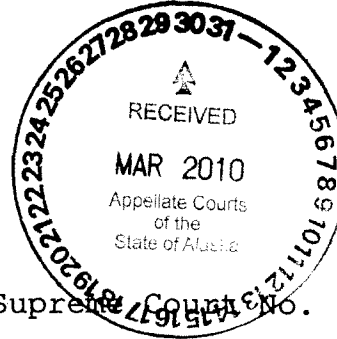
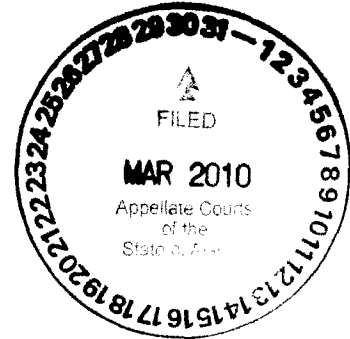


FILE COPY

IN THE SUPREME COURT OF THE STATE OF ALASKA



LETA TRASK,)
)
Appellant,)
)
v.)
)
KETCHIKAN GATEWAY BOROUGH,)
)
Appellee.)

Supreme Court No. S-13590

Trial Court Case No. 1KE-07-437 CI

APPEAL FROM THE SUPERIOR COURT,
FIRST JUDICIAL DISTRICT AT KETCHIKAN,
THE HONORABLE TREVOR N. STEPHENS, PRESIDING

BRIEF OF APPELLANT

Amanda M. Schulz
0206025
307 Bawden Street
Ketchikan, AK 99901
(907) 225-9401

Attorney for Appellant
Leta Trask

Filed in the Supreme Court of
the State of Alaska, this 15th
day of March, 2010.

Marilyn May, Clerk

By: *Amanda Schulz*
Deputy Clerk

TABLE OF CONTENTS

Page

Table of Authorities.....ii

Constitutional Provisions, Court Rules, and Statutes
Principally Relied Upon.....iv

Statement of Jurisdiction.....1

Issues Presented for Review.....2

Statement of the Case.....3

Standard of Review.....11

Argument.....11

The Trial Court Erred in Dismissing Leta Trask's 42
U.S.C.A. § 1983 Counterclaim.....11

The Trial Court Erred When it Denied Leta Trask's Motion
for Enhanced Attorney's Fees Under Alaska Civil Rule
82(b)(3).....18

Conclusion.....22

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Bernhardt v. County of Los Angeles</u> , 279 F.3d 862 (9 th Cir. 2002).....	15
<u>Carey v. Phipus</u> , 435 U.S. 247 (1978).....	15
<u>Faustin v. City, County of Denver</u> , 104 F. Supp.2d 1280 (D. Colo 2000).....	15
<u>Faustin v. City, County of Denver</u> , 268 F.3d 942 (10 th Cir. 2001).....	15, 16, 17
<u>Kazan v. Dough Boys, Inc.</u> , 201 P.3d 508 (Alaska 2009).....	11
<u>Klevon v. Yukon-Koyukuk Sch. Dist.</u> , 853 P.2d 518 (Alaska 1983).....	14
<u>Lybrand v. Trask</u> , 31 P.3d 801 (Alaska 2001).....	20, 21
<u>Marron v. Stromstad</u> , 123 P.3d 992 (Alaska 2005).....	11
<u>State v. American Civil Liberties Union of Alaska</u> , 204 P.3d 364 (Alaska 2009).....	11
<u>State v. Planned Parenthood of Alaska</u> , 35 P.3d 30 (Alaska 2001).....	13, 14
<u>Trustees to Alaska v. State</u> , 736 P.2d 324 (Alaska 1987).....	14
<u>Varilek v. City of Houston</u> , 104 P.3d 849 (Alaska 2004).....	11
<u>Wagstaff v. Superior Court, Family Court Div.</u> , 535 P.2d 1220 (Alaska 1975).....	14
<u>Ward v. Utah</u> , 321 F.3d 1263 (10 th Cir. 2003).....	17
<u>Yniquez v. Arizonans for Official English</u> , 42 F.2d 1217 (9 th Cir. 1994).....	15
 <u>Constitutional Provisions</u>	
U.S. Const. amend. I.....	11

Court Rules

Alaska Civil Rule 82(b)(3).....18, 19, 20, 21, 22

Statutes

42 U.S.C.A. § 1983.....12

AS 09.60.010(c).....21, 22

**CONSTITUTIONAL PROVISIONS, COURT RULES AND
STATUTES PRINCIPALLY RELIED UPON**

Constitutional Provisions

U.S. Const. amend I. Freedom of religion, speech, and of the press.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Court Rules

