

IN THE SUPREME COURT OF THE STATE OF ALASKA

THE STATE OF ALASKA, and)
THE MUNICIPALITY OF ANCHORAGE,)
)
Appellant,)
)
vs.)
)
JULIE A. SCHMIDT, GAYLE SCHUH,)
JULIE M. VOLLICK, SUSAN L. BERNARD,)
FRED W. TRABER, and)
LAURENCE SNIDER)
)
Appellees.)
)
) Case No. S-14521

Superior Court Case No. 3AN-10-9519 CI

APPEAL FROM THE SUPERIOR COURT,
THIRD JUDICIAL DISTRICT AT ANCHORAGE,
THE HONORABLE FRANK A. PFIFFNER, PRESIDING

BRIEF OF APPELLANT MUNICIPALITY OF ANCHORAGE

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the State of Alaska this _____
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By: _____
Deputy Clerk

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**STATUTES, REGULATIONS AND COURT RULES
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ALASKA STATUTES

AS 09.60.010. Costs and attorney fees allowed prevailing party.

(a) The supreme court shall determine by rule or order the costs, if any, that may be allowed a prevailing party in a civil action. Unless specifically authorized by statute or by agreement between the parties, attorney fees may not be awarded to a party in a civil action for personal injury, death, or property damage related to or arising out of fault, as defined in AS 09.17.900, unless the civil action is contested without trial, or fully contested as determined by the court.

(b) Except as otherwise provided by statute, a court in this state may not discriminate in the award of attorney fees and costs to or against a party in a civil action or appeal based on the nature of the policy or interest advocated by the party, the number of persons affected by the outcome of the case, whether a governmental entity could be expected to bring or participate in the case, the extent of the party's economic incentive to bring the case, or any combination of these factors.

(c) In a civil action or appeal concerning the establishment, protection, or enforcement of a right under the United States Constitution or the Constitution of the State of Alaska, the court

(1) shall award, subject to (d) and (e) of this section, full reasonable attorney fees and costs to a claimant, who, as plaintiff, counterclaimant, cross claimant, or third-party plaintiff in the action or on appeal, has prevailed in asserting the right;

(2) may not order a claimant to pay the attorney fees of the opposing party devoted to claims concerning constitutional rights if the claimant as plaintiff, counterclaimant, cross claimant, or third-party plaintiff in the action or appeal did not prevail in asserting the right, the action or appeal asserting the right was not frivolous, and the claimant did not have sufficient economic incentive to bring the action or appeal regardless of the constitutional claims involved.

(d) In calculating an award of attorney fees and costs under (c)(1) of this section,

(1) the court shall include in the award only that portion of the services of claimant's attorney fees and associated costs that were devoted to claims

concerning rights under the United States Constitution or the Constitution of the State of Alaska upon which the claimant ultimately prevailed; and

(2) the court shall make an award only if the claimant did not have sufficient economic incentive to bring the suit, regardless of the constitutional claims involved.

(e) The court, in its discretion, may abate, in full or in part, an award of attorney fees and costs otherwise payable under (c) and (d) of this section if the court finds, based upon sworn affidavits or testimony, that the full imposition of the award would inflict a substantial and undue hardship upon the party ordered to pay the fees and costs or, if the party is a public entity, upon the taxpaying constituents of the public entity.

AS 22.05.010. Jurisdiction.

(a) The supreme court has final appellate jurisdiction in all actions and proceedings. However, 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.

AS 29.45.010. Property Tax.

(a) A unified municipality may levy a property tax. A borough may levy

(1) an areawide property tax for areawide functions;

(2) a nonareawide property tax for functions limited to the area outside cities;

(3) a property tax in a service area for functions limited to the service area.

(b) A home rule or first class city may levy a property tax subject to AS 29.45.550 - 29.45.560. A second class city may levy a property tax subject to AS 29.45.590.

(c) If a tax is levied on real property or on personal property, the tax must be assessed, levied, and collected as provided in this chapter.

