

ESSAY QUESTION NO. 7

Answer the question in booklet No. 7

Plaintiff Wilderness Widgets, Inc., which produced survival gear for Alaska outdoor enthusiasts, sued the North Coast Borough (Defendant.) Plaintiff claimed Defendant was ruining its business by mandating a series of unnecessary shutdowns of Plaintiff's small manufacturing plant due to false allegations of product safety violations. Plaintiff also claimed Defendant wrongly communicated to Widget customers not to count on receiving their orders because the Borough planned to shut Widgets down permanently, which led to many order cancellations.

Plaintiff sued Defendant for tortious interference with business relations and for defamation. Plaintiff also claimed under the Alaska Constitution that Defendant violated the business's right to due process of law before being deprived of property, and the right to enjoy the rewards of its own industry. Plaintiff presented evidence of its own losses from the prior shutdowns and its expected losses should the shutdown become permanent, and alleged damages in the amount of \$2.5 million.

After trial, the jury found for Defendant on all counts and the court entered judgment in favor of the Defendant. Defendant subsequently moved for an award of attorneys' fees, claiming it had incurred \$100,000 in fees; it presented documentation for the claimed amount.

1. Discuss the legal grounds for Defendant's motion. If the Court agrees with the motion, should it award fees? If so, how much should it award?

Now assume that, in opposing the motion, Plaintiff argued its constitutional claims precluded an award of attorneys' fees in this case.

2. Discuss the legal grounds for Plaintiff's opposition. Should Plaintiff's arguments alter the Court's decision regarding fees?

GRADERS' GUIDE
***** QUESTION NO.7 *****
CIVIL PROCEDURE

This question requires the examinee to address (A) the application of the prevailing party fees rule to parties such as this defendant which has recovered no money judgment, and (B) the application of what is often referred to as the public interest litigant exemption.

A. Grounds for attorney's fees. The granting of attorneys' fees in civil cases is set out in Rule 82, Alaska Rules of Civil Procedure, Attorney's Fees.¹ (50 points)

Rule 82 provides, in pertinent part:

(a) **Allowance to Prevailing Party.** Except as otherwise provided by law or agreed to by the parties, the prevailing party in a civil case shall be awarded attorney's fees calculated under this rule.

(b) **Amount of Award.**

...

(2) In cases in which the prevailing party recovers no money judgment, the court shall award the prevailing party in a case which goes to trial 30 percent of the prevailing party's reasonable actual attorney's fees which were necessarily incurred, and shall award the prevailing party in a case resolved without trial 20 percent of its actual attorney's fees which were

¹ Alaska's fee-shifting in favor of a prevailing party has its origins in English law. It remains unusual in the United States. Some version of what is now Rule 82 became law here in 1884. It was adapted from Oregon law, but survived the 1900 Congressional Code of Procedure and the 1949 application of the entire then-existing Federal Rules of Civil Procedure to the Territory. In the 1950s the local Federal Rules were amended to make the prevailing party right to fees more clear. After Statehood in 1959, the new Alaska Constitution gave the Alaska Supreme Court the right to promulgate rules of court, and the Territorial statutes continued in effect until the state legislature could pass new ones. In 1960, the new Alaska rules of court went into effect, including Rule 82, with no federal counterpart. In 1962 the Legislature promulgated a new Code of Civil Procedure, which repealed all prior statutory provisions on fees and costs, and AS 090.60.010 came into existence. The 1962 version of Rule 82 lacked a schedule for the amount of fees for prevailing parties who recovered no money judgment. In 1963 the existing section (a)(2) of the Rule was amended to make such parties' fees "commensurate with the amount and value of legal services rendered." Summarized from *Alaska's English Rule: Attorney's Fee Shifting in Civil Cases*, Alaska Judicial Council, (1995.) See particularly its pages 29-38 and footnotes 168-169. See also discussion of public interest cases at 54 and 73-77.

necessarily incurred. The actual fees shall include fees for legal work customarily performed by an attorney but which was delegated to and performed by an investigator, paralegal or law clerk.

(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:

...

(F) the reasonableness of the claims and defenses pursued by each side;

...

(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;

...

(K) other equitable factors deemed relevant. If the court varies an award, the court shall explain the reasons for the variation.

...

