SUPREME COURT FOR THE STATE OF ALASKA

Alaska Conservation Foundation, Applicant, v. **Pebble Limited Partnership,** Respondent.	Supreme Court Nos. S-15059 S-15060 S-15089
Nunamta Aulukestai, et al., Petitioners, v. **State of Alaska** **Dept. of Natural Resources, et al.,** Respondents.	Anchorage Superior Court No. 3AN-09-09173CI Judge Eric A. Aarseth
Trustees for Alaska, Applicant, v. **Pebble Limited Partnership,** Respondent.	

Amici Curiae Brief of Alaska Legal Services Corporation, American Civil Liberties Union of Alaska Foundation, Native American Rights Fund, Northern Justice Project, LLC, and Planned Parenthood of the Great Northwest

Filed in the Supreme Court of the State of Alaska this 18th day of July, 2013

Marilyn May, Clerk

By:_____
Deputy Clerk

JOSHUA A. DECKER, No. 1201001
DAVID C. EMBREE, No. NA16506*
**Rule 44 Legal Intern*
ACLU OF ALASKA FOUNDATION
1057 W Fireweed Lane, Ste. 207
Anchorage, AK 99503
T: 907-258-0044, F: 907-258-0228
ATTORNEYS FOR AMICI CURIAE

ACLU OF ALASKA FOUNDATION
1057 W Fireweed Ln
Suite 207
Anchorage, Alaska
99503
TEL: 907.258.0044
FAX: 907.258.0288

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ACLU OF ALASKA FOUNDATION
1057 W Fireweed Ln
Suite 207
Anchorage, Alaska
99503
TEL: 907.258.0044
FAX: 907.258.0288

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1057 W Fireweed Ln
Suite 207
Anchorage, Alaska
99503
TEL: 907.258.0044
FAX: 907.258.0288

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1057 W Fireweed Ln
Suite 207
Anchorage, Alaska
99503
TEL: 907.258.0044
FAX: 907.258.0288

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1057 W Fireweed Ln
Suite 207
Anchorage, Alaska
99503
TEL: 907.258.0044
FAX: 907.258.0288

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1057 W Fireweed Ln
Suite 207
Anchorage, Alaska
99503
TEL: 907.258.0044
FAX: 907.258.0288

AUTHORITY PRINCIPALLY RELIED UPON

Alaska Stat. § 09.60.010. Costs and attorney fees allowed prevailing party.

(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,

. . .

(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.

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1057 W Fireweed Ln
Suite 207
Anchorage, Alaska
99503
TEL: 907.258.0044
FAX: 907.258.0288

JURISDICTIONAL STATEMENT

In an order without clear precedent under Alaska law, the Anchorage Superior Court compelled discovery from Plaintiff Nunamta Aulukestai and its individual co-plaintiffs;[1] their attorneys, Trustees for Alaska; and the non-party Alaska Conservation Foundation to explore supposed "economic incentive" under Alaska Stat. § 09.60.010, the public interest litigant statute. The Plaintiffs, Trustees, and ACF each challenged the discovery order; the Court granted their petition for review[2] and original applications[3] on April 11, 2013 and has jurisdiction under Alaska Appellate Rules 304 and 402.

INTERESTS OF AMICI

As amici more fully describe in today's motion for leave to file this brief, they regularly participate in public interest constitutional litigation throughout Alaska as parties or attorneys. This experience affords them a useful view on this challenge to the Superior Court's order, including how compulsory post-trial discovery of attorneys and third parties will affect and deter Alaska's public interest bar.

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1057 W Fireweed Ln
Suite 207
Anchorage, Alaska
99503
TEL: 907.258.0044
FAX: 907.258.0288

[1] Ricky Delkittie, Sr.; Violet Willson; Bella Hammond; and Victor Fischer.

[2] No. S-15060.

[3] Nos. S-15059 and S-15089.

ISSUES PRESENTED FOR REVIEW

Based on amici's history with public interest litigation, they address three issues:

1. Whether a litigant has a "sufficient economic incentive" only if she has a reasonable chance that her economic position will improve as a result of the litigation,

2. Whether, before a trial court orders one who is not a party to a lawsuit to disclose its private financial information, should there first be a threshold showing of reasonable cause for discovery into this third-party's alleged "economic incentive," and

3. Whether the Superior Court's order will foster an otherwise avoidable ethical tension between attorneys and clients and thus discourage attorneys from representing public interest clients pro bono.

STATEMENT OF THE CASE

This appeal challenges the Anchorage Superior Court's January 18, 2013 order compelling post-trial discovery from Plaintiffs; Plaintiffs' attorneys, Trustees for Alaska; and the non-party Alaska Conservation Foundation. Trustees, a nonprofit public interest law firm, has been a fixture in Alaska since its founding in 1974. ACF is a public foundation with similarly deep roots in the state, having first been established in

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1057 W Fireweed Ln
Suite 207
Anchorage, Alaska
99503
TEL: 907.258.0044
FAX: 907.258.0288

1980. This appeal generally explores the appropriate contours of when a court may order post-trial discovery about public interest plaintiffs: here, the amici specifically address whether the Superior Court may require the Plaintiffs' pro bono lawyers and a non-party nonprofit organization to disclose their private information, including private financial records.

