

Although the 11 September 2003 amendment narrowed the scope of qualification as a public interest litigant, the gravamen remains grounded in constitutional litigation. In the instances of constitutional litigation the statute creates a fee-shifting mechanism that is both a sword and a shield: a prevailing public interest litigant is entitled to an award of full attorney's fees but a losing public interest party does not have fees assessed against it.²

Three parties claim to be public interest litigants under the statute: George Riley and Ronald Dearborn (hereafter referred to as "Riley" for convenience); the City of Petersburg and several individuals aligned with the city³ (hereafter referred to as "Petersburg" for convenience); and the Alaska Democratic Party and several individuals⁴ who challenged the 14 July 2013 Plan (hereafter "ADP" for convenience).

The three part test set out in AS 09.60.010(c)(2) regarding the application of the statute to a losing party is simple. The claims asserted must concern a constitutional right. The action must not be frivolous. And the claimant must not have sufficient economic incentive to bring the action regardless of the constitutional claims involved.

The initial complaints by Riley and Petersburg certainly raised constitutional issues.⁵ In fact, the focus of the first phase of the litigation through trial was on the interplay between the requirements of the Alaska Constitution and the Voting Rights Act ("VRA") mandates, specifically how preclearance requirements under the VRA militated drawing districts that were *contrary* to the Alaska Constitution but were required by the Supremacy Clause of the United

² *State v. Native Village of Nunapitchuk*, 156 P.3d 389, 392 (Alaska 2007).

³ Mark Jensen, Brenda Norheim, and Nancy Strand.

⁴ Katie Hurley and Warren Keough.

⁵ The Fairbanks North Star Borough [FNSB] filed a similar complaint, all cases were consolidated, and ultimately FNSB moved to dismiss its complaint and to participate as an *amicus curiae*; this motion was granted. Riley was authorized to assert the FNSB claims.

States Constitution. This was not a delicate interplay and ultimately resulted in a mandate that the Board follow the *Hickel* process in navigating the competing constitutional demands. ADP raised constitutional issues, in a slightly different context, regarding the 14 July 2013 plan, but they were constitutional issues nevertheless. The court finds that the issues that all three parties raised focused primarily on constitutional issues as used by the public interest litigant statute and case law.

The claims raised by these three parties were not frivolous. It is true that Petersburg did not prevail on a motion for summary judgment regarding compactness, but the motion certainly was not frivolous.⁶ It is also true that ADP did not prevail on its several theories, again on summary judgment, but its claims were not frivolous. And Riley effectively prevailed in their theories to the extent that the current plan addressed most, but not quite all, of their claims. The court finds that the claims asserted by these parties were asserted in good faith, were reasonably arguable on their face, and that none of these three parties asserted frivolous claims.

None of these parties had a sufficient economic incentive to bring these claims. Redistricting cases certainly are open to arguments that parties are prosecuting the claims in order to gain some perceived or inchoate advantage in some unspecified economic manner, but such arguments are speculative at best.⁷ Voting litigation is squarely the type of litigation prosecuted for constitutional issues that benefit the commonweal and not for individual economic gain. No doubt Riley is happier voting with his neighbors in Fairbanks than with fellow citizens living on the Bering Sea. No doubt Petersburg is happier with a more compact district. Presumably the ADP expected to have some advantage in challenging the 14 July 2013

⁶ The court consistently noted that summary judgment in favor of the Board was based on the testimony of Dr. Handley that the VRA required a minority “influence” district in Southeast, a premise that was not accepted by the Department of Justice and which was dispelled at trial.

⁷ The Corrupt Old Bastards Club is a stain on the integrity of all Alaskans but such aberrations are not the economic incentive that is the reason for redistricting litigation in the instant cases.

plan. But none of these motives are sufficient economic incentive for these parties to bring the litigation solely on their own behalf. Therefore the court finds these litigants did not, nor could they be expected, to bring litigation in this case for their own economic benefit.

Therefore the court finds that Riley, Petersburg, and the ADP are all public interest litigants under the statute.

II. Prevailing Party Status. The case was hotly contested by several parties over the course of several years. Over 78 motions were filed. Most motions were substantive and complex; many were dispositive motions. The case also involved trial, the use of various experts, and a significant change in the application of controlling law as the result of a decision of the United States Supreme Court.⁸ Overlaying this otherwise complex litigation was the Alaska Constitutional requirement, and Alaska Court Rule requirement, for resolving the matter with alacrity, celerity, and exigency not inconsistent with fundamental notions of fair play and substantial justice.⁹ The matter also was before the Alaska Supreme Court on several occasions.¹⁰

For present purposes there are several, discrete stages of litigation: dispositive matters regarding a specific party decided before trial [this applies to the City of Petersburg (“Petersburg”)]; resolution of the trial court case after trial; litigation post trial and before remand from the Alaska Supreme Court on 28 December 2012; litigation from the 28 December 2012 remand until the proclamation of the final plan by the Board on 14 July 2013; and litigation subsequent to that date until the entry of Final Judgment. These stages are addressed regarding each litigant.

⁸ *Shelby County, Ala. v. Holder*, 133 S.Ct. 2612 (2013).

