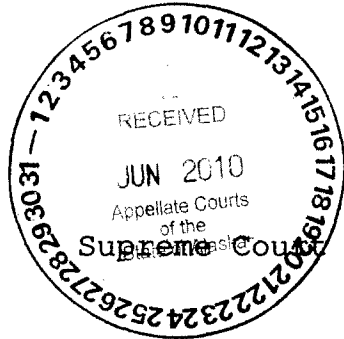


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IN THE SUPREME COURT OF THE STATE OF ALASKA



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



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

REPLY BRIEF OF APPELLANT

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Filed in the Supreme Court of
the State of Alaska, this 25th
day of May, 2010.

Marilyn May, Clerk
By: *[Signature]*
Deputy Clerk



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**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.

Ordinances

KGB Code 60.10.090(A)(8). Roof-mounted signs, including any signs painted on the roof surface, but excepting those mounted on a marquee or canopy, are prohibited.

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 THE CASE

Appellee contends that Leta Trask has omitted or mischaracterized part of the history of this matter. Leta Trask takes issue with that statement and does not concede Appellee's rendition of the history.

Leta Trask also takes issue with certain cites to the excerpt of record in support of what Appellee asserts are the facts. In the Brief of Appellee at 2, Appellee states that, "Ms. Trask and her uphill neighbor litigated the display on the roof of 713/715 Hill Road, resulting in the removal of the sign in August 2005. (Exc. 81)." The same document is also cited in support of the statement, "Ms. Trask did not take action to install a sign in October 2005, but left the rooftop unadorned until June 2007. (Exc. 81)." Excerpt 81 is a petition signed by various individuals. The drafter of the petition is not identified. The information on the petition is not a statement of fact but the drafter's opinion.

ARGUMENT

The Trial Court Erred In Dismissing Leta Trask's

42 U.S.C.A. § 1983 Counterclaim.

1. *Leta Trask Has Standing to Pursue Her 42 U.S.C.A. § 1983 Counterclaim.*

The issue before the Court is whether Leta Trask has standing to assert a claim pursuant to 42 U.S.C.A. § 1983, not whether she would prevail on such a claim. Appellee's Brief seems to focus mainly on the merits of the counterclaim.

While Leta Trask has not appealed the trial court's ruling on standing as specifically set forth in its Memorandum and Decision dated April 13, 2009, she has appealed the ruling to the extent it is the basis for the trial court's dismissal of her § 1983 claim. [Exc. 87 - 110, 128 - 129]. In its April 13, 2009, Memorandum and Decision, the trial court did not make any findings regarding Leta Trask's claim pursuant to 42 U.S.C.A. § 1983. [Exc. 108 - 110].

To clarify, in this appeal, Leta Trask is not contesting the trial court's ruling that she does not have standing to challenge the **facial** constitutionality of sections of the KGB ordinance that were not applied to her. Leta Trask is not contesting that she does not have standing to seek prospective relief based upon the future application of the ordinance. She is not asserting "chilling effect" standing as addressed in

Appellee's Brief at 24-25. Leta Trask does intend to continue to express her right to free speech upon her roof, but as the trial court has ruled the ordinance is inapplicable, she is not asserting there is a threat of future prosecution. Rather, Leta Trask's claim for standing is based upon the application of KGB Code 60.10.090(A)(8) to her speech, from the time of the first letter demanding removal of the speech, through the time Appellee instituted suit insisting that Leta Trask's speech be enjoined, and until the trial court dismissed Appellee's lawsuit. Leta Trask contends that the ordinance was unconstitutional as applied to her during that time period and seeks damages for the deprivation of her right to freedom of speech under the First Amendment.

As asserted in Leta Trask's opening brief, Alaska's standing requirement has been interpreted leniently to facilitate access to the courts. State v. Planned Parenthood of Alaska, 35 P.3d 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).

Again, the interest at issue is freedom of speech. The conduct was the application of an unconstitutional ordinance, which included demands for removal of Leta Trask's protected speech and the filing of a civil lawsuit. [Exc. 117 - 122, 1 - 8]. The exercise of Leta Trask's right to free speech was curtailed by the enforcement actions of the Ketchikan Gateway Borough and she was forced to defend herself and her First Amendment rights. As these injuries were suffered directly by Leta Trask, she has a personal stake in the outcome.