STANDARD OF REVIEW

While an appellate court "generally review[s] a trial court's discovery rulings for abuse of discretion,"[4] this Court has consistently held that matters of law embedded in a trial court's discovery rulings are reviewed independently or de novo.[5] Because this appeal does not

[4] *Marron v. Stromstad*, 123 P.3d 992, 998 (Alaska 2005).

[5] *E.g. Peterson v. State*, 280 P.3d 559, 561 (Alaska 2012) ("Discovery rulings are generally reviewed for abuse of discretion, but whether a privilege applies is a question of law we review independently."); *Prentzel v. State, Dept. of Public Safety*, 169 P.3d 573, 594 (Alaska 2007) ("We review discovery orders . . . . for abuse of discretion, but review de novo whether the trial court considered the appropriate factors when issuing a discovery order."); *Fuller v. City of Homer*, 113 P.3d 659, 662 (Alaska 2005) ("Courts typically review discovery orders under the abuse of discretion standard. *We review interpretation of the Civil Rules under the independent judgment standard*.") (emphasis added) (internal quotation marks omitted); *see also Booth v. State*, 251 P.3d 369, 372 (Alaska App. 2011) ("[T]he Alaska appellate courts have repeatedly declared that 'abuse of discretion' is the standard that governs appellate review of a trial court's [discovery order]. But this is not true as a general proposition of law. . . . If the underlying problem confronting the appellate court is to ascertain the law or the legal test

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1057 W Fireweed Ln
Suite 207
Anchorage, Alaska
99503
TEL: 907.258.0044
FAX: 907.258.0288

represent a challenge to the Superior Court's findings of fact, but instead its construction and application of the public interest exception of Alaska Stat. § 09.60.010, the appropriate standard of review is de novo.

ARGUMENT

This Court should read Alaska Stat. § 09.60.010 to mean that (1) a litigant has a "sufficient economic incentive" only if there is a reasonable chance that her economic position will improve because of the litigation, and (2) before a court orders post-trial discovery into a third party's private finances and its supposed "economic incentive," it should first require a threshold showing of reasonable cause that this third party in fact controls the litigation. Permitting post-trial discovery into the funding of pro bono litigation absent this threshold showing will create ethical tensions between attorneys and public interest clients and, as a result, will likely discourage attorneys from representing future public interest clients pro bono. An attorney confronted with an invasive discovery order designed to uncover her own private financial records might be tempted to advance certain arguments she is ethically obliged *not* to advance—because they are at

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1057 W Fireweed Ln
Suite 207
Anchorage, Alaska
99503
TEL: 907.258.0044
FAX: 907.258.0288

that applies to a given situation, then the appellate court will apply the 'independent judgement' or '*de novo*' standard of review.").

odds with the interests of her client but would selfishly help her. The prospect of this ethical quandary will likely deter attorneys from representing public interest clients pro bono in future cases.

1. A Litigant Has a "Sufficient Economic Incentive" Only if There Is a Reasonable Chance that Her Economic Position Will Be Better Because of the Litigation.

A litigant has a "sufficient economic incentive," as used in Alaska Stat. § 09.60.010(c)–(d), only when there is a reasonable chance that her economic position will improve if she sues than if she does not. Merely having the financial ability to sue is not an affirmative incentive to sue, nor is it even an economic benefit, for resources that make a suit possible will be spent on the litigation and will not be pocketed by the client. As such, the Superior Court erred to the extent that it assumed a litigant has a "sufficient economic incentive" for the purposes of Alaska Stat. § 09.60.010 if she has the financial ability to sue.

a. The Ability to Sue Is Not a "Sufficient Economic Incentive" to Sue.

The Superior Court reasoned that post-trial discovery was appropriate in this case because "a lot of money has been spent on

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Suite 207
Anchorage, Alaska
99503
TEL: 907.258.0044
FAX: 907.258.0288

litigation,"[6] and "neither the individually named plaintiffs nor Nunamta could possibly have afforded this litigation, which means that the money had to come from somewhere else."[7] This focus on the litigation's costs seemed to trigger analysis that led to the discovery order and suggests confusion between, on the one hand, covering costs and removing other barriers to litigation such as arranging plaintiffs' pro bono counsel and, on the other hand, reaping an economic profit from the litigation. The latter is an economic incentive under Alaska Stat. § 09.60.010; the former is a staple of the public interest bar.

