

FILED

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WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

GLEND A WOLVERTON, an)
individual taxpayer and resident-citizen)
of Richland; BRANDY LEIGHTER, an)
individual taxpayer and resident-citizen)
of Kennewick; MARY MAHONEY, an)
individual taxpayer of Kennewick;)
LEONORA CLAIRE CLARKE and)
JOSEPH DAVID CLARKE, husband)
and wife, married taxpayers of)
Kennewick; the State of Washington *ex*)
rel. GLEND A WOLVERTON,)
BRANDY LEIGHTER, MARY)
MAHONEY, LEONORA CLAIRE)
CLARKE, and JOSEPH DAVID)
CLARKE; and the Cities of Kennewick,)
Pasco, and Richland *ex rel.* THE TRI-)
CITY ANIMAL CONTROL)
AUTHORITY, a Ch. 39.34 RCW entity)
formed by interlocal cooperation)
agreement *ex rel.* GLEND A)
WOLVERTON, BRANDY)
LEIGHTER, MARY MAHONEY,)
LEONORA CLAIRE CLARKE and)
JOSEPH DAVID CLARKE, on behalf)
of all taxpayers, residents, and citizens)
in the Cities of Kennewick, Pasco, and)
Richland,)

Appellants,)
)

No. 24117-3-III

Division Three

UNPUBLISHED OPINION

v.)
)
**BRUCE W. YOUNG and SANDY A.)
YOUNG, in both their individual and)
official capacities as animal control)
officers, as well as husband and wife,)
and the marital community composed)
thereof; TRI-CITIES ANIMAL CARE)
& CONTROL SHELTER (UBI 601-)
992-382), a Washington nonprofit)
corporation d/b/a TRI-CITY ANIMAL)
CONTROL; TRI-CITY ANIMAL)
CONTROL & SHELTERING)
SERVICES (UBI 602-019-162), a)
Washington for-profit corporation d/b/a)
TRI-CITY ANIMAL CONTROL;)
CITY OF KENNEWICK, a)
Washington municipal corporation;)
CITY OF PASCO, a Washington)
municipal corporation; and CITY OF)
RICHLAND, a Washington municipal)
corporation, and DOES 1-10,)
)
Respondents.)**

THOMPSON, J.*—The cities of Pasco, Kennewick, and Richland entered into an interlocal cooperative agreement creating the Tri-City Animal Control Authority (ACA). The ACA contracted with Tri-City Animal Control to provide animal control services. Glenda Wolverton and several other concerned citizens (collectively “Ms. Wolverton”) sued Tri-City Animal Control, and its owners, Bruce and Sandy Young (collectively

* Judge Philip J. Thompson is serving as judge pro tempore of the Court of Appeals pursuant to RCW 2.06.150.

No. 24117-3-III
Wolverton v. Young

“TCAC”), alleging that TCAC improperly and inhumanely performed its animal control services contract. The suit also named Pasco, Kennewick, Richland, and the ACA (collectively “the Cities”), alleging that the Cities were responsible for the conduct of TCAC. The Cities and TCAC moved to dismiss the complaint for failure to state a claim, arguing that Ms. Wolverton lacked standing to sue under the interlocal agreement, the contract between ACA and TCAC, the public bidding statutes, and 42 U.S.C. § 1983. Ms. Wolverton sought leave to amend the complaint to add 10 new claims.

The trial court granted the motion to dismiss, concluding that Ms. Wolverton lacked standing as a taxpayer and as a third party beneficiary. The court also denied Ms. Wolverton’s motion to amend. Ms. Wolverton appeals. We conclude the court erred by dismissing the complaint because Ms. Wolverton has taxpayer standing to challenge illegal governmental acts. However, we also conclude that the court properly dismissed all of the § 1983 claims except for those related to Mary Mahoney and Brandy Leighter. Finally, we conclude the court abused its discretion by denying Ms. Wolverton’s motion to amend.

FACTS

The cities of Kennewick, Pasco, and Richland entered into an interlocal cooperative agreement creating the ACA. On a rotating basis, one of the three cities is designated as the operating jurisdiction charged with administering the ACA Personal Services Agreement (PSA) with an independent contractor chosen through the

competitive bidding process.

The operating jurisdiction is also charged with establishing policies for the implementation of an Animal Control Plan (Plan). The Plan provided the basic level of services for impounding and boarding apprehended animals, euthanizing unclaimed animals, and notifying owners of found animals.

