REEVES AMODIO LLC
500 L STREET, SUITE 300
ANCHORAGE, ALASKA 99501-1990
PHONE (907) 222-7100, FAX (907) 222-7199

IN THE SUPREME COURT OF THE STATE OF ALASKA

ROBERT RIDDLE, DBA FAIRBANKS PUMPING AND THAWING, Appellant, vs. ERIC LANSER, Appellee,	) Supreme Court No. S-15780) Trial Court No. 4FA-11-03117 CI

CERTIFICATE OF SERVICE AND TYPEFACE

I hereby certify that on January 13, 2016, a true and correct copy of the Brief of Appellee Eric Lanser, the Appellee's Excerpt of Records and this Certificate of Service and Typeface was served via U.S. mail upon the following:

William Satterberg Jr.
Satterberg Law Offices
709 4th Avenue
Fairbanks, AK 99701

I further certify, pursuant to App. R. 513.5, that the Appellee Brief was prepared in 13 point proportionately spaced Times New Roman typeface.

Respectfully submitted, this 16th day of January, 2016.

Susan Orlansky, ABA 8106042

IN THE SUPREME COURT OF THE STATE OF ALASKA

ROBERT RIDDLE, DBA FAIRBANKS PUMPING AND THAWING, Appellant, vs. ERIC LANSER, Appellee,	) Supreme Court No. S-15780)) Trial Court No. 4FA-11-03117 CI

APPEAL FROM THE SUPERIOR COURT
FOURTH JUDICIAL DISTRICT AT FAIRBANKS
THE HONORABLE BETHANY S. HARBISON

BRIEF OF APPELLEE

Filed in the Supreme Court
for the State of Alaska on
this __ of January, 2016.

Marilyin May, Clerk
Appellate Courts

By:_____
Deputy Clerk

Susan Orlansky [ABA No. 8106042]
REEVES AMODIO LLC
500 L Street, Suite 300
Anchorage, AK 99501
(907) 222-7117

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes and Rules

Other Authorities

Restatement (Second) of Torts

AUTHORITIES PRINCIPALLY RELIED UPON

AS 09.45.235

Agricultural operations as private nuisances.
(a) An agricultural facility or an agricultural operation at an agricultural facility is not and does not become a private nuisance as a result of a changed condition that exists in the area of the agricultural facility if the agricultural facility was not a nuisance at the time the agricultural facility began agricultural operations. For purposes of this subsection, the time an agricultural facility began agricultural operations refers to the date on which any type of agricultural operation began on that site regardless of any subsequent expansion of the agricultural facility or adoption of new technology. An agricultural facility or an agricultural operation at an agricultural facility is not a private nuisance if the governing body of the local soil and water conservation district advises the commissioner in writing that the facility or operation is consistent with a soil conservation plan developed and implemented in cooperation with the district.

(b) The provisions of (a) of this section do not apply to (1) liability resulting from improper, illegal, or negligent conduct of agricultural operations; or (2) flooding caused by the agricultural operation.

(c) The provisions of (a) of this section supersede a municipal ordinance, resolution, or regulation to the contrary.

(d) In this section, (1) "agricultural facility" means any land, building, structure, pond, impoundment, appurtenance, machinery, or equipment that is used or is intended for use in the commercial production or processing of crops, livestock, or livestock products, or that is used in aquatic farming; (2) "agricultural operation" means (A) any agricultural and farming activity such as (i) the preparation, plowing, cultivation, conserving, and tillage of the soil; (ii) dairying; (iii) the operation of greenhouses; (iv) the production, cultivation, rotation, fertilization, growing, and harvesting of an agricultural, floricultural, apicultural, or horticultural crop or commodity; (v) the breeding, hatching, raising, producing, feeding, keeping, slaughtering, or processing of livestock; (vi) forestry or timber harvesting, manufacturing, or processing operations; (vii) the application and storage of pesticides, herbicides, animal manure, treated sewage sludge or chemicals, compounds, or substances to crops, or in connection with the production of crops or livestock; (viii) the manufacturing of feed for poultry or livestock; (ix) aquatic farming; (x) the operation of roadside markets; and (B) any practice conducted on the agricultural facility as an incident to or in conjunction with activities described in (A) of this paragraph, including the application of existing, changed, or new technology, practices, processes, or procedures; (3) "livestock" means horses, cattle, sheep, bees, goats, swine, poultry, reindeer, elk, bison, musk oxen, and other animals kept for use or profit.

AS 09.45.255

In AS 09.45.230 - 09.45.255, "nuisance" means a substantial and unreasonable interference with the use or enjoyment of real property, including water.

Alaska Civil Procedure Rule 37

(g) Failure to Cooperate in Discovery or to Participate in the Framing of a Discovery Plan. If a party or a party's attorney engages in unreasonable, groundless, abusive, or obstructionist conduct during the course of discovery or fails to participate in good faith in the development and submission of a proposed discovery plan as required by Rule 26(f), the court may, after opportunity for hearing, require such party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the conduct. (Adopted by SCO 5 October 9, 1959; amended by SCO 158 effective February 15, 1973; by SCO 888 effective July 15, 1988; by SCO 1026 effective July 15, 1990; by SCO 1153 effective July 15, 1994; by SCO 1172 effective July 15, 1995; by SCO 1325 effective July 15, 1998; and by SCO 1682 effective April 15, 2009)

Alaska Civil Procedure Rule 82.

Attorney's Fees. (b) Amount of Award. (2) In cases in which the prevailing party recovers no money judgment, the court shall award the prevailing party in a case which goes to trial 30 percent of the prevailing party's reasonable actual attorney's fees which were necessarily incurred, and shall award the prevailing party in a case resolved without trial 20 percent of its actual attorney's fees which were necessarily incurred. The actual fees shall include fees for legal work customarily performed by an attorney but which was delegated to and performed by an investigator, paralegal or law clerk.

(3) The court may vary an attorney's fee award calculated under subparagraph (b)(1) or (2) of this rule if, upon consideration of the factors listed below, the court determines a variation is warranted:
(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. If the court varies an award, the court shall explain the reasons for the variation.

INTRODUCTION

Contrary to the claims in the Appellant's Brief, this case does not present a challenge to the protections intended by the legislature when it enacted the Right to Farm Act. This case was resolved by the superior court on factual, not legal, grounds. The court determined, as a matter of fact, that Robert Riddle's septage storage lagoons were not an "agricultural operation" as defined by the Act, because they were not operated "in connection with the production of crops and livestock." Rather than store and spread septage to promote farming on his land, Riddle amassed septage for five years before land-applying any of it, and even then he spread septage only occasionally to manage the increased volume; his land could have benefited from *all* the septage he stored, yet in no year before trial did he apply even as much as a third of the septage that was deposited.

As an alternative basis for denying Riddle protection from a nuisance suit, the court found that Riddle's property likely did not qualify as an "agricultural facility," because, although Riddle conducted some farming activities on his land, the evidence did not establish that he was using his land for the commercial production of crops or livestock.

The court's factual findings as to the Right-to-Farm-Act defense are not clearly erroneous and should be affirmed by this Court. Likewise, this Court should affirm the superior court's fact-based determination that the septage lagoons were a nuisance. And, because the award of attorney fees under Civil Rule 82(b)(3) and of discovery sanctions under Civil Rule 37(g) were not an abuse of discretion, these too should be affirmed.

ISSUES PRESENTED

(1) Did the superior court clearly err in its findings of fact and application of those facts to the definitions in the Right to Farm Act, and on the basis of those facts did the court err in determining that the Act did not protect Riddle's septage storage against a nuisance suit?

(2) Did the superior court clearly err in finding that, with his septage storage, Riddle intentionally or recklessly and substantially and unreasonably interfered with Lanser's use and enjoyment of his own property and thus constituted a nuisance?

(3) Did the superior court abuse its discretion in awarding Lanser enhanced attorney fees under Civil Rule 82(b)(3) and fees and costs under Civil Rule 37(g) as sanctions for Riddle's unreasonable refusal to cooperate with discovery?

STATEMENT OF FACTS[1]

Robert Riddle's activities 2005-2010

Robert Riddle started acquiring land on Eielson Farm Road in 2005. [Tr.[2] 2229] He began some limited farming activities on the land that year. [Tr. 2242]

---

[1] Riddle's Statement of Facts tends to accept evidence from the trial court record in the light most favorable to himself [At. Br. 1-29], even though the superior court resolved disputed facts against him. This Court always accepts the facts in the light most favorable to the prevailing party. *See Laybourn v. City of Wasilla*, 362 P.3d 447, 453 (Alaska 2015) (Court reviews "all factual findings in the light most favorable to the prevailing party below" (internal quotes omitted)). Also, Riddle relies heavily on testimony from the preliminary injunction ("PI") hearing, despite the parties' agreement to re-present at trial any evidence they wished the superior court to consider. *See infra* at 8.

[2] The transcripts submitted by Riddle are not consecutively paginated. In this brief, "Tr." refers to the transcript of the trial held on July 9-13, July 16-19, and September 12-

Riddle also owned Fairbanks Pumping and Thawing Company, which conducted various businesses, including pumping septic tanks. [Tr. 2219] Prior to 2005, Riddle paid to dump the septage he collected at Golden Heart Utilities. [Exc. 278]

The Eielson Farm Road land that Riddle purchased was covered by a series of farm conservation plans, issued to the land's previous owners. [Exc. 1-6; Tr. 1450-51, 1455] These plans did not authorize construction of septage lagoons. [*Id.*; Tr. 1491-92] Nonetheless, in 2005, Riddle began constructing five septage lagoons on his property [Tr. 2274, 2276], and, although he had no permit from the Alaska Department of Environmental Conservation ("ADEC") to dispose of septage on his land, he began dumping septage from his pump-trucks into the lagoons. [Tr. 2308]

In April 2006, Riddle applied to ADEC for a permit to spread septage on his property as fertilizer for crops to be grown on the land. [Exc. 13][3] His first application was incomplete; with ADEC's help, he submitted a revised application in February 2007. [Exc. 13, 439-46; Tr. 2254-55] Riddle's application acknowledged the possibility of offensive odors that could "become a nuisance"; he committed to covering his stockpiles with non-breathable covers and to using odor inhibitors if necessary to control any noxious smells. [Exc. 16, 444] He conveyed to ADEC that he planned to store septage in the winter only until it could be spread in the spring. [Tr. 2199] Various neighbors voiced concerns about possible odors. [Exc. 16] ADEC granted a land-spreading permit for the five-year

---

13, 2013. "PI Tr." refers to the transcript of the PI hearing held on April 2-5, 2012. "AH Tr." refers to the transcript of the abatement hearing on March 27-28, 2014.

