



IN THE SUPREME COURT FOR THE STATE OF ALASKA

716 WEST FOURTH AVENUE LLC,)
)
Petitioner.)
)
vs.)
)
ALASKA BUILDING, INC., an Alaska)
corporation,)
)
Respondent.)
_____)

Supreme Court No. _____

Trial Court No. 3AN-15-05969 CI

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this document is 13 Point Times

**PETITION FOR REVIEW
OF SUPERIOR COURT'S AUGUST 20, 2015 ORDER
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE PATRICK J. MCKAY PRESIDING**

Filed in the Supreme Court of the
State of Alaska this 2nd day of
September, 2015

By: _____
Deputy Clerk

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PETITION FOR REVIEW

I. INTRODUCTION AND RELIEF REQUESTED

716 West Fourth Avenue (“716”) by and through counsel, Ashburn & Mason, P.C., petitions for review of the superior court’s August 20, 2015 decision granting Alaska Building, Inc. (“ABI”) citizen-taxpayer standing. The superior court’s ruling merits reversal on two grounds: first, because the superior court expressly acknowledged the existence of other more appropriate plaintiffs who were more directly affected than ABI by the allegations at issue; and second, because it failed to find (and the record does not support) that ABI possessed the requisite adversity. For these reasons, 716 respectfully requests that this Court reverse the superior court’s ruling and dismiss Count One of ABI’s Amended Complaint for lack of standing.

II. STATEMENT OF FACTS AND RELEVANT PROCEEDINGS

On March 31, 2015, ABI filed a two-count complaint against several defendants, including 716 and the Legislative Affairs Agency (“Agency”). ABI amended the complaint on June 8, 2015 to clarify its claims. ABI amended the complaint on June 8, 2015, but the claims under Count I of that complaint remained identical to the claims in the original complaint. As alleged in ABI’s pleadings, ABI owns a building that shares a wall with the Legislative Information Office building (“LIO”) in downtown Anchorage. In 2013, 716 entered into a lease with the LIO that involved remodeling the building (“LIO Project”). ABI’s interest in this proceeding appears to have been triggered by its belief that construction of the LIO Project damaged its property.

Count One of the Amended Complaint challenges the legality of the LIO lease under AS 36.30.083(a), which allows the legislative council “to extend a real property lease for up to 10 years if a minimum cost savings of at least 10 percent below the market value of the extension would be achieved on the rent due under the lease.” The statute provides that “market value must be established by a real estate broker’s opinion of the rental value or by an appraisal of the rental value.” Plaintiff claims that the LIO project is not an extension and that the rental rate was not at least 10 percent below the market value of the real property at the time of the extension. Count Two alleges that construction of the Project caused damage to ABI’s building, which abuts the LIO.¹ ABI requested declaratory judgment that the lease is invalid, reformation of the lease “to market value,” unspecified damages of “\$250,000 or more,” “[a] Judgment in favor of Alaska Building of 10% of the savings to the Legislative Affairs Agency for invalidation or reformation of the LIO Project Lease,” and punitive damages, as well as costs and fees.

716 and the Agency filed separate motions to dismiss, arguing that ABI lacked standing to assert the Count One claim.² They pointed out that ABI had failed to identify facts adequate to support either interest-injury standing or citizen-taxpayer standing.

¹ The superior court severed Count Two in the same August 20, 2015 order at issue in this Petition, and 716 does not challenge that portion of the Order. ABI has since filed a Second Amended Complaint devoted solely to the Count I allegations.

² LAA’s motion was initially filed before the Complaint was amended, but the amendments did not affect the relief sought or the grounds on which it was sought.

After both motions were fully briefed, the superior court heard oral argument on both motions on August 18, 2015. The superior court made a preliminary ruling from the bench at the close of oral argument and issued a written order on August 20, 2015. The superior court's written order concluded, in relevant part, that ABI had citizen-taxpayer standing to bring the claims asserted in Count One.