In 1998, 2001, and 2004, the ACA—through its operating jurisdiction—entered into three consecutive PSAs with TCAC. Each of these agreements contained requirements to ensure that animals impounded by TCAC: (1) received treatment and care in conformity with applicable laws and industry standards; (2) were handled humanely; (3) were euthanized in a manner approved by the ACA; and (4) were restored as required by law if injured or abused. The three PSAs also contained provisions requiring the maintenance of records which must be provided or made available to the ACA.

On August 11, 2004, Ms. Wolverton and four other plaintiffs filed this action against the three cities, the ACA, the TCAC, the Youngs, and unknown employees of TCAC. A first amended complaint was filed on August 30. The complaint alleges numerous acts of mistreatment and deficient care by TCAC and the Youngs. For example, Ms. Wolverton alleges that TCAC and the Youngs systematically under euthanized impounded animals by using as little as one-third of the required dose, failed to scan cats for microchips, did not provide proper care and treatment of animals, and,

No. 24117-3-III
Wolverton v. Young

since 2001, illegally euthanized or adopted out approximately 300 animals prior to the expiration of the applicable hold period.

In her complaint, Ms. Wolverton alleges a breach of contract claim against all defendants, and seeks preliminary and permanent injunctive relief and declaratory relief. The complaint also alleges three claims against the ACA and the Cities: (1) abuse of discretion; (2) avoidance of the 2004-2007 PSA; and (3) negligent administration of the PSAs. Finally, the complaint alleges a claim based on the violation of federal rights against TCAC and the Youngs.

On October 15, 2004, Ms. Wolverton filed a motion to amend the complaint to add 10 more claims. The Cities moved to dismiss the complaint for failure to state a claim or, in the alternative, for judgment on the pleadings. The court granted the motion to dismiss, and denied the motion for leave to amend the complaint. Ms. Wolverton sought direct review by the Supreme Court, but the matter was transferred to this court.

MOTION TO DISMISS

Ms. Wolverton's complaint was not dismissed on summary judgment. Instead, her complaint was dismissed as the result of a consolidated motion based on CR 12(c) for judgment on the pleadings and CR 12(b)(6) for failure to state a claim.

We review a trial court's ruling on a motion to dismiss for failure to state a claim *de novo*. *Berst v. Snohomish County*, 114 Wn. App. 245, 251, 57 P.3d 273 (2002). Courts should dismiss under this rule only when it appears beyond doubt that no facts

No. 24117-3-III
Wolverton v. Young

justifying recovery exist. *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 214, 118 P.3d 311 (2005). The allegations of the complaint are presumed to be true for the purpose of the motion. *Berst*, 114 Wn. App. at 251. And any hypothetical situation raised by the complaint will defeat a CR 12(b)(6) motion if the hypothetical situation is legally sufficient to support the plaintiff's claim. *Halvorson v. Dahl*, 89 Wn.2d 673, 674-75, 574 P.2d 1190 (1978). Additionally, this court may affirm the lower court's ruling on any basis supported by the record. *Wendle v. Farrow*, 102 Wn.2d 380, 382, 686 P.2d 480 (1984).

(1) Did the court err by concluding that Ms. Wolverton lacked standing to challenge the Cities' illegal acts based solely on her position as a taxpayer?

The trial court concluded that Ms. Wolverton lacked standing to challenge illegal acts of the Cities in letting and managing the contracts. In making this decision, the court relied on *Greater Harbor 2000 v. City of Seattle*, 132 Wn.2d 267, 937 P.2d 1082 (1997).

In *Greater Harbor*, the lead opinion, signed by two justices, stated that taxpayer standing required a showing of the violation of a unique right. *Greater Harbor*, 132 Wn.2d at 281. But none of the other justices concurred on this point. Also, *Greater Harbor* relied on *American Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 802 P.2d 784 (1991), which held that taxpayers must show that the government violated a unique right or interest in order to challenge a government's lawful, discretionary acts.