[3] This permit for waste disposal was required under 18 AAC 60.200.

period ending on April 12, 2012. [Exc. 7-10] Its decisional document, which explained the bases for granting the permit, stated that the permit could not be denied because of the risk of offensive odors, but the permit could be revoked if Riddle did not control the smells. [Exc. 16][4]

In 2007, Riddle applied to the Fairbanks North Star Borough ("FNSB") for a permit to spread biosolids on his land. [Exc. 18] He concealed that he already was storing septage on his property. [Exc. 278 (falsely representing that he was then dropping off his septage at Golden Heart Utility)] At the public hearing on that permit application, Riddle stated that he would have only "a small holding cell," about the size of an Olympic swimming pool, and he stated that he would neither collect nor store septage during the winter. [Exc. 277-78; Tr. 2396-97] These statements misrepresented the lagoons he had already built and was using for year-round dumping and long-term storage. [Tr. 2274, 2308 (lagoons were constructed in 2005 and Riddle began dumping then)] The permit was granted, with a number of conditions, including the requirement that

> [a]s long as biosolids are being applied to the property the principal use of the property must be agricultural in nature, with the beneficial application of biosolids remaining a conditionally-approved accessory use in support of the agricultural use. The disposal of biosolids cannot become the principal use of the property.

[Exc. 19]

Riddle did not spread any biosolids for the five years from 2005-2009; until 2010

---

[4] ADEC later determined that the south edges of two lagoons were too close to a slough; ADEC required Riddle to move those lagoons, which he did. [Tr. 1338-39]

he only stored in the lagoons what he had collected. [Exc. 320-21; Tr. 1980 (confirming that the 2010 certification reflected his first spreading)]

In 2011, Riddle belatedly obtained a revised farm conservation plan that authorized construction of four septage lagoons. [Exc. 20-23; Tr. 1466; *see also* Tr. 1611-12] Under a farm conservation plan, agriculture must be the primary use of the land. [Tr. 1441] Septage lagoons must be used to support farming; that is, the septage must be spread and not just stored. [Tr. 1469, 1557] Riddle stated that he would apply septage "to all cropable soils." [Exc. 452]

Eric Lanser's activities 2005-2010

Eric Lanser, another Fairbanks resident, purchased approximately 115 acres adjacent to Riddle's land in 2007. [Tr. 1018; PI Tr. 497] The land was zoned for a residential subdivision. [PI Tr. 469-70] Lanser had the subdivision land rezoned for larger lots – approximately four acres each. [Tr. 755-57, 1018-20] He began construction work on the lots almost immediately after the purchase closed. [Tr. 1022]

No offensive smells pervaded the neighborhood when Lanser purchased the land. [Tr. 1033] He became aware of Riddle's permit applications to ADEC and FNSB. [Tr. 1016] He had no problem with the concept of using septage as fertilizer. [Exc. 311; Tr. 1110, 1236]

2010: Noxious septage smells begin

In 2010, Riddle dramatically expanded the septage dumping and storage on his property. In addition to the septage from his own company, Fairbanks Pumping and Thawing, Riddle began accepting septage from Bigfoot Pumping and Thawing. [Tr. 2422]

Bigfoot dumped at least 2.5 million gallons in 2010, and more than 3.6 million gallons in each of the two following years. [Tr. 2422][5]

Lanser and his employees, while working on Lanser's property, first noticed offensive smells in early spring 2010. [Tr. 1033-35] The men were outdoors, constructing a home on one of the subdivision lots, and they were greatly disturbed by the noxious smells that reached them and lingered all day. [*Id.*] When the smells returned the next day, Lanser contacted Riddle; and, when the smells did not abate, he contacted ADEC and FNSB. [Tr. 1035-37; Exc. 311-12] The offensive smells persisted until freeze-up, two to four times a week, lasting from hours to all day. [Tr. 159-60, 1090-92] The smells stopped during the winter, and returned from break-up to freeze-up in 2011 with the same frequency and intensity as in the prior year. [Exc. 324; Tr. 1087, 1090-92]

Finally, having had no success in getting the smells abated through voluntary action by Riddle or enforcement action by any governmental agency,[6] Lanser filed suit against Riddle in December 2011, seeking declaratory and injunctive relief against the nuisance

---

[5] Records of Golden Heart Utility showed that Bigfoot's change in dumping site removed approximately half the septage from the utility. [Tr. 550-51, 578]

[6] By 2010, Riddle had discovered the Right to Farm Act, and claimed that, because he was farming on his land, all his activities were immune from suit for nuisance. [Tr. 1928 (Riddle first showed ADEC a copy of the Right to Farm Act in 2010), 2257 (Riddle said he originally offered odor controls in his permit applications because he was not then aware of the Right to Farm Act)] His arguments caused the state and municipal agencies to question their enforcement authority – and, once suit was filed, the agencies decided to defer to the court to determine the protections afforded by the Right to Farm Act. [Tr. 1928, 1931-32, 2022-24, 2168-69, 2197, 2263]

odors. [Exc. 44-61] One cause of action was private nuisance. [Exc. 59][7]

Preliminary injunction hearing

In April 2012, the superior court (Judge Randy Olsen, presiding) held a four-day evidentiary hearing on Lanser's request for a preliminary injunction prohibiting septage storage and spreading on Riddle's land. [PI Tr. 7-937; R. 177-84] At the hearing, Riddle relied heavily on the Right to Farm Act, which he contended protected him against liability for private nuisance. [Exc. 148-60; R. 158-60]

Judge Olsen determined that Lanser failed to make a clear showing of probable success on the merits, and therefore the court declined to issue a preliminary injunction against Riddle's storage and spreading of biosolids. [Exc. 153-60] But Judge Olsen also denied Riddle's motion to dismiss the complaint for failure to state a claim. [Exc. 161-62]

Discovery disputes

With the case headed for trial, Lanser served discovery requests on August 21, 2012. [R. 689-718] Riddle resisted providing much of the information that Lanser sought. [R. 290-318] Lanser brought a motion to compel production of documents and answers to interrogatories, which the superior court granted. [Exc. 265-66; R. 677-85] Finding that Riddle's discovery objections were unreasonable, the court authorized Lanser to apply for fees and costs under Civil Rule 37(g) [Exc. 265-66], and Lanser did. [R. 864-71] Additional details concerning the discovery fight and the eventual award of fees and costs

---

[7] Other claims against Riddle were later dismissed [Exc. 174-81] and are not at issue in this appeal. Likewise, the court dismissed Lanser's claims against ADEC [R. 2914], and those also are not at issue in this appeal.

are presented below in Argument III.B.1.

Trial

Judge Bethany Harbison presided over a non-jury trial, conducted over nine days in July and two days in September 2013. [Tr. 10-2577] In colloquoy with counsel before the trial began, Judge Harbison stated that, although she was familiar with the testimony from the PI hearing, she preferred that the parties re-present any testimony that they wanted her to consider, rather than just incorporating or referencing the previous testimony. [Tr. 21] The parties agreed to this. [Tr. 20-21]

Relevant evidence presented at trial is summarized in Arguments I and II.

Following the trial, Judge Harbison issued a written order containing her findings of fact and conclusions of law. [Exc. 182-204] In brief, the superior court found as a matter of fact that Riddle's septage storage operations created noxious smells of such frequency and intensity as to constitute a nuisance to Lanser, because they substantially interfered with his use and enjoyment of his own property. [Exc. 197-98]

The court found that the Right to Farm Act did not apply to Riddle's septage lagoons because he failed to establish that they qualify as an "agricultural operation" within the meaning of the Act,[8] given facts that convinced the judge that Riddle was storing and spreading septage to benefit his septic pumping business and not to benefit his farm land. [Exc. 202-03] The judge cited the undisputed evidence that established that, although Riddle's lands could benefit from application of all the septage as fertilizer, Riddle spread

---

8 *See* AS 09.45.235(d)(2)(A)(vii).

no biosolids during the first five years of dumping; in 2010, he spread less than 7% of the septage that was dumped that year; in 2011, he spread more, but still less than 29%; and in 2012, he spread less than 14%. [Exc. 194-95, 197; *see* Tr. 2422][9] From the evidence, the court concluded that Riddle's intent in operating the septage lagoons was to use them for the treatment and disposal of septage, and that his occasional land-application of septage "was more to dispose of the septage than to prepare the land for farming." [Exc. 197]

The court also expressed skepticism whether the Act applied on another ground: Riddle did not show he was operating a *commercial* farm as required by the terms of the Act. [Exc. 199-202, referring to AS 09.45.235(d)(1)] The court stressed that, in the eight years between the trial and when Riddle acquired property on Eielson Farm Road, he made no commercial sales of any product grown or harvested from the land. [Exc. 201-02][10]

Having found that Riddle's septage storage created a nuisance that was not protected by the Right to Farm Act, the court scheduled further proceedings to determine how he could abate the nuisance. [Exc. 203]

Abatement hearing

At a hearing in March 2014, Riddle presented testimony that he had purchased and

---

[9] These percentages all reflect the percentage of *Bigfoot*'s deposits that was land-applied. Riddle professed to have no records of the quantities his own business dumped [Tr. 2361; Exc. 187-88], so it is impossible to compute the percentage of the total gallons dumped that were applied; it is possible to say only that the percentage of the total deposits applied is *less* than the percentage of Bigfoot's deposits that was applied.

[10] The superior court stated erroneously that Riddle had made no sales at all. [Exc. 186, 201-02] In fact, he made two very small sales of hay: one in 2007 for $1190 and one in 2008 for $425. [Tr. 1866-68, 2441; At. Br. 24-25] These sales were so minimal that the court's error is immaterial.

installed a Canadian-marketed deodorizing system, which sprayed a chemical into the air to neutralize the odors. [AH Tr. 54-75, 157-200, 205-27] The superior court accepted the testimony that, if operated within certain constraints, this system was likely to provide effective odor control. [Exc. 205-06] The court therefore entered an order prescribing the terms by which Riddle must operate this odor control system. [Exc. 206-07] While maintaining his position that he was immune from any nuisance suit because of the Right to Farm Act, Riddle also asserted that he had purchased and installed the system voluntarily – before the court ruled against him following the trial – and that the cost of operation was not a problem for him. [Tr. 2470-71; AH Tr. 292] Thus, the abatement remedy is not at issue in this appeal.