716 timely seeks review of this ruling.³

III. QUESTIONS PRESENTED FOR REVIEW

1. Did the superior court err in ruling that ABI had citizen-taxpayer standing, despite its finding that other more appropriate plaintiffs existed?

2. Did the superior court err in ruling that ABI was an appropriate plaintiff, despite the lack of any finding that ABI possessed any true adversity?

IV. REASONS WHY REVIEW SHOULD NOT BE POSTPONED

Alaska Rule of Appellate Procedure 402(b) provides that interlocutory review is not a matter of right, but will be taken only where one of the four circumstances enumerated in that rule is present. Here, three of those four circumstances exist.

First, standing is an issue that demands attention early in a proceeding. It would be inequitable to defer review until entry of a final judgment. If review is denied at this time, 716 will be forced to expend substantial time and money defending against a claim

³ This Petition would have been due on August 31, 2015, under normal operation of the rules; however, the Presidential visit delayed the due date until September 2, 2015. *In the Matter of: Court Closure for Visit of President Barack Obama*, PJ Order #648 (Alaska Third Judicial District, Aug. 12, 2015).

ABI may have no legal ability to bring.⁴ This dispute is still in its early stages; discovery is just now beginning and trial will not take place until the week of August 15, 2016.

Second, 716's Petition raises an important question of law that requires the attention of this Court.⁵ Despite the steady evolution of citizen-taxpayer standing jurisprudence in *Trustees for Alaska v. State*,⁶ *Ruckle v. Anchorage School District*,⁷ *Keller v. French*,⁸ and *Law Project for Psychiatric Rights, Inc. v. State* ("LPPRI"),⁹ this Court has yet to articulate a standard for determining when the threshold adversity requirement for citizen-taxpayer standing has been met.

Third, if review is not granted at this time, this issue may evade review entirely.¹⁰ 716 is confident that ABI's claim will fail on its merits, and ABI has expressed in its filings a sensitivity to a potential adverse fee award under Civil Rule 82.¹¹ As 716 will not appeal a ruling in its favor, and as ABI is unlikely to expose itself to further fee liability by bringing an appeal, this Petition may well present the only opportunity for the Court to consider this question.

⁴ Appellate Rule 402(b)(1).

⁵ Appellate Rule 402(b)(2).

⁶ 736 P.2d 324, 327 (Alaska 1987).

⁷ 85 P.3d 1030 (Alaska 2004).

⁸ 205 P.3d 299 (Alaska 2009).

⁹ 239 P.3d 1252 (Alaska 2010).

¹⁰ Appellate Rule 402(b)(3).

¹¹ ABI's Opposition to 716's Motion at 5. This sensitivity is understandable, in light of this Court's ruling in *LPPRI*. There, as here, opposing counsel James Gottstein was a director and president of the plaintiff corporation and also served as its legal counsel in the litigation.

V. THE SUPERIOR COURT'S RULING FAILED TO FOLLOW THIS COURT'S PRECEDENTS AND WAS LEGAL ERROR

Whether a party has standing to sue is a question of law reviewed by this Court *de novo*.¹² In *Trustees*, this Court stated that “[t]he basic requirement for standing in Alaska is adversity.”¹³ In *LPPRI*, it reaffirmed the inflexibility of this this requirement, even though the Court generally “favor[s] access to judicial forums[.]”¹⁴ Regardless of whether a party asserts interest-injury standing or citizen-taxpayer standing, it must meet this requirement. In the context of citizen-taxpayer standing, this Court has held that “plaintiffs must show that the case is of public significance and that they are appropriate plaintiffs.”¹⁵

A. The superior court’s ruling was erroneous, in light of its factual finding that other more appropriate and more directly affected plaintiffs exist.

The superior court found more appropriate plaintiffs than ABI exist, but held their existence did not require it to find ABI was also not an appropriate plaintiff. The court indicated judicial review of matters of public concern should not have to wait for the “perfect plaintiff” to sue.¹⁶ This ruling is contrary to this Court’s precedents, which make clear that a plaintiff does not become “appropriate” for standing purposes solely because other more appropriate or more directly affected plaintiffs are deemed unlikely to bring suit or have not yet brought suit. 716 has consistently argued that ABI is not an

¹² *Keller*, 205 P.3d at 302.