Prior to *Greater Harbor*, the Washington Supreme Court repeatedly recognized

No. 24117-3-III
Wolverton v. Young

that a taxpayer had standing to challenge illegal governmental acts on behalf of all taxpayers without the need to allege a direct, special, or pecuniary interest in the outcome. *State ex rel. Boyles v. Whatcom County Superior Court*, 103 Wn.2d 610, 614, 694 P.2d 27 (1985); *City of Tacoma v. O'Brien*, 85 Wn.2d 266, 269, 534 P.2d 114 (1975); *Walker v. Munro*, 124 Wn.2d 402, 419, 879 P.2d 920 (1994). However, the taxpayers seeking to bring such action must show that the attorney general refused their demand to institute the action or that this request would have been useless. *O'Brien*, 85 Wn.2d at 269.

Hence, Washington has recognized litigant standing to challenge illegal governmental acts on the basis of status as a taxpayer. *Boyles*, 103 Wn.2d at 614. “The recognition of taxpayer standing has been given freely in the interest of providing a judicial forum when this state’s citizens contest the legality of official acts of their government.” *Id.*

We conclude that the holdings in *Boyles*, *O'Brien*, and *Walker* are more persuasive than the split decision in *Greater Harbor*. We agree that taxpayers have standing to challenge illegal governmental acts on behalf of all taxpayers and need not allege a direct, special, or pecuniary interest in the outcome. We note that other courts have reached the same conclusion. *Robinson v. City of Seattle*, 102 Wn. App. 795, 805, 10 P.3d 452 (2000) (Division One of this court); *Kightlinger v. Pub. Util. Dist. No. 1*, 119 Wn. App. 501, 506-07, 81 P.3d 876 (2003) (Division Two of this court), *case dismissed*,

No. 24117-3-III
Wolverton v. Young

152 Wn.2d 1001 (2005); *Wash. Pub. Trust Advocates ex rel. City of Spokane v. City of Spokane*, 117 Wn. App. 178, 182, 69 P.3d 351 (2003).¹

In summary, the trial court erred by concluding that taxpayer status alone was insufficient to confer standing. Ms. Wolverton has standing to challenge *illegal* governmental acts related to the letting and managing of the contracts without pleading a special injury or violation of a unique right to challenge illegal acts.

(2) Did the court err by concluding that Ms. Wolverton lacked standing to challenge discretionary acts of government?

The fact that a taxpayer disagrees with a discretionary decision of a governmental authority is insufficient to provide standing to challenge that decision. *See In re Petition of City of Bellingham*, 52 Wn.2d 497, 499, 326 P.2d 741 (1958). In order to challenge a government's lawful, discretionary acts, the taxpayer must establish that the government violated a unique right or interest that is different from other taxpayers. *Am. Legion*, 116 Wn.2d at 7-8.

Relying on *Greater Harbor*, the trial court concluded that Ms. Wolverton lacked standing to challenge discretionary acts of the Cities because she failed to establish a special injury. Ms. Wolverton maintains that she has standing to challenge discretionary

¹ TCAC contends that Ms. Wolverton failed to comply with the holding in *Washington Public Trust* that taxpayer derivative suits must be brought in the name of the taxpayer on behalf of other taxpayers similarly situated. *Wash. Pub. Trust*, 117 Wn. App. at 182. But Ms. Wolverton points out in her reply brief that this problem was corrected in her first amended complaint.

governmental acts based on special injury. In the alternative, Ms. Wolverton maintains that she need not establish a special injury because *Robinson* and *Kightlinger* challenged the court's decision in *Greater Harbor*.

However, *Robinson* and *Kightlinger* both involved taxpayer challenges to allegedly illegal governmental acts. As *Kightlinger* explained, a taxpayer must establish special injury to challenge a government's lawful, discretionary acts, but need not show special injury when challenging an unlawful act. *Kightlinger*, 119 Wn. App. at 506. Accordingly, Ms. Wolverton lacks standing to challenge the Cities' discretionary acts unless she can demonstrate a special injury. And here, none of the plaintiffs owned an animal that was impounded or mistreated at TCAC.

Ms. Wolverton maintains that she suffered a concrete aesthetic injury. To support this argument, Ms. Wolverton relies on *Sierra Club v. Morton*, 405 U.S. 727, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972), and *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). *Sierra Club* concluded that a plaintiff could establish Article III² standing by alleging statutory-based nonpecuniary injuries including injuries that were aesthetic, conservational, or recreational. *Sierra Club*, 405 U.S. at 738. Significantly, the *Sierra Club* court also noted that broadening the categories of injury that may support standing was different than abandoning the injury requirement. *Id.*

² U.S. CONST. art. III, § 2, cl. 1.

