STATE OF ALASKA
LITIGATION OVERVIEW

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I. The Alaska Court System

The Alaska Court system has three court levels: the trial courts, the Court of Appeals, and the Alaska Supreme Court. The Court of Appeals handles criminal appeals only. AS 22.07.020. There is discretionary review of Court of Appeals rulings by the Supreme Court. AS 22.07.030.

The trial courts are divided into the District Courts, which are courts of limited jurisdiction that handle smaller matters, and the Superior Courts, which are courts of general jurisdiction. Civil cases that seek damages less than $100,000.00 generally must be filed in District Court. AS 22.15.030. Discovery is more limited in District Court cases. District Court cases are appealable to the Superior Court.

The court system is divided into four judicial districts that cover the state. Each judicial district is then divided into a number of venue districts. The lines for the judicial districts and venue districts do not necessarily follow any political boundaries. Each judicial district will contain several superior court locations and a larger number of venue districts or district court locations. AS 22.15.020.

II. Statutes of Limitation

A. Personal Injury

The statute of limitation for personal injury is two years. AS 09.10.070. Alaska has adopted the "discovery" rule, which provides that the statute of limitation begins to run when a plaintiff discovers or should have discovered that a claim may have existed. Sengupta v. Wickwire, 124 P.3d 748, 753 (Alaska 2005); John's Heating Service v. Lamb, 46 P.3d 1024, 1031-32 (Alaska 2002); Hanebuth v. Bell Helicopter, Int'l, 694 P.2d 143, 144 (Alaska 1984); Pedersen v. Zielski, 822 P.2d 903 (Alaska 1991) (statute starts to run on date plaintiff discovers or should reasonably have discovered all elements of his or her cause of action).

B. Wrongful Death

The statute of limitation for a wrongful death action is also two years. AS 09.55.580(a). The statute may be tolled during the period in which the statutory beneficiary is a minor. Haakanson v. Wakefield Seafoods, Inc., 600 P.2d 1087 (Alaska 1979). The two-year statute of limitations begins to run from the time of death, not the underlying tort or accident which caused the injury. In re Estate of Maldonado, 117 P.3d 720, 726-27 (Alaska 2005).

C. Property Damage

The statute of limitation for personal property damage actions is two years. AS 09.10.070.

Damage to real property, including to a residence, falls under the six year statute of limitations for trespass. State Farm Fire & Cas. Co. v. White-Rodgers Corp., 77 P.3d 729, 731 (Alaska 2003). Nuisance claims also fall under the six year statute of limitations for trespass. AS 09.10.050; Fernandes v. Portwine, 56 P.3d 1, 6 (Alaska 2002).

D. Breach of Contract

The statute of limitation for breach of contract claims is three years. AS 09.10.053; Silvers v. Silvers, 999 P.2d 786 (Alaska 2000). For contract actions arising before August 7, 1997, the statute of limitations is six years. Alderman v. Iditarod Properties, Inc., 104 P.3d 136, 139 (Alaska 2004).

E. Professional liability.

Actions for a breach of a duty arising out of a professional services relationship are governed by AS 09.10.053, and thus are subject to a three-year limitation period. Gefre v. Davis Wright Tremaine, LLP, 306 P.3d 1264, 1273 (Alaska 2013); Hutton v. Realty Executives, Inc., 14 P.3d 977, 980 (Alaska 2000).

F. Product Liability

Product liability actions may be brought under the theory of strict product liability, breach of warranty, or ordinary negligence. For claims pursued under principles of negligence or strict product liability, the statute of limitation is two years from the date of the accident, or two years from the time at which the plaintiff should reasonably have discovered all elements of his or her cause of action. AS 09.10.070; Yurioff v. American Honda Motor Co., 803 P.2d 386 (Alaska 1990); Anderson v. Fairchild Hiller Corp., 358 F. Supp. 976 (D. Alaska 1973) (requiring that strict liability claims be brought within two years is a reasonable interpretation of the public policy of Alaska).

Unlike claims for strict product liability and negligence, warranty claims are governed by the statute of limitation contained in the Uniform Commercial Code. AS 45.02.725. Under this statute, warranty claims are governed by a four-year statute of limitation which usually begins to run at the time the product is sold. Sinka v. Northern Commercial Co., 491 P.2d 116 (Alaska 1971). When a product warranty "explicitly extends to future performance," the four-year statute of limitation begins to run from the date of injury rather than the date of sale, however. Armour v. Alaska Power Authority, 765 P.2d 1372 (Alaska 1988).

G. Fraud and Misrepresentation

Misrepresentation and fraud are tort concepts, and the two-year tort statute of limitations governs these claims. Hutton v. Realty Executives, Inc., 14 P.3d 977, 979-80 (Alaska 2000); Alaska Tae Woong Venture, Inc. v. Westward Seafoods, Inc., 963 P.2d 1055, 1065 (Alaska 1998).

H. Tolling of the Statute

If a plaintiff is either incompetent or a minor at the time the cause of action accrues, the statute of limitation is tolled until two years after the disability ceases. AS 09.10.140(a); AS 09.10.180; Cikan v. ARCO Alaska, Inc., 125 P.3d 335, 339 (Alaska 2005); Yurioff v. American Honda Motor Co., 803 P.2d 386 (Alaska 1990). The age of majority in Alaska is eighteen. AS 25.20.010; see also Neary v. McDonald, 956 P.2d 1205, 1209 n.3 (Alaska 1998) (noting that the age of majority is eighteen years of age). The statute also tolls if a person becomes incompetent after the cause of action arose, but before bringing suit. AS 09.10.180.

The 1997 Tort Reform Act attempted to create an exception to the tolling statute for plaintiffs who are under the age of eight at the time the injury occurred. Under this exception, when a plaintiff is injured while under the age of eight, the statute of limitation is tolled until the child's eighth birthday. AS 09.10.140(c). Evans v. State, 56 P.3d 1046, 1066 (Alaska 2002). The Alaska Supreme court ruled this exception to be unconstitutional as violating the due process right of minors to access the courts. Sands ex rel. Sands v. Green, 156 P.3d 1130, 1136 (Alaska 2007).

The Alaska court has also relied on the doctrines of equitable estoppel and equitable tolling to extend the statute of limitations. Although both doctrines serve to excuse an untimely filing, they differ in that equitable estoppel turns on wrongdoing by the party invoking the statute of limitations, whereas the equitable tolling rule looks only to the claimant's circumstances -- whether he has pursued an alternative remedy that proved unavailing. Kaiser v. Umialik Ins., 108 P.3d 876, 880 (Alaska 2005).

I. Statute of Repose

The 1997 Alaska Tort Reform statute created a ten year statute of repose. This statute establishes that a person may not bring an action for personal injury, death, or property damages unless the action is commenced within "10 years of the earlier of . . . (1) substantial completion of the construction" or "within 10 years of the last act alleged to have caused the personal injury, death or property damage." AS 09.10.055(a)(1), (2). This ten year statute of repose applies to causes of action accruing on or after August 7, 1997.

The statute of repose is intended to bar claims based on conduct which occurred over ten years in the past. It applies even where the plaintiff is under the age of majority or under a

disability at the time of injury. See AS 09.10.055(a). There are a number of exceptions to the statute. For example, the statute does not apply where:

> (1) the personal injury, death or property damage was caused by (A) prolonged exposure to hazardous waste; (B) an intentional act or gross negligence; (C) fraud or misrepresentation; (D) breach of an express warranty or guarantee; (E) a defective product; (F) breach of trust or fiduciary duty; (2) the facts that would give notice of a potential cause of action are intentionally concealed; (3) a shorter period of time for bringing the action is imposed under another provision of law; (4) the provisions of this section are waived by contract; or (5) the facts that would constitute accrual of a cause of action of a minor are not discoverable in the exercise of reasonable care by the minor's parent or guardian.

AS 09.10.055(b).

A prior Alaska statute of repose was declared unconstitutional by the Alaska Supreme Court. Turner Construction Co. v. Scales, 752 P.2d 467 (Alaska 1988). The current statute of repose has been found to be constitutional, however. Evans v. State, 56 P.3d 1046, 1068 (Alaska 2002). But the constitutionality of the statute as applied to minors remains in doubt because of due process concerns. See Sands ex rel. Sands v. Green, 156 P.3d 1130, 1136 (Alaska 2007).

III. Choice of Law

A. On Torts

In tort cases, Alaska courts have followed the Restatement (Second) of Conflicts of Law in determining the applicable substantive law. Ehredt v. deHavilland Aircraft Co. of Canada, Ltd., 705 P.2d 446, 453 (Alaska 1985). Under the Restatement, the local law of the state where the injury occurred determines the rights and liabilities of the parties in a personal injury action unless some other state has a more significant relationship to the occurrence and to the parties. Id. In other words, the court will apply the local law of the state with the most significant relationship to the parties and the occurrence. Savage Arms, Inc. v. Western Auto Supply Co., 18 P.3d 49 (Alaska 2001).

B. On Contracts

Alaska courts have similarly looked to the principles set forth in the Restatement (Second) of Conflicts of Law in resolving choice of law questions involving contracts. See Palmer G. Lewis Co. v. ARCO Chemical Co., 904 P.2d 1221, 1227 (Alaska 1995). Under the Restatement, the courts are directed to examine the location in which the contract was entered, negotiated, and performed and then apply the law of the state with "the most significant relationship to the transaction and the parties." Id. at 1234 n.14.

