

IN THE SUPREME COURT OF THE STATE OF ALASKA

GOVERNOR DUNLEAVY, MICHAEL)
JOHNSON, and KELLY TSHIBAKA)

Appellants,)

v.)

COALITION FOR EDUCATION EQUITY,)

Appellee.)

) Supreme Court No. S-17785

Trial Court Case No. 1JU-19-00753 CI

APPEAL FROM THE SUPERIOR COURT
FIRST JUDICIAL DISTRICT AT JUNEAU
THE HONORABLE DANIEL J. SCHALLY, PRESIDING

APPELLEE COALITION FOR EDUCATION EQUITY'S BRIEF

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AUTHORITIES PRINCIPALLY RELIED UPON

ALASKA STATUTE

AS 09.60.010, provides:

(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.

ISSUES PRESENTED

Issue One: The Coalition for Education Equity is an Alaska non-profit corporation that champions a quality, equitable, and adequate public education for every Alaska child. Does the Coalition for Education Equity have “sufficient economic interest,” such that it is prevented from recovering attorneys’ fees as a prevailing constitutional litigant simply because its members are school districts who oversee the application of the predetermined appropriation to the school children of Alaska?

Issue Two: The Alaska Supreme Court has held that a constitutional claimant is entitled to recover fees that are “devoted in any reasonably connected way to the constitutional claims on which it prevailed.”¹ The Coalition for Education Equity’s claims that (1) the Governor violated the Education Clause by failing to execute or disburse appropriated funds and (2) that the Education Clause provided authority for the Legislature’s appropriations are two sides of the same coin and intertwined with each other. Should this Court retreat from its precedent to exclude from constitutional litigant attorney fee recovery all fees associated with claims that themselves are not independently successful, regardless of the interconnectivity of the arguments and research to the prevailing claims?

INTRODUCTION

This appeal turns on the statutory meaning of “sufficient economic incentive” within the Alaska costs and attorney fee statute.² It is undisputed that the Coalition for

¹ *Meyer v. Stand for Salmon*, 450 P.3d 689, 690–91 (Alaska 2019).

² Alaska Stat. § 09.60.010.

Education Equity (“CEE”) advanced only constitutional claims, which would entitle it to attorney fees *unless* it had “sufficient economic incentive to bring the suit, regardless of the constitutional claims involved.”³ Despite the Governor’s attempts to impute a direct economic benefit upon CEE based upon the sheer amount of the legislative appropriation underlying the constitutional policy issue,⁴ and CEE being comprised of school district members that would serve to administer the appropriation,⁵ the superior court appropriately applied this Court’s precedent in granting CEE’s Motion for Attorneys’ Fees as a prevailing constitutional litigant. [Exc. 95] Additionally, because all of CEE’s legal fees were devoted in a “reasonably connected way” to the constitutional claim on which it prevailed, the superior court appropriately awarded all the reasonable fees requested. [Exc. 95]

Lastly, the Governor’s continued qualm with the superior court’s decision to permit intervention ⁶ as a right, or alternatively permissively [Exc. 50], is not appropriately before this Court in this appeal and should not serve to distract from the resolution of the scope of the statutory language. CEE had a right to intervene [Exc. 50], succeeded on its constitutional claim [Exc. 51-52], and, per the mandatory language of the statute,⁷ was awarded reasonable attorney fees. [Exc. 65-70, 95] The Governor

³ Alaska Stat. § 09.60.010. *See also* Appellant Br. at 6.

⁴ Appellant Br. at 11-12.

⁵ *Id.* at 10.

⁶ *Id.* at 13-15 (continuing to argue the necessity or appropriateness of intervention).

⁷ Alaska Stat. § 09.60.010(c)(1) (“[T]he court (1) *shall* award . . . full reasonable attorney fees and costs to a claimant”)(emphasis added).

has appealed issues related to the fees under Alaska Statute § 09.60.010, not the superior court's order granting intervention.⁸

For the foregoing reasons, the judgment of the superior court should be affirmed.

