

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

STANLEY ALLEN VEZEEY)
Plaintiff,)
v.)
BRYCE EDGMON, Speaker of the)
Alaska State House of)
Representatives, and CATHERINE)
A. GIESSEL, President of the)
Alaska State Senate, individually,)
Defendants.)

Case No. 4FA-19-02233CI

**DECISION AND ORDER REGARDING DEFENDANT'S MOTION
FOR ATTORNEY'S FEES AND COSTS**

I. Introduction

Following the dismissal of the plaintiff's claims, the defendants are the prevailing parties in this case. They filed the present motion for attorney fees and costs pursuant to Civil Rules 79 and 82. However, because the plaintiff's claims were constitutional in nature, the plaintiff did not have a direct financial interest in the litigation, and the plaintiff's claims were not frivolous, AS 09.60.010(c) provides that the plaintiff may not be held liable for attorney fees of an opposing party. Therefore, although the defendants are entitled to recover costs pursuant to Civil Rule 79, the defendants may not recover attorney fees to which prevailing parties are generally entitled to under Civil Rule 82.

II. Facts and Proceedings

This case arose from the dispute between the defendants and Governor Dunleavy over the location of a special legislative session during the summer of 2019.

The Governor issued a Proclamation calling for a special session of the legislature to be convened in Wasilla beginning on July 8, 2019. The defendants, the Speaker of the House and the President of the Senate, and a majority of the legislature instead convened in Juneau on that date. Nine days later, the Governor issued a supplemental proclamation designating Juneau as the site of the special session. Following the supplemental proclamation, the entire legislature convened in Juneau and resumed the special session.

The plaintiff filed a complaint in this court alleging that the defendants violated the Alaska Constitution and Alaska statutes by convening in Juneau rather than Wasilla. The plaintiff sought a declaratory judgment and an injunction compelling the defendants and the rest of the Juneau legislative contingent to meet in Wasilla. This court dismissed the case on four separate grounds; first, because the defendants were immune from service at the time the plaintiff attempted service of process; second, because the plaintiff's claims were rendered moot by the Governor's supplemental proclamation; third, because the plaintiff lacked standing to bring this suit; and fourth, because the substance of the plaintiff's claim presented a non-justiciable political question.

III. Discussion

- a. *AS 09.60.010(c) provides that unsuccessful plaintiffs who litigate constitutional issues are exempt from the ordinary attorney fee-shifting provisions of Civil Rule 82 if the plaintiff lacked a sufficient economic incentive to bring the claim independent of the constitutional issues and the claim was not frivolous.*

Under Alaska Civil Rule 82, prevailing parties in civil actions are entitled to recover a portion of the attorney fees incurred in the litigation. Prior to 2003, there

existed a “public interest litigant” exception to Civil Rule 82 that was first recognized in *Gilbert v. State*.¹ Under this doctrine, unsuccessful plaintiffs were exempt from liability for an opponent’s attorney fees under Civil Rule 82 if they satisfied the following four-prong test:

- (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?²

The purpose underlying this exception was “to encourage plaintiffs to raise issues of public interest by removing the awesome financial burden of such a suit.” As the Court explained in *Thomas v. Croft*,³ plaintiffs litigating matters of public concern “should not be penalized by an assessment of attorney’s fees unless the suit is frivolous.”⁴

The passage of AS 09.60.010(c) in 2003 abrogated the common law public interest litigant doctrine and replaced it with a narrower “constitutional litigant” exemption to Rule 82.⁵ This statutory exemption applies only if the underlying action “concern[ed] the establishment, protection, or enforcement of a right under the United

¹ 526 P.2d 1131, 1136 (Alaska 1974) (superseded by AS 09.60.010) (holding that it is an abuse of discretion for a trial court to award attorney fees against “a losing party who has in good faith raised a question of genuine public interest before the courts.”).

² *Murphy v. City of Wrangell*, 763 P.2d 229, 233 (Alaska 1988) (superseded by AS 09.60.010) (citing *Southeast Alaska Conservation Council v. State*, 665 P.2d 544, 553 (Alaska 1983)).

³ 614 P.2d 795 (Alaska 1980) (superseded by AS 09.60.010).

⁴ *Id.* at 798.

⁵ See Hearing on H.B. 145 Before the H. Finance Comm., 23rd Leg., 1st Sess., Tape HFC 03-88, Side A (May 12, 2003) (statement of Assistant Attorney General Chris Kennedy); see also *Simpson v. Murkowski*, 129 P.3d 435 (Alaska 2006) (finding that AS 09.60.010(c) abrogated the common law public interest litigant doctrine).

