

IN THE SUPREME COURT FOR THE STATE OF ALASKA

ALASKA BUILDING, INC.,)
Appellant,) Supreme Court No. S-16371
vs.)
LEGISLATIVE AFFAIRS AGENCY,)
and 716 WEST FOURTH)
AVENUE LLC,)
Appellees.)

Superior Court Case No. 3AN-15-5969CI

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE PATRICK J. MCKAY, PRESIDING

BRIEF OF APPELLANT

James B. Gottstein (7811100)
Law Offices of James B. Gottstein
406 G Street, Suite 206
Anchorage, Alaska
(907) 274-7686



Attorney for Appellant,
Alaska Building, Inc.

Filed in the Supreme Court of
the State of Alaska, this 26
day of September, 2016.

Marilyn May, Clerk

By: 
Deputy Clerk

I. TABLE OF CONTENTS

I. TABLE OF CONTENTS i

II. TABLE OF CONSTITUTIONAL PROVISIONS, CASES, AND STATUTES ii

III. CONSTITUTIONAL PROVISIONS, STATUTES, COURT RULES, AND OTHER AUTHORITIES PRINCIPALLY RELIED UPON ii

IV. JURISDICTIONAL STATEMENT 1

V. PARTIES 1

VI. STATEMENT OF ISSUE PRESENTED FOR REVIEW 1

VII. STATEMENT OF THE CASE 1

 A. Brief Description of Case 1

 B. Course of Proceedings 2

 C. Statement of Facts 6

VIII. ARGUMENT 12

 A. Summary of Argument 12

 B. The Superior Court Erred by Granting the Rule 11 Motion 13

 (1) Standard of Review 13

 (2) The Superior Court Failed to Make a Clear Record Concerning the Reasons and Authority for finding Alaska Building, Inc., Violated Rule 11. 14

 (3) The 10% of Savings Claim Was Not Frivolous 15

IX. CONCLUSION 18

II. TABLE OF CONSTITUTIONAL PROVISIONS, CASES, AND STATUTES

CASES

Anchorage v. McCabe, 568 P.2d 986 (Alaska 1977) 15
Dansereau v. Ulmer, 955 P.2d 916 (Alaska 1998) 15
Esch v. Superior Court, 577 P.2d 1039 (Alaska 1978) 14
Gilbert v. State, 526 P.2d 1131 (Alaska 1974)..... 15
Limeres v. Limeres, 367 P.3d 683 (Alaska 2016) 13
Luedtke v. Nabors Alaska Drilling, Inc., 834 P.2d 1220 (Alaska 1992)..... 12, 13
Rude v. Cook Inlet Region, Inc., 322 P.3d 853 (Alaska 2014)..... 13
Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S.
765, 120 S. Ct. 1858 (2000) 17

STATUTES

31 USC §3729, *et seq.* 18
31 USC §3730(d)..... 18
AS 09.60.010 15
AS 22.05.010(a)..... 1
AS 22.05.010(b) 1
AS 36.30.083(a)..... passim

RULES

Civil Rule 11..... passim
Civil Rule 56(f)..... 3
Civil Rule 68..... 16
Civil Rule 82..... passim

III. CONSTITUTIONAL PROVISIONS, STATUTES, COURT RULES, AND OTHER AUTHORITIES PRINCIPALLY RELIED UPON

STATUTES

AS 09.60.010

§ 09.60.010. Costs and attorney fees allowed prevailing party

(a) The supreme court shall determine by rule or order the costs, if any, that may be allowed a prevailing party in a civil action. Unless specifically authorized by statute or by agreement between the parties, attorney fees may not be awarded to a party in a civil action for personal injury, death, or property damage related to or arising out of fault, as defined in AS 09.17.900, unless the civil action is contested without trial, or fully contested as determined by the court.

(b) Except as otherwise provided by statute, a court in this state may not discriminate in the award of attorney fees and costs to or against a party in a civil action or appeal based on the nature of the policy or interest advocated by the party, the number of persons affected by the outcome of the case, whether a governmental entity could be expected to bring or participate in the case, the extent of the party's economic incentive to bring the case, or any combination of these factors.