Whether the court-ordered abatement system works to protect Lanser against nuisance odors remains largely untested. Some noxious smells reached Lanser on his land after Riddle installed the system. [R. 2352, 2358-59] In March 2014 (right after the abatement hearing), ADEC employees inspected Riddle's property and determined that, in violation of state statute and regulation, Riddle was making compost and using dewatered septage as landfill. [R. 2748-51] By letter dated April 9, 2014, ADEC directed him to stop discharging septage into the lagoons and to stop placing septage from the lagoons onto his property. [*Id.*; *see also* R. 2747, 2759] Riddle confirmed on April 30, 2014, that he had ceased discharging septage into the lagoons and storage tanks on his land. [R. 2760]

Attorney fees and costs

Following judgment in his favor, Lanser timely moved for attorney fees under Rule 82. [R. 2622-41] He sought enhanced fees – up to 100% of his reasonable and necessary

attorney fees – based on the factors in Rule 82(b)(3). [R. 2629-40] Lanser also renewed his long-pending request under Rule 37 to recover the fees and costs he incurred in connection with Riddle's refusal to cooperate with discovery. [R. 2628-29]

The superior court entered a lengthy order addressing the attorney fees issue. [Exc. 212-30] The court accepted several of Riddle's arguments for excluding certain categories of fees (such as fees incurred in connection with administrative hearings before litigation commenced). [Exc. 217-21] After deducting those fees, the court awarded Lanser 40% of the remaining attorney fees, which the court had determined were reasonable and necessary. [Exc. 229] Taking care to avoid any double counting, the court also awarded Lanser the fees and costs he sought under Rule 37(g). [Exc. 213-15, 229-30]

STANDARDS OF REVIEW

Lanser concurs with Riddle's statement of applicable standards of review. [At. Br. 29-30]

ARGUMENTS

I. THE RIGHT TO FARM ACT DID NOT SHIELD RIDDLE FROM LIABILITY FOR NUISANCE.

A. THE RIGHT TO FARM ACT

The Alaska legislature enacted Alaska's Right to Farm Act, AS 09.45.235, in 1986. Its purpose was to preserve agricultural land; the means chosen was to protect agricultural operations against nuisance claims by non-farmers who moved into agricultural areas.[11]

---

[11] *See* SLA 1986, ch 34 § 1, available in 1986 Temporary and Special Acts; *id.* § 2, codified as AS 09.45.235. *See generally* R. 3192-98 (minutes of hearings of the House

Alaska's Act was part of a national trend. Many states adopted a Right to Farm Act in the 1970s and '80s; although the details vary, typically these Acts codify the "coming to the nuisance" defense, and resolve any balancing of the values of competing land uses in favor of the farmer.[12]

The Alaska legislature amended Alaska's law in 2001.[13] The amendment added a key provision critical to the current case: the requirement that, to be protected, an agricultural facility must be "commercial."[14] Thus, since 2001, the Alaska Right to Farm Act has provided in pertinent part:

> (a) An agricultural facility or an agricultural operation at an agricultural facility is not and does not become a private nuisance as a result of a changed condition that exists in the area of the agricultural facility if the agricultural facility was not a nuisance at the time the agricultural facility began agricultural operations. For purposes of this subsection, the time an agricultural facility began agricultural operations refers to the date on which any type of agricultural operation began on that site regardless of any subsequent expansion of the agricultural facility or adoption of new technology. . . .
>
> (b) The provisions of (a) of this section do not apply to
> (1) liability resulting from improper, illegal, or negligent conduct of agricultural operations; . . . .
>
> ***
>
> (d) In this section,
> (1) "agricultural facility" means any land, building, structure, pond,

---

Community and Regional Affairs Committee and House Judiciary Committee, April 16 and 26, 1986, on SB 409 and HCS CSSB 409).

[12] *See* Grossman & Fischer, *Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer*, 1983 WIS. L. REV. 95, 117.

[13] *See* SLA 2001, ch 28, enacting HCS CSSB 60(Res), including changes codified in AS 09.45.235(a), (b)(1), and (d).

[14] *See id.*, including change codified in AS 09.45.235(d)(1).

impoundment, appurtenance, machinery, or equipment that is used or is intended for use in the commercial production or processing of crops, livestock, or livestock products . . . ;

(2) "agricultural operation" means
(A) any agricultural and farming activity such as
(i) the preparation, plowing, cultivation, conserving, and tillage of the soil;

***

(iv) the production, cultivation, rotation, fertilization, growing, and harvesting of an agricultural . . . crop or commodity;

***

(vii) the application and storage of pesticides, herbicides, animal manure, treated sewage sludge or chemicals, compounds, or substances to crops, or in connection with the production of crops or livestock;

***

(B) any practice conducted on the agricultural facility as an incident to or in conjunction with activities described in (A) of this paragraph, including the application of existing, changed, or new technology, practices, processes, or procedures . . . .[15]

The legislative history contains no discussion of the reasons for the 2001 amendments incorporated in the above-quoted passages and no discussion of the meaning of the term "commercial."[16]

Because the Right to Farm Act is an affirmative defense to a nuisance claim, the defendant has the burden of proving that the Act applies.[17]

---

[15] AS 09.45.235.

[16] Much of the legislative discussion concerned a provision addressing whether a seller of property must give notice to a buyer that an agricultural facility exists within the neighborhood. *See* SLA 2001, ch 28 §§ 4-5, amendments codified at AS 34.70.050(3).

[17] The superior court properly called the Right to Farm Act an affirmative defense. [Exc. 274] Alaska law imposes the burden of proving an affirmative defense on the

B. RIDDLE FAILED TO ESTABLISH THAT HIS SEWAGE LAGOONS WERE AN "AGRICULTURAL OPERATION."

As quoted above, the Right to Farm Act protects "agricultural operations," which are defined to include the storage and application of animal manure, treated sewage sludge, and other chemical compounds "to crops, or in connection with the production of crops or livestock."[18] Lanser assumes that, because the Act is broadly written, this provision covers storage and application of septage, if the septage is applied to crops or used in connection with the production of crops or livestock.

The superior court found that Riddle's storage of septage was not covered by the Right to Farm Act, because he stored and spread the septage to benefit his pumping business and used very little in connection with the production of crops or livestock. In pertinent part, the court wrote:

> The evidence at trial was clear and convincing: if the lagoons were intended to store septage for use in farming, Riddle could, and should, be applying all of the septage to his land. The court concludes, based on the evidence . . . , that the septage lagoons are not presently intended to be used in farming. Riddle's current intention in operating the septage lagoons is to use them for the treatment and disposal of septage. He has occasionally applied some of the septage to his fields, but his intention in doing this was more to dispose of the septage than to prepare the land for farming. [Exc. 197]

---

defendant. *See, e.g.*, *Schaub v. Schaub*, 305 P.3d 337, 343-44 (Alaska 2013); *Morrow v. New Moon Homes, Inc.*, 548 P.2d 279, 294 (Alaska 1976) ("The party raising the affirmative defense generally bears the burden of proof as to that issue."). Other states with Right to Farm Acts consistently treat the application of the Act as an affirmative defense to a nuisance suit. *See, e.g.*, *Parker v. Obert's Legacy Dairy, LLC*, 988 N.E.2d 319, 321 (Ind. App. 2013); *Belvidere Township v. Heinze*, 615 N.W.2d 250, 252 (Mich. App. 2000); *Curtis v. Parchman*, 2014 WL 819424 at *2 (Tenn. App. Feb. 27, 2014); *Holubec v. Brandenberger*, 111 S.W.3d 32, 34 (Tex. 2003).

[18] *See* AS 09.45.235(d)(2)(vii).

***

> [T]he evidence at trial demonstrated clearly that Riddle's septage lagoons are not an "agricultural operation" such that Riddle is protected from a nuisance suit by the Right-To-Farm Act. Riddle is not operating the lagoons "as an incident to or in conjunction with agricultural activities." In fact, Riddle is using the lagoons to treat and dispose of septage rather than to support his limited agricultural operations. The lagoons are clearly intended to treat the septage through the processes of dewatering and natural degradation rather than to store septage that is intended to be land-applied to fertilize the soil. In fact, even the land-application of the septage seems to be intended to dispose of it rather than to fertilize fields with it. [Exc. 202 (footnote omitted)]

Ample evidence in the record – discussed below – supports these factual findings.

Riddle constructed the lagoons in 2005, and he began dumping septage into them that same year. [Tr. 2246, 2308] His farm plan (after it was revised) authorized the lagoons but required him to *use* the septage dumped into the lagoons; simply storing septage, rather than spreading it on fields, violated the farm plan. [Tr. 1557] The farm plan stated expressly that he would apply septage "to all cropable soils." [Exc. 452]

Riddle acknowledged that he did not apply any of the septage to his land until 2010. [Tr. 2363-64] The court found that he offered no credible, farm-related reason for simply storing the septage for five years. [Exc. 188] Witnesses testified that Fairbanks soils are poor and require years of fertilizing to build up the nutrients. [Tr. 413, 465, 476-79, 838-39, 1054-56, 2116-18] Riddle began clearing the land and conducting other farm-related activities as early as 2005 and stated that he planned to develop all the land. [Tr. 425, 477, 2242] There was no reason why he could not have applied septage starting in 2005 to the

fields he was planning to cultivate.[19]

The timing of Riddle's decision to apply septage to the land for the first time in 2010 also supports the court's suspicion of his motives and true intentions. Riddle first applied septage to the land *after* people complained about the smells and apparently after he discovered the Right to Farm Act. [Tr. 1928 (Riddle first brought ADEC a copy of the Right to Farm Act in 2010), 2363-64 (Riddle started spreading septage in 2010)] The start of land-application also responded to the dramatic increase in the volume of septage dumped into the lagoons starting in 2010, when Riddle began accepting huge quantities from Bigfoot. [Tr. 2422] Without some spreading, his lagoons would have overflowed. [Tr. 2279]

Riddle calculated that he could apply up to 43,000 gallons of septage per year to an acre planted in hay. [Tr. 2287-88] That would be over 20 million gallons per year that he could have used in fertilizing all of his 500 acres, 6.3 million gallons to fertilize 150 acres, or 1.64 million gallons to fertilize 40 acres for growing hay. [Tr. 2288] Riddle and others testified that he did not have enough septage to meet all of his fertilization needs, and he could have applied all that he had in his lagoons, plus more.[20]

---

[19] *See* Tr. 465, 479 (Karl: Riddle can apply all the septage; it's just the beginning of what he needs), 903-04 (Wrigley: can't think of a farming reason not to apply all the material in the lagoons), 1747 (Knight: no reason Riddle shouldn't be using all the septage he has).

[20] *See* Tr. 850-51 (Wrigley: 3 million gallons is not enough to fertilize Riddle's fields), 1745, 1747 (Knight: Riddle doesn't have "near enough" biosolids to meet his crop needs), 2055 (Wozniak: Riddle could apply more septage to his fields), 2115-16 (Fellman: Riddle might have not even have enough septage to fertilize the acres under cultivation), 2367 (Riddle: have more acres than product; don't have enough septage).