AS 29.45.030. Required Exemptions

(e) The real property owned and occupied as the primary residence and permanent place of abode by a resident who is (1) 65 years of age or older; (2) a disabled

veteran; or (3) at least 60 years of age and the widow or widower of a person who qualified for an exemption under (1) or (2) of this subsection is exempt from taxation on the first \$150,000 of the assessed value of the real property. A municipality may by ordinance approved by the voters grant the exemption under this subsection to the widow or widower under 60 years of age of a person who qualified for an exemption under (2) of this subsection. A municipality may, in case of hardship, provide for exemption beyond the first \$150,000 of assessed value in accordance with regulations of the department. Only one exemption may be granted for the same property, and, if two or more persons are eligible for an exemption for the same property, the parties shall decide between or among themselves who is to receive the benefit of the exemption. Real property may not be exempted under this subsection if the assessor determines, after notice and hearing to the parties, that the property was conveyed to the applicant primarily for the purpose of obtaining the exemption. The determination of the assessor may be appealed under AS 44.62.560 - 44.62.570.

AS 29.45.800. Applicability of AS 29.45.010.

AS 29.45.010 - 29.45.560 apply to home rule and general law municipalities.

REGULATIONS

3 AAC 135.085. Eligibility.

(a) When an eligible person and his or her spouse occupy the same permanent place of abode, the reimbursement described in AS 29.45.030 (g) applies, regardless of whether the property is held in the name of the husband, wife, or both.

COURT RULES

Alaska R. Civ. P. 82. Attorney's Fees

(b) Amount of Award.

(3) The court may vary an attorney's fee award calculated under subparagraph (b)(1) or (2) of this rule if, upon consideration of the factors listed below, the court determines a variation is warranted:

- (A) the complexity of the litigation;
- (B) the length of trial;

- (C) the reasonableness of the attorneys' hourly rates and the number of hours expended;
- (D) the reasonableness of the number of attorneys used;
- (E) the attorneys' efforts to minimize fees;
- (F) the reasonableness of the claims and defenses pursued by each side;
- (G) vexatious or bad faith conduct;
- (H) the relationship between the amount of work performed and the significance of the matters at stake;
- (I) the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts;
- (J) the extent to which the fees incurred by the prevailing party suggest that they had been influenced by considerations apart from the case at bar, such as a desire to discourage claims by others against the prevailing party or its insurer; and
- (K) other equitable factors deemed relevant. If the court varies an award, the court shall explain the reasons for the variation.

I. JURISDICTIONAL STATEMENT

This is an appeal of a decision of the Superior Court. Appellant Municipality of Anchorage (“Municipality”) may appeal as a matter of right under AS 22.05.010(a), and that statute provides that the Alaska Supreme Court has appellate jurisdiction.¹

II. STATEMENT OF ISSUES

- A. Whether the trial court erred in awarding attorney’s fees against the Municipality when the Municipality had no ability to avoid or compromise litigation.
- B. Whether the trial court erred in not requiring plaintiffs to establish their status as public interest litigants before awarding fees as such.
- C. Whether the trial court neglected to consider and/or properly apply equitable factors that justified a reduction in the attorney’s fees award sought by plaintiffs.

III. STATEMENT OF THE CASE

Plaintiffs (Appellees in this matter) filed a complaint on August 3, 2010, in which they asserted the senior citizen and disabled veteran tax exemption under AS 29.45.030(e) violated Alaska Constitution’s equal protection clause because same sex domestic partners cannot receive the full exemption. [Exc. 1-13] Plaintiffs engaged in some discovery, limited to promulgating interrogatories and requests for production on the State of Alaska and the Municipality. No party conducted depositions.

