SB

86

Sectional Analysis of ~~CSHB 117(CRA)~~/CSSB 86(CRA) (Liability of State and Municipalities for Attorney Fees)

CSHB 117(CRA)/CSSB 86(CRA) addresses the use of state or municipal funds to subsidize certain types of litigation through awards of attorney fees to prevailing parties that are higher than the partial awards that are the norm in Alaska. The legislation would limit these enhanced awards to instances where the legislature has made a policy judgment to provide for them by statute.

Sec. 1. The findings, purpose and intent section notes the fiscal impact of enhanced fee awards, and determines that except where provided by specific statute, where needed as a court sanction, or in the context of an exercise of eminent domain, no public policy sufficiently supports such awards to justify their fiscal impact. The section relies on the legislature's constitutional authorities to regulate suits against the State and to confer immunities on the State and municipalities, as well as on the doctrine of sovereign immunity. Section 1 states that this Act neither precludes nor repeals specific statutes authorizing the award of costs or fees in particular situations.

Sec. 2. The single substantive provision of the bill creates a new section in the chapter of title 9 devoted to immunities. It provides that for civil actions or appeals in which a money judgment is recovered, the State and municipalities are not liable to pay more than 20 percent of the money judgment as an attorney fee award to the adverse party. In civil actions where no money judgment is recovered, the liability of the State and municipalities for attorney fees for cases that go to trial is capped at 30 percent of the reasonable actual fees that were necessarily incurred in litigating issues on which the party prevailed, and at 20 percent of the same figure for cases that do not go to trial. For appeals in which no money judgment is recovered, the liability of the State and municipalities for attorney fees is capped at 20 percent of reasonable actual fees that were necessarily incurred in litigating issues on which the party prevailed. These limits do not apply where statutes provide differently, where the courts determine it is appropriate to award attorney fees as a sanction for misconduct by a party or their counsel, or in cases involving the condemnation of property under the power of eminent domain.

Sec. 3. The Act will apply only to civil actions or appeals initiated after the Act becomes effective.

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: SB 96
(S) Publish Date: 1/31/05

Revision Date/Time (Note if correction):
Dept. Affected: Administration
Title: An act relating to liability for attorney fees in certain civil actions
RDU: Risk Management
Component: Risk Management
Sponsor:
Requester:
Component No. 71

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2005) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

Section 2 provides enhanced immunity for State and municipalities to not be liable to pay attorney fee awards exceeding those provided for in Civil Rule 82 (unless otherwise provided by specific statute).

Risk Management is not affected by this new limitation.

Any monetary judgment awarded on personal injury (tort) actions against the State of Alaska covered by the Risk Management self insurance program are presently addressed by Civil Rule 82 - which remains unchanged.

Prepared by: J. Brad Thompson, Director
Phone 465-5725
Division: Risk Management
Date/Time 12/10/04 10:46 AM
Approved by: Michael Tibbles, Deputy Commissioner
Date 12/10/2004
Agency: Department of Administration

(Revised 9/23/2004 OMB)

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: 2
Bill Version: SB 86
(S) Publish Date: 1/31/05

Revision Date/Time (Note if correction):
Dept. Affected: LAW
Title "An Act relating to the liability of the state and municipalities for attorney fees..."
RDU CIVIL
Component Labor & State Affairs
Sponsor
Requester Governor
Component No.

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2005) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This bill would, as a matter of sovereign immunity, limit the award of attorney fees against the state and municipalities. Though the bill will apply to almost all actions against the state and municipalities, it will have a particular effect on attorney fees awarded to parties determined by the courts to be public interest litigants. HB 145, passed by the legislature in 2003, has been challenged in court and found by the superior court to be unconstitutional because it was viewed as requiring a court rule change, thus needing a two-third vote by both houses of the legislature, which it did not receive. In addition the court found it to be an unconstitutional denial of due process and equal protection insofar as it required public interest litigants to pay attorneys fees. That decision is being appealed to the Alaska Supreme Court. This bill responds to the Superior Court decision by narrowly focusing on the award of fees against the state or municipality and limiting the award to the amount applicable under Civil Rule 82 unless

Prepared by: Kathryn Daughhetee, Director
Phone 465-3673
Division Administrative Services Division
Date/Time 12/9/04 4:09 PM
Approved by: Kathryn Daughhetee for Gregg D. Renkes, Attorney General
Date 12/9/2004
Agency Department of Law

(Revised 9/23/2004 OMB)

STATE OF ALASKA
2005 LEGISLATIVE SESSION

BILL NO. SB 86

ANALYSIS CONTINUATION

otherwise provided for in specific statutes, or if the courts determine it is appropriate to award attorney fees as a sanction for misconduct by a party or the party's counsel, or in cases involving the condemnation of property under the power of eminent domain.

Passage of this legislation will not have a foreseeable fiscal impact on the Department of Law.

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: SB86-LAW-L&SA-03-07-
() Publish Date:

Revision Date/Time (Note if correction)
Dept. Affected: LAW
Title "An Act relating to the liability of the state and municipalities for attorney fees for certain civil actions..."
RDU CIVIL
Component Labor & State Affairs
Sponsor Senate Rules
Requester Senate Community and Regional Affairs
Component No.

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2005) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This bill would, as a matter of sovereign immunity, limit the award of attorney fees against the state and municipalities. Though the bill will apply to almost all actions against the state and municipalities, it will have a particular effect on attorney fees awarded to parties determined by the courts to be public interest litigants. HB 145, passed by the legislature in 2003, has been challenged in court and found by the superior court to be unconstitutional because it was viewed as requiring a court rule change, thus needing a two-third vote by both houses of the legislature, which it did not receive. In addition the court found it to be an unconstitutional denial of due process and equal protection insofar as it required public interest litigants to pay attorneys fees. That decision is being appealed to the Alaska Supreme Court. This bill responds to the Superior Court decision by narrowly focusing on the award of fees against the state or municipality and limiting the award to the amount applicable under Civil Rule 82 unless

Prepared by: Kathryn Daughhetee, Director — Phone 465-3673
Division Administrative Services Division — Date/Time 3/7/06 2:47 PM
Approved by: Kathryn Daughhetee for David Márquez, Attorney General — Date 3/7/2006
Agency Department of Law

(Revised 9/21/2004 OMB)

ANALYSIS CONTINUATION

otherwise provided for in specific statutes, or if the courts determine it is appropriate to award attorney fees as a sanction for misconduct by a party or the party's counsel, or in cases involving the condemnation of property under the power of eminent domain.

Passage of this legislation will not have a foreseeable fiscal impact on the Department of Law's base budget. There is a fiscal impact however, in terms of the annual supplemental appropriation requested by Law to pay for judgments, claims, court awards and settlements against the State. On the average, about $600,000 of that annual appropriation goes to pay public interest litigants, who would no longer qualify for that status if this legislation were to pass. None of that appropriation is included in the Department of Law's base operating budget.

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: CSSB 80 (CRA)(efd fld)
() Publish Date:

Revision Date/Time (Note if correction): 3/7/06 - 4:23 p.m.
Dept. Affected: Administration

Title: An act relating to liability for attorney fees in certain civil actions
RDU: Risk Management
Component: Risk Management

Sponsor: Rules Committee
Requester: Governor
Component No.: 71

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2006) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

Risk Management is not affected by this legislation.

Any monetary judgment awarded on personal injury (tort) actions against the State of Alaska, (covered by the Risk Management self insurance program) are presently provided within the Rule 82 schedule - typically not greater than 20 percent limitation proposed in section 2.

Prepared by: J. Brad Thompson, Director
Phone 465-5723
Division: Risk Management
Date/Time 3/7/06 - 4:23 p.m.

Approved by: Michael Tibbles, Deputy Commissioner
Date 3/8/2006
Agency: Administration

(Revised 9/7/2005 OMB)

Westlaw.

115 P.3d 547

Page 1

115 P.3d 547

(Cite as: 115 P.3d 547)

Supreme Court of Alaska.
Sean HALLORAN, Appellant,
v.
STATE of Alaska, DIVISION OF ELECTIONS, Appellee.
No. S-11358.

June 24, 2005.

Background: Voter brought action against Alaska Division of Elections, challenging constitutionality of election procedures for voting on initiative proposition in August 2002 primary election. He obtained temporary restraining order (TRO) allowing him to cast vote on proposition without affiliating with one of six political parties offering ballots, but his main constitutional challenge was later mooted by legislation that revamped procedure for primary elections. After action was dismissed, the Superior Court, Third Judicial District, Anchorage, William F. Morse, J., denied voter's request for attorney fees. Voter appealed.

Holdings: The Supreme Court, Eastaugh, J., held that:
(1) Supreme Court had jurisdiction to decide voter's appeal;
(2) voter was not entitled to attorney fees under catalyst theory;
(3) voter was entitled to determination whether he was prevailing party by virtue of obtaining TRO; and
(4) fees were not required to be apportioned.
Vacated and remanded.

West Headnotes

[1] Appeal and Error ⇦984(5)
30k984(5) Most Cited Cases
The Supreme Court reviews the superior court's determination of prevailing party status, for purpose of awarding attorney fees, for abuse of discretion.

[2] Appeal and Error ⇦1024.1
30k1024.1 Most Cited Cases
On review of the trial court's ruling on a request for attorney fees, the Supreme Court exercises its independent judgment in reviewing whether the trial court has applied the appropriate legal standard in making its prevailing party determination.

[3] Appeal and Error ⇦781(4)
30k781(4) Most Cited Cases
Under statute granting parties an appeal as a "matter of right," the Supreme Court had jurisdiction to decide voter's appeal from trial court's denial of his request for attorney fees in his action challenging statute on primary election procedures, which was rendered moot by subsequent legislation. AS 22.05.010.

[4] Costs ⇦194.42
102k194.42 Most Cited Cases
Voter, whose challenge to constitutionality of election procedures for voting on initiative proposition was mooted by subsequent legislation that revamped procedure for primary elections, was not entitled to attorney fees as prevailing party under catalyst theory; voter failed to refer to any facts or to anything in text of legislation or its history that satisfied rigorous standard of causation between voter's action and legislation that rendered action moot.

[5] Costs ⇦194.42
102k194.42 Most Cited Cases
The catalyst theory should not be used to determine the prevailing party, for awarding attorney fees, when a case is mooted by a legislative enactment absent the very clearest expression of legislative purpose; it is not enough for the party to show that its lawsuit provided some impetus for the legislative change.

[6] Costs ⇦194.42
102k194.42 Most Cited Cases

115 P.3d 547

Voter, who brought action against Alaska Division of Elections challenging constitutionality of election procedures for voting on initiative proposition and who obtained temporary restraining order (TRO) allowing him to cast vote on proposition without affiliating with one of six political parties offering ballots, was entitled to determination whether he was "prevailing party," for purpose of attorney fee award, even though his action was dismissed as mooted by subsequent legislation that revamped procedures for primary elections. Rules Civ.Proc., Rule 82.

[7] Costs ⇦194.14
102k194.14 Most Cited Cases
For purpose of attorney fee award, the "prevailing party" is the party that succeeds on the main issue in the case, but the party is not required to succeed on all issues in order to prevail. Rules Civ.Proc., Rule 82.

[8] Costs ⇦194.14
102k194.14 Most Cited Cases
When each party prevails on some issue, it is within the trial court's discretion to refuse to designate either party as the prevailing party for the purpose of an attorney fee award. Rules Civ.Proc., Rule 82.

[9] Costs ⇦194.42
102k194.42 Most Cited Cases
Attorney fees awarded to voter, a public interest litigant, who obtained temporary restraining order (TRO) in his action challenging election procedures for initiative proposition which was dismissed as mooted by subsequent elections legislation, were not required to be apportioned such that he recovered only for work done up to issuance of TRO.

[10] Costs ⇦194.42
102k194.42 Most Cited Cases
For purpose of attorney fee award, a party is a "public interest litigant" if (1) the case was designed to effectuate strong public policies, (2) numerous people would benefit if the litigant succeeded, (3) only a private party could be expected to bring the suit, and (4) the litigant lacked sufficient economic incentive to bring suit.

[11] Costs ⇦194.42
102k194.42 Most Cited Cases
Once a public interest litigant has been identified as the prevailing party entitled to attorney fees, his or her varying degree of success on the different issues is rarely a component of a reasonable fee.

[12] Costs ⇦194.42
102k194.42 Most Cited Cases
The public interest litigant rule for awarding attorney fees is designed to encourage plaintiffs to raise issues of public interest by removing the awesome financial burden of such a suit.

[13] Costs ⇦194.42
102k194.42 Most Cited Cases
Attorney fees for a public interest litigant should be apportioned only in exceptional circumstances, but the superior court may apportion fees if it determines that some issues or proceedings were so frivolous that apportionment of attorney's fees would be necessary to determine reasonable fees.

***548** Michael Jungreis, Hartig Rhodes Hoge & Lekisch, PC, Anchorage, for Appellant.

Sarah J. Felix, Assistant Attorney General, and Gregg D. Renkes, Attorney General, Juneau, for Appellee.

Before: BRYNER, Chief Justice, MATTHEWS, EASTAUGH, FABE, and CARPENETI, Justices.

***549** *OPINION*

EASTAUGH, Justice.

I. INTRODUCTION

A voter challenged the constitutionality of election procedures for voting on an initiative proposition in the August 2002 primary election. The voter obtained a temporary restraining order that allowed him to cast a vote on the proposition in the primary without affiliating with one of the six political parties offering ballots, but his main constitutional challenge was later mooted by legislation that revamped the procedure for primary elections. The superior court declined to award attorney's fees to

the voter because it found that neither party had prevailed under the catalyst approach. Although it was not error for the superior court to reject the voter's fee request under the catalyst approach, we remand for consideration of his alternative theory that entry of the temporary restraining order made him the prevailing party.

II. FACTS AND PROCEEDINGS

The August 27, 2002 primary election was the first held after the Alaska legislature enacted chapter 103, SLA 2001. That statute, codified as AS 15.25.010, changed the primary format in Alaska from a blanket primary election--in which one ballot was provided for all parties and candidates--to a closed primary election--in which separate party primary ballots were provided for each recognized political party. Each party's 2002 primary ballot set out: (1) the candidates nominated to represent that party in the general election and (2) a ballot initiative proposition known as 99PRVT. That initiative proposition, titled an "Initiative Implementing Alternative Voting Electoral System," was non-partisan and was identical on each party's ballot. The proposition was on the 2002 primary ballot because AS 15.45.190 requires an initiative proposition to be placed on "the first statewide general, special, or primary election" conducted after the measure is eligible for voting. Only by using a ballot provided by one of the six parties could a voter cast a vote on the initiative proposition in the 2002 primary.

Sean Halloran went to his polling place on primary election day and was told that he had to choose a political party ballot in order to vote. He refused to publicly associate himself with any of the political parties and was therefore denied the opportunity to vote, even on 99PRVT.

Later that day Halloran filed a three-count complaint in superior court. His complaint alleged that the Alaska Division of Elections violated his right to vote, right of privacy, and right of free association by requiring him to affiliate with a political party before casting a vote on a non-partisan ballot initiative proposition. He asked the court to grant orders: (1) directing the Division of Elections to permit him to vote on 99PRVT without affiliating with a political party; (2) declaring the primary election system unconstitutional; and (3) permanently enjoining the division from requiring voters to affiliate with a political party prior to voting on "matters other than the selection by political parties of candidates."

Following a contested hearing, the superior court issued a temporary restraining order (TRO) that instructed the division to allow Halloran to randomly choose one of the parties' ballots and cast his vote on the initiative proposition. Halloran took this order to his polling place and voted in accordance with its terms.

On September 17, 2002 Halloran filed an amended complaint alleging that the state intended to use the same closed ballot voting system for future primary elections (including initiative propositions) and that use of this mechanism would continue to infringe upon his rights. The state answered and moved for summary judgment based on the statute of limitations. Halloran opposed the state's motion and cross-moved for summary judgment.

While these motions were pending, the legislature passed House Bill (H.B.) 46. [FN1] House Bill 46 requires the Division of Elections ***550** to issue a separate primary election ballot that contains only the ballot titles and initiative propositions being voted on in the primary election. [FN2] This ballot is separate from the political party ballots and can be used by anyone who does not wish to affiliate with a political party.

> FN1. Ch. 96, SLA 2003 (enacting C.S.H.B. 46(STA) (effective Sept. 14, 2003)). H.B. 46 amended AS 15.25.060(a).
>
> FN2. Following amendment in 2003, AS 15.25.060(a) provides:
> The primary election ballots shall be prepared and distributed by the director in the manner prescribed in this section. The director shall prepare and provide a

> primary election ballot for each political party that contains all of the candidates of that party for elective state executive and state and national legislative offices *and all of the ballot titles and propositions required to appear on the ballot at the primary election.* The director shall print the ballots on white paper and place the names of all candidates who have properly filed in groups according to offices. The order of the placement of the names for each office shall be as provided for the general election ballot. Blank spaces may not be provided on the ballot for the writing or pasting in of names. *The director shall also prepare and print a separate primary election ballot including only the ballot titles and propositions required to appear on the ballot.*
> (Underlined text added by H.B. 46.)

After the legislature passed H.B. 46, the superior court held the summary judgment motions in abeyance to give Governor Frank Murkowski an opportunity to act on H.B. 46. Governor Murkowski signed the bill into law and it became chapter 96, SLA 2003. The superior court then declared Halloran's case moot but reserved the issue of attorney's fees. Both sides moved for attorney's fees; both sides asserted prevailing party status. Halloran argued that the superior court should employ the catalyst theory to determine which party had prevailed and that he had achieved some of the benefit he sought when the court issued the TRO allowing him to vote. The state claimed that it had prevailed because its goal was dismissal of the case, which was ultimately dismissed as moot.

The superior court entered an order declaring that "[n]either Sean Halloran, nor the State of Alaska, Division of Elections is the prevailing party in this action. Neither shall recover attorneys' fees, costs or interest." The court discussed the catalyst theory and determined that Halloran had not proved that his lawsuit motivated the legislature's enactment of H.B. 46. The court refused to delve into the motivations behind passage of H.B. 46, stating that to do so would be "an intrusion upon the affairs of the legislative branch." It found that Halloran sought to have the court declare the primary election procedure unconstitutional. Reasoning that the legislature's passage of H.B. 46 did not establish that the preexisting election law was unconstitutional, the superior court held that Halloran had not achieved the goal of his litigation.

Halloran appeals the denial of his motion for full costs and attorney's fees.

III. DISCUSSION

A. Standard of Review

[1][2] We review the superior court's determination of prevailing party status for abuse of discretion. [FN3] We exercise our independent judgment in reviewing whether a trial court has applied the appropriate legal standard in making its prevailing party determination. [FN4]

> FN3. *Shepherd v. State, Dep't of Fish & Game,* 897 P.2d 33, 44 (Alaska 1995).
>
> FN4. *Koller v. Reft,* 71 P.3d 800, 804 (Alaska 2003).

B. We Have Jurisdiction To Decide Whether the Superior Court Erred in Failing To Grant Attorney's Fees to Any Party.

[3] The state first asserts that "where there was no award of attorney's fees that would be affected by appellate review," it is "not clear" that we have jurisdiction to hear the appeal. [FN5] But AS 22.05.010 grants parties ***551** such as Halloran an appeal to this court as a "matter of right." [FN6] This right is not affected by the fact that the superior court declined to award any attorney's fees [FN7] or that the merits of much of Halloran's case are moot. [FN8] We have jurisdiction to decide an appeal asserting that the superior court erroneously denied the appellant's motion for an award of attorney's fees.

> FN5. The state bases its jurisdictional argument on *Ulmer v. Alaska Restaurant*

& Beverage Ass'n (ARBA), 33 P.3d 773, 777 (Alaska 2001). We there held that "[b]ecause there was no award of attorney's fees that would be affected by appellate review and the issue has not been preserved for appeal, we decline to reach the merits on this basis." *Id.* In that case, the state had not sought attorney's fees in the superior court. *Id.* We held that the state could not request attorney's fees for the first time on appeal. *Id. ARBA* does not stand for the proposition that we will not, or cannot, review a superior court's refusal to award attorney's fees to either party.

FN6. AS 22.05.010(a) states that "a party has only one appeal as a matter of right from an action or proceeding commenced in either the district court or the superior court."

FN7. *Cf. De Witt v. Liberty Leasing Co. of Alaska*, 499 P.2d 599, 601 (Alaska 1972) (holding that trial court's determination that neither party prevailed was "manifestly unreasonable" and its refusal to enter attorney's fees award was erroneous).

FN8. *LaMoureaux v. Totem Ocean Trailer Express, Inc.*, 651 P.2d 839, 840 n. 1 (Alaska 1982) (holding that court will hear moot case to determine prevailing party for attorney's fees purposes).

C. The Catalyst Theory Does Not Apply to a Lawsuit Mooted by Legislation Absent the Clearest Expression of Legislative Intent.

[4] Halloran argued in the superior court and argues on appeal that correctly applying the catalyst theory requires a determination that he is the prevailing party for purposes of awarding attorney's fees.

We have stated that the catalyst theory, when it applies, requires a party to show that a "goal of the litigation" was achieved by succeeding on "any significant issue which achieves some of the benefit sought in bringing the suit." [FN9] The party must then show that its lawsuit was "a substantial factor or significant catalyst" in the action that caused the case to become moot. [FN10] A plaintiff must "show both a causal connection between the filing of the suit and the defendant's actions and that the defendant's conduct was required by law, i.e., not a wholly gratuitous response to an action that in itself was frivolous or groundless" in order to succeed under the catalyst theory. [FN11]

FN9. *DeSalvo v. Bryant*, 42 P.3d 525, 530 (Alaska 2002).

FN10. *Id.*

FN11. *Id.*

Halloran relies on *DeSalvo v. Bryant*, in which we held that the catalyst approach "allows for awards of attorney's fees in instances where a plaintiff prevails when his or her lawsuit brings about the relief requested in a manner other than a formal judgment." [FN12]

FN12. *DeSalvo v. Bryant*, 42 P.3d 525, 530 (Alaska 2002).

The state argues that Halloran is reading *DeSalvo* too broadly. We agree. In *DeSalvo*, the lawsuit was mooted by a settlement procured by the parties themselves without their respective counsels' knowledge in an attempt to thwart the payment of counsel's fees. [FN13] We held that "courts should not participate in denying [counsel] compensation as the result of the questionable conduct of [their clients] in settling the ... claims behind counsel's back." [FN14] Although the catalyst theory had been questioned by the federal courts, we held that it could be applied to DeSalvo's case. [FN15]

FN13. *Id.* at 527.

FN14. *Id.* at 529.

FN15. Although the United States

> Supreme Court has recently disavowed use of the catalyst theory in suits under federal fee-shifting statutes, the rationale behind this theory may apply to the facts of this case. As this approach allows for awards of attorney's fees in instances where a plaintiff prevails when his or her lawsuit brings about the relief requested in a manner other than a formal judgment we believe that it may be appropriately used under the circumstances of this case. *Id.* at 530 (internal citations omitted).

In the course of denying costs and attorney's fees to both sides, the superior court held that **Halloran** had "not adequately shown that he was the 'catalyst' in this case becoming moot and dismissed." It further stated:

> He has not shown that his lawsuit motivated the Alaska State Legislature to enact House Bill 46. **Halloran's** complaint sought to have the existing Alaska election *552 law declared unconstitutional. The legislature merely enacted a new law. It did not necessarily agree that the old scheme was unconstitutional. **Halloran's** goal was not achieved by the litigation and it is unclear that it would have been.

The court also stated:

> Delving into the thought processes and motivations of the Alaska State Legislature is not in the [province] of this court. Deciding whether Halloran's lawsuit or his lobbying efforts or public outcry prompted the legislature to enact House Bill 46 is a political question.3 Court involvement would result in an intrusion upon the affairs of the legislative branch.4 Therefore, a causal connection between **Halloran's** lawsuit and the enactment of House Bill 46 has not been established. **Halloran** is not entitled to an award of attorney's fees and costs.