Riddle kept no records of the amounts of septage he dumped from his own septic pumping business [Tr. 2361] – but the amounts he received from Bigfoot (which appears to have been the larger operation) never exceeded 4 million gallons a year. [Tr. 2422; Exc. 279-310, 337-82, 389-430] Yet, when Riddle began land-application of septage, he used only a small percentage of the septage deposited in the lagoons[21]:

Year	Gallons dumped by Fairbanks Pumping & Thawing	Gallons dumped by Bigfoot Pumping	Gallons Riddle applied to fields	Percentage used*
2005	?	0	0	0
2006	?	0	0	0
2007	?	0	0	0
2008	?	0	0	0
2009	?	0	0	0
2010	?	2.5 million	174,000	7%
2011	?	3.8 million	1.1 million	29%
2012	?	3.65 million	500,000	14%

* For 2010-2012, "Percentage used" is calculated as the percentage of the septage dumped by Bigfoot that was land-applied; the percentage of the total (i.e., including the amount dumped by Fairbanks Pumping) is obviously less.

Riddle's records showed that he applied septage infrequently in the six-month window he had between break-up and freeze-up: 4 days in 2010 [Exc. 320], 27 days in 2011 [Exc. 326-36], 19 days in 2012 [Exc. 383-88], and 17 days in 2013. [Exc. 433-38] The records support the court's finding that Riddle's claims that he applied septage "just about all the time," "when the days are good," and "as much as I can" to be incredible. [Exc. 195; *see* Tr. 2266, 2279-80, 2381] Even accepting that fields with crops must be

[21] Data in the table come from the exhibits at Exc. 279-310, 320-21, 326-419, 423-30; testimony about the exhibits is at Tr. 2363-66, 2369, 2373-79, 2422 (stipulation regarding Bigfoot amounts).

fertilized before planting and/or after harvesting, Riddle had no crops or pasture on the majority of his property; in 2013, for example, he said he had 150 acres (out of 500 acres he owned) "available" for cultivation – but he spread septage on only 40 acres. [Tr. 2339] Sometimes he spread septage on fields where nothing was growing. [Tr. 2386] He offered no reason why septage could not have been applied regularly to the unplanted land, or why the lagoons could not have been emptied every spring. [*See* Tr. 1745, 1747]

Riddle's rate of application certainly increased in fall 2013 – which he was able to establish at trial only because trial was unexpectedly continued from July to September. [Tr. 1870-72, 2084-85] As of July 2013, when the trial had been expected to conclude, he had applied only 310,000 gallons for the year. [Exc. 433-34; Tr. 2377-79] By September 13, he had applied a total of 1.64 million gallons to 40 acres. [Exc. 433-36; Tr. 2380] This may have reached the agronomic limit for those acres, but Riddle applied no septage in 2013 to the any of the other 65 acres where he claimed he had planted grain or that were available for cultivation. [Tr. 2327-30, 2335-39][22] Riddle explained the increase in application in 2013: By 2013, his lagoons were operating at capacity, whereas before they were not. [Tr. 2366-67] The court thus found that the application of septage was intended to dispose of it, rather than to fertilize the fields. [Exc. 202, 203]

---

[22] The 2013 dumping and spreading records were incomplete when the trial ended in September 2013, so the percentage spread in that year cannot be computed. Assuming 1.64 million gallons was the total spread that year [Tr. 2380] and assuming that the total dumped in 2013 was approximately the same as in 2012 (i.e., 3.65 million gallons from Bigfoot [Tr. 2422] plus an unknown amount from Riddle's septic pumping business), Riddle applied less than 45% of the total.

As part of dealing with the increased accumulation, rather than directly applying all the septage to the land, as he could have done, Riddle used the septage to create compost, both through dewatering the septage and allowing natural processes to occur and by actively mixing the dewatered septage with wood chips. [Exc. 196; Tr. 2108, 2126, 2269, 2344-45] The superior court observed accurately that Riddle's ADEC permit did not authorize him to apply composted septage to his land [Exc. 196, 447], a point Riddle did not dispute. [Tr. 2453] Consequently, the superior court correctly determined that, as of the time of trial, any composting activities could not be considered an "agricultural operation" because the finished product could not be used in conjunction with farming on Riddle's land. [Exc. 196][23]

In short, the evidence as a whole, particularly Riddle's own testimony and records, solidly supported the trial court's finding that Riddle was operating the lagoons to support his septic pumping business, and he applied stored septage to the land primarily as a means to dispose of the accumulated septage and not to support agriculture on his land. [Exc. 202-03] The court's factual finding that the septage lagoons were *not* an agricultural operation is not clearly erroneous.[24]

---

[23] The superior court found it "unlikely" that Riddle will obtain a modification of his permit to allow application of composted septage, both because Riddle made material misrepresentations to ADEC when first applying for his permit and because compost made from septage may not pass a metals test. [Exc. 196] *See* AS 46.03.120(a)(1) (material misrepresentations in the application are a ground for revoking a waste disposal permit); Tr. 2350 (septage was not tested for heavy metals).

[24] *See Laybourn v. City of Wasilla*, 362 P.3d 447, 452-53 (Alaska 2015) (this Court reviews factual findings in the light favorable to the prevailing party; the Court applies the

This Court should affirm the conclusion that, because the lagoons were not an agricultural operation, they were not protected by the Right to Farm Act.

C. RIDDLE'S LAND ALSO DID NOT QUALIFY AS AN "AGRICULTURAL FACILITY."

Under the Right to Farm Act, an "agricultural facility" cannot become a private nuisance as a result of changed conditions in the surrounding areas, if the agricultural facility was not a nuisance at the time it began agricultural operations.[25] The Act defines "agricultural facility" to include any land, pond, or impoundment that is "used or intended for use in the *commercial* production or processing" of crops or livestock.[26]

The superior court questioned whether Riddle's land qualified as an agricultural facility under this definition, because there was essentially no evidence that Riddle used or intended to use the land for commercial production of crops or livestock. [Exc. 199-202][27] The court did not decide the case on this issue, but it provides a strong alternative ground for affirming the trial court's conclusion that the Right to Farm Act did not apply to Riddle.[28]

"clearly erroneous" standard and will find clear error only when, after a thorough review of the record, the Court has a definite and firm conviction that a mistake has been made).

25 *See* AS 09.45.235(a).

26 AS 09.45.235(d)(1) (emphasis added).

27 With respect to the land usage before Riddle acquired the property, there was some testimony that the land was farmed, but no testimony established that the land previously was farmed commercially. [Tr. 758-64, 2240] The land was subject to farm plans, but that meant only that the land needed to be preserved for agriculture; a farm plan does not require any planting or farming. [Tr. 1486]

28 *See Demoski v. New*, 737 P.2d 780, 786 (Alaska 1987) ("An appellee may seek to defend a judgment on any basis established by the record, whether or not it was relied on

Alaska's Right to Farm Act contains no definition of "commercial production." The superior court adopted a commonsense definition, drawn from a Michigan Right-to-Farm-Act case: "commercial production" means "producing or processing crops, livestock, or livestock products intended to be marketed and sold."[29]

As the superior court accurately observed, virtually no evidence indicated that Riddle engaged in activities devoted to producing a crop that was intended to be marketed or sold. [Exc. 201-02] Without providing any specific plan for commercial agriculture, Riddle simply stated that he planned to prepare all the land for agriculture and he was "planting crops for the future." [Tr. 425, 1851-52, 2242 (he was thinking of planting peonies and blueberries)] The court did not find even this vague testimony credible because it was not backed by action. [Exc. 201] Credibility findings are well within the province of a superior court judge sitting as factfinder.[30] And there was ample reason in the trial to doubt the credibility of Riddle's claim.[31] Past practice is a good indicator of

---

by the trial court[.]").

[29] Exc. 201, citing *Charter Township of Shelby v. Papesh*, 704 N.W.2d 92, 99 (Mich. App. 2005).

[30] *See Laybourn*, 362 P.3d at 452 (this Court "give[s] particular deference to the superior court's factual findings when . . . they are based primarily on oral testimony, because the superior court, not this court, judges the credibility of witnesses and weighs conflicting evidence" (internal quotes omitted)); *Demoski*, 737 P.2d at 784.

[31] Riddle's credibility was impeached in significant ways beyond his claimed intent to be storing septage to support his farm. He misrepresented material facts in applying to the state and the borough for the permits he needed to accept septage on his property. *See supra* at 3-4. He admitted at trial that he did not honor the promises he made to the FNSB. [Tr. 2399] He told the court that he applied septage "just about all the time" (and other similar comments), but his records showed that in the six possible months, he applied

future intent – and Riddle had done almost nothing to begin commercial production from his land in the eight-plus years that he had owned the property before the trial. As discussed in the previous section, when given the chance to use septage to fertilize the land for future farming activities, Riddle mostly forwent that opportunity and instead simply stored the majority of the septage. [*See supra* at 14-19] He grew hay that he used to feed his own horses, and some hay that he gave away in 2008. [Tr. 2304-05; Exc. 240] He allowed his neighbor to take some hay in a sharecropping arrangement, whereby the neighbor farmed on Riddle's land. [Tr. 2305] None of that constituted "commercial production." Riddle came closest to describing a plan for a commercial crop when he described the sod he had planted that he hoped to sell – but that was a total of five acres, and he did not use septage on those acres. [Tr. 1630, 2337-38; Exc. 201][32]

Riddle conceded at trial that, during almost nine years of farming, he made exactly two sales: one sale of hay in 2007 (for $1190) and one sale in 2008 (for $425). [Exc. 238-39; Tr. 1854, 2441] Two small sales in eight-plus years do not make him a commercial farmer, any more than a person who sells two used cars on Craig's List becomes a commercial used car dealer.[33] Further, the evidence showed that he *never* filed a tax form

---

septage on fewer than 20 days most years. [*Compare* Tr. 2266, 2279-80, 2381 *with* Exc. 320, 326-36, 383-88, 433-38]

[32] During trial, Riddle claimed he planted another ten acres in grass for sod on the evening before his testimony. [Tr. 1852] But when trial reconvened two months later, Riddle continued to refer to just five acres of sod [Tr. 2224, 2337], giving reason to doubt the credibility of the claim that he had, coincidentally, planted ten additional acres just before he testified earlier in the case.