No. 24117-3-III
Wolverton v. Young

Lujan concluded that an injury to an aesthetic interest in the observation of animals is sufficient to establish Article III standing. *Lujan*, 504 U.S. at 566-67. The *Lujan* court explained that: “[T]he person who observes or works with a particular animal threatened by a federal decision is facing perceptible harm, since the very subject of his interest will no longer exist.” *Id.* at 566.

Along similar lines, in *Alternatives Research & Development Foundation v. Glickman*, 101 F. Supp. 2d 7, 11 (D.C. Cir. 2000), a researcher challenged a regulation excluding birds, mice, and rats from coverage under the Animal Welfare Act, 7 U.S.C. § 2131 *et seq.* The court granted standing, finding that the researcher’s aesthetic interest was injured when she had to observe rats that had been subjected to inadequate food, water, housing, and veterinary care. *Glickman*, 101 F. Supp. 2d at 11. Likewise, in *Humane Society of United States v. Hodel*, 268 U.S. App. D.C. 165, 840 F.2d 45 (D.C. Cir. 1988), the court found an individual had standing to sue the secretary of the interior and the director of the wildlife service for violation of federal acts related to the opening of wildlife refuges on the basis that the individual had visited before and intended to return, which might expose him to animal corpses and environmental degradation.

While these cases demonstrate a trend toward broadening categories of injury to support standing, Ms. Wolverton failed to demonstrate that she fits within the categories.

Finally, Ms. Wolverton cites two cases for the premise that the pecuniary loss requirement should be excused where the governmental conduct would continue

No. 24117-3-III
Wolverton v. Young

unchecked if taxpayers could not bring a particular suit: *Upper Bucks County Vocational-Technical Sch. Ed. Ass'n v. Upper Bucks County Vocational-Technical Sch. Joint Comm.*, 504 Pa. 418, 422, 474 A.2d 1120 (1984) and *City of Wilmington v. Lord*, 378 A.2d 635, 638 (Del. 1977). Contrary to Ms. Wolverton's assertions, these cases do not hold that the pecuniary loss requirement is completely excused upon a showing that the governmental conduct would continue unchecked. *Upper Banks*, 504 Pa. at 422; *City of Wilmington*, 378 A.2d at 638.

The trial court did not err by concluding that Ms. Wolverton lacked standing to challenge discretionary acts of government.

(3) Did the trial court err by concluding that Ms. Wolverton lacked standing to challenge the issuance of the contract as a bidder and by dismissing her public contract bidding claim?

Standing. Ms. Wolverton contends she has taxpayer standing to challenge the bidding procedures on the contract. In her view, taxpayer standing for a bid protest does not require a showing of special or direct injury. In response, the Cities argue that Ms. Wolverton lacks bidder standing. Both parties rely on *Dick Enterprises, Inc. v. King County*, 83 Wn. App. 566, 922 P.2d 184 (1996).

In *Dick Enterprises*, the court examined whether a plaintiff had taxpayer standing or bidder standing. The Cities rely on the language in *Dick Enterprises* stating that contract formation is the bright-line cutoff point for bidder standing. 83 Wn. App. at 571. One plaintiff here, Brandy Leighter, was a bidder for the PSA. The Cities maintain that

No. 24117-3-III
Wolverton v. Young

there is no bidder standing here because Ms. Leighter was not lowest bidder and she did not sue before the PSA was signed.

But the Cities are discussing bidder standing while Ms. Wolverton seeks taxpayer standing to challenge the award of a bid. To allege taxpayer standing, the plaintiff must show facts supporting taxpayer status, and that the plaintiff pays the taxes funding the subject of the contract and that the attorney general's office was asked to take action prior to the filing of the lawsuit. *Id.* at 572-73. Moreover, the purposes of competitive bidding are best advanced if lawsuits against performance of public contracts are restricted to plaintiffs with taxpayer standing. *Id.* at 569-70.

The court erred by concluding that Ms. Wolverton lacked taxpayer standing to challenge the bidding procedures.

Public Contract Bidding Claim. The trial court sua sponte invoked *Shaw Disposal, Inc. v. City of Auburn*, 15 Wn. App. 65, 546 P.2d 1236 (1976), to deny Ms. Wolverton's claim that municipal bidding ordinances required letting animal control contracts to the lowest bidder. Ms. Wolverton contends *Shaw Disposal* is inapplicable because it considered a contract in the context of a code city.

