

H B

4 4 5

STATE OF ALASKA THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

January 13, 1984

SUBJECT: Sectional analysis of HB 445

TO: Representative Charlie Bussell
Chairman, House Judiciary Committee

FROM: Keith B. Levy *KBL*
Legislative Counsel

You have requested a sectional analysis of HB 445, "An Act relating to attorney fees." Under present law (AS 09.60.010) the Supreme Court has the discretion to determine by rule or order what attorney fees may be ordered to the prevailing party in civil cases. Under the authority of that section, the Supreme Court enacted Civil Rule 82. Civil Rule 82 does not deal with attorney fees in public interest cases. However, in a number of cases, the Court has determined that in a genuine public interest case, it is an abuse of discretion for the trial court to award attorney fees against the plaintiff if the defendant prevails. See Gilbert v. State, 526 P.2d 1131 (Alaska 1974); Anchorage v. McCabe, 586 P.2d 986 (Alaska 1977); Thomas v. Croft, 614 P.2d 795 (Alaska 1980); and SEACC v. State, ___ P.2d ___, No. 2662, (Alaska 1983).

House Bill 445 provides that in a civil suit against a non-governmental party, it is not an abuse of discretion to award attorney fees, even if it is a genuine public interest case.

KBL:lmb
L3/080



POUCH V
JUNEAU, ALASKA 99811
(907) 465-4990

Alaska State Legislature
HOUSE OF REPRESENTATIVES

REPRESENTATIVE
CHARLIE BUSSELL
CHAIRMAN

Committee on Judiciary

HB 445
TABLE OF CONTENTS

- A. House Bill No. 445
"An act relating to attorney fees."
- B. Sectional Analysis
Keith B. Levy, Legislative Counsel.
- C. Fiscal Note
Richard I. Pegues, Director, Administrative Services, Dept of Law.
- D. "The Public Interest Exception to the Award of Attorney's Fees."
Keith B. Levy. Legislative Counsel.
- E. "Public Interest Exemption Lawsuits"
Attachment A. Alaska Supreme Court Cases.
Nancy Pease, Legislative Analyst, House Research Agency, 1983.
- F. Alaska Statutes: Chapter 60, Sec. 09.60.010.
- G. Civil Rule 82.
- H. GILBERT v. STATE
Excerpt from Pacific Reporter.
- I. Pertinent News Clippings.

MEMBERS:
REP. JOHN LISKA, VICE CHAIRMAN; REP. RAMONA BARNES, EMERITUS;
REP. JOE HAYES; REP. HUGH MALONE; REP. DON CLOCKSIN; REP. RON WENDTE

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M

January 13, 1984

SUBJECT: Sectional analysis of HB 445

TO: Representative Charlie Bussell
Chairman, House Judiciary Committee

FROM: Keith B. Levy *KBL*
Legislative Counsel

You have requested a sectional analysis of HB 445, "An Act relating to attorney fees." Under present law (AS 09.60.010) the Supreme Court has the discretion to determine by rule or order what attorney fees may be ordered to the prevailing party in civil cases. Under the authority of that section, the Supreme Court enacted Civil Rule 82. Civil Rule 82 does not deal with attorney fees in public interest cases. However, in a number of cases, the Court has determined that in a genuine public interest case, it is an abuse of discretion for the trial court to award attorney fees against the plaintiff if the defendant prevails. See Gilbert v. State, 526 P.2d 1131 (Alaska 1974); Anchorage v. McCabe, 586 P.2d 986 (Alaska 1977); Thomas v. Croft, 614 P.2d 795 (Alaska 1980); and SEACC v. State, ___ P.2d ___, No. 2662, (Alaska 1983).

House Bill 445 provides that in a civil suit against a non-governmental party, it is not an abuse of discretion to award attorney fees, even if it is a genuine public interest case.

KBL:1mb
L3/080

FISCAL NOTE

Revision Date: _____

REQUEST

Bill/Resolution No.: HB 445
 Title: "An Act relating to attorney fees."
 Sponsor: Rep. Liska
 Requestor: Rep. Liska
 Date of Request: 1-18-84

FISCAL DETAIL

Agency Affected: Department of Law
 Program Category Affected: General Government
 BRU, Program or Subprogram(s) Affected: Legal Services Operations

EXPENDITURES/REVENUES: (Thousands of Dollars)

| | FY 84 | FY 85 | FY 86 | FY 87 | FY 88 | FY 89 |
|-----------------------|-------|-------|-------|-------|-------|-------|
| OPERATING | | | | | | |
| 100 PERSONAL SERVICES | | | | | | |
| 200 TRAVEL | | | | | | |
| 300 CONTRACTUAL | | | | | | |
| 400 SUPPLIES | | | | | | |
| 500 EQUIPMENT | | | | | | |
| 600 LAND & STRUCTURES | | | | | | |
| 700 GRANTS, CLAIMS | | | | | | |
| 800 MISCELLANEOUS | | | | | | |
| TOTAL OPERATING | -0- | -0- | -0- | -0- | -0- | -0- |
| CAPITAL | | | | | | |
| REVENUE | | | | | | |

FUNDING: (Thousands of Dollars)

| | FY 84 | FY 85 | FY 86 | FY 87 | FY 88 | FY 89 |
|---------------|-------|-------|-------|-------|-------|-------|
| GENERAL FUND | -0- | -0- | -0- | -0- | -0- | -0- |
| FEDERAL FUNDS | | | | | | |
| OTHER | | | | | | |
| TOTAL | | | | | | |

POSITIONS:

| | FY 84 | FY 85 | FY 86 | FY 87 | FY 88 | FY 89 |
|-----------|-------|-------|-------|-------|-------|-------|
| FULL-TIME | -0- | -0- | -0- | -0- | -0- | -0- |
| PART-TIME | | | | | | |
| TEMPORARY | | | | | | |

SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

N/A

ANALYSIS: Attach a separate page for analysis

Prepared By: Richard I. Pegues, Director Phone: 465-3672
 Division: Administrative Services Date: 1-19-84
 Approved by Commissioner: Richard I. Pegues/HR Date: 1-19-84
 Agency: Department of Law

Distribution (by Agency preparing fiscal note):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

12/1/83

Fiscal Note
Analysis
HB 445

January 19, 1984

This bill appears to adopt by statute the criteria established by Alaska Supreme Court decisions over the past several years. Because this criteria for awarding attorney fees in public interest lawsuits is already being followed by the courts, no additional fiscal impact is expected to result by enactment of this legislation.

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

HOUGHY STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

MEMORANDUM

June 17, 1983

SUBJECT: The public interest exception to the award of attorney's fees (Work Order No. 13-1434)

TO: Representative John J. Liska

FROM: Keith B. Levy *KBL*
Legislative Counsel

You have asked a number of questions in regard to the public interest exception to the award of attorney's fees in court actions. Specifically, you have asked:

1. What is the state law on attorney's fees?
2. Does CSSB 196 (Rules) am protect the non-governmental defendant from the potential financial burden of a public interest law suit when the plaintiff loses?
3. If not, how can the non-governmental defendant in this type of case be adequately protected?

I will address each of these questions separately.

1. State law on attorney's fees

AS 09.60.010 provides:

Except as otherwise provided by statute, the supreme court shall determine by rule or order what costs, if any, including attorney fees, shall be allowed the prevailing party in any case.

Under the authority of this section, the Supreme Court has adopted Civil Rule 82. Rule 82 sets out a schedule of attorney's fees to be awarded the prevailing party, "unless the court, in its discretion, otherwise directs." Rule 82 also provides

Should no recovery be had, attorney's fees for the prevailing party may be fixed by the court in its discretion in a reasonable amount.

The public interest exception to Rule 82 states that "it is an abuse of discretion to award attorney's fees against a losing party who has in good faith raised a question of genuine public interest before the courts." Gilbert v. State, 526 P.2d 1131, 1136 (Alaska 1974). The exception is not provided for by statute or court rule, rather, it is a matter of public policy established by the Alaska Supreme Court in a number of cases. See Gilbert v. State, 526 P.2d 1131 (Alaska 1974); Anchorage v. McCabe, 586 P.2d 986 (Alaska 1977); Thomas v. Croft, 614 P.2d 795 (Alaska 1980); and SEACC v. State, ___ P.2d ___, No. 2662, (Alaska 1983). Citing these cases, the court in SEACC, supra, stated that the policy behind the public interest exception is

. . . to encourage plaintiffs to raise issues of public interest by removing the awesome financial burden of such a suit.

