

ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE

May 18, 2003

10:10 a.m.

MEMBERS PRESENT

Senator Ralph Seekins, Chair
Senator Scott Ogan, Vice Chair
Senator Gene Therriault
Senator Johnny Ellis
Senator Hollis French

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

CS FOR HOUSE BILL NO. 245(JUD)(efd fld)

"An Act relating to certain suits and claims by members of the military services; relating to certain suits and claims regarding acts or omissions of the organized militia; relating to workers' compensation and death benefits for members of the organized militia; relating to liability arising out of certain search and rescue, civil defense, fire management, and fire fighting activities."

MOVED CSHB 245(JUD) (efd fld) OUT OF COMMITTEE

CS FOR HOUSE BILL NO. 145(FIN)

"An Act prohibiting discrimination in the awarding of attorney fees and costs in civil actions or appeals to or against, or in the posting of bonds or other security by, public interest litigants; and relating to awards of attorney fees and costs in cases involving enforcement of constitutional rights; and providing for an effective date."

MOVED CSHB 145(FIN) OUT OF COMMITTEE

CS FOR HOUSE CONCURRENT RESOLUTION NO. 16(RLS)

Proposing amendments to the Uniform Rules of the Alaska State Legislature providing that the 2000 edition of "Mason's Manual of Legislative Procedure" shall implement the rules; relating to meetings of subcommittees and conference committees; and providing for an effective date for the amendments.

MOVED CSHCR 16(RLS) OUT OF COMMITTEE

PREVIOUS ACTION

HB 245 - See Judiciary minutes dated 5/17/03.
HB 145 - No previous action to consider.
HCR 16 - No previous action to record.

WITNESS REGISTER

Ms. Gail Voitlander, Assistant Attorney General
Department of Law
PO Box 110300
Juneau, AK 99811-0300
POSITION STATEMENT: Commented on HB 245.

Ms. Tamara Cook
Legislative Affairs Agency
Alaska State Capitol
Juneau, AK 99801-1182
POSITION STATEMENT: Commented on HB 245.

Mr. Craig Tillery, Assistant Attorney General
Department of Law
PO Box 110300
Juneau, AK 99811-0300
POSITION STATEMENT: Commented on HB 145.

Mr. Benjamin Brown
Alaska State Chamber of Commerce
Juneau, AK 99801
POSITION STATEMENT: Supported HB 145.

Mr. Robert Briggs, Attorney
Disability Law Center
Juneau, AK 99801
POSITION STATEMENT: Opposed HB 145.

Representative Rokeberg
Alaska State Capitol
Juneau, AK 99801-1182
POSITION STATEMENT: Sponsor of HCR 16.

ACTION NARRATIVE

TAPE 03-53, SIDE A

CSHB 245(JUD)(efd fld)-SUITS & CLAIMS: MILITARY/FIRE/DEFENSE

CHAIR RALPH SEEKINS called the Senate Judiciary Standing Committee meeting to order at 10:10 a.m. Present were Senators Ellis, French and Ogan. The first order of business to come before the committee was CSHB 245(JUD)(efd fld).

SENATOR FRENCH said he continued to have reservations about section 2, which has to do with search and rescue functions. He feels that law enforcement officers have to be held accountable for the decisions they make. For instance, if some FBI and DEA officers decided to make a bust on what they think is a drug house and they wind up three doors down by mistake, because the printing of the address on the search warrant was wrong, they should be responsible. He feels there should be some balance point that they haven't found yet for making certain that once the function is undertaken, it's undertaken in a responsible way.

Another example is if he calls a state trooper asking for help and he puts the phone down and writes a note to himself and then completely forgets it. "It just flat slips his mind. That strikes me that there's some liability there...Under this statute, they would walk free."

CHAIR SEEKINS asked if he proposed to hold the state or the individual liable for that.

SENATOR FRENCH responded that either one would be immune under this section. He believes the balance point should be somewhere farther away from absolute immunity.

MS. GAIL VOITLANDER, Assistant Attorney General, commented that in Senator French's first scenario nothing in this bill takes away anyone's ability to sue for a constitutional rights violation under 42USC, section 1983. On the latter scenario, the Supreme Court has already stated in four cases in a row that you cannot sue the police for negligent investigation including both the decision of whether to commence an investigation or not and how the investigation is carried out.

This bill simply makes it clear that that same policy, which is recognized by the Supreme Court is the best one for the state of Alaska and people overall....

Regarding the last scenario, as with any state employee, when there is a dereliction of duty, then obviously there are personnel actions up to and including discharge that is the vehicle to hold

someone personally responsible. What this bill does is simply say the state treasury will not be held responsible and if there are derelictions of duty, then obviously those would become personnel matters...