STATEMENT OF THE CASE

On May 3, 2018, Governor Bill Walker signed SCS HB 287 (FIN) into law as Ch. 6, SLA 2018.⁹ Chapter 6, SLA 2018 appropriated funding for public school districts in the state, student transportation, and a one-time supplemental grant for public schools, for the fiscal year 2020.¹⁰ Governor Dunleavy initially refused to execute any of these appropriations, contending that they unconstitutionally “forward fund” public education for the 2019–2020 school year.¹¹ The Alaska Legislative Council, on behalf of the Legislature, then filed a complaint in the superior court, seeking, among other things, a declaration that the governor had violated his duty to faithfully execute the laws and had infringed the legislature's power of appropriation and duty to maintain Alaska's system of public education. [R. 684] The Alaska Legislative Council and the Governor stipulated that, while the lawsuit was pending, the Governor would execute monthly disbursements of the state aid and transportation components of the appropriations made in Ch. 6, SLA 2018. [R. 172-74; Exc. 30-31] The stipulation did not provide for disbursement of the additional \$30 million in supplemental school district grants for

⁸ Appellant Br. at 1.

⁹ Ch. 6, § 4 SLA 2018 (approved by governor May 3, 2018).

¹⁰ *Id.*

¹¹ *See* Alaska A.G. Op., 2019 WL 2112834 (May 8, 2019).

FY 2020 also enacted in Ch. 6, SLA 2018. [R. 172-74; Exc. 30-31]

CEE moved to intervene to advance its interest and those of its members and all Alaska school children in contesting the Governor's conduct, advancing two constitutional claims: (1) the Governor violated the Constitution by failing to faithfully execute the appropriated funds, and (2) the Governor violated the Education Clause of the Alaska Constitution by failing to provide a constitutionally adequate public education. [Exc. 1-14] The superior court granted in part CEE's motion to intervene as a matter of right, or alternatively permissively. [Exc. 50] Thereafter, the superior court ruled in favor of CEE's motion for summary judgment, determining that forward appropriations are constitutional and should have been executed by the Governor. [Exc. 51-52]. CEE then moved for attorney's fees and costs as a constitutional litigant under AS 09.60.010. [Exc. 53-70] After considering the motion and supporting affidavits, response, and reply, and for the reasons set out in CEE's briefing, the superior court granted CEE's motion and awarded all fees requested. [R. 638-667; Exc. 95] This appeal followed.

STANDARD OF REVIEW

“Interpretation of AS 09.60.010 is a question of law to which [the Court is to] apply [its]['] independent judgment. [The Court is to] look to the meaning of the language, the legislative history, and the purpose of the statute in question and adopt the rule of law that is most persuasive in light of precedent, reason, and policy.”¹²

¹² *Alaska Miners Ass'n v. Holman*, 397 P.3d 312, 315 (Alaska 2017) (internal quotations omitted) (quoting *Alaska Conservation Found. v. Pebble Ltd. P'ship*, 350 P.3d 273, 279 (Alaska 2015)). See also *Dep't of Health & Soc. Servs. v. Planned Parenthood of Great Nw.*, 448 P.3d 261, 262-63 (Alaska 2019) (Winfrey, J., concurring) (“In my

ARGUMENT

Contrary to the Governor's opening contention, this case is not simply about money.¹³ This case is about protecting the *legislative practice* of forward funding in order to permit budget predictability and staffing retention, which benefit the school children of Alaska. [Exc. 9, 54] While money is involved in the practical application of the constitutional challenge, the primary purpose of the lawsuit is not a direct economic recovery for CEE.¹⁴

Alaska's constitutional litigant rule provides an award of full fees for those who successfully prosecute constitutional claims against the State of Alaska. The statute, AS 09.60.010, provides in pertinent part:

(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;

view a sufficient economic incentive determination is one of law, generally made on indisputable facts. ... [A]t least in connection with appellate review of trial court determinations, we do not want different results in similar litigation contours simply due to the deferential standard of review we normally afford discretionary determinations. This seems to be the type of determination that an appellate court should control and continuously refine through its independent judgment. Thus even our own determination of sufficient economic incentive to bring or defend an appeal, regardless of the constitutional nature of the claim on appeal, should consistently be rendered as a legal conclusion rather than as an ad hoc discretionary determination.”) (internal footnotes omitted).

¹³ Appellant Br. at 9.

¹⁴ See *Alaska Conservation Found.*, 350 P.3d at 283-84 (discussing cases where the financial interest of association and organization members were not imputed to the entity and did not amount to the primary purpose of the litigation).

...

(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.