* * *

. . . a plaintiff who in good faith seeks to vindicate matters infused with strong public policy concerns should not be penalized by having attorney's fees taxed against it unless its suit is frivolous.

SEACC, supra, at 24. Thus, the award of attorney's fees in the state is governed by statute, court rule, and public policy as determined by the Supreme Court.

2. The effect of CSSB 196 (Rules) am

CSSB 196 (Rules) am amends AS 09.60.010 by adding a new subsection to read:

(b) The supreme court shall by rule or order provide that the court in its discretion may compel a plaintiff in an action to post a bond or other acceptable surety with the court in an amount determined by the court to be reasonable under (a) of this section.

This section merely gives the court the discretion to require a plaintiff to post a bond or other surety to cover any costs or attorney's fees that may be awarded against the

plaintiff. Since the court may not award attorney's fees against a losing plaintiff in a genuine public interest case anyway, the new section does nothing for the winning defendant. Thus, even if CSSB 196 (Rules) am is enacted, it will have no affect on the public interest exception to the award of attorney's fees.

3. Providing adequate protection for winning non-governmental defendants in public interest cases

The court in SEACC, supra, ruled that the public interest exception applies in cases involving non-governmental defendants as well as governmental defendants. As noted above, the purpose of the public interest exception is to avoid penalizing a public interest plaintiff with heavy attorney's fees if the law suit is not frivolous. Citing Kenai Lumber Co. v. Leresche, 646 P.2d 215 (Alaska 1982), the court in SEACC, supra, pointed to the following criteria which must be met before the public interest exception can be asserted by a losing plaintiff:

"(1) Is the case designed to effectuate strong public policies?

"(2) If the plaintiff succeeds will numerous people receive benefits from the lawsuit?

"(3) Can only a private party have been expected to bring the suit?

"(4) Would the purported public interest litigant have sufficient economic incentive to file suit even if the action involved only narrow issues lacking general importance?"

SEACC, supra, at 25. The Supreme Court feels that these criteria are sufficient to ensure that a plaintiff may not freely harass an innocent defendant with a frivolous law suit under the cloak of the public interest exception without suffering the consequences. It would appear that the criteria successfully do just that. They effectively limit the public interest exception to situations where a private plaintiff is bringing a meritable law suit in the genuine public interest with no opportunity for financial gain to itself. It is difficult to imagine a plaintiff bringing a law suit merely for harassment under such circumstances. Accordingly, I would conclude that non-governmental

defendants in public interest law suits are already adequately protected under the law.

If your intent is to protect non-governmental defendants from frivolous law suits, an amendment to the current law is unnecessary. However, if you wish to eliminate the public interest exception as it applies to non-governmental defendants, that could be done by amending AS 09.60.010 to limit the court's discretion in awarding attorney's fees in these cases.

KBL:ljb
24/024



ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

Pouch Y, State Capitol
Juneau, Alaska 99811
(907) 465-3991

October 24, 1983

MEMORANDUM

TO: Representative John Liska

FROM: Nancy Pease
Legislative Analyst NP

RE: Public Interest Exemption Lawsuits
Research Request 83-200

Linda Edgeworth of your staff asked for information on public interest lawsuits in Alaska courts with regard to the exemption of attorney's fees. She indicated that you were specifically interested in public interest cases since 1978 in which the defense prevailed, and for such cases, the available information on the costs to the defendants and plaintiffs.

The general rule for attorney's fees in Alaska courts is that the losing party in a lawsuit may be ordered to pay, at the court's discretion, part of the prevailing party's attorney's fees as a compensatory gesture. The amount of attorney's fees charged to the losing party is determined by the court, either in accordance with a fee schedule based on the amount of the money judgement recovered in the case or, if there is no monetary recovery, "a reasonable amount" relative to the prevailing party's costs in trying the case [Alaska Rules of Court, Civil Rule 82].

The Alaska Supreme Court in Gilbert v. State, (Alaska 1974), established a "public interest" exception to this rule by holding that "it is an abuse of [the court's] discretion to award attorney's fees against a losing party who has in good faith raised a question of genuine public interest before the courts" [526 P.2d at 1136]. Thus, the exception is designed to encourage plaintiffs to bring issues of public interest to the courts. - See also...

Ed Hein of the Legislative Affairs Agency's Legal Services Division explained to me that the Alaska Supreme Court has identified four criteria for determining whether a case may be designated as public interest litigation:

1. Does the case have the potential to affect public policies?

2. Will numerous people receive benefits from the lawsuit if the plaintiff succeeds?
3. Could only a private party be expected to bring this suit?
4. Did the plaintiff have sufficient economic incentive to bring the lawsuit regardless of any issues of public interest involved?

If the court can answer "yes" to the first three questions and "no" to the fourth question, then the case will be designated a public interest lawsuit, the exception to Rule 82 will apply, and the court will not charge the losing party with the prevailing party's attorney's fees.

Many of the highly-publicized class action lawsuits that involve Alaska are brought in federal courts. The federal court either awards attorney's fees at their discretion or in accordance with Alaska Rules, according to Joanne Meyers, Clerk of the Court at the Federal District Court in Anchorage. Ms. Meyers said there was no general rule analogous to Alaska Rule 82 for award of attorney's fees in federal courts. There may be federal statutes governing award of fees in specific types of suits, for example, the Civil Rights Attorney's Fees Awards Act (42 U.S.C. § 1988). These statutes may be raised in State court, as was the above Act in the public interest case of Tobeluk v. Lind, 589 P.2d 873 (Alaska 1979).

To identify public interest exemption cases, I reviewed law journals and talked with many people in the legal system, but I was unable to obtain all of the desired information. Unfortunately, there is no practical system for identifying public interest lawsuits in Alaska that have not been appealed to the Alaska Supreme Court. At the trial court level, each judicial district in Alaska maintains its own files of cases, indexed by the parties' names but not by the issues contested in the cases. The only reference to cases which were closed in the trial courts is the recall of people involved in the legal system. To this end, I have contacted agencies that frequently initiate class actions (the Sierra Club Legal Defense Fund, the Alaska Resources Defense Council, Alaska Legal Services Corporation, Alaska Human Rights Commission, AkPIRG, etc.). However, all of the unsuccessful class actions that I found in this way were eventually appealed to the Alaska Supreme Court.

Another problem in identifying public interest lawsuits is that unless the exemption from award of fees was contested in an appeal, a lawsuit involving issues of public concern may not be widely recognized as a public interest case.

Representative Liska
October 24, 1983
Page 3

Attached is a list of lawsuits appealed to the Alaska Supreme Court since 1978 in which the losing plaintiff argued for application of the public interest exception. I have provided a short summary of the issues in the original trial, and the grounds for appeal. The first set of cases closely parallels the suit involving Schnabel Lumber Co., which Ms. Edgeworth mentioned in her correspondence. In these cases, the losing public interest plaintiffs were all exempted from paying the winning defendants' legal fees.

In the next set of cases, the court found sufficient economic incentives for the plaintiff to have brought the case regardless of any public issues involved. In these cases, the court ordered the losing plaintiffs to pay the defendants' fees, despite their service to the public in raising genuine public issues. The final two cases also involved issues of genuine public interest, but special exceptions governed the payment of legal fees.

In this same period, the Supreme Court has rejected as "private disputes" other appeals in which the plaintiff argued for the public interest exemption. These cases, which did not meet criteria #1-3, are cited briefly at the end of the list.

I have been able to report on the costs to the litigants in only a few cases. Unfortunately, parties contacted were usually unable or unwilling to report their costs to us.

I hope this information is helpful. If you have further questions on this issue, please let us know how we can assist you.

NP

Attachment

ATTACHMENT A
ALASKA SUPREME COURT CASES

ALASKA SUPREME COURT CASES
INVOLVING PUBLIC INTEREST CLAIMS

I. Cases in which the public interest exception applied:

Anderson v. State, 584 P.2d 539 (Alaska 1978)

Appellants: Oris O. Anderson and Aiko Anderson.
Appellee: State of Alaska, Department of Highways.

The Andersons sued the State for allegedly committing fraud when it did not properly notify them of the condemnation of a strip of their land for a road right-of-way.

The plaintiffs lost their case but were not required to pay part of the defendants attorney's costs because they raised issues of public importance. The legal staff of the State Attorney General's office was unable to estimate the State's legal expenses. The plaintiffs funded their suit personally.

