IN THE SUPREME COURT OF THE STATE OF ALASKA

Law Project for Psychiatric Rights, Inc.,	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	
State of Alaska, et al.,	)	**Supreme Court No.: S-13558**
	)	
Appellees.	)	
	)	

Trial Court Case No. **3AN-08-10115CI**

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

BRIEF OF APPELLEE, STATE OF ALASKA

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Filed in the Supreme Court
of the State of Alaska
this ___ day of _____, 2010

MARILYN MAY, CLERK
Appellate Courts

By: _____
Deputy Clerk

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ALASKA STATUTES:

AS 09.60.010. Costs and attorney fees allowed prevailing party.

(a) The supreme court shall determine by rule or order the costs, if any, that may be allowed a prevailing party in a civil action. Unless specifically authorized by statute or by agreement between the parties, attorney fees may not be awarded to a party in a civil action for personal injury, death, or property damage related to or arising out of fault, as defined in AS 09.17.900 , unless the civil action is contested without trial, or fully contested as determined by the court.

(b) Except as otherwise provided by statute, a court in this state may not discriminate in the award of attorney fees and costs to or against a party in a civil action or appeal based on the nature of the policy or interest advocated by the party, the number of persons affected by the outcome of the case, whether a governmental entity could be expected to bring or participate in the case, the extent of the party's economic incentive to bring the case, or any combination of these factors.

(c) In a civil action or appeal concerning the establishment, protection, or enforcement of a right under the United States Constitution or the Constitution of the State of Alaska, the court

(1) shall award, subject to (d) and (e) of this section, full reasonable attorney fees and costs to a claimant, who, as plaintiff, counterclaimant, cross claimant, or third-party plaintiff in the action or on appeal, has prevailed in asserting the right;

(2) may not order a claimant to pay the attorney fees of the opposing party devoted to claims concerning constitutional rights if the claimant as plaintiff, counterclaimant, cross claimant, or third-party plaintiff in the action or appeal did not prevail in asserting the right, the action or appeal asserting the right was not frivolous, and the claimant did not have sufficient economic incentive to bring the action or appeal regardless of the constitutional claims involved.

(d) In calculating an award of attorney fees and costs under (c)(1) of this section,

(1) the court shall include in the award only that portion of the services of claimant's attorney fees and associated costs that were devoted to claims concerning rights under the United States Constitution or the Constitution of the State of Alaska upon which the claimant ultimately prevailed; and

(2) the court shall make an award only if the claimant did not have sufficient economic incentive to bring the suit, regardless of the constitutional claims involved.

(e) The court, in its discretion, may abate, in full or in part, an award of attorney fees and costs otherwise payable under (c) and (d) of this section if the court finds, based upon sworn affidavits or testimony, that the full imposition of the award would inflict a substantial and undue hardship upon the party ordered to pay the fees and costs or, if the party is a public entity, upon the taxpaying constituents of the public entity.

COURT RULES:

Civil Rule 23. Class Actions.

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) The prosecution of separate actions by or against individual members of the class would create a risk of

(A) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) The party opposing the class has acted or refuses to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the finding include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to Be Maintained -- Notice Judgment -- Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in the action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of

proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Civil Rule 82. Attorney's Fees.

(a) Allowance to Prevailing Party. Except as otherwise provided by law or agreed to by the parties, the prevailing party in a civil case shall be awarded attorney's fees calculated under this rule.

(b) Amount of Award.

(1) The court shall adhere to the following schedule in fixing the award of attorney's fees to a party recovering a money judgment in a case:

Judgment and, if awarded,
Prejudgment Interest Contested With Trial Contested Without Trial Non-Contested
First $ 25,000 20% 18% 10%
Next $ 75,000 10% 8% 3%
Next $400,000 10% 6% 2%
Over $500,000 10% 2% 1%

(2) In cases in which the prevailing party recovers no money judgment, the court shall award the prevailing party in a case which goes to trial 30 percent of the prevailing party's reasonable actual attorney's fees which were necessarily

incurred, and shall award the prevailing party in a case resolved without trial 20 percent of its actual attorney's fees which were necessarily incurred. The actual fees shall include fees for legal work customarily performed by an attorney but which was delegated to and performed by an investigator, paralegal or law clerk.

(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:

(A) the complexity of the litigation;

(B) the length of trial;

(C) the reasonableness of the attorneys' hourly rates and the number of hours expended;

(D) the reasonableness of the number of attorneys used;

(E) the attorneys' efforts to minimize fees;

(F) the reasonableness of the claims and defenses pursued by each side;

(G) vexatious or bad faith conduct;

(H) the relationship between the amount of work performed and the significance of the matters at stake;

(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;

(J) the extent to which the fees incurred by the prevailing party suggest that they had been influenced by considerations apart from the case at bar, such as a desire to discourage claims by others against the prevailing party or its insurer; and

(K) other equitable factors deemed relevant. If the court varies an award, the court shall explain the reasons for the variation.

(4) Upon entry of judgment by default, the plaintiff may recover an award calculated under subparagraph (b)(1) or its reasonable actual fees which were necessarily incurred, whichever is less. Actual fees include fees for legal work performed by an investigator, paralegal, or law clerk, as provided in subparagraph (b)(2).

(c) Motions for Attorney's Fees. A motion is required for an award of attorney's fees under this rule or pursuant to contract, statute, regulation, or law. The motion must be filed within 10 days after the date shown in the clerk's certificate of distribution on the judgment as defined by Civil Rule 58.1. Failure to move for attorney's fees within 10 days, or such additional time as the court may allow, shall be construed as a waiver of the party's right to recover attorney's fees. A motion for attorney's fees in a default case must specify actual fees.

(d) Determination of Award. Attorney's fees upon entry of judgment by default may be determined by the clerk. In all other matters the court shall determine attorney's fees.

(e) Equitable Apportionment Under AS 09.17.080. In a case in which damages are apportioned among the parties under AS 09.17.080, the fees awarded to the plaintiff under (b)(1) of this rule must also be apportioned among the parties according to their respective percentages of fault. If the plaintiff did not assert a direct claim against a third-party defendant brought into the action under Civil Rule 14(c), then

(1) the plaintiff is not entitled to recover the portion of the fee award apportioned to that party; and

(2) the court shall award attorney's fees between the third-party plaintiff and the third-party defendant as follows:

(A) if no fault was apportioned to the third-party defendant, the third-party defendant is entitled to recover attorney's fees calculated under (b)(2) of this rule;

(B) if fault was apportioned to the third-party defendant, the third-party plaintiff is entitled to recover under (b)(2) of this rule 30 or 20 percent of that party's actual attorney's fees incurred in asserting the claim against the third-party defendant.

(f) Effect of Rule. The allowance of attorney's fees by the court in conformance with this rule shall not be construed as fixing the fees between attorney and client.

JURISDICTION

This is an appeal from a final order of the superior court, the Honorable Jack W. Smith, Judge, dismissing with prejudice the second amended complaint filed by the appellant, Law Project for Psychiatric Rights ("PsychRights"), against the appellees, the State of Alaska, et al. The trial court ordered the complaint dismissed on the record and also in a written order, both dated May 27, 2009; final judgment was entered on June 16, 2009. The appellant appeals from the order dismissing the complaint, from the trial court's order of March 31, 2009, staying discovery in the case, and from the trial court's order of July 29, 2009, awarding attorneys' fees to the defendants. This Court has legal authority to consider this appeal pursuant to AS 22.05.010 and Appellate Rule 202(a).