Furthermore, 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).

The trial court ruled that Leta Trask lacked standing to challenge the constitutionality of the ordinance because the ordinance did not apply to Leta Trask's speech. [Exc. 110]. However, as stated above, the ordinance was in fact applied. To

that extent, Leta Trask can challenge it. A controversy still exists as to whether the Ketchikan Gateway Borough violated Leta Trask's freedom of speech based upon an act that has already occurred. To that extent, a controversy still exists preventing a finding of mootness. F.E.R. v. Valdez, 58 F.3d 1530, 1533 (10th Cir. 1995).

In Leta Trask's opening brief, she cited to the 10th Circuit as persuasive authority on the issue of standing. On multiple occasions, Wendy Faustin was told to remove her banner from an overpass and was eventually cited for violating section 3-1 of the Denver Municipal Code. The charge was dismissed by the prosecutor as it was determined that the ordinance did not apply. Faustin v. City and County of Denver, Colorado, 268 F.3d 942, 946 (10th Cir. 2001). Here, Leta Trask and her tenants were sent numerous letters to remove the painting from her roof and Leta Trask was eventually cited with violating KGB Ordinance 60.10.090(A)(8). [Exc. 117 - 122, 1 - 8]. The charge was eventually dismissed by the trial court after it determined the ordinance did not apply. [Exc. 110].

In Faustin's complaint, she alleged that Denver's policy of prohibiting speech on the overpass, in particular, the application of 3-1 to her banner, was unconstitutional. Id. at 946. 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. Faustin, 104 F.Supp.2d 1280, 1288 (D. Colo. 2000). 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. 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 interpreted Faustin's complaint as a challenge to section 3-1, section 42-4-606, and also found that she was challenging an unwritten policy or custom. Id. at 950. 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. It found that she also had standing to challenge the unwritten policy and remanded the case to the district court to determine whether the unwritten policy violated Faustin's First Amendment rights. Id. at 950. It found

Faustin lacked standing to seek prospective injunctive relief or to challenge section 42-4-606, the ordinance under which she was not charged. Id.

Based upon the foregoing and Leta Trask's opening brief, Leta Trask has standing to assert her counterclaim pursuant to 42 U.S.C.A. § 1983. Therefore, the trial court erred when it dismissed the claim.

2. The Trial Court Erred in Concluding a Constitutional Violation Did Not Occur.

There are two elements to a § 1983 claim against a municipality. The harm must be caused by a constitutional violation and the municipality must be responsible for the violation. Collins v. City of Harker Heights, 503 U.S. 115, 120 (1992). The trial court summarily concluded that there was no constitutional violation. [Exc. 128 - 129]. No analysis was done. Appellee contends that the trial court's factual finding that the speech was not a sign deprived the trial court of jurisdiction to rule on the constitutionality of KGB Code 60.10.090(A)(8), but that is incorrect. Appellee's Brief at 12 - 13. The trial court apparently drew the same conclusion. The trial court could not conclude that no constitutional violation occurred without looking at the constitutionality of the ordinance as applied to Leta Trask.

The constitutionality of the ordinance was addressed in Leta Trask's Motion for Summary Judgment. At that time, the argument was more broadly based as it addressed more than just KGB Code 60.10.090(A)(8) and it addressed both facial and applied challenges. [R. 227 - 268, 188 - 200]. However, the trial court never undertook any constitutional analysis once it determined that Leta Trask's painting did not meet the definition of sign.

Moreover, in its brief, Appellee asserts that the KGB Code 60.10.090(A)(8) is facially constitutional. Appellee's Brief at 13 - 18. That issue is not before the Court. The issue that should have been addressed by the trial court was whether the ordinance was unconstitutional as applied to Leta Trask's speech. Leta Trask contends KGB Code 60.10.090(A)(8) is not constitutional as applied to her speech.