City of Yakutat v. Ryman, 654 P.2d 794 (Alaska 1980)

Appellant: City of Yakutat.
Appellee: Frank L. Ryman, Jr.

Ryman charged the city with failing to comply with the statutory requirements for levying property taxes. He sued to obtain a refund of his general property taxes for a three year period.

He was awarded the refund for two of the three years and part of his costs for that portion of the case. The city appealed, and Ryman cross-appealed.

Ultimately, the City of Yakutat paid the plaintiff's costs for the issues it lost, and was denied collection of its own costs for the issues it won because Ryman was acting in the public interest. The City's law firm would not disclose their charges in this case despite the City's permission to do so.

Thomas v. Croft, 614 P.2d 797 (Alaska 1980)

Appellants: Lowell Thomas, Jr., Lieutenant Governor of Alaska; Patty Ann Polley, Director, Division of Elections, et al.

Appellee: Chancy Croft.

In the original suit, two losing gubernatorial candidates sued the successful primary candidates, Croft and Hammond, and State election officials. They charged that improprieties in the State's conduct of the election might have been sufficient to change the outcome. The State lost and appealed. The Supreme Court reversed the decision, ruling that the misconduct and irregularities in the election were not sufficient to have changed the outcome.

Croft could not collect his legal costs from the public interest plaintiffs, but he collected \$15,000 from his co-defendant, the State, since their actions and not his own had prompted the suit. The attorney general's office was unable to estimate the cost to the State of defending the election officials.

Douglas v. Glacier State Telephone, 615 P.2d 580 (Alaska 1980)

Appellant: John H. Douglas and Jean Douglas.

Appellees: Glacier State Telephone Co. and Kenai Peninsula Borough.

The Douglases challenged a local sales tax on interstate phone calls charged to phones within the Kenai Borough. They claimed that the tax violated the Commerce Clause, and that the Borough had violated equal protection laws by not collecting the tax from customers of a certain utility.

The telephone company prevailed, but the Douglases were exempted from paying the company's attorney's fees which totalled \$8,800.

Whitson v. Anchorage, 632 P.2d 233 (Alaska 1980)

Appellant: Carl Whitson, Individually and as Officer, Agent, or Employee of the Libertarian Party, and the Libertarian Party.

Appellee: Anchorage, a Municipal Corporation.

The City challenged Whitson's petition to place on the ballot an initiative allowing voters to block tax increases. The City won and was awarded attorney's fees. Whitson appealed the award of fees, claiming he deserved a public interest exemption.

The Supreme Court denied the City its attorney's fees, which totalled \$5,778.

Falke v. Fairbanks North Star Borough, 648 P.2d 599 (Alaska, 1982)

Appellant: Wolfgang Falke
Appellees: Fairbanks North Star Borough and the State of Alaska.

Falke claimed that the service area provisions of a State statute violated the constitutional rights of Borough residents. Falke lost the case, but was exempted from paying the Borough's attorney's fees.

The Fairbanks Borough Attorney estimates the Borough's legal costs in this case at \$10,000 for the trial and appeal. The plaintiff funded his suit against the Borough himself.

Hammond v. North Slope Borough, 645 P.2d 750 (Alaska, 1982)

Appellants: Jay Hammond, Governor of the State of Alaska; Robert E. LeResche, Commissioner of the Department of Natural Resources; Frances C. Ulmer, Director, Division of Policy Development and Planning; Amoco Production Co.; Atlantic Richfield Co.; other oil companies; et al.
Appellees: North Slope Borough, Eben Hopson, Sr., Jacob Adams; City of Barrow; Village of Nuiqsut; et al.

Several Alaska villages and individuals charged that the State's decision to lease offshore tracts for oil and gas exploration would harm the natural environment and the Inupiat Eskimos' traditions and lifestyle. The State prevailed, but the plaintiffs were not required to pay the State's attorney's fees because of the public interest issues raised by the case.

Again, the attorney general's office could not estimate the State's legal expenses. The plaintiffs were represented by the Alaska Legal Services Corporation.

SEACC v. LeResche, not yet published in the law digest, (Alaska 1983)

Appellant: Southeast Alaska Conservation Council.
Appellee: Robert E. LeResche, Commissioner of the Department of Natural Resources; other officials of the State of Alaska; and Schnabel Lumber Company.

SEACC charged the State's Department of Natural Resources with signing an illegal contract with Schnabel Lumber. SEACC, represented in court by the Sierra Club Legal Defense Fund, alleged that the contract violated the State's principals of sustained-yield timber management. SEACC lost the case and the Superior Court ordered SEACC to compensate Schnabel for \$25,000 of its attorney's fees. SEACC was released from this order when they appealed.

The attorney general's office couldn't estimate the State's legal expenses. Bill Oliver of Schnabel Lumber Co. listed the direct legal costs of the case as \$210,00, raised from the following sources: Schnabel Lumber Company paid \$70,000; various groups and individuals across the state donated \$20,000; the City of Haines paid \$32,000 as amicus curiae (a friend of the court); and the Borough of Haines levied a 1% sales tax, raising \$98,000. Schnabel Lumber was ordered to pay \$10,000 toward the legal fees of SEACC for its appeal to the Supreme Court.*

* Mr. Oliver listed the following indirect costs of the suit:

Loss of bonding. Bonding companies became nervous over the suit and withdrew bonding. When Schnabel could not fulfill a \$2.6 million contract with the U.S. Forest Service because of the delays of the suit, the Forest Service sued for default. The Forest Service last week agreed to settle for \$200,000, but not before Schnabel had incurred additional legal expenses. Schnabel also had to default on a contract with a Chinese firm because of a stay issued in the case.

Loss of jobs. According to Mr. Oliver, fifty mill workers, 35 loggers, 40 longshoremen, and 35 office and other workers were laid off during the suit. The payroll lost to the community totalled \$3 million.

Additional losses included maintenance costs to the mill during the shutdown of \$30,000 per month.

II. Cases for which the court denied the public interest exemption based on the economic incentive for the lawsuit (criterion #4):

Gold Bondholders Protective Council v. Atchison, Topeka and Santa Fe Railway Co., 658 P.2d 776 (Alaska 1983)

Appellants: Gold Bondholders Protective Council; Richard L. Randolph; David Brenner; Karl L. Flaccus; and Lee R. Ellenberg.
Appellees: Atchison, Topeka & Santa Fe Railroad.

The Bondholders sued the bond issuers seeking to enforce a clause in the bonds dating back to 1895 which promised interest payments in gold coin. The bond issuers defended successfully and were awarded \$15,521 in legal expenses. The Bondholders appealed the award.

Fees were charged to the losing plaintiff despite the issues of genuine public concern that the plaintiff raised.

Weaver Bros., Inc. v. Alaska Transportation Commission, 588 P.2d 819 (Alaska 1978)

Appellant: Weaver Bros., Inc.
Appellees: Alaska Transportation Commission; K & W Trucking Co. Inc; and O. G. Ness doing business as O. G. Ness Truck Company.

Weaver Bros. protested the Transportation Commission's approval of the transfer of a motor carrier permit between two competitive firms. The Supreme Court affirmed the Commission's decision and ordered Weaver Bros. to pay its competitors' attorneys' fees despite the issues of genuine public concern that Weaver Bros. lawsuit had raised.

Sisters of Providence v. Department of Health and Social Services, 648 P.2d 986 (Alaska 1982)

Appellant: Sisters of Providence in Washington, Inc.
Appellees: Department of Health and Social Services, State of Alaska and Lake Otis Clinic, Inc.

Providence Hospital challenged DHSS's decision concerning a competitor's certificate of need. The Superior Court ruled for the competitor and charged the competitor's fees to Providence Hospital. Providence appealed.

Because of the competitive business advantage at stake in this case, fees were charged to the losing plaintiff despite the issues of genuine concern that the plaintiff had raised.

Kenai Lumber Co. v. LeResche, 646 P.2d 215 (Alaska 1982)

Appellant: Kenai Lumber Co., Inc.
Appellees: Robert LeResche, Commissioner of the Department of Natural Resources of the State of Alaska; Geoffrey Haynes, Director of Division of Lands of the Department of Natural Resources, et al; and South-Central Timber Development, Inc.

Kenai Lumber claimed that DNR and a competitive timber firm had illegally circumvented the State's competitive bidding process by negotiating amendments to a long term timber contract.

