

*Alaska Guide to  
Retail  
Liability*

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## **I. Introduction**

### **A. The Alaska State 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.<sup>1</sup> For civil matters, there is appeal as of right to the Alaska Supreme Court. For criminal matters, the Alaska Supreme Court exercises discretionary review of Court of Appeals rulings.<sup>2</sup>

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.<sup>3</sup> Discovery is 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.<sup>4</sup>

The procedural rules in Alaska are governed by the Alaska Rules of Civil Procedure. Many of Alaska's Civil Rules are patterned after the Federal Civil Rules. While the federal

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<sup>1</sup> AS 22.07.020.

<sup>2</sup> AS 22.07.030.

<sup>3</sup> AS 22.15.030.

<sup>4</sup> AS 22.15.020.

court's interpretations are not binding, the Alaska Courts look to the federal court interpretations of similar federal rules for guidance.

## **B. Alaska Federal Courts**

The United States District Court for the District of Alaska is comprised of a single judicial district. There are court locations in Anchorage, Fairbanks, Juneau, Ketchikan, and Nome.

## **II. Negligence**

### **A. Elements of a Cause of Action of Negligence**

In Alaska, as in other jurisdictions, negligence is defined as the failure to exercise reasonable care. To establish negligence under Alaska law, a party must prove duty, breach of duty, causation, and harm.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

There is a two-part test for causation in negligence 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.<sup>8</sup> However, the “but for” test may be inappropriate for cases involving independent concurrent causes.<sup>9</sup>

### **B. Landowner Liability**

Alaska courts have abandoned traditional rule that the scope of a landowner’s duty depends on the status of the plaintiff as trespasser, licensee, or invitee.<sup>10</sup> The duty of a landowner is to use reasonable care under the circumstances.<sup>11</sup> Thus, as a general rule, landowners have a duty to use due care to guard against unreasonable risks created by dangerous

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<sup>5</sup> Silvers v. Silvers, 999 P.2d 786, 793 (Alaska 2000).

<sup>6</sup> Lyons v. Midnight Sun Transportation Services, Inc., 928 P.2d 1202 (Alaska 1996); Wilson v. Sibert, 535 P.2d 1034, 1036-37 (Alaska 1975).

<sup>7</sup> State v. Guinn, 555 P.2d 530, 536 (Alaska 1976).

<sup>8</sup> Robles v. Shoreside Petroleum, Inc., 29 P.3d 838 (Alaska 2001).

<sup>9</sup> Vincent v. Fairbanks Memorial Hospital, 862 P.2d 847 (Alaska 1993).

<sup>10</sup> Webb v. City & Borough of Sitka, 561 P.2d 731 (Alaska 1977).

<sup>11</sup> Schumacher v. City & Borough of Yakutat, 946 P.2d 1255 (Alaska 1997).

conditions existing on their property.<sup>12</sup> The 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.<sup>13</sup> The landowner may be liable based on the failure to warn of hidden or latent dangers which the person entering the property would be unaware.<sup>14</sup>

Landlords have a general duty of care to use reasonable care under the circumstances. This duty extends to commercial leases.<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup>

An owner of unimproved land is not liable in tort, except for an act or omission that constitutes gross negligence or reckless or intentional misconduct, for accidents arising out of the natural condition of the land.<sup>18</sup>

### **C. The “Out of Possession Landlord”**

Pursuant to Alaska law, commercial landlords owe a general duty of care under the circumstances to employees of their commercial lessees, and it has been suggested that the duty is also owed to non-employee third parties.<sup>19</sup> There is little case law in this area, and the Alaska Supreme Court has not address whether such a duty is non-delegable.

### **D. Defenses**

Alaska is a pure comparative fault state and allows the apportionment of fault to plaintiffs and all other parties to the action in tort-based actions.<sup>20</sup> That is, a defendant's share of financial

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<sup>12</sup> Guerrero v. Alaska Housing Finance Corp., 6 P.3d 250 (Alaska 2000).

<sup>13</sup> State v. Guinn, 555 P.2d 530, 536 (Alaska 1976).

<sup>14</sup> Moloso v. State, 644 P.2d 205, 219 (Alaska 1982).

<sup>15</sup> Sauve v. Winfree, 985 P.2d 997 (Alaska 1999).

<sup>16</sup> Guerrero v. Alaska Housing Finance Corp., 6 P.3d 250 (Alaska 2000).

