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UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

DAVIS WRIGHT TREMAINE
By _____

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

MATTHEW T. ARMSTRONG, *et al.*,
Plaintiffs,
vs.
UNITED STATES OF AMERICA and
VISIONS INTERNATIONAL, INC.,
Defendants.

CASE NO. A00-31 CV (JWS)
ORDER FROM CHAMBERS
[Re: Motions at dockets 82, 85, 88,
and 89]

VISIONS INTERNATIONAL, INC.
Third-Party Plaintiff,
vs.
UNITED STATES OF AMERICA,
Third-Party Defendant.

I. MOTIONS PRESENTED

At docket 82, defendant and third-party defendant United States filed a motion for summary judgment. At docket 85, plaintiffs Matthew T. Armstrong, *et al.* (the "Armstrongs") filed a motion to preclude reference to a standard of care contrary to that established by the Community Health Aide/Practitioner Manual (the "Manual"). At docket 88, the Armstrongs filed a motion for partial summary judgment on the "Good

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Samaritan" defense. At docket 89, the Armstrongs filed a motion for partial summary judgment on the allocation of fault to non-parties. All motions have been fully briefed. Oral argument was heard on March 28, 2003.

II. BACKGROUND

In the Summer of 1997, Matthew Armstrong ("Matthew") attended an outdoor camp operated by Visions International, Inc. ("Visions") at Mentasta, Alaska. While there, Matthew was afflicted with a seizure. A Community Health Aide, Nora David, employed by the Mentasta Community Health Clinic ("Clinic"), arrived on the scene and attended Matthew. The Clinic was operated by the Mount Sanford Tribal Consortium ("MSTC"), pursuant to a contract between MSTC and the United States entered pursuant to 25 U.S.C. § 450f (d). Matthew suffered serious brain injury and is now incapable of caring for himself.

On February 9, 2000, after the United States had failed to act on their administrative claims, the Armstrongs filed suit against the United States on the theory that the United States was liable for Nora David's negligent failure to provide adequate medical care to Matthew and the Clinic's failure to have necessary medical supplies and trained personnel available. Earlier, the Armstrongs had sued Visions in Alaska state court. After Visions joined the United States, MSTC, the Clinic, and Nora David as third-party defendants, the action was removed to this court by the United States.¹

Thereafter, the United States Attorney filed a certification pursuant to 28 U.S.C. § 2679(d)(2), 42 U.S.C. § 233, and Pub. L. 101-512, Title III, § 314 as he is authorized to do by 28 C.F.R. § 15.3. The certification states that after reading the complaint in the removed case as well as the complaint in the original federal case, the United States Attorney certifies that at the relevant time MSTC was carrying out a contract entered

¹Case No. A00-182, doc. 1.

pursuant to 25 U.S.C. § 450f,² that the Clinic was operated by MSTC, and that Nora David was acting within the scope of her employment. As a result, all claims pled against MSTC, the Clinic, and Nora David were deemed to have been replaced by claims against the United States, and MSTC, the Clinic, and Nora David ceased to be parties to this litigation.

As presently configured, this is an action under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671 *et seq.*, against the United States with additional state law claims brought by plaintiffs against Visions to which are appended Visions' third-party claims against the United States.³ Jurisdiction exists under this court's jurisdiction to adjudicate tort claims against the United States. Additional facts are noted in subsequent sections of this order.

III. STANDARD OF REVIEW

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment should be granted if there is no genuine dispute as to material facts and if the moving party is entitled to judgment as a matter of law. The moving party has the burden of showing that there is no genuine dispute as to material fact.⁴ The moving party need not present evidence; it need only point out the lack of any genuine dispute as to material fact.⁵ Once the moving party has met this burden, the nonmoving party must set forth evidence of specific facts showing the existence of a genuine issue for trial.⁶

²The certification actually refers to Pub. L. 93-638. That act as amended is known as the Indian Self-Determination and Educational Assistance Act ("ISDEA") and is mostly classified to 25 U.S.C. § 450, *et seq.*

³MSTC was granted permission to intervene for the limited purpose of filing a brief in opposition to the United States' motion for summary judgment. Doc. 139. MSTC is not presently a party to the litigation.

⁴*Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

⁵*Id.* 477 U.S. at 323-25.