Because competitive business advantages may have motivated this suit, the court charged the winner's fees to the losing plaintiff despite the issues of genuine public concern that the plaintiff raised.

III. Cases in which special exceptions applied to the award of fees:

Tobeluk v. Lind, 589 P.2d 873 (Alaska 1979)

Appellants: Anna Tobeluk and Henry A. Tobeluk, minors, by their father and next friend John Tobeluk, et al.
Appellees: Marshall L. Lind, as Commissioner of Education, et al.

Alaska Native schoolchildren brought action to compel the State to build secondary schools in their villages. Following settlement of this issue, the Tobeluks' motion for costs and attorney's fees was denied by the Superior Court, and the Tobeluks appealed.

The court ruled that neither party clearly prevailed and declined to award fees.

Horowitz v. Alaska Bar Association, 609 P.2d 39 (Alaska 1980)

Appellants: Bruce Horowitz, William Parker, James Love; David Loutrel; Wilson A. Rice; John E. Duggan; Donald E. Clocksin; Thomas G. Beck; Elizabeth Ratner; Randall Simpson; Phillip R. Volland; and Jeffrey Lowenfels.
Appellee: The Alaska Bar Association.

A group of attorneys charged that a business meeting of the ABA board of governors had violated federal and State due process rights and the Alaska open meeting statute.

Fees are rarely awarded in suits involving the ABA because the ABA acts as an arm of the judiciary to uphold court rules. ABA declined to specify its expenses.

IV. Cases which did not meet criteria #1-3 to qualify as public interest cases:

F/V American Eagle v. State, 620 P.2d 657 (Alaska 1980).

Rouse v. Anchorage School District, 613 P.2d 263 (Alaska 1

Hilbers v. Municipality of Anchorage, 66 P. 2d 31 (Alaska 19

White v. Alaska Insurance Guaranty Association, 592 P.2d 367 (A a 1

oses specified in the decree.

.) Except for specific constitutional and statutory age requirements, the power and capacity of an adult, including but not limited to the right to self-control, the right to be domiciled where one desires, the right to receive and control one's earnings, to sue or to be sued, and the capacity to contract. (§ 2 ch 233 & 1976)

cc. 09.55.600 — 09.55.640. [Renumbered as AS 25.35.010 — 35.060.]

Chapter 60. Costs.

| Section | Section |
|--|---|
| Costs allowed prevailing party | 40. Costs where party is a representative |
| Attorney fees in small tort actions | 50. Costs awarded against state, borough, city or other public agencies |
| Liability of guardian ad litem for costs | 60. Security for costs where plaintiff a nonresident or foreign corporation |
| Guardian's responsibility for allowance against infant plaintiff | |

Collateral references. — 20 Am. Jur. Costs, § 1 et seq.

20 C.J.S. Costs, § 1 et seq.

Allowance of costs in litigation by beneficiary respecting trust, on theory that fund was created or preserved, 9 ALR2d 1150.

Allowance of costs in litigation by beneficiary for partition of trust property, ALR2d 1219.

Actual payment of costs as a condition to dismissal under rule or statute providing for voluntary dismissal without prejudice on such terms and conditions as court deems proper, 21 ALR2d 633.

Allowance of fees for guardian ad litem appointed for infant defendant, as costs, 30 ALR2d 1148.

Costs in action for removal of trustee of trust, 34 ALR2d 1142.

Unsuccessful litigant's payment of costs as barring his right to appeal from judgment on merits, 39 ALR2d 194.

Appealability of order or judgment awarding or denying costs but making no other adjudication, 54 ALR2d 927.

Depositions, costs and fees as affected by Rule 30(b) of the Federal Rules of Civil Procedure, and similar state statutes and rules, relating to preventing, limiting, or terminating the taking of, 70 ALR2d 734.

Liability of state, or its agency or board, for costs in civil action to which it is a party, 72 ALR2d 1379.

Taxation of costs and expenses in proceedings for discovery or inspection, 76 ALR2d 953.

Liability for costs in action against lessee for breach of covenant as to repairs, 80 ALR2d 1032.

Constitutionality, construction, and application of statutes, requiring bond or security for costs and expenses in taxpayers' action, 89 ALR2d 333.

Allowance as costs, of such items as maps, models, wall charts, photographs, and the like, 97 ALR2d 138.

Validity and construction of statute or rule allowing attorneys' fees to out-of-state defendant successfully defending suit brought in state, 51 ALR3d 1336.

Right of indigent to proceed in marital action without payment of costs, 52 ALR3d 844.

prevailing party in proceedings awarding costs where both parties prevail on affirmative claims, 66 ALR3d 1116.

Construction and application of state statute or rule subjecting party making untrue allegations or denials to payment of costs or attorneys' fees, 68 ALR3d 209.

Condemnor's liability for cost of condemnee's expert witnesses, 68 ALR3d 546.

Construction of provision, in comparison

prosecuting appeal in state court, 68 ALR3d 661.

Continuance of civil case not conditioned upon applicant's payment of costs or expenses incurred by other party, 9 ALR4th 1144.

Allocation of defense costs between primary and excess insurance carriers, 19 ALR4th 107.

Sec. 09.60.010. Costs allowed prevailing party. Except as otherwise provided by statute, the supreme court shall determine by rule or order what costs, if any, including attorney fees, shall be allowed the prevailing party in any case. (§ 5.14 ch 101 SLA 1962)

Cross references. — For related court rules, see Civ. R. 54, 79 and 82.

NOTES TO DECISIONS

- I. General Consideration.
- II. Right to Costs.
 - A. Generally.
 - B. Prevailing Party.
- III. Award.
 - A. Generally.
 - B. Attorney's Fees.

I. GENERAL CONSIDERATION.

Applied in *Brand v. First Fed. Sav. & Loan Ass'n*, Sup. Ct. Op. No. 658 (File Nos. 1119, 1154), 478 P.2d 829 (1970).

Quoted in *Albritton v. Estate of Larson*, Sup. Ct. Op. No. 413 (File No. 793), 428 P.2d 379 (1967); *Thomas v. Croft*, Sup. Ct. Op. No. 2135 (File No. 4719), 614 P.2d 795 (1980).

Cited in *Guin v. Hn*, Sup. Ct. Op. No. 1810 (File No. 3742), 591 P.2d 1281 (1979); *Stone v. Stone*, Sup. Ct. Op. No. 2522 (File No. 5674), P.2d (1982).

II. RIGHT TO COSTS.

A. Generally.

The right to costs is purely statutory. *Mutual Benefit Health & Accident Ass'n v. Moyer*, 9 Alaska 235, 94 F.2d 906 (9th

Cir.), cert. denied, 9 Alaska 292, 304 U.S. 581, 58 S. Ct. 1054, 82 L. Ed. 1543 (1938).

And no such right existed at common law. *Mutual Benefit Health & Accident Ass'n v. Moyer*, 9 Alaska 235, 94 F.2d 906 (9th Cir.), cert. denied, 9 Alaska 292, 304 U.S. 581, 58 S. Ct. 1054, 82 L. Ed. 1543 (1938).

The authority to make awards of attorney fees is derived from this section, which is of relatively ancient origin, dating from an Act of Congress of June 6, 1900, 31 Stat. 415-18, which was amended in 1923 by the Territorial Legislature of Alaska to expressly permit the courts to impose reasonable attorney's fees. *Stepanov v. Gavrilovich*, Sup. Ct. Op. No. 1823 (File No. 3236), 594 P.2d 30 (1979).

Rule 82(a), which allows for the recovery of reasonable attorney's fees, is supported

by legislation which specifies that the supreme court shall determine when attorney's fees are to be awarded. Thus, the award of attorney's fees is authorized, though not mandated, by statute. *Klopfenstein v. Pargeter*, 597 F.2d 150 (9th Cir. 1979).

There is no statute authorizing awards of attorney's fees in child in need of aid proceedings, nor has any rule or order authorizing such an award been promulgated. *Cooper v. State*, Sup. Ct. Op. No. 2453 (File Nos. 4906, 4970), 638 P.2d 174 (1981).

Civil R. 82 established pursuant to delegation of authority in section. — Civil R. 82, authorizing awards of attorney's fees to the prevailing party in civil litigation, apart from eminent domain proceedings, was established by the supreme court pursuant to a legislative delegation of authority found in this section. *Crisp v. Kenai Peninsula Borough School Dist.*, Sup. Ct. Op. No. 1771 (File No. 3318), 587 P.2d 1168 (1978).