(c) In a civil action or appeal concerning the establishment, protection, or enforcement of a right under the United States Constitution or the Constitution of the State of Alaska, the court

(1) shall award, subject to (d) and (e) of this section, full reasonable attorney fees and costs to a claimant, who, as plaintiff, counterclaimant, cross claimant, or third-party plaintiff in the action or on appeal, has prevailed in asserting the right;

(2) may not order a claimant to pay the attorney fees of the opposing party devoted to claims concerning constitutional rights if the claimant as plaintiff, counterclaimant, cross claimant, or third-party plaintiff in the action or appeal did not prevail in asserting the right, the action or appeal asserting the right was not frivolous, and the claimant did not have sufficient economic incentive to bring the action or appeal regardless of the constitutional claims involved.

(d) In calculating an award of attorney fees and costs under (c)(1) of this section,

(1) the court shall include in the award only that portion of the services of claimant's attorney fees and associated costs that were devoted to claims concerning rights under the United States Constitution or the Constitution of the State of Alaska upon which the claimant ultimately prevailed; and

(2) the court shall make an award only if the claimant did not have sufficient economic incentive to bring the suit, regardless of the constitutional claims involved.

(e) The court, in its discretion, may abate, in full or in part, an award of attorney fees and costs otherwise payable under (c) and (d) of this section if the court finds, based upon sworn affidavits or testimony, that the full imposition of the award would inflict a substantial and undue hardship upon the party ordered to pay the fees and costs or, if the party is a public entity, upon the taxpaying constituents of the public entity.

AS 36.30.083(a)

§ 36.30.083. Lease extensions authorized

(a) Notwithstanding any other provision of this chapter, the department, the Board of Regents of the University of Alaska, the legislative council, or the court system may extend a real property lease that is entered into under this chapter for up to 10 years if a minimum cost savings of at least 10 percent below the market rental value of the real property at the time of the extension would be achieved on the rent due under the lease. The market rental value must be established by a real estate broker's opinion of the rental value or by an appraisal of the rental value.

RULES

Civil Rule 11. Signing of Pleadings, Motions, and Other Papers

(a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name--or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper--whether by signing, filing, submitting, or later advocating it--an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

Civil Rule 68. Offer of Judgment

(a) At any time more than 10 days before the trial begins, either the party making a claim or the party defending against a claim may serve upon the adverse party an offer to allow judgment to be entered in complete satisfaction of the claim for the money or property or to the effect specified in the offer, with costs then accrued. The offer may not be revoked in the 10 day period following service of the offer. If within 10 days after service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service, and the clerk shall enter judgment. An offer not accepted within 10 days is considered withdrawn, and evidence of the offer is not admissible except in a proceeding to determine costs. The fact that an offer is made but not accepted does not preclude a subsequent offer.

(b) If the judgment finally rendered by the court is at least 5 percent less favorable to the offeree than the offer, or, if there are multiple defendants, at least 10 percent less favorable to the offeree than the offer, the offeree, whether the party making the claim or defending against the claim, shall pay all costs as allowed under the Civil Rules and shall pay reasonable actual attorney's fees incurred by the offeror from the date the offer was made as follows:

(1) if the offer was served no later than 60 days after the date established in the pretrial order for initial disclosures required by Civil Rule 26, the offeree shall pay 75 percent of the offeror's reasonable actual attorney's fees;

(2) if the offer was served more than 60 days after the date established in the pretrial order for initial disclosures required by Civil Rule 26 but more than 90 days before the trial began, the offeree shall pay 50 percent of the offeror's reasonable actual attorney's fees;

(3) if the offer was served 90 days or less but more than 10 days before the trial began, the offeree shall pay 30 percent of the offeror's reasonable actual attorney's fees.

(c) If an offeror would be entitled to receive costs and reasonable actual attorney's fees under paragraph (b), that offeror shall be considered the prevailing party for purposes of an award of attorney's fees under Civil Rule 82. Notwithstanding paragraph (b), if the amount awarded an offeror for attorney's fees under Civil Rule 82 is greater than a party would receive under paragraph (b), the offeree shall pay to the offeror attorney's fees specified under Civil Rule 82 and is not required to pay reasonable actual attorney's fees under paragraph (b). A party who receives attorney's fees under this rule may not also receive attorney's fees under Civil Rule 82.

IV. JURISDICTIONAL STATEMENT

Appellant, Alaska Building, Inc., appeals to the Alaska Supreme Court from that part of the Superior Court's June 23, 2016, Order Granting Legislative Affairs Agency's Motion for Rules 11 and 82 Attorneys' Fees, finding that Alaska Building, Inc., violated Civil Rule 11. Notice of Appeal was timely filed June 27, 2016. This court has jurisdiction under AS 22.05.010(a)&(b).

