THE SUPREME COURT OF THE STATE OF ALASKA

CRAIG PUDDICOMBE and JOHN DUNHAM, Appellants and Cross-Appellees, v. JOANNE CONNER FITZGERALD, MICHAEL A. CONNER, JAMES V. KRACKER, DALE N. FIDLER, Appellees and Cross-Appellants.	Supreme Court Nos. S-8342/8421 Superior Court No. 3PA-91-391 CI MEMORANDUM OPINION AND JUDGMENT* [No. 0930 - August 25, 1999]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Palmer, Brian C. Shortell, Judge.

Appearances: Patricia R. Hefferan, Noel H. Kopperud, Kopperud and Hefferan, Wasilla, for Appellants and Cross-Appellees. Joanne Fitzgerald, pro se, Wasilla. Michael Conner, pro se, Palmer. Erica Kracker, Kracker Law Office, Palmer, for Appellees and Cross-Appellants Kracker and Fidler.

Before: Matthews, Chief Justice, Eastaugh, Fabe, Bryner, and Carpeneti, Justices.

1. The superior court did not err in locating the public right-of-way along the route of Sumner's driveway. The Ninth Circuit's 1996 decision[1] vacating Shultz v. Department of the Army

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* Entered pursuant to Appellate Rule 214.

[1] Shultz v. Department of the Army (Shultz II), 96 F.3d 1222, 1223 (9th Cir. 1996).

(Shultz I)[2] does not affect the analysis or result reached in Fitzgerald v. Puddicombe.[3] As such, the superior court's decision to locate the right-of-way along the driveway was not erroneous because a Revised Statute (RS) 2477 right-of-way can be established along "a generally-followed route."[4]

The Department of Natural Resources's (DNR) administrative determination finding no RS 2477 grant across United States Survey (USS) 5265 does not change this result. In Dillingham Commercial Co. v. City of Dillingham,[5] we explained that there are two methods by which an RS 2477 right-of-way could be established:

> The operation of [RS 2477] is not obvious from its terms. Case law has made it clear that [RS 2477] is one-half of a grant -- an offer to dedicate. In order to complete the grant "there must be either [1] some positive act on the part of the appropriate public authorities of the state, clearly manifesting an intention to accept a grant, or [2] there must be public user for such a period of time and under such conditions as to prove that the grant has been accepted."[6]

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[2] 10 F.3d 649 (9th Cir. 1993).

[3] 918 P.2d 1017 (Alaska 1996).

[4] See id. at 1021-22.

[5] 705 P.2d 410, 413 (Alaska 1985).

[6] Id. at 413-14 (quoting Hamerly v. Denton, 359 P.2d 121, 123 (Alaska 1961)).

Under the second method, an RS 2477 grant comes into existence "automatically when a public highway [is] established across public lands in accordance with the law of the state."[7]

Using method one, DNR, an "appropriate public authorit[y] of the state," did not find an RS 2477 grant across USS 5265. But under method two, this court in Fitzgerald did.[8] The superior court on remand was bound by the Fitzgerald decision and was not free to reject or ignore it in favor of DNR's decision. Accordingly, the superior court did not err when it declined to locate the RS 2477 right-of-way in the location DNR selected.[9]

2. The superior court did not err in holding that the right-of-way should be 100 feet wide. The scope of an RS 2477 grant is subject to state law.[10] The superior court's reliance on AS

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[7] Standage Ventures, Inc. v. Arizona, 499 F.2d 248, 250 (9th Cir. 1974).

[8] See Fitzgerald, 918 P.2d at 1022 ("[W]e hold that there is a public right-of-way through USS 5265.").

[9] Our review of the record reveals that Puddicombe and Dunham did not present evidence before the superior court concerning the proper placement and exact location of the RS 2477 right-of-way across their property. Rather, their arguments before the superior court on remand were that the RS 2477 grant should not cross their property. But in Fitzgerald we decided that the grant did cross their property. 918 P.2d at 1022. Accordingly, the superior court did not err in not granting Puddicombe and Dunham a hearing on the issue of the location of the right-of-way. Cf. Smith v. State, CSED, 790 P.2d 1352, 1353 (Alaska 1990) ("A statutory right to a hearing does not require development of facts through an evidentiary hearing in the absence of a factual dispute.").