B. Prevailing Party.

No party is entitled to costs until he prevails in the suit, in other words, until judgment is entered. *Mutual Benefit Health & Accident Ass'n v. Moyer*, 9 Alaska 235, 94 F.2d 906 (9th Cir.), cert. denied, 9 Alaska 292, 304 U.S. 581, 58 S. Ct. 1054, 82 L. Ed. 1543 (1938).

The prevailing party is entitled to costs. *Owen Jones & Sons v. C.R. Lewis Co.*, Sup. Ct. Op. No. 795 (File No. 1460), 497 P.2d 312 (1972).

The prevailing party is entitled to costs, including an award for attorney's fees. *De Witt v. Liberty Leasing Co.*, Sup. Ct. Op. No. 818 (File No. 1638), 499 P.2d 599 (1972).

No costs allowed where both prevail. — Where both parties prevailed in part in an action under the Miller Act (40 USC 270b) no costs should be taxed to either party. *United States ex rel. Miller & Bentley Equip. Co. v. Kelly*, 192 F. Supp. 274 (D. Alas. 1961).

"Prevailing party". — The prevailing party to a suit is the one who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention. He is the one in whose favor the decision or verdict is rendered and the judgment entered. *De Witt v. Liberty Leasing Co.*, Sup. Ct. Op. No. 818 (File No. 1638), 499 P.2d 599 (1972); *Cooper v. Carlson*, Sup. Ct. Op. No. 907 (File No. 1769), 511 F.2d 1305 (1973).

A party does not have to prevail on all of the issues in the case to be a "prevailing party." *Malvo v. J.C. Penney Co.*, Sup. Ct. Op. No. 901 (File No. 1630), 512 P.2d 575 (1973).

A litigant who is successful in defeating a claim of great potential liability may be the prevailing party even though the other side is successful in receiving an affirmative recovery. *Cooper v. Carlson*, Sup. Ct. Op. No. 907 (File No. 1769), 511 P.2d 1305 (1973).

Where a party prevailed on every liability issue, and was unsuccessful only in his argument that he was entitled to nominal damages on his counterclaim, he was the prevailing party. *Cooper v. Carlson*, Sup. Ct. Op. No. 907 (File No. 1769), 511 P.2d 1305 (1973).

As a general rule, the "prevailing party" is considered to be the party who has successfully prosecuted or defended against the action, the one who is successful on the "main issue" of the action and in whose favor the decision or verdict is rendered and the judgment entered. *In re V.M.C.*, Sup. Ct. Op. No. 1103 (File No. 2107), 528 P.2d 788 (1974).

The determination of which party prevails in certain cases is, like the award of attorney's fees, within the discretion of the trial judge. *Owen Jones & Sons v. C.R. Lewis Co.*, Sup. Ct. Op. No. 795 (File No. 1460), 497 P.2d 312 (1972); *In re V.M.C.*, Sup. Ct. Op. No. 1103 (File No. 2107), 528 P.2d 788 (1974).

The determination of which party prevailed is committed to the discretion of the trial court and is reviewable on appeal only for abuse. *De Witt v. Liberty Leasing Co.*, Sup. Ct. Op. No. 818 (File No. 1638), 499 P.2d 599 (1972); *State ex rel. Palmer Supply Co. v. Walsh & Co.*, Sup. Ct. Op. No. 1583 (File No. 2816), 575 P.2d 1213 (1978).

Affirmative recovery not determinative. — It is not an immutable rule that the party who obtains an affirmative recovery must be considered the prevailing party. *Owen Jones & Sons v. C.R. Lewis Co.*, Sup. Ct. Op. No. 795 (File No. 1460), 497 P.2d 312 (1972).

Prevailing party not determined by amount of recovery. — Judgment was entered for plaintiff and the defendant's counterclaim was dismissed therefore plaintiff was the prevailing party within the purview of this section, even though he did not recover the full measure of the relief he prayed for. *Buza v. Columbia Lumber Co.*, Sup. Ct. Op. No. 254 (File No. 453), 395 P.2d 511 (1964).

An incidental recovery is not a sufficient recovery to bar a party who has defended a large claim from being considered a prevailing party. *Owen Jones & Sons v. C.R. Lewis Co.*, Sup. Ct. Op. No. 795 (File No. 1460), 497 P.2d 312 (1972).

III. AWARD.

A. Generally.

Apportionment of costs. — If the problem involved in the litigation is one of general interest and the prevailing party is not wholly without benefit because of the instigation of the proceedings it may be proper to apportion the costs on an equitable basis and each may be made to bear his own. *Kederick v. Heintzleman*, 16 Alaska 333, 141 F. Supp. 633 (D. Alas. 1956).

Where part of the defendants are successful and part are unsuccessful the cost of bringing the successful defendants into court should be taxed against plaintiff and not against the unsuccessful defendants. *Humphries v. Starna*, 12 Alaska 535, 87 F. Supp. 374 (D. Alas. 1949).

Waiver. — Parties to an action may by stipulation waive their respective rights to costs and attorney's fees. *Jones v. Fuller-Garvey Corp.*, Sup. Ct. Op. No. 172 (File No. 344), 386 P.2d 838 (1963).

Costs in habeas corpus proceeding. — Where a habeas corpus proceeding is found to be without merit, the courts have taxed costs, apparently on the basis of the necessity and merit of the proceedings. *Application of Spracher*, 17 Alaska 144, 150 F. Supp. 555 (D. Alas. 1957).

Liability of state for costs. — See *Reynolds v. Wade*, 16 Alaska 221, 140 F. Supp. 713 (D. Alas. 1956); *Fidalgo Island Packing Co. v. Phillips*, 16 Alaska 621, 147 F. Supp. 883 (D. Alas. 1957).

Allowance of witness fees. — See *Humphries v. Starna*, 12 Alaska 535, 87 F. Supp. 374 (D. Alas. 1949).

The award is discretionary. — See notes under same catchline under analysis line III B, "Attorney's Fees."

Amount of the award of costs and fees held not unreasonably. — See *In re V.M.C.*, Sup. Ct. Op. No. 1103 (File No. 2107), 528 P.2d 788 (1974).

B. Attorney's Fees.

Allowance of attorneys' fees as costs. — See *Baker v. Marvel Creek Mining Co.*, 5 Alaska 348 (1915); *Forno v. Coyle*, 75 F.2d 692 (9th Cir. 1935); *Pilgrim v. Grant*, 9 Alaska 417 (1938); *Columbia Lumber Co. v. Agostino*, 13 Alaska 34, 184 F.2d

731 (9th Cir. 1950); *United States ex rel. Brady's Floor Covering v. Breeden*, 14 Alaska 214, 110 F. Supp. 713 (D. Alas. 1953); *Jonas v. Bank of Kodiak*, 17 Alaska 755, 166 F. Supp. 739 (D. Alas. 1958); *Varnell v. Swires*, 261 F.2d 891 (9th Cir. 1958).

Statutory authorization for the allowance of attorney's fees is of relatively ancient origin. *McDonough v. Lee*, Sup. Ct. Op. No. 378 (File No. 674), 420 P.2d 459 (1966).

The award of attorney's fees as costs is governed by the Rules of Civil Procedure. *McDonough v. Lee*, Sup. Ct. Op. No. 378 (File No. 674), 420 P.2d 459 (1966).

Attorney's fees not covered by literal requirements of Civ. R. 79(b). — While attorney's fees are costs, they are not covered by the literal requirements of Civ. R. 79(b), which specifies items allowed as costs. *State v. University of Alaska*, Sup. Ct. Op. No. 2303 (File No. 4579), 624 P.2d 807 (1981).

Federal law governs allowance of attorney's fees in case involving construction of federal statute. — In cases involving the construction of federal statutes the federal law rather than the law of the state in which the action is brought governs with regard to the allowance of attorney's fees. *Gilliam v. A. Shyman, Inc.*, 205 F. Supp. 534 (D. Alas. 1962).

The allowance of attorney's fees in diversity cases is governed by state law, except that the amount thereof should be governed by the federal rules of court. *Danzas, Ltd. v. National Bank*, 222 F. Supp. 671 (D. Alas. 1963), modified, 226 F. Supp. 928 (D. Alas. 1964).