> FN3 *State, DNR v. Tongass Conservation Soc.*, 931 P.2d 1016, 1020 (Alaska 1997) (courts should not attempt to determine whether a lawsuit "rather than, for example, vigorous lobbying, or a collective perception of good public policy, prompted the legislature [to act or] not to act").
>
> FN4 *Id.*

[5] We agree with the superior court's comments concerning the difficulty of determining whether a pending lawsuit caused the legislature to enact a particular law. When a case becomes moot due to a legislative amendment, rarely if ever could a party prove that its litigation conduct was a "substantial factor or significant catalyst" in the passage of the legislation because that determination would require the court to delve into the mind of the legislature. We have held that "ascertaining the legislature's true motive is a task which more often than not would be impossible" and that judicial inquiries into the legislature's motives are to be avoided. [FN16] Thus, the catalyst theory should not be used to determine the prevailing party when a case is mooted by a legislative enactment absent the very clearest expression of legislative purpose. In such a case, it is not enough for a party to show that its lawsuit "provided some impetus" for the legislative change. [FN17] Halloran has not referred us to any facts, and to nothing in the text of H.B. 46 or in its legislative history, that would satisfy the rigorous standard of causation that applies in such a case. [FN18] We therefore hold that the superior court did not abuse its discretion by rejecting Halloran's request for an attorney's fees award under the catalyst approach.

> FN16. *State, Dep't of Natural Res. v. Tongass Conservation Soc'y*, 931 P.2d 1016, 1019-20 (Alaska 1997) (holding inquiry into legislature's motives for not enacting bill involves political question that is nonjusticiable). We used the catalyst approach in that case because the lawsuit arose from a federal statute and federal courts were, at the time, using the catalyst approach. *Id.* at 1017.
>
> FN17. *But cf. City of Yakutat v. Ryman*, 654 P.2d 785, 793 (Alaska 1982) (affirming superior court's discretionary refusal to award prevailing party status to defendant whose case was dismissed

because superior court found plaintiff's lawsuit "provided some impetus" for city's corrective actions which mooted issues and resulted in dismissal).

FN18. In holding that the catalyst theory should not be used when lawsuits are mooted by legislative action, we do not completely disavow its use. There may be times the catalyst theory may be used to determine the prevailing party for purposes of awarding attorney's fees. *See, e.g., Jerue v. Millett*, 66 P.3d 736, 743 n. 13, 749 (Alaska 2003) (stating that "under some circumstances plaintiffs may be able to recover attorney's fees in at least some types of cases dismissed for mootness," but declining to decide whether catalyst theory applies to shareholder derivative suit).

D. The Prevailing Party Issue Should Be Decided in this Case Under Civil Rule 82 Without Using the Catalyst Theory.

[6] Halloran also argued in his superior court attorney's fees motion that whether his lawsuit caused the legislature to change the primary election balloting system was irrelevant because he had "achieved some of the benefit sought in bringing the suit." He contended that he sought to vote on 99PRV1 without associating with a political party and that he achieved that goal when the superior court granted the TRO that required the division to allow him to choose a ballot at random and cast his vote on the initiative proposition. Although Halloran primarily relied on the catalyst theory, which we concluded ***553** in Part III.C does not apply here, his argument in the superior court that obtaining the TRO made him the prevailing party justifies our consideration of this more traditional basis for awarding fees in Alaska. [FN19]

FN19. *Zeman v. Lufthansa German Airlines*, 699 P.2d 1274, 1280 (Alaska 1985) (applying liberal approach to determining whether issue or theory was raised in lower court).

[7][8] Alaska Civil Rule 82 provides that "the prevailing party in a civil case shall be awarded attorney's fees." We have long held that the prevailing party is the party that succeeds on the main issue in the case. [FN20] But we do not require a party to succeed on all issues in order to prevail. [FN21] When each party prevails on some issue, it is within the trial court's discretion to refuse to designate either party as the prevailing party. [FN22]

FN20. *Hickel v. Southeast Conference*, 868 P.2d 919, 925 (Alaska 1994) (citing *Tobeluk v. Lind*, 589 P.2d 873, 876 (Alaska 1979)).

FN21. *Day v. Moore*, 771 P.2d 436, 437 (Alaska 1999) (holding superior court did not abuse its discretion in finding that plaintiff who succeeded on one of three claims and defeated counterclaim was prevailing party).

FN22. *Fernandes v. Portwine*, 56 P.3d 1, 8 (Alaska 2002); *see also Nordin Constr. Co. v. City of Nome*, 489 P.2d 455, 474 (Alaska 1971).

The state relies on *Shepherd v. State, Department of Fish & Game* [FN23] in arguing that obtaining a TRO is not itself sufficient to confer prevailing party status. Shepherd sued the Alaska Department of Fish and Game, alleging that regulations favoring resident hunters over non-resident hunters were unconstitutional. [FN24] The superior court eventually ruled against Shepherd and upheld the state's regulation, but early in the litigation Shepherd succeeded in having some emergency regulations overturned because they had been improperly noticed. [FN25] We affirmed the superior court's finding that the state was the prevailing party. We reasoned that "the procedural validity of the emergency regulations [was] only peripheral to the central issue litigated by the parties--the constitutionality of AS 16.05.255(d)." [FN26]

FN23. *Shepherd v. State, Dep't of Fish &*

Game, 897 P.2d 33 (Alaska 1995).

FN24. *Id.* at 36.

FN25. *Id.* at 36, 44.

FN26. *Id.* at 44.

Although Halloran's case is similar to *Shepherd* in that both cases involved a preliminary judicial action followed by a substantive constitutional challenge, they are procedurally distinguishable. In *Shepherd*, the substantive issues were fully litigated and the regulations were ultimately determined to be constitutional. [FN27] Here, the superior court never finally resolved the constitutional question because it became moot. Although Halloran's only victory was in obtaining the TRO that allowed him to vote, the TRO was also the only relief granted during the litigation. In *Shepherd*, the preliminary victory was purely procedural; it did not require the court to undertake any constitutional analysis. [FN28] Here, the TRO stated that "[i]f this order is not issued, [Halloran] will be unable to exercise his constitutional right to vote without being forced to affiliate himself with a party with which he does not wish to be affiliated." The superior court's order also stated that Halloran "may lawfully refuse" to affiliate himself with any political party. The TRO was not "peripheral to the central issue" of the constitutionality of the challenged election procedure--the superior court considered the substantive issues in deciding to grant the order.

FN27. *Id.* at 45.

FN28. *Id.* at 44.

The state argues that the voting procedure required by the TRO did not provide **Halloran** the relief he requested because he was required to cast his vote on the ballot of one of the parties. We are unconvinced by this contention. **Halloran's** complaint sought "an order directing the defendant to permit the plaintiff to vote on the ballot measures ... without first requiring the plaintiff to affiliate with any political party." The TRO required election officials to "allow Mr. **Halloran** to select one ballot in a manner that does not constitute his having a selection of a party's specific ballot." Election officials allowed ***554 Halloran** to vote in accordance with the TRO. The TRO therefore allowed him to vote on the initiative proposition without affiliating himself with any party; this was part of the relief his complaint requested.

The state also argues that the TRO could not confer prevailing party status on **Halloran** because **Halloran** did not seek to make the TRO permanent. But once **Halloran** cast his vote on August 27, 2002, the TRO had achieved its purpose. The relief **Halloran** requested in seeking the TRO was permanent; he was permitted to and in fact did vote on 99PRVT without affiliating with a party. The later dismissal of his complaint did not cause his vote to be uncounted.

In the superior court, Halloran barely raised his alternative theory that entry of the TRO made him the prevailing party. It is therefore not surprising that the attorney's fees order did not address this alternate argument. But because the order did not rule on this alternative theory, it is necessary to remand for consideration of whether entry of the temporary restraining order made Halloran successful on a main issue in his case.

E. The Superior Court Is Not Required To Apportion Fees According to Stage in the Litigation.

[9][10] It is undisputed that Halloran is a public interest litigant [FN29] As a public interest litigant, Halloran is entitled to full reasonable attorney's fees if he is determined on remand to be the prevailing party. [FN30]

FN29. A party is a public interest litigant "if (1) the case was designed to effectuate strong public policies; (2) numerous people would benefit if the litigant succeeded; (3) only a private party could be expected to bring the suit; and (4) the litigant lacked sufficient economic incentive to bring suit." *Matanuska Elec. Ass'n v. Rewire the Bd.*, 36 P.3d 685, 696,

698 (Alaska 2001) (affirming superior court's determination that members of rural electrical co-op were public interest litigants in suit to remove co-op's directors).

FN30. *See id.*

The state argues that if Halloran is determined to be the prevailing party, he should recover fees only for work done up to the issuance of the TRO. [FN31]

FN31. The record contains Halloran's "summary of fees incurred"; it seems to suggest that a relatively small part of the fees was incurred for work before the TRO was issued.

In *Hickel v. Southeast Conference,* we held that the superior court did not abuse its discretion by declining to apportion its attorney's fees award according to the stage in the litigation. [FN32] The superior court awarded full reasonable attorney's fees to the plaintiffs. [FN33] We affirmed this award because "[a]ll of the fees sought by plaintiffs relate[d] to attorney services performed before a final judgment was entered in the trial court" and the various stages of the litigation were "significantly related." [FN34]

FN32. *Hickel v. Southeast Conference,* 868 P.2d 919, 927 (Alaska 1994).

FN33. *Id.* at 933

FN34. *Id.* at 926, 927.

[11][12][13] "Once a public interest litigant has been identified as the prevailing party, his or her varying degree of success on the different issues is rarely a component of a 'reasonable fee' " [FN35] The public interest litigant rule is designed "to encourage plaintiffs to raise issues of public interest by removing the awesome financial burden of such a suit." [FN36] Fees for a public interest litigant should be apportioned only "in exceptional circumstances," but the superior court may apportion fees if it determines that some issues or proceedings were "so frivolous that apportionment of attorney's fees would be necessary to determine reasonable fees." [FN37]

FN35. *Dansereau v. Ulmer,* 955 P.2d 916, 920 (Alaska 1998) (reversing superior court's apportionment of attorney's fees by issue because it had not found that any of public interest litigant's claims were frivolous).

FN36. *Anchorage v. McCabe,* 568 P.2d 986, 990 (Alaska 1977) (reaffirming policy of awarding public interest litigants full reasonable attorney's fees).

FN37. *Dansereau,* 955 P.2d at 920 & n. 4.

On remand if the superior court determines that **Halloran** was the prevailing party, it should consider, in deciding what fee award is appropriate, whether the stages of ***555 Halloran's** litigation were substantially related, whether the attorney's fees were incurred before entry of final judgment, and whether any of **Halloran's** claims or proceedings were frivolous.

IV. CONCLUSION

For the reasons discussed above, we VACATE the order denying an award of fees to **Halloran** and REMAND.

115 P.3d 547

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In the Supreme Court of the State of Alaska

Alaska Civil Liberties Union, et al.,	
Appellants,	Supreme Court No. **S-10459**
v.	**Order**
	Attorney's Fees
State of Alaska & Municipality of Anchorage,	
Appellees.	Date of Order: **2/10/06**

Trial Court Case # **3AN-99-11179CI**

Before: Bryner, Chief Justice, Matthews, Eastaugh, Fabe, and Carpeneti, Justices.

Appellants have moved for an award of full attorney's fees, which they represent total $90,559. They support the motion with appropriate attachments, including affidavits of counsel. Appellees oppose the motion, arguing that appellants are not public interest litigants because they had sufficient economic incentive to bring suit, and that the fees sought are excessive and duplicative. The municipality also argues that any award should be allocated between the two appellees based on the number of the appellees' employees participating in this lawsuit and on other related reasons. The full court having considered these contentions,

IT IS ORDERED:

1. The court concludes that appellants are public interest litigants. The controlling issue is whether the appellants had sufficient economic incentive to bring suit, and thus to prosecute this appeal. There is no reasonable dispute that Alaska Civil

Liberties Union has no economic incentive to bring suit or file this appeal. It is true that the individual appellants may potentially benefit from the litigation financially but that benefit will not be directly realized as a result of the appellate decision of this court, or the reversal of the lower court's judgment. The appellants below sought only declaratory relief and asserted no damages claim or any claim for benefits denied to date. Certainly they contended below that they were being denied valuable benefits, and we have implicitly recognized that the benefits to which they are entitled are economically valuable. But whether they realize the benefits that ultimately must be provided to persons who are in the status the plaintiffs alleged they were in when they filed their complaint and affidavits in the superior court will depend on the status of the individual claimants when appellees make benefits available.

The individual appellants had to know, when they commenced suit, that their domestic status at that time might materially change by the time benefits might ultimately be offered to qualifying persons; individual appellants could not know in advance exactly what criteria either appellee might adopt and whether those criteria would render each individual appellant eligible. Likewise, their employment status or that of their domestic partner might change before benefits might ultimately be offered to qualifying couples. Given these uncertainties and the prospect of significant delay before the individual appellants might finally be entitled to apply for benefits, we think the closest analogous case is *Kodiak Seafood Processors v. State*, 900 P.2d 1191 (Alaska 1995), in which the individual members of the association stood to be affected financially by the state's conduct, but the effect was highly contingent and uncertain. We therefore held the association to be a public interest litigant.

Cont'd ...

2. Having considered the appellants' application for fees totaling $90,559 and having considered the complexity of the issues, and the extent of briefing of similar issues in the superior court. we conclude that a full reasonable fee should not exceed a total of $60,000, representing 300 hours of attorney time at $200 an hour. We award the fees jointly to appellants' counsel. If appellants wish that amount to be apportioned among counsel and cannot come to agreement as to the apportionment, they should make application to the clerk of the appellate courts, who will refer the matter to an individual justice. The amount awarded includes the paralegal fees.

3. The clerk will rule on the appellants' cost bill pursuant to Appellate Rule 508(f).

4. The municipality argues that the fee award should be allocated between the appellees. Because no party, including the state, has had an opportunity to respond to that suggestion, the municipality's allocation request is DENIED without prejudice. The municipality may re-raise the issue by separate, properly noticed motion.

Entered by direction of the court.

Clerk of the Appellate Courts

Marilyn May

Marilyn May

cc: Supreme Court Justices
Judge Joannides
Trial Court Clerk/Anchorage

Distribution:

Tobias Wolff
University of California Law School-Davis
400 Mark Hall Drive
Davis CA 95616

Kenneth Choe
American Civil Liberties Union
125 Broad Street
New York NY 10004

Allison Mendel
Mendel & Associates
431 W 7th Avenue Suite 101
Anchorage AK 99501

Virginia B Ragle
Asst Attorney General
PO Box 110300
Juneau AK 998110300

Neil T O'Donnell
Atkinson Conway & Gagnon
420 L Street Suite 500
Anchorage AK 99501

Kevin G Clarkson
Brena Bell & Clarkson PC
310 K Street Suite 601
Anchorage AK 99501

Rebecca Maxey
Law Offices of Rebecca L. Maxey, LLC
310 K Street Suite 200
Anchorage AK 99501

Thomas Dosik
The Disability Law Center
3300 Arctic Blvd Suite 103
Anchorage AK 99503

James M. Gorski
Hughes Thorsness
550 West Seventh Avenue Suite 1100
Anchorage AK 99501

THE SUPREME COURT OF THE STATE OF ALASKA

CITY OF KENAI, an Alaska municipal corporation, Appellant, v. FRIENDS OF THE RECREATION CENTER, INC., an Alaska corporation, MARK NECESSARY, ANITA NECESSARY, and CLIFFORD D. MASSIE, Individually, Appellees.	Supreme Court No. S-11506 Superior Court No. 3KN-03-503 CI OPINION [No. 5989 - February 17, 2006]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Kenai, Harold M. Brown, Judge.

Appearances: Cary R. Graves, City Attorney, Kenai, for Appellant. John E. Havelock, John E. Havelock Attorney at Law, Anchorage, for Appellees.

Before: Bryner, Chief Justice, Matthews, Eastaugh, Fabe, and Carpeneti, Justices.

EASTAUGH, Justice.

I. INTRODUCTION

Was it error to award full reasonable attorney's fees to public interest litigants who sued the City of Kenai? They claimed that awarding a contract to manage the city's recreation center without competitive bidding violated the city's code. The superior court entered a preliminary injunction preventing the city from using public funds to pay the manager, but later dismissed the suit as moot after the city amended the pertinent ordinance and recontracted with the manager. Because it was not an abuse of discretion to enter the preliminary injunction, we conclude that the court did not err in finding that the plaintiffs were the prevailing parties. We also conclude that the dismissal for mootness did not deprive them of that status, and that the superior court was not obliged to apportion the attorney's fees award.

II. FACTS AND PROCEEDINGS

In early 2003 the City of Kenai was examining options for adjusting its budget; the options included budget cuts. City employees had operated the city's Kenai Recreation Center since it opened in the 1980s, but it appeared that the city could realize net savings of $110,000 by contracting for private management of the center. The city therefore solicited from the Boys & Girls Club of the Kenai Peninsula ("the club") a proposal for a "Partnering Agreement," a contract under which the club would manage the center. The city did not solicit competitive bids for the proposed contract, and the city manager discouraged another interested private party from bidding.

Over the next several months the Kenai Parks & Recreation Advisory Commission — which makes recommendations to the city council regarding parks and recreation facilities in Kenai — and the city council met to discuss a partnering agreement with the club. The city council approved a contract with the club on May 21, 2003. Friends of the Recreation Center, Inc. and three individuals, Mark and Anita

Necessary and Clifford Massie, (collectively, "Friends") sued the city on June 26, contending in part that the city had not conducted competitive bidding for the contract as required by city ordinance.[1] Friends asked the superior court for a temporary restraining order and a preliminary injunction preventing the city from honoring its contract with the club. Friends also asked for a judgment declaring that the contract was void for, among other reasons, violating the competitive bidding requirement of KMC 7.15.040.[2]

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[1] Kenai Municipal Code (KMC) 7.15.040(a) requires the city, before awarding a contract for services, to solicit bids from at least three potential contractors, if possible, "and/or publish notice of the proposed [contract] in a newspaper of general circulation" within the city. KMC 7.15.040(f) requires the city to award the contract to the "lowest responsible bidder."

KMC 7.15.050 lists exceptions to the competitive bidding requirement of KMC 7.15.040. When the city first contracted with the club and Friends filed suit, KMC 7.15.050(5) provided that "[t]he following may be purchased without giving an opportunity for competitive bidding: . . . (5) Contractual services of a professional nature, such as engineering, architectural, and medical services." We refer to this as the "pre-amendment" version of KMC 7.15.050(5). While Friends's suit was pending, the city council amended KMC 7.15.050(5) to include "facilities management." *See infra* note 4 and accompanying text.

[2] Friends also alleged that (1) the contract was illegal because the club did not have an Alaska business license; (2) notice of the city council meetings at which the potential contract was discussed was inadequate, in violation of Alaska's Open Meetings Act (AS 44.62.310); (3) residents were not allowed to participate or comment at a city council meeting, in violation of the Open Meetings Act; and (4) the Kenai City Charter violates the constitutional right to referendum by allowing for only a one-month signature-gathering period and by limiting the right "to City Council ordinances only," so that the contract with the club could not be voided by referendum. The superior court did not base the preliminary injunction on any of these claims. We discuss in Part III.C the city's contention that because Friends did not prevail on these claims, any attorney's fees awarded to Friends should be apportioned by issue.

The club began operating the center on July 1, 2003. On July 10 the superior court rejected the city's contention that, because KMC 7.15.050(5) as it then read exempted a service "of a professional nature," the contract was exempt from KMC 7.15.040's competitive bidding requirement. The court then issued a preliminary injunction preventing the city from paying the club under the contract.[3]

On September 3, 2003 the city council amended KMC 7.15.050(5) to exempt contracts for "facilities management" services from KMC 7.15.040's competitive bidding requirement.[4] The city then solicited bids for private management of the center, assigned the club's bid the highest score, and replaced the club's first contract with a second contract.

On May 7, 2004 the superior court granted the parties' joint motion to dismiss Friends's suit as moot. Then, over the city's objection, it found that Friends was a public interest litigant and the prevailing party, and awarded Friends its full reasonable attorney's fees.

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[3] The superior court later allowed the release of city funds to compensate the club for services rendered before the preliminary injunction was issued.

[4] KMC 7.15.050 now reads:

> The following may be purchased without giving an opportunity for competitive bidding: . . . (5) Professional services. Professional services means those advisory, consulting, architectural, management, engineering, research or development services that involve the exercise of discretion and independent judgment together with an advanced or specialized knowledge, expertise or training gained by formal studies or experience. Examples of professional services include . . . facilities management . . . .

We refer to this version of KMC 7.15.050(5) as the "post-amendment" version.

The city appeals.

III. DISCUSSION

A. Standard of Review

We review for abuse of discretion the superior court's determination of prevailing party status for purposes of awarding attorney's fees.[5] We also review the issuance of preliminary injunctions for abuse of discretion.[6] We will find an abuse of discretion "only 'when we are left with a definite and firm conviction, after reviewing the whole record, that the trial court erred in its ruling.' "[7] But we review de novo the superior court's legal determinations in issuing the preliminary injunction.[8] We will approve the apportionment of a prevailing public interest litigant's attorney's fees award "only in exceptional circumstances."[9]

B. Friends Is Entitled to Full Reasonable Attorney's Fees as a Prevailing Party Public Interest Litigant.

"Under Alaska law, the prevailing party is the one who successfully prosecuted or defended the action and prevailed on the main issue."[10] The prevailing

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5 *Fernandes v. Portwine*, 56 P.3d 1, 5 (Alaska 2002).

6 *State, Div. of Elections v. Metcalfe*, 110 P.3d 976, 978 (Alaska 2005).

7 *DeSalvo v. Bryant*, 42 P.3d 525, 528 (Alaska 2002) (quoting *Arbelovsky v. Ebasco Servs., Inc.*, 922 P.2d 225, 227 (Alaska 1996)).

8 *See People ex rel. Gallo v. Acuna*, 929 P.2d 596, 626 (Cal. 1997) ("Of course, questions underlying the preliminary injunction are reviewed under the appropriate standard of review. Thus, for example . . . issues of pure law are subject to independent review.").

9 *Dansereau v. Ulmer*, 955 P.2d 916, 920 (Alaska 1998).

10 *Matanuska Elec. Ass'n, Inc. v. Rewire the Bd.*, 36 P.3d 685, 690 (Alaska

party in civil litigation is normally entitled to recover partial attorney's fees under Alaska Civil Rule 82. But if the prevailing party is a public interest litigant, it is normally entitled to full reasonable attorney's fees.[11] Because the city does not argue on appeal that Friends is not a public interest litigant, Friends is entitled to full reasonable attorney's fees if the superior court did not err in finding it to be the prevailing party.

After the superior court issued the preliminary injunction, the city rendered the merits of the competitive bidding dispute moot by amending KMC 7.15.050(5) to exempt "facilities management" from KMC 7.15.040's competitive bidding requirement and by entering into a new contract with the club. We will decide the merits of otherwise-moot cases in order to determine the prevailing party for purposes of attorney's

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[10](...continued)
2001).

[11] *Damsereau*, 955 P.2d at 918.

AS 09.60.010 was amended in 2003 to prohibit the award of full reasonable attorney's fees to prevailing public interest litigants except in cases "concerning the establishment, protection, or enforcement" of a constitutional right. AS 09.60.010(b), (c). AS 09.60.010(b) applies "to all civil actions and appeals filed on or after" the Act's effective date of September 11, 2003. Ch. 86, § 4, SLA 2003.

The city has not argued that AS 09.60.010(b) has any bearing on the attorney's fee award in this case, and the parties have not briefed the issue. We express no view as to AS 09.60.010(b)'s applicability to this case, but note that legislative history may inform the interpretation of the term "appeal" in ch. 86, § 4, SLA 2003. *See* Judiciary Committee Substitute for House Bill (C.S.H.B. (Jud)) 145, 23rd Leg., 1st Sess. (2003); House Judiciary Committee Minutes, May 7, 2003 (testimony of Robert B. Briggs, staff attorney for the Disability Law Center of Alaska, Inc., commenting on an April 21, 2003 letter by an assistant attorney general explaining and interpreting H.B. 145); *see also* AS 22.10.020(a), (d). To the extent there is a contention that Friends is or is not entitled to full reasonable attorney's fees as a prevailing public interest litigant, the parties will have an opportunity to address the applicability of AS 09.60.010(b) in the context of a motion for attorney's fees under Alaska Appellate Rule 508.

fee awards.[12] We therefore focus on whether Friends successfully prosecuted the case and prevailed on the main issue in obtaining the preliminary injunction; this requires us to consider whether the superior court abused its discretion in issuing the preliminary injunction.

