

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT AT ANCHORAGE

RECALL DUNLEAVY, an  
Unincorporated association,

Plaintiff,

v.

STATE OF ALASKA, DIVISION OF  
ELECTIONS, and GAIL FENUMIAI,  
DIRECTOR, STATE OF ALASKA,  
DIVISION OF ELECTIONS,

Defendants.

Case No. 3AN-19-10903CI

STAND TALL WITH MIKE, an  
Independent expenditure group,

Intervenor.

**Order on Motion for Attorney's Fees**

**I. PROCEDURAL BACKGROUND.**

The Plaintiff filed its complaint on November 5, 2019, alleging the public's right to recall was infringed when the application for recall was wrongfully denied.<sup>1</sup> The right to recall elected officials is granted to the public in Article XI, Section 8 of the Alaska Constitution, which states "[a]ll elected public officials in the State, except judicial officials, are subject to recall by the voters of the State or political subdivision from

<sup>1</sup> See Complaint at 5, ¶ 21 (stating "This lawsuit is brought in the interest of the public to enforce the provisions of article XI, section 8 of the Alaska Constitution and AS 15.45.470-720, which provide for citizens' right to recall the state's elected officials.").

which elected. Procedures and grounds shall be prescribed by the legislature.”<sup>2</sup> Grounds for recall are specified in Alaska Statute 15.45.510, while procedures are found in Alaska Statutes 15.45.470 through 15.45.720.<sup>3</sup>

The Complaint specified that the recall application included three grounds for recall under AS 15.45.510—neglect of duties, incompetence, and lack of fitness—with four allegations supporting these grounds.<sup>4</sup> The allegations were as follows:

- (1) Governor Dunleavy violated Alaska law by refusing to appoint a judge to the Palmer Superior Court within 45 days of receiving nominations.
- (2) Governor Dunleavy violated Alaska law and the Constitution, and misused state funds by unlawfully and without proper disclosure, authorizing and allowing the use of state funds for partisan purposes to purchase electronic advertisements and direct mailers making partisan statements about political opponents and supporters
- (3) Governor Dunleavy violated separation-of-powers by improperly using the line-item veto to: (a) attack the judiciary and the rule of law; and (b) preclude the legislature from upholding its constitutional Health, Education and Welfare responsibilities.
- (4) Governor Dunleavy acted incompetently when he mistakenly vetoed approximately \$18 million more than he told the legislature in official communications he intended to strike. Uncorrected, the error would cause the state to lose over \$40 million in additional federal Medicaid funds.<sup>5</sup>

Plaintiff moved for summary judgment arguing that the grounds as stated in the application for recall were proper and comported with Alaska Statutes 15.45.470 - 15.45.720.<sup>6</sup> The Defendants and Intervenors each filed cross-motions for summary judgment arguing the 200-word statement of the grounds for recall was not legally or

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<sup>2</sup> Complaint at 1, ¶ 2; Art. XI, § 8 Alaska Constitution.

<sup>3</sup> AS 15.45.470-720.

<sup>4</sup> Complaint at 3, ¶ 14.

<sup>5</sup> Complaint at 3-4, ¶¶ 15-18.

<sup>6</sup> Superior Court’s Order Re: Plaintiff’s Motion for Summary Judgment; Defendant’s Cross-Motions for Summary Judgment; Intervenor’s Cross-Motion for Summary Judgment, Jan. 14, 2020.



factually sufficient.<sup>7</sup> Finding that its decision *both* preserved the rights of Alaska voters under the constitution *and* did not usurp the legislature’s role to prescribe the recall process, the superior court reversed the Director of Elections’ decision to deny the recall application on all of the allegations, save (3)(b). The superior court found “[e]ach of the remaining allegations is legally sufficient and is stated with particularity such that the elected official can adequately respond to the allegation.”<sup>8</sup>

Defendants appealed the superior court’s decision and oral argument was held on March 25, 2020.<sup>9</sup> “Having considered the parties’ arguments, the superior court record and the parties’ briefs, including their supplemental briefs responding to the court’s written questions[.],” the Supreme Court of Alaska affirmed the superior court’s order on the parties summary judgment motions.

## II. LEGAL STANDARD.

The question before this Court is whether to apportion attorney fees in accord with Alaska Statute 09.60.010(c) or Rule 82(b).<sup>10</sup> “Civil Rule 82 generally entitles a prevailing party to an attorney’s fees award from the opposing party.”<sup>11</sup> There used to be a public interest exception to Civil Rule 82, which applied in circumstances where litigation was brought in the public interest. However, in 2003 the Alaska Legislature abrogated and replaced the public interest exception in Civil Rule 82 with Alaska Statute 09.60.010.<sup>12</sup>

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<sup>7</sup> *Id.* at 1.