Amici, along with other public interest organizations and attorneys, sue not for the prospect of financial reward but instead to vindicate important constitutional rights and to advance public policy. These constitutional public interest suits are both complex and expensive. A nonprofit's choice to offset a suit's *costs*, such as providing pro bono counsel or paying the filing fee, is a separate and distinct matter from whether the claimant has a *benefit*, an "economic incentive to bring the action or appeal regardless of the constitutional claims involved."[8]

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[6] Joint Excerpt of Petitioners Nunamta Aulukestai, et al. and Applicants Alaska Conservation Foundation and Trustees for Alaska 711 at Tr. 73.

[7] *Id.*

[8] Alaska Stat. § 09.60.010(c)(2).

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TEL: 907.258.0044
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This Court previously rejected basing a party's public interest status on her ability to pay costs[9] and it has never held that a party with pro bono counsel is disqualified from being a public interest litigant. It is error to slip one's gaze from the text and long-standing precedent of the economic incentive to litigation's barriers or to use a public interest suit's costs to analyze its benefits.

The costs of pro bono cases are a poor proxy for benefits: if benefits approximated costs, one could hire a private lawyer and would not need a pro bono attorney.[10] Indeed, confusing costs with benefits is not only unfaithful to the public interest statute, it ignores the many times this Court has applauded and enabled the removal of these very obstacles, especially in cost- and labor-intensive litigation.[11] *Okuley* did not find an "economic incentive" from the plaintiffs having pro bono counsel and reducing litigation's barriers through pro bono representation has long been something this Court has praised, not discouraged.

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[9] *Municipality of Anchorage v. Citizens for Representative Governance*, 880 P.2d 1058, 1064 (Alaska 1994).

[10] *C.f. State, Dep't of Health & Soc. Services v. Okuley*, 214 P.3d 247, 256 (Alaska 2009) (quoting Lloyd Benton Miller's affidavit that "there is an extreme shortage of attorneys in the private Bar willing to take on substantial commitments to plaintiff's work in contingent class action litigation for indigent clients.").

[11] *Id.* at 254 (approving the use of the attorney's fee statute to "encourag[e] pro bono representation and of using the class action mechanism").

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Suite 207
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99503
TEL: 907.258.0044
FAX: 907.258.0288

Indeed, the very purpose of subsection (c)(1) of the attorney's fees statute is to mandate the payment of fees to a victorious constitutional plaintiff. If this was a prohibited "economic incentive," then the statute would be a nonsensical ouroboros, swallowing its own tail: any non-frivolous constitutional plaintiff would have an "economic incentive" to sue, because her attorney's fees would be covered by the losing party if she won, yet having such an economic incentive, she could not recover attorney's fees under subsection (c)(1). To avoid this endless circularity, the only reasonable reading of (c)(1) is that fees do not equal economic incentive and if the payment of attorney's fees cannot be an "economic incentive" under (c)(1), payment of attorney's fees cannot be an "economic incentive" under (c)(2).

Rather than dissuading pro bono attorneys from important, complicated litigation, this Court has sought to *encourage* pro bono counsel to participate in complex cases.[12] By reversing the Superior Court, this Court will help ensure that other courts and litigants remain focused on the benefits, and not the costs of litigation in determining attorney's fees.

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Suite 207
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99503
TEL: 907.258.0044
FAX: 907.258.0288

[12] *E.g., Krone v. State, Dep't of Health & Soc. Services*, 222 P.3d 250, 252 (Alaska 2009) (noting testimony showing the paucity "of attorneys both capable of taking on a case of this [complex] type [and] willing to do so on a pro bono basis").

b. The Superior Court Misinterpreted the Public Interest Exception by Focusing on the Ability to Sue.

The Superior Court erred by focusing on the suit's costs rather than whether there was a reasonable chance that the party's financial position would be improved as a result of the case: the analytical error began with the court's focus on the Plaintiffs' financial ability to sue. Yet, even if a plaintiff's attorney's fees and court costs for bringing the case will be zero—because a third party pays them—that arrangement still gives her no economic incentive to bring the action: the attorney's fees and court costs associated with *not* bringing an action are also zero.

Second, the Superior Court failed to recognize that public interest cases about important constitutional rights are usually expensive, long, and complex. The expense of bringing this particular piece of litigation does not indicate the presence of an economically interested third party holding the reins to the litigation.[13] Cases that "concern[] the

[13] During the initial committee hearings in the Alaska Senate about the codification of the public interest exception, the proponents of the bill asserted that nonprofit public interest law firms, such as Trustees for Alaska, were sufficiently well-funded to continue to bring constitutional lawsuits even in the absence of a broad public interest exception. *See*, *e.g.*, *S.B. 97-Attorney Fees: Public Interest Litigants: Hearing on S.B. 97 Before the Senate Resources Comm.*, 23rd Legislature (March 28, 2003) (statement of Neil MacKinnon, Vice Chair of the Alaska Minerals Commission) (comparing the finances of Trustees for Alaska with those

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1057 W Fireweed Ln
Suite 207
Anchorage, Alaska
99503
TEL: 907.258.0044
FAX: 907.258.0288

establishment, protection, or enforcement of a [constitutional] right"[14] pose fundamental questions and demand a searching inquiry into citizens' rights and governments' responsibilities, and they are complex, weighted with disputed facts and conflicting legal authority. This complexity balloons if the suit is one of first-impression and the plaintiff advances cutting-edge arguments to expand Alaskans' constitutional protections.[15] And, where complexity goes, length and expense follow: complex cases require significant investments of time and expense is a direct product of the time invested.[16]

The internal logic of the discovery order relies on an inherent suspicion of long, expensive, and complex constitutional cases tried by pro bono attorneys on behalf of clients who, without free counsel, "could

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of the companies it seeks to sue). This legislative history is decisively at odds with the Superior Court's suspicion that, in order to bring the current lawsuit, Trustees must have obtained funding from some conglomeration of economically interested third parties.