Alaska Civil Rule 82(b)(3). Attorney's Fees. Amount of Award. 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:

- (A) the complexity of the litigation;
- (B) the length of trial;
- (C) the reasonableness of the attorneys' hourly rates and the number of hours expended;
- (D) the reasonableness of the number of attorneys used;
- (E) the attorneys' efforts to minimize fees;
- (F) the reasonableness of the claims and defenses pursued by each side;
- (G) vexatious or bad faith conduct;
- (H) the relationship between the amount of work performed and the significance of the matters at stake;
- (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;

(J) the extent to which the fees incurred by the prevailing party suggest that they had been influenced by considerations apart from the case at bar, such as a desire to discourage claims by others against the prevailing party or its insurer; and

(K) other equitable factors deemed relevant.

Statutes

42 U.S.C.A. § 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

...

AS 09.60.010(c). Costs and attorney fees allowed prevailing party.

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.

STATEMENT OF JURISDICTION

This appeal is taken from the June 24, 2009 Memorandum and Order and the August 30, 2009 Memorandum and Order issued by Superior Court Judge Trevor N. Stephens. This appeal is brought in accordance with Alaska Rule of Appellate Procedure 204. This Court has jurisdiction over this appeal pursuant to AS 22.05.010(b).

ISSUES PRESENTED FOR REVIEW

1. Did the trial court err when it dismissed Leta Trask's counterclaim brought pursuant to 42 U.S.C. § 1983?
2. Did the trial court err when it denied Leta Trask's motion for enhanced attorney fees under Alaska Civil Rule 82(b)(3)?

STATEMENT OF THE CASE

On November 15, 2004, the Ketchikan Gateway Borough Assembly adopted Ordinance No. 1328A, amending Ketchikan Gateway Borough Code of Ordinances, Title 60, §§ 60.10.090 and 60.10.140. The amendment added a prohibition of roof signs and modified the definition of sign by deleting the phrase "street or highway" and adding the word "area". Ketchikan Gateway Borough Code § 60.10.140(B), now defines a sign as:

Any words, lights, letters, parts of letters, figures, numerals, phrases, sentences, emblems, devices, trade names or trademarks by which anything is made known, such as are used to designate an individual, a firm, an association, a corporation, a profession, a business or a commodity or product, which are visible from any public area and used to attract attention.
(emphasis added).

§ 60.10.090(A)(8) defines a roof sign as, "A sign projecting over the coping of a flat roof, or over the ridge of a gable, hip or gambrel roof, and supported by or attached to said roof, or any sign that uses the roof for support." [Exc. 89 n.1, 96].

On August 10, 2005, Leta Trask requested written confirmation that she did not need a permit for the painting on her roof. [Exc. 78]. She submitted a drawing of what she intended to place on the roof. [Exc. 79]. On October 5, 2005, Erin Reeve, Assistant Planner for Ketchikan Gateway Borough, responded to the letter and advised that based upon the

information provided, which included a phone conversation, a permit was not necessary. [Exc. 80].

On July 13, 2007, the Ketchikan Gateway Borough, through its attorney, Scott Brandt-Erichsen, sent Robert and Leta Trask a letter advising that a complaint had been received about the painting on their roof. A copy of the letter was also sent to the Acting Code Administrator. The letter went on to advise of the 2004 amendments. The letter also indicated that it was being requested that the code administrator, by copy of the letter, issue an order of removal as allowed by the code. [Exc. 117 - 118].

On August 15, 2007, in response to a letter from Leta Trask, Ketchikan Gateway Borough, again through its attorney, Scott Brandt-Erichsen, sent Robert and Leta Trask a letter. That letter asserted that the owners and tenants were responsible for any violations of the code and that if the sign was not removed, citations could be issued to the current residents and the owners. [Exc. 119 - 120].

On September 4, 2007, Ketchikan Gateway Borough, through its attorney, Scott Brandt-Erichsen, sent a letter to the "Residents of 713/715 Hill Road". The letter advised of the 2004 code amendments and requested that the residents make arrangements to have the words or phrases painted over or removed. [Exc. 121 - 122].

