

ALASKA SUPREME COURT
September 17, 2010—**Constitution Day**
Oral Argument Case Summary

CASE #2
Leta Trask, Appellant,
v. Ketchikan Gateway Borough, Appellee.
Supreme Court No. S-13590

***Disclaimer:** This summary of the case was prepared for educational purposes only by the Supreme Court LIVE program coordinator and does not reflect the views of any member of the court.*

ATTORNEYS

- *Attorney for the Appellants [“Trask”]:*
Amanda M. Schulz, Ketchikan
- *Attorney for Appellee [“KGB”]:*
Scott A. Brandt-Erichsen, Borough Attorney, Ketchikan Gateway Borough

QUESTIONS PRESENTED ON APPEAL

- ✓ Did the trial court err in dismissing Trask’s counterclaim for deprivation of her constitutional rights under 42 U.S.C.A. §1983, which is based on her claim that KGB’s enforcement of its sign ordinance against her violated her free speech rights under the First Amendment?
 - Is Trask’s civil action under 42 U.S.C. §1983 foreclosed by the trial court’s findings that the messages on her roof don’t constitute a “sign” under KGB’s sign ordinance, and as a consequence, she lacks “standing” to challenge the constitutionality of the ordinance because there is no risk it will be enforced against her?
 - Does a lack of standing to challenge the constitutionality of the ordinance also mean that Trask lacks standing to maintain a 42 U.S.C. §1983 action, since the latter requires a showing of a constitutional violation?

- ✓ **Note:** Appellant Trask also claims that she is entitled to enhanced attorney fees under Alaska Rules of Court [Civil Rule 82(b)(3)], but this issue is not included in this summary.

MAJOR AUTHORITIES TO CONSIDER

U.S. Constitution, Amendment I—Freedom of religion, speech, and of the press.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C.A. §1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

Ketchikan Gateway Borough Code §60.10.090(A)(8). Roof Signs.

Roof-mounted signs, including any signs painted on the roof surface, but excepting those mounted on a marquee or canopy, are prohibited.

Ketchikan Gateway Borough Code §60.10.140(B). Definitions.

...

Sign: Any words, lights, letters, parts of letters, figures, numerals, phrases, sentences, emblems, devices, trade names or trademarks by which anything is made known, such as are used to designate an individual, a firm, an association, a corporation, a profession, a business or a commodity or product, which are visible from any public area and used to attract attention.

...

Sign, Roof: A sign projecting over the coping of a flat roof, or over the ridge of a gable, hip or gambrel roof, and supported by or attached to said roof, or any sign that uses the roof for support.

SUMMARY OF THE CASE

Appellant Leta Trask has had biblical words and symbols painted on the roof of the house she owns in Ketchikan since as early as April 1988. Although the messages have varied, they have been painted in white over a space measuring up to 25 feet by 20 feet. In 2004, KGB amended its sign ordinance to specifically prohibit “roof-mounted signs, including any signs painted on the roof surface...” Trask’s roof was largely bare of words and symbols by August 2005, but at that time she advised KGB planning officials that she intended to again place biblical passages on her roof. Although the messages were not specified, she assured planning officials that they would not be directed at a public area or roadway; would not advertise any commodity or product, or designate an individual, a firm, an association, a corporation, a profession, or a business; and would not be intended to attract attention. Based on these assurances, a KGB planning official advised Trask that her roof messages did not meet the definition of a “sign” under the KGB sign ordinance. Subsequently, the following messages appeared in large white letters on one side of Trask’s roof: “DO UNTO OTHERS...; BY YOUR DEEDS ARE YOU KNOWN; LOVE YOUR NEIGHBOR; YOU’RE WELCOME.” These messages were accompanied by a white cross.

In July 2007, nine residents of Ketchikan submitted a written complaint to KGB requesting that the sign be removed. KGB subsequently filed a complaint in court seeking to enforce its sign ordinance. According to KGB, the words and phrases on Trask’s roof violated the prohibition against roof signs and also constituted a nuisance, in violation of other sections of the KGB codes. KGB asked the court to fine Trask for the violation and to order her to remove the words and phrases from her roof.

Trask responded by challenging the constitutionality of KGB’s sign ordinance and asking that KGB be barred from enforcing it. In her view, KGB’s code violated her rights to free speech, freedom of religion, due process, and equal protection under both the U.S. Constitution and the Alaska Constitution. Trask also claimed the right to damages under a federal law—42 U.S.C.A. §1983—that allows governmental entities to be held liable for violating citizens’ constitutional rights.

Summary Judgment. In most circumstances, parties to a lawsuit have the right to trial by a jury of their peers on the factual disputes in their case. The jury hears the testimony of witnesses and other evidence presented and renders a decision on what they believe occurred. However, sometimes a lawsuit can be resolved without a trial—an outcome known as “summary judgment.” To be granted summary judgment, the party seeking it (the “movant”) must demonstrate that there are no “genuine issues of material fact” in the case, and that it can be resolved as a matter of law. Because granting summary judgment prevents the non-moving party from having their day in court on the factual issues, the trial court must “draw all reasonable inferences of fact from the proffered materials *against* the movant and *in favor* of the non-moving party.”

