IN THE SUPREME COURT FOR THE STATE OF ALASKA

IN RE 2011 REDISTRICTING CASES

Supreme Ct No. S-14721
Superior Ct Case No. 4FA-11-2209CI

RILEY PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION OF ORDER REGARDING FEES AND COST

On December 28, 2012, the Court issued an order, entered at the direction of an individual justice, directing that each party is to bear its own costs and attorney fees as to the Petition for Review in this matter. The order contained no findings explaining this decision. The order is clearly at odds with AS 09.60.010 and this Court's holdings in *Hickel v Southeast Conference.*[1] The Court should allow Respondents (i.e. the Riley Plaintiffs) leave to file a motion for attorney fees and costs in the two (2) Petitions for Review in this matter, or remand the matter to the Superior Court to determine fees and costs.

I. BACKGROUND

The 2011 Redistricting Cases came before this Court on two Petitions for Review (i.e. S-14441 and S-14721) after decisions by the Trial Court invalidating the first and second attempts by the Redistricting Board to promulgate a redistricting plan for the Alaska State Legislature.

GAZEWOOD & WEINER, PC
1008 16th Avenue
Suite 200
Fairbanks, Alaska 99701
Tel.: (907) 452-5196
Fax: (907) 456-7058
info@fairbankslaw.com

---

[1] 868 P.2d 919 (Alaska, 1994).

a) The Trial Court. The Riley Plaintiffs challenged the entire plan arguing that the Board failed to follow the "*Hickel* Process"[2] in adopting the original plan promulgated by the Redistricting Board in its first redistricting plan.[3]

In its Memorandum and Order of September 22, 2011,[4] the Trial Court rejected the Plaintiffs claim that *Hickel* mandated any particular process, but struck down four (4) house districts (i.e. HD 1, 2, 37 and 38) and, by implication, SD S. The Court held that the districts violated the Alaska Constitution and the Board had failed to justify the deviation based upon the necessity to comply with the VRA. The Trial Court also ruled against the Plaintiffs on SD A-C, holding that the voters within the City of Fairbanks did not have a legally cognizable voter dilution claim; only voters within a borough had such a claim.

b) Supreme Ct No.S-14441. The Redistricting Board did not contest the Trial Court's decision as to HD 1 & 2. However, the Board sought to overturn the Trial Court's holding on HD 37 & 38 arguing that the Trial Court had used

---

2

[1] The "Hickel Process" refers to the mandated process delineated in *Hickel v Southeast Conference,* 846 P.2d 38 (Alaska 1992) and described by this Court in this Court's Order on December 28, 2012.

3

[1] Jt. Exc. 2085-208 (S-14441) More specifically, the Plaintiffs challenged eight (8) House Districts (HD 1-6, 37 and 38) and four (4) Senate Districts (SD A-C and S) alleging violations of the compact, contiguous and socioeconomic integration requirements of the Alaska Constitution, violation of Alaska's Equal Protection Clause guarantee to fair and effective representation, and a failure to justify such violations as necessary under the Federal Voting Rights Act (VRA). The Board argued that HD 1-6 did not violate the Alaska Constitution. While the Board did not seriously contest that HD 37 and 38 violated the Alaska Constitution, the Board argued that these Districts and SD S were necessary to comply with the VRA. See generally, Jt. Exc. 48-50 (S-14441).

4

[1] Jt. Exc. 1 et. seq. (S-14441).

GAZEWOOD &
WEINER, PC
1008 16th Avenue
Suite 200
Fairbanks, Alaska 99701
Tel (907) 452-5196
Fax (907) 456-7058
info@fairbankslaw.com

the wrong standard for determining compliance with the VRA.[5] The Plaintiffs filed a Cross Petition for Review challenging the Trial Court's order failing to recognize the cognizablity of the "Hickel Process" claim, the City of Fairbanks voter's dilution claim, and the borough voter dilution claim.[6]

In it's Order of March 14, 2012, this Court reversed the Trial Court on the Plaintiff's process claims, and remanded the entire plan to the Board based principally upon the failure of the Board to comply with the "*Hickel* Process" advocated by the Plaintiffs.[7] While the remaining issues were technically moot, this Court provided the Superior Court and the Board additional guidance by also reversing the Trial Court's holding respecting the cognizabilty of the Fairbanks City voter dilution claim.[8] This Court also provided guidance on the implementation of the VRA. The Court confirmed that the VRA did not allow the Board to "depart from 'traditional redistricting principals to draw districts using race as 'the predominate, overriding factor' which may result in an impermissible racial gerrymander as alleged by the Plaintiffs."[9] The Trial Court also was

5

[1] See ARB Petition for Review (S-14441).