1. Fees When Prevailing Party Recovers No Money Judgment

Defendant was the prevailing party in this case and the Court would begin its analysis with the assumption that attorneys' fees should be awarded. The issue is how the Court will determine the amount to be awarded.

Because Defendant brought no claim and recovered no money judgment, but was required to litigate through trial, its fee would be determined under part (b)(2) of the Rule. This provides for 30 percent of Defendant's "reasonable actual attorney's fees which were necessarily incurred" Assuming Defendant can justify those fees to the Court's satisfaction under the "reasonable, actual" and "necessary" standards, it would be entitled to a fee award of \$30,000 (30 percent of \$100,000).

Examinees may note that the Court may consider one or more of the variance factors in part (3) of Rule 82. For example, an examinee may argue that if a large award is found against a small business like Wilderness Widgets, it may deter other, similarly situated litigants from recourse to the courts; this might support a downward variance in the fee award. Rule 82(b)(3)(I). Note

that the part (3) factors allow the Court to “vary” the award, but do not indicate the Court may deny an award entirely.

B. Statutory exceptions where claims concern constitutional rights. Exceptions that may apply to this case are found in AS 09.60.010, Costs and attorney fees allowed prevailing party. (50 points)

(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.

(Italics added.)

The statute also provides:

...

(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.

2. Exception for “Public Interest” Litigant.

Through case law, Alaska has long permitted full attorney's fees for plaintiffs in public interest cases to encourage raising issues of public interest. This was Alaska's original public-interest exception to the general “loser pays” rule. It is now codified in AS 09.60.010, as limited by amendment in 2003.

Those 2003 amendments were upheld by the Alaska Supreme Court in *State v. Native Village of Nunapitchuk*, 156 P.3d 389, 406 (Alaska 2007.) The Court said the amendment “abrogates, in part, the public interest exception” The Court also stated that losing public-interest litigants may still be “shielded” from paying fee awards, but that decisions on such awards will be made “on a case-by-case basis” Rule 82, with all of its variance factors, still applies. The Court has described the 2003 changes as “limiting the circumstances in which public interest litigants would be considered exempt from paying attorney's fees.” Thus, in a proper case, prevailing defendants may now recover fees from losing plaintiffs. See *Simpson v. Murkowski*, 129 P.3d 435, 447-449 (Alaska 2006) (remanded for findings on whether plaintiffs had “sufficient economic incentive” to bring their case regardless of their desire to raise constitutional issues. It appeared from the record that plaintiffs economic incentives had been “one of the central issues” below.)

Under paragraph (c)(2,) the public interest exception (or exemption) may protect a plaintiff from a defense attorneys' fee award *if* plaintiff's assertion of constitutional rights was not frivolous *and if* plaintiff “did not have sufficient economic incentive to bring the action . . . regardless of the constitutional claims” pled. Also, as limited, the public interest exception does not always shield a losing plaintiff from having to pay an adverse fee award to the

prevailing defendant. *Simpson* at 448.

On the facts in *Wilderness Widgets*, the Court should consider both that not all of Plaintiff's claims were constitutional, and that Plaintiff had a substantial economic interest in its lawsuit. The Court should make findings as to those facts so that its ruling may be reviewed on appeal.

There are not enough facts for an examinee to determine whether this plaintiff's constitutional claims were well-grounded or frivolous. But there are ample facts to show Plaintiff had an economic incentive to sue; it was in an apparently economically distressed condition, asserting losses from past shutdowns and concerns about possible future economic losses. Its claim for \$2.5 million damages also demonstrates a strong economic incentive. It appears Plaintiff's monetary claims were among the "central issues" in the lawsuit. On these facts, paragraph (c) does not protect Plaintiff from an award of fees.

3. Bar Against Discrimination.

Paragraph (b) bars "discrimination" in awarding fees based on "the nature of the policy or interest advocated by the party." On the facts of this question, the fact that Plaintiff raised constitutional claims – *without more* – should not protect Plaintiff from a fee award. That is, the court should not "discriminate" against Defendant by denying it an award to which Rule 82 and AS 09.60.010 otherwise entitle it, merely because Plaintiff pled constitutional claims.

The court should determine the public interest litigant statute does not protect *Wilderness Widgets* from an adverse fee award nor alter the amount of the scheduled Rule 82 award to Defendant.