On September 18, 2007, Ketchikan Gateway Borough filed a Complaint to Enjoin Sign Code Violation naming Robert and Leta Trask, and John and Jane Doe, as Defendants. The complaint alleged that the named Defendants maintained a roof sign in violation of KGB Code § 60.10.090(A)(8). [Exc. 1 - 8]. The painting included hearts and a cross as well as the following phrases: "Do Unto Others...", "By Your Deeds You're Known", "Love Your Neighbor", and "You're Welcome". [Exc. 8]. Leta Trask filed an Answer, pro se, on October 12, 2007. [Exc. 9 - 14]. Ketchikan Gateway Borough filed a Notice of Dismissal Without Prejudice as to Robert Trask on January 25, 2008. [R. 379]. On March 28, 2008, by and through counsel, Leta Trask filed an Amended Answer and Counterclaim. [Exc. 15 - 27]. In part, the counterclaims alleged that the ordinance was unconstitutional. [Exc. 24 - 26]. It was also alleged that by enforcing KGB Code § 60.10.090, Ketchikan Gateway Borough, acting under the color of state law, deprived and was depriving Leta Trask of her rights guaranteed by the United States Constitution and the Alaska Constitution and that Ketchikan Gateway Borough was liable for any such actions that violated Leta Trask's constitutional rights. [Exc. 25- 26].

On April 9, 2008, Ketchikan Gateway Borough filed a Motion to Dismiss Counterclaim for failure to state a claim. [R.328 - 335]. Leta Trask filed her opposition on April 28, 2008. [R.

307 - 327]. On April 30, 2008, Ketchikan Gateway Borough filed its Reply. [R. 302 - 306]. The Court issued a Memorandum and Order on May 23, 2008, granting Ketchikan Gateway Borough's Motion to Dismiss Counterclaim in part and denying it in part. [Exc. 28 - 34]. The Superior Court dismissed Leta Trask's counterclaim to the extent it was based on violations of the Alaska Constitution finding that § 1983 does not apply to violations of state law. [Exc. 33]. The Superior Court denied the remainder of the motion. [Exc. 33].

On June 9, 2008, Ketchikan Gateway Borough filed its answer to Appellant's Counterclaim. [Exc. 35 - 39]. Leta Trask filed a Motion for Summary Judgment on September 16, 2008. [R. 221 - 268]. She asserted that the ordinance was an invalid content-based speech restriction, that it was an invalid time, place or manner restriction, that the ordinance amounted to illegal prior restraint and was overbroad, and that the ordinance was void for vagueness. [R. 230 - 239]. Ketchikan Gateway Borough filed its Opposition on September 23, 2008. [R. 203 - 220]. Leta Trask's Reply was filed October 3, 2008. [R. 188 - 200]. Oral argument was set for October 24, 2008. [R. 186]. On October 24, 2008, Ketchikan Gateway Borough filed a Notice of Supplemental Authority. [R. 165 - 185]. Leta Trask responded to the supplemental authority the same day. [R. 155 - 164].

On March 1, 2009, the Superior Court issued an Order requesting additional briefing from the parties as to the scope of the prohibition in KGB Code 60.10.090(A)(8). [R. 153 - 154]. A Non-Opposed Request for Clarification was filed on March 11, 2009. [R. 152]. On March 13, 2009, the Superior Court provided clarification indicating that it wanted to be able to determine whether what was painted on Leta Trask's roof was a "sign" under KGB Code 60.10.140. [R. 151].

On March 27, 2009, both parties filed additional briefing. Leta Trask argued that the painting was not a sign and therefore the ordinance did not apply to the painting. [R. 102 - 135]. Ketchikan Gateway Borough argued it was a sign and the ordinance applied. [R. 137 - 147]. On April 7, 2009, Ketchikan Gateway filed a Notice of Supplemental Authority with regard to ripeness and standing. [R. 44 - 101]. On April 13, 2009, the Superior Court issued a Memorandum and Order granting Leta Trask's summary judgment in part and denying it in part. [Exc. 87 - 110]. The Court granted summary judgment on the issue of whether the painting was a sign and dismissed Ketchikan Gateway Borough's Complaint. [Exc. 110]. The Superior Court went on to find that Leta Trask lacked standing to assert her claims that KGB Code §60.10.090 violates her constitutional right to free speech because the ordinance did not apply to her painting and because she had not shown that the ordinance broadly prohibited