⁶*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986).

All evidence presented by the non-movant must be believed for purposes of summary judgment, and all justifiable inferences must be drawn in favor of the non-movant.⁷ However, the nonmoving party may not rest upon mere allegations or denials, but must show that there is sufficient evidence supporting the claimed factual dispute to require a fact-finder to resolve the parties' differing versions of the truth at trial.⁸

IV. DISCUSSION

A. Motion for Summary Judgment at Docket 82

The FTCA waives the sovereign immunity of the United States for claims which fall within its scope. In some circumstances claims against persons or entities other than the United States may be deemed claims against the United States which fall within the FTCA so that the remedy against the United States under the FTCA becomes a claimant's exclusive remedy. For example, the exclusive remedy for medical malpractice claims against the Public Health Service ("PHS") and its employees is under the FTCA,⁹ and under certain provisions of federal law other entities and their employees may be deemed to be part of the PHS thereby making a claim under the FTCA the exclusive remedy. Entities which receive federal funds under 42 U.S.C. § 254b are deemed to be part of the PHS by 42 U.S.C. § 233 (g). A tribal entity such as MSTC may be deemed part of the PHS pursuant to 25 U.S.C. § 450f (d) when it has a contract with the United States authorized by 25 U.S.C. § 450f (d), commonly called a self-determination contract ("SDC").

The United States' motion for summary judgment is based on the proposition that MSTC cannot be deemed part of the PHS to the extent the Armstrongs' claims are based on activities outside the scope of its SDC. The Armstrongs and MSTC disagree. MSTC, in particular, argues in its brief that by virtue of the fact that MSTC has been

⁷*Id.* at 255.

⁸*Id.* at 248-49.

⁹42 U.S.C. § 233 (a).

deemed to be part of the PHS pursuant to 25 U.S.C. § 450f (d), the United States is now foreclosed from contending that MSTC is not part of the PHS by virtue of 42 U.S.C. § 233 (g)(1)(f).

Were MSTC an entity deemed to be part of the PHS directly pursuant to § 233, MSTC's argument would be correct, for the language of § 233(g)(1)(f) is directly applicable and quite clear. The analysis required here is more subtle, because MSTC is deemed to be part of the PHS under 25 U.S.C. § 450f (d) by virtue of its SDC. It is not deemed to be part of the PHS by § 233 directly. Section 450f (d) says in pertinent part:

For purposes of section 233 of Title 42, with respect to [tort claims] by any person . . . whether such person is an Indian or Alaska Native, or is served on a fee basis or under other circumstances permitted by Federal law or regulations . . . resulting from the performance . . . of medical . . . functions . . . a tribal organization . . . carrying out a contract . . . under this section . . . is deemed to be part of the [PHS] while carrying out any such contract . . .

This section imposes certain limitations on when a tribal organization is deemed to be part of the PHS. The critical limitation is that when providing medical services to non-Indians, a tribal entity is deemed to be part of the PHS only if it is providing those services in circumstances permitted by Federal law or regulations while carrying out its SDC.

In its purpose section, MSTC's SDC recites the following:

Each provision of the [ISDEA] and each provision of the [SDC] shall be liberally construed for the benefit of [MSTC] to transfer the funding and the following related functions, services, activities and programs (or portions thereof) that are contractable under section [25 U.S.C. §450f (a)] . . . from the Federal Government to [MSTC]:
. . . Emergency Medical Services . . . "10

It will be immediately observed that whatever MSTC has contracted to do in the SDC, it must be something transferred from the United States which is contractable under 25

¹⁰ARM. 126.

U.S.C. § 450f (a). That statutory provision provides that, upon request from a tribal organization such as MSTC, the Secretary will contract with the organization to perform programs or portions of programs which fall within five categories listed in the statute. Each of the five categories is limited to programs that provide benefits to Indians, or as one of the statutory categories phrases it, to certain programs which are "for the benefit of Indians because of their status as Indians."¹¹ Of course, one of the services historically provided to Indians because of their status as Indians is medical care. Of importance here, there are limited circumstances in which the United States' delivery of medical services to Indians may include provision of medical services to non-Indians as well. Specifically, the United States is authorized by statute to provide such services in the circumstances set out in 25 U.S.C. § 1680c.