¹³ *Trustees*, 736 P.2d at 327.

¹⁴ *LPPRI*, 239 P.3d at 1255 (citing *Trustees*, 736 P.2d at 327).

¹⁵ *Keller*, 205 P.3d at 302.

¹⁶ Order at 7.

appropriate plaintiff, given the existence of actual appropriate plaintiffs (as now identified by the court), not that the court need to wait for a “perfect” plaintiff. Moreover, the court has significantly departed from the appropriateness test developed by this Court. The superior court concluded its analysis by stating ABI “has an interest in this matter as a taxpayer-citizen” without ever giving an explanation as to how it arrived at that conclusion.¹⁷

This rule has evolved over time. In *Trustees*, this Court did hold that citizen-taxpayer “standing may be denied if there is a plaintiff more directly affected by the challenged conduct who has *or is likely to* bring suit.”¹⁸ However, its later decisions reined in this expansive rule. In *Keller*, the Court rejected a “too literal” interpretation of its citizen-taxpayer standing test and ruled more narrowly that the fact “[t]hat other individuals who are more directly affected have chosen not to sue despite their ability to do so does not confer citizen-taxpayer standing on an inappropriate plaintiff.”¹⁹ The Court likened *Keller* to *Kleven v. Yukon-Koyukuk School District*, where it held that even a plaintiff who had been affected by his former employer’s grievance process lacked standing to sue because those individuals still working for the employer were in a better position to sue—which rendered them more appropriate plaintiffs, even if they were unlikely to bring suit.²⁰ The Court provided still more guidance on this principle in

¹⁷ *Id.*

¹⁸ 736 P.2d at 329 (emphasis added).

¹⁹ *Keller*, 205 P.3d at 303.

²⁰ *Id.* (citing *Kleven*, 853 P.2d 518, 526 (Alaska 1993)).

LPPRI. There, it held that the plaintiff's assertion of citizen-taxpayer standing on the basis of wrongs done to others was an improper attempt to assert third-party rights, citing the plaintiff's lack of any direct interest and the existence of numerous other litigants actually affected.²¹

The superior court's ruling here must be considered in the context of these evolving standards. The superior court found:

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 alternate parties that were excluded from the hypothetical bidding process would have a more direct claim to challenge the lease as opposed to ABI.²²

²¹ *LPPRI*, 239 P.3d at 1255.

²² Order at 6. *Ruckle v. Anchorage School District*, 85 P.2d 1030 (Alaska 2004), relied on by ABI below and cited in the superior court's Order, is a red herring. The superior court stated that it found *Ruckle* to be "particularly helpful" in determining the appropriateness of ABI as a plaintiff and that it found the facts here to be "more similar" to those of *Ruckle* than of other more apposite cases. Order at 4, 6 (citing *Ruckle*, 85 P.3d at 1036). These statements are difficult to reconcile with the clear factual differences between *Ruckle* and the case at bar—most notably, the fact that the Court determined *Ruckle* to be an inappropriate plaintiff because another more appropriate plaintiff *had already brought suit*. *Ruckle*, 85 P.2d at 1037 ("Not only is it clear that another party has brought suit to vindicate these interests, but under the circumstances we agree that Laidlaw is the more appropriate plaintiff in this case."). Trial courts are to evaluate the appropriateness of plaintiffs on a case-by-case basis, and in the specific context of *Ruckle*, "allowing *Ruckle* to proceed with her claims against ASD would be unnecessarily duplicative given Laidlaw's enormous economic incentive and the fact that it has already filed suit." *Id.* at 1037. *Ruckle* thus represents an extreme factual situation where denial of taxpayer-citizen standing was clearly mandated, even under an expansive reading of this Court's precedents; it does not stand for the proposition that standing must be found unless another suit has already been brought by a more directly affected plaintiff.

