

ALBANY COMMERCIAL FILLS, 200B-200C  
7/99

1169 SEATTLE AIRS

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 66  
 (S) Publish Date: 1/31/05

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Administration  
 Title: An act relating to liability for attorney RDU: Risk Management  
fees in certain civil actions 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						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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**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)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

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 465-5723  
 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

# 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  
 Sponsor: \_\_\_\_\_ Component: Labor & State Affairs  
 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						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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**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)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

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

FISCAL NOTE #2

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  
 Sponsor: Senate Rules Component: Labor & State Affairs  
 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
Personnel Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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**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)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

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

**FISCAL NOTE**

**STATE OF ALASKA  
2006 LEGISLATIVE SESSION**

**BILL NO. CSSB86**

**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 RDU Risk Management  
fees in certain civil actions 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						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
-------------------------------	--	--	--	--	--	--

**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)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

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  
 Division: Risk Management  
 Approved by: Michael Tibbles, Deputy Commissioner  
 Agency: Administration

Phone 465-5723  
 Date/Time 3/7/06 - 4:23 p.m.  
 Date 3/8/2006

## Westlaw.

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(Cite as: 115 P.3d 547)

P

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

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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

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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(SA) (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

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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. Refit*, 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*

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& 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

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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.<sup>3</sup> Court involvement would result in an intrusion upon the affairs of the legislative branch.<sup>4</sup> 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

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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 99PR11 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 &*

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*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.

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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.

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In the Supreme Court of the State of Alaska

Alaska State Office

Alaska Civil Liberties Union, et al., )

Appellants, )

v. )

State of Alaska & Municipality )

of Anchorage, )

Appellees. )

Supreme Court No. S-10459

Order

Attorney's Fees

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

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S-10459  
Order of 2/10/06  
Page 2

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.

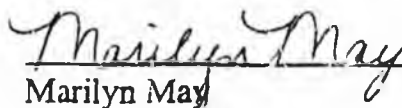
2. Having considered the appellants' application for fees totaling \$90,559 and having considered the complexity of the issues, and the extent of briefing of similar issues in the superior court, we conclude that a full reasonable fee should not exceed a total of \$60,000, representing 300 hours of attorney 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

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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  
Brenn 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

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THE SUPREME COURT OF THE STATE OF ALASKA

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

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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.<sup>1</sup> 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.<sup>2</sup>

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<sup>1</sup> 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.

<sup>2</sup> 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.<sup>3</sup>

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.<sup>4</sup> 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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<sup>3</sup> The superior court later allowed the release of city funds to compensate the club for services rendered before the preliminary injunction was issued.

<sup>4</sup> 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.<sup>5</sup> We also review the issuance of preliminary injunctions for abuse of discretion.<sup>6</sup> 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."<sup>7</sup> But we review de novo the superior court's legal determinations in issuing the preliminary injunction.<sup>8</sup> We will approve the apportionment of a prevailing public interest litigant's attorney's fees award "only in exceptional circumstances."<sup>9</sup>

#### 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."<sup>10</sup> The prevailing

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

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

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

<sup>8</sup> *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.").

<sup>9</sup> *Dausereau v. Ulmer*, 955 P.2d 916, 920 (Alaska 1998).

<sup>10</sup> *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.<sup>11</sup> 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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<sup>10</sup>(...continued)  
2001).

<sup>11</sup> *Dansereau*, 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.<sup>12</sup> 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.<sup>13</sup>

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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<sup>12</sup> 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)).

<sup>13</sup> *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,<sup>14</sup> 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.<sup>15</sup> 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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<sup>14</sup> 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 . . .").

<sup>15</sup> 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."<sup>16</sup> 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."<sup>17</sup> 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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<sup>16</sup> *N. Kenai Peninsula Rd. Maint. Serv. Area v. Kenai Peninsula Borough*, 850 P.2d 636, 639 (Alaska 1993).

<sup>17</sup> "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.**

The city, citing *Laborers Local No. 942 v. Lampkin*,<sup>18</sup> 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.<sup>19</sup> 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."<sup>20</sup> 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."<sup>21</sup>

*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).<sup>22</sup> We noted that the construction "project

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<sup>18</sup> *Laborers Local No. 942 v. Lampkin*, 956 P.2d 422 (Alaska 1998).

<sup>19</sup> *Id.* at 435.

<sup>20</sup> *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)).

<sup>21</sup> *Lampkin*, 956 P.2d at 432 n.11.

<sup>22</sup> *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.”<sup>23</sup> 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.”<sup>24</sup>

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,<sup>25</sup> 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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<sup>23</sup> *Id.* at 435.

<sup>24</sup> *Id.* at 432, 435-36.