6

[1] See Riley Petition for Review (S-14441)

7

[1] Order No. 77, at para. 11.

8

[1] Id. at para. 13.

9

[1] Id. at para 9, citing *Bush v Vera*, 517 U.S. 952 (1996). See Riley Reply, at 10 (S-1441). The argument is that in creating HD 38 the Board purposefully submerged non-Native urban Democratic-inclined voters into a district that was intended to be a Native effective district because the Board supposed that Democrats would vote for a

GAZEWOOD & WEINER, PC
1008 16th Avenue
Suite 200
Fairbanks, Alaska 99701
Tel. (907) 452-5196
Fax (907) 456-7058
info@fairbankslaw.com

instructed that just because the Native effective house districts had more Native VAP than necessary did not justify the conclusion that the districts were not necessary.[10] This Court did not issue any order on costs and fees in S-14441.

c) **Supreme Ct No. S-14721.** Upon remand, the Superior Court rejected the Second Proclamation Plan holding that the Board didn't comply with the *Hickel* Process mandated by this Court. The Board filed a second petition for review, which Plaintiffs opposed. This Court rejected the Board's petition, and upheld the Superior Court's order remanding the plan to the Board with instructions that the Board should "draft a new plan based upon strict adherence to the *Hickel* process." This Court also reversed the Superior Court's ruling that the Board must make specific findings on the Constitutionality of each house district (which Plaintiffs did not oppose) and that the Board must submit the plan to the Court for approval in the drafting phase.

d) **The Amount of Costs.** The Plaintiffs incurred $81,458.96 in fees and costs with respect to S-14721. (see attached) Upon leave of the Court, Plaintiffs will submit fees and costs respecting S-14441 to this Court or the Superior Court.

II. AS PREVAILING PUBLIC INTEREST LITIGANTS, THE PLAINTIFFS ARE ENTITILED TO FULL ATTORNEY FEES AND COSTS.

GAZEWOOD & WEINER, PC
1008 16th Avenue
Suite 200
Fairbanks, Alaska 99701
Tel (907) 452-5196
Fax (907) 456-7058
info@fairbankslaw.com

Native-preferred candidate, while Republicans would not. As noted previously, the 2012 election results proved the Board's expert particularly wrong on this point and the resulting HD 38 turned out to not be an effective Native District. See Motion to Supplement Record filed on November 13, 2012 in this matter. The Court has not ruled on that motion.

[1] Order No. 77, at para. 9.

<u>a) The Order Failed To Consider The Public Interest Litigant Exception</u>. As a general matter, in Alaska "A prevailing public interest plaintiff is normally entitled to full reasonable attorney's fees."[11] The "rule to grant public interest litigants full reasonable fees was designed to reward the successful "private attorney general" and to encourage meritorious claims that otherwise might not be brought.[12] Subsequent to *Hickel,* the Legislature modified the public interest litigant exception in a manner that is particularly relevant to the present matter. Specifically, the statute provides

> 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...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.... (emphasis added).[13]

The public interest litigant exception has been determined to be a rule of substantive law, and that the statute does not change Rule 82 as it previously existed.[14] Thus, a prevailing public interest plaintiff continues to be normally entitled to full reasonable attorney fees. The statute expressly references appeals,

---

11 *Hickel, 868 P.2d, at 923 citing Hunsicker v Thompson,* 717 P.2d 358, 359 (Alaska, 1986) and *Anchorage Daily News v Anchorage School Dist.,* 803 P.2d 402, 404 (Alaska 1990).

12 *Hickel,* 868 P.2d, at 926 *citing Anchorage v McCabe,* 568 P.2d 986, 993-94 (Alaska 1977).