The United States Supreme Court has determined that limitations exist with regard to freedom of speech. There are certain created categories of expression that have been determined "not within the area of constitutionally protected speech." R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992), quoting, Roth v. United States, 354 U.S. 476, 483 (1957). For example, the First Amendment protections are generally not found to extend to defamation, obscenity, and fighting words. Id., citing, Roth, 354 U.S. 476 (1975) (obscenity), Beauharnais v.

Illinois, 343 U.S. 250 (1952) (defamation), and Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

The phrases written upon Leta Trask's roof are, "Do Unto Others", "By Your Deeds You're Known", "Love Your Neighbor", and "You're Welcome." Also included is a cross and hearts. [Exc. 8]. These writings do not defame the character or reputation of any individual. The writings are not so indecent and improper that they are an affront to accepted standards of decency. Nor are these writings fighting words, "those personally abusive epithets, which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke a violent reaction." Cohen v. California, 403 U.S. 15, 20 (1971). To fall outside the realm of protection, the speech must "produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." City of Houston v. Hill, 482 U.S. 451, 462 (1987), quoting, Terminiello v. Chicago, 337 U.S. 1, 4 (1949). As the paintings upon Leta Trask's roof do not fall within any of the categories recognized by the United States Supreme Court as unprotected speech, her writings are entitled to the protections guaranteed by the First Amendment.

In evaluating a law that governs speech, the court must first determine whether the regulation is content-neutral or content-based and then apply the proper level of scrutiny. City

of Ladue v. Gilleo, 512 U.S. 43, 59 (1994) (concurring opinion).

A regulation is content-neutral if it can be justified without reference to the content of the regulated speech. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989), quoting, Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984).

A law that controls the substance of a speaker's message is not content-neutral, even if it has broad application. Hill v. Colorado, 530 U.S. 703, 767 (2000). "As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based." Turner Broadcasting Systems, Inc. v. FCC, 512 U.S. 622, 643 (1994).

KGB's sign ordinance is not content neutral. As noted above, Leta Trask is charged with maintaining a roof sign in violation of KGB Code 60.10.090(A)(8), for painting phrases directly upon her roof. KGB Code 60.10.090(A)(8) reads as follows: "Roof-mounted signs, including any signs painted on the roof surface, but excepting those mounted on a marquee or canopy, are prohibited." At first glance, this section would appear to be content neutral. However, nowhere within KGB Code § 60.10.090 does it provide a specific exemption for flags to be painted directly upon roofs. However, it is apparent that the code administrator is allowing such an exemption. [R. 245 -

257, 266]. Therefore, KGB Code § 60.10.090(A)(8) was applied to Leta Trask's speech based upon content.

When restrictions are content based, the Court must determine whether the restrictions involve commercial or non-commercial speech. Commercial speech is expression related solely to the economic interests of the speaker and its audience, or speech proposing a commercial transaction. Rubin v. Coors Brewing Co., 514 U.S. 476, 493 (1995). Non-commercial speech is accorded greater protection than commercial speech. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 513 (1981). In the case at hand, the ordinance was applied to non-commercial speech. Content-based restrictions on non-commercial speech are analyzed under a strict scrutiny test and are presumptively invalid. R.A.V., 505 U.S. at 382. To survive under strict scrutiny it must be shown that the regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that purpose. Id. The narrow tailoring analysis requires a least restrictive alternative analysis. See, Ward, 491 U.S. at 798 n.6.

This ordinance does not survive strict scrutiny. As specifically applied to Leta Trask, Appellee can provide no compelling state interest for allowing flags to be painted directly upon roofs and not other non-commercial messages. Any justifications set forth are compromised by the exceptions.

Gilleo, 512 U.S. at 52-53. Aesthetics and safety are not compelling enough interests to justify content-based restrictions on fully protected speech. Metromedia, 453 U.S. at 507-08, 514-15.

Since the trial court failed to perform any analysis on the constitutionality of the ordinance as applied to Leta Trask, it could not conclude there was not a constitutional violation. Therefore, the case should be remanded to the trial court with appropriate instructions.