[33] As noted earlier, the superior court erred in finding *no* evidence of *any* sales of farm products. [Exc. 186, 201-02] But the error is harmless. The two small sales established

1040-F, for listing profit or loss from farming activities, nor did his taxes itemize any farm income or expenses. [Tr. 1788-90, 1793, 1801-02, 1805, 1809-11, 1813, 1815, 1817; Exhs. 53, 56-61 (tax returns from 2005-2011 include no form 1040-F); *see* Exc. 431-32 (blank form 1040-F)]

Contrary to Riddle's claim on appeal, the superior court did not focus on whether Riddle made a profit or whether he worked full- or part-time on the farm. [At. Br. 32-33] Instead, the court examined the record for evidence that Riddle was using the land to grow crops that he intended to market, and she found essentially no evidence of that. [Exc. 186, 201-02] The court accepted that Riddle intends that some day he will have a facility that combines septage disposal and commercial farming [Exc. 202] – but the court was correct to conclude that, until he begins commercial farming, he cannot claim that he has an "agricultural facility" protected by the Right to Farm Act. [*Id.*]

Riddle emphasizes the court's finding that he "intends" that his septage disposal will some day support commercial farming. [At. Br. 32, citing Exc. 202 and the "intended" language in AS 09.45.235(d)(1)] But that finding does not mean that the Right to Farm Act applies to him now. The legislature cannot have intended that a vague future intent to some day operate a commercial farm protects all non-farming activity conducted on the land for an indefinite period of time until the landowner's commercial farming dream comes true. That broad an interpretation would mean anyone could do anything on his or her land and be protected from a nuisance claim, so long as he or she says "I intend to farm

---

by the evidence did not make Riddle a commercial farmer.

this land commercially some day." In the definition of "agricultural facility," the word "intended" presumably was added to cover land, buildings, ponds, equipment, and so forth that are used for a crop that fails; i.e., they were intended to be used in commercial production, even though in that season nothing in fact was marketed or sold. Possibly, the term also covers land, equipment, etc., being used in immediate preparation for commercial agricultural activities, such as equipment used to clear land one year for planting in the next year. However, to read the term to encompass nonfarming activities conducted for years without evidence of commercial farming activities, just because the owner claims to intend to start commercial farming some year, would expand the Right to Farm Act far beyond what the legislature must have intended.

From the evidence in the record, this Court could conclude that Riddle's land did not qualify as an agricultural facility, and that this is an alternative basis for upholding the superior court's determination that the Right to Farm Act did not apply to Riddle.

II. RIDDLE'S SEPTAGE STORAGE WAS A PRIVATE NUISANCE.

"Private nuisance liability results from an intentional and unreasonable interference with another's use and enjoyment of his or her own property."[34] Reckless conduct can also establish nuisance liability.[35] The trial court found, as a matter of fact, by clear and convincing evidence, that Riddle's actions with respect to septage storage on his property

---

[34] *Parks Hiway Enterprises, LLC v. CEM Leasing, Inc.*, 995 P.2d 657, 666 (Alaska 2000); *see id.* at 666 n.45, citing AS 09.45.255 and RESTATEMENT (SECOND) OF TORTS § 822(b) (1965).

[35] *See Parks Hiway*, 995 P.2d at 666.

constituted a private nuisance to Lanser, because Riddle's actions were intentional or reckless and they substantially and unreasonably interfered with Lanser's use and enjoyment of his property. [Exc. 192-94, 197-98] These findings are not clearly erroneous; they are well supported by the record.

As described above, Lanser owned 115 acres adjacent to Riddle's property. [PI Tr. 497] From the time he bought the land in 2007, Lanser has worked on his land for over 40 hours each week. [Tr. 1018, 1022, 1026] He constructs quality log homes on the subdivision lots, so he necessarily works outdoors much of the year, moving indoors in the winters to do finish work after houses are framed-in during the warmer months. [Tr. 1023, 1202]

While there were no offensive odors for the first few years, starting around break-up in 2010, Lanser experienced a consistent and persistent pattern of noxious smells wafting from Riddle's property. [Tr. 1033-37, 1090-92] Smells that were more than just a whiff occurred two to four times a week on average; sometimes they lasted all day, and sometimes they went away more quickly. [Tr. 159-60, 1037, 1090] The pattern endured from break-up[36] to freeze-up each year from 2010 until trial in 2013. [Tr. 1034-38, 1087, 1090-92] The odors were intensely disgusting. Lanser described them as "equivalent to working in a portajohn" and like having his "head stuck in a honey bucket." [Exc. 311, 324] The extreme bad odors affected Lanser "quite a bit." [Tr. 1105; *see also* PI Tr. 574,

---

[36] One of the defense witnesses explained that the smells could be particularly intense in the spring because gasses build up during the winter under the ice, so concentrated gasses are released when the ice melts. [Tr. 1337-38]

627 (smells caused his employees to complain to him, and caused him "heartache and misery")]

Lanser's descriptions of the offensive smells and how frequently they affected the subdivision were corroborated by those who bought and lived in homes in the subdivision.[37] ADEC employees also confirmed that they could smell offensive odors in the subdivision. [Exc. 323; Tr. 1901] The people who lived there characterized the odors as so offensive as to drive them indoors and to prevent them from using and enjoying their properties in the ways they would like.[38]

The trial court found this testimony credible, and, based on the testimony, the court did not err in concluding that Riddle's septage storage[39] substantially and unreasonably interfered with Lanser's enjoyment of his own property and therefore constituted a nuisance. [Exc. 197-98]

---

[37] *See* Tr. 57-69, 73 (Dean Lawson), 149-50, 157-65, 176-77 (Mark Renson), 218-27, 258 (Diane Long), 273-74, 280-87, 300-03, 307-10, 318-20 (John Brunsberg); Exc. 313-14, 318-19, 322 (email complaints).

[38] *See* Tr. 64-65 (Lawson: when the smells come, his family has to go inside), 158-59, 162, 165, 176 (Renson: guests moved inside because of smells; when the smells come and it's hot, he doesn't want to breathe outside; his family doesn't open the house windows, because the smell comes in and lingers; they don't go outside or they drive elsewhere for outdoor activities), 226-28 (Long: her family has to shut the windows; they can't sit on the porch, and can't spend time outdoors), 284-87, 301 (Brunsberg: party guests had to go indoors; his family changes its plans because of the smell, and finds it frustrating not to be able to plan on outdoor activities; his wife can't read on the porch; they don't want to be outside when the smell is present).

[39] The court specified that the offensive odors came from the storage in the lagoons, not from spreading the septage on the land. [Exc. 193] The smells began in the spring before any spreading occurred, and occurred on many days when Riddle's records showed he was not spreading septage. [*Id.*; Tr. 1903, 1917 (ADEC witness was clear that the smells came from the lagoons, not from the spreading)]

Riddle's attack on the trial court's fact-finding relies on accepting testimony in the record in the light most favorable to himself. [At. Br. 39] Certainly, there were witnesses who did not live in the neighborhood but who stood on Riddle's land and claimed to smell no smell, or no smell that they considered offensive. [*E.g.*, Tr. 1462, 2050, 2112] But this mixed testimony did not preclude the trial court from finding Lanser and the other plaintiff witnesses credible.[40] Having accepted that testimony, the court had a solid basis for concluding that Riddle's septage lagoons were extremely offensive and substantially and unreasonably interfered with Lanser's use and enjoyment of his property. [Exc. 197-98]

Riddle also contends that the superior court erred in finding a nuisance without explicitly balancing the factors listed in the RESTATEMENT (SECOND) OF TORTS §§ 827 and 828. [At. Br. 39-42] While this Court has referred to the RESTATEMENT's treatment of nuisance,[41] it appears that the Court has never discussed the factors in §§ 827 and 828 in a reported case,[42] and this Court has never required judges to weigh those specific factors.

Under the RESTATEMENT, an intentional invasion of another's interest in the use and enjoyment of land is unreasonable if "the gravity of the harm outweighs the utility of the actor's conduct."[43] In the current case, even without an explicit balancing analysis, the superior court considered the kinds of factors discussed in the RESTATEMENT. [Exc. 193-

---

40 *See Laybourn*, 362 P.3d at 452 (trial court determines credibility and weighs conflicting testimony); *Demoski*, 737 P.2d at 784.

41 *See Parks Hiway*, 995 P.2d at 666 nn.44-45.

42 The factors are cited and discussed in the unpublished decision in *Trails North, Inc. v. Seavey*, 1999 WL 33958785 at *3 & n.11 (Alaska Dec. 1, 1999).

43 RESTATEMENT § 826(a).

94, 198] The court considered the nature and severity of the harm caused by the offensive odors. [Exc. 193-94, 197-98] The court implicitly found no utility in storing septage but not using it in farming. She explicitly found that Riddle had acted intentionally or at least recklessly with respect to the risk of sending offensive smells into the neighborhood. [Exc. 198] She noted that his statements in his permit applications reflected an awareness of the possibility of offensive odors and commitments to take steps to avoid the odors, none of which he honored before the litigation started. [Exc. 190-92, 198; *see supra* at 3-4 (discussing the misrepresentations)] He made few efforts to mitigate the smells, even after specific complaints were brought to his attention. [*See* Tr. 2282-83 (claiming he rarely noticed a bad smell), 2495 (spread some lime slurry to be a good neighbor)] He himself suggested ways to operate his business while controlling the smells. [Exc. 190-92, 277-78, 444; Tr. 2470-71] Thus, the court had a sound basis for finding that storing septage without meaningful efforts to control the smells was unreasonable. [Exc. 197-98]

Riddle offers a self-serving view of how the courts should consider the RESTATEMENT factors. [At. Br. 40-42] His view is colored by his perception that he is using the lagoons in connection with farming, which the superior court found not to be true. [Exc. 202-03] In the light most favorable to Lanser, as the prevailing party, the record supports a very different analysis of the RESTATEMENT factors[44]:

---

[44] Below, the first factors (a)-(e) come from RESTATEMENT § 827 (factors important in determining the gravity of the harm from another's intentional invasion of the owner's use and enjoyment of land). The second set of factors (a)-(c) comes from RESTATEMENT § 828 (factors important in determining the utility of the conduct that causes the intentional invasion of another's interest in the use and enjoyment of his land).

(a) *The extent of the harm involved*: Lanser's job required him to work outdoors. While performing his work on his property, he was forced to endure extremely offensive smells that affected him "quite a bit" two to four times every week, for six months of the year. [Tr. 1033-37, 1090-92, 1105] To accomplish his work, he had no choice except to persevere despite the smells. Others, who had choices about whether to stay outdoors or move indoors, regularly had to change their plans and not use their land as they wished. *See supra* n.38.