C. Choice of Forum Provisions

Generally, Alaska courts will apply the law of the state chosen by the parties to govern their contractual rights. Id.; Alaska Airlines, Inc. v. United Airlines, Inc., 902 F.2d 1400, 1403 (9th Cir. 1990). Thus, a choice of law clause in a contract will generally be given effect unless (1) the chosen state has no substantial relationship with the transaction or there is no other reasonable basis for the parties' choice, or (2) the application of the law of the chosen state would be contrary to a fundamental public policy of a state that has a materially greater interest in the issue and would otherwise provide the governing law. Peterson v. Ek, 93 P.3d 458, 465 (Alaska 2004). However, where the interest of Alaska is greater than that of the jurisdiction chosen by the parties, and the application of the law of the chosen state would offend a fundamental policy of Alaska, the court may disregard the parties' choice of law. E.g., Long v. Holland American Lines, 26 P.3d 430 (Alaska 2001).

IV. Principles of Negligence, Liability

A. Elements of Negligence

To establish negligence, a party must prove duty, breach of duty, causation, and harm. Silvers v. Silvers, 999 P.2d 786, 793 (Alaska 2000). The elements of a negligence claim in the medical malpractice setting are set forth in AS 09.55.540(a). See Marsingill v. O'Malley, 58 P.3d 495, 499 (Alaska 2002).

B. Reasonable Person Standard

The Alaska Supreme Court has held that the jury is required to weigh actions of persons charged with negligence against the standard of conduct of a reasonable person in the same circumstances. Lyons v. Midnight Sun Transportation Services, Inc., 928 P.2d 1202 (Alaska 1996); Wilson v. Sibert, 535 P.2d 1034, 1036-37 (Alaska 1975). This obligation to act reasonably may create liability for inaction if a reasonably prudent person would have foreseen the probability of harm resulting from the failure to act. State v. Guinn, 555 P.2d 530, 536 (Alaska 1976).

C. Duty of Care of Minors

The general rule is that minors are held to the same standard of care as a person of like age, intelligence and experience under similar circumstances. This standard does not apply where a child is engaged in activities normally only undertaken by adults, such as driving a vehicle, in which case the minor is held to an adult standard of care. Ardinger v. Hummell, 982 P.2d 727 (Alaska 1999). On the other hand, it is less likely that a minor will be held to an adult standard of care in cases involving handling of firearms. J.R. v. State, 62 P.3d 114 (Alaska App. 2003) (discussing but not deciding issue).

D. Res Ipsa Loquitur

The doctrine of res ipsa loquitur "is a bridge, dispensing with the requirement that a plaintiff specifically prove breach of duty, once that duty and proximate cause have been established," and applies only when an accident ordinarily does not occur in the absence of negligence. State Farm Fire & Cas. Co. v. Municipality of Anchorage, 788 P.2d 726, 730 (Alaska 1990); Widmyer v. Southeast Skyways, Inc., 584 P.2d 1, 10 (Alaska 1978); Falconer v. Adams, 974 P.2d 406, 414 (Alaska 1999).

The doctrine of res ipsa loquitur permits, but does not compel, an inference of negligence from the circumstances of an injury. The doctrine should be applied when: (1) the accident is one which ordinarily does not occur in the absence of someone's negligence; (2) the agency or instrumentality is within the exclusive control of the defendant; and (3) the injurious condition or occurrence was not due to any voluntary action or contribution on the part of the plaintiff. Widmyer, 584 P.2d at 11 (footnote omitted).

By shifting the burden of production of evidence to the defendant without relieving the plaintiff of the burden of proof, the doctrine makes recovery possible where circumstances render proof of the defendant's specific act of negligence impracticable and the defendant is the party in the superior, if not the only, position to determine the cause of an accident. Ferrell v. Baxter, 484 P.2d 250, 258 (Alaska 1971). Uncontradicted proof of specific acts of negligence which completely explain the circumstances and cause of the accident renders the doctrine superfluous and inapplicable. Widmyer, 584 P.2d at 11-12; State Farm Fire & Cas. Co. v. Municipality of Anchorage, 788 P.2d 726, 730 (Alaska 1990).

Alaska has legislatively nullified the doctrine of res ipsa loquitur in medical malpractice actions. Parker v. Tomera, 89 P.3d 761, 770 (Alaska 2004).

E. Negligence Per Se

In Alaska, violation of a legislative enactment or administrative regulation may constitute negligence per se. McLinn v. Kodiak Electric Ass'n, Inc., 546 P.2d 1305 (Alaska 1976). Under the negligence per se doctrine, a court may adopt as the standard of conduct of a reasonable person the requirements of a regulation or statute whose purpose is to protect the class of persons to which the plaintiff belongs. The unexcused violation of such a statute is negligence in itself. Ferrell v. Baxter, 484 P.2d 250, 263-64 (Alaska 1971). In determining whether to give a negligence per se instruction, the trial court must first determine whether the conduct at issue lies within the ambit of the statute or regulation in question, by applying the four criteria set out in the Restatement (Second) of Torts § 286 (1965). Shanks v. Upjohn Co., 835 P.2d 1189, 1201 (Alaska 1992).

Substitution of an applicable law for the general duty of care is appropriate when the rule of conduct contained in the law is expressed in specific, concrete terms. Substitution is not

appropriate when the law merely sets out a general or abstract standard of care. Bachner v. Rich, 554 P.2d 430, 441-42 (Alaska 1976). The Alaska court has adopted the standards of the Restatement (Second) of Torts § 288A for determining whether a violation of a statute is excused. Getchell v. Lodge, 65 P.3d 50 (Alaska 2003) (skidding into other lane of traffic while trying to avoid moose constitutes a valid excuse).

F. Products Liability

1. Design Defect

In Alaska, there is a two-prong test for establishing design defect. Under this test, a product is defective either if the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner [consumer expectation test], or if the plaintiff proves that the product's design proximately caused his injury and the defendant fails to prove that on balance the benefits of the challenged design outweighed the risk of danger inherent in such design [risk benefit test]. General Motors Corp. v. Farnsworth, 965 P.2d 1209, 1220 (Alaska 1998); Caterpillar Tractor Co. v. Beck, 593 P.2d 871 (Alaska 1979).

2. Manufacturing Defect

In Alaska, there is a manufacturing defect if the product differed from the manufacturer's intended result, or the product differed from other units of the same product line. Shanks v Upjohn Co., 835 P.2d 1189 (Alaska 1992); Caterpillar Tractor Co. v. Beck, 593 P.2d 871 (Alaska 1979).

3. Failure to Warn

A manufacturer has a duty to warn if the use of the product in a manner that is reasonably foreseeable by the defendant involves a substantial danger that would not be readily recognized by the ordinary user of the product and the manufacturer fails to provide adequate warning of such danger. Prince v. Parachutes, Inc., 685 P.2d 83 (Alaska 1984); Shanks v. Upjohn Co., 835 P.2d 1189 (Alaska 1992). There is no duty to warn as to open and obvious dangers. Id. A manufacturer has a post-sale duty to inform consumers of its products of dangers that became apparent after sale when the danger is potentially life-threatening. Jones v. Bowie Indus., Inc., 282 P.3d 316, 335 (Alaska 2012).

4. Breach of Warranty

Breach of warranty claims are governed by Alaska's Uniform Commercial Code. See Alaska Statutes ch. 45.02. Breach of an express warranty requires proof of the existence of the warranty, breach, loss proximately caused by breach, and that the product failed to perform in accordance with warranty terms. Universal Motors, Inc. v. Waldrock, 719 P.2d 254 (Alaska

1986). Alaska also recognizes the implied warranty of merchantability and the warranty of fitness for intended purpose. Damages will be reduced based on the plaintiff's comparative negligence. AS 09.17.900.

G. Successor Liability

A successor corporation can be held liable for the torts of a prior corporation if (a) the successor agrees to assume liabilities; (b) when the purchase amounts to a consolidation or merger; (c) where the purchasing company is a "mere continuation" of the selling company; and (d) when the sale is a sham to avoid liabilities. In addition, there are three additional "modern" exceptions: (e) continuity of existence; (f) product line; and (g) "duty to warn." Savage Arms Inc. v. Western Auto Supply Co., 18 P.3d 49 (Alaska 2001).

H. Landowner Liability

Alaska courts have abandoned the traditional rule that the scope of a landowner's duty depends on the status of the plaintiff as trespasser, licensee, or invitee. Webb v. City & Borough of Sitka, 561 P.2d 731 (Alaska 1977). The duty of a landowner is to use reasonable care under the circumstances. Schumacher v. City & Borough of Yakutat, 946 P.2d 1255 (Alaska 1997). Thus, as a general rule, landowners have a duty to use due care to guard against unreasonable risks created by dangerous conditions existing on their property. Guerrero v. Alaska Housing Finance Corp., 6 P.3d 250 (Alaska 2000).

Landlords also have a general duty of care to use reasonable care under the circumstances. This duty extends to commercial leases. Sauve v. Winfree, 985 P.2d 997 (Alaska 1999). This duty may extend to injuries that occur off the landlord's premises if the property is maintained in such a manner as to expose persons to an unreasonable risk of injury offsite. Guerrero v. Alaska Housing Finance Corp., 6 P.3d 250 (Alaska 2000). Whether a landlord will have a duty with respect to off-site hazards will involve a consideration of the following factors: (1) whether the hazard was immediately adjacent to the landlord's property; (2) whether the landlord had any right or ability to control or abate the off-site hazard; (3) whether that hazard was as open and obvious; and (4) whether any activity or condition on the landlord's property contributed to the accident or enhanced the adjacent danger. Guerrero v. Alaska Housing Finance Corp., 123 P.3d 966, 973 (Alaska 2005).

I. Ultrahazardous Activity

Alaska has adopted the ultrahazardous activity test for determining whether a manufacturer or retailer of a dangerous product will be held strictly liable for a resulting injury. The court determines whether a product is ultrahazardous, taking into account (1) whether there is a serious risk of harm, (2) whether the product cannot be made completely safe, and (3) whether the product is uncommon in the area. See Parks Hiway Enterprises, LLC v. CEM Leasing, Inc., 995 P.2d 657 (Alaska 2000). Some products, such as explosives, are deemed

ultrahazardous as a matter of law and a manufacturer or retailer can be held strictly liable for damage resulting from use of that product.

