

**2003 ANNUAL UPDATE**

**TORT/PERSONAL INJURY SECTION  
ALASKA BAR ASSOCIATION**

**APRIL 3, 2003**

**SUMMARY OF SIGNIFICANT  
DECISIONS BY THE ALASKA SUPREME COURT  
APRIL 1, 2002 - MARCH 31, 2003**

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### **DEFAMATION**

Legislators have absolute immunity for statements made in the exercise of their legislative duties. This immunity protected legislators against defamation claims based on information discussed at a committee hearing, and allegedly distributed with committee minutes. Whalen v. Hanley, 63 P.3d 254 (Alaska 2003).

### **EXPERT TESTIMONY**

Where negligence is not evident to lay people, the plaintiff in a medical malpractice action must present expert testimony to establish the claim. Midgett v. Cook Inlet Pre-Trial Facility, 53 P.3d 1105 (Alaska 2002).

In State v. Coon, the Court adopted the Daubert standard for the admissibility of scientific testimony. The intent of the Coon rule was to "continue and clarify our liberal admissibility standard for expert witness testimony." "The net effect should be including more expert testimony." In response to a Coon motion, the trial court should hold an evidentiary hearing, or perhaps select an independent expert, but on these facts, a hearing was waived and was unnecessary. John's Heating Service v. Lamb, 46 P.3d 1024 (Alaska 2002).

A state trooper listed as a fact witness could give expert testimony about the causes of an accident and the reasonableness of the driver's conduct. The trooper was a "hybrid witness". The testimony was not barred by Evidence Rules 702 or 403. Getchell v. Lodge, \_\_\_ P.3d \_\_\_ (Alaska 2003).

### **FAULT APPORTIONMENT**

Under the fault apportionment statutes (AS 09.17.080 & AS 09.17.900) prior to the 1997 amendments, fault could not be apportioned to intentional tortfeasors. Under that statutory scheme, intentional tortfeasors and negligent tortfeasors were jointly and severally liable. Kodiak Island Borough v. Roe, 63 P.3d 1009 (Alaska 2003).

The fault apportionment provision in AS 09.17.080 is constitutional on its face. See attached summary. Evans v. State, 56 P.3d 1046 (Alaska 2002).

### **INDEMNITY**

In order to obtain implied contractual indemnity for amounts paid to an injured party, the settling party/indemnatee cannot be liable to the injured party except vicariously, and the settling party must obtain a release that extinguishes any potential liability of the indemnitor to the injured party. AVCP Regional Housing Auth. v. R.A. Vranckaert Co., 47 P.3d 650 (Alaska 2002).

### **INSURANCE**

In a personal injury action seeking punitive damages, there was no error in permitting defense counsel to refer to the fact that an insurance company hired him. The existence of insurance was relevant to the defendant's wealth, which is a factor in determining punitive damages (even if the policy only covered the compensatory damages). There was also no error in refusing to exclude jurors who were insured by the same insurance company, because an adverse award would have a minimal effect on their premiums, and the jurors did not know which company insured the defendant. Fleegel v. Estate of Boyles, 61 P.3d 1267 (Alaska 2002).

### **LEGAL MALPRACTICE**

In a legal malpractice case, the defendant moved for summary judgment, and submitted a report and affidavit from an expert witness. The expert's report did not address each of the plaintiffs' claims. Summary judgment could not be granted as to malpractice claims that were not addressed in the defendant's expert's report and affidavit, even when the plaintiffs failed to respond to the summary judgment motion with expert testimony supporting their malpractice claim. The moving party has the burden of demonstrating the absence of any genuine issue of material fact, and the facts excused the plaintiffs' failure to submit an opposing opinion. Ball v. Birch, Horton, Bittner & Cherot, 58 P.3d 481 (Alaska 2002).

### **MEDICAL MALPRACTICE/INFORMED CONSENT**

Physicians have a duty to disclose sufficient information for patients to make informed and intelligent choices. A breach of this duty is judged by the expectations of the "reasonable patient", and not by expert testimony concerning breach of the professional standard of care. Marsingill v. O'Malley, 58 P.3d 495 (Alaska 2002).

Under AS 09.55.540, the plaintiff in a medical malpractice action must 1) establish a standard of care; 2) show that the defendant failed to exercise this standard of care; and 3) establish that the failure was the proximate cause of the plaintiff's injuries. Midgett v. Cook Inlet Pre-Trial Facility, 53 P.3d 1105 (Alaska 2002)

Where negligence is not evident to lay people, the plaintiff in a medical malpractice action must present expert testimony to establish the claim. Midgett v. Cook Inlet Pre-Trial Facility, 53 P.3d 1105 (Alaska 2002).