PARTIES

The appellant, PsychRights, is an Alaska nonprofit law firm. The appellees are the State of Alaska, the Alaska Department of Health and Social Services, the governor of Alaska, and several officials within the Alaska Department of Health and Social Services. (Except where context requires otherwise, the appellees are collectively referred to as "the defendants." "the state defendants," or "the state.")

ISSUES PRESENTED

1. The trial court ordered discovery to be stayed while it considered the state's dispositive motion to dismiss the case on the pleadings. Was this ruling an abuse of the court's discretion?

2. PsychRights, a nonprofit law firm, sued to stop the state from paying for psychotropic medications that doctors prescribed for minors, and to stop the state from allowing children in its custody to take such prescribed medications. PsychRights did not claim to have been injured by the state's alleged actions or to represent anyone who had been injured. Did the trial court err in finding that PsychRights lacked standing to bring this suit?

3. The trial court awarded the defendants attorneys' fees in accordance with Civil Rule 82. Was this an abuse of the court's discretion?

STATEMENT OF THE CASE

I. INTRODUCTION

A nonprofit law firm – PsychRights – sued the state to enjoin it from paying for psychotropic medications that psychiatrists prescribed for Alaska minors and from authorizing children in state custody to take such medications that are prescribed for them. [Exc. 53-54] PsychRights filed the suit in its own name and did not name any other plaintiffs. [Exc. 1] PsychRights did not allege to have suffered any harm as a result of the actions it alleges the state to have taken, but rather claimed it was entitled to maintain this suit as a citizen-taxpayer plaintiff because it is genuinely opposed to the use of psychotropic medication to

treat mental illness. [Exc. 585; At. Br. at 24, 28-37] The trial court: (1) stayed discovery while it considered the defendants' motion to dismiss the case on the pleadings; (2) dismissed the case after finding that PsychRights was without standing to maintain it; and (3) awarded the defendants partial attorneys' fees. [Exc. 561, 582-89] PsychRights appeals each of the trial court's orders.

II. FACTS AND PROCEEDINGS

On September 29, 2008, PsychRights filed a 54-page complaint in which it averred that it is an "Alaska non-profit corporation" and a "public interest law firm whose mission is to mount a strategic litigation campaign against forced psychiatric drugging and electroshock."[1] [Exc. 4] The complaint, which contained allegations about the administration of certain medications to minors in Alaska, sought three forms of equitable relief: (1) a declaration that Alaska minors have a right not to receive psychotropic medication except in compliance with conditions specified by PsychRights, (2) an injunction prohibiting the state from authorizing or paying for such medication other than in accordance with those conditions, and (3) an injunction ordering that all minors currently receiving

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[1] In considering a trial court's dismissal of a case on the basis of a pretrial motion, this Court will accept all well-pleaded allegations as factually true. By repeating in its brief the facts averred in the complaint, the state does not concede that the facts are true, nor that, if true, the complaint alleges a claim upon which relief can be granted against the state. If this Court reverses the trial court's dismissal of the case, factual disputes must be litigated on remand. *Pepper v. Routh Crabtree, APC*, 219 P.3d 1017 at 1018, n.1 (Alaska 2009).

psychotropic medication who are in state custody or whose medications are paid for by the state:

> be reassessed in accordance, and brought into compliance, with the specifications of Critical ThinkRX . . . by a contractor knowledgeable of the Critical ThinkRX curriculum and ready, willing and able to implement the Critical ThinkRX specifications, appointed and monitored by the Court, or a Special Master to be paid for by the State, appointed for that purpose.

[Exc. 54][2]

The complaint averred that children in Alaska have a due process right not to be treated with psychotropic medications and that state statutes require the state to care for children in its custody. [Exc. 6-8] It averred that, except in certain circumstances, Medicaid may not be used to pay for outpatient prescriptions. [Exc. 8] It described PsychRights' personnel's efforts to engage

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[2] The conditions specified by PsychRights in its request for declaratory relief would prohibit minors from receiving psychotropic medication:

> unless and until, (i) evidence-based psychosocial interventions have been exhausted; (ii) rationally anticipated benefits of psychotropic drug treatment outweigh the risks; (iii) the person or entity authorizing administration of the drug(s) is fully informed of the risks and potential benefits; and (iv) close monitoring of, and appropriate means of responding to, treatment emergent effects are in place.

[Exc. 53-54] While the requested declaratory relief would apply to all Alaska minors, the requested injunctive relief is limited to minors who are in the state's legal custody or whose medications are authorized or paid for by the state. [Exc. 53-54]

government officials and legislators about psychotropic medication, described the contents of an internet curriculum (Critical ThinkRX) critical of the use of psychotropic medication, detailed the FDA approval process for certain categories of pharmaceuticals, criticized marketing and prescribing practices for such medications, and described PsychRights' suggested interventions to address the marketing and prescribing practices. [Exc.8-50] In the only allegations directed at the defendants, PsychRights claimed that the state inappropriately authorized and paid for psychotropic drugs to be administered to minors. [Exc. 50-52] The complaint did not identify anyone whose interest PsychRights purported to represent.

The defendants answered the complaint on October 13, 2008. The answer asserted affirmative defenses, including that PsychRights lacked standing to bring the action. [Exc. 74-95]

On March 2, 2009, PsychRights served the state with requests for production. [Exc. 175-88] The state did not respond, but instead filed a dispositive motion for judgment on the pleadings and a motion to stay discovery pending resolution of the dispositive motion. [Exc. 104-35]

The trial court granted both motions and later entered a final judgment dismissing the case. [Exc. 561, 582-89] While the court found that the complaint raised issues of public interest and that PsychRights was capable of

advocating those issues, it also found that PsychRights was without standing to bring the suit because more appropriate plaintiffs existed. The court relied upon recent precedent from this Court, including *Keller v. French*, 205 P.3d 299 (Alaska 2009), in rejecting PsychRights' argument that it had standing to sue because individuals who were more directly affected had not sued and were not likely to do so. [Exc. 587]. The court noted that even assuming that PsychRights was genuinely opposed to the state's practices and that its mission statement reflected this opposition, such opposition did not confer standing to sue, because if it did, "any individual or group [could] create adversity by simply creating a nonprofit and drafting a mission statement opposing whatever issue they wish to challenge." [Exc. 586]

Following judgment, the state moved for attorney's fees. PsychRights opposed, averring that "[a]ny award is likely to deter litigants from the voluntary use of the courts." [Exc. 605] PsychRights did not challenge the amount of the fees. The trial court awarded the state its requested fees of $3,876.00 in accord with the schedule contained in Civil Rule 82.

PsychRights appealed the trial court's decisions (a) staying discovery, (b) granting the state's motion for judgment on the pleadings, and (c) awarding attorney's fees to the state.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN GRANTING THE STATE'S MOTION TO STAY DISCOVERY

A. Standard of Review

This Court reviews a trial court's order granting a motion to stay discovery for an abuse of discretion.[3] An appellate court generally will not upset a trial court's discovery ruling unless, in the totality of the circumstances, the ruling amounts to a gross abuse of discretion affecting substantial rights of the parties.[4]

B. PsychRights' Argument Is Not Properly Before This Court

PsychRights argues on appeal that the trial court erred in staying discovery pending resolution of the state's dispositive motion because PsychRights intended to explore through discovery "facts applicable to the question of whether a more directly affected plaintiff was likely to sue," specifically whether "such potential plaintiffs were unlikely to bring suit because of lack of resources and fear of retaliation." [At. Br. at 4, 39] This argument is not properly before this Court because it was never presented to the trial court.[5]

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[3] *Stone v. International Marine Carriers, Inc.*, 918 P.2d 551, 554 (Alaska 1996).