1. The superior court did not abuse its discretion in issuing the preliminary injunction.

We have recently described what a plaintiff must show to obtain a preliminary injunction:

> The showing required to obtain a preliminary injunction depends on the nature of the threatened injury. If the plaintiff faces the danger of irreparable harm and if the opposing party is adequately protected, then we apply a balance of hardships approach in which the plaintiff must raise serious and substantial questions going to the merits of the case; that is, the issues raised cannot be frivolous or obviously without merit. If, however, the plaintiff's threatened harm is less than irreparable or if the opposing party cannot be adequately protected, then we demand of the plaintiff the heightened standard of a clear showing of probable success on the merits.[13]

The superior court found that Friends faced irreparable harm, that the city was adequately protected, and that Friends "demonstrated a substantial likelihood of success on the merits of [its] claim."

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[12] *See Bruner v. Petersen*, 944 P.2d 43, 47 n.4 (Alaska 1997) (citing *LaMoureaux v. Totem Ocean Trailer Express, Inc.*, 651 P.2d 839, 840 n.1 (Alaska 1982)).

[13] *State, Div. of Elections v. Metcalfe*, 110 P.3d 976, 978 (Alaska 2005) (internal quotation marks and citations omitted).

a. The issues whether Friends was faced with irreparable harm and whether the city was adequately protected are moot.

Although the city argues that the superior court did not make adequate findings that Friends was faced with irreparable harm,[14] it does not contend that Friends was not faced with irreparable harm. If we were reviewing the issuance of a preliminary injunction in a pending case, and concluded that the findings were inadequate, we would remand to the superior court for additional findings.[15] But remanding for additional findings in this case would be a needless exercise, given that the ultimate issue in this attorney's fees appeal is whether Friends was the prevailing party. The dispute that resulted in the injunction in this case is moot. Because the city does not argue that Friends was not faced with irreparable harm, we decline to consider whether the superior court abused its discretion in finding the threat of irreparable harm here.

The superior court also found that "[t]he security posted by [Friends] under the circumstances is sufficient" to protect the city. The city argues that it was not adequately protected and that the superior court's finding was clearly erroneous.

When a party requesting a preliminary injunction has shown probable success on the merits, a preliminary injunction may be issued even if the injury from the

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[14] *See* Alaska R. Civ. P. 52(a) ("[I]n granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law constitute the grounds of its action."); Alaska R. Civ. P. 65(d) ("Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; [and] shall be specific in terms . . . .").

[15] *See State, Dep't of Fish & Game v. Pinnell*, 461 P.2d 429, 432 & n.8 (Alaska 1969).

preliminary injunction "may not be adequately indemnified by a bond."[16] The superior court found that Friends had demonstrated a "substantial likelihood of success" on the merits. Because the court thought it was more likely than not that Friends would prevail on the merits of its claim, we interpret the court's finding of "substantial likelihood of success on the merits" as a finding of "probable success on the merits."[17] If the superior court did not abuse its discretion in concluding that Friends had demonstrated probable success on the merits, any possible error in its finding that the city was adequately protected is harmless. We therefore turn to whether Friends demonstrated probable success on the merits.

b. Friends demonstrated probable success on the merits.

There is no factual dispute on appeal that the city did not conduct competitive bidding before awarding the original management contract to the club. Whether Friends demonstrated probable success on the merits therefore turns on the legal question whether the pre-amendment version of KMC 7.15.050(5) exempted management of the center from KMC 7.15.040's competitive bidding requirement. Before September 3, 2003 KMC 7.15.050 provided: "The following may be purchased without giving an opportunity for competitive bidding: . . . (5) Contractual services of a professional nature, such as engineering, architectural, and medical services."

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[16] *N. Kenai Peninsula Rd. Maint. Serv. Area v. Kenai Peninsula Borough*, 850 P.2d 636, 639 (Alaska 1993).

[17] "Likelihood" is defined as "probability" and "appearance of probable success." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1310 (1966).

i. The superior court was not required to defer to the city's interpretation of the pre-amendment version of KMC 7.15.050(5)

The city, citing *Laborers Local No. 942 v. Lampkin*,[18] contends that the "reasonable basis" test applies to the city's interpretation of its procurement code. In *Lampkin* we held that a city's interpretation of its own procurement code will be upheld if there is a reasonable basis for the interpretation.[19] Under the rational basis test, we will uphold a governmental unit's decision if it "is supported by the facts and has a reasonable basis in law, even if we may not agree with the [unit's] ultimate determination."[20] The city argues that because it had a reasonable basis to conclude that the term "professional services" included management of the center, the superior court abused its discretion by issuing the preliminary injunction.

But we apply the reasonable basis standard of review to a municipality's interpretation of its own ordinances only "when this interpretation implicates complex matters or the formulation of fundamental policy."[21]

Lampkin concerned a Fairbanks North Star Borough requirement that the successful bidder for a school renovation project enter into a previously negotiated Project Labor Agreement (PLA).[22] We noted that the construction "project

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[18] *Laborers Local No. 942 v. Lampkin*, 956 P.2d 422 (Alaska 1998).

[19] *Id.* at 435.

[20] *Gunderson v. Univ. of Alaska, Fairbanks*, 922 P.2d 229, 233 (Alaska 1996) (quoting *Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.*, 746 P.2d 896, 903 (Alaska 1987)).

[21] *Lampkin*, 956 P.2d at 432 n.11.

[22] *Id.* at 427-28.

unquestionably presented special challenges," and that the PLA would facilitate necessary "flexible scheduling" and eliminate "the potential for strikes or other labor difficulties."[23] We held the borough had a reasonable basis to conclude that the PLA would allow the borough to satisfy its minimum needs, its procurement code's policy of "maximum practicable competition," and the procurement code's provisions dealing with "sole source procurement."[24]

The legal question in this case is far less complex, involving only the meaning of "services of a professional nature." Nor is there any indication that defining that phrase implicates "the formulation of fundamental policy." We therefore conclude that although the superior court held that the city's interpretation failed even the reasonable basis test, the court could have interpreted pre-amendment KMC 7.15.050(5) using its independent judgment. Because we review de novo the superior court's legal determinations in issuing the preliminary injunction,[25] we review the meaning of pre-amendment KMC 7.15.050(5) using our independent judgment. We then review for abuse of discretion the superior court's determination of probability of success on the merits and its ultimate decision to issue the preliminary injunction.

ii. The superior court did not err in holding that "services of a professional nature" in the pre-amendment version of KMC 7.15.050(5) did not include management of the center.

The superior court relied on what it characterized as the "clear language" of the ordinance in determining that management of the center was not a service of a

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23 *Id.* at 435.

24 *Id.* at 432, 435-36.

25 *See People ex rel. Gallo v. Acuna*, 929 P.2d 596, 626 (Cal. 1997).

professional nature. The city cites several cases from other jurisdictions holding that in the context of similar procurement codes, management of various facilities was professional in nature.[26] At least some of these cases are easily distinguishable.[27] Moreover, numerous cases from other jurisdictions hold that management of facilities is not professional in nature and requires competitive bidding.[28] Opinions from other jurisdictions interpreting similar statutes can be persuasive,[29] but we turn first to our own methods of statutory interpretation.

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[26] *See Hurd v. Erie County*, 34 A.D.2d 289, 292 (N.Y. App. Div. 1970) (professional football stadium); *City of Cleveland v. Laushe*, 49 N.E.2d 207, 211 (Ohio App. 1943) (zoological garden); *Lieberman Org. v. City of Phila.*, 595 A.2d 638, 640-41 (Pa. 1990) (homeless shelter).

[27] The facilities in Erie and Cleveland were considerably larger and more complex than the facility in Kenai, and they required far more expertise to manage.

[28] *See, e.g., City of Inglewood-L.A. County Civic Ctr. Auth. v. Superior Court of L.A. County*, 103 Cal. Rptr. 689, 692 (Cal. 1972) (rejecting argument that management contract for public construction project is analogous to contract for engineering and architectural services); *Glatstein v. City of Miami*, 399 So. 2d 1005, 1009 (Fla. App. 1981) (holding that contract for management of theme park was not professional service); *Communicare, Inc. v. Woody County Bd. of Comm'rs*, 829 N.E.2d 706, 712-15 (Ohio App. 2005) (holding that contract for management services for operation of nursing home was not professional service enumerated by statute). These facilities seem more analogous to the Kenai facility than those found in Erie, Cleveland, or Philadelphia.

[29] *See Nicholson v. Sorensen*, 517 P.2d 766, 770 n.9 (Alaska 1973) ("[A] construction of a similar statute by the highest court of another state rendered after adoption of the statute by Alaska may be persuasive," but "a statute is presumed to have been adopted with the interpretation that had been placed upon it prior to its Alaska enactment by the highest court of the state from which it was taken."). The city does not suggest that the pre-amendment version of KMC 7.15.050(5) was "taken" from any of the statutes interpreted in the cases cited in *supra* note 26. We therefore accord them no extraordinary persuasive force.

Interpretation of a statute begins with its text.[30] We apply the same rules of interpretation to municipal ordinances.[31] In interpreting statutes, we "have adopted a sliding scale approach," under which "[t]he plainer the statutory language is, the more convincing the evidence of contrary legislative purpose or intent must be."[32] Black's Law Dictionary defines "professional" as "[a] person who belongs to a learned profession or whose occupation requires a high level of training and proficiency."[33] Webster's

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[30] *Barney v. State, Dep't of Admin., Teachers Ret. Bd.*, 110 P.3d 1254, 1258 (Alaska 2005).

[31] *See Marlow v. Municipality of Anchorage*, 889 P.2d 599, 602 (Alaska 1995) (applying sliding scale approach to interpretation of ordinance).

[32] *Gov't Employees Ins. Co. v. Graham-Gonzalez*, 107 P.3d 279, 284 (Alaska 2005).

[33] BLACK'S LAW DICTIONARY 1226 (7th ed. 1999). AS 01.10.040(a) requires that

> [w]ords and phrases shall be construed according to the rules of grammar and according to their common and approved usage. Technical words and phrases and those which have acquired a peculiar and appropriate meaning, whether by legislative definition or otherwise, shall be construed according to the peculiar and appropriate meaning.

See also Graham-Gonzalez, 107 P.3d at 284 ("In assessing statutory language, unless words have acquired a peculiar meaning, by virtue of statutory definition or judicial construction, they are to be construed in accordance with their common usage.") (internal quotations omitted).

The city argues that it has interpreted "services of a professional nature" to include facilities management in the past. But the city does not point to a peculiar legislative definition. Moreover, we do not regard two other facilities management contracts that the city claims it made without competitive bidding as imbuing the term "professional" with a peculiar meaning. We therefore look to the term's common and approved usage.

Third International Dictionary provides a similar definition.[34] "[S]ervices of a professional nature" are therefore commonly understood to be services that are rendered by a member of the learned professions or that require a high level of training and proficiency.

The illustrative clause — "such as engineering, architectural, and medical services" — that follows "services of a professional nature" provides textual support for this interpretation.[35] "Pursuant to the doctrine of *ejusdem generis*, a general term, when followed by specific terms, will be interpreted in light of the characteristics of the specific terms, absent clear indication to the contrary."[36] Before its 2003 amendment, KMC 7.15.050(5) listed only "engineering, architectural, and medical services" as examples of "services of a professional nature." These specific examples all require extensive education, training, and proficiency. Most professions encompassed by these

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[34] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1811 (1966) (defining "professional," when used as an adjective, as describing one "engaged in one of the learned professions or in an occupation requiring a high level of training and proficiency").

[35] The term "such" means "[o]f this or that kind." BLACK'S LAW DICTIONARY 1446 (7th ed. 1999). "Under Alaska law, words and phrases in statutes generally are to be construed according to their common and approved usage." *Human Res. Co. v. Alaska Comm'n on Post Secondary Educ., State of Alaska*, 946 P.2d 441, 444 (Alaska 1997). The use of "such as" in pre-amendment KMC 7.15.050(5) therefore indicates that the list of "services of a professional nature" is meant to be illustrative rather than exclusive.

[36] *West v. Umialik Ins. Co.*, 8 P.3d 1135, 1141 (Alaska 2000) (citing *State Farm Fire & Cas. Co. v. Bongen*, 925 P.2d 1042, 1046 (Alaska 1996)); *see also Cable v. Shefchik*, 985 P.2d 474, 480 (Alaska 1999) (explaining that under doctrine of *ejusdem generis*, "a general term, like 'tool,' when modified by specific terms, like 'drills, saws and other hand tools,' will be interpreted 'in light of those specific terms, absent a clear indication to the contrary' ") (quoting Alaska Construction Code § 05.090(c)(3)(A); *Bongen*, 925 P.2d at 1046).

examples require licensing in Alaska.[37] There has been no contention, much less any evidence, that successful management of the city's recreation center requires education, training, or proficiency equivalent to that required of engineers, architects, and providers of medical services.

In light of the plain meaning of "services of a professional nature" and the specific examples listed in pre-amendment KMC 7.15.050(5), we conclude that the phrase "services of a professional nature" does not include facilities management. We therefore agree with the superior court that management of the center does not involve "services of a professional nature" as that phrase was used in pre-amendment KMC 7.15.050(5). The superior court therefore did not abuse its discretion in finding that Friends had demonstrated probable success on the merits.

2. Friends is the prevailing party even though the city succeeded in privatizing management of the center.

The city asserts that Friends is not the prevailing party because the city accomplished exactly what it set out to accomplish and what Friends's lawsuit sought to prevent — private management of the center. It argues that because Friends did not achieve its goal, Friends is not the prevailing party.

When determining prevailing party status, we have consistently looked to whether the party successfully prosecuted or defended the action and to whether the party

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[37] *Cf.* AS 08.48.171 (requiring registration of architects and engineers); AS 08.64.170 (requiring registration for practice of medicine, podiatry, and osteopathy); AS 08.68.160 (requiring registration of nurses).

prevailed on the main issue.[38] Our determination of prevailing party status has therefore traditionally focused on the litigation itself.

Furthermore, the purposes of the public interest litigant exception to Civil Rule 82 suggest that the city's political success in amending KMC 7.15.050(5) and entering into a second management contract with the club is not an appropriate basis for concluding that Friends is not the prevailing party. We award prevailing public interest litigants full reasonable attorney's fees "to encourage plaintiffs to raise issues of public interest."[39] This suggests that the focus of the prevailing party determination should be on the litigation, rather than on contemporaneous political or contractual developments.

The city has not convinced us that a public interest litigant that brings a meritorious claim against a governmental unit and obtains a preliminary injunction loses its prevailing party status if, through the political process, the governmental unit later moots the lawsuit and accomplishes its challenged goals. Because Friends succeeded in obtaining the only judicial relief granted in this case before it was dismissed without objection as moot following amendment of the ordinance, the superior court did not abuse its discretion in finding that Friends was the prevailing party.[40]

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[38] *Matanuska Elec. Ass'n, Inc. v. Rewire the Bd.*, 36 P.3d 685, 690 (Alaska 2001); *Meidinger v. Koniag, Inc.*, 31 P.3d 77, 88 (Alaska 2001); *De Witt v. Liberty Leasing Co. of Alaska*, 499 P.2d 599, 601 (Alaska 1972); *Buza v. Columbia Lumber Co.*, 395 P.2d 511, 514 (Alaska 1964).

[39] *Southeast Alaska Conservation Council, Inc. v. State*, 665 P.2d 544, 553 (Alaska 1983) (quoting *Anchorage v. McCabe*, 586 P.2d 986, 990 (Alaska 1977)).

[40] *See Halloran v. State, Div. of Elections*, 115 P.3d 547, 554 (Alaska 2005) (holding that obtaining temporary restraining order may be basis for finding plaintiff to be prevailing party when the restraining order was only relief granted in litigation).

C. No Extraordinary Circumstances Justify Apportioning this Attorney's Fees Award.

Although prevailing public interest litigants are generally entitled to full reasonable attorney's fees, we held in *Dansereau v. Ulmer* that attorney's fee awards may be apportioned for prevailing public interest litigants when "exceptional circumstances" exist.[41] We have suggested that raising frivolous issues or issues included only to inflate prospective attorney's fee award may constitute exceptional circumstances.[42]

The city argues that Friends abandoned three of the claims made in its complaint by failing to respond to the city's motion for summary judgment on those claims.[43] The city claims that this "abandonment," coupled with Friends's failure to achieve its goal, establishes exceptional circumstances that warrant apportionment of any attorney's fees awarded to Friends.

But the city moved to dismiss the underlying litigation as moot at the same time it moved for summary judgment on the claims it characterizes as abandoned. Friends very appropriately recognized that the underlying litigation was moot and joined the city's motion to dismiss the case for mootness. It was therefore not necessary to oppose the motion for summary judgment on the merits as to those three claims. Friends's decision not to oppose summary judgment as to those claims therefore cannot be characterized as an "abandonment" that might somehow demonstrate exceptional circumstances justifying apportionment of fees. And, as we stated above, Friends

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[41] *Dansereau v. Ulmer*, 955 P.2d 916, 918-20 (Alaska 1998).

[42] *Id.* at 920.

[43] As stated above, the superior court issued the preliminary injunction based on Friends's claim that the city violated its competitive bidding requirement. The remaining claims are enumerated in *supra* note 2. The city argues that "[o]ne of them was dismissed by the plaintiffs and three were essentially abandoned."

succeeded in obtaining judicial relief. The city cannot make this an "exceptional" case by mooting it through the political process. Because no exceptional circumstances exist, the superior court did not abuse its discretion in declining to apportion the attorney's fee award.[44]

IV. CONCLUSION

For the reasons discussed above, we AFFIRM the superior court's judgment.

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[44] At oral argument on appeal, the city disclaimed any contention that any award of attorney's fees to Friends should be apportioned by litigation stage. It is therefore unnecessary to consider whether apportionment on that basis would be proper here. *Cf. Halloran*, 115 P.3d at 554-55 (instructing superior court on remand to consider apportionment of attorney's fee award by stage of litigation if it determined that plaintiff was prevailing party); *Hickel v. Southeast Conference*, 868 P.2d 919, 926 (Alaska 1994) (discussing propriety of apportioning attorney's fee award by litigation stage).

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT AT FAIRBANKS

BACHNER COMPANY, INC. and BOWERS INVESTMENT COMPANY,

Appellants,

vs.

STATE OF ALASKA, DEPARTMENT OF ADMINISTRATION, and JIM DUNCAN, IN HIS OFFICIAL CAPACITY AS COMMISSIONER THEREOF,

Appellee

Case No.: No. 4FA-02-2674 CI

MEMORANDUM OPINION AND ORDER ON PUBLIC INTEREST LITIGANT STATUS

INTRODUCTION

Bachner Company Inc. and Bowers Investment Company ("Bachner and Bowers") appellants in this action and the prevailing parties on the merits, come before the Court seeking to establish their status as public interest litigants for the purposes of an award of attorneys' fees and costs. The State of Alaska, Department of Administration, has opposed the motion, arguing that Bachner and Bowers brought the suit in their own interest, not that of the public.

PROCEDURAL HISTORY

In December 2001, the Department of Adminstration, Division of General Services, issued a Request for Proposals ("RFP") for office and storage space for the Department of Transportation and Public Facilities, seeking a twenty-year lease contract with two ten-year extensions at the State's option. There were serious defects and improprieties in the procurement process for

this RFP. Bachner and Bowers, two of the disappointed bidders, requested stays of award, and, when a stay was denied, filed bid protests.

The Commissioner, in deciding the bid protests (which were aggregated for decision both there and here), acknowledged the seriousness of the defects in the procurement process, but declined to provide relief beyond the award of bid preparation costs. Bachner and Bowers appealed to the Superior Court, but, shortly thereafter, obtained a remand to the Commissioner for the assessment of further evidence. The Commissioner did not change his position on remand.

This Court issued its Decision and Order on Appeal on December 2, 2005. It found that Bachner and Bowers were entitled to relief beyond that awarded by the Commissioner and ordered that the contract be rescored or rebid.

As prevailing parties in this action, Bachner and Bowers now seek an award of attorneys' fees and costs. In addition, they seek a determination that, since their suit was brought to protect the integrity of the procurement process rather than for personal gain, they are entitled to public interest litigant status, entitling them in turn to an award of the full amount of their fees and costs. The State has opposed this motion, arguing that it is improper to impose this expense on the citizens of the state, and moreover that Bachner and Bowers had sufficient economic motivation to bring this appeal on their own behalf.

DISCUSSION

To be accorded public interest litigant status, a party must satisfy the following criteria:

(1) Is the case designed to effectuate strong public policies?
(2) If the plaintiff succeeds, will numerous people receive benefit from the lawsuit?
(3) Can only a private party have been expected to bring the suit?

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

Anchorage Daily News v. Anchorage School Dist., 803 P.2d 402, 404 (Alaska 1990). Each of these four criteria must be satisfied for a party to obtain public interest litigant status.

The award of full fees to public interest litigants is well established. Even under the standard "American rule" that each party bears its own costs, "awards of attorney's fees to public interest plaintiffs have long been an exception ..." - an exception articulated by the U.S. Supreme Court, which first suggested that public interests litigants act as "private attorneys general." Anchorage v. McCabe, 568 P.2d 986, 990 (Alaska 1977) (citing Newman v. Piggie Park Enterprises, Inc., 390 U.S 400 (1968)).

Here, the State more or less concedes the first and third criteria, but claims that, under the second and fourth, Bachner and Bowers do not qualify. In brief, the State argues that only a small number of people benefit from the suit - those who have the chance to bid again - but that many people - all the taxpayers of the state - will be hurt by the costs to the State. It also argues that the chance to bid again on a very lucrative contract constituted a sufficient economic incentive for Bachner and Bowers to bring this suit. Finally, the State suggests that the recovery of bid preparation costs proves that Bachner and Bowers had sufficient economic incentive to bring the suit.

First, the contention that the fact that the suit and the award both cost the taxpayers of the state and so cannot be in the public's interest is easily disposed of as spurious and inconsistent with public policy. This is the same argument the State put forward in the main appeal, and is just as unavailing here. The State's bottom line is not the measure of the public interest - the interest of the people of this state in responsible government

must weigh at least as strongly. It is as if the people of the state must make an investment in integrity and say, "we will do this one right even if it costs more this time in order be sure it gets done right in the future."

The reasoning followed in the decision on appeal - that the greatest good is a responsible procurement process - holds just as true here. The State claims that it got this message at the administrative level - after all, it was punished by paying bid costs. However, the State also failed to fix the problem, and incorrectly assessed the relative importance of the monetary concerns and the concern for integrity in procurement. Really, the State dug its own hole by failing to remedy the defects in this procurement when they first came to light, and must now pay for its mistake.

As to the fourth criterion, sufficient economic incentive to bring the suit without the public interest concern, a few examples will illustrate why Bachner and Bowers satisfy this criterion.

In Anchorage Daily News, the Supreme Court considered the situation where the plaintiff newspaper arguably did stand to gain financially from a suit seeking access to government documents in that its circulation figures and prestige might rise, but where the newspaper did not seek any monetary recovery. 803 P.2d at 403. The Supreme Court weighed relative importance to the suit of the newspaper's interest in its circulation against the importance of public access to government documents, and found that the latter outweighed the former in this case:

> ... the lawsuit filed by the Daily News vindicated an important public right; the main reason for the litigation, and its primary accomplishment, was to compel the school district to disclose information required by law to be available to the public. Moreover, whatever private interest the Daily News might have had, economic or otherwise, was comparatively minor. Indeed, it is highly unlikely that the Daily News would have brought its suit "if the action [had] involved only narrow issues lacking in general importance."

Id. at 404.

As in Anchorage Daily News, Bachner and Bowers had comparatively little economic incentive here - only the vague, nebulous "maybe" of bidding on a future RFP for the same lease - assuming that DOA did not choose to redefine them in the mean time. While Bachner and Bowers may have had this at least partly in mind, the mere hope of a future opportunity to bid is too slender a bough on which to hang a claim of economic motive. As our Supreme Court has said, "... so long as the claims themselves ... further strong public policies, ... the plaintiff's motivations are irrelevant" and that "within the context of the test as a whole, the plaintiff's motivations are only relevant to the extent that the plaintiff had sufficient economic motive to bring suit." Eyak Traditional Elders Council v. Sherstone, Inc., 904 P.2d 420, 424 n. 9 (Alaska 1995).

