORDER**

An oral argument was held August 18, 2015. At issue at were the following motions: Legislative Affairs Agency's Motion to Dismiss or, in the alternative, to Sever Claims for Misjoinder, filed by Legislative Affairs Agency "LAA" on May 27, 2015; and Motion to Dismiss Count I, filed by 716 West Fourth Avenue, LLC "716" on June 23, 2015.

**ISSUES PRESENTED**

1. Does Alaska Building, Inc., "ABI", lack standing to bring the claims presented in Count One?
2. Are Counts One and Count Two severable due to a misjoinder?

**LEGAL STANDARD**

Lack of jurisdiction over the subject matter is a complete defense to any claim in law or equity.<sup>1</sup> Unlike other defenses, it is not subject to waiver, but may instead be raised at any

<sup>1</sup> Civ. R. 12(b)(1).

time.<sup>2</sup> The rule states that “[w]henver it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter[,] the court shall dismiss the action.”<sup>3</sup>

Misjoinder of parties is not ground for dismissal of an action.<sup>4</sup> Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just.<sup>5</sup> Any claim against a party may be severed and proceeded with separately.<sup>6</sup>

## ANALYSIS

### Standing:

Standing questions are limited to whether the litigant is a proper party to request an adjudication of a particular issue.<sup>7</sup> Standing in our state courts is not a constitutional doctrine; rather, it is a rule of judicial self-restraint based on the principle that courts should not resolve abstract questions or issue advisory opinions.<sup>8</sup> The basic requirement for standing in Alaska is adversity.<sup>9</sup> The concept of standing has been interpreted broadly in Alaska.<sup>10</sup> Alaska has departed from a restrictive interpretation of the standing requirement, adopting instead an approach favoring increased accessibility to judicial forums.<sup>11</sup> There are two different kinds of standing: interest-injury standing and taxpayer-citizen standing.

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<sup>2</sup> Civ. R. 12(h)(3).

<sup>3</sup> *Id.*

<sup>4</sup> Civ. R. 21.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Trustees for Alaska v. State*, 736 P.2d 324, 327 (Alaska 1987) (internal citations omitted).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

Under the interest-injury approach, a plaintiff must have an interest adversely affected by the conduct complained of.<sup>12</sup> Such an interest may be economic, or it may be intangible, such as an aesthetic or environmental interest.<sup>13</sup> The degree of injury to the interest need not be great; the basic idea is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation.<sup>14</sup>

ABI, despite arguing otherwise,<sup>15</sup> clearly has no interest-injury standing for the claims contained within Count One. ABI is not a party to the lease and was not involved in the process of negotiation or formation of the lease. ABI does not have a personal interest adversely affected by the formation of the lease.

The Court next addresses taxpayer-citizen standing. The Supreme Court in *Trustees for Alaska v. State* stated:

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In our view, taxpayer-citizen standing cannot be claimed in all cases as a matter of right. Rather, each case must be examined to determine if several criteria have been met. First, the case in question must be one of public significance. One measure of significance may be that specific constitutional limitations are at issue, as in *Carpenter and Lewis*. That is not an exclusive measure of significance, however, as statutory and common law questions may also be very important. Second, the plaintiff must be appropriate in several respects. For example, standing may be denied if there is a plaintiff more directly affected by the challenged conduct in question who has or is likely to bring suit. The same is true if there is no true adversity of interest, such as a sham plaintiff whose intent is to lose the lawsuit and thus create judicial precedent upholding the challenged action. Further, standing may be denied if the plaintiff appears to be incapable, for

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<sup>12</sup> *Id.* See also *Kanuk ex rel. Kanuk v. State, Dep't of Natural Res.*, 335 P.3d 1088, 1092 (Alaska 2014) ("The plaintiffs here claim interest-injury standing, which means they must show a 'sufficient personal stake in the outcome of the controversy to ensure the requisite adversity.'").