[14] Alaska Stat. § 09.60.010.

[15] *See, e.g., State v. Murtagh*, 169 P.3d 602 (Alaska 2007) (deciding 10 years after the initial complaint that certain restrictions on criminal defense attorneys violate due process).

[16] In *Murtagh*, the plaintiffs were awarded $278,926 in attorney's fees and $19,452.55 in costs for their counsel's decade of work. Ex. A, *Murtagh v. State* Order for Costs and Attorney's Fees Upon Conclusion of the Case and Stipulation as to Cost and Attorneys' Fees.

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1057 W Fireweed Ln
Suite 207
Anchorage, Alaska
99503
TEL: 907.258.0044
FAX: 907.258.0288

[not] possibly have afforded"[17] to have brought their case. This logic forgets that constitutional public interest litigation is long and expensive, and it ignores that the public interest exception is not concerned with a suit's costs or how a party pays them.[18]

If this Court adopts this logic by affirming the Superior Court, it risks relegating public interest constitutional litigation to the exclusive purview of the wealthy: while some cases may offer damages large enough for an attorney to take them on a contingency basis, most substantial constitutional questions—which seek injunctions and declaratory judgments—will not. Middle class and low-income Alaskans cannot spend hundreds of thousands of dollars on attorneys to address ordinary constitutional wrongs, because, by definition, they lack the wherewithal to retain an attorney for a large, complex case. Such a policy would reverse this Court's and the public interest statute's clear, long-standing desire to encourage both individuals and

[17] Joint Excerpt of Petitioners Nunamta Aulukestai, et al. and Applicants Alaska Conservation Foundation and Trustees for Alaska 711 at Tr. 73.

[18] *Municipality of Anchorage*, 880 P.2d at 1064 (the financial worth of public interest litigants does not disqualify them from the public interest exception).

ACLU OF ALASKA FOUNDATION
1057 W Fireweed Ln
Suite 207
Anchorage, Alaska
99503
TEL: 907.258.0044
FAX: 907.258.0288

pro bono counsel to bring important constitutional public interest litigation.[19]

2. A Threshold Showing of Reasonable Cause Is Necessary Before Post-Trial Discovery into a Third Party's "Economic Incentive."

Absent a threshold showing of reasonable cause to believe that a third party actually controlled the litigation, compelling post-trial discovery into a third party's "economic incentive[s]" is inappropriate because: (a) the motives of a third party are relevant only if the third party controls the litigation, and (b) compelling discovery into a third party's motives diminishes the constitutional right to privacy, creating special concerns for pro bono public interest attorneys and law firms.

a. The Motives of a Third Party Are Relevant Only if the Third Party Controls the Litigation.

A court should not compel post-trial discovery into a third party's "economic incentive[s]" absent initial evidence that supports a reasonable cause to believe that the third party actually controlled the

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[19] *Okuley*, 214 P.3d at 254 (recognizing "the policy objectives of encouraging pro bono representation"); *Anchorage v. McCabe*, 568 P.2d 986, 990 (Alaska 1977) (the public interest exception is "designed to encourage plaintiffs to bring issues of public interest to the courts"). Though § 09.60.010 refined the scope of *McCabe*'s public interest exception to issues arising under the Federal and Alaska Constitutions, *McCabe*'s analysis of the exception's purpose is intact.

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1057 W Fireweed Ln
Suite 207
Anchorage, Alaska
99503
TEL: 907.258.0044
FAX: 907.258.0288

litigation. Both the plain meaning of Alaska Stat. § 09.60.010(c) and its case law show that the motives of third parties are generally irrelevant to determining a claimant's "economic incentive[s]." The Superior Court erred by ordering post-trial discovery into the motives of ACF or Trustees without first requiring this threshold showing.

"Statutory interpretation in Alaska begins with the plain meaning of the statute's text."[20] Alaska Stat. § 09.60.010(c)(2) protects plaintiffs from being assessed attorneys fees if they raise non-frivolous constitutional claims and lack "*sufficient economic incentive to bring the action*[.]"[21] By its text, § 09.60.010(c)(2) speaks only of the "economic incentive[s]" of "claimant[s]," not the claimant's attorneys, not any person who may have assisted the claimant, and not someone who may have donated to a nonprofit that might have in turn assisted the claimant. Pro bono public interest attorneys and philanthropists who happen to agree with a lawsuit's goals—but do not join the suit or control it from behind the scenes—fall outside the plain meaning of "claimant."