[4] *Tiedman v. Am. Pigment Corp.*, 253 F.2d 803 (4th Cir. 1958); *Bank of Am. Nat. Trust & Sav. Ass'n v. Hayden*, 231 F.2d 595 (9th Cir. 1956); *Roebling v. Anderson*, 257 F.2d 615 (D.C. Cir. 1958).

[5] *See, Vivian P. v. State*, 78 P.3d 703, 709 (Alaska 2003); *G.C. v. State, Dep't of Health & Soc. Servs., Div. of Family & Youth Servs.*, 67 P.3d 648, 655 n.25 (Alaska 2003); Appellate Rule 212(c)(8)(B).

PsychRights raises it for the first time in its appellate brief.

PsychRights filed a 28-page opposition – accompanied by 192 pages of exhibits – to the state's motion to stay discovery pending resolution of its motion for judgment on the pleadings. [Exc. 145-365] Despite the state's clear argument in its dispositive motion that the case should be dismissed because PsychRights lacked standing [Exc. 125-35], and its unequivocal position that the discovery proposed by PsychRights could have no effect on the merits of the dispositive motion [Exc. 104-07], nowhere in PsychRights' lengthy opposition does it hint, as it now argues on appeal, that it intended to establish its standing to bring the case by exploring through discovery the ability or willingness of other potential plaintiffs to file suit.

At the time PsychRights briefed the discovery motion, it clearly understood the importance of the standing issue to the state's then-pending dispositive motion. For example, it asserted in its opposition to the discovery motion that "[t]he sole legal basis asserted [in the dispositive motion] is lack of standing, which is in itself unmeritorious and in any event, can be addressed by naming additional plaintiffs," and "[t]he Motion for Judgment on the Pleadings, while it includes inaccurate and extraneous statements of counsel regarding factual matters, is legally grounded entirely on the extremely dubious contention that PsychRights lacks standing under Alaska's liberal standing requirements." [Exc. 146, 148] While PsychRights indicated that it intended to conduct discovery to address the alleged "inaccurate and extraneous" factual statements, it nowhere

indicated that it intended to explore issues implicating standing through discovery.[6] [Exc. 149-51]

PsychRights told the trial court in great detail what it intended to accomplish through discovery: it intended to show that children in Alaska were being harmed by the administration of certain medications and that the state defendants were involved in authorizing and paying for the administration of such medications. Specifically, PsychRights stated:

> [t]he evidence sought to be obtained regards the actual practice of pediatric psychopharmacology to Alaskan children and youth in State custody and through Medicaid, and the extent of the harm being done. The planned discovery is anticipated to produce evidence entitling PsychRights to one or more preliminary injunctions and at least partial summary judgment as to declaratory relief.

[Exc. 145]

PsychRights informed the trial court that its discovery plan was designed to obtain information about "the State's computerized records" as well as the ways that "pediatric psychopharmacology is actually practiced on Alaska children and youth in State custody and through Medicaid." [Exc. 151] It told the court it intended to "seek negative data about the drugs that have heretofore been hidden by pharmaceutical companies as well as the improper promotion of pediatric psychopharmacology by pharmaceutical companies." [Exc. 151-52] It

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[6] The state does not concede that any statements made in its dispositive motion were either beyond the scope of the pleadings or "inaccurate and extraneous." See Exc. 370.

planned to "depose at least a few child psychiatrists, and perhaps other physicians and other people prescribing psychotropic drugs to Alaskan children and youth, to have them disclose upon what they are relying in doing so," [Exc. 164-65] and to obtain materials regarding off-label marketing from numerous pharmaceutical companies and "from people having access to discovery depositories concerning these matters." [Exc. 169]

Specifically relating to the state's dispositive motion, PsychRights stated:

> [T]here are issues raised in the State's Motion for Judgment on the Pleadings for which PsychRights does seek discovery from the State. The first is to rebut the unsupported and untrue assertion made by the State in its Motion for Judgment on the Pleadings that the State has nothing to do with authorizing and administering psychotropic drugs to children and youth whom it has taken away from their parent(s). The second is to supply the lack of specificity regarding the State's inappropriate payment for and administration of psychotropic drugs to Alaskan children and youth."

[Exc. 151] These were the *only* issues in the state's dispositive motion that PsychRights informed the court that it intended to address through discovery – not, as it now argues to this Court, any issue regarding standing and the ability and motivation of other plaintiffs to file suit.[7] [Exc. 166-69] If PsychRights wished

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[7] In its appellate brief, PsychRights cites its opposition to the state's stay-of-discovery motion to argue that it intended to conduct discovery "to establish parents or guardians are coerced by the State into giving consent." [At. Br. at 23-24] But a review of PsychRights' discovery plan and its opposition to the stay-of-discovery motion makes clear that PsychRights' discovery plan had

the trial court to issue an order allowing it to conduct discovery into whether it had standing to bring this suit because all directly affected potential plaintiffs were disinclined to sue due to lack of resources, fear of retribution by the state, or fear of attorneys' fees awards [At. Br. at 25] it should have clearly asked the court to do so. It did not.

PsychRights' assertion that the trial court abused its discretion by staying discovery designed to establish PsychRights' standing to bring suit is not properly before this court, because the issue was never raised or briefed in the trial court. This situation is underscored by the fact that PsychRights makes only conclusory allegations to this Court about the scope of its intended discovery and does not point to anything in its proposed discovery plan that might reasonably lead to information about other potential plaintiffs' abilities or motivations to sue the state over the issues raised in PsychRights' complaint. [At. Br. at 37-39] This Court should decline to reach the issue.

C. The Question Is Moot

Insofar as PsychRights challenges the trial court's discovery ruling regarding discovery that is not directly related to the state's dispositive motion, the

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(footnote 7, continued) nothing to do with whether other plaintiffs were willing or able to bring this suit; rather, it intended to establish the nature and extent of the state defendants' involvement in the administration of medication to Alaska minors. [Exc. 142-43, 166-67, 178-91, 195-202, 357-62] In dismissing the case, the trial court did not reach either of the issues raised by PsychRights in its objection to the discovery motion. The court's ruling was based solely on PsychRights' lack of standing to sue. [Exc. 585-89]

challenge is moot. If this Court affirms the trial court's dismissal of the underlying action, no discovery will occur; if, however, the matter is remanded for trial, discovery presumptively will proceed, as the sole reason that the trial court stayed discovery was to allow it to rule on the state's dispositive motion. [Exc. 561] Any future rulings on discovery matters will not be affected by this Court's ruling on the trial court's discovery order, but will instead depend on the situation in effect at the time of the future rulings. Therefore, this Court does not need to reach the issue.

D. The Trial Court's Ruling Was Within Its Discretion

PsychRights does not raise on appeal – and therefore has abandoned – the arguments it made in the trial court as to why it should have been allowed to proceed with discovery while the court considered the state's dispositive motion. But even if the issue were not moot and PsychRights had not abandoned its arguments, caselaw is clear that a trial court has broad discretion to stay discovery pending the court's consideration of a dispositive motion.[8] The trial court did not abuse its discretion in this case.