(emphasis added). Alaska Statute 09.60.010 mandates that a constitutional claimant recover “full reasonable attorney fees,” for “that portion of the services” devoted to constitutional issues on which the claimant prevailed.¹⁵ The Governor does not dispute that CEE advanced only constitutional issues. Instead, in the present appeal, the Governor challenges only (1) whether CEE had a sufficient economic interest to bring suit, such that the exclusion for cost and attorney fee recovery under Alaska Statute 09.60.010(d)(2) is triggered, and (2) whether reasonable fees connected with related, but non-prevailing claims are recoverable by CEE.¹⁶

I. CEE DID NOT HAVE SUFFICIENT ECONOMIC INCENTIVE

As an initial matter, the Governor cites, in piecemeal, arguments advanced by CEE in its Motion to Intervene without providing the full context of the interests advanced, including that “CEE has a direct interest in this litigation because the *Governor's actions* will disrupt the funding and quality of public education. . . .” [Exc. 1] Simply because funding is impacted by the constitutional issue does not equate to CEE

¹⁵ *Meyer v. Stand for Salmon*, 450 P.3d 689, 690 (Alaska 2019).

¹⁶ Appellant Br. at 1 (issues restated).

itself having a direct economic incentive. As this brief will articulate below, having any financial interest is not the standard;¹⁷ nor has this Court attributed a “sufficient economic incentive” to an entity when its members or constituents alone may derive some financial benefit.¹⁸ Additionally, the Governor has failed to provide any authority to indicate that the standard for a direct, sufficient interest under Civil Rule 24(a) is synonymous with a sufficient economic incentive under AS 09.60.010.

A. Benefits of Members are Not Imputed

The Governor spends the majority of his brief citing to cases where the plaintiffs themselves sought to gain some benefit.¹⁹ In so doing, he contends that CEE had sufficient economic incentive to intervene because its *members* include school districts funded, in part, through the appropriations underlying this litigation.²⁰ Each of the two cases discussed by the Governor in his brief as being analogous to the facts of this case—*Matanuska-Susitna Borough School District v. State*²¹ and *City of Kotzebue v. State Department of Corrections*²²—involve a plaintiff that stands to itself receive a financial benefit from the litigation. Those cases are not analogous to the facts before this Court.

¹⁷ *City of Valdez v. Copper Valley Elec. Ass’n, Inc.*, 740 P.2d 462, 466 (Alaska 1987)(holding there was not a sufficient economic incentive to trigger statutory fee exception even though Copper Valley Electric Association, Inc. had “a good deal of self-interest at stake”).

¹⁸ *See supra* n.14.

¹⁹ Appellant Br. at 10-13.

²⁰ *Id.*

²¹ *Matanuska-Susitna Borough School Dist. v. State*, 931 P.2d 391, 391 (Alaska 1997).

²² *City of Kotzebue v. State, Dept. of Corr.*, 166 P.3d 37, 37 (Alaska 2007).

CEE (unlike its members) is not entitled to any portion of the appropriation that underlies the issue of forward funding. [Exc. 54-55]

In an attempt to muddle the issue of direct economic incentive, the Governor’s brief takes aim at the intended use of the economic benefit or nonprofit status of the movant.²³ While neither the status of the entity nor the entity’s intended use of *its* benefit in and of itself matters to the analysis, it does matter that the entity pursuing the litigation actually be the entity that would receive the direct financial benefit.²⁴ That is not the present situation; CEE will not receive any amount of the appropriated funds [Exc. 54-55], and any appropriated funds received by CEE’s member school districts is passed down to the benefit of the school children, not retained for the school districts’ own benefit.²⁵ The Court should not be distracted by that useless line of briefing.

This Court has “never required that parties seeking constitutional-claimant status ... be completely disinterested in the case.”²⁶ Accordingly, it has admonished trial courts time and time again that, in order to deny a party constitutional litigant status, it must find the party has a “direct” financial stake in the outcome of the litigation: “We reiterate and emphasize—again—that direct economic benefit is needed for there to be ‘sufficient

²³ Appellant Br. at 12-13.

²⁴ See *Alaska Conservation Found. v. Pebble Ltd. P’ship*, 350 P.3d 273, 285 (Alaska 2015) (“We reiterate and emphasize the necessity of direct economic benefit from constitutional litigation for ‘sufficient economic incentive[.]’”).

²⁵ *City of Valdez v. Copper Valley Electric Association, Inc.*, 740 P.2d 462, 466 (Alaska 1987) (determining that the interest in effectuating policy outweighed the utility’s self-interest in the lawsuit where the benefit received from the lawsuit would flow down to the customers and not remain with the utility).