The Cities contend the public contract bidding claim was properly dismissed because (1) the PSA is a contract for personal services and not subject to public bidding, (2) the Interlocal Cooperation Act (chapter 39.34 RCW) provisions apply and do not require public bidding, (3) if the Kennewick and Richland Codes apply, the cities have

No. 24117-3-III
Wolverton v. Young

discretion in awarding the contract, and (4) the plaintiffs have no standing to challenge the contract award. The Cities also contend that the public bid requirements do not apply to the ACA, but they cite no authority to support this argument. Significantly, RCW 39.34.180 provides that with limited exceptions, no interlocal agreement relieves a public agency of the responsibilities and obligations imposed by law.

Ms. Wolverton contends that the PSA is a predominantly nonprofessional service contract requiring the quote to go to the lowest responsible bidder under Richland Municipal Code (RMC) 3.04.120(C). She also contends that, under the RMC, there is a financial limit on the city manager's authority to authorize a contract. The complaint alleges that the PSA should have been awarded to Dan Blasdel, who even the ACA recognized as the undisputed lowest responsible bidder.

The court erred by dismissing the public contract bidding claim. Both parties refer to the PSA, which is not a part of the record. Assuming Ms. Wolverton can prove her allegations, she may succeed in her public contract bidding claim. In any event, the arguments presented by the parties cannot be resolved on the pleadings here.

(4) Did the court err by concluding that Ms. Wolverton lacked third party beneficiary status?

Ms. Wolverton contends that nonparties to a contract may sue for a contractor's breach of duty under the contract, if the parties intend that the promisor assume a direct obligation to the intended beneficiary at the time they enter into the contract. Ms.

No. 24117-3-III
Wolverton v. Young

Wolverton points out that under the PSA, TCAC promised to care for impounded animals and ensure that they were free from inhumane treatment and unlawful disposition. In her view, the plain language of the PSA supports the argument that the animals, their owners, and the plaintiffs here are third party beneficiaries. She maintains that TCAC has a direct obligation to the citizens of Richland, Kennewick, and Pasco to abide by the terms of the PSA.

There is a rebuttable presumption that parties enter a contract for their own benefit and not for the benefit of a third party. 25 DAVID K. DEWOLF ET AL., WASHINGTON PRACTICE: CONTRACT LAW AND PRACTICE § 12.1, at 239 (1998). To create a third party beneficiary contract, the parties must intend that the promisor assume a direct obligation to the intended beneficiary at the time the contract is executed. *Lonsdale v. Chesterfield*, 99 Wn.2d 353, 361, 662 P.2d 385 (1983). The terms of the contract must necessarily require a promisee to confer a benefit upon a third party, but the intent of the contract is not a desire or purpose to benefit the third party, but an intent that the promisor assume a direct obligation to him. *Vikingstad v. Baggott*, 46 Wn.2d 494, 496-97, 282 P.2d 824 (1955). The test to determine whether the parties intended to create a third party beneficiary contract is objective. The contracting parties' intent is determined by construing the terms of the contract as a whole in light of the circumstances under which the contract is made. *Am. Pipe & Constr. Co. v. Harbor Constr. Co.*, 51 Wn.2d 258, 266, 317 P.2d 521 (1957).

Ms. Wolverton cannot establish that TCAC assumed a direct obligation to her when the PSA was made. The obligations set forth in the portions of the PSA she cites in her complaint do not imply any attempt by TCAC to assume a direct obligation to the public at large. And none of the plaintiffs owned an animal that was impounded at the TCAC.

Ms. Wolverton contends that the PSA was made for the direct benefit of animals as well as their owners. Ms. Wolverton relies on chapter 11.118 RCW which provides that animals can be beneficiaries of trusts. She also points to PSA provisions that detail humane transport, handling, and euthanasia, noting that ACA retained control over the means and methods of performance, particularly with regard to animal treatment and the euthanasia protocol. According to Ms. Wolverton, the PSA provisions demonstrate an intent that the contractor has a direct obligation to the citizens of Richland, Pasco, and Kennewick.

The PSA is not part of the record, but some provisions are set forth in Ms. Wolverton's complaint. Based on these provisions, Ms. Wolverton and the other plaintiffs cannot be viewed as third party beneficiaries under the PSA because the promisor did not assume a direct obligation to them when the PSA was made.