States Constitution or the Constitution of the State of Alaska⁶ Still, AS 09.60.010(c) serves a similar function to the public interest litigant doctrine in that it facilitates litigation to vindicate constitutional rights of public importance regardless of a plaintiff's financial circumstances.⁷ The statute also preserved other parts of the public interest litigant test, as AS 09.60.010(c)(2) still requires that the party seeking exemption from liability for attorney fees show that the "action . . . asserting the right was not frivolous, and the claimant did not have sufficient economic incentive to bring the . . . action . . . regardless of the constitutional claims involved."

b. The plaintiff's claims in this case are constitutional in nature.

The Alaska Supreme Court wrote in *City of Kodiak v. Kodiak Public Broadcasting Corporation*⁸ that "asserting' a constitutional right for purposes of AS 09.60.010(c) means making a claim on the basis of that right in a complaint or other claim for relief."⁹ Although the constitutional litigant exemption does not apply to plaintiffs who assert only statutory rights or assert a constitutional right only in passing,¹⁰ the Court held in *Lake & Peninsula Borough Assembly v. Oberlatz*¹¹ that the exemption may apply even in cases where the rule of law controlling the case's outcome is statutory, as "[AS] 09.60.010(c)'s

⁶ See also *All. of Concerned Taxpayers, Inc. v. Kenai Peninsula Borough*, 273 P.3d 1128, 1139 (Alaska 2012) (quoting AS 09.60.010(c)).

⁷ See Hearing on H.B. 145 Before the S. Jud. Comm., 23rd Leg., 1st Sess., Tape 03-53, Side A (May 18, 2003) (comments of Benjamin Brown).

⁸ *City of Kodiak v. Kodiak Pub. Broad. Corp.*, 426 P.3d 1089 (Alaska 2018)

⁹ *Id.* at 1094 (citing *State v. Jacob*, 214 P.3d 353, 360-61 (Alaska 2009)).

¹⁰ See *Lentine v. State*, 282 P.3d 369 (Alaska 2012) (finding that AS 09.60.010(c) did not protect the plaintiff from an award of attorney fees because her primary claim was breach of the implied covenant of good faith and fair dealing, and she only brought up a claim of a due process violation in passing in her closing arguments at trial).

¹¹ 329 P.3d 214 (Alaska 2014).

application depends not on the source of the rule of law, but on the source of the right asserted.”¹²

The defendants argue that the plaintiff is not a constitutional litigant for two reasons. First, the defendants argue that the plaintiff’s claims were statutory in nature, as it is AS 24.05.100 – not the Alaska Constitution – that expressly grants the Governor the authority to designate the location of special legislative sessions. Second, the defendants argue that because the plaintiff’s claims were non-justiciable because of lack of standing, mootness, and the political question doctrine, the plaintiff’s claims could not have been made for the purpose of asserting a constitutional right.

However, as illustrated by *City of Kodiak*, the proper focus of the inquiry is whether the basis of the claim for relief as described in the complaint is constitutional in nature, not whether the claim itself is found to be meritorious or justiciable.¹³ It is apparent from the face of the complaint that the plaintiff’s claims were based on the assertion of a constitutional right. The complaint states that the defendants violated the Governor’s right to convene the legislature granted under Article III, Section 17 of the Alaska Constitution when they convened in Juneau rather than the location designated in the Governor’s proclamation.¹⁴ Although the complaint alleges that the defendants

¹² *Id.* at 226 (citing *Alliance of Concerned Taxpayers, Inc. v. Kenai Peninsula Borough*, 273 P.3d 1128, 1139 (Alaska 2012)).

¹³ Lifting the protections of the constitutional litigant exception for plaintiffs whose cases are dismissed on justiciability grounds would be contrary to the policy underlying AS 09.60.010, as the risk of incurring liability for attorney fees would have a chilling effect on parties seeking to litigate novel constitutional claims where issues of justiciability, particularly standing and mootness, may not have a clear-cut resolution.

¹⁴ See *Complaint* at ¶ 16-17. The complaint further alleges that the legislators assembled in Juneau breached their constitutional duties to consider action on the Governor’s vetoes and prepare a budget. See *id.* at ¶ 19-21

also violated AS 24.05.100, the complaint describes AS 24.05.100 as merely a statutory codification of the Governor's right to designate the location of special sessions that the plaintiff contends is implied under Article III, Section 17.¹⁵ Under *Oberlatz*, the fact that the plaintiff also alleged a statutory violation does not mean that the defendant's claims were not constitutional in nature.¹⁶ The plaintiff's claims therefore concerned the establishment, protection, or enforcement of a constitutional right.

c. *The plaintiff did not have a sufficient economic incentive to bring these claims absent the constitutional issues.*

For the purposes of 09.60.010(c)(2), "[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."¹⁷ The primary purpose of the claim is

¹⁵ *Id.* at ¶ 8.