13 A.S. 09.60.010.

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

GAZEWOOD & WEINER, PC
1008 16th Avenue
Suite 200
Fairbanks, Alaska 99701
Tel (907) 452-5196
Fax (907) 456-7058
info@fairbankslaw.com

and thus clarifies that the public interest litigant exception applies to the determination of fee and cost awards in appellate matters such as the present matter.[15] The relevant questions, therefore, are 1) whether the plaintiffs were public interest litigants, 2) whether any applicable exceptions apply to prevent or limit the Plaintiffs claim to full and reasonable attorney fees, and 3) whether the Plaintiffs were the prevailing party.

b) The Riley Plaintiffs Are Public Interest Litigants. The Riley Plaintiffs fall squarely within the statutory language of A.S. 09.60.010 defining public interest litigants. The statute makes plain that full fees are to be awarded to the prevailing plaintiff that is seeking to enforce state and federal constitutional rights. The present action is, by definition, an enforcement action specifically authorized by Art. 6, § 11 of the Alaska Constitution.[16] Thus, the action inherently seeks to enforce state constitutional rights.

---

15 See also *State, Dept. of Hwy v Salzwedel, 596 P.2d 17, 19 (Alaska, 1979)* and *State v Smith,* 593 P.2d 625, 630 (Alaska, 1979) as explained in *State v Native Village of Nunapitchuk, supra.*

16 The section reads:

§ 11. Enforcement

Any qualified voter may apply to the superior court to compel the Redistricting Board, by mandamus or otherwise, to perform its duties under this article or to correct any error in redistricting. Application to compel the board to perform must be filed not later than thirty days following the expiration of the ninety-day period specified in this article. Application to compel correction of any error in redistricting must be filed within thirty days following the adoption of the final redistricting plan and proclamation by the board. Original jurisdiction in these matters is vested in the superior court. On appeal from the superior court, the cause shall be reviewed by the supreme court on the law and the facts. Notwithstanding section 15 of article IV, all dispositions by the superior court and the supreme court under this section shall be expedited and shall have priority over all other matters pending before the respective court. Upon a final judicial decision that a plan is invalid, the matter shall be returned to the board for correction and development of a new plan. If that new plan is declared invalid, the matter may be referred again to the board. [Amended 1998].

GAZEWOOD & WEINER, PC
1008 16th Avenue
Suite 200
Fairbanks, Alaska 99701
Tel (907) 452-5196
Fax (907) 456-7058
info@fairbankslaw.com

Moreover, all the challenges in this matter alleged that the process used to develop the plan and create Constitutionally infirm districts violated the Alaska Constitution. There is little question that the Plaintiffs claims fall squarely and unquestionably within the statutory language of A.S. 09.60.010 defining public interest litigants.

It is equally clear that the exceptions in the statute do not apply to the Riley Plaintiffs. Those statutory exceptions are contained in AS 09.60.010 (d) & (e). Specifically, these exceptions include 1) costs incurred litigating non-constitutional issues upon which the Plaintiff prevailed,[17] 2) the Plaintiff had economic incentive to bring the suit,[18] or 3) the fee and cost award would be a "substantial and undue hardship" upon the taxpaying constituents of the Board.[19] Neither the first and third of these exceptions relate to a parties "prevailing party" status; rather they relate to the amount of the fee award.[20] The remaining exception does not apply in this case.

17 A.S. 09.60.010(d).

18 Id.

19 A.S. 09.60.010(e)

20 The first concern is irrelevant because all the claims at issue in this matter were "constitutional" claims. See infra discussion regarding apportionment issues. As to the "hardship" concern, the Board has no taxpaying constituents; rather the Board is an arm of the State of Alaska which would be responsible for the fee award. It is unlikily that the amounts at issue will generate a "hardship" claim by the State.