J. Causation

There is a two-part test for causation in tort cases. First, the plaintiff must show that the accident would not have happened "but for" the defendant's negligence. Second, the negligent act must have been so important in bringing about the injury that a reasonable person would regard it as a cause and attach responsibility to it. Robles v. Shoreside Petroleum, Inc., 29 P.3d 838 (Alaska 2001). However, the "but for" test may be inappropriate for cases involving independent concurrent causes. Vincent v. Fairbanks Memorial Hospital, 862 P.2d 847 (Alaska 1993).

V. Allocation of Fault

A. Joint & Several Liability Abolished

Alaska is a pure comparative fault state and provides for the apportionment of fault to plaintiffs and all other parties to the action in warranty and tort-based actions. AS 09.17.060, .080, .900. That is, a defendant's share of financial responsibility for the judgment is reduced according to the percentage of fault apportioned to plaintiff and the other parties. Id. Fault is broadly defined to include negligent, reckless or intentional misconduct, breach of warranty, misuse of a product, unreasonable failure to avoid an injury, or failure to mitigate damages. AS 09.17.900.

Alaska abolished the system of joint and several liability which held each tortfeasor fully liable for the injured party's damages in 1989. AS 09.17.080; Robinson v. Alaska Properties and Inv., Inc., 878 F. Supp. 1318, 1321 (D. Alaska 1995); Benner v. Wichman, 874 P.2d 949, 955 (Alaska 1994); Fancyboy v. Alaska Village Elec. Co-op., Inc., 984 P.2d 1128 (Alaska 1999).[1] Alaska has adopted a system of pure several liability, in which a plaintiff "[can] only recover from each tortfeasor in the proportion that his fault played to the total fault of all the persons and entities at fault including the plaintiff herself." Robinson, 878 F. Supp. at 1321; AS 09.17.080. Since 1997, fault is allocated among all tortfeasors, regardless of whether the tort was negligent or intentional. Kodiak Island Borough v. Roe, 63 P.3d 1009 (Alaska 2003).

B. Allocation of Fault Procedures

Under Alaska's allocation of fault statute, fault can be allocated to parties to an action. The statute provides, as an exception, that fault may also be allocated to released parties. AS 09.17.080(a). Thus, a jury may allocate fault to all plaintiffs, defendants, and released parties. A

[1] Between 1986 and 1989 a system governed where each party could only be held liable for twice its percentage of fault.

defendant that wants to allocate fault to a non-party must join that party to the lawsuit. Alaska R. Civ. P. 14(c); Benner v. Wichman, 874 P.2d 949 (Alaska 1994).

C. Allocation of Fault to Absent Parties

Prior to the Tort Reform Act of 1997, the Alaska courts allowed a defendant to allocate a percentage of fault to a third party under the theory of equitable apportionment. However, a defendant who wished to allocate fault to a non-party was required to join the party to the action. Benner v. Wichman, 874 P.2d 949 (Alaska 1994) (fault may not be allocated to individuals who may have been at fault, but who were not properly joined as parties).

Under the 1997 Tort Reform Act, it is no longer necessary for a defendant to join a party in order to allocate fault in all situations. Fault may now be apportioned to non-parties if the parties did not have "sufficient opportunity to join" the absent party. The statute holds there is not "sufficient opportunity to join" if the party is outside the jurisdiction of the court, is not reasonably locatable, or where joinder is precluded by law. Where a party to an action has sufficient opportunity to join a party, but chooses not to do so, fault still cannot be allocated to the absent party. AS 09.17.080.

D. Allocation of Fault to Employers

Prior to the 1997 Tort Reform Act, fault could not be allocated to employers or co-employees who were at fault for injuries to a worker because of the workers' compensation bar. Lake v. Construction Machinery, Inc., 787 P.2d 1027 (Alaska 1990). Under the 1997 Tort Reform statute, fault may be allocated to employers and co-employees, although they cannot be held liable to plaintiff for damages. Allocation of fault to an employer can affect worker's compensation lien held by the employer, and the employer may intervene to protect its interests. AS 23.30.015(g); Scammon Bay Ass'n, Inc. v. Ulak, 126 P.3d 128 (2005).

E. Statute of Limitation Does Not Apply to Equitable Apportionment

The 1997 Tort Reform Act is committed to allowing equitable apportionment of fault among defendants. The Alaska Supreme Court made this abundantly clear in Alaska General Alarm v. Grinnell, in which the court held a third-party defendant could be sued for apportionment of fault even after the statute of limitation on the underlying claim had run. Alaska General Alarm v. Grinnell, 1 P.3d 98 (Alaska 2000) (statute of limitation for tort actions does not apply to claims for equitable apportionment). Alaska General Alarm further held that the third-party defendant must pay damages to the plaintiff for its percentage of fault, even if the third-party claim is brought after the statute of limitation has run.

The plaintiff, however, likely cannot bring a direct action against the third-party defendant after the statute of limitations has run. Janitscheck v. U.S., 45 Fed. Appx. 809 (9th Cir. 2002).

VI. Indemnity, Contribution

Contractual indemnity is recognized by Alaska law. Duty Free Shoppers, Ltd. v. State, 777 P.2d 649 (Alaska 1989). In a construction contract, however, indemnity agreements protecting a party from its sole negligence or willful misconduct are contrary to public policy and will not be enforced. AS 45.45.900.

Alaska traditionally allowed implied indemnity by a non-negligent party against the party primarily responsible, for example in a product liability action. Koehring Mfg. Co. v. Earthmovers of Fairbanks, Inc., 763 P.2d 499 (Alaska 1988); Ross Laboratories v. Thies, 725 P.2d 1076 (Alaska 1986). In the absence of a contrary contractual provision, there is no implied indemnity among concurrently negligent tortfeasors, however. Vertecs Corp. v. Reichhold Chemicals, Inc., 671 P.2d 1273 (Alaska 1983).

The Alaska court has held that equitable indemnity is no longer available as a remedy in Alaska, post tort reform. AVCP Regional Housing Authority v. R.A. Vranckaert Co., 47 P.3d 650 (Alaska 2002). The court continues to allow claims for implied contractual indemnity, e.g., in a products liability action, where the indemnitee (a) was not liable except vicariously for the tort of the indemnitor, or (b) was not liable except as a seller of a product supplied by the indemnitor and the indemnitee was not independently culpable. Id. The indemnitee must also have secured the release of the indemnitor. Id.

Prior to 1989, Alaska applied the Uniform Contribution Among Joint Tortfeasors Act. With the adoption of Alaska's earlier tort reform initiative, which became effective on March 5, 1989, statutory contribution was abolished in Alaska. Carriere v. Cominco Alaska, Inc., 823 F. Supp. 680, 684 (D. Alaska 1983).

In 2006, the Alaska Supreme Court recognized a cause of action for common law contribution. McLaughlin v. Lougee, 137 P.3d 267, 268–69 (Alaska 2006). See also Petrolane Inc. v. Robles, 154 P.3d 1014, 1022 (Alaska 2007)(McLaughlin recognized common law contribution action because it furthered the goal of apportioning tort losses in accordance with each responsible person's percentage of fault). Under this new cause of action, a tortfeasor who has settled a claim or satisfied a judgment may bring an action against a party whose responsibility was not considered in the original action. In order to establish a contribution claim there must be a discharge of the liability of the contribution defendant and payment of the contribution plaintiff in excess of the contribution plaintiff's comparative share of responsibility. See McLaughlin, supra.

VII. Tort Reform

A. Tort Reform Prior to 1997

Alaska has passed three separate tort reform statutes. A 1986 statute partially modified joint and several liability, so that a defendant could be required to pay no more than twice his percentage of fault. For example, a defendant found to be 25% at fault could be liable for no more than 50% of the plaintiff's total damages. The 1986 statute also made a number of other changes limiting a plaintiff's recovery, such as requiring proof of punitive damages by clear and convincing evidence, allowing collateral benefits to offset a monetary award under certain circumstances, and reducing future economic losses to their present value using principles of safe investment. The 1986 Tort Reform statute applied to causes of action arising after June 11, 1986.

The 1986 statute was amended by initiative in 1989. The 1989 amendment eliminated contribution and introduced a statutory scheme of pure several liability which limited each tortfeasor's liability to his or her percentage of relative fault.

B. Tort Reform in 1997

In 1997 the Alaska legislature adopted another tort reform statute which was intended to further limit liability. This statute was generally upheld as constitutional in Evans v. State, 56 P.3d 1046 (Alaska 2002). As to the damages caps and the award of punitive damages to the state, the statute was upheld by a split 2-2 decision only. The Alaska court subsequently has upheld the constitutionality of the punitive damages provisions of the statute. Reust v. Alaska Petroleum Contractors, Inc., 127 P.3d 807 (Alaska 2005).

The 1997 statute applied to causes of action accruing on or after August 7, 1997 and implemented a number of significant changes including the following:

1. Statutes of Limitation

The 1997 Tort Reform statute reduced the statute of limitation for injury to personal property from six years to two years; reduced the statute of limitation for contract actions from six years to three years; and created a ten year statute of repose.

2. Caps on Non-Economic Damages

The 1997 Tort Reform statute capped recovery for non-economic damages to the greater of $400,000 or $8,000 multiplied by the plaintiff's life expectancy. This cap applies to wrongful death claims, as well as other personal injury cases. In cases of severe, permanent physical impairment or severe disfigurement, the cap on non-economic damages was set at the greater of

$1,000,000 or $25,000 multiplied by the plaintiff's life expectancy. AS 09.17.010. A separate cap applies in medical malpractice actions. AS 09.55.549.