The superior court thus made three findings relevant to this Petition. First, it found it “undisputed” that other potential plaintiffs existed. Second, it found that the “parties to the lease” were “more appropriate” plaintiffs than ABI. Third, it found that even hypothetical bidders “would have a more direct claim to challenge the lease” than ABI. Despite these three findings—three red flags under both *Keller* and *LPPRI*—the superior court went on to conclude that ABI had standing.²³ It reasoned that “just because a more appropriate plaintiff may exist does not require this Court to find that ABI is not an appropriate plaintiff.”²⁴ This was error. The superior court never found that the undisputed, identifiable “more appropriate” plaintiffs would be unwilling or unable to sue if they thought their rights had been violated because of the lease extension.²⁵ Under the case law outlined above, the certain existence of a more appropriate plaintiff with a “more direct claim” does in fact require the trial court to find that the plaintiff at hand lacks standing. This is imperative where, as here, the suing plaintiff has identified no actual adversity and is not affected in any way by the subject of the action—where he is, in other words, entirely inappropriate.²⁶

²³ Order at 7 (quoting *Trustees* language regarding favoring accessibility to judicial forums.).

²⁴ *Id.*

²⁵ *Cf. Keller*, 205 P.3d at 303.

²⁶ A policy concern appears to have informed the superior court’s decision, as evidenced by its statement that “[t]o 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.’” Order at 7. But this concern is unwarranted in light of *LPPRI*’s later modification to this now outdated standard. *LPPRI*, 239 P.3d at 1255

B. The superior court failed to make findings on the issue of ABI's adversity, an element required to render ABI an appropriate plaintiff.

As discussed above, and as the superior court acknowledged in its Order, “[t]he basic requirement for standing in Alaska is adversity.”²⁷ Yet the superior court failed to make findings supporting its ruling that ABI was adverse such as to render it an “appropriate plaintiff” on Count One.²⁸

Given the record in this case, the lack of any such findings is not surprising. In its Amended Complaint, ABI alleged no facts going to adversity on Count One. In its brief opposing 716’s motion to dismiss, ABI argued only that its attempt to recover damages demonstrated its adversity. However, the only damage alleged on Count One was ABI’s claim for “10% of the savings to the Legislative Affairs Agency for invalidation or reformation of the LIO Project Lease”—a claim even ABI acknowledged at oral argument was supported by no existing law.²⁹ In the context of concluding that ABI “clearly” lacked interest-injury standing on Count One, the superior court found that ABI “is not a party to the lease[,]” “was not involved in the process of negotiation or

(“Although we favor access to judicial forums, a basic requirement of standing is adversity of interests.”).

²⁷ Order at 2 (citing *Trustees*, 736 P.2d at 327).

²⁸ The superior court also considered ABI’s competence and whether it was a “sham plaintiff.” Order at 5, 6. 716 does not seek review of the superior court’s fact-based findings on these issues.

²⁹ The superior court appropriately disregarded this damage claim its Order in the context of interest-injury standing. Order at 3 (“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.”).

formation of the lease,” and “does not have a personal interest adversely affected by the formation of the lease.”³⁰

The notable absence of adversity evidence from the record—which was confirmed by the superior court’s factual finding that ABI had no conceivable interest adversely affected by the formation of the lease—clearly establishes that ABI does not seek to assert any of its own rights through Count One. This lack of any adverse personal interest should have been fatal to ABI’s attempt to obtain standing. The Court has repeatedly held that citizen-taxpayer standing cannot be founded on the assertion of third-party rights. In *Keller*, it found that the plaintiffs were “attempting to assert the individual rights of potential or ‘imaginary’ third parties” and stated that it “ha[d] never before allowed citizen-taxpayer standing to be used in this way.”³¹ In *LPPRI*, the Court reiterated and applied its holding in *Keller*, finding the situations “indistinguishable.”³²

The situation presented in this Petition is similarly indistinguishable, as ABI seeks to assert not its own rights, but the individual rights of potential bidders or potentially the State of Alaska itself. Despite this clear parallel, the superior court attempted to distinguish ABI’s claim from *Keller* and *LPPRI*, stating that ABI was exercising “a citizen’s right to challenge the potentially excessive state expenditures of public funds”

³⁰ Order at 3.