V. PARTIES

The parties to this appeal are Alaska Building, Inc., Appellant, and the Alaska Legislative Affairs Agency and 716 West Fourth Avenue LLC, Appellees.

VI. STATEMENT OF ISSUE PRESENTED FOR REVIEW

1. Did the Superior Court err by concluding Alaska Building, Inc., violated Civil Rule 11.

VII. STATEMENT OF THE CASE

A. Brief Description of Case

This case is a citizen-taxpayer suit to declare the 2013 contract providing for the demolition, reconstruction and lease of the Anchorage Legislative Information Office Building (LIO Project Lease) illegal and invalid as a violation of AS 36.30.083(a), which only allows non-competitive lease extensions if the rent is at least 10% below market. Alaska Building, Inc., included a claim for 10% of any savings realized by the State if the LIO Project Lease was declared illegal. The Superior Court dismissed Alaska Building,

Inc.'s claim for 10% of any savings, but entered a declaratory judgment that the LIO Project Lease was illegal and invalid for violating AS 36.30.083(a).

The Superior Court subsequently found Alaska Building, Inc., to be the prevailing party and awarded the default amount of fees under Civil Rule 82, but granted the Legislative Affairs Agency's motion for Civil Rule 11 fees regarding the claim for 10% of savings, stating the claim was frivolous. Only the finding of a Civil Rule 11 violation has been appealed.

B. Course of Proceedings

The complaint in this matter was filed on March 31, 2015 against (i) 716 West Fourth Avenue LLC, (ii) Koonce Pfeffer Bettis, Inc., d/b/a KPB Architects, (iii) Pfeffer development, LLC, (iv) Legislative Affairs Agency, and (v) Criterion General, Inc. Exc.

1. Count One claimed the LIO Project Lease was illegal because it neither extended a lease nor was the rent at least 10% below market rent as required by AS 36.30.083(a).

Exc. 4. Count Two was for \$250,000 or more in damages to the Alaska Building caused by the demolition and construction performed under the LIO Project Lease. Exc. 4.

On May 27, 2015, the Legislative Affairs Agency moved to dismiss the Complaint against it on the grounds that Alaska Building, Inc., lacked standing to bring an action to declare the LIO Project Lease illegal for violation of AS 36.30.083(a) or, in the alternative, to sever the damages to the Alaska Building claim from the claim that the contract violated AS 36.30.083(a). R. 347.

On June 8, 2015, Alaska Building, Inc., filed an Amended Complaint, which included the Legislative Affairs Agency as a defendant in the damages claim. Exc. 7.

On June 12, 2015, Alaska Building, Inc., filed a Motion for Partial Summary Judgment that the LIO Project Lease did not "extend a real property lease" as required by AS 36.30.83(a) in order to avoid the public bidding requirements. R. 164.

On August 21, 2015, the Superior Court denied the Legislative Affairs Agency's Motion to dismiss Count One pertaining to the illegality of the LIO Project Lease for lack of standing, but did grant its motion to sever Count Two pertaining to damages to the Alaska Building and ordered Alaska Building, Inc., to file an amended complaint without the claim for damages to the Alaska Building. R. 665-672.

Pursuant to the order to sever, Alaska Building, Inc., filed its Second Amended Complaint on August 25, 2016, including only the claim that the LIO Project Lease was illegal for violating AS 36.30.083(a). Exc. 30.

Both the Legislative Affairs Agency and 716 West Fourth Avenue LLC requested Civil Rule 56(f) extensions of the time to respond to Alaska Building, Inc.'s Motion for Partial Summary Judgment that the LIO Project Lease did not extend a real property lease, which were granted on September 15, 2015, extending the time to respond until January 31, 2016. R. 565.

On October 6, 2015, 716 West Fourth Avenue LLC, filed a motion to preclude Alaska Building Inc.'s 10% of savings and punitive damages claims, Exc. 36, to which the Legislative Affairs Agency filed a non-opposition on October 22, 2015. Exc. 41.

On October 21, 2015, the Legislative Affairs Agency filed a Motion for Summary Judgment under the Laches Doctrine. R. 411.

On October 27, 2015, Alaska Building, Inc., opposed 716 West Fourth Avenue LLC's a motion to preclude Alaska Building Inc.'s 10% of savings and punitive damages claims. Exc. 59.