²⁶ *Alaska Miners Ass’n v. Holman*, 397 P.3d 312, 317 (Alaska 2017).

economic incentive to bring the action.”²⁷ Applying this standard, the Supreme Court has reversed the trial court’s “sufficient economic incentive” finding where it was “unclear whether the individual plaintiffs even would have derived *any* economic benefit had they prevailed[.]”²⁸ CEE falls within this category. As attested to by CEE’s Executive Director, CEE had no financial stake in the outcome of the litigation and does not stand to derive any economic benefit whatsoever. [Exc. 54-55] The appropriations that the Governor was constitutionally required to disburse to school districts, including a number of CEE member school districts, will not enrich CEE. Instead, the beneficiaries of those funds will be Alaska school children.

Equally as misguided is the Governor’s focus on the economic interests of CEE’s school district members, rather than CEE itself. The Supreme Court has repeatedly declined to impute the interests of non-parties when evaluating a constitutional claimant’s economic incentives. This is so even when the non-party had a clear economic stake in the litigation and was funding the lawsuit. For example, non-profit plaintiffs challenging Pebble Mine permits in *Alaska Conservation Foundation v. Pebble Limited Partnership* were constitutional litigants, even though commercial fishing interests may have been funding the litigation.²⁹ Similarly, industry associations challenging an anti-Pebble ballot initiative in *Alaska Miners Association v. Holman* did not forfeit constitutional litigant

²⁷ *Id.* at 317; *see also Alaska Conservation Found.*, 350 P.3d at 285 (“We reiterate and emphasize the necessity of direct economic benefit from constitutional litigation for ‘sufficient economic incentive[.]’”).

²⁸ *Matanuska-Susitna Borough School Dist. v. State*, 931 P.2d 391, 404 (Alaska 1997) (emphasis added).

²⁹ *Alaska Conservation Found.*, 350 P.3d at 285.

status just because their mining members stood to benefit from the proposed mine and Pebble was funding the litigation.³⁰ And a non-profit corporation challenging motor restrictions on the Kenai River in *Citizens for the Pres. of Kenai River, Inc. v. Sheffield* did not have sufficient economic incentive to sue, even though the restrictions would cost one of its members up to \$30,000 annually.³¹ Accordingly, the fact that CEE's member school districts were some of the intended recipients of the appropriations underlying this litigation does not preclude a finding that CEE is a constitutional litigant.

Even if the financial interests of CEE's school district members could be imputed to CEE for purposes of AS 09.60.010, CEE would still be entitled to constitutional litigant status because any benefit held by the school district is to be administered for the benefit of the school children. In such circumstances, this Court has held that a plaintiff does not have a sufficient economic incentive to sue. In *City of Valdez v. Copper Valley Electric Association, Inc.*,³² the Copper Valley Electric Association ("CVEA") sued the City of Valdez, alleging a "wrongful withholding of payments which CVEA is allegedly entitled to receive directly from the state, and which should have been credited on the customer's bill, thus lowering the cost of electricity to the citizens of Valdez."³³ CVEA was therefore suing to recover direct payments from the City. This Court nevertheless

³⁰ *Holman*, 397 P.3d at 316 ("[W]e have never actually held that a third party could be the real party in interest for the purposes of this statute.").

³¹ *Citizens for the Pres. of Kenai River, Inc. v. Sheffield*, 758 P.2d 624, 627 (Alaska 1988).

³² *City of Valdez v. Copper Valley Electric Association, Inc.*, 740 P.2d 462 (Alaska 1987).

³³ *Id.* at 466.

held that CVEA did not have sufficient economic incentive to sue and was entitled to public interest litigant status. Even though CVEA had “a good deal of self-interest at stake,” it was suing to effectuate public policy and would be passing on any benefits it received to its customers.³⁴ This case is analogous. Like the end-user customers in *City of Valdez*, students are the ultimate beneficiaries of the appropriations. And, like CVEA, CEE was not suing for economic gain, but to effectuate public policy for the benefit of Alaskan children. *City of Valdez* therefore provides ample authority for finding CEE to be a constitutional litigant in this case.