Trask moved for summary judgment on her claims, and KGB opposed her motion. Oral argument was heard before Ketchikan Superior Court Judge Trevor N. Stephens in October 2008. In April 2009, Judge Stephens issued a Memorandum and Order granting Trask's motion in part and denying it in part. Trask filed this appeal to challenge the trial court's decision that she lacked standing to pursue an action under 42 U.S.C.A. §1983.

THE TRIAL COURT'S DECISION.

Judge Stephens ruled in Trask's favor on the issue of whether the messages on her roof violated the KGB code prohibiting roof signs. Based on several principles of statutory construction that he addresses in detail, Judge Stephens concluded that the words and phrases on Trask's roof were not a "sign" within the meaning of the KGB sign code. His reasons included: (1) the sign code was primarily designed to regulate commercial signs, not messages such as Trask's; (2) KGB officials on two separate occasions had themselves interpreted Trask's messages as falling outside the sign ordinance; and (3) interpreting the code narrowly to apply it to commercial speech only would "substantially limit, if not eliminate dangers of unconstitutionality." Accordingly, Judge Stephens dismissed KGB's enforcement action against Trask.

Notwithstanding this conclusion in Trask's favor, Judge Stephens ruled that Trask was not entitled to challenge the constitutionality of the KGB sign ordinance because she lacked "standing." "Standing" is the concept that a person must have "a sufficient personal stake in the outcome of the controversy." As a general rule, courts "should not resolve abstract questions or issue advisory opinions," but should instead resolve actual controversies, where actual injuries are at stake. Since the court ruled that Trask's roof messages did not constitute a "sign", she was no longer in danger of having the ordinance enforced against her, so she could not be viewed as having a personal stake in the outcome of any dispute over the ordinance's constitutionality. Further, Trask was not entitled to the exception to the requirement of an actual controversy that can sometimes apply in cases where the challenged governmental action threatens to "broadly" prohibit speech protected by the First Amendment. Because the only "speech" that was ever in question were the messages on her roof—messages that were no longer at risk—Trask faced no broad prohibition of protected speech.

In a supplemental Memorandum and Order issued June 24, 2008, Judge Stephens also ruled that Trask's action for damages under 42 U.S.C.A. §1983 should be dismissed. He reasoned that such actions require (1) a constitutional violation; and (2) standing, neither of which could be shown in Trask's case. First, the sign code did not apply to her roof messages, so did not violate her free speech rights. Second, her lack of standing to litigate the constitutionality of the sign ordinance precluded her from maintaining a §1983 action. Since she had no

standing to litigate the constitutionality of the ordinance, she had no standing to litigate the key element in a §1983 action--a constitutional violation.

LEGAL ISSUES GENERALLY.

The main issue on appeal is whether Judge Stephens was correct in ruling that Trask lacked standing to litigate her action under 42 U.S.C.A. §1983 once he ruled that the KGB sign ordinance did not apply to her roof messages.

Trask asserts that Judge Stephens was incorrect for several reasons. First, the fact that she may not be at risk of future enforcement actions by KGB doesn't eliminate the injuries she has already suffered from KGB's past enforcement efforts. In her view, KGB's efforts to force her to remove her roof messages, followed by its enforcement action in court, impinged on her free speech rights and caused her sufficient injury to meet the requirement for standing under 42 U.S.C.A. §1983. The fact that KGB was ultimately unsuccessful in its enforcement efforts doesn't eliminate the harm its efforts caused her, and she should be entitled to pursue her §1983 claims.

KGB counters that Trask's free speech rights were never impinged, and are not at risk of being impinged, so there is no existing controversy on which the court should rule. In KGB's view, Judge Stephens was right not to allow the dispute over the constitutionality of the sign ordinance to go forward once he determined that the ordinance did not apply to the circumstances of Trask's case. For the same reason, he was right not to allow the §1983 action to proceed. Courts have a long tradition of declining to hear cases where litigants have no direct stake in the outcome. The requirement of standing ensures that courts devote their resources to actual controversies, not abstract disputes. Once the trial court determined that the sign code did not apply to her roof messages, Trask had no stake in proving that the code was unconstitutional, because a decision on the code's constitutionality would not affect her in any way.

QUESTIONS FOR STUDENTS TO CONSIDER

1. In this case, KGB unsuccessfully sought the removal of Trask's roof messages based on its sign code. Years earlier, Trask's uphill neighbor sought removal of the signs in court—also unsuccessfully—by alleging that they intentionally inflicted emotional distress. Do you agree that Trask should be able to keep her roof signs? Why or why not?
2. Read Judge Stephen's decision in full, which is available on the website (See "Decision of the Trial Court"). Do you agree with his conclusion that Trask lacks standing to pursue her claims? Why or why not? In your view, did she suffer injury from KGB's actions?

3. If Trask were allowed to pursue her constitutional claims, do you think the court would rule that the KGB ordinance violates her constitutional right to free speech? Do you think KGB has a legitimate interest in regulating signs?