Furthermore, this Court has determined that the public interest exception means that the motives of third parties are relevant only in

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1057 W Fireweed Ln
Suite 207
Anchorage, Alaska
99503
TEL: 907.258.0044
FAX: 907.258.0288

[20] *Ward v. State, Dept. of Public Safety*, 288 P.3d 94, 98 (Alaska 2012).

[21] Alaska Stat. § 09.60.010(d)(2) (emphasis added).

extraordinary circumstances, such as when the third party controls the litigation or when a named claimant is the mere surrogate for a third party.[22]

The Superior Court's order compels discovery into the potential "economic incentive[s]" of third parties when there is no reasonable cause to believe that they had control over the litigation. Neither the State nor Pebble have alleged with substantiation that either the individually named Plaintiffs or Nunamta Aulukestai pursued litigation as mere surrogates for their pro bono attorneys, for a non-party nonprofit organization, or for other, unnamed third parties. Additionally, by requiring disclosure of the identities of donors, who contributed as little as $5,000, the discovery order reaches parties that are unlikely to control the litigation.[23] As the Superior Court correctly observed, the lawsuit was expensive—the Defendants spent over $2 million on their attorneys. A contribution of $5,000 is only 0.25 percent of that $2 million figure. If the cost of *bringing* the lawsuit even began to approximate the costs of *defending* the lawsuit, a $5,000 contribution

[22] *Kachemak Bay Watch, Inc. v. Noah*, 935 P.2d 816, 827–28 (Alaska 1997); *Carmony v. McKechnie*, 217 P.3d 818 (Alaska 2009).

[23] Although this argument focuses on donations below a certain threshold, a donor's financial contributions, standing alone, should not be sufficient to believe that the donor controls the litigation, regardless of its size.

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Suite 207
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99503
TEL: 907.258.0044
FAX: 907.258.0288

would represent only a scintilla of the total costs of litigation. The Superior Court's order required disclosure of donations so small that they could not plausibly be "calculated to lead to the discovery of admissible evidence" pertaining to the award of attorney's fees.[24] Absent any showing that a third party controlled the litigation, the Superior Court erred by compelling discovery into the "economic incentive[s]" of those third parties.

b. A Threshold Showing of Reasonable Cause Is Necessary To Preserve the Constitutional Right to Privacy.

A court order compelling post-trial discovery into the "economic incentive[s]" of third parties, including public interest attorneys and non-party nonprofit organizations, diminishes their constitutional right to privacy. The threshold showing of reasonable cause is necessary not only because it logically follows from the statute's text and precedent, but also to protect these non-parties' constitutional rights. Allowing post-trial discovery absent this threshold showing would particularly harm—and deter—public interest attorneys and law firms who regularly represent their clients pro bono and who will be forced to sacrifice their constitutional rights rather than just their wallets.

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1057 W Fireweed Ln
Suite 207
Anchorage, Alaska
99503
TEL: 907.258.0044
FAX: 907.258.0288

[24] Alaska R. Civ. Pro. 26(b)(1).

Mandatory evidentiary thresholds before discovery of third party financial information are a part of Alaska law. In *Miller v. Clough*, a child support case, this Court upheld the denial of a motion to compel the disclosure of the finances of the mother's new husband.[25] Agreeing with the logic of the Superior Court, given "the intrusive nature of the discovery request and the fact that it implicated the privacy rights of a person who had no child-support obligation . . . some threshold showing of actual need should be required before discovery of this kind would be allowed."[26] Other courts have similarly set evidentiary thresholds to obtain broad discovery of financial circumstances.[27] Federal courts, in particular, have long prohibited discovery against third parties alleged to be an *alter ego* of a party to the litigation absent a substantial threshold showing of the nature of the entanglement of the parties.[28]

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[25] *Miller v. Clough*, 165 P.3d 594 (Alaska 2007).

[26] 165 P.3d at 597.

[27] *See, e.g.*, *L.C. Rudd & Son, Inc. v. Superior Court*, 52 Cal. App. 4th 742, 749, 60 Cal. Rptr. 2d 703, 708 (1997) (holding that petitioner challenging class settlement was not entitled to discovery of defendants' financial statements because petitioner had not met a threshold showing that the settlement was "disproportionately low").

[28] "When the ground for the discovery is an alleged alter ego relationship with the judgment debtor, there must be facts before the Court to show the basis for the allegation." *Trustees of N. Florida Operating Engineers Health & Welfare Fund v. Lane Crane Serv., Inc.*, 148 F.R.D. 662, 664 (M.D. Fla. 1993); *see also Strick Corp. v. Thai Teak Products Co.*, 493 F. Supp. 1210, 1218 (E.D. Pa. 1980); *Magnaleasing,*

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1057 W Fireweed Ln
Suite 207
Anchorage, Alaska
99503
TEL: 907.258.0044
FAX: 907.258.0288

The need for such evidentiary thresholds is underscored by the fact that all Alaskans, including public interest attorneys and law firms, have an explicit right to privacy.[29] Attorneys and their firms do not relinquish this right when a client retains them or when they file suit on her behalf; while parties to a suit knowingly submit themselves to the civil discovery process, the individual attorneys and firms, *qua* individual persons and organizations, do not.