GAZEWOOD & WEINER, PC
1008 16th Avenue
Suite 200
Fairbanks, Alaska 99701
Tel (907) 452-5196
Fax (907) 456-7058
info@fairbankslaw.com

Specifically, there was no incentive for the Plaintiffs to bring this lawsuit. The Plaintiffs are individual voters who did not request damages. The only relief requested is a new plan that complies with the State and federal constitutions. By definition, the Plaintiffs had no economic incentive to bring this action.[21] Thus, Plaintiffs' claims fall within the exceptions contained in AS 09.60.010 (d) and (e), and the Plaintiffs have a statutory substantive right[22] to an award of full attorney fees and costs, which the Court's order clearly overlooked.[23]

c) <u>The Riley Plaintiffs Were Prevailing Parties.</u> The relevant statute clearly provides that a "plaintiff ...(who) prevailed in asserting the right" is to be

---

21 *Koyukuk River Tribal Task Force on Moose Mgmt v Rue,* 63 P.3d 1019, 1021 (Alaska, 2003).

22 See *State v Native Village of Nunapitchuk, surpa.*

23 In non-redistricting cases since enactment of the statute, this Court has continued to use its traditional analysis respecting the public interest exception. In *City of Kotzebue v State, Dept. of Corrections,* 166 P.3d 37 (Alaska, 2007) this Court identified "four factors that courts must consider in deciding whether a party qualifies as a public-interest litigant:

(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?

Citing *Koyukuk River Tribal Task Force on Moose Mgmt v Rue,* supra, at 1020-1021. The right to an equally weighted vote "touches an important area of human rights.... any alleged infringement of the right of citizens to vote must be carefully and meticulous scrutinized." *Reynolds v Sims,* 377 US 533, (1964). Thus, there is little question that the case is "designed to effectuate strong public policies." Plaintiff's success in invalidating the process used by the Board and the resulting plan benefits the entire electorate and the state by producing a plan in a constitutional manner. Thus, numerous persons benefit from the lawsuit. In this case, it is clear that only a private party could have been expected to bring the suit. As the Court is clearly aware, various local governments initially joined the suit, but politics undermined their participation and caused their ultimate withdrawal. After the case was brought, some local governments appeared amicus, but did not seek to participate as parties. The history of this case clearly demonstrates that if the Riley Plaintiffs had not brought this case, no public entity would have prosecuted the lawsuit. Finally, as discussed above, the Plaintiff had no economic incentive to bring this case because they sought no money. Thus, the traditional analysis renders the same result: the Riley Plaintiffs are public interest litigants.

GAZEWOOD &
WEINER, PC
1008 16th Avenue
Suite 200
Fairbanks, Alaska 99701
Tel (907) 452-5196
Fax (907) 456-7058
info@fairbankslaw.com

awarded full reasonable fees and costs.[24] Under the statute, the test is rather simple: did the plaintiff prevail in the claim brought on appeal. The statute does not define "prevail." However, as explained in *Hickel,* this Court has repeatedly held that a "party does not have to prevail on all the issues in the case to be a 'prevailing party.'[25] The party must be successful with regard to the main issues in the action, and need not prevail on every subsidiary issue."[26]

The main issue on both petitions for review was the *Hickel* process. In the prior matter (S-14441) the Trial Court had held that the *Hickel* process was not required, the Plaintiffs filed a petition for review on this issue, and this Court reversed the Trial Court agreeing with the Plaintiffs that the *Hickel* process was required. In the present matter (S-14721) the Trial Court upheld the Plaintiffs objections that the Board failed to use the *Hickel* process on remand as directed by this Court, the Board sought review, the Plaintiffs opposed, and this Court agreed with the Plaintiff and affirmed the Trial Court. The Plaintiffs prevailed on the main issue in both matters.

For the sake of argument, the Riley Plaintiffs would also be considered the prevailing party as to most of the subsidiary issues. In S-14441, the subsidiary issues were technically rendered moot; however, this Court offered explanatory

GAZEWOOD &
WEINER, PC
1008 16th Avenue
Suite 200
Fairbanks, Alaska 99701
Tel (907) 452-5196
Fax (907) 456-7058
info@fairbankslaw.com

24 AS 09.60.010(a).

25 *Hickel, 868 P.2d, at 925 n 7, citing Day v Moore,* 771 P.2d 436, 437 (Alaska 1989).