¹⁶ See 329 P.3d at 226. In *Oberlatz*, the plaintiffs challenged a determination by the Borough Clerk that they were not residents of the Borough and therefore ineligible to vote in the Borough election. *Id.* at 218. The plaintiffs filed a superior court action alleging that the Clerk's determination violated their right to vote under Article V, Section 1 of the Alaska Constitution. *Id.* at 219. In finding that the plaintiffs satisfied the constitutional claim requirement of AS 09.60.010(c), the Alaska Supreme Court wrote:

The voters have constitutional rights to vote in municipal elections under article V, section 1 of the Alaska Constitution. They sought to protect those rights by asserting that the Borough's application of residency laws deprived them of their opportunities to vote. It does not matter that the deprivations also violated statutes designed to regulate the right to vote or that the statutes provide the rule of law for determining whether the constitutional right has been infringed. The ultimate question is whether the voters sought to protect themselves from deprivation of their constitutional rights by the Borough's application of the election laws. *Id.* at 227.

¹⁷ *Alaska Conservation Found. v. Pebble Ltd. P'ship*, 350 P.3d 273, 281-82 (Alaska 2015).

determined "by looking to the facts of the case and by examining 'the nature of the claim and relief sought and the direct economic interest at stake.'"¹⁸

Here, the defendants do not argue that the plaintiff had a sufficient economic incentive to bring the litigation absent the constitutional claims. The plaintiff sought only declaratory and injunctive relief, and no evidence has been presented suggesting that the plaintiff had a direct economic interest in the outcome of the legislative dispute other than his claim of generalized harm that could hypothetically befall all residents of Alaska if legislation passed during the special session were invalidated because of the defendant's actions, which was insufficient to confer standing. Because there is no evidence that the plaintiff had a direct economic interest at stake in this litigation, the plaintiff is not disqualified from claiming the constitutional litigant exception for this reason.

d. The plaintiff's claims were not frivolous.

In determining what constitutes a frivolous claim under AS 09.60.010(c), the Alaska Supreme Court has looked to case law surrounding frivolous claims in the context of the imposition of Rule 11 sanctions.¹⁹ The Court has noted that "Rule 11 imposes an objective standard of reasonableness and 'should not be used to stifle

¹⁸ *Barneby v. Department of Administration, Division of Motor Vehicles*, 2020 WL 1814582, at *9 (Alaska Apr. 10, 2020) (quoting *Alaska Conservation Found.*, 350 P.3d at 282).

¹⁹ *Manning v. State Dep't. of Fish and Game*, 420 P.3d 1270, 1283 (Alaska 2018) ("To assess whether each of Manning's claims is frivolous requires first defining the parameters of the term 'frivolous.' [AS 09.60.010] does not define this term, and we have not previously defined its meaning in the specific context of the constitutional litigant exception. But we find instructive our interpretation of this term in the context of Alaska Civil Rule 11 sanctions, which can be imposed on a party whose filings contain frivolous arguments.").

creative advocacy or chill [a litigant's] enthusiasm in pursuing factual or legal theories.”²⁰ Accordingly, in most cases, “a claim should not be considered frivolous unless the litigant has ‘abused the judicial process’ or ‘exhibited an improper or abusive purpose.’”²¹

This requirement sets a high threshold for establishing that a claim is frivolous. As an illustrative example, in *Alaska Building, Inc. v. Legislative Affairs Agency*, the Court found that the plaintiff's claim for damages, even though it “had no basis in Alaska law”,²² could not be considered a frivolous abuse of judicial process in the absence of additional evidence that the plaintiff asserted the claim for the purpose of delaying, harassing, or increasing litigation costs for an opposing party.²³ In explaining this holding, the Court wrote that

We do not mean to imply that sanctions may never be justified when an attorney asserts a claim that is obviously lacking in merit. But the clearer case for sanctions based on the assertion of a claim involves both a lack of merit and an improper purpose, As a general proposition, we agree that “Rule 11 is designed to deter parties from abusing judicial resources, not from filing [claims].”²⁴

The Court further noted that a claim does not become frivolous or vexatious merely because there is little reasonable likelihood of success.²⁵

²⁰ *Id.* (quoting *Alaska Bldg., Inc. v. Legislative Affairs Agency*, 403 P.3d 1132, 1136 (Alaska 2017) (internal quotation omitted)).

²¹ *Id.* at 1283-84 (quoting *Alaska Bldg.*, 403 P.3d at 1136 (internal footnote omitted)).

²² *Alaska Bldg.*, 403 P.3d at 1137.

²³ *Id.* at 1139.

²⁴ *Id.* at 1137-38 (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 411 (1990) (Stevens, J., dissenting in part)) (internal citation and footnote omitted).