Full reimbursement not automatically to be awarded. — The prevailing party in each case should not automatically be awarded the full amount of the attorney fees incurred. *Malvo v. J.C. Penney Co.*, Sup. Ct. Op. No. 901 (File No. 1630), 512 P.2d 575 (1973).

If a successful litigant were to receive full reimbursement for all expenses incurred in the case with no requirement of justification and no consideration of the "good faith" nature of the unsuccessful party's claim or defense, there would be a serious detriment to the judicial system. *Malvo v. J.C. Penney Co.*, Sup. Ct. Op. No. 901 (File No. 1630), 512 P.2d 575 (1973).

Public interest plaintiffs. — The trial court may, in its discretion, award full attorney's fees to public interest plaintiffs. *City of Anchorage v. McCabe*, Sup. Ct. Op. No. 1490 (File No. 2737), 568 P.2d 986 (1977).

public interest plaintiffs is to encourage plaintiffs to raise issues of public interest by removing the awesome financial burden of such a suit. *City of Anchorage v. McCabe*, Sup. Ct. Op. No. 1490 (File No. 2737), 568 P.2d 986 (1977).

It is an abuse of discretion to award attorney's fees against a losing party who has in good faith raised a question of genuine public interest before the courts. *City of Anchorage v. McCabe*, Sup. Ct. Op. No. 1490 (File No. 2737), 568 P.2d 986 (1977).

Attorney's fees may be awarded against plaintiffs who litigate good-faith claims. — See *Stepanov v. Gavrilovich*, Sup. Ct. Op. No. 1823 (File No. 3236), 594 P.2d 30 (1979).

Reliance upon invalid zoning ordinance. — It would be unfair to impose attorney's fees on a party who had relied on a zoning ordinance which was found to be invalid. *City of Anchorage v. McCabe*, Sup. Ct. Op. No. 1490 (File No. 2737), 568 P.2d 986 (1977).

Use of in-house counsel. — There is no express prohibition against awarding attorney's fees when a party's active representation in litigation is by in-house counsel rather than by retained counsel. *Greater Anchorage Area Borough v. Sisters of Charity of House of Providence*, Sup. Ct. Op. No. 1550 (File No. 3223), 573 P.2d 862 (1978).

Where teacher's dismissal is affirmed. — Application of Civ. R. 82, relating to awards of attorney's fees, was not extended to allow an award of attorney's fees against a teacher whose dismissal is affirmed. *Crisp v. Kenai Peninsula Borough School Dist.*, Sup. Ct. Op. No. 1771 (File No. 3318), 587 P.2d 1168 (1978).

Given a teacher's statutorily guaranteed right to contest his dismissal in the courts, it would be manifestly unreasonable to penalize the exercise of that right by allowing an award of any attorney's fees to the school district dismissing him. *Crisp v. Kenai Peninsula Borough School Dist.*, Sup. Ct. Op. No. 1771 (File No. 3318), 587 P.2d 1168 (1978).

The award is discretionary with the trial judge and is reviewable on appeal only for abuse. *Cooper v. Carlson*, Sup. Ct. Op. No. 907 (File No. 1769), 511 P.2d 1305 (1973).

The matter of awarding attorney's fees is committed to the discretion of the trial court. The supreme court shall interfere with the exercise of that discretion only where it has been abused. *Malvo v. J.C.*

1630), 512 P.2d 575 (1973).

The award of costs and fees to the prevailing party is clearly within the broad discretion of the trial court. *In re V.M.C.*, Sup. Ct. Op. No. 1103 (File No. 2107), 528 P.2d 788 (1974).

The supreme court has recognized that the trial judge has wide discretion in awarding attorney's fees to a prevailing party. *City of Anchorage v. McCabe*, Sup. Ct. Op. No. 1490 (File No. 2737), 568 P.2d 986 (1977).

Trial judge need not make formal findings of fact and conclusions of law to justify his decision denying attorney's fees. An oral explanation on the record is sufficient. *Larry v. Dupree*, Sup. Ct. Op. No. 1652 (File No. 3714), 680 P.2d 325 (1978).

Abuse of discretion. — An abuse of discretion is established where it appears that the trial court's determination as to attorney's fees was manifestly unreasonable. *De Witt v. Liberty Leasing Co.*, Sup. Ct. Op. No. 818 (File No. 1635), 499 P.2d 599 (1972); *Malvo v. J.C. Penney Co.*, Sup. Ct. Op. No. 901 (File No. 1630), 512 P.2d 575 (1973); *Cooper v. Carlson*, Sup. Ct. Op. No. 907 (File No. 1769), 511 P.2d 1305 (1973).

While the supreme court has made it clear that the award of attorney's fees to the prevailing party is not mandatory, it is equally clear that the denial of a motion for such fees may not be arbitrary or capricious or for some improper motive. *Cooper v. Carlson*, Sup. Ct. Op. No. 907 (File No. 1769), 511 P.2d 1305 (1973).

Only upon a clear abuse of discretion can the supreme court interfere with its exercise, such abuse being established only where it appears that the court's determination is manifestly unreasonable. *In re V.M.C.*, Sup. Ct. Op. No. 1103 (File No. 2107), 528 P.2d 788 (1974).

The supreme court will interfere only where the trial court's determination as to attorney's fees appears to be "manifestly unreasonable." *City of Anchorage v. McCabe*, Sup. Ct. Op. No. 1490 (File No. 2737), 568 P.2d 986 (1977).

Discretion not abused. — The trial court did not abuse its discretion by permitting the request for attorney's fees 13 days after the judgment. *State v. University of Alaska*, Sup. Ct. Op. No. 2303 (File No. 4579), 624 P.2d 807 (1981).

Award excessive. — An award of attorney's fees over 90 percent of what was requested, where there was no evidence that the other party's claim was frivolous,

excessive. *State v. University of Alaska*, P.2d 807 (1981).

Sec. 09.60.015. Attorney fees in small tort actions. (a) In any action for damages where the amount pleaded is \$1,000 or less, and the plaintiff, when represented by counsel, prevails in the action, the plaintiff shall be allowed a reasonable amount to be fixed by the court as attorney fees for the prosecution of the action as a part of the costs of the action if the court finds that written demand for the payment of the claim was made on the defendant 20 days or more before the commencement of the action. However, no attorney fees shall be allowed to the plaintiff if the court finds that the defendant tendered to the plaintiff before the commencement of the action, an amount not less than the damages awarded to the plaintiff.

(b) If the defendant, when represented by counsel, pleads a counterclaim which does not exceed \$1,000, and the defendant prevails in the action, the defendant shall be allowed a reasonable amount to be fixed by the court as attorney fees for the prosecution of the counterclaim as part of the costs of the action. (§ 1 ch 18 SLA 1972)

Sec. 09.60.020. Liability of guardian ad litem for costs. No person appointed guardian ad litem by a court for an infant or incompetent defendant is liable for the costs of the action. (§ 5.08 ch 101 SLA 1962)

Sec. 09.60.030. Guardian's responsibility for allowance against infant plaintiff. When costs or disbursements are adjudged against an infant plaintiff or incompetent, the guardian by whom the plaintiff appeared in the action is responsible for the payment, and payment may be enforced against the guardian as if the guardian were the actual plaintiff. (§ 5.09 ch 101 SLA 1962)

Sec. 09.60.040. Costs where party is a representative. In actions in which an executor, administrator, trustee of an express trust, or a person authorized to represent a party is a party, costs may be allowed as in other cases. However, when costs are allowed against that party, they are chargeable solely upon the estate, fund, or party represented unless the court orders the costs to be paid by that party personally for mismanagement or bad faith in the conduct of the action. (§ 5.10 ch 101 SLA 1962)

Sec. 09.60.050. Costs awarded against state, borough, city or other public agencies. When the state or a borough, city, or other public agency or entity or an officer thereof in an official capacity is a party, costs shall be awarded against it on the same basis as against any other natural person or party. However, when the action is brought upon the information of a natural person, that person shall be liable for costs awarded against the state. The costs shall not be recovered from the state until after execution has issued for the costs against that person and has been returned unsatisfied in whole or in part. (§ 5.11 ch 101 SLA 1962)

Rule 82. Attorney's Fees.

(a) Allowance to Prevailing Party.