<sup>8</sup> *Id.* at 18.

<sup>9</sup> Supreme Court No. S-17706, Disposition of Appeal 5/8/2020 at 1-2.

<sup>10</sup> Alaska R. Civ. P. 82(b); AS 09.60.010(c)-(e).

<sup>11</sup> *Alaska Conservation Found. v. Pebble Ltd. P’ship*, 350 P.3d 273, 279 (Alaska 2015).

<sup>12</sup> *Id.* at 274–81.



Subsection (c) sets the basic parameters for an attorney fee award—it “requires courts to award full reasonable attorney’s fees to a successful constitutional claimant but only if the claimant lacked sufficient economic incentive to bring the claim.”<sup>13</sup> It also “prohibits a court from ordering a losing plaintiff to pay the attorney fees of an opponent devoted to claims concerning constitutional rights.”<sup>14</sup> While subsections (d) and (e) afford courts discretion to constrict the award:

(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

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<sup>13</sup> *Id.*; AS 09.60.010(c) (stating:

(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.)

<sup>14</sup> *Lake & Peninsula Borough Assembly v. Oberlatz*, 329 P.3d 214, 226 (Alaska 2014).



ordered to pay the fees and costs or, if the party is a public entity, upon the taxpaying constituents of the public entity.<sup>15</sup>

The statute's application depends "not on the source of the rule of law but on *the source of the right asserted*. It applies in a civil action or appeal concerning the *establishment, protection, or enforcement* of a right under the . . . Constitution of the State of Alaska."<sup>16</sup> It does not apply when the right asserted "finds its source in statute."<sup>17</sup>

When assessing the applicability of Alaska Statute 09.60.010 in cases with mixed constitutional and statutory claims, the Alaska Supreme Court clarified that "*Oberlatz* and *Manning* provide the correct legal framework."<sup>18</sup> The Alaska Supreme Court has expressly rejected using proration to allocate attorney fees; thus, "a court may not 'simply characterize all the claims as primarily constitutional or primarily non[-]constitutional'" and then award fees.<sup>19</sup>

Courts must assess which claims are reasonably connected to the constitutional claims on which the party prevailed. A prevailing claimant is entitled to attorney fees under Alaska Statute 09.60.010 "for any work devoted, in any reasonably connected way, to constitutional claims on which they prevailed."<sup>20</sup> A partially prevailing claimant is not entitled to attorney fees under Alaska Statute 09.60.010 "for work devoted *solely* to

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<sup>15</sup> AS 09.60.010(d)-(e).

<sup>16</sup> *Oberlatz*, 329 P.3d at 226 (emphasis added).

<sup>17</sup> *Id.*

<sup>18</sup> *Meyer v. Stand for Salmon*, 450 P.3d 689, 692-93 (Justice Winfrey's concurrence) (Alaska 2019) (citing *Oberlatz*, 329 P.3d at 226 (Alaska 2014); *Manning v. State, Dep't of Fish & Game*, 355 P.3d 530 (Alaska 2015)).

<sup>19</sup> *Meyer*, 450 P.3d at 692-93 (citing *Oberlatz*, 329 P.3d at 227; *Manning*, 355 P.3d 530).

<sup>20</sup> *Meyer*, 450 P.3d 693.

constitutional claims on which they did not prevail or for any work devoted *solely* to non-constitutional claims.”<sup>21</sup>

On the other hand, a prevailing defendant is entitled to attorney fees under Civil Rule 82 “for any work devoted *solely* to non-constitutional claims.”<sup>22</sup> When work on general procedural issues cannot be separated from a claimant’s constitutional claims “the court must assume that all billed time for procedural work was connected to [the] constitutional claims.”<sup>23</sup>

Regarding the economic prong of Alaska Statute 09.60.010, the Alaska Supreme Court has noted that “prior cases interpreting the economic incentive prong of the public interest litigant test [under Civil Rule 82] provide the guiding parameters for the meaning of ‘sufficient economic incentive’ under [Alaska Statute] 09.60.010.”<sup>24</sup> “We generally examine two factors—the nature of the claim and relief sought and the direct economic interest at stake—to determine primary purpose.”<sup>25</sup> Courts may examine the pleadings, the reasons for a lawsuit, and whether the relief requested was legal or equitable in addition to the amount of money in controversy when evaluating the nature of the claim and relief.<sup>26</sup> When assessing the direct economic interest at stake, courts may examine what direct economic benefits will flow to the claimant if successful.<sup>27</sup>

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* (citing *Manning*, 355 P.3d 530).

<sup>24</sup> *Pebble Ltd. P’ship*, 350 P.3d at 280–81 (Alaska 2015).

<sup>25</sup> *Id.* at 281-282.

<sup>26</sup> *Id.* at 282-283.