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Plaintiff's Opposition to Legislative Affairs Agency's Motion to Dismiss or, in the alternative, to Sever Claims for Misjoinder, page 4 ¶3 (June 12, 2015) ("With respect to Count One, the illegality of the LIO Lease, ABI is seeking 10% of any savings and this is a sufficient interest for standing purposes."). This Court would note that this rather novel claim is not an issue presently before the Court, but the Court does not find enough credence in the claim to grant interest-injury standing.

economic or other reasons, of competently advocating the position it has asserted.<sup>16</sup>

The controlling inquiry in . . . all standing cases, is whether the plaintiff had a sufficient personal stake in the outcome of the controversy.<sup>17</sup> An important consideration is the magnitude of the transaction and its potential economic impact on the State.<sup>18</sup> This inquiry must turn on the facts of each case.<sup>19</sup>

The Supreme Court's decision in *Ruckle v. Anchorage School Dist.*<sup>20</sup> was particularly helpful in determining the appropriateness of a plaintiff. In that case, a taxpayer brought action for declaratory and injunctive relief against city school district and state Department of Education challenging the bidding process for school bus transportation contracts. While the plaintiff, brought claims seeking only declaratory and injunctive relief, another entity, Laidlaw, had previously brought suit for substantially the same issues but requesting monetary damages. The defendant in *Ruckle* held the position that the plaintiff could be an appropriate plaintiff and achieve standing based on taxpayer-citizen status, but *not at the same time* as a more appropriate plaintiff who maintained a separate suit.<sup>21</sup> The Supreme Court found this analysis compelling.<sup>22</sup> Furthermore, the Supreme Court stated that several "cases do support the proposition that taxpayer-citizens have standing to challenge the results of public bidding systems."<sup>23</sup>

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<sup>16</sup> *Id.* (Internal citations omitted).

<sup>17</sup> *Hoblitt v. Comm'r of Natural Res.*, 678 P.2d 1337, 1341 (Alaska 1984).

<sup>18</sup> *Id.* Quoting *State v. Lewis*, 559 P.2d 630, 635 (Alaska 1977).

<sup>19</sup> *Id.* Quoting *Flast v. Cohen*, 392 U.S. 83, 101 (1968).

<sup>20</sup> 85 P.3d 1030, 1036 (Alaska 2004).

<sup>21</sup> *Id.* (Emphasis added).

<sup>22</sup> *Id.* at 1037.

<sup>23</sup> *Id.* ("See, e.g., *Ewy v. Sturtevant*, 962 P.2d 991, 995 (Colo.App.1998) (stating that "[t]he public bidding process, however, is for the protection of the public, not the bidders" and as such "bidders [ ] have no standing to challenge the propriety of an award of a public contract to another bidder"); *Black Ash Servs., Inc. v. DuBois Area Sch. Dist.*, 764 A.2d 672, 674 (Pa.Comm. Ct.2000) (holding that "mere disappointed bidder to a public contract does not have standing to challenge its award" and requiring that "[t]o have standing, the bidder must be an aggrieved taxpayer of the municipality awarding the contract"); *On-Point Tech. Sys., Inc. v. Commonwealth*, 753 A.2d 911, 914 (Pa.Comm. Ct.2000) (distinguishing between action brought by disappointed bidder against state under Procurement Code and one filed by taxpayer in equity); *Sloan v. Sch. Dist.*, 342 S.C. 515, 537 S.E.2d 299, 303 (App.2000) (stating that "[t]he taxpayers of Greenville County have a

*Keller*<sup>24</sup> differs slightly from *Ruckle*, as it deals with plaintiffs bringing suit on behalf of another potential plaintiff. Five state legislators sued two other legislators, a permanent legislative committee, and the independent investigator, alleging a state constitutional “fair and just treatment clause” violation in a legislative investigation into governor's dismissal of Public Safety Commissioner. When, then in office, Governor Palin dismissed the Public Safety Commissioner an investigation was initiated to determine whether any abuse of power or improper actions had occurred. The lawsuit was brought, not by Gov. Palin, but by five legislators not involved. The case was merged with another case brought by seven other state employees who were challenging subpoenas issued under the investigation.<sup>25</sup>