<sup>17</sup> Guerrero v. Alaska Housing Finance Corp., 123 P.3d 966, 973 (Alaska 2005).

<sup>18</sup> AS 09.65.200.

<sup>19</sup> Sauve v. Winfree, 985 P.2d 997, 1002 (Alaska 1999).

<sup>20</sup> AS 09.17.060, .080, .900.

responsibility for the judgment is reduced according to the percentage of fault apportioned to the other parties, including plaintiff. 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.<sup>21</sup> Alaska recognizes other traditional tort defenses such as the failure to mitigate damages, and superseding and intervening cause.<sup>22</sup>

Additionally, an Alaska statute may apply to limit liability in cases involving injury or death stemming from a sports or recreational activity.<sup>23</sup> The statute provides that a person who participates in a sports or recreational activity assumes the inherent risks of the activity and is legally responsible for all injuries, death or property damage that result from the inherent risks of the activity.<sup>24</sup> The statute is inapplicable if the defendant's negligence was the proximate cause of the injury or damage.<sup>25</sup>

### **III. Examples of Negligence Claims**

#### **A. "Slip and Fall" Cases**

In Alaska, slip and fall cases involving snow and ice are common as it is impossible to remove all of the snow and ice that accumulates during wintertime in Alaska. Important facts in these cases can include whether there were regular inspections of the property, maintenance records, the use of a winter maintenance service, and logs that show when the property was inspected, sanded or shoveled.

Once a claim involving a slip and fall on snow or ice is made, it is critical to determine if a snow removal service was responsible for the area in which the fall occurred. If so, the contract should be examined to determine if it contains an insurance or indemnity clause. Similarly, leases between landlords and tenants often contain indemnity clauses or clauses requiring that party or another be named as an additional insured.

The open and obvious nature of a condition is not an automatic defense, but rather is relevant to the potential comparative fault of a plaintiff. For example, the fact that a pedestrian

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<sup>21</sup> AS 09.17.900.

<sup>22</sup> See, e.g., University of Alaska v. Chauvin, 521 P.2d 1234, 1239 (Alaska 1974)(discussing plaintiff's obligation to mitigate damages caused by tortfeasor conduct) and Sharp v. Fairbanks Northstar Borough, 569 P.2d 178 (Alaska 1977) (parental supervision of students was superceding cause of plaintiff's injuries, precluding liability of school district).

<sup>23</sup> See AS 09.65.290.

<sup>24</sup> Id.

<sup>25</sup> Id.

deliberately walks on a sidewalk known to be icy does not automatically render the pedestrian negligent; the test is whether the pedestrian, knowing of the icy condition, reasonably believed that she could safely traverse the area by exercise of ordinary care.<sup>26</sup>

Alaska law requires a factfinder to consider all of the circumstances in determining whether a defendant acted reasonably in maintaining a premises.<sup>27</sup> Actual or constructive notice of a dangerous condition is one factor that a factfinder may consider in determining the reasonableness of the defendant's conduct, but it is not a required element in a slip and fall claim.<sup>28</sup>

## **B. Claims Arising From the Wrongful Prevention of Thefts**

### **1. False Imprisonment and Arrest**

Occasionally, a person who has been retained based on a suspected theft or suspected shoplifting will bring a claim for false imprisonment or wrongful arrest. A plaintiff asserting a claim for false imprisonment must establish: (1) the defendant's conduct or words resulted in the plaintiff being confined; (2) the defendant intended to confine the plaintiff; (3) the plaintiff knew or was seriously harmed by the confinement; and (4) the plaintiff did not consent to the confinement.<sup>29</sup>

False arrest and false imprisonment are not separate torts under Alaska. A false arrest is one way to commit false imprisonment.<sup>30</sup> A false arrest claim is made by established by showing a restraint upon the plaintiff's freedom in the absence of proper legal authority.<sup>31</sup> Generally, a retailer has a qualified privilege to report a suspected to the police, and cannot be held liable for a report to the police made in good faith.

Alaska law allows retailers to detain a suspected shoplifter for purposes of protecting the retailer's property and conducting an investigation.<sup>32</sup> In order to be entitled to the privilege, the retailer must have reasonable cause to believe the plaintiff was committing or attempting to shoplift, the detention must occur in or in the immediate vicinity of the retailer's premises for the purpose of investigation, and the detention must be done in a reasonable manner and for a

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<sup>26</sup> Hale v. City of Anchorage, 389 P.2d 434 (1964).