³¹ *Keller*, 205 P.3d at 304.

³² *LPPRI*, 239 P.3d at 1255.

rather than bring suit on the basis of “individual rights.”³³ This statement was made without citation and does not reflect any cognizable argument made by ABI below.

A close review of the Order suggests that the superior court may have founded this statement on a misreading of a single line of dicta in *Ruckle*. Earlier in the Order, the superior court characterized *Ruckle* as acknowledging that citizen-taxpayers have standing to challenge the results of a public bidding system.³⁴ This Court, however, made clear in *Ruckle* that while it had been presented with several cases that did “support the proposition that citizen-taxpayers have standing to challenge the results of public bidding systems[,]” those cases were decided under legal regimes very different from Alaska’s.³⁵ The Court helpfully provided parenthetical descriptions for every case cited in its footnote to that statement, which reveal that in each instance, the governing law had precluded direct challenges from disappointed bidders.³⁶ In such circumstances, allowing citizen-taxpayer standing makes sense, because the parties actually affected—the bidders—lack the ability to bring suit themselves. But as the Court itself acknowledged, “[t]his is not the law in Alaska.”³⁷ Rather, Alaska’s procurement laws expressly allow

³³ Order at 6.

³⁴ Order at 4.

³⁵ *Ruckle*, 85 P.3d at 1036.

³⁶ *Id.* at 1036 n.20.

³⁷ *Id.* at 1036.

bid protests.³⁸ The superior court’s approval of ABI’s “citizen’s challenge” appears to have been founded on such an interpretation of *Ruckle*, and was therefore error.

In foregoing any meaningful analysis of ABI’s adversity—the crucial element underlying all other considerations of “appropriateness”—the superior court functionally rested its standing determination solely on the first element of the citizen-taxpayer standing test: whether the claim involves a matter of public significance. The implication of allowing its ruling to stand is profound. If the mere expenditure of funds by the State provides grounds for standing, *any* citizen could challenge *any* State action. Such a lax standard would run directly counter to this Court’s deliberate efforts to ensure that citizen-taxpayer standing is granted only where the plaintiff also demonstrates actual adversity and is determined to be an appropriate litigant.

VI. STATEMENT OF RELIEF SOUGHT

“Standing is a ‘rule of judicial self-restraint based on the principle that courts should not resolve abstract questions or issue advisory opinions.’”³⁹ The superior court’s ruling grants ABI standing to assert abstract claims, based on theoretical injuries to unknown third parties, in defiance of this rule. For this reason, and for the reasons stated above, 716 respectfully requests that the Court grant review of this pressing question, reverse the superior court’s decision as to citizen-taxpayer standing, and dismiss Count One.

³⁸ See AS 36.30.560 (“An interested party may protest the award of a contract, the proposed award of a contract, or a solicitation for supplies, services, professional services, or construction by an agency.”).

³⁹ *Keller*, 205 P.3d at 302 (quoting *Ruckle*, 85 P.3d at 1034).

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Attorneys for 716 West Fourth Avenue, LLC

DATED: 9-2-15

By: *JWR*
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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/ KPB ARCHITECTS, PFEFFER)
DEVELOPMENT, LLC, LEGISLATIVE)
AFFAIRS AGENCY, and CRITERION)
GENERAL, INC.,)
Defendants.)

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ASHBURN & MASON

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.¹ Unlike other defenses, it is not subject to waiver, but may instead be raised at any

¹ Civ. R. 12(b)(1).

time.² 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.”³

Misjoinder of parties is not ground for dismissal of an action.⁴ 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.⁵ Any claim against a party may be severed and proceeded with separately.⁶

ANALYSIS

Standing:

Standing questions are limited to whether the litigant is a proper party to request an adjudication of a particular issue.⁷ 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.⁸ The basic requirement for standing in Alaska is adversity.⁹ The concept of standing has been interpreted broadly in Alaska.¹⁰ Alaska has departed from a restrictive interpretation of the standing requirement, adopting instead an approach favoring increased accessibility to judicial forums.¹¹ There are two different kinds of standing: interest-injury standing and taxpayer-citizen standing.