The Alaska Supreme Court has found the cap on non-economic damages to be constitutional. C.J. v. State, Dep't of Corr., 151 P.3d 373, 382 (Alaska 2006); L.D.G., Inc. v. Brown, 211 P.3d 1110, 1131 (Alaska 2009).

3. Caps on Punitive Damages; Discovery Regarding Assets

The 1997 Tort Reform statute placed caps on punitive damages as well. The default cap for punitive damages under the 1997 Tort Reform statute is the greater of three times the amount of compensatory damages or $500,000. AS 09.17.020(f). In cases where the wrongful acts were motivated by financial gain, and where the "adverse consequences of the conduct were actually known by the defendant or the person responsible for making policy decisions on behalf of the defendant," punitive damages are capped at the greater of $7,000,000, four times compensatory damages, or four times the aggregate amount of financial gain received as a result of the misconduct.

The 1997 Tort Reform statute incorporates a lower cap for punitive damages where the action involves unlawful employment practices.

Discovery regarding the defendant's assets is not allowed until the fact finder determines punitive damages are appropriate. Punitive damages are determined during a separate trial. Finally, 50% of a punitive damage award goes to the State of Alaska. AS 09.17.020(a), (e), (j).

4. Apportionment of Fault

The 1997 Tort Reform statute amended provisions on apportionment of fault, as discussed above.

5. Offers of Judgment

The 1997 Tort Reform statute changed Alaska law with regard to offers of judgment. These changes have been incorporated into the court rules and allow enhanced attorney fees where a judgment is at least 5% less favorable to the offeree[2] than the amount of the offer of judgment. Alaska R. Civ. P. 68.

[2] In other words, the party making an offer of judgment must now beat the offer by 5% to receive attorney fees under the rule. The party making an offer of judgment must beat the judgment by 10% where multiple defendants are involved.

The amount of attorney fees allowed depends on the stage of litigation in which the offer of judgment is made. Where an offer of judgment is made within 60 days of the required initial disclosures, the offeror may be awarded 75% of reasonable, actual attorney fees. If the offer is made more than 60 days after the required initial disclosures, but more than 90 days before trial, the offeror is entitled to 50% of reasonable, actual attorney fees. On the other hand, where the offer is made 90 days or less before trial, but more than ten days before trial, an offeror is entitled to 30% of reasonable, actual attorney fees.

A successful offeror under the new Alaska R. Civ. P. 68 is considered the "prevailing party" and is therefore entitled to elect attorney fees under either Alaska R. Civ. P. 82 or Alaska R. Civ. P. 68, whichever provides the greater recovery.

6. Prejudgment Interest

The 1997 Tort Reform statute lowered the rate of prejudgment and postjudgment interest to 3 percentage points above the Federal Discount Rate on January 2 of the year in which the judgment is entered. See AS 09.30.070. The interest rate changes the first of every year. The interest rate for cases that accrued prior to August 7, 1997 remains at 10.5%. For the current rate, see the state's web site at www.state.ak.us/courts/int.htm. The parties may contract for a different rate of interest to apply.

The Tort Reform statute codified current case law to assure that prejudgment interest is not allowed on future economic and non-economic damages or punitive damages. See AS 09.30.070(c); Navistar International Transportation Corp. v. Pleasant, 887 P.2d 951 (Alaska 1994) (no prejudgment interest on future damages); McConkey v. Hart, 930 P.2d 402 (Alaska 1996) (same); Bobich v. Stewart, 843 P.2d 1232 (Alaska 1993) (no prejudgment interest on punitive damages).

7. Discovery Limitations

The 1997 Tort Reform statute limited discovery in cases involving claims totaling less than $100,000. In such cases, the only discovery allowed is disclosures under Alaska R. Civ. P. 26, the depositions of the parties, and a deposition of one additional non-party witness. This change has been adopted by court rule and applies to all cases filed after August 7, 1997. See Alaska R. Civ. P. 26(a)(1) and Alaska Dist. Ct. R. Civ. P. 1(a)(1).

VIII. Immunities

A. Sovereign Immunity

The State of Alaska and municipalities enjoy limited sovereign immunity which protects the state and municipal governments from suit in certain circumstances. AS 09.50.250 (state); AS 09.65.070 (municipalities). The Alaska Supreme Court has adopted a distinction between

governmental planning decisions, which generally enjoy immunity, and operational decisions, which do not enjoy immunity. Industrial Indemnity Co. v. State, 669 P.2d 561 (Alaska 1983).

The Alaska Supreme Court has refused to use a mechanical test in determining whether a particular function or duty is immune from suit and weighs the possibility that liability may inhibit the vigorous performance of the state in its duties. State v. Abbott, 498 P.2d 712 (Alaska 1972) (excessive judicial interference with important decisions committed to the coordinate branches of government should be avoided); Adams v. State, 555 P.2d 235 (Alaska 1976) (Alaska Supreme Court declined to adopt a systematic test in determining whether a particular duty is discretionary); Kiokun v. State, Dept. of Public Safety, 74 P.3d 209, 216 (Alaska 2003) (detailed discussion of discretionary immunity doctrine; initial decision in this case whether to launch a search and rescue effort is sufficiently based on resource allocation and public policy considerations that it is immune).

Until recently, Alaska had not adopted absolute immunity for the discretionary acts of public officials. Instead, the Alaska courts examine three factors in determining whether immunity will attach. These factors are (1) the nature and importance of the government function, (2) the likelihood the public official will be subjected to frequent accusations of wrongful motives, and (3) the availability to the injured party of other forms of relief. Aspen Exploration Corp. v. Sheffield, 739 P.2d 150 (Alaska 1987). A 2004 statute now holds State employees acting in the course and scope of employment are immune from suit, and the proper defendant in any such suit is the state. AS 09.50.253.

Punitive damages are not recoverable against either a state or municipality. AS 09.50.280; Alaska Housing Finance Corp. v. Salvucci, 950 P.2d 1116, 1123 (Alaska 1997).

Alaska's native villages, as tribes, also have sovereign immunity. Runyon ex rel. B.R. v. Association of Village Council Presidents, 84 P.3d 437, 439 (Alaska 2004).

B. Worker's Compensation

Under Alaska's Worker's Compensation statute, employers and co-employees are protected from suit for on-the-job injuries. AS 23.30.055. State v. Purdy, 601 P.2d 258 (Alaska 1979); Elliott v. Brown, 569 P.2d 1323 (Alaska 1977) (workmen's compensation is an exclusive remedy and bars a common-law action against a fellow employee). There is an exception where an employee commits an intentional tort upon a fellow employee, or where injury results from responsibilities not "inextricably intertwined" with an individual's employment duties. Sauve v. Winfree, 907 P.2d 7 (Alaska 1995) (co-employee may be liable for responsibilities which are not "incident to" nor "inextricably intertwined" with their employment duties); Elliott v. Brown, 569 P.2d 1323 (Alaska 1977) (socially beneficial purpose of the workmen's compensation law would not be furthered by allowing a person who commits an intentional tort to use the compensation law as a shield against liability). There is also no protection where an employer fails to purchase

the required worker's compensation insurance. Ehredt v. deHavilland Aircraft Co., 705 P.2d 913 (Alaska 1985).

Historically, the workers compensation bar protected the actual employer, and not a parent or subsidiary corporation, or a project owner or sub-contractor. E.g., Croxton v. Crowley Maritime Corp., 817 P.2d 460, 462 (Alaska 1991). This common law rule was partially amended by statute in 2004, to extend worker's compensation protection to persons or entities contractually upstream from the employer of the injured employer. See AS 23.30.045(a); AS 23.30.055. This protection extends to contractors who hire subcontractors; and to owners for injuries to employees of contractors and subcontractors. See Anderson v. Alyeska Pipeline Serv. Co., 234 P.3d 1282, 1288 (Alaska 2010); Nelson v. Municipality of Anchorage, 267 P.3d 636, 640 (Alaska 2011)(applying immunity to municipalities).

C. Other Immunities

1. Charitable Immunity

There is no charitable immunity doctrine in Alaska. See Tuengel v. City of Sitka, 118 F. Supp. 399 (D. Alaska 1954). There are several limited exceptions, some of which are noted below.

2. Alaska's "Good Samaritan" Statute

Alaska has a "Good Samaritan" statute which immunizes from liability "a person who renders emergency care or emergency counseling to an injured, ill, or emotionally distraught person . . . in immediate need of emergency aid in order to avoid serious harm or death." AS 09.65.090(a). This immunity extends to a voluntary member of an organization which exists for the purpose of providing emergency services, AS 09.65.090(b), but does not apply to individuals who have a pre-existing obligation to provide rescue services such as police officers and physicians. Lee v. State, 490 P.2d 1206 (Alaska 1971), overruled on other grounds, Munroe v. City of Anchorage, 545 P.2d 165 (Alaska 1976) (holding police officers have no duty to rescue would not comport with public conceptions of their role); Deal v. Kearney, 851 P.2d 1353 (Alaska 1993) (physicians have a pre-existing duty to render emergency care). The statute does not preclude liability for damages arising out of gross negligence or reckless misconduct. AS 09.65.090(d).

3. Limited Liability for Non-Profit Organizations

In the absence of gross negligence, AS 09.65.170 provides immunity for certain individuals acting within the scope of their official duties. This group includes individuals such as officers and directors of a tax-exempt, non-profit corporation, members of the board of directors of a public or non-profit hospital and members of a school board.

4. Intra-Family Immunity Abolished

Alaska has abolished all inter-spousal or intra-family tort immunity and recognizes tort actions between family members. Drickerson v. Drickerson, 546 P.2d 162 (Alaska 1976).