<sup>27</sup> Edenshaw v. Safeway, Inc., 186 P.3d 568 (Alaska 2008).

<sup>28</sup> Edenshaw v. Safeway, Inc., 186 P.3d 568 (Alaska 2008).

<sup>29</sup> Malvo v. J.C. Penney Co., Inc., 512 P.2d 575 (Alaska 1973).

<sup>30</sup> Zok v. State, 903 P.2d 574 (Alaska 1995).

<sup>31</sup> Prentzel v. State, Dept. of Public Safety, 169 P.3d 573 (Alaska 2007).

<sup>32</sup> Malvo v. J.C. Penney Co., Inc., 512 P.2d 575 (Alaska 1973); AS 11.46.230.

reasonable time.<sup>33</sup> “A reasonable time” is the length of time necessary for the plaintiff to make a statement, or refuse to make a statement, and for the retailer’s employees to examine records relating to the merchandise.<sup>34</sup>

## **2. Defamation**

A plaintiff who brings a claim for wrongful detention may also bring a defamation claim. Where the plaintiff is not a public figure, a plaintiff states a claim for defamation under Alaska law by establishing: (1) the defendant made a defamatory statement; (2) the defendant communicated the statement to a person other than the plaintiff; (3) the statement was reasonably understood to be about the plaintiff; (4) the statement was false; and (5) the defendant knew the statement was false or failed to use reasonable care to determine whether the statement was true or false.<sup>35</sup> Certain privileges apply to limit liability for defamation.

## **C. Negligent Hiring, Retention, or Supervision of Employees**

An injured plaintiff can also claim that the employee responsible for the injury was improperly hired, trained, or supervised. Alaska recognizes negligent hiring, supervision and retention as independent bases for negligence liability. Plaintiff must show that the defendant employer failed to exercise reasonable care in hiring, and/or retaining or supervising the employee and that the failure to do so was a substantial factor in causing harm to the plaintiff.<sup>36</sup>

These claims are often raised in situations where a customer or patron has been assaulted by an employee. In addition to a negligence claim related to its hiring, retention or supervision of the employee at issue, a retailer or business owner can also be sued under the theory of respondeat superior, which imposes vicarious liability for an employee’s negligent and intentional torts if they were committed within the scope of employment.<sup>37</sup> Alaska follows the factors set out in the Restatement (Second) of Agency, Sections 228 and 229, as relevant considerations in the fact-specific inquiry of determining whether an employee acts within the scope and course of his employment.<sup>38</sup> Where a customer has been assaulted by an employee, an

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<sup>33</sup> Id.

<sup>34</sup> Id.

<sup>35</sup> MacDonald v. Riggs, 166 P.3d 12 (Alaska 2007).

<sup>36</sup> Kodiak Island Borough v. Roe, 63 P.3d 1009, 1011 (Alaska 2003)(negligent hire of counselor with sexual abuse history who sexually abused developmentally disabled resident of Borough facility).

<sup>37</sup> See, e.g., Tanranto v. North Slope Borough, 909 P.2d 354, 358 (Alaska 1996).

<sup>38</sup> Id. at pp. 358, 359.

important factor in determining whether the employee's conduct will be attributed to the employer is whether the battery, although not authorized, was "not unexpected in view of the duties of the [employee]."39

#### **D. Liquor Liability**

The seller or provider of alcoholic beverages may face claims stemming from accidents or incidents involving an intoxicated individual. Under Alaska's dram shop statute, a person who provides alcoholic beverages to another person is immune from civil liability caused by the intoxication *unless* the provider is licensed to dispense alcoholic beverages and the person served is a "drunken person."<sup>40</sup> Sellers of alcoholic beverages have a duty to reasonable care to ensure that their business is "lawfully conducted."<sup>41</sup> Accordingly, a licensee, agent or employee of a seller of alcoholic beverages may not, with criminal negligence: (1) sell or provide alcoholic beverages to a drunken person; (2) allow another person to sell or provide alcoholic beverages to a drunken person within licensed premises; (3) allow a drunken person to enter and remain within licensed premises or to consume an alcoholic beverage within licensed premises; or (4) permit a drunken person to sell or serve alcoholic beverages.<sup>42</sup> An individual acts with "criminal negligence" when he fails to perceive a substantial and justifiable risk that the circumstance exists and the failure to perceive the circumstance constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.<sup>43</sup> A person qualifies as "drunken" when his conduct is substantially and visibly impaired as a result of alcohol ingestion.<sup>44</sup>

