

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. VOLLUCK, SUSAN L. BERNARD,)
FRED W. TRABER, and)
LAURENCE SNIDER)
)
Appellees.)

RECEIVED
FOR _____
JUN 4 2012
DAVIS WRIGHT TREMAINE
BY _____

) 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

REPLY BRIEF OF APPELLANT MUNICIPALITY OF ANCHORAGE

DENNIS A. WHEELER
Municipal Attorney
PAMELA D. WEISS (AK Bar No. 0305022)
Assistant Municipal Attorney
P.O. Box 196650
Anchorage, Alaska 99519-6650
(907) 343-4545
Attorney for Appellant
Municipality of Anchorage

Filed in the Supreme Court of
the State of Alaska this _____
day of June, 2012.

Marilyn May, Clerk

By: _____
Deputy Clerk

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

AUTHORITIES RELIED UPON.....iii

I. ARGUMENT 1

 A. There are No Objections to Remand on the Issue of the Municipality’s
 Responsibility for Attorney Fees. 1

 B. Appellees Incorrectly Suggest that the Superior Court Made a
 Finding With Respect to Plaintiffs’ Status as Public Interest Litigants..... 1

 C. The Superior Court Failed to Offer an Explanation of Its Award of
 Full Fees Under Civil Rule 82.2

II. CONCLUSION 3

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<i>Moses v. McGarvey</i> 614 P.2d 1363 (Alaska 1980)	2
<i>Municipality of Anchorage v. Anchorage Police Dept. Employees Ass'n</i> 839 P.2d 1080 (Alaska 1992)	3
<i>Simpson v. Murkowski</i> 129 P.3d 435 (Alaska 2006)	2
 <u>COURT RULES</u>	
Alaska Civil Rule 82	2, 3

**STATUTES, REGULATIONS AND COURT RULES
PRINCIPALLY RELIED UPON**

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.

COURT RULES

Ak 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. ARGUMENT

A. **There are No Objections to Remand on the Issue of the Municipality's Responsibility for Attorney Fees.**

Appellees do not oppose the Superior Court addressing the issue of the Municipality's responsibility for fees. Indeed, they state expressly they would "not object if this Court were to remand the issue of apportioning fees between Defendants." Brief of Appellees ("Appellees Br.") at p. 49, n.236.¹ Accordingly, this court should either address the issue or remand it to the Superior Court.

Meanwhile, the Municipality wishes to make one point concerning a statement made by Appellees that relates to the Municipality's position in the litigation and that could affect the allocation of responsibility for fees. Contrary to Appellees' suggestion, the Municipality did not "adopt" the State's arguments in the underlying case or in the summary judgment motion practice. *See* Appellees Br. at p. 44. The Municipality did not make any arguments at all, stating instead that the Motion for Summary Judgment should be addressed by the State. [R. 224] Taking no position should not be equated with adoption.

B. **Appellees Incorrectly Suggest that the Superior Court Made a Finding With Respect to Plaintiffs' Status as Public Interest Litigants.**

It is unclear what Appellees' exact stance is with respect to this argument. Appellees appear to be arguing that the Superior Court made a finding that they were public interest litigants. However, in their Brief, Appellees state: "the superior court's Final Judgment specifically denied finding without briefing that Plaintiffs were public

¹ The State, for its part, does not address this issue at all.

interest litigants.” Appellees Br. at p. 45. The Municipality agrees that, in the Final Judgment, the court “denied finding” the plaintiffs were public interest litigants. However, that is exactly the point – the court did not conclude that Appellees established they were a public interest litigant.

The court similarly made no such finding in its order awarding fees. The entirety of the court’s order on fees is as follows:

The plaintiffs have properly brought a motion for attorney’s fees under Rule 82 of the Alaska Rules of Civil Procedure and AS [sic] 09.60.010. The court finds the fees sought by plaintiffs to be reasonable, both in terms of the hours of work associated with the litigation and the rates billed. The defendants shall pay attorney’s fees in the amount of \$135,457.50 to plaintiffs’ attorneys.

[Exc. 133] In other words, the court stated that plaintiffs brought a motion under AS 9.60.010, but the court did not address the merits of plaintiffs’ public interest litigant status. The trial court should have made such a finding. *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). Its failure to do so requires remand.

C. The Superior Court Failed to Offer an Explanation of Its Award of Full Fees Under Civil Rule 82.

Assuming the court’s award was therefore made under Civil Rule 82, the Superior Court failed to explain its rationale for an award of full fees. Appellees, for their part, make no effort to address the requirement set out in *Moses v. McGarvey*. 614 P.2d 1363, 1369 (Alaska 1980) (providing “[i]f full attorney’s fees are to be awarded, the court must set forth a valid reason for such an exception to the general rule.”). Thus, 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).

II. CONCLUSION

In light of Appellees' non-objection to consideration of apportionment of fees between the Municipality and the State, the Municipality respectfully requests this court reverse the award of fees as to the Municipality and remand the issue of apportionment to the Superior Court. Further, the Municipality requests that the court reverse and remand the issue of whether Appellees have established that they are public interest litigants or to provide explanation of the award of full attorney's fees under Civil Rule 82.

DATED this 1st day of June, 2012.

DENNIS A. WHEELER
Municipal Attorney

By: 

Pamela D. Weiss
Alaska Bar No. 0305022
Assistant Municipal Attorney
P.O. Box 196650
Anchorage, Alaska 99519-6650
(907) 343-4545
Attorney for Appellant
Municipality of Anchorage

Pamela D. Weiss
Alaska Bar No. 0305022
Assistant Municipal Attorney
P.O. Box 196650
Anchorage, Alaska 99519-6650
(907) 343-4545

Attorney for Appellant
Municipality of Anchorage

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. VOLLIK, SUSAN L. BERNARD,)
FRED W. TRABER, and)
LAURENCE SNIDER)
)
Appellees.)
) Case No. S-14521

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

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 Reply Brief and other documents submitted hereto is Times New Roman, 13-point, proportionally spaced.

//

//

//

DATED this 1st day of June, 2012.

DENNIS A. WHEELER
Municipal Attorney

By: 

Pamela D. Weiss
Pamela D. Weiss
Assistant Municipal Attorney
Alaska Bar No. 0305022

Pamela D. Weiss
Alaska Bar No. 0305022
Assistant Municipal Attorney
P.O. Box 196650
Anchorage, Alaska 99519-6650
(907) 343-4545

Attorney for Appellant
Municipality of Anchorage

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

CERTIFICATE OF MAILING

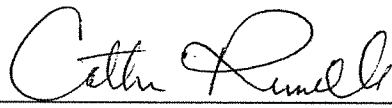
I hereby certify that on June 1, 2012 I caused to be mailed a true and correct copy of the Appellant's Reply Brief and Certificate of Typeface and Point Size to:

Thomas Stenson
ACLU of Alaska
1057 W. Fireweed Ln, #207
Anchorage, AK 99503

David W. Oesting
701 West 8th Ave., Ste 800
Anchorage, AK, 99501

Kevin M. Saxby
Assistant Attorney General
1031 W. 4th Ave., Ste 200
Anchorage, AK 99501

DATED this 1st day of June, 2012.


Cathi Russell, Legal Secretary
Municipal Attorney's Office