SENATOR OGAN asked if she remembered the instance in which an Anchorage airport policeman chased an unarmed person and finally shot and killed him.

MS. VOITLANDER recalled it was a single officer with a single vehicle that went down to Indian and that action resulted in the death of a young man. The family did sue in that case under civil rights violation, but it was resolved out of court.

SENATOR OGAN asked if police officers are indemnified under this bill.

MS. VOITLANDER replied the only portions of this bill that would address actions of police officers is the search and rescue area, section 2, or if they participated in civil defense activities under sections 7 - 10.

SENATOR FRENCH asked about a scenario with a fire on the Hillside in Anchorage due to the spruce bark beetle deadfall and a bulldozer is cutting a firebreak and takes a wrong turn. The operator bulldozes a huge swath and knocks down part of a building. He questioned whether the state would be liable under this bill.

MS. VOITLANDER replied this bill would bar a civil action for damages that resulted from an act or omission if it was in prevention, monitoring, control or suppression of fires. Obviously, if for some reason the bulldozer's action rose to the level of constituting a violation of someone's federally protected rights, they could sue.

SENATOR FRENCH asked what the difference was between sections 11 and 12 since they are both about fire.

MS. VOITLANDER replied that under Title 41 there are two chapters that deal with firefighting activities by the state. Chapters 15 and 17 of Title 41 are concerned with firefighting and so they are reflected in the bill also.

10:23 - 10:25 a.m. - at ease

SENATOR OGAN said he struggles with giving this power back to the king, so to speak, where the people are less than sovereign. He asked Tam Cook, Legislative Affairs, if he was off base.

MS. TAMARA COOK, Legislative Affairs Agency, replied:

Senator Ogan's remarks highlight the difficulty of the choice that is before the legislature in this regard. Because we don't have a king any more, one could certainly urge that when you analyze the burdens, they are allocating the possibility of loss. The state enjoys sovereign immunity as a matter of constitutional law and chooses to some extent to waive that immunity. (Municipalities do not enjoy sovereign immunity)...In our system of course, the government is much more closely tied to the people as a whole. So, when the state elects to assume some liability in order to protect the individual, that liability is actually born by the populations as a whole. It is all of us that bear that liability and the question is is it better for the populace as a whole through its taxes and its fees and its burdens to assume liability in situations in order to preserve what might be a catastrophic loss on the part of some of the individuals of that society? So, in fact, I think the choice is far worse when you're talking about a modern complex government such as ours.... No matter how it comes out, somebody is going to have to bear that burden and that's the philosophical problem. Where do you place that?

SENATOR THERRIAULT arrived at 10:35 a.m.

CHAIR SEEKINS said he thought it was reasonable to give the state sovereign immunity for certain circumstances.

SENATOR OGAN said that the Supreme Court recently said that the state could be held liable for negligence in the Miller's Reach fire, but the Superior Court judge tossed it out under the assumption that the state was immune from suits like that. He asked if she knew what the assumption was under which Judge Cutler originally tossed the suit out.

MS. COOK replied that she would defer to the Attorney General's office for those comments.

MS. VOITLANDER responded that there were actually two different lawsuits filed - one in Palmer that was dismissed by Judge Cutler and then one in Anchorage with Judge Reese who dismissed that case, as well. Judge Cutler was presented with briefings that showed Ninth Circuit cases in which a number of other states adopted the concept that there should not be a lawsuit against firefighters and their employers - be they state, federal or local government, because of the problems that arise in terms of firefighting decisions.

SENATOR FRENCH said he missed the grounds for reversal in the Supreme Court.

MS. VOITLANDER explained that the Supreme Court rejected the other jurisdictions and found that the Legislature had not enunciated clearly enough under AS 9.50.250, the statute under Alaska law that allows someone to file a tort claim, that there should be immunity. They found that some decisions might be immune, but some of them may not. The Supreme Court remanded it to the trial court for further factual development and eventually there were trials on a number of issues where plaintiffs claimed that state firefighters were negligent for a variety of specific actions.

SENATOR FRENCH said it sounds like the basic structure is that you can sue the state unless the Legislature clearly takes the right away.

MS. VOITLANDER replied if there is not an existing statute that takes the right away and you fall within the types of suits where claims are allowed under AS 9.50.250, you can sue the state agents who are negligent. She noted that AS 9.65.070 immunizes local firefighters and municipal firefighters.

SENATOR THERRIAULT moved to pass CSHB 245(JUD) (efd fld) from committee with individual recommendations and attached fiscal notes.

SENATOR FRENCH objected for a short question. He said he thought they could make this a better bill by trying to enunciate a couple of principles. One is you can't force the state to take on a rescue or fight a fire, but having chosen to act, he couldn't see anything wrong with saying you have to act responsibly.