In Eyak Traditional Elders Council v. Sherstone, the plaintiff counsel sought to enjoin logging on what it believed were tribal burial grounds. Id. at 421. Initially, they sought money damages in addition to injunctive relief. Id. The Supreme Court determined that, despite the fact that the issues were "of deep personal concern" to the plaintiff council, the council had "framed its entire case in furtherance of statutory and constitutional policies that concern the public as a whole." Id. at 424.

Examining the public policy defended by the council, the Court found that "the legislature has determined that all Alaskans are harmed when the historical and cultural traditions of one of Alaska's native peoples are relegated to a museum wall." Id. It acknowledged the existence of contrary interests - primarily economic development interests - but commented that "[i]n any case purported to effectuate public policy, some people will have contrary interests. This fact has not been held to disqualify a litigant from public interest status." Id. at 425.

The same reasoning applies in large part here: to be sure, Bachner and Bowers were litigating "issues of deep personal concern," but, as the Supreme

Court has said, that does not "disqualify [them] from public interest status." As the Eyak Council did, Bachner and Bowers consistently emphasized the harm to the public from a dishonest bidding process, and the greater costs the State incurred by failing to accurately assess the bids.

Likewise, Bachner and Bowers represented the interests of the class of bidders as a whole. While this is a much smaller group, their interests are no less important - after all, the right to negotiations in good faith was important enough for the legislature to explicitly state it in the statute. AS 36.30.880. In addition, protecting contractors' and bidders' interests is likely of value to the public as a whole, for if potential bidders were to choose not to bid because they viewed the bidding process as untrustworthy or arbitrary, that would prevent the people of the state from getting the best products and services.

A final example in which the Supreme Court found that plaintiffs were not entitled to public interest litigant status completes the illustration. In Abbott v. Kodiak Island Borough Assembly, 899 P.2d 922, 923 (Alaska 1995), the plaintiff homeowners challenged changes to zoning which they claimed would "harm the environment, damage the general character of their neighborhood, create drainage problems, decrease property values, ... cause them to pay for road improvements [and] ... result in greatly increased traffic on Woodland Drive, a street on which many of the complainants lived ..."

Contrasting its assessment of these homeowners' claims with those brought by homeowners in Oceanview Homeowners Association, Inc. v. Quadrant Construction & Engineering, 688 P.2d 793, 799 (Alaska 1984) and Brookwood Area Homeowners Association, Inc. v. Municipality of Anchorage, 702 P.2d 1317, 1326-27 (Alaska 1985), the Supreme Court found that the homeowners in Abbott were not entitled to public interest litigant status. 899 P.2d at 924-25. The Court found that, unlike in Oceanview and Brookwood, the homeowners in Abbott had sufficient economic incentive to bring the suit

without a public interest motive, and, moreover, had relied on theories (such as Fifth Amendment takings without just compensation and the imposition of costs for road improvements) which emphasized their pecuniary interest in the outcome of the case. This, the Court found, prevented the homeowners from satisfying the fourth of the public interest criteria, namely whether "the purported public interest litigant [would] have [had] sufficient economic incentive to file suit even if the action [had] involved only narrow issues lacking general importance." Anchorage Daily News v. Anchorage School Dist., 803 P.2d 402, 404 (Alaska 1990).

Unlike the homeowners in Abbott, Bachner and Bowers have at best a minimal pecuniary interest in this suit. The Court simply cannot credit the notion that an opportunity to bid on a new RFP - which may or may not have the same terms as the challenged RFP - is an economic incentive sufficient to defeat public interest status.

Finally, the fact that Bachner and Bowers recovered bid preparation costs is irrelevant to their public interest status in regards to the appeal. Bid preparation costs may well have been sufficient to defeat public interest status at the administrative level, but on appeal Bachner and Bowers themselves conceded that they could not recover further damages and that only injunctive remedies were available. Furthermore, Bachner and Bowers conceded that an award to either of them by the Court would be improper. Instead, they simply sought a rescore or rebid that would be fair to all bidders, or a cancellation of the contract and a new RFP. None of these remedies yields financial or personal gain to either Bachner or Bowers. As to the appeal, Bachner and Bowers' recovery of bid preparation costs does not, therefore, defeat their claim for public interest litigant status.

CONCLUSION

For the foregoing reasons, Bachner and Bowers' Motion to Establish Public Interest Litigant Status is GRANTED.

Dated at Fairbanks, Alaska, this 9th day of February 2006.

WINSTON S. BURBANK
Superior Court Judge *pro tempore*

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Case No.: No. 4FA-02-2674 CI

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ORDER FOR DISCLOSURE OF ATTORNEY'S FEES

Appellants Bachner Company, Inc., and Bowers Investment Company ("Bachner and Bowers") have moved this Court for an award of attorneys' fees and costs associated with this appeal. The Court has made a preliminary review of the documents supporting that motion, and, finds that the submitted documentation concerning the billings is wholly inadequate for opposing counsel to determine the necessity and the reasonableness of the requested billings. Therefore the Court orders Bachner and Bowers to provide opposing counsel with billing statements which provides counsel with sufficient information to determine what work was done, who did the work, the amount of time of the work, and the date the work was done. In the event that Bachner and Bowers should determine that the disclosure of such information infringes upon their attorney/client relationship, then perhaps they should not seek compensation for those billings.

It is therefore ordered that Bachner and Bowers are to provide opposing counsel with billing statements within fifteen (15) days of the date of this order.

Dated at Fairbanks, Alaska, this 9th day of Feb., 2005.

WINSTON S. BURBANK
Superior Court Judge, pro tempore

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Here, the State more or less concedes the first and third criteria, but claims that, under the second and fourth, Bachner and Bowers do not qualify. In brief, the State argues that only a small number of people benefit from the suit - those who have the chance to bid again - but that many people - all the taxpayers of the state - will be hurt by the costs to the State. It also argues that the chance to bid again on a very lucrative contract constituted a sufficient economic incentive for Bachner and Bowers to bring this suit. Finally, the State suggests that the recovery of bid preparation costs proves that Bachner and Bowers had sufficient economic incentive to bring the suit.

First, the contention that the fact that the suit and the award both cost the taxpayers of the state and so cannot be in the public's interest is easily disposed of as spurious and inconsistent with public policy. This is the same argument the State put forward in the main appeal, and is just as unavailing here. The State's bottom line is not the measure of the public interest - the interest of the people of this state in responsible government

must weigh at least as strongly. It is as if the people of the state must make an investment in integrity and say, "we will do this one right even if it costs more this time in order be sure it gets done right in the future."

The reasoning followed in the decision on appeal - that the greatest good is a responsible procurement process - holds just as true here. The State claims that it got this message at the administrative level - after all, it was punished by paying bid costs. However, the State also failed to fix the problem, and incorrectly assessed the relative importance of the monetary concerns and the concern for integrity in procurement. Really, the State dug its own hole by failing to remedy the defects in this procurement when they first came to light, and must now pay for its mistake.

As to the fourth criterion, sufficient economic incentive to bring the suit without the public interest concern, a few examples will illustrate why Bachner and Bowers satisfy this criterion.

In Anchorage Daily News, the Supreme Court considered the situation where the plaintiff newspaper arguably did stand to gain financially from a suit seeking access to government documents in that its circulation figures and prestige might rise, but where the newspaper did not seek any monetary recovery. 803 P.2d at 403. The Supreme Court weighed relative importance to the suit of the newspaper's interest in its circulation against the importance of public access to government documents, and found that the latter outweighed the former in this case:

> ... the lawsuit filed by the Daily News vindicated an important public right; the main reason for the litigation, and its primary accomplishment, was to compel the school district to disclose information required by law to be available to the public. Moreover, whatever private interest the Daily News might have had, economic or otherwise, was comparatively minor. Indeed, it is highly unlikely that the Daily News would have brought its suit "if the action [had] involved only narrow issues lacking in general importance."

Id. at 404.

As in Anchorage Daily News, Bachner and Bowers had comparatively little economic incentive here - only the vague, nebulous "maybe" of bidding on a future RFP for the same lease - assuming that DOA did not choose to redefine them in the mean time. While Bachner and Bowers may have had this at least partly in mind, the mere hope of a future opportunity to bid is too slender a bough on which to hang a claim of economic motive. As our Supreme Court has said, "... so long as the claims themselves ... further strong public policies, ... the plaintiff's motivations are irrelevant" and that "within the context of the test as a whole, the plaintiff's motivations are only relevant to the extent that the plaintiff had sufficient economic motive to bring suit." Eyak Traditional Elders Council v. Sherstone, Inc., 904 P.2d 420, 424 n. 9 (Alaska 1995).

In Eyak Traditional Elders Council v. Sherstone, the plaintiff counsel sought to enjoin logging on what it believed were tribal burial grounds. Id. at 421. Initially, they sought money damages in addition to injunctive relief. Id. The Supreme Court determined that, despite the fact that the issues were "of deep personal concern" to the plaintiff council, the council had "framed its entire case in furtherance of statutory and constitutional policies that concern the public as a whole." Id. at 424.

Examining the public policy defended by the council, the Court found that "the legislature has determined that all Alaskans are harmed when the historical and cultural traditions of one of Alaska's native peoples are relegated to a museum wall." Id. It acknowledged the existence of contrary interests - primarily economic development interests - but commented that "[i]n any case purported to effectuate public policy, some people will have contrary interests. This fact has not been held to disqualify a litigant from public interest status." Id. at 425.

The same reasoning applies in large part here: to be sure, Bachner and Bowers were litigating "issues of deep personal concern," but, as the Supreme

Court has said, that does not "disqualify [them] from public interest status." As the Eyak Council did, Bachner and Bowers consistently emphasized the harm to the public from a dishonest bidding process, and the greater costs the State incurred by failing to accurately assess the bids.

Likewise, Bachner and Bowers represented the interests of the class of bidders as a whole. While this is a much smaller group, their interests are no less important - after all, the right to negotiations in good faith was important enough for the legislature to explicitly state it in the statute. AS 36.30.880. In addition, protecting contractors' and bidders' interests is likely of value to the public as a whole, for if potential bidders were to choose not to bid because they viewed the bidding process as untrustworthy or arbitrary, that would prevent the people of the state from getting the best products and services.

A final example in which the Supreme Court found that plaintiffs were not entitled to public interest litigant status completes the illustration. In Abbott v. Kodiak Island Borough Assembly, 899 P.2d 922, 923 (Alaska 1995), the plaintiff homeowners challenged changes to zoning which they claimed would "harm the environment, damage the general character of their neighborhood, create drainage problems, decrease property values, ... cause them to pay for road improvements [and] ... result in greatly increased traffic on Woodland Drive, a street on which many of the complainants lived ..."

Contrasting its assessment of these homeowners' claims with those brought by homeowners in Oceanview Homeowners Association, Inc. v. Quadrant Construction & Engineering, 680 P.2d 793, 799 (Alaska 1984) and Brookwood Area Homeowners Association, Inc. v. Municipality of Anchorage, 702 P.2d 1317, 1326-27 (Alaska 1985), the Supreme Court found that the homeowners in Abbott were not entitled to public interest litigant status. 899 P.2d at 924-25. The Court found that, unlike in Oceanview and Brookwood, the homeowners in Abbott had sufficient economic incentive to bring the suit

without a public interest motive, and, moreover, had relied on theories (such as Fifth Amendment takings without just compensation and the imposition of costs for road improvements) which emphasized their pecuniary interest in the outcome of the case. This, the Court found, prevented the homeowners from satisfying the fourth of the public interest criteria, namely whether "the purported public interest litigant [would] have [had] sufficient economic incentive to file suit even if the action [had] involved only narrow issues lacking general importance." Anchorage Daily News v. Anchorage School Dist., 803 P.2d 402, 404 (Alaska 1990).

Unlike the homeowners in Abbott, Bachner and Bowers have at best a minimal pecuniary interest in this suit. The Court simply cannot credit the notion that an opportunity to bid on a new RFP - which may or may not have the same terms as the challenged RFP - is an economic incentive sufficient to defeat public interest status.

Finally, the fact that Bachner and Bowers recovered bid preparation costs is irrelevant to their public interest status in regards to the appeal. Bid preparation costs may well have been sufficient to defeat public interest status at the administrative level, but on appeal Bachner and Bowers themselves conceded that they could not recover further damages and that only injunctive remedies were available. Furthermore, Bachner and Bowers conceded that an award to either of them by the Court would be improper. Instead, they simply sought a rescore or rebid that would be fair to all bidders, or a cancellation of the contract and a new RFP. None of these remedies yields financial or personal gain to either Bachner or Bowers. As to the appeal, Bachner and Bowers' recovery of bid preparation costs does not, therefore, defeat their claim for public interest litigant status.

CONCLUSION

For the foregoing reasons, Bachner and Bowers' Motion to Establish Public Interest Litigant Status is GRANTED.

Dated at Fairbanks, Alaska, this 9th day of February 2006.

WINSTON S. BURBANK
Superior Court Judge *pro tempore*

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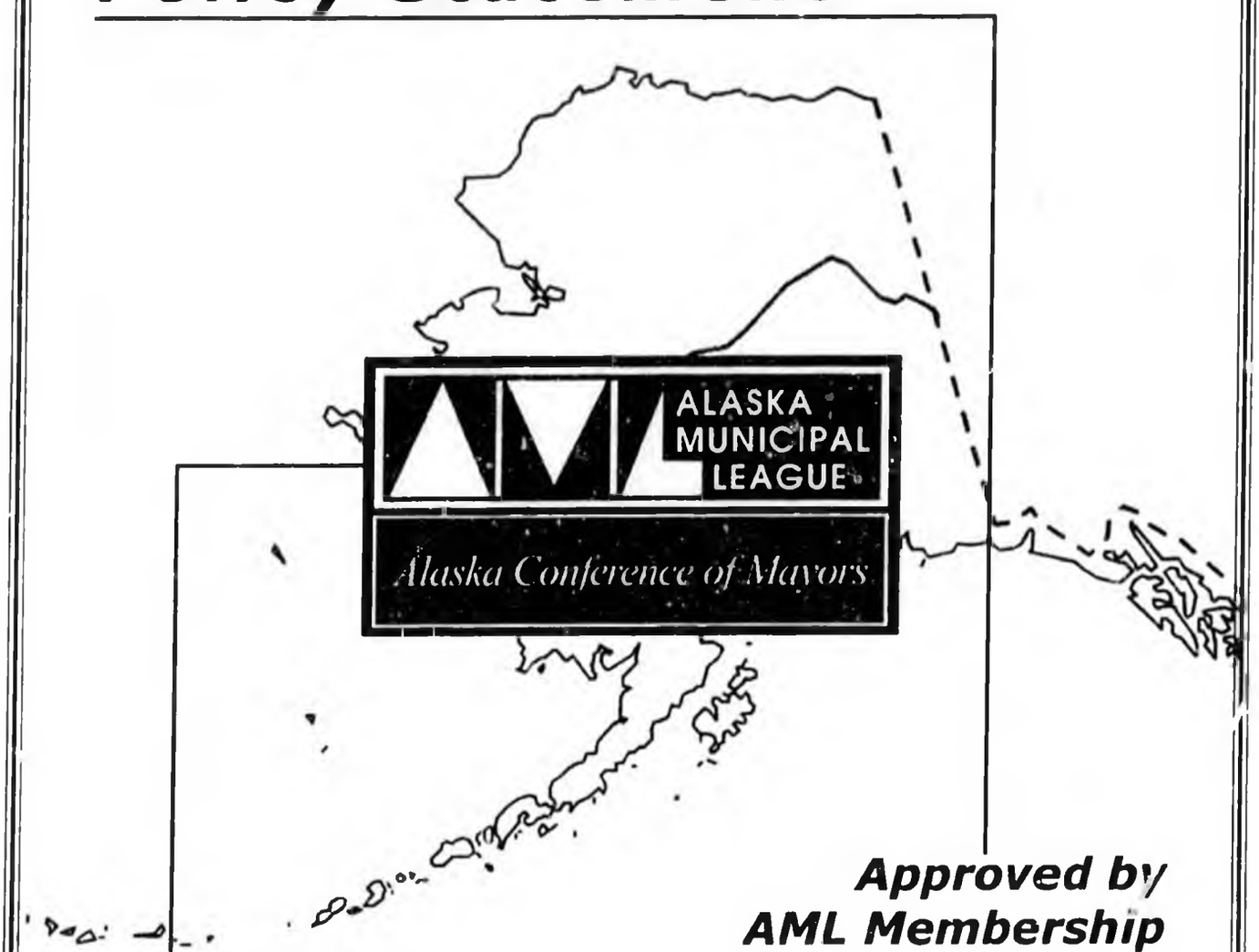
2006
Policy Statement



Approved by
AML Membership
November 2005

Alaska Municipal League
217 Second Street, Suite 200
Juneau, Alaska 99801
Phone (907) 586-1325
Fax (907) 463-5480

4. *Liability for Corrections Community Service Workers:*

The League supports legislation that would require the State of Alaska to assume full responsibility for medical costs and liability related to state court-ordered corrections community service workers.

5. *Liability for Jail/Prison Operations:*

The League supports legislation providing reasonable statutory immunity from civil damages resulting from an act or omission in the administration, operation, or monitoring of a correctional facility.

6. *Municipal Liability Limitations:*

The League supports legislation which limits liability of the State and municipalities for attorney fees.

D. STATE FUNDED SOCIAL PROGRAMS

The League strongly urges the State to adequately fund essential social programs:

- child protection
- substance abuse
- domestic and sexual abuse
- suicide prevention
- Fetal Alcohol Effect/Fetal Alcohol Syndrome
- Mental Health

E. WELFARE

1. *Adequate Funding and Job Opportunities:*

a. The League urges the state to match federal funding dollar-for- dollar under the Alaska Temporary Assistance Program.

b. The League urges the state to fund childcare, work services, and other services designed to help welfare recipients into the workforce statewide.

c. The League urges the state to provide funding for training and economic development to further increase employment opportunities statewide.

2. *Safety Net:*

The League urges a state maintained safety net for those moving from welfare to work. This net may vary with each recipient but should encompass assistance needed for childcare, transportation, training and education, health care, and counseling.

3. *Focus:*

The focus of the Welfare to Work Program should remain on finding and creating jobs, providing supportive services, protecting the welfare of children, and keeping people employed.

STATE OF ALASKA

Frank H. Murkowski, Governor

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

P.O. BOX 110300
JUNEAU, ALASKA 99811-0300
PHONE: (907)465-3600
FAX: (907)465-2075

April 15, 2006

VIA HAND DELIVERY

Honorable Representative Paul Seaton
Chair, House State Affairs Committee
State Capitol, Room 102
Juneau, Alaska 99801

Re: SB 86 / Limiting the Liability of
the State and Municipalities

Dear Chair Seaton:

You asked the Department of Law to provide additional information regarding awards of enhanced attorney's fees to public interest litigants that failed to prevail on the main issues in the case. A copy of a March 10, 2005, letter to Representative LeDoux on this issue is attached.

I would also note that despite statements made to your legislative committee, the main types of beneficiaries of the Court's public interest litigant policy are organizations, such as the ACLU (Revenue of $58 million in fiscal year ending 2005) or Planned Parenthood (Revenue of $59 million in fiscal year ending 2004). In addition, the judgments and claims section of the operating budget for FY 2007 contains public interest litigant attorney's fee payments of approximately $44,000 and $19,000 to sex offenders who challenged the state's registration and DNA testing laws.

I believe this answers all the committee's questions. I look forward to another hearing and movement of the bill to the Judiciary Committee for further review.

Sincerely,

Randy Ruaro
Legislative Liaison

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

FRANK H. MURKOWSKI, GOVERNOR

1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE: (907)269-5274
FAX: (907)278-7022

March 10, 2005 .

Representative Gabrielle LeDoux
House of Representatives
State Capitol, Room 412
Juneau, AK 99801-1182

Re: HB 117

Dear Representative LeDoux:

During our discussion on March 1, 2005, you asked for specific examples of the courts' application of the policy adopted by the Alaska Supreme Court in *Dansereau v. Ulmer*, 955 P.2d 916 (Alaska 1998), that attorney fees for prevailing public interest litigants, may be apportioned only in exceptional circumstances. In that case the Supreme Court required the award of full fees even though the plaintiffs prevailed on only one of three main issues. Later decisions have been even more egregious.

State v. ACLU

One expensive example for the state came in *State v. Alaska Civil Liberties Union*, 978 P.2d 597 (Alaska 1999). In that case the Alaska Civil Liberties Union sued the State of Alaska, asserting that every provision of the 1996 campaign finance reform legislation (Ch. 48 SLA 1996) was invalid because many of the legislation's provisions were allegedly unconstitutional. The Superior Court granted summary judgment to the AkCLU, ruling that all of the legislation's provisions were invalid. Because the AkCLU was a public-interest litigant, the court awarded the ACLU $99,703.75 as its full, reasonable attorney fees.

The state appealed the decision to the Alaska Supreme Court. The Alaska Supreme Court reversed nearly all of the lower court's decision on the merits, holding nine of the eleven challenged provisions in the 1996 reform legislation constitutional and valid. The Court held that the unconstitutional provisions of the legislation were severable from the constitutional provisions, allowing the constitutional provisions to remain in effect. It was, in essence, a resounding victory for the state.

The Alaska Supreme Court remanded the case to the lower court to determine whether the AkCLU was still entitled to an award of attorney fees and expert fees. On remand, the lower court concluded that the AkCLU was still a prevailing public-interest litigant and awarded the AkCLU $101,203.75 in

attorney fees. The state appealed the award, asserting that the AkCLU was not entitled to any attorney fees award because it was not the prevailing party. In memorandum decision (copy attached), the Alaska Supreme Court upheld the full fee award. Justice Eastaugh, who wrote the substantive opinion in the main case, dissented from the decision. The Alaska Supreme Court then awarded the ACLU another $6,610 for attorney fees incurred in the appeal. The claim was submitted to the legislature for payment. (Judgment and Claims form attached).

Cook Inlet Areawide Lease Sale

In litigation over the 1999 Cook Inlet Areawide oil and gas lease sale, the Superior Court ruled that 85 percent of the sale tracts could go forward. The remaining tracts were remanded to the Department of Natural Resources because the court found that the tracts were important beluga whale habitat. The state challenged a request for full attorney fees, arguing that the plaintiff could not be the prevailing party where it only prevailed with such a low percentage of the contested tracts and that, in any event, any fee award should be apportioned. The Superior Court found the plaintiff to be the prevailing party and rejected fee apportionment, granting the plaintiff its full fees of $82,000.

I believe you also inquired about the recent article in the Alaska Law Review about public interest litigant case. I have attached a copy for your use. Note that although the author believes that the Alaska Supreme Court should affirm the lower court decision with respect to HB 145, he concludes at page 353 that there is a problem of fairness created by the award of full fees to public interest litigants that creates an incentive to litigate even marginal claims. Therefore the author recommends that the Court consider revising the public interest litigant policy by granting only partial Rule 82 fees to prevailing public interest litigants. He suggests that removing the ability to obtain full fees for a prevailing claim will disable the incentive for public interest litigants to abuse the process. This is precisely what HB 117 does.

Sincerely,

SCOTT J. NORDSTRAND
ACTING ATTORNEY GENERAL

By: Craig J. Tillery
Craig J. Tillery
Chief Assistant Attorney General

CJT/cam
Enclosures
cc: David Marquez

THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA,	)	Supreme Court No. S-8967/9710
	)	
Appellant,	)	Superior Court No. 3AN-97-5289 CI
	)	
v.	)	
	)	MEMORANDUM OPINION AND JUDGMENT*
ALASKA CIVIL LIBERTIES UNION,	)	
	)	
Appellee.	)	[No. 1041 - August 15, 2001]
	)	

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Michael L. Wolverton, Judge.

Appearances: David T. Jones, Assistant Attorney General, Anchorage, and Bruce M. Botelho, Attorney General, Juneau, for Appellant. Jonathan B. Rubini and Thomas P. Amodio, Foster Pepper Rubini & Reeves LLC, Anchorage, for Appellee.

Before: Fabe, Chief Justice, Matthews, Eastaugh, and Bryner, Justices. [Carpeneti, Justice, not participating.]

EASTAUGH, Justice, dissenting.

In State v. Alaska Civil Liberties Union,[1] we reviewed the constitutionality of Alaska's 1996 Campaign Finance Reform Act, also known as Senate Bill (SB) 191. The superior court granted summary judgment in favor of Alaska Civil Liberties Union (AkCLU), declaring the entire Act unconstitutional under the First Amendment.[2] On appeal by the state, we reversed the superior court's ruling as to nine of the Act's eleven challenged

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* Entered pursuant to Appellate Rule 214.