### **MOOSE**

"Skidding to avoid a moose is the type of excuse contemplated by § 288A of the Restatement of Torts" Getchell v. Lodge, \_\_\_ P.3d \_\_\_ (Alaska 2003).

### **NEGLIGENCE PER SE**

Violation of a statute may be excused for an emergency, such as a moose emerging from the darkness into the road. Getchell v. Lodge, \_\_\_ P.3d \_\_\_ (Alaska 2003).

### **NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS**

Inmate sued the state for medical negligence and negligent infliction of emotional distress ("NIED"). There are two exceptions to the rule that physical injury is required for a NIED claim: 1) defendant owed plaintiff a pre-existing duty; and 2) the plaintiff witnessed physical injury to a close relative. Only the pre-existing duty exception could apply here. The NIED claim was dismissed because plaintiff could not prevail on his medical negligence claim, and therefore no duty was breached. Hinsberger v. State, 53 P.3d 568 (Alaska 2002).

## **NEGLIGENT MISREPRESENTATION**

A statement about future intentions or actions that is accurate when made is not a misrepresentation, even if future events render the statement inaccurate. Simply stating one's intentions to another person does not, without more, create a duty to alert the other person to a change in those intentions. Valdez Fisheries Development Ass'n, Inc. v. Alyeska Pipeline Serv. Co., 45 P.3d 657 (Alaska 2002).

## **NUISANCE**

Preponderance of evidence is the standard of proof for a nuisance claim (distinguishing cases where the claim is for a quasi-criminal sanction). Fernandes v. Portwine, 56 P.3d 1 (Alaska 2002).

The six-year statute of limitations in AS 09.10.050 applied to a nuisance claim. Fernandes v. Portwine, 56 P.3d 1 (Alaska 2002).

A nuisance is permanent when there is a high probability that it will continue. A nuisance is temporary when it is abatable. A temporary nuisance gives rise to a new cause of action with each invasion or injury. Van Deusen v. Seavey, 53 P.3d 596 (Alaska 2002).

### **OFFERS OF JUDGMENT**

The offer of judgment provision in amended AS 09.30.065 and Rule 68 is constitutional on its face. See attached summary. Evans v. State, 56 P.3d 1046 (Alaska 2002).

### **PREJUDGMENT INTEREST**

There is no prejudgment interest on future damages. John's Heating Service v. Lamb, 46 P.3d 1024 (Alaska 2002).

### **PRODUCT LIABILITY**

The trial court admitted comparative risk statistics showing risk of riding a three-wheeler relative to other recreational vehicles. The Court affirmed because the statistics were relevant to the manufacturer's notice of a defective condition and to punitive damages. Kava v. American Honda Motor Co., 48 P.3d 1170 (Alaska 2002).

### **PROFESSIONAL NEGLIGENCE/SKILLED TRADES**

"A claim that a provider of skilled services committed negligence states a claim for professional negligence." This rule applies to skilled trades persons, such as machinists, electricians and plumbers. This means that in a negligence action against a skilled trades person, the plaintiff must show that the defendant failed to perform the work with the same level of skill and prudence that a reasonably skilled and qualified professional in the field would exercise under the circumstances. The plaintiff must offer expert testimony to establish the standard of care (unless the case involves a non-technical situation where negligence would be apparent to a lay person). Only witnesses with specialized knowledge of the trade are competent to testify about the standard of care. John's Heating Service v. Lamb, 46 P.3d 1024 (Alaska 2002).

### **PUNITIVE DAMAGES**

In a personal injury action seeking punitive damages, there was no error in permitting defense counsel to refer to the fact that an insurance company hired him. The existence of insurance was relevant to the defendant's wealth, which is a factor in determining punitive damages (even if the policy only covered the compensatory damages). Fleegel v. Estate of Boyles, 61 P.3d 1267 (Alaska 2002).

The statutory cap on punitive damages in AS 09.17.020 is constitutional on its face. See attached summary. Evans v. State, 56 P.3d 1046 (Alaska 2002). See also Central Bering Sea Fisherman's Ass'n v. Anderson, 54 P.3d 271 (Alaska 2002) ("in Evans we held that punitive damages caps are constitutional . . . . That holding controls here.").

The Superior Court's holding that the provision in AS 09.17.020 awarding 50% of punitive damage awards to the State is constitutional is affirmed, on a 2-2 vote. See attached summary. Evans v. State, 56 P.3d 1046 (Alaska 2002).