3. *Leta Trask Can Maintain a Claim Under 42 U.S.C.A. § 1983 Based Upon the Borough Bringing an Action for Enforcement Pursuant to an Unconstitutional Ordinance.*

To sustain a § 1983 action, a plaintiff must show that there is a direct causal link between the conduct for which the municipality is responsible and the deprivation of federal rights. Board of the County Commissioners of Bryan County v. Brown, 520 U.S. 397, 404 (1997). A municipality is responsible for a violation if the action alleged to have violated a constitutional right "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." Monell v. Department of Social Services of New York, 436 U.S. 658, 690 (1978). While a municipality may also be responsible if the alleged

constitutional violation was caused by a governmental custom, it is not the only way. Id. at 691.

Appellee's Brief all but ignores the issue of the ordinance and focuses on the lack of an unwritten policy. The focus is misplaced. Appellee is correct that Leta Trask has not pointed to an unwritten policy. Rather, Leta Trask points to an ordinance that was passed by the KGB Assembly and applied to her speech in violation of the First Amendment. Here, as in Faustin, Leta Trask's claim is based upon the theory that the application of KGB Code 60.10.090(A)(8) to her speech was unconstitutional because it prohibited her protected speech. Unlike Faustin, Leta Trask is not also asserting a claim pursuant to an unwritten policy. Here, the KGB Assembly passed an ordinance and that ordinance was applied to Leta Trask in violation of her right to free speech.

Appellee is responsible for the sign ordinance. In this matter, KGB Assembly, acting pursuant to its authority under state law, enacted a sign ordinance. [Exc. 2 - 3]. Leta Trask does not dispute that in order for a municipality to be held liable for a constitutional deprivation, there must in fact be a constitutional deprivation. City of Los Angeles v. Heller, 475 U.S. 796, 799 (1986). In the case at hand, Leta Trask's constitutional right to free speech was impeded. Therefore, a constitutional deprivation occurred and the municipality can be

held liable. By enacting the ordinance and filing suit against Leta Trask pursuant to that ordinance, Appellee deprived Leta Trask of her constitutional right to freedom of speech.

Appellee's numerous attempts to force Leta Trask to remove the painting on her roof through letters and the filing of a civil complaint, deprived her of her constitutional right to freedom of speech by curtailing the exercise of that right. [Exc. 1 - 8, 117 - 122]. Appellee was the cause in fact of the constitutional deprivation.

There is a direct causal link between the ordinance and the alleged violation of Leta Trask's right to free speech. The ordinance caused Leta Trask harm because as a result of its application to her painting, KGB filed a civil suit against her. She was forced to defend herself against that suit. Furthermore, as a result of being sued based upon the ordinance, Leta Trask did not refresh or change the contents of her painting. [Exc. 116]. Her exercise of free speech was curtailed.

Based upon the foregoing, the case should be remanded to the trial court.

4. Appellee is *Not Entitled to Absolute Immunity*.

Appellee is not entitled to absolute immunity. This is not a malicious prosecution case filed against an individual prosecutor. If Leta Trask filed suit against Ketchikan Gateway

Borough's Attorney for malicious prosecution, an issue of immunity with regard to that individual may apply. However, as noted in Monell, municipal corporations are not entitled to absolute immunity. 436 U.S. at 701. As for qualified immunity, even the good faith of its officers and agents is not a defense to a municipal corporation's liability under § 1983. Owen v. City of Independence, Mo., 445 U.S. 622, 637 (1980). As in Owen, the issue here is not about various officers being sued in their individual capacities such that immunity insulates them from personal liability. Rather, the issue here is the liability of the municipality. Id. at n.18. Imbler v. Pachtman, 424 U.S. 409 (1976), is about the absolute immunity of a prosecutor, not a municipality.

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

Leta Trask relies upon her arguments in her opening brief.

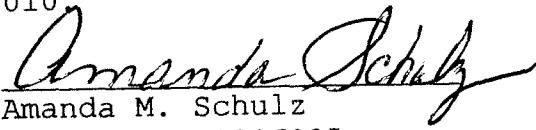
CONCLUSION

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 21st day of May, 2010.


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