SENATOR FRENCH also agreed that the state should have a certain amount of immunity, but he thought there was a difference

between that and blanket immunity. This bill gives blanket immunity in several big areas. He was concerned that someone's house could get bulldozed or someone could kick in the wrong door and you could sue under the federal constitution; and he thought the state constitution should be just as open to correcting mistakes as the federal constitution.

SENATOR OGAN said he didn't have problems with the civil defense and military areas of the bill, but he is still struggling with the search and rescue and fire sections, because there are so many variables that are out of control for those people.

CHAIR SEEKINS called for a roll call vote.

The motion passed with Senators Ogan, Therriault and Seekins voting yea and Senator French voting nay. CSHB 245(JUD) (efd fld) moved from committee with attached fiscal notes.

10:44 a.m. - 7:03 p.m. - at ease

CSHB 145(FIN)-ATTY FEES/ BOND: PUBLIC INTEREST LITIGANT

CHAIR SEEKINS announced CSHB 145(FIN) to be up for consideration.

MR. CRAIG TILLERY, Assistant Attorney General, said the bill is intended to prohibit discrimination in the award of attorneys' fees by preventing the allowance of specific favoritism to public interest litigants. It provides that in an action or appeal, a court may not discriminate in the awarding of attorneys' fees if the action or appeal is based on the nature of the policy or the interest advocated by the party or on the persons affected by the outcome of the case or the governmental entity [indisc]. Those are the four factors the Supreme Court listed as supporting the public interest litigant status.

In calculating the award that may be granted to the public interest litigant on the constitutional case, the court shall include in the award only those parts of the case that were devoted to the constitutional issues and upon which it prevailed. The court can only make the award if the claimant did not have sufficient economic incentive to bring the lawsuit. Finally, the court in its discretion can abate an award if it finds substantial and undue hardship is put upon the party ordered to pay the fees or costs.

He said that Section 3 of the bill would prevent a court from using those public interest litigant factors in determining whether to require or in allowing a party to be excused from paying a bond.

SENATOR THERRIAULT asked for an example of having sufficient economic reason for bringing a case.

MR. TILLERY replied that in order to have that sort of status, you cannot have economic incentive to bring the action.

MR. BENJAMIN BROWN, Alaska State Chamber of Commerce, supported HB 145 in its current version and explained:

...This bill looks at the nature of the claim and it says what are the most important claims that someone ought to be able to bring, regardless of his or her financial circumstances - in what has been called the public interest - and the bill makes the determination that it's constitutional claims that deserve that special status....

MR. BROWN highlighted a three-page document, Order on Emergency Relief, written by one of the single justices of the Alaska Supreme Court that explains why section 3 does not excuse a litigant from posting a bond to get things like temporary restraining orders. He also noted that while there had been discussion about putting (c) into Chapter 68 of Title 9, because prior sections of the chapter were adopted with court rule changes, he did not see language in (c) violating any existing rules and, therefore, didn't think it was necessary to put this language into the statute.

SENATOR OGAN asked if the intent language on page 2, lines 1 - 9, had the effect of being retroactive.

MR. BROWN replied no. The applicability of this legislation is covered under Section (4) on page 3 and it applies to all civil actions and appeals filed on or after the effective date, which is immediate. The effect of the language on page 2, expressly overruling decisions of the Alaska Supreme Court and the cases listed, is not going to have a retroactive affect and will not affect other holdings in those cases beyond the public interest doctrines. The drafters wanted to make sure that only public interest elements were captured in overruling the doctrine.

TAPE 03-53, SIDE B

SENATOR OGAN asked a question as the tape was changing and Mr. Brown responded that the public interest doctrine is not codified and not part of the Rules of Civil Procedure.

MR. BOB BRIGGS, attorney with the Disability Law Center, urged them to reconsider the wisdom of CSHB 145(FIN), because it expands the abrogation of the public interest litigant doctrine to all statutory and all common law claims. Testimony from Laurie Hugonin, Alaska Network on Domestic Violence and Sexual Abuse, in the previous Legislature regarding SB 183 pointed out that her organization sued the Alaska court system because it was not implementing a statute the Legislature had passed. She pointed out that if it were not for the public interest litigant doctrine, she didn't think she could have brought that lawsuit. He suggested that there might be a much broader impact than the original focus of HB 145 and there really isn't a legislative record that would support that broad abrogation of the doctrine.

He pointed out that they only heard from people who said the public interest litigant doctrine had affected resource development in this state, but not from anyone complaining about the affect it had on enforcement of our civil rights statutes and our election or redistricting laws.

