IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

SCOTT A. KOHLHAAS, THE ALASKAN INDEPENDENCE PARTY, ROBERT M. BIRD, AND KENNETH P. JACOBUS, Plaintiffs, vs. STATE OF ALASKA; STATE OF ALASKA DIVISION OF ELECTIONS; LIEUTENANT GOVERNOR KEVIN MEYER, in his official capacity as Supervisor of Elections; and GAIL FENUMIAI, in her official capacity of Director of the Division of Elections, Defendants.	Case No. 3AN-20-09532 CI
ALASKANS FOR BETTER ELECTIONS, INC., Intervenor.	

ORDER DENYING INTERVENOR'S MOTION FOR ATTORNEYS' FEES and COSTS
(Case Motion #15)

Final judgment has been issued in favor of the State and intervenor Alaskans for Better Elections ("ABE"). ABE now seeks an award of fees and costs. Plaintiffs oppose. The State takes no position, and has not moved for fees or costs. Oral argument was held September 28, and the motion is ripe. There is no dispute that ABE is the prevailing party. Nonetheless, for the reasons stated below, this court hereby **DENIES** ABE's motion.

ABE had actual fees of $91,662 and costs of $980.93. ABE seeks 50% of its fees ($45,831) and full costs, for a total of $46,811.93. Per Civil Rule 82(b)(2), a "normal" award of fees would be 20% of the prevailing party's total actual reasonable fees. But per Rule 82(b)(3), a court may award "enhanced" fees of up to 100% if certain factors are met. Here, ABE seeks 50%. ABE supported its motion with an affidavit and printout of its fees showing the attorneys

used, amount of time, and resulting charge for each task. ABE argues that its hourly rates are standard and even reduced; that the number of attorneys it used and the hours spent by each attorney are both reasonable and itemized in its submitted, sworn billing statements; that the case presented novel claims; and, that all parties briefed and argued the motions on an expedited basis. ABE also argues that it ultimately incurred somewhat higher fees than what might have been possible because Plaintiffs kept changing their theories, and that Plaintiffs did not do a good job in presenting those theories. Plaintiffs do not really challenge any of this. Rather, Plaintiffs argue that they should not be forced to pay any fees/costs because Plaintiffs were "public interest litigants" who were raising constitutional claims, and that as a matter of law they should be deemed immune from fees/costs. Plaintiffs then argue that even if they are not deemed immune, that ABE should not be awarded anything above the "normal" 20% of Rule 82(b)(2) because ABE "ran up its attorney fees unreasonably," and that ABE is seeking an award of large fees "to prevent anyone else from challenging Alaskan elections," to "punish" the Plaintiffs (who Plaintiffs characterize as "volunteers"), and that ABE's motion is "simply a tactical move, to bully the plaintiffs into not appealing..."[1]

This court discusses the "public interest, constitutional claims" argument in the next paragraphs. But as to the Rule 82 argument, this court agrees with ABE. ABE properly supported its motion, and this court finds that the hourly rates, number of lawyers and hours spent per task are reasonable. This court also finds that the issues were novel but not complex, but that the expedited nature of the case resulted in increased fees. This court also agrees with ABE that ABE's fees increased as a direct result of Plaintiffs' changing and poorly-developed theories, and that Plaintiffs chose to ignore very clear law that went directly against Plaintiffs' arguments. Finally, this court rejects Plaintiffs' argument that ABE "ran up its fees," or that ABE is trying to

[1] *See* Plaintiff's August 18, 2021 "Opposition to Motion for Attorney Fees and Costs," at pp. 5-6.

"punish" or "bully" Plaintiffs or anyone else. Indeed, this allegation by Plaintiffs is a good example of why enhanced fees *should* be awarded to ABE: here too, Plaintiffs make wholly unsupported arguments, which ABE then had to spend time addressing in its reply. Plaintiffs have not pointed to a single time entry that Plaintiffs suggest was unnecessary, too long, or in any other way inappropriate. Nor do Plaintiffs provide any sworn or even unsworn factual support for their arguments of ABE's alleged "bullying tactics" or for any of Plaintiffs' other allegations. For each of these reasons, if Civil Rule 82(b)(3) were the only consideration this court must consider, this court would grant ABE's motion for 50% fees and 100% costs.

