

**2004 ANNUAL UPDATE**  
**TORT/PERSONAL INJURY SECTION**  
**ALASKA BAR ASSOCIATION**

**APRIL 20, 2004**

**SUMMARY OF DECISIONS**  
**BY THE ALASKA SUPREME COURT**  
**APRIL 1, 2003 - MARCH 31, 2004**

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**SUMMARY OF LEGISLATION**  
**FROM THE 2003 LEGISLATIVE SESSION**

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**DECISIONS BY THE ALASKA SUPREME COURT**

**DUTY OF CARE**

State was not liable in tort to third-parties allegedly harmed by the State's decision regarding whether to ask a court to extend a juvenile's commitment to state custody. Under common law tort principles, the State does not have a duty of care to third parties with respect to such decisions. The same result is reached by applying the *D.S.W.* factors. Although new crimes by the juvenile were foreseeable, the other *D.S.W.* factors outweighed foreseeability, and dictated a finding of no duty. (Three justices declined to consider whether to overrule Division of Corrections v. Neakok (applying *D.S.W.* factors and recognizing a tort duty relating to release of prisoners on parole), because the issue had not been briefed and the cases were factually distinguishable. Two justices concurred, saying they would overrule Neakok). State v. Sandness, 72 P.3d 299 (Alaska 2003)

**EXPERT TESTIMONY**

Defense psychiatrist could testify concerning whether the plaintiff accurately described to the psychiatrist her mental health status and her alleged symptoms. An opinion that the plaintiff fabricated symptoms and was malingering was within the proper scope of testimony. However, it would not be proper for the psychiatrist to testify about the credibility of any party's testimony concerning the events that gave rise to the claim. Samaniego v. City of Kodiak, 80 P.3d 216 (Alaska 2003)

Trial court properly distinguished between a physician's fact testimony, and expert testimony. Her fact testimony was admissible, and could not be excluded on grounds that it had not been properly disclosed as expert opinion testimony. Freitas v. Alaska Radiology Associates, 80 P.3d 696 (Alaska 2003).

The plaintiff's treating physician was not a retained expert, and therefore no Rule 26(a) report was required. However, the trial court had discretion to require the plaintiff to make disclosures regarding the treating physician's testimony. Fletcher v. South Peninsula Hospital, 71 P.3d 833 (Alaska 2003).

Court did not abuse its discretion when it excluded a proposed expert witness who would have testified about whether a police officer acted reasonably in using force to

detain a witness, on the grounds that the testimony would not assist the jury. City of Kodiak v. Samaniego, 83 P.3d 1077 (Alaska 2004).

## **INSURANCE**

A Rule 82 endorsement that did not conform with the regulation and model form adopted by the Alaska Division of Insurance was not effective to limit coverage. Pursuant to their settlement agreement with the insured, the injured parties could enforce the regulation by obtaining a judicial declaration concerning the validity of the endorsement. Tierchek v. Grant Aviation, 74 P.2d 191 (Alaska 2003)

An injured party sought payment under an underinsured motorist (UIM) policy. The court considered whether the injured party had exhausted the \$50,000 policy limits that were available from the tortfeasor's insurance company. A settlement between the injured party and the tortfeasor (and the tortfeasor's liability insurer) included both a \$40,000 cash payment, and an agreement to satisfy a \$10,000 lien in favor of the UIM insurer for medical payments made by the UIM insurer. The court held that in determining whether policy limits had been exhausted, the full value of the \$10,000 medical lien should be credited (even though the tortfeasor's liability insurer paid only \$5000 to satisfy the lien). The court also held that for purposes of determining whether the UIM insured had exhausted the tortfeasor's insurance, the tortfeasor's \$50,000 policy limits did not include prejudgment interest or attorneys' fees. Coughlin v. Government Employees Insurance Co., 69 P.3d 986 (Alaska 2003).

## **INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE**

Elements of the tort of intentional interference with prospective economic advantage restated. Sisters of Providence v. AA Pain Clinic, 81 P.3d 989 (Alaska 2003)

In a claim for intentional interference with prospective economic advantage, the plaintiff must prove that the defendant lacked any justification or privilege for its conduct. Sisters of Providence v. AA Pain Clinic, 81 P.3d 989 (Alaska 2003)

In a claim for intentional interference with prospective economic advantage, the plaintiff is not required to show that the defendant interfered with the plaintiff's relationship with some specifically identified party. Plaintiff meets the burden of proof if plaintiff shows interference with a prospective relationship with unidentified persons (here, unidentified prospective patients). Sisters of Providence v. AA Pain Clinic, 81 P.3d 989 (Alaska 2003)

## **LEGAL MALPRACTICE**

Issue of fact existed regarding whether a lawyer had a duty to inquire concerning the existence of liability insurance providing coverage for claims against the client, whether the policy would have provided coverage, and whether the insurer would have denied coverage due to prejudice from late notice of the claim. Tush v. Pharr, 68 P.3d 1239 (Alaska 2003)

## **MEDICAL CARE LIENS**

The Alaska Native Health Consortium, d/b/a Alaska Native Medical Center, has a federal and state statutory lien against a tort recovery for the cost of medical care that was provided to the plaintiff. The lien is subject to reduction for a pro-rata share of attorneys' fees incurred by the plaintiff. Alaska Native Tribal Health Consortium v. Settlement Funds, 84 P.3d 418 (Alaska 2004).