A trial judge may remit a punitive damage award as excessive when the award is "manifestly unreasonable." Factors are identified for this determination. The amount remitted should reflect the maximum that the jury could have awarded without being excessive. Laidlaw

Transit v. Crouse, 53 P.3d 1093 (Alaska 2002) (affirming remittitur from \$3.5 million to \$500,000).

Punitive damage awards will be reviewed by the Alaska Supreme Court *de novo*, to determine if they are grossly excessive and prohibited by the due process clause of the 14<sup>th</sup> Amendment. Central Bering Sea Fisherman's Ass'n v. Anderson, 54 P.3d 271 (Alaska 2002). When an employee acts within the course and scope of his/her employment, Alaskan Village v. Smalley, 720 P.2d 945 (1986) adopted the so-called "course of employment" rule. "Under this rule, an employer is vicariously liable [for punitive damages], regardless of the employee's rank, so long as the employee was acting within the course and scope of employment." Laidlaw Transit v. Crouse, 53 P.3d 1093, 1098 (Alaska 2002). Whether the employee acted within the "course & scope" is determined using factors in Restatement (2d) of Agency, § 228. In contrast, when an employee acts outside the course & scope of employment, Alaska follows the "complicity" rule. 53 P.3d at 1098 n. 9, citing VECO v. Rosebrock, 970 P.2d 906 (1999). In general, this rule requires at least some degree of employer complicity before the employer is held liable for punitive damages based on the conduct of a non-supervisory employee. 53 P.3d at 1098 and n. 8 (citing Restatement (Second) of Torts § 909 and Restatement (Second) of Agency § 217(C)). Due to recent Alaska legislation and a US Supreme Court decision, "the Alaskan Village rule may be anachronistic" 53 P.3d at 1098 n. 9. The Court may consider adopting the complicity rule in future cases, if the issue is properly raised in the trial court. Laidlaw Transit v. Crouse, 53 P.3d 1093 (Alaska 2002)

A corporate defendant's wealth is relevant to punitive damages, even when the theory is vicarious liability for an employee's conduct. Laidlaw Transit v. Crouse, 53 P.3d 1093 (Alaska 2002)

#### **STATUTES OF LIMITATION**

The statute of repose in AS 09.10.055 is constitutional on its face. See attached summary. Evans v. State, 56 P.3d 1046 (Alaska 2003).

AS 09.10.140 (addressing tolling for the statute of limitations for minors) is constitutional on its face, as construed. See attached summary. Evans v. State, 56 P.3d 1046 (Alaska 2002).

There are three possible accrual dates under the discovery rule: 1) when the plaintiff reasonably should have discovered the existence of all essential elements of the cause of action; 2) when the plaintiff has information that is sufficient to alert a reasonable person to begin an inquiry to protect his rights; and 3) in the event a person makes a reasonable inquiry within the limitations period and it does not reveal the elements of the cause of action, then the accrual date is when a reasonable person discovers actual knowledge of or would be prompted to inquire again into the cause of action. John's Heating Service v. Lamb, 46 P.3d 1024 (Alaska 2002).

#### **STATUTORY CAPS ON DAMAGES**

The statutory cap on punitive damages in AS 09.17.020 is constitutional on its face. See attached summary. Evans v. State, 56 P.3d 1046 (Alaska 2002).

The Superior Court's holding that the statutory cap on non-economic damages in AS 09.17.010 is constitutional on its face is affirmed, on a 2-2 vote. See attached summary. Evans v. State, 56 P.3d 1046 (Alaska 2002).

Juries should not be instructed on the statutory cap on punitive damages in 09.17.020. The cap is applied by the judge, post-verdict. Central Bering Sea Fisherman's Ass'n v. Anderson, 54 P.3d 271 (Alaska 2002).

Juries should not be instructed on the statutory cap on non-economic damages in 09.17.010. The cap is applied by the judge, post-verdict. Kodiak Island Borough v. Roe, 63 P.3d 1009 (Alaska 2003).

Each incident of assault is separate, for purposes of the statutory cap on non-economic damages. Kodiak Island Borough v. Roe, 63 P.3d 1009 (Alaska 2003).