(b) *The character of the harm involved*: The harm to Lanser entailed frequently having to endure smells equivalent to putting one's head into a porta-potty or honey bucket. [Exc. 311, 324]

(c) *The social value that the law attaches to the use and enjoyment affected*: The law values construction of homes in a properly platted subdivision, and the freedom to work without being subjected to frequent intensely bad odors. To protect neighbors, the law decrees specifically that depositing on one's property anything that is "obnoxious or offensive to the public" is a nuisance.[45]

(d) *The suitability of the particular use or enjoyment invaded to the character of the locality*: Lanser's activities were entirely suited to the locality. The land where he was developing houses was zoned for residential development. [PI Tr. 469-70; Tr. 1018-20] Lanser was aware that the neighborhood also contained farms, and the superior court found him credible when he testified that he was not anti-farm (and not even anti-septage), and

---

[45] *See* AS 46.03.810(a)(2).

did not seek to eliminate all farm-related odors. [Exc. 189, 311; Tr. 1110] He distinguished the smell of decomposing septage from the normal smells of a farm. [Tr. 1093]

(e) *The burden on the person harmed of avoiding the harm*: There was no way Lanser could avoid the smells that wafted on to the lots where he was working, without giving up his work or perhaps wearing a gas mask.

(a) *The social value that the law attaches to the primary purpose of the [defendant's] conduct*: The law attaches little value to the storage of septage on private property, when it is not being used to further agriculture or for another beneficial purpose. Regulated public utilities exist to accept and manage septage in a manner that does not offend the neighbors. [Tr. 536, 608]

(b) *The suitability of the [defendant's] conduct to the character of the locality*: If managed properly, with reasonable efforts to control odors, septage lagoons used in farming would not be unsuitable on Riddle's property. Because the property is in an area with both farms and non-farm residences, storage of septage without odor controls is conduct unsuitable to the locality.

(c) *The impracticality of preventing or avoiding the invasion*: Avoiding the invasion of Lanser's interests was not impractical. Riddle himself made multiple suggestions on how he could prevent the invasion of his neighbors' lands with offensive smells – he told ADEC he would cover the lagoons and use commercial deodorizing products if necessary; he told FNSB he would not collect and store septage during the winter; he told both agencies he would *use* the septage in his farming activities (rather than stockpile large quantities); and he told the superior court, even before the judgment against

him, that he had bought and installed a chemical deodorizing system that was easy and not expensive to use. [Exc. 277-78, 444; Tr. 2470; AH Tr. 292]

Assuming that explicit consideration of all the RESTATEMENT factors is required, such a consideration soundly supports finding that Riddle's septage storage was a nuisance.

This Court should affirm the determination that Riddle's septage storage was a nuisance.

III. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN THE AWARD OF ATTORNEY FEES AND COSTS UNDER RULE 82 AND RULE 37.

A. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN THE AWARD OF FEES UNDER RULE 82.

Riddle does not dispute that Lanser prevailed in the litigation and thus was entitled to an award of partial attorney fees under Civil Rule 82. [At. Br. 42-48; Exc. 216] Pursuant to Rule 82(b), the presumptive award to a party who prevailed at trial and who did not seek a monetary recovery is 30% of his reasonable and necessary attorney fees. Here, after careful consideration of the factors in Rule 82(b)(3), the superior court increased the award to 40%. [Exc. 222-29] In enhancing the fee award, the court considered all of the factors addressed by the parties but placed particular emphasis on two: Riddle's bad faith conduct and the unreasonableness of the defense he presented. [Exc. 227, referring to Rule 82(b)(3)(F) and (G))][46]

---

[46] For the superior court briefing on attorney fees, including exhibits, see R. 2626-2760, 2777-2880, 3775-3804, 3807-46.

Before making this modest upward adjustment, the superior court addressed a series of claims by Riddle that certain portions of the attorney hours claimed by Lanser were unreasonable or not incurred in connection with the litigation. [Exc. 217-21; R. 2778-82] The court resolved several of these points in Riddle's favor, reducing the total number of hours, and thereby reducing the total award. [Exc. 217-21, 229-30]

In his appeal of the attorney fee award, Riddle does not challenge the total hours the court treated as reasonable and necessary or the reasonableness of Lanser's attorneys' billing rates. Instead, Riddle presents three discrete challenges to the factors that the superior court considered, or allegedly failed to consider, in deciding to enhance the award. Based on those purported errors, he contends that the court erred in increasing the fee award above 30%. [At. Br. 42-48]

As discussed in the three sections that follow, the superior court did not abuse its discretion, and the fee award under Rule 82(b)(3) should be affirmed.

1. The superior court had a solid basis for determining that Riddle's defense was unreasonable or brought in bad faith.

The superior court found that Riddle's defense based on the Right to Farm Act was not reasonable or brought in good faith because Riddle "misrepresented his use of his property." [Exc. 227] The court relied on the factual findings that she made at the conclusion of the trial – that, although Riddle claimed he built and used the septage lagoons to support his farming activities, in fact he used only a very small percentage of the septage on his fields and he offered no farming-related reason for not using all of it, warranting the court's conclusion that the storage and spreading were intended to support his septic

pumping business, not his agricultural operations. [Exc. 227-28, citing Exc. 202] The court also noted the completely false statements Riddle made in support of his permit applications – including his assertion that he would not dump or store septage during the winter and that he would cover his stockpiles. [Exc. 227-28, referring to Exc. 277-78, 444] Those statements were false when made and thus evidenced an intent to deceive the permitting authorities about the nature and purpose of his planned septage storage. [Exc. 228] Given that the facts known to Riddle did not support his claim that his septage storage activities were conducted to support his agricultural venture, the court had a sound basis for finding that he advanced and relied on the Right-to-Farm-Act defense in bad faith. [Exc. 227-29]

This conclusion was not an abuse of discretion.[47] Contrary to Riddle's claim on appeal [At. Br. 44-47], the superior court did not find Riddle's defense unreasonable and in bad faith merely because it was unsuccessful. Rather, as just noted, the court found the defense unreasonable and in bad faith because it was premised on the untruthful claim that Riddle was storing septage to support his agricultural operations. [Exc. 227-29]

Riddle also is wrong that the reasonableness of his defense is established by Judge Olsen's findings at the close of the PI hearing. [At. Br. 46-47] The superior court was

---

[47] A court has wide discretion in deciding whether to find a position unreasonable and whether to increase the fee award. *See BP Pipelines (Alaska) Inc. v. State, Dep't of Revenue*, 327 P.3d 185, 198-99 (Alaska 2014). An abuse of discretion exists only where the superior court's decision is "arbitrary, capricious, manifestly unreasonable, or stemmed from improper motives." *Ware v. Ware*, 161 P.3d 1188, 1192 (Alaska 2007); *see id.* at 1200 (this Court reviews the determination of bad faith or unreasonableness for abuse of discretion).

correct in rejecting Riddle's reliance on the denial of a preliminary injunction:

> The fact that Judge Olsen denied the request for a temporary injunction does not have any bearing on whether Riddle's defense was brought in good faith. To assert otherwise is to distort the standard of proof and the depth of evidence required to obtain a preliminary injunction compared to that which is considered when making a final judgment. That Lanser could not demonstrate, prior to the discovery process, a likelihood of success on the merits has no bearing on the factual findings at the conclusion of this case, when the court concluded that Riddle was "using the lagoons to treat and dispose of septage rather than to support his limited agricultural operations."

[Exc. 228, quoting Exc. 202]

Similarly, the denial of summary judgment to Lanser on issues related to the Right-to-Farm-Act defense does not establish that the defense was reasonable. [At. Br. 46] The court's summary judgment ruling means only that, in the light most favorable to Riddle, not taking credibility into account, slightly more than a scintilla of evidence supported his defense.[48]

This Court should hold that the superior court did not abuse its discretion in determining that Riddle's defense was unreasonable and in bad faith, and that such conduct justified a modest increase in the attorney fees awarded.[49]

---

[48] *See, e.g., Meyer v. State, Dep't of Revenue*, 994 P.2d 365, 367-68 (Alaska 1999) (superior court was required to deny summary judgment to State on paternity claim when putative father swore that he had not had sexual relations with the mother nine months before the birth of the child, notwithstanding that the man admitted a sexual history with the mother and DNA tests showed a 99.98% likelihood that he was the father).

[49] *See, e.g., Nautilus Marine Enterprises, Inc. v. Exxon Mobil Corp.*, 332 P.3d 554, 562 (Alaska 2014) (superior court did not abuse its discretion in finding bad faith and enhancing fee award from 30 to 35%); *Gold Dust Mines, Inc. v. Little Squaw Gold Mining Co.*, 299 P.3d 148, 169-70 (Alaska 2012) (not abuse of discretion to enhance fee award on a number of grounds, including that defendant increased the complexity of the litigation due to unreasonable, "bordering on bad faith," arguments); *Ware*, 161 P.3d at 1198-99

2. The superior court did not err in considering Riddle's misrepresentations to ADEC and FNSB.

In concluding that factor (G) – "vexatious or bad faith conduct" – also supported an increase in attorney fees, the superior court mentioned Riddle's material misrepresentations to ADEC and FNSB. [Exc. 227] Riddle's appeal discusses error only with respect to the court's reliance on his misrepresentations to ADEC [At. Br. 42-43], so this Court may find that Riddle waived any challenge to the court's reliance on his misrepresentations to FNSB.[50] And the Court may find that the superior court's finding under factor (F) warranted the enhanced fee award, making it unnecessary to consider any challenge to the court's findings on factor (G).[51]

On the merits, the superior court did not err in mentioning Riddle's misrepresentations to either government agency when discussing the bases for increasing the attorney fee award from 30% to 40%. [Exc. 227-29] Riddle is correct that, to support an enhanced fee award, vexatious or bad faith conduct must occur during the litigation, and not in the course of conduct that became the subject of litigation.[52] Here, the superior court

---

(upholding an award of 80% of the prevailing party's fees, noting that the Court has "frequently" upheld awards "well above" the scheduled amount, and that a finding of bad faith alone can justify an award of enhanced fees); *Cole v. Bartels*, 4 P.3d 956, 961 (Alaska 2000) (not abuse of discretion to find defenses were unreasonable and to use that as one of the bases for awarding plaintiffs 75% of their attorney fees).

[50] *See A.H. v. W.P.*, 896 P.2d 240, 243 (Alaska 1995) (arguments given only cursory briefing on appeal are waived).

[51] *See Ware*, 161 P.3d at 1199 ("a finding of bad faith alone can justify increased attorney's fees").

[52] *See Cole*, 4 P.3d at 961 n.24.

did not rely on Riddle's out-of-court misrepresentations as such; the court's decision to exclude from Rule 82 consideration the attorney fees that Lanser incurred in dealing with the permitting agencies demonstrates that the court fully understood the distinction between litigation-related and non-litigation-conduct and that only the former may be considered under Rule 82. [Exc. 217-18] The superior court referred to Riddle's out-of-court misrepresentations as evidence of an ongoing course of conduct that began before and continued through the trial: "Riddle did misrepresent his intentions and actions both before and during litigation." [Exc. 229] The court also referred to Riddle's vexatious conduct concerning discovery – both for trial and on abatement issues – and she noted how it delayed resolution of the case and how "his good faith compliance could have prevented several thousand dollars' worth of attorney's fees from being incurred." [*Id.*]

For all these reasons, the court did not abuse its discretion in finding that Riddle's vexatious conduct during litigation supported enhancing the fee award.