26 *Hickel, 868 P.2d, at 925 n 7, citing Cooper v Carlson, 511 P.2d 1305, 1308 (Alaska, 1973).*

instructions on the subsidiary issues to guide the Trial Court upon remand. In particular Order No. 77 reversed the Trial Court holding that the City of Fairbanks lacked sufficient population to give rise to a cognizable voter dilution claim. That holding, sought by the Plaintiffs, was a particularly important decision because it required the Board to create a Senate seat, of which 80%+ was comprised of the City of Fairbanks, which had the ripple effect of requiring changes in all the Fairbanks Senate seats in accord with the Plaintiffs initial claims. The Board had very limited and mixed success on the subsidiary issue respecting VRA implementation. In Order No. 77, this Court rejected the Trial Court's VRA analysis respecting "excess Native VAP," however, this Court's memorandum also validated Plaintiffs' principal concerns that the Board needed to avoid racial gerrymandering as defined in *Bush v Verà* in implementing the VRA, which had been rejected by the Trial Court. As a result, while not dispositive on the subsidiary issue of VRA implementation, this Court's holding in Order No. 77 refocused the Trial Court on the balance between both parties principal positions respecting VRA implementation.

This Court's Opinion No. 6741 (S-14721) reversed the Trial Court's order respecting another subsidiary issue: i.e. requiring specific district-by-district findings and court approval of the Board's *Hickel* initial plan. Plaintiffs never

GAZEWOOD &
WEINER, PC
1008 16th Avenue
Suite 200
Fairbanks, Alaska 99701
Tel (907) 452-5196
Fax (907) 456-7058
info@fairbankslaw.com

sought these remedies,[27] but it might be an overstatement to suggest that the Board prevailed upon this point in light of the concurring opinion. In a concurring opinion, Justice Winfree, joined by Justice Stowers, suggested a possible "three-strikes and you are out" rule by noting "the Board's further failure to comply with the *Hickel* process might justify" judicial review of an interim plan, and noting that the two justices would have affirmed the Trial Court on the need for "district-by-district" findings.[28]

Determining a prevailing party, as opposed to determining the amount of the fee award, is a gross calculation which focuses upon the primary issue in the case.[29] By contrast, determining the amount of the fee award may involve apportionment by issue.[30] However, the macroscopic result may be the best measure of a Plaintiff's success.[31] As noted by Justice Matthews' dissent, Opinion

---

27

[1] At trial and upon review, the Plaintiffs never took a position upon the district-by-district findings issue. At the trial level, the Plaintiffs sought the appointment of Masters arguing a variation of "three-strikes and you're out." The Plaintiffs appreciate the Court's decorous compliments for the Board's hard work, but "hard work" does not mean "good work." There is little in the record that suggests that in the future the Board has any intention of elevating substance over form to produce a plan worthy of Alaska's Founding Fathers high ideals. In the past, Alaskan Courts have found it necessary to appoint Masters to avoid the unfortunately awkward results occasioned in the present redistricting cycle: i.e. the interim use of a plan held by this Court to have been developed in violation of the Alaska Constitution. This Court's judicial restraint is admirable, but the Plaintiffs believe that judicial restraint should not be confused with judicial resolve to require compliance with Alaska's constitutional principles.

28

[1] Op. at 16-17.

29

[1] *Hickel, 868 P.2d, at 925.*

30

[1] Id. See also AS 09.60.010(e).

31

[1] *Alaska Center for the Environment v State,* 940 P.2d 916 (Alaska, 1997). [Where main issue in action for reformation of public trust was approval or rejection of settlement agreement, intervenor who prevailed on that issue was entitled to attorney fees even if interveners legal argument did not directly, primarily or necessarily

GAZEWOOD &
WEINER, PC
1008 16th Avenue
Suite 200
Fairbanks, Alaska 99701
Tel (907) 452-5196
Fax (907) 456-7058
info@fairbankslaw.com

No.6741 "sends the redistricting process mandated as a result of the 2010 census back to ground zero."[32] It is rather obvious that the Plaintiffs opposed both the Board's initial plan and the Board's plan produced upon remand. Both have been rejected by this Court. That macroscopic result is the best measure of the Riley Plaintiffs' prevailing party status.[33]

CONCLUSION.