Section 1680c includes three situations in which provision of medical services to non-Indians is authorized. The first situation relates to the provision of services to ineligible minor dependents and spouses of Indians,¹² circumstances which have nothing to do with the case at bar. The second situation arises when a tribe has requested authority to provide services to non-Indian persons who reside in the area served by the tribal health care facility.¹³ Specifically as relevant here, §1680c (b) would have authorized the provision of such services if MSTC had requested authority to provide them, and the Secretary and MSTC had jointly determined that (i) providing such services would not diminish or deny medical services to Indians, and (ii) there were no reasonable alternative facilities either within the area served by MSTC or outside that area which would be available to meet the needs of the non-Indians. The United States asserts that no such determination was made here. The SDC contains

¹¹25 U.S.C. § 450f (a)(1)(E). A thorough explication of the five categories will be found in a very recent Ninth Circuit decision, *Navajo Nation v. Dep't. of Health & Human Servs.* (9th Cir. April 8, 2003) (No. 99-16129) (en banc).

¹²25 U.S.C. § 1680c (a).

¹³*Id.* at (b).

nothing which shows that the Secretary and MSTC made the joint determination required by § 1680c (b). Neither has any party presented any evidence that such a determination was made. The court must conclude that § 1680c (b) does not apply.

There is one circumstance identified in the statute which does apply to the facts in this case. Under 25 U.S.C. § 1680c (c)(1) the Indian Health Service is authorized to provide services to an ineligible person such as Matthew in order to "achieve stability in a medical emergency." The SDC provides that MSTC must administer transferred programs in accordance with the attached "Scope of Work."¹⁴ The first goal for the emergency medical services program is to promote and provide education and training about emergency medical services to (1) local residents, (2) Community Health Aides and alternates, (3) Community Health Representative, (4) MSTC employees, and (5) other interested persons.¹⁵ Under this goal three objectives are listed. One of them is to "work with the Copper River EMS Council, . . . Cross Road medical Center, . . . and the Volunteer First Responders to ensure continued coordination of services in response to emergencies in the MSTC region."¹⁶ There is no limitation to medical emergencies experienced by Indians. Considering this point in light of the liberal interpretation of services transferred to MSTC required by the purpose section of the SDC, the court has little trouble concluding that the United States is responsible for any negligence in the efforts undertaken to "achieve stability" in Matthew's medical emergency.

There is no foundation for the proposition that MSTC may be deemed part of the PHS with respect to providing medical care to Matthew beyond that necessary to achieve stability. The provision of such services could only have been authorized by federal law if the United States and MSTC had taken the steps necessary to comply

¹⁴ARM 127. The Scope of Work is an attachment to the SDC and is reproduced at ARM 138 thru 159.

¹⁵ARM 138.

¹⁶*Id.*

with the requirements of 25 U.S.C. § 1680c (b). They did not. It follows that for purposes of providing emergency care beyond achieving stability, MSTC cannot be deemed part of the PHS. Consequently, the United States is not responsible for any negligence in the provision of such additional care.¹⁷

This determination, does not, however, establish that the United States is entitled to summary judgment. The United States Department of Health and Human Services publishes a manual entitled Community Health Aide/Practitioner Manual ("Manual"), and all parties seem to agree that the 1987 edition of the Manual was in effect at the time of Matthew's seizure.¹⁸ Precisely how the Manual came to play a central role in the operation of the Clinic is somewhat obscure. The SDC to which MSTC was a party provides that, except as otherwise provided in the ISDEA, MSTC was "not required to abide by program guidelines, manuals, or policy directives of the Secretary, unless otherwise agreed to by the Contractor and the Secretary, or otherwise required by law."¹⁹ Nevertheless, the parties' briefing on the several pending motions read as a whole clearly indicates that both plaintiffs and defendant agree the

¹⁷During the time-period relevant to this litigation, MSTC also received state funding from Alaska's Community Health Aide Program ("ACHAP"). The United States contends that because it was not a party to the funding contract between MSTC and ACHAP, the state mandate that the Clinic provide care to the public created no duty to care for Matthew which may be imposed on the United States. This argument is correct, for to hold otherwise would be to say that a contract between the State of Alaska and MSTC worked a waiver of the sovereign immunity of the United States.