On May 11, 2011, plaintiffs moved for summary judgment on their equal protection claim. [R. 173-208] The State of Alaska opposed the motion and cross-

¹ The State of Alaska is an appellant in this matter as well. Appellees were plaintiffs in the original matter, and include Julie A. Schmidt, Gayle Schuh, Julie M. Vollick, Susan L. Bernard, Fred W. Traber, and Laurence Snider.

moved for summary judgment on July 11, 2011. [R. 104-138] Meanwhile, the Municipality filed a simple statement indicating that the State should address plaintiffs' arguments because the Municipality is required to administer the exemptions in accordance with State law. [R. 224] Following briefing and oral argument, the Superior Court concluded in its Decision and Order that the provisions did violate the Constitution, based on the Alaska Supreme Court's ruling in *Alaska Civil Liberties Union ("ACLU") v. State*, 122 P.3d 781 (Alaska 2005). [Exc. 66-92]

Thereafter plaintiffs sought attorney's fees. [R. 489-496] Both the State and the Municipality opposed the motion. [R. 518-524, 526-549] On December 12, 2011, without any explanation or discussion, the Superior Court awarded plaintiffs full attorney's fees in the amount of \$135,475.50. [Exc. 132-133] The Superior Court simply stated "[t]he court finds the fees sought by plaintiffs to be reasonable... ." [Exc. 133] However, the Superior Court failed to address any of the Municipality's arguments regarding attorney's fees – including whether plaintiffs established they were public interest litigants, whether the Municipality should not be held responsible for attorney's fees since the State enacted the tax exemption and the Municipality must simply follow it, or whether the attorney's fees should be adjusted downward. [R. 526-549]; [Exc. 132-133] For the reasons discussed below, this Court should reverse the award of attorney's fees against the Municipality.

IV. STANDARD OF REVIEW

Generally, the Alaska Supreme Court reviews decisions about the reasonableness of an award of attorney's fees using the "abuse of discretion" standard. *Cizek v.*

Concerned Citizens of Eagle River Valley, Inc., 71 P.3d 845, 848 (Alaska 2003). This Court will find that a decision is an abuse of discretion only when the decision is “manifestly unreasonable.” *Thorstenson v. ARCO Alaska, Inc.*, 780 P.2d 371, 376 (Alaska 1989). When the Supreme Court is asked to determine whether the trial court applied the law correctly in determining the award of attorney’s fees, the Supreme Court applies the *de novo* standard of review. *Glamann v. Kirk*, 29 P.3d 255, 259 (Alaska 2001).

While trial courts have broad discretion in awarding attorney’s fees under Civil Rule 82, the courts abuse this discretion when they award full attorney’s fees without providing any explanation. *Moses v. McGarvey*, 614 P.2d 1363, 1369 (Alaska 1980). “If full attorney’s fees are to be rewarded, the court must set forth a valid reason for such an exception to the general rule.” *Id.*

V. ARGUMENT

In this case, the trial court merely stated that the fees sought by plaintiffs were “reasonable,” but the court did not provide an explanation of why it deviated from the general rule and awarded plaintiffs full attorney’s fees. [Exc. 133] Nor did it explain why the Municipality – who did not actively brief issues – should be responsible for attorney’s fees. The court’s ruling should be reversed. *See Moses v. McGarvey*, 614 P.2d at 1369. At the very least, this Court should remand the decision to the Superior Court to permit that court to provide the appropriate explanation of its award of full attorney’s fees. *See Municipality of Anchorage v. Anchorage Police Dept. Employees Ass’n*, 839 P.2d 1080, 1092 (Alaska 1992).

A. Trial Court Erred in Awarding Attorney's Fees Against the Municipality.

1. The Municipality Should Not be Required to Pay Attorney's Fees Where it Had No Ability to Avoid or Compromise the Litigation.

This Court should reverse the award of attorney's fees against the Municipality.² Plaintiffs facially challenged a state tax exemption for senior citizens and disabled veterans. [Exc. 1-13] While the Superior Court agreed with plaintiffs that the provisions violated Alaska's equal protection clause [Exc. 60], the court's Decision and Order makes no explicit finding that the Municipality improperly enforced state law. Rather, the Superior Court noted, "the Municipality does not have a choice in how it applies the allegedly unconstitutional legislation." [Exc. 60]

The Municipality should not be held liable for attorney's fees for following state law, as it is required to do. *See* AS § 29.45.800 (stating AS 29.45.010 – 29.45.560 governs property taxation by home rule municipalities); AS 29.45.010 ("If a tax is levied on real or personal property, the tax must be assessed, levied and collected as provided in this chapter."). Because the Municipality must adhere to the provisions of AS 29.45, along with the state administrative regulations relating to the chapter, the Municipality had no ability to compromise or avoid the litigation. Indeed, it could not have agreed to stop administering the exemption in a manner that would have contravened 3 AAC 135.085(a). *See* AS § 29.45.010.