5. Other Immunities or Limitations on Liability

There are a number of other immunity statutes located at AS ch. 09.65 and elsewhere. These include:

Electrical utilities cannot be held liable for strict liability (AS 09.65.085)

No negligence action against persons voluntarily performing aircraft safety inspections (AS 09.65.092)

Limitations on liability for injuries caused by livestock. (AS 09.65.145)

Limitations as to civil liability of zoos (AS 09.65.180)

Limitations as to liability for injuries occurring on unimproved land (AS 09.65.200; University of Alaska v. Shanti, 835 P.2d 1225 (Alaska 1992))

Limitations in liability as to manufacture, sale or transfer of firearms or ammunition (AS 09.65.155; 09.65.270)

Limitations as to actions of Village Public Safety Officers (AS 09.65.280)

Limitations on actions relating to sports or recreational activities (AS 09.65.290)

Limitations of liability for ski area operators (AS 05.45.010, et seq.)

Limitations as to liability for injuries or death for aircraft and watercraft guest passengers, where operator is uninsured and informs passengers, excepting common carriers. (AS 09.65.112)

Additionally, the vicarious liability of a hospital for emergency room physicians that are contractors, created in Jackson v. Power, 743 P.2d 1376, 1383-85 (Alaska 1987), has been modified by AS 09.65.096.

IX. Defenses

A. Comparative Negligence

Because Alaska is a several liability state, a plaintiff is entitled to recover against each defendant and third-party defendant in proportion to his or her degree of fault. Although a plaintiff's negligence is usually not a bar to recovery, a defendant may allege that a plaintiff was comparatively negligent and decrease the plaintiff's recovery according to the plaintiff's relative fault. AS 09.17.060; AS 09.17.080.

B. Product Liability Defenses

Alaska's "several liability" and allocation of fault applies to product liability actions. Alaska law requires a jury to allocate fault among all parties by considering the conduct of each party and the causal connection between that party's conduct and the damage incurred. AS 09.17.080(a), (b). In cases involving product liability, "fault" includes breach of warranty, misuse of a product, unreasonable failure to avoid an injury, or failure to mitigate damages. AS 09.17.900.

In Smith v. Ingersoll Rand, 14 P.3d 990 (Alaska 2000), the court recognized that AS 09.17.900 expanded the definition of comparative negligence to include ordinary negligence in addition to product misuse and unreasonable assumption of risk.

1. Assumption of Risk

Even when a defendant can be held strictly liable, a plaintiff's damage award will be reduced where the plaintiff himself assumed the risk of harm by knowingly using an unsafe product, or by misusing the product. Caterpillar Tractor Co. v. Beck, 593 P.2d 871, 889 (Alaska 1979); AS 09.17.900. A plaintiff is negligent where he has actual awareness of the product's defect and voluntarily and unreasonably encountered a risk known to him. Assumption of risk is thus considered in the allocation of fault analysis and can reduce a defendant's liability. Where a product is used as intended, and is defective based on failure to provide a safety feature, plaintiff's failure to install such a device is not considered negligence and will not reduce a plaintiff's recovery. 593 P.2d at 890.

2. Product Misuse

Where product misuse is the proximate cause of plaintiff's injury such misuse constitutes comparative negligence. Keogh v. W.R. Grasle, Inc., 816 P.2d 1343 (Alaska 1991). See also AS 09.17.900.

3. Sale or Lease

Strict liability in tort is not confined to sales transactions, but extends equally to commercial leases and bailments. However, no sale exists where a product is merely serviced or repaired. When a machinery repairer replaces a component part and bills separately for it, the firm will be held to be the seller of the product for purposes of product liability. Bell ex rel. Estate of Bell v. Precision Airmotive Corp., 42 P.3d 1071, 1072 (Alaska 2002).

4. Substantial Change

In order for product liability to attach, the product must be defective at the time it leaves the defendant's possession. A substantial change after the product leaves the hands of the manufacturer or retailer will ordinarily relieve that individual from liability. Once a plaintiff demonstrates that a defect existed at the time the product left the manufacturer's possession, the burden is then shifted to the manufacturer to demonstrate the plaintiff's injury resulted from something other than a product defect.

5. Industry Standards

Conformity with industry standards is not a complete defense in a product liability action. The jury may consider such evidence in determining the existence of a defect, the feasibility of other designs or to determine whether the manufacturer should have been aware of the defect. Keogh v. W.R. Grasle, Inc., 816 P.2d 1343, 1349 (Alaska 1991); Caterpillar Tractor Co. v. Beck, 593 P.2d 871, 887 (Alaska 1979).

6. Scientific Unknowability

It may be a defense that the particular danger was not scientifically knowable when the product left the defendant's possession. Heritage v. Pioneer Brokerage & Sales, Inc., 604 P.2d 1059 (Alaska 1979); Shanks v. Upjohn Co., 835 P.2d 1189 (Alaska 1992).

7. Economic Loss Doctrine

Purely economic loss will not support a claim for product liability, unless the defective product creates a situation potentially dangerous to persons or other property, and loss occurs as a result of that danger. Once this standard is met, strict liability in tort is an appropriate theory of recovery, even though the damage is confined to the product itself. In order to recover on such a theory plaintiff must show (1) that the loss was a proximate result of the dangerous defect and (2) that the loss occurred under the kind of circumstances that made the product a basis for strict liability. Northern Power & Engineering Corp. v. Caterpillar Tractor Co., 623 P.2d 324, 329 (Alaska 1981); Pratt & Whitney Canada, Inc. v. Sheehan, 852 P.2d 1173 (Alaska 1993).

8. Privity

Privity is not required in a products liability action (except perhaps where the claim is for pure economic loss). See State for Use of Smith v. Tyonek Timber, Inc., 680 P.2d 1148, 1151 (Alaska 1984) (disallowing claim for pure economic loss); Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42, 44 (Alaska 1976) (privity is a contractual defense, whereas strict liability is a tort theory of recovery).

C. Sudden Emergency Doctrine

The Sudden Emergency Doctrine as a separate defense or jury instruction has been disapproved by the Alaska court. Lyons v. Midnight Sun Transportation Services, Inc., 928 P.2d 1202 (Alaska 1996). However, emergency has been allowed as a defense to a claim of negligence per se. Getchell v. Lodge, 65 P.3d 50 (Alaska 2003).

D. Exculpatory Agreements and Releases

Releases and exculpatory agreements involving consumers are greatly disfavored by the Alaska courts. Before a pre-injury exculpatory release will bar a personal injury claim, the release must clearly notify the releasor of the effect of signing the release, and the releasor's intent to release future claims must be unequivocal. Ledgends, Inc. v. Kerr, 91 P.3d 960 (Alaska 2004). Any ambiguities in pre-recreational exculpatory clauses must be resolved against the party seeking exculpation, and an agreement is not effective unless the agreement is "clear, explicit and comprehensible in each of its essential details." Id. at 961-62. Under Alaska law pre-recreational exculpatory agreements have been held to a very high standard of clarity and any ambiguity is strictly construed against the party seeking exculpation. Id. at 962.

The court has also invalidated exculpatory provisions on public policy grounds, noting that such a provision is likely invalid when it concerns a business of a type generally thought suitable for public regulation. Moore v. Hartley Motors, Inc., 36 P.3d 628, 631 (Alaska 2001). The court will also distinguish between inherent risks, and risks that could be eliminated or mitigated through the exercise of reasonable care, limiting releases solely to inherent risks. Id. at 633.

More recently, the Alaska court upheld a pre-activity exculpatory release. The court held that an effective liability release requires six characteristics:

> (1) the risk being waived must be specifically and clearly set forth (*e.g.* death, bodily injury, and property damage); (2) a waiver of negligence must be specifically set forth using the word "negligence"; (3) these factors must be brought home to the releasor in clear, emphasized language by using simple words and capital letters; (4) the release must not violate public policy; (5) if a release seeks to exculpate a defendant from liability for acts of negligence

> unrelated to inherent risks, the release must suggest an intent to do so; and (6) the release agreement must not represent or insinuate standards of safety or maintenance.

Donahue v. Ledgends, Inc., 331 P.3d 342, 348 (Alaska 2014).

A parent may release a child's prospective claim for negligence with respect to recreational activities. AS 09.65.292.

The Alaska courts treat exculpatory clauses in contracts between businesses less strictly. As a matter of statute, exculpatory clauses in construction contracts that seek to hold a party harmless against its sole negligence are unenforceable. AS 45.45.900.

E. Injury Arising Out of Commission of Crime

Under AS 09.65.210, where a person suffers personal injury or death while committing a felony or under the influence of drugs or alcohol, that person, or his or her personal representative, may not recover damages if the illegal conduct substantially contributed to the injury or death.

X. Damages

A. Personal Injury

In a personal injury claim recoverable losses always include special damages such as lost wages and medical expenses. In addition, a personal injury plaintiff is entitled to damages for pain, suffering, inconvenience, physical impairment, disfigurement, loss of enjoyment of life, and loss of consortium, as well as other non-pecuniary damages. AS 09.17.010(a). As noted earlier, there may be caps on non-economic damages.

1. Loss of Consortium

Alaska allows claims for loss of spousal consortium. Schreiner v. Fruit, 519 P.2d 462 (Alaska 1974). A child may also claim loss of consortium for injuries to a parent and a parent may claim loss of society for injuries or death of a child below the age of majority. Hibpshman v. Prudhoe Bay Supply, Inc., 734 P.2d 991 (Alaska 1987); Gillispie v. Beta Construction Co., 842 P.2d 1272 (Alaska 1992); Scott v. United States, 884 F.2d 1280 (9th Cir. 1989).

Likewise, a parent may make a claim for loss of consortium for injury or death to a child, but only for the period the child was or would have been below the age of majority. Sowinski v. Walker, 198 P.3d 1134, 1164 (Alaska 2008). A sibling, however, does not have a claim for loss of consortium in a wrongful death claim, or likely other claims. Id. at 1162.