Attorneys and law firms, such as Trustees, have a more-than-legitimate expectation that they will not be witnesses and that their private information will stay private: non-parties without personal knowledge, even non-parties who are attorneys, are rarely deposed and attorneys assume that they will not be witnesses in their clients' cases.[30] This expectation informs attorneys' right to privacy, which protects (1) information that one legitimately expects to be private, (2) that is not necessary "to serve a compelling state interest," and (3) will be disclosed in a way other than the "least intrusive" manner.[31]

Inc. v. Staten Island Mall, 76 F.R.D. 559, 562 (S.D.N.Y. 1977); *NML Capital, Ltd. v. Republic of Argentina*, C 12-80185 JSW MEJ, 2013 WL 655211 (N.D. Cal. Feb. 21, 2013).

[29] Alaska Const. art. I, § 22.

[30] Alaska R. Prof. Conduct 3.7.

[31] *Jones v. Jennings*, 788 P.2d 732, 738 (Alaska 1990).

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1057 W Fireweed Ln
Suite 207
Anchorage, Alaska
99503
TEL: 907.258.0044
FAX: 907.258.0288

The Superior Court's discovery order upends attorneys' reasonable expectations. Before, a pro bono attorney with an expensive[32] and difficult[33] constitutional public interest case would (correctly) think it unlikely that the other side would depose her; now, if the discovery order stands, she will (again, correctly) assume that she may have to testify.

This creates a new risk for lawyers in expensive and difficult constitutional public interest suits. While many donors may give proudly to non-profit causes, others may view their donations to controversial causes, such as non-profits defending reproductive rights or prisoner rights, as matters that they would not necessarily share with a friend.[34] Attorneys will likely mitigate this extra risk by being more reluctant to take those cases or, if this risk expands to cases that are not expensive or difficult, the typical attorney will then hesitate to take *any* public interest case. No matter the risk's specific details, some attorneys will hesitate to represent public interest constitutional plaintiffs if broad discovery is permitted into the attorney's finances. In

[32] "Expensive" is the discovery order's first proposition.

[33] Difficult cases are harder to win, and losing likely means facing the defendant's request for fees and post-trial discovery.

[34] *Int'l Ass'n of Fire Fighters, Local 1264 v. Anchorage*, 973 P.2d 1132, 1134 (Alaska 1999).

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Suite 207
Anchorage, Alaska
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TEL: 907.258.0044
FAX: 907.258.0288

order to mitigate this risk, this Court should require a threshold showing of reasonable cause before allowing post-trial discovery into the possible "economic incentive[s]" of third parties.

3. The Superior Court's Order Will Create Ethical Tension Between Attorneys and Clients and Will Discourage Attorneys from Representing Future Public Interest Clients Pro Bono.

The Superior Court's misinterpretation of the public interest exception is especially a problem for public interest attorneys and law firms who regularly represent their clients pro bono because: (a) it creates an otherwise-avoidable ethical tension between attorneys and clients, and (b) the consequences of the Superior Court's order counter Alaska's established policy of encouraging pro bono representation and public interest litigation.

a. The Superior Court's Order Creates an Otherwise Avoidable Ethical Conflict Between Attorneys and Clients.

An attorney's first responsibility is to her client, putting her client's interests before her own.[35] Assuming that disclosing the attorney's financial records would do nothing to prejudice the *client's* cause, it would be in the client's best interest for the attorney to simply disclose

[35] Alaska R. Prof. Conduct 1.7(a)(2) (prohibiting placing the "personal interest of the lawyer" ahead of the client's representation).

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1057 W Fireweed Ln
Suite 207
Anchorage, Alaska
99503
TEL: 907.258.0044
FAX: 907.258.0288

that information instead of exposing the client to a needless discovery fight. Attorneys at public interest firms, which are funded by donors who desire privacy and are governed by boards of directors to whom the attorneys have a separate organizational obligation, may face countervailing institutional obligations *not* to disclose their firm's financial records. If, as here, a court orders an attorney to disclose sensitive information, she is more likely to face the Sophie's Choice of championing her rights at the expense of the client's or protecting her client by sacrificing the attorney's own interests.

And the attorney's interests are more than the straightforward and fundamental desire to be left alone and to keep private information private. Public interest law firms such as amici marshal limited resources of money, staff, and time towards their primary goal of representing clients. Discovery orders such as the Superior Court's impose real costs: the money, people, and time spent answering those requests are dollars, individuals, and hours that cannot help clients. These firms also have boards and duties to those directors, who themselves may be compelled to give evidence and are personally liable for the missteps of their firms.