The court did not err by concluding that Ms. Wolverton lacked third party beneficiary standing.

No. 24117-3-III
Wolverton v. Young

(5) Did the court err by dismissing Ms. Leighter's and Ms. Mahoney's claims under 42 U.S.C. § 1983?

To maintain a 42 U.S.C. § 1983 claim, a plaintiff must establish: (1) that some person deprived him of a federal constitutional or statutory right; and (2) that the person was acting under color of state law. *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 11, 829 P.2d 765 (1992). A public employee acting in his official capacity generally acts under color of state law. *Morinaga v. Vue*, 85 Wn. App. 822, 833, 935 P.2d 637 (1997). But a purely private party is not subject to liability under § 1983. *See Miguel v. Guess*, 112 Wn. App. 536, 550, 51 P.3d 89 (2002). Before the conduct of a private actor can be considered state action for purposes of § 1983, there must be a sufficiently close nexus between the state and the private actor so that the action of the private actor may be fairly treated as that of the state. *Jensen v. Lane County*, 222 F.3d 570, 575 (9th Cir. 2000).

In her 42 U.S.C. § 1983 claim, Ms. Wolverton alleges violations of federal rights caused by: (1) unreasonable seizure; (2) First Amendment retaliation; (3) deprivation of procedural due process right to property; (4) deprivation of procedural due process right to liberty; (5) deprivation of substantive due process; (6) denial of equal protection; and (7) taking without just compensation.

To support this § 1983 claim, Ms. Wolverton alleges that TCAC and the Youngs: (1) refused to adopt animals to two other pet agencies; (2) banned Ms. Mahoney and Ms. Leighter from entering the facilities and refused them access to review TCAC records;

No. 24117-3-III
Wolverton v. Young

(3) improperly euthanized animals; (4) failed to keep complete records of animal intake and disposition; (5) failed to scan cats for microchips; (6) inhumanely handled animals; and (7) disposed of animals before the expiration of the hold period.

Although the trial court did not consider the merits of these claims, most were properly dismissed. First, there is no federal right to adopt animals, and the pet agencies that allegedly attempted to obtain animals from TCAC are not parties to this action. Second, none of the plaintiffs here had animals that were housed or mistreated by TCAC and the plaintiffs do not have standing to bring a claim on behalf of animals.

The complaint alleges that Ms. Mahoney and Ms. Leighter were barred from the TCAC facility because they spoke out against TCAC's animal control policies. The complaint also alleges that Ms. Mahoney and Ms. Leighter were denied access to TCAC to examine records. Based on these allegations, the complaint asserts claims based on First Amendment retaliation and equal access.

Sufficient facts are alleged with regard to these claims to state a cause of action. In some circumstances, plaintiffs may allege §1983 claims for retaliation by state actors who threaten the exercise of their First Amendment rights. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-84, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977). Additionally, Ms. Mahoney and Ms. Leighter have alleged sufficient facts indicating that they may have been denied access to TCAC, a public facility, based on distinctions having no rational basis. The equal protection clauses of the state and federal

No. 24117-3-III
Wolverton v. Young

constitutions require that “persons similarly situated with respect to the legitimate purpose of the law receive like treatment.” *Harmon v. McNutt*, 91 Wn.2d 126, 130, 587 P.2d 537 (1978).

The Cities maintain that the § 1983 claims were properly dismissed because there is no evidence that the Youngs were acting under state authority. The question as to whether Mr. Young operated as a state actor cannot be decided in the context of this motion to dismiss.

The court erred by dismissing Ms. Mahoney’s and Ms. Leighter’s § 1983 claims, but all other § 1983 claims were properly dismissed.

(6) Did the court err by dismissing Ms. Wolverton’s claims based on ultra vires, abuse of discretion, and negligent administration of contract?

Ms. Wolverton contends the court erred by dismissing her claims based on ultra vires and negligent administration of contract.

In her ultra vires claim, Ms. Wolverton alleges that the Cities acted beyond the scope of their authority when awarding the contract to TCAC. As indicated above, Ms. Wolverton has taxpayer standing to challenge illegal acts by the Cities. However, Ms. Wolverton also has included claims for negligent administration of contract and abuse of discretion. Ms. Wolverton does not have taxpayer standing to challenge discretionary governmental acts. Hence, these claims were properly dismissed to the extent they are not based on allegations of illegal governmental acts.