² Civ. R. 12(h)(3).

³ *Id.*

⁴ Civ. R. 21.

⁵ *Id.*

⁶ *Id.*

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

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

Under the interest-injury approach, a plaintiff must have an interest adversely affected by the conduct complained of.¹² Such an interest may be economic, or it may be intangible, such as an aesthetic or environmental interest.¹³ 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.¹⁴

ABI, despite arguing otherwise,¹⁵ 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:

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

¹² *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.'").

¹³ *Id.*

¹⁴ *Id.*

¹⁵ 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.¹⁶

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

The Supreme Court's decision in *Ruckle v. Anchorage School Dist.*²⁰ 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.²¹ The Supreme Court found this analysis compelling.²² 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."²³

¹⁶ *Id.* (Internal citations omitted).

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

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

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

²⁰ 85 P.3d 1030, 1036 (Alaska 2004).

²¹ *Id.* (Emphasis added).

²² *Id.* at 1037.

²³ *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.w.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.w.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*²⁴ 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.²⁵

The Supreme Court found that the plaintiffs were not “sham” plaintiffs and that they were capable of competently advocating their positions.²⁶ 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.²⁷ 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.²⁸ The Court stated that they would not “allow the use of taxpayer-citizen standing as a substitute for third-party standing.”²⁹

Again, in *Law Project for Psychiatric Rights, Inc. v. State*,³⁰ 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

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.

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

²⁵ 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.

²⁶ *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.”)

²⁷ *Id.*

²⁸ *Id.*

²⁹ *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.)

³⁰ 239 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."³¹ Before the Alaska Supreme Court, LPPR conceded that the constitutional right it sought to establish was an individual right.³² The Court noted that "*Keller* is indistinguishable from the situation here."³³ 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."³⁴

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.

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.

³¹ *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.'")

³² *Id.* at 1255.

³³ *Id.* ("LPPR seeks to establish a personal constitutional right on behalf of an unknown number of minors through citizen-taxpayer standing.")

³⁴ *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.³⁵ 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."³⁶ 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."³⁷ This provision is "used by our courts to ensure that the real contestants in interest are before it."³⁸ This provision can be used to dismiss a claim or sever it from the main action.³⁹

The 9th 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.⁴⁰ 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."⁴¹ This is substantially similar to the language contained in Alaska's Civil Rule 20(a).⁴²

³⁵ 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.")

³⁶ *Id.* at 327.

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

³⁸ *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).

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

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

⁴¹ *Id.*

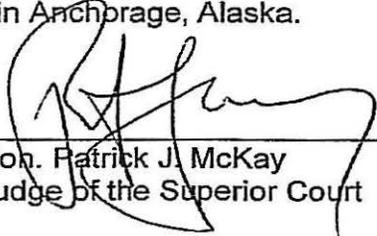
⁴² Alaska Civ. R. 20(a) states: "All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact 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 Complaint⁴³ and Amended Complaint⁴⁴ fail to name any party other than LAA in Count One.⁴⁵ 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 716.⁴⁶ 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.



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. Mattatien B. Cook C. Lacey
A. Robinson M. Scher
D. Green R. Audley
R.N. 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."

⁴³ 17-22, March 31, 2015.

⁴⁴ 17-22, June 8, 2015.

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

⁴⁶ *Id.*

IN THE SUPREME COURT OF THE STATE OF ALASKA

DOCKETING STATEMENT B

**For Use With Petitions for Hearing, Petitions for
Review, and Original Applications and
as a Notice of Intent to File Sentence Petition**

(for court system use)

RECEIVED

SEP 3 2015

BY: _____

No. _____

INSTRUCTIONS FOR MULTIPLE PARTIES OR ATTORNEYS: If there are multiple parties or attorneys, repeat the appropriate box. This may be done on a separate page. Please clearly indicate which attorney represents which party.