(1) Unless the court, in its discretion, otherwise directs, the following schedule of attorney's fees will be adhered to in fixing such fees for the party recovering any money judgment therein:

ATTORNEY'S FEES IN AVERAGE CASES

| | <i>Contested</i> | <i>Without Trial</i> | <i>Non-Contested</i> |
|---------------|------------------|----------------------|----------------------|
| First \$2,000 | 25% | 20% | 15% |
| Next \$3,000 | 20% | 15% | 12.5% |
| Next \$5,000 | 15% | 12.5% | 10% |
| Over \$10,000 | 10% | 7.5% | 5% |

Should no recovery be had, attorney's fees for the prevailing party may be fixed by the court in its discretion in a reasonable amount.

(2) In actions where the money judgment is not an accurate criteria for determining the fee to be allowed to the prevailing side, the court shall award a fee commensurate with the amount and value of legal services rendered.

(3) The allowance of attorney's fees by the court in conformance with the foregoing schedule is not to be construed as fixing the fees between attorney and client.

(4) Attorney's fees upon entry of judgment by default shall be determined by the clerk. In all other matters the court shall determine attorney's fees. Awards not pursuant to the schedule set forth in subparagraph (1) of this Rule shall be made only upon motion.

(b) Allowance in Mental Cases. In proceedings under the Mental Health Act, the attorney appointed to represent the patient shall be allowed and paid a fee of \$25.00, unless the judge, in his discretion, orders otherwise. A lay advisor appointed in such proceedings shall be allowed and paid a fee of \$10.00, unless the judge, in his discretion, orders otherwise. (Amended by Supreme Court Order 497 effective January 18, 1982)

William Sidney GILBERT, Appellant,
v.
STATE of Alaska and H. A. Boucher,
Lieutenant Governor, Appellees.
No 2290.

Supreme Court of Alaska.
Sept. 30, 1974.

Action for declaratory judgment by potential candidate for state senator, seeking declaration that requirement of three-year residency in state and one-year residency in election district for election to legislative office violated the candidate's equal protection rights. The Superior Court, Third Judicial District, Anchorage District, P. J. Kalamarides, J., denied the petition, awarded attorney's fees to the state, and candidate appealed. The Supreme Court, Erwin, J., held that the residency requirement served a compelling state interest and thus did not deny candidate equal protection; but that it was an abuse of discretion to award attorneys' fees against the candidate who had in good faith raised a question of genuine public interest before the courts.

Affirmed in part and reversed in part.

1. Constitutional Law ⇨ 113(1), 211
Elections ⇨ 21

Residency requirements for state legislative candidacy of three years in state and one year in election district serve compelling state interests, and thus neither violated potential candidate's rights to equal protection or to freedom of interstate travel, nor did they violate voters' rights to participate in elections. Const. art. 1, § 1; art. 2, § 2; AS 15.25.030; U.S.C.A.Const. Amend. 14.

2. Constitutional Law ⇨ 209

Where statute challenged as violative of equal protection burdens fundamental or basic right, it can be sustained only upon showing that it promotes compelling governmental interest. U.S.C.A.Const. Amend. 14.

3. Elections ⇨ 7

Constitutional residency requirements for legislative candidates should be viewed with strict judicial scrutiny, i. e., whether they serve compelling state interest. Const. art. 2, § 2.

4. Costs ⇨ 172

Award of attorney's fees to state against potential candidate for legislature who in good faith raised issue of constitutionality of residency requirements was abuse of discretion. Rules of Civil Procedure, rule 82.

5. Costs ⇨ 172

It is not purpose of award of attorney's fees to penalize party for litigating good-faith claim but rather partially to compensate prevailing party where such compensation is justified. Rules of Civil Procedure, rule 82.

6. Costs ⇨ 172

It is abuse of discretion to award attorney fees against losing party who has in good faith raised question of genuine public interest before courts. Rules of Civil Procedure, rule 82.

John W. Wood, Anchorage, for appellant.

Norman C. Gorsuch, Atty. Gen., Juneau, Timothy G. Middleton, Asst. Atty. Gen., Anchorage, for appellees.

Before RABINOWITZ, C. J., and CONNOR, ERWIN, BOOCHEVER, and FITZGERALD, JJ.

OPINION

ERWIN, Justice.

This appeal involves a challenge to the constitutionality of article II, section 2 of the Alaska Constitution and AS 15.25.030, which collectively conditions eligibility for seeking legislative office upon three years residency in the state and one year in the election district.

Appellant is a citizen of the United States and has been a resident of Alaska

the Kenai Board proposed plan may right for other ilar arguments. nees I would aced reapportion- thern Kenai ex- ceptions I may e particular dis-

577

We see no viable alternative means of advancing these important interests alleged by the state. Appellant suggests that these interests may be met by imposing some sort of subjective test upon potential legislators. We disagree. To create a subjective test of candidates' knowledge, understanding or character would necessarily place undue power in the hands of those who would implement such a standard. We think it better that a relative few be delayed from realizing their political aspirations for a relatively brief period than that some group of persons pass upon the fitness of all candidates before they are permitted to present themselves to the voters.

Nor can these interests be protected by relying solely upon the electoral process itself. Voters are, in a sense, "consumers" of the product portrayed by the persons they elect to office. In these days of "packaged" media candidates, they often cannot know what is in the package until they have made their selection and observed the utility of the product. In adopting their constitution, the voters of Alaska chose to protect themselves from unknown deficiencies in their candidates by imposing objective standards upon those who would hold legislative office.

We conclude that while objective tests for candidacy unavoidably place a burden upon the privilege of running for political office, the burden is both temporary and slight and is necessary to promote governmental interests which are compelling.

[4] We turn to the question of whether the award of attorneys' fees to the state by the trial court was a proper exercise of discretion by the trial court pursuant to Civil Rule 82. Appellant alleges that the issues litigated here relate to a matter of public interest and contends that awarding fees in this type of controversy will deter citizens from litigating questions of gener-

al public concern for fear of incurring the expense of the other party's attorneys' fees.

[5,6] It is not the purpose of Rule 82 to penalize a party for litigating a good faith claim but rather partially to compensate the prevailing party where such compensation is justified.³³ We have previously intimated that denial of attorneys' fees might be appropriate in a proper case where the public interest is involved.³⁴ As a matter of sound policy, we hold that it is an abuse of discretion to award attorneys' fees against a losing party who has in good faith raised a question of genuine public interest before the courts. Accordingly, we reverse the award of attorneys' fees to the state in this matter.

Affirmed in part and reversed in part.



ALASKA RENT-A-CAR, INC., d/b/a Avls
Rent-A-Car, Appellant,

v.

The FORD MOTOR COMPANY, a corporation, Appellee.

No. 1823.

Supreme Court of Alaska.

Oct. 4, 1974.

Third-party action to recover against manufacturer of leased vehicle involved in rear-end collision. The Superior Court, First Judicial District, Juneau, Hubert A. Gilbert, J., entered summary judgment in favor of manufacturer, and lessor appealed. The Supreme Court, Connor, J., held that issue as to whether it might be inferred from evidence that defect existed in leased vehicle when it left hands of manu-

33. *Malvo v. J. C. Penney Co., Inc.*, 512 P.2d 575, 587 (Alaska 1973).

34. *Mobil Oil Corp. v. Local Boundary Comm'n.*, 518 P.2d 92, 101 (Alaska 1974); *Jefferson*

v. City of Anchorage, 513 P.2d 1099, 1102 (Alaska 1973).

facturer and p
volved in rear-
brake pedal w
ing summary j
tion wherein
against manu
breach of impli
ty.

Reversed a
Boochever.

1. Judgment

Burden is
nary judgment
material issue c
cedure, rule 56(

2. Automobiles
Sales 439

Whether le
rear-end collisi
manufacturer u
ty or under br
warranty, it wa
either theory t
brake pedal an
automobile left

3. Judgment

Statements
oath may not b
a summary ju
Civil Procedure

4. Judgment

Party opp
judgment need
ultimately prev
there exists a
litigated. Rule
56(c).

5. Judgment

All inferen
proofs are to l
opposing summ
movant. Rules
56(c).

1. Mr. Johnson
ment about th
which was att
position to the

Outdoors

Supreme Court affirms public interest exemption

By MARK BAUMGARTNER
Empire Staff Reporter

Alaska's non-profit public interest groups can breathe a little easier after the state Supreme Court overturned a Juneau court ruling that the Southeast Alaska Conservation Council must pay attorney fees in a case it lost.