(7) Did the court err by dismissing Ms. Wolverton's claim for declaratory and injunctive relief?

Ms. Wolverton seeks declaratory and injunctive relief. Relief under the Declaratory Judgment Act (chapter 7.24 RCW) is not available unless there is an actual, present, and existing dispute. *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 814-15, 514 P.2d 137 (1973). In addition, the plaintiff must show that the challenged practice or ordinance causes actual concrete harm. *Walker v. Munro*, 124 Wn.2d 402, 412, 879 P.2d 920 (1994). A party seeking an injunction must show (1) that he or she has a clear legal or equitable right, (2) that he or she has a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of are either resulting in or will result in actual and substantial injury to him or her. *Tyler Pipe Indus., Inc. v. Dep't of Revenue*, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982).

The Cities and TCAC contend that Ms. Wolverton's request for injunctive and declaratory relief was properly dismissed because there is no justiciable issue and no pending harm. Because we conclude that some of the claims here should not have been dismissed, and that Ms. Wolverton has standing to pursue these claims, the trial court erred by dismissing Ms. Wolverton's requests for injunctive and declaratory relief.

(8) Does this court have jurisdiction?

The Cities and TCAC contend the Franklin County Superior Court lacks jurisdiction to hear this matter. They also note that none of the plaintiffs reside in Pasco.

No. 24117-3-III
Wolverton v. Young

Ms. Wolverton points out that the ACA geographically spans both Benton and Franklin Counties. Ms. Wolverton maintains that the ACA does not specify a governing venue. However, according to Ms. Wolverton, the original PSA contained a paragraph stating that the governing forum/venue for disputes under the PSA shall be Franklin County.

It is impossible to resolve the jurisdiction issue without copies of the relevant agreements, including the interlocal agreement and the applicable PSAs. This issue cannot be resolved on this record.

MOTION TO AMEND COMPLAINT

Where a responsive pleading has been filed, a party may amend its pleading by leave of the court, and leave shall be freely given when justice so requires. CR 15(a). The purpose of this rule is to facilitate decisions on the merits, to provide parties with adequate notice of claims and defenses, and to allow amendment of the pleadings unless amendment would prejudice the opposing party. *Caruso v. Local Union No. 690 of Int'l Bhd. of Teamsters*, 100 Wn.2d 343, 349, 670 P.2d 240 (1983).

The “touchstone for denial of an amendment is the prejudice such amendment would cause the nonmoving party.” *Id.* at 350. Factors considered include undue delay, unfair surprise, and jury confusion. *Herron v. Tribune Publ’g Co.*, 108 Wn.2d 162, 165-66, 736 P.2d 249 (1987). However, a court may also deny a leave to amend the pleadings based on the futility of the amendment or the repeated failure of a party to cure

No. 24117-3-III
Wolverton v. Young

deficiencies in prior amendments. *Culpepper v. Snohomish County Dep't of Planning & Cmty. Dev.*, 59 Wn. App. 166, 796 P.2d 1285 (1990).

A trial court's denial of a motion to amend pleadings is reviewed for an abuse of discretion. *Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316 (1999).

In its memorandum decision, the trial court noted Ms. Wolverton's representation that if granted leave to amend, she would have standing to bring this action on behalf of animals. The court dismissed the motion to amend, concluding that animals do not have standing absent a statute expressly permitting animals to sue on their own behalf. The court made no finding that the other parties would be prejudiced if the amendments were allowed.

Ms. Wolverton contends that standing to sue as next friends seeking to enforce anticruelty laws on behalf of impounded animals may be implied from state statutes and the Cities' ordinances. She maintains that humans may serve as plaintiffs on behalf of animals and that Washington case law implies that animals may sue in their own name. Moreover, she asserts that taxpayer standing should apply here as animals are mistreated with public monies even though the statutes imply enforceable obligations.

Ms. Wolverton relies on *Cetacean Community v. Bush*, 386 F.3d 1169 (9th Cir. 2004), and *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990). In *Cetacean Community*, the Ninth Circuit concluded that while animals could be granted statutory standing, animals did not have standing under the Endangered Species Act, the

No. 24117-3-III
Wolverton v. Young

Administrative Procedure Act, the Marine Mammal Protection Act, or the National Environmental Protection Act. *Cetacean Cmty.*, 386 F.3d at 1179. In *Bennett*, the court found an implied cause of action for age discrimination under RCW 49.44.090. *Bennett*, 113 Wn.2d at 921. Ms. Wolverton asks this court to find an implied cause of action for animals under several different Washington statutes dealing with animals and animal cruelty.