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[8] *See, e.g., Karen L. v. State, Dept. of Health & Soc. Servs., Div. of Family & Youth Servs.*, 953 P.2d 871, 879 (Alaska 1998) (order staying discovery affirmed where potentially dispositive legal issues were raised in a summary judgment motion and appellant did not demonstrate that the stay prejudiced her ability to oppose the dispositive motion); *Petrus v. Bowen*, 833 F.2d 581, 583 (5th Cir. 1987) ("A trial court has broad discretion and inherent power to stay discovery until preliminary questions that may dispose of the case are determined."); *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1367-68 (11th Cir. 1997) (claims or defenses should often be resolved before discovery begins, in

PsychRights planned to launch a massive discovery campaign targeting not only the computerized record-keeping systems of numerous state agencies, including the state's Medicaid program, Office of Children's Services, Division of Juvenile Justice, Alaska Psychiatric Institute, and Division of Behavioral Health, but also targeting psychiatrists, other physicians, pharmaceutical companies, and "parties having access to discovery depositories" both within Alaska and in an undisclosed number of other jurisdictions. [Exc. 154, 164, 169] PsychRights' stated rationale for this campaign was to "demonstrate . . . that the current practice of psychopharmacology is ineffective and counterproductive, is doing great harm, and non-pharmacological psychosocial approaches should be used instead in most cases." [Exc. 169-70] Allowing this discovery to proceed in the face of a meritorious motion that would dispose of the entire case – based on PsychRights' lack of standing to bring the action in the first place – would have needlessly exposed the state and PsychRights' numerous other targets to considerable burden and expense and would likely have resulted in judicial resources being squandered on refereeing ultimately meaningless discovery disputes.

(footnote 8, continued) part because discovery and discovery disputes may impose needless costs on parties and may tax scarce judicial resources); *Feldman v. Flood*, 176 F.R.D. 651, 652 (M.D.Fla. 1997) (a court deciding whether to "stay all discovery pending resolution of a [dispositive] motion . . . . must balance the harm produced by a delay in discovery against the possibility that the motion will be granted and entirely eliminate the need for such discovery") (emphasis added).

The trial court was within its discretion in staying the proposed discovery pending the court's decision on the state's pending dispositive motion. The court's ruling should be affirmed.

II. THE TRIAL COURT DID NOT ERR IN GRANTING THE STATE'S MOTION FOR JUDGMENT ON THE PLEADINGS

A. Standard of Review

This Court reviews *de novo* a trial court's order granting a motion for judgment on the pleadings as well as a trial court's findings regarding standing.[9]

B. The Trial Court Did Not Err in Determining that PsychRights Lacked Standing to Bring the Action

In Alaska courts, standing is a rule of judicial self-restraint based on the principle that courts should not resolve abstract questions or issue advisory opinions.[10] Alaska courts recognize three types of standing. Two types – interest-injury standing and third-party standing[11] – are not implicated in this action. [Exc. 585; At. Br. at 24, 28-37] PsychRights claims to possess only the third type, citizen-taxpayer standing, which allows plaintiffs in certain situations to challenge – in their capacity as citizens – allegedly illegal governmental conduct. Citizen-taxpayer standing to challenge government conduct "cannot be claimed in all

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9 *Allstate Insurance Co. v. Teel*, 100 P.3d 2, 4 (Alaska 2004); *Baxley v. State*, 958 P.2d 422, 428 (Alaska 1998).

10 *Keller*, 205 P.3d at 302

11 *See id.* at 302-304.

cases as a matter of right. Rather, each case must be examined to determine if several criteria have been met."[12] The party asserting citizen-taxpayer standing must demonstrate that "the issues raised are of significant public concern and . . . the taxpayer-plaintiff is a suitable advocate of the issues involved in the lawsuit."[13]

1. More appropriate plaintiffs exist who are likely to sue

Assuming that this case present issues that are appropriate for resolution through a citizen-taxpayer suit,[14] in order to maintain the suit as a citizen-taxpayer plaintiff, PsychRights must demonstrate that it "is a suitable advocate of the issues involved."[15] "Suitable advocates" do not include plaintiffs who do not have true adversity of interest (*i.e.*, "sham" plaintiffs), plaintiffs who cannot competently advocate the case, and plaintiffs who sue when more directly affected potential plaintiffs have sued or are likely to sue.[16]

PsychRights argues that it has standing because (1) no individual plaintiff or group of plaintiffs has standing to raise the issues it is attempting to

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12 *Trustees for Alaska v. State*, 736 P.2d 324, 329 (Alaska 1987).

13 *Kleven v. Yukon-Koyukuk School Dist.*, 853 P.2d 518, 526 (Alaska 1993) (citing *Trustees for Alaska*, 736 P.2d 324 at 329 (Alaska 1987)); *State v. Lewis*, 559 P.2d 630, 635 (Alaska 1977).

14 See section II.B.2., below.

15 *Kleven,* 853 P.2d at 526, citing *Trustees for Alaska*, 736 P.2d at 329; *Lewis*, 559 P.2d at 635.

16 *Trustees*, 736 P.2d at 329.

raise, and (2) no directly affected potential plaintiff has sued or is likely to sue about those issues. [At. Br. at 28-36] Both of these contentions are incorrect.

a. Plaintiffs who have actually been affected by the state's alleged actions may raise the issues raised by PsychRights

PsychRights' first argument is that it must be allowed to pursue this case as a citizen-taxpayer because potential plaintiffs who have been and continue to be directly affected by the challenged government conduct do not have standing to seek systemic relief on their own behalf. [At. Br. at 31-33] PsychRights cites no authority to support its claim that "it appears such a plaintiff(s) could not obtain the relief sought," nor does it explain how it has standing to seek systemic reform of allegedly illegal state conduct when the individuals actually affected by that conduct do not. [At. Br. at 33]

If, as PsychRights alleges, thousands of Alaskans are suffering harm of a common nature because of systemic, illegal government action, systemic relief is available to the affected persons through a class action under Civil Rule 23.[17] The situation is similar to claims, raised in *Cleary v. Smith*,[18] of violations of prisoners' constitutional rights by conditions imposed on prisoners by the state. The state's conduct in that arena was challenged not by a citizen-taxpayer, but rather by the actually-affected prisoners themselves, who sought systemic relief

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17 The state does not concede the truth of PsychRights' allegation.

18 146 P.3d 997 (Alaska 2006).

through an interest-injury class action suit.[19] Further, in addition to whatever relief may be available through equitable class actions, if the state is committing acts that are systemically violating the rights of minors, systemic relief may be afforded through the application of *stare decisis* to the holdings of civil actions that individual plaintiffs would incontestably have the standing to maintain.[20]

b. PsychRights' suit is barred because directly affected plaintiffs have chosen not to sue

PsychRights relies on a literal interpretation of language from *Trustees* to argue that a citizen-taxpayer has standing to challenge government conduct of public significance if no directly affected plaintiff has sued or will likely sue, even if directly affected potential plaintiffs exist who have chosen not to sue. [At. Br. at 35-37] PsychRights' argument may have been colorable in 1987, when *Trustees* was decided, but since that time this Court has issued two decisions that clarify *Trustees,* rejecting the literal reading advanced by PsychRights and making clear that citizen-taxpayer status will not obtain when directly affected individuals exist who have the ability to sue but have chosen not to do so.