The Alaska Supreme Court has held that the "basic function" of the dram shop statute is to create an immunity, and "traditional principles" of tort law apply when the immunity is not applicable.<sup>45</sup> In a dram shop case, under Alaska's apportionment of fault scheme, the dram shop can have the jury apportion fault to all named parties, which can include the intoxicated individual, as well as a minor who illegally purchased alcohol.<sup>46</sup>

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<sup>39</sup> Williams v. Alyeska Pipeline Service Co., 650 P.2d 343, 349 (Alaska 1982).

<sup>40</sup> AS 04.21.020; Gonzales v. Safeway Stores, Inc., 882 P.2d 389, 393 (Alaska 1994).

<sup>41</sup> AS 04.21.030.

<sup>42</sup> AS 04.16.030.

<sup>43</sup> AS 04.21.080(a)(1).

<sup>44</sup> AS 04.21.080(b)(8); Gonzales v. Safeway Stores, Inc., 882 P.2d 389, 393 (Alaska 1994).

<sup>45</sup> Gonzales v. Krueger, 799 P.2d 1318, 1321-22 (Alaska 1990).

<sup>46</sup> Sowinski v. Walker, 198 P.3d 1134 (Alaska 2008).

## **V. Claims Arising From Construction-Related Accidents**

Claims that may stem from a construction-related accident under Alaska law include: breach of contract, negligence, negligence per se, breach of warranty, misrepresentation and fraud, and indemnity. In Alaska, violation of a legislative enactment or administrative regulation may constitute negligence per se.<sup>47</sup> Therefore, the violation of an OSHA regulation may lead to a negligence per se claim.

## **VI. Indemnity and Contribution**

Alaska law recognizes contractual indemnity.<sup>48</sup> 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.<sup>49</sup>

Alaska traditionally allowed implied indemnity by a non-negligent party against the party primarily responsible, for example in a product liability action.<sup>50</sup> In the absence of a contrary contractual provision, there was no implied indemnity among concurrently negligent tortfeasors, however.<sup>51</sup> The Alaska court more recently held that equitable indemnity is no longer available as a remedy in Alaska, post tort reform.<sup>52</sup> The court has continued 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. The indemnitee must also have secured the release of the indemnitor.

Alaska also does not have a contribution statute. However, in 2006, the Alaska Supreme Court recognized a cause of action for common law contribution.<sup>53</sup> 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

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<sup>47</sup> McLinn v. Kodiak Electric Ass'n, Inc., 546 P.2d 1305 (Alaska 1976).

<sup>48</sup> Duty Free Shoppers, Ltd. v. State, 777 P.2d 649 (Alaska 1989).

<sup>49</sup> AS 45.45.900.

<sup>50</sup> Koehring Mfg. Co. v. Earthmovers of Fairbanks, Inc., 763 P.2d 499 (Alaska 1988); Ross Laboratories v. Thies, 725 P.2d 1076 (Alaska 1986).

<sup>51</sup> Vertecs Corp. v. Reichhold Chemicals, Inc., 671 P.2d 1273 (Alaska 1983).

<sup>52</sup> AVCP Regional Housing Authority v. R.A. Vranckaert Co., 47 P.3d 650 (Alaska 2002).

<sup>53</sup> McLaughlin v. Lougee, 137 P.3d 267, 268 (Alaska 2006).

payment by the contribution plaintiff in excess of the contribution plaintiff's comparative share of responsibility.

## **VII. Allocation of Fault**

### **A. Several Liability**

In 1989, Alaska abolished the system of joint and several liability which previously held each tortfeasor fully liable for the injured party's damages.<sup>54</sup> 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."<sup>55</sup> Since 1997, fault is allocated among all tortfeasors, regardless of whether the tort was negligent or intentional.<sup>56</sup>

### **B. Allocation of Fault**

Under Alaska's allocation of fault statute, fault in general can only be allocated to parties to an action. The statute provides, as an exception, that fault may also be allocated to released parties.<sup>57</sup> Thus, a jury may allocate fault to all plaintiffs, defendants, and released parties. A defendant that wants to allocate fault to a non-party generally must join that party to the lawsuit.<sup>58</sup> Fault may be apportioned to non-parties only if the parties did not have "sufficient opportunity to join" the absent party. The statute holds there is not "sufficient opportunity to join" a party 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 cannot be allocated to the absent party.<sup>59</sup>

## **VIII. Damages**

### **A. Recoverable Losses**

Recoverable losses in a personal injury claim 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,

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<sup>54</sup> 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).