B. The Governor’s Primary Cases are Not Analogous

The Governor’s reliance on *Matanuska-Susitna Borough School Dist. v. State* (“*MSBSD*”)³⁵ is misplaced. *MSBSD* is distinguishable on both the law and the facts. First, *MSBSD* was decided under the public interest litigant exception to Rule 82, prior to the enactment of AS 09.60.010. At that time, the Supreme Court reviewed public interest litigant determinations only for abuse of discretion. Because the Mat-Su Borough School District had lost on this issue in the trial court, the Supreme Court imposed a “heavy burden of persuasion” to show an abuse of discretion on appeal.³⁶ Thus, because of the procedural posture of that case and the trial court’s prior determination, the school district was presumptively *not* a public interest claimant. No such presumption applies here, and, accordingly, CEE does not bear the “heavy burden of persuasion” that the Supreme Court

³⁴ *Id.*

³⁵ *Matanuska-Susitna Borough School Dist. v. State*, 931 P.2d 391 (Alaska 1997).

³⁶ *Id.* at 402.

imposed on the school district in *MSBSD*. Because *MSBSD* was decided under an abuse of discretion standard, it does not control here. *MSBSD* is therefore distinguishable on the law.

MSBSD is also distinguishable on the facts. In *MSBSD*, a school district itself was one of the plaintiffs, and “stood to gain from bringing suit, either by increased state funding or decreased taxes.”³⁷ Neither of those things is true in this case. Here, CEE, not any school district, is the constitutional claimant, and CEE stands to gain no economic benefit from the suit at all. Moreover, even if the financial benefit that school districts stand to gain from this lawsuit could be imputed to CEE, those benefits are far less direct than the “increased state funding or decreased taxes” at issue in *MSBSD*. In *MSBSD*, the *amount* of state aid to municipal school districts was directly at issue, and the district and borough stood to gain millions of dollars.³⁸ By contrast, the issues in this case did not involve the amount of state or local aid that school districts would ultimately receive, only whether the Legislature could constitutionally appropriate State education funds on a multi-year basis.

Indeed, before this lawsuit was filed, Governor Dunleavy had already promised to sign the same appropriation amounts into law if the Legislature passed them in a new bill. [Exc. 88] So, according to the Governor, school funding was never actually in jeopardy. Thus, the litigation did not involve the prospect of “future gains or losses” to school districts. Instead, the primary issue was whether the Alaska Constitution allowed the

³⁷ *Id.* at 403.

³⁸ *Id.*

Legislature to provide budgeting certainty by appropriating education funds in advance.

The Governor’s reliance on *City of Kotzebue v. State, Department of Corrections* (“*Kotzebue*”)³⁹ is similarly flawed. Just as with *MSBSD*, *Kotzebue* was decided prior to the enactment of AS 09.60.010 and involved a recovery that would go directly to the plaintiff advancing the constitutional claim. In *Kotzebue*, the City sued the State Department of Corrections looking to recoup the expenses it incurred in housing criminals before they were transferred into state custody.⁴⁰ While the issues advanced were constitutional, the City itself had a direct economic incentive to bring the suit—repayment for services provided. Unlike the present facts where CEE itself will not be entitled to any portion of the appropriated funds, the City of Kotzebue was seeking direct repayment and is not instructive here.

For all of the foregoing reasons, the Governor’s contention that CEE had a sufficient economic incentive is without merit, and CEE is entitled to constitutional claimant status under AS 09.60.010.

C. The Statute Mandates the Award of Full Fees

The language of the statute is not discretionary. It mandates that “the court [] *shall* award . . . full reasonable attorney fees and costs to a claimant, who, . . . has prevailed in asserting the right[.]”⁴¹ If the claims asserted were constitutional claims, the asserting party prevailed, and that prevailing party did not have a “sufficient economic incentive to

³⁹ *City of Kotzebue v. State, Dept. of Corr.*, 166 P.3d 37, 37 (Alaska 2007).

⁴⁰ *Id.* at 38.

⁴¹ AS 09.60.010(c)(1) (emphasis added).

bring the suit,” AS 09.60.010 requires courts to award recovery of the full amount of reasonable fees attributable to the prevailing claims.⁴² Despite this mandatory language, the Governor attempts to re-litigate the appropriateness of CEE’s intervention under the guise of statutory intent,⁴³ and urges this Court to determine that fees are not warranted because CEE’s “participation was not necessary” and that adequate representation of the interests was already present.⁴⁴ This Court should look to the language of the statute and not allow the Governor to collaterally attack the superior court’s Order granting CEE’s Motion to Intervene.