1 978 P.2d 597 (Alaska 1999), cert. denied, 528 U.S. 1153 (2000).

2 See id. at 602.

provisions;[3] we declared only two provisions to be unconstitutional -- one limiting pre-election contributions, and the other prohibiting legislative session contributions.[4] Because we found these two provisions to be severable, we upheld the constitutionality of the Act as a whole:

> [T]he challenged provisions, with limited exceptions . . . , do not offend rights of speech and association. Reading the bans on non-group entities' expenditures and contributions narrowly, we reverse generally the judgment declaring the Act unconstitutional. But we affirm as to the invalidity of the pre-election year and legislative session contribution bans.[5]

Upon reaching this decision, we remanded the case for consideration of unresolved issues on attorney's fees. We asked the superior court to determine whether AkCLU was the prevailing party in the proceedings before that court and, if so, to ascertain the attorney's fees and costs that AkCLU should be awarded.[6] On remand, the superior court found AkCLU to be the prevailing party, established its reasonable fees to be $101,203.75, and awarded that amount in full to AkCLU as a public interest litigant. The state appeals.

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[3] See id. at 607-14, 614-17, 617 & 618-20, 621-26, 631-32, 632-33, 630.

[4] See id. at 626-29, 630-31. Moreover, we concluded that one of the nine provisions that we declared constitutional required a narrowing construction to avoid unconstitutionality. See id. at 606-07 & 612.

[5] Id. at 600.

[6] The court ordered each party to pay its own attorney's fees on appeal. See Order, No. S-8778 (April 16, 1999).

The state argues that the superior court erred in finding AkCLU to be the prevailing party. Noting that AkCLU consistently advocated invalidating the entire Act, the state asserts that "[t]he main issue in this case was whether the 1996 reform legislation [was] constitutional." Since this court held that the Act generally passed constitutional muster, the state reasons that AkCLU did not prevail on the main issue. Accordingly, the state urges us to find the superior court's designation of AkCLU as the prevailing party manifestly unreasonable.

In response, AkCLU challenges the state's premise that a law can be found "'only a little bit' unconstitutional," noting that this premise seems "particularly curious in a case where First Amendment rights to engage in the electoral process are involved." AkCLU defends the superior court's award of attorney's fees as a sound exercise of discretion, insisting that "[n]o restriction on First Amendment rights should be dismissed as immaterial or insubstantial" and that the two provisions of the Act that were declared unconstitutional were "an integral and burdensome part of the new campaign finance laws."

We have recognized that a trial court's award of attorney's fees is generally subject to reversal only for abuse of discretion or manifest unreasonableness.[7] More specifically, we have held that "[d]esignation of the prevailing party 'is committed

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[7] See Hillman v. Nationwide Mut. Fire Ins. Co., 855 P.2d 1321, 1326 (Alaska 1993); see also Shepherd v. State, Dep't of Fish & Game, 897 P.2d 33, 44 (Alaska 1995); Day v. Moore, 771 P.2d 436, 437 (Alaska 1989).

to the broad discretion of the trial court.'"[8] Alaska Civil Rule 82 provides that the trial court shall award the prevailing party attorney's fees.[9] Although the rule does not define "prevailing party," we have said that a prevailing party is "the one 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."[10] In the present case, this court is divided on the question of whether the superior court's award of attorney's fees is an abuse of discretion.[11]

The majority of the court focuses on the nature of the claims that AkCLU presented rather than on the size or scope of its ultimate recovery.[12] Adopting this focus, the court finds AkCLU's basic claims to be whether the challenged Act violated the

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[8] Hillman, 855 P.2d at 1326 (quoting Apex Control Sys., Inc. v. Alaska Mechanical, Inc., 776 P.2d 310, 314 (Alaska 1989)); Dansereau v. Ulmer, 955 P.2d 916, 918 (Alaska 1998); Alaska Ctr. for the Env't v. State, 940 P.2d 916, 921 n.4 (Alaska 1997); Hickel v. Southeast Conference, 868 P.2d 919, 927-28 (Alaska 1994); Tobeluk v. Lind, 589 P.2d 873, 878 (Alaska 1979); Cooper v. Carlson, 511 P.2d 1305, 1308-09 (Alaska 1973).

[9] Alaska Rule of Civil Procedure 82(a) states that "the prevailing party in a civil case shall be awarded attorney's fees calculated under this rule."

[10] Hillman, 855 P.2d at 1327 (quoting Day v. Moore, 771 P.2d 436, 437 (Alaska 1989)) (internal quotation marks omitted).

[11] Justice Carpeneti is recused from participating in this case. See Recusal Notice, S-8976 (July 23, 1999).

[12] See Hillman, 855 P.2d at 1327-28 (holding that trial court erred in refusing to designate party as prevailing when party won substantial affirmative recovery based on two of three issues that were central to the case).

constitution. As long as AkCLU prevailed to some extent, the superior court could properly declare AkCLU the prevailing party unless AkCLU's recovery was de minimis[13] or stemmed from the resolution of an issue that was incidental to AkCLU's basic claims.[14] Because AkCLU succeeded to some extent on its claims of unconstitutionality and its success was neither de minimis nor incidental to its claim, the court holds that the superior court did not abuse its discretion in awarding fees to AkCLU.

In contrast, Justice Eastaugh would emphasize the nature of the relief sought by AkCLU and the extent to which AkCLU obtained its expressed goal.[15] Because AkCLU sought to invalidate the entire Act as unconstitutional, succeeded in having only two of its eleven challenged provisions (both severable) declared unconstitutional, and ultimately failed to bar enforcement of the Act as a whole, Justice Eastaugh would hold that AkCLU could not reasonably be deemed to have prevailed on the main issue. Justice Eastaugh would therefore reverse.

The superior court's award of attorney's fees is AFFIRMED.

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[13] See id. at 1327.

[14] See id. at 1327-28.

[15] See Alaska Ctr. for the Env't v. State, 940 P.2d 916, 922 (1997) (holding that the superior court erred by not granting attorney's fees to the party that prevailed on the main issue -- which was the rejection of a settlement agreement).

Alaska Pharmacists Association

April 18, 2006

Honorable Paul Seaton
State House of Representatives
Alaska State Capitol
Juneau, Alaska 99801
Chair of the House State Affairs Committee

The Honorable Representative Paul Seaton,

The Alaska Pharmacists' Association would like to go on record as opposing SB 86, State/Municipal Liability for Attorney Fees. Thank you for choosing not to move it from your committee to date. We ask that you continue to hold the bill so that it does not progress any further this session.

We believe SB 86 could have a chilling effect on private citizen participation in challenging questionable government practices through the courts. All avenues of citizen participation in shaping government should be kept as open as possible.

Thank you for your thoughtful consideration of this important issue.

Please feel free to contact me if you any questions regarding our position.

Sincerely,

Dirk White RPh.
Legislative Committee Co-Chair
Harry Race Pharmacy
106 Lincoln Street
Sitka, Alaska 99835
(907) 738-6337

ALASKA PHARMACISTS ASSOCIATION

To: Representative Seaton
Chair of the House State Affairs Committee
From: Nancy Davis, Executive Director
Date: 4/19/06
Re: SB 86

The Alaska Pharmacists Association would like to go on record as opposing SB 86, State/Municipal Liability for Attorney Fees. Thank you for choosing not to move it from your committee to date. We ask that you continue to hold the bill so that it does not progress any further this session.

We believe SB 86 could have a chilling effect on private citizen participation in challenging questionable government practices through the courts. All avenues of citizen participation in shaping government should be kept as open as possible.

Thank you for your thoughtful consideration of this important issue.

Please feel free to contact me if you any questions regarding our position.

Nancy Davis

Nancy Davis, Executive Director
Alaska Pharmacists Association

E-mail akphrmcy@alaska.net

4107 Laurel Street, Suite 101 • Anchorage, Alaska 99508 • (907) 563-8880 • Fax (907) 563-7880

Juneau Office
130 Seward St #209
Juneau, Alaska 99801
Phone: (907) 586-3650
Fax: (907) 463-4493
www.andvsa.org

ANDVSA
Alaska Network on Domestic Violence & Sexual Assault

Sitka Office
PO Box 6631
Sitka, Alaska 99835
Phone: (907) 747-7545
Fax: (907)747-7547

April 19, 2006

Representative Paul Seaton
State Capitol
Room 102
Juneau, AK 99801

Dear Chairman Seaton,

Thank you for the opportunity to comment on SB 86 before the State Affairs Committee. Enclosed with this letter is my testimony against SB86.

In response to inquiries from the committee regarding the Alaska Network on Domestic Violence and Sexual Assault's (ANDVSA) history as a public interest litigant, I have included a copy of the third district Superior Court opinion and judgment from *Jane Doe, and ANDVSA vs. the State of Alaska.*

In this case we successfully sued the Alaska Court System to provide all three types of domestic violence protective orders authorized by the legislature on the domestic violence court forms. Without this important public interest litigation, victims of domestic violence and sexual assault would not have access to needed safety protections as authorized under the law. Passing SB 86 will make it more difficult for public interest groups to force the government to comply with its own legal obligations.

If you have any questions, please feel free to contact me at 907-586-3650 x 24.

Sincerely,

Kari Robinson

Kari Robinson
ANDVSA Legal Advocacy Project
Director/ Attorney

cc: Peggy Brown, ANDVSA Executive Director

Juneau Office
130 Seward St #209
Juneau, Alaska 99801
Phone: (907) 586-3650
Fax: (907) 463-4493
www.andvsa.org

ANDVSA
Alaska Network on Domestic Violence & Sexual Assault

Sitka Office
PO Box 6631
Sitka, Alaska 99835
Phone: (907) 747-7545
Fax: (907) 747-7547

SB 86- Public Interest Litigants

April 13, 2006

Testimony Against SB 86

Kari Robinson, Staff Attorney
Alaska Network on Domestic Violence & Sexual Assault

Please accept this statement in opposition to SB 86. The Alaska Network on Domestic Violence & Sexual Assault is a non-profit membership corporation with twenty member programs across the State of Alaska. We oppose SB 86 on the grounds that it will have a chilling effect on the ability of parties acting in the public interest to challenge the state or local government when it has failed to comply with its obligations under the law.

The typical plaintiff in a public interest lawsuit is an individual, a non-profit advocacy organization, or a charitable organization. The typical suit involves a party with limited financial resources who needs to hire outside counsel against a governmental entity with access to substantially greater financial and legal resources. This was the case with our agency when we successfully sued the Alaska Court System to provide all three types of domestic violence protective orders authorized by the legislature on the domestic violence court forms. Without this important public interest litigation, victims of domestic violence and sexual assault would not have access to needed safety protections authorized under the law. This proposed legislation would make if difficult for us to take on victim safety issues in the future.

Under the current law, a public interest litigant only receives reimbursement if a) he or she is acting in the public interest and b) he or she is successful in showing that the government acted wrongly. The key is to set up a system that doesn't reward improper behavior- or there will be no incentive for the government to stop inappropriate action if there is no one willing to speak out against such action through public interest legal action. This bill will affect those in our society least able to afford it – the poor, minority groups, the disabled, and the elderly- all of whom have benefited from public interest litigation at one time- and many of whom would not have been able to bring such actions in their own right. This bill will make it harder for someone acting in the public interest to force the government to comply with its legal obligations. We strongly urge you to reject this bill.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

JANE DOE, and the ALASKA NETWORK ON DOMESTIC VIOLENCE AND SEXUAL ASSAULT,	)	
Plaintiffs,	)	
vs.	)	
STATE OF ALASKA, ALASKA COURT SYSTEM ADMINISTRATIVE OFFICE OF THE COURTS, and ART SNOWDEN, ADMINISTRATIVE DIRECTOR,	)	
Defendants.	)	
	)	Case No. 3AN-96-5455 Civil

MEMORANDUM OPINION AND JUDGMENT

This case comes before the court on cross-motions for summary judgment dealing with statutory construction of various sections of the Domestic Violence Prevention and Victim Protection Act of 1996 and the forms utilized by the Alaska Court System to implement the Act. At issue is the statutory construction of sections of the act codified under AS 18.66.100 and AS 18.66.110 which provide for the granting of domestic violence protective orders.

As the issues before the court deal with statutory construction, and there are no issues of material fact, disposing of this case by way of summary judgment under Alaska Civil Rule 56 is appropriate.

I. FACTUAL BACKGROUND

On May 6, 1996, the Alaska Legislature, through the unanimous vote of both the House and Senate, enacted the Domestic Violence

Prevention and Victim Protection Act of 1996 (hereinafter "DV Act"). Through the Act, the legislature directed that the Alaska Court System (hereinafter "ACS") "after consulting with the Council on Domestic Violence and Sexual Assault and other interested persons and organizations, shall prepare forms for petitions, protective orders, and instructions for their use by a person seeking a protective order under this chapter." AS 18.66.150. The DV Act took effect on July 1, 1996.

On July 12, 1996, Jane Doe and the Alaska Network on Domestic Violence and Sexual Assault (hereinafter "Network") filed the present lawsuit alleging that on July 1, 1996 the ACS put into effect new domestic violence forms which were not in accordance with the requirements of the DV Act. According to the Network, the ACS forms were deficient in three substantial ways.

A. EX-PARTE PROTECTIVE ORDER IN CONJUNCTION WITH OR INDEPENDENT FROM A SIX MONTH ORDER

The DV Act provides for three types of protective orders. AS 18.66.100 provides for a six-month regular protective order; AS 18.66.110(a) provides for a 20-day "ex parte" protective order; and 18.66.110(b)-(c) allows for a peace officer to apply for an "emergency" 72-hour protective order. The Petition for Protective Order form utilized by ACS immediately following the July 1, 1996 effective date of the DV Act (Form DV-100 (6/96)) gave a petitioner the option of either applying for a regular six-month protective order alone; or applying for a regular six-month protective order in conjunction with a 20-day ex-parte protective order. There was

no provision, under Form DV-100 (6/96), for a petitioner to seek a 20-day ex parte protective order absent also applying for a regular six-month protective order.

A revised version of the Petition for Protective Order form, DV-100 (11/96) -- which is the form currently in use -- does not change the requirement that in order for a petitioner to apply for a 20-day ex parte protective order, a petitioner must also apply for a regular six-month protective order. This current form only gives a petitioner the choice of selecting from one of two options as follows:

> I am requesting:
>
> [ ] only a long-term protective order (which requires prior notice to the respondent and a court hearing).
>
> [ ] both a long-term protective order and a 20-day protective order (called an "ex parte" order, which can take effect immediately without prior notice to the respondent).

Form DV-100 (11/96) at 1.

The Network contends that the DV Act authorizes a petitioner to apply for a 20-day ex parte protective order without having to also apply for a six-month long-term protective order. The current Petition for Protective Order form, according to the Network, is in violation of both the letter and the legislative purpose of the DV Act. The Network asserts that by requiring victims of domestic violence to apply for the six-month protective order when applying for a 20-day ex parte order, some victims of domestic violence may be dissuaded from filing for any protective order at all, and this may lead to consequences unforseen by the legislature when voting

on the DV Act. The Network asserts that the ACS has abused its discretion under the DV Act when it imposed these conditions on the 20-day protective order that were not written into the DV Act.

The ACS, on the other hand, claims that Form DV-100 (11/96) and the requirement that a 20-day ex parte protective order be sought in conjunction with a six-month protective order embodies the language of the DV Act. The DV Act states, in part:

> A person who is a victim of a crime involving domestic violence may file a petition under AS 18.66.100(a) and request an ex parte protective order.

AS 18.66.110(a) (emphasis added). The ACS claims that the conjunctive "and" in the language of the act sets forth that the 20-day order may only be sought in conjunction with the six-month order. The ACS argues that by allowing a 20-day ex parte order without the requirement that a petitioner also file for a six-month order does not afford respondents adequate due process protections since there is no notice and hearing requirement for the 20-day order whereas there is for the six-month order.

B. REQUIRING THE ADDRESS OF PETITIONER

The second area where the Network claims the forms are in violation of the DV Act deal with the requirement that a petitioner's home and work address be revealed on court filings. When the DV Act first took effect, on July 1, 1996, Child Custody and Support Order Form DR-300 (10/95) was in use where a domestic violence petitioner was seeking temporary child support. This form requests information on a petitioner's home and work address and

phone number. The Network alleges that this information may jeopardize the safety of domestic violence petitioners who are attempting to keep this information confidential from the respondent.

During the pendency of this case, the ACS determined that these addresses were not necessary for Child Support and Enforcement Division (CSED) purposes, and the ACS created a new Temporary Child Support Order form specifically for domestic violence circumstances, Form DV-200 (11/96). The new form does not require a petitioner to disclose a home or work address or telephone number.

C. REQUIRING THE LISTING OF PRIOR COURT CASES

The terms of the DV Act require that a petitioner list all the "pending civil actions or domestic violence criminal actions involving either the petitioner or respondent." AS 18.66.150 (b). The language of the DV Act does not explicitly require a petitioner to list any past court cases. Under the Petition for Protective Order form used immediately after the July 1, 1996 effective date of the DV Act, Form DV-100 (6/96), a petitioner was required, however, to reveal all court cases, within the prior five years, in which either the petitioner or the respondent were involved. The Network urges that this requirement was overbroad and in violation of the DV Act. The ACS counters that the DV Act allows it to require information on past cases by virtue of the fact that the words of the DV Act say that a petition for a protective order

must include "other information required". See AS 18.66.150 (b).

With the introduction of the new Form DV-100 (11/96), the ACS no longer requires a petitioner for a protective order to disclose information on past cases. Instead, Form DV-100 (11/96) requires only pending cases involving the parties to be listed:

> The following are all the pending civil (for example, divorce or child custody) cases or domestic violence criminal cases, in this or another state, involving either me or respondent.

Form DV-100 (11/96) at 5. Additionally, a petitioner may include other court cases at the petitioner's choosing: "The following are other court cases (civil or criminal) involving the respondent that I want the court to know about." Form DV-100 (11/96) at 6.

The Network asserts that, with the creation and use of Form DV-100 (11/96), the ACS has conceded to the position that it is not permitted to require that a petitioner give information of past court cases. The ACS, while declaring that the use of the revised Form DV-100 (11/96) has obviated the need to litigate this issue, nevertheless claims that it has made no concession. Under the "other information required" provision of AS 18.66.150 (b) (discussed above), the ACS claims that it still has the authority to require information of a petitioner and respondent's past court cases.

II. STANDARD OF REVIEW

Before the court is a matter of pure statutory interpretation. Statutory interpretation is the "regular grist for judicial mills." Tesoro Alaska Petro. v. Kenai Pipe Line, 746 P.2d 896, 904 (Alaska

1987). Where cases involve statutory interpretation, "the independent judgment test is the appropriate standard of review." Id. at 904.

Given that the DV Act is a new statute, its construction is a matter of first impression. This court exercises its own judgment in interpreting the DV Act, and it is not bound to the ACS interpretation of the said act.

This court's interpretation of the DV Act is based on the language of the statute itself. See Borg-Warner Corp. v. AVCO Corp., 850 P.2d 628, 633 n.12 (Alaska 1993) ("Statutory construction begins with an analysis of the language of the statute construed in view of its purpose.") In interpreting the DV Act, this court will adopt "the rule of law which is most persuasive in light of precedent reason and policy." See M.R.S. v. State, 897 P.2d 63, 66 (Alaska 1995) (citations omitted).

III. ARGUMENTS AND ANALYSIS

A. UNDER THE DV ACT A PETITIONER HAS THE RIGHT TO AN INDEPENDENT 20-DAY EX PARTE PROTECTIVE ORDER

1. The Wording of the DV Act

Under the forms created by the ACS to implement the DV Act, namely Form DV-100 (11/96), a petitioner cannot file for a 20-day ex parte protective order independently. Under the current forms, the petitioner can only apply for a 20-day ex parte order in conjunction with a six-month regular (i.e., requiring notice to the respondent and a hearing) protective order. The ACS insists that this limitation on the 20-day ex parte order is written into the

DV Act. The primary basis for this contention on the part of the ACS is the following language:

> A person who is a victim of a crime involving domestic violence may file a petition under AS 18.66.100(a) and request an ex parte protective order.

AS 18.66.110(a) (emphasis added).

It is the ACS's contention that the above language establishes that an ex parte protective order is not independently provided for by the DV Act. The ACS argues that the conjunction "and" in AS 18.66.110(a) provides that the legislature directed that the 20-day order may only be sought where a six-month order is also sought. In designing Form DV-100 (11/96), the ACS acts in accordance with this position. The ACS claims that were an independent 20-day ex parte order to have been provided for, AS 18.66.110(a) would have read: "[a] person . . . may file a petition under this section for an ex parte protective order." The wording of AS 18.66.110(a) lends itself to some ambiguity. However, the ACS's interpretation of the DV Act holding that the act excludes an independent 20-day ex parte order is flawed.

AS 18.66.110(a) also uses the auxiliary verb "may" in the following context:

> A person who is a victim of a crime involving domestic violence may file a petition under AS 18.66.100(a) and request an ex parte protective order.

Id. (emphasis added). The wording of the above passage does not so narrowly lend itself to the ACS's interpretation. The ACS interprets AS 18.66.110(a) as if to read: "[a] person who is a victim of a crime involving domestic violence may request an ex

parte protective order if and only if the petitioner also files for a six-month protective order." The subsection's plain wording says far less than this. AS 18.66.110(a), as worded, more accurately states that one may file for both a petition under AS 18.66.100(a) along with an ex parte protective order, yet it does not direct that one must file for the two together.

If a narrow reading -- that the two types of orders must be filed together -- is given effect, this would also appear to eliminate the existence of an independent six-month protective order (which the ACS has indeed provided for in Form DV-100 (11/96)). Construing the plain language of the statute with a view of its intended purpose of protecting victims of domestic violence, the court is not persuaded by ACS' position.

2. AS 18.66.100(a)

Additional factors support a determination that an independent 20-day ex parte order exists under the statute. AS 18.66.110(a) cross-references AS 18.66.100(a). According to the ACS, AS 18.66.100(a) refers to the six-month protective order. It is through AS 18.66.110(a) cross-referenced with AS 18.66.100(a) that the ACS claims they are instructed that a 20-day order may not be filed independently. AS 18.66.100(a), contrary to the ACS assertion, does not even refer specifically (neither explicitly nor by inference) to the six-month protective order. Subsection (a) of AS 18.66.100 reads as follows:

> A person who is or has been a victim of a crime involving domestic violence may file a petition in the district or

> superior court for a protective order against a household member. A parent, guardian, or other representative appointed by the court under this section, may file a petition for a protective order on behalf of a minor. The court may appoint a guardian ad litem or attorney to represent the minor. Notwithstanding AS 25.24.310 or this section, the office of public advocacy may not be appointed as a guardian ad litem or attorney for a minor in a petition filed under this section unless the petition has been filed on behalf of the minor.

This subsection merely delineates those individuals that may file a protective order petition (on behalf of themselves or another). Logically, under AS 18.66.110(a), the cross-reference to AS 18.66.100(a) merely sets forth, with specification, those individuals which may file an ex parte protective order.

AS 18.66.110(a) merely incorporates the list of those eligible to file a six-month order petition into the list of those eligible to file an 20-day order ex parte petition. If the legislature had intended otherwise, it would have referenced subsection (b) of AS 18.66.100, not subsection (a), into AS 18.66.110(a). It is subsection (b) that establishes a six-month protective order. Subsection (a) of AS 18.66.100 does no such thing. Contrary to the ACS's assertion, AS 18.66.110(a) does not combine the six-month order with the 20-day ex parte order: it merely defines those eligible to file a petition for a 20-day ex parte order.

The ACS points out that the language of AS 18.66.110(a) duplicates the opening lines of AS 18.66.100(a): "A person who is or has been a victim of a crime involving domestic violence may file a petition . . . ." The ACS urges that this somehow establishes that the cross reference in AS 18.66.110(a) was for some purpose other than defining who is eligible to file a

petition. The ACS would have it that the legislature, therefore, must have been referring to the six-month order when it referenced this subsection. This argument is unpersuasive since, first, there is no ambiguity as to what subsection the legislature was referencing in AS 18.66.110(a): the legislature explicitly referenced subsection (a) which does not talk about a six-month order at all. Second, since there is no ambiguity as to which subsection the legislature was referring to, it is of no matter that the opening phrase of the two passages use the same language. AS 18.66.110(a) merely contains a vague provision (on who can file a petition) that refers to AS 18.66.100(a), a more detailed provision (on who can file a petition).