In 1993 the Court decided *Kleven.* In that case, a former school district administrator brought suit to compel his former employer to take action on

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19 The suit was ultimately resolved through a settlement agreement. *Id.* at 998.

20 *See Rivers v. Katz*, 495 N.E.2d 337, 345 (N.Y. 1986).

a list of grievances relating to his prior employment with the district. Several of his grievances alleged that the district was not complying with safety regulations at various school facilities. The former administrator, claiming citizen-taxpayer standing, sought fines and an injunction requiring the district to comply with the safety regulations.[21] Citing the very language of *Trustees* that PsychRights relies on, this Court affirmed the trial court's dismissal of the action, finding that the former administrator did not have citizen-taxpayer standing to bring the suit because the district's "remaining employees are certainly in better position to raise the grievances Kleven cites and because we have no reason to believe that current [district] employees would be indisposed to press legitimate grievances."[22] The Court made this holding even though there was no indication that any current employee had challenged, or intended to challenge, the district's alleged non-compliance with the safety regulations.

PsychRights does not acknowledge *Kleven* except to speculate, without support, that the Court's citizen-taxpayer holding was meant to apply only to grievances in the labor law context and that if so, "the Superior Court's reliance on it is entirely misplaced." [At. Br. at 31] PsychRights' contention is clearly incorrect. While it may be that the *Kleven* plaintiff's underlying grievances involved labor law, (a) the Court decided the case based on the standing analysis

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21 853 P.2d at 522, n.5.

22 *Id.* at 526.

applicable to civil actions generally, (b) the Court did not in any way indicate that its ruling was limited to labor law, (c) it was a civil action, not an administrative grievance, that the former administrator filed under a claim of citizen-taxpayer standing, which the trial court dismissed, and which dismissal this Court affirmed, and (d) in this Court's recent discussion of *Kleven*, in *Keller*, the Court made no indication that *Kleven* is limited to labor law grievances or that *Kleven's* standing analysis does not apply to civil cases – such as *Keller* and the present case – in general.[23]

Indeed, this Court's observation in *Kleven* that the plaintiff's grievances concerned not only "the interpretation of a grievance policy to which he is no longer subject," but also "the correction of [allegedly unsafe] working conditions that he no longer encounters,"[24] illustrates the similarity between *Kleven* and the present case. Just as the former administrator in *Kleven* did not have standing to sue to remedy safety concerns that directly affected others but did not directly affect him, PsychRights does not have standing to sue to remedy mental health medication concerns that directly affect others but do not directly affect PsychRights.

More recently, in *Keller*, this Court upheld a trial court's dismissal of a suit because the plaintiffs were without citizen-taxpayer standing, even though

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23 *Keller*, at 303.

24 *Kleven*, at 522.

the case was assumed to involve issues of public significance,[25] the plaintiffs were not sham plaintiffs, and the plaintiffs were capable of competently advocating their position.[26]

In the case, five legislators brought suit to halt a legislative investigation into the governor's dismissal of a state commissioner, claiming that the investigation violated the Alaska Constitution's fair and just treatment clause.[27] The superior court dismissed the suit on a dispositive motion, ruling that it involved nonjusticiable political questions. This Court affirmed the dismissal on the alternative ground that the plaintiffs lacked standing – specifically citizen-taxpayer standing – to bring the suit.[28]

The Court found the legislators without citizen-taxpayer standing for two independent reasons. First, it noted that at the same time the legislators filed their suit, several state employees who had been subpoenaed to testify in the investigation brought a separate action challenging the subpoenas. These

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[25] The Court "assume[d], without deciding, that an alleged violation of the fair and just treatment clause is a matter of public significance." *Keller*, at 302. The clause provides: "No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed." Alaska Constitution, Article 1, section 7.

[26] *Id.* at 302.

[27] *Id.* at 300. The plaintiffs made numerous other claims in the trial court, but pursued only the fair and just treatment clause claim on appeal.

[28] *Id.* at 302-04.

plaintiffs did not assert that the investigation violated the fair and just treatment clause, but the Court nevertheless found that their case deprived the legislators of citizen-taxpayer standing because it was based on claims that were "closely related" – although not identical – to the legislators' claims.[29]

Second, and independently, the Court ruled that the legislators did not have citizen-taxpayer standing because

> there was at least one other potential plaintiff who was directly affected by the investigation and who was fully capable of suing. The Keller plaintiffs concede that Governor Palin was "arguably more directly concerned," but argue that she is "unlikely to sue. . . ." *Their interpretation of the citizen-taxpayer standing test is too literal.* Even if the governor did not intend to sue, there is no indication that, if she thought her rights were being violated, she would be unable to do so. The Keller plaintiffs do not contend that the governor or any other potential plaintiffs were somehow limited in their ability to sue. *That 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.*[30]

The *Keller* Court discussed *Kleven*, stating that that "decision did not hinge on the likelihood that the current employees would sue. Here there is no reason to believe that any potentially implicated executive branch officials, including the governor, would be unwilling to sue if they thought their rights were

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29 *Id.* at 301

30 *Id.* at 303 (emphases added).

being violated during the investigation."[31] The Court "therefore . . . reject[ed] the Keller plaintiffs' argument that no other plaintiff more directly affected by the challenged conduct is likely to sue."[32] PsychRights, like the plaintiffs in *Keller*, is "attempting to assert the individual rights of potential or 'imaginary' third parties."[33] The Court should, therefore, affirm the dismissal of this case as it did in *Keller*, because the Court has "never before allowed citizen-taxpayer standing to be used in this way."[34]

PsychRights' argument that no directly affected potential plaintiff has the ability to sue is addressed below. To the extent that directly affected potential plaintiffs who have the ability to sue if they feel their rights have been violated have chosen not to do so, their existence divests PsychRights – as it did the plaintiffs in *Kleven* and *Keller* – of any claim to possess citizen-taxpayer standing to bring this suit.[35]

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31 *Id.*

32 *Id.*

33 *Id.* at 304.

34 *Id.*

35 PsychRights further argues that because, like Trustees for Alaska (one of the plaintiffs in *Trustees*) it is a public interest law firm it must be accorded citizen-taxpayer standing with respect to litigation concerning issues in which it has an interest. [At. Br. at 30] This argument is incorrect. First, the Court in *Trustees* did not mention the organizational status or mission statement of any plaintiff, simply noting that they were "a coalition of environmental, Native, and fishing groups" whose "sincerity in opposing the state's mineral disposition system is unquestioned." *Trustees* at 326 and 330. In addition, PsychRights'

c. PsychRights' claim that private plaintiffs are deterred from bringing suit is not supported by evidence

PsychRights argues that it has citizen-taxpayer standing to bring this suit because the affected children and their families are dissuaded from suing due to threatened retaliation by the state, lack of financial resources, and fear of adverse attorneys' fees awards. [At. Br. at 35-37] These allegations are entirely speculative and devoid of evidentiary support. PsychRights cites only to pages 385-86 of the excerpt of record to support its assertions. [At. Br. at 35-36] Those pages contain no evidence, but rather comprise a portion of the argument section of PsychRights' opposition to the state's dispositive motion. [Exc. 385-86] While PsychRights trumpeted the same assertions in that pleading that it presents in its appellant's brief, that pleading contains no citation to any actual evidence or factual support. [Exc. 385-86] Simply repeating speculation does not make it true.