1. TYPE OF PETITION

Type of Petition	Court of Appeals or Superior Court Case Number	Date of Distribution of Decision or Order to be Reviewed	Superior Court Judge	Subsequent Proceedings
a. <input type="checkbox"/> Petition for Hearing from Court of Appeals				Petition for Rehearing: <input type="checkbox"/> not filed <input type="checkbox"/> filed. Date filed: _____ <input type="checkbox"/> Date of distribution of order denying petition: _____
b. <input checked="" type="checkbox"/> Petition for Hearing from Superior Court	3AN-15-05969			
c. <input type="checkbox"/> Petition for Review <input type="checkbox"/> Notice of Intent to file Sentence Petition				Motion for Reconsideration: <input type="checkbox"/> not filed <input type="checkbox"/> filed. Date filed: _____ <input type="checkbox"/> denied by order distribution: _____ <input type="checkbox"/> deemed denied under Civil Rule 77(k)(4).
d. <input type="checkbox"/> Original Application <input type="checkbox"/> from Court of Appeals case No. _____ <input type="checkbox"/> from trial court case. No. _____ Judge _____ <input type="checkbox"/> Other. Explain: _____				

2. PETITIONER

a. Name 716 West Fourth Avenue, LLC	b. Status in the Trial Court <input type="checkbox"/> Plaintiff <input checked="" type="checkbox"/> Defendant
c. Petitioner Mailing Address (not attorney's address) 425 G. Street Suite 210, Anchorage, AK 99501	<input type="checkbox"/> Other. Specify: _____
City State Zip Code Anchorage Alaska 99501	d. Telephone

3. PETITIONER'S ATTORNEY

a. Name Jeffrey W. Robinson	b. Bar Number 0805038	
c. Attorney Mailing Address 1227 W. 9th Avenue Suite 200	d. Telephone 907-276-4331	e. Fax 907-277-8235
City State Zip Code Anchorage Alaska 99501	f. Firm/Agency	

4. RESPONDENT

a. Name Alaksa Building, Inc.	b. Status in the Trial Court <input checked="" type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant	
c. Respondent Mailing Address 406 G St. Suite 206	<input type="checkbox"/> Other. Specify: _____	
City State Zip Code Anchorage AK 99501	d. Telephone 274-7686	

5. RESPONDENT'S ATTORNEY

a. Name James B. Gottstein	<input type="checkbox"/> Court Apptd	b. Bar Number 7811100
c. Attorney Mailing Address 406 G St. Suite 206	d. Telephone 274-7686	e. Fax
City Anchorage	State AK	Zip Code 99501
f. Firm/Agency		

6. CONSTITUTIONAL ISSUES

Is the constitutionality of a state statute or regulation at issue in this proceeding? Yes No
 If yes, cite statute or regulation: _____

7. SENTENCE PETITIONS ONLY

a. Excessiveness of the sentence is the ONLY issue.
 b. A transcript of the sentencing proceeding is requested because Petitioner is indigent.
 (If petitioner has not been adjudicated indigent by the trial court, a completed, financial statement affidavit form must be attached.)

8. ATTACHMENTS

The following items are submitted with this form (a, b, or c must be check unless this is a notice of intent to file sentence petition):

a. The original petition for review and SIX copies or petition for hearing from the superior court and SIX copies; OR
 b. The original petition for hearing from the court of appeals and NINE copies; OR
 c. The original application and SIX copies.
 d. A copy of the judgment or order from which relief is sought attached to the original petition and EACH copy.
 e. A \$200 filing fee or a motion to appeal at public expense (financial statement affidavit form must be included).
 a motion to waive filing fee (if basis for motion is inability to pay, financial statement affidavit form must be included).
 no filing fee is required because appellant is represented by court-appointed counsel.
 the state or an agency thereof.
 an employee appealing denial of benefits under AS 23.20 (Employment Security Act)
 f. A motion for expedited action submitted not submitted.
 g. A motion for stay of trial court proceedings submitted not submitted