Attorneys and their firms sensibly wish to avoid invasive post-trial discovery and they have a duty to avoid it. The ethical problem arises

ACLU OF ALASKA FOUNDATION
1057 W Fireweed Ln
Suite 207
Anchorage, Alaska
99503
TEL: 907.258.0044
FAX: 907.258.0288

when the means of avoiding the discovery—perhaps by advancing certain arguments or conceding other facts—may harm the client. A nonprofit law firm might very reasonably wish to argue that, while certain discovery might be permitted as to its clients' funds, such discovery should not be permitted into its own records. By injecting the attorney into the discovery process, beyond the typical review of the attorney's hours and rates, sweeping third-party discovery orders put the attorney in the uncomfortable situation of comparing and contrasting her own legal rights with those of her client. Even if the attorney acts ethically and places the client first, this ethical tension bruises the client, who will legitimately worry about who exactly the attorney is zealously protecting.[36]

The Rules of Professional Conduct attempt to avoid this ethical thicket by eradicating the bramble seeds before they are planted: an advocate may not be a witness in her client's case[37] nor may "[t]he lawyer's own interests . . . be permitted to have an adverse effect on representation of a client."[38] Sadly, the Superior Court's order gathers

[36] The client may "ameliorate" this worry by ceasing to confide in her lawyer, which will diminish the quality of her representation and create a completely new set of harms.

[37] Alaska R. Prof. Conduct 3.7 and comment 6.

[38] Alaska R. Prof. Conduct 1.7 comment 10.

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1057 W Fireweed Ln
Suite 207
Anchorage, Alaska
99503
TEL: 907.258.0044
FAX: 907.258.0288

the bramble seeds and douses them with fertilizer, by engendering a circumstance where the lawyer *must* be a witness and where the lawyer's interests will frequently conflict with the client's interests in pro bono litigation.

Trustees is trapped in this ethical miasma;[39] its escape is dictated by the path that this Court paves. If the discovery order stands, however, other attorneys may avoid these grounds altogether: knowing that public interest cases have thorny ethical problems—problems that may condemn them to ethical violations and professional sanction—attorneys will simply move away from the public interest area.

b. The Consequences of the Superior Court's Order Counter Alaska's Established Policy of Encouraging Pro Bono Representation and Public Interest Litigation.

The Alaska courts and Bar decry the lack of capable pro bono counsel[40] and, to fill this hole, attorneys have "a professional

[39] A possible indication of this dilemma is this fact Trustees felt compelled to hire a separate law firm to represent its interests in this appeal.

[40] *Krone*, 222 P.3d at 252 (describing a "paucity of attorneys"); Alaska R. Prof. Conduct 6.1 comment 2 (recognizing "the critical need for legal services that exists among persons of limited means").

ACLU OF ALASKA FOUNDATION
1057 W Fireweed Ln
Suite 207
Anchorage, Alaska
99503
TEL: 907.258.0044
FAX: 907.258.0288

responsibility to provide legal services to those unable to pay"[41] and "should aspire to render at least (50) hours of pro bono publico legal services per year."[42] The Alaska courts and legislature have also long "taken the position that litigation in behalf of the public interest should be encouraged."[43]

This desire for, and the dearth of, pro bono lawyers are particularly acute in constitutional cases, which tend to be legally complex and to require sophisticated analysis and argument.[44] To ameliorate this and to "encourag[e] representation in similar [public interest] cases,"[45] constitutional public interest claimants may recover their "full

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[41] Alaska R. Prof. Conduct 6.1.

[42] *Id.*

[43] *Thomas v. Bailey*, 611 P.2d 536, 541 (Alaska 1980) *superseded by statute on other grounds,* ch. 86, §§ 1–4, SLA 2003; *State, Dep't of Health & Soc. Services v. Okuley*, 214 P.3d 247, 254–55 (Alaska 2009) (affirming the "sound policy of encouraging capable [public interest] representation."). For the legislative preference, *see Krone*, 222 P.3d at 258 (the "legislative history [of Alaska Stat. § 09.60.010] reflects a consensus that successful constitutional claimants were to continue being treated in the same general manner as successful public interest litigants.").

[44] *Krone*, 222 P.3d at 252 (quoting the superior court's discussion of "'testimony concerning the paucity of attorneys both capable of taking on a [constitutional] case of this type [and] willing to do so on a pro bono basis.'") (second alteration in original).

[45] *Id.* at 257.

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1057 W Fireweed Ln
Suite 207
Anchorage, Alaska
99503
TEL: 907.258.0044
FAX: 907.258.0288

reasonable attorney fees and costs"[46] and these fees may be "enhanced . . . because of the risk of nonpayment and the sound policy of encouraging capable representation."[47]

Constitutional public interest cases where the "pertinent law is unclear at the outset" or "new law [must] be forged or difficult burdens of proof met"[48] are the most difficult and thus, under the Superior Court's test, are the most likely to result in post-trial discovery of counsel. Yet, *these are the very cases* that this Court encourages through multipliers of fee awards.[49] The discovery order, which will likely reduce pro bono public interest representation, counters decades of explicit Alaska policy and practice and the apparent intent of the statute itself.