On January 7, 2016, the Superior Court denied the Legislative Affairs Agency's Motion for Summary Judgment Under the Laches doctrine, R. 1722, and denied reconsideration thereof on January 22, 2016. R. 1676.

On January 13, 2016, the Superior Court granted 716 West Fourth Avenue LLC's motion to preclude (i) Alaska Building, Inc.'s claims for 10% of any savings from declaring the LIO Project illegal and (ii) punitive damages against 716 West Fourth Avenue LLC. Exc. 222.

On February 26, 2016, in response to 716 West Fourth Avenue LLC arguing that whether the LIO Project was illegal was a non-justiciable political issue, R. 1942, the Superior Court ordered the Legislative Affairs Agency to answer the following question: "Is the legislature asking the judiciary to find this case to be nonjusticiable?" R. 2170.

The Legislative Affairs Agency responded on March 11, 2016, that whether the LIO Project complied with AS 36.30.083(a) was justiciable, but whether the Legislature followed its own procedures was not. R. 2156.

On March 24, 2016, the Superior Court issued its Order on Motion for Summary Judgment Re: Lease is Not an Extension, holding that (1) whether the LIO Project complied with AS 36.30.083(a) was justiciable and (2), the LIO Project Lease was illegal

and invalid under AS 36.30.083(a) because it did not extend a real property lease. Exc. 230-246.

Following a March 30, 2016, motion for reconsideration by 716 West Fourth Avenue LLC, R. 1850, to which the Superior Court asked the other parties to respond, R. 2581, on May 20, 2016, the Superior Court denied the motion for reconsideration. R. 2565.

Alaska Building, Inc., filed a motion for attorney's fees as the prevailing party on May 26, 2016, R. 2548, which was opposed by both the Legislative Affairs Agency, R. 2445, and 716 West Fourth Avenue LLC. R. 2400.

On May 31, 2016, The Legislative Affairs Agency filed a motion for Civil Rule 82 Fees on the issue of Alaska Building's claim of damages against it and for Civil Rule 11 Fees for Alaska Building's unsuccessful claim for 10% of any savings the State of Alaska might receive as a result of the LIO Project Lease being declared illegal. Exc. 257.

On June 10, 2016, Alaska Building, Inc., opposed the motion for Rule 11 and Rule 82 Fees against it. Exc. 294.

On June 23, 2016, the Superior Court granted Alaska Building, Inc.'s motion for attorney's fees as the prevailing party and awarded Alaska Building, Inc., the default percentage of 20% of its attorney's fees. R. 2339.

That same day the Superior Court granted the Legislative Affairs Agency's motion for Rule 82 fees with respect to the damages claim against it and for Rule 11 fees with respect to Alaska Building, Inc.'s claim for 10% of the savings to the State resulting from declaring the LIO Project Lease illegal. Exc. 316-317.

This appeal of the Superior Court's award of Rule 11 fees against Alaska Building, Inc., followed on June 27, 2016.

C. Statement of Facts

On September 9, 2013, the Legislative Affairs Agency and 716 West Fourth Avenue LLC entered into the non-competitive LIO Project Lease to virtually gut and reconstruct the existing Anchorage Legislative Information Office Building. Exc. 230. The LIO Project Lease required demolition and reconstruction of the existing rental space, and demolition and subsequent construction of a separate building on an adjoining lot, increasing the square footage of the leasehold from approximately 23,645 square feet to approximately 64,048 square feet, a 170% increase in square footage. Exc. 230. The agreement called for the Legislative Affairs Agency to pay for certain tenant improvements estimated to have cost in excess of \$7.5 million. Exc. 230. The project required relocation of the tenants for several months. Exc. 230. At the completion of the project, the Legislative Affairs Agency once again leased the office space. Exc. 230. Construction began in December 2013 and was completed around January 9, 2015. Exc. 230. The monthly rental increased from \$56,863.05 to \$281,638 and the term of the lease was extended to May 31, 2024, a 395% increase in monthly rent. Exc. 230.

The putative authority for entering into the LIO Project Lease was (1) AS 36.30.083(a), which allows the Legislature to extend a real property lease if the rent is at least 10% below market, Exc. 188, (2) amendments to the Legislature's Procurement

Code to allow no-bid "material modifications" to existing leases adopted to facilitate the LIO Project Lease, Exc. 178, and (3) motions by the Legislative Council Authorizing Rep. Hawker to negotiate an extension under AS 36.30.083(a) and a material modification for an amount not to exceed the estimated cost of a similarly sized, located and apportioned newly constructed building. Exc. 179-180.