9-2-15

Date

James B. Gottstein

Signature of Petitioner or Petitioner's Attorney

CERTIFICATE OF SERVICE

I certify that on 9/2/15 a copy of this docketing statement and all attachments (except filing fee) were

mailed	delivered	to All Parties in the trial court (listed)
<input checked="" type="checkbox"/>	<input type="checkbox"/>	- See attached Affidavit of Service
<input type="checkbox"/>	<input type="checkbox"/>	
<input type="checkbox"/>	<input checked="" type="checkbox"/>	Judge Patrick McKay
<input type="checkbox"/>	<input type="checkbox"/>	Superior Court - via hand delivery
		See Attached Affidavit of Service

Signature: David G. Wyllie

IN THE SUPREME COURT FOR THE STATE OF ALASKA

ALASKA BUILDING, INC., an Alaska corporation,)

Plaintiffs,)

vs.)

716 WEST FOURTH AVENUE LLC,)
KOONCE PFEFFER BETTIS, INC., d/b/a)
KPB ARCHITECTS, PFEFFER)
DEVELOPMENT, LLC, LEGISLATIVE)
AFFAIRS AGENCY, and CRITERION)
GENERAL, INC.,)

Defendants. _____



Case No.: 3AN-15-05969 Civil

AFFIDAVIT OF SERVICE

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

I, Heidi A. Wyckoff, being first duly sworn upon oath, depose and state:

1. I am employed by the law firm of Ashburn & Mason, P.C., counsel for Petitioner in the above-captioned matter.

2. Pursuant to Appellate Rule 403 (a)(1)(A), I served a copy of the Docketing Statement, Petition for Review and Affidavit of Service, via hand delivery on September 1, 2015 to:

Chambers of the Honorable Judge Patrick A. McKay
Anchorage Superior Court
425 W. 4th Avenue
Anchorage, Alaska 99501

3. Pursuant to Appellate Rule 403 (a)(1)(A), I served a copy of the Docketing Statement, Petition for Review and Affidavit of Service on the following parties via U.S. mail on September 1, 2015 on the following parties:

James B. Gottstein
Law Offices of James B.
Gottstein
406 G Street, Suite 206
Anchorage, Alaska 99501

Mark P. Scheer
Scheer & Zehnder LLP
701 Pike Street, Suite 2200
Seattle, WA 98101

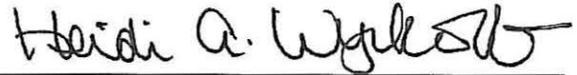
Kevin Cuddy
Stoel Rives, LLP
510 L Street, Suite 500
Anchorage, Alaska 99501

Cynthia L. Ducey
Delaney Wiles
1007 W. 3rd Avenue, Ste.
400
Anchorage, Alaska 99501

Dan Quinn
360 K Street, Suite 200
Anchorage, AK 99501

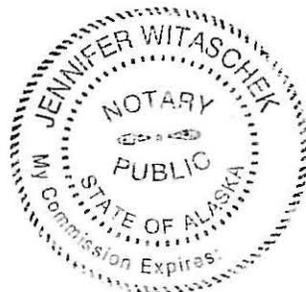
Blake Call
Call & Hanson, P.C.
413 G Street
Anchorage, Alaska 99501

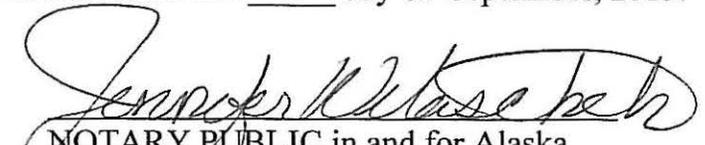
FURTHER YOUR AFFIANT SAYETH NAUGHT.



Heidi A. Wyckoff

SUBSCRIBED AND SWORN to before me this 2nd day of September, 2015.




NOTARY PUBLIC in and for Alaska
My Commission Expires: 9/17/17