CONCLUSION

The Superior Court misinterpreted the public interest exception as codified in Alaska Stat. § 09.60.010. If this Court allows the Superior Court's interpretation to stand, pro bono public interest attorneys will

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[46] Alaska Stat. § 09.60.010(c)(1).

[47] *Okuley*, 214 P.3d at 254–55.

[48] *Id.* at 255 (internal quotation omitted).

[49] *Id.* (internal quotation omitted) ("A multiplier might be appropriate when 'pertinent law is unclear at the outset of a case' or 'new law had to be forged or difficult burdens of proof met.'").

ACLU OF ALASKA FOUNDATION
1057 W Fireweed Ln
Suite 207
Anchorage, Alaska
99503
TEL: 907.258.0044
FAX: 907.258.0288

experience otherwise-avoidable ethical conflicts and will likely hesitate to represent public interest clients on a pro bono basis in the future.

The order of the Superior Court should be reversed.

Dated: June 27, 2013

Respectfully submitted,

JOSHUA A. DECKER, No. 1201001
DAVID C. EMBREE, No. NA16506*
**Rule 44 Legal Intern*
ACLU OF ALASKA FOUNDATION
1057 W Fireweed Lane, Ste. 207
Anchorage, AK 99503
T: 907-258-0044, F: 907-258-0228
jdecker@akclu.org

ATTORNEYS FOR AMICI CURIAE

Certificate of Typeface

I certify that the text's font is 13-point Century Schoolbook and the footer's font is 10-point Century Schoolbook. Alaska R. App. P. 513.5(c).

David C. Embree

ACLU OF ALASKA FOUNDATION
1057 W Fireweed Ln
Suite 207
Anchorage, Alaska
99503
TEL: 907.258.0044
FAX: 907.258.0288

EXHIBIT A

Murtagh v. State
Order for Costs and Attorney's Fees Upon Conclusion of the Case and Stipulation as to Cost and Attorneys' Fees

3·13·08

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

JOHN M. MURTAGH, et. al.,

Plaintiffs,

v.

STATE OF ALASKA and OFFICE OF VICTIM'S RIGHTS,

Defendants.

Case No. 3AN-97-649 CI

ORDER FOR COSTS AND ATTORNEY'S FEES UPON CONCLUSION OF THE CASE

The final judgment of this court was appealed. On October 26, 2007, the supreme court of the State of Alaska, affirmed in part, reversed in part, and remanded the case to determine attorney's fees and costs. Jurisdiction was returned to this court on November 6, 2007. This court ordered further proceedings on the issue of cost and attorneys fees. The parties negotiated a resolution of the issue of cost and attorneys fees. This order is to set forth the stipulation in the form of an order.

IT IS ORDERED that the total attorneys fees awarded to the plaintiffs attorneys, not including attorneys fees ordered by the supreme court are $231,038.50.

IT IS ORDERED that the total costs awarded to the plaintiffs are $17,563.80.

DATED this 13 day of March, 2008.

by: _____
The Honorable ~~Sen K.~~ Tan
Superior Court Judge

I certify that on 3/14/08 a copy of the above was mailed to each of the following at their addresses of record: S. Orlansky
R. Svobodny-AGO
M. Lucas D.V. Kester-OVR

DEPARTMENT OF LAW - CRIMINAL DIVISION
ATTORNEY GENERAL, STATE OF ALASKA
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: (907) 465-3428 FAX: (907) 465-4043

(D)

Filed 3.13.08

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

JOHN M. MURTAGH, et. al.,

Plaintiff,

v.

STATE OF ALASKA and OFFICE OF VICTIM'S RIGHTS,

Defendant.

Case No. 3AN-97-649 CI

STIPULATION AS TO COST AND ATTORNEYS' FEES

The parties to the litigation stipulate that the total costs and attorneys' fees to be awarded the plaintiff's counsel are $298,398.55. The $298,378.55 consists of the following breakdown:

Appeal	
Attorneys' fees	$ 47,887.50
Costs	1,888.75
Before the trial court	
Attorneys' fees	$231,038.50
Costs	17,563.80
Total	$298,378.55

An order for costs and attorneys' fees occurring on appeal has been entered by the supreme court. This stipulation will serve as the basis for the superior court to enter an order.

D. Victor Kester
Director, Office of Victims Rights

3/13/08
Date

Richard Svobodny
Deputy Attorney General

13 March 2008
Date

Susan Orlansky
Counsel for Plaintiffs

3/13/08
Date

DEPARTMENT OF LAW - CRIMINAL DIVISION
ATTORNEY GENERAL, STATE OF ALASKA
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: (907) 465-3428 FAX: (907) 465-4043