## **SUMMARY JUDGMENT**

In a legal malpractice case, the defendant moved for summary judgment, and submitted a report and affidavit from an expert witness. The expert's report did not address each of the plaintiffs' claims. Summary judgment could not be granted as to malpractice claims that were not addressed in the defendant's expert's report and affidavit, even when the plaintiffs failed to respond to the summary judgment motion with expert testimony supporting their malpractice claim. The moving party has the burden of demonstrating the absence of any genuine issue of material fact, and the facts excused the plaintiffs' failure to submit an opposing opinion. Ball v. Birch, Horton, Bittner & Cherot, 58 P.3d 481 (Alaska 2002).

## **VICARIOUS LIABILITY**

The existence of a master/servant or independent contractor relationship is determined by applying the factors in Restatement of Agency § 220. Where the evidence presented on summary judgment did not lead to any clear conclusion, the jury must decide the nature of the relationship. Powell v. Tanner, 59 P.3d 246 (Alaska 2002).

The existence of an agency relationship is not enough to give rise to vicarious liability. "The critical inquiry in determining vicarious liability is whether a master-servant relationship exists; evidence of agency, alone, is insufficient to impose vicarious liability." Powell, 59 P.3d at 252, n. 26.

Standards for determining a corporation's vicarious liability for punitive damages based on the conduct of an employee; application of the "course and scope" rule. Laidlaw Transit v. Crouse, 53 P.3d 1093 (Alaska 2002). See discussion under punitive damages.

## **WORKERS COMPENSATION EXCLUSIVITY RULE**

Injured employee claimed his employer could be liable under the intentional tort exception to the workers compensation exclusivity rule. For this exception to apply, the employee must show that the employer specifically intended to injure the employee; it is not enough that the employer knew that harm to the employee was a substantial certainty. Fenner v. Municipality of Anchorage, 53 P.3d 573 (Alaska 2002).

## **WRONGFUL DEATH**

In a wrongful death action, Rule 82 attorneys fees cannot be awarded against individual statutory beneficiaries (husband and children of the decedent) who are not named as plaintiffs in their personal capacities. (distinguishing In re Soldotna Air Crash Litigation, 835 P.2d 1215, 1220 (Alaska 1992)). Zaverl v. Hanley, \_\_ P.3d \_\_\_\_ (Alaska 2003).

**EVANS v. STATE**  
**56 P.3d 1046 (Alaska 2002)**

**1. The Cap on Non-Economic Damages in AS 09.17.010 is  
Facially Constitutional (Affirming the Superior Court on a 2-2  
Tie)**

AS 09.17.010 limits non-economic damages in personal injury and wrongful death actions to \$400,000 or life expectancy x \$8000, whichever is greater, except in cases of severe disfigurement or severe permanent physical impairment, where the limit is \$1 million, or life expectancy x \$25,000. Two justices said that these limits are constitutional on their face. Two justices said that these caps violate the plaintiff's right to a jury trial, and the equal protection clause in the Alaska Constitution.

**2. The Cap on Punitive Damages in AS 09.17.020 is Facially  
Constitutional (Unanimous)**

AS 09.17.020 sets caps on the amount of punitive damage awards. The court held that these caps are constitutional on their face.

**3. The Provision of AS 09.17.020(j) Requiring Payment of  
50% of Punitive Damage Awards to the State is Facially  
Constitutional (Affirming the Superior Court on a 2-2 Tie).**

**4. The Fault Apportionment Provision, AS 09.17.080, is  
Facially Constitutional (Unanimous)**

AS 09.17.080 is a comparative negligence statute that requires the finder of fact to assign a percentage share of responsibility for damages to each responsible party and non-party, and mandates that liability for damages must be apportioned between the responsible parties in accordance with their percentage of responsibility. Specifically, AS 09.17.080(a) requires the fact-finder to assign fault percentages to all parties to the suit, as well as to non-parties released from liability or "responsible for the damages." However, potentially responsible non-parties are not included within the apportionment of fault if the parties had a "sufficient opportunity" to join them but "chose not to" do so. The general rule, or "presumption," established by the statute is that all parties and non-parties "responsible for the damages" may be assigned a fault percentage. However, there are exceptions to that general rule: fault may not be allocated to any non-party that (1) is identified as "potentially responsible," (2) is not protected by the statute of repose, and (3) is a person or entity that the parties had a "sufficient opportunity" to join, but "chose not to."

In order to include a non-party in the fault allocation, a defendant must identify the non-party as someone who the defendant will argue is at fault, because otherwise that non-party cannot be a "person responsible for the damages" under the general rule of AS 09.17.080(a)(2). And, even if the defendant argues that a nonparty was at fault, that

non-party cannot be included in the allocation of fault if there was a "sufficient opportunity" to join that non-party, because a "sufficient opportunity" to join triggers the exception in [AS 09.17.080\(a\)\(2\)](#) defining non-parties that cannot be assigned an allocation of fault. The statute states that there is a "sufficient opportunity" to join when the non-party is "(A) within the jurisdiction of the court; (B) not precluded from being joined by law or court rule; and (C) reasonably locatable."