The reason the public interest litigant doctrine treats people differently is to level the playing field and HB 145, therefore, reskews an unlevel playing field. HB 145 fails to identify the fact that it makes a court rule change...The court may make and promulgate rules of procedure by any means that effects a public pronouncement of the rule of procedure.... I didn't find an Alaska case on this point, but I did find a New York case on this point...but promulgate means to publicly pronounce or to disseminate...so a rule can be disseminated in any number of ways. The Alaska Supreme Court has espoused the public interest litigant doctrine in three ways: first; by publishing it as a notation to a codified rule; secondly, by including it as a specific paragraph in a Supreme Court order, Supreme Court Order 11.18 (am); and, as part of a published series of judicial decisions.

So, I suggest that the public interest litigant doctrine is a rule of procedure that courts are required to apply in making their decisions about the

allocation of attorney's and costs and in litigation to which it applies. And, therefore, in changing the doctrine, you should identify in the title of the bill that you are abrogating the doctrine. To be legally effective, it should be adopted by two-thirds majority of both houses.

The rule, if amended as I suggested, is the doctrine, itself, as well as Civil Rule 82. Civil Rule 62 in this new version is affected by this bill and modified; the same is true for Appellate Rule 508, Appellate Rules 204 and Appellate Rule 602.

MR. BRIGGS said that those rules all relate to the procedure by which courts go about issuing stays on appeals. He concluded by urging the committee to vote no on HB 145, but added that the Disability Law Center took no position on the much narrower House Judiciary version of the bill.

SENATOR FRENCH arrived at 7:19 p.m.

SENATOR OGAN said he also preferred a much narrower bill focused on resource issues as public interest litigant status has stymied efforts to develop our resources, which is in Alaska's best interest.

SENATOR THERRIault commented that the only court case he has heard of on redistricting was brought on constitutional grounds and that was covered in HB 145. He asked if he was missing something.

MR. BRIGGS replied that he would have to get back to him on redistricting cases and what cases have been granted public interest status and whether they have been statutory or constitutional.

But, ...no lawyer worth their salt would file a public interest type case without throwing in some constitutional claims. On the other side of the coin, what you're forestalling is the kind of case, like the domestic violence case I mentioned, where there's a clear statute and somebody is failing to implement it.... We know at least for the next four years there's going to be a large alignment between the majority of this body and the governor, but no one can say what's going to happen after that. It's possible to conceive of a case where a statute you folks pass

is not being enforced by the executive branch and then a public interest litigant would want to come in as a private attorney general. And most of the times the court has talked about it, [it] said this is to encourage citizens to act as private attorneys general.

SENATOR OGAN said he felt his point was valid and that this raises the level of diligence the Legislature must exercise to keep the other branch in check.

CHAIR SEEKINS asked Mr. Briggs if he found anything close to the provisions of Rule 82 in any other state.

MR. BRIGGS replied he hadn't, but he hadn't researched it. He felt that was an approach that would upset the tort branch of the bar association. Another approach would be to abrogate Rule 82 so that everyone is not dealing with the fee-shifting rule.

CHAIR SEEKINS asked if they weren't just putting public interest litigants in Alaska on the same level they would be on in any other state.

MR. BRIGGS replied that is true.

SENATOR FRENCH said one category of claims they would be disrupting unintentionally is folks who bring a public interest litigation to enforce zoning laws.

Sometimes you have to bring a suit against the city to enforce its own laws to run prostitutes off, to clean up drug houses, to haul off old junk cars and that doesn't strike me as being a constitutional claim. It's simply a matter of municipal ordinance. So, before we pass this out in a big hurry, we should take a look at the possibility that we're interfering with the rights of citizens to live in clean and decent neighborhoods....

SENATOR THERRIAULT motioned to pass CSHB 145(FIN) from committee with individual recommendations and accompanying fiscal notes. Senators French and Ellis objected and Chair Seekins called for a roll call vote.

SENATORS French and Ellis voted nay; Senators Therriault, Ogan and Seekins voted yea; and CSHB 145(FIN) passed from committee.

7:34 - 7:35 p.m. - at ease

CSHCR 16(RLS)-UNIFORM RULES; MASON'S MANUAL EDITION

CHAIR SEEKINS announced CSHCR 16(RLS) to be up for consideration.

REPRESENTATIVE ROKEBERG, sponsor of HCR 16, said that Alaska was using the 1979 version of Mason's Manual and this is the only Legislature in the nation that is using that version. The manual was revised in 1989 and 2000 and this resolution asks that the Legislature adopt the 2000 edition. It also amends Rule 23 regarding subcommittees and conference committees to make clear that the five-day rule does not apply to subcommittees and conference committees.

SENATOR OGAN moved to pass CSHCR 16(RLS) from committee with individual recommendations and asked for unanimous consent. There was no objection and it was so ordered.

There being no further business to come before the committee, CHAIR SEEKINS adjourned the meeting at 7:42 p.m.