But this is not the only issue. The "public interest, constitutional claims" issue is applicable. Both parties agree that Plaintiffs raised constitutional claims, and that as a result, AS 09.60.010(c)(2) comes into play. That statute reads:

> (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
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> . . .
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> (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.

The statute was passed in 2003. Prior to then, the phrase used was whether a party was a "public interest litigant." The Alaska Supreme Court had adopted a four-part test to determine if fees should be awarded in such litigation.[2] Since passage of this statute, the phrase now used

[2] *Kenai Lumber Co., v. LeResche*, 646 P.2d 215, 223 (Alaska 1982); Anchorage *Daily News v. School District*, 803 P.2d 402, 404 (Alaska 1990), quoted and followed in *Kodiak Seafood Processors Ass'n. v. State*, 900 P.2d 1191, 1198 (Alaska 1995), and *Ninilchik Traditional Council v. Noah*, 928 P.2d 1206, 1218-19 (Alaska 1996).

is whether constitutional claims are alleged.[3] Although the label changed, the four-part test remains, and is to be applied by trial courts. The test is:

> (1) Is the case designed to effectuate strong public policies?
> (2) If the plaintiff succeeds will numerous people receive benefits from the lawsuit?
> (3) Can only a private party have been expected to bring the suit?
> (4) Would the purported public interest litigant have sufficient economic incentive to file suit even if the action involved only narrow issues lacking general importance?[4]

The Alaska Supreme Court has decided many cases on this issue. Through those cases it is obvious that the legislature and the Court intend that the protections of this statute be broadly interpreted to promote and protect litigants bringing or defending constitutional claims.[5]

As to how to apply the statute, in 2014 the Court stated that "Alaska Statute 09.60.010(c)'s application depends not on the source of the rule of law, but on the source of the right asserted."[6]

The next year, in *Conservation Foundation v. Pebble*,[7] the Court stated that:

> Since *Kenai Lumber* our focus has been on primary purpose: A litigant has sufficient economic incentive to bring a claim when it is brought primarily to advance the litigant's direct economic interest, regardless of the nature of the claim. We generally examine two factors—the nature of the claim and relief sought and the direct economic interest at stake—to determine primary purpose.
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> . . .
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> The nature of the claim and the type of relief requested are strong indicators of primary purpose. We look to statements made in the pleadings and proceedings about the rationale for the lawsuit, to whether the relief requested was equitable or legal, and to the amount of money in controversy, to determine whether the litigant had sufficient economic incentive to bring the claim. But the type of relief sought is not always conclusive: "Economic interest need not take the form of damages," and requesting injunctive relief does not guarantee a lack of economic motivation. We also have stated that

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[3] *Conservation Foundation v. Pebble Ltd. P'ship,* 350 P.3d 273, 280 (Alaska 2015).
[4] *Id.* at 279.
[5] The Court directly stated in *Conservation Foundation v. Pebble,* 350 P.3d at 280, that AS 09.10.060 "encourages and protects parties bringing constitutional claims."
[6] *Lake & Peninsula Borough v. Oberlatz*, 329 P.3d 214, 226 (Alaska 2014).
[7] *Conservation Foundation v. Pebble Ltd. P'ship,* 350 P.3d 273, 281-285 (Alaska 2015).

