

**2005 ANNUAL UPDATE**  
**TORT/PERSONAL INJURY SECTION**  
**ALASKA BAR ASSOCIATION**  
**MAY 6, 2005**

**SUMMARY OF DECISIONS**  
**BY THE ALASKA SUPREME COURT**  
**APRIL 1, 2004 – MARCH 31, 2005**

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**SUMMARY OF LEGISLATION**  
**FROM THE 2004 LEGISLATIVE SESSION**

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## DECISIONS BY THE ALASKA SUPREME COURT

### DUTY OF CARE

State DFYS has no tort-based duty of care toward parents or grandparents in child in need of aid proceeding. There is no Bivens-type cause of action because of the availability of alternative remedies, including participation as intervenors in the CINA proceeding and opposing an adoption decree. McGrew v. State, 106 P.3d 319 (Alaska 2005).

Provider of out-patient substance abuse treatment had a duty to protect a patient from danger in the course of her treatment, including foreseeable danger from the intentional actions of other patients (following Restatement 2d of Torts, §§ 315, 323 and 299A). The duty is one of reasonable care. This duty is confined to the treatment context and is subject to restrictions imposed by patient confidentiality statutes. Bryson v. Banner Health System, 89 P.3d 800 (Alaska 2004).

### EXPERT WITNESSES

Where an expert disclosed his opinion, but did not describe the underlying reason for the opinion, it was not error to let the expert testify. The opinion was disclosed, and if the opposing party wanted additional detail about the reason for the opinion, that party should have moved to compel or taken the expert's deposition. Jackson v. American Equity Insurance Co., 90 P.3d 136 (Alaska 2004).

### INSURANCE BAD FAITH

In general, an insurance company is not required to give its insured assurances before trial that it will cover an excess judgment if the insurer does not accept a policy limits demand. If such a duty arises, it arises only if there is a reasonable likelihood of recovery in excess of policy limits. Jackson v. American Equity Insurance Co., 90 P.3d 136 (Alaska 2004).

Instruction was incorrect when it said that proof of an insurance company's bad faith in consideration of a policy limits settlement demand requires proof of the insurance company's improper motive, malice, or reckless indifference. Jackson v. American Equity Insurance Co., 90 P.3d 136 (Alaska 2004).

When a plaintiff is not represented by an attorney, policy limits for purposes of a policy limits demand/offer do not include potential Rule 82 attorneys' fees. Maloney v. Progressive Specialty Ins. Co., 99 P.3d 565 (Alaska 2004).

### **INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS**

The analysis that governs the existence of a duty of care for negligence claims does not apply to intentional tort claims, such as intentional infliction of emotional distress. Intentional infliction of emotional distress claims against DFYS could not be dismissed on the pleadings based on the rationale that there was no duty of care. McGrew v. State, 106 P.3d 319 (Alaska 2005).

### **MEDICAL MALPRACTICE**

When the defendant medical care providers submitted an expert's affidavit establishing no breach of duty and no causation, and the plaintiff failed to respond with admissible expert testimony establishing issues of fact, the trial court was right to grant summary judgment to the defendants on the malpractice claims. However, summary judgment should not have been granted on informed consent claims, because the defendants' summary judgment affidavit did not establish that the patient had been informed of certain risks. Parker v. Tomera, 89 P.3d 761 (Alaska 2004).

Informed consent requires disclosure of information that a reasonable patient would need to know in order to make an informed decision about proposed treatment. Parker v. Tomera, 89 P.3d 761 (Alaska 2004).

Trial court was not required to appoint an expert advisory panel. The appointment is discretionary, and there were few qualified physicians who did not have conflicts and could serve on a panel. Also, the request for a panel was untimely. Parker v. Tomera, 89 P.3d 761 (Alaska 2004).

### **NON-ECONOMIC DAMAGE CAPS**

For purposes of the cap on non-economic damages, the trial court makes a threshold determination of whether there is sufficient evidence so that a reasonable jury could find severe disfigurement. If there is sufficient evidence, the question is submitted to the jury (but the jury is not instructed about the cap). The standard for severe disfigurement is an objective test: would a reasonable person find that the injury mars the plaintiff's physical appearance and causes a degree of unattractiveness sufficient to bring negative attention or embarrassment? Evidence of actual reactions by observers is not required. The severe disfigurement need not be permanent, but the disfigurement must be assessed after completion of a reasonable healing period. City of Bethel v. Peters, 97 P.3d 822 (Alaska 2004).