<sup>55</sup> Robinson, 878 F. Supp. at 1321; AS 09.17.080.

<sup>56</sup> Kodiak Island Borough v. Roe, 63 P.3d 1009 (Alaska 2003).

<sup>57</sup> AS 09.17.080(a).

<sup>58</sup> Alaska R. Civ. P. 14(c); Benner v. Wichman, 874 P.2d 949 (Alaska 1994).

<sup>59</sup> AS 09.17.080.

and loss of consortium, as well as other non-pecuniary damages.<sup>60</sup> As noted below, there are caps on non-economic damages.

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

## **B. Damages Caps**

### **1. Caps on Non-Economic Damages**

Alaska places a cap on non-economic damages which applies to both wrongful death claims and other personal injury claims.<sup>61</sup> The statute caps damages at the greater of \$400,000.00 or \$8,000.00 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 \$1,000,000.00 or \$25,000.00 multiplied by the plaintiff's life expectancy.<sup>62</sup>

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.<sup>63</sup>

### **2. Caps on Punitive Damages**

Alaska places caps on punitive damages as well. The default cap for punitive damages is the greater of three times the amount of compensatory damages or \$500,000.<sup>64</sup> 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.

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<sup>60</sup> AS 09.17.010(a).

<sup>61</sup> AS 09.17.010(b).

<sup>62</sup> AS 09.17.010(c).

<sup>63</sup> City of Bethel v. Peters, 97 P.3d 822, 829 (Alaska 2004).

<sup>64</sup> AS 09.17.020(f).

## **C. Interest and Attorney Fees**

### **1. 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 rate of prejudgment interest for judgments entered in 2014 is 3.75%. The current rate can be found at the court's website.<sup>65</sup> The rate of interest for actions accruing prior to August 7, 1997 remains at 10.5%, regardless of when judgment is entered. Prejudgment interest runs from the date of notice that a claim may be brought.<sup>66</sup>

Prejudgment interest may not be awarded for future economic losses, future non-economic losses, or punitive damages.<sup>67</sup> Prejudgment interest is simple interest, not compound interest.<sup>68</sup> 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.<sup>69</sup>

### **2. Post-judgment Interest**

Alaska awards post-judgment interest on judgments at the same rate as prejudgment interest.<sup>70</sup> 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.

## **D. Attorney Fees**

Unlike other jurisdictions, Alaska routinely allows partial reimbursement of attorney fees to the prevailing party by both statute and court rule.<sup>71</sup> There is extensive Alaska case law

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<sup>65</sup> <http://www.state.ak.us/courts/int.htm>.

<sup>66</sup> AS 09.30.070(b).

<sup>67</sup> AS 09.30.070(c). *McConkey v. Hart*, 930 P.2d 402 (Alaska 1996); *Anderson v. Edwards*, 625 P.2d 282 (Alaska 1981).

<sup>68</sup> *Alyeska Pipeline Service Co. v. Anderson*, 669 P.2d 956 (Alaska 1983).

<sup>69</sup> *Liimatta v. Vest*, 45 P.3d 310, 322 (Alaska 2002).

<sup>70</sup> See AS 09.30.070.

<sup>71</sup> See AS 09.60.010; Alaska R. Civ. P. 82.

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.<sup>72</sup>

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. 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 the attorney fees in other cases.<sup>73</sup> 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.<sup>74</sup>

Attorney's fees are also allowed when an applicable contract provides for attorney's fees. Additionally, Alaska has a number of statutes that also award reasonable attorney's fees to the prevailing party.<sup>75</sup>

#### **E. Offers of Judgment**

Alaska Civil Rule 68 governs offers of judgment. If a party makes an offer of judgment, and at trial beats the offer, the party making the offer may receive an attorney's fees award. Because of the detailed nature of Alaska's offer of judgment scheme regarding when offers of judgment must be made and how many in attorney's fees may be collected, the rule should be reviewed for details.

