## **2007 UPDATE**

## TORT/PERSONAL INJURY SECTION ALASKA BAR ASSOCIATION

MAY 10, 2007

SUMMARY OF DECISIONS BY THE ALASKA SUPREME COURT APRIL 1, 2005 – MARCH 31, 2007

> Jim Leik PERKINS COIE LLP Anchorage, Alaska

ABUSE OF PROCESS. One of the elements is a willful act in the use of the process that is not proper in the regular conduct of the proceeding. The mere act of filing suit is not enough, nor is testifying to a grand jury, or at trial. This element could not be satisfied by a letter to the judge that was within the writer's rights as a victim, pursuant to Alaska's Crime Victim's Rights Act. Greywolf v. Carroll, 151 P.3d 1234 (Alaska 2007).

ALCOHOL LIABILITY/SOCIAL HOSTS. Alaska's social host immunity statute, AS 04.21.020(a), applied in a case within admiralty jurisdiction, because applying this state law did not materially prejudice maritime law or interfere with its proper harmony and uniformity. The Alaska statute barred claims by the decedent's estate against his cousin that were based on an alleged duty to supervise, monitor and control the decedent's drinking. Christiansen v. Christiansen, 152 P.3d 1144 (Alaska 2007).

**COLLATERAL ESTOPPEL**. A no contest plea to a serious criminal offense triggers collateral estoppel in a civil matter with respect to an essential element of the offense (applied to establish the plaintiff's eligibility for punitive damages following a no-contest plea to an assault charge, which included "recklessness" as an essential element of the offense). <u>Lamb v. Anderson</u>, 126 P.3d 132 (Alaska 2005) and 147 P.3d 736 (Alaska 2006).

**DAMAGES**. Loss of earning capacity is compensable, and it is not necessarily equated with actual loss of earnings. A plaintiff who has negligible or nonexistent lost earnings may still recover for loss of earning capacity. State v. Miller, 145 P.3d 521 (Alaska 2006).

The \$400,000 cap on non-economic losses in AS 09.17.010 does not violate the equal protection clause of the Alaska Constitution. A separate cap applied to each act of sexual assault. CJ v. State, 151 P.3d 373 (Alaska 2006).

**DEFAMATION**. A public figure must show that the allegedly defamatory statement was made with actual malice. On a motion for summary judgment, the federal summary judgment standard (requiring plaintiff to show actual malice by clear and convincing evidence) does not apply. But summary judgment is proper under state law where defendant presents sufficient evidence to support the conclusion that the defendant lacked actual malice, and plaintiff fails to show a genuine issue of material fact on this issue. Defendant can meet its burden with testimony that defendant believed the statements were true when made, as long as the circumstances do not indicate that the allegedly defamatory statement was fabricated by the defendant, based on wholly unverifiable and suspect sources, or inherently improbable. Summary judgment for defendant affirmed. Lowell v. Hayes, 117 P.3d 745 (Alaska 2005).

There is a conditional privilege for statements made to coworkers regarding personal safety in the workplace. In moving for summary judgment based on the conditional privilege, the defendant has the burden of establishing that the conditional privilege applies, and that the defendant did not abuse the privilege. If the defendant meets this burden, the plaintiff has the burden of demonstrating a genuine issue of material fact regarding the defendant's abuse of the privilege. <u>DeNardo v. Bax</u>, 147 P.3d 672 (Alaska 2006).

DISCRETIONARY FUNCTION IMMUNITY. Decisions regarding installation and location of traffic signals, construction of pedestrian overpasses and other improvements require policy considerations and raise resource allocation questions. As a result, these decisions are immune under the discretionary function test, unless the project at issue was governed by clearly established standards that mandated their installation. But decisions regarding the posting of traffic signs are "operational" and are not immune. Guerrero v. AHFC, 123 P.3d 966 (Alaska 2005).