## **RELEASES**

A pre-injury exculpatory release did not bar the plaintiff's personal injury claim. Such releases must clearly notify the releasor of the effect of signing the release, and the releasor's intent to release future claims must be unequivocal. Ledgens, Inc. v. Kerr, 91 P.3d 960 (Alaska 2004).

## **SUMMARY JUDGMENT**

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## **STATUTE OF LIMITATIONS**

Facts that included divorce, incarceration and illness did not support effort to establish equitable tolling of statute of limitations based on "extraordinary circumstances." Statute that allows tolling of statute of limitations based on mental illness or mental disability is liberally interpreted. The test is whether the person could know or understand her legal rights sufficiently well to manage her personal affairs. But this statute only tolls the limitations period for the time of disability. Kaiser v. Umalik Insurance Co., 108 P.3d 876 (Alaska 2005).

Complaint named father as defendant, rather than his son who was the actual driver. An amended complaint naming the son as the defendant could relate back, because the insurance company had notice of the claim, and knowledge of the plaintiff's mistake. There is a presumption that an insurance company and its insured have an identity of interests, and therefore notice to the insurer is notice to the insured. Phillips v. Gieringer, 108 P.3d 889 (Alaska 2005).

## **SUBSEQUENT REMEDIAL MEASURES**

Rule against admission of subsequent remedial measures only bars evidence of such measures actually taken, and does not bar evidence concerning recommendations to take such measures (subject to careful evaluation of the evidence under Evidence Rule 403 balancing test). City of Bethel v. Peters, 97 P.3d 822 (Alaska 2004).

## **UM/UIM COVERAGE**

The mother of a passenger was an "insured person" under the driver's UM/UIM insurance policy, and could make a claim for negligent infliction of emotional distress under the driver's UM/UIM policy. Allstate Ins. Co. v. Teel, 100 P.3d 2 (Alaska 2004).

## **WORKERS' COMPENSATION/EXCLUSIVE LIABILITY**

Truck owners/drivers leased their trucks to a trucking firm. "Relative nature of the work" test applied to determine whether the truck owners/drivers were independent contractors or employees. Fact that the trucking firm carried workers' compensation insurance on the owners/drivers was not dispositive, nor was the fact that one of the owner/drivers applied for and received workers' compensation benefits. Odsather v. Richardson, 96 P.3d 521 (Alaska 2004).

**NEW ALASKA STATUTES AFFECTING TORT CLAIMS  
(REFERENCES ARE TO 2004 SESSION LAWS OF ALASKA)**

**CHAPTER 25: Limits on Damages in Claims Against Construction Professionals (Amends AS 09.45.895)**

Defines the damages recoverable against contractors, architects and engineers, except in cases involving gross negligence or reckless or intentional conduct.

**CHAPTER 56: Immunity for Providing Free Health Care (AS 09.65.300)**

Provides limited immunity to health care providers who provide services without charge; excludes claims for gross negligence, recklessness or intentional misconduct.

**CHAPTER 65: District Court Jurisdiction**

Increases jurisdictional limit of district courts to \$100,000.

**CHAPTER 69: Liability Limits for Drivers (AS 09.65.310)**

Limits liability of persons who drive a vehicle for an owner/operator who is under the influence of alcohol; excludes claims for gross negligence, recklessness or intentional misconduct and does not limit UIM recoveries.

**CHAPTER 80 Extension of Workers' Compensation Liability and Immunity (AS 23.30.045, .055)**

Makes project owners potentially liable for paying workers' compensation for employees of contractors and subcontractors; extends exclusive liability protection to project owners, contractors and subcontractors who are liable or potentially liable for workers' compensation benefits payable to their own employees or to employees of a contractor or subcontractor.

**CHAPTER 94 Tort Claims Against State Employees (AS 09.50.253)**

Creates tort immunity for State employees who are acting in the scope of their office or employment, and restricts the plaintiff to an action against the State. Provides for substitution of the State as the defendant in cases where the State employee is sued. Allows employee to petition court to require the State to substitute as defendant and defend.

**CHAPTER 103 Contacts with Aviation Accident Victims (AS 02.40.030)**

Provides for a 45 day period after an aviation accident in which attorneys are prohibited from initiating contact with potential plaintiffs, and air carriers and their insurers are prohibited from initiating contact to make a final settlement of claims.

**CHAPTER 172 Uninsured Motorist Penalty; UM/UIM Policies (AS 09.65.320, AS 21.89.020)**

Prohibits uninsured drivers from suing for non-economic damages, with certain exceptions. Allows insurance companies to exclude punitive damages from UM/UIM insurance.