(footnote 35, continued) argument ignores the fact that unlike PsychRights' narrow mission statement, which seems to have been devised with litigation as its purpose, the plaintiff coalition in *Trustees* represented a wide diversity of citizens' interests in matters of concern to the general public, including annual state royalties of more than $100,000, the state's method of making state land available for mining, tens of thousands of existing mining claims, the risk of forfeiture to the federal government of extensive areas of state lands, and the construction of provisions of the Alaska Statehood Act. *Trustees* at 326 and 330. In any event, PsychRights concedes that it does not have standing to maintain this action, regardless of its interest in the subject matter, if "there exists a plaintiff more directly affected by the challenged conduct in question who has or is likely to bring suit." [At. Br. at 30-31]

In its decision dismissing PsychRights' case, the trial court acknowledged PsychRights' argument:

> Plaintiff argues there is every reason to presume that no affected child, youth, parent or guardian is likely to sue in this case because none of these parties have yet to file a suit, and it is likely they will never bring this claim. Plaintiff argues these children and youth, as well as their parents, lack the resources to file suit, and the potential for being subjected to an award of attorneys fees against them is a powerful disincentive to bringing suit.

[Exc. 584] But after evaluating PsychRights' claim, the trial court rejected this argument, finding that "the affected children, their parents or guardians . . . would make a more appropriate plaintiff if a legitimate grievance existed," and that PsychRights "failed to establish [that] any parent or guardian with a legitimate grievance on behalf of their juvenile or child has declined to sue." [Exc. 586] PsychRights cites no evidence to call the trial court's finding into question.[36] This Court should reject PsychRights' unsupported contention that "virtually all" directly affected potential plaintiffs are unable or afraid to sue and that it therefore is vested with citizen-taxpayer standing to maintain this suit. [At. Br. at 35]

d. PsychRights' brief indicates that it knows of plaintiffs who have been directly affected by the state's alleged actions who are likely to sue

PsychRights argues that no directly affected plaintiff is in a position

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[36] As discussed above, PsychRights' argument that the trial court's order staying discovery prevented it from presenting evidence about the ability or willingness of potential plaintiffs to sue is without merit.

to sue the state, but its brief contains numerous references to directly affected persons who are apparently willing and ready to sue, except for the fact that PsychRights has chosen to first seek relief in its own name rather than represent these persons as clients. The references include: "[I]ndividual affected persons may not be able to obtain the injunctive relief requested, which was one of the reasons PsychRights brought the action in its own name rather than specific affected individuals" [At. Br. at 24]; "PsychRights did not name such plaintiffs because it did not want to subject such plaintiffs to the prospect of an attorney's fee award against them" [At. Br. at 25]; "[T]he most important relief requested is the injunction against the State . . . . This was one of the reasons PsychRights brought this action in its own name, and did not name any other plaintiffs" [At. Br. at 32]; and "The prospect of an attorney's fee award against individual plaintiffs was, in fact, one of the reasons PsychRights did not bring this lawsuit in one or more individual plaintiffs' name(s)." [At. Br. at 40]

In addition, PsychRights informed the trial court that "[t]he sole legal basis asserted [in the state's dispositive motion] is lack of standing, which is in itself unmeritorious and in any event, can be addressed by naming additional plaintiffs" [Exc. 146], that "PsychRights could move to amend the Complaint to add individual children and youth, their parents, or guardians, or any combination thereof, to achieve such interest-injury standing, but is reluctant to do so" [Exc. 394], and that if the trial court was to rule that PsychRights did "not have citizen-taxpayer standing to bring this suit, PsychRights will consider whether to amend

the Complaint to add such named plaintiffs or whether to appeal instead." [Exc. 396]

Thus, contrary to PsychRights' assertion that all directly affected plaintiffs are dissuaded from suing because of fears of state retaliation and financial issues, it appears that PsychRights knows of such individuals and has counseled them not to file suit while it tests the waters to see whether Alaska courts will allow PsychRights, without representing any clients, to sue the state. This nonprofit law firm thus seeks to manipulate the judicial system in order to insulate actual parties in interest from bearing – unlike parties in any other lawsuit – the potential burdens, expenses, and risks inherent in seeking recourse from the courts.

Allowing a "public interest law firm" on its own to obtain an injunction that will bind Alaska children and their parents and guardians to follow a specific course of conduct in addressing the children's mental health issues – without an identified case or controversy and without a single directly affected individual participating in the action as a named party would fly in the face of this Court's precedent and the court system's policy regarding standing, and could conceivably open floodgates to a plethora of suits by litigants purporting to represent the interests of persons other than themselves, with out support of the persons actually affected. This is precisely the scenario that the standing doctrine is intended to forestall, and this Court should, therefore, affirm the trial court's enforcement of the doctrine here.

2. This case does not present the type of issues of public significance that are amenable to resolution through a citizen-taxpayer action

The trial court denied PsychRights' claim to have standing because the court found that more appropriate, directly affected plaintiffs exist who could bring the suit on their own behalf. As discussed above, this Court should affirm the decision on that ground. The Court may also, however, affirm on the alternative grounds that (1) the issues presented in this case do not impact the interests of the general public in such a way that a citizen-taxpayer suit is appropriate, and (2) PsychRights cannot claim citizen-taxpayer standing because it is not a taxpayer.[37]

The trial court found that PsychRights' complaint raised issues of public significance because it alleged violations of constitutional rights and state laws and involved an unknown number of affected persons. [Exc. 585] The defendants below did not dispute that the complaint raised – "at least in theory if not in fact" – issues of public significance. [Exc. 130] But while the issues in this case are unquestionably significant to persons affected by the alleged government

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[37] This Court may affirm a trial court's decision "on any appropriate ground, even if it is a ground which was rejected by the trial court." *Torrey v. Hamilton*, 872 P.2d 186, 188 (Alaska 1994). This principle applies to cases that have been dismissed on the basis of dispositive motions. *See Sopko v. Dowell Schlumberger, Inc.*, 21 P.3d 1265, 1269 (Alaska 2001) ("[W]e can affirm a grant of summary judgment on alternative grounds, including grounds not advanced by the lower court or the parties. Moreover, we will consider any matter appearing in the record, even if not passed upon by the lower court, in defense of the judgment.").

conduct, a case must present issues of general *public* significance in order to be appropriate for challenge through a citizen-taxpayer suit.[38] The issues in this case are qualitatively different from those presented in previous citizen-taxpayer suits, because here the alleged government conduct directly and individually affects a limited, defined subset of Alaska's population rather than citizens generally in their capacity as citizens. Therefore, the Court should not entertain a suit based on citizen-taxpayer standing in this matter.

The allegations raised in PsychRights' complaint, if true, are unquestionably of vital importance to children in state custody (and the families of those children) whose mental health conditions are treated with prescription psychotropic medications. But that group constitutes a discrete and identifiable subset of Alaskans with particular claims, for whom both individual proceedings and class actions for declaratory and injunctive relief may be available. Such actions would provide the appropriate venues for affected individuals to obtain judicial review of the government's actions.

Unlike cases in which individual and class relief is available, the cases in which this Court has approved citizen-taxpayer standing involve allegations of government conduct that affect or potentially affect the interests of citizens as citizens, not government conduct alleged to directly affect members of a discrete, identifiable subset of citizens.