The LIO Project Lease was negotiated between Mr. Mark Pfeffer on behalf of the 716 West Fourth Avenue LLC, and Rep. Hawker, who was chair of the Legislative Council at the time on behalf of the Legislative Affairs Agency, appellees. Exc. 103-112, 208, 209. Mr. Pfeffer's and Rep. Hawker's plan in having the legislative procurement rules changed to allow a no-bid "material modifications" was to extend the existing lease in its then current condition ("as-is") under AS 36.30.083(a) for at least 10% below market rent and then a "material modification" under the just amended procurement regulations to perform the demolition and construction work to build the new Anchorage Legislative Information Office Building. Exc. 103.

It was recognized at that time by Don McClintock, attorney for the landlord 716 West Fourth Avenue LLC, that it was not feasible to construct the renovations and lease the building for at least 10% below market value:

I don't know whether beating a post-renovation BOV or appraisal by 10% will prove feasible, but I do not believe Rep. Hawker wants or expects to be told that standard limits improvements to the building.

Exc. 103. Mr. McClintock attempted to implement the extend "as-is" and material amendment plan in a July 12, 2013, e-mail to Mr. Gardner, forwarding a draft lease

extension under AS 36.30.083(a) for the existing building "as-is" and a "material amendment" for the demolition and construction work for the LIO Project.¹ Exc. 105.

However, Doug Gardner, the Legislative Affairs Agency's attorney, insisted that the motions approved by the Legislative Council "contemplate a final contract that is below [fair market value]" as Mr. McClintock wrote in another July 12, 2013 e-mail:

The Initial conversation with Gardner was a little rocky. Although his earlier tone a few weeks ago seemed to be more interested In addressing solutions to the contracting issues, today he was quite dug In with his theory that the motions contemplate a final contract that is 10% below FMV and a deal that can entirely be justified by section 083. He seems to have blown right past his concerns-shared a few weeks ago about how to do a material modification under section 083 and discounted the value of a section 080 approval by the legislature. I think john and I fundamentally are not confident that the entire deal can be done under section 083 with the material modification as well.

Exc. 106.

Mr. Pfeffer forwarded this e-mail to Rep. Hawker's private e-mail account, to which Rep. Hawker wrote, "Crap. I need to get back and deal with him again. Double crap. I hate lawyers." Exc. 106.

The next day, July 13, 2013, Mr. John Steiner, Pfeffer Development's attorney, expanded on Mr. McClintock's report of their meeting with Mr. Gardner, including that the deal was not conceived as being 10% under market rent as required by AS 36.30.083(a) and that the project would not qualify under AS 36.30.083(a) as an extension because of the enlargement to the adjoining property. Exc. 108-109. Mr. Steiner also reported that Mr. Gardner believed that the plan to extend "as-is" for at least

¹ The attachment was omitted from 716 LLC's production. Exc. 72, n.22.

10% below market rent and then enter into a material modification under the recently changed legislative procurement code would be seen as disingenuous and contrary to the action of the Legislative Council at its June 7, 2013 meeting. Exc. 109. Mr. Steiner also reported that Mr. Gardner was not keen to get crosswise with Rep. Hawker. Exc. 109.

Then, Mr. Pfeffer forwards this e-mail exchange to Rep. Hawker, telling Rep. Hawker that he thinks Gardner, who as counsel for the Legislative Affairs Agency is Rep. Hawker's lawyer in the matter, "is just flat out wrong," and that he thinks Gardner "needs to be brought along other ways." Exc. 108.

On July 25, 2013, Mr. Pfeffer e-mails Rep. Hawker a LIO Project Procurement Analysis, with the warning, "I wouldn't share this with anyone yet, we will scrub the author references if you do want to share it." Exc. 111.