<sup>27</sup> *Id.*



### III. ANALYSIS

*A. The right to recall is based upon Article XI, § 8 of the Alaska Constitution.*

Alaska Statute 09.60.010 applies when the source of the right asserted is grounded constitutionally. This Court finds that the right to recall is founded in Article XI Section 8 of the Alaska Constitution. Alaska Statutes 15.45.470-720 proscribe processes and grounds through which the public may *enforce* and *protect* their constitutionally afforded right to recall public officials. The statutes do not create the right; they enumerate processes through which it may be exercised.<sup>28</sup> Therefore, this Court finds that Alaska Statute 09.60.010 applies to Plaintiff's award for attorney fees because the right to recall is founded in the Alaska Constitution.

*B. The four claims that Plaintiff prevailed upon are reasonably connected to the Alaska Constitution.*

The Plaintiff was successful on four of five claims (all except for 3(b)). Thus, the Plaintiff demonstrated that the public's right to recall was infringed upon when the application for recall was wrongfully denied.<sup>29</sup> The source of all the claims that Plaintiff prevailed on is the Alaska Constitution.<sup>30</sup> When the Election Director denied the recall petition, it called into question the citizen's right to recall a governor. The litigation involved more than merely the statutory elements of Alaska Statutes 15.45.470 through 15.45.720, because these statutes only promulgate the grounds and procedures for recall.

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<sup>28</sup> See *Oberlatz*, 329 P.3d at 226 (Alaska 2014).

<sup>29</sup> See Complaint at 5, ¶ 21 (stating "This lawsuit is brought in the interest of the public to enforce the provisions of article XI, section 8 of the Alaska Constitution and AS 15.45.470-720, which provide for citizens' right to recall the state's elected officials.").

<sup>30</sup> *Lake & Peninsula Borough Assembly v. Oberlatz*, 329 P.3d 214, 226 (Alaska 2014)

Whereas, the right for recalling the Governor is found in Article XI, Section 8 of the Alaska Constitution.

*C. The Plaintiff had no economic incentive to pursue the litigation.*

The second element of AS 09.60.010 requires that the Plaintiff not have an economic incentive to pursue the litigation.<sup>31</sup> To determine if there is an economic incentive, the Court must look at the nature of the claim and the relief sought, as well as the economic interest at stake.<sup>32</sup> The nature of the Plaintiff's claim, recalling Governor Dunleavy, is a Constitutional right authorized by Article X, Section 8. The Court finds there was no economic incentive to pursue the litigation.

*D. The work provided by the two attorneys, who performed research and drafting, should be included in the attorney fees award.*

The state argues the two attorneys who assisted in researching and drafting some of the pleadings should not be part of the attorney fee award because there was no information provided about them. The Plaintiff corrected this problem by providing the information in Ms. Lindemuth's and Ms. Orlansky's affidavits. After reviewing the time sheets, the Court finds their work was reasonable and should be compensated.

*E. The court finds Plaintiff's attorney fee request reasonable.*

The fees in this litigation are reasonable. The issues before the Court are complex and address Constitutional issues that are a first impression to this state. The fees the

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<sup>31</sup> AS 09. 60.010(c)(2)

<sup>32</sup> *Pebble Ltd. P'ship*, 350 P.3d at 280–81 (Alaska 2015).

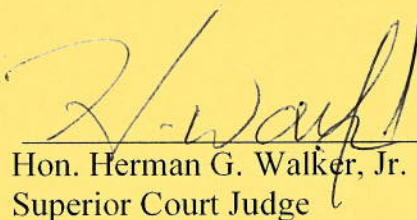


associated with the most experienced and primary attorneys, Ms. Lindemuth, Ms. Orlansky, and Jeffrey Feldman are reasonable; the fees were also discounted. The remaining attorney fees are also commensurate with the attorney's experience and are reasonable.

#### IV. CONCLUSION

The Court finds that Plaintiff is entitled to full reasonable attorney fees, pursuant to AS 09.60.010. In their reply, the Plaintiff agrees that its fees should be reduced by \$22,335.91. The Court finds that reduction is warranted because no fees should be awarded for the claims the Plaintiff did not prevail on. This reduction also includes fees for letters to the Division of Elections, public relations, and additional attorneys who attended the hearing. The Court awards the Plaintiff \$186,822.09 and costs of \$3,184.40.

ORDERED this 8th day of October, 2020 at Anchorage, Alaska.

  
Hon. Herman G. Walker, Jr.  
Superior Court Judge

I certify that on 10-8-20  
a copy of the above was distributed to:  
S. Orlansky; J. Feldman; S. Gottstein;  
S. Kendall; J. Lindemuth; M. Patton-Walsh;  
C. Richards; M. Baylous; B. Jamieson

  
L. Greene, Judicial Assistant