Parole Board decisions are protected by discretionary function immunity (overruling <u>Division of Corrections v. Neakok</u> insofar as it was interpreted to say otherwise). Claims against parole officers must be analyzed to determine whether discretionary function immunity applies. <u>State v. Cowles</u>, 151 P.3d 353 (Alaska 2006).

**DUTY**. A company that devised a training program for instructors and certified the instructors had a duty to the eventual students of those instructors, and could be liable for injuries to a student caused by negligence in developing and implementing the training program. <u>Anderson v. PPCT Management Systems</u>, 145 P.3d 503 (Alaska 2006).

Parole officers have a duty toward potential victims of criminal acts by parolees if officers know, or reasonably should know, that a parolee poses a danger to a particular individual or identifiable group. But discretionary function immunity may limit claims. <u>State v. Cowles</u>, 151 P.3d 353 (Alaska 2006).

**EXPERT TESTIMONY**. Under Alaska law, the <u>Coon/Daubert</u> test does not apply to expert testimony that is based on the witness's "accrued wisdom and accumulated experience" (declining to follow the U.S. Supreme Court decision in <u>Kumho Tire</u> in this regard). The <u>Coon/Daubert</u> test applies only to testimony that purports to be based on scientific principles. Admissibility of non-scientific expert testimony is subject to Evidence Rules 702, 703, and 403, and is regulated by cross-examination and careful instruction on the burden of proof. <u>Marron v. Stromstad</u>, 123 P.3d 992 (Alaska 2005). <u>See also Marsingill v. O'Malley</u>, 128 P.3d 151, 160 (Alaska 2006).

Based on Alaska's liberal rules concerning qualification of expert witnesses, an accident reconstructionist could testify about the speed of vehicles and the effect of the impact on the plaintiff. Even though the witness was not an engineer or trained in biomechanics, he was qualified to testify by virtue of his training and experience in accident reconstruction. It is sufficient that his evaluation was more informed than could be made by the jury looking at the same evidence without the aid of an expert. Similarly, a neurologist could testify that the plaintiff was not a proper candidate for surgery, that there was no objective basis for plaintiff's pain complaints, that plaintiff's behavior could be explained by factors other than pain, and that a rear-end accident at low speed could not cause the claimed injury. Rule 702 does not require expertise in the precise area where testimony will be offered. Marron v. Stromstad 123 P.3d 992 (Alaska 2005). See also Hagen v. Insurance v. Roller, 139 P.3d 1216 (Alaska 2006) (based on experience handling workers' compensation claims, lawyer could express opinion that if plaintiff had surgery, he would have permanent impairment).

The <u>Coon/Daubert</u> test does not apply to a treating physician's testimony about the patient's course of treatment. <u>Marron v. Stromstad</u>, 123 P.3d 992, 1002 (Alaska 2005).

An expert witness is immune from tort claims by an adverse party based on the expert witness's testimony in an arbitration. <u>Gilbert v. Sperbeck</u>, 126 P.3d 1057 (Alaska 2005).

**FALSE IMPRISONMENT**. The State is immune from false imprisonment claims, and from related claims for negligent record-keeping (overruling Zerbe v. State). Kinegak v. State, 129 P.3d 887 (Alaska 2006).

**FAULT APPORTIONMENT**. Under the fault allocation system in existence in Alaska between 1989 and 1997, a tortfeasor has a common law right of contribution against a joint tortfeasor. The contribution claim can be pursued in a separate action. In the separate action, prior judgments and settlements will not be disturbed. But prior fault allocations and damages may be relitigated. McLaughlin v. Lougee, 137 P.3d 267 (Alaska 2006).

In a failure to protect case, fault must be allocated between the wrongdoer and the party who failed to protect the plaintiff from the wrongdoer, and liability is several in accordance with percentages of fault, pursuant to AS 09.17.080. Pederson v. Barnes, 139 P.3d 552 (Alaska 2006).