On August 8, 2013, after the rent to which Rep. Hawker had agreed emerged, Pamela Varni, Executive Director of the Legislative Affairs e-mailed Rep. Hawker with her comments, including an analysis of proposed replacements for the Anchorage Legislative Information Office previously rejected by the Legislative Council, all of which were for much less money, as well as a schedule of Executive Branch Office leases. Exc. 113-116. In her analysis Ms. Varni points out that with the figures presented so far, she estimated the cost to be over \$5.00 per square foot, which would make it the most expensive lease by far ever for the State of Alaska. Exc. 114. She also notes that the Legislative Affairs Agency's Fairbanks Class A rental space leasehold improvement costs were \$62.50 per square foot, while the proposal was for \$120 per square foot, asking, "What is the justification for the disparity." Exc. 115.

This e-mail was first forwarded by Rep. Hawker from his Legislative e-mail account to his private account and then forwarded to Mr. Pfeffer from his private e-mail account that same day. Exc. 142. Mr. Pfeffer responded by writing he would produce a rebuttal and if "Doc" at the Alaska Housing Finance Corporation agrees, AHFC can produce the memo to dispute Varni. Exc. 142. The next day, August 9, 2013, Mr. Pfeffer e-mailed Rep. Hawker a draft of a response to Ms. Varni's analysis, stating, "Obviously please do not forward this email." Exc. 144.

On August 25, 2013, Rep. Hawker e-mailed to Mr. Pfeffer that, "I don't see anything that Pam or Gardner can do now to derail this Not that they will not try." Exc. 145.

On September 6, 2013, in response to an e-mail from Mr. Gardner, Rep. Hawker writes to Mr. McClintock and Mr. Pfeffer, "How are we doing with Gardner? This note makes me worry a bit. Do we need to plan another sit down?" Exc. 146. Mr. Pfeffer responds, "Standby on this Mike. I'm working it." Exc. 146.

Just under two weeks later, on September 13, 2013, the LIO Project Lease was signed, putatively complying with (1) AS 36.30.083(a) allowing no bid extensions so long as the rent was at least 10% below market, and (2) the revised Legislative Procurement Rules allowing for a "material modification" of an existing lease without going out to public bid. Exc. 178-186.

The LIO Project Lease, was, in fact, far above market rent, providing for payments totaling over \$20 million above that allowed under AS 36.30.083(a). Exc. 35.

Upon filing the Complaint on March 31, 2015, Count One of which sought a declaratory judgment that the LIO Project Lease was illegal because it neither extended a lease, nor was at least 10% below market rent, Exc. 4, Alaska Building, Inc., e-mailed the Alaska Attorney General and the Executive Director of the Legislative Affairs Agency, attaching a copy, noting that the agreement was illegal under AS 36.30.083(a) because it was neither a lease extension nor 10 percent below the market rental value, and expressing the hope that they would therefore support invalidation of the agreement. Exc. 21.

On May 1, 2015, Alaska Building, Inc., wrote the Governor an open letter urging him to veto the appropriation to pay the rent for the illegal sole source lease, stating that the plaintiff should not have to bear the risk of bringing the claim to address the blatant corruption. Exc. 28-29.

The claim for 10% of any savings from a declaration that the lease was illegal was to counterbalance the risk of a substantial attorney's fee award against the plaintiff, as plaintiff's president explained in his deposition:

Q. . . . What is the basis for claiming an entitlement to 10 percent of the savings?

A. I think that it's -- it's a way to make real the citizen taxpayers' right to bring actions on behalf of the government to stop government -- illegal government action.

What we had -- from about 1974 through 1998, the Alaska Supreme Court had established what's called a public interest exception to Civil Rule 82, providing that public interest litigants that were truly suing on behalf of the public were not subjected to having attorneys' fees against them and would have -- if they prevailed, would have -- be awarded full attorneys' fees.

So there wasn't really -- if they could establish that they were public interest litigants, they wouldn't really face the risk of having attorneys' fees awarded against them.

In 2003, the Alaska legislature passed a statute that changed that, except with respect to constitutional claims, basically because they were tired of paying attorneys' fees in all these cases where the government was found to have acted illegally.

And so now you have a situation where anybody trying to bring such a suit faces potentially ruinous attorneys' fees if they don't prevail, or certainly large attorneys' fees if they don't prevail. And that, in my -- my sense of it, has essentially virtually dried up public interest litigation, and so now the government pretty much has free rein to act illegally without any kind of check through this public interest litigation.

And so by -- in these types of cases, where a big, you know, savings or recovery on behalf of the government is achieved, this is a way to really make real the citizens' rights to sue to redress illegal government action.

Exc. 78-79.