⁹ *See*, Alaska Const. Art. VI, §11; Alaska Civil Rule 90.8.

¹⁰ Sufficient unto this court are fees and costs motions for the litigation for this court; fees and costs regarding appellate litigation must necessarily be addressed in the appellate forum.

A. *Petersburg*. Petersburg contested the compactness of the district under the original 13 June 2011 plan. The court ruled adverse to its position. Ironically the adverse ruling turned on what ultimately was an erroneous basis to deviate from the Alaska Constitutional requirements in order to comply with the VRA, specifically the need to create a minority “influence” district in Southeast. Petersburg was not the prevailing party in the trial court on its complaint. Petersburg not only did not prevail in its motion practice, it filed a stipulation to dismiss its other claims before the adverse summary judgment ruling.

Petersburg asserts at this juncture that it actually *is* a prevailing party because it obtained the relief requested on the main issue, even though not to the extent originally sought.¹¹ It also contends its actions, although not successful, were a “catalyst” for the current, accepted plan. The plan ultimately adopted by the Board on 14 July 2013 did result in more compact districts in Southeast, not because of the efficacy of the Petersburg’s arguments, but rather because of a sea shift in the law triggered by *Shelby County*. The court cannot find, on this record, that Petersburg was a prevailing party. As a public interest litigant under AS 09.60.010 no fees or costs may be awarded against it.

B. *ADP*. ADP was a late comer to the litigation and joined only after the 14 July 2013 plan was adopted. Although its objectives were constitutional, it did not prevail. Unlike Petersburg, who arguably received indirectly what it wanted because of a change in federal law, the ADP did not prevail on any of its claims. The court finds the ADP was not a prevailing party. As a public interest litigant under AS 09.60.010 no fees or costs may be awarded against it.

¹¹ *Taylor v. Moutrie-Pelham*, 246 P.3d 927, 929-30 (Alaska 2011); *Alliance of Concerned Taxpayers, Inc. v. Kenai Peninsula Borough*, 273 P.3d 1123, 1126 (Alaska 2012), citing *K&K Recycling, Inc. v. Alaska Gold Co.*, 80 P.3d 702, 721 (Alaska 2003), quoting *Tobeluk v. Lind*, 589 P.2d 873, 876 (Alaska 1979); see also *Progressive Corp.*, 195 P.3d at 1092 (“A plaintiff may prevail even if he or she fails to recover all the relief prayed for.”)

C. *Riley.* Riley points out, correctly, that this court's selection of the 28 December 2012 date for briefing of various stages of the litigation is strained because there was continued litigation both in the trial court and in the Alaska Supreme Court after that date. Rather Riley contends that they prevailed on all material issues, for purposes of prevailing party status until at least 14 July 2013. Riley advances several theories for why they are the prevailing party overall, including findings by the Alaska Supreme Court that they were a prevailing party. The court agrees, under controlling case law involving prevailing parties in general, and prevailing parties in redistricting cases in particular, that Riley prevailed on the main objectives of the litigation from the filing of the complaint through the adoption of the 2013 Proclamation Plan on 14 July 2013.

Riley did not prevail on litigation contesting the 14 July 2013 Proclamation Plan. The Board prevailed on litigation after 14 July 2013. As a public interest litigant under AS 09.60.010 no fees or costs may be awarded against them for this period.

D. *The Board.* The Board is the prevailing party on all litigation since 14 July 2013, but because of the public interest litigant status of the relevant parties under AS 09.60.010 it may not recover fees and costs for that period.

III. Conclusion. Based on the foregoing facts and authorities, the court finds and orders as follows:

A. Riley, Petersburg, and the ADP are all public interest litigants under AS 09.60.010.

B. Petersburg and the ADP are not prevailing parties in this litigation, but no fees or costs are assessed against them pursuant to AS 09.60.010(c)(2).

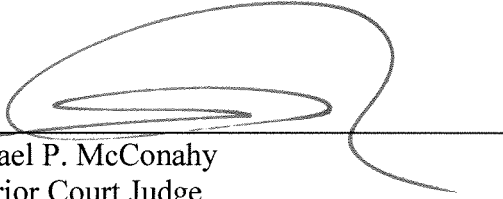
C. Riley is the prevailing party on all litigation from the filing of the complaint until 14 July 2013 and entitled to full reasonable fees and costs from the date of the filing of his original complaint on 12 July 2011 until 14 July 2013. Riley shall serve and file a motion for fees and costs, including an itemized statement in sufficient detail for a determination of the reasonable nature of the work within 20 days of the date of the distribution of this order. The Board shall have 20 days to file its objections, if any, to such a motion. Riley may file a reply within 5 days to an opposition.

Riley shall file a separate motion for costs; the same terms and conditions. This court will entertain the cost motion directly without the necessity of filing a cost bill first with the clerk of the court under Civil Rule 79.

D. Although the Board prevailed on litigation since 14 July 2013 it cannot recover fees and costs from the public interest litigants under AS 09.60.010.

E. The court will issue a final judgment specifically for costs and fees once those issues are resolved.

DATED at Fairbanks, Alaska, this 14 of April, 2014.



Michael P. McConahy
Superior Court Judge

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