¹⁸A seventy-nine page extract from what appears to be a Manual containing more than 436 pages is filed as Ex. 24 to the memorandum at docket 96. One page which is missing from that extract is page 270 of the Manual, but that page is found in the smaller extract from the Manual filed as Ex. 2 to the memorandum filed at docket 121. Bits and pieces of the Manual are found elsewhere in the parties' papers also. To avoid confusion, when the court refers to a page in the Manual it will cite that page according to the page numbering used in the Manual itself. For example a reference to page 270 in the Manual would not cite page 2 of Ex. 2 at docket 121, but rather page 270 of the Manual. The court will leave it to the parties to sift through the record when reading this order if they wish to look at the particular page in the Manual, just as the court has been forced to sift through the record to find the pages of the Manual when preparing this order.

¹⁹ARM 131.

Manual did apply to the operation of the Clinic. The only disagreement about the Manual is a dispute over the extent to which the Manual sets the applicable standard of care for plaintiffs' medical malpractice claims.²⁰ Thus, the court takes it as a given that the Manual applies to the operation of the Clinic and to Nora David's actions.

The Armstrongs take the position, which is not disputed at least for purposes of this summary judgment motion, that administration of oxygen and anti-seizure medication to Matthew would have changed his outcome.²¹ It is undisputed that neither oxygen nor anti-seizure medications were available to Nora David when she provided emergency care to Matthew. To the extent that the United States' assumes that administration of either material would constitute treatment and so be beyond merely stabilizing Matthew's condition, that assumption is not consistent with the Manual. The Manual contains two sections dealing with seizure disorders, one for emergency situations and one for long-term care. The administration of oxygen and anti-seizure medication is addressed in the section on emergency care, not the section on long-term care.²² Moreover, the proposition that administration of oxygen and anti-seizure medications goes beyond stabilizing a seizure condition does not seem intuitively correct. Indeed, the court would intuit the opposite, for it seems that delivery of oxygen and administration of a drug with anti-seizure properties would be efforts to stabilize the

²⁰See, e.g., docs. 85 and 126.

²¹It appears to be undisputed that administration of oxygen and anti-seizure medications are part of the protocol for treating persons experiencing serious seizures. The Armstrongs take the position in their opposition that the lack of oxygen and appropriate medications are the facts which are crucial in deciding the United States' motion for summary judgment. For purposes of opposing the motion, they do not rely on any of the other allegations of negligence in their complaint, such as lack of training. Doc. 96, p. 5. Accordingly, the court will focus exclusively on the failure to administer oxygen and anti-seizure medications. The court is not making a finding that would be binding at trial that the outcome necessarily would have been better had these materials been provided to Matthew. Rather, the court accepts the proposition that for purposes of summary judgment there is at least a disputed issue of material fact respecting the efficacy of using these materials.

²²Compare Manual pp. 270-273 with Manual pp. 274-275.

underlying condition, and that true medical care would come later in the form of an effort to diagnose and treat the underlying cause of the seizure.

Even assuming, as the court must for purposes of the summary judgment motion, that oxygen and an anti-seizure drug should have been administered in an effort to stabilize Mathew and that their administration would have changed the outcome, the United States would still be entitled to summary judgment if, as it argues, the United States is immune from liability because the decision not to have oxygen available and the decision not to stock anti-seizure drugs were decisions falling within the discretionary function exception to liability under the FTCA.²³

The government argues that the decision not to stock anti-seizure medications, has all the requisite hallmarks of a discretionary decision: Such medications, says the government, all fall into the category of controlled substances.²⁴ The absence of anti-seizure drugs, says the United States, reflects a decision not to stock controlled substances in a relatively insecure facility located in a village where the risk of mis-use of such substances could not be adequately minimized. The decision not to stock such materials was, therefore in the government's view, discretionary, because the decision involved the very kinds of social and economic policy judgments for which the discretionary function exception was designed.

To see the defect in the United States' argument it must first be noted that the Manual contains a section setting out an emergency treatment protocol for persons who are experiencing seizures.²⁵ That section recommends that oxygen and an anti-seizure drug be administered and lists two drugs, phenobarbital and diazepam, one of which

²³See 28 U.S.C. § 2680(a).