VIII. ARGUMENT

A. Summary of Argument

In granting the Legislative Affairs Agency's Rule 11 motion, the Superior Court merely stated that the claim for 10% of the savings was frivolous, without any explanation of how it arrived at this conclusion. This is insufficient. *Luedtke v. Nabors Alaska Drilling, Inc.*, 834 P.2d 1220, 1227 (Alaska 1992).

Most importantly, Alaska Building, Inc.'s claim of 10% of savings to the state from having the LIO Project Lease declared illegal was a nonfrivolous argument for establishing new law, which is not a violation of Civil Rule 11. The unique development of Alaska law, resulting in the imposition of substantial attorney's fees against an unsuccessful litigant attempting to hold the government accountable for illegal actions

has been so chilling public interest litigation has all but disappeared in Alaska. This has left government wrongdoing in Alaska essentially unchallenged in the courts. The 10% of savings claim would have addressed this problem, albeit only in the circumstances where such savings occur.

B. The Superior Court Erred by Granting the Rule 11 Motion

(1) Standard of Review

Where sanctions are to be imposed under Civil Rule 11 the trial court should make a clear record concerning the reason for imposing the particular sanction and the authority relied upon to do so. *Luedtke*, 834 P.2d at 1227.

This Court has held it reviews an award of attorney's fees for abuse of discretion, but whether the superior court applied the appropriate legal standard presents a question of law that this Court reviews *de novo*. *Limeres v. Limeres*, 367 P.3d 683, 686-687 (Alaska 2016). The Superior Court's has discretion to deny Rule 11 sanctions even if a violation is made out. *Rude v. Cook Inlet Region, Inc.*, 322 P.3d 853, 860 (Alaska 2014). This case presents the opposite situation with the sole question being whether the claim for 10% of savings was frivolous. It is respectfully suggested that whether a claim is frivolous is a legal question this Court should review *de novo*.

(2) The Superior Court Failed to Make a Clear Record Concerning the Reasons and Authority for finding Alaska Building, Inc., Violated Rule 11.

The entirety of the Superior Court's order regarding a Civil Rule 11 violation was:

The Court also finds that Plaintiff's request for relief in the form of 10% of the alleged savings to the LAA for lease invalidation was frivolous and hereby GRANTS LAA's Motion for Rule 11 Attorneys' Fees.

Exc. 317.

In *Luedtke*, citing *Esch v. Superior Court*, 577 P.2d 1039, 1043 (Alaska 1978),

this Court held with respect to Civil Rule 11:

"[W]here sanctions are to be imposed, courts should, as a matter of sound practice, make a clear record concerning the reason for imposing the particular sanction and the authority relied upon to do so. Failure to do so may require a reversal and remand for entry of such findings."

577 P.2d at 1227.

The Superior Court failed to make any record concerning the reason nor identify any authority for its finding that Alaska Building, Inc., violated Rule 11, other than merely stating that Alaska Building, Inc.'s claim for 10% of the savings from the court declaring the LIO Project Lease illegal was frivolous. It is respectfully suggested that this is insufficient.

However, rather than remand, as in *Luedtke*, 577 P.2d at 1228, it is respectfully suggested the Civil Rule 11 Order should be reversed because the record does not support a finding that Rule 11 had been violated. In other words, the claim for 10% of savings was not frivolous

(3) The 10% of Savings Claim Was Not Frivolous

Alaska Building, Inc.'s claim for 10% of the savings to the Legislative Affairs Agency as a result of the invalidation of the LIO Project Lease was a serious attempt to make meaningful the right of citizen-taxpayers to seek judicial redress of illegal governmental action.² As a consequence of the unique development of Alaska law, both by statute and judicially, citizens' and taxpayers' right to bring cases to redress illegal government action has become a hollow paean. More particularly, the now standard imposition of attorney's fees against such a plaintiff who does not prevail has chilled this important check against governmental misdeeds almost out of existence. Allowing a 10% of savings claim could at least ameliorate this in situations in which such a recovery might be possible.

Prior to the enactment of HB145/Ch. 86 SLA 2003 by the Alaska Legislature, codified at AS 09.60.010(b)&(e) (HB 145), this Court had created a public interest exception to Civil Rule 82 that allowed plaintiffs truly bringing actions in the public interest to be protected from attorney fee awards against them and full, reasonable attorney's fees if they prevailed.³ This enabled civic minded people to hold the

² Neither of the defendants below, appellees here, appealed the Superior Court's judgment declaring the LIO Project Lease illegal and invalid, Exc. 230, and, as a result, Alaska Building, Inc., did not cross-appeal the dismissal of its 10% of savings claim.