<sup>25</sup> *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.<sup>26</sup> At least some of these cases are easily distinguishable.<sup>27</sup> Moreover, numerous cases from other jurisdictions hold that management of facilities is not professional in nature and requires competitive bidding.<sup>28</sup> Opinions from other jurisdictions interpreting similar statutes can be persuasive,<sup>29</sup> but we turn first to our own methods of statutory interpretation.

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<sup>26</sup> 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).

<sup>27</sup> 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.

<sup>28</sup> 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.

<sup>29</sup> 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.<sup>30</sup> We apply the same rules of interpretation to municipal ordinances.<sup>31</sup> 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.”<sup>32</sup> 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.”<sup>33</sup> Webster’s

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<sup>30</sup> *Barney v. State, Dep’t of Admin., Teachers Ret. Bd.*, 110 P.3d 1254, 1258 (Alaska 2005).

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

<sup>32</sup> *Gov’t Employees Ins. Co. v. Graham-Gonzalez*, 107 P.3d 279, 284 (Alaska 2005).

<sup>33</sup> 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.<sup>34</sup> “[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.<sup>35</sup> “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.”<sup>36</sup> 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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<sup>34</sup> 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”).

<sup>35</sup> 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.

<sup>36</sup> *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.<sup>37</sup> 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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<sup>37</sup> 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.<sup>38</sup> 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."<sup>39</sup> 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.<sup>40</sup>

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<sup>38</sup> *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).

<sup>39</sup> *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)).

<sup>40</sup> *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.<sup>41</sup> We have suggested that raising frivolous issues or issues included only to inflate prospective attorney's fee award may constitute exceptional circumstances.<sup>42</sup>

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.<sup>43</sup> 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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<sup>41</sup> *Dansereau v. Ulmer*, 955 P.2d 916, 918-20 (Alaska 1998).

<sup>42</sup> *Id.* at 920.

<sup>43</sup> 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.<sup>44</sup>

#### IV. CONCLUSION

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

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<sup>44</sup> 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 CAP-  
ACITY AS COMMISSIONER THEREOF,

Appellee

Case No.: No. 4PA-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 Administration, 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

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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 Syak 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, 68 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).

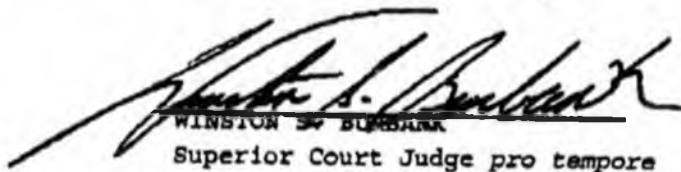
Unlike the homeowners in Abbott, Bachner and Bowers have at best a minimal pecuniary interest in this suit. The Court simply cannot credit the notion that an opportunity to bid on a new RFP - which may or may not have the same terms as the challenged RFP - is an economic incentive sufficient to defeat 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 9<sup>th</sup> day of February 2006.

  
WINSTON S. BUSHARA  
Superior Court Judge pro tempore

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Clerk

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 CAP-  
ACITY AS COMMISSIONER THEREOF,

Appellee

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

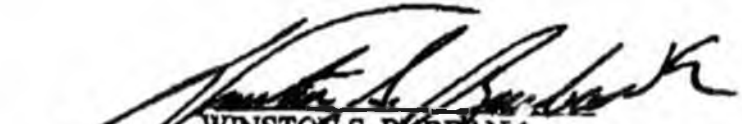
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**ORDER FOR DISCLOSURE OF ATTORNEY'S FEES**

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 9<sup>th</sup> day of Feb., 2005.

  
WINSTON S. BURBANK  
Superior Court Judge, pro tempore

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
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BACHNER COMPANY, INC. and  
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STATE OF ALASKA, DEPARTMENT  
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DUNCAN, IN HIS OFFICIAL CAP-  
ACITY 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 Administration, 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 rescinded 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 interest litigants act as "private attorneys general." Anchorage v. McCabe, 568 P.2d 996, 990 (Alaska 1977) (citing Newman v. Piggie Park Enterprises, Inc., 390 U.S. 40) (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 hols 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 Syak 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).

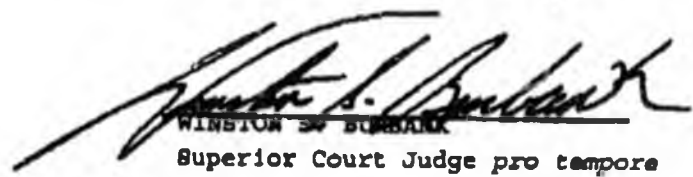
Unlike the homeowners in Abbott, Bachner and Bowers have at best a minimal pecuniary interest in this suit. The Court simply cannot credit the notion that an opportunity to bid on a new RFP - which may or may not have the same terms as the challenged RFP - is an economic incentive sufficient to defeat 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 rescure 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 Powers. 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 9<sup>th</sup> day of February 2006.