²⁴The court has not found any evidence in the record that all anti-seizure medications are controlled substances. Rather, this is an assertion by the United States' counsel not supported to any citation to the record. See doc. 82 at 32.

²⁵Manual pp. 270 -274.

should be used.²⁶ Furthermore, the Manual specifically provides as follows: "[i]f drugs or supplies are recommended in this manual and are not on your region's CHAP list, the Clinical Director will need to decide which of those should be supplied or what the alternatives should be."²⁷

The record here, however, does not show that any person exercising the function of a Clinical Director made a conscious decision not to stock either of the two drugs recommended as anti-seizure drugs. Moreover, the court reads the Manual to provide that if a decision were made not to stock phenobarbital or diazepam, then an alternative drug must be stocked, or an alternative procedure adopted. Given the Manual's requirements, simply doing nothing—which is what happened here—was not a discretionary act.²⁸

The lack of oxygen on site at the time Matthew presented for assistance was not the result of a decision that oxygen and the equipment needed to administer oxygen would not be available at the Clinic. Rather, the oxygen and equipment needed to administer it had been left at Batzulnetas a week earlier, instead of being returned to the Clinic. The decision to leave the oxygen and equipment at the remote location rather than return it to the Clinic was not a decision involving policy choices. Rather, it was a simple failure to do what in the ordinary course would have been done—that is return the oxygen and associated equipment to the Clinic where it would be needed.

In summary, Nora David had a duty to stabilize Matthew's condition, and any negligence in doing so is the responsibility of the United States. The court cannot find as a matter of law that the administration of oxygen and anti-seizure drugs would not have been part of an appropriate stabilization effort yielding a better outcome for

²⁶Manual p. 271.

²⁷Manual p. viii.

²⁸See *Faber v. United States*, 56 F.3d 1122, 1126-27 (9th Cir. 1995) (decision to simply do nothing rather than to act in conformity with management plan was not a discretionary decision).

Matthew. Beyond that, the court finds that the failure to have oxygen and anti-seizure drugs available for use at the time when Matthew needed them was not a decision which was subject to the discretionary function exception to liability under the FTCA. It follows that the United States' motion for summary judgment at docket 82 must be denied.

B. Motion At Docket 85 To Preclude Reference To Other Standards Of Care

The Armstrongs' claims for medical malpractice are governed by AS 09.55.540. The first statutory requirement for proof of a medical malpractice claim is that the plaintiff establish the applicable standard of care.²⁹ In support of their motion at docket 85, the Armstrongs argue that the only standard of care which may be considered in determining whether the United States was negligent in caring for Matthew is the 1987 edition of the Manual. The United States, on the other hand, argues that the Manual provides health practitioners such as Nora David with guidance—but does not establish a standard of care.

Approximately fifty statewide health care providers reviewed and contributed to the Manual³⁰ which was then published under the imprimatur of the United States Department of Health and Human Services.³¹ The Manual purports to "reflect a realistic standard of care for the Alaskan village" (emphasis added).³² The Manual is designed to be used by community health aides and practitioners ("CHA/PA's"), such as Nora David, who work under the supervision of physicians who are generally not on site. Against that background the Manual explains:

²⁹ The medical malpractice standard of care is defined as "the degree of knowledge or skill possessed or the degree of care ordinarily exercised under the circumstances, at the time of the act complained of, by health care providers in the field or specialty in which the defendant is practicing." AS 09.55.540(a)(1).

³⁰Doc. 85, Ex. 1 p. 3.

³¹*Id.* p. 1.

³²*Id.* p. 3.

Although the referral doctor has overall responsibility for health care provided by the CHA/Ps, we recognized the importance of setting up consistent statewide treatment guidelines for the Community Health Aide/Practitioner and referral person to use in dealing with village health problems. Written in consultation with specialists at the Alaska Native Medical center and under the direction of [Alaska Area Native Health Service] (and related) physicians, this manual is meant to reflect a standard of care. Referral health care providers should follow the guidelines in this manual, if at all possible.³³

Of course, expert testimony is ordinarily required to establish a professional standard of care.³⁴ The primary exception for "non-technical situations where negligence is evident to lay people,"³⁵ has no application here. The mere existence of the Manual does not eliminate the need for a lay trier of fact to apply a technical standard of care to the facts presented at trial.