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38 *See Trustees*, 736 P.3d at 327-28.

Government conduct that this Court has held properly subject to citizen-taxpayer suits includes allegations: that the legislature violated the fair and just treatment clause of the Alaska Constitution (which safeguards Alaska citizens from abusive government investigation);[39] that a borough illegally levied an excise tax or imposed a sales tax without voter input;[40] that a locally controversial plan to vacate a city street without voter input was illegal;[41] that a contract disposing of state land without public notice violated the Alaska Constitution's public notice clause;[42] that a city illegally repealed a sales tax exemption without voter approval;[43] that legislation changing ballot procedures violated voters' constitutional rights and the integrity and fairness of public elections;[44] that legislation that authorized amendments to oil leases "violated constitutional

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[39] In *Keller,* 205 P.3d at 302, the Court "assume[d], without deciding, that an alleged violation of the fair and just treatment clause is a matter of public significance."

[40] *Fannon v. Matanuska-Susitna Borough*, 192 P.3d 982, 985-86 (Alaska 2008). The Court concluded that the challenged tax was significant in part because it was projected to raise more than four million dollars a year for the borough.

[41] *Washington's Army v. City of Seward*, 181 P.3d 1102 (Alaska 2008).

[42] *Laverty v. Alaska R.R. Corp.*, 13 P.3d 725 (Alaska 2000). Article 8, Section 10 provides, "No disposals or leases of state lands, or interests therein, shall be made without prior public notice and other safeguards of the public interest as may be prescribed by law."

[43] *City of St. Mary's v. St. Mary's Native Corp.*, 9 P.3d 1002, 1004 (Alaska 2000).

[44] *Sonneman v. State*, 969 P.2d 632, 636 (Alaska 1998).

provisions, would reduce the state's income, undermined public confidence in the integrity of the bidding system, and violated the public trust";[45] that a borough illegally abolished a road service area and consolidated it with other service areas without borough voters' input;[46] that a regional hiring preference law violated the constitutional guarantee of "equal opportunity" for all Alaskans;[47] that the State's mineral leasing system violated mineral leasing requirement of the Alaska Statehood Act by not requiring payment of rent or royalties in leases;[48] that a three-way exchange of land between Alaska, the United States, and a native regional corporation violated state constitutional prohibitions against alienation of mineral rights in state lands and enactment of local and special acts;[49] that a municipality's decision to dispose of a significant amount of the municipality's

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45 *Baxley*, 958 P.2d at 428-29.

46 *N. Kenai Peninsula Rd. Maint. Serv. Area v. Kenai Peninsula Borough*, 850 P.2d 636, 641 (Alaska 1993).

47 *State, Dep't of Transp. & Dep't of Labor v. Enserch Alaska Const., Inc.*, 787 P.2d 624 (Alaska 1989). Article 1, Section 1 provides, "This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State."

48 *Trustees*.

49 *Lewis*. The Court identified an important consideration in its decision to be "the magnitude of the transaction and its potential economic impact on the State. Plaintiffs have claimed that participation in the land transfer will result in losses to the estate [sic] treasury and the taxpayers of vast sums of money." *Id.* at 635.

land under a land sale lottery ordinance violated the equal protection clauses of the federal and state constitutions;[50] and that the lieutenant governor's promulgation of regulations pertaining to the counting of ballots violated the Alaska Administrative Procedures Act.[51]

The alleged government conduct about which PsychRights complains is fundamentally different. It directly affects a subset of the Alaska public, but it does not affect the general public in the way that makes a citizen-taxpayer challenge to the conduct appropriate. Instead, the alleged conduct affects a defined group of individuals who presumptively possess individual and class remedies to challenge it. Challenges to such allegedly unconstitutional or illegal systemic state action affecting an identifiable subset of citizens with commonality of claims that have been allowed to proceed as class actions in equity have alleged: that the Department of Health and Social Services violated state and federal constitutional due process rights of disabled, low-income individuals by terminating their participation in a long-term health care services program without making findings adequate to support its action;[52] that conditions of incarceration

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50 *Gilman v. Martin*, 662 P.2d 120 (Alaska 1983).

51 Alaska Statutes 44.62.010-.950. *Coghill v. Boucher*, 511 P.2d 1297 (Alaska 1973). The Court's decision relied in part on its observation that "Denial of standing to appellants in the instant case would have the effect of unduly limiting the possibility of a popular check upon executive control of the election process." *Id.* at 1304.

52 *Krone v. State, Dep't of Health & Soc. Servs.*, --- P.3d ----, 2009 WL 5154266 (Alaska 2009).

imposed upon prisoners confined in correctional institutions owned or operated by the State of Alaska or the Federal Bureau of Prisons violated the Alaska and United States Constitutions;[53] and that the state reduced or terminated the in-home personal care benefits that it had been providing to individuals under a government program without providing due process notice to the recipients.[54]

Even in situations in which class action relief is not available, systemic government misconduct may be remedied through the precedential effect inhering in individual equitable actions. For example, in *Rivers*,[55] a case involving adult patients' constitutional rights to refuse involuntary administration of antipsychotic medication, the New York Court of Appeals affirmed the trial court's denial of class action certification, because "application of the principles of stare decisis will adequately protect subsequent litigants."

Analysis of the body of citizen-taxpayer caselaw indicates that the present case does not present the type of issues that are appropriately resolved through citizen-taxpayer suits, but instead presents issues appropriate for resolution through individual or class actions brought by plaintiffs with legitimate interest-injury standing. This Court should thus affirm the trial court's dismissal of this action based on PsychRights' lack of standing.

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53 *Cleary*, 146 P.3d 997.

54 *Baker v. State, Dep't of Health & Soc. Servs.*, 191 P.3d 1005 (Alaska 2008).

55 495 N.E.2d at 345.

3. PsychRights does not pay taxes and therefore cannot maintain an action as a citizen-taxpayer

In its complaint, PsychRights identifies itself as "the Law Project for Psychiatric Rights, an Alaska non-profit corporation (PsychRights®), . . . a public interest law firm whose mission is to mount a strategic litigation campaign against forced psychiatric drugging and electroshock." It makes no allegation that it pays taxes to the State of Alaska, and the trial court made no such finding. In order to maintain an action as a citizen-taxpayer, a plaintiff must, as a prerequisite, pay taxes. *Greater Anchorage Area Borough v. Porter & Jefferson.*[56] Because PsychRights has not shown that it pays taxes to the State of Alaska, it is without standing to maintain a citizen-taxpayer suit challenging state action. This Court thus should affirm the dismissal of PsychRights' action on this basis.

