2008 UPDATE

TORT/PERSONAL INJURY SECTION
ALASKA BAR ASSOCIATION

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SUMMARY OF DECISIONS
BY THE ALASKA SUPREME COURT
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ABUSE OF PROCESS. An action taken in the ordinary course of litigation without ulterior motive, such as filing a motion to compel compliance with a court order, cannot serve as the basis for an abuse of process claim. DeNardo v. Cutler, 167 P.3d 674 (2007).

ARBITRATION. In an arbitration between an insurance company and its insured, the arbitrator's findings of fact are unreviewable, even in the event of gross error. Although an arbitrator's decision may be reversed due to fraud, fraud requires proof of affirmative wrongdoing. Gilbert v. State Farm, 171 P.3d 136 (2007).

BATTERY. Emotional distress damages may be awarded for battery even without demonstrating that the conduct was outrageous. Brandner v. Hudson, 171 P.3d 83 (2007).

Emotional distress claims in a battery case were subject to "eggshell skull" rule and would not be reduced based on an argument that the plaintiff's reaction was extreme or unusual. Brandner v. Hudson, 171 P.3d 83 (2007).

Battery requires intent to cause harmful or offensive contact. Absent proof of such intent, cigarette smoke from a neighbor's apartment is not battery. DeNardo v. Corneloup, 163 P.3d 956 (2007).

CAUSATION. Alaska follows the substantial factor test. Plaintiff must show that the accident would not have happened but for the defendant's negligence and that the negligent act was so important in bringing about the injury that reasonable individuals would regard it as a cause and attach responsibility to it. Winschel v. Brown, 171 P.3d 142 (2007).

Alaska follows the Restatement (2d) of Torts § 435 regarding superseding cause. Superseding cause exists only when after the event and looking back from the harm to the actor's negligent conduct it appears highly extraordinary that it should have brought about the harm. It was error to grant summary judgment finding that the plaintiff's illegal use of an ATV

on a bike path at allegedly excessive speed was a superseding cause. Winschell v. Brown, 171 P.3d 142 (2007).

COLLATERAL ESTOPPEL. A defendant who pleads no contest to an assault charge is collaterally estopped in a civil action for assault, so trial court properly granted summary judgment in favor of the plaintiff on liability. Wilson v. MacDonald, 168 P.3d 887 (2007).

COMPARATIVE NEGLIGENCE. The issue of comparative negligence should have been submitted to the jury, when the facts could support the conclusion that the plaintiff driver had been negligent due to excessive speed. The driver's compliance with the speed limit did not foreclose a finding of comparative negligence. Noffke v. Perez, ___ P.3d ___ (2008).

DAMAGES. A tort award may be offset by amounts previously paid by a defendant or its insurer, including payments made to a plaintiff's subrogated insurer. In order to obtain an offset for pretrial damage payments made by a defendant, the defendant must show that the payments covered the same expenses that were included in the jury's award. If defendant intends to seek an offset, defendant is responsible for making sure that the verdict is specific enough so that the judge can determine whether the jury awarded the same expenses for which the offset is sought. Turner v. Municipality of Anchorage, 171 P.3d 180 (2007).

The rule adopted in Petrolane v. Robles applies to causes of action that arose after the 1997 amendment to AS 09.17.080. Therefore, the defendant's liability is not reduced by settlement amounts paid by a joint tortfeasor. The nonsettling defendant is liable for its percentage of the total damages, without regard to amounts paid by settling parties. Diggins v. Jackson, 164 P.3d 647 (2007).

DEFAMATION. A statement is defamatory if it tends to harm the reputation of another so as to lower him in the estimation of the community or to deter third persons from associating with him (Restatement § 580B). The alleged defamatory statements accused the plaintiff of conduct that constituted a felony. This is slander per se. The jury could award general damages without proof of damages. MacDonald v. Riggs, 166 P.3d 12 (2007).

Speech on matters of public safety is conditionally privileged. The privilege extends to non-malicious misstatements of fact. Plaintiff must prove actual malice (statement made with actual knowledge that it was false, or with reckless disregard to whether it was false). Newspaper was entitled to summary judgment when it met its burden with a reporter's affidavit asserting that he believed the facts were true, and describing his sources. Olivit v. City and Borough of Juneau, 171 P.3d 1137 (2007).

Pure expressions of opinion cannot be the basis for a defamation claim. An expression of opinion is defamatory if the expression includes an implied assertion of false fact, and is sufficiently derogatory to cause harm to the plaintiff's reputation. If the context demonstrates that the speaker is not purporting to state or imply actual, known facts, the claim fails. State v. Carpenter, 171 P.3d 41 (2007).

Alaska recognizes a claim for false light invasion of privacy, as described in Restatement § 652E. Such claims require proof of false statements of fact. A statement of opinion cannot support a false light claim. State v. Carpenter, 171 P.3d 41 (2007).

