

IN THE SUPREME COURT FOR THE STATE OF ALASKA



LAW PROJECT FOR PSYCHIATRIC)
RIGHTS, Inc., an Alaskan non-profit)
corporation,)
Appellant,)
vs.)
STATE OF ALASKA, et al.,)
Appellees.)
_____)

Supreme Court No. S-13558

Superior Court No. 3AN 08-10115CI

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE JACK W. SMITH, PRESIDING

REPLY BRIEF OF APPELLANT

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**CONSTITUTIONAL PROVISIONS, STATUTES, COURT RULES, AND
OTHER AUTHORITIES PRINCIPALLY RELIED UPON**

CONSTITUTIONAL PROVISIONS

COURT RULES

AS 10.06.848(a)

(a) A domestic or foreign corporation may not commence a suit, action, or proceeding in a court in this state without alleging and proving at the time it commences the suit, action, or proceeding that it has paid its biennial corporation tax last due and has filed its biennial report for the last reporting period. A certificate of the payment of the biennial corporation tax and filing of the biennial report is prima facie evidence of the payment of the tax and the filing of the biennial report. The commissioner shall issue the certificate or a duplicate for a fee established by the department by regulation.

AS 10.20.011(b)(2)

A corporation may

...

(2) sue and be sued, complain and defend, in its corporate name;

Civil Rule 82(b)(3)(I)

(3) The court may vary an attorney's fee award calculated under subparagraph (b)(1) or (2) of this rule if, upon consideration of the factors listed below, the court determines a variation is warranted:

...

(I) the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts;

REPLY ARGUMENT

I. PsychRights has Citizen-Taxpayer Standing

Under the long line of cases starting with *Trustees for Alaska v. State*, 736 P.2d 324, 329 (Alaska 1987), this Court has denied citizen-taxpayer standing where the other requirements are met only "if there is a plaintiff more directly affected by the challenged conduct in question who has or is likely to bring suit" Here, no one has brought suit, and in PsychRights' opening brief it established that for various reasons there is no such plaintiff who is likely to bring suit. In response the State asks this Court to abandon this long-established precedent regarding citizen-taxpayer standing and erect additional, essentially insurmountable, barriers to citizen-taxpayer standing.

A. The State Essentially Admits Individual Parents or Children Can Not Achieve the Systemic Relief Requested.

In §II.B.1.a., of its brief, in response to PsychRights pointing out that individuals may have interest-injury standing to seek a remedy for themselves, but not to achieve the systemic relief sought here, the State argues (1) that the right of each affected individual to use *stare decisis* is a way to effect systemic relief, and (2) a class action could be brought for such systemic relief.

PsychRights respectfully suggests that these arguments are an admission of PsychRights' contention that such individual potential plaintiffs do not have any more standing than PsychRights to pursue the systemic relief sought here. It is not systemic relief to require each poverty stricken parent or child to mount a lawsuit against the state to vindicate their right not to be or have their child(ren) psychiatrically drugged

inappropriately. This is not only not systemic relief, it is illusory relief because such parents and children do not have the resources to mount such a case, even leaving aside the very real prospect of retaliation by the State should they attempt to do so.

Only by issuing the injunction sought by PsychRights will Alaska's children and youth be protected from the extremely harmful psychiatric drugging that is particularly pervasive in foster care and also endemic through Medicaid. PsychRights asserts in this action that children and youth have constitutional and statutory rights not to be harmed in this way, and the systemic injunction appears to be the only way to effectuate that right. PsychRights respectfully suggests requiring each individual child or parent to bring a suit to vindicate their individual rights not to be inappropriately given psychiatric drugs is no systemic remedy.

Similarly, that a class action may be available is not, it is respectfully suggested, grounds for denying citizen-taxpayer standing. Imposing the large additional procedural hurdles and mechanisms required of class actions would be a significant barrier to such suits. There is certainly nothing in the record here to suggest such a class action lawsuit would be mounted. There is nothing in this Court's citizen-taxpayer jurisprudence to suggest that citizen-taxpayer standing may be denied because of the possibility of a class action lawsuit, especially where there is no showing such a class action lawsuit is likely.

B. There is No Plaintiff Who Has Sued or is Likely to Sue.

In §II.B.1.b., of its brief, the State argues that through *Kleven v. Yukon-Koyukuk School District*, 853 P.2d 518 (Alaska 1993) and *Keller v. French*, 205 P.3d 299 (Alaska 2009), this Court has overruled *Trustees'* allowance of citizen-taxpayer standing where,

in addition to the other requirements, "no directly affected plaintiff has sued or is likely to sue." In *Keller*, however, there was a finding that more directly affected plaintiffs who were capable of suing and would have been willing to do so if they felt their rights were being violated, had chosen not to do so.¹ In *Kleven*, this Court held, "we have no reason to believe that current YKSD employees would be indisposed to press legitimate grievances."² This is in stark contrast to here where, for the reasons stated by PsychRights below³ and in its opening brief,⁴ the ability and willingness of such affected potential plaintiffs to sue is very questionable.

If citizen-taxpayer standing is denied here on the grounds that more directly affected plaintiffs have chosen not to sue, it is hard to see when citizen-taxpayer standing could ever be successfully asserted.