3. Legislative History

The ACS challenges attempts by the Network to introduce various documents as legislative history, including the affidavits of Representative Sean Parnell (the DV Act's sponsor) and Deputy Attorney General Laurie Otto. Statements made by legislators or witnesses after the passage of an act do not, in and of themselves, constitute legislative history, for there is no record that the legislative body was privy to the information contained. Neither should the Model Code on Domestic and Family Violence (on which the DV Act is based) constitute legislative history, since there is no indication that the Legislature adopted the Model Code as a whole, and since there is no indication that the individual legislators considered the Model Code comments.

The ACS claims that the plain language meaning of AS 18.66.110(a) is clear and no legislative history supports the Network's position. As discussed above, the plain language meaning of the statute tips in favor of the Network's position. Any dearth of legislative history hence does not disadvantage the Network, but rather, disadvantages the ACS. The ACS has failed to put forth any legislative history in support of its position that a 20-day ex parte order cannot be requested on its own.

To an extent, the limited existing legislative history supports the Network's position that an independent 20-day ex parte order is authorized. Included in the house floor debate, which clearly constitutes legislative history, are comments by Representative Parnell in which he states that:

> HB 314 establishes three orders; one is a three-day order, one is a twenty-day order and the other is a six-month order. The three-day order and the twenty-day order are ex parte in nature, meaning that they can be obtained by the victim. The six-month order requires a hearing; it requires notice and an opportunity to be heard by the court before that order is issued.

Transcript of May 6, 1996 House Proceedings at 3. In the proceedings on the DV Act, nowhere on record is there an indication that the 20-day order can only be petitioned for in conjunction with the six-month order. As the above excerpt indicates, the DV Act was described as offering three distinct types of orders. There is no indication that the legislators were under the impression that any one type of order can only be gotten in conjunction with another. In spite of this support, though, the legislative history does not specifically speak to the purpose of

AS 18.66.110(a).

4. Overall Purpose, Common Sense and Good Policy

When "the legislative history sheds no light as to the specific purpose of [a] subsection", the court must examine the plain language of the subsection "in light of [the act's] overall purpose and in accordance with common sense and good policy." Saunders Properties v. Municipality of Anchorage, 846 P.2d 135, 138 (Alaska 1993). While the legislative history does not specifically discuss AS 18.66.110(a), the purpose of the DV Act is clear. The DV Act is designed to protect victims of domestic violence. This is evident from the title: 'Domestic Violence Prevention and Victim Protection Act of 1996". This is evident from the floor discussions on the bill, in which there was talk of improving "the safety of domestic violence victims" (Testimony of Senator Salo, Senate Proceedings (May 3, 1996); and "ennanc[ing] protection for domestic violence victims" (Testimony of Representative Parnell, House Proceedings (May 6, 1996). A reading of the Senate and House debate can lead to no other reasonable conclusion than that the purpose of the DV Act was to protect victims of domestic violence.

The DV Act is clearly a victim's rights law. It is clearly intended to provide the maximum amount of protection to victims of domestic violence. When this court considers this purpose, the proposition that an independent 20-day ex parte order exists under the DV Act is firmly grounded. The proposition that AS 18.66.110(a) requires a 20-day ex parte order request to join a

six-month order petition tends to undermine the purpose of the DV Act.

As a matter of common sense, by allowing victims of domestic violence the option of requesting a 20-day ex parte protective order independent of a 6-month order, the victim of domestic violence is offered a greater encouragement to seek some degree of protection. Six months is a long period and the prospects of filing a six-month order may seem overwhelming and daunting to some victims. Others may not apply because they merely want a short cooling-off period from their abusers, and when they find that a six-month period is required, they may elect no protection at all. Requiring a linkage of a 20-day ex parte order to a six-month order could have a chilling affect on some domestic violence victims. While the court does not have before it cold hard statistics as to the percentage of victims that would decline to file a 20-day order request were it attached to a six-month petition, common sense informs the court that if the independent 20-day order was permitted, the incentive to seek protection would -- at least to some degree -- be increased. As a matter of public policy, it is desireable to increase the incentive for victims of domestic violence to come forward and seek protection from their abusers.

The ACS has argued that requiring that a six-month order be sought in conjunction with a 20-day ex parte order does not amount to any real limitation. A petitioner, for instance, could just withdraw the petition after the 20 days should the petitioner prefer not to seek a full six-month protective order, or the

petitioner could fail to show up at the hearing required for a six-month order. This is simply not an acceptable substitute for allowing an independent 20-day ex parte order. A pro se petitioner may not be fully appraised of the right to withdraw a petition.

5. The DV Act Scheme vs. Civil Injunction Rules

The ACS proposes that the petition for protective orders under the DV Act is essentially the same as a petition for a civil injunction under Rule 65 of the Alaska Rules of Civil Procedure. Under Rule 65, it is accepted that:

> a party who initially obtains a TRO is not entitled to receive its benefits indefinitely by not proceeding to request a preliminary injunction hearing.

Ostrow v. Higgins, 722 P.2d 936, 940 (Alaska 1986) (citations omitted). The ACS urges that this holding precludes allowing an ex parte order under the DV Act without also requiring that the petitioner seeks a six-month order, since doing so would be like allowing an indefinite TRO without proceeding to a preliminary injunction hearing. This is an unpersuasive argument. The 72-hour, 20-day and six-month orders now utilized in the domestic violence context in the State of Alaska are the product of the DV Act. The DV Act's scheme of protection orders was designed and enacted by the legislature, and is not bound to the general civil injunction requirements of Rule 65.

6. The Rights of the Accused

The ACS has expressed concern that the existence of an independent 20-day ex parte protective order would jeopardize the respondent's right to notice and hearing, since the ex parte order can (by definition) be implemented without notice or an opportunity for a hearing to the respondent. The DV Act contains two provisions which adequately address these concerns.

First, under the act, an ex parte protective order may be dissolved:

> An ex parte protective order expires 20 days after it is issued unless dissolved earlier by the court at the request of either the petitioner or the respondent and after notice and, if requested, a hearing.

AS 18.66.110(a) (emphasis added). Secondly, an ex parte order may be modified:

> Either the petitioner or the respondent may request modification of a protective order. If a request is made for modification of . . . an ex parte protective order under AS 18.66.100(a), the court shall schedule a hearing on three days' notice or on shorter notice as the court may prescribe; the court shall hear and rule on the request in an expeditious manner.

AS 18.66.120(a)(1) (emphasis added). Given these provisions, the respondent in a DV Act protective order action is not deprived of an opportunity to be heard where an ex parte protective order is granted.

B. THE ISSUES OF REQUIRING THE ADDRESS OF PETITIONER AND REQUIRING THE LISTING OF PRIOR CASES ARE MOOT

As stated previously, the ACS has made changes to the domestic violence forms so that they no longer require the disclosure of a petitioner's home and work address and so that they no longer

require the disclosure of prior cases within the last five years involving either the petitioner or respondent. These changes were clearly appropriate. The DV Act is designed to afford victims of domestic violence protection from their abusers. Requiring the listing of a petitioner's address with the potential for disclosure to the respondent would not be consistent with the DV Act's intent to protect a victim of domestic violence. Requiring the listing of all prior cases within the last five years involving either the petitioner or respondent was too broad, and presented an undue burden to the petitioner.

A claim is moot if it has lost its character as a present, live controversy. Kodiak Seafood Processors Ass'n v. State, 900 P.2d 1191, 1195 (Alaska 1995) (citing Kleven v. Yukon-Kovukuk School Dist., 853 P.2d 518, 523 (Alaska 1993) (citations omitted)). In order for a court to review a controversy, in general,

> [t]he controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

Id. (quoting Jefferson v. Asplund, 458 P.2d 995, 998-99 (Alaska 1969) (citations omitted)).

The ACS no longer utilizes Child Custody and Support Order Form DR-300 (10/95) in the domestic violence protective order context. Instead, it now utilizes Temporary Child Custody Order (Domestic Violence) Form DV-200 (11/96), which does not require a petitioner's address information. The issue of whether the ACS

should be enjoined from using Form DR-300 (10/95) in the domestic violence protective order context because it requires information regarding a petitioner's home and work address is now, therefore, moot. The question of whether the ACS should be enjoined from requiring a domestic violence protective order petitioner from listing a work and home address on court documents is no longer a live controversy since the form currently used no longer requires a petitioner to list such addresses.

The issue of whether the ACS should be enjoined from requiring a petitioner to list "all court cases within the last five years" involving either petitioner or respondent is similarly moot. For the ACS, through the introduction of the revised Form DV-100 (11/96), no longer requires that such information be divulged. The question no longer presents a live controversy.

Both parties have acknowledged that the replacement of Form DV-100 (6/96) with Form DV-100 (11/96) obviates the need to litigate the "prior court case" issue. Both parties have also acknowledged that the replacement of Form DR-300 (10/95) in the domestic violence context with Form DV-200 (11/96) obviates the need to litigate the "confidentiality of address" issue. Neither of the parties have put forth an argument that, despite the mootness of both these issues, they fall under an exception to the mootness doctrine.

For a court to review a matter despite the absence of a live controversy (i.e., where the controversy is moot), the following factors are applied:

> 1) whether the disputed issues are capable of repetition.
> 2) whether the mootness doctrine, if applied, may repeatedly circumvent review of the issues and,
> 3) whether the issues presented are so important to the public interest as to justify overriding the mootness doctrine.

DHSS v. Alaska State Hospital, 856 P.2d 775, 766 (Alaska 1993). The issues at hand are presumably capable of repetition since the ACS could arguably choose, in the future, to alter its forms in a manner by which a petitioner may, once again, be required to list past court cases or list the petitioner's address. Nevertheless, the two issues at hand do not fit under the exception to the mootness doctrine since, should the ACS alter the forms in such a manner, the Network would have redress through filing a new suit at such a time. The issues would not repeatedly circumvent review.

IV. CONCLUSION

A petitioner filing for protection under the Domestic Violence Prevention and Victim Protection Act of 1996 has the right to seek the following relief:

1. An independent ex parte emergency protective order under AS 18.66.110 which expires 20 days after it is issued;

2. An independent six (6) month protective order under AS 18.66.100(b); or

3. Both an ex parte 20-day protective order in conjunction with a regular six-month protective order.

Subsequent to the filing of this litigation, the Alaska Court System made various appropriate changes to the forms in use by

petitioners applying for a domestic violence order. The forms currently in use no longer require the petitioner to list a home and work address, nor do they mandate that a petitioner list all cases in which either the petitioner or the respondent were involved during the last five years. As a result of the changes made by the Alaska Court System to the forms, the issues raised by the plaintiffs in these areas have become moot.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Alaska Court System prepare and utilize a revised Form DV-100 that provides proper notice that a petitioner may request the following protective orders:

[ ] an ex parte 20-day protective order which takes effect immediately and without prior notice to the respondent.

[ ] a six-month protective order which can be granted only after notice to the respondent and a court hearing.

[ ] both an ex parte 20-day protective order (which can take effect immediately, without prior notice to the respondent) and a regular 6-month protective order (which can be granted only after notice to the respondent and a hearing).

Dated this 13th day of March, 1997, at Anchorage, Alaska.

RENE J. GONZALEZ
SUPERIOR COURT JUDGE

I certify that on 3-13-97
a copy of the above was mailed to each
of the following at their addresses of
record: Lombardi

Secretary/Deputy Clerk

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

JANE DOE, and the ALASKA NETWORK ON DOMESTIC VIOLENCE AND SEXUAL ASSAULT,	)
Plaintiffs,	)
vs.	)
STATE OF ALASKA, ALASKA COURT SYSTEM ADMINISTRATIVE OFFICE OF THE COURTS, and ART SNOWDEN, ADMINISTRATIVE DIRECTOR,	)
Defendants.	)
	) Case No. 3AN-96-5455 Civil

FINAL JUDGMENT

The above-entitled parties, through respective counsel, having entered into a Stipulation Regarding Attorneys' Fees and Costs, dated April 25, 1997, and this court, after consideration thereof, having entered an order in accordance with same, now adjudges that,

Pursuant to this court's Memorandum Opinion and Judgment, dated March 13, 1997, ordering, adjudging and decreeing revision of the Form DV-100 to permit petitioners to request a 20-day *ex parte* protective order without also requesting a 6-month order, and pursuant to this court's order regarding attorneys' fees and costs,

Gilmore & Doherty
ATTORNEYS AT LAW
RESOLUTION PLAZA
1029 W. 3rd AVE., SUITE 300
ANCHORAGE, ALASKA
99501-1982
TEL (907) 279-4506
FAX (907) 279-4507

final judgment is entered in favor of the plaintiffs, Jane Doe and the Alaska Network on Domestic Violence and Sexual Assault in the amount of nineteen thousand dollars ($19,000.00).

DATED this ___ day of _____, 1997, at Anchorage, Alaska.

_____
René J. Gonzalez
Superior court Judge

APPROVED as to form, DISAPPROVED as to form or ACKNOWLEDGED RECEIPT of a true and correct copy of the foregoing FINAL JUDGMENT this 25th day of April, 1997.

By: _____
Paul J. Niewiadomski, Counsel for Plaintiffs

CERTIFICATE OF SERVICE
I HEREBY CERTIFY that on this _____ day of April, 1997, a true and correct copy of the foregoing was delivered by mail/hand delivery to:

Suzanne H. Lombardi
Faulkner, Banfield, Doogan & Holmes
550 West Seventh Ave., Suite 1000
Anchorage, Alaska 99501-3510
GILMORE & DOHERTY
By: _____
Debi Morrow
C:\DOCS\AK-COURT\FINAL.JUD

Gilmore & Doherty
ATTORNEYS AT LAW
RESOLUTION PLAZA
[illegible] AVE., SUITE 800
ANCHORAGE, ALASKA
99501-1982
TEL (907) 279-4506
FAX (907) 279-4507

Louie Flora

From: POMS@legis.state.ak.us
Sent: Thursday, April 13, 2006 3:48 PM
To: Louie Flora
Subject: New Pom:SB 86 State/muni Liability For Attorney Fees

Alison York
1170 Sundance Loop

Fairbanks 99709-6855,

Please do not support passage of SB86 from committee. This bill would discourage private citizens from contesting state and local actions. This is ultimately in the public interest.

Louie Flora

From: Michael J. Schneider [mjspc@gci.net]
Sent: Wednesday, April 12, 2006 10:5 AM
To: Rep Paul Seaton
Subject: SB 86

Dear Chairman Seaton:
I am working in California and can't seem to make this computer send this message to all members of the committee. Please pass it along.

I have practiced law in Anchorage for 30 years. I think SB 86...a bill limiting attorney fee awards against government entities, is a bad idea.

R's and D's, liberals and conservatives, young and old, urban and rural have had to rely on current law as the ONLY hope of mounting a righteous fight against some governmental bad idea or other. The rich can always afford to challenge those in power. The rest of us can't. Remember, the person seeking the fees has to WIN UNDER CURRENT LAW TO GET THEM. There is nothing wrong with making governmental action accountable on the same level and under the same rules as individual action.

I am sorry that I am out of state and unable to testify. Please vote "no" and encourage other committee members to do the same.

Michael J. Schneider

Louie Flora

From: Sherrie Goll [riverside@aptalaska.net]
Sent: Wednesday, April 12, 2006 4:49 PM
To: Rep. Paul Seaton; Rep. Carl Gatto; Rep. Bob Lynn; Rep. Jay Ramras; Rep. Berta Gardner; Rep. Max Gruenberg; Rep. Jim Elkins
Subject: Opposing SB 86

Dear House State Affairs Committee,

I am writing to urge you not support SB 86 the public interests litigant bill currently in House State Affairs.

This measure is aimed at chilling lawsuits that seek to compel the government to do what it is obligated to do by law.

It would limit the reimbursement of attorney fees to plaintiffs acting in the public's interest, not for monetary gain, after they have successfully proved in court that the state or some other public entity has failed to comply with its obligations under the law.

This measure will affect non-profit organizations, conservatives, liberals, pro-business groups, pro and anti environmentalists and political groups of every persuasion.

It is a bad policy. I urge you not to pass it.

Thank you for your consideration.

Sherrie

Sherrie Goll

P.O. Box 261

Haines, AK 99827

Phone: 907 766 3717

AMERICAN CIVIL LIBERTIES UNION OF ALASKA
P. O. Box 201844
Anchorage, AK 99520
(907) 258-0044
(907) 258-0288 (fax)
WWW.AKCLU.ORG

ACLU
AMERICAN CIVIL LIBERTIES UNION of ALASKA

April 13, 2006

To: Representative Paul Seaton, Chairman
House State Affairs Committee

From: Michael W. Macleod-Ball, Executive Director

RE: Senate Bill 86 – *An Act relating to the liability of the state and municipalities for attorney fees in certain civil actions and appeals.*

Please accept this statement in opposition to the above referenced bill. We oppose SB 86 on the grounds that it will have a chilling effect on the ability of parties acting in the public interest to challenge the inappropriate exercise of governmental authority. Further, the bill will tend to widen the legal advantage currently held by governmental litigants over private individuals. The ACLU of Alaska will be affected somewhat by this measure, but not to the extent of other non-profits and individuals who benefit from the current rule. That is because many of our claims are constitutional in nature – and often there is an alternative statutory award of attorney fees. Most others will not be so lucky. The bottom line is that citizen oversight of government will be thwarted by this measure and that will be bad for Alaskans.

The typical plaintiff in a public interest lawsuit is an individual, a non-profit advocacy organization, or a charitable organization. A typical defendant in such a suit is a governmental entity – often the federal or state government due to the nature of the issues commonly litigated. However, your reports clearly show that public interest cases are brought just as regularly against quasi-public or private entities. There can be no dispute that the typical suit pits a party with limited financial resources who needs to hire outside counsel against a governmental entity with access to substantially greater financial and legal resources. As often as not, the dispute is over principle and not over money.

Compare this to any other type of litigation. First, private suits almost always involve a fight over money or property interests. Typically, general civil litigation pits business against business or individual against individual. Certainly there are disparities in each party's ability to cope with the costs of litigation – but it's a matter of happenstance.

The public interest litigant, therefore, is financially disadvantaged and typically does not have the prospective benefit of a money damages award. As a result, attorneys are not readily available to take on such cases without sizable retainers – it is not profitable for them to do so. Therefore, the public interest litigant is legally disadvantaged as well – because the governmental adversary will always have counsel on board from the start. In his letter of transmittal, the Governor complains that the public interest litigant is being subsidized by the current system of attorney fee reimbursement. But, bear in mind that the public interest litigant only receives reimbursement if a) he or she is acting in the public interest and b) he or she is successful in showing that the government acted wrongly. On the other hand, the government gets its subsidy

from the taxpayers whether it wins or not. It's not as if the individual within the government who caused the government to violate the victim's rights is made to reimburse the taxpayers for the internal costs of running the government in a manner violative of the public interest. The key is to set up a system that doesn't reward improper behavior – and there will be no incentive for the government to stop inappropriate action if there is no one willing to speak out against such action through public interest legal action.

Who will this bill affect? It will affect those in our society least able to afford it – the poor, the uneducated, the minorities, the disabled, the elderly – all of whom have benefited from public interest litigation at one time or another – and many of whom would not have been able to bring such actions in their own right. It won't make a difference to the wealthy individual who funds a public interest lawsuit – for such individuals, attorney fee reimbursement is not a consideration. Rather, this law will discourage normal, everyday people from trying to make a difference when they see the government failing to do its job. If this bill becomes law, the state government will be able to rest easier that it can act against the public interest because it will be less likely to be held to account for its wrongful actions.

We agree with those who assert that this measure effectuates a court rule change, requiring a 2/3 vote for approval. Though we defer to the comments of others on this issue, we note for the record the pending court case against the most recent legislation in this area. The measure was struck down in Superior Court and is now on appeal to the Supreme Court. In our view, it's inappropriate to further muddy the waters by legislating in this area before the case has been decided and we strongly recommend that, at a very minimum, the legislature wait for a final decision before moving forward.

We note with concern the exception provided for eminent domain proceedings. This measure preserves an award of attorney fees for eminent domain cases where the government loses. If it's okay to award full fees when someone property rights have been violated by the government, what about other unlawful action by the government? What about government negligence, violations of open meeting laws, equal protection rights, due process rights, free speech rights or restrictions on religious freedom rights? What about violations of election laws? Who is to say that a taking of property is worthy of fee reimbursement, but a violation of a liberty interest is not?

In short, this bill is presented as if the government is unfairly required to pay for a vengeful individual's lawsuit against the state. Nothing could be further from the truth. This bill will make it harder for someone acting in the public interest to force the government to comply with its legal obligations. We strongly urge you to reject this bill.

SB 86- Public Interest Litigants

February 8, 2005- Senate CRA

810 N St, Ste 203, Anchorage Alaska 99501 / Ph. 907.258.6171 / Fax 907.258.6177
PO Box 22151, Juneau Alaska 99802 / Ph. 907.463.3366 / Fax 907.463.3312 / www.acvoters.org

Two bills currently under consideration in the Legislature would severely limit Alaskans' ability to challenge poor government decisions **SB 86** and **HB 117** asserts sovereign immunity to ignore the Supreme Court rules that allow public interest litigants to recover legal expenses for challenges of decisions made by the State. The public interest litigant Rule 82 exemption is necessary to ensure that citizens can afford to challenge bad decisions by state agencies. SB 86/HB 117 limit the award of attorney's fees against the state or municipalities to the amount applicable under Civil Rule 82, **only 20-30% of legal expenses.** The limits will make it difficult for public interest litigants to find attorney's to challenge the state.

Public Interest Litigants, by definition, are *not* motivated by an economic incentive, but rather by an interest in the resolution of a significant public policy issue. In 1974 the Alaska Supreme Court removed barriers that allowed only the rich to challenge bad government decisions.

Limited Financial Benefit for the State

Over the 10 year period of 1993-2003, the state paid $9,088,000 in attorney s fees. Over one half of the cost was for the ongoing Mental Health Trust Litigation. If the Trust litigation is deleted and HB 117/SB 86 passes the State will save an average of only about $360,000 per year.

All Sides Impacted

Public interest litigants represent all points along the ideological and political spectrum. If not for the public interest rule, citizens such as those cited below, could not afford to challenge poor government decisions.

Ruedrich, Cities of Craig, Valdez, Delta, et al. v. Alaska Redistricting Board, 44 P.3D 141 (Alaska 2001): The Republican Party and several communities challenged the proposed electoral redistricting

Citizens for the Preservation of the Kenai River, Inc. v. Sheffield, 758 P.2d 624 (Alaska 1988): A group of boat-owners brought suit challenging the validity of a state regulation limiting horsepower of motorized boats on the Kenai River.

Payton v. State, 938 P.2d 1036 (Alaska 1997): Rural residents sued DNR for failing to establish a subsistence salmon fishery on the upper Yentna River.

Alaska Survival, Inc. v. Dept. of Natural Resources, 723 P.2d 624 (Alaska 1988): An organization of local residents filed suit regarding state land disposal of 32 agricultural homesteads.

Is the bill constitutional?

Two superior courts have held that attorney's fees are a matter of procedure under the Alaska Constitution, and this issue will be heard by the Supreme Court this spring. Should the court agree this bill could require Court Rule change 2/3rds vote, because it again attempts to change procedural rules regarding the award of attorney's fees.

Alaskans building a better future.

P's Q's 10:15 a.m.

~~Smith Project~~ Almost full attendance

All litigation precinct

Hillman v. Nguyen → Have to win on main issues
— under Dansereau → don't have to win on all issues
only on a few (that were the main issues)

A.C.L.U. → 9 of 11 constitutional issues → won 2 out of 11 → what's back up afforded by court

→ Supreme Courts rules 85% upper Court [illegible] lower sides
less than 20% of provisions were struck down

(?) 10:18

Ketchikan → Municipal Attorney → Not a court rule now
Changes wouldn't [illegible]
[illegible] sufficient distinction

(1) Group sued city clerk

(2) other
Public Interest on both sides → States will not be as lopsided

under current law — if lose → can't get award of atty fees for Pub. Int. Litigation.
under Supreme Courts doctrine

Legislature abolished
HB 145 → ruling unconstitutional by Supreme Court
not yet by Supreme Court

under appel - diffs
under appellate rule - discretion of Supreme Court
between 500 - 1,000 + cost of printing of briefs
that determine if win on appeal on drop in fee
issues

This → would
P.2 line 21-24
in an appeal currently only gets 1st $1,000 — 20% might significantly increase
in a few of the mill

Trial appeal
Appellate rule 508
→ what is current case language
→ 50 days not impacted currents court rules
As a matter of Sovereign immunity Statute [illegible] will not be open [illegible] 20%

~~trade~~ If supreme court upholds 145
then ↓
Based on confidential grounds & usual

Dawson ? →

If were to have an appearance

— how apportion? fees on grounds?