  
WINSTON S. BURCHARD  
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

## DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

*Frank H. Murkowski, Governor*

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

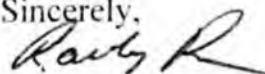
Dear Chair Seaton:

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 4<sup>TH</sup> 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

March 15, 2005

Page 2

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  
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  
 ALASKA CIVIL LIBERTIES UNION, ) AND JUDGMENT  
 )  
 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,<sup>1</sup> 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.<sup>2</sup> On appeal by the state, we reversed the superior  
court's ruling as to nine of the Act's eleven challenged

\* Entered pursuant to Appellate Rule 214.

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

<sup>2</sup> See id. at 602.

provisions;<sup>3</sup> we declared only two provisions to be unconstitutional -- one limiting pre-election contributions, and the other prohibiting legislative session contributions.<sup>4</sup> 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.<sup>5</sup>

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.<sup>6</sup> 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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<sup>3</sup> See id. at 607-14, 614-17, 617 & 618-20, 621-26, 631-32, 632-33, 630.

<sup>4</sup> 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.

<sup>5</sup> Id. at 600.

<sup>6</sup> 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.<sup>7</sup> More specifically, we have held that "[d]esignation of the prevailing party 'is committed

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<sup>7</sup> 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."<sup>8</sup> Alaska Civil Rule 82 provides that the trial court shall award the prevailing party attorney's fees.<sup>9</sup> 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."<sup>10</sup> 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.<sup>11</sup>

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.<sup>12</sup> Adopting this focus, the court finds AkCLU's basic claims to be whether the challenged Act violated the

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<sup>8</sup> 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).

<sup>9</sup> 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."

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

<sup>11</sup> Justice Carpeneti is recused from participating in this case. See Recusal Notice, S-8976 (July 23, 1999).

<sup>12</sup> 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<sup>13</sup> or stemmed from the resolution of an issue that was incidental to AkCLU's basic claims.<sup>14</sup> 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.<sup>15</sup> 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.

<sup>13</sup> See id. at 1327.

<sup>14</sup> See id. at 1327-28.

<sup>15</sup> 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

E-mail: [akphrmev@alaska.net](mailto:akphrmev@alaska.net)



## ALASKA PHARMACISTS ASSOCIATION

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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.

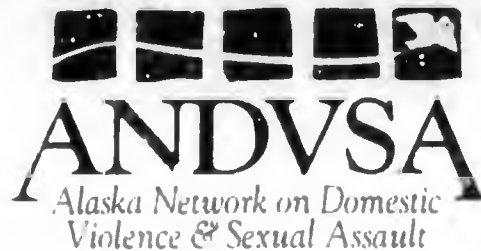
Please feel free to contact me if you any questions regarding our position.

*Nancy Davis*

Nancy Davis, Executive Director  
Alaska Pharmacists Association

E-mail: [ckphrmcy@alaska.net](mailto:ckphrmcy@alaska.net)

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



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  
ANDVSA Legal Advocacy Project  
Director/ Attorney

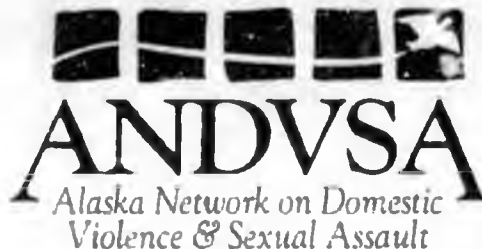
cc: Peggy Brown, ANDVSA Executive Director

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Member Programs

Anchorage AWAIC, AWRC, STAR Barrow AWIC Bethel TWC Cordova CFRC Dillingham SAFE Fairbanks IAC  
Homer SPHH Juneau AWARE Kenai LeeShore Center Ketchikan WISH Kodiak KWRCC Kotzebue MECC  
Nome BSWG Palmer AFS Seward SCS Sitka SAFV Unalaska USAFV Valdez AVV

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Fax: (907) 747-7547

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## 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 it 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.

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#### Member Programs

Anchorage AWAIC, AWRC, STAR Barrow AWIC Bethel TWC Cordova CFRC Dillingham SAFE Fairbanks IAC  
Homer SPIH Juneau AWARE Kenai LeeShore Center Ketchikan WISH Kodiak KWRCC Kotzebue MFCC  
Nome BSWG Palmer AFS Seward SCS Sitka SAFV Unalaska USAFV Valdez AVV

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 unforeseen 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