II. ALL OF CEE’S FEES WERE DEVOTED IN A “REASONABLY CONNECTED WAY” TO THE CONSTITUTIONAL CLAIMS ON WHICH IT PREVAILED

The Governor contends that CEE is not entitled to recover any fees related to its claim that the Governor violated the Education Clause because the court did not permit intervention on that claim.⁴⁵ But this is an unduly narrow construction of the fees recoverable under AS 09.60.010. This Court has held that a constitutional claimant is entitled to recover fees that are “devoted in any reasonably connected way to the constitutional claims on which it prevailed.”⁴⁶ Fees are excluded only if they are

⁴² *See id.* at (c)(2).

⁴³ Appellant Br. at 13 (“[T]he purposes of the statute are not served by awarding full fees for its unnecessary intervention in this case.”).

⁴⁴ *Id.* at 14.

⁴⁵ *Id.* at 15-16.

⁴⁶ *Meyer v. Stand for Salmon*, 450 P.3d 689, 690–91 (Alaska 2019).

“devoted *solely* to...constitutional claims” on which the party did not prevail.⁴⁷ In this case, even the fees that CEE incurred in support of its claim that the Governor violated the Education Clause were devoted in a “reasonably connected way” to its prevailing argument that the Education Clause provided authority for the Legislature’s appropriations. They are opposite sides of the same coin, and Count I of CEE’s complaint presented them in conjunction with one another. [Exc. 18-19] Indeed, CEE asked the Court to declare that the Legislature had the authority to forward fund public education, and that the Governor could not interfere with that funding, in the very same sentence. [Exc. 19] The Governor’s contention that CEE is required to back out any time its attorneys spent thinking solely about his affirmative duties under the Education Clause is therefore unworkably narrow and without merit. Such time would be *de minimis* in any event since, as the Governor points out, the Court precluded merits briefing on that issue. CEE’s arguments regarding the Governor’s violation of the Education Clause are contained in two paragraphs in its complaint [Exc. 19], and a single paragraph in its motion to intervene [Exc. 11-12], both of which are “reasonably connected” to the issues on which CEE ultimately prevailed. CEE is entitled to its full reasonable fees.⁴⁸

The Governor’s contention that CEE’s overarching Education Clause arguments were irrelevant is also incorrect. The Education Clause arguments in CEE’s briefing

⁴⁷ *Id.* at 691.

⁴⁸ Even if the Court accepts the Governor’s argument that CEE filed this lawsuit to obtain a financial benefit, CEE would still be entitled to a percentage of its fees under Alaska R. Civ. P. 82 and the issue of Rule 82 fees should be remanded to the superior court.

were necessary to distinguish and refute the Anti-Dedication Clause arguments advanced by the Governor. The Governor’s briefing took the position that education funding was irrelevant as to the dedicated funds argument it advanced. In other words, education funding had no special constitutional value for purposes of applying the dedicated funds clause and legal precedent. However, the premise of the Governor’s argument was not true. In *Myers v. Alaska Housing Finance Corporation*,⁴⁹ this Court recognized that the outcome of that case involved competing constitutional values between the prohibition on dedicated funds and the legislative appropriation power and the legislative power to manage state assets. In order to properly apply the balance between the competing constitutional values in the present case, the court needed to evaluate and consider the State’s constitutional obligations to adequately fund education and the State’s duty to establish a system of education open to all under the Education Clause. In *Myers*, this Court balanced the competing constitutional values in finding no violation of the dedicated funds clause. Without considering the State’s obligations and duties under the Education Clause, the lower court could not have properly applied the *Myers* holding. CEE had no choice but to fully brief the competing constitutional values under the Education Clause. Rather than being irrelevant, the fact that the forward funding in this case was necessary to avoid the disruption in school districts from the “pink slip” debacle justified the Legislature’s exercise of the appropriation power.

⁴⁹ *Myers v. Alaska Housing Finance Corporation*, 68 P.3d 386, 391 (Alaska 2003).

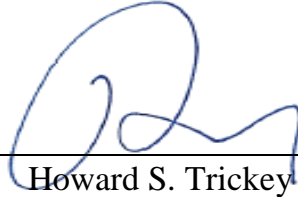
III. CONCLUSION

For all of the foregoing reasons, CEE is a constitutional litigant under AS 09.60.010 and is entitled to recover the reasonable fees it incurred to reverse the Governor's unconstitutional conduct, and, accordingly, the judgment of the Superior Court should be affirmed.

DATED at Anchorage, Alaska this 9th day of November, 2020.

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