PX →

FO 90 Substantial → occasion v. conflict
P. 5 of 8
conflict of interest — claimed to be LPMA

Grumberg — Struck down clause primary
→ or constitutional grounds

Dawson v. Wilmot
9/55 P 2.nd 9.16

full awards — after 82

→ ~~Condemnation~~ proceedings
→ or when legislature provides for full award
→ or when sanctioned by courts for misconduct

"Policy priorities determined by legislature"

10:55

Discretionary Decision
↳

Procurement for an office bid challenge?

↳ State fund faulty procedures
~~have to go back~~
Superior court decision
↘
ACLU.
→ Not reported yet in perfo[?] court

Slip opinion # → to GTAE

if challenge not successful fund would be awarded

↳ overturned by Supreme Court
in 1985 → Constitution ← as construed by
→ Supreme Court

· Kedvan

occasionally issues →

P.I.L. — only half in terms of regulatory/law
half on Admin discharges of Staff
Doubts (e.g. Clerk Corps/ at many
clerking) → Mystic Sho[uld] that promote
→ into reg.?

(.5) philosophical

→ (p's Q?) heightened attention?

(4) Vs (Unitedwhere) — in P.I.L. CSS that counts

In regs CSS tests are for in Army where you
know term is Company

Times — Elects (real!) — Criteria — "day
bst" but perform still displaced

(10:30) [illegible]

[illegible] (7) →

What diff between this legislation
~~[illegible]~~ and other

~~This would change — Good~~

Normally Attempts for Prisons

→ Abstain (?) in Writ

4/13/06

~~#~~ 82 Sub B 3 ✓

→ Other states [illegible]

TRO?

Plaintiff 1st on 11 counts (with [illegible]

Dasercan v. [illegible] — allow full atty fees on [illegible] issues → Rules Will Provide an outline

Challenge on constitutional grounds full recovery of fees

↓

HB ~~14~~5 →

P 2. → L. 4 - 6 of SB 86

[illegible] Preclude

Max

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to. 129 6th St., Rm. 329

MEMORANDUM April 26, 2006

SUBJECT: Is a two-thirds vote required because of a court rule change? (CSSB 86(CRA))

TO: Representative Les Gara
Attn: Darcy Dugan

FROM: Dennis C. Bailey DCB
Legislative Counsel

You asked for an opinion whether a two-thirds vote is required for passage of CSSB 86(CRA). The short answer is yes. The bill modifies Civil Rule 82, which provides for court-awarded attorney fees. Article IV, sec. 15, Constitution of the State of Alaska requires a two-thirds vote by the members in each house to change a court rule. Accordingly, there should be a section and court rule change notice in the title of the modification of Civil Rule 82.

Without meeting the two-thirds voting requirement, the bill is subject to a court challenge. *Native Village of Nunapitchuk v. State*, 1-JU-03-700 CI (April 6, 2004) (currently on appeal to the state Supreme Court).

If I may be of further assistance, please advise.

DCB:med
06-341.med

Full Journal

05-05-2005 Senate Journal 1380
SB 86
CS FOR SENATE BILL NO. 86(CRA) was read the third time.

Senator Stedman called the Senate. The call was satisfied.

The question being: "Shall CS FOR SENATE BILL NO. 86(CRA) "An Act relating to the liability of the state and municipalities for attorney fees in certain civil actions and appeals; and providing for an effective date" pass the Senate?" The roll was taken with the following result:

05-05-2005 Senate Journal 1381
CSSB 86(CRA)
Third Reading - Final Passage

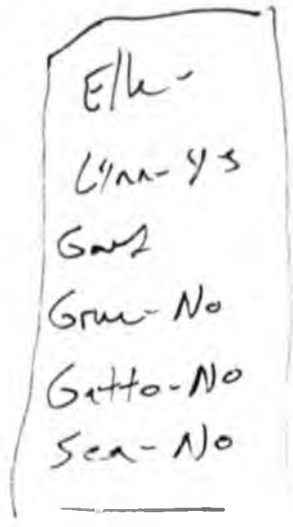
YEAS: 11 NAYS: 8 EXCUSED: 1 ABSENT: 0

Yeas: Cowdery, Dyson, Green, Huggins, Seekins, Stedman, Stevens B, Stevens G, Therriault, Wagoner, Wilken

Nays: Davis, Ellis, Elton, French, Guess, Hoffman, Kookesh, Olson

Excused: Bunde

It didn't get a 2/3 vote in the Senate


Elk-
Lynx-Yes
Gnat
Gnu-No
Gutto-No
Sea-No

LEGISLATIVE RESEARCH REPORT

FEBRUARY 17, 2006 REPORT NUMBER 06.097

PUBLIC INTEREST LITIGATION IN ALASKA, 1993-2005

PREPARED FOR REPRESENTATIVE PAUL SEATON

BY BECKY TAYLOR, LEGISLATIVE ANALYST

You asked us to update Legislative Research Report 03.150, "Public Interest Litigation in Alaska, 1993-2003."[1] You were interested in a list of public interest litigation before the Alaska court, including the name of each case, the amount and year of the judgment, and a very brief description of the topic at issue.

As we noted in our previous report, a public interest litigant is a plaintiff who seeks to resolve a public policy issue impacting a number of people rather than to achieve some private goal. Such a litigant must adhere throughout a civil suit to the same rules and procedures as every other litigant. The question of status as a litigant acting in the public interest arises only in the context of awards of attorney's fees and costs that accompany the decision in the case.

Neither the rules of court nor pertinent statutes directly address public interest litigants; however, by long-standing judicial practice, such litigants are exempt from the normal application of Civil Rule 82. Under this rule, the losing party in a civil action generally pays a portion of the reasonable attorney's fees of the prevailing party. If, however, the court makes a specific finding that a plaintiff qualifies as acting in the public interest, the plaintiff is exempt from paying the fees

[1] Please note the following limitations to our search. (1) We could find no way to identify cases that are settled before a judicial decision is reached. (2) Decisions issued by the superior court are not published, although because the legislature must appropriate funds for any judgment against the State, we can identify those public interest cases that result in such judgments. Aside from that record, however, there is no ready way to identify superior court cases that do not result in a judgment against the State, unless the decision is appealed to the Supreme Court and public interest status is at issue. (3) There is no ready system for identifying cases against municipal governments and other governmental bodies unless they are appealed to the Supreme Court and public interest status is at issue.

907-465-3991
907-465-3908 (fax)

Alaska Legislature
Legislative Research Services
w3.legis.state.ak.us/Research/research_home.htm

State Capitol
Juneau, AK 99801

of the prevailing party.[2] If the plaintiff prevails, the losing party pays full reasonable attorney's fees.[3]

Table 1 shows, by fiscal year, the amount of attorney's fees, costs, and interest paid by the State from those cases that the Department of Law and the Division of Legislative Audit identified as public interest cases resulting in judgments against the State. Table 2 displays, by case, the attorney's fees, other costs, and interest paid by the State. Table 3 shows those cases in which a public interest plaintiff lost and, therefore, paid no fees to the State, as well as cases involving entities other than the State. We identified these cases by searching the Lexis database of Alaska cases for the past thirteen years.

I hope you find this information to be useful. Please do not hesitate to contact us if you have questions or need additional information.

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[2] According to the Court in *Anchorage v. McCabe*, 568 P.2d 986 (Alaska 1977),

> The public interest exception to [Civil Rule 82] is designed to encourage plaintiffs . . . to raise issues of public interest by removing the awesome financial burden of such a suit.
>
> As a matter of sound policy, attorney's fees should not be assessed against public interest plaintiffs because awarding fees in this type of controversy will deter citizens from litigating questions of general public concern for fear of incurring the expense of the other party's attorney's fees.

[3] The criteria the court uses in weighing a plaintiff's private motivation against the extent of public interest involved appear among the annotations to Civil Rule 82 as follows: (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?

Table 1: Attorney's Fees, Costs, and Interest Paid by the State in Public Interest Cases, FY93-FY05					
Fiscal Year	Attorney's Fees	Costs	Interest		Total
			Pre-Judg.	Post-Judg.	
FY 93	689,806	Unknown			689,806
FY 94	37,894				37,894
FY 95	373,290				373,290
FY 96	259,584	6,585	1,437	10,586	278,192
FY 97	215,684	7,074	0	11,044	233,803
FY 98	238,298	7,337	0	23,898	269,533
FY 99	151,578	5,212	0	6,853	163,643
FY 00	80,833	3,232	0	6,445	90,510
FY 01	417,931	22,115	1,693	45,659	487,398
FY 02	1,847,137	141,324	0	40,693	2,029,154
FY 03	490,442	59,779	0	5,885	556,106
FY 04	41,330	410	0	586	42,326
FY 05	192,256	1,936	0	4,482	198,674
Several Years (Weiss v. State)	4,578,758	Unknown			4,578,758
FY93-FY05	9,614,821	255,004	3,129	156,132	**10,029,086**

Notes: There were a number of discrepancies in the information that was provided by the Department of Law for both the previous and current report. Although every effort was made to select the most recent and most accurate information, the number of discrepancies raises the concern that there may be errors.

This table shows the fiscal years in which judgments were paid, not necessarily years in which cases were decided. Not included are cases that settled out of court, and public interest cases that did not result in a judgment against the State.

For some years, the fees figure may include a small amount of costs. For *Cleary v. State* in FY96-FY99 and *Lynn Canal Conservation v. State* in FY03, no information is available regarding how much of the award was allocated for costs and how much was allocated for fees. The total of fees and costs is calculated into total costs as if it were all fees. The FY02 amount shown for fees for *In Re 2001 Redistricting Cases / Alaska Redistricting Board* includes a small amount of costs for the Craig plaintiffs. In that consildated case, the Redistricting Board and the Craig plaintiffs stipulated in superior court to the award of fees and costs in the amount of $173,922. A relatively small but unspecified portion of this amount represents costs. In every other regard, the court orders in this case were specific as to the amounts for fees and costs, and of those awards, costs represented approximately 11 percent of the total.

A statute that would eliminate the court's authority to award full attorney's fees under its own rules would not entirely eliminate instances in which the court could award full fees: some other state and federal laws allow for full fees. Federal law could have been a factor in determining fees awarded under *Cleary v. Smith*.

In *Weiss v. State*, the plaintiffs received an appropriation of $3,500,000 for the land work. The appropriation did not go through the judgment process, which removes litigants from the public interest litigant category. That amount is therefore not reflected in the above nearly $4.6 million for *Weiss*.

Sources: Kathryn Daughhetee, Administrative Services Director, Department of Law, (907) 465-3673, and Pat Davidson, Legislative Auditor, Division of Legislative Audit, (907) 465-3830.

Table 2: Public Interest Cases and Fees Paid by the State, FY 1993-FY 2005

Case Name	Description	Attorney's Fees	Costs	Interest		Total	Amount Paid	
				Pre-Judg.	Post-Judg.		Criminal Division	Civil Division
FY 93								
Stein v. State (Trustees for Alaska)	NPDES placer mining permits	14,049	Unknown			14,049	Unknown	
Trustees for Alaska v. Gorsuch	Coal mining permit	39,890				39,890		
S.E. Conference v. Hickel	Reapportionment	635,868				635,868		
FY 93 Subtotal		**685,806**				**639,806**		
FY 94								
Kuitsarak v. Swope	Offshore prospecting permits for platinum in Goodnews Bay	30,000	Unknown			30,000	Unknown	
Kuitsarak v. Swope	Offshore prospecting permits for platinum in Goodnews Bay	7,894				7,894		
FY 94 Subtotal		**37,894**				**37,894**		
FY 95								
Hickel v. Cowper	Interpretation of Article IX, Section 17 of the Alaska Constitution "amount available for appropriation"	43,756	Unknown			43,756	Unknown	
S.E. Conference v. Hickel (Minimum required exclusive of attorneys fees)	Reapportionment	106,928				106,928		
Southeast Alaska Conservation Council v. State	DNR's granting of concurrence under section 906(k) of ANILCA through No Name Bay, Kuiu Island	44,705				44,705		
Cleary v. Smith	Prisoners' rights	82,047	Unknown			82,047	Unknown	
Native Village of Toksook Bay v. State	Right to subsistence herring fishery	33,385				33,385		
City of Ekwok & Lake & Peninsula Borough v. Local Boundary Commission	Challenging boundary of Lake & Peninsula Borough	51,407				51,407		
Kwethluk IRA Council v. Coghill	Elections case regarding failure to open certain polling places in 10/94 elections	11,063	Unknown			11,063	Unknown	
FY 95 Subtotal		**373,290**				**373,290**		
FY 96								
Robert Shepard v. Kodiak	Conditions in Kodiak jail (DOC contract jail)	26,000	500		1,433	**27,933**	27,933	
Trustees of Alaska v. State	Challenging DNR's best interest finding in O&G lease sale #55	42,855			3,625	**46,480**		46,480
Tuiksarmute v. Heinze	Appealing decision by DNR Div of Water to extend water appropriation permits to mining company	6,225	264		517	**7,006**		7,006

Table 2: Public Interest Cases and Fees Paid by the State, FY 1996-FY 2005--Continued

Case Name	Description	Fees	Costs	Interest		Total	Amount Paid	
				Pre-Judg.	Post-Judg.		Criminal Division	Civil Division
Dansereau v. Ulmer	1994 Gubernatorial election		2,560		317	2,877		2,877
Keane v. LBC	LBC decision incorporating the City of Pilot Point	11,038	261	1,437	1,414	14,149		14,149
Cleary v. Smith	Prisoners' rights	116,467			2,038	118,505	118,505	
Ken Sorenson v. State	Subsistence - moose hunting	57,000	3,000		1,243	61,243		61,243
FY 93 Subtotal		**259,584**	**6,595**	**1,437**	**10,586**	**278,102**	**146,438**	**131,753**
FY 97								
Cowper v. Knowles	CBRF appropriation language	4,331			326	4,657		4,657
O'Callaghan v. Coghill	Open/closed primary issue	25,000	3,249		3,208	31,457		31,457
Capital Info Group v. State	Deliberative process executive privilege	20,000	272		1,418	21,690		21,690
Cleary v. Smith	Prisoners' rights	81,353			3,639	84,992	84,992	
Ninilchik Traditional Council v. State	Cook Inlet Oil & Gas lease sale #78	85,000	3,[illegible]4		2,454	91,007		91,007
FY 97 Subtotal		**215,684**	**7,074**	**0**	**11,044**	**233,803**	**84,992**	**148,811**
FY 98								
Payton v. State	Upper Ventna River salmon subsistence	54,780	2,585		4,688	62,053		62,053
Port Graham & Nanwalek v. State	"Zero discharge" in Cook Inlet from drilling platforms	24,047			2,186	26,233		26,233
Cleary v. Smith	Prisoners' rights	51,861			2,061	53,922	53,922	
Pullen v. Ulmer	Challenging the Lt. Governor's certification of the F.I.S.H. Initiative for placement on the November 1996 ballot	24,254	1,085		838	26,177		26,177
Dansereau v. Ulmer	1994 Gubernatorial election	83,356	3,668		14,124	101,148		101,148
FY 98 Subtotal		**238,298**	**7,337**	**0**	**23,993**	**269,533**	**53,922**	**215,611**
FY 99								
Bess v. Ulmer	Challenging same sex marriage constitutional amendment	50,245	3,262		842	54,349		54,349
Kachemak Bay Conservation Society v. State.	Cook Inlet Oil & Gas lease sale #85A	37,050	1,950		3,414	42,414		42,414
Cleary v. Smith	Prisoners' rights	54,786			1,948	56,734	56,734	
Doe v. Burton	Challenge to Alaska's Sex Offender Registration Act	9,496			648	10,145	10,145	
FY 99 Subtotal		**151,578**	**5,212**	**0**	**6,853**	**163,643**	**66,879**	**96,764**

Gruenberg

Table 2: Public Interest Cases and Fees Paid by the State, FY 1996-FY 2005--Continued

Case Name	Description	Fees	Costs	Interest		Total	Amount Paid	
				Pre-Judg.	Post-Judg.		Criminal Division	Civil Division
FY 00								
Alexie v. State	Affect of cultural adoption on child support obligation	34,742	105		2,877	**37,724**		37,724
Cleary v. Smith	Prisoners' rights	46,091	3,127		3,569	**52,786**	52,786	
FY 00 Subtotal		**80,833**	**3,232**	**0**	**6,445**	**90,510**	**52,786**	**37,724**
FY 01								
Planned Parenthood v. State	Unconstitutionality of statute limiting partial birth abortions	102,725	7,901		29,559	**140,185**	140,185	
Cleary v. Smith	Prisoners' rights	119,379	9,252		5,747	**134,378**	134,378	
Cook Inlet Keeper v. State	Challenge to DNR's inclusion in a oil and gas lease sale of certain tracts identified as important to beluga whale whale migration	81,975			3,971	**85,946**		85,946
NAEC/Sierra Club v. State/Golden Valley Electric	Challenge to DNR ROW for the Northern Intertie	99,102	3,202	1,693	5,737	**109,733**		109,733
Greenpeace v. State	Challenge to legality of numerous DNR water permits	12,488	1,760		552	**14,799**		14,799
Gilbertson v. State	Challenge to DNR process of identifying RS 2477 easements	2,263			93	**2,356**		2,356
FY 01 Subtotal		**417,931**	**22,115**	**1,693**	**45,659**	**487,398**	**274,563**	**212,835**
FY 02								
Planned Parenthood v. State	Challenge to legislative elimination of funding for abortions under the General Relief Medical Program	228,082	7,965		33,049	**269,075**		269,075
Ak Civil Liberties Union v. State	Challenge to the 1996 campaign finance reform legislation	107,814	141		7,243	**115,197**		115,197
Cleary v. Smith	Prisoners' rights	9,295	598		401	**10,294**	10,294	
In Re 2001 Redistricting Cases v. Alaska Redistricting Board	Reapportionment	1,501,967	132,621	Unknown		**1,634,588**	Not Applicable	
FY 02 Subtotal		**1,847,137**	**141,324**	**0**	**40,693**	**2,029,154**	**10,294**	**384,272**
FY 03								
Neighborhood Mine Watch v. State, DNR and Fbks Gold Mining, Inc	Challenge to DNR ROW for the haul road	22,242	1,846		948	**25,037**		25,037
Alaskans for Efficient Gov't v. State	Challenge to the ballot summary for the legislation session move initiative	24,000			509	**24,509**		24,509
Lynn Canal Conservation v. State	DNR's list of generally allowed uses on state land must be promulgated by regulation	53,260			314	**53,574**		53,574
Cook Inlet Keeper v. State	Challenge that Forest Oil Corp's Osprey Project was consistent with ACMP	51,215	524		2,156	**53,895**		53,895

Table 3: Other Public Interest Litigation Before the Alaska Supreme Court, FY 1993 - FY 2005

Case Name	Citation	Subject
Valleys Borough Support Comm. v. Local Boundary Commision	863 P.2d 232 (1993)	Incorporation of Borough
Municipality of Anchorage v. Citizens for Representative Governance	880 P.2d 1058 (1994)	Validity of petitions to recall school board members from office.
Eyak Traditional Elders Counsel v. Sherstone, Inc.,	904 P.2d 420 (1995)	Attorney's fees after voluntary dismissal of action to enjoin logging on land alleged to be ancestral village & burial grounds
Spenard Action Comm. v. Lot 3, Block 1, Evergreen Subdivision	902 P.2d 766 (1995)	Subsistence hunting and fishing--challenge to "all Alaskans" eligibility
Kodiak Seafood Processors Ass'n v. State	900 P.2d 1191 (1995)	Permit to a private fisher for exploratory fishing in closed waters
State v. United Cook Inlet Drift Ass'n	895 P.2d 947 (1995)	Subsistance hunting and fishing--challenge to "all Alaskans" eligibility
Keam v. Local Boundary Commission	893 P.2d 1239 (1995)	Incorporation of city
Griswold v. City of Homer	925 P.2d 1015 (1996)	Validity of a city ordinance re zoning, and conflict of interest
Laverty v. Alaska Railroad Corp.	13 P.3d 725 (2000)	Extraction of gravel & Public Notice Clause, Alaska Const. art. VIII, § 10
Gwich'in Steering Comm. v. Office of the Governor	10 P.3d 572 (2000)	Deliberative process executive privilege (re ANWR lobbying activity)
Matanuska Elec. Ass'n Inc. v. Rewire the Bd.	36 P.3d 685 (2001)	Rural electric cooperative--removal of directors
Anchorage Police Dep't Emples. Ass'n v. Municipality of Anchorage	24 P.3d 547 (2001)	Substance abuse testing for police and fire department employees in safety-sensitive positions
Cabana v. Kenai Peninsula Borough	21 P.3d 833 (2001)	Whether classification of municipal land is a legislative decision or quasi-judicial and subject to appeal
Koyukuk River Tribal Task Force v. Rue	63 P.3d 1019 (2003)	Moose management
Cizek v. Concerned Citizens of Eagle River Valley, Inc.	71 P.3d 845 (2003)	Partial public interest attorney's fees awarded to plaintiff citizens group sueing property owners seeking re-zoning
Alaska Wildlife Alliance v. State	74 P.3d 201 (2003)	Composition of the Board of Game
Matanuska Elec. Ass'n Inc. v. Rowland Scott Waterman	87 P.3d 820 (2004)	Campaign disclosure violation as grounds to deny a seat on the Board of Directors
State v. Greenpeace, Inc.	96 P.3d 1056 (2004)	Due process in regards to Department of Natural Resource permitting
Halloran v. State	115 P.3rd 547 (2005)	Attorney's fees after legislation mooted a challenge to the constitutionality of election procedures for voting on an initiative proposition

Notes: Included are Alaska Supreme Court public interest cases against the State in which the plaintiff lost (i.e., no fees paid and, therefore, the case is not included in Table 1). It also includes cases (both winning and losing) against entities other than the State that were appealed to the Supreme Court that we identified as involving a public interest litigant. Not included are cases that settled out of court and those public interest cases that resulted in judgments for attorney's fees against the State.
Source: Lexis search of Alaska cases within the past thirteen years.

Table 2: Public Interest Cases and Fees Paid by the State, FY 1996-FY 2005--Continued

Case Name	Description	Fees	Costs	Interest		Total	Amount Paid	
				Pre-Judg.	Post-Judg.		Criminal Division	Civil Division
State v. Grady	Challenge to Lindauer gubernatorial candidate's placement on the ballot	99,075	13,060		1,958	114,094		114,094
In Re 2001 Redistricting Cases v. Alaska Redistricting Board	Reapportionment	240,650	44,348	Unknown		284,998	Not Applicable	
FY 03 Subtotal		**490,442**	**59,779**	**0**	**5,885**	**556,106**	**0**	**271,108**
Hinterberger v. State	Challenge to failure to certify petitions re: marijuana legalization	25,250	410		443	26,103		26,103
Jacobus v. State	Challenge to constitutionality of $5,000 limit on an individual's contributions to a political party etc.	16,080			143	16,223		16,223
FY 04 Subtotal		**41,330**	**410**	**0**	**586**	**42,326**	**0**	**42,326**
FY 05								
Trust the People v. State	Challenge to failure to certify petitions re: US Senate vacancies	103,168	968		3,994	108,130		108,130
Jacobus v. State	Challenge to constitutionality of $5,000 limit on an individual's contributions to a political party etc.	77,400	740		143	78,283		78,283
Hinterberger v. State	Challenge to failure to certify petitions re: marijuana legalization	11,688	228		344	12,260		12,260
FY 05 Subtotal		**192,256**	**1,936**	**0**	**4,482**	**198,674**	**0**	**198,674**
General Years								
Weiss v. State	Mental Health Land Trust breach	4,578,758	Unknown					
Totals FY93-FY05[1]		**9,814,821**	**255,004**	**3,129**	**166,132**	**10,239,086**	**Incomplete Data**	

Total Fees and Costs: 9,8b9,825.39

Notes: There were a number of discrepancies in the information that was provided by the Department of Law for both the previous and current report. Although every effort was made to select the most recent and most accurate information, the number of discrepancies raises the concern that there may be errors.