The Supreme Court found that the plaintiffs were not “sham” plaintiffs and that they were capable of competently advocating their positions.<sup>26</sup> Despite this, the Court focused on the substantial question as to whether other persons who are more directly affected have ~~sued or are likely to sue.~~<sup>27</sup> In addition to the seven legislators who opted not to join in the appeal, the Court found that Gov. Palin was more directly affected than the plaintiffs by the investigation and she was capable of bringing suit.<sup>28</sup> The Court stated that they would not “allow the use of taxpayer-citizen standing as a substitute for third-party standing.”<sup>29</sup>

Again, in *Law Project for Psychiatric Rights, Inc. v. State*,<sup>30</sup> a plaintiff attempted to bring suit on behalf of a violation of the rights of a third party. A non-profit public interest law firm filed suit in its own name against the State of Alaska seeking to establish constitutional

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direct interest in the proper use and allocation of tax receipts by the District” and therefore may challenge “the District's failure to abide by the competitive sealed bidding requirements in its procurement code”). *Id.* at 1035 n. 19.

<sup>24</sup> *Keller v. French*, 2050 P.3d 299 (Alaska 2009).

<sup>25</sup> The seven plaintiffs challenging subpoenas did not join in the appeal after their complaint was dismissed as a non-justiciable political question. *Id.* at 301.

<sup>26</sup> *Id.* at 302. (The Court further assumed, “without deciding, that an alleged violation of the fair and just treatment clause is a matter of public significance.”).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 304. (The Court also stated there is no precedent in Alaska to allow plaintiffs to assert the individual rights of potential or ‘imaginary’ third parties.)

<sup>30</sup> 239 P.3d 1252 (Alaska 2010).

standards that must be met before compelling minors to take psychotropic medications. LPPR claimed administering psychotropic medication to children without their consent constitutes involuntary medicating and “infringes upon [the children’s] fundamental constitutional rights.”<sup>31</sup> Before the Alaska Supreme Court, LPPR conceded that the constitutional right it sought to establish was an individual right.<sup>32</sup> The Court noted that “*Keller* is indistinguishable from the situation here.”<sup>33</sup> The Court concluded that “an individual (or group) directly affected by the State’s administration of psychotropic drugs to minors would be the appropriate litigant.”<sup>34</sup>

In the current matter, the facts are more similar to *Ruckle* than to *Keller* or *Law Project*. The rights asserted to be violated are not individual rights but rather a citizen’s right to challenge the potentially excessive state expenditures of public funds. There is no substitution of third party rights in this case.

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Each instance of taxpayer-citizen standing must be evaluated on a case by case basis. First, the value of the lease at issue is significant, implicating millions of dollars in state funds over the course of many years. The first measure of taxpayer-citizen standing seems unambiguous. The same holds true of the final measure, as ABI seems to be completely capable of competently advocating the position it has asserted. Plaintiff is represented by competent counsel who has vociferously presented plaintiff’s position.

The question of whether ABI is an appropriate plaintiff is the only measure of taxpayer-citizen standing that requires further analysis by the Court. The Court is not aware of any other plaintiff who has brought suit on the same issue or is likely to bring suit. However, the existence of such potential plaintiffs seems undisputed. Not only are the parties to the lease more appropriate, but even alternative parties that were excluded from the hypothetical bidding process would have a more direct claim to challenge the lease as opposed to ABI.

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<sup>31</sup> *Id.* at 1254. (It was noted before the Superior Court that “LPPR failed to ‘identify a single individual who has been harmed by the alleged violations.’”)

<sup>32</sup> *Id.* at 1255.

<sup>33</sup> *Id.* (“LPPR seeks to establish a personal constitutional right on behalf of an unknown number of minors through citizen-taxpayer standing.”)

<sup>34</sup> *Id.* at 1256.

However, just because a more appropriate plaintiff may exist does not require this Court to find that ABI is not an appropriate plaintiff.<sup>35</sup> To hold matters of public concern in abeyance until a perfect plaintiff appears is at odds with the standard elucidated in *Trustees for Alaska* favoring “increased accessibility to judicial forums.”<sup>36</sup> ABI does not appear to be a “sham” plaintiff or an otherwise inappropriate plaintiff. This Court finds that ABI has an interest in this matter as a taxpayer-citizen.