³ *Gilbert v. State*, 526 P.2d 1131 (Alaska 1974); *Anchorage v. McCabe*, 568 P.2d 986 (Alaska 1977); *Kenai Lumber Co. v. LeResche*, 646 P.2d 215 (Alaska 1982); and *Dansereau v. Ulmer*, 955 P.2d 916 (Alaska 1998).

government accountable judicially for disobeying the law and there was a fair amount of such litigation.

However, in response to the many times the State was found in violation of law and the consequent awarding of full attorney's fees to the citizens bringing these lawsuits, through HB 145, the Alaska Legislature abrogated this Court's judicially created public interest litigant exception to Civil Rule 82 except with respect to litigation to enforce constitutional rights. This was upheld in *Alaska v. Native Village of Nunapitchuk*, 156 P.3d 389 (Alaska 2007). Most public interest litigation has disappeared as a result. The risk of a large attorney's fee award against such a plaintiff has simply made the potential financial cost of a public interest lawsuit too great. *Alaska Conservation Foundation v. Pebble Limited Partnership*, 350 P.3d 273, 285 (Alaska 2015), describes the history and abrogation of the public interest exception to Civil Rule 82. The large attorney fee award there was vacated because the underlying decision was reversed and therefore this Court did not reach the issue of the extent to which this abrogation impermissibly infringes upon the constitutional right of access to the courts.

The problem of substantial attorney's fees awards under Civil Rule 82 chilling legitimate challenges to illegal government action is exacerbated by the abusive use of Offers of Judgment under Civil Rule 68 whereby the State threatens to seek as much as 75% of its attorney's fees against a plaintiff who does not achieve a judgment within at

least 5 or 10% of the offer.⁴ At the same time the Legislature has successfully chilled public minded citizens from bringing public interest litigation to challenge illegal government action, Alaska has had rampant corruption, of which the LIO Project Lease at issue here is an example, providing for well over \$20 million more than allowed under AS 236.30.083(a) to be paid to 716 West Fourth Avenue LLC. Exc. 35.

Under these circumstances, approval of the modest 10% of savings claim made by Alaska Building, Inc.,⁵ is something the judiciary could do to address such corruption and the chilling of public interest litigation as a result of the Legislature's abrogation of this Court's public interest litigant exception to Civil Rule 82. Such a judicially created recovery would not solve all of the problems created by the legislative abrogation of the public interest litigant exception to Civil Rule 82, but it would address some of it.

While Alaska Building, Inc., does not characterize the 10% of savings claim a *qui tam* remedy, the Superior Court characterized it as such. In any event, this Court has authority to create such a remedy. *Qui Tam* recoveries were judicially created under the common law in England starting in the 14th century, but in the United States they have heretofore only been created by statute. *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 775, 120 S. Ct. 1858, 1863 (2000). However, appellant is unaware of any decisions to the effect that the judiciary in the United States

⁴ In fact, the Legislative Affairs Agency served a \$1 offer of judgment on Alaska Building, Inc., in just such an attempt to intimidate Alaska Building, Inc. R. 2562.

does not have the power to create such a remedy to address corruption. Appellant respectfully suggests that Alaska's attorney fee shifting under Civil Rule 82 and the Legislature's abrogation of the Public Interest Litigant exception created by this Court has created such a problem that in an appropriate case, this Court could and should address the problem, such as by allowing a 10% of savings claim.

This Court might have rejected the 10% of savings claim if the claim had come to it in this case, but this Court also might have allowed the claim. It is respectfully suggested the 10% of savings claim was not frivolous.

IX. CONCLUSION

For the foregoing reasons, Appellant Alaska Building, Inc., respectfully requests this Court to **Reverse** and **Vacate**, that part of the Superior Court's June 23, 2016, Order Granting Legislative Affairs Agency's Motion for Rules 11 and 82 Attorneys' Fees, finding that Alaska Building, Inc., violated Civil Rule 11.

(Continued footnote)-----
⁵ The federal False Claims Act, 31 USC §3729, *et seq.*, grants successful *qui tam* plaintiffs between 15 and 25% if the government intervenes and takes over the case and 25-30% if not. 31 USC §3730(d).