The Armstrongs rely on the Alaska Supreme Court decision, in *Ward v. Lutheran Hosps. & Home Soc. of America, Inc.*,³⁶ for the proposition that the Manual supplies the applicable standard of care. In *Ward*, the court addressed whether a hospital blood bank was liable for not obtaining the plaintiff's informed consent before giving her a blood transfusion.³⁷ Rejecting the argument that an expert's testimony was relevant to establish the standard of care, the Alaska court noted that "[c]ourts routinely have rejected the testimony of experts as a basis for establishing [a blood bank's] standard. Instead, they have looked to industry practices and the rules promulgated by national

³³*Id.*

³⁴*D.P. v. Wrangell Gen'l Hosp.*, 5 P.3d 225, 229 (Alaska 2000); see also *Trombley v. Starr-Wood Cardiac Group, PC*, 3 P.3d 916, 919 (Alaska 2000) ("expert testimony is needed to establish a medical malpractice claim").

³⁵*Id.* (citation and internal quotes omitted).

³⁶963 P.2d 1031 (Alaska 1998).

³⁷*Id.* at 1033.

blood bank organizations and regulatory authorities."³⁶ The court reasoned that deference to practices and guidelines is warranted where "the practices in question are the result of careful thought and decision"³⁷ Although the circumstances in *Ward* are distinguishable from those in the present case, the analysis used there fits here. Just as the industry practices and blood bank rules under consideration in *Ward* were the result of careful, thoughtful evaluation rather than being mere reflections of a custom or practice that might itself be negligent despite being commonplace, so here the Manual represents the effort of a host of people motivated to come up with sensible standards to govern the practices of CHAPs. Moreover, the Manual was issued under authority of the United States Department of Health and Human Services using the oversight of those of its own employees whose expertise in providing health care to Alaska Natives assures the quality of the Manual.

Following *Ward*, the court holds that the Manual does establish a standard of care applicable in this case. Nevertheless, expert testimony remains important to make sure the Manual will be properly understood and applied. The motion at docket 85 will be granted, but this will not entirely foreclose the introduction of expert testimony relating to the application of the standard of care to the facts.

C. Motion at Docket 88, "Good Samaritan" Statute

At docket 88, the Armstrongs ask the court to hold that the United States cannot properly characterize Nora David as acting in the capacity of a "Good Samaritan" for purposes of Alaska's Good Samaritan statute.⁴⁰ The court agrees, because her attempt to stabilize Matthew was an effort which she had a duty to undertake pursuant to

³⁶*Id.* at 1036.

³⁷*Id.* at 1037 (citation and internal quotes omitted).

⁴⁰AS 09.65.090.

MSTC's SDC. Medical personnel who have a pre-existing duty do not fall within the parameters of the Good Samaritan law.⁴¹

To the extent that the Armstrongs' motion asks the court to gag defendant's counsel and witnesses such that they cannot even utter the words "Good Samaritan," the court declines to do so, for the same reasons and subject to the potential use of the same corrective measures as those described in the court's order refusing to impose an earlier request for a gag order on the words "assume" and "risk."⁴² However, the court must add that it is difficult to foresee any circumstance when it would be necessary for a witness or a lawyer to use the specific phrase "Good Samaritan" at the trial of this case.

Having concluded that there was a duty to stabilize Matthew for which the United States is responsible, that the Manual establishes a standard of care, and that the administration of oxygen and anti-seizure drugs were likely required by that standard of care, the court deems it unnecessary to enter the analytical thicket surrounding the question of how the Good Samaritan statute might apply in the event that Nora David were considered to be doing something other than attempting to stabilize Matthew. If future developments in the case require resolution of that issue, the matter can be raised again, but the court does not presently foresee that such an issue will have to be resolved in this litigation.

⁴¹*Deal v. Kearny*, 851 P.2d 1353, 1356 (Alaska 1993).

⁴²Order at doc. 152.

D. Motion at Docket 88, Allocation of Fault

Under the relevant Alaska statute,⁴³ fault may only be apportioned among those who are parties to the litigation. Nevertheless, the United States seeks to present evidence and argument at trial to the effect that Dr. Harness, an English physician who cannot be joined as a party to the action here in the District of Alaska, bears the entire fault for Matthew's condition. Dr. Harness is the physician who advised Matthew's parents that Matthew was fit to attend Visions' camp despite his earlier surgeries and continuing situation.