Thus, [AS 09.17.080](#) allows the allocation of fault to a non-party only if certain conditions are met. The defendant first has to identify the person as someone the defendant will argue is at fault. While no method of identification is specified, the procedures in the Alaska Rules of Civil Procedure will govern this identification. Next, the defendant will have to show that the person could not be added as a third-party defendant either because that person is outside the jurisdiction of the court or because by law or court rule the person cannot be named as a party. Thus, a defendant who wishes to allocate fault to a person must add the person as a party if the defendant is legally able to do so.

The identification of "potentially responsible persons" can be made by any party and will be managed by the trial court. The rule-making process will provide further guidance if such guidance is needed.

It is "inevitable" that someone will be disadvantaged by the presence of "empty chairs" in multi-party tort cases. Under a system of "joint and several liability" (the former system in Alaska), the defendants are prejudiced because they face the risk of paying more than their fair share of damages, and must sue other co-defendants for contribution to remedy the situation. Under the [AS 09.17.080](#) comparative negligence scheme, plaintiffs are prejudiced because they risk getting less than their fair share of compensation. The choice between a system which disadvantages defendants and a system which disadvantages plaintiffs is a pure public policy choice that was made by the legislature and is not one that is vulnerable to constitutional attack.

#### **5. The Revisions to the Offer of Judgment Statute, AS 09.30.065, and Rule 68 are Facially Constitutional (Unanimous)**

The revised offer of judgment procedure penalizes parties who receive an offer of judgment for some sum, refuse that offer, and win a judgment after trial that is less favorable than the offered sum by five percent or more. The penalty is that the offeree is required to pay all costs and between thirty percent and seventy-five percent of the offeror's attorney's fees, depending on when the offer was made. The court rejected a constitutional challenge to these revisions to the offer of judgment provisions.

#### **6. The Tolling Provision for Minors in AS 09.10.140(c) is Facially Constitutional (3-1 Majority)**

Plaintiffs argued that the statute that tolls the statute of limitations for minors, AS 09.10.140, created an irrational distinction between minors who were under eight years old, and other minors. AS 09.10.140(c) specifies that for minors who are under age eight at the time of injury, the statute of limitations is tolled only until they reach their eighth birthday. As to other minors, the statute of limitations is tolled until the minor is eighteen. In rejecting the plaintiff's argument, the court reconciled three statutes: the two-year statute of limitations for personal injury claims in AS 09.10.070; the tolling provision for minor plaintiffs in AS 09.10.140; and the 10 year statute of repose in

AS 09.10.055. Practitioners who represent injured minors under age eight should carefully review this discussion.

**7. Partial Tort Immunity for Hospitals is Facially Constitutional (AS 09.65.096) (Unanimous)**

[AS 09.65.096](#) grants partial immunity to hospitals for actions taken by emergency room physicians who are not employees but are rather independent contractors. (Overruling Jackson v. Power, 743 P.2d 1376 (Alaska 1987)). Under [AS 09.65.096](#), hospitals are responsible only for exercising reasonable care in granting and reviewing privileges to practice in the hospital. Hospitals are not otherwise responsible for actions taken by emergency room physicians who are independent contractors, as long as the hospital provides notice, and the physicians have prescribed levels of malpractice insurance. The Court rejected an argument that this provision violates substantive due process.

**8. The Ten-Year Statute of Repose is Facially Constitutional (AS 09.10.055) (Unanimous)**

The court rejected a constitutional challenge to the statute of repose, AS 09.10.055. This statute imposes a ten-year limitations period for actions for personal injury, death, or property damage.

Specifically, under [AS 09.10.055](#), actions must be filed within ten years after the earlier of (1) "substantial completion" of construction that allegedly caused the injury, or (2) the last act alleged to have caused the personal injury. There are exceptions for certain types of injuries. [AS 09.10.055\(b\)](#) exempts certain injuries caused by hazardous waste, and breach of trust or fiduciary duty. There is also an exception where "the facts that would give notice of a potential cause of action are intentionally concealed," or, in the case where the injured party is a minor, the facts are "not discoverable in the exercise of reasonable care by the minor's parent or guardian." The ten-year period is tolled during a period in which a "foreign body" upon which a cause of action is based remains undetected in a plaintiff's body.

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