² Although the Superior Court's order does not expressly state the Municipality is liable for attorney's fees [Exc. 132-133], in the absence of any discussion the State and Municipality are jointly and severally liable for the attorney's fees. *See Hughes v. Foster Wheeler Co.*, 932 P.2d 784, 792 (Alaska 1997).

That the Municipality should not be held liable is supported by the rationale in *Moses v. McGarvey*, 614 P.2d at 1367. In that case, this Court approved the lower court's apportionment of attorney's fees against two co-defendants after the lower court's original award of fees was against only one of the defendants. *Id.* at 1365. The trial court awarded a judgment against the co-defendant, which required the co-defendant to reimburse the other defendant for all of the attorney's fees awarded in the case. *Id.* This Court stated that the trial court has the discretion to order one defendant to pay all of the attorney's fees awarded in a case, "especially where the court believes that [one] defendant...to be the wrongdoer." *Id.* at 1368. The same result is appropriate in this case.

2. The Trial Court Neglected to Determine if an Award of Attorney's Fees Against the Municipality Would Constitute a "Substantial and Undue" Hardship.

The Superior Court neglected to consider whether the award of attorney's fees as against the Municipality should be adjusted. The court has discretion to abate (in full or in part) attorney's fees if it finds that the party ordered to pay would face "substantial and undue hardship" if ordered to pay the full award. AS 09.60.010(e). In awarding fees, the statute explains, the court should consider whether "full imposition of the award would inflict a substantial and undue hardship ... upon the taxpaying constituents." AS 09.60.010(e). The legislative history behind AS 09.60.010 does not explain what types of hardship warrant an adjustment. While the Municipality did not and could not reasonably argue that the payment of \$130,000 in fees (or half that amount) would constitute an economic hardship, considering the size of the Municipality's budget, because of the

factors discussed above, *see* Discussion *supra* section A.1,³ payment by the Municipality of such an amount is an “undue” hardship. The taxpayers of the Municipality should not be forced to pay attorney’s fees related to an action where the court found a State statute unconstitutional and where the Municipality could not avoid the litigation at all. The Court should therefore reverse or significantly reduce the Superior Court’s imposition of fees against the Municipality.

B. The Trial Court Erred in Not Requiring Plaintiffs to Establish They Were Public Interest Litigants.

This court should also reverse the Superior Court’s award of full attorney’s fees because the Superior Court failed to address whether the award was based on public interest litigant status. *See Simpson v. Murkowski*, 129 P.3d 435, 449 (Alaska 2006) (reversing trial court’s award of attorney’s fees for determination on remand of whether awardee had sufficient economic incentive for purposes of public interest litigant status). The Superior Court did not find, and plaintiffs did not show, that they were public interest litigants. [Exc. 133] However, in order to be classified as public interest litigants, plaintiffs must show that they lacked “sufficient economic incentive to bring the action or appeal regardless of the constitutional claims involved.” AS § 09.60.010 (c)(2); *Simpson v. Murkowski*, 129 P.3d at 448. The only argument plaintiffs made concerning their public interest status was that the State allegedly agreed the tax benefit would

³ The Municipality recognizes that provision states the court may make findings based on sworn affidavit or testimony. However, no affidavit or testimony would assist the court since the Municipality has already acknowledged the total amount is minimal in view of the Municipal budget. The issue is therefore only whether there is a “substantial and undue” hardship in view of the facts in the record, and that is ultimately a decision for the Court.

probably only amount to a few hundred dollars a year. [R. 491-492] But plaintiffs used the State's statement out of context. The State was not positing on the actual benefit the plaintiffs would derive for purposes of determining whether the taxpayer had economic incentive to bring suit. *See* [R. 127]. The actual benefit to an individual could, in fact, be higher, depending on the assessed value of the property and the year or years the exemption is applied. As the State's representation was the sole basis relied upon by plaintiffs, and because that does not establish public interest litigant status, plaintiffs should have been required to make the showing that they would not have a sufficient economic incentive to bring the suit before an award of full attorney's fees. *See* AS 09.60.010 (c).