C. This Case Presents Issues of Public Significance

In §II.B.2., of its brief, citing *Torrey v. Hamilton*, 872 P.2d 186, 188 (Alaska 1994) and *Sopko v. Dowell Schlumberger Inc.*, 21 P.3d 1265, 1269 (Alaska 2001), the State asserts this Court should affirm the dismissal on the grounds that this case does not present an issue of public significance even though the State took the position below that the case did present issues of public significance. Exc. 130. Neither *Torrey* or *Sopko* involve the situation where the party conceded the point below, as here, nor has

¹ 205 P.3d at 303;

² 853 P.2d at 526.

³ Exc. 385-386.

⁴ Opening Brief at 31.

PsychRights found any case where this Court has invoked the rule that it may affirm a judgment on a ground different than that made by the trial court where the party asserting it took the contrary position before the trial court.

In fact, in *Doxsee v. Doxsee*, 80 P.3d 225, 231 (Alaska 2003), this court held, "Because Doxsee's argument is fundamentally inconsistent with her position below, . . . we reject the argument as unpersuasive." PsychRights respectfully suggests the State should not be allowed to change its position on appeal. PsychRights did not address the issue below because it was conceded.

Moreover, this case presents issues of public significance. Frankly, it is unfathomable to PsychRights that the State is arguing protecting Alaska's children and youth from the harms detailed in the complaint, which must be taken as true for purposes of this appeal, does not raise issues of public significance. It is this cavalier indifference towards the great harm the State is inflicting on thousands and thousands of Alaska's children and youth through the inappropriate authorization and administration of psychiatric drugs to children and youth that made this action necessary.⁵

The State argues that while a locally controversial plan to vacate part of a street in Seward is of sufficient public significance to invoke citizen-taxpayer standing,⁶ the actions of the State here in harming thousands upon thousands of Alaskan children and youth through inappropriate psychiatric drugging is not because it only affects a "subset

⁵ See, Exc., 55-73, for the extensive efforts of PsychRights in attempting to get the State to address the problem without litigation.

of the Alaska public." It is hard to see how a locally controversial plan to vacate part of a street in Seward, which involved far fewer people, is of more public significance than the State harming thousands upon thousands of Alaskan children and youth. Moreover, the State's premise is incorrect that the complained of action affects only the subset of Alaskan children and youth being harmed, and perhaps their parents. It is respectfully suggested that so many children and youth being harmed by the State's actions affects and should concern all Alaskans.

II. Should This Court Create the Requirement that a Specific Allegation that PsychRights Paid Taxes is Required, PsychRights Should be Allowed to Amend the Complaint To Do So.

The state also raises for the first time on appeal at §II.B.3, that PsychRights lacks citizen-taxpayer standing because PsychRights did not allege that it pays taxes to the State of Alaska. During briefing on the State's Motion to Dismiss, PsychRights did amend paragraph 4 of the complaint to include the allegation that PsychRights "has citizen-taxpayer standing to bring this action," in order to cure that as a potential technical pleading defect. Ex. 562, 581. If the State had made the argument below that a specific allegation that PsychRights has paid taxes was necessary, PsychRights would have amended the complaint to do so. Should this Court decide the specific allegation

(Continued footnote)-----
⁶ *Washington's Army v. City of Seward*, 181 P.3d 1102 (Alaska 2008).

that PsychRights pays taxes is necessary,⁷ PsychRights respectfully suggests it should be allowed to amend the complaint to include such an allegation(s).⁸

III. The Superior Court Erred By Staying Discovery

In §I.B., of its brief, the State asserts that PsychRights' contention that the Superior Court erred by staying discovery with respect to facts applicable to the question of whether a more directly affected plaintiff was likely to sue, was not raised below. This is not true. This issue was directly raised at Exc. 385-386.

IV. The Attorney Fee Award Should Be Vacated

PsychRights will rely on its opening brief for the substantive arguments, but must correct the State's misstatement at page 34 of its brief that PsychRights apparently advised potential plaintiffs not to bring suit. PsychRights has never advised potential plaintiffs not to sue. For the reasons stated, PsychRights decided not to bring the case in their name, but never advised such potential plaintiffs not to sue.

Fundamentally, the State's position on the attorney's fee issue is part and parcel of its effort in this case to erect ever greater barriers to people without wealth being able to meaningfully access the courts to vindicate their rights. Civil Rule 82(b)(3)(I) is

⁷ AS 10.06.848(a) provides that a for profit corporation must allege and prove it has paid its biennial tax last due, while AS 10.20.011(b)(2) provides that a nonprofit corporation may bring suit without such an allegation.

⁸ Should this Court uphold the dismissal on the basis that PsychRights did not allege it paid taxes, there would seem to be nothing to prevent it from re-filing with such an allegation.

designed to at least ameliorate this problem in some way and PsychRights respectfully suggests the Superior Court abused its discretion in failing to consider and invoke it.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests this Court

1. REVERSE the Superior Court's dismissal of this action for lack of citizen-taxpayer standing, and REMAND this case for further proceedings, and
2. REVERSE and VACATE the Attorney's Fee Award against PsychRights.