> courts must " 'look to the facts of the case to determine the litigant's primary motivation for filing the suit.'...
>
> We also look to the direct economic interest at stake when determining primary purpose. When direct economic benefits will flow to the claimant as a result of successful litigation, that is strong evidence the litigant had economic incentive to bring the claim...[8]

The Court followed this same logic two years later in stating that "We reiterate and emphasize – again – that *direct* economic benefit is needed for there to be 'sufficient economic incentive to bring the action'."[9]

In these and other cases on this issue, the Court has generally viewed quite narrowly what constitutes a "direct" or "sufficient" financial interest. The Court has generally -- but not always – held in favor of the public interest litigant in finding only indirect and insufficient financial interests in their bringing their lawsuit, and thus that the litigant is protected by the immunity of AS 09.60.010(c).

Finally, in 2018 the Court addressed the language in AS 09.60.010(c) that the plaintiff's claim must not have been "frivolous."[10] The Court acknowledged that it had "never conclusively addressed how the frivolousness analysis should be conducted," and that the statute does not define the term. The Court then used its interpretation from Civil Rule 11, that:

> ...Rule 11 imposes an objective standard of reasonableness and "should not be used to 'stifle creative advocacy' or 'chill [a litigant's] enthusiasm in pursuing factual or legal theories'." In most cases, then, a claim should not be considered frivolous unless the litigant has "abused the judicial process" or "exhibited an improper or abusive purpose."[11]

In this instant case, there are four plaintiffs. Of those, the focus in this attorneys' fees motion has been on only one of those plaintiffs, Scott Kohlhaas. It is undisputed that he earns

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[8] *Id.* at 281-83 (citations omitted).
[9] *Alaska Miners Association v. Holman*, 397 P.3d 312, 316-7 (Alaska 2017) (italics in original).
[10] *Manning v. State, Dept. of Fish and Game*, 420 P.3d 1270, 1283-84 (Alaska 2018).
[11] *Id.* (internal cites omitted; brackets in original).

money collecting signatures for the Libertarian party, and that he will likely lose future income under the new law. It is disputed, however, what percentage of his income comes from collecting signatures, or even how much he makes from it. There was no evidence pro or con about the other plaintiffs. Notwithstanding this dispute and lack of evidence, this court finds that all four plaintiffs, including Mr. Kohlhaas, brought this case first and foremost because they do not like the new election law that was created via passage of Ballot Measure 2. Plaintiffs did not sue to collect money damages. Rather, they sued to stop the law by having it deemed unconstitutional. At no point was Mr. Kohlhaas's signature gathering business ever mentioned in the complaint or in any party's summary judgment arguments. His signature gathering was at best an "indirect" issue, which as a matter of law does not destroy the statutory immunity Plaintiffs have against fees/costs.

As to whether Plaintiffs' claims were frivolous, at oral argument on the fees motion ABE argued that although Plaintiffs' claims were ever-changing, not supported by the law, and that Plaintiffs' counsel missed deadlines and/or improperly tried to add to the closed record, ABE conceded that Plaintiffs' claims were likely not "frivolous." ABE's concession is appropriate. As noted above, the *Lake & Peninsula Borough* Court stated that "Alaska Statute 09.60.010(c)'s application depends not on the source of the rule of law, but on the source of the right asserted."[12] This court interprets that phrase to mean that although Plaintiffs failed to prove that the law from Alaska or any jurisdiction *supported* their claims, that nonetheless their claims were *based upon* the Alaska and U.S. Constitutions. Nor is there any indication that Plaintiffs "abused the judicial process" or "exhibited an improper or abusive purpose."

[12] *Lake & Peninsula Borough*, 329 P.3d at 226.

In summary, Plaintiffs brought constitutional claims. Although they failed to prove their claims, they fall within the protection of AS 09.06.010(c)(2) and Alaska case law. They are therefore not liable for fees or costs, and ABE's motion for fees and costs is **DENIED**.

Dated this 04th day of October 2021.

Gregory Miller
Superior Court Judge

I certify that on 10/4/21
a copy of the above was emailed to:
Kenneth Jacobus
Margaret Paton-Walsh
Thomas Flynn
Samuel Gottstein
Jahna Lindemuth
Scott Kendall

S. Spraker, Judicial Administrative Assistant