C. **The Trial Court's Award Was Excessive Because it Failed to Consider Equitable Factors Warranting a Reduction.**

The Superior Court also failed to adjust the fees based on the factors listed in Alaska Civil Rule 82(b)(3), including:

- (A) the complexity of the litigation
- (B) the length of trial;
- (C) the reasonableness of the attorneys' hourly rates and the number of hours expended;
- (D) the reasonableness of the number of attorneys used;
- (E) the attorneys' efforts to minimize fees;
- (F) the reasonableness of the claims and defenses pursued by either side;
- (G) vexatious or bad faith conduct;
- (H) the relationship between the amount of work performed and the significance of the matters at stake;
- (I) the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from voluntary use of the courts;
- (J) the extent to which the fees incurred by the prevailing party suggest that they had been influenced by considerations part from the case at bar,

such as desire to discourage claims by others against the prevailing party or its insurer; and
(K) other equitable factors deemed relevant.

Undisputedly, this was a simple case. There was little discovery and no trial preparation; the case was decided on summary judgment. Plaintiffs asserted they were entitled to prevail because of the court's decision in *ACLU v. State*, 122 P.3d 781. [R. 180] Indeed, it was on that basis that the Superior Court found for plaintiffs. [Exc. 59-92] But given the simplicity of the case, it is difficult to comprehend the need for seven attorneys and the enormous amount of hours spent researching, meeting, coordinating, writing and reviewing. *See* [Exc. 96-131]. The Superior Court should have taken note of the particularities of the case and adjusted the award accordingly.

Had the Superior Court looked more carefully at the invoices submitted by plaintiffs, it would have been clear that there was excessive and repetitive review and revision of the few pleadings that were produced in this case – namely the complaint, two sets of discovery requests to each of the defendants, and the motion for summary judgment. [Exc. 96-127] For example, the tables accompanying the declarations show that plaintiffs' attorneys spent nearly 55 hours researching and drafting the complaint, at a cost exceeding \$15,000. *See* [R. 453-488] However, much of the complaint was made up of quotations from the pertinent codes and statutes, and statements about plaintiffs' personal circumstances. [Exc. 1-13] While the Municipality recognizes that collaboration may be warranted, the amount of time actually spent on such collaboration in this case was excessive. The Superior Court therefore erred when it found the fees incurred were "reasonable." [Exc. 133]

CONCLUSION

Because the Superior Court abused its discretion in granting an award of full attorney's fees against the Municipality, this Court should reverse the Superior Court's award. Alternatively, this Court should remand the decision to the Superior Court to permit the court to provide the appropriate explanation of its award of full attorney's fees.

DATED this 6th day of March, 2012.

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CERTIFICATE REGARDING TYPEFACE AND POINT SIZE

Pursuant to Alaska Rule of Appellate Procedure 513.5(c)(2), Appellant Municipality of Anchorage, by and through Assistant Municipal Attorney Pamela D. Weiss, hereby certifies that the typeface used in its Brief and other documents submitted hereto is Times New Roman, 13-point, proportionally spaced.

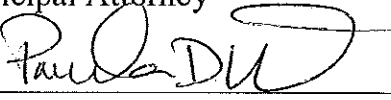
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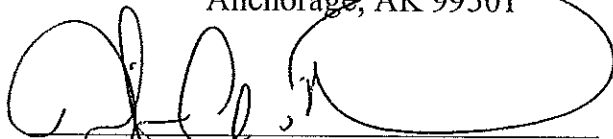
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