The Riley Plaintiffs were the prevailing party with regard to Order No. 77 (S-14441) and Opinion No. 6741 (S-14721). Pursuant to AS 09.60.010, the Plaintiffs have a statutory substantive right to an award of full attorney fees and costs, which the Court's fee and cost order clearly overlooked. Additionally, the Plaintiffs are entitled to an award of full attorney fees under this Court's case law, which the Court's fee and cost order also overlooked. The Court should reconsider its fee and cost order and either permit the Plaintiffs to file a formal application for attorney fees and costs in this Court for S-14441 and S-14721, or remand the matter to the Superior Court to award attorney fees and costs.

---

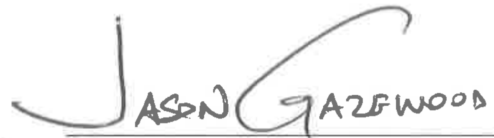
cause courts favorable decision.] In *Hickel*, 868 P. 2d 919 this Court held that a Court had the discretion to apportion fees by issue in certain circumstances. AS 09.60.010 (d) & (e) carries this idea forward to reduce fees to a prevailing party for work done on non-constitutional issues. This concern is not relevant to the issues at hand because all issues involved constitutional concerns.

32 Op. No. 674, at 41.

33 It is possible that the Board may argue that it was the prevailing party because expediency was sufficient to convince this Court to use the Board's Constitutionally flawed plan as an Interim Plan. While such an argument may lack noetic elegance, it does possess a certain Niebuhr-istic charm in light of *Babcock, Predictably Unpredictable: The Alaskan Supreme Court and Reapportionment*, at 121, in Grofman, Race and Redistricting, (Agathon, 1998). Nonetheless, costs and fees related to the interim plan may be segregated and not included in a fee award to the Plaintiffs.

GAZEWOOD & WEINER, PC
1008 16th Avenue
Suite 200
Fairbanks, Alaska 99701
Tel (907) 452-5196
Fax (907) 456-7058
info@fairbankslaw.com

Date: January 7, 2013



For: Michael J. Walleri
Attorney for Riley Plaintiffs
Alaska Bar No. 7906060

GAZEWOOD & WEINER, PC
1008 16th Avenue
Suite 200
Fairbanks, Alaska 99701
Tel (907) 452-5196
Fax: (907) 456-7058
info@fairbankslaw.com

Certificate of Service
I certify that a true and correct copy of the foregoing was served by mail and e-mail on this January 7, 2013 to:

Mr. Michael D. White
Nicole A Corr
Patton Boggs, LLP
601 5th Ave.. Suite 700
Anchorage, AK 99501
mwhite@pattonboggs.com
ncorr@pattonboggs.com

Mr. Thomas F. Klinker
Birch, Horton, Bittner & Cherot
127 W. 7th Ave.
Anchorage, AK 99501
tklinkner@bhb.com

cc: (Amicus)

Ms. Jill Dolan
Legal Department
Fairbanks North Star Borough
P.O. Box 71267
Fairbanks, AK 99707
jdolan@co.fairbanks.ak.us

Ms. Marsha Davis
Calista Corporation
301 Calista Court
Anchorage, AK 99518
mdavis@calistacorp.com

Mr. Scott A Brandt-Erichsen
Borough Attorney
Ketchikan Gateway Borough
1900 First Ave., Suite 215
Ketchikan, Alaska 99901
scottb@kgbak.us

Ms Carol J. Brown
Association of Village Council Presidents
101A Main Street
Bethel AK 99550
cbrown@avcp.org

Mr. Joseph N. Levesque
Walker & Levesque
731 N Street
Anchorage, AK 99501
joe-wwa@ak.net

Ms Natalie Landreth
Native American Rights Fund
801 B Street, Suite 401
Anchorage, AK 99501
landreth@narf.org

Kristine Stoy

GAZEWOOD & WEINER, PC
1008 16th Avenue
Suite 200
Fairbanks, Alaska 99701
Tel (907) 452-5196
Fax (907) 456-7058
info@fairbankslaw.com