Under Alaska law, a consortium claim must be joined with the underlying cause of action. This rule applies to both claims of spousal consortium, Schreiner v. Fruit, supra, 519 P.2d at 466, and, "wherever feasible," to a child's claim for loss of parental consortium. Hibpshman, supra, 734 P.2d at 997.

2. Negligent Infliction of Emotional Distress

In cases involving negligence or negligent infliction of emotional distress (NIED), emotional distress unaccompanied by physical injury will not allow recovery. Hancock v. Northcutt, 808 P.2d 251 (Alaska 1991) (general rule in Alaska is that in the absence of physical injury, there can be no claim for emotional distress). Kallstrom v. United States, 43 P.3d 162 (Alaska 2002). The Alaska courts have not addressed the amount of injury required to support a claim for NIED. Where a plaintiff has suffered severe emotional distress as a result of "extreme or outrageous conduct" the plaintiff may have a claim for intentional infliction of emotional distress (IIED). The "physical injury" requirement does not apply to bystander claims, pre-existing duty claims, or claims for intentional infliction of emotional distress. See below.

Care must be taken to determine whether a claim is one for NIED or for emotional distress accompanying physical injury. For example, where a broker failed to procure insurance, and this delayed medical treatment, the emotional distress was derivative of the physical injury caused by the lack of care, and therefore the claim was not one for NIED. Hagen Ins., Inc. v. Roller, 139 P.3d 1216 (Alaska 2006).

3. Bystander Claims

One exception to the physical injury requirement is the "bystander claim," in which a plaintiff claims emotional distress from observing a loved one being physically injured by the act of a tortfeasor. In Tommy's Elbow Room, Inc. v. Kavorkian, 727 P.2d 1038 (Alaska 1986), the Alaska Supreme Court followed the California approach in ruling that the bystander need not be directly in the zone of danger in order to recover. In Kavorkian, a father arrived at the scene of an accident sometime after the accident occurred and observed his daughter's serious physical injury. The court allowed the father to recover for emotional distress. The court determined that what had formerly been known as a "zone of danger" requirement "is not a rigid requirement of sensory and contemporaneous observance of the accident, but rather is a reasonable foreseeability that the plaintiff-witness would suffer emotional harm." Id. at 1043. While the bystander need not necessarily observe the loved one's injury at the scene of the accident (e.g., observing the injury at the hospital, for example, might suffice), "there remains a requirement that the shock result more or less contemporaneously with the plaintiff learning of the nature of the victim's injury." Mattingly v. Sheldon Jackson College, 743 P.2d 356, 365-66 (Alaska 1987) (father notified of son's accident by telephone was precluded from claiming emotional distress damages where he had to travel from one island to another to see his son for the first time in the hospital); see also Beck v. State, 837 P.2d 105 (Alaska 1992) (court should apply concepts of foreseeability and duty with view toward reasonable limitations on liability).

Factors in determining whether a third party may bring a bystander claim for negligent infliction of emotional distress (NIED) include (1) whether the third party was near the scene of the accident, (2) whether shock resulted from contemporaneous observation of the accident, and (3) the closeness of the relationship between the plaintiff and the victim. Beck v. State, 837 P.2d 105 (Alaska 1992). To recover damages, the harm suffered by the plaintiff as a result of the shock must be severe, but it does not necessarily need to result in physical illness or injury. Sowinski v. Walker, 198 P.3d 1134, 1162 (Alaska 2008); Chizmar v. Mackie, 896 P.2d 196, 201-04 (Alaska 1995).

4. Pre-Existing Duty Claims

A plaintiff may recover for emotional distress where the defendant owed the plaintiff a pre-existing duty and breached that duty. Chizmar v. Mackie, 896 P.2d 196 (Alaska 1995). The Alaska courts originally held the only contracts that will give rise to this type of duty are contracts highly personal and laden with emotion, such as contracts to marry or conduct a funeral. Nome Commercial Co. v. National Bank of Alaska, 948 P.2d 443 (Alaska 1997). In Chizmar, the court allowed a claim for negligent infliction of emotional distress to go to the jury where a doctor made an incorrect AIDS diagnosis. Subsequently, the court suggested that breach of a duty to supply medical services would also support such a claim, but that plaintiff would not be able to maintain a claim where he could not establish that any duty had in fact been breached. Hinsberger v. State, 53 P.3d 568 (Alaska 2002).

5. Intentional Infliction of Emotional Distress

In determining whether a third party may bring a claim for intentional infliction of emotional distress (IIED) the court considers whether the third person was foreseeably harmed by the extreme and outrageous conduct. See King v. Brooks, 788 P.2d 707 (Alaska 1990) (to recover for intentional infliction of emotional distress, the "offending party, through extreme or outrageous conduct, must intentionally or recklessly cause severe emotional distress"). There is no physical injury requirement for recovery under intentional infliction of emotional distress. Kallstrom v. United States, 43 P.3d 162 (Alaska 2002). Also, there need not be a pre-existing legal duty as might be required for a negligence claim or NIED claim. McGrew v. State, Dept. of Health and Social Services, 106 P.3d 319, 325 (Alaska 2005).

6. Calculating Future Wage and Economic Loss

Pre-Tort Reform case law held that in calculating past wage losses (losses incurred up through the date of trial), a plaintiff should be awarded his probable lost earnings, and for future economic loss, a plaintiff should be awarded his "lost earning capacity." Alaska's 1986 Tort Reform statute may have altered the calculation of future earnings by limiting loss to "the amount of wages the injured party could have been expected to earn during future years." AS 09.17.040(b)(1). The courts have not yet interpreted this statutory change.

Income taxes are deducted from past wage loss; no tax deduction is made for future earning loss claims.

7. Liability Insurance

Pursuant to statute, plaintiffs in automobile liability cases that are themselves uninsured are barred from claiming non-economic damages, if the person knew he was uninsured. AS 09.65.320. This statutory limitation does not apply where the tortfeasor:

(1) was driving while under the influence of an alcoholic beverage, inhalant, or controlled substance;

(2) acted intentionally, recklessly, or with gross negligence;

(3) fled from the scene of the accident; or

(4) was acting in furtherance of an offense or in immediate flight from an offense that constitutes a felony.

B. Wrongful Death

Alaska's wrongful death statute is AS 09.55.580. The statute provides significantly different measures of recovery depending on whether the decedent dies with or without a "spouse or children or other dependents." Id. 09.55.580(a).

1. No Statutory Beneficiaries

In cases where there is no statutory beneficiary, i.e., no spouse, wife, child, or "other dependent," the amount recovered for wrongful death "shall be limited to pecuniary loss," and the claim is by the personal representative on behalf of the estate. Alaska has adopted a net earnings theory or a net accumulation theory to determine loss to the estate. Loss to the estate is the probable value of the decedent's estate had he not prematurely expired, less the actual value of the estate at death. Osbourne v. Russell, 669 P.2d 550 (Alaska 1983). Net accumulations or savings are calculated by determining the decedent's future gross earnings and subtracting the percentage of those earnings that would constitute the decedent's personal consumption. Kulawik v. Era Jet Alaska, 820 P.2d 627 (Alaska 1991).

As in all tort cases, future tax liability may not be considered in calculating either future gross earnings or future personal consumption. Kulawik v. Era Jet Alaska, 820 P.2d 627 (Alaska 1991). Income taxes are considered in calculating past economic losses through the date of trial, but not future losses. Unless the parties agree otherwise, future economic damages are reduced to present value using a formula based on an assumption that present monies will be "invested at long-term future interest rates in the best and safest investments." AS 09.17.040(b).

As noted below, the estate may also make a survival claim for pre-death pain and suffering.

2. Statutory Beneficiaries

When a decedent leaves a statutory beneficiary, i.e., a spouse, child or "other dependent," a totally different set of standards apply. In such cases the claim must be brought by the administrator of the estate and all monetary judgments go to the statutory beneficiaries, who are the real parties in interest. It is possible an adult, non-dependent child of a parent will be considered to be a statutory beneficiary, although the issue has not been addressed directly by the Alaska Supreme court. See Kulawik v. Era Jet Alaska, 820 P.2d 627, 638 (Alaska 1991). Trial courts have issued rulings on both side of the issue.

Courts have allowed a full spectrum of recovery to statutory beneficiaries. Recovery has included loss of expectation of pecuniary benefits, loss of contributions for support, loss of assistance or services, loss of consortium, loss of prospective training and education, and medical and funeral expenses. See AS 09.55.580(c). In addition, Alaska case law allows beneficiaries to recover for anguish, grief, and suffering. Tommy's Elbow Room, Inc. v. Kavorkian, 727 P.2d 1038 (Alaska 1986). A designated beneficiary can also recover "prospective inheritance" i.e., the inheritance the deceased would have left had not died prematurely. Kulawik v. Era Jet Alaska, 820 P.2d 627 (Alaska 1991).

3. Damages Allowed for "Other Dependents"

In addition to spouses and children, "other dependents" are statutory beneficiaries entitled to a full measure of damages under Alaska's wrongful death statute. A surviving parent can fit within this category, but only if the surviving parent can show actual dependency. Estate of Pushruk, 562 P.2d 329 (Alaska 1977). The category of "other dependent" also includes an unmarried partner or non-adopted stepchild where actual dependency is shown. See Greer Tank & Welding, Inc. v. Boettger, 609 P.2d 548 (Alaska 1980).

4. Parents May Sue for Injuries or Death of Child

A parent may maintain an action for the injury or death of a child below the age of majority. AS 09.15.010. Although a parent is not a statutory beneficiary under the wrongful death act, the Alaska courts have allowed a parent to sue for non-pecuniary damages, including mental anguish, grief, and loss, under AS 09.15.010. Gillespie v. Beta Construction Co., 842 P.2d 1272 (Alaska 1992). The time period for which damages can be claimed ends when the child reaches, or would have reached, the age of majority. Sowinski v. Walker, 198 P.3d 1134, 1164 (Alaska 2008).