#### **F. Punitive Damages**

Most premises liability claims will not give rise to a colorable claim for punitive damages. Pursuant to Alaska law, 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."<sup>76</sup> Punitive damages must be

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<sup>72</sup> See Cooper v. Carlson, 511 P.2d 1305, 1308 (Alaska 1973).

<sup>73</sup> Alaska R. Civ. P. 82(b)(2).

<sup>74</sup> See Alaska R. Civ. P. 82(b)(3).

<sup>75</sup> See AS 09.60.010, .015, .070.

<sup>76</sup> AS 09.17.020(b).

established by clear and convincing evidence.<sup>77</sup> Further, 50% of any punitive damages award goes to the State.<sup>78</sup>

With regard to claims for punitive damages based on vicarious liability for an employee's misconduct, Alaska law restricts an employer's vicarious liability for punitive damages (1) to wrongful acts committed by a manager; (2) to wrongful acts of an employee which are authorized or ratified by the manager; or (3) to instances where the employee was unfit to perform the job requested by the employer.<sup>79</sup>

Punitive damages are insurable. There is no statutory or public policy prohibiting insuring against punitive damages in Alaska.<sup>80</sup> In the absence of an exclusion, punitive damages may be deemed covered.<sup>81</sup>

## **G. Wrongful Death**

### **1. Wrongful Death Claims**

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."<sup>82</sup>

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.<sup>83</sup>

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.

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<sup>77</sup> AS 09.17.020(b).

<sup>78</sup> AS 09.17.020(j).

<sup>79</sup> AS 09.17.020(k).

<sup>80</sup> 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).

<sup>81</sup> State Farm v. Lawrence, 26 P.3d 1074 (Alaska 2001).

<sup>82</sup> AS 09.55.580(a).

<sup>83</sup> Osbourne v. Russell, 669 P.2d 550 (Alaska 1983).

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.<sup>84</sup> In addition, Alaska case law allows beneficiaries to recover for anguish, grief, and suffering.<sup>85</sup> A designated beneficiary can also recover “prospective inheritance” i.e., the inheritance he or she would have received if the deceased had not died prematurely.<sup>86</sup>

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.<sup>87</sup> The category of “other dependent” also includes an unmarried partner or non-adopted stepchild where actual dependency is shown.<sup>88</sup>

In addition, Alaska allows a parent to bring a claim for the loss of a minor child and allows for a full measure of damages in such cases, including non-economic damages.<sup>89</sup>

## **2. Survival Actions**

Alaska law allows a survival action for pre-death injuries caused by negligence.<sup>90</sup> 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.<sup>91</sup> Pain and suffering which occurs “substantially contemporaneous with death” is not compensable.<sup>92</sup>

**This Compendium outline contains a brief overview of certain laws concerning various litigation and legal topics. The compendium provides a simple synopsis of current law and is not intended to explore lengthy analysis of legal issues. This compendium is provided for general information and educational purposes only. It does not solicit, establish, or continue an attorney-client relationship with any attorney or law firm identified as an author, editor or contributor. The contents should not be construed as legal advice or**

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<sup>84</sup> See AS 09.55.580(c).

<sup>85</sup> Tommy's Elbow Room, Inc. v. Kavorkian, 727 P.2d 1038 (Alaska 1986).

<sup>86</sup> Kulawik v. Era Jet Alaska, 820 P.2d 627 (Alaska 1991).

<sup>87</sup> Estate of Pushruk, 562 P.2d 329 (Alaska 1977).

<sup>88</sup> See Greer Tank & Welding, Inc. v. Boettger, 609 P.2d 548 (Alaska 1980).

<sup>89</sup> AS 09.15.010.

<sup>90</sup> AS 09.55.570.

<sup>91</sup> Sweeney v. Northern Lights Motel, 561 P.2d 1176 (Alaska 1977).

<sup>92</sup> Sweeney v. Northern Lights Motel, 561 P.2d 1176 (Alaska 1977).

**opinion. While every effort has been made to be accurate, the contents should not be relied upon in any specific factual situation. These materials are not intended to provide legal advice or to cover all laws or regulations that may be applicable to a specific factual situation. If you have matters or questions to be resolved for which legal advice may be indicated, you are encouraged to contact a lawyer authorized to practice law in the state for which you are investigating and/or seeking legal advice.**