²⁵ *Id.* at 1136 (While the claim had little reasonable likelihood of success, we conclude that it was a “nonfrivolous argument . . . for establishing new law,” something Rule 11 expressly permits.”). Although *Alaska Building* involved Rule 11 sanctions, the Court has applied an similarly high standard for establishing frivolousness in cases involving

Only in the most obviously deficient cases is a claim so devoid of merit as to be frivolous. For example, when the Court upheld an award of attorney fees against a public interest plaintiff in *O'Callaghan v. State*,²⁶ it was because the plaintiff sued a losing political candidate more than two years after the date of the election for allegedly submitting a Declaration of Candidacy two days late.²⁷ The Court found the suit to be so obviously moot that "the litigation was frivolous as a matter of law."²⁸

In their motion for attorney fees, the defendants allege that the plaintiff's claims were frivolous, but they offer no evidence or analysis in support of this claim, apparently relying on the fact that the plaintiff's claims lacked merit because they were dismissed. This court's dismissal of the plaintiff's constitutional claims is not a sufficient basis for concluding that the claims were frivolous. Although this court found that the plaintiff lacked standing and that his claims were non-justiciable because of lack of standing, mootness, and the political question doctrine, the fact that the Anchorage superior court came to a different conclusion on these matters in separate litigation over the same

public interest litigants and constitutional litigants as well. In *Manning v. State Department of Fish and Game*, the Alaska Supreme Court declined to find that a constitutional litigant's claims were frivolous under AS 09.60.010(c) even though the plaintiff's constitutional arguments were deemed "futile" and had previously been rejected by the Court, albeit in opinions published after the plaintiff filed his initial complaint. 420 P.3d at 1284. In *Alaska Wildlife Alliance v. State*, 74 P.3d 201 (Alaska 2003),²⁵ the public interest litigant plaintiff's complaint, filed just one day after the trial court had dismissed a substantially identical complaint by the plaintiff on its merits, was barred by *res judicata*. *Id.* at 208-09. However, the Court refused to find that the complaint was frivolous because the question of whether *res judicata* applied was "reasonably debatable". *Id.* at 209.

²⁶ 920 P.2d 1387 (Alaska 1996).

²⁷ *Id.* at 1388-90.

²⁸ *Id.* at 1390.

events²⁹ demands the conclusion that the present action was not so obviously lacking in merit as to be frivolous, unlike the litigation at issue in *O'Callaghan*.

The defendants elaborated on their argument that the plaintiff's claims were frivolous in their reply brief, alleging that the plaintiff's claims were an abuse of judicial process because the plaintiff's conduct in prosecuting the suit was vexatious. As evidence, the defendants cite: (1) the fact that the plaintiff was a former legislator, but nevertheless served the defendants with process while they were attending a legislative session;³⁰ (2) the fact that the plaintiff filed a motion for a preliminary injunction requiring the defendants to travel to Wasilla and sought expedited consideration thereof,³¹ and (3) public comments by the plaintiff that he expected that this lawsuit would have little chance of success.³²

However, these actions did not amount to either vexatious conduct or an abuse of judicial process. First, it was the plaintiff's position throughout litigation that the defendants were not attending a valid legislative session while in Juneau. The fact that he attempted to serve them while they attended this session is not indicative of bad faith, even though this defective service was fatal to his claims. Second, given the time-sensitive nature of the legislative dispute, the plaintiff's efforts to seek expedited relief were not manifestly unreasonable under the circumstances. Third and finally, for reasons described above, the fact that the plaintiff believed that these claims were

²⁹ Litigation over the constitutionality of the actions of the legislature and Governor during the legislative standoff at issue in this case is still ongoing in *McCoy et al. v. Dunleavy*, Case No. 3AN-19-08301CI.

³⁰ *Def.'s Mot. for Attorney Fees* at 6.

³¹ *Id.*

³² *Id.* at 8.

unlikely to succeed does not render these claims frivolous. Absent other evidence indicating an improper purpose or bad faith motive, the conduct cited by the defendant is insufficient to establish that the plaintiff's claims were frivolous.

IV. Conclusion

The plaintiff's claims were constitutional in nature, the plaintiff lacked an economic incentive to file this action absent the constitutional claims, and the plaintiff's claims were not frivolous. Therefore AS 09.60.010(c) dictates that the plaintiff is not liable for attorney fees incurred by the defendants in this case.

V. Order

Accordingly, for the reasons set forth above,

IT IS HEREBY ORDERED that Defendants' Motion for Attorney's Fees and Costs is GRANTED IN PART and DENIED IN PART. The defendants may recover costs allowable under Civil Rule 79, but may not recover attorney fees pursuant to Civil Rule 82.

DATED this 24th day of June, 2020 at Fairbanks, Alaska.



Michael A. MacDonald
Superior Court Judge

I certify that on _____ copies of this
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CLERK: _____

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