[10] See Sierra Club v. Hodel, 848 F.2d 1068, 1080-83 (10th Cir. 1988); State v. Alaska Land Title Ass'n, 667 P.2d 714, 722 (continued...)

19.10.015 to determine the scope was not erroneous. The statutory definition of "highway" includes "trail[s]."[11]

3. The superior court did not err in holding that the right-of-way could be used for "any purpose consistent with public travel." This conclusion is directly supported by our decision in Dillingham.[12]

4. The superior court abused its discretion in awarding Fitzgerald full attorney's fees as a public interest litigant. To qualify as a public interest litigant, a party must satisfy the following criteria: (1) the case is designed to effectuate strong public policies; (2) if the party succeeds, numerous people will receive benefits from the lawsuit; (3) only a private party could have been expected to bring suit; and (4) the purported public interest litigant would not have sufficient economic incentive to file suit even if the action involved only narrow issues lacking general importance.[13] The party claiming public interest litigant status carries the burden of satisfying all four criteria.[14]

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[10](...continued)
(Alaska 1983).

[11] AS 19.45.001(9).

[12] 705 P.2d at 415.

[13] See Anchorage Daily News v. Anchorage Sch. Dist., 803 P.2d 402, 404 (Alaska 1990).

[14] See Kachemak Bay Watch, Inc. v. Noah, 935 P.2d 816, 827 (Alaska 1997).

Fitzgerald did not satisfy this burden with regard to the fourth criterion. Fitzgerald acknowledges that several of her affirmative defenses, including "adverse possession" and "prescriptive right of access" involved her private interests. Had she prevailed on one of these private defenses, she would not have qualified as a public interest litigant. These initial affirmative defenses show that her motivation in this case was in good measure due to her desire to maintain her access to her mining claim. In Kachemak Bay Watch, we affirmed the trial court's denial of public interest status to litigants whose property values might have been affected by the lawsuit they filed.[15] Such an economic incentive related to property ownership is analogous to Fitzgerald's ownership of mining claims in Metal Creek.[16]

The superior court's award of full attorney's fees was also erroneous because it did not consider Puddicombe and Dunham's status in this case. In Moses v. McGarvey,[17] we stated that

> the cases discussing full fees on [the public interest] basis have involved public or governmental agencies and that in no case have full fees been assessed against an individual defendant on the public interest theory. It is entirely justifiable for a public or governmental agency to bear the full costs of litigating a public interest question because the public benefits. In cases involving the personal liability of an individual defendant, there is no such benefit conferred on the

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[15] 935 P.2d at 828.

[16] See 918 P.2d at 1018.

[17] 614 P.2d 1363 (Alaska 1980).

> defendant as a result of litigating a question of genuine public interest.[18]

This statement suggests that private defendants should not be subject to full fees under the public interest litigation doctrine. We adhere to this suggestion in this case. Accordingly, the award of full attorney's fees and costs to Fitzgerald is vacated and remanded to the trial court.[19]

5. Conner's, Kracker's and Fidler's cross-appeals for attorney's fees are without merit. Kracker and Fidler never went to trial in this case. And although Conner did participate in the first trial, he did not appeal the superior court's adverse ruling against him and Fitzgerald. Thus, neither Conner's nor Kracker and Fidler's efforts were contributory to Fitzgerald's success on appeal and on remand. For this reason, they are not entitled to fees or costs.

6. The superior court did not err when it denied Dunham an increased exemption under AS 09.38.050(b). The trial court correctly noted that the head of household exemption under AS 09.38.050(b) did not apply because Dunham lives alone and a household is "a group of persons dwelling together under the same roof."

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[18] 614 P.2d at 1369-70 (footnotes omitted).

[19] Because we vacate her award for attorney's fees and costs, Fitzgerald's claim that the superior court erred in not awarding her all of her requested costs is moot.

We AFFIRM the superior court's decision, with the exception of the award of full attorney's fees to Fitzgerald. On that issue, we VACATE the attorney's fees award and REMAND.