DUTY OF CARE. Under the Restatement (2d) of Torts § 321, when the combined actions of two actors result in a hazardous condition, each actor may be treated as having created the hazard, if each actor's conduct substantially contributed to the resulting hazard and each actor realized the resulting danger of serious harm to others. Thus, more than one actor may have a duty to use reasonable care to prevent the hazard from causing harm to others. The duty is not restricted to one actor whose conduct is the but for cause of the hazard. Parnell v. Peak Oilfield Service Co., 174 P.3d 757 (2007). See also Winschel v. Brown, 171 P.3d 142 (2007).

Summary judgment may be granted on the existence of duty, but is ordinarily not granted on the precise scope of the duty or whether there is a breach. Winschel v. Brown, 171 P.3d 142 (2007).

The defendant owes a duty of care to all persons foreseeably endangered by his conduct, with respect to all risks which make the conduct unreasonably dangerous. The court takes an expansive view of foreseeability. Foreseeability does not require that the precise harm be predictable. Thus, a driver who knocked over a utility pole had a duty of care toward an individual who subsequently hit the downed pole while illegally operating an ATV on a bike path at allegedly excessive speed. The plaintiff's conduct was a comparative fault issue. Winschel v. Brown, 171 P.3d 142 (2007).

EXCESSIVE FORCE/QUALIFIED IMMUNITY. In excessive force cases, Alaska follows a qualified immunity rule similar to the rule stated by the United States Supreme Court in Saucier v. Katz (clarifying Samaniego v. City of Kodiak). Even if an officer's conduct is objectively excessive, an officer is immune if the officer reasonably believed that the conduct was legal, in light of clearly established law and the facts of the case. A mistaken but reasonable belief about the legality of the officer's actions supports immunity. Sheldon v. City of Ambler, 178 P.3d 459.

EXPERT WITNESSES. The trial judge did not abuse his discretion when he ordered an expert witness to produce his income tax returns, under the protection of a confidentiality order. Income tax information was relevant to proving bias, based on the argument that the witness's impartiality could be called into question if the witness generated a significant portion of his income from a particular side or particular attorney. Privacy considerations were adequately addressed by a confidentiality order. Marron v. Stromstad (affirming an opposite decision by a trial court) is distinguished, because in that case there was other evidence that could be used to prove the expert's bias, and because in Marron the experts had refused to produce their tax returns. In Noffke, the expert intervened and expressed willingness to produce his tax returns, subject to a protective order. Noffke v. Perez, ___ P.3d ___ (2008).

It was error to exclude an expert witness's affidavit based on failure to comply with a pretrial deadline, when excluding the affidavit determined a central issue in the case (plaintiff's causation theory in a product liability case) and the court did not consider lesser sanctions for the failure to comply with the pretrial order. It was also error to exclude the expert's affidavit as conclusory. Maines v. Kenworth Alaska, 155 P.3d 318 (2007).

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS. IIED claims alleging that the defendant provoked listeners to harass the plaintiff were distinct from defamation claims and were not protected by the First Amendment. Thus, such statements could be the basis for an IIED claim, and were not subject to limits that are imposed upon defamation claims. An IIED claim could not be based solely on derogatory comments about the plaintiff, as those statements were subject to a qualified privilege for matters of public interest. Instructions on the IIED claim must distinguish between these categories of speech. State v. Carpenter, 171 P.3d 41 (Alaska 2007).

MISREPRESENTATION. Under the Restatement of Torts § 551, there is a duty to disclose facts if the disclosure is necessary to prevent partial or ambiguous statements from being misleading. Summary judgment was proper when there was no evidence of partial or ambiguous statements by the defendant. Deptula v. Simpson, 164 P.3d 640 (2007).

Under the Restatement of Torts § 551, there is a duty to disclose facts basic to a transaction when a party occupies a special relationship such that disclosure would reasonably be expected. When each party was represented by a real estate agent, and the contract contained an "as is" clause, there was no "special relationship" that would give rise to a duty of disclosure, and defendant was entitled to summary judgment. Deptula v. Simpson, 164 P.3d 640 (2007).

In a misrepresentation claim, plaintiff has the burden of proving that the alleged misrepresentation was material. A material fact is one that could reasonably be expected to influence a person's judgment or conduct. Diblik v. Marcy, 166 P.3d 23 (2007).

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS. A claim for negligent infliction of emotional distress in the absence of a physical injury depends in part upon whether there is a preexisting contractual or fiduciary relationship between the plaintiff and the defendant, and a breach of duties arising from that relationship would foreseeably result in emotional harm. An employer's promise to provide health insurance to an employee whose spouse was pregnant meets these requirements and supports an award for negligent infliction of emotional distress for failure to provide insurance as promised. Southern Alaska Carpenters Health & Security Trust Fund v. Jones, 177 P.3d 844 (2008).