speech protected by the First Amendment. [Exc. 104]. The Court also found that her declaratory judgment claims were not ripe because there was no longer an "actual sign-related controversy between her and KGB." [Exc. 108 - 110]. In a footnote the Superior Court indicated that Ketchikan Gateway Borough was no longer able to attempt to penalize Leta Trask under KGB §60.10.090(A)(8) given its ruling. [Exc. 109 n. 54]. The Superior Court also found the claims were not ripe because Leta Trask did not show that she was in danger of sustaining any direct injury as a result of a civil or criminal enforcement based upon the ordinance because the speech she engaged in was not covered by the ordinance. [Exc. 109]. Lastly, the Superior Court found that "the balance between a need for decision and the risk of a decision favors no decision." [Exc. 109]. Therefore, the Superior Court did not address the constitutionality of the ordinance. In its conclusion, the Superior Court noted that it was not addressing whether or not Leta Trask's §1983 action remained viable. [Exc. 110].

A hearing was held on May 1, 2009. At that time Ketchikan Gateway Borough asserted that there was not a viable §1983 action given the Superior Court's April 13, 2009, ruling. [Tr. 3]. Ketchikan Gateway Borough also asserted the issue was addressed in its previous 12(b)(6) motion. [Tr. 3]. Leta Trask asserted the belief that the claim was viable regardless of

whether the painting qualified as a sign given Ketchikan Gateway Borough's attempts to restrict her free speech rights, especially since the ordinance did not in fact apply. [Tr. 3 - 4]. Leta Trask asserted that the constitutional violation was the suppression or attempted suppression of her freedom of speech. [Tr. 3 - 4]. The Superior Court allowed 30 days for additional briefing from Leta Trask and gave Ketchikan Gateway Borough two weeks to respond. [Tr. 6].

On June 1, 2009, Leta Trask filed a Memorandum Re: U.S.C.A. §1983. [Exc. 112 - 122]. Ketchikan Gateway Borough responded on June 9, 2009. [Exc. 123 - 127]. On June 24, 2009, the Superior Court dismissed the remaining counterclaim based upon § 1983, setting forth two reasons. [Exc. 128 - 129]. First the trial court asserted that Leta Trask had not met the elements of a § 1983 claim, specifically that there was a constitutional violation. [Exc. 129]. The second reason was because the Court had already found that Leta Trask did not have standing to litigate the constitutionality of the ordinance. [Exc. 129].

Leta Trask filed a Motion for Attorney's Fees on July 10, 2009, contending she was the prevailing party and requesting enhanced fees. [Exc. 130 - 140]. Ketchikan Gateway Borough opposed the motion on July 27, 2009, contending that neither party could be considered the prevailing party. [Exc. 141 - 144]. Leta Trask filed her Reply on August 5, 2009. [Exc. 145

- 147]. In a Memorandum and Order dated August 30, 2009, the Superior Court found that Leta Trask was the prevailing party and awarded her 20% of her fees. It denied her request for enhanced fees. [Exc. 148 - 149.] On September 9, 2009, the parties filed a stipulation regarding fees. [Exc. 150 - 151]. Pursuant to the stipulation, on September 10, 2009, the Superior Court awarded Appellant fees in the amount of \$3,090.96. [Exc. 152].

STANDARD OF REVIEW

The Court reviews de novo decisions granting or denying motions to dismiss. Varilek v. City of Houston, 104 P.3d 849, 851 (Alaska 2004). The Court reviews a trial court's standing determination de novo. State v. American Civil Liberties Union of Alaska, 204 P.3d 364, 368 & n.11 (Alaska 2009). Questions of law and the trial court's application of the law to the facts is reviewed de novo. Kazan v. Dough Boys, Inc., 201 P.3d 508, 513 (Alaska 2009).

The Court reviews a trial court's fact-based decisions as to whether attorney's fees are reasonable and should be awarded for an abuse of discretion. An award of attorney's fees constitutes an abuse of discretion only when it is manifestly unreasonable. The Court reviews de novo whether the trial court applied the law correctly in awarding attorney's fees. Marron v. Stromstad, 123 P.3d 992, 998 (Alaska 2005).

ARGUMENT

The Trial Court Erred In Dismissing Leta Trask's

U.S.C.A. § 1983 Counterclaim.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

...