There was no basis for fault apportionment to the plaintiff in an intentional interference with contract case. Lack of justification for interference with the contract is an element of the tort. The conduct that allegedly constituted "fault" by the plaintiff would be considered in determining whether the alleged interference was justified. Once the jury determined that the interference was not justified, there was no further basis for considering any "fault" by the plaintiff. Therefore, there was no basis for allocating fault to the plaintiff. Domke v. Alyeska Pipeline Service Co., 137 P.3d 295 (Alaska 2006).

For claims governed by the fault allocation system that was in effect from 1989-1997, a payment by a settling party is not credited against the judgment entered against defendant(s) after trial. The fact-finder may allocate a percentage of fault to the settling parties, and the liability of non-settling defendant(s) is reduced by this percentage. The amount actually paid by the settling parties is irrelevant to this determination. <u>Petrolane, Inc. v. Robles,</u> 154 P.3d 1014 (Alaska 2007).

FRAUD. Alaska follows the Restatement (Second) of Torts § 529, which recognizes a fraud claim based on statements that are literally true, but which are materially misleading because of omissions. Anchorage Chrysler Center v. Daimler Chrysler Corp., 129 P.3d 905 (Alaska 2006). See also Lightle v. State, 146 P.3d 980 (Alaska 2006).

Proof of fraudulent misrepresentation does not require proof that the defendant had a specific intent to deceive the recipient of the statement. Rather, the maker of the statement must know the untrue character of the statement, and must make the statement with the purpose of inducing the recipient to act in reliance on the statement. The "purpose to induce action in reliance" requirement is met if the maker of the statement intends that the recipient will act in reliance on the statement, or if the maker of the statement has reason to believe that the recipient will act in reliance on the statement. Lightle v. State, 146 P.3d 980 (Alaska 2006) (following Restatement (2d) of Torts §§ 525, 526 & 531).

Conduct that gives rise to a breach of contract claim may also give rise to a tort claim for intentional misrepresentation. <u>Jarvis v. Ensminger</u>, 134 P.3d 353 (Alaska 2006).

**INTENTIONAL TORTS**. Corporate officers or employees who commit intentional torts may be held personally liable and are not shielded by the corporate form. <u>Casciola v. F.S. Air Service, Inc.</u>, 120 P.3d 1059 (Alaska 2005).

**INTERVENTION**. Where a stipulation to apportion fault to the non-party employer may have adversely affected the employer's workers' compensation lien, the employer or its insurer should have been permitted to intervene in the tort suit. <u>Scammon Bay Association v. Ulak</u>, 126 P.3d 138 (Alaska 2005).

**INVASION OF PRIVACY**. Alaska recognizes a cause of action for invasion of privacy. It requires proof that the plaintiff had a reasonable expectation of privacy, and that the defendant intruded in a manner highly offensive to a reasonable person. Both elements have subjective and objective elements. Summary judgment is entered for defendant when the objective standards are not met. <u>Greywolf v. Carroll</u>, 151 P.3d 1234 (Alaska 2007).

**LANDLORD'S DUTIES**. Description of factors that determine whether a landlord has a duty to protect tenants from off-site dangers. Mere awareness of an obvious danger and foreseeable harm is not enough to give rise to a duty. Thus, landlord had no duty to address dangers arising from traffic on adjacent street. <u>Guerrero v. AHFC</u>, 123 P.3d 966, 973-74 (Alaska 2005).

A jury could find that a property manager assumed a duty of care toward tenants that included using its expertise as property manager to take reasonable steps in inspecting the property and warning tenants about dangers that might not be obvious to the ordinary tenant. <u>Kay v. Danbar, Inc.</u>, 132 P.2d 262 (Alaska 2006).

MALICIOUS PROSECUTION. A private individual may be liable for malicious prosecution if the private individual deliberately misleads the authorities so that they make an erroneous determination of probable cause (citing Restatement (Second) of Torts § 653). Summary judgment for defendant was proper where there was no genuine issue of fact as to whether the defendant believed that the facts he gave to the police were true. Greywolf v. Carroll, 151 P.3d 1234 (Alaska 2007).