OFFERS OF JUDGMENT. The defendant's insurer paid the plaintiffs' medical bills. Prior to trial, the defendant made a Rule 68 offer. The offer did not refer to the medical expense payments. Since the medical bills were paid by the defendant's insurer, plaintiff had no right to recover them. To determine whether the judgment was lower than the Rule 68 offer, the court had to subtract the medical expenses from the damages awarded by the jury. When the insurer paid the medical bills, the insurer did not specify that the payments were limited to the defendant (insured's) share of fault. Consequently, the payments should have been deducted from the total damage award, not from the portion of the damages awarded against the defendant based on its percentage of fault. Jackman v. Jewel Lake Villa One, 170 P.3d 173 (2007).

An offer of judgment is not conditional when it acknowledges the existence of a lien and says that the offeree is responsible for it. The offer of judgment was not ambiguous because it failed to say that a lien had been satisfied through payment by the offeror. Turner v. Municipality of Anchorage, 171 P.3d 180 (2007).

In a case where defendant has filed a third party complaint to apportion fault to a third-party defendant, but plaintiff has not sued the third-party defendant, an offer of judgment by the defendant is invalid, because it creates undue apportionment problems. Pagenkopf v. Chatham Electric, 165 P.3d 634 (2007).

PRODUCT LIABILITY. Defense expert's statement that the failure rate in an evaporator core was ½% was sufficient to raise a genuine issue of

material fact on plaintiff's negligent manufacture theory, because reasonable jurors could conclude that toxic gas leaks in 1 out of 200 trucks was an unacceptable failure rate. Maines v. Kenworth Alaska, 155 P.3d 318 (2007).

PUNITIVE DAMAGES. AS 09.17.020(j), authorizing the State to receive 50% of punitive damage awards, does not violate the Alaska Constitution. The State's share of the punitive damage award is reduced by a pro rata share of the plaintiff's contingent attorneys' fees, and a pro rata share of the plaintiff's costs. State v. Carpenter, 171 P.3d 41 (2007).

A punitive damage award of $150,000 on an award of $5000 in compensatory damages (30 to 1 ratio) was not excessive under constitutional due process standards. The relatively low compensatory damages could justify this ratio, and the punitive damage award was consistent with the fines that could be imposed in a criminal case involving similar conduct. State v. Carpenter, 171 P.3d 41 (2007).

SOVEREIGN IMMUNITY. AS 09.50.250(5) revoked the State's waiver of sovereign immunity for claims by state-employed seaman, and required those employees to seek compensation under the workers' compensation system. The State's assertion of sovereign immunity did not violate Article II, section 21 of the Alaska Constitution. Article II, section 21 is not an absolute waiver of the State's sovereign immunity. The Alaska legislature may specify circumstances where sovereign immunity is not waived. Glover v. State, 175 P.3d 1240 (2008).

SPOLIATION OF EVIDENCE. A spoliation claim requires proof that the plaintiff had a viable underlying cause of action, that spoliation occurred with the intent to disrupt the civil action, and that the spoliation disrupted prosecution of the action. Evidence that the defendant was on notice of the potential claim and gave the tape to its legal department was sufficient to support the inference that the defendant acted with the necessary intent. State v. Carpenter, 171 P.3d 41 (2007).

Punitive damages are particularly appropriate for spoliation claims, as the compensatory damages are speculative due to the destruction of the relevant evidence. State v. Carpenter, 171 P.3d 41 (2007).

STATUTES OF LIMITATIONS. The statute of limitations in AS 09.10.140(c) barring certain claims of minors is unconstitutional, because it violates the due process right of access to the courts. Sands v. Green, 156 P.3d 1130 (2007).

The statute that tolls the statute of limitation when a defendant is out of state does not apply if the defendant is subject to service of process under the Alaska long arm statute during the period when the defendant is out of state. Kuk v. Nalley, 166 P.3d 47 (2007).

UIM INSURANCE. In determining the amount payable by a UIM insurer, the amount paid by the tortfeasor's insurer is offset against the total damages determined by a UIM arbitration panel. Pursuant to Coughlin, the UIM insurer's obligation to make UIM payments was triggered when the insured accepted the full face amount of the tortfeasor's insurance policy. But the UIM insurer was not obligated to pay prejudgment interest and attorneys' fees to its insured, when these amounts were available to the insured under the tortfeasor's policy but the insured had not obtained these amounts in its settlement with the tortfeasor. The UIM insurer was, however, obligated to pay a pro rata share of attorneys' fees incurred by the insured in obtaining the settlement from the tortfeasor. Sidney v. Allstate Insurance, ___ P.3d ___ (2008) (petition for rehearing pending).