42 U.S.C.A. § 1983.

In dismissing Leta Trask's U.S.C.A. § 1983 counterclaim, the trial court essentially revived Ketchikan Gateway Borough's Motion to Dismiss. The trial court found two reasons to dismiss Leta Trask's counterclaim. First, the Court found that Ms. Trask did not meet one of the elements required for a § 1983 claim. That element was a constitutional violation. The second reason was that the trial court had already found she did not have standing to litigate the constitutionality of the ordinance. [Exc. 129]. The trial court apparently took the view that Leta Trask's claims hinged upon the applicability of the ordinance to her roof painting. That view is too narrow.

A review of paragraphs 70 and 71 of Leta Trask's counterclaim shows that Leta Trask's U.S.C.A. § 1983 claim is based upon more than the constitutionality or applicability of the ordinance itself. [Exc. 25]. The U.S.C.A. § 1983 claim is based upon Ketchikan Gateway Borough's numerous attempts to force Leta Trask to remove the painting on her roof through

letters and the filing of a civil complaint. [Exc. 1 - 8, 117 - 122]. This is acknowledged by the trial court in its April 13, 2009, Memorandum and Order at n. 54. "She claims that the KGB has violated her constitutional rights by attempting to penalize her under KGB § Code 60.10.090(A)(8) for the writings and symbols on her roof." [Exc. 109 n. 54]. These attempts are even more egregious when the ordinance is not even applicable to the painting, as found by the trial court in its Memorandum and Order dated April 13, 2009. [Exc. 110].

Leta Trask's argument is not based upon whether Ketchikan Gateway Borough can continue to go after Leta Trask with letters or in court, but the fact that they have already done so and in doing so curtailed the exercise of her free speech rights. The actions taken by Ketchikan Gateway Borough under the guise of an inapplicable ordinance violated Leta Trask's right to free speech. The application of the ordinance to her protected speech was unconstitutional.¹

Leta Trask's standing on this issue is not based upon third-party standing or citizen-taxpayer standing. Rather, it is based on interest-injury standing. Alaska's standing requirement has been interpreted leniently to facilitate access to the courts. State v. Planned Parenthood of Alaska, 35 P.3d

¹ The trial court never reached the issue of whether Leta Trask's painting was constitutionally protected speech. [Exc. 110 n. 59]. Leta Trask contends it is. [Exc. 112 - 113].

30, 34 (Alaska 2001). Interest-injury standing requires "an interest adversely affected by the conduct complained of." Trustees to Alaska v. State, 736 P.2d 324, 327 (Alaska 1987). A "party asserting standing [must demonstrate] a sufficient personal stake in the outcome of the controversy to ensure the requisite adversity." Klevon v. Yukon-Koyukuk Sch. Dist., 853 P.2d 518, 525 (Alaska 1983). The degree of injury does not need to be great. The basic idea is that an identifiable trifle is enough for standing to fight out a matter of principle. Wagstaff v. Superior Court, Family Court Div., 535 P.2d 1220, 1225 & n.7 (Alaska 1975).

The interest at issue is freedom of speech. Leta Trask was ordered in writing, as were her tenants, to remove her paintings from her roof. [Exc. 117 - 122]. A civil complaint was filed against her when she did not comply. [Exc. 1 - 8]. The enforcement actions of the Ketchikan Gateway Borough chilled the exercise of her right to free speech. Although no evidentiary hearing was ultimately held, the assertions were made that Leta Trask did not refresh or modify the paintings once she received the letters and complaint. [Exc. 116]. This is an injury. She was forced to defend against the civil complaint, a complaint based upon an ordinance that was not applicable to her painting. This caused her emotional distress and cost her money. [Exc.

24]. This is also an injury. As these injuries were suffered directly by her, she has a personal stake in the outcome.

In a § 1983 action, a plaintiff is entitled to nominal damages even without proof of actual injury. Yniquez v. Arizonans for Official English, 42 F.3d 1217, 1243 (9th Cir. 1994) (citing, Carey v. Piphus, 435 U.S. 247, 266-67 (1978)). By allowing nominal damages the law recognizes the importance of certain absolute rights. Id. A claim for even nominal damages confers standing. Bernhardt v. County of Los Angeles, 279 F.3d 862, 872 (9th Cir. 2002).