3. The superior court did not abuse its discretion in failing to consider what Riddle calls bad faith conduct by Lanser.

During the litigation, Riddle repeatedly accused Lanser of acting in bad faith. [At. Br. 47-48, referring *inter alia* to contentions at R. 2804] However, the superior court never accepted those arguments. As to one claim – that Lanser acted in bad faith by conducting unnecessary and improper depositions instead of waiting for the court to rule on the motion to compel discovery – the superior court expressly found that Lanser's counsel acted reasonably in light of then-impending court deadlines and Riddle's resistance to proper discovery requests. [Exc. 219; *see* R. 3783-85]

Even if there had been instances of bad faith by Lanser in the course of a long-running and hard-fought case, it would not follow that the superior court abused its discretion in not discussing that conduct when deciding the award of attorney fees. This Court has stressed the broad discretion of the superior court both with respect to finding whether a party acted unreasonably or in bad faith and with respect to whether such conduct deserves an adjustment in an attorney fee award.[53] It appears that this Court has never *required* a superior court to adjust a fee award for perceived bad faith or unreasonable conduct by one of the litigants.[54] A holding here that the court abused its discretion by failing to make such an adjustment would be both unprecedented and an unwarranted encroachment on the discretion of the superior court.

4. Conclusion

This Court should hold that the superior court acted well within its discretion in its Rule 82 award to Lanser.

B. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN AWARDING FEES AND COSTS TO LANSER UNDER RULE 37.

Riddle contends that the court abused its discretion in awarding Lanser approximately $15,000 as sanctions under Rule 37(g). [At. Br. 48-54] To understand his claims and why they are meritless requires substantial factual background.

---

[53] *See BP Pipelines*, 327 P.3d at 198-99 (upholding superior court's decision to exercise its discretion *not* to adjust fee award for arguably unreasonable conduct).

[54] *See id.*; *see generally Spenard Action Committee v. Lot 3, Block 1, Evergreen Subdivision*, 902 P.2d 766, 777 (Alaska 1995) (noting that cases establish minimum criteria for imposing discovery sanctions but do not mandate particular sanctions).

1. Background facts

Lanser's discovery requests and Riddle's objections: The discovery phase of this case commenced after the superior court denied the preliminary injunction that Lanser sought. [Exc. 148-62] Lanser served Riddle with requests for production ("RFPs"), interrogatories, requests for admission, and a request to inspect the property at issue in the case. [R. 689-718] Riddle responded by refusing to produce documents responsive to 22 of the 30 RFPs, refusing to answer 15 of the 28 interrogatories, and refusing to grant permission to inspect the property. [R. 290-318] The most common objection was "Irrelevant and will not lead to relevant discovery." [*Id.*]

Sample RFPs to which Riddle offered this objection included:

- Please produce all proof of oats, hay and/or any other crops grown on the property located on Eielson Farm Road September 1st, 2007 through present. [R. 291 (RFP 2)]

- Please produce all proof of oats, hay and/or any other crops sales on the property located on Eielson Farm Road September 1st, 2007 through present. [R. 291 (RFP 3)]

- Please produce all records reflecting the volume of domestic septage dumped at the property located on Eielson Farm Road by Fairbanks Pumping & Thawing and Bigfoot Pumping [sic] from September 1st, 2007 through present. [R. 293 (RFP 10)]

Sample interrogatories that Riddle claimed sought irrelevant information included:

- Please list all sales of crops grown at the property on Eielson Farm Road, including the type of crop, the amount paid, and the date of purchase from September 1st, 2007 through present. [R. 300 (Interrogatory 3)]

- Please list the names and addresses of all persons employed by Robert Riddle d/b/a Fairbanks Pumping & Thawing from September 1st, 2007 through present. [R. 306 (Interrogatory 23)]

As bases for his objections, Riddle relied principally on the oral finding by the court following the preliminary injunction hearing, when the court stated that "Riddle is operating a legitimate farm." [R. 318, referring to PI Tr. 929] Riddle reasoned that, in light of this finding, discovery requests related to crop production and sales were irrelevant and harassing. [R. 318] As to the requests for information about septage dumping, Riddle relied on Judge Olsen's statement that the pumping and thawing business "is not a factor at all." [R. 318, referring to PI Tr. 930][55] Again, Riddle treated that finding as dispositive, such that discovery on the subject was unnecessary, irrelevant, and harassing. [R. 318] He offered the same explanation for his refusal to allow entry onto his property. [R. 774; *see also* R. 298]

Lanser's motion to compel and Riddle's opposition: After efforts to resolve the discovery dispute informally failed, Lanser moved to compel responses to his RFPs and interrogatories and to allow entry onto the land. [R. 677-85] Lanser sought expedited consideration of his motion to compel, because Riddle had filed a summary judgment motion on the same day as he served his objections to discovery. [R. 318, 328] Lanser needed the information sought through discovery in order to oppose summary judgment. [R. 231-33] Lanser noted that he had also filed a motion for a Rule 56(f) continuance as an alternative way to ensure that he had the opportunity to receive and review the information sought in discovery before his opposition to the summary judgment motion

---

[55] Riddle's quote is misleading. What Judge Olsen actually said is, "I'm not here to preserve the pumping and thawing business. I'm not – that is not a factor at all." [PI Tr. 930]

was due. [R. 232, referring to R. 275-83] The court granted the motion for a continuance and on the same day denied the motion for expedited consideration, presumably because it was no longer necessary. [R. 640, 642]

Riddle opposed the motion to compel. [R. 627-35] He reiterated his view that Judge Olsen's preliminary injunction findings disposed of all issues related to whether Riddle was operating a legitimate farm and whether the operations of his pumping and thawing business were relevant. [R. 629-31]

Orders granting the motion to compel and denying reconsideration: By the time the motion to compel was ripe for decision, the case had been administratively reassigned to Judge Harbison. [R. 3027] Judge Harbison reviewed the motion and opposition, as well as information in the court file regarding the PI hearing, and she granted the motion to compel in full. [Exc. 265-66, 268] Her order found Riddle's refusal to respond to the discovery requests "unreasonable[] under Civil Rule 37(g)" and allowed Lanser to move for attorney fees and costs. [Exc. 265-66]

Riddle moved to reconsider, accusing Judge Harbison of not being sufficiently familiar with the record and rulings from the preliminary injunction hearing and of not explaining the bases for her discovery order. [R. 524-29]

Judge Harbison denied reconsideration, but entered a written order explaining her ruling "[t]o assuage the defendant's concern about the level of the court's familiarity with the case and the discovery requests at issue." [Exc. 267] That order summarized testimony from the PI hearing and set forth the grounds for holding that Riddle's refusals to respond to discovery were not substantially justified. [Exc. 267-75] The court explained that she

rejected Riddle's argument that Judge Olsen's preliminary findings disposed of key issues, because those findings were *preliminary* only; Lanser retained the right to trial on the merits, and the preliminary findings did not foreclose his right to discovery to assist his preparation of his case for trial. [Exc. 273] The court called discovery requests related to Riddle's farming and septage dumping plainly relevant both to Lanser's claims and particularly to rebutting Riddle's Right-to-Farm-Act defense. [Exc. 274-75]

Lanser's motion for fees and costs under Rule 37 and Riddle's opposition: Lanser timely moved for attorney fees and costs incurred as a result of Riddle's refusal to cooperate with discovery. [R. 864-71] His fee request included time his counsel had spent preparing the motion for expedited consideration and the motion for a Rule 56(f) continuance, both of which were necessitated by Riddle's timing in moving for summary judgment while refusing to provide discovery. [R. 866-67] Lanser also sought recompense for the hours his attorneys spent, while the motion to compel was pending, when they attempted to obtain from third parties at least some of the information that Riddle refused to provide. [R. 867-68] And Lanser included an estimate for the cost of having his expert redo his report, since the first report, prepared to meet the expert witness disclosure deadline, necessarily relied on estimates rather than actual data from Riddle. [R. 868-70]

Riddle opposed every aspect of the fee request. [R. 782-97] He contended that his objections were justified and not unreasonable. [R. 787-90] He also protested most of the specific fee and cost requests, asserting that Lanser's attorneys spent too many hours on the motion to compel [R. 785-86]; that no recovery should be allowed for the time spent on the motion for expedited consideration [R. 786]; that no fees should be allowed for the

efforts to obtain discovery from third parties [R. 791-94]; and that costs for redoing the expert report should not be allowed. [R. 794-95] Lanser rebutted these arguments in his reply. [R. 1044-50, especially R. 1046-48]

Order granting fees and costs under Rule 37: The court deferred ruling on the motion for fees and costs under Rule 37, saying she would address the request in connection with any post-trial application for attorney fees. [R. 1958, 2346]

Following the trial and entry of judgment in Lanser's favor, Lanser moved for an award of fees under Rule 82. [R. 2626-41] In that motion, he renewed the earlier-filed request for fees and costs under Rule 37, making minor adjustments to avoid any double counting of costs that also would be available under Rule 79. [R. 2628-29, 3776-78; Exc. 214] The superior court granted the revised request, taking care to avoid any duplication of fees allowed under Rule 82. [Exc. 214-15, 229-30] The total award under Rule 37(g) was for $12,050 in attorney and paralegal fees and $2,953 in costs. [Exc. 215, 236]

2. The superior court did not abuse its discretion in the award of fees and costs under Rule 37.

Civil Rule 37(a)(4)(A) provides in relevant part that, if a motion to compel discovery is granted, the court *shall* require the party whose conduct necessitated the motion to pay the moving party the reasonable expenses, including attorney fees, incurred in bringing the motion, unless the objections were "substantially justified." In other words, an award of attorney fees for preparing a motion to compel is presumed. Additionally, Rule 37(g) provides that, if a party engages in "unreasonable, groundless, abusive, or obstructionist conduct during the course of discovery," the court may require the party to

pay the reasonable expenses, including attorney fees, "caused by the conduct."

Effectively ignoring the superior court's broad discretion in awarding sanctions for discovery abuses,[56] Riddle has challenged nearly every aspect of the court's Rule 37 award. [At. Br. 48-54] As discussed below, none of the objections has merit.

i. Riddle's discovery objections were unreasonable.