## **MEDICAL MALPRACTICE**

Hospital was not vicariously liable for the conduct of surgeon, who was an independent contractor (declining to extend the non-delegable duty rule that applies to emergency room physicians adopted in Jackson v. Power). Fletcher v. South Peninsula Hospital, 71 P.3d 833 (Alaska 2003).

There was no apparent agency or apparent authority relationship between a hospital and a surgeon, in part because of effective disclaimers by the hospital. As a result, the hospital was entitled to summary judgment against those theories of vicarious liability for surgeon's conduct. Fletcher v. South Peninsula Hospital, 71 P.3d 833 (Alaska 2003).

Issues of fact existed concerning whether a hospital was negligent in renewing privileges for a surgeon. Fletcher v. South Peninsula Hospital, 71 P.3d 833 (Alaska 2003).

## **PREEXISTING INJURIES**

Pattern Instruction 20.11 concerning aggravation of pre-existing injuries is approved. The trial court was not required to give an instruction that emphasized the difficulty in distinguishing between the preexisting injury and an aggravation, and stating that plaintiff was not required to prove with precision the damages attributable to aggravation of the preexisting injury. Doxsee v. Doxsee, 80 P.3d 225 (Alaska 2003)

## **PUNITIVE DAMAGES**

Award of 50% of punitive damage award to the State under AS 09.17.020 did not violate the Alaska or US Constitutions. (affirming Superior Court on 2-2 vote). Anderson v. Central Bering Sea Fishermen's Ass'n, 78 P.3d 710 (Alaska 2003).

When State receives a portion of a punitive damage award under AS 09.17.020, the State's portion is reduced by a pro rata amount reflecting the attorneys' fees payable under the plaintiff's contingent fee agreement. The plaintiff's Rule 68 fee award is not taken into consideration in computing the State's share. Anderson v. Central Bering Sea Fishermen's Ass'n, 78 P.3d 710 (Alaska 2003).

## **SOVEREIGN IMMUNITY/TRIBAL-OWNED ENTITY**

A non-profit corporation owned by fifty-six villages, who are federally-recognized tribes, does not have sovereign immunity. The tribal entities have sovereign immunity, but the non-profit corporation is a separate entity and does not have the sovereign immunity enjoyed by the tribes. Runyon v. AVCP, 84 P.3d 437 (Alaska 2004).

## **STATE'S DISCRETIONARY FUNCTION IMMUNITY**

The State's decision whether to initiate a search-and-rescue was a discretionary function, immune from tort liability, because the decision was sufficiently based on resource allocation and public policy considerations. The decision whether to initiate a search-and-rescue operation is one of policy. Some, although not necessarily all, decisions made after a search-and-rescue is commenced, may be operational (and not immune). Kiokun v. State, 74 P.3d 209 (Alaska 2003)

## **STATUTE OF LIMITATIONS/INJURY TO REAL PROPERTY**

Claims for damage to residence arising from natural gas explosion were governed by six-year statute of limitations in AS 09.10.050, which governs claims for "waste or trespass upon real property." This was true even though the claims alleged faulty products or negligence, and sounded in tort or product liability. The focus is on the injuries claimed, not the particular cause of action pled. Here, the plaintiffs alleged that the defendants' conduct caused substantial interference with their right to possess and use their residence, and thus the claims fell within the scope of the six-year statute's "waste or trespass" language. The court did not reach the broader issue of whether all negligent or tortious injuries to real property are governed by the six-year statute. State Farm Fire & Casualty v. White-Rodgers Corp., 77 P.3d 729 (Alaska 2003).

**NEW ALASKA STATUTES AFFECTING TORT CLAIMS  
(REFERENCES ARE TO 2003 SESSION LAWS OF ALASKA)**

**CHAPTER 30**

Withdraws the State's waiver of sovereign immunity with respect to injuries to seamen who are employed by the State; prohibits claims against the State under the Jones Act, in admiralty, or under general maritime law; provides for exclusive remedy under the workers' compensation act

**CHAPTER 43**

Establishes the State's immunity for various claims arising out of military service, fire control, civil defense and search and rescue activities

**CHAPTER 85 (codified at AS 09.17.020)**

Restricts punitive damages awards against employers for the conduct of their employees. This statute follows the Alaska Supreme Court's decision in Laidlaw Transit v. Crouse, 53 P.3d 1093 (Alaska 2002). In that decision, the Court reaffirmed prior law, saying that employers were vicariously liable for punitive damages assessed for the conduct of their employees, regardless of rank, if the employees were acting in the course and scope of their employment. However, the Court said it would consider restricting the employer's vicarious liability for punitive damages along the lines stated in the *Restatement (2d) of Torts*, and the *Restatement of Agency*. The new statute essentially follows those provisions.

**CHAPTER 119 (codified at AS 09.65.112 and elsewhere)**

Limits the liability of owners and operators of airplanes and boats to their guest passengers.

**CHAPTER 121 (codified at AS 09.65.290)**

Limits liability for the "inherent risks" in sports and recreational activities. Persons who participate in sports or recreational activities assume the inherent risks in those activities, and are legally responsible for all injuries or death and all damage to property that result from the inherent risks. However, this statute doesn't apply to civil actions based on:

- the negligence of a provider (someone who promotes, offers, or conducts the activity) if such negligence is a proximate cause of the injury or death, or
- the design or manufacture of equipment used in the activity

**CHAPTER 136 (codified at AS 09.10.054, 09.45.881 & .882)**

Limits claims against construction professionals for defects in the design, construction and remodeling of houses, duplexes, condominiums; creates a pre-litigation dispute resolution procedure. This does not apply to personal injury or death claims. “Construction professionals” include registered contractors, architects and engineers.