Ms. Wolverton cites no cases where a court found an implied cause of action for animals. The trial court did not err by concluding that Ms. Wolverton lacked next friend status to sue on behalf of animals.

In her motion to amend, Ms. Wolverton requested leave to add 10 claims and to “add or modify factual, jurisdiction, and venue allegations, causes of action, and prayers for relief consistent with the above ten (10) material amendments.” Clerk’s Papers at 40. Ms. Wolverton did not attach a proposed amended complaint to her motion.³ Ms. Wolverton sought leave to amend her complaint to include the following 10 claims: violation of public trust; maintaining illegal contract against public policy; writ of review/certiorari of Franklin County district court decision; constitutionality of Pasco Municipal Code 8.02.170; writ of review/certiorari of Pasco municipal court decision in its motion to amend; violation of the Animal Welfare Act; taxpayer derivative suit;

³ Former CR 15(a) (1967) did not require the filing of a proposed amended complaint with the motion for leave to amend.

No. 24117-3-III
Wolverton v. Young

equitable relief claim; formalize the addition of new plaintiffs; and negligence claim to include prayer for money damages.

The trial court dismissed the complaint based on standing, and then denied the motion for leave to amend based on standing. Because we conclude the court erred by granting the motion to dismiss, we also conclude the court abused its discretion by denying the motion to amend. At this point in the proceeding, Ms. Wolverton should be allowed to amend her complaint. Additionally, we note that the amendments will be easier to evaluate when incorporated into the complaint.

ATTORNEY FEES

Ms. Wolverton requests an award of fees under RAP 18.1 on the basis that she is acting as a private attorney general preserving the common fund and conferring a substantial benefit on taxpayers by challenging the unconstitutional expenditure of public funds.

There are four recognized equitable grounds for awards of attorney fees: (1) bad faith conduct of the losing party; (2) preservation of a common fund; (3) protection of constitutional principles; and (4) private attorney general actions. *Miotke v. City of Spokane*, 101 Wn.2d 307, 338, 678 P.2d 803 (1984). These equitable grounds are not applicable here. We deny Ms. Wolverton's request for fees.

CONCLUSION

We conclude that Ms. Wolverton and the other plaintiffs have taxpayer standing to

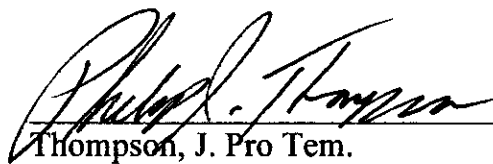
No. 24117-3-III
Wolverton v. Young

challenge illegal governmental acts. We affirm with the trial court's decision that the plaintiffs lack standing to challenge the Cities' discretionary acts and lack standing as third party beneficiaries. Likewise, the court properly dismissed all of the § 1983 claims except for those relating to Ms. Mahoney and Ms. Leighter. However, we conclude the trial court erred by dismissing the remaining claims in the complaint.

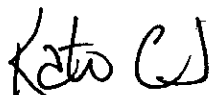
We also conclude the trial court abused its discretion by denying the motion for leave to amend. However, we agree with the trial court that Ms. Wolverton lacks standing to proceed with any claim on behalf of the animals. We deny Ms. Wolverton's request for attorney fees.

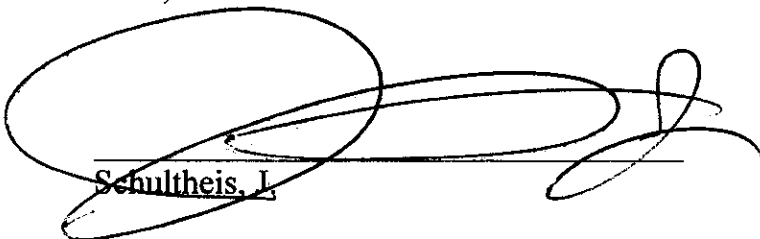
Affirmed in part; reversed in part.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.


Thompson, J. Pro Tem.

WE CONCUR:


Kato, C.J.


Schultheis, J.