III. THE TRIAL COURT DID NOT ERR IN AWARDING ATTORNEYS' FEES TO THE STATE

A. Standard of Review

This Court reviews a superior court's Civil Rule 82 award of attorney's fees for an abuse of discretion, and "will disturb the award only if it is

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[56] 469 P.2d 360 (Alaska 1970) (partnership, which filed suit challenging the existence of the Greater Anchorage Area Borough, was without citizen-taxpayer standing because it "paid no taxes and does not appear on the assessment rolls of the Borough"); *see also Fannon*, 192 P.3d at 986 ("we have only denied citizen-taxpayer standing where a claimant paid no taxes whatsoever"); *Trustees*, 736 P.2d at 329 ("Taxpayer-citizen standing has never been denied in any decision of this court, except on the basis that the controversy was not of public significance, or on the basis that the plaintiff was not a taxpayer") (citations omitted).

manifestly unreasonable."[57]

B. The Trial Court Did Not Abuse Its Discretion in Awarding Attorney's Fees to the State Under Civil Rule 82

A nonprofit law firm – PsychRights – filed this suit in its own name, representing to the superior court that no other plaintiff could or would file suit, so it alone had citizen-taxpayer standing to pursue the action. [Exc. 585-86] At the same time, the law firm was apparently advising directly affected potential plaintiffs not to sue, even though it was aware that – assuming the facts in the complaint were true – such persons could pursue a legitimate action as interested, injured parties. [Exc. 146, 394, 396; At. Br. at 24-25, 40] The trial court recognized that PsychRights was attempting to fundamentally alter the precepts that govern civil litigation in Alaska courts. The court stated that if PsychRights had its way, this case "would indicate any individual or group can create adversity by simply creating a nonprofit and drafting a mission statement opposing whatever issue they wish to challenge," thus gutting the concept of interest-injury standing, a result the court clearly did not intend to encourage. [Exc. 585-86]

Unsuccessful litigants in Alaska are expected to partially reimburse a portion of their opponents' attorneys' fees according to a formula specified in the Rules of Court. Civil Rule 82. A trial court may vary a fee award based upon several factors, including "the reasonableness of the claims and defenses pursued

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[57] *Capolicchio v. Levy*, 194 P.3d 373, 377 (Alaska 2008) (citation omitted).

by each side," and "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."[58] A court must explain its reasons if it varies an award from the formula; however, it need not explain its refusal of a litigant's request to depart from the formula.[59] In such cases, this Court "will reverse an award of attorney's fees only if the award is arbitrary, capricious, manifestly unreasonable, or stems from improper motive."[60]

PsychRights argues that the trial court erred by not explaining why it awarded the fee prescribed by the civil rule schedule rather than declining to award any fee at all. [At. Br. at 40] But this argument is without merit, as the court was under no obligation to explain its action.[61]

PsychRights argues alternatively that the trial court erred because any award of attorneys' fees may discourage future litigants from accessing the courts. But PsychRights' opposition to the state's request for fees in the trial court consisted of an unsupported allegation that any award of fees would deter future

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58 Civil Rule 82(b)(3)(F)&(I).

59 Civil Rule 82(b)(3)(K); *Marsingill v. O'Malley*, 128 P.3d 151, 163 (Alaska 2006) ("when a trial court issues a fee award that accords with the presumptive percentages in Rule 82(b)(2), the court need not offer an explanation of its award") (citing *Nichols v. State Farm Fire and Cas. Co.*, 6 P.3d 300, 305 (Alaska 2000).

60 *Nichols*, at 305 (internal quotation marks and citation omitted).

61 Civil Rule 82(b)(3)(K); *Marsingill*, at 163.

litigants; PsychRights did not demonstrate, as required by the rule, "*how* any award would chill suits by similarly situated litigants."[62] Nor did PsychRights make out a case that the award was arbitrary, capricious, manifestly unreasonable, or stemmed from an improper motive.

Indeed, PsychRights does not argue that the fee awarded by the trial court in this case "is so great that it imposes an intolerable burden on a losing litigant which, in effect, denies the litigant's right of access to the courts."[63] Instead, PsychRights argues that *any* fee award against a nonprofit plaintiff pursuing purported public interest litigation is barred by Civil Rule 82. [At. Br. at 39-40] This argument flies in the face of the legislature's 2003 amendment to AS 09.60.010(b).[64]

Partial compensation of the defendants in this case is entirely

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62 *Fuhs v. Gilbertson*, 186 P.3d 551, 558 (Alaska 2008) (emphasis added).

63 *Bozarth v. Atlantic Richfield Oil Co., Inc.*, 833 P.2d 2, 6 (Alaska 1992) (Matthews, J., dissenting).

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> The purpose of [AS 09.60.010(b) is] to provide for a more equal footing for parties in civil actions and appeals by abrogating the special status given to public interest litigants with respect to the award of attorney fees and costs. It is the intent of the legislature to expressly overrule . . . decisions of the Alaska Supreme Court . . . insofar as they relate to the award of attorney fees and costs to or against public interest litigants in future civil actions and appeals.

Ch. 86, SLA 2003, Sect. 1: Purpose.

consistent with the trial court's ruling that PsychRights was entirely without standing to bring this case, but that the case should instead have been filed, if at all, by an appropriate plaintiff – at least several of which, according to PsychRights, it has waiting in the wings. The trial court's fee award, which partially compensated the defendants for their expenses in defending this suit, was in accord with the intent of AS 09.60.010 and Civil Rule 82.[65] PsychRights complains that this fee award "will most likely deter PsychRights from taking such cases in the Alaska state courts." [At. Br. at 41] The trial court's intent was not to deter future litigants from accessing the courts, but to partially compensate the prevailing party for its litigation expenses. Any effect of deterring future litigants – including PsychRights – from bringing lawsuits they are without standing to bring is outweighed in this case by the state policy that successful defendants should be partially compensated for their costs in defending against meritless litigation.

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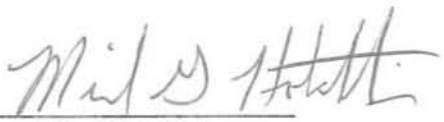
[65] "The purpose of Civil Rule 82 in providing for the allowance of attorney's fees is to partially compensate a prevailing party for the costs to which he has been put in the litigation in which he was involved." *Preferred Gen. Agency of Alaska, Inc. v. Raffetto*, 391 P.2d 951, 954 (Alaska 1964).

CONCLUSION

The trial court's rulings staying discovery, dismissing the suit, and awarding attorneys' fees to the state defendants should be affirmed.

DATED January 22, 2010.

DANIEL S. SULLIVAN
ATTORNEY GENERAL

By: 

Michael G. Hotchkin
Assistant Attorney General
Alaska Bar No. 840872

IN THE SUPREME COURT OF THE STATE OF ALASKA

Law Project for Psychiatric Rights, Inc.,

Appellant,

v.

State of Alaska, et al.,

Appellees.

Supreme Court No.: S-13558

Trial Court Case No. **3AN-08-10115CI**

NOTICE REGARDING EXCERPT OF RECORD

The Appellees will not file an excerpt of record in this appeal.

Dated January 22, 2010.

DANIEL S. SULLIVAN
ATTORNEY GENERAL

By: [signature]
Michael G. Hotchkin
Senior Assistant Attorney General
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IN THE SUPREME COURT OF THE STATE OF ALASKA

Law Project for Psychiatric Rights, Inc.,	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	
State of Alaska, et al.,	)	**Supreme Court No.: S-13558**
	)	
Appellees.	)	
	)	

Trial Court Case No. **3AN-08-10115CI**

CERTIFICATE OF SERVICE

I hereby certify that I am a Law Office Assistant at the Department of Law, Office of the Attorney General and that on this date I served, by first class mail, a true and correct copy of the BRIEF OF APPELLEE, STATE OF ALASKA and NOTICE REGARDING EXCERPT OF RECORD in this proceeding on the following;

James B. Gottstein
Law Project of Psychiatric Rights
406 G Street, Suite 206
Anchorage, Alaska 99501

I further certify that the above-named documents are in Times New Roman, 13 point typeface.

1/22/10

Samantha Christenson Date