**MEDICAL MALPRACTICE**. A psychiatrist who was appointed by the court to evaluate patient's mental health and make recommendations regarding involuntary commitment had quasi-judicial immunity from a malpractice claim. Greywolf v. Carroll, 151 P.3d 1234 (Alaska 2007).

**NEW TRIAL**. When the trial judge considers a motion for new trial, the trial judge does not review the facts in the light most favorable to the non-moving party. But on appeal of a denial of new trial, the Supreme Court defers to the trial judge, and considers the evidence in the light most favorable to the non-moving party. Hogg v. Raven Contractors, Inc., 134 P.3d 349 (Alaska 2006).

PUNITIVE DAMAGES. Under Alaska law, there is no fixed ratio between punitive damages and compensatory damages. Ratios above 3 to 1 or 4 to 1 are permitted (affirming award of \$300,000 in punitive damages when there was award of \$30,000 in compensatory damages). Award met <u>BMW v. Gore</u> due process standards. <u>Casciola v. F.S. Air Service, Inc.</u>, 120 P.3d 1059 (Alaska 2005).

The cap on punitive damages in AS 09.17.020 does not violate due process. The statute allocating 50% of a punitive damage award to the State does not violate the constitution. The State should be allowed to intervene in a case if there is a dispute about how a punitive damage award is to be allocated. Reust v. Alaska Petroleum Contractors, Inc., 127 P.3d 807 (Alaska 2005).

Court abused its discretion by failing to grant a directed verdict against a punitive damage claim. Plaintiff conceded defendant did not act with malice, and there was insufficient evidence to show reckless indifference (citing with approval Restatement (Second) of Torts § 908 comment b, indicating that punitive damages are restricted to conduct involving some element of outrage similar to that usually found in crime). Pederson v. Barnes, 139 P.3d 552 (Alaska 2006).

Eligibility for a punitive damage award based upon reckless indifference (see AS 09.17.020) may be established by a no-contest plea to a serious criminal offense, if recklessness is an essential element of the crime. Lamb v. Anderson, 147 P.3d 736 (Alaska 2006).

Proof of reckless indifference sufficient to satisfy the requirements for a punitive damage award as stated in AS 09.17.020(b) means only that the jury may award punitive damages based upon the factors in AS 09.17.020(c), and not that the jury is required to do so. <u>Lamb v. Anderson</u>, 147 P.3d 736 (Alaska 2006).

**SETTLEMENTS**. For claims governed by the fault allocation system that was in effect from 1989-1997, a payment by a settling party is not credited against the judgment entered against defendant(s) after trial. The fact-finder may allocate a percentage of fault to the settling parties, and the liability of non-settling defendant(s) is reduced by this percentage. The amount actually paid by the settling parties is irrelevant to this determination. <u>Petrolane, Inc. v. Robles</u>, 154 P.3d 1014 (Alaska 2007).

**SOVEREIGN IMMUNITY**. To the extent that the State has sovereign immunity from liability for intentional torts committed by State employees pursuant to AS 09.50.250(3), it is also immune from claims based on negligent hiring, supervision and training of those employees. <u>Kinegak v. State</u>, 129 P.3d 887 (Alaska 2006).

**STATUTE OF LIMITATIONS**. A cause of action for breach of an insurer's duty to defend accrues when the insurer refuses to defend and the insured is notified of the refusal. But the statute of limitations is tolled until final judgment is entered in the case for which defense was sought. <u>Brannon v. Continental Casualty</u>, 137 P.3d 280 (Alaska 2006).

Factual disputes concerning the application of the statute of limitations are decided by the court following a pretrial evidentiary hearing. Cikan v. ARCO Alaska Inc., 125 P.3d 335 (Alaska 2005).