Misjoinder:

Alaska Civil Rule 21 “allows a court to drop misjoined parties on motion of any party or of its own initiative at any stage of the action.”<sup>37</sup> This provision is “used by our courts to ensure that the real contestants in interest are before it.”<sup>38</sup> This provision can be used to dismiss a claim or sever it from the main action.<sup>39</sup>

The 9<sup>th</sup> Circuit has stated that a court, in its discretion, may sever the parties if the test from permissive joinder is not satisfied, so long as no substantial right will be prejudiced by the severance.<sup>40</sup> Rule 20(a) of the Federal Rules of Civil Procedure “permits the joinder of plaintiffs in one action if: (1) the plaintiffs assert any right to relief arising out of the same transaction, occurrence, or series of transactions or occurrences; and (2) there are common questions of law or fact.”<sup>41</sup> This is substantially similar to the language contained in Alaska’s Civil Rule 20(a).<sup>42</sup>

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<sup>35</sup> See *Trustees for Alaska*, 736 P.2d at 330. (“In our view, the mere possibility that the Attorney General may sue does not mean that appellants are inappropriate plaintiffs.”).

<sup>36</sup> *Id.* at 327.

<sup>37</sup> *Varilek v. City of Houston*, 104 P.3d 849, 852 (Alaska 2004) (internal citations omitted).

<sup>38</sup> *The First Nat’l Bank of Anchorage v. Tom Zawodny.*, 602 P.2d 1254, 1254 (Alaska 1979); see also *KOS v. Williams*, 616 P.2d 868, 869 (Alaska 1980).

<sup>39</sup> See generally *Aleut v. Rogers*, 619 P.2d 472, 473-74 (Alaska 1980).

<sup>40</sup> *Coughlin v. Rogers*, 130 F.3d 1348, 1350 (9th Cir. 1997).

<sup>41</sup> *Id.*

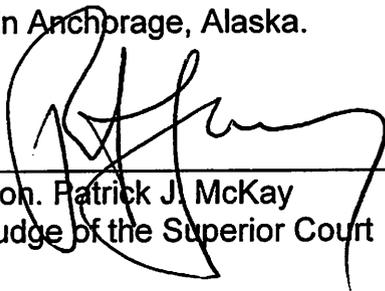
<sup>42</sup> Alaska Civ. R. 20(a) states: “All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A

In the current matter, both ABI's Complaint<sup>43</sup> and Amended Complaint<sup>44</sup> fail to name any party other than LAA in Count One.<sup>45</sup> ABI also alleges that both Count One and Count Two, the claimed damage sustained by ABI's building, arise out of the lease signed by LAA and defendant 716.<sup>46</sup> It is not clear to this Court how the remaining defendants named in Count Two could be held liable for the claims in Count One. Thus, Count One should be severed from Count Two. Plaintiff shall file an amended complaint in this action as to the allegations in Count One. Plaintiff shall file a separate action, if desired, on the allegations in Count Two. The Court would waive the filing fee for the separate filing.

**RULING**

This Court finds that ABI has taxpayer-citizen standing required to bring the claims in Count One. Therefore, the Motions for Dismissal are DENIED. This Court further finds that ~~the claims present in Count Two shall be SEVERED from the current matter and a new suit shall proceed separately.~~

ENTERED this 20th day of August, 2015, in Anchorage, Alaska.

  
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Hon. Patrick J. McKay  
Judge of the Superior Court

I certify that on 8/20/15,  
a copy of the above was mailed to each of  
the following at their addresses of record:  
J. Hattstein B. Cell C. Sweeney  
A. Robinson M. Scheer  
A. Quinn R. Audley  
\_\_\_\_\_ Judicial Assistant

plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities."

<sup>43</sup> 17-22, March 31, 2015.

<sup>44</sup> 17-22, June 8, 2015.

<sup>45</sup> Plaintiff's Opposition, page 9, June 12, 2015, does state that damages against defendant 716 are sought as part of Count One as well.

<sup>46</sup> *Id.*