C. Survival Actions

Alaska law allows a survival action for pre-death injuries caused by negligence or other tort. AS 09.55.570. The most common claims in survival actions are for pre-death pain and suffering and pre-death medical expenses. Alaska generally allows recovery for pre-death pain and suffering which is consciously experienced. Sweeney v. Northern Lights Motel, 561 P.2d 1176 (Alaska 1977). Pain and suffering which occurs "substantially contemporaneous with death" is not compensable. Id.

D. Property Damage

The overriding principle governing recovery of damages in negligence cases is that the injured plaintiff is entitled to be restored to the position he or she would have occupied were it not for the defendant's negligence. Newberry Alaska, Inc. v. Alaska Constructors, 644 P.2d 224 (Alaska 1982). In property damage cases, the Alaska courts have approved jury instructions that allow for an award of the lesser of two figures: (1) the reasonable expense of necessary repair of the property, plus the difference between the fair market value of the property immediately before it was damaged and the fair market value of the property after it was repaired; or (2) the difference between the fair market value of the property immediately before it was damaged and the fair market value of the unrepaired property immediately after it was damaged. Era Helicopters, Inc. v. Digicon Alaska, Inc., 518 P.2d 1059, 1061 (Alaska 1974). When replacement of the damaged property is a less expensive alternative to repairing the property, the measure of damages will be the cost of a replacement unit less the trade in value of the damaged unit. Era Helicopters, Inc., supra, 518 P.2d 1062 n.13 (Alaska 1974). When a long period of repair will be required, the cost of renting a replacement unit is to be included in the cost of the repair. Id. at 1062.

When personal property is damaged to such an extent that it is a constructive total loss, the measure of damages is the fair market value of the item at the time of its destruction. State v. Stanley, 506 P.2d 1284, 1292 (Alaska 1973).

Similar principles would apply in cases of damage to real property. When the injury to real property is of a permanent nature, the proper measure of damages is the difference between the value of the land before and after the injury. GNA Contractors, Inc. v. Alaska Greenhouse, Inc., 517 P.2d 1379, 1386 n.9 (Alaska 1974). Restoration or repair damages have been approved in the case of destruction of real property, but only when the injury to real property is temporary in nature. Id. at 1386.

In at least one case, the Alaska Supreme Court has approved the inclusion of indirect administrative costs in a damage award based on the expense of repairing damaged property. Overhead costs for the processing of the claim against the defendant must be fair and reasonable, however. Golden Valley Electric Assoc. v. Revel, 719 P.2d 263 (Alaska 1986); Curt's Trucking Co. v. City of Anchorage, 578 P.2d 975, 979 (Alaska 1978).

The Alaska Supreme Court has consistently awarded lost income damages for loss of use of income producing property or property essential to the operation of a commercial enterprise. In such cases, a plaintiff is compensated for the fair value of the use of the item of property during the period reasonably necessary to fix or replace it. State v. Stanley, 506 P.2d 1284, 1293 (Alaska 1973); Burgess Construction Co. v. Hancock, 514 P.2d 236, 238 (Alaska 1973); Bridges v. Alaska Housing Authority, 375 P.2d 696, 700 (Alaska 1962).

E. Damage Caps

As noted above, Alaska's tort reform statute placed damage caps on non-economic damages. The cap applies to both wrongful death claims and other personal injury claims. AS 09.17.010; L.D.G., Inc. v. Brown, 211 P.3d 1110, 1131 (Alaska 2009).

The statute caps non-economic damages at the greater of $400,000 or $8,000 multiplied by the plaintiff's life expectancy. In cases of severe, permanent physical impairment or severe disfigurement, the cap on non-economic damages is the greater of $1,000,000 or $25,000 multiplied by the plaintiff's life expectancy. A separate cap applies in medical malpractice actions. AS 09.55.549.

A severe disfigurement need not be permanent to support damages beyond the cap. However, a reasonable healing period must be allowed before disfigurement may be assessed. Disfigurement is severe if a reasonable person would find that the injury mars the plaintiff's physical appearance and causes a degree of unattractiveness sufficient to bring negative attention or embarrassment. City of Bethel v. Peters, 97 P.3d 822, 829 (Alaska 2004).

F. Punitive Damages

Punitive damages are insurable. There is no statutory or public policy prohibiting insuring against punitive damages in Alaska. See Providence Washington Ins. Co. v. City of Valdez, 684 P.2d 861 (Alaska 1984); LeDoux v. Continental Ins. Co., 666 F. Supp. 178 (D. Alaska 1987). In the absence of an exclusion, punitive damages may be deemed covered. State Farm v. Lawrence, 26 P.3d 1074 (Alaska 2001).

1. Standard for Recovery

Alaska's 1997 Tort Reform statute holds that a fact finder may make an award of punitive damages if the defendant's conduct was (1) "outrageous, including acts done with malice or bad motives," or (2) "evidenced reckless indifference to the interest of another person." AS 09.17.020(b). Punitive damages must be established by clear and convincing evidence. AS 09.17.020(b).

The 1997 Tort Reform statute appears to have codified prior Alaska case law on the subject of punitive damages. The Alaska Supreme Court has previously held that to be entitled to punitive damages, the plaintiff must establish at a minimum that the defendant's conduct amounted to reckless indifference regarding the rights of others, and "conscious action in deliberate disregard of those rights." Chizmar v. Mackie, 896 P.2d 196, 210 (Alaska 1995). Thus, a court should not allow a claim of punitive damages to go to the jury unless there is evidence that gives rise to an inference of "actual malice or conduct sufficiently outrageous to be deemed equivalent to actual malice." Id. (quoting State Farm Mutual Automobile Ins. Co. v. Weiford, 831 P.2d 1264, 1266 (Alaska 1992)).

There is a statutory cap on punitive damages, which are determined in a separate trial only after a jury has determined such damages are appropriate. AS 09.17.020.

Evidence of insurance may be admissible to determine defendant's financial condition, and thus what is an appropriate level of punitive damages. Fleegel v. Estate of Boyles, 61 P.3d 1267 (Alaska 2003).

2. Punitive Damages Allowed

A plaintiff may recover punitive damages in a wide variety of cases. For example, the Alaska Supreme Court has affirmed awards of punitive damages in cases involving product liability, wrongful repossession, intentional interference with contract, intentional infliction of emotional distress, fraudulent misrepresentation and tortious breach of the implied covenant of good faith and fair dealing. See Sturm, Ruger & Co., Inc. v. Day, 594 P.2d 38, 46-47 (Alaska 1979) (punitive damage award affirmed in product liability case); Alaska Statebank v. Fairco, 674 P.2d 288 (Alaska 1983) (punitive damages affirmed for wrongful repossession); Oaksmith v. Brusich, 774 P.2d 191 (Alaska 1989) (punitive damages affirmed for intentional infliction of emotional distress); Great Western Savings Bank v. George W. Easley Co., 778 P.2d 569 (Alaska 1989) (punitive damages affirmed for fraudulent misrepresentation); State Farm Fire and Casualty Co. v. Nicholson, 777 P.2d 1152 (Alaska 1989) (punitive damages affirmed for breach of implied covenant of good faith and fair dealing).

Punitive damages are not recoverable for breach of contract unless conduct constituting breach is also a tort for which punitive damages are recoverable. Reeves v. Alyeska Pipeline Service Co., 56 P.3d 660 (Alaska 2002).

3. Employer Liability for Punitive Damages

Under the doctrine of respondeat superior, an employer is liable for the negligent acts or omissions that his employee committed within the scope of his employment. Under the "independent contractor rule" the doctrine of respondeat superior does not apply to acts of independent contractors. Because an employer normally does not control the work of the independent contractor, he is not held liable for the torts of the contractor and its employees.

Powell v. Tanner, 59 P.3d 246, 248-49 (Alaska 2002); Parker Drilling Co. v. O'Neill, 674 P.2d 770, 775 (Alaska 1983).

In 1986, the Alaska Supreme Court embraced the rule set forth in the Restatement (Second) of Agency, which states that employers are vicariously liable for punitive damages when tortious acts are committed by their managerial employees acting within the scope of employment. Alaskan Village, Inc. v. Smalley, 720 P.2d 945 (Alaska 1986). In 1999, the Alaska Supreme Court broadened the scope of an employer's liability by eliminating the requirement that an employee be "managerial" in order for vicarious liability to attach. Veco, Inc. v. Rosebrock, 970 P.2d 906, 911 (Alaska 1999) ("Alaska case law has eliminated the requirement that the employees be managerial"). The Alaska Supreme Court reiterated their commitment to extensive employer liability by affirming the Veco holding in Norcon, Inc. v. Kotowski, 971 P.2d 158 (Alaska 1999) (employer will be held liable for punitive damages caused by the acts of non-managerial employees), and Laidlaw Transit, Inc. v. Crouse, 53 P.3d 1093 (Alaska 2002) (bus company liable for actions of employee who drove bus under the influence of marijuana). In Laidlaw, the Alaska court left open the door to adopting the complicity rule in a future case, which places limits on employer's responsibility for actions of its employees, where the issue was properly presented.

House Bill 214, passed in 2003, now restricts an employer's liability for punitive damages to acts by managerial agents. AS 09.17.020(k). By adopting the complicity rule by legislation, the statute makes it more difficult to hold employers liable for punitive damages. A managerial agent is a person with some power to set policy for the employer.

A partner will be held vicariously liable for the tortious acts of another partner. Murray v. Feight, 741 P.2d 1148 (Alaska 1987).