The United States relies on the Alaska Supreme Court's decision in *Lake v. Constr. Mach., Inc.*⁴⁴ to support its position. There, an employee named Phillip Lake

⁴³Matthew's injuries occurred prior to the August 7, 1987 amendment to the statute, so the version of AS 09.17.080 which applies reads as follows:

- Apportionment of damages. (a) In all actions involving fault of more than one party to the action, including third-party defendants and persons who have been released under AS 09.16.040, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or if there is no jury, shall make findings, indicating
- (1) the amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and
 - (2) the percentage of the total fault of all the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under AS 09.16.040
- (b) In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault, and the extent of the causal relation between the conduct and the damages claimed. The trier of fact may determine that two or more persons are to be treated as a single party if their conduct was a cause of the damages claimed and the separate act or omission of each person cannot be distinguished.
- (c) The court shall determine the award of damages to each claimant in accordance with the findings, subject to a reduction under AS 09.16.040, and enter judgment against each party liable. The court also shall determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault.
- (d) The court shall enter judgment against each party liable on the basis of several liability in accordance with that party's percentage of fault.

⁴⁴787 P.2d 1027 (Alaska 1990).

was injured in the course of his employment when he fell from a manlift.⁴⁶ He received Workers' Compensation benefits from his employer. Thereafter Lake sued the equipment's manufacturer, distributor, and vendors.⁴⁶ One of the defendants filed a third-party claim against Lake's employer on an express indemnity theory. The trial court ruled that the defendants could assert the employer's negligence as a partial defense to Lake's claim even though the employer was protected from any claim by Lake based on the exclusive liability provision of the Workers' Compensation Law. The Alaska Supreme Court disagreed holding that evidence of the employer's negligence would be admissible only to prove that the employer was entirely at fault, or that its act was a superseding cause. The Alaska court held that under AS 09.17.080 the fact-finder could allocate all of the fault to the employer or none of it, but could not allocate only a portion of the fault to the employer.⁴⁷

The United States attempt to analogize Dr. Harness to the employer in the *Lake* case falls to account for the fact that the employer in *Lake* had been joined as a third party defendant. The case at bar is controlled by two other decisions, *Benner v. Wichman*⁴⁸ and *Alaska Gen'l Alarm Inc. v. Grinnell*⁴⁹ rather than by *Lake*. In *Benner*, the Alaska court held that the term "party" in AS 09.17.080 means parties to an action, including third-party defendants and settling parties, and that the trier of fact may not consider the negligence of non-parties.⁵⁰ In *Grinnell*, the Alaska court specifically rejected the notion that fault could be allocated to a party which might be legally responsible, but could not be joined as a party. The court pointedly rejected the

⁴⁶*Id.* at 1028.

⁴⁸*Id.*

⁴⁷*Id.* at 1031.

⁴⁸874 P.2d 949 (Alaska 1994).

⁴⁹1 P.3d 98 (Alaska 2000).

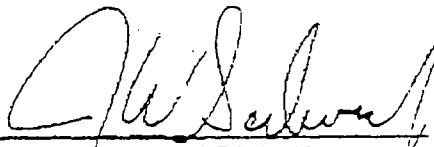
⁵⁰*Benner*, 874 P. 2d at 958.

"allocate the fault to an empty chair" approach the United States urges the court to take here.⁸¹

V. CONCLUSION

For the foregoing reasons, the United States' motion at docket 82 is DENIED, and the Armstrongs' motions at dockets 85, 88, and 89 are each GRANTED, but only to the extent consistent with the preceding text.

DATED at Anchorage, Alaska, this 11th day of April 2003.



JOHN W. SEDWICK
UNITED STATES DISTRICT JUDGE

MAILED ON 4-11-03

BY PRE

600-0031--CV (JMS)

- H. ROOBY (ASSISTANT)
- D. SPRENGER
- T. BELLER (DAVIS)
- R. FORSTOT (AS-ATTY)

⁸¹Grinnell, 1 P.3d at 102-03.