SEACC in 1979 sued the state's Department of Natural Resources, charging the agency broke the law when it signed a contract with the Schnabel Lumber Co. of Haines. SEACC said the contract was illegal because it violated principles of sustained-yield timber management.

Then Juneau Superior Court Judge Allen T. Compton ruled the contract was valid. He also did something which hadn't been done before; he ordered SEACC, a non-profit public interest group, to partially reimburse Schnabel for his attorney fees.

SEACC appealed Compton's ruling on the grounds public interest groups are exempt from a state rule requiring losing parties to pay the prevailing party's attorney fees.

The Supreme Court on April 29 affirmed Compton's ruling on the legality of the timber contract. Justice Warren W. Matthews wrote the court's opinion approving the contract. Justice Jay A. Rabinowitz wrote a dissenting opinion, arguing the state used an incorrect definition of sustained yield when it determined an acceptable harvest level.

But the high court also found it was "an abuse of discretion" to award attorney fees against

SEACC because the group in good faith raised a question of genuine public interest.

Compton has since been appointed to the Supreme Court. He did not participate in the Supreme Court's hearing of SEACC's appeal.

"We're delighted we didn't have to pay the \$25,000," said SEACC executive director Jim Stratton, referring to the amount Compton had awarded Schnabel Lumber Co.

The group found a benefactor to put up a \$25,000 bond, he said, payable if SEACC lost the appeal. Its status as a non-profit organization means the group relies on contributors to finance most its day-to-day operations, he said.

\$25,000 represents one-third of SEACC's operating budget for this year, he said.

SEACC was represented in the May, 1982, Supreme Court appeal by Stephan Volker, an attorney with the Sierra Club Legal Defense Fund. Volker told the court that taxing a losing public interest group with attorney fees would have a "broad chilling effect on public interest litigation."

"The lower court ruling 'scared a lot of people, made them cautious,'" said Eric Smith, director of Trustees for Alaska, an Anchorage-based public interest law firm, in a recent interview.

Smith said he was unaware of a public interest group deciding not to sue because of the ruling, but the precedent makes them think twice, he said.



Justice Allen Compton: His 1979 Superior Court ruling that a non-profit organization must pay attorneys in a case it lost has been overturned by the Alaska Sup. Court.

"If you define 'chilling effect' as having a psychological influence than I think that's the case," he said.

"Clients always want to know what they're undertaking" when they consider a lawsuit, Smith said. "They want to know if it will cost them anything."

Most of Trustees for Alaska's cases are in federal court, Smith said, and the group interprets federal law as providing a public interest exemption from an assessment of attorney fees in losing cases.

Stratton said Compton's ruling didn't deter SEACC from bringing litigation.

In his ruling, Compton found SEACC acted in good faith in suing DNIR and so he declined to tax SEACC with the state's attorney costs.

He acknowledged the public interest exemption but said Schnabel, as a private intervener in the case, received no benefit from SEACC's action.

In fact, Compton said, Schnabel was harmed by the lawsuit. He ordered SEACC to reimburse Schnabel for part of the company's attorney fees.

That ruling should stand, according to the Supreme Court opinion in the case, unless there was an "abuse of discretion."

The court ruled the award to Schnabel of attorney fees was an abuse of discretion, and therefore reversed the ruling.

In making its finding the Supreme Court

reversed the reason for the public interest exemption is "to encourage plaintiffs to raise issues of public interest by removing the awesome financial burden of such a suit."

The court affirmed its support of the policy behind the public interest exemption in Civil Rule 23 (used to fix attorney fees).

"Since the policy seeks to encourage the vindication of the public interest, we perceive no reason to distinguish between the public or private character of the defendant in a public interest lawsuit," the opinion states.

Here's the crux of the opinion — "It is the interest that the plaintiff seeks to protect and not the public or private character of the defendant that is the touchstone" of the public interest exemption to Rule 23.

The court said every Alaskan would have benefitted from the lawsuit had there been a finding timber was not being harvested according to sustained yield forestry.

Furthermore, the court said, since the Umber contract was between the state and a private logger no public entity could have been expected to bring this suit. It took a private group — SEACC — to do it. It's case was neither frivolous nor in bad faith, the court found, and SEACC had no economic incentive for bringing the suit.

In other words, SEACC and other private non-profit groups meeting these tests must not be discouraged by the threat of having to pay attorney fees if it brings a losing case to court.

STATE OF ALASKA
THE LEGISLATURE

FOUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M

January 20, 1984

SUBJECT: Relationship between HB 445 and Civil Rule 82

TO: Representative Charlie Bussell
Chairman, House Judiciary Committee

FROM: Keith B. Levy *KBL*
Legislative Counsel

You have requested an opinion on the effect HB 445, "An Act relating to attorney fees," will have on the award of attorney fees in public interest cases in light of the existing Civil Rule 82. Specifically, you have asked whether, under Rule 82, an award of attorney fees will be mandatory in every public interest case in which the plaintiff prevails against a nongovernmental entity, if HB 445 is enacted. For the reasons set out below, it is my opinion that under Rule 82, if HB 445 is enacted, an award of attorney fees will not be required in every case and the trial judge will have the discretion to make this determination within certain limits.

HB 445, by repealing the "public interest exception" to the award of attorney fees, makes Rule 82 applicable in public interest cases. Rule 82(a)(1) clearly makes the award of attorney fees within the discretion of the trial judge. It sets out a schedule of suggested fees for the party recovering a money judgement, but provides that the court may in its discretion ignore the schedule. Rule 82(a)(1) further provides:

Should no recovery be had, attorney's fees for the prevailing party may be fixed by the court in its discretion in a reasonable amount.

Thus, it is clear from the language of Rule 82(a)(1) that the award of attorney fees, whether there is a money judgement or not, is within the discretion of the trial judge. However, Rule 82(a)(2) seems to provide for certain situations in which the award of attorney fees is not discretionary, but mandatory. It provides:

In actions where the money judgement is not an accurate criteria [sic] for determining the fee to be allowed to the prevailing side, the court shall award a fee commensurate with the amount and value of legal services rendered. (Emphasis added).

The use of the word "shall" seems to indicate that in cases in which there is no apparent relationship between the money judgement and the attorney's fee, the award of attorney fees is mandatory. A careful reading of the case law on Rule 82 leads me to the conclusion, however, that this would be an erroneous interpretation of the rule. The cases indicate that, subject only to the limitation that the award not be "manifestly unreasonable," attorney fees under rule 82 are not mandatory, but discretionary.

The Alaska Supreme Court has said in a number of cases that the denial of attorney fees altogether under Rule 82 is not necessarily an abuse of discretion. Cooper v. Carlson, 511 P.2d 1305 (Alaska 1973); Larry v. Dupree, 580 P.2d 326 (Alaska 1978). The trial judge has wide discretion in awarding attorney fees and the supreme court will overturn the trial judge's decision only if it is "manifestly unreasonable." Malvo v. J.C. Penney Co., 512 P.2d 575 (Alaska 1973).

Although it is not always clear from these cases whether the Court made its decision under Rule 82(a)(1) or (a)(2), a more recent case indicates that the determination of whether Rule 82(a)(2) comes into consideration at all is within the discretion of the trial judge. In Arctic Slope Native Association v. Paul, 609 P.2d 32 (Alaska 1980), the Supreme Court considered whether or not an award of full attorney fees was appropriate. After citing rule 82(a)(2), the Court said

In this case the trial judge concluded that the money judgement was not an accurate criterion for establishing the appropriate fee.

Thus, the trial court made its own determination of the attorney fees. The Supreme Court agreed with this assessment by the trial judge, indicating that the determination of whether Rule 82(a)(2) comes into play at all is within the discretion of the trial judge. In other words, the award of attorney fees under Rule 82(a)(2) is not mandatory in the sense that the trial judge has discretion

Representative Charlie Bussell
Page 3
January 20, 1984

to determine whether 82(a)(2) applies. Once the trial judge determines that 82(a)(2) applies, some attorney fees must be awarded. But the trial judge has the discretion to ignore 82(a)(2) as long as that decision is not manifestly unreasonable.

In conclusion, HB 445 does not make an award of attorney fees in public interest cases mandatory by making Civil Rule 82 applicable. Although Rule 82(a)(2) does seem to make an award of attorney fees mandatory, the award under Rule 82(a)(1) is discretionary, and the trial judge has the discretion to determine whether to apply Rule 82(a)(1) or (a)(2).

KBL:ojb
J2/056

cc: Representative Don Clocksin