Under the 1997 tort reform statute's scheme of several liability, an employer may not be vicariously liable for an employee's percentage of fault when claims are made for negligent hire or supervision, but will be liable for its own independent negligence. Kodiak Island Borough v. Roe, 63 P.3d 1009 (Alaska 2003) (dicta); Pederson v. Barnes, 139 P.3d 552, 561 (Alaska 2006)(providing for allocation of fault in duty-to-protect cases).

The 1997 amendments to the tort reform statute removed language that "the trier of fact may determine that two or more persons may be treated as a single person. . . . ." Although there is an apparent conflict between the statute's several liability scheme and an employer's vicarious liability under the doctrine of respondeat superior, to date no court has moved away from respondeat superior liability for employers.

G. Collateral Source Rule

Historically, Alaska's collateral source rule provided that benefits received from a plaintiff's insurance policy would not be deducted from a claim against the defendant. For

example, where a plaintiff sustained $100,000 in damages and was paid $50,000 by his or her insurance company, the plaintiff was still entitled to recover the full $100,000 from the defendant. Tolan v. Era Helicopters, Inc., 699 P.2d 1265 (Alaska 1985) (precluding discussion or credit for collateral benefits received for the same injury). This common law scheme was partially modified by the 1986 Tort Reform statute. See AS 09.17.070. Under this statute, a defendant is entitled to claim certain collateral benefits as an offset after the court or jury has rendered an award.

An offset is allowed only if the claimant has received compensation for the same injury from a collateral source that does not have a right of subrogation. Additionally, the collateral benefits cannot be used for offset where the benefit is one that under federal law cannot be reduced or offset, is a life insurance policy, or was a "gratuitous benefit." AS 09.17.070. For example, offset was allowed for payments by a fund providing compensation to oil spill victims that did not have a right of subrogation. Chenega Corp. v. Exxon Corp., 991 P.2d 769 (Alaska 1999). Similar deductions are available for payments made by the tortfeasor's insurer. Liimatta v. Vest, 45 P.3d 310 (Alaska 2002). Trial court rulings have suggested offsets would be available for benefits received under state or federal disability programs or statutes.

However, worker's compensation payments are not a collateral benefit for which an offset is allowed. Rather, the worker's compensation carrier has a statutory lien against recoveries in a third-party action arising out of the same accident. AS 23.30.015.

XI. Interest and Attorney Fees

A. Prejudgment Interest

Alaska courts award prejudgment interest as a measure of damages. Under Alaska's current statute on prejudgment interest, AS 09.30.070, the rate of prejudgment interest is "three percentage points above the Twelfth Federal Reserve District discount rate in effect on January 2 of the year in which the judgment or decree is entered." For causes of action accruing after August 7, 1997, the rate of prejudgment interest changes January 1 of every year. The current rate can be found at the court's website, http://www.state.ak.us/courts/int.htm. The rate of interest for actions accruing prior to August 7, 1997 remains at 10.5%, regardless of when judgment is entered.

Prejudgment interest may not be awarded for future economic losses, future non-economic losses, or punitive damages. AS 09.30.070(c). McConkey v. Hart, 930 P.2d 402 (Alaska 1996); Anderson v. Edwards, 625 P.2d 282 (Alaska 1981). Prejudgment interest is simple interest, not compound interest. Alyeska Pipeline Service Co. v. Anderson, 669 P.2d 956 (Alaska 1983). A different prejudgment interest rate may be applied if founded on a contract in writing. Also, prejudgment interest should not be awarded where funds have been paid in advance for past damages. Liimatta v. Vest, 45 P.3d 310, 322 (Alaska 2002).

Generally, prejudgment interest accrues from the day process is served on the defendant, or the day that the defendant has received written notification that an injury has occurred. AS 09.30.070(b); McConkey v. Hart, 930 P.2d 402, 404 (Alaska 1996). Proof of actual notice will satisfy the statutory requirement of written notice. Sherbahn v. Kerkove, 987 P.2d 195, 202 (Alaska 1999); McConkey v. Hart, supra. AS 09.30.070(b) applies only to actions for personal injury, death, or damage to property, and in contract or economic loss claims pre-judgment interest runs from the accrual of the loss. Beaux v. Jacob, 30 P.3d 90, 101 (Alaska 2001).

B. Postjudgment Interest

Alaska awards postjudgment interest on judgments at the same rate as prejudgment interest. See AS 09.30.070. The interest rate is based on the year judgment is entered, and changes January 1 of each year, based on the federal discount rate in effect January 1. As with prejudgment interest, a higher or lower rate may be negotiated in contract cases, so long as the rate is specified within the contract.

C. Attorney Fees

Unlike other jurisdictions, Alaska routinely allows partial reimbursement of attorney fees to the prevailing party by both statute and court rule. See AS 09.60.010; Alaska R. Civ. P. 82. There is extensive Alaska case law explaining which party qualifies as the "prevailing party," but generally, the term "prevailing party" refers to the party in whose favor the decision or verdict is rendered and in whose favor judgment is entered. See Cooper v. Carlson, 511 P.2d 1305, 1308 (Alaska 1973). In other words, the prevailing party is the party who was successful with regard to the main issues in the action. Id. It should be noted there is no "prevailing party" in child custody or divorce proceedings and Alaska R. Civ. P. 82 does not apply to those types of cases.

The purpose of the Alaska R. Civ. P. 82 is to partially reimburse the prevailing party for attorney fees. In cases where money is recovered, Alaska R. Civ. P. 82 sets a schedule detailing the amount of attorney fees allowed:

Judgment & if Awarded Prejudgment Interest		Contested With Trial	Contested Without Trial	Non-Contested
First	$ 25,000	20%	18%	10%
Next	$ 75,000	10%	8%	3%
Next	$400,000	10%	6%	2%
Over	$500,000	10%	2%	1%

In cases in which the prevailing party does not recover a money judgment, the presumption is that the prevailing party is entitled to 30% of the prevailing party's attorney fees if a case goes to trial, and 20% of attorney fees in other cases. Alaska R. Civ. P. 82(b)(2). A

court may adjust attorney fees upward or downward depending on a number of equitable factors such as length and complexity of the litigation, length of trial, reasonableness of the hourly rate and other factors the court deems relevant. See Alaska R. Civ. P. 82(b)(3).

An offer of judgment pursuant to Alaska R. Civ. P. 68 may trigger an enhanced attorney fee award of 30% to 75% of the prevailing party's actual attorney fees. The operation of Rule 68 offers of judgment is discussed in more detail above.

In automobile liability policies, prejudgment interest and Rule 82 attorney fee coverages are supplemental to the face limits when the policy provides statutory minimum (50/100) coverage. Hughes v. Harrelson, 844 P.2d 1106 (Alaska 1993). A policy is not required to pay prejudgment interest if the limits are above statutory minimums. Farquhar v. Alaska National Insurance Co., 20 P.3d 577 (Alaska 2001). For almost all policies, unless a policy properly restricts its Rule 82 attorney fee coverage, the insurer will be liable for attorney fees based on a percentage of the plaintiff's total damages, rather than as a percentage of the face limits of the policy. Bohna v. Hughes Thorsness, 828 P.2d 745 (Alaska 1992). See 3 AAC 26.500 (regulations on form of Rule 82 endorsement).

There are a number of statutes that affect how attorney fees may be awarded, and contractual provisions, such as indemnification causes, may also affect the award of attorney fees.

In personal injury cases where the injury arises out of certain criminal offenses, including driving under the influence of alcohol or controlled substance, the plaintiff is entitled to full reasonable attorney fees. AS 09.60.070. A liability insurer's obligation under an insurance contract is limited to payment of fees that could be awarded under Rule 82(b)(1). Id.

There are limitations on the recovery of attorney fees against plaintiffs in wrongful death cases. The personal representative is a nominal party only, and not liable for fees. Likewise, the beneficiaries are not parties to the litigation and may not be liable. Zaverl v. Hanley, 64 P.3d 809 (Alaska 2003); In re Soldotna Aircrash Litigation, 835 P.2d 1215 (Alaska 1992).

XII. Liens and Subrogation

A. Subrogation

An insurer that pays for a loss is subrogated to the rights of its insureds either as a matter of contract or common law. A subrogation claim belongs to the insurer and not the insured. The insurer is free to settle those claims at any time. It may also instruct its insured not to pursue those claims on its own behalf. If it does so, the insured does not have the authority to bring those claims, and the defendant may raise the defense of lack of authority. Ruggles v. Grow, 984 P.2d 509 (Alaska 1999).

B. Liens

In addition to subrogation claims, liens may arise under a number of different statutes in Alaska:

Health Care Providers: AS 34.35.450-.475 (liability for lien based on receipt of notice or on recording)

Child Support Liens: AS 25.27.230(d) (requires actual notice)

Medicaid Liens: AS 47.05.070(b)(c) (state subrogated to the right of Medicaid recipient for proceeds of the settlement or judgment relating to medical expenses paid) (this statute was amended in 2006)

Medicare Liens: 42 USC § 1395y(b)

Other Federal Liens: 42 USC § 2651 (lien for payments made by Alaska Native Medical Center or Veteran's Administration); 25 USC § 1621(e) (relating to liens from Alaska Native Medical Center). See Alaska Native Tribal Health Consortium v. Settlement Funds, 84 P.3d 418 (Alaska 2004) (relating to Alaska Native Medical Center liens)

Worker's Compensation Liens: AS 23.30.015(g) (worker's compensation insurer may be subrogated to right of employee for all third party payments received)

Also, attorneys can assert liens against settlements. AS 34.35.430.

Disclaimer:

This law summary is intended to give readers an overview of Alaska law. The summary is not and should not be taken as legal advice or a legal opinion as to how the law will apply to any specific set of facts. Although every effort has been made to be accurate, the document is a summary and its accuracy cannot be guaranteed. Also, Alaska law will change over time and will apply differently according to the facts of each case.

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