As in Faustin v. City, County of Denver, Colorado, 104 F.Supp.2d 1280 (D. Colo. 2000), affirmed in part, reversed in part, and remanded by, 268 F.3d 942 (10th Cir. 2001), Ketchikan Gateway Borough infringed upon Leta Trask's constitutional right to freedom of speech. In Faustin, Wendy Faustin filed a claim under 42 U.S.C.A. § 1983 alleging that her First Amendment rights were violated. On several different occasions, Faustin displayed a banner at an overpass, reading, "Abortion kills children." 268 F.3d at 945. On December 5, 1997, while displaying the banner, a police officer approached Faustin and asked her to stop displaying the banner. The officers advised they were unaware of any law that she was violating. On February 6, 1998, Faustin was again displaying the banner. Another officer approached her and told her she could not

display the banner. Faustin advised she was finished for the day and no action was taken. Id. On March 6, 1998, Faustin was again displaying the banner at the overpass. Yet another officer approached her and told her she was violating the Posting Ordinance. The officer consulted with another officer that indicated that the banner also violated the Outdoor Advertising Act. Id. at 945-46. After this encounter, Faustin's attorney sent a letter to the Police Chief requesting assurance that Faustin would not be arrested for displaying the banner. No response was received. Id. at 946. On August 7, 1998, Faustin was again displaying the banner and was approached by another officer. Within fifteen minutes, four other police cars arrived. Faustin was cited for violating section 3-1. The charge was dismissed on October 9, 1998, as the city prosecutor determined that the posting ordinance did not apply. Id. On November 18, 1998, the Assistant City Attorney wrote a letter to the police chief advising him that Faustin's conduct was protected speech. On November 23, 1998, Faustin filed her complaint alleging among other claims that the application of section 3-1 to the display of her banner, was unconstitutional. Id.

The lower court found that based upon the defendant's ordering Faustin to stop displaying her banner and charging her pursuant to the ordinance, the statute was applied in an

overbroad and unconstitutional manner in violation of 42 U.S.C.A. § 1983. 104 F.Supp.2d at 1288. According to the district court, the fact that Faustin removed her banner after one of the police contacts, the fact that she was charged at all under the statute, and the fact that her speech was chilled indicated that the defendant's constitutional violation was not "such a quickly disposed of inconvenience." Id. The district court granted summary judgment in favor of Faustin holding that section 3-1 was unconstitutional as applied to Faustin. 268 F.3d at 947. The defendants appealed claiming the case was moot and that Faustin lacked standing because the charge against her had been dismissed and was unlikely to recur. Id. The Court of Appeals found that Faustin had standing to sue for damages based upon her prosecution and affirmed the district court holding on that issue. Id. at 948 & 950. In Ward v. Utah, 321 F.3d 1263, 1268 (10th Cir. 2003), the Court of Appeals explained that "Insofar as Faustin sought damages based upon her past prosecution (including nominal damages) and declaratory relief with respect to that prosecution, we held that she had standing." They found she lacked standing to seek prospective injunctive relief. Id.

While not Alaska case law, the scenarios are analogous. The only real difference is that Faustin's message was portable and easily removable and Leta Trask's painting is not. However,

both Faustin and Leta Trask were told to remove their messages, both were prosecuted, and both prosecutions were dismissed because the ordinances used to instigate the prosecutions were inapplicable. The actions of the Ketchikan Gateway Borough in using the ordinance to demand removal of the painting and then filing suit against Leta Trask were an overbroad and unconstitutional application of the ordinance that had the effect of curtailing Leta Trask's speech.

Based upon the foregoing, Leta Trask's counterclaim under 42 U.S.C.A. § 1983 remained viable. Therefore, the trial court erred when it dismissed said claim.

The Trial Court Erred When it Denied Leta Trask's Motion for Enhanced Attorney's Fees Under Alaska Civil Rule 82(b)(3).

Alaska Civil Rule 82 provides that the prevailing party in a civil case shall be awarded attorney's fees.² Pursuant to Alaska Civil Rule 82(b)(2), if a prevailing party recovers no money judgment in a case resolved without trial, the party shall be awarded 20% of its actual fees. According to Alaska Civil Rule 82(b)(3), the Court may vary an award if it determines a variation is warranted upon consideration of various factors, including:

² While for purposes of this appeal the discussion is limited to Alaska Civil Rule 82, Leta Trask does not intend to waive any argument for attorney's fees pursuant to 42 U.S.C.A. § 1988.