VIM. There may be separate "per person" limits under a UIM policy for NIED or loss of society claims by related persons. Coverage issues as to these claims may be outside the arbitration clause of the policy. In that event, if the coverage issues are "inextricably intertwined" with liability and damage issues that are subject to an arbitration clause, the issues must be addressed by arbitration. If the coverage issues are not "inextricably intertwined" with the liability and damages issues that are subject to arbitration, the coverage issues may be addressed by a court in a declaratory judgment action. The trial judge in the declaratory judgment action has discretion whether to allow arbitration on liability and damage issues to proceed before, or concurrent with, the declaratory judgment action addressing coverage. In the declaratory judgment action, the court must give collateral estoppel effect to fact determinations made by the arbitrator, if these determinations were necessary to issues properly before the arbitrator. State Farm v. Dowdy, 111 P.3d 337 (Alaska 2005).

In an action by the insured against the UIM insurer, the amount paid by the tortfeasor's insurance company is properly offset against the plaintiff's total damages to reduce the recovery from the UIM insurer. This is not an offset under AS 09.17.070. Attorneys' fees were properly calculated based on the recovery after the offset. Gibson v. GEICO, 153 P.3d 312 (Alaska 2007).

Policy limits under a UIM policy did not include anticipated Rule 82 attorneys' fees already paid to the claimant under a liability policy (where the payment under the liability policy fully paid the prospective Rule 82 fee award). State Farm v. Lestenkof, 155 P.3d 313 (Alaska 2007).

VICARIOUS LIABILITY. Manufacturer and seller of engine could be held liable for the negligence of an installer of the engine, based on agency arising from apparent authority. Following the Restatement (Second) of Agency, the focus is on manifestations by the alleged principal, which were known to the plaintiff. Cummins, Inc. v. Nelson, 115 P.3d 536 (Alaska 2005). See also Anderson v. PPCT Management Systems, Inc., 145 P.3d 503 (Alaska 2006) (no agency arises when the principal never indicates to the third-party that the supposed agent has authority).

Employers are vicariously liable for conduct of employees within the scope of their employment. "Scope of employment" is addressed using the factors in Restatement (Second) of Torts § 228. Plaintiff was entitled to directed verdict on employer's vicarious liability. <u>Domke v. Alyeska Pipeline Service Co.</u>, 137 P.3d 295 (Alaska 2006).

In Alaska, an employer's liability for torts of an employee is determined by whether the conduct occurred within the scope of the employee's employment. This determination is made by applying factors stated in Restatement (Second) of Torts §§ 228 and 229. On the facts in this case, the issue could not be decided on summary judgment. Ondrusek v. Murphy, 120 P.3d 1053 (Alaska 2005).

WORKERS' COMPENSATION. Estate of an employee who was killed at a job site could pursue a tort claim against decedent's employer based on fact issues regarding whether the incident occurred after the shift was over, and whether the employee was engaged in activities that were unrelated to work. Even when an injury occurs on the employer's premises, it may not be covered by workers' compensation if the employee has loitered around the workplace after the shift is over, and is engaged in unauthorized activities. Estate of Milos v. Quality Asphalt, 143 P.3d 533 (Alaska 2006).

Where a stipulation to apportion fault to the non-party employer may have adversely affected the employer's workers' compensation lien, the employer or its insurer should have been permitted to intervene in the tort suit. Scammon Bay Association v. Ulak, 126 P.3d 138 (Alaska 2005).

WRONGFUL DEATH. Wrongful death settlement proceeds are allocated among statutory beneficiaries based on Horsford v. Estate of Horsford, 561 P.2d 927 (Alaska 1977). The Horsford formula considers the life expectancy of the decedent, and the years that each statutory dependent could reasonably expect to receive significant benefits from the decedent. Absent reliable evidence to the contrary, the court should assume that the decedent would have had a full life expectancy. The court can take judicial notice of mortality tables. A party who claims that the decedent did not have an ordinary life expectancy has the burden on this issue. Clement v. Fulton, 110 P.3d 927 (Alaska 2005).