Riddle contends, first, that discovery sanctions may be awarded only if the court finds a willful refusal to cooperate with discovery. [At. Br. 48] Riddle is wrong. Willfulness is required before the court may impose sanctions that determine liability.[57] But, under the plain language of Rule 37(g), less severe sanctions may be imposed for conduct that was "unreasonable, groundless, abusive, or obstructionist."[58]

The court did not abuse its discretion in finding Riddle's discovery objections unreasonable. [Exc. 265-66] Riddle's objections rested chiefly on his claim that Judge Olsen's statements in denying a preliminary injunction were dispositive and binding throughout the rest of the case. [R. 318] On appeal, he again insists this position was reasonable. [At. Br. 49-50] But the United States Supreme Court has explained that the law is squarely to the contrary:

> [A] preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party thus is not required to prove his case in full at a preliminary-

---

[56] *See, e.g.*, *Roderer v. Dash*, 233 P.3d 1101, 1108 (Alaska 2010); *Hikita v. Nichiro Gyogyo Kaisha, Ltd.*, 85 P.3d 458, 460 (Alaska 2004).

[57] *See, e.g.*, *Khalsa v. Chose*, 261 P.3d 367, 372 (Alaska 2011); *Honda Motor Co., Ltd. v. Salzman*, 751 P.2d 489, 492 (Alaska 1988).

[58] *See Spenard Action Committee*, 902 P.2d at 777 (award of costs and fees as a discovery sanction does not require willfulness).

> injunction hearing . . . and the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits[.][59]

The commonsense explanation by the superior court also supports finding Riddle's position unreasonable. As the court stated, if a PI is denied, the moving party retains the right to trial and therefore must retain the right to conduct discovery to prepare for trial. [Exc. 273][60]

The Court should hold that the superior court did not abuse its discretion in finding that Riddle's objections were unreasonable and deserving of sanction.[61]

ii. The superior court did not abuse its discretion with respect to the amount of fees and costs awarded.

Riddle asserts that this Court can determine that the Rule 37 award here was excessive merely by comparing the total attorney fees awarded here (approximately $12,050) with the significantly lesser totals upheld in two other reported cases.[62] But the fact that other attorneys, who brought different motions, in cases decided eight and twenty-nine years ago, claimed fees that were lower than Lanser's attorneys claimed proves nothing. The fees reasonably incurred in bringing a motion to compel and in otherwise

---

59 *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981).

60 *See also Haggblom v. City of Dillingham*, 191 P.3d 991, 999-1000 (Alaska 2008) (when a court combines a PI hearing with trial on the merits, each party must have notice and the opportunity to present the evidence it would be allowed to present at trial).

61 *See Khalsa*, 261 P.3d at 375 ("the trial court is in the best position to evaluate a litigant's good faith").

62 *See* At. Br. 50-51, citing *Kestner v. Clark*, 182 P.3d 1117, 1125 n.32 (Alaska 2008), and *City of Kenai v. Ferguson*, 732 P.2d 184, 191 (Alaska 1987), cases that upheld Rule 37 awards of under $1,000.

having to respond to an adversary's intransigence regarding proper discovery requests are highly fact-specific and necessarily depend on the billing rates of the attorneys, the novelty or complexity of the issues, the number of sub-issues, and the like. That one case required only a few hours does not mean that the attorneys in another case overbilled when they spent many more hours. The superior court is best positioned to determine whether the hours billed are reasonable under the circumstances.[63]

The remainder of Riddle's arguments about the Rule 37 award nitpick at details of Lanser's fee request. [At. Br. 50-54] He essentially asks this Court to put itself in the position of the superior court and to reconsider almost every dollar awarded. Lanser shows below that, as to each challenged part of the award, the superior court's decision to approve the fee or cost was not "arbitrary, capricious, [or] manifestly unreasonable" nor did it "stem[] from improper motives."[64] Consequently, this Court should conclude that the superior court did not abuse its discretion.

Riddle's claim that Lanser's attorneys billed excessive time in preparing the motion to compel: Riddle contends that the $3,612 billed by two attorneys for researching and writing the motion to compel discovery was excessive. [At. Br. 50-51] The total apparently includes time spent on the motion and its exhibits, the reply, and the

---

63 *See Nautilus Marine Enterprises*, 332 P.3d at 560-61 (superior court has "broad discretion" in determining whether attorney hours were reasonable or excessive and, compared to this Court, is "uniquely suited" to determine reasonableness because of its "greater knowledge of the case"), quoting *Valdez Fisheries Dev. Ass'n, Inc. v. Froines*, 217 P.3d 830, 833 (Alaska 2009); *see also Gamble v. Northstore P'ship*, 28 P.3d 286, 289-90 (Alaska 2001).

64 *Ware*, 161 P.3d at 1192.

accompanying motion to expedite consideration. [R. 867] The superior court reviewed the attorneys' submissions and had the opportunity to evaluate the quality of the work compared to the hours spent in this case and in comparable cases over which the court had presided. Riddle has provided no ground for concluding that the court abused its discretion in approving this portion of the fee request.[65]

Riddle's claim that the superior court should not have awarded fees for the motion to expedite consideration: Riddle contends that the court should not have approved any amount for drafting the motion to expedite consideration of the motion to compel discovery, because the motion to expedite was not granted and because Lanser also filed a Rule 56(f) motion for continuance. [At. Br. 51] However, Riddle created the situation that caused Lanser's counsel to seek an expedited ruling: he moved for summary judgment on the same day that he objected to most of Lanser's discovery requests. [R. 290-318, 328-37] Riddle put Lanser in the position of needing judicial assistance to avoid having to answer a summary judgment motion without facts to support the opposition. [R. 231-33] The court recognized the unfair bind into which Lanser was placed by granting a Rule 56(f) continuance [R. 640], which effectively mooted the motion for expedited consideration. The superior court did not abuse its discretion in treating the time to draft an expedited consideration motion as one of the costs reasonably incurred as a result of Riddle's unreasonable objections to discovery requests.

---

65 *See supra* n.63.

Riddle's claim that the award for fees incurred on the Rule 56(f) motion is excessive: Riddle did not raise this claim in the superior court [R. 782-97], so this Court should consider it waived.[66] On the merits, Riddle does not claim error in the superior court's acceptance of Lanser's position that filing the Rule 56(f) motion was a cost reasonably incurred as a result of Riddle's discovery objections; he claims only that the hours allowed are excessive. [At. Br. 53] Again, the superior court had the opportunity to consider the hours claimed and to see that the briefing did not merely duplicate the motion for expedited consideration. [*Compare* R. 275-83 *with* R. 231-33] Riddle has not established a basis for holding that the superior court abused its broad discretion in assessing the reasonableness of the hours expended.

Riddle's claim that fees and costs for conducting records depositions should not have been allowed: Lanser requested $2,004 for the fees and costs incurred when his attorneys conducted records depositions of third parties in an attempt to obtain from others some of the information that Riddle refused to provide. [R. 867-68, 1048] Riddle objects to this charge, because he contends that Lanser's counsel should have waited until the motion to compel was decided. [At. Br. 51-52] This argument presumes, ironically, that Lanser's counsel should have known that they would win and that the court would determine that Riddle was wrongfully withholding relevant documents.

In the context of awarding attorney fees under Rule 82, the superior court

---

[66] *See Brandon v. Corrections Corp. of America*, 28 P.3d 269, 280 (Alaska 2001) (a party may not raise an argument for the first time on appeal).

determined that Lanser's attorneys' efforts to obtain information promptly (which assisted them in responding to motions and preparing for trial) was one appropriate response to Riddle's non-cooperation with discovery. [Exc. 219] This is a reasoned analysis, and not an abuse of discretion.

Riddle's claim that fees should not have been awarded for responding to the motion to quash a third-party subpoena [At. Br. 52-53]**:** One of the places from which Lanser sought documents due to Riddle's refusals to answer interrogatories and RFPs was Bigfoot Pumping and Thawing. [R. 868] Riddle moved to quash the subpoena, and substantial motion work ensued. [R. 598-610, 581-86, 592-97] Riddle contends that the subpoena was quashed [At. Br. 52], but that is misleading. The court quashed the subpoena temporarily but allowed it to be "reissued if appropriate after the court rules on the pending motion to compel." [R. 566] Ultimately, Riddle produced records on Bigfoot's dumping. [Exc. 279-310, 337-82, 389-430] The superior court did not abuse its discretion in treating the fees that Lanser incurred in dealing with Riddle's motion to quash the Bigfoot subpoena as a cost reasonably incurred as a consequence of Riddle's obstruction of discovery.

Riddle's challenge to the expert witness fees awarded as a sanction: In the motion for fees, Lanser's counsel argued that, because Riddle had not provided discovery, they were forced to have an expert prepare a report using estimates on the volume of septage that had been dumped on Riddle's land. [R. 869-70] They argued that the expert would be forced to redo his report when Riddle eventually produced his records as the court ordered, since his records would be more accurate than the estimates. [*Id.*] They requested an award of half the amount of the original report ($2,953) as compensation for their extra

expense and as a sanction for Riddle's resistance to discovery, and the court allowed this. [R. 870] Riddle now complains about awarding costs based on an estimate, rather than an actual bill,[67] and he complains that the entire cost is improper because the expert never testified. [At. Br. 54] Riddle can make these arguments only because the court deferred consideration of the Rule 37 motion until the end of trial. Lanser's counsel briefed the motion pretrial, when it was due; at that time, counsel could not know actual future costs. [R. 870] The court did not abuse its discretion in considering and accepting the arguments that were reasonable when they were made and allowing expenses that would be reasonable when incurred, since Lanser's counsel could not possibly foresee pretrial how the case would unfold and whether the expert actually would testify.[68]

Conclusion: The superior court's decision to approve each challenged component of the Rule 37 award was not arbitrary, capricious, manifestly unjust, or based on an improper motive. Indeed, even Riddle does not claim that it was; read fairly, his appeal claims only that the court should have exercised its discretion differently. Because the court has broad discretion in ruling on a request under Rule 37, this Court should approve the award in all respects.

---

[67] He does not claim that additional expenses were not incurred. He notes that Lanser paid the expert $12,629 in February 2013, but that amount was not broken down into costs to update the original report vs. costs of new work. [At. Br. 53-54, citing R. 2704]

[68] *See Nautilus Marine Enterprises*, 332 P.3d at 562 (superior court did not abuse its discretion in enhancing attorney fees and awarding expert witness costs to sanction misconduct during discovery, even when the misconduct did not affect the outcome of the case: "This does not mean that [a party's] bad faith during discovery cannot be sanctioned.").

CONCLUSION

This Court should uphold the superior court's rulings in full. Specifically, the Court should hold that the Right to Farm Act did not apply, given the facts that the superior court found; that Riddle's septage storage created a nuisance as to Lanser, given the facts that the superior court found; and that the superior court did not abuse its discretion in the award of fees and costs under Civil Rule 82(b)(3) and Civil Rule 37(g).

Respectfully submitted, this 13 day of January 2016.

REEVES AMODIO LLC

Susan Orlansky [ABA 8106042]