This table shows the fiscal years in which judgments were paid, not necessarily years in which cases were decided. Not included are cases that settled out of court, and public interest cases that did not result in a judgment against the State.

For some years, the fees figure may include a small amount of costs. For *Cleary v. State* in FY96-FY99 and *Lynn Canal Conservation v. State* in FY03, no information is available regarding how much of the award was allocated for costs and how much was allocated for fees. The total of fees and costs is calculated into total costs as if it were all fees. The FY02 amount shown for fees for *In Re 2001 Redistricting Cases v. Alaska Redistricting Board* includes a small amount of costs for the Craig plaintiffs. In that consildated case, the Redistricting Board and the Craig plaintiffs stipulated in superior court to the award of fees and costs in the amount of $173,922. A relatively small but unspecified portion of this amount represents costs. In every other regard, the court orders in this case were specific as to the amounts for fees and costs, and of those awards, costs represented approximately 11 percent of the total.

A statute that would eliminate the court's authority to award full attorney's fees under its own rules would not entirely eliminate instances in which the court could award full fees; some other state and federal laws allow for full fees. Federal law could have been a factor in determining fees awarded under *Cleary v. Smith*.

In *Weiss v. State*, the plaintiffs received an appropriation of $3,500,000 for the land work. The appropriation did not go through the judgment process, which removes litigants from the public interest litigant category. That amount is therefore not reflected in the above nearly $4.6 million for *Weiss*.

1) Totals for costs and interest are for FY96-FY05, as these figures were not provided for FY93-FY95.

Sources: Kathryn Daughhetee, Administrative Services Director, Department of Law, (907) 465-3873, and Pat Davidson, Legislative Auditor, Division of Legislative Audit, (907) 465-3830

LEGISLATIVE RESEARCH REPORT

FEBRUARY 17, 2006

REPORT NUMBER 06.064

CIVIL LAWSUITS INVOLVING THE STATE OF ALASKA AND LOCAL GOVERNMENTS, 1993-2005

PREPARED FOR REPRESENTATIVE PAUL SEATON

BY BECKY TAYLOR, LEGISLATIVE ANALYST

You asked for a list of cases in which the State of Alaska, or an Alaska city, borough, or municipality, was involved in civil litigation as a defendant. Specifically, you were interested in the number of these types of cases each year between 1993 and 2005.

SUMMARY

We contacted the Alaska Department of Law (DOL) to determine how many cases the State of Alaska has been involved in as a defendant between 1993 and 2005. Although the DOL was able to determine the total number of civil cases involving the State that were opened during those years, the department has no efficient mechanism for sorting through the over 20,000 cases to identify those in which the State was the defendant. Additionally, the DOL was unable to provide case names because confidential cases would be included in the list. For this reason, we are unable to provide exact figures for the number of civil cases involving the State of Alaska as the defendant.

Based on the department's estimate that the State is the defendant in approximately 75% of the civil cases that it is involved in, we provide an estimate of the number of such cases. Bob Meiners, Administrative Services Manager for the Alaska Department of Law, offered the following insight into why the State is more frequently the defendant than the plaintiff:

> As the chief enforcer of state laws and regulations as well as being viewed as the penultimate "deep-pocket," the State is frequently and, in most instances, the target of litigation rather than the initiator. As a consequence the vast majority of the files listed (possibly 70% to 80%) have the State as the defendant. The remainder where the State is the "plaintiff" fall mainly into those categories where the State is required to work through the courts to accomplish specific agency

missions (e.g., mental health commitments and hospitalizations, child support enforcement actions, etc.).[1]

Our estimates of the number of cases involving the State of Alaska as the defendant are included below in Table 1. These numbers are rough estimates at best, and do not represent the actual number of cases.

Table 1: Estimated Number of Civil Cases Involving the State of Alaska, 1993-2005

Year	1994	2004	1993-2005	
			Number	Annual Average
Total number of general litigation files involving the State of Alaska	1,851	1,298	20,533	1,579
Estimated number of cases involving the State of Alaska as the defendant	1,388	974	15,400	1,184

Notes: To obtain our estimates we multiplied the total number of cases by 75%, based on Mr. Meiners approximation that the state is the defendant in possibly 70% to 80% of the civil cases that it is involved in. These numbers are estimates only and do not necessarily represent the actual number of cases. Although the State is usually the target of ligitation, rather than the initiator, the State acts as the plaintiff primarily in cases, such as child support enforcement actions or mental health commitments, where working through the courts is necessary to accomplish the mission of a specific agency.

Sources: Data for 1994 and 2004 were provided by Bob Meiners, Administrative Services Manager, Department of Law. Mr. Meiners can be reached at (907) 465-5427. Data for 1993-2005 were provided by Kathryn Daughhetee, Director of the Administrative Services Division, Department of Law. Ms. Daughhetee can be reached at (907) 465-3673.

In order to determine the total number of civil cases involving municipalities, we conducted a Lexis search of Alaska cases within the past thirteen years. As you may know, decisions in superior court and cases that settle are not published. This count, therefore, includes only those cases that were appealed to the Alaska Supreme Court. Table 2 shows the number of cases that we identified involving local governments as the defendant for each of the specified years.

[1] Personal communication from Bob Meiners, Administrative Services Manager, Alaska Department of Law. Mr. Meiners can be reached at (907) 465-5427.

Table 2: Litigation Before the Alaska Supreme Court Involving Local Governments as the Defendant, 1993-2005

Defendant (City, Borough, or Municipality)	Year													Total
	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	
Municipality of Anchorage	3	0	4	5	4	0	5	1	5	2	5	4	2	40
City and Borough of Juneau				2									1	3
City and Borough of Sitka												1		1
City and Borough of Yakutat					1								1	2
Fairbanks North Star Borough	2		1		1			2						6
Kenai Peninsula Borough	1						1		1		2			5
Ketchikan Gateway Borough	1								1					2
Lake and Peninsula Borough			1											1
Matanuska-Susitna Borough			1				1			1				3
North Slope Borough		1		1			1				1			4
City of Dillingham				1					1					2
City of Fairbanks	1			2	1	2		1	1	1				9
City of Haines										1				1
City of Homer				1					1	1	1		1	5
City of Houston										1		1		2
City of Ketchikan			1											1
City of Klawock					1									1
City of Kodiak					1			1			1			3
City of Kotzebue						1	1							2
City of Nome				1										1
City of North Pole					1									1
City of Sand Point					1	1								2
City of Soldotna													1	1
City of St. Paul					1									1
City of Tenakee Springs						2								2
Total City, Borough, or Municipality: 101														

Table 2: Litigation Before the Alaska Supreme Court Involving Local Governments as the Defendant, 1993-2005—Continued

Defendant (Other Governmental Entities)	Year													Total
	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	
Anchorage Equal Rights Commission		2										1		3
Anchorage Police and Fire Retirement Board						1								1
Anchorage School District	1			2					1			1	1	6
City of Anchorage Police Department					1				1					2
City of Fairbanks Council						1								1
Fairbanks North Star Borough Board of Equalization	1													1
Fairbanks North Star Borough School District		1		1					1					3
Kenai Peninsula Borough School District										1				1
Kodiak Island Borough Assembly			1											1
Lake and Peninsula Borough School District							1							1
Matanuska-Susitna Borough Board of Adjustment and Appeals			1											1
Sitka School District	1					1								2
Total Other Governmental Entities: 23														
Total All Local Government: 124														

Notes: Included are Alaska Supreme Court cases. Not included are cases that settled out of court, or that for other reasons did not reach the Alaska Supreme Court.
Source: Lexis search of Alaska cases within the past thirteen years.

I hope you find this information to be useful. Please do not hesitate to contact us if you have questions or need additional information.

file with Bill

Governor wants attorney fees

Residents debate merits of road

Louie Flora

From: Layla Hughes [lhughes@earthjustice.org]
Sent: Tuesday, April 26, 2005 12:44 PM
To: Louie Flora
Subject: RE: public interest litigants

Do you have a copy of the report done by Patricia Young for the fees paid by the state from 1993-2003? If not, I would be happy to send it to you. Since full fee recovery amounted to 9 million, the ballpark estimate of what the state would have paid without the public interest litigant rule for that period would be about 25% of that or 2.25 million over the 11 year period. (Though Leg. Legal will be able to come up with a more accurate estimate by looking at which cases went to trial and which did not.)

Keep in mind, however, that this really doesn't give you an accurate estimate. Because the court can vary an award according to the Rule 82(b)(3) factors, there is no way to guess whether the court would have awarded more than 20-30% of the total attorney fee costs on these cases and relied on those factors (instead of the public interest litigant rule.) In fact, because some of those factors relate to the same concerns the court has when it uses the public interest litigant rule, it actually seems likely that the court would have used those factors to give greater awards. Because Rule 82(b)(3)(k) allows the court to vary a fee award for "equitable factors deemed relevant" it is even possible that the court would have awarded the exact same awards, even without the public interest litigant rule.

-----Original Message-----
From: Louie Flora [mailto:Louie_Flora@legis.state.ak.us]
Sent: Tuesday, April 26, 2005 12:31 PM
To: Layla Hughes
Subject: RE: public interest litigants

Thanks for the e-mail, Layla. I have been threshing through a massive heap of paperwork and trying to get to the job of requesting from Leg.
Legal a summary of the past ten years of public interest litigant cases and the fees recovered, comparing this to what they would have recovered under court rule 82. I will be working on this during the interim, and will be stationed out of the Juneau office until the end of May.

Louie Flora
Aide,
Rep. Seaton
465-4963

-----Original Message-----
From: Layla Hughes [mailto:lhughes@earthjustice.org]
Sent: Tuesday, April 26, 2005 12:21 PM
To: Louie Flora
Cc: pvantuyn@earthlink.net
Subject: public interest litigants

Hi Louie,

I am one of the attorneys who has closely followed the public interest litigant bills over the past few years and who is challenging HB 145 before the supreme court right now.

Pete Van Tuyn informed me that he spoke to Rep. Seaton about HB 117 and the issue of public interest litigant fee awards, and promised to provide you all with more information this summer. I recently drafted a brief explanation that addresses some of the concerns we've heard legislators express. (Attached).

I would be happy to work with you more this summer to address these or any other concerns or ideas you might have. Please feel free to contact me any time.

<<hb117.doc>>
Layla Hughes
Earthjustice
325 Fourth St.
Juneau, AK 99801-1145
Ph: (907) 586-2751
Fax: (907) 463-5891
www.earthjustice.org

- Parties that succeed only on tangential issues do not recover fee awards

Under Alaska law, all litigants receive court awarded attorney's fees only if they are the prevailing party. Litigants are considered the prevailing party if they succeed on the main issue. *See e.g., Hillman v. Nationwide Mut. Fire Ins. Co*, 855 P.2d 1321, 1327 (Alaska 1993).

Generally, fee awards are not apportioned for either prevailing private or public interest litigants. However, the court has discretion to vary a fee award based on any equitable factor it deems relevant. Civil Rule 82 (b)(3)(K). For example, a court may consider the prevailing party's varying degree of success on issues when the court sets the award amount. *See Hickel v. Southeast Conference*, 868 P. 2d 919, 925 (Alaska 1994). A court may also determine that apportionment is appropriate because the litigant raised certain issues that were frivolous. *See Dansereau v. Ulmer*, 955 P. 2d 916, 919 n.4 (Alaska 1998).

- The State pays only about 0.01% of its budget on attorney's fees in public interest cases

The State is required to pay attorney fees to public interest litigants when a court finds that the State has not acted in accordance with the law. The cost of responding to lawsuits is a necessary incident of having a system of government in which state action can be challenged in court. However, this cost is quite low. The total amount spent by the state on attorney's fee awards in public interest cases from 1993-2003 was about $9 million. *See* Patricia Young, *Public Interest Litigation in Alaska, 1993-2003*, Legislative Research Services (Alaska Leg., April 21, 2003)).

Even this total is misleadingly high, because over half of the fees paid during this eleven-year period were from a single unusual case, the Alaska Mental Health Land Trust Litigation (*Weiss v. State*, 939 P.2d 380 (Alaska 1997)). It is unlikely that another aberrational case of this type will be filed. The state paid an additional 1.75 million dollars for the 2001 redistricting cases. Leaving out these two cases, the state has paid an average of $252,000 per year in public interest litigant fee awards.

Civil Rule 82

Not condemnation

Fair business practices

Sanction for bad behavior

Recall Election

1/2 arise out of administrative duties

1/2 regulations

BRIGGS LAW OFFICE

Robert B. Briggs, Attorney at Law
P.O. Box 33425, Juneau, AK 99803-3425
(907) 523-4645 (phone and fax)

April 12, 2006

By facsimile transmission only

Hon. Paul Seaton
Chair, State Affairs Committee
Alaska State Legislature
Alaska State Capitol, Room 102
Fax no.: 907-465-3472

Re: **Opposition to CSSB 86 (CRA)(efd fld)**

Dear Representative Seaton:

I am writing to urge opposition to passage of CSSB 86. I regret that I cannot attend the hearing scheduled for tomorrow, but submit this letter for the committee's consideration. I am not being compensated by anyone for writing this letter, so mine are the views of a private citizen and lawyer who has taken some interest in this issue over my professional career. I regret I was not aware of this bill when it was before the Senate.

I have been involved in the past in the debate over the so-called Public Interest Litigant exception. That rule of procedure exists in Alaska case law as an exception to the codified rules of procedure for allocating attorneys fees and costs to prevailing parties in litigation. See Supreme Court Order 1118 am, acknowledged as Note to Rule 82, Alaska R. Civ. Proc. and cases applying the exception under Rule 508(e), Alaska R. App. Proc. The Public Interest Litigant exception has existed since at least 1980 with the case of *Thomas v. Bailey*, 611 P.2d 536 (Alaska 1980). It is the product of careful thought, I think, by many justices of the Alaska Supreme Court informed by decades of public policy and legal experience.

1. **Do not throw good money after bad: CSSB 86 lacks a two-thirds majority**

When the Legislature last acted on this subject, it passed a version of House Bill 145 in 2003, over arguments made by many (including myself) that the Public Interest Litigant exception was in effect a Supreme Court rule of procedure requiring a two-thirds majority in both Houses to be modified. That precise question was fully litigated – and the State lost – in a case brought in Juneau before Superior Court Judge Patricia Collins. Judge Collins' decision is now under review by the Alaska Supreme Court, in a case that has been fully briefed, argued and is awaiting decision. *State of Alaska v. Native Village of Nunapitchuk, et al.*, S. Ct. No. S11525

(oral argument held Nov. 9, 2005). The Legislature should wait for a Supreme Court decision.

CSSB 86 did not pass the Alaska Senate by the requisite two-thirds majority. Although I did not litigate the *Village of Nunapitchuk* case, if I and other lawyers are correct, the lack of passage by a 2/3 majority is a legally fatal flaw of the bill. It makes no public policy sense to pass another bill on this subject before hearing the Alaska Supreme Court's views in the *Village of Nunapitchuk* case. Otherwise, a law on the books will have to be challenged and litigated at further public expense. Please do not throw the public's good money after bad. Instead, please wait for the Supreme Court to rule in the *Village of Nunapitchuk* case. Later legislative action on this subject, informed by the Supreme Court, is the better play.

2. CSSB 86 gambit to carve out a 'government exception to the exception' is likely to be trumped by the Equal Protection clause

CSSB 86 is a different take on the Public Interest Exception than previous bills. It essentially exempts state and municipal governments from liability for full attorneys fees when the government loses a lawsuit. In essence, the bill carves out a "government exception" to the Public Interest Exception to the normal rules of procedure. The motives behind such a gambit are understandable, given the strongly held views that our municipal and state governments need to be free to act quickly and with authority in addressing important social policy issues like taxation reform, promotion of natural resource development, and stimulation of Alaska's economy.

However, the Public Interest Litigant exception was created "to encourage plaintiffs to raise issues of public interest," *City of Kenai v. Friends of the Recreation Center, Inc. et al.*, S. Ct. No. S-11506, slip op. at 16 (Alaska Feb. 17, 2006) (citations omitted)(excerpt attached), usually in cases where the financial stake of the plaintiffs is small compared to the cost of litigation.

The question is, will such an "exception to the exception" pass muster under the Equal Protection clauses of the United States and Alaska Constitutions? What data is before the Legislature – other than that municipalities and the State have to pay money if they lose a lawsuit – to justify treating the governments different than other defendants engaged in public interest litigation. Are governments less well-financed than non-governmental defendants? Are they greater targets of litigation under the Public Interest Doctrine? I am not privy to all of the public record supporting CSSB 86, but I personally doubt this bill can survive an Equal Protection challenge.

My personal view is that access to the courts to raise issues of public interest is a form of constitutionally-protected speech. I believe this even more emphatically when the conduct being challenged is that of a state or local government. If I am correct, then the "rational basis" tests for government action are supplanted by the "strict scrutiny" tests involving infringements of

fundamental rights. Under Alaska's sliding scrutiny tests, there will have to be a greater justification for treating the government litigant differently from other litigants. If so, then it will be that much harder for CSSB 86 to overcome legal challenges based equal protection claims. I think it will be trumped.

3. **CSSB 86 is bad public policy for individuals forced to deal with the government in court**

While those engaged in private business and the use of capital, often needing government authorization to pursue their endeavors, might not understand or agree with the need for individual access to the courts, it takes only one personal legal brush with the full power of the government to gain understanding. There are many ways besides resource development that state and local government action affects individuals. There are many decisions that state or local governments make that do not directly affect individual financial interests, but do have a significant effect on individuals. And so I ask you and each member of the committee to consider whether, in the nearly three decades that the Public Interest Litigant exception has been implemented, has this stopped local or state government from acting? Will CSSB 86 instead be an unfair trump card, an ace in the hole for unfair and unwise government action?

In other countries, people go to war, get beaten and thrown in jail, for things like freedom of religion, speech, peaceful assembly, petition of government. We are very fortunate as individuals to have the courts as one very important avenue for redress of our grievances. The Alaska Supreme Court has recognized that the Public Interest Litigant doctrine has been necessary, as laws and legal procedure have become at times impossibly complex, to ensure that lawyers provide representation to those who need it, not to just those who can afford it. CSSB 86 would instead make it that much harder for an individual to find a lawyer willing to take on city hall and the power of the state bureaucracy. Thus I urge those who believe in protecting individual rights to oppose CSSB 86.

For these reasons, I urge a "no" vote on CSSB 86. Thank you for considering these ideas.

Very truly yours,

Bob Briggs

Robert B. Briggs

THE SUPREME COURT OF THE STATE OF ALASKA

CITY OF KENAI, an Alaska municipal corporation, Appellant, v. FRIENDS OF THE RECREATION CENTER, INC., an Alaska corporation, MARK NECESSARY, ANITA NECESSARY, and CLIFFORD D. MASSIE, Individually, Appellees.	Supreme Court No. S-11506 Superior Court No. 3KN-03-503 CI **OPINION** [No. 5989 - February 17, 2006]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Kenai, Harold M. Brown, Judge.

Appearances: Cary R. Graves, City Attorney, Kenai, for Appellant. John E. Havelock, John E. Havelock Attorney at Law, Anchorage, for Appellees.

Before: Bryner, Chief Justice, Matthews, Eastaugh, Fabe, and Carpeneti, Justices.

EASTAUGH, Justice.

prevailed on the main issue.[38] Our determination of prevailing party status has therefore traditionally focused on the litigation itself.

Furthermore, the purposes of the public interest litigant exception to Civil Rule 82 suggest that the city's political success in amending KMC 7.15.050(5) and entering into a second management contract with the club is not an appropriate basis for concluding that Friends is not the prevailing party. We award prevailing public interest litigants full reasonable attorney's fees "to encourage plaintiffs to raise issues of public interest."[39] This suggests that the focus of the prevailing party determination should be on the litigation, rather than on contemporaneous political or contractual developments.

The city has not convinced us that a public interest litigant that brings a meritorious claim against a governmental unit and obtains a preliminary injunction loses its prevailing party status if, through the political process, the governmental unit later moots the lawsuit and accomplishes its challenged goals. Because Friends succeeded in obtaining the only judicial relief granted in this case before it was dismissed without objection as moot following amendment of the ordinance, the superior court did not abuse its discretion in finding that Friends was the prevailing party.[40]

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[38] *Matanuska Elec. Ass'n, Inc. v. Rewire the Bd.*, 36 P.3d 685, 690 (Alaska 2001); *Meidinger v. Koniag, Inc.*, 31 P.3d 77, 88 (Alaska 2001); *De Witt v. Liberty Leasing Co. of Alaska*, 499 P.2d 599, 601 (Alaska 1972); *Buza v. Columbia Lumber Co.*, 395 P.2d 511, 514 (Alaska 1964).

[39] *Southeast Alaska Conservation Council, Inc. v. State*, 665 P.2d 544, 553 (Alaska 1983) (quoting *Anchorage v. McCabe*, 586 P.2d 986, 990 (Alaska 1977)).

[40] *See Halloran v. State, Div. of Elections*, 115 P.3d 547, 554 (Alaska 2005) (holding that obtaining temporary restraining order may be basis for finding plaintiff to be prevailing party when the restraining order was only relief granted in litigation).

Loule Flora

From: Jewell Family [jewell@acsalaska.net]

Sent: Monday, April 10, 2006 9:17 PM

To: Rep. Carl Gatto; Rep. Max Gruenberg; Rep. Berta Gardner; Rep. Jim Elkins; Rep. Jay Ramras; Rep. Paul Seaton; Rep. Bob Lynn

Please do not support the passage of SB 86 from committee. This proposal will make it difficult for ordinary Alaskans to find attorney's to contest state and local actions. Private citizens should be able to challenge their government and be reimbursed for their costs if they prevail on an issue brought before the courts to reverse or change a bad law or public policy. The balance of power already rests with the government. Government has vast resources available to it that most individuals do not. The public interest litigant concept helps keep the government honest and balances the unfair advantage with which a citizen is faced when deciding about whether or not to challenge the state. if there is a need to discourage frivolous lawsuits, let's find a way to do so without making it impossible for citizens to challenge bad laws or policies.

Sincerely,
Barb and Bob Jewell

Louie Flora

From: MSandberg@aol.com

Sent: Tuesday, April 11, 2006 9:25 PM

To: Rep. Carl Gatto; Rep. Paul Seaton; Rep. Bob Lynn; Rep. Jim Elkins; Rep. Jay Ramras; Rep. Berta Gardner; Rep. Max Gruenberg; MelissaFouseAATL@aol.com

Subject: SB 86 Public Interest Attorney Fees

I am writing to or e passage of SB 86, reducing public interest attorney fee awards.
Twenty-five yea ,o, I was the lawyer for Ron and Penny Zobel.
Their case was hard fought and went all the way to the US Supreme Court.
In the end, that case paved the way for equal PFD dividends for all Alaskans, including children.
Ron and Penny were young and starting out. There was no way they could pay for a lawsuit that ultimately vindicated the constitutional rights of thousands of Alaskans.
It was only the prospect of public interest fees if we won that made it possible to fight for Alaskans' rights. And, if we been wrong and lost, the State would have owed us nothing. Only successful litigants can recover. This seems like a small price for the State to pay for the vindication of Alaskans rights.
Mark Sandberg

Louie Flora

From: Michael J. Schneider [mjspc@gci.net]

Sent: Wednesday, April 12, 2006 10:57 AM

To: Rep. Paul Seaton

Subject: SB 86

Dear Chairman Seaton:
I am working in California and can't seem to make this computer send this message to all members of the committee. Please pass it along.

I have practiced law in Anchorage for 30 years. I think SB 86...a bill limiting attorney fee awards against government entities, is a bad idea.

R's and D's, liberals and conservatives, young and old, urban and rural have had to rely on current law as the ONLY hope of mounting a righteous fight against some governmental bad idea or other. The rich can always afford to challenge those in power. The rest of us can't. Remember, the person seeking the fees has to WIN UNDER CURRENT LAW TO GET THEM. There is nothing wrong with making governmental action accountable on the same level and under the same rules as individual action.

I am sorry that I am out of state and unable to testify. Please vote "no" and encourage other committee members to do the same.

Michael J. Schneider