(A) the complexity of the litigation; (B) the length of trial; (C) the reasonableness of the attorneys' hourly rates and the number of hours expended; (D) the reasonableness of the number of attorneys used; (E) the attorneys' efforts to minimize fees; (F) the reasonableness of the claims and defenses pursued by each side; (G) vexatious or bad faith conduct; (H) the relationship between the amount of work performed and the significance of the matters at stake; (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; (J) the extent to which the fees incurred by the prevailing party suggest that they had been influenced by considerations apart from the case at bar, such as a desire to discourage claims by others against the prevailing party or its insurer; and (K) other equitable factors deemed relevant.

The trial court found Leta Trask to be the prevailing party with regard to the complaint filed by KGB and awarded her 20% of her actual fees. [Exc. 148 - 149].

Pursuant to Alaska Civil Rule 82(b)(3), the trial court should have varied the award of attorney's fees and awarded Leta Trask full reasonable fees. Ketchikan Gateway Borough contended that this was a straightforward code enforcement case [R. 280]. That clearly was not the case since the trial court found the code did not even apply. [Exc. 104 - 106]. While the Court was able to resolve the matter without ruling on constitutional issues, the constitutional claims were reasonable given the poorly written ordinance and the importance of the constitutional right to free speech. Ketchikan Gateway Borough,

on the other hand, continued to raise defenses such as absolute and legislative immunity, despite the Court's prior ruling that it was not immune. [Exc. 33, 37 - 38].

Counsel for Leta Trask was aware of prior suits against Leta Trask regarding the painting on her roof, including an appeal. See, Lybrand v. Trask, 31 P.3d 801 (Alaska 2001). Knowing that Ms. Trask previously expended a great deal of money defending herself, counsel attempted to do all she could to minimize fees and costs. [Exc. 140]. Other than to review motion work prior to filing and brainstorming, only one attorney worked on this case. Much time was donated and any time billed for work by counsel's partner was billed at a reduced rate. [Exc. 140].

Ketchikan Gateway Borough proceeded based upon vexatious and bad faith conduct, filing suit against Leta Trask pursuant to an inapplicable ordinance despite its own earlier determinations that Leta Trask did not need a permit because her painting was not a "sign" and despite the fact that Ketchikan Gateway Borough's own attorney previously determined that the code was aimed at commercial speech and not Leta Trask's painting. [Exc. 76 - 77, 80].

The issue of being able to use your private residence to exercise your First Amendment Right is very significant and Leta Trask found it necessary to stand up for that right. Given the

importance of the issue to her and to citizens in general, the amount of work performed was more than reasonable.

Given the reasonableness of the fees, an award of full fees will not be so onerous as to deter other litigants from using the courts. In addition, Leta Trask's motive behind defending herself and standing up for her constitutional rights has nothing to do with recovering attorney's fees or discouraging claims. She simply believes that one must stand up for oneself, as she has shown time and time again, despite the expense to her and the lack of monetary recovery. See, Lybrand v. Trask, 31 P.3d 801 (Alaska 2001).

With regard to other equitable factors, it should be noted that part of Leta Trask's defense was based upon affirmative defenses which included constitutional violations. [Exc. 18 - 20. However, in determining the ordinance was inapplicable to Leta Trask's painting, the Court found Leta Trask no longer had standing to challenge the constitutionality of the ordinance, thereby avoiding making any constitutional rulings. [Exc. 108 - 110]. As this action involved the "establishment, protection, or enforcement of a right under the United States Constitution or the Constitution of the State of Alaska," she is a public interest litigant or constitutional claimant under AS 09.60.010(c). If Leta Trask prevailed in asserting some or all of her constitutional claims she would be entitled to full

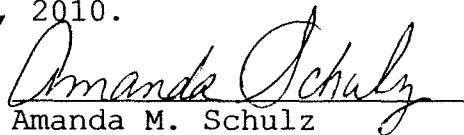
reasonable fees and costs so long as she did not have sufficient economic incentive to bring the suit. This was not a suit about money but about defending one's constitutional rights. This should have been considered. This same provision protects Leta Trask from having to pay attorney's fees for any constitutional claims on which she did not prevail, including her counterclaim.

CONCLUSION

The evidence before the trial court and the applicable law did not support the trial court's dismissal of Leta Trask's counterclaim under 42 U.S.C.A. § 1983. Therefore, the holding of the trial court must be reversed.

Given the facts before the trial court, it was manifestly unreasonable for the court not to enhance fees above 20%. Given this abuse of discretion, the holding of the trial court limiting attorney's fees to 20% must be reversed.

Dated this 8th day of March, 2010.


